





03466



THE  
ENGLISH AND EMPIRE DIGEST  
WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS.

---

CUMULATIVE SUPPLEMENT

**In this Volume the new English Cases reported up to 1st January, 1939, are included, and other new cases are included so far as the Volumes of Reports of the same were available in London on that date.**

**ALL ENGLAND LAW REPORTS**

**References to cases subsequent to January, 1936, are followed by a citation to the above series of Reports. Thus :**

***Green v. Berliner*, [1936] 1 All E.R. 199.**

# THE ENGLISH AND EMPIRE DIGEST

COMPLETE AND EXHAUSTIVE  
ANNOTATIONS

CUMULATIVE SUPPLEMENT

*BRINGING THE WORK UP TO*

1939

*BEING CUMULATIVE AND CONTAINING ALL THE MATTER OF THE  
PREVIOUS SUPPLEMENTS, AND, IN ADDITION, ALL THE NEW CASES  
AND ANNOTATIONS WHICH HAVE BEEN DECIDED IN THE INTERVAL*

VOLUMES 23—44

EDITED BY

PHILIP F. SKOTTOWE, Esq., LL.B.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

LONDON

BUTTERWORTH & CO. (PUBLISHERS), LTD.

BELL YARD, TEMPLE BAR.

SYDNEY:	BUTTERWORTH & CO. (AUSTRALIA), LTD.
MELBOURNE:	
CALCUTTA:	BUTTERWORTH & CO. (INDIA), LTD.
MADRAS:	
BOMBAY:	
TORONTO:	BUTTERWORTH & CO. (CANADA), LTD.
WELLINGTON (N.Z.):	BUTTERWORTH & CO. (AUSTRALIA), LTD.
DURBAN:	BUTTERWORTH & CO. (AFRICA), LTD.

1939

PRINTED IN GREAT BRITAIN

PRINTED IN GREAT BRITAIN BY  
WILLIAM CLOWES AND SONS, LIMITED,  
LONDON AND BECCLES



151. *Add. Annotation*:—*Re*fd. *Jenkins v. Jenkins*, [1928] 2 K. B. 501.
152. *Add. Annotations*:—*Ap*ld. *Re* *Comberbach. Saunderson v. Jackson* (1929), 73 Sol. Jo. 403, *Re*fd. *Jenkins v. Jenkins*, [1928] 2 K. B. 501; *Cashin v. Cashin*, [1938] 1 All E. R. 536.
153. *Add. Annotation*:—*Generally*, *Re*fd. *Jenkins v. Jenkins*, [1928] 2 K. B. 501.
- 154a. — *Appointment of one of several makers of promissory note.*—During the lifetime of testator the exor. named in his will & three other persons made a joint & several promissory note payable to him. After the death of testator & probate of the will the exor. brought an action on the promissory note against one of the other makers thereof:—*Held*: the action was not maintainable, inasmuch as the effect of pltf.'s appointment as exor. was (1) at common law that the debt was discharged by release at the date of the death of testator, & (2) in equity that it was discharged by payment at the date of probate, so that in either case the debt had ceased to exist before the action was brought.—*JENKINS v. JENKINS*, [1928] 2 K. B. 501; 97 L. J. K. B. 400; 139 L. T. 119; 44 T. L. R. 483; 72 Sol. Jo. 319, D. C.
- 165a. — *Appointment of wife of debtor.*—*Re* *PRICE, PRICE v. PRICE* (1879), 11 Ch. D. 163; 48 L. J. Ch. 478; 40 L. T. 668; 27 W. R. 698, C. A.
- 165b. — *]*—*JENKINS v. JENKINS*, No. 154a, *ante*.
- 181a. — *After intermeddling.*—An individual & a bank having been appointed exors. & trustees under a will, the individual exor. intermeddled technically with the estate, & both of them subsequently refused to act as exor. or prove the will. By a codicil testator directed that in the event of a "vacancy" occurring "in the office of the individual exor. & trustee whether from death, resignation, refusal to serve, inability to act, or otherwise," one of two named persons, in the order named, should fill the vacancy. The first named person renounced:—*Held*: the ct. was entitled to appoint one of the substituted exors. & probate was granted to the second named person on his application.—*In the Estate of FREEMAN* (1931), 146 L. T. 143; 48 T. L. R. 1; 75 Sol. Jo. 764.
- 209a. *S. P. ANON.* (1806), 12 Ves. 4; 33 E. R. 2. *Annotation*:—*Re*fd. *Browell v. Reid* (1842), 11 L. J. Ch. 272.
238. *Add. Annotation*:—*Consd.* *In the Estate of Dinshaw*, [1930] P. 180.
258. *Add. Annotation*:—*As to* (1) *Re*fd. *Jenkins v. Jenkins*, [1928] 2 K. B. 501.
296. *Add. Annotation*:—*Re*fd. *Re City Equitable Fire Insce.*, [1925] Ch. 407.
306. *Add. Annotation*:—*As to* (1) *Re*fd. *Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v. Estate & Trust Agencies* (1927), Ltd., [1938] A. C. 624.
- 425a. *Exercise of option to purchase by surviving partner—Notice to executor before probate—Validity.*—Under a partnership deed the surviving partner had an option of acquiring the deceased partner's interest at a valuation on his giving to the "personal representatives" of the deceased partner notice within three months from the death of such partner. The notice was given within the time, but before the exors. had obtained probate:—*Held*: the notice was properly given, & the option had been duly exercised.—*KELSEY v. KELSEY* (1922), 91 L. J. Ch. 382; 127 L. T. 86.
427. *Add. Citations*:—*Moore*, K. B. 146; *sub nom. RUSSELL v. PRAT*, 1 And. 177; *on appeal* (1589), 1 Leon. 193, Ex. Ch.
492. *Add. Annotation*:—*As to* (2) *Re*fd. *Macleay v. Treadwell*, [1937] A. C. 626.

## PART I. SECT. 9.

202 1. *Jurisdiction to release—Surrogate court.*—A surrogate ct. judge has no power to make an order releasing exors. "from their exorship."—*Re DENTON ESTATE* (Sask.), [1926] 3 W. W. R. 186.—CAN.

o i. — *]*—Under the discretionary power given him by *Trustee Act*, R. S. S., 1920 (c. 75), s. 71, the judge appointed a judicial trustee in place of an extrix.—*SMALL v. PACKARD*, [1925] 1 W. W. R. 897.—CAN.

1 (p. 46) I. — *Executor—Desiring to be released—Co-executor necessary party.*—When some of several co-exors. apply to be released from the trust, the ct. will require the other co-exors. to be brought before the ct. before they will refer it to a master to report on suitability of persons to be substituted.—*Re TOBIN'S ESTATE* (1858), 3 N. S. R. (2 Thom.) 338.—CAN.

1 (p. 46) II. — *Conduct of co-executor prejudicial to trust property.*—On the appln. of an exor. held that an order should go for the removal of his co-exor. on the ground that the latter's conduct had been such as to endanger the trust property, although nothing in the nature of fraud or dishonesty was imputed against him.—*Re SOMERSET ESTATE*, [1928] 2 W. W. R. 697; 40 Man. L. R. 566.—CAN.

so. *Contested motion—Costs of.*—The costs of a contested motion, for the removal of an administrator & the appointment of another in his place, should not be taxed as between solr.

& client.—*Re GAMMON ESTATE, PAYNE v. GAMMON*, [1927] 2 D. L. R. 405; [1927] 1 W. W. R. 506; 38 B. C. R. 153.—CAN.

st. *Order for made upon originating notice—Direction to pass accounts—& replace trust fund.*—An order under *Trustee Act*, R. S. O. 1927, c. 150, s. 36, for the removal of an exor., may now be made summarily upon originating notice. An order removing an exor. & trustee directed him to pass his accounts. It was not denied that he was liable for the loss or jeopardy of a considerable sum of money. He made a claim for the statutory compensation for his services which was not admitted; & he was required, pending the taking of the accounts, to replace the trust fund for which he was not able to show any security in hand.—*Re PATTERSON*, [1928] 3 D. L. R. 197; 62 O. L. R. 255.—CAN.

## PART I. SECT. 10, SUB-SECT. 1.—C.

274 1a. *S. P. PUBLIC TRUSTEE v. REGISTRAR-GENERAL OF LAND*, [1927] N. Z. L. R. 839.—N.Z.

## PART I. SECT. 12, SUB-SECT. 1.

sg. *What amounts to renunciation—Right reserved to infant to come in & prove.*—Probate was granted to adult exors., reserving to infant exor. a right to be admitted to executorship upon attaining majority:—*Held*: as the infant exor. had not declined to prove the will, & his right to prove was reserved to him by the letters probate, his minority did not prevent his taking.—*Re GRACEY* (1928), 63 O. L. R. 218.—CAN.

## PART I. SECT. 12, SUB-SECT. 5.—A.

d i. — *]*—The ct. in a proper case will allow an exor. who has renounced probate to retract his renunciation.—*Re FOSTER*, [1930] N. Z. L. R. 80.—N.Z.

## PART I. SECT. 13, SUB-SECT. 2.

n i. — *]*—The exor. named in a will represents the estate of deceased for all purposes, even before probate of the will is taken out. The taking out of probate establishes the will from the date of the death of testator, & thereby all intermediate acts of the exor. in connection with the estate are validated.—*MEGHRAJ v. KRISHNA CHANDRA BHATTACHARJI* (1923), 1 L. R. 46 All. 286.—IND.

r i. — *]*—*Re CROFT ESTATE*, [1937] 1 W. W. R. 463; 51 B. C. R. 359.—CAN.

## PART I. SECT. 13, SUB-SECT. 8.—B.

471 1. *General rule.*—Although an exor., who elects to act, may be sued before probate, the ct. has no jurisdiction over a person as exor., who has obtained a grant of probate in a foreign country, unless there were assets of testator within the jurisdiction at the time of his death, in respect of which the ct. may reasonably assume that the exor. will clothe himself in due course with the necessary representative character by an application for probate or the reissuing of the foreign probate.—*NAGEL v. HUGHES* (1937), 27 S. R. N. S. W. 418; 44 N. S. W. N. 121.—AUS.



493. *Add. Annotation*.—*Reid. Re Wells, Swinburne-Hanham v. Howard*, [1933] Ch. 29.

677. *Add. Annotation*.—*Reid. Re Simms, Ex p. Trustee*, [1934] Ch. 1.

## Part II.—Probate and Letters of Administration.

701. Before this case add :—

Grant of probate or administration where no estate.]—*See Administration of Justice Act*, 1925 (c. 55), s. 2 (1).

718a. ———.]—*CHAMBERLAIN v. AGAR* (1813), 2 Ves. & B. 259; 35 E. R. 317.

*Annotation*.—*Reid. Briggs v. Penny* (1849), 3 De G. & Sm. 525.

734a. ———.]—*In the Goods of SERGEANT* (1872), 26 L. T. 669; 36 J. P. 696; *sub nom. In the Goods of SERJEANT*, 20 W. R. 872.

771a. ——— Letters referred to must be produced or accounted for.]—On an application for leave to depose as to the death of a person who had disappeared, the affidavit of appct. referred to letters from that person which

were not produced or accounted for, & did not explain the delay which had occurred in making the application, & there was no corroborative statement of belief of the death:—*Held*: the hearing must be adjourned for a further & better statement.—*In the Goods of CLARKE*, [1896] P. 287; 66 L. J. P. 9.

774a. *S. P. In the Goods of BARBER* (1886), 11 P. D. 78; 56 L. T. 894; 35 W. R. 80.

784. *Add. Annotation*.—*Reid. Lal Chand Marwari v. Mahant Ramrup Gir* (1925), 42 T. L. R. 159.

858. *Citation*.—For “34 Ch. D. 177” read “24 Ch. D. 177.”

### PART I. SECT. 14, SUB-SECT. 3.—A.

b1. ———.]—Letters of administration relate back to the death of the intestate so as to enable the administrator to bring action in respect of matters done between the death & his appointment. —*Doe d. MCKINLAY v. ELLIOTT* (1851), 3 Nfld. L. R. 180.—NFLD.

### PART I. SECT. 14, SUB-SECT. 3.—B. (b).

sh. *Liability on agreement*.—*Entered into before grant*.—*LARRY v. BAKER* (1902), 7 Terr. L. R. 145.—CAN.

sk. *Action on life assurance policy*.—Pltf., the only child of J., who on Sept. 30, 1928, as the result of an accident, died, intestate & a widow, commenced this action on Nov. 26, 1926, upon an accident insurance policy issued by defts. upon the life of J. Pltf. was not named as beneficiary in the policy. On May 9, 1927, while the action was pending, pltf. obtained from a Surrogate Ct. letters of administration to the estate of J., & when the action came on for trial, in 1928, applied for leave to amend the proceedings by describing himself as the administrator of the estate of J.:—*Held*: the amendment should be allowed & pltf. awarded judgment for the amount of the policy. The letters of administration related back so as to validate the action already commenced by pltf.—*JOHNSON v. GENERAL ACC. ASS'CE CO.*, [1929] 1 D. L. R. 597; 63 O. L. R. 296.—CAN.

### PART I. SECT. 15, SUB-SECT. 2.

g1. ———.]—*Held*: the sale of the reversion in a term of years, under a *fi. fa.* on a judgment against an exor. *de son tort*, was a valid sale as against the rightful administrator.—*BAIN v. MCINTYRE* (1867), 17 C. P. 500.—CAN.

603 i. *When binding—When lawful*.—An exor. *de son tort* is not necessarily a wrong-doer & his possession cannot always be regarded as wrongful at its inception. His intentions in respect of the acts attributed to him must be taken into account, to determine when the conversion took place & as on what date liability is to be fastened on him.—*SHIVAPRASAD SINGH v. PRAYAGKUMARI DEBEE* (1933), 1 L. R. 61 Calo. 711.—IND.

613 i. *Rights of buyer from executor de son tort*.—*TRUSTS & GUARANTEE CO. v. NELSON*, [1930] 3 W. W. R. 241; 4 D. L. R. 1032; *revers.*, [1930] 3 D. L. R. 985.—CAN.

sl. *On whom binding—Third party—Estoppel*.—Where a buyer of goods under a conditional sale agreement induces a buyer of the same goods from him under a similar agreement to deliver up the goods to the exor. *de son tort* of the original seller in settlement of his, the first buyer's claim, he will not be allowed, in an action against such second buyer, to deny the authority of the exor. *de son tort* to take over the goods.—*LARSON v. COATES* (Sask.), [1926] 4 D. L. R. 561; [1926] 3 W. W. R. 397.—CAN.

sm. ——— *Administrator of estate—Onus on administrator*.—Deft. had bought three horses & other animals under a conditional sale agreement. The present action was brought by the administrator of the seller for the balance due under the agreement. Deft. pleaded that the exor. *de son tort* of the seller had taken the horses in satisfaction of the indebtedness out of the possession of a man to whom deft. had sold them. The authority of the exor. *de son tort* to take the chattels & so bind the administrator was established by a prior decision in an action by the deft. herein against the buyer from him. There was no evidence herein as to what the exor. *de son tort* did with the chattels:—*Held*: the burden of proving that the exor. *de son tort* had complied with the terms of the agreement & of Conditional Sales Act as to retention of the chattels & notice of their sale was on pltf. herein, the administrator.—*NATIONAL TRUST CO., LTD. v. LARSON*, [1928] 3 W. W. R. 723.—CAN.

### PART I. SECT. 15, SUB-SECT. 4.—B. (a).

ml. ———.]—In an action by a creditor of a deceased against an exor. *de son tort* it is proper to sue deft. as executor as well as personally, & if pltf. establishes his claim the judgment should be that the amount thereof be paid out of the assets of deceased, if deft. have so much, & if not, then out of deft.'s personal assets.—*BURNS P. & CO. v. CZERNIL*, [1928] 4 D. L. R. 854; [1928] 3 W. W. R. 294.—CAN.

### PART II. SECT. 1, SUB-SECT. 1.—A. (a).

697 i. *Construction of documents—Only for purposes of admission to probate*.—*NANDKISHORE LAL v. PASUPATI NATH SAHU* (1928), 1 L. R. 7 Pat. 396.—IND.

sd. *Will already administered—Not matter of construction*.—Testator had, by his will, bequeathed his farm to his son J. on condition that he should reside on the farm & assist in the management thereof until he attained twenty years, with a gift over to testator's son W. in the event of this condition not being fulfilled. In 1928 J. attained twenty-one years, whereupon the surviving trustee of the will gave him possession of the farm. On the death of J. in 1930, W. brought a summons for the construction of the will. It was contended that J. was not entitled to the farm by reason of the fact that he had failed to comply with the conditions of the bequest. Pltf. submitted that the ct. had jurisdiction to determine the matter either under R. S. C., Ord. 54A, r. 4 or Ord. 55, r. 4:—*Held*: the trustee having administered & allowed J. into possession the question at issue was not a proper one to be determined on an originating summons either as a matter arising in the administration or upon the construction of the will.—*WIGHTMAN v. COUSINS*, [1931] N. I. 138; *affd.*, [1932] N. I. 61.—IR.

### PART II. SECT. 1, SUB-SECT. 1.—A. (b).

703 i. *For letters of administration—Grant required to assist prosecution of claims abroad*.—It is not the duty of the ct., by determining the abstract question who is the deceased's proper representative, to assist such representative to prosecute claims to titles & property abroad.—*In the Goods of CAMPBELL WILSON*, [1929] S. R. (Q.) 59.—AUS.

### PART II. SECT. 1, SUB-SECT. 1.—D.

ci. ———.]—The judge of a Surrogate Ct. cannot adjudicate on a claim to moneys of a deceased person under an alleged *donatio mortis causa*.—*Re GRAHAM* (1911), 35 O. L. R. 5.—CAN.

### PART II. SECT. 5, SUB-SECT. 1.

sg. *Will mutilated—By accident*.—Testator made a will, which was discovered, a year after his death, mutilated by the destruction of parts thereof containing certain words of the will. The state of the will when discovered was due to the way in which it had been kept by testator. Testator had also made a draft will, as well as a pretended will, but no copy of his last will, & no oral evidences as to the

884. For "—— Will proved in France.]" read "—— Will proved in France.]"

885. For "——.]]" read "——.]]"

902. *Add. Annotation*:—*Re*fd. *Smith v. Thompson* (1931), 146 L. T. 14.

911a. — Who is—Holder of office appointed executor.]—Where the holder of an office has been appointed exor., the person entitled to probate is the holder of that office, not at the time when the will was executed, but at the date of testator's death.—*In the Estate of JONES* (1927), 43 T. L. R. 324.

912. *Add. Annotation*:—*Consd. In the Estate of Dinshaw*, [1930] P. 180.

919a. — Power to act as executor given by Act of Irish Free State.]—By Public Trustee Act, 1906 (c. 55), & Public Trustee (Custodian Trustee) Rules, 1926, r. 30, made thereunder, a corpn. constituted under the law of the United Kingdom or any part thereof & having a place of business there & empowered by its constitution to undertake trust business within the meaning of Public Trustee Act & the rules in question is expressly empowered to act as trustee & exor. & administrator, & power to grant representation to a trust corpn. is conferred by Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), s. 161. By an Act of the Irish Free State passed in 1929, after the separation from Great Britain, the Bank of Ireland was for the first time authorised to act as exor. or administrator. The Bank of Ireland has places of business in Northern Ireland, therefore in the United Kingdom. A testator domiciled in the Irish Free State, by his will dated in 1931, appointed the governor & co. of the Bank of Ireland his exor. Amongst the assets was personal estate domiciled in England. As a preliminary to the issue of a grant of probate in England to the English estate the Bank moved for leave to swear

by its representative that it fulfilled the definition of a "corpn." in the Acts & Rules:—*Held*: the Bank having been empowered to undertake the business in question only since the establishment of the Irish Free State, had that power within the Free State only & was not for the purpose of the motion a "corpn. constituted under the law of the United Kingdom or any part thereof," & the motion accordingly failed.—*Re BARLOW* (H. T.), [1933] P. 184; 102 L. J. P. 84; 149 L. T. 456; 49 T. L. R. 544; 77 Sol. Jo. 524.

924a. —.]—Ct. of Probate Act, 1857 (c. 77), s. 73, confers wide powers on the ct. Under it an exor., not willing or competent to take probate, may be replaced by an administrator to be appointed by the ct., if it shall appear to be necessary or convenient by reason of special circumstances. Misfeasance on the part of an exor. with regard to the estate of his testator is a ground for proceeding under the sect., even after the exor. has inter-meddled.

Exors. had intermeddled & neglected to prove the will, & had made an agreement with the universal legatee that the will should not be proved. In passing them over the ct. ordered that a grant of administration should be made to a third person to be agreed upon by the exors. & the legatee, or in default to be appointed by the ct.—*In the Estate of POTTICARY*, [1927] P. 202; 96 L. J. P. 94; 137 L. T. 256.

931. *Add. Citation*:—*sub nom. In the Goods of HETT*, 6 Jur. 350.

931a. — Failure to prove will.]—*In the Estate of POTTICARY*, No. 924a, *ante*.

931b. —.]—Where property was left to an exor. in trust for a minor the ct. passed over the exor. without citation, on proof that his interest was adverse, that he had delayed obtaining probate & that he was unfit, although he resided in England & apparently

precise form of the last will as it stood before becoming mutilated was forthcoming. The ct. made an order for probate of the will, in so far as the same was legible, & so far as the same was illegible, in the words & figures contained in a copy of the will which, as regards the missing portions, had been reconstructed from the context of the will, from the draft will & from the pretended will.—*In the Goods of WRIGHT* (1908), 44 I. L. T. 137.—*IR.*

*rk.* — *Intentionally*.]—Testator made a will. Subsequently he stated to witnesses that he had cut a certain beneficiary out of his will. To one of these witnesses, after having stated what he had done, he showed a strip of paper, which he informed the witness was the piece of his will which he had cut out, & which he thereupon threw into the fire, where the witness saw it burning. After his death, on the will being opened, it was found to have a piece cut out of it. Probate decreed of the will in its mutilated condition.—*In the Goods of BENTLEY*, [1930] I. R. 455.—*IR.*

#### PART II. SECT. 5, SUB-SECT. 5.

*r. i.* — *Photostat copy*.]—Proceedings were instituted to prove a will in solemn form. The will had already been admitted to probate in England, & was deposited in the Principal Probate Registry of the High Ct., London. The ct. admitted a photostat copy of the will to probate,

it having been sealed & certified. Such a document, if consisting of several pages, should be sealed on every page & certified on the last.—*In the Goods of TRACEY, LENNON v. GRAY*, [1931] I. R. 374.—*IR.*

*r. ii.* — *Will proved in Sweden*.]—When a will has been probated, or recognised as a valid will, in a jurisdiction other than a British country or a State of the United States of America, probate may be granted by a Surrogate Ct. in Saskatchewan upon production of a copy of the will & of the decree of probate or other act of recognition thereof, & without requiring further evidence of its validity. The extract in question herein, from the records of a District Ct. in Sweden, & the sworn translation thereof, quoted in the judgment, held admissible in evidence on an appln. for letters of administration with the will annexed of the estate of a husband who with his wife had executed a joint will in Sweden.—*Re BERGMAN*, [1928] 1 W. W. R. 601.—*CAN.*

*r. iii.* — *Will proved in Scotland*.]—*Re CLAZY*, [1928] 2 D. L. R. 971; [1928] 1 W. W. R. 974.—*CAN.*

#### PART II. SECT. 5, SUB-SECT. 11.

*sn.* *Where suspicion arises only as to particular provisions*.]—In all cases in which a will is prepared under circumstances which raise the suspicion of the ct. that it does not express the mind of testator, it is for those who pro-

pound the will to remove that suspicion, & it is only when that has been done that the onus is thrown on those who oppose the will to prove fraud or undue influence. Where the suspicion arises only as to one particular provision which is severable, & that suspicion is not removed the ct. can admit the rest of the document to probate.—*SARAT KUMARI DEBI v. SAKHI CHAND* (1928), L. R. 56 Ind. App. 62, P. C.—*IND.*

#### PART II. SECT. 6, SUB-SECT. 1.—A.

*n. i.* —.]—Probate may be granted to an extrin., even though at the date of testator's death & of the application she was resident out of the jurisdiction of the ct.—*Re WALLEN*, [1926] N. Z. L. R. 729.—*N. Z.*

*n. ii.* — *Declaratory judgment*.]—The High Ct. of Ontario has no jurisdiction to pronounce a declaratory judgment that an exor. is entitled to probate.—*MUTHIE v. ALEXANDER* (1911), 23 O. L. R. 396.—*CAN.*

#### PART II. SECT. 6, SUB-SECT. 1.—C.

*r. i.* — *Allegation of undue influence*.]—An allegation that the appointment of a person as exor. under a will is invalid & of no effect because such person caused or procured the will to be written, is insufficient to sustain a claim to set aside the appointment.—*SMITH v. BIRD* (1924), 45 N. L. R. 381.—*S. AF.*

was competent & not unwilling to act.—*In the Goods of RAY* (1926), 96 L. J. P. 37; 136 L. T. 640.

*Annotations*:—*Refd. In the Estate of Potticary*, [1927] P. 202; *In the Estate of Leguia* (1936), 105 L. J. P. 72.

**938a.** ———.]—(1) No rule of the common law as to evidence is contravened by the admission of secondary evidence as to the contents of a lost document, & when the due execution of a no longer existing testamentary paper is established, & its contents are shown to have included a clause revoking previous papers, those papers are no longer testamentary from the moment of such execution.

(2) Declarations of testator made after execution of the will are not admissible as to the fact of execution itself, as tending to contravene the statutory requirements as to execution; but they are admissible to prove the contents of a paper otherwise shown to have been properly executed, & no longer in existence.—*BARKWELL v. BARKWELL*, [1928] P. 91; 44 T. L. R. 207; 72 Sol. Jo. 69; *sub nom. In the Estate of BARKWELL, BARKWELL v. BARKWELL*, 97 L. J. P. 53; 138 L. T. 526.

**956a.** ———.]—*OAKES v. UZZELL*, No. 968a, *post*.

**962.** *Add. Annotation*:—*Refd. Ahamath v. Sariffa Umma*, [1931] A. C. 799.

**968a.** ———.]—One of the attesting witnesses of the execution of a will must always be called by the party propounding the document. The attesting witness is then the witness of the ct., & the party by whom he is called may cross-examine to disprove a statement made, or evidence given by him, which appears to be hostile to due execution.—*OAKES v. UZZELL*, [1932] P. 19; 100 L. J. P. 99; 146 L. T. 95; 47 T. L. R. 573; 75 Sol. Jo. 543.

**970.** *Add. Annotation*:—*Consd. In the Estate of Musgrove, Davis v. Mayhew*, [1927] P. 264.

**979.** *Add. Annotation*:—*Refd. Ahamath v. Sariffa Umma*, [1931] A. C. 799.

**986.** *Add. Annotation*:—*Refd. Palin v. Ponting*, [1930] P. 185.

**991.** *Add. Annotations*:—*Consd. Neal v. Denston* (1932), 48 T. L. R. 637. *Refd. In the Estate of Musgrove, Davis v. Mayhew*, [1927] P. 264.

**992.** *Add. Annotation*:—*Refd. In the Estate of Musgrove, Davis v. Mayhew*, [1927] P. 264.

**993a.** ———.]—Where there is a defect in the attestation clause, the evidence of one witness is required. But where an affidavit is necessary to account for alterations, & where two witnesses are required to make an affidavit, & these join in one affidavit, both shall depose to the execution (SIR H.

JENNER FUST).—*In the Goods of BATTEN* (1849), 2 Rob. Eccl. 124; 7 Notes of Cases, 288; 163 E. R. 1264.

**1011a.** ———.]—*In the Goods of BRINING* (1870), 22 L. T. 630; 34 J. P. 694.

**1016.** *Add. Annotation*:—*Refd. Barkwell v. Barkwell*, [1928] P. 91.

**1017.** *Add. Annotations*:—*Consd. Neal v. Denston* (1932), 48 T. L. R. 637. *Refd. In the Estate of Musgrove, Davis v. Mayhew*, [1927] P. 264.

**1018.** *Add. Annotation*:—*As to* (1) *Refd. Barkwell v. Barkwell*, [1928] P. 91.

**1019.** *Add. Annotations*:—*As to* (1) *Refd. Barkwell v. Barkwell*, [1928] P. 91. *Generally, Refd. In the Estate of Jessop* (1924), 132 L. T. 31.

**1019a.** ———.]—Circumstances in which the ct. will grant probate of the contents of a lost will.—*Re SPAIN* (1915), 31 T. L. R. 435.

**1022a.** ———.]—*BARKWELL v. BARKWELL*, No. 938a, *ante*.

**1031a.** — Will gnawed by rats.]—A will torn in pieces with rats, if a stranger by laying the pieces together could make the devise appear, good; if gnawed before the death, against the will.—*ETHERINGHAM v. ETHERINGHAM* (1646), Aleyn. 2; 82 E. R. 883.

**1031b.** — Belief that will useless.]—*In the Goods of LEGG* (1848), 6 Notes of Cases, 528.

*Annotation*:—*Distd. Wharram v. Wharram* (1864), 3 Sw. & Tr. 301.

**1031c.** — Accidental destruction.]—The ct. will not admit the draft of a will, which has been inadvertently destroyed, to probate on motion.—*In the Goods of BODY* (1865), 4 Sw. & Tr. 9; 34 L. J. P. M. & A. 55; 164 E. R. 1418.

*Annotation*:—*Apld. Re Sainsbury* (1896), 12 T. L. R. 428.

**1031d.** — Destruction by third party—After testator's death.]—A. devises lands to several persons, & after his death, one who was a friend to the heir at law, snatches the will out of the exor.'s hands & tears it in pieces. The pieces being gathered up, & stitched together, a bill was brought to establish the will, & decreed the devisees to hold & enjoy, & the heir to convey to them.—*HAINES v. HAINES* (1702), 2 Vern. 411; 23 E. R. 883; *sub nom. HAYNE v. HAYNE*, Dick. 18.

*Annotations*:—*Consd. Davies v. Evans* (1851), 4 De G. & Sm. 440. *Refd. Cowgill v. Rhodes* (1863), 33 Beav. 310.

**1031e.** ———.]—A will destroyed after death of testator, who had consented to its destruction before his death. A copy admitted to probate.—*In the Goods of CARTER* (1843), 2 Notes of Cases, 105.

*Annotations*:—*Distd. Wharram v. Wharram* (1864), 3 Sw. & Tr. 301. *Refd. In the Goods of Legg* (1848), 6 Notes of Cases, 528.

## PART II. SECT. 6, SUB-SECT. 3.—B.

**949 iii.** — Attestation clause not read by witnesses.]—A will was prepared for a testator by his brother, who was sole beneficiary. The will was witnessed in an hotel lounge by two waiters, who gave evidence at the trial to the effect that the execution was informal. The brother & his wife, who were present at the time of the execution, gave evidence to the effect that the will had been duly executed. The evidence of the attesting witnesses was found to be unreliable.—*Held*: notwithstanding the attestation clause

was not read by the attesting witnesses, the presumption in favour of due execution applied. Also, no ground of suspicion being suggested, except that the will was prepared by & executed in the presence of the sole beneficiary, & there being no evidence to show that this beneficiary exerted any influence, the presumption was not displaced.—*Re SPICER, EXECUTOR TRUSTEE & AGENCY CO. OF SOUTH AUSTRALIA, LTD. v. MORRIS*, [1929] S. A. S. R. 28.—*AUS.*

## PART II. SECT. 6, SUB-SECT. 3.—G.

**1002 i.** *Testator deaf & dumb.*.]—

Circumstances in which probate of an alleged will of a deaf & dumb person was refused.—*Re EWEN (DECEASED)*, [1927] N. Z. L. R. 881.—*N.Z.*

## PART II. SECT. 6, SUB-SECT. 5.—A.

**k i.** — At death of testator.]—On proof of a lost will by a carbon copy produced by the solr. who prepared the original it is not necessary to prove that the original will was in existence at the date of testator's death.—*Re BARKER'S ESTATE* (1933), 6 M. P. R. 327.—*CAN.*

1031f. — Without testator's knowledge.—  
A will destroyed in the lifetime of testator, but without his knowledge; substantiated & admitted to proof.—*TREVELYAN v. TREVELYAN* (1810), 1 Phillim. 149; 161 E. R. 944.

*Annotations*.—*Distd. Wharram v. Wharram* (1864), 3 Sw. & Tr. 301. *Refd. Lister v. Smith* (1863), 3 Sw. & Tr. 282.

*D. Other Cases.*

*See case, infra.*

1042. *Add. Annotation*.—*As to* (1) *Consd. In the Estate of Birkby* (1929), 73 Sol. Jo. 556.

1044. *Add. Annotations*.—*As to* (1) *Apld. In the Estate of Musgrove, Davis v. Mayhew*, [1927] P. 264. *As to* (2) *Apld. In the Estate of Musgrove, Davis v. Mayhew*, [1927] P. 264. *Generally, Refd. Smith v. Thompson* (1931), 146 L. T. 14; *In the Estate of Musgrave, Tidy v. Musgrave*, [1934] Ch. 402, n.

1102. *Add. Annotation*.—*Refd. Beresford v. Royal Insurance Co.*, [1938] A. C. 586.

1164. *Add. Annotation*.—*Consd. In the Estate of Plant, Wild v. Plant*, [1926] P. 139.

1191. *Add. Annotation*.—*Generally, Refd. Robins v. National Trust Co.*, [1927] A. C. 515.

1247a. — — — — —.]—*LAMKIN v. BABB* (1752), 1 Lee, 1; 161 E. R. 1.

1271. *Add. Annotation*.—*Refd. Robins v. National Trust Co.*, [1927] A. C. 515.

1294. *Add. Annotations*.—*Refd. In the Estate of Musgrove, Davis v. Mayhew*, [1927] P. 264; *Robins v. National Trust Co.*, [1927] A. C. 515.

1301a. — — — — —.]—Testatrix having directed the person whom she made her residuary legatee to prepare her will, he did so, but by mistake the name of one of the legatees was omitted. Subsequently she directed that three additional bequests should be inserted in the will, which the residuary legatee promised but neglected to do. The will was afterwards read over to testatrix by the residuary legatee, & having declared herself satisfied, she executed it:—*Held*: although the residuary legatee was aware at the time of the execution of the will by testatrix, that her further instructions were not complied with, & that testatrix was ignorant of that fact, still in the absence of fraud on his part the will was entitled to probate.—*MITCHELL v. GARD* (1863), 3 Sw. & Tr. 75; 32 L. J. P. M. & A. 129; 8 L. T. 438; 27 J. P. 487; 9 Jur. N. S. 673; 11 W. R. 773; 164 E. R. 1280.

*Annotation*.—*Refd. Guardhouse v. Blackburn* (1866), 35 L. J. (P. & M.) 116.

1304. *Add. Annotations*.—*Consd. In the Estate of Musgrove, Davis v. Mayhew*, [1927] P. 264. *Refd. Robins v. National Trust Co.*, [1927] A. C. 515.

1310. *Add. Annotation*.—*Refd. Re Belliss, Polson v. Parratt* (1929), 141 L. T. 245.

1313a. — — — — —.]—*In the Estate of AUSTIN* (1929), 73 Sol. Jo. 545.

1317. *Add. Annotation*.—*As to* (3) *Refd. In the Estate of Musgrove, Davis v. Mayhew*, [1927] P. 264.

PART II. SECT. 6, SUB-SECT. 5.—B.

1035 i. *Proof of contents*.—Need of *stringent proof*.—*Re PERRY*, [1925] 1 D. L. R. 930; 56 O. L. R. 278.—CAN.

PART II. SECT. 6, SUB-SECT. 5.—D.

sn. *Will in custody of English Probate Court*.—*Sealed & certified photographic copy*.—Proceedings were instituted to prove a will in solemn form. The will had already been admitted to probate in England & was deposited in the Principal Probate Registry of the High Court, London. The English Probate Ct., having been requested to allow the will to be produced at the trial of the action in the Irish Free State, refused, on the ground of absence of jurisdiction:—*Held*: secondary evidence of the will could be given, & a sealed & certified photographic copy was admitted.—*LYONS & BLENNEHASSSETT v. CHALMERS*, [1919] 1 R. 674.—IR.

PART II. SECT. 6, SUB-SECT. 8.—A.

so. *Nature of proof required*.—The proof necessary to establish a will is not an absolute or conclusive one, but such proof as would satisfy a prudent man.—*SURENDRA NATH CHATTERJI v. JAHNAVY CHARAN MUKHERJI* (1928), 1 L. R. 56 Calo. 390.—IND.

PART II. SECT. 6, SUB-SECT. 8.—B.

1048 ii. — — — — —.]—Where a will is impeached on the ground that testator was not at the time of its execution a person of testamentary capacity, the onus is on those propounding the will to show that it was the will of the testator & that he was a person of testamentary capacity.—*PAINTER v. HODGKIN* (No. 2), [1935] 1 W. W. R. 410.—CAN.

1053 i. — — — — —.]—*Wherever ground for suspicion*.—*Howie v. CHATTERTON*, [1926] N. Z. L. R. 595.—N.Z.

1053 ii. — — — — —.]—The burden of proof as to the execution & the testamentary capacity of testator at the time of the execution of a will lies upon its propounder who has to explain away the suspicious circumstances appearing in the case.—*SURENDRA NATH CHATTERJI v. JAHNAVY CHARAN MUKHERJI* (1928), 1 L. R. 56 Calo. 390.—CAN.

1065 iii. — — — — —.]—If a party propounding a will for probate has satisfied the ct. that testator executed it with due formalities, & that when he did so he was of sound & disposing mind & memory, had full knowledge & appreciation of its contents, & actually comprehended what he was doing, the party propounding has fulfilled the onus upon him; he does not have to go farther & disprove or negative the alleged exercise of undue influence or fraud; it is for the party impugning the will to satisfy the ct. of the exercise of undue influence or fraud.—*RIACH v. FERRIS*, [1934] S. C. R. 725; [1935] 1 D. L. R. 118.—CAN.

ap. *Verbal will*.—The onus of establishing a verbal will is always a very heavy one; it must be proved with the utmost precision & with every circumstance of time & place.—*VENKAT RAO v. NAMDEO* (1931), 58 L. R. Ind. App. 362.—IND.

PART II. SECT. 6, SUB-SECT. 9.—A.

st. *Non-compliance with Wills Act, R. S.*, 1923 (c. 146), s. 15.—Application refused.—*Re Cox*, [1927] 1 D. L. R. 441; 59 N. S. R. 103.—CAN.

PART II. SECT. 6, SUB-SECT. 9.—D. (g).

1196 i. *Evidence*.—*Witness not available*.—*Attesting witness to will*.—*Affidavit made on proof in common form inadmissible*.—The affidavit of an attesting witness in statutory form upon probate in common form, is

inadmissible after the death of the witness upon proof in solemn form.—*Re ROBERSON*, [1936] 1 D. L. R. 53; 5 F. L. J. (Can.) 85.—CAN.

PART II. SECT. 6, SUB-SECT. 9.—E.

t i. — — — — —.]—*Plea of forgery*.—*Deft. in a probate action pleaded that the will which pltf. sought to establish was not signed by testatrix or by any other person in her presence & by her direction*:—*Held*: as this amounted to a plea of forgery, deft. must disclose the name of the person by whom, & the time when it was alleged the document was signed.—*GALLAGHER v. KENNEDY*, [1931] N. I. 207.—IR.

PART II. SECT. 8.

1238 i. *Double grants*.—*Discouraged*.—When a will appoints one exor. for general purposes & another one for limited purposes, only one grant should be made, & the respective powers of the two exors. should be distinguished therein. The ct. should discourage double grants, & upon the application for probate made by either exor., the other one should be cited.—*Re MAURAT ESTATE* (Sask.), [1927] 3 W. W. R. 18.—CAN.

PART II. SECT. 9, SUB-SECT. 4.

1241 i. *When knowledge & approval presumed*.—*LIDSTONE v. McWILLIAMS*, [1931] 3 D. L. R. 455; S. C. R. 685; affg., 1 M. P. R. 350.—CAN.

PART II. SECT. 9, SUB-SECT. 5.—A.

1244 i. *Exercise of influence must be proved*.—*MURRAY v. HAYLOW*, [1927] 3 D. L. R. 1036; 60 O. L. R. 629.—CAN.

PART II. SECT. 9, SUB-SECT. 5.—C.

1271 i. *Onus of proof*.—*On party alleging undue influence*.—*Re McWILLIAMS* (1880), 1 M. P. R. 350.—CAN.

1318. *Add. Annotation:—Refd. In the Estate of* Musgrove, *Davis v. Mayhew*, [1927] P. 264.

1320a. ———.]—Where a will is propounded by the chief beneficiary under it, who has taken a leading part in giving instructions for its preparation & in procuring its execution, probate should not be granted unless the evidence removes suspicion & clearly proves that testator approved the will.—*VELLASAWMY SERVAI v. SIVARAMAN SERVAI* (1929), 57 L. R. Ind. App. 96, P. C.

1344. *Add. Annotation:—Refd. Smith v. Thompson* (1931), 146 L. T. 14.

1348a. *Misdescription of relationship.*—Where in a will the residue had been left to the grandchildren of a person named & described as “my uncle,” whereas he was in fact the cousin of testatrix, the ct. ordered that the words “my uncle” be excluded from probate, which had been granted but not published.—*Re CLARK* (1932), 101 L. J. P. 27; 147 L. T. 240; 48 T. L. R. 544; 76 Sol. Jo. 461.

1351. *Add. Annotation:—Folld. Kitcat v. King*, [1930] P. 266.

1351a. ———.]—A testamentary paper headed “Codicil to be attached to my will,” & proceeding “This is the last will & testament of A. B.” did not expressly or by implication revoke an earlier will although it effected a substantial difference in the destination of a large portion of the property passing. The same paper bore, in addition to the signature of the testator, the signatures of four persons, two of whom were beneficiaries under it; all four signatures had been placed on the paper at the time of attestation, & there was evidence that the two beneficiaries signed otherwise than as attesting.—*Held*: the words “last will & testament” did not preclude the admission to probate of both papers, & probate of the codicil might go without including the names of the two beneficiaries as attesting witnesses.—*KITCAT v. KING*, [1930] P. 266; 99 L. J. P. 126; 143 L. T. 408; 46 T. L. R. 617; 74 Sol. Jo. 488.

1367. *Add. Annotation:—Distd. In the Estate of* Caie, *In the Estate of Davis* (1927), 71 Sol. Jo. 898.

1369a. ———.]—The ct. directed that certain non-testamentary words of an offensive nature should be omitted from the probate of a will, but declined to order their expungement from the will itself.—*Re MAXWELL* (1929), 140 L. T. 471; 45 T. L. R. 215, *sub nom. In the Estate of MAXWELL*, 73 Sol. Jo. 159.

#### PART II. SECT. 10, SUB-SECT. 3.

b. i. ———.]—Where the draftsman of a will empowered by testator to use his own judgment makes a mistake of law or error in drafting, testator is bound by the mistake, but where the draftsman in doing the merely ministerial act of copying what he thinks the testator has written in his instructions inserts a word in error & the mistake is not brought to the notice of testator the word so inserted must be omitted from probate.—*PERPETUAL TRUSTEE CO. v. WILLIAMSON* (1929), 99 S. R. N. S. W. 487; 46 N. S. W. W. N. 151.—*AUS.*

#### PART II. SECT. 10, SUB-SECT. 4.—B.

1369 i. *Objectionable matter—Unconnected with testamentary dispositions—*

*Scandalous or defamatory matter.*—The Supreme Ct. has jurisdiction, to be exercised with great care, to order that words in a will, which are scandalous or defamatory & in no way germane to the dispositions of the will, be omitted from the probate.

Testator stated: “I make no provision for my wife on account of her intemperate habits & other misconduct.” The ct. refused to order those words be omitted from the probate.—*Re O'REILLY'S WILL*, [1927] V. L. R. 633; [1927] *Argus* L. R. 396.—*AUS.*

#### PART II. SECT. 11, SUB-SECT. 1.

sn. *Appeal from refusal to grant.*—*Re MACDONALD, R. v. SURROGATE*

—.]—*In the Estate of RAWLINGS* (1934), 78 Sol. Jo. 338.

1369c. ———.]—*Repugnant to testator's family.*—The ct. will permit words of a will which are not dispositive to be omitted from the probate, though they make no personal allusion to any individual, if they are otherwise offensive & objectionable & repugnant to the members of the family of the testator.—*In the Goods of BOWKER*, [1932] P. 93; 101 L. J. P. 30; 146 L. T. 572; 48 T. L. R. 332; 76 Sol. Jo. 344.

1371a. ———.]—*In the Estate of CAIE* (1927), 43 T. L. R. 697; *sub nom. In the Estate of CAIE, In the Estate of DAVIS*, 71 Sol. Jo. 898.

1375a. *Settlement—Identical bequests.*—Where a will contained bequests identical with the trusts of a marriage settlement the ct. did not require the whole of the marriage settlement to be set out in the probate, but only such extracts as were necessary to explain the bequests.—*In the Goods of GARBET* (1869), 33 J. P. 792; 21 L. T. 366.

1383. *Add. Annotation:—Consd. In the Estate of* Todd, [1926] P. 173.

1388a. ———.]—*In the Estate of TODD*, No. 1398a, *post*.

1398a. ———.]—*Wills not independent.*—If testamentary papers are independent, one dealing exclusively with property within the jurisdiction & the other with property outside it, there is no obligation on a party propounding the first to obtain probate of the second. The question is whether the papers are independent or interdependent.

Testator left two wills, one English, the other American; the latter dealt exclusively with property outside the English jurisdiction, but the two documents were interdependent with regard to the residue, which was liable for English estate duty. The exors. of the two wills were different persons. Testator had expressly directed that the American will should be “probated” in America:—*Held*: (1) the two wills & a codicil to the English will should all be proved in England; (2) the document to be retained in the English Probate Registry as evidence of the testamentary act of making the American will should be an examined & sealed copy of that will, & after probate the original American will should be handed out to the exors. named therein for probate in America.—*In the Estate of TODD*, [1926] P. 173; 95 L. J. P. 105; 135 L. T. 381; 42 T. L. R. 545; 70 Sol. Jo. 671.

1410a. ———.]—*In the Estate of TODD*, No. 1398a, *ante*.

COURT JUDGE (No. 2), [1930] 2 D. L. R. 995; 1 W. W. R. 261; 38 Man. L. R. 471.—*CAN.*

sp. ———.]—*Appeal from refusal to grant administration under Surrogate Ct. Act only lies where the grant is contested.*—*DICKSON v. MONTEITH* (1887), 14 O. R. 719.—*CAN.*

#### PART II. SECT. 11, SUB-SECT. 4.—A

1423 III. ———.]—The rule that in granting letters of administration the grant will follow the majority of interests is a stronger rule than that under which the preference is usually given to a man over a woman. The fact that one of appcts. has a large claim against the estate is a circum-

- 1431a. Where minority interest.]—*Re* HERBERT, No. 1883a, *post*.
- 1431b. —.]—Under Jud. (Consolidation Act), 1925 (c. 49), ss. 160 (1) & 162 (1), the ct. cannot make a grant of administration to less than two individuals, when it is aware that there is a minority interest.—*Re* WHITE, [1928] P. 75; 96 L. J. P. 157; 138 L. T. 68; 43 T. L. R. 729; 71 Sol. Jo. 603, C. A.
- 1431c. — Administrator pendente lite.]—*Re* PRICE (1931), 75 Sol. Jo. 295.
- 1463a. — "Special circumstances."—This was an application by two nominees for a grant of letters of administration of the estate of an intestate, whose next of kin were unable to agree on any one or more of them administering the estate. Being all *sui juris*, they signed an act of renunciation in which they consented to the appcts. taking the grant subject to the approval of the ct. It was submitted that though normally the ct. would make a grant only to kindred of an intestate, in "special circumstances" it would make a grant to a stranger. The ct. exercised that power under sect. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162, as amended by Administration of Justice Act, 1928 (c. 26), s. 9:—*Held*: in the "special circumstances" the order would be made as prayed.—*Re* MORGANS (W. A.) (1931), 145 L. T. 392; 47 T. L. R. 452.
- 1464a. Nominee of plaintiff—Action against estate under Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41).—In the absence of a personal representative of a deceased intestate, against whose estate a cause of action survived by virtue of Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1, the ct. appointed as administrator of deceased the nominee of a party intending to prosecute the cause of action in order that proper parties to the action should be constituted. The machinery of Administration of Justice Act, 1928 (c. 26), s. 9, proviso (b), applied.—*In the Estate of SIMPSON, In the Estate of GUNNING*, [1936] P. 40; 105 L. J. P. 7; 154 L. T. 136; 52 T. L. R. 117; 79 Sol. Jo. 861.
1474. *Add. Annotation*:—*Re*fd. *Re* Bower Williams, *Ex p.* Trustee, [1927] 1 Ch. 441.
1485. *Add. Annotation*:—*Re*fd. Ormond Investment Co. v. Betts, [1928] A. C. 143.
1508. *Add. Annotation*:—*Re*fd. A.-G. for Alberta v. Cook, [1926] A. C. 444.
1509. *Add. Annotation*:—*Re*fd. A.-G. for Alberta v. Cook, [1926] A. C. 444.
1510. For "— Protection order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39)—Whether citation of husband necessary" read "— Separation order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39)—Whether citation of husband necessary."
1566. *Add. Annotation*:—*Re*fd. A.-G. for Alberta v. Cook, [1926] A. C. 444.
- 1650a. —.]—Testatrix commenced a will with the words: "This is my last will, the former one being cancelled," having substituted for the German word "*ungültig*" its English equivalent "cancelled." This will made dispositions quite different from those in an earlier will, without however disposing of the residue:—*Held*: the later will revoked the earlier, & testatrix being illegitimate, the ct. granted letters of administration to the Treasury Solicitor with the will annexed.—*JONES v. TREASURY SOLICITOR* (1932), 147 L. T. 340; 48 T. L. R. 615; 76 Sol. Jo. 690; *affd.* 49 T. L. R. 75.
1651. *Add. Annotation*:—*Re*fd. *Re* Wells, Swinburne-Hanham v. Howard (1932), 48 T. L. R. 617.
1653. *Add. Annotation*:—*As to* (2) *Consd. Re* Mason (1928), 97 L. J. Ch. 321.
1656. *Add. Annotation*:—*Re*fd. A.-G. for Ontario v. McLean Gold Mines, [1927] A. C. 185.
- 1675a. — Death of foreigner domiciled abroad—Estate insolvent—No proof by executor.]—Deceased, a Peruvian, died in Peru on Feb. 6, 1932, leaving a will of which his son was the surviving exor. The estate was insolvent & consisted in part of English assets which formed the subject of pending proceedings in Chancery. The exor. had not been cited & had not renounced probate. There was evidence that the exor., who had been in this country since the death of deceased, had taken no steps to obtain probate & had withdrawn a retainer given to English solrs., intending to leave the country without taking probate.
- stance to be considered.—*BELL v. SPELLISCY*, [1932] 1 W. W. R. 174.—CAN.
- PART II. SECT. 11, SUB-SECT. 4.—B. sp. To attorney of executors.]—*Re* BULLEN (DECEASED) (1926), 37 B. C. R. 240.—CAN.
- PART II. SECT. 11, SUB-SECT. 4.—C. 1447 ii. —.]—In the absence of special circumstances, a sole administrator should be appointed to the estate of deceased, rather than joint administrators, even when the claimants are equal in degree of kindred to deceased.—*STONE v. STONEY* (1923), 1 L. R. 2 Pat. 508.—IND.
- PART II. SECT. 11, SUB-SECT. 4.—F. (c). sp. Widow separated from husband for eighteen years.]—A widow having had good reason for discontinuing to live with her husband:—*Held*: the fact that she had not lived with him for 18 years prior to his death & they had had nothing to do with one another during that long period was not a sufficient reason, there having been no misconduct on her part, for refusing her a grant of administration directly or through her attorney.—*Re* HOLMES ESTATE, [1931] 3 W. W. R. 665.—CAN.
- PART II. SECT. 11, SUB-SECT. 4.—G. (a). 1596 ii. — Application by former nominee for widow—English Noncontentious Business Rules, r. 28.]—After the refusal of a grant to the nominee of the widow the widow renounced her right to administer, & the nominee made another application based on the fact that he was one of the next of kin:—*Held*: appct. being *prior petens* & there being nothing in the circumstances requiring a strict application of English Noncontentious Business Rules, r. 28, the letters of administration should be granted to him. The English Noncontentious Business Rules 28, 33, 34, are in force in Saskatchewan.—*Re* KRAUSE ESTATE (Sask.), [1929] 4 D. L. R. 1082; 1 W. W. R. 896.—CAN.
- PART II. SECT. 11, SUB-SECT. 4.—G. (d) i. 1 i. — Those with majority of interests preferred.]—Between next of kin of the same degree, the ct. will appoint as administrators those with the majority of interests.—*Re* MCCARTHY, [1936] 1 D. L. R. 735; 5 F. L. J. (Can.) 199.—CAN.
- PART II. SECT. 11, SUB-SECT. 4.—H. st. Preferred to official administrator—Though resident out of jurisdiction—Agent managing estate.]—*Re* LELAIRE (1903), 9 B. C. R. 429.—CAN.
- PART II. SECT. 11, SUB-SECT. 4.—K. (a). sv. Creditor with judgment against debtor—Right to file bill against real representative—Before suing out execution.]—*DUFFY v. GRAHAM* (1869), 15 Gr. 547.—CAN.

The ct., in the exercise of its general jurisdiction, passed over the exor., & made a grant of administration with the will annexed to English creditors of deceased.—*In the Estate of LEGUIA, Ex p. ASHWORTH, Ex p. MEINERTZHAGEN*, [1934] P. 80; 103 L. J. P. 34; 150 L. T. 339; 50 T. L. R. 177; 78 Sol. Jo. 136.

1701. After this case add:—

*Compare No. 1773a, post.*

1772a. Remainderman—Settlement determined on death of life tenant.]—Where a woman died intestate without known next of kin & was, at the time of her death, the life tenant of an estate previously settled upon her by will, the settlement was determined on her death, & the legal estate vested in the personal representative of the life tenant. The ct. made a general grant of administration to the remainderman under the settlement, following the non-appearance of persons interested in the life tenant's estate who had been cited.—*In the Estate of BORDASS*, [1929] P. 107; 98 L. J. P. 65; 140 L. T. 120; 45 T. L. R. 52; 72 Sol. Jo. 826.

Annotation:—Distd. *In the Estate of Taylor*, [1929] P. 260.

1772b. ———.]—*In the Estate of BIRCH*, [1929] P. 164; 98 L. J. P. 66; 141 L. T. 32; 73 Sol. Jo. 221.

Annotation:—Distd. *In the Estate of Taylor*, [1929] P. 260.

1773a. Poor law guardians—Administration of estate of orphan's deceased parent.]—By Poor Law Act, 1927 (c. 14), a board of guardians may act in certain circumstances as *in loco parentis* in respect of an orphan child, & in that capacity is entitled to take out letters of administration of the estate of the child's deceased parent for the benefit of the child.—*Re PETERS* (1929), 142 L. T. 328; 46 T. L. R. 119; 74 Sol. Jo. 13.

1774. Add. Annotation:—*Refd. Re White*, [1928] P. 75.

1780. Add. Annotation:—*Refd. In the Estate of Leguia* (1936), 105 L. J. P. 72.

1785. Add. Annotation:—*Refd. In the Estate of Potticary*, [1927] P. 202.

1834. Add. Annotation:—*Refd. Beresford v. Royal Insurance Co.*, [1938] A. C. 586.

1873a. Doubt as to capacity in which person entitled—Refusal to take grant in either capacity.]—An intestate was presumed to have died in or since 1905. Owing to the uncertainty of the date of his death it was not known whether he was survived by his father, who in that event would have been entitled to a grant of administration. The

father died in 1909 leaving a will, & a brother of the presumed deceased was now entitled to a grant of administration of his estate whether as his next of kin or as the exor. of his father. The brother of the presumed deceased refused either to renounce his derivative right as exor. of his father or to take the grant in his original right as next of kin of his brother, & he had become bkpt. The ct. granted administration under Ct. of Probate Act, 1857 (c. 77), s. 73, to the Public Trustee.—*In the Estate of PARNALL*, [1936] P. 47; 105 L. J. P. 20; 154 L. T. 374; 52 T. L. R. 160; 80 Sol. Jo. 94.

*E. To whom Grant may be made.*

(Vol. XXIX., p. 170.)

*See, also, Administration of Justice Act, 1928 (c. 26), s. 9.*

1883a. — During minority.]—Jud. (Consolidation) Act, 1925 (c. 49), s. 160 (1), directs that either a trust corpn., with or without an individual, or not less than two individuals, shall take a grant of administration in the case of an interest in the estate during minority of the party interested; but this provision must be read subject to the modification of sect. 162 (1), namely, that the ct. in the case of insolvency is to have a discretion to grant administration to some person other than those interested in the residue. Under the latter sect. it is competent for the ct., even during a minority, to appoint a creditor to be a single administrator, as it could formerly have done under Ct. of Probate Act, 1857 (c. 77), s. 73.—*Re HERBERT*, [1926] P. 109; *sub nom. In the Goods of HERBERT*, 95 L. J. P. 53; 135 L. T. 123; 42 T. L. R. 469.

Annotations:—*Consd. Re White* (1927), 43 T. L. R. 729, *Dtd. Re White*, [1928] P. 75. *Consd. Re Price* (1931), 75 Sol. Jo. 295.

2056a. —.]—Testator made his will leaving all his money to A. There was no appointment of an exor. A. moved for administration with the will annexed. The parties interested in intestacy resisted the application:—*Held*: in the circumstances the application failed, the persons entitled in intestacy taking the grant in priority to a legatee or devisee under Non-contentious Rules, r. 119, operating since Jan. 1, 1926, in the case of an estate not wholly disposed of.—*In the Goods of GATES*, [1928] P. 128; 97 L. J. P. 76; 138 L. T. 714; 44 T. L. R. 353; 72 Sol. Jo. 172; *varied*, [1928] P. 178, C. A.

PART II. SECT. 11, SUB-SECT. 4.—M.

*sm. Ex-convict.*—A person who has been convicted of felony, & has served his sentence, is in the same position as if pardoned, & can be appointed administrator.—*In the Goods of COLEMAN*, [1926] 1 R. 327.—IR.

*sp. Adopted child.*—*Re WLADYSLAW DZURMAN ESTATE* (1936), 44 Man. L. R. 151.—CAN.

PART II. SECT. 11, SUB-SECT. 5.—D. (c).

1834 i. Conviction for killing intestate.]—A husband, who has been convicted of killing his wife, who died intestate, has no claim to her estate, & neither he nor his attorney is entitled to administer it.—*Re NOBLE* (Sask.), [1927] 1 W. W. R. 938.—CAN.

PART II. SECT. 11, SUB-SECT. 5.—E. (c).

*sw. Right of next of kin to be appointed guardian.*—*Re BELL ESTATE* (Sask.), [1929] 3 W. W. R. 68.—CAN.

PART II. SECT. 12, SUB-SECT. 1.—B. (a).

*sy. Dependent on value of interest.*—The priority of right to the grant of administration with will annexed is regulated by the value of the interest under the will, the widow (as such) having no such priority of right as she would have in the case of the grant of general letters of administration without a will.—*Re CAMPBELL*, [1933] N. Z. L. R. 817.—N.Z.

PART II. SECT. 12, SUB-SECT. 1.—B. (b).

2155 i. Where estate insolvent—

*Assets assigned before death to executrix—Executrix neither proving nor renouncing.*—*Held*: letters of administration with a copy of the will annexed should be granted to a duly appointed syndic of the creditor, who might be one of its officers.—*Re RANDALL*, [1927] V. L. R. 535; 49 A. L. T. 89; [1927] Argus L. R. 395.—AUS.

PART II. SECT. 12, SUB-SECT. 1.—B. (j).

*sg. Nominee of renouncing executor.*—Where a sole executrix who was also the sole beneficiary, an Assyrian by birth & illiterate, renounced probate, the ct. allowed a grant of administration with the will annexed to her nominee who was the son of herself & testator.—*Re MOSKES* (1931), 48 N.S. W. W. N. 104.—AUS.



- 2314a. —.]—An administrator with a will annexed being also universal legatee & devisee under the will was declared bkpt. & a trustee of his estate was appointed. At the expiration of twelve months from the death of testator the administrator had absconded from the country & had not since been heard of. A grant of special administration was made to the trustee in bkpcy. as a person interested in the estate within Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), s. 164 (1).—*In the Goods of ROSSE*, [1934] P. 29; 103 L. J. P. 32; 150 L. T. 220; 50 T. L. R. 72; 78 Sol. Jo. 30.
- 2321a. "Person interested in the estate"—Trustee in bankruptcy of administrator. *In the Goods of ROSSE*, No. 2314a, ante.
- 2327a. — Fresh attorney appointed by surviving executor—Whether entitled to grant.]—Several exors. out of the jurisdiction gave a power to an attorney to take administration with a will & codicils annexed without reference to survivorship amongst the exors. The attorney took a grant of administration & partly administered the estate. The surviving exor. appointed fresh attorneys. The ct. revoked the grant to the original attorney & made a fresh grant to the fresh attorneys.—*In the Goods of DINSHAW*, [1930] P. 180; 99 L. J. P. 118; 142 L. T. 652; 46 T. L. R. 308; 74 Sol. Jo. 264.
- 2398a. Where minority interest.]—*Re PRICE* (1931), 75 Sol. Jo. 295.
2436. Add. Annotation:—*Re* Achilopoulos, *Johnson v. Mavromichali*, [1928] Ch. 433.
2440. Add. Annotation:—*Re* Achilopoulos, *Johnson v. Mavromichali*, [1928] Ch. 433.
- 2441a. —.]—Where administration is taken out in this country by the attorney of a foreign principal in respect of English assets belonging to a foreign testator, & the foreign principal is not by the law of the domicile an exor., but by virtue of his interest under the foreign will is charged by the law of the domicile with the duties which under English law are imposed on an exor., the ct. will authorise such administrator, after satisfying all English liabilities & all foreign liabilities of which he has notice, to hand over the surplus in his hands to the foreign principal, whose receipt will be a good & sufficient discharge. In such a case the administrator need not issue any foreign advertisements or take any active steps abroad to ascertain the position with regard to debts, as the foreign principal, who by the law of the domicile is in the position of an exor., is in such a case directly responsible for the payment of foreign debts.—*Re ACHILLOPOULOS, JOHNSON v. MAVROMICHALI*, [1928] Ch. 433; 97 L. J. Ch. 246; 139 L. T. 62.
- 2459a. Existence of Spanish civil war.]—PRACTICE NOTE, [1937] W. N. 298.
2485. Add. Annotation:—*Re* Pratt v. London Passenger Transport Board, [1937] 1 All E. R. 473.
2495. Add. Annotation:—*Re* Pratt v. London Passenger Transport Board, [1937] 1 All E. R. 473.
- 2511a. —.]—*COLLISS v. HECTOR* (1875), L. R. 19 Eq. 338; 44 L. J. Ch. 267; 23 W. R. 485.
2516. Add. Annotation:—*Re* Pratt v. London Passenger Transport Board, [1937] 1 All E. R. 473.
- 2516a. Official Solicitor.]—In the first case debts. in an action for personal injuries attributed the blame to a third person, who had since died. He left no estate, but he had been insured against such claims for negligence by an insurance co. Pltf. applied under R. S. C., Ord. 16, r. 46, for an order that the Official Solicitor should represent deceased's estate & be added to the record as a deft. The order asked was made without the consent of the Official Solicitor. In the second case, the facts were similar, except that deceased was one of debts. in the action, & that the order was made without the knowledge of the Official Solicitor. The Official Solicitor appealed in both cases:—*Held*: there is no power under R. S. C., Ord. 16, r. 46, to appoint a person against his will to represent the estate of a deceased person.—*PRATT v. LONDON PASSENGER TRANSPORT BOARD, GREEN v. VANDEKAR*, [1937] 1 All E. R. 473; 156 L. T. 265; 53 T. L. R. 355; 81 Sol. Jo. 79, C. A.
- 2518a. Solicitor of deceased defendant.]—On the death of a deft., the Ct. of Appeal directed his legal personal representative to be added as deft. & discharged an order which had been made appointing deceased's solr. to represent his estate.—*HARDY v. HOLMES & SPRINZ* (1913), H. No. 1314 (unreported), Y. S. C. P.
2523. Add. Annotation:—*Re* Pratt v. London Passenger Transport Board, [1937] 1 All E. R. 473.
- 2555a. Notice of appointment—Change of title of proceedings.]—Where an order has been made under R. S. C., Ord. 16, r. 46, appointing a person to represent an estate, the order should be left at the Central Office for entry, & the person appointed should file a notice of his appointment & the name & address of his solr., & thenceforward the title of the proceedings should contain the name of the person appointed, described as "A. B., appointed by order dated, etc., to represent the estate of C. D. deceased." The person appointed will then be entitled to be represented in ct. at the hearing as a party (*CLAUSON, J.*).—*Re PROSSER, PROSSER v. GRIFFITH*, [1929] W. N. 85.
- 2585a. Trust estate vested in tenant for life—Settled Land Act, 1925 (c. 18).]—Where testator, dying in 1897, appointed his wife A. sole extrix. & devised to her for life all his real estate with remainder to B. in fee simple absolutely, & A. died in Feb. 1926, intestate & a widow, leaving no statutory next of kin & no trustees for the purposes of the above Act were ever appointed:—*Held*: B. was entitled under Jud. (Consolidation) Act, 1925 (c. 49), s. 155 (1), to a grant of limited administration in respect of such real estate.—*Re DALLEY* (1926), 136 L. T. 223; 70 Sol. Jo. 839.
- 2585b. Property subject to life tenancy—Settled Land Act, 1925 (c. 18), s. 20 (1)—Law of Property Act, 1925 (c. 20), Sched. I., Part II., para. 6 (c).]—*In the Estate of JAMES* (1926), 162 L. T. Jo. 498.



**2585c. Settled land.]—**Grants of probate to special exors. are not to be confined to those persons whose qualifications fall within Settled Land Act, 1925 (c. 18), s. 30 (1), & the effect of that Act is not to limit the operation of Administration of Estates Act, 1925 (c. 23), ss. 1, 13 & 22.—*In the Estates of GIBBINGS*, [1928] P. 28; 97 L. J. P. 4; 138 L. T. 272; 44 T. L. R. 230; 71 Sol. Jo. 911.

**2585d. — Death of settlor fifty years earlier—Personal representatives not traced.]—**G. died in 1882 & the chain of representation to his estate was not known & could not be ascertained without considerable expense. E., testator, died on Mar. 27, 1930, & the present appcts., who were his exors., had taken probate of his will in due course save & except land vested in testator which was settled previously to his death & not by his will & remained settled land notwithstanding his death. Testator was interested in land settled by the will of G. as follows: (a) he was tenant for life for the purposes of Settled Land Act, 1925 (c. 18), of a portion of the N. estate subject to a compound settlement consisting of the will of G. together with an indenture of resettlement of the N. estate dated Sept. 25, 1909; (b) he was absolute owner of certain portions of the N. estate, which by reason of a rentcharge upon them continued to be settled land after his death. These portions were included in a settlement created by the will of G. but were not subject to the compound settlement or the resettlement. They were therefore the subject of a separate settlement; (c) certain portions of the N. estate of which testator was absolute owner were subject to the same conditions as to title as (b) but testator had exonerated these latter from the incidence of the rentcharge as between the various portions of the estate, but he could only do so in so far as the income from both (b) & (c) was adequate to meet the rentcharge. As regards the burden of the rentcharge as a whole both (b) & (c) remained subject to it in favour of the chargee. Of these interests in settled land of testator all three remained subject to the rentcharge, the object of which was to provide an annuity to the still surviving widow of G., & apart from the operation of Settled Land Act, 1925 (c. 18), s. 30 (3), for the purposes of that Act, there were originally no trustees of any of these interests of testator under the settlement created by the will of G. On July 22, 1931, S. & W. had already as trustees of the compound settlement & resettlement obtained a grant of special probate to testator as his special exors. limited to settled land, vested in him as tenant for life under the compound settlement & resettlement. Probate of testator's will having excluded settled land there was no representation in respect of the settled land of which he was absolute owner which remained settled land because of the existence of the rent-

charge. On the application of the general exors. of the will of testator the ct. revoked the earlier probate & granted general probate to them save & except settled land, of which special exors. had already been appointed by the grant dated July 22, 1931, under the authority of Judicature (Consolidation) Act, 1925 (c. 49), s. 155, without citing the personal representatives (if any) of the settlor, G.—*In the Estate of POWELL*, [1935] P. 114; 104 L. J. P. 33; 152 L. T. 515; 51 T. L. R. 413; 79 Sol. Jo. 321.

**2603a. —.]—**A will duly executed was on the death of testator in the custody of the sole exor., & universal legatee named in it. It was never proved, there not being at that time any property which could pass under it, & was subsequently lost or mislaid. No draft or copy of it was forthcoming. The ct. granted administration of the effects of deceased, limited until the will, or an authentic copy of it, shall be brought into the probate registry.—*In the Goods of JOHNSON* (1865), 11 Jur. N. S. 184.

**2617. Add. Annotation:—**Consd. *In the Estate of Leguia* (1936), 105 L. J. P. 72.

**2618. Add. Annotations:—**Consd. *Re Cockell, Jackson v. A.-G.*, [1931] 1 Ch. 389; *In the Estate of Leguia* (1936), 105 L. J. P. 72.

**2619. Add. Annotations:—**Consd. *Re Cockell, Jackson v. A.-G.*, [1931] 1 Ch. 389; *In the Estate of Leguia* (1936), 105 L. J. P. 72.

**2744a. Threatened breach—Surety entitled to apply to court—For relief by way of indemnity against liability under bond.]—**Sureties who have entered into the usual bond for the proper administration by the administrator of an intestator's estate are entitled to apply to the ct. for relief *quia timet*, & will be granted the same by way of indemnity against their liability thereunder in a case where they have reasonable ground for anticipating jeopardy owing to a threat by the administrator, persisted in up to the issue of the writ, to distribute the estate without providing for contingent liabilities in contravention of the bond.—*Re ANDERSON-BERRY, HARRIS v. GRIFFITH*, [1928] Ch. 290; 97 L. J. Ch. 111; 138 L. T. 354, C. A.

**2754a. Right to allege several breaches.]—**A party had obtained from a prerogative ct. a general order to put an administration bond in suit against the surety, on the sole ground that the principal had not paid over the residue. On *non est factum* being pleaded, the pltf. suggested breaches, not only for not paying over the residue, but on several other distinct parts of the condition; the Exchequer Ct. refused to compel him to strike out the breaches on the other parts of the condition, or to allow deft. to let judgment go by default, & pay nominal damages on those breaches.—*CANTERBURY (ARCHBP.) v. ROBERTSON* (1832), 1 Cr. & M. 181; 149 E. R. 365.

PART II. SECT. 13, SUB-SECT. 6.—  
B.

so. *Payment to surety—When allowed to administrator.]—*Where a person who is entitled to a grant of administration, but is otherwise unable to give justifying security, procures a surety bond from an insurance co. & pays a premium thereon, it is within the

discretion of the ct. to allow the amount of such premium out of the general personal estate, where the circumstances of the case show that reliable security could not otherwise be obtained, & that the course adopted was reasonable & proper, & for the interest of all parties entitled to the assets.—*Re LUCAS, PARR v. BLAIR*, [1900] 1 I. R. 292.—IR.

PART II. SECT. 13, SUB-SECT. 7.—  
B. (b).

o i. — *Insolvency of administrator.]—**Re ELLIOTT SMITH'S ESTATE*, [1931] 3 M. P. L. 485.—CAN.

xx. *Right of sureties—Anticipated waste by administrator—Injunction & receiver.]—**In the Estate of HUNTER* (1928), 45 N. S. W. N. 170.—AUS.

2777a. ———.]—*THOMPSON v. JUDGE* (1854), 2 Drew. 414; 61 E. R. 780; *sub nom.* TOMSON v. JUDGE, 2 Eq. Rep. 1141; 23 L. J. Ch. 929; 23 L. T. O. S. 217; 2 W. R. 574.

2877. *Add. Annotation*:—*Refd.* Ormond Investment Co. v. Betts, [1927] 2 K. B. 326.

2911. *Add. Annotations*:—*Refd.* Hoystead v. Taxation Comr., [1926] A. C. 155; Jaeger Co., Ltd. v. Jaeger (1929), 46 R. P. C. 336.

2979a. ——— Twenty years after death of testator.]—Administration revoked.—*In the Estate of* MUSGROVE, DAVIS v. MAXHEW, [1927] P. 264; 98 L. J. P. 140; 137 L. T. 612; 43 T. L. R. 648; 71 Sol. Jo. 542, C. A.

2993. *Add. Annotation*:—*Refd.* Burr v. Anglo-French Banking Corp., Ltd. (1933), 49 T. L. R. 405.

3011. *Add. Annotation*:—*Refd.* *Re* Ross, Ross v. Waterfield (1929), 46 T. L. R. 61.

3022a. Absence of necessary party—Non-disclosure of material facts.]—On an *ex parte* motion in this matter in Dec. 1933, a grant of administration with the will annexed was made to creditors of deceased, & the ct., in dispensing with the citation of the exor., expressed it as an exceptional course which should not be regarded as justifying in ordinary cases any relaxation of the usual practice of giving an

exor., by a formal notice, the opportunity of appearing before the ct. In July, 1935, the exor. applied for the revocation of the grant, & after fresh evidence the President revoked the grant which he had made, on the ground that on the original motion material facts had not been disclosed which, had they been disclosed, would have caused him to require the citation of the exor. In the order embodying the grant the administrators were not described as creditors, & it was directed that in all future grants of administration to a creditor he should be so described in the order. The administrators appealed against the revocation of the grant:—*Held*: the decision of the President must be affirmed, owing to non-disclosure of material facts. The President had jurisdiction to revoke his own grant, because it had been made in the absence of a necessary party.—*In the Estate of* LEGUIA (A. B.) (1936), 105 L. J. P. 72; 155 L. T. 270, C. A.

3074. *Add. Annotation*:—*Refd.* Akt. Ocean v. Harding, [1928] 2 K. B. 371.

3111. *Add. Annotation*:—*Apld.* *Re* Howden & Hyslop's Contract, [1928] Ch. 479.

3111a. ——— Sale of English real estate.]—Scottish exors. with a confirmation resealed under Jud. (Consolidation) Act, 1925 (c. 49), s. 168, can make a good title to English real

PART II. SECT. 15, SUB-SECT. 2.—A. *sy. Foreign will—Incorrect translation annexed.*—Where letters of administration, *cum testamento annexo*, have been granted with an incorrect translation of a foreign will annexed thereto, the ct. will, upon evidence to its satisfaction, order the substitution of a correct translation in lieu of the incorrect one.—*Re* KLEINSANG (No. 2) (1928), 28 S. R. N. S. W. 559; 45 N. S. W. W. N. 150.—AUS.

PART II. SECT. 15, SUB-SECT. 2.—B. (a).

n i. ———.]—Probate is conclusive proof of the due execution of the will by testator.—*CHANDRESHWAR PRASAD NARAIN SINGH v. BHISHESHWAR PRATAP NARAIN SINGH* (1926), 1 L. R. 5 Pat. 777.—IND.

PART II. SECT. 15, SUB-SECT. 2.—B. (e).

p. *Revsd.* on other grounds, 37 O. L. R. 498.

PART II. SECT. 15, SUB-SECT. 4.—C. *st. As to title to land.*—*Held*: probate was not sufficient.—*SUTHERLAND v. YOUNG* (1884), 1 Man. L. R. 38.—CAN.

PART II. SECT. 15, SUB-SECT. 6.

h i. ———.]—Pltfs., who were the exors. of the will of one McA., had obtained from a competent ct. in British Columbia a grant of probate of his will. McA. & deft. had made an agreement under seal by which McA. agreed to sell & deft. agreed to purchase certain land in Alberta, & under which part of the purchase-price was to be met by the assumption of a mtge. The mtge. was foreclosed & title to the land obtained by the mtgee. The agreement for sale was in the possession of McA. in British Columbia at the time of his death & came into the possession of pltfs. there. Pltfs., who were unable to give title to the land to deft., brought an action in Alberta on the personal covenant in the agreement, without having obtained any grant of letters probate, ancillary or otherwise, or any grant of letters of administration with will annexed from

any ct. in Alberta:—*Held*: the action was maintainable.—*MCALLISTER & MCALLISTER v. BEDARD*, [1932] 2 W. W. R. 577.—CAN.

h ii. ———.]—*SUTTON v. SOUDAK & SOUDAK* (GEORGE) FUR Co., [1932] 2 W. W. R. 82; 41 Man. L. R. 38.—CAN.

PART II. SECT. 16, SUB-SECT. 1.—B.

n i. ———.]—The High Ct. of Ontario has no power to revoke letters of administration granted by a Surrogate Ct.—*BELANGER v. BELANGER* (1911), 24 O. L. R. 439.—CAN.

n ii. ———.]—The Judge of the Surrogate Ct. on receiving information that his ct. had issued letters of administration on a false statement of facts has an inherent right to cancel them; & a further right to appoint a trust co. to act as administrator for the protection of any persons whose interests may have been affected by the mistaken action of the ct.—*Re* PAYNE ESTATE, [1934] 3 W. W. R. 631; [1935] 1 D. L. R. 474.—CAN.

PART II. SECT. 16, SUB-SECT. 2.—C.

sb. *As to person entitled—Advocate consenting without instructions.*—Where an advocate for one of the parties under a misapprehension consented to the other party being granted the letters:—*Held*: if such consent was given by the advocate without instructions, the client might withdraw the consent at any time prior to the actual issue of letters.—*KYONG HOE TSEE v. KYON SOON SUN* (1925), 1 L. R. 3 Ran. 261.—IND.

PART II. SECT. 16, SUB-SECT. 2.—E.

2988 i. *Administration granted on false affidavit—As to person entitled.*—Where a grant of administration is made to a man on his fraudulent representation that he was the intestate's lawful widower, but his alleged marriage to the intestate was illegal, he having a wife then living, the grant is void, & neither he nor his exors. can claim any right to or interest in the estate.—*IRELAND v. PAYNE*, [1933] 3 W. W. R. 363; *on appeal*, [1934] 2 W. W. R. 188.—CAN.

PART II. SECT. 16, SUB-SECT. 2.—J.

so. *Validity of will not proved.*—*ODYNAK v. FESCHUK* (Alta.), [1927] 3 D. L. R. 842; [1927] 3 W. W. R. 64; *revsd.* [1928] 1 D. L. R. 423; [1928] 1 W. W. R. 113; 23 Alta. L. R. 263.—CAN.

PART II. SECT. 16, SUB-SECT. 3.—H.

3055 iii. ———.]—On an application to revoke a grant of probate on the grounds that persons who ought to have been cited were not cited, & that the will was a forgery, if the first ground is established the *onus* is upon the opposite party to prove that the will is genuine.—*RAMAIAUNDI KUER v. KALAWATT KUER* (1927), 55 L. R. Ind. App. 18.—IND.

PART II. SECT. 16, SUB-SECT. 4.—A. (b) i.

3063 i. *On acts of administration.*—Letters of administration were granted to the brother of a man who was erroneously presumed to have died intestate. The administrator, as personal representative of deceased, sold & conveyed to a purchaser a portion of the land belonging to deceased. Upon the subsequent discovery of a will, pltf. obtained a grant of probate:—*Held*: the grant of administration was not void *ab initio* & purchaser had acquired a good title.—*MCPEARLAND v. COULSON*, [1930] N. I. 138.—IR.

PART II. SECT. 18, SUB-SECT. 1.

3097 ii. ——— *Irish Free State—Resealing in Victoria.*—Letters of administration c.t.a. having been granted in the Irish Free State, & application to have them sealed in Victoria under sect. 81 of Administration & Probate Act, 1928, was made by the attorney under power appointed by the administratrix for that purpose:—*Held*: the letters had not been granted "in the United Kingdom" & consequently could not be sealed under the sect.—*Re* STOKES, [1934] V. L. R. 362.—AUS.

estate without the necessity of any separate grant in respect thereof.—*Re HOWDEN & HYSLOP'S CONTRACT*, [1928] Ch. 479; 97 L. J. Ch. 313; 139 L. T. 309; 72 Sol. Jo. 400.

3125. *Add. Annotation*:—*Consd. In the Estate of Plant, Wild v. Plant*, [1926] P. 139.

3126. *Add. Annotation*:—*Apld. In the Estate of Plant, Wild v. Plant*, [1926] P. 139.

3127. *Add. Annotations*:—*Consd. In the Estate of Plant, Wild v. Plant*, [1926] P. 139. *Refd. Thomas v. Jones*, [1928] P. 162.

3127a. —.—]—The proviso to R. S. C., Ord. 65, r. 1, that nothing in that rule contained shall deprive an exor. who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules theretofore acted upon in the Chancery Div., governs the case of bare exors. who reasonably propound a will & codicil, even if, though the will is pronounced for, the codicil is pronounced against. The position of such exors. differs from that of persons named as exors. in a testamentary paper which they unsuccessfully propound. Having established the validity of the will, & made good their position as testator's exors., they are entitled to their costs of the litigation out of the estate as between solr. & client, & can be deprived of that right, which rests substantially upon contract, only if they have acted culpably or unreasonably. Until that has been established, their costs are not in the discretion of the ct., & notwithstanding Jud. Act, 1873 (c. 66), s. 49, repealed & reenacted by Jud. (Consolidation) Act, 1925 (c. 49), s. 31 (1) (h), an appeal lies without leave from an order condemning them in costs or depriving them of costs out of the estate.—*In the Estate of PLANT, WILD v. PLANT*, [1926] P. 139; *sub nom. Re PLANT, WILD v. PLANT*, 95 L. J. P. 87; 135 L. T. 238; 42 T. L. R. 443; 70 Sol. Jo. 605, C. A.

*Annotation*:—*Refd. Thomas v. Jones*, [1928] P. 162.

3127b. —.—]—The principle of the decision in *In the Estate of Plant, Wild v. Plant*, No. 3127a, ante, that exors. who have established the validity of their will are entitled to their whole costs of the litigation, although they fail in establishing a codicil, does not extend in all cases to costs incurred by them by reason of their insisting upon probate not only of clauses in a will expressing the

testamentary mind of their testator, but also of a clause which is found not to be his testamentary act. If a residuary gift is excluded from probate on the ground of want of capacity the question still arises whether the costs so incurred by the exors. are due to their "violation or culpable neglect of duty." If the ct. finds on this issue that an exor. is a wrongdoer, his *prima facie* right to receive out of the estate costs not otherwise provided for is displaced.—*THOMAS v. JONES*, [1928] P. 162; 139 L. T. 214; 44 T. L. R. 467; 72 Sol. Jo. 255; *sub nom. In the Estate of JONES, THOMAS v. JONES*, 97 L. J. P. 81.

3130a. —.— *In interest suit*.]—In interest suits the unsuccessful party is, as a general rule, condemned in costs. But where the only issue raised was as to the fact of the marriage of deft., who gave to pltf.'s attorney false information as to the place of her marriage, & whose own attorney, although in possession of the certificate of the marriage, returned no answer to two letters he received from the pltf.'s attorney asking for the production of the certificate to save further expense, & only produced it to him on the day of the trial, the ct. refused to condemn the pltf., the unsuccessful party, in costs.—*WISEMAN v. WISEMAN* (1866), L. R. 1 P. & D. 351; 35 L. J. P. & M. 22; 15 L. T. 415; 31 J. P. 40.

3163. *Add. Annotation*:—*Apld. In the Estate of Plant, Wild v. Plant*, [1926] P. 139.

3164. *Add. Annotation*:—*Apld. In the Estate of Plant, Wild v. Plant*, [1926] P. 139.

3171a. —.—]—There is no authority for allowing costs out of the estate in a probate action to an unsuccessful party who merely seeks to prove, in the case of a will executed by testator of sound disposing mind, that testator had a domicile under the law of which that party would take a large part of testator's estate in opposition to his wishes. The costs should follow the event in such a case.—*FLEMING v. HORNIMAN* (1928), 138 L. T. 669; 44 T. L. R. 315.

3175. *Add. Annotation*:—*Apld. In the Estate of Plant, Wild v. Plant*, [1926] P. 139.

3181. *Add. Annotation*:—*Refd. In the Estate of Southerden, Adams v. Southerden*, [1925] P. 177.

3184. *Add. Annotation*:—*Refd. Smith v. Thompson* (1931), 146 L. T. 14.

3186. *Add. Annotation*:—*As to (1) Consd. Neal v. Denston* (1932), 48 T. L. R. 637.

## PART II. SECT. 18, SUB-SECT. 3.

*sd. Grounds for granting or refusing application for resealing*.]—The ct. has the right, on an application under Alberta Rules, r. 945 (24), for resealing, to inquire as to the original appointment of the administrator, & should refuse the application, where the exors. have the right & duty to apply in Alberta for probate.—*Re BLAGBURN ESTATE*, [1927] 1 W. W. R. 716; *affd.*, [1927] 2 W. W. R. 206.—CAN.

## PART II. SECT. 19.

s. 1. —.—]—An extrix., to whom probate of a will had been granted in England, appointed appt. as attorney under power in Victoria to procure the resealing of the probate in Victoria:—*Held*: appt. was authorised to produce the probate & obtain the sealing thereof under Administration & Probate Act, 1915, s.

51, that being the proper procedure for him to adopt in order to procure himself to be constituted the legal representative of testator in Victoria.—*Re FAIRER'S WILL*, [1927] V. L. R. 580; [1927] Argus L. R. 462.—AUS.

*ss. Revocation*.]—When a foreign probate which has been sealed in Victoria is subsequently revoked by the foreign ct., the Supreme Ct. has power to revoke the sealing.—*Re HALL* (1930), V. L. R. 309; Argus L. R. 264.—AUS.

*st. Duty of registrar*.—*Supreme Court of New Zealand*.]—Where letters of administration have been duly granted in England & are produced to the registrar of the Supreme Ct. of New Zealand, & a copy thereof left with him, the registrar is bound under Administration Act, 1908, s. 43, to reseat letters of administration, & there is no need of an application to

the ct., for the ct. has no discretion in the matter. In the absence of fraud in the will or by the administrator the ct. has no power to set aside such resealing.—*Re WILLCOX*, [1925] N. Z. L. R. 325.—N.Z.

## PART II. SECT. 20, SUB-SECT. 3.—A. (b)

3187 iv. —.—]—Testator 87 years old, executed a will, & probate was opposed on the grounds of want of testamentary capacity & undue influence. The ct. pronounced in favour of the will, but only after much consideration. Much of the evidence was not available to the caveators, & the ct. considered they were amply justified in opposing the will:—*Held*: the caveators should be relieved of the Public Trustee's costs, but should not be granted costs out of the estate.—*Re PATTERSON (DECEASED)*, [1924] N. Z. L. R. 441.—N.Z.

3303. *Add. Annotation*:—**Refd.** *In the Estate of Plant, Wild v. Plant*, [1926] P. 139.
3312. *Add. Annotation*:—**Consd.** *In the Estate of Plant, Wild v. Plant*, [1926] P. 139.
3315. *Add. Annotation*:—**Distd.** *In the Estate of Plant, Wild v. Plant*, [1926] P. 139.
3380. *Add. Annotations*:—**Refd.** *White v. Altrincham Urban District Council*, [1936] 2 K. B. 138; *British United Shoe Manufacturing Co. v. Houldfast Boots, Ltd.*, [1936] 3 All E. R. 717; *Pelster v. Pelster & Samuel*, [1936] 3 All E. R. 783.
- 3431a. *Application to presume death—Application for special grant of administration—Combination in one motion.*—An application for leave to swear that a person has died on or since a certain date & an application for a grant of letters of administration of that

person's estate may be combined in a single motion.—*In the Estate of LEVER* (1935), 105 L. J. P. 9; 154 L. T. 270; 52 T. L. R. 97; 79 Sol. Jo. 861.

- 3478a. — For purpose of lawsuit out of the jurisdiction.—There is no power in the Probate Ct. to allow a will admitted to probate in England to go out of the jurisdiction, even in the custody of an official, for the purposes of a lawsuit in a British Dominion or elsewhere abroad.—*Re GREER* (1929), 45 T. L. R. 362; 73 Sol. Jo. 349.

*Annotation*:—**Folld.** *In the Estate of Guinee* (1929), 73 Sol. Jo. 569.

- 3478b. — —.—*In the Estate of GUINEE* (1929), 73 Sol. Jo. 569.

3487. *Add. Annotation*:—**Refd.** *Capron v. Capron*, [1927] P. 243.

## Part III.—Interest of Representative in Deceased's Property.

3509. *Add. Annotation*:—**Refd.** *Toates v. Toates*, [1926] 2 K. B. 30.

3517a. *Right of selection under will.*—Testator bequeathed to his wife such articles as she should within two months select from the articles in certain rooms in a house. Five days after his death his wife died without having made any selection:—**Held**: the right of selection did not pass to the wife's exors.—*Re MADGE, PRIDIE v. BELLAMY* (1928), 44 T. L. R. 372; *sub nom. Re MADGE, PUDEE v. BELLAMY*, 72 Sol. Jo. 284.

3518a. *Loan posted to but not received by deceased.*—On the receipt of a signed promissory note a money-lender forwarded an agreed sum to the borrower through the post. The borrower, the secretary to a co., died between the times of the posting & delivery of the letter. The joint acting secretary of the co. having notice of the secretary's death, opened the money-lender's letter & retained possession of the enclosed money until such time as he could hand it over to the personal representatives of the borrower. In an action by the money-lender to recover the sum lent from the joint acting secretary:—**Held**: debt. received the money on behalf of deceased's

estate, & the proper course for the money-lender was to litigate with the borrower's representatives.—*MICHAELSON v. CRISP* (1927), 71 Sol. Jo. 982.

3521. *Add. Annotation*:—**Refd.** *Symons v. Southern Ry. Co.* (1935), 153 L. T. 98.

3524. *Add. Annotation*:—*As to* (1) **Refd.** *Re Mills, Mills v. Lawrence*, [1930] 1 Ch. 654.

3543. *Add. Annotation*:—*As to* (2) **Refd.** *Re Mathieson*, [1927] 1 Ch. 283.

### I. Choses in Action Accruing in Lifetime of Deceased (p. 288).

*See, now, Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1.*

3553. *Add. Annotation*:—**Consd.** *Riley v. Brown* (1929), 98 L. J. K. B. 739.

3554. *Add. Annotation*:—**Refd.** *Graves v. Cohen*, (1929), 46 T. L. R. 121. [Reference has been made to the headnote, not justified by anything in the judgment, in *Stubbs v. Holywell Ry. Co.*, (per WRIGHT, J.)]

3569. *Add. Annotation*:—*As to* (3) **Distd.** *Re Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter*, [1933] Ch. 611.

PART II. SECT. 20, SUB-SECT. 4.—B. *eg. Taxation.*—*Re MOREN*, [1927] 1 D. L. R. 648; 59 N. S. R. 58.—CAN.

PART II. SECT. 20, SUB-SECT. 6.  
n 1. — *Determined by substantial position of parties.*—While an exor. who has taken proof in common form may be required by a party whose interest is adversely affected by the will to bring in the probate & be put upon proof of the will in solemn form, the circumstances may make it proper that appct. should bear the onus of attacking the will, thus of taking over the role of pltf. In the Probate Ct. the question whether or not security for costs should be given must be decided by the substantial & not by the nominal positions of debt. & pltf. In the proceedings.—*Re WILLIAMS ESTATE, WILLIAMS v. ROBINSON*, [1934] 1 W. W. R. 632; 2 D. L. R. 732; 42 Man. L. R. 124.—CAN.

PART II. SECT. 21, SUB-SECT. 2.  
q 1. — *Duty to make inquiries.*—

Although no hard & fast rules can be laid down, a caveat should not be filed against the granting of probate of a will without substantial grounds, & before filing, the intending caveator should make full inquiry. Where a caveat was filed without substantial grounds & without proper inquiry, a caveatrix, who was unable to carry the matter further was ordered to pay costs.—*In the Will of ELIZABETH O'DRISCOLL* (1929), 29 S. R. N. S. W. 558; 46 N. S. W. W. N. 176.—AUS.

sh. *Caveator setting up different will.*—If on a petition for probate, the caveator sets up another will of testator, it is obligatory on him to file a separate petition to propound the will set up by him. The result in such a case is, that there are two separate suits which may either be heard together or be consolidated.—*VENIDAS NEMCHAND v. BAI CHAMPATAVI* (1928), 1 L. R. 53 Bom. 829.—IND.

PART II. SECT. 21, SUB-SECT. 10.  
sk. *Jurisdiction of court*—To alter

*previous order.*—In addition to its powers under Succession Act, s. 234, & Probate & Administration Act, s. 50, the ct. has power in review to alter its previous order in contested proceedings for the grant of probate or letters of administration.—*KYONE HOE TSEE v. KYON SOON SUN* (1925), 1 L. R. 3 Ran. 261.—IND.

sl. *Duty to sell—& pay beneficiary share of proceeds.*—*Re MONTGOMERY, LUMBERS v. MONTGOMERY* (1912), 22 W. L. R. 634; 22 Man. L. R. 735.—CAN.

PART III. SECT. 1, SUB-SECT. 2.—  
l. (a) v.

p 1. — —.—An option to purchase contained in a will is *prima facie* not purely personal, but is assignable by the optionee & transmissible by him to his personal representatives.—*PERPETUAL TRUSTEE Co. v. UNION TRUSTEE Co.* (1927), 28 S. R. N. S. W. 222; 45 N. S. W. W. N. 30; *reversd. sub nom. ABBOTT v. UNION TRUSTEE Co.* (1929), 41 C. L. R. 375.—AUS.

**3572a.** —.]—**NOBLE v. CASS** (1828), 2 Sim. 343; 57 E. R. 817.

**Annotations:—***Refd.* Richards v. A.-G. of Jamaica (1848), 6 Moo. P. C. C. 381; *Re* Francis, Barrett v. Fisher (1905), 74 L. J. Ch. 198; *Re* Lacon's Settlement, Lacon v. Lacon, [1911] 2 Ch. 17.

**3575. Add. Annotation:—***Apprvd.* *Re* Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter, [1933] Ch. 611.

**3594. Add. Annotations:—***Consd.* *Re* Walker, Walker v. Patterson (1934), 177 L. T. Jo. 325; *Re* Firth, Sykes v. Hall, [1938] Ch. 517; *Re* Winterstoke's Will Trusts, Gunn v. Richardson, [1938] Ch. 158.

**3605. Add. Annotation:—***Refd.* Riley v. Brown (1929), 98 L. J. K. B. 739.

**3611a.** —.]—**ANON.** (1457), Y. B. 36 Hen. 6, fo. 7, pl. 4; 7 Jur. 494, n.

**Annotations:—***Appld.* Tharpe v. Stallwood (1843), 5 Man. & G. 760. *Refd.* Wangford v. Wangford (1704), 11 Mod. Rep. 38.

**3611b.** —.]—**EAST v. NEWMAN** (1601), Gouldsb. 152; 75 E. R. 1059; *sub nom.* EASON v. NEWMAN, Cro. Eliz. 495.

**3611c.** —.]—**BEAR v. SOPER** (1759), 2 Keny. 441; 96 E. R. 1238.

**3617. Add. Citations:—***sub nom.* MASON & DAVY v. DIXON, Latch 167; Noy 87.

**Add. Annotations:—***Refd.* Saunders v. Plummer (1662), O. Bridg. 223; Finlay v. Chirney (1888), 57 L. J. Q. B. 247.

**3624a.** —.]—**Injury must have been committed within six months of death.**—**BUSH v. LONDON COUNTY COUNCIL** (1933), 77 Sol. Jo., 388, D. C.

iv. *Personal Injury* (p. 297).

See, now, Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1, & NEGLIGENCE, Nos. 953b-953f, *post*.

**PART III. SECT. 1, SUB-SECT. 2.—**  
I. (b) i.

**q i.** —.]—The common law maxim *actio personalis moritur cum persona* in India has been very largely abrogated by statutory provisions contained in Succession Act, s. 306.—**DEHRA DUNMUSSORIE ELECTRIC TRAMWAY CO. v. HANSRAJ** (1935), 1 L. R. 58 All. 342.—**IND.**

**PART III. SECT. 1, SUB-SECT. 2.—**  
I. (b) ii.

**3617 i. Application of rule.—***Detinue.*—The administrator of the estate of a deceased person cannot recover damages, in respect of a chattel belonging to the deceased, for its detention or seizure during his lifetime, or prior to the issue of the letters of administration, unless there is evidence to show that the chattel was damaged, or that the estate of the deceased was depreciated by the seizure or detention in that period. The administrator, however, is entitled to recover for the estate damages for being deprived of the use & possession of the chattel after the issue of the letters of administration.—**DAY v. HORTON** (1913), 20 W. L. R. 72; 5 W. W. R. 751; 14 D. L. R. 763; 23 Man. L. R. 625.—**CAN.**

**PART III. SECT. 1, SUB-SECT. 2.—**  
I. (b) iii.

**sn. Whether right continues in personal representative.**—Under the provisions of R. S. c. 113, s. 1, the right to maintain or to institute an action for an injury to land, committed within six months of the death of the owner, survives to his personal representative. The clear & reasonable meaning of the

statute is that the exor. or administrator may commence an action or carry on an action instituted by testator or intestate.—**MILLER v. CORKUM** (1899), 32 N. S. R. 358.—**CAN.**

**so.** —.]—In an action for trespass to land brought in 1895, the statement of claim included a claim for erecting & maintaining fences & depasturing cattle. Pltf. died in 1897, & his extrix. was made a party in 1898.—*Held:* R. S. c. 113, s. 21, in relation to a continuing cause of action, applied.—**GRANT v. WOLFE** (1899), 32 N. S. R. 444.—**CAN.**

**PART III. SECT. 1, SUB-SECT. 2.—**  
I. (b) iv.

**sp. Whether right continues in representative.**—In case of tort, for alleged negligence resulting in the death of the person injured, the right to maintain an action dies with the person.—**HAWLEY v. WRIGHT** (1904), 37 N. S. R. 77.—**CAN.**

**sq.** —.]—An action for injury to the person now survives to the exor. of pltf., who can, in case of his death, *pendente lite* on entering a suggestion of the death & obtaining an order of revivor, continue the action.—**MASON v. PETERBOROUGH TOWN** (1893), 20 A. R. 683.—**CAN.**

**PART III. SECT. 1, SUB-SECT. 2.—**  
J. (a) ii.

**3660 i. Right to receive dividends.**—Dividends paid out of the profits of industrial cos. in Quebec, Canada, declared periodically so far as circumstances permit, are generally speaking to be treated as "civil fruits" within art. 449 of the Civil Code of Quebec, & must, pursuant to

**3631. Add. Annotation:—***Consd.* *Re* Dickens, Dickens v. Hawksley, [1935] Ch. 267.

**3638. Add. Annotation:—***Refd.* British Russian Gazette & Trade Outlook, Ltd. v. Associated Newspapers, Ltd., Talbot v. Associated Newspapers, Ltd., [1933] 2 K. B. 616.

**3646. Add. Annotation:—***Refd.* Flower v. Prechtel (1934), 150 L. T. 491.

**3655. Add. Annotation:—***Refd.* *Re* Portman (No. 2), [1925] Ch. 294.

**3658. Add. Annotations:—***Consd.* *Re* Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter, [1933] Ch. 611. *Refd.* Price v. Corp'n. d'Energie de Montmagny, [1927] A. C. 363; *Re* Rutherford's Conveyance, Goadby v. Bartlett, [1938] Ch. 396.

**3671. Add. Annotation:—***As to* (1) *Refd.* *Re* Blake, *Re* Minahan's Petition of Right (1931), 100 L. J. Ch. 251.

**3687a.** —.]—**APPLETON v. DOILY** (1609), Yelv. 135; 80 E. R. 91.

**Annotations:—***Refd.* Shuttleworth v. Garnett (1688), Carth. 90; Hudson v. Jones (1706), 1 Salk. 90.

**3691. Add. Annotations:—***Distd.* Skinner v. Geary (1931), 47 T. L. R. 597. *Refd.* Roe v. Russell, [1928] 2 K. B. 117.

**3692. Add. Annotations:—***As to* (1) *Apprvd.* Skinner v. Geary (1931), 47 T. L. R. 597. *Refd.* Roe v. Russell, [1928] 2 K. B. 117; Lovibond (J.) & Sons v. Vincent, [1929] 1 K. B. 687.

**3692a.** —.]—In my view *Collis v. Flower*, No. 3691, was wrong, for the reasons that I have been stating. The common law tenancy was terminated. The exor. had a common law tenancy, & it was terminated by notice to quit. He did not remain in occupation of the house, & in my view, the

art. 451, be considered as having been acquired day by day & belonging to the usufructuary in proportion to the duration of his usufruct.

**Es.** who was entitled under the will & a deed of gift of his father to certain dividends payable by a co. of which his father had been the founder & sole shareholder, died three days before the declaration of dividends on its preferred & common stocks out of profits admittedly earned during E.'s lifetime. On a claim by applt., the widow & executrix & universal legatee of E., to the proportionate share of the dividends so declared which she alleged was due to her husband at the date of his death under the will & deed of gift:—*Held:* (1) although E. was not a usufructuary under the deed of gift, having only a right as beneficiary to share in certain "fruits & revenues" (the dividends) distributed from time to time by the trustees under the deed of gift, he was, by virtue of the provisions of art. 981 (a) to (n) of the Civil Code of Quebec, a beneficiary under the deed of gift & the will with personal rights against the fiduciary donees & the fiduciary legatee respectively; (2) art. 451 of the Civil Code was applicable by analogy to the rights of a beneficiary under the will & deed of gift in respect of the dividends declared by the co. The dividends in question, therefore, were civil fruits subject to the principle contained in art. 451 that they should be considered to have been acquired day by day, & E.'s widow was accordingly entitled to her husband's proportionate share of the dividends which were in fact declared three days after his death.—**LAVERDURE v. DU TREMBLAY**, [1937] A. C. 666; 106 L. J. P. C. 107, P. C.—**CAN.**

original tenant having no right, as we have now decided, to dispose of the property by will, had no right to give any statutory right to the exor., & the exor., who had not lived in the house, could not claim to be a statutory tenant. In my view, therefore, *Collis v. Flower*, No. 3691, is no longer an authority.

The administrator case stands on a different footing, because one has to look in all these cases to see what the facts were. The administrator case is the case of *Mellows v. Low*, No. 3692. There the facts were different. The original tenant was a weekly tenant. It was a common law tenancy, & during her tenancy she died intestate. Consequently, whatever rights she had in her common law tenancy remained to her representatives in an intestacy. No notice to quit was ever given. Consequently the common law tenancy remained. Then the landlord claimed that on the death of the tenant intestate, with no member of her family residing in the house, the tenancy lapsed. It was held that the administratrix was a person who derived title under the original tenant, & consequently, that the residence could not be interfered with. The point of that case which renders it a right decision is that no notice to quit the common law tenancy had ever been given. The common law tenancy, therefore, remained, & it remained in the person who at common law was entitled to it, & her tenancy had never been terminated. Consequently, *Mellows v. Low*, No. 3692, on the facts, is right, but if notice to terminate the common law tenancy had been given the ct. could not, in my opinion, have said, unless the matter could be brought within the very curious clause about intestacy to which I have referred, that such an administratrix not being in possession is entitled to be protected by the Act (SCRUTTON, L.J.).—*SKINNER v. GEARY*, [1931] 2 K. B. 546; 100 L. J. K. B. 718; 145 L. T. 675; 95 J. P. 194; 47 T. L. R. 597; 29 L. G. R. 599, C. A.

699. *Add. Annotation*:—*Refd. Re Bower Williams, Ex p. Trustee*, [1927] 1 Ch. 441.

3702. *Add. Annotation*:—*Folld. Re Bower Williams, Ex p. Trustee*, [1927] 1 Ch. 441.

3710. *Add. Annotations*:—*Consd. Beaumont v. Beaumont*, [1933] P. 39; *Re Debtor, Ex p. Petitioning Creditors* (No. 5 of 1932) (1932), 101 L. J. Ch. 372; *Morris v. Baines & Co.*, [1933] 1 K. B. 540.

3711. *Add. Annotation*:—*Consd. Morris v. Baines & Co.*, [1933] 1 K. B. 540.

3732a. ————]—*BATHO v. FULTON* (1824), 2 L. J. O. S. Ch. 196.

3786a. ————]—*CURLING v. AUSTIN* (1862), 2 Drew. & Sm. 129; 10 W. R. 682; 62 E. R. 570.

*Annotation*:—*Refd. Lawrie v. Loes* (1881), 7 App. Cas. 19.

3795. *Add. Annotations*:—*Refd. Re Murphy's Estate, Morton v. Marchanton* (1930), 74 Sol. Jo. 321; *Parker v. Judkin*, [1931] 1 Ch. 475.

3796. *Add. Annotation*:—*Refd. Parker v. Judkin*, [1931] 1 Ch. 475.

3800. *Add. Annotation*:—*Refd. Parker v. Judkin*, [1931] 1 Ch. 475.

3818a. ————]—The effect of Land Transfer Act, 1897 (c. 65), ss. 1 & 2, is to impose an "express trust" within Jud. Act, 1873 (c. 66), s. 25 (2), on the personal representatives of deceased in respect of real estate, & so to prevent Real Property Limitation Act, 1874 (c. 57), from running in their favour.—*TOATES v. TOATES*, [1926] 2 K. B. 30; 95 L. J. K. B. 526; 135 L. T. 25; 90 J. P. 103, D. C.

\*SUB-SECT. 4.—IN CASE OF PERSONS DYING  
SINCE 1925 (Vol. XXIII., p. 317).

3819a. *Settled land—Termination of settlement on death of tenant for life.*]—Administration of Estates Act, 1925 (c. 23), s. 22 (1), does not apply where the settlement comes to an end on the death of the tenant for life, & his exor. when constituted can sell, & he is not deemed to have appointed the sole surviving trustee of the settlement as his special exor. pursuant to such sect.—*Re BRIDGETT & HAYES' CONTRACT*, [1928] Ch. 163; 97 L. J. Ch. 33; 138 L. T. 106; 44 T. L. R. 222; 71 Sol. Jo. 910.

*Annotation*:—*Distd. In the Estate of Taylor*, [1929] P. 260.

3819b. ————]—*In the Estate of BORDASS*, No. 1772a, *ante*.

3819c. ————]—*In the Estate of BIRCH*, [1929] P. 164; 98 L. J. P. 66; 141 L. T. 32; 73 Sol. Jo. 221.

*Annotation*:—*Distd. In the Estate of Taylor*, [1929] P. 260.

3819d. ————]—*Grant of probate to tenant for life as special executor.*]—Land was devised by H. on trusts providing for limited ownerships & in default of issue for the right heirs of H. C. who was the right heir of H., by his will appointed the applicant T. exor. & trustee & devised his lands to the use of the applicant for life with remainders over. On Jan. 1, 1926, the commencement of Settled Land Act, 1925 (c. 18), the lands passing under the wills of H. & C. remained subject to the settlement created by the will of H., & in the event of the termination of the limited ownership under the will, also subject to the settlement created by the will of C. On the same date J. was tenant for life under the will of H. By a vesting deed dated Apr. 16, 1926, the lands were declared to be vested in J. in fee upon the trusts operating from time to time under the will of H. or otherwise. J. died Apr. 27, 1928. General probate of his will including the settled land was granted to his exors. in the first place. Later the grant was amended limiting it "save & except the settled land vested in testator settled previously to his death & remaining settled notwithstanding his death." J. having died without issue appt. T. then became tenant for life in possession under the settlement created by the will of C. as well as the trustee of that settlement. On appeal from the registrar a grant of probate of the will of J. limited to the settled land was directed to issue to the appt. as special exor. of J.—*In the Estate of TAYLOR*, [1929] P. 260; 98 L. J. P. 145; 141 L. T. 200; 45 T. L. R. 481; 73 Sol. Jo. 385.

## Part IV.—Duties of Representative.

3888. *Add. Annotation*:—As to (2) *Consd. Re* Rooke, *Jeans v. Gatehouse*, [1933] Ch. 970.

3899. *Add. Annotation*:—As to (2) *Consd. Re* City Equitable Fire Insco., [1925] Ch. 407.

3934. *Add. Annotation*:—*Consd. Re* Mansel, *Smith v. Mansel*, [1930] 1 Ch. 352.

3959a. ————.]—Exor. charged with interest on dividends of stock received by him, & kept at his banker's with his own money for a number of years, instead of being invested to accumulate.—*GOODCHILD v. FENTON* (1829), 3 Y. & J. 481; 148 E. R. 1269.

3966a. ———— Application to court—Order for inquiry as to sufficiency.—*Re LETHERBROW, HOPP v. DEAN*, [1935] W. N. 34; 179 L. T. Jo. 161.

*Annotation*:—*Refd. Re* Holden, *Isaacson v. Holden* (1935), 179 L. T. Jo. 235.

3973a. ————.]—*Re* HOLDEN, *ISAACSON v. HOLDEN*, [1935] W. N. 52; 179 L. T. Jo. 235.

3999a. ————.]—HUDSON v. MARTIN (1726), 2 Eq. Cas. Abr. 401; 22 E. R. 393.

4013. *Add. Annotation*:—*Refd. Re* Phillips, *Lawrence v. Huxtable*. [1931] 1 Ch. 347.

4021. *Add. Annotation*:—As to (2) *Refd. Re* Mathieson, [1927] 1 Ch. 283.

4040a. Income accruing after death—Administration of Estates Act, 1925 (c. 23), s. 32 (1).—*Re TONG, HILTON v. BRADBURY*, No. 5917b, *post*.

4086a. Devise in trust to pay debts—Until son attain twenty-one—Death under twenty-one—Debts unpaid.]—Devise of the rents & profits of lands till his son attain twenty-one, towards payment of debts; & if my son die before twenty-one, my debts being paid, then to A., & the son dies before twenty-one; yet the rents & profits not only till he would have attained twenty-one, but also beyond, till the debts be paid, shall be applied for that purpose.—*MARTIN v. WOODGATE* (1691), *Prec.* Ch. 34; 24 E. R. 18.

4089a. Foreign estate—Produce in transit at time of death.]—CLIFFE v. GIBBONS (1714), 2 Ld. Raym. 1324; 92 E. R. 364, L. C.

*Annotation*:—*Refd. Goodtitle d. Hart v. Knot* (1774), 1 Cowp. 43.

## PART IV. SECT. 1, SUB-SECT. 1.

3823 ————.]—Payments made by exors. for a concrete curbing & foot marker at the grave of testator approved since apart from the provisions, if any, therefor in a will the law contemplates reasonable outlays for such purposes.—*Re ROGERS ESTATE*, [1937] 1 W. W. R. 455; 2 D. L. R. 79.—CAN.

n i. ————.]—*Promise to pay*.—*Re JACKSON'S ESTATE, JACKSON v. JACKSON*, [1937] 3 W. W. R. 498.—CAN.

## PART IV. SECT. 1, SUB-SECT. 3.—A.

3891 i. *Duty to get in debts—Liability for neglect*.—*Re JOHNSTON, JOHNSTON v. HOGG* (1877), 25 Gr. 261.—CAN.

sr. *Executor debtor to testator*.—Where an exor. was indebted to his testator at the latter's death the debt is considered in equity to have been paid by the debtor to himself as executor, & he is chargeable in the accounts with the amount thereof at the time of probate with legal interest thereafter during default in payment.—*Re GIBSON ESTATE*, [1930] 2 W. W. R. 400; [1931] D. L. R. 159; 39 Man. L. R. 564.—CAN.

## PART IV. SECT. 1, SUB-SECT. 3.—B. (a) iii.

3927 i. *Power to retain—What are investments—Not right to receive payment on quantum meruit*.—*Re JONES, JONES v. BAXTER* (1929), 46 N. S. W. N. 190.—AUS.

3927 ii. ————.]—*Not right to appointment as architect*.—*Re JONES, JONES v. BAXTER* (1929), 46 N. S. W. N. 190.—AUS.

## PART IV. SECT. 1, SUB-SECT. 3.—B. (e).

n i. ————.]—Where a will directs that the proceeds of sales of property of the estate shall be deposited in a chartered bank, such proceeds cannot be otherwise invested except by consent of all persons interested.—*Re WALTERS*, [1925] 2 W. W. R. 557.—CAN.

## PART IV. SECT. 1, SUB-SECT. 4.

p i. ————.]—*Deceased with foreign domicile*.—In the case of the estate of a deceased who died domiciled outside of

Saskatchewan the exor.'s advertisement for claims against the estate was published at the last place of residence of deceased in said foreign domicile:—*Held*: there had been a sufficient compliance with rule 43 of the Surrogate Ct. Rules, & an order under rule 45 (2) dispensing with the passing of accounts was granted.—*Re JACOBSON, BROWN & ATCHESON ESTATES*, [1935] 3 W. W. R. 513.—CAN.

## PART IV. SECT. 2, SUB-SECT. 1.

st. *Claim disputed—Effect of service of notice of appointment for passing accounts on claimant*.—The act of an administrator in serving claimants against the estate with orders & appointments for passing accounts both with, & subsequent to, the service upon them of notice of dispute, held to have estopped him from setting up said notice as a bar to such claims.—*Re KURYLO ESTATE*, [1922] 2 W. W. R. 815; 68 D. L. R. 784; 15 Sask. L. R. 463.—CAN.

sw. *Payment of doubtful claim to legatee*.—Exors. cannot pay claims of doubtful validity, conditional upon their being deducted from legacies to the claimant in the event of validity not being established.—*Re GILLIS*, [1936] 2 D. L. R. 658.—CAN.

## PART IV. SECT. 2, SUB-SECT. 2.—A.

sv. *Undisposed of realty & personality—Before personal estate charged with payment*.—In the administration of the estate of testator, who has died testate as to some assets & intestate as to others, the primary fund for payment of his debts, funeral & testamentary expenses, in the absence of a contrary intention expressed in the will, is that constituted by both the real & personal estate of which testator has died intestate & is in priority to personal estate, charged with their payment.—*PUBLIC TRUSTEE v. LERCH* (1928), 28 S. R. N. S. W. 313; 45 N. S. W. N. 85.—AUS.

sw. *Property exempt under Executions Act*.—In construing Devolution of Estates Act, R. S. M., 1913, s. 3, which provides that an intestate's real or personal estate or both, "except in so far as either or both may be excepted by any law or enactment," shall be chargeable with his debts, property exempt under Executions Act, R. S. M.,

1913, is to be considered one of the "exceptions."

A farmer died intestate leaving four dependent infant children. The administrator of his estate sold certain chattels which were during the lifetime of the deceased "exemptions" under Executions Act, s. 29. On an application by the administrator for directions as to the disposition of the moneys realised from the sale, the creditors of the deceased, none of whom had recovered judgment, contended that the right of exemption terminated on the deceased's death; that all the assets of the deceased, including the exemptions, were liable for his debts; & that even if the chattels continued to be exempt, the proceeds of their sale was not exempt:—*Held*: the administrator, who had also been appointed guardian, held the money received from the sale of the exemptions for the benefit of the children.—*Re MCKENZIE ESTATE (Man.)*, [1930] 1 D. L. R. 49; [1929] 3 W. W. R. 358 39 Man. L. R. 155.—CAN.

## PART IV. SECT. 2, SUB-SECT. 2.—B. (a).

3985 i. *General rule*.—By her will a testatrix having bequeathed all her personal property to her sister-in-law, *inter alia*, directed that certain land should be sold & "from the proceeds of the sale, & after payment of all outstanding debts," gave certain pecuniary legacies. On an originating summons to decide whether the general personality had been exonerated from the payment of debts:—*Held*: as there was no express or implied provision in the will to indicate that testatrix wished to override the statutory order of application of assets, the statutory order applied & the general personality was liable for the payment of debts.—*FULLER v. FULLER* (1936), 36 S. R. N. S. W. 600; 53 N. S. W. N. 222.—AUS.

## PART IV. SECT. 2, SUB-SECT. 2.—C. (b) i.

sn. *Under 5 Geo. 2, c. 7*.—*Held*: land was assets in the hands of exors. for the payment of unliquidated damages in an action of covenant.—*SICKLES v. ASSELSTINE* (1853), 10 U. C. R. 203.—CAN.



**4101a. Liability to contribute rateably—Under Administration of Estates Act, 1925 (c. 23), ss. 32, 33, 34—Notwithstanding devolution of beneficial interest to heir-at-law of lunatic.]—**For six years before her death a lady was a certified patient at a mental home, & without any testamentary capacity. She was not, however, a lunatic so found by inquisition, & never had a committee or receiver. She died at the home on Feb. 1, 1929, a spinster & intestate, aged seventy-six:—*Held*: her real estate went to her heir at law under Administration of Estates Act, 1925 (c. 23), s. 51 (2), which exemption sect. read with the definition sect., sect. 55 (1) (viii.), was not confined to cases where a lunatic or defective had a committee or receiver. However, the exemption in sect. 51 (2) only extends to the devolution of the beneficial interest, & the real estate must bear its rateable share of the funeral, testamentary & administration expenses, debts, & liabilities, under sects. 32, 33, 34, & Sched. I.—*Re GATES, GATES v. GATES*, [1930] 1 Ch. 199; 99 L. J. Ch. 161; 142 L. T. 327.

**4101b. — “According to value”—Meaning of “value.”—**In Administration of Estates Act, 1925 (c. 23), Sched. I., Part II., para. 6, “Property specifically devised or bequeathed, rateably according to value,” the word “value” means the value to testator. Where, therefore, property is devised subject to a mtge. created by testator, & other property is devised burdened with the payment of specified legacies, & the personal estate of testator is insufficient to pay pecuniary legacies & debts, in order to ascertain the proportion payable the word “value” means the value of the property to testator & not the value of the property to the devisees. The “value” in the case of the property burdened with the mtge. is the value of the property less the amount of the mtge., whereas in the case of the property burdened with the payment of legacies the amount of the legacies is not

to be deducted to ascertain the “value” of the property.—*Re JOHN, JONES v. JOHN*, [1933] Ch. 370; 102 L. J. Ch. 72; 148 L. T. 450.

**4134. Add. Annotation:—***Consd. Re Wells, Swinburne-Hanham v. Howard*, [1933] Ch. 29.

**4154a. Solicitor entitled to payment of testamentary charges not paid by deceased executor.]—***TANNER v. CARTER* (1856), 25 L. J. Ch. 664; 27 L. T. O. S. 195; 2 Jur. N. S. 413; 4 W. R. 533.

**4158. Add. Annotation:—***Consd. A.-G. v. Jackson* (1932), 48 T. L. R. 261.

**4163a. Income tax—For any year ending before testator's death.]—***Held*: the Crown's preferential claim for income tax could be made for tax assessed for any one year ending before testator's death.—*Re COCKELL, JACKSON v. A.-G.* (No. 2) (1932), 76 Sol. Jo. 495; 16 Tax Cas. 681, 721.

**4193. Add. Annotation:—***Refd. Christopher (Hove), Ltd. v. Williams*, [1936] 3 All E. R. 68.

**4210a. — — — — —.]—**A judgment was signed in 1854, but was not registered till after the death of the judgment debtor in 1862:—*Held*: the judgment had no preference over simple contract debts against the estate of the judgment debtor.—*KEMP v. WADINGHAM* (1866), L. R. 1 Q. B. 355; 7 B. & S. 301; 35 L. J. Q. B. 114; 13 L. T. 709; 14 W. R. 390.

**4221. Add. Annotation:—***Refd. A.-G. v. Jackson* (1932), 48 T. L. R. 261.

**4225. Delete the cross-reference immediately preceding this case.**

**4248. Add. Annotation:—***Refd. Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v. Estate & Trust Agencies* (1927), Ltd., [1938] A. C. 624.

**4343. Add. Annotation:—***Refd. Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v. Estate & Trust Agencies* (1927), Ltd., [1938] A. C. 624.

**PART IV. SECT. 2, SUB-SECT. 3.—A.**

**p 1. — Preferred to mortgage of property devised beneficially to executor.]—***Re SCULTHORPE* (Ont.), [1926] 2 D. L. R. 739; 7 C. B. R. 505.—CAN.

21 O. L. R. 201.—CAN.

**sp. Claim for breach of trust.]—**The fact that a claim against the estate of a deceased person arose in consequence or by means of a breach of duty as a trustee, affords no ground for giving such claim a preference over other creditors of the estate; as, under Property & Trusts Act, R. S. O. 1877, c. 107, s. 30, the claimant can only rank *pari passu* with other creditors.—*BROCK v. CAMERON* (1878), 25 Gr. 369.—CAN.

**PART IV. SECT. 2, SUB-SECT. 3.—B.**

**4162 i. Simple contract debt due to the Crown—Priority over specialty & simple contract debts due to subject.]—**A debt incurred by the purchase of wheat from the Minister of Agriculture, under Wheat Marketing Act, is a Crown debt, & should be paid in priority to all other debts of intestate.—*Re McMAHON, LAWSON v. INTESTATE ESTATES CURATOR*, [1921] V. L. R. 549.—AUS.

**PART IV. SECT. 2, SUB-SECT. 3.—C. (a).**

**4167 i. Priority over specialty & simple contract debts.]—**In the administration of assets, a judgment obtained against deceased is entitled to priority over simple contract & specialty creditors, but it is essential to the judgment that it should have been docketed.—*FRONTENAC LOAN Co. v. MORICE* (1886), 3 Man. L. R. 462.—CAN.

**4178 i. Degrees of priority—Between judgment creditors—Judgment for balance of legacy charged on realty—Judgment by creditor secured by mortgage.]—***CAMERON v. HARPER* (1892), 21 S. C. R. 273.—CAN.

**PART IV. SECT. 2, SUB-SECT. 3.—C. (c).**

**4206 i. Against deceased.]—***FRONTENAC LOAN Co. v. MORICE*, No. 4167 i., *ante*.—CAN.

**PART IV. SECT. 2, SUB-SECT. 4.—A. (a).**

**4245 iii. —.]—**An administrator may pay a statute-barred debt without incurring personal liability.—*Re GREEN*, [1932] 3 D. L. R. 48; 4 M. P. R. 482.—CAN.

**sq. Right of widow to pay husband's debt.]—**The payment of a husband's debt, though barred, has been held to

be a pious duty on the part of the widow, & it is not necessary that there should be any danger to the estate, in order to entitle the widow to incur debts, or to alienate the property of her husband in order to pay off barred debts. The Hindu law does not take cognisance of any bar of limitation.—*ASHUTOSH SIKDAR v. CHIDAM MANDAL* (1929), I. L. R. 57 Cal. 904.—IND.

**PART IV. SECT. 2, SUB-SECT. 4.—A. (c) i.**

**d 1. S. P. WATKINS v. WASHBURN** (1846), 2 U. C. R. 291.—CAN.

**4272 i. By representative—Inclusion of debt in probate affidavit.]—**The setting out of a debt in an affidavit for estate duty is not a sufficient acknowledgment to take it out of the Statute of Limitations.—*PRENDERGAST v. O'GORMAN*, [1933] I. R. 460.—IR.

**sr. By executor de son tort.]—**An *exor. de son tort* cannot give a new starting point to Stat. Limitations as against the rightful administrator, or the parties beneficially interested in the estate.—*GRANT v. McDONALD* (1860), 8 Gr. 468.—CAN.

**PART IV. SECT. 2, SUB-SECT. 5.—A.**

**st. Claim for wages by manager of intestate's farm—Claim by execution creditor.]—***GILMOUR v. GILMOUR* (1894), 3 B. C. R. 397.—CAN.



**4351. Add. Annotations:—***Refd. Re Cockell, Jackson v. A.-G.*, [1931] 1 Ch. 389; *In the Estate of Leguia* (1936), 105 L. J. P. 72.

**4353a. How exerciseable—Equitable assignment of future assets.]—**A personal representative's right to prefer creditors, preserved by Administration of Estates Act, 1925 (c. 23), s. 34 (2), can be exercised not only by payment in cash, or by a legal charge equivalent thereto, but also by an equitable assignment of future assets that materialise before an administration decree. — *Re WILLIAMS, RICHARDS v. WILLIAMS*, [1930] 2 Ch. 378; 99 L. J. Ch. 476; 143 L. T. 630.

**4368. For existing citation substitute the following paragraph & citations:—**

If, after a decree, an exor. thinks fit to pay a creditor, he does so at his own risk, & he is only entitled to stand in the place of his creditor against the estate.—*IRBY v. IRBY* (1857), 24 Beav. 525; 3 Jur. N. S. 1314; 53 E. R. 460.

**4392. Add. Annotation:—***As to* (2) *Consd. A.-G. v. Jackson* (1932), 48 T. L. R. 261.

**4418. Add. Annotation:—***As to* (3) *Consd. Re Cockell, Jackson v. A.-G.*, [1931] 1 Ch. 389.

**4423. Add. Annotation:—***Consd. A.-G. v. Jackson* (1932), 48 T. L. R. 261.

**4428a. Against Crown—Administration of Estates Act, 1925 (c. 23), s. 34 (2).]—***A.-G. v. JACKSON*, No. 4538a, *post*.

**4429. Add. Annotation:—***Refd. A.-G. v. Jackson* (1932), 48 T. L. R. 261.

**4432. Add. Annotation:—***Refd. In the Estate of Leguia* (1936), 105 L. J. P. 72.

**4433. Add. Annotation:—***Refd. Re Cockell, Jackson v. A.-G.*, [1931] 1 Ch. 389.

**4484. Add. Annotations:—***Consd. A.-G. v. Jackson* (1932), 48 T. L. R. 261. *Refd. Re Patten, Official Receiver v. Patten*, [1936] 2 All E. R. 1119.

**4485. Add. Annotations:—***Overd. A.-G. v. Jackson* (1932), 48 T. L. R. 261. *N.F. Re Patten, Official Receiver v. Patten*, [1936] 2 All E. R. 1119.

**4485a. ——— Bankruptcy Act, 1914 (c. 59), s. 36 (2)—Administration of Estates Act, 1925 (c. 23), s. 34, Sched. I, Part I.]—***S. P.*, the debtor, died in Oct. 1934, intestate & insolvent. His widow, who had taken out letters of administration, having in her husband's lifetime advanced him certain moneys for the purpose of his business, & having after his death received certain sums which formed part of his estate & which equalled the amount so advanced by her, on Feb. 1, 1935, paid them as his administratrix into her own private account. On Feb. 8 an order was made for the administration of her deceased husband's estate in bkpcy., the sums then still remaining in her hands. These sums paid into her own private account having been claimed by the official receiver as trustee

of the husband's estate, who alleged that by virtue of Bkpcy. Act, 1914 (c. 59), s. 36 (2) (replacing Married Women's Property Act, 1882 (c. 75), s. 3) & Administration of Estates Act, 1925 (c. 23), the widow had no right of retainer as against other creditors, a special case was at the request of both parties sent by the county ct. judge, before whom the matter first came, for the opinion & determination of the High Ct.:—*Held*: on Feb. 8, the widow had in her hands the sums in question forming part of her husband's estate & she had not made these sums her own by paying them in to her private account on Feb. 1, for she had no right of retainer as against the other debts due from the estate, which were all of higher degree than the debt owing to her, & the sums must accordingly be handed over to the official receiver.—*Re S. P., Ex p. OFFICIAL RECEIVER*, [1936] Ch. 735; 105 L. J. Ch. 371; 156 L. T. 31; [1936-7] B. & C. R. 8; *sub nom. Re PATTEN, OFFICIAL RECEIVER v. PATTEN*, [1936] 2 All E. R. 1119; 80 Sol. Jo. 673.

**4511. Add. Annotation:—***As to* (2) *Consd. A.-G. v. Jackson* (1932), 48 T. L. R. 261.

**4527. Add. Annotation:—***Consd. A.-G. v. Jackson*, [1932] A. C. 365.

**4533. Add. Annotation:—***Consd. A.-G. v. Jackson* (1932), 48 T. L. R. 261.

**4535. Add. Annotations:—***Consd. A.-G. v. Jackson* (1932), 48 T. L. R. 261. *Refd. Re Patten, Official Receiver v. Patten*, [1936] 2 All E. R. 1119.

**4538a. Administration of Estates Act, 1925 (c. 23), s. 34 (1).]—**Under sect. 34 (1), & the rules set out in Part I. of Sched. I., to Administration of Estates Act, 1925 (c. 23), in the administration of insolvent estates an exor. has no right of retainer of a simple contract debt against the Crown so far as the Crown has priority under the bkpcy. rules affecting debt priorities; consequently the Crown has priority for a claim for taxes, not exceeding in the whole one year's assessment.

In my opinion there are now only two, or possibly three, degrees of priority of debts, being, first, those which are by the Bkpcy. Act expressly given priority; secondly, those which are expressly directed to be paid *pari passu*; & possibly, thirdly, those mentioned in Bkpcy. Act, 1914 (c. 59), s. 36, & in sect. 3 of the Partnership Act, 1890 (c. 39), the effect of the latter section being expressly retained in the Bkpcy. Act, 1914 (c. 59), s. 33. It follows that the balance of any Crown debt in excess of that portion which is given priority is now of the same degree as the debt of the executrix in the present case, & that she can retain against such balance (LORD ATKIN).

The right still remains as before, the right to retain against debts of equal degree. Some debts have been put in a higher degree than

#### PART IV. SECT. 3, SUB-SECT. 1.

*av. Future liability contingent—Rights of executor to distribute residue.]*—The father of a pauper lunatic daughter, who had become chargeable to the parish council, admitted his liability to aliment her, & died intestate. The son, as exor., divided the estate, which was movable, equally between himself & his sister.

At the date of division the daughter's share had not been exhausted by the cost of her maintenance since his death:—*Held*: as any claim there might be against the rest of the estate for aliment was merely contingent, the exor. was not bound to retain the remaining share of the estate to meet that claim.—*EDINBURGH PARISH COUNCIL v. COOPER*, [1924] S. C. 139.—*SCOT.*

#### PART IV. SECT. 4, SUB-SECT. 1.

*sp. Necessity for valid debt.]*—The right of the exor. of a creditor of a legatee to retain out of the legacy an amount sufficient to satisfy the debt due to testator depends upon the existence of a valid debt.—*PARKES PROPERTY & STOCK CO., LTD. v. PERPETUAL TRUSTEE CO., LTD.* (1936), 36 S. R. N. S. W. 457; 53 N. S. W. W. N. 185.—*AUS.*

they were before; but the exor.'s right always has been subject to changes of that description. What has been affected is not the right, but the classes in respect of which the right is exercised (LORD ATKIN).—A.-G. v. JACKSON, [1932] A. C. 305; 48 T. L. R. 201; 70 Sol. Jo. 140; *sub nom.* *Re COCKELL*, A.-G. v. JACKSON, 101 L. J. Ch. 186; [1931] B. & C. R. 167; *sub nom.* *Re COCKELL*, JACKSON v. A.-G., 146 L. T. 450; 16 Tax Cas. 681, H. L.

*Annotations*.—*Fold. Re Patten*, Official Receiver v. Patten, [1936] 2 All E. R. 1119. *Refd. Re Bailey*, Duchess Mill, Ltd. v. Bailey (1932), 76 Sol. Jo. 560.

4584. In line 6 of the paragraph, before the words "secured by bond," add the word "not."

4587a. ———. ———.]—By his will a testator bequeathed to his son "the sum of £3,000 to be paid to him out of the share of my capital & loans in the business of W. & B., & I direct that provided [the son] shall within 6 months of my death be accepted by the remaining partners in the said business as a partner as from the date of my death upon terms mutually acceptable to [the son] & the remaining partners of the said business the said legacy of £3,000 or any part thereof shall not be withdrawn by [the son] until after the expiration of 12 months from the date of my death, & in the meantime shall bear interest at the rate of £5 per cent. *per annum*":—*Held*: the bequest was a demonstrative legacy & not a specific one.—*Re WEBSTER*, GOSS v. WEBSTER, [1937] 1 All E. R. 602; 156 L. T. 128, C. A.

4591. *Add. Annotation*.—*Consd. Re Quintin Dick*, Cloncurry v. Fenton, [1926] Ch. 992.

4607. *Add. Annotations*.—*Apld. I. R. Comrs. v. Smith*, [1930] 1 K. B. 713. *Consd. Parker v. Judkin*, [1931] 1 Ch. 475.

4613a. ———. ———. Devisee requiring conveyance—Liability of estate for costs.]—*Re STRINGER*, HILL v. STRINGER (1899), Y. S. C. P.

#### PART IV. SECT. 5, SUB-SECT. 1.—B.

4548 i. *What are*—*Bequest of stock*—*Testator possessing no such stock at death*.]—*Re MILLAR*, [1927] 3 D. L. R. 270; 60 O. L. R. 434.—CAN.

#### PART IV. SECT. 5, SUB-SECT. 4.—C.

n i. ———. *No power to impose terms as condition precedent to immediate payment*.]—*BEDDY v. SMITH* (1845), 1 L. T. O. S. 390.—IR.

sw. *Discretion given by will*.]—A will contained a bequest (para. 5) to pltf. of \$300 per annum during his lifetime, "to be paid as soon as the finances of my estate will permit my exors. to do so." By para. 7 testatrix directed that "it shall not be incumbent to pay any bequest until three years after my decease, & my husband, & any other exors. after his death, shall decide when the amounts shall be paid & in what amounts from time to time." By para. 12 testatrix authorised her exors. "at any time to withhold any payment of legacy or bequest until such time as they may consider it advisable to make same":—*Held*: nothing in paras. 5 & 7 authorised deft. to withhold payment of pltf.'s legacy; & the discretion given by para. 12 did not put deft. in a position to violate deliberately the terms of the will. The discretion was one to be reasonably exercised.—*SEYMOUR v. PRATT* (1925), 57 O. L. R. 278.—CAN.

sx. *Before letters of administration*—*Legacy very small*.]—*ROSS v. ROSS* (1872), 4 Ch. Ch. 27.—CAN.

#### PART IV. SECT. 5, SUB-SECT. 4.—D.

4683 i. *Out of what funds payable*.]—*Testator by his will directed his exors. "to pay to the legatees mentioned in the will of my late wife amounting in all to \$20,000 which sum is represented by bonds in a certain bank" in a parcel separate from my own securities*:—*Held*: the legacies were to be treated as legacies from testator, payable out of that portion of his estate earmarked in the way indicated.—*Re LASHAM* (1924), 56 O. L. R. 137.—CAN.

#### PART IV. SECT. 5, SUB-SECT. 4.—E. (a).

4703 i. *Direction for postponement or accumulation*—*When legatee may require payment*.]—Where testator gives a legatee an absolute vested interest in a defined fund, the ct. will order payment on his attaining twenty-one, notwithstanding that by the terms of the will payment is postponed to a subsequent period.—*GORF v. STROHM* (1897), 28 O. R. 553.—CAN.

4703 ii. ———. ———.]—Where a testator gives a legatee an absolute vested interest in a certain defined fund, so that, according to the ordinary rule, he would be entitled to receive it on attaining the age of 21 years, but by the terms of the will payment is postponed until a subsequent period, *e.g.* till the legatee attains the age of 25 years, the ct. will nevertheless order payment on his attaining 21 years.—*Re TANNER ESTATE*, GOULD v. TANNER & TANNER, [1931] 2 W. W. R. 794.—CAN.

4630. *Add. Annotation*.—*Consd. Re City Equitable Fire Insee.*, [1925] Ch. 407.

4651. *Add. Annotation*.—*Refd. Re Carrington*, Ralphs v. Swithenbank, [1932] 1 Ch. 1.

4653. *Add. Annotations*.—*Consd. I. R. Comrs. v. Smith*, [1930] 1 K. B. 715. *Refd. Herbert v. I. R. Comrs.*, I. R. Comrs. v. Herbert (1925), 9 Tax Cas. 593; *Daw v. Inland Revenue Comrs.*, *Duff-Dumbar v. Inland Revenue Comrs.* (1928), 14 Tax Cas. 58.

4661. For "(1844)" read "(1842)."

4664a. *Incomplete gift inter vivos*—*Completion by appointment as executor*—*No necessity for assent*.]—*Re COMBERBACH*, SAUNDERSON v. JACKSON (1929), 73 Sol. Jo. 403.

4685. *Add. Annotation*.—*Refd. Re Vander Byl*, Fladgate v. Gore, [1931] 1 Ch. 216.

4687a. ———. *Advances by co-legatees barred by Statute of Limitations*—*Not interest on such advances*.]—*POOLE v. POOLE* (1871), 7 Ch. App. 17; 25 L. T. 771; 20 W. R. 133, L. JJ. *Annotations*.—*Consd. Re Rees*, Rees v. George (1881), 17 Ch. D. 701. *Refd. Re Milnes*, Milnes v. Sherwin (1885), 53 L. T. 534.

4699. *Add. Annotations*.—*Distd. Berry v. Geen*, [1938] A. C. 575. *Refd. Re Jefferies*, Finch v. Martin, [1936] 2 All E. R. 626; *Re Blake*, Berry v. Geen, [1937] Ch. 325.

4712a. ———. ———.]—*FRYER v. BUTTAR* (1837), 8 Sim. 442; 59 E. R. 175.

*Annotations*.—*Consd. Re Parry*, Scott. v. Leak (1889), 42 Ch. D. 570. *Refd. Harbin v. Masterman* [1896] 1 Ch. 351.

4714. *Add. Annotation*.—*Refd. Re Blake*, Berry v. Geen, [1938] A. C. 575.

4727. *Add. Annotation*.—*Refd. Brown v. Brown*, [1937] P. 7.

4738a. ———. ———.]—*HORNER v. SAYNER* (1838), Coop. Pr. Cas. 168; 47 E. R. 450, L. C.

4753. After this case add "Sale of legacy to executor—In return for annuity—Validity of transaction."—*See FRAUDULENT & VOIDABLE CONVEYANCES*, No. 895a, *post*."

#### PART IV. SECT. 5, SUB-SECT. 4.—E. (b).

ri. ———. ———.]—*Re MCSWEE-NEY*, EASTERN TRUST CO. v. MCSWEE-NEY (1931), 2 M. P. R. 583.—CAN.

sv. *Annuity charged on land*—*Duty of representative on transferring land to devisees*—*Land Titles Act*.]—*Re CREST ESTATE* (1914), 7 W. W. R. 614; 19 D. L. R. 190.—CAN.

#### PART IV. SECT. 5, SUB-SECT. 4.—E. (d).

sz. *Duty of executors to buy bonds to satisfy specific legacies*.]—*Re BANNERMAN'S ESTATE*, [1936] 3 W. W. R. 520.—CAN.

#### PART IV. SECT. 5, SUB-SECT. 4.—H.

sa. *Estate insufficient*—*Pecuniary legatee entitled before residuary*.]—Where the estate is insufficient, pecuniary legatees, or annuitants, must be paid in preference to the residuary legatee.—*Re KNIGHT*, [1938] 1 D. L. R. 677.—CAN.

sb. *Bequest of right to board & lodging*.]—A bequest of the right to board & lodging on a farm does not give a right to a money payment on abandonment of the farm.—*MOLONEY v. MOLONEY & CONDEN*, [1938] 1 D. L. R. 654; O. R. 73.—CAN.

#### PART IV. SECT. 5, SUB-SECT. 5.—A.

af. *Question for court*.]—*Re ARMOUR* (1928), 23 S. L. R. 525.—CAN.

**4768a.** ———.]—*Re* LYMAN'S TRUST & TRUSTEE RELIEF AMENDMENT ACT, 1860 (1860), 2 L. T. 662.

**4764a.** Payment on account—No appropriation between principal & interest—Right of legatee to appropriate.]—Where there are insufficient funds to pay legacies when due, & interest thereon becomes payable, the legatees are entitled, when payments are made on account at a later date & there is no appropriation between principal & interest, to appropriate such payments *pro tanto* as payments of interest due to them at the time of payment on account of such legacies.—*Re* PRINCE, HARDMAN v. WILLIS (1935), 51 T. L. R. 526.

*Annotation:—Re*fd. *Re* Morley's Estate, Hollenden v. Morley, [1937] Ch. 491.

**4764b.** Settled legacy—Payment by instalments—Apportionment between principal & interest.]

—Where owing to the nature of a testator's estate it has been impossible to realise it so as to pay legacies in full until after a lapse of some years from the date of the death, but payments on account of the principal & interest of legacies have been made at intervals under orders of the ct., the rule of administration is that each such payment must be appropriated first to interest at 4 per cent. *per annum*, & after satisfying all interest due, to the principal, & this rule must be applied, unless there is any direction in the will or in any order, previously made by the ct. in the matter, to the contrary.—*Re* MORLEY'S ESTATE, HOLLENDEN v. MORLEY, [1937] Ch. 491; [1937] 3 All E. R. 204; 107 L. J. Ch. 18; 157 L. T. 547; 53 T. L. R. 768; 81 Sol. Jo. 458.

**4764c.** Whether interest payable out of legacies liable to abate.]—A testator by his will bequeathed legacies to several persons including W. N. W. & C. D. W., directing that, in the event of his residuary estate being insufficient to pay them, those of W. N. W. & C. D. W. should abate equally in priority, to the intent that all other legacies should be paid in full. The estate proved insufficient

to meet the full amount of the legacies, which were not paid within one year after the testator's death:—*Held*: (1) the interest payable to a legatee from one year after a testator's death on the amount of a legacy not paid by that date did not itself amount to a legacy, but was a sum paid in the course of administration; (2) accordingly, the legacies bequeathed to W. N. W. & C. D. W., having abated to provide for payment in full of the other legacies, should not abate further to provide for the payment of interest thereon.—*Re* WYLES, FOSTER v. WYLES, [1938] Ch. 313; [1938] 1 All E. R. 347; 107 L. J. Ch. 164; 54 T. L. R. 336; 82 Sol. Jo. 95; *sub nom.* *Re* WYLES, PORTER v. WYLES, 158 L. T. 147.

**4770.** *Add. Annotation:—As to* (2) *Re*fd. Dewar v. I. R. Comrs., [1935] 2 K. B. 351.

**4812.** *Add. Annotation:—Consd.* *Re* Buxton, Buxton v. Buxton, [1930] 1 Ch. 648.

**4849.** *Add. Annotation:—As to* (3) *Re*fd. *Re* Jones, Meacock v. Jones, [1932] 1 Ch. 642.

**4869a.** ———.]—The ct. has power where realisation has been postponed for the benefit of the residuary legatees to direct that a legatee should be paid, not £4 per cent. under R. S. C., Ord. 65, r. 64, but £5 per cent. as from one year from the death of testator upon the legacy moneys.—*Re* BRINTON, BRINTON v. PREEN (1923), 67 Sol. Jo. 704.

**4877a.** Capitalisation of reserve fund.]—A testator bequeathed to his son & grandson on the death of his wife the shares belonging to him at his death in a certain co. Between the death of testator & the subsequent death of his wife each of the 460 shares of the value of £35 each which belonged to him at the date of his death became, as the result of the capitalisation of a portion of the reserve fund of the co., consolidated with a new share of the value of £15 into a share of the value of £50. Testator's estate, as the result of the capitalisation, also became entitled, in consequence of his holding of

PART IV. SECT. 5, SUB-SECT. 5.—  
B. (a).

**4765 vii.** ———.]—*Re* DALY, [1926] 1 D. L. R. 822; 58 O. L. R. 301.—CAN.

**4765 viii.** ———.]—Testator died in 1888, & legacies became payable in 1890. His estate was heavily insolvent, & the last of the debts was not finally discharged until 1919. From that date the trustees accumulated funds until 1924, when they brought an action of multipoleinding & exoneration for distribution of the estate:—*Held*: (1) while as a general rule interest was allowed upon legacies from the death of testator or from the proscribed date of payment, there was no absolute rule compelling the ct. in all cases to allow such interest, the general rule being displaced if circumstances showed it to be inapplicable; (2) the general legatees were not entitled to interest on their legacies from 1890 to 1919, in respect that, owing to the insolvency of the estate during that period, there was no asset realisable to meet the legacies nor any interest-bearing subject; (3) there was no absolute rule to the effect that the rate of legal interest should be 5 per cent., the rate of interest being in every case for the discretion of the ct. in the particular circumstances.—*WADDELL'S TRUSTEES v. CRAWFORD*, [1926] S. C. 654.—SCOT.

*sf.* On termination of preceding life

*interest.*]—A will directed that the estate should be sold & exors. should hold proceeds in trust to pay an annuity & then pay residue of income to testator's widow for life & on her death divide the corpus, paying to two grandchildren \$1,000 each & dividing the rest among testator's children. The will declared that the two legacies to the grandchildren were subject to the widow's life interest & directed that they should be paid when the grandchildren should attain twenty-one, but in case the estate should be divided before they attained that age, interest should be paid on their legacies. If the grandchildren died before attaining twenty-one, the legacies were to fall into the estate. Both the grandchildren attained twenty-one before the death of the widow:—*Held*: interest on the legacies was payable by the estate only from the death of the widow.—*Re* SCADDING (1902), 4 O. L. R. 632.—CAN.

PART IV. SECT. 5, SUB-SECT. 5.—  
B. (d).

**4827 iii.** ———.]—In determining the right of legatees to interest upon legacies the payment of which is postponed for a definite period by the will, the mere direction of such postponement will not of itself alter the date from which interest is to run, & testator's reasons for such postponement may be taken into consideration.

If payment was delayed in order thereby to benefit a residuary legatee, then, in the absence of a direction to the contrary, no interest upon such postponed legacies would be payable before the expiration of the prescribed period. But where the postponement was intended primarily to enable the exors. to collect & realise the assets, the postponed legacies would carry interest from such a time after the end of the "exors." year as the exors. had in hand realised assets which could rightfully be applied to the payment of such legacies.—*MORPETH v. WILLIAMSON*, [1926] N. Z. L. R. 39.—N.Z.

*sd.* Legacy payable "when & how he likes."—A will provided that: "the exor. has the power given him to pay these three bequests when & how he likes—the estate is not to be sacrificed in any way to pay them." The exor., acting prudently, disposed of the estate many years after the death of testator:—*Held*: the legacies did not carry interest from the end of the year of testator's death.—*PLANTA v. GREEN-SHIELDS* (No. 2), [1932] 2 W. W. R. 60; 3 D. L. R. 423; 45 B. C. R. 228.—CAN.

PART IV. SECT. 5, SUB-SECT. 5.—C.

**4868 i.** When more than 4 per cent. allowed.—*Special circumstances.*]—*WADDELL'S TRUSTEES v. CRAWFORD*, No. 4765 viii, *ante.*—SCOT.

460 ordinary shares, to 920 preferred ordinary shares of £10 each:—*Held*: (1) following *Smell v. Dee* (1707), 2 Salk. 415, the gifts were contingent, & (2) the original 460 shares together with the accretions became, on the death of testator's wife, the property of the specific legatees.—*Re Buxton, Buxton v. Buxton*, [1930] 1 Ch. 648; 99 L. J. Ch. 334; 143 L. T. 37.

4895a. ————]—Testatrix gave legacies of £100 to each of her exors. & trustees & then bequeathed all her plate, jewellery, ornaments, china, & other household effects to two specific legatees absolutely. The whole of her residuary property of every kind she devised, bequeathed & appointed to her trustees upon trust to sell & out of the proceeds, first, to pay her funeral & testamentary expenses, debts, & the legacy duty; secondly, to appropriate & set apart two sums of £4,000 & £2,000 to be held upon certain trusts for life & then over; & thirdly, to pay a number of pecuniary legacies, including one of £600. Testatrix declared that should her residuary personal estate be insufficient to pay all the legacies then the legacy of £600 should be reduced to £500; & every legacy & annuity was bequeathed free of legacy duty. There was a deficiency in the estate;—*Held*: (1) there were sufficient indications in the will that the testatrix intended the distribution of her estate to be in accordance with the priorities mentioned, & the settled legacies must be paid in full before all the other pecuniary legacies; (2) the legacy of £600 must be reduced to £500 & this reduced legacy, plus the duty, must abate *pro rata* with the other postponed legacies, including those to the exors.; (3) the costs of packing & delivering specific legacies must be borne by the specific legatees.—*Re Leach, Milne v. Daubeny*, [1923] 1 Ch. 161; 92 L. J. Ch. 225; 128 L. T. 525; 67 Sol. Jo. 198.

4903. *Add. Annotation*:—*Consd. Re Cousen's Will Trusts*, *Wright v. Killick*, [1937] Ch. 381.

4910. *Add. Annotation*:—*Refd. Jones v. Wright* (1927), 139 L. T. 43.

4914. *Add. Annotation*:—*As to* (1) *Fold. Re Ellis, Nettleton v. Crimmins*, [1935] Ch. 193.

4914a. ————]—*Re Brouncker, Mairis v. Mandeville* (1938), 82 Sol. Jo. 315.

4917. *Add. Annotation*:—*Distd. Re Beecham's Settlement*, *Johnson v. Beecham*, [1934] Ch. 183.

4918. *Add. Annotations*:—*As to* (2) *Consd. Re Beecham's Settlement, Johnson v. Beecham*, [1934] Ch. 183. *Generally, Refd. Re Ellis, Nettleton v. Crimmins*, [1935] Ch. 193; *Re Cox, Public Trustee v. Eve*, [1938] 1 All E. R. 661.

4919. *Add. Annotation*:—*Refd. Re Cox, Public Trustee v. Eve*, [1938] 1 All E. R. 661.

4922. *Add. Annotation*:—*Refd. Re Cox, Public Trustee v. Eve*, [1938] Ch. 556.

4924. *Add. Annotations*:—*Consd. Re Cox, Public Trustee v. Eve*, [1938] Ch. 556. *Refd. Re Ellis, Nettleton v. Crimmins*, [1935] Ch. 193; *Re Vardon, Brown v. Vardon* (1938), 82 Sol. Jo. 697.

4925. *Add. Annotation*:—*Refd. Re Cox, Public Trustee v. Eve*, [1938] Ch. 556.

4936. *Add. Annotation*:—*Refd. Bowen v. I. R. Comrs.*, [1937] 1 All E. R. 607.

4937a. ————]—The testator by his will gave certain pecuniary legacies. He also gave an annuity of £250 *per annum* free of duty & free of income tax. He directed his trustees to appropriate a fund sufficient to satisfy the annuity, & declared that after such appropriation the annuitant should have no right to resort to any part of his estate for the payment of the annuity except the income & capital of the appropriated fund. Upon the death of the annuitant, the capital, if any, remaining of the appropriated fund was given to the School of English Church Music absolutely. There was a deficiency of assets, whereupon the question of abatement arose as between the legatees, the annuitant & the School of English Church Music:—*Held*: the proper method of abatement was to ascertain the amount of the appropriated fund if the legacy could be paid in full, & the figure thus obtained should abate proportionately with the legacies. The sum, being the abated amount of the appropriated fund, ought to be invested, & the annuitant should be paid her full annuity of £250 *per annum* free of duty & free of income tax out of the income of this sum, the capital being resorted to in so far as the income was insufficient. The School of English Church Music would be entitled to the capital, if any, of this sum remaining at the death of the annuitant.—*Re Nicholson, Chadwyck-Healey v. Crawford*, [1938] 3 All E. R. 270; 82 Sol. Jo. 624.

4937b. ————]—*Re Farmer, Nightingale v. Whybrow* (1938), 82 Sol. Jo. 1050.

4953. *Add. Annotation*:—*Refd. Re Whitrod, Burrows v. Base*, [1926] Ch. 118.

4972a. *Legacy to creditor after composition*.]—One by will gives several legacies, & *inter alia* to such of his creditors with whom he had formerly compounded their debts; this but a legacy & not to be preferred to other legacies.—*Coppin v. Coppin* (1725), 2 P. Wms. 291; *Cas. temp. King*, 28; 24 E. R. 735.

5002a. ————]—Executrix having, in mistake, made payments to A. in respect of his annuity for two years before he attained twenty-one, was entitled to retain them out of the future payments of the annuity.—*Livesey v. Livesey* (1827), 3 Russ. 287; 6 L. T. O. S. Ch. 13; 38 E. R. 583.

5022. *Add. Annotation*:—*Consd. Bowen v. I. R. Comrs.*, [1937] 1 All E. R. 607.

Boyd, [1928] N. I. 14.—IR.

#### PART IV. SECT. 5, SUB-SECT. 6.—D

4961 II. ————]—*Re Boyd Estate, Boyd v. Boyd*, [1928] N. I. 14.—IR.

#### PART IV. SECT. 5, SUB-SECT. 8.

*As Judgment for balance of legacy—Priority over creditors.*]—*Harper v. Harper* (1890), 3 B. C. R. 15.—CAN.

#### PART IV. SECT. 5, SUB-SECT. 6.—A.

4883 IV. ————]—A. by his will directed that certain pecuniary legacies, amounting in all to the sum of £710, should be paid "with & out of the proceeds" of the sale of his investments comprising stocks & shares. The investments realised the sum of £487 0s. 4d. At the date when the will was made they were worth approximately the sum of £481 12s. 6d. There

was a further direction that the legacies were to be paid free of all Crown duties. Testator further dealt with the residue of his property item by item. On a summons raising the question whether the balance of the legacies was payable out of the general residue of the estate:—*Held*: the balance was not payable & as the fund specified by testator for their payment was insufficient to pay them in full, they must abate ratably *inter se*.—*Re Boyd Estate, Boyd v.*

**5057a.** ——.]—A testatrix guaranteed her son's loan account at a bank. She then made a will appointing him one of her exors. & giving him a legacy of £100 & a protected life interest in the income of her residuary estate. She then guaranteed the son's overdraft on his current account. On each occasion the son charged his estate & interest in a public-house to secure such sum as the testatrix might be called upon to pay. The estate of testatrix was about to be called upon to pay a sum of over £5,000. The son after the death of testatrix executed a deed of assignment for the benefit of his creditors:—*Held*: (1) the fact that testatrix required security for the repayment of the debt after the execution of her will showed an intention not to release the debt, & the son was liable to the estate in the amount which would have to be paid to the bank; (2) notwithstanding that the debt or some part might remain unpaid, the trustees of the will were entitled to pay in their discretion such part of the income as they might think necessary for the son's maintenance & support.—*Re EISER'S WILL TRUSTS*, *FOGG v. EASTWOOD*, [1937] 1 All E. R. 244.

**5063.** *Add. Annotation*:—*Refd.* *Cashin v. Cashin*, [1938] 1 All E. R. 536.

**5065.** *Add. Annotation*:—*Refd.* *Jenkins v. Jenkins*, [1928] 2 K. B. 501.

**5072.** *Add. Annotation*:—*As to* (1) *Refd.* *Re Pennington & Owen*, [1925] Ch. 825.

**5075.** *Add. Annotation*:—*Refd.* *Re Lennard, Lennard's Trustee v. Lennard*, [1934] Ch. 235.

**5079.** *Add. Annotation*:—*Distd.* *Re Pennington & Owen*, [1925] Ch. 825.

**5085.** *Add. Annotation*:—*As to* (1) *Refd.* *Re Fenton* (No. 2), *Ex p. Fenton Textile Assocn., Ltd.*, [1932] 1 Ch. 178.

#### PART IV. SECT. 5, SUB-SECT. 12.—A.

**5056 i.** *Release of debts.*]—A. by his will gave to a nephew the amount owing by him to A. under a mtgo. & bill of sale, & in addition gave him a pecuniary legacy of £1,000, & a motor car. To five other nephews & nieces he gave legacies of £2,000 each, & to another nephew £1,000. He directed his trustees to invest the surplus of his residuary estate, to accumulate & invest the income, & at the end of five years to convert those investments into money & hold the proceeds for such of the seven nephews & nieces who were pecuniary legatees as should then be living "in the same proportions as the legacies herein bequeathed to them bear to one another absolutely":—*Held*: the gift of the amount of the debt to the debtor was a legacy, & the amount of applt.'s indebtedness as well as the gift of £1,000 to him should be taken into account in calculating the share in the residuary estate to which applt. was entitled.—*DAWES v. EXECUTOR TRUSTEE & AGENCY CO. OF SOUTH AUSTRALIA, LTD.* (1935), 52 C. L. R. 291; 8 A. L. J. 470.—AUS.

**5057 i.** ——. *What amounts to release.*]—A bequest of "all moneys owing" by the legatee shows an intention to forgive all debts owed by the legatee to the testator.—*Re HICKS*, [1935] 4 D. L. R. 781; O. R. 538; 5 F. L. J. Can. 164.—CAN.

#### PART IV. SECT. 5, SUB-SECT. 13.—A. (a).

**5111 v.** ——. *Appointment by codicil of new executors—Provision in codicil for remuneration of executors.*]—*Held*:

the exors. were entitled only to the commission mentioned in the codicil, notwithstanding a provision in the codicil that the will should be construed as if the names of the exors. were inserted throughout in place of those of the original exors.—*Re BOSSI* (1897), 5 B. C. R. 446.—CAN.

**5111 vi.** ——.]—Where testator gives a legacy to an executor or trustee, stating that it is given for his services in that capacity, & particularly where testator declares it to be in lieu of commission or remuneration, such exor. or trustee, if he accepts the trust, is not entitled to anything more than he is given by the will, unless under exceptional circumstances, such as the gift being so small as to be illusory; & the mere inadequacy of the remuneration given by the will is not of itself a sufficient reason for departing from that practice.—*Re MURPHY* (1928), S. R. Q. 1.—AUS.

#### PART IV. SECT. 5, SUB-SECT. 14.—C.

**5189 i.** ——. *Parent.*]—An exor. cannot discharge himself by paying a legacy given to an infant to the father or mother, as guardian, unless the ct. allows it in special circumstances.—*Re NAKAUCHI ESTATE*, [1927] 3 D. L. R. 1087; [1927] 2 W. W. R. 607; 21 Sask. L. R. 673.—CAN.

*ab. Payment into court—Estate in Australia—Infant legatee & guardian domiciled in England.*]—By his will testator, domiciled in California, bequeathed money on deposit in banks in Australia, amounting to about £12,000, to the infant daughters of

**5110a.** ——.]—*LLÖYD v. STODDART* (1752), Amb. 152; 27 E. R. 100, L. C.

**5160a.** ——.]—*WILSON v. LESLIE* (1857), 5 W. R. 815.

*Annotation*:—*Dbtd.* *Re Dacre, Whitaker v. Dacre* (1916), 85 L. J. Ch. 274.

**5202.** *Add. Annotation*:—*Refd.* *Re Griffiths, Jones v. Jenkins*, [1926] Ch. 1007.

**5206.** After this case add "*See, also, CONFLICT OF LAWS*, No. 548a, *ante*."

**5240a.** ——.]—Testator bequeathed sums of stock to his grandchildren, to be paid to them on attaining twenty-one, with benefit of survivorship to those attaining that age, but in case they should all die under twenty-one, then he willed the interest arising from such sums to their father for life, with remainder over:—*Held*: the grandchildren were entitled during their minority to have the interest arising from their legacies applied towards their maintenance.—*BODDY v. DAWES* (1836), 1 Keen, 362; 6 L. J. Ch. 145; 48 E. R. 346.

*Annotations*:—*Refd.* *Festing v. Allen* (1844), 5 Hare, 573; *Dundas v. Wolfe Murray* (1863), 1 Hem. & M. 425; *Re Judkin's Trusts* (1884), 50 L. T. 200.

**5245.** *Add. Annotations*:—*Distd.* *Re Reade-Revell, Crellin v. Melling*, [1930] 1 Ch. 52. *Refd.* *Re Senior, Senior v. Wood*, [1936] 3 All E. R. 196.

**5246.** *Add. Annotations*:—*Apld.* *Re Raine, Tyerman v. Stansfield*, [1929] 1 Ch. 716. *Distd.* *Re Reade-Revell, Crellin v. Melling*, [1930] 1 Ch. 52.

**5249.** *Add. Annotations*:—*As to* (1) *Apld.* *Re Fulford, Fulford v. Hyslop*, [1930] 1 Ch. 71. *As to* (2) *Distd.* *Re Reade-Revell, Crellin v. Melling*, [1930] 1 Ch. 52. *Consd.* *Re Jones, Meacock v. Jones*, [1932] 1 Ch. 642. *Refd.* *Stern v. I. R. Comrs.* (1930), 15 Tax Cas. 148.

E., & appointed E. as guardian of the estate of his daughters, & appointed two residents of Brisbane as exors. of the testator's estate in Australia. E. & his two daughters were domiciled in England:—*Held*: in the circumstances the exors. should pay the legacies into ct., leaving E. to make appropriate application for payment out to him.—*Re TUDOR*, [1928] S. R. Q. 299.—AUS.

#### PART IV. SECT. 5, SUB-SECT. 14.—D. (b) i.

*u i.* ——.]—The ct. may allow maintenance to an infant (1) out of property to which the infant is contingently entitled under a disposition made by its father or a person standing *in loco parentis* to it if the infant is unprovided for, or (2) out of the income earned by a contingent legacy bequeathed to an infant which is directed to be set apart for the infant so that if & when the contingency happens, the income on the legacy will become payable to the infant, or (3) out of the infant's share in the income of property subject of a gift to a class, all or some of whose members must take where the chance of taking is equal as to all of them, or a gift to such a class or an individual & the donees over in default of the class consent. But the ct. will apply money for an infant's maintenance in disregard of the trust only when the result of not doing so will leave the infant in such adverse circumstances that it must be assumed that if they had been foreseen by testator he would have provided for the case.—*Re FRENEY* (1931), 24 Tas. L. R. 35.—AUS.

As to (4) *Refd. Re Raine, Tyerman v. Stansfield*, [1929] 1 Ch. 716.

5250. *Add. Annotation*:—*Apld. Re Raine, Tyerman v. Stansfield*, [1929] 1 Ch. 716.

5251a. ———.]—A contingent or future pecuniary legacy payable to an infant upon attaining twenty-one does not carry intermediate income under Law of Property Act, 1925 (c. 20), s. 175. & there is no power under Trustee Act, 1925 (c. 19), s. 31, to apply the interest, or intermediate income thereof, when invested, for the infant's maintenance, unless testator is the parent of or *in loco parentis* to the infant, or has indicated an intention by his will that the infant should be maintained out of the income, or has directed the legacy to be appropriated & invested for the benefit of the infant.—*Re RAINE, TYERMAN v. STANSFIELD*, [1929] 1 Ch. 716; 98 L. J. Ch. 244; 141 L. T. 25.

*Annotation*:—*Refd. Re Reade-Revell, Crellin v. Melling*, [1930] 1 Ch. 52.

5251b. ———.]—Testatrix, who died after the commencement of Trustee Act, 1925 (c. 19), by her will directed the trustees thereof to set apart a specific sum, to accumulate & capitalise the income thereof, until A. should attain the age of twenty-one years; & if A. should attain that age, then to pay to her the income of that sum during her life, & after her death to hold the capital sum in trust for her children:—*Held*: as the trust for A., for a contingent interest for her life, did not carry the intermediate income, the trustees had, upon the proper construction, Trustee Act, 1925 (c. 19), s. 31, no power to apply that income towards A.'s maintenance.—*Re READE-REVELL, CRELLIN v. MELLING*, [1930] 1 Ch. 52; 99 L. J. Ch. 136; 142 L. T. 177.

*Annotation*:—*Distd. Re Leng, Dodsworth v. Leng*, [1938] 3 All E. R. 181.

5251c. ———.]—Where a testator, being the parent, or *in loco parentis*, of an infant, gives a legacy to that infant, contingently on his attaining an age other than full age, & makes no provision for maintenance, it is within the discretion of the ct. to order the interest on the legacy to be applied in maintaining the legatee until the legacy vests.—*Re JONES, MEACOCK v. JONES*, [1932] 1 Ch. 642; 101 L. J. Ch. 307; 147 L. T. 137.

5251d. ———.]—Testatrix by her will directed a fund to be accumulated. She expressly directed that no payment from the fund should be made to the beneficiary during a certain period. If the beneficiary died during that period the fund was to fall into residue. The gift was one which would carry the intermediate income:—*Held*: the terms of Trustee Act, 1925 (c. 19), s. 31 (1) (ii) imposed a statutory duty on the trustees to pay the income of the fund to the beneficiary upon the beneficiary attaining 21 during the period & the provision in the will to the contrary would then become ineffective & the statutory duty would prevail.—*Re RICARDE-SEAVEY'S WILL TRUSTS, MIDLAND*

*BANK EXECUTOR & TRUSTEE CO., LTD. v. SANDBROOK*, [1936] 1 All E. R. 580; 154 L. T. 599; 52 T. L. R. 508; 80 Sol. Jo. 385.

*Annotation*:—*Consd. Re Turner's Will Trusts, District Bank, Ltd. v. Turner*, [1936] 2 All E. R. 1435.

5256. *Add. Annotation*:—*Expld. & Distd. Re Jones, Meacock v. Jones*, [1932] 1 Ch. 642.

5273. *Add. Annotations*:—*Folld. Re Stokes, Bowen v. Davidson*, [1928] Ch. 716. *Expld. Re Raine, Tyerman v. Stansfield*, [1929] 1 Ch. 716.

5273a. ———.]—Where a legacy given to an infant is clearly indicated by the will to be intended for the support of the infant, interest on such legacy will run from the death of testator, as the support of the infant must begin immediately upon such death; & where such legacy is one of two or more legacies all in the same category & all given in the same group to the trustees of the will, no distinction being made between any of the legacies, the other legacy or legacies will likewise carry interest from the date of testator's death.—*Re STOKES, BOWEN v. DAVIDSON*, [1928] Ch. 716; 97 L. J. Ch. 273; 139 L. T. 331; 72 Sol. Jo. 384.

*Annotations*:—*Distd. Re Raine, Tyerman v. Stansfield*, [1929] 1 Ch. 716. *Refd. Dewar v. I. R. Comrs.*, [1935] 2 K. B. 351.

5273b. *Whether infant entitled to whole of income.*]

—Testator, standing *in loco parentis*, gave to trustees a legacy of £4,000, on trust to pay it to A., on his attaining twenty-one. He authorised them to raise it by mtg. of his real estates, & out of the money thereby bequeathed, to raise such sum, not exceeding the interest at 4 per cent. of the expectant portion, as to them should seem sufficient for maintenance:—*Held*: the legatee, during minority, was entitled to maintenance only, & not to the whole amount of interest on the legacy.—*RUDGE v. WINNALL* (1849), 12 Beav. 357; 18 L. J. Ch. 469; 14 L. T. O. S. 325; 13 Jur. 737; 50 E. R. 1098.

*Annotations*:—*Refd. Re Rouse's Estate* (1852), 9 Hare, 649. *Mend. Re Roose, Evans v. Williamson* (1880), 17 Ch. D. 696.

5276. *Add. Annotation*:—*Refd. Re Jones, Meacock v. Jones*, [1932] 1 Ch. 642.

5287. *Add. Annotation*:—*Distd. Re Raine, Tyerman v. Stansfield*, [1929] 1 Ch. 716.

5293. *Add. Annotation*:—*Distd. Re Reade-Revell, Crellin v. Melling*, [1930] 1 Ch. 52.

5301. *Add. Annotation*:—*Consd. Re Jones, Meacock v. Jones*, [1932] 1 Ch. 642.

5320. *Add. Annotation*:—*Refd. Re King, Public Trustee v. Aldridge*, [1928] Ch. 330.

5322. *Add. Annotation*:—*Apld. Re Maber, Ward v. Maber*, [1928] Ch. 88.

5331. *Add. Annotation*:—*Refd. Re Whitrod, Burrows v. Base*, [1926] Ch. 118.

5334. *Add. Annotation*:—*Refd. Re Whitrod, Burrows v. Base*, [1926] Ch. 118.

5335. *Add. Annotation*:—*Apld. Re Whitrod, Burrows v. Bax* (1925), 70 Sol. Jo. 209.

5337. *Add. Annotation*:—*Refd. Re Whitrod, Burrows v. Base*, [1926] Ch. 118.

PART IV. SECT. 6, SUB-SECT. 1.—A.

ask. *Law-agent's business books*.]—A law-agent directed his exors. to convey the residue of his estate to a residuary legatee. The exors. con-

veyed the residue, with the exception of deceased's business books, which they retained on the ground that it would be a breach of confidentiality towards deceased's clients if they were to hand them over. In an action by

the residuary legatee for delivery of the books:—*Held*: pursuer was entitled to delivery.—*ROBERTSON v. ROBERTSON'S EXECUTORS*, [1925] S. C. 606.—SCOT.



**5339.** *Add. Annotation*:—*Re*fd. *Re Tilden*, *Cou-*  
*brough v. Royal Society of London* (1938),  
82 Sol. Jo. 334.

**5340a.** —.]—Testator left his property on trust  
for sale & realisation, & thereafter gave &  
bequeathed one-tenth part to A., two-tenth  
parts to C.'s children, & the rest in tenth &  
twentieth parts to specific objects in a  
similar manner, & "to K. £30, to L. £40, to  
Nonconformist Ministers of D. the residue  
in equal shares":—*Held*: the will must be  
read as though after disposing of nine-tenths  
of his residuary estate he directed the  
remaining tenth, charged with the two sums  
as therein provided, to be divided among the  
ministers, & there was an intestacy as to the  
undivided aliquot shares of persons who  
predeceased testator.—*Re* WHITROD, BUR-  
ROWS v. BASE, [1926] Ch. 118; 95 L. J. Ch.  
205; 134 L. T. 627; 70 Sol. Jo. 209.

**5341.** *Add. Annotation*:—*Re*fd. *Re Whitrod*, Bur-  
rows v. Base, [1926] Ch. 118.

**5353a.** ———.]—*Re* COPE'S TRUSTS (1877), 36  
L. T. 437.

**5354.** *Add. Annotations*:—*Consd.* *Baker v. Archer-*  
*Shee*, [1927] A. C. 844. *Apld.* *I. R. Comrs.*  
*v. Smith*, [1930] 1 K. B. 713. *Re*fd. *Herbert v.*  
*I. R. Comrs.*, *I. R. Comrs. v. Herbert* (1925),  
9 Tax Cas. 593; *A.-G. v. Bellios*, [1928] 1  
K. B. 798; *Daw v. Inland Revenue Comrs.*,  
*Duff-Dunbar v. Inland Revenue Comrs.* (1928),  
14 Tax Cas. 58; *Corbett v. I. R. Comrs.*,  
[1938] 1 K. B. 567; *Re* White, *Skinner v.*  
*A.-G.*, [1938] 2 All E. R. 691.

**5358.** *Add. Annotations*:—*As to* (1) *Apld.* *Re*  
*Shee*, *Taylor v. Stoger*, [1934] Ch. 345. *Distd.*  
*Re* Fenwick, *Fenwick v. Stewart*, [1936] 2  
All E. R. 1096. *Consd.* *Corbett v. I. R.*  
*Comrs.*, [1938] 1 K. B. 567. *Re*fd. *Re*  
*Oldham*, *Oldham v. Myles* (1927), 71 Sol. Jo.  
491.

**5359.** *Add. Annotation*:—*As to* (2) *Re*fd. *Corbett*  
*v. I. R. Comrs.*, [1938] 1 K. B. 567.

**5360a.** ———.]—The interim interest  
from a fund set apart to meet future vested  
legacies, which do not carry interest in the  
meantime, is capital & not income of residue,  
& must, therefore, be invested, & the income  
only of such investment paid to the tenant  
for life of the residuary estate. The rule

adopted in *Allhusen v. Whittell*, No. 5358,  
*ante*, in reference to contingent legacies, has  
no application to vested legacies.—*Re* WHITE-  
HEAD, *PEACOCK v. LUCAS*, [1894] 1 Ch. 678;  
63 L. J. Ch. 229; 70 L. T. 122; 42 W. R.  
491; 38 Sol. Jo. 183; 8 R. 142.

*Annotation*:—*Distd.* *Re* Hawkins, *White v. White*, [1916]  
2 Ch. 570.

**5363.** *Add. Annotation*:—*Generally*, *Re*fd. *Corbett*  
*v. I. R. Comrs.*, [1938] 1 K. B. 567.

**5363a.** *Contingent legacies.*  
Contingent legacies are excluded from the  
rule in *Allhusen v. Whittell*, No. 5358, *ante*,  
& the whole of the legacy duty payable  
on contingent legacies given free of duty  
is a charge on the corpus of the estate.—  
*Re* FENWICK'S WILL TRUSTS, *FENWICK v.*  
*STEWART*, [1936] Ch. 720; [1936] 2 All E. R.  
1096; 105 L. J. Ch. 351; 155 L. T. 199;  
80 Sol. Jo. 553.

**5363b.** *Gross or net amount.*—In  
applying the rule in *Allhusen v. Whittell*,  
No. 5358, *ante*, the income of the estate  
should be calculated, not on the basis of the  
gross amount received, but at the net amount  
after deduction of tax.—*Re* OLDHAM, *OLDHAM*  
*v. MYLES* (1927), 71 Sol. Jo. 491.

**5369.** *Add. Annotation*:—*Consd.* *Re* Fenwick,  
*Fenwick v. Stewart*, [1936] 2 All E. R. 1096.

**5371.** *Add. Annotations*:—*Apld.* *Re* Shee, *Taylor*  
*v. Stoger*, [1934] Ch. 345. *Consd.* *Re* Fenwick,  
*Fenwick v. Stewart*, [1936] 2 All E. R. 1096.  
*Re*fd. *Re* Leicester's Settled Estates, *Coke v.*  
*Leicester*, [1938] 3 All E. R. 553.

**5373.** *Add. Annotations*:—*Consd.* *Re* Barratt,  
*National Provincial Bank v. Barratt*, [1925]  
Ch. 550; *Re* Corelli (1925), 69 Sol. Jo. 525;  
*Re* Sullivan, *Dunkley v. Sullivan* (1929), 45  
T. L. R. 590. *Apld.* *Re* Trollope's Will  
Trusts, *Public Trustee v. Trollope*, [1927]  
1 Ch. 596. *N.F.* *Re* Brooker, *Brooker v.*  
*Brooker* (1926), 70 Sol. Jo. 526. *Consd.* *Re*  
*McKee*, *Public Trustee v. McKee*, [1931] 2  
Ch. 145.

For the cross-reference following this case  
substitute "———."—*See, further*, *SETTLE-*  
*MENTS*, Vol. XL., pp. 672–674; *WILLS*."

**5375.** *Add. Annotation*:—*Re*fd. *Re* McKee, *Public*  
*Trustee v. McKee*, [1931] 2 Ch. 145.

PART IV. SECT. 6, SUB-SECT. 1.—B.

**5351** 1. *Right to have residue ascer-*  
*tained & paid over.*—When the per-  
sonal estate of a testator has been  
fully administered by his exors. & the  
net residue ascertained, the residuary  
legatee is entitled to have the residue  
as so ascertained, with any accrued  
income, transferred & paid to him;  
but until that time he has no property  
in any specific investment forming  
part of the estate or in the income  
from any such investment, & both  
corpus & income are the property of  
the exors. & are applicable by them as  
a mixed fund for the purposes of  
administration.—*NG AUN THYE v.*  
*WEW KEOK NEOH*, [1933] 3 W. W. R.  
129, P. C.—*STRAITS SETTLE-*  
*MENTS*.

*sm. Mistake as to value of assets—*  
*New distribution ordered.*—*CLARKE v.*  
*HAWKE* (1865), 11 Gr. 527.—CAN.

PART IV. SECT. 6, SUB-SECT. 3.  
*sm. Duty of administrator—To dis-*  
*tribute under Devolution of Estates Act.*  
—*Re* BOWER (1905), 5 O. W. R. 383;  
9 O. L. R. 199.—CAN.

PART IV. SECT. 6, SUB-SECT. 4.—  
A. (b).

**5378** 1. *General rule.*—Testator by  
his will gave certain legacies & devised  
certain land to his widow for life or  
widowhood; upon her death or  
marriage this land to go to the children  
of his sister. The residue of his estate  
he devised & bequeathed to "my  
exors." In the next clause he ap-  
pointed three of his nephews his  
exors.:—*Held*: the change made in  
the law by the Imperial Act of 1830,  
adopted in this province & now found  
in *Trustee Act*, R. S. O., 1927, s. 53,  
does not apply in cases in which  
testator himself has given the property  
to his exors.; the Act applies only  
where there is a bare appointment of  
exors. so that the implication of law  
has to be resorted to in order to see  
whether the estate of testator not  
otherwise disposed of vests in them  
beneficially *virtute officii*. In this case,  
as nothing in the will indicated a con-  
trary intention, the exors. took bene-  
ficially.—*Re* GRACEY, [1929] 1 D. L. R.  
260; 63 O. L. R. 218.—CAN.

**5382** 1. *Whether intention for executor*

*to take beneficially apparent by will—*  
*Construction of will.*—Testator by his  
will gave certain legacies & devised  
certain land to his widow for life, or  
widowhood, & upon her death, or  
marriage, this land to go to the children  
of his sister. The residue of his estate  
he devised & bequeathed to "my  
exors." In the next clause he ap-  
pointed three of his nephews his  
exors. One of these was at the date  
of the will an infant of tender years,  
& was only 13 years old at the time of  
testator's death. Probate was granted  
to the adult exors. reserving to the  
infant a right to be admitted to exor-  
ship upon attaining majority.—*Held*:  
the change made in the law of the  
Imperial Act of 1830, known as  
Sugden's Act, adopted in this Province,  
& now found in *Trustee Act*, R. S. O.  
1927, c. 150, s. 53, does not apply to  
cases in which testator himself has  
given the property to his exors., the  
Act applies only to cases where there  
is a bare appointment of exors., so that  
the implication of law has to be resorted  
to in order to see whether the estate of  
testator not otherwise disposed of  
vests in them beneficially *virtute*

5387. *Add. Annotation*:—*Re*d. *Re* Cousen's Will Trusts, *Wright v. Killick*, [1937] Ch. 381.

5407. *Add. Annotations*:—*Apld.* *I. R. Comrs. v. Soc. for Relief of Widows & Orphans of Medical Men, I. R. Comrs. v. Medical Charitable Soc. for West Riding of Yorkshire* (1926), 136 L. T. 60. *Re*d. *Re* Blake, *Re Minahan's Petition of Right* (1931), 100 L. J. Ch. 251.

(c) *After 1925 (p. 472).*

5408a. *General rule.*—A will made on a printed form contained an appointment of testator's wife as executrix & a direction to pay debts & funeral & testamentary expenses, but no gift or disposition of property to any person:—*Held*: the executrix took testator's estate as trustee for the persons entitled to the property of an intestate, including herself, as set out in sect. 46 of the Administration of Estates Act, 1925 (c. 23). The repeal by that Act of Exors. Act, 1830 (c. 40), has not restored the law in force before the latter Act was passed under which an exor. took property which was undisposed of beneficially.—*Re* SKEATS, *THAIN v. GIBBS*, [1936] Ch. 683; [1936] 2 All E. R. 298; 105 L. J. Ch. 262; 155 L. T. 451; 52 T. L. R. 558; 80 Sol. Jo. 406.

5408b. —.]—The testatrix, after giving certain legacies, & after providing for the upkeep of a grave, gave the two executors £100 each, & concluded as follows: "The residue to be disposed of as my exors. shall think fit":—*Held*: the exors. did not take the residue beneficially, but in trust for such persons as were, under Administration of Estates Act 1925 (c. 23), s. 49, entitled to it upon a partial intestacy.—*Re* CARVILLE, *SHONE v. WALTHAMSTOW BOROUGH COUNCIL*, [1937] 4 All E. R. 461.

5411. *Add. Annotation*:—*Re*d. *Re* Jones, *Johnson v. A.-G.* (1925), 133 L. T. 601.

5412. *Add. Annotation*:—*Consd.* *Re* Wells, *Swinburne-Hanham v. Howard* (1932), 48 T. L. R. 617.

5416. *Add. Annotation*:—*Re*d. *Re* Wells, *Swinburne-Hanham v. Howard* (1932), 48 T. L. R. 617.

5417. *Add. Annotation*:—*Re*d. *Re* Wells, *Swinburne-Hanham v. Howard* (1932), 48 T. L. R. 617.

5423a. —.]—By his will dated Jan. 27, 1913, testator appointed his wife M. & *pltf.* J. to be his exors., & after directing them to pay his debts & funeral & testamentary expenses, bequeathed all his estate & effects, real & personal, which he might die possessed of, to his wife M. absolutely. M. predeceased testa-

tor & died on Aug. 14, 1919. Testator died on Dec. 30, 1920, leaving real & personal property, but no heir-at-law or next of kin:—*Held*: there was in the will an obvious indication of an intention by testator that the exor. was not to take beneficially. He was in the position of a trustee, & on failure of a *cestui que trust* the beneficial interest in the personal estate vested in the Crown as *bona vacantia*.—*Re* JONES, *JOHNSON v. A.-G.*, [1925] Ch. 840; 94 L. J. Ch. 341; 133 L. T. 601; 69 Sol. Jo. 460.

5440. *Add. Annotation*:—*Re*d. *Re* Rooke, *Jeans v. Gatehouse*, [1933] Ch. 970.

5442a. —.]—Testatrix by her will, dated June 2, 1913, after making numerous specific bequests, bequeathed to her trustees all her horses & all her carriages not thereby otherwise disposed of wherever the same might be at her death . . . upon trust to sell & stand possessed of the proceeds for G. & C. in equal shares as tenants in common. In 1918 testatrix, having become through senility unable to manage her affairs, a receiver of her estate was appointed by the Master in Lunacy, who authorised the sale of her motor-car. A part of the purchase-money was applied for her maintenance. She died in 1920, having no horses or carriages, but the receiver still held the balance of the purchase-money. The estate proved insufficient to pay all the legacies in full. On an originating summons taken out by the trustees, asking, among other things, whether the above-named legatees were entitled to the balance of the purchase-money & whether specific legatees were to bear the cost of packing & dispatching the articles specifically bequeathed to them:—*Held*: (1) the above-mentioned gift included the motor-car & the legatees were entitled to such of the proceeds of the sale thereof as had not been applied by the receiver; (2) the specific legatees must bear the cost of packing & dispatching the several articles bequeathed to them.—*Re* SIVEWRIGHT, *LAW v. FENWICK* (1922), 128 L. T. 416; 67 Sol. Jo. 168.

*Annotation*:—*Folld.* *Re* Leach, *Milne v. Daubeney*, [1923] 1 Ch. 161.

5442b. —.]—*Re* LEACH, *MILNE v. DAUBENY*, No. 4895a, *ante*.

5447. *Add. Annotation*:—*Folld.* *Re* Rooke, *Jeans v. Gatehouse*, [1933] Ch. 970.

5447a. —.]—The costs of the preservation & upkeep of property specifically devised & bequeathed between the date of testator's death & the date of exors.' assent are payable by the specific devisees & legatees.—*Re* ROOKE, *JEANS v. GATEHOUSE*, [1933] Ch. 970; 102 L. J. Ch. 371; 149 L. T. 445.

*offici*; &, as nothing in the will indicated a contrary intention, the exors. took beneficially.—*Re* GRACEY, [1929] 1 D. L. R. 260; 63 O. L. R. 218.—CAN.

PART IV. SECT. 7, SUB-SECT. 1.—  
A. (a).

5425 v. —.]—P. by his will directed that his real property, not specifically devised, should be sold & all the remainder of his property realised. He also directed that his debts, funeral & testamentary expenses should be paid, an annuity

provided for his sister, & that certain legacies, all charitable save one, should be paid:—*Held*: testator not having directed that the proceeds of sale of his realty & personalty should form a mixed fund, the primary fund out of which the debts, funeral & testamentary expenses, the annuity, & the legacies should be paid was the pure personalty, & the realty was only charged in aid of the pure personalty in so far as it proved insufficient for the payment of all charges, except the charitable legacies which lapsed as far as the pure personalty proved insufficient.—*Re* PATTON, *CAUGHEY v.*

*COPELAND*, [1925] N. 206.—IR.

*o. l.* —.]—Testator directed payment of debts, expenses & taxes & made certain specific bequests & then gave the residue of his estate including the proceeds of all policies on his life in trust for his wife, daughter, & grandchildren:—*Held*: the proceeds were part of his estate.—*Re* HOARE, [1933] 2 D. L. R. 780; O. R. 474.—CAN.

*sc. Payment of death duties—Exemption by statute—Full effect to be given.*—*Re* AIKINS, [1928] 2 D. L. R. 415; 69 O. L. R. 33.—CAN.



**5448a.** —.]—*Held*: the direction for payment of the "testamentary expenses" of testator's widow extended to the costs & expenses in obtaining letters of administration, & in connection with the administration of the estate of the widow; & the costs of an action in the probate division.—*Re CLEWOW, YEO v. CLEWOW*, [1900] 2 Ch. 182; 69 L. J. Ch. 522; 82 L. T. 550; 48 W. R. 541; 44 Sol. Jo. 428.

*Annotations*:—*Reid. Re Treasure, Wild v. Stanham*, [1900] 2 Ch. 648; *Re Sharman, Wright v. Sharman*, [1901] 2 Ch. 280; *Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250; *Re King, Travers v. Kelly*, [1904] 1 Ch. 383; *Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130; *Porte v. Williams*, [1911] 1 Ch. 188; *O'Grady v. Wilmot*, [1916] 2 A. C. 231; *Re Massey, Ram v. Massey* (1920), 90 L. J. Ch. 40.

**5449a.** Costs of probate action.]—*Re CLEWOW, YEO v. CLEWOW*, No. 5448a, *ante*.

**5451a.** —. —. —.]—Land which had been delivered in execution, under a writ of *elegit*, to judgment creditors of a testator, was specifically devised by the subsequent will of testator:—*Held*: Locke King's Acts applied, & the devisee was not entitled to have the land exonerated by the personal estate.—*Re ANTHONY, ANTHONY v. ANTHONY*, [1892] 1 Ch. 450; 61 L. J. Ch. 434; 66 L. T. 181; 40 W. R. 316; 36 Sol. Jo. 255.

**5452.** *Add. Citation*:—*previous proceedings*, [1892] 1 Ch. 450.

**5460.** *Add. Annotation*:—*Expld. Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v. Estate & Trust Agencies* (1927), Ltd., [1938] A. C. 624.

**5461.** *Add. Annotation*:—*Consd. Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v. Estate & Trust Agencies* (1927), Ltd., [1938] A. C. 624.

**5461a.** —. —.]—*Primâ facie* it is the duty of a legal personal representative to perform all the contracts of his testator or intestate, as the case may be, that can be enforced whether by way of specific performance or otherwise. In the case of an enforceable onerous contract he ought not to neglect any opportunity of coming to terms with the other contracting party which may benefit the estate; but

the breaking of an enforceable contract is an unlawful act, & it is not the duty of an exor. or administrator to commit such an act. Whether the completion of a contract will be for the benefit of the estate is not the test to be applied.—*AHMED ANGULLIA BIN HADJEE MOHAMED SALLEH ANGULLIA v. ESTATE & TRUST AGENCIES* (1927), Ltd., [1938] A. C. 624; [1938] 3 All E. R. 106; 107 L. J. P. C. 71; 159 L. T. 428; 54 T. L. R. 831, P. C.

**5466.** *Add. Annotation*:—*Consd. Re Forder, Forder v. Forder* (1927), 137 L. T. 538.

**5483a.** —.]—*DIXON v. DUTFIELD*, No. 6014b, *post*.

**5540.** *Add MELLERSH v. BRIDGER, SMITH v. BRIDGER* (1853), 17 Jur. 908.

**5558.** *Add. Annotations*:—*Apld. Re Reeves, Reeves v. Pawson*, [1928] Ch. 351. *Reid. Re Tilden, Coubrough v. Royal Society of London* (1938), 82 Sol. Jo. 334.

**5560a.** *Collateral security*.]—A sum of £400 borrowed by an intestate on his promissory note, but secured also by a memorandum & deposit of even date of title deeds of real estate in terms as collateral security:—*Held*: within Locke King's Act.—*COLEBY v. COLEBY* (1866), L. R. 2 Eq. 803.

**5565a.** —.]—(1) Prior to his death, testator entered in a contract to purchase certain freehold property & paid a deposit. He then became ill & was quite unable to attend business matters, & there was no one with authority to sign cheques upon his banking account. In these circumstances the bank opened a special account in the name of testator's solrs., advanced a sufficient sum to that account to meet the payment, & the solrs. received & held the title deeds of the property. By his will testator devised this property to his wife:—*Held*: the result of the above transactions was that the property became charged in favour of the solrs. with the amount of the balance of the purchase-money; the testator's wife took the property, subject to that charge.

PART IV. SECT. 7, SUB-SECT. 1.—  
A. (b).

**5462 i.** *Specific legacy—Of incumbered chattel*.]—As between a specific legatee of an incumbered chattel & other specific legatees & devisees, the former must bear the burden of the incumbrance, & a general direction that debts shall be paid will not alter this.—*Re SIMPSON*, [1927] 2 D. L. R. 1043; 60 O. L. R. 310.—CAN.

PART IV. SECT. 7, SUB-SECT. 1.—  
A. (b) ii.

**5511 i.** *Whether mixed fund primarily liable*.]—Where testator has devised his real & personal estates to his exors., to sell or convert same into money & out of the proceeds to pay his debts & legacies, he has created a mixed fund for the purpose.—*GRAYSON v. WALSH*, [1926] 1 D. L. R. 206; [1926] 1 W. W. R. 125; 20 Sask. L. R. 288.—CAN.

**5511 ii.** —.]—Testatrix devised & bequeathed one-half of her estate to G., & after all her debts had been paid certain legacies to others, & the balance to G. The assets consisted mainly of realty, & were sufficient to discharge the debts & the funeral & testamentary expenses without recourse to the share given to G.:—*Held*: the second half of the estate

was charged with the payment of debts in exoneration of G.'s share, & the ordinary rules as to the abatement of different parts of the estate for the payment of debts being applicable to the payment of funeral & testamentary expenses, G.'s shares was exempt also from the payment of those expenses.—*Re ROWE, GRASS v. McCLELLAND*, [1929] V. L. R. 290; [1929] Argus L. R. 211.—AUS.

**5513 i.** *Whether mixed fund primarily liable—Necessity for direction in will for payment out of mixed fund*.]—Since the Wills Act a residuary devise must for the purposes of administration be regarded as a specific devise, & in the order of assets for the payment of debts ranks with specific devises & specific bequests. A residuary devise does not lose its right to contribution from specifically bequeathed personality for the payment of debts so far as the general personal estate is insufficient, merely by reason of the facts that it is given together with the general personal estate on trust for conversion & the proceeds of conversion are made a mixed fund for the purposes of disposition, & that the whole estate is subject to a general constructive charge for the payment of debts. To entitle specifically bequeathed personality to be exonerated

from such liability by the residuary realty further evidence of testator's intention to that effect is necessary: such as a direction that the debts are to be paid out of the mixed fund, or that the proceeds of conversion are to be regarded as personal estate.—*Re FORSYTH, WYATT v. FORSYTH* (1929), 29 S. R. N. S. W. 411; 46 N. S. W. W. N. 127.—AUS.

PART IV. SECT. 7, SUB-SECT. 1 —  
C. (a).

**5540 vi.** —.]—*RICKER v. RICKER* (1868), 14 Gr. 264.—CAN.

**5540 vii.** —.]—*SCOTT v. SUPPLE* (1893), 23 O. R. 393.—CAN.

**5548 i.** *Personal estate insufficient*.]—*LAPP v. LAPP* (1869), 16 Gr. 159.—CAN.

PART IV. SECT. 7, SUB-SECT. 1.—  
C. (b) iii.

**5561 ii.** —.]—Where land is devised which testator held as a purchaser subject to a vendor's lien, unless a contrary intention appears, it is primarily liable for the unpaid purchase-money.—*Re MACDOUGALL*, [1927] 3 D. L. R. 464; [1927] 1 W. W. R. 612; 21 Sask. L. R. 397.—CAN.

**5561 iii.** —.]—*Re NAGEL*, [1928] 3 D. L. R. 36.—CAN.

(2) Certain repairs of the property were, with the approval of testator, carried out, but not paid for during his life-time:—*Held*: the cost of these repairs was a debt of testator & should be discharged by the exors. out of the estate.—*Re RIDDELL, PUBLIC TRUSTEE v. RIDDELL*, [1936] Ch. 747; [1936] 2 All E. R. 1600; 105 L. J. Ch. 378; 155 L. T. 247; 52 T. L. R. 675; 80 Sol. Jo. 595.

*Annotations*:—*Generally, Reid. Re Robert's Will Trusts*, Younger v. Lewins, [1937] Ch. 274. *Generally, Reid. Godwin, Coutts & Co. v. Godwin*, [1938] Ch. 341.

**5571a. Lien on shares for debt due to company.]—**

A testator by his will bequeathed 10,000 shares in a private co., in which he held the bulk of the capital, to his widow. Under the arts. of assocn. the co. had a first & paramount lien upon all shares registered in the name of a member for his debts, liabilities, & engagements. At the date of his death the testator owed a large sum of money to the co., subsequently paid off by his exors.:—*Held*: the article in question created an equitable charge on the shares bequeathed to the testator's widow, & she took the shares subject to the obligation to discharge a proportionate amount of the moneys owing to the co. by the testator at the time of his death.—*Re TURNER, TENNANT v. TURNER*, [1938] Ch. 593; [1938] 2 All E. R. 560; 159 L. T. 246; 54 T. L. R. 697; 82 Sol. Jo. 295.

**5594. Add. Annotation:—Apld. Re Fegan, Fegan v. Fegan**, [1928] Ch. 45.

**5594a. Direction in will for payment of "money secured on mortgage" out of residue—Balance of unpaid purchase-money.]—**Testator, who at the date of his will in 1912 was the owner of several freehold properties, one of which was subject to a mtge. & of leasehold & other personal estate, gave & bequeathed all the freehold & leasehold properties of which he might die possessed upon trusts in favour of certain of his grandchildren & great-grandchildren, & the residue of his estate upon trust for sale & conversion; he then directed that his trustees should out of the money thereby produced pay (*inter alia*) his debts & legacies, & should out of the residue of such money pay & discharge "any sum of money secured on mtge. of any of my freehold properties," & should stand possessed of the residue of such money in trust to divide same as therein mentioned. After the date of his will testator paid off the mtge. & took a reconveyance of the mortgaged property. Shortly before his death, in June & Oct. 1917, testator contracted to purchase certain freehold properties in respect of which he paid deposits, leaving balances of the purchase-money owing to the respective vendors. On Dec. 23, 1917, testator made a final codicil, by which, after revoking the appointment of one of his exors. & bequeathing a legacy, he confirmed his will in all other respects. Testator died on Dec. 26, 1917, without having completed the purchases or paid the balances of the purchase-money, & shortly after his death his exors. completed the purchases & paid the balances of the purchase-money; whereupon the question

arose whether, as between the persons claiming under testator's will, those balances ought to be borne by the freehold properties of testator in respect of which same were payable, or ought to be satisfied out of his residuary estate:—*Held*: (1) inasmuch as a vendor's lien for unpaid purchase-money differs essentially from a mtge., even in the modern & wider sense of that term, upon the true construction of the will in the absence of any context enlarging the meaning of the term "mtge." the balances of the unpaid purchase-money owing at testator's death were not "sums of money secured on mtge.," & no contrary intention was signified by the direction in the will to pay & discharge such sums out of testator's residuary estate, so as to exclude the operation of 1854 Act, which by virtue of 1867 Act, s. 2, extends to a vendor's lien for unpaid purchase-money; with the result that the balances in question ought to be borne by & satisfied out of the freehold properties in respect of which same were payable, & the devisees thereof were not entitled to have those balances discharged out of testator's residuary estate; (2) the confirmation of the will by the last codicil thereto, although executed after the mtge. on testator's freehold property had been paid off & after the vendor's lien had arisen, had not the effect of extending the meaning of the words "any sums of money secured on mtge. of any of my freehold & leasehold properties," so as to include the balances of unpaid purchase-money in question.—*Re BEIRNSTEIN, BARNETT v. BEIRNSTEIN*, [1925] Ch. 12; 94 L. J. Ch. 62; 132 L. T. 251; *sub nom. Re BERNSTEIN, BARNETT v. BERNSTEIN*, 69 Sol. Jo. 88.

(c) *After 1925* (Vol. XXIII., p. 495).

**5620a. Special fund for payment of debts—**

"Contrary or other intention"—*Administration of Estates Act, 1925* (c. 23), s. 35.]—The provision by testator in his will of a special fund, not being any of the funds mentioned in sect. 35 (2) of the above Act, for payment of his debts operates as the expression of a "contrary or other intention" within the sect., so as to exonerate, as between the different persons claiming through testator, a personalty fund which at testator's death was subject to a mtge. from the primary liability to discharge it; but the fund is only exonerated to the extent that the special fund is available for discharging the mtge. debt, & in so far as it is inadequate, the mortgaged property remains primarily liable.—*Re FEGAN, FEGAN v. FEGAN*, [1928] 1 Ch. 45; 97 L. J. Ch. 36; 138 L. T. 265; 71 Sol. Jo. 866.

**5640. Add. Annotation:—As to (4) Consd. Re Littlewood, Clark v. Littlewood** (1930), 47 T. L. R. 79.

**5641a. —.]—MARCH (LADY) v. FOWKE** (1679), *Cas. temp. Finch*, 414; 23 E. R. 226, L. C.

**5654a. —. —. To revert to residue on death of legatee.]—**By his will, testator bequeathed a legacy of £10,000 to trustees for his daughter A. during her life & after her death directed

that the legacy should revert to & be added to his general residuary personal estate & go as the same was bequeathed by his will. Testator then gave his general residuary personal estate to B. Testator devised his estates in certain places to other trustees as a fund for the discharge of his debts, funeral & testamentary expenses & his pecuniary legacies in aid of his personal estate, with power to his trustees, if they thought it expedient or necessary either before or after his residuary personal estate should be exhausted to raise money for those purposes by sale or mortgage & subject thereto upon trust for B., in fee. The personal estate of testator was insufficient for the payment of his debts & legacies, & B. supplied such deficiency, including the annual payments to A. in respect of her legacy. A. survived both testator & B. On the death of B., the question arose whether, as testator's personalty was insufficient for the payments before mentioned, testator intended that the corpus of the legacy should be raised out of the real estate devised to B. for the benefit of B., who was testator's residuary legatee:—*Held*: the words "revert to & be added to my general residuary estate" in the will, showed that the testator meant the legacy to be restored to the funds from which it was taken; & it was not to be taken from the real estate merely for the purpose of augmenting the personal estate.—*Re SOMERSET (DUKE), THYNNE v. ST. MAUR* (1886), 55 L. T. 753.

5697a. —.]—*EYLES v. CARY* (1687), 1 Vern. 457; 23 E. R. 583.

*Annotation*:—*Dbtd. Mallison v. Middleton* (1739), 1 Eq. Cas. Abr. 198, n.

5697b. —.]—*BOWDLER v. SMITH* (1706), Prec. Ch. 264; 2 Eq. Ca. Abr. 371; 24 E. R. 128.

5697c. —.]—*PARKER v. WILCOX* (1723), 2 Eq. Cas. Abr. 371; 22 E. R. 316.

5697d. —.]—*WILLAN v. LANCASTER* (1826), 3 Russ. 108; 38 E. R. 516.

5723a. —.]—Testatrix, who had power, under her brother's will, to appoint real & personal estate, gave the real estate to trustees to raise £1,000, & pay the amount as legacies to various persons & subject thereto for P. & his heirs. She then gave several legacies, payable out of her own personal estate, & other legacies payable out of an unappointed moiety of her brother's personal estate, after the decease of his widow, & she directed the duty on all the foregoing legacies to be paid out of her personal estate, & if deficient for full payment either of duty or legacies, such deficiency was to be made good out of the real estate, on which she charged same. By two codicils, testatrix left other legacies, & directed that the sums bequeathed out of her brother's estate should be paid, with the other legacies, immediately after her decease:—*Held*: the legacies given

by the codicils were charged on the real estate.—*WILLIAMS v. HUGHES* (1857), 24 Beav. 474; 27 L. J. Ch. 218; 30 L. T. O. S. 215; 4 Jur. N. S. 42; 6 W. R. 94; 53 E. R. 441.

5734. *Add. Citations*:—*sub nom. NYSSSEN v. GRETTON*, 2 Y. & C. Ex. 222; 160 E. R. 378.

5737a. —.]—Testator directed his debts & funeral & testamentary expenses to be paid out of his personal estate. He then devised his freeholds to trustees to be sold, & the proceeds, after deducting costs, to be deemed part of the residue of his personal estate, & to be subject to the dispositions thereinafter made of the same. Testator then gave a legacy of £1,000 upon certain trusts, & finally directed all the rest & residue of his personal estate to go to his wife for life, remainder over. The pure personal estate being insufficient to pay all the debts & legacies:—*Held*: the legacy of £1,000 ought to be paid out of the moneys arising from the sale of the real estate.—*Re WOOLLARD'S TRUST* (1854), 18 Jur. 1012.

5758. *Add. Annotation*:—*Consd. Re Thompson, Public Trustee v. Husband*, [1936] 2 All E. R. 141.

5762a. —.]—A testator bequeathed an annuity & certain legacies & devised & bequeathed all his real & personal estate not otherwise devised or bequeathed to certain persons. He left personal estate & real estate of considerably greater value. Questions arose in connection with the incidence of certain death duties, whether an annuity & legacies were for that purpose to be treated as payable primarily out of the residuary personalty or out of the realty & personalty in proportion to their values:—*Held*: the law in force before Administration of Estates Act, 1925 (c. 23), as regards the primary fund for payment of legacies as between the personal & real estate has not been altered by sect. 34 (3) of clauses 2 & 8 (b) of Part II. of Sched. I., to that Act, & the personal estate must be treated as primarily liable, & recourse will not be made to the real estate until the personal estate has been exhausted. In any case for the purpose of determining the incidence of death duties this result is effected by clause 8 (b) of Part II. of the Sched.—*Re THOMPSON, PUBLIC TRUSTEE v. HUSBAND*, [1936] Ch. 676; [1936] 2 All E. R. 141; 105 L. J. Ch. 289; 155 L. T. 474; 80 Sol. Jo. 466.

5839a. —.]—A general charge of debts & legacies upon all the real estates of testator not annulled by a subsequent power to sell a particular estate only & apply the produce to the same purpose: but that estate was first applied.—*COXE v. BASSET* (1796), 3 Ves. 155; 30 E. R. 945.

*Annotation*:—*Consd. Wrigley v. Sykes* (1856), 21 Beav. 337.

PART IV. SECT. 7, SUB-SECT. 2.—  
C. (a) i.

p i. —.]—*WRIGHT v. WRIGHT*, [1928] N. Z. L. R. 331.—N.Z.

r i. —.]—*Balance of proceeds of sale of land sold by mortgage treated as land.*—*ARMON v. THOMPSON* (1877), 25 Gr. 138.—CAN.

r ii. —.]—Testator devised to his daughter a lot of land charged with a

legacy. The daughter predeceased testator, leaving two children, to whom the lot descended. On an appln. by the exors. at the instance of the official guardian:—*Held*: it was the duty of the exors. to sell the land & pay the legacy.—*Re EDDIE* (1892), 22 O. R. 556.—CAN.

r iii. —.]—*Re SISKIN ESTATE, SISKIN v. BOGOCH & HOCHMAN*, [1929] 4 D. L. R. 1086; 1 W. W. R. 820; 23

S. L. R. 626.—CAN.

PART IV. SECT. 7, SUB-SECT. 2.—  
C. (a) ii.

o i. —.]—If under a will there are general gifts of legacies & then of the rest & the residue, real & personal, blending the whole in one mass, the legacies are a charge on the realty.—*Re CONNER*, [1930] 1 W. W. R. 442; 2 D. L. R. 348.—CAN.

5864. *Add. Annotation*:—*Reid. Re Carrington, Ralphs v. Swithenbank*, [1932] 1 Ch. 1.

5864a. —.]—*WATERHOUSE v. Clout, Ex p. Booker* (1871), 41 L. J. Ch. 223; 20 W. R. 277.

5908a. **Charge of debts, legacies & expenses on specific bequest—Variation of statutory order of administration.**—By a will, testatrix gave & bequeathed "All my farm stock, implements & tenant-right but charged with payment of all my just debts, & funeral & testamentary expenses, & also with the payment thereof of the legacies mentioned in the will of my late husband W., & an additional legacy of £50 which I bequeath to my step-daughter E. unto & equally between my step-son G. & my son F."—*Held*: Administration of Estates Act, 1925 (c. 23), Sched. I., Part II., in the case of wills, *a fortiori* in the case of those executed before 1926, indicating with reasonable clarity the intention of deceased, is to take effect subject to variations necessary to give effect to the intention, & therefore the farm stock, implements, & tenant-right were primarily applicable for payment of the funeral & testamentary expenses & debts.—*Re LITTLEWOOD, CLARK v. LITTLEWOOD*, [1931] 1 Ch. 443; 100 L. J. Ch. 243; 144 L. T. 718; 47 T. L. R. 79.

5917a. ————— **Administration of Estates Act, 1925 (c. 23), Sched. I., Part II.**—A share of residuary estate which lapses owing to the person who would have been entitled to it under the will of a testator predeceasing testator is "property undisposed of by will" within clause 1 of above Part, & therefore under sect. 34 (3) of the Act primarily liable, subject to any direction to the contrary in the will, to the discharge thereof of funeral & testamentary expenses, debts & legacies.—*Re LAMB, VIPOND v. LAMB*, [1929] 1 Ch. 722; 98 L. J. Ch. 305; 141 L. T. 60; 45 T. L. R. 190; 73 Sol. Jo. 77.

*Annotations*:—*Distd. Re Petty, Holliday v. Petty*, [1929] 1 Ch. 726. *Folld. Re Atkinson, Webster v. Walter*, [1930] 1 Ch. 47. *Distd. & Distd. Re Kempthorne, Charles v. Kempthorne*, [1930] 1 Ch. 268, C. A. *N.F. Re Cruse, Gass v. Ingham*, [1930] W. N. 206. *Apprvd. Re Tong, Hilton v. Bradbury*, [1931] 1 Ch. 202.

5917b. —————.]—A testator by his will, after directing his executors to pay all legacies free of estate duty & to pay out of his estate any duty which might become payable on any gift made before his decease & after bequeathing certain legacies & annuities & the use & benefit of two freehold cottages, directed them to collect the income from the remainder of his estate & to pay 75 per cent. thereof to E. H. during her life & on her death the income of the whole of the estate to be invested for the benefit of the children of M. & A. on their attaining the age of twenty-one years, & if there should be no children then the whole of the accumulated funds was to be divided between two named charities. Testator died on Mar. 12, 1929. It having been held upon the originating summons that, in consequence of the will having been attested by the husband of E. H., the 75 per cent. share of the income of the residuary estate was undisposed of by the will, until the death of E. H. or the birth of a child to either M. or A., the question then

arose whether testator's funeral, testamentary & administration expenses, debts & liabilities other than the estate duty in the will mentioned ought to be paid primarily out of such undisposed of income or out of the corpus of his estate:—*Held*: (1) the "real & personal" estate of a deceased person made assets for the payment of his debts by Administration of Estates Act, 1925 (c. 23), s. 32 (1), include the share of income of testator's residuary estate accruing after his death as to which he died intestate; (2) that property "undisposed of by will," made by sect. 34 (3), Sched. I., Part II., para. 1, of that Act the primary fund for payment of the expenses, debts, & liabilities mentioned in that sub-sect. includes a share of future income of residuary estate which lapses by reason of the statutory inability of the legatee to take under the will; (3) upon the proper construction of the will & the sub-sect. there was no provision for payment of the funeral, testamentary, & administration expenses, debts, & liabilities, with the result that those expenses & the debts & liabilities, except the estate duty in the will mentioned, must be paid primarily out of the share of income which lapsed & any other property undisposed of by the will.—*Re TONG, HILTON v. BRADBURY*, [1931] 1 Ch. 202; 100 L. J. Ch. 132; 144 L. T. 260, C. A.

*Annotation*:—As to (3) *Folld. Re Worthington, Nichols v. Hart*, [1933] Ch. 771.

5917c. —————.]—*Re CRUSE, GASS v. INGHAM*, [1930] W. N. 206.

5917d. —————.]—Testatrix by her will after appointing a sole exor. thereof & bequeathing a number of pecuniary legacies gave devised & bequeathed all the residue of her estate both real & personal to E. S. & L. M. H. in equal shares absolutely. E. S. died in the lifetime of testatrix, & her moiety lapsed & passed as on an intestacy:—*Held*: the order of the application prescribed by Administration of Estates Act, 1925 (c. 23), s. 33 (2), & Sched. I., Part II., being under sect. 33 (7), sect. 34 (3), & Sched. I., Part II., expressly subject to variation by the provisions of the will, & there being in this case no such provisions, the statutory order must be followed, & both the debts, funeral & testamentary expenses & the legacies were payable primarily out of the lapsed share of the residue.—*Re WORTHINGTON, NICHOLS v. HART*, [1933] Ch. 771; 102 L. J. Ch. 273; 149 L. T. 296; 49 T. L. R. 444; 77 Sol. Jo. 371, C. A.

5917e. ————— **Contrary intention of testator.**—Testator devised & bequeathed his residuary real & personal estate upon trust for sale & conversion, & after directing payment of his debts, etc., out of that mixed fund gave the residue thereof thereafter referred to as the residuary trust fund, as to one-half to his wife & as to the other half to two daughters in settled shares. Testator died in 1928. His wife having predeceased him, her moiety lapsed & passed as on an intestacy:—*Held*: the order of application of assets prescribed by Administration of Estates Act,

1925 (c. 23), Sched. I., Part II., being under sects. 33 (7), 34 (3), & Sched. I., Part II., para. 8 (a), expressly subject to variation by the provisions of the will, which in this case clearly threw the debts, etc., rateably on the mixed fund, those debts, etc., were payable out of that mixed fund rateably, & not primarily out of the lapsed moiety.—*Re PETTY, HOLLIDAY v. PETTY*, [1929] 1 Ch. 726; 98 L. J. Ch. 207; 141 L. T. 31.

*Annotations*.—*Distd. Re Atkinson, Webster v. Walter*, [1930] 1 Ch. 47. *Apprvd. Re Kempthorne, Charles v. Kempthorne*, [1930] 1 Ch. 268.

59171.

—By his will dated Dec. 2, 1911, a testator devised to his brother C. "all my freehold & copyhold property," & gave all his leasehold property & personal estate & effects, subject to payment of his funeral & testamentary expenses, debts, & legacies upon trust for division amongst his brothers & sisters as therein mentioned. Testator died on Aug. 15, 1928, & was at his death entitled, subject to the effect of the provisions of the Law of Property Act, 1925 (c. 20), to two equal ninth shares of certain freehold property comprised in his father's residuary estate, & to one equal fourth part of certain freehold minerals purchased by him. He also owned the entirety of certain other freehold property. The residuary gift of personalty lapsed as regards three equal seventh parts owing to the death of two legatees in the testator's lifetime:—*Held*: testator by directing that his debts should first be paid out of the residue before division amongst the residuary legatees had shown an intention that in regard to the lapsed shares of residue the order of administration prescribed by Administration of Estates Act, 1925 (c. 23), Sched. I., Part II., should not apply, inasmuch as the net amount of the residue available for distribution could not be ascertained until after the debts had been paid. The debts were therefore not payable out of the

lapsed shares in exoneration of the other shares.—*Re KEMPTHORNE, CHARLES v. KEMPTHORNE*, [1930] 1 Ch. 268; 99 L. J. Ch. 107; 142 L. T. 111; 46 T. L. R. 15, C. A.

*Annotations*.—*Appld. Re Littlewood Clark v. Littlewood* (1930), 47 T. L. R. 79. *Consd. Re Cruse, Gass v. Ingham*, [1930] W. N. 206. *Distd. Re Tong, Hilton v. Bradbury*, [1931] 1 Ch. 202. *Consd. Re Warren, Warren v. Warren*, [1932] 1 Ch. 42. *Distd. Re Worthington, Nichols v. Hart*, [1933] Ch. 771. *Reid. Re Newman, Slater v. Newman*, [1930] 2 Ch. 409; *Re Hind, Bernstone v. Montgomery*, [1933] Ch. 208.

5917g. —[—]—*Re SANGER, TAYLOR v. NORTH*, [1938] 4 All E. R. 417; 159 L. T. 603; 55 T. L. R. 109; 82 Sol. Jo. 950.

5919a. —As property undisposed of by will—*Contrary intention of testator*.—In the administration of the solvent estate of a testator who died after the commencement of Administration of Estates Act, 1925 (c. 23), a direction in his will to the trustees to pay his funeral & testamentary expenses & debts out of the proceeds of the sale & conversion of his personal estate is a provision within the meaning of sect. 34 (3) of that Act. Its effect is to make the personal estate applicable towards the discharge of testator's funeral, testamentary, & administration expenses, debts, & liabilities payable out of his estate, except death duties imposed on real estate, in priority to testator's real estate which, owing to the death of the devisee thereof in testator's lifetime, was property undisposed of by his will & which, but for the provision in his will, would be primarily liable according to the order of application of assets specified in Administration of Estates Act, 1925 (c. 23), Sched. I., Part II., cl. 1.—*Re ATKINSON, WEBSTER v. WALTER*, [1930] 1 Ch. 47; 99 L. J. Ch. 35; 142 L. T. 129.

*Annotations*.—*Consd. Re Kempthorne, Charles v. Kempthorne*, [1930] 1 Ch. 268. *Appld. Re Littlewood, Clark v. Littlewood* (1930), 47 T. L. R. 79. *Consd. Re Tong, Hilton v. Bradbury*, [1930] 2 Ch. 400.

## Part V.—Powers and Rights of Representative.

5973. *Add. Annotation*:—*Reid. Flower v. Prechtel* (1934), 150 L. T. 491.

5977a. One executor carrying on business in competition with testator's business—*Breach of trust*.—By his will testator who, at the date thereof, was carrying on the business of a yacht broker, appointed ptfs., namely, his daughter B. & one W. & deft. exors. & trustees thereof, & directed them to carry on his business after his death; & in the event of a sale thereof by the exors. the whole of the proceeds were bequeathed to B. Testator died on Aug. 1, 1928, & his exors., in pursuance of the directions con-

tained in the will, carried on his business, until Feb. 1, 1929, when, testator's tenancy of the business premises being about to expire, they removed the business to other premises, a lease of which was shortly afterwards granted to deft. alone, of which lease to deft. ptfs. did not become aware until a few weeks after the grant thereof, when deft. claimed the right to hold the lease of the new premises for his own benefit, to exclude ptfs. from the new premises & to set up & carry on his own account a business similar to & in competition with testator's business. Deft. having, since the issue of the writ in the

### PART IV. SECT. 7, SUB-SECT. 9.—A.

t i. —[—]—Testator, whose estate was subsequently sequestrated on the petition of his exors., & who had effected several whole life policies of assurance upon his own life with the Australian Mutual Provident Society, in respect of which the total amount payable at his death was £4,828 18s. 3d., & which were protected under Australian Mutual Provident Society's Act, 1857, s. 14, to the extent of either

£1,500 or £1,780 1s. 9d., had during his lifetime assigned the policies in question to the Society by way of mtge. as collateral security for the repayment of certain advances totalling £3,500, in respect of which advances the amount of £3,560 12s. 3d. was due at the date of his death:—*Held*: the equitable doctrine of marshalling applied, & the mtgee. must resort primarily to the protected fund to satisfy the mtge. debt, so as to leave the unprotected portion of the policy moneys available

for the unsecured creditors, with the result that the protection afforded by the Act was entirely destroyed.—*Re HOLLAND, Ex p. HOLLAND* (1928), 28 S. R. N. S. W. 369; 45 N. S. W. N. 88.—AUS.

PART V. SECT. 1, SUB-SECT. 1.—A  
5972 III. —[—]—*McCALLUM v. TORONTO GENERAL TRUSTS CORPN.*, [1931] 1 D. L. R. 371; 43 B. C. R. 31; *revid.*, [1931] 4 D. L. R. 926; 43 B. C. R. 342.—CAN.

action, assigned the lease of the new premises to B. & the goodwill of the business also having been assigned to her, it became no longer necessary to grant any of the relief claimed & necessary to determine only whether deft. was entitled at the date of the issue of the writ to the right which he then claimed, for the purpose of deciding how the costs of the action ought to be borne:—*Held*: (1) in face of the claim made by deft. to the benefit of the lease, plffs. were justified in bringing the action; (2) having regard to the special nature of the business of a yacht broker which necessarily involved competition between every individual broker with all the others, it would have been a breach by deft. of his fiduciary duty towards the beneficiaries under the will, if he had at the date of the issue of the writ set up on his own account an independent business of a yacht broker in competition with plffs., carrying on their testator's business; with the result that deft. must pay all the costs of the action.—*Re THOMSON, THOMSON v. ALLEN*, [1930] 1 Ch. 203; 99 L. J. Ch. 156; 142 L. T. 253.

**6014a.** —.]—Testator devised & bequeathed to trustees estate A. & also all & singular his freehold & leasehold estates & effects in H. & W. together with the steam engines & machinery, money in hand, etc., together with all & singular other his real & personal estates & effects, upon trust, that his trustees, etc., should carry on his cotton manufactory in the best & most proper manner they possibly could & he empowered them to retain as much ready money, as a capital in the business, as by them might be considered necessary, with full power to carry on the same, & to keep the whole in good repair, & to renew the machinery: & directed that at the end of every twelve months next after his decease, provided his daughters L. & E. were living, the profits, if any, & the surplus income from his H. & W. estates, after paying certain annuities, after retaining a sufficient capital to carry on the manufactory, should be equally divided between his two daughters, share & share alike; but if his trustees were not inclined to carry on the cotton manufactory, he empowered them to let the same, when he directed the reserved capital to be immediately divided between his two daughters L. & E. share & share alike: & he further directed that the surplus rents of his H. & W. estates, after paying the annuities, were to be equally divided every twelve months after his decease between such two daughters, share & share alike. He directed his trustees to allow his daughter E. to receive all the rents, etc., of his estate A. for her life & declared that at her death her issue were to be entitled to such estates, but if she left no issue then such estates were to go to his daughter L.

& if she should then be dead, having left issue, such issue were to take; he then gave to L. an annuity of £600 during her life, & charged the same on all his real & personal estates in H. & W. & bequeathed the same at her death to her issue equally: & if she should die without leaving lawful issue, his daughter E. if she should be living, was to take the annuity of £600 & the whole of the surplus rents, etc., of his H. & W. estates, both real & personal: & if neither of his daughters left issue, the whole of his estates, both real & personal, were to go to R. H. for life, with remainder to his issue, remainder to his heir at law. L. & E. survived testator: E. & L. both died without issue:—*Held*: (1) the representatives of L. & E. were absolutely entitled, in equal shares, to all such personal estate as was situate in H. & W. & which was not retained by the trustees as capital for carrying on the manufactory; (2) on the death of the survivor of E. & L. without leaving issue, the whole of testator's personal estate described in his will as situate in H. & W. consisting of his leasehold estate & the manufactory, & the capital retained by the trustees for carrying on the business, were subject to the trusts declared in favour of R. H.; (3) R. H. was entitled for his life to the whole of the income of the freehold estates at A., H. & W. & to the income of the capital retained & employed by the trustees in carrying on the business.—*HORSEFIELD v. ASHTON* (1856), 26 L. T. O. S. 300; 2 Jur. N. S. 193, L. C. & L. J.J.; *affirmed, sub nom. ASHTON v. HORSEFIELD*, *HORSEFIELD v. SIDEBOTHAM* (1860), 2 L. T. 1; 6 Jur. N. S. 355, H. L.

*Annotations*:—*Generally*, *Reid*, *Tyrone Earl v. Waterford Marquis* (1860), 1 De G. F. & J. 613; *Guthrie v. Walrond* (1883), 22 Ch. D. 573.

**6014b.** —.]—Testator directed that his business should be carried on for the benefit of his widow or until her second marriage, with very full powers to the trustees to carry on the same, & "to increase or abridge his said business, & his capital, stock & implements therein," & generally to act "as most advantageous & mostly for the benefit of the persons claiming under his will." He also directed that all his debts, funeral & testamentary expenses, & the "costs, charges & expenses of carrying into effect the trusts of his said will," should be paid out of the capital of said business:—*Held*: (1) the widow was entitled for life or until her second marriage, to the whole of the profits made by such business after testator's death; the cash at the banker's & the trade debts being assets or part of the capital of such business; (2) the debts, funeral & testamentary expenses, & the costs of suit, etc., should be borne out of the capital of such business; testator having exonerated his residuary estate from any such or similar charges.—*DIXON v. DUTFIELD* (1862), 5 L. T. 741.

*MORROW*, [1936] 2 W. W. R. 566; 4 D. L. R. 331; 50 B. C. R. 540.—*CAN.*

*b ii.* — *Manner of carrying on—Admissibility of evidence.*—Where testator directs his business to be carried on "as heretofore," extrinsic evidence may be admitted as to the manner in which it was carried on.—*Re SAINT-HILL*, [1933] 1 D. L. R. 386; *on appeal*, [1933] 3 D. L. R. 231; 7 M. P. R. 49.—*CAN.*

**PART V. SECT. 1, SUB-SECT. 1.—B.**

*b i.* — *No power to give guarantee.*—By the will of her husband, under which deft. was made an extrix., his business "now being carried on by me in the City of Vancouver" was devised to her & two other trustees in trust to continue to carry it on until his son should become of a certain age. Testator was interested in, & doubtless a shareholder in, a certain coal mining

co., & had given plff. bank a guarantee of its debt to the bank. After his death a further guarantee for a later debt of the co. to the bank was executed by the three trustees, of which deft. is the survivor. Deft. was sued as extrix. on this guarantee.—*Held*: deft. had no authority to bind the estate by a guarantee of the debt of another business entity, & therefore, the appeal from the judgment for plff. must be allowed.—*BANK OF MONTREAL v.*



6016. *Add. Annotation*:—*Re* *Murphy's Estate, Morton v. Marchanton* (1930), 74 Sol. Jo. 321.

6016a. — *No right to priority—Assent to carrying on business.*—*Re* *MURPHY (ELIJAH) ESTATE, MORTON v. MARCHANTON* (1930), 74 Sol. Jo. 321.

6020a. — *Right to interest.*—Where exors. have carried on a business belonging to testator after his death, under a power in his will, & in an action for administration of testator's estate, the debts incurred in so carrying on the business have been certified, those debts will be paid with interest as from the date of the certificate, before distribution to beneficiaries; but R. S. C., Ord. LV., rr. 62, 63, under which interest is allowed to creditors of a deceased upon their debts as from the date of the order for administration, does not extend to creditors of his exors.—*Re* *BRACEY, HULL v. JOHNS*, [1936] Ch. 690; [1936] 2 All E. R. 767; 105 L. J. Ch. 270; 155 L. T. 473; 80 Sol. Jo. 511.

6025. *Add. Annotation*:—*Re* *Bracey, Hull v. Johns*, [1936] 2 All E. R. 767.

6053a. *Effect of Administration of Estates Act, 1925 (c. 23), s. 39.*—The expression "personal representatives" in the Administration of Estates Act, 1925 (c. 23), s. 39, does not include trustees in the ordinary sense, even when the personal representatives themselves become trustees upon an assent. The introductory words of sect. 39, conferring powers on personal representatives "during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives," are explained by the fact that under the new law of intestate succession the existence of an infant bene-

ficiary or of a beneficiary, such as a widow, entitled to a life interest only may postpone distribution, & that in these cases sect. 33 places the personal representatives substantially in the position of trustees. The provision in sect. 39 (1) (ii), conferring on personal representatives "all the powers, discretions & duties conferred or imposed by law on trustees holding land upon an effectual trust for sale" does not operate referentially to make Law of Property Act, 1925 (c. 20), s. 28 (2), applicable to pure personality. Accordingly, where under the will of a testator unauthorised investments are retained under a power to postpone conversion, the rule laid down in *Howe v. Lord Dartmouth* (1802), 7 Ves. 137a, still remains applicable in regard to the income payable to a tenant for life.—*Re* *TROLLOPE'S WILL TRUSTS, PUBLIC TRUSTEE v. TROLLOPE*, [1927] 1 Ch. 596; 96 L. J. Ch. 340; 137 L. T. 375; 71 Sol. Jo. 310.

6062. *Add. Annotation*:—*Apld.* *Johnson v. Clarke*, [1928] Ch. 847.

6074a. — *To pay specialty debt—Mortgage valid as against bond—Executor without notice of bond.*—*WATERLOO INSURANCE CO. v. HIND* (1862), 1 New Rep. 64.

6082. *Add. Annotation*:—*Apld.* *I. R. Comrs. v. Smith*, [1930] 1 K. B. 713.

6085. *Add. Annotation*:—*Re* *Williams, Richards v. Williams*, [1930] 2 Ch. 378.

6117. *Add. Annotation*:—*As to* (1) *Re* *Parker v. Judkin*, [1931] 1 Ch. 475.

6138a. *Effect of Administration of Estates Act, 1926 (c. 23), s. 39.*—*Re* *TROLLOPE'S WILL TRUSTS, PUBLIC TRUSTEE v. TROLLOPE*, No. 6053a, *ante*.

#### PART V. SECT. 2, SUB-SECT. 1.

so. *Before death duties paid—Where security for payment given.*—*R. v. CALEDONIAN INSURANCE CO.*, [1924] 2 D. L. R. 649; [1924] S. C. R. 207.—CAN.

#### PART V. SECT. 2, SUB-SECT. 2.—B. (a) i.

6046 ii. — — — — —. — *A trustee has implied power to sell the residuary estate for the purpose of distribution when it is vested in him to pay expenses & debts.*—*Re* *WALKER'S ESTATE, MACRAE v. DRUMMIE* (1932), 4 M. P. R. 358.—CAN.

#### PART V. SECT. 2, SUB-SECT. 3.—B. (a) i.

f (p. 577) i. — — — — —. — *Where testator charged his debts on his land:—Held: the mere failure of testator to enumerate all his land did not detract from the conclusion that all the land was so charged, & the direction that his debts should be paid by his exors. conferred an implied power of sale upon them for the purpose of paying the debts out of the proceeds.*—*Yost v. ADAMS* (1886), 13 A. R. 129.—CAN.

t (p. 577) i. — — — — —. — *Where executor's power coupled with interest.*—*WESSELS v. CARSCALLEN* (1860), 10 C. P. 215.—CAN.

bb (p. 577) i. — — — — —. — *Legal estate in exors.*—*A devise of land to exors. in trust for the purpose of selling the lands, passes the legal estate & the beneficiaries take an equitable interest.*—*TOOMEY v. BHUPENDRA NATH BOSE* (1928), 1 L. R. 7 Pat. 520.—IND.

t (p. 578) i. — — — — —. — *Where testator directed his trustees to hold*

property for twenty-one years, & then sell it:—*Held: there was no power to sell contrary to the express provisions of the will, except perhaps in a case of emergency.*—*DOBDEL v. LOUDOUN*, [1920] N. Z. L. R. 131.—N.Z.

b (p. 578) i. — — — — —. — *Under Devolution of Estates Act.*—*Re* *LOGAN*, [1927] 4 D. L. R. 1074; 61 O. L. R. 323.—CAN.

h (p. 578) i. — — — — —. — *Interference by court—Whether court will restrain executor from selling.*—*SAMUELSON v. SCHWANDT*, [1927] 3 D. L. R. 565; [1927] 1 W. W. R. 620; 21 Sask. L. R. 341.—CAN.

h (p. 578) ii. — — — — —. — *Sale not necessary for administration purposes—Title of bona fide purchaser.*—*An exor. or administrator has no absolute power to dispose of the property of deceased if it is not necessary for the purpose of administration of the estate, but a bona fide purchaser may be protected in certain cases where a transfer is not for that purpose.*—*TARAKESWAR DAS GUPTA v. AMBICA CHARAN BHATTACHARJEE* (1927), 1 L. R. 55 Cal. 892.—IND.

h (p. 578) iii. — — — — —. — *Option to purchase given—Whether valid.*—*Testator devised all her property to her exors. upon certain trusts, to carry out which they were empowered (inter alia) "to sell & dispose of my real estate . . . in such manner & at such times as they may deem advisable." Being unable to effect a sale of a certain dwelling-house property which upon its conversion into money would form part of the residuary estate, the exors. leased it for 16 months, reserving to themselves the right to determine the lease if they should wish to sell. A few*

weeks later they & the tenant entered into an agreement, called an "option to purchase," under which he made a cash payment & agreed to make monthly payments thereafter in addition to rent, & which also provided that on \$1,000 being thus paid, or at any sooner time, he would be entitled to a conveyance, the amounts so paid as well as the rent to be credited on the purchase price, & the balance to be secured by mtge. payable in monthly payments. The "option" was stated to be irrevocable within the time for "acceptance" thereof, but was to remain in force only so long as the purchaser remained tenant of the property, & payment of \$1,000 at any time during the continuance of the agreement, was to constitute the "acceptance" of the option:—*Held: a sale within the power given by the will.*—*CLOSE v. McMEANS*, [1931] 2 W. W. R. 550; [1932] 1 D. L. R. 210; 40 Man. L. R. 31.—CAN.

#### PART V. SECT. 2, SUB-SECT. 3.—B. (a) ii.

1 i. *S. P. McCURDY v. McDANIEL* (1863), 7 N. S. R. (1 G. & O.) 267.—CAN.

#### PART V. SECT. 2, SUB-SECT. 3.—B. (b).

p i. — — — — —. — *Testator gave his real & personal property to trustees upon certain trusts. He charged his estate with the payment of his debts & succession duties. The personal property was not sufficient to satisfy them, & it was not in the interests of the estate, owing to market conditions, to sell the real estate. The will gave the trustees no express power to mtge.:—*Held: the trustees had power**

6147. *Add. Annotation*:—As to (1) *Re*fd. Parker v. Judkin, [1931] 1 Ch. 475.
6161. *Add. Annotation*:—*Re*fd. Parker v. Judkin, [1931] 1 Ch. 475.
6177. *Add. Annotation*:—*Re*fd. Parker v. Judkin, [1931] 1 Ch. 475.
6178. *Add. Annotations*:—*Re*fd. *Re* Murphy's Estate, Morton v. Marchanton (1930), 74 Sol. Jo. 321; Parker v. Judkin, [1931] 1 Ch. 475.
6271. *Add. Annotation*:—*Consd. Re* Mansel, Smith v. Mansel, [1930] 1 Ch. 352.
- 6281a. —.]—Testator, who died on May 17, 1916, by his will appointed appcts. exors. & trustees, & bequeathed a number of absolute & settled pecuniary legacies. Testator gave all his estate whatsoever unto appcts. upon trust for sale & conversion at such time & manner as they should think fit, with power & discretion to postpone sale & conversion & charged the moneys to arise with the legacies bequeathed by his will. Testator's will contained a residuary bequest, investment clause in wide terms, & a power to appcts. to appropriate any part of the estate in its actual condition in satisfaction of any legacy. The principal asset of testator's estate was a sum of nearly a quarter of a million pounds Irish Three per cent. Guaranteed Stock, & the

estate was insufficient for payment in full of all the legacies. The Irish stock could not be sold even at a reduced market value of £151,411 & in the interests of the estate it was inexpedient to realise it at once. Appcts. having caused to be prepared a scheme of apportionment, appropriation & abatement among & between the legacies, applied by an originating summons issued on June 27, 1917, to the ct. for its sanction:—*Held*: appcts. could exercise the discretionary power of appropriation notwithstanding the fact that some of the legacies were settled by testator's will.—*Re* DANIELS, LONDON CITY & MIDLAND EXECUTOR TRUSTEE CO., LTD. v. DANIELS (1918), 87 L. J. Ch. 661; 118 L. T. 435.

- 6326a. *Grant to trust corporation*.]—Where letters of administration are granted to a trust corp., the ct. may give the corp. power to charge on the authorised scale.—*In the Estates of* YOUNG (1934), 103 L. J. P. 75; 151 L. T. 221; 50 T. L. R. 424; 78 Sol. Jo. 431.
6330. *Add. Annotations*:—*Consd. Re* Hill's Trusts, Claremont v. Hill, [1934] Ch. 623. *Re*fd. *Re* Gates, Arnold v. Gates, [1933] Ch. 913.
6331. *Add. Annotation*:—As to (1) *Re*fd. *Re* Gates, Arnold v. Gates, [1933] Ch. 913.
6334. *Add. Annotations*:—*Re*fd. *Re* Gates, Arnold v. Gates, [1933] Ch. 913; *Re* Hill's Trusts, Claremont v. Hill, [1934] Ch. 623.

to mtge. the real estate for the purpose of paying the debts & succession duties, & they could borrow by way of mtge. from one of themselves.—*Re* HIGGINS, HIGGINS v. HIGGINS (1932), 4 M. P. R. 365.—CAN.

6145 II. —.]—*Held*: although there was no express devise of realty to the exors., a devise was implied by the terms of the will, & there being a general charge of debts, the exors. had full power to give a mtge.—*BANQUE PROVINCIALE DU CANADA v. CAPITAL TRUST CORPN.*, [1927] 3 D. L. R. 199; 60 O. L. R. 452.—CAN.

PART V. SECT. 2, SUB-SECT. 3.—  
B. (c).

sp. Power to reserve benefit to one beneficiary.—Out of lands devised to another beneficiary.—*MCKENZIE v. GRANT* (1856), 13 U. C. R. 180.—CAN.

PART V. SECT. 2, SUB-SECT. 3.—  
C. (a).

h i. Sale under licence of Probate Court.—Whether licence conclusive.—Licence obtained improperly.—*DOE v. THOMPSON* (1800), 9 N. B. R. (4 All.) 483.—CAN.

h ii. —. —. Sufficient personal property for payment of debts.—*DOE d. SULLIVAN v. CURREY* (1872), 14 N. B. R. (1 Pug.) 175.—CAN.

st. Conveyance inoperative.—*TEAHON v. LEAMEY* (1861), 21 U. C. R. 216.—CAN.

sw. Effect of sale after three years.—*Devolution of Estates Act*, 1927 s. 12.]—C., the owner of land, died on Dec. 20, 1925, intestate. Letters of administration were granted to his daughter A., who was his sole heiress-at-law & next of kin. On Feb. 17, 1926, she, as administratrix, conveyed in fee to R., who, on the same day, conveyed in fee to A. & her husband, as joint tenants. No caution having been registered by A. as administratrix & no certificate of *lis pendens* having been registered by any creditor:—*Held*: after Dec. 20, 1928, the three-year period during which the estate was vested in A. as administratrix having elapsed, she & her husband were entitled, by *Devolution of Estates Act*,

s. 12, to convey, to a purchaser in good faith & for valuable consideration, who has no notice of the existence of any claims of creditors, a title free from any liability for the debts of C.—*Re* DOWN & STINBERG, [1929] 3 D. L. R. 70; 63 O. L. R. 541.—CAN.

PART V. SECT. 2, SUB-SECT. 3.—  
C. (b).

o i. —.]—*Held*: testator having charged a legacy on his estate, & having devised his estate to his exor. gave his exor. a power of sale apart from the residuary clause which might be exercised without the purchaser being put on inquiry to ascertain if it was duly exercised.—*KENNEDY v. SUYDAM* (1916), 36 O. L. R. 512.—CAN.

PART V. SECT. 3, SUB-SECT. 1.

sa. Power to reduce debt & execute quit-claim deed.]—Where testator had agreed to sell land to K., & the exors. reduced the purchase price in order to keep K. on the land, & later gave T., from whom testator had bought the land, a quit-claim deed of all their interest in the land:—*Held*: (1) the action of the exors. in reducing the price payable by K. was reasonable & proper; (2) they should not have executed the quit-claim deed without applying, under *Trustee Act*, R. S. S., 1920 (c. 75), s. 64, to a Judge of the King's Bench for advice, but, since they had acted honestly & in what they considered to be the best interests of the estate, their failure to do so should be excused under sect. 44.—*LEMOCKE v. NEWLOVE* (Sask.), [1926] 4 D. L. R. 293; [1926] 2 W. W. R. 830; varied [1927] 2 D. L. R. 1049; S. C. R. 389.—CAN.

PART V. SECT. 6, SUB-SECT. 1.

a (p. 597) i. —.]—*Re* VINNY-COMBE ESTATE, [1934] 1 W. W. R. 780.—CAN.

dd i. —.]—Where by a will part of the corpus of the estate was set aside & a life interest in the income thereof given to the widow:—*Held*: (1) all the costs of administering the trusts relating to the devised property must be borne by the subject-matter

of the gift, which comprised the income as well as the corpus; & the percentage allowed to the exors. for collecting the rents must be charged against the income; (2) expense incurred for repairs to a building upon the land devised was properly charged against the corpus; (3) interest on money borrowed to meet the expenditure made in order to preserve the property was chargeable to income.—*Re* VAIR (1923), 54 O. L. R. 497.—CAN.

l (p. 601) i. —. Under *Trustee Act*, R. S. B. C., 1924 (c. 262), s. 80.—Amount limited to 5 per cent. of gross value of estate.—*Re* BECKMAN'S ESTATE (1925), 37 B. C. R. 41.—CAN.

n (p. 601) i. —.]—A fee amounting to 5 per cent. of the total value of the estate in question held to be an exorbitant fee, under the circumstances, to allow executors for their services; & a fee of 1 per cent. of the total value was held ample. The exors. were also allowed their disbursements actually made or actually incurred.—*Re* BEYER ESTATE, [1932] 3 W. W. R. 587.—CAN.

n (p. 601) ii. —.]—Compensation to be allowed an exor. or trustee is a matter of wide discretion.—*Re* MORTIMER, [1936] 3 D. L. R. 380; O. R. 438.—CAN.

t (p. 601) i. —.]—*Re* BUSCH, [1927] 2 D. L. R. 344; 254.—C.

g (p. 602) i. —. Not after estate properly administered & accounts passed.—*Re* OXENHAM, [1926] 2 D. L. R. 662.—CAN.

sb. Liability for Beneficiary entitled to specific bequest benefited by work of executor.]—There is no jurisdiction in the ct. to order that the remuneration of an exor. be paid out of a specific bequest on account of its benefiting by the work of the exor.—*In the Estate of* RATHBONE, [1929] N. Z. L. R. 123.—N.Z.

sd. Management fee.]—Sect. 80 of *Trustee Act*, R. S. B. C., 1924, does not confer any power on the ct. to allow a management fee to exors.—*Re* MCINTOSH ESTATE, [1934] 3 W. W. R. 255; 49 B. C. R. 297.—CAN.



6341. *Add. Annotation*:—*Consd. Jones v. Wright* (1927), 139 L. T. 48.

6341a. ——— Charges for work in execution of statutory trusts.]—By his will testator directed that his trustees should stand possessed of certain hereditaments upon certain trusts, & declared that any exor. or trustee of his will, who was a solr. or a person engaged in any profession or business, might individually, or through his firm, act in the course of his profession or business on behalf of the exors. & trustees, & charge for so doing:—*Held*: as the land was vested in the trustees upon the statutory trusts, any exor. or trustee of the will, who was a solr. or a person engaged in a profession or business, was entitled, under the will, to charge for work or business done in the execution of the statutory trusts, because such work or business would be done on behalf of the exors. & trustees.—*Re PEDLEY, WALLACE v. WALLACE*, [1927] 2 Ch. 168; 96 L. J. Ch. 438; 137 L. T. 636; 71 Sol. Jo. 583.

6348. *Add. Annotations*:—*Consd. Re Hill's Trusts, Claremont v. Hill*, [1934] Ch. 623. *Refd. Re Gates, Arnold v. Gates*, [1933] Ch. 913.

6350. *Add. Annotation*:—*Distd. Re Gertzenstein, Ltd.*, [1936] 3 All E. R. 341.

6370. *Add. Annotation*:—*Refd. Re Anderson-Berry, Harris v. Griffith*, [1928] Ch. 290.

6386a. ———.]—*Re LEWIS, JENNINGS v. HEMSLEY* (1938), 159 L. T. 600; 55 T. L. R. 53; 82 Sol. Jo. 931.

6388a. ———.]—Leasehold property belonging to testator, who was original lessee, having been directed to be sold & the proceeds divided:—*Held*: the exors. were entitled to be indemnified out of the proceeds.—*SMITH v. SMITH* (1854), 2 Eq. Rep. 727.

6405. *Add. Annotation*:—*Refd. Re Murphy's Estate, Morton v. Marchanton* (1930), 74 Sol. Jo. 321.

6409. *Add. Annotation*:—*As to* (2) *Distd. Re Murphy's Estate, Morton v. Marchanton* (1930), 74 Sol. Jo. 321.

## Part VI.—Liability of Representative.

6446a. ——— Sale of goodwill of business—Solicitation of customers.]—The rule in *Trego v. Hunt*, [1896] A. C. 7, extends to a vendor's exor. completing a contract for the sale of the goodwill of a business, & the exor. will be restrained at the suit of the purchaser from soliciting customers of the business.—*BOORNE v. WICKER*, [1927] 1 Ch. 687; 96 L. J. Ch. 361; 137 L. T. 409; *sub nom. BORNE v. WICKER*, 71 Sol. Jo. 310.

*Annotations*:—*Distd. Re Thomson, Thomson v. Allen*, [1930] 1 Ch. 203. *Refd. Farey v. Cooper*, [1927] 2 K. B. 384.

### PART V. SECT. 7, SUB-SECT. 1.

n i. ———.]—*STORY v. DUNLOP* (1867), 13 Gr. 375.—CAN.

n ii. ———.]—*Re WILLIAMS* (1895), 22 A. R. 196.—CAN.

### PART V. SECT. 7, SUB-SECT. 2.—A.

r i. ———.]—*In respect of guarantee—Distribution of estate in ignorance of guarantee.*]—*SAUDRY v. HAMPTON*, [1927] N. Z. L. R. 673.—N.Z.

r ii. ———.]—*In respect of debt contracted for estate—Right of creditor to benefit of representative's right to indemnification.*]—Where an exor. contracts a debt on behalf of the estate the creditor is in equity entitled to the benefit of the exor.'s right to be indemnified out of the assets of the estate in the hands of the beneficiaries.—*NETHERLANDS INVESTMENT CO. v. DESBRUSAY*, [1928] 1 D. L. R. 581; [1928] 1 W. W. R. 461; 23 Alta. L. R. 291.—CAN.

### PART V. SECT. 7, SUB-SECT. 3.

s. Representative not authorised by will.—Beneficiaries claiming profits of business—Right of representative to be indemnified.]—*M'GINLEY v. GALLAGHER*, [1929] 1 R. 307.—IR.

### PART V. SECT. 8.

sh. To receive payment of lump sum for which pension commuted by deceased.]—*R. v. MCCORMISTON*, [1926] 4 D. L. R. 1086.—CAN.

sl. To bring action—To set aside tax sale of land belonging to estate.]—*RODGER v. MORAN* (1896), 28 O. R. 375.—CAN.

### PART V. SECT. 9.

6426 i. ———.]—*Power of executor to bind—Co-executor.*]—*Held*: a settlement made by an exor. precluded the co. exor. & cestuis que trust from opening up the estate so settled.—*Re BATH'S ESTATE* (1879), 12 N. S. R. (3 R. & C.) 604.—CAN.

### PART V. SECT. 10.

6438 iii. ———.]—*Re HEWETT v. JERMYN* (1898), 29 O. R. 383.—CAN.

### PART VI. SECT. 1.

sl. For failure to prove—Who may sue for penalty.]—Next of kin, although taking no interest under the will, is a "person having an interest in the estate" within Probate Act, R. S. N.S., 1923, s. 137 (1), & so may sue for the statutory penalty against an exor. who fails to prove the will.—*DUNN v. MACGREGOR*, [1934] 3 D. L. R. 463.—CAN.

### PART VI. SECT. 2, SUB-SECT. 3.

6501 i. *Covenant to pay debt—Under mortgage.*]—In a will, the only provision for the payment of debts, was the usual one, that all testator's first debts should be paid by his exors. At the time of his death, a parcel of land was held in joint tenancy by testator & his wife, subject to a mtge.:—*Held*: the wife on death of testator, became owner subject to the mtge., & as between her & testator's estate, she was not entitled to call upon the estate to pay the mtge.; but if mtgee. could recover from testator's estate upon a covenant by testator for payment, dissolution of testator's interest could

not deprive mtgee. of that right.—*Re GRACEY* (1925), 63 O. L. R. 218.—CAN.

sg. *Covenant in mortgage.*]—A claim for money due under mtge. is not a "claim or demand" against the estate within Ontario Surrogate Cts. Act, R. S. O., 1927.—*LONDON & WESTERN TRUST CO. v. SALE*, [1936] 2 D. L. R. 297; O. R. 244.—CAN.

### PART VI. SECT. 2, SUB-SECT. 5.

6521 ii. ———.]—*WHYATT v. MARSH* (1848), 4 U. C. R. 485.—CAN.

g. *Add. Citation:—restd. sub nom. M'GUGAN v. SMITH* 1892, 21 S. C. R. 263.—CAN.

g i. ———.]—*MURDOCH v. WEST* (1895), 24 S. C. R. 305.—CAN.

g ii. ———.]—*GRAY v. JOHNSTON*, [1928] S. C. 659.—SCOT.

g iii. ———.]—*JEFFERSON v. MUISE*, [1930] 4 D. L. R. 208.—CAN.

k i. ———.]—*Re STRETTON ESTATE, CAY & HILL v. MARCOTTE*, [1930] 1 W. W. R. 824; 2 D. L. R. 700; 24 S. L. R. 481.—CAN.

sk. *Necessity for consideration.*]—The mother of ptf. made a will by which she devised certain land with a house on it to ptf., who was at that time living in it with her husband. Before the will was made, according to ptf.'s story, her husband wished to live elsewhere, & her mother said: "Do not leave; stay on here & fix this house up & I will leave it to my daughter (ptf.) at my death." The husband & wife stayed on & made improvements, relying on the promise, & the mother made the will leaving

6595. *Add. Annotation*:—*Consd.* Beaumont v. Beaumont, [1933] P. 39.

6596. *Add. Annotation*:—*Consd.* Beaumont v. Beaumont, [1933] P. 39.

6597. *Add. Annotation*:—*Consd.* Beaumont v. Beaumont, [1933] P. 39.

6598. *Add. Annotation*:—*Consd.* Beaumont v. Beaumont, [1933] P. 39.

6600. *Add. Annotations*:—*Folld.* Firman v. Royal, [1925] 1 K. B. 681. *N.F.* *Re* Hedderwick, Morten v. Brinsley, [1933] Ch. 669.

6602. *Add. Annotation*:—*As to* (1) *Refd.* A.-G. v. Midland Bank Executor & Trustee Co. (1934), 19 Tax Cas. 136.

6610. *Add. Annotation*:—*Generally*, *Refd.* *Re* Field, Sanderson v. Young, [1925] Ch. 636.

6611. *Add. Annotation*:—*Refd.* *Re* Weld-Blundell Estate, Mowbray (Lord) v. Weld-Blundell (1929), 73 Sol. Jo. 585.

6667a. — *Non-repair by representative.*—In debt for rent against an administrator, as assignee of the intestate, deft. pleaded, in discharge of his liability otherwise than as administrator, that the intestate underlet, for an unexpired term, to a tenant who had become insolvent & unable to pay rent; that the premises were of less value than the rent, viz. of the value of a certain sum, part of which deft. had paid to pltf., & part towards the expense of a party-wall; that, before the rent became due, deft. offered to surrender all his interest in the premises to pltf., who refused to accept them; & that he had fully administered, etc. Replication; that the premises were of more value than the sum mentioned in the plea, viz. of the value of the rent; & that deft. did not offer to surrender, etc. Issue thereon:—*Held*: (1) the real value of the premises, as against deft., must be taken to be that which it would have been if he had not himself committed a breach of a covenant to repair in the original lease; (2) the value, as between pltf. & deft., was not affected by the insolvency of the under-tenant, whose lease also contained a covenant to repair with a proviso of re-entry for breach & for non-payment of rent.—*HORNIDGE v.*

WILSON (1840), 11 Ad. & El. 645; 3 Per. & Dav. 641; 9 L. J. Q. B. 72; 113 E. R. 559.

*Annotations*:—*As to* (1) *Consd.* *Re* Bowes, Strathmore v. Vane, Norcliffe's Claim (1887), 37 Ch. D. 128. *Refd.* *Rendall v. Andrew* (1892), 61 L. J. Q. B. 630.

*B. Effect of Death* (p. 644).

*See, now*, Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1.

6711. *Add. Annotation*:—*Apld.* Graves v. Cohen (1929), 46 T. L. R. 121.

6712. *Add. Annotation*:—*Consd.* Riley v. Brown (1929), 98 L. J. K. B. 739.

6713. *Add. Annotation*:—*As to* (1) *Consd.* Riley v. Brown (1929), 98 L. J. K. B. 739.

6713a. —.]—An action for damages for breach of promise of marriage abates on the death of the alleged promisor & cannot be continued against the exors. of the deceased unless special damage can be proved. Such special damage must arise directly or naturally out of the transaction between the parties to the breach & must relate to matters within the contemplation of the parties at the time the alleged promise was made.—*RILEY v. BROWN* (1929), 98 L. J. K. B. 739; 142 L. T. 42; 45 T. L. R. 613; 73 Sol. Jo. 499.

6723. *Add. Annotation*:—*Consd.* Firman v. Royal, [1925] 1 K. B. 681.

### SECT. 3.—FOR TORTS OF DECEASED (p. 646).

*See, now*, Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1.

6730. *Add. Annotation*:—*Refd.* A.-G. v. Midland Bank Executor & Trustee Co. (1934), 19 Tax Cas. 136.

6745. *Add. Annotation*:—*Consd.* A.-G. v. Canter, [1938] 3 All E. R. 329.

6762. *Add. Annotation*:—*Refd.* *Re* Field, Sanderson v. Young, [1925] Ch. 636.

6770a. *Negligence.*—A co. was formed for the purpose of buying the business of a firm of bill brokers, & by the memorandum of assocn.

the property to pltf. Subsequently the mother made a new will leaving the property to another daughter. In an action for specific performance of the alleged agreement:—*Held*: there was no corroboration of pltf.'s evidence & no consideration passing to deceased for the binding contract alleged.—*HOLLIDAY v. TURNER*, [1930] 3 D. L. R. 205; 65 O. L. R. 206.—*CAN.*

### PART VI. SECT. 2, SUB-SECT. 10.—D.

6595 i. — *Matrimonial causes—Order for costs against husband.*—A wife, whose husband had died after a decree nisi for divorce & before the date when it could have been made absolute:—*Held*: not entitled, there being no funds in ct., to costs against his estate.—*JARVIS v. JARVIS*, [1925] 8 D. L. R. 415; [1925] 1 W. W. R. 247.—*CAN.*

### PART VI. SECT. 2, SUB-SECT. 12.—B. (b) i.

6678 i. *Personal liability—As assignee.*—In Mar. 1921, pltf. executed a lease of land & buildings to H., & M. covenanting to allow the lessees to erect a partition on the ground floor of the chief building, & himself to contribute \$1,000 towards the cost. The

partition was built, pltf. contributed the \$1,000 & the lessees went into possession. H. died in Jan. 1923, & his wife, deft. A., & deft. co., the executors named in the will, obtained probate thereof. In Oct. 1923, M. made an assignment in bkpcy. & deft. co. was appointed custodian of the bkpt. estate. Pltf.'s claim in this action was to recover a large sum made up of rent, taxes, cost of repairs & interest. He alleged that defts. entered into, & from Jan. 1923, continued in possession & receipt of the rents & profits & claimed payment from them personally:—*Held*: deft. co. entered upon the premises not merely in its representative capacity as exor., but personally as assignee of the term, & as such was personally chargeable with the amount of rents & profits which it received, & with such further sums as it might have received if it had used due diligence, but not exceeding in the aggregate the full amount of the actual rental value of the premises.—*RYCKMAN v. TRUSTS & GUAR. CO.*, [1929] 1 D. L. R. 545; 63 O. L. R. 285; 10 C. B. R. 414.—*CAN.*

### PART VI. SECT. 3, SUB-SECT. 1.

6726 i. *General rule—Representatives*

*not liable.*—*CONNOLLY v. SHIVES* (1879), 18 N. B. R. 606.—*CAN.*

6726 ii. —.]—*LESLIE v. CALVIN* (1885), 9 O. R. 207.—*CAN.*

ri. — *To negligence in management of ship.*—*CAMERON v. MILLOY* (1872), 22 C. P. 331.—*CAN.*

### PART VI. SECT. 3, SUB-SECT. 2.—A.

k i. —.]—An action of tort for damages for the destruction of personal property because of the negligence of deceased in driving a motor-car in which pltf. was a passenger falls within Administration Act, R. S. B. O., 1924, s. 71; but claims for personal injuries & a claim by a father for the death of a child fall within the rule *actio personalis moritur cum persona*.—*KIRK v. LEE*, [1934] 2 W. W. R. 175; 3 D. L. R. 373; 48 B. C. R. 233.—*CAN.*

### PART VI. SECT. 3, SUB-SECT. 4.

sl. *Negligence & fraud.*—An action by a bank against one of its directors for negligence & fraud is not one to which the maxim *actio personalis moritur cum persona* applies, being an action for breach of quasi-contract.—*PEOPLES BANK OF NORTHERN INDIA v. HARGOPAL* (1735), 1 L. R. 17 Lab. 262.—*IND.*

the directors were empowered to buy it upon such terms & under such stipulation as to guarantee or otherwise as might be agreed upon. The prospectus referred to the memorandum of assocn. & to a certain deed of covenant. By that deed the business was assigned to the co., & all accounts, except such as the directors should require to be reserved & excepted, were to be carried on by the co., & the partners in the business guaranteed that all debts due to the firm & taken over by the co. were good. By a second deed of the same date, not mentioned or disclosed to the shareholders, assets of the firm to the nominal value of £4,213,896 were reserved & excepted, & provisions were made for guaranteeing payment by the partners of the balance which, after a certain period & under certain arrangements, should not be got in on this account. The co. carried on business for some time, & then stopped payment. A bill was filed by the co. against the living directors & the exors. of a deceased director stating these facts, & that the co. had lost £1,500,000 by taking the liabilities of the business, & by the insufficiency of the guarantee, & charged that the directors had been guilty of a breach of duty in buying the business without obtaining the sanction of a general meeting, & in not taking mtgs. on the property of the partners in order to secure the guarantee, but no fraud was charged against the directors:—*Held*: on demurrer by the exors. of the deceased director, that as regarded any loss beyond the money placed in the directors' hands, the remedy, if any, was at law, by an action of negligence, which would not survive against exors.—*OVEREND, GURNEY & Co. v. GURNEY* (1869), 4 Ch. App. 701; 21 L. T. 73; 39 L. J. Ch. 45, L. C.; *affd. on other grounds, sub nom. OVEREND, GURNEY & Co. v. GIBB* (1872), L. R. 5 H. L. 480, H. L.

**6771a. Action for penalties—False income tax return.**—Deceased had incurred liabilities to the Inland Revenue in respect of incorrect statements made in his returns for income tax for the years ending Apr. 5, 1932, & Apr. 5, 1933. No proceedings were taken against him during his lifetime, but proceedings were commenced against his executrix on July 26, 1937. The question was whether the cause of action in such a case by virtue of Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1), was made to survive against

the estate of deceased, & whether such proceedings were in respect of a cause of action in tort within sect. 1 (3) of that Act:—*Held*: (1) the cause of action survived against the estate of the deceased under sect. 1 (1) of the Act of 1934; (2) it was not a cause of action in tort within sect. 1 (3) of that Act.—*A.-G. v. CANTER*, [1938] 2 K. B. 826; [1938] 3 All E. R. 329; 107 L. J. K. B. 690; 159 L. T. 412; 54 T. L. R. 954; 82 Sol. Jo. 494.

**6835. Add. Annotation:—***Refd. Hardie & Lane v. Chilton*, [1928] 2 K. B. 306.

**6840. Add. Annotation:—***Refd. Royal Exchange Assce. v. Hope*, [1928] Ch. 179.

**6850. Add. Annotation:—***Consd. Flower v. Prechtel* (1934), 150 L. T. 491.

**6850a. Disturbance of easement.**—D. sold to pltf. a house, No. 10, together with a right of way over a strip of land 10 ft. broad to the garden of the house. D. died, & at the time of his death was under contract with the purchaser of the adjoining house, No. 11, to erect a garden fence for him & to give him a similar right of way to his garden. Pltf. entered No. 10 shortly after the death of D. & a few days later H., a sub-contractor, on the orders of W., the builder of the houses, erected the fence at the back of No. 11 so as to constrict the right of way granted by D. to pltf. Pltf. sued defts., the exors. of D. as exors., & by his amended statement of claim founded his action (a) in breach of covenant, & (b) in nuisance, but it was argued solely as an action of tort. These facts being proved by pltf., defts. called no evidence, & there was no evidence of the contract of D. with W., the builder. The trial judge found that the fence was erected by W. on the instructions of the exors. of D., defts., & gave judgment for pltf.:—*Held*: the appeal must be dismissed.—*FLOWER v. PRECHTEL* (1934), 150 L. T. 491, C. A.

**6861a. ————**—*BEAUMONT v. GROVER* (1701), 1 Eq. Cas. Abr. 8; 21 E. R. 833.

**6861b. ————**—*KEMISH v. BETSON* (1732), Kel. W. 74; 25 E. R. 497.

**6864. Add. Annotation:—***Refd. Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v. Estate & Trust Agencies* (1927), Ltd., [1938] A. C. 624.

**6893. Add. Annotation:—***Refd. Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v.*

#### PART VI. SECT. 4, SUB-SECT. 1.

*ad. Release by co-executor—Whether binding on beneficiary.*—A release of an exor. from liability for breach of trust by a deceased co-exor. will not be set aside when it has been adopted by the beneficiary with knowledge of his right to take proceedings.—*BELLEVUE v. TAIT*, [1935] 1 D. L. R. 726; 8 M. P. R. 567.—*CAN.*

#### PART VI. SECT. 4, SUB-SECT. 2.—A.

*e i. ————*—A contract made by an exor. or administrator on behalf of the estate, but not relating to an obligation incurred by testator or intestate, renders him personally liable, even though it is expressed to be made "as exor." or "as administrator."—*WALCH v. NORDBRIST*, [1926] 4 D. L. R. 126 [1926] 2 W. W. R. 854; 36 Man. L. R. 46.—*CAN.*

*d i. ————*—*Administrator guilty of fraud.*—*DOE d. DOBIE v. VANDERLII*

(1836), 5 O. S. 85.—*CAN.*

#### PART VI. SECT. 4, SUB-SECT. 3.

**6849 i. Executor primarily liable—Right to indemnity—From testator's estate—If acting in interests of estate.**—An exor. is personally liable for tort committed by him & should be sued personally. He is entitled to an indemnity from the estate if the tort was committed while acting reasonably in the interests of the estate.—*GROUNDWATER v. GROUNDWATER* (1935), 10 M. P. R. 56.—*CAN.*

#### PART VI. SECT. 4, SUB-SECT. 5.—A. (a).

**6851 i. Sale of testator's estate—Below proper value.**—Defts., as exors. of a will, were directed by the will to sell lands of testatrix, & distribute the proceeds among her children & a grandchild. In this action, pltf., two of the

children, alleged that defts., exors., had committed a breach of trust by selling the lands at a gross undervalue. Pltf. gave a notice for trial by jury, & the action was tried with a jury, & judgment entered upon its findings in favour of pltf. for the recovery of damages:—*Held*: the evidence established no negligence on the part of defts., & no breach of trust.—*DAVIES v. NELSON*, [1928] 1 D. L. R. 254; 61 O. L. R. 457.—*CAN.*

**6863 ii. ————**—Where exors. are held liable to the estate for what it has lost by their disposition of an agreement for the sale of land entered into by testator under the crop-payment plan, the main consideration in determining the value of the asset lost to the estate is the value of the purchaser's covenant to pay.—*LEMCKE & CRAIK v. NEWLOVE & NEWLOVE* (Sask.), [1929] 2 D. L. R. 516; 1 W. W. R. 761.—*CAN.*

Estate & Trust Agencies (1927), Ltd., [1938] A. C. 624.

6911. *Add. Annotation:—Apld. Re Munton, Munton v. West, [1927] 1 Ch. 262.*

6915a. *Liability of executor for "wilful default"—What amounts to.*—Pltfs. were the two sons of testatrix, entitled in equal shares to her estate undisposed of by her will, including £214 14s. 5d. in the Post Office Savings Bank & £62 4s. in Savings Certificates. Deft., as sole exor. of testatrix, employed to wind up her estate a solr. who, unknown to him, had at one time been suspended from practice, & who obtained from the first pltf. the Post Office Savings Bank deposit book & the Savings Certificates. Deft. heard for the first time of the solr.'s suspension three months later, when the first pltf. told him of it. Under def't.'s written authority, a warrant valued at £62 4s. had been issued in favour of the solr.'s firm, & the first pltf. wrote to def't. objecting to his having taken that course. Later, the first pltf. asked def't. to employ another solr., but def't. did not do so, as the solr. was then promising to settle the matter. Ultimately the solr. absconded, & the sums of £14 14s. 5d. & £62 4s. were not recovered. In an action by pl'tfs. for a declaration that def't. was guilty of a breach of trust in permitting the sums to be retained by the solr., & for payment of them, def't. in his defence relying upon Trustee Act, 1925 (c. 19), s. 23:—*Held*: Trustee Act, 1925 (c. 19), s. 23 (1), authorised def't. in signing the authorities to the solr.'s firm to collect the sums; (2) by virtue of sect. 30 (1) of the Act, trustees are not liable for losses due to the default of "any banker, broker, or other

person with whom any trust money or other securities may be deposited" unless the losses are caused by the trustees' own wilful default; (3) an exor. employing an agent to receive moneys belonging to the estate & relying on sect. 23 (1), will not be liable if the money is lost through the agent's misconduct, unless the exor. has himself been guilty of wilful default; (4) def't. was guilty only of an error of judgment which, where losses are due to a solr.'s dishonesty, does not amount to "wilful default" on the part of an exor.—*Re VICKERY, VICKERY v. STEPHENS, [1931] 1 Ch. 572; 100 L. J. Ch. 138; 144 L. T. 562; 47 T. L. R. 242.*

6922. *Add. Annotations:—Consd. Re City Equitable Fire Insce., [1925] Ch. 407; Re Vickery, Vickery v. Stephens, [1931] 1 Ch. 572.*

7059. *Add. Annotation:—Refd. Re Munton, Munton v. West, [1927] 1 Ch. 262.*

7163. *Add. Annotation:—Consd. Manley v. Sartori, [1927] 1 Ch. 157.*

7168. *Add. Annotation:—Refd. Barlow v. I. R. Comrs. (1937), 21 Tax Cas. 354.*

7169a. —.—]—*FLOCKTON v. BUNNING (1868), 8 Ch. App. 323, n.*

7190a. —.—]—*Exors. must be allowed a reasonable time for breaking up testator's domestic establishment & discharging his servants. Two months:—Held: not to be an unreasonable delay, having regard to the circumstances.—FIELD v. PECKETT (No. 3) (1861), 29 Beav. 576; 9 W. R. 525; 54 E. R. 751.*

7190b. —.—]—*BROWNE v. COLLINS, No. 6308, ante.*

7214. *Add. Annotation:—Refd. Re Bracey, Hull v. Johns, [1936] 2 All E. R. 767.*

PART VI. SECT. 4, SUB-SECT. 5.—  
A. (c).

6906 i. *Insurance of property.*—In Ontario exors. are bound to insure, against fire, buildings forming part of the estate in their hands, & are liable on a *devastavit* if they fail to insure.—*Re GAMBLE, [1925] 4 D. L. R. 768; 57 O. L. R. 504.—CAN.*

s i. —. —. —.]—*AULD v. DAVIS, [1937] 3 W. W. R. 368; 4 D. L. R. 439; 7 F. L. J. (Can.) 179.—CAN.*

PART VI. SECT. 4, SUB-SECT. 5.—  
A. (d).

69131. *Misappropriation—By agent—Agent previously employed by deceased.*—Exors., relying in good faith on the statement of their testator's solr. that he had in his hands securities sufficient to answer a fund they were directed by the will to invest for an annuitant, distributed the estate. Subsequently it was found that before testator's death the solr. had misappropriated the money given to him by testator to invest, & had, in fact, at the time of the representation, no securities or money in his hands.—*Held*: the exors. were protected by Trustee Limitation Act, R. S. O. 1897, c. 129, s. 32.—*CLARKE v. BELLAMY (1900), 27 A. R. 435.—CAN.*

6913 ii. —. —. —.]—*An administrator acting for infants who pays funds to his solr. to be paid to the official guardian of the infants, which funds are never received, is guilty of gross negligence & breach of trust.—RENJAMIN v. HASKELL, [1936] 4 D. L. R. 465.—CAN.*

PART VI. SECT. 4, SUB-SECT. 5.—  
C. (a).

6979 1. *Bar to enforcement of remedy—*

*Conduct of party injured—Delay.*—*MEACHAM v. DRAPER (1861), 2 Gr. 316.—CAN.*

PART VI. SECT. 6, SUB-SECT. 1.

f i. —. *Liability of executor for solicitor's costs.*—An exor. who fails to keep proper records may be personally liable to a solr. for extra work in preparing accounts due to the exor.'s default.—*Re A SOLICITOR, [1934] 2 D. L. R. 761; O. R. 241.—CAN.*

sd. *Jurisdiction of court—To call upon executors to account.*—The Surrogate Ct. has jurisdiction to call upon an exor. to account even before the expiration of the two years provided for in his letters probate.—*Re NORRTOMME ESTATE, [1928] 3 W. W. R. 290.—CAN.*

PART VI. SECT. 6, SUB-SECT. 2.—  
B. (b).

sm. *Not where administration granted on application of party interested adversely to executor.*—*HARRISON v. MOGLASHAN (1859), 7 Gr. 531.—CAN.*

PART VI. SECT. 6, SUB-SECT. 5.—B.

sn. *Counsel's fee—For general work & advice—Not allowed.*—*Re DODGE ESTATE, [1925] 1 D. L. R. 1140; [1925] 1 W. W. R. 776.—CAN.*

so. —. —. —.]—*Unless estate difficult to manage or solicitor required to render services by way of business management.*—*Re ROEMER (Sask.), [1927] 3 W. W. R. 603; varied sub nom. Re ROEMER ESTATE, Re MOTT v. ROEMER, [1928] 3 D. L. R. 860; [1928] 2 W. W. R. 566.—CAN.*

sr. *Upkeep of family vault.*—An exor. is entitled to a reasonable allow-

ance for the perpetual upkeep & care of the family vault.—*Re MURRAY, [1936] 1 D. L. R. 463.—CAN.*

PART VI. SECT. 6, SUB-SECT. 5.—  
C. (a).

7200 1. *Under special circumstances.*—Where the circumstances of the case render it reasonable that they should do so exors. are entitled to employ the services of such agents as may be necessary.—*Re LEVEL ESTATE, [1927] 1 D. L. R. 900; [1927] 1 W. W. R. 1000; 38 B. C. R. 211.—CAN.*

PART VI. SECT. 6, SUB-SECT. 5.—  
D. (a).

sp. *Increased fee to counsel—Necessity of notice to parties interested.*—In a proper case, an increased counsel fee should be allowed the solr. of the exor. as between solr. & client. It is impossible to lay down any fixed rule governing such amounts. The increased fee should not be applied for or granted without notice to the parties interested; but in the present case, since the parties were all before the ct. & had argued the point, an increased counsel fee on the passing of accounts was allowed to save further expense, although notice that it would be applied for had not been given.—*Re MACDONALD ESTATE, [1928] 2 D. L. R. 338; [1928] 1 W. W. R. 662; 22 Sask. L. R. 288.—CAN.*

PART VI. SECT. 6, SUB-SECT. 6.—  
C. (a).

sx. *Payment to wrong beneficiary—Delay in application to court for interpretation of will.*—Acting upon what they considered sufficient evidence that the conditions entitling X. to an annuity had not been satisfied, & upon their

- 7219. Add Annotation:—**Consd. *Re Mason* (1928), 97 L. J. Ch. 321.
- 7225a. Assets improperly obtained.]—**Where two exors. obtained part of the assets improperly, by signing joint receipts in favour of each other, while they had large balances in their hands respectively, the ct. gave interest on those sums at five per cent. against both exors.—*BRICK v. MOTLEY* (1835), 2 My. & K. 312; 39 E. R. 962; *sub nom. BECK v. MOTLEY* 4 L. J. Ch. 63.
- 7250a. —.]—**Where there is a direction in the will to accumulate a residue, with which the exor. does not comply, he must pay interest from the expiration of one year after testator's decease up to the date of filing the answer.—*AMISS v. HALL* (1857), 3 Jur. N. S. 584.
- Annotation:—*Dtd. *Re Emmet's Estate*, *Emmet v. Emmet* (1881), 17 Ch. D. 142.
- 7256a. —.]—**Exor. charged with interest

on dividends of stock received by him, & kept at his banker's with his own money for a number of years, instead of being invested to accumulate.—*GOODCHILD v. FENTON* (1829), 3 Y. & J. 481; 148 E. R. 1269, Ex. Ch.

- 7273a. —.]—***GILROY v. STEPHENS*, No. 7268, ante.
- 7276a. — To authorise maintenance.]—***CHARLTON v. SADEN* (1836), Donnelly, 36; 47 E. R. 210.
- 7311a. Who may re-open.]—**A., entitled to a share of a residue, made a settlement of the balance appearing upon a settlement of accounts with the exors. upon himself & afterwards on C., a volunteer:—*Held: C.* could not, against the will of A., open the settlement of accounts with the exors.—*PARKER v. BLOXAM* (1855), 20 Beav. 295; 52 E. R. 616.

## Part VII.—Actions by and against Representative.

- 7439a. In whose name—Deceased's property assigned to assignees before death.]—**The property of an intestate was assigned to assignees previous to his death; pltf. administered, & applied to deft. for payment for goods sold him by the intestate, in the name of the assignees, & afterwards brought an action in his character of administrator:—*Held: such action was well brought.*—*BRANDT v. HEATIG* (1818), 2 Moore, C. P. 184.
- 7475. Add. Annotation:—***Re*fd. *Flower v. Prechtel* (1934), 150 L. T. 491.
- 7492a. Suit for account of testator's estate.]—**

Lapse of time will not of itself bar an exor. of an exor. of his right to have an account of his exor.'s testator's estate taken, with a view to ascertain such exor.'s liabilities as an accounting party.—*SMITH v. O'GRADY* (1870), L. R. 3 P. C. 311; 7 Moo. P. C. C. N. S. 106; 39 L. J. P. C. 63; 23 L. T. 476; 19 W. R. 22; 17 E. R. 41, P. C.

- 7531. Add. Annotation:—**Consd. *Re Richardson*, *Richardson v. Nicholson*, [1933] W. N. 90.
- 7531a. — In respect of matters relating to estate —Action by representative in own right.]—***Re RICHARDSON*, *RICHARDSON v. NICHOLSON*, [1933] W. N. 90; 175 L. T. Jo. 269, C. A.

own interpretation of the will, the exors. for several years ignored the possibility of X. ever establishing a claim to the annuity, & paid over to C., who herself was one of the exors. & under the will was entitled to the residuary income, the moneys which, if X. were entitled, ought to have been paid to him. The Privy Council decided in his favour as to the annuity & on a claim to be paid interest by the exors.:—*Held: C.*'s right was so doubtful that the exors. had been guilty of negligence & were liable to pay interest upon the annuity at 5 per cent. *per annum* without rests.—*Re PATTON*, [1931] 3 D. L. R. 544; O. R. 348.—CAN.

### PART VI. SECT. 6, SUB-SECT. 7.—A.

*sq. Jurisdiction of registrar—Should not pass upon his own accounts.]—**Re BENT*, [1927] 1 D. L. R. 592; 59 N. S. R. 107.—CAN.

*sv. —.]—*Registrar of Probate Ct. has no jurisdiction, on petition of creditors, to cite an administratrix to account for funds in her hands & to require her to deposit them in a chartered bank.—*Re MOSELEY*, [1936] 4 D. L. R. 503.—CAN.

*sr. Jurisdiction of Surrogate Court.]—**Re MACINTYRE* (1906), 11 O. L. R. 136.—CAN.

*st. —.]—*Upon an audit of the accounts of the exors. of B. deceased, the judge of a Surrogate ct. took evidence with a view to determining a question as to ownership of certain mtges., each of which had been taken jointly in the names of deceased & another person. These mtges., according to the contention of resps., should

be regarded as assets of the estate & accountable for by the exors. While the surviving mtgee. in each case contended that he was entitled as survivor to the security & the fund represented by it:—*Held: the judge had jurisdiction to make the proposed inquiry.*—*Re BAECHLER*, [1931] 2 D. L. R. 997; 66 O. L. R. 483.—CAN.

**7296 1. Passing accounts—Costs—Form of order.]—***Re HASLETT*, *McKENNA v. HASLETT*, [1927] V. L. R. 21; 48 A. L. T. 125; [1927] *Argus* L. R. 12.—AUS.

**7296 II. — Application of King's Bench rules to Surrogate court.]—**The Surrogate ct. in Saskatchewan is governed with respect to the passing of accounts by K. B. rules 301–319 so as they are applicable.—*Re KRAUSS ESTATE* (Sask.), [1929] 3 W. W. R. 205.—CAN.

*sq. Grounds for ordering accounts.]—**Re BARRICK ESTATE*, [1934] 2 W. W. R. 337.—CAN.

### PART VI. SECT. 6, SUB-SECT. 9.

*sj. Although order passed by Court of Appeal.]—*An action to set aside exor.'s accounts will lie although the order passing the accounts has been sustained by the Ct. of Appeal.—*McFARLANE v. FLEMING*, [1935] 2 D. L. R. 814.—CAN.

### PART VII. SECT. 1, SUB-SECT. 7.

*h 1. — Will.]—*In an action by exors. to recover money paid by deceased, his will is not admissible as evidence to prove that a loan & not a gift was intended.—*McDONALD v. YOUNG*, [1934] 4 D. L. R. 172.—CAN.

*1 i. — Evidence of opposite or interested party.]—**TAYLOR v. REGIS* (1895), 26 O. R. 483.—CAN.

### PART VII. SECT. 1, SUB-SECT. 9.—A.

*sv. General rule.]—*In litigating with third persons, exors. are, with respect to costs, in the same position as parties who litigate in their own right.—*GREAT WESTERN RY. Co. v. JONES* (1867), 13 Gr. 355.—CAN.

*sw. Liability on failure of appeal—Appeal without merit or substance.]—*The costs of an appeal without merit or substance taken by a personal representative:—*Held: to be payable* by such representative in his individual capacity.—*STRELLOFF v. FIRST NATIONAL BANK OF JOLIET*, [1925] 2 W. W. R. 501.—CAN.

### PART VII. SECT. 1, SUB-SECT. 9.—B.

**7545 iv. —.]—***BILLET v. BILLET*, [1929] 2 D. L. R. 944; 1 W. W. R. 778; 23 S. L. R. 630.—CAN.

### PART VII. SECT. 2, SUB-SECT. 3.

*sx. Application by originating notice to presume death of executor.]—*Pltf. in an action against exors. alleged to be surviving exors. may, under rule 928 (h), apply by originating notice for an order declaring that the other exor. named in the will is deemed or presumed to be dead, even though the allegation in the statement of claim of his death is formally denied in the statement of defence.—*Re BRICKER ESTATE* (Man.), [1929] 3 W. W. R. 697; [1930] 2 D. L. R. 148.—CAN.

*sz. Action against widow & heirs.]—*In an action of debt against a widow

7584. *Add. Annotation* :—*Refd. Re Forder, Forder v. Forder*, [1927] 2 Ch. 291.

7617a. May be joined to plea of *ne unques executor*.]  
—A deft. sued as exor., on an affidavit that

he was advised that he would be put to great difficulty if he were not permitted to do so, was allowed to plead *ne unques executor*, & also *plene administravit*.—*TYSON v. KENDALL* (1850), 19 L. J. Q. B. 434; 14 Jur. 1044.

## Part VIII.—Administration by Court.

7712a. Public trustee—Appearing as plaintiff & defendant—Improper.]—The same person may not be both pltf. & deft. &, where the Public Trustee appeared in both capacities, the ct. amended the summons by striking out the Public Trustee as deft. & substituting

a person beneficially interested.—*PHILLIPS, Re, PUBLIC TRUSTEE v. MEYER* (1931), 101 L. J. Ch. 338; 76 Sol. Jo. 101.  
*Compare No. 8757a, post.*

7867. *Add. Annotation* :—*Refd. Horwood v. Statesman Publishing Co.* (1929), 98 L. J. K. R. 450.

as representing all persons interested in the estate.—*Held*: the action was not maintainable in that form since any judgment against the widow & heirs must be against the separate property of defts. & not against the estate.—*MAPLE LEAF FRUIT CO., LTD. v. MACUMBER* 1933, 7 M. P. R. 158.—*CAN.*

### PART VII. SECT. 2, SUB-SECT. 5.—B. (a).

sm. *Appointment by foreign court*.]—An exor. or administrator cannot, as a general rule, be sued as such in the cts. of any State or country other than that in which he received his appointment.—*GOODBUN v. MITCHELL*, [1926] 2 D. L. R. 540; [1926] 2 W. W. R. 67; 35 Man. L. R. 569.—*CAN.*

### PART VII. SECT. 2, SUB-SECT. 5.—B. (c) ii.

so. *To action by widow—Under Widow's Relief Act—Six months after death of husband*.]—*KROGMAN v. DICKSON*, [1928] 2 D. L. R. 948.—*CAN.*

### PART VII. SECT. 2, SUB-SECT. 5.—B. (g) i.

s. *Action commenced within one year from death—Necessity for leave of court—Probate Act (N. S.), s. 43 (7)*.]—*WALSH v. EASTERN TRUST CO.*, [1932] 3 D. L. R. 525.—*CAN.*

### PART VII. SECT. 2, SUB-SECT. 6.—A. p i.

—*Claim for decedent's board during lifetime*.]—*Re THOMPSON* (1926), 58 N. S. R. 489.—*CAN.*

### PART VII. SECT. 2, SUB-SECT. 8.—A. a i.

—The proper form of judgment against exors. or administrators in respect of a liability of deceased is for payment in due course of administration, unless there is on their part a distinct affirmative admission of assets sufficient to pay all creditors; upon a judgment for the amount recovered to be paid in due course of administration it is improper to issue execution.—*Re HEXTALL ESTATE*, [1921] 1 W. W. R. 118; 56 D. L. R. 710.—*CAN.*

### PART VII. SECT. 2, SUB-SECT. 8.—C. d i.

—*Judgment against defendant administrator of estate*.]—A certificate of a county ct. judgment against "A. B., administrator of the estate of X," charges A. B. personally & not the estate.—*Re JOYCE & SCARRY* (1889), 6 Man. L. R. 281.—*CAN.*

fi. *Contribution from devisees*.]—*EMERSON v. CANNIFF* (1878), 26 Gr. 149.—*CAN.*

### PART VII. SECT. 2, SUB-SECT. 8.—D. 7731 v.

—Where following the recovery of a judgment against an administrator as such the judgment

creditor garnishes money owing to the estate & then moves for payment out of ct. of the moneys paid in by the garnishee, the administrator, notwithstanding that he had allowed the judgment to go against him by default, has a right to appear on the motion to show that the estate is insolvent & to oppose the motion in so far as its allowance may tend to operate against a *pari passu* distribution of the assets of the estate as between its creditors.—*WINNIPEG TRUSTEE CO. v. WOLFMAN*, [1933] 1 W. W. R. 381; 47 Man. L. R. 27.—*CAN.*

### PART VII. SECT. 2, SUB-SECT. 9.—A. s i.

—*Widow's costs of application for relief under Devolution of Estates Act, R. S. S., 1920 (c. 73), s. 24*.]—*Re MOWCHENKO*, [1926] 1 D. L. R. 265; [1926] 1 W. W. R. 139; 20 Sask. L. R. 279.—*CAN.*

si. *Litigation caused by legatee*.]—*O'SULLIVAN v. HARTY* (1885), 11 S. C. R. 322.—*CAN.*

sk. *Payment out of fund in court*.]—*Re MORRIS ESTATE*, [1933] 2 W. W. R. 80; 47 B. C. R. 239.—*CAN.*

### PART VII. SECT. 2, SUB-SECT. 10.—A. 7763 i.

—*Garnishee proceedings—Decree in administration suit—Damages recovered by administrator under Fatal Accidents Act—Garnishee summons set aside*.]—*McEWAN v. SPECKT* (N. W. T.) 1906, 4 W. L. R. 325.—*CAN.*

7763 ii. *Against debt due to estate—For contract with executor*.]—*HALL v. MACINTYRE & SARTORIO*, [1934] 2 W. W. R. 145; 3 D. L. R. 559, 48 B. C. R. 306.—*CAN.*

### PART VII. SECT. 2, SUB-SECT. 10.—B. (a).

sz. *Priority of execution—Over purchaser from executor*.]—*HENRY v. SHARP* (1871), 18 Gr. 16.—*CAN.*

### PART VII. SECT. 2, SUB-SECT. 10.—B. (b).

ii. —.]—*Held*: land & tenements held in fee simple by debtor at the time of his decease, might be taken in execution on a judgment against his exor. or administrator.—*FORSYTH & RICHARDSON v. HALL* (1830), Dra. 304.—*CAN.*

sb. *Judgment by default—Notwith, standing insufficient personal assets*.]—*Held*: the exor. was not entitled to an injunction against proceedings on the judgment.—*DONER v. ROSS* (1872), 19 Gr. 229.—*CAN.*

### PART VIII. SECT. 1, SUB-SECT. 4. b i.

—*Cannot entertain claim for balance on mortgage by executors to pay debts & legacies*.]—*Re RICHARDSON'S ESTATE* (1890), 22 N. S. R. 416.—*CAN.*

g i. *Application for directions*—

*Previous decree to deliver property in sub-court*.]—Where a decree was obtained by a legatee against the exor. for delivery of the property in a suit in a sub-court, & subsequently the exor. filed a petition in the High Ct. under Indian Succession Act, XXXIX of 1925, s. 302, for directions as to the fund relating to a charity mentioned in the will but not dealt with by the decree of the lower ct., the High Ct. had jurisdiction to give directions, as the matter was not adjudicated in the suit, but would not give directions where the matter had been definitely settled in a properly constituted suit.—*AKKAYYA v. VANAMA LAKSHAMMA* (1927), 1 L. R. 51 Mad. 849.—*IND.*

g ii. *To determine who are beneficiaries*.]—The ct. has jurisdiction to make an order determining who are the beneficiaries entitled under a given will, & in such a case it may direct the registrar to conduct an inquiry for the purpose of obtaining the information upon which such jurisdiction could properly be exercised.—*Re FLANAGHAN*, [1929] N. Z. L. R. 746.—*N.Z.*

sm. *Surrogate Court—Accounts*.]—An order directing an inquiry upon the footing of wilful default into the accounts of an exor. or administrator is beyond the jurisdiction of a Surrogate Ct. in Saskatchewan; it being one which can be made only by the Ct. of King's Bench. The jurisdiction conferred on the Surrogate Cts. in Saskatchewan is confined to "matters & causes testamentary," i.e., matters & causes relating to the grant & revocation of the probate of wills & of administration & incidental matters.—*Re McELHINNEY ESTATE, STANDARD TRUSTS CO. v. McELHINNEY* (Sask.), [1929] 3 W. W. R. 664; [1930] 2 D. L. R. 290; 24 S. L. R. 160; *reversé*, [1929] 4 D. L. R. 783; 3 W. W. R. 105.—*CAN.*

### PART VIII. SECT. 2, SUB-SECT. 1. sa.

—*Share of next of kin—Mortgagee of*.]—*Held*: entitled to bring proceedings.—*SWEENEY v. GALLAGHER* (1888), 22 I. L. T. 82.—*IR.*

sb. *Assignee of*.]—*Held*: entitled to bring proceedings.—*TEVLIN v. GILSENAN* (1901), 36 I. L. T. 35.—*IR.*

### PART VIII. SECT. 2, SUB-SECT. 2.—A.

sc. *All creditors*.]—An exor. cannot maintain an action for administration against one creditor as sole deft., even where, from the exor. being the universal devisee & legatee, no next of kin or *cestui que trust* could become pltf. or be named deft.—*MANDEVILLE v. MANDEVILLE* (1888), 23 I. L. R. 339.—*IR.*

sd. —.]—An action for administration cannot be maintained against one creditor as sole deft.—*Re ROE*,

7990. *Add. Annotation*:—*Refd. Re Robertson's Application* (1929), 46 T. L. R. 17.

7993. *Add. Annotation*:—*Refd. Haskell v. Marlow*, [1928] 2 K. B. 45.

8014. *Add. Annotations*:—*As to* (1) *Refd. Re Ross, Ross v. Waterfield* (1929), 46 T. L. R. 61; *Robinson v. Speakman or Robinson* (1929), 69 L. Jo. 61.

8018. *Add. Annotations*:—*Refd. Hunter v. Stadtische Hochseefischerei Gessellschaft*, [1925] 2 K. B. 493; *Lazard Bros. & Co. v. Banque Industrielle de Moscou, Lazard Bros. & Co. v. Midland Bank, Ltd.* (1931), 101 L. J. K. B. 65.

8166a. — Unpaid debts—Death of testator over six years before judgment.]—PRACTICE DIRECTION, [1937] W. N. 416.

8259. *Add. Annotation*:—*As to* (2) *Consd. Re Morley's Estate, Hollenden v. Morley*, [1937] Ch. 491.

8270a. — Separate sets of trustees of settled shares.]—*Re SCOTT, SCOTT v. SCOTT* (1926), 17 Sol. Jo. 430.

8280a. Power of court to order—Ancillary to order relating to management of property—R. S. C. Ord. 55, r. 2 (13).]—When, in an administration action upon a summons connected with the management of the property, under above sub-rule, a judge of the Ch. Div. sitting in chambers makes an order sanctioning the expenditure of a certain sum out of capital for the purposes authorised, he has ancillary jurisdiction under that sub-rule, by the same order, to give full practical effect thereto by further directing payment of the sum so authorised out of a fund of whatever amount standing in ct. to the general credit of the

action.—*Re TERRY, TERRY v. TERRY*, [1929] 2 Ch. 412; 98 L. J. Ch. 436; 141 L. T. 536; 45 T. L. R. 539.

8310. For "Ord. 45" read "Ord. 15."

8337. *Add. Annotation*:—*Consd. Green v. Weatherill*, [1929] 2 Ch. 213.

8342a. Action against representative—Payment into court—Subsequent action by creditors—Whether creditors entitled to fund in court.]—A bill was filed by a *cestui que trust* against a surviving trustee & the representative of B., a defaulting trustee, to obtain a proper investment of the trust fund. B.'s representative did not admit assets, but admitted that he had in his hands part of B.'s estate, which he paid into court under the order of the ct. A decree was obtained, by which B.'s estate was declared liable to make good the trust fund, & accounts were ordered to be taken of B.'s estate. A creditors' suit was instituted for the administration of B.'s estate, & the common decree obtained:—*Held*: the decree in the first suit did not entitle plffs. therein to the whole fund paid into ct. in that suit, but only to a proportional part of it with the other creditors of B.—*SMITH v. BIRCH* (1840), 3 Beav. 10; 9 L. J. Ch. 349; 4 Jur. 670; 49 E. R. 5.

*Annotation*:—*Refd. Tomlin v. Tomlin* (1841), 1 Hare, 236.

8349. *Add. Annotation*:—*Refd. Douglass v. Lloyds Bank* (1929), 34 Com. Cas. 263.

8351a. Estate found insolvent in beneficiary's action—Form of order.]—*Re VAN OPPEN, ROBERTS v. GRAY*, [1935] W. N. 51; 179 L. T. Jo. 255.

8371. *Add. Annotation*:—*Refd. Re Anderson-Berry, Harris v. Griffith*, [1928] Ch. 290.

ROE v. SQUIRE (1911), 45 L. L. T. 144.—IR.

#### PART VIII. SECT. 2, SUB-SECT. 3.

*sp. Legatees*.]—*SPARROW v. ROYAL TRUST CO.*, [1938] 2 W. W. R. 379.—CAN.

#### PART VIII. SECT. 3, SUB-SECT. 2.—B.

7986 iii. —.]—An originating summons cannot be taken out to determine whether property conveyed by a testator in trust has reverted to his estate on failure of the trust.—*RATTENBURY v. ROYAL TRUST CO.*, [1937] 3 D. L. R. 204; 51 B. C. R. 513.—CAN.

7987 ii. —.]—*SORBY v. PARKER* (1920), 52 D. L. R. 692.—CAN.

7989 i. *Questions between parties claiming under will—& adverse claimant*.]—On an originating summons to determine whether certain property belonged to the estate of deceased:—*Held*: although without a special inquiry there appeared to be no jurisdiction to determine the question on such an application, yet there was jurisdiction upon the application to direct a special inquiry &, if the person against whom the inquiry is directed submits to it as if an action had been brought against him, the question may be proceeded with.—*Re ROYAL TRUST CO. & RATTENBURY*, [1937] 1 W. W. R. 451; 51 B. C. R. 334.—CAN.

*sm. Not question whether property part of estate*.]—*Re COLLINS*, [1927] 4 D. L. R. 770; 61 O. L. R. 225.—CAN.

*so. Question whether executors might act without consent of named person*.]—*Re ROGERS*, [1929] 1 D. L. R. 116; 63 O. L. R. 180.—CAN.

*sq. Questions arising out of actions for purchase by widow of*

*interests*.]—*Re DELAERE ESTATE & ROYAL TRUST CO.*, [1933] 2 W. W. R. 258; [1934] 1 D. L. R. 70.—CAN.

#### PART VIII. SECT. 4, SUB-SECT. 1.

*sr. Failure of claimant to appear—Effect on right to appeal*.]—A claimant against the estate who has not appeared personally or by a representative at the passing of accounts cannot appeal from the decree passing the accounts & ordering distribution.—*Re PECK'S ESTATE* (1933), 6 M. P. R. 349.—CAN.

#### PART VIII. SECT. 5, SUB-SECT. 1.

*n i.* —.]—*GILBERT v. JARVIS* (1869), 16 Gr. 265.—CAN.

#### PART VIII. SECT. 5, SUB-SECT. 3.—G.

8199 ii. — *Where personal estate sufficient if properly administered—Limit of time for application for sale*.]—*PEOPLE'S BANK v. MARROW* (1825-1897), N. B. Dig. 312.—CAN.

#### PART VIII. SECT. 5, SUB-SECT. 3.—H. (b).

*h i.* — *Balance on bond—After foreclosure & sale by mortgagee*.]—*Re CHANDLER'S ESTATE* (1884), 5 R. & G. 78.—CAN.

*h ii.* — *Not debt arising out of illegal transaction*.]—*Re GHEE, Ex p. LOWE KING, PUBLIC TRUSTEE v. LOWE KING*, [1928] N. Z. L. R. 266.—N.Z.

8228 i. — *Mortgage debt—Purchase of land by deceased—Payment of mortgage as part of purchase price*.]—*Held*: the mtgee. was entitled to prove for the balance of the mtge. debt against the general estate of the purchaser.—*Re COZIER, PARKER v. GLOVER* (1877), 24 Gr. 537.—CAN.

*sr. Valuation of securities—To what securities applicable*.]—*Held*: a mtge.

security held by a bank, as collateral to deceased's general indebtedness to it, is not a security on the estate of deceased or on the estate of a third person for whom the estate of deceased was only indirectly or secondarily liable. The bank, therefore, was not obliged to value its security by Trustee Act, R. S. O., 1927, s. 56.—*ST. LOUIS v. CANADIAN BANK OF COMMERCE*, [1934] O. R. 50; 1 D. L. R. 472.—CAN.

#### PART VIII. SECT. 5, SUB-SECT. 3.—H. (d).

*sl. Parol evidence*.]—*Held*: the master had properly received parol evidence to establish the widow's claim in question.—*ROSS v. MASON* (1862), 9 Gr. 568.—CAN.

#### PART VIII. SECT. 5, SUB-SECT. 4.—C.

*n i.* — *Disposal of assets*.]—Where a creditor or one of the next of kin institutes an administration suit against an exor. the institution of the action or the obtaining of a decree will not bring the doctrine of *lis pendens* into operation, & does not deprive the exor. of the power to dispose of assets, unless plff. has obtained an order appointing a receiver or an injunction restraining the exor. from exercising the powers vested in him.—*LEW LIM MA HOCK v. SAW MA HONE* (1923), 1 L. R. 2 Ran. 4.—IND.

#### PART VIII. SECT. 6, SUB-SECT. 2.

*sp. Executor buying in property for himself*.]—A case for an administration action is shown by evidence that an exor. bid in property to himself at a low price in foreclosure of a mtge. under a power of attorney of the testator, immediately prior to the administration.—*MARSHALL v. MARSHALL*, [1937] 2 D. L. R. 227; 12 M. P. R. 76.—CAN.



8484. *Add. Annotation*:—As to (1) *Refd. A.-G. v. Jackson* (1932), 48 T. L. R. 261.

8484a. — *Valuation of annuity payable under payment included.*—In order to qualify an annuitant, to whom a person who died in 1922 was liable under a judgment by consent to pay the annuity, to prove for the value thereof in the administration by the ct. of the deceased person's estate, it is sufficient for the annuitant to prove, as a fact, that if the annuity continues for the period normally to be expected, the estate will not suffice to meet the debts & the annuity in full.—*Re PINK, ELVIN v. NIGHTINGALE*, [1927] 1 Ch. 237; 96 L. J. Ch. 202; 136 L. T. 399; 70 Sol. Jo. 1090.

8487. *Add. Annotation*:—*Refd. A.-G. v. Jackson* (1932), 48 T. L. R. 261.

8492a. *Counsel's fees—Estate of deceased solicitor.*—Counsel has no right to prove for his fees in the administration of the insolvent estate of a deceased solr. in a case where the client reimbursed the solr. the amount of the fees upon the faith of the solr.'s false representation that he had in fact paid them to counsel. Further, as the exor. of a deceased solr. is not, as a trustee of a bkpt.'s property is, an officer of the ct., the rule followed by the Ct. of Bkpcy. that the ct. ought to be as honest as other people will not be so extended as to give the ct. jurisdiction to order the exor. to refund fees to counsel. The rules laid down in Administration of Estates Act, 1925 (c. 23), Sched. I., Part I., do not authorise the application of the rule followed by the Ct. of Bkpcy. to such a case.—*Re SANDIFORD* (No. 2), ITALO-CANADIAN CORPN., LTD. v. SANDIFORD, [1935] Ch. 681; 104 L. J. Ch. 335; 154 L. T. 7.

8505. *Add. Annotation*:—*Refd. Re Bush, Lipton* (B.), LTD. v. MACKINTOSH, [1930] 2 Ch. 202.

8507. *Add. Annotation*:—*Refd. Re Bush, Lipton* (B.), LTD. v. MACKINTOSH, [1930] 2 Ch. 202.

8509. *Add. Annotations*:—*Apld. Re Bush, Lipton* (B.), LTD. v. MACKINTOSH, [1930], 2 Ch. 202. *Refd. Re Cockell Jackson v. A.-G.*, [1931] 1 Ch. 389; *Re Parent Trust & Finance Co.*, [1936] 1 All E. R. 641.

8512. *Add. Annotation*:—*Refd. A.-G. v. Jackson* (1932), 48 T. L. R. 261.

8516a. — *In creditor's action—Beneficiary's action followed by creditor's action.*—*Re SAGAR, RUSSIAN COMMERCIAL & INDUSTRIAL TRADE v. KOGAN, KOGAN v. KOGAN* (1930), 70 L. Jo. 10; 169 L. T. Jo. 557; [1930] W. N. 149.

8517. *Add. Annotation*:—*Consd. Re Prince, Hardman v. Willis* (1935), 51 T. L. R. 526.

8520a. *Rate of interest.*—Where an intestate dies insolvent proof can be made in respect of interest claimed by a creditor at the rate of 7 per cent. *per annum* calculated down to the date of payment, & Bkpcy. Act, 1914 (c. 59), s. 66, does not apply to such a case.—*Re WELLS*, [1929] 2 Ch. 269; 98 L. J. Ch. 407; 141 L. T. 323; [1929] B. & C. R. 119.

*Annotations*:—*N.F. Re Bush, Lipton* (B.), LTD. v. MACKINTOSH, [1930] 2 Ch. 202. *Refd. Re Bailey, Duchess Mill, Ltd. v. Bailey* (1932), 76 Sol. Jo. 560.

8520b. — *In the administration of the estates of deceased insolvents by the Chancery Div., Bkpcy. Act, 1914 (c. 59), s. 66 (1), applies, & creditors are entitled to be paid interest only at a rate not exceeding 5 per cent. until all the debts proved in the estate have been paid in full.*—*Re BUSH, LIPTON* (B.), LTD. v. MACKINTOSH, [1930] 2 Ch. 202; 99 L. J. Ch. 503; 143 L. T. 700; [1929] B. & C. R. 216.

*Annotations*:—*N.F. Re Bailey, Duchess Mill, Ltd. v. Bailey* (1932), 76 Sol. Jo. 560; *Re Parent Trust & Finance Co.*, [1936] 1 All E. R. 641.

8520c. — *Re BAILEY, DUCHESS MILL, LTD. v. BAILEY* (1932), 76 Sol. Jo. 560 (V.-C. of Lancaster).

8558. After cross-reference following this case add:—

(n) *Set-Off.*

8558a. *Effect of agreement to exclude.*—*Re BAILEY, DUCHESS MILL, LTD. v. BAILEY* (1932), 76 Sol. Jo. 560 (V.-C. of Lancaster).

8757a. *Costs of Public Trustee—As plaintiff in one capacity—Defendant in another capacity.*—*Re ABERCROMBIE'S WILL TRUSTS, PUBLIC TRUSTEE v. ABERCROMBIE*, [1931] W. N. 109; 171 L. T. Jo. 416.

*Annotation*:—*Expld. Re Phillips, Public Trustee v. Mayer* (1932), 76 Sol. Jo. 10.

*Compare* No. 7812a, *ante*.

8758a. *Claims against legatee exceeding legacy.*—By the decree sums due from a legatee were ordered to be set-off against her share of testator's estate, & her costs were ordered to be paid to her solr. It being found that the claims against her exceeded her portion of the estate, & the legatee being insolvent, an application was made by motion, that the costs ordered to be paid to her solr. might be carried to the credit of her account. The ct. stayed the payment of the costs for a month, in order that the matter might be set right.—*NICHOLSON v. NORTON* (1844), 7 Beav. 67; 13 L. J. Ch. 140; 2 L. T. O. S. 345; 49 E. R. 988.

8768a. *Costs of proving debt before master.*—Costs of proving a debt before the master

PART VIII. SECT. 7, SUB-SECT. 2.—B. (b).

sy. *Insurance policy—Protected for payment of debts—Under Life Insurance Act, 1908, s. 65.*—Where an insolvent estate includes the proceeds of an insurance policy protected for deceased's debts by the above Act, the policy moneys are liable for all testamentary expenses arising in the administration & realisation thereof; funeral & the other testamentary expenses are borne by the protected policy moneys & the remainder of the estate in proportion to their value.—*MAITLAND v. PUBLIC TRUSTEE*, [1924] N. Z. L. R. 840.—N.Z.

PART VIII. SECT. 7, SUB-SECT. 2.—B. (c).

sz. *Overpayment—Liability of executor.*—*TAYLOR v. BRODIE* (1874), 21 Gr. 607.—CAN.

PART VIII. SECT. 7, SUB-SECT. 3.—B. (c).

sb. *Insolvency of deceased administrator—Priority of original estate—Over claim by surety company on administrator's bond.*—*NOVA SCOTIA TRUST CO. v. UNITED STATES FIDELITY & GUARANTEE CO.*, [1931] 2 D. L. R. 279.—CAN.

PART VIII. SECT. 8, SUB-SECT. 1.—A.

8559 ii. — *Costs of mortgagee's action to realise security & for administration.*—*LEONARD v. KELLETT* (1891), 27 L. R. Ir. 418.—IR.

PART VIII. SECT. 8, SUB-SECT. 2.—A.

11. — *Establishing claim as such.*—Next of kin who are successful in establishing their claims as such before the chief clerk are entitled to be paid their costs incurred in so doing out of the estate of the intestate.—*Re GRAZEBROOK, CHASE v. LATTON* (No. 2), [1928] V. L. R. 312.—AUS.



under the usual decree upon a creditor's bill not allowed.—*ABELL v. SCREECH* (1804), 10 Ves. 355; 32 E. R. 882.

*Annotation*:—*Consd. Watkins v. Maule* (1821), Jac. 105.

**8790a.** —.]—A bill was filed for the administration of the real & personal estate. A part of the real estate was specifically devised, & gave rise to questions of construction; other part was devised to charities, which devise was void under the Statute of Mortmain. The residuary real estate descended on the heir, & the residuary personal estate was undisposed of, & went to the next of kin:—*Held*: the costs of suit attributable to the administration of the trusts of the real estate were payable out of the descended estates, & that those relating to the execution of the trusts of the personal estate out of the residuary personal estate.—*SANDERS v. MILLER* (1858), 25 Beav. 154; 53 E. R. 595; *sub nom. SAUNDERS v. MILLER*, 6 W. R. 454.

*Annotations*:—*Consd. Re Middleton, Thompson v. Harris* (1882), 19 Ch. D. 552. *Refd. Randfield v. Randfield* (1863), 32 L. J. Ch. 668; *Patching v. Barnett* (1881), 51 L. J. Ch. 74.

**8802.** *Add. Annotation*:—*As to* (2) *Refd. In the Estate of Plant, Wild v. Plant*, [1926] P. 139.

**8815.** *Add. Annotation*:—*Refd. Re Wells, Swinburne-Hanham v. Howard* (1932), 48 T. L. R. 617.

**8819a.** — — — —.]—“Testamentary expenses” directed to be paid out of a particular part of testatrix's property include the costs of unsuccessful claimants to a legacy made debts. to a summons by trustees for obtaining

the direction of the ct. as to whom the legacy should be paid. The costs of unsuccessful claimants to a legacy who are made debts. to a summons by the trustees of the will for obtaining the direction of the ct. as to who is entitled to the legacy will be ordered to be paid out of the estate, notwithstanding the objection of the residuary legatee or other person entitled to that part of the estate out of which such costs will become payable; & such costs will be ordered to be paid as between solr. & client, notwithstanding the objection of the same person.—*Re CLARKE, CLARKE v. ST. MARY'S CONVALESCENT HOME* (1907), 97 L. T. 707.

*Annotation*:—*Consd. Re Hall-Dare, Le Marchant v. Lee Warner*, [1916] 1 Ch. 272.

**8829.** *Add. Annotation*:—*As to* (1) *Refd. Re Walpole, Public Trustee v. Canterbury*, [1933] Ch. 431.

**8841a.** — — — —.]—*Re POTTS, HOOLEY v. FOUNTAIN*, [1884] W. N. 106.

**8860a.** — — — —.]—*Re PHILLIPS, PUBLIC TRUSTEE v. PHILLIPS*, [1938] 4 All E. R. 483; 82 Sol. Jo. 1047, C. A.

**8866.** *Add. Annotation*:—*Refd. Re Porter, Porter v. Porter*, [1925] Ch. 746.

**8891.** *Add. Annotation*:—*Consd. In the Estate of Plant, Wild v. Plant*, [1926] P. 139.

**8924.** *Add. Annotation*:—*Refd. Re Cox, Public Trustee v. Eve*, [1938] Ch. 556.

**9014.** *Add. Annotation*:—*As to* (4) *Refd. In the Estate of Plant, Wild v. Plant*, [1926] P. 139.

**PART VIII. SECT. 8, SUB-SECT. 2.—C.**

**8771 i.** *Legatee & assignee—Whether legatee's costs only allowed.*—Orders for costs, in administration suits, should be made in such a form that a person who has not encumbered his share will be relieved as far as possible in the matter of costs created by the fact that another co-sharer has assigned or encumbered his share.—*NATIONAL IN-*

*SURANCE Co., LTD. v. NISSIM ABRAHAM GUBBAY* (1928), 1 L. L. R. 56 Calc. 447.—*IND.*

**PART VIII. SECT. 8, SUB-SECT. 3.—E.**

**b i.** — — — — *Inquiry as to next of kin.*—Where a testator devises his residuary estate in trust to sell & out of the proceeds *inter alia* to pay testamentary expenses, & to divide

the ultimate residue into aliquot parts & to hand the same respectively to named persons, the costs of ascertaining who are entitled to a lapsed share of residue are testamentary expenses which should be paid out of the whole residuary estate, & not out of the lapsed share only.—*Re STONE, READ v. DUBUA* (1936), 36 S. R. N. S. W. 508; 53 N. S. W. N. 214.—*AUS.*

## EXTRADITION AND FUGITIVE OFFENDERS.

## Part I.—Extradition to Foreign Countries.

## B. Particular Offences (p. 872).

Add See Extradition Act, 1932 (c. 39).

32. *Add. Annotation:—Generally, Rejd. China Navigation Co. v. A.-G. (1932), 48 T. L. R. 375.*

37. *Add. Annotation:—As to (1) Rejd. R. v. Boebe (1925), 133 L. T. 736.*

66. *Add. Annotation:—Distd. Kossekechatko v. A.-G. of Trinidad, [1932] A. C. 78.*

74a. ———.]—Applts. were brought before a magistrate in Trinidad under sect. 5 of the French Guiana Extradition Ordinance of Trinidad charged with being fugitive criminals from French Guiana, where there is a penal settlement. At the hearing it was proved that they had each been convicted in France of a specified crime, & had each received a sentence of imprisonment which was unexpired. The magistrate made an entry in his magistrate's book against their names "extradition ordered." He did not, however, make, as he should have done, an order under Extradition Act, 1870 (c. 52), s. 10 (made applicable by sect. 5 of the

Ordinance), for committal to await the Governor's warrant for surrender. Instead another magistrate, who had not heard the case, made a detention order under sect. 3 of the Ordinance, which section applies to suspected fugitives. Upon *habeas corpus* proceedings:—*Held*: the appellants should be released: (1) because under the terms of the extradition treaty with France they could be extradited only if the crimes of which they had been convicted were committed in French territory, & there was no evidence that that was so, nor was it necessarily involved in the convictions; (2) because sects. 11 & 12 of the local Summary Conviction Offences (Procedure) Ordinance did not make the entry in the magistrate's book equivalent to an order under Extradition Act, 1870 (c. 52), s. 10, & the irregularities with regard to the order signed prevented the detention of applts. from being warranted.—*KOSSEKECHATKO v. A.-G. FOR TRINIDAD*, [1932] A. C. 78; 101 L. J. P. C. 17; 146 L. T. 101; 29 Cox, C. C. 394; 48 T. L. R. 27; 75 Sol. Jo. 741, P. C.

## PART I. SECT. 1, SUB-SECT. 1.

e. i. ———.]—The East Indian Dependencies of France, having been expressly excluded from the Extradition Treaty of 1876, & not being States or parts of a State to which the Extradition Acts of 1870 & 1873 apply, are not "Foreign States" within Indian Extradition Act of 1903. Extradition in the East Indian possessions of Great Britain & France is governed by Art. IX. of the Treaty of Mar. 7, 1815; & that article contemplating summary delivery at the request of any authority of either High Contracting Party & not providing any special procedure for the purpose of extradition, the British Indian Govt. may, on the statement of the Govt. of Pondicherry that a British Indian subject has committed the offence of theft within its territory & on its demand, deliver him up to the Govt. of Pondicherry, without holding an inquiry to satisfy itself that there is a *prima facie* case against the person whose extradition is sought.—*RE MUTHU REDDI (1930), 1 L. R. 53 Mad. 1023.—IND.*

sg. *Obligation to surrender.*—Technicalities of the surrendering State will not be allowed to prevent the discharge of an obligation imposed by an extradition treaty.—*Re Low, [1932] O. R. 681; \* D. L. R. 542; 59 C. C. C. 97; revid. [1933] 2 D. L. R. 608; O. R. 393; 59 C. C. C. 346.—CAN.*

## PART I. SECT. 2, SUB-SECT. 2.—A.

f. i. ———.]—Forgery must be an offence by the law of Canada, & of the demanding country.—*Re MURPHY (1895), 2 O. C. C. 578.—CAN.*

r. ii. ———.]—*By law of State where committed.*—*Semble*: in order for an offence to be extraditable under the extradition treaties with the United States of America it is not necessary to show that it is a crime in every part of both Canada & the United States; it is sufficient if it is a crime in Canada & in the state wherein it is alleged to have been committed, & that it is made extraditable by the treaties.—

UTAH STATE v. PETERS, [1936] 2 W. W. R. 9; 4 D. L. R. 509; 66 Can. C. C. 75.—CAN.

## PART I. SECT. 2, SUB-SECT. 2.—B.

g (p. 873) i. ———.]—A charge of larceny & embezzlement in Illinois is an extradition crime, for theft in the Canadian Criminal Code includes larceny & other fraudulent conversions of property.—*Re INSULL, [1934] 2 D. L. R. 696; 61 C. C. C. 336.—CAN.*

sa. *Obtaining by false pretences.—Extraditable offence.*—*Re MARTIN (No. 2) (1897), 2 Terr. L. R. 304.—CAN.*

sb. ———.]—*Not extraditable.*—Goods are not "other property" within the meaning of the words, "obtaining money, valuable security or other property by false pretences," which is clause 7 of the sched. to the Extradition Treaty with the United States of America. Therefore, the offence of obtaining goods by false pretences is not extraditable under said treaty.—*Re ROSEN, [1931] 2 W. W. R. 799; 56 Can. C. C. 162; 44 B. C. R. 203.—CAN.*

so. *Procuring abortion.*—The procuring abortion held extraditable on the demand of the State of Alabama.—*Re O'CONNOR, [1928] 1 D. L. R. 558; [1928] 1 W. W. R. 65; 39 B. C. R. 271; sub nom. Ex p. O'CONNOR, 49 Can. Crim. Cas. 151.—CAN.*

sd. *Revenue offences.—Breach of Harrison Anti-narcotic Law.*—The government of the United States of America is entitled to apply for extradition for alleged breaches of the "Harrison Anti-Narcotic Law" with respect to the "having in possession" or "buying" or "selling," etc., drugs. Although the Supreme Ct. of the United States has declared said Act to be within the powers of Congress because the incorporation therein of provisions for a tax or licence fee rendered it a revenue measure, yet on an application for extradition for such offences, the Act having been declared constitutional, both the judgment, which recognises the dual aspect of the legislation, & the Act itself must be

taken as a whole; & therefore, the contention that said offences are breaches of a revenue law & therefore not extraditable was not sustained.—*Re GIFFORD (No. 2) (Man.), [1929] 3 W. W. R. 496; [1930] 1 D. L. R. 752; 52 Can. Crim. Cas. 293.—CAN.*

se. ———.]—In view of the decisions of the Supreme Ct. of the United States holding that the "Harrison Anti-Narcotic Law" is a revenue measure & that the provisions thereof for the suppression of narcotics are constitutional only because they are regarded as in aid of the collection of the taxes imposed by the Act, offences against said provisions are breaches of a revenue law & therefore not extraditable.—*Re SIEMAN, [1930] 1 W. W. R. 970.—CAN.*

st. ———.]—*Re SIEMAN (No. 2), [1930] 2 W. W. R. 111.—CAN.*

## PART I. SECT. 3, SUB-SECT. 1.

39 iv. ———.]—*Application by French Republic.—Extradition to Saar Basin of Germany.*—*Re INCAMPE, [1928] 3 D. L. R. 240; 49 Can. Crim. Cas. 386.—CAN.*

t. i. ———.]—Extradition proceedings need not originate in the foreign country.—*Re O'CONNOR, [1928] 1 D. L. R. 558; [1928] 1 W. W. R. 65; 39 B. C. R. 271; sub nom. Ex p. O'CONNOR, 49 Can. Crim. Cas. 151.—CAN.*

## PART I. SECT. 3, SUB-SECT. 3.—C. (a) i.

68 i. *Identity of accused.*—Evidence which under Canadian law may be inadmissible on a trial because the prisoner had not been properly warned of the possible consequences of the making of a statement or giving answers to a policeman's question is at least admissible on extradition proceedings to prove the identity of the person arrested with the person charged.—*Re O'CONNOR, [1928] 1 D. L. R. 558; [1928] 1 W. W. R. 65; 39 B. C. R. 271; sub nom. Ex p. O'CONNOR, 49 Can. Crim. Cas. 151.—CAN.*

- 121a. — Necessity for signature by magistrate hearing case.]—KOSSEKCHATKO v. A.-G. FOR TRINIDAD, No. 74a, ante.
126. Add. Annotation:—As to (1) Refd. R. v. Brixton Prison, *Ex p. Shure*, [1926] 1 K. B. 127.
127. Add. Annotation:—Consd. R. v. Brixton Prison, *Ex p. Shure*, [1926] 1 K. B. 127.
136. Add. Annotation:—Refd. Eshugbayi Eleko v. Nigeria Government (Officer Administering), [1931] A. C. 662.

## Part II.—Extradition from Foreign States.

- 146a. Onus of proof of surrender under treaty.]—Appl't. was brought before a tribunal in France on a claim for his extradition on a charge of false pretences. He waived all the formalities of extradition & was handed over to the English police. He was convicted in England on a charge of fraudulent conversion based upon the facts contained in the information upon which the claim for extradition was made:—*Held*: (1) the onus of showing that he had been surrendered in accordance with the extradition treaty between this country & France lay on appl't., & he had failed to discharge that onus; (2) Extradition Act, 1870 (c. 52), s. 19, which, in effect, enacts that a person extradited may be tried for any offence which can be proved by the facts upon which the surrender was grounded, was not abrogated by the provisions of Art. IV. of a treaty of extradition made between this country & France, applied to the Act of 1870 by & embodied in an Order in Council, which prohibited the trial of such person for any offence other than that upon which he had been surrendered, & consequently, the ct. had jurisdiction to try appl't. for fraudulent conversion.—R. v. CORRIGAN, [1931] 1 K. B. 527; 100 L. J. K. B. 55; 144 L. T. 187; 47 T. L. R. 27; 29 Cox, C. C. 198; 22 Cr. App. Rep. 106, C. C. A.
- 146b. For what offences triable—Extradition Act, 1870 (c. 52), s. 19—Effect of Treaty with France, 1878.]—R. v. CORRIGAN, No. 146a, ante.

## Part III.—Surrender between British Dominions inter se and the United Kingdom.

148. Add. Annotation:—As to (1) Apprvd. Sobhuza II. v. Miller, [1926] A. C. 518.
153. Add. Annotation:—Consd. R. v. Brixton Prison Governor, *Ex p. Bidwell*, [1937] 1 K. B. 305.

### PART I. SECT. 3, SUB-SECT. 3.—C. (a) ii.

83 iv. —.]—While the imputed offence must be shown to be a crime under the law of the demanding State, yet, in determining whether there is such evidence of criminality as according to Canadian law would justify a commitment if the crime had been committed in Canada, regard is to be had to the essence of the act charged, & extradition is permitted if there exists the elements of the imputed offence according to Canadian law.—WASHINGTON STATE v. FLETCHER, [1926] 3 D. L. R. 426; [1926] 2 W. W. R. 508; 46 Can. Crim. Cas. 226; 20 Sask. L. R. 575.—CAN.

c i. — Whether admissible as proof of law of demanding State.]—Re WAGNER, [1928] 4 D. L. R. 615; 50 Can. Crim. Cas. 254.—CAN.

f i. —.]—Re CLARK (P. E. I.), [1929] 3 D. L. R. 737; 51 Can. Crim. Cas. 302.—CAN.

fi i. —.]—Where on an application before an extradition comr. for an order for the surrender of the accused the evidence adduced shows a *prima facie* case of a crime known to the common law, the burden rests on the accused to show that the alleged facts do not constitute a crime under the law of the demanding state.—Re SULLIVAN & STATE OF CALIFORNIA, [1932] 3 W. W. R. 187.—CAN.

f iii. —.]—A *prima facie* case in proceedings before an Extradition Comr. is sufficient to justify a warrant of commitment.—LOOSBERG v. SEGUIN,

[1934] 2 D. L. R. 218; 61 C. C. C. 77.—CAN.

sl. Foreign law—Mode of proof.]—UTAH STATE v. JONES [1925], 44 Can. Crim. Cas. 355; [1925] 3 W. W. R. 750.—CAN.

### PART I. SECT. 3, SUB-SECT. 3.—C. (b) i.

98 i. After this case add:—

—.]—See, now, Chinese Extradition Amendment Ordinance, 1915, s. 18, as amended by Chinese Extradition Amendment Ordinance, 1927.

sm. Only evidence admissible under *lex fori*—Not hearsay.]—Re GRABOWSKY (1930), 53 Can. C. C. 75.—CAN.

sn. Evidence of customs inspector—Proof of foreign law.]—In proceedings in which extradition was sought of one alleged to have bribed a United States Customs Inspector in the State of New York:—*Held*: the criminal law of the United States on this point could be proved by a United States Customs Inspector.—Re LOW, [1932] O. R. 681; 4 D. L. R. 542; 59 C. C. C. 97; *reusd.*, [1933] 2 D. L. R. 608.—CAN.

### PART I. SECT. 3, SUB-SECT. 3.—D.

so. Power of judge or commissioner to grant.]—An extradition judge or comr. has the power in his direction to grant bail, but before it will be granted especially strong grounds should be shown in support of the application therefor.—UNITED STATES GOVERNMENT v. GIFFORD (MAN.), [1929] 1

W. W. R. 879; [1930] 1 D. L. R. 800; 52 Can. C. C. 355.—CAN.

PART I. SECT. 3, SUB-SECT. 3.—E. b i. —.]—Re MARTIN (No. 2) 1897), 2 Terr. L. R. 304.—CAN.

### PART II.

i i. —.]—Where a person who has been accused of an extraditable offence & arrested in the United States under instructions from the Canadian authorities waives extradition proceedings, he may be tried here for any other offence committed before he was brought back, even though such other offence is not an extraditable one, & it was not until he was taken before an extradition comr. & charged before him that he agreed to return without extradition.—It. v. DIERICK & LIBERTY (Alta.), [1929] 3 W. W. R. 748; [1930] 1 D. L. R. 892; 24 Alta. L. R. 325; 52 Can. Crim. Cas. 370.—CAN.

### PART III. SECT. 1, SUB-SECT. 1.

ni. —.]—The Commonwealth of Australia having, by passing the Commonwealth Extradition Act, 1903, acted as a central legislature under the Extradition Act, 1870 (Imperial), may be assumed to have power to deal under the external affairs power of the Constitution with the rendition of fugitive offenders. If this is so, the effect of the Commonwealth Constitution Act upon the definition of "legislature" in Fugitive Offenders Act, 1881 (c. 69), s. 39, is to create an

159. *Add. Annotations*:—*Apld. Re Paget, Ex p. Official Receiver*, [1927] 2 Ch. 85. *Refd. Re Jawett*, [1929] 1 Ch. 108.

159a. — **Indorsement of warrant—Whether indorsement by Secretary of State as well as magistrate necessary.**—*Fugitive Offenders Act*, 1881 (c. 69), s. 3, provides that: "Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part . . . in or on the way to which the fugitive is or is suspected to be: that is to say (1) a judge of a superior ct. in such part; & (2) in the United Kingdom a Secretary of State and one of the magistrates of the metropolitan police ct. in Bow Street; & (3) in a British possession the governor of that possession, . . . may indorse such warrant . . .":—*Held*: that in category (2) of the authorities who may indorse the warrant the word "and" is used disjunctively, & that a warrant issued in a part of the Sovereign's dominions for the apprehension of a suspected fugitive from

that part may be indorsed in the United Kingdom by a magistrate of the said police ct. alone, & need not be indorsed both by a magistrate & a Secretary of State.

*Fugitive Offenders Act*, 1881 (c. 69), s. 5, provides: "A fugitive when apprehended shall be brought before a magistrate. . . . If . . . such evidence is produced as . . . raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant . . . the magistrate shall commit the fugitive to prison to await his return":—*Held*: in requiring, as a condition of committing an alleged fugitive, such evidence as raises "a strong or probable presumption" that he committed the offence, the sect. means such evidence as, if it remained uncontradicted at the trial, would entitle a reasonable jury to convict the alleged fugitive upon it.

Where, in proceedings under this sect., a magistrate has found that the evidence produced before him raises a strong or probable presumption that the alleged fugitive is guilty of the offence & has committed him, & the alleged

exception to the definition so that it must now be read as meaning that the expression "legislatures," where there are local legislatures as well as a central legislature, means the central legislature only; but, in respect of the Commonwealth of Australia, means the Parliament of the Commonwealth only when it has exercised its powers to deal with the surrender of fugitive offenders between the Commonwealth & other parts of His Majesty's dominions. The Commonwealth Service & Execution of Process Act, 1901, was not an exercise by the Commonwealth of any overriding powers which the Commonwealth possesses in respect of the subject-matter of the *Fugitive Offenders Act*, 1881 (c. 69).—*Re MUNRO*, [1935] N. Z. L. R. 271.—N.Z.

n ii. — **Jurisdiction of States.**—For the purposes of the *Fugitive Offenders Act*, 1881, Australia is one British possession. But within the several States, State judicial officers have authority under the law of the "possession" & so are competent to act under the provisions of that statute. A New Zealand warrant was brought to Australia & indorsed by a police magistrate for New South Wales under sect. 13 of *Fugitive Offenders Act*, 1881. Deft. was arrested under the warrant & was brought before a stipendiary magistrate at Sydney, who made an order reciting that he was satisfied, as required by sect. 14 of *Fugitive Offenders Act*, that the warrant was issued by a person having lawful authority to issue it & directing that the deft. be returned to New Zealand.—*Held*: the New South Wales magistrate had jurisdiction to order the return of deft. under sect. 14 of *Fugitive Offenders Act*, 1881.—*McARTHUR v. WILLIAMS* (1936), 55 C. L. R. 324; 42 *Argus* L. R. 239; 10 A. L. J. 40.—AUS.

so. **Application to New Guinea.**—The provisions of the Imperial *Fugitive Offenders Act*, 1881, have been properly applied to the mandated territory of New Guinea by Orders in Council.—*FROST v. STEVENSON* (1937), 43 *Argus* L. R. 533; 11 A. L. J. 205.—AUS.

#### PART III. SECT. 1, SUB-SECT. 3.

sk. **Not absconding from jail.**—*JAIPAL BHAGAT v. R.* (1921), 1 L. R. 1 Pat. 57.—IND.

#### PART III. SECT. 2, SUB-SECT. 1.

(p. 891) l. —.—Objection was taken to the form of a warrant, as

falling to show jurisdiction, since it did not show that M. was a fugitive offender & that he was charged with an offence to which the Act applied:—*Held*: this objection was unsustainable in view of the facts alleged in the warrant, & also because the Act did not require the warrant to state that the offence charged was an offence within the Act; moreover, the warrant was merely one to apprehend, & had been indorsed in the manner provided by the Act.—*IRISH FREE STATE v. LITTLE*, [1931] 1 L. R. 39.—IR.

b (p. 893) l. — **Whether counsel entitled to cross-examine.**—On the taking of depositions for the purposes of the *Fugitive Offenders Act*, 1881 (Imp.), the counsel of accused has no right to cross-examine the witnesses.—*RE CAMPBELL*, [1935] N. Z. L. R. 352.—N.Z.

st. **Cancellation of warrant—Jurisdiction of High Court.**—Although *Extradition Act*, 1903, s. 15, empowers the Govt. of India & the local Govt. to stay proceedings taken under chap. III of the Act & to direct any warrant to be cancelled & accused released, this does not oust the jurisdiction of the High Ct. to interfere where action has not been taken under a valid warrant.—*JAIPAL BHAGAT v. R.* (1921), 1 L. R. 1 Pat. 57.—IND.

sb. **Authentication of warrant & depositions.**—In proceedings before a magistrate under *Fugitive Offenders Act*, 1881, the endorsed warrant for the apprehension of the fugitive bore the signature of a person who signed as a magistrate; the signature was certified by the Acting British Resident of the locality. A witness before the magistrate gave evidence identifying the signature of the magistrate & of the Resident, & stated that the magistrate was *de facto* exercising jurisdiction. Depositions put before the magistrate bearing the endorsement "True Copy" were similarly signed, certified, & identified:—*Held*: both the warrant & the copy of the depositions were duly authenticated as required by *Fugitive Offenders Act*, 1881, ss. 5, 29.—*RE POUNDALL, Ex p. WILLIAMS* (1931), 48 N. S. W. N. 228.—AUS.

sd. **Application of Order in Council—How proved.**—Promulgation of an Order in Council may be proved by the production of a copy of the Government Gazette containing the notice of proclamation of the Order in Council. The application of *Fugitive Offenders Act*, 1881 & 1915, to a Protected State

by Order in Council, which is proclaimed in the London Gazette, may be proved as an Act of State by tendering a copy of such Gazette. An Order in Council of the State of Perak made the penal code of the Straits Settlements applicable in Perak "upon the publication thereof in the Gazette." A book containing such Order was in evidence before a magistrate & contained a note that the Order was published in the *Perak Government Gazette* of a certain date:—*Held*: this notification afforded *prima facie* evidence of the due publication of the penal code in the State of Perak since it fell within the terms of N.S.W. Evidence Act, 1898, No. 11, s. 19 (1).—*RE SEERY, Ex p. WILLIAMS* (1931), 48 N. S. W. N. 221.—AUS.

st. **Application must be made in good faith.**—An application for the return of a prisoner is not made "in good faith in the interests of justice . . ." within *Fugitive Offenders Act*, 1881 (c. 69), s. 19, where the whole purpose & object of the laying of the information & the issuing of the warrant is to secure the return to a country of a person so that he might be there when certain civil proceedings, then pending, are heard & so that the pits. in those proceedings might be in a more advantageous position to obtain civil redress.—*RE COOK, Ex p. McELWAIN* (1932), 49 N. S. W. N. 153.—AUS.

#### PART III. SECT. 2, SUB-SECT. 2.

k i. —.—*Held*: the President of the High Ct. is "a Judge of a Superior Ct." within sect. 3 of *Fugitive Offenders Act*, 1881, & a District Justice of Dublin Metropolis is "a magistrate" who may exercise the powers conferred by sect. 5 of the Act.—*IRISH FREE STATE v. LITTLE*, [1931] 1 L. R. 39.—IR.

sg. **Warrant for offence punishable by State of Commonwealth.**—Where the warrant is for an offence punishable by a law of the State of the Commonwealth, & the evidence in support of the application for the warrant of remand to the Commonwealth is that the offence charged is an offence under the law of that State, & there is no evidence that it is an offence under the law of the Commonwealth, a warrant of remand for the return of the prisoner is invalid, & he is entitled to a writ of *habeas corpus*.—*RE MUNRO & CAMPBELL*, [1935] N. Z. L. R. 169.—N.Z.

fugitive has obtained an order *nisi* for a *habeas corpus*: *Qu.*; whether on the argument of the order *nisi* it is open to the High Ct. to consider whether the evidence produced before the magistrate is sufficient to raise a strong or probable presumption of the guilt of the alleged fugitive.—*R. v. Brixton*

PRISON GOVERNOR, *Ex p.* BIDWELL, [1937] 1 K. B. 305; [1936] 3 All E. R. 1; 106 L. J. K. B. 599; 155 L. T. 453; 100 J. P. 458; 53 T. L. R. 1; 80 Sol. Jo. 876; 34 L. G. R. 461; 30 Cox, C. C. 462, D. C.

160. *Add. Annotation*:—*Refd.* *Campbell v. Pollak*, [1927] A. C. 732.

## FACTORIES AND SHOPS.

### Part I.—Classification and Definitions.

1. *Add. Annotation* :—As to (1) **Refd.** *Kearns v. Gee, Walker & Slater, Ltd.*, [1936] 3 All E. R. 151.
8. *Add. Annotation* :—As to (1) **Consd.** *Mumby v. Volp* (1929), 141 L. T. 663.
13. After cross-reference following this case add :—  
**Factory & Workshops Acts, 1901–1920, in relation to Rating & Valuation (Apportionment) Act, 1928 (c. 44).**—See RATES & RATING, *post*.
17. *Add. Annotation* :—**Consd.** *Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc., etc.* (1930), 143 L. T. 653.
18. *Add. Annotation* :—**Consd.** *Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc., etc.* (1930), 143 L. T. 653.
22. *Add. Annotation* :—**Consd.** *Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc., etc.* (1930), 143 L. T. 650.
28. *Citation* :—For “2 B. & S. 153” read “3 B. & S. 153.”
29. *Add. Annotations* :—**Consd.** *Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc., etc.* (1930), 99 L. J. K. B. 428. **Refd.** *Skinner v. Breach*, [1927] 2 K. B. 220.
- 36a. — Need not be by owner of building.]—*MUMBY v. VOLP*, No. 98a, *post*.
38. *Add. Annotation* :—**Consd.** *Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc., etc.* (1930), 143 L. T. 650.
39. *Add. Annotation* :—**Consd.** *Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc., etc.* (1930), 143 L. T. 650.
40. *Add. Annotations* :—**Dbtd.** *Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc., etc.* (1930), 99 L. J. K. B. 428. **Refd.** *Skinner v. Breach*, [1927] 2 K. B. 220.
41. After this case add :—  
**Factory & Workshops Acts, 1901–1920, in relation to Rating & Valuation (Apportionment) Act, 1928 (c. 44).**—See RATES & RATING, *post*.
- 44a. “Occupier” of factory.]—Resp. co. was charged, as occupier of a factory, which was subject to certain regulations made in pursuance of the Factory & Workshop Act, 1901 (c. 22), s. 79, for the generation, transformation & distribution & use of electrical energy, with having neglected to observe a certain provision of the regulations, in that, certain work having to be done on a switchboard for high pressure situated in the power-station, the co. failed to make dead the switchboard, contrary to the requirements of the regulations, & that, in consequence of such neglect, a workman was killed. The work on the switchboard was being carried out by another co., & at the time of the accident the work had not yet been completed nor had the switchboard been handed over in working order to resp. co. The justices dismissed the charge, on the ground that in the circumstances resp. co. was not the occupier within the meaning of the Act at the time of the accident :—**Held** : (1) as the object of the switchboard was to control the distribution of extremely powerful electrical energy which came from resp. co.’s power-house, resp. co. was the occupier, within the meaning of the Act, & was therefore guilty of the offence with which it was charged ; (2) as the switchboard in question was not a “machine or implement moved by steam, water or other mechanical power,” within sect. 142 of the Act of 1901, that sect. was of no avail to the resp. co.—*TURNER v. COURTAULDS, LTD.*, [1937] 1 All E. R. 467 ; 81 Sol. Jo. 239, D. C.

### Part II.—Health and Sanitation.

57. *Add. Annotation* :—**Consd.** *Yates v. Burnley Rating Authority* (1933), 97 J. P. 226.

### Part III.—Accidents.

62. *Add. Annotations* :—**Consd.** *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] A. C. 206. **Refd.** *Dew v. United British S.S. Co.* (1928), 139 L. T. 628 ; *Lochgelly Iron & Coal Co. v. M’Mullan*, [1934] A. C. 1.

PART I. SECT. 1, SUB-SECT. 1.  
sa. *Flour mill.*]—**Held** : a “factory” within Factories Act, 1894.—*SELBY v. BANNIGAN* (1901), 3 S. A. L. R. 21.—**AUS.**

k i. ———.]—*R. v. WONG SAM* (B. C.), (1929) 52 Can. Crim. Cas. 357.—**CAN.**

m i. ———.]—**Held** : a drying yard,

situate about five or six yards from a factory, was part of the factory.—*RAMANATHAM v. R.* (1926), 1 L. R. 50 Mad. 834.—**IND.**

63. *Add. Annotations*:—*Refd.* Flower v. Ebbw Vale Steel, Iron & Coal Co., [1934] 2 K. B. 132. *Generally, Refd.* Atkinson v. L. & N. E. Ry. (1925), 42 T. L. R. 79; Wheeler v. New Merton Board Mills, Ltd., [1933] 2 K. B. 669.

63. *Add. Annotations*:—*Consd.* Sowter v. Steel Barrel Co. (1935), 154 L. T. 85; Wing v. Soar, [1938] 1 K. B. 379, n.

68a. ———.]—*Resps.*, the occupiers of a factory, provided adequate guards for securely fencing the mill-gearing, & exhibited a notice prohibiting workmen from removing any guard without special instructions. The workmen removed nine guards for the purpose of setting the rollers, & having replaced only eight of the guards, started the rollers. Owing to their neglect, one workman, who slipped & fell, was dragged into the coupling gear & was killed. An information against *resps.* under 1901 Act, s. 136, for neglecting to observe the provision of sect. 10 (1) (c) that the mill-gearing must be securely fenced, was dismissed, on the grounds that *resps.* had taken all adequate precautions by providing the necessary guards, & that it was the fault of the workmen that caused the accident:—*Held*: under sect. 10 it was the duty of *resps.* not merely to provide guards, but to fence the machinery securely, & as they had not performed this duty, the justices ought to have convicted them.—*THOMAS v. BOLTON (THOMAS) & SON, LTD.* (1928), 139 L. T. 397; 92 J. P. 147; 44 T. L. R. 640; 26 L. G. R. 459; 28 Cox, C. C. 529, D. C.

68b. ———.]—*Resps.* were charged with having failed to have certain mill gearing in their factory securely fenced, or in such position or of such construction as to be equally safe to every person employed or working in their factory, in consequence of which one of their workmen was injured. The mill gearing consisted of a countershaft 12½ ft. from the ground to which a belt was attached, & the workman was injured in replacing the belt. The justices dismissed the charge, holding that the said mill gearing need not be fenced, as it was as safe as it would be if fenced:—*Held*: as the essential purpose of Factory & Workshop Act, 1901 (c. 22), s. 10 (1) (c), is to provide absolute safety, so far as fencing can provide it, it was clear that the sect. had been contravened, & the offence charged was, therefore, proved.—*FINDLAY v. NEWMAN, HENDER & CO., LTD.*, [1937] 4 All E. R. 58; 81 Sol. Jo. 901; 35 L. G. R. 621, D. C.

68c. ———.]—*Pltf.*, who was sixteen and a half years of age, met with an accident while employed on a circular wood-cutting machine in *deft.*'s factory, where he had been so employed, on & off, for some seventeen months. At the time of the accident, he was engaged in cutting timber measuring from 3 ins. to 2 ins. in depth, & before he com-

menced work, the foreman, in accordance with the practice at the factory, adjusted the guard fitted to the saw in the proper position for cutting timber this size, so that the teeth of the saw were covered by the guard, except at the point where the lengths of timber were inserted, where the teeth were of necessity exposed for a few inches. *Pltf.* was supplied with a push-stick for the purpose of pushing through the length of sized timber, & also for that of detaching the off-cut from the left-hand side of the saw. After inserting a piece of timber, & while detaching the off-cut, the thumb of *pltf.*'s left hand got caught in the saw at the point of entrance, with the result that his thumb was cut off at the top joint, & that he eventually lost his little finger & the tops of his ring & middle fingers. The accident was caused through *pltf.* detaching the off-cut with his left hand instead of using the push-stick. Factory & Workshop Act, 1901 (c. 22), s. 10, provides that all dangerous parts of machinery shall be either securely fenced, or be in such a position as to be equally safe to every person working in the factory as they would have been if securely fenced. Reg. 11 of the regulations made under sect. 79 of the Act requires a suitable push-stick to be kept available for use at the bench of every circular saw fed by hand, & reg. 23 (ii) requires every person employed at the machine to use the push-stick provided in compliance with reg. 11:—*Held*: (1) *deft.* had committed a breach of his statutory duty under Factory & Workshop Act, 1901 (c. 22), s. 10, in failing to guard the teeth at the point of entrance to the saw, & the duty under that sect. was not altered by the regulations made under sect. 79; (2) *pltf.* had been guilty of contributory negligence in not complying with his statutory duty under reg. 23 (ii), & *deft.* must succeed on this ground.—*LEWIS v. DENYE*, [1938] 2 All E. R. 813.

71. *Add. Annotations*:—*Consd.* Higgins v. Harrison (1932), 25 B. W. C. C. 113; Peacock v. Gyproc Products, Ltd. (1935), 79 Sol. Jo. 904; Sowter v. Steel Barrel Co. (1935), 154 L. T. 85; Walker v. Bletchley Flettons, Ltd., [1937] 1 All E. R. 170; Carey v. Ocean Coal Co., [1938] 1 K. B. 365; Wing v. Soar, [1938] 1 K. B. 379, n. *Refd.* Atkinson v. L. & N. E. Ry. (1925), 42 T. L. R. 79; Flower v. Ebbw Vale Steel, Iron & Coal Co., [1934] 2 K. B. 132; Caswell v. Powell Duffryn Associated Collieries, Ltd., [1938] 3 All E. R. 21; Sutherland v. James Mills, Ltd., [1938] 1 All E. R. 283.

71a. ———.]—*PEACOCK v. GYPROC PRODUCTS, LTD.* (1935), 79 Sol. Jo. 904, D. C.

71b. ———.]—*Resps.* were charged with having failed to have the pinion-wheels of parts of their machinery securely fenced so as to be safe to every person employed or working in their factory, in consequence of which one of their workmen was injured while

PART III. SECT. 1, SUB-SECT. 1.—A.

70 III. ———.]—A co. was charged under 1901 Act, s. 10 (1) (c), with failing to keep its factory in conformity with that Act, in respect that a dangerous part of the machinery, the cutter of a horizontal milling machine, was not either securely fenced, or in

such a position or of such construction as to be equally safe to every person employed or working in the factory as it would have been if it had been securely fenced:—*Held*: (1) the question whether a part of the machinery was "dangerous" within the Act was one of degree, & the risk involved in the use of the cutter

did not reach a degree sufficient to justify that part being classified as "dangerous"; (2) in any event, to secure a conviction, facts must be established to support the second branch of the complaint, & on the facts, the charge was not proven.—*LAUDER v. BARR & STROUD*, [1927] S. C. (J.) 21.—*SCOT*.

engaged in greasing the machinery while it was in motion. Resps. had put up a notice in the factory as follows: "Do not put your hands in the machinery while it is in motion. Persons disregard this notice at their own risk." The pinion-wheels, although usually stopped, were occasionally allowed to remain in motion, for the purpose of greasing. The magistrate dismissed the charge, holding that the pinion-wheels were not dangerous parts of the machine unless in motion, when it was not usual for greasing to be done:—*Held*: as the wheels were dangerous parts of the machinery, they ought to have been securely fenced, despite the fact that greasing was not usually done while the machinery was in motion, as it cannot be assumed that every person will always exercise the necessary care. The offence charged was therefore proved.—*CHASTENEY v. NAIRN (MICHAEL) & CO., LTD.*, [1937] 1 All E. R. 376; 81 Sol. Jo. 238; 35 L. G. R. 195, D. C.

72. *Add. Annotation*:—*Reid*. *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K. B. 669.

72a. ———.—Resps. were charged with having failed to have certain machinery in their factory securely fenced, which machinery was dangerous to persons employed or working there, in consequence of which one of their workmen was injured. The machinery consisted of an electrically-driven reeling-machine, for the purpose of straightening & polishing steel bars & rods. While the workman was passing steel bars through the reeling-machine, & was endeavouring to pass a long rod, which was bent, through the machine, he was injured. The justices dismissed the charge, holding that the machinery was not dangerous, on the ground that, *inter alia*, the workman had no cause to put his hand near the gear-wheels, & that the machine had been inspected by H.M. factory inspectors, who did not raise any objection to its construction:—*Held*: as the purpose of the Act of 1901 is to provide protection against machinery which is dangerous in fact, it was not enough to say that, if the workman had obeyed his instructions, he would not have suffered injury, nor could it be said that burden was shifted by the Act upon the factory inspector. The offence charged was, therefore, proved.—*SUTHERLAND v. JAMES MILLS, LTD., EXECUTORS*, [1938] 1 All E. R. 283; 36 L. G. R. 167, D. C.

72b. ———.—An infant workgirl lost the ring finger of her right hand by accident arising out of & in the course of her employment. She received compensation under the Workmen's Compensation Act for a time, & then accepted £20 in purported settlement on the promise by the employer to re-employ her. No memorandum of this agreement was recorded. She worked at this employment for five years, when, by reason of trade conditions, she was discharged. She then commenced an action against the employer for

damages for personal injuries resultant from the employer's alleged breach of statutory duty to fence the machine. The action was tried by a judge alone, who found that the injury had been caused by the employer's breach of statutory duty to fence, & that there was no contributory negligence on the part of pltf. He, however, also found, having regard to the fact that the infant had received employment for five years after her accident under the agreement, that the agreement to accept compensation, though not registered, was for her benefit & therefore binding, with the result that the action was barred by Workmen's Compensation Act, 1925 (c. 84), s. 29, of the Act. The infant appealed:—*Held*: (1) without deciding whether the agreement was for the infant's benefit or whether further proceedings might be taken under the Workmen's Compensation Act, the action for breach of statutory duty failed because, on the evidence, the machine was not a dangerous machine within Factory & Workshop Act, 1901 (c. 22), s. 10, & therefore there was no duty on the employer to fence it; (2) on the evidence, the accident was caused by the negligence of pltf., which was a complete defence to the action even if such negligence had only been of a contributory character.—*HIGGINS v. HARRISON* (1932), 25 B. W. C. C. 113, O. A.

*Annotations*:—As to (1) *Consd.* *Rudd v. Elder Dempster & Co.* (1932), 49 T. L. R. 202; *Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E. R. 170. *Generally, Reid*. *Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1; *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1934] 2 K. B. 132.

72c. ———.—What amounts to "dangerous."—Pltf. was employed by defts., a firm of brick-makers, & was being taught to drive a mechanical excavator. When going, as he was entitled to do, to the tool-box, he slipped & his leg was caught & severely injured by a wheel of the machine which was not cased or fenced. No negligence on the part of anyone was alleged. Pltf. claimed that the absence of fencing made the machine a dangerous machine, & claimed damages for breach of statutory duty:—*Held*: in considering whether machinery is dangerous, it must not be assumed that everybody will always be careful. A part of a machine is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur. In the circumstances the part of the machine complained of was a dangerous one within Factory & Workshop Act, 1901 (c. 22), s. 10.—*WALKER v. BLETCHELY FLETTONS, LTD.*, [1937] 1 All E. R. 170.

74a. ———.—Machinery in electrical station—What amounts to:—*PAINE v. COLNE VALLEY ELECTRICITY SUPPLY CO., LTD., & BRITISH INSULATED CABLES, LTD.*, [1938] 4 All E. R. 803; 55 T. L. R. 181.

———.—A workman in a factory injured his hand in a machine so constructed that it

76a i. ———.—Defts. were the occupiers of a factory. A workman in their employment, following his daily duties, climbed up a ladder to the shafting in the dye-house to fix a belt on a pulley, & was caught in the shafting, whirled round & killed. No one actually saw the occurrence, but, as portions of deceased's clothing were on the shaft, they probably got caught

in it. An information against defts. charged that, contrary to Factory & Workshop Act, 1901, s. 10 (1) (c), a part of the mill gearing, namely, a line of shafting, was neither securely fenced nor in such a position nor of such construction as to be equally as safe to every person employed or working in the factory as if it had been securely fenced. The justices dismissed

the information, but stated a case for the opinion of the K. B. D.:—*Held*: defts., in failing to fence the line of shafting, had contravened Factory & Workshop Act, 1901, s. 10 (1) (c), & should be convicted.—*MINISTRY OF LABOUR FOR NORTHERN IRELAND v. COWDY & SONS*, [1939] N. I. 110.—



could only be operated by the workman actuating a safety device with one hand & the operating lever with the other. On the hearing of an information against the occupiers of the factory charging them with an offence against sect. 10 of 1901 Act, the justices held that the machine was "equally safe to every person employed or working in the factory as it would be if it were securely fenced" within sub-sect. (1) (c) of that sect., & they therefore dismissed the information:—*Held*: the word "safe" in the sub-sect. meant actually safe, not merely reasonably or practically safe, & the justices ought to have convicted resps.—*SOWTER v. STEEL BARREL CO., LTD.* (1935), 154 L. T. 85; 99 J. P. 379; 33 L. G. R. 376, D. C.

*Annotation*:—*Refd.* Chastaney v. Nairn (Michael) & Co [1937] 1 All E. R. 376.

- 76b. — Machinery equally safe fenced or unfenced—Overhead shaft.**—Resps. were the occupiers of a factory in which was a machine driven by a pulley fixed on a horizontal shaft, which formed part of the mill gearing. The driving belt slipped off the pulley & an employee of resps. attempted to put it back while the shaft was running & sustained injuries. The shaft & pulley were about thirteen feet from the floor & they were not fenced or guarded. In attempting to put on the belt the workman stood on a beam about seven feet from the floor, & was acting contrary to resps.' instructions. Resps. were summoned for not having the shaft fenced, but the justices, being of opinion that any fence would have been useless owing to the shaft being thirteen feet above the ground, dismissed the case:—*Held*: the finding of the justices was not equivalent to a finding that the shaft was "in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced," which was the requirement of 1901 Act, s. 10 (1) (c), & there would have been no evidence to support the latter finding.—*ATKINSON v. LONDON & NORTH EASTERN RY. CO.*, [1926] 1 K. B. 313; 95 L. J. K. B. 266; 134 L. T. 217; 90 J. P. 17; 42 T. L. R. 79; 23 L. G. R. 702; 28 Cox, C. C. 112, D. C.

*Annotations*:—*Consd.* Sowter v. Steel Barrel Co. (1935), 154 L. T. 85; *Wing v. Soar*, [1938] 1 K. B. 379, n. *Refd.* Findlay v. Newman, Hender & Co., [1937] 4 All E. R. 58.

- 76c. — Fencing removed for examination & lubrication.**—Resps. were the occupiers of a factory in which there was a machine the dangerous parts of which were ordinarily protected by a metal guard. In Dec. 1936, the guard was removed to facilitate experiments with bearings of a new type & for the purpose of examination & lubrication. In Feb. 1937, while the guard was still removed, an accident occurred. Resps. were charged with offences under Factory & Workshop Act, 1901 (c. 22), based on the allegation that they were occupiers of a factory containing dangerous machinery which was not securely fenced, contrary to sect. 10 (1) (c) of that Act. Resps. pleaded by way of defence that the dangerous parts of the machine were necessarily exposed for the purposes referred to in sect. 10 (1) (d) of the Act. The justices dismissed the charges:—*Held*: the exemption in para. (d) of sect. 10 (1) of Factory & Workshop Act, 1901 (c. 22), applied also to

para. (c) of that sub-sect., & where it was proved that the fencing of dangerous parts of machinery was removed for any of the purposes set out in para. (d), the occupier of the factory could not be convicted of a breach of para. (c); also the exemption in para. (d) provided no defence where there had been a failure to fence at all.—*ATKINSON v. BALDWIN, LTD.* (1938), 158 L. T. 279; 102 J. P. 158; 36 L. G. R. 333, D. C.

- 76d. —**—*VOWLES v. ARMSTRONG SIDDELEY MOTORS, LTD.* (1938), 55 T. L. R. 201, C. A.

- 76e. Statutory duty to use guard.**—The Woodworking Machinery Regulations, 1922, imposed upon the occupier of a woodworking factory an obligation (Reg. 17) to provide when practicable the cutter of every vertical spindle moulding machine with the most efficient guard, & (Reg. 21) to maintain the guards required by those Regulations in an efficient state, which must be constantly kept in position while the machinery is in motion. The Regulations also imposed a duty upon every person employed on a woodworking machine (Reg. 23) to use & maintain in proper adjustment the guards provided in accordance with the Regulations. In *Defts.*' woodworking factory there was a spindle moulding machine in which the circular saw was protected by a pair of fences when the machine was being used for grooving a straight piece of wood, but which had to be removed when the machine was being used for grooving curved wood. A factory inspector visited the factory & required *defts.* to provide a proper guard for curved work. This was done, but the guards had to be constantly changed according as the machine was being used for straight work or for curved work. *Defts.*' managing director gave an order to *pltf.*, who was working the machine, not to use the guard, because it was a waste of time. In consequence *pltf.* did not use the guard, with the result that his hand came in contact with the saw & he was injured. *Pltf.*, who was under twenty-one years of age, received certain weekly payments under Workmen's Compensation Act, 1925. Subsequently he commenced an action at common law to recover damages for his personal injuries, alleging that *defts.* had been guilty of a statutory breach of duty in failing to fence the machine. *HILBERY, J.*, held that he could not recover, as he had himself committed a breach of statutory duty imposed upon him by Reg. 23 of the Woodworking Machinery Regulations in failing to use & maintain the guard. On appeal:—*Held*: there was not a guard provided by the employers within the Reg. 23 of the Woodworking Machinery Regulations, 1922, & therefore *pltf.* was not committing a breach of statutory duty in failing to use & maintain a guard provided in accordance with the Regulations. It was true that there was a guard upon the premises near where *pltf.* was working, but he had been told by his employers not to use it. When *pltf.* was ordered not to use the guard, it had been taken away, just as much as if it had not been provided at all; further, *pltf.*, being an infant, was not bound by the fact that he had accepted weekly payments under the Workmen's Compensation Act, 1925, as it was more to his benefit to bring an action

at common law in order to recover damages for his personal injuries than to make a claim for compensation under the Act of 1925.

*Per GREER, L.J.*: The case ought also to be decided in favour of *pltf.* upon the ground that a man cannot take advantage of his own wrong. *Defts.* were not entitled to take advantage of the order they had given to *pltf.* not to use the guard, whereby they had prevented him from performing his duty under Reg. 23.—*MURRAY v. SCHWACHMAN, Ltd.*, [1938] 1 K. B. 130; [1937] 2 All E. R. 68; 106 L. J. K. B. 354; 156 L. T. 407; 53 T. L. R. 458; 81 Sol. Jo. 294; 30 B. W. C. C. 466, C. A.

*Annotation*:—*Refd.* *Lewis v. Denye*, [1938] 2 All E. R. 813.

79. *Add. Annotations*:—*As to* (1) *Refd.* *Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1. *As to* (2) *Refd.* *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] A. C. 206.

80. *Add. Annotations*:—*As to* (1) *Consd.* *Dew v. United British S.S. Co.* (1928), 139 L. T. 628. *Apld.* *Higgins v. Harrison* (1932), 25 B. W. C. C. 113. *Distd.* *Rudd v. Elder Dempster & Co.* (1932), 49 T. L. R. 202. *Refd.* *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1938] 3 All E. R. 21. *As to* (2) *Consd.* *Knott v. London County Council*, [1934] 1 K. B. 126; *Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1; *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K. B. 669. *Refd.* *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] A. C. 206; *Kearns v. Gee, Walker & Slater, Ltd.*, [1936] 3 All E. R. 151; *Murray v. Schwachman, Ltd.*, [1937] 2 All E. R. 68. *Generally, Refd.* *Craze v. Meyer-Dumore Bottlers' Equipment Co.*, [1936] 2 All E. R. 1150.

81a. ————.]—*HIGGINS v. HARRISON*, No. 72b, *ante*.

81b. ————.]—*Defts.* installed in their factory a circular saw, which in breach of a statutory duty was improperly fenced. A workman was injured while testing the machinery of the saw in a manner which was held to be the direct cause of the accident. In an action for damages for personal injuries it was argued on behalf of the workman that, in order to prevent him from obtaining compensation based upon a breach of a statutory duty, there must be contributory negligence on the part of the workman limited to acts done in breach of some order or done outside

the ambit of his employment:—*Held*: the negligence of a workman which would prevent him from obtaining compensation based upon a breach of a statutory duty was negligence of the ordinary kind, & as the workman had been negligent in the present case he could not recover.—*CRAZE v. MEYER-DUMORE BOTTLERS' EQUIPMENT CO., LTD.*, [1936] 2 All E. R. 1150; 80 Sol. Jo. 552, C. A.

*Annotation*:—*Refd.* *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1938] 3 All E. R. 21.

81c. ————.]—*LEWIS v. DENYE*, No. 68c, *ante*.

91. *Add. Annotation*:—*As to* (2) *Consd. & Expld.* *Mumby v. Volp* (1929), 141 L. T. 663.

92. For "69 L. T. 622" read "79 L. T. 622."

93a. *Duty to keep in repair & free from obstructoin*—*Part of factory in occupation of lessee.*—The supply of mechanical power referred to in *Factory & Workshop Act*, 1901 (c. 22), s. 149 (1), is not limited to the case of supply by the owner of the building, & there is no reason to read into the sub-sect. after the word "supplied" the words "by the owner."

X. owned a building which was a factory where more than forty persons were employed, & carried on business as a shirt manufacturer in the basement & on the ground & first floors. The second floor was unoccupied. The third & fourth floors were let to Y., who carried on business there as a blouse manufacturer, employing more than forty persons. The factory of X. & that of Y. were respectively worked by separate & distinct electric motors, driven by electricity generated & supplied by the electricity undertaking of a municipal corpn. & each factory had a separate meter. Without this supply of electricity the electric motors could not be driven:—*Held*: mechanical power, namely, electrical current, was supplied to different parts of the same building within sect. 149 (1). Accordingly, as the building was a tenement factory, etc., the owner, was responsible under sect. 14 (6), (7) of the Act that the means of escape in case of fire provided throughout the factory, including the two floors occupied by Y., should be maintained in good condition & free from obstruction.—*MUMBY v. VOLP*, [1930] 1 K. B. 460; 99 L. J. K. B. 213; 141 L. T. 663; 93 J. P. 197; 27 L. G. R. 594, D. C.

## Part IV.—Dangerous and Unhealthy Industries.

104. *Add. Annotation*:—*As to* (2) *Consd.* *Smith v. Cammell Laird & Co.*, [1938] 3 All E. R. 52.

105. *Add. Annotation*:—*Refd.* *Smith v. Cammell Laird & Co.*, [1938] 3 All E. R. 52.

109. *Add. Annotation*:—*Refd.* *Smith v. Cammell Laird & Co.*, [1938] 3 All E. R. 52.

118. *Add. Annotations*:—*Folld.* *Manchester Ship Canal Co. v. Director of Public Prosecutions*, [1930] 1 K. B. 547. *Consd.* *Hawkins v. Thames Stevedore Co. & Cold Storage Co.*, [1930] 2 All E. R. 472. *Refd.* *Hamilton v. Shelton Iron, Steel & Coal Co.*, *Leigh v. Same*, *Timmins v. Same* (1926), 96 L. J. K. B.

81 iii. ————.]—In an action by the widow of a deceased employee against his employer *pltf.* alleged that *deft.* in contravention of *Factories & Shops Act*, 1912 (N.S.W.), neglected & omitted securely or at all to fence the dangerous parts of a machine whereby deceased was injured & died. The jury returned a general

verdict for *deft.*:—*Held*: in the particular circumstances there should be a new trial, there having been a misdirection on the question of contributory negligence upon which the jury might have acted.—*COFIELD v. WATERLOO CASE CO., LTD.* (1924), 34 C. L. R. 363.—*AUS.*

81 iv. ————.]—*Con-*

tributory negligence is not a defence to an action to recover damages for personal injury, caused by a breach of an absolute statutory duty imposed for the benefit of a class of persons, of which *pltf.* is a member.—*BOURKE v. BUTTERFIELD & LEWIS, LTD.* (1927), 38 C. L. R. 354; 27 S. R. N. S. W. 339; [1927] *Argus* L. R. 3.—*AUS.*

295; *Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw* (1927), 96 L. J. K. B. 664; *Bevan v. Nixon's Navigation Co.*, [1929] A. C. 44.

122. *Add. Annotation*:—*Refd. Smith v. Cammell Laird & Co.*, [1938] 3 All E. R. 52.

124. *Add. Annotation*:—*As to* (1) *Refd. Smith v. Cammell Laird & Co.*, [1938] 3 All E. R. 52.

135. *Add. Annotation*:—*Consd. Smith v. Cammell Laird & Co.*, [1938] 3 All E. R. 52.

136. *Add. Annotations*:—*Refd. Russell v. Criterion Film Productions, Ltd.*, [1936] 3 All E. R. 627; *Wilson & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.

137. *Add. Annotation*:—*Folld. Manchester Ship Canal Co. v. Director of Public Prosecutions*, [1930] 1 K. B. 547.

138. *Add. Annotations*:—*Consd. Hawkins v. Thames Stevedore Co. & Cold Storage Co.*, [1936] 2 All E. R. 472. *Refd. Manchester Ship Canal Co. v. Director of Public Prosecutions*, [1930] 1 K. B. 547.

138a. — **Docks Regulations, 1925.** Reg. 34 provided: "(a) Where there is more than one hatchway, if any hatch of a hold exceeding five feet in depth measured from the level of the deck in which the hatch is situated to the bottom of the hold, is not in use for the passage of goods, coal, or other material, or for trimming, & the coamings are less than two feet six inches in height, such hatch shall either be fenced to a height of three feet or be securely covered . . .":—*Held*: (1) the duty of fencing or covering a hatch, in compliance with reg. 34, which was not in use but which had been used during the process of unloading a ship lay upon the person who by himself, his agents, or workmen carried on the process of unloading, & not upon the owner, master, or officer in charge of the ship; (2) for the purposes of the 1901 Act, the covering of a hatch which had been used for the purpose of unloading the ship was ancillary to the main work of unloading, & the work of unloading was not completed till the hatch was covered.—*MANCHESTER SHIP CANAL CO. v. DIRECTOR OF PUBLIC PROSECUTIONS*, [1930] 1 K. B. 547; 99 L. J. K. B. 230; 143 L. T. 113; 46 T. L. R. 163; 18 Asp. M. L. C. 140, D. C.

*Annotation*:—*As to* (2) *Consd. Hawkins v. Thames Stevedore Co. & Cold Storage Co.*, [1936] 2 All E. R. 472.

138b. — — —.]—A workman in a ship in dock fell through a hatchway of which the fencing had become loose & was injured. He was employed in replacing the insulation on refrigerator pipes, & his employers were in no way connected with either of defts. He sued the stevedores working on the hatch, & the owners, for negligence & breach of their statutory duty to light the ship efficiently & to fence the hatchway while it remained open. The Factory & Workshop, Dangerous & Unhealthy Industries Regulations, 1934, reg. 12, provides that decks where work is being done must be efficiently lighted when "processes," which include unloading, are being carried on. Defts. contended that the "process" was finished

when the hatchways had been fenced in accordance with the regulations; & also that pltf., who was not engaged in any of the processes, was not within the benefit of reg. 37, which provides for the fencing of hatchways:—*Held*: (1) the process of unloading continues until all the hatch covers have been replaced; (2) on the authority of *Manchester Ship Canal Co. v. Director of Public Prosecutions*, No. 138a, the effect of Docks Regulations, 1925, was to protect any workman employed in the ship even if not employed on any of the processes & the 1934 Regulations did not withdraw this protection.—*HAWKINS v. THAMES STEVEDORE CO., LTD. & UNION COLD STORAGE CO., LTD.*, [1936] 2 All E. R. 472; 80 Sol. Jo. 387.

138c. — — —.]—Pltf., employed as a labourer, was assisting in the unloading of timber from defts.' ship. Having finished unloading one kind of timber, a different skid was required to unload the next kind. It was suggested to pltf. that a suitable skid was to be found in the after part of the ship & he proceeded there in search of one. In a badly lighted part of the deck space he fell down an open hatch & was injured. It was contended for defts. that there was no invitation to pltf. to go to the part of the ship where the accident happened. Pltf. relied upon a breach of the regulations made under the Factory & Workshops Act, 1901 (c. 22), s. 79, namely, that in breach of reg. 12 (c) the deck space was insufficiently lighted & in breach of reg. 37 (a) the hatch was insufficiently fenced. The only fence in the present case was some distance from the hatch & in any event of an insufficient height:—*Held*: (1) pltf. was an invitee & was entitled to recover; (2) in the above reg. 12 (c) "required to proceed" does not necessarily mean ordered to proceed; but includes any place where a workman might properly go for ropes, slings, skids, etc.; (3) in the above reg. 37 (a) "accessible" means accessible without reasonable let or hindrance & the "fence" is a fence situated in close proximity to a single hatch.—*HENAGHAN v. REDERIET FORANGIRENE*, [1936] 2 All E. R. 1426.

138d. **Hatch covering not strengthened—Docks Regulations, 1934.**—Five stevedores were loading a ship, & following instructions given to them by the hatch foreman, a servant of deft. co., placed 49 tons of iron upon a between-deck hatch covering. The hatch covering collapsed & pltf. fell into the hold & were injured. The claim in negligence was barred by the doctrine of common employment, & reliance was placed upon a breach of statutory duty imposed by Docks Regulations, 1934, regs. 36, 38, made under Factory & Workshop Act, 1901 (c. 22). Reg. 36 requires a deck-stage or cargo-stage to be substantially constructed, & reg. 38 provides that no cargo shall be loaded or unloaded by a fall or sling at any intermediate deck unless either the hatch at that deck is securely fastened or a secure landing platform has been placed across it:—*Held*: (1) the ct. was bound by the dictum of SCRUTTON,

PART IV. SECT. 2, SUB-SECT. 1.—D.

135 H. — *Interpretation of regulations—Question for court.*—*BISSETT v. HEITON & CO., LTD.*, [1930] 1 R. 17.—IR.

L.J., in *Hillen & Pettigrew v. I.C.I. (Alkali), Ltd.*, to hold that the hatch of a ship is not a deck-stage or cargo-stage within the meaning of that word in reg. 36; (2) the placing of the weight of iron upon the hatch coverings when they were not so strengthened & reinforced as to be capable of bearing the weight imposed upon them was a breach of reg. 38; (3) reg. 38 imposes a duty upon the shipowner & does not impose a duty upon the persons employed in the process of loading or unloading. It could not, therefore, be said that plffs. were guilty of any breach of statutory duty.—*HANLON v. PORT OF LIVERPOOL STEVEDORING CO., LTD.*, [1937] 4 All E. R. 39.

**138e. Defective staging—Shipbuilding Regulations, 1931.**—Shipbuilding Regulations, 1931, made in respect of the construction & repair of ships in shipbuilding yards provide that it shall be the duty of the occupier to comply with the Regulations, & by Part II., reg. 11 (b), that all staging shall be securely constructed of sound & substantial material & shall be maintained in such condition as to ensure the safety of all persons employed.

Defts. were constructing in their shipbuilding yard a vessel for shipowners, which had been launched & placed for finishing in a wet dock in that yard. For the purposes of their building operations defts. had erected in the lower forehold of the vessel a staging, which they no longer used, though their inspectors still examined it from time to time. The shipowners employed an insulation co. to do certain work in the vessel, & defts. allowed that co. to occupy & use the staging in the course of their work. Owing to a defect in the staging, pltf., an employee of the insulation co., while engaged in their work fell from the staging & was injured. Pltf. brought an action against defts. for damages for personal injuries alleged to have been caused by the negligence of defts., & by their breach of the statutory duty imposed upon them by the Regulations:—*Held*: the Regulations, as regards their provisions for the security of staging, did not so affect sect. 104 of the Act as for the purposes of the case to render the shipbuilding yard the only possible factory & the shipbuilders the only occupiers, or necessarily to prevent premises forming part thereof from becoming a factory & the occupier of such premises from being the occupier of a factory; the part of the vessel in which the staging was erected constituted a factory within the meaning of the Act & the Regulations, the occupiers of which were not defts. but the insulation co.; defts. were under no duty to maintain the staging; & the action failed & should be dismissed.—*SMITH v. CAMMELL, LAIRD & CO., LTD.*, [1938] 2 K. B. 700; [1938] 3 All E. R. 52; 107 L. J. K. B. 529; 159 L. T. 25; 54 T. L. R. 730; 82 Sol. Jo. 392; 36 L. G. R. 541, C. A.

**138f. Unloading ship—Docks Regulations, 1934.**—*PECK v. HULL AND EAST COAST STEVEDORING CO., LTD.* (1938), 82 Sol. Jo. 153, C. A.

**PART IV. SECT. 2, SUB-SECT. 4.**  
q i. — *Defective hoist—Liability of scaffolding firm.*—A scaffolding firm were employed by builders to erect a hoisting machine for use in the construction of a building which the builders were erecting. The scaffolding firm erected the machine & handed it over to the builders. It was not

used until after it was handed over; when it collapsed, owing to defects in its construction, causing injuries to certain workmen.—*Held*: the scaffolding firm were guilty of an offence under para. 4 (a) of the Building (Amendment) Regs., 1931, in respect that a duty of compliance with the Regs. was imposed upon them as well as

upon the builders; & the fact that the Regs. applied only to premises in which machinery was "temporarily used" did not preclude the commission of an offence under para. 4 (a) before the date on which the machine was brought into actual use.—*SCAFFOLDING (GREAT BRITAIN), LTD. v. STRATHERN*, [1936] S. C. (J.) 9.—*SCOT*.

**143. Add. Annotation:—Consd.** *Westripp v. Bal-dock*, [1938] 2 All E. R. 779.

**144. Add. Annotation:—Refd.** *Westripp v. Bal-dock*, [1938] 2 All E. R. 779.

**145. Add. Annotation:—Consd.** *Smith v. Cammell Laird & Co.*, [1938] 3 All E. R. 52.

**153. Add. Annotation:—Refd.** *Stroud v. Bath Gas Light & Coke Co.* (1927), 137 L. T. 623.

**153a. — "Temporarily used"—Machinery not in actual use.**—By Factory & Workshop Act, 1901 (c. 22), s. 79, the Secretary of State may make regulations in respect of dangerous machinery. By sect. 105 the provisions of the Acts with respect (*inter alia*) to fines in respect of death or injury are applicable as if any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building were included in the word "factory," & as if the person who by himself, his agents or workmen, temporarily uses any such machinery for the before-mentioned purpose were the occupier of a factory. The Secretary of State, in pursuance of s. 79, made certain regulations casting upon employers of workmen the duty of fencing floor-openings with a suitable guard rail & toe board or other efficient means:—*Held*: (1) the words "temporarily used" are not confined to the actual moment when the machinery is in use, but extend to the whole period during which the machinery is available for use in the constructional work, & therefore that persons who had brought such machinery upon the premises were liable to conviction as the occupiers of a factory in respect of the death of a workman who fell through an unfenced shaft at a time when the mechanical hoist for which the shaft was made was not in use; (2) the words "employers of workmen" imposed upon sub-contractors, engaged in laying floors in a building in course of erection, liability in respect of the death of one of their workmen who fell through an unguarded well hole which the sub-contractors had left for a staircase in the construction of which the sub-contractors were not concerned.—*BARNETT v. CAXTON FLOORS, LTD., BUTLER v. KLEINE PATENT FIRE RESISTING FLOORING SYNDICATE, LTD.* (1928), 140 L. T. 138; 93 J. P. 59; 45 T. L. R. 141; 27 L. G. R. 27; 28 Cox, C. C. 558, D. C.

— *Electric crane.*—By para. 31 of the Building Regulations, 1926, made under Factory & Workshop Act, 1901 (c. 22), which apply to all premises on which machinery worked by steam, water or other mechanical power is temporarily used for the purpose of the construction of a building: "Any part of the premises in which any person is habitually employed shall be covered in such a manner as to protect any person who is working in that part from being struck by any falling material or article."

Pltf., a bricklayer, having been struck while at work on a building under reconstruction by bricks falling from a higher floor & thereby injured, claimed damages for negligence, as having been due to the breach of a statutory regulation—namely, para. 31 set out above. The county ct. judge dismissed the action on the ground that the scaffolding where the accident happened having only been in position for a day & a half, neither pltf. nor any other person was habitually employed there. On appeal:—*Held*: (1) “mechanical power” includes an electric crane; (2) the regulation assumed that workmen would have to move about from one part of the premises to another & imposed a duty upon the employers to afford protective cover against falling material in all parts of the building where it might be required, for the benefit of any person who might be working there. Pltf. was therefore entitled to recover damages for his injury.—*KEARNS v. GEE, WALKER & SLATER, LTD.*, [1937] 1 K. B. 187; [1936] 3 All E. R. 151; 106 L. J. K. B. 16; 155 L. T. 519; 53 T. L. R. 38; 80 Sol. Jo. 854, C. A.

**180a.** — Regulations binding on “employer of workman”—Liability of sub-contractor.]—*BARNETT v. CAXTON FLOORS, LTD., BUTLER v. KLEINE PATENT FIRE RESISTING FLOORING SYNDICATE, LTD.*, No. 153a, *ante*.

**180b.** — Extensive building site—House on site completed.]—Injuries were sustained by two workmen in the employ of resps., who were contractors engaged in the erection of a number of houses on a large area of unenclosed land. At one point on the building site was a mortar mill driven by a petrol engine, & there was also on the site a concrete mixer on wheels, which was moved about the site as occasion required. In the first case the workman injured himself while working on the roof of a house which had almost been completed. The mortar mill was 100 yds. distant from the house, & was not within its curtilage or precincts. In the second case the accident occurred in a completed house from which the mortar mill was 25 yds. & the concrete mixer about 400 yds. distant; neither of these machines had any connection with the accident. In both cases the workmen were disabled for more than three days, but resps. did not send written notice to the inspector of the district. Informations for failing to give notice were preferred against resps. under the Notice of

Accidents Act, 1906 (c. 53), as amended by Workmen's Compensation Act, 1923 (c. 42). The justices dismissed both informations:—*Held*: (without deciding whether an extensive building site may be a “factory” within Factory & Workshop Act, 1901 (c. 22), s. 105 (1)), the question of the extent of “premises on which machinery . . . it temporarily used for the purpose of the construction of a building” was one of degree & therefore of fact; & the justices had not misdirected themselves in holding that a house on such a site, when completed, or nearly completed, became a separate set of premises, which could not be deemed to be a “factory” within the Act.—*PEASE v. SIMMS (W. J.), SONS & COOKE, LTD.*, [1932] 1 K. B. 723; 101 L. J. K. B. 805; 146 L. T. 366; 96 J. P. 66; 48 T. L. R. 176; 30 L. G. R. 87, D. C.

**180c.** “Habitually employed.”]—*KEARNS v. GEE, WALKER & SLATER, LTD.*, No. 153b, *ante*.

**180d.** Electric wire insufficiently insulated.]—Resps. were charged, as the occupiers of certain premises in the course of construction, with failing to have properly covered with insulating material the lead to a portable electric lamp, & with failing so to place & safeguard that lead as to prevent danger, so far as reasonably practicable, contrary to the Building Regulations, 1926, & that, in consequence of such neglect, a labourer employed by resps. had been killed. The justices dismissed the informations, on the ground that the leads were supplied & intended by resps. for use as a “hanging” cable, & not as a “trailer”; that the leads were of the type usual for such purpose, & had been passed by the local electrician for such purpose; that the leads had been repaired with adhesive tape, where necessary; & that the accident had happened at night when the labourer himself, without authority, fetched the lamp from the boiler house, & instead of hanging it up, trailed it through the wet, & received a fatal shock. The regulations require an electrical conductor to be covered with insulating material where necessary to prevent danger, & to be so placed & safeguarded as to prevent danger where reasonably practicable:—*Held*: the regulations were imperative, & required the occupiers so to place & protect the wires that there was no danger to any person employed. The facts proved showed a breach of the regulations.—*LONG v. KIRK & Co., LTD.*, [1938] 1 All E. R. 142; 82 Sol. Jo. 256; 36 L. G. R. 153.

## Part V.—Conditions as to Employment and Wages.

**186. Add. Annotation:—***Reid. Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc.*, etc. (1930), 99 L. J. K. B. 428.

**190.** After this case add:—

—.]—*See Hairdressers' & Barbers' Shops (Sunday Closing) Act, 1930 (c. 35), s. 3.*

**192. Add. Annotation:—***As to (1) Consd. Rutherford v. Trust Houses*, [1926] 1 K. B. 321.

### PART V. SECT. 3, SUB-SECT. 1.

**q1.** — *Automatic vending machine.*]—An automatic vending machine attached to a telegraph pole in a public street is not a “shop” within Shops & Offices Act, 1921–22. *Qu.*: the case of an automatic machine which is part

of a shop but which can be operated from outside the shop.—*LIGHTFOOT v. HUGH & G. K. NEILL, LTD.*, [1929] N. Z. L. R. 848.—*N.Z.*

*sk. Meal-times—Interval for meals—Whether part of hours of employment—Shops Act, 1912 (c. 3), s. 1 (3) & Sched. I.]*

—Two employees in a shop began work at 7 a.m. & stopped work at 6.45 p.m. One of them was allowed away for dinner from 10.45 a.m. until 11.45 a.m., the other from 2 p.m. to 3 p.m. approximately:—*Held*: although each of the employees

193. *Add. Annotations*.—As to (1) *Folld. George Hotel (Colchester), Ltd. v. Ball*, [1938] 3 All E. R. 790. As to (2) *Dlstd. Rutherford v. Trust Houses* (1925), 89 J. P. Jo. 682.

193a. —.]—A residential hotel had accommodation for about forty guests. There was only one dining-room, which was used by residents & non-residents. A waiter, wholly employed in the dining-room, was found by the justices to be mainly employed in serving meals to non-residents. In these circumstances, the justices held that the dining-room was a shop, & the waiter a shop assistant within Shops Act, 1912, s. 1:—*Held*: it followed from the findings of fact of the justices that the dining-room was a shop, & the waiter a shop assistant, within the sect.—*GEORGE HOTEL (COLCHESTER), LTD. v. BALL*, [1938] 3 All E. R. 790; 159 L. T. 85; 102 J. P. 337; 82 Sol. Jo. 435; 36 L. G. R. 410, D. C.

197a. — Warehouse.]—Appls. were convicted by justices of offences against sects. 11 & 12 of Shops (Sunday Trading Restriction) Act, 1936 (c. 53), relating to Sunday employment at a "shop" of which they were the occupiers. Appls. occupied a warehouse for the storage of ice-cream from which on Sunday supplies were given to employees to be sold by each of those employees to members of the public by retail from a movable box-tricycle:—*Held*: the warehouse was not a shop which was open for the serving of customers on Sunday within sect. 11 (1) of the Act, nor was it a place where retail trade or business was carried on within sect. 13 so that the provisions of the Act extended to it as if it were a shop; the box-tricycle was not a "place" within sect. 13; & therefore, appls. had been wrongly convicted.—*ELDORADO ICE CREAM CO., LTD. v. CLARK, ELDO-*

*RADO ICE CREAM CO., LTD. v. KEATING*, [1938] 1 K. B. 715; [1938] 1 All E. R. 330; 107 L. J. K. B. 290; 158 L. T. 249; 102 J. P. 147; 54 T. L. R. 356; 82 Sol. Jo. 176; 36 L. G. R. 203; 30 Cox, C. C. 660, D. C.

197b. What is a "place"—Warehouse.]—*ELDORADO ICE CREAM CO., LTD. v. CLARK*, No. 197a, ante.

197c. Box-tricycle.]—*ELDORADO ICE CREAM CO., LTD. v. CLARK*, No. 197a, ante.

206a. Shops Act, 1913 (c. 24), s. 1.—Where the occupier of premises for the sale of refreshments, whether licensed for the sale of intoxicating liquor or not, elects under sect. 1 (1) of the above Act that instead of the provisions of Shops Act, 1912 (c. 3), s. 1, with regard to holidays, the provisions of sect. 1 (1) (a), (b), (c) & (d) of the above Act shall apply to shop assistants employed on the premises wholly or mainly in connection with the sale of intoxicating liquors or refreshments for consumption on the premises, he must be taken to elect to adopt the extended definition of shop assistant in sect. 1 (5) of the above Act, namely, that "shop assistant" includes "all persons wholly or mainly employed in any capacity at the premises in connection with the business there carried on," & he cannot afterwards be heard to say that any person so employed is not a shop assistant.—*RUTHERFORD v. TRUST HOUSES, LTD.*, [1926] 1 K. B. 321; 95 L. J. K. B. 371; 134 L. T. 630; 90 J. P. 62; 42 T. L. R. 148; 24 L. G. R. 245; 28 Cox, C. C. 161, D. C.

207a. Notice relating to young persons—"Exhibited"—Notice in folder.]—*TINN v. CUNNINGHAM* (1938), 82 Sol. Jo. 435, D. C.

was away during part of the period 11.30 to 2.30, their hours of employment included those hours, & their employer had contravened the above Act by not allowing them an interval of three-quarters of an hour between those hours.—*HUTCHISON v. CUMMING*, [1926] S. C. (J.) 110.—SCOT.

s1. Failure to give annual holidays—Right of action for wages in lieu.]—Under Shops Act, 1912, s. 21 (6), Sched. V., on failure to comply with the provisions of that Sched., the occupier of the shop is guilty of an offence against the Act & is liable to the penalty therein prescribed. The Sched. provides for an annual holiday for shop assistants without deduction from wages or salary. Pltf. brought a civil bill claiming the sum of £9 0s. 0d., being the amount due by deft. for four weeks wages in lieu of the holidays which he had not received.—*Held*: pltf. had a right of action for deft.'s breach of statutory duty to give him a fortnight's holiday with full pay in each year & this right was available in addition to the remedy for recovery of a penalty.—*REILLY v. MOORE*, [1935] N. I. 196.—IR.

#### PART V. SECT. 3, SUB-SECT. 2.—A.

e 1. —.]—It is unlawful for the keeper of a shop in which goods of different classes, including fruit & vegetables, are kept for sale, to keep his shop open for the purpose of selling groceries during hours in which the sale of groceries is prohibited, although the same shop is used for the conduct of a "furtive tea-room," & for the sale

of fruit & vegetables.—*HUNN v. REYNOLDS*, 22 Tas. L. R. 64.—AUS.

e 11. —.]—It is lawful for the keeper of a shop, in which goods of different classes are kept for sale, to keep such shop open for the *bond fide* conduct of a tea room during hours in which the sale of goods which are not exempted by Shops Act, 1925, is prohibited.—*WEYMOUTH v. SHACKLOTH*, 22 Tas. L. R. 7.—AUS.

f 1. — Meaning of "open."—A shop is open for trading when it is made accessible to customers for that purpose.—*DEVONISH v. PORTER*, [1928] S. A. S. R. 296.—AUS.

o 1. —.]—Where a municipal bye-law, *s.g.*, one requiring shops to be closed on certain afternoons, is in strict accordance with the powers conferred by the Act under which it was passed, it cannot be held to be invalid or unenforceable on the ground that its provisions are unreasonable, uncertain or oppressive.—*WINNIPEG MERCHANDISERS, LTD. v. WINNIPEG CITY*, [1936] 3 W. W. R. 530.—CAN.

211 1. Customer in shop before closing hour—Failure to complete purchase in time—Shops (Early Closing) Act, 1920 (c. 58), Sched. 1, Art. 2 (1).—An auctioneer, who had closed his premises to the public at the appointed hour, but continued after that hour to conduct retail sales by auction to persons who were already collected within the premises, was held rightly convicted, in respect that, while an auctioneer might complete any transaction which was in progress at the time of closing for the benefit of those then present,

he was not entitled thereafter to put up further articles to auction.—*GORDON v. SOMERVILLE*, [1928] S. C. (J.) 45.—SCOT.

s1. Exemption—Sale of "medical & surgical appliances"—Contraceptives.]—A shopkeeper sold a rubber contraceptive to a customer after the closing hour. Such contraceptives are used to prevent conception & the communication of disease, & their use is sometimes advised by medical men. On the occasion of the sale the door of the shop was not locked, & entrance could be obtained by any one. A notice was exhibited stating that the shop was closed except for the sale of medical & surgical appliances. An assistant was in attendance to serve customers. The shopkeeper having been convicted of a contravention of Shops (Hours of Closing) Act, 1928 (c. 33), s. 1:—*Held*: the contraceptive was a medical or surgical appliance within Sched. 1. of the Shops Act; & in order to comply with the provisions of the Act, it was not necessary for the shop to be closed in the physical sense, an intimation that it was open only for the sale of permitted articles being sufficient. Conviction quashed.—*WADE v. ADAIR*, [1933] S. C. (J.) 28.—SCOT.

sg. Application for bye-law—Time for making.]—The provision that a municipal council shall pass a bye-law within one month of application for early closing of shops, contained in Factory, Shop & Office Building Act, 1932, s. 85 (5), is directory only.—*Re GREIG & TORONTO*, [1934] 4 D. L. R. 248; O. R. 514.—CAN.



208. Before this case add "*See, now, Shops (Hours of Closing) Act, 1928 (c. 33).*"

211. *Add. Annotation*.—*Distd. Moore v. Tweedale, [1935] 2 K. B. 163.*

211a. — *Failure to complete work in time—Permanent hair-waving.*—On a day on which, by Shops Act, 1912 (c. 3), s. 4, & an Order made thereunder, a shop in the occupation of a hairdresser was required to be closed at 1 p.m., two customers attended at the shop by previous appointment for a hairdressing operation which would necessarily last for four hours more or less for the production of what was known as a "permanent wave." One of these customers arrived at the shop at 10.45 a.m., & in her case the operation began at that hour & continued until 2 p.m. The other customer arrived at the shop at 11 a.m., & in her case the operation began at that hour & continued until almost 4 p.m.:—*Held*: though the customers were served for the periods of time indicated after the hour at which the shop was required to be closed under above sect., yet, inasmuch as they were in the shop & being served before that hour, the cases came within the proviso to sub-sect. 7 of the sect., & the occupier was not guilty of an offence against the Act.—*MOORE v. TWEEDALE, [1935] 2 K. B. 163; 104 L. J. K. B. 594; 153 L. T. 96; 99 J. P. 221; 51 T. L. R. 437; 79 Sol. Jo. 288; 33 L. G. R. 216; 30 Cox, C. C. 229, D. C.*

211b. *Right of local authority to make closing order "not being earlier than 8 o'clock"*—*Order requiring closing at 7 o'clock—Effect of Shop (Hours of Closing) Act, 1928 (c. 33), s. 4.*—*Held*: a closing order under Shops Act, 1912 (c. 3), requiring sweet shops to close at 7 p.m. was not saved by Shops (Hours of Closing) Act, 1928 (c. 33), s. 4, since the provision fixing the closing hour at 7 p.m. was inconsistent with the special provision of the 1928 Act that a closing order in respect of such shops might fix an hour "not being earlier than 8 o'clock in the evening."—*KENYON v. STREET, [1931] 1 K. B. 305; 100 L. J. K. B. 214; 144 L. T. 403; 95 J. P. 36; 47 T. L. R. 107; 29 L. G. R. 100; 29 Cox, C. C. 227, D. C.*

211c. "*Newly-cooked provisions*"—*Rolls & bread.*—On Nov. 3, 1937, after 8 p.m., a customer was served in resp.'s shop with newly baked bread rolls, to be consumed off the premises, & another customer was served with half a loaf of newly baked bread, also to be consumed off the premises. Resp. was charged with having kept the shop open for the serving of customers after the hour of 8 p.m., in contravention of Shops (Hours of Closing) Act, 1928 (c. 33), s. 1. By Sched. I (1) (b) to the said Act, it is provided that customers may be served after the said hour of 8 p.m. with, *inter alia*, "newly-cooked provisions . . . to be consumed off the premises." The magistrate dismissed the charge, holding that newly baked rolls or newly baked bread could be properly described as "newly-cooked provisions."

Thereupon this appeal was brought:—*Held*: as it was impossible to exclude newly baked rolls or newly baked bread from the scope of the expression "newly-cooked provisions," within the exemption clause in the Act of 1928, no offence had been committed.—*LONDON COUNTY COUNCIL v. DAVIS, [1938] 2 All E. R. 764; 159 L. T. 44; 102 J. P. 347; 54 T. L. R. 845; 82 Sol. Jo. 567; 36 L. G. R. 564.*

229a. *Silk weavers—Price variable with speed.*—It is no objection to a ticket delivered to a silk weaver under 8 & 9 Vict. c. 128, ss. 1, 2, that, by a condition annexed thereto, the price is made to vary according to the quickness with which the work is done & returned to the master.—*SEDDON v. COCKER (1861), 25 J. P. 196.*

233. *Add. Citation*.—*previous proceedings, sub nom. SHARMAN v. UNION IRON WORKS CO. (1852), 3 Car. & Kir. 298, N. P.*

236. *Add. Annotation*.—*Refd. Pritchard v. James Clay (Wellington) (1925), 42 T. L. R. 139.*

239a. — *Packer.*—Pltf. had been employed for many years as a packer with a firm of wholesale drapers. The nature of his work was to assemble crates, which, when not in use, were kept in bundles, to line them with packing material, to cord them together, to nail on the top, & then either to stencil or to attach the label showing the destination. He also packed cases, which he would have to label after cording them, & cartons. Some of the packing consisted of stitching canvas covers round rolls of material. In Mar. 1920, deft. co. was formed to take over the business of the firm & they continued to employ pltf. as a packer. From Mar. 1920, to Dec. 1925, deft. co. paid pltf. a weekly sum in cash, & they also supplied him with dinner & tea on the premises. The agreed value of the meals so supplied by deft. co. was 10s. per week:—*Held*: (1) pltf. was a manual worker who had entered into, or had worked under, a contract with the defts., & was, therefore, within the protection of the Truck Acts; (2) defts. had contravened sect. 3 of Truck Act, 1831, by supplying pltf. with meals as part of the remuneration for his labour. Defts. were not protected by sect. 23, as there was no agreement or contract in writing & signed by pltf. authorising any stoppage or deduction from wages for meals, as required by the proviso. The whole scope of the Truck Acts contemplated that deductions should not be made from a man's pay except by his consent, given personally, in circumstances of some formality; (3) pltf. was entitled to recover from defts., under sect. 4, the agreed value of the meals so supplied, as being so much of pltf.'s wages as had not been actually paid to him by defts. in the current coin of the realm; (4) pltf.'s action was for debt on a specialty for work done, & the period of limitation applicable under sect. 3 of Civil Procedure Act, 1833, was twenty years after the cause of action; pltf. was therefore

PART. V. SECT. 3, SUB-SECT. 2.—B.

§ 1. — *Trade of tobacconist carried on—No exemption if other trades carried on.*—In sect. 222 of City Act, 1934, which authorises bye-laws for Wednesday afternoon closing of shops,

the definition of "shop," in sub-sect. (11), excludes therefrom any place "where the only trade or business carried on is that of a tobacconist":—*Held*: the exception applies only to those shops in which the trade of a

tobacconist is the only trade, it does not apply to shops in which in addition to tobacco articles not connected with the trade in tobacco are sold.—*R. (McDUGALL) v. BROWN, [1936] 3 W. R. 332.—CAN.*

entitled to recover the full amount claimed.—*PRATT v. COOK, SON & CO. (ST. PAUL'S), LTD.*, [1938] 2 K. B. 51; [1938] 1 All E. R. 555; 159 L. T. 139; 102 J. P. 190; 54 T. L. R. 443; 82 Sol. Jo. 234; 36 L. G. R. 212; *reversd.* [1938] 4 All E. R. 356, C. A.

242. *Add. Annotation*:—*Refd. Pratt v. Cook, Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51.

247. *Add. Annotation*:—*Refd. Pratt v. Cook, Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51.

261. *Add. Annotations*:—*Consd. Kenyon v. Darwen Cotton Manufacturing Co.*, [1936] 1 All E. R. 310. *Distd. Penman v. Fife Coal Co.*, [1936] A. C. 45. *Refd. Riversdale Mill Co. v. Hart* (1926), 43 T. L. R. 73.

263. *Add. Annotations*:—*Appld. Jones v. Harris* (1926), 43 T. L. R. 1. *Consd. Hart v. Riversdale Mill Co.*, [1928] 1 K. B. 176. *Expld. & Distd. Sagar v. Ridehalgh & Son, Ltd.*, [1931] 1 Ch. 310. *Consd. Kenyon v. Darwen Cotton Manufacturing Co.*, [1936] 1 All E. R. 310; *Penman v. Fife Coal Co.*, [1936] A. C. 45.

264. *Add. Annotation*:—*Generally, Refd. Pratt v. Cook, Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51.

264a. —.]—*Appld.* was employed by resps. as a moulder of iron pipes upon piece work under an agreement by which applt. was to be paid 5½d. for a complete pipe free from defects, & other & smaller agreed prices for pipes defective in specified ways, *e.g.*, 5½d. for a pipe that was bent. These agreed prices were fixed at the time of applt.'s employment. No notices containing the terms of the agreement were kept by resps. as required by Truck Act, 1896 (c. 44), & no particulars in writing were supplied to applt. as required by that Act:—*Held*: the agreement was a clear attempt to evade the above Act. The workman was employed to make pipes of full length & free from defects, & in paying the smaller prices for defective pipes resps. were making deductions "for or in respect of bad or negligent work or injury to the materials or other property of the employer."—*PRITCHARD v. JAMES CLAY (WELLINGTON), LTD.*, [1926] 1 K. B. 238; 95 L. J. K. B. 107; 134 L. T. 244; 90 J. P. 15; 42 T. L. R. 139; 70 Sol. Jo. 266; 28 Cox, C. C. 122, D. C.

*Annotation*:—*Distd. Riversdale Mill Co. v. Hart*, [1927] 1 K. B. 624.

264b. —.]—By order dated Mar. 3, 1897, the Secretary of State exempted from the provisions of Truck Act, 1896 (c. 44), persons engaged in the weaving of cotton in the county of Lancashire. Resp., a weaver of cotton in Lancashire employed by applts., was negligent in performing certain work &, in accordance with a custom which had long existed in the Lancashire trade, the employers deducted a reasonable sum from the "standard list" rates of wages which had been agreed between the employers' & workers' organisations, as the remuneration for good, merchantable cloth, & paid her the balance as her wages:—*Held*: this deduction was not illegal as being in contravention of the Truck Acts.—*HART v. RIVERSDALE MILL*

*Co.*, [1928] 1 K. B. 176; 96 L. J. K. B. 691; 137 L. T. 364; 91 J. P. 135; 43 T. L. R. 396; 71 Sol. Jo. 407, C. A.; *affg. S. C. sub nom. RIVERSDALE MILL CO. v. HART*, [1927] 1 K. B. 624, D. C.

*Annotation*:—*Appld. Sagar v. Ridehalgh, H. & Son, Ltd.*, [1931] 1 Ch. 310.

264c. —.]—*Pltf.* was a weaver in defts.' employment & his wages were calculated on the amount & kind of cloth woven in each week in accordance with a uniform list of prices agreed between the employer's & workmen's unions. According to the list of prices, *pltf.* became entitled for the week ending Aug. 1, 1928, after agreed deduction to a sum of £2 5s. 0½d., but defts. only paid him £2 4s. 0½d., claiming the right to deduct 1s. in respect of three yards of cloth woven with a fault rendering them unmerchantable. The evidence showed that it had been the practice of the mill for many years to make deductions for work not done with reasonable care & skill, the deductions not exceeding in amount the loss sustained by the employers & often not being exacted. A similar usage existed in the bulk of the mills carrying on the Lancashire weaving trade, though some of the mill owners were trying to do without deductions:—*Held*: this practice was not rendered illegal by the Truck Act, 1831 (c. 37), s. 3, as it did not involve a deduction for bad work from ascertained wages, but a deduction for bad work made in calculating the wages.—*SAGAR v. RIDEHALGH (H.) & SON, LTD.*, [1931] 1 Ch. 310; 100 L. J. Ch. 220; 144 L. T. 480; 95 J. P. 42; 47 T. L. R. 189; 29 L. G. R. 421, C. A.

265. *Add. Annotation*:—*Refd. Pratt v. Cook, Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51.

266a. —.]—*Signed by servant—Agreement between union & master's association.*—*PRATT v. COOK, SON & CO. (ST. PAUL'S), LTD.*, No. 239a, *ante*.

275a. *Deduction of rent payable by father of employee.*—*Appld.* was an oncost workman in resps.' colliery. His father had been in resps.' employment & was tenant of a house owned by them. The father ceased to be employed by resps., but remained tenant of the house, in which he lived with his family including *applt.* The father failed to pay the rent for the house, & resps. deducted the rent from *applt.*'s wages, *applt.* signing a written consent to the deduction in order to save the family from eviction. *Appld.* brought an action to recover sums amounting to £37 15s. 4d., which he alleged were illegally deducted:—*Held*: he was entitled to recover the sum claimed as the deductions were illegal, null & void under Truck Act, 1831 (c. 37), ss. 2, 3.—*PENMAN v. FIFE COAL CO., LTD.*, [1936] A. C. 45; 104 L. J. P. C. 74; 153 L. T. 261; 51 T. L. R. 494; 79 Sol. Jo. 478, H. L.

*Annotation*:—*Consd. Kenyon v. Derwen Cotton Manufacturing Co., Ltd.*, [1936] 1 All E. R. 310.

275b. *Scheme for re-opening factory—Employee's shares—Payment by deduction from wages.*—Shortly after entering the employment of

PART V. SECT. 5, SUB-SECT. 2.—  
B. (b).

n 1. — *Debt owed to third party.*—*Pltf.*, who was employed by defts., was indebted to the W. co. Defts., with the

consent of *pltf.*, paid the amount owing to the W. co. out of *pltf.*'s wages. *Pltf.* subsequently sued to recover this amount on the ground that the payment to the W. co. was a contra-

vention of the Truck Act:—*Held*: payment in such circumstances was not a contravention of Truck Act.—*PILBARRA COPPER FIELDS, LTD. v. NEILSEN* (1930), W. A. L. R. 34.—*AUS.*



defts., pltf. signed two documents. One was an application to defts. to allot to her a number of shares in deft. co. The other contained (*inter alia*) a request that "you [the co.] should deduct from my wages each week & allocate towards payment for my shares the following amounts. . . . Similar applications & requests were later made in respect of further shares. For some weeks pltf. received her net wages in coin & an envelope containing the share subscription in coin, which was immediately handed back to defts. Thereafter pltf. was handed only the net amount & a receipt for the deductions made. Pltf. sued to recover the amount of her wages which had been applied in payment of shares. Defts. counterclaimed the amount due in respect of unpaid instalments of shares:—*Held*: (1) the agreement that deductions should be made from pltf.'s wages was illegal under Truck Acts, & pltf. was entitled to recover the sum claimed, there being no distinction between the two methods employed for the deductions; (2) the agreement to take & pay for shares was not

severable from the illegal agreement relative to deductions, & the counterclaim failed.—*KENYON v. DARWEN COTTON MANUFACTURING CO., LTD.*, [1936] 2 K. B. 193; [1936] 1 All E. R. 310; 105 L. J. K. B. 342; 154 L. T. 553; 52 T. L. R. 294; 80 Sol. Jo. 147, C. A.

*Annotation*:—*Generally*, *Refd.* *Pratt v. Cook, Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51.

276. *Add. Annotations*:—*Apld.* *Hart v. Riversdale Mill Co.*, [1928], 1 K. B. 176; *Sagar v. Ridehalgh & Son, Ltd.*, [1931] 1 Ch. 310. *Consd.* *Pratt v. Cook, Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51.

277. *Add. Annotations*:—*Consd.* *Hart v. Riversdale Mill Co.*, [1928] 1 K. B. 176. *Refd.* *Sagar v. Ridehalgh & Son, Ltd.*, [1931] 1 Ch. 310; *Pratt v. Cook, Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51.

279. *Add. Annotation*:—*Refd.* *Sagar v. Ridehalgh & Son, Ltd.*, [1931] 1 Ch. 310.

284a. *Limitation of action.*—*PRATT v. COOK, SON & CO. (ST. PAUL'S), LTD.*, No. 239a, *ante*.

## Part VI.—Administration and Penalties.

294a. — *Injured workman—Proceedings not bonâ fide.*—*MACLEOD v. LANE (J. J.), LTD.* (1938), 82 Sol. Jo. 871, D. C.

299. *Add. Annotations*:—*Consd.* *Wing v. Soar*,

[1938] 1 K. B. 379, n. *Refd.* *Atkinson v. L. & N. E. Ry.* (1925), 42 T. L. R. 79; *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1934] 2 K. B. 132; *Sowter v. Steel Barrel Co.* (1935), 154 L. T. 85.

*ELLIS v. NORTHCOTE, LTD.*, [1929] S. A. S. R. 40.—*AUS.*

¶1. *Prosecution by Chief Inspector of Factories—Liability as to costs.*—The Chief Inspector of Factories for Tasmania may quite properly prosecute offences under Shops Act, 1925, in his official capacity, & so long as he acts *bonâ fide*, he will not be ordered to pay deft.'s costs of an unsuccessful prosecution.—*REYNOLDS v. GEMMELL*, 22 Tas. L. R. 57.—*AUS.*

### PART VI. SECT. 3.

296 II. —. —.]—*Resp.* was charged with selling certain non-exempted goods after prohibited hours. A complaint purporting to be for a similar offence was laid against an employee; this complaint was bad in law; both complaints inferentially referred to the same transaction. The employee pleaded guilty; & thereupon the special magistrate dismissed the complaint against the employer, the two complaints, by consent, being heard

together. There was no evidence of a statutory defence provided by sect. 83 of Early Closing Act that the employer had used due diligence to enforce the provisions of the Act or that the offence had been committed without the employer's knowledge, consent or connivance. There was, however, in the complaint against the employee an allegation that he had committed the act charged without the employer's knowledge, consent or connivance:—*Held*: the dismissal of the complaint against the employer was wrong.—

## FAMILY ARRANGEMENTS.

## Part I.—Meaning and Formation.

38. *Add. Annotation* :—*Folld. Re Morton, Morton v. Morton*, [1932] 1 Ch. 505.

39. *Add. Annotation* :—*Folld. Re Morton, Morton v. Morton*, [1932] 1 Ch. 505.

39a. —.]—A family arrangement for the division of an estate entered into in the absence or without the knowledge of one of the parties or persons interested in & affected thereby is not binding on any of the parties unless his concurrence is subsequently obtained.

On the death of W. without having made an effective will, & leaving his five brothers his next of kin, four of them joined with a niece in executing a deed of family arrange-

ment, whereby the niece, who had been living with W. & his wife, who predeceased him, & for whom W. desired to make provision, was to be given an equal one-fifth share with the four brothers. The fifth brother T. was not a party to the deed, as at the date thereof he had not been heard of for over twelve years, & it was uncertain whether he was living or dead. Since the date of the deed the whereabouts of T. had been discovered, & he refused to concur in it :—*Held* : the arrangement was not binding on any of the parties thereto.—*Re MORTON, MORTON v. MORTON*, [1932] 1 Ch. 505; 101 L. J. Ch. 269; 146 L. T. 527.

## Part II.—Validity and Effect.

86a. —.]—A testator, more than two years prior to his death, transferred to his wife a large sum in bearer bonds by manual delivery. By his will he bequeathed, *inter alia*, certain legacies to his three sons, one of whom was resp., & the residue of his estate to his wife for life, & after her death to his three sons in equal shares. He appointed his wife an executrix of his will. The estate was insufficient to pay the legacies in full. Subsequently endeavours were made on behalf of the Minister of Finance to obtain payment of death duties on the bonds, on the footing that they formed part of the estate. This contention was based on the fact that the testator had collected & used the interest on the bonds during his lifetime & after the transfer had been made. Ultimately payment of the amount claimed was made by the testator's widow, without prejudice to her ownership of the bonds. Later a deed was executed by her & her three sons, under which she undertook to provide a sum sufficient to pay the additional estate duty (which she had already done) & all pecuniary legacies in full, her sons, on their part, relinquishing any claim against her in relation to the bonds. The deed did not purport to

be, nor was it in substance, an agreement by the executors with the beneficiaries. The provisions of the deed were at once carried out. Three years afterwards, resp. instituted proceedings to set aside the deed, on the ground that it constituted a release of the bonds to a person in a fiduciary position, or, alternatively, that, if intended to take effect as a family arrangement, it was an agreement *uberrimæ fidei*, casting upon the testator's exors. a duty of full disclosure. It was alleged that the exors. had failed to disclose that the bonds had not been the subject of a complete gift by the testator to his wife, & that therefore at his death they formed part of his estate :—*Held* : the deed was a release by the three sons of a doubtful claim against the mother, & it was a mistake to regard her as a trustee of the bonds for the beneficiaries, even if the gift had not been completed. Her position as an extrix. gave her no advantage in coming to an agreement with her sons, nor did the deed involve a family arrangement tainted with undue influence. Resp. was a merchant of such knowledge, experience & ability that there was no inequality in relation to capacity to contract as between him & his mother, & as there was neither concealment

## PART I. SECT. 3.

32 II. —.]—In the usual type of family arrangement, unless any item of property which is admitted by all the parties to belong to one of them is allotted to another there is no "exchange" or other transfer of ownership.

A binding family arrangement of this type can be made orally, & if made orally, no question of registration arises. If such arrangement is followed by a writing containing reference to it, then the question is whether thereby terms of the arrangement have been "reduced to the form of a document," i.e. formally recorded in a document with the purpose that they should be evidenced by that document, & that is a question of fact in each case to be determined upon a considera-

tion of the nature & phraseology of the writing & the circumstances in which & the purpose with which it is written.—*RAM GOPAL v. TULSHI RAM* (1928), 1 L. R. 51 All. 79.—IND.

## PART II. SECT. 1.

n I. —.]—*SIDH GOPAL v. BIHARI LAL* (1927), 1 L. R. 50 All. 284.—IND.

t I. —.]—Where it is proposed to substitute the trusts of a deed of family arrangement for those contained in a will of which probate has been granted to certain named exors. it is proper to provide in such deed for the release of the said exors. from their obligations under the will & for the vesting of the property in the exors., or in such person or persons as are to hold it, upon the trusts comprised in

the deed; & when the approval of the ct. is sought for such a deed, & when there are infant beneficiaries, there should be evidence before the ct. from which it could properly be inferred that the deed is beneficial to such infants.—*Re SNELLING, SNELLING v. HANNA*, [1930] N. Z. L. R. 426.—N.Z.

## PART II. SECT. 3, SUB-SECT. 1.

65 I. *What is sufficient consideration.*—*Held* : a promise by a married man to abandon the intention which he & his wife had formed of starting life elsewhere & to remain in the homestead & build a house is sufficient consideration for the promise of his uncles, aunt, & grandmother to give him 100 acres of the homestead lands.—*ROBERTSON v. ROBERTSON* (1933), 6 M. F. R. 370.—CAN.

of material facts nor any want of fairness in the transaction embodied in the deed, it could not be set aside.—CASHIN v. CASHIN, [1938] 1 All E. R. 536, P. C.

87. *Add. Annotation* :—**Refd.** Lancashire Loans, Ltd. v. Black, [1934] 1 K. B. 380.
113. *Add. Annotation* :—**Refd.** Cashin v. Cashin, [1938] 1 All E. R. 536.

131. *Add. Annotation* :—**Refd.** Lancashire Loans, Ltd. v. Black, [1934] 1 K. B. 380.

164. *Add. Annotation* :—**Refd.** Parr v. A.-G., [1926] A. C. 239.

165. *Add. Annotation* :—**Consd.** *Re* Carnarvon's Chesterfield S. E., *Re* Carnarvon's Highclere S. E., [1927] 1 Ch. 138.

PART II. SECT. 7.

136 II. ———.]—HAWKINS v. AGLASSINGER, [1928] 4 D. L. R. 188.—CAN.

PART II. SECT. 8, SUB-SECT. 1.

sa. *Compromise between husband & wife—Respecting wife's property—Con-*

*cealment of fact by husband.*]—Specific performance decreed of an agreement in the English form made between husband & wife, Armenian Christians, in the nature of a family compromise respecting the wife's separate property. In the answer of the wife it was alleged that property purchased by

the husband had been concealed by him from her when she executed the agreement:—*Held*: under the circumstances, that fact even if proved, was not sufficient to entitle the wife to treat the agreement as a nullity.—GREGORY v. COCHRANE (1860), 8 Moo. Ind. App. 275.—IND.

## FEDERAL CONSTITUTIONS.

*See* DEPENDENCIES AND DOMINIONS.

## FERRIES.

## Part I.—Definition and Nature of Ferries.

6. *Add. Annotation* :—*Generally*, *Consd.* Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1930] A. C. 549.

8. For the paragraph in the original volume substitute the following paragraph :—

—[.]—Defts., under a statute of 1791, built a toll-bridge in place of an ancient ferry on a public highway, & also approaches which by the Act were to be considered as part & parcel of the bridge. Pltfs., the county council, owned land adjoining one of the approaches & built a school on it. Defts. denied pltfs.' right to free access to the school over the approach :—*Held* : as the old highway consisted of the approaches to the ferry plus the passage across the river, & the substituted highway consisted of the approaches to the bridge plus the bridge, & as the old approaches were highways to which owners would be entitled to access, the substituted approaches were highways by which adjoining owners had similar rights of access, & defts.' claim was ill-founded.—*YORKSHIRE, EAST RIDING, COUNTY COUNCIL v. SELBY BRIDGE CO. OF PROPRIETORS*, [1925] Ch. 841; 95 L. J. Ch. 86; 133 L. T. 628; 41 T. L. R. 602; 69 Sol. Jo. 775; 23 L. G. R. 547.

13a. ———— *Persons able to cross on foot at low water.*—Pltfs. were the owners of a ferry connecting the highway at South Benfleet with the highway at Canvey

Island over a tidal creek which at low water could be traversed on foot & they sought to establish their right to an ancient ferry. They proved that as long as living memory went there had always been at this place a ferry with a uniform rate of charge during the day, though at night a different charge had been made, & at times during the night there had been refusal to carry passengers :—*Held* : there was evidence from which a presumption ought to be made of a grant in times gone by of a franchise ferry of which pltfs. were not in possession, & though there was evidence of acts which were not permissible by the owner of the ferry, & which were wrongful as between him & the public, such acts were due to ignorance of his rights, & were not sufficient to rebut the evidence of a franchise ferry.—*LAYZELL v. THOMPSON* (1926), 91 J. P. 89; 43 T. L. R. 58; *affd.* (1927), 96 L. J. Ch. 332, C. A.

31a. ————[.]—The landing stage constructed in Poole Harbour at South Haven Point by the Bournemouth-Swanage Motor Road & Ferry Co. under their private Act of 1923 is the private property of the co., & they are entitled to prevent any one from using it except in connection with their ferry & on payment of the appropriate tolls.—*BOURNEMOUTH-SWANAGE MOTOR ROAD & FERRY CO. v. HARVEY & SONS* (1930), 144 L. T. 132; 95 J. P. 9; 47 T. L. R. 16; 29 L. G. R. 22, C. A.

## Part II.—Creation and Transfer of Ferries.

34. *Add. Annotations* :—*As to* (3) *Refd.* Layzell v. Thompson (1926), 43 T. L. R. 58. *As to* (5) *Consd.* Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1930] A. C. 549.

35. *Add. Annotations* :—*Consd.* Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1930] A. C. 549. *Refd.* Layzell v. Thompson (1926), 43 T. L. R. 58.

35a. ————[.]—*LAYZELL v. THOMPSON*, No. 13a, *ante*.

51. *Add. Annotation* :—*As to* (2) *Refd.* Layzell v. Thompson (1926), 43 T. L. R. 58.

55a. *Extent of right—Whether exclusive right of ferry—Construction of Act.*—By a private Act pltfs. were empowered to make & maintain a motor road from South Haven Point in the parish of Studland in the county of

Dorset to a public road leading from Studland to Swanage. By sect. 56 of the Act they were empowered to establish, maintain, work & use a ferry service for passengers, animals, vehicles & goods between the Sandbanks & South Haven Point within Poole Harbour. By sect. 62, passed for the protection of the Poole Harbour Comrs., pltfs. were required to establish or acquire & thereafter continuously work the ferry by means of a vessel propelled by steam on a chain cable system, & by sects. 62, 97, passed for the benefit of certain landowners, they were required to provide from seven o'clock in the forenoon when summer time should be in force & from eight o'clock in the forenoon at all other times of the year until one hour after sunset on every day a minimum hourly service of vessels from each shore. The two sects. contained provisions

## PART I. SECT. 1.

9 i. *A franchise—Under licence from Crown.*—A ferry is a franchise, that no one can erect without a licence from the Crown. It is *publici juris*, & when a ferry is erected, another cannot be erected without a licence; the Crown has a remedy *a quo warranto*,

& the former grantee has a remedy by action.—*SIRAJGANG LOCAL BOARD (CHAIRMAN) v. BUDHISWAR PATNI* (1930), 1 L. R. 57 Calc. 1261.—*IND.*

PART II. SECT. 1, SUB-SECT. 1.—A. so. *Extinguishment of right of owner of terminal.*—The general right of the

owner of land on either bank of a river to establish a ferry for profit must give way if it comes in competition with the grantee of the Government who has previously enjoyed a monopoly under his grant.—*DHANPAT PANDEY v. PASUPAT PRATAP SINGH* (1931), 1 L. R. 53 All. 764.—*IND.*

enabling Poole Harbour Comrs. & the land-owners respectively to exercise certain powers & rights in case plffs. should cease working the ferry or fail to work it continuously & efficiently. They established a ferry service in accordance with these provisions :—*Held* : the Act did not confer on plffs. an exclusive right of ferry, & that they were not entitled to an injunction restraining defts., who for many years before the Act had in fact carried

passengers between the Sandbanks & South Haven Point without claiming any franchise entitling them to do so, from carrying passengers bicycles & goods across the mouth of Poole Harbour within or near the limits of plffs.' said ferry.—*BOURNEMOUTH-SWANAGE MOTOR ROAD & FERRY CO. v. HARVEY & SONS*, [1930] A. C. 549; 99 L. J. Ch. 337; 143 L. T. 313; 46 T. L. R. 439; 28 L. G. R. 351, H. L.

### Part III.—Rights, Duties and Liabilities of Ferry Owner.

63. *Add. Annotation* :—As to (1) *Refd.* A.-G. v. Racecourse Betting Control Board, [1935] Ch. 34.

65. *Add. Annotations* :—*Refd.* Layzell v. Thompson (1926), 43 T. L. R. 58; Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1930] A. C. 549.

66. *Add. Annotations* :—As to (1) *Consd.* Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1930] A. C. 549. *Generally*, *Refd.* Winsford Entertainments v. Winsford U. D. C. (1924), 23 L. G. R. 254; Yorkshire East Riding County Council v. Selby Bridge Co., [1925] Ch. 841; Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons (No. 2) (1930), 144 L. T. 132.

71a. *Exemption from tolls—Crown.*—By a local Act of Parliament private landowners were authorised to establish & maintain a ferry service at Torpoint, Cornwall, across the river Tamar, & to charge tolls for its use. Avoidance of the tolls by the running of any boat service for hire in competition with the ferry was penalised by the Act, but officers & other servants of His Majesty were exempted from this provision, & their vessels were allowed

free passage between the points served by the ferry. By another sect. of the Act, the ferry owners & their successors were exempted from the payment of rates & taxes in respect of the ferry. By Ferries (Acquisition by Local Authorities) Act, 1919 (c. 75), deft. council became the owners of the Torpoint ferry. Upon a summons to determine what, if any, officers, men, or other persons in His Majesty's service were entitled to be borne free of charge or toll, by the Torpoint ferry :—*Held* : the Crown's general prerogative of exemption from the payment of tolls cannot be deemed to have been abandoned by implication, in respect of tolls created by any Act of Parliament, either (a) by reason merely of the specific exemption in such Act of any class of His Majesty's servants from the payment of tolls, nor (b) from the fact that the Crown has foregone or curtailed its rights in any other direction (e.g. that of imposing taxation) elsewhere in such Act.—*A.-G. v. CORNWALL COUNTY COUNCIL* (1933), 97 J. P. 281; 31 L. G. R. 364.

87. *Add. Annotation* :—As to (2) *Refd.* Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1929] 1 Ch. 686.

### Part IV.—Disturbance of Ferries and Remedies Therefor.

109. *Add. Annotation* :—*Generally*, *Refd.* Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1929] 1 Ch. 686.

150. *Add. Annotations* :—As to (1) *Refd.* Metcalfe v. Boyce, [1927] 1 K. B. 758. As to (3) *Consd.* Bournemouth-Swanage Motor Road & Ferry

Co. v. Harvey & Sons, [1929] 1 Ch. 686. *Generally*, *Refd.* Layzell v. Thompson (1926), 43 T. L. R. 58.

151a. —.] —*LAYZELL v. THOMPSON*, No. 13a, ante.

#### PART IV. SECT. 2, SUB-SECT. 3.—B.

sb. *Proof of acquisition of termini sufficient—Proof of origin unnecessary.*—In an action by a railway co. to interdict defender from conveying passengers for hire across a ferry :—*Held* : conveyances from the owners of the lands on either side of the ferry of their whole rights gave pursuers,

in the absence of any rival title in favour of defender, a *prima facie* title to sue, without the necessity of averring on what their author's titles were founded.—*LONDON, MIDLAND & SCOTTISH RY. CO. v. M'DONALD*, [1924] S. C. 835.—*SCOT.*

#### PART IV. SECT. 2, SUB-SECT. 4.

sd. *Right of ferry exercised by*

*others.*—In an action by a railway co. to interdict defender from conveying passengers for hire across a ferry :—*Held* : a defence that pursuers had not exercised an exclusive right of ferry, in respect that other persons had, without protest, ferried passengers for hire, was irrelevant.—*LONDON, MIDLAND & SCOTTISH RY. CO. v. M'DONALD*, [1924] S. C. 835.—*SCOT.*

## Part VI.—Taxation and Rating of Ferries.

167. *Add. Annotation* :—*Consd. Cadbury Bros., Ltd. v. Sinclair* (1933), 103 L. J. K. B. 29.

## FIDELITY INSURANCE.

*See* INSURANCE.

## FISHERIES.

## Part I.—In General.

2. *Add. Annotations*:—*As to* (2) *Refd.* *Peech v. Best* (1930), 99 L. J. K. B. 537. *As to* (3) *Refd.* *Peech v. Best* (1930), 99 L. J. K. B. 537.
3. *Add. Annotation*:—*Consd.* *Peech v. Best* (1930), 99 L. J. K. B. 537.

*Add. Annotations*:—*Expld. & Foll.* *Nicholls v. Ely Beet Sugar Factory*, [1931] 2 Ch. 84. *Consd.* *Peech v. Best* (1930), 99 L. J. K. B. 537. *Consd.* *Nicholls v. Ely Beet Sugar Factory, Ltd.*, [1936] Ch. 343. *Refd.* *Wenner v. Morris* (1935), 79 Sol. Jo. 252.

## Part II.—Public Fisheries.

29. *Add. Annotation*:—*As to* (2) *Refd.* *The Fagernes*, [1926] P. 185.
48. *Add. Annotation*:—*Refd.* *Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons* (No. 2) (1929), 94 J. P. 10; *Williams-Ellis v. Cobb*, [1935] 1 K. B. 310.
50. *Add. Annotation*:—*Refd.* *The Harkaway*, [1928] P. 199.
57. *Add. Annotations*:—*Consd.* *British Trawlers' Federation, Ltd. v. London & North Eastern Ry. Co.*, [1933] 2 K. B. 14. *Refd.* *South Staffordshire Mines Drainage Comrs. v. Elwell* (1927), 91 J. P. 153.

## Part III.—Private Fisheries.

111. *Add. Annotation*:—*Refd.* *Secretary of State for India in Council v. Fourcar & Co.* (1934), 50 T. L. R. 241.
178. *Add. Annotation*:—*Consd.* *Peech v. Best* (1930), 99 L. J. K. B. 537.
176. *Add. Annotations*:—*Refd.* *Abrahams v. Mac-Fisheries*, [1925] 2 K. B. 18; *Roe v. Russell*, [1928] 2 K. B. 117.
- 176a. *Fishing rights*—Whether part of “premises” within *Landlord & Tenant Act, 1927* (c. 36),

## PART II. SECT. 1, SUB-SECT. 1.—A.

9 III. — *Whether right to interfere with obstruction.*—Though every subject has a common right of fishery in the sea, a person in possession of a weir built below low water mark may maintain trespass against a wrongdoer who interferes with his possession, though, as against the Crown, the weir was wrongfully there.—*Wilson v. Codyre & Allingham* (1888), 27 N. B. R. 320.—CAN.

20 I. — *Between high & low water mark—Effect of grant of soil.*—The fact that the soil between high & low water marks has been granted does not interfere with the public right of fishery.—*Wilson v. Codyre & Allingham* (1888), 27 N. B. R. 320.—CAN.

## PART II. SECT. 1, SUB-SECT. 1.—B.

40 I. — *Exclusion of public right—By private fishery—Grant by Crown.*—An exclusive right of fishery in public, tidal & navigable rivers may be granted by the Crown to private individuals.—*Arjun Kaibarta v. Manoranjan De Bhoomik* (1933), I. L. R. 61 Cal. 45.—IND.

## PART III. SECT. 1, SUB-SECT. 1.—B.

109 II. — *Whether prescriptive right of fishing from old banks exercisable from new banks.*—Where the right of salmon-fishing had been exercised from banks on the bed of a river for more than forty years, but, from changes in the river, new banks had been formed, one of which had existed for less than that period:—*Held*: the possession of the fishings from this new bank was only an exercise of the right of fishing previously exercised from the former banks, the substantial right of fishing being the matter to be regarded & not the particular stations from which the right was exercised.—*Earl of Zetland v.*

*Tennent's Trustees* (1873), 11 Macph. (Ct. of Sess.) 469; 45 Sc. Jur. 311.—SCOT.

## PART III. SECT. 1, SUB-SECT. 5.

130 I. — *Inland non-tidal lake—Land vested in Crown—Rights of owner or lessee of land extending to lake.*—*McDonald v. Linton* (N. B.), [1926] 3 D. L. R. 779.—CAN.

## PART III. SECT. 3, SUB-SECT. 1.—A.

k I. — *By the charter of the City of St. John, all the lands & waters within certain defined limits, bounded by low water mark, were granted by the Crown to the city, with all the rights & privileges appurtenant thereto, including fishing; & to the freemen & inhabitants of the city was granted the sole & exclusive privilege of fishing, & erecting weirs between high & low water marks:—Held*: the exclusive right of fishing granted by the charter did not extend to any part of the sea shore beyond the bounds of the city, though it was within the harbour of St. John.—*Wilson v. Codyre & Allingham* (1888), 27 N. B. R. 320.—CAN.

## PART III. SECT. 3, SUB-SECT. 1.—B.

154 XI. — *—*—*—*—*—*—*—*—*Little v. Moylett*, [1929] I. R. 439.—IR.

158 II. — *—*—*—*—*—*—*—*—*Defts. denied the validity of the documentary title relied on, & further contended that, by the provisions of Magna Carta, the Crown was prohibited from granting a several or sole & exclusive fishery in the locus in quo in case such was not existing in or before the year 1189, & any grant by the Crown contrary to the provisions aforesaid was null & void; that a several or sole & exclusive fishery in the locus in quo in or before the year 1189 did not in fact exist, & was not historically possible; & that the said documents of title & the*

historical evidence given showed that the claim to a several or sole & exclusive fishery in the *locus in quo* was modern in origin, & dated at the earliest from the times of Queen Elizabeth & King James I.:—*Held*: there was nothing in the terms of Magna Carta, c. 16, or the writings of ancient lawyers, or the judgments in modern cases to support the proposition that, whether the several fishery was actually in the hands of the Crown at the time of the death of Henry II., or in the hands of an assignee or feudatory of the Crown, or even of an intruder, the original act of appropriation must have been effected by the Crown itself.—*Moore v. A.-G.*, [1929] I. R. 191; *reversd.*, [1934] I. R. 44.—IR.

## PART III. SECT. 3, SUB-SECT. 2.

sb. *Right of lessee to cut bushes along bank necessary for fishing.*—*Pltf. by indenture under seal, leased to deft. for a term of years, with the right to renew, pltf.'s land on the E. River, G. County, for fishing purposes, with the right to enter & use the same in such a way as might be necessary for fishing in said river. Damages claimed by pltf. were for cutting bushes along the bank of the river:—Held*: the burden of proof was upon pltf., & the right to fish from the bank of the river involved the right to do such cutting as was necessary for that purpose.—*McKeen v. Pattillo* (1927), 59 N. S. R. 452.—CAN.

## PART III. SECT. 3, SUB-SECT. 3.

st. *Under Fisheries Act—Effect.*—*Held*: the licences granted to pltf. under Fisheries Act gave him no several right of fishery, & he could not therefore succeed in an action for interference with the fishery by pollution.—*Fillion v. New Brunswick International Paper Co.*, [1934] 3 D. L. R. 22; 8 M. P. R. 89.—CAN.

- s. 5.]—Where an incorporeal right, such as a right of fishing, is demised along with corporeal hereditaments by the same lease, & the lessee uses both for the purpose of his trade or business, the incorporeal right is part of the "premises" within above sect. Therefore, on the expiration of such a lease, the lessee, if he can show that the compensation for goodwill to which under the Act he would be entitled would not compensate him for the loss of goodwill if he removed to & carried on his trade or business in other premises, may require a new lease of the premises which shall include the incorporeal right demised by the original lease.—*WHITLEY v. STUMBLER*, [1930] A. C. 544; 99 L. J. K. B. 518; 143 L. T. 441; 40 T. L. R. 555; 74 Sol. Jo. 488, H. L.; *affg.* S. C. *sub nom.* *STUMBLER v. WHITLEY*, [1930] 1 K. B. 393, C. A.
278. *Add. Annotation* :—*Refd.* *Cleobury Mortimer Rural District Council v. Childe*, [1933] 2 K. B. 368.
289. *Add. Annotation* :—*Refd.* *Nicholls v. Ely Beet Sugar Factory, Ltd.*, [1936] Ch. 343.
- 312a. ——— & arrest of angler—Outside limits of fishery—Reasonable belief that angling within limits.]—Defts., servants of P., apprehended pltf. while fishing in the night-time near the mouth of the river O., in Carnarvonshire, in which river P. had a several fishery. In an action of trespass for this arrest, defts. gave much evidence to show that P.'s fishery included the place where the pltf. was apprehended. The jury, however, defined the limits of the fishery so as to exclude that place by a few yards; but they also found that P. & defts. believed that it included that place:—*Held*: defts. were entitled to the protection of the 7 & 8 Geo. 4, c. 29, ss. 35 & 63.—*HUGHES v. BUCKLAND* (1846), 15 M. & W. 346; 3 Dow. & L. 702; 15 L. J. Ex. 233; 7 L. T. O. S. 91; 10 J. P. 725; 10 Jur. 884; 153 E. R. 883.
318. *Add. Annotation* :—*Refd.* *Nicholls v. Ely Beet Sugar Factory, Ltd.*, [1936] Ch. 343.
- 343a. ——— No pecuniary damage.]—Pltf. was the owner of two several & exclusive fisheries in the River Ouse below Ely. Defts. carried on the business of beet sugar manufacturers at a factory abutting on the Ouse some miles above pltf.'s fisheries. Pltf. alleged that in the course of defts.' manufacturing operations, & in particular from Sept. 1933, to Jan. 1934, following the beet harvest, large quantities of refuse & effluent were discharged from the factory into the river, & by reason of that he had suffered damage & his fisheries had been prejudicially affected. He claimed an injunction accordingly & damages. At the hearing evidence was also given as to injury to the fisheries between Sept. 1934, & Jan. 1935 :—*Held*: disturbance of a several fishery is an invasion of a legal right, & in such a case it is not necessary to prove pecuniary loss, but the injury to the legal right carries with it the right to damages; but pltf. had failed to show that the injury to his fisheries had been caused by the acts of defts.—*NICHOLLS v. ELY BEET SUGAR FACTORY, LTD.*, [1936] Ch. 343; 105 L. J. Ch. 279; 154 L. T. 531; 80 Sol. Jo. 127, C. A.
- 353a. ———.]—In May & Oct. 1922, some dead fish were observed in a river, at a spot below that from which a drain-pipe leading from certain gasworks entered the river. Samples of the effluent from this pipe were taken on each occasion, which, on analysis, were found to contain matter highly poisonous to fish. The owner of the fishing rights over that part of the river affected commenced an action for an injunction & damages against the owners of the gasworks:—*Held*: it was satisfactorily proved that the effluent from the gasworks was, on each occasion, the cause of the death of the fish, & pltf. was entitled to an injunction & damages.—*GRANBY (MARQUIS) v. BAKEWELL URBAN DISTRICT COUNCIL* (1923) 87 J. P. 105; 21 L. G. R. 329.
354. *Add. Annotation* :—*Expld. & Distd.* *Nicholls v. Ely Beet Sugar Factory, Ltd.*, [1936] Ch. 343.

## Part IV.—Fisheries in relation to Navigation.

356. *Add. Annotation* :—*As to* (2) *Refd.* *The Carlgarth, The Otarama*, [1927] P. 93.
366. *Add. Annotation* :—*Refd.* *The Carlgarth, The Otarama*, [1927] P. 93.

### PART III. SECT. 3, SUB-SECT. 4.

d 1. ——— *Extent of rights acquired.*—*Held*: the right which may be acquired by possession of forty years on a grant of salmon-fishings pertaining to lands situated on one side of a river (a) is not limited to the fishings in that part of the river which is *ex adverso* of the lands; & (b) may extend to fishings beyond the *medium flum* of the river.—*EARL OF ZETLAND v. TENNENT'S TRUSTEES* (1873), 11 Macph. (Ct. of Sess.) 469; 45 Sc. Jur. 311.—*SCOT.*

### PART III. SECT. 4, SUB-SECT. 2.

sh. *Ownership of land abutting on*

*river—Tenant at will.*]—A person in possession of land bordering on a non-tidal river, as a tenant at will of the owner, is entitled to be treated as a riparian owner, so far as regards the right of fishing.—*PHAIR v. VENNING* (1882), 22 N. B. R. 362.—*CAN.*

### PART III. SECT. 5, SUB-SECT. 1.—A.

m 1. ———.]—*LITTLE v. MOYLETT*, [1929] 1. R. 439.—*IR.*

### PART III. SECT. 5, SUB-SECT. 2.—C.

c 1. ——— *Centuries.*]—*MOORE v. A.-G.*, [1929] 1. R. 191.—*IR.*

### PART III. SECT. 7.

286 1. *Right of way—& right to repair embankments.*—Where right of fishery had been granted in respect of two pieces of land, surrounded on all sides by embankment, & described in the lease as "*bheri jamt jalkar*":—*Held*: the expression "rights over fisheries" to be found in Bengal Tenancy Act, s. 193, includes, also, the user of land for the purpose of fishing or for the purpose of repairing embankments in the interest of fishing.—*NANI LAL MANDAL v. PRIYA NATH RAY* (1929), 1. L. R. 56 Calc. 1170.—*IND.*



## Part V.—Statutory Enactments relating to Salmon and Freshwater Fisheries.

387. *Add. Annotation* :—*Reid. Forth Conservancy Board v. I. R. Comrs.*, [1931] A. C. 540.

## Part VI.—Statutory Enactments relating to Salt Water Fisheries and Sea Fishing.

485. *Add. Annotation* :—*Reid. Everton v. Walker* (1927), 137 L. T. 594. 497a. — *Jurisdiction of superintendent—When arising.*—*Pltfs.*, who were the owners of a

### PART V. SECT. 1, SUB-SECT. 2.

c i. — *Power to restrict fishing for salmon—Riparian owners on non-tidal river.*—*PHAIR v. VENNING* (1882), 22 N. B. R. 362.—CAN.

c ii. — *Riparian owners on estuary—Titles acquired prior to July, 1867.*—*DELANEY v. McDONALD* (1883), 23 N. B. R. 189.—CAN.

### PART V. SECT. 3.

g i. — *To seize nets.*—Ontario Game & Fisheries Act, s. 6 (5), makes it the duty of every overseer to seize all nets used contrary to the regulations, & sect. 80 of the Dominion Act makes a similar provision; by s. 5 of the Dominion Act the Governor in council is empowered to appoint fishery officers, & by order in council the Provincial officers are in substance made Dominion officers.—*SERO v. GAULT* (1921), 50 O. L. R. 27; 64 D. L. R. 327.—CAN.

### PART V. SECT. 5, SUB-SECT. 1.—D. (a).

sk. *Within two hundred yards of weir—Weir used for supplying water to mills, factories, or for navigation—Fisheries (Ir.) Act, 1850 (c. 88), s. 37.*—*IRELAND v. QUIRKE*, [1928] I. R. 231.—IR.

sl. *Keeping purse-seine open.*—*R. v. MCPHERSON* (B. C.), [1929] 2 W. W. R. 141; 51 Can. Crim. Cas. 419.—CAN.

### PART V. SECT. 5, SUB-SECT. 3.

n i. — *].*—The owners of a bag-net fishery duly removed the leaders of their bag-nets during the weekly close time. In spite of this, they caught 165 salmon during eleven successive weekly close times :—*Held* : the owners were guilty of a contravention of Salmon Fisheries (Scotland) Act, 1868 (c. 123), s. 15 (2), in respect that compliance with by-laws did not avoid the duty of observing the statutory prohibition against fishing for or taking salmon during the weekly close time.—*ABERDEEN HARBOR COMRS. v. STOTT*, [1927] S. C. (J.) 35.—SCOT.

### PART V. SECT. 1, SUB-SECT. 1.

sp. *Election of conservators—Validity of proxy.*—A proxy to vote "at the next election" does not sufficiently "specify" the day of the meeting at which such proxy is to be available within Stamp Act, 1870 (c. 97), s. 102 (1).—*R. v. M'INERNEY* (1891), 30 L. R. Ir. 49.—IR.

### PART V. SECT. 6, SUB-SECT. 1.

sr. *Duty to erect grating in tail race of mill—Although banks of adjoining owner affected.*—*Deft.* was fined at petty sessions for failing to erect a grating or lattice across the tail race of his mill at a point where the tail race re-enters the river "F." The river "F." is a river in which there are

salmon. For a certain distance before & at the point where the tail race re-enters this river it is bounded on both sides by lands that belong to an adjoining owner, & not to the *deft.*, the owner of the mill. There was no grating or lattice on the tail race where it diverged from or re-entered the river; to construct the grating or lattice, it would be necessary to erect piers that would project into the banks, on the side of the tail race, the property of the adjoining owner. *Deft.* had started the necessary work of erecting the grating, but had abandoned it in consequence of the objection of the adjoining owner to any trespass on his lands. *Deft.* had the use of the tail race from the moment it left his own lands until it reached the river :—*Held* : *deft.* was under a statutory obligation by 5 & 6 Vict. c. 106, s. 78, to erect the grating even though it entailed an interference with the banks of the adjoining owner.—*R. (STEWART) v. RECORDER & JJ. FOR LONDON DERRY*, [1930] N. L. 104.—IR.

### PART V. SECT. 9.

sw. *Action against Crown servants—Jurisdiction of Exchequer Court.*—At Livingstone's Cove, Nova Scotia, is a breakwater owned by the *resp.*, to provide a shelter for boats of shallow draught. In this cove suppliant had set a salmon trap net under licence from the Department of Marine & Fisheries. Dredging operations were being carried on in the vicinity of the breakwater by the Department of Public Works under the supervision & direction of one of its officers. The tug *A.*, hired by *resp.*, whilst moving a loaded scow to the dumping grounds came into contact with suppliant's net, seriously damaging the same. The action was to recover the value, or cost of repairing the net & the loss of the use thereof for about one month :—*Held* : the master & crew of the tug *A.*, the crew of the scow, & the master & crew of the dredge were servants of the Crown employed upon a public work within sect. 190 of Exchequer Ct. Act, & the ct. had jurisdiction to hear & entertain the action. On the evidence, the net in question was not an interference to navigation within sect. 33 of Fisheries Act, 1927, & the master of the tug *A.*, was negligent in moving the scow as & when he did; suppliant was entitled to damages for the injury caused to his net & damages for the loss of the use of his net.—*MASON v. R.*, [1933] Ex. C. R. 1; *affd.*, [1933] S. C. R. 332; 4 D. L. R. 309.—CAN.

### PART VI. SECT. 1, SUB-SECT. 4.

sz. *Order to proceed to nearest port—Onus of proof as to port.*—The master of a trawler, who had refused to comply with a direction to proceed to Storno-

way given by a British sea fishery officer, was charged with contravening Sea Fisheries Act, 1883 (c. 22), s. 14 (2). Stornoway was not the nearest port to the place where the direction was given, & the prosecutor made no attempt to prove that it was the most convenient port :—*Held* : the fact that a sea fishery officer directed accused to go to Stornoway raised a strong presumption that Stornoway was the most convenient port within Sea Fisheries Act, 1883, s. 12 (8); it was open to accused to rebut that presumption; & as accused had not been allowed to cross-examine the prosecution witnesses on the question of convenience, it was impossible to hold that he ought to have been convicted.—*MACKENZIE v. JINKS*, [1934] S. C. (J.) 48.—SCOT.

### PART VI. SECT. 2, SUB-SECT. 1.—A.

r i. — *Grant of licence—Validity of regulations.*—Sect. 69A of the Fisheries Act provided, among other things: that, under licence from the Minister a vessel registered as a British ship in Canada & owned by "a Canadian or a Canadian co. with its principal place of business in Canada," is allowed to use an "otter" or other similar trawl. Moreover under this Statute, rules & regulations might be made by Order in Council, & the same were made providing that such licence could be granted only to "Canadian built" vessels, & that after Apr. 1932, none but such would be eligible for licence, & further providing that after Apr. 1, 1930, a licence fee of one cent a pound on the fish caught should be payable. This fee in the case of *deft.* would amount to between \$130,000 to \$150,000 a year :—*Held* : as the regulations ignore the statutory limitation to British ships registered in Canada or owned by a Canadian, etc., & fix as the condition upon which the licence would issue that such ships be Canadian built, & such condition being obviously beyond the scope of the Act, & the delegated powers, such regulations are *ultra vires*, unenforceable, null & void.—*R. v. NATIONAL FISH CO., LTD.*, [1931] Ex. C. R. 75.—CAN.

sm. *Prohibition against use of nets—Accused charged as "master or person in charge"—No evidence that accused on board.*—*Held* : as there was no statutory provision making the master of a vessel liable, as such, for a contravention of the bye-law, & as the bye-law might be contravened by "any person," the prosecutor was bound to prove that the accused was on board the vessel at the time.—*SHIACH v. FARQUHAR*, [1929] S. C. (J.) 88.—SCOT.

### PART VI. SECT. 2, SUB-SECT. 1.—C.

so. *Prohibition against use of crayfish pots—Condemnation of boat & appurtenances—Failure to summon joint*

steam fishing boat, brought an action in the county ct. against deft., who was a member of the crew of the boat, claiming a sum as money lent by them to deft. Deft. alleged in defence that the sum claimed had been paid to him as wages; &, further, that the county ct. had no jurisdiction, the question between the parties being a dispute concerning wages within Merchant Shipping Act, 1894 (c. 60), s. 387, which could only be dealt with by a superintendent thereunder. At the trial it was found as a fact that the sum claimed had been lent to deft., & that there was no real dispute concerning wages:—*Held*: (1) the county ct. had jurisdiction

to entertain the action notwithstanding the section, inasmuch as that ct. had all along had jurisdiction to entertain an action for money lent & the section did not either expressly or by implication exclude that jurisdiction; (2) the jurisdiction of the superintendent under the sect. did not arise until a party to the dispute called him to decide it, & here no party had called upon him to do so.—*STURLEY v. POWELL*, [1930] 1 K. B. 677; 99 L. J. K. B. 197; 142 L. T. 484; 46 T. L. R. 236; 18 Asp. M. L. C. 97.

497b. — Jurisdiction of county court.]—*STURLEY v. POWELL*, No. 497a, ante.

## Part VII.—Whale and Seal Fisheries.

507. *Add. Annotation*:—*Refd.* The Humorous, The Mabel Vera, [1933] P. 109.

*owners*.]—*FISHERIES COMRS. v. BUTTON*, (1925), 21 Tas. L. R. 8.—*AUS.*

### PART VI. SECT. 4. SUB-SECT. 4.

*sp. Bounty—Time of service on ship—Regulations of December 10, 1897.*]—*SNOW v. R.* (1907), 11 Exch. C. R. 164.—*CAN.*

### PART VI. SECT. 5. SUB-SECT. 1.

*h i.* ———.]—(1) To justify an entry by a foreign fishing vessel into Canadian territorial waters on the ground of "stress of weather," the weather must be such as to produce in the mind of a reasonably competent & skilful master, possessing courage & firmness, a well grounded *bona fide* apprehension that if he remains outside such waters he will put in jeopardy his vessel & cargo. In each case the questions whether the master fairly & honestly on reasonable ground believed it necessary to take shelter, & whether he exercised reasonable skill, competence & courage in the circumstances, are questions of fact for the tribunal whose duty it is to find the facts.

(2) The Convention of Oct. 20, 1818, between Great Britain & the United States, respecting fisheries & boundary lines, did not apply to the Pacific waters so far as fisheries were concerned, & therefore could not be available as justification for the entry in question.—*THE MAY v. R.*, [1931] S. C. R. 374; 3 D. L. R. 15.—*CAN.*

*h ii.* ———.]—(1) To justify, as against incurrance of penalty under the Customs & Fisheries Protection Act, R. S. C., 1927, s. 10, a foreign fishing vessel entering Canadian territorial waters on the ground of "stress of weather," there must be such a condition of atmosphere & sea as would produce in the mind of a reasonably competent & skilful master, possessing courage & firmness, a well grounded *bona fide* apprehension that if he remains outside such waters he will put in jeopardy his vessel & cargo. A want of *bona fides* would abrogate any right or privilege to shelter given by the statute. Further, weaknesses in a vessel may be such, as instanced in certain respects in the present case, as, e.g., glass of inadequate thickness in pilot house windows a small height from the sea, constituting a special danger from waves, that any distress arising from them should be deemed a distress created by the owner or master himself.

(2) The Convention of Oct. 20, 1818, between Great Britain & the United States, respecting fisheries & boundary lines, has no application to Canadian territorial waters on the Pacific Coast, so far as fisheries are concerned. Even if it had, deft. vessels could claim no privilege under it, as the only permission to take shelter in Canadian waters given by the proviso to art. 1 thereof is permission to enter "bays or harbours," & the place where they were seized was not shown to be a bay or harbour.—*THE QUEEN CITY v. R.*, *THE TILLIE M. v. R.*; *THE SUNRISE v. R.*, [1931] S. C. R. 387; [1931] 3 D. L. R. 147; *affg.*, 43 B. C. R. 494.—*CAN.*

*h iii.* ———.]—The *N. S.* entered the port of North Sydney, from the fishing grounds off Ingonish, N. S., for the alleged purpose of effecting repairs to her engines. On the same day, after effecting certain repairs & after clearing outwards, her master purchased 5½ tons of ice from a local dealer, without licence or permit. The *N. S.* was shortly afterwards seized for an infraction of sect. 10 (c) of Customs & Fisheries Protection Act:—*Held*: though an American vessel may, under Fisheries Treaty, 1818, enter a Canadian port for the purpose of making repairs therein, this did not render lawful the act of her master in purchasing ice as aforesaid, contrary to the provision of Customs & Fisheries Act, & the vessel was lawfully seized & forfeited.—*R. v. AUXILIARY FISHING SCHOONER NATALIE S.*, [1932] Ex. C. R. 155.—*CAN.*

### PART VII. SECT. 2.

*b i.* ———.]—*Division of proceeds—Shipwrecked sailors on board sealer.*]—*CONNELL v. RORKE* (1859), 4 Nfld. L. R. 394.—*NFLD.*

### PART VIII. SECT. 1.

*a i.* ———.]—Deft. was convicted by a district justice of an offence under Fisheries Act, 1924, but the district justice omitted to order a forfeiture of the fish as required by the Act:—*Held*: the omission invalidated the conviction.—*TANGNEY v. KERRY COUNTY DISTRICT JUSTICE*, [1928] I. R. 358.—*IR.*

*a ii.* ———.]—O'S. was also convicted at the same time on another summons for unlawfully using a net for the purpose of taking salmon or

trout in the said tidal waters without being duly licensed, contrary to 13 & 14 Vict. c. 88, s. 12. That section provides for such offence a pecuniary penalty, & also the forfeiture of the net used. The district justice's conviction on this summons did not order the forfeiture of the net. It was the same net the forfeiture of which was ordered by the justice in the other conviction:—*Held*: the conviction was bad for not ordering the forfeiture of the net, notwithstanding the fact that its forfeiture was ordered by the other conviction.—*THE STATE (O'SULLIVAN) v. CIRCUIT COURT JUDGE OF CORK*, [1931] I. R. 733.—*IR.*

*sg. Fishing quahangs without licence.*]—Fine for fishing quahangs without a licence reduced because of mitigating circumstances.—*GILLIS v. R.*, [1936] 1 D. L. R. 769; 65 Can. C. O. 127.—*CAN.*

### PART VIII. SECT. 2.

*a i. Liability of master.*]—At the trial upon a summary complaint, which set forth that the accused, being the master or person in charge of the motor boat *Ruby*, INS 422, had contravened Byelaw No. 17 made under the Sea Fisheries Act, 1883, it was proved that after having been engaged in fl trawling, the *Ruby* returned to anchorage, & the accused, who subsequently admitted that he was the master, was found by the fishery officers on the pier near his boat. It was not, however, proved that he had been on board while illegal fishing was taking place. A conviction followed:—*Held*: Sea Fisheries Act, 1883, s. 20 (1), made the master or the person for the time being in charge vicariously liable for any contravention of the Act which might be committed by a person on board the vessel, unless he was able to bring himself within the proviso to sect. 20 (1); &, on the evidence, the sheriff-substitute was entitled to convict, notwithstanding that the accused was not proved to have been on board when the offence was committed.—*SMITH v. ROSS*, [1937] S. C. (J.) 65.—*SCOT.*

### PART VIII. SECT. 5.

526 *i. General rule—Jurisdiction ousted.*]—*R. (MOORE) v. O'HANRAHAN*, [1927] I. R. 406.—*IR.*

*m i.* ———.]—*R. v. HARRAN* (1912), 21 O. W. R. 951; 3 O. W. N. 1107; 3 D. L. R. 753.—*CAN.*

## FOOD AND DRUGS.

## Part II.—Adulteration and Impoverishment.

NOTE.—*Sale of Food & Drugs Acts, 1875–1927, are consolidated by Food & Drugs (Adulteration) Act, 1928 (c. 31).*

76. *Add. Annotation*:—*Folld. Bowker v. Woodroffe, Bowker v. Premier Drug Co. (1927), 96 L. J. K. B. 750.*
78. *Add. Annotation*:—*As to (2) Apld. Bowker v. Woodroffe, Bowker v. Premier Drug Co. (1927), 96 L. J. K. B. 750.*
- 78a. ———.]—(1) Where a person is charged with selling to the prejudice of a purchaser an article of food which is not of the nature, substance & quality demanded, & the article is one for which there is no recognised standard of quality, it is the duty of the ct. to fix a standard, in the sense of having regard to a minimum below which the article must be regarded as deficient.
- (2) Where an analyst expresses in a certificate an opinion as to the quality or genuineness of an article, the ct. must accept it, if uncontradicted.
- (3) A wholesale merchant cannot be convicted of aiding & abetting a retailer, if the wholesaler was not present when the retail sale complained of took place, nor if there is no evidence that he knew the composition of the article.—*BOWKER v. WOODROFFE, BOWKER v. PREMIER DRUG CO., [1928] 1 K. B. 217; 96 L. J. K. B. 750; 137 L. T. 347; 91 J. P. 118, 43 T. L. R. 516; 25 L. G. R. 306; 28 Cox, C. C. 397, D. C.*
- Annotation*:—*As to (3) Refd. Gough v. Rees (1929), 46 T. L. R. 103.*
96. *Add. Annotation*:—*As to (1) Consd. Square v. Model Farm Dairies (Bournemouth), Ltd., [1938] 2 All E. R. 740.*
97. *Add. Annotation*:—*Consd. Square v. Model Farm Dairies (Bournemouth), Ltd., [1938] 2 All E. R. 740.*
- 98a. *Liability of wholesaler—Sale by retailer.*—*BOWKER v. WOODROFFE, BOWKER v. PREMIER DRUG CO., No. 78a, ante.*
101. *Add. Annotation*:—*As to (1) Refd. Orpen v. Haymarket Capitol, Ltd. (1931), 145 L. T. 614.*
104. *Add. Annotation*:—*As to (1) Refd. Square v. Model Farm Dairies (Bournemouth), Ltd., [1938] 2 All E. R. 740.*
113. *Add. Annotation*:—*Consd. Square v. Model Farm Dairies (Bournemouth), Ltd., [1938] 2 All E. R. 740.*
135. *Add. Citations*:—23 L. G. R. 15; 27 Cox, C. C. 672.
140. *Add. Citations*:—23 L. G. R. 22; 27 Cox, C. C. 678, D. C.
- Add. Annotation*:—*As to (2) Refd. Preston v. Grant (1924), 94 L. J. K. B. 125.*
147. *Add. Annotation*:—*As to (1) Refd. Bowker v. Woodroffe, Bowker v. Premier Drug Co. (1927), 96 L. J. K. B. 750.*
148. *Add. Annotation*:—*Refd. Bowker v. Woodroffe, Bowker v. Premier Drug Co. (1927), 96 L. J. K. B. 750.*
150. *Add. Annotation*:—*As to (1) Consd. Bowker v. Woodroffe, Bowker v. Premier Drug Co. (1927), 96 L. J. K. B. 750.*
- 150a. ———.]—*Absence of recognised standard.*—*BOWKER v. WOODROFFE, BOWKER v. PREMIER DRUG CO., No. 78a, ante.*
- 169a. *Vinegar.*—*PRESTON v. JACKSON (1928), 73 Sol. Jo. 712.*
174. *Add. Annotation*:—*Folld. Bridges v. Griffin, [1925] 2 K. B. 233.*
187. After this case insert “Addition of colouring matter to milk.”—*See No. 218a, post.*
193. *Add. Annotation*:—*Refd. Woolworth & Co. v. Pottier (1935), 33 L. G. R. 527.*
- 217a. *Warranty on order form—Order form retained by seller.*—By Food & Drugs (Adulteration) Act, 1928 (c. 31), s. 29 (1), it is a defence on a prosecution for selling drugs not of the nature, substance or quality demanded by the purchaser for deft. to prove that he purchased the drugs as being of the nature, substance & quality so demanded & with a written warranty to that effect & that he had no reason to believe at the time he sold the drugs that they were otherwise, & that he sold them in the same state as when he bought them. Appls. gave an order for drugs on an order form specifying that the goods were ordered on the condition that the suppliers warranted them to be of the nature, substance & quality described in the order. The suppliers placed their initials on the order form & in due course delivered the goods, retaining the order form in their own possession:—*Held*: the initialled order form was a written warranty within sect. 29 (1),

## PART II. SECT. 2, SUB-SECT. 4.—B. (c).

r i. ———.]—Under the Sale of Food & Drugs Acts the certificate of a public analyst is *prima facie* but not conclusive evidence.—*TODD v. COCHRANE (1901), 38 Sc. L. R. 801.—SCOT.*

## PART II. SECT. 3, SUB-SECT. 3.—B. (b).

101 ii. ———.]—*Sale by servant or agent.*—To prove a limited co. guilty of the offence of selling an article which does not conform with the regulations made under Food & Drugs Act, 1908, it must be shown that the sale was made on its behalf by a servant or agent who had authority to sell. Where a sale was made by a servant who had no

authority to sell anything, it was held that the sale did not constitute an offence by the co.—*MITTON v. R. G. LOCK & Co., LTD., [1928] S. A. S. R. 444.—AUS.*

## PART II. SECT. 3, SUB-SECT. 3.—C. (a).

110 iii. ———.]—*Whether property passed*—*Food & Drugs Act, 1908, ss. 5, 22.*—*WALTERS v. MITTON, [1926] S. A. S. R. 261.—AUS.*

## PART II. SECT. 3, SUB-SECT. 3.—C. (b) iv.

142 i. ———.]—*Notice not seen by purchaser—Onus of proof.*—Where an article of food exposed for sale bears a label indicating that it does not conform to the statutory standard of

genuineness:—*Held*: the seller must prove that the contents of the label were brought to the notice of the purchaser.—*PATTERSON v. FINDLAY, [1925] S. C. (J.) 53.—SCOT.*

## PART II. SECT. 3, SUB-SECT. 3.—D. (b).

sd. *Coffee.*—K. having asked accused for coffee, received a mixture containing at least 67 per cent. of chicory. When he asked for coffee K. expected to get an addition of chicory according to commercial usage:—*Held*: what K. got was substantially chicory containing an addition of some coffee, & the commodity was not of the nature, substance & quality demanded.—*MOODLEY v. R. (1927), 48 N. L. R. 395.—S. AF.*

notwithstanding that it did not come into the possession of applts. until after the prosecution had been instituted.—*WOOLWORTH (F. W.) & CO., LTD. v. POTTER (1935)*, 80 Sol. Jo. 111; 33 L. G. R. 527, D. C.

**218a. — Milk adulterated with colouring matter.]**

—The defence that he purchased the milk with a written warranty is not available to a vendor of milk adulterated by the addition of colouring matter contrary to Milk & Dairies (Amendment) Act, 1922 (c. 54), s. 4, which neither includes such a defence nor contains any provision that it is to be read with any Act containing such a defence.—*REEMAN v. KNAPP (1925)*, 134 L. T. 224; 90 J. P. 7; 42 T. L. R. 131; 24 L. G. R. 42; 28 Cox, C. O. 117, D. C.

**243a. What amounts to.]—Applts., who manu-**

factured an article called "R.'s rum & butter toffee," supplied it to a confectioner with a warranty, & on analysis it was found to contain rum & butter, & coconut fat. On a summons against applts. for giving a false warranty there was evidence that toffee made partly with coconut fat had been sold for years as "rum & butter toffee." The justices convicted applts.:—*Held*: the description "butter toffee" implied that no fat, except butter, was used in the manufacture, & the conviction must be affirmed.—*RILEY BROTHERS (HALIFAX), LTD. v. (1927)*, 44 T. L. R. 238, D. C.

**261a. — Proceedings against previous seller—**

Previous analysis before proceedings against retailer.]—An inspector appointed under the Sale of Food & Drugs Acts bought a sample of ground ginger from a retail shop. He complied with the provisions of Food & Drugs (Adulteration) Act, 1928 (c. 31), s. 18, with regard to the division of the sample into three parts, delivering one part to the seller

& having an analysis made. Upon analysis the ground ginger was found to contain an added preservative, contrary to the provisions of the Public Health (Preservatives, etc., in Food) Regulations, 1925. The retailer was convicted upon an information charging him with the sale of the ground ginger to the prejudice of the purchaser under Food & Drugs (Adulteration) Act, 1928 (c. 31), s. 2. Subsequently, proceedings were commenced against the previous seller of the ground ginger for wilfully neglecting to obey the Public Health (Preservatives, etc., in Food) Regulations, 1925, by selling the ground ginger to the retailer. No further sample was taken of the ground ginger & no further analysis made. No part of the sample that was taken in the first instance was sent to the previous seller of the ground ginger. The magistrate refused to convict on the ground that the provisions of sect. 18 of 1928 Act had not been complied with:—*Held*: the magistrate was wrong in holding that compliance with the formalities prescribed by sect. 18 of 1928 Act was a condition precedent to the institution of proceedings against the previous seller for a sale to which art. 7 of the Regulations of 1925 applied. When the formalities prescribed by sect. 18 of 1928 Act with regard to taking of sample, division & analysis had been complied with in proceedings as between the purchaser & the retailer, there was no necessity for those formalities to be repeated when proceedings were subsequently taken against the previous seller under art. 7 of the Regulations of 1925.—*TWYNHAM v. BADCOCK*, [1932] 2 K. B. 549; 101 L. J. K. B. 755; 147 L. T. 35; 96 J. P. 219; 48 T. L. R. 389; 30 L. G. R. 239; 29 Cox, C. O. 448.

**283. Add. Annotation:—As to (3) Refd. Conn v. Turnbull (1925)**, 89 J. P. 300.

## Part III.—Sale of Unwholesome Food.

**358. Add. Annotation:—Refd. Frome United Breweries Co. v. Bath JJ.**, [1926] A. C. 586.

**361a. Onus of proof.]—Resps. were charged with** being in possession of certain tuberculous meat contrary to Public Health Act, 1875, s. 117, as extended by Public Health Acts Amendment Act, 1890, s. 28. By sect. 116 of the Act of 1875 the onus of proof that the said meat was not exposed or deposited for sale, or was not intended for the food of man, is placed upon the party charged. Resps. led evidence in order to discharge the onus on

them under sect. 116, & the magistrates found that that evidence "was very probably true," & that, as they were not satisfied beyond reasonable doubt that the meat was on the premises for the purpose alleged, resps. were entitled to the benefit of the doubt. They accordingly dismissed the charge:—*Held*: the onus of proof imposed by sect. 116 of the Act of 1875 had not been discharged by resps., & the offence with which they were charged was therefore proved.—*CANT v. HARLEY & SONS, LTD.*, [1938] 2 All E. R. 768; 36 L. G. R. 465.

**PART II. SECT. 5, SUB-SECT. 1.—A.**

*c. i.* — — — — —.]—Where, under Food & Drugs Act, 1899 (c. 51), s. 2, the Local Govt. Board, or Board of Agriculture, through their officer, procure samples of an article of food (e.g. margarine) for analysis, & communicate the certified result of the analysis, when made, to the secretary of the local authority, the secretary of the local authority may, without any special resolution, transmit such certificate to the inspector appointed under Food & Drugs Act, 1875 (c. 13); & he without antecedent authorisation may proceed in his own name to prosecute for any penalties to which the

vendor may be liable.—*CONNOR v. BUTLIN*, [1902] 2 I. R. 569.—*IR.*

**PART II. SECT. 5, SUB-SECT. 4.—A.**

*st. When returnable—Under Health Act, 1919, s. 262 (d).*—The provision in above section, that where any prosecution or proceeding under Part XII. of the Act relates to any food, drug or substance, the summons "shall not be made returnable in less than fourteen days from the day on which it is served," means that such summons is to be "returnable in not less than fourteen clear days" from such date.—*DOWNES v. FRESHENFY*, [1928] V. L. R. 64; [1928] Argus L. R. 6.—*AUS.*

**PART III. SECT. 2, SUB-SECT. 1.—D.**

*11. — Supply of milk to boarders by boarding-house keeper.*—The supplying of milk by a boarding-house keeper to boarders for use with meals does not constitute a sale within the meaning of the Pure Food Act, 1908.—*PATTON v. MOULD* (1931), 48 N. S. W. W. N. 158.—*AUS.*

*sg. Article sold—Mens rea—Whether knowledge of disease necessary.*—*Held*: there was no evidence on which the magistrate could find that deft. sold meat affected by tuberculosis, knowing at the time that it was so affected, & the conviction should be quashed.—*DIXON v. SEILER, Ex p. SEILER*, [1938] S. R. Q. 93.—*AUS.*

## Part V.—Particular Articles of Food.

**414a. Exposure for sale—What amounts to.]—**A baker was delivering bread from an open car; after completing his round, while he was on his way back to the bakehouse, he was stopped by an inspector, who weighed the remaining loaves & found a deficiency:—*Held*: there was both an offering & an exposure for sale of the bread left in the car, since, when the journey started, it was uncertain which, if any, loaves would remain unsold, & they were taken for the purpose of being sold if customers required them.—*KEATING v. HORWOOD* (1926), 135 L. T. 29; 90 J. P. 141; 42 T. L. R. 472; 24 L. G. R. 362; 28 Cox, C. C. 198, D. C.

**439a. Protection of employer under Sale of Food (Weights & Measures) Act, 1926 (c. 63)—When applicable.]—**(1) *Held*: the language of Sale of Food (Weights & Measures) Act, 1926 (c. 63), s. 12 (2), has no relation & does not apply to a case where a defect of deft.'s machinery or a default of an employee under deft.'s control is the cause of the deficiency. This sub-sect. deals with the case where the deficiency is due to a *bond fide* mistake or accident or other causes beyond deft.'s control, that is to say, not with negligence or other conduct of deft.'s servants or other persons under his control. In such a case deft. may avail himself of the provisions of sect. 12 (5) if he satisfies the provisions of that sub-sect., by having any other person, including an employee, whom he charges as the actual offender, brought before the ct.

(2) On the question whether proceedings against defts. for contravening this sub-sect. were "proceedings under this Act in respect of an alleged deficiency of weight" within sect. 12 (2), whilst LORD HEWART, C.J., did not express a decided opinion, one way or the other, AVORY, J., expressed the view that proceedings under sect. 6 (2) of the Act were in respect of an alleged deficiency of weight, & TALBOT, J., expressed an opinion to the contrary.

(3) On proceedings against bakers under sect. 6 (2) of the Act defts. duly laid an information against one of their employees under sect. 12 (5); having him brought before the ct. as the actual offender & tendering evidence in order to prove that they had used due diligence to enforce the execution of the Act, & that their employee had committed the offence without their consent, connivance, or wilful default. At petty sessions, the information against the employee was dismissed, but defts. were convicted. Defts. appealed to Quarter Sessions:—*Held*: the Ct. of Quarter Sessions had no power to exempt defts. from any penalty under sect. 12 (5) on the ground (*per* LORD HEWART, C.J., & TALBOT, J.) that

having regard to the fact that the employee had been acquitted at petty sessions, it was not open to defts. to contend at Quarter Sessions that the employee was wrongly acquitted, & on the ground (*per* AVORY, J.) that in any case on the facts the employee charged was not the actual offender within the sub-sect.—*WALKLING, LTD. v. ROBINSON* (1930), 99 L. J. K. B. 171; 143 L. T. 105, 106; 94 J. P. 73; 46 T. L. R. 151; 28 L. G. R. 88; (1929), 29 Cox, C. C. 131.

*Annotations*:—*As to* (2) *Distd. Wolfenden v. Oliver* (1932), 96 J. P. 202. *Consd. Cave v. Dudley Co-operative Society, Ltd.* (1934), 98 J. P. 265. *As to* (3) *Consd. Hammett (R. C.), Ltd. v. Crabb, Hammett (R. C.), Ltd. v. Beldam* (1931), 47 T. L. R. 623.

**439b. Exercise of due diligence by employer—Question of fact.]—**(1) Where an employer who is charged with an offence against the Sale of Food (Weights & Measures) Act, 1926 (c. 63), brings another person before the ct. under sect. 12 (5), as being the actual offender, the question whether the employer has used due diligence to enforce the execution of the Act is one of fact & not of law. (2) The result of compliance with sect. 12 (5) is that both the employer & the other person are convicted, but that the latter alone is liable to any penalty. (3) *Qu.*: whether in a case where the justices have convicted the employer & have refused to convict the actual offender, the employer may not appeal to quarter sessions. *Walkling, Ltd. v. Robinson*, No. 439a, is no authority to the contrary, since in that case the employee was found as a fact not to be the actual offender, & an appeal would have involved the allegation that he was wrongly acquitted.—*HAMMETT (R. C.), LTD. v. CRABB, HAMMETT (R. C.), LTD. v. BELDAM* (1931), 145 L. T. 638; 95 J. P. 180; 47 T. L. R. 623; 29 L. G. R. 515; 29 Cox, C. C. 364, D. C.

*Annotation*:—*As to* (1) *Consd. R. C. Hammett, Ltd. v. London County Council* (1933), 49 T. L. R. 209.

**439c. — Failure of branch manager to exercise due diligence.]—**Applts., a co. owning a large number of butchers' shops, were charged with an offence at one of their shops under Sale of Food (Weights & Measures) Act, 1926 (c. 63), s. 5 (2). They brought before the ct. as the actual offender one P., a salesman employed at the shop. Applts. were convicted, & the summons against P. was dismissed. On appeal quarter sessions found that B., the manager of the branch, had not exercised due diligence to enforce the execution of the Act, but that in all other respects applts. had exercised due diligence. They held that the manager's failure was the failure of applts., & dismissed the appeal:—*Held*: quarter sessions were entitled so to hold.

## PART V. SECT. 2, SUB-SECT. 3.

*al. Exposure of several loaves—Whether separate offences.]—*Sale of Food (Weights & Measures) Act, 1926, s. 3, enacts that "a person shall not . . . in exposing or offering any article of food for sale, make any misrepresentation . . . or commit any other act calculated to mislead the purchaser

or prospective purchaser, as to the weight or measure of the article." Sect. 11 (3) renders a person contravening sect. 3 liable to a fine "not exceeding in the case of a first offence five pounds":—*Held*: in the case of a first offence, a shopkeeper, who had exposed for sale at the same place & time twenty-five loaves deficient in weight, had committed not one, but

twenty-five offences, for each of which he could be penalised, & accordingly, a penalty of £25 imposed by the magistrate was within his powers. *Semble*: in the circumstances, each of the offences would fall to be regarded as a first offence.—*MONTROSE CO-OPERATIVE SOCIETY v. MARR*, [1935] S. C. (J.) 69.—SCOT.

*Qu.*: whether an appeal lay to quarter sessions.—HAMMETT (R. C.), LTD. v. LONDON COUNTY COUNCIL (1933), 97 J. P. 105; 49 T. L. R. 209; 31 L. G. R. 155, D. C.

439d. — Effect of compliance with sect. 12.]—HAMMETT (R. C.), LTD. v. CRABB, HAMMETT (R. C.), LTD. v. BELDAM, No. 439b, *ante*.

439e. — What are "proceedings in respect of an alleged deficiency of weight"—Proceedings under Sale of Food (Weights & Measures) Act, 1926 (c. 63), s. 6 (2).]—WALKLING, LTD. v. ROBINSON, No. 439a, *ante*.

439f. — — — — —.]—Proceedings under Sale of Food (Weights & Measures) Act, 1926 (c. 63), s. 6 (2), against a person for having in his possession for sale loaves of bread the net weight of which is not one pound or an integral number of pounds may be proceedings "in respect of an alleged deficiency of weight" within sect. 12 (2), of the Act, so as to entitle deft. to rely on the defences provided by that sub-section.—WOLFINDEN v. OLIVER (1932), 147 L. T. 80; 96 J. P. 202; 48 T. L. R. 394; 30 L. G. R. 263; 29 Cox, C. C. 471, D. C.

439g. — Acquittal of employee—Power of Quarter Sessions to exempt employer from penalty.]—WALKLING, LTD. v. ROBINSON, No. 439a, *ante*.

439h. — — — — — Conviction of employer—Right of appeal to quarter sessions.]—HAMMETT (R. C.), LTD. v. CRABB, HAMMETT (R. C.), LTD. v. BELDAM, No. 439b, *ante*.

439i. — — — — —.]—HAMMETT (R. C.), LTD. v. LONDON COUNTY COUNCIL, No. 439c, *ante*.

439j. Comparison with other loaves—Reasonable number to be weighed.]—Two informations under Sale of Food (Weights & Measures) Act, 1926 (c. 63), s. 6 (2), were preferred against defts. (i.) for having in their possession for sale thirty-seven loaves of bread, the net weight of each loaf not being one pound or an integral number of pounds; (ii.) for selling a loaf of bread the net weight of which was not one pound or an integral number of pounds. Under the supervision of an inspector of weights & measures fifty-six loaves, purporting to be 2-lb. loaves, were taken from a considerably larger number in a cart from which defts.' vanman was delivering bread, & weighed. Nineteen proved to be either of correct weight or of a weight in excess of 2 lb., but thirty-seven were deficient in weight, & in the case of one loaf the deficiency amounted to 2 ozs. 4 drams. That loaf was purchased by the inspector. The justices dismissed both informations, on the ground that defts. were in each case protected

by sect. 12 (1).—*Held*: on the first charge, with respect to each of the thirty-seven loaves, the justices were entitled to look at the average weight of a number of other loaves offered for the sale on the same occasion, but it was not possible for them to hold that thirty-six was not a reasonable number; but on the second charge, the variation from the proper weight in the case of the single article being clearly considerable, they ought not to have had regard to the average weight of other loaves sold, as that inquiry arose only where the variation was inconsiderable.—CAVE v. DUDLEY CO-OPERATIVE SOCIETY (1934), 103 L. J. K. B. 569; 151 L. T. 448; 98 J. P. 265; 30 Cox, C. C. 151; 32 L. G. R. 515, D. C.

445a. Deficiency in weight—Sale of Food (Weights & Measures) Act, 1926 (c. 63), s. 4—Pre-packed butter—Material time of making up.]—Resps. had in their possession for sale pre-packed packages of butter purporting to be in the quantities prescribed by Sale of Food (Weights & Measures) Act, 1926 (c. 63), s. 4 (2) (a), namely, in multiples of a quarter of a pound, which, however, when weighed by appts.' food inspector, were deficient in weight. It was contended that as the packages were correct in weight at the time of making up, four days earlier, they were "made up for sale" in the prescribed quantities, & that the offence of having in their possession for sale pre-packed articles of food not being made up in the quantities prescribed by the above sub-sect., had not been committed.—*Held*: "made up for sale" does not refer to the moment of making up only but to the moment of having in possession for sale, & resps. were guilty of the offence charged.—LONDON COUNTY COUNCIL v. ROYAL ARSENAL CO-OPERATIVE SOCIETY, LTD., [1936] 1 K. B. 154; 105 L. J. K. B. 58; 154 L. T. 214; 100 J. P. 25; 52 T. L. R. 98; 80 Sol. Jo. 77; 34 L. G. R. 42; 30 Cox, C. C. 318, D. C.

447. *Add. Annotation*:—*Reid*. Preston v. Grant, [1925] 1 K. B. 177.

465. *Add. Citation*:—27 Cox, C. C. 637.

475. *Add. Annotation*:—*Distd*. Burrows v. Rapson (1927), 25 L. G. R. 397.

475a. — — — — — Grocer occasionally selling bottled milk.]—Applt. carried on business as a general grocer. He purchased for resale sterilised milk in sealed bottles, & resold about three dozen bottles a week in the condition in which the milk was received from the factory. He was not registered as a dairyman or purveyor of milk.—*Held*: there was evidence to support a conviction of applt. for

PART V. SECT. 3, SUB-SECT. 4.—B.

s 1. — — — — — Words descriptive of article sold.]—Where margarine was sold in a wrapper which bore, in large type, the words "Charmo Margarine," below which, in smaller type, were the words "containing a small quantity of butter," & the name "Charmo," was a duly approved addition to the word "margarine," & the seller, convicted under Butter & Margarine Act, 1907, s. 8, appealed.—*Held*: the words "containing a small quantity of butter," were merely descriptive of the article sold, & did not form part of a fancy or descriptive name which had

not been approved; & conviction quashed.—SOMERVILLE & BARR, LTD. v. CHALMERS, [1925] S. C. (J.) 70.—SCOT.

PART V. SECT. 4, SUB-SECT. 1.

m 1. — — — — — Relating to property in milk vessels.]—A dairyman, charged with contravening art. 12 of Milk & Dairies (Scotland) Order, 1925, maintained that the article was *ultra vires* of the Board, in respect that the Board was empowered to make Orders only for the purpose of ensuring the purity of milk, whereas the purpose of art. 12 was, not to ensure purity of milk, but

to preserve the rights of property in milk vessels. It was stated for the complainant that the Board regarded the article as in the interests of public health, since it assisted the tracing of sources of infection.—*Held*: although art. 12 *prima facie* appeared to be *ultra vires* as being directed solely to preserving rights of property in milk vessels, yet, since it was possible that further information might show that it did tend to ensure the purity of milk, the ct. could not decide, in these proceedings & on the information before it, that the article was *ultra vires*.—SOMERVILLE v. LANGMUIR, [1932] S. C. (J.) 55.—SCOT.

carrying on the trade of a dairyman or purveyor of milk without being registered.—*BURROWS v. RAPSON* (1927), 25 L. G. R. 397, D. C.

476. *Add. Annotation*:—*Refd.* *Easington Rural District Council v. Gilson* (1929), 46 T. L. R. 107.

476a. — *Necessity for registration in every district where business carried on.*—A person carrying on business as purveyor of milk must be registered under art. 6 of the Milk & Dairies Order, 1926, with the sanitary authority of each district in which he carries on business. It is not sufficient that he is registered with the sanitary authority of the district where his cowsheds & dairy are situated if he also carries on business in other districts where he has a regular milk round.—*EASINGTON RURAL DISTRICT COUNCIL v. GILSON* (1929), 142 L. T. 429; 94 J. P. 56; 46 T. L. R. 107; 28 L. G. R. 49; 29 Cox, C. C. 86.

476b. *Change of tenancy—Removal of predecessor from register—Whether new tenant "person aggrieved."*—On May 1, 1930, applt. succeeded a predecessor as annual tenant of premises used as a dairy. On May 12, 1930, resps., who were the local authority, having in the meantime given a similar notice to his predecessor, gave to applt. a notice purporting to be given under Milk & Dairies (Amendment) Act, 1922 (c. 54), s. 2 (1), calling upon him to show cause why they should not remove his predecessor from the register of purveyors of milk in respect of the premises on the ground that they were satisfied that by default of the latter the premises were not in a fit condition for the purposes of a dairy. On May 13, 1930, resps., after hearing applt., decided to remove his predecessor from the register on that ground, & thereupon gave applt. notice that they had so decided. An appeal by applt. under the above subsect. against the decision of resps. was dismissed by the magistrate on the ground that applt. was not a "person aggrieved" by the decision within the sub-sect. On an appeal from the magistrate by case stated:—*Held*: applt. was a "person aggrieved" within the sub-sect., & the case should be remitted to the magistrate to be heard by him on the merits.—*PROSSER v. MOUNTAIN ASH URBAN DISTRICT COUNCIL*, [1931] 2 K. B. 132; 100 L. J. K. B. 266; 144 L. T. 549; 95 J. P. 84; 29 L. G. R. 218; 29 Cox, C. C. 265, D. C.

476c. *Artificial Cream Act, 1929 (c. 32)—Application.*—Appls. were convicted on informations preferred against them under Artificial Cream Act, 1929 (c. 32), in respect of the sale by them of certain confectionery, described as "cream filled Swiss rolls" & "vanilla cream sandwich," containing a cream-like paste or substance, which was not cream as defined in Artificial Cream Act, 1929 (c. 32):—*Held*: the Act applies only to the sale of cream or artificial cream as a separate article of food, & has no application to confectionery or to a composite substance in connection with confectionery. It applies only to a substance purporting to be cream & not to a substance purporting to contain cream.—*LYONS (J.) & Co., LTD. v. KEATING*, [1931]

2 K. B. 535; 100 L. J. K. B. 513; 145 L. T. 263; 95 J. P. 150; 47 T. L. R. 442; 75 Sol. Jo. 489; 29 L. G. R. 407; 29 Cox, C. C. 323, D. C.

476d. *Breach of Milk & Dairies (Amendment) Act, 1922 (c. 54), s. 3 (1) (b)—Offence by licence holders.*—Milk & Dairies (Amendment) Act, 1922 (c. 54), s. 3 (1) (b), which prohibits the use, except under licence from the Minister of Health or with his authority, in connection with the sale of milk, of certain prescribed designations, is not limited in its application to acts committed by persons who do not hold licences.

On a charge of an offence under this sect. the question of sale to the prejudice of the purchaser does not arise.—*PRATT v. LLOYD* (1932), 148 L. T. 137; 96 J. P. 479; 49 T. L. R. 14; 30 L. G. R. 505; 29 Cox, C. C. 569, D. C.

476e. *Sale of pasteurised milk at several shops in area—Necessity for licence for each shop.*—Milk (Special Designations) Order, 1923, made by the Minister of Health under Milk & Dairies (Amendment) Act, 1922 (c. 54), which provides for the grant of licences to sell milk under special designations, including pasteurised milk, in Sched. IV., sets out the following table of fees payable for licences: "Licence in respect of the establishment in which the process of pasteurising is carried on, & of any shop or other premises in the area of the same, licensing authority from which the milk is sold—£1 1s." "Licence in respect of any other shop or other premises at or from which the milk is sold—5s." Pltfs., who carried on the sale of pasteurised milk at fourteen establishments in the area of the same licensing authority, claimed against the licensing authority a declaration that on the true construction of the above Order they were entitled to receive from the authority, on payment of the sum of 5s., a licence for the sale of pasteurised milk within the area:—*Held*: on the construction of the Order, a dealer's licence at a fee of 5s. must be obtained for each shop or premises at which the pasteurised milk is to be sold. The local authority is not authorised by the Order to grant a dealer in return for payment of one sum of 5s. a licence to sell at & from as many places as he may choose within the area.

*Semble*: if a preliminary objection had been taken *in limine* to the action on the grounds that a person aggrieved by the Order is confined, as regards his remedy, to an appeal to the Minister of Health under clause 9 (2) of the Order, & that the Minister of Health was not a party to the action, that objection would have succeeded, & the action would not have been maintainable.—*UNITED DAIRIES (LONDON), LTD. v. HACKNEY BOROUGH COUNCIL* (1934), 151 L. T. 56; 98 J. P. 236; 50 T. L. R. 307; 78 Sol. Jo. 278; 32 L. G. R. 158.

476f. *Refusal of licence for sale—Whether action lies.*—*UNITED DAIRIES (LONDON), LTD. v. HACKNEY BOROUGH COUNCIL* (1934), No. 476e, *ante*.

476g. *Milk Marketing Board—Imposition of fine—Excess of jurisdiction—Certiorari.*—*R. v. MILK MARKETING BOARD, Ex p. NORTH* (1934), 50 T. L. R. 559; 78 Sol. Jo. 536.



476h. — Imposition of penalty—Registration disputed—Prohibition.]—*Ex parte* WENHAM (1934), 78 Sol. Jo. 414, D. C.

476i. — Registered producer having not more than four milch cows.]—The Milk Marketing Scheme, which has statutory force under the Milk Marketing Scheme (Approval) Order, 1933, empowers the Milk Marketing Board to impose fines on registered producers who sell milk under contracts not in the form prescribed in the Scheme. The Scheme further provides by para. 38 that the Board shall keep a register of producers, & by para. 40 (a) that producers who have in their possession not more than four milch cows, & who do not sell by retail shall be exempt from registration. By para. 41, the Board, on being satisfied that a person who is registered has ceased to be a producer or is exempt from registration, shall remove his name from the register, provided that the name of a person shall not, by reason only that he is exempt from registration, be removed from the register without his consent.

Deft., a farmer, was registered as a producer in 1933, at which time he possessed six milch cows. Later in that year he disposed of two of them, & thereafter never had in his possession more than four milch cows. In 1934 he entered into a contract for the sale of milk, not by retail, which contract was not in the prescribed form:—*Held*: the Board had power to impose a fine on deft., notwithstanding that at the date of the alleged offence he possessed not more than four milch cows, since he remained a registered producer until his name was removed from the register with his consent.—MILK MARKETING BOARD v. WILLIAMS (1935), 153 L. T. 115; 79 Sol. Jo. 363, C. A.

476j. — Right to recover costs of operating scheme—What amounts to.]—Applt. was

liable as a registered producer & retailer of milk to contribute to the costs of operating the scheme contained in the Scottish Milk Marketing Scheme (Approval) Order, 1933, made under & in terms of Agricultural Marketing Act, 1931 (c. 42), s. 1 (8), & administered by resps. Under the scheme, which came into operation on Dec. 1, 1933, resps. fixed a price for the sale of milk & realised the unmarketable surplus of milk by selling it in a cheaper market. In computing the costs of operating the scheme resps. included as a cost of operation the difference between the lower price received by them for the surplus milk & the price in the liquid market, upon which basis resps. sought to recover rateably from all registered members of the scheme, including applt., a charge or levy calculated at so much per gallon of milk disposed of by each member. Applt., when called upon to pay this charge or levy for each of the months of Dec. 1933, to July, 1934, inclusive, declined to do so, & without disputing the arithmetical correctness of the sum claimed, contended that resps. had wrongly & illegally included in their computation of costs the amount of the alleged loss relating to the said sale of surplus milk, & that, as their method of computation & disposal of contributions provided a benefit to ordinary producers to the detriment of producers & retailers, they had acted *ultra vires* & contrary to the provisions of the scheme. Resps. basis of computation was in accordance with a previous decision of the Second Division of the Ct. of Session in a recent special case to which applt. was not a party:—*Held*: the difference between the lower price received by resps. & the price in the liquid market was not a "cost" of operating the scheme; & the contributions claimed from applt. being unauthorised by the scheme, resps. had acted *ultra vires* in

476g i. Milk Marketing Board—Right to accounts.]—A distributor of milk entered into contracts for the supply of milk by registered producers, under which he agreed to make payments direct to the producers for the milk supplied. In an action against him by the Board, established by the Scottish Milk Marketing Scheme, 1931, made under Agricultural Marketing Act, 1931 (c. 42), concluding for an accounting of the milk purchased by him & the payment of the sum due by him as the balance of his intromissions, he maintained that, as a distributor, he was under no obligation to count & reckon with the Board:—*Held*: the Board, in virtue of their statutory monopoly right to market milk, were entitled to an accounting from a distributor in respect of milk purchased by him from registered producers.—SCOTTISH MILK MARKETING BOARD v. FERGUSON, [1935] S. C. 252.—SCOT.

476g ii. — Power to restrain sale to unapproved customers.]—An interim interdict will be granted to restrain a producer from selling to unapproved customers, although he claims to do so in virtue of a wholesaler's licence, if the administration of the Board's scheme is interfered with.—SCOTTISH MILK MARKETING BOARD v. FARIS, [1935] S. C. 287.—SCOT.

st. Milk Control Board—Validity of regulation.]—A regulation of the Milk Control Board requiring licensees to be solvent is *ultra vires*.—*Re* KENDRICK & MILK CONTROL BOARD, [1935] 3 D. L. R. 198; O. R. 308; 63 Can. O. C. 385.—CAN.

sv. — Charge of levy by agent association—Validity.]—Deft. assoc. was appointed an agency of a marketing board set up under Natural Products Marketing (British Columbia) Act, 1934, to control the marketing of milk. Pltf., a dairyman, who before the establishment of the marketing scheme had been selling his milk to G.'s dairy, continued to ship his milk to it, but instead of receiving payment from G., cheques with accompanying statements were sent him by deft., who deducted from the price certain charges, including one termed an equalisation levy which arose out of the operation of a milk pool by deft.:—*Held*: since the pool was operated by deft., not as an agency of the marketing board, but as an assoc., & deft. was not a member of the assoc., deft. was not authorised to charge pltf. with said levy.—BROOKE v. INDEPENDENT MILK PRODUCERS CO-OPERATIVE ASSOC., [1937] 3 W. W. R. 401; 4 D. L. R. 362; 52 B. C. R. 61.—CAN.

sw. Milk Board—Liability to garnishee proceedings.]—The Milk Board by reason of the provisions of Milk Act, 1931, s. 12, may be made liable to garnishee proceedings under Small Debts Recovery Act, 1912–1933.—*Re* FARMERS' FERTILIZERS CORP., LTD., *Ex p.* MILK BOARD (1935), 52 N. S. W. W. N. 200.—AUS.

sz. Sale without licence—Onus of proof.]—Where on a charge of selling milk without a licence it has been proved *prima facie* that a sale of milk has taken place, the onus is on deft. to establish that he was duly licensed to

sell milk.—KIRKPATRICK v. BARTLETT [1936] S. A. S. R. 10.—AUS.

sc. Whether "beverage" within Criminal Code.]—Milk is not a beverage within the provision of the Criminal Code requiring a duly registered trade mark on any bottle of beverage for sale.—*R. v. ROUSE*, [1936] 4 D. L. R. 797; 86 Can. C. C. 225.—CAN.

st. Place of delivery—How determined.]—A farmer was charged with selling defective milk. He was a registered producer under the Scottish Milk Marketing Scheme, & at the time of the alleged offence his milk was being consigned, on the instructions of the Milk Marketing Board, to a creamery. The milk was conveyed to the creamery by a haulier who had been licensed by the Board in terms of the Scheme, & the charge against the farmer was founded upon a sample which had been taken on the arrival at the creamery of the haulier's lorry. The sheriff-substitute having found the accused not guilty, on the ground that the sample had not been taken at the place of delivery, according to Food & Drugs (Adulteration) Act, 1928:—*Held*: the Scottish Milk Marketing Scheme provided no assistance in determining the place of delivery; in the circumstances the place of delivery must, as enacted by the Sale of Goods Act, s. 29, be taken to be the producer's premises, & accordingly, the sheriff-substitute was entitled to acquit the accused of the charge.—PATERSON v. AIRD, [1937] S. C. (J.) 128.—SCOT.



respect that the disposal of the said contributions conferred a benefit upon the class of ordinary producers at the expense of the class of producers & retailers including applt. —*FERRIER v. SCOTTISH MILK MARKETING BOARD*, [1937] A. C. 126; [1936] 2 All E. R. 1131; 105 L. J. P. C. 135; 155 L. T. 425; 80 Sol. Jo. 718, H. L.

**476k. — Construction of order.]**—The Milk Marketing Board had statutory power to fix the prices for milk by reference to the different purposes for which the producers sold the milk. It fixed a price for milk manufactured into fresh cream, tinned cream, & milk manufactured into other products. It did not fix any price for sterilised cream as such, nor for bottled cream. Milk was sold to be manufactured into sterilised cream in bottles, & a dispute arose as to the price applicable:—*Held*: the term “tinned cream” included only cream which had been sterilised & put in tins, & did not include sterilised cream in bottles. The price applicable was, therefore, that for “milk manufactured into other products.”—*DRIED MILK PRODUCTS, LTD. v. MILK MARKETING BOARD*, [1938] 2 All E. R. 534; 54 T. L. R. 630; 82 Sol. Jo. 272, C. A.

**476l. — Explanatory leaflet—Whether warranty.]**—The Milk Marketing Board was established under the Agricultural Marketing Act, 1931 (c. 42), s. 6, & regulated by a scheme which was one of the Statutory Rules & Orders. The Board also issued an explanatory leaflet which contained (*inter alia*) the following: “In various parts of the country at the present time the producer-retailer is feeling the pinch of severe undercutting, & the stabilisation of the industry which will result from the operation of the scheme will end all his anxiety under this head since undercutting will be impossible.” In an action to enforce certain levies under the scheme deft. set up that the above passage was a representation that undercutting would be stopped by the operation of the scheme & that the Board had failed to stop undercutting. He set this up as a defence upon the footing that the above statement was a warranty or agreement, & also as the basis of a counterclaim claiming damages for breach of duty:—*Held*: (1) if the passage amounted to a representation at all, it applied wholly to the future, & there was no representation as to any present fact that could be relied upon in law; (2) there was no duty upon the Board to stop undercutting; (3) upon the facts the Board had taken all reasonable steps to prevent undercutting.—*MILK MARKETING BOARD v. WARMAN & SONS*, [1937] 3 All E. R. 541; 81 Sol. Jo. 651.

#### PART V. SECT. 4, SUB-SECT. 3.

**508 III. — — — — —.]**—A dairyman was convicted of selling sweet milk which was not genuine, in respect that it contained less than 3 per cent. of milk fat. The alleged deficiency in fat was established, but it was also proved that the milk had not been tampered with in any way, the deficiency being due to the milk having stood for some time in the can, & to the sample having been drawn from a tap at the bottom after the cream had risen. No evidence was led as to the possibility or impossibility of redistributing the constituents of the milk in the can by stirring or otherwise:

—*Held*: accused had failed to rebut the statutory presumption that the milk was not genuine, & the conviction was right.—*MCALLUM v. BROOKS*, [1926] S. C. (J.) 39.—*SCOT*.

**k 1. — Price of milk varying with quality supplied—Genuine milk to be supplied.]**—Deft. was a shareholder in a certain co-operative dairy society, & she & the other suppliers of milk to the creamery of the said society delivered daily to the creamery quantities of milk. The quantity of milk delivered by each supplier was recorded by weight in pounds, dependent on the number of gallons, & the manager or other official of the creamery took a

**476m. Milk Act, 1934 (c. 51), s. 4—Calculation of price.]**—An agreement to fix prices for a marketing scheme by reference to market quotations included the phrases “exceptional quotations being disregarded” & “the average of the mean prices for the two kinds of cheese”:—*Held*: (1) “exceptional quotations” did not mean quotations for goods which were in fact exceptional owing to their quality or character but to quotations so described in the market report; (2) the “mean” is the figure mid-way between two extremes whereas the “average” is ascertained by adding all the items together & dividing by the number of items.—*UNITED DAIRIES (WHOLESALE), LTD. v. LEMON*, [1937] 2 All E. R. 618, C. A.

**476n. Sale of infected milk—No mens rea—Liability in damages.]**—S. arranged with defts., who were large distributors of milk, to supply him, his family & household with milk. In Aug. a serious outbreak of typhoid fever occurred. S.’s wife, two children, his niece & governess contracted the disease, & S. himself, though escaping typhoid, was incapacitated for some little time through inoculation. Before they commenced to supply S., defts. wrote asking him to deal with them, & enclosed a brochure describing the way in which they carried on their business, & in particular the care taken to insure a pure supply of milk, which was stated to be mainly produced on their own farm. It was proved at the trial that, during the summer season, they drew the greater part of their supplies from a large number of other farms, most of the milk being mixed together, at the defts.’ distributing depot, before being delivered to customers. For the purpose of the trial, it was admitted that the infection was carried in the milk supplied by defts. Pltfs. founded their actions not only upon negligence, but also upon the breach of the statutory duty imposed by Food & Drugs (Adulteration) Act, 1928, s. 2, which requires sellers of food to supply food of the nature, substance & quality demanded:—*Held*: (1) defts. were not guilty of negligence at common law; (2) though defts. had no means of knowing that the milk was infected, there had been a breach of the statutory duty under Food & Drugs (Adulteration) Act, 1928, s. 2, for which they were liable in damages.—*SQUARE v. MODEL FARM DAIRIES (BOURNEMOUTH), LTD.*, [1938] 2 All E. R. 740; 159 L. T. 40; 54 T. L. R. 821; 82 Sol. Jo. 548; 38 L. G. R. 607.

**495. Add. Annotation:—***Refd. Bridges v. Griffin*, [1925] 2 K. B. 233.

**508. Add. Citation:—**28 Cox, C. C. 7.

sample of each delivery, tested it, & ascertained its contents of butter-fat. In return for the said milk delivered by her, deft. received from the creamery: (a) at the end of every month a cash payment per pound of milk delivered, calculated on the average percentage of butter-fat contained in the milk delivered during the month—the greater the content of the butter-fat, the higher the price paid; & (b) each day a quantity of separated milk, which was determined in accordance with the rules of the society & was proportionate to the quantity of milk delivered by deft. to the creamery, or, instead, a cash payment. A sample

**515a. Meat—Sale of Food (Weights & Measures) Act, 1926 (c. 63)—Butchers' Meat—Whether stuffed meat included.]—**A sale of a piece of stuffed butchers' meat, so labelled & asked for as such by the purchaser & weighed together with the stuffing, is not a sale of butchers' meat otherwise than by net weight within the prohibition in Sale of Food (Weights & Measures) Act, 1926 (c. 63), s. 5 (1), the meat

not being sold as butchers' meat but as a composition called stuffed meat.—*Dewhurst, Ltd. v. Eddins*, [1935] 2 K. B. 105; 104 L. J. K. B. 274; 153 L. T. 16; 99 J. P. 219; 51 T. L. R. 341; 79 Sol. Jo. 287; 33 L. G. R. 207; 30 Cox, C. C. 222, D. C.

**Protection of employer.]—***See* Nos. 439b, 439c, *ante*.

## Part VI.—Control in Wartime.

**519. Add. Annotations:—***Folld. Brocklebank v. R.*, [1925] 1 K. B. 52. **Consd. China Navigation Co. v. A.-G.** (1932), 48 T. L. R. 375. **Refd. R. v. London County Council, Ex p. Entertainments Protection Asscn., Ltd.**, [1931] 2 K. B. 215.

**555. Add. Annotation:—***As to (2) Refd. R. v. Minister of Health, Ex p. Yaffe*, [1930] 2 K. B. 98.

**558a. ———.]—**The Food Controller, acting under powers conferred by Defence of the Realm Regulations, reg. 2B, requisitioned all the bacon landed on or before a certain specified date, & at the same time, acting under powers conferred by reg. 2F, requisitioned all bacon landed after such date:

**—Held:** in assessing the compensation to be paid for the bacon requisitioned under reg. 2F, the arbitrator was entitled to take into consideration the fact that the Food Controller was already in possession of large stocks of bacon requisitioned under reg. 2B.—*Swift & Co. v. Board of Trade*, [1926] 2 K. B. 131; 95 L. J. K. B. 834; 135 L. T. 391; 42 T. L. R. 461, C. A.; *previous proceedings*, [1925] A. C. 520, H. L.

**570. Add. Annotation:—***Refd. R. v. Kent J.J. Ex p. Metropolitan Police Comr.*, [1936] 1 K. B. 547.

**572. Add. Annotation:—***Refd. R. v. Maidstone Prison, Ex p. Maguire* (1925), 133 L. T. 710.

of deft.'s milk taken by an Inspector of Food & Drugs when the milk was in the course of delivery to the creamery was found on analysis to be inferior to the standard prescribed by regs. 1 & 2 of Sale of Milk (Ir.) Regulations, 1901, & deft. was charged for selling to the creamery, to the prejudice of the purchaser, i.e. the said creamery, within Sale of Food & Drugs Act, 1875 (c. 63), as amended by Sale of Food & Drugs Act Amendment Act, 1879 (c. 30), s. 3, an article of food, to wit, milk, which was not of the nature, substance, & quality demanded by the purchaser. No evidence was given by deft. to rebut the presumption of abstraction or adulteration which applied to the said sample by reason of the said regulations. The district justice dismissed the summons:—**Held:** the district justice was wrong in law in dismissing the summons, as although the price paid by the creamery varied with the quality of the milk supplied, the contract contemplated the supply of genuine milk, & the milk of which the sample was taken was not genuine milk as defined by Sale of Milk (Ir.) Regulations, 1901.—*MURPHY v. NICHOLSON*, [1931] 1 R. 582.—*IR*.

### PART V. SECT. 4, SUB-SECT. 4.

**sp. Sale by driver of cart—Name of defendant on cart—Whether evidence of sale by defendant.]—**On the hearing of an information against resp. co. for selling adulterated milk the evidence showed that an inspector saw in the street a milk-cart bearing the same name & address as those of the co., & purchased from the driver of the cart milk which was adulterated:—**Held:** the evidence was insufficient to establish, even *prima facie*, that the milk-cart was the cart of the co. or used in its business, or that there was any relationship between the driver of the cart & the co.—*HOUSTON v. WITTNER'S PTY., LTD.*, [1928] V. L. R. 539; [1928] Argus L. R. 356.—*AUS*.

### PART V. SECT. 6.

**st. Flour—Sale in unmarked barrels—Seller not liable—Manufacturer or packer liable.]—***R. v. BEEKMAN* (1844), 2 U. C. R. 57.—*CAN.*

**sw. Meat—Validity of bye-law.]—**City Act, R. S. S., 1930, sect. 216 paras. 64 (f) & (g), do not allow a choice between two systems of inspection, but are intended to dispense with the necessity of further inspection only in the case of meat marked "approved" by the Dominion in-

spector being offered for sale in the city, & therefore a city bye-law, which without providing for inspection by an inspector appointed by the city prohibits the selling of the meat of an animal which was not inspected by an inspector appointed under Meat & Canned Foods Act, R. S. C., 1927, & marked "approved" by him, is *ultra vires*.—*R. (ORME) v. STONEHOUSE*, [1934] 2 W. W. R. 131.—*CAN.*

**sz. Eggs—Regulations under Live Stock & Live Stock Products Act—Not applicable to consumers.]—***R. v. MALIAN*, [1934] 3 W. W. R. 545; [1935] 1 D. L. R. 249; 62 C. C. C. 330.—*CAN.*

**sa. ———.]—***R. v. THORSBY TRADERS, LTD.*, [1935] 3 W. W. R. 475; [1936] 1 D. L. R. 592; 65 Can. C. C. 109; 5 F. L. J. (Can.) 197.—*CAN.*

**sc. ———.]—**Reg. 11 (2) of the regulations under Live Stock & Live Stock Products Act, R. S. C., 1927, held to be an authorised regulation.—*R. v. GREENBERG*, [1936] 1 W. W. R. 599; 2 D. L. R. 802; 65 Can. C. C. 190; 44 Man. L. R. 104.—*CAN.*

**sb. ———. Validity.]—***R. v. ZASLAVSKY*, [1935] 2 W. W. R. 34; 3 D. L. R. 788.—*CAN.*



the settlement must necessarily have that effect.—*CARRUTHERS v. PEAKE* (1911), 55 Sol. Jo. 291.

227. *Add. Annotation*:—*Refd. Re Phillips, Lawrence v. Huxtable*, [1931] 1 Ch. 347.

250. *Add. Annotations*:—*Consd. Re Simms*, [1930] 2 Ch. 22. *Refd. Re Simms, Ex p. Trustee v. William Simms, Ltd. & Gillett* (1933), 176 L. T. Jo. 142.

252. *Add. Annotation*:—*Refd. Re Lloyd's Furniture Palace, Evans v. The Co.*, [1925] Ch. 853.

293. *Add. Annotation*:—*Refd. Re Patrick & Lyon, Ltd.*, [1933] Ch. 786.

339a. ——— *Subsequent sale to third party—Purchaser from sheriff entitled to recover.*—*KIDD v. RAWLINSON* (1800), 2 Bos. & P. 59; 126 E. R. 1155.

*Annotations*:—*Consd. Arundell v. Phipps & Taunton* (1804), 10 Ves. 139. *Appl. Watkins v. Birch* (1813), 4 Taunt. 823; *Latimer v. Batson* (1825), 7 Dow. & Ry. K. B. 106. *Consd. Cook v. Walker* (1855), 25 L. T. O. S. 51. *Refd. Joseph v. Ingram* (1817), 1 Moore, C. P. 189; *Cromack v. Heathcote* (1820), 4 Moore, C. P. 357; *Steward v. Lombe* (1820), 1 Brod. & Bing. 506.

368. *Add. Annotation*:—*Refd. Fleetwood Hesketh v. I. R. Comrs.* (1935), 180 L. T. Jo. 99.

#### PART I. SECT. 4, SUB-SECT. 2.—A.

224 ii. ———.—*DoE d. STEEL v. MCGILL* (1842), 2 Ont. Dig. 2918.—CAN.

#### PART I. SECT. 4, SUB-SECT. 2.—B.

229 v. ———.—*A conveyance by a husband to a wife in consideration of natural love & affection will be set aside at the instance of a secured creditor holding a mtge. on the property at the time of conveyance.*—*DIXON v. WALSH*, [1937] 1 D. L. R. 585.—CAN.

#### PART I. SECT. 4, SUB-SECT. 2.—C.

q. i. ———.—*SCHUBERT v. KOCH*, [1928] 3 W. W. R. 623.—CAN.

t. i. ———.—*The transfer of his homestead from a husband to his wife, when he was insolvent & in order to prevent his creditors from satisfying their claims therefrom:—Held: fraudulent.*—*BARRETT v. BARON*, [1925] 1 D. L. R. 474; [1925] 1 W. W. R. 87; 19 Sask. L. R. 207; 5 C. B. R. 448.—CAN.

t. ii. ———.—*The transfer by a husband to his wife of his homestead, which is exempt from seizure under execution, cannot be set aside for the benefit of the husband's creditors.*—*RUSSIAN MERCANTILE CO., LTD. v. SLOBODA & SLOBODA (Alta.)*, [1927] 4 D. L. R. 931; [1927] 3 W. W. R. 451.—CAN.

a. i. ———.—*Husband trustee for wife of property conveyed.*—*GRAY v. FORD*, [1925] 1 W. W. R. 943; 34 B. C. R. 517.—CAN.

a. ii. ———.—*Goods purchased with wife's money & goods of husband exempt from seizure for debt.*—*REVELSTOKE SAWMILL CO., LTD. v. STRATFORD*, [1928] 4 D. L. R. 772; [1928] 3 W. W. R. 260.—CAN.

sm. *To child—To defraud secured creditor.*—*A voluntary conveyance to a daughter in order to put the property out of reach of a secured creditor is a fraudulent conveyance within the Statute of Elizabeth.*—*SMITH v. ROBERTSON*, [1936] 1 D. L. R. 505; O. R. 134.—CAN.

#### PART I. SECT. 4, SUB-SECT. 2.—D.

sh. *Conveyance by husband to wife—Proof of validity against creditors—Affidavits necessary.*—*Where property claimed by or on behalf of a wife*

under a conveyance to her during coverture, an explanation of the transaction should be given on oath to show that it was *bond fide*, & good as against the husband's creditors; the affidavits for this purpose should be by the petitioners, & should be satisfactorily corroborated by disinterested persons of known credibility.

*sk. Reconveyance by wife to husband—Land held by wife on trust for husband.*—*WINDSOR AUTO SALES AGENCY v. MARTIN* (1915), 7 O. W. N. 471; 8 O. W. N. 130, 252; 25 D. L. R. 549; 33 O. L. R. 354.—CAN.

al. *Voluntary conveyance—To person of same name as owner—Necessity for explanation.*—*Ex p. WRIGHT* (1869), 2 Ch. Ch. 355.—CAN.

sm. *Family arrangement—Without consideration.*—*HAWKINS v. AGLASINGER*, [1928] 4 D. L. R. 188.—CAN.

#### PART I. SECT. 4, SUB-SECT. 3.

n. i. ———.—*Payment of charges & incumbrances.*—*The promise of a transferee to pay the charges & incumbrances against the property transferred is not a sufficient consideration to support the transaction as against the creditors of the transferor. The question whether a transfer was a voluntary one or not for good consideration is only important as against creditors where it was made *bond fide*.*—*BLUDOFF v. OSACHOFF*, [1928] 3 D. L. R. 170; [1928] 2 W. W. R. 150; 22 Sask. L. R. 533.—CAN.

#### PART I. SECT. 4, SUB-SECT. 5.—A.

264 iii. ———.—*GALIBERT v. SOCIÉTÉ D'ADMINISTRATION GÉNÉRALE & BANQUE NATIONALE & CIE. GÉNÉRAL D'ENTREPRISES PUBLIQUES*, [1925] 3 D. L. R. 1206; [1925] S. C. R. 683.—CAN.

264 iv. ———.—*CUMMINGS & ELLIS v. O'LYNN* (1924), 34 B. C. R. 275.—CAN.

264 v. ———.—*A sale by a son to his father, made when the son was in insolvent circumstances & with the common intent & effect of giving a preference:—Held: void.*—*HUNTER v. LAWRIE*, [1925] 1 D. L. R. 653; [1925] 1 W. W. R. 411; 35 Man. L. R. 126.—CAN.

264 vi. ———.—*ENTFIELD REALTY CO. v. PETERSON (Sask.)*, [1926] 2 D. L. R. 1005.—CAN.

377. *Add. Annotation*:—*Refd. Re Lloyd's Furniture Palace, Evans v. The Co.*, [1925] Ch. 853.

395. *Add. Annotation*:—*Consd. Jagger v. Jagger*, [1926] P. 93.

396. *Add. Annotation*:—*Consd. Jagger v. Jagger*, [1926] P. 93.

408a. ——— *With consent of trustees or Chancery court.*—*On Mar. 19, 1932, the settlor executed a voluntary deed of settlement by which he assigned all his interests under two wills to trustees upon certain trusts. By clause 5 he gave himself power at any time to raise the sum of £150, without the consent of the trustees. At the date of the settlement his debts did not exceed £100. On Feb. 22, 1935, he was adjudicated bkpt. Clause 7 of the deed gave the settlor power to revoke the whole of the trusts in the settlement with the consent either of the trustees or of a judge of the Chancery Division:—Held: the deed was not void under Law of Property Act, 1925 (c. 20), s. 172 (1), against the trustee in bkptcy.*—*Re BAKER*, [1936] Ch. 61; 105 L. J. Ch. 33; 154 L. T. 101; *sub nom. Re BAKER, Ex p. TRUSTEE v. BAKER & ARNOLD*, [1934-5] B. & C. R. 214.

264 vii. ———.—*CANADIAN OIL CO., LTD. v. JAMIESON (Sask.)*, [1926] 2 D. L. R. 1046.—CAN.

#### PART I. SECT. 4, SUB-SECT. 5.—C.

sd. *Under guarantee—Voluntary conveyance set aside.*—*ONTARIO WIND ENGINE & PUMP CO. v. BOBO (Alta.)*, [1926] 1 D. L. R. 57; [1926] 1 W. W. R. 45.—CAN.

#### PART I. SECT. 4, SUB-SECT. 6.—A.

ss. *Under sale by parol.*—*Held: the sale was void as against subsequent creditors.*—*WILLIAMS v. RAPELJE* (1880), 8 C. P. 186.—CAN.

#### PART I. SECT. 4, SUB-SECT. 7.

st. *Conveyance to wife—Onus of proof—Discharge of onus.*—*If land is transferred by a husband to his wife, who *bond fide* works the land on her own account, a person alleging that the whole transaction, including the working of the land, is colourable only must satisfy the ct. by showing facts & circumstances which go beyond raising a mere suspicion.*—*JOHNSTONE LUMBER CO. v. HAGER*, [1924] 1 D. L. R. 693; 1 W. W. R. 389; 20 Alta. L. R. 286.—CAN.

sg. *Grantee instrument of benefit to grantor.*—*A deed which contains a sweeping assignment of personal property without any valuation, & which makes the grantee the instrument of subsequent benefit to the grantor, will be set aside as fraudulent.*—*PRINCE EDWARD ISLAND MUTUAL FIRE INSC. CO. v. BEST* (1933), 7 M. P. R. 107.—CAN.

#### PART I. SECT. 4, SUB-SECT. 11.

418 i. a. ———.—*The assignment of a lease by the lessee to a trustee, for a *bond fide* creditor of the assignor, with the intention of thereby evading the creditors of the lessee, is not a fraudulent assignment.*—*DOE d. BIGGARD v. MILLARD* (1889), 1 Ont. Dig. 480.—CAN.

418 xii. ———.—*SHAVER v. GOLDHAR*, [1926] 2 D. L. R. 1216.—CAN.

418 xiv. ———.—*Re RICE*, [1928] 2 D. L. R. 96.—CAN.

a. i. ———.—*Security.*—*An insolvent debtor to a creditor with intent to give him a preference over other creditors is void; but the existence of the intent may be*

422a. —. —]—*Re LLOYD'S FURNITURE PALACE, LTD., EVANS v. THE CO., No. 428a, post.*

428. *Add. Annotation* :—*Consd. Re Simms, [1930] 2 Ch. 22.*

428a. — Issue of debentures to one creditor—*Issue postponed for benefit of company.*—Where a co. agrees to issue debentures to a creditor as security for past & future loans, but delays issuing them for a considerable time in order to retain its credit with its other creditors, the debentures are not voidable under 13 Eliz. c. 5, when the co. goes into liquidation.

If, as appears to be established by the

negated by showing that the debtor yielded to the importunity of the preferred creditor, & may also be negated by proof of the existence of some other motive which may not have had its origin in the creditor, e.g. when property is conveyed as the result of fear of a criminal prosecution or where the transaction has its origin in the recognition of a moral obligation to restore property improperly converted. —*GOLDMAN v. HARRISON, [1928] 3 D. L. R. 73; 62 O. L. R. 291.*—CAN.

s]. *Mortgage to obtain loan to pay creditor*—*Presumption that mortgage void.*—*MILLER v. OSIER, [1925] 4 D. L. R. 692.*—CAN.

sk. *What constitutes preference—Security given to creditor—Debtor insolvent.*—W., secretary-treasurer of pltf. municipality, misappropriated funds. At his request deft. sent him a cheque to pay off a mtgee., & in repayment sent deft. his own cheque, which was refused by the bank. He also received from deft. a cheque to purchase an interest in land, which he deposited to the credit of the municipality. He notified deft. & assigned him securities to cover the two cheques. Within sixty days of the assignments pltf. began action to set them aside as preferential. —*Held*: under Assignments Act, R. S. S. 1909, then in force, the assignments to deft. were void as against pltf. & should be set aside. —*MOUNT HOPE RURAL MUNICIPALITY v. FINDLAY (1922), 66 D. L. R. 660; 15 Sask. L. R. 40; [1921] 3 W. W. R. 658.*—CAN.

sl. *Who is a "creditor"—Agent making advance out of funds of principal—No pressure by principal for security.*—*MOUNT HOPE RURAL MUNICIPALITY v. FINDLAY (1922), 66 D. L. R. 660; 15 Sask. L. R. 40; [1921] 3 W. W. R. 658.*—CAN.

#### PART I. SECT. 5, SUB-SECT. 1.

o. Delete this case.

t i. — *On crops raised by vendee.*—If land is transferred by a husband to his wife, who *bond fide* works the land on her own account, even if the transfer is one that as against creditors can be set aside, the wife is entitled to the crops raised under her operations. —*JOHNSTONE LUMBER CO. v. HAGER, [1924] 1 D. L. R. 693; 1 W. W. R. 389; 20 Alta. L. R. 286.*—CAN.

t ii. —. —. —]—The fact that a sale of land is found to be fraudulent & voidable as against execution creditors of the vendor, does entitle them to seize on thereon by the vendee, although the rule is otherwise if the transaction is shown to be a mere sham. —*BANQUE CANADIENNE NATIONALE v. TENOCHA, [1927] 4 D. L. R. 685.*—CAN.

sg. *Purchase of Government annuity.*—Where the result of the purchase of a Dominion government annuity was to put beyond reach of an existing creditor of the annuitant all of his property, except a house, & it could be rendered exempt or partially so by his occupying it as a home:—*Held*: he had brought himself, although perhaps involun-

tarily, within the scope of sect. 11 (2) of Government Annuities Act, R. S. C., 1927, which provides that if an annuity is applied & paid for "with intent to delay, hinder or defraud creditors" they shall be entitled to the remedy therein provided. The creditor who was held herein to be so entitled was the annuitant's wife with whom before the purchase of the annuity he had entered into a separation agreement under which he was under a definite continuing liability subject to termination or to variation of the amount payable only upon the happening of the events, or one of them, mentioned therein. —*LANE v. LANE (No. 2), [1937] 2 W. W. R. 49; subsequent proceedings, LANE v. LANE (No. 3), [1937] 3 W. W. R. 612.*—CAN.

#### PART I. SECT. 5, SUB-SECT. 2.—A.

sn. *Not receiver of company—Alleged fraudulent preference made before receiver appointed.*—*FOX v. NIPISSING RY. CO., GOODERHAM v. NIPISSING RY. CO. (1881), 29 Gr. 11.*—CAN.

#### PART I. SECT. 5, SUB-SECT. 2.—C.

sl. — *Personal representative.*—Pltf., a daughter of R., deceased, purchased judgments which had been obtained against R. in his lifetime. She later became administratrix of his estate. She then, as administratrix & in her personal capacity, sued her brother, deft., attacking transfers made by R. to deft. as having been made to defraud creditors:—*Held*: pltf.'s position as administratrix did not entitle her to attack the fraudulent transfers. A debtor who fraudulently transfers his property cannot himself attack his fraudulent transaction, & his administrator has no greater right. —*RYAN v. CHARLESWORTH, [1930] S. C. R. 427; 3 D. L. R. 431.*—CAN.

sl. *Broker negotiating conveyance.*—A broker who negotiates the conveyance of land to a purchaser's wife cannot attack the conveyance as being in fraud of creditors, since he is a consenting party. —*ROSCOE v. BOZYK, [1933] 4 D. L. R. 585; 4 Man. L. R. 505.*—CAN.

#### PART I. SECT. 5, SUB-SECT. 2.—

D. (a).

m i. —. —. —. —]—In the absence of evidence to the contrary, it is presumed that a mtgee.'s security is sufficient to satisfy his claim; & unless it is shown that the mtge. security at the time of the loan was less; than the amount of the mtge. the mtge. debt is not within 13 Eliz. c. 5. —*CLARK v. SMITH, [1938] 3 W. W. R. 116; 41 Man. L. R. 438.*—CAN.

sp. *Secured creditor.*—If the security of a secured creditor is sufficient to satisfy his claim in full he cannot bring action under *Fraudulent Preferences Act, R. S. S., 1920 (c. 204).* —*BARRETT v. BARON, [1925] 1 D. L. R. 474; [1925] 1 W. W. R. 87; 19 Sask. L. R. 207; 5 C. B. R. 448.*—CAN.

sq. *S. P. McLEAN v. RATERIN (Sask.), [1926] 4 D. L. R. 174; [1926] 2 W. W. R. 671.*—CAN.

authorities, a present fraudulent intention to prefer one creditor over the others is not sufficient under the statute to avoid a conveyance to that creditor, unless the debtor is himself in some way benefited by the conveyance, I am unable to see how the conveyance is avoided merely because the debtor always had the intention to prefer the creditor at some time or another (*ROMER, J.*). —*Re LLOYD'S FURNITURE PALACE, LTD., EVANS v. THE CO., [1925] Ch. 853; 95 L. J. Ch. 140; 134 L. T. 241; [1926] B. & C. R. 29.*

446. *Add. Annotation* :—*Refd. Alexander v. Rayson, [1936] 1 K. B. 169.*

st. *Not creditor advising conveyance.*—*BLACKLEY v. KENNY (1889), 16 A. R. 522.*—CAN.

#### PART I. SECT. 5, SUB-SECT. 2.—D. (c).

m i. —. —. —]—Pltf. suing for a tort, such as slander or malicious prosecution, is not a creditor of deft. until he has recovered judgment in the action, & has no status to impeach a conveyance as fraudulent against him, even though it was made because of the threatened action. —*FISHER v. KOWSELOWSKI (1913), 25 W. L. R. 417; 5 W. W. R. 91; 13 D. L. R. 785; 23 Man. L. R. 769.*—CAN.

m ii. —. —. —]—A judgment creditor may in his own name maintain an action to set aside a conveyance as fraudulent & void, without having a lien by virtue of an execution in the hands of the sheriff. —*BROWN v. WEIL, [1927] 4 D. L. R. 218; 61 O. L. R. 55.*—CAN.

sw. *Judgment for alimony.*—Where a wife, having obtained a judgment for permanent alimony, brought an action to have a release executed by the husband set aside & the transaction declared preferential, fraudulent, & void, under *Fraudulent Conveyances Act, R. S. O., 1914 (c. 105)*:—*Held*: even if pltf. was not her husband's creditor she could nevertheless bring an action, for under sect. 3 "creditors & others" were protected. —*SHEPARD v. SHEPARD, [1925] 2 D. L. R. 897; 56 O. L. R. 555; affd., [1924] 3 D. L. R. 566.*—CAN.

#### PART I. SECT. 6, SUB-SECT. 1.

sx. *Whether proceeds may be followed.*—The fact that a conveyance is set aside as fraudulent against the transferor's creditors does not render available to them the proceeds of a policy of insurance which, after said transfer, was effected by the transferor in his own favour & paid for by him. —*CANADIAN CREDIT MEN'S TRUST ASSOCN., LTD. v. CHOW LUN, [1931] 1 W. W. R. 211; 1 D. L. R. 1000.*—CAN.

#### PART I. SECT. 6, SUB-SECT. 2.—B.

k (p. 219) i. —. —. —]—The rule that in an action by a judgment creditor to set aside a transfer by his debtor as fraudulent against creditors the debtor is not a necessary or proper party when he has no interest in the land transferred & no relief is asked against him does not apply where it is shown that he still has an interest in said land & a sale of the land is stayed for to satisfy the judgment. —*RUSSELL (DUKE OF BEDFORD) v. MURPHY & CARON (Sask.), [1929] 3 D. L. R. 787; 2 W. W. R. 324.*—CAN.

i (p. 219) i. —. —. —]—No benefit retained by grantor. —The grantor is not a proper party to an action to set aside a deed in fraud of creditors, unless he has retained some benefit for himself. —*RITCHIE v. RAYNER (1932), 7 M. P. R. 419.*—CAN.

d[(p. 220) i. —. —. —]—*Unless execution*

**525a.** ——— **Refusal of fair offer.**—After bill filed on behalf of creditors to set aside as fraudulent & void a voluntary settlement by A., their debtor, & a composition signed by the creditors in ignorance of such prior voluntary settlement, the debtor was adjudicated bankrupt, & an order was made by the Ct. of Bkpcy. setting aside the voluntary settlement. Pltfs., whose claim to prove under the bkpcy. had been admitted notwithstanding the opposition of the trustees of the settlement, wrote to them proposing to dismiss the bill without costs as against them, & that pltfs.' costs should come out of the estate. The trustees declined this proposal, but offered to consent to an order staying all proceedings in the suit without

costs, or dismissing the bill without costs:—*Held*: the trustees of the settlement, who, by their refusal of pltfs.' offer, had compelled them to bring the suit to a hearing, must pay all pltfs.' costs incurred since the date of that offer.—*TANQUERAY v. BOWLES* (1872), L. R. 14 Eq. 151.

**525b.** ——— **Negligent solicitor-trustee.**—A decree being made for setting aside a voluntary settlement, on the ground of the omission of a power of revocation:—*Held*: the solr. who prepared the deed, & who was one of the trustees named in it, must pay his own costs as a penalty for not having called the settlor's attention to the absence of the power.—*HENSHALL v. FEREDAY* (1873), 27 L. T. 743; 21 W. R. 240; *on appeal*, 29 L. T. 46, L.JJ.

## Part II.—Conveyances Impeachable by Subsequent Purchasers under Statute.

**594.** *Add. Annotation*:—As to (1) *Refd.* Bird v. I. R. Comrs. (1924), 12 Tax Cas. 785.

**604a.** **Settlement with uses in remainder.**—*Held*: fraudulent against a purchaser.—*ANON.* (1606), Lane, 22; 145 E. R. 267.

**619a.** ———.—*HEISLER v. CLARKE* (1709), 2 Eq. Cas. Abr. 46; 22 E. R. 41, L. C.

**751.** *Add. Annotation*:—*Refd.* Westminster Bank, Ltd. v. Wilson, [1938] 3 All E. R. 652.

## Part III.—Conveyances Impeachable from Position of Parties.

**807a.** ———.—A conveyance by a weak man for a small consideration set aside.—*CLARKSON v. HANWAY* (1723), 2 P. Wms. 203; 24 E. R. 700, L. C.

*Annotations*:—*Consd.* Cray v. Mansfield (1750), 1 Ves. Sen. 379. *Refd.* Hawes v. Wyatt (1790), 2 Cox, Eq. Cas. 263; Blachford v. Christian (1829), 1 Knapp, 73.

**811.** *Add. Annotation*:—*Consd.* Lancashire Loans, Ltd. v. Black, [1934] 1 K. B. 380.

**831a.** **Deed not fully explained to donor.**—*PHILLIPSON v. KERRY* (1863), 32 Beav. 628; 9 L. T. 40; 11 W. R. 1034; 55 E. R. 247. *Annotation*:—*Apld.* Ellis v. Ellis (1909), 26 T. L. R. 166.

*creditor.*—An execution creditor, who sues to set aside a transfer by his debtor on the ground that it is fraudulent against creditors, is not obliged to sue on behalf of all other creditors of debtor as well as himself. Origin of the distinction in this respect between execution creditors & simple contract creditors reviewed.—*ST. GREGOR MERCANTILE CO. v. HALBACH & BANK OF MONTREAL*, [1927] 1 D. L. R. 761; [1927] 1 W. W. R. 247; 21 Sask. L. R. 315.—*CAN.*

2 W. W. R. 494; 31 Sask. L. R. 593.—*CAN.*

§ (p. 223) II. ———.—*BROWN v. WEIL*, [1927] 4 D. L. R. 218; 61 O. L. R. 55.—*CAN.*

§ (p. 223) III. ———.—*KUSHNER v. YASINKA* (Sask.), [1927] 4 D. L. R. 697; [1927] 3 W. W. R. 328.—*CAN.*

o (p. 223) I. ———.—*Of bona fides.*—*MCNEILL v. CAIRNS* (1931), 3 M. P. R. 195.—*CAN.*

### PART I. SECT. 6, SUB-SECT. 2.—D.

h i. ———.—*Semble*: in an action to set aside as fraudulent Preferences Act, R. S. S., 1920 (c. 204), the *onus* is always on pltf. of proving debtor's insolvency.—*MCLEAN v. RATEKIN* (Sask.), [1927] 4 D. L. R. 739; [1927] 3 W. W. R. 444; *affd.*, [1928] 4 D. L. R. 18; [1928] 2 W. W. R. 421; 22 S. L. R. 633; 10 C. B. R. 156.—*CAN.*

o (p. 223) I. ———.—In an action to set aside as fraudulent against creditors a transfer between sisters:—*Held*: the corroborative evidence necessary to meet the *prima facie* cases which pltf. established by showing a transfer between near relatives in circumstances of suspicion, had been supplied.—*LUNDQUIST v. PULS*, [1925] 3 D. L. R. 84; [1925] 1 W. W. R. 834.—*CAN.*

o (p. 223) II. ———.—*KUSHNER v. YASINKA* (Sask.), [1927] 4 D. L. R. 697; [1927] 3 W. W. R. 328.—*CAN.*

§ (p. 223) I. ———.—*KNOX v. SHAW*, [1927] 3 D. L. R. 1185; [1927]

### PART II. SECT. 3, SUB-SECT. 2.—B. (a).

572 i. *Necessity for valuable consideration.*—*DOE PROUDFOOT v. MCCRAE* (1842), 6 O. S. 502.—*CAN.*

### PART III. SECT. 1.

k i. ———.—B., a person of full age & understanding, who at the time was suffering under emotional distress & loss of interest in life, executed a voluntary transfer of her property in favour of A. with whom she was then living. In a suit by B. to set aside the transfer:—*Held*: the facts did not show want of capacity, nor did the circumstances constitute a fiduciary relationship, & in the absence of fraud or overreaching the ct. could not entertain the suit.—*BOYD v. ALEXANDER* (1931), 31 S. R. N. S. 645; 48 N. S. W. W. N. 202.—*AUS.*

ii. ———.—*Grantor without business experience.*—*Held*: the instruments were void in equity.—*EDINBURGH LIFE ASSURANCE CO. v. ALLEN* (1871), 18 Gr. 425.—*CAN.*

p i. ———.—The social relationship between donor & donee, the former a man of 83 years whose mental powers were greatly weakened, added to the facts that he had made the donee his financial agent with respect to a certain transaction, & reposed much confidence in him, was held to raise the presumption of undue influence.—*Re MCPHERSON, TRUSTS & GUARANTEE CO., LTD. v. BRADFORD*, [1930] 3 W. W. R. 368; 4 D. L. R. 915; *affd.*, [1930] 3 D. L. R. 378.—*CAN.*

p ii. ———.—Pltf., an aged, ignorant, & worn man, transferred his land to his son, deft., the only consideration to pltf. being a lease for 30 years, in consideration of one dollar, of a small house & garden, part of the land conveyed, and an agreement to supply pltf. periodically with certain provisions:—*Held*: the transaction should be set aside on the ground that it was an improvident transaction made practically without consideration & without advice, in favour of a person who had a duty at least to see that the transaction went no further than was actually necessary.—*HRNYK v. HRNYK*, [1932] 1 W. W. R. 82; 1 D. L. R. 672; 40 Man. L. R. 173.—*CAN.*

p iii. ———.—*Grant in consideration of maintenance for life.*—A woman, 69 years old, transferred land to defts. in consideration of her maintenance for life, which transfer the Supreme Ct. of Tasmania on her death set aside as procured by undue influence:—*Held*: the transaction was properly set aside.

**834a.** —.]—Where the relations between a donor & donee raise a presumption that the donee had influence over the donor, the ct. will set aside the gift unless the donee establishes that it was the spontaneous act of the donor acting in circumstances which enabled him to exercise an independent will, & which justified the ct. in holding that it was the result of a free exercise of the donor's will. If the evidence establishes the fact above stated it should not be disregarded merely because the donor did not receive independent legal advice. On the other hand, the receipt of independent legal advice may rebut the presumption although it is not acted upon. But to have that effect it must be given with a knowledge of all the relevant circumstances, & be such as a competent & honest adviser would give if acting solely in the interest of the donor.

A Malay woman, who was a great age & wholly illiterate, executed a deed of gift of landed property in Singapore in favour of her nephew, who had the management of all her affairs. Before executing the deed the donor had independent advice from a lawyer who acted in good faith. He was unaware, however, that the gift constituted practically the whole of the donor's property, & did not bring home to her mind that she could more prudently, & equally effectively, benefit the donee by bestowing the property upon him by will:—*Held*: the gift should be set aside, as the presumption which arose was not rebutted.—*INCHE NORIAH v. SHAIK ALLIE BIN OMAR*, [1929] A. C. 127; 98 L. J. P. C. 1; 140 L. T. 121; 45 T. L. R. 1, P. C.

*Annotations*:—*Consd. Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380. *Apld. Williams v. Johnson*, [1937] 4 All E. R. 34.

**835. Add. Annotation**:—*Consd. Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380.

**844. Add. Annotation**:—*Consd. Inche Noriah v. Shaik Allie Bin Omar*, [1929] A. C. 127.

—*WATKINS v. COOMBS* (1922), 30 C. L. R. 180.—*AUS.*

**p. iv.** — *Deaf & illiterate*.]—Conveyances set aside on grounds of improvidence, & want of proper professional advice.—*SHANAGAN v. SHANAGAN* (1884), 7 O. R. 209.—*CAN.*

**r. i.** — *Deaf & illiterate—Onus of proof*.]—Action to set aside a conveyance obtained from an old woman who was deaf & unable to write, & who had no relatives or friends, by the reeve of the township in which she lived, & who was well known as a justice of the peace, & an active, shrewd business man, engaged in many enterprises:—*Held*: the onus was not on deft., & pltt. must prove her case.—*MC EWAN v. MILNE* (1884), 5 O. R. 100.—*CAN.*

**t. i.** — *Onus of proof*.]—The fact that deft., who had set up the defence of fraud to an action on a guarantee, proved that he could not read or write the English language, that in which the guarantee was written, was held not to be sufficient of itself in the present case to raise such a *prima facie* presumption of fraud as to justify the trial judge in placing on pltt. the burden of proving affirmatively that that portion of the document, which deft. attacked, was in fact read over to him & that he understood the same.—*LASBY v. JOHNSON*, [1928] 4 D. L. R. 956; [1928] 3 W. W. R. 447.—*CAN.*

**844a.** —.]—*GREENLAW v. KING* (1841), 10 L. J. Ch. 129; 5 Jur. 18, L. C.

*Annotations*:—*Refd. Llewellyn v. Baceley* (1842), 1 Hare, 527; *Walsingham v. Goodricke* (1843), 3 Hare, 122; *Beaden v. King* (1852), 9 Hare, 499; *Boyd v. Barker* (1859), 28 L. J. Ch. 445; *Guest v. Smythe* (1870), 5 Ch. App. 553, n.; *Fenner v. L. & S. E. Ry.* (1872), L. R. 7 Q. B. 767.

**845. Add. Annotations**:—*Consd. Inche Noriah v. Shaik Allie Bin Omar*, [1929] A. C. 127; *Refd. Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380.

**889a.** — *Independent adviser unaware of extent of property*.]—*Applt.*, a medical practitioner & an intimate friend of resp., an elderly widow, attended her professionally during two illnesses in the years 1928 & 1930. He made no charge for his professional services or for the medicines supplied, & had stated that he did not regard her as a paying patient. After her recovery from the second illness, resp. in 1931 executed a deed by which she purported to convey to *applt.* certain freehold land, together with the building thereon, for the sum of £1,500, but it was not in dispute that no consideration money was paid. Subsequently resp. instituted proceedings to have the conveyance set aside & a reconveyance of the property made to her, alleging that the deed was executed by her under the influence of *applt.*, her medical attendant, & without independent advice. The deed was explained to the patient by her solr., but he was unaware of the proportion the property conveyed bore to her whole estate. Both parties were alive at the date of the trial, & gave evidence:—*Held*: (1) the relationship of doctor & patient existed between the parties; (2) a person giving independent advice must be aware of the total amount of the donor's property & the proportion the part given bears to the whole; (3) the onus, which lay upon *applt.*, to prove that the gift was the result of the free exercise of resp.'s independent will having been discharged to the trial judge's satisfaction, the ct. in the

**PART III. SECT. 2, SUB-SECT. 1.**

**832 ii.** —.]—*KRYE v. KRYE*, [1929] 1 D. L. R. 289; 5 C. R. 153.—*CAN.*

**832 iii.** —.]—Where suspicious circumstances coupled with relationship are proved there is a *prima facie* case for setting aside a conveyance.—*SYRJA v. SYRJA* (1931), 45 B. C. R. 321.—*CAN.*

**s. (p. 259) i.** —.]—*PLAETZER v. RAYMOND* (Ont.), [1927] 2 D. L. R. 389; 8 C. B. R. 181.—*CAN.*

**s. (p. 259) ii** —.]—*BARRY v. MCGUIRE* (1932), 4 M. P. R. 573.—*CAN.*

**sp. Evidence in rebuttal**.]—Although where the relationship between a donor & donee raises a presumption of undue influence the donee must, in order to rebut the presumption, show that the gift was the result of the free exercise by the donor of an independent will, proof of independent legal advice is not the only way in which the presumption can be rebutted. It may be rebutted by other circumstances.—*BRETT v. BRETT* (No. 2), [1937] 2 W. W. R. 693; *affd.*, [1938] 2 W. W. R. 368.—*CAN.*

**PART III. SECT. 2, SUB-SECT. 2.—A.**

**sw. Fiduciary relationship—Where no independent advice**.]—*GOULET v. TARDIF* (Man.), [1929] 4 D. L. R. 128.—*CAN.*

**PART III. SECT. 2, SUB-SECT. 2.—B.**

**sx. Onus of proof—On party alleging fairness of transaction—Sale by parent to son**.]—In an action by a father against his son to set aside a transfer on the ground of fraud, where admittedly no pecuniary consideration passed at the time, the father could not speak English, the solr. who drew the transfer spoke only English, & the document was in English, & the father was entirely dependent on the son for information as to what was said & done, the burden of proof was held to be upon the son that his father knew well the nature & effect of the instrument.—*IWANCHUK v. IWANCHUK* (Alta.), [1919] 3 W. W. R. 363; 48 D. L. R. 381.—*CAN.*

**PART III. SECT. 2, SUB-SECT. 2.—C.**

**sz. Aunt & niece**.]—A presumption of undue influence was held to arise as between a lady of eighty-seven, nearly blind, & her niece & niece's husband.—*DONNELLY v. JESSEAU, DONNELLY v. MORRISSEY* (1936), 11 M. P. R. 1.—*CAN.*

**PART III. SECT. 2, SUB-SECT. 2.—F.**

**sy. When presumed—Husband in impaired physical & mental condition—Wife with business ability**.]—*MCCAFFREY v. MCCAFFREY* (1891), 18 A. L. R. 599.—*CAN.*



circumstances of this case could reverse such finding only if there was no evidence at all to support it.—*WILLIAMS v. JOHNSON*, [1937] 4 All E. R. 34; 81 Sol. Jo. 784; *sub nom.* *WILLIAMS v. WILLIAMS*, [1937] W. N. 321, P. C.

895a. —.]—If a legatee agrees to sell to the exor. of the will his legacy for an annuity, the burden will lie on the exor. to show that there was no unfairness in the transaction.—*Re BIEL'S ESTATE, GRAY v. WARNER* (1873), L. R. 16 Eq. 577; 42 L. J. Ch. 556; 28 L. T. 835; 21 W. R. 808.

Annotation :—*Refd.* *Harloe v. Harloe* (1875), 44 L. J. Ch. 512.

909a. —.]—*DEANE v. RASTRON* (1792), 1 Anst. 64; 145 E. R. 801.

940. *Add. Annotation* :—*Refd.* Permanent Trustee Co. of New South Wales, Ltd. v. Bridgewater, [1936] 3 All E. R. 501.

961. *Add. Annotation* :—*Refd.* Permanent Trustee Co. of New South Wales, Ltd. v. Bridgewater, [1936] 3 All E. R. 501.

962a. —.]—Resp. was entitled to certain contingent & reversionary interests under his grandfather's & father's wills, the exact nature & extent of which interests were the subject of some doubt, & several counsel had advised upon them & their opinions differed. One M., a moneylender whose exors. were appts., had advanced various sums to the resp. between the end of 1927 & Sept., 1928, amounting in all to £2,203 17s. 7d. In Sept., 1928, M. refused to make any further

advance, but offered to purchase the whole interest under the grandfather's will & the interest under the father's will to the extent of £1,450 to £125. Resp. saw an independent solr. with whom, however, he only had one short interview, & who seemed to have acquiesced in the transaction as soon as resp. said he was determined to sell. M., at the time of the earlier advances, had insisted on policies for £2,500 on the life of resp. to be taken out & assigned to him, & they were assigned to him absolutely. It seemed probable that resp. paid the first premium & in the surrender of one of them resp. & M. acted jointly & both signed all documents :—*Held* : (1) the sale had been made at a substantial undervalue, & resp. had had no proper separate advice; (2) the position of the parties was such that it was incumbent on the exors. of M. to prove affirmatively that the transaction was just & equitable, & this they had failed to do; (3) the judge of first instance having decided that the policies had become the absolute property of M. there was nothing in the facts which rendered this view wrong in law.—*PERMANENT TRUSTEE CO. OF NEW SOUTH WALES, LTD. v. BRIDGEWATER, BRIDGEWATER v. PERMANENT TRUSTEE CO. OF NEW SOUTH WALES, LTD.*, [1936] 3 All E. R. 501; 80 Sol. Jo. 973, P. C.

964a. Purchase by devisee—Representation that defective will duly executed.]—*BRODERICK v. BRODERICK* (1713), 1 P. Wms. 239; 24 E. R. 369, L. C.

Annotation :—*Refd.* *Baugh v. Price* (1752), 1 Wils. 320.

### PART III. SECT. 2, SUB-SECT. 2.—M.

sz. *Fiancée & fiancé's father*.]—Where shortly after the death of assured the beneficiary, his fiancée, assigned to his father, without consideration, all her interest in the policy & the benefits thereof :—*Held* : in the circumstances she should be declared entitled to the insurance money.—*REDMOND v. BOVEY (Man.)*, [1927] 1 D. L. R. 1057; [1927] 1 W. W. R. 386; *affd.*, [1928] 4 D. L. R. 806; [1928] 3 W. W. R. 345; 37 Man. L. R. 458.—CAN.

### PART III. SECT. 3, SUB-SECT. 1.

ri. —.]—Pltf. purchased land from deft. Subsequently pltf.'s husband having been convicted of a crime & sentenced to imprisonment, deft. induced pltf. to retransfer the land to him :—*Held* : pltf. having been imposed on, & having conveyed the land for less than the real value thereof & without independent advice, the transfer should be set aside.—*COLF v. HUNTER* (1911), 1 W. W. R. 314.—CAN.

928 III. —.]—*McEACHERN v. SOMERVILLE, McEACHERN v. WHITE* (1876), 37 U. C. R. 609.—CAN.

### PART III. SECT. 3, SUB-SECT. 2.—A.

935 i. *Principles of relief—Presumption of incapacity*.]—Expectant heirs & reversioners need to be protected against the consequences of their own improvidence in dealing with designing men.—*MOREY v. TOTTEN* (1857), 6 Gr. 176.—CAN.

### PART III. SECT. 4, SUB-SECT. 3.

ci. —.]—Pltf., a person of little or no business ability, who was possessed of a life interest in a capital sum of considerable amount, had been adjudicated bkpt., & under threat of his creditors to realise the life interest, had approached deft., a money-lender, for assistance. Notwithstanding the business ignorance of pltf. & the financial straits in which he was placed, of which deft., by reason of previous transactions with him, must have been well aware, & without pltf. being independently advised, a sale of the life interest to deft. was arranged at a figure considerably under its real value. In an action brought some eleven years later to have the transaction set aside :—*Held* : although inadequacy of consideration for a

transaction is not of itself sufficient to give rise to a presumption of undue influence, the surrounding circumstances in the present case were sufficient to show that pltf. was in the hands of deft. & the subsequent delay in bringing action, & the conduct by pltf., in effecting further insurance in pursuance of the transaction having taken place, while pltf. yet remained in ignorance of its impeachable nature, did not amount to a confirmation, & same should be set aside.—*HARRIS v. RICHARDSON*, [1929] N. Z. L. R. 668.—N.Z.

### PART V. SECT. 6.

1077 i. *Onus of proof that purchaser with notice*.]—In India the onus lies on a third party, who takes the benefit of a transaction with notice or knowledge of circumstances raising a presumption or probability of undue influence by the other party to the contract on the party complaining of undue influence, of proving that he, the third party, derived no unfair advantage or that the party complaining of undue influence acted as a free agent.—*RAMA PATTAR v. LINGAPPA GOUNDER* (1934), 1 L. R. 58 Mad. 454.—IND.



## FRIENDLY SOCIETIES.

### Part III.—Unregistered Societies.

17. *Add. Annotation* :—As to (3) *Reid. Greenberg v. Cooperstein*, [1926] Ch. 657.

### Part IV.—Collecting Societies.

35. *Add. Annotation* :—*Apld. Bell v. Harker* (1927), 91 J. P. 189.

35a. —.]—Where a person allows a policy with a collecting society or industrial assurance company to lapse & takes out instead of it a similar policy in another society, a transfer takes place within the contemplation of Industrial Assurance Act, 1923 (c. 8), s. 26 (1), notwithstanding that before the date of the

policy with the second society the person already held other policies with that society, or that after that date he continues to hold other policies in the first society, or that before the lapse of the earlier policy the two policies for a time co-exist.—*BELL v. HARKER*, [1928] 1 K. B. 368; 97 L. J. K. B. 155; 138 L. T. 226; 91 J. P. 189; 44 T. L. R. 33; 25 L. G. R. 505; 28 Cox, C. C. 451, D. C.

### Part VIII.—Privileges of Registered Societies.

51a. “Demand in writing”—What amounts to.]—Friendly Societies Act (c. 63) requires the assignees, etc., of the officers of such societies “upon demand in writing” to pay the debts due from such officers in priority of his other

creditors:—*Held*: a bill filed to recover the amount is a sufficient “demand in writing.”—*ABSOLOM v. GETTING* (1863), 32 Beav. 322; 32 L. J. Ch. 786; 8 L. T. 132; 9 Jur. N. S. 1263; 11 W. R. 332; 55 E. R. 126.

### Part XI.—Rules.

73a. What majority required—Levy on prosperous branches—In aid of non-prosperous.]—The ct. held that the Ancient Order of Foresters were entitled to alter the general laws of the Order without a nine-tenths’ majority so as to compel branches or cts. of the society

which were in a good financial position to contribute 7½ per cent. of any surplus on valuation for the support of branches which were not prospering.—*BUNDEY v. SEABROOK* (1932), 48 T. L. R. 361; 76 Sol. Jo. 289.

### Part XII.—Officers.

109a. Agent—Termination of employment—Under amended rules.]—Pltf. was appointed an agent of debts., a friendly society, whose rules, though subject to alteration, provided at that time for the retention of agents in office so long as their conduct was satisfactory. After pltf. reached the age of sixty-five debts. altered their rules, by providing that agents

should be compulsorily retired at the age of sixty-five, & debts. terminated pltf.’s employment:—*Held*: as the rules, on the face of them, were alterable, pltf. was not entitled to a declaration that debts. were not entitled to terminate his employment.—*PAGE v. LIVERPOOL VICTORIA FRIENDLY SOCIETY* (1927), 43 T. L. R. 712, C. A.

### Part XIII.—Membership.

123. *Add. Annotation* :—*Apld. R. v. Lancashire JJ.*, *Ex p. Tyrer*, [1925] 1 K. B. 200.

145a. *Illegal policy*—Liability of company—“False

representation” by proposer.]—*PEARL ASSURANCE CO., LTD. v. BROMLEY*, No. 174a, *post*.

#### PART I.

s. *Charitable Associations Act*, R. S. M., 1913.]—*SASS v. ST. NICHOLAS MUTUAL BENEFIT ASSOCIATION OF WINNIPEG*, [1937] S. C. R. 413; 2 D. L. R. 761.—CAN.

#### PART XI. SECT. 5.

s. 1. — *Rules affecting rights given by Ontario Insurance Act*, 1927, s. 153.] —The rules of a mutual benefit society cannot affect the right to surrender, assign or dis. of the contract

between society & beneficiary given by the Ontario Insurance Act, R.S.O., 1927, s. 153.—*Re MCKINNON*, [1935] 1 D. L. R. 428; O. R. 33.—CAN.

PART XIII. SECT. 3, SUB-SECT. 1.  
s. 1. *Changes in constitution*—Right to

155a. — What must be disclosed to directors.]—  
On the construction of Geo. 3, c. lxxiii., by which the Customs' Annuity & Benevolent Fund was established, & of the rules made under the authority of that Act:—*Held*: (1) in appointing a "nominee" of a subscriber's interest in the fund the directors ought to be informed for what purpose the nominee is appointed & to whom money is to be paid. This may be done by the instrument appointing the nominee or by some other instrument signed by the subscriber, or by his will; (2) *Seem*: a "nominee" may be a person who is intended to take as a trustee for others.—*URQUHART v. BUTTERFIELD* (1887), 37 Ch. D. 357; 57 L. J. Ch. 521; 57 L. T. 780; 36 W. R. 376; 4 T. L. R. 161, C. A.

155b. Who may be nominee—Trustee.]—  
*URQUHART v. BUTTERFIELD*, No. 155a, *ante*.

174a. Industrial Assurance Act, 1923 (c. 8), s. 3 — "Grandparent" — Step-grandparent.]—(1) By Industrial Assurance Act, 1923 (c. 8), s. 3, "Amongst the purposes for which . . . industrial assurance cos. may issue policies of assurance there shall be included insuring money to be paid for the funeral expenses of a parent, child, grandparent, grandchild, brother, or sister. . . .":—*Held*: "grandparent" does not include a step-grandparent. (2) By sect. 5 of the same Act "Any . . . industrial assurance co. which issues policies of industrial assurance which are illegal . . . shall, without prejudice to any other penalty, be liable to pay to the owner of the policy a sum equal to the surrender value of the policy . . . or, if the policy was issued after the commencement of this Act, a sum equal to the amount of the premiums paid, unless it is proved that owing to any false representation on the part of the proposer, the . . . co. did not know that the policy was illegal . . .":—*Held*: the "false representation" here referred to includes any untrue statement, whether made innocently or fraudulently.—*PEARL ASSURANCE CO.*,

*LTD. v. BROMLEY* (1933), 49 T. L. R. 446; 77 Sol. Jo. 404.

175a. Insurance of child for more than statutory amount.]—*Resp.*, an industrial assurance co., issued three policies of insurance in respect of the life of a child, for sums which aggregated more than the statutory maximum, though each was for a sum less than that maximum. Each policy contained a provision that no payment would be made which either alone or in conjunction with other such payments exceeded the statutory maximum. On a charge of having committed an offence within Industrial Assurance Act, 1923 (c. 8), s. 39 (2):—*Held*: (1) the words in sect. 4 (1) "relating to payments on the death of children" were merely descriptive of the group of sects. in the 1896 Act headed "Payments on death of children," & did not limit those sects. in their application to industrial assurance cos. to payment only, but included the provisions as to insurance; (2) the above provision in each policy had no legal effect at all, & it could not be contended that in fact the co. did not insure for more than the statutory amount; (3) the proceedings were in time because, for this purpose, the insurance co. did not insure from the time only when the policies were taken out, but (*LORD HEWART, C.J.*) either insured on every occasion when a premium was paid, or (*AVORY, J.*) continued to insure during the time that the assured was not in default & the policies were in force.—*HARKER v. BRITANNIC ASSURANCE CO., LTD.*, [1928] 1 K. B. 766; 97 L. J. K. B. 359; 138 L. T. 395; 91 J. P. 51; 44 T. L. R. 243; 72 Sol. Jo. 121; 26 L. G. R. 136; 28 Cox, C. C. 475, D. C.

*Annotations*:—As to (2) *Distd. Hirst v. Liverpool Victoria Friendly Society*, *Clark v. London & Manchester Assoc. Co.*, [1930] 2 K. B. 209; *Re Smith & Britannic Assurance Co., Ltd.'s Arbn.*, [1933] 1 K. B. 109.

175b. — Proviso in policy limiting sum assured.]—*In* 1920 H. took out a policy of industrial insurance on the life of his daughter, then

*attack — Laches.*] — Members cannot attack changes in the constitution after standing by for six years.—*SOKIL v. ZAWIDOWSKI*, [1938] 2 D. L. R. 602.—*CAN.*

#### PART XIII. SECT. 3, SUB-SECT. 2.—A.

sa. Conditions precedent—Delivery of policy & payment of premium.]—*In* an action wherein plffs. sought to recover benefits from a fraternal society as the beneficiaries of a deceased who was alleged to have become a member thereof:—*Held*: applying sects. 81 (3) & 86 (1) of Insurance Act, 1925, deceased's application for membership & the acceptance thereof did not effect a contract binding on the society because no policy, or certificate of membership, was delivered & payment of the first premium or at least all of it had not been made, which, under said sects., were conditions precedent to a binding contract.—*FEDERSON v. EMPIRE HOME BENEFIT ASSOCN.*, [1931] 2 W. W. R. 858.—*CAN.*

#### PART XIII. SECT. 4, SUB-SECT. 1.

142 i. Necessity for insurable interest.]—A woman, C., on the suggestion of the agent of a friendly society, agreed to take out a policy of industrial assurance on the life of her step-mother, T., & she left it to the agent to take the necessary steps to effect

the insurance. She signed no proposal for a policy in favour of T., nor was such a proposal signed by T., who was unaware of the transaction, & there was no evidence to show by whom the proposal, which bore to be signed by T., was in fact signed; but a policy in favour of T. was issued by the society & handed to C., who retained it, & paid premiums on it. C. had no insurable interest in the life of T., & she had no intention of benefiting T.. C. having claimed repayment from the society of the premiums paid by her:—*Held*: C. was entitled to repayment, as, owing to the absence of *consensus ad idem*, no concluded contract was disclosed either between C. & the society, or between T. & the society.

*Opinions*, that, on the assumption that a policy on the life of T. for the benefit of C. had been entered into, it was an illegal policy within Life Assurance Act, 1774 (c. 48), & C. was, on that ground also, entitled to repayment of the premiums under Life Assurance Act, 1774 (c. 48), s. 5.—*CAME v. CITY OF GLASGOW FRIENDLY SOCIETY*, [1933] S. C. 69.—*SCOT.*

1 i. —.]—Deft. club, which was incorporated under Charitable Assocs. Act, R.S.M., 1913, held to be a corp'n. carrying on the business of insurance, & a "friendly society" within

Manitoba Insurance Act, 1932. Sect. 118 (5) of Manitoba Insurance Act, as to the effect of the understating of the age of the insured in the application or contract, held to apply to the contract of insurance in question herein.—*BROADBENT v. 1600 CLUB OF SOUTHERN MANITOBA*, [1935] 1 W. W. R. 353; 2 D. L. R. 802; *on appeal*, [1935] 2 W. W. R. 539; 4 D. L. R. 227; 43 Man. L. R. 221.—*CAN.*

#### PART XIII. SECT. 4, SUB-SECT. 2.—C.

sa. Benevolent association incorporated under Charitable Associations Act, R. S. M., 1913 (c. 27)—Validity of bye-law as to nomination.]—*THEOBALD v. WINNIPEG MUSICIANS ASSOCN.*, [1927] 1 D. L. R. 57; 36 Man. L. R. 163; [1926] 3 W. W. R. 337.—*CAN.*

#### PART XIII. SECT. 4, SUB-SECT. 3.—A.

1. —.]—*Re* IVAN FRANKO UKRAINIAN BENEVOLENT ASSOCN. OF BROOKLANDS & MAKSYMIV & PERCHALUK, [1938] 2 W. W. R. 310.—*CAN.*

#### PART XIII. SECT. 4, SUB-SECT. 3.—B.

11. — Sum payable by rules to "widow or heirs or representatives"—"Or" not read as "and."—*APLEYBY v. SEARLE* (1930), 2 M. P. R. 319.—*CAN.*

aged three months, at a premium of twopence per week, & in 1925 he effected a similar policy on the life of his son, then aged one month, in each case assuring the amounts respectively set out in a Table contained in the policy. The Table in the policy of 1920 was made out on the basis of a premium of one penny per week & insured sums payable on the death of the life assured varying in amount according to age & the time the policy had been in force; it also contained the following statement: "Twopence per week will assure double the above sums provided that in any case where the amount secured by the larger premium would exceed the limits of assurance prescribed by Friendly Societies Act, 1896 (c. 25), viz., £6 for children under five years of age, & £10 for children under ten years of age, the sum assured shall be limited to £6 or £10 as the case may require." In the policy of 1925 was a statement that the amount payable under it was subject to the limitations of Friendly Societies Act, 1924 (c. 11):—*Held*: in view of the statements in the two policies limiting the amount insured in each case to the statutory maximum, neither policy contravened the provisions of the Friendly Societies Acts, 1896 & 1924, & was valid.

In 1925 C. signed a proposal for a whole life assurance on the life of her son, then aged one year next birthday, at a weekly premium of one penny for a sum to be assured increasing as per scale up to £15. On the same day she signed a proposal for an endowment assurance on the same life at a weekly premium of threepence for a "sum to be assured £7 14s. payable on attainment of age fifteen or in the event of previous death as per scale." Two policies were issued on the basis of these proposals. On the whole-life policy there was this memorandum: "This life is also assured under [the endowment] policy. Accordingly, the full sum assured printed in the schedule will not come into operation until the attainment of the age of ten. The combined amount payable in the event of earlier death shall not exceed £6 on death under age three, £10 under age six, & £15 under age ten":—*Held*: as the above quoted memorandum cut down the sums payable under the combined policies to the statutory limit, the policies did not contravene the Friendly Societies Act, 1924 (c. 11), & were valid.—*Re HIRST & LIVERPOOL VICTORIA FRIENDLY SOCIETY, Re CLARK & LONDON & MANCHESTER ASSURANCE CO.*, [1930] 2 K. B. 209; 99 L. J. K. B. 138; 142 L. T. 291; 94 J. P. 81; 73 Sol. Jo. 832; 28 L. G. R. 53, C. A.

*Annotation*.—*Appl. Smith v. Britannic Assurance Co.* (1932), 174 L. T. Jo. 44.

175c. ——.]—*Appl.* insured her child, who was born on May 2, 1927, a month after its birth, the premium to be 2d. a week. Friendly Societies Act, 1924 (c. 11), s. 2 (1), stated that Friendly Societies Act, 1896 (c. 25), s. 62,

should have effect "as if for that section the following section were substituted," & provided that a society should not insure or pay on the death of a child under three years of age any sum of money which exceeded or which, when added to any amount payable on the death of that child by any other society or branch or by any trade union, exceeded £6. By Industrial Assurance Act, 1923 (c. 8), s. 21, it was required that any such policy of insurance should set out in distinctive type a statement of the effect of sect. 62. *Appl.* claimed from resp. co. the return of her premiums on the grounds that (a) under sect. 62 as amended by sect. 2 (1) of the Act of 1924 the sum insured exceeded the amount allowed, & (b) under sect. 21 of the Act of 1923 the policy did not set out a statement of the effect of sect. 62 as amended. Sect. 62 of the Act of 1896 was left unamended & unrepealed by the Act of 1924, but under the latter Act was to be read as provided by the Act of 1924. The policy was issued for a penny premium, & that was altered to twopence premium, & it was then stated that the amount payable on death was ascertainable from Sched. B., but that, the premium in this case being twopence, the amounts stated in Sched. B were increased in proportion. That would bring the amounts over what was allowed by sect. 62 as amended, but to the above statement was added "subject to the conditions of the Friendly Societies Act." In a second proviso on the face of the policy it was stated that the policy was issued "subject to the provisions of sect. 62 of Friendly Societies Act, 1896 (c. 25), as amended by the Industrial Assurance Act, 1923 (c. 8)—the provisions of which would, it was argued, make it illegal." Then followed the effect of sect. 62 without the express language introduced by the Act of 1924:—*Held*: the child had not been insured for sums in excess of the amounts permitted by sect. 62 of the Act of 1896 as amended by sect. 2 (1) of the Act of 1924, having regard to the effect of the statements in the policy, & particularly the proviso, & to the fact that sect. 62 of the Act of 1896 still existed, not having been repealed, though the amendment of it in the Act of 1923 had been repealed, & though sect. 62 had now to be read as if it had the effect set out in sect. 2 (1) of the Act of 1924. The co. had not committed an offence against sect. 21 of the Act of 1923, as it used the very language in its policy which had been used by the Legislature from 1896 to 1924, & did introduce the effect of sect. 62, & it was immaterial that the Act of 1924 was not specifically mentioned.—*Re SMITH & BRITANNIC ASSURANCE CO.'S ARBITRATION*, [1933] 1 K. B. 109; 102 L. J. K. B. 51; *sub nom. SMITH v. BRITANNIC ASSURANCE CO., LTD.*, 147 L. T. 367, C. A.

175d. Who is "child" within Industrial Assurance Act, 1923 (c. 8), s. 3—*Illegitimate child*.]—Above sect. provides that: "Amongst the

#### PART XIII. SECT. 5.

*sd. For funds improperly divided—Unauthorised distribution.*]—*Held*: under the rules of the Ancient Order of Foresters & under Friendly Societies Act, 1896 (c. 25), s. 78 (1) (c), a dis-

solution of a ct. required the consent of the central body, & as this had not been obtained, the members of the ct. which had dissolved were personally liable for the money they had divided.—*KELLY v. PEACOCK* (1917), 55 So. L. R. 65.—*SCOT*.

#### PART XIII. SECT. 6, SUB-SECT. 2.—A.

*sg. Construction of rule—Membership to cease when deposit two months in arrears.*]—Rule 17 of a Chinese benevolent assocn. at Penang provided that

purposes for which industrial assurance cos. may issue policies of assurance, there shall be included insuring money to be paid for the funeral expenses of a parent, child, grandparent, grandchild, brother or sister, & the issuing of such policies shall be treated as part of the industrial assurance business of the society or co.":—*Held*: the word "child" in the above sect. includes an

illegitimate child, & policies taken out by a mother for the purpose of insuring money to be paid for the funeral expenses on the death of her illegitimate children were valid.—*MORRIS v. BRITANNIC ASSURANCE CO., LTD.*, [1931] 2 K. B. 125; 100 L. J. K. B. 268; 145 L. T. 45; 47 T. L. R. 318; 75 Sol. Jo. 206.

## Part XVII.—Accounts and Inspection of Affairs.

**223a.** Power of commissioner or inspector to hold public inquiry—*Industrial Assurance Act, 1923* (c. 8), s. 17.]—An inspector appointed by the Industrial Assurance Comr. under Industrial Assurance Act, 1923 (c. 8), s. 17 (1), for the purpose of examining into & reporting on the affairs of an industrial assurance co., is not entitled to conduct the inspection in public, but this shall not prevent him from admitting from time to time any persons the presence of whom is reasonably necessary to enable him to carry out his duty under the statute; & he is not entitled to make public the information gained by him in the course of

such examination or of the exercise of the powers conferred upon him by the said subsection & by Friendly Societies Act, 1896 (c. 25), s. 76 (5), or otherwise to make use of such information save for the purposes of carrying out his examination & of preparing his report on the affairs of the co. & for purposes ancillary thereto. The same principle applies where the Comr. himself makes the examination.—*HEARTS OF OAK ASSURANCE CO., LTD. v. A.-G.*, [1932] A. C. 392; 101 L. J. Ch. 177; 147 L. T. 41; 48 T. L. R. 296; 76 Sol. Jo. 217, H. L.

*Annotation*:—*Consd. O'Connor v. Waldron*, [1935] A. C. 76.

## Part XVIII.—Disputes.

**224a.** —.]—*TIMMS v. WILLIAMS* (1842), 3 Q. B. 413; 2 Gal. & Dav. 621 11 L. J. Q. B. 210; 6 J. P. 685; 6 Jur. 1012; 114 E. R. 565.

**250.** *Add. Annotation*:—*Refd. Paul, Ltd. v. Wheat Commission* (1935), 152 L. T. 352.

**251.** *Add. Annotation*:—*Refd. Paul, Ltd. v. Wheat Commission* (1935), 152 L. T. 352.

## Part XIX.—Offences, Penalties and Proceedings.

**322.** *Add. Annotation*:—*Consd. Fishwick v. Gyani*, [1925] 1 K. B. 617.

**329a.** — False return.]—An information for making a false return under the Friendly Societies Act, 1896 (c. 25), s. 84 (c), is good if

laid within six months from the date when the return is sent to the registrar.—*WINDRIDGE v. ANCIENT ORDER OF FORESTERS' FRIENDLY SOCIETY*, [1933] 1 K. B. 42; 102 L. J. K. B. 62; 148 L. T. 285; 96 J. P. 483; 49 T. L. R. 16; 30 L. G. R. 510, D. C.

the monthly deposit to be made under rule 16 should be payable by each member in advance on the 15th day of the month, & that "if his monthly deposit shall be two months in arrear" he was to be notified, & failing payment within twenty-one days was *ipso facto* to cease to be a member & forfeit all privileges:—*Held*: upon the true construction of rule 17 a member could be notified of default only if payment of a monthly deposit was two months in arrear; it was not sufficient that at the date of the notification two monthly deposits were in arrear. Appeal dismissed.—*CHEE WOR LOK v. YEOW SAW GEOK*, [1935] A. C. 69; 104 L. J. P. C. 25; 152 L. T. 193, P. C.—*STRAITS SETTLEMENTS*.

### PART XV. SECT. 1.

*sd. Subscriptions—Whether capital or income.*]—Subscriptions paid by the members of a benefit society or association to the society or association to enable it to carry on its business are its "income" & not "capital."

*VIZAGAPATAM MUNICIPAL COUNCIL v. TEA DISTRICTS LABOUR ASSOCN.* (1932), 1 L. R. 55 Mad. 282.—*IND.*

### PART XV. SECT. 3.

*sd. Unauthorised investments—Liability of auditors.*]—Failure of auditors to report irregularity in investment of funds amounts to misconduct, & the auditors are responsible for any resulting loss.—*CANADIAN WOODMEN OF THE WORLD v. HOOPER*, [1933] 1 D. L. R. 168.—*CAN.*

### PART XVII.

*sd. Order for investigation by Attorney-General—Validity.*]—The Workers' Benevolent Society of Canada, incorporated in 1923 under Charitable Associations Act, R. S. M., 1923 (now superseded by Part VIII. of Cos. Act, 1932), appealed from the dismissal of its motion for an order prohibiting the making of an investigation of the books, accounts & securities of the society & into the general conduct of its business, pursuant to an order of the A.-G. made under sect. 414 of Cos.

Act, 1932, & amendments thereto:—*Held*: the appeal should be allowed & the issue of the order of prohibition be directed.—*Re WORKERS' BENEVOLENT SOCIETY OF CANADA & HARRISON*, [1933] 3 W. W. R. 498; [1934] 1 D. L. R. 257; 41 Man. L. R. 519.—*CAN.*

### PART XIX. SECT. 3, SUB-SECT. 1.—A. (a).

*sd. Action for libel—Whether proof of special damage necessary.*]—*Held*: pits. were entitled to maintain an action to recover damages for defamation of the society as such; it was unnecessary, in the case of a trading corp., society or partnership, to allege & prove special damages where defamatory words were spoken or written of the corp., society or partnership, in relation to its trade or business; & damages limited to the injury done to the joint adventure might be awarded without proof of special damage.—*IRISH PEOPLE'S ASSOC. Co. v. DUBLIN CITY ASSOC. Co.*, [1929] 1 R. 25.—*IR.*

**363a. Parent society—Improper dealings with funds of branch.]**—It was alleged that a local branch of a friendly society had improperly purchased certain freehold property, & the parent society sued for a declaration that the purchase was an improper one, in breach of the rules, & a breach of trust, & that debts were to make good to the lodge the money spent upon the purchase :—*Held* : the parent

society had a vested interest in the fund of the local lodge, although the amount of such interest could be ascertained only upon a proper valuation in accordance with the rules, & was entitled to maintain the action under Friendly Societies Act, 1896 (c. 25), s. 94.—*TOMLEY v. SHREEVE*, [1937] 3 All E. R. 75; 81 Sol. Jo. 498.

## Part XXII.—Dissolution.

**430. Add. Annotations :—As to (1) Refd. I. R. Comrs. v. Soc. for Relief of Widows & Orphans of Medical Men, I. R. Comrs. v. Medical Charitable Soc. for West Riding of Yorkshire (1926), 42 T. L. R. 612; I. R. Comrs. v.**

**Yorkshire Agricultural Soc., [1928] 1 K. B. 611; Re De Carteret, Forster v. De Carteret, [1933] Ch. 103; as to (2) Refd. Re Wells, Swinburne-Hanham v. Howard (1932), 48 T. L. R. 617.**

### PART XX. SECT. 3.

**so. Right to secede.]**—In the absence of statutory provisions there is no power in a branch lodge of a friendly society to secede from the order to which it belongs, unless the power is expressly conferred by the rules of the society. *Semble* : even if the rules give a right to secede, there is no practical method of doing so, unless machinery is provided for the purpose.—*INDEPENDENT ORDER OF ODDFELLOWS v. INDEPENDENT ORDER OF ODDFELLOWS BON ACCORD LODGE No. 11, [1901-3] S. A. L. R. 62.—AUS.*

**sd. Effect of secession—On property & funds.]**—A mere right to secede

does not confer a power in the seceding lodge to take away the funds constituted under the rules of the order. A rule of a friendly society providing that a lodge which is expelled shall forfeit its property to the ruling authority of the society is not *ultra vires*.—*INDEPENDENT ORDER OF ODDFELLOWS v. INDEPENDENT ORDER OF ODDFELLOWS BON ACCORD LODGE No. 11, [1901-3] S. A. L. R. 62.—AUS.*

**st. Secession by Scottish branch of English society—Refusal to grant certificate of secession—Jurisdiction of Scottish courts.]**—The Scottish branch of a friendly society, whose registered office was in England but whose rules

had been recorded in Scotland, resolved to secede from the parent body, & applied to the secretary of the society for a certificate of secession in order that the branch might be registered as a separate society in Scotland. The certificate having been refused, the branch brought a petition, under Ct. of Session (Scotland) Act, 1868 (c. 100), s. 91, for an order on the society to grant a certificate :—*Held* : the ct. had jurisdiction to entertain the petition, & procedure by way of a summary petition under sect. 91 was a convenient & practical method of invoking the aid of the ct.—*SONS OF TEMPERANCE FRIENDLY SOCIETY, [1926] S. C. 418.—SCOT.*

## GAME.

## Part IV.—Persons having Rights over Game.

44. *Add. Annotation*:—*Refd.* Cleobury Mortimer Rural District Council v. Childe, [1933] 2 K. B. 368.
53. *Add. Annotations*:—*As to* (2) *Consd.* Peech v. Best (1930), 99 L. J. K. B. 537. *Refd.* Wenner v. Morris (1935), 79 Sol. Jo. 252.
55. *Add. Annotation*:—*As to* (2) *Consd.* Peech v. Best (1930), 99 L. J. K. B. 537.
64. *Add. Annotation*:—*Refd.* Cleobury Mortimer Rural District Council v. Childe, [1933] 2 K. B. 368.
69. *Add. Annotation*:—*Consd.* Peech v. Best (1930), 99 L. J. K. B. 537.
71. After this case add:—  
———.]—Stat. Frauds, s. 4, is now replaced by Law of Property Act, 1925 (c. 20), s. 40.
76. *Add. Annotations*:—*Refd.* Swayne v. Howells (1926), 43 T. L. R. 14; Cleobury Mortimer Rural District Council v. Childe, [1933] 2 K. B. 368.
87. *Add. Annotation*:—*Consd.* Peech v. Best (1930), 99 L. J. K. B. 537.
90. *Add. Annotations*:—*Consd.* Peech v. Best (1930), 99 L. J. K. B. 537. *Refd.* Wenner v. Morris (1935), 79 Sol. Jo. 252.
91. *Add. Annotation*:—*Consd.* Peech v. Best (1930), 99 L. J. K. B. 537.
92. *Add. Annotation*:—*Consd.* Peech v. Best (1930), 99 L. J. K. B. 537.
- 92a. *Sale of part of land for erection of racing stables*—*Breach of covenant for quiet enjoyment.*]—A landowner who has granted a lease of sporting rights over land to a tenant together with a covenant for quiet enjoyment & afterwards during the currency of the tenancy sells part of that land to a third party so that it is or may be used for the erection of racing stables, is thereby derogating from his grant so as to become liable in damages to his tenant.—*PEECH v. BEST*, [1931] 1 K. B. 1; 99 L. J. K. B. 537; 143 L. T. 266; 46 T. L. R. 467; 74 Sol. Jo. 520, C. A.
- Annotation*:—*Refd.* Wenner v. Morris (1935), 79 Sol. Jo. 252.
98. *Add. Annotation*:—*As to* (2) *Consd.* Peech v. Best (1930), 99 L. J. K. B. 537.
- 100a. ——— *Grant of licence to gliding association.*]—The user of land for gliding flights may be an actionable interference with sporting rights granted over the land.—*WENNER v. MORRIS* (1935), 79 Sol. Jo. 252.

## PART II. SECT. 1.

*c i.* — *Amendment of conviction.*]—Appet. was summarily convicted for that he "unlawfully did, during the closed season, wound & hunt big game, to wit, a doe deer, contrary to sect. 18 (A2) of Game Act." On *certiorari*:—*Held*: (1) the conviction was for two separate offences & was not within the saving provisions of sect. 64 of Summary Convictions Act, R. S. B. C., 1936, which provides that no conviction shall be held to charge two offences on account of its stating the offence to have been committed in different modes; (2) the conviction might & should be amended under sect. 101 of Summary Convictions Act by striking out one of the charges, viz. that of wounding; it was also just & proper that the conviction should be amended by inserting the time & place of the offence as alleged in the information; (3) under said sect. 101, the ct. on this application had the like powers to deal with the case as seemed just as are by sect. 82 of Summary Convictions Act conferred upon the ct. to which an appeal is taken under sect. 77 thereof.—*R. v. ADVENT*, [1938] 1 W. W. R. 881.—CAN.

*xx.* "Taking or killing" game under one year of age—*What amounts to.*]—Sect. 4 of Game Act, R. S. S., 1930, provides that "no person shall hunt, trap, take, shoot at, wound or kill . . . the young under one year of age of any of the animals mentioned in the sect."—*Held*: (1) the application of the word "take" therein is limited to the act of capturing an animal & in order to constitute an offence, the capture would have to be of a living

animal, notwithstanding that sect. 2 (5) provides that "game" means such animals dead or alive; (2) although the killing of such an animal is done when the animal is found lying wounded by some other person, & in order to end its suffering, the killing nevertheless comes within the terms of the section & is, therefore, an offence.—*R. v. ZIMMER & ZIMMER*, [1931] 2 W. W. R. 562.—CAN.

PART II. SECT. 3, SUB-SECT. 4.—  
A. (b) iii.

*yy.* *Provincial game Act—Killing of game by white man on Indian reserve.*]—The fact that the Dominion Parliament has exclusive legislative authority over "Indians & land reserved for Indians" does not prevent a provincial game protection Act which prohibits the killing of game out of season from being applied to the killing of game on an Indian reserve where the offender is a white man.—*R. v. McLEOD*, [1930] 2 W. W. R. 37; 54 Can. C. C. 107.—CAN.

## PART IV. SECT. 3, SUB-SECT. 1.

*sa.* *Right to shoot game—Under Game Act Amendment Act, 1925.*]—Game Act Amendment Act, 1925, does not give a farmer an absolute right to shoot game birds found doing damage to his crop, provided he does not shoot across a public highway: it means merely that so far as the penalties imposed by said Act are concerned they shall not be enforceable against a farmer shooting under the circumstances therein described. The right of a municipality to protect its citizens by prohibiting the discharge of firearms within its limits is not interfered with.—

*R. ex rel. RANKIN v. PENDRAY*, [1929] 1 W. W. R. 30; 51 Can. Crim. Cas. 27; 40 B. C. R. 410.—CAN.

## PART IV. SECT. 4.

*i i.* ———]—*R. v. SYLIBOX*, [1929] 1 D. L. R. 307; 50 Can. Crim. Cas. 389.—CAN.

*i ii.* ———]—Indians in Alberta entitled to the benefits of the articles of treaty made between the Queen & the Blackfoot, Stony, & other Indians on Sept. 12, 1877, may, regardless of the provisions of a provincial Game Act, when hunting for food kill all kinds of wild animals regardless of age or size wherever they may be found on unoccupied Crown lands or other lands to which such Indians have a right of access, at all seasons of the year, & may hunt such animals with dogs or otherwise as they see fit, & they need no licence beyond the language of Alberta Natural Resources Act, 1930, s. 12, to entitle them to do so.—*R. v. WESLEY*, [1932] 2 W. W. R. 337; 4 D. L. R. 774; 58 C. C. C. 269; 26 Alta. L. R. 433.—CAN.

*i iii.* ———]—A treaty Indian is bound by the provisions of Game Act, R. S. S., 1930, & prohibited thereby from shooting, hunting, trapping or carrying fire-arms within certain areas of Crown lands which are declared to be game preserves & which are particularly described in Sched. B. of Game Act.—*R. v. SMITH*, [1935] 2 W. W. R. 433; 3 D. L. R. 703.—CAN.

*i iv.* ———]—Indians have no right of access to a game reserve beyond that of other persons under the Game Act, R. S. S., 1930.—*R. v. SMITH* (1935), 64 Can. C. C. 131.—CAN.

## Part VI.—Remedies for Infringement of Rights.

127. *Add. Annotation* :—**Consd.** *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 1 All E. R. 825.
129. *Add. Annotation* :—**Consd.** *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 1 All E. R. 825.
142. *Add. Annotation* :—**Refd.** *Andrews v. Carlton* (1928), 93 J. P. 65.
145. *Citation* :—substitute “ 57 J. P. 423.”
- 247a. **Summing up—Necessary contents.**—There must be a careful direction to the jury on the nature of common enterprise in the case of poachers charged with violence.—*R. v. PEARCE* (1929), 21 Cr. App. Rep. 79, C. C. A.
- 265a. **More than one offence in same count.**—Applt. was convicted on a count of an indictment which charged an offence against Night

Poaching Act, 1828 (c. 69), s. 1, in the following terms: “ A. D. on the 13th day of December in the year 1932 in the county of L. by night unlawfully took or destroyed game or rabbits in [certain land] or was in the said land by night with a gun, net or other instrument for the purpose of unlawfully taking or destroying game or rabbits ” :—*Held* : the count charged two offences in the alternative & was, therefore, bad in law, & the conviction must be quashed.—*R. v. DISNEY*, [1933] 2 K. B. 138 ; 102 L. J. K. B. 381 ; 149 L. T. 72 ; 97 J. P. 103 ; 49 T. L. R. 284 ; 77 Sol. Jo. 178 ; 24 Cr. App. Rep. 49 ; 31 L. G. R. 176 ; 29 Cox, C. C. 635, C. C. A.

*Annotation* :—**Consd.** *R. v. Wilmot* (1933), 149 L. T. 407.

299. *Add. Annotation* :—**Consd.** *Farey v. Welch*, [1929] 1 K. B. 388.

## Part VII.—Gamekeepers.

354. *Add. Annotations* :—**Consd.** *Cotterill v. Penn*, [1936] 1 K. B. 53. **Refd.** *Barnard v. Evans*, [1925] 2 K. B. 794.

## Part VIII.—Licences.

375a. — **Coursing—What amounts to.**—Resp. was charged with having killed a hare when he had no licence to kill game, as required by sect. 4 of Game Licences Act, 1860 (c. 90). Resp. owned three greyhounds, which he kept for coursing & sport. On the day of the alleged offence he was riding his horse in a field, with the permission of the owner, & had with him two of his greyhounds. There were no other persons or dogs present. The two greyhounds chased a hare, overtook & killed it. Thereupon resp. galloped across the field to where the greyhounds were, picked up the hare, put it in a bag, & placed the bag in the bottom of a hedge :—*Held* : these facts constituted the killing of a hare

by coursing with greyhounds within the meaning of the third exception in Game Licences Act, 1860 (c. 90), s. 5, which excepted from the duties & provisions of that Act : “ (3) the pursuing & killing of hares . . . by coursing with greyhounds, . . . ” ; therefore, the justices were right in acquitting resp. The exception is not restricted to any organized sport of coursing hares.—*DOLBY v. HALMSHAW*, [1937] 1 K. B. 196 ; [1936] 3 All E. R. 229 ; 106 L. J. K. B. 169 ; 155 L. T. 533 ; 100 J. P. 486 ; 53 T. L. R. 48 ; 80 Sol. Jo. 877 ; 34 L. G. R. 553 ; 30 Cox, C. C. 484.

387. *Add. Annotation* :—**Refd.** *Clark v. Westaway*, [1927] 2 K. B. 597.

### PART VI. SECT. 2, SUB-SECT. 1.— B. (a) i.

*sp. Presence in game reserve armed.*—Presence in a game reserve in the middle of the night with arms & dressed in hunting clothes is sufficient to sustain a conviction under the Game Act.—*R. v. JACKSON* (1937), 68 Can. C. C. 134.—CAN.

Deft. was prosecuted for pursuing a hare with a greyhound without having a game certificate, contrary to Game Certificates (Ireland) Act, 1842, ss. 2, 5. Deft. had coursed a hare with a single greyhound on certain lands, but produced a written permission from the owner of the lands to do so. The resident magistrate held that failure to take out a licence under Game Licences Act, 1860, formed the basis of the charge, & deft. was exempted on sect. 5, exception 3, of that Act, in respect of coursing a hare with his

greyhound, & dismissed the summons. On a case stated :—*Held* : the resident magistrate was wrong in deciding that deft. came within Game Licences Act 1860, s. 5, exception 3.—*R. (NEVIN) v. CLARKE*, [1930] N. I. 174.—IR.

### PART IX. SECT. 2.

*sz. Possessing the “ green hide of moose ” during close season—Possession of small piece—No offence.*—*R. v. MASON*, [1931] 2 D. L. R. 288 ; 55 Can. C. C. 25 ; 2 M. P. R. 457.—CAN.

### PART VIII. SECT. 1, SUB-SECT. 4.

393 i. *Defences—Coursing hare.*—

## Part I.—Gaming and Wagering Contracts Generally.

## Part I.—Gaming and Wagering Contracts Generally.

- Annotations:**—**Consd.** *Weddle, Beck v. Hackett* (1928), 45 T. L. R. 67. **Refd.** *Woodward v. Wolfe*, [1936] 3 All E. R. 529.

11. *Distinguished from speculative transactions.*—The mere fact that a transaction is speculative does not make it a wagering one.—KANWAR BHAN-SUKHA NAND v. GANPAT RAI-RAM JIWAN (1926), I. L. R. 7 Lah. 442.—IND.

10. *1. Severable contract.*—Pltf. & deft. entered into an agreement whereby pltf. was to train deft.'s horses for trotting, & deft. was to pay £2 per week for each horse, give pltf. one-fourth of stakes won, & further, when a horse was in a race & had a reasonable chance of winning, deft. was to put £5 on the totalisator & pay to pltf. any dividend received. —*Held:* (1) an agreement by an owner to pay to his trainer one-fourth of the stakes won was valid & enforceable; (2) the

term of the contract whereby investment was to be made on the totalisator by deft. in pltf.'s interest was unlawful; (3) the whole contract was not rendered unlawful thereby, the promises being independent, & the lawful promises being capable of enforcement.—*WILSON v. HOGARTH*, [1927] N. Z. L. R. 332.—N. Z.

d i. —. ]—WILSON v. HOGARTH,  
No. 10 i. ante.—N.Z.

**22. Agreement for payment of differences—***Arising out of wagering contract.*—Where a forward contract for the purchase & sale of goods is void on the ground of wagering under Contract Act, s. 30, a subsequent cross contract, as a result of which the differences payable under the original wagering contract are settled, is void under Bombay Act III. 1865, s. 1.—**JIVANOHAND GAMBHIRMAL, ETC. v. LAXMINARAYAN GANESHRAM (1925), I. L. R. 49 Bom. 689.—IND.**

sb. Agreement by racehorse owner to pay trainer share of stakes won.]—  
WILSON v. HOGARTH, No. 10 i, ante.—  
N.Z.

11.2c. *Contract to buy & sell on margin—  
Onus on defendant to prove illegal.*—  
Defts., Toronto merchants, engaged  
piffs., Chicago brokers, to buy & sell  
grain in Chicago on margin, which the  
latter did, advancing them money for  
which they sued. Defts. having refused

self & the other members of the Club, the trustees of the Club & W. & Sons as stakeholders, to enforce payment by the deft. of the entrance fees or the part of them agreed to be forfeited:—*Held*: the contracts for the two races, which were between the Club & deft. & not between the various entrants *inter se*, were in neither case by way of gaming or wagering within Gaming Act, 1845 (c. 109), s. 18, & the Club were entitled to recover from deft. the amount of the fees agreed to be forfeited in the two races.

(2) There cannot be more than two parties or two sides to a bet (*RUSSELL, L.J.*).—*ELLESMERE (EARL) v. WALLACE*, [1929] 2 Ch. 1; 98 L. J. Ch. 177; 140 L. T. 628; 45 T. L. R. 238; 73 Sol. Jo. 143. C. A.

**15d. Transactions in foreign currencies.] — IRON-MONGER & CO. v. DYNE (1928), 44 T. L. R. 497, C. A.**

**Annotations:**—**Consd.** *Weddle, Beck v. Hackett* (1928), 45 T. L. R. 67. **Refd.** *Woodward v. Wolfe*, [1936] 3 All E. R. 529.

24. *Add. Annotation*:—**Consd.** *Fender v. Mildmay*, [1937] 3 All E. R. 402.

26. *Add. Annotation* :—**Refd.** *Fender v. Mildmay*, [1937] 3 All E. R. 402.

47. *Add. Annotation*:—**Distd.** Ellesmere v. Wallace, [1929] 2 Ch. 1.

51. *Add. Annotation* :—**Distd.** Ellesmere v. Wallace, [1929] 2 Ch. 1.

52. *Add. Annotation*:—**Distd.** Ellesmere v. Wallace, [1929] 2 Ch. 1.

58. *Add. Annotation*:—**Distd.** Ellesmere v. Wallace, [1929] 2 Ch. 1.

55. *Add. Annotations*:—**Distd.** *Burrell v. Leven* (1926), 42 T. L. R. 407. **Refd.** *Latter v. Colwill*, [1937] 1 All E. R. 442.

to settle for losses sustained:—*Held*: assuming the State law to be that if the contract were to be dealt in such a way that the difference in prices would be settled according to the rise & fall of the market, & no grain be either delivered or accepted, the contract would be a gambling contract & illegal, it lay upon defts. to establish clearly that such was the character of the dealing.—*RIE v. GUNN* (1881), 4 O. R. 579.—*CAN.*

55 1. — *Forbearance to post as*  
*defaulter.*—A wagering contract under  
Indian Contract Act is void to the  
extent that no ct. will enforce such a  
contract, but it is not illegal. A col-  
lateral agreement, therefore, based upon  
a transaction which was originally a  
wagering transaction, is not on that  
account illegal.

A cheque arising out of a betting transaction, but given in consideration of a person's promise to refrain from posting the drawer of the cheque before the Turf Club, & having him declared a defaulter, is valid, & for good consideration. — **BANVARD v. MOOLLA** (1928), I. L. R. 7 Ran. 263.—**IND.**

o 1. — *Forbearance to post as defaulter—Authority of agent.*—In Apr. 1931, doft. became heavily indebted to



57. *Add. Annotation*:—*Refd.* Poteliakhoff v. Teakle, [1938] 3 All E. R. 686.
58. *Add. Annotations*:—*Distd.* Burrell v. Leven (1926), 42 T. L. R. 407; Eldridge & Morris v. Taylor, [1931] 1 K. B. 416. *Consd.* Burden v. Harris, [1937] 4 All E. R. 559. *Expld. & Distd.* Poteliakhoff v. Teakle, [1938] 3 All E. R. 686. *Refd.* Richardson v. Moncrieffe (1926), 43 T. L. R. 32; Evans v. Bartlam, [1937] A. C. 473; Latter v. Colwill, [1937] 1 All E. R. 442; *Re* Brice's Estate, Brice v. Frere (1937), 81 Sol. Jo. 238.
- 62a. —.—.]—An agreement by debtor to pay a debt resulting from a betting transaction:—*Held*: to be enforceable, although obtained under the threat that, notwithstanding ct. proceedings were pending, he would be reported to Tattersall's.—*Buxton v. Cumming* (1927), 71 Sol. Jo. 232.
63. *Add. Annotation*:—*Refd.* Latter v. Colwill, [1937] 1 All E. R. 442.
64. *Add. Annotation*:—*Distd.* Hyde v. Tyler (1926), 42 T. L. R. 442.
- 64a. —.—.]—Pltf. backed a horse with debt. for £10 & the horse won the race. There was subsequently a dispute as to whether the result of the betting was payable at 100 to 1 or at 33 to 1. The parties agreed to refer the question to Tattersall's Committee. The Committee decided that the amount payable was £1,000, & that it was to be paid within seven days. In an action to recover the £1,000 pltf. alleged that debt. had agreed to abide by the decision of the Committee:—*Held*: as the parties only referred to Tattersall's Committee the question whether the bet was at 100 to 1 or at 33 to 1, & as there was no further agreement by debt. for good consideration to pay such sum as the Committee might find to be payable, the action failed.—*Hyde v. Tyler* (1926), 42 T. L. R. 652; 70 Sol. Jo. 856, C. A.
65. *Add. Annotation*:—*Refd.* Poteliakhoff v. Teakle, [1938] 3 All E. R. 686.
- 66a. —.—.]—Deft. had given pltf. a cheque for £74 in respect of a gaming debt, & the cheque was dishonoured. Pltf. threatened to bring an action, whereupon debt., in order to avoid any publicity, agreed to pay £11, & the balance in monthly instalments. No payment except the first payment of £11 was made, & pltf. brought the present action to

recover the balance:—*Held*: as the threatened action was one which could not have been successful, being one in respect of a gaming debt, the agreement not to bring it was no consideration for debt.'s fresh promise to pay the debt. The avoidance of publicity necessary to support a new consideration does not refer to the publicity resulting from the bringing of an action in the cts.—*POTELIAKHOFF v. TEAKLE*, [1938] 2 K. B. 816; [1938] 3 All E. R. 686; 107 L. J. K. B. 678; 54 T. L. R. 1075; 82 Sol. Jo. 644, C. A.

70. *Add. Annotations*:—*Apld.* Hyde v. Tyler (1926), 42 T. L. R. 442. *Refd.* Poteliakhoff v. Teakle, [1938] 3 All E. R. 686.

70a. *Agreement to compromise action.*—A mere agreement to compromise an action brought for a gaming debt is not sufficient consideration on which to found an action on the agreement.—*BURRELL & SON v. LEVEN* (1926), 42 T. L. R. 407.

*Annotation*:—*Refd.* Poteliakhoff v. Teakle, [1938] 3 All E. R. 686.

76. *Add. Annotation*:—*As to* (1) *Consd.* Ellesmere v. Wallace, [1929] 2 Ch. 1.

83. *Add. Annotation*:—*Distd.* Ellesmere v. Wallace, [1929] 2 Ch. 1.

94. *Add. Annotation*:—*Refd.* Ellesmere v. Wallace, [1929] 2 Ch. 1.

98. *Add. Annotation*:—*Refd.* Ellesmere v. Wallace, [1929] 2 Ch. 1.

107. *Add. Annotation*:—*Distd.* Ellesmere v. Wallace, [1929] 2 Ch. 1.

108. *Add. Annotation*:—*As to* (1) *Apld.* Samuel v. Adelaide Club, Ltd., [1934] 2 K. B. 69.

146. *Add. Annotation*:—*Refd.* *Re* Brice's Estate, Brice v. Frere (1937), 81 Sol. Jo. 238.

148. *Add. Annotations*:—*Consd.* Morgan v. Ashcroft, [1937] 3 All E. R. 92. *Refd.* Morgan v. Ashcroft, [1938] 1 K. B. 49.

152. *Add. Annotation*:—*Refd.* Ellesmere v. Wallace, [1929] 2 Ch. 1.

164. *Add. Annotation*:—*As to* (1) *Consd.* Humphery v. Wilson (1929), 141 L. T. 469.

171. *Add. Annotation*:—*Refd.* Ramdutt Ramkissen Dass v. Sassoon E. D. & Co. (1929), 98 L. J. P. C. 58.

173. *Add. Annotation*:—*Refd.* Berg v. Sadler & Moore, [1937] 2 K. B. 158.

181. *Add. Annotation*:—*Consd.* Carlton Hall Club v. Laurence, [1929] 2 K. B. 153.

a number of bookmakers. On settling day, being unable to pay, he consulted a solr., whose managing clerk, W., happened to be a member of the Committee of Tattersall's Club. After a general discussion of the position W. was sent to Tattersall's Club to inform some, or all, of the bookmakers concerned, including pltf., that debt. could not pay at that time, but would pay them when he could. It was alleged that W., as debt.'s agent, entered into an agreement with pltf. to the effect that if pltf. did not "post" debt. as a defaulter at Tattersall's Club, he would pay what he owed in full within a reasonable time, & that thereby a legal obligation to pay the debt was created:—*Held*: W. had no authority from debt. to enter into any such contract on his behalf.—*O'MALLEY v. GORMAN*, [1935] W. A. L. R. 39.—*AUS.*

**PART I. SECT. 3, SUB-SECT. 1.—D.**

*se. Gaming Act, 1835, s. 2—Cheque in name of company—Personal transaction of president.*—In the present action, one by a co. to recover the amount of various cheques given debt., a bookmaker, in payment of bets on horse races which bets were lost:—*Held*: on the evidence, although the cheques were drawn in the co.'s name, the bets had been the personal transactions of its president, & therefore, it had no status to maintain the action.—*WINDSOR HOTEL CO. v. SILVERMAN*, [1934] 3 W. W. R. 249; [1935] 1 D. L. R. 616; 62 C. C. C. 247.—*CAN.*

**PART I. SECT. 4, SUB-SECT. 2.**

*h i. —.—.*—Where debt. sold for pltf. horses won by pltf. at a raffle, & received the purchase money:—*Held*: he could not refuse to pay it over, on

the ground that pltf. had obtained the horses by gambling.—*JAMIESON v. SHERWOOD* (1856), 14 U. C. R. 282.—*CAN.*

**PART I. SECT. 5.**

*165 i. Action between partners—Defences.*—*GIBBS v. CANN*, [1932] 1 D. L. R. 282; 56 Can. C. C. 346.—*CAN.*

**PART I. SECT. 6, SUB-SECT. 1.**

*181 iii. —.—.*—Where during a game of dice cheques are given by one player to another player for money advanced to enable the former to continue the game, such cheques will be deemed to have been given for an illegal consideration.

If in an action brought on such cheques the evidence discloses the illegal consideration the trial judge should dismiss the action, even though

182. *Add. Annotation* :—*Consd. Carlton Hall Club v. Laurence*, [1929] 2 K. B. 153.

185. For "Gaming Act, 1838" read "Gaming Act, 1738."

*Add. Annotation* :—*As to* (1) *Refd. Foster v. Driscoll*, *Lindsay v. Attfield*, *Lindsay v. Driscoll*, [1929] 1 K. B. 470.

188a. — *Loan to bookmaker for general purposes of business.*—A loan to a firm of bookmakers for the general purposes of the business & charged by deed on the assets of the partnership in the absence of proof that the money was required for the purpose of making bets, is not illegal as being "for the reimbursing or repaying any money knowingly lent or advanced for betting" within Gaming Acts, 1710 & 1835.—*HUMPHERY v. WILSON* (1929), 141 L. T. 469; 45 T. L. R. 535, C. A.

188b. — *Money lent in England on a security with a view to its being used by the borrower in playing here a game of cards for money cannot be recovered in an English Ct.*—*CARLTON HALL CLUB v. LAURENCE*, [1929] 2 K. B. 153; 98 L. J. K. B. 305; 140 L. T. 534; 45 T. L. R. 195; 73 Sol. Jo. 127, D. C.

189. *Add. Annotations* :—*Refd. Hill v. Fox* (1858), 31 L. T. O. S. 118; *Foster v. Driscoll*, *Lindsay v. Attfield*, *Lindsay v. Driscoll*, [1929] 1 K. B. 470.

191. *Add. Annotation* :—*Apld. Humphery v. Wilson* (1929), 141 L. T. 469.

192. *Add. Annotations* :—*As to* (2) *Apld. Humphery v. Wilson* (1929), 141 L. T. 469. *Consd. Woolf v. Freeman*, [1937] 1 All E. R. 178.

192a. — *GIBSON v. ROBERTS* (1936), 80 Sol. Jo. 596.

192b. — *Pltf. was the proprietor of a club where card games were played for money, chips or counters being used for money in the actual play. Deft. purchased from the club chips to the value of £30 for which he gave the cheque of a third party, which was subsequently dishonoured. There was a practice in the club whereby, in the event of the loser having insufficient chips to pay his losses, both winner & loser proceeded to the office of the club & the office paid the sum agreed as won direct to the winner. The office had so paid £18 19s. on behalf of deft. In an action for £30, the price of the counters, or, alternatively, for the same sum as money lent, & for the sum of £18 19s., money lent:—Held: (1) the giving of the counters on credit was a transaction in the nature of a promise*

void & unenforceable under Gaming Act, 1892 (c. 9), s. 1, as it was a promise to pay money paid under contracts void under Gaming Act, 1845 (c. 109), s. 18; (2) the sum of £18 19s., being paid direct to the person who had already won the money upon wagers, was money lent to deft. for the purpose of gaming or wagering & therefore irrecoverable under the Gaming Acts; (3) bridge is not an unlawful game, but *qu.*: whether poker is an unlawful game.—*WOOLF v. FREEMAN*, [1937] 1 All E. R. 178; 156 L. T. 219; 80 Sol. Jo. 995.

192c. — *Re BRICE'S ESTATE, BRICE v. FRERE* (1937), 81 Sol. Jo. 238.

203. *Add. Annotations* :—*As to* (1) *Consd. Ellesmere, Earl v. Wallace*, [1929] 2 Ch. 1. *As to* (2) *Apld. Carlton Hall Club, Ltd. v. Laurence*, [1929] 2 K. B. 153. *Consd. Humphery v. Wilson* (1929), 141 L. T. 469.

205a. — *Pltf. & other players of chemin de fer took it in turn to be croupier or banker. Deft., one of the players, bought counters to stake, & at the end of the game, having lost £500, he gave a cheque for that amount to pltf. in payment of what he had lost to pltf. &/or other persons. In an action on the cheque:—Held: a payment to a winner at gaming, or to a person who accepted payment for winners, in the form of a cheque was void & unenforceable, & the action failed.*—*RICHARDSON v. MONCRIEFFE* (1926), 43 T. L. R. 32.

213. *Add. Annotation* :—*Consd. Humphery v. Wilson* (1929), 141 L. T. 469.

224. *Add. Annotation* :—*As to* (1) *Refd. Re Wilson, Ex p. Salaman v. Keith, Prowse* (1925), 133 L. T. 814.

226. *Add. Annotation* :—*Refd. Falcon v. Famous Players Film Co.* (1925), 42 T. L. R. 91.

227. *Add. Annotation* :—*Consd. Ward v. British Oak Insurance Co.*, [1932] 1 K. B. 392.

229. *Add. Annotation* :—*Refd. Falcon v. Famous Players Film Co.* (1925), 42 T. L. R. 91.

239. *Add. Annotations* :—*Folld. Soc. Anon. des Grands Etablissements de Touquet Paris-Plage v. Baumgart* (1927), 96 L. J. K. B. 789. *Consd. Carlton Hall Club v. Laurence*, [1929] 2 K. B. 153.

240. *Add. Annotations* :—*Apld. Carlton Hall Club v. Laurence*, [1929] 2 K. B. 153. *Refd. Soc. Anon. des Grands Etablissements de Touquet Paris-Plage v. Baumgart* (1927), 96 L. J. K. B. 789; *Nihalchand Navalchand v. McMullan*, [1934] 1 K. B. 171.

the illegality has not been pleaded.—*GOGGINS v. MORRISON*, [1925] 2 D. L. R. 1203; [1925] 2 W. W. R. 75.—CAN.

m 1. — *Gambling on grain exchange.*—Money advanced or lent to enable the borrower to carry out an illegal purpose as, *e.g.*, gambling transaction on a grain exchange, cannot be recovered where, at least, the purpose has been carried out wholly or to a substantial extent.—*THOMAS v. PARLEY* (Sask.), [1929] 3 D. L. R. 755; 2 W. W. R. 317.—CAN.

PART I. SECT. 7, SUB-SECT. 1.—A.

*sp. Cheque cashed during game.*—During a game of poker one player cashed a cheque for another:—*Held*: the giving of the cheque was founded upon, arose out of, & was connected

with, the game of poker, which was a gambling transaction, & it was therefore void.—*LE BLANC v. THOMAS* (1932), 5 M. P. R. 401.—CAN.

PART I. SECT. 7, SUB-SECT. 2.

o 1. — *Containing words "value received."*—*Deft. gave D., a fellow player in a game of dice to whom he had lost \$400, a promissory note for \$1,200 to cover said \$400 & \$800 in cash which D. then lent to deft. On maturity of the note, deft. paid \$700 & gave D. a new note for \$500, which note D. endorsed before maturity & for value to pltf. who had no notice of the consideration for which that note or the original note had been given. The \$500 note bore the words "value received." In an action in the county ct. on the \$500 note the defence was*

set up that it had been given in whole or in part for a gambling debt: & therefore, because of sect. 66 (a) & (c) of County Cts. Act, R. S. M., 1913, the county ct. had no jurisdiction. *Judgment for pltf.*—*HAMMER v. FINKELSTEIN*, [1931] 1 W. W. R. 769; 2 D. L. R. 738; 39 Man. L. R. 447.—CAN.

PART I. SECT. 7, SUB-SECT. 3.

s 1. — *Contract to buy & sell on margin.*—*PEARSON v. CARPENTER & SON* (1904), 35 S. C. R. 380.—CAN.

s 11. — *Contract not speculative transaction on part of plaintiff.*—*WOODWARD & CO., LTD. v. KOEFORD* (1921), 62 D. L. R. 431; 37 Can. Crim. Cas. 829; 31 Man. L. R. 286; [1921] 3 W. W. R. 232.—CAN.

243. *Add. Annotations*:—*Folld. Soc. Anon. des Grands Etablissements de Touquet Paris-Plage v. Baumgart* (1927), 96 L. J. K. B. 789. *Consd. Carlton Hall Club, Ltd. v. Laurence*, [1929] 2 K. B. 153. *Refd. Nihalchand Navalchand v. McMullan*, [1934] 1 K. B. 171.

245. *Add. Annotations*:—*Folld. Soc. Anon. des Grands Etablissements de Touquet Paris-Plage v. Baumgart* (1927), 96 L. J. K. B. 789. *Consd. Carlton Hall Club v. Laurence*, [1929] 2 K. B. 153.

245a. ————]—Where money is lent in a foreign country for the purposes of gaming & gaming in that country is not illegal, & cheques payable in England are given for the money lent, *pltf. can ignore the security & sue as for money lent to deftd.*—*SOCIÉTÉ ANONYME DES GRANDS ÉTABLISSEMENTS DE TOUQUET PARIS-PLAGE v. BAUMGART* (1927), 96 L. J. K. B. 789; 136 L. T. 799; 43 T. L. R. 278.

*Annotation*:—*Consd. Carlton Hall Club v. Laurence*, [1929] 2 K. B. 153.

## Part II.—Games, Gaming and Gaming Houses.

247. *Add. Annotation*:—*Consd. Ellesmere v. Wallace*, [1929] 2 Ch. 1.

251. *Add. Annotations*:—*Apld. Ankers v. Bartlett*, [1936] 1 K. B. 147. *Refd. Ellesmere v. Wallace*, [1929] 2 Ch. 1.

252. *Add. Annotation*:—*Consd. Ellesmere v. Wallace*, [1929] 2 Ch. 1.

253. *Add. Annotations*:—*Consd. Ellesmere v. Wallace*, [1929] 2 Ch. 1; *Joel v. Barclay*, [1937] 1 All E. R. 309.

254. *Add. Annotations*:—*As to (2) Consd. R. v. Kirby, Parker & Patrick* (1927), 20 Cr. App. Rep. 12; *R. v. O. K. Social & Whist Club, Ltd.* (1929), 45 T. L. R. 570. *Refd. R. v. Brennand* (1930), 47 T. L. R. 22.

255. *Add. Annotation*:—*Refd. Davis v. Parker*, [1931] 2 K. B. 210.

255a. ————]—The questions whether a house is used for unlawful gaming within sect. 4 of the above Act, & whether a game is unlawful within Betting Act, 1853 (c. 119), s. 3, are for the judge, & not the jury.—

*R. v. KIRBY, PARKER & PATRICK* (1927), 20 Cr. App. Rep. 12, C. C. A.

260. *Add. Annotations*:—*As to (4) Refd. Richardson v. Moncrieffe* (1926), 43 T. L. R. 32. *As to (6) Consd. Davis v. Parker*, [1931] 2 K. B. 210. *Generally, Refd. R. v. Berg, Britt, Carré & Lummies* (1927), 20 Cr. App. Rep. 38; *R. v. O. K. Social & Whist Club, Ltd.* (1929), 45 T. L. R. 570; *Daniels v. Pinks*, [1931] 1 K. B. 374.

261. *Add. Annotation*:—*Refd. Richardson v. Moncrieffe* (1926), 43 T. L. R. 32.

267a. ————]—Progressive whist, where the partners are shuffled as well as the cards, is not a game of skill, & if played for money prizes, is an unlawful game.—*R. v. O. K. SOCIAL & WHIST CLUB, LTD.* (1929), 45 T. L. R. 570; 73 Sol. Jo. 451; 21 Cr. App. Rep. 119, C. C. A.

267b. *Stud poker*.—*DALTON v. ADELPHI CLUB*, [1938] 4 All E. R. 556; 55 T. L. R. 167; 82 Sol. Jo. 972.

### PART II. SECT. 1, SUB-SECT. 1.

252 i. ————]—*Prizes provided out of admission money.*—A person hired a hall for one night, & another hall for two nights, & advertised that whist drives, open to the public on payment of one shilling for admission, would be held in the halls on those nights. A large number of people attended, & prizes were awarded to the successful players. The purchase of the prizes was defrayed out of the admission money, any balance over being retained by the promoter:—*Held*: (1) the playing of progressive whist was gaming, in view of the facts that the element of chance predominated in the game, & that the prizes were derived from the admission money, & it was immaterial whether the proceedings were or were not detrimental to the morals of the community; (2) accused had managed, conducted, or carried on gaming in the premises, although his operations had been restricted to three isolated occasions.—*BUNTON v. MILLER*, [1926] S. C. (J.) 120.—SCOT.

### PART II. SECT. 1, SUB-SECT. 2.—C. (a).

o i. ————]—M. was the manager of a Sports Club. On a prosecution under sect. 3 of Gaming & Betting Act, 1912, charging M. with being the keeper of a common gaming house the police gave evidence that they saw people playing poker with both money & counters, & heard expressions used which indicated that gambling was in progress. It was proved that the club was open every day of the week to a very late hour, & that it was competent for any member of the public to join the club upon paying 2s.

entrance fee & having his name approved. M. was convicted:—*Held*: poker is not an unlawful game; however, there was evidence upon which the magistrate could find that the club tended to cause a public mischief & was, accordingly, a common gaming house & the rule *nisi*, therefore, should be discharged with costs.—*Re LISLE, Ex p. McCROHON* (1936), 53 N. S. W. N. 132.—AUS.

sv. *Whistle board*.—The owner of a restaurant having therein a machine called whistle board, which is a game of chance, is guilty of keeping a common gaming house.—*R. v. DUMONT*, [1930] 3 D. L. R. 257; 65 Can. C. C. 365.—CAN.

### PART II. SECT. 1, SUB-SECT. 2.—D.

270 ii. ————]—*Game played by problem checker boards.*—*D'ORIO v. LEIGH & CUTHBERTSON, LTD.*, [1929] 2 W. W. R. 171; 41 B. C. R. 153; *affg.*, [1929] 1 W. W. R. 122.—CAN.

### PART II. SECT. 1, SUB-SECT. 2.—E.

b i. ————]—*R. v. ARNOLD*, [1927] 4 D. L. R. 206; 48 Can. Crim. Cas. 101; 60 O. L. R. 582.—CAN.

b ii. ————]—An automatic vending machine which answers the description in sect. 986 (4) of the Criminal Code, as amended by 1930 (c. 11), s. 27, is a "means of contrivance for playing a game of chance," within subsect. (2) of sect. 986, regardless of whether there is any real or material value in what the operator, *i.e.* the player, of the machine receives at times, as the result of operating it.—*R. v. FREEDMAN*, [1931] 1 W. W. R.

775; 55 Can. C. C. 288; 39 Man. L. R. 407.—CAN.

b iii. ————]—*R. v. WILKES, R. v. HISCOCK, R. v. ROBERTSON* [1931], 1 D. L. R. 995; 66 O. L. R. 319; 56 Can. C. C. 1.—CAN.

b iv. ————]—Accused had on his premises an automatic vending machine in which customers placed a five cent coin, pulled a lever, & received from the machine a package of candy, with or without "slugs," varying in number, which had no commercial or exchangeable value but might be used to operate the machine to show printed legends for amusement only, no candy being emitted. The candy package emitted for the coin deposited was such as that sold over the counter for five cents, & on the sale of the candy omitted the accused made a profit:—*Held*: accused was not guilty, under the Criminal Code, of keeping a common gaming house.—*ROBERTS v. R.*, [1931] S. C. R. 417; 3 D. L. R. 225; 56 Can. C. C. 144.—CAN.

b v. ————]—*R. v. ATTHONAS* (1931), 56 Can. C. C. 146.—CAN.

b vi. ————]—In view of the manner in which the automatic vending machine in question herein was operated by accused, its lessee, in exchanging for merchandise the slugs which the players received in varying numbers from the machine:—*Held*: it was a "means or contrivance for playing a game of chance," within sect. 986 (2), (4) of the Criminal Code.—*R. v. RICHARDS*, [1932] 1 W. W. R. 148; 2 D. L. R. 361; 44 B. C. R. 430; 57 C. C. C. 208.—CAN.

b vii. ————]—*R. v. RICHARDS* (No. 2), [1932] 1 W. W. R. 177.—CAN.

275. *Add. Annotation*:—*Folld. Bennett v. Ewens*, [1928] 2 K. B. 510.
276. *Add. Annotation*:—*Consd. Davis v. Parker*, [1931] 2 K. B. 210.
278. *Add. Annotations*:—*As to* (1) *Folld. Bennett v. Ewens*, [1928] 2 K. B. 510. *As to* (2) *Consd. R. v. Kirby, Parker & Patrick* (1927), 20 Cr. App. Rep. 12.

278a. —.]—R. v. PERRY, R. v. DRANSFIELD,  
(1936), 80 Sol. Jo. 896, C. C. A.

**278b. Certainty of winning something.]—**(1) A machine may be used for the purposes of "gaming" & "betting" even though, if the directions affixed to it are obeyed, it is certain that the user will win something.

(2) In a conflict of evidence it is for the jury to decide for what purposes persons "resort" to the premises in question.—*R. v. BRENNAND* (1930), 47 T. L. R. 22; 74 Sol. Jo. 788; 22 Cr. App. Rep. 95, C. C. A.

**278c. Order for destruction of machines—Proceedings under Gaming Houses Act, 1854 (c. 38).]**—Applt. was convicted before petty sessions of unlawfully gaming with automatic machines, & a number of machines in his possession were ordered by the justices to be destroyed:—*Held*: the proceedings being taken under Gaming Houses Act, 1854 (c. 38), the justices had no jurisdiction to order the destruction of the machines, such jurisdiction being conferred only by Gaming Act, 1845 (c. 109), s. 8, & in cases brought before them by a warrant issued under that Act.—*EYRE v. BRUMFIELD*, [1936] 2 All E. R.

b viii. ———.]—R. v. HEIT (1931), 57  
C. C. C. 107.—CAN.

b ix. —.]—R. v. GLENFIELD, R. v. STEIN, R. v. AMBREY, R. v. HUGHES, R. v. WONG CHEW, [1934] 3 W. W. R. 465; [1935] 1 D. L. R. 37; 62 C. C. C. 334.—CAN.

**d i.** ———.]—R. v. COOK, R. v. DODDS, [1938] 1 W. W. R. 239; 1 D. L. R. 720; 69 Can. C. C. 394.—**CAN.**

1. —.—.]—*Held*: a machine known as the "Caille Victory Vendor" was one to which the prohibition in Gaming Machines (Scotland) Act, 1917 (c. 23), s. 1 (1), applied.—*ULIVI v. MILLER*, [1927] S. O. (J.) 87.—*SCOT.*

278 1. *Whether dominant element of skill.*—Deft. kept for use by the public on his premises a number of machines, known by the name of "Diddler." Any one wishing to use one of these machines purchased from deft. discs at the price of seven for 6d. He inserted one disc in a slot & pulled a handle, which caused three rollers to revolve. On each roller was printed a number of devices, such as cherries, roses, etc. If certain combinations of these devices stopped opposite a pointer on the face of the machine, the player won a certain number of discs. With these he could purchase on the premises certain goods. The winning combinations & the odds for each were printed on the front of the machine in view of the player. If none of these combinations stopped opposite the pointer, the player lost his disc. The machine was fitted with a control, by which the player could stop the rollers, one at a time, & so endeavour to obtain a winning combination. There were 15 machines on the premises. Deft. was prosecuted under Gaming Houses Act, 1864, s. 4, that he, being the occupier of the premises, did use them for the purpose of unlawful gaming. The justice was satisfied on the evidence that the

majority of the persons who used the machine would be players of less than average skill, &, therefore, held that the game was one in which the chances were not favourable alike to all players, including the owner of the machine, & accordingly convicted the deft. :—  
*Held*: the conviction was right.—  
GORDON v. DUNLEVY, [1928] I. R. 595.  
—IR.

276 H. —.]—R. v. LIPTRON, [1928]  
3 W. W. R. 60; 50 Can. Crim. Cas.  
244.—CAN.

276 Ill. —.]—The operation of the slot machine in question herein, when, at least, it is exposed for use with the object of gain to the proprietor, & operated by his customers, held to be a "mixed game of chance & skill" within Criminal Code, s. 226 (a).—*R. v. CANADA MINT CO.*, [1928] 4 D. L. R. 539; [1928] 3 W. W. R. 195; 50 Can. Crim. C. 384.—*CAN.*

276 iv. —.]—R. v. WOLFE, [1928]  
4 D. L. R. 941; [1928] 2 W. W. R. 689;  
50 Can. Crim. Cas. 189.—CAN.

52. *Confiscation—Necessity for search warrant.*—*R. v. Rocco*, [1931] 2 W. W. R. 55; 55 Can. C. C. 323; 39 Man. L. R. 453.—CAN.

ad. *Licensed machines operated for gambling.*—The fact that slot machines are licensed in Quebec does not make them legal if operated for gaming.—*R. v. BERNIER* (1916), 27 Can. C. O. 225.—CAN.

21. *Liability of person supplying*.—A person furnishing a restaurant with a slot machine to be operated for his benefit is liable for "assisting" in keeping a disorderly house.—*R. v. BELAND*, [1936] 1 D. L. R. 44; 64 Can. C. C. 354.—CAN.

**PART II. SECT. 2, SUB-SECT. 1.**

sd. *General rule.*)]—Where a game as played on premises encourages an indulgence in all classes of the community of the propensity to gamble, &

1; 154 L. T. 696; 100 J. P. 209; 52 T. L. R. 454; 80 Sol. Jo. 368; 84 L. G. R. 249; 30 Cox. C. C. 393, D. C.

**284a.** House used for game where chances not alike favourable to all players.]—The committee of management of a members' club installed in the club certain machines for the use of members only & for the purpose of giving additional pleasure to the members. The machines were operated by means of pennies inserted in a slot. The player, having first inserted a penny, depressed a handle, causing three cylinders to revolve on which were depicted bells, bars & fruits. On the cylinders ceasing to revolve the player either lost his penny or received winnings up to twenty pennies, according to the combination of fruits &/or bells &/or bars opposite a pointer. The machine automatically filled a jack pot from its winnings, & the pennies in the jack pot were returned to the player who obtained the combination of three bars. The machines were similar in type to other machines for the user of which persons had been convicted under the Gaming Houses Act, 1854 (c. 38), where the persons had used the machines in shops or places of public entertainment or in proprietary clubs. Four members of the committee of management of the club in question were charged under Gaming Houses Act, 1854 (c. 38), s. 4, for being persons having the care & management of certain premises, to wit, the club, which were then being used for the purpose of unlawful gaming being

is injurious to public morals & a common law nuisance, the premises are a common gaming house.—**DAWSON v. SINCLAIR**, [1926] N. Z. L. R. 721.—N. Z.

284 1. *Proprietary club—Need not be open to public.*—A common gaming house is one in which a large number of persons are invited habitually to congregate for the purpose of gaming, & it makes no difference that its use is restricted to subscribers & members of a club, & it is not open to all persons desirous of using it. *—RE CHINNIAH (1923). I. L. R. 47 Mad. 426. —IND.*

284 II. *In which poker played.*—An Incorporated co., the proprietor of a "club" in which membership was secured by payment of a periodical fee, & where stud poker was played, the players being required to pay cash for the "club" & gum, fruit, candy or soft drinks being supplied on each sale of cards:—*Held*, to have been properly convicted for keeping a common gaming house.—*R. v. TRAINMEN'S CLUB* (1926), 45 Can. Crim. Cas. 231; 20 Saak. L. R. 461; [1926] 1 W. W. R. 830.—CAN.

*s i. Place or office kept for making contracts for sale of stocks & goods on differences.*—*R. v. HARNESSE* (1905), 6 O. W. R. 219; 10 O. L. R. 555.—**CAN.**

e i. ——.]—On a prosecution for keeping a common gaming house:—*Held*: premises on which were found cards, poker chips, dice, a round cloth-covered table & a "punch board," were "provided with any means or contrivance for unlawful betting or gaming" within Criminal Code, s. 986.—*R. v. Coy*, [1925] 3 W. W. R. 538; 44 Can. Crim. Cas. 119.—*CAN.*

\* II. —.—.]—The keeping of a "multiseller" for gain:—*Held*: to render the place in which it was kept & where it was "played" by persons

carried on therein. The contention of the members of the committee of management was that the position of a members' club was analogous to that of a private house, & that gaming upon the machines in a members' club was therefore not unlawful gaming:—*Held*: in order that a house should be a common gaming house within s. 2 of the Gaming Act, 1845 (c. 109), s. 2, it was not necessary that some person should be keeping the house for his gain, lucre or living; it was sufficient that it was a house kept or used for playing at any game where the chances of the game being played therein are not alike favourable to all the players; the chances of the game played on the machines in this club were not alike favourable to all the players, & that the club was a members' club did not prevent the club premises being kept or used for the purpose of unlawful gaming being carried on therein, & therefore the members of the committee of management of the club could be convicted of the offence charged under Gaming Houses Act, 1854 (c. 38), s. 4.—*DANIELS v. PINKS*, [1931] 1 K. B. 374; 100 L. J. K. B. 337; 144 L. T. 372; 95 J. P. 23; 47 T. L. R.

166; 75 Sol. Jo. 59; 29 L. G. R. 120; 29 Cox, C. C. 221, D. C.

**284b. Game must be unlawful.**—Appls., proprietors of a place known as "Fun Fair," invited the public to resort thereto, & the public did so resort, for the purpose of playing for money at a game with an automatic machine called the "Circle of Skill," which the justices found was a game of skill:—*Held*: appls. could not be convicted of permitting the above place to be opened for the purpose of unlawful gaming.—*DAVIS v. PARKER*, [1931] 2 K. B. 210; 100 L. J. K. B. 590; 95 J. P. 146; 47 T. L. R. 418; 29 L. G. R. 387; *sub nom.* *PARKER v. DAVIS*, 145 L. T. 188; 75 Sol. Jo. 312; 29 Cox, C. C. 297, D. C.

*Add. Annotation*:—*Refd.* *Ankers v. Bartlett*, [1936] 1 K. B. 147.

**286. Add. Annotation**:—*Appld.* *R. v. Berg, Britt, Carré & Lummies* (1927), 20 Cr. App. Rep. 38.

**288a. ——— Members of committee of members' club.**—*DANIELS v. PINKS*, No. 284a, *ante*.

**295. Add. Annotation**:—*Appld.* *Ankers v. Bartlett*, [1936] 1 K. B. 147.

resorting thereto, a common gaming house.—*R. v. ELASZ* (1926), 45 Can. Crim. Cas. 257; 20 Sask. L. R. 605; [1926] 2 W. W. R. 368.—*CAN.*

*e. iii.* ———.—*R. v. DONALD*, [1931] 44 B. C. R. 514.—*CAN.*

*sf. Under Gaming Act, 1908, s. 4.*—*WEATHERED v. FITZGIBBON*, [1925] N. Z. L. R. 331.—*N.Z.*

*sk. What evidence admissible.*—The question being whether a place was a common gaming house, the things which persons brought to the place & the words they uttered there in relation to those things were all parts of the *res gestæ* & admissible as such.—*LENTHALL v. MITCHELL*, [1933] S. A. S. R. 231.—*AUS.*

## PART II. SECT. 2, SUB-SECT. 2.

*h i.* ———.—*Acting as "banker" but not residing in common gaming house.*—*Held*: not to justify a conviction as keeper of the house.—*R. v. MARK* (1924), 43 Can. Crim. Cas. 368.—*CAN.*

*h ii.* ———.—*Under Gaming Act, 1908, s. 4.*—*WEATHERED v. FITZGIBBON*, [1925] N. Z. L. R. 331.—*N.Z.*

*h iii.* ———.—*Trading in sale & purchase of cotton—On payment of differences.*—*EMPEROR v. THAVARMAL RUPCHAND* (1928), 1 L. R. 53 Bom. 367.—*IND.*

*h iv.* ———.—*Acting as dealer.*—A person who acts as "dealer" in a game of chance but is not a player & not interested in any way in the profits made from the carrying on of the game is not "assisting in the care, government, or management" of the place in which the game is played, within sect. 229 (2) of Criminal Code, & therefore, cannot be deemed a "keeper" thereof.—*R. v. PANG DAT & GIN BO (Man.)*, [1929] 3 W. W. R. 513; [1930] 1 D. L. R. 625; 38 Man. L. R. 365; 52 Can. Crim. Cas. 305.—*CAN.*

*h v.* ———.—*Assisting caterer other than club controlling premises.*—A person who has nothing whatever to do with the care, management, or government of a common gaming house can be liable as the keeper thereof only if his acts were in aid of the keeper. In the present case what the accused did was held to have been, not in aid of the club which controlled

& managed the premises, but in aid of a caterer other than the club, although both the co. & the club were managed by one & the same person.—*R. v. NELSON*, [1929] 2 D. L. R. 317; 1 W. W. R. 665; 51 Can. Crim. Cas. 213; 24 Alta. L. R. 59.—*CAN.*

*h vi.* ———.—*Persons in minor positions.*—Parliament did not intend that clerks & others in minor positions not charged or appearing to be charged with the care, government or management of a disorderly house should be deemed to be keepers.—*R. v. SELOCK*, [1931] 2 W. W. R. 745; 50 Can. C. C. 243; 25 Alta. L. R. 504.—*CAN.*

*n i.* ———.—The mere fact that the room in which a game of chance is played is in the same premises as & communicating with a shop under the same management as the room does not justify the finding that there was in the game an element of "gain" within the meaning of sect. 226 (a) of Criminal Code, if there is no evidence that any purchase was made from the shop by any of the players at any time.—*R. v. PANG DAT & GIN BO (Man.)*, [1929] 3 W. W. R. 513; 52 Can. Crim. Cas. 305.—*CAN.*

*n ii.* ———.—The fact that the accused, who was charged with keeping a common gaming house, sold beer, on the occasion in question, to the players on his premises held not sufficient in itself to justify the inference that "gain," within the meaning of sect. 226 of the Code, resulted to him, where there was no evidence that he was carrying on the business of selling beer.—*R. v. LEMAIRE*, [1929] 2 D. L. R. 795; 1 W. W. R. 321; 51 Can. Crim. Cas. 137; 38 Man. L. R. 42.—*CAN.*

*n iii.* ———.—*R. v. RADINSKY (B. C.)*, [1929] 3 W. W. R. 212; 52 Can. Crim. Cas. 131.—*CAN.*

*n iv.* ———.—*R. v. FORDER* (1930), 54 Can. C. C. 388.—*CAN.*

*r i.* ———.—*R. v. CHARLIE SAM*, [1929] 1 D. L. R. 166; 50 Can. Crim. Cas. 364; [1928] 3 W. W. R. 424.—*CAN.*

*r ii.* ———.—Before the presumption arising under sect. 985 of Criminal Code from the finding of cards, dice, etc., can be held to have been established all the conditions of its existence which are provided for in the section must be strictly proved;

therefore where the search warrant under which the place in which they were found is alleged to have been entered is not properly proved the presumption does not exist.—*R. v. LEMAIRE*, [1929] 2 D. L. R. 795; 1 W. W. R. 321; 51 Can. Crim. Cas. 137; 38 Man. L. R. 42.—*CAN.*

*r iii.* ———.—On an appeal from a conviction for unlawfully keeping a common betting house:—*Held*: certain perforated pasteboard cards marked in duplicate, & similar to those used for checking hats at a hotel, constituted, under all the circumstances & in the absence of any explanation of their presence, a "means or contrivance for betting" within sect. 986 (2) of the Criminal Code, & therefore, the finding of them on the accused premises raised a *prima facie* case against him under said sub-sect. In order to raise a *prima facie* case under sect. 986 (2) it is not necessary that the search on which the means or contrivances for betting were found should have been made under a valid search warrant.—*R. v. MILLER*, [1931] 1 W. W. R. 537; 3 D. L. R. 213; *affd.*, [1931] S. C. R. 483; 3 D. L. R. 795; 56 Can. C. C. 272.—*CAN.*

*e i.* ———.—*Keeping bank—Proof of—When necessary.*—Accused was charged originally with keeping a disorderly house, to wit, a common gaming house, contrary to sect. 229 of Criminal Code. On the trial before the magistrate the charge was amended to read that the accused kept a disorderly house, to wit, a common gaming house, "as defined in sub-sect. (b), part (1), of sect. 226 of the Criminal Code," contrary to sect. 229 of the Criminal Code. The accused was convicted. On appeal:—*Held*: because of the amendment, the accused was not charged merely with keeping a common gaming house but with keeping a place used for playing therein at any game of chance or any mixed game of chance & skill in which a bank was kept by one or more of the players exclusively of the others, & therefore, the Crown was bound to prove that in the place in question a bank was so kept, & as proof of this was not to be found within the appeal book, the conviction must be set aside.—*R. v. ROBERTS*, [1936] 2 W. W. R. 387; 4 D. L. R. 492; 66 Can. C. C. 298; 6 F. L. J. (Can.) 131.—*CAN.*

**295a. Gaming in refreshment house—What amounts to—Metropolitan Police Act, 1839 (c. 47), s. 44.**—In Metropolitan Police Act, 1839 (c. 47), s. 44, the word "gaming" includes the playing of any game played for money or money's worth, whether the game be lawful or unlawful & whether it involves or does not involve skill.—**ANKERS v. BART-**

**LETT**, [1936] 1 K. B. 147; 105 L. J. K. B. 161; 154 L. T. 260; 100 J. P. 65; 79 Sol. Jo. 988; 34 L. G. R. 31; 30 Cox, C. C. 338, D. O.

**304. Add. Annotation:—Reid. Allen v. Whitehead** (1929), 45 T. L. R. 655.

**305. Add. Annotation:—Reid. Allen v. Whitehead** (1929), 45 T. L. R. 655.

## Part III.—Betting and Betting Houses.

**310. After this case add "Agreement to collect betting debts—Contrary to public policy."—See ACTION, No. 599a, ante."**

**Racecourse betting.]—See Racecourse Betting Act, 1928 (c. 41).**

### PART II. SECT. 2, SUB-SECT. 3.

**301 i. What amounts to suffering gaming—Actual knowledge not necessary—But some proof necessary.]—**Where betting lasting for an hour & a half with a considerable number of men went on in a room in a hotel near the bar where the licensee was serving:—**Held:** on the evidence, notwithstanding the denial of the licensee that he did not know betting was taking place, he was properly convicted of an offence under Licensing Act, 1917, s. 139.—**NORVAL v. NOBLETT**, [1928] S. A. A. R. 38.—**AUS.**

**g i. —.]—**Conviction for allowing gambling on premises for which there was a retail liquor licence quashed, the holder of the licence not having knowledge of the gambling.—**R. v. WHELAN** (1908), 9 W. L. R. 424.—**CAN.**

### PART II. SECT. 2, SUB-SECT. 4.

**q i. —.]—**Whether charge to be laid as soon as possible.—The limitation of time ("as soon as possible") in sect. 641 (2) of Criminal Code does not apply to a charge under sect. 229 of the Code, of keeping a common gaming house.—**R. v. LEE HAI**, [1935] 2 W. W. R. 177; 3 D. L. R. 448; 64 Can. C. C. 49; 43 Man. L. R. 134.—**CAN.**

**r i. —.]—**A search warrant for the seizure of money & instruments of gaming may be executed at night.—**Re R. v. HALLINAN**, [1937] 4 D. L. R. 214; 68 Can. C. C. 226.—**CAN.**

**s i. —.]—**Effect of inaccuracy.—**Held:** as the inaccuracy was not so material or substantial as to mislead a stranger if one were to go to the locality & attempt to find the place intended to be raided with the help of the warrant, it did not amount to more than a misdescription & was not of a nature to vitiate the warrant.—**EMPEROR v. THAVARMAL RUPCHAND** (1928), 1 L. R. 53 Bom. 367.—**IND.**

**a i. —.]—**Conviction for keeping gaming house quashed.—When an order forfeiting money was based, as the wording of the order in question herein shows it to have been, on a conviction for keeping a common gaming house on the premises where the money was seized, & that conviction has been quashed, the foundation for the order of forfeiture falls & it too should be quashed.—**R. v. CHIN JUNG & TONG NIN**, [1938] 1 W. W. R. 414; 1 D. L. R. 784.—**CAN.**

**a ii. —.]—**Invalid—Effect.—A conviction for keeping a common gaming house may be sustained, even though the search warrant, under which entry was made, was defective.—**R. v. PRIDGON** (1926), 45 Can. Crim. Cas. 253; 37 B. C. R. 309; [1926] 3 W. W. R. 765.—**CAN.**

**p (p. 432) i. —.]—**A charge under sect. 229 of Criminal Code, R. S. C., 1927, that the accused

between certain dates, at a certain place, did unlawfully keep a disorderly house, to wit, a common gaming house, is well laid. It is not necessary that the particular kind of gaming house alleged to have been conducted should be specified as defined by sect. 226 (a) (b) of the Code.—**R. v. WONG GAI**, [1936] 2 W. W. R. 615; 4 D. L. R. 453; 50 B. C. R. 475; 66 Can. C. C. 265.—**CAN.**

**p (p. 432) ii. —.]—**Two separate & distinct offences are defined by sect. 226 of Criminal Code, R. S. C., 1927, which defines a common gaming house. A conviction for that the accused at a certain time & place did unlawfully keep a disorderly house, to wit "a common gaming house," is, therefore, bad, either as disclosing no offence or as leaving it uncertain as for which one of several separate & distinct offences he was convicted.—**R. v. SOO KIR SANG**, [1936] 1 W. W. R. 382; 2 D. L. R. 608; 65 Can. C. C. 220; 50 B. C. R. 386.—**CAN.**

**p (p. 432) iii. —.]—****R. v. LUM PIE**, [1938] 2 W. W. R. 463.—**CAN.**

**sm. —.]—**On summary conviction for keeping a common gaming house, a magistrate has power to order the destruction of a slot machine used.—**R. v. MILES** (1936), 65 Can. C. C. 88.—**CAN.**

**sp. —.]—**Whether appeal lies.—**R. v. MILES** (1935), 5 F. L. J. (Can.) 212.—**CAN.**

**sg. Witness—Required to be examined—Right to certificate of freedom.]—****R. v. SCOTT, Ex p. SCOTT**, [1927] S. A. S. R. 492.—**AUS.**

**sk. Confiscation of gaming machines—Validity.]—**Accused who had pleaded guilty to a charge of keeping a common gaming house & had been fined appealed from the order confiscating the gambling machines:—**Held:** since in certain cases gaming instruments may be seized without a search warrant, & there was nothing before the Ct. of Appeal by way of affidavit or otherwise as to the manner in which the search warrant was executed or as to whether one was necessary, it must be assumed that the process was regular in all respects.—**R. v. GREEN**, [1935] 1 W. W. R. 526; 43 Man. L. R. 105.—**CAN.**

### PART III. SECT. 1.

**ti. —.]—**Cards on premises—No facilities for innocent use.—**MILLER v. R.**, [1931] 3 D. L. R. 795; S. C. R. 483; 56 Can. C. C. 272.—**CAN.**

**310 i. Betting or betting business—Not illegal ipso facto.]—**Neither in India nor in England has the legislature gone so far as to enact in express terms that betting transactions are illegal, but it is clear that in both countries the legislature regards it as undesirable in the public interest that any assist-

ance should be afforded by cts. of law to enforce obligations which have been created in connection with betting or wagering transactions.—**MITCHELL v. TENNENT** (1925), 1 L. R. 52 Cal. 677.—**IND.**

**310 ii. —.]—**It is not a crime to make a bet with a bookmaker. Sect. 235 of the Criminal Code applies only to the bookmaker & his aids & assistants in the forbidden acts.—**WINDSOR HOTEL CO. v. SILVERMAN**, [1934] 3 W. W. R. 249; [1935] 1 D. L. R. 616; 62 C. C. 247.—**CAN.**

**sg. Provision of "facilities" for carrying on bookmaker's business.]—**A greyhound racing co. received from each of certain bookmakers not only the maximum authorised charge for a bookmaker's admission but also a payment of 7s. 6d. In consideration of this payment the co. supplied to the bookmaker such material as he required for carrying on his business on the track, including betting lists, easels, boards & stools, & provided him with special lighting, the services of an attendant & a hut for storing his gear. It was not made a condition of a bookmaker's being allowed to carry on his business that he should use the materials, etc., provided, or that he should pay the 7s. 6d. or any part thereof:—**Held:** the materials supplied & the services rendered by the co. to the bookmakers in question were "facilities" for the carrying on of their business, within Betting & Lotteries Act, 1934, s. 13 (2), & the co. was properly convicted under that section.—**IRVINE GREYHOUND RACING CO. v. MACMILLAN**, [1936] S. C. (J.) 96.—**SCOT.**

### PART III. SECT. 2, SUB-SECT. 1.

**b i. —.]—**Verandah.—**Held:** in the definition of "street" in Gaming & Betting Act, 1912, s. 5, the word "land" means all enclosed or unenclosed land, other than land upon which or above which a house is built or stands, & the word "house" must be taken to include any adjoining structure such as a verandah roof, which is attached to the fabric of the building in such a way as to form part thereof.—**WOODS v. TONKIN** (1933), 50 N. S. W. W. N. 5.—**AUS.**

**b ii. —.]—**Appl't. was charged with being in a public place for the purpose of betting except by a totalisator. The evidence showed that appl't. was on a verandah in front of his hotel & made several bets with one man. There was no evidence of bets with any one else or that appl't. carried on business as a bookmaker. Appl't. stated that his purpose for sitting out on the verandah was to be in a cool place:—**Held:** the evidence did not raise a preponderance of probability, nor was it a reasonable inference, that appl't. was on the verandah for the purpose of betting.—**LANE v. GILES**, [1934] S. A. S. R. 311.—**AUS.**



318. *Add. Annotation*:—*Apld. Richards v. Price*, [1931] 2 K. B. 204.

319a. “*Loitering for purpose of bookmaking*”—*Distribution in street of entry forms of football pool.*—*Resps.*, on behalf of N., distributed forms in the street containing an invitation to participate in football pools, together with an entry form & particulars of the terms of participation therein. The recipients who accepted the invitation sent to N. forecasts of the results of football matches specified in the forms, together with a statement of the amount they were prepared to stake thereon. This was not payable until after the matches had been played. The aggregate of these amounts was divided among those sending correct forecasts, less a commission retained by N.:—*Held*: *resps.* were guilty of loitering on behalf of N. for the purpose of bookmaking—*i.e.* the negotiating by N. of bets made between the participants in the pool *inter se.*—*RICHARDS v. PRICE*, [1931] 2 K. B. 204; 100 L. J. K. B. 526; 145 L. T. 189; 95 J. P. 151; 47 T. L. R. 411; 75 Sol. Jo. 345; 29 L. G. R. 396; 29 Cox, C. C. 301, D. C.

321a. —  *Rolled down slide into squares.*—*EVANS v. EXWORTH* (1936), 81 Sol. Jo. 59, D. C.

322. *Add. Annotation*:—*N.F. Everett v. Shand* (1931), 145 L. T. 216.

b iii. — *Hotel area.*—On a charge of street betting, under sect. 104 of Police Offences Act, 1928, the place in which the offence was alleged to have been committed was a tiled area in front of an hotel & abutting on the public footpath. The area, which was open, uncovered, & raised three or four inches above the level of the footpath, formed part of the allotment on which the hotel was built:—*Held*: the area was not a “street.”—*WEAVING v. MAHNKEN*, [1933] V. L. R. 90; *Argus* L. R. 153.—*AUS.*

b iv. — *Hotel yard.*—The enclosed yard of an hotel which forms no part of the land upon which the actual hotel building itself stands, is a street within Gaming & Betting Act, 1912.—*Re O'DONNELL, Ex p. COURTNEY* (1933), 50 N. S. W. N. 217.—*AUS.*

314. *1. Enclosed grounds — Cricket ground.*—A grass field occupied by a cricket club, was bounded on all four sides by a wire fence in good condition. The fence along its western side ran at the foot of a railway embankment, which was admittedly not a public place within Street Betting Act, 1906, s. 1 (4). Between the northern end of this fence & the fence bounding the northern side of the ground was a gateway, 3 feet wide, giving access to the ground. The gateposts were in position, but the gate had been missing for some time. The portion of the field adjoining the gateway was not used for cricket, & the public had unrestricted access to that portion & gathered there in numbers every day. In a prosecution for loitering for the purpose of betting:—*Held*: the cricket ground was not a “public place” within sect. 1 (4) in respect that it could not be described as “unenclosed.”—*Foggo v. HILL*, [1932] S. C. (J.) 8.—*SCOT.*

315. *Pathway—Sole access to three houses.*—A pathway leading from public land to three separate dwelling-houses, to which it provided the only means of access, was entered from the lane through a gate which was never locked:—*Held*: the pathway was a “public passage,” & a “street”

within Street Betting Act, 1906 (c. 43), s. 1.—*MACKIE v. CROMBIE*, [1926] S. C. (J.) 29.—*SCOT.*

### PART III. SECT. 2, SUB-SECT. 3.

f i. — *Investment received elsewhere than at totalisator itself.*—During the progress of a trotting club's meeting, totalisator tickets having been sold at the members' & stewards' stands from boxes not situated in the totalisator building, *applt.*, a servant of the club, was convicted of the offence of permitting an investment on the totalisator to be received elsewhere than at the totalisator itself:—*Held*: an investment received in an entirely separate building with no connection & no attempt at synchronising with the main totalisator is a payment made elsewhere than at the totalisator itself, & *applt.* was rightly convicted under Gaming Act, 1908, s. 30 (3).—*GOOGIN v. YOUNG*, [1928] N. Z. L. R. 753.—*N.Z.*

p i. — *1.—A pak-a-pu ticket is an instrument of gaming within Gaming & Betting Act, 1912, s. 37.*—*JENNINGS v. YET CHING* (1931), 48 N. S. W. N. 248.—*AUS.*

r 1. *Paraphernalia for conducting betting house.*—*R. v. BRENNAN & NEWLANDS* (1928), 49 Can. Crim. Cas. 543.—*CAN.*

### PART III. SECT. 4, SUB-SECT. 1.—A.

m (p. 438) i. — *1.—A person standing stationary in a public street for a considerable period is not thereby guilty of the offence of loitering under Lottery & Gaming Act, 1917, s. 40, although he has been requested by a police constable to cease from loitering.*—*MATTIN v. CURRIE*, [1927] S. A. S. R. 459.—*AUS.*

m (p. 438) ii. — *“Frequenting.”*—In a trial on a charge of having, *inter alia*, frequented certain streets for the purpose of receiving bets, contrary to Street Betting Act, 1906, s. 1, it was established that, on five occasions on one day & on two occasions on another, accused had driven along the streets in question in a motor car; that, at certain street corners he had

betting by means of the contrivance known as a totalisator on a dog-race do not act in contravention of Vagrant Act (Amendment) Act, 1873 (c. 38), s. 3, inasmuch as a dog-race is not in itself a “game or pretended game of chance” within the sect.; & consequently, where a dog-racing track & a totalisator thereat belonged to a co., the contrivance being worked by its clerks, that charges against the secretary & managing director of the co. & some of the clerks, of aiding & assisting persons betting at the track by means of the contrivance on dog-races in contravention of the section, were not maintainable & should be dismissed.—*EVERETT v. SHAND*, [1931] 2 K. B. 522; 100 L. J. K. B. 612; 145 L. T. 216; 95 J. P. 147; 47 T. L. R. 415; 75 Sol. Jo. 393; 29 L. G. R. 390; 29 Cox, C. C. 309.

323. *Add. Annotation*:—*Consd. Everett v. Shand* (1931), 145 L. T. 216.

325a. — *—*.—*EVERETT v. SHAND*, No. 322a, *ante.*

326. *Add. Annotation*:—*Refd. Everton v. Walker* (1927), 137 L. T. 594.

330. *Add. Annotation*:—*Consd. Everton v. Walker* (1927), 137 L. T. 594.

339. *Add. Annotation*:—*As to* (4) *Refd. Shuttleworth v. Leeds Greyhound Asscn.*, [1933] 1 K. B. 400.

slowed down, & a man standing at each corner had thrown a packet into the car; that, on the last occasion, accused had stopped in one of the streets & taken up two men as passengers; that the police had thereafter followed accused's car, & after overtaking it, had apprehended accused & his companions; & that, on searching the men, they had discovered envelopes containing betting slips & other similar papers on their persons:—*Held*: accused was guilty of “frequenting” the streets in question for the purpose of receiving bets, within sect. 1 of 1906 Act.—*CASSIDY v. LANGMUIR*, [1935] S. C. (J.) 65.—*SCOT.*

m (p. 438) iii. — *1.—A person who is sitting in a stationary motor car in a street may be said to loiter within Lottery & Gaming Act, 1917, s. 40. The natural sense of the word “loiter” in this section is that of staying in the street or place without any sufficient & lawful reason for being there.*—*JOHNS v. BERRY & DALTON*, [1934] S. A. S. R. 111.—*AUS.*

k (p. 439) i. *S. P. MUHAMMAD KHAN v. R.* (1927), 1 L. R. 9 Lah. 255.—*IND.*

t (p. 440) i. — *1.—Where certain persons rented an enclosure, part of a larger enclosure abutting on a public road, & invited others to come there & make bets:—Held*: any person found betting there was rightly convicted of gambling in a public place.—*R. v. TULASHI DAS* (1924), 1 L. R. 46 All. 787.—*IND.*

sl. *Shed—Used by workmen for meals.*—At the trial of a workman, who was charged with using a place for the purpose of betting it was proved that on five dates labelled, between the hours of 12 noon & 1 p.m., he had engaged in ready-money betting with fellow-workmen in a shed in the employers' premises. The workmen were allowed to use the shed for the purpose of taking their meals, but the accused's betting transactions were carried on without the permission or knowledge of his employers:—*Held*: the shed was a “place” used by the accused for the purpose of betting.—*YOUNG v. DARRAH*, [1929] S. C. (J.) 17.—*SCOT.*

**358. Add. Annotations:—***As to (2) Consd. Samuel v. Adelaide Club, Ltd.*, [1934] 2 K. B. 69. *As to (4) Expld. & Distd. Shuttleworth v. Leeds Greyhound Assocn.*, [1933] 1 K. B. 400. *Refd. Clark v. Westaway*, [1927] 2 K. B. 597. *As to (5) Refd. Clark v. Westaway*, [1927] 2 K. B. 597. *Generally, Refd. Schneiders v. Abrahams*, [1925] 1 K. B. 301.

**358a. Totalisator—Greyhound racing track.]—**The words “such owner, occupier, keeper, or person as aforesaid” in the latter part of Betting Act, 1853 (c. 119), s. 1, are not to be read as limited to the class of persons who come within the ambit of the earlier part of the sect.—namely, persons who themselves are parties to bets or to transactions of the nature of bets. A person, therefore, such as the proprietor of a totalisator on a greyhound racecourse, who merely provides facilities for other persons to bet, & is not himself a party to any bet, may be guilty of an offence under the latter part of the sect.

*Resp. Assocn.* were the occupiers of a totalisator within the inclosure of their greyhound racecourse. The totalisator was a one-storey wooden building equipped with windows for paying & receiving money, & an indicator forming a separate part, both within the racecourse. Access to both, dependent on access being obtained by payment to the racecourse, was by payment & receipt of a ticket. In the totalisator were windows at which 10s. tickets & 2s. tickets were sold, & three or four paying-out windows. Tickets were bought at the respective windows with a number indicating the number on the race-card of a dog running in the race, the purchaser of the ticket stating the number of the dog selected before purchasing his ticket. After the race the stakes received, after certain deductions,

*so. Part of premises.]—*Conviction for keeping a disorderly house upheld on evidence that the use of part of the premises for betting was not a single or casual occasion.—*R. v. EDWARDS* (1936), 66 Can. C. C. 117.—CAN.

#### PART III. SECT. 4, SUB-SECT. 1.—B.

**g i. —.**—[Deft. assocn. was incorporated as a co. by letters patent, which were amended by adding certain objects & purposes, viz., to encourage horse-racing, to construct, maintain, & operate race-courses, & other like objects & purposes. The co. established a race-course & held race-meetings, at which betting on the races was permitted, & was convicted under Criminal Code, ss. 228, 235, of the offences of keeping a common betting house, & recording & registering bets, etc.:—*Held*: the co. was not protected by sect. 235 (2).—*R. v. LONG BRANCH RACING ASSOCN.*, [1925] 2 D. L. R. 46; 43 Can. Crim. Cas. 283; 56 O. L. R. 303.—CAN.

#### PART III. SECT. 4, SUB-SECT. 2.—A.

**o i. — Sale of totalisator vouchers.]—**A co. occupying a greyhound racecourse on which a totalisator was erected, & the manager of the totalisator, were charged with contravening Betting Act, 1853, s. 1. It was proved that persons betting through the totalisator purchased vouchers costing 2s. each, which were marked with the name of the dog on which the purchaser desired to bet. These vouchers represented the stakes, & after the race the whole money staked was divided among the backers of the

were divided in certain proportions among the persons who held tickets bearing the numbers of the winning & second & third dogs:—*Held*: *resp. Assocn.* had been guilty of an offence under Betting Act, 1853 (c. 119), s. 1.—*SHUTTLEWORTH v. LEEDS GREYHOUND ASSOCN., LTD.*, [1933] 1 K. B. 400; 102 L. J. K. B. 264; 148 L. T. 424; 97 J. P. 37; 49 T. L. R. 143; 77 Sol. Jo. 48; 31 L. G. R. 100; 29 Cox, C. C. 583, D. C.

*Annotations:—Consd. Streatham Cinema, Ltd. v. John McLauchlan, Ltd.*, [1933] 2 K. B. 331. *Apld. Samuel v. Adelaide Club, Ltd.*, [1934] 2 K. B. 69.

**362. Add. Annotation:—***Consd. Roden v. Brett*, [1936] 2 All E. R. 136.

**362a. Not person on premises for innocent purpose.]—**Police officers raided a public-house where betting was being carried on. Among other persons, they arrested a builder who was on the premises solely for the purpose of doing repair work, & charged him under Betting Act, 1853 (c. 119), with unlawfully resorting to a house for the purpose of betting on horse-racing. Later this charge was dropped & replaced by a charge under Unlawful Games Act, 1541 (c. 9), s. 9, of unlawfully resorting to a common gaming-house. Justices, although they found that deft. was on the premises for a wholly innocent purpose & knew nothing about the betting, convicted him & bound him over not to resort to gaming houses, ordering him to pay 4s. costs:—*Held*: there could be no conviction or binding over of deft. after a finding that he was on the premises for a proper & innocent purpose. The conviction must, therefore, be quashed.—*RODEN v. BRETT*, [1936] 2 All E. R. 136; 155 L. T. 28; 100 J. P. 296; 52 T. L. R. 471; 80 Sol. Jo. 596; 34 L. G. R. 286; 30 Cox, C. C. 425, D. C.

quashed.—*GIBSON v. LAIRD*, [1933] S. C. (J.) 6.—SCOT.

**o iii. —.**—[A co. occupying a greyhound racecourse on which a totalisator was erected were charged with a contravention of Betting Act, 1853, s. 1. It was admitted that members of the public betting through the totalisator purchased vouchers costing 1s. each, which were marked with the number of the dog on which the purchaser desired to bet. The money paid for these vouchers represented the stakes, & after the race the whole money staked was divided among the backers of the winning dog, under deduction of 10 per cent., which was retained by the co.

Persons concerned in the management of premises in which totalisators were erected were charged with a contravention of sect. 15 of Glasgow Police (Further Powers) Act, 1892, which imposes a penalty on the owner or manager of a gaming or betting house. It was proved that the public were admitted to the premises which were designated as a club, on payment of a nominal membership fee. Betting on the result of horse races & dog races run elsewhere was carried on through the totalisators in the same way as in the case of the co. referred to above:—*Held*: the accused in each case were guilty of a contravention of the sections.—*STRATHERN v. ALBION GREYHOUNDS (GLASGOW), LTD.*; *STRATHERN v. RUSSELL*, [1933] S. C. (J.) 91.—SCOT.

**o iv. — Keeping means.]—**Appeal from a conviction for common betting house at a

winning dog, under deduction of 10 per cent. to cover expenses:—*Held*: the purchasers of vouchers entered into the betting transactions with each other, & not with the co. or the manager; & the fact that a charge was made for the use of the totalisator & for the service of operating it did not involve the co. or the manager in a contravention of the sects. libelled.—*STRATHERN v. SCOTTISH GREYHOUND RACING CO.*, [1930] S. C. (J.) 24.—SCOT.

**o ii. —.**—[The tenant of certain premises in which a totalisator was installed, & his assistants, were charged with a contravention of sect. 407 of Burgh Police (Scotland) Act, 1892. It was proved that members of the public resorted to the premises in large numbers for the purpose of betting through the totalisator on the results of dog races. Those betting purchased vouchers costing 1s. each, which were marked with the number of the dog selected for backing. The money thus paid represented the stakes, & after each race, the whole money staked was divided among the backers of the winning dog, under deduction of 10 per cent., which was retained by the tenant of the premises for himself & his assistants:—*Held*: sect. 407 of Burgh Police Act, applied only to the same class of premises as that to which Betting Act, 1853 (c. 119), s. 1, applied, namely, premises where the betting carried on took place between the management & persons resorting thereto, & as the premises were not of this description, the conviction fell to be



395. *Add. Annotation*:—*Reid. Samuel v. Adelaide Club, Ltd.*, [1934] 2 K. B. 69.

399. *Add. Annotation*:—*Consd. Samuel v. Adelaide Club, Ltd.*, [1934] 2 K. B. 69.

399a. *Question for jury*.—*R. v. BRENNAN*, No. 278b, *ante*.

399b. — *Social club communicating by telephone with bookmaker's office*.—Pltf. let premises to defts. on condition that they should not be used for any illegal purpose. Defts. permitted a social club to occupy the premises for carrying out its objects as such. That club made an arrangement with a bookmaker to act for its members & open an account with them. Telephones were installed connecting the club premises with the bookmaker's office, & the members of the club thereby communicated their proposed bets to the bookmaker for his acceptance. The bookmaker supplied to the club premises information as to races which was published there. A commission was paid by the bookmaker to the club on all bets made with its members through him. Pltf. brought an action against defts. for breach of the contract of letting in permitting the premises to be used for a purpose which was illegal under Betting Act, 1853 (c. 119), & claiming a declaration to that effect, an injunction, & damages:—*Held*: defts. were permitting the premises to be "used" for the purpose of a person (the bookmaker) "procured" by the occupier (the club) betting with persons resorting thereto within & contrary to sect. 1 of the Act, & pltf. was entitled to the relief which he claimed.—*SAMUEL v. ADELAIDE CLUB, LTD.*, [1934] 2 K. B. 69; 103 L. J. K. B. 561; 151 L. T. 116; 98 J. P. 257; 50 T. L. R. 341; 78 Sol. Jo. 318; 32 L. G. R. 129.

hotel. Accused, who was a roomer at the hotel, was found in the rotunda looking at a copy of "The Morning Digest," a turf publication, which was spread out on a desk, & writing on a small pad of paper. One or two men were with him, also looking at the publication. A copy of another turf publication was also on the desk, but behind a glass case. Certain letters & figures on the pad were written by the accused in the sight of a constable, unnoticed by the accused. The sheet contained 15 other entries of the same class & in the same handwriting. Figures in pencil were written after the name of each of the horses listed in the publications, & a witness, who was a bookmaker, testified that the figures were such as would be put there by one intending to take bets. He also gave the opinion that the entries on the pad, except the last two items, showed bets on horses. The last item was that which the constable saw the accused write. With respect to those two items the witness said that they might be entries of a bet but that if he had been making the entries he would have made them in another way:—*Held*: the evidence was not sufficient to sustain the conviction.—*R. v. MCCANN*, [1936] 3 W. W. R. 497; 4 D. L. R. 788; 67 Can. O. C. 121; 6 F. L. J. (Can.) 164.—*CAN.*

363 l. *What persons liable to penalties*—*Persons "keeping"*—*Servant in sole charge*.—Any person, whether servant or agent, or on his own account, who has for the time being the exclusive charge of premises, & who uses those premises for the purpose of betting, is guilty of keeping or using the premises as a common gaming house under Gaming Act, 1908, s. 4, even though

he is not the owner, & the owner is ignorant of the use to which the premises were put, & though the premises so used are only part of the premises of the owner.—*DAVIS v. NUTTALL*, [1924] N. Z. L. R. 65.—*N.Z.*

363 II. — *Licensee of hotel—Permitting others to use premises for betting purposes*.—*DEELEY v. DICK*, [1928] V. L. R. 121, [1928] A. L. R. 62.—*AUS.*

#### PART III. SECT. 4, SUB-SECT. 2.—C.

■ i. — *Person stationed to signal approach of police*.—One stationed at the entrance to a common betting house for the purpose of signalling at the approach of police is guilty of keeping a disorderly house.—*R. v. CUNNINGHAM*, [1937] 3 D. L. R. 448; 68 Can. C. O. 176.—*CAN.*

■ ii. — *Person visiting pool-room daily*.—One who visits a pool-room daily for the purpose of obtaining bets may be convicted of keeping a common betting house, although neither owner nor tenant.—*R. v. MARIN*, [1937] 2 D. L. R. 782; O. R. 507; 68 Can. C. O. 245.—*CAN.*

#### PART III. SECT. 4, SUB-SECT. 4.

sd. *Receipt from agent*.—No bets were made at accused's office, but he engaged & paid bookmakers to make bets on the streets & elsewhere. He supplied these bookmakers with betting slips & football coupons, from which, when returned to his office, he made up an account of the gains & losses of each bookmaker. He received at his office daily from each bookmaker any balance of gains on the bets made on the preceding day, & he transmitted to the bookmakers any sum required to make

401. *Add. Annotation*:—*Distd. Shuttleworth v. Leeds Greyhound Assocn.*, [1933] 1 K. B. 400.

401a. *Holding whist drive*.—Whist drives, where an entrance fee is charged & prizes offered, are illegal under Betting Act, 1853 (c. 119), s. 1.—*BENNETT v. EWENS*, [1928] 2 K. B. 510; 97 L. J. K. B. 801; 139 L. T. 335; 92 J. P. 120; 44 T. L. R. 545; 72 Sol. Jo. 354; 28 Cox, C. C. 522; 26 L. G. R. 396, D. C.

406. *Add. Annotation*:—*As to (2) Consd. Joel v. Barclay*, [1937] 1 All E. R. 309.

408a. *Receipt of whole stake—Whether "deposit."*—The charge against applt. was that being the occupier of a place used for a betting game he unlawfully did receive money as a deposit on certain bets, contrary to the Betting Act, 1853 (c. 119), s. 4. The date in the information was "between May 30, 1936, & June 1, 1936." Persons taking part in the game paid 1d. It was found as a fact that on May 30, 1936, pennies were laid on the table by the players & taken by applt. or his assistants before the game was decided. On May 31 & June 1, 1936, the pennies paid by the players were paid after the game was decided. Applt. contended (i) that the information was bad for duplicity, & (ii) that what was paid by the players could not properly be called a deposit on any bet:—*Held*: (1) the information charged only one offence, & the fact that three days were comprised in the period named in the information did not make it bad; (2) although the players paid the whole stake payable in respect of the game this was none the less a "deposit" within Betting Act, 1853 (c. 119), s. 4.—*JOEL v. BARCLAY*, [1937] 1 All E. R. 309, D. C.

good a deficiency on the day's transactions:—*Held*: accused had contravened the section libelled, in respect that he used the office for the receipt of money accruing from ready-money bets, although the money was paid over else where by the persons betting.—*REID v. HILL*, [1931] S. C. (J.) 19.—*SCOT.*

#### PART III. SECT. 4, SUB-SECT. 5.

k i. — *F. caused to be distributed through the post to householders some thousands of circulars announcing a Rugby football competition & inviting entries, accompanied by 1s., the entrants to pick the winners of thirteen local football matches to be played on a named Saturday. The prize-money offered was £20, to be paid to the competitor, or divided among competitors, who correctly picked all the winning teams in the list of matches; & if more than one correct solution were received, the prize-money was to be equally divided among the successful competitors. No one succeeded in correctly forecasting the result of all the matches; several were correct as to eleven of them. F. was prosecuted under sect. 63 (c) of Gaming Act, 1908, for causing to be sent to divers persons "circulars inviting such persons to make bets on the result of a certain sport"—viz. the said Rugby football matches. A Stipendiary Magistrate dismissed the information. On appeal from such determination:—*Held*: allowing the appeal, (1) the circular was an invitation to make a bet or wager; (2) the bet came within the words "such bet or wager" occurring in sect. 63 (c) of Gaming Act, 1908.—*MCLENNAN v. FRANCE*, [1938] N. Z. L. R. 391.—*N. Z.**

**415a.** —.—.]—Appls. were the responsible proprietors of a four-page weekly newspaper, which was sold at 6d. a copy, & which had in winter a weekly circulation of over 32,000 copies. The newspaper contained what was called a "Free Football Competition" with a coupon giving particulars of future football matches & a column for the competitors to fill in their forecast of the results, a prize of £150 being offered for a correct forecast of all the results & a prize of £100 for a correct forecast of nine results, but no money was to be sent with the coupons. Appls. were summoned for unlawfully publishing a coupon of a ready-money football betting business contrary to sect. 1 of the above Act. The justices found that the majority of the persons who bought the newspaper did so for the sake of the coupon, & that appls. had circulated coupons of a ready-money football betting business, & they convicted appls. :—*Held*: the case was typical of the mischief aimed at by the Act, & the justices' decision must be affirmed.—*SUTTLE v. CRESSWELL*, [1926] 1 K. B. 264; 95 L. J. K. B. 367; 134 L. T. 144; 90 J. P. 3; 42 T. L. R. 75; 23 L. G. R. 695; 28 Cox, C. C. 94, D. C.

*Annotations*:—*Appld.* *Turf Publishers v. Davies*, [1927] W. N. 190. *Expld.* *Leng (Sheffield Telegraph) v. Sillitoe*, [1929] 1 K. B. 366. *Consd.* *Baker v. Sillitoe* (1931), 47 T. L. R.

**415b.** —.—.]—*TURF PUBLISHERS, LTD. v. DAVIES*, [1927] W. N. 190, D. C.

*Annotation*:—*Appld.* *Leng (Sheffield Telegraph) v. Sillitoe*, [1929] 1 K. B. 366.

**415c.** —.—.]—Where a daily newspaper contained as one among its various features coupons in which the names of football teams were set out, & the public were invited to forecast the winners of matches in which the teams were shortly to be engaged, the person who most nearly got the correct results receiving a prize:—*Held*: the proprietors & publishers of the newspaper were guilty of an offence under sect. 1 of the above Act, although the evidence only showed that some, & not the majority, of the purchasers of the newspaper bought it, wholly or partly, for the sake of the coupon, & although no competitor was allowed to send in more than one coupon from one & the same issue of the newspaper.—*SIR W. C. LENG & CO. (SHEFFIELD TELEGRAPH), LTD. v. SILLITOE*, [1929] 1 K. B. 366; 98 L. J. K. B. 262; 140

L. T. 500; 93 J. P. 26; 45 T. L. R. 94; 72 Sol. Jo. 810; 28 Cox, C. C. 593, D. C.

**415d.** —.—.]—Resp. employed about 10,000 collectors in different parts of the United Kingdom for the purpose of conducting & carrying on football pool betting businesses. He issued printed instructions to every collector not to accept or collect money invested by clients until after the matches had been played, as it was illegal to accept it at the time the investment was made. One collector sometimes accepted money at the time of investment without resp.'s knowledge, but did not send the money to resp. until after the results of the matches were known. The words "credit only" were printed on every coupon in bold type. In consequence of the said collector's conduct, resp. was charged with publishing coupons of two ready money football betting businesses, contrary to the Ready Money Football Betting Act, 1920 (c. 52), s. 1:—*Held*: as resp. published coupons of a credit business & gave most careful instructions to his collectors not to take money at the time of investment, he was innocent of the offences with which he was charged.—*WILSON v. MURPHY*, [1937] 1 All E. R. 315; 53 T. L. R. 308; 81 Sol. Jo. 139, D. C.

**415e.** —.—.]—*Prizes of indeterminate amount.*—Appls. were the promoters of a scheme by which working men were invited to forecast the results of football matches & pay an entrance fee of one penny with each forecast. Prizes of an amount at the discretion of the promoters were awarded to the senders of the most correct forecasts:—*Held*: the fact that the amount of the prizes was indeterminate was immaterial, & appls. were rightly convicted of circulating coupons of a ready money football betting business, contrary to the Ready Money Football Betting Act, 1920 (c. 52).—*BAKER v. SILLITOE* (1931), 145 L. T. 635; 95 J. P. 182; 47 T. L. R. 632; 29 L. G. R. 521; 29 Cox, C. C. 356, D. C.

**416.** *Add. Annotations*:—*Consd.* *Joel v. Barclay*, [1937] 1 All E. R. 309.

**416a.** —.—.]—*JOEL v. BARCLAY*. No. 408a, ante.

**420.** *Add. Annotations*:—*Refd.* *Alexander v. Rayson*, [1930] 1 K. B. 169; *Berg v. Sadler & Moore*, [1937] 2 K. B. 158.

### PART III. SECT. 6.

**415 i.** "Printing or knowingly circulating coupons"—*Construction of Football Betting Act*, 1920 (c. 52), s. 1, 2.]—Commission agents issued a printed publication containing coupons for use in predicting results of football matches & offering money prizes. Apart from the coupons & matters connected therewith the paper contained very little reading matter, & the majority of purchasers bought it for the sake of the coupons. The commission agents were convicted of knowingly printing & circulating circulars or coupons of a ready-money football betting business:—*Held*: the paper was a circular or coupon of the business of appls., & conviction sustained.—*JAMESON v. SINCLAIR*, [1925] S. C. (J.) 1.—*SCOT*.

sn. "Ready-money football betting business"—*Newsagents settling with publishers monthly.*]—Commission agents issued a printed publication

containing coupons for use in predicting results of football matches & offering money prizes. It was issued to wholesale newsgagents, & distributed by them to retail newsgagents, who sold it to the public. The wholesale & retail newsgagents settled their accounts weekly; the wholesale newsgagent ran monthly accounts with the commission agents, who paid the prizewinners. The prize money was paid, although the monthly accounts had not been settled:—*Held*: there was evidence on which the magistrates might hold that appls.' business was a ready-money football betting business.—*JAMESON v. SINCLAIR*, [1925] S. C. (J.) 1.—*SCOT*.

### PART III. SECT. 7.

**q i.** —.—.]—An information for keeping a common betting house need not specify which of the special heads of the definition in sect. 227 were contravened.—*R. v. GRISB*, [1937] 1

D. L. R. 279; [1936] O. R. 604; 67 Can. C. C. 184.—*CAN*.

**b i.** —.—.]—*Lottery & Gaming Act Amendment Act*, 1921, s. 14.—*HOLMES v. ALLCHURCH*, [1926] S. A. S. R. 255.—*AUS*.

**b ii.** —.—.]—*LAMPARD v. WEST*, [1926] S. A. S. R. 293.—*AUS*.

**b iii.** —.—.]—*Similar transactions on other days—Admissible.*]—*PINCHBECK v. GLEESON*, [1926] S. A. S. R. 379.—*AUS*.

**c i.** —.—.]—*PATERSON v. MACPHERSON*, [1924] S. C. (J.) 38.—*SCOT*.

**c ii.** —.—.]—*Right to open closed envelopes.*—*Held*: the special warrant under Betting Act, 1853, s. 11, entitled the police to open postal or other communications found on the premises, although contained in closed envelopes, for the purpose of ascertaining whether they contained documents relating to betting.—*STRATHERN v. BENSON*, [1925] S. C. (J.) 40.—*SCOT*.

421. *Add. Annotation*:—*Consd. Roden v. Brett*, [1936] 2 All E. R. 136.
422. *Add. Annotation*:—*As to* (1) *Appld. R. v. Dixon, Southampton Justices, Ex p. Porteous* (1929), 142 L. T. 597.
423. *Add. Annotation*:—*As to* (1) *Refd. Pointon v. Cox* (1926), 136 L. T. 506.
- 424a. — Information under Licensing Consolidation Act, 1910 (c. 24)—*Form of conviction*.—An information was preferred against applt. under sect. 79 (1) (b) of the above Act for that he, being the holder of a justices' licence, suffered his premises to be used in con-

travention of Betting Act, 1853 (c. 119). Applt. was convicted, & appealed to quarter sessions, who allowed the appeal, on the ground that the conviction was bad on the face of it because it did not specify what contravention of Betting Act, 1853 (c. 119), was alleged:—*Held*: applt. was entitled to the precise information to which he would have been entitled if he had been prosecuted under Betting Act, 1853 (c. 119), & the decision of quarter sessions was right.—*POINTON v. COX* (1926), 136 L. T. 506; 91 J. P. 33; 43 T. L. R. 175; 25 L. G. R. 101; 28 Cox, C. C. 308, D. C.

## Part IV.—Lotteries.

*See, now, Betting & Lotteries Act, 1934* (c. 58), ss. 21–28.

- 433a. — *Provision for commission without control over sales*.—A co., having bought a quantity of note cases at a price of less than 1s. 6d. each, devised a scheme for selling them at a profit, & issued to the public a leaflet in accordance with the terms of which the scheme was conducted. The leaflet informed

a person desirous of participating in the scheme that on filling up & sending in an attached order form together with £1 there would be sent to him a note case & a supply of the leaflets, the order forms of which would be marked with a number allotted to him; that he should get other persons to give orders for note cases, using these forms; that he would be entitled to no benefit from

421 i. *Power of arrest*.—Police, having obtained a warrant to enter a stable (number 4), watched the stable for a period of twenty minutes, during which it was visited by about twenty men, six of whom carried what appeared to be betting slips in their hands. On the police approaching the stable, accused, who had been in the stable all the time, ran into a neighbouring stable (number 3), one of them carrying a bundle of betting lines. The police took them back into stable number 4, where they were searched & taken into custody, & the money found on them was seized. The accused were convicted & sentenced:—*Held*: the escape of the accused with their papers from the premises to which the warrant applied & the fact that they were thereafter taken back by the police to these premises did not render the subsequent arrest & seizure illegal under the warrant.—*MORRIS v. LANGMUIR*, [1929] S. C. (J.) 103.—SCOT.

h i. — *Joint complaint—One defendant calling no evidence, but wishing to give evidence for co-defendant—Mode of trial*.—*HOLMES v. ALLCHURCH*, [1926] S. A. S. R. 255.—AUS.

h ii. — *Whether summons or information condition precedent*.—Deft. was arrested on a warrant issued under Betting Act, 1853 (c. 119), s. 11. He was brought before the petty sessions et. on the charge, that he being the user of a certain house situate in the city of B., did use the same for the purpose of betting with persons resorting thereto. On the charge being proceeded with before the magistrates a preliminary objection was raised to the hearing of the charge on the ground (*inter alia*) that no summons had been served on deft. charging him with the offence alleged, a summons being, it was submitted, a condition precedent to any proceedings under the Act charging an offence. The magistrates dismissed the case without prejudice, but stated a case for the opinion of the K. B. D.:—*Held*: the magistrates were wrong in point of law in dismissing the charge on the ground that the information or summons was a condition precedent to the exercise of their jurisdiction & it should be remitted to them to proceed according

to law.—*R. (LOCKHART) v. McKENNA*, [1933] N. I. 21.—IR.

sp. *Appeal—Principles on which court acts*.—*R. v. SMITH* (1926), 37 B. C. R. 248.—CAN.

### PART IV. SECT. 1.

d i. — — — — — *POWER v. CANNIFF* (1859), 18 U. C. R. 403.—CAN.

d ii. — — — — — *LLOYD v. CLARK* (1862), 12 C. P. 320.—CAN.

h i. — — — — — The accused, who was the agent of a cigarette co. at Belfast, published a pamphlet advertising a prize of Rs.5 which could be automatically obtained by purchasers of Park Drive cigarettes. Accused sent ten currency notes of Rs.5 each to the manufacturers of Park Drive cigarettes at Belfast, who put each note in a packet of cigarettes, mixed those packets with other packets which contained no notes, & sent them out to accused in India. On a prosecution of accused under second part of Indian Penal Code, s. 294A:—*Held*: the scheme published by accused for distribution of prizes by lot or chance amounted to a lottery.—*EMPEROR v. VAZIRALLY* (1928), I. L. R. 53 Bom. 57.—IND.

430 ii. — — — — — Accused invited the public to subscribe a large sum for an assoc. whose object was said to be the relief of people in debt or distress. There was no provision for the return of the capital sum, but one-sixth of the interest derived therefrom was to be used for the objects of the assoc., whilst the remainder became divisible every three months among the subscribers as cash bonuses. These bonuses were distributed by lot:—*Held*: a lottery.—*A. D. RAJ v. KING-EMPEROR* (1932), I. L. R. 10 Ran. 232.—IND.

n i. — — — — — *Bonds in series—Payment not dependent on knowledge or skill*.—In a prosecution for a contravention of Lotteries Act, 1823, it was established that the promoters had formed & put into execution a scheme for the sale of bonds, each of which entitled the holder on certain conditions to £150. To qualify for this sum a participant had first to obtain a bond at the cost

of 1s. either from the promoters or from a friend. This was the parent of a family of bonds which was brought into existence by a process of sub-sales. The holder of the parent bond had to buy from the promoters four bonds for 3s. & to sell them to four friends for 1s. each. These four bonds were the first generation, & each of the four holders of them had to repeat the same process, thus bringing the second generation of sixteen bonds into existence. The process had to be repeated until the sixth generation of 4096 bonds had come into existence, making, for the complete series, 5461 bonds. On the occurrence of this event the holder of the parent bond became entitled to £150. Not only was each individual bond a member of a family of bonds, but it could itself become the parent of a new family, & the holder of it was entitled to £150 as soon as its sixth generation was completed:—*Held*: the scheme was a lottery, in respect that the occurrence of the event upon which payment fell to be made could neither be approximately predicted nor materially influenced by the exercise of any knowledge, experience, art, or skill on the part of the holder of the parent bond.—*BARNES v. STRATHERN* [1929] S. C. (J.) 41.—SCOT.

p i. — — — — — *Not dependent on skill alone*.—The chance, which the prohibition in Criminal Code against lotteries & other species of gambling, has in contemplation is the chance or risk which the competitor is taking. Therefore, in a case where he is required to estimate a number, the prohibition applies unless the correct number can be ascertained by skill alone without any element of chance, even though the number to be estimated is an actually existing number at the time the estimate is made.—*R. v. IRWIN, R. v. LONG*, [1928] 4 D. L. R. 625; [1928] 2 W. W. R. 597; 50 Can. Crim. Cas. 159; 23 Alta. L. R. 506.—CAN.

b (p. 454) i. — — — — — *Conducting "suit clubs"*.—*Held*: a violation of Criminal Code, s. 236 (c) (d).—*R. v. A. D. MURRAY TAILORING, LTD.*, [1925] 3 W. W. R. 483; 44 Can. Crim. Cas. 346.—CAN.

the first three of these orders, but would be paid a commission of 10s. on every other order received on his forms & on sales made as a result of these orders; that whenever an order was received on one of his forms, after the first three, a supply of forms also marked with his number would be sent to the buyer, & that the participant would be paid a commission of 10s. on each of the first three sales made by every one to whom one of the forms so numbered was sent; & that there was no time limit to the scheme, but that the maximum commission payable to a participant was £20,000:—*Held*: inasmuch as, with the exception of commissions resulting from orders directly obtained by the participant himself, all the commissions which he received would result from orders given by persons over whom he had no control & would depend so far as he was concerned not upon his skill or work but upon pure chance, the scheme was a "lottery" within Lotteries Act, 1823 (c. 60), s. 41.—*PUBLIC PROSECUTIONS DIRECTOR v. PHILLIPS*, [1935] 1 K. B. 391; 104 L. J. K. B. 73; 152 L. T. 190; 98 J. P. 461; 51 T. L. R. 54; 78 Sol. Jo. 735; 32 L. G. R. 464; 30 Cox, C. C. 195, D. C.

**433b. — Crossword puzzle.**—A newspaper published an advertisement of a crossword puzzle competition with a money prize, for which a competitor entered by posting his

solution along with a specified fee to the office of the newspaper. The puzzle was so constructed that in a number of instances a clue could be satisfied by only one word having no alternative, while in other instances the clue suggested two or more alternative words which might not all be equally appropriate. The competition editor had prepared beforehand a test solution of the puzzle, & the prize was to be awarded to the competitor whose solution happened to correspond most closely to that of the competition editor, although, if all the solutions sent in were examined & compared on their merits, the solution of that competitor might not be found to be intrinsically the best:—*Held*: the proprietors & the printer of the newspaper were guilty of the offence of printing & publishing an advertisement of a "lottery" under Betting & Lotteries Act, 1934 (c. 58), s. 22 (1) (c) (i).—*COLES v. ODHAMS PRESS, LTD.*, [1936] 1 K. B. 416; 105 L. J. K. B. 208; 154 L. T. 218; 100 J. P. 85; 52 T. L. R. 119; 79 Sol. Jo. 860; 34 L. G. R. 34; 30 Cox, C. C. 329, D. C.

*Annotation*:—*Dist. Witty v. World Service, Ltd.*, [1936] Ch. 303.

**433c. —**—*STEVENSON v. WILLIAMS* (1936), 80 Sol. Jo. 933, C. A.

**433d. — Betting scheme.**—A limited co. employed agents to distribute tickets bearing the

b (p. 454) ii. — *Club distributing "chances" for prizes with membership cards.*—*Held*: a violation of Criminal Code, s. 236.—*R. v. GRATTON* (Ont.) (1926), 46 Can. Crim. Cas. 41.—*CAN.*

b (p. 454) iii. — *Giving purchasers of goods tickets for club—Club distributing prizes.*—*Held*: a violation of Criminal Code, s. 236.—*R. v. ROBERICK* (Ont.) (1926), 45 Can. Crim. Cas. 110.—*CAN.*

b (p. 454) iv. — ————*]*—A firm of tailors gave each of its customers on the weekly payment plan the privilege of being a member of a "club," each member of which had the chance week by week while the payments under his contract were uncompleted of having his name arbitrarily chosen by the management as the member to receive a receipt for the unpaid balance which entitled him to a suit at once, without further payment:—*Held*: the scheme was a lottery & the conducting of it a violation of sect. 236 (1) (c) of the Criminal Code.—*R. v. HARRISON*, [1931] 1 W. W. R. 621; 55 Can. C. C. 238.—*CAN.*

b (p. 454) v. — ————*]*—*R. v. UNITED PROFIT SHARING SYSTEM, LTD.* (Ont.), [1927] 4 D. L. R. 619; 43 Can. Crim. Cas. 154.—*CAN.*

b (p. 454) vi. — *Free distribution of option certificates.*—A free distribution of option certificates drawn by lot is not a lottery.—*R. v. ROBINSON* (1917), 29 Can. O. C. 153.—*CAN.*

b (p. 454) vii. — *Contest of signatures.*—A contest of signatures is a contest of skill, taste & judgment, & therefore, not a lottery.—*BROWN v. BONNYCASTLE*, [1935] 3 W. W. R. 536; [1936] 1 D. L. R. 295.—*CAN.*

b (p. 454) viii. — ————*]*—Appet. in pursuance of a scheme for advertising its wares obtained customers to purchase certain cabinets of cutlery upon terms which provided that customers would be formed into groups & should pay certain weekly sums towards the purchase price of the cutlery & that at monthly intervals, up to a

total of three selections, appet. would select one of its customers from the group. The customer would be selected after careful consideration & not capriciously & each person so selected would receive the cutlery without further payments:—*Held*: the scheme was a lottery, & the offence proved was an offence within sect. 3 of Lotteries & Art Unions Act, 1901.—*Re WILLARD, Ex p. BRITISH PRODUCTS PROPRIETARY, LTD.* (1935), 35 S. R. N. S. W. 152; 52 N. S. W. W. N. 39.—*AUS.*

b (p. 454) ix. — *Picture competition.*—A. was the manager of a certain co. which conducted & advertised the holding of certain competitions known as the "Bran Tub Competition." The scheme of the competition was to take a sentence from an Australian newspaper & reproduce it in puzzle form. The competitors were invited to interpret in words the pictorial rendering of the sentence. The prize was awarded to the person who reproduced the precise words of the sentence chosen or who got nearest to that particular collection of words:—*Held*: the competition was a matter of chance & therefore, a lottery within sect. 3 (6) of Lotteries & Art Unions Act, 1901–1929.—*Re CHRISTENSEN, Ex p. ATMORE* (1936), 53 N. S. W. W. N. 66.—*AUS.*

b (p. 454) x. — ————*]*—A. published an advertisement in a newspaper setting out the terms of a "competition" of which he was the promoter & controller. The nature of the competition was as follows:—A "frame" was set out in the advertisement consisting of a number of vertical rows of squares, each row containing a different number of squares. In each row one of the squares contained a letter of the alphabet. To each row was allotted a "clue" & to each letter a number. The competitor was asked to fill in the blank squares with letters so as to make each row contain a word of as many letters as there were squares in the row, the word filled in being "suitable to the clue" allotted to the particular row. Each letter in the

word was then given its numerical value & the competitor who supplied words the total numerical value of which was the highest won the competition. The advertisement stated that the "missing words" were "ordinary everyday words" & that they must be "recognised words suitable to the clues" & must be found in Chambers's dictionary. In the conduct of the competition unusual & obsolete words used were accepted:—*Held*: the magistrate was entitled to find that the conduct of the competition was such as to preclude the fair consideration of the answers & the competition was a lottery within Lotteries & Art Unions Act, 1901–1929.—*Re CHRISTENSEN, Ex p. ATMORE* (1936), 53 N. S. W. W. N. 217.—*AUS.*

sg. *Conducting lottery—Sufficiency of evidence—Finding of tickets & paraphernalia.*—Where a charge is laid under Criminal Code, s. 236, evidence that tickets & other paraphernalia suitable for lottery purposes were found on the premises of the accused does not amount to a *prima facie* case.—*R. v. WONG SSM*, [1929] 1 D. L. R. 240; 50 Can. Crim. Cas. 231; [1928] 3 W. W. R. 492.—*CAN.*

sr. *Distribution of cash commissions dependent on chance.*—The system under a scheme known as the Multiplication Bureau operated as follows: "A" enrolled as a member at a fee of £1 & when he got four new members he was entitled to a commission of 15s. on the enrolment of the fourth member; when this fourth member got three new members "A" was entitled to 12s. 6d. commission on each, & when these three each got three new members "A" was entitled to 12s. 6d. commission on the resulting nine enrolments, & the process continued until the commissions accruing to "A" totalled £1,500:—*Held*: the scheme is to be regarded, in substance, as one in which the main source of the cash commissions is the indirect enrolments & the receipt of commissions arising from such enrolments, or any of them, depends purely on chance far as the receiving member is con-

names of races, horses & jockeys, & also the name of the co., & an offer to exchange the tickets for goods on demand. A member of the public receiving a ticket was entitled to bet on the combinations named on the ticket, in which case if he won he received the amount of his bet; if he lost he was entitled to exchange the ticket for goods worth sixpence, through the firm's agents. By conditions on the ticket he paid no money to the agents, but undertook to pay 6d. if he lost. The co. & its directors were convicted at petty sessions under Betting & Lotteries Act, 1934 (c. 58), & appealed:—*Held*: (1) the scheme was a lottery; (2) the appearance of the name of the co. on the tickets, together with evidence that the same agent had distributed similar tickets which had been exchanged by the co. for goods, was evidence connecting the agent with the co.—*GORDON, MACKAY & Co., LTD. v. WATSON*, [1936] 2 All E. R. 33, D. C.

434. *Add. Annotation*:—*Refd. Kerslake v. Knight* (1925), 133 L. T. 606.

443. *Add. Annotations*:—*Apld. Howgate v. Ralph* (1929), 141 L. T. 512. *Consd. Public Prosecu-*

tioned; & the scheme is accordingly a lottery.—*McLEAN v. MURCH*, [1934] N. Z. L. R. Supp. 7; G. L. R. 61.—N.Z.

*sv. "Drawing"*.—*Meaning of*.—The word "drawing" used in sect. 294A of the Indian Penal Code, in relation to lotteries, must be given its usual physical interpretation, & its meaning relative to a lottery therefore is that lots should be drawn by some mechanical or human agency involving their chance extraction.—*GURBAKHS SINGH v. R.* (1934), 1 L. R. 16 Lah. 51.—IND.

#### PART IV. SECT. 3.

*st. Art unions—Whether exempt under Criminal Code, s. 236.*—*R. v. LEBLANC* (Ont.) (1926), 46 Can. Crim. Cas. 38.—CAN.

*sw. State lottery—Liability for resale of tickets.*—Sect. 5 of State Lotteries Act, 1930, provides that "Any subscriber or contributor to a state lottery shall be freed & discharged from all penalties, suits, proceedings & liabilities to which by law he would be liable but for this Act as being concerned in an illegal lottery, liltgeoe, or unlawful game." N. subscribed to a State Lottery & purchased a number of tickets. Shares in each of the tickets so obtained were sold to other persons. N. was charged with knowingly allowing a room to be used for the sale of shares in chances for the disposal of money by chance in contravention of the Gaming & Betting Act, 1912:—*Held*: (1) *appt.* was guilty of an offence within sects. 4 & 17 of Gaming & Betting Act, 1912; (2) sect. 5 of State Lotteries Act did not afford him protection, as that sect. is limited to the acquisition of tickets in State Lotteries & does not confer an unfettered transferable right on the holder of a ticket.—*RUSSELL v. NAYLOR* (1932), 33 S. R. N. S. W. 168; 49 N. S. W. W. N. 65.—AUS.

#### PART IV. SECT. 4.

*o l.* —.—.—Three pursuers sued a defender for payment of balances due to them under a contract whereby, as they averred, the four parties had contributed equally to the purchase of a ticket in a foreign lottery, the ticket to be taken in defender's name & any proceeds to be divided equally among the parties. Defender, who disputed that any balances were due, averred that he had purchased the ticket in

Scotland before any contract had been entered into, & he pleaded that the action was incompetent in respect that it was based on a *pactum illicitum*. The proceeds of the ticket in question arose in part from a subsale to a Glasgow bookmaker:—*Held*: (1) a lottery was not illegal by the common law of Scotland; (2) the lottery in question was not illegal by statute, Betting & Lotteries Act, 1934, s. 21, having no application to foreign lotteries; (3) sect. 22 (1), while applying to foreign lotteries, did not make the purchase of a ticket in a foreign country, or the setting up of a partnership for that purpose, illegal; (4) accordingly, the contract, as averred by pursuers, was capable of lawful performance; but (5) having regard to the different account of the transaction given by defender, it was impossible either to sustain or to repel defender's plea until the facts had been ascertained. Proof before answer allowed.—*CLAYTON v. CLAYTON*, [1937] S. C. 619.—SCOT.

#### PART IV. SECT. 5, SUB-SECT. 1.

*q l.* —.—.—Defts. conducted in public a series of games known as "diggers' bagatelle." Bystanders were invited to take part in each game on payment of threepence to defts. The winner of a game received from defts. the sum of ninepence, & became entitled to join in the next game without charge.—*Held*: defts. did not thereby "dispose" of any "property" within Police Offences Act, 1915, s. 88 (b).—*DEELEY v. McEVoy*, [1928] V. L. R. 117; [1928] Argus L. R. 47.—AUS.

*q il.* —.—.—On a charge of unlawfully selling tickets for disposing of property by a mode of chance, contrary to sect. 236 (b) of Criminal Code, R. S. C., 1927, the proper test to be applied in determining whether the offence has been established is the intention & purpose for which the tickets were sold. To say that, since the scheme is such that when all purchasers of tickets are unlucky no property or prize is disposed of, the tickets were, therefore, not sold for "disposing of property," is to apply an erroneous test. "Property" within sect. 236 (b), includes money.—*R. v. SAM CHOW*, [1938] 1 W. W. R. 468.—CAN.

tions *Director v. Phillips*, [1935] 1 K. B. 391. *Refd. Kerslake v. Knight* (1925), 133 L. T. 606.

449. *Add. Citations*:—94 L. J. K. B. 919; 133 L. T. 606; 89 J. P. 142; 23 L. G. R. 574; 28 Cox, C. C. 27.

451a. *Lotteries authorised by Act of Parliament—Must be Parliament of United Kingdom.*—The exception in Lotteries Act, 1823 (c. 60), s. 41, which prohibits the sale of tickets in any lottery, "except such as are or shall be authorised by this or some other Act of Parliament," does not include a lottery authorised by any body other than the Parliament of the United Kingdom.—*R. v. REGISTRAR OF JOINT STOCK COMPANIES, Ex p. MORE*, [1931] 2 K. B. 197; 100 L. J. K. B. 638; 145 L. T. 522; 95 J. P. 137; 47 T. L. R. 383; 29 L. G. R. 452, C. A.

462. *Add. Annotations*:—*Consd. A.-G. v. Walker-gate Press, Ltd.*; *A.-G. v. Bloomfield*; *A.-G. v. Carlton* (1930), 142 L. T. 408.

462a. —.—.—*Liability of individual directors.*—(1) Liability under above sect. attaches, if there has been publication of a proposal or scheme for a lottery, although the

*s l.* —.—.—*Pak-ku-pue.*—The game of Pak-ku-pue is a lottery within Law 7 of 1890.—*R. v. LEW HOI*, [1937] A. D. 215.—S. AF.

*b (p. 459) i.* —.—.—*"Property" includes money.*—*"Property"* in sect. 236 (c) of Criminal Code includes money, & the fact that there may be a period during which the amount to be given away under the scheme in question is unascertained is immaterial.—*R. v. BREWERTON*, [1936] 3 W. W. R. 433; 4 D. L. R. 703; 6 Can. C. C. 60; 6 F. L. J. (Can.) 211.—CAN.

*sw. Sale of gambling device.*—A violation of Criminal Code, s. 236 (b), may be proved, although there is no evidence that at the time of the sale of the device in question, e.g., a punch board, there was a conscious arrangement between the buyer & seller that some property would be disposed of by chance by means of the device. The essential inquiry is, what is the purpose or known intended use of the device.—*R. v. HEISE*, [1926] 1 D. L. R. 60; [1925] 3 W. W. R. 724.—CAN.

*sv. Knowingly conveying articles for use in lottery.*—Accused, the driver of a motor truck who had a contract with a mercantile co. to transport its goods, was under its instructions bringing 30 cases of goods to its premises from the customs warehouse when he was stopped under a search warrant & 10 of the cases were found to contain the paper slips in question. These papers when seized were in a state in which they could be adapted to either a lawful or unlawful use.—*Held*: the conviction must be quashed, since, assuming that the finding that the co. had imported the papers with the intention of illegal use was justified, there was no evidence to support the finding that *appt.* had knowledge of that intention.—*R. v. LOUIE HOW*, [1936] 2 W. W. R. 638.—CAN.

*sz. Exemptions—Lessee of fair grounds association.*—A lessee of a fair grounds assocn. is within the exemptions proviso relating to lotteries in Criminal Code, s. 236 (c).—*R. v. BEASLEY*, [1936] 2 D. L. R. 377; O. R. 299; 65 Can. C. C. 337.—CAN.

*sd. Conveying tickets—Necessity for mens rea.*—A truckman conveying lottery tickets without knowledge of their character commits no offence.—*R. v. HOW*, [1936] 4 D. L. R. 389; 66 Can. C. C. 250; 50 B. C. R. 554.—CAN.

matter has not actually proceeded to a lottery.

(2) A limited co. is not liable to the penalties prescribed by above sect., but directors, who have issued a proposal jointly with a limited co., are liable. They are, however, liable only for one penalty between them in respect of each offence committed.—*A.-G. v. WALKERGATE PRESS, LTD.*; *A.-G. v. BLOOMFIELD*; *A.-G. v. CARLTON* (1930), 142 L. T. 408; 94 J. P. 90; 46 T. L. R. 177; 74 Sol. Jo. 106; 28 L. G. R. 235; 29 Cox, C. C. 68. As to (2) *Consd. Green v. Kursaal (Southend-on-Sea) Estates, Ltd.*, [1937] 1 All E. R. 732.

**464. Add. Annotation:—***Appld. Ranson v. Burgess* (1927), 137 L. T. 530.

**464a. ———.**—*J.*—A printer printed and sold to a purchaser a set of tickets adapted for use in a lottery, but no lottery was then in existence. The purpose was that the purchaser should institute & carry on a lottery by means of the tickets, by reselling them singly & providing out of the proceeds a prize for the holder of the winning ticket. The printer took no further interest, financial or otherwise, in the matter, beyond the original purchase price for the sale of the tickets as a set:—*Held*: the printer was properly convicted of publishing a proposal or scheme for the sale of tickets or chances in a lottery contrary to the above sect.—*RANSON v. BURGESS* (1927), 137 L. T. 530; 91 J. P. 133; 43 T. L. R. 561; 25 L. G. R. 378; 28 Cox, C. C. 425, D. C.

*Annotations:—**Folld. A.-G. v. Walkergate Press, Ltd.*; *A.-G. v. Bloomfield*; *A.-G. v. Carlton* (1930), 142 L. T. 408.

**464b. ———.**—*Distribution of circulars advertising lottery.*—*Resp.* employed canvassers to call from house to house, inviting persons to undertake to buy tea from her regularly. Each week the canvassers carried with them handbills which declared that: "To advertise our famous tea we will distribute among our customers cash gifts of £3 and £6," as the purchaser bought one or two packets of tea per week. The circular continued: "Each customer's name is entered in rotation in our ledger and cash gifts are paid out accordingly." The names & addresses of new customers were entered in the ledger in the exact order in which they had been obtained, the list of one canvasser's customers on his return to the office being completely entered before that of the next was begun. *Resp.* awarded her bonus each week to the next customer whose name was on the list after that of the customer last to receive a bonus, provided that the customer was still regularly buying

the tea. The names of customers who ceased to buy the tea weekly were struck out of the list, thus advancing the names of customers below them. It was stated in one of the circulars that during the twenty-four weeks ending in June, 1928, *resp.* had paid out £1,920 by way of bonus gifts. *Appltd.*, a superintendent of police, preferred an information against *resp.*, charging her with publishing a proposal or scheme for the sale of chances in a lottery not authorised by Act of Parliament, contrary to above Act. The stipendiary magistrate dismissed the information holding that *resp.* had not published a proposal or scheme for the sale of chances in a lottery:—*Held*: there were no materials to justify the magistrate in so holding. The case must be remitted to him with the direction to convict.—*HOWGATE v. RALPH* (1929), 141 L. T. 512; 93 J. P. 127; 45 T. L. R. 426; 73 Sol. Jo. 253; 27 L. G. R. 432; 28 Cox, C. C. 633, D. C.

*Annotation:—**Refd. Public Prosecutions Director v. Phillips*, [1935] 1 K. B. 391.

**466a. "Shall be deemed to be a rogue & vagabond"**—*What must be proved—**Lotteries Act, 1823 (c. 60), s. 41.*—When a person is charged under Lotteries Act, 1823 (c. 60), s. 41, with selling tickets in a lottery it is not necessary to show that he has the "status" or "mode of life" of a rogue & vagabond. The effect of the section is that any person selling such tickets is to be punished as if he were a rogue & vagabond.—*PROTHERO v. WATSON* (1931), 145 L. T. 643; 95 J. P. 184; 47 T. L. R. 627; 75 Sol. Jo. 629; 29 L. G. R. 528; 29 Cox, C. C. 370, D. C.

**466b. Selling "tickets in any lottery"**—*Lotteries Act, 1823 (c. 60), s. 41—Proposed lottery.*—The expression "tickets in any lottery" in Lotteries Act, 1823 (c. 60), s. 41, means tickets in a proposed lottery.—*BARKER v. WOOD* (1932), 48 T. L. R. 402; 76 Sol. Jo. 307, D. C.

**466c. Proceeds of lottery—Refusal of Home Secretary to exercise jurisdiction—Whether bona vacantia.**—*MAY v. THOMAS* (1934), 78 Sol. Jo. 413.

**466d. Possession of ticket for sale or distribution—Possession as custodian for syndicate.**—*Appltd.*, received from the purchaser a block of forty-eight tickets in a lottery on behalf of a syndicate comprising twenty-one persons, including *appltd.* He collected from each member 2s. a week & himself set aside a similar amount weekly, & subsequently paid over the money collected by him to the purchaser of the tickets. The whole of the

#### PART IV. SECT. 5, SUB-SECT. 2.

**sz. Action by wife against husband.**—In an action by a common informer under sect. 236 (3) of the Criminal Code, *pltf.* being wife of *def.*:—*Held*: judgment should not be granted since there was a suspicion of collusion & also that there was no proof that by the law of Canada a wife can sue her husband.—*DINNING v. DINNING*, [1932] O. R. 208; 2 D. L. R. 205; 57 C. C. C. 393.—*CAN.*

**sd. Proceedings for penalty—Security for costs—Whether ordered.**—*Pltf.* brought an action to have it declared that a contest in connection with an automobile show in which *def.* won an automobile was contrary to sect. 236 (3) of the Criminal Code, & that said

automobile be forfeited to him. Upon an application by *def.*, the referee, pursuant to K. B. R. 987, ordered *pltf.* to secure *def.*'s costs. *Pltf.* appealed:—*Held*: sect. 236 (3) of the Criminal Code confers a right of action which in no way can be diminished or impaired by K. B. R. 987; nor is it required that said rule shall apply, in order that due enforcement of the rule shall be upheld.—*BROWN v. KEELE*, [1934] 2 W. W. R. 670; 4 D. L. R. 508; 42 Man. L. R. 329; 62 C. O. C. 84.—*CAN.*

**st. Forfeiture of property** There is no discretionary power not to adjudge a forfeiture of property won in a lottery.—*SAUNDERS v. MOLLISON* (1931), 62 Can. C. C. 274.—*CAN.*

**sl. Destruction of "documents"**—

*What are.*—A bookmaker was convicted, under Betting & Lotteries Act, 1934, s. 22, of having conducted an illegal lottery. The sheriff-substitute ordered forfeiture of one ten-shilling note, & the destruction of all coupons produced in the case, but refused to order destruction of postal orders, money orders & cheques, which represented payments to the accused by persons taking part in the lottery in respect of their tickets therein:—*Held*: the postal orders, etc., in question, since they represented the price of tickets in the lottery, were "documents" relating to the conduct of the lottery within 1934 Act, s. 30 (3), & accordingly, they fell to be destroyed.—*STRANG v. ADAIR*, [1936] S. O. (J.) 56.—*SCOT.*



forty-eight tickets were held by the syndicate on behalf of all the members, each member holding a twenty-first part in the whole of the tickets. No individual member was entitled to any ticket or tickets, & any prize won by means of any of the tickets would have been divided equally between the members of the syndicate. Applt. was convicted under Betting & Lotteries Act, 1934 (c. 58), s. 22 (1) (b) of having the tickets in his possession for the purpose of sale or dis-

tribution:—*Held*: there was no evidence that any ticket was in applt.'s possession for either purpose, as the intention was that all the tickets should be held by him as custodian on behalf of all the members & no sub-sale of tickets between members was ever in contemplation, & the conviction must, accordingly, be quashed.—*CORFIELD v. DOLBY* (1935), 154 L. T. 266; 100 J. P. 75; 52 T. L. R. 139; 80 Sol. Jo. 128; 34 L. G. R. 97; 30 Cox, C. C. 341, D. C.

## Part V.—Races and Racecourses.

472. *Add. Annotation*:—*Refd.* Weddle, *Beck v. Hackett*, [1929] 1 K. B. 321.

479. *Add. Annotation*:—*Distd.* Ellesmere v. Wallace, [1929] 2 Ch. 1.

### SECT. 2.—RACECOURSES.

(Vol. XXV., p. 460.)

**Racecourse betting.**—*See* Racecourse Betting Act, 1928 (c. 41); Betting & Lotteries Act, 1934 (c. 58), ss. 1–20.

480a. — **Powers of Control Board—Payment of commission for placing bets on totalisators of Board.**—The Racecourse Betting Control Board was established as a statutory body with powers to set up & operate totalisators on approved racecourses for the purposes of betting, subject to the conditions required by the Act being observed. In the years 1929 to 1933 inclusive the Board had entered into a series of agreements with two cos., in order to procure the collection of bets from persons not on the racecourse on race days, & the placing of such bets on the totalisator on the course. The Board agreed to pay commission at certain rates dependent on the amount of money placed by means of such bets, & also the expenses of its agents in collecting & telephoning the bets to the course, such commission & expenses being paid by the Board out of the totalisator fund. The Board also agreed with one of the cos. to provide at its own expense all reasonable facilities required by the co. for the purpose of its business on the authorised racecourses & to make contributions towards the initial expenses of that co. In an action brought at the relation of the secretary of a book-makers' organisation, asking for a declaration that such agreements & payments were invalid & *ultra vires* the Board:—*Held*: (1) the action of the Board in agreeing to pay the commission & the expenses of providing facilities on the authorised racecourses was reasonably incidental to the power conferred on the Board by Racecourse Betting Act, 1928 (c. 41), & was therefore not *ultra vires*.

In so doing the Board was only taking steps to increase the bets placed on the totalisators on the courses; (2) in contributing towards the preliminary expenses of one of the cos. the Board was acting *ultra vires*, as it was thereby assisting in the general business of the co. which as between itself & its customers was carrying on "off-the-course" betting.—*A.-G. v. RACECOURSE BETTING CONTROL BOARD*, [1935] Ch. 34; 104 L. J. Ch. 13; 152 L. T. 146; 51 T. L. R. 36; 78 Sol. Jo. 783, C. A.

480b. — **Contribution to expenses of company collecting bets.**—*A.-G. v. RACECOURSE BETTING CONTROL BOARD*, No. 480a, *ante*.

480c. — **Excessive dividend paid—Mistake of fact—Whether recoverable.**—Deft. made a bet on the totalisator & won £42 10s. Intending to pay him forty one-pound notes, a clerk, employed by ptlfs., paid him forty five-pound notes. When this was discovered, deft. offered to pay back any sum ptlfs. could prove he had been overpaid. Seventeen of the five-pound notes in his possession were proved by the serial numbers to have been paid to him by ptlfs., & this £85 was returned to them. Rule 4 of the Totalisator Rules made by ptlfs. under the provisions of the Racecourse Betting Act, 1928, s. 2 (8), contains the following provision: "Dividends should be examined before leaving these windows, as mistakes cannot be rectified later." Upon an action being brought to recover the balance of the amount by which deft. had been overpaid, deft. counterclaimed for the sum of £85 he had repaid, & it was contended on his behalf that rule 4 was bilateral, & applied equally whether ptlfs. had paid a backer too much or too little:—*Held*: the rules were not any part of the contract between the parties, & did not affect ptlfs.' common law rights to recover money paid under a mistake of fact.—*RACECOURSE BETTING CONTROL BOARD v. MOUNT*, [1938] 3 All E. R. 547; 159 L. T. 379; 54 T. L. R. 1072; 82 Sol. Jo. 605, C. A.

483. *Add. Annotations*:—*Refd.* Ellesmere v. Wallace, [1929] 2 Ch. 1; Cipriani v. Burnett, [1933] A. C. 83.

**PART V. SECT. 1, SUB-SECT. 3.**  
*By. Coursing—Use of mechanical hare*  
—*Whether within Gaming & Betting Act, 1912, s. 7.*—Resp. attended a licensed racecourse on which a sport consisting of the pursuit of a mechanical hare by dogs was held, & made bets on several of the dogs. He was charged before a magistrate with an offence

under above sect., & the magistrate held, as a matter of law, on the evidence before him, that the pursuit of a mechanical hare by dogs was "coursing" within above sect., & dismissed the information:—*Held*: the pursuit of a mechanical hare by dogs was not "coursing" within above sect., & the determination of the magistrate

was erroneous in point of law.—*KELSO v. MCLACHLAN* (1928), 28 S. R. N. S. W. 510; 45 N. S. W. N. 143.—*AUS.*

### PART V. SECT. 2.

*By. Refusal of admission—Validity of bye-law.*—*NAYLOR v. STEPHEN*, [1937] 2 W. W. R. 601.—*AUS.*

483a. ———.]—A contract may make the award of a specified tribunal a condition precedent to an action at law without doing so in terms.

The tickets sold for a sweepstake in connection with a race meeting in Trinidad stated: "This ticket is sold subject to the condition that in the event of any dispute arising with respect to any matters connected with the drawing of the sweepstake, or the awarding of the prizes, the decision of the stewards of the Trinidad Turf Club thereon

shall be accepted as final":—*Held*: the terms of the ticket, having regard to the circumstances belonging to it, made a decision by the stewards a condition precedent to any action to recover the stakes.—*CIPRIANI v. BURNETT*, [1933] A. C. 83; 102 L. J. P. O. 118; 148 L. T. 148, P. O.

484. *Add. Annotation*:—*Refd. Ellesmere v. Wallace*, [1929] 2 Ch. 1.

490. *Add. Annotation*:—*Refd. Cipriani v. Burnett*, [1933] A. C. 83.

## Part VI.—Competitions.

496. *Add. Annotations*:—*Distd. Suttle v. Cresswell* (1925), 42 T. L. R. 75. *Consd. Coles v. Odhams Press, Ltd.*, [1936] 1 K. B. 416.

497. *Add. Annotation*:—*Refd. Suttle v. Cresswell* (1925), 42 T. L. R. 75.

498. *Add. Annotations*:—*Apld. Suttle v. Cresswell* (1925), 42 T. L. R. 75. *Consd. Shuttleworth v. Leeds Greyhound Assocn.*, [1933] 1 K. B. 400.

501. *Add. Annotation*:—*Refd. Suttle v. Cresswell* (1925), 42 T. L. R. 75.

501a. *Betting & Lotteries Act, 1934 (c. 58), s. 26—Betting pool business—What amounts to.*—A co. whose only trade or business was that of a bookmaker as defined in Part I. of the *Betting & Lotteries Act, 1934 (c. 58)*, advertised a "football pool" in a weekly newspaper. Readers were thereby invited to fill in coupons relating to any one or more of a series of football matches to be played on the following Saturday, with their respective forecasts of the results, including the score, & to stake a named sum thereon. Under the rules of the pool entrants were required on the day before the matches were played to remit the coupons they had filled up to the co. with a promise in writing, duly signed, to pay the amount they were staking in case they lost, on the Tuesday following. The

total amount received from entrants, less 10 per cent., was distributed by the co. among those whose forecasts turned out to be correct, or most nearly correct. On a motion by pltf., a director of deft. co., for an injunction to restrain them from so conducting the pool:—*Held*: the pool was not a "competition in which prizes are offered for forecasts of the result . . . of a future event" within the prohibition contained in *Betting & Lotteries Act, 1934 (c. 58), s. 26*, but a pari-mutuel or pool betting operation conducted by a bookmaker, & therefore lawful within sect. 3 & the proviso to sect. 26 of the Act.—*ELDERTON v. UNITED KINGDOM TOTALISATOR CO., LTD.*, [1935] Ch. 373; 104 L. J. Ch. 105; 152 L. T. 549; 99 J. P. 179; 51 T. L. R. 237; 79 Sol. Jo. 126; 38 L. G. R. 176.

502. *Add. Annotations*:—*As to (1) Consd. Coles v. Odhams Press, Ltd.*, [1936] 1 K. B. 416. *As to (3) Refd. Greenberg v. Cooperstein*, [1926] Ch. 657.

503. *Add. Annotation*:—*Refd. Coles v. Odhams Press, Ltd.*, [1936] 1 K. B. 416.

504a. ——— *Determination of order of popularity of specified articles.*—The proprietors of a number of commodities organised, for advertisement purposes, a competition in which

### PART V. SECT. 3.

484 i. *Finality of decision—Absence of final decision.*—Where a challenge cup, to be won in a bicycle race between competing clubs, was held by trustees under an instrument of trust, by which all arrangements pertaining to the course, race, protests & matters "connected with the welfare of the cup" were to be decided by the trustees according to certain rules, the ct., upon the mere allegation of fraud, & before any decision of the trustees, refused to exercise jurisdiction restraining the trustees from parting with the cup to an alleged winner under protest, upon the ground that one of the winning riders did not go round the course, that being a matter of fact for the decision of the trustees.—*ROSS v. ORR* (1894), 25 O. R. 595.—CAN.

484 ii. ——— *Appeal to committee of Turf Club—Powers of committee.*—*MONTGOMERY v. LEE STEERE* (1926), 29 W. A. L. R. 70.—AUS.

### PART VI. SECT. 1.

d i. ——— *Receipt of money with coupons—Whether offence under Street Betting Act.*—In a complaint under *Street Betting Act, 1906*, it was proved that accused received in the street

from various persons a large number of slips accompanied by sums of money. The slips were odd pieces of paper, upon each of which were written the names of at least one group of eight football teams, to which was added a name, number or other symbol, for identifying the sender of the slip. Accused did not submit lists of football teams for the purpose of selection, the names of such teams being selected by the senders of the slips from lists of teams advertised or reported in the public press to play on the Saturday following the date on which the slips were received by accused. The teams selected were those which the senders of the slips predicted would be winning teams on that Saturday. Along with each slip was sent 1s., the understanding being that, after the results of the matches were published, accused would examine the forecasts made, & thereafter would deduct from the money received a sum in name of commission, & hand over the balance to the person sending in the correct forecast if only one forecast was correct, or, if more than one forecast was correct, an equal share of such balance to each of the senders of correct forecasts. If no correct selection was sent in there was no distribution, & the whole

contributions were carried forward to the next week; which procedure was repeated until a correct forecast was made, or until the end of the football season arrived, when if there had been no correct selection received, the money in hand, less a commission to the accused, was distributed among those who had sent it:—*Held*: accused was engaged in betting transactions & was guilty of an offence under *Street Betting Act, 1906*.—*YEDALL v. MCQUILKIE*, [1928] S. C. (J.) 54.—SCOT.

### PART VI. SECT. 2.

n i. ——— *Estimate of future temperatures.*—The publication of the scheme in question herein by which deft. offered prizes for the nearest estimates of the average temperatures of seven named cities on a future date & the attendance at the Regina Fair on certain future days, & under which those invited to compete were supplied with statistical information to assist them in making their estimates, was held not to be a violation of s. 326 (a) of the Criminal Code.—*R. v. REGINA AGRICULTURAL & INDUSTRIAL EXHIBITION ASSOCN., LTD.*, [1932] 2 W. W. R. 131.—CAN.



customers were asked to place thirteen named articles in the order of their popularity as shown by the actual voting of the entrants themselves. A number of money & other prizes were offered to those whose lists most nearly agreed with that shown by the voting as a whole. No entrance fee was charged, but each entrance form had to be accompanied by part of a bag or wrapper from one of the named articles:—*Held*: since the competitors were not asked to judge the real merits of the articles but to guess how other people would guess at their popularity, there was material on which a magistrate was justified in finding that the result depended entirely on chance & in convicting the advertising manager of the promoters of an offence under Lotteries Act, 1823 (c. 60), s. 41, —*HOBBS v. WARD* (1929), 93 J. P. 163; 45 T. L. R. 373; 27 L. G. R. 410, D. C.

*Annotations*:—*Foll.* *Challis v. Warrender* (1930), 144 L. T. 437. *Consd.* *Coles v. Odhams Press, Ltd.*, [1936] 1 K. B. 416.

**504b.** — *Determination of order of popularity of theatrical rôles.*—*Resps.* sent to members of the theatrical profession & to persons whose names appeared in "Who's Who" books of 10s. tickets in a "Grand National Mutual Subscription Fund in aid of the Ellen Terry Memorial Museum" with a request to sell the tickets among their friends & return the counterfoils & money by a certain date. An accompanying circular explained that 25 per cent. of the money subscribed would be devoted to the museum & that the remaining 75 per cent. would be distributed "in such manner as the organisers in their absolute discretion shall think fit," but that £20,000 would be distributed in prizes. It was apparently originally contemplated that the money should be used for a sweepstake on the Grand National horse race, but owing to a communication from the police there was substituted a scheme whereby subscribers were invited to place in order of popularity, as shown by the general votes of the competitors, ten rôles played by the late Dame Ellen Terry:—*Held*: the scheme was a lottery. The fact that the original books of tickets were sent only to members of the

theatrical profession & persons in "Who's Who" did not so limit the class of competitors as to render it possible by any element of skill to arrive at a reasonable forecast of how they would vote; especially as they might be expected to sell many tickets to persons outside those two categories, so that the competition was in effect open to the public.—*CHALLIS v. WARRENDER* (1930), 144 L. T. 437; 95 J. P. 39; 47 T. L. R. 123; 29 L. G. R. 109; 29 Cox, C. C. 251.

**505.** *Add. Annotations*:—*Apld.* *Hobbs v. Ward* (1929), 93 J. P. 163. *Consd.* *Coles v. Odhams Press, Ltd.*, [1936] 1 K. B. 416.

**506.** *Add. Annotations*:—*Distd.* *Hobbs v. Ward* (1929), 93 J. P. 163. *Consd.* *Coles v. Odhams Press, Ltd.*, [1936] 1 K. B. 416.

**506a.** — *Picture puzzle competition.*—A competition was advertised in a newspaper in which a money prize was offered to the reader sending in the best solution of a picture puzzle illustrated in the same issue. The puzzle consisted of a set of nine small sketches each intended to depict the name, as spelt or pronounced, of some place in the United Kingdom. A list of names providing clues was given. Competitors were required to fill in blank forms with their solutions & send them in to the editor with entrance fees. The artist who drew the sketches was instructed to make some of them capable of representing one or other of two or three different places. In an action brought to test the legality of the competition:—*Held*: (1) success in the competition depended on the exercise of a substantial degree of skill, there being no predetermined solution of the puzzle, & therefore it did not come within the prohibition contained in Betting & Lotteries Act, 1934 (c. 58), s. 26 (1) (b); (2) the competition was not a "game" within the prohibition of Betting Act, 1853 (c. 119), s. 1.—*WITTY v. WORLD SERVICE, LTD.*, [1936] Ch. 303; 105 L. J. Ch. 63; 154 L. T. 491; 100 J. P. 68; 52 T. L. R. 235; 79 Sol. Jo. 966; 34 L. G. R. 150; 30 Cox, C. C. 375.

## GARAGE.

*See* NUISANCE.

## GAS.

## Part II.—Lands and Works.

10. *Add. Citations*:—94 L. J. Ch. 382; 133 L. T. 565; 89 J. P. 177; 23 L. G. R. 525.
- 15a. ——— *Country road*.]—The word “street,” as used in Gasworks Clauses Act, 1847 (c. 15), s. 6, is not necessarily confined to what is ordinarily known as a street, & over which there is a public right of way. A country lane with certain residences
27. *Add. Annotation*:—*Refd.* West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt (1932), 96 J. P. 159.

## Part III.—Supply of Gas.

31. *Add. Annotations*:—*Apld.* Stevens v. Aldershot Gas, Water & District Lighting Co. (now Mid-Southern District Utility Co.) (1932), 102 L. J. K. B. 12. *Refd.* Scammell v. Hurley, [1929] 1 K. B. 419.
37. *Add. Annotation*:—*Refd.* R. v. Electricity Comrs., *Ex p.* Yorkshire Electric Power Co. (1927), 91 J. P. 191.
40. *Add. Annotation*:—*Distd.* Granger v. South Wales Electric Power Distribution Co., [1931] 1 Ch. 551.
- 51a. *Duration of agreement to supply—Power to terminate*.]—In 1906 a co. was incorporated by statute to supply gas in a certain area in the place of a limited co., & by sect. 7 the statutory co. took the benefit of all contracts & engagements of the limited co. which had been supplying gas to the defts., an urban council, for public lighting. In 1909 the co. entered into an agreement under seal with the council in which it was recited that before the passing of the Act “it was agreed by & between the predecessors of the gas co. & the council that the agreement then in force for public lighting should continue to remain in force & be binding on both parties until the council should determine the same,” & that “it has been deemed desirable by the said parties hereto that the terms of the said agreement for the public lighting shall be set out as hereinafter mentioned.” By the operative part of the agreement the co. agreed to light all the public lamps within the district “from & after the first day in Sept. in every year up to the following first day of May inclusive” on certain terms; & provisions were made for increasing the number of lamps. There was no provision as to the period for which the agreement was to run or giving either party a right to determine it. By a supplemental agreement dated June 30, 1921, the times of lighting & the charges were varied, & clause 1 (c) provided that new lanterns supplied by the co. should become the property of the council without payment after fifteen years if the agreements continued for so long, “& if the said agreements be determined before the expiration of such period” the council were to pay for them. On Apr. 30, 1927, the council gave notice to determine the agreement on Aug. 31, 1927:—*Held*: having regard to the recitals in the original agreement & clause 1 (c) of the supplementary agreement & to the nature of the contracts they were determinable by notice.—*CREDITON GAS CO. v. CREDITON URBAN DISTRICT COUNCIL*, [1928] Ch. 447; 97 L. J. Ch. 184; 138 L. T. 723; 92 J. P. 76; 44 T. L. R. 369; 72 Sol. Jo. 225; 26 L. G. R. 325, C. A.

## PART I. SECT. 3.

*sd. Franchise granted to company—Option of town to purchase*.]—It cannot be said that clauses 37 & 39 of sect. 162 of Town Act, R. S. A., 1922, as it stood at the time the agreement in question herein was entered into, relate to different kinds of agreements & that clause 39 does not apply to an agreement by which a special franchise is granted by a town. Whether or not clause 39 (b) applies to agreements granting special franchises, clause 11 of the agreement herein is binding as a term of the contract so far as it is not *ultra vires*.—*Re WAINWRIGHT TOWN & WAINWRIGHT GAS CO., LTD.*, [1930] 3 W. W. R. 49.—*CAN.*

## PART III. SECT. 1.

*xx. Power to run pipes under highway through municipality—No power to supply municipality—Right of municipality to sue for illegal supply*.]—*NELSON V. DOMINION NATURAL GAS CO., LTD.*, [1931] 2 D. L. R. 229; 66 O. L. R. 271.—*CAN.*

*sg. Grant of right to supply gas in district—District added to municipality—Municipality not entitled to interfere with right to supply*.]—The effect of a bye-law passed by the council of a township in Ontario under Consolidated Municipal Act, 1903 (Ont.), s. 566 (3), authorising a co., incorporated with suitable powers, to lay mains under the streets of the township & to supply its inhabitants with gas, together with an agreement by the co. accepting the bye-laws & its conditions, is to confer upon the co. (the conditions being fulfilled or waived) a valid & perpetual franchise, not subject to repeal, application to the geographical territory which at the date of the bye-law was comprised in the township. Upon parts of that territory being annexed to an adjacent city, under provisions of the above Act as amended & Municipal Act, 1913 (Ont.), the franchise remains effective in & applicable to the annexed areas. In those areas the municipality of the city after the annexation takes the place *mutatis mutandis* of the municipality of the township to all intents & purposes as regards the rights

& obligations created by the bye-law & relative agreement.—*UNITED GAS & FUEL CO. OF HAMILTON, LTD. v. DOMINION NATURAL GAS CO., LTD.*, [1934] A. C. 435; 103 L. J. P. C. 94; 151 L. T. 385, P. C.

## PART III. SECT. 2, SUB-SECT. 5.

*sa. Powers of municipality as undertaker—No power to surcharge for delay in payment*.]—A municipal corp., though it may allow discounts for prompt payment for supplies of gas or electricity, cannot surcharge for delay in payment unless it is given statutory authority so to do, & no such authority at present exists.—*NELSON CITY CORPN. v. BUSBRIDGE*, [1930] N. Z. L. R. 269.—*N.Z.*

## PART III. SECT. 2, SUB-SECT. 6.

*sb. Refusal to pay increased rates—Right to cut off gas*.]—*Held*: Natural Gas Conservation Act, 1921 (c. 17), & 1922 (c. 23), were valid.—*SANDWICH v. UNION NATURAL GAS CO. (Ont.)*, [1925] 4 D. L. R. 795; *affg.*, [1925] 2 D. L. R. 707; 56 O. L. R. 399.—*CAN.*

## Part IV.—Protection of Property of Undertakers.

62. *Add. Annotations*:—*As to* (2) *Refd. Brooke v. Bool*, [1928] 2 K. B. 578; *Honeywill & Stein, Ltd. v. Larkin Bros.* (London's Commercial

Photographers), Ltd., [1934] 1 K. B. 191; *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A. C. 108.

## Part V.—Negligence and Nuisance.—Liability of Undertakers.

74. *Add. Annotations*:—*Refd. Stein v. Gates* (1935), 79 Sol. Jo. 252; *Burnham v. Boyer & Brown*, [1936] 2 All E. R. 1165.

80a. *Excavation by local authority—Failure of gas company to inspect operations.*—A hotel belonging to & insured by resps. respectively was destroyed by fire caused by the escape & ignition of natural gas which percolated through the soil & penetrated into the hotel basement from a fractured welded joint in a 12-in. intermediate pressure main, 3 ft. 6 ins. below the street level, belonging to applts., a public utility co. who supplied natural gas to consumers in the City of Edmonton, Alberta. The cause of the break in the welded joint through which the gas leaked was found to be the operations of the City of Edmonton in constructing a storm sewer, involving underground work immediately beneath applts.' main. On a claim for damages by resps. against applts.:—*Held*: that the words "locate & construct" in Alberta Water, Gas, Electric & Telephone

Cos. Act, 1922, s. 13, refer only to the initial location or construction of the works, & do not include "maintain," & applts. were not subject to the rule of strict or absolute liability, but were entitled to the protection accorded to persons acting under statutory authority; but as applts. were carrying gas at high pressure which was very dangerous, if it should escape, they owed a duty to the owners of the hotel, to exercise reasonable care & skill that the owners should not be damaged. The degree of care which that duty involved must be proportioned to the degree of risk involved. The City might at any time be conducting operations in connection with their sewers in the vicinity of applts.' mains, & it was the duty of applts. to watch such operations. The operations in question were, from their public nature & conspicuous character & from the time during which they went on, such that a failure by applts. to know of them was plainly not consistent with due care on their part in the interests of members of the public likely to be

### PART IV. SECT. 2, SUB-SECT. 1.

62 i. *Gas main—Damage by subsidence.*—A gas co. opened a street in a city & laid down a gas main. The city corpn. constructed an underground drain, &, by reason of a subsidence of the drain, the gas main was broken. The co. opened the street & repaired the gas main & the corpn. reinstated the drain & roadway. In an action by which the corpn. sought to recover from the co. the cost of such reinstatement, the co. by counterclaim sought to recover from the corpn. the cost of repairing the gas main:—*Held*: the liability of the corpn. for the damage to the gas main depended upon negligence in the exercise of its statutory powers causing unnecessary damage to the co., & the onus of proving such negligence had not been discharged by the co.—*METROPOLITAN GAS CO. v. MELBOURNE CORPN.*, [1925] V. L. R. 132; 35 C. L. R. 186; 31 *Argus* L. R. 25.—*AUS.*

### PART V. SECT. 1, SUB-SECT. 1.—B.

o i. ——.]—*EMPIRE MARBLE & TILE CO., LTD. v. NORTHWESTERN UTILITIES, LTD.*, [1933] 3 W. W. R. 225.—*CAN.*

o ii. ——.]—In an action for damages from an explosion of gas alleged to have been caused by the negligent installation of a pipeline serving pltf.'s premises:—*Held*: deft. co. was not protected from liability by virtue of a certain clause of its rules & regulations, incorporated in the contract between pltf. & deft., & which read: "The property line shall be the place of delivery of all gas in this contract & all expenses, risks & liability in utilising & using the gas after its delivery at the property line shall be borne exclusively by the con-

sumer"; it being held that the escape of gas from a fracture in a pipe caused by the negligence of deft.'s servants was not a "utilising" or "using" of the gas, &, moreover, that the clause meant a utilisation or use by the consumer.—*EMPIRE MARBLE & TILE CO., LTD. v. NORTHWESTERN UTILITIES, LTD.*, [1933] 3 W. W. R. 225.—*CAN.*

q. For "Escape of gas from gas main" read "Escape of gas—From gas main."

q i. ——. *During installation of gas connections—Destruction of buildings by fire following explosion.*—*Held*: the gas co. were liable.—*CONSUMERS' GAS CO. v. R.*, [1927] 1 D. L. R. 561; [1926] S. C. R. 709.—*CAN.*

q ii. ——. *Necessity for proof of negligence.*—In an action for damages for injuries to pltfs. caused by the escape of gas from deft. gas co.'s main:—*Held*: since the co. had laid & was operating its system under statutory power, & there was nothing in its incorporating Act providing that nothing therein should exonerate the co. from liability for nuisance, the co.'s liability depended upon proof that it had been negligent & that its negligence caused pltfs.' sufferings.—*SCHER v. WINNIPEG ELECTRIC CO.*, [1936] 2 W. W. R. 369; 3 D. L. R. 494; 44 *Man. L. R.* 179.—*CAN.*

### PART V. SECT. 1, SUB-SECT. 2.

q i. ——. *Liability of city.*—A provision in a city charter imposing on the city the duty of constructing all public works & apparatus appertaining thereto so as not to endanger the public health or safety includes the duty to keep said works & apparatus in such repair as will effect the same object. In the present case:—*Held*: deft. city had not met the obligation

of this provision with respect to a service pipe connecting a natural gas main with pltf.'s premises; the gradual development & enlargement of a leak in the stopcock in said service pipe was not a "breaking" of the pipe or attachments within a section of the charter giving the city immunity for damages caused by "breaking."—*REID v. MEDICINE HAT CITY*, [1933] 1 W. W. R. 65.—*CAN.*

sp. *Escape of gas—Act of stranger.*—An action for damages for an injury to pltf.'s health caused by an escape of gas owing to the breaking of deft.'s service pipe in premises in which pltf. resided. Pltf. lived with her mother, who was the householder & who apparently had contracted for the supply of gas. No contractual relation between pltf. & deft. was established, & no negligence was proven against deft. The pipes had been properly laid & were in sound condition when the break occurred. The cause of the break was the action of an occupant of the front part of the lot in so altering his premises that additional weight was thrown laterally against the sunken pipe until it broke at a joint, permitting gas to escape & pass under ground to the basement, whence it reached pltf.'s bedroom. Deft.'s charter required it "so to construct & locate their works & all apparatus & appurtenances thereto appertaining or therewith connected & whosoever situated as in no wise to endanger the public health, convenience, or safety." The sect. then goes on to provide for inspection at all reasonable times by the municipal authorities of the co.'s works, apparatus & appurtenances, & the obeying by the co. of all reasonable orders & directions following such inspection with penalties for disobedience of the same:—*Held*:

affected. Although under the exception to the rule in *Rylands v. Fletcher*, applts. would not be liable for damages caused, without default on their part, by the independent, conscious act of a third party, they were negligent in failing to foresee & guard against the consequences to their works of the City's operations.—*NORTHWESTERN UTILITIES, LTD. v. LONDON GUARANTEE & ACCIDENT CO., LTD.*, [1936] A. C. 108; 105 L. J. P. C. 18; 154 L. T. 89; 52 T. L. R. 93; 79 Sol. Jo. 902, P. C.

*Annotation*:—*Refd.* *Collingwood v. Home & Colonial Stores, Ltd.*, [1936] 3 All E. R. 200.

84. *Add. Annotations*:—*Consd.* *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46. *Refd.* *McAlister (or Donoghue) v. Stevenson* (1932), 48 T. L. R. 494; *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A. C. 108; *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.

85. *Add. Annotation*:—*Refd.* *Markland v. Manchester Corpn.*, [1934] 1 K. B. 566.

99. *Add. Annotation*:—*Refd.* *Sheffield Corpn. v. Kitson*, [1929] 2 K. B. 322.

## Part VIII.—Gas Supply in the Metropolis.

114. *Add. Annotation*:—*Consd.* *A.-G. v. County of London Electric Supply Co.*, [1926] Ch. 542.

117. *Add. Annotations*:—*Refd.* *Markland v. Manchester Corpn.*, [1934] 1 K. B. 566; *Pearce v. London County Electric Supply Co.* (1935), 34 L. G. R. 349.

125. *Add. Annotation*:—*As to* (1) *Consd.* *Salisbury & Fordingbridge District Drainage Board v. Southern Tanning Co. (1920), Ltd.*, [1927] 2 K. B. 566.

deft. was not liable.—*DARBEY v. WINNIEG ELECTRIC CO.*, [1933] 1 W. W. R. 566; 4 D. L. R. 252; 41 Man. L. R. 123.—CAN.

sr. —.—]—Deft. gas co. held not liable for an explosion in pltf.'s house, there being no evidence as to how the gas escaped into pltf.'s house, & no evidence that deft. co. was in any way responsible.—*SNYDER v. MONCTON ELECTRICITY & GAS CO., LTD.*, [1936] 2 D. L. R. 31; 10 M. P. R. 138.—CAN.

sw. *Meter placed in inaccessible position.*]—In an action of damages for personal injuries which was brought against Glasgow Corpn., the pursuer, an elderly woman, averred that her house was originally supplied by defenders, under their statutory powers, with gas for cooking & lighting purposes through a meter of ordinary

type which was placed above a cupboard 7 feet 9 inches in height; that this meter was subsequently removed & a slot meter, operated by a lever after the insertion of a coin, was installed in exactly the same position by defenders' servants, notwithstanding a request by the pursuer that it could be placed in a more accessible position within the cupboard; that, while standing on a stepladder which she had to use when proceeding to obtain a fresh supply of gas from the meter, she overbalanced, fell to the floor, & was injured; that it was the duty of defenders, if they chose to instal a slot meter, to place it in a position reasonably accessible to persons using it; & that they had negligently failed in that duty. She further explained that, prior to the accident, she had continued to use the meter because of the repeated assur-

ances of defenders' servants that it would be placed in a more accessible position.—*Held*: the averments of pursuer relevantly set forth a case for inquiry.—*POLLOCK v. GLASGOW CORPN.*, [1936] S. C. 428.—SCOT.

### PART V. SECT. 2, SUB-SECT. 1.

ri. —.— *Natural use of property.*]—The laying of gas pipes by a landlord for the supply of gas to dwelling-houses owned by him is a natural use of his property, & accordingly, ownership of an ordinary service pipe for the conveyance of gas to a tenant's house is insufficient *per se*, & without negligence to render the landlord liable for injury resulting to the occupants of the house through an escape of gas from the pipe.—*MILLER v. ROBERT ADDIE & SONS' COLLIERIES*, [1934] S. C. 150.—SCOT.

## GIFTS.

## Part I.—In General.

9. *Add. Annotation*:—*Refd. Re Gregory* (1934), 50 T. L. R. 492.
10. *Add. Annotation*:—*Refd. Wimbledon & Putney Commons Conservators v. Tuely*, [1931] 1 Ch. 190.

## Part II.—Capacity to Give and to Receive Gifts.

17. *Add. Annotation*:—*Refd. Wimbledon & Putney Commons Conservators v. Tuely* (1930), 47 T. L. R. 17.
19. *Add. Annotation*:—*Apld. Wimbledon & Putney Commons Conservators v. Tuely* (1930), 47 T. L. R. 17.
- 19a. ———.]—It is within the powers conferred upon the Wimbledon & Putney Commons conservators (a corpn. constituted under the provisions of the Wimbledon & Putney Commons Act, 1871) to pay pensions, annuities, or superannuation allowances to persons in their service who shall retire from such service by reason of age, infirmity, or otherwise.—*WIMBLEDON & PUTNEY COMMONS CONSERVATORS v. TUELY*, [1931] 1 Ch. 190; 100 L. J. Ch. 77; 144 L. T. 310; 47 T. L. R. 17; 74 Sol. Jo. 819; 29 L. G. R. 78.
20. *Add. Annotations*:—*Refd. Deuchar v. Gas Light & Coke Co.*, [1925] A. C. 691; *A.-G. v. Smethwick Corpn.* (1932), 96 J. P. 105.

## Part III.—Gifts inter vivos.

- 26a. Gift for public purposes—Whether formalities for compulsory acquisition apply.]—The formalities required for the exercise of the compulsory powers given by statute for taking land for public improvements have no application to the case of a voluntary gift of land.—*MICHAUD v. MONTREAL (CITY)* (1923), 92 L. J. P. C. 161; 129 L. T. 417, P. C.
- 54a. ———.]—Declarations by an intestate, that he meant that a person with whom he resided should have his furniture & effects for what he owed her:—*Held*: sufficient to entitle such person to take, & retain possession of the property.—*ROYSTON v. HANKEY* (1833), 3 Moo. & S. 381.
69. *Add. Citations*:—*sub nom. BINION v. STONE*, *Freem. Ch.* 169; *Nels.* 68.

## PART I.

2 i. *Essentials of gift*—*1 property—Intention alone ins JARVIS v. JARVIS*, [1926] 3 897.—CAN.

## PART III. SECT. 1, SUB-SECT. 1.

b i. ———.]—*MCMURCHY v. STEWART (Alta.)*, [1926] 3 D. L. R. 448; [1926] 2 W. W. R. 463.—CAN.

sb. *Purchase by father for pupil daughters—Disposition & registration in daughters' names.*]—*Held*: the father had made a complete & effective donation.—*LINTON v. INLAND REVENUE COMRS.*, [1928] S. G. 209; 13 Tax Cas. 448.—SCOT.

sc. *Gift by Mahomedan resident in Ceylon.*]—A Mahomedan resident in Ceylon executed in 1904 a deed purporting to give immovable property to his son, subject to conditions & restrictions inconsistent with an intention to make a gift as recognised by Mahomedan law but creating a valid *fidei commissum* according to Roman-Dutch law:—*Held*: the deed was not invalid on the ground that there had been no delivery of possession to the donee as required by Mahomedan law for the validity of a gift.—*WEERASE v. PERIS*, [1933] A. C. 190; 102 L. J. P. C. 38; 148 L. T. 389, P. C.—CEYLON.

## PART III. SECT. 1, SUB-SECT. 2.—B. (a).

f i. ———.]—*DICKSON v. CHAMBERLAND*, [1927] 2 D. L. R. 429; [1927]

1 W. W. R. 794; 22 Alta. L. R. 393.—CAN.

sd. *What amounts to—Conduct recognising right of donee.*]—*GRIFFITHS v. CARLETON* (1927), 30 W. A. L. R. 1.—AUS.

sk. *Delivery to agent of donor.*]—A gift of a debt covered by a promissory note given by an invalid codicil, is not good as a gift *inter vivos* where the promissory note is given to the husband of the intended donee in testator's lifetime, but only as exor. or agent for testator.—*ALLEN v. GRAHAM*, [1934] 3 D. L. R. 797.—CAN.

## PART III. SECT. 1, SUB-SECT. 2.—B. (b).

36 vi. ———.]—In an action of trover brought to recover the value of eight hundred seals alleged to have been wrongfully taken at the seal-fishery, it appeared that pltf. had found a quantity of seals panned & flagged by one W., who had abandoned them himself, but had sent a message to deft. that he might take the seals so left on the ice. Deft. proceeded to the locality where the seals were & found that pltf. had taken some of them on board his vessel, had counted others of the patch, & was in the act of taking on board his vessel the remainder, his crew being then in charge. Deft. then took charge of the remainder of the seals & had them conveyed on board his own vessel, & refused to permit pltf. to participate in the same. In an action by pltf. for the seals so

taken the jury found for pltf.; on a rule nisi to set aside the verdict:—*Held*: there was a valid gift from W. to deft. such as would cause a legal transfer of property; & further, it was in the power of W. to transfer property floating on the sea which he had himself the power to secure.—*DOYLE v. BARTLETT* (1872), 5 Nfld. L. R. 445.—NFLD.

36 vii. ———.]—*LANGER v. McTAVISH BROS., LTD.*, [1932] 4 D. L. R. 90; 45 B. C. R. 494.—CAN.

## PART III. SECT. 1, SUB-SECT. 2.—B. (c).

51 i. *Whether immediate gift intended.*]—*GARLAND v. O'REILLY* (1911), 44 S. C. R. 197.—CAN.

## PART III. SECT. 1, SUB-SECT. 2.—B. (d).

n i. ———.]—*To bank manager.*]—The payee of a promissory note payable on demand left it with his bank for the purpose of having the interest on it collected. Subsequently he indorsed the note to his nephew & left it with the bank manager, telling him that he wished to collect the interest on it while he lived & to have the note delivered to his nephew on his death, & the manager put the note into a large envelope in the bank which held documents belonging to the nephew:—*Held*: there had been a complete gift *inter vivos* of the note.—*DICKSON v. CHAMBERLAND*, [1926] 3 D. L. R. 765; [1926] 2 W. W. R. 570; 22 Alta. L. R. 270.—CAN.

73a. —.—.]—ANON. (1667), *Freem. Ch.* 128 ; 22 E. R. 1104.

73b. —.—.]—SHALES *v.* SHALES (1701), *Freem. Ch.* 252 ; 1 Eq. Cas. Abr. 382 ; 22 E. R. 1191.

77. *Add. Annotation* :—*Refd. Re Carroll (J. M.)*, [1931] 1 K. B. 317.

83a. —.—.]—When a father purchases property with his own money, & takes a conveyance in the name of his son, the law presumes it to be an advancement for the son, & not a trust for the father. Those who allege that it is a trust are bound to prove it, & the evidence for that purpose consists mainly, if not exclusively, of contemporaneous circumstances. Testator has transferred property into the names of his sons :—*Held* : they were advancements, but there being doubts

as to his solvency at the time, inquiries were directed on the point.—*CHRISTY v. COURTENAY* (1849), 13 Beav. 96 ; 51 E. R. 38.

*Annotation* :—*Consd. Batstone v. Salter* (1874), L. R. 19 Eq. 250.

88a. *Business in son's name—Receipt of profits by father—Presumption of advancement.*—*LEWIS & BARDER v. PICZENICK* (1930), 74 Sol. Jo. 107.

103a. —.—.]—*Re COLLINSON, COLLINSON v. COLLINSON* (1853), 3 De G. M. & G. 409 ; 21 L. T. O. S. 234 ; 43 E. R. 160, L. C.

*Annotation* :—*Consd. Bennet v. Bennet* (1879), 10 Ch. D. 474.

108. *Add. Annotation* :—*Refd. Gopeekrist Gosain v. Gungapersaud Gosain* (1854), 6 Moo. Ind. App. 53.

119. *Add. Annotation* :—*Refd. Lewis & Barder v. Piczenick* (1930), 74 Sol. Jo. 107.

### PART III. SECT. 2.

xx. —.—.]—Before it can be said that influence which a donee is found to have had with his donor was such as to justify the ct. in setting aside the gift, under the doctrine of presumed undue influence, it must appear that the relations between the donor & donee were such that the latter was under some duty to advise or manage for, or look after the interest of, the donor.—*BRADLEY, LANG & SCRAGG v. CRITTENDEN*, [1932] S. C. R. 552 ; 3 D. L. R. 193 ; *affg.*, [1931] 2 W. W. R. 669 ; 4 D. L. R. 384 ; 25 Alta. L. R. 562 ; *revg.*, [1931] 2 D. L. R. 961.—*CAN.*

### PART III. SECT. 3, SUB-SECT. 2.—A.

q i. —.—.]—The question whether a purchase of property by a parent in the name of his wife or child was a gift by way of advancement must be determined by what took place at the time the property was purchased. A gift to a parent from a child under age & under the parental dominion stands on the same footing as any other gift once the presumption of parental influence is rebutted.—*ROYAL TRUST CO. v. JONES*, [1935] 1 W. W. R. 46.—*CAN.*

### PART III. SECT. 3, SUB-SECT. 2.—B.

89 i. *Whether presumption arises.*—The facts that a daughter (her mother standing *in loco parentis* to her) was not informed of the deposit by her mother of a sum of money in her name & that the mother died before the daughter assented to or accepted such intended gift, do not prevent the gift, if intended, being complete subject to the donee's right to disclaim, the acceptance of a gift by a donee being presumed until his dissent is signified, even though the donee is not aware of the gift :—*Held* : on the evidence, the presumption of a gift to the daughter had not been rebutted.—*IRVIN v. BROOKES*, [1937] N. Z. L. R. 73 ; 13 N. Z. L. J. 20.—*N.Z.*

89 ii. —.—.]—There is a presumption of gift to the daughter in the case of a bank account opened by a widowed mother in the joint names of herself & her married daughter.—*RADWAY & SHORTT v. RADWAY*, [1938] 2 D. L. R. 578 ; O. R. 234.—*CAN.*

89 iii. —.—.]—C. G. who died in 1912, by his will, having provided for his children by his first wife & for his son, P. G., by his second wife, left certain property to his second wife, who survived him for many years. P. G. by the terms of his father's will received £100 *per annum* during his minority for his maintenance & education, & after attaining age in 1912 became absolutely entitled to certain property yielding between £50 & £100 *per annum*. Having qualified as a solr, he became

a partner in a Dublin firm of solrs. in 1918. P. G. continued to reside with his mother until her death in 1930. He married in 1933 & died in 1934. By his will he left all his property to his wife. His mother between the years 1913 & 1930 invested considerable sums of money in various securities ; some of which she purchased in her own name, & others in the joint names of herself & P. G. :—*Held* : the presumption of advancement applied to the securities purchased in the joint names, & P. G.'s widow was therefore entitled to the securities ; further, even if the presumption of advancement did not apply, yet, on the evidence, the intention of P. G.'s mother to benefit her son was sufficiently strong to rebut any presumption of a resulting trust.—*Re GRIMES, GRIMES v. GRIMES*, [1937] 1. R. 470.—*IR.*

### PART III. SECT. 3, SUB-SECT. 2.—D.

sg. *Grandfather & grandchild.*—The relationship of grandfather & grandson, when the grandfather is not *in loco parentis* & the father is living, raises no presumption of a gift.—*MACDONALD v. YOUNG* (1934), 7 M. P. R. 602.—*CAN.*

### PART III. SECT. 3, SUB-SECT. 3.

113 i. *Contrary intention of donor—Investments as trustee for daughters.*—*Held* : the circumstances did not rebut the presumption that the money was intended as an advancement to the children.—*JONES v. KINNEAR* (1882), N. S. R. (4 R. & G.) 1.—*CAN.*

sv. —.—.]—A father purchased land, the transfer of which was taken in the name of his daughter. The price paid was £700, of which the daughter contributed £286 10s., the father providing the balance. The title, when issued, was held by the father. Rents & outgoings were shared equally by the father & daughter during the father's life. At the request of the father the daughter signed an acknowledgment that the father owned "one equal half part of 'the house' in her name," being the property purchased. The father died leaving his widow a life interest in his residuary estate & until her death she received one-half of the net rents of the property. There were statements by the father contemporaneous with the gift showing that he might give his daughter the whole of the property, but he had never done so :—*Held* : on these facts, any presumption of advancement of the whole property to the deft. was rebutted.—*MILLARD v. LUCAS*, [1936] S. A. S. R. 166.—*AUS.*

sw. —.—.]—In 1920 deft. S. had an account with a savings bank the amount of which exceeded the amount permitted to bear interest. Acting on a suggestion made either by his own banker or an employee

of the savings bank, & desiring to keep his money at call & earning interest, S. opened at various times three trust accounts, signing on each occasion the declaration of trust required by the bank whereby he constituted himself trustee for each of his three infant daughters of all moneys standing at any time to his credit in each of the three accounts. By these declarations he declared that the moneys should be the exclusive property of the respective daughters & that he would not own or be interested (otherwise than as trustee) in any of the moneys. It was clear on the evidence of deft. that he always regarded & treated the moneys as his own, & thought of the declarations as formalities designed to overcome a technical obstacle, & that he never had any intention of disposing of the beneficial interest in any of the moneys deposited :—*Held* : deft. had not constituted himself a trustee of any of the moneys, & was entitled thereto as beneficial owner.—*STARR v. STARR*, [1935] S. A. S. R. 263.—*AUS.*

### PART III. SECT. 4.

124 viii. —.—.]—A., having large sums on deposit, gave the manager of his bank a number of deposit receipts in the joint names of A. & P. payable to them or either of them. He frequently took out sums & re-deposited in the same terms. In an action by P. against A.'s exors. claiming that the sums in the joint names of A. & P. did not form part of A.'s estate :—*Held* : *pltf.* had failed to rebut the implication of a resulting trust which arose in favour of A. & his representatives, *pltf.* having failed to prove any intention on the part of A. to part with his property in the deposited money during his life, & a disposition to take effect only upon his death, if he should not previously have disposed of the money, could only be effected by a declaration of trust, which was admitted not to have been made by him.—*OWENS v. GREEN*, [1932] 1. R. 225.—*IR.*

124 ix. —.—.]—Where money was put on deposit receipt in the joint names of the owner of the money & that of a stranger, & where the latter, at the request of the original owner, refused to sign the joint deposit receipt, & upon the death of the owner refused to sign the receipt to enable his personal representative to receive the money :—*Held* : in the absence of proof of intention on the part of the original owner to benefit the stranger or proof of a relationship from which a presumption of advancement might be drawn, the proceeds must go to the personal representative of the deceased original owner of the money.—*DOYLE v. BYRNE* (1922), 56 I. L. T. 125.—*IR.*

124 x. —.—.]—Money was deposited in a bank by X. in the joint

127a. —.]—J. M., being in failing health & expecting death in a short time, deposited a sum of £10,000 with the B. Bank & received from the Bank a deposit receipt in this form: "£10,000 . . . Received from J. M. & J. D. M. (a minor)," the son of J. M., . . . "the sum of ten thousand pounds sterling for credit in deposit account. Not transferable. . . Payable to either or the survivor. . . This receipt must be produced when payment of either principal or interest is desired." By his will, after giving certain legacies, J. M. directed his exors. to hold the rest of his property in trust for J. D. M. until he should attain the age of twenty-five years, & on his attaining that age, for him absolutely. Until J. D. M. attained that age the business of testator was to be carried on by the exors. There were other dispositions in case J. D. M. died under that age, an event which did not happen. On the death of J. M. the exors. withdrew & redeposited the sum of £10,000 & obtained a new deposit receipt for that sum in their own names. The business of testator was carried on at a loss. The business account kept by the exors. with the B. Bank was continually overdrawn. The exors. repeatedly paid the overdrafts out of the £10,000 & in so doing finally exhausted the whole sum. Both before & after he came of age J. D. M. took part in the management of the business. Soon after attaining the age of twenty-five J. D. M. claimed that he was entitled to the £10,000 deposited by J. M., & brought an action against the B. Bank to recover that sum as having been wrongfully & without his authority paid by the Bank to the exors.:—*Held*: by LORD WARRINGTON & LORD MACMILLAN, the exors. were entitled to receive the money & to apply it in due course of administration as directed by the will of J. M.; LORD THAKERTON agreeing on the ground that on the evidence as a whole J. M. did not purport to act as agent for J. D. M. in making the contract with the Bank, so as to make J. D. M. a contracting party, but that he alone contracted with the Bank, though for the benefit of J. D. M. as a third party; by LORD ATKIN, the contract was made by J. M. on behalf of himself & J. D. M., & if J. D. M. had ratified the act done on his behalf he would

have made himself a party to the contract; but by his conduct he had represented to the Bank that he did not intend to ratify the act done on his behalf, having so acted he could not afterwards ratify it, & consequently he had never become a party to the contract.—*McEvoy v. BELFAST BANKING CO., LTD.*, [1935] A. C. 24; 103 L. J. P. C. 137; 151 L. T. 501; 40 Com. Cas. 1, H. L.

131. *Add. Annotation*:—*Refd.* *Westminster Bank, Ltd. v. Wilson*, [1938] 3 All E. R. 652.

133. *Add. Annotation*:—*As to* (1) *Refd.* *Brown v. Brown*, [1936] 2 All E. R. 1616.

135. *Add. Annotation*:—*Refd.* *Beebee & Co. v. Turner's Successors* (1931), 48 T. L. R. 61.

151. *Add. Annotation*:—*Refd.* *Westminster Bank, Ltd. v. Wilson*, [1938] 3 All E. R. 652.

169a. — — —.]—*BERKLEY RYDER* (1752), 2 Ves. Sen. 533; 28 E. R. 340, L. C.

171. *Add. Annotation*:—*Consd.* *Re Wilkinson, Page v. Public Trustee*, [1926] Ch. 842.

172. *Add. Annotation*:—*Consd.* *Cohen v. Sellar*, [1926] 1 K. B. 536.

173. *Add. Annotation*:—*Consd.* *Cohen v. Sellar*, [1926] 1 K. B. 536.

174. *Add. Annotation*:—*Consd.* *Cohen v. Sellar*, [1926] 1 K. B. 536.

175. *Add. Annotation*:—*Consd.* *Cohen v. Sellar*, [1926] 1 K. B. 536.

175a. — — —.]—(1) If a man who has promised to marry a woman, & has given to her an engagement ring in contemplation of marriage, refuses without legal justification to carry out his promise, he cannot demand the return of the engagement ring.

(2) *Semble*: if a woman who has received an engagement ring in contemplation of marriage refuses to fulfil the conditions of the gift & to carry out her promise, she must return the ring.

(3) *Semble*: if an engagement to marry be dissolved by mutual consent, then in the absence of an agreement to the contrary the engagement ring & like gifts must be returned by each party to the other.—*COHEN v. SELLAR*, [1926] 1 K. B. 536; 95 L. J. K. B. 629; 135 L. T. 21; 42 T. L. R. 409; 70 Sol. Jo. 505.

names of X. & an infant X. kept possession of the bank-book:—*Held*: on X.'s death the remainder of the account did not pass to the infant, since the gift was testamentary & void.—*McKNIGHT v. TITUS* (1933), 6 M. P. R. 282.—*CAN.*

124 xi. — — —.]—An elderly lady & her nephew opened a joint account in the Commonwealth Savings Bank by the transfer of a large sum from an account in the lady's name. The nephew, who assisted his aunt in all her matters of business, did not contribute to the account, which was kept in funds by payments from the aunt's investments. The account was used solely for the purpose of supplying the aunt's needs. Moneys for this purpose were withdrawn by the nephew as required, the withdrawal slips being signed by both the aunt & the nephew. When the account was opened the aunt told the nephew & others that any balance remaining in the account at her death would belong to the nephew. Upon his aunt's death the nephew claimed the balance of the account:—*Held*: (1) the presumption

of a resulting trust in favour of the aunt & her estate was rebutted by the evidence of her intention to benefit the nephew; consequently, his legal right to the balance by survivorship prevailed; (2) the gift thus conferred upon the nephew was not a testamentary disposition.—*RUSSELL v. SCOTT* (1936), 55 C. L. R. 440; 36 S. R. N. S. W. 454; 53 N. S. W. W. N. 178; 42 Argus L. R. 375; 10 A. L. J. 211.—*AUS.*

#### PART III. SECT. 7, SUB-SECT. 1.

*sg. Gift subject to condition—Whether absolute gift & condition void—Or gift of life estate.*—*AMJAD KHAN v. ASHRAF KHAN* (1929), 56 L. R. Ind. App. 213.—*IND.*

*sk. Gift for education of infant.*—Money delivered to a Roman Catholic bishop to pay for the education of the infant, is a gift to the infant, & not a trust. On failure of the gift there is therefore no resulting trust to the donor.—*CLARKE v. ROMAN CATHOLIC BISHOP OF ST. JOHN*, [1937] 4 D. L. R. 491; 12 M. P. R. 183; 7 F. L. J. (Can.) 52.—*CAN.*

#### PART III. SECT. 7, SUB-SECT. 2.

172 v. — — —.]—A present made by an engaged man to his fiancée, in view of marriage, & intended for the use of both of them during their courtship & after their marriage, is recoverable by his personal representative where he dies before the marriage & during the continuance of the engagement.—*SHEPPARD v. ROBINSON* [1928] 3 D. L. R. 347; [1928] 2 W. W. R. 235; 23 Alta. L. R. 461.—*CAN.*

172 vi. — — —.]—Gifts which are given by the bridegroom, at the time of the betrothal of a girl, to the girl's parents on her behalf according to Burmese Buddhist custom must be returned by the parents if the betrothal is broken off.—*MAUNG LAW PHU v. MA BAW* (1933), 1 L. R. 11 Ran. 143.—*IND.*

#### PART III. SECT. 8.

185 iv. — — —.]—In absence of statute, there is no hard-and-fast rule that where a gift is alleged to have been made by a donor, since deceased, the evidence of the alleged donee as to the making of the gift must be dis-

191. *Add. Annotation*:—*Refd.* *Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776.
192. *Add. Annotation*:—*Refd.* *Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776.

194. *Add. Annotation*:—*Consd. Re Mainwaring, Mainwaring v. Verden*, [1936] 3 All E. R. 540.

## Part IV.—Incomplete Gifts.

206. *Add. Annotations*:—*Distd.* *Royal Exchange Assce. v. Hope*, [1928] Ch. 179. *Refd.* *Timpson's Executors v. Yerbury*, [1936] 1 All E. R. 186.

227. *Add. Annotation*:—*Overd. Re Swinburne, Sutton v. Featherley* (1925), 70 Sol. Jo. 64.

228. For the paragraph in original volume substitute the following paragraph:—

— *Non-payment due to suspicious signature* — *Subsequent death of donor.*—A lady, in her last illness, gave a cheque for £700 to a person with whom she had lived for some time, & the cheque was duly presented but not honoured, owing to the signature being of a very shaky & doubtful character. The donor died before the cheque could be again presented:—*Held*: the cheque not having been paid, there was no valid & effectual gift of the money to the donee.—*Re SWINBURNE, SUTTON v. FEATHERLEY*, [1926] 1 Ch. 38; 95 L. J. Ch. 104; 134 L. T. 121; 70 Sol. Jo. 64, C. A.

*Annotation*:—*Consd.* *Timpson's Executors v. Yerbury* (1935), 79 Sol. Jo. 523.

Compare original volume, p. 542, No. 292.

259. *Add. Annotations*:—*Distd.* *Royal Exchange Assc. v. Hope*, [1928] Ch. 179. *Refd.* *Timpson's Executors v. Yerbury*, [1936] 1 All E. R. 186.

268. *Add. Annotations*:—*Apld. Re Comberbach, Saunderson v. Jackson* (1929), 73 Sol. Jo. 403. *Refd.* *Jenkins v. Jenkins*, [1928] 2 K. B. 501; *Cashin v. Cashin*, [1938] 1 All E. R. 536.

269. *Add. Annotation*:—*Refd.* *Jenkins v. Jenkins*, [1928] 2 K. B. 501.

270. *Add. Annotation*:—*Refd.* *Cashin v. Cashin*, [1938] 1 All E. R. 536.

274. *Add. Annotation*:—*Refd.* *Cashin v. Cashin*, [1938] 1 All E. R. 536.

- 276a. — *Incomplete gift of real estate.*—*Re COMBERBACH, SAUNDERSON v. JACKSON* (1929), 73 Sol. Jo. 403.

### SUB-SECT. 4.—APPOINTMENT OF DONEE AS ADMINISTRATOR.

- 280a. *Intention expressed in donor's lifetime—Continuing intention.*—The legal estate acquired by an administrator is no less effectual than that of an exor. appointed by will to perfect an imperfect gift made by deceased owner of the estate to the administrator.

On the death of his father, J. handed over the furniture & title deeds of a certain house & premises, forming part of his father's estate, to S. & allowed her to occupy the house rent free. J. died intestate, & S. was appointed an administratrix:—*Held*: there was a continuing intention on the part of the donor up to the time of his death to give the property to the donee, & by her appointment as an administratrix she had acquired the legal estate.—*Re JAMES, JAMES v. JAMES*, [1935] Ch. 449; 104 L. J. Ch. 247; 153 L. T. 277.

believed unless corroborated. It must be examined with care, even with suspicion, but if it brings conviction to the tribunal trying the case, that conviction will be acted upon.—*NATIONAL TRUST CO., LTD. v. AYTON*, [1934] 1 W. W. R. 285; 2 D. L. R. 404.—CAN.

187 i. *Onus of proof on donee—Grant purporting to be for consideration.*—Where a conveyance or mtge. is expressed to be for valuable consideration, but the fact is that none was paid nothing but the clearest evidence can avail to show that a gift was intended. Where there is nothing but the instrument itself before the ct. from which to draw conclusions, it must be held to be the exclusive & conclusive evidence of the contract between the parties.—*JOHN DEERE PLOW CO., LTD. v. PETERS & SPOHN*, [1929] 2 D. L. R. 103; 23 S. L. R. 218; [1928] 3 W. W. R. 686.—CAN.

### PART III. SECT. 10, SUB-SECT. 2.

*sm. Gift of land subject to mortgage.*—Where a father makes a gift of land to his son, the presumption is that it is made subject to mtges. which then actually exist against the land, including a mtge. which had not been registered at the date of the gift.—*ORENZUK v. DOLINSKY* (Alta.), [1927] 3 W. W. R. 596.—CAN.

### PART IV. SECT. 1, SUB-SECT. 1.

*h i.* — *J.*—*MORTON v. BRIGHOUSE*, [1927] 1 D. L. R. 1009; [1927] S. C. R. 118.—CAN.

PART IV. SECT. 2, SUB-SECT. 1.—A. 245 ii. — *J.*—Equity will not perfect an incomplete gift.—*JACQUES v. HOPKINS & HOPKINS*, [1931] 2 W. W. R. 277; 3 D. L. R. 410; 25 Alta. L. R. 372.—CAN.

### PART IV. SECT. 2, SUB-SECT. 1.—B.

*r i.* — *Document not completed.*—*Nor proved to be document made by donor.*—*REILLY v. WOODWORTH* (1924), 51 N. B. R. 163.—CAN.

### PART IV. SECT. 2, SUB-SECT. 2.

*s i.* — *J.*—*X.* put his son Y. & his wife in possession of land & told them they could have it as long as they wished. He assisted Y. to build a fence & Y. then built a house:—*Held*: this amounted in equity to a gift of the land.—*CAMPBELL v. CAMPBELL*, [1932] 3 D. L. R. 501; 4 M. P. R. 502.—CAN.

*t i.* — *J.*—*Hovey v. Ferguson* (1871), 18 Gr. 498.—CAN.

### PART IV. SECT. 2, SUB-SECT. 3.

*c i.* — *J.*—*Re JENKINS & BRASH v. VULCAN IRON WORKS, BRAY v. VULCAN IRON WORKS* (B.C.), [1927] 1 D. L. R. 1099.—CAN.

*c ii.* — *J.*—*W.*, a member of a stockbroking partnership, credited his son's account in the client's ledger with £5,000 & debited his own account in the partners' ledger with the same sum. This was balanced on the other side of the account with shares to the

face value of £13,000, which stood in the name of a certain bank as collaterals for the loan account of W. The investments were sold from time to time & others substituted, & at the time of the death of W. were represented by securities to the face value of £9,000 which were in the name & custody of the bank. W. never informed the bank that he had made the shares over to his son, but requested them to accept release orders signed by his son & all dividends on the original & substituted securities were credited to the account of the son in the books of the firm. By a letter handed to his son W. informed the exors. of his will that the shares were the property of his son & did not form part of his assets & so informed one of the exors. verbally. W. did nothing further to perfect the gift of the securities but appointed his son as one of the exors. of the will:—*Held*: the securities did not form part of the estate of W. but were the property of his son, subject to the limitation that the exors., if any, of the value of the securities, when realised, over the sum of £5,000 belonged to the exors. as assets of the testator.—*Re WILSON, GROVE-WHITE v. WILSON*, [1933] 1 R. 729.—IR.

### PART IV. SECT. 3.

*sp. Donor repossessing himself of transfer & certificate of title—Before transfer registered.*—Registered owner of land, with intention of making a gift of it



## Part V.—Gifts mortis causâ.

286. *Add. Annotation*:—*As to* (2) *Refd. Wilkes v. Allington*, [1931] 2 Ch. 104.

292. *Add. Annotation*:—*As to* (1) *Consd. Re Swinburne, Sutton v. Featherley* (1925), 70 Sol. Jo. 64.

294a. ———.]—*Semble*: when testator, in his lifetime, hands over to a person a sum of money, & directs him, out of it, to pay the expenses consequent on his sickness, & in case of death, his funeral expenses, such money does not pass under the will.—*In the Goods of TOOMY* (1864), 3 Sw. & Tr. 562; 34 L. J. P. M. & A. 3; 28 J. P. 824; 13 W. R. 106; 164 E. R. 1393.

302. *Add. Annotation*:—*Folld. Darlow v. Sparks*, [1938] 2 All E. R. 235.

303. *Add. Annotation*:—*As to* (1) *Refd. Wilkes v. Allington*, [1931] 2 Ch. 104.

307. *Add. Annotation*:—*Refd. Wilkes v. Allington*, [1931] 2 Ch. 104.

327. *Add. Annotation*:—*Refd. Re Swinburne, Sutton v. Featherley* (1925), 70 Sol. Jo. 64.

330a. ———.]—*Re WHILE, WILFORD v. WHILE*, [1928] W. N. 182.

331. *Add. Annotation*:—*Refd. Re Swinburne, Sutton v. Featherley* (1925), 70 Sol. Jo. 64.

337a. ———.]—Where testator, in his last illness, said he wanted to leave something to C., & then directed her father to get mtge. deeds out of a box in his room, & said he should give the deeds for C., & handed them over to her father:—*Held*: the gift was a good *donatio mortis causâ*, & the donee was entitled to the money secured by the deeds.—*Re PATTERSON, MITCHELL v. SMITH* (1864), 10 L. T. 520; 10 Jur. N. S. 578; on appeal, 4 De G. J. & Sm. 422.

## (g) Other Documents.

342a. War Savings certificates.]—Shortly before her death, a woman, using words of gift,

handed to her father certain War Savings certificates & National Savings certificates, with the intention of passing the property in them. The husband of the woman claimed to be entitled to them:—*Held*: War Savings certificates & National Savings certificates are capable of being the subject-matter of a *donatio mortis causâ*.—*DARLOW v. SPARKS*, [1938] 2 All E. R. 235; 54 T. L. R. 627; 82 Sol. Jo. 256.

342b. National Savings certificates.]—*DARLOW v. SPARKS*, No. 342a, ante.

347. *Add. Citations*:—95 L. J. Ch. 204; 133 L. T. 465.

351. *Add. Annotation*:—*Refd. Wilkes v. Allington*, [1931] 2 Ch. 104.

356a. Gift made in contemplation of death from incurable disease—Death from different illness—Gift valid.]—A *donatio mortis causâ* is not generally conditioned upon the donor dying from the same disorder as that from which he is suffering, & contemplates the probability of death, at the time it is made.

By a mtge. made in 1922 the widow of J., who was tenant for life under his will, mortgaged a farm to W., a brother of J., to secure £1,000 & interest at 5 per cent. The widow died in 1923, having appointed her two daughters, E. & X., exors. of her will. The mtge. contained no personal covenant for payment of the principal, & the mtgee. accepted interest at 3½ per cent., reduced in 1924 to 3 per cent. In 1924 W., who was on very friendly terms with his brother's family, gave the deeds relating to the farm, other than the mtge. deed, to E. & X., to retain in their custody. On Dec. 11, 1927, W., who had since 1922 been suffering from an incurable disease & knew that he could not possibly live long, called upon his nieces, who were aware of his state of health, & gave them an envelope indorsed in his own handwriting: "Deeds relating to X. farm to be

to S., delivered to the father of S. a transfer of the land to S. & the duplicate certificate of title. He subsequently repossessed himself of the transfer & certificate before S. had an opportunity to register the transfer which he destroyed:—*Held*: the inchoate gift to S. was effectually revoked & S. was not entitled to be recorded as owner of the land.—*SMITH v. SMITH* (1915), 21 D. L. R. 861; 31 W. L. R. 607; 8 W. W. R. 1077.—CAN.

## PART V. SECT. 1.

*sr. Grounds for setting aside—Undue influence—Gift by parishioner to parish priest.*—*BOHAN v. WALKER*, [1928] 4 D. L. R. 630.—CAN.

## PART V. SECT. 2, SUB-SECT. 2.—A.

*sr. Receipts issued to transferee of stock by Banks of England & Ireland.*—Neither the receipt issued by the Bank of England to a transferee of India 5½ per cent. stock, 1932, which contained particulars of the consideration paid for the "interest or share in the stock transferred," nor the receipt issued by the Bank of Ireland to a transferee of 3 per cent. local loans stock, can be the subject of a *donatio mortis causâ*.—*Re M'WEY, RYAN v. CASHIN & COSTELLO*, [1928] I. R. 486.—IR.

## PART V. SECT. 2, SUB-SECT. 2.—B. (b).

311 *xxiii.* ———.]—A *donatio mortis causâ* may be made by the donor placing money upon deposit receipt in the joint names of himself & the donee. The handing of the deposit receipt to the donee is sufficient delivery, & a direction by the donor to the donee to make certain payments out of the money does not invalidate the gift.—*FAYNE v. MARTIN* (1924), 59 I. L. T. 14.—IR.

311 *xxiv.* ———.]—A woman, engaged in domestic service & without a home of her own, placed her savings in deposit-receipt in 1900 in name of herself & her sister to be drawn by either of them or the survivor. The receipt was then handed to the sister, who kept it at her home, but periodically the deposit was uplifted by the depositor & redeposited with interest & further savings added to it. The depositor had a niece & nephew, her sister's children, & on the sister's death in 1921, the name of the niece was substituted as the second name in the receipt, the receipt being thereupon handed by her to him. The depositor regarded her sister's family as her only relatives & their home as her own, & on several occasions, she had stated to third persons that the

sum on deposit was to go to the survivor of the persons named in the receipt. The depositor having died in 1930, survived by the nephew:—*Held*: the terms of the deposit-receipt, taken in conjunction with the depositor's expressions of intention, were sufficient to instruct a donation *mortis causâ* of the sum on deposit in favour of the nephew.—*MACPHERSON'S EXECUTRIX v. MACKAY*, [1932] S. C. 505.—SCOT.

## PART V. SECT. 2, SUB-SECT. 2.—B. (c) ii.

326 *i.* *Cheque—Cashed before death.*—The gift of a cheque three days before death, & cashed the day before death:—*Held*: not testamentary, & either a valid completed gift *inter vivos*, or a *donatio mortis causâ*.—*CAMPBELL v. FENWICK*, [1934] 4 D. L. R. 787; O. R. 692.—CAN.

## PART V. SECT. 2, SUB-SECT. 2.—B. (f).

341 *i.* *Life insurance policy—Document delivered to third party for donee.*—*Held*: all the essential conditions of a valid & effectual *donatio mortis causâ* had been established.—*NELSON v. PRUDENTIAL ASSURANCE CO.*, [1929] N. I. 113.—IR.

given up at death. W.,” saying: “I have brought this down for you; put it away.” After he had left the house the envelope was opened, & was found to contain the mtge., which the nieces placed in their safe. On Jan. 23, 1928, W. died of pneumonia following a chill. In an action by his exors. for a declaration that the mtge. was a subsisting security & to enforce it:—*Held*: there was a valid *donatio mortis causa* by W., & a release of the mtge. to the two daughters of J. for the benefit of his estate.—*WILKES v. ALLINGTON*, [1931] 2 Ch. 104; 100 L. J. Ch. 262; 144 L. T. 745; 47 T. L. R. 307; 75 Sol. Jo. 221.

369a. ———.]—*Re HARRISON, PUBLIC TRUSTEE v. BEST* (1934), 78 Sol. Jo. 135.

372. *Add. Annotation*:—*Reid. Re Swinburne Sutton v. Featherley*, [1926] Ch. 38.

379. *Add. Annotation*:—*Consd. Re Craven's Estate, Lloyds Bank, Ltd. v. Cockburn*, [1937] Ch. 423.

386a. *Instructions to use power of attorney*.]—A testatrix had given her son a power of attorney in very wide terms over certain shares & money standing in her name at a bank abroad. When about to undergo an operation she told the son to get such shares & money transferred into his own name, as she wanted him to have them if anything should happen to her. The son accordingly, acting as her agent under the power of attorney, instructed the bank to transfer the shares & money into his name. Testatrix died a few days later. The question arose as to whether there had been a good *donatio mortis causa* of the shares & money or whether they formed part of the estate of testatrix. By her will testatrix gave her trustees a power of

advancement in favour of the son, *inter alia*, for “the purchase of a business or a share in a business”:—*Held*: (1) the mere giving of the power of attorney was not in itself a sufficient parting by testatrix with her dominion over the shares & money to make it a *donatio mortis causa*, but when testatrix instructed her son to transfer the shares & money into his own name, she parted with her dominion over the property, & there was a good *donatio mortis causa*; (2) the question was one which arose in the administration of the estate, & as the estate was being administered in England according to English law, it was a question which ought to be determined according to the law of England, subject to the condition that, the property being situated abroad, that which was said to constitute the parting with dominion ought to be something which would be an effective parting with dominion in the place abroad where the property was situated; (3) the power of advancement did not extend to an advance of a sum to be applied & invested with the trustees of Lloyd's as a fund which would be available to meet the son's liabilities, so as to enable him to become an underwriter at Lloyd's; (4) as such an advance would not be expedient for the trust as a whole, the ct. could not sanction it under Trustee Act, 1925 (c. 19), s. 57 (1).—*Re CRAVEN'S ESTATE, LLOYDS BANK, LTD. v. COCKBURN* (No. 1), [1937] Ch. 423; [1937] 3 All E. R. 33; 106 L. J. Ch. 308; 157 L. T. 283; 53 T. L. R. 694; *sub nom. Re CRAVEN'S ESTATE, LLOYDS BANK, LTD. v. CRAVEN*, 81 Sol. Jo. 398.

399a. *Donee with access to keys—Presumption of fraud*.]—*SIMMS v. COX* (1824), 3 L. J. O. S. K. B. 44.

PART V. SECT. 3, SUB-SECT. 3.—A.  
357 v. *affd.* (1920), 48 O. L. R. 539.—CAN.

PART V. SECT. 3, SUB-SECT. 3.—B.

374 v. ———.]—The delivery by a person *in extremis* of the keys of his safe, accompanied by the words, “They lead to everything I have got, everything I have got is yours”:—*Held*: to operate as a *donatio mortis causa* of the things in the safe other than the money in a bank represented by a pass book found in the safe.—*CUSACK v. DAY*, [1925] 3 D. L. R. 1023; [1925] 2 W. W. R. 715.—CAN.

sl. *Delivery of paper expressing gift*.]  
—A valid *donatio mortis causa* is constituted by the giving of a paper expressing a gift of furniture, etc., a year & a half prior to the death.—*Re ROSEMERGEY* (1934), 49 B. C. R. 93.—CAN.

PART V. SECT. 3, SUB-SECT. 3.—C.

387 iv. ———.]—Shortly before her death deceased handed to her servant a locked box with the key & told her to keep it for A. D. until the latter returned from England, & then give it to her. The servant was instructed to tell A. D. that what was in the box

was for her. The box was not delivered until after the death of deceased, &, on being opened, it was found to contain a post office savings bank-book, which showed a certain sum standing to the credit of deceased. It was not disputed that there was an intention to make a *donatio mortis causa*:—*Held*: the intended *donatio mortis causa* failed, as there was no delivery, actual or constructive, to A. D., since the mere instructions by deceased to her servant, & the obedience to these instructions, were not sufficient to make the servant an agent of the intended donee.—*Re THOMPSON'S ESTATE*, [1928] 1 R. 606.—IR.

## GRAIN.

See AGRICULTURE.

# GUARANTEE AND INDEMNITY.

## Part II.—Requisites of Guarantee.

41. *Add. Annotations*:—*Dlstd. Hardie & Lane v. Chilton*, [1928] 2 K. B. 306. *Consd. Mutual Finance, Ltd. v. Wetton & Sons, Ltd.*, [1937] 2 K. B. 389.
45. *Add. Annotations*:—*As to (2) Refd. Re Lloyds Bank, Ltd., Bomze v. Bomze* (1930), 47 T. L. R. 38. *Generally, Refd. Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380.
54. *Add. Annotations*:—*Consd. Re George Inglefield, Ltd.* (1932), 48 T. L. R. 536; *Staffs Motor Guarantee, Ltd. v. British Wagon Co.*, [1934] 2 K. B. 305.
83. *Add. Annotation*:—*Refd. Hawkesworth v. Turner* (1930), 46 T. L. R. 389.
121. *Add. Annotation*:—*Refd. Hardie & Lane v. Chilton*, [1928] 2 K. B. 306.
134. *Add. Annotations*:—*Consd. Portofino Tank Steamer Owners v. Berlin Derunaptha* (1934), 39 Com. Cas. 330. *Refd. Hall v. I. R. Comrs.* (1926), 135 L. T. 759; *Lewis v. Cammell, Laird & Co.* (1929), 22 B. W. C. C. 410; *Smith v. Union Castle S.S. Co., Ltd.* (1931), 24 B. W. C. C. 71; *Re Gregory, Ex p. Norton*, [1935] Ch. 65.
156. *Add. Annotation*:—*Refd. Mutual Finance, Ltd. v. Wetton & Sons, Ltd.*, [1937] 2 K. B. 389.

## Part III.—Proof of Guarantee.

257. *Add. Annotation*:—*Refd. Royal Exchange Assce. v. Hope*, [1928] Ch. 179.
285. *Add. Annotation*:—*Refd. Stanley (Montagu) & Co. v. Solomon, Ltd.*, [1932] 2 K. B. 287.

### PART I.

b i. ——— *Original distinguished from collateral contract.*—*Re THOMSON*, [1927] 2 D. L. R. 254; 60 O. L. R. 165.—CAN.

13 i. ———.]—The mere fact that a particular agreement may terminate in a liability for the debt of another does not make it a guarantee instead of an indemnity where the former is not its immediate or main object.—*McPHERSON v. FORLONG*, [1928] 3 W. W. R. 45; 37 Man. L. R. 508.—CAN.

sa. *Distinguished from direction to furnish goods on credit of principal.*—*GRASSETT v. HUTCHINSON* (1860), 10 C. P. 265.—CAN.

sb. *Distinguished from novation of contract.*—*NATIONAL POLE & TREATING CO. v. BLUE RIVER POLE & TIE CO.* (B. C.), [1929] 3 D. L. R. 638; *revid. on facts*, [1930] 3 D. L. R. 996; 43 B. C. R. 98.—CAN.

### PART II. SECT. 1.

so. *Fidelity guarantee — Primary obligation of principal.*—*R. v. BLACK* (Ont.) (1899), 8 Exch. C. R. 236.—CAN.

se. *Necessity for mutuality.*—*GANONG v. GAULT*, [1934] 2 D. L. R. 353.—CAN

### PART II. SECT. 2, SUB-SECT. 1.

23 i. *What constitutes offer.*—Goods were supplied by a manufacturer to a buyer upon the faith of a document addressed to the manufacturer, & signed by a third person, containing these words—"I am prepared to back him, the buyer, for 1 month credit to £30"—*Held*: the document amounted to a guarantee.—*DAVISON (A. A.) PTY., LTD. v. SEABROOK*, [1931] Argus L. R. 156.—AUS.

### PART II. SECT. 3, SUB-SECT. 2.

44 ii. ——— *For benefit of third party.*—Where a married woman signs an instrument at the request of her husband, not for his benefit, but for the accommodation of a friend or relative of his, the evidence necessary to prove that undue influence was exercised by the husband must be much stronger than would be necessary

had the signature been obtained for the husband's benefit.—*WATKINS (J. R.) Co. v. NOBERT (Alta.)*, [1926] 1 D. L. R. 526; [1926] 1 W. W. R. 156.—CAN.

——— *For benefit of husband.*—*See HUSBAND & WIFE*, Nos. 1370 i, 1370 ii, *post*.

### PART II. SECT. 3, SUB-SECT. 5.

1 i. ———.]—Pltf. entered into a contract with an incorporated building co. for the installation of heating equipment. Def., as president of the co., wrote a letter to pltf. in which he said, "I shall personally see to it that you get your payments regularly as per contract" & signed it:—*Held*: the document was not a guarantee by the co. of its own account & the signature was sufficient to charge deft. personally.—*MILES v. ZUCKERMAN*, [1931] 1 D. L. R. 448; *affd.*, [1931] 4 D. L. R. 370; O. R. 368.—CAN.

### PART II. SECT. 4, SUB-SECT. 1.

55 vi. ———.]—*CAMPBELL v. MCISAAC* (1873), 9 N. S. R. (3 G. & O.) 287.—CAN.

55 vii. ———.]—R. had a contract with def., the owner of a building, to do some work thereon. Pltfs. supplied R. on credit, with material for the work; & alleging a promise by deft. to pay for the material if R. did not, sued deft. as upon a guarantee, R. having failed to pay:—*Held*: there being nothing in the evidence to suggest that there was any bargain with deft. that pltfs. would not register a mechanic's lien on deft.'s property, there was no consideration for the alleged promise of deft.—*ERSKINE-SMITH CO. v. BORDELEAU*, [1929] 2 D. L. R. 877; 63 O. L. R. 621.—CAN.

### PART II. SECT. 4, SUB-SECT. 3.—A.

sd. *Agreement by bailee to deliver goods to purchaser—Promise by vendor to indemnify bailee against loss if goods not according to contract.*—*Held*: the agreement to deliver, & not the delivery itself, formed the consideration for the promise to indemnify.—*CUNNARD*

*v. PLUMMER* (1844), 4 N. B. R. (2 Kerr) 418.—CAN.

### PART II. SECT. 4, SUB-SECT. 5.—A.

157 i. *Insufficiency of past consideration.*—Pltf. sued deft. for moneys due under an agreement in writing whereby he undertook that if a co. in which pltf. had at his request taken shares, failed to pay a ten per cent. dividend in certain years, he would pay pltf. within seven days the amount of such ten per cent. dividends. The agreement was executed some months after pltf. had taken up shares. Pltf. alleged that the agreement was made in pursuance of an agreement made antecedent to his purchase of the shares. Deft. denied the antecedent agreement & claimed that the guarantee having been given for a past consideration, was not enforceable:—*Held*: on the facts, although the question of a guarantee had been raised between the parties prior to pltf.'s taking up the shares, there had been no *animus contrahendi* on the part of deft. to give the guarantee before the shares were acquired & the guarantee being therefore given for a past consideration was a *nudum pactum* & unenforceable.—*POWER v. AHERN* (1935), 29 Q. J. P. R. 85; [1935] Q. W. N. 22.—AUS.

### PART III. SECT. 1, SUB-SECT. 1.—A.

so. *Verbal agreement of guarantee or suretyship.*—*Held*: unenforceable because of Stat. Frauds.—*DOYLE v. MCKINNON*, [1925] 3 D. L. R. 334; 57 O. L. R. 104.—CAN.

### PART III. SECT. 1, SUB-SECT. 1.—B.

st. *Promise to guarantee dividend & stock.*—*Held*: not a guarantee to which Stat. Frauds, R. S. O., 1914 (c. 102), s. 6, applied.—*QUANCE v. BROWN*, [1926] 2 D. L. R. 824; 58 O. L. R. 578.—CAN.

### PART III. SECT. 1, SUB-SECT. 2.—A.

190 i. *Representations within Statute of Frauds Amendment Act, 1828 (c. 14), s. 6—Representation by partner as to credit of firm.*—A representation made by one of two or more partners as to

295. *Add. Annotation*:—*Apld.* Farr, Smith v. Messers (1927), 44 T. L. R. 48.
307. *Add. Annotation*:—*N.F.* McCall Bros., Ltd. v. Hargreaves (1932), 48 T. L. R. 450.
308. *Add. Annotations*:—*Consd.* National Sales Corp., Ltd. v. Bernardi, Bernardi v. National Sales Corp., Ltd., [1931] 2 K. B. 188. *Expld.* McCall Bros., Ltd. v. Hargreaves (1932), 48 T. L. R. 450.
309. *Add. Annotations*:—*Consd.* National Sales Corp., Ltd. v. Bernardi, Bernardi v. National Sales Corp., Ltd., [1931] 2 K. B. 188. *Expld.* McCall Bros., Ltd. v. Hargreaves (1932), 48 T. L. R. 450.
310. *Add. Annotations*:—*Apld.* National Sales Corp., Ltd. v. Bernardi, Bernardi v. National Sales Corp., Ltd., [1931] 2 K. B. 188. *Consd.* McCall Bros., Ltd. v. Hargreaves (1932), 48 T. L. R. 450.
- 310a. ———.]—*Pltfs.*, who were creditors of the W. co., agreed with the W. co. & with deft. that they would take bills in respect of the past & future indebtedness of the W. co. if deft. would indorse the bills. Bills payable to *pltfs.* order were then drawn by *pltfs.* & accepted by the W. co., & before *pltfs.* had indorsed them, deft. wrote his name on the back. Subsequently *pltfs.* indorsed the bills by writing their name beneath, instead of above, that of deft. In an action on the bills deft. contended that as they had never been negotiated he did not incur the liabilities of an indorser & that his agreement, if any, was a guarantee & was not in writing, & he pleaded the Statute of Frauds:—*Held*: in the above circumstances *pltfs.* had authority under Bills of Exchange Act, 1882 (c. 61), s. 20, to complete the bills by adding their indorsement, & that even if deft.'s agreement was a contract of guarantee the Statute of Frauds was no answer to a claim on the bills, & therefore the action succeeded.—*MCCALL BROS., LTD. v. HARGREAVES*,

[1932] 2 K. B. 423; 101 L. J. K. B. 733; 147 L. T. 257; 48 T. L. R. 450; 76 Sol. Jo. 433.

312. *Add. Annotations*:—*Folld.* National Sales Corp., Ltd. v. Bernardi, Bernardi v. National Sales Corp., Ltd., [1931] 2 K. B. 188. *Refd.* McCall Bros., Ltd. v. Hargreaves (1932), 48 T. L. R. 450.

312a. *Signature of drawer below that of third party—Intention of parties considered.*]—Bills of exchange drawn to the order of the drawer & accepted were indorsed by a third party with the intention of rendering himself liable if the acceptor did not pay. They were afterwards indorsed by the drawer with the intention of completing them & making them enforceable against the third party if necessary, the signature of the drawer being placed below that of the third party on the backs of the bills. The acceptor not having paid the bills at maturity, the drawer brought an action upon them against the third party as indorser:—*Held*: he was entitled to recover, inasmuch as the fact that his signature instead of being above was below that of the third party on the backs of the bills was a mere inadvertence which did not nullify the intentions of the parties or alter the rights which they would otherwise have had.—*NATIONAL SALES CORPN., LTD. v. BERNARDI, BERNARDI v. NATIONAL SALES CORPN., LTD.*, [1931] 2 K. B. 188; 100 L. J. K. B. 386; 145 L. T. 48; 47 T. L. R. 380; 36 Com. Cas. 270.

*Annotation*:—*Apld.* McCall Bros., Ltd. v. Hargreaves (1932), 48 T. L. R. 450.

323. *Add. Annotation*:—*Refd.* Franco-British Ship Store Co. v. Compagnie des Chargeurs Française (1926), 42 T. L. R. 735.

345. *Add. Annotations*:—*Distd.* Reckitt v. Barnett, Pembroke & Slater, [1929] A. C. 176. *Refd.* Lloyds Bank v. Chartered Bank of India, Australia & China, [1929] 1 K. B. 40.

## Part IV.—Interpretation.

377. *Add. Annotation*:—*As to* (2) *Refd.* Eshelby v. Federated European Bank, Ltd. (1931), 101 L. J. K. B. 245.
421. *Add. Annotation*:—*Refd.* Allen v. Royal Bank

of Canada (1925), 95 L. J. P. C. 17.

433. *Add. Annotation*:—*Consd.* Mann, Taylor & Co., Ltd. v. Royal Bank of Canada (1935), 40 Com. Cas. 267.

the credit of his firm is a representation as to the credit "of any other person" within sect. 6 of Lord Tenterden's Act, but a firm is not liable for such a representation made by one of its partners, even though the other partners knew & approved of it; the only person who can be charged being the partner who actually signed the representation. In an action against partners founded upon fraudulent misrepresentations as to the credit of the firm, one of the defts. pleaded non-compliance with sect. 6 of Lord Tenterden's Act:—*Held*: sects. 8, 12 & 13 of Partnership Act had not the effect of impliedly repealing sect. 6 in so far as it related to false representations by a partner, & the plea was a good defence to the cause of action except in so far as the representations were in writing signed by deft.—*TURNBULL & CO. v. MACKAY*, [1932] N. Z. L. R. 1300; G. L. R. 444.—*N.Z.*

196 III. ———.]—*TUPPER v. CROWE* (1862), 15 N. S. R. (3 R. & G.) 261.—*CAN.*

196 IV. ———.]—*CARR v. BANK OF MONTREAL*, [1929] 3 D. L. R. 54; 63 O. L. R. 544.—*CAN.*

sq. *Representations within C. S. U. C.*, c. 46, s. 10.—*As to solvency of trader—Necessity for writing.*—*MCLEAN v. DUN* (1877), 1 A. R. 153.—*CAN.*

### PART III. SECT. 2, SUB-SECT. 1.—B. (a).

232 1. *Whether credit given to surety alone.*]—A promise "you haul the wood & I'll see you paid" creates a primary liability & not a contract of suretyship.—*WAMBOLT v. ARENBURG*, [1936] 4 D. L. R. 399.—*CAN.*

### PART III. SECT. 2, SUB-SECT. 2.

263 1. *Promise to stranger—Surety, guarantor or bail.*]—A promise to indemnify one who is a surety, guarantor or bail for a third person is not within Stat. Frauds.—*MCPIERSON v. FORLONG*, [1928] 3 W. W. R. 45; 37 Man. L. R. 508.—*CAN.*

### PART III. SECT. 3, SUB-SECT. 3.—A.

st. *Lapse of signed offer—Resuscitation.*]—Where a signed offer of guarantee has lapsed, it may be resuscitated either by the signatory's reopening the offer to the other party, or by the other party offering to accept it as a binding agreement, & upon an agreement resulting the document containing the signed offer is sufficient to satisfy Stat. of Frauds.—*O'YOUNG & LUM v. REID & CO., LTD.*, [1932] Argus L. R. 278; 6 A. L. J. 76.—*AUS.*

### PART IV. SECT. 1.

369 II. ———.]—A contract of guarantee must be strictly construed; but it must be read as a whole & given an intelligible construction.—*BANK OF NOVA SCOTIA v. ZINK* (1934), 7 M. P. R. 476.—*CAN.*

### PART IV. SECT. 2, SUB-SECT. 1.

s. 1. ———.]—No collateral agreement will be admitted to affect a guarantee complete upon its face.—

## Part V.—Liability of the Surety.

479. *Add. Annotation*:—*Refd. Smith v. Wood* (1928), 130 L. T. 250.
482. *Add. Annotation*:—*Consd. Tate v. Crewdson*. [1938] 3 All E. R. 43.
483. *Add. Annotation*:—*Generally, Refd. Tate v. Crewdson*, [1938] 3 All E. R. 43.
516. *Add. Annotations*:—*As to* (1) *Refd. Re Parent Trust & Finance Co.*, [1936] 3 All E. R. 432.
517. *Add. Annotation*:—*Refd. Greer v. Kettle*, [1938] A. C. 156.
525. *Add. Annotation*:—*Generally, Refd. Re Parent Trust & Finance Co.*, [1936] 3 All E. R. 432.
546. *Add. Annotation*:—*Refd. Eshelby v. Federated European Bank, Ltd.* (1932), 146 L. T. 336.
557. *Add. Annotation*:—*As to* (1) *Refd. Re Parent Trust & Finance Co.* (1936), 155 L. T. 159.
- 559a. *Guarantee of payments to contractor—Subject to due execution of work.*]—A limited co. employed a building contractor to execute certain repairs & decorations to a building by an agreement under seal made between the co., one T. therein called the guarantor, & a bank, & the contractor. The agreement provided that the contractor should do the work for the sum of £1,500, to be paid in four equal instalments on named dates "subject to the said works being duly executed in accordance with this agreement." By clause 11 of the agreement the guarantor agreed with the contractor & with the bank, & undertook, that the co. should, subject to the said works being duly executed in accordance with the agreement,

duly & punctually make to the contractor the payments mentioned above, & that upon any default for three days on the part of the co. (written notice of which should be given by the contractor to the guarantor within six days of the default) in making any payment on the prescribed date, the guarantor would himself immediately make the payment so in default to the contractor. By clause 12 the bank agreed with the contractor & undertook, that upon any default for three days or more (written notice of which should be given to the bank by the contractor within three days of the default) on the part of the guarantor in making any payment under clause 11 the bank would immediately make the payment so in default to the contractor. The co. did not pay the first instalment. The contractor gave no notice either to the guarantor or to the bank. The contractor then issued a specially indorsed writ against the bank claiming the first instalment. The case was heard by an Official Referee, who found that at the date of the writ it was necessary to spend £80 in order to complete the work in accordance with the agreement. He deducted this sum from the amount claimed, & gave judgment for *pltf.* for the balance:—*Held*: the defts. were not liable.

By SCRUTTON & SLESSER, L.J.J., because it was a condition precedent to their liability that the works should be duly executed in accordance with the agreement, & the works were not so executed. By GREER & SLESSER, L.J.J., because the liability of defts. depended upon that of T., & he was never liable, because it was a condition precedent to his liability that *pltf.* should have given him notice of the

BANK OF NOVA SCOTIA v. WIGMORE (1933), 7 M. P. R. 115.—CAN.

*sh. To supply name of principal debtor—Not admissible.*]—IMPERIAL BANK OF CANADA v. NIXON, [1926] 4 D. L. R. 1052; 59 O. L. R. 538.—CAN.

## PART IV. SECT. 5, SUB-SECT. 1.

*p. l. For definite engagement.*]—Where a guarantee has been given for the performance of a definite engagement, which has already come into existence & is not contingent, & the consideration for which is not variable as the result of future dealings between the parties, the guarantee is not a continuing guarantee.—HASAN ALI v. WALI ULLAH (1930), 1 L. R. 52 All. 997.—IND.

*sl. No notice of cancellation.*]—CANADIAN BANK OF COMMERCE v. MOTHERSILL, [1937] S. C. R. 169; 2 D. L. R. 81; 6 F. L. J. (Can.) 291.—CAN.

## PART V. SECT. 1.

449 *l. Disposition by surety of property—To evade liability—Void.*]—A guarantor is not more justified in placing the whole of his property out of the reach of liability to pay the debt than is the principal debtor.—BLUDOFF v. OSACHOFF, [1928] 3 D. L. R. 170; [1928] 2 W. W. R. 150; 22 Sask. L. R. 533.—CAN.

## PART V. SECT. 2, SUB-SECT. 1.—B.

*k. l. Given for due performance of duties by inspector—Inspector liable for default of his deputy—Deputy also covered by guarantee.*]—VERRATT v. MCAULAY (1884), 5 O. R. 313.—CAN.

## PART V. SECT. 2, SUB-SECT. 2.—B.

*l. i. —*]—By an agreement in writing *pltf.* let a house & shop to a tenant to hold the same as a monthly tenant at a certain monthly rent, the said rent to be paid regularly on the first of each month. There was a proviso that either party should have the right at any time to determine the tenancy by giving to the other one month's notice in writing of his intention so to do, the said notice to determine on any gale day. The following guarantee for the payment of the rent was endorsed on the agreement & signed by *deft.*: "I hereby guarantee the full & punctual payment of the rent reserved by the within agreement." Eight months' rent being in arrear *pltf.* sued *deft.* on his guarantee to recover the amount. *Deft.* admitted liability for the first month's rent but denied liability in respect of the seven other months, contending that he offered to guarantee payment of the rent on the implied condition that he should receive notice of any default by the tenant in making full & punctual payment, & that no notice was given to him, & accordingly he was unable to exercise his right to revoke his offer:—*Held*: *deft.*'s contention was unsustainable & *pltf.* was entitled to judgment for the amount claimed.—O'CONNOR v. SORAHAN, [1933] 1 R. 591.—IR.

## PART V. SECT. 2, SUB-SECT. 2.—C.

498 *l. General rule—Not necessary.*]—A Scottish co., by a contract which

was declared to be deemed an English contract, contracted to supply certain engineering plant to a colonial municipal council. A bond, in English form, guaranteeing the fulfilment of the contract, was granted by an individual. The municipal council brought an action of damages for breach or non-fulfilment against the co. & also against the guarantor, & used arrestments on the dependence against the latter:—*Held*: the action as against the guarantor was not premature, & the arrestments should not be recalled.—JOHANNESBURG MUNICIPAL COUNCIL v. STEWART (D.) & Co. (1902), LTD. (1909), 47 Sc. L. R. 20, H. L.—SCOT.

## PART V. SECT. 2, SUB-SECT. 2.—D. (b).

*sd. Refusal by one creditor.*]—A condition precedent to the liability of a guarantor being the acceptance of 100 per cent. of the creditors of a compromise, his liability does not arise on refusal by one creditor to accept.—JAEGER Co. v. CONNORS, [1935] 3 D. L. R. 573; 5 F. L. J. (Can.) 36.—CAN.

## PART V. SECT. 2, SUB-SECT. 2.—F.

*sl. Failure of consideration—Surety discharged.*]—The rule of law is firmly established that the total failure of the consideration for a surety's promise of guarantee has the effect of discharging him.—GURDAS MALRAM CHAND v. GURANDITTA MAL (1929), 1 L. R. 11 Lah. 77.—IND.

co.'s default, & this notice had never been given.—*ESHELBY v. FEDERATED EUROPEAN BANK, LTD.*, [1932] 1 K. B. 423; 101 L. J. K. B. 245; 146 L. T. 336, C. A.

**561a. Guarantee of secured loan—Whether security for loan condition precedent.**—By a deed of guarantee for the repayment of a loan of £250,000 & interest, which recited that the lenders had, at the request of the guarantors, advanced to the borrowers £250,000, upon security of a charge on certain shares, the guarantors covenanted, in the event of the borrowers failing to make the repayments provided for, forthwith to repay to the lenders the said sum of £250,000, with interest at the rate of 8 per cent. *per annum*. The deed further provided that, whatever the position between the lenders & the borrowers, the guarantors should be liable for all moneys due as principal debtors, & that they were not to be released from liability by reason of time being given by the lenders, or by their taking no steps to protect their securities. The shares above mentioned were at no time secured, & had not in fact been issued. Upon default in repayment of part of the loan, the liquidator of the guarantors rejected the proof by the liquidators of the lenders, contending that the security of the charge on the shares was a condition precedent to the guarantee:—*Held*: (1) upon a true construction of the deed of guarantee, the guarantors were not bound by the guarantee, as the security of the charge on the shares was a condition precedent to the guarantee; (2) the recital in the deed was not binding upon the guarantors, who were not estopped from setting up the facts, nor from asserting the non-existence of a charge on the shares.—*GREER v. KETTLE*, [1938] A. C. 156; [1937] 4 All E. R. 396; 107 L. J. Ch. 56; 158 L. T. 433; 54 T. L. R. 143; 82 Sol. Jo. 133, H. L.; *affg.* S. C. *sub nom.* *Re PARENT TRUST & FINANCE CO., LTD.*, [1936] 3 All E. R. 432, C. A.

**571. Add. Annotations:**—*As to* (2) *Refd. Vandepitte v. Preferred Accident Insurance Co. of New York*, [1933] A. C. 70. *As to* (3) *Refd. Royal Exchange Assce. v. Hope*, [1928] Ch. 179. *Generally, Refd. Liverpool Corn Trade Asscn., Ltd. v. Hurst*, [1936] 2 All E. R. 309.

**574. Add. Citation:**—11 Exch. 623.

**587. After this case add Sufficiency of consideration.**—*See LANDLORD & TENANT*, No. 4142a."

**608. Add. Annotations:**—*Expld. Elder v. Northcott*,

[1930] 2 Ch. 422. *Consd. I. R. Comrs. v. Holder*, [1931] 2 K. B. 81.

**608a. — Claim for repayment of income tax—Whether maintainable.**—Where the payment of a sum advanced by a bank to a customer together with interest due or to become due thereon is guaranteed, & subsequently the whole sum due is paid by the guarantor, that is not a payment of interest by the guarantor but is a payment by him of a debt under the guarantee, not of a debt in respect of an advance made to him. He cannot, therefore, claim repayment of tax on "interest" on an advance from a bank under the provision of Income Tax Act, 1918 (c. 40), s. 36 (1). The question whether, where the interest on such an advance is added to capital each half-year in accordance with the custom of bankers & that is acquiesced in by the customer, the payment of the whole sum by the guarantor was only a payment of capital, was not necessary to be decided.—*HOLDER v. INLAND REVENUE COMRS.*, [1932] A. C. 624; 101 L. J. K. B. 306; 48 T. L. R. 365; 76 Sol. Jo. 307; *sub nom.* *INLAND REVENUE COMRS. v. HOLDER*, 147 L. T. 68; 16 Tax Cas. 540, H. L.

*Annotation:*—*Refd. Paton v. I. R. Comrs.*, [1938] A. C. 341.

**628. Add. Annotations:**—*Apld. Re Houlder*, [1929] 1 Ch. 205. *Refd. Re Fenton, Ex p. Fenton Textile Asscn.* (1930), 99 L. J. Ch. 358.

**631. Add. Annotation:**—*Distd. Re Houlder*, [1929] 1 Ch. 205.

**638a.** —.]—B., being indebted to the firm of W. & P., gave them a memorandum of charge on certain leasehold premises, subject to a prior mtge. The memorandum charged the premises "with the payment of the sum of £100 for goods delivered, or to be delivered, to me by you to that amount." The prior mtge. was afterwards transferred to defts. Between the date of the memorandum of charge & the transfer of the prior mtge., W. & P. had delivered goods to B., & received cash from him on account to the sum of £120; but on the balance of account, just before the transfer, a sum of £81 4s. 4d. was due to W. & P.:—*Held*: the security given by the memorandum of charge of £100 & payment thereon did not expire upon the delivery of goods to the amount, but was a continuing security.—*WESTON v. EMPIRE ASSURANCE CORPN., LTD.* (1868), L. R. 6 Eq. 23; 19 L. T. 305.

**657a.** — — —.]—Where a warrant of attorney was given with a defeasance, stating

*SUMMERS v. HAMILTON* (1840), 6 O. S. 113.—CAN.

*st.*—*Money received by de facto sheriff colore officii.*—*KENT v. MERCER* (1862), 12 C. P. 30.—CAN.

**PART V. SECT. 4, SUB-SECT. 1.—B.**

*sv. Admissibility of parol evidence—To show liability limited to specific transactions.*—The guarantee bonds in question herein which were given to plff. bank held to be on the face of them continuing guarantees, & therefore, parol evidence was not admissible to show that the liability thereunder was intended to be limited to certain specific transactions.—*CANADIAN BANK OF COMMERCE v. KOFFMAN & CHERRY*, [1928] 4 D. L. R. 87; [1928] 2 W. W. R. 662.—CAN.

—*Ogilvie v. McLeod* (1862), 11 C. P. 348.—CAN.

*sm.*—.]—*HENEY CO., LTD. v. BIRMINGHAM* (1909), 7 E. L. R. 163.—CAN.

*sn. Under guarantee for delivery of goods.*—*GEORGE v. BRAYLEY* (1873), N. B. Dig. 397-8.—CAN.

*so.*—.]—*HIGBY v. CUMMINGS* (1853), 10 U. C. R. 222.—CAN.

*sp. Under guarantee for payment of demurrage.*—*WARREN v. NAT'L SURETY CO.*, [1927] 1 D. L. R. 554.—CAN.

*sq. Notice by surety to creditor—Asking for limitation of liability to fixed sum—Not acted upon by creditor—Effect of.*—*WATKINS J. R. CO. v. ROBERTSON*, [1928] 1 D. L. R. 979.—CAN.

**PART V. SECT. 3, SUB-SECT. 2.—A.**

*ar. Money received by sheriff.*—]

**PART V. SECT. 3, SUB-SECT. 1.**

*566 iv.* —.]—S. lent G. a large sum of money on a mtge. by G., & a guarantee by applts. for the "debt that shall ultimately be due to S. from G." with a maximum liability of Rs. 18 lakhs:—*Held*: the guarantee was to the effect that the debt that shall remain due after realising the securities was to be borne by the guarantors limited to the maximum mentioned; & the suit was consequently premature.—*PHILLIPS v. MITCHELL* (1929), 1 L. R. 57 Cal. 764.—IND.

*sk. Under guarantee for payment of compensation for land compulsorily acquired.*—*MURRAY v. THOMPSON*, 3 Ont. Dig. 5953-4.—CAN.

*sl. Under guarantee for price of goods.*]

it to be given "as a security for £4,000 & lawful interest thereon":—*Held*: it was to be construed as a continuing security, & not merely as a security for money then due.—*WOOLLEY v. JENNINGS* (1826), 5 B. & C. 165; 7 Dow. & Ry. K. B. 824; 108 E. R. 61.

**665a.** — *Right of creditor to retain securities of surety.*—*Pltfs.*, M.T., an English co. carrying on business in London, opened a branch in New York, M.L., & requested defts. to instruct their New York branch to give financial accommodation to M.L. Defts. agreed to do so up to a specified amount if *pltfs.* would sign a guarantee protecting defts. against loss through M.L. failing to meet their liabilities. In the events which happened M.L. received advances from the New York branch of defts. which they were unable to repay. Defts. had in their custody cash & securities belonging to *pltfs.* & refused to deliver them to *pltfs.* on demand, on the ground that the indebtedness of M.L. exceeded the value of the cash & securities. *Pltfs.* brought this action to recover possession of the cash & securities, together with interest, & defts. counterclaimed for, *inter alia*, a declaration

that they were entitled to retain the cash & realise the securities & retain the proceeds in part satisfaction of the indebtedness of M.L.:—*Held*: the indebtedness of M.L. to the New York branch of defts. was covered by the guarantee given to defts. by M.T., & the total amount of that indebtedness exceeded the value of the cash & securities of *pltfs.* which were in the possession of defts.; & defts. were therefore entitled to retain the cash & securities in part satisfaction of their claim under the guarantee.—*MANN, TAYLOR & Co., LTD. v. ROYAL BANK OF CANADA* (1935), 40 Com. Cas. 267.

**679.** *Add. Annotations*:—*Refd.* *Reckitt v. Barnett, Pembroke & Slater*, [1928] 2 K. B. 244; *Kleinwort, Sons & Co. v. Associated Automatic Machine Corpn., Ltd.* (1932), 77 Sol. Jo. 12.

**697.** *Add. Annotation*:—*Consd.* *Hay v. Carter*, [1935] Ch. 397.

**698.** *Add. Annotation*:—*Refd.* *Hay v. Carter*, [1935] Ch. 397.

**705.** *Add. Annotation*:—*Consd.* *McCall Bros., Ltd. v. Hargreaves* (1932), 48 T. L. R. 450.

## Part VI.—Surety's Rights against Creditor.

**750.** *Add. Annotation*:—*Refd.* *De Bearn (Prince) v. La Compagnie D'Assurances La Federale De Zurich* (1937), 42 Com. Cas. 189.

**759.** *Add. Annotation*:—*Consd.* *Eshelby v. Federated European Bank, Ltd.* (1931), 101 L. J. K. B. 245.

**782a.** — — — — — *Beckett v. Booth* (1708), 2 Eq. Cas. Abr. 595; 22 E. R. 500, L. C.

**788.** *Add. Annotations*:—*Consd.* *Re Fenton, Ex p. Fenton Textile Assocn.* (1930), 99 L. J. Ch. 358. *Refd.* *Re Fenton (No. 2), Ex p. Fenton Textile Assocn., Ltd.*, [1932] 1 Ch. 178.

**792a.** *Rights of co-sureties inter se—Agreement that one should be primarily liable.*—*Deft.* & her husband guaranteed an overdraft upon a co.'s account at a bank, *deft.* depositing as security certain stock, & her husband the title deeds of certain property. As between themselves it was agreed that the husband should be primarily liable, but the bank did not recognise any such primary liability. The husband was adjudicated

*bkpt.* & his property was sold by the trustee in *bkpcy.*, with the bank's consent, the purchase price of the property charged to the bank being duly paid over to the bank. The bank also realised the stocks deposited by *deft.* *Deft.* claimed that the agreement between herself & her husband that the husband was to be primarily liable on the guarantee had the effect of creating an equitable charge in her favour on the husband's property & she alleged that the trustee in *bkpcy.* wrongfully sold the property charged to the bank by her husband for less than he could have obtained for it, & she claimed from the trustee in *bkpcy.* the difference between the purchase price obtained & the price which she alleged ought to have been obtained:—*Held*: the agreement between *deft.* & her husband did not have the effect of creating an equitable charge upon the husband's property, & *deft.* had no cause of action against the trustee in *bkpcy.*—*PRATT'S TRUSTEE v. PRATT*, [1936] 3 All E. R. 901; 81 Sol. Jo. 34.

### PART V. SECT. 4, SUB-SECT. 2.

*sw. Inspector—Default of deputy inspector.*—*Held*: the surety was liable, & the fact of there being a remedy also on the deputy inspector's bond was no answer.—*VERRATT v. McAULAY* (1884), 5 O. R. 313.—CAN.

### PART V. SECT. 7, SUB-SECT. 1.

*sz. After judgment by default—Whether amendment allowed.*—*SCOTT v. M'DONALD* (1841), 6 O. S. 238.—CAN.

### PART V. SECT. 7, SUB-SECT. 6.

*728 ii.* — — — — — *Re THOMSON*, [1926] 4 D. L. R. 755; 59 O. L. R. 449.—CAN.

*sz. Whether specialty or simple contract—Guarantee in writing—Confirmation by deed.*—*O.* & others, by writing not under seal, agreed to payment of advances by a bank to a co. Later, by writing under seal, all the sureties but one consented to discharge the

latter from liability under the guarantee, the document providing that the parties did in every respect "ratify & confirm the said guarantee & consent to be bound thereby as if the said O. C. had never been a party thereto":—*Held*: the last-mentioned instrument did not convert the original guarantee into a specialty, & C. having died an action thereon by the bank against his exors. instituted more than six years after his death was barred by Stat. Limitations.—*UNION BANK OF CANADA v. CLARK* (1910), 43 S. C. R. 299.—CAN.

### PART VI. SECT. 3, SUB-SECT. 3.

*775 ii.* — — — — — *REVILLON WHOLESALE, LTD. v. NEMIRSKY*, [1926] 2 D. L. R. 374; [1926] 2 W. W. R. 166; 7 C. B. R. 583.—CAN.

### PART VI. SECT. 4, SUB-SECT. 2.—A.

*782 iv.* — — — — — *Against assignee of*

*interest in security.*—*GARRETT v. JOHNSTONE* (1867), 13 Gr. 36.—CAN.

*782 v.* — — — — — *Rights of mortgagee of surety.*—*QUAY v. SOULTHORPE* (1869), 16 Gr. 449.—CAN.

*782 vi.* — — — — — *Further advance by creditor to debtor.*—*Re HAMILTON TRUSTS* (1895), 10 Man. L. R. 573.—CAN.

### PART VI. SECT. 4, SUB-SECT. 2.—B. (b).

*793 viii.* — — — — — *Payment as surety.*—The vendor of a motor car, sold under a conditional sale agreement, sold his interest in the car & in the balance of the purchase-price to a finance co., the transaction being carried out by the assignment to said co. of a new lien agreement & lien note made by the purchaser. The new agreement & note were signed by the purchaser & also by a co. of which he was the president & practically the sole owner. The charter of this co. gave no power to



809. *Add. Annotation* :—*Refd. Smith v. Wood* (1928), 139 L. T. 250.
815. *Add. Annotation* :—*As to* (2) *Apld. Smith v. Wood* (1928), 139 L. T. 250.
816. *Add. Annotation* :—*Refd. Re Conley, Ex p. Trustee v. Barclays Bank, Ltd.*, [1938] 2 All E. R. 127.
824. *Add. Annotation* :—*As to* (2) *Refd. Smith v. Wood* (1928), 139 L. T. 250.
849. *Add. Annotation* :—*Apld. Re Houlder*, [1929] 1 Ch. 205
851. *Add. Annotation* :—*Apld. Re Houlder*, [1929] 1 Ch. 205.

## Part VII.—Surety's Rights against Principal Debtor.

879. *Add. Annotation* :—*Refd. Re Lennard, Lennard's Trustee v. Lennard*, [1934] Ch. 235.
891. *Add. Annotation* :—*Refd. Re Conley, Ex p. Trustee v. Barclays Bank, Ltd.*, [1938] 2 All E. R. 127.
898. *Add. Annotation* :—*Refd. Re Anderson-Berry, Harris v. Griffith*, [1928] Ch. 290.
902. *Add. Annotations* :—*As to* (1) *Fold. Tate v. Crewdson*, [1938] 3 All E. R. 43. *Refd. Re Fenton, Ex p. Eenton Textile Assocn.* (1930), 99 L. J. Ch. 358. *Generally, Refd. Re Anderson-Berry, Harris v. Griffith*, [1928] Ch. 290.
- 903a. ———.]—A bank lent money on mtge. to two joint borrowers, one, *pltf.*, being surety for the other, *deft.*, for the full amount lent. The borrowers, & *pltf.* as surety, covenanted jointly & severally to repay the loan on demand & interest meantime half-yearly. The mtge. gave to the bank power to sell & to appoint a receiver immediately at any time after demand for repayment, without notice to the borrowers; & it provided that, as between the borrowers & their property & the surety & his, the former should be primarily liable under mtge., without affecting the bank's rights & remedies, & that the surety, although surety for the borrowers only as between himself & them, should, as between himself & the bank, be liable to the bank as a principal debtor under the mtge. The borrowers later agreed between themselves that the money should be deemed to have been lent in the proportion of one-half to each of them, & that each should be liable to repay his half & to pay the interest on it meanwhile, should be able, under the mtge., to recover any payments made by him in respect of the other's half & interest, & should be entitled, despite anything in the mtge., to the same security for payments made by him in respect of the other's half as the bank would have if that half were not paid; & the agreement provided that neither borrower should be able to compel the other to repay his half for ten years from the date of the agreement so long as the interest owing thereon should be paid within thirty days of the same becoming due. *Deft.* failed to pay certain interest due from him within thirty days of its becoming due. The bank did not at any time demand repayment of the loan :—*Held* : on *pltf.*'s repaying his half of the loan, the *ct.* would order *deft.* to repay his half.—*TATE v. CREWDSON*, [1938] Ch. 869; [1938] 3 All E. R. 43; 107 L. J. Ch. 328; 159 L. T. 512; 54 T. L. R. 857; 82 Sol. Jo. 454.
907. *Add. Annotation* :—*As to* (1) *Refd. Re Anderson-Berry, Harris v. Griffith*, [1928] Ch. 290.
908. *Add. Annotation* :—*Refd. Banco de Portugal v. Waterlow & Sons, Ltd.* (1931), 100 L. J. K. B. 465.

guarantee the debts of another. The first two subsequent instalments due the vendor were paid by the purchaser & later instalments were paid by cheques of his co. written by him & signed by him as president & also by the manager. In replevin proceedings issued in an action brought by the finance co. against the purchaser & his co., his wife claimed the car as her property under a gift from her husband & on the question whether there had been a gift of the car to her the *ct.* found in her favour. Her husband's co. set up the right of subrogation because of the payments made by it :—*Held* : to be entitled to stand in the creditor's shoes & take over by subrogation the lien on the car, said co. was required to establish beyond question that the payments made by it were made in its character as surety; & the car not having been transferred to the co. it must be assumed in the absence of evidence to the contrary that the cheques of the co. were advances to him. The claim of the co. was dismissed.—*ASHWIN v. ASHWIN & FORT ROUGE COAL CO., LTD.*, [1933] 1 W. W. R. 141; 1 D. L. R. 577; 41 Man. L. R. 34.—CAN.

### PART VI. SECT. 4, SUB-SECT. 2.— B. (c) ii.

822 i. *Assignment of judgment*.—*SMITH v. BURN* (1880), 30 C. P. 630 --CAN.

### PART VI. SECT. 4, SUB-SECT. 2.— E. (a).

*sm. Right of subrogation*.—*Money paid to avoid tax-sale*.]—The guarantor of a mtge. who pays money to avoid the sale of the land for taxes is entitled to be subrogated to the rights of the mtgees. against the mtgor.—*HARRIS v. CARNEGIE*, [1933] 4 D. L. R. 760; O. R. 844.—CAN.

### PART VII. SECT. 1.

*sz. Where land transferred as security*.]—*SCHULTZ v. CAN. SURETY CO. (Alta.)*, [1927] 2 D. L. R. 580.—CAN.

### PART VII. SECT. 2, SUB-SECT. 2.—A.

872 ii. ———.]—A surety who enters into an agreement to procure the discontinuance of an action against his principal, & pays the amount of his guarantee, is entitled to be reimbursed.—*GOUGH v. GOODWIN*, [1931] 1 D. L. R. 701; 3 M. P. R. 435.—CAN.

872 iii. ———.]—E., an administrator, whose sureties under the administration bond were a bonding co. & himself in his personal capacity, employed a solr. to act as solr. for him as administrator. E. covenanted with the co. that the moneys of the estate should be deposited in a certain bank & should be drawn upon only by cheques countersigned by the same solr. as its agent; & he also covenanted to indemnify the co. against all loss which it might incur under its bond. Moneys

of the estate were stolen by the solr. through the use of blank cheques which E. had left with him after E. had signed them. In an action by a beneficiary of the estate judgment was given against E. as administrator & against the co. as surety. By third party notice the co. claimed to be entitled to be indemnified by E. This claim was dismissed & the co. appealed :—*Held* : the co. by requiring the estate moneys to be so deposited & by requiring the cheques to be countersigned by the solr. as its agent did not clothe him with such authority to intermeddle in the administration of the estate that it must now be said that in stealing the moneys the solr. was acting as agent for the co.; the extent of his authority as agent for the co. was to countersign cheques, & the loss to the estate was not caused by the countersigning but by the use of the cheques, over which the administrator had full control, after they had been so signed; & in handling the cheques so signed & the proceeds thereof the solr. was acting as solr. for the administrator & not as agent for the co. The appeal was, therefore, allowed.—*RAMDELL v. ELLIOTT & UNITED STATES FIDELITY & GUARANTY CO.*, [1937] 1 W. W. R. 37; 1 D. L. R. 269; 6 L. Jo. 269.—CAN.

PART VII. SECT. 3, SUB-SECT. 2.—A.  
g i. ———.]—*SUTTON v. HINCH* (1910), 19 Man. L. R. 705.—CAN.



913. *Add. Annotations*:—*Re* *Anderson-Berry, Harris v. Griffith*, [1928] Ch. 290; *Tate v. Crewdson*, [1938] 3 All E. R. 43.
915. *Add. Annotations*:—*Re* *Fenton, Ex p. Fenton Textile Asscn.* (1930), 99 L. J. Ch. 358; *Re Debtor* (No. 627 of 1936), [1937] Ch. 156.
918. *Add. Annotation*:—*Re* *Tate v. Crewdson*, [1938] 3 All E. R. 48.
- 931a. *Guarantor of preference dividends*.—The only right which a guarantor of dividends on preference shares has in respect of sums paid under the guarantee is a right to be subrogated to the preference shareholders. He has no right to proceed as a creditor against the co. in respect of those sums.—*Re WALTERS' DEED OF GUARANTEE, WALTERS' "PALM" TOFFEE, LTD. v. WALTERS*, [1933] Ch. 321; 102 L. J. Ch. 149; 148 L. T. 473; 49 T. L. R. 192; 77 Sol. Jo. 83.
937. *Add. Annotation*:—*Re* *Debtor* (No. 627 of 1936), [1937] Ch. 156.
939. *Add. Annotation*:—*Re* *Chetwynd's Estate, Dunn's Trust, Ltd. v. Brown*, [1937] 3 All E. R. 530.
947. *Add. Annotations*:—*Re* *Liggett (Liverpool) v. Barclays Bank* (1927), 137 L. T. 443; *Re Debtor* (No. 627 of 1936), [1937] Ch. 156.
948. *Add. Annotation*:—*Re* *Debtor* (No. 627 of 1936), [1937] Ch. 156.
1010. *Add. Annotation*:—*Re* *Ridley v. Lee*, [1935] Ch. 591.
1021. *Add. Annotation*:—*Re* *Debtor* (No. 627 of 1936), [1937] Ch. 156.

## Part VIII.—Rights and Liabilities of Co-Sureties inter se.

1050. *Add. Annotation*:—*Apld. Hay v. Carter*, [1935] Ch. 397.
- 1062a. *Joint & several guarantee by three—Payment by two—No contribution*.—Three persons bind themselves jointly & severally in a bond of indemnity & two of them pay the whole money, they cannot join in an action for contribution against the third.—*KELBY & VERNON v. STEEL* (1805), 5 Esp. 194; 170 E. R. 783, N. P.
1069. *Add. Annotation*:—*Re* *Hay v. Carter*, [1935] Ch. 397.
1070. *Add. Annotation*:—*Re* *Hay v. Carter*, [1935] Ch. 397.
1074. *Add. Annotation*:—*Generally, Re* *Hay v. Carter*, [1935] Ch. 397.
1080. *Add. Annotation*:—*Re* *Debtor* (No. 627 of 1936), [1937] Ch. 156.
1099. *Add. Annotations*:—*As to* (1) *Consd. Re Fenton, Ex p. Fenton Textile Asscn.* (1930), 99 L. J. Ch. 358. *As to* (2) *Re* *Chetwynd's Estate, Dunn Trust, Ltd. v. Brown*, [1936] 3 All E. R. 254.
1111. *Add. Annotation*:—*Consd. Hay v. Carter*, [1935] Ch. 397.
- 112a. ———.—When a surety sues his co-sureties for contribution he must make the principal debtor a party to the action unless the principal debtor's insolvency is proved or can be reasonably inferred by the ct. from the facts of the case.—*HAY v. CARTER*, [1935] Ch. 397; 104 L. J. Ch. 220; 152 L. T. 445, C. A.
- 1115a. *Form of order*.—*KENT v. ABRAHAM*s, [1928] W. N. 266; 66 L. Jo. 323.

### PART VII. SECT. 4, SUB-SECT. 2.—B.

m 1. ———.—*Or partner of debtor*.—Where a surety has taken a cession of action from the creditor against payment of the debt, he is entitled not only to sue the debtor, but also the debtor's partner where such partner is under the circumstances liable to the creditor for the debt.—*AFRICAN GUARANTEE & INDEMNITY CO., LTD. v. THORPE*, [1933] App. D. 380.—S. AF.

PART VII. SECT. 4, SUB-SECT. 3. 937 iv. ———.—*READ v. McLEAN*, [1925] 3 D. L. R. 716.—CAN.

### PART VII. SECT. 4, SUB-SECT. 4.

964 i. *Rights after debtor discharged—Debt due before discharge—Payment by surety after*.—K. was surety for payment of a debt due by G. to D. G. applied to be declared insolvent & in due course G. was discharged. D. then sued K. & got a decree against him. Thereafter K. sued G. for recovery of the amount which he had been compelled to pay.—*Held*: the order of discharge was a bar to the suit.—*GANGADHAR v. KANHAI* (1928), 1 L. R. 50 All. 606.—IND.

### PART VII. SECT. 4, SUB-SECT. 6.

sa. *On debtor's property—Agreed to be deposited in bank to meet surety's promissory notes—Property garnished by creditor*.—A surety having been called upon to pay the principal's debt, paid the creditor part of it in cash & gave him his promissory notes for the balance. The principal, who was selling his house, repaid the surety out of the proceeds the cash previously

paid by him & promised to deposit the balance of the proceeds in a bank to the joint credit of the surety & himself. Instead of doing so, he deposited it in his own name & it was garnished by plff. when the notes given by the surety were not yet due & were still unpaid. On an interpleader issue between the garnisher & the surety who contended that there had been an equitable assignment of the money so deposited:—*Held*: said promise was nothing more than a voluntary one, never carried to completion, & therefore, unenforceable as against the claims of the principal's other creditors.—*HENSCHHEL v. HOFFMAN & BANK OF MONTREAL & HENSCHHEL*, [1928] 2 D. L. R. 543; [1928] 1 W. W. R. 763.—CAN.

### PART VIII. SECT. 2, SUB-SECT. 1.—D.

1054 i. *Sureties for different portions of debt*.—Two persons independently guaranteed the current account of a customer of a bank, each guarantee being for a limited sum only. The indebtedness of the customer exceeded that limited sum.—*Held*: the guarantors were not sureties for independent debts, but for the whole for the floating balance of the customer. Each of the guarantors agreed with the bank that his guarantee was independent of any other guarantee or security held by the bank, & that he would not claim the benefit of any such guarantee or security.—*Held*: this agreement had not the effect of destroying the right to contribution of the sureties *inter se*, & therefore one of the guarantors who had paid more than his due proportion in liquidation of the amount due by the customer to

the bank, was entitled to recover the excess from his co-surety.—*CORNFOOT v. HOLDENSON*, [1931] Argus L. R. 376.—AUS.

### PART VIII. SECT. 2, SUB-SECT. 2.—B. (a).

1058 iv. ———.—The fact that a settlement made by some of a number of co-sureties with their creditor has not been agreed to by all the co-sureties or fixed by judgment does not prevent those who have made the settlement & paid thereunder from enforcing contribution from the others, if the latter, although notified of & invited to take part in the negotiations for settlement, did nothing & made no protest with respect thereto.—*STEWART v. BRAUN*, [1925] 2 D. L. R. 423; [1925] 1 W. W. R. 871.—CAN.

1058 v. ———.—*McNEILL v. SHORT* (Alta.), [1926] 4 D. L. R. 951.—CAN.

1058 vi. ———.—*CADWELL v. CAMPEAU* (1912), 21 O. W. R. 283; 3 O. W. N. 816; 3 D. L. R. 555.—CAN.

1058 vii. ———.—*TUCKER v. BENNETT*, [1927] 2 D. L. R. 42; 60 O. L. R. 118.—CAN.

### PART VIII. SECT. 2, SUB-SECT. 2.—B. (b).

1068 i. *Revsd.*, 35 C. L. R. 48.

### PART VIII. SECT. 2, SUB-SECT. 4

1116 i. *Application of Mercantile Law Amendment Act, 1856* (c. 87), s. 5—*Assignment of judgment—Necessity for leave to issue execution*.—Where a creditor takes judgment against two

## Part IX.—Determination of the Guarantee.

**1149. Add. Annotation:—***Refd. Albemarle Supply Co. v. Hind*, [1928] 1 K. B. 307.

**1165a.** —.]—Bankers made an advance to a customer, on the security of a joint promissory note of himself & a surety. The customer afterwards paid into the bank, generally, sums exceeding the amount of the advance, but also drew out a still larger amount, & became bkpt.:—*Held*: the surety was not entitled to have the payments appropriated in discharge of the sum secured by the note.—*Re MAYOR, Ex p. WHITWORTH* (1841), 2 Mont. D. & De G. 164.

**1177. Add. Annotation:—***Distd. Re Houlder*, [1929] 1 Ch. 205.

**1186. Add. Annotation:—***As to* (3) *Consd. Smith v. Wood* (1928), 139 L. T. 250.

**1198a. Agreement that variation should not discharge surety—What amounts to variation.]**—One L. entered into two agreements with pltf's. for the hire-purchase of two vehicles, & deft. guaranteed L.'s payments thereunder, the guarantee in each case providing that it should not be avoided by any "variation in the terms" of the agreement. L. fell into arrears, & pltf's. made a new agreement with him whereby the two old agreements were consolidated & both vehicles were to be regarded as hired together & L. could not acquire the property in either unless he had paid all instalments in respect of both. L. having again fallen into arrears, pltf's. sued the guarantor:—*Held*: the new agreement was only a variation of the old agreements & not such a new agreement as would release the guarantor, & therefore the action succeeded.—*BRITISH MOTOR TRUST CO., LTD. v. HYAMS* (1934), 50 T. L. R. 230.

or more sureties & issues execution against each, & one of them pays the judgment, the surety so paying is entitled to stand in the place of the creditor & carry on, in his own name, any proceedings already taken to enforce the judgment against the other surety until he receives the amount of the other's contributive share, & he is not required to obtain leave to issue execution in his own name.—*FAST v. ZARCHEKOFF*, [1926] 4 D. L. R. 355; [1926] 2 W. W. R. 577; 20 Sask. L. R. 596.—CAN.

**PART IX. SECT. 2, SUB-SECT. 1.—A.**  
**1179 vii.** —.]—*NASH-SIM-INGTON CO., LTD. v. THOMAS* (Sask.), [1926] 2 D. L. R. 462.—CAN.

**1179 viii.** —.]—*TOOKE BROS. v. WALTERS, LTD.*, [1935] 1 D. L. R. 295; 49 B. C. R. 195.—CAN.

**1179 ix.** —.]—A guarantor will be discharged if the creditor changes the terms of liability by accepting notes & selling a mtge. held as collateral.—*DE BLOIS BROS. v. CHISHOLM*, [1936] 1 D. L. R. 514; 10 M. P. R. 47; 5 F. L. J. (Can.) 212.—CAN.

**a i.** —.]—*Held*: the surety was not released from his guarantee.—*DUNN v. THICKETT* (Man.), [1925] 3 W. W. R. 736.—CAN.

**a ii.** —.]—*WINSLOW v. VERNER* (1890), 30 N. B. R. 150.—CAN.

**PART IX. SECT. 2, SUB-SECT. 1.—C. (b).**

**st. Renewal of loan.]**—The condition of a bond securing repayment of a mtge. loan is to be strictly construed as against the obligee, & therefore, where

its language with reference to an extension or renewal of the loan is singular & not plural it cannot be construed as providing for an advance consent by the obligors to more than one renewal or extension.—*HOLLAND-CANADA MORTGAGE CO., LTD. v. HUTCHINGS* (No. 2), [1935] 1 W. W. R. 133; 2 D. L. R. 800; *affd.*, [1935] 2 W. W. R. 338; 3 D. L. R. 527; 5 F. L. J. (Can.) 83; *affd.*, [1936] S. C. R. 165; 2 D. L. R. 481; 5 F. L. J. (Can.) 307.—CAN.

**PART IX. SECT. 2, SUB-SECT. 1.—C (c).**

**sb. Wrongful withdrawals.]**—Failure by a bank to inform a guarantor of wrongful withdrawals by a debtor whose account is guaranteed does not discharge the guarantor.—*ROYAL BANK OF CANADA v. FLEMING*, [1933] 3 D. L. R. 353; O. R. 601.—CAN.

**sw. Promissory notes exchanged for new note.]**—Sums were borrowed by a committee from a bank against promissory notes. A guarantee was given to the bank guaranteeing the payment of any sums due or which might become due. A new note was signed by one of the committee & endorsed by one of the guarantors, & given to the bank in exchange for the other notes.—*Held*: the other signatories to the guarantee were not discharged.—*TREMBLAY v. BANQUE CANADIENNE NATIONALE*, [1934] 4 D. L. R. 673.—CAN.

**PART IX. SECT. 2, SUB-SECT. 1.—C. (g).**

**sd. Change of system of audit.]**—The fact that a municipality, which had

**1200. Add. Annotation:—***Distd. Midland Motor Showrooms v. Newman*, [1929] 2 K. B. 256.

**1200a.** —.]—*Hire-purchase agreement.]*

—Pltf's. were the assignees of the rights of the R. Co. under a hire-purchase agreement dated July 6, 1927, whereby the co., "the owners," agreed to let to one T., "the principal," a motor car on the terms that he should be at liberty to purchase the car at a fixed price, paying as a first payment £22 6s. 8d., & thereafter monthly payments of £14 3s. 4d., until the whole was paid. The payments by the principal under this agreement were guaranteed by deft. as surety under a document signed by her on July 6, 1927. The principal afterwards fell in arrears in payment of the monthly instalments, & on Feb. 3, 1928, he wrote to the owners offering a cheque for £20 drawn by a friend in part payment. On Feb. 4 the owners wrote accepting this cheque & stipulating that the rest of the arrears should be paid within one month. The cheque was sent to the owners, but the arrears, which amounted to £79, were not paid within one month, & the owners then took back the car, acting upon their powers under the hire-purchase agreement. On Sept. 18, 1928, the owners assigned their rights under that agreement to pltf's., who claimed £122 in all from deft. as surety:—*Held*: (1) there was a binding contract by the owners to give time to the principal debtor; (2) the liability for payments under the hire-purchase agreement was one & indivisible, & deft. was entirely discharged from her suretyship.—*MIDLAND MOTOR SHOWROOMS v. NEWMAN*, [1929] 2 K. B. 256; 98 L. J. K. B. 490; 141 L. T. 230; 45 T. L. R. 499, C. A.

taken out a fidelity bond based on an application in which it stated that the bonded employee's books would be audited quarterly, thereafter changed said auditing system to a system of "continuous audit," held not to be a breach of the contract of such a nature as to avoid the contract.—*PENTICTON DISTRICT v. LONDON GUARANTEE & ACCIDENT CO., LTD.*, [1932] 1 W. W. R. 812; 45 B. C. R. 464; *revid.*, [1933] 1 W. W. R. 712; 3 D. L. R. 216; 46 B. C. R. 515.—CAN.

**PART IX. SECT. 2, SUB-SECT. 1.—C. (h).**

**st. Surrender of some chattels bought under lien note—No detriment to value of chattels.]**—*Held*: the surety who signed the note was not released.—*TOOVEY v. BROOK & BROCK* (1916), 34 W. L. R. 973.—CAN.

**sk. Sale of goods exceeding stipulated amount.]**—*Held*: the sureties were not liable.—*TEXAS CO. (S. A.), LTD. v. WEBB & TOMLINSON* (1927), 48 N. L. R. 24.—S. AF.

**PART IX. SECT. 2, SUB-SECT. 1.—C. (i).**

**sm. Making principal debtor bankrupt.]**—Where a surety contended that, by making debtor bkpt., the creditor had so prejudiced the surety as to discharge him from liability:—*Held*: no duty was owed by a creditor to a surety either to put debtor into bkpy. or to refrain from doing so.—*IMPERIAL BANK OF CANADA v. ALLEY*, [1926] 3 D. L. R. 86; 59 O. L. R. 1.—CAN.

**sn. Retaking possession of chattels under conditional sale agreement.]**—

**1216. Add. Annotations:—***As to* (1) *Appld. Smith v. Wood* (1928), 139 L. T. 250. *As to* (2) *Consd. Re Darwen & Pearce, Associated Paper Mills v. Barnes* (1926), 95 L. J. Ch. 487; *Johnson Bros. (Dyers), Ltd. v. Davison* (1935), 79 Sol. Jo. 306.

**1216a. — Assignment—Lease contemplating assignment.]—***JOHNSON BROS. (DYERS), LTD. v. DAVISON* (1935), 79 Sol. Jo. 306.

**1217. Citations:—**Delete 9 Bing. 746; 3 Moo. & S. 191; 131 E. R. 794.

**1222. Add. Annotations:—***Appld. Re Darwen & Pearce, Associated Paper Mills v. Barnes* (1926), 95 L. J. Ch. 487; *Smith v. Wood* (1928), 139 L. T. 250. *Refd. Sassoon v. International Banking Corp., [1927] A. C. 711; Midland Motor Showrooms, Ltd. v. Newman, [1929] 2 K. B. 256.*

**1223. Add. Annotations:—***As to* (1) *Appld. Smith v. Wood* (1938), 139 L. T. 250. *Refd. Re Conley, Ex p. Trustee v. Barclays Bank, Ltd., [1938] 2 All E. R. 127.*

**1223a. Charge by several persons of properties—Release of deeds deposited by one.]—**By a joint & several memorandum of charge twelve persons, including six resps., deposited deeds with applt. as security to relieve applt. from the entire burden of a guarantee given by him to a bank for the overdraft of S. & Co., & they thereby respectively charged the hereditaments to which the deeds related with repayment of all money to become due from S. & Co. Applt., at the request of C., one of the twelve persons, allowed her to take the deeds deposited by her away for the purpose of raising a loan. S. & Co. having gone into liquidation, the bank called upon applt. to make good his guarantee. Thereupon resps. brought an action claiming that they were entitled to have all the deeds deposited by them under the terms of the charge discharged from the debt to which they were made liable to contribute under the charge, on the ground that, by applt. allowing C. to withdraw the deeds deposited by her, their risk had been increased:—*Held*: (1) there had been an alteration made in the position of those whose properties remained deposited as securities under the charge by reason of applt. allowing the withdrawal by C. of the deeds deposited by her, & they not having consented to the alteration, their properties, the deeds of which they had deposited, were discharged from all claims under the charge; their right of marshalling had been affected by the withdrawal of the deeds of one of the parties, & the materiality of the alteration was a question to be decided by them; (2) the same reasoning was applicable, whether what was contributed were securities or personal liability.—*SMITH v.*

*Wood* [1929], 1 Ch. 14; 98 L. J. Ch. 59; 139 L. T. 250; 72 Sol. Jo. 517, C. A.

*Annotation:—As to* (1) *Refd. Re Conley, Ex p. Trustee v. Barclays Bank, Ltd., [1938] 2 All E. R. 127.*

**1224a. Guarantee of call on shares—Forfeiture of shares—Discharge of surety.]—**On Dec. 29, 1920, D. & P., who afterwards became bkpt., joined with others in entering into an agreement with a co., whereby they guaranteed to them the payment of all the instalments then owing upon the shares in the co. specified in the schedule to the agreement, the amount of D. & P.'s liability being limited to the sum therein mentioned. The shareholders having been served with notice calling upon them to pay the instalments due on their respective shares on pain of forfeiture, & D. & P. also having been required to pay the same on or before Feb. 17, 1925, in case of non-compliance by the shareholders with the notice, & default in payment having been made by both the shareholders & by D. & P., the co. forfeited the bulk of the shares in pursuance of the power conferred upon them by their arts. of assocn. Art. 31 was as follows: "Any member whose shares have been forfeited shall, notwithstanding such forfeiture, be liable to pay to the co. all calls or other moneys, interest & expenses, whether presently payable or not, owing in respect of such shares at the time of forfeiture, together with interest thereon from the time of forfeiture until payment at the rate of 10 per cent. *per annum* or such less rate as may be fixed by the Board." On Sept. 9, 1925, a receiving order in bkpcy. was made against D. & P., & on Apr. 10 the co. lodged their proof for the amount claimed to be due on the guarantee. Upon a motion by the co. for the reversal of the decision of the trustee in rejecting their proof:—*Held*: (1) the right created by art. 31 was a new right which arose upon the forfeiture of the shares & one which placed a more onerous obligation upon the shareholders than if the shares had not been forfeited. The forfeiture, therefore, was an interference with the rights of the sureties as against the principal debtor; (2) the co. had by exercising their option to forfeit the shares deprived the sureties of their lien on the shares which they would have been entitled to, had the co., in lieu of forfeiture, compelled them to pay the calls; with the result that, upon the principles stated in *Polak v. Everett*, No. 1222, *ante*, D. & P. were discharged from their liability as sureties under the guarantee & the decision of the trustee in their bkpcy. in rejecting the proof of the co. was right.—*Re DARWEN & PEARCE, [1927] 1 Ch. 176; 95 L. J. Ch. 487; 136 L. T. 124; 70 Sol. Jo. 965; [1926] B. & C. R. 65.*

**1329. Add. Annotation:—***As to* (1) *Consd. Smith v. Wood* (1928), 139 L. T. 250.

*Held*: the contract constituted a relationship of mtgor. & mtgee. between vendor & purchaser, & the surety continued to be liable under the guarantee.—*STEPHEN v. BLACK* (1902), Cout. 217.—CAN.

*sp. Contract for purchase of electrical power.]—*A surety is not discharged by the alteration of a clause in a contract for the purchase of electrical power, although he has no notice, if such alteration is not material to the risk.—*HYDRO-ELECTRIC POWER COMMISSION v. FIDELITY INSURANCE CO., [1937] 4 D. L. R. 626.—CAN.*

**PART IX. SECT. 2, SUB-SECT. 2.—A. so. Surety not prejudiced—Onus of proving prejudice on surety.]—***CLOSE v. STEWART, [1928] 2 D. L. R. 445.—CAN.*

**PART IX. SECT. 2, SUB-SECT. 4.—A. (a).**

*e. i. —.]—Held*: It was not necessary to show that the surety was prejudiced by the giving time.—*DARLING v. McLEON* (1861), 20 U. C. R. 372.—CAN.

*sw. Agreement may be implied.]—*An agreement to give time to the principal debtor may be implied &

need not be express.—*JOHNSTON & WARD v. McCARTNEY, [1934] 2 D. L. R. 800; S. C. R. 494.—CAN.*

**PART IX. SECT. 2, SUB-SECT. 4.—A. (a).**

1322 *ill. —.]—CORRIGAL v. BOULTON* (1898), 17 U. C. R. 131.—CAN.

**PART IX. SECT. 2, SUB-SECT. 4.—B. (a).**

1340 *i. Consent to judgment—Debt & costs payable by instalments.]—*When on an application for attachment before

1342. *Add. Annotations*:—*Refd. Re Darwen & Pearce*, [1927] 1 Ch. 176; *Smith v. Wood* (1928), 139 L. T. 250.

1343. *Add. Annotation*:—*Consd. Midland Motor Showrooms v. Newman*, [1929] 2 K. B. 256.

1345a. ———.]—*MIDLAND MOTOR SHOWROOMS v. NEWMAN*, No. 1200a, *ante*.

1357. *Add. Annotation*:—*Apld. Midland Motor Showrooms v. Newman*, [1929] 2 K. B. 256.

1372. *Add. Annotation*:—*Apld. Midland Motor Showrooms v. Newman*, [1929] 2 K. B. 256.

1379a. ———.]—*MIDLAND MOTOR SHOWROOMS v. NEWMAN*, No. 1200a, *ante*.

1397. *Add. Annotation*:—*Generally, Refd. Berry v. Berry*, [1929] 2 K. B. 316.

1478. *Add. Annotations*:—*Distd. Smith v. Wood*, [1929] 1 Ch. 14. *Refd. West Bromwich Building Society v. Bullock*, [1936] 1 All E. R. 887.

1522. *Add. Annotations*:—*Folld. Morris & Sons, Ltd. v. Jeffreys* (1932), 148 L. T. 56. *Refd. Re Katherine et cie, Ltd.*, [1932] 1 Ch. 70.

1522a. ———.]—Disclaimer of a lease by a trustee in bkpcy. operates as a discharge of a surety for payment of the rent, notwithstanding that part of the demised premises have been sublet before the bkpcy.

The lessee of certain premises was adjudicated a bkpt., & his trustee, acting in pursuance of the powers conferred on him by 1914 Act, s. 54, disclaimed the lease. Prior to the bkpcy., the lessee had sublet a portion of the premises. Deft. had guaranteed the

payment of the rent, & the lessors obtained from him sums equal to the rent which would have accrued if the lease had still been in existence:—*Held*: the disclaimer discharged the surety, on the ground that if the surety were called on to pay he would have a right of proof against the bkpt.'s estate, whereas the intention of sect. 54 was that the bkpt. & his property should be released from all liability.—*MORRIS (D.) & SONS, LTD. v. JEFFREYS* (1932), 148 L. T. 56; 49 T. L. R. 76.

1523. *Add. Annotations*:—*Distd. Re Wells, Swinburne-Hanham v. Howard*, [1933] Ch. 29. *Refd. Morris v. Harris*, [1927] A. C. 252; *Re Katherine et cie, Ltd.*, [1932] 1 Ch. 70.

1549. *Add. Annotation*:—*Generally, Consd. Re Conley, Ex p. Trustee v. Barclays Bank, Ltd.*, [1938] 2 All E. R. 127.

1561. *Add. Annotation*:—*Refd. Jenkins v. Jenkins*, [1928] 2 K. B. 501.

1570. *Add. Annotations*:—*Consd. Freshwater v. Bulmer Rayon Co.*, [1933] Ch. 162. *Refd. Firm of R. M. K. R. J. v. Firm of M. R. M. V. L.* (1926), 95 L. J. P. C. 197; *Pirie v. Richardson* (1926), 70 Sol. Jo. 1023; *Cumberland v. Lanarkshire Tram Co.* (1927), 20 B. W. C. C. 780; *Jenkins v. Jenkins*, [1928] 2 K. B. 501; *Holmes v. Watt*, [1935] 2 K. B. 300.

1571. *Add. Annotations*:—*Refd. Freshwater v. Bulmer Rayon Co.*, [1933] Ch. 162; *Holmes v. Watt*, [1935] 2 K. B. 300.

1574a. ———.]—*Creditor member of trade association.*—*The Liverpool Corn Trade Assocn., Ltd.*,

judgment, a surety executes a bond in form 6 in App. F to Civil Procedure Code, 1908, he is discharged from his obligations if a compromise decree is passed between pltf. & deft. allowing deft. to pay the decretal amount by instalments, unless it is proved that the compromise which was subsequently embodied in the decree was in the contemplation of pltf. & the surety when the latter executed the bond.—*MAHOMEDALLI IBRAHIMI v. LAKSHMI* (1929), 1 L. L. R. 54 Bom. 118.—*IND.*

PART IX. SECT. 2, SUB-SECT. 4.—B. (d).

*sp. Alteration in number of instalments.*—*Held*: not made on a basis of extension of time, so as to release the surety from liability.—*MALKIN (W. H.) Co., Ltd. v. SHERMAN* (1925), 35 B. C. R. 445.—*CAN.*

PART IX. SECT. 2, SUB-SECT. 4.—C. (a).

1364 xv. ———.]—*BURNARD v. LYSNOR*, [1927] N. Z. L. R. 757.—*N.Z.*

PART IX. SECT. 2, SUB-SECT. 7.—C.

1448 iii. ———.]—There must be some positive act done by the employer to the surety's prejudice, or such degree of negligence as to imply connivance & amount to fraud.—*LONDON GUARANTEE & ACCIDENT CO., LTD. v. CITY OF HALIFAX*, [1927] 1 D. L. R. 1129; [1927] S. C. R. 185.—*CAN.*

1451 i. *Fraud of employee—Neglect of employer to supervise conduct—Neglect must be gross.*—Circumstances in which:—*Held*: gross negligence in checking accounts discharged the surety.—*FRAHER v. WATERFORD COUNTY COUNCIL*, [1936] 1 R. 505.—*IR.*

1455 i. ———.]—*Checking accounts.*—*FRAHER v. WATERFORD COUNTY COUNCIL*, [1936] 1 R. 505.—*IR.*

*sq. Failure to observe statutory requirement.*—The observations of LORD BROUGHAM in *Macdaggart v. Watson*, 3 Cl. & F. 525, & the decision in *Madden v. McMullen*, 13 I. C. L. R. 305, establish that failure to observe statutory requirements does not necessarily relieve a surety (*MURNAGHAN, J.*).—*WICKLOW COUNTY COUNCIL v. HIBERNIAN FIRE & GENERAL INSOC. Co.*, [1932] 1 R. 581.—*IR.*

PART IX. SECT. 2, SUB-SECT. 8.—A.

*sr. General rule.*—If it is an express or implied condition of, or collateral to, the arrangement for a guarantee, that an existing security, whether inchoate or complete, should be made or kept effective by the creditor for the benefit of the parties as a counter-security, failure to observe that condition discharges the surety absolutely, inasmuch as he has not got the contract he bargained for.

If there is, in fact, in the possession of the creditor such a counter-security, it is the duty of the creditor, whether its existence is known to the surety or not, to exercise reasonable care in maintaining it for the benefit of the surety, so as to be available, unimpaired by reason of any negligence, on the discharge of the debt. If he fails in this duty, the surety is entitled to credit against his liability for the damages suffered by such breach of duty by the creditor.—*NORTHERN BANKING CO., LTD. v. NEWMAN & CALTON*, [1927] 1 R. 520.—*IR.*

PART IX. SECT. 2, SUB-SECT. 8.—B.

1477 i. *Sale of security—Failure to get best price.*—*MACDONALD v. HIRSCH*, [1932] 4 D. L. R. 121; 5 M. P. R. 469.

1477 ii. ———.]—The mere fact of a sale by a creditor of property comprised in a bill of sale, given to the creditor by the principal debtor as security

for a loan, does not operate to discharge from liability the guarantor of such loan.—*TOOTH & CO., LTD. v. LAPIN* (1936), 53 N. S. W. W. N. 224.—*AUS.*

1480 i. *Release of mortgage debt.*—*Held*: the surety was not liable under the guarantee.—*ORCHISTON v. SCHLAEPFER*, [1924] N. Z. L. R. 1170.—*N.Z.*

*st. Failure to renew chattel mortgage.*—*LEACROFT v. MCCANNELL*, [1930] 2 W. W. R. 105; 3 D. L. R. 988.—*CAN.*

PART IX. SECT. 2, SUB-SECT. 9.—A

1496 i. *When surety discharged—Release obtained by fraud—Of debtor.*—When the release of the principal debtor by the creditor is accomplished by means of fraud, on the part of the former, the surety is not discharged, even if he is not a party to the fraud by which the release was secured.—*R. v. THE CANADIAN SURETY CO.*, [1929] Ex. C. R. 216; *affd. with variations*, [1930] S. C. R. 434; 3 D. L. R. 321.—*CAN.*

1499 i. *When surety discharged—Release of debtor.*—*MILNE v. YORKSHIRE GUARANTEE & SECURITIES CORPN.* (1906), 37 S. C. R. 331.—*CAN.*

PART IX. SECT. 2, SUB-SECT. 9.—B. (a).

*sv. Sale of debtor's equity of redemption.*—*Held*: not a release of debtor, nor of his surety.—*STEWART v. CLARK* (1863), 13 C. P. 203.—*CAN.*

PART IX. SECT. 2, SUB-SECT. 9.—B. (c).

*sw. Release of co-lessee—Surety discharged.*—*ISMAN v. WIDEN* (Sask.), [1936] 1 D. L. R. 247.—*CAN.*

PART IX. SECT. 2, SUB-SECT. 9.—O. (b).

1561 iv. ———.]—*HOLLIDAY v. HOGAN* (1893), 20 A. R. 298.—*CAN.*

is an organisation for promoting & protecting the interests of those engaged in the corn trade. Membership is confined to individuals, but cos., either public or private, engaged in the trade can have the advantages of membership by nominating, in the case of a private co., one representative, on condition that a guarantee by the directors is given to the assocn. that the co. will duly discharge its liabilities to members, & for the conduct of its representative. Deft. in 1931 had joined with S. & two other directors of S. & Co., Ltd., a private co., in a joint & several guarantee to the assocn., given in accordance with this provision. This action was brought by plffs. claiming a declaration that they were entitled as trustees for ten firms & cos. who were creditors of S. & Co., Ltd., to enforce the guarantee in question. S. & Co., Ltd., got into financial difficulties & in 1935 S. executed a deed of assignment for the benefit of his creditors under which he was released from all "debts, claims, & demands whatsoever" which the other parties to the deed might have against him with the usual reservation of rights against sureties. Plffs. & the ten firms & cos. whose debts made up the sum claimed were parties amongst others, to the deed of assignment:—*Held*: (1) the

release in the deed of assignment operated to release all the joint guarantors & the position was in no way affected by the reservation of rights against sureties; (2) "members of the assocn." meant members of the assocn. or any incorporated co. whose nominee or nominees is or are members of the assocn.; (3) the assocn. was entitled to sue for the benefit of the members entitled & as trustee for them; (4) "liabilities" in the guarantee meant all liabilities to individual members or to cos. whose nominees were members.—*LIVERPOOL CORN TRADE ASSOCN., LTD. v. HURST*, [1936] 2 All E. R. 309; 80 Sol. Jo. 673.

1576. *Add. Annotation*:—*Refd. Jenkins v. Jenkins*, [1928] 2 K. B. 501.  
 1577. *Add. Annotation*:—*Refd. Jenkins v. Jenkins*, [1928] 2 K. B. 501.  
 1581. *Add. Annotation*:—*Refd. Re Parent Trust & Finance Co.*, [1936] 3 All E. R. 432.  
 1582. *Add. Annotation*:—*As to (2) Consd. Smith v. Wood* (1928), 139 L. T. 250.  
 1608. *Add. Annotation*:—*Refd. Re Darwen & Pearce, Associated Paper Mills v. Barnes* (1926), 95 L. J. Ch. 487.  
 1643. *Add. Annotation*:—*Refd. Tate v. Crewdson*, [1938] 3 All E. R. 43.

## Part X.—Avoidance of the Guarantee.

1656a. **Power to contract out of duty to disclose.**—A Harbour & Dock Board, having resolved to enlarge their dock, invited tenders for the work from numerous contractors, informing them where the contract for the work might be inspected & instructing them that they must make local & independent inquiries as to the nature of the surface, strata, soil & sub-soil or ground to be excavated, & the nature & height of the tides, & generally must obtain their own information on all matters affecting the construction, completion & maintenance of the works, & as to all matters which might influence them in making their tender & fixing the rates & prices therein, & that the Board would not be responsible for any information the contractors might obtain except such as was given in reply to a written inquiry addressed to the clerk or manager of the Board. Of several tenders received that of a co., K. & R., Ltd., was by far the lowest. The Board informed K. & R., Ltd., that they were not prepared to accept that tender unless K. & R., Ltd., procured a guarantee to the amount of £50,000 for the due performance of the contract. In compliance with this demand K. & R., Ltd., procured a joint & several bond from an insurance co. whereby that co. & K. & R., Ltd., jointly & severally bound themselves to the Board for the due performance of the contract by K. & R., Ltd. The

Board accepted this guarantee, & K. & R., Ltd., entered upon the work in pursuance of the contract, which made the final certificate of the Board's engineers final & binding between the parties. In the course of the work the contractors encountered an unexpected quantity of water in the soil, & the expense of pumping was such that they could not continue the work without further funds. Thereupon the Board advanced them two sums of £20,000 & £25,000 to be repaid upon certain terms; but, notwithstanding these loans, the contractors failed to complete the contract & went into liquidation, & the Board's engineers made a final certificate showing over £78,000 due from the contractors to the Board. This sum included so much of the £45,000 lent to the contractors as remained unpaid at the date of their default. The Board sued the insurance co. on the joint bond:—*Held*: (1) the bond was a contract of guarantee & not a contract of insurance; (2) there was no such misrepresentation or non-disclosure of material facts by the Board as to invalidate the bond; (3) the loans of £20,000 & £25,000 being outside & independent of the contract, the amount due thereon ought not to have been included in the engineers' final certificate; inasmuch as the amount due & unpaid on the loans was unascertained, the amount due on the bond being equally undefined, the Board

**PART IX. SECT. 2, SUB-SECT. 11.—B.**  
*sy. Whether revocable by notice—Fidelity guarantee.*—*Resp. executed a bond guaranteeing the fidelity of a servant of applt.'s. Subsequently he purported to withdraw the guarantee by a written notice:—Held*: (1) the

guarantee, in the nature of a security for the servant's fidelity, is not a continuing guarantee which may be revoked by the guarantor at will; (2) a guarantor for the fidelity of a servant is allowed as a measure of equitable relief, to recall his guarantee

from such time as the servant is proved guilty of misconduct or from such time as the position of the parties has completely changed.—*MYINGYAN MUNICIPALITY v. MAUNG PO NYUN* (1930), L. L. R. 8 Ran. 320.—*IND.*

could not recover upon it.—*TRADE INDEMNITY CO., LTD. v. WORKINGTON HARBOUR & DOCK BOARD*, [1937] A. C. 1; [1936] 1 All E. R. 454; 105 L. J. K. B. 183; 154 L. T. 507; 41 Com. Cas. 186, H. L.

1658. *Add. Annotation*:—*Refd. Re Lloyds Bank, Ltd., Bomze & Lederman v. Bomze*, [1931] 1 Ch. 289.

1686. *Add. Annotation*:—*Refd. Trade Indemnity Co. v. Workington Harbour & Dock Board*, [1937] A. C. 1.

1691. *Add. Annotation*:—*Refd. Trade Indemnity Co. v. Workington Harbour & Dock Board*, [1937] A. C. 1.

1704a. ———.—A contract of guarantee, like any other contract, is liable to be avoided if induced by material misrepresentation, even if made innocently.—*MACKENZIE v.*

*ROYAL BANK OF CANADA*, [1934] A. C. 468; 103 L. J. P. C. 81; 151 L. T. 486; 78 Sol. Jo. 471, P. C.

1721. *Add. Annotation*:—*As to* (1) *Refd. With v. O'Flanagan*, [1936] Ch. 575.

1725. *Add. Annotation*:—*Refd. Re Lloyds Bank, Ltd., Bomze & Lederman v. Bomze*, [1931] 1 Ch. 289.

1726. *Add. Annotation*:—*Refd. Re Lloyds Bank, Ltd., Bomze & Lederman v. Bomze*, [1931] 1 Ch. 289.

1737. *Add. Annotation*:—*Consd. Koch v. Dicks*, [1933] 1 K. B. 307.

1741. *Add. Annotations*:—*Refd. Slingsby v. District Bank, Ltd.* (1931), 47 T. L. R. 587; *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46; *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.*, [1938] A. C. 287.

## Part XII.—Indemnity.

1745. *Add. Annotation*:—*Refd. Wiggins v. Lavy* (1928), 44 T. L. R. 721.

1745a. *Distinguished from del credere agency*.—Defts. agreed in writing with pltf., stock-brokers on the Stock Exchange, that in consideration of 50 per cent. of the commissions received by pltf. in respect of business introduced to them by defts. the latter

would be liable for 50 per cent. of "any loss sustained" by pltf. on such business. X., who had been introduced by defts., became indebted to pltf. in respect of such business. When X. executed an assignment for the benefit of creditors, pltf. thereupon claimed that a "loss" had been sustained within the meaning of the above letter at the time when

### PART X. SECT. 2.

d i. ———.—There is no universal obligation on a creditor entering into a contract of suretyship to make disclosure to the surety of all the facts relative to the dealings between the creditor & the principal. There must, however, be no undue concealment, which consists not merely in the omission to disclose such facts as need be mentioned in answer to the surety's questions, but also in the non-disclosure of those facts which the creditor must spontaneously disclose to him. The omission by the creditor to reveal to the surety every fact which under the circumstances the surety would expect not to exist amounts to an implied representation that it does not exist: & it depends upon the nature of the transaction in each case whether the fact not disclosed is so impliedly represented. Where a guarantee was given for the payment of "all moneys which are now or at any time hereafter may be due or owing to the co. from . . . on the general balance of his account with the co." there could not be at the time of its making any implied representation by the co. arising from the co.'s non-communication to the surety of the state of the account that there was no indebtedness to which the guarantee could apply.—*NATIONAL MORTGAGE & AGENCY CO. OF NEW ZEALAND, LTD. v. STALKER*, [1933] N. Z. L. R. 1182.—N. Z.

### PART X. SECT. 4, SUB-SECT. 2.—C.

1685 i. *Character*.—An offer, by an employer, who has knowledge of dishonesty on the part of his employee, amounts to a representation to one from whom he seeks or obtains, without disclosure, a fidelity guaranty, that, so far as he is aware, the employee whose fidelity is to be guaranteed is not dishonest. If that representation is untrue, it matters not that the employer's failure to disclose the true situation was not wilful, intentional, or with a view to advantage himself.—

*EBY-BLAIN, LTD. v. MATTHEWS*, [1925] 2 D. L. R. 382; 56 O. L. R. 383.—CAN.

1685 ii. ———.—Where an employee is required to furnish a fidelity bond, & his employer knows that he has been dishonest in the office or service to which the bond is to apply, but fails to disclose such knowledge to the surety who gives the bond in ignorance of the former dishonesty of appt., such non-disclosure releases the surety.—*RURAL MUNICIPALITY OF CHURCH-BRIDGE No. 211 v. LONDON GUARANTEE & ACCIDENT CO., LTD.*, [1925] 3 D. L. R. 341; [1925] 2 W. W. R. 334; 19 Sask. L. R. 450.—CAN.

1685 iii. *S. P. MAYFIELD RURAL MUNICIPALITY, No. 406 v. LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA*, [1927] 1 D. L. R. 403; [1927] 1 W. W. R. 67; 21 Sask. L. R. 283.—CAN.

g 1. ———.—*Statement made in ignorance & without fraud*.—For the purpose of a renewal of a fidelity policy, pltf. certified to defts. that the employee "is not at present in arrears or default." The employee was in fact in arrears & default at the time, but the certificate was made without knowledge of this & without fraud:—*Held*: pltf. could not recover under the policy.—*DOMINION OF CANADA GUARANTEE & ACCIDENT CO., LTD. v. HOUSING COMMISSION OF CITY OF HALIFAX*, [1927] 4 D. L. R. 161; [1927] S. O. R. 492.—CAN.

### PART X. SECT. 4, SUB-SECT. 3.

1702 x. ———.—*JOHN DEERE PLOW CO. v. MAGUSS*, [1929] 2 D. L. R. 262; 1 W. W. R. 669; 24 Alta. L. R. 65.—CAN.

h 1. ———.—*Separate obligations—Only one explained—Sureties illiterate*.—*WATKINS J. R. CO. v. MINKE*, [1928] 3 D. L. R. 557; [1928] S. C. R. 414.—CAN.

1713 i. *As to nature of transaction*.—It is a good defence to an action on a guarantee that it was executed by the surety in the belief, induced by the

fraudulent misrepresentations of debtor, that it is a document of another nature.

—*WATKINS (J. R.) CO. v. HANNAH (Sask.)*, [1926] 4 D. L. R. 93; [1926] 2 W. W. R. 800.—CAN.

### PART X. SECT. 5, SUB-SECT. 2.

1730 ii. ———.—*Held*: the influence exerted by the husband was not undue influence, & the wife executed the guarantee as the result of her own considered judgment of the consequences thereof.—*CANADIAN BANK OF COMMERCE v. FOREMAN*, [1927] 2 D. L. R. 530; [1927] 1 W. W. R. 783; 22 Alta. L. R. 443.—CAN.

1730 iii. ———.—When a married woman disputes her liability to a creditor of her husband upon a guaranty signed by her at her husband's request, the *onus* is on her to prove that the husband had executed an overpowering influence upon her to induce her to sign it, & that the giving of the guaranty was an immoderate & irrational act on her part.—*ROYAL BANK OF CANADA v. DIAMOND*, [1929] 3 D. L. R. 390; 2 W. W. R. 267; 38 Man. L. R. 301.—CAN.

### PART XII. SECT. 1.

1744 iii. ———.—*Person indemnified insolvent*.—Where a person entitled to be indemnified is insolvent:—*Semble*: the contract to indemnify him has the same effect as if it were a guarantee to the principal creditor of payment of the debt.—*Re WINDING-UP ACT & FRANCO-CANADIAN MORTGAGE CO., LTD., Re BANK OF MONTREAL (Alta.)*, [1927] 1 W. W. R. 403; 8 C. B. R. 176.—CAN.

sz. *Does not extend to doing unlawful acts*.—*Held*: the fact of a municipal council having undertaken to indemnify an officer for lawful acts done in his official capacity, does not entitle him to look to them for indemnity against the consequences of unlawful acts.—*IRWIN v. MARIPOSA CORPN.* (1872), 22 C. P. 367.—CAN.

the assignment was executed:—*Held*: (1) the agreement was one of indemnity & not in the nature of a *del credere* agency; (2) in the absence of evidence of actual loss sustained after taking into consideration the value of pl'tfs.' rights under the assignment, there must be judgment for defts.—*STANLEY (MONTAGU) & Co. v. SOLOMON (J. S.), LTD.*, [1932] 1 K. B. 611; 76 Sol. Jo. 272; *affd.*, [1932] 2 K. B. 287.

1747. *Add. Annotation*:—*Consd.* Dawson Line, Ltd. v. Aktiengesellschaft Adler für Chemische Industrie of Berlin, [1932] 1 K. B. 433.

1750. *Add. Annotation*:—*Refd.* Strathlorne S.S. Co., Ltd. v. Andrew Weir & Co. (1934), 40 Com. Cas. 168.

1751. *Add. Annotations*:—*Apld.* Strathlorne S.S. Co. v. Andrew Weir & Co. (1934), 40 Com. Cas. 168. *Refd.* Secretary of State for India in Council v. Bank of India, Ltd., [1938] 2 All E. R. 797.

1756. *Add. Annotations*:—*Apld.* Dawson Line, Ltd. v. Aktiengesellschaft Adler für Chemische Industrie of Berlin, [1932] 1 K. B. 433. *Refd.* Strathlorne S.S. Co. v. Andrew Weir & Co. (1934), 40 Com. Cas. 168.

1758a. —.]—A broker, having possession of a government promissory note for Rs.5,000 of the 3½ per cent. loan of 1854–55 on behalf of a lady, who was the holder & indorsee, forged her indorsement to it in his favour & indorsed it for value to resp. bank. The bank, acting in good faith, presented the note for renewal by the government under Indian Securities Act, 1920, s. 12, & received a renewed note in their favour. The lady, becoming aware of the fraud, & of the renewal of the note, sued the Secretary of State in conversion, & recovered the appropriate damages. The Secretary of State then instituted the present action against the bank, claiming to be indemnified against the loss thus sustained by him, on the principle that the renewed note had been issued at the request of the bank, & that he was accordingly entitled to be indemnified against the damage resulting from the renewal. As far as the renewed note was concerned, it was accepted on both sides that it constituted a new contract between the government & the bank, unaffected by the circumstances in which it was issued. The government officer, when issuing the renewed note to the bank, did not exact an indemnity under sect. 21 of the Act. The Secretary of State contended that he was not debarred from relying on an indemnity implied under the common law of India, which in this respect is identical with that of England:—*Held*: (1) the application to the prescribed officer for a renewed note, & the satisfying him of the justice of the claim, constituted a request from which a common law indemnity against injury to a third party might properly be *prima facie* implied, notwithstanding the fact that some deliberation might be involved on the part of the officer before he consented to renew the note; (2) sect. 21 provides an added statutory right of indemnity, different from, & in no way inconsistent with, the common law right, & therefore the Secretary of State was entitled to recover upon the common law indemnity.—*SECRETARY OF STATE FOR INDIA v. BANK OF INDIA, LTD.*, [1938] 2 All E. R. 797; 159

L. T. 101; 54 T. L. R. 770; 82 Sol. Jo. 372, P. C.

1760. *Add. Annotation*:—*As to* (1) *Refd.* Strathlorne S.S. Co., Ltd. v. Andrew Weir & Co. (1934), 40 Com. Cas. 168.

1762. *Add. Annotation*:—*Distd.* Bradstreets British, Ltd. v. Mitchell (1932), 48 T. L. R. 670.

1762a.

—.]—Pl'tfs., a private inquiry agency, carried on the business of providing to approved subscribers confidential reports on companies, firms & persons engaged in trade. The terms upon which the reports were issued were (*inter alia*) that all statements were strictly confidential, & that every subscriber should indemnify pl'tfs. against any loss or damage they might suffer from the breach by the subscriber of any of the conditions of the contract. Deft. co., an approved subscriber, through its managing director, requested pl'tfs. to furnish information regarding the X. Co. for whom they were agents. The report, being of an unfavourable nature, was communicated by deft. co. to their own solrs. Deft. M., a director of deft. co., with the approval of its managing director, applied for & was furnished with similar information regarding the X. Co., & on the same terms & conditions. M. at once informed the managing director of deft. co. of its contents. The matter having been brought to pl'tfs.' notice by the co. reported on, both defts. at the request of pl'tfs. returned the unfavourable reports.

Pl'tfs., an action for libel having been brought against them in the K. B. Div., commenced proceedings against both defts. for an injunction to restrain disclosure of the unfavourable reports which had been furnished, & a declaration that they were liable to indemnify pl'tfs., against any loss or damage arising from this disclosure. They also claimed damages:—*Held*: (1) deft. co. did not disclose the report to any person other than its own solrs. & that this did not constitute a breach of contract with pl'tfs. within the meaning of the agreements; (2) deft. M. became a subscriber to pl'tfs.' confidential reports for the purpose of obtaining a report on the X. Co. & communicating the result to the managing director of deft. co.; (3) neither M. nor the managing director of deft. co. was acting as the agent of deft. co. & no breach of contract committed by M. was induced by deft. co. The action against deft. co. therefore failed; (4) the agreement entered into by M. not to disclose the confidential information furnished to him & to indemnify pl'tfs. for any loss or damage which they might suffer from a breach by a subscriber of the conditions upon which reports were furnished, was not void as being against public policy; (5) the disclosure by deft. M., although a breach of this contract, did not create the liability of pl'tfs. to be sued for libel; this liability did not arise directly or indirectly out of any act of the deft. M. & was not therefore within the scope of the express indemnity contained in pl'tfs.' agreement with M. The only liability for damages, therefore, resulted from M.'s own breach of contract, & in the circumstances such damages were merely nominal.—*BRADSTREETS BRITISH, LTD. v. HAROLD MITCHELL*



& CARAPANAYOTI & CO., LTD., [1933] Ch. 190; 102 L. J. Ch. 34; 148 L. T. 111; 48 T. L. R. 670.

**1782. Add. Annotations:—**Consd. Dawson Line, Ltd. v. Aktiengesellschaft Adler fur Chemische Industrie of Berlin, [1932] 1 K. B. 433. Refd. Secretary of State for India in Council v. Bank of India, Ltd., [1938] 2 All E. R. 797.

**1787. Add. Annotation:—**Refd. Pontypridd Grdns. v. Drew, [1926] 1 K. B. 567.

**1789. Add. Annotation:—**Refd. Pontypridd Grdns. v. Drew (1926), 95 L. J. K. B. 1030.

**1790. Add. Annotation:—**Overd. Pontypridd Grdns. v. Drew (1926), 95 L. J. K. B. 1030.

**1790a. ————]**—Guardians who supply goods to a pauper by way of ordinary poor relief have no right to recover from the pauper the reasonable value of the goods so supplied. *Birkenhead Union Guardians v. Brookes*, No. 1790, overd.—PONTYPRIDD UNION v. DREW, [1927] 1 K. B. 214; 95 L. J. K. B. 1030; 136 L. T. 83; 90 J. P. 169; 42 T. L. R. 677; 70 Sol. Jo. 795; 24 L. G. R. 405, C. A.

See, further, POOR LAW.

**1800. Add. Annotation:—**Consd. *Re Harrington Motor Co.*, *Ex p.* Chaplin, [1928] Ch. 105.

**1826a. Limited to claims by third parties.]**—Pltfs. took a lease of premises from deft. railway co., & by an agreement supplemental to the lease, defts. gave pltfs. permission to use a portable gangway, which could be moved over certain of defts.' railway lines. One of the terms was that pltfs. "agree & undertake to indemnify the co. against all claims & demands or liability whatsoever, whether in respect of damage to person or property, arising out of or in connection with the existence or user of the gangway." When pltfs. were using the gangway some trucks were shunted down the line, & the gangway was destroyed. In an action for damages for negligence &/or breach of duty defts. denied liability & pleaded the above term of the supplemental agreement:—*Held*: the undertaking was only one to hold defts. harmless against claims by third parties.—*GREAT WESTERN RY. CO. v. DURNFORD (JAMES) & SONS, LTD.* (1928), 139 L. T. 145; 44 T. L. R. 415; 33 Com. Cas. 251, H. L.; *affg.*, S. C. *sub nom.* DURNFORD (JAMES) & SONS, LTD. v.

*GREAT WESTERN RY. CO.* (1927), 138 L. T. 137, C. A.

*Annotations:—*Distd. *Furness Shipbuilding Co. v. London & North Eastern Ry. Co.* (1934), 103 L. J. K. B. 180. *Consd.* *London Passenger Transport Board v. T. Walton (London), Ltd.* (1934), 78 Sol. Jo. 224. *Refd.* *The Carlton* (1931), 47 T. L. R. 517.

**1826b. Claims arising "in connection with the works."]**—By a contract made in 1929, appls. were employed by the resps. to reconstruct a bridge of the railway near West Ham Station; & clause 34 (a) provided that: "The contractor shall be responsible for & provide against all risks & contingencies whatever that may arise in respect of the works, & shall be liable to make good & pay for any interruption, accident, damage, loss or injury of, or to any person, property or rights, whether public or private, & any loss of life caused in connection with the works." On Dec. 20, 1929, a train was dispatched by resps.' servants from London, & as it approached the bridge one of the carriage doors, which had swung open, struck two of appls.' workmen, killing one & seriously injuring the other. Resps. were adjudged to pay the representatives of deceased workman & the injured workman £3,614 1s. Resps. claimed indemnity in respect of that liability from appls. The trial judge found that the railway carriage door swung open by reason of its having been insecurely fastened at Fenchurch Street Station, owing to the negligence of resps.' servants, but held that under clause 34 (a) appls. were liable to indemnify resps. The Ct. of Appeal affirmed that decision:—*Held*: the accident arose in connection with the bridge where the men were working, & the contractors, therefore, under clause 34 (a), must indemnify resps. in respect of the accident.—*FURNESS SHIPBUILDING CO. v. LONDON & NORTH EASTERN RY. CO.* (1934), 103 L. J. K. B. 180; 50 T. L. R. 257; 39 Com. Cas. 182; *sub nom.* *LONDON & NORTH-EASTERN RY. CO. v. FURNESS SHIPBUILDING CO., LTD.*, 150 L. T. 382, H. L.

**1826c. Property of defendant "direct or contributing cause of the accident."]**—*LONDON PASSENGER TRANSPORT BOARD v. T. WALTON (LONDON), LTD.* (1934), 78 Sol. Jo. 224.

**1830. Add. Annotation:—**As to (2) Refd. *Stoney v. Eastbourne R. D. Co.*, [1927] 1 Ch. 367.

**1867. Add. Annotations:—**Refd. *Re Harrington Motor Co.* (1927), 44 T. L. R. 58; *Hoods'*

# PART XII. SECT. 5. SUB-SECT. 1.

**1805 II. ———]**—Pltfs. took a son of testator, represented by deft., into their employ upon testator's oral promise that he would indemnify them against any loss sustained by them through embezzlement by the son. The ct. found that the substance of the conversation, when the contract was made, was that testator said to pltfs. "If you take my son into your employ, & he makes default by embezzlement, you look to me":—*Held*: testator's promise was a direct, unconditional & original promise of indemnity, to which sect. 4 of "The Statute of Frauds" did not apply.—*CONNOR v. TASMANIAN PERMANENT EXORS. & TRUSTEES ASSOCN., LTD.* (1935), 28 Tas. L. R. 93.—AUS.

# PART XII. SECT. 6. SUB-SECT. 1.—A.

**1825 II. ———]**—*RUTHERFORD v. STOVEL* (1861), 12 C. P. 9.—CAN.

**1825 III. ———]**—*GRAND TRUNK PACIFIC COAST S.S. CO. v. VICTORIA-VANCOUVER STEVEDORING CO.* (1919), 43 D. L. R. 231.—CAN.

*ag. Supply of information—Indemnity against loss.]*—Resp. carried on a business of financing motor car dealers. Applt. carried on a business of obtaining & giving information as to credit, character, etc., & including the checking of cars in dealers' hands & reporting thereon. Applt. made an agreement to supply its service to resp. Resp. signed an "indemnity agreement," agreeing to treat in confidence the information furnished, to hold applt. harmless on account of any damages arising from publication or dissemination of information or careless handling of reports, & agreeing, "in consideration of receiving this service, & as a condition of its rendition," that neither applt. nor its employees should be responsible "for any loss that may

occur to resp. through the use of the information furnished." Through careless car-checking reports, made without personally checking over the cars, in respect of a dealer, made by a local inspection agent of applt. & passed on to resp., resp. was misled, to its loss, & sued applt. for damages. Applt. claimed that it had not bound itself for more than reasonable care in the selection of its inspection agents, & further, that, in any case, it was relieved from liability by the concluding clause of the indemnity agreement:—*Held*: resp. should recover. The concluding clause of the indemnity agreement did not, on proper construction of that agreement, relate to car-checking reports.—*RETAIL CREDIT CO., INCORPORATED v. COMMERCIAL FINANCE CORPN., LTD. & MERCHANT'S CASUALTY INSURANCE CO., RETAIL CREDIT CO., INCORPORATED v. COMMERCIAL FINANCE CORPN., LTD. & WESTERN ASSURANCE CO.*, [1932] S. C. R. 33.—CAN.

Trustees v. Southern Union General Insce. of Australasia, [1928] Ch. 793.

1877. *Add. Annotation*:—*Re*fd. Admiralty Comrs. v. S.S. *Susquehanna*, [1926] A. C. 655.

1881. *Add. Annotation*:—*Re*fd. *Re Debtor* (No. 627 of 1936), [1937] Ch. 156.

1882. *Add. Annotation*:—*Re*fd. *Re Pinto Leite & Nephews, Ex p. Des Oliveira* (Visconde), [1929] 1 Ch. 221.

1889. *Add. Annotations*:—*As to* (1) *Re*fd. *Harmer v. Armstrong*, [1934] Ch. 65. *As to* (2) *Re*fd. *Hyman v. Hyman, Hughes v. Hughes*, [1929] A. C. 601. *Generally*, *Re*fd. *May & May*, [1929] 98 L. J. K. B. 770.

1895a. — Against “loss sustained”—Actual loss necessary—Effect of deed of assignment by debtor.]—*STANLEY (MONTAGU) & Co. v. SOLOMON (J. C.), LTD.*, No. 1745a, *ante*.

1908a. Indemnity against loss on debentures—Sale of debentures by party indemnified.]—Deft. was the chairman of the S. Co., which at the end of 1921 was seeking to issue £15,000 First Lien Debentures to rank *pari passu* with a previous issue of first lien debentures of the same amount; & deft., having interested pltf. in the matter, sent him a letter of indemnity, dated Feb. 17, 1922, in these terms: “Regarding the issue of £15,000 First Lien Debentures of the S. Co. at the price of £80 per £100 . . . I understand you are subscribing for £3,000 of the same at a cost to you of £2,400. In consideration of your giving me one-fourth of any profit you may receive on such investment, I hereby indemnify you against any loss thereon. The expression ‘any profit’ only refers to the redemption price of £100

per £80, which, when received, will show a profit of £20 per bond & the bonus out of the proceeds of any royalties on oil sales from the co.’s properties during the currency of the debentures. . . . The interest you will be entitled to receive from the co. is excluded from the consideration of profits.” The debentures were redeemable on July 1, 1925, but they were secured by two debenture trust deeds which gave power to extend the due date, & in Apr. 1925, steps were taken which resulted in its extension to July 1, 1930. In May & June, 1925, a correspondence took place between pltf. & deft. in which pltf. announced his intention of selling the debentures, & deft. protested against this, claiming that they must be kept till their due date. On July 16, 1925, pltf. put the debentures up for sale, & in the absence of other bidders sold them to his son for £25. He then commenced proceedings to recover the amount of his loss, but the House of Lords decided that nothing was payable under the indemnity until the due date arrived. On July 18, 1928, the co. went into liquidation & pltf., having repurchased the debentures from his son, brought these proceedings to recover his loss:—*Held*: in selling the debentures pltf. had committed a breach of an implied term of the contract, & having failed to maintain the position essential to enable deft. to receive the consideration for the indemnity, he had committed a breach of a term going to the root of the contract. Deft. had elected by his pleadings in the previous action to treat the contract as at an end & pltf. could not therefore maintain the present action.—*GUY-PELL v. FOSTER*, [1930] 2 Ch. 169; 99 L. J. Ch. 520; 143 L. T. 247, C. A.

PART XII. SECT. 7, SUB-SECT. 1.

b 1. — Claim by liquidator of indemnified party—Before payment of liability.]—Where commission agents had incurred liability on behalf of

their principals, who had agreed to indemnify them, & the agents having subsequently gone into liquidation, official liquidator sued the principals for the amount of liability:—*Held*: he could recover the amount even

though the agents having gone into liquidation had not actually paid their vendor.—*OSMAN JAMAL & SONS v. GOPAL PURSHATTAM* (1928), 1 L. R. 56 Calc. 262.—*IND*.

## HIGHWAYS, STREETS AND BRIDGES.

## Part I.—Definitions and Characteristics.

4. *Add. Annotation*:—*Refd.* Linton v. New-castle-upon-Tyne Corpn. (1929), 142 L. T. 49.
5. *Add. Annotations*:—*As to* (2) *Refd.* Williams-Ellis v. Cobb, [1935] 1 K. B. 310. *As to* (4) *Refd.* A.-G. & Public Trustee v. Woolwich Metropolitan Borough Council (1930), 144 L. T. 132.  
*Add. Annotation*:—*Generally*, *Refd.* Williams-Ellis v. Cobb, [1935] 1 K. B. 310.
- 9a. — Land flooded at spring tides.]—In 1928 pltf. purchased a large strip of foreshore & let part of it for caravans & bungalows. She erected a fence round the land side, with gates at three places at which persons other than local inhabitants were charged 1d. toll. Deft., the proprietor of a tea shop at the Western end of pltf.'s land, claimed that the fence obstructed five public or customary rights of way. Four of the alleged public ways were over land flooded at spring tides. For the purpose of asserting these rights, deft. pulled down some of pltf.'s fence, & did not absolve himself from association with a mob which also pulled down another part of the fence. Deft., without joining the A.-G., counterclaimed for a declaration that the five ways were public, alleging that his tea shop gave him an interest in their remaining open which was not possessed by the general public & that therefore the fiat of the A.-G. was not necessary:—*Held*: (1) there was a public right of way over three of the ways claimed; (2) the damage done by deft. was excessive; (3) the fiat of the A.-G. was necessary.—SEATON v. SLAMA (1932), 77 Sol. Jo. 11; 31 L. G. R. 41.
18. *Add. Annotations*:—*Consd.* Williams-Ellis v. Cobb, [1935] 1 K. B. 310. *Refd.* Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons (No. 2) (1929), 24 J. P. 10.
20. *Add. Annotations*:—*Consd.* Williams-Ellis v. Cobb, [1935] 1 K. B. 310. *Refd.* Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons (No. 2) (1930), 144 L. T. 132.
- 29a. —.]—A.-G. v. TASKER, No. 263a, *post*.
- 52a. Road leading to the sea.]—Pltf. claimed damages against several defts. for trespassing over his land, & asked for an injunction. Defts. alleged that they were lawfully exercising public rights of way. Evidence was given of public user by five different classes of persons, extending over the whole period of living memory, of two defined ways over pltf.'s land from a public high road to the sea at high-water mark. It was also proved that pltf.'s land was in strict settlement from 1856 to 1908, & that during that period there was never an owner capable of dedication.
- The county ct. judge held that there being no owner capable of dedication during the period of proved public user, he was not entitled to infer dedication from such user. He held also that the ways claimed by defts. had no sufficient *terminus ad quem*. On appeal:—*Held*: (1) although the public have only limited rights over the foreshore, the sea may be a sufficient *terminus ad quem* for a public way, which may now be proved, even though it does not lead to a public place; (2) where there is evidence of public user of a way throughout the period of living memory, but there has been no owner of the land capable of dedication during that period, the tribunal of fact which has to decide the issue of dedication or no dedication may infer a dedication at some date anterior to the earliest proved user by an owner capable of dedication; (3) there is no *presumptio juris* to compel the tribunal to draw such an inference even from un rebutted evidence of long-continued & uninterrupted user.—WILLIAMS-ELLIS v. COBB, [1935] 1 K. B. 310; 104 L. J. K. B. 109; 152 L. T. 133; 99 J. P. 93; 51 T. L. R. 131; 79 Sol. Jo. 11; 33 L. G. R. 39, C. A.
65. To the existing paragraph add as follows:—  
(3) The words “annual payment towards the cost of the maintenance & repair” in Local Government Act, 1888 (c. 41), s. 11 (2), mean a payment to be made annually in respect of the expenditure of the particular year, not a fixed sum to be arrived at by taking the average expenditure over a series of years.
- Annotations*:—*As to* (1) *Consd.* Manchester Corpn. v. Audenshaw U. C. & Denton U. C., [1928] Ch. 763. *Apld.* Reigate Corpn. v. Surrey County Council, [1928] Ch. 359. *Refd.* A.-G. & Taylor & Son, Ltd. v. Todmorden Borough Council, [1937] 4 All E. R. 588.
66. *Add. Annotations*:—*As to* (1) *Consd.* Reigate Corpn. v. Surrey County Council, [1928] Ch. 359. *As to* (4) *Consd.* Nicholson v. Southern Ry. Co. & Sutton & Cheam Urban District Council, [1935] 1 K. B. 588.
79. *Add. Annotation*:—*Refd.* Howard-Flanders v. Maldon Corpn. (1926), 135 L. T. 6.
- 91a. Not confined to public highway.]—*Held*: the word “street” even in London does not necessarily mean a public highway.—BARNES v. CADOGAN DEVELOPMENTS, LTD., [1930] 1 Ch. 479; 99 L. J. Ch. 274; 142 L. T. 626.
97. *Add. Annotation*:—*Refd.* Postmaster-General v. Birmingham Corpn., [1936] 1 K. B. 66.
137. *Add. Annotation*:—*Apld.* A.-G. & Public Trustee v. Woolwich Metropolitan Borough Council (1929), 93 J. P. 173.

## PART I. SECT 1, SUB-SECT. 1.

10 i. Once a highway always a highway.]—A highway once laid out & recorded, the public acquire permanent rights in it, which are unaffected by non-user.—LEBLANC v. SAULNIER, [1934] 4 D. L. R. 109 8 M. P. R. 20.—OAN.

## PART I. SECT. 1, SUB-SECT. 3.

45 i. *Cul-de-sac*.]—Scavenging may not be sufficient evidence that a *cul-de-sac* is a public highway.—JATIN-DHANATH BARAT v. CALCUTTA CORPN. (1930), 1 L. R. 58 Calo. 1124.—IND.

## PART I. SECT. 1, SUB-SECT. 4.

sk. *Religious procession*.]—There is

a right in every community to take a religious procession, with its appropriate observances, along a highway. This is an inherent right & does not depend on the proof of any custom or long-established practice.—MUHAMMAD JALIL KHAN v. RAM NATH KHAN (1930), 1 L. R. 43 All.—IND.

- 137a. ———.] —A.-G. & PUBLIC TRUSTEE v. WOOLWICH METROPOLITAN BOROUGH COUNCIL, No. 951a, *post*.
146. *Add. Annotation*:—*Apld.* A.-G. & Public Trustee v. Woolwich Metropolitan Borough Council (1929), 93 J. P. 173.
- 164a. *Whether public highway—Claim of dedication.*]—Pltfs. claimed a declaration that a way over deft.'s land was a public highway for vehicular traffic up to a certain point & for foot traffic from that point to Cockington Church on the ground that dedication should be presumed from evidence of uninterrupted use by the public throughout living memory & from evidence of reputation. The church was surrounded by deft.'s grounds, & apart from a private path from his grounds, there was no access to the church except by the way in question. Deft. admitted that there was a church way for parishioners along the way, but he denied that there was any public right of way. Since 1774 the title to the property had been such that the owners could, if so minded, have dedicated the way to the public. The freehold of the church was in the incumbent & it had fulfilled all the functions of a parish

church, but no person had a right to enter it without the permission of the vicar & churchwardens when it was not open for Divine service. The ct. found that apart from parishioners comparatively few persons had visited the church until about 1890, but since the War large numbers of persons had done so by the way in question & no one had ever been turned back. Owing to the increased use of the way notices were put up that visitors must keep to the path & not pick the flowers & that there would be no admission through the gate after 6 p.m. There was also a notice "No thoroughfare except to the church." In 1923 annoyance from visitors began & the gate was ordered to be locked after dusk, but no complaint was ever made, though some persons were actually prevented from going along the way to the church:—*Held*: on the evidence, the use of the way could properly be explained as having taken place by permission, & there was no reason why the ct. should presume from that use dedication to the public, & therefore the action failed.—A.-G. v. MALLOCK (1931), 146 L. T. 344; 48 T. L. R. 107; 30 L. G. R. 141.

## Part II.—Highway Statutes, Areas and Authorities.

SECT. 2.—HIGHWAY AREAS AND AUTHORITIES (p. 279).

*See, now, Local Government Act, 1929 (c. 17), ss. 29–45.*

## Part III.—Origin and Proof of Highways.

177. *Add. Annotations*:—*As to* (2) *Consd.* Williams-Ellis v. Cobb, [1935] 1 K. B. 310. *Refd.* Merstham Manor, Ltd. v. Coulsdon & Purley Urban District Council, [1937] 2 K. B. 77; Jones v. Bates, [1938] 2 All E. R. 237.
178. *Add. Annotations*:—*As to* (2) *Refd.* Stoney v. Eastbourne R. D. C. & Devonshire (1925), 90 J. P. 133; Williams-Ellis v. Cobb, [1935] 1 K. B. 310.
181. *Add. Annotation*:—*As to* (2) *Refd.* Williams-Ellis v. Cobb, [1935] 1 K. B. 310.
187. *Add. Annotations*:—*Refd.* Stoney v. Eastbourne R. D. C. & Devonshire (1925), 90 J. P. 57; Williams-Ellis v. Cobb, [1935] 1 K. B. 310.
189. *Add. Annotations*:—*As to* (1) *Consd.* A.-G. v. Tasker (1928), 92 J. P. 157; A.-G. v. Manchester Corpn. (1930), 46 T. L. R. 629. *Folld.* Williams-Ellis v. Cobb, [1935] 1 K. B. 310. *Refd.* Jones v. Bates, [1938] 2 All E. R. 237.
- As to* (2) *Consd.* Merstham Manor, Ltd. v. Coulsdon & Purley Urban District Council, [1937] 2 K. B. 77.
194. *Add. Annotations*:—*As to* (1) *Consd.* A.-G. v. Manchester Corpn., [1931] 1 Ch. 254. *As to* (2) *Consd.* Williams-Ellis v. Cobb, [1935] 1 K. B. 310. *Refd.* A.-G. v. Mallock (1931), 48 T. L. R. 107; Merstham Manor, Ltd. v. Coulsdon & Purley Urban District Council, [1937] 2 K. B. 77.
196. *Add. Annotation*:—*As to* (2) *Refd.* Layzell v. Thompson (1926), 43 T. L. R. 58.
- 201a. *No legal presumption from long user.*]—WILLIAMS-ELLIS v. COBB, No. 52a, *ante*.
212. *After this case add*:—  
—Erection of notices.]—*See* Rights of Way Act, 1932 (c. 45), s. 1 (3).
216. *Add. Annotations*:—*Consd.* Stoney v. Eastbourne R. D. C. & Devonshire (1925), 90 J. P. 133; Williams-Ellis v. Cobb, [1935] 1 K. B. 310.

### PART I. SECT. 5, SUB-SECT. 1.

s1. *Street declared residential—Effect.*]—Once a street has been declared residential by the municipality under Ontario Municipal Act the owner of a building thereon may not conduct an undertaking business on the premises.—*ST. CATHARINES v. HUTSE*, [1935] 4 D. L. R. 732; *reversd.*, [1936] 2 D. L. R. 453.—CAN.

### PART I. SECT. 6, SUB-SECT. 2.

sa. *By Government survey—Prevails*

*against previous possession.*]—MOUNTJOY v. R. (1861), 1 E. & A. 429.—CAN.

### PART III. SECT. 1.

r 1. ———.]—POINT ABINO ASS'N. v. BERTIE TOWNSHIP, [1927] 4 D. L. R. 503; 61 O. L. R. 120; *affd.*, [1928] 2 D. L. R. 31; 61 O. L. R. 610.—CAN.

### PART III. SECT. 2, SUB-SECT. 2.

206 vi. ——— *Crown patents issued in accordance with plan showing highway.*]

—EDMONTON TOWN v. BROWN & CURRY (1893), 1 Terr. L. R. 454.—CAN.  
206 vii. ———.]—*Re* PETERS, [1931] 3 D. L. R. 89.—CAN.

### PART III. SECT. 2, SUB-SECT. 3.—C.

218 ii. ———.]—*Held*: no presumption of dedication from user by the public could be made against an owner who was in fact out of possession or control; to justify such presumption it must be shown that there was some period during which the owner could

219. *Add. Annotations*:—*As to* (1) *Refd. Stoney v. Eastbourne R. C. & Devonshire* (1926), 95 L. J. Ch. 312; *Williams-Ellis v. Cobb*, [1935] 1 K. B. 310.

236. *Add. Annotation*:—*As to* (1) *Consd. Symes & Jaywick Asscn. Properties, Ltd. v. Essex Rivers Catchment Board*, [1936] 2 All E. R. 551.

247a. — *Land in settlement during living memory.*]—*WILLIAMS-ELLIS v. COBB*, No. 52a, *ante*.

251. *Citations*:—For “L. R. 3 Exch. 316” read “L. R. 2 Exch. 316.”

*Add. Annotations*:—*As to* (1) *Consd. Stoney v. Eastbourne R. D. C. & Devonshire* (1925), 90 J. P. 133; *Williams-Ellis v. Cobb*, [1935] 1 K. B. 310. *As to* (2) *Refd. Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159; *Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401. *Generally, Refd. Stoney v. Eastbourne R. D. C. & Devonshire* (1925), 90 J. P. 57.

256. *Add. Annotation*:—*As to* (2) *Consd. Williams-Ellis v. Cobb*, [1935] 1 K. B. 310.

263a. —.]—Where nothing is known about a way except that it is used, the origin of the way is to be found in the user; & in such a case the user raises a legal presumption of dedication.

Upon proof that a path had been used by the public on foot & on horseback as of right during the period of living memory & that such right was reputed to exist therefore back to the early part of last century:—*Held*: the path was dedicated to the public as a bridleway at or about the commencement of, or prior to the commencement of, last century.—*A.-G. v. TASKER* (1928), 92 J. P. 157.

266. *Add. Annotation*:—*Refd. Merstham Manor, Ltd. v. Coulsdon & Purley Urban District Council*, [1937] 2 K. B. 77.

270. *Add. Annotation*:—*Refd. Williams-Ellis v. Cobb*, [1935] 1 K. B. 310.

270a. *Motive of user immaterial.*]—*HUE v. WHITELEY*, No. 298a, *post*.

274a. — *Reputed to exist for over one hundred years.*]—*A.-G. v. TASKER*, No. 263a, *ante*.

278. After this case add:—*Statutory periods.*]—*See Rights of Way Act*, 1932 (c. 45), s. 1 (1), (2).

278a. — “Actual enjoyment.”]—The public

had for forty years used a roadway at O. &, though there was some evidence of people being stopped or turned away, it was clear that in the majority of cases it had been used as a public highway without challenge. The owner had acquiesced in its inclusion in a town planning scheme as a public highway. No notice had been placed upon the way or served upon the local authority. No fence or gate had been erected to prevent its use before the end of 1934, & it was the removal of a fence or gateway then erected that was complained of in this case as an act of trespass:—*Held*: (1) upon the evidence, the roadway had been dedicated & used as a public highway; (2) “actually enjoyed by the public as of right” in *Rights of Way Act*, 1932 (c. 45), s. 1 (1), means actually enjoyed by the public as of right, & the exercise of such right has been actually suffered by the owner for the period of 20 years; (3) “as of right” in the same sub-sect. means in the exercise of a right vested in the public & not by permission of the owner from time to time given; (4) “without interruption” in the same sub-sect. means without actual & physical stopping of the enjoyment of the right; (5) defts. were entitled under *Public Authorities Protection Act*, 1893 (c. 61), s. 1 (b), to costs to be taxed between solr. & client.—*MERSTHAM MANOR, LTD. v. COULSDON & PURLEY URBAN DISTRICT COUNCIL*, [1937] 2 K. B. 77; [1936] 2 All E. R. 422; 106 L. J. K. B. 603; 100 J. P. 381; 52 T. L. R. 516; 80 Sol. Jo. 615; 34 L. G. R. 356.

*Annotation*:—*As to* (3) *Consd. Jones v. Bates*, [1938] 2 All E. R. 237.

278b. — “As of right.”]—*MERSTHAM MANOR, LTD. v. COULSDON & PURLEY URBAN DISTRICT COUNCIL*, No. 278a, *ante*.

278c. — “Without interruption.”]—*MERSTHAM MANOR, LTD. v. COULSDON & PURLEY URBAN DISTRICT COUNCIL*, No. 278a, *ante*.

285. *Add. Annotations*:—*As to* (1) *Dists. Hue v. Whiteley*, [1929] 1 Ch. 440. *Refd. Stoney v. Eastbourne R. C. & Devonshire* (1926), 95 L. J. Ch. 312; *A.-G. v. Mallock* (1931), 48 T. L. R. 107; *Williams-Ellis v. Cobb*, [1935] 1 K. B. 310. *As to* (2) *Consd. Trafford v. Thrower* (1929), 45 T. L. R. 502.

298. *Add. Annotations*:—*As to* (2) *Refd. Williams-Ellis v. Cobb*, [1935] 1 K. B. 310. *Generally, Refd. Boulwood v. Paignton U. D. C.* (1928), 92 J. P. 98.

have taken action to exclude the public.—*A.-G. v. DUNEDIN*, [1929] N. Z. L. R. 261.—N.Z.

#### PART III. SECT. 2, SUB-SECT. 4.—B. (a).

257 xi. —.]—In an action of trespass, deft. alleged a public right of way across plfts.’ land:—*Held*: the evidence as to uninterrupted public user of the alleged road for a period coextensive with the memory of witnesses, along with other circumstances in evidence, justified a finding of dedication.—*FULTON v. CREELMAN*, [1931] S. C. R. 221; 1 D. L. R. 733; *affd.*, [1930] 4 D. L. R. 43.—CAN.

#### PART III. SECT. 2, SUB-SECT. 4.—B. (c).

*sd. Lane less than prescribed minimum width of private streets—No dedication*

*inferred.*]—*CARPET IMPORT CO., LTD. v. BEATH & CO., LTD.*, [1927] N. Z. L. R. 37.—N.Z.

*sd. Track leading to foreshore.*]—A proprietor, who owned the foreshore *ex adverso* of his lands, brought an action of declarator that there existed no right of way over a track about a quarter of a mile in length leading from a public road to the foreshore. The track was held to have been part of a road extending to the foreshore which became a public road in 1819, but which ceased to be maintained at public expense in 1836. It was proved that from 1865 to 1934, when the proprietor first attempted to close the track, it had been used by the public as an access to the foreshore for the purposes of bathing & recreation. The evidence justified the inference that this use had extended as far back as 1836:—*Held*: (1) the track having

been at one time a public road, the foreshore at its terminus had acquired the character of a public place which it had never lost; & further that, even if it was not established that the track had ever been part of a public road, the resort by the public to the foreshore for recreation had made the foreshore a public place prior to 1894, when the prescriptive period began; (2) the extent of the public use of the track throughout the prescriptive period was consistent, not with tolerance by the proprietor, but with the assertion of a right by the public.

Opinion, *per* Lord MONCRIEFF, that a public road could not lose its character as such merely by failure on the part of the road authority to maintain it & without resort by them to the statutory procedure for closing it.—*BUTE (MARQUIS) v. M’KIRDY & CO.*, [1937] S. C. 93.—SCOT.

**298a.** — **Paths joining existing highways.]**—Evidence of long public user, as of right, of a pathway or roadway for the purpose of passing from one public place to another, is not the less ground for inferring dedication because recreation may have been the sole motive of such user.

H. & W. were neighbouring freeholders, & the sites of their properties originally formed part of the D. estate. The property of H. was originally let on a long lease in 1878 to one G., together with a right of way over a rough road, of the nature of a timber road, leading up from the London Road towards the property & past the property to Box Hill. In 1916 H. acquired the freehold of the property, & took a conveyance of the roadway in 1924. W., without the consent of H., opened a small gate for pedestrians in the boundary fence. In the action H. claimed a declaration that he was the freeholder of the said roadway & an injunction to restrain W. from trespassing thereon. Evidence was given of public user between Box Hill & the London Road for purposes of pleasure:—*Held*: the evidence of public user led to a presumption that the land had been dedicated, & that the motive of such user was irrelevant.—*HUE v. WHITELEY*, [1929] 1 Ch. 440; 98 L. J. Ch. 227; 140 L. T. 531.

*Annotation*:—*Refd.* Jones v. Bates, [1938] 2 All E. R. 237.

**310a.** — **—.]**—A local authority acquired, in 1875, an area of land under its Act, in accordance with which it laid out streets & made improvements in the area. But a plot of land included in the area was practically neglected for sixteen years, & was then handed over to the local authority's Parks Committee for use as an open space & was drained & gravelled. Later, a fountain & certain structures were erected on the plot, & the public used the plot freely & continuously. In or about 1928 the local authority wished to build a tuberculosis dispensary & offices on the plot, & the Minister of Health approved its appropriation for that purpose. In an action by the Attorney-General on relation for an injunction to restrain the local authority from building so as to interfere with the right of user & enjoyment of the plot by the public:—*Held*: the public had not acquired by user a public right of way over the plot; the public rights over the plot were general & to some extent precarious, & could be destroyed under Public Health Acts (Amendment) Act, 1907 (c. 53), s. 95.—*A.-G. v. MANCHESTER CORPN.*, [1931] 1 Ch. 254; 100 L. J. Ch. 33; 144 L. T. 112; 46 T. L. R. 629; 28 L. G. R. 634.

*Annotation*:—*Refd.* Williams-Ellis v. Cobb, [1935] 1 K. B. 310.

**311a.** **Footpath along sea cliff.]**—Where there was evidence of the user by the public of a footpath along a sea cliff for some distance

when its direction continued on a line slanting inland, & during the course of some twenty years, owing to erosion by the sea, the footpath so used had receded about twenty or thirty feet inland, though the ct. was always slow to infer the dedication of a public right of way along a sea cliff, such a dedication could be here inferred, having regard to the fact that part of the footpath did not run along the sea cliff, & no objection to its user had been made by the owner of the land over which the footpath continued after leaving the sea cliff. *Pltfs.* having claimed that there was no public right of way over a strip of land under a portion of a fence removed by *defts.*:—*Held*: the public had wandered from the original right of way over the land of *pltfs.* when it was in the hands of their predecessor in title & was derelict, but the user of the new way by the public had never been acquiesced in, & there had never been a dedication of it to the public use, & *pltfs.* were entitled to a declaration that there was no such public right of way.—*BOULTRWOOD v. PAIGNTON URBAN DISTRICT COUNCIL* (1928), 92 J. P. 98.

**313a.** **Road leading to seashore.]**—*WILLIAMS-ELLIS v. COBB*, No. 52a, *ante*.

**322a.** — **User by sufferance.]**—*Deft.* council claimed that there was a public footpath over *pltf.*'s park. On a plan attached to an inclosure award of 1816 no such public footpath was set out, & since that time down to 1901 the park had been in settlement with no one capable of dedicating a right of way to the public. The alleged footpath led from the public road over part of the carriage drive to the hall, & then turned off through the park, leading to only three farms & three or four cottages, & by its use a distance of about sixty-four yards was saved. There was no evidence of dedication, & the evidence of user was by the occupants of the farms & cottages & their friends:—*Held*: the proof of uninterrupted user was no more than evidence from which the ct. could infer that at some time the owner of the soil had dedicated the path to the public of which there was no evidence, & the evidence of user was user by sufferance only since 1816, before which no such public footpath was shown to exist.—*FENWICK v. HUNTINGDON RURAL DISTRICT COUNCIL* (1928), 92 J. P. 41.

**329a.** — **—.]**—*BOULTRWOOD v. PAIGNTON URBAN DISTRICT COUNCIL*, No. 311a, *ante*.

**333.** *Add. Annotation*:—*Refd.* Hillen v. I. C. I. (Alkali), Ltd., [1934] 1 K. B. 455.

**333a.** **User under Rights of Way Act, 1932.]**—(1) The words in Rights of Way Act, 1932 (c. 45), s. 1 (1), "actually enjoyed by the public as of right & without interruption," mean that the way has been used without compulsion, secrecy, or licence, *nec vi, nec clam, nec precario*.

(2) (*Per* SCOTT, L.J.). The party asserting

rights of its owner.—*DAWSON v. ROUHAE ZAMANI BEGUM (PRINCESS)* (1928), 1 L. R. 6 Ran. 456.—*IND.*

**PART III. SECT. 2, SUB-SECT. 4.—**  
**B. (e).**

*so. Right to obstruct—Locus in quo conveyed with adjoining property.*—*LEARY v. ARMSTRONG* (1850), 12 N. B. R. (1 Han.) 22.—*CAN.*

**PART III. SECT. 2, SUB-SECT. 4.—**  
**B. (d).**

**317 II.** — **—.]**—Where a person has possessory rights over a piece of land, the title to the land being vested in Govt., another person may establish a right of access to a tomb erected on such land & to worship there. Such a right must have been openly enjoyed

without leave, stealth, or force for a length of time which suggests originally an agreement or usage that has become a customary law of the place in respect of the persons or things in which it is concerned. But the establishment of such right only does not include the right to erect substantial structures over & round the tomb which would be an infringement of the possessory

the right of way has not to prove the absence of compulsion, secrecy, or licence. It is for the party denying the existence of the right of way to prove compulsion, secrecy, or licence.

(3) (*Per* SCOTT, L.J.). A mere discontinuance of user does not amount to interruption. This can only arise from an interference with the enjoyment of the right of passage.

(4) (*Per* FARWELL, J.). Where the user is for a period of less than twenty years, it is still possible, notwithstanding the Act of 1932, to prove the existence of a public right of way by implied dedication.—JONES v. BATES, [1938] 2 All E. R. 237; 158 L. T. 507; 102 J. P. 291; 54 T. L. R. 648; 82 Sol. Jo. 314; 36 L. G. R. 227, C. A.

345a. Under Rights of Way Act, 1932.]—JONES v. BATES, No. 333a, *ante*.

355a. ———.]—The purchaser of land sold "subject to rights of way," after an unsuspected right of way had been established on behalf of the public, brought an action against the vendor for breach of the implied covenants expressed by his having conveyed as "beneficial owner." The vendor's covenant being qualified, the question turned upon whether there had been dedication of the right subsequently to 1782, the date of the last purchase for value by those through whom the vendor claimed. Pltf. produced two tithe maps, made respectively in 1802 & 1840, in neither of which was the right of way marked:—*Held*: the tithe maps were made for a special purpose, & not for the purpose of showing public or private rights other than as regards tithe; they were not, there-

fore, *prima facie* evidence enabling pltf. to contend that the dedication was at a subsequent date, so as to shift upon deft. the *onus* of proving that the dedication was prior to 1782.—STONE v. EASTBOURNE RURAL COUNCIL, [1927] 1 Ch. 367; 95 L. J. Ch. 312; 135 L. T. 281; 90 J. P. 173; 70 Sol. Jo. 690; 24 L. G. R. 333, C. A.

Annotation:—Consd. Williams-Ellis v. Cobb, [1935] 1 K. B. 310.

355b. ———.]—A tithe map & award produced from the proper custody may, in cases in which the question is whether a highway was dedicated to the public before or after Mar. 20, 1836, be used in conjunction with evidence of uninterrupted public user throughout living memory as evidence, (1) that there was at the date of the award a carriage-way along the line shown on the map, & (2) of reputation that the way so shown had by the date of the award been dedicated to the public.—A.-G. (FEVERSHAM'S (EARL) TRUSTEES) v. STOKESLEY RURAL DISTRICT COUNCIL (1928), 26 L. G. R. 440.

356. Add. Annotation:—*Refd.* Layzell v. Thompson (1927), 137 L. T. 106.

357. After this case add:—

— Deposited with council.]—*See* Rights of Way Act, 1932 (c. 45), s. 1 (4).

361. Add. Annotation:—*As to* (1) Distd. Great Western Ry. v. Monmouthshire County Council (1929), 94 J. P. 6.

390a. ——— Persons going to church.]—A.-G. v. MALLOCK, No. 164a, *ante*.

407. Add. Annotations:—Consd. Marshall v. Blackpool Corp., [1933] 2 K. B. 339. *Refd.* Williams-Ellis v. Cobb, [1935] 1 K. B. 310.

## Part IV.—Width of Highways.

443a. ———.]—STILLWELL v. NEW WINDSOR CORPN., No. 616a, *post*.

454. Add. Annotation:—*Refd.* Harper v. Haden & Sons (1932), 102 L. J. Ch. 6.

468a. ———.]—Pltfs. were owner & occupier respectively of a farm which pltf. Hinds had bought in Dec. 1918. They claimed that an unenclosed piece of land bordering the highway abutting on their land was part of the farm, & in 1936 they proceeded to fence it. Thereupon defts. by their servants or agents removed the fence, claiming the land to be roadside waste & part of the highway in relation to which defts. were the highway authority. The fence erected in 1936 was in a continuous line with fences on adjoining parts of the highway, but there was an old fence at a distance from the highway varying from 37 ft. to 99 ft. Evidence was given that animals had in the past strayed upon the land from the highway & that gypsies had encamped there. Defts. contended that, in

the case of a highway running between fences, there is a presumption that the public right of way extends over the whole space of ground between the fences, & is not confined to the metalled portion, & that *prima facie* the fences are to be taken as having been originally put up for the purpose of separating land dedicated to the public as highway from land not so dedicated:—*Held*: (1) such a presumption would not be raised unless the circumstances were such as to make it reasonable to do so; (2) the circumstances in this case were such as did not raise such a presumption.—HINDS & DIPLOCK v. BRECONSHIRE COUNTY COUNCIL, [1938] 4 All E. R. 24.

472. Add. Annotation:—*Refd.* Hanscombe v. Bedfordshire County Council, [1938] 3 All E. R. 647.

474a. ——— Statutory power to fill in.]—A highway was bounded by a fence, & on the road side of the fence there was a ditch. The land

PART III. SECT. 2, SUB-SECT. 7.  
404 I. Non-user by public.]—BRITISH COLUMBIA HOP CO., LTD. v. DISTRICT OF KENT, [1925] 3 D. L. R. 171; [1925] 2 W. W. R. 31.—CAN.

PART III. SECT. 3.

434 I. Compliance with statutory

requirements.—Failure of commissioners to file return of laying out.—Laying out not invalidated.]—BROWN v. MCKEEL (1841), 1 Kerr, 311.—CAN.

434 II. ———.]—R. v. ROY, *Ex p.* DUGUENNE, [1931] 4 D. L. R. 748; 3 M. P. R. 104.—CAN.

sw. Reservation in Crown grants.]—In all grants under Public Lands Act, R. S. O., 1927, there is reserved to the Crown 5 per cent. of the lands for purposes of roads.—CRANE LUMBER CO. v. BRISSON, [1936] 3 D. L. R. 744; O. R. 457.—CAN.



immediately adjoining the ditch belonged to ptlfs. In 1937, defts., without the consent or knowledge of ptlfs., laid pipes in a portion of the ditch & filled it in completely. They justified these acts on the grounds (i) that the portion of the ditch filled in was part of the highway, & (ii) that, if that were not so, the acts were within the scope of their statutory powers. The ditch clearly served the purpose of carrying off the overflow from a pond on ptlfs.' land & the surface-water from that land. It also carried off the surface-water from the road. At all times, the cleaning & repair of the ditch had been undertaken by ptlfs.:—*Held*: (1) the presumption that

the ditch did not form part of the highway had not been rebutted, & the ditch was vested in ptlfs.; (2) the highway authority had no statutory power to fill in the ditch without the owner's consent, & ptlfs. were therefore entitled to a declaration of title & nominal damages.—*IFANSCOMBE v. BEDFORDSHIRE COUNTY COUNCIL*, [1938] Ch. 944; [1938] 3 All E. R. 647; 107 L. J. Ch. 433; 159 L. T. 357; 102 J. P. 443; 54 T. L. R. 1093; 82 Sol. Jo. 697; 36 L. G. R. 601.

476. *Add. Annotation*:—*Refd.* Liddle v. North Riding of Yorkshire County Council, [1934] 2 K. B. 101.

## Part V.—Rights in Connection with Highways.

486. *Add. Annotation*:—*Refd.* Liddle v. North Riding of Yorkshire County Council, [1934] 2 K. B. 101.

491. *Add. Annotation*:—*Consd.* Liddle v. North Riding of Yorkshire County Council, [1934] 2 K. B. 101.

492. *Add. Annotation*:—*Consd.* Liddle v. North Riding of Yorkshire County Council, [1934] 2 K. B. 101.

494. *Add. Annotation*:—*Consd.* Liddle v. North Riding of Yorkshire County Council, [1934] 2 K. B. 101.

496. *Add. Annotation*:—*Consd.* Liddle v. North Riding of Yorkshire County Council, [1934] 2 K. B. 101.

546. *Add. Annotation*:—*Expld.* Spillers, Ltd. v. Cardiff Assessment Committee & Cardiff Revenue Officer, [1931] 2 K. B. 21.

587. *Add. Annotations*:—*Dlstd.* Curtis v. Geeves (1930), 143 L. T. 48. *Consd.* Marshall v. Blackpool Corpn., [1933] 2 K. B. 339.

588. *Add. Annotation*:—*As to* (2) *Consd.* Grant v. Derwent, [1929] 1 Ch. 390.

597. *Add. Annotation*:—*Refd.* West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt, [1932] 2 K. B. 1.

601. *Add. Annotation*:—*Refd.* West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt (1932), 96 J. P. 159.

605a. ———. ———. ———. *STILLWELL v. NEW WINDSOR CORPN.*, No. 616a, *post*.

607. *Add. Annotations*:—*Consd.* Port of London Authority v. Canvey Island Comrs. (1931), 101 L. J. Ch. 63. *Refd.* Noble v. Harrison, [1926] 2 K. B. 332.

608. *Add. Annotations*:—*Consd.* Port of London

Authority v. Canvey Island Comrs. (1931), 101 L. J. Ch. 63. *Refd.* Sewai Jaipur (I.L.H. Maharaja Man Singh) v. Arjun Lal, [1937] 4 All E. R. 5.

616. *Add. Annotations*:—*Consd.* Port of London Authority v. Canvey Island Comrs. (1931), 101 L. J. Ch. 63. *Apld.* Stillwell v. Windsor Corpn. (1932), 76 Sol. Jo. 433.

616a. ———. *Trees*.]—As owner of a house at C., which was bounded on the west & north by public highways known as Mill Lane & St. Andrew's Road respectively, ptlf. claimed the property in certain polled lime trees, proved to be about 110 years old, standing along the edge of the footpaths on the eastern & southern sides of those two highways. Ptlf. having refused to comply with defts.' notice to remove the trees on the ground that they were dangerous & obstructions to traffic & defts. having, in consequence of her refusal, themselves removed three of the trees in St. Andrew's Road, ptlf. brought this action, by which she claimed an injunction to restrain defts. from removing the remaining trees & for certain other relief. She claimed that the trees had been planted before the dedication of the roads as public highways, & that there had been excepted from such dedication the portions of the roads in which the trees were planted. There was no evidence of such restricted dedication as ptlf. asserted, but, on the contrary, evidence that the trees in both roads were planted in areas over which, as ancient highways, the public had rights of passage. It was proved that some of the trees were, through disease & decay, so unstable as to be an immediate danger to the public & a nuisance to the highway,

PART V. SECT. 1, SUB-SECT. 1.  
481 i. *Right to walk in carriage-way*.—*Extent of liability of highway authority for repair*.]—Pedestrian using carriage-way on foot has no right to expect a higher degree of repair than would render the way safe for vehicles.—*BELLING v. HAMILTON CITY* (1902), 3 O. L. R. 318.—*CAN.*

PART V. SECT. 1, SUB-SECT. 2.  
sl. ———. ———. ———. *HASAN v. ZAMAN* (1924), 41 T. L. R. 88.—*IND.*

PART V. SECT. 2, SUB-SECT. 3.  
616 iv. ———. ———. ———. In the United Provinces all public streets are vested in the municipality by statute. The Municipal Board sanctioned the

erection of a portico resting upon pillars standing on the footpath. Ptlf., who was, subject to the statutory rights of the municipality, the owner of the soil of the highway, claimed a mandatory injunction ordering its demolition & damages, basing his action upon a trespass to his property in the land:—*Held*: although the municipality under the statute took only a restricted interest in the street sufficient to safeguard its use as a highway, they had power to sanction the erection of the portico, & ptlf. had no right of action in trespass. The Ct. expressed no opinion as to ptlf.'s right to complain of the portico as a nuisance in a properly constituted action.—*SEWAI JAIPUR v. ARJUN LAL*,

[1937] 4 All E. R. 5; 81 Sol. Jo. 763, P. C.—*IND.*

n 1. *Under Town Planning & Development Act, 1920*.]—A piece of land, comprising about 14,000 acres, situated in a farming district, & within the boundaries of a district council area, was subdivided by the owner into twelve lots. A plan was deposited in the Lands Titles Registration Office, & showed certain private roads which were marked "private roads to be vested in" the owner:—*Held*: the fee-simple of these roads did not vest by virtue of Town Planning & Development Act, 1920, in the district council.—*LOXTON DISTRICT COUNCIL v. BRUCE*, [1927] S. A. S. R. 463.—*AUS.*

that others threatened to become a similar danger at short notice, & that the rest, including the three trees which defts. had removed, were a danger to traffic & a nuisance. On Aug. 16, 1920, the boundary of the borough of New Windsor was altered so as to include the parish of C. (Without), & it was admitted that the two roads were highways repairable by the inhabitants at large:—*Held*: (1) the roads were ancient highways upon which, after dedication to the public use, the trees were planted; (2) even assuming pltf. had property in the trees, defts. as to those trees which had been proved to be a nuisance to the highway, had not merely a right but a duty to remove them, & as to the remaining trees, they were entitled to remove them as being obstructions to the rights of the public over the entire width of the roads, which were not limited to the use of the carriageways; (3) the trees, as being parts of the "streets" or as produce of the soil thereof, vested under Public Health Act, 1875, in & came under the control of defts. as the highway authority, with the result that pltf. was not in a position to complain, & her action failed.—*STILLWELL v. NEW WINDSOR CORPN.*, [1932] 2 Ch. 155; 101 L. J. Ch. 342; 147 L. T. 306; 76 Sol. Jo. 433; 30 L. G. R. 477.

618. *Add. Annotations*:—*Apld.* *A.-G. v. Hornsey B. C.* (1926), 43 T. L. R. 92. *Consd.* *Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63. *Refd.* *Grant v. Derwent*, [1929] 1 Ch. 390.

626a. *Road built upon open arches.*—The vesting of a highway in a local authority as highway authority includes, in addition to the surface of the road, the "area of user," i.e., so much of the soil & sub-structure as is necessary to enable the authority to perform its statutory duties of repair & maintenance of the highway. In a case where a public carriage road was built upon a raised viaduct resting upon open arches & descending to the ground level upon embankments:—*Held*: (1) vesting of the road included (a) the whole masonry & structure of the viaduct, together with such soil as it actually occupied, (b) the soil of the embankments; but not (c) the soil lying beneath & between the arches of the viaduct. The local authority, however, was entitled to a right of access to the latter at all times for the purpose of inspection & maintenance; (2) such right of access was not forfeited by laches or acquiescence on the part of the local authority where it was

necessary to enable such authority to perform its statutory duties.—*HERTFORDSHIRE COUNTY COUNCIL v. LEA SAND, LTD.* (1933), 98 J. P. 109; 32 L. G. R. 279.

627. *Add. Annotation*:—*Consd.* *Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63.

634. *Add. Annotations*:—*Consd.* *Marshall v. Blackpool Corpn.* (1932), 102 L. J. K. B. 91. *Refd.* *Fresh Wharf, Ltd. v. Nicholson's Wharves, Ltd.* (1935), 79 Sol. Jo. 479.

637. *Add. Annotation*:—*Mentd.* *Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons* (No. 2) (1929), 94 J. P. 10.

641a. ———.]—*Applt.* was convicted of driving a motor car across the pavement in Threadneedle Street, contrary to City Police Act, 1839 (c. xciv.), s. 35 (7), which provides that, "Every person who shall . . . draw or drive any cart or carriage . . . so that it can stand across or upon any footway," shall be guilty of an offence. He drove across the pavement into a courtyard forming part of the premises of the National Provincial Bank, there being no evidence of any other means of access to the courtyard from the highway. The footway was not constructed to allow of vehicular traffic crossing it, & there was a kerb six inches high. There were no pedestrians on the footway at the time, & the right of passage by the public was not interfered with. *Applt.* was an employee of the bank authorised to drive the car into the courtyard. There was no evidence either as to the ownership of the footway or of any prior user of the courtyard for vehicular traffic:—*Held*: since access to the courtyard by vehicles was not shown to be essential to any user of the premises, the magistrate was entitled to convict.—*CURTIS v. GEEVES* (1930), 143 L. T. 48; 94 J. P. 71; 46 T. L. R. 187; 28 L. G. R. 103; 29 Cox, C. C. 126, D. C.

*Annotation*:—*Consd.* *Marshall v. Blackpool Corpn.*, [1933] 2 K. B. 339.

642a. ———. *Construction of communication for vehicles—Effect of local Act.*—By sect. 62 of the Blackpool Improvement Act, 1879: "Every person desirous of forming a communication for horses or vehicles across any footpath so as to afford access to any premises from a street shall first submit to the corpn. a plan of the proposed communication, showing where it will cut the footpath, & what provision (if any) is made for kerbing & for a paved crossing, & the dimensions &

#### PART V SECT. 3, SUB-SECT. 1.

636 i. ———. *From any part of land.*—Where land is described in a grant as abutting on a road the grantee may come upon the road from any part of the premises & the grantor is estopped from denying the existence of the road.—*DALHOUSIE LAND CO., LTD. v. BEAROE* (1933), 6 M. P. R. 399.—*CAN.*

645 a i. *Restriction on development—Who may prosecute.*—In a question as to whether a county council, as highway authority, were entitled to prosecute for a contravention of Restriction of Ribbon Development Act, 1935, s. 2 (1) (b):—*Held*: while sect. 11 had authorised the highway authority to recover by civil process the expense of demolition, incurred by them in their administrative capacity in consequence of a contravention of

sect. 2 (1) (b), it had not, either expressly or by implication, empowered the authority to prosecute for offences against the Act, & accordingly, the only person entitled to do so was the Lord Advocate or his representative, as the public prosecutor.—*INVERNESS-SHIRE COUNTY COUNCIL v. WEIR*, [1938] S. C. (J.) 11.—*SCOT.*

sd. *Interference with right—Passengers waiting for cars—Nuisance.*—*BUTLER v. NOVA SCOTIA L. & P. CO.*, [1930] 2 D. L. R. 680; 1 M. P. R. 407.—*CAN.*

ss. *Effect of Municipal Act, R.S.O., 1927.*—At common law an owner of land was entitled to access to an adjoining public highway at any point at which his land actually touched such highway, for any kind of traffic which was necessary for the reasonable

enjoyment of his premises & which would not, as he proposed to conduct it, cause a substantial nuisance. A municipal authority, in the absence of an express right to the contrary, was not entitled to deprive him of the full enjoyment of such right. But in Ontario Municipal Act, R. S. O., 1927, & Local Improvement Act, R. S. O., 1927, have created an interference with such common law rights.—*TORONTO TRANSPORTATION COMMISSION v. SWANSEA VILLAGE CORPN.*, [1935] S. C. R. 455; 3 D. L. R. 619.—*CAN.*

st. *Extent of right.*—An adjoining landowner cannot compel a municipality to permit a change in the level of the sidewalk in front of his land to make it suitable for the purpose for which he proposes to use his land.—*T. O. v. SWANSEA*, [1935] 3 D. L. R. 619.—*CAN.*

gradients of the necessary works, & after having obtained the sanction of the corpn. may execute the works at his own expense under the supervision & to the satisfaction of the surveyor, & not otherwise, & if any person drives or permits or causes to be driven any horse or vehicle across any footway unless & until such a communication as aforesaid has been so made he shall be liable to a penalty not exceeding five pounds."

Appls., proprietors of motor coaches, were owners of land bounded by a wall & abutting upon a street which was partly a footpath & partly a carriage-way. The footpath ran along the wall, & the carriage-way ran along the footpath. Appls., being minded to open a passage for vehicles from their land across the footpath & so into the carriage-way, submitted to resps. a plan of the proposed works in accordance with the above enactment, & applied to them to sanction the works. Resps. found no fault with the proposed works as works, but they refused to sanction them, having regard to the safety of the public & the convenience of pedestrians & vehicular traffic which might use the highway:—*Held*: resps. were not authorised by the above sect. to take these matters into consideration in deciding whether to give their sanction to the proposed works; for the owner of land adjoining a highway has at common law a right of access to any part of the highway unless some statute has deprived him of the right, which sect. 62 of the Blackpool Improvement Act, 1879, did not purport to do.—*MARSHALL v. BLACKPOOL CORPN.*, [1935] A. C. 16; 103 L. J. K. B. 566; 151 L. T. 286; 98 J. P. 376; 50 T. L. R. 483; 78 Sol. Jo. 488; 32 L. G. R. 329, H. L.

#### 645a. Restriction on development—Compensation.]

—On Sept. 24, 1935, the claimants made proposals for the development of certain land as a housing estate, which proposals were afterwards withdrawn. On Nov. 5, 1935, the claimants submitted other proposals, to which consent was given, & which were unaffected by the restrictions imposed by the Act of 1935, so as to exclude any claim to compensation. The claimants sought to recover compensation, on the basis that the earlier proposals were proposals "at the date of the claim to compensation" which was made on Jan. 6, 1936:—*Held*: as the earlier proposals for the development of the land were not proposals immediately practicable "at the date of the claim to compensation" within the meaning of sect. 9 (1) of the

Act of 1935, the claimants were not entitled to the compensation claimed.—*MELKSHAM URBAN DISTRICT COUNCIL v. WILTSHIRE COUNTY COUNCIL*, [1937] 4 All E. R. 142; 102 J. P. 38; 35 L. G. R. 632, D. C.

648. *Add. Annotation*:—*Refd.* Fresh Wharf, Ltd. v. Nicholson's Wharves, Ltd. (1935), 79 Sol. Jo. 479.

851. *Add. Annotation*:—*As to* (1) *Refd.* Howard-Flanders v. Maldon Corpn. (1926), 135 L. T. 6.

857. *Add. Annotation*:—*As to* (2) *Consd.* Howard-Flanders v. Maldon Corpn. (1926), 135 L. T. 6.

661. *Add. Annotation*:—*Dbtd.* Witham Outfall Board v. Boston Corpn. (1926), 136 L. T. 756.

664. *Add. Annotation*:—*As to* (2) *Refd.* Harper v. Haden & Sons, Ltd. (1932), 102 L. J. Ch. 6.

665. *Add. Annotation*:—*Apld.* Holt Bros. & Whitford v. Axbridge Rural District Council (1931), 95 J. P. 87.

876. After this case add "— Grant void for uncertainty.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 564, No. 637."

756. *Add. Annotation*:—*Apld.* Powell Lane Manufacturing Co. v. Putnam (1928), [1931] 2 K. B. 305, n.

757. *Add. Annotation*:—*Consd.* Race v. Postmaster-General (1932), 146 L. T. 489.

779a. — Use of competing bridge.]—A statutory co., formed for the purpose of building a bridge across the river Derwent, were empowered by their Act of Parliament to exact tolls from persons using the bridge, & the Act further provided that it should not be lawful for any person for hire or recompense to convey any other person, carriage, article or thing across the Derwent within one mile of the said bridge, with intent to evade payment of tolls. Another bridge was built by a local authority within one mile of the co.'s bridge, & a co. owning motor omnibuses made use of the new bridge for the purpose of conveying passengers & goods across the river in motor omnibuses:—*Held*: the motor omnibus co. had not substituted as a means of taking persons & articles across the river some means of conveyance other than the co.'s bridge & had not, therefore, contravened the provisions of the statute, & accordingly the proprietors of the old bridge were not entitled to an injunction restraining the motor omnibus co. from conveying passengers & goods across the new bridge.—*LOFTSOME BRIDGE CO. OF PROPRIETORS v. EAST YORKSHIRE MOTOR SERVICES, LTD.* (1933), 97 J. P. 268; 31 L. G. R. 317.

## Part VI.—Repair of Highways.

786a. — Increased burden of traffic.]—A road was constructed by pltf. corpn. under powers conferred by a private Act of 1875, which enacted that the road should be constructed according to a certain specification

& that it should thereafter be maintained at pltf.'s expense. The road was completed in 1878 as a waterbound macadamised road in accordance with the statutory requirements & was fully maintained by them for many

#### PART V. SECT. 4.

r i. — — — — —.]—*LODGE v. MONCTON*, [1936] 4 D. L. R. 66; 10 M. P. R. 436; 6 F. L. J. (Can.) 37.—CAN.

e i. — — — — —.]—*Grade of street lowered causing subsidence.*—*NEW WESTMINSTER CITY CORPN. v. BRIGHOUSE* (1892), 20 S. C. R. 520.—CAN.

e ii. — — — — —.]—*Street closed by agreement between municipality & railway company.*—The closing of a street under a joint agreement between a railway co. & a municipality will entitle an adjoining owner to damages.—*HOLE-PROOF HOSIERY CO. v. LONDON*, [1936] 4 D. L. R. 302; *affd.*, [1937] 4 D. L. R.

96.—CAN.

PART V. SECT. 5, SUB-SECT. 1.  
st. Power of International Bridge Company—To regulate charges.]—*CANADA SOUTHERN RY. CO. v. INTERNATIONAL BRIDGE CO.* (1883), 8 App. Cas. 733.—CAN.

years, but ultimately it deteriorated owing to the increase of traffic of a kind unknown in 1878, & unless resort was had to tar-spraying, or to some similar modern expedient, the existing traffic would rapidly destroy the road:—*Held*: (1) *pltf.*s. were liable to maintain the road in the condition in which it was completed in 1878, & that liability still continued, notwithstanding the change of circumstances brought about by the increase of traffic; (2) the obligation to maintain the road rested on *pltf.*s. alone.—*MANCHESTER CORPN. v. AUDENSHAW URBAN COUNCIL & DENTON URBAN COUNCIL*, [1928] Ch. 763; 97 L. J. Ch. 276; 139 L. T. 509; 92 J. P. 163; 44 T. L. R. 628; 72 Sol. Jo. 452; 26 L. G. R. 343, C. A.

**795a. Retaining wall—Repair sufficient to support highway.**—A highway, vested in deft. *corpn.* & situated on an incline, was supported by a retaining-wall, which was extended upwards above the road to the height of about 2 ft. 6 ins. as a fence-wall. The whole wall was a dry wall, the stones not being cemented together. *Pltf.*s. were the owners of property immediately adjoining the retaining-wall, & wished to erect new buildings on their land. There was evidence that there had been some minor collapses of parts of the wall in recent years. In the course of adapting the road to modern traffic conditions, *defts.* had raised the level of its surface, & it was contended that such raising had increased the pressure on the wall, & that, the wall not having been strengthened, this was an act of misfeasance. A declaration was asked that this wall was a public or private nuisance, & that *defts.* be ordered to abate such nuisance:—*Held*: (1) the wall was not a public or private nuisance, as there was no indication that it was in a dangerous condition; (2) the position that a highway authority is not liable for non-feasance has not been altered as to main roads by Local Government Act, 1929 (c. 17); (3) the only duty of the highway authority was to keep the wall in a state of repair sufficient to support the highway, & there was no duty upon it to reconstruct the wall in accordance with the best modern engineering practice; (4) the raising of the level of the road was not, in the circumstances, an act of misfeasance, as it was not proved to have weakened the wall in any

way; (5) the raising of the level of the road was not an act of misfeasance, although the fence-wall had thereby been reduced in height.—*A.-G. & TAYLOR & SON, LTD. v. TODMORDEN BOROUGH COUNCIL*, [1937] 4 All E. R. 588.

**797. Add. Annotations:**—*As to* (1) *Consd. Reigate Corpn. v. Surrey County Council*, [1928] Ch. 359. *Refd.* *A.-G. & Taylor & Son, Ltd. v. Todmorden Borough Council*, [1937] 4 All E. R. 588.

**819. Add. Annotation:**—*As to* (1) *Refd. Palmer v. Crone*, [1927] 1 K. B. 804.

**834. Add. Annotation:**—*As to* (1) *Refd. Skilton v. Epsom and Ewell Urban District Council*, [1937] 1 K. B. 112.

**876. Add. Annotation:**—*Generally. Refd. Stockwell v. Southgate Corpn.*, [1936] 2 All E. R. 1343.

**882. Add. Annotation:**—*Consd. Stockwell v. Southgate Corpn.*, [1936] 2 All E. R. 1343.

**892. Add. Annotations:**—*As to* (1) *Apld. A.-G. v. Hornsey B. C.* (1926), 43 T. L. R. 92. *Refd. Reigate Corpn. v. Surrey County Council*, [1928] Ch. 359.

**945. Add. Annotation:**—*Consd. Garnett v. Pratt*, [1926] Ch. 897.

**951. Add. Annotation:**—*Apld. A.-G. & Public Trustee v. Woolwich Metropolitan Borough Council* (1929), 93 J. P. 173.

**951a.** ———.]—*Relators* were trustees of two wills, & as such owned lands abutting upon a certain road in the Metropolitan Borough of W. By notices dated Feb. 14, 1928, the trustees were required to pay to *defts.* two sums amounting to £1,473 11s. 2d., being the estimated expenses of making up as a new street certain portions of the road upon which their lands respectively abutted. The A. G. claimed a declaration that those portions of the road were highways repairable by the inhabitants at large, & *relators* as co-*pltf.*s. claimed a declaration that those portions of the road were not "new streets" within *Metropolis Management Acts, 1855 & 1862*. *Defts.* contended that the road in question had not been dedicated to the public before Mar. 20, 1836, & was therefore not repairable by them. Further, they said that each of the portions of the road was in fact & in law a "new street" within *Metropolis Manage-*

#### PART VI. SECT. 1.

**789 i. *Revsd.***, 25 A. R. 43.

**789 ii.** ———. *Every portion of road.*—A municipality is liable in damages for an accident resulting from the breach of its duty to keep every portion of a road in repair, that is, in a fit condition to be travelled upon.—*REA v. MUNICIPALITY OF MINTO*, [1925] 3 D. L. R. 523; [1925] 2 W. W. R. 657; 35 Man. L. R. 190.—CAN.

**789 iii.** ———.]—Although every portion of a public road must be kept in repair by the municipality in which the road lies, the driver of a very heavy vehicle is not entitled to drive it to the extreme edge of a raised road built of earth in absolute reliance that it will not crumble.—*BLACKIE v. MUNICIPALITY OF MINOTA*, [1925] 4 D. L. R. 1054; [1925] 3 W. W. R. 561.—CAN.

#### PART VI. SECT. 5, SUB-SECT. 1.

**eg. Liability of village—Village Act**, s. 8. A. 1922 (c. 109), s. 88.—Before

a village can be held liable for damage resulting from a defect in a road, it must be shown that the road is within one of the classes of roads specified in the above sect.—*GREENAWAY v. CANADIAN PACIFIC RY. CO.*, [1925] 1 D. L. R. 992; [1925] 1 W. W. R. 667; 21 Alta. L. R. 331; *varying*, [1924] 4 D. L. R. 977; [1924] 3 W. W. R. 498.—CAN.

**sd. Improved road—Under control of Minister—Liability of adjoining owners.**—When a municipal *corpn.* has passed a resolution placing under the control of the Minister of Roads the maintenance & repairs of an improved road, the costs incurred by the *corpn.* are levied only on the properties whose owners are bound to maintain the road, if there is a byelaw then in force to that effect, notwithstanding the facts that the resolution of the *corpn.* was adopted years after the enactment of the byelaw & that the cost of improvements made under the authority of the Minister was higher than anticipated by the ratepayers, when they petitioned for an improved road, & by the byelaw

describing the work & imposing the expense on certain interested landowners.—*LANCOT v. ST. CONSTANT CORPN.*, [1931] S. C. R. 614.—CAN.

**se. Unincorporated police village.**—The trustees of an unincorporated police village are under no duty to keep the sidewalks & highways in repair, & they are not therefore liable in damages to any one who is injured as a result of the non-repair of such sidewalks or highways.—*BROOKS v. WHITE*, [1934] O. R. 55; 1 D. L. R. 463.—CAN.

#### PART VI. SECT. 6, SUB-SECT. 2.

**sl. Covenant to "repair"—Reconstruction not included.**—*Held*: as a covenant to repair is not a covenant to make a new thing, & inasmuch as to do what the suppliant now required of *resp.* would practically amount to reconstruction of the whole of said wall, such work did not come within the meaning of "repairs" called for by the covenant in the contract.—*ST. JOHN CITY v. R.*, [1932] S. C. R. 537; 2 D. L. R. 803; *affg.*, [1931] Ex. C. R. 188.—CAN.

ment Acts, & that neither they nor their predecessors had at any time taken into charge or assumed the maintenance of the paving or roadway of the street of which the said portions of the road formed part:—*Held*: (1) on the evidence there was nothing to show that the road in question was anything else than a public highway repairable by the inhabitants at large. The fact that repairs had been done by private owners for their own benefit was no evidence of any liability on their part to repair *ratione tenuræ*; (2) neither of the portions of road in respect of which the claim arose constituted a "new street" within Metropolis Management Acts.—*A.-G. & PUBLIC TRUSTEE v. WOOLWICH METROPOLITAN BOROUGH COUNCIL* (1929), 93 J. P. 173; 27 L. G. R. 700.

997. *Add. Annotation*:—*Refd. A.-G. v. Hornsey B. C.* (1926), 43 T. L. R. 92.

1002a. *Walls & roof of tunnel*.—In 1823 a road was constructed as a private road by S., on, through, & under his own land. In order

to make the road S. tunnelled under an existing footpath. In 1923 the road became a main road, *pltf's.*, S.'s successors in title to the soil through which the tunnel was driven, being the road authority. In 1924 it became necessary to repair the walls & roof of the tunnel:—*Held*: (1) the walls & roof of the tunnel either formed part of the highway or were necessary for its maintenance, & the costs of their repair were costs within Local Govt. Act, 1888 (c. 41), s. 11 (2), towards which *defts.* were bound to make an annual payment; (2) even if S., having in 1823 tunnelled under an existing highway, became liable *ratione nocumenti* to repair the part of the tunnelled road under the highway, that liability did not descend to *pltf's.* under Local Govt. Act, 1888, s. 97, because *pltf's.* were not only S.'s successors in title but also a highway authority.—*REIGATE CORPN. v. SURREY COUNTY COUNCIL*, [1928] Ch. 359; 97 L. J. Ch. 168; 138 L. T. 691; 92 J. P. 46; 44 T. L. R. 308; 72 Sol. Jo. 154; 26 L. G. R. 278.

## Part VII.—Enforcement of Duty to Repair.

1053. *Add. Annotation*:—*Refd. A.-G. v. Hornsey B. C.* (1926), 43 T. L. R. 92.

1082. *Citations*:—For "2 Saund." read "2 Wm. Saund." For "185 E. R." read "85 E. R."

## Part VIII.—Powers, Duties and Liabilities of Highway Authorities.

1146a. — *Removal of footway*.—A municipal *corpn.*, in exercise of its powers as highway authority under Public Health Act, 1875 (c. 55), s. 149, widened a narrow street in the town by entirely removing a raised & kerbed footway on one side, & throwing its site into the carriage-way without any notice to or consent of the owner of the adjoining house & premises, who was also owner of one-half of the soil of the road. The owner brought an action in the county ct. for a mandatory order to restore the footway, & for damages for injury to his property. It was proved that the access to & egress from the property through doors in a garden wall was rendered inconvenient & dangerous by the removal of the footway, & the county ct. judge granted a mandatory injunction to *defts.* to restore the footway to a width of 1 ft. less than

before:—*Held*: the county ct. judge had rightly directed himself in law, & there was evidence upon which he was entitled to find that the action of *defts.* in removing the footway was unreasonable & arbitrary, & it was not sufficient for the action to be *bona fide*; & the order was properly made.—*HOWARD-FLANDERS v. MALDON CORPN.* (1926), 135 L. T. 6; 90 J. P. 97; 70 Sol. Jo. 544; 24 L. G. R. 224, C. A.

*Annotation*:—*Refd. Symes & Jaywick Association Properties, Ltd., v. Essex Rivers Catchment Board*, [1936] 2 All E. R. 551.

1164a. *Duty to inspect trees—On private ground adjoining highway—Patent danger*.—*MACKIE v. DUMBARTONSHIRE COUNTY COUNCIL, WESTERN DISTRICT COMMITTEE* (1927), 71 Sol. Jo. 710; 91 J. P. Jo. 634, H. L.

PART VII. SECT. 1.  
1006 *li. —*.—*Re R. v. LAMETON* (Ont.) (1926), 46 Can. Crim. Cas. 13.—CAN.

PART VII. SECT. 2, SUB-SECT. 1.  
*ak. Not suspended by provision of statutory remedy*.—*R. v. TOWN OF PARIS* (1862), 12 C. P. 445.—CAN.

PART VII. SECT. 2, SUB-SECT. 3.—B.  
1107 *l. Neglect to repair after conviction—Writ de nocumento amovendo*.—*R. v. PORTAGE LA PRAIRIE RURAL MUNICIPALITY* (1905), 2 W. L. R. 141; 10 Can. Crim. Cas. 125.—CAN.

PART VIII. SECT. 1, SUB-SECT. 1.  
*b l. —*.—*STRONG v. ARRAH*

(1913), 28 O. L. R. 106; 4 O. W. N. 765; 12 D. L. R. 44.—CAN.

*sm. No power to alienate part of old road*.—*CHAPPUIS v. LA SALLE*, [1927] 3 D. L. R. 764; 60 O. L. R. 564; *affd.*, [1928] 2 D. L. R. 386; 62 O. L. R. 139.—CAN.

PART VIII. SECT. 1, SUB-SECT. 2.  
*f l. —* 18 *Vict. c. 100*.—*QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES v. VEZINA* (1884), *Cass. Dig.* (2nd ed.) 758.—CAN.

PART VIII. SECT. 1, SUB-SECT. 4.  
1164a *l. Duty to inspect trees*.—A tree planted in a city highway fell upon a motor car. The tree had long been in a decaying condition:—*Held*: the city *corpn.*, having by bye-law

assumed the duty of caring for the trees planted upon the highway, were liable for discharging that duty negligently.—*HUESTIS v. CITY OF TORONTO*, [1926] 3 D. L. R. 142; 58 O. L. R. 648.—CAN.

PART VIII. SECT. 1, SUB-SECT. 5.  
*o i. S. P. PHEASEY v. EDMONTON (Alta.)*, [1927] 2 W. W. R. 445.—CAN.

*r* (p. 389) *l. —*.—*Pltf.* slipped & fell when walking upon a granolithic sidewalk & was injured. For five or six days before this occurrence, the sidewalk at the point where she fell was covered with glare ice & was consequently in a slippery & dangerous condition. *Pltf.'s* injury was not attributable to any lack of care on her part. The city authorities had knowledge of the dangerous condition for

1167. *Add. Annotation*:—*Reid. A.-G. & Taylor & Son, Ltd. v. Todmorden Borough Council*, [1937] 4 All E. R. 588.

1168. *Add. Annotation*:—*Consd. A.-G. & Taylor & Son, Ltd. v. Todmorden Borough Council*, [1937] 4 All E. R. 588.

1171. *Add. Annotation*:—*Apld. Polkinghorn v. Lambeth Borough Council*, [1938] 1 All E. R. 339.

1191a. — *Obstruction during construction of new road.*—A corp., in making a new road connecting two existing roads in the same straight line with a bridge across a ravine dividing them, pulled down an old wall which closed a *cul de sac* in which one of the roads terminated, partly constructed the new road & erected a wooden fence at the end, beyond which was the ravine. Pltf. drove his car after dark down a public road leading straight into the new road under construction, & not seeing the fence in time, which had no red lamp or other warning of danger upon it, & was not watched, drove through it & fell with his car into the ravine, sustaining serious personal injury & damage to the car:—*Held*: the corp., being in occupation of the land under construction as a new road, pltf. was not a trespasser upon private property, but an invitee, to whom they owed a duty to warn of any hidden danger; the unlighted

fence was in the circumstances a concealed trap, & pltf. not being guilty of contributory negligence, defts. were liable to him in damages for negligence.—*OLDHAM v. SHEP-FIELD CORPN.* (1927), 136 L. T. 681; 91 J. P. 69; 43 T. L. R. 222; 25 L. G. R. 94, C. A.

*Annotation*:—*Consd. Coleshill v. Manchester Corp.*, [1928] 1 K. B. 776.

1191b. — *Trench dug in unfinished road.*—

Defts. in execution of a housing scheme were laying out a new road running eastwards from a certain highway & closed at its eastern end by a quickset hedge. Footpaths had already been laid out & edged with kerbstones; houses were being built on the northern side & heaps of earth & building materials made the footpath on this side impassable; the footpath on the south side was still unfinished, but was traversable; it was bounded by a fence of wooden posts & bars; the middle of the road was levelled but not metalled; across it, for laying an electric cable, defts. had cut a trench which they left unfenced & by night unlighted. They did not prevent persons, whether intending occupiers of houses or others, from walking down the new road. Pltf. on a Sept. evening, while there was still daylight, walked with a companion down the highway & into the new road along the southern footpath. Through a gap in the fence they

were five or six days before the accident & made no attempt to remove the danger:—*Held*: the city corp. were guilty of gross negligence within Consolidated Municipal Act, 1922, s. 460 (3), & were liable.—*COKERS v. BELLEVILLE*, [1925] 2 D. L. R. 250; 56 O. L. R. 451; *revers.*, [1924] 2 D. L. R. 333.—CAN.

r (p. 389) ii. — *Dangerous condition known to pedestrian.*—Where a person, who knows that a sidewalk is in a dangerous condition because of a pile of slippery snow thereon, deliberately makes use of it, instead of walking on the road as he has previously done, & thereby sustains injuries, the maxim *volenti non fit injuria* is applicable.—*ROBINSON v. ASSINIBOIA TOWN*, [1927] 3 D. L. R. 514; [1927] 2 W. W. R. 499; 21 Sask. L. R. 658.—CAN.

r (p. 389) iii. — *Depression caused by permitting children to use sidewalk as slide.*—*Gross negligence.*—*MAITLAND v. PEMBROKE*, [1929] 1 D. L. R. 191.—CAN.

r (p. 389) iv. — *Exemption from liability except for gross negligence.*—*McKEE v. WINNIPEG CITY*, [1929] 1 D. L. R. 65; [1929] 3 W. W. R. 561.—CAN.

r (p. 389) v. — *Used by children as slide.*—*MAITLAND v. PEMBROKE (Ont.)*, [1929] 1 D. L. R. 191.—CAN.

so. *Method adopted temporarily dangerous—Whether gross negligence.*—Where ice or icy snow covered the surface of a sidewalk in a city & the method of removing it used by men employed by the city corp. was such as to make the sidewalk temporarily dangerous to pedestrians who chose to walk on it while the work of removal was in progress, & an accident happened to a passer-by:—*Held*: the adoption of this method was not in itself evidence of "gross negligence."—*LYONS v. OTTAWA CITY*, [1928] 1 D. L. R. 171; 61 O. L. R. 405.—CAN.

#### PART VIII. SECT. 1, SUB-SECT. 7.

o i. — — — — —. — *A public road crossed a stream by a bridge. There was a fence between the road & the land adjoining it, erected by the proprietors of the latter. At a point immediately adjoining the bridge there*

was a gap, 15 feet wide, in the fence. A pedestrian, on a dark night, mistaking this gap for the road, walked through it & fell into the stream & was drowned. In an action of damages against the proprietors of the land adjoining the road:—*Held*: there was no duty on such proprietors to fence a natural, as opposed to an artificially created, danger on their lands, any such duty, where it existed, falling on the road authorities.—*MORRISON v. LONDON MIDLAND & SCOTTISH RY. CO.*, [1929] S. C. 1.—SCOT.

o ii. — — — — —. — *Defts. constructed a bridge across a navigable stream, having in it a draw or swing to enable vessels to ply on the river. There was not any gate or other protection to guard the approaches to the bridge when swung. A horse belonging to pltf. broke away from the person in charge of him, escaped out upon the public road, & ran a distance of about two miles to the bridge, reaching it while the draw was open to allow a vessel to pass, & rushing into the gap was drowned:—Held: deft. municipality could not be made answerable for the loss of the horse.*—*STEINHOFF v. KENT CORPN.* (1887), 14 A. R. 12.—CAN.

#### PART VIII. SECT. 1, SUB-SECT. 8.

sq. *Restriction during repairs—What is sufficient warning of danger.*—The duty of those making repairs upon a travelled road, is to take such reasonable care, by notice, lighting, guarding or otherwise, as may be reasonably necessary to prevent damages as the result of the temporary condition of the road. When this is done, & the condition of non-repair & of temporary danger is brought home to a person using the highway, he is called upon to use reasonable care on his part for his own safety.—*WISE v. TORONTO TRANSPORTATION COMMISSION*, [1928] 2 D. L. R. 557; 62 O. L. R. 120.—CAN.

#### PART VIII. SECT. 1, SUB-SECT. 9.

sd. *Street railway track adjacent to highway.*—Pltf. in a motor car attempted to cross the tracks of a street railway, which were at that point not laid upon the travelled

highway but upon land owned by the city corp., adjacent to the travelled highway. The place of crossing was in a dangerous condition, by reason of the tracks not being ballasted but simply resting upon exposed sleepers. The car was imprisoned there & run into by a street car, & pltf. were injured & the car damaged:—*Held*: the city corp. were liable since, although no obligation to repair existed, there was a trap or concealed danger.—*JAMES v. TORONTO* (1925), 57 O. L. R. 322; *aff.* 27 O. W. N. 233.—CAN.

#### PART VIII. SECT. 1, SUB-SECT. 11.—A.

1190 i. *Liability for failure to light—Statutory duty to light.*—A motor car driven at night came into collision with a tramway car, & was damaged. In an action against defenders, as the local authority charged, under Edinburgh Municipal & Police Act, 1879, with the lighting of the streets, it was proved that a red lamp situated on the island was not lit at the time of the accident. It was also established that defenders had not failed in their duty with respect either to the construction & condition of the lamp, or to the precautions taken to ensure that it should remain alight during the hours of darkness:—*Held*: the standard of performance could not be absolute, but must be relative to the best available means of achieving exact performance, & in the absence of evidence of any failure on the part of defenders to take every reasonable means of carrying out their statutory obligations, they fell to be absolved.—*KEOGH v. EDINBURGH MAGISTRATES*, [1928] S. C. 814.—SCOT.

r i. — — — — —. — *A corp. planted trees along one of its streets, & resp. sustained injuries through his motor car colliding with one of the trees on a dark night. There was a street-lamp in the vicinity, but it had gone out:—Held: the corp. having caused a dangerous obstruction on the street, it was its duty to light & keep lighted the obstruction, so as to make it visible to persons using the street.*—*CAMARU (MAYOR) v. CLARKE*, [1927] N. Z. L. R. 464.—N.Z.



went across other land occupied by defts. to a golf course. They returned somewhat hurriedly when it was growing dark, & pltf. fell into the trench & was injured:—*Held*: the trench being apparent to all, there was nothing in the nature of a concealed danger or trap, & defts were not liable to pltf., who was a mere licensee.—*COLESHILL v. MANCHESTER CORPN.*, [1928] 1 K. B. 776; 97 L. J. K. B. 229; 188 L. T. 537; 92 J. P. 37; 44 T. L. R. 258; 26 L. G. R. 124, C. A.

1197. *Add. Annotation*:—*Refd.* *Oldham v. Sheffield Corpn.* (1927), 136 L. T. 681.

1216. *Add. Annotation*:—*Apld.* *Manchester Corpn. v. Audenshaw U. C. & Denton U. C.*, [1928] Ch. 127.

1219. *Add. Annotation*:—*Consd.* *Bryant v. Marx* (1932), 48 T. L. R. 624.

1228a. Amount of payment—How calculated—Local Government Act, 1888 (c. 41), s. 11 (2).—*SANDGATE URBAN DISTRICT COUNCIL v. KENT COUNTY COUNCIL*, No. 65, *ante*.

1236. *Add. Annotation*:—*Apld.* *A.-G. v. London & Home Counties Joint Electricity Authority*, [1929] 1 Ch. 513.

1237. *Add. Annotation*:—*Apld.* *A.-G. v. London & Home Counties Joint Electricity Authority*, [1929] 1 Ch. 513.

# PART VIII. SECT. 1, SUB-SECT. 11.—D.

1210 i. *Liability of driver—Accidental injury*.—*Held*: the driver of a horse van, which was capized against a lamp-post by a gust of wind, was not liable in damages under General Police & Improvement (Scotland) Act, 1862 (c. 101), s. 128, in respect that the breaking of the lamp was not his act.—*HOGG v. MACPHERSON*, [1928] S. C. (J.) 15.—*SCOT*.

# PART VIII. SECT. 2, SUB-SECT. 2.

5a. *Right to rebate—Basis of calculation*.—*Resp.* village, an urban municipality within appt. county, was subject by statute to an annual general levy by the council of the county for county road purposes. Under a provision of an Ontario statute of 1926, repealed & re-enacted as sect. 28 (5) of Highway Improvement Act, R. S. Ont., 1927, the village first became entitled to a rebate in each year of 75 per cent. of the general annual rate raised in the village in the previous year. The annual general rate imposed in the years 1926, 1927 & 1928 included sums required by the council of the county to meet the interest & sinking fund charges upon debentures issued by it before 1926 in order to raise money for constructing & improving roads forming part of the county road system:—*Held*: in fixing the sum upon which resp. village was entitled to the 75 per cent. rebate the appt. county was bound to include the amount raised by it in the village towards the interest & sinking fund charges upon the debentures.—*LINCOLN COUNTY CORPN. v. PORT D'ARBOUSE VILLAGE CORPN.*, [1931] A. C. 808; 100 L. J. P. C. 219; 145 L. T. 659; 47 T. L. R. 613, F. C.—*CAN.*

# PART VIII. SECT. 5, SUB-SECT. 1.—A.

1240 xiv. —.—.—*Sect.* 730 of the Winnipeg Charter, which gives the city a right of indemnity "of & from all costs, claims, & damages" caused by any obstruction, encroaching or nuisance placed on any public road by any person, firm, or corpn. whether pursuant to permit or agreement with the city or not, does not apply to claims for damages arising out of encroachment or nuisances created by the joint

act of the city & the third party.—*SCHALER v. WINNIPEG (Man.)*, [1929] 4 D. L. R. 683; 2 W. W. R. 358.—*CAN.*

1240 xv. —.—.—*A* highway authority is not liable for damage caused by a defective condition of a road arising from a failure to exercise its powers of maintenance or repair with respect to the highway itself or anything constructed for the purposes of the highway. If, therefore, a drain placed in the road solely for the purpose of draining the roadway is broken, the omission to repair it gives no cause of action to a person passing along the highway who is injured in consequence of the omission. But the rule does not apply to drains or other artificial works placed there for purposes foreign to the road considered as a highway, such as sewers for drainage of adjoining land & the like, & a highway authority which is also a drainage authority is liable for failing to keep in a safe condition drains introduced into the roadway by it in its latter capacity.—*BUCKLE v. BAYSWATER ROAD BOARD* (1937), 57 C. L. R. 259; 10 A. L. J. 377; 43 *Argus* L. R. 50; 13 L. G. R. 130.—*AUS.*

1252 vii. —.—.—*In* the absence of a statute imposing the duty to keep a sidewalk in repair:—*Held*: deft. municipality was not liable for injuries sustained by a pedestrian as the result of its decay, where its construction was authorised by statute & there was no evidence of original faulty construction; the fact that no bye-law authorising its construction could be found, was held immaterial since no statutory provision made a bye-law necessary for the laying of sidewalks in streets the possession of which was already vested in the municipality.—*GILROY v. BURNABY CORPN.*, [1931] 3 W. W. R. 1; 4 D. L. R. 411; 44 B. C. R. 171.—*CAN.*

1260 xiii. —.—.—*GREER v. MULMUR TOWNSHIP*, [1926] 4 D. L. R. 132; 59 O. L. R. 259.—*CAN.*

1260 xiii. —.—.—*LINGRELL v. STOKES No. 363 MUNICIPAL DISTRICT (Alta.)*, [1927] 3 D. L. R. 478; [1927] 2 W. W. R. 313.—*CAN.*

1260 xxiv. —.—.—*JESSON v. RURAL MUNICIPALITY OF LIVINGSTONE (Sask.)*, [1929] 2 D. L. R. 474; 1 W. W. R. 474.—*CAN.*

1239. *Add. Annotation*:—*Refd.* *Skilton v. Epsom & Ewell Urban District Council*, [1936] 2 All E. R. 50.

1242. *Add. Annotation*:—*Refd.* *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 336.

1251. *Add. Annotations*:—*Consd.* *Skilton v. Epsom & Ewell Urban District Council* [1937] 1 K. B. 112. *Refd.* *Blundy, Clark & Co. v. London & North Eastern Ry. Co.*, [1931] 2 K. B. 334; *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 336.

1252. *Add. Annotations*:—*Consd.* *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 336. *Refd.* *Swain v. Southern Ry. Co.*, [1938] 3 All E. R. 705.

1253. *Add. Annotation*:—*Refd.* *Blundy, Clark & Co. v. London & North Eastern Ry. Co.*, [1931] 2 K. B. 334.

1254. *Add. Annotations*:—*Consd.* *Skilton v. Epsom & Ewell Urban District Council*, [1937] 1 K. B. 112. *Refd.* *Newsome v. Darton Urban District Council*, [1938] 1 All E. R. 79.

1255. *Add. Annotations*:—*Consd.* *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 336. *Refd.* *A.-G. & Taylor & Son, Ltd. v. Todmorden Borough Council*, [1937] 4 All E. R. 588.

1260 xxv. —.—.—*A* break in a water main of deft. city having occurred about Jan. 22, the city made a cut in the granolithic sidewalk at that point & excavated the earth to the water pipe. The excavated earth & some gravel were thrown back into the hole, & beginning about the following Apr. 10, the excavated surface was kept under observation for subsidence, but it was not until about the following July 5 that the city's department in charge of resurfacing sidewalks was requested to act, & from Apr. 10 to July 9 there was a subsidence of about 24 inches & on nine occasions refilling was found necessary. On the intervening June 5 pltf. wife tripped, in a hole in the excavation area where a subsidence of four or five inches had taken place, & was injured. She had passed over the place in question many times, the latest, earlier on the evening of the accident. The trial judge found that the delay in repairing the sidewalk was intentional & due to the awaiting of such a rainfall or rainfalls as would in the opinion of some official cause a final settlement. The expert testimony was that now the curing & placing of cement may be done in winter months at a cost but little greater than at other seasons:—*Held*: said testimony had not been reasonably met & could not be ignored as merely theoretical; & aside from it, the city should be held negligent in delaying the repair work beyond Apr. or May.—*BRENNAN v. WINNIPEG CITY*, [1936] 2 W. W. R. 38; 6 F. L. J. (Can.) 3.—*CAN.*

t (p. 402) i. —.—.—*THORSON v. COULEE*, [1930] 1 D. L. R. 918.—*CAN.*

g (p. 403) i. —.—.—*The* law does not impose an uny obligation on a traveller using a city or country road of remembering all the pitfalls & dangers therein which he may have seen on previous journeys. The most that can be expected of a traveller who has knowledge of dangerous conditions is that the degree of care which he exercises should be reasonably commensurate with his knowledge. Where a municipality digs, for its own purposes, a pit extending into the road allowance it



**1264. Add. Annotation :—***Reid. Skilton v. Epsom & Ewell Urban District Council*, [1937] 1 K. B. 112.

*Add. Annotation :—Reid. Skilton v. Epsom & Ewell Urban District Council, [1937] 1 K. B. 112.*

is bound to make the adjoining road safe for travellers.

Although country roads cannot be expected to be perfectly safe the public have a right to be protected against excavations or obstructions on or near the travelled way which render the road unsafe for travellers using it.—**KEISO v. ROBIN RURAL MUNICIPALITY**, [1930] 3 W. W. R. 291; 4 D. L. R. 471.—**CAN.**

Plt. sued for damages to his separator caused by its overturning when a rear wheel dropped into a hole in a road. The road was a graded main market highway. The hole was near the centre of the grade & had been there during the whole of the summer. To the knowledge of the councillor of the division, & at the time of the accident, Nov. 10, was frozen over & in the nature of a trap.—*Held*: the municipality was liable.—*SHEP v. PLEASANTDALE RURAL MUNICIPALITY*, [1932] 1 W. W. R. 627.—**CAN.**

g (p. 403) iii. ————  
Contributory negligence.]—R. v. GILBERT, [1933] 1 D. L. R. 795.—CAN.

**g (n. 403) iv.** —————.]  
It cannot be said that a dirt road which has a hole in it of the description of that in question herein is because of that fact not in a reasonable state of repair; or that, under the circumstances, the city could reasonably have anticipated that a passenger alighting from a street car would step into the hole which pltf. alleged she stepped into & be injured thereby.—  
**REYNOLDS v. VANCOUVER** ((Tty), [1937] 3 W. W. R. 46. **CAN.**

g (p. 403) v. ——— *Ditch*  
*without guards or railings.*]—WALTON v.  
 YORK COUNTY CORPN. (1881), 6 A. R.  
 181.—CAN.

g (p. 403) vi. — — — — —. The fact that the teet of a horse, ridden by plaintiff, broke through a wooden culvert on a highway :—Held : to be conclusive evidence that the culvert was not in proper repair & *prima facie* evidence of negligence on the part of the municipality, which could be met by it only by showing that it had properly inspected the culvert at reasonable & proper times, & that the inspection did not disclose anything from which it could be suspected that the poles were becoming so rotted as to render the culvert unsafe. —McCOMB v. PLEASANTDALE RURAL MUNICIPALITY, [1938] 2 W. W. R. 157. CAN.

(p. 403) vii. *Defective street in subway.*—Where a city which has no statutory duty to keep its streets in repair is charged in an action for damages with non-repair, the fact that the particular piece of pavement from the non-repair of which plaintiff's injury is alleged to have resulted happens to be under a subway constructed at the instance of, or for the benefit of, the city under a contract approved by the Board of Railway Comrs. for Canada, between the city & a railway co. & under which the city agreed to maintain & repair said pavement, does not change the character or origin of the liability, i.e. any, of the city to plaintiff. —SCHEALER v. CITY OF WINNIPEG (No. 2) (Man.). [1930] 1 D. L. R. 499; (1929) 3 W. W. R. 433; 36 C. D. C. 234; *affd.*, [1931] 3 W. W. R. 709; 4 D. L. R. 198. —CAN.

g (p. 403) viii. — *Failure to make proper provision at level crossing.* Where a city, under a statutory duty to keep its streets & sidewalks in repair builds sidewalks up to the rails at a railway crossing, thus inviting pedestrians to use them & so cross the railway, it should see to it that suitable provision for such crossing is made &

It is liable to a person who is injured because of its failure to do so.—*MACGREGOR v. CANADIAN NATIONAL RYS. & EDMONTON CITY*, [1930] 3 W. W. R. 392; [1931] 1 D. L. R. 87; 25 Alta. L. R. 104; *varg.*, [1930] 3 W. W. R. 237.—**CAN.**

**g** (p. 403) ix. — *Sewers frozen over.*—Municipality held not liable for damage caused by sewers becoming frozen over, since this was non-feasance.—**MCLEOD v. SYDNEY**, [1935] 2 D. L. R. 807.—**CAN.**

g (p. 403) x. — *Culvert overgrown with weeds.*—Pltf. while being driven on a summer afternoon in a motor car owned by the driver was injured by the car running into a ditch dug by the deft. village across a street at an intersection. Over the ditch was a culvert 24 feet long, which was covered in by road material, except for a space of about two feet at each end. Deft. was under a statutory duty to keep its roads, culverts, etc., "in a reasonable state of repair, having regard to the character of the road, culvert . . . & the locality in which the same is situated," & the statute made it liable for damages sustained by reason of default in carrying out that duty. Pltf. alleged that his injuries were caused by deft.'s negligence in allowing the ditch to become filled with growing weeds & grasses which obscured it, & in not erecting signals or barriers around the ditch:—*Held*: the village was not negligent in constructing the ditch & maintaining it in the condition in which it was at the time of the accident.—*BARTOK v. TANTALON VILLAGE*, [1937] 2 W. W. R. 81.—CAN.

h (p. 404) i. — *Rocks near highway.* Owing to the failure of the driver of plaintiff's car to follow a diversion of the highway the car, after travelling over a grass plot, hit rocks imbedded in the earth by nature. — *Held* : the fact that the municipality had not erected a sign or signal indicating the diversion or placed a guard rail at said point was not negligence & the presence of the rocks in question near the highway did not render it liable. — PARKINS v. COULEE, [1930] 3 W. W. R. 609. — CAN.

h (p. 404) ii. — *Stone slightly projecting.*] — Accident on highway, through striking a stone which projected less than 6 inches above the lowest depression in the roadway & was partly situate on the shoulder of the road, off the *via trita*. — *Held*: the highway was not in a state of non-repair. — WEIR v. TURNBERRY & HALIDAY TOWNSHIP, [1932] O. R. 692 [1933] 1 D. L. R. 33. — **CAN.**

k (p. 404) l. — *Failure of traveller to see.*—Where a traveller fails to see an obstruction which a person using ordinary care would have avoided, the statutory liability does not arise.—KING v. RILEY, [1925] 2 D. L. R. 218.—CAN.

k (p. 404) ii. — *Imbedded wire.*—  
Pltf. was injured by tripping over a  
wire imbedded in a street.—*Held:*  
defts. had not discharged the *onus*  
of removing the presumption that they  
had failed in their duty.—WOODCOCK  
v. VANCOUVER (B. C.), [1927] 3  
W. W. R. 759.—CAN.

k (p. 404) iii. — *Projecting iron covering of excavation.*—Pltf., while walking on a sidewalk, stumbled & fell as a result of the projection over the cement part of the sidewalk of the iron covering of an excavation which the city had allowed the abutting owner to make:—*Held*: the accident happened because of want of proper repair of the sidewalk, & the city had not shown that it had done all that could

reasonably be done to prevent the want of repair.—**MORAN v. VANCOUVER CITY**, [1929] 1 D. L. R. 461; 40 B. C. R. 450; [1928] 3 W. W. R. 660.—**CAN.**

k (p. 404) iv. — *Projecting slab of concrete.*—*Held*: the defect was one which, in such a location, should have been remedied: it would have been negligence to have there constructed the sidewalk with such a rise, & deliberately to allow it to remain was not less a fault.—*HENNESSY v. TORONTO CTRY.* [1928] 4 D. L. R. 378; 62 O. L. R. 541.—*CAN.*

**k** (p. 404) v. — *Causing obstruction of view.*—The failure of a municipality to cut down scrub & bush so growing at the side of a road—allowance near an intersection that it prevents persons travelling on the road from having a clear view of vehicles approaching on the intersecting road does not constitute a breach of the municipality's duty to repair under Rural Municipality Act, s. 196.—**PARTRIDGE v. RURAL MUNICIPALITY OF LANGENBURG (Sask.),** (1929) 3 W. W. R. 555; [1930] 1 D. L. R. 939; 24 S. L. R. 153.—**CAN.**

k (p. 404) vi. — Failure to erect substantial barricade during repairs.]. — When work of excavation on a highway was begun, the contractor put up two signs on the right-hand side of the road: "Drive slowly, men at work," & "closed to traffic." These signs were at some distance from the excavation. The road-superintendent put up a barricade with a red lantern & a detour sign at a place where the roads fork. This consisted of a board extending about half-way across the travelled portion of the highway, supported at one end by a telegraph pole & at the other by an iron rod set into the road.—*Hild*: not a "substantial barricade" within Highway Improvement Act.—*RUTTAN v. R.*, [1931] 1 D. L. R. 301; 66 O. L. R. 133.—*CAN.*

k (p. 404) vii. — *Safety platform.* —  
—Pltf. while driving a motor car at night was injured by colliding with a safety island or platform which, under authority given deft. city by its charter, had been placed by it on the street for the use of persons using tram cars. The judge held that the platform was a "trap," because of the fact that it differed very little in colour, if at all, from the rest of the highway; & he awarded pltf. damages. Def't. appealed:—*Held:* the appeal should be allowed, since the platform was properly placed, & there was no evidence that def't.'s failure to furnish more light at or near the platform than it did supply or to paint the platform amounted to misfeasance which left the highway in disrepair. —  
KNIGHT v. WINNIPEG, [1930] 1 W. W. R. 234; 1 D. L. R. 874; 38 Man. L. R. 430.—*CAN.*

oci. —.]—Where an accident results from lack of repair of a road a presumption arises, without evidence that the municipality responsible for the road had notice of its condition, that the statutory duty to repair has been neglected.—**REA v. MUNICIPALITY OF MINTO**, [1925] 3 D. L. R. 523 [1925] W. W. R. 657; 35 Man. L. R. 190.—**CAN.**

oe li. —.]—In an action against a town for damages for injuries resulting from falling on a slippery sidewalk:—  
**Held:** the town which had received verbal notice of the accident within 24 hours thereof had not been prejudiced by the failure to give written notice of the accident within the time stipulated by sect. 627 (3) of Municipal Act, & there was reasonable excuse within the meaning of sect. 628 of said

**1266a.** **Non-repair of traffic stud.**—Pltf. whilst cycling along a road in defts.' area reached a line of traffic studs at the same time as a motor-car. As the car passed her one of the studs which had become loose shot out & struck her bicycle with such force as to overturn it, & pltf. was thrown to the ground & injured. The studs were inserted in the road by defts. as the highway authority under the powers conferred on them by Road Traffic Act, 1930 (c. 43), s. 48, for the purpose of regulating the traffic, & there was evidence that the particular stud had been defective for some time. In an action brought by pltf. for damages for personal injury defts. contended that the stud formed part of the highway, & that pltf. had not proved misfeasance, for which alone a highway authority could be held liable:—*Held*: assuming, but without deciding, that the stud was physically part of the highway, the placing therein of the stud in such a manner that it became defective amounted to the placing of a nuisance on the highway, & defts. could not take advantage of the cases which dealt with maintenance of the highway, because the stud was not brought on to the highway as part of the

maintenance of the highway under the Highway Act, 1835 (c. 50), but for the purposes of traffic direction under the powers conferred on defts. by Road Traffic Act, 1930 (c. 43).—*SKILTON v. EPSOM & EWELL URBAN DISTRICT COUNCIL*, [1937] 1 K. B. 112; [1936] 2 All E. R. 50; 106 L. J. K. B. 41; 154 L. T. 700; 100 J. P. 231; 52 T. L. R. 494; 80 Sol. Jo. 345; 34 L. G. R. 389, C. A.

*Annotation*:—*Consd.* *Newsome v. Darton Urban District Council*, [1938] 3 All E. R. 93.

**1268.** *Add. Annotation*:—*Refd.* *Oldham v. Sheffield Corpn.* (1927), 136 L. T. 681.

**1270.** *Add. Annotations*:—*Refd.* *Skilton v. Epsom & Ewell Urban District Council*, [1937] 1 K. B. 112; *Newsome v. Darton Urban District Council*, [1938] 1 All E. R. 79.

**1274.** *Add. Annotations*:—*Consd.* *Skilton v. Epsom & Ewell Urban District Council*, [1937] 1 K. B. 112; *Newsome v. Darton Urban District Council*, [1938] 1 All E. R. 79.

**1278.** *Add. Annotation*:—*Refd.* *Oldham v. Sheffield Corpn.* (1927), 136 L. T. 681.

**1280.** *Add. Annotation*:—*Refd.* *Oldham v. Sheffield Corpn.* (1927), 136 L. T. 681.

Act for the delay in giving the written notice.—*O'BRIEN v. DAUPHIN TOWN*, [1930] 1 W. W. R. 907; 3 D. L. R. 330.—*CAN.*

#### PART VIII. SECT. 5, SUB-SECT. 1.— B. (a).

**1274 ii.** —.—.—*JACOBSON v. MUNICIPAL DISTRICT CROWN*, [1930] 1 D. L. R. 847.—*CAN.*

**1282 ii.** —.—.—*Injury to unlicensed driver.*—The fact that a taxi driver has not obtained the chauffeur's permit from the chief of police, & has not procured the driver's licence required by deft. city's byelaw, does not affect the liability of the city for injuries caused him by its negligence in allowing an obstruction, *c.g.*, a barrier around repairs, to remain on a highway without guarding it sufficiently with warning signs or lights.—*BURCHILL v. VANCOUVER CITY*, [1932] 1 W. W. R. 641; 3 D. L. R. 287; *affd.*, [1932] S. C. R. 620; 4 D. L. R. 200.—*CAN.*

**1289 i.** —.—.—*Damage to adjoining owners—Construction of road causing flood.*—Municipality:—*Held*: liable.—*MEIER v. FRANKLIN, LIMPRECHT v. FRANKLIN, STREICH v. FRANKLIN* (Man.), [1926] 3 D. L. R. 433; [1926] 2 W. W. R. 330.—*CAN.*

**1289 ii.** —.—.—*Negligent construction of ditches causing flood.*—*STADNICK v. BIFROST MUNICIPALITY*, [1927] 4 D. L. R. 61; [1927] 3 W. W. R. 49; 37 Man. L. R. 26.—*CAN.*

**1289 iii.** —.—.—*Road materials carried into raceway by violent storm.*—*Held*: defts. were not liable.—*SNOOK v. BRANTFORD TOWN COUNCIL*, (1856), 14 U. C. R. 255.—*CAN.*

**q** (p. 408) i. —.—.—*Deft. municipality when in pursuance of its statutory powers it was constructing a sewer along the side of a highway erected a barricade of planks against which the earth taken from the excavation was piled up. The barricade & the pile of earth occupied so much of the sidewalk that a path only 18 inches wide was left behind the barricade for the use of pedestrians. Owing to ordinary rainfall & the moist character of the earth so piled up, there was a seepage of water carrying slimy particles of clay through the spaces between the planks resulting in the surface of the pathway becoming dangerously muddy & slippery. Pltf. while walking along the pathway*

*slipped on said surface & was seriously injured.*—*Held*: deft. had created & continued a nuisance which was the proximate & sole cause of pltf.'s injuries.—*WATTS v. DISTRICT OF BURNABY* (B. C.), [1929] 4 D. L. R. 142; 2 W. W. R. 612.—*CAN.*

**r** (p. 408) i. —.—.—*Highway repaired with inflammable material.*—While pltf. was driving a motor car along a side road, which although a legal highway was not often used, the rear wheels of the car suddenly sank down & the car became immovable. It then caught fire & was totally destroyed. The loam underneath the surface of the road was found to be on fire, although the surface appeared to be intact & there was nothing to indicate that the sub-surface was in the condition in which it actually was.—*Held*: taking into consideration all of the circumstances, including the locality, general nature of the soil & materials at hand, & the extent of the use of the road, the fact that deft. municipality used loam or swamp earth of an inflammable nature in constructing the road did not constitute negligence on its part.—*CONROY v. SPRUCE GROVE, MUNICIPAL DISTRICT OF*, [1931] 1 D. L. R. 555; [1930] 3 W. W. R. 605; 25 Alta. L. R. 193.—*CAN.*

**r** (p. 408) ii. —.—.—*Upheaval of road—Construction according to expert opinion.*—*Held*: no misfeasance.—*TRUEMAN v. R., DEWAN v. R.*, [1932] O. R. 703; 4 D. L. R. 676.—*CAN.*

**r** (p. 408) iii. —.—.—*Omission to take precautions during repair.*—Omission to take precautions while repairing a highway is misfeasance & not non-feasance.—*CRAWFORD v. FRANKLIN MUNICIPALITY*, [1924] 3 D. L. R. 964.—*CAN.*

**r** (p. 408) iv. —.—.—*Street level raised—Adjacent property damaged.*—Injury to property resulting from raising the street level under statutory authority is not actionable by virtue of Halifax City Charter, s. 528.—*STONEMAN v. HALIFAX*, [1936] 2 D. L. R. 504; 10 M. P. R. 466; 6 F. L. J. (Can.) 53.—*CAN.*

**r** (p. 408) v. —.—.—*Slippery sidewalk.*—Deft. municipality is a mining centre. The topographical features are rough & rugged & great changes in elevation occur in a very short distance. Because of the practically prohibitive expense of putting the sewer pipes underground they are carried on the

surface along the front of the lots & boxed in. The top planking of the boxing is used as a sidewalk or footpath. Because of the elevation of houses above roadways steep narrow stairways of different heights had been constructed to permit householders to reach the roadways. The top step was at the boxing (or sidewalk). There had been removal of rock in front of a house in an attempt at levelling for road purposes & this removal had caused a drop that necessitated such steps. At the point in question there were five wooden steps, including the top step & one on the ground. The top step was about 5 ft. in length & the lower ones about 4 ft. The vertical height was about 3 ft. From the top of these steps pltf. fell on an evening in March. The light was good & there was no hindrance of vision. Pltf., who was carrying certain articles, knew the locality. *TAYLOR, J.*, found that the steps were not of faulty construction but also found that their slippery condition was the cause of the accident & therefore, gave judgment for pltf.—*Held*: although it could not be said that the trial judge's finding as to the construction of the steps was against the evidence, yet, on the other hand, the mere fact, if it were a fact, that the sidewalk or steps were slippery did not prove negligence on the part of deft. & did not even impose on deft. the onus of explanation, & since the onus which rested on pltf. of proving negligence had not been discharged, the action must be dismissed.—*MCMANARA v. ELIN FLON MUNICIPAL DISTRICT*, [1938] 1 W. W. R. 807; 2 D. L. R. 649.—*CAN.*

**r** (p. 408) vi. —.—.—*Truck breaking culvert—Culvert well constructed.*—Pltf.'s motor truck, loaded with gravel, broke off the end of one of the planks of a culvert on a highway & the truck was damaged.—*Held*: there was no evidence of misfeasance. The culvert, which was built about thirty years ago, had been constructed in accordance with the requirements of safety as they then existed; the fact that it had lasted so long was evidence that it had been well constructed.—*WALKER v. WHITEWATER RURAL MUNICIPALITY*, [1938] 2 W. W. R. 167.—*CAN.*

**sk.** *Road under repair by Minister of Highways.*—*Held*: as long as the work of construction or repair is being carried on, the highway is removed from the direction, control & management

**1290a.** — **Road raised—Dangerous drop on to adjoining land.**—Where a danger has been created on a highway by something done on the highway & not by anything done on the adjoining land, the owner of the adjoining land is not bound to make any alteration on or to his land to do away with that danger. Thus, where, in consequence of a highway having been made up by a highway authority, the level of the adjoining land, which is unfenced, has been lowered so as to cause a dangerous drop from the edge or kerb of the reconstructed highway, & a pedestrian slips down from the highway on to the adjoining land & is thereby injured, the owner of the adjoining land is not liable, but the highway authority is.—**NICHOLSON v. SOUTHERN RY.**

**Co. & SUTTON & CHEAM URBAN DISTRICT COUNCIL.** [1935] 1 K. B. 558; 104 L. J. K. B. 205; 152 L. T. 349; 99 J. P. 141; 51 T. L. R. 216; 79 Sol. Jo. 87; 33 L. G. R. 140.

**1316. Add. Annotation:—****Refd.** **Blundy, Clark & Co. v. London & North Eastern Ry. Co.,** [1931] 2 K. B. 334.

**1320. Add. Annotation:—****Consd.** **Newsome v. Dar-ton Urban District Council,** [1938] 3 All E. R. 93.

**1322. Add. Annotation:—****Consd.** **Skilton v. Epsom & Ewell Urban District Council,** [1936] 2 All E. R. 50.

**1327. Add. Annotation:—****Refd.** **Rudd v. Elder Dempster & Co.,** [1933] 1 K. B. 566.

## Part IX.—Nuisances and Remedies.

**1330a.** — **Enclosing highway.]—R. v. OGDEN** (1702), Fortes. Rep. 251; 7 Mod. Rep. 45; 92 E. R. 839.

**1348. Add. Annotation:—****Refd.** **Rudd v. Elder Dempster & Co.,** [1933] 1 K. B. 566.

**1363. Add. Annotation:—****As to (1) Consd.** **Wil-chick v. Marks & Silverstone,** [1934] 2 K. B. 56.

**1364. Add. Annotation:—****Consd.** **Wilchick v. Marks & Silverstone,** [1934] 2 K. B. 56.

**1366. Add. Annotation:—****Refd.** **Wilchick v. Marks & Silverstone,** [1934] 2 K. B. 56.

**1367a.** — **Liability of occupier.]—**The servant of a coal merchant delivering coke at the house of R. on the instructions of R.'s servant opened a cellar flap in the pave-ment opposite R.'s house & left it open &

unguarded for a short time. Pltf. fell into the opening & was injured. In third-party proceedings between joint tortfeasors for an indemnity or contribution:—**Held:** on the true interpretation of Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), s. 6 (2), the ct., exercising a judicial discretion, had to determine what, on the facts, was a fair division of responsibility between the parties, & on that basis the damages should be apportioned as to nine-tenths against the coal merchants & one-tenth against R.—**DANIEL v. RICKETT, COCKERELL & Co., LTD. & RAY-MOND,** [1938] 2 K. B. 322; [1938] 2 All E. R. 631; 107 L. J. K. B. 589; 159 L. T. 311; 54 T. L. R. 756; 82 Sol. Jo. 353.

**1369a. Fireplug—**Projection above pavement—**Liability of water company.]—**A fireplug had

of the municipality, which is not liable to travellers for damages resulting from its state of repair until the high-way is again under its control & man-agement.—**HORSFIELD v. CANA RURAL MUNICIPALITY No. 214,** [1925] 2 D. L. R. 874; [1925] 1 W. W. R. 1067; 19 Sask. L. R. 378.—**CAN.**

**so. Who may sue—**Accident to car—**Guest of driver—**Condition of road un-known to driver.]—A passenger accept-ing a ride in another's car, for the express purpose of testing it on a rough road, cannot recover for an injury incurred by reason of the con-dition of the highway unknown to the driver.—**KARBERG v. GRANTHAM TOWN-SHIP,** [1936] 1 D. L. R. 221.—**CAN.**

### PART VIII. SECT. 5, SUB-SECT. 1.—B. (c).

**1300 ix. —**—A municipal corpn. is not liable for injury caused by failure to make minor repairs to a street, but is liable if the damage occurs through negligence or fault in the original construction, & if it can be shown that the construction in the first place by those who were re-sponsible for it was of a negligent, improper, or faulty description, they will be liable if damages result.—**STEWART v. MONCTON** (1925), 53 N. B. R. 427.—**CAN.**

**al. Acts of inhabitants.]—**A munici-pality cannot be held liable on the ground of misfeasance because of the acts of its inhabitants where there is no evidence that in doing the acts complained of they were acting on behalf of the municipality & not merely

for their own convenience.—**DANBERG & DANBERG v. CANWOOD VILLAGE,** [1932] 2 W. W. R. 320.—**CAN.**

**PART IX. SECT. 1, SUB-SECT. 1.—A. k i. —**Obstruction on part not used by public.]—**R. v. BENNETT** (1825), N. B. Dig. 400.—**CAN.**

**sm. Obstruction permitted—**Duty of person causing obstruction to provide lights at night.]—**HERVEY v. FRENCH** (1839), 4 Ont. Dig. 7433.—**CAN.**

### PART IX. SECT. 1, SUB-SECT. 1.—D.

**sn. Areas forming part of side-walk—**Left uncovered.]—On a dark night one of pltf.'s, wife of her co-pltf., stepped into an area, one of several, in the sidewalk of a street in a town & was injured. The areas were constructed as part of a building adjacent to the sidewalk & were for the benefit of the owners or tenants of the building. No authorisation by the town corpn. for the construction of the areas was shown, but it appeared that, since the year 1900, the corpn. had looked after the coverings of the areas, treating them as part of the side-walk. Before the accident, the area into which pltf. stepped had been covered with a plank, but on the night of the accident it was uncovered:—**Held:** the town corpn., having knowl-edge of the condition, & having taken no steps to close the areas, or to see that they were adequately protected, were liable to pltf.—**McMICHAEL v. GODERICH TOWN,** [1928] 4 D. L. R. 538; 62 O. L. R. 547.—**CAN.**

**so. Lift forming part of pavement—**Well of lift inadequately fenced.]—

**HAYMAN v. CITY PROPERTY INVESTMENT TRUST CORPN., LTD.,** [1929] S. C. (H. L.) 65.—**SCOT.**

**sp. Petrol pump.]—****BRITISH AMERI-CAN OIL Co. v. SHURR** (Ont.), [1929] 3 D. L. R. 118.—**CAN.**

**st. Truck on footpath.]—****McVEIGH v. SMITH TRANSPORT, LTD.** (1935), 5 F. L. J. (Can.) 4.—**CAN.**

**sv. Guard wire round park strip.]—**Guard wire round a park strip of the sidewalk, to prevent it being trampled on, is not necessarily a nuisance so as to make the municipality liable if the pedestrian stumbles over it.—**ROSEN v. KITCHENER,** [1935] 4 D. L. R. 644; O. R. 522.—**CAN.**

**sw. Fall of post—**Negligence—**Lim-itation of action.]—**A wooden signpost erected by deft. city on a boulevard near a street corner fell & injured pltf. as she was walking towards her au-tomobile after visiting friends who lived near the highway. The part of the boulevard where the post stood was away from the travelled part of the highway or street. The city was found to have been negligent in not repairing the post:—**Held:** the case was not one of nuisance, the post *in situ* did not interfere with the public's use of the highway & pltf. was not on city prop-erty when the post fell; the case was one of negligence to repair within the meaning of sect. 26 of Vancouver Incorporation Act, 1921, Amendment Act, 1936, c. 68, & since the action had not been brought within the three months limited thereby it must be dismissed.—**LONG v. VANCOUVER CITY,** [1938] 2 W. W. R. 343.—**CAN.**

been lawfully fixed in a footpath by defts. Originally the top of the fireplug had been level with the pavement, but in consequence of the ordinary wearing away of the footpath the fireplug projected half an inch above the level of the pavement. The fireplug itself was in perfect repair. Pltf., whilst passing along the footpath, fell over the fireplug & was hurt:—*Held*: as the fireplug was in good repair, & had been lawfully fixed in the footpath, no action by pltf. would lie against defts.—*MOORE v. LAMBETH WATERWORKS CO.* (1886), 17 Q. B. D. 462; 55 L. J. Q. B. 304; 55 L. T. 309; 50 J. P. 756; 34 W. R. 559; 2 T. L. R. 587, C. A.

*Annotations*:—*Apld.* *Thompson v. Brighton Corpn., Oliver v. Horsham L. B.*, [1894] 1 Q. B. 332. *Consd.* *Hartley v. Rochdale Corpn.*, [1908] 2 K. B. 594. *Apld.* *G. C. Ry. v. Hewlett*, [1916] 2 A. C. 511. *Consd.* *Withington v. Bolton Borough Council*, [1937] 3 All E. R. 108. *Refd.* *R. v. Poole Corpn.* (1887), 19 Q. B. D. 602; *Steel v. Dartford L. B.* (1891), 60 L. J. Q. B. 256; *Dawson v. Bingley U. D. C.* (1910), 75 J. P. 17; *Papworth v. Battersea B. C.* (1914), 79 J. P. 105.

**1372a. Liability of water company.]—**A water co., at the request & expense of the owner of a house, laid down a service pipe leading from their main under the street into the house, in which they placed a stop-cock for the purpose of regulating the supply of water. This stop-cock was protected by a cover or guard-box let into the pavement, which was provided with a lid or flap. Owing to the hinge of the lid or flap being out of repair, it projected above the pavement, & pltf. while passing along the street tripped over it & sustained injury. The apparatus could not be repaired without being removed, or removed without breaking up the pavement. The jury found that there was negligence on the part of those who were liable for the repair of the hinge:—*Held*: the co., who alone had power to break up the street for the purpose of repairing the guard-box, were responsible for its repair, & liable in respect of the injuries sustained by pltf.—*CHAPMAN v. FYLDE WATERWORKS CO.*, [1894] 2 Q. B. 599; 64 L. J. Q. B. 15; 71 L. T. 539; 59 J. P. 5; 43 W. R. 1; 10 T. L. R. 580; 38 Sol. Jo. 629; 9 R. 582, C. A.

*Annotations*:—*Consd.* *Colne Valley Water Co. v. Hall* (1907), 96 L. T. 395. *Distd.* *Stacey v. Gas Light & Coke Co.* *Metropolitan Water Board & West End Tailoring Co.* (1910), 9 L. G. R. 174. *Consd.* *Batt v. Metropolitan Water Board*, [1911] 2 K. B. 965. *Refd.* *Grand Junction Waterworks Co. v. Rodocanachi*, [1904] 2 K. B. 230.

**1378a. In contravention of City Police Act, 1839, c. xciv, s. 35 (7)—Claim of right.]—***CURTIS v. GEEVES*, No. 641a, *ante*.

**1380a. Overcrowded inn yard—Vehicles left in highway.]—**An innkeeper had for some years, when his yard was full, placed the vehicles of his guests on a triangular piece of ground at the corner of two streets. This piece of ground having been ascertained to be part of the highway:—*Held*: deft. was rightly convicted of an obstruction under Highway Act, 1835 (c. 50), s. 72.—*GORING v. BARFIELD* (1864), 4 New Rep. 284.

**1381a. —.]—**A person placing a dangerous obstruction in a highway, or in a private road over which persons have a right of way, is bound to take all necessary precautions to protect persons exercising their right of way; & if he neglects to do so, is liable for the consequences.—*CLARK v. CHAMBERS* (1878),

3 Q. B. D. 327; 47 L. J. Q. B. 427; 38 L. T. 454; 42 J. P. 438; 26 W. R. 613.

*Annotations*:—*Consd.* *Bull v. Shoreditch Corpn.* (1902), 67 J. P. 37; *Ruoff v. Long*, [1918] 1 K. B. 148. *Apld.* *Glasgow City Corpn. v. Taylor*, [1922] 1 A. C. 44. *Refd.* *A.-G. v. Tod-Healy & Brownrigg* (1879), 76 L. T. 174; *Tolhausen v. Davies* (1888), 59 L. T. 436; *McDowall v. G. W. Ry.*, [1902] 1 K. B. 618; *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398.

**1383. Add. Annotation:—***Refd.* *Polkinghorn v. Lambeth Borough Council*, [1938] 1 All E. R. 339.

**1384a. —.]—**Deft. acquired certain property adjoining the towpath along the River Thames. The conveyance described the property as bounded by the towpath, & proceeded to give deft. a right of way over the towpath. Deft., it was alleged, had suffered annoyance from the use of the towpath by persons bringing motor cars, ice-cream barrows & other vehicles thereon. To prevent this he erected upon the towpath posts about 3 ft. apart. The conservators had erected similar posts at the other end of the path. It was contended that (a) the property in the towpath had passed to deft. under the conveyance, & (b) the public were so benefited by the erection of the posts that they could not complain of them as a nuisance:—*Held*: (1) upon the construction of the conveyance the towpath did not pass thereunder to the deft., as a person cannot be granted a right of way over his own land; (2) the benefit to the public by the prevention of the vehicular traffic was not a sufficient justification for the obstruction, & an injunction against such obstruction ought to be granted.—*A.-G. v. WILCOX*, [1938] (Ch. 934, [1938] 3 All E. R. 367; 107 L. J. Ch. 425; 159 L. T. 212; 54 T. L. R. 985; 82 Sol. Jo. 566; 36 L. G. R. 593.

**1384b. Bollard on refuge—Failure to light.]—**An illuminated bollard at one end of a tram refuge had been damaged in an accident. Deft. council had placed a light upon it, but this light had, for some unexplained reason, gone out. As a result of this, pltf.'s motor car collided with the bollard, & pltf. was injured:—*Held*: deft. council, having erected the refuge & bollards, were under a continuing duty to keep them adequately lighted. They were, therefore, liable to pltf. in respect of the injury he had sustained.—*POLKINGHORN v. LAMBETH BOROUGH COUNCIL*, [1938] 1 All E. R. 339; 158 L. T. 127; 102 J. P. 131; 54 T. L. R. 345; 82 Sol. Jo. 94; 36 L. G. R. 130, C. A.

**1391. Add. Annotations:—***Refd.* *Williams v. Larsen* (1928), 21 B. W. C. C. 339; *Templeton v. Parkin & Co.* (1929), 140 L. T. 519.

**1399. Add. Annotation:—***Distd.* *Oldham v. Sheffield Corpn.* (1927), 136 L. T. 681.

**1404. Add. Annotation:—***Consd.* *Newsome v. Darton Urban District Council*, [1938] 3 All E. R. 93.

**1405. Add. Annotation:—***Consd.* *Withington v. Bolton Borough Council*, [1937] 3 All E. R. 108.

**1408a. Subsidence of filled-in trench.]—**In July, 1933, defts., who were the local sanitary authority as well as the local highway authority, had made a trench in a highway for the purpose of executing certain drainage work. The excavation was filled in, & in 1935, when the surface was tar-sprayed & chippings were rolled in with a steam-roller, the surface was said to be level. In 1936, a

depression had formed at the place where the work had been done, & the jury found that the highway at this place was dangerous to those using it with due care. The jury also found that, although the original work was executed without negligence, the dangerous condition was due to the work of defts., & that defts. were negligent in not discovering & taking steps to remedy the danger. Pltf., having been thrown from his bicycle & injured by reason of the subsidence of the road at the place in question, brought an action against defts. as the authority responsible for the repair of the road:—*Held*: there was a duty on defts. as the sanitary authority to make good the inevitable subsidence resulting from their work in 1933. They were negligent in not discovering, & in not taking steps to remedy, the danger, & this negligence amounted to misfeasance.—*NEWSOME v. DARTON URBAN DISTRICT COUNCIL*, [1938] 3 All E. R. 93; 159 L. T. 153; 102 J. P. 409; 54 T. L. R. 945; 82 Sol. Jo. 520; 36 L. G. R. 506, C. A.

**1412a. Failure to open—Non-repair—Interference with navigation.**—*S. & R. STEAMSHIPS, LTD. v. LONDON COUNTY COUNCIL* (1938), 82 Sol. Jo. 353.

**1414. Add. Annotation:—Consd.** *Harper v. Haden & Sons* (1932), 102 L. J. Ch. 6.

**1435a. Street traders—Licence—Application to renew—Duties of borough council.**—(1) The remedy by appeal to petty sessions given by London County Council (General Powers) Act, 1927 (c. xxii.), s. 35 (2), to a street trader who is aggrieved by the refusal of the renewal of his licence as a street trader is equally beneficial, convenient & effectual as *mandamus* would be. *Mandamus* will therefore not lie to a Metropolitan borough council to compel them to hear & determine a street trader's application for renewal of a licence.

(2) In deciding such applications, the council is an administrative body, not a judicial one; it may therefore properly take into account a report of a committee, & its decision will not be invalidated merely by the fact that some members taking part in it were not present at an earlier meeting when the applicant was heard.

(3) *Semble*: the Act does not contemplate the calling of evidence before the council on such applications; but the justices at petty sessions who hear an appeal can conveniently hear such evidence as may be necessary.—*R. v. LEWISHAM CORPN.*, *Ex p.*

*JACKSON* (1929), 93 J. P. 171; 73 Sol. Jo. 318; 27 L. G. R. 416, D. C.

**1435b. — — — Refusal to renew—Appeal to petty sessions—Evidence.**—*R. v. LEWISHAM CORPN.*, *Ex p. JACKSON*, No. 1435a, *ante*.

*Mandamus.*—*R. v. LEWISHAM CORPN.*, *Ex p. JACKSON*, No. 1435a, *ante*.

**1435d. — — — Liability for trading without—Notwithstanding legal impossibility of grant.**—(1) The fact that a borough council is precluded by the existence of Sunday Observance Act, 1677 (c. 7), from granting a licence for street trading on Sunday does not render impossible the conviction for trading without a licence of a trader who in fact trades on Sunday without a licence.

(2) An information for so trading may be laid by a person duly authorised on behalf of the council, such as a solr.'s managing clerk, instructed by the Town Clerk, though not himself an officer of the council.—*BAARS v. KEEP, BROOKS v. KENSINGTON BOROUGH COUNCIL* (1931), 145 L. T. 260; 95 J. P. 153; 47 T. L. R. 436; 75 Sol. Jo. 511; 29 L. G. R. 400; 29 Cox, C. C. 315.

**1435e. Information—By whom laid.**—*BAARS v. KEEP, BROOKS v. KENSINGTON BOROUGH COUNCIL*, No. 1435d, *ante*.

**1435f. — — — Movable receptacle occupying stationary position.**—Applt., riding a box-tricycle, patrolled certain streets five times a day offering for sale ice-cream, & at times halted for some twenty minutes at a school where he knew he should find, & did find, customers among the children. He did not hold a licence. He was charged & convicted of selling the ice-cream from a "receptacle occupying a stationary position" contrary to sect. 30 of the London County Council (General Powers) Act, 1927. The proviso to the sect. enacted that it should not apply to a person selling, etc., any article from any receptacle which he ordinarily moved from place to place in pursuit of & while conducting his trade:—*Held*: the proviso applied & no offence had been committed.—*TAYLOR v. TOWNEND*, [1938] 2 K. B. 198; [1938] 1 All E. R. 336; 107 L. J. K. B. 403; 158 L. T. 247; 102 J. P. 163; 54 T. L. R. 343; 82 Sol. Jo. 156; 36 L. G. R. 199; 30 Cox C.C. 655.

**1435g. Refusal to grant—Appeal—Discretion of magistrate.**—An appeal was brought to a ct. of summary jurisdiction under sect. 35 (2) of the London County Council (General Powers) Act, 1927, from a refusal of a Metropolitan Borough Council

#### PART IX. SECT. 1, SUB-SECT. 1.—I.

*st. Use of street as golf course.*—Part of the golf course used by deft. club was land which was shown on a registered plan of subdivision as a street. Under the governing legislation, the dedication of said land as a public street was effective forthwith on registration of the plan. The street was never graded or used as a street, & there were golf tees, greens, etc., thereon. After the street had been so used for a number of years, pltf. bought a tract of land bounded by the street & erected a small house thereon in which he lived. Pltf. complained that many golf balls were driven on to his property & that players trespassed thereon in search of the balls & that he was obstructed by said use by the club of said land in his right to use it as a public street. Pltf. asked for damages

& an order for the removal of the tees, etc., as against both the golf club & the municipality & for an injunction restraining the club's members from playing on the street:—*Held*: the club should be enjoined against using the street as part of its golf course & ordered to restore it to its normal state.—*CHISWELL v. CHARLESWOOD & ALCREST GOLF CLUB, LTD., RURAL MUNICIPALITY* (No. 2), [1937] 1 W. W. R. 177; 1 D. L. R. 776; 44 Man. L. R. 469; 6 F. L. J. (Can.) 244.—CAN.

#### PART IX. SECT. 1, SUB-SECT. 1.—K. (c) 1.

*sv. Street traders—Licence—"Article or thing"*—*What included.*—*Held*: a live pig was an "article or thing" within Street Trading (Regulation) Act (Northern Ireland), 1929, s. 1 (1).—

*R. (U. D. C. OF PORTADOWN) v. ARMAGH CHAIRMAN & JUSTICES*, [1931] N. I. 209.—IR.

*sv. — — — Construction of bye-law.*—A street trader, who held no permit from the chief constable, hawked fruit & vegetables from a cart in various streets in E. which he visited usually twice a week. On arrival at each street he cried his wares, & when customers came he stopped his cart. The cart remained standing, sometimes for a period of over half an hour, until the last of the customers was served, & the trader then moved on. In a prosecution for infringing a bye-law:—*Held*: accused did not carry on business on a stance, within the bye-law, in respect that he did not occupy a permanent position where he waited for customers.—*GRIEVE v. MACPHERSON*, [1933] S. C. (J.) 65.—SCOT.

to grant a street trading licence on the ground that the streets named in the application were not streets ordinarily prescribed by them in street trading licences:—*Held*: the jurisdiction of the ct. was not confined to considering whether the streets were or were not in fact ordinarily prescribed, but it was entitled to consider the question whether, notwithstanding that the streets were not ordinarily prescribed, a licence ought nevertheless to be granted on the merits of the particular case.—*FULHAM METROPOLITAN BOROUGH COUNCIL v. SANTILLI*, [1933] 2 K. B. 357; 102 L. J. K. B. 728; 149 L. T. 452; 97 J. P. 174; 49 T. L. R. 480; 31 L. G. R. 257; 29 Cox, C. C. 668, D. C.

**1435h. One day licence.**—Resp. sold apples from a barrow in a street within the Metropolitan Borough of P. It was the custom of the P. Borough Council to issue one-day licences to street traders, but though resp. had been issued with several of these licences in the past, he was not in possession of one on the day in question. He was summoned for selling goods from a barrow without a licence contrary to L.C.C. (General Powers) Act, 1927, s. 39. The magistrate dismissed the summons on the ground that the borough council having granted a licence, they could dispute its validity; & also upon the ground that the prosecution was instituted to test the system of one-day licences & was not *bona fide*:—*Held*: licences could only be granted in accordance with the provisions of the Act, & any licence issued otherwise was invalid. Resp. had not therefore a valid licence & ought to have been convicted.—*DENNIS v. WILLMORE*, [1936] 2 All E. R. 407, D. C.

**1435j. Removal of refuse—Liability for charges.**—The “other services” mentioned in London County Council (General Powers) Act, 1927 (c. xxii.), s. 37, are services *ejusdem generis* as the removal of refuse.

Appls., a borough council, claimed payment of their charges in respect of “other services” rendered by them to resp., a licensed street trader, being charges in respect of the general administration of Part VI. of the Act dealing with the regulation of street trading:—*Held*: in the absence of evidence of the removal of refuse or of services *ejusdem generis* as the removal of refuse, appls. were not entitled to recover.—*WESTMINSTER CORPN. v. ARMSTRONG*, [1929] 2 K. B. 451; 142 L. T. 263; 98 L. J. K. B. 707; 45 T. L. R. 634; 94 J. P. 18; 27 L. G. R. 671; 29 Cox, C. C. 49, D. C.

**1435k. Movable barrow—Occupying sta-**

**tionary position.**—*CRANFIELD v. LAWRENCE* (1938), 82 Sol. Jo. 873, D. C.

**1441. Add. Annotations:**—*Appld. Vanderpant v. Mayfair Hotel Co.* (1929), 27 L. G. R. 752. *Consd. Harper v. Haden & Sons, Ltd.* (1932), 102 L. J. Ch. 6.

**1442. Add. Annotation:**—*Consd. Vanderpant v. Mayfair Hotel Co.* (1929), 27 L. G. R. 752.

**1443. Add. Annotations:**—*Consd. Vanderpant v. Mayfair Hotel Co.* (1929), 27 L. G. R. 752. *Refd. Harper v. Haden & Sons, Ltd.* (1932), 102 L. J. Ch. 6.

**1447. Add. Annotation:**—*Consd. Vanderpant v. Mayfair Hotel Co.* (1929), 27 L. G. R. 752.

**1456. Add. Annotations:**—*Refd. Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401; *Harper v. Haden & Sons* (1932), 102 L. J. Ch. 6.

**1457a. Causing horse to shy.**—In an action for a nuisance it appeared that pltf. was driving at night in a cart drawn by a horse along a public highway, when the horse shied at a heap of earth & refuse placed by defts. on their land adjoining the highway, & the cart was upset & pltf. injured. Evidence was tendered by pltf. to prove that other horses had shied at the heap on the same day:—*Held*: if the heap was of such a nature as to be dangerous by causing horses passing on the highway to shy, it was a public nuisance.—*BROWN v. EASTERN & MIDLANDS RY. CO.* (1889), 22 Q. B. D. 391; 58 L. J. Q. B. 212; 60 L. T. 266; 53 J. P. 342; 5 T. L. R. 242, D. C.; *on appeal*, 22 Q. B. D., at p. 393, C. A.

*Annotation:*—*Refd. Heath's Garage v. Hodges* (1915), 14 L. G. R. 195.

**1464a. — Dangerous condition—Duty of local authority to remove.**—*STILLWELL v. NEW WINDSOR CORPN.*, No. 616a, *ante*.

**1465.** After this case add “*See, also, AGRICULTURE*, Nos. 970a, 970b.”

**1473. Add. Annotation:**—*Consd. Vanderpant v. Mayfair Hotel Co.* (1929), 27 L. G. R. 752.

**1475. Add. Annotation:**—*Appld. Vanderpant v. Mayfair Hotel Co.* (1929), 27 L. G. R. 752.

**1481a. Noise from loudspeaker—Advertisement of entertainment—Information.**—*ADAMS v. BALDWIN* (1935), 79 Sol. Jo. 922, D. C.

**1486. Add. Annotation:**—*Refd. Deen v. Davies*, [1935] 2 K. B. 282.

**1500. Add. Annotation:**—*Consd. Eastbourne County Borough v. Fuller & Sons* (1928), 93 J. P. 29.

#### PART IX. SECT. 1, SUB-SECT. 1.—L.

**r1. — Parked car—Liability of municipality.**—A motor car parked on a street may constitute a nuisance; but in order to render the municipality liable for damages caused by such nuisance it must have had actual knowledge thereof, or the nuisance must have existed for a time sufficient to entitle the ct. to hold that the municipality ought to have had knowledge thereof & that a further reasonable period had elapsed before the accident within which the municipality could have proceeded to remove the nuisance.—*BERTRAND v. NEILSON & VANCOUVER CITY*, [1934]

3 W. W. R. 433; 49 B. C. R. 150.—CAN.

#### PART IX. SECT. 1, SUB-SECT. 1.—N.

**sq. Prickly bush protruding through fence.**—Where deft. permitted a gorse bush growing on his land to project over a street, & pltf. was injured by a thorn of the bush penetrating one of his eyes:—*Held*: deft. was liable.—*CULL v. GREEN* (1924), 27 W. A. L. R. 62.—AUS.

**sr. Suffering trees to grow—Causing obstruction—Madras Local Boards Act.**—The allowing of prickly-pear to spread on to a road used by the public is a public nuisance within Indian

Penal Code, s. 268.—*Re MOLAIPPA GOUNDAN* (1928), 1 L. R. 52 Mad. 79.—IND.

#### PART IX. SECT. 1, SUB-SECT. 1.—P.

**sp. Crowds collected by speaking into microphone in shop.**—In order to constitute the offence of obstructing a footpath, within sect. 5 (14) of Police Offences Act, 1928, the act complained of must in itself be obstructive. Speaking into a microphone inside a shop, with the result that persons gather outside the shop so as to obstruct the footpath, does not constitute an offence under the sub-sect.—*CAMPBELL v. HANNAFORD*, [1934] V. L. R. 246; 40 Argus L. R. 312.—AUS.



1509. *Add. Citation*:—95 L. J. K. B. 81.

1511. *Add. Annotation*:—*Consd. Eastbourne County Borough v. Fuller & Sons* (1928), 93 J. P. 29.

1512. *Add. Annotations*:—*Distd. McGowan v. Stott* (1923), 99 L. J. K. B. 357, n. *Consd. Ryan v. Youngs*, [1938] 1 All E. R. 522.

1513a. ———. ]—When any one places a motor omnibus or other vehicle which is likely to skid upon the highway, such person may be liable for placing a nuisance upon the road, & for negligent use of the highway.—*WALTON (ISAAC) & Co., LTD. v. VANGUARD MOTOR BUS CO., GIBBONS v. VANGUARD MOTOR BUS CO.* (1908), 72 J. P. 505; 25 T. L. R. 13; 53 Sol. Jo. 82; 7 L. G. R. 349, D. C.

*Annotations*:—*Overd. Parker v. L. G. O. Co.* (1909), 101 L. T. 623. *Refd. Barnes U. D. C. v. L. G. O. Co.* (1908), 7 L. G. R. 359; *Wing v. L. G. O. Co.*, [1909] 2 K. B. 652.

1514. *Add. Annotation*:—*Generally, Refd. Britannia Hygienic Laundry Co. v. Thornycroft* (1926), 135 L. T. 83.

1514a. ———. *Death of driver from heart disease.*]—A man, who was employed by deft. to drive a motor lorry, died while driving the lorry, which ran on & injured pltf. The man, who appeared to be in sound health, in fact suffered from fatty degeneration of the heart, but medical evidence showed that, even had deceased been medically examined, such examination would not have indicated any liability to sudden collapse. It was contended that the employer had been negligent in allowing his lorry to go on the road driven by a man suffering from such a latent disability, or that the lorry in such circumstances amounted to a nuisance:—*Held*: (1) the employer had not been negligent, & the man appeared to be in good health, &

medical examination would not have disclosed any defect. He was not, moreover, under any obligation to have the driver medically examined; (2) there was no defect in the lorry, & it was not a nuisance; (3) the accident was due to an act of God.—*RYAN v. YOUNGS*, [1938] 1 All E. R. 522; 82 Sol. Jo. 233, C. A.

1519. *Add. Annotations*:—*Distd. Noble v. Harrison*, [1926] 2 K. B. 332. *Consd. Reigate Corp. v. Surrey County Council*, [1928] Ch. 359. *Refd. Cunard v. Antifyre, Ltd.* (1932), 49 T. L. R. 184; *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.

1540. *Add. Annotation*:—*Refd. Manchester Corp. v. Farnworth*, [1930] A. C. 171.

1546. *Add. Annotation*:—*Refd. Donovan v. Union Cartage Co.* (1932), 49 T. L. R. 125.

1546a. *Heap of refuse—Horse frightened.*]—Pltf.'s horse shied at a heap of road-scrappings placed by defts. by the side of a public highway on land belonging to them, & personal injuries were, in consequence sustained by pltf.'s wife. Upon the trial of an action brought in respect of such injuries, evidence that other horses had shied at the same heap, on the same day, was rejected:—*Held*: such evidence was admissible, for if the heap was of such a nature as to be likely to cause horses to shy, it was a public nuisance, & whatever showed it to be likely to cause horses to shy was evidence for pltf's.—*BROWN v. EASTERN & MIDLANDS RY. CO.* (1889), 22 Q. B. D. 391; 58 L. J. Q. B. 212; 5 T. L. R. 284, C. A.

*Annotation*:—*Refd. Heath's Garage v. Hodges* (1916), 14 L. G. R. 195.

[1927] 2 D. L. R. 263; [1927] 1 W. W. R. 524; 22 Alta L. R. 467.—CAN.

#### PART IX. SECT. 1, SUB-SECT. 16.

q i. ———. *Contributory negligence—Failure to wear adequate footwear.*]—In an action for damages for injuries sustained by slipping on an icy sidewalk, held that deft. city had not negligently permitted snow or ice to remain on the sidewalk; & moreover, pltf. was guilty of negligence which occasioned or contributed to the accident in that the kind of footwear which she was wearing was not ordinarily adequate to the circumstances.—*Knight v. SASKATOON, CITY* or, [1930] 3 W. W. R. 101; & 4 D. L. R. 1010.—CAN.

q ii. ———. ]—In an action for injuries sustained through slipping on an icy sidewalk:—*Held*: deft. municipality was not grossly negligent within sect. 469 (3) of Municipal Act, R. S. O., 1927, & pltf. did not exercise reasonable care in going out in the dark wearing Oxford shoes with rubber heels, but without rubbers or overshoes & without the aid of a cane.—*BURGESS v. SOUTHAMPTON TOWN*, [1933] O. R. 279; 2 D. L. R. 582.—CAN.

q iii. ———. *Municipality liable only for gross negligence.*]—The effect of the term "gross negligence" in a statute which imposes on a municipality the duty of keeping its streets in repair, but provides that it shall not be liable for injuries resulting from snow or ice upon a sidewalk "except in cases of gross negligence," is that its duty in cases within the proviso is substantially lower than its duty to keep its streets free from other defects & dangers not so specified.—*JOHNSON v. ST. JAMES RURAL MUNICIPALITY*, [1930] 3 W. W. R. 86; & 4 D. L. R. 120.—CAN.

#### PART IX. SECT. 1, SUB-SECT. 4.

1501 iii. ———. *Obstruction of access.*]—Whether it is or is not unlawful to use a locomotive engine in a public street depends on the manner & extent of the user. In an action for nuisance by obstructing access to pltf.'s garage by the unreasonable user of a locomotive engine & trucks for the purpose of delivering to & loading goods from the deft.'s factory:—*Held*: a nuisance had been proved, & an injunction against unreasonable user & damages should be awarded.—*MCCARRON v. NOSKE BROS. PROPRIETARY, LTD.* (1929), S. A. S. R. 433.—AUS.

#### PART IX. SECT. 1, SUB-SECT. 6.

1517 i. *Danger to persons on highway—Unguarded gap in area railings.*]—In an action brought by a father against (a) a road authority, (b) the proprietrix of a sunk area, and (c) a police constable, to recover damages in respect of injuries to his pupil son, aged 6, pursuer averred that, about 4 p.m. on an Oct. afternoon, a motor car collided with, & made a large gap in the railing guarding the area, & that the child, when playing the street about 7.30 p.m. after it was dark, fell through the gap while it was unguarded, & was injured:—*Held*: pursuer had relevantly averred fault against the constable, who had left his post where he had been stationed to guard the gap; both the road authority & the proprietrix had a duty to guard the gap; pursuer had relevantly averred failure by both in that duty as the cause of the accident, in respect that a jury might find that the posting of the constable did not discharge the road authority of their responsibility, & the proprietrix's duty to guard revived when she knew

that the constable had left his post, & further, it did not appear so clearly that the proximate cause of the accident was the negligence of the constable that the action must be dismissed as against the other two defendants, & also, per Lord Anderson, in respect that both the road authority & the proprietrix must be held to have delegated their duties to the constable & therefore to be responsible for his negligence. It was for the jury to decide whether the child had been guilty of contributory negligence.—*STEVENSON v. EDINBURGH MAGISTRATES*, [1934] S. C. 226.—SCOT.

#### PART IX. SECT. 1, SUB-SECT. 11.

st. *Encroachment on private street—Authorized by Dean of Guild.*]—The proprietors of a building adjoining a private street in G., who were, also, the owners of the *sumum* of the street, applied to the Dean of Guild for authority to extend their building over part of the foot pavement of the street. The master of works lodged objections in the public interest, on the ground that, under Glasgow Police Acts, 1866 to 1924, the Dean of Guild had no jurisdiction to sanction an encroachment on a private street:—*Held*: nothing in these Acts deprived the Dean of Guild of jurisdiction to grant a lining for the erection of a building on a private street within the burgh.—*SAXONE SHOE CO., LTD. v. SOMERS*, [1929] S. C. 232.—SCOT.

#### PART IX. SECT. 1, SUB-SECT. 14.

k i. *Broken-down motor car—Not left on highway for unreasonable time—Owner not liable.*]—*PEDERSON v. PATERSON* (1916), 31 D. L. R. 368.—CAN.  
v. *House left in street at night—Street blocked—Person moving house liable.*]—*SCOTT v. CALGARY & RIDDOCK*,



1569a. —. —. —.]—A.-G. v. WILCOX, No. 1384a, ante.

1576a. Obstruction unreasonable.]—Where a highway is obstructed for building operations, & the obstructor has obtained the appropriate licence from the local authority, a person suffering inconvenience or loss from the inconvenience can only recover damages in a case where the obstruction is unreasonable, either as to quantum or duration.

*Per* LAWRENCE, L.J.: When the owner of a house abutting on a public street desires to undertake building operations, & has obtained the appropriate licence from the local authority under Metropolis Management Act, 1855 (c. 120), or similar statutes relating to other places, it cannot be contended that the necessary scaffolding & hoardings are illegal & a public nuisance unless they were erected in a manner or place not authorised by the licence, or maintained for a longer period than by the licence authorised.—HARPER v. HADEN (G. N.) & Sons, [1933] Ch. 298; 102 L. J. Ch. 6; 148 L. T. 303; 96 J. P. 525; 76 Sol. Jo. 849; 31 L. G. R. 18, C. A.

1590. *Add. Annotation*:—*As to* (2) *Refd.* Bottomley v. Bannister (1931), 101 L. J. K. B. 46; Nicholson v. Southern Ry. Co. & Sutton & Cheam Urban District Council, [1935] 1 K. B. 588. *Generally*, *Refd.* Shirvell v. Hackwood Estates Co., [1938] 2 All E. R. 1.

1592. *Add. Annotations*:—*Refd.* Layzell v. Thompson (1926), 91 J. P. 89; London Corpn. v.

Lyons, Son & Co. (Fruit Brokers), Ltd., [1936] Ch. 78.

1616. *Add. Annotation*:—*Refd.* Reigate Corpn. v. Surrey County Council, [1928] Ch. 359.

1623. *Add. Annotation*:—*Refd.* Oldham v. Sheffield Corpn. (1927), 136 L. T. 681.

1628. *Add. Annotation*:—*Distd.* Wells v. Metropolitan Water Board, [1937] 4 All E. R. 639

1634. *Add. Annotations*:—*Consd.* Swadling v. Copper (1930), 46 T. L. R. 597. *Appld.* Tart v. Chitty & Co., [1933] 2 K. B. 453. *Consd.* Flower v. Ebbw Vale Steel, Iron & Coal Co., [1934] 2 K. B. 132. *Refd.* Hargrove v. Burn (1929), 46 T. L. R. 59; Tidy v. Battman, [1934] 1 K. B. 319.

1637. *Add. Annotations*:—*Consd.* Hargrove v. Burn (1929), 46 T. L. R. 59; Swadling v. Cooper (1930), 46 T. L. R. 597; Flower v. Ebbw Vale Steel, Iron & Coal Co., [1934] 2 K. B. 132. *Refd.* The Vectis, [1929] P. 204; The Chatwood, [1930] P. 272; M'Lean v. Bell (1932), 48 T. L. R. 467.

1639. *Add. Annotation*:—*Refd.* Seaton v. Slama (1932), 77 Sol. Jo. 11.

1649. *Add. Annotation*:—*Refd.* Seaton v. Slama (1932), 77 Sol. Jo. 11.

1652. *Add. Annotation*:—*Generally*, *Refd.* Salisbury & Fordingbridge District Drainage Board v. Southern Tanning Co. (1920), [1927] 2 K. B. 566.

1657a. —. —. —.]—Trees.]—STILLWELL v. NEW WINDSOR CORPN., No. 616a, ante.

1668. *Add. Annotation*:—*Refd.* A.-G. v. Sharp (1930), 99 L. J. Ch. 441.

q iv. —. —. —.]—In an action for damages for personal injuries sustained by falling on a patch of ice which had formed on a sidewalk the night before the accident:—*Held*: the fact that deft. city, which under its charter is not liable for injuries so caused except in cases of gross negligence had not placed sand or cinders on the particular patch of ice before the time of the accident, nine in the morning, did not under all the circumstances constitute gross negligence.—STINSON v. EDMONTON CITY, [1932] 1 W. W. R. 839; *affd.*, [1933] 3 W. W. R. 224.—CAN.

q v. —. —. —.]—In an action for injuries sustained by a pedestrian through a fall due to a slippery street:—*Held*: deft. city had been grossly negligent in not taking more care to prevent such injuries.—WOLFE & WOLFE v. EDMONTON CITY, [1932] 1 W. W. R. 129; *affd.*, [1932] 1 W. W. R. 855; 3 D. L. R. 370; 26 Alta. L. R. 310.—CAN.

q vi. —. —. —.]—In an action against a rural municipality for injuries sustained by falling on a sidewalk in a village therein of a few hundred people, the sidewalk having been made slippery by snow:—*Held*: although the municipality did not have any system of inspecting such streets during the winter & did not remove the snow therefrom or sprinkle cinders or sand thereon, it was not guilty of "gross negligence" within sect. 628 of Municipal Act, R.S.M., 1913. It cannot be "gross negligence" not to do what it is the custom not to do.—CHRISTIANSON v. CLANWILLIAM RURAL MUNICIPALITY, [1933] 3 W. W. R. 415.—CAN.

q vii. —. —. —.]—On appeal from the dismissal of an action against a city for damages for personal injuries caused by falling on an icy sidewalk:—*Held*: there was no evidence of gross negligence on the part of deft. &

therefore, since its charter provided that the city should not be liable for such accidents unless in cases of gross negligence, the action failed.—WALLER v. ST. BONIFACE CITY, [1935] 2 W. W. R. 378; 4 D. L. R. 135.—CAN.

q viii. —. —. —.]—HOLLAND v. TORONTO CITY (1925), 59 O. L. R. 628.—CAN.

q ix. —. —. —.]—HOLLAND v. TORONTO CITY, [1927] S. C. R. 242.—CAN.

q x. —. —. —.]—MURPHY v. OTTAWA CITY (1928), 63 O. L. R. 248.—CAN.

q xi. —. —. —.]—*Liability for acts of contractor.*—City corpn. held liable for negligence of contractors in course of relaying pavement, whereby rainwater was obstructed & flooded premises in the street.—KITCHENER CITY v. ROBE & CLOTHING CO., [1925] S. C. R. 106.—CAN.

q xii. —. —. —.]—*From snow plough.*—*Municipality not liable.*—A municipality is not liable to a pedestrian for injuries due to ice & snow formed on the sidewalk by the snow plough.—POTTER v. SYDNEY MINES, [1936] 1 D. L. R. 764.—CAN.

q xiii. —. —. —.]—*Ice sanded & guarded by red lights.*—The highway authority is not liable for an accident caused by ice & ruts which had been sanded & guarded by red lights.—EDGEWORTH v. R., [1937] 4 D. L. R. 136; O. R. 721.—CAN.

q xiv. —. —. —.]—It is a good defence to an action against a municipality for damages caused by slipping on an icy sidewalk that the sidewalk had been sanded, although with sand ineffectively prepared.—HUYCKE v. COBOURG, [1937] 3 D. L. R. 720; O. R. 682.—CAN.

ss. *Flow of water.*—*Meaning of.*—Water which soaks or seeps through a bank on land on to a road does not flow on to such road.—JARRAD v. LOADER, [1928] S. A. S. R. 35.—AUS.

sd. *Ice & snow from driveway.*—Action for damages for injuries sustained through slipping on a sidewalk, owing to ice & snow from defts.' cement driveway:—*Held*: defts. were liable for nuisance.—TAYLOR v. ROBINSON, [1933] 3 D. L. R. 73; O. R. 535.—CAN.

#### PART IX. SECT. 3, SUB-SECT. 2.

m i. —. —. —.]—*Not mandamus.*—*Nuisance by municipality.*—No mandamus lies to a municipal corpn. to compel it to remove a gasoline pump from the street. If it amounts to a public nuisance the A.-G. is the proper person to intervene.—*Re* METRO OIL, LTD. & TORONTO, [1935] 3 D. L. R. 303; O. R. 338.—CAN.

#### PART IX. SECT. 3, SUB-SECT. 3.—A.

1670 v. —. —. —.]—In an action for a mandatory injunction requiring deft. to remove a verandah & steps attached to her house, which encroached upon a street in a village, & caused inconvenience to pltf. & other persons using the street:—*Held*: the inconvenience was such only as was common to all persons using the street, & pltf., whose house was so situated that persons coming from it, in order to gain access to the principal street of the village, had to make a detour by reason of the verandah & steps, suffered no special damage or injury by reason of the nuisance, & was not entitled to the relief claimed.—WHALEY v. KELSEY, [1928] 2 D. L. R. 268; 61 O. L. R. 679.—CAN.

1670 vi. —. —. —.]—ARDESHAR JIVANJI v. AIMAI KUVARJI (1928), 1 L. R. 53 Bom. 187.—IND.

1670 vii. —. —. —.]—*Rule not applicable to India.*—Any individual member of the public has the right to maintain a suit for removal of obstruction of a public highway, if his right of passage through it is obstructed, without proving special damage. The principle of

- English law which requires proof of special damage in such cases is not applicable to India.—MANDAKINEE DEBEE v. BASANTAKUMAREE DEBEE (1933). I. L. R. 60 Cal. 1003.—IND.

q ii. — *Notice of claim.*—The absence of the notice required by City Act, R. S. S. 1920 (c. 86), s. 542, to be given the municipality is a bar to an action for damages for injuries caused by snow or ice on a sidewalk.—HICKMAN

q iii. — — Sufficiency of.]—  
MCGREGOR v. R. (Ont.), [1929] 1  
D. L. R. 181.—CAN.

**PART IX. SECT. 3, SUB-SECT. 5.**  
*sw. Cost of fencing bank—Whether within Burgh Police (Scotland) Act, 1892, s. 190.]—The magistrates of a burgh, founding upon the section, brought an action against the owners of a steep natural bank, which sloped*

PART IX. SECT. 3, SUB-SECT. 6.  
d i. ————.]—R. v. FITZGERALD  
(1876), 39 U. C. R. 297.—CAN.

## Part X.—Interference with Highways under Statutory Powers.

**1761a. Duty of local authority—**On request to exercise statutory powers.]—A local authority, requested to carry out in a "street laid out but not dedicated" constructive works under its statutory powers, need not necessarily inquire into the title of those making the request. But it must, in considering whether compliance with the request will be a lawful exercise of the powers, have regard primarily to the physical conditions

obtaining in the area of the proposed operations; & those physical conditions will be one of the principal factors in determining whether relevant statutory definitions are complied with. This applies to powers conferred by either public general or private local statutes.—*DAVIES v. RIPON CORPN.*, [1928] Ch. 884; 97 L. J. Ch. 479; 139 L. T. 636; 92 J. P. 153; 26 L. G. R. 530.

## Part XI.—Excessive Weight and Extraordinary Traffic.

**1765. Add. Annotation:—**Consd. *Eastbourne County Borough v. Fuller & Sons* (1928), 93 J. P. 29

**1771. Add. Annotation:—**Distd. *Eastbourne County Borough v. Fuller & Sons* (1928), 93 J. P. 29.

**1772. Add. Annotation:—**As to (1) Refd. *Eastbourne County Borough v. Fuller & Sons* (1928), 93 J. P. 29.

**1775a.** —.]—Defts., who owned & used traction engines for the purposes of their business, drove two of these engines on a very hot day in July over a highway belonging to pltfs., who were the highway authority for the district. The highway, which had been constructed as a first class main road for the purpose of bearing traffic of all sorts, had a mexphalte surface. In passing along the most exposed part of the highway, the driving wheels of these engines sank into the road at a point where the surface was very soft, with the result that the road was damaged. Pltfs. thereupon brought an action against defts. to recover extraordinary expenses, pursuant to Highways & Locomotives (Amendment) Act, 1878 (c. 77), s. 23, as amended by Locomotives Act, 1898 (c. 29), s. 12. They also claimed damages for wrongful abuse of the highway by defts. & for nuisance & negligence:—*Held*: as agricultural traffic, including heavy traction engines, was admittedly part of the ordinary traffic, & the weights in the present case were normal, no claim for excessive weight or for extraordinary traffic could arise under the Act of 1878; there was no excess whatever by defts. of the lawful use of the highway & no wrongful abuse of their rights of passing & repassing; the injury to the highway was due to a peculiar & unique conjunction of heat & of atmospheric & other conditions; defts.' vehicles did not

constitute a nuisance, & there was no negligence on the part of defts.—*EASTBOURNE COUNTY BOROUGH v. FULLER & SONS* (1928), 93 J. P. 29; 72 Sol. Jo. 762.

**1810. Add. Annotation:—**Distd. *Eastbourne County Borough v. Fuller & Sons* (1928), 93 J. P. 29.

**1829. Add. Annotation:—**Refd. *A.-G. v. Canter*, [1938] 3 All E. R. 329.

**1841.** After this case add "*See, also*, No. 1852, *post*."

**1844.** To the existing paragraph add as follows:—

The surveyor of a highway gave a certificate under the above sect. to the effect that extraordinary expenses had been incurred by reason of extraordinary traffic caused by resp. in repairing roads in four separate townships. Six months later he gave another certificate which referred to extraordinary expenses incurred partly before & partly after the date of the first certificate on a single road in one of the townships:—*Held*: the first certificate was good, & with regard to expenses incurred before it was made, the period of six months limited by Summary Jurisdiction Act, 1848 (c. 43), s. 11, for recovering the amount began to run from the date of the first certificate.

**1852.** After this case add "*See, also*, No. 1841, *ante*."

**1852a.** Where more than one certificate given.]—*WIRRAL HIGHWAY BOARD v. NEWELL*, No. 1844, *ante*.

**1858a.** — Where several contracts.]—*ERSOM URBAN COUNCIL v. LONDON COUNTY COUNCIL*, No. 1818, *ante*.

**1872. Add. Annotation:—**Refd. *Eastbourne County Borough v. Fuller & Sons* (1928), 93 J. P. 29.

**1876. Add. Annotation:—**Refd. *Eastbourne County Borough v. Fuller & Sons* (1928), 93 J. P. 29.

**PART XI. SECT. 4, SUB-SECT. 1.**  
t. Add *affd.*, [1913] 2 I. R. 250, C. A.

**PART XI. SECT. 4, SUB-SECT. 5.**  
1872 l. *General rule.*—It is not the total sum actually spent on repair that is recoverable by the road authority, whether that repair involves reconstruction or not. Regard must be

had to all the circumstances of the case; the state of the roads when the extraordinary traffic commenced, its general character & suitability for the traffic reasonably to be expected thereon, the amount of ordinary traffic whether of deft. or other persons, & the extent & nature of the repairs reasonably required. Deductions

should also be made if roads when repaired are in a better condition than before extraordinary traffic commenced.—*DOWN COUNTY COUNCIL v. STEWART*, [1927] N. 49.—IR.

1881 l. *Deductions & allowances—Improvement of road due to repair.*—*DOWN COUNTY COUNCIL v. STEWART*, No. 1872 l, *ante*.—IR.

## Part XII.—Stopping-up or Diversion of Highways.

1887. *Add. Annotation*:—*Refd.* Linton v. Newcastle-upon-Tyne Corpn. (1929), 142 L. T. 49.

1894a. ——— *Consent of owners of land abutting on highway—Condition precedent.*—By sect. 59 of a local Act “the corp’n. may from time to time by order stop up wholly or partially any highway which in their opinion is unnecessary on such terms as to the vesting of the soil & other matters as may be agreed on between the corp’n. & the owners & lessees of buildings & lands abutting on the highway & on any highway being so stopped up all public & other rights of way & other rights in, over or upon the same shall be absolutely extinguished.” By sect. 117: “Any person deeming himself aggrieved by any order or determination of the corp’n. or by any conviction or order made by a ct. of summary jurisdiction under any provision of this Act may appeal . . . to the next practicable ct. of quarter sessions under & according to Public Health Act, 1875 (c. 55), s. 269”:—*Held*: (1) it was a condition of the making of an order under sect. 59 that there should be an agreement between the corp’n. & the owners & lessees of buildings & lands abutting on the highway; (2) the “highway” must mean the whole highway & not any part thereof; & the applt. was therefore a person aggrieved although his land did not abut on the part of the highway stopped up.—LINTON v. NEWCASTLE-UPON-TYNE CORPN. (1929), 142 L. T. 49; 94 J. P. 20; 27 L. G. R. 607, H. L.

1894b. ——— *Meaning of highway—Not confined to part of highway stopped up.*—LINTON v. NEWCASTLE-UPON-TYNE CORPN., No. 1894a, *ante*.

1897. *Add. Annotation*:—*Refd.* Oldham v. Sheffield Corp’n. (1927), 136 L. T. 681.

1922. *Add. Annotation*:—*Apld.* R. v. Postmaster-General, *Ex p.* Carmichael (1927), 96 L. J. K. B. 347.

1958. *Add. Annotation*:—*Refd.* Brown v. Harrison, Hourani v. Same (1927), 137 L. T. 549.

1979a. ——— *Not costs of preparing for appeal—Order abandoned.*—R. v. WING (1825), 4 B. & C. 184; 6 Dow. & Ry. K. B. 323; 3 Dow. & Ry. M. C. 184; 3 L. J. O. S. K. B. 201; 107 E. R. 1028.

1984. *Add. Annotation*:—*Refd.* West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt (1932), 96 J. P. 159.

1985a. ———.]—A ry. co. were empowered by Act of Parliament to stop up a certain street for the purpose of providing additional warehouses. The co. stopped up & enclosed part of such street & formed a cul-de-sac. They constructed a warehouse abutting upon the pavement in such cul-de-sac. The ware-

house had flaps which opened across such pavement, & for forty years the co. loaded & unloaded goods from such flaps across the pavement into & from vans standing in the cul-de-sac from 6 a.m. to 7 p.m. daily. The London County Council by a private Act, which incorporated the Lands Clauses Acts, were empowered to make a new street, & they gave notice to treat for certain premises in the possession of the ry. co. The new street included the pavement above referred to. The co. claimed compensation (*inter alia*) for injurious affection of the above-mentioned warehouse by reason of the works of the council preventing them from delivering goods from the warehouse across the pavement to vans in the way they had therefore done:—*Held*: the use which the ry. co. had made of the pavement amounted to a stopping up of such pavement under their statutory powers above referred to, although such pavement had not been enclosed; the council were bound to acquire an easement over such pavement for the purpose of making the new street, & the co. were entitled to compensation for injurious affection of the warehouse.—*Re* GREAT EASTERN RY. CO. & LONDON COUNTY COUNCIL (1907), 98 L. T. 116; 72 J. P. 1, C. A.

1986. *Add. Annotation*:—*Consd.* Port of London Authority v. Canvey Island Comrs. (1931), 101 L. J. Ch. 63.

1988. *Add. Annotation*:—*Refd.* Stockwell v. Southgate Corp’n., [1936] 2 All E. R. 1343.

1988a. *On liability to repair.*—A part of an old footpath, repairable by the inhabitants at large, was diverted & the substituted highway was a road 60 feet wide. All the usual steps were taken under Highways Act, 1835 (c. 50), in respect of the diversion, except that at no time did the justices view the new highway in accordance with sect. 91 of the Act. From 1911 the old highway had been built over and the new highway continuously used. Two frontagers claimed a declaration that the new highway was repairable by the inhabitants at large:—*Held*: (1) the proper proceedings to test this question were proceedings in a ct. of summary jurisdiction under the Private Streets Works Act, 1892 (c. 57); (2) this was not a proper case for the ct. in the exercise of its discretion to make a declaration; (3) the Attorney-General was not a necessary party to the action; (4) the substituted highway would not be repairable by the inhabitants at large until Highways Act, 1835 (c. 50), s. 91, had been complied with; (5) it could not be assumed in a recent case that all formalities had been complied

PART XII. SECT. 2, SUB-SECT. 1.  
sx. *Necessity for compliance with statutory formalities.*—*Held*: a public highway cannot be closed without complying with the statutory formalities.—LARCHER v. SUDBURY TOWN (1913), 24 O. W. R. 659; 4 O. W. N. 1289; 11 D. L. R. 111.—CAN.

PART XII. SECT. 2, SUB-SECT. 2.—A.  
1898 il. ———.]—By Municipal Act, R. S. O., 1927, s. 483 (1) (c), a

municipality may pass a bye-law stopping up a highway. The obligation of the municipality to supply “another convenient road or way of access” is not satisfied by the municipality conveying the freehold in the closed highway to a grantee & exacting from such grantee a covenant to keep the roadway open & in repair for highway purposes for the benefit of the person whose means of ingress & egress is affected.—HODSON v. GLENHODSON

COUNTY CLUB & WHITBY TOWNSHIP (1933) O. R. 271; 2 D. L. R. 277.—CAN.

b i. ——— *Under Highway Act, R. S. N. B., 1927—Duty of jury under sect. 30 to consider whether highway necessary.*—R. v. BELLIVEAU, *Ex p.* LE BLANC (1930), 1 M. P. R. 28.—CAN.

b ii. ——— *Duty of supervisor to view lands—Amounts to judicial act.*—R. v. BELLIVEAU, *Ex p.* LE BLANC (1930), 1 M. P. R. 28.—CAN.

with & the local authority was not estopped from asserting such non-compliance.—**STOCKWELL v. SOUTHGATE CORPN.**, [1936] 2 All E. R. 1343; [1937] 3 All E. R. 627; 155 L. T. 437; 34 L. G. R. 527.

**1990. Add. Annotation:—Refd.** *Stockwell v. Southgate Corpn.*, [1936] 2 All E. R. 1343.

**1991. Add. Annotation:—Consd.** *Stockwell v. Southgate Corpn.*, [1936] 2 All E. R. 1343.

## Part XIII.—Streets.

### SECT. 1.—METROPOLITAN.

For references to London Building Act, 1894 (c. cxxiii.), *see, now*, London Building Act, 1930 (c. clviii.), which replaces the 1894 Act.

**1997. Add. Annotation:—Consd.** *Howard-Flanders v. Maldon Corpn.* (1926), 135 L. T. 6.

**2032. Add. Annotation:—As to (2) Consd.** *A.-G. v. Hornsey B. C.* (1926), 43 T. L. R. 92.

**2039. Add. Annotation:—As to (2) Consd.** *A.-G. & Public Trustee v. Woolwich Metropolitan Borough Council* (1929), 93 J. P. 173.

**2044. Add. Annotation:—Appld.** *Dennerley v. Prestwich U. D. C.* (1929), 141 L. T. 602.

**2075. Add. Annotation:—Appld.** *Dennerley v. Prestwich U. D. C.* (1929), 141 L. T. 602.

**2076. Add. Annotation:—Apprvd.** *Dennerley v. Prestwich U. D. C.* (1929), 141 L. T. 602.

**2087a. — Boundary wall.**—In defining a general line of buildings under London Building Act, 1930 (c. clviii.), s. 22, a boundary wall cannot be taken into consideration either by the superintending architect or by the Tribunal of Appeal on an appeal from his certificate. —*MOLINS MACHINE CO., LTD. v. LONDON COUNTY COUNCIL*, [1932] 1 K. B. 764; 101 L. J. K. B. 259; 147 L. T. 457; 95 J. P. 202; 29 L. G. R. 627.

**2093. Add. Annotation:—Consd.** *Black v. George Parker & Sons, Ltd.* (1929), 142 L. T. 130.

**2100. Add. Annotations:—Consd.** *Sittingbourne U. D. C. v. Lipton, Ltd.* (1930), 47 T. L. R. 120. *Refd.* *Molino Machine Co. v. L. C. C.* (1931), 95 J. P. 202.

**2102. Add. Annotation:—Consd.** *Sittingbourne U. D. C. v. Lipton, Ltd.* (1930), 47 T. L. R. 120.

**2120. Add. Citation:—**68 J. P. 490.

**2170a. Consent to lay out—Whether deed necessary.**—B. was the owner of a house which had its front & only entrance in F. street, & behind it a garden with a dead wall at the further end. A new street was made parallel to F. street, of which the dead wall at the end of B.'s garden was part of the line of street. This new street was a mews which the metropolitan board allowed to be made of 20 feet width:—*Held*: the consent of the metropolitan board to the mews being of 20 feet did not require to be given under the seal of the board.—*PADDINGTON VESTRY v. BRAMWELL* (1880), 44 J. P. 815.

**2173. Add. Annotation:—Refd.** *Smith v. Benabo*, [1937] 1 K. B. 518.

**2178a. Proceedings for removal—Whether restrained by injunction.**—Pltf., having purchased certain premises in the metropolis, erected buttresses for the purpose of improving the wall abutting on the highway. The local authority took out a summons before a magistrate against pltf. under Metropolis

Management Act, 1855 (c. 120), s. 119, to compel pltf. to remove the buttresses, on the ground that they were an encroachment on the highway. Pltf., alleging that the site of the buttresses was not part of the highway, then brought an action against the local authority & moved for an injunction to restrain them from interfering with the buttresses & from going on with the proceedings before the magistrate to determine any questions to be determined in the action:—*Held*: though the ct. had jurisdiction to restrain proceedings before a magistrate if it was satisfied that he had no jurisdiction or that owing to the special circumstances the proceedings before the magistrate ought not to be allowed, yet in the present case, as the magistrate had jurisdiction, & as there were no special circumstances, the motion must be dismissed.—*WILLIAMS v. DEPTFORD URBAN DISTRICT COUNCIL* (1924), 41 T. L. R. 47.

**2195a. — Dead shores.**—Sect. 75 of Metropolis Paving Act, 1817 (c. xxix) (Michael Angelo Taylor's Act), is impliedly repealed by sects. 122 & 123 of Metropolis Management Act, 1855 (c. 120). Therefore a charge, framed under sect. 75 of the Act of 1817, of setting up dead shores in a public street without a licence, failed, the same offence, with different penalties & procedure, being dealt with in sects. 122 & 123 of the later Act.

*Semble*: the dead shores could properly be described as hoards or scaffolding.—*SMITH v. BENABO*, [1937] 1 K. B. 518; [1937] 1 All E. R. 523; 106 L. J. K. B. 367; 156 L. T. 194; 101 J. P. 141; 53 T. L. R. 353; 81 Sol. Jo. 200; 30 Cox, C. C. 540; 35 L. G. R. 130.

**2196a. Metropolis Paving Act, 1817 (c. xxix.), s. 75—Whether repealed by Metropolis Management Act, 1855 (c. 120), ss. 122, 123, 247.** —*SMITH v. BENABO*, No. 2195a, *ante*.

**2202. Add. Annotation:—Refd.** *Fredman v. Minister of Health* (1935), 154 L. T. 240.

**2203. Add. Annotations:—Appld.** *Ashby-de-la-Zouch Grdns. v. Summers*, [1928] 2 K. B. 397. *Consd.* *West Ham Corpn. v. Benabo (Charles) & Son*, [1934] 2 K. B. 253.

**2204a. — Recovery of expenses of repairing dangerous structure—London Building Act, 1894, s. 116—Summary Jurisdiction Act, 1848 (c. 43), s. 11.**—A building in the metropolis having been certified to be dangerous, the county council did the work necessary to make it safe, & on Sept. 15, 1924, demanded from the owner the amount of the expenses. The amount not having been paid, the council on Jan. 1, 1926, applied to a magistrate under sect. 116 (1) of the above Act of 1894 to fix the amount of the expenses & to make an order that no part of the structure should be let for occupation until after pay-

ment thereof. The magistrate dismissed the complaint on the ground that more than the period of six months limited by sect. 11 of the above Act of 1848 had elapsed between the time when the matter of the complaint arose & the date when the complaint was made:—*Held*: the six months' limitation of time applied to proceedings under sect. 116 (1) of the Act of 1891, & the time ran from the date of the demand, & the magistrate's decision must be affirmed.—*LONDON COUNTY COUNCIL v. OWNER OF 14, LEE-STREET STEPNEY* (1926), 135 L. T. 182; 90 J. P. 145; 42 T. L. R. 543; 24 L. G. R. 386, D. O.

2217. *Add. Annotation*:—*Refd.* *Hanscombe v. Bedfordshire County Council*, [1938] 3 All E. R. 647.

2229a. *Part of premises fronting another street.*—Deft. in 1903 purchased a house which fronted on G. road. In 1907 she bought a strip of land which she used to form a carriage drive to the house. In 1904 her husband became the tenant of a field to the south of & adjoining the house & land. The field fronted on E. road. In 1907 deft. purchased the field, but entered into a tenancy agreement letting it to her husband, & from that time the field & the house & land had been separately assessed by the local authority though in fact the tenancy agreement between deft. & her husband ceased to exist about 1918. In 1920 E. road was made up, the usual course being followed under Public Health Act, 1875 (c. 55), ss. 150 & 257, with the result that plffs. claimed a charge, for the admitted proportion due from deft. of the expenses incurred in making up E. road, on the whole of deft.'s property, including her house & grounds as well as the field, as fronting, adjoining or abutting on E. road:—*Held*: the house & grounds & the field must be considered as being one close, & as such the whole was liable to a charge for making up E. road as fronting, adjoining or abutting thereon.—*ALTRINCHAM URBAN DISTRICT COUNCIL v. O'BRIEN* (1927), 91 J. P. 149; 25 L. G. R. 369.

2244a. —[—]—(1) A notice given to a frontager to make up the portion of the street opposite to his premises under Public Health Act, 1875 (c. 55), s. 150, is not rendered inoperative because all the frontagers on the street are not served, but he will be liable only for his proportion of the sum expended in making up those portions of the street which abut on the premises of such of the frontagers as are served with the notice, no change of ownership occurring during the course of the proceedings.

(2) The words "the same" contained in the form of notice given in the above Act

refer to that portion only of the street abutting on the premises of the owner on whom such notice is served, & not to the whole street.

(3) Two winter months given as the time within which to execute works under a notice given under the above sect. is sufficient.—*SUNDERLAND CORPN. v. GRAY*, [1928] Ch. 756; 97 L. J. Ch. 411; 136 L. T. 405; 91 J. P. 52; 25 L. G. R. 139.

2252a. 'The same.'—*SUNDERLAND CORPN. v. GRAY*, No. 2244a, *ante*.

2253. *Add. Annotation*:—*Consd. Cardiff Corpn. v. Cardiff Pure Ice & Cold Storage Co.* (1930), 95 J. P. 11.

2254. *Add. Annotation*:—*As to* (3) *Consd. Cardiff Corpn. v. Cardiff Pure Ice & Cold Storage Co.* (1930), 95 J. P. 11.

2254a. —[—]—*SUNDERLAND CORPN. v. GRAY*, No. 2244a, *ante*.

2268. *Add. Annotation*:—*As to* (2) *N.F. Sunderland Corpn. v. Gray* (1926), 136 L. T. 405.

2276. *Add. Annotation*:—*Consd. Finney v. Birkenhead Corpn.*, [1936] 2 All E. R. 590.

2277. *Add. Annotation*:—*Consd. Finney v. Birkenhead Corpn.*, [1936] 2 All E. R. 590.

2279a. — *Asphalt in place of flags.*—The predecessors of resp. corpn. by notice adopted H. Road under Public Health Act, 1875 (c. 55), s. 152. In accordance with the provisions of Public Health Act, 1925 (c. 71), resps. prepared a list of roads repairable by the inhabitants at large. H. Road was therein stated to be repairable by the local authority as to the carriageway, but not as to the footway. There was some evidence that the road had never been made up. Resps. were empowered by a local Act to serve notice upon the frontagers to make, curb, flag, & complete the footway, & if through the frontagers' default, they executed the work themselves, to apportion the whole cost on the frontagers in the case of a road not repairable by the inhabitants at large, & half the cost in the case of a road repairable by the inhabitants at large. Such notice was served in respect of H. Road &, resps. having done the work, apportioned the whole cost on the frontagers. The notices required the frontagers to make, flag & complete, but in fact the resps. did not flag the road, but asphalted it:—*Held*: (1) H. Road was a road repairable by the inhabitants at large &, in any event, resps. could only recover half the cost; (2) the work specified in the notice must be carried out & the use of asphalt in place of flags was not a proper compliance with the notice, & resps. could not recover the cost of the work done.—*FINNEY v. BIRKENHEAD CORPN.*, [1936] 2 All E. R. 590; 80 Sol. Jo. 655.

# PART XIII. SECT. 2. SUB-SECT. 2.

sa. *Purchase for widening & improvement.—What is due compensation.*—*Re MACDONALD & TORONTO CORPN.* (1912), 27 O. L. R. 179; 4 O. W. N. 54; 8 D. L. R. 303.—*CAN.*

sb. — *Power to acquire land beyond quantity actually required.*—*Held*: under Municipal Corpn. Act, 1920, s. 192, a municipal corpn. is empowered when widening a street, to acquire not only what land is required for that purpose, but also to acquire, if the corpn. deems it expedient, land

additional thereto on either or both sides of the street in question, provided land is required for the purpose of widening the street & that the land proposed to be taken, is on either or both sides of the street & whether or not the land is owned in part by one owner & in part by another.—*WELINGTON CORPN. v. DEALY*, [1929] N. Z. L. R. 352.—*N.Z.*

# PART XIII. SECT. 2. SUB-SECT. 3

o i. —[—]—*SOUTH GRIMSBY TOWNSHIP v. COUNTY OF LINCOLN & NORTH*

*GRIMSBY TOWNSHIP, COUNTY OF LINCOLN v. SOUTH GRIMSBY TOWNSHIP* (1921), 19 O. W. N. 576; 58 D. L. R. 599.—*CAN.*

sd. *Meaning of "forming" & "making" street.*—To "form" a street is to alter its natural surface so as to provide the desired shape or contour. To "make" a street involves adding where necessary an artificial surface to the natural or formed surface of the street.—*Rowe v. District Council of Prospect* (1929), S. A. S. R. 462.—*AUS.*

**2280. Add. Annotation:—***Refd.* Cardiff Corpn. v. Cardiff Pure Ice & Cold Storage Co. (1930), 95 J. P. 11.

**2282a. — Two streets repaired at same time.]—**A local authority which has executed repairs to streets under Public Health Acts Amendment Act, 1907 (c. 53), s. 19, is not entitled to include two streets in the same account & apportion the combined expenses among the frontagers of both streets. Nor have the justices, before whom the local authority seek to recover such expenses, any jurisdiction to investigate the accounts & separate the expenses of the two streets for the purpose of making a proper apportionment.—*NASH v. GILES* (1926), 96 L. J. K. B. 216; 136 L. T. 352; 91 J. P. 19; 43 T. L. R. 121; 25 L. G. R. 66, D. C.

**2285a. Effect of agreement between frontagers—**Frontager not to be liable for maintenance of road until taken to by local authority—Frontager not entitled to repayment of apportioned share of cost of making up road.]—*MOORE v. TODD* (1903), 68 J. P. 43; 19 T. L. R. 642; 2 L. G. R. 376, C. A.

**2316. Add. Annotations:—***Consd.* West Ham Corpn. v. Benabo (Charles) & Son, [1934] 2 K. B. 253. *Refd.* Dennerley v. Prestwich U. D. C. (1929), 141 L. T. 602.

**2318. Add. Annotations:—***Consd.* Dennerley v. Prestwich U. D. C. (1929), 141 L. T. 602. *Refd.* R. v. North Worcestershire Assessment Committee, *Ex p.* Hadley, [1929] 2 K. B. 397; London County Council v. Harling Street Owners, [1935] 2 K. B. 322.

**2319. Add. Annotation:—***Consd.* Croydon Corpn. Oldaker, [1937] 1 K. B. 337.

**2322. Add. Annotation:—***Refd.* Croydon Corpn. v. Oldaker, [1937] 1 K. B. 337.

**2322a. — Under local Act.]—**By the C. Corpn. Act, 1884, s. 39, it is provided that whenever the corpn. put in force the provisions of the Public Health Act, 1875 (c. 55), s. 150, "they may before themselves executing any works as therein provided recover in a summary manner the amount of the estimated cost thereof from the owners in default." On June 27, 1935, the local authority served a notice, under Public Health Act, 1875 (c. 55), s. 150, upon resp., the owner of premises fronting on a certain road, requiring him to do certain street works. On June 28, 1935, resp. conveyed the premises to a third person. On Oct. 4, 1935, the local authority served a notice upon resp., under C. Corpn. Act, 1884, s. 39, demanding payment of certain sums in respect of the estimated cost of the works, which works had not then been

executed. Resp. refused to pay any part of the amount claimed & the local authority thereupon on Dec. 20, 1935, lodged a complaint claiming payment. The magistrates were of opinion that there could be no default until the expiration of the time given in the notice to repair, & that as at the expiration of that time resp. was no longer the owner of the premises, resp. was not the "owner in default" within C. Corpn. Act, 1884, s. 39, & they held that he was not liable to pay the amount claimed. The local authority appealed:—*Held*: "owner" in the C. Corpn. Act, 1884, s. 39, referred to the owner at the time of the service of the notice to execute the street works, & if such owner failed to execute the works, he became & remained for the purposes of that sect. the "owner in default," notwithstanding a conveyance of the property to a third person. Resp. was therefore liable to pay the amount claimed by the local authority.—*CROYDON CORPN. v. OLDAKER*, [1937] 1 K. B. 337; [1936] 3 All E. R. 369; 106 L. J. K. B. 190; 155 L. T. 557; 100 J. P. 519; 53 T. L. R. 79; 80 Sol. Jo. 954; 34 L. G. R. 574.

**2326. Add. Annotation:—***Refd.* I. R. Comrs. v. Sneath (1932), 48 T. L. R. 241.

**2340. Add. Annotation:—***Refd.* Crediton Gas Co. v. Crediton U. C., [1928] Ch. 447.

**2344. Add. Annotation:—***Expld.* Allen v. Waters & Co., [1935] 1 K. B. 200.

**2351. After this case add the following new subsection:—**

#### vi. Other Cases.

**2351a. Action to recover expenses—Form of writ—Names & addresses of owners not known.]—**Pltfs., being entitled under Public Health Acts to recover the expenses of making up a road from the owners of the lands abutting on the roadway & being unable to discover who some of those owners were, issued a writ against A., a known owner of some of the land, "& the owners of certain lands adjoining" the road "more particularly described in the indorsement" on the writ, "whose names & addresses are not known to pltfs." Upon the summons for directions pltfs. desired to amend the writ by adding after the word "owners" the words "at the time of the completion of the works referred to in the indorsement hereon," & they also asked for leave to effect substituted service on defts. so described by affixing copies of the writ on the respective premises:—*Held*: the writ, in not giving the names & addresses of defts. other than A., did not comply with the form of writ which had the

#### PART XIII. SECT. 2, SUB-SECT. 4.— A. (1) iii.

**2314 i. Finality of award.]—**Where certain works in a private street had been carried out by an urban district council & the total expenses as certified to by the surveyor had been apportioned according to their respective linear frontages on the owners of premises fronting both sides of the street. Resp. objected to the apportionment on the ground that the works included a footpath on one side only of the street & opposite to resp.'s premises. The arbitrator in his award varied the surveyor's apportionment by abating the amount payable by resp. by the sum attributable to his con-

tribution to the cost of the footpath:—*Held*: the umpire had no authority to go behind the certificate of the amount expended or to inquire into the reasonableness of the amount apportioned or to apportion it on the basis of the proportionate benefit derived from the works by each owner. Equitable relief might, however, have been obtained by petition in due form to the Local Government Board.—*BANGOR U. D. C. v. MCKEE* (1914), 48 L. T. 92.—*IR.*

#### PART XIII. SECT. 2, SUB-SECT. 4.— A. (2) ii.

**so. Owner at time of commencement of action.]—**A municipal council did

certain paving, kerbing, & guttering work in a public road. At that time defts. were the joint owners of land on the same side of the road & adjacent to the work done. Before any steps were taken to recover any part of the cost defts. parted with the ownership of the land. Thereafter the council brought an action against them to recover half the cost of the work:—*Held*: the words "the owner for the time being" in Local Government Act, 1919, s. 243, meant the owner at the time of the commencement of the action, & therefore that defts. were not liable.—*ULMARRA MUNICIPAL COUNCIL v. NOTARAS* (1929), 29 S. R. N. S. W. 501; 46 N. S. W. W. N. 179; 9 L. G. R. 80.—*AUS.*



basis of statutory authority & was prescribed by R. S. C., Ord. 2, r. 3, & Appendix A, Part 1; the writ, whether as originally issued or as proposed to be amended, was bad as against the persons so sought to be made defts., & the words following A.'s name must be struck out.—*FRIERN BARNET URBAN COUNCIL v. ADAMS*, [1927] 2 Ch. 25; 1 L. J. Ch. 145; 136 L. T. 649; 91 J. P. 60; 25 L. G. R. 75, C. A.

2353. *Add. Annotations*:—*As to* (1) *Refd. Sunderland Corp. v. Priestman*, [1927] 2 Ch. 107. *As to* (2) *Consd. Payne v. Cardiff R. D. C.* (1931), 47 T. L. R. 532.

2357. *Add. Annotations*:—*Appld. Bristol Corp. v. Virgin*, [1928] 2 K. B. 622. *Refd. Paddington B. C. v. Finucane*, [1928] Ch. 567.

2360. *Add. Annotation*:—*Distd. Dennerley v. Prestwich U. D. C.* (1929), 141 L. T. 602.

2364. *Add. Annotations*:—*Appld. Paddington B. C. v. Finucane*, [1928] Ch. 567. *Refd. Bristol Corp. v. Virgin*, [1928] 2 K. B. 622.

2366. *Add. Annotation*:—*Refd. Friern Barnet U. C. v. Adams*, [1927] 2 Ch. 25.

2367a. ——— *Form of writ.*—*FRIERN BARNET URBAN COUNCIL v. ADAMS*, No. 2351a, *ante*.

2367b. ——— *Before expiry of time for summary proceedings.*—The two remedies conferred by Public Health Act, 1875 (c. 55), s. 257, are concurrent, & a local authority need not wait till the six months, during which the summary remedy is available, have expired before commencing proceedings to enforce the charge created by the sect.—*SUNDERLAND CORPN. v. PRIESTMAN*, [1927] 2 Ch. 107; 96 L. J. Ch. 441; 137 L. T. 638; 26 L. G. R. 64.

2367c. ——— *Form of order.*—*BROMLEY RURAL DISTRICT COUNCIL v. BROOKER, ORPINGTON URBAN DISTRICT COUNCIL v. BROOKER*, [1934] W. N. 237.

2386a. ——— *Outside area of authority—Validity of order.*—Deft. co. made an application to the local authority under Private Street Works Act, 1892 (c. 57), stating that it had made up a street to the satisfaction of the surveyor & asking that this street should be taken over by the authority as a street repairable by the inhabitants at large. The local authority thereupon made the order asked. The street was described both in the application & in the order as: 1–15 inclusive, Front Newbottle Row. It was proved in evidence that the street in question so far as Nos. 1–5 abutted upon it was not within the area of the local authority:—*Held*: as part of the street was outside the area of the local authority & the order referred to the whole street, the order was *ultra vires* & invalid. It was impossible to sever the application & the order & treat the order as valid so far as the street was within the area of the local authority.—*NEWTON v. LAMBTON HETTON & JOICEY COLLIERIES, LTD.*, [1937] 2 All E. R. 150; 35 L. G. R. 607, C. A.

2396. *Add. Annotation*:—*As to* (2) *Appld. Hornchurch Urban District Council v. Webber*, [1938] 1 K. B. 698.

2401a. ——— *Used for deposit of ashes.*—By Carlisle Corp. Act, 1887, s. 192, it was provided that "No ry. co. shall be deemed to be an owner or occupier in respect of any land of such co. upon which any street shall wholly

or partially front or abut & which shall be used by such co. solely as part of their line of railway or sidings & shall have no direct communication with such street & the expenses incurred by the corpn. under the powers of the Public Health Acts . . . shall be paid by the other owners having frontages abutting on such street . . .":—*Held*: land used by a ry. co. for the purpose of depositing ashes thereon did not fall within the exemption contained in that sect.

I am of opinion Mr. Macmorran's argument cannot prevail. Indeed, had it been addressed to me upon sect. 22 of the Private Street Works Act, 1892, I should have doubted much whether this land had been used by the ry. co. solely for the purposes of their line of railway, sidings, station or works (PHILLMORE, J.).—*Re CARLISLE CORPN. & SAUL'S EXORS.* (1907), 71 J. P. 502; 5 L. G. R. 1128; *sub nom. CARLISLE CORPN. v. SAUL* (S. G.) EXORS., 97 L. T. 514.

2405a. *Burial ground "attached" to place of worship.*—The exemption from liability for the expenses of private street works given by Private Street Works Act, 1892 (c. 57), s. 16, to a burial ground "attached" to a "place appropriated to public religious worship, which is for the time being by law exempt from rates for the relief of the poor," extends only to a burial ground in physical attachment or contiguity to the building, & does not include a burial ground at a distance, "attached" to the place of worship in the functional sense that it is owned & maintained by the congregation of the place of worship for their members.—*HOLY LAW SOUTH BROUGHTON BURIAL BOARD v. FAILSWORTH URBAN DISTRICT COUNCIL*, [1928] 1 K. B. 231; 96 L. J. K. B. 713; 137 L. T. 483; 91 J. P. 104; 43 T. L. R. 519; 25 L. G. R. 324, D. C.

2405b. *Vacant land adjoining chapel.*—An objection was made by the trustees of a chapel to the inclusion in a provisional apportionment under Private Street Works Act, 1892 (c. 57), of certain vacant land adjoining the chapel, on the ground that the land was exempt from expenses under sect. 16 of that Act & Poor Rate Exemption Act, 1833 (c. 30), s. 1. The trustees were owners of the land, & at the time of the provisional apportionment it was their intention to erect a Sunday school thereon communicating by a corridor with the chapel:—*Held*: the land was not exempt from expenses as a "place" or "premises" exclusively appropriated to religious worship within the above Acts, as the words "place" & "premises" refer to buildings only, & cannot include a piece of vacant land; & there was no evidence on which it could be held that the land was within the curtilage of or formed part of the site of the chapel.—*ILFORD CORPN. v. MALINSON* (1932), 147 L. T. 37; 96 J. P. 185; 48 T. L. R. 358; 30 L. G. R. 201.

2409. *Add. Annotation*:—*Refd. Faulkner v. Hythe Corp.* (1926), 43 T. L. R. 55.

2413a. ——— *Premises not adjoining—Discretion of local authority.*—An urban authority, acting under sects. 6 & 10 of the Private Street Works Act, 1892 (c. 57), resolved that the expenses of certain works which were to be carried out should "be apportioned on the premises fronting, adjoining, or abutting

on such street . . . regard being had to the greater or less degree of benefit to be derived by any premises from such works." The authority did not resolve, under the last part of sect. 10, to include any premises which did not front, adjoin, or abut on the street. Objections having been taken under sect. 7 of the Act to the proposals of the authority by certain owners of premises affected thereby, the justices who heard the objections under sect. 8 of the Act directed that certain premises which did not front, adjoin, or abut on the street should be included in the provisional apportionment:—*Held*: the statute empowered the urban authority alone, as a matter of discretion & policy, to decide whether or not premises which did not front, adjoin, or abut on the street should be included in the apportionment, & the justices, in the absence of a resolution by the authority that such premises should be included, had no jurisdiction on the hearing of objections to the apportionment to amend the apportionment by directing that they should be included.—*HORNCHURCH URBAN DISTRICT COUNCIL v. WEBBER*, [1938] 1 K. B. 698; [1938] 1 All E. R. 309; 107 L. J. K. B. 438; 158 L. T. 258; 102 J. P. 167; 54 T. L. R. 358; 82 Sol. Jo. 157; 36 L. G. R. 262, D. C.

**2419.** *Add. Annotation*:—*Refd.* *I. R. Comrs. v. Sneath* (1932), 43 T. L. R. 241.

**2423a.** —.—.]—*CHATHAM CORPN. v. WRIGHT*, No. 2447a, *post*.

**2425a.** *Method of apportionment.*]—A local authority resolved to make up a street under Private Street Works Act, 1892, & that in making the apportionment of expenses regard should be had to the greater or less degree of benefit to be derived by the premises fronting, adjoining, or abutting on the street. They passed no resolution either under Public Health Act, 1925 (c. 71), s. 35 for varying the relative widths of the carriage-way & footways of the street—namely, a 24 ft. carriageway with two 8 ft. footways, nor under Private Street Works Act, 1892 (c. 57), s. 15, to contribute any part of the expenses. The road was one which was used both by local & through traffic. The justices having dismissed objections by certain frontagers, they appealed to quarter sessions, & the appeal committee, being of opinion that a 20 ft. carriageway would suffice for the needs of the local traffic, quashed the resolution & apportionment on the ground that it was unreasonable to cast on the frontagers the greater burden rendered necessary for the through traffic from which they derived no benefit:—*Held*: the burden is cast on the frontagers by statute, & the discretionary power to vary the normal rule of apportionment according to frontage is given to the local authority, & not to the justices, who are confined to considering the reasonableness of the amount of the burden, not of its incidence.—*ALLEN v. HORNCHURCH URBAN DISTRICT COUNCIL*, [1938] 2 K. B. 654; 107 L. J. K. B. 741; 159 L. T. 473; 102 J. P. 393; 54 T. L. R. 1063; 82 Sol. Jo. 729; 36 L. G. R. 441; *sub nom.* *HORNCHURCH URBAN DISTRICT COUNCIL v. ALLEN*, [1938] 2 All E. R. 431, D. C.

**2428.** *Add. Annotation*:—*Appl.* *Hornchurch Urban District Council v. Webber*, [1938] 1 K. B. 698.

**2430a.** —.—.]—*CHATHAM CORPN. v. WRIGHT*, No. 2447a, *post*.

**2430b.** —.— *After completion of works.*]—When an objection is lodged to proposed works under Private Street Works Act, 1892 (c. 57), s. 7, the local authority must apply under sect. 8 to the justices to determine the objection before the works are executed. After the works are completed, the justices have no jurisdiction to determine an objection under sect. 7.—*FAULKNER v. HYTHE CORPN.*, [1927] 1 K. B. 532; 96 L. J. K. B. 107; 136 L. T. 329; 91 J. P. 22; 43 T. L. R. 55; 71 Sol. Jo. 20; 25 L. G. R. 60, D. C.

*Annotation*:—*Refd.* *Stockwell v. Southgate Corpn.*, [1936] 2 All E. R. 1343.

**2432.** *Add. Annotation*:—*Refd.* *Faulkner v. Hythe Corpn.* (1926), 43 T. L. R. 55.

**2433.** *Add. Annotations*:—*Refd.* *Stockwell v. Southgate Corpn.*, [1936] 2 All E. R. 1343; *Hornchurch Urban District Council v. Webber*, [1938] 1 K. B. 698.

**2436.** *Add. Annotation*:—*Refd.* *Dennerley v. Prestwich U. D. C.* (1929), 141 L. T. 602.

**2439a.** —.— *Sale by owner—Necessity for demand on purchaser—Limitation of action.*]—Defts. being a local authority having duly made a final apportionment under Private Street Works Act, 1892 (c. 57), s. 12, of the expenses of certain private street works, demanded in 1910 the amount thus apportioned from an owner of land abutting on the street thus made up. In 1927 the latter sold the land in question to pltf. without having satisfied defts.' demand, & pltf. then proceeded to erect houses on the land in respect of which he became entitled to a subsidy. Defts. thereupon claimed to set off against the subsidy the amount of their claim against the owners for the time being of the land in respect of the apportioned expenses, together with interest thereon:—*Held*: (1) although defts. might have lost their right to sue the original owner for the expenses they were not prevented from suing pltf. as a subsequent owner for the time being. A demand on such owner was necessary to complete the cause of action for such expenses & Stat. Limitations did not begin to run until such demand had been made; (2) on the footing that Real Property Limitation Act, 1874 (c. 57), s. 8, was applicable, that sect. did not apply to defeat a claim against pltf., the owner for the time being, because defts. had no present right to receive the sum set off from pltf. until he became owner & twelve years from that date had not elapsed.—*DENNERLEY v. PRESTWICH URBAN DISTRICT COUNCIL*, [1930] 1 K. B. 334; 99 L. J. K. B. 25; 141 L. T. 602; 94 J. P. 34; 45 T. L. R. 659; 73 Sol. Jo. 530; 27 L. G. R. 618, C. A.

**2440a.** —.— *On default of instalment.*]—A local authority had carried out certain street improvements, & premises had, under Private Street Works Act, 1892 (c. 57), s. 13 (1), become charged with the sum apportioned to them in respect of the improvements, that sum being ordered to be paid by instalments:—*Held*: the local authority, under the powers conferred by Private Street Works Act, 1892 (c. 57), s. 13 (1), & Law of Property Act, 1925 (c. 20), s. 101, had power to sell the premises, not merely when the whole of the apportioned sum was due, but also when an

instalment was in default.—*PAYNE v. CARDIFF RURAL DISTRICT COUNCIL*, [1932] 1 K. B. 241; 100 L. J. K. B. 626; 145 L. T. 575; 95 J. P. 173; 47 T. L. R. 532; 29 L. G. R. 507.

2443. *Add. Annotation*:—*Refd. Faulkner v. Hythe Corpn.* (1926), 43 T. L. R. 55.

2446. *Add. Annotation*:—*Refd. Stockwell v. Southgate Corpn.*, [1936] 2 All E. R. 1343.

2447. *Add. Annotations*:—*Folld. Chatham Corpn. v. Wright* (1929), 142 L. T. 431. *Refd. Hornchurch Urban District Council v. Webber*, [1938] 1 K. B. 698; *Hornchurch Urban District Council v. Allen*, [1938] 2 All E. R. 431.

2447a. —.]—An urban sanitary authority, acting under the Private Street Works Act, 1892 (c. 57), resolved to execute certain private street works in a street in their district, & to contribute a certain portion of the expenses thereof, & that in settling the apportionment of the balance of the expenses thereof, regard should be had to the greater or less degree of benefit to be derived from the works, by the premises of the frontagers, & they approved provisional apportionments on the frontagers which were duly served & deposited in accordance with the provisions of the Act. Two of the frontagers objected to the provisional apportionments on their premises, before justices, who expressed the opinion that the proposed works were not unnecessary; that the estimated expenses were not excessive; that the premises of the objectors should not be excluded from the apportionment; but they stated that they considered the proposed works were unreasonable in that it was not reasonable that the objectors should bear the whole of the amounts shown in their provisional apportionments. Accordingly they approved the plans, sections, specifications, & estimates of the urban sanitary authority, but quashed in part the apportionments on the objectors' premises, by reducing each of these two apportionments by £100. They confirmed the apportionments on the other frontagers:—*Held*: the justices had sought to compel the urban sanitary authority to increase their contribution at the risk alternatively of sacrificing the scheme as a whole. It was not within the province of the justices, directly or indirectly, to compel the urban sanitary authority to make a larger contribution than that which they had already agreed to grant.

Upon the further consideration of the case, the justices must adopt one of three courses: increase the apportionments on the other frontagers to satisfy the balance of £200; quash the whole of the apportionment; or adjourn the matter, giving the urban sanitary authority the opportunity of considering whether they would pass a new resolution increasing their contribution by the £200 (*per CUR.*).—*CHATHAM CORPN. v. WRIGHT* (1929), 142 L. T. 431; 94 J. P. 43; 28 L. G. R. 4, D. C.

2449a. Time fixed by order—Reasonable time—What must be considered.]—Under sects. 33, 34 of Cardiff Corpn. Act, 1884, the corpn. made an order that a street, not being a

highway repairable by the inhabitants at large, should be paved, kerbed, etc., within two months. The estimate & plan deposited in accordance with sect. 33 of the Act showed that under part of the street a sewer was to be laid by the corpn. while the work was being done, & the order showed that some of the frontagers were required to connect the works which they were required to do with the new sewer. Certain frontagers did not comply with the order, & the work was done by the corpn., & after service of notice of apportionment of the expense of the work & demand for payment, the corpn. applied to the ct. by originating summons, for a declaration that the proper proportion of the costs of the work, with interest to date of payment, was a charge upon the premises of those frontagers, in accordance with sect. 54 of the Act:—*Held*: the time fixed by the order was not, in the circumstances, unreasonable; nor was there any evidence to establish that if the frontagers had done the work themselves the corpn. would have hampered them by laying the sewer simultaneously with their work. The frontagers were entitled to comply with the order & to restrain any interference with them in doing so, but not having so complied, they were liable for the expense of the work being done for them & the corpn. were entitled to the relief claimed.—*CARDIFF CORPN. v. CARDIFF PURE ICE & COLD STORAGE CO., LTD.* (1930), 95 J. P. 11; 29 L. G. R. 29, C. A.

2452. *Add. Annotation*:—*As to (2) Refd. Allen v. Waters & Co.*, [1935] 1 K. B. 200.

2466a. — Powers of magistrate.]—B. Corpn. proposed to execute certain private street works under Birmingham Corpn. (Consolidation) Act, 1883, ss. 46–50, which were substantially identical with Private Street Works Act, 1892 (c. 57). The corpn. duly complied with the formalities required & made a provisional apportionment on resps., the frontagers on the street, according to their respective frontages. Resps. objected that the works were unnecessary. On the hearing of this objection resps. called no evidence. The stipendiary magistrate held that some works were necessary, but was of opinion that the estimated expenses were too heavy. He reduced the estimate & ordered that one resp. should pay one-half & each other resp. two-thirds of the respective sums named in the provisional apportionment:—*Held*: inasmuch as the corpn. had not resolved that the apportionment should be on any basis other than frontage, the stipendiary magistrate could not direct an apportionment on any other basis. Subject to that limitation, he must consider & determine, upon evidence, whether the proposed works were in any, & what, respect unnecessary, & must have regard to any alternative proposals, if resps. made any & supported them by evidence, & to the cost thereof.—*BIRMINGHAM CORPN. v. MOTHER-GENERAL OF CONVENT OF SISTERS OF CHARITY OF ST. PAUL* (1927), 91 J. P. 186; 44 T. L. R. 31; 25 L. G. R. 517, D. C.

*Annotation*:—*Refd. Hornchurch Urban District Council v. Webber*, [1938] 1 K. B. 698.

PART XIII. SECT. 2, SUB-SECT. 4.—C. (a) ii.

2451 i. *Validity of notice—Works specified in excess of those provided for in bye-law.*—*SKREMILKA v. WINNIPEG CITY*, [1935] 2 W. W. R. 455; 43 Man. L. R. 154.—CAN.

**2470a.** — **Not mortgagee of pews & vaults in & under church.**—*CHORLTON UPON MEDLOCK (CONSTABLES & BURGESS) v. WALKER* (1842), 10 M. & W. 742; 12 L. J. Ex. 88; 7 J. P. 162; 152 E. R. 671.

**2471a.** — **Insufficient particulars.**—The Birkenhead Improvement Act, 1884, by sect. 25 provides that: "In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting adjoining or abutting on the street or part in respect of which the expenses are to be incurred shall be apportioned according to the frontage of the respective premises: Provided that the surveyor may settle the apportionment as having regard to all the circumstances of the case & not merely to frontage he may deem most just." By Part I. of the Second Sched. to the Act (which is identical with the Sched. to Private Street Works Act, 1892 (c. 57)), it is provided that provisional apportionments "shall state the amounts charged on the respective premises & the names of the respective owners or reputed owners & shall also state whether the apportionment is made according to the frontage of the respective premises or not & the measurements of the frontages, & the other considerations (if any) on which the apportionment is based."

The Birkenhead Corpn., having resolved to execute certain private street works, approved a "provisional apportionment" of the expenses of the said works between the respective frontagers. The document was expressed to be made "pursuant to the provisions of the Birkenhead Improvement Act, 1884, & principally according to the frontage of the respective premises, & having regard to all the circumstances of the case & the amount & value of the work already executed by or on behalf of certain frontagers." The provisional apportionment was subdivided into different columns showing the names of the respective owners, particulars of the respective properties charged, & the measurements of the front-

ages respectively, & also showing the estimated cost, attributable to each owner, of the work to be executed, under a number of headings. The basis of division was different in different columns, & in some columns the frontagers had been charged on different footings, but the apportionment contained no statement or explanation as to how the various factors, stated in the heading of the apportionment as the considerations on which the apportionment was based, had been applied in the division of the estimated cost of the work between the various owners. On appeal by one of the frontagers from a decision of the justices, overruling a preliminary objection that the provisional apportionment did not comply, for lack of particularity, with the requirements of the local Act:—*Held*: the Act required particularity, for the information both of the respective frontagers & of the corp., & if no uniform scale was applied, it ought clearly to be shown where the deviation took place; the provisional apportionment failed to give the complete & specific disclosure required by the Sched. & the appeal must be allowed & the case sent back to the justices.—*SMITH v. BIRKENHEAD CORPN.*, [1938] 1 K. B. 288; [1937] 4 All E. R. 75; 107 L. J. K. B. 133; 158 L. T. 66; 102 J. P. 1; 54 T. L. R. 24; 81 Sol. Jo. 863; 35 L. G. R. 575.

**2508a.** — **—**—[One of the bye-laws of deft. Board provided that 15 square feet air space should be left open in the rear of any new building. It was held that where a person built in contravention of that bye-law within the 15 square feet the Board might pull down the offending building consistently with safety in any way they pleased, but not in a dangerous way; so that where there had been excess in pulling down the building they were not liable unless the damage done was appreciable.—*JAGGER v. DONCASTER UNION RURAL SANITARY AUTHORITY* (1890), 54 J. P. 438.

**2508b.** — **—**—[Appl. was the owner of certain old premises from which he removed the roof & commenced to erect on the walls

700; 101 L. J. P. C. 172; 147 L. T. 517, P. C.—*CAN.*

#### PART XIII. SECT. 2, SUB-SECT. 6.—B.

**sh.** *Bye-law authorising opening of street—Before land acquired.*—A bye-law passed by the council of a town authorising the opening & improving of a street shown upon a registered plan, as a local improvement under Local Improvement Act, R. S. O. 1927, c. 235, was held not to be invalid or illegal because the land for the street had not been acquired by the corp. before the bye-law was passed.—*RE CHAPPUIS & LA SALLE TOWN*, [1928] 2 D. L. R. 950; 62 O. L. R. 140.—*CAN.*

**sk.** *Bye-law providing for construction of sidewalks—Street not opened—Ultra vires.*—*RE CHAPPUIS & LA SALLE TOWN*, [1928] 2 D. L. R. 950; 62 O. L. R. 140.—*CAN.*

**sl.** *Width of entrance to new street—Existing entrance a narrow road—Over land of third party.*—*ROSE v. SYDENHAM LOCAL ADMINISTRATION & HEALTH BOARD* (1928), 49 N. L. R. 203.—*S. AF.*

**sm.** *Bye-law closing part of road allowance—No alternative way of access to private land—Invalid.*—*GILMORE v. WESTMINSTER*, [1929] 4 D. L. R. 1; 64 O. L. R. 344.—*CAN.*

#### PART XIII. SECT. 2, SUB-SECT. 6.—A.

**sd.** *Single scheme for several streets communicating with one another—Right of authority to recover cost from owners.*—A municipal council in proceeding under Local Govt. Act, 1925, ss. 526, 527, may properly adopt a specification, estimate & scheme of distribution of the cost of forming, levelling, etc., several streets communicating with one another & enforce payment of a proportionate part of the cost of the whole scheme against the owner of premises adjoining or abutting on one or more only of such streets.—*MACGOWAN v. ST. KILDA CITY*, [1928] V. L. R. 462; [1928] Argus L. R. 254.—*AUS.*

**se.** *"Opening or establishing new street"—What amounts to.*—*Re Toronto & Saunders*, [1931] 2 D. L. R. 840; O. R. 116.—*CAN.*

**sf.** *Notice to property owners—Defective notice—For less than prescribed period.*—*SANDRINGHAM CITY CORPN. v. RAYMENT* (1928), 40 C. L. R. 510; [1928] V. L. R. 312; [1928] Argus L. R. 173.—*AUS.*

**sg.** — *Necessity for—Before works entered upon.*—*DUNN v. BRAYBROOK SHIRE*, [1928] V. L. R. 454; [1928] Argus L. R. 286.—*AUS.*

**sh.** *Statutory liability of City—Non-fulfilment—Validity of subsequent statute*

*imposing liability on frontagers.*—By a Quebec statute of 1910 the City of Montreal within six months was to macadamise certain streets, including S. Street, in a township thereby annexed to the City, but later statutes postponed until May, 1925, the date for completing the work. In 1910 the City had no power to charge the cost of paving streets against the frontagers, but statutes of 1911 & 1914 gave the City that power in the case of permanent paving. In July, 1925, the City passed a resolution that S. Street, which had not been macadamised, should be permanently paved & that the frontagers thereon should be taxed in respect of the cost. Accordingly, S. Street was permanently paved with asphalt. In 1928 resps., as frontagers, were assessed to tax under a statute of that year, which provided that the cost of all pavings laid since Jan. 1, 1910, should be charged to the frontagers at a specified rate. All the statutes above mentioned were enacted as amendments of the City's statutory charter of 1899.—*Held*: having regard to the specific terms of the statute of 1928 it applied to S. Street, notwithstanding the unfulfilled obligations of the City under the statute of 1910, & accordingly the assessment was valid.—*MONTREAL (CITY) v. MONTREAL INDUSTRIAL LAND CO., LTD.*, [1932] A. C.

thereof, & on the ground surrounding it, a new building without giving any notice to the local surveyor or delivering plans. The building was completed in Apr. 1901, & in Nov. 1901, applt. was summoned to show cause why the said building should not be pulled down, & on Nov. 4, 1901, resps. made an order requiring him to pull down the building:—*Held*: the order was rightly made though, no plans having been deposited, there had been no disapproval by the local authority, & though six months had elapsed from its completion.—*FAIRBRASS v. CANTERBURY CORPN.* (1902), 67 J. P. 181; 1 L. G. 181.

2523. *Add. Annotations*:—*As to* (1) *Consd.* Salisbury & Fordingbridge District Drainage Board *v.* Southern Tanning Co. (1920), Ltd., [1927] 2 K. B. 566. *As to* (2) *Consd.* A.-G. *v.* Sharp (1930), 99 L. J. Ch. 441. *Refd.* Musical Performers' Protection Assocn., Ltd. *v.* British International Pictures, Ltd. (1930), 46 T. L. R. 485. *Generally*, *Refd.* A.-G. *v.* Premier Line, Ltd., [1932] 1 Ch. 303.

2534. *Add. Annotations*:—*Consd.* A.-G. *v.* Sharp (1930), 99 L. J. Ch. 441. *Refd.* Musical Performers' Protection Assocn., Ltd. *v.* British International Pictures, Ltd. (1930), 46 T. L. R. 485.

2572. *Add. Annotation*:—*Refd.* A.-G. *v.* Sharp (1930), 143 L. T. 367.

2575. *Add. Annotation*:—*Consd.* A.-G. *v.* Sharp (1930), 99 L. J. Ch. 441.

2580. *Add. Annotation*:—*Consd.* A.-G. *v.* Prices' Tailors (1928), Ltd., [1930] 2 Ch. 316.

2580a. — *Conversion of two shops into one.*—Defts., who had purchased two houses with the shops on the ground floors projecting towards the street on which the premises fronted a few feet beyond the exterior walls of the two upper floors, submitted to the local authority plans of some proposed alterations. These consisted in the main in the conversion of the two shops into one continuous shop with a single entrance from the street in a new position. The local authority took the view that the proposed alterations amounted to taking down the front of the premises for the purpose of rebuilding, so as to entitle them to prescribe a new building line under the Public Health Act, 1875 (c. 55), s. 155. They therefore refused to approve the plans & called on defts. to set the ground floor front back to the existing exterior walls of the floors above. Defts. having refused to comply, this action was brought on the relation of the local authority & pltf. moved for a declaration that defts. were not entitled to build beyond the prescribed line & for an order on them to remove so much of the new front of the shop as projected beyond that line:—*Held*: the local authority had no power to prescribe a new building line under sect. 155, because (1) on the true construction of the sect. "the front" included the exterior walls of the two upper floors as well as the exterior wall of

the ground floor, & (2) in any case the alterations made to the premises did not amount to taking down the front of the ground floor.—A.-G. *v.* PRICES' TAILORS (1928), LTD., [1930] 2 Ch. 316; 99 L. J. Ch. 511; 143 L. T. 416; 94 J. P. 226; 29 L. G. R. 15, C. A.

2580b. "Front" of the premises—*What included.*—A.-G. *v.* PRICES' TAILORS (1928), LTD., No. 2580a, *ante*.

2584. *Add. Annotation*:—*Refd.* *Fredman v. Minister of Health* (1935), 154 L. T. 240.

2591a. *Meaning of "new building"—Reconstructed building not included.*—BALLARD *v.* HORTON'S ESTATE, LTD. (1926), 24 L. G. R. 499, D. C.

2592a. *Meaning of "erections" & "obstructions"—Includes petrol pumps.*—Clause 36 (a) of a town planning scheme, provided that "where a building line is shown upon the map (prepared for the scheme) in respect of any existing street or proposed new street no building or erection other than boundary walls & fences shall be erected or set up nearer to the street than such building line." Clause 40 (b) of the scheme provided that "no post, rail, fence, or other obstruction shall be erected in front of any shop or business premises in advance of the building lines fixed by clause 36, clause 37, clause 39 or this clause." Clause 70 of the scheme provides penalties for breach of these clauses. Applt., who was the proprietor of a motor garage, which was situated in an existing street for which a building line was shown on the map referred to in the scheme, erected two petrol pumps in a forecourt in front of his premises, which was nearer to the highway & abutted thereon & was in advance of the building line shown upon the map & between that building line & the front boundary of the premises:—*Held*: the pumps were "erections" within clause 36 (a) of the scheme & also "obstructions" within clause 40 (b), & applt. had been rightly convicted of offences under those clauses.—MACKENZIE *v.* ABBOTT (1926), 24 L. G. R. 444, D. C.

2592b. *Building already erected when building line prescribed—Right to compensation—In respect of restriction on future extensions.*—SURREY COUNTY COUNCIL *v.* CATERHAM ENTERTAINMENTS, LTD. (1930), 94 J. P. Jo. 189, D. C.

SUB-SECT. 8.—IMPROVEMENT LINE IN STREETS.  
For "Public Health Act, 1875," read "Public Health Act, 1925."

2592c. "New erection"—*What amounts to.*—*Held*: the object of Public Health Act, 1925 (c. 71), s. 33, is to facilitate the widening of streets by enabling local authorities to prescribe an improvement line to which buildings will eventually be set back, & it is contemplated that the authorities will for that purpose then exercise the power conferred on

PART XIII. SECT. 2, SUB-SECT. 6.—D.

b i. — *Lots bordering on navigable river.*—Land Registry Act, c. 23 of 1906, s. 68, dealing with the subdivision of land into town or other lots,

provides, *inter alia*, that, in case a lot borders on the shores of any navigable water, streets leading to & continuing to such water must be shown at a not greater distance apart than 600 feet:—*Held*: the object of the section was

to require land abutting on navigable waters to be subdivided so as to provide straight & continuous access to the water at intervals of not less than 600 feet.—*Re LONSDALE ESTATE* (1907), 12 B. C. R. 366.—CAN.

them by Public Health Act, 1875 (c. 55), s. 154, of purchasing premises. In order not to increase the burden of compensation which the exercise of that power involves, Public Health Act, 1925 (c. 71), s. 33 (5), enacts that no new erection can be placed on the street side of the improvement line. Resps.' shop had in 1908 been moved back, leaving a paved forecourt in front of the shop so moved back upon which they used to expose their goods. After an improvement line had been prescribed in 1927, resps. again enclosed the forecourt into the shop, bringing the shop front back to its old level, which was beyond

and on the street side of the improvement line:—*Held*: this was a "new . . . erection" within sect. 33 (5).—*SITTINGBOURNE URBAN DISTRICT COUNCIL v. LIPTON, LTD.*, [1931] 1 K. B. 539; 100 L. J. K. B. 109; 144 L. T. 241; 95 J. P. 18; 47 T. L. R. 120; 29 L. G. R. 83, D. C.

2592d. — *Increase of burden on local authority.*—*SITTINGBOURNE URBAN DISTRICT COUNCIL v. LIPTON, LTD.*, No. 2592c, *ante*.

2596. *Add. Annotation*:—*Generally, Refd.* *Salisbury & Fordingbridge District Drainage Board v. Southern Tanning Co. (1920), Ltd.*, [1927] 2 K. B. 566.

## Part XIV.—Footpaths.

2609. *Add. Annotation*:—*As to* (2) *Consd.* *Bryant v. Marx* (1932), 48 T. L. R. 624.

2619. *Add. Annotation*:—*Apld.* *A.-G. & Public Trustee v. Woolwich Metropolitan Borough Council* (1929), 93 J. P. 173.

2622. *Add. Annotation*:—*Refd.* *Seaton v. Slama* (1932), 77 Sol. Jo. 11.

2626. *Add. Annotation*:—*Apld.* *Polkinghorn v. Lambeth Borough Council*, [1938] 1 All E. R. 339.

## Part XV.—Bridges and Approaches thereto.

2630. *Add. Citation*:—95 L. J. Ch. 86.

2630a. *Covenant to erect & maintain.*—A strip of land running the length of the vendor's property was conveyed to purchasers for use in connection with a reservoir, with the result that the vendor's property was severed from the highway by a conduit. The purchasers accordingly covenanted in the conveyance that they would at their own expense erect & maintain across the conduit a bridge of not less than 30 ft. in width to connect the severed portion of the vendor's land with the highway. There was no means of access to the vendor's land except by means of this bridge. The vendor's successor in title, desiring to develop the land as a building estate, claimed to be entitled to use the bridge for the laying of pipes & cables for the supply of water, gas & electricity & other services:—*Held*: upon the true construction of the conveyance the vendor's successor in title was not entitled to place & maintain upon the bridge anything of a permanent nature which must necessarily be maintained, & he was not entitled to lay pipes or cables on the bridge for any purpose.—*METROPOLITAN WATER BOARD v. WATKINS*, [1937] 1 All E. R. 489; 81 Sol. Jo. 158.

2644a. *Agreement to maintain bridge over canal—Extent of duty—Tow-path raised to avoid flooding—Whether council bound to raise bridge.*—The construction of a canal involved the interception of a certain public road; &

the canal co., in accordance with its statutory obligations, carried the road over the canal by means of a bridge. The canal subsequently became vested in a railway co., who were required under sect. 17 of the Regulation of Railways Act, 1873 (c. 48), to keep the canal open & navigable. At a later date the railway co. entered into an agreement with the county council having jurisdiction in the locality under which the council agreed to remove the bridge & to construct a new bridge in substitution thereof; & the council covenanted that they would "from time to time & at all times thereafter well & sufficiently maintain & repair the new bridge & the roadway & footpaths upon the same & the approaches thereto." The agreement provided for a headway of six feet between the arch of the new bridge & the towing-path passing under it. The bridge & the neighbouring part of the canal for considerable distances on both sides of the bridge were in a mining area which had been subsiding for a long time prior to the agreement; & within sixteen years thereafter, owing to further subsidences, there was a general sinking of the bridge & the towing path. As, however, the water level remained the same, the railway co. found it necessary, in order to avoid flooding, to raise the towing path, the resulting effect being that the headway between the bridge & the towing path was reduced to four feet six inches, which was insufficient for the convenient working of the

### PART XV. SECT. 2, SUB-SECT. 1.—A. (a).

d i. — Upon an application to a county ct. judge for an order declaring a bridge about to be built across a stream to replace a bridge that had been carried away by a storm, to be a county bridge, the sole question was whether the bridge was or would be "of a greater length than 300 feet"

within sect. 458 of the Municipal Act. Before the approaches on the west side of the bridge were constructed, the waters sometimes crossed the highway considerably west of a point 300 feet west of the eastern bank, & an embankment that far west was rendered necessary on account of the waters overflowing the highway & being then constructed, became part

of the highway:—*Held*: the embankment was rendered necessary within the meaning of the Act & the bridge was therefore of greater length than 300 feet.—*Re PICKERING & ONTARIO*, [1930] 1 D. L. R. 820; 64 O. L. R. 611.—*CAN.*

d ii. — *Re SANDUSK CREEK BRIDGE (Ont.)*, [1926] 3 D. L. R. 353.—*CAN.*

canal:—*Held*: the covenant on the part of defts. to "maintain" the bridge did not impose upon them an obligation to raise the bridge so as to obtain the six feet of clearance for the use of the water way, even although pltf. had found it necessary to raise the towing path.—*GREAT WESTERN RY. v. MONMOUTHSHIRE COUNTY COUNCIL* (1929), 94 J. P. 6; 27 L. G. R. 569, C. A.

2650. *Add. Annotation*:—*Refd.* *A.-G. v. Hornsey B. C.* (1926), 43 T. L. R. 92.

2661. *Add. Annotation*:—*As to* (2) *Distd.* *Great Western Railway v. Monmouthshire County Council* (1929), 94 J. P. 6.

2705. *Add. Annotation*:—*Refd.* *Manchester Corp'n v. Audenshaw & Denton U. D. Councils* (1928), 139 L. T. 509.

2708a. *Dock swing bridge—Liability for maintenance.*—Pltf. was injured by tripping over a nail projecting from the footway of a swing bridge which defts., the Port of London Authority, were under a statutory duty to maintain in repair, & which the public had a right to use only when it was not required to be swung open for dock traffic. The cause of the accident was the failure of defts. to maintain the footway in good condition. In an action for damages:—*Held*: the swing bridge was not a highway & defts. were not in the position of a surveyor of highways, & therefore defts. could not avoid liability on the ground of nonfeasance or on the ground that a surveyor of highways is not liable to pay damages to persons injured by his neglect of duty, & pltf. was entitled to recover.—*GUILFOYLE v. PORT OF LONDON AUTHORITY*, [1932] 1 K. B. 336; 101 L. J. K. B. 91; 146 L. T. 91; 95 J. P. 217; 48 T. L. R. 55; 75 Sol. Jo. 763; 29 L. G. R. 659.

*Annotation*:—*Refd.* *Swain v. Southern Ry. Co.*, [1938] 3 All E. R. 705.

2712. *Add. Annotation*:—*Refd.* *Manchester Corp'n v. Audenshaw & Denton U. D. Councils* (1928), 139 L. T. 509.

2716. *Add. Annotations*:—*Apld.* *Manchester Corp'n v. Audenshaw U. C. & Denton U. C.*, [1928] Ch. 763. *Consd.* *London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E. R. 602. *Refd.* *Swain v. Southern Ry. Co.*, [1938] 3 All E. R. 705.

2717. *Add. Annotation*:—*Apld.* *Manchester Corp'n v. Audenshaw U. C. & Denton U. C.*, [1928] Ch. 763.

2719. *Add. Annotations*:—*Consd.* *London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E. R. 602. *Refd.* *Swain v. Southern Ry. Co.*, [1938] 3 All E. R. 705.

2719a. — *Damage by locomotive passing over bridge—Locomotive Act, 1861 (c. 70), s. 7.*—In respect of actual damage to a bridge, as distinguished from consequential loss, the liability to repair is imposed upon the owner of the locomotive if he has the charge of it at the material time, but if some person other

than the owner has the charge of it, the liability is upon that person. The above sect. does not make the owner & such other person jointly & severally liable for that damage.—*SOUTHERN RY. CO. v. GOSPORT CORPN.*, [1926] 2 K. B. 89; 95 L. J. K. B. 545; 90 J. P. 161; 70 Sol. Jo. 651; *varied*, [1927] 1 K. B. 331, C. A.

2719b. *Liability of railway company for non-feasance.*—Pltf., a steam-crane driver, in proceeding to his work on his bicycle, had to cross a bridge belonging to deft. co. The road over it, & the approach thereto, were alleged to be in a bad state of repair, there being several potholes & a rut, about 2 ft. from the near side, several inches deep in some places, extending a number of yards from the crown of the bridge down the incline, & said to have been caused in the course of time by rainwater. Pltf.'s machine got into the rut & he was thrown to the ground & suffered severe injuries to his head. It was found as a fact that the accident was caused by the want of repair of the road over the bridge. The claim was based on negligence, nuisance, & breach of the statutory duty of defts. to maintain the road on the bridge & the approach thereto. The bridge had been constructed by defts.' predecessors under the South Western Exeter Extension Act, 1856, incorporating the Railways Clauses Consolidation Act, 1845 (c. 20). It was contended on behalf of defts. (i) that defts. were in a position similar to that of a highway authority, & were not liable for non-feasance; (ii) that they were entitled to the benefit of Public Authorities Protection Act, 1893; (iii) that they were only liable, if at all, to maintain the road over the bridge for the purposes of the traffic using the road in the year in which it was constructed:—*Held*: (1) by the Railways Clauses Consolidation Act, 1845 (c. 20), s. 46, the co. were liable for non-feasance as well as misfeasance; (2) a railway co. is not a public authority within the meaning of that term as used in Public Authorities Protection Act, 1893 (c. 61), s. 1; (3) the road was in fact in a condition which would have been dangerous to traffic as it was at the date at which the bridge was constructed; but the duty of a railway co. under Railways Clauses Consolidation Act, 1845 (c. 20), s. 46, is to maintain the bridge & its approaches in the state they are when constructed in accordance with that sect., & that necessarily implies an absence of dangerous ruts.—*SWAIN v. SOUTHERN RY. CO.*, [1938] 3 All E. R. 705; 159 L. T. 462; 54 T. L. R. 1119; 82 Sol. Jo. 713; 36 L. G. R. 569.

2766a. *Liability of borough council—Bridge built since 1835—Public Health Act, 1875 (c. 55), s. 4.*—In 1882 seven streets were, in the course of the development of an estate, carried across a river on iron girder bridges. These streets subsequently became highways repairable by the inhabitants at large. An action was commenced by the A.-G. against

PART XV. SECT. 2, SUB-SECT. 1.—A. (b).

p. l. — — — — —. — *Re* *CALEDONIA & HALDIMAND* (1912), 22 O. W. R. 961; 3 O. W. N. 1654; 6 D. L. R. 267.—CAN.

PART XV. SECT. 2, SUB-SECT. 1.—C.

t. l. — *Too dilapidated to repair.*—*Ontario Municipal Act, R. S. O., 1927, s. 469*, does not impose any duty, enforceable at the suit of an affected landowner, on a municipality to reconstruct a bridge which has de-

teriorated to such an extent that the cost of repair would be more than the subject-matter of repair is reasonably worth & which it is no longer economically feasible to repair.—*BRYANT v. TORONTO*, [1932] 3 D. L. R. 590; O. R. 538; *affd.*, [1933] 1 D. L. R. 535; O. R. 105.—CAN.



the local authority for a declaration that they were liable to repair & keep in repair these seven bridges :—*Held* : having regard to the fact that the word "street," as defined by the above sect., includes, if this is not inconsistent with the context, any bridge, not being a county bridge, *pltf.* was entitled to the declaration.—*A.-G. v. HORNSEY BOROUGH COUNCIL*, [1927] 1 Ch. 331; 96 L. J. Ch. 164; 136 L. T. 502; 91 J. P. 61; 43 T. L. R. 92; 70 Sol. Jo. 1197; 25 L. G. R. 260.

**2776.** *Add. Annotation* :—*Consd. London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E. R. 692.

**2777.** *Add. Annotation* :—*Consd. London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E. R. 692.

**2778.** *Add. Annotation* :—*Consd. London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E. R. 692.

**2778a.** — *Road over bridge & approaches.*—The Act of Parliament incorporating the predecessors of *applt.*s provided (*inter alia*) : "In all cases in which the railway shall cross any . . . public highway . . . such public highway shall be carried over the said railway . . . at the expense of the said co., by means of a bridge." It was admitted that

*applt.*s were liable for the repair & maintenance of the bridge in question in this case, but they contended that they were not liable to repair the road over it :—*Held* : the word "bridge" included the highway over it & *applt.*s were therefore liable to repair so much of the road as ran over the bridge & the approaches thereto.—*LONDON & NORTH EASTERN RY. CO. v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL*, [1936] A. C. 365; [1936] 1 All E. R. 692; 105 L. J. Ch. 133; 154 L. T. 409; 52 T. L. R. 260; 80 Sol. Jo. 423, H. L.

**2780.** *Add. Annotations* :—*Consd. Skilton v. Epsom & Ewell Urban District Council*, [1937] 1 K. B. 112. *Refd. Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 336; *Newsome v. Darton Urban District Council*, [1938] 3 All E. R. 93.

**2782.** *Add. Annotation* :—*Refd. Skilton v. Epsom & Ewell Urban District Council*, [1937] 1 K. B. 112.

**2782a.** — *Against Port of London Authority—Dock swing bridge.*—*GUILFOYLE v. PORT OF LONDON AUTHORITY*, No. 2708a, *ante*.

**2787.** *Add. Annotation* :—*As to (3) Refd. A.-G. v. Hornsey B. C.* (1926), 43 T. L. R. 92.

PART XV. SECT. 2, SUB-SECT. 2.—  
B. (c).

o i. — *Transfer of area to municipality.*—A railway co. constructed & maintained a bridge & approaches by which a road was carried across their railway. The area in which the bridge was situated was subsequently annexed to a burgh, & the burgh authorities called upon the co., as frontagers to a private street, to construct a paved footway along one side of the road :—*Held* : assuming that the co. were frontagers to a private street, *Burgh Police (Scotland) Act*, 1903 (c. 33), s. 16, had not, either

expressly or by implication, altered or extended these obligations.—*MAGISTRATES OF LEVEN v. LONDON & NORTH EASTERN RY. CO.*, [1926] S. C. 528.—*SCOT.*

PART XV. SECT. 3.

k i. — *Apportionment of cost—Bridge across railway.*—*PUBLIC HIGHWAYS DEPT., ONTARIO v. CANADIAN PACIFIC RY. CO. (CLAPPISON BRIDGE CASE)* (1924), 30 Can. Ry. Cas. 5.—*CAN.*

k ii. — *Bridge over boundary river.*—In order to give jurisdiction to the Municipal Comr. to apportion the costs of building a bridge over a

river or stream forming the boundary between two municipalities, the latter must previously have agreed to construct the bridge.

The power of a municipality to contract with another municipality to build by joint action such a bridge must be exercised by bye-law.—*RURAL MUNICIPALITY OF PORTAGE LA PRAIRIE v. RURAL MUNICIPALITY OF CARTIER*, [1925] 4 D. L. R. 1035; [1925] S. C. R. 691; *affg.*, [1924] 4 D. L. R. 601; [1924] 3 W. W. R. 244; 34 Man. L. R. 405; *reversg.*, [1924] 1 D. L. R. 775; [1924] 1 W. W. R. 225.—*CAN.*



## HUSBAND AND WIFE.

## Part I.—Contracts to Marry.

14. *Add. Annotations:—As to (1) Distd. Siveyer v. Allison*, [1935] 2 K. B. 403. *Refd. Fender v. Mildmay*, [1937] 3 All E. R. 402.
15. *Add. Annotation:—Refd. Fender v. Mildmay*, [1937] 3 All E. R. 402.
20. *Add. Annotations:—Refd. Skipp v. Kelly* (1926), 42 T. L. R. 258.
24. *Add. Annotation:—Consd. Fender v. Mildmay*, [1935] 2 K. B. 334.
25. *Add. Annotations:—Consd. Fender v. Mildmay*, [1937] 3 All E. R. 402. *Refd. Davies v. Elmslie*, [1938] 1 K. B. 337.
26. *Add. Annotation:—Refd. Cohen v. Sellar*, [1926] 1 K. B. 536.
30. *Add. Annotation:—Refd. Cohen v. Sellar*, [1926] 1 K. B. 536.
36. *Add. Annotation:—Refd. Guy-Pell v. Foster*, [1930] 2 Ch. 169.
- C. Survival of Right (p. 27).*  
*See, now, Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1), (2) (b).*
38. *Add. Annotation:—Refd. Riley v. Brown* (1929), 98 L. J. K. B. 739.
39. *Add. Annotations:—As to (2) Apld. Riley v. Brown* (1929), 98 L. J. K. B. 739. *Generally, Refd. Cohen v. Sellar*, [1926] 1 K. B. 536.
40. *Add. Annotation:—As to (1) Consd. Riley v. Brown* (1929), 98 L. J. K. B. 739.
- 40a. ———.—An action for damages for breach of promise of marriage abates on the death of the alleged promisor & cannot be continued against the exors. of the deceased unless special damage can be proved. Such special damage must arise directly or naturally out of the transaction between the parties to the breach & must relate to matters within the contemplation of the parties at the time the alleged promise was made.—*RILEY v. BROWN* (1929), 98 L. J. K. B. 739; 142 L. T. 42; 45 T. L. R. 613; 73 Sol. Jo. 499.
81. *Add. Annotation:—As to (3) Refd. Cohen v. Sellar*, [1926] 1 K. B. 536.
87. *Add. Annotations:—Refd. Cohen v. Sellar*, [1926] 1 K. B. 536; *Riley v. Brown* (1929), 98 L. J. K. B. 739.
114. *Add. Annotation:—Refd. Cohen v. Sellar*, [1926] 1 K. B. 536.

## PART I. SECT. 5, SUB-SECT. 1.

*sr. Effect of Jewish betrothal.*—Among Jews the betrothal ceremony "Kaseph Kiddushim," if it is a valid ceremony, is something more than a betrothal between Christians. It is not a mere contract which the parties can set aside at will, but confers some of the rights & obligations of the married state. If the betrothal is upon certain conditions & the conditions are not fulfilled, the betrothal becomes void. It is then not necessary to execute a "Get" or a bill of divorce to nullify the effect of the "Kaseph Kiddushim" ceremony.—*EZEKIEL v. RUBEN* (1931), 1 L. R. 55 Bom. 803.—IND.

## PART I. SECT. 6, SUB-SECT. 1.—A.

30 ii. ———.—*MUNN v. HAAHTI* (1926), 37 B. C. R. 71.—CAN.

m i. ———. *Agreement to marry after obtaining divorce.*—L. alleged that in Apr. 1928, she & D. verbally agreed to marry one another as soon as she could obtain a divorce & that D. also agreed to pay the costs of obtaining it. She was then a married woman who had been deserted by her husband for upwards of twenty years. She obtained her decree absolute, but D. then refused to marry her or to pay the costs of the divorce. She brought an action against him for damages for alleged breach of promise, & for special damages to the amount of the costs of the divorce proceedings. The following questions of law were argued before trial: (a) whether the alleged promise to marry as soon as pltf. could obtain a divorce was actionable in view of the fact that pltf. was a married woman at the time of the alleged promise; & (b) whether the alleged promise to pay the costs of obtaining the divorce was a valid promise in view of the above facts. It was contended for pltf. that, as in New

Zealand the law recognises as a ground for divorce a mere agreement for separation subsisting for three years, the fact that pltf. had been deserted by her husband for upwards of twenty years at the time of the alleged promise was sufficient to relax the rigidity of the rule of public policy.—*Held*: (1) It would be contrary to public policy to allow an action to be maintained on a promise such as was alleged by pltf., as, in principle, there is no distinction between a promise to marry after the wife's death & one to marry after a divorce is obtained, & it is immaterial that no harm resulted or that the possibility of harm is remote; (2) although in New Zealand the law recognises an agreement for separation subsisting for three years as a ground for divorce, the argument that there should on that ground be a relaxation of the rule of public policy disregards the principle that it is the tendency, not the actual result, of the recognition of contracts such as sued on in this case that affords the ground for the rigidity of the rule; & on that test pltf. must fail; (3) the agreement as to the costs of the divorce is covered by the principle applicable to the promise to marry.—*LAMBERT v. DILLON*, [1933] N. Z. L. R. 1059.—N.Z.

## PART I. SECT. 6, SUB-SECT. 5.

r i. ———.—In an action for breach of promise of marriage, corroboration may be found in circumstances which according to ordinary experience would be accepted as showing that the relationship of engaged persons existed between the parties, but evidence of the most affectionate relations between a man & his mistress is no evidence at all from which the ct. might draw the conclusion that the relationship of engaged persons existed.—*SAWDON v. DALE* (1929), 29 S. R. N. S. W. 573; 46 N. S. W. W. N. 196.—AUS.

## PART I. SECT. 7, SUB-SECT. 1.

st. *Not facts discovered subsequent to breach.*—*SWYRIPA v. VACULCHIK* (Alta.), [1926] 3 W. W. R. 795.—CAN.

sw. *Immoral consideration.*—Where a promise of marriage was given on the condition that pltf. enter, as she did, into an immoral relationship:—*Held*: the breach of the promise did not give rise to a cause of action.—*B. v. B.*, [1936] 3 W. W. R. 76; *reversd.*, [1937] 1 W. W. R. 363; 44 Man. L. R. 494; *sub nom. BAKER v. BALDERSTON*, [1937] 1 D. L. R. 736.—CAN.

## PART I. SECT. 7, SUB-SECT. 5.

89 ii. ———. *Necessity to plead & prove.*—The fact that in an action for breach of promise of marriage the trial judge found that both parties had repented of their bargain held not to support the plea that the agreement had been rescinded by mutual consent before any breach thereof, there being no suggestion in such finding that they had translated their feelings into the performance of any act or acts which would terminate the contract whether by mutual consent or otherwise. Where in such an action deft. wishes to contend that pltf. was not ready & willing to marry him, he should in his defence plead that specifically as a condition precedent & allege its non-performance; otherwise its due performance is presumed.—*LAFAYETTE v. VIGNON*, [1928] 3 D. L. R. 613; [1928] 2 W. W. R. 506.—CAN.

## PART I. SECT. 8, SUB-SECT. 2.—A.

1 i. ———.—In cases of breach of promise of marriage the elements usually considered in estimating the amount of damages are the monetary loss which pltf. has sustained, the financial position of deft., the social position of the parties, & the extent to which the feelings of pltf. have been wounded.—*MCCALMAN v. THORNE*, [1934] N. L. R. 86.—S. AF.

## Part II.—Marriage.

123. *Add. Annotations* :—*Refd.* *Gottliffe v. Edleston*, [1930] 2 K. B. 378; *Inverclyde v. Inverclyde*, [1931] P. 29.
127. *Add. Annotations* :—*As to* (1) *Refd.* *Nachimson v. Nachimson*, [1930] P. 217. *As to* (2) *Refd.* *Republica de Guatemala v. Nunez*, [1927] 1 K. B. 609; *Inverclyde v. Inverclyde*, [1931] P. 29. *Generally*, *Refd.* *Sloggett v. Sloggett*, [1928] P. 148.
134. *Add. Annotation* :—*Refd.* *De Pret-Roose v. De Pret-Roose* (1934), 78 Sol. Jo. 914.
- 140a. —.]—Where a Jewess went through a form of marriage with a Jew at a Register Office under the mistaken belief that it was merely a ceremony of betrothal, & where conjugal relations had never taken place, the ct. granted her a decree of nullity.—*KELLY (OTHERWISE HYAMS) v. KELLY* (1932), 148 L. T. 143; 49 T. L. R. 99; 76 Sol. Jo. 832.
143. *Add. Annotation* :—*Consd.* *Hussein (otherwise Blitz) v. Hussein*, [1938] P. 159.
- 148a. —.]—Where a woman petitioned for nullity of marriage on the ground of duress & her *de facto* husband was domiciled at the time of the institution of the suit in Egypt, the ct. exercised jurisdiction & held that petitioner was constrained through fear, caused by the man's threats, to go through the ceremony.—*HUSSEIN (OTHERWISE BLITZ) v. HUSSEIN*, [1938] P. 159; [1938] 2 All E. R. 344; 107 L. J. P. 105; 54 T. L. R. 632; 82 Sol. Jo. 336.
163. *Add. Annotation* :—*As to* (1) *Refd.* *Dodworth v. Dale*, [1936] 2 All E. R. 440.
175. After this case add :—  
—*Sixteen.*]—*See* Age of Marriage Act, 1929 (c. 36).
- 175a. —. —. —. —.]—*CARR (otherwise FOWLER) v. CARR* (1936), 80 Sol. Jo. 57.
193. After this case add :—  
—.]—*See, now*, Marriage (Prohibited Degrees of Relationship) Act, 1931 (c. 31), s. 1 (1).
199. After this case add :—  
—.]—*See, now*, Marriage (Prohibited Degrees of Relationship) Act, 1931 (c. 31), s. 1 (1).
- 217a. *Husband of mother's deceased illegitimate sister.*]—*RESTALL OTHERWISE LOVE v. RESTALL* (1929), 45 T. L. R. 518; 73 Sol. Jo. 385.
219. After this case add :—  
—.]—*See, now*, Marriage Act, 1835 (c. 54), s. 2.

## PART II. SECT. 3, SUB-SECT. 1.

131 i. *Necessity for voluntary consent.*]—*SOBUSH v. SOBUSH*, [1931] 2 W. W. R. 900.—CAN.

## PART II. SECT. 3, SUB-SECT. 3.

142 i. *General rule.*]—*KAWALUK v. KAWALUK (Sask.)*, [1927] 3 D. L. R. 493.—CAN.

## PART II. SECT. 4, SUB-SECT. 1.

sa. *Marriage between Protestant & Roman Catholic in Quebec.*]—A marriage between a Protestant & a Roman Catholic, by a Protestant minister in Quebec, is, civilly valid.—*CARMICHAEL v. KENT*, [1935] 4 D. L. R. 620.—CAN.

sd. *Religious disability.*]—A Scots woman, who had married a Hindu in Scotland, brought an action of declaration of marriage, in which she maintained (a) that there was no *consensus in idem*, in respect that she had contracted on the basis that the marriage would give her the status in India of a lawful wife, whereas the defender had known that it would not do so, & (b) that the defender, by the law of his Indian domicile, had not been capable of contracting a valid marriage outside Hinduism. The evidence established that the defender was under a religious disability whereby he was prohibited from marrying outside Hinduism while he remained a Hindu himself :—*Held* : there had been a deliberate exchange of consent to marriage, & the religious disability imposed on the defender was not of a kind which rendered the marriage invalid; action dismissed.—*MACDUGALL v. CHITNAVIS*, [1937] S. C. 390.—SCOT.

## PART II. SECT. 4, SUB-SECT. 2.

166 i. *General rule.*]—For a Christian marriage in India in 1926 the age of consent is twelve for the girl, that being the then state of the law in England.—*GOODAL v. GOODAL* (1932), 1 L. R. 55 All. 243.—IND.

167 i. *Effect of want of age.*]—Application for decree of nullity where pre-marital intercourse had taken place refused because (1) the jurisdiction of the Supreme Ct. of Ontario to declare

marriages null by Marriage Act, R. S. O., 1927, s. 34, is limited to cases where the action is brought "by the person who was at the time of the ceremony under the age of eighteen years; & (2) a false statement as to age in an application for a marriage licence was not a ground for nullity according to the law of England in 1870, within the meaning of Divorce Act, 1930, declaring the same to be in force in Ontario.—*KERR v. KERR*, [1932] O. R. 601; 4 D. L. R. 289; *affd.*, [1934] 2 D. L. R. 369; S. C. R. 72.—CAN.

sd. *Child Marriage Restraint Act, 1929—Restriction to British India.*]—The Child Marriage Restraint Act, 1929, is limited in its operation to British India, & only strikes at marriages contracted in British India.—*NARAYAN MUDLAGIN v. EMPEROR* (1935), 1 L. R. 59 Bom. 745.—IND.

## PART II. SECT. 4, SUB-SECT. 5.

177 i. *Effect of—Marriage void.*]—Where in an action for a decree of nullity of marriage it is proved that at the time of the marriage a person to whom deft. had been legally married was still alive & there is nothing to show that this prior marriage had ever been dissolved, the decree will be granted.—*ENGLISH v. ENGLISH*, [1928] 1 D. L. R. 419; [1928] 1 W. W. R. 14.—CAN.

## PART II. SECT. 5, SUB-SECT. 2.—A.

i. —.]—A marriage between an uncle & his niece cannot be lawfully solemnised in Alberta whether the parties are domiciled in the province or elsewhere.—*Re SEIDLER & MACKIE (Alta.)*, [1929] 4 D. L. R. 478; 2 W. W. R. 645.—CAN.

sv. *Aunt by marriage.*]—A marriage between a man & his aunt by marriage is within the prohibited degrees of affinity & is therefore invalid.—*DEJARDIN v. DEJARDIN*, [1932] 2 W. W. R. 237.—CAN.

## PART II. SECT. 5, SUB-SECT. 3.

219 iii. —.]—Where the parties to a marriage are within the prohibited degrees of consanguinity &

both parties are aware of the fact prior to the marriage the ct. has jurisdiction to grant a decree of nullity.—*C. v. C.*, [1932] N. Z. L. R. 1425.—N.Z.

## PART II. SECT. 6, SUB-SECT. 1.

sb. *Failure to comply with requirements—Effect of.*]—Although a marriage licence, the publication of banns, or the consent of parents is made by statute a prerequisite to the solemnisation of marriage, the non-fulfilment of said requirement does not render a marriage void or voidable, unless the statute expressly or by clear necessary intendment so provides; & even the fact that the statute prohibits under a penalty other than nullity solemnisation without observance of the requirement does not imply nullity. The fact that a marriage was solemnised without the licence or publication of banns required by sect. 3 of Marriage Act, 1924, does not make the marriage void or voidable.—*WYLIE (OTHERWISE PATTON) v. PATTON*, [1930] 1 W. W. R. 216; 1 D. L. R. 747; 24 S. L. R. 285.—CAN.

## PART II. SECT. 6, SUB-SECT. 2.

ti. —. —.]—In Dec. 1928, a woman brought an action of declarator of marriage against the representatives of a man who had died in Sept. of that year, averring that a marriage had been entered into between them by declaration *de presenti* in Dec. 1922. It was proved that the parties had for many years prior to that date been on terms of intimate friendship, & that deceased had more than once proposed marriage to the pursuer. On Dec. 28, 1922, at an hotel at which the parties were staying, they stated in the presence of three witnesses that they accepted one another as husband & wife. A document attesting the marriage was signed by the parties & by the witnesses. The pursuer & the three witnesses to the document deposed that the interchange of consent was serious, & was intended to constitute marriage, & that no other person was present at the ceremony. On the other hand, a witness B. deposed that

## SUB-SECT. 4.—REMARriage OF DIVORCED PERSONS.

(Vol. XXVII., p. 43.)

To cross-reference add "*See, also, Marriage (Prohibited Degrees of Relationship) Act, 1931 (c. 31), s. 2.*"

235. After this case add :—

Usual place of worship of either party.]—*See Marriage Measure, 1930 (No. 3).*

335. *Add. Annotation* :—*Refd. Nachimson v. Nachimson, [1930] P. 217.*341. *Add. Annotation* :—*Folld. R. v. Lamb (1934), 150 L. T. 519.*342. *Add. Annotation* :—*As to (1) Folld. R. v. Lamb (1934), 150 L. T. 519.*

342a. ————.]—On a prosecution for bigamy it was proved that prisoner's first

marriage had taken place in a register office by certificate after notice & that prisoner, with the knowledge & consent of the woman, gave the notice in a false name; & that subsequently the prisoner went through a form of marriage with another woman :—*Held* : the giving of the notice in a false name, with the knowledge & consent of the other party, did not prevent the notice from being "due notice" within Marriage Act, 1836 (c. 85), s. 4. The first marriage was therefore valid, & the prisoner could properly be convicted of bigamy.—*R. v. LAMB (1934), 150 L. T. 519; 50 T. L. R. 310; 78 Sol. Jo. 279; 24 Cr. App. Rep. 145; 30 Cox, C. C. 91, C. C. A.*

347. *Add. Annotation* :—*As to (1) Consd. R. v. Lamb (1934), 150 L. T. 519.*446. *Add. Annotation* :—*Refd. Nachimson v. Nachimson, [1930] P. 217.*

she was present during part of the ceremony, & that the proceedings were of the nature of a joke. At the date of this ceremony the deceased was seventy-six & the pursuer was about forty. The pursuer & one witness deposed that the parties occupied the same bedroom after the ceremony. The witness B. gave evidence to the contrary effect.

The parties did not take up residence together. The pursuer continued to carry on her profession as a teacher under her maiden name. Several witnesses deposed that deceased had subsequently introduced the pursuer to them as his wife. Other witnesses gave evidence that deceased had denied that he was married to the pursuer. Deceased died on Sept. 2, 1928, leaving about £20,000. In his will, made two days before his death, he left the pursuer a legacy of £200 under her maiden name :—*Held* : the exchange of serious matrimonial consent had been clearly established by the document & the evidence of the pursuer & the three witnesses thereto, & the subsequent conduct of the parties did not displace this conclusion.—*DUNN v. DUNN'S TRUSTEES, [1930] S. C. 131.—SCOT.*

t. ii. ———— *Subsequent belief by one party that marriage invalid.*—*Mere consent makes marriage, & the validity of the contract is not affected by the fact that one of the parties subsequently forms an erroneous view that it was invalid for lack of some formality.*—*COURTIN v. ELDER, [1930] S. C. 68.—SCOT.*

PART II. SECT. 7, SUB-SECT. 1.—E. (b) ii.

sd. *Rule in India.*—The English law that non-publication of banns makes the marriage void only if lack of publication is within the knowledge of both parties is no guide to the Indian cts., for in the Indian Christian Marriage Act there is nothing equivalent to the wording in sect. 22 of the English Marriage Act.—*JONES v. TITLI (1932), 1 L. R. 55 All. 185.—IND.*

PART II. SECT. 7, SUB-SECT. 3.—C. (a).

sf. *To widow—Presumption of death of first husband—Form of declaration.*—*Re SHOOK, [1935] 3 W. W. R. 115.—CAN.*

PART II. SECT. 7, SUB-SECT. 3.—C. (b).

o i. ———— *Parties within prohibited degrees.*—Where it is disclosed to an issuer of marriage licences that there is a legal impediment to the proposed marriage by reason of the relationship of the applicants, by consanguinity he acts properly in refusing to issue the

licence.—*Re SEIDLER & MACKIE (Alta.), [1929] 4 D. L. R. 478; 2 W. W. R. 645.—CAN.*

PART II. SECT. 7, SUB-SECT. 5.—G. (a).

g i. ———— *Formal consent filed after marriage—Verbal consent given before.*—*LE ARROWSMITH v. LE ARROWSMITH, [1931] 2 D. L. R. 608; 1 W. W. R. 616.—CAN.*

sk. *When marriage invalidated by.*—Sect. 52a of Marriage Act, 1933, which empowers the ct. to declare that a form of marriage gone through by a minor without the consent required by the Act & which has not been consummated was not a valid marriage, does not apply to a marriage solemnised before the passing of the amendment. *Qu.* : whether if said amendment is to be construed so as to make it possible for persons of marriageable age who deliberately went through such a form of marriage, having obtained the licence on false statutory declarations as to age, to have it declared a nullity on their own testimony that the marriage was not consummated, does not the amendment invade the Federal field of jurisdiction.—*GRAHAM (OTHERWISE BRUCE) v. GRAHAM, [1937] 2 W. W. R. 411; restd., [1938] 1 W. W. R. 155; 1 D. L. R. 778; 7 F. L. J. (Can.) 216.—CAN.*

PART II. SECT. 8, SUB-SECT. 1.—A.

so. *Person other than contracting parties.*—Marriage Act, R. S. M., 1913, contemplates that the official or person solemnising a marriage must be a person distinct from either of the contracting parties. Sect. 30 of said Act was never intended to validate a ceremony performed by one of the contracting parties. *Scmble* : the words "other person," as used in said sect. refer to those persons other than ministers & clergymen who are named in sect. 2 of said Act but who are not qualified within the language used in the various sub-sects. thereof.

*Deft.* after obtaining from an issuer of marriage licences a licence for the marriage of himself & *pltf.* handed it to her, saying, "You married woman, I your husband, you my wife," & informed her (a foreigner, who had recently come to Canada) that it was not necessary in Manitoba to have a marriage solemnised by a minister or "the church." The parties regarded themselves as legally married, & lived together as husband & wife for fifteen years. *Pltf.* filed a petition praying for a decree that she & *deft.* had been legally married & a declaration that she was his lawful wife. *Resp.* (*deft.* *herein*) filed an "answer" & the matter was treated as a matrimonial cause :—*Held* : Divorce &

Matrimonial Causes Act, 1857, & the amending Acts in force in Manitoba, did not give the ct. jurisdiction to grant the relief asked, but an order was made on the hearing, counsel for *resp.* agreeing thereto, converting the proceedings into an ordinary action in the ct. & the same was then heard, whereupon it was held that the parties were not legally married.—*STOCKHOLDER v. STOCKHOLDER, [1934] 1 W. W. R. 365; 42 Man. L. R. 85.—CAN.*

PART II. SECT. 8, SUB-SECT. 2.—A.

sa. *Marriage of Doukhoborts.*—*CHERNENKOFF v. CHERNENKOFF, [1930] 2 W. W. R. 165; 3 D. L. R. 1001.—CAN.*

PART II. SECT. 8, SUB-SECT. 4.

sb. *Under Indian Christian Marriage Act, 1872—Between Roman Catholics.*—A civil marriage contracted before a registrar in accordance with the provisions of Indian Christian Marriage Act, 1872, by persons professing the Roman Catholic faith is valid & legal. That Act deals with the forms of solemnisation of marriages of all Christians in India, including Roman Catholics.—*SALDANHA v. SALDANHA (1929), 1 L. R. 54 Bom. 288.—IND.*

PART II. SECT. 9.

so. *Marriage in foreign State—Celebration by person with power to do so.*—*MELLEN v. DOBENKO, [1927] 4 D. L. R. 1128; 61 O. L. R. 340.—CAN.*

PART II. SECT. 10.

bi. ———— *Marriage Act, R. S. A., 1922 (c. 213), s. 20.*—The above sect. cannot apply to an alleged marriage of which there was no solemnisation whatever, other than the purchase of two wedding rings from an issuer of marriage licences & the placing of one of them on a finger of each of the parties, who did not belong to any sect or nationality which recognises this proceeding as a valid marriage ceremony.—*PRETSCHL v. BUCH (Alta.), [1926] 4 D. L. R. 1185; [1926] 3 W. W. R. 598.—CAN.*

PART II. SECT. 11, SUB-SECT. 1.

ci. ————.]—The doctrine, that a person who goes through a form of marriage must be presumed to have acted innocently & legally & that, until this presumption is rebutted, it must prevail over the presumption that a first husband or wife whose death was not proved, but who had not been heard of for over seven years before the second marriage, was alive at the time thereof, can have no application where it is found that the person relying on such doctrine did not act in innocent good faith in going through

453a. ———.]—The detail & strictness of proof of a marriage required in a criminal prosecution for bigamy is of a totally different standard from that required before a magistrate who is dealing with the question of the maintenance of a wife alleged to have been deserted. In civil cases, where there is evidence of the fact of a ceremony of marriage, followed by cohabitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence. The burden of impeaching the factum of a marriage & the presumption of law *semper presumitur pro matrimonio*, lies upon the impeaching party.

Statement in Halsbury's "The Laws of England," Vol. 16, Husband & Wife, Part II., Marriage, para. 604 [2nd Ed., para. 932,] approved.—SPIVACK v. SPIVACK (1930), 99 L. J. P. 52; 142 L. T. 492; 94 J. P. 91; 46 T. L. R. 243; 74 Sol. Jo. 155; 28 L. G. R. 188; 29 Cox, C. C. 91.

508a. ———.]—Evidence by a witness of reputation of marriage is admissible so long as it appears to be of a general reputation; so soon as it appears, however, upon cross-examination or otherwise, that the witness is speaking from information given to him by some individual, even of the existence of a general reputation, such evidence is merely hearsay, & as such, inadmissible.—SHEDDEN v. A.-G. (1860), 2 Sw. & Tr. 170; 30 L. J. P. M. & A. 217; 3 L. T. 592; 6 Jur. N. S. 1163; 9 W. R. 285; *affd.*, *sub nom.* SHEDDEN v. PATRICK & A.-G. (1869), L. R. 1 Sc. & Div. 470, H. L.

510. *Add. Annotation*:—*Refd.* Skipp v. Kelly (1926), 42 T. L. R. 258.

the form of a second marriage.—IRWIN v. IRWIN (Man.), [1926] 2 D. L. R. 794; [1926] 1 W. W. R. 849.—CAN.

• II. ———.]—*Compliance with Marriage Act*, s. 21 (b).—MCGINN v. ELLERTON, ELLERTON v. ELLERTON, [1925] 2 D. L. R. 1136; [1925] 1 W. W. R. 962.—CAN.

• III. ———.]—A marriage *prima facie* valid affords a strong presumption that there was no legal impediment thereto, & the presumption is not to be broken in upon by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct & satisfactory. In an action attacking the validity of K.'s second marriage & seeking a declaration that the six children born thereof should be excluded from participating in an estate bequeathed to their father's lawful children, upon the ground that at the time of the said marriage K.'s first wife was living.—*Held*: the only possible inference from the proved facts was that the first wife was dead when the disputed marriage was contracted & therefore the children thereof were legitimate & entitled to participate in the said estate. Also, as the result of the action had settled the question of the legitimacy of K.'s children by his second marriage, thus enabling the Public Trustee to distribute a fund that had been held by him pending such settlement, *pltd.* should be awarded costs.—KEMPTON

v. PUBLIC TRUSTEE, [1932] N. Z. L. R. 1380; G. L. R. 647.—N.Z.

• IV. ———.]—*Compliance with necessary ceremonies*.—In an action under Families' Compensation Act, R.S.B.C. 1924, for the benefit of the alleged wife & children of the deceased, a Chinese, deceased & the alleged wife were alleged to have been married in China where, apparently, they were both domiciled at the time. There was no proof of the marriage by record or by anyone present thereat, but evidence was given as to the intention of the two to marry & of a betrothal contract, & there was sufficient to show that they cohabited together in China after the alleged marriage & were there regarded by their friends, neighbours & relatives as man & wife.—*Held*: in the absence of proof, as a fact, as to what, if any, presumption would be drawn under Chinese law from such cohabitation, the ct. could not presume from said evidence that a valid marriage took place.—LEONG SOW NOM v. CHIN YEE YAU, [1934] 3 W. W. R. 686; 49 B. C. R. 244.—CAN.

PART II. SECT. 11, SUB-SECT. 2.—B. (a).

478 i. *Many years*.—P., a Natal native, from about 1897 until just before her death in 1916 cohabited continuously with A., a half-caste woman. When the cohabitation began A. had a husband, who was still living. There

536. *Add. Annotation*:—*Apld.* Spivack v. Spivack (1930), 99 L. J. P. 52.

548a. ———.]—T. B. lived in Rockhampton from 1860–1870 with a certain lady; they held themselves out to be husband & wife, & they & their children were received in local society, which would not have been the case had there been any suggestion of irregularity. T. B. at his death was one of the most prominent solrs. in Rockhampton. The birth certificates of the children recorded the marriage of the parents as having taken place at Ballan, Victoria, on Jan. 10, 1860, but no such marriage was registered there, although registration had there been compulsory for some years. In 1873, T. B.'s father, who lived in England, executed a deed covenanting to make certain payments to the children or their mother & this deed contained these words: "the following reputed children of his deceased son," T. B., "which children are now in England with their mother E. M., otherwise E. B.".—*Held*: (1) the absence of any entry in the register of marriages was not sufficient to rebut the presumption of marriage of T. B.; (2) the words in the deed of 1873 were insufficient to rebut the presumption; (3) the presumption of marriage can be rebutted only by evidence of the most cogent kind, & the children in question ought to be declared to be the lawful children of T. B. & his wife E. B.—*Re* TAPLIN, WATSON v. TATE, [1937] 3 All E. R. 105; 81 Sol. Jo. 526.

548b. ———.]—*Re* BRADSHAW, BLANDY v. WILLIS, [1938] 4 All E. R. 143; 82 Sol. Jo. 909.

568a. ———.]—SPIVACK v. SPIVACK, No. 453a, *ante*.

580a. ———.]—RALSTON v. RALSTON, No. 2293a, *post*.

583. *Add. Annotation*:—*Consd.* Nachimson v. Nachimson, [1930] P. 217.

was evidence to show that P. & A. had both said before 1902 that they were not married, & there was no evidence of any registration of a marriage between P. & A. There was some evidence that P. & A. were reputed to be man & wife since the birth of their five children, all of whom had been brought up & educated by P.'s brother C., who had treated them as his nephews & nieces.—*Held*: the evidence adduced was not strong enough to rebut the presumption of marriage arising from the lengthy cohabitation of P. & A.—NYOKANA v. NYOKANA (1925), 46 N. L. R. 227.—S. AF.

PART II. SECT. 11, SUB-SECT. 2.—B. (c).

521 iv. ———.]—R. v. PROUD, [1926] 3 D. L. R. 664; [1926] S. C. R. 599.—CAN.

PART II. SECT. 11, SUB-SECT. 2.—E.

553 H. ———.]—DAHLBERG v. SWANSON, [1927] 3 D. L. R. 669; [1927] 1 W. W. R. 617; 21 Sask. L. R. 388.—CAN.

PART II. SECT. 13.

580 i. *General rule*.—The ct. in an ordinary action can make a declaration as to the validity of a marriage.—STOCKHOLDER v. STOCKHOLDER, [1934] 1 W. W. R. 365; 42 Man. L. R. 85.—CAN.

## Part III.—Personal Rights and Obligations arising from Marriage.

**595a. — Bankruptcy of husband.]—**The bkpcy. of a husband who has entered into a separation deed is an answer to any claim for the payment of agreed sums under the deed, but does not convert his wife's agreement to live apart with an allowance into an agreement to live apart without maintenance. Her right to that maintenance is not in contract but is an incident of matrimonial status at common law. An agreement under a separation deed to receive an allowance merely suspends, but does not annul, that right, which revives as soon as the agreement is terminated by bkpcy., notwithstanding the receipt of a dividend. The dividend is not a transaction between husband & wife, but an incident in the bkpcy., & its receipt does not operate as a new bargain with the husband compounding the common law right of the wife. The separation agreement thus put an end to does not debar the wife from alleging the wilful neglect of the husband to provide reasonable maintenance for her within Summary Jurisdiction (Separation & Maintenance) Acts, 1895 to 1925.—*DEWE v. DEWE, SNOWDON v. SNOWDON*, [1928] P. 113; 97 L. J. P. 65;

138 L. T. 552; 92 J. P. 32; 44 T. L. R. 274; 72 Sol. Jo. 69; 26 L. G. R. 191.

*Annotation:—*Refd. *Markovitch v. Markovitch* (1934), 151 L. T. 139.

**601. Add. Annotations:—**Refd. *Grubb v. Grubb* (1934), 150 L. T. 420; *Markovitch v. Markovitch* (1934), 151 L. T. 139; *Herod v. Herod*, [1938] 3 All E. R. 722.

**611. Add. Annotations:—**Consd. *Place v. Searle* (1932), 48 T. L. R. 428. Refd. *Gottliffe v. Edleston*, [1930] 2 K. B. 378.

**640. Add. Annotations:—**As to (1) *Folld. Place v. Searle*, [1932] 2 K. B. 497. Generally, Refd. *Davies v. Elmslie*, [1938] 1 K. B. 337.

**641. Add. Annotations:—**Consd. *Place v. Searle*, [1932] 2 K. B. 497. Refd. *Davies v. Elmslie*, [1938] 1 K. B. 337.

**642. Add. Annotations:—**Consd. *Place v. Searle*, [1932] 2 K. B. 497.

**643. Add. Annotation:—**Consd. *Place v. Searle* (1932), 48 T. L. R. 428.

**643a. — Whether necessary to prove wife's will overborne by defendant.]—**For pltf. to succeed he must show that his wife did not elect to leave him, but was overborne by a stronger

### PART III. SECT. 1, SUB-SECT. 1.

**k (p. 76) i. —**Effect of repeal of *Judicature Act*, 1922, *pendente lite.*—An alimony action begun before the coming into force of Domestic Relations Act, 1927, c. 5, s. 75, is governed as to pltf.'s rights & deft.'s liability by Jud. Act, R. S. A. 1922, c. 72, s. 21, notwithstanding its repeal by said sect. 75.—*CLARKE v. CLARKE*, [1928] 1 D. L. R. 249; [1927] 3 W. W. R. 728.—CAN.

**s (p. 76) i. —**Provoked by wife's misconduct.]—*WEITZEL v. WEITZEL*, [1928] 3 D. L. R. 261.—CAN.

**m (p. 77) i. —**Invalidity of marriage.]—*Held: pltf.* was not entitled to succeed on an alternative claim for a quantum meruit for her services as deft.'s housekeeper.—*HOLMES v. HOLMES (Alta.)*, [1927] 2 D. L. R. 979; [1927] 2 W. W. R. 253.—CAN.

**ff i. —**Liability for interim disbursements.]—The Supreme Ct. of Alberta has the power in an alimony action to grant the wife an order for payment of interim disbursements.—*DREWRY v. DREWRY*, [1928] 3 W. W. R. 460.—CAN.

**hh i. —**Husband purposefully denuding himself of his property.]—*LIGHTHEART v. LIGHTHEART*, [1927] 1 D. L. R. 386; [1927] 1 W. W. R. 393.—CAN.

**hh ii. —**Alimony provided for in prior separation agreement—Power of court to increase.]—*KAWIN v. KAWIN*, [1927] 3 D. L. R. 883; [1927] 1 W. W. R. 690; 21 Sask. L. R. 416.—CAN.

**rr i. —**Necessity for written demand for cohabitation & restitution of conjugal rights.]—*Held: pltf.* not entitled to decree for alimony, because she had not before action made a written demand for cohabitation & restitution of conjugal rights.—*SCOTT v. SCOTT*, [1930] 1 D. L. R. 53; 64 O. L. R. 422.—CAN.

**rr ii. —**—FREEMAN v. FREEMAN, [1935] 1 W. W. R. 477; 2 D. L. R. 809; 49 B. C. R. 554.—CAN.

**rr iii. —**Variation—Jurisdiction of Supreme Court of Nova Scotia.]—*MCLEOD v. MCLEOD*, [1931] 2 D. L. R. 364; 2 M. P. R. 559; *revsq.*, [1930] 3 D. L. R. 157.—CAN.

**rr iv. —**Effect of decree as res judicata—Subsequent action for annulment.]—*THOMPSON v. CRAWFORD*, [1932] 2 D. L. R. 466; O. R. 281; *affd.*, [1932] 4 D. L. R. 206.—CAN.

**s (p. 78) i. —**—*Semle*: there is no common law rule that a husband is bound to maintain his wife while she is incarcerated in a lunatic asylum without his consent.—*A-G. v. RAND* (1931), S. R. N. S. W. 568; 48 N. S. W. W. N. 154.—AUS.

### PART III. SECT. 1, SUB-SECT. 4.

**d i. —**—The duty of a husband to support his wife is not limited to the providing of such "necessaries" as food & clothing but includes also the duty to provide shelter; & although the wife is living in a house which is the family home & although it is owned by her, she may, nevertheless, be in necessitous circumstances within the meaning of sect. 242 (3) of Criminal Code.—*R. v. HAKENSLAK*, [1937] 1 W. W. R. 1; 1 D. L. R. 337; 67 C. C. C. 277; 6 L. Jo. 259.—CAN.

### PART III. SECT. 2, SUB-SECT. 1.—A.

**sm. Court cannot order wife to live apart from husband.]—**A judge awarded a wife alimony & also expressed the opinion that it would be better for the parties to live apart for a time. The formal judgment contained a clause adjudging that pltf. vacate the premises.—*Held: the ct.* had no power to order the wife to leave her husband's roof; & even if the jurisdiction existed, it would not be exercised at the instance of the wife against the protest of the husband.—

*SCOTT v. SCOTT*, [1930] 1 D. L. R. 53; 64 O. L. R. 422.—CAN.

### PART III. SECT. 2, SUB-SECT. 3.—A. (b).

**o i. —**—A person who, without justification, procures, entices or persuades a wife to leave her husband is liable in damages to the husband for the latter's loss of his right of consortium. Adultery is no part of the cause of action in such a case. In an action by a husband for the enticement away of his wife he must prove that it was deft.'s enticement which caused her to cease from cohabiting & consorting with pltf. Where the only evidence is that it was she, rather than deft., who was the enticer, the action fails.—*BRUNE v. STENSTO*, [1938] 1 W. W. R. 746.—CAN.

**a i. —**—In an action by a husband against his wife's parents for unlawfully harbouring & detaining her against his wishes.—*Held: where the harbouring & enticement could only be proved against the father, the mother could not be held liable.*—*MCBAY v. MERRITT*, [1936] 4 D. L. R. 319; 11 M. P. R. 20.—CAN.

**k i. —**—The enticement away of a wife by a third person is an infringement of the absolute right of the husband to the benefit of the society & services of the wife, & the husband can maintain a suit for damages for such actionable wrong. It is immaterial that at that time the husband may have been away at another town; it is not the mere depriving of a husband for a day or two of the society of his wife which gives rise to the action, but the fact that deft. has acted in a way towards the wife of pltf. which is an infringement of pltf.'s right under the contract of marriage. The case of a wife, therefore, stands on a different footing from that of seduction of a daughter or a servant.—*SOBHA RAM v. TIKKA RAM* (1936), I. L. R. 58; All. 903.—IND.



will (DARLING, J.).—SANDERSON v. HUDSON (1923), *Times*, Jan. 29, 1923.

Annotation:—Overd. Place v. Searle (1932), 101 L. J. K. B. 465.

643b. ———.]—A wife owes the duty to her husband to reside & consort with him, & any one who, without justification, procures, entices or persuades her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages. In order to succeed in such an action the husband need not prove that the will of the wife was overborne by the stronger will of the deft.—PLACE v. SEARLE, [1932] 2 K. B. 497; 101 L. J. K. B. 465; 147 L. T. 188; 48 T. L. R. 428, C. A.

Annotations:—Consd. Newton v. Hardy (1933), 149 L. T. 165; Refd. Menon v. Menon & Warth, [1936] 1 All E. R. 900.

643c. Postponement of hearing—Until after hearing of divorce proceedings.]—PACHECO DE CESPEDES v. McCANDLISH (1935), 79 Sol. Jo. 964, C. A.

644. Add. Annotation:—As to (1) Consd. Newton v. Hardy (1933), 149 L. T. 165.

645. Add. Annotations:—Consd. Place v. Searle,

[1932] 2 K. B. 497; Newton v. Hardy (1933), 149 L. T. 165.

645a. ———.]—(1) A married woman has a legal right to the *consortium* of her husband & can recover damages from any one who violates that right. In order to recover such damages she must prove that her husband has been enticed, procured, or persuaded by the deft. to cease from cohabiting & consorting with her. Where, therefore, a pltf. proved that deft. had committed adultery with her husband, but failed to prove that deft. had induced him to cease from cohabiting & consorting with her, the action failed.

(2) *Qu.*: whether the deft.'s husband can be made liable in such an action as being in law responsible for his wife's torts.—NEWTON v. HARDY (1933), 149 L. T. 165; 49 T. L. R. 522; 77 Sol. Jo. 523.

647. Add. Annotations:—Consd. Davies v. Elmslie, [1938] 1 K. B. 337. Refd. *Re* Wilkinson, Page v. Public Trustee, [1926] Ch. 842.

649. Add. Annotation:—As to (2) Consd. Davies v. Elmslie, [1938] 1 K. B. 337.

## Part IV.—Effect of Marriage with Regard to Wife's Property.

See, now, Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), ss. 1, 2.

656. Add. Annotation:—As to (1) Consd. *Re* Bower Williams, *Ex p.* Trustee, [1927] 1 Ch. 441.

### PART III. SECT. 2, SUB-SECT. 3.—B.

645 ii. ———.]—The statement of claim in an action by a wife alleged that deft. had induced pltf.'s husband to depart & remain absent from the home, whereby pltf. had been deprived of the society comfort & protection of her husband & partially of his support:—*Held*: the statement of claim was bad in law & disclosed no cause of action.—WRIGHT v. CEDZICH, [1929] V. L. R. 117; [1929] Argus L. R. 102; *affd.*, 43 C. L. R. 493; (1930), V. L. R. 141; 3 A. L. J. 437; (1930), Argus L. R. 105.—AUS.

i. ———.]—In an action by a wife against her husband's father for alienating the affections of her husband, she alleged that she was prevented from the companionship of her husband & infant daughter by deft.'s conduct in keeping her husband away from her, so that she was compelled to support herself as best she could. There was no allegation of making defamatory statements by deft., & there was no allegation of malice:—*Held*: no reasonable cause of action was shown.—TALMAGE v. TALMAGE, [1928] 3 D. L. R. 15; 62 O. L. R. 209.—CAN.

ii. ———.]—In Ontario an action by a married woman to recover damages against a third person for alienation of her husband's affections does not lie.—BARKS v. DONE, [1934] 1 D. L. R. 789.—CAN.

### PART IV. SECT. 1.

i. ———.]—*Acquired & disposed of through husband—Belong to husband.*—A number of hogs, either the progeny of two hogs acquired by a wife as compensation for services performed by her for a neighbour or bought with the proceeds of sale of such progeny, were raised, acquired & disposed of through the efforts & the expense of her husband:—*Held*: they did not belong to the wife as against the husband's creditors.—JOHN DEERE PLOW Co. v. BOWEN, [1925] 1 D. L. R. 769; [1925] 1 W. W. R. 357.—CAN.

sb. *Legacy to wife—Death before*

*reduction into possession—Right of husband as representative of wife.*—If a legacy is bequeathed to a married woman, who dies before any act done by husband to reduce it into possession, he can only maintain an action for it as the representative of his wife, though he may be beneficially entitled to it.—COLLINS v. CAHIR (1850), 7 N. B. R. (2 All.) 103.—CAN.

sc. *Husband not constituted agent of wife by marriage.*—A husband is not *prima facie* an agent for his wife by reason of their relationship. The *onus* is on the person alleging such agency to prove that he is her agent.—MILLARD v. BRYAN LUMBER & SHINGLE CO., LTD., [1928] 2 D. L. R. 367; 39 B. C. R. 430.—CAN.

sd. *Division of property of husband & wife—Married Women's Property Act, 1881.*—WARD v. WARD, [1932] 3 D. L. R. 774; 45 B. C. R. 248.—CAN.

### PART IV. SECT. 2.

sf. *Reversionary interest.*—STANDARD BANK v. BOULTON (1878), 6 A. R. 93.—CAN.

### PART IV. SECT. 6, SUB-SECT. 2.

sg. *Not business carried on in partnership with husband.*—COHN v. CANARY (B. C.), [1925] 4 D. L. R. 431; [1925] 3 W. W. R. 357; *revg.*, [1925] 3 D. L. R. 223; [1925] 2 W. W. R. 563.—CAN.

sh. *Crops grown by wife—On husband's land—Strict proof necessary.*—ANDERSON v. JOHN DEERE PLOW Co., LTD. (Sask.), [1926] 4 D. L. R. 255; [1926] 2 W. W. R. 667.—CAN.

sj. ———.]—*On wife's land—Burden of proof.*—BANQUE CANADIENNE NATIONALE v. TENCHA (Can.), [1927] 4 D. L. R. 665.—CAN.

sk. ———.]—In determining as between an execution creditor & the wife of the debtor whether the crops grown on certain land were the property of the debtor or his wife, held that

the effect of the judgment in *Banque Canadienne Nationale v. Tencha*, is that the issue must be decided on the answer to the question, whose land was it that produced the crops, & not on the answer to the question, whose business was the farming operations which produced them.—MAYER (F.) BOOT & SHOE Co. v. MOELLENDORF, [1930] 3 W. W. R. 58; 4 D. L. R. 508; [1931] 1 D. L. R. 360; [1930] 3 W. W. R. 311; *revid.*, 25 Alta. L. R. 76.—CAN.

sl. ———.]—The crop of grain in question herein grown on a farm leased by an execution debtor's wife & on which the farm work was done by the wife & the debtor with the assistance of grown-up children:—*Held*: to have been raised by the wife in carrying on the business of farming separately from her husband, & therefore, to be her property. The fact that the lease had previously been taken by the husband & that he & the wife & the children agreed that, in order to protect themselves, it should thereafter be taken in the name of the wife & that he should work for her, their real intention being to run the farm for he wife & through her for the family, & there being no attempt to conceal or dispose of any assets of the husband to evade their seizure, was not to constitute an illegal arrangement in fraud of his creditors, even though its effect, & possibly one of its purposes, was to defeat them.—UNIVERSAL MOTORS, LTD. v. WURCH, [1933] 1 W. W. R. 696; 3 D. L. R. 329; 41 Man. L. R. 188.—CAN.

### PART IV. SECT. 7, SUB-SECT. 1.

so. *Conveyance to husband & wife—Creates tenancy in common.*—At common law, under a conveyance of land to husband & wife, they took an estate by entirety; but the effect of Married Women's Property Act is to enable the wife to take as though she were a *feme sole* & so the effect of the marital relationship is ended so far as real property is concerned. Under Con-

## Part V.—Effect of Divorce or Separation with Regard to Wife's Property.

753. *Add. Annotation*:—*Consd. Re* *Monro's Settlement*, *Monro v. Hill*, [1933] Ch. 82.

755a. *Effect of remarriage*.—In 1916 a post-nuptial settlement by P. was executed with his trustees whereby it was agreed among other things that they should hold two-thirds of the settled fund upon trust to pay the income to the wife for her life. If she survived P. & married again she was to have the income of one-fifth for her life of the two-thirds during the subsequent coverture. Power to appoint the two-thirds was given to her by deed or will for the benefit of her children by the settlor, such power to cease on remarriage except as to the one-fifth, to the income of which she would still be entitled & without prejudice to any appointment she might previously have made otherwise than by precluding her from exercising on remarriage any power of revocation reserved to her so far as regarded that part of the two-thirds in which her interest then ceased. If she survived & remarried, the power to appoint new trustees conferred on her by the deed was to cease. There were four children of the marriage, all born before the execution of the deed. In 1919 the marriage was dissolved, & by a deed poll in 1922 the wife appointed the two-thirds to the four children of the marriage, reserving a power of revocation & new appointment. Shortly after she remarried. On a summons taken out by the trustees asking whether as from the remarriage they should pay her the income of the two-thirds or of one-fifth thereof, whether she was entitled to exercise the power of revocation & new appointment reserved by the deed poll, & whether she still retained the power to appoint new trustees:—*Held*: except in so far as the wife's power of appointment in future was concerned, her position under the deed was wholly unaffected by the remarriage she had contracted. —*Re* *PILKINGTON'S SETTLEMENT*, *PILKINGTON v. WRIGHT* (1923), 129 L. T. 629; 67 Sol. Jo. 679.

*Annotation*:—*Consd. Re* *Monro's Settlement*, *Monro v. Hill*, [1933] Ch. 82.

755b. — *Trust for wife after husband's death*

“until she shall marry again”—Not applicable to remarriage during first husband's lifetime.—By a marriage settlement property therein called “the husband's fund” was assigned to the trustees on trusts which provided that from & after the husband's death the trustees should pay the income of the husband's fund to the wife, if she should survive the husband, “during her life or until she shall marry again. . . .” The settlement provided also that from & after the husband's death & the wife's death or re-marriage the trustees should stand possessed of the husband's fund & the income of it in trust for the issue of the marriage as the husband & wife should by deed jointly appoint, or in default of & subject to any such appointment as the survivor of them should by deed or will appoint, & in default of & subject to any such appointment by the survivor in trust for the child or children of the marriage as therein mentioned. The marriage was dissolved in 1916 upon the wife's petition. The wife married again in 1930. In 1932 the husband died:—*Held*: the words “until she shall marry again” must be construed to mean a marriage entered into by the wife after the husband's death, & the wife was therefore entitled to the income of the husband's fund (until she should marry again) & could still exercise the power of appointment over the husband's fund given to her as survivor of the husband & herself.—*Re* *MONRO'S SETTLEMENT*, *MONRO v. HILL*, [1933] Ch. 82; 102 L. J. Ch. 89; 148 L. T. 279.

757a. *Husband entitled to income of trust fund during separation*.—*DUNCAN v. CAMPBELL* (1842), 12 Sim. 616; 6 Jur. 677; 59 E. R. 1269.

*Annotation*:—*Apld. Re* *Barnard*, *Barnard v. White* (1887), 56 L. T. 9.

774. *Add. Annotation*:—*Refd.* *Kirk v. Eustace*, [1937] 1 K. B. 278.

786. *Add. Annotation*:—*Refd.* A.-G. for Alberta *v. Cook*, [1926] A. C. 444.

787. *Add. Annotation*:—*Refd.* A.-G. for Alberta *v. Cook*, [1926] A. C. 444.

## Part VI.—Disposition of Property.

*See, now*, Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), ss. 1, 2.

799. *Add. Annotation*:—*Refd. Re* *Horne's Settle-*

*veyancing & Law of Property Act*, R. S. O., 1927, c. 137, s. 12, they now take as tenants in common.—*SPRING v. KINNEE*, [1928] 4 D. L. R. 723; 62 O. L. R. 562.—CAN.

PART IV. SECT. 10, SUB-SECT. 3.—A.

730 i. *General rule*.—Moneys received by a married woman, while living with her husband, out of the proceeds of his business or saved by her out of an allowance given her by him for housekeeping expenses, dress or the like, belong to the husband

though they may be invested in her own name, unless it appears that he intended that any such savings should belong to her as her separate property as a gift from him.—*ASHTON v. ASHTON*, [1934] 3 W. W. R. 63.—CAN.

PART V. SECT. 1, SUB-SECT. 2.

s. *Right of wife to jus relictæ*—How calculated.—Whether husband's life-rent included.—Resp. obtained a Scottish divorce from her husband, applt., who at the date of the divorce was entitled, under his father's trust disposition &

ment, *Coutts & Co. v. Duchessa Dusmet de Smours*, [1932] 2 Ch. 180.

807a. *Accrued arrears of annuity*—Payment of

settlement, among other movable estate, to a life-rent interest in a share of the trust estate. In an action by resp. against applt. to establish her right to her legal provision of *jus relictæ*, which, under Scots law, the dissolution of the marriage conferred on her:—*Held*: applt.'s life-rent interest ought to be taken into account in determining the amount of the *jus relictæ*.—*SELDON v. SELDON* (1934), 50 T. L. R. 469; 78 Sol. Jo. 471, H. L.—SCOT.

dividend in bankruptcy.]—A marriage having been dissolved by a decree absolute in 1925, the wife remarried shortly afterwards. Immediately before the remarriage the former husband executed a settlement on his former wife in consideration of her release of any claim to alimony or maintenance from him. By the settlement the husband covenanted with his former wife & as a separate covenant with the trustees to pay her, during their joint lives, an annuity of such an amount as after deduction of income tax would yield the clear sum of £3,000 a year for her separate use without power of anticipation whilst under coverture. In 1929 the former husband was adjudicated bkpt. Pltfs., as trustees of the settlement, & deft., the former wife, jointly proved in the bkpcy. for a large sum made up of several items, of which £41,723 represented the capital value of the annuity of £3,000. The proof was admitted, & in Dec. 1931, a dividend of 6d. in the pound was paid to pltfs. This amounted to £2,322, of which £1,043 1s. 6d. was the proportion attributable to the annuity. On a summons taken out by pltfs. to determine the question whether they ought to pay to deft. the dividend so far as it was attributable to the annuity, notwithstanding the restraint upon anticipation, or whether they ought to invest the same, as being capital, in purchasing an annuity for the life of deft.:—*Held*: the trustees could properly pay the whole dividend to deft.—

IORNE'S SETTLEMENT, COUTTS & CO. v. DUSMET DE SMOURS (DUCHESSA), [1932] 2 Ch. 180; 101 L. J. Ch. 359; 147 L. T. 492.

809. *Add. Annotation*:—*Refd.* Sutherland v. German Property Administrator (1933), 149 L. T. 47.

815. *Add. Annotation*:—*Apld.* *Re* Horne's Settlement, Coutts & Co. v. Duchessa Dusmet de Smours, [1932] 2 Ch. 180.

827. *Add. Annotation*:—*Refd.* *Re* Landau, *Ex p.* Trustee, [1934] Ch. 549.

906. *Add. Citations*:—*revid. sub nom.* PUBLIC TRUSTEE v. WOLF, [1923] A. C. 544; 92 L. J. Ch. 520; 129 L. T. 738; 39 T. L. R. 553; 67 Sol. Jo. 637, H. L.

965. *Add. Annotation*:—*Apld.* Townshend v. Child (1932), 48 T. L. R. 575.

973. *Add. Annotation*:—*Refd.* MacCarthy v. Agard, [1933] 2 K. B. 417.

982a. Order for payment of costs—Discovery after order—Apportionment of receiver—Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30).—An order was made on Nov. 4, 1936, for the payment by pltf. (a married woman) of the costs of a motion in an action. The order directed that "such costs are not to be payable out of any

property of hers to the enjoyment of which there is attached any enforceable restraint against anticipation." Under pltf.'s marriage settlement (dated Oct. 3, 1892) it was declared that the trustees should stand possessed of the trust fund upon trust to pay the annual income thereof to the wife during her life for her separate use without power of anticipation. Shortly after the making of the order & before payment of the above-mentioned costs pltf.'s husband died:—*Held*: the fact that pltf. was under coverture at the date of the order did not, in the events which had happened, prevent the trust fund from being applied in satisfaction of the costs of the motion; & in view of the provisions of the Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), & the repeal thereby of sects. 1-5 of Married Women's Property Act, 1882 (c. 75), & sect. 1 of Married Women's Property Act, 1893 (c. 63), & pltf. having ceased to be under coverture, the trust fund was not subject to an enforceable restraint against anticipation & could be so applied.—*Re* MEREDITH'S TRUSTS, MEREDITH v. CLARKE, [1938] Ch. 806; [1938] 3 All E. R. 199; 107 L. J. Ch. 302; 159 L. T. 303; 54 T. L. R. 962; 82 Sol. Jo. 566.

986. *Add. Annotation*:—*Generally*, *Refd.* Capron v. Capron, [1927] P. 243.

1002. *Add. Annotation*:—*Refd.* Westminster Bank, Ltd. v. Wilson, [1938] 3 All E. R. 652.

1007. *Add. Annotation*:—*Refd.* Bosworthick v. Bosworthick, [1926] P. 159.

1036. *Add. Annotation*:—*Refd.* *Re* Alington & L. C. C.'s Contract, [1927] 2 Ch. 253.

1053a. — Cause of action arising before marriage—Liability for costs arising after marriage.]—

A widow commenced an action against a professional man, from whom she claimed damages for alleged negligence. Before the trial of the action she remarried. At the trial judgment was given for deft. with costs:—*Held*: (1) the liability to pay costs was one wholly arising at a date when pltf. was a married woman, & was therefore payable out of her separate estate & not otherwise; (2) there was jurisdiction under Married Women's Property Act, 1893 (c. 63), s. 2, to order & enforce the payment of costs out of that separate estate whether subject to a restraint on anticipation or not; (3) such an order ought to be made having regard to the circumstances in which the action had been commenced & prosecuted.—TOWNSHEND v. CHILD, [1933] 1 K. B. 181; 102 L. J. K. B. 685; 147 L. T. 278; 48 T. L. R. 575.

1054. *Add. Annotation*:—*As to* (1) *Consd.* Townshend v. Child (1932), 48 T. L. R. 575.

1057. *Add. Annotation*:—*Refd.* Townshend v. Child (1932), 48 T. L. R. 575.

PART VI. SECT. 1, SUB-SECT. 5.—  
B. (a) i.

911 i. *Assignment inoperative—Transfer to pay husband's debts.*—RODRIGUE v. DOSTIE & VACHON, [1927] 4 D. L. R. 1139; [1927] S. C. R. 563.—CAN.

PART VI. SECT. 1, SUB-SECT. 5.—  
C. (a).

951 v. —.—.—UNION BANK v. BENEDET, [1925] 4 D. L. R. 1057.—CAN.

PART VI. SECT. 3, SUB-SECT. 1.

d i. —.—.—Not on conveyance of

equitable estate.]—ADAMS v. LOOMIS (1875), 22 Gr. 99.—CAN.

e i. —.—.—HARTLEY v. MAYCOCK (1897), 28 O. R. 508.—CAN.

k i. —.—.—ELLIOTT v. BROWN (1884), 11 A. R. 228.—CAN.

k ii. —.—.—Sale as spinster—Conveyance not impeachable on ground of non-compliance with statutory formalities.]—GRAHAM v. MENCILLY (1869), 16 Gr. 661.—CAN.

so. Pledge of wife's shares as security for husband—Absence of independent advice—Onus of proof of duress.]—In an action by a married woman

against a bank to set aside, on the ground of the undue influence of her husband & of misrepresentation, a guarantee (with pledge of securities) given by her for the indebtedness of a co. in which her husband was the principal shareholder, there is not an onus upon the bank to prove that she had independent advice; in the absence of substantive proof of the undue influence (particulars of which should be pleaded) the action fails so far as it is based upon that ground.—MACKENZIE v. ROYAL BANK OF CANADA, [1934] A. C. 468; 103 L. J. P. C. 81; 79 Sol. Jo. 471, P. C.—CAN.

1058. *Add. Annotation*:—*Refd.* Croston v. Vaughan, [1938] 1 K. B. 540.

1063. *Add. Annotation*:—*Consd.* Townshend v. Child (1932), 48 T. L. R. 575.

1066. *Add. Annotation*:—*Consd.* Townshend v. Child (1932), 48 T. L. R. 575.

1067. *Add. Annotation*:—*Consd.* Townshend v. Child (1932), 48 T. L. R. 575.

1079. *Add. Annotation*:—*Refd.* Townshend v. Child (1932), 48 T. L. R. 575.

1097. *Add. Annotation*:—*Refd.* R. v. Minister of Health, *Ex p.* Villiers, [1936] 1 All E. R. 817.

1106. *Add. Annotation*:—*Apld.* *Re* Mathieson, [1927] 1 Ch. 283.

1162. *Add. Annotation*:—*Refd.* *Re* Lloyds Bank,

**PART VI. SECT. 6, SUB-SECT. 1.**

1190 i. *Purchase out of wife's income—Land conveyed in own name—Resulting trust.*—A resulting trust held to have arisen in favour of a wife whose money, it was found, had been used in the purchase of land the title to which was taken in the name of her husband. —*MORRIS v. MORRIS & FRENCH*, [1931] 3 W. W. R. 427.—*CAN.*

o i. *Conveyance by husband alone—Effect.*—*WALLIS v. BURTON* (1855), 6 Gr. 352.—*CAN.*

o ii. —.—.—*Held*: an effectual transfer of his marital rights in the land conveyed. —*ALLAN v. LEVES-CONTE* (1857), 15 U. C. R. 9.—*CAN.*

o iii. —.—.—*Held*: a deed of gift executed by a Burmese Buddhist husband without his wife's consent of part of the joint property of the marriage is wholly void & conveys no title to the donee in respect of the property which it purports to convey. —*U. Po. U. v. MATOK GYT* (1929), 1 L. R. 7 Ran. 374.—*IND.*

o i. *Property used & maintained by husband—No presumption of gift by wife.*—*CALHOUN v. REID* (Sask.), [1927] 4 D. L. R. 808; [1927] 3 W. W. R. 429.—*CAN.*

i i. —.—.—*SEMPLE v. SHARP*, [1927] 1 W. W. R. 965; 21 Sask. L. R. 435.—*CAN.*

i ii. —.—.—*Wife not examined—Certificate of examination fraudulently signed.*—Title set aside, subject to the rights of an innocent purchaser from the transferee to obtain the land on the terms of his agreement with the transferee. —*FROSTAD v. LIBEK*, [1927] 3 D. L. R. 916; [1927] 2 W. W. R. 550; 21 Sask. L. R. 603.—*CAN.*

i iii. —.—.—*The fact that the husband makes his home on certain land, in which he & another have each a one-half interest, brings it within Homesteads Act, 1915 (c. 29).* —*McDOUGALL v. McDOUGALL*, [1919] 2 W. W. R. 637; 12 Sask. L. R. 289.—*CAN.*

i iv. —.—.—*After a homestead under Homesteads Act has ceased to be such owing to its permanent abandonment as a place of residence the wife has no status under said Act to oppose the validity of an assignment of the land executed by her husband prior to said date, although the assignment was not executed, as the Act requires it to be, by her; & her husband is in no better position in this respect than she is.* —*DOUGLAS v. ADDIE*, [1928] 4 D. L. R. 167; [1928] 3 W. W. R. 37; *aff.*, [1929] 2 D. L. R. 401; 1 W. W. R. 610; 23 S. L. R. 463.—*CAN.*

i v. —.—.—*Order dispensing with consent of wife to disposition—When granted under Dower Act.*—Where a husband had refused, without lawful reason therefor, to live with his wife or support her & his treatment of her was found to have conduced to her adultery, it was held that it would not be "fair & reasonable under the circumstances," to grant an order under Dower Act, R. S. A. 1922, c. 135, s. 8, dispensing with her consent to his disposition of his homestead within said Act. Under Dower Act, s. 3, as it now stands a disposition of the homestead by the husband without the wife's consent, when there is no order dispensing with it, is absolutely null & void, &

not so merely as it affects the wife's interest therein. —*Re MILLER*, [1929] 1 D. L. R. 147; [1928] 3 W. W. R. 643.—*CAN.*

i vi. —.—.—*Action by wife to set aside agreement for sale by husband.*—*BAKER v. BAKER*, [1932] 3 W. W. R. 375; 40 Man. L. R. 631.—*CAN.*

*No consent by wife—Conveyance of joint property—Void.*—*SCHMIDT v. MILLER*, [1934] 2 W. W. R. 593; 4 D. L. R. 42 Man. L. R. 340.—*CAN.*

i viii. —.—.—*Acknowledgment—Who may take.*—*Held*: that where the wife's acknowledgment to a document to which sect. 3 (1) of Homesteads Act, R. S. S., 1930, applies is taken by the person who prepared the document the effect is the same as if no acknowledgment were taken at all & as if the wife were not a party to the transaction; & it follows, under sect. 11 of said Act, that she is entitled to have it set aside & cancelled. The husband is not a necessary party to the action brought by her for said purpose. —*WILGUSKI & WILGUSKI v. MIAZGA*, [1936] 1 W. W. R. 21.—*CAN.*

n i. —.—.—*Residence condition precedent.*—*PENDLETON v. PENDLETON*, [1927] 2 W. W. R. 720; 21 Sask. L. R. 579.—*CAN.*

o i. —.—.—*Signature of wife—When dispensed with.*—*ASKIN v. ASKIN*, [1929] 4 D. L. R. 1068; 1 W. W. R. 663; 23 S. L. R. 631.—*CAN.*

o ii. —.—.—*Where a wife is living apart from her husband, pursuant to the terms of a separation agreement, which does not provide that she shall be disentitled to alimony, & in which there is nothing in the nature of a release or an agreement for the release of dower, it cannot be said that she is so living "under such circumstances as disentitle her to alimony"; & an order dispensing with her signature, for the purpose of barring her dower, to a deed of conveyance of land of the husband will not be made under sect. 13 of Dower Act, R. S. O., 1927. —*Re DAVIDSON*, [1930] 2 D. L. R. 84; 65 O. L. R. 19.—*CAN.**

o iii. —.—.—*Renewal of lease of homestead.*—Under the Homesteads Act, R. S. S., 1930, which provides that "homestead" shall also "include any property which has been such a homestead at any time," & that every transfer, etc., of an interest in a homestead shall be signed by the owner's wife, if any, the signature of the wife is required to a renewal of a lease of a homestead although they had not resided on the homestead since the making of the original lease. —*AUDOORN v. AUDOORN & PRISMA*, [1935] 1 W. W. R. 717; on appeal, [1935] 2 W. W. R. 362; 5 F. L. J. (Can.), 37.—*CAN.*

**PART VI. SECT. 8, SUB-SECT. 2.—A.**

o i. —.—.—*Separate estate.*—The interest of a wife in a policy effected by her husband on his own life, & which has been declared by him to be for her benefit, is her separate estate, & may, in her husband's lifetime, be assigned by her. —*GRAHAM v. CANADA LIFE ASSURANCE CO., PROCTOR v. GRAHAM* (1894), 24 O. R. 607.—*CAN.*

o k. *Position of wife under Insurance*

*Act, R. S. O., 1927.*—Under Insurance Act, R. S. O., 1927, a wife's position upon maturity of the policy is not that of a preferred beneficiary, but of a person who has an accrued cause of action on the policy & an absolute right to the proceeds of the policy. —*ARMSTRONG v. IMPERIAL BANK OF CANADA*, [1938] O. R. 239.—*CAN.*

**PART VI. SECT. 8, SUB-SECT. 2.—B.**

n i. —.—.—*Bankruptcy of husband.*—S. effected an insurance on his own life in favour of his wife under Married Women's Policies of Assurance (Scotland) Act, 1880. S.'s estates were afterwards sequestered. —*Held*: the policy vested in bkpt. as trustee for his wife, & it formed no part of his estate & was not liable to the diligence of his creditors. —*STEWART v. HODGE* (1901), 8 S. L. T. 436.—*SCOT.*

n ii. —.—.—*Money due under a policy of insurance payable to the wife of the insured after his death forms part of the estate of the insured. No trust is created in favour of the wife by a life policy expressed to be for the benefit of the wife of the assured.* —*KRISHNA LAL SADRHU v. PRAMILA BALA DAS* (1928), 1 L. R. 55 Calc. 1315.—*IND.*

n iii. —.—.—*A husband insured his life for £2,000 payable on his death. The policy stated: "This policy is for the benefit of M.T.R., the wife of the assured." —Held: the trust so created in favour of the wife in virtue of Married Women's Property Act, 1915, s. 14 (2), was one which immediately & unconditionally conferred on her the entire beneficial interest in the policy. Therefore, on the death of the husband the policy moneys were not dutiable under Administration & Probate Act, 1915, s. 147, as property comprised in a settlement by him containing trusts & dispositions to take effect after his death. —*Re REYNOLDS, REYNOLDS v. VICTORIA COMR. OF TAXES*, [1931] V. L. R. 254; *Argus L. R.* 231.—*AUS.**

n iv. —.—.—*Whether assignable.*—A policy of assurance was effected by a husband for the benefit of his wife under Married Women's Policies of Assurance (Scotland) Act, 1880. There was competition between the widow & an assignee claiming under an assignment which bore to have been executed with the consent & concurrence of the wife. —*Held*: the wife had no power to discharge the trust in her favour created by the policy, & the insurance co. ought to have known that the deed was one which the spouses were disabled from granting. —*SCOTTISH LIFE CO. v. DONALD* (1901), 9 S. L. T. 200.—*SCOT.*

o i. —.—.—*What amounts to.*—A life insurance policy, in the column headed "to whom payable" contained the following words, viz. "the assured or his wife if he predeceases her." —*Held*: the said words express on the face of the policy that the same is for the benefit of his wife, & as such it enures & is deemed to be a trust for the benefit of the wife within sect. 6 of Married Women's Property Act (Act III. of 1874). —*ABHIRMAVALLI v. MADRAS OFFICIAL TRUSTEES* (1932), 1 L. R. 55 Mad. 171.—*IND.*

Ltd., *Bomze & Lederman v. Bomze*, [1931] 1 Ch. 289.

1203. *Add. Citation* :—8 W. R. 333.

1211. *Add. Annotation* :—*As to* (1) *Consd. Cousins v. Sun Life Assurance Society*, [1933] Ch. 126.

1220. *Add. Annotation* :—*Refd. Royal Exchange Assee. v. Hope*, [1928] Ch. 179.

1223a. *Necessity for survivorship of wife.*

In the year 1876 a husband during the lifetime of his wife took out a policy on his life with an assurance co., whereby, after a recital that the assured "for the benefit of his wife" in pursuance of Married Women's Property Act, 1870 (c. 93), had proposed to the co. to effect an assurance on his own life for £500, in consideration of the payment of the premiums during the life of the assured, the co. covenanted that the property of the co. should be liable to pay to the exors., administrators & assigns of the assured the sum of £500. In 1918 the wife died, & in 1929 the husband died without having married again. In 1891 the husband was adjudicated bkpt. & obtained his discharge as from Apr. 14, 1899 :—*Held* : upon the true construction of the policy & Married Women's Property Act, 1870 (c. 93), s. 10, the interest in the policy moneys vested in the husband & upon his adjudication in the trustee in his bankruptcy subject to the trust in favour of his wife which ensured for her benefit only if she survived her husband ; with the result that as she died before her husband & before the fund fell into possession, the policy moneys belonged & were payable to the trustee in bkpty.

*Semble* : Married Women's Property Act, 1870 (c. 93), s. 10, does not enable a husband to confer the benefit of the policy upon any wife who does not by surviving him become his widow.—*Re COLLIER*, [1930] 2 Ch. 37 ; 143 L. T. 329 ; *sub nom. Re COLLIER, Ex p. COLLIER'S EXORS.*, 99 L. J. Ch. 241 ; [1929] B. & C. R. 173.

*Annotation* :—*Dbtd. Cousins v. Sun Life Assurance Society*, [1933] Ch. 126.

1224. *Add. Annotation* :—*Consd. Re Gladitz, Guaranty Executor & Trustee Co. v. Gladitz*, [1937] 3 All E. R. 173.

1225. *Add. Annotation* :—*Apld. Re Fleetwood's Policy*, [1926] Ch. 48.

1226. *Add. Annotations* :—*Consd. Re Pitts, Cox v. Kilsby*, [1931] 1 Ch. 546 ; *Beresford v. Royal Insurance Co.*, [1938] A. C. 586. *Refd. Royal Exchange Assee. v. Hope*, [1928] Ch. 179 ; *Re Collier*, [1930] 2 Ch. 37 ; *Cousins v. Sun Life Assurance Society*, [1933] Ch. 126 ; *Re Sigsworth, Bedford v. Bedford*, [1935] Ch. 89 ; *Re Foster, Hudson v. Foster*, [1938] 3 All E. R. 357 ; *Re Sinclair's Life Policy*, [1938] 3 All E. R. 124.

1226a. *If living at his death—Cash value of policy sought to be taken by insured during life.*—A husband took out an insurance policy for £500 on his life, & by the terms of the policy the co. agreed to pay that sum to

insured's wife, if she were living at his death, or in the event of her prior death to pay it to insured's exors., administrators & assigns. The policy contained a proviso that, if at the end of twenty years insured was still living, he should have the right to exercise any of six specified options. Insured being then still living, he exercised an option to receive the entire cash value of the policy with its share of accumulated profits & to discontinue the policy. A sum of £288 thus became payable. The co. were unwilling to pay over this sum except on the joint receipt of the husband & wife, & ultimately paid it into ct. :—*Held* : (1) the policy came within sect. 11 of the above Act, & created a trust in favour of the wife in certain events ; (2) insured must be taken to have exercised the option for the benefit of the trust ; (3) unless the husband & wife came to an agreement, the fund must be accumulated in ct. until it could be ascertained by the death of either party who was entitled to it.—*Re FLEETWOOD'S POLICY*, [1926] Ch. 48 ; 95 L. J. Ch. 195 ; 135 L. T. 374.

*Annotations* :—*Consd. Cousins v. Sun Life Assurance Society*, [1933] Ch. 126 ; *Re Gladitz, Guaranty Executor & Trustee Co. v. Gladitz*, [1937] 3 All E. R. 173.

1226b. ——— *Death of wife in husband's lifetime.*—Where a husband has insured his life under the provisions of the Married Women's Property Act, 1882 (c. 75), for the benefit of his wife, & she dies in his lifetime, the policy & the surrender value become the property of the wife's legal personal representatives, & the husband has no claim to them.—*COUSINS v. SUN LIFE ASSURANCE SOCIETY*, [1933] Ch. 126 ; 102 L. J. Ch. 114 ; 148 L. T. 101 ; 49 T. L. R. 12, C. A.

*Annotation* :—*Refd. Re Smith, Bilham v. Smith*, [1937] 3 All E. R. 472.

1226c. ——— *Lien of husband for premiums paid.*—A husband took out a policy of life assurance for £1,000 payable after ten years or upon his earlier death & expressed to be for the benefit of his wife, therein named, under Married Women's Property Act, 1882 (c. 75). Two years later, & before the policy possessed any surrender value, the wife died. The husband kept the policy on foot, paying the premiums, until it matured, when the insurance co. paid the policy moneys into a deposit account in the joint names of the husband & another as personal representatives of the deceased wife. The husband having died, his widow, as his administratrix, claimed a lien on the policy moneys for the amount of the premiums paid after his first wife's death :—*Held* : while the policy moneys belonged to the first wife's estate, in accordance with the decision in *Cousins v. Sun Life Assurance Society*, [1933] Ch. 126, the estate of the husband was entitled to a lien thereon for the amount of the premiums paid by him since his first wife's death, as being money expended by him as a trustee to preserve property of a *cestui que trust*.—*Re SMITH'S ESTATE, BILHAM v. SMITH*, [1937] Ch. 636 ; [1937] 3 All E. R. 472 ; 106 L. J. Ch. 377 ; 157 L. T. 511 ; 53 T. L. R. 910 ; 81 Sol. Jo. 611.

#### PART VI. SECT. 8, SUB-SECT. 4.

*sp. Pledge by wife to secure advances for joint support—Account.*—*Securities*

pledged by a wife as collateral for advances to the husband for their joint support will not entitle her to an accounting by the creditor.—*PIPER v. UNVERZAGT*, [1937] 2 D. L. R. 319 ; 51 B. C. R. 379.—*CAN.*

PART VI. SECT. 9, SUB-SECT. 1.—A. t. 1. ———.—*WHITEHEAD v. WHITEHEAD* (1887), 14 O. R. 621.—*CAN.*

t. II. ———.—*BELL v. BELL*, [1928] 2 D. L. R. 311.—*CAN.*

**1227. Add. Annotations:—***Apld. Re Collier*, [1930] 2 Ch. 37. *Refd. Cousins v. Sun Life Assurance Society*, [1933] Ch. 126.

**1227a. ——— Adopted child.]—**A policy effected by the assured under & by virtue of the Married Women's Property Act, 1882 (c. 75), s. 11, was stated to be for the benefit of the wife of the assured, & if she were dead at the time the policy moneys became payable then for his daughter, naming her, & if both of them were then dead for the exors., administrators or assigns of the assured. The daughter was an adopted child, & there had been no legal adoption under Adoption of Children Act, 1926 (c. 29):—*Held*: (1) there was no effective trust for the adopted child by virtue of Married Women's Property Act, 1882 (c. 75), s. 11, & the infant was outside the scope of that sect.; (2) the adopted child had no legal right to claim the policy moneys from the insurance co. The only persons who had such a right were the assured & his wife, who could surrender the policy or otherwise deal with it without reference to the infant.—*Re CLAY'S POLICY OF ASSURANCE*, *CLAY v. EARNSHAW*, [1937] 2 All E. R. 548.

*Annotation:—As to (2) Refd. Re Sinclair's Life Policy*, [1938] 3 All E. R. 124.

**1228. Add. Citation:—**95 L. J. Ch. 24.

**1228a. ——— Accident policy.]—**A policy of insurance provided for the payment of certain specified sums by the underwriters on death on disablement of the assured caused by

accident. It contained a memorandum stating that it was understood & agreed that all claims thereunder should be payable to his wife, "if she is living at the happening of the event upon which the claim becomes payable, or if she is dead, then to the exors., administrators & assigns of the assured." The assured died as the result of an accident within the policy, his wife surviving him:—*Held*: (1) the policy was one effected by the assured on his own life within Married Women's Property Act, 1882 (c. 75); (2) it was expressed to be for the benefit of his wife within the same sect.; (3) accordingly, his wife was solely & beneficially entitled to the moneys payable thereunder.—*Re GLADITZ, GUARANTY EXECUTOR & TRUSTEE CO., LTD. v. GLADITZ*, [1937] Ch. 588; [1937] 3 All E. R. 173; 106 L. J. Ch. 254; 157 L. T. 163; 53 T. L. R. 857; 81 Sol. Jo. 527.

**1233a. Number of trustees—Fund to be retained for infants—Single trustee not appointed.]—***Re HLOWSON'S POLICY TRUSTS*, [1885] W. N. 213.

**1234. Add. Annotations:—***Refd. Royal Exchange Assce. v. Hope*, [1928] Ch. 179; *Smith v. Wood* (1928), 139 L. T. 250; *Re Smith, Bilham v. Smith*, [1937] 3 All E. R. 472; *Re Foster, Hudson v. Foster* (No. 2), [1938] 3 All E. R. 610.

**1302. In second paragraph for "on which" read "or child."**

**1306. Add. Annotation:—***Refd. Harrods, Ltd. v. Tester*, [1937] 2 All E. R. 236.

#### PART VI. SECT. 9, SUB-SECT. 2.— A. (a).

**1302 v. ———. ———.]—***Pltf.*, deft.'s husband, became entitled to a conveyance of certain land vested in a solr. By *pltf.*'s direction the solr. conveyed the land to deft. The conveyance was dated Apr. 9, 1920, & was not registered until the following Dec. Until registration the deed had not been delivered, & deft. had been told nothing about it:—*Held*: though the presumption of advancement may be rebutted by evidence of actual intention, there was cogent evidence of *pltf.* having ultimately made up his mind that his wife should have the property.—*HARRINGTON v. HARRINGTON*, [1925] 2 D. L. R. 849; 56 O. L. R. 568.—CAN.

**1302 vi. ———. ———.]—***DE BURY v. DE BURY* (1903), 36 N. B. R. 37; 22 C. L. T. 184.—CAN.

**1302 vii. ———. ———.]—***CHALLONER v. CHALLONER*, [1930] 4 D. L. R. 18.—CAN.

**1302 viii. ———. ———.]—**Expenditures made by a husband in purchasing property in the name of his wife, or in improving her property, must *prima facie* be considered as gifts to the wife, but this presumption may be rebutted by evidence; & this evidence may consist of the surrounding & accompanying circumstances, & of parol testimony. Or she may create a trust in his favour after the property has become hers.—*BREMER v. BROWN-RIDGE*, [1934] 1 W. W. R. 545.—CAN.

**1302 ix. ———. ———.]—**A presumption of advancement arises on conveyance of land to a wife by a husband.—*HYMAN v. HYMAN*, [1934] 4 D. L. R. 532.—CAN.

**o 1. ——— Subsequent deed of gift by wife.]—***Pltf.*, who was the former wife of deft. & the registered owner of a property known as the G. Hotel, sued to have a *caveat* registered by him discharged, on the ground that he had no interest in the property. The

*caveat* was based upon the following document: "I hereby agree to give D. half of the property known as the G. Hotel, & to give him half the rent of the same from the present date, & he agrees to pay half of all debts against the above property up to date for the said half interest." The land had been purchased in 1902 by deft. in the name of *pltf.*, his then wife. Upon that purchase & the erection & equipment of the hotel building he applied the proceeds of the sale of two quarter sections, one of which was in his name & the other in hers. They ran the hotel business together, until 1905, he acting as manager, she as cook & housekeeper. Having agreed to separate, they sold the furniture, & leased the hotel, & borrowed money on mtge. to help pay off the floating liabilities. The husband signed the mtge. as a joint covenantor, & the lease as a consenting party. Before leaving her he asked her to sign the memorandum above set out which she did without demur:—*Held*: an express trust existed in favour of deft. for one half of the estate in question.—*REYNOLDS v. BETSON*, [1931] 1 W. W. R. 793; 2 D. L. R. 760; 39 Man. L. R. 411.—CAN.

**1306 i. ——— As between husband & wife—Notwithstanding intention to defraud creditors.]—**In Mar. 1931, *applt.*, who was registered as the owner of an "E." motor car, signed an application under Motor Vehicles Act requesting cancellation of his registration as he had disposed of the car to resp. his wife; the wife signed a form stating she had acquired the car from *applt.* In Aug. 1931, the "E." car, by arrangements to which *applt.* was a party, was traded in for a "N." car, *applt.* paying a deposit & also the balance of the price, after allowing for the value of the "E." The prescribed documents showing that the "N." car had been disposed of to & acquired by the wife, were signed by the vendor & the wife. The car was kept in a garage at the matrimonial home, to which

both husband & wife had keys, but the wife, although able to drive, did not drive the "N." car. There was evidence to show that *applt.* put the car into the wife's name to avoid financial liabilities in case of accident, & as a safeguard against creditors. It is an offence under Motor Vehicles Act to make a false statement in an application & by that Act a certificate relating to the ownership of a car is *prima facie* evidence of the truth of its contents. In proceedings by *applt.* to establish his ownership & right to possession:—*Held*: the evidence disclosed a purchase by *applt.* in the name of resp.; the presumption was that of a gift by *applt.* to resp.; & therefore, the covinous arrangement alleged by *applt.* could not be permitted to rebut the presumption of ownership, which arose from the acts of the parties as well as under the Statute.—*MUSMAN v. MUSMAN*, [1933] S. A. S. R. 327.—AUS.

**1309 ii. ———.]—**A gift is presumed where moneys of the husband are deposited by the wife, with his knowledge, in her sole name.—*Re NORTHAGE*, [1936] 2 D. L. R. 78; 10 M. P. R. 248; 5 F. L. J. (Can.) 245.—CAN.

**sm. Grain & stock on land conveyed to wife.]—**A husband conveyed to his wife half of a quarter section of land. Husband & wife lived together on, & farmed, the quarter section, & the husband worked on the farm after the transfer in the same way as before:—*Held*: the husband was the owner of grain grown on, & animals situated on, the quarter section.—*NATIONAL TRUST CO. v. HOLLOWAYCHUK*, [1925] 3 W. W. R. 382.—CAN.

**sm. Purchase in husband's name—Subsequent transfer to wife—Failure of consideration.]—**Husband & wife purchased a house in Oct. 1920. The house was in *pltf.*'s name until Jan. 1922, when it was transferred to the wife. In Jan. 1924, the husband was ejected from the house, & he brought action against the wife for a declaration that his wife held the house as trustee



1311a. —.]—A husband opened a banking account in his wife's name, all payments into the account being made by the husband. The account was used for domestic & other purposes. The wife always asked her husband's consent before she drew on the account & she had given the bank a mandate to allow her husband to draw on the account. Judgment creditors of the wife sought to garnishee the account:—*Held*: on the facts there was a resulting trust in favour of the husband & as the moneys were therefore the property of the husband, the wife's creditors could not garnishee the account, although it was in her name.—*HARRODS, LTD. v. TESTER*, [1937] 2 All E. R. 236; 157 L. T. 7; 81 Sol. Jo. 376, C. A.

Annotation:—*Refd.* *Hirschhorn v. Evans*, [1938] 3 All E. R. 491.

1318. *Add. Annotation*:—*Refd.* *Harrods, Ltd. v. Tester*, [1937] 2 All E. R. 236.

1320a. — *Payment of mortgage moneys as surety for wife.*—Upon a mtge. by the wife, the husband joined as surety, the two covenanting jointly & severally to pay the mtge. debt. The wife received the mtge. money from the mtgees. Later the mtgees. during the lifetime of the wife called upon the husband as such surety to repay the mtge. moneys, which he did. After the death of

the wife the husband sought to prove in her estate as a creditor for the sum so paid, when it was contended that he had no right to prove as a creditor since the payment was an advancement of the wife:—*Held*: the husband in paying the mtgee. was discharging a legal obligation under his guarantee, & in such circumstances there could be no question of making a gift & no presumption of an advancement. Upon payment he became entitled to all remedies of a surety who has paid the debt of the principal debtor, & in the absence of any evidence of a release by him, he was entitled to prove in the estate as a creditor.—*Re SALISBURY-JONES, HAMMOND v. SALISBURY-JONES*, [1938] 3 All E. R. 459; 159 L. T. 469; 82 Sol. Jo. 728.

1336. *Add. Annotations*:—*Refd.* *Harrods, Ltd. v. Tester*, [1937] 2 All E. R. 236; *Hirschhorn v. Evans*, [1938] 3 All E. R. 491.

1339. *Add. Annotation*:—*As to* (2) *Refd.* *Dodworth v. Dale*, [1936] 2 All E. R. 440.

1363. *Add. Annotations*:—*As to* (1) *Refd.* *Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380. *As to* (3) *Consd.* *Re Lloyds Bank, Ltd., Bomze v. Bomze* (1930), 47 T. L. R. 83.

1365. *Add. Annotation*:—*Refd.* *Re Lloyds Bank, Ltd., Bomze & Lederman v. Bomze*, [1931] 1 Ch. 289.

for him. On the trial the husband stated that when he made the conveyance to his wife he did so on her undertaking that the members of her family would vacate the house, & this was never carried out:—*Held*: *plff.* could not succeed, as the only claim he could set up would be that he had made a conveyance for a consideration that had failed, & his action would be either for specific performance or damages.—*Boby v. Boby* (1924), 34 B. C. L. 315.—CAN.

so. *Conveyance by husband without consideration—Husband solvent—Certificate of title issued to wife.*—Where land was transferred, as a gift, to a married woman by her husband, during the time that Married Woman's Act, R. S. M. 1892, c. 95, was in force, the husband being then solvent, & a certificate of title therefor issued in her name under Manitoba Real Property Act:—*Held*: the beneficial, as well as the legal, interest in the land vested in her for her separate use, & neither the land nor its proceeds could be taken in execution for debts of the husband subsequently incurred, notwithstanding Married Woman's Act, s. 2, respecting property received by a married woman from her husband during coverture.—*FRASER v. DOUGLAS* (1908), 40 S. C. R. 384.—CAN.

PART VI. SECT. 9, SUB-SECT. 2.—A. (b).

1337 iii. —.]—The deposit by a Hindu of his own money in a bank in the joint names of himself & wife, & on the terms that it is to be payable to either or the survivor, does not on his death constitute a gift by him to his wife there being in India no presumption of an intended advancement in favour of a wife.—*GURAN DITTA v. RAM DITTA* (1928), 55 L. R. Ind. App. 235.—IND.

m i. —.]—*Held*: to raise a presumption of joint tenancy.—*MATHEWS v. NATIONAL TRUST CO. (Ont.)*, [1925] 4 D. L. R. 774.—CAN.

m ii. —.]—D. deposited a sum of money in a bank to the joint credit of himself & his wife, & they both signed a document authorising the bank to pay all moneys at the credit of the

account to either of them, & in the case of the death of either to pay the same to the survivor. After D.'s death, his widow became insane & was confined in a public hospital. Money was paid by the bank to the Public Trustee. Having been restored to sanity the widow redeposited in the bank what was left of the money to the joint credit of herself & two relatives:—*Held*: the money originally deposited belonged to D. & was placed to the credit of himself & wife as a means of conveniently managing the affairs of himself & his family; & therefore, the presumption in favour of the right of his wife to what remained of the fund on his death was rebutted.—*STADDER v. CANADIAN BANK COMMERCE*, [1929] 3 D. L. R. 651; 64 O. L. R. 69.—CAN.

m iii. —.]—The rule of English law that where a deposit is made in the joint names of husband & wife, a gift is to be presumed in favour of the wife, the gift being defeasible on the death of the wife in the lifetime of the husband, does not apply to India. In India the case is governed by sect. 123 of Transfer of Property Act, under which a gift of movable property must be effected either by a registered instrument or by delivery.—*PAUL v. NATHANIEL GOPAL NATH* (1931), 1 L. R. 53 All. 633.—IND.

m iv. —.]—Money in a bank deposit account which had been opened in the joint names of deceased & his wife under an agreement with the bank signed by both of them, which provided that the death of either should not affect the right of the survivor to withdraw moneys deposited therein, held to belong to the wife by virtue of her survivorship.—*ROBERTSON v. BACHELOR* (No. 2), [1935] 3 W. W. R.

m v. — *Deposit book retained by husband.*—Where a husband transferred his savings account to the joint names of husband & wife, but retained the deposit book, & included the money in his testamentary disposition:—*Held*: there was an intention to retain the money as his property, & it passed to his estate.—*Re McKAY*, [1938] 1 D. L. R. 581.—CAN.

sp. *Banking account in joint names.* 1—A wife & husband opened a joint account in a bank, & both signed a direction to the bank: "All money which may be deposited by us or either of us to the account is our joint property, but such money may be withdrawn by either one of us, or the survivor of us." The money was all the husband's, & was deposited to pay the expenses of the wife & her child, during the husband's absence, & to make payments in connection with his property:—*Held*: the wife was not entitled to half the money to the credit of the account.—*SOUTHBY v. SOUTHBY* (1917), 40 O. L. R. 429; 38 D. L. R. 700.—CAN.

— *Right of wife as survivor.*—*See Nos.* 1335-1338.

sr. *Rebuttal of presumption.*—The presumption of gift arising from deposit by a husband in the joint names of his wife & himself may be rebutted by showing that it was a matter of convenience.—*MCLEAN v. VESSEY*, [1935] 4 D. L. R. 170; *sub nom.* *RE VESSEY, MCLEAN v. VESSEY*, 10 M. P. R. 16; *sub nom.* *VESSEY v. VESSEY*, 5 F. L. J. (Can.) 116.—CAN.

PART VI. SECT. 9, SUB-SECT. 2.—A. (d).

sw. *Money sent to wife to be saved.*—Money sent by a husband to his wife to be saved for their old age, belongs to them equally.—*CARROLL v. CARROLL*, [1937] 2 D. L. R. 314; 11 M. P. R. 397.—CAN.

PART VI. SECT. 9, SUB-SECT. 3.—A. (a).

1363 i. — *Understanding transaction.*—Where a wife signed a quit-claim deed before a lawyer, transferring her half interest in the home to her husband, but she alleged that she thought they went to the lawyer solely to obtain a divorce, the deed was upheld in an action for cancellation, there being no evidence that she did not know what she was doing, or of undue influence.—*HEATHORN v. HEATHORN* (1932), 46 B. C. R. 413.—CAN.



- |   |   |
|---|---|
| <p><b>1369.</b> <i>Add. Annotation:—Refd. Re Lloyds Bank, Ltd., Bomze &amp; Lederman v. Bomze, [1931] 1 Ch. 289.</i></p> <p><b>1373.</b> <i>Add. Annotation:—Refd. Re Lloyds Bank, Ltd., Bomze &amp; Lederman v. Bomze, [1931] 1 Ch. 289.</i></p> <p><b>1378.</b> <i>Add. Annotation:—Refd. Re Lloyds Bank,</i></p> | <p><i>Ltd., Bomze &amp; Lederman v. Bomze, [1931] 1 Ch. 289.</i></p> <p><b>1394.</b> <i>Add. Annotation:—Consd. Re Lloyds Bank, Ltd., Bomze &amp; Lederman v. Bomze, [1931] 1 Ch. 289.</i></p> <p><b>1462.</b> <i>Add. Annotation:—Consd. Townshend v. Child (1932), 48 T. L. R. 575.</i></p> |
|---|---|

## Part VII.—Liability for Ante-Nuptial Obligations of Wife.

**SECT. 1.—LIABILITY OF HUSBAND** (p. 175.)

*See, now, Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), s. 3.*

## Part VIII.—Contracts of Wife during Coverture.

*See, now, Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), s. 1.*

- 1469. Add. Annotations :—**Consd. Green v. Weatherill, [1929] 2 Ch. 213. **Apld.** Townshend v. Child (1932), 48 T. L. R. 575. **Consd.** MacCarthy v. Agard, [1933] 2 K. B. 417.
- 1479. Add. Annotation :—**Refd. *Re Landau, Ex p. Trustee*, [1934] Ch. 549.
- 1489a. Settlement of Insurance policies on life of husband.]—**By a post-nuptial settlement made in pursuance of ante-nuptial articles, certain policies of insurance on the life of the husband were assigned to trustees upon trust to receive the money & pay the income to the wife during her life for her separate use, independently of any future husband whom she might marry. There

was no restraint on anticipation. During the life of her first husband the wife made promissory notes in favour of *pltf.*, & *pltf.*, the first husband being still alive, brought an action claiming a charge on the policies:—*Held*: the trust for separate use did not arise till after the death of the husband, & as the contracts of a married woman can only be enforced against property which formed part of her separate estate at the date of the contract, the action could not be maintained.—*KING v. LUCAS* (1883), 23 Ch. D. 712, 713; 53 L. J. Ch. 64; 49 L. T. 216; 31 W. R. 904. C. A.

- 1491a.** —.j—A woman, married since the passing of Married Women's Property Act, 1870 (c. 93), joined her husband in signing a joint & several promissory note for money lent to him. The husband became bkpt. :—*Held* :

1370 1. *Wife not independently advised—Guarantee for husband.*—Want of independent advice standing alone is insufficient to justify relief, but where there has been undue influence by the husband & knowledge of its exercise or facts from which such knowledge should be inferred, & the transaction is contrary to the wife's interests, a sufficient case has been made out for the granting of relief.—*CANADIAN BANK OF COMMERCE v. FOREMAN (Alta.)*, [1926] 4 D. L. R. 844; [1928] 3 W. W. R. 486; *reversed* on the facts, [1927] 2 D. L. R. 530; [1927] 1 W. W. R. 783; 22 *Alta. L. R.* 443.—*CAN.*

1870 H. — — —.]—BRADLEY v.  
IMPERIAL BANK OF CANADA, [1926  
3 D. L. R. 38; 58 O. L. R. 650.—CAN.

1370 ill. — *Promissory note.*—  
FRYERS & CO., LTD. v. STEEVES (N. B.),  
[1927] 4 D. L. R. 1077.—CAN.

1392 iv. — — —.]—On an interpleader issue between an execution creditor & the wife of the debtor as to the ownership of a motor car, the wife & her husband testified that the car had been bought with her money, which had come to her from the keeping of boarders & from the sale of her property. These moneys were all collected by the husband & left by the wife in his hands to use as he saw fit, & he placed them in his own account & used them indifferently with his own. He had never rendered her an account of them, nor had she ever called on him to do so. They had lived together in amity since their marriage & he had maintained her. The wife testified that she had an arrangement

with the husband under which said moneys were to remain her property, but the circumstances under which it was entered into were not disclosed, & its terms were indefinite:—*Held*: the moneys in question had become the husband's by way of gift from his wife.—*PEAREN v. BLACK & ARMSTRONG*, [1928] 3 D. L. R. 471; [1928] 2 W. W. R. 98; 22 Sask. L. R. 502.—*CAN.*

*sq. Presumption of undue influence—Guarantee for husband—Promissory note—Transaction not explained.]—CANADIAN BANK OF COMMERCE v. DAVISON, [1930] 1 D. L. R. 1003.—CAN.*

SR. ————.]—CANADIAN BANK OF COMMERCE v. DAVISON, [1930] 4 D. L. R. 605.—CAN.

**PART VI. SECT. 9, SUB-SECT. 3.—**  
**A. (b).**

st. *Funds of wife managed by husband.*—Where a husband is entrusted by his wife with the management of her funds out of which he is to pay their expenses & make such investments as they from time to time agree upon, the decision of the question whether the law implies a gift to the husband depends on the particular facts of the case. —*WALKER & ROBERTS V. SILK*, (1930) 2 W. W. R. 407; 4 D. L. R. 201; 43 B. C. R. 43.—*CAN.*

**PART VI. SECT. 9, SUB-SECT. 3.—**  
**B. (b) ii.**

14221. *Joint earnings—Investment in realty in husband's name.*—KROPIELNICKI v. KROPIELNICKI, [1935] 1 W. W. R. 249; 2 D. L. R. 100.—

**PART VI. SECT. 9, SUB-SECT. 4.**

d 1. — *Property purchased with man's money—Woman realising property & appropriating proceeds ordered to account.*—*ST. ELOI v. ENO* (1925), 38 B. G R. 153—CAN.

**PART VII. SECT. 1, SUB-SECT. 1.**

**sv. Married Women's Property Act**  
**R. S. O., 1927—Effect.**—The repeal  
 by Married Women's Property Act,  
 R. S. O., 1927, of sect. 18 of the Act  
 as found in R. S. O., 1914, had not the  
 effect of reviving the husband's  
 common law liability for the debts of  
 his wife contracted before the marriage.  
 —PENNY v. HUNT, [1929] 2 D. L. R.  
 473; 63 O. L. R. 510.—CAN.

**PART VIII. SECT. 1, SUB-SECT. 6.**

11. — — —.]—*Held*: a married woman, having separate real property, was not entitled to contract debts for its improvement so as to make herself liable individually, or jointly with her husband.—*WRIGHT v. GARDEN* (1869), 28 U. C. R. 609.—*CAN.*

14. ————1— Deft., a married woman, married to her present husband in 1877 or 1878, & carrying on business separate from him by farming one of her former husband's farms, in 1883 & 1884 contracted the debt sued on. She was entitled to dower in the lands of her first husband, who died in 1875, which were sold, realising a large sum, & also to her share in his personal estate, neither of which she had received:—*Held*: the Act of 1884, 47 Vict. c. 19 (O.), had not the effect of repealing the prior Acts, & it was not necessary to shew that deft. had

her separate estate was liable for the amount due on the note, & it was not necessary to make any trustees for the wife parties to the action.—*DAVIES v. JENKINS* (1877), 6 Ch. D. 728; 26 W. R. 260.

*Annotations*.—*Refd.* Flower v. Buller (1880), 15 Ch. D. 665; Pike v. Fitzgibbon (1880), 14 Ch. D. 837.

1498. *Add. Annotation*.—*Refd.* Selby v. Atkins (1926), 135 L. T. 45.

1576a. —.—*STONE v. WALTER* (1649), O. Bridg. 618; 124 E. R. 778.

1656. *Add. Annotation*.—*Refd.* Dewe v. Dewe, Snowdon v. Snowdon, [1928] P. 113.

1664. *Add. Annotation*.—*Refd.* Kirk v. Eustace, [1937] 1 K. B. 278.

1665. *Add. Annotation*.—*Refd.* Dewe v. Dewe, Snowdon v. Snowdon, [1928] P. 113.

1669. *Add. Annotation*.—*Refd.* Dewe v. Dewe, Snowdon v. Snowdon, [1928] P. 113.

married or had acquired separate estate since the Act of 1884 came into force; it was sufficiently shown that she was possessed of separate estate, & that she intended it should be bound.—*ROBERTSON v. LAROCQUE* (1889), 18 O. R. 469.—CAN.

sa. *Wife carrying on separate business*—*Signatures by wife at request of husband*—*Liability of wife*.—Where a married woman, in carrying on a business with the assistance of her husband, signs everything that he asks her to sign & asks no questions, she should be held responsible for her signature, in the absence of clear proof of undue influence, whether it turns out to be in her interest or otherwise.—*WATKINS (J. R.) Co. v. NOBERT (Alta.)*, [1926] 1 D. L. R. 526; [1926] 1 W. W. R. 156.—CAN.

sb. *Lease taken by wife—Liability of wife—For breach of lease*.—*Held*: the husband was not liable, although he lived in the premises for about two months prior to the time he & his family vacated it & twice paid the rent during that period.—*NATIONAL SECURITIES, LTD. v. DARLING (Alta.)*, [1927] 1 W. W. R. 413.—CAN.

sc. *Entered into in married name—No reference to husband*.—The effect of Married Women's Act, R. S. A., 1922, c. 214, is that a married woman has as full & complete freedom to bind herself by her own contracts as a man has. A married woman who contracted for the purchase of goods in her own name, i.e. as Mrs. McDonald, without informing the seller or without his knowing that she was in fact acting as agent for her husband or that she had a husband, held personally liable.—*REID-WELCH FURNITURE Co. v. MACDONALD*, [1928] 2 D. L. R. 608; [1928] 1 W. W. R. 789; 23 Alta. L. R. 317.—CAN.

sd. *Contract to work by husband & wife—Liability to employer for children's keep—Joint*.—*Def.* engaged ptf. & her husband to work for him for wages & their board, & it was a term of the bargain that def. would be entitled to charge a certain rate per day for the board of the couple's three children, although no specific promise to pay said amounts was made by either ptf. or her husband.—*Held*: considering the circumstances under which the bargain was made & the dealings between the parties as disclosed by the evidence, the liability to pay def. for the board of the children was a joint one on the part of ptf. & her husband, & therefore, each of them was liable for the whole cost of the keep of the children.—*FORSBERG v. UGLUM*, [1931] 3 W. W. R. 612.—CAN.

1680. *Add. Annotation*.—*Refd.* Dewe v. Dewe, Snowdon v. Snowdon, [1928] P. 113.

1717. *Add. Annotations*.—*Refd.* Selby v. Atkins (1926), 135 L. T. 45; Dewe v. Dewe, Snowdon v. Snowdon, [1928] P. 113.

1732. *Add. Annotations*.—*Refd.* Selby v. Atkins (1926), 135 L. T. 45; Dewe v. Dewe, Snowdon v. Snowdon, [1928] P. 113.

1735. *Add. Annotations*.—*Refd.* Grubb v. Grubb (1934), 150 L. T. 420; Markovitch v. Markovitch (1934), 151 L. T. 139; Herod v. Herod, [1938] 3 All E. R. 722.

1739. *Add. Annotation*.—*Refd.* Dewe v. Dewe, Snowdon v. Snowdon, [1928] P. 113.

1741. *Add. Citation*.—2 C. & P. 25, n.

1748. *Add. Annotation*.—*Refd.* Dewe v. Dewe, Snowdon v. Snowdon, [1928] P. 113.

1750. *Add. Annotation*.—*Refd.* Welton v. Welton, [1927] P. 162.

PART VIII. SECT. 2, SUB-SECT. 1.  
1499 ii. —.—*A. HOBRECKER LTD. v. WILSON* (1932), 4 M. P. R. 469.—CAN.

1500 i. —.—*Supply of goods not necessities*.—Authority may be given by implication that the husband intends the wife to take means to supply herself with necessities, the implication being for the benefit of the wife & not of those who supply her. It is only for what is reasonably necessary that the implied agency is, not for what the wife may see fit to order.—*ROBERT SIMPSON Co., LTD. v. RUGGLES*, [1930] 3 D. L. R. 174; 65 O. L. R. 186.—CAN.

PART VIII. SECT. 2, SUB-SECT. 4.  
1514 i. *Wife acting under express authority not disclosed—Liability of husband*.—*FOULDS v. CURTELETT* (1871), 21 C. P. 368.—CAN.

PART VIII. SECT. 2, SUB-SECT. 5.  
1515 i. *Credit given to wife—Husband not liable*.—Where an article was sold by ptf. to a married woman & not to her husband, & credit was given to her alone.—*Held*: the husband was not liable for the price.—*BEATTY BROS., LTD. v. MURPHY*, [1930] 3 D. L. R. 448; 65 O. L. R. 293.—CAN.

ix. *Credit given to wife—Goods purchased for wife's business—Managed by husband—Whether husband's creditors can take in execution*.—*DOMINION SAVINGS & INVESTMENT SOCIETY v. KILROY* (1888), 15 A. R. 487.—CAN.

PART VIII. SECT. 2, SUB-SECT. 6.  
qi. —.—*Several liability*.—*TOBIN & Co. v. SMITH*, [1930] 3 D. L. R. 350.—CAN.

PART VIII. SECT. 2, SUB-SECT. 12.—*D.*

sz. *What amounts to*.—The fact that a husband instructed a shop to close his account, to which his wife was allowed to charge purchases, because it "ran too high," does not amount to a termination of the wife's authority.—*SIMPSON (ROBERT) & Co. v. GODSON*, [1937] 1 D. L. R. 454.—CAN.

PART VIII. SECT. 2, SUB-SECT. 13.—*A.*

ti. —.—*On appeal from the dismissal as against the husband of an action against him & his wife for the balance of the purchase-price of a player-piano, purchased by the wife*.—*Held*: although the wife's prior authority to act as agent for her husband with respect to the purchase was not proven, the facts showed a definite ratification by him with full knowledge of all the circumstances. Appeal

allowed.—*WINNIPEG PIANO Co., LTD. v. WAWRYSZYN*, [1935] 2 W. W. R. 220; 3 D. L. R. 184.—CAN.

PART VIII. SECT. 3, SUB-SECT. 1.—*A. (a).*

1576 iv. —.—*ARSENAULT v. BISHOP*, [1931] 2 D. L. R. 325; 3 M. P. R. 334; [1932] 2 D. L. R. 814.—CAN.

1576 v. —.—*A wife is presumed to have her husband's authority to pledge his credit for necessities while they are living together*.—*MOORE, McLEOD & Co., LTD. v. JARDINE* (1932), 5 M. P. R. 327.—CAN.

1601 iii. —.—*In an action against a husband for medical services rendered to a wife it is a defence that as to services rendered during cohabitation there was an express prohibition against pledging credit; & as to services rendered while they were living apart the wife had such means as precluded agency of necessity*.—*LINHAM v. HOLDEN*, [1933] 4 D. L. R. 187.—CAN.

PART VIII. SECT. 3, SUB-SECT. 1.—*B. (b).*

1642 i. *Jewellery*.—A ring supplied to a working miner's wife.—*Held*: not a necessary.—*PIANTA v. MACROW & SONS Pty., LTD.* (1925), 27 W. A. L. R. 99.—AUS.

sy. *Fur coat*.—The question whether a fur coat is a necessary is one of fact depending on the circumstances of each case.—*DEBBIE & FORREST v. KERSHAW*, [1927] 3 D. L. R. 156; [1927] 2 W. W. R. 166; 21 Sask. L. R. 489.—CAN.

sz. *Surgical operation*.—Even if a wife has money of her own, she is presumed to have authority to pledge her husband's credit for necessities, including surgical operations.—*SELDON v. ZAMBOWSKI*, [1928] 1 D. L. R. 638; [1928] 1 W. W. R. 630; 39 B. C. R. 205.—CAN.

sa. *Employment of detective—To obtain evidence for divorce proceedings*.—*BARNETT v. MILNER* (1927), 49 N. L. R. 1.—S. AF.

PART VIII. SECT. 3, SUB-SECT. 2.—*D. (a).*

1691 ii. *Revsd.*, 9 O. R. 198.

PART VIII. SECT. 3, SUB-SECT. 2.—*D. (d) i.*

1749 i. *Subsequent condonation by husband*.—Condonation by a husband of his wife's adultery does not render him liable for necessities supplied to her subsequently to the adultery & prior to the condonation.—*WINGROVE v. FRASER*, [1936] V. L. R. 132; 42 Argus L. R. 233.—AUS.

1753. *Add. Annotation*:—**Refd.** *Welton v. Welton*, [1927] P. 162.

1753a. **Inadmissible.**—Statements by an alleged adulterous wife that she had committed adultery cannot be evidence against persons who are without knowledge & without means of knowledge of the truth of those statements & to whom they have not been communicated.—**WRIGHT** (H. S.) & **WEBB v. ANNANDALE** (1930), 46 T. L. R. 239; *affd. on other grounds*, [1930] 2 K. B. 8, C. A.

1755. *Add. Annotation*:—**Consd.** *Selby v. Atkins* (1926), 135 L. T. 45.

1760. *Add. Annotation*:—**Consd.** *Dodworth v. Dale*, [1936] 2 All E. R. 440.

1800. *Add. Annotations*:—**Folld. & Extd.** **Wright** (H. S.) & **Webb v. Annandale**, [1930] 2 K. B. 8. **Refd.** *Welton v. Welton*, [1927] P. 162; *Arnold & Weaver v. Amari*, [1928] 1 K. B. 584.

1800a. ——— **Proceedings Instituted against wife.**—A husband took divorce proceedings against his wife on the ground of her adultery. She consulted a solr., who upon her instructions put in a defence denying the charge & briefed counsel to appear for her. At the hearing the wife failed to appear, & a decree was made against her dissolving the marriage on the grounds alleged in the petition. The wife's counsel applied for costs, but as no security for her costs had been obtained, no costs were granted. The wife's solr. brought an action in the K. B. Div. to recover the costs from the husband, on the ground of his wife's agency of necessity at common law. The judge found as a fact that the solr. had acted without negligence, honestly believing that the wife was innocent & that she would be successful in her defence:

—**Held**: in those circumstances the wife had no authority to bind her husband, so as to make him liable for the costs of her defence to his petition for divorce.—**ARNOLD & WEAVER v. AMARI**, [1928] 1 K. B. 584; 97 L. J. K. B. 238; 138 L. T. 591; 44 T. L. R. 221; 72 Sol. Jo. 138.

*Annotation*:—**Consd.** **Wright** (H. S.) & **Webb v. Annandale**, [1930] 2 K. B. 8.

1800b. ——— **]**—The rule that a solr. acting for a wife, who is living apart from her husband, cannot, in a common law action, recover his costs from the husband, if when those costs were incurred the wife, although the fact was unknown to the solr., had been guilty of a matrimonial offence, applies not only where the wife has been living in adultery but also where she has committed an isolated act of adultery. The rule applies alike whether in the particular matter the wife was proceeding against the husband, or was defending a suit brought against her by the husband.—**WRIGHT** (H. S.) & **WEBB v. ANNANDALE**, [1930] 2 K. B. 8; 99 L. J. K. B. 444; 143 L. T. 452; 46 T. L. R. 402; 74 Sol. Jo. 319, C. A.

1800c. ——— **Single act of adultery.]** **WRIGHT** (H. S.) & **WEBB v. ANNANDALE**, No. 1800b, *ante*.

1803a. ——— **]**—**WITHERS, BENSONS, CURRIE, WILLIAMS & Co. v. CAWSTON** (1928), 72 Sol. Jo. 191.

1826. *Add. Annotation*:—**Refd.** *Gottliffe v. Edleston*, [1930] 2 K. B. 378.

1833. *Add. Annotations*:—**As to** (1) **Refd.** *Re Mason* (1928), 97 L. J. Ch. 321; *Re Blake, Re Minahan's Petition of Right* (1931), 100 L. J. Ch. 251.

**PART VIII. SECT. 3, SUB-SECT. 2.—G.**

1774 i. For "A husband is liable" read "A husband is not liable."

sb. **Purchase of husband's property by wife—Improvements made by husband after sale.**—A purchase by a wife from her husband, the consideration being paid out of her separate estate, was held to be maintainable against creditors of whose debts she had no notice. The husband, after the purchase, expended money in improving the property. In a suit by a judgment creditor of the husband to obtain the benefit of such expenditure:—**Held**: the wife was entitled to show that the debt for which the judgment was recovered had been satisfied before action brought.—**HILL v. THOMPSON** (1870), 17 Gr. 445.—**CAN.**

**PART VIII. SECT. 3, SUB-SECT. 2.—H.**

sd. **Medical expenses—Birth of husband's child.**—A husband, whose wife has left him without any reasonable ground & against his wish, cannot avail himself of that fact against a claim for reasonable & proper charges for medical services rendered to her in the delivery, either alive or dead, of the husband's child; more particularly when the wife's condition is

such that the medical services were necessary to save her life.—**GOBEY v. MOORE**, [1935] N. Z. L. R. 739.—**N.Z.**

sh. **Hotel expenses—During convalescence.**—A husband living apart from his wife is liable for her hotel expenses during convalescence after an operation.—**MCDONALD v. JARDINE**, [1936] 1 D. L. R. 250; 10 M. P. R. 43; 5 F. L. J. (Can.) 228.—**CAN.**

**PART VIII. SECT. 5, SUB-SECT. 2.**

i. ——— **Summary application for delivery up of title deeds.**—**Re MELLOR** (B. C.) (1905), 2 W. L. R. 17.—**CAN.**

n i. ——— **]**—A wife does not fall within the class of "protected" persons in respect of whom in certain relationships there is a presumption of undue influence.—**MACKENZIE v. ROYAL BANK OF CANADA**, [1934] A. C. 468; 103 L. J. P. C. 81; 78 Sol. Jo. 471, P. C.—**CAN.**

sb. **Work done by husband for wife before marriage—Effect of marriage on mechanic's lien.**—**HAUGEN v. HAUGEN** (Alta.), [1929] 2 D. L. R. 16.—**CAN.**

sc. **Marriage invalid—Annulment—Action by "wife" for rent & wages—No implied contract.**—**Pltf. & deft.** had lived together for a number of years

as man & wife under the belief that they were legally married. **Deft.** then secured an annulment of the alleged marriage. **Pltf.** then brought the present action claiming general damages for fraud, on the ground that **deft.** had falsely represented to **pltf.** that **pltf.** was free to marry him. Under an alternative claim, not based on fraud, **pltf.** alleged that she had married **deft.** in reliance on his assurance that she was at liberty to marry. She claimed also rent for the time **deft.** lived in her house, wages as housekeeper on a *quantum meruit* basis, a sum alleged to have been paid by her for household expenses, & an amount due on a promissory note:—**Held**: the claims based on fraud & on said assurance had not been substantiated; there had been no express or implied agreement by **deft.** to pay rent or wages; there was proof of **deft.**'s promise to repay the amounts advanced by her for household expenses prior to 1919, but **Stat.** Limitations barred recovery thereof, & there had been no express or implied authority from **deft.** to incur said expenses thereafter; & the claim on the note had been released for good consideration.—**MARSHALL v. MARSHALL**, [1931] 3 W. W. R. 369.—**CAN.**

## Part X.—Wrongs of Wife during Coverture.

### SECT. 2.—TORTS (p. 213).

See, now, Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), s. 3.

1851. *Add. Annotations*:—*Refd. Gottliffe v. Edleston*, [1930] 2 K. B. 378; *Greenwood v. Martins Bank, Ltd.*, [1933] A. C. 51.

1852a. *Enticing husband of another woman—Whether husband of defendant liable.*—*NEWTON v. HARDY*, No. 645a, *ante*.

1852b. *Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), s. 3—Whether retrospective.*—By a writ dated Aug. 16, 1935 (after the coming into operation on Aug. 2, 1935, of Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30)), *pltf.*, a married woman, sued *defts.*, husband & wife, claiming damages in respect of slanders alleged to have been uttered by the female *deft.* on divers dates in 1934 & in the early months of 1935, the claim as against the male *deft.* being that he authorised or caused the female *deft.* to utter the words complained of. *Defts.* denied the publication, & the male *deft.* denied that he authorised or caused the female *deft.* to utter the alleged defamatory words. At the trial the judge left the case against both *defts.* to the jury without directing them that if they found for *pltf.* they should return a separate verdict with separate damages in respect of each publication. No objection was taken to this direction at the time. The jury found a single verdict against both *defts.* & judgment was entered against them accordingly. On appeal:—*Held*: (1) there was evidence entitling the jury to find that the female *deft.* uttered the slanders complained of & therefore that the verdict & judgment against her must stand; (2) there was no

evidence that the male *deft.* authorised or caused the female *deft.* to utter the words complained of; (3) Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), has a retrospective operation, & by virtue of its provisions the male *deft.* was not liable for his wife's tort; (4) as no objection was taken at the trial to the jury being asked to consider the different publications as a whole instead of separately, or not being asked to assess separate damages in respect of each publication, the female *deft.* could not be heard to say that the verdict was a nullity.

*Per SCOTT, L.J.* There is nothing in the Judicature Acts or in the Rules of the Supreme Ct. that separate verdicts & judgments are invariably necessary in respect of separate causes of action contained in the same writ. The question whether one or more causes of action can be included in one verdict or judgment depends upon the exercise of the trial judge's judicial discretion upon all the circumstances of the case.

*Per SCOTT, L.J.* The canon against giving a retrospective interpretation to a statute, in the absence of specific provision, expresses no rigid or absolute rule. It does not apply to a statute dealing with procedure, nor, *semble*, does it apply to a statute abolishing old legal fictions.—*BARBER v. PIDGEN*, [1937] 1 K. B. 664; [1937] 1 All E. R. 115; 106 L. J. K. B. 858; 156 L. T. 245; 53 T. L. R. 246; 81 Sol. Jo. 78, C. A.

1860a. *Liability of husband—Goods delivered to husband & wife.*—*ANON.* (1364), Y. B. 38 Edw. 3, fol. 1a.

*Annotation*:—*Consd. Isaac v. Clark* (1615), 2 Bulst. 306.

1875. *Add. Annotation*:—*Refd. Greenwood v. Martins Bank, Ltd.* (1931), 47 T. L. R. 607.

1880. *Add. Annotation*:—*As to* (1) *Refd. Green-*

### PART X. SECT. 2, SUB-SECT. 1.

*r. i.* ———.—A husband may be made jointly liable with his wife for her torts, notwithstanding Married Women's Property Act, R. S. M., 1913 (c. 123).—*DENOVICH v. HUCAL (Man.)*, [1927] 1 D. L. R. 879; [1927] 1 W. W. R. 179.—*CAN.*

*r. ii.* ———.—In Saskatchewan a husband is liable for his wife's post-nuptial torts.—*DAVIDNER v. SCHUSTER, RISENBERG v. SCHUSTER & MRAZEK*, [1936] 1 W. W. R. 45; 1 D. L. R. 580; 5 F. L. J. (Can.) 199.—*CAN.*

*t. i.* ———.—A husband is not liable for his wife's post-nuptial torts.—*HALL v. WILKINS* (1933), 33 S. R. N. S. W. 220; 50 N. S. W. W. N. 44.—*AUS.*

*sd. False representation by wife—As to authority of husband to order goods—Whether coverture good defence.*—*Held*: plea good: Administration of Justice Act could not assist *pltf.*, & Married Woman's Act, R. S. O., 1877, c. 125, ss. 6, 20, did not create any new liability against a married woman for her torts or quasi torts, but merely allowed her to be sued alone, where formerly she could have been sued with her husband, & the authorities showed that if so sued the action would have failed.—*STONE v. KNAPP* (1879), 29 C. P. 805.—*CAN.*

*ss. Negligence—Joint liability of husband—Confined to actual personal negligence of wife.*—An innocent husband is liable to be sued at common

law jointly with his wife for the actual personal negligence of his wife while driving a vehicle, her own or another's; but he is not liable to be so sued for the actual personal negligence of a third party when the wife's liability for the negligence of that party arises out of her sole ownership of a chattel & the power of control resulting therefrom.—*BLACK v. MACFARLANE*, [1931] N. Z. L. R. 112.—*N.Z.*

*st.* ——— *Liability of husband when wife husband's agent.*—Whether or not a husband is liable under Married Women's Property Act, N. S. W. B., 1927, s. 15, for his wife's torts is immaterial when the husband is being made liable for her negligent acts as his agent in driving his car.—*WHITE v. JACKSON*, [1936] 2 D. L. R. 707.—*CAN.*

### PART X. SECT. 2, SUB-SECT. 2.

*sm. Joint conversion by husband & wife—Liability of wife's separate estate.*—Where *pltf.* proved a joint wrongful occupation & conversion of the rents & profits of his land by a husband & wife:—*Held*: the husband & wife were jointly liable to *pltf.*, & *pltf.* was entitled to recover against the separate property of the wife, for it could not be inferred that the latter was acting under the direction or coercion of her husband so as to exempt her from liability.—*BARKER v. WESTOVER* (1882), 5 O. R. 116.—*CAN.*

### PART X. SECT. 2, SUB-SECT. 3.

1861 *iv.* ———.—*Married*

Women's Property Act, R. S. O. 1927, s. 3, does not take away the right of a person injured to sue a husband & wife jointly for the wife's naked tort committed during coverture. In an action for slander uttered by the wife, without the husband's suggestion or approval, judgment was directed to be entered against both jointly for the damages assessed, the wife being still alive when judgment was reached.—*HERCZEG v. BARSEY*, [1930] 1 D. L. R. 758; 64 O. L. R. 529.—*CAN.*

*di.* ——— *Saskatchewan.*—In Saskatchewan a husband is not liable for damages awarded against his wife in an action on the statutory cause of action given to a woman for slander of her chastity.—*PALUK v. MABORUK & MABORUK*, [1931] 3 W. W. R. 380.—*CAN.*

### PART X. SECT. 2, SUB-SECT. 4.

*sg. Joint trespass by husband & wife—Damage to adjoining property—Due to acts of husband—Liability of wife.*—In an action of trespass against husband & wife for placing logs against *pltf.*'s building & causing damage, & for placing a spout, by which the water from the roof of *deft.*'s house ran against & injured *pltf.*'s building, the evidence showed that the property was owned by the wife, but that she did not interfere with the management of it, or participate in the acts complained of:—*Held*: the wife was not liable.—*McDONALD v. LESTER* (1890), 30 N. B. R. 137.—*CAN.*

- wood v. Martin's Bank, Ltd. (1932), 48 T. L. R. 601.
1883. *Add. Annotation*:—*Refd.* Greenwood v. Martin's Bank, Ltd. (1932), 48 T. L. R. 601.
1885. *Add. Annotation*:—*Dbtd.* Greenwood v. Martin's Bank, Ltd., [1933] A. C. 51.
- 1897a. ———.]—*LANHAM v. PIRIE* (1857), 29 L. T. O. S. 171; 3 Jur. N. S. 704; 5 W. R. 540, L. C. & L. JJ.

## Part XI.—Contracts for Separation.

1920. *Add. Annotation*:—*Generally*, *Refd.* Hyman v. Hyman, Hughes v. Hughes (1928), 139 L. T. 416.
1930. *Add. Annotations*:—*Refd.* Hyman v. Hyman, [1929] A. C. 601; *Fender v. Mildmay*, [1937] 3 All E. R. 402.
1932. *Add. Annotation*:—*Refd.* Fender v. Mildmay, [1937] 3 All E. R. 402.
1934. *Add. Annotation*:—*Refd.* Hyman v. Hyman, Hughes v. Hughes (1928), 139 L. T. 416.
1935. *Add. Annotations*:—*Consd.* Davies v. Elmslie, [1938] 1 K. B. 337. *Refd.* Hyman v. Hyman, Hughes v. Hughes (1928), 139 L. T. 416.
- 1938a. —.]—*Pltf.*, a married woman, in her statement of claim alleged an agreement whereby "in consideration of *pltf.* persuading her husband to go to New Zealand &/or consenting to forego the *consortium* of her said husband," *deft.*, a third party, promised to pay her a weekly sum, & that she had foregone the *consortium* of her husband. *Deft.* in his defence alleged that the agreement was founded on an illegal consideration & was against public policy. This point of law was set down for argument under R. S. C., Ord. XXV., r. 2:—*Held*: by LEWIS, J., there was no general principle of public policy that no contract is enforceable which is inconsistent with maintenance of the obligations of the marriage tie, & in the absence of proof of facts showing that this contract was against public policy, it was enforceable; by the Ct. of Appeal, the contract, as pleaded in the statement of claim, was not an agreement for separation of husband & wife, & the consideration for the promise was not intended to be the consent of the wife to forego the *consortium* of her husband, & therefore the contract alleged in the pleading was not illegal & void.—*DAVIES v. ELMSLIE*, [1938] 1 K. B. 337; [1937] 4 All E. R. 471; 107 L. J. K. B. 113; 158 L. T. 362; 54 T. L. R. 170; 81 Sol. Jo. 1000, C. A.
1937. *Add. Annotations*:—*Consd.* Davies v. Elmslie, [1938] 1 K. B. 337. *Refd.* Papadopoulos v. Papadopoulos (1929), 46 T. L. R. 44.
1939. *Add. Annotation*:—*Refd.* Hyman v. Hyman, Hughes v. Hughes (1928), 139 L. T. 416; *Fender v. Mildmay*, [1937], 3 All E. R. 402.
1941. *Add. Annotation*:—*Refd.* Hyman v. Hyman, Hughes v. Hughes (1928), 139 L. T. 416.
1943. *Add. Annotations*:—*Refd.* Hyman v. Hyman, Hughes v. Hughes (1928), 139 L. T. 416; *Fender v. Mildmay*, [1937] 1 K. B. 111.
1944. *Add. Annotations*:—*Consd.* Lurie v. Lurie, [1938] 3 All E. R. 156. *Refd.* Fender v. Mildmay, [1936] 1 K. B. 111.
- 1944a. —.]—By a deed dated Oct. 23, 1936, a husband covenanted, in consideration of his wife discontinuing divorce proceedings then pending & brought against him on the ground of his alleged adultery with a named woman, & of his wife's returning to live with him, that, if at any time thereafter she should bring further divorce proceedings founded on acts of adultery committed with the same woman after the date of the deed, he would, upon his wife requiring him so to do, assign to two trustees all his interest in certain business premises, together with the goodwill of the business, upon trust, with the consent of the husband & the wife, to sell, & until sale to allow the husband to occupy the premises & conduct the business. The husband further agreed that, should the wife obtain a final decree against him, he would, if required by her, assign the premises to her or her nominees absolutely, & enter into a covenant not to enter into a similar business for a period of five years within a distance of 10 miles from the boundary of the county borough wherein the business was situated. It was also stipulated that, if a final decree was not obtained within two years from the commencement of the proceedings, or the wife did not call for an assignment within three months from the making of a final decree, the premises were to be reassigned to him. The petition was dismissed by consent on Oct. 30, 1936, & the wife returned to live with her husband. On Aug. 24, 1937, she presented a further petition for divorce alleging adultery with the same woman. On Sept. 17, 1937, she called upon him to assign the property to trustees in accordance with the terms of the above deed, & upon his refusing to do so, commenced these proceedings for specific performance:—*Held*: (1) the question of the legality of the restriction upon the husband carrying on business did not arise in these proceedings, & would only arise when the wife called for a transfer from the trustees; (2) the words "founded on" an act of adultery did not require actual proof of that adultery, but meant that proceedings were commenced on the basis of such adultery having been committed; (3) the deed did not impose a penalty upon the husband, but made provision for the wife upon the happening of the event stated; (4) the deed was not an agreement for the future separation of husband & wife living together, but one providing for reconciliation of a husband & wife living apart, & the addition of a pro-

PART XI. SECT. 1, SUB-SECT. 3.—A.  
1928 II. S. P. Woods v. Woods,  
[1927] 8 D. L. R. 321; 60 O. L. R.  
438.—CAN.

1941 I. What amounts

ment contemplating reconciliation.]—  
Although the separation agreement  
between husband & wife in question  
herein "prospectively looked" to the  
parties living together again, it was

held not to provide for a future separation  
thereafter, & therefore, was not  
void as against public policy.—*MORGAN*  
*v. MORGAN*, [1931] 3 W. W. R. 292;  
44 B. C. R. 482.—CAN.

- vision for future separation in the latter class of deed is not against public policy.—*LURIE v. LURIE*, [1938] 3 All E. R. 156; 107 L. J. Ch. 289; 159 L. T. 249; 54 T. L. R. 889; 82 Sol. Jo. 476.
1948. *Add. Annotations*:—*Refd. Lever Bros., Ltd. v. Bell* (1930), 47 T. L. R. 47; *British Homophone, Ltd. v. Kunz & Crystallite Gramophone Record Manufacturing Co.* (1935), 152 L. T. 589.
- 1949a. *Subsequent nullity decree*.—A decree of nullity of marriage, granted on the ground of the incapacity of the wife to consummate the marriage, does not affect a previous deed of separation, whereby the husband covenanted to pay the wife an annuity, so long as she should continue to lead a chaste life, & she covenanted to keep him indemnified against all debts & liabilities.—*FOWKE v. FOWKE*, [1938] Ch. 774; [1938] 2 All E. R. 638; 107 L. J. Ch. 350; 159 L. T. 8; 54 T. L. R. 801; 82 Sol. Jo. 415.
1954. *Add. Annotation*:—*As to* (1) *Refd. Papadopoulos v. Papadopoulos*, [1930] P. 55.
1965. *Add. Annotations*:—*Consd. Hyman v. Hyman*, [1929] A. C. 601. *Refd. Dewe v. Dewe, Snowden v. Snowden*, [1928] P. 113. *Fender v. Mildmay*, [1937] 3 All E. R. 402.
1969. *Add. Annotation*:—*Refd. Hyman v. Hyman, Hughes v. Hughes* (1928), 139 L. T. 416.
1989. *Add. Annotations*:—*Refd. Hyman v. Hyman, Hughes v. Hughes* (1928), 139 L. T. 416; *May v. May* (1920), 98 L. J. K. B. 770.
1995. *Add. Annotation*:—*Refd. Matthews v. Matthews* (1932), 48 T. L. R. 511.
1996. *Add. Annotation*:—*Refd. Matthews v. Matthews*, [1932] P. 103.
- 1999a. — *Threat to remove children from jurisdiction*.—*DE PRET-ROOSE v. DE PRET-ROOSE* (1934), 78 Sol. Jo. 914.
- 2014a. *Covenant to pay one quarter of gross income—Right to deduct outgoings*.—A husband & wife entered into a deed for separation. After proceedings had begun with reference to the amount payable to the wife under the deed, the proceedings were settled on terms contained in an order of the ct. which included the provision that the husband should pay to the wife such sum as, after payment of income tax, would amount to one-quarter of the husband's gross income. The husband's income was derived from earnings as a film producer. During the period to which this summons referred, the husband had to pay a commission of £135. He contended that in order to ascertain his gross income he was entitled to deduct such sum from his film production fees, which amounted to £3,350, & therefore, his gross income was nearly £3,215:—*Held*: although the particular provision was awkwardly phrased, yet it obviously meant that the wife was able to put in her pocket, free from any claims to income tax, a sum which would amount to one-quarter of her husband's income in the usual way, that is to say, it meant such sum as was his income after all proper deductions had been made in respect of his business, but before any deduction was made in respect of income tax. It followed that the husband was entitled to discharge his obligations by paying over to the wife a sum which she would put into her pocket free of all claim for income tax & which would amount to one-quarter of £3,215, & there would be a declaration that the husband was entitled to deduct expenses necessarily incurred in his occupation.—*Re HISCOTT'S INDENTURE* (1937), 158 L. T. 368; 54 T. L. R. 147; 81 Sol. Jo. 963.
2019. *Add. Annotations*:—*As to* (1) *Refd. Hyman, v. Hyman, Hughes v. Hughes* (1928), 139 L. T. 416. *As to* (7) *Refd. Hyman v. Hyman, Hughes v. Hughes* (1928), 139 L. T. 416.
2037. *Add. Annotation*:—*Consd. Kirk v. Eustace*, [1937] 1 K. B. 278.
- 2037a. — — — — —.]—By a deed made in 1922 providing for a separation between husband & wife, & containing mutual covenants to live separate & apart, the husband covenanted with his wife to pay her the weekly sum of £2 during her life for her maintenance & support, but determinable upon reconciliation. In 1936 the husband died. The widow claimed that his estate was liable to continue paying the maintenance during the rest of her life, but the exors. contended that the liability had come to an end by the husband's death:—*Held*: as the deed provided that the weekly payment to the wife should continue during her life & as there was nothing in the language used to show an intention that the husband's obligation should continue only during his life, his estate remained liable to pay the weekly sum to the widow.—*KIRK v. EUSTACE*, [1937] A. C. 491; [1937] 2 All E. R. 715; 106 L. J. K. B. 617; 157 L. T. 171; 53 T. L. R. 748; 81 Sol. Jo. 376, II. L.
2038. *Add. Annotations*:—*Consd. Hyman v. Hyman, Hughes v. Hughes* (1928), 139 L. T. 416. *Appl. May v. May*, [1929] 2 K. B. 386. *Consd. H— v. H—*, [1938] 3 All E. R. 415.
2039. *Add. Annotations*:—*Consd. Hyman v. Hyman*, [1929] A. C. 601. *Appl. May v. May*, [1929] 2 K. B. 386. *Consd. Kirk v. Eustace*, [1937] 1 K. B. 278.
- 2039a. — — — — —.]—By a deed of separation reciting that differences had arisen between a husband & a wife, it was agreed that the wife should during the life of the husband live separate & apart from him & free from his marital control & authority as if she were unmarried, & that the wife should retain as her separate property certain articles which, if she should die in the lifetime of the husband without having disposed of them, should devolve as if she had died possessed thereof intestate & a widow. The husband covenanted that he would during the life of the wife pay to her an annual sum of £600. The wife was also to be entitled to certain furniture & effects for the use of herself during her life. Throughout the deed the parties were referred to as "the husband" & "the wife"

PART XI. SECT. 3, SUB-SECT. 2.  
n i. —.]—Where a wife understood the agreement, had independent advice, & was not misled or influenced by her husband in regard to her legal rights or the meaning & effect of the docu-

ment:—*Held*: it could not be set aside for fraudulent misrepresentation & duress.—*THOMSON v. THOMSON*, [1927] 1 D. L. R. 653; 59 O. L. R. 661.—*CAN.*

n ii. —.]—A separation agreement

executed by a husband in settlement of a criminal prosecution for non-support is not illegal as being obtained by duress or as stifling a prosecution.—*ROGERS v. ROGERS*, [1938] 1 D. L. R. 99; 12 M. P. R. 321.—*CAN.*

respectively. It was provided that if the husband & the wife should be reconciled to each other & return to cohabitation the deed should become void. The husband subsequently committed adultery & the wife obtained a decree dissolving the marriage. He then made default in paying the full annual sum provided for by the deed, & she brought an action to recover the arrears:—*Held*: the deed was not subject to any implied term that it should only operate so long as the marriage relation continued to exist between the parties, & *pltf.* was entitled to recover.—*MAY v. MAY*, [1929] 2 K. B. 386; 98 L. J. K. B. 770; 141 L. T. 629, C. A.

*Annotations*:—*Refd.* *Mann v. Mann*, [1936] 1 All E. R. 952; *Kirk v. Eustace*, [1937] 1 K. B. 278.

2040a. — *Bankruptcy of husband*.—*DEWE v. DEWE, SNOWDON v. SNOWDON*, No. 595a, *ante*.

2049. *Add. Annotations*:—*Refd.* *Willis v. Willis* (1927), 96 L. J. P. 177.

2061a. — *Refusal of nominee to undertake custody—Effect on deed*.—Where the parties to a matrimonial suit had agreed to settle it, & a deed of separation had been approved to give effect to such settlement:—*Held*: the refusal of the husband's brother to undertake the custody of one of the children, as nominee of the husband, which custody had been agreed on between the husband & wife as one of the terms of the deed, was not a failure of such a vital term as to prevent the settlement from being carried into effect.—*WILLIS v. WILLIS*, [1928] P. 10; 96 L. J. P. 177; 137 L. T. 621; 43 T. L. R. 657, C. A.

2067. *Add. Annotations*:—*Refd.* *Kirk v. Eustace*, [1937] 1 K. B. 278.

#### PART XI. SECT. 6, SUB-SECT. 7.

i. — *Where a separation agreement was not invalid on the ground that the father had therein waived his rights to the control & guardianship of the children*:—*Held*: before the wife could ask for maintenance for them, she must show that she had failed to perform those duties to them amounting to guardianship which she had assumed under the agreement.—*HOLOWACHUK v. HOLOWACHUK* (Man.), [1927] 2 W. W. R. 470.—CAN.

#### PART XI. SECT. 6, SUB-SECT. 11.

2073 ii. — *Where a separation agreement, which provided for the payment of a specific sum by instalments to be secured by a mtg., & which did not contain a *dum casta* clause*:—*Held*: enforceable by the wife, although there had been subsequent adultery by her & she had been divorced & had married again.—*RUST v. RUST*, [1927] 2 D. L. R. 248; [1927] 1 W. W. R. 491; 22 Alta. L. R. 430.—CAN.

2073 iii. — *Where a separation deed, notwithstanding the wife's subsequent adultery, unless there is a *dum casta* clause*:—*JASPER v. JASPER*, [1935] 3 D. L. R. 64; O. R. 269; *affd.*, [1936] 1 D. L. R. 193; O. R. 57.—CAN.

#### PART XI. SECT. 6, SUB-SECT. 12.

2086 i. *Covenant by wife not to claim further maintenance—Subsequent judicial separation*.—Where a petition for a decree of judicial separation on the ground of the husband's adultery was brought so that a petition for alimony might be founded:—*Held*: the petition must be dismissed.—*K. v. K.*, [1925] 3 D. L. R. 872; [1925] 2 W. W. R. 641.—CAN.

ii. *Covenant by wife not to claim alimony—Subsequent adultery of hus-*

*band—Whether covenant still binding—Right of court to award maintenance for children*.—*HOLTEN v. HOLTEN*, [1928] 1 D. L. R. 546.—CAN.

iii. — *Where an agreement between a husband & wife before a decree nisi of divorce, in which, in consideration of the payment of a certain weekly sum for her maintenance, she covenanted to take no proceedings for alimony, does not prevent the ct. under Divorce & Matrimonial Causes Act, 1857, from entertaining an application for alimony*.—*X. v. X.*, [1933] 2 W. W. R. 413; 41 Man. L. R. 209.—CAN.

#### PART XI. SECT. 7, SUB-SECT. 2.—B.

ix. *Jurisdiction of court—King's Bench Act, s. 22*.—*DAVIS v. DAVIS*, [1926] 1 W. W. R. 942; 20 Sask. L. R. 543.—CAN.

2102 ii. — *Where a covenant by the wife that she would not "molest, disturb or annoy" her husband was not broken by her taking the children to England without her husband's knowledge or consent, thereby depriving him of his right of access given by the deed of separation, since such removal had been effected in order to protect the wife & children from the importunity & probable violence of the husband. If there had been a breach, such breach was no defence to an action by the wife for arrears of maintenance of the children, the husband's remedy being a counter-claim for damages*.—*WILLIAMS v. WILLIAMS*, [1933] N. Z. L. R. 94; G. L. R. 592.—N.Z.

2102 iii. — *Breach of condition—As to access to child—Reply alleging husband's bad character*.—A separation agreement provided that the wife should be given the custody of the son, but that his father should be allowed

2080. *Add. Annotations*:—*Consd.* *Lindsay v. Lindsay*, [1934] P. 162.

2083. *Add. Annotations*:—*Apprvd.* *Hyman v. Hyman*, [1929] A. C. 601.

2084. *Add. Annotations*:—*Apprvd.* *Hyman v. Hyman*, [1929] A. C. 601.

2085. *Add. Annotations*:—*Overd.* *Hyman v. Hyman*, [1929] A. C. 601; *Lambert v. Lambert*, [1936] 3 All E. R. 20.

2085a. — *Where a woman who, in a deed of separation, covenants in consideration of certain benefits not to claim from her husband in the future maintenance or alimony, & is afterwards granted a decree absolute of divorce, is not debarred from petitioning for maintenance after the dissolution of marriage, notwithstanding that the deed contained no provision for its termination on the marriage being dissolved*.—*HYMAN v. HYMAN*, [1929] A. C. 601; 98 L. J. P. 81; 141 L. T. 329; 93 J. P. 209; 45 T. L. R. 444; 73 Sol. Jo. 317; 27 L. G. R. 379, H. L.

*Annotations*:—*Expld.* *May v. May*, [1929] 2 K. B. 386. *Consd.* *L. v. L.*, [1931] P. 63; *Lambert v. Lambert*, [1936] 3 All E. R. 20; *H. v. H.*, [1938] 3 All E. R. 415. *Refd.* *Papadopoulos v. Papadopoulos* (1929), 46 T. L. R. 44; *Russell (Countess) v. Russell (Earl)*, [1935] P. 39; *Mann v. Mann* [1936] 1 All E. R. 952.

2090. *Add. Annotations*:—*Generally*, *Refd.* *Hyman v. Hyman*, [1929] A. C. 601; *Russell (Countess) v. Russell (Earl)*, [1935] P. 39.

2106. *Add. Annotations*:—*As to* (1) *Refd.* *Hyman v. Hyman*, [1929] A. C. 601. *Generally*, *Refd.* *Harmer v. Armstrong*, [1934] Ch. 65.

2111. *Add. Annotations*:—*Refd.* *H. v. H.*, [1928] P. 206.

2144. *Add. Annotations*:—*Refd.* *Hyman v. Hyman*,

to see him with reasonable frequency & should be consulted as to, & satisfied with, his up-bringing. To an action by the wife under the agreement for overdue instalments breach of the condition as to the son was pleaded:—*Held*: a reply alleging the husband's bad character was no excuse for a breach of the condition.—*MCLENNAN v. MCLENNAN*, [1925] 3 D. L. R. 281; [1925] S. C. R. 279; *affd.*, [1925] 1 D. L. R. 277; 57 N. S. R. 480.—CAN.

2103 i. *For arrears of annuity*.—*BARLOW v. BARLOW* (1927), 30 W. A. L. R. 8.—AUS.

ii. *For agreed sum for maintenance—Covenant not to sue*.—By a separation agreement it was provided, *inter alia*, that the husband would pay the wife £150 for her maintenance & support; that the wife would keep the husband indemnified against her debts; that the wife would not commence proceedings for maintenance against the husband, & that she would not molest him. Custody of, & the duty of maintaining, two children of the marriage were conferred on the wife. The husband did not pay the £150 mentioned; the wife sued for this sum:—*Held*: the wife was entitled to recover.—*MEZZINE v. MEZZINE*, [1927] S. A. S. R. 167.—AUS.

iii. — *Where a covenant by the wife that she would not "molest, disturb or annoy" her husband was not broken by her taking the children to England without her husband's knowledge or consent, thereby depriving him of his right of access given by the deed of separation, since such removal had been effected in order to protect the wife & children from the importunity & probable violence of the husband. If there had been a breach, such breach was no defence to an action by the wife for arrears of maintenance of the children, the husband's remedy being a counter-claim for damages*.—*WILLIAMS v. WILLIAMS*, [1933] N. Z. L. R. 94; G. L. R. 592.—N.Z.

2102 ii. — *Where a covenant by the wife that she would not "molest, disturb or annoy" her husband was not broken by her taking the children to England without her husband's knowledge or consent, thereby depriving him of his right of access given by the deed of separation, since such removal had been effected in order to protect the wife & children from the importunity & probable violence of the husband. If there had been a breach, such breach was no defence to an action by the wife for arrears of maintenance of the children, the husband's remedy being a counter-claim for damages*.—*WILLIAMS v. WILLIAMS*, [1933] N. Z. L. R. 94; G. L. R. 592.—N.Z.

2102 iii. — *Breach of condition—As to access to child—Reply alleging husband's bad character*.—A separation agreement provided that the wife should be given the custody of the son, but that his father should be allowed

to see him with reasonable frequency & should be consulted as to, & satisfied with, his up-bringing. To an action by the wife under the agreement for overdue instalments breach of the condition as to the son was pleaded:—*Held*: a reply alleging the husband's bad character was no excuse for a breach of the condition.—*MCLENNAN v. MCLENNAN*, [1925] 3 D. L. R. 281; [1925] S. C. R. 279; *affd.*, [1925] 1 D. L. R. 277; 57 N. S. R. 480.—CAN.

2103 i. *For arrears of annuity*.—*BARLOW v. BARLOW* (1927), 30 W. A. L. R. 8.—AUS.

ii. *For agreed sum for maintenance—Covenant not to sue*.—By a separation agreement it was provided, *inter alia*, that the husband would pay the wife £150 for her maintenance & support; that the wife would keep the husband indemnified against her debts; that the wife would not commence proceedings for maintenance against the husband, & that she would not molest him. Custody of, & the duty of maintaining, two children of the marriage were conferred on the wife. The husband did not pay the £150 mentioned; the wife sued for this sum:—*Held*: the wife was entitled to recover.—*MEZZINE v. MEZZINE*, [1927] S. A. S. R. 167.—AUS.

iii. — *Where a covenant by the wife that she would not "molest, disturb or annoy" her husband was not broken by her taking the children to England without her husband's knowledge or consent, thereby depriving him of his right of access given by the deed of separation, since such removal had been effected in order to protect the wife & children from the importunity & probable violence of the husband. If there had been a breach, such breach was no defence to an action by the wife for arrears of maintenance of the children, the husband's remedy being a counter-claim for damages*.—*WILLIAMS v. WILLIAMS*, [1933] N. Z. L. R. 94; G. L. R. 592.—N.Z.

2102 ii. — *Where a covenant by the wife that she would not "molest, disturb or annoy" her husband was not broken by her taking the children to England without her husband's knowledge or consent, thereby depriving him of his right of access given by the deed of separation, since such removal had been effected in order to protect the wife & children from the importunity & probable violence of the husband. If there had been a breach, such breach was no defence to an action by the wife for arrears of maintenance of the children, the husband's remedy being a counter-claim for damages*.—*WILLIAMS v. WILLIAMS*, [1933] N. Z. L. R. 94; G. L. R. 592.—N.Z.

2102 iii. — *Breach of condition—As to access to child—Reply alleging husband's bad character*.—A separation agreement provided that the wife should be given the custody of the son, but that his father should be allowed



[1929] A. C. 601; *Fender v. Mildmay*, [1937] 3 All E. R. 402.

. *Add. Annotations*:—*Refd. Hyman v. Hyman*, [1929] A. C. 601; *Kirk v. Eustace*, [1937] 1 K. B. 278.

2158. *Add. Annotation*:—*Refd. Kirk v. Eustace*, [1937] 1 K. B. 278.

2164. *Add. Annotation*:—*Refd. Kirk v. Eustace*, [1937] 1 K. B. 278.

2174. *Add. Annotations*:—*Consd. Melvill v. Melvill & Woodward*, [1930] P. 159. *Refd. Bosworthick v. Bosworthick*, [1927] P. 64; *Hyman v. Hyman*, [1929] A. C. 601; *Brown v. Brown*, [1936] 2 All E. R. 1616.

2176. *Add. Annotations*:—*Refd. Bosworthick v. Bosworthick*, [1927] P. 61; *Hyman v. Hyman*, *Hughes v. Hughes* (1928), 139 L. T. 416.

2177. *Add. Annotations*:—*Consd. Bosworthick v.*

*Bosworthick* (1926), 136 L. T. 211. *Apld. May v. May*, [1929] 2 K. B. 386. *Refd. Hyman v. Hyman*, *Hughes v. Hughes* (1928), 139 L. T. 416; *Cooper v. Cooper & Ford* (1932), 48 T. L. R. 275.

2178a. ————.]—On a husband's petition for the cancellation of a post-nuptial settlement, after decree absolute of divorce granted on the ground of her adultery subsequent to the date of the settlement, the registrar's order extinguishing resp.'s interest in the settlement was varied by the amount payable thereunder being reduced & by a limitation *dum sola et casta*.—*COOPER v. COOPER & FORD*, [1932] P. 75; 101 L. J. P. 28; 147 L. T. 16; 48 T. L. R. 275; 76 Sol. Jo. 249.

2179. *Add. Annotation*:—*Consd. Hyman v. Hyman*, [1929] A. C. 601.

## Part XII.—Legal Proceedings.

*See, now, Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), s. 1.*

2184. *Add. Annotation*:—*Refd. Gottliffe v. Edelston*, [1930] 2 K. B. 378.

2189a. ————.] — PRACTICE NOTE, [1926] W. N. 8.

2199. *Add. Annotation*:—*Refd. Rodrigues v. Bakewell & Salmon*, [1934] 1 K. B. 668.

2210. *Add. Annotation*:—*Consd. Smith v. Schilling*, [1928] 1 K. B. 429.

2212. *Add. Annotation*:—*Refd. Gottliffe v. Edelston*, [1930] 2 K. B. 378.

2213. *Add. Annotation*:—*Consd. Smith v. Schilling*, [1928] 1 K. B. 429.

2223a. ———— Power to amend—Woman in fact widow.]—Deft. was sued, & judgment was obtained against her, as Mrs. A., a married woman, the judgment being in the form settled in *Scott v. Morley*. In fact, deft. was not Mrs. A. or a married woman, but was Mrs. W., a widow, she having kept back from, & actively misrepresented to, the ct.

her real name & status. On the real facts being ascertained pltf. applied by summons to the master asking that the judgment should be altered to a personal judgment against deft. as Mrs. W., a widow:—*Held*: there was no jurisdiction to amend the judgment either under the slip rule or under the inherent jurisdiction of the ct. inasmuch as the judgment had been intentionally given in the form it was.—*MACCARTHY v. AGARD*, [1933] 2 K. B. 417; 102 L. J. K. B. 753; 149 L. T. 595, C. A.

2225. *Add. Annotations*:—*Consd. MacCarthy v. Agard*, [1933] 2 K. B. 417. *Refd. Townshend v. Child* (1932), 48 T. L. R. 575.

2238. *Add. Annotation*:—*Refd. Townshend v. Child* (1932), 48 T. L. R. 575.

2245. *Add. Annotations*:—*Refd. Gottliffe v. Edelston*, [1930] 2 K. B. 378; *Hirschhorn v. Evans*, [1938] 3 All E. R. 491.

2249. *Add. Annotation*:—*As to (2) Consd. Green v. Weatherill*, [1929] 2 Ch. 213.

### PART XI. SECT. 8.

2165 iii. ————.]—A separation agreement may have as a secondary object the effecting of a permanent settlement of property, but unless a separation agreement clearly indicates such purpose the general rule, that the agreement is no longer enforceable after resumption of cohabitation, should be applied.—*NATIONAL TRUST CO., LTD. v. BELL*, [1925] 4 D. L. R. 1029; [1925] 3 W. W. R. 712.—*CAN.*

sb. *Agreement for—Failure of consideration*.]—*WAKARUK v. WAKARUK (Alta.)*, [1926] 1 D. L. R. 493.—*CAN.*

sf. *Power of court to set aside deed*.]—*H. & W.* had entered into a private deed of separation. *H.* now sued for an order setting it aside. He desired to resume matrimonial relations with *W.* & could provide her with a home. There were no grounds for a judicial separation & there were no longer any grounds for a private separation. *W.* was in breach of the deed, & was in default in the action:—*Held*: it was competent for the ct. to set aside a private deed of separation, & by granting the relief sought the ct. would be encouraging the parties to resume their married life.—*ORAM v. ORAM* (1936), N. L. R. 287.—*S. AF.*

### PART XI. SECT. 9.

p i. — *Good reason for variation—Onus of proof*.]—A husband & wife having entered into a separation agreement under which the custody of their two eldest children were given to the father & that of the youngest child to the mother, & provision was made for access of both parents to all the children, the mother subsequently launched a petition to obtain the custody & control of the eldest boy, the second child had been accidentally drowned in the meantime:—*Held*: the mother had failed to show any good reason why the ct. should interfere with the arrangement made by the separation agreement.—*BRUIN v. BRUIN (B. C.)*, [1929] 4 D. L. R. 802; 2 W. W. R. 218.—*CAN.*

### PART XII. SECT. 1, SUB-SECT. 1.—A.

e (p. 249) i. ————.]—In an action by a purchaser for specific performance of an agreement for the sale of land, a motion by deft.'s wife to be added as deft. on the ground that, under *Dower Act, R. S. A. 1922 (c. 135)*, she had an interest in the property, was refused.—*SAMPSON v. THOMAS*, [1926] 1 W. W. R. 1018.—*CAN.*

### PART XII. SECT. 1, SUB-SECT. 1.—F. (a).

2221 ii. ————.]—Under K. B. Rule 755 an order for payment may be obtained by a judgment creditor against a married woman.—*BISHOP v. BLACK*, [1925] 3 W. W. R. 679.—*CAN.*

ei. ————.]—Defts. who were husband & wife, signed a promissory note payable to pltf. on demand. Upon default being made in payment, pltf. obtained judgment against defts. in the county court of Victoria. The judgment against Mrs. R. was against her personally:—*Held*: a nullity.—*MAYER FINANCE CO. v. ROSS*, [1929] N. Z. L. R. 748.—*N.Z.*

o ii. ————.]—*SILLIKER v. FRASER*, [1931] 4 D. L. R. 326.—*CAN.*

### PART XII. SECT. 1, SUB-SECT. 1.—I.

so. *Liability of husband—Participating in litigation*.]—In an action by a married woman against a third party:—*Held*: notwithstanding *Married Women's Property (Scotland) Act, 1920 (c. 64), s. 3 (1)*, pursuer's husband, in respect that he had actively participated in the litigation, fell to be made jointly & severally liable in expenses along with his wife.—*M'ILLAN v. MACKINLAY*, [1926] S. O. 673.—*SCOT.*

**2282. Add. Annotation:—Refd.** Gottliffe v. Edelston, [1930] 2 K. B. 378.

**2286. Add. Annotation:—Refd.** Gottliffe v. Edelston, [1930] 2 K. B. 378.

**2287a. Action for libel by wife against husband—Wife in business.]—RALSTON v. RALSTON, No. 2293a, post.**

**2290. Add. Annotation:—Refd.** Gottliffe v. Edelston, [1930] 2 K. B. 378.

**2291a. Claim by husband against wife—Interpleader proceedings.]—**A wife deposited certain furniture & other goods with warehousemen for safe storage. Her husband claimed that the furniture & other goods were his property, & issued a writ in detinue against the warehousemen claiming the delivery up of the goods. The wife also claimed the goods as being her property. The warehousemen disclaimed any interest in the goods except for storage charges, & took out an interpleader summons in the action, making the wife the claimant. An order was made by a master directing the trial of an issue in the King's Bench Division to determine whether the goods were the property of the husband or the wife, & directing that in that issue the husband was to be pltf. & the wife was to be deft. The judge in chambers affirmed the order. Upon an appeal by the wife on the ground that such an order could not be made as between a husband & a wife:—*Held*: the interpleader issue which was directed was not an action by the husband against the wife but a proceeding in the action by the husband against

the warehousemen, & the order for interpleader was necessary in order to give relief to the warehousemen, who had two claimants making claims against them in respect of the property, & there was jurisdiction under R. S. C., Ord. LVII, r. 7, to make the order directing an interpleader issue to be tried, & the husband was properly directed to be in the position of pltf. in the issue, & the wife in the position of deft., because the deposit of the property with the warehousemen had been made by the wife, & the husband had to make out his case.—*DE LA RUE v. IERNU, PERON & STOCKWELL, LTD.*, [1936] 2 K. B. 164; [1936] 2 All E. R. 411; 105 L. J. K. B. 430; 154 L. T. 713; 52 T. L. R. 499, C. A.

**2292. Add. Annotation:—Consd.** Gottliffe v. Edelston, [1930] 2 K. B. 378.

**2293a. ———.]—**(1) Pltf. married deft. in 1893. In 1899 the parties separated under a deed of separation & thenceforward lived apart. By the deed of separation deft. covenanted to pay an annuity to pltf., & the deed also contained a covenant for further assurance. After the separation pltf. set up in business as a garage proprietor, & she subsequently converted this business into a private limited co. in which she held the majority of the shares & also was the chairman & managing director. In 1929 she saw in a churchyard near her husband's residence a tombstone on which was the following inscription: "In loving memory of Jennie the dearly beloved wife of W. R. Crawshaw Ralston of the Bungalow, Valley. Died 20th May, 1916." Deft. was

**PART XII. SECT. 1, SUB-SECT. 2.—A.**

**e 1. — Interference with business carried on by wife.]—**Pltf., a married woman, carried on business as an hotel-keeper, & owned the chattels in the hotel. Deft., her husband, interfered with pltf. in her business by taking the receipts, giving orders to servants, & maltreating pltf. An injunction was granted restraining deft. from interfering in the business or with the servants or agents, or removing any of pltf.'s chattels.—*DONNELLY v. DONNELLY* (1886), 9 O. R. 673.—CAN.

**e 11. —]**—The effect of sects. 10 & 11 of Married Women's Property Act, R. S. M., 1913, is that, other than an action for tort, all civil remedies are open to a husband against his wife. Pltf. alleged that deft., his wife, had wrongfully broken open a trunk & taken therefrom a sum of currency belonging to him, & that she had deposited a certain amount thereof to her credit under an assumed name in the post office savings bank at Winnipeg, where the money remained, & that she had refused on demand to transfer or return it to him. He prayed that the money be declared his property, for an injunction restraining her from withdrawing it, & for an order that the money be paid to him or that she sign a cheque therefor to his order:—*Held*: pltf. was not suing for a tort but to have it declared that the money was his & for enforcement of his title thereto. The appeal was allowed, & the injunction was made permanent, & pltf. was declared to be entitled to the money.—*SEREDOWICZ v. SEREDOWICZ*, [1934] 1 W. W. R. 665; 3 D. L. R. 47; 42 Man. L. R. 35.—CAN.

**e4. Action for breach of trust.]—***Held*: under the Married Women's Property Act, 1890, a husband can maintain an action against his wife for breach of trust, & in cases where another person is sued with the wife, & that person sets up a claim to

portion of the property, the right of action given by sect. 21 of that Act is not an exclusive remedy.—*ANHAEUSSER v. ANHAEUSSER & ROTH* (1930), S. R. (Q.) 55.—AUS.

**e1. Proceedings for possession order—Husband's house in possession of wife.]—**A husband cannot obtain a possession order against his wife for his house in which she continues to reside after separation unless he provides another home for her.—*MCLEOD v. MCLEOD*, [1935] 2 D. L. R. 648; *reversd. sub nom. M. v. M.*, [1935] 3 D. L. R. 551; O. R. 329.—CAN.

**PART XII. SECT. 1, SUB-SECT. 2.—B.**

**2292 i. Action by wife against husband—For negligence.]—**Pltf., a married woman, brought this action against her husband & another for negligence in the operation of a motor vehicle driven by her husband, in which she was a passenger, whereby she was injured, & she claimed damages for her injury. The statement of claim contained no allegation of any express or implied contract:—*Held*: the action was for a tort within Married Women's Property Act, 1926, s. 8, & was not maintainable against pltf.'s husband.—*GOLDMAN v. GOLDMAN*, [1928] 2 D. L. R. 152; 61 O. L. R. 657.—CAN.

**2292 ii. ———.]—**A wife, who was being driven by her husband in his motor car, was injured in a collision between the motor car & a motor lorry. She brought an action of damages against the owner of the lorry & against her husband:—*Held*: the action against the husband was incompetent, in respect that (a) at common law the relationship existing between husband & wife is of so intimate a character that it is against public policy that the one should have a right of action against the other in consequence of a wrong done, & (b) Married Women's Property (Scott-

land) Act, 1920, has not altered the law in this respect.—*HARPER v. HARPER*, [1929] S. C. (Ct. of Sess.) 220.—SCOT.

**2292 iii. ———.]—***COUPLAND v. MAJRE*, [1931] O. R. 707.—CAN.

**2292 iv. — Married Women's Act, R. S. A. 1922, s. 2.]—**Married Women's Act, R. S. A. 1922, c. 214, s. 2, which provides, *inter alia*, that a married woman shall be capable of suing & being sued in any form of action as if she were an unmarried woman cannot be relied on to support an action in tort by a wife against her husband. *Sensu*: the Act, if, and so far as, it purports to enable a wife to sue her husband in tort, is *intra vires* the Province as being legislation in relation to a "civil right".—*HILL v. HILL*, [1928] 4 D. L. R. 161; [1928] 3 W. W. R. 1, 673; *affd.*, [1929] 2 D. L. R. 735; 2 W. W. R. 41; 24 Alta. L. R. 105.—CAN.

**sp. Action by wife against husband—To set aside fraudulent conveyance.]—**Pltf., who had obtained a judgment for alimony & costs, sued on behalf of herself & all other creditors of her husband to set aside, as fraudulent & void under the Fraudulent Conveyances Act, R. S. B. C., 1924, a prior conveyance made by him to his daughter:—*Held*: pltf.'s action was one upon the statute & not one of tort within Married Women's Property Act, R. S. B. C., 1924.—*FUEHR v. FUEHR*, [1936] 2 W. W. R. 237; 50 B. C. R. 438.—CAN.

**sb. Action by wife against husband's employer.]—**The rule that a husband & wife may not sue each other in tort does not affect the right of a wife to sue her husband's employer for injuries received through her husband's negligent driving of his employer's car, in which she was a passenger.—*WHITE v. PROCTOR*, [1937] 3 D. L. R. 599; O. R. 647.—CAN.

the W. R. Crawshaw Ralston mentioned in the inscription & he had caused the inscription to be made. Pltf. brought an action against her husband for libel & also for a declaration that she was the lawful wife of deft.:—*Held*: though the inscription was capable of a defamatory meaning, pltf., by reason of Married Women's Property Act, 1882 (c. 75), s. 12, could not sue her husband on it, the action being for a tort & not for the protection & security of her separate property.

(2) If there were any doubt as to the validity of the marriage, in my opinion, an action at law in the K. B. Div. of the High Ct. is not the proper proceeding in which to have that matter determined. I think it would be necessary, if there were any doubt as to the validity of the marriage, to take proceedings under the Legitimacy Declaration Act, 1858 (c. 93) (MACNAUGHTEN, J.).—RALSTON v. RALSTON, [1930] 2 K. B. 238; 99 L. J. K. B. 266; 142 L. T. 487.

2294. *Add. Annotation*:—Consd. RALSTON v. RALSTON, [1930] 2 K. B. 238.

2294a. — For negligence—Injury sustained before marriage.]—Although by Married

Women's Property Act, 1882 (c. 75), s. 12, a married woman has the same civil remedies for the protection & security of her own separate property as if it belonged to her as a feme sole, & by sect. 24 "property" includes a thing in action, nevertheless a right of action for a pure tort which accrued before the marriage of the parties is not a thing in action within sect. 24, & consequently such right is not part of the wife's separate property.

An unmarried woman sustained injuries through a man's negligent driving, & issued a writ against him claiming damages in respect thereof. Before the trial of the action she married him:—*Held*: her right of action was not such a thing in action as would become her separate property within the meaning of the Act, but was barred by the general disability of husband & wife to sue each other for a tort.—GOTTLIFFE v. EDELSTON, [1930] 2 K. B. 378; 99 L. J. K. B. 547; 143 L. T. 595; 46 T. L. R. 544; 74 Sol. Jo. 567.

2310. *Add. Annotations*:—Consd. Ralston v. Ralston, [1930] 2 K. B. 238. Refd. Gottliffe v. Edelston, [1930] 2 K. B. 378.

## Part XIII.—Matrimonial Causes.

2317. *Add. Annotations*:—As to (2) *Apld.* Cavendish v. Cavendish, [1926] P. 10. *Distd.* Elliott v. Albert, [1934] 1 K. B. 650.

2318. *Add. Annotation*:—Refd. Rugg-Gunn v. Rugg-Gunn & Archer, [1931] P. 147.

2321. *Add. Annotations*:—Consd. H. v. H., [1928] P. 206. Refd. A.-G. for Alberta v. Cook [1926] A. C. 444; Raeburn v. Raeburn (1928), 138 L. T. 672.

PART XII. SECT. 1, SUB-SECT. 2.—D. *sd.* Jurisdiction to decide on originating notice—Right to direct an issue.]—FOSTER v. FOSTER, [1928] 3 W. W. R. 573.—CAN.

*sd.* Meaning of "property."]—In Married Women's Property Act (N. B.), s. 17, which relates to the determination of title as between husband & wife, "property" includes real estate.—RE MILLS, [1937] 3 D. L. R. 464.—CAN.

### PART XIII. SECT. 1, SUB-SECT. 1.

m i. —.—.—.]—A judge of the Supreme Ct., sitting in his ordinary capacity, has no jurisdiction to interfere with decrees pronounced by the ct. as a ct. for divorce & matrimonial causes under Matrimonial Causes Act, 1857 (c. 85).—CLAMAN v. CLAMAN (1925), 35 B. C. R. 137.—CAN.

m ii. —.—.—.]—The Supreme Ct. of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that Colony & in respect of matrimonial offences alleged to have been committed therein.—WATTS & A.-G. FOR BRITISH COLUMBIA v. WATTS, [1908] A. C. 573, P. C.—CAN.

q i. —.—.—.]—The parties went through a form of marriage in Nova Scotia. In an action for declaration of nullity based on absence of consent & fraud:—*Held*: the Supreme Ct. of Ontario had no jurisdiction to entertain the action, & would have had none even if the marriage had been

an Ontario marriage. The jurisdiction of the Ecclesiastical Cts. in England has not been conferred upon the Supreme Ct. of Ontario.—VAMVAKIDIS v. KIRKOFF, [1930] 2 D. L. R. 877; 64 O. L. R. 585.—CAN.

q ii. —.—.—.]—*Adultery before Divorce Act, 1930, in force.*—Divorce Act, 1930, is retroactive & confers on the Supreme Ct. of Ontario jurisdiction to dissolve a marriage if pltf. can establish an act of adultery on the part of deft. at any time after the celebration of the marriage even though the act of adultery occurred before the Divorce Act came into force.—UPPER v. UPPER, [1933] O. R. 1; 1 D. L. R. 244.—CAN.

a i. —.—.—.]—*High Court—Bombay—To hear matrimonial suits between Jews.*—The High Ct. of Bombay has jurisdiction to entertain a suit arising out of matrimonial disputes between Jews, & in deciding such disputes, the Jewish law must be applied "with such adaptations to the circumstances of the case as justice may require."—BENJAMIN v. BENJAMIN (1925), 1 L. R. 50 Bom. 369.—IND.

a ii. —.—.—.]—*Proceedings for nullity—Under Christian Marriage Act, 1872.*—A suit for a declaration that a marriage is null & void under Christian Marriage Act, 1872, s. 4, because it was not solemnized in accordance with the rules, rites & ceremonies of the Church must be instituted in the appropriate subordinate civil ct. & cannot be entertained by the High Ct. direct.—TITLI *alias*

2327. *Add. Annotation*:—Refd. Dodworth v. Dale, [1936] 2 All E. R. 440.

2328a. —.—.—.]—NEWBOULD v. A.-G., No. 6069a, *post*.

2328b. *Distinguished from other grounds for annulling marriage.*—A decree annulling a marriage on the ground of impotence is a judgment *in rem* altering the status of the parties, & can be pronounced only by the ct.

TEREZA v. JONES (1933), 1 L. R. 56 All. 428.—IND.

a i. —.—.—.]—*Court of Appeal—British Columbia.*—The Ct. of Appeal has no jurisdiction to entertain appeals in divorce & matrimonial causes.—TYTTLER v. JAMIESON, [1935] 3 W. W. R. 510; 4 D. L. R. 705; 50 B. O. R. 263.—CAN.

### PART XIII. SECT. 1, SUB-SECT. 3.

2320 1. *Practice of Ecclesiastical Courts followed—Proceedings in forma pauperis in Manitoba.*—COLERIDGE v. COLERIDGE (Man.), [1926] 2 D. L. R. 896; [1926] 1 W. W. R. 857.—CAN.

sa. *Rule inconsistent with Divorce & Matrimonial Causes Act, 1857—Validly.*—The fact that K. B. Rule 598 differs from sect. 28 of Divorce & Matrimonial Causes Act, 1857, does not render the rule invalid. Said sect. 28 deals wholly with rules of practice & procedure, & even if they were ever effective in Saskatchewan they, as the result of sect. 12 of King's Bench Act, 1930, have been superseded by K. B. Rule 598.—MAY v. MAY & MCKINLAY, [1934] 3 W. W. R. 471.—CAN.

### PART XIII. SECT. 3, SUB-SECT. 1.

p i. —.—.—.]—The fact that, at the time of her marriage, a wife has living a child born as a consequence of illicit intercourse with another man, of which intercourse her husband had no knowledge, does not entitle the latter to have the marriage set aside.—STANDER v. STANDER, [1939] App. D. 349.—S. AF.

of their domicil. A decree annulling a marriage on this ground deals with a marriage which till the date of the decree was voidable only & not void. In substance it is a decree for the dissolution of that marriage, & is thus distinguished from decrees annulling marriages for illegality or informality.—*INVERCLYDE (OTHERWISE TRIPP) v. INVERCLYDE*, [1931] P. 29; 100 L. J. P. 16; 144 L. T. 212; 95 J. P. 73; 47 T. L. R. 140; 29 L. G. R. 353.

*Annotation*.—*Refd. White (otherwise Bennett) v. White*, [1937] P. 111.

2331. *Add. Annotation*.—*Refd. Inverclyde v. Inverclyde*, [1931] P. 29.

2334. *Add. Annotations*.—*Refd. Salvesen (or von Lorange) v. Austrian Property Administrator*, [1927] A. C. 641; *Inverclyde v. Inverclyde*, [1931] P. 29; *Newbould v. A.-G.*, [1931] P. 75; *Dodworth v. Dale*, [1936] 2 All E. R. 440.

2340. *Add. Annotations*.—*Refd. Intract v. Intract (otherwise Jacobs)*, [1933] P. 190; *Dodworth v. Dale*, [1936] 2 All E. R. 440.

2342a. — *Reputation of marriage by other party.*—In a suit for nullity of marriage on the ground of incapacity to consummate it the ct. granted a decree to a petitioner who was the incapable spouse, finding as a fact that the other spouse had repudiated the marriage contract, but expressly refrained from deciding that there is jurisdiction to entertain such a suit at the instance of an incapable petitioner in the absence of repudiation of the contract by the other spouse.—*DAVIES (OTHERWISE MASON) v. DAVIES*, [1935] P. 58; 104 L. J. P. 9; 152 L. T. 264; 51 T. L. R. 151; 78 Sol. Jo. 878.

2345. *Add. Annotation*.—*Folld. H. v. H. (otherwise N.)* (1929), 45 T. L. R. 618.

2345a. — *Where the ct. finds in a suit for nullity of marriage that both the parties to the ceremony of marriage are impotent, each being incapable as regards the other,*

a decree *nisi* may be granted to each of the parties & either may apply in due course for a decree absolute.—*H. v. H. (OTHERWISE N.)* (1929), 98 L. J. P. 155; 45 T. L. R. 618.

2350. *Add. Annotation*.—*Apld. Snowman v. Snowman*, [1934] P. 186.

2351a. — *Miscarriage resulting from fecundation ab extra.*—Where in a woman's suit for nullity of marriage on the ground of the man's incapacity it was established that there had only been imperfect intercourse, as a result of which fecundation *ab extra* took place on two occasions & miscarriages followed, & the woman still remained *virgo intacta*, the ct. pronounced a decree *nisi* of nullity.—*SNOWMAN (OTHERWISE BENSINGER) v. SNOWMAN*, [1934] P. 186; 103 L. J. P. 87; 151 L. T. 180; 50 T. L. R. 445.

2369. For "*DICKINSON v. DICKINSON*" read "*DICKINSON v. DICKINSON (OTHERWISE PHILLIPS)*."

2370. *Add. Annotation*.—*Refd. Newbould v. A.-G.*, [1931] P. 75.

2377. For "*B. v. B.*" read "*B. (OTHERWISE H.) v. B.*"

2381. *Add. Annotations*.—*Refd. Inverclyde v. Inverclyde*, [1931] P. 29; *Intract v. Intract (otherwise Jacobs)*, [1933] P. 190.

2382. *Add. Annotation*.—*As to (1) Refd. Dodworth v. Dale*, [1936] 2 All E. R. 440.

2383. *Add. Annotation*.—*Consd. Intract v. Intract (otherwise Jacobs)*, [1933] P. 190.

2384a. — *During three years' cohabitation following a ceremony of marriage the man made no attempt to consummate the marriage, & in fact it was never consummated. The ct. granted the woman on her petition a decree nisi of nullity, acting on the presumption of law that resp. was incapable.*—*KAY (OTHERWISE GUNSON) v. KAY* (1934), 152 L. T. 264; 51 T. L. R. 152; 78 Sol. Jo. 899.

2405. *Add. Annotation*.—*Consd. Intract v. Intract (otherwise Jacobs)*, [1933] P. 190.

PART XIII. SECT. 3, SUB-SECT. 2.—A.

2329 v. — *Where the law of Ontario as to annulment of marriage is the law of England as of July 15, 1870, unless modified by provincial law. Relief for persistent refusal of intercourse can only be given where an inference of impotence can be drawn.*—*BETHELL v. BETHELL*, [1932] O. R. 300; 2 D. L. R. 663.—CAN.

2329 vi. — *Where an annulment of marriage is sought on the ground of alleged impotency neither Divorce & Matrimonial Causes Act, 1857, nor the decisions thereon justify the contention that the petitioner may call to his aid in supporting the onus of proof that is on him such considerations as the future good of the parties or the fact that no useful purpose can be gained by refusing to grant the petition. The discretion given the ct. by sect. 31 of the Act is not a general judicial discretion, but is confined to the transgressions or defaults of the petitioner specified in that sect.*—*DAWSON v. DAWSON*, [1937] 3 W. W. R. 8; 3 D. L. R. 769; 45 Man. L. R. 427.—CAN.

PART XIII. SECT. 3, SUB-SECT. 2.—B.

s i. — *A decree for nullity of marriage cannot according to the principles of the ecclesiastical law as administered in the Matrimonial Ct. be granted to petitioner on the ground merely of petitioner's own impotence; but, if a petitioner can in addition to his own impotence satisfy the ct. that*

there has been & is conduct on the part of resp. which has destroyed the *verum matrimonium*, as, by a genuine & deliberate repudiation of the marriage contract & its obligations, the ct. may *ex justa causa* grant the relief.—*McM. v. McM.*, *McK. v. McK.*, [1936] 1 R. 177.—IR.

PART XIII. SECT. 3, SUB-SECT. 2.—C.

2346 iii. — *Where the husband was potent & there was no structural incapacity on the part of the wife, but the marriage had never been consummated owing to the opposition of the wife without any legitimate reason, the ct. granted a decree of nullity of the marriage on the ground that there was an invincible repugnance on the part of the wife to the act of consummation resulting in paralysis of the will, which was consistent only with incapacity.*—*S. v. S.* (1926), 29 W. A. L. R. 52.—AUS.

2356 i. *Not mere incapacity of conception—Where intercourse possible.*—*Persistent & wilful refusal to consummate by a wife is not of itself a ground for annulment, except so far as it is evidence of abnormal physical condition. If there is capacity to consummate, incapacity of conception is no ground for annulment.*—*TICE v. TICE*, [1937] 1 D. L. R. 660; O. R. 233; *affd.*, [1937] 2 D. L. R. 591.—CAN.

PART XIII. SECT. 3, SUB-SECT. 2.—D. (b).

2366i. — *Wilful & persistent refusal*

*—Refusal to be medically examined.*—*Refusal & persistent refusal by a wife to consummate, & refusal to submit to a medical examination, raise an inference of impotence entitling the husband to have the marriage annulled.*—*SZREJHER v. SZREJHER*, [1936] 2 D. L. R. 413; O. R. 250.—CAN.

PART XIII. SECT. 3, SUB-SECT. 2.—D. (e).

sk. *Whether age a defence.*—*The advanced age of the parties is not in itself a bar to the annulment of a marriage on the ground of impotency.*—*MARTIN v. MARTIN*, [1937] 1 W. W. R. 95; 1 D. L. R. 411; 6 L. Jo. 229; 44 Man. K. B. 436.—CAN.

PART XIII. SECT. 3, SUB-SECT. 2.—E.

2397 i. *Sufficiency of.*—*HATE v. HATE*, [1927] 3 D. L. R. 481; [1927] 2 W. W. R. 366; 22 Alta. L. R. 565.—CAN.

PART XIII. SECT. 3, SUB-SECT. 4.

st. *What must be proved.*—*Before a decree of dissolution of marriage can be made on the ground set out in sect. 10 (f) of Divorce & Matrimonial Causes Act, 1928, which is as follows: "That resp. is a person of unsound mind & is unlikely to recover, & has been confined as such in New Zealand in an institution within Mental Defectives Act, 1911, or in a like institution in any other country of the British dominions, for a period or periods not less in the aggregate than seven years*

**2412a. Right to begin.**—In a suit of jactitation of marriage, resp. begins; but, *semble*, petitioner's counsel has a right of reply.—**GOLDSTONE v. GOLDSTONE** (1922), 127 L. T. 32; *sub nom.* **GOLDSTONE v. SMITH** (OTHERWISE **GOLDSTONE**, 38 T. L. R. 403.

**2431a. No prior cohabitation.**—A suit for restitution of conjugal rights will lie even although there has never been cohabitation between the spouses.—**FASSBENDER v. FASSBENDER**, [1938] 3 All E. R. 389; 107 L. J. P. 123; 54 T. L. R. 1006; 82 Sol. Jo. 626.

**2452a.** —.]—**MANN v. MANN**, No. 2496, *post*.

**2453a.** —.]—In this suit two questions arose: (a) whether a memorandum of agreement permitting the wife to live separate & apart was a deed of separation; (b) whether her proposal, after having herself separated from her husband & signed the agreement, that they should set up house together in the interests of the children, constituted a sincere desire for resumption of cohabitation. For petitioner it was submitted that the memorandum of agreement relied upon was not a deed of separation, but merely an agreement for maintenance for a limited period. Even if it were a deed of separation, the wife was entitled to change her mind, & she had in fact shown a sincere desire to live together again with her husband, though her motive might have been the welfare of the children:—*Held*: the memorandum of agreement was a valid & binding & subsisting agreement to live separate & apart. The wife's proposal, not being made to restore the conjugal relationship *simpliciter*, but merely so that she & her husband & the children should set up house together, was not a sincere desire that they should live together. Petition dismissed.—**LACEY v. LACEY** (1931), 146 L. T. 48; 95 J. P. 179; 47 T. L. R. 577; 75 Sol. Jo. 572; 29 L. G. R. 566.

**2477a.** —.]—**LYNCH v. LYNCH** (1933), 78 Sol. Jo. 30.

**2479a. Extravagance of wife.**—(1) Extravagance of living on the part of a wife affecting

the financial position & prospects of her husband may be a matter "so grave & heavy" within **Yeatman v. Yeatman**, No. 3001, as to render it contrary to the real truth of the case to treat the husband as guilty of desertion without reasonable cause, & therefore may afford a defence to a petition for restitution of conjugal rights.

(2) A husband is not to be taken as having deserted his wife without reasonable cause because his work in life compels him to live away from her.—**G. v. G.**, [1930] P. 72; 142 L. T. 311; 94 J. P. 79; 46 T. L. R. 69; *sub nom.* **G.-M. v. G.-A. D.**, 99 L. J. P. 14; 74 Sol. Jo. 59; *subsequent proceedings, sub nom.* **GORDON v. GORDON** (1931), 75 Sol. Jo. 139.

**2479b. Husband's work requiring him to live apart from wife.**—**G. v. G.**, No. 2479a, *ante*.

**2480. Add. Annotation.**—*Refd.* **Herod v. Herod**, [1938] 3 All E. R. 722.

**2484a.** — Together with aversion from husband's work & interests.—**RUSSELL** (MARCHIONESS OF TAVISTOCK) *v.* **RUSSELL** (MARQUIS OF TAVISTOCK) (1935), 80 Sol. Jo. 16.

**2487a.** — —.]—**LACEY v. LACEY**, No. 2453a, *ante*.

**2490. Add. Annotations.**—*As to* (2) **Consd. Hyman v. Hyman**, **Hughes v. Hughes**, [1929] P. 1. *Generally, Refd.* **Hyman v. Hyman**, [1929] A. C. 601; **Russell (Countess) v. Russell (Earl)**, [1935] P. 39.

**2492. Add. Annotation.**—**Consd. Hyman v. Hyman**, [1929] A. C. 601.

**2494. Add. Annotation.**—*As to* (1) *Refd.* **Lacey v. Lacey** (1931), 47 T. L. R. 577.

**2498. Add. Annotations.**—*Refd.* **Hyman v. Hyman**, **Hughes v. Hughes** (1928), 139 L. T. 416; **Fender v. Mildmay**, [1937] 2 All E. R. 402.

**2501. Add. Annotations.**—*Refd.* **Hyman v. Hyman**, **Hughes v. Hughes** (1928), 139 L. T. 416; **Watson v. Watson**, [1938] 3 All E. R. 770.

**2511. Add. Annotation.**—*Refd.* **Dewe v. Dewe**, **Snowdon v. Snowdon**, [1928] P. 113.

within the period of ten years immediately preceding the filing of the petition." Petitioner has to establish not merely that resp. is a person of unsound mind & is unlikely to recover, but also that resp. has been confined as such in an institution for the required period—*i.e.*, confined as a person afflicted with unsoundness of mind to a degree that warrants the making of a committal order. Consequently, it is not permissible under the above-quoted para. (f) to count any period of detention as a voluntary boarder in a mental institution which resulted in relief & temporary cure & discharge merely because the person ultimately became a person of so unsound a mind as to warrant & result in committal, or to treat a voluntary boarder as having been actually confined as a person of unsound mind merely because it is established by evidence that such resp. could have been lawfully confined as a person of unsound mind.—**G. v. G.**, [1936] N. Z. L. R. 752; **G. L. R.** 555; 12 N. Z. L. J. 248.—**N. Z.**

#### PART XIII. SECT. 5, SUB-SECT. 1.—D.

**2435 li.** —.]—A prior request in writing for restitution of conjugal rights is not a prerequisite to the bringing of an action in Saskatchewan for restitution of conjugal rights.—

**POLOVNIKOFF v. POLOVNIKOFF**, [1930] 2 W. R. R. 177.—**CAN.**

#### PART XIII. SECT. 5, SUB-SECT. 1.—E.

**2452 li.** —.]—On a petition for restitution of conjugal rights petitioner must satisfy the ct. that he or she has a sincere desire for a real restitution of those rights & a corresponding willingness to render them to the other spouse.—**WOODLANDS v. WOODLANDS** (1924), 35 C. L. R. 448.—**AUS.**

**2452 lii.** —.]—After a husband & wife had separated & had been living apart, each of them being content to do so, the wife sincerely but unsuccessfully endeavoured to induce him to resume cohabitation. She then petitioned for restitution of conjugal rights. There was no suggestion of any matrimonial offence by either party which would bar the restitution:—*Held*: she was entitled to the decree.—**WALTON v. WALTON**, [1934] 3 W. W. R. 588; [1935] 1 D. L. R. 79; 42 Man. L. R. 538.—**CAN.**

#### PART XIII. SECT. 5, SUB-SECT. 1.—F. (a).

*ad. Petitioner guilty of adultery.*—A suit for restitution of conjugal rights lies under Burmese Buddhist law; but a husband will not obtain such restitution on account of his misconduct.—

**MATHEIN NWE v. MAUNG KHA** (1929), 1 L. R. 7 Ran. 451.—**IND.**

*ss. Defendant in prison.*—The ct. has no power to dispense with the preliminary order of restitution in an action for restitution of conjugal rights failing which a divorce on the ground of malicious desertion. In such an action the mere fact that def. is in prison is no bar to the granting of a restitution order.—**ALDRED v. ALDRED**, [1929] App. D. 356.—**S. AF.**

*sg. Agreement to settle differences—Not acted upon.*—A memorandum of agreement of settlement of matrimonial differences signed after the close of the pleadings in proceedings for judicial separation, but not acted upon, has no effect, & will not bar petitioner from obtaining her remedy in proceedings for restitution.—**COLDICUTT v. COLDICUTT** (1932), 46 B. C. R. 354.—**CAN.**

#### PART XIII. SECT. 5, SUB-SECT. 1.—F. (b).

*sk. Petitioner suffering from venereal disease.*—The fact that a husband is suffering from venereal disease is no bar to an action by him against his wife for restitution of conjugal rights failing which a divorce.—**AINSBURY v. AINSBURY**, [1929] App. D. 109.—**S. AF.**

**2518a.** —.]—A husband & wife intermarried in Feb. 1922, & continued to cohabit until July, 1927, when the wife left the husband. On Nov. 2, 1927, the wife petitioned for a divorce founded upon an act of sodomy alleged to have been committed on her by the husband in Mar. 1922, & alleged acts of cruelty consisting of (a) acts of shameless uncleanness & invitations to repeat them, & (b) ordinary acts of cruelty, such as acts of ill-temper & abuse.

At the trial the judge in summing up to the jury did not warn the jury against finding that the sodomy alleged had been committed on the uncorroborated evidence of the wife, who was an accomplice; nor did he clearly point out that before it could be held that there was cruelty as regards the sexual malpractices it must be shown that they caused danger to life, limb or health, bodily or mental, or a reasonable expectation of it. The jury's verdict was that sodomy had been committed as alleged; that the husband had been guilty of cruelty of the class (a), & that he had not been guilty of cruelty of class (b). The judge then made a decree *nisi* for dissolution of the marriage. On appeal:—*Held*: (1) the judge ought to have warned the jury that cogent evidence was required to overcome the presumption of innocence of sodomy, & that they should not convict on the wife's uncorroborated evidence; (2) the ct. must take notice of the fact that there had been condonation of the offence, even though the husband did not plead it; (3) the judge had misdirected the jury by saying that the sexual malpractices were cruelty in themselves, as there could not be legal cruelty without danger to life, limb, or health, physical or mental, or reasonable apprehension of it; & (4) instead of directing a new trial the ct. should dismiss the wife's petition.

(5) The wife having on the evidence been a consenting party to the act of sodomy alleged to have been committed it would be impossible for her to obtain a decree of divorce based solely on that act.

(6) The rules with regard to condonation & connivance as a bar to a decree for divorce were well established in the practice of the Ecclesiastical Cts. before the Act of 1857. In my judgment these rules apply to cases in which the ground alleged for divorce is sodomy (GREER, L.J.).—*STATHAM v. STATHAM*, [1929] P. 131; 98 L. J. P. 113; 140 L. T. 292; 45 T. L. R. 127; 72 Sol. Jo. 847, C. A.

*Annotation*:—*As to* (1) *Connad.* D. B. v. W. B., [1935] P. 80.

**2554.** *Add. Annotation*:—*Generally, Refd.* *Raeburn v. Raeburn* (1928), 138 L. T. 672.

**2602.** Add the following para.:—

Though there was no suggestion that the children had been cruelly or improperly treated by the husband, the ct. directed the children to remain in the custody of the mother so long as she maintained & properly educated them without expense to her husband, he to have proper access to them, till they should respectively attain fourteen years of age.

**2648a.** *Unnatural offences.*—*STATHAM v. STATHAM*, No. 2518a, *ante*.

**2661.** *Add. Annotations*:—*Appld.* *Statham v. Statham*, [1929] P. 131. *Refd.* *Rugg-Gunn v. Rugg-Gunn & Archer*, [1931] P. 147.

**2671.** *Add. Annotation*:—*Refd.* *W—, M. J. v. W—, H. R. W.*, [1936] 2 All E. R. 1112.

**2704a.** —.]—Where the ct. was satisfied that a wife had been raped by a man unknown, with the result that she gave birth to a child, it held that there was no adultery & dismissed the husband's petition for divorce.—*CLARKSON v. CLARKSON* (1930), 143 L. T. 775; 46 T. L. R. 623.

#### PART XIII. SECT. 5, SUB-SECT. 2.— B. (a).

**2519 II.** —.]—The word "cruelty" used in sect. 34 of the Parsi Marriage & Divorce Act, 1936, means "legal cruelty" as understood in English law, namely, injury causing danger to life, limb or health, or reasonable apprehension of such injury.—*COWASJI NUSSERAWANJI v. SHEHRA COWASJI*, 1 L. R., [1938] Bom. 75.—*IND.*

**2521 I.** *Question of fact & degree.*—Cruelty is a matter of degree.—*A. v. A.*, [1925] 2 D. L. R. 1195; [1925] 2 W. W. R. 154; 19 Sask. L. R. 346.—*CAN.*

**2521 II.** —.]—The question whether plff. herein was actually afraid of her husband or not held not to affect the question whether his conduct amounted to legal cruelty as defined in *Russell v. Russell*, No. 2661.—*DESABRAIS v. DESABRAIS*, [1928] 3 D. L. R. 549; [1928] 2 W. W. R. 394; 22 Sask. L. R. 417.—*CAN.*

**2534 I.** *Cumulative effect of acts not cruelty per se.*—The acts constituting cruelty may be treated as cumulative.—*A. v. A.*, [1925] 2 D. L. R. 1195; [1925] 2 W. W. R. 154; 19 Sask. L. R. 346.—*CAN.*

#### PART XIII. SECT. 5, SUB-SECT. 2.— B. (c).

**2560 IX.** —.]—A course of conduct calculated to break the spirit of the sufferer & continued until health breaks down, or is likely to break down, under the strain, is cruelty.—*KAUFELD v. KAUFELD* (Sask.), [1926] 1 W. W. R. 159.—*CAN.*

#### PART XIII. SECT. 5, SUB-SECT. 2.— B. (h).

*eg. Spending earnings on mistress—Telling wife of preference for mistress.*—Where the conduct of a husband, in obliging his wife to earn her own living while he spends his earnings on a mistress for whom he openly indicates his preference, so preys on the wife's mind that, to his knowledge, it undermines her health, it constitutes cruelty.—*JONES v. JONES*, [1925] 2 D. L. R. 1144; [1925] 1 W. W. R. 449; 19 Sask. L. R. 262; 44 Man. L. R. 233.—*CAN.*

#### PART XIII. SECT. 5, SUB-SECT. 2.— B. (l).

*sh. Husband describing himself on enlistment as widower—Deserting wife during pregnancy.*—A husband deserted his wife on two occasions, on one of which she had a baby three months old, & on the other when she was about to be confined. On joining the army in 1916 the husband stated that he was a widower, & thereby the wife was caused considerable pain & anxiety, & with difficulty obtained an allowance out of his pay as his wife.—*Held*: the husband's conduct amounted to cruelty.—*STUART v. STUART* (1926), 1 L. R. 53 Calo. 436.—*IND.*

#### PART XIII. SECT. 5, SUB-SECT. 2.—E.

**2683 III.** —.]—Action by a wife for judicial separation on the ground of cruelty dismissed, where the violence complained of did not injure her health or give her cause to fear injury thereto, & was the result of her conduct with

another man which she continued knowing that it provoked deft.—*CONNOLLEY v. CONNOLLEY*, [1925] 2 W. W. R. 426.—*CAN.*

*sl. Refusal of marital intercourse.*—A wife's refusal of marital intercourse is not a justification of legal cruelty. Legal cruelty is sufficient ground for judicial separation; desertion is not a necessary element when such cruelty is proved.—*GUSTAFSON v. GUSTAFSON*, [1935] 2 W. W. R. 286.—*CAN.*

#### PART XIII. SECT. 5, SUB-SECT. 3.—A.

*c i.* — *Evidence of marriage.*—On an indictment for adultery under R.S.N.B., 1854, evidence of marriage is subject to the same rules as on an indictment for bigamy.—*R. v. FOSTER*, [1935] 1 D. L. R. 252; 62 C. C. 263; 8 M. P. R. 10.—*CAN.*

*c ii.* —.]—The offence in sect. 310 (b) of the Criminal Code of cohabiting in any kind of conjugal union with a person who is married to another was aimed at polygamy, & does not include adultery.—*L. v. TOLBURST, R. v. WRIGHT*, [1937] 3 D. L. R. 808; O. R. 570; 68 Can. C. C. 319.—*CAN.*

*c i.* —.]—Attempted intercourse does not in law constitute adultery unless actual penetration has been proved or must be inferred, but complete penetration is not essential.—*ANTHONY v. ANTHONY & CORDATO* (1932), 49 N. S. W. W. N. 103.—*AUS.*

#### PART XIII. SECT. 5, SUB-SECT. 3.— B. (a).

**2712 I.** *Single act—For purpose of supplying evidence.*—An act of



2718a. —.]—An infection of resp. with "crabs" is, in the absence of prior misconduct or infection of petitioner, *prima facie* evidence that resp. has committed adultery.—STEAD v. STEAD (1927), 71 Sol. Jo. 391.

2722a. — Staying with unknown woman in same bedroom—Presumption of adultery.]—WOOLF v. WOOLF, No. 2770c, *post*.

2723. *Add. Annotation*:—*Refd.* Thompson (otherwise Hulton) v. Thompson, [1938] P. 162.

2723a. —.]—HALLAM v. HALLAM (1930), 47 T. L. R. 207; 75 Sol. Jo. 157.

2730. *Add. Annotation*:—*Refd.* Woolf v. Woolf, [1931] P. 134.

2733a. — Hotel evidence.]—On the trial of an undefended petition for divorce, on the ground of adultery with a woman unknown, the ct. declared its intention of refusing to sanction the practice of resorting to hotels to establish a *prima facie* case for dissolution of marriage, & dismissed the petition.—AYLWARD v. AYLWARD (1928), 44 T. L. R. 456.

2737a. —.]—Applt. in 1915 ceased to live with resp. as his wife, though she joined him sometimes in America, London & Scotland, & letters passed between them of an affectionate nature. In 1919 applt. met D. in New York, who was living with her husband & two daughters on terms of affection & up to the date of these proceedings, continued to be on these terms with them. In

Dec. 1920, with her husband's consent, she went on a big game shooting expedition to Africa with applt.; applt.'s wife consented, though against her desire. Applt. & D. were drawn together through their mutual enthusiasm for sport. An expert photographer was with them on the expedition but fell ill. Applt. & D. were away on trips with no one but natives for several days & nights together. D. was, in 1920, forty-five years of age, & there was no direct evidence of familiarity between them:—*Held*: there was not sufficient ground for the inference that adultery might reasonably be assumed as the result of an opportunity for its occurrence.—ROSS v. ELLISON (OR ROSS), [1930] A. C. 1; 96 L. J. P. C. 163; 141 L. T. 666, H. L.

2743. *Add. Annotations*:—*Distd.* Mart v. Mart, [1926] P. 24. *Appld.* Collis v. Collis & Thomas (1933), 77 Sol. Jo. 573; Grubb v. Grubb (1934), 150 L. T. 420. *Consd.* Snowman v. Snowman (1934), 50 T. L. R. 445. *Distd.* Farnham v. Farnham, [1937] P. 49; *Re* Hamer's Estate, Public Trustee v. A.-G., [1937] 1 All E. R. 130. *Consd.* Stafford v. Kidd, [1937] 1 K. B. 395. *Distd.* Roast v. Roast, [1938] P. 8. *Refd.* Selby v. Atkins (1926), 135 L. T. 45; S. v. S. & P. (1927), 44 T. L. R. 52; *Re* A. B.'s Petn., [1928] P. 25; Inverclyde v. Inverclyde, [1931] P. 29; Russell (Countess) v. Russell (Earl), [1935] P. 39.

adultery committed solely or the purpose of supplying evidence on which the spouse of the party so committing it may base an action for divorce will not entitle pltf. to a decree. Although under ordinary circumstances the evidence herein would support the inference that adultery had in fact been committed, yet, since it appeared plain that said evidence was "staged", by deft. for the purpose of enabling pltf. to bring the action, it was held that the inference was at most a highly improbable one.—DE ARMOND v. DE ARMOND (Sask.), [1929] 2 D. L. R. 121; 1 W. W. R. 554.—CAN.

2717 i. *Contraction of venereal disease*.]—The fact that a husband has communicated venereal disease to his wife is in law sufficient evidence of adultery. It also amounts to legal cruelty.—HARDLESS v. HARDLESS (1932), 1 L. R. 55 All. 134.—IND.

2717 ii. —.]—Where in an action for divorce by a husband against his wife the evidence showed that the husband did not have syphilis, the wife had contracted that disease, but there was no other evidence tending to show adultery or loose conduct on the part of the wife:—*Held*: pltf. had not discharged the onus of showing that the wife had committed adultery.—CRASKE v. CRASKE, [1936] S. A. S. R. 439.—AUS.

2719 i. *Evidence of private detectives*.]—Evidence of professional investigator not corroborated & divorce not granted on the ground of insufficiency of evidence.—ALBERT v. ALBERT, [1934] 3 D. L. R. 792.—CAN.

#### PART XIII. SECT. 5, SUB-SECT. 3.—B. (b).

2725 vii. —.]—STEPHEN v. STEPHEN, [1931] 2 D. L. R. 892.—CAN.

2725 viii. —.]—BOURGOIN v. BOURGOIN, [1930] 2 D. L. R. 797.—CAN.

2725 ix. —.]—S. v. S. & M., [1931] 1 W. W. R. 116; *affd.*, [1931] 2 W. W. R. 126.—CAN.

2725 x. —.]—On appeal by co-resp. in a divorce action:—*Held*: the evidence justified the trial judge's finding that co-resp. & deft. had been guilty of adultery.—ROOKE v. ROOKE & DULMAGE, [1935] 2 W. W. R. 59.—CAN.

2725 xi. —.]—In a suit for divorce, where there is no proof that the parties charged with adultery had at least a disposition to take advantage of the opportunities for misconduct, no number of equivocal incidents, each compatible with innocence, will justify the inference of adultery. Nor can that inference be drawn from the untruthfulness of the parties charged, where there is no evidence *aliunde* to support petitioner's case.—EDMUNDS v. EDMUNDS & AYSICOUGH, [1935] V. L. R. 177.—AUS.

2725 xii. —.]—In an action by a husband for divorce held that, although the incidents in evidence if taken separately might not justify a finding of adultery, yet their cumulative effect was such that adultery must necessarily be inferred. The custody of the children was given to pltf., deft. to have reasonable access. Costs of her defence & counterclaim were given deft., & pltf. was awarded costs of action & on the counterclaim against co-deft., said costs to include those payable by pltf. to deft.—PAULIN v. PAULIN & MARTIN, [1937] 1 W. W. R. 753; *affd.*, [1938] 1 W. W. R. 261; 1 D. L. R. 686.—CAN.

2736 i. *Whether necessary to prove direct fact—When opportunity shown to exist—Letter from defender admitting incident*.]—SMITH v. SMITH, [1929] S. C. (Ct. of Sess.) 75.—SCOT.

s]. *Failure to deny evidence given by other side*.]—*Held*: a strong circumstance to be taken into account.—STACEY v. STACEY (Alta.), [1927] 2 D. L. R. 854; [1927] 1 W. W. R. 821.—CAN.

#### PART XIII. SECT. 5, SUB-SECT. 3.—B. (c).

2743 i. *Proof of non-access—Evidence of either spouse*.]—The rule of Russell

v. Russell, No. 2743, does not apply so as to exclude evidence of non-access, where there is no possibility of bastardising a child.—ROBERTS v. ROBERTS (Alta.), [1928] 1 D. L. R. 227; [1927] 3 W. W. R. 625.—CAN.

2743 ii. —.]—*Held*: the evidence of spouses was admissible to bastardise a child born during wedlock; the rule to the contrary, applied in *Russell v. Russell*, No. 2743, not being part of the law of Scotland.—BURMAN v. BURMAN, [1930] S. C. 262.—SCOT.

2743 iii. —.]—In an action by a husband for divorce on the grounds of adultery evidence by the husband of non-access by him to his wife to show that deft. became pregnant during the period of non-access is admissible if such pregnancy, in consequence of a surgical operation performed upon deft., cannot result in the birth of a child.—VENTER v. VENTER, [1932] N. L. R. 90.—S. AF.

2743 iv. —.]—Where, in a suit for divorce on the ground of the wife's adultery, it was proved that eight months after the filing of the petition of divorce the wife had a miscarriage & produced a foetus six weeks old:—*Held*: the husband could give evidence of non-access to his wife at the material date.

It is a question whether the rule in *Russell v. Russell* applies to India or not, having regard to sects. 112, 120 of the Evidence Act.—COCKMAN v. COCKMAN (1933), 1 L. R. 56 All. 570.—IND.

2743 v. —.]—The rule that evidence by a husband or wife of non-access is inadmissible, is the same in British India as in England, & is applicable not only to cases in which the legitimacy of the child is in issue but also to proceedings instituted in consequence of adultery, where the wife's adultery is sought to be established by proof that she has given birth to a child of which the husband is not the father. The fact of non-access can, however, be proved by evidence *aliunde*.—SWEENEY v. SWEENEY (1935), 1 L. R. 63 Cal. 1080.—IND.



- 2746. Add. Annotations :—***Reid. Mart v. Mart*, [1926] P. 24; *Re Bromage, Public Trustee v. Cuthbert*, [1935] Ch. 605; *Stafford v. Kidd*, [1937] 1 K. B. 395.

- 2747. Add. Citations :—**[1926] P. 24 ; 95 L. J. P. 29 ; 134 L. T. 446.

**Add. Annotations :—***Distd. Collis v. Collis & Thomas* (1933), 77 Sol. Jo. 573. *N.F. Re Bromage, Public Trustee v. Cuthbert*, [1935] Ch. 605. *Folld. Stafford v. Kidd*, [1937] 1 K. B. 395.

- 2749. Add. Annotations:—**Consd. Rimmer v. Rimmer (1930), 46 T. L. R. 624, n. Folld. Roast v. Roast, [1938] P. 8.

- 2749a. -.]—The wife alleged that the husband had left her without cause & had, therefore, been guilty of desertion. The husband's case was that he left his wife because she stated that a child with which she was pregnant would have to be kept by him whether it was his or not. There was no attempt to negative access by the husband to the wife at any material time. In addition to the evidence as to the child, indecent literature had been found in the wife's possession & an indecent letter had been written by her :—*Held* : the statement by the wife, although amounting to a doubt with reference to the paternity of the child, was not an attempt by her to bastardise the child so as to be inadmissible in evidence under the rule in *Russell v. Russell*, but was an admission that at a material time a man other than her husband had had intercourse with her & was therefore admissible as evidence that the husband had reasonable grounds for leaving his wife.—*ROAST v. ROAST*, [1938] P. 8; [1937] 4 All E. R. 423; 107 L. J. P. 21; 157 L. T. 596; 102 J. P. 25; 54 T. L. R. 107; 81 Sol. Jo. 965; 36 L. G. R. 59; 30 Cox, C. C. 646.

- 2751a. Nullity suit.]-On a petition by the man for nullity of a marriage celebrated in Apr. 1933, the ct. found on the facts, subject to the admissibility of evidence, that the marriage had never been consummated by reason of the woman being *frigida quoad hunc* & that she had given birth to a child in Aug. 1935, after leaving the man in Sept. 1933, & had confessed intercourse with another man to whom she ascribed paternity. On these findings the ct. held that the evidence tendered was not rendered inadmissible in a case of nullity by the rule in *Russell v. Russell*, [1924] A. C. 687. The exclusion by that rule of the evidence of a spouse negating the legitimacy of offspring does not extend to the exclusion of evidence negating the existence of married intercourse. The right of the man to prove that the woman is unable to consummate the marriage with him cannot be destroyed by reason of her having

given birth to a child who is from the nature of the case illegitimate.

In a suit for nullity of marriage for want of consummation there is no issue as to adultery; non-consummation once established, adultery becomes an irrelevant though necessary inference, as also bastardisation, when the birth of a child has occurred.—*FARNHAM v. FARNHAM (OTHERWISE DANIELS)*, [1937] P. 49; [1938] 3 All E. R. 776; 106 L. J. P. 6; 155 L. T. 621; 53 T. L. R. 123; 81 Sol. Jo. 60.

- Annotation:—Folld. Burgess (otherwise Leadbetter) v. Burgess, [1937] P. 60.*

- 2751b.**                   -].—On a petition by the woman for nullity of marriage on the ground of the impotence of the man the ct. admitted as evidence statements by the woman that a child, born in wedlock was the result of her ante-marital intercourse with another man & ascribing the paternity of a second child born before the hearing to a second man.—**BURGESS (OTHERWISE LEADBETTER) v. BURGESS, [1937] P. 60; [1937] 1 All E. R. 374; 108 L. J. P. 20; 156 L. T. 200; 53 T. L. R. 190; 81 Sol. Jo. 240.**

- 2753. Add. Annotation:—Reid.** Sloggett v.  
Sloggett, [1928] P. 148.

- 2753a. — Evidence of petitioner's father—That petitioner living apart from wife at material period.]—In this undefended petition for a divorce by a labourer the evidence of adultery depended upon the proof of the birth of a child to the wife some eighteen months after they had ceased to live together. Both parties continued to live at different addresses in South London, & the ct. accepted as evidence of non-access the evidence of the petitioner's father that the petitioner had been living with him during the material period & had not slept away one night.—*HADLOW v. HADLOW* (1930), 143 L. T. 774; 46 T. L. R. 624; 74 Sol. Jo. 582.

**Annotation :—***Reid. Stafford v. Kidd*, [1937] 1 K. B. 395.

2762. *Add. Annotation*:—**Folld.** Little v. Little,  
[1927] P. 224.

- 2763a. — — — — —.]—The adultery of a husband in his wife's suit for dissolution of marriage is sufficiently established, subject to identification, by the production of the decree in a former suit, upon which it appears that damages have been assessed against him as co-resp. in respect of the same adultery, & that he has been ordered to pay such damages, without the decree in question containing any express & separate finding that he committed the adultery in question.—*LITTLE v. LITTLE*, [1927] P. 224; 96 L. J. P. 131; 137 L. T. 495; 71 Sol. Jo. 493.

- 2765a. Conviction for perjury—In action in which immorality alleged.]—A conviction for per-**

2755 1. *Statement by wife—As to illegitimacy of child—Admissible to establish fact of wife's adultery.*—BLEKKER v. BLEEKER (1927), 48 N. L. R. 133.—S. AF.

2755 II. — — — —.]—On the hearing of a petition by a husband for divorce on the ground of his wife's adultery, evidence of a statement by the wife that a man other than her husband is the father of a child born to her is admissible, not as evidence of the paternity of the child, but as constituting an admission of misconduct. —GINN v. GINN. [1931] V. L. R. 298;

Argus L. R. 263.—AUS.

ask. Birth of child while parties separated.—Proof of maternity necessary.]—In a case where it is proposed to prove the alleged adultery by calling evidence as to the birth of a child, since the separation of the husband & the wife, the evidence should be directed to the maternity of the mother & the mere statement that a child has been found or seen living in the same house with the wife is not ordinarily sufficient to establish that the child is her child.—SIMON LAKRA V. MUHAMMAD SUGAN BAKHLA (1932), I. L. R. 11 Pat. 637.—IND.

**PART XIII. SECT. 5, SUB-SECT. 3.—**  
**B. (d).**

**h. i.**—*In regular course of business.*]—Where a peddler, e.g. a tradesman, physician, or tax collector, is called to the house of a prostitute, in the regular course of his business, the inference that he committed adultery there should not be drawn against him in a divorce action in the absence of evidence in addition to that of the fact of such visits.—**WRIGHT v. WRIGHT**, [1928] 1 D. L. R. 934; 1 W. W. R. 383.—**CAN.**

jury committed during a slander action, for falsely swearing that sexual intercourse with a certain woman had not occurred, is equivalent to a finding that there had been such intercourse, & the certificate of conviction is admissible as *prima facie* evidence of the intercourse in a subsequent suit for dissolution of marriage in which the man convicted is resp.—*O'TOOLE v. O'TOOLE* (1926), 134 L. T. 542; 42 T. L. R. 245.

2768. *Add. Annotation*:—*Refd.* *Fender v. Mildmay*, [1937] 3 All E. R. 402.

2770a. *Entry in register of births.*—An entry in a register of births, signed by the wife, is admissible against her as a confession of adultery.—*BRIERLEY v. BRIERLEY & WILLIAMS*, [1918] P. 257; 87 L. J. P. 153; 119 L. T. 343; 34 T. L. R. 458; 62 Sol. Jo. 704.

2770b. *Admission of adultery by husband—Sufficiency of.*—*BOOTH v. BOOTH* (1929), 73 Sol. Jo. 159.

2770c. *Refusal to disclose name of woman.*—On an undefended petition by a wife for dissolution of marriage by reason of the adultery of her husband, the evidence was that the husband passed two nights in a bedroom at an hotel with a woman. He then informed his wife of the fact, but disclosed no name or address of the woman in question either to his wife or to her solrs. or to the King's Proctor to whom the papers in the case had been sent by the ct., although both the solrs. & the King's Proctor applied to him for these particulars. As the result of inquiries by the King's Proctor there was no evidence of any association of the husband with a woman other than his wife, still less of illicit association:—*Held*: the appeal must be allowed & a decree *nisi* granted on the ground that if evidence were tendered in good faith which under all usual circumstances clearly pointed to adultery, it was the duty of the ct. to act upon it, unless the King's Proctor could adduce cogent evidence to rebut the obvious conclusion, & in the present case there were circumstances on which the ct.

ought to be satisfied in accordance with what had hitherto been the practice that adultery had been established.—*WOOLF v. WOOLF*, [1931] P. 134; 100 L. J. P. 73; 145 L. T. 36; 47 T. L. R. 277, C. A.

*Annotation*:—*Refd.* *Wyatt v. Wyatt*, [1937] 3 All E. R. 885.

2771a. *Discretion statement in former suit.*—In Dec. 1932, a husband presented a petition for divorce against his wife on the ground of her alleged adultery in which he prayed the ct. to exercise its discretion in his favour & filed the usual discretion statement. The petition was dismissed & it became therefore unnecessary to have recourse to the discretion statement. In Dec. 1933, the wife presented a petition for divorce against the husband at the hearing of which he did not appear. The wife then sought to use the admissions in the husband's discretion statement as evidence against him of his adultery:—*Held*: (1) inasmuch as it was not the practice of the Divorce Ct. to reserve discretion statements solely for the use of the ct. but to permit access to them by parties to the suits, they were analogous to depositions under Cos. Act, 1929 (c. 23), s. 214, & the evidence obtained by an inspection of them might be treated as admissions & used, if necessary, in other proceedings. Therefore, the wife was entitled to rely on the husband's discretion statement as evidence of his adultery; (2) this decision was based on the practice as it existed before Jan. 1, 1934, when the Matrimonial Causes (Amendment) Rules, 1934, came into force, & would apply only to divorce proceedings which had been commenced before that date.—*BEVIS v. BEVIS*, [1935] P. 86; 104 L. J. P. 41; 152 L. T. 545; 51 T. L. R. 291; 79 Sol. Jo. 194, C. A.

*Annotations*:—*Consd.* B. — v. B. — & G. —, [1936] 2 All E. R. 1254. *Refd.* *Russell (Countess) v. Russell (Earl)*, [1935] P. 39.

—.]—*See, now*, Matrimonial Causes (Amendment) Rules, 1934, S. R. & O., 1934, No. 1348.

2777. *Add. Annotation*:—*As to* (1) *Consd.* *Bevis v. Bevis*, [1935] P. 86.

PART XIII. SECT. 5, SUB-SECT. 3.—  
B. (f) i.

2770 i. *Admission of adultery by wife—Sufficiency of.*—In July, 1923, petitioner & resp. entered into a separation agreement, & thereafter lived separate & apart. During the separation resp., in May, 1924, gave birth to a child. The husband petitioned for divorce. The evidence of adultery consisted of admissions by resp.:—*Held*: this evidence was admissible.—*HENLEY v. HENLEY*, [1927] S. A. S. R. 364.—AUS.

sm. *Admissions by respondent.*—Admissions, whether written or verbal, made by resp. in a suit for dissolution of marriage are not in themselves sufficient proof of adultery; but when other facts, tending to establish such adultery, have been adduced, the admissions are corroborated evidence of such facts so adduced.—*WILKIE v. WILKIE*, [1928] N. Z. L. R. 406.—N.Z.

sp. —.]—*GOWDY v. GOWDY*, [1933] 2 W. W. R. 128; 3 D. L. R. 797; 41 Man. L. R. 275.—CAN.

sx. *Diary — Inadmissible against co-respondent.*—In an action of divorce on the ground of adultery:—*Held*: entries made by the defender in a private diary kept by her, the import of which was that she had committed

adultery with the co-defender, although evidence against her, could not be founded on as evidence against the co-defender.—*CREASEY v. CREASEY*, [1931] S. C. 9.—SCOT.

sz. *Torn-up draft letter.*—In an action of divorce for adultery brought by a husband against his wife, pursuer averred that he had discovered, in an open bureau in the drawing-room of the house in which he & defender were then residing, a torn-up draft letter from defender to co-defender & an envelope addressed to co-defender, & that the letter, which was couched in passionate terms, was in defender's handwriting, & referred to the period of the alleged adultery. Defender, who denied adultery, pleaded that pursuer's averments relative to the letter & envelope were irrelevant, & should not be remitted to probation:—*Held*: the mere facts that the letter in question had not been dispatched, or that it had been torn up were not sufficient to render it inadmissible as evidence, if it might be directly relevant to the issue under trial; & further, it might be so relevant as showing defender's state of mind at the time when it was written, & the relationship which existed between defender & co-defender.—*WATSON v. WATSON*, [1934] S. C. 374.—SCOT.

PART XIII. SECT. 5, SUB-SECT. 3.—  
B. (f) ii.

2773 i. —.]—*To petitioner's solicitor.*—*Semble*: a decree for divorce should not be granted on evidence merely of deft.'s admissions of adultery, especially when made to pltf.'s solr. or other officer of the ct. or on deft.'s testimony admitting adultery.—*SANBORN v. SANBORN*, [1928] 1 D. L. R. 881; [1928] 1 W. W. R. 78; 22 Sask. L. R. 168.—CAN.

2773 ii. *By respondent—Whether evidence against co-respondent.*—*HARRIS v. HARRIS*, [1931] 4 D. L. R. 933.—CAN.

PART XIII. SECT. 5, SUB-SECT. 3.—  
B. (f) iii.

2780 vi. —.]—In an action for divorce the ct. is bound to act on any evidence legally admissible by which the fact of adultery is established; & therefore, if there is evidence, not open to exception, of admissions of adultery by the principal resp. it is the duty of the ct. to act on such admissions, although there may be a total absence of all other evidence to support them, & the action is undefended.—*GORDON v. GORDON & WATT*, [1935] 2 W. W. R. 419.—CAN.

2780 vii. —.]—In an action for

**2792a.** .]—In this petition by a husband for dissolution of marriage, the only evidence of adultery was the wife's own oral admission to petitioner, coupled with statements in her own letters as to associations with men & a letter after petition in which she admitted her unfaithfulness:—*Held*: it was strong corroboration that the wife made the admission & stood by it though she had everything to lose thereby. Decree *nisi* pronounced.—*SIMPSON v. SIMPSON* (1931), 146 L. T. 47; 75 Sol. Jo. 542.

*F. Remedies* (Vol. XXVII., p. 304).

Add the following case:—

**2813a. Petition for judicial separation—Whether petition brought only for collateral purpose.]—**A wife petitioned for judicial separation from her husband, on the ground of his adultery. She needed no protection against interference from her husband, but she required orders for permanent maintenance & for custody. The judge, following his usual custom, asked petitioner why she prayed for judicial separation & not dissolution of the marriage. Petitioner stated that she did not wish her husband to marry the woman who had ruined her home:—*Held*: permanent maintenance & custody being, at any rate, a part of the purpose for which the suit was brought, petitioner had a right to a decree of judicial separation. The ct. had a discretion to refuse such a decree, but not an unlimited discretion, & that discretion must be exercised upon some legal ground, such as the absolute & discretionary bars & the ground that the suit was not brought *bona fide*, but only for some collateral purpose. It was not such a legal ground that the ct. thought it would be better that the relief to be granted should be dissolution, & not judicial separation.—*BLANCHARD v. BLANCHARD* (1928), 138 L. T. 176; 44 T. L. R. 313; 72 Sol. Jo. 138.

divorce the only evidence of adultery was that deft. had told his wife "he had gone about with another woman," & a written confession that the allegations of adultery contained in the statement of claim in the action were true. No evidence was tendered to show that the husband was at the towns where adultery was alleged to have taken place at the material times, & there was evidence to show that the husband was ready to seize an opportunity of being freed from his marriage:—*Held*: a decree for divorce ought not to be made as all grounds for distrust of, & suspicions of the falsity of the confession, had not been removed.—*CARTER v. CARTER*, [1937] S. A. S. R. 16.—*AUS.*

*sq. Admissibility.]—*Admissions being that resp. had given birth to a child of which pltf., her husband, was not the father, were inadmissible; the birth certificate in which the child was registered by resp., in accordance with sect. 62 of Vital Statistics Act, R. S. S., 1930, as legitimate, *held*, however, to be admissible evidence & to be sufficient ground for finding that resp. had committed adultery.—*LASKO v. LASKO & MILLER*, [1935] 3 W. W. R. 363.—*CAN.*

**PART XIII. SECT. 5, SUB-SECT. 3.—**  
E. (a).

**2802 i. Acts other than those charged in petition—Subsequent acts of adultery.]—**Evidence of acts of adultery sub-

sequent to the date of the petition can only be admitted where preceded by some evidence upon which the jury, without more, might find a charge of adultery, as alleged in the petition, to have been proved.—*ELLIOTT v. ELLIOTT*, [1927] N. Z. L. R. 338.—*N.Z.*

**PART XIII. SECT. 5, SUB-SECT. 3.—**  
F. (a).

*sq. Divorce—Mere adultery on part of husband.]—*Mere adultery on the part of the husband does not by itself entitle a wife to a divorce according to Burmese Buddhist law.—*MATHEIN NWE v. MAUNG KHA* (1929), 1 L. R. 7 Ran. 451.—*IND.*

**PART XIII. SECT. 5, SUB-SECT. 3.—**  
F. (b).

**b i. —.]—**In an action for damages for criminal conversation by deft. with pltf.'s wife, evidence was given that pltf. & A. J. M., his alleged wife, had lived together as man & wife & were generally reputed as such. Pltf. & his alleged wife gave evidence of the actual celebration of the marriage. No other evidence was given or produced on behalf of pltf. The judge decided that strict proof of a being essential, pltf. had not and the onus of proof, & he the jury to find a verdict for deft., which they accordingly did. Pltf. brought a new trial motion to set aside the verdict & judgment:—*Held*: the evidence given by & on

**SUB-SECT. 4.—INCESTUOUS ADULTERY**

(p. 306).

**2828a. Proof of relationship.]—**In a suit by a wife for divorce on the ground of her husband's incestuous adultery with her sister, a certificate of birth to prove the relationship should, as a rule, be produced.—*GREEN v. GREEN* (1913), 29 T. L. R. 357.

**2828b. Whether defendant estopped by previous decree absolute—Finding as to adultery.]—**After a husband was granted a decree *nisi* for the dissolution of his marriage on an undefended petition he proceeded to present a separate petition, claiming damages against co-resp. The latter filed an answer alleging connivance & conduct conducing. The second petition was heard after the decree had been made absolute:—*Held*: co-resp. was estopped from setting up a case of connivance, by reason of the decree having been made absolute; but the plea of conduct conducing, being only a discretionary bar, could be left to the jury.—*HOPKINS v. HOPKINS & CASTLE* (1933), 103 L. J. P. 33; 150 L. T. 279; 50 T. L. R. 99; 78 Sol. Jo. 64.

**2828c. — Conduct conducing—Not raised in previous proceedings.]—***HOPKINS v. HOPKINS & CASTLE*, No. 2828b, *ante*.

**2828d. — Finding as to connivance.]—***HOPKINS v. HOPKINS & CASTLE*, No. 2828b, *ante*.

**2829a. — With her consent.]—***STATHAM v. STATHAM*, No. 2518a, *ante*.

**2830. Add. Annotation:]—***Apld. Statham v. Statham*, [1929] P. 181.

**2830a. —.]—***STATHAM v. STATHAM*, No. 2518a, *ante*.

**2833a. Whether amounting to cruelty.]—***STATHAM v. STATHAM*, No. 2518a, *ante*.

**2833b. Condonation—Whether special plea necessary.]—***STATHAM v. STATHAM*, No. 2518a, *ante*.

**2833c. Bestiality.]—***R. v. R.* (1932), 173 L. T. Jo. 264.

behalf of pltf. constituted sufficient *prima facie* proof of the marriage, & the case should not have been withdrawn from the jury. The appeal was allowed, & a new trial ordered.—*MCCARTHY v. HASTINGS*, [1933] N. I. 100.—*IR.*

**i i. — Unsatisfactory evidence.]—***DOWLINSKI v. RAWLUK* (Man.), [1929] 4 D. L. R. 20.—*CAN.*

**PART XIII. SECT. 5, SUB-SECT. 7.**

**2834 i. Proof—Independent of verdict on criminal charge.]—**A criminal record of a conviction for an offence necessarily involving actual sexual intercourse is admissible against deft. in an action for divorce. If the case is undefended, proof of the conviction is *prima facie* evidence of deft.'s adultery, & will be regarded as sufficient unless there is evidence rebutting the presumption created by the conviction, provided deft. is identified with the person convicted.—*DICKASON v. DICKASON*, [1934] N. L. R. 97.—*S. AF.*

**PART XIII. SECT. 5, SUB-SECT. 8.—A.**

*sw. Absence of just cause implied.]—*The legal concept of desertion implies that the desertion is without just cause or excuse.—*GILBERT v. GILBERT*, [1937] S. A. S. R. 79.—*AUS.*

**PART XIII. SECT. 5, SUB-SECT. 8.—**  
B. (a).

**2844 ii. —.]—**In order to establish desertion, proof of a refusal to acknow-

2845. *Add. Annotation*:—*As to (2) Consd. Papadopoulos v. Papadopoulos*, [1936] P. 108.
2846. *Add. Annotations*:—*As to (1) Refd. Papadopoulos v. Papadopoulos*, [1936] P. 108; *Herod v. Herod*, [1938] 3 All E. R. 722.
2850. *Add. Annotations*:—*As to (3) Consd. Chapman v. Chapman & Thomas*, [1938] P. 93. *Refd. Courage v. Courage* (1931), 47 T. L. R. 395.
2852. *Add. Annotation*:—*Consd. Herod v. Herod*, [1938] 3 All E. R. 722.
2858. *Add. Annotation*:—*Refd. Papadopoulos v. Papadopoulos*, [1936] P. 108.
2888. *Add. Annotation*:—*Consd. Fassbender v. Fassbender*, [1938] 3 All E. R. 389.
2910. *Add. Annotation*:—*Refd. Papadopoulos v. Papadopoulos*, [1936] P. 108.
2925. *Add. Annotations*:—*Refd. Clark v. Clark* (1931), 145 L. T. 487; *Herod v. Herod*, [1938] 3 All E. R. 722.

- 2928a. —.]—*PRATT v. PRATT* (1938), 55 T. L. R. 251, C. A.
- 2939a. *Husband convicted of sexual offence.*]—After the husband had been convicted of a sexual offence the wife refused to resume cohabitation with him & presented a petition for divorce alleging that he had constructively deserted her:—*Held*: before a case of constructive desertion could be made out the ct. must be satisfied that the conduct of resp. was such as to show a clear intention to drive the petitioner away. Although the husband seemed to be a sexual pervert, unable to control himself, there was no evidence that he had at any time ceased to wish to live with his wife, nor of any intention on his part to bring the cohabitation to an end.—*BOYD v. BOYD*, [1938] 4 All E. R. 181; 159 L. T. 522; 55 T. L. R. 3; 82 Sol. Jo. 912.
2940. *Add. Annotation*:—*Refd. Diggins v. Diggins* (1926), 43 T. L. R. 37.

ledge the obligations of the married state may suffice.

*Semble*: the bringing of a prior suit, which was abandoned, for divorce can be relied on as constituting desertion.—*BRUCE v. BRUCE* (Alta.), [1926] 4 D. L. R. 1117; [1926] 3 W. W. R. 605.—CAN.

*sb. Husband not heard of for over seven years.*]—The husband deserted the wife in 1920, & desertion continued since then until the date of hearing. Some months after the desertion began the wife left Australia for England, & returned in 1931. During that time she had not heard of or from her husband. There was no evidence that any one who would be likely to have heard from the husband, if living, had done so:—*Held*: in the absence of proof of death, the wife was entitled to a decree *nisi* of divorce.—*SELWAY v. SELWAY*, [1931] S. A. S. R. 381.—AUS.

*sd. No intention to cohabit—Separation after ceremony.*]—In 1931, the parties married for the purpose of giving a name to an expected child. Immediately after the ceremony at a Registry Office the parties separated & had never seen each other since. The petitioner knew before the marriage that her husband did not intend to make a home for her, & there was no intention that the parties should live together as man & wife:—*Held*: desertion, within the meaning of that word as used in the Divorce Act, had not been proved.—*SEAMAN v. SEAMAN* (1935) W. A. L. R. 7.—AUS.

PART XIII. SECT. 5, SUB-SECT. 8.—B. (b).

2860 i. *What amounts to cohabitation—Parties living under same roof—Husband not recognising or treating wife as such.*]—*Held*: the husband was living apart from his wife without sufficient excuse in circumstances entitling her to restitution of conjugal rights.—*LINKHART v. LINKHART*, [1923] 2 D. L. R. 1180.—CAN.

PART XIII. SECT. 5, SUB-SECT. 8.—B. (c).

2868 ii. —.]—Petition by wife for dissolution of marriage on the ground of the husband's desertion:—*Held*: desertion begins when the intention to desert is complete, & that in this case there never was any intention on the part of the husband to desert his wife.—*LITTLE v. LITTLE*, [1928] W. A. L. R. 60.—AUS.

2868 iii. —. *Mental infirmity of defendant.*]—Def. (who had had a nervous breakdown in the year 1926, on which occasion he was mentally affected) now, under a delusion that people thought & spoke evilly of him—a delusion that engendered moroseness

& melancholia, though it did not deprive him of the capacity to understand his duties to his wife—ignored pltf. & withdrew himself from all conjugal intercourse with her, & for twelve months, from Oct. 1927, to Oct. 1928, the spouses occupied separate bedrooms. At the end of that time, def. having refused to seek work & being unable to support pltf. & the children of the marriage, pltf. left the house & obtained employment in B. On Feb. 16, 1933, she signed a petition for the dissolution of her marriage on the ground of continuous desertion for five years & upwards as from Apr. 1927:—*Held*: on the facts, def.'s conduct towards pltf. was a result of mental infirmity caused by delusions consequent on his nervous breakdown, & did not amount to desertion without cause.—*STEPHENSON v. STEPHENSON*, [1933] S. R. (Q.) 256.—AUS.

PART XIII. SECT. 5, SUB-SECT. 8.—B. (d).

2887 iv. —.]—In order to legitimate a child, petitioner & resp. agreed to marry & then separate & not live together as man & wife, an agreement void as against public policy. Immediately after the marriage, in the street, they *bona fide* verbally agreed in their capacity as married persons to an immediate separation, which continued in full force for not less than three years:—*Held*: the petitioner was entitled to her decree.—*BRYMONT v. BRYMONT*, [1937] N. Z. L. R. 98; 13 N. Z. L. J. 31.—N. Z.

2887 v. —.]—Petitioner & resp. in a divorce suit had been intimate before marriage & a child was expected. They arranged to marry, to execute a deed of separation prepared before marriage providing for the child, & then to part. After the marriage they executed the deed, parted, & lived separate & apart for more than three years. The ground for the petition was that the deed had been in full force for not less than three years:—*Held*: there had been a genuine agreement made after the marriage for an immediate separation & that the parties were relying upon a post-nuptial, & not as in *Brodie v. Brodie*, [1917] P. 271, upon a pre-nuptial, agreement, & the petitioner was entitled to her decree.—*SMITH v. SMITH*, [1937] N. Z. L. R. 94; 13 N. Z. L. J. 31.—N. Z.

PART XIII. SECT. 5, SUB-SECT. 8.—B. (e) i.

2901 iii. —.]—During the statutory period of five years required for desertion the wife, except for a period when a position obtained by her with her husband's consent kept her away from home, lived in the matrimonial home, usually had her meals with her

husband, & conversed with him. During part of the time when the wife was at the matrimonial home the husband paid her wages. She had told the husband & a friend on several occasions that she regarded herself as a single woman, & she went out at night against the husband's wishes & had pawned her wedding ring, but when this was done the spouses were in impecunious circumstances. During the whole of this period she refused her husband sexual intercourse:—*Held*: on these facts, desertion had not taken place.—*TONKIN v. TONKIN*, [1936] S. A. S. R. 100.—AUS.

*sm. Non-compliance with decree for restitution—What amounts to.*]—After a decree for restitution of conjugal rights had been made against a wife she returned to her husband & lived with him for three months. She returned sincerely willing to stay with him if her affection for him was felt by her to be sufficient, but she had in her mind a condition unexpressed that she would not stay with him if she found her affection insufficient. At the end of three months she left & refused thereafter to resume cohabitation:—*Held*: the wife's conduct did not amount to a compliance with the decree, & therefore, that her husband was entitled to a dissolution of marriage.—*HARRIS v. HARRIS* (1929), 30 S. R. N. S. W. 59; 47 N. S. W. W. N. 9.—AUS.

PART XIII. SECT. 5, SUB-SECT. 8.—B. (e) ii.

n i. —.]—Malicious denial of carnal intercourse persisted in for four years may constitute desertion, but the standard of proof, both of the denial itself & of the absence of consent by the offended spouse, must be exacting.—*GOOLD v. GOOLD*, [1927] S. C. 177.—SCOT.

*sp. Motive immaterial.*]—If a wife living apart from her husband without excuse is *bona fide* desirous of living with her husband & performing the duties of a spouse, her motive for so doing is immaterial. Nothing more than genuine intention to amend the deserting party's conduct by resumption of the performance by overt acts of the matrimonial duties is required.—*RUSSELL v. RUSSELL*, [1935] S. A. S. R. 85.—AUS.

PART XIII. SECT. 5, SUB-SECT. 8.—B. (f).

2933 ii. —. —. —.]—*LEE v. LEE*, [1927] 1 D. L. R. 94; 59 O. L. R. 561.—CAN.

PART XIII. SECT. 5, SUB-SECT. 8.—B. (g).

2940 ii. —.]—A divorce refused,

2941. *Add. Annotation*:—*Consd. Watson v. Watson*, [1938] 3 All E. R. 770.

2942a. ———.]—*TATE v. TATE*, [1938] 4 All E. R. 264; 82 Sol. Jo. 934.

2948. *Add. Annotation*:—*Consd. Watson v. Watson*, [1938] 3 All E. R. 770.

2949. *Add. Annotation*:—*Consd. Watson v. Watson*, [1938] 3 All E. R. 770.

2952a. ———.]—Petitioner & resp. separated in 1932 under a deed of separation whereby resp. covenanted to pay petitioner the sum of 30s. per week. He paid this sum for about a month & thereafter made no further payments. The parties had, while living together, kept a public-house, & after the separation petitioner took the licence of another public-house in order to support herself & her child. During their married life resp. drank heavily, but had many times made promises, which proved quite illusory, to give up drink. After the separation he saw petitioner on various occasions & made promises or suggestions to return, but they were quite fantastic, & were never carried beyond mere suggestion:—*Held*: although the fact that payments under a deed of separation have ceased is not sufficient evidence of repudiation of the deed, the further facts proved here showed a repudiation, & desertion had been proved.—*RATCLIFFE v. RATCLIFFE*, [1938] 3 All E. R. 41; 54 T. L. R. 793; 82 Sol. Jo. 455.

2952b. ———.]—On a wife's undefended petition for divorce on the ground that the husband had deserted her without cause for a period of at least three years immediately preceding the presentation of the petition, it appeared that the parties had entered into a deed of separation in 1932, but that no payment had ever been made under the deed, & that the husband had treated it as a nullity:—*Held*: the desertion had continued, notwithstanding the execution of the deed.—*STARKEY v. STARKEY*, [1938] 3 All E. R. 773; 159 L. T. 490; 54 T. L. R. 1117; 82 Sol. Jo. 745.

2952c. ———.]—*Deed entered into while living apart.*—In 1924, resp. deserted petitioner, leaving her with a young child of six years of age. Three months later he made an offer to provide a room for his wife, which it was held that she was entitled to reject. In 1929, a separation was signed by the parties, reciting that the wife was entitled to an order for maintenance in a ct. of summary jurisdiction & containing in the operative part a clause providing that they should live separate & apart & an agreement for the payment by the husband of 15s. weekly during the joint lives. Under this agreement the total pay-

ments made by the husband were £4 10s.:—*Held*: the parties did not separate under the separation agreement, & it was a mere incident in the desertion. The terms of the agreement were not observed by resp., nor sought to be enforced by petitioner. On the facts, there had been desertion for a period of three years & upwards preceding the date of the petition, & petitioner was entitled to a decree *nisi*.—*WATSON v. WATSON*, [1938] P. 258; [1938] 3 All E. R. 770; 107 L. J. P. 160; 159 L. T. 523; 54 T. L. R. 1117; 82 Sol. Jo. 714.

2954. *Add. Annotation*:—*Refd. Matthews v. Matthews* (1932), 48 T. L. R. 511.

2956. *Add. Annotation*:—*Refd. Matthews v. Matthews*, [1932] P. 103.

2960. *Add. Annotations*:—*Consd. Statham v. Statham*, [1929] P. 131. *Refd. Welton v. Welton*, [1927] P. 162.

2973a. *Separation based on mistaken belief of invalidity of marriage—Revival of right to cohabitation by proceedings for maintenance.*—The parties were married in England in 1912. In 1913 the husband left the wife & they formally separated in 1914 by consent under an agreement which at the time both believed to be valid, the wife receiving a sum of money in full satisfaction of all claims on the husband. Thereafter there was no change in the marital relations of the parties *inter se* & they remained apart & the husband later went through a form of marriage with another woman. The agreement was based upon the mistake of law that the marriage had been invalid by reason of it not complying with the law of the foreign domicile of the husband, & in 1929, in proceedings in which an order for maintenance of the wife made by a ct. of summary jurisdiction was upheld by a Divisional Ct., the agreement was held to be illegal. In 1934 the wife, relying on this decision & on the footing of her resulting right to cohabitation, sued the husband, who had returned to England, for judicial separation on the ground of desertion. In discussing the definition of desertion in *Fitzgerald v. Fitzgerald* (1869), L. R. 1 P. & M. 694, 698, & similar cases & with reference to the necessary cessation of an existing state of cohabitation to constitute desertion, the ct. doubted whether time had ever ceased to run for the purpose of two years' desertion from 1913 onwards owing to the illegality of the agreement made in 1914, but:—*Held*: the wife, having reasserted her rights in 1929, the husband had now been guilty of desertion for not less than two years during the period since 1913.—*PAPADOPOULOS v. PAPADOPOULOS*, [1936] P. 108; 105 L. J. P. 21; 154 L. T. 242; 52 T. L. R. 190; 80 Sol. Jo. 56.

on the ground that a separation agreement prevented a finding of desertion.

In an action for divorce the existence of a separation agreement is not to be disregarded by the ct. merely because deft. does not set it up as a bar.—*WALSH v. WALSH & KIRKLAND*, [1925] 2 D. L. R. 794; [1925] 1 W. W. R. 951; 19 Saak. L. R. 509.—*CAN.*

2940 iii. ———.]—An agreement to live apart entered into more than three years after the commencement of desertion, is not, in the absence of a condition barring proceedings, any bar to a petition for divorce on the ground of such desertion.—*AMOS v. AMOS* (1937), V. L. R. 257; 43 *Argus* L. R. 335.—*AUS.*

2941 ii. ———.]—*Deed not acted upon.*—Proposition, that, when a deed of separation is treated as a nullity or set at nought, & the spouse who repudiates it persists in leaving the other as if deserted, the former is from that time guilty of desertion, doubted.—*HOGGETT v. HOGGETT*, [1926] V. L. R. 505; 48 A. L. T. 62; [1926] *Argus* L. R. 330.—*AUS.*

PART XIII. SECT. 5, SUB-SECT. 8.—C.

2958 i. *Failure to obey restitution decree—What amounts to.*—Compliance with a decree for restitution of conjugal rights is the aggregate effect of a great number of acts & consists in a course of behaviour, & the acts & conduct of the spouse bound to obey must

not be opposed or repugnant to the maintenance of the matrimonial relationship. Sexual intercourse is not necessary to obedience, but its refusal is a matter material to be considered.—*BARTLETT v. BARTLETT* (1934), 50 C. L. R. 3.—*AUS.*

PART XIII. SECT. 5, SUB-SECT. 8.—D. (a).

2944 i. *From time of intention to desert.*—Petition by wife for dissolution of marriage on the ground of the husband's desertion:—*Held*: desertion begins when the intention to desert is complete, & in this case there never was any intention on the part of the husband to desert his wife.—*LITTLE v. LITTLE* (1937), 50 W. A. L. R. 60.—*AUS.*

2975a. —.]—WILLIAMS v. WILLIAMS, [1938] 4 All E. R. 445.

*F. Termination of Desertion.*

(a) *In General* (p. 319).

2977a. *Petitioner's adultery.*—Upon a petition for divorce by a husband upon the ground that his wife had deserted him without cause for a period of at least three years immediately preceding the presentation of the petition, it appeared that the husband had been guilty of adultery during practically the whole of the statutory period. There was no evidence that the wife was aware of the adultery:—*Held*: there was no authority binding on the ct. which established that desertion was necessarily terminated as a matter of law when a spouse committed adultery after he or she had been deserted, regardless of the question whether the deserter knew of the adultery or whether it had any influence on his or her conduct. Under the statutory jurisdiction, adultery by petitioner committed after desertion by the resp. did not necessarily terminate that desertion. It was merely a discretionary bar, & in the circumstances of the present case, a decree *nisi* ought to be granted.—*HEROD v. HEROD*, [1938] 3 All E. R. 722; 159 L. T. 530; 54 T. L. R. 1134; 82 Sol. Jo. 665.

2980. *Add. Annotations*:—*Refd. R. v. Middlesex Justices, Ex p. Bond*, [1933] 1 K. B. 72; *Higgs v. Higgs*, [1935] P. 28.

2981. *Add. Annotation*:—*Refd. Chapman v. Chapman & Thomas*, [1938] P. 93.

2984. *Add. Annotation*:—*Consd. Sandler v. Sandler, Davies & Johnstone*, [1934] P. 149.

2986. *Add. Annotations*:—*Distd. Chapman v. Chapman & Thomas*, [1938] P. 93. *N.F. Johnson v. Johnson*, [1938] 3 All E. R. 765.

2987a. —.]—*MATTHEWS v. MATTHEWS*, [1938] 4 All E. R. 377.

2987b. —.]—*WALTON v. WALTON*, [1938] 4 All E. R. 382.

2987c. —.]—*BUSH v. BUSH*, [1938] 4 All E. R. 598.

2995. *Add. Annotations*:—*As to* (1) *Consd. Hyman v. Hyman, Hughes v. Hughes* (1928), 139 L. T. 416; *Russell (Countess) v. Russell (Earl)*, [1935] P. 39. *Refd. Statham v. Statham*, [1929] P. 131; *Herod v. Herod*, [1938] 3 All E. R. 722.

2999a. —.]—Under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), justices are empowered on the application of a wife to make an order containing a provision that the applicant be no longer bound to cohabit with her husband, & this provision while in force has the effect in all respects of a decree of judicial separation on the ground of cruelty. But where the wife's application is based upon a charge of desertion only, such a clause should not be inserted in the order, inasmuch as it prevents the continuance of desertion in strict law after

the date of the order. In the present case the wife was granted a separation order on the ground of desertion, & the non-cohabitation clause was inserted in the order:—*Held*: the justices were entitled to find as they did, but were wrong in allowing the non-cohabitation clause to be included in the order. In cases of cruelty it might be necessary for the protection of the wife, but that was not so in cases of desertion; & the non-cohabitation clause was struck out.—*SAYERS v. SAYERS* (1929), 93 J. P. 72; 27 L. G. R. 366, D. C.

2999b. —.]—*Matrimonial Causes Act, 1937* (c. 57).—Where a husband petitioned for divorce in 1935 & the wife filed a further or supplemental answer in Jan. 1938, praying for divorce on the ground of desertion for at least three years immediately preceding the filing of the further answer, the wife was granted leave at the hearing to present & serve forthwith a petition containing the same charges as in her further answer:—*Held*: (1) the charges of adultery on either side were not established; (2) the further answer, being supplemental to the answer, was part of the original answer, on the authority of *Sandler v. Sandler*, [1934] P. 149; Digest Supp., & therefore could not be the subject of relief under the Matrimonial Causes Act, 1937 (c. 57); (3) the charge of desertion against the husband since June, 1933, was made out; (4) the desertion continued till the presentation of the wife's cross-petition, & the period of desertion continued to run against the husband despite the presentation of his divorce petition, & nothing which the wife did by the presentation or prosecution of her proceedings altered that position; (5) the wife was accordingly entitled to a decree of divorce under Matrimonial Causes Act, 1937 (c. 57).

*Semble*: a decree of divorce may be pronounced on the ground of desertion, part of which ran before Jan. 1, 1938, the date on which the Matrimonial Causes Act, 1937 (c. 57), came into operation.—*CHAPMAN v. CHAPMAN & THOMAS*, [1938] P. 93; [1938] 1 All E. R. 635; 107 L. J. P. 30; 158 L. T. 424; 54 T. L. R. 462; 82 Sol. Jo. 216.

2999c. —.]—*Petition abandoned.*—The wife deserted her husband in Nov. 1933. On Sept. 18, 1937, the husband presented a petition for judicial separation based upon his wife's desertion for more than two years. After the wife had entered an appearance, the husband withdrew the petition. On Feb. 10, 1938, the husband presented a petition for divorce based upon his wife's desertion for three years immediately preceding the presentation of the petition. It was suggested that, upon the authority of *Stevenson v. Stevenson*, [1911] P. 191; 27 Digest 320, 2986, the second petition would not lie:—*Held*: as the Matrimonial Causes Act, 1937 (c. 57), s. 6, enacted that the petition would

PART XIII. SECT. 5, SUB-SECT. 8.—E.

2975 i. *During imprisonment*—*Manifest intention to desert.*—A husband, who was married in July, 1916, lived with his wife for six weeks, & thereafter did not live with her again for over three years. In Nov. 1919, he met her accidentally & lived with her for a few days, & then he went abroad to take up an appointment. On the voyage out he wrote informing her that the appointment had been cancelled.

Thereafter he never lived with his wife or communicated with her again. From Apr. 1920 till June 1923 he was in prison, & in Oct. 1923 he was again imprisoned. In Oct. 1925, after his release, he wrote to his wife's father stating that he was about to go abroad, & offering to supply material for divorce:—*Held*: pursuer had relevantly averred desertion commencing in Nov. 1919 & including the of defender's incarceration, in

respect that, when liberated from prison, defender had shown no disposition to alter his intention to persist in his desertion.—*PARKER v. PARKER*, [1926] S. C. 574.—SCOT.

PART XIII. SECT. 5, SUB-SECT. 8.—F. (b).

2981 i. *Whether desertion terminated*—*Filing of petition.*—*ADEY v. ADEY*, [1938] S. R. Q. 305.—AUS.



not be barred if the previous petition had been prosecuted to a decree, it was not barred by the abandoned proceedings.—*JOHNSON v. JOHNSON*, [1938] 3 All E. R. 765; 159 L. T. 489; 54 T. L. R. 1120; 82 Sol. Jo. 698.

**3001.** *Add. Annotation*:—*Reid. Lynch v. Lynch* (1933), 78 Sol. Jo. 30.

**3008.** *Add. Annotation*:—*Consd. Herod v. Herod*, [1938] 3 All E. R. 722.

**3010a.** *False assertion of pregnancy.*—On an application by a wife against her husband for an order for maintenance on the ground of desertion, the justices have no discretion to refuse an order on the ground that the wife had deceived the husband into marrying her by an untrue statement that she was pregnant.—*DAWSON v. DAWSON* (1929), 93 J. P. 187; 45 T. L. R. 397; 73 Sol. Jo. 367; 27 L. G. R. 363, D. O.

#### SUB-SECT. 9.—INSANITY.

**3015a.** *Matrimonial Causes Act, 1937 (c. 57), s. 3—Incurable—What amounts to.*—A wife, at the date of the husband's petition, was in her eightieth year, the marriage having taken place in 1878, & since 1887 had been under care & treatment under several reception orders for periods varying from a few days to the last continuing period of upwards of eight years:—*Held*: the wife resp. was incurably of unsound mind of by no means a violent or extreme kind; & on the facts of the case there was no distinction between "incurably" & "irrecovertably" of unsound mind.—*SWETTENHAM v. SWETTENHAM*, [1938] P. 218; [1938] 3 All E. R. 183; 107 L. J. P. 148; 54 T. L. R. 903; 82 Sol. Jo. 525.

#### PART XIII. SECT. 5, SUB-SECT. 8.—G. (c).

**3003 i.** *What is "reasonable cause"—Conduct falling short of matrimonial offence—Not mere frailty of temper & habits.*—Mere infirmity of temper accompanied by the free use of a vulgar & abusive tongue, an occasional resort to physical violence not directed against the person of her husband & futile threats of bodily harm to him, are not sufficient to justify a husband's desertion of his wife.—*CLARKE v. CLARKE* (Alta.), [1928] 1 D. L. R. 249; [1927] 3 W. W. R. 728.—CAN.

**i.** ————*—N. H. brought a petition for divorce against her husband on the ground of desertion. It appeared that subsequently to the commencement of the desertion alleged she had committed adultery. It did not appear that the resp. knew of the adultery before the commencement of the suit. He did not enter an appearance nor appear at the hearing.—Held*: as the adultery was not in any way connected with the continuance by the resp. of his desertion of petitioner it did not afford him any "just cause or excuse" for continuing to desert her.—*HOPKINS v. HOPKINS*, [1936] V. L. R. 218; 42 Argus L. R. 328.—AUS.

**ii.** ————*Petitioner's cruelty.*—Soon after the marriage of the parties in 1923 the husband was guilty of acts of cruelty to the wife, which resulted in permanent injuries to her. Following on this conduct the wife left her husband in Feb. 1923, & although he at once requested her to return to she did not do so. The husband petitioned for divorce on the ground of desertion.—*Held*: the husband must be presumed to have intended the consequence of his acts; by his conduct he had compelled his wife to leave him, & his petition must be

dismissed.—*LAWRENCE v. LAWRENCE* (1929), W. A. L. R. 86.—AUS.

#### PART XIII. SECT. 7, SUB-SECT. 1.

**i.** ————*Knowledge of impotence.*—A woman married a man who was at the date of the marriage, & remained thereafter, impotent in consequence of paralysis. The parties had cohabited, & had occupied the same bed, for two months prior to the marriage, & the woman was aware of the man's condition. Her reason for entering into the marriage was to obtain support for herself & for an illegitimate child, which she had previously had by another man. After the marriage the parties lived together for over four years. In an action of declarator of nullity of marriage brought by the woman.—*Held*: she was barred from founding on defender's impotency, in respect that she entered into the marriage in knowledge of it, & in the circumstances of the case, it would be inequitable to allow her to found upon it.—*L. v. L.*, [1931] S. O. 477.—SCOT.

#### PART XIII. SECT. 7, SUB-SECT. 3.—A. (a).

**3026 i.** *Dissolution suit—Previous suit.*—A former suit for divorce brought by pltf. was dismissed on the ground that by his wilful neglect of his wife he had condoned to her adultery. In a subsequent suit for divorce he proved that his wife & co-resp. had, since the former suit, left the province & were living as man & wife in California.—*Held*: the dismissal of the former suit was not a bar to the subsequent suit.—*KESELERING v. KESELERING* (OTHERWISE NEVERKA & NEVERKA (Sask.)), [1927] 4 D. L. R. 767; [1927] 3 W. W. R. 273.—CAN.

#### PART XIII. SECT. 7, SUB-SECT. 3.—A. (b).

**3027 i.** *Suit for dissolution—Same*

**3015b.** ————*—*—*RANDALL v. RANDALL*, [1938] 4 All E. R. 696.

**3015c.** ————*Documents relating to patient's medical history—Disclosure by Board of Control—Admissibility of copies.*—*Re BOARD OF CONTROL*, [1938] 4 All E. R. 176.

**3015d.** ————*Duties of Official Solicitor as guardian ad litem.*—*TIMINS v. TIMINS*, [1938] 4 All E. R. 180.

**3015e.** ————*Effect of temporary absences from hospital.*—*SHIPMAN v. SHIPMAN*, [1938] 4 All E. R. 732.

**3019a.** *Respondent second husband of petitioner—First husband having disappeared—Whether bar to relief.*—*SPURGEON v. SPURGEON* (1930), 46 T. L. R. 396.

**3024.** *Add. Citations*:—" *affg.*, [1892] P. 222; 61 L. J. P. 115."

**3026a.** ————*Previous proceedings for separation—Dismissal by consent.*—*GOLDBLUM v. GOLDBLUM*, [1938] 4 All E. R. 477, C. A.

**3039.** *Add. Annotations*:—*Folld. L. v. L.*, [1931] P. 63. *Consd. II—v. II—*, [1938] 3 All E. R. 415. *Reid. Russell* (Countess) *v. Russell* (Earl), [1935] P. 39.

**3040.** *Add. Annotation*:—*Consd. H—v. II—*, [1938] 3 All E. R. 415.

**3040a.** *Agreement not to sue for matrimonial offences prior to separation deed—Validity.*—By a separation deed executed by spouses who were then parties to a suit for judicial separation on the ground of the cruelty of the husband, it was agreed that neither of them should sue the other for any misconduct which had theretofore taken place, & the deed further stipulated that any offence that either of them had committed should be

evidence as in former suit.—*For judicial separation.*—A petitioner in the absence of any fresh matrimonial offence, is not entitled to a decree for dissolution of marriage upon precisely the same grounds as those on which she obtained previously judicial separation.—*COLLINS v. COLLINS* (1928), 1 L. R. 56 Calc. 166.—IND.

**3027 ii.** ————*Same evidence as in former proceedings for maintenance.*—A finding on proceedings under Deserted Wives' Maintenance Act, R.S.B.R., 1924, that the wife had not committed adultery estops the husband, on the principle of *res judicata*, from setting up the same alleged act of adultery in a subsequent petition for divorce.—*HARRAP v. HARRAP*, [1935] 1 W. W. R. 729; 2 D. L. R. 816; 49 B. C. R. 496.—CAN.

**3032 ii.** ————*Previous proceedings under Wives' & Children's Maintenance & Protection Act.*—*SCOTT v. SCOTT*, [1937] 1 W. W. R. 375; 1 D. L. R. 796.—CAN.

**sk.** *Counterclaim for judicial separation & alimony—Same evidence as in former suit for same relief.*—In an action by a husband for judicial separation the wife counterclaimed for judicial separation & alimony, setting up, in substance, the same facts as were alleged & adduced in evidence in a former action, in which she, as pltf., claimed the same relief against the present pltf., but which was decided against her. There was no subsequent resumption of marital relations or other change in circumstances.—*Held*: the husband was entitled to have the counterclaim struck out on the ground of *res judicata*, even if Domestic Relations Act, 1927, c. 5, s. 6 (2), which had been passed after the dismissal of the first action, had a retrospective effect.—*DAVIS v. DAVIS*, [1928] 3 D. L. R. 69; [1928] 2 W. W. R. 130; 23 Alta. L. R. 355.—CAN.



**Annotations:—****Expld.** Russell (Countess) v. Russell (Earl), [1935] P. 39. **Refd.** Knott v. Knott, [1935] P. 158; H— v. H—, [1938] 3 All E. R. 415.

**3044. Add. Annotation:—***Consd. Hyman v. Hyman*  
*Hughes v. Hughes* (1928), 139 L. T. 416.

**3051.** *Add. Annotation:—*Reid. Matthews v. Matthews, [1932 P. 103.

1928, a suit for judicial separation in which the wife as petitioner alleged cruelty was compromised upon terms, *inter alia*, that all charges of cruelty were withdrawn & that the cause should be placed in the reserve list until a deed of separation was executed by the parties. The deed was executed on Mar. 20, 1929, & it was thereby provided, *inter alia*, that neither of the parties would take proceedings against the other for judicial separation or restitution of conjugal rights, & that the wife thereby withdraw all the charges of cruelty alleged by her in the petition & particulars. The petition was not dismissed, but remained in the reserve list. On Jan. 1, 1938, the wife filed a petition for divorce charging the same cruelty as that alleged in the former petition. It was contended that the second petition was barred by the deed of separation:—*Held*: (1) the

(2) Where the ct. was not satisfied that an inquiry agent employed by petitioner had not been accessory to or connived at the adultery of resp. the petition was dismissed.—*POULDEN v. POULDEN*, [1938] P. 63; [1938] 1 All E. R. 508; 107 L. J. P. 27; 158 L. T. 231; 102 J. P. 155; 54 T. L. R. 441; 82 Sol. Jo. 197; 30 L. G. R. 349.

**3060b.** —.]—LLOYD v. LLOYD & LEGGERI,  
No. 3087a, *post*.

**3084.** *Add. Annotations* :—As to (1) **Dlstd.** Preger v. Preger (1926), 134 L. T. 670. **Apld.** Lloyd v. Lloyd & Leggeri, [1938] P. 174.

**8067a. Payment to commit adultery.]—MIRANDA v. MIRANDA (1931), 171 L. T. Jo. 309.**

**3069.** *Add. Annotations*:—**Dlstd.** Preger *v.* Preger (1926), 134 L. T. 670; Clayton *v.* Clayton & Sharman, [1932] P. 45. **Consd.** Lloyd *v.* Lloyd & Leggeri, [1938] P. 174.

8069a. — [ ]—A decree of a foreign ct. in a country where the parties were not domiciled, purporting to annul an English marriage at the instance of the wife on the sole ground of want of cohabitation, was consented to by the husband, & the wife subsequently went through a form of marriage with another man with whom she cohabited. The husband filed in this ct. a petition claiming dissolution of his marriage on the ground of the adultery constituted by co-

so. *Suit for dissolution by wife—*  
*Acts of cruelty prior to separation.*—  
In a suit for dissolution of marriage  
by the wife against the husband, after  
the execution of a deed of separation  
by them containing (*inter alia*) a clause

the other is hereby condoned," the wife cannot rely upon the husband's acts of cruelty alleged prior to the said deed of separation, though coupled with allegations of adultery committed by him subsequently to the deed. — *MONK v. MONK* (1932), 1 L. R. 60 Cal. 318. — *IND.*

habitation under the form of marriage last mentioned. It appeared that both the husband & the wife honestly believed at the time of the proceedings in the foreign ct. that those proceedings were competent & that their marriage was effectually dissolved:—*Held*: there was no guilty intention amounting to connivance on the part of the husband at the subsequent adultery of the wife, & further, although the facts might technically raise the discretionary bar of conduct conducing on his part, the latter offence was in the circumstances present of a degree which justified the exercise of the discretion of the ct. in his favour.—CLAYTON v. CLAYTON & SHARMAN, [1932] P. 45; 101 L. J. P. 23; 146 L. T. 327; 48 T. L. R. 191; 76 Sol. Jo. 96.

*Annotation*:—Consd. Lloyd v. Lloyd & Leggeri, [1938] P. 174.

**3077a.** ——— *Petitioner in fear of co-respondent.*—In an undefended divorce petition by a husband it was admitted that he had spent many week-ends at his home under the same roof with his wife & co-resp. when the two latter were, to his knowledge, committing adultery; & that before the husband filed his petition citing his wife's paramour as co-resp., he entered into a deed of separation which in terms permitted his wife to "reside at such places, & with such persons as she may from time to time think fit." The case was remitted from assizes to the Divorce Ct. on the question of connivance:—*Held*: there was a strong case for the husband being an accessory to his wife's adultery, but, though almost terrified to be under the same roof as co-resp., he resented & resisted as far as he dared the continuance of the adulterous relations. He did not encourage it. They defied him. He was not an accessory, & did not enter into the deed with the idea of consenting to his wife's living in adultery with co-resp. Decree nisi granted & papers sent to the King's Proctor.—KING v. KING & EVANS (1929), 142 L. T. 162; 73 Sol. Jo. 833.

**3082.** *Add. Annotations*:—As to (1) Consd. Clayton v. Clayton & Sharman, [1932] P. 45. As to (1) & (3) Consd. Lloyd v. Lloyd & Leggeri, [1938] P. 174.

**3087.** *Add. Annotation*:—As to (1) Consd. Lloyd v. Lloyd & Leggeri, [1938] P. 174.

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
**B. (a).**

*sq. Suspicion of adultery—Watching wife—To obtain evidence.*—The fact that a husband who suspected that his wife had been guilty of adultery secretly watched, & had others so watch, her without interfering, for the purpose of obtaining proof of her guilt:—*Held*: not to establish connivance.—W. v. W. & M., [1933] 3 W. W. R. 588.—CAN.

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
**B. (b) iii.**

**3078 i.** *General rule.*—A husband who has allowed his wife to carry on a dangerous intimacy & has shown a reckless disregard of her chastity, may be refused a divorce notwithstanding her adultery.—STEEL v. STEEL, [1932] 1 D. L. R. 76; O. R. 50.—CAN.

**3081 i.** *Invitation to commit adultery.*—McEWEN v. McEWEN (Man.), [1926] 3 D. L. R. 430.—CAN.

**3085 i.** *Consent to residence in paramour's house.*—Where a husband who has no reason to believe that his wife

& co-resp. have already committed adultery acquiesces in & is accessory to his wife's leaving him & going to live with co-resp., he will be held to have connived at his wife's ultimate misconduct & therefore, to be without the right to a divorce.—LACERF v. LACERF & EVANS (Saak.), [1929] 4 D. L. R. 134; 2 W. W. R. 524; *affg.*, [1929] 2 D. L. R. 136; 1 W. W. R. 569.—CAN.

**3085 ii.** ———.—On appeal from the refusal of a decree nisi in an undefended divorce action on the ground that pltf. had been guilty of connivance:—*Held*: the case was distinguishable from *Lacerf v. Lacerf & Evans*, [1929] 2 W. W. R. 524, which in the opinion of the trial judge prevented him from granting relief, & the appeal should be allowed & the decree nisi granted. The evidence was open to the construction that pltf. exasperated by his wife's actions & realising that he had lost her affections & could not live with her in peace had decided to leave her. It was not a case of the wife meeting a stranger. She deliberately chose as her companion a man whom she had

**3087a.**

known for ten years prior to her marriage to pltf. While pltf. may have too easily surrendered it cannot be held that he willingly let her go with co-resp., or if he consented it was an unwilling consent.—SKONDRAS v. SKONDRAS & FRIPP, [1938] 2 W. W. R. 221.—CAN.

—.]—(1) In a husband's contested divorce suit on the ground of his wife's adultery it was established to the ct.'s satisfaction that the wife committed adultery with two men to the husband's knowledge; that petitioner condoned it; that in Sept. 1935, petitioner became aware of his wife's adulterous association with a third man, co-resp., & that his wife refused his repeated requests to give up co-resp., but husband & wife had intercourse on several occasions thereafter until in June, 1936, he decided to take divorce proceedings, having made up his mind that his wife preferred co-resp. to himself:—*Held*: a man might not stand by & tolerate his wife's adultery, meeting her, conversing with her, & having intercourse with her, & then, because in the end he conceived that when her affections had passed from him he was entitled to a divorce, seek a remedy at the hands of the ct. Petitioner's conduct fell with LORD WESTBURY's definition of connivance in *Gipps v. Gipps & Hume* (1864), 11 H. L. C. 1; 27 Digest 327, 3064.

(2) Whereas before Matrimonial Causes Act, 1937 (c. 57), became law, the burden of proof of connivance alleged by a resp. lay upon that resp., now, where the circumstances of the case suggest connivance, the burden is upon petitioner to satisfy the ct. that connivance did not exist.—LLOYD v. LLOYD & LEGGERI, [1938] P. 174; [1938] 2 All E. R. 480; 107 L. J. P. 90; 159 L. T. 258; 102 J. P. 353; 54 T. L. R. 735; 82 Sol. Jo. 397; 36 L. G. R. 471.

**3092a.**

*Agreement between husband & co-respondent as to damages.*—Petitioner filed a petition for divorce on the ground of his wife's adultery with co-resp., & it was disclosed to the ct. that petitioner & co-resp. had agreed that co-resp. should pay petitioner £2,500 damages, of which £1,750 was to be paid down, & the rest later, & that petitioner should claim no further damages from co-resp. & should put no obstacles in the way of a decree nisi being made absolute. The petition was dismissed on the ground that the suit was collusive. After the dismissal resp. & co-resp. continued to live in adultery, & petitioner, who had received the £1,750, presented a second petition against them, complaining of the adultery since the date of

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
**B. (b) iv.**

**3089 i.** *Connivance at acts during separation—Construction of separation deed.*—Although a separation deed intended to provide for the wife's adulterous intercourse or for a renewal thereof establishes connivance in the husband's action for divorce, yet where such a deed purports to provide it is open to the ct. to investigate the circumstances under which the separation was entered into & to entertain the broad question whether, taking the deed itself & all of said circumstances into consideration, the husband did in fact consent that the wife should live in adultery.—CULVER v. CULVER & GAMMIE, [1933] 1 W. W. R. 395; 2 D. L. R. 535.—CAN.

the former petition:—*Held*: petitioner had by the agreement prevented himself from complaining of any adultery whether past or future, & he had connived at the adultery of which in his second petition he complained, & the second petition must be dismissed.—*GIFFORD v. GIFFORD & FREEMAN* (1926), 43 T. L. R. 141.

**3093. Add. Annotations:—***Distd.* *Preger v. Preger* (1926), 134 L. T. 670. *Refd.* *Greenwood v. Greenwood*, [1937] P. 157.

**3094. Add. Annotation:—***Distd.* *Preger v. Preger* (1930), 134 L. T. 670.

**3095a. ———.**—[A wife, desirous that her husband should return to her, continued for thirteen years to receive an allowance from him knowing at all material times that he was living with another woman. She then filed a petition for divorce, but was induced to compromise it for an increase in the allowance, fearing that her husband might lose his employment as a result of exposure. After a further lapse of time she accepted a deed of separation with a mutual condonation of past offences & the payment of a lump sum of cash in lieu of maintenance. Having exhausted this provision, she now filed the present petition for divorce:—*Held*: petitioner was from the date of the compromise of the first petition for divorce guilty of unreasonable delay & also of connivance & the petition must be dismissed.—*GREENWOOD v. GREENWOOD*, [1937] P. 157; [1937] 3 All E. R. 63; 106 L. J. P. 74; 157 L. T. 168; 53 T. L. R. 716; 81 Sol. Jo. 480.

*Annotation:—**Consd.* *Lloyd v. Lloyd & Leggeri*, [1938] P. 174.

**3097a. ———.** *Matrimonial Causes Act, 1937* (c. 57), s. 4.—*POULDEN v. POULDEN*, No. 3060a, ante.

**3099. Add. Annotation:—***Consd.* *Poulden v. Poulden & Alexander*, [1938] P. 63.

**3122. Add. Citation:—**134 L. T. 670.

**3124a. ———.**—[*TOWNEND v. TOWNEND* (1928), 72 Sol. Jo. 518.

**3125. Add. Annotation:—***Consd.* *Beattie v. Beattie*, [1938] P. 99.

PART XIII. SECT. 7, SUB-SECT. 3.—  
C. (b) 1.

**3135 ii. ———.**—[“Collusion” is a species of statutory fraud on the ct., & like “fraud,” is incapable of exhaustive definition, & will ever be widened to prevent the mischief which the statute was intended to prevent. Collusion is possible in a good case, i.e. although the ct. is convinced that matrimonial misconduct was proved, yet if evidence of collusion, too gross & palpable to admit of being overlooked or explained, appeared, no decree should be made.

In the present case the ct., having concluded that there was an arrangement between the parties to obtain a divorce & as to the testimony which should be offered to support the claim therefore, & that the testimony given by the resp. was in accordance with this arrangement, & largely untrue, refused the decree, holding that, aside from the admission as to the arrangement, the appearances of collusion were too gross & palpable to admit of being overlooked or explained, & that the arrangement itself was clearly collusive.—*SANBORN v. SANBORN*, [1928] 1 D. L. R. 881; [1928] 1 W. W. R. 78; 22 Sask. L. R. 168.—CAN.

**3135 iii. ———.**—[Collusion is established (a) if there be an agreement or

understanding or concerted action between the parties which has the effect of deceiving the ct. either by causing untrue facts to be placed before the ct. or by suppressing facts which are material or pertinent; & (b) if there be an agreement or understanding or concerted action between the parties which, from the nature of such agreement or understanding or action may be calculated to have that effect; but where the facts to be placed before the ct. are such as to support a prayer for either of two forms of relief, it is not collusion for a petitioner, for valuable consideration, to agree with a resp. to change merely the form of relief prayed for in the petition.—*DOUTREBANDE v. DOUTREBANDE* (1929), 39 S. R. N. S. W. 456; 46 N. S. W. W. N. 160.—AUS.

**3135 iv. ———.**—[To establish collusion in an action for divorce it is necessary to show some understanding or agreement which involves some imposition on the ct. An agreement between the parties which does not involve such an imposition or a suppression of facts, but merely facilitates proof & smooths the asperities of litigation is not collusion, although it is liable to be looked into by the ct. Nor does the fact that an agreement involves monetary consideration necessarily render it collusive.—*BEALE v.*

**3132a. Original petition collusive—Effect on supplemental petition.]—***SANDLER v. SANDLER*, No. 3670a, post.

**3133. Add. Annotations:—***As to* (3) *Consd.* *Lloyd v. Lloyd & Leggeri*, [1938] P. 174; *Woods v. Woods*, [1937] 4 All E. R. 9. *Refd.* *Sandler v. Sandler, Davies & Johnstone* (1934), 103 L. J. P. 88.

**3135a. ———.**—[A husband & wife separated in the summer of 1935, there being no suggestion of adultery up to that time. Before parting, discussions had taken place as to a divorce based upon evidence to be provided by the husband, the wife even suggesting that, for the sake of the husband's career, he should divorce her, but this the husband refused to consider. There was some suggestion that a separation was all that was required, but subsequently the husband wrote to the wife to the effect that a divorce after a lapse of six months or a year would be better. Later the husband sent an hotel bill upon which the wife based a petition for divorce. The judge found that the wife at no time wanted a divorce & that she never really assented to the husband's proposal that, whatever the reality of the matter might be, she should present a petition on evidence which he would provide. The petition was later amended to include an additional charge of adultery with another woman:—*Held*: (1) if the petition as originally presented was tainted with collusion, no kind of amendment by adding a different charge would cure the defect; (2) the mere fact that the adultery charged is with a woman known or unknown on an isolated occasion at a hotel is not of itself evidence of collusion; (3) the reality of the case was that the wife decided to act upon the evidence of the hotel bill, not in pursuance of any existing understanding, but because for the first time she had made up her mind that it was the proper thing to do in the circumstances. The petition was accordingly not presented as a result of collusion, & a decree *nisi* ought to be pronounced.—*WYATT v. WYATT*, [1937] 3 All E. R. 885.

*BEALE & LINDON*, [1929] 3 D. L. R. 1; 2 W. W. R. 1; 23 S. L. R. 548.—CAN.

**3135 v. ———.**—[An agreement between a husband & wife which does not involve an imposition on the ct. or a suppression of facts but which is merely for the purpose of facilitating proof in an action by one of them for divorce does not constitute collusion, but it is liable to be scrutinised carefully.—*CURELL v. CURELL & HANSEN*, [1937] 2 W. W. R. 128.—CAN.

**3135 vi. ———.**—[“Collusion” implies an agreement for the dishonest submission of real or fictitious facts to a ct. of justice, or the dishonest suppression of true facts from that ct. for the purpose of obtaining a divorce.—*BARLOW v. BARLOW & KLEMMICH & ANGUS*, [1937] S. A. S. R. 246.—AUS.

*al. Acts regarded as unobjectionable by solicitor.]—*Collusion cannot be imputed from ordinary acts of parties which a solr. would naturally regard as inoffensive & unobjectionable.—*LINTON v. GUDERIAN* (1928), 1 L. L. R. 56 Calo. 530.—IND.

*sq. Husband permitting cohabitation with another man.—*For five years.]—A husband who permits his wife to leave him & live for five years with another man is guilty of collusion.—*CYBULIAK v. CYBULIAK*, [1937] 4 D. L. R. 79.—CAN.

**3185b. — Coercion.]—Resp., a solr., was anxious to obtain a divorce from his wife. In 1934 the wife had, with the approval of the husband, agreed to purchase a house, & found herself in the greatest straits to find £115 19s. 3d. required to complete the purchase. On Nov. 30, 1934, resp. wrote to his wife informing her of adultery at an hotel & suggesting action being taken thereon. On Jan. 28, 1935, the wife, who did not desire a divorce, instructed her solrs. to file a petition. On Feb. 4, resp. gave his solrs. a sealed envelope for transmission to his wife. Although there was nothing to prevent such solrs. sending the envelope direct to the wife, it was in fact sent to the wife's solrs. with a request that they would hand it to her on her next attending at their office. On Feb. 6 the wife attended at her solrs.' office, signed the petition for divorce, & received the sealed envelope, which was found to contain a cheque signed by resp. for £116. On Jan. 8 the wife's solrs. had written that upon all arrears due to her being paid to her account, the necessary steps "in the other matter" would be taken, & the clerk of those solrs. admitted that he deliberately withheld the envelope until the petition had been signed. The wife, petitioner, attempted throughout the proceedings to conceal from the ct. the motives for her actions:—*Held*: (1) it could not be held upon the facts that the collusive bargain was obtained by duress, so that, there being in law no bargain at all, there was no collusion; (2) the facts disclosed that, as petitioner did not desire a divorce, there was no real injury to her, & amounted to collusion & an abuse of the process of the ct.—*WOODS v. WOODS*, [1937] 4 All E. R. 9; 81 Sol. Jo. 815.**

**3139. Add. Annotation:—Consd. Beattie v. Beattie**, [1938] P. 99.

**3140a. Acceptance of sum for costs—Independent decision to bring proceedings.]—A wife, after failing to comply with repeated requests from her husband that she should divorce him on his finding the costs in advance, took steps to ascertain the approximate cost of instituting such a suit, but did not decide to petition until a change in her employment made it appear to her a desirable course. She then accepted from her husband £15 towards the costs, & presented her petition, which was not defended:—*Held*: such a transaction required most careful scrutiny as to collusion. Though there had been full disclosure, if it was a collusive arrangement, no disclosure**

altered it. On the other hand, if the matter were susceptible of a sinister or an innocent interpretation, a full & candid disclosure might enable the ct. to adopt a more charitable view. The acceptance of the money was most unwise & dangerous, but the wife never in fact made any arrangement that in consideration of the money she would bring proceedings, & therefore the petition was not presented in collusion.—*BEATTIE v. BEATTIE*, [1938] P. 99; [1938] 2 All E. R. 74; 107 L. J. P. 45; 159 L. T. 69; 54 T. L. R. 565; 82 Sol. Jo. 297.

**3143. Add. Annotations:—Consd. Beattie v. Beattie**, [1938] P. 99. *Refd.* *Hyman v. Hyman*, *Hughes v. Hughes* (1928), 139 L. T. 416; *Sandler v. Sandler*, *Davies & Johnstone* (1934), 103 L. J. P. 88.

**3155. Add. Annotations:—Refd. Sandler v. Sandler**, *Davies & Johnstone* (1934), 103 L. J. P. 88; *Beattie v. Beattie*, [1938] P. 99.

**3158. Add. Annotation:—Generally, Refd. Herod v. Herod**, [1938] 3 All E. R. 722.

**3163a. — Application of rules to condonation of sodomy.]—STATHAM v. STATHAM**, No. 2518a, *ante*.

**3166. Add. Annotations:—As to (1) Consd. Germany v. Germany**, [1938] 3 All E. R. 64. *Refd.* *Sneyd v. Sneyd & Burgess*, [1926] P. 27. *As to (3) Refd. Mason v. Mason & Cottrell*, [1933] P. 199.

**3171. Add. Annotation:—As to (1) Refd. Statham v. Statham**, [1929] P. 131.

**3175. Add. Annotations:—Refd. Chapman v. Chapman & Thomas**, [1938] P. 93; *Herod v. Herod*, [1938] 3 All E. R. 722.

**3178. Add. Annotation:—Refd. Germany v. Germany**, [1938] 3 All E. R. 64.

**3179a. —.]—(1) Condonation has been defined as "the complete forgiveness & blotting out of a conjugal offence followed by cohabitation, the whole being done with knowledge of all the circumstances of the particular offence forgiven."**

(2) Petitioner alleged, but in the opinion of the ct. failed to prove, that he was induced to resume cohabitation by his belief, brought about by the fraudulent representation of his wife, that she was innocent:—*Semble*: such a belief would not be material if proved.—*SNEYD v. SNEYD & BURGESS*, [1926] P. 27; 95 L. J. P. 22; 135 L. T. 124; 42 T. L. R. 247.

**3182a. —.]—SNEYD v. SNEYD & BURGESS**, No. 3179a, *ante*.

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
C. (b) ii.

**3138 iii. —.]—The fact that a husband's suit for divorce has been brought at the request of a man, with whom deft. has been living for a number of years, & who has promised pltf. to pay all the costs in order that deft. may be made free to marry him, does not constitute collusion.—*CHRISTMANSON v. CHRISTMANSON***

**3138 iv. —.]—It is not collusion for a man living with another woman, & having a child by her, to arrange with a solr. to ask his wife to sue him for divorce, which he will not defend.—*WILHELM v. WILHELM*, [1935] 2 D. L. R. 222; O. R. 93.—CAN.**

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
C. (b) v.

**3159 i. Respondent assisting in identification.]—The fact that deft. to a divorce action admitted to pltf.'s solr. before the trial that she had been guilty of adultery with co-resp., & supplied the solr. with her photograph to be used for the purpose of identification, is not proof of collusion, where there is no evidence that pltf. ever had any arrangement with deft. that she should provide him with grounds for divorce.—*PARRY v. PARRY*, [1926] 3 D. L. R. 95; [1926] 2 W. W. R. 185; 20 Sask. L. R. 474.—CAN.**

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
D. (a).

*sm. Is defence to suit for divorce on ground of bestiality.]—A. v. A.*, [1925]

2 D. L. R. 1195; [1925] 2 W. W. R. 154; 19 Sask. L. R. 346.—CAN.

*st. Proof of renewal of intercourse unnecessary.]—DEANE v. DEANE & FAY*, [1929] S. R. (Q.) 124.—AUS.

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
D. (b) i.

**3169 iii. —.]—PREMCHAND HIRA v. BAI GALAL** (1927), 1 L. R. 51 Bom. 1026.—IND.

**3169 iv. —.]—*Held*: condonation of adultery may be made subject to the express condition that the guilty spouse shall not see or correspond with the other guilty person, so that when the condition is broken the condonation is cancelled & the right to found an action on the adultery revived.—*BAUER v. BAUER & HASS*, [1930] 2 W. W. R. 16; 4 D. L. R. 36; 24 S. L. R. 409.—CAN.**

**3183a. Agreement for temporary separation after confession of adultery—Parties continuing to live apart for several years.**—After a wife's confession of adultery she & her husband agreed to live apart for six months, she to receive an allowance, & it was agreed that at the end of that time their mutual position was to be reconsidered. After the six months they continued to live apart, & ten years after the admitted adultery the husband sued for divorce on that ground:—*Held*: the agreement was made by a man who was distraught by the domestic calamity. There was no condonation in the legal sense of complete reinstatement of the wife in the rights of a wife. The delay was excusable by the effect which the wrongdoing had upon the petitioner's mind.—*LETBE v. LETBE & WHITEHEAD* (1928), 140 L. T. 199; 45 T. L. R. 6; 72 Sol. Jo. 745.

**3191a.** —.]—(1) Where in a divorce suit resp. alleges condonation, the burden of disproof is shifted to petitioner by virtue of Matrimonial Causes Act, 1937 (c. 57), s. 4.

(2) Condonation implies not only forgiveness but restoration; but the test of restoration is not now the former simple test: did the parties go back under the same roof? The ct. must consider the varying circumstances & varying conditions of different parties. A wife, after presenting a petition for divorce on the ground of the husband's adultery, forgave him, on his giving up the woman, & resumed marital relations, though she did not stay with him at the house where he was living. Later she proceeded with her petition. The husband pleaded condonation:—*Held*: the wife had condoned his adultery.—*GERMANY v. GERMANY*, [1938] P. 202; [1938] 3 All E. R. 64; 107 L. J. P. 124; 159 L. T. 487; 54 T. L. R. 799; 82 Sol. Jo. 456.

**3196. Add. Annotation:—***Refd. M. v. M.*, [1928] P. 123.

**3213. Add. Annotation:—***As to* (1) *Refd. Sneyd v. Sneyd & Burgess*, [1926] P. 27.

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
D (b) ii.

**3195 i. Parties sleeping in same house.**—Where a wife had deserted her husband & the spouses afterwards lived for a few days in the same flat occupying the same room, but no marital intercourse took place, & the husband endeavoured to induce the wife to discontinue her desertion. *Semble*: these facts did not establish condonation.—*RUSSELL v. RUSSELL*, [1935] S. A. S. R. 85.—*AUS.*

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
D. (c).

**3204 iii.** —.]—In 1919 petitioner entertained some suspicion of his wife's adultery, & this suspicion, although partially allayed by what a medical practitioner had told him, was not entirely removed from his mind. Having this suspicion, he continued & resumed sexual intercourse with his wife for some years, until he obtained evidence of the adultery charged in the petition, which adultery had taken place in 1918:—*Held*: sexual intercourse in these circumstances did not amount to condonation.—*DONNITHORNE v. DONNITHORNE*, [1930] S. A. S. R. 182.—*AUS.*

**3204 iv.** —.]—In questions of condonation suspicion of a conjugal offence cannot be regarded as "substantial knowledge."—*HERBERT v. HERBERT*, [1936] 3 D. L. R. 141; O. R. 432.—*CAN.*

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
D. (g).

**sh. Duty of wife's advisers to investigate the facts before pleading condonation.**—*LOUIS v. LOUIS & STEAD*, [1929] S. R. (Q.) 184.—*AUS.*

**sk. Agreement for revocation of condonation.**—A husband & wife cannot by agreement between themselves make the condonation of a matrimonial offence revocable on the non-performance of an undertaking (*e.g.*, one not to have anything more to do with the paramour) the breach of which is not in law a sufficient reason for a decree of divorce.—*BAGGALEY v. BAGGALEY*, [1934] 1 W. W. R. 5.—*CAN.*

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
D. (h) iii.

**3255 iii.** —.]—Any matrimonial offence which in itself is ground for divorce but which has been condoned may be revived by the subsequent commission of any other legally recognised matrimonial offence, *e.g.*, cruelty.—*A. v. A.*, [1925] 2 D. L. R. 1195; [1925] 2 W. W. R. 154; 19 Sask. L. R. 346.—*CAN.*

**PART XIII. SECT. 7, SUB-SECT. 3.—**  
D. (h) iv.

**3274 i. By desertion—For two years without reasonable excuse.**—Condoned adultery revived.—*SPRING v. SPRING* (Alta.), [1926] 2 D. L. R. 893; [1926] 2 W. W. R. 78.—*CAN.*

**3220. Add. Annotation:—***Refd. Lloyd v. Lloyd & Leggeri*, [1938] P. 174.

**3223. Add. Citations:—**[1926] P. 27; 95 L. J. P. 22; 135 L. T. 124; 42 T. L. R. 247.

**3224a.** —.]—*HOWARD v. BURTONWOOD* (1742), Selwyn's N. P. 13th edn., p. 9, n.

*Annotation:—**Consd. Bernstein v. Bernstein*, [1893] P. 292.

**3234. Add. Annotation:—***Consd. Statham v. Statham*, [1929] P. 131.

**3235a. Onus of proof.**—*GERMANY v. GERMANY*, No. 3191a, *ante*.

**3288. Add. Annotations:—***As to* (1) *Expld. Apted v. Aptd & Bliss*, [1930] P. 246. *Refd. Cullen v. Cullen*, [1933] P. 218.

**3289. Add. Annotation:—***Consd. Apted v. Apted & Bliss*, [1930] P. 246.

**3292. Add. Annotation:—***Consd. Apted v. Apted & Bliss*, [1930] P. 246.

**3293. Add. Annotations:—***Refd. Apted v. Apted & Bliss*, [1900] P. 246; *Bainbridge v. Bainbridge*, [1934] P. 66.

**3296. Add. Annotation:—***Consd. Apted v. Apted & Bliss*, [1930] P. 246.

**3315a. How time calculated—Whether from execution of separation deed.**—*GREENWOOD v. GREENWOOD*, No. 3095a, *ante*.

**3317a.** — — —.]—A husband petitioner for divorce separated from his wife about eighteen years after their marriage because of her assoc. with co-resp., with whom she cohabited in adultery for about twenty years. The husband was willing to take proceedings for a divorce, but resp. & co-resp. desired their relations not to be made public & the husband was indifferent & no step was taken. Thereafter the husband maintained an adulterous connection with another woman for many years. He had since separated from this woman, but having about thirty-eight years after his marriage met another woman whom he desired to marry he now presented the present petition for the dissolution of his existing marriage. The ct., construing delay

i. For 'i. By desertion' read '3274 ii. -

m i. —.]—*L. v. L.* (Man.), [1930] 1 D. L. R. 72; 38 Man. L. R. 333; [1929] 3 W. W. R. 396; *revers.*, [1929] 4 D. L. R. 801.—*CAN.*

m ii. —.]—Subsequent desertion will revive adultery which has been condoned.—*LALEUNE v. LALEUNE*, [1930] 1 D. L. R. 72; 38 Man. L. R. 333; [1929] 3 W. W. R. 396; *revers.*, [1929] 4 D. L. R. 801.—*CAN.*

**PART XIII. SECT. 7, SUB-SECT. 4.—**  
B. (a).

**3312 ii.** —.]—Unreasonable & unexplained delay between a petitioner's knowledge of the adultery committed by resp. & the filing of his petition for dissolution of the marriage may induce the ct. to dismiss the petition, as indicating acquiescence in the injury complained of.—*KING v. KING* (1929), 1 L. R. 57 Calc. 215.—*IND.*

**PART XIII. SECT. 7, SUB-SECT. 4.—**  
B. (b).

**sk. What delay unreasonable—Twenty-four years.**—In an undefended action of divorce on the ground of desertion brought by a wife against her husband twenty-four years after the alleged desertion:—*Held*: the fact that the pursuer had delayed to bring her action was not *per se* sufficient to deprive her of her remedy.—*MONAHAN v. MONAHAN*, [1930] S. C. 221.—*SCOT.*

within the meaning of the statute to be culpable delay in the nature of acquiescence, held the facts of the case to amount to culpable delay, & dismissed the petition.—*BINNEY v. BINNEY & HILL*, [1936] P. 178; [1936] 2 All E. R. 409; 105 L. J. P. 81; 155 L. T. 144; 52 T. L. R. 481; 80 Sol. Jo. 449.

*Annotation*.—*Refd.* *Greenwood v. Greenwood*, [1937] P. 157.

**3339. Add. Annotations**.—*As to* (2) *Consd. T. v. T.* (1931), 47 T. L. R. 629. *Refd.* *Inverclyde v. Inverclyde*, [1931] P. 29; *Dodworth v. Dale*, [1936] 2 All E. R. 440. Generally, *Refd.* *Newbould v. A.-G.*, [1931] P. 75.

**3345. Add. Annotation**.—*Consd. T. v. T.* (1931), 47 T. L. R. 629.

**3358a. — Fourteen years.**—On a husband's petition for nullity of marriage on the ground of his wife's incapacity through alleged invincible repugnance, it was held that as the petition was not presented until over 14 years after the marriage a very special burden of proof rested on the petitioner. After hearing the evidence of the parties & their witnesses & expert medical witnesses, the ct. dismissed the petition.—*T. v. T.* (OTHERWISE J.) (1931), 146 L. T. 18; 47 T. L. R. 629.

**3360a. —**—*T. v. T.* (OTHERWISE J.), No. 3358a, *ante*.

**3369a. —**—Want of means is a sufficient excuse for delay.—*WILSON v. WILSON* (1872), L. R. 2 P. & D. 435; 41 L. J. P. & M. 74; 27 L. T. 351; 20 W. R. 891.

**3397. Add. Annotations**.—*Consd. Apted v. Apted & Bliss*, [1930] P. 246. *Refd.* *Cullen v. Cullen*, [1933] P. 218.

**3429a. —**—Petitioner married resp. in 1873, & they lived together very happily till the birth of the only child, early in 1874, shortly after which event resp.'s mind became temporarily unhinged, & she was removed to an asylum, from which, towards the end of the same year, she was discharged as cured. Petitioner was, however, advised by his

wife's medical attendant that further cohabitation, if it resulted in pregnancy, would probably prove dangerous to resp. & any future offspring. By the consent of the families of both parties, it was arranged that they should live apart, the wife having the child with her, & the husband making her an allowance. Petitioner corresponded with his wife until 1880, when he refused all further direct communication, but continued the allowance through his solr.; & throughout the separation he declined all private interviews with his wife, although urgently & repeatedly requested & begged for by her. In 1879 he wrote that she was not to inquire into his mode of life, & he would not interfere with hers.—*Held*: he was not disentitled to a divorce, on the ground of his wife's subsequent adultery.—*LANDER v. LANDER, TEMPLE, FOX & FOX* (1890), 63 L. T. 257.

**3433. Add. Annotation**.—*Refd.* *Welton v. Welton*, [1927] P. 162.

**3436a. —**—*Plows v. Plows* (1928), 44 T. L. R. 263.

**3445a. Statement in sealed envelope—Wife not entitled to disclosure.**—Where a petitioner for a divorce by his or her petition admits that he or she has been guilty of adultery & asks for the exercise of the discretion of the ct. in his or her favour, the ct. has, in the exercise of its power under the proviso to Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), s. 178, a discretion to direct that the particulars of the adultery should be disclosed to the ct. by a statement signed by petitioner to be enclosed in a sealed envelope & lodged in ct., to be opened by the registrar for the purpose of his certificate & revealed by him, but not to be disclosed to the other parties to the suit.—*CULLEN v. CULLEN*, [1933] P. 218; 102 L. J. P. 81; 149 L. T. 323; 49 T. L. R. 469; 77 Sol. Jo. 447, C. A.

*Annotation*.—*Refd.* *Russell (Countess) v. Russell (Earl)*, [1935] P. 39.

**3445b. Duty of solicitor to inquire as to adultery by petitioner.**—*MOYSE v. MOYSE & CRICK* (1929), 73 Sol. Jo. 192.

#### PART XIII. SECT. 7, SUB-SECT. 4.— B. (c).

**so. When a bar—Proceedings brought to obtain alimony from pension.**—An action for judicial separation after a lapse of 6 years, & mainly brought for the purpose of obtaining alimony from a Government pension, held barred by laches.—*PHILLIPS v. PHILLIPS*, [1936] 2 D. L. R. 543.—CAN.

#### PART XIII. SECT. 7, SUB-SECT. 4.— B. (d) i.

**3338 i. General rule.**—*LACHANCE v. ROCHON* (Que.), [1927] 1 D. L. R. 1190.—CAN.

**3338 ii. —**—A marriage, one of the parties to which is incapable of properly consummating it, may, nevertheless, be so approbated by the acts & conduct of the other as to preclude the latter from impeaching its validity. Lapse of time, though not in itself under ordinary circumstances an absolute bar to a suit for nullity, is yet an important factor for consideration, & may operate with other circumstances as a bar to such a suit. Where a husband petitioned, over eight years after the marriage, for nullity of his marriage because of his wife's malformation & impotence.—*Held*: the husband, on the facts & circumstances established, should have known

years before the suit, & would have so known had he acted as any ordinarily reasonable & prudent man would have acted in the circumstances, that his wife's condition was one which could not be rectified by surgical skill, & his explanation at the trial for his inaction was one which should not be accepted as valid & sufficient in the circumstances disclosed.—*B. v. B.*, [1935] S. C. R. 231; 1 D. L. R. 695.—CAN.

#### PART XIII. SECT. 7, SUB-SECT. 4.— B. (f) iii.

**sk. Parties living apart.**—Delay for a number of years after discovery of adultery, the parties meanwhile living apart, will not bar a right to divorce on the ground of laches.—*GRAINGER v. GRAINGER, WARD v. WARD*, [1937] 2 D. L. R. 425; 6 F. L. J. (Can.) 278.—CAN.

#### PART XIII. SECT. 7, SUB-SECT. 4.— C. (a) i.

**3397 iii. —**—*McNALLY v. McNally*, [1927] 2 D. L. R. 604; 60 N. S. R. 268.—CAN.

#### PART XIII. SECT. 7, SUB-SECT. 4.— C. (a) iii.

**sn. Letter instigating adultery.**—*GALLACHER v. GALLACHER*, [1928] S. C. (Ct. of Sess.) 586.—SCOT.

#### PART XIII. SECT. 7, SUB-SECT. 4.— D. (a) i.

**3445 i. Disclosure of petitioner's adultery—Duty to disclose.**—It is the duty of a petitioner who has been guilty of a matrimonial offence to admit the fact in his petition, for the information both of the ct. & of the A.-G., & specifically to ask for the discretion of the ct.—*DEANE v. DEANE & FAY*, [1929] S. R. (Q.) 124.—AUS.

**3445 ii. —**—In a divorce action in Alberta a pltf. guilty of adultery is not under a duty to disclose that fact either in his or her statement of claim or on the trial. If such adultery is established by deft. or by any stranger or by the intervention of the King's Proctor it then, & not till then, becomes the duty of the trial judge to exercise his discretion under the proviso to sect. 31 of Divorce & Matrimonial Causes Act, 1857 (Imp.), & in doing so care should be taken to see that pltf. suffers no prejudice because of his or her non-disclosure. Pltf., however, is entitled, if he or she considers it expedient in his or her own interest to do so, to make the disclosure either in the statement of claim or in evidence at the trial.—*SHERMAN v. KING'S PROCTOR*, [1936] 2 W. W. R. 152; 3 D. L. R. 90; *sub nom.* *SHERMAN v. SHERMAN*, 6 F. L. J. (Can.) 51.—CAN.



**3446. Add. Annotation:—**Refd. *Apted v. Apted & Bliss*, [1930] P. 246.

**3448. Add. Annotations:—**Expld. *Apted v. Apted & Bliss*, [1930] P. 246. Refd. *Bainbridge v. Bainbridge*, [1934] P. 66; *Fender v. Mildmay*, 154 L. T. 94.

**3448a. —.**—Although in suitable cases the limits for the exercise of discretion laid down in *Hines v. Hines & Burdett*, No. 3296, might be extended on the lines indicated by the decision of the President in *Wilson v. Wilson*, No. 3448, this was not such a case, as the petitioner's misconduct had been long continued, & he had concealed it from the ct. —*HENSLEY v. HENSLEY & NEVIN* (1920), 122 L. T. 814; 36 T. L. R. 288.

**3449. Add. Annotation:—**Refd. *Fender v. Mildmay*, [1935] 2 K. B. 334.

**3449a. —.**—*GRAYSON v. GRAYSON* (1927), 43 T. L. R. 225.

*Annotation:—*Refd. *Apted v. Apted & Bliss*, [1930] P. 246.

**3449b. —.**—The discretionary power of the ct. to grant a decree of divorce to a petitioner guilty of adultery is a regulated discretion which it is the duty of the ct. to reduce to method. The primary essential for the exercise of its power by the ct. is that there should be secured to it the means of knowledge of the material facts with reasonable certainty. With this end in view the fact that the exercise of the discretion is sought should appear on the face of the petition. There should be lodged along with the application for the certificate of a registrar

that the proceedings are in order, preliminary to setting down, a statement of the matters in respect of which the exercise of the discretion is prayed & the grounds on which the petition in this behalf is based. The intervention of the King's Proctor following suppression of fact or presentment of falsehood by a petitioner in these matters is not the only safeguard for the observance of due procedure. A party to a divorce proceeding who is asking to have the discretion of the ct. favourably exercised & who in doing so acts in such a manner as to obstruct or divert the course of justice is guilty of a contempt of ct. & liable to its consequences. The multiplication of the tribunals in whom is vested the jurisdiction to decree divorce has rendered necessary a more precise procedure to secure the presentment to them of the facts in each case material to the exercise of the discretion &, if necessary, cases can then be adjourned for further consideration & the services of the King's Proctor made available. To formulate & limit with precision the grounds for the exercise of the discretion when the facts are once before the ct. is a practical impossibility; they cannot be rigidly defined but certain broad principles can be gathered from authority. The more strict & early view that two or at most three classes of cases only called for the exercise of the discretion savoured more of estoppel than of the powers of the ct. as defined by statute. Those two classes arose either when resp. had induced petitioner to believe in the death of resp. or

**3445 iii. —.**—*Ontario*.]—Divorce Act (Ontario), 1930, introduced the law of England as at 1870, but it did not introduce the practice of the English cts. relating thereto. There is no provision in the Ontario Rules requiring a pltf. to disclose his or her adultery in the pleadings or in a written confidential statement.—*Howe v. Howe*, [1937] 1 D. L. R. 508; O. R. 57; 6 F. L. J. (Can.) 213.—CAN.

#### PART XIII. SECT. 7, SUB-SECT. 4.—D. (a) ii.

**3446 i. Principle on which court acts.]—**There is nothing in Marriage Act, 1915, s. 131 (1), to indicate that the general rule is that the discretion of the ct. should be exercised against a petitioner who has himself been guilty of adultery, or that it should only be exercised in his favour in exceptional circumstances. The discretion of the ct., on the wording of the section, is quite open. If anything, the words would appear to indicate that ordinarily the decree  *nisi* would be granted notwithstanding the adultery of the petitioner, but that in such a case the ct. is not bound to grant it. Under the section the ct. has an unfettered discretion, & it is neither desirable nor possible to lay down definite & rigid rules by which the ct. should be guided in all cases. The mere non-disclosure in his affidavit by a petitioner of the fact that he has during the marriage committed adultery is not a sufficient ground for refusing a decree  *nisi* to which he would otherwise be entitled.—*ADAMS v. ADAMS*, [1928] V. L. R. 90; [1928] A. L. R. 89.—AUS.

**3446 ii. —.**—A ct. administering divorce jurisdiction in India has a discretion, where petitioner has been guilty of adultery during the marriage, to grant or refuse a decree for dissolution. This discretion is unfettered, but must not be exercised capriciously. The dicta of English judges laying down tests in this matter do not con-

stitute rules or principles which in any way fetter cts. in India.—*LILLY SWAINE v. DENNIS SWAINE* (1932), 1 L. R. 10 Man. 299.—IND.

**3446 iii. —.**—Pltf., after obtaining an American divorce from deft. which was invalid here, went through a form of marriage with X. & returned with her to Alberta where he has since resided with her. Deft. then married B. & lived with him in Alberta. There was a child of each second "marriage." B. obtained a declaration of nullity of his "marriage." Pltf.'s present action for divorce was based on the ground of deft.'s adultery with B. while living with him as his wife following her "marriage" to him:—*Held*: in order for pltf. to succeed it would be necessary for the ct. to exercise its discretion in his favour, &, under the circumstances, it would be wrong to do so; deft. could not fairly be held blameworthy for her adultery to a greater extent than he was for his; assuming that he thought he was free to marry after his divorce it must also be assumed that she too felt she was free to marry again; her adultery was condoned by his action in obtaining the invalid divorce.—*SCHOOF v. SCHOOF*, [1938] 1 W. W. R. 769.—CAN.

**3448 i. Factors governing exercise of.]—**When it is admitted by petitioner that he has been guilty of adultery, the ct. will exercise its discretion in his favour in a case that comes clearly within the principles laid down in *Wilson v. Wilson*, No. 3448.—*LAIRD v. LAIRD* (1927), 38 B. C. R. 297.—CAN.

**3448 ii. —.**—A wife who was deserted by her husband, having reason to believe he was dead, married a second time. The first husband, turning up, petitioned for divorce. It appeared from the evidence that petitioner had been guilty of an infraction of substantially all the matters set out in Divorce & Matrimonial Causes Act, s. 16, & that the wife was a very deeply injured woman

without a stain on her character:—*Held*: although there is power to refuse petitioner a decree, the judge's discretion is left unfettered & absolute by the legislature. & it is in the best interests of the wife, in the circumstances, to be set free; the marriage will, therefore, be dissolved on condition that petitioner gives security for the maintenance of resp. in the terms of sect. 17 of the statute.—*HARNEY v. HARNEY* (1926), 39 B. C. R. 275.—CAN.

**3448 iii. —.**—*Held*: even if the evidence against the pltf. justified the inference that he had committed adultery, the circumstances of the case, including the interests of pltf.'s child, warranted the ct. in exercising its judicial discretion in his favour.—*WRIGHT v. WRIGHT*, [1928] 1 D. L. R. 934; [1928] 1 W. W. R. 383.—CAN.

**3448 iv. —.**—The ct. will not grant a man divorce from a wife who has deserted him, to enable him to marry a woman with whom he has been cohabiting, & to legitimate their issue.—*NEWSON v. NEWSON*, [1936] 1 D. L. R. 696; O. R. 117.—CAN.

**sb. Adultery coupled with cruelty & desertion.—Discretion not exercised.]—**In divorce proceedings, consisting of a petition by a husband & a cross-petition by his wife, it was proved that resp. had committed adultery, as set out in the petition, that petitioner had committed adultery & was guilty of cruelty to resp. & of wilfully deserting her & had been convicted of theft & sentenced to a term in gaol, & petitioner was in goal when resp. committed the acts of adultery upon which the husband's petition was founded:—*Held*: petitioner had been guilty of such wilful neglect & misconduct as condoned to resp.'s adultery, & the discretion conferred by sect. 31 of Divorce & Matrimonial Causes Act, 1857, should not be exercised in his favour.—*CARSWELL v. CARSWELL*, [1934] 3 W. W. R. 485; 42 Man. L. R. 485.—CAN.



when a petitioning wife had been forced by a resp. husband to lead an immoral life, & the question was treated as open whether condonation of petitioner's adultery constituted a third class. To-day these may be stated as guiding principles; a governing consideration is now the interest of the community at large in maintaining the sanctions of honest matrimony; a strong affirmative case is still necessary to justify the ct. in departing from the discretionary prohibition of relief to a guilty petitioner; it is manifestly contrary to law that a judicial discretion in favour of a litigant who has been guilty of adultery should be exercised when that course will probably encourage immorality: if the exercise is not unlikely to have that effect there is an argument against leniency. On the one hand condonation by a resp. of a petitioner's adultery is, though not so in the earlier time, admittedly now a ground for exercising the discretion; on the other hand, it is now a ground for refusing to exercise the discretion that the adultery of petitioner has in some serious degree conduced to that of resp. & conversely that a resp. should not escape the consequences of his or her proved adultery by putting forward similar acts of petitioner for which resp. was in any serious degree responsible. Further matters now considered are the interests of children, the position of a mother in whose care children are, & possible conditions as regards the future of the guilty parties. All these considerations are held to affect the interest of the community at large.—**APTED v. APTE & BLISS**, [1930] P. 246; 99 L. J. P. 73; 143 L. T. 353; 46 T. L. R. 456; 74 Sol. Jo. 338.

**Annotations**.—**Consd. Bainbridge v. Bainbridge**, [1934] P. 66. **Refd. Bevis v. Bevis**, [1935] P. 86; **Russell (Countess) v. Russell (Earl)**, [1935] P. 39; **Fender v. Mildmay**, [1935] 2 K. B. 334; **Sheldon v. Sheldon**, [1937] 1 All E. R. 779.

**3455. Add. Annotation**.—**Refd. Apted v. Apted & Bliss**, [1930] P. 246.

**3456. Add. Annotation**.—**Refd. Apted v. Apted & Bliss**, [1930] P. 246.

**3458. Add. Annotation**.—**Consd. Bainbridge v. Bainbridge**, [1934] P. 66.

**3459. Add. Annotation**.—**Refd. Apted v. Apted & Bliss**, [1930] P. 246.

**3459a. Regulated discretion to be exercised with method.**—**APTED v. APTE & BLISS**, No. 3449b, *ante*.

**3462. Add. Annotation**.—**Refd. Apted v. Apted & Bliss**, [1930] P. 246.

**3463. Add. Annotations**.—**Consd. Bainbridge v. Bainbridge**, [1934] P. 66. **Refd. Apted v. Apted & Bliss**, [1930] P. 246.

**3464. Add. Annotation**.—**Refd. Herod v. Herod**, [1938] 3 All E. R. 722.

**3469. Add. Annotation**.—**Refd. Apted v. Apted & Bliss**, [1930] P. 246.

**3470. Add. Annotations**.—**As to (1) Folld. L. v. L.** [1931] P. 63. **Expld. Russell (Countess) v. Russell (Earl)**, [1935] P. 39. **Consd. H—v. H—**, [1938] 3 All E. R. 415. **Refd. Hyman v. Hyman**, **Hughes v. Hughes** (1928), 139 L. T. 416.

**3475a. —.**—**APTED v. APTE & BLISS**, No. 3449b, *ante*.

**3477. Add. Annotation**.—**Refd. Apted v. Apted & Bliss**, [1930] P. 246.

**3484. Add. Annotation**.—**Refd. Apted v. Apted & Bliss**, [1930] P. 246.

**3486. For "Coupled with discretion" read "Coupled with desertion."**

**3490. Add. Annotations**.—**Consd. Herod v. Herod**, [1938] 3 All E. R. 722. **Refd. Apted v. Apted & Bliss**, [1930] P. 246.

**3491. Add. Annotations**.—**Consd. Apted v. Apted & Bliss**, [1930] P. 246. **Refd. Cullen v. Cullen**, [1933] P. 218.

**3497. Add. Annotation**.—**Consd. Cullen v. Cullen**, [1933] P. 218.

**3499a. —.**—**APTED v. APTE & BLISS**, No. 3449b, *ante*.

**3502a. —.**—A petitioner for divorce had admittedly, over a period of years, both before & after she left her husband, committed adultery in the nature of prostitution. It was found that the husband was aware of the fact, acquiesced in it, had received money which he knew was being obtained by prostitution, & that his treatment of her conduced to her adultery. Petitioner asked for the exercise of the discretion of the ct. in her favour:—**Held**: the discretion of the ct. ought to be exercised in petitioner's favour on the ground that (i) it was not in the interests of the state that the present state of affairs should continue, and there was no chance of the parties being reconciled; (ii) a divorce would give petitioner her one chance of living a decent life again; (iii) it was in the interests of the child of the marriage.—**SHELDON v. SHELDON**, [1937] 1 All E. R. 779; 106 L. J. P. 44; 156 L. T. 222; 53 T. L. R. 374; 81 Sol. Jo. 259.

#### PART XIII. SECT. 7, SUB-SECT. 4.— D. (a) v.

**3488 1. Whether conclusive in favour of petitioner.**—On a petition for dissolution of marriage under Divorce & Matrimonial Causes Amendment Act, 1920, s. 4, as amended by 1921–22 Act, s. 2 (1), where resp. proves to the ct.'s satisfaction that the separation was due to petitioner's adultery, resp. is entitled to rely on that adultery as a bar to petitioner's claim for relief, notwithstanding such adultery was condoned.—**CHAPMAN v. CHAPMAN**, [1926] N. Z. L. R. 291.—N.Z.

**sp. Effect of.**—Where a wife had committed adultery on numerous occasions but this adultery had been condoned by the husband, who subsequently committed adultery & was also guilty of habitual cruelty to the wife:—**Held**: the wife was entitled

as of right to a decree for divorce.—**HOPKINS v. HOPKINS**, [1935] S. A. S. R. 295.—AUS.

#### PART XIII. SECT. 7, SUB-SECT. 4.— D. (a) vi.

**3505 1. Desertion by respondent—No excuse for petitioner's adultery—Bigamous marriage.**—Bigamous adultery by a husband, in wholly inexcusable circumstances:—**Held**: a bar to a decree nisi, even though the adultery did not occur until three years after the wife's desertion & could not be regarded as conducing to or excusing that desertion.—**THOMAS v. THOMAS** (No. 2), [1926] V. L. R. 206; 47 A. L. T. 158; [1926] Argus L. R. 186.—AUS.

**3505 1. — Petitioner destitute.**—A wife was deserted by her husband for four years & was forced by necessity

& circumstances to become unchaste:—**Held**: her petition for divorce should be granted.—**REBERIO v. REBERIO** (1926), 1 L. R. 54 Cal. 80.—IND.

**3508 11. —.**—Where the husband treated the wife with great brutality & subsequently deserted her without making any provision for her maintenance or that of the surviving child of the marriage, & thereafter frequently visited brothels; & the wife, driven desperate by want, & to maintain herself & her children, adopted the life of a prostitute, & having saved some money, gave up the said mode of livelihood, & then filed a petition for the dissolution of her marriage, & in the pleading as well as at the trial did not conceal anything from the ct.:—**Held**: this was a fit case in which the ct. should exercise its discretion in favour of petitioner.—

**3518a. Petitioner induced to believe in respondent's death.**—*APTED v. APTED & BLISS*, No. 3449b, *ante*.

**3533. Add. Annotations:**—*Refd. Sloggett v. Sloggett*, [1928] P. 148; *W—, M J. v. W—*, H. R. W., [1936] 2 All E. R. 1112.

**3537. Add. Annotation:**—*As to (1) Apld. O'Toole v. O'Toole* (1926), 134 L. T. 542.

**3539. Add. Annotations:**—*As to (1) Consd. Herod v. Herod*, [1938] 3 All E. R. 722. *As to (2) Refd. Arnold & Weaver v. Amari*, [1928] 1 K. B. 584. *Generally, Refd. Welton v. Welton*, [1927] P. 162.

**3540. Add. Annotations:**—*Refd. Welton v. Welton*, [1927] P. 162; *Herod v. Herod*, [1938] 3 All E. R. 722.

**3545. Add. Annotation:**—*Expld. Apted v. Apted & Bliss*, [1930] P. 246.

**3548. Add. Annotation:**—*Refd. Russell (Countess) v. Russell (Earl)*, [1935] P. 39.

**3559. Add. Annotation:**—*Refd. Welton v. Welton*, [1927] P. 162.

**3560. Add. Annotations:**—*Consd. Herod v. Herod*, [1938] 3 All E. R. 722. *Refd. Welton v. Welton*, [1927] P. 162.

**3569. Add. Annotation:**—*As to (1) Refd. Porter v. Porter* (1928), 72 Sol. Jo. 826.

**3631. Add. Annotation:**—*Refd. Herod v. Herod*, [1938] 3 All E. R. 722.

*B. Indorsement of Notice to Appear*  
(Vol. XXVII., p. 375).

Add the following case:—

**3635a. Form—Woman charged with adultery named in petition.**—(1) On a wife's petition for dissolution of marriage, which was unde-

fended, a woman named in the petition as having committed adultery with the husband was ordered to pay costs.

(2) As the prayer in the petition contained a claim for costs against the woman named, in accordance with an instruction of the senior registrar, dated June 4, 1927, the notice indorsed on the copy of the petition served on the woman was in the form set out in Matrimonial Causes Rules, 1924, Appendix 1, in accordance with r. 2 of those rules, & the woman's name formed part of the title of the suit as resp.—*DAVIS v. DAVIS & HELBING* (1928), 138 L. T. 623.

**3666. Add. Annotation:**—*Consd. Sandler v. Sandler, Davies & Johnstone*, 103 L. J. P. 88.

**3667. Add. Annotation:**—*Refd. Hyman v. Hyman, Hughes v. Hughes* (1928), 139 L. T. 416.

**3670a. Nature of—Part of original petition.**—A supplemental petition for divorce is not a separate proceeding but is part of the original petition. Where therefore a petition by a husband was dismissed on the ground of collusion, it was held by the Ct. of Appeal that a supplemental petition, although untainted by collusion alleging further acts of adultery since the date of the original petition, must also be dismissed.—*SANDLER v. SANDLER*, [1934] P. 149; 103 L. J. P. 88; 151 L. T. 313; 50 T. L. R. 397; 78 Sol. Jo. 383, C. A.

*Annotations:*—*Folld. Volkors v. Volkors* (Wingate Cited), [1935] P. 33; *Chapman v. Chapman & Thomas*, [1938] P. 93. *Refd. Wyatt v. Wyatt*, [1937] 3 All E. R. 885.

**3670b. Dismissal of petition for collusion—Effect on supplemental petition.**—*SANDLER v. SANDLER*, No. 3670a, *ante*.

*WILSON-DE-ROZE v. WILSON-DE-ROZE* (1929), 1 L. L. R. 57 Calc. 891.—*IND.*

*sa. Respondent's conduct rendering home life unhappy.*—Where a petitioner had made full disclosure of adultery committed by him with two women after conduct on the part of his wife which rendered his home life exceedingly unhappy, & having two young children, was desirous of marrying again:—*Held:* In the particular circumstances disclosed, the discretion to grant a decree nisi for dissolution might be exercised in favour of the petitioner.—*MURRAY v. MURRAY, SMITH & HODGENS*, [1928] S. A. S. R. 136.—*AUS.*

**PART XIII. SECT. 7, SUB-SECT. 4.—**  
**D (b).**

**3539 ff. —.**—A wife guilty of adultery is not entitled to a decree of judicial separation at least in the absence of special circumstances.—*BOIVIN v. BOIVIN*, [1937] 1 W. W. R. 125; *rescd.*, [1937] 1 W. W. R. 368; 1 D. L. R. 804; 6 F. L. J. (Can.) 291.—*CAN.*

**3541 i. Whether adultery a bar—Petition on ground of cruelty.**—In an action for judicial separation the decision of the ct. in matters of defence must be governed by sect. 22 of Divorce & Matrimonial Causes Act, 1857. Therefore where the wife sues for judicial separation on the ground of cruelty the ct. cannot refuse to hold that her claim is barred by her adultery, where, at least, the cruelty had not conduced to her adultery or had made it dangerous for her to continue to cohabit with him.—*GARDINER v. GARDINER*, [1936] 2 W. W. R. 1.—*CAN.*

**PART XIII. SECT. 7, SUB-SECT. 4.—**  
**E. (c).**

*sd. Discretion of court.*—*NEILSEN v.*

*NEILSEN & CHRISTENSEN*, [1937] 2 W. W. R. 447.—*CAN.*

**PART XIII. SECT. 8, SUB-SECT. 1.—**  
**A.**

*st. No style of cause required.*—There is no style of cause required in a divorce petition, & the naming of the co-resp. in a paragraph of the petition is sufficient compliance with Divorce Rule 4 & sect. 13 of the Divorce Act.—*HARRAP v. HARRAP* (1935), 49 B. C. R. 401.—*CAN.*

**PART XIII. SECT. 8, SUB-SECT. 1.—D.**

*sb. How suit commenced—Necessity for writ of summons.*—*CALLANDER v. CALLANDER* (Sask.), [1927] 3 W. W. R. 449.—*CAN.*

*sd. Cannot be joined with claim for arrears under separation agreement.*—A claim for arrears due a wife under a separation agreement cannot be joined with a claim for a judicial separation & alimony.—*DUKE v. DUKE*, [1937] 2 W. W. R. 245.—*CAN.*

**PART XIII. SECT. 8, SUB-SECT. 1.—**  
**F. (a).**

*ff. — Alternative claim for judicial separation.*—In a suit by a wife for divorce it is not necessary, or indeed proper, to ask to have a separation agreement between the parties set aside, or to include an alternative claim for judicial separation.—*CAMRUP v. CAMRUP* (Sask.), [1927] 4 D. L. R. 365; [1927] 2 W. W. R. 759.—*CAN.*

*f ff. — Allegation denying collusion—Unnecessary.*—*BABCOCK v. BABCOCK & KING* (Sask.), [1929] 4 D. L. R. 372; 2 W. W. R. 533.—*CAN.*

*f ff. — Domicil.*—In order for the ct. to have jurisdiction for divorce the necessary domicile must be alleged in the petition.—*FAWCETT v. FAWCETT*,

[1936] 2 W. W. R. 67; 3 D. L. R. 280.—*CAN.*

*so. Any grounds may be adduced—Notwithstanding existence of other grounds.*—It is open to petitioner to claim a dissolution of marriage on any authorised grounds which he can establish, & the fact that he may be entitled to the same relief upon other grounds is no reason for refusing relief on the ground set up.—*CHAPLIN v. CHAPLIN* (1929), S. A. S. R. 460.—*AUS.*

*sd. By counterclaim—In action for alimony.*—A claim for divorce may be set up by a counterclaim to an action for alimony.—*SCHERER v. SCHERER*, [1928] 1 W. W. R. 305; 22 Sask. L. R. 302.—*CAN.*

*st. Joinder of claim for money owing under foreign decree.*—*SUTHERLAND v. SUTHERLAND*, [1935] 1 W. W. R. 430.—*CAN.*

**PART XIII. SECT. 8, SUB-SECT. 1.—**  
**F. (b).**

*so. Form of pleadings.*—In Saskatchewan a claim for damages for criminal conversation may, under the exception provided for in K. B. Rule 600, be joined in an action for divorce, or in an action for judicial separation on the ground of adultery. For that purpose the necessary allegation of adultery in an action for divorce & a similar allegation in an action for judicial separation, followed by a claim for damages, is sufficient.—*BABCOCK v. BABCOCK & KING* (Sask.), [1929] 4 D. L. R. 372; 2 W. W. R. 533.—*CAN.*

**PART XIII. SECT. 8, SUB-SECT. 2.**

*sm. Non-disclosure of acts of adultery—Nor of circumstances in which respondent left petitioner—Effect of.*—A husband, who petitioned for divorce,

3706. *Add. Annotation*:—*Refd. Sandler v. Sandler, Davies & Johnstone*, [1934] P. 149.

3735. *Add. Annotation*:—*Refd. Fender v. Mildmay*, [1936] 1 K. B. 111.

3741. *Add. Annotation*:—*Folld. Hinton v. Hinton & Spillett* (1930), 46 T. L. R. 585.

3751a. ————*]*—In a divorce case, where co-resp. has not appeared, & where the jury award damages in excess of the amount claimed, the claim should not be amended until a summons for leave to amend has been served on co-resp.—*HINTON v. HINTON & SPILLETT* (1930), 46 T. L. R. 585, C. A.

3752. *Add. Annotation*:—*Consd. Sandler v. Sandler, Davies & Johnstone*, [1934] P. 149.

3770. *Add. Annotation*:—*As to (2) Consd. Apled v. Apled & Bliss*, [1930] P. 246.

3778a. *Discontinuance by solicitor—Grounds for—Petitioner suing as poor person—Adultery induced by petitioner.*—This was a summons, adjourned into ct., by which the solrs. to whom the conduct of a poor person's divorce suit had been allocated by the Poor Persons' Committee of the Law Society sought to be relieved of their duty, with the approval of that committee. It was submitted on behalf of petitioner's solrs. that since the petition was filed in June 1929 there had been brought to their notice letters written by petitioner to his wife several years ago, which entitled them to discontinue to act. The registrar referred the summons to the judge, there being no precedent:—*Held*: the letters revealed had incited resp. to set up an adulterous intercourse & had not been disclaimed by petitioner. The order admitting the petitioner to sue as a poor person was dis-

charged.—*PINK v. PINK* (1930), 142 L. T. 579; 46 T. L. R. 214; 74 Sol. Jo. 123.

3783a. *Wife's petition—Woman charged with adultery added as respondent with husband.*—*PEPPER v. PEPPER & BAKER*, No. 4848a, *post*.

3825a. ————*When granted.*—*GLEED v. GLEED* (1927), 43 T. L. R. 678; 71 Sol. Jo. 729.

3836. *Add. Annotation*:—*As to (3) Consd. Townshend v. Child* (1932), 48 T. L. R. 575.

3837a. *Certificate of virginity by intervener—Onus of proof.*—During the hearing of an undefended divorce suit, it appeared that the woman intervener had supplied petitioner's solrs. with medical certificates as to her virginity. She had refused the request of those solrs. that she should submit herself to examination by a doctor named by them. The matter was referred to the King's Proctor for inquiry. An intervention followed wherein it was alleged that the intervener had not committed adultery. At the hearing fresh evidence was called, but it was held that, though the certificates were, in fact, given in respect of the intervener, the evidence was sufficient to discharge the increased burden of proof upon the petitioner. The King's Proctor was ordered to pay three-quarters of petitioner's taxed costs of the intervention:—*Held*: this was not a case where the ct. required the case to be argued on behalf of the King's Proctor. Upon receipt of the papers, he might or might not take action, at the discretion of the Attorney-General, but, upon the latter deciding to take action, the King's Proctor became a party, & liable to be ordered to pay the costs of his intervention if that were unsuccessful.—

on the ground of his wife's adultery, failed in the affidavit in support of his petition, to disclose certain acts of adultery alleged by resp. against him, & also, failed to disclose the circumstances in which resp. left him:—*Held*: the non-disclosure in the affidavit of these facts was of itself, not a sufficient ground for dismissing the petition, but the petitioner should have been given an opportunity of explaining, if he were able, how the affidavit came to be drawn as it was.—*McKAY v. McKAY*, [1928] V. L. R. 6.—*AUS.*

so. ————*Right to cross-examine petitioner as to—Evidence in disproof not already given.*—Petitioner having failed to disclose, in his affidavit in support of his petition, acts of adultery alleged by his wife to have been committed by him, was cross-examined to show that he had committed such adultery:—*Held*: the witness, not having already given evidence in disproof of such alleged adultery, should not, by reason of Marriage Act, 1923, s. 8, have been asked such questions at that stage, unless previously warned that he was not bound to answer them.—*McKAY v. McKAY*, [1928] V. L. R. 6.—*AUS.*

sq. ————*In undefended case.*—*HILL v. HILL & JOHNSTON*, [1938] 1 W. W. R. 94; 1 D. L. R. 774.—*CAN.*

sk. *Failure to file—Effect.*—The ct. may permit a proper affidavit to be filed *nunc pro tunc* where a divorce action has been dismissed only upon the ground of failure to comply with the rules as to swearing affidavits.—*FLETCHER v. FLETCHER*, [1935] 1 D. L. R. 525.—*CAN.*

sp. *Denial of collusion & connivance.*—An allegation in the affidavit called for by sect. 41 of Divorce & Matrimonial Causes Act, 1857, & Saskatchewan King's Bench Rule 597

denying collusion & connivance is a condition precedent to the validity of the proceedings. Its absence is not cured by the fact that the statement of claim contained a paragraph wherein said denial was made & the affidavit filed alleged that the statements in certain paragraphs of the statement of claim, including said paragraph, are true in substance & in fact.—*PETTIT v. PETTIT & ANTWEILER*, [1938] 2 W. W. R. 253.—*CAN.*

PART XIII. SECT. 8, SUB-SECT. 4.—D.

sp. *Right to sue in form pauperis—Foreign petitioner domiciled in Province.*—*FRANKOSKI v. FRANKOSKI*, [1934] 1 W. W. R. 345.—*CAN.*

st. *Leave to sue in form pauperis—When granted.*—*COLERIDGE v. COLERIDGE (Man.)*, [1926] 2 D. L. R. 896; [1926] 1 W. W. R. 857.—*CAN.*

PART XIII. SECT. 8, SUB-SECT. 4.—E. (b) i.

3779 i. *General rule—Saskatchewan.*—Rule 598 (Sask.) which provides that in a divorce action the alleged adulterers shall be made defts. unless a judge otherwise directs is not complied with when the order is obtained after the action has been begun.—*WINDRUM v. WINDRUM*, [1937] 1 W. W. R. 751.—*CAN.*

sv. *Where uncorroborated affidavit of petitioner only evidence.*—The ct. will not dispense with the co-respondent in a suit for dissolution of marriage on the uncorroborated affidavit of petitioner only.—*SPARKES v. SPARKES*, [1928] N. Z. L. R. 750.—*N.Z.*

PART XIII. SECT. 8, SUB-SECT. 4.—E. (b) ii.

3802 i. *Adulterer dead.*—A husband filed a petition for the dissolution of his marriage upon the grounds of his wife's adultery & desertion for three years. The alleged adulterer had

died prior to the issue of the citation. At the hearing of the suit, there being proper materials before the ct., an order was made exonerating petitioner from joining the alleged adulterer as a co-resp.—*KELLETT v. KELLETT* (1936), 42 Argus L. R. 72.—*AUS.*

PART XIII. SECT. 8, SUB-SECT. 4.—E. (c).

3826 i. *Where leave granted—Petition amended—Substituted service of notice of amendment—Advertisement.*—When, on a petition for divorce, an order dispensing with the naming of a co-resp. has been made & for substituted service, & subsequently an appln. to amend the petition by adding a further charge of adultery was allowed, the ct. ordered that substituted service of the notice of amendment be served by registered post on an uncle of the petitioner, & that a notice that the petition had been amended be advertised, & enlarged the time for appearance, but were of opinion that no further order was necessary for leave to proceed without naming a co-resp.—*MARTIN v. MARTIN*, [1927] S. A. S. R. 363.—*AUS.*

PART XIII. SECT. 8, SUB-SECT. 4.—F. (a).

3836 i. *Position of intervener.*—*Held*: a "party" within K. B. Rule 951.—*BUSSELL v. BUSSELL & McKENNA (No. 3)*, [1927] 3 W. W. R. 600.—*CAN.*

sg. *Striking out name—Practice.*—The name of an alleged adulterer who intervened in an action for divorce should not be struck out, even with the consent of pltf. & deft., merely on the grounds that if her name did not appear in the order determining the action she would withdraw her intervention.—*IRELAND v. IRELAND*, [1935] S. A. S. R. 217.—*AUS.*

THOMPSON (OTHERWISE HULTON) v. THOMPSON, [1938] 4 All E. R. 1; 159 L. T. 467; 55 T. L. R. 10; 82 Sol. Jo. 853, C. A.

3840. *Add. Annotation*:—*Refd.* W—, M. J. v. W—, H. R. W., [1936] 2 All E. R. 1112.

3845. *Add. Citation*:—11 P. D. 150.  
*Add. Annotation*:—*Consd.* Chalmers v. Chalmers, [1930] P. 154.

3859. *Add. Annotation*:—*Refd.* McCausland v. McCausland (1927), 43 T. L. R. 592.

3859a. ————]—Where resp. is a minor, personal service of the petition on resp. is good service, & the appointment of a guardian *ad litem* is not necessary.—MCCAUSLAND v. MCCAUSLAND (1927), 96 L. J. P. 149; 137 L. T. 653; 43 T. L. R. 592; 71 Sol. Jo. 472.

3867. *Add. Annotations*:—*Apld.* Raeburn v. Raeburn (1928), 138 L. T. 672. *Consd.* Johnstone v. Johnstone, [1929] P. 165.

3891a. ———— In communication with brother—Possibility of personal service through brother.]—An application was made on behalf of a wife, who had presented a petition for dissolution of marriage, to dispense with personal service of the citation, & allow substitutional service on the brother of the husband. The affidavits, in support of the application, showed that the husband was living abroad under an assumed name, & that the wife could not ascertain where he was, but that her husband's brother was in communication with him, & had undertaken to forward the citation to him. The Judge Ordinary rejected the application, on the ground that personal service might be effected through the husband's brother.—CHANDLER v. CHANDLER (1858), 27 L. J. P. & M. 35; 28 L. J. P. & M. 6.

3920a. ———— Proof of signature.]—Where it is sought to prove the service of a petition or other document in a matrimonial cause by affidavit & the identification of the person served depends upon proof that a signature is the signature of such person, the paper containing the signature shall be exhibited to the affidavit.—PRACTICE NOTE, [1934] W. N. 112.

3955. *Add. Annotations*:—*Apprvd.* Johnstone v. Johnstone, [1929] P. 165. *Refd.* Shearn v. Shearn (1930), 143 L. T. 772.

3955a. ———— Petition for judicial separation.]—A wife, who was domiciled in England before her marriage, petitioned for a judicial

separation on the ground of the alleged adultery in Germany of her husband, a Spaniard. The husband entered an appearance under protest, & subsequently filed an Act on Petition. On the wife applying by summons asking that the Act on Petition should be struck out:—*Held*: the petition & Act on Petition should be tried together on oral evidence, & further, an answer must be filed by the husband to the petition.—RIERA v. RIERA (1914), 112 L. T. 223; 31 T. L. R. 50; *sub nom.* RIEVA v. RIEVA, 59 Sol. Jo. 206.

3974a. ———— Sufficiency of.]—On summons for particulars of a charge of adultery, an order was made to give, at least ten days before the trial, particulars specifying dates & occasions, or petitioner to be precluded from giving other than documentary evidence in support of certain charges of adultery. A statement, purporting to be particulars, was given, but with scarcely any specification of dates & occasions. At the trial evidence other than documentary was objected to, on the ground that the order for particulars had in substance not been complied with:—*Held*: the evidence was admissible, & if the particulars were not sufficient, the proper course would have been to apply for further & better particulars.—CODRINGTON v. CODRINGTON & ANDERSON (1865), 4 Sw. & Tr. 63; 34 L. J. P. M. & A. 60 11 Jur. N. S. 287; 13 W. R. 527; 164 E. R. 1439.

3993a. ———— Reliance on discretion statement.]—Resp. to a divorce petition, the prayer of which asks for the discretion of the ct. to be exercised in favour of petitioner, is not entitled in pleading to treat this prayer as an admission by petitioner of his own adultery & as justifying thereby a cross-claim for dissolution of marriage on the ground of that adultery without giving any further particulars of the same. It is immaterial that petitioner must be aware of the facts & may have lodged his statement of them along with his application for the Registrar's certificate that the case is ready for trial.

*Semble*: this practice is still correct notwithstanding the dictum in *Bevis v. Bevis*, [1935] P. 86, 97, that the prayer of a petition, by including the prayer for the exercise of the discretion, is notice to resp. that petitioner has been guilty of adultery.—B. v. B. & G., [1937] P. 1; [1936] 2 All E. R. 1254; 105

PART XIII. SECT. 8, SUB-SECT. 5.—B.

3853 ii. ————]—Substitutional service in a divorce action effected in accordance with an order therefor regularly made is equivalent to personal service, & it is not necessary that actual notice of the proceedings should reach deft.—PARTINGTON v. PARTINGTON, [1925] 3 D. L. R. 1085; [1925] 2 W. W. R. 723; *reversd.* 19 Sask. L. R. 402; [1925] 1 W. W. R. 1039.—CAN.

*sw.* Personal service impossible.]—DALE v. DALE, [1931] 4 D. L. R. 934.—CAN.

PART XIII. SECT. 8, SUB-SECT. 5.—D. (a).

*ss.* Party must be ordinarily resident within province.]—MCLEOD v. MCLEOD, [1931] 1 W. W. R. 811.—CAN.

PART XIII. SECT. 8, SUB-SECT. 5.—E. (a) ii.

3909 i. Service complete on proof of receipt by respondent.]—SHERIFF v. SHERIFF, [1928] V. L. R. 585.—AUS.

PART XIII. SECT. 8, SUB-SECT. 5.—F.

3917 ii. ———— Sworn in England before commissioner for oaths—Admissibility.]—An affidavit, purporting to be sworn in England before a person describing himself as a comr. for oaths, may be received in evidence of the facts deposed to therein in proof of service of the petition & citation in a divorce suit.—THOMAS v. THOMAS, [1928] V. L. R. 188; 47 A. L. T. 157; [1928] Argus L. R. 137.—AUS.

3919 i. ———— Identification of party served.]—The ct. hearing a petition for divorce has a duty to be satisfied not only that a service of the petition was made but that the identity of the party or parties purporting to have been served has been established.—BAILEY v. BAILEY, [1934] 1 W. W. R. 317.—CAN.

PART XIII. SECT. 8, SUB-SECT. 8.—A.

*sw.* Right of intervenor to.]—B. v. B. & S. (B. C.), [1939] 4 D. L. R. 1069; 1 W. W. R. 916.—CAN.

*ss.* Particulars of allegations against intervenor—Necessity for affidavit.]—Particulars of allegations against an interviewer were filed, but not verified by affidavit. On service of an amended petition containing the allegations the affidavit must still be filed.—*Re* P. v. P. (1935), 50 B. C. R. 201.—CAN.

PART XIII. SECT. 8, SUB-SECT. 8.—B.

*ss.* Further & better particulars—When ordered.]—Petitioner for divorce ordered, on motion of co-*resp.*, to deliver further & better particulars of the dates & places when & where the acts of adultery mentioned in the petition were committed.—GUSHOWATY v. GUSHOWATY & JONES, [1925] 3 D. L. R. 436; [1925] 2 W. W. R. 938; 35 Man. L. R. 134.—CAN.

PART XIII. SECT. 8, SUB-SECT. 9.

*ss.* Order for payment into court—Non-compliance by respondent—No ground for striking out pleadings.]—MARSH v. MARSH, [1932] 1 W. W. R. 688.—CAN.

L. J. P. 90 ; 155 L. T. 322 ; 52 T. L. R. 719 ; 80 Sol. Jo. 637.

**4003a. Material facts not denied—Implied admission.]—**LINDSAY v. LINDSAY, No. 5365b, *post*.

**4028a. ———.]—**PORTER v. PORTER (1928), 72 Sol. Jo. 826.

**4045. Add. Annotations:—**Consd. Sandler v. Sandler, Davies & Johnstone, [1934] P. 149; Volkens v. Volkens (Wingate Cited), [1935] P. 33.

**4046. Add. Annotation:—**As to (1) Consd. Volkens v. Volkens (Wingate Cited), [1935] P. 33.

**4063a. Under Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (3).—**Held: (1) the effect of the above sub-sect. was not to confine the power of the ct. to make interim orders to cases in which the facts were such as would warrant the ct. in making an order in proceedings for judicial separation, but to confer on the ct. a general power to make interim orders of the same nature & class as could be made in properly instituted proceedings for judicial separation; (2) a wife found guilty of adultery in a suit for divorce brought by her husband, whose petition had been dismissed because by his conduct he condoned to her adultery, was a competent suitor for dissolution of marriage on the ground of her husband's adultery, & if she presented a petition for divorce, the ct. had jurisdiction under the above sub-sect., in its discretion, to award her alimony *pendente lite*; (3) as the means of the wife were insufficient to support herself & her two children, she was entitled to alimony *pendente lite*, although the husband

had contributed nothing towards her maintenance for seven years before the institution of the suit, & she had been able in some precarious fashion to maintain herself.—WELTON v. WELTON. [1927] P. 162 ; 96 L. J. P. 75 ; 136 L. T. 675 ; 43 T. L. R. 174 ; 71 Sol. Jo. 121, C. A.

**4097. Add. Annotation:—**Dlstd. Welton v. Welton, [1927] P. 162.

**4098. Add. Annotation:—**Dlstd. Welton v. Welton, [1927] P. 162.

**4098a. ———.]—**WELTON v. WELTON, No. 4063a, *ante*.

**4111. Add. Annotation:—**Generally, Refd. Gilbey v. Gilbey, [1927] P. 197.

**4131. Add. Annotations:—**Refd. Capron v. Capron, [1927] P. 243 ; Burrowes v. Burrowes (1929), 141 L. T. 201.

**4156. Add. Annotation:—**Consd. M. v. M., [1928] P. 123.

**4158. Add. Annotation:—**Refd. Welton v. Welton (1926), 43 T. L. R. 161.

**4159. Add. Annotation:—**Folld. *Re* Hedderwick, Morten v. Brinsley, [1933] Ch. 669.

**4161a. ——— Whether allowed pending appeal.]—**Where an undefended divorce petition brought by a wife was dismissed on the ground that the only evidence sought to be adduced in proof of adultery was inadmissible, the ct., in giving leave to appeal, decided that an existing order of alimony *pendente lite* should be maintained pending the result of the appeal.—BEVIS v. BEVIS (1934), 104 L. J. P. 7 ; 152 L. T. 120 ; 51 T. L. R. 72 ; 78 Sol. Jo. 785.

PART XIII. SECT. 8, SUB-SECT. 11.—  
A

**r i. ——— Adultery by both parties.]—**On the hearing of a petition & cross-petition for divorce it appeared that both the husband & wife had committed adultery:—Held: the wife's petition should be dismissed, but that the marriage should be dissolved on the husband's cross-petition.—S. v. S. (1927), 30 W. A. L. R. 40.—AUS.

**r ii. ——— Separate petition necessary.]—**In answer to a wife's petition in a divorce action, resp. alleged that she committed adultery & prayed that her petition be dismissed & the marriage dissolved. Petitioner's application to strike out that part of the prayer asking for dissolution on the ground that resp. can only obtain such relief by filing a petition was granted.—WATKINS v. WATKINS (1936), 50 B. C. R. 306.—CAN.

**sd. Counterclaim for alimony.—**Condition precedent.]—Where a husband is suing for divorce, & the wife counter-claims for alimony, a written demand for cohabitation & restitution of conjugal rights is not a condition precedent to the right to alimony.—WEATHERALL v. WEATHERALL, [1937] 3 D. L. R. 468 ; O. R. 572 ; 7 F. L. J. (Can.) 68.—CAN.

PART XIII. SECT. 9, SUB-SECT. 1.—A.

**k i. ——— Pending appeal.]—**The power, if any, of the ct. to grant interim alimony to a wife pending the disposition of an appeal by her to the Ct. of Appeal from a judgment at the trial dismissing her action for alimony, is discretionary & ought not to be exercised in favour of the wife where there has been nothing in the conduct of the wife to justify the exercise of such discretionary power in her favour.—CUMPTON v. CUMPTON, [1934] O. R. 60 ; 1 D. L. R. 461.—CAN.

**sv. Not local master.]—**In an action for judicial separation & alimony

applications for *interim* alimony must be made to a judge in chambers ; a local master has no jurisdiction to entertain them.

Where an order for *interim* alimony has been made by a local master, such order is a nullity, but a judge in chambers has no jurisdiction to set it aside where the application to him is not by way of appeal.—VOLHOFFER v. VOLHOFFER, [1925] 3 D. L. R. 552 ; [1925] 2 W. W. R. 304 19 Sask. L. R. 442.—CAN.

**sz. Pending appeal.]—**The Ct. of Appeal of Saskatchewan has jurisdiction to make an order for the payment to a wife of interim alimony pending the disposition of her appeal from a decree nisi for divorce. Such an order should not be made where the wife has been found guilty of adultery, unless special circumstances are shown to exist in her favour. The better practice is for the wife to apply to the trial judge for the continuance of alimony pending the appeal ; but if her application is made to the Ct. of Appeal it has the same power as the trial judge & the same right to exercise its discretion.—MILTON v. MILTON & COOK, [1930] 3 W. W. R. 324 ; [1931] 1 D. L. R. 387 ; 25 S. L. R. 192.—CAN.

**sc. Costs.]—**HAZELTON v. HAZELTON, [1938] 1 W. W. R. 489.—CAN.

PART XIII. SECT. 9, SUB-SECT. 1.—  
B. (a).

**sd. Notwithstanding release by wife.]—**The ct. may order interim alimony, notwithstanding an agreement by the wife releasing the husband from all claims.—SKAITH v. SKAITH, [1936] 4 D. L. R. 653.—CAN.

PART XIII. SECT. 9, SUB-SECT. 1.—  
B. (e).

**4086 iv. ———.]—**An order for payment by deft. to pltf. in an action for

alimony of *interim* alimony & disbursements was set aside, pltf. having means of her own ample for the purpose of maintaining herself & bringing the action to trial.—GIBBS v. GIBBS, [1925] 2 D. L. R. 880 ; 56 O. L. R. 614.—CAN.

PART XIII. SECT. 9, SUB-SECT. 1.—  
B. (d).

**4095 ii. ———.]—**PITMAN v. PITMAN (No. 1), [1935] 1 W. W. R. 297.—CAN.

**4095 iii. ——— Covenant not to sue for alimony.]—**The existence in a deed of separation between husband & wife of a covenant by the wife not to take any proceedings for maintenance or alimony does not debar the wife from applying for alimony *pendente lite* in a suit for divorce thereafter instituted by her husband ; & the ct. has jurisdiction to hear & determine such application, but the nature of the provision made by the separation deed & the fact of the existence of the covenant are matters to be taken into consideration.—SEYMOUR v. SEYMOUR & DELANEY (1936), 36 S. R. N. S. W. 667 ; 53 N. S. W. W. N. 237.—AUS.

PART XIII. SECT. 9, SUB-SECT. 1.—  
B. (e).

**4099 i. General rule.]—**Alimony *pendente lite* will be awarded on proof of the relationship of the parties. This will be allowed even in a nullity suit.—BARNET v. BARNET, [1934] 2 D. L. R. 728 ; O. R. 347.—CAN.

PART XIII. SECT. 9, SUB-SECT. 1.—  
E. (e).

**sd. Judgment.]—**Interim alimony is payable only up to the time of the pronouncement of judgment unless otherwise ordered.—BOIVIN v. BOIVIN & SCHIFFERS (No. 2), [1937] 1 W. W. R. 506 ; 2 D. L. R. 206.—CAN.

4165a. —.]—*Re* HEDDERWICK, MORTEN v. BRINSLEY, No. 5902a, *post*.

4171a. No jurisdiction to vary amount under Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), (s. 196.)—ABBOTT v. ABBOTT, No. 5405a, *post*.

4185. *Add. Annotation*:—As to (2) *Refd.* Fender v. Mildmay, [1936] 1 K. B. 111.

4189a. In suit for judicial separation—Before decree *nisi*.]—The provision of alimony *pendente lite* is a privilege of the wife for her subsistence during the litigation; & a wife who has obtained a decree of judicial separation is not entitled to an allotment of alimony *pendente lite*, unless she has obtained an order for it before the decree, although she may have commenced proceedings earlier in the suit to obtain it.—M. v. M., [1928] P. 123; 97 L. J. P. 101; 138 L. T. 648; 44 T. L. R. 299; 72 Sol. Jo. 155.

4237. *Add. Annotation*:—*Consd.* *Re* Liddell's Settlement Trusts, Liddell v. Liddell, [1936] 1 All E. R. 239.

4242. *Add. Annotation*:—*Refd.* *Re* Carroll (J. M.), [1931] 1 K. B. 317.

4244. *Add. Annotation*:—*Refd.* *Re* Carroll (J. M.), [1931] 1 K. B. 317.

4278. *Add. Annotation*:—As to (2) *Apld.* Williams v. Williams, [1929] P. 114.

4278a. — When appeal lies.]—The principle that the ct. will provide for the wife's costs of a matrimonial suit originally arose from the fact that on her marriage her property passed to her husband, but it still obtains, though at the present day the question is whether as a litigant she has sufficient separate estate wherewith to pay the costs of a solr. The power of a registrar under Matrimonial Causes Rules, 1924, r. 91, to provide for the wife's costs is discretionary & not subject to review unless he has clearly proceeded on a basis which is wrong. He is entitled to take into consideration the capital & income of both parties & the nature & availability of it in arriving at a conclusion as to the "sufficient separate estate" of the wife within the rule. Among other matters the amount of an allowance under an existing deed of separation is a factor, although partly & primarily intended as an alimentary provision & not as a fund for defraying costs.—WILLIAMS v. WILLIAMS, [1929] P. 114; 98 L. J. P. 40; 140 L. T. 383; 45 T. L. R. 157; 73 Sol. Jo. 77.

4280a. — —.]—On a husband's petitioning

for divorce on the ground of his wife's alleged adultery with a named co-resp., the paternity of a child being in dispute, the wife by her answer admitted the birth of the child, & she did not allege that petitioner was the father, but she denied adultery with co-resp. It was urged on behalf of petitioner that the pleadings showed that the wife had not a good ground for her defence so as to justify an order against her husband to secure her costs. In accordance with an offer made by petitioner an order was made for security to be given without payment into ct.—*Re* A. B.'s PETITION, [1928] P. 25; *sub nom.* S. v. S. & P., 97 L. J. P. 37; 138 L. T. 302; 44 T. L. R. 52; 72 Sol. Jo. 31.

4281a. — — —.]—A husband cannot refuse to pay & give security for his wife's costs of divorce suit or issue as to domicile merely on the ground that he disputes the jurisdiction. A husband who appears under protest to a wife's petition & disputes the jurisdiction on the ground of his having a foreign domicile may be ordered to pay his wife's costs of suit up to the setting down of the issue & to give security for her costs attendant on the issue & down to the close of pleadings, on the ground *per* LORD HANWORTH, M.R., & LAWRENCE, L.J., that the ct. had jurisdiction to make the order under Matrimonial Causes Rules, 1924, r. 91; *per* GREER, L.J., that the ct. had inherent jurisdiction derived from the practice of the old Ecclesiastical Cts.—JOHNSTONE v. JOHNSTONE, [1929] P. 165; 98 L. J. P. 76; 140 L. T. 451, C. A.

4281b. — Origin of principle.]—WILLIAMS v. WILLIAMS, No. 4278a, *ante*.

4289. *Add. Annotation*:—As to (1) *Refd.* Jackson v. Jackson & Barwell, [1936] 2 All E. R. 1588.

4293a. — — —.]—What must be considered.]—WILLIAMS v. WILLIAMS, No. 4278a, *ante*.

4296. *Add. Annotations*:—*Refd.* Welton v. Welton, [1927] P. 162; Arnold & Weaver v. Amari, [1928] 1 K. B. 584; Mason v. Mason & Cottrell (1933), P. 199.

4300. Delete "No. 4865, *post*" & add the following para. & citations:—

If the father of a minor petitions for a decree of nullity of his child's marriage, he must make the other party to the *de facto* marriage a party to the suit. In such a suit the *de facto* wife is not entitled to have her costs taxed against the petitioner, as in ordinary cases between husband & wife.—

### PART XIII. SECT. 9, SUB-SECT. 1.— I. (a).

h i. —.]—A motion for interim alimony must be made promptly.—PASCOE v. PASCOE, [1938] 1 D. L. R. 800.—CAN.

sg. In dissolution suit.]—It is not proper to include a prayer for maintenance in a petition for dissolution of marriage, & the ct. has no power to include a provision for maintenance in a decree *nisi*. There must be a separate petition for maintenance, which may be filed as soon as a decree *nisi* has been pronounced, but not before.—GOSPODARYK v. GOSPODARYK, [1935] 2 W. W. R. 449; 43 Man. L. R. 147; 5 F. L. J. (Can.) 53.—CAN.

sl. After service of writ of summons.]—MACKENZIE v. MACKENZIE, [1930] 3 W. W. R. 597.—CAN.

so. —.]—Where a notice of motion for interim alimony was served at the

same time as the writ of summons:—*Held*: It could not be said that the application was made after the writ of summons was served.—GNIP v. GNIP, [1935] 1 W. W. R. 182.—CAN.

### PART XIII. SECT. 9, SUB-SECT. 1.— I. (d) i.

4214 i. Evidence by affidavit — Limited to evidence filed with notice of motion.]—MACKENZIE v. MACKENZIE, [1930] 3 W. W. R. 597.—CAN.

### PART XIII. SECT. 9, SUB-SECT. 1.—K.

sa. Modes of enforcement—Garnishee summons.]—REDDICK v. REDDICK, [1930] 3 W. W. R. 502.—CAN.

### PART XIII. SECT. 9, SUB-SECT. 5.—A.

q i. — Cross petition for separation by wife.]—Where husband petitions for divorce & wife cross-petitions for separation, these are separately triable

& the court will not require the husband to give security for the full costs of the cross petition without investigation by the wife's counsel as to the *bona fides* of her claim.—HOUSTON v. HOUSTON & BATEMAN, [1937] 2 D. L. R. 427.—CAN.

xx. Whether court can grant interim costs to wife.]—There is no rule or practice in Alberta which permits the granting of interim costs to a wife in a divorce action.—ROUSSEAU v. ROUSSEAU, [1928] 3 D. L. R. 195; [1928] 2 W. W. R. 104; 23 Alta. L. R. 371.—CAN.

xy. —.]—There is no rule or practice in Alberta authorising the granting of interim costs or an order for security for costs to a wife defending a divorce action, even though she has counterclaimed for alimony.—GUNDERSON v. GUNDERSON, [1930] 1 W. W. R. 715; 3 D. L. R. 152; 24 Alta. L. R. 435.—CAN.



WELLS v. COTTAM (FALSELY CALLED WELLS) (1863), 3 Sw. & Tr. 364; 33 L. J. P. M. & A. 41; 10 L. T. 138; 164 E. R. 1316.

4305. *Add. Annotation*:—*As to (3) Refd. Arnold & Weaver v. Amari*, [1928] 1 K. B. 584.

4306. *Add. Annotation*:—*Refd. Fanshawe v. Fanshawe*, [1927] P. 238.

4306a. *Amount of security—Wife proceeding as poor person.*—*HALLS v. HALLS AND LUK-OVER*, [1938] 4 All E. R. 573, C. A.

4307. *Add. Annotation*:—*As to (1) Refd. Baldwin Raper v. Baldwin Raper & Metz* (1926), 42 T. L. R. 619.

4313. *Add. Citations*:—95 L. J. P. 18; 134 L. T. 414.

4331a. *Dispensing power of court.*—In nullity suits presented on the ground of incapacity, the practice of ordering medical inspection of the parties by officers of the ct. is followed for the ct.'s own protection, & is a most valuable safeguard against collusion. There is no rule of practice as to medical inspection of universal application, however, & the ct. has a dispensing power, which may be exercised in special circumstances.

In a nullity suit based on alleged incapacity, the woman resp. was of unsound mind, & the ct. held that in her case an order for inspection could be dispensed with, there being sufficient medical evidence *aliunde* as to her condition.—*INTRACT v. INTRACT (OTHERWISE JACOBS)*, [1933] P. 190; 149 L. T. 334; 77 Sol. Jo. 404; *sub nom. I. v. I. (OTHERWISE J.)* (1933), 102 L. J. P. 65; 49 T. L. R. 456.

4334. *Add. Annotation*:—*As to (2) Consd. Intract v. Intract (otherwise Jacobs)*, [1933] P. 190.

4336. *Add. Annotation*:—*As to (1) Consd. Intract v. Intract (otherwise Jacobs)*, [1933] P. 190.

4342a. ——— *District registrar—Poor persons' suit commenced in district registry.*—In a poor persons' undefended nullity suit commenced in a district registry & determined on assize in accordance with the Matrimonial Causes at Assizes Order, 1922, the district registrar has authority to appoint medical inspectors in accordance with the practice of the Divorce Registry.—*STROUD v. STROUD (OTHERWISE GRANTHAM)* (1929), 45 T. L. R. 248; 73 Sol. Jo. 221.

4354a. ——— *"Discretion cases"—Adultery by petitioner—Insertion in defended list necessary.*—*HOWELL v. HOWELL & DAVIDSON* (1926), 42 T. L. R. 497.

4354b. ——— *Application to expedite trial—Grounds*

for refusing.]—The ct., on the ground of public policy, refused an application by a wife, petitioning for a divorce on the ground of her husband's adultery, that the trial of the suit in the undefended list might be expedited so that the decree might be made absolute, & resp. might marry the woman named in the petition, before the birth of a child expected to be born as the result of resp.'s relations with that woman.—*P. v. P.* (1927), 44 T. L. R. 114; 71 Sol. Jo. 964.

4355a. *Condition precedent to setting down—Statement of grounds for exercise of discretion—Adultery of petitioner.*—*APTED v. APTED & BLISS*, No. 3449b, *ante*.

4355b. ——— *Not other matrimonial offence.*—(1) A statement lodged by an appct. for divorce giving particulars of his or her own adultery, in accordance with the direction of May 29, 1930, which followed the decision in *Apted v. Bliss*, No. 3449b, *ante*, applies only to the matrimonial offence of adultery.

(2) Where in such statement there are charges against the other party which are additional to charges in the petition they must be communicated to the party accused.—*KIRK v. KIRK & GUNDY* (1934), 103 L. J. P. 56; 150 L. T. 514; 50 T. L. R. 237; 78 Sol. Jo. 175.

4355c. ——— *Additional charges must be communicated to other party.*—*KIRK v. KIRK & GUNDY*, No. 4355b, *ante*.

4355d. ——— *—*—Where a petitioner on a petition, disclosing his or her own misconduct in spite of which he or she is asking for the discretion of the ct. to be exercised in his or her favour, alleges adultery or other misconduct on the part of the other party which is not charged in the petition, notice of such allegations should be given to the other party, either by voluntary disclosure of the statement itself—I emphasise the words "voluntary disclosure"—or in some other appropriate form. Petitioner must satisfy the ct. at the hearing of the petition that this has been done (*SIR BOYD MERRIMAN, P.*).—*ANON.* (1934), 78 Sol. Jo. 175.

4355e. ——— *—*—Where, in the statement filed in support of a prayer for the discretion of the ct., a party alleges on the part of the other spouse adultery, or some other matrimonial offence, which is not referable to any specific allegation in the pleadings, notice of such allegation must be given to the other spouse. The party must be prepared

PART XIII. SECT. 10, SUB-SECT. 1.—A.

4308 i. *Against whom order made—Not infant intervener or his next friend.*—*RUSSELL v. RUSSELL & MCKENNA (Man.)*, [1927] 4 D. L. R. 403; [1927] 3 W. W. R. 144.—CAN.

sz. *Admissions of adultery by defendants—Admissibility.*—At the trial of a divorce action, the examinations of the two defts. for discovery were tendered. Each deft. admitted adultery with the other in these examinations, but no warning had been given that they were not bound to answer questions tending to show that he or she was guilty of adultery.—*Feld*: the admissions were admissible at the trial.—*ELLIOTT v. ELLIOTT & COOK*, [1933] O. R. 206; 2 D. L. R. 40.—CAN.

PART XIII. SECT. 10, SUB-SECT. 1.—C.

4325 i. *What interrogatories allowed—Relating to charge of adultery.*—On an examination for discovery, in an action for judicial separation & alimony, deft. should not be required to answer questions intended to fasten responsibility on him for certain letters, where such letters tend to show that he has committed adultery.—*LIGHTHEART v. LIGHTHEART (Sask.)*, [1926] 4 D. L. R. 885; [1926] 3 W. W. R. 494.—CAN.

4325 ii. ——— *—*—The interrogatories in question herein held to fall within the rule that the ct. should not order interrogatories in a petition for divorce where they can be material only in so far as they may tend to establish adultery.—*BRAMMALL v.*

*BRAMMALL (B. C.)*, [1929] 1 W. W. R. 800.—CAN.

PART XIII. SECT. 10, SUB-SECT. 1.—D.

sp. *Jurisdiction to order—Ontario.*—There is no right in Ontario to an order of ct. for the physical examination of one of the parties in an action of nullity of marriage for physical incompetence.—*H. v. H.*, [1933] 3 D. L. R. 792.—CAN.

PART XIII. SECT. 11, SUB-SECT. 1.

n i. ——— *—*—In an action for divorce if there is evidence, not open to exception, of admissions of adultery by the principal respondent it is the duty of the ct. to act on the admissions, even though there is no other evidence to support them. The ct. will act upon



to satisfy the ct. at the hearing that such notice has been given, or to justify the failure to give the same.—PRACTICE NOTE, [1934] W. N. 86.

4878a. Degree of proof—Less than that required in prosecution for bigamy.]—SPIVACK v. SPIVACK, No. 453a, ante.

4386. Add. Annotation:—Apld. Elliott v. Albert, [1934] 1 K. B. 650.

4398. Add. Annotation:—Overd. Morton v. Morton, Daly & McNaught (1937), 157 L. T. 46.

4398a. —. —. —.]—Judicature (Consolidation) Act, 1925 (c. 49), s. 198, means that unless & until the husband or wife as the case may be has denied the adultery with regard to which cross-examination is to be directed there is no right of cross-examination as to that particular adultery. A result is that in a case where there are two co-resps. to a petition & a resp. wife gives evidence denying adultery with one of them, but gives no evidence with reference to the charge of adultery with the other of them, although also pleaded, she does not expose herself to cross-examination as to the latter adultery. If, however, a party gives evidence denying adultery in general, cross-examination may be directed to that general denial.—MORTON v. MORTON, DALY & MCNAUGHT, [1937] P. 151; [1937] 2 All E. R. 470; 106 L. J. P. 100; 157 L. T. 46; 53 T. L. R. 659; 81 Sol. Jo. 359.

such uncorroborated evidence only if convinced that the admissions were in fact made and were genuine.—MONAGHAN v. MONAGHAN, [1930] 2 W. W. R. 748; 4 D. L. R. 1025; *revid. on facts*, [1931] 2 W. W. R. 1; 2 D. L. R. 934.—CAN.

s i. —. —.]—Pltf. in a divorce action in Alberta is not a compellable witness; & if the evidence adduced establishes his or her case & does not also prove anything which is an absolute defence or which gives the ct. a discretion to refuse the decree, the decree must be granted although pltf. has not attended in person at the trial & the action is an undefended one.—EMENY v. EMENY (Alta.), [1930] 1 D. L. R. 253; [1929] 3 W. W. R. 577; 24 Alta. L. R. 303.—CAN.

s ii. —. —.]—It is incumbent on a petitioner for divorce, even in an undefended proceeding, to fully establish the case & reveal all material facts; & he may be required to attend personally at the hearing.—BAILEY v. BAILEY (Man.), [1929] 4 D. L. R. 1068; 1 W. W. R. 708.—CAN.

sg. Necessity for preponderance of evidence—Effect of declaration of no intention to remarry.]—In a divorce action the rule as to the preponderance of evidence in civil actions should not be weakened, but the evidence required to establish pltf.'s case should be, if anything, stronger & more preponderating than in other actions. Pltf. in a divorce action who proves a case entitling him to a divorce is not prejudiced or deprived of his right to the divorce because he declares that if he gets it he does not intend to remarry.—LEBOEUF v. LEBOEUF & GERMAIN, [1928] 2 D. L. R. 23; [1928] 1 W. W. R. 423; 23 Alta. L. R. 328.—CAN.

sf. Number of witnesses.]—The effect of legislation is that the rule of evidence in the Ecclesiastical Cts., which required proof by two witnesses to establish a case, has no application in the Divorce Ct. in New South Wales. It is unnecessary, therefore, that two witnesses should be called for the proof of any fact, & the usual practice in the cts. of common law must be followed.—BOARDMAN v. BOARDMAN

(1936), 36 S. R. N. S. W. 474; 53 N. S. W. N. 182.—AUS.

#### PART XIII. SECT. 11, SUB-SECT. 2.

4376 i. Whether formal proof essential—Suit for dissolution—Damages claimed against co-respondent.]—Where on a petition for divorce damages are claimed against co-resp. *prima facie* proof of marriage, if not rebutted, is sufficient to meet the strictness of proof required in the criminal conversation phase of the proceedings.—KNIGHT v. KNIGHT & OWENS, [1925] 2 D. L. R. 467; [1925] 1 W. W. R. 824.—CAN.

sk. Admissions of parties—Suit for nullity.]—A declaration that a marriage is null & void by reason of the previous marriage of one of the parties will not be granted upon admissions only.—GRASSICK v. GRASSICK, [1935] 1 D. L. R. 351; O. R. 50.—CAN.

#### PART XIII. SECT. 11, SUB-SECT. 3. —A.

4381 iii. —. —.]—Sects. 51 & 52 of the Indian Divorce Act contain the law upon the question whether a resp. or co-resp. can give evidence against themselves of adultery.—BONHIEM v. KA TROLIMON (1929), 1 L. R. 57 Calc. 1159.—IND.

sm. Whether respondent can be examined for discovery.]—MYRLOWYSZ v. MYRLOWYSZ, [1930] 3 W. W. R. 83; [1931] 1 D. L. R. 154.—CAN.

#### PART XIII. SECT. 11, SUB-SECT. 3. —B. (b).

4384 i. "Proceeding instituted in consequence of adultery"—Suit for nullity.]—In a suit for nullity petitioner may be compelled to answer questions tending to show that he has committed adultery.—W. v. W., [1926] S. A. S. R. 425.—AUS.

#### PART XIII. SECT. 11, SUB-SECT. 5.

h i. —. —. —.]—In a suit by a husband for divorce, letters written by the wife to co-resp., but not delivered to him, are not made evidence of adultery admissible against co-resp. by Ceylon Evidence Ordinance, 1885, s. 9. The fact that co-resp.'s counsel has based questions in cross-examination upon the contents of the letters, which had properly been admitted as

4406a. Substituted service of petition on respondent & co-respondent.]—TUTT v. TUTT & WOOD (1928), 165 L. T. Jo. 55.

4409a. Telephone conversations—Reports—Witness refreshing memory.]—Petitioner had caused the telephone line from his house to be tapped by means of a line taken to a room in another house hired for the purpose. He employed an inquiry agent to listen in to all telephone calls made from & received at his house, & to write down verbatim reports of the conversations. Some of the conversations were also listened to by petitioner as well as by the inquiry agent:—*Semble*: evidence by petitioner of the telephone conversations, which he had overheard between resp. & co-resp., was admissible, & he might refresh his memory from the notes of these conversations which the inquiry agent had written at the time & which petitioner had checked shortly after. Although some of the conversations were irrelevant, still their recording was necessary & the costs thereof should be allowed.—JACOBS v. JACOBS & SOLOMON, [1936] 1 All E. R. 67.

4422. Add. Annotation:—Distd. Preger v. Preger (1926), 134 L. T. 670.

4427. Add. Citation:—11 W. R. 85.

4434. Add. Annotation:—Refd. Capron v. Capron, [1927] P. 243.

4439. Add. Annotation:—Consd. Cavendish v. Cavendish, [1926] P. 10.

evidence against the wife, does not make the letters evidence against co-resp.—GABRIEL v. ELIATAMBY, [1926] A. C. 133; 95 L. J. P. C. 9; 134 L. T. 200.—CEYLON.

h ii. —. —. —.]—Letters to husband from alleged adulterers—Taken from husband's desk by wife.]—*Held*: admissible.—LIGHTHEART v. LIGHTHEART, [1927] 1 D. L. R. 386; [1927] 1 W. W. R. 393; 21 Sask. L. R. 300.—CAN.

k i. —. —. —.]—Letter from intervener to husband.]—In an action for divorce a letter written by the intervener & received by deft. husband containing suggestions that the intervener was pregnant by the husband was found by pltf. wife among the husband's papers. The husband denied the adultery & falsely told his wife that the letter had been written by certain relatives as a joke.—*Held*: the letter was admissible as against deft. as some evidence of his conduct & of the relations between him & the intervener. Also, the false statements as to the writer of the letter were not, in the absence of other evidence tending to prove adultery, evidence of adultery.—BASEDOW v. BASEDOW, [1935] S. A. S. R. 155.—AUS.

m i. —. —. —.]—The pursuer in an action of divorce for adultery, instituted in 1923, reclaimed against an interlocutor, pronounced in 1927, which assuaged defender & co-defender. Before the case was put out for hearing in the Inner House, pursuer presented a note, in which she asked leave to amend her record, & to lead evidence regarding certain incidents which occurred in 1925, for the purpose of throwing light upon the relations of defender & co-defender prior to the date of the action. The ct. in the exercise of its discretion, granted the leave craved.—ROSS v. ROSS, [1928] S. C. (Ot. of Sess.) 600.—SCOT.

sz. Admissions—Of adultery—By wife—Bastardizing offspring.]—Admissions by a wife, that the father of a child born to her during the marriage was not her husband:—*Held*: receivable in evidence, so far as they did not relate to non-access.—JUSTICE v. [1925] S. A. S. R. 278.—AUS.



4636. *Add. Annotation*:—*Refd. Sloggett v. Sloggett*, [1928] P. 148.

4638a. *Two trials by jury—Disagreement—Order for trial by judge.*—By the Matrimonial Causes Rules, 1924, r. 30 (B): "Unless a registrar shall otherwise order on summons, all causes in which damages are claimed shall be tried by a common jury & all other causes shall be heard by the ct. itself without a jury."

A husband filed a petition against his wife for divorce on the ground of her alleged adultery with co-resp., but claimed no damages against him. He subsequently obtained an order from the judge under r. 30 (B) of the Matrimonial Causes Rules, 1924, that the issue should be tried before a special jury. The petition was twice tried, & on each occasion the jury failed to agree & were discharged. The husband then applied to the President for an order that the order for a jury which had been made should be discharged & that the petition should be tried by a judge alone. The President made the order. On appeal:—*Held*: under rule 30 (B) the President had jurisdiction to order that the further trial of the petition should be before a judge alone; the power given by that rule to direct the method of trial was not limited to one application & one order only, but enabled the ct. to determine from time to time what was the right mode of trial; also the order made by the President in the judicial exercise of his discretion was a proper one to make in the circumstances of the case. *Per SLESSER, L.J.*, R. S. C., Ord. XXXVI, r. 1, did not confer jurisdiction to make the order.—*TRINDER v. TRINDER* (MIDWINTER), [1935] P. 61; 104 L. J. P. 28; 152 L. T. 276; 51 T. L. R. 206; 78 Sol. Jo. 914, C. A.

4640a. ——— *Cruelty.*—There is now no statutory right of a party to a matrimonial suit to insist on the trial of any issue of fact by a jury. On a petition by a husband seeking dissolution of marriage on the ground of the alleged adultery of resp. wife with the co-resp., resp. counter-charged petitioner with cruelty & prayed a judicial separation. An order having been made for the trial by a jury of the issue of adultery, the Ct. of Appeal refused to extend the order to include the

issue of cruelty.—*RUGG-GUNN v. RUGG-GUNN & ARCHER*, [1931] P. 147; 100 L. J. P. 61; 145 L. T. 200; 47 T. L. R. 398; 75 Sol. Jo. 424, C. A.; *affg.*, S. C. *sub nom.* R. G. v. R. G. & A., 47 T. L. R. 370.

*Annotations*:—*Consd. Croker v. Croker* (1932), 48 T. L. R. 597; *Cooper v. Cooper*, [1936] 2 All E. R. 642. *Refd. Trinder v. Trinder & Midwinter*, [1935] P. 61.

4650. *Add. Annotation*:—*As to* (1) *Refd. Statham v. Statham*, [1929] P. 131.

4676. *Add. Annotation*:—*Generally, Refd. Place v. Searle* (1932), 48 T. L. R. 428; *Newton v. Hardy* (1933), 149 L. T. 165.

*B. By Whom Assessed* (Vol. XXVII., p. 452).

After the cross-reference add as follows:—

4677a. *By court.*—The ct. has power to direct that damages shall be assessed by a judge alone, unless one of the parties applies for trial by jury. The practice is now regulated by R. S. C., Ord. 36, rr. 2-6, & Matrimonial Causes Rules, 1924, r. 30 (b).—*BEDFORD v. BEDFORD & POWDRILL* (1926), 96 L. J. P. 22; 136 L. T. 383.

4719a. ——— *Damages previously recovered in enticement action.*—Although the causes of action on a claim for the enticement of a wife & on a claim for damages in divorce against the same deft. in respect of adultery committed by him with the wife are not identical, the measure of damages in a case where there has been adultery may be practically the same under both causes of action. This applies to the loss of consortium & the loss of services of the wife as well as to the adultery. If the action for enticement is disposed of before a petition for divorce & all the circumstances relating to adultery must have been in the contemplation of the parties when the action was disposed of, practically all the damages available to the husband have been awarded in the action for enticement. Further damages are only obtainable in divorce if some grave matter for consideration has not been dealt with in the enticement action.

Observations on the combination at the instance of a husband of the two remedies & the attendant claim for double damages.—*MENON v. MENON & WARTH*, [1936] P. 200; [1936] 1 All E. R. 900; 105 L. J. P. 83; 154 L. T. 725; 52 T. L. R. 483; 80 Sol. Jo. 348.

adultery, there is no absolute right to either party to have the case tried before a jury, but there is a primary right to have the case set down for trial before a judge & jury. On an application "for trial otherwise" under the rule, if either party desires that the issue be tried before a jury, the ct. should, as a general rule, refuse to make an order for trial otherwise than before a jury.—*ELLIOTT v. ELLIOTT* [1932] N. Z. L. R. 484.—N.Z.

*st. — Conduct conducing to.*—In a suit for divorce on the ground of adultery, the ct. has a discretion, under sect. 161 of Marriage Act, 1915, as to whether the issue raised by an allegation in resp.'s answer that petitioner was guilty of wilful neglect or misconduct conducing to the adultery should be tried by a jury.—*LACK v. LACK*, [1931] V. L. R. 72; *Argus L. R.* 21.—AUS.

*sv. — — — — —*—In a suit for divorce on the ground of adultery, questions whether the petitioner connived at, or condoned, or was guilty of conduct which conducing to, the adultery alleged, are not "matters of fact in

relation to" the charge of adultery within sect. 79 (3) of Marriage Act, 1928, & the parties are, therefore, not entitled as of right to have such questions submitted to a jury.—*CLARKE v. CLARKE*, [1931] V. L. R. 69; *Argus L. R.* 20.—AUS.

PART XIII. SECT. 16, SUB-SECT. 5.—A.

4676 i. *General rule.*—The factors to be considered in granting damages against co-resp. are (1) the actual value of the wife to the husband; (2) the injury to his feelings, the blow to his marital honour & the hurt to his matrimonial & family life.—*HAYNES v. HAYNES* (Sask.), [1926] 4 D. L. R. 473; [1926] 2 W. W. R. 726.—CAN.

PART XIII. SECT. 16, SUB-SECT. 5.—B.

*sb. By judge.*—It is not the law in Saskatchewan that damages against co-resp. must be assessed by a jury.—*RIDER v. RIDER*, [1925] 3 D. L. R. 370; [1925] 1 W. W. R. 1051; 19 Sask. L. R. 384.—CAN.

*sd. — — — — —*—A judge sitting without

a jury in Manitoba has jurisdiction to award damages against a co-resp. to a divorce action.—*MITCHELL v. MITCHELL & CROOME*, [1936] 1 W. W. R. 553; 2 D. L. R. 374; 44 Man. L. R. 23; 5 F. L. J. (Can.) 292.—CAN.

PART XIII. SECT. 16, SUB-SECT. 5.—D. (b).

4685 i. *Not punitive.*—*RIDER v. RIDER*, [1925] 3 D. L. R. 370; [1925] 1 W. W. R. 1051 19 Sask. L. R. 384.—CAN.

4685 ii. ———.—*TRANTER v. TRANTER & LAMB*, [1925] N. Z. L. R. 593.—N.Z.

PART XIII. SECT. 16, SUB-SECT. 5.—D. (c).

4690 i. *Whether bar to claim for damages—Illicit relationship continued after knowledge.*—Co-resp.'s conduct in continuing adulterous relations with resp. after he became aware that she was married:—*Held*: to deprive him of any protection with respect to immunity from damages to which his prior ignorance of her married state might have entitled him.—*HAYNES v. HAYNES* (Sask.), [1926] 4 D. L. R. 473; [1926] 2 W. W. R. 726.—CAN.

**4746. Add. Annotation:—Generally, Refd.** Bosworthick v. Bosworthick, [1927] P. 64.

**4750a. Disagreement of jury—Refusal to enter verdict.]—**WAUDBY v. WAUDBY & BOWLAND, No. 4836a, *post*.

**4752. Add. Annotations:—Consd.** Dodworth v. Dale, [1936] 2 All E. R. 440; Fowke v. Fowke, [1938] 2 All E. R. 638.

**4752a. — Void second marriage—Reference in decree nisi dissolving first marriage refused.]—**HEWETT v. HEWETT & DUPIN (1929), 73 Sol. Jo. 402.

**4753a. — After decree nisi for dissolution.]—**DAGLISH v. DAGLISH, [1936] P. 49; 105 L. J. P. 19; 154 L. T. 246; 52 T. L. R. 171; 80 Sol. Jo. 129.

**4753b. — —.]—**PETCH v. PETCH (1936), 182 L. T. Jo. 370.

**4759. Add. Annotation:—Refd.** Fender v. Mildmay, [1937] 3 All E. R. 402.

**4763a. — — As res judicata.]—**(1) A finding of adultery as a fact on which a decree *nisi* has proceeded is not *res judicata*, so that it cannot subsequently be questioned in the Divorce Div. in any event, nor is resort to the Ct. of Appeal the only means of reviewing it. The decree *nisi* resembles any other order *nisi* in that it proceeds merely upon the materials before the ct. at the time of its pronouncement & cause can be shown against it being made absolute. (2) The King's Proctor, not being a party to the suit as originally constituted, cannot resort to the Ct. of Appeal, but if he comes to the conclusion that the decree has been obtained contrary to the justice of the case he must intervene & show cause against making the decree absolute. For that purpose he may call fresh evidence to show that there has been no adultery notwithstanding the previous finding in the affirmative.—**CHALMERS v. CHALMERS**, [1930] P. 154; 99 L. J. P. 60; 142 L. T. 654; 46 T. L. R. 269; 74 Sol. Jo. 216.

**4767a. Effect of—On status of parties.]—**A decree for restitution of conjugal rights with the usual finding that the parties to the suit are husband & wife, though it may not

directly affect their status, nevertheless proceeds upon the basis of their status being thus conclusively established *inter partes*. Resp. in a suit for restitution of conjugal rights, who does not resist such a finding, cannot afterwards dispute the validity of the marriage of the parties. A subsequent suit for nullity of the marriage, in which bigamy is alleged to have been in fact committed by one of the parties to it, does not, after this finding of its validity as between them, afford any exception to the general rule of estoppel.—**WOODLAND v. WOODLAND (OTHERWISE BELIN OR BARTON)**, [1928] P. 169; 97 L. J. P. 92; 139 L. T. 262; 44 T. L. R. 495; 72 Sol. Jo. 303.

**Annotations:—Consd.** Lindsay v. Lindsay, [1934] P. 162. **Refd.** Papadopoulos v. Papadoulos, [1930] P. 55.

**4773a. —.]—**Where there has been, in fact, a ceremony of marriage & there is issue, although the marriage be afterwards declared null & void, the ct. has jurisdiction, on pronouncing the decree of nullity, to make an order for the custody of the child or children of the union under the terms of Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193, & not merely an order for its, or their, care & control.—**LE MESURIER (OTHERWISE GORDON) v. LE MESURIER** (1930), 99 L. J. P. 33; 142 L. T. 496; 46 T. L. R. 203; 74 Sol. Jo. 77.

**4776a. Exclusive jurisdiction of Divorce Division.]—**In Apr. 1930, appt. petitioned for the dissolution of his marriage. His wife appeared, but did not defend the suit. On Aug. 24, 1931, after the decree had been made absolute, the wife applied to a ct. of summary jurisdiction for an order under Guardianship of Infants Act, 1886 (c. 27), s. 5, as amended by Guardianship of Infants Act, 1925 (c. 45), ss. 3 (2), 7 (1), for the custody & maintenance of a child of the marriage. It was pointed out to the Bench that the marriage of the parties had been dissolved, & that the wife having appeared was entitled under r. 34 of the Matrimonial Causes Rules, 1924, to be heard in the Divorce Ct. on questions as to the custody of children of the marriage. The chairman said: "If that is the case we think the application should be made there."

#### PART XIII. SECT. 17, SUB-SECT. 2.

**4751 i. Decree of nullity—Effect of.]—**A decree of nullity of marriage is in Manitoba a decree absolute in the first instance; therefore where a wife who had appealed from a decree of nullity applied for security for her costs & for maintenance pending the appeal:—**Held:** the Ct. of Appeal had no jurisdiction to grant the application.—**B. v. B.**, [1935] 1 W. W. R. 290; 2 D. L. R. 798; 43 Man. L. R. 123.—CAN.

**4758 i. Decree nisi—Effect of—On status of parties—Marriage undissolved.]—**A decree *nisi* in a suit for divorce does not sever the marriage tie.—**WRIGHT (OTHERWISE HARRISON) v. HARRISON**, [1932] 1 W. W. R. 592.—CAN.

**a i. — Granted when divorce decree refused.]—**Although a claim for divorce is withdrawn at the trial, ptf. is entitled to judicial separation where the evidence warrants the granting of it & justifies the ct. in disregarding a separation agreement between the parties.—**CAMRUD v. CAMRUD (Sask.)**, [1927] 4 D. L. R. 385; [1927] 2 W. W. R. 759.—CAN.

**b i. — Action for nullity.]—**The requirement as to delivery of a

judgment *nisi* in an action for annulment of marriage was not introduced into Ontario by Divorce Act (Ont.), 1930 (Can.), nor as a matter of practice by the Divorce Rules.—**WALKER v. WALKER**, [1932] 1 D. L. R. 380; O. R. 69.—CAN.

**• i. — Necessity for service.]—**A decree *nisi* in a divorce action should be promptly issued & served, whether it contains any special terms or not.—**OLIVER v. OLIVER**, [1928] 4 D. L. R. 566; [1928] 3 W. W. R. 33.—CAN.

**• ii. — Nature of.]—**A decree *nisi* for divorce is not a separate decree, it is inchoate, a step in the cause, until completed by the decree absolute.—**WINN v. WINN & FISHER**, [1938] 1 W. W. R. 674; 2 D. L. R. 475; 46 Man. L. R. 78.—CAN.

**† i. — Notice of "home"—Meaning of.]—**The usual decree of restitution of conjugal rights granted to a petitioner husband imposes, as a condition precedent to the effective service of the decree, a condition that written notice of the home to which she is to return be served on resp. wife:—**Held:** the word "home" used in such notice means the home of the petitioner in the true sense of the word. *Semble:* the

word "home" in such case means the place where petitioner usually or then resides, & may be in a boarding house or hotel.—**SUMMERS v. SUMMERS** (1935), 52 N. S. W. W. N. 60.—AUS.

#### PART XIII. SECT. 17, SUB-SECT. 3.—B.

**sg. General rule—Northern Ireland.]—**There is no jurisdiction in Northern Ireland in matrimonial proceedings to make orders affecting the immediate custody of children of the marriage either under Guardianship of Infants' Act, 1886 (c. 27), s. 7, or otherwise.—**CAREY v. CAREY**, [1935] N. I. 144.—IR.

**sj. Discretion of court.]—**Appeal from an order under Wives' & Children's Maintenance Act, 1936, by which the custody of the eldest child, a girl of eighteen, was given to the father & the custody of the younger children, six in number, was given to the mother. Appt., the father, appealed against the order because of said provision & argued that this objection involved an appeal against the judge's general finding that the wife had made out her case under the Act:—**Held:** in view of the judge's findings, his order should not be interfered with.—**WHITE v. WHITE**, [1938] 2 W. W. R. 217.—CAN.

On Apr. 11, 1932, the wife renewed her application to the justices, & a differently constituted ct. made an order giving her the custody of the child & ordering appt. to pay five shillings weekly for its maintenance while under the age of sixteen. On an application by the husband for *certiorari*:—*Held*: (1) the matter was *res judicata* by the decision of Aug. 24, 1931, whether that were regarded as a refusal to make an order from which refusal there had been no appeal, or as a decision that the matter was one which "would more conveniently be dealt with by the High Court"; (2) the jurisdiction of the Divorce Ct., when it has become seised of a matrimonial cause, is an exclusive & overriding jurisdiction, & ousts that of the justices under the Guardianship of Infants Acts.—*R. v. MIDDLESEX JJ., Ex p. BOND*, [1933] 1 K. B. 72; 102 L. J. K. B. 40; 148 L. T. 134; 96 J. P. 487; 49 T. L. R. 18; 30 L. G. R. 498; 29 Cox, C. C. 563, D. C.; *on appeal*, [1933] 2 K. B. 1, C. A.

*Annotations*:—As to (2) *Apld. Higgs v. Higgs*, [1935] P. 28; *Knott v. Knott*, [1935] P. 158.

**4776b. Effect of order—Conclusive as to legitimacy.**—*LINDSAY v. LINDSAY*, No. 5365b, *post*.

**4785a.** —.]—*MARSH v. MARSH*, No. 2602, *ante*.

**4790. Add. Annotations**:—*Refd. Bosworthick v. Bosworthick*, [1927] P. 64; *Hyman v. Hyman*, *Hughes v. Hughes* (1928), 139 L. T. 416.

**4813a. Refusal of application—Further application—Res judicata.**—A wife who had appeared to, but had not defended, her husband's petition for divorce applied, after the decree had been made absolute, to a ct. of summary jurisdiction under Guardianship of Infants Act, 1886 (c. 27), s. 5, as amended by Guardianship of Infants Act, 1925 (c. 45), for an order for the custody & maintenance of a child of the marriage. On the Bench being informed that it was open to the wife to apply for the order to the Divorce Ct. under r. 34 of Matrimonial Causes Rules, 1924, the chairman said: "If that is the case, we think the application should be made there." At a later date the wife renewed her application to a differently constituted Bench, which made the order asked for:—*Held*: the matter was *res judicata* by the earlier decision of the justices.—*R. v. MIDDLESEX JJ., Ex p. BOND*, [1933] 2 K. B. 1; 102 L. J. K. B. 432; 148 L. T. 544; 97 J. P. 130; 49 T. L. R. 247; 31 L. G. R. 169; 29 Cox, C. C. 620, C. A.

**4836a.** — Abortive trial—Discretion to make no order "at present."—A husband filed a petition for divorce, alleging adultery by his wife with a co-*resp.* The wife filed a cross-petition for judicial separation, alleging adultery & cruelty on the part of the husband, to which he pleaded condonation. At the trial the jury disagreed as to the wife's adultery, & as to condonation by her, but signified, without returning a formal verdict,

that they were prepared to find both adultery & cruelty on the part of the husband. The judge at the trial declined to enter any verdict. The Ct. of Appeal refused to do otherwise. On an application by the wife for her costs of the abortive trial, the judge refused to make any order at that stage in the proceedings:—*Held*: the refusal at that stage was a matter for the discretion of the judge, with which the Ct. of Appeal would not interfere.—*WAUDBY v. WAUDBY & BOWLAND* (1901), 84 L. T. 829; 17 T. L. R. 620; 45 Sol. Jo. 615, C. A.

*Annotation*:—*Apprvd. Grist v. Grist*, [1932] P. 1.

**4836b.** — — —.]—Notwithstanding the general rule that in proceedings between husband & wife the latter is entitled to her costs of an abortive trial before further proceedings are brought, the ct. in its discretion is entitled in such a case to reserve its decision & to say that it will make no order as to costs "at present."—*GRIST v. GRIST*, [1932] P. 1; 101 L. J. P. 1; 146 L. T. 82; 48 T. L. R. 2; 75 Sol. Jo. 725, C. A.

**4837. Add. Annotation**:—As to (2) *Refd. Darnborough v. Darnborough & Smith*, *Clare Intervening* (1926), 96 L. J. P. 24.

**4845. Add. Annotation**:—*Refd. Capron v. Capron*, [1927] P. 243.

**4848a.** — Wife's petition—Woman charged with adultery added as respondent.—If, in a wife's suit for divorce, the married woman with whom the husband is alleged to have committed adultery is made a *resp.* in the suit by an order made on summons under Jud. (Consolidation) Act, 1925 (c. 49), s. 177 (2), the ct. has power to award costs against both *resps.*, but, as regards the married woman, limited to her separate estate.—*PEPPER v. PEPPER & BAKER* (1926), 96 L. J. P. 17; 136 L. T. 224; 43 T. L. R. 1.

**4848b.** —.]—*DAVIS v. DAVIS & HELBING*, No. 3635a, *ante*.

**4864a.** — Liability to wife—Not to wife's solicitors.—(1) Where, after an order has been made for payment into ct. by the husband of a sum for securing the wife's costs of his proceedings for divorce, an order is made at the hearing extending her security, the wife is not thereby made a secured creditor for any sum in excess of the money in ct., but if she obtains an order for payment of her costs, & when taxed they exceed the money in ct., she will be entitled to recover the excess from the husband.

(2) Where in divorce proceedings the usual order is made for payment by the husband of the wife's costs to her solrs., they are not thereby made the creditors of the husband, but they are merely entitled to receive payment on behalf of the wife.

(3) On cross-petitions between a husband & wife which were consolidated, an order was made at the hearing that the husband's

**PART XIII. SECT. 18, SUB-SECT. 1.**

*sk. Order for new trial—Costs reserved.*—*GARDINER v. GARDINER*, [1935] 1 W. W. R. 181.—*CAN.*

**PART XIII. SECT. 18, SUB-SECT. 2.**

**4826 iv.** —.]—The discretion provided for by sect. 51 of Divorce & Matrimonial Causes Act, 1857, which

sect. is still in force in Manitoba, is not to be whittled down by a rule not having the force of a statute or by ct. decisions. Rule 951 of King's Bench Act, R. S. M., 1913, however, is a statutory rule, & it will only be in the exceptional cases therein provided for that the limitation mentioned in the said rule will not be applied.—*TARN v. TARN*, [1935] 3 W. W. R. 334; 43 Man. L. R. 888.—*CAN.*

**PART XIII. SECT. 18, SUB-SECT. 3.—A.**

**4851 i. Husband liable for wife's costs.**—An agreement between a husband & wife cannot derogate from the power of the ct. under rule 91 of Divorce Rules to allow the wife her necessary & proper costs in an action for divorce.—*MATROCK v. MATROCK & JAMIESON*, [1937] 2 W. W. R. 680.—*CAN.*

petition should be dismissed with costs to the wife on the issue of her adultery & an intervener was given her costs against the wife. Before the trial orders had been made under which a total sum of £340 was brought into ct. by the husband to secure the wife's costs, & at the trial in Nov. 1932, the wife obtained an order for extension of the security. On Mar. 10, 1933, an order was made for payment of the wife's costs, less the sum paid into ct., to the wife's solrs.; but the husband, having previously taken an assignment of the intervener's taxed costs, set them off against the sum he was ordered to pay & only paid the balance. The wife's solrs. then obtained a garnishee order *nisi* against the husband's bank account in respect of the amount of the set-off. Subsequently Lord MERRIVALE, P., discharged the order *nisi*. On appeal:—*Held*: the wife's solrs. were not persons who had obtained a judgment or order against the husband for recovery or payment of any sum within R. S. C., Ord. 45, r. 1, so as to be entitled to a garnishee order; & (4) they had no lien upon the costs ordered to be paid by the husband to the wife that entitled them, having regard to R. S. C., Ord. 65, r. 14, to defeat the husband's right of set-off, in the absence of a declaration under Solicitors Act, 1932 (c. 37), s. 69, giving them a charge on those costs.—*MASON v. MASON & COTTRELL*, [1933] P. 199; 102 L. J. P. 91; 149 L. T. 346; 49 T. L. R. 489, C. A.

4864b. — Effect of order.—*MASON v. MASON & COTTRELL*, No. 4864a, *ante*.

Abortive trial.—*GRIST v. GRIST*, No. 4836a, *ante*.

4866. For first catchword “ ” read “ Petition successful.”

4873a. — — — — —.]—P. v. P. (1929), 73 Sol. Jo. 144.

4879a. — — — — —.]—Although, if costs have been reasonably incurred on a wife's behalf in presenting a case of a reasonable character on a divorce petition, she is allowed her costs even if she fails, yet, if she presents a petition which ought never to have been brought, the judge has a discretion, in dismissing the petition, to refuse to grant her any costs

except such as, under the procedure of the ct., she has already received before the hearing.—*COURAGE v. COURAGE* (1931), 47 T. L. R. 395, C. A.

Annotation:—*Consd. Grist v. Grist*, [1932] P. 1.

4882a. — — — — —.]—Where a wife's petition is dismissed, the facts that security for the wife's costs has been ordered, & that the conduct of the wife's solr. is not open to censure, do not deprive the ct. of its discretion to give costs or to refuse them to the wife or to give costs against the wife.—*BALDWIN RAPER v. BALDWIN RAPER & METZ*, *BALDWIN RAPER v. BALDWIN RAPER* (1926), 42 T. L. R. 619.

4884. Add. Annotation:—As to (1) *Refd. Welton v. Welton*, [1927] P. 162.

4906. Add. Annotation:—*Consd. Grist v. Grist*, [1932] P. 1.

4909a. — To secure wife's costs—Undefended petition by wife—Subsequent defence on admission of adultery by wife.—On the abandonment by a wife of her prayer in a petition for the dissolution of her marriage, which petition was originally undefended, her husband, by leave, filed an answer alleging adultery admitted by his wife as her reason for having her prayer struck out. The registrar refused to make an order for securing the wife's costs on the fact of the wife's admission being brought to his notice. At the trial of the suit on the husband's prayer the ct. granted the husband a decree *nisi* & made an order for the wife's costs “in the ordinary way.” A difficulty arose in the interpretation of the order, inasmuch as the usual order for security had not been made:—*Held*: though solrs. acting for a wife must avail themselves of the rules in the divorce jurisdiction for securing payment of the wife's costs from the husband, in this case the husband, until his wife's admission of adultery, had desired the success of his wife's suit, & therefore the ct. directed, in the exercise of its discretion, that the husband must pay his wife's costs properly incurred up to service of the summons for leave to file an answer.—*GODDARD v. GODDARD* (1929), 140 L. T. 472; 45 T. L. R. 229; 73 Sol. Jo. 174.

4910. Add. Annotation:—*Consd. Courage v. Courage* (1931), 47 T. L. R. 395.

### PART XIII. SECT. 18, SUB-SECT. 3.—B.

r i. — — — — —.]—Although the question of costs is within the discretion of the ct., it seems to be a rule of practice that a wife found guilty of adultery who unsuccessfully appeals against the judgment should not get her costs of such appeal unless she shows special circumstances.—*WHARTON v. WHARTON & YOUNG*, [1928] S. R. Q. 351.—AUS.

r ii. — Dismissal of suit on ground of absence of jurisdiction.—*Held*: it was not competent to award expenses to a wife, where the suit had been dismissed on the ground that the ct. had no jurisdiction, & the husband had not appeared to defend.—*KELLY v. KELLY*, [1928] S. C. 43.—SCOT.

s i. — — — — — Frivolous A petition by a wife for judicial separation on the ground of cruelty having been dismissed as frivolous & vexatious:—*Held*: in the exercise of the ct.'s discretion, petitioner should not be awarded any costs.—*CHRSZCZ v. CHRSZCZ*, [1931] 1 W. W. R. 94; 39 Man. L. R. 372.—CAN.

s ii. — Discretion of judge.—The general rule governing the exercise of the trial judge's discretion under K. B. rule 623 to award costs to a wife who has unsuccessfully prosecuted a matrimonial action is that she is entitled to costs unless in his opinion her solr. had not reasonable grounds for believing that he was prosecuting a just cause. *Semble*: there should be an exception where the wife is possessed of a separate estate. The discretion given the trial judge by rule 623 to award costs to an unsuccessful wife is not dependent upon costs having been paid or secured to her under the provisions of K. B. rule 622.—*HORNBY v. HORNBY* (Sask.), [1929] 4 D. L. R. 406; 2 W. W. R. 625.—CAN.

### PART XIII. SECT. 18, SUB-SECT. 3.—C. (b).

t i. — — — — —.]—Although a divorce petition by a husband is decided in his favour, the wife is entitled to her costs, if she has had them secured & her defence has been *bond fide*.—*KNIGHT v. KNIGHT & OWENS*, [1925] 2 D. L. R. 467; [1925] 1 W. W. R. 824.—CAN.

a i. — — — — — Wife's separate estate insufficient.—Costs of resp. wife

ordered paid & secured by petitioning husband notwithstanding payment of separation allowance under deed if wife's separate estate insufficient to pay legal costs.—*DAVIES v. DAVIES* (1934), 48 B. C. R. 436.—CAN.

b i. — Costs not secured.—A wife who is unsuccessful in defending a divorce action is not entitled to costs where she has not had them secured.—*JOHNSON v. JOHNSON & ERICKSEN*, [1928] 3 W. W. R. 574.—CAN.

b ii. — — — — —.]—It is not a fixed principle in divorce actions that a wife guilty of adultery cannot recover any costs against her husband.—*DICKIE v. DICKIE*, [1931] 2 W. W. R. 463; 3 D. L. R. 110.—CAN.

b iii. — No appearance by wife.—*THOMPSON v. THOMPSON*, [1936] 2 W. W. R. 496.—CAN.

sd. Judgment re-opened by wife.—*RUTTEN v. RUTTEN & OUTLER*, [1936] 2 W. W. R. 221.—CAN.

### PART XIII. SECT. 18, SUB-SECT. 3.—D.

4910 i. Disallowance of wife's costs—Misconduct of solicitor.—It is not a sufficient ground for refusing to make



4918. *Add. Annotations*:—*Consd. Johnstone v. Johnstone*, [1929] P. 165; *Beaumont v. Beaumont*, [1933] P. 39.

4926a. ———.]—*DAVIS v. DAVIS* (1930), 74 Sol. Jo. 123.

4945. *Add. Annotation*:—*Refd. Mason v. Mason & Cottrell*, [1933] P. 199.

4948. *Add. Annotation*:—*Refd. Mason v. Mason & Cottrell*, [1933] P. 199.

4950. *Add. Annotation*:—*Refd. Mason v. Mason & Cottrell*, [1933] P. 199.

4960. *Add. Annotations*:—*Expld. P. v. P.* (1929), 73 Sol. Jo. 144. *Consd. Courage v. Courage* (1931), 47 T. L. R. 395; *Grist v. Grist*, [1932] P. 1; *Mason v. Mason & Cottrell*, [1933] P. 199.

4961. *Add. Annotation*:—*Consd. Mason v. Mason & Cottrell*, [1933] P. 199.

4963a. *Order at hearing extending security—Recovery of excess of sum in court.*—*MASON v. MASON & COTTRELL*, No. 4864a, ante.

4969a. ———.]—A jury, being unable to agree, were discharged without giving a verdict. On a second trial petitioner obtained a verdict, & a decree was pronounced, condemning co-resp. in costs, but the ct. refused to include in these costs the costs of the first trial.—*WOOD v. WOOD & STANGER* (1868), L. R. 1 P. & D. 467; 37 L. J. P. & M. 25; 18 L. T. 110; 16 W. R. 568.

4985. *Add. Annotations*:—*As to* (2) *Folld. Earl v. Earl & Kyle* (1926), 96 L. J. P. 23. *Refd. Horwood v. Statesman Publishing Co.* (1929), 98 L. J. K. B. 450.

an order against a husband for the payment of his wife's costs of a suit for divorce, whether she be petitioner or resp., that she had been unsuccessful. The true tests is whether her solr. has been guilty of improper conduct in initiating or defending the suit on her behalf.—*STRATTON v. STRATTON & PARKYN*, [1928] S. A. S. R. 245.—AUS.

PART XIII. SECT. 18, SUB-SECT. 3.—E. (b).

4918 i. *Possession of separate property entails liability.*—*ELMAN v. ELMAN*, [1930] 2 W. W. R. 295; 3 D. L. R. 1002.—CAN.

4918 ii. ———.]—*As* between the husband & the wife, in a matrimonial suit, there is no real reason why the wife should not be made to pay to her husband the costs, which her conduct has occasioned to her husband, if she has the money to do so.—*FORRESTER v. FORRESTER* (1930), 1 L. R. 57 Calc. 1350.—IND.

PART XIII. SECT. 18, SUB-SECT. 3.—F. (a).

4953 i. *Petition by husband—Wife proved innocent.*—*Held*: K. B. Rule 951 was not applicable, & full costs should be paid to the solr. of the successful wife.—*PRESTON v. PRESTON & MOXLEY*, [1925] 4 D. L. R. 1013.—CAN.

4953 ii. ———.]—K. B. Rule 951 (which imposes a limitation, unless removed by the trial judge, on the amount of party & party costs) applies to the costs awarded a wife in an unsuccessful action against her for divorce. The Divorce Rules as to costs, drawn up in 1919, should be interpreted in the light of the change in the property & other rights of married women which by that time

had come about since Divorce & Matrimonial Causes Act, 1857, & the amendments thereto prior to July 15, 1870, were passed.—*BLACK v. BLACK & STOBIE*, [1934] 1 W. W. R. 346; 42 Man. L. R. 1.—CAN.

4960 i. *Petition by husband—Wife proved guilty.*—*BOURGOIN v. BOURGOIN*, [1930] 3 D. L. R. 155; 1 W. W. R. 576; 42 B. C. R. 349.—CAN.

4960 ii. ———.]—On a husband's petitioning for divorce the answers of both resp. & co-resp. denied the adultery alleged against them. Resp.'s answer also raised the issue of petitioner's adultery. Evidence was given that on a prior petition, brought by the wife of co-resp., he had been found guilty of the adultery with the present resp. which was alleged against them in the present petition. It was found therefore that resp. herein had been guilty of adultery. It was also found that petitioner had committed adultery as alleged by resp.. The petition was, therefore, dismissed. In respect of costs:—*Held*: there was no reasonable justification for the defence denying resp.'s adultery, & therefore, the costs should be disposed of by directing, (a) taxation between party & party on the usual scale of the whole costs of resp. including her costs of all interlocutory proceedings herein not otherwise disposed of & payment of one-half thereof by the petitioner to resp.; (b) taxation of the whole costs of petitioner, not including, however, the costs which he has to pay resp., & payment of one-half thereof by the co-resp. to petitioner; & (c) resp.'s costs not to be paid until the amount of petitioner's costs payable by co-resp. as aforesaid has been paid into ct. when petitioner & resp. may apply in respect of payment out of same.—*EMERY v. EMERY & BARBOUR*, [1937] 2 W. W. R. 141.—CAN.

4985a.

—.]—Where an order has been made 'consolidating' a husband's petition for dissolution on the ground of his wife's adultery with the wife's cross petition for dissolution on the ground of the husband's cruelty & adultery, & the two suits have been tried together, the ct. has no power under Jud. (Consolidation) Act, 1925 (c. 49), s. 50, to order co-resp. to pay the costs of the wife's suit to which he was not a "party."—*EARL v. EARL & KYLE*, *EARL v. EARL* (1926), 96 L. J. P. 23; 136 L. T. 383.

4985b. *Cross charges by wife.*—If a wife makes cross charges of cruelty & of adultery with a named woman against a husband in her answer to his petition for dissolution of marriage & the cross charges fail, the woman intervening being dismissed from the suit with costs & the husband being granted a decree nisi, there is one proceeding only, & co-resp. can be condemned in the whole of the costs, including those of the intervenor.—*DARNBOROUGH v. DARNBOROUGH & SMITH* (1926), 96 L. J. P. 24; 136 L. T. 384.

5042. *Add. Annotations*:—*Folld. Walker v. Walker & Walker*, [1937] 3 All E. R. 523. *Refd. Fender v. Mildmay*, [1936] 1 K. B. 111.

5042a. — *Fresh order for costs.*—Petitioner & resp. in a suit for divorce having become reconciled after the decree nisi, the husband, petitioner, moved for the rescission of the decree nisi & for a fresh order condemning co-resp. in the taxed costs of the petition. The ct. ordered that the decree should be rescinded, the petition dismissed & co-resp. condemned in the costs of the petition as taxed without including the costs of the

PART XIII. SECT. 18, SUB-SECT. 4.—B.

i. Read now "4964 i."

4964 ii. *S. P. CROSSE v. CROSSE & HEATH* (1926), 28 W. A. L. R. 10.—AUS.

PART XIII. SECT. 18, SUB-SECT. 4.—C. (a).

xx. *Limitation to interim costs of respondent wife.*—*MILTON v. MILTON & COOK* (No. 2), [1931] 1 W. W. R. 102; 1 D. L. R. 1007.—CAN.

zz. *Co-respondent defending in forma pauperis.*—On making a decree nisi for dissolution of marriage the ct. may order a co-resp. who has defended in forma pauperis to pay petitioner's costs.—*SMALL v. SMALL*, [1931] V. L. R. 141; *Argus L. R.* 192.—AUS.

PART XIII. SECT. 18, SUB-SECT. 4.—C. (a) i.

5016 i. *Necessity for knowledge—Before liable for costs—No absolute rule.*—The liability of a co-resp. for costs depends upon the facts of the particular case. Petitioner herein was given costs against co-resp. where the judge concluded that, even if he did not know that resp. was married, he had the means of knowledge or was careless whether she was or not.—*BOURGOIN v. BOURGOIN*, [1930] 1 W. W. R. 576; 3 D. L. R. 155; 42 B. C. R. 349.—CAN.

5020 i. *Effect of knowledge—Liability of co-respondent for whole costs.*—If co-resp. knew that the woman was married & a divorce is granted, he is liable for all the costs of the proceedings, including those which the husband has been compelled to pay the wife.—*KNIGHT v. KNIGHT & OWENS*, [1925] 2 D. L. R. 467; [1925] 1 W. W. R. 824.—CAN.



hearing of the motion, the order to be subject to the filing of an affidavit of the service of it on co-resp.—*WALKER v. WALKER & WALKER*, [1937] P. 206; [1937] 3 All E. R. 523; 106 L. J. P. 103; 157 L. T. 122; 53 T. L. R. 902; 81 Sol. Jo. 613.

**5049a. — Not cited—Same name as person cited.]**

—In this petition by a wife for divorce a woman intervened who had not been served with the petition & against whom there was no charge, though her name was the same as that attributed in the petition to the woman actually cited. The ct. refused to allow the intervener her costs.—*DARNBOROUGH v. DARNBOROUGH* (1929), 141 L. T. 610; 45 T. L. R. 603; 73 Sol. Jo. 514.

**5050a. Profit costs—When ordered.]**

*GRIBBLE v. GRIBBLE* (1929), 45 T. L. R. 192; 73 Sol. Jo. 61.

*Annotation:—Consd. Jackson v. Jackson & Barwell*, [1936] 2 All E. R. 1588.

**5052a. Co-respondent with means—Whether profit costs ordered.]**

—A husband petitioner suing as a poor person claimed & was awarded damages against co-resp. Co-resp. did not contest the issue of adultery, but contested the question as to damages. Petitioner asked for an order that co-resp. should pay petitioner profit costs. It was argued that the evidence indicated that co-resp. could afford to pay costs on the ordinary footing, & that this was a special circumstance within R. S. C., Ord. 16, r. 31B (2), which enabled the ct. to make an order for the payment of profit costs:—*Held*: the fact that co-resp. had some means did not constitute a special circumstance within R. S. C., Ord. 16, r. 31B (2), & co-resp. should not be ordered to pay profit costs.—*JACKSON v. JACKSON & BARWELL*, [1936] P. 214; [1936] 2 All E. R. 1588; 105 L. J. P. 93; 155 L. T. 324; 52 T. L. R. 717; 80 Sol. Jo. 657.

**5067. Add. Annotation:—Refd. Sloggett v. Sloggett**, [1928] P. 148.

**5068. Add. Annotations:—Consd. Hyman v. Hyman, Hughes v. Hughes** (1928), 139 L. T. 416. *Refd. Statham v. Statham*, [1929] P. 131.

**5068a. Time for investigations not limited.]**

**PART XIII. SECT. 18, SUB-SECT. 5.**

**5048 i. Intervener—Married woman.]**—To justify an order, in a wife's suit for divorce, making a married woman with whom the adultery is alleged to have been committed a resp., so that if petitioner is successful an order for costs may be made against her, it is not necessary for petitioner to show more than the claim for costs in the petition & the service of a copy of the pleadings on said woman. It is not necessary to allege she has a separate estate.—*TIBBITS v. TIBBITS*, [1936] 2 W. W. R. 65; 50 B. C. R. 243.—*CAN.*

**PART XIII. SECT. 18, SUB-SECT. 7.**

**5056 i. — — — — —.]**—*ELLIOTT v. ELLIOTT (Man.)*, [1929] 4 D. L. R. 700; 3 W. W. R. 169.—*CAN.*

**5065 i. No previous application for security.]**—If, in a divorce case in Manitoba, the wife has obtained security under rule 42 & is unsuccessful at the trial, she may apply under rule 43 at such trial to bring in her actual costs of the days of the trial as if the husband had been ordered to

pay or secure them; but if she goes to trial without having previously taxed her costs against her husband, & fails, the husband will not, except in very exceptional cases, be made liable for costs.—*PRUSS v. PRUSS*, [1932] 3 W. W. R. 429; [1933] 1 D. L. R. 146; 40 Man. L. R. 577.—*CAN.*

**PART XIII. SECT. 19, SUB-SECT. 1.**

**5067 i. Power of court to direct.]**—The ct. has power to obtain the assistance of the Crown Solr.; & accordingly can allow the Crown Solr., acting under the directions of the A.-G., to take part in the hearing of a suit for the dissolution of marriage in order to place the true facts before the ct.—*COOPER v. COOPER-GILL* (1931), 48 N. S. W. N. 60.—*AUS.*

**PART XIII. SECT. 20, SUB-SECT. 1.**

**1 i. — — — — —.]**—The fact that a petitioner has committed adultery is a material fact which should be brought to the attention of the ct.; & a petitioner seeking relief, who wilfully conceals a material fact which the ct. ought

*MACKENZIE v. MACKENZIE* (1928), 72 Sol. Jo. 400.

**5070. Add. Annotation:—Consd. Sloggett v. Sloggett**, [1928] P. 148.

**5071a. Extent of duty.]**—Where the King's Proctor is investigating a certain matter at the request of the ct., & in the discharge of his duties, he wishes to interview one of the parties to a suit, there is no need for him to approach in the first place the solr. on the record representing that party.—*PAKENHAM v. PAKENHAM*, [1937] 3 All E. R. 549; 81 Sol. Jo. 652.

**5074. Add. Annotation:—Refd. Sloggett v. Sloggett**, [1928] P. 148.

**5076. Add. Annotation:—Refd. Sloggett v. Sloggett**, [1928] P. 148.

**5076a. — — — — —.]**—The intervention of &, if necessary, the calling of evidence by the King's Proctor, subject to the direction of the A.-G., in a suit for the dissolution of marriage, before decree nisi, is not limited to cases of suspected collusion.—*SLOGGETT v. SLOGGETT*, [1928] P. 148; 97 L. J. P. 71; 139 L. T. 238; 44 T. L. R. 394; 72 Sol. Jo. 192.

*Annotations:—Refd. Clarkson v. Clarkson* (1930), 143 L. T. 775; *W — —, M. J. v. W — —, H. R. W.*, [1936] 2 All E. R. 1112.

**5076b. Suppression of fact or falsehood by petitioner—Where exercise of discretion of court desired.]**—*APTED v. APTED & BLISS*, No. 3449b, *ante*.

**5078a. Intervention during adjournment—Original petition completed—Position of issue in cause list.]**—The wife petitioned for dissolution; the husband made no answer; the hearing of the petition had been adjourned for further proof, pending which the Queen's Proctor intervened, & alleged the petitioner's adultery, who took issue thereon, & the ct. allowed the proof of the original petition to be completed, & the issue as between the petitioner & Queen's Proctor to be set down for trial by a jury, retaining the same position in the cause list as the original petition.—*GETHIN v. GETHIN* (1861), 2 Sw. & Tr. 406; 31 L. J. P. M. & A. 43; 5 L. T. 363; 10 W. R. 122; 164 E. R. 1053.

**5085. Add. Annotation:—Refd. W — —, M. J. v. W — —, H. R. W., [1936] 2 All E. R. 1112.**

to know, is guilty of contempt of ct. & may be punished accordingly, & the decree nisi may, in the discretion of the ct., be rescinded. When the Solicitor-General intervenes, not on the ground of collusion, but "by reason of material facts not having been brought before the ct.," he does so as one of the public only & not in his capacity as Solicitor-General. Though it is his duty so to intervene upon the information being communicated to him, there is no jurisdiction in New Zealand to order the petitioner to pay the costs of such an intervention as the Solicitor-General is not, as Solicitor-General, entitled to costs, & regarded as one of the public, is not a party to the proceedings.

So held by REED, J., who held further, that adultery since the separation on which the decree nisi was based, with nothing more than non-disclosure to the ct. by the petitioner through ignorance of his duty to do so, was insufficient to cause the ct. to exercise its discretion adversely to him. The Judge drew attention to the fact that the law in New Zealand in respect to intervention by the Solicitor-General is practically identical with

- 5088a.** **Agreement for withdrawal of opposition—Validity.**—A husband, resp., obtained a decree *nisi* for divorce from his wife, applt. There being nothing in law or in practice in Ceylon to prevent an application for a decree absolute being made by the guilty spouse, applt. duly made an application which was opposed by resp. Applt. then agreed to pay to resp. a monthly allowance in consideration (*inter alia*) of the withdrawal of his opposition to applt.'s application. Applt. defaulted in payment of the allowance, & resp. brought an action to recover the amount due:—**Held:** (1) there was nothing in the agreement or in the circumstances under which it was entered into which would justify the ct. in holding that it had any improper object or purpose or that it was in any way contrary to public policy; (2) there was nothing in sect. 5 of Ordinance 8 of 1923, borrowed from English Married Women's Property Act, 1882, s. 1, to prevent a wife from disposing of her movable or immovable property in favour of her husband, & the amounts due under the agreement were recoverable.—**HULME-KING v. DE SILVA**, [1936] A. C. 306; [1936] 1 All E. R. 713; 105 L. J. P. C. 109; 155 L. T. 90, P. C.
- 5089.** **Add. Annotation:—****Refd.** **Fender v. Mildmay**, [1936] 1 K. B. 111.
- 5090.** **Add. Annotation:—****Consd.** **W—, M. J. v. W—, H. R. W.**, [1936] 2 All E. R. 1112.
- 5097.** **Add. Annotation:—****Refd.** **Fender v. Mildmay**, [1936] 1 K. B. 111.
- 5103.** **Add. Annotation:—****Refd.** **Apted v. Apted & Bliss**, [1930] P. 246.
- 5110.** **Add. Annotation:—****Refd.** **Woods v. Woods**, [1937] 4 All E. R. 9.
- 5112.** **Add. Annotation:—****Refd.** **Sloggett v. Sloggett**, [1928] P. 148.
- 5115.** **Add. Annotations:—****Consd.** **Bainbridge v. Bainbridge**, [1934] P. 66. **Refd.** **Apted v. Apted & Bliss**, [1930] P. 246.
- 5117a.** ——. **—.**—**APTED v. APTED & BLISS**, No. 3449b, *ante*.
- 5117b.** ——. **Effect of separation deed containing Rose v. Rose clause.**—A covenant in a deed of separation in the form in *Rose v. Rose* (1882), 7 P. D. 225, that no matrimonial offence before the deed or act of either party in relation thereto shall be pleaded, alleged or admissible in evidence, does not absolve a petitioner in subsequent proceedings, who has committed adultery before the deed, from the duty of making full disclosure to the ct. of the circumstances in which he or she asks to have exercised in his or her favour the discretionary power of the ct. to grant or withhold a decree. Although it is now established law that *inter partes* a covenant to condone & refrain from recrimination is not only not against public policy but positively beneficial, it is equally clear that no bargain of the sort can bind the ct. or limit

the scope of its discretion. Parties can contract themselves out of their rights, but it is not competent for them to contract the ct. out of its duty.

*Semble:* for these reasons a petitioner who seeks the exercise in his or her favour of the discretion of the ct. to grant a decree *nisi* of dissolution of marriage is notwithstanding the existence of a covenant of the kind in question bound to include in the petition a prayer for the exercise of the discretion & to file the usual discretion statement, & to give notice to the other spouse of any allegation of conduct on his or her part, not referred to in the pleadings, which petitioner is making by way of excuse for his or her own adultery.

—**RUSSELL v. RUSSELL**, [1935] P. 39; 104 L. J. P. 10; 152 L. T. 283; 51 T. L. R. 173; 78 Sol. Jo. 930.

- 5118.** **Add. Annotation:—****Refd.** **Bainbridge v. Bainbridge**, [1934] P. 66.

**5121a.** **Concealment as ground for refusing to exercise discretion.**—If a petitioner seeking a decree on the ground of the adultery of the resp. has himself been guilty of adultery, complete frankness in the disclosure of it is a paramount condition of the exercise of the discretion of the ct. in his favour. Although the facts are such as might warrant the exercise of the discretion, if disclosed as material facts at the hearing of the suit, their suppression then & the denial of them when set up in subsequent proceedings as cause for not making the decree absolute render the exercise of the discretion in such a case mischievous as an encouragement to perjury.—**STUART v. STUART & HOLDEN**, [1930] P. 77; 99 L. J. P. 17; 142 L. T. 359; 46 T. L. R. 132; 74 Sol. Jo. 58.

- 5124.** **Add. Annotations:—****Refd.** **Apted v. Apted & Bliss**, [1930] P. 246; **Bainbridge v. Bainbridge**, [1934] P. 66.

**5128a.** ——. **Deliberate perjury committed by a petitioner in denying his or her adultery & wilful deception of the ct. by a party asking for the exercise of its discretion to grant a decree come within the mischief of the general considerations laid down in Apted v. Apted & Bliss, No. 3449b.** This is specially the case where none of the special circumstances exist which have been held to justify the ct. in exercising its discretion. A decree *nisi* granted to a petitioning wife was rescinded on a finding on a King's Proctor's intervention that she had committed perjury in denying her own adultery with A. On a second petition by her she asked for the exercise of the discretion of the ct. in her favour in spite of the finding of adultery with A., which she again denied. She further swore that she had not committed adultery with any man. She was believed, & a decree *nisi* was again pronounced. On an intervention by the King's Proctor in the second petition she was charged with a course of adultery with B. & adultery with a man

that which was in force in England prior to 1878, & it has not been altered as has the law in England, which is now contained in Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), ss. 181, 182.—**HOPKINS v. HOPKINS** (SOLICITOR-GENERAL INTERVENING), [1933] N. Z. L. R. 1486.—**N.Z.**

**5093** 1. *King's Proctor.*—The King's

Proctor can intervene in an action for divorce in the Supreme Ct. of Alberta, & can so intervene on the ground of collusion or on the ground of material facts not brought before the ct.—**ELKOWECH v. ELKOWECH**, [1925] 4 D. L. R. 1037; [1925] 3 W. W. R. 705; *aff.* [1925] 3 D. L. R. 676; [1925] 2 W. W. R. 486.—**CAN.**

**PART XIII. SECT. 20, SUB-SECT. 3.—**  
**A.**

**ad. Decree obtained by evidence "framed up" between defendant & detective employed by petitioner.**—**Held:** the decree should be rescinded, even though neither petitioner nor her solicitor were implicated in the "frame-up."—**RUSSELL v. RUSSELL & McKenna** (No. 2) (Man.), [1937] 3 W. W. R. 397.—**CAN.**

unknown. In answer she admitted adultery with B. The intervention was allowed, & the case stood over for consideration whether after her deliberate perjury the discretion of the ct. could be exercised to allow the second decree *nisi* to stand in spite of her adultery:—*Held*: in the public interest & having regard to all the circumstances of the case, the second decree *nisi* must be rescinded.—*BAINBRIDGE v. BAINBRIDGE*, [1934] P. 66; 103 L. J. P. 19; 150 L. T. 197; 50 T. L. R. 126.

5133. *Add. Annotation*:—*Consd. Apted v. Apted & Bliss*, [1930] P. 246.

5136. *Add. Annotation*:—*Refd. Fender v. Mildmay*, [1936] 1 K. B. 111.

5138a. *Non-appearance of petitioner.*—In a suit by a husband for dissolution of marriage the Queen's Proctor intervened after a decree *nisi*, & filed a plea on which issue was joined. An order was subsequently made, that the petitioner should attend in ct. on the hearing of the issue, & upon his non-appearance when the case came on for hearing, the ct. reversed the decree, & dismissed the petition without requiring evidence in support of the plea.—*POLLACK v. POLLACK, DEANE & M'NAMARA* (1863), 34 L. J. P. M. & A. 49.

5146. *Add. Annotation*:—*As to (4) Refd. Beaumont v. Beaumont*, [1933] P. 39.

5158. *Add. Annotation*:—*As to (2) Refd. Fender v. Mildmay*, [1936] 1 K. B. 111.

5159a. *Fresh evidence disproving adultery—Notwithstanding finding of adultery.*—*CHALMERS v. CHALMERS*, No. 4763a, *ante*.

5162a. — Co-respondent not a party to intervention.]—Where a decree *nisi* of divorce was rescinded on the King's Proctor's plea, to which co-resp. was not a party, & co-resp. applied to have the damages which he had lodged in ct. paid out to him, the ct. held that it had jurisdiction to deduct therefrom the costs of the King's Proctor's intervention, but on the facts refused to allow any such deduction from the money lodged in ct., & ordered that the money be paid out to co-resp.'s solrs.—*GRAYSON v. GRAYSON & SEBRIGHT* (1930), 144 L. T. 157; 47 T. L. R. 36; 74 Sol. Jo. 803.

5163a. — — — — —.]—*HEDDERWICK v. HEDDERWICK* (1930), 74 Sol. Jo. 863.

5174a. — By holder of office for time being.]—The Queen's Proctor for the time being can sue for costs, although he was not the

Queen's Proctor during the time that such costs were incurred.—*Re RAYNER, Ex p. RAYNER* (1877), 37 L. T. 38; 25 W. R. 851.

5178. *Add. Annotation*:—*Consd. Thompson (otherwise Hulton) v. Thompson*, [1938] P. 162.

5178a. —.]—*THOMPSON (OTHERWISE HULTON) v. THOMPSON*, No. 3837a, *ante*.

5185a. *By woman named in petition.*—The woman named in a petition by a wife as having committed adultery with the husband was served with the petition with the usual notice to apply for leave to appear & intervene. She did not enter an appearance or apply for leave. The husband appeared but filed no answer. A decree was pronounced, but according to the practice named no woman. Six months elapsed & petitioner took no step to make the decree absolute, but eight months after decree *nisi* the woman named appeared as a member of the public pursuant to sect. 183 (2) of the Judicature (Consolidation) Act, 1925 (c. 49), to show cause against the decree absolute. She filed an affidavit the gist of which was an allegation of collusion between the husband & the wife & a denial of adultery. The parties to the suit traversed these allegations. On a summons to strike out her appearance raising the question whether she came within the description of "any person" in above sub-sect., because she had been named in & served with the petition, & on a comparison of the authorities in which it was held that the right of intervention was not open to the parties to the suit, & on consideration of the material sects. of the Act of 1925, replacing the former legislation:—*Held*: mere service of the petition upon her did not make her a party to the suit; but as proceedings for divorce & the nature of the evidence adduced were not matters of personal litigation merely but also of public interest, intervention after decree *nisi* was a statutory right in the public interest, & until it was exercised the woman named continued to have the character of "any person" within the sect. & could obtain leave to intervene. When she had done so her right under the sect. disappeared, because she had then by exercising her right of intervention become a party to the suit.—*W—, M. J. v. W—, H. R. W.*, [1936] P. 187; [1936] 2 All E. R. 1112; 105 L. J. P. 97; 155 L. T. 319; 52 T. L. R. 639; 80 Sol. Jo. 656.

*Annotation*:—*Refd. Woods v. Woods*, [1937] 4 All E. R. 9.

PART XIII. SECT. 20, SUB-SECT. 4.—  
A. (g) i.

so. *Onus of proof.*—Where in a suit for the dissolution of marriage upon the ground of adultery, the Crown Solr. under sect. 21 of Matrimonial Causes Act, 1899, appears to show cause why a decree *nisi* should not be made absolute upon the ground that material facts were not brought before the ct., the onus of proof is upon the Crown Solr. to prove the existence of the alleged facts, their materiality, & their non-presentation to the ct.; & upon such proof by the Crown Solr., the burden of proving the issue of adultery is then upon the party alleging adultery at the original hearing, & there is no burden upon the Crown Solr. to disprove such adultery.—*JENNER v. JENNER* (1936), 63 N. S. W. W. N. 245.—*AUS.*

PART XIII. SECT. 20, SUB-SECT. 4.—  
A. (g) ii.

so. *Unsuccessful allegation of col-*

lusion.]—If, on an intervention by the King's Proctor, the allegation of collusion fails, the practice in England, that the King's Proctor is not entitled to costs, is not necessarily applicable in the Supreme Ct. of Alberta.—*ELKOWECH v. ELKOWECH*, [1925] 4 D. L. R. 1037; [1925] 3 W. W. R. 705.—*CAN.*

sk. *Solicitor-General—Liability to pay.*—The position in New Zealand as to the costs of the Solicitor-General when he intervenes, since the enactment of sect. 23 of Statutes Amendment Act, 1936, does not differ from the position in England of the King's Proctor. The statutory discretion given by sect. 23 (1) to the ct. to make such order "as may seem just" ought to be exercised with reference to the facts of the particular case, unfettered by any supposed settled practice. The mere fact that the Solicitor-General has not acted unreasonably in intervening is not a decisive reason why costs should not be given against him;

& in the absence of some qualifying circumstances, the petitioner should recover costs from the unsuccessful intervenor. In the circumstances of this case, no costs were allowed, either to the Solicitor-General or to the petitioner.—*RADLEY v. RADLEY*, [1937] N. Z. L. R. 919; 13 N. Z. L. J. 340.—*N. Z.*

PART XIII. SECT. 21, SUB-SECT. 1.—  
B.

st. *Appeal from dismissal of petition—Security for costs.*—The Ct. of Appeal in Manitoba has jurisdiction to order that a wife, who is resp. to an appeal from the dismissal of a petition for divorce, shall be given security for her costs necessary to meet such appeal.—*BLACK v. BLACK & STOBIE* (No. 2), [1934] 1 W. W. R. 586; 3 D. L. R. 239; 42 L. Man. R. 4.—*CAN.*

sh. *Decree absolute—Remarriage of party—Expiry of time.*—Inasmuch as the time for appealing against the decree absolute had expired before the

5194a. Not King's Proctor.]—CHALMERS v. CHALMERS, No. 4763a, *ante*.

5196. Citation:—

Add "affg. S. C. sub nom. RUTHERFORD v. RUTHERFORD, [1922] P. 144, C. A."

Add. Annotations:—Consd. Croker v. Croker (1932), 48 T. L. R. 597. Refd. Sandler v. Sandler, Davies & Johnstone, [1934] P. 149; Thompson (otherwise Hulton) v. Thompson, [1938] P. 162.

5197. Add. Annotations:—Refd. Fletcher v. Fletcher, [1928] P. 20; Re Thomsett, Thomsett v. Thomsett, [1936] 3 All E. R. 649.

5199a. Power of Court of Appeal to grant—Verdict of jury set aside.]—On an appeal from an order of the Divorce Ct. dismissing a petition for divorce, the Ct. of Appeal has power under R. S. C., Ord. 58, r. 4, & R. S. C., Ord. 39, if it has before it all the necessary materials, & comes to the conclusion that the verdict of the jury finding there has been no misconduct was wrong, itself to grant a decree nisi instead of sending the case back for a new trial.—CROKER v. CROKER, [1932] P. 173; 101 L. J. P. 69; 147 L. T. 464; 48 T. L. R. 597; 76 Sol. Jo. 527, C. A.

5203. Add. Annotation:—Consd. Perkins v. Perkins, [1938] 3 All E. R. 116.

5221. Add. Annotation:—Refd. Manners v. Manners & Fortescue, [1936] 1 All E. R. 41.

5224a. ———.]—Resp. against whom a decree nisi had been pronounced for the dissolution of her marriage on the ground of her adultery after trial by a judge alone, moved before a Divisional Ct. to set aside the decree & to have the case re-heard on the alleged ground that she had not been served with the petition. The question arising under Matri-

monial Causes Rules, 1924, r. 46 whether the application should be made to the Divisional Ct. on the general terms of the rule as to re-hearing or to the Ct. of Appeal as coming within the exception reserved by the rule of an "error of the ct. at the hearing" was argued by the direction of the ct. On a general review of the practice as to re-hearing from the commencement of the matrimonial jurisdiction of the ct.:—Held: without expressly defining error of the ct. & by analogous reference to County Cts. Act, 1888 (c. 43), s. 91, & to R. S. C., Ord. 36, r. 33, the application was not within the exception as to "error of the ct." & was therefore properly entertained by the Divisional Ct.—MANNERS v. MANNERS & FORTESCUE, [1936] P. 117; [1936] 1 All E. R. 41; 105 L. J. P. 26; 154 L. T. 271; 52 T. L. R. 244; 80 Sol. Jo. 187.

5236. Add. Annotations:—Consd. Croker v. Croker (1932), 48 T. L. R. 597. Refd. Woodland v. Woodland (otherwise Berlin), [1928] P. 169.

5250. Add. Annotation:—Consd. W——, M. J. v. W——, H. R. W., [1936] 2 All E. R. 1112.

5257. Add. Annotation:—Generally, Refd. Woolf v. Woolf, [1931] P. 134.

5271a. ———.]—MILLER v. MILLER (1928), 72 Sol. Jo. 205.

5271b. Who may apply—Respondent.]—MILLER v. MILLER (1928), 72 Sol. Jo. 205.

5275. Add. Annotation:—Refd. Horniman v. Horniman, [1933] P. 95.

5275a. Dependent on subsisting marriage.]—PASTRE v. PASTRE, No. 5320b, *post*.

present action to rescind the decrees was instituted, & a new status had been acquired by petitioner remarrying & becoming, as was his present wife, entitled to the protection afforded by Divorce & Matrimonial Causes Act, 1857 (c. 85), s. 57, the decree absolute, although originally voidable, had become unassailable.—McPHERSON v. MCPHERSON, [1936] A. C. 177; 105 L. J. P. C. 41; 154 L. T. 221; 52 T. L. R. 166; 80 Sol. Jo. 91, P. C.—CAN.

sl. Practice.]—A person intervening under Divorce Rules 67-72 as a "person wishing to show cause" why a decree nisi should not be made absolute is entitled to have petitioner submit to cross-examination on the affidavit filed by him in reply to the intervener's affidavit.—USHER v. USHER & CARMICHAEL, [1938] 1 W. W. R. 42; 1 D. L. R. 311; 45 Man. L. R. 557.—CAN.

PART XIII. SECT. 21, SUB-SECT. 1.—C.

sl. Appeal from judgment for alimony—Application for stay pending payment of arrears & security for costs.]—Held: in view of r. 8 of the Ct. of Appeal Rules, & following the English cases on appeals to the Ct. of Appeal in matrimonial causes, the application must be refused. The refusal was without costs.—CHERNENKOFF v. CHERNENKOFF, [1930] 1 W. W. R. 365; 2 D. L. R. 792; 24 S. L. R. 317.—CAN.

PART XIII. SECT. 21, SUB-SECT. 3.—B. (a).

5248 II. ———.]—Birth of child.]—KEARNEY v. KEARNEY, [1933] 1 W. W. R. 650.—CAN.

sv. Refusal of trial judge to

infer adultery.]—Appeal dismissed.—HENDERSON v. HENDERSON & MCKAY, [1927] 3 D. L. R. 845; [1927] 2 W. W. R. 473; 21 Sask. L. R. 675.—CAN.

sz. Divorce obtained by fraud—Action to set aside after husband's death.]—In an action by a divorced wife to set aside the decree absolute in the divorce action on the ground that it was obtained by the perjured testimony of her husband:—Held: such an action lies & this right of action is not affected by the fact that the husband had died before the action was brought, if, at least, he left an estate & the object of the action is to enable her to have vested in her the lawful widow those rights in regard to, & that interest in, the estate which but for his alleged fraud in obtaining the divorce would have vested in her.—BLATCHFORD v. A.-G. FOR ALBERTA & VAN RUYVEN, VAN RUYVEN v. BLATCHFORD, [1931] 1 W. W. R. 445; on appeal, [1931] 1 W. W. R. 640; 2 D. L. R. 636; 25 Alta. L. R. 404.—CAN.

PART XIII. SECT. 21, SUB-SECT. 4.

sl. Action for declaration that decree void for want of jurisdiction.]—Action for a declaration that two decrees ordering judicial separation & awarding permanent alimony were null & void for lack of jurisdiction, dismissed.—CLAMAN v. CLAMAN (No. 2) (1925), 35 B. C. R. 141.—CAN.

PART XIII. SECT. 22, SUB-SECT. 1.—A.

sn. In decree of judicial separation.]—An award of permanent alimony may be made in a decree of judicial separa-

tion itself.—WEDLEY v. WEDLEY, [1925] 3 W. W. R. 46.—CAN.

sp. Effect of—Wife not debarred from filing caveat under Homesteads Act, R. S. S., 1920 (c. 69).]—Re LONNEM CAVEAT, [1926] 1 D. L. R. 279; [1926] 1 W. W. R. 134; 20 Sask. L. R. 275.—CAN.

sq. — Not defence to application for relief under Devolution of Estates Act, R. S. S., 1920 (c. 73).]—Re LONNEM CAVEAT, [1926] 1 D. L. R. 279; [1926] 1 W. W. R. 134; 20 Sask. L. R. 275.—CAN.

sr. Suit for alimony—No jurisdiction to order wife to leave husband.]—A judge awarded a wife alimony, & also expressed the opinion that it would be better for the parties to live apart for a time at least. The formal judgment contained a clause adjudging that plff. vacate the premises:—Held: the ct. has no power to order a wife to leave her husband's roof; & even if jurisdiction existed, it would not be exercised at the instance of the wife against the protest of the husband.—SCOTT v. SCOTT, [1930] 1 D. L. R. 53; 64 O. L. R. 422.—CAN.

PART XIII. SECT. 22, SUB-SECT. 1.—B.

st. Nova Scotia.]—A divorce judge in Nova Scotia has power & discretion to fix the amount of permanent alimony.—ORLANDO v. ORLANDO, [1937] 1 D. L. R. 784; 12 M. P. R. 34.—CAN.

PART XIII. SECT. 22, SUB-SECT. 1.—C.

5282. 1. After decree of judicial —CAMRUD v. CAMRUD (Sask.), [1927] 4 D. L. R. 365; [1927] 2 W. W. R. 759.—CAN.

5283. *Add. Annotation*:—*Refd. Horniman v. Horniman*, [1933] P. 95.

5317. *Add. Annotation*:—*Refd. Horniman v. Horniman*, [1933] P. 95.

5320a. — *Decree of competent court terminating marriage—Foreign court.*—*WEISS v. WEISS* (1908), cited [1930] P. 82.

*Annotation*:—*Consd. Pastre v. Pastre*, [1930] P. 80.

5320b. — *Necessity for application for discharge.*—The basis of a wife's right to receive permanent alimony from her husband is that the marriage is subsisting & that she is still a wife. If after a decree for judicial separation & an order for the payment of alimony the marriage is put an end to by the decree of a ct. of competent jurisdiction the status of the woman as wife & her consequential right to alimony have ceased to exist. The order for alimony, however, which in its common form is limited till further order, remains effective till an application is made for its discharge.—*PASTRE v. PASTRE*, [1930] P. 80; 99 L. J. P. 20; 142 L. T. 490; 46 T. L. R. 175; 74 Sol. Jo. 76.

*Annotation*:—*Folld. Mezger v. Mezger*, [1937] P. 19.

5327. *Add. Annotation*:—*Generally, Refd. Hyman v. Hyman*, [1929] A. C. 601.

5327a. — *Children in custody of wife.*—Petitioner having obtained a judicial separation from her husband by reason of his adultery, & also the custody of their two children, until the ct. should otherwise direct, presented a further petition praying the ct. to order resp. to pay to her a sum or sums of money for the past & future maintenance of the children. Resp., in answer, asked the ct. to order the children to be delivered up to his father & sister, who were quite prepared at their own costs to provide for the maintenance & education of them. The ct. refused to take the children out of the custody of their mother, & made an order upon resp. to contribute in a moderate extent to their maintenance.—*MILFORD v. MILFORD* (1869), L. R. 1 P. & D. 715; 38 L. J. P. & M. 63; 21 L. T. 155; 17 W. R. 1063.

5330a. — *Conduct of parties irrelevant.*—Upon a husband's petition for the reduction of the amount of alimony payable to a wife under an absolute order, the only material matter for the consideration of the ct. is

the ability of the husband to pay, & allegations in the petition with respect to the past conduct of the parties will be struck out as irrelevant, although the conduct of the parties is a material matter to be considered when the order for alimony is made.—*HALL v. HALL* (1914), 111 L. T. 403, C. A.

5330b. — *& wife remarried.*—(1) Where an order for maintenance has been made in favour of a wife who has obtained a decree absolute of divorce, & on a subsequent petition for reduction by the former husband it is established that his ability to pay has decreased, the effect of the wife's remarriage on her fortune may be considered in revising the quantum of maintenance.

(2) Where a maintenance order after decree absolute is expressed to be "until further order," the ct. may, if such order comes up for review, have regard to all the statutory factors available for consideration, as if on the original petition for maintenance.—*BENNETT v. BENNETT* (1934), 103 L. J. P. 38; 150 L. T. 460; 50 T. L. R. 239; 78 Sol. Jo. 155.

*Annotation*:—*As to* (1) *Refd. Perkins v. Perkins*, [1938] 3 All E. R. 116.

5332. *Add. Annotations*:—*Consd. Gandy v. Gandy* (1885), 30 Ch. D. 57. *Dtd. Hyman v. Hyman*, [1929] A. C. 601. *Refd. May v. May* (1929), 98 L. J. K. B. 770.

5335a. *Security for payment—No jurisdiction to order.*—*B. v. B.* (1929), 73 Sol. Jo. 334.

5343a. — *Issue as to adultery.*—Where an issue of adultery (not determined in the suit itself) is raised upon a petition for maintenance, permanent alimony, or periodical payments, the direction of the judge should be taken as to how the several issues in the pleadings shall be determined. In order to avoid delay by first taking an appointment before a registrar, the matter may be brought before the judge by summons.—*PRACTICE NOTICE*, [1934] W. N. 86.

*K. Enforcement of Order* (Vol. XXVII., p. 500).

After "Injunction—Restraining husband from receiving legacy" add "—Restraining husband from receiving dividends."—*See No. 5995a, post.*

*Judgment summons & committal order.*—*See BANKRUPTCY*, No. 8494a, *ante*.

#### PART XIII. SECT. 22, SUB-SECT. 1.—D. (a).

*e i.* — *On an application for permanent alimony the ct. should not recognise any right in the husband to reduce his income by retaining unsaleable & unproductive real estate & paying taxes & interest thereon; but it should be astute to frustrate an intention to make such payments the means of escaping payment of alimony.*—*NEWTON v. NEWTON* (Man.), [1927] 1 D. L. R. 756; [1927] 1 W. W. R. 106.—CAN.

*so. Jus relictas—Life-rent of husband—Liability to account.*—*SLESDON v. SLESDON* (1934), 50 T. L. R. 469; 78 Sol. Jo. 471, H. L.—SCOT.

#### PART XIII. SECT. 22, SUB-SECT. 1.—D. (c).

*e i.* — *MacINTOSH v. MacINTOSH* (N. B.), [1927] 3 D. L. R. 1190.—CAN.

*e ii.* — *Where the wife was a school teacher, the ct. awarded her one-half of the joint income less the amount of her salary.*—*NEWTON v. NEWTON* (Man.), [1927] 1 D. L. R.

756; [1927] 1 W. W. R. 106.—CAN.

*st. No fixed proportion of joint income.*—There is no fixed rule as to what proportion of the joint incomes of the husband & wife should be allowed as permanent alimony to an innocent wife. Moreover, since under Domestic Relations Act, 1927, c. 5, the amount of alimony is in the discretion of the judge, any rule based on the practice of the Ecclesiastical Courts is not applicable in Alberta.—*HARRY v. HARRY* (Alta.), [1929] 4 D. L. R. 997; 3 W. W. R. 342.—CAN.

#### PART XIII. SECT. 22, SUB-SECT. 1.—E.

*sz. Cannot be discharged by agreement.*—An order for periodical payments of alimony made in a suit for dissolution of marriage cannot be discharged by agreement.—*T. v. T.*, [1930] V. L. R. 293; 42 Argus L. R. 330.—AUS.

#### PART XIII. SECT. 22, SUB-SECT. 1.—F.

5325 *ii.* — *Facts discovered after trial.*—Amount of permanent alimony

increased on consideration of facts discovered after the trial.—*WEDLEY v. WEDLEY*, [1925] 3 W. W. R. 46.—CAN.

5328 *i.* *Reduction—Husband's means reduced.*—*MACKINNON v. MACKINNON* (1924), 58 N. S. R. 220.—CAN.

*g i.* — *Remarriage of husband.*—The mere fact that a divorced husband has married again is not such a change of circumstances as entitles him to a reduction in the amount of alimony which he was ordered to pay the first wife.—*EDWARDS v. EDWARDS*, [1938] 1 W. W. R. 880.—CAN.

#### PART XIII. SECT. 22, SUB-SECT. 1.—G.

5333 *i.* *Payment of arrears—Whether enforced.*—*PATTERSON v. PATTERSON*, [1928] 4 D. L. R. 793; 63 O. L. R. 97.—CAN.

#### PART XIII. SECT. 22, SUB-SECT. 1.—I. (f).

*st. Examination of husband as to means—No jurisdiction to order.*—*BARBOUR v. BARBOUR*, [1934] 1 W. W. R. 799; 48 B. C. R. 321.—CAN.

**5359a.** Finding against wife.]—Where a *de facto* husband obtains a decree of nullity on the ground of the incapacity of the *de facto* wife, the latter is entitled to petition for maintenance, & the ct. may order her an allowance *dum sola*, notwithstanding that her financial position as a *feme sole* is no worse than before the ceremony of marriage.—EDWARDS v. EDWARDS (OTHERWISE COWTAN), [1934] P. 84; *sub nom.* E. v. E. (OTHERWISE C.) (1934), 103 L. J. P. 37; 151 L. T. 36; 50 T. L. R. 235; 78 Sol. Jo. 137.

**5360.** Add. Annotation :—*Refd.* Fergusson v. Fergusson (1931), 146 L. T. 212.

**5360a.** On lunacy of husband.]—The jurisdiction in lunacy to appoint a receiver of the estate of a person of unsound mind does not exclude other cts. from enforcing lawful claims against his estate, including claims arising in the Divorce Div. Although the primary duty of those concerned with the care of a person of unsound mind is to apply his estate for his maintenance, & there is power under Law of Property Act, 1925 (c. 20), s. 171, to direct a settlement of the property of a lunatic or defective, the Divorce Div. is not thereby discharged from the duty of providing for the permanent maintenance of a petitioning wife out of the estate of a husband of unsound mind. When by an order in lunacy a provision has been directed for the wife during the lifetime of the husband & pending his incapacity, & the Divorce Div. approve the quantum of the order, the proper course, on application in that Div. by the wife for permanent maintenance, is to order it to be secured to her at the rate ordered in lunacy so far as the husband's means permit & without prejudice to any further order in lunacy, the security not to be enforceable pending subsistence of the order in lunacy, & should it subsist during the life of the husband not to be enforceable till his death.—C. L. v. C. F. W., [1928] P. 223; 97 L. J. P. 138.

**5362.** Add. Annotations :—*Consd.* Horniman v. Horniman, [1933] P. 95; Perkins v. Perkins, [1938] 3 All E. R. 116. *Refd.* Turk v. Turk, Duffy v. Duffy, [1931] P. 116.

**5364a.** ——— Delay.]—In allotting maintenance one of the statutory duties of the ct. is to have regard "to the conduct of the parties." If a wife obtains a decree in an undefended case it does not necessarily follow that her conduct, for example, in the matter of delay, was approved by the trial

judge. Even if the judge disapproved of the delay, he still had a discretion to pronounce the decree. In an undefended case, therefore, on allegations of unreasonable delay being made in the maintenance proceedings, sufficient evidence must be received to enable the ct. properly to determine whether the allegations are established &, if so, how if at all the conduct in question should affect the sum of money which the husband should be ordered to secure &/or to pay.—CHAPPLE v. CHAPPLE (1929), 98 L. J. P. 95; 140 L. T. 699; 45 T. L. R. 273; 73 Sol. Jo. 207.

**5365a.** Although not raised in proceedings for dissolution.]—The rule laid down in *Restall v. Restall*, No. 5376a, that it is essential that the ct. in exercising its discretion to grant permanent maintenance should have before it all relevant evidence of the conduct of the parties, extends to a case of dissolution of marriage in which there has been no defence to the original petition, although the conduct in question might have afforded possible defences which would have been an answer if pleaded.

A petition for maintenance is a proceeding separate & distinct from the original petition for dissolution. A resp. who desires to raise in answer to the petition for maintenance, as conduct of petitioner, within Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1), matters which may have afforded a defence to the original petition is not estopped by his previous failure to plead them to the original petition.—MOULD v. MOULD, [1933] P. 76; 102 L. J. P. 21; 148 L. T. 499; 49 T. L. R. 242; 77 Sol. Jo. 117.

Annotation :—*Dbtd.* Lindsay v. Lindsay, [1934] P. 162.

**5365b.** Not matters amounting to *res judicata*.]—(1) Though it is essential, as laid down in *Restall v. Restall*, No. 5376a, that in assessing maintenance for the wife the ct. should have before it all relevant evidence of the conduct of the parties before & after marriage, this rule does not allow the re-opening of an issue of fact already determined in proceedings for dissolution of marriage & consequently *res judicata*.

A petition for maintenance, though a proceeding distinct from a petition for dissolution, can nevertheless be proceeded with only as incidental to a petition for dissolution, & when the paternity of a child has not been disputed & has been established

# PART XIII. SECT. 22, SUB-SECT. 1.—K.

*sv. Order for sale of husband's land—Amount recoverable.*]—*Pltf.*, in Feb. 1924, recovered a judgment against *def.* for alimony. Payments under the judgment being in arrear, *pltf.*, in 1928, applied for an order for leave to sell *def.*'s interest in certain land in order to satisfy the arrears. It appeared that *def.* & *pltf.* had lived together as man & wife for about a month at the end of 1927. *Pltf.* swore that *def.* lived with her during this month at her parent's home, & left her early in Jan. 1928, & she had not lived with him since. *Def.* swore that his home had been & still was open for her to return to at any time, & that it was at his home that they lived together for a month :—*Held* : *pltf.* was entitled to an order for sale, but

the amount recoverable must be limited to the arrears that accrued up to Dec. 1, 1927.—PATTERSON v. PATTERSON, [1928] 4 D. L. R. 793; 63 O. L. R. 97.—CAN.

# PART XIII. SECT. 22, SUB-SECT. 2.—B.

**5360 1.** On dissolution of marriage—*For guilt of wife.*]—Divorce & Matrimonial Causes Act, 1908, s. 42, does not authorise the ct., where a decree for dissolution of marriage has been obtained by a husband against a wife, to make an order on the husband for the permanent maintenance of the wife.—HARRIS v. HARRIS, [1926] N. Z. L. R. 274.—N.Z.

p 1. ———]—The ct. has power under Divorce & Matrimonial Causes Act, 1928, s. 33 (1), to make an order pro-

viding for permanent maintenance & approving a deed securing an annuity from resp. for the life of petitioner.—BOND v. BOND, [1929] N. Z. L. R. 909.—N.Z.

p 11. ——— *Agreement for maintenance—Action on—Whether claim for future instalments abandoned.*]—In an action by a wife, who had divorced her husband, for maintenance founded upon an agreement made after the divorce :—*Held* : statements made by *pltf.*'s counsel at the trial meant that she had abandoned all claims set forth in her statement of claim except that for damages for breach of contract, & the judge awarded her a certain amount as final & complete damages for breach of contract.—COWLEY v. COWLEY, [1934] 1 W. W. R. 625; 2 D. L. R. 725; 48 B. C. R. 155.—CAN.



by a substantive order for its custody in a decree *nisi*, the paternity becomes *res judicata* & cannot be assailed in maintenance proceedings which follow.

*Qu.*: whether the principle laid down in *Mould v. Mould*, No. 5365a, that matters not pleaded in answer to a petition for dissolution though possible defences to it can be relied on in answer to maintenance proceedings, necessarily follows from the decision in *Restall v. Restall*, No. 5376a.

(2) The rules of pleading laid down by R. S. C., Ord. 19, rr. 13, 17, 19, are imported into pleadings in matrimonial causes by Matrimonial Causes Rules, 1924, r. 97, & any material fact not denied is to be treated as admitted.—*LINDSAY v. LINDSAY*, [1934] P. 162; 103 L. J. P. 100; 151 L. T. 283; *sub nom.* *L. v. L.*, 50 T. L. R. 441; 78 Sol. Jo. 472.

5366. *Add. Annotation*:—*Refd.* *Mould v. Mould* (1933), 49 T. L. R. 242.

5373. *Add. Annotation*:—*Apprvd.* *Hyman v. Hyman*, [1929] A. C. 601.

5374. *Add. Annotation*:—*As to* (1) *Apprvd.* *Hyman v. Hyman*, [1929] A. C. 601.

5375. *Add. Annotation*:—*Refd.* *Hyman v. Hyman*, *Hughes v. Hughes* (1928), 139 L. T. 416.

5376a. *Before & after marriage.*—*Held*: the words “conduct of the parties” in Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1), referred to the conduct both before & after the marriage.

A petitioner having obtained a decree absolute for nullity of marriage presented a petition under sect. 190 of the 1925 Act for permanent maintenance. Resp. in his reply made serious allegations of misconduct both before & after the marriage against petitioner. Petitioner filed an affidavit in which she dealt with the allegations of misconduct. The registrar refused leave to resp. to file a rejoinder & directed the allegations in the answer as to misconduct to be struck out. On appeal the judge confirmed the registrar's order & directed petitioner's affidavit in reply to be struck out. On appeal:—*Held*: the words “conduct of the parties” in sect. 190 (1) referred to the conduct of the parties both before & after the marriage, & in exercising its discretion under the sect. it was essential that the ct. should have before it all the relevant evidence of the conduct of the parties both before & after the marriage. Therefore, the order directing that the paragraphs in resp.'s answer containing the allegations of misconduct & the affidavit of petitioner in reply should be struck out must be set aside & leave would be given to resp. to file a rejoinder.—*RESTALL v. RESTALL*, [1930] P. 189; 99 L. J. P. 123; 143 L. T. 225; 46 T. L. R. 398; 74 Sol. Jo. 319, C. A.

*Annotations*:—*Fold.* *Mould v. Mould* (1933), 49 T. L. R. 242. *Consd.* *Lindsay v. Lindsay*, [1934] P. 162. *Refd.* *Horniman v. Horniman*, [1933] P. 95.

5380a. —.]—Consideration of the amount of permanent maintenance which a divorced husband should be ordered to pay to his former wife.

The wife must be put in the same position as she would have been in had she remained

his lawful wife (*SHEARMAN, J.*).—*HULTON v. HULTON* (1917), 33 T. L. R. 137.

5380b. — *Matters for consideration.*—The only considerations to be followed by the ct. in assessing maintenance are, first, whether there shall be any & what security for the maintenance ordered, & further, what sum if any it is reasonable to order to be paid in addition to the secured maintenance, having regard to the factors enumerated in the statute, namely, the fortune of the wife, the ability of the husband & the conduct of the parties.

A covenant by a husband to provide for his child by a former marriage may affect the ability of the husband, but is not to be regarded as a liability which is to be deducted as a matter of law from the assessable means of the husband on which the ct. has a discretion to allot reasonable maintenance.

The burden of an existing liability of the husband for costs incurred in legal proceedings between the husband & the wife may be considered under the directions of the statute as affecting the ability of the husband & also as arising out of his conduct.

A deferred liability for premiums on the purchase of a house no longer occupied as the matrimonial home of the parties is not a legal deduction from the assessable income of the husband.

In cases where security is ordered, the relative proportion of the whole of the maintenance order to the part secured is a material factor in the assessment of the maintenance. An order that a substantial portion of the maintenance shall be secured may justify an assessment at a lower total amount, secured & unsecured, of the whole maintenance.—*CHICHESTER v. CHICHESTER*, [1936] P. 129; [1936] 1 All E. R. 271; 105 L. J. P. 38; 154 L. T. 375; 52 T. L. R. 265; 80 Sol. Jo. 207.

5382. *Add. Annotations*:—*Consd.* *Perkins v. Perkins*, [1938] 3 All E. R. 116. *Refd.* *Gilbey v. Gilbey*, [1927] P. 197; *Shearn v. Shearn* (1930), 143 L. T. 772.

5382a. —.]—Although the considerations which applied in the Ecclesiastical Cts. to awards of alimony must have due weight in determining the proper award of maintenance to a wife after a decree of divorce, the assumption of a fixed arithmetical rule & an indispensable process of applying that rule is erroneous, & disregards the duty imposed on the ct. by Jud. (Consolidation) Act, 1925 (c. 49), s. 190 (1) & (2). Where the husband's whole income has been expended on the requirements of the matrimonial home, a third of his means may well be required for the wife's maintenance; but where, beyond everything called for by such requirements, the husband possesses an ample fortune, the amount of his income affords no definite guidance as to the sum required to supply his sometime wife with the necessaries, comforts, & advantages incidental to her station in life.

Where the husband's gross income was £25,337 a year, derived mainly from his interest in a business concern, the registrar by his report submitted that the husband should be ordered to secure to his wife, who had divorced him, by way of permanent



maintenance for her life, the annual sum of £3,500 less tax, & to pay to his wife during their joint lives the further annual sum of £500 less tax. The ct. confirmed the report.—*GILBEY v. GILBEY*, [1927] P. 197; 96 L. J. P. 55; 137 L. T. 31; 43 T. L. R. 283.

*Annotations*:—*Apprvd. Stibbe v. Stibbe*, [1931] P. 105 *Refd. Horniman v. Horniman*, [1933] P. 95.

**5382b.** —.]—*Resp.*, a husband, who had been divorced, re-married, & by an antenuptial settlement settled property, which included the matrimonial home & the chattels therein & the major part of his capital, on his wife *in futuro*. Petitioner, his former wife, had obtained an order for permanent maintenance of £400 a year & of £100 for her son, when resp.'s annual income was about £1,500. Subsequently, when resp.'s income, not taking into account the settlement, was about £4,500, petitioner applied for an increase in the amount of the order, on the ground that resp.'s means had increased. The registrar increased the order for permanent maintenance from £400 to £1,200 a year, less income tax, & from £100 to £150 a year, free of income tax, for the son:—*Held*: (1) resp.'s means had increased, as by sharing the advantages of the matrimonial home as of right settled upon his wife, a larger portion of the £1,500 unsettled income was left free to be dealt with by him & by the ct.; (2) the order could not be made disregarding the settlement, which subsisted; (3) an order for permanent maintenance, or an increase of it, should not be based on the income of the husband during a year of exceptional prosperity; (4) an order for permanent maintenance in such a case should not be based on the old practice of the Ecclesiastical Cts. in the case of a decree *a mensâ et thoro*, of granting to the wife one-third of the husband's available means, as the conditions arising from the two decrees were not the same, petitioner & resp. being divorced, & free to marry again; (5) in view of the increased means of the husband, having regard to the wife's fortune, the ability of the husband & the conduct of the parties, the order for permanent maintenance for the former wife should be increased from £400 a year to £750 a year, less income tax.—*N. v. N.* (1928), 138 L. T. 693; 44 T. L. R. 324; 72 Sol. Jo. 156.

**5383.** *Add. Annotations*:—*Consd. Horniman v. Horniman*, [1933] P. 95; *Perkins v. Perkins*, [1938] 3 All E. R. 116.

**5383a.** —. *No fixed proportion.*—In cases of dissolution of marriage, permanent maintenance is to be awarded on principles distinct from those governing the allotment of permanent alimony in judicial separation, which for the most part follow the practice of the Ecclesiastical Cts. Permanent maintenance is ordered pursuant to Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1), (2), on a statutable basis which gives the ct. a discretion & specifies the manner of its exercise. Considerations founded on the state of the law at the passing of Matrimonial Causes Act, 1857 (c. 85), s. 32, which gave a husband possession of his wife's property, no longer attach since the legislation which from 1870 onwards has affected the status of married women.

There is no arithmetical rule of proportion in allotting the joint income between the spouses in cases of dissolution such as may still obtain in those of judicial separation; & in fixing what amount of maintenance for the wife is reasonable, having regard to her fortune, the ability of the husband & the conduct of the parties, the ct. is solely guided by its own discretion.—*HORNIMAN v. HORNIMAN*, [1933] P. 95; 102 L. J. P. 33; 148 L. T. 572; 49 T. L. R. 245; 77 Sol. Jo. 158.

**5384.** *Add. Citations*:—[1926] P. 1; 95 L. J. P. 30; 134 L. T. 24.

*Add. Annotations*:—*Apld. May v. May* (1929), 98 L. J. K. B. 770. *Refd. Hyman v. Hyman*, *Hughes v. Hughes* (1928), 139 L. T. 416.

**5391.** *Add. Annotation*:—*Consd. Turk v. Turk*, *Duffy v. Duffy*, [1931] P. 116.

**5393.** *Add. Annotations*:—*Apld. Restall v. Restall*, [1930] P. 189. *Refd. Gilbey v. Gilbey*, [1927] P. 197.

**5393a.** —. *Wife owner of valuable jewellery.*—In fixing the amount of permanent maintenance for a wife who has obtained a decree of divorce, the registrar is entitled to take into consideration the fact that she is the owner of valuable jewellery, which could be sold so as to produce an income.—*LYSAGHT v. LYSAGHT* (1928), 44 T. L. R. 723; 72 Sol. Jo. 546.

**5396a.** *In discretion of court—No fixed principles.*—*SHERWOOD v. SHERWOOD*, No. 5498a, *post*.

**5399.** *Add. Annotation*:—*Consd. Clifton (otherwise Packe) v. Clifton*, [1936] 2 All E. R. 886.

**5399a.** —. —.]—*SHERWOOD v. SHERWOOD*, No. 5498a, *post*.

**5399b.** *Grounds for refusing—Short duration of cohabitation.*—A marriage was celebrated in June, 1934, & a petition for its annulment on the ground of the impotence of the man was filed by the woman in Apr. 1935. Resp. did not present himself for medical examination & did not defend the suit & a decree *nisi* of nullity was pronounced. Petitioner filed a petition for maintenance. Apart from settled funds the means of resp. in respect of which maintenance could be ordered amounted to about £760 *per annum*; the means of petitioner were about £420 *per annum*. Further means of resp. arose under a covenant by a third party to a marriage settlement of the parties to the suit. The ct., in confirming the report of the Registrar that no case for maintenance was made out, distinguished other cases of nullity in which maintenance had been ordered having regard to the short duration of the cohabitation in the case before it & also on the ground that the third party to the settlement from whose covenant settled funds of the husband proceeded had entered into his covenant in the expectation of a valid marriage being contracted.—*CLIFTON (OTHERWISE PACKE) v. CLIFTON*, [1936] P. 182; [1936] 2 All E. R. 886; 105 L. J. P. 87; 155 L. T. 205; 52 T. L. R. 616; 80 Sol. Jo. 555.

**5403.** *Add. Annotations*:—*Distd. Jenkins v. Jenkins* (1930), 99 L. J. P. 63. *Refd. Fanshawe v. Fanshawe*, [1927] P. 238.

5405a ———. Under Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 196—Limited to cases of restitution of conjugal rights.]—The powers conferred on the ct. by Judicature (Consolidation) Act, 1925 (c. 49), s. 196, to vary periodical payments is restricted in operation to cases of restitution of conjugal rights & does not apply to orders for alimony *pendente lite*. Where a consent order for alimony *pendente lite*, with “liberty to apply,” was made in a divorce suit when the husband resp. was & had been unfit to discuss his financial affairs with his legal advisers, the ct. held that on the application of the husband the registrar could review the order.—*ABBOTT v. ABBOTT*, [1931] P. 26 ; 100 L. J. P. 36 ; 144 L. T. 598 ; 47 T. L. R. 207 ; 75 Sol. Jo. 138 ; *affd.*, 47 T. L. R. 222, C. A.

5405b. —————.]—Maintenance for a wife which the ct. may order on the dissolution of a marriage & the jurisdiction to review an order for it are matters of discretion conferred on the ct. by statute & not standardised by the rules applying in cases of judicial separation. The jurisdiction is now embodied in the Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1), (2), & if an order for maintenance is limited “until further order,” the ct. in reviewing it should regard all the present circumstances of the case as if they had existed at the date of the original order. It may consider not only the descending income of the husband but the ascending scale of that of the wife. Even in the absence of the limitation relevant facts as to the fortune of the wife may have weight in relation to the discretionary power to review, if occasion arises under sect. 190 (2), by reason of the inability of the husband to pay. The ct. does not derive its power to review an order for maintenance from sect. 196. The Act is a consolidating, not an amending one, & the latter sect., having regard to its terminology, is limited in its operation to cases of restitution of conjugal rights.—*TURK v. TURK*, *DUFFY v. DUFFY*, [1931] P. 116; 100 L. J. P. 90; 145 L. T. 331; 47 T. L. R. 445; 75 Sol. Jo. 394; *subsequent proceedings* (1932), 147 L. T. 18.

**Annotations:**—**Expld.** *Bennett v. Bennett* (1934), 103 L. J. P. 38. **Refd.** *Perkins v. Perkins*, [1938] 3 All E. R. 116.

**5408a. — — — Statutory discretion under Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190.]—TURK v. TURK, DUFFY v. DUFFY, No. 5405b, ante.**

5406b. Order limited "until further order"—  
Circumstances to be considered as at date of  
order.]-*TURK v. TURK, DUFTY v. DUFTY*,  
No. 5405b, *ante*.

5406c. ———.]—BENNETT v. BENNETT, No.  
5330b. *ante.*

**5408. Add. Annotations:—**Consd. *Abbott v. Abbott* (1930), 100 L. J. P. 36. Refd. *Re Landau*,

*Ex p. Trustee*, [1934] Ch. 549; *Mann v. Mann*, [1936] 1 All E. R. 952.

**5409a.** ———.]—Where in an order for permanent maintenance made by consent of the parties in Sept. 1927, resp. was ordered, in para. (1), to pay to petitioner during her life a certain annual sum to be secured on settled funds, & in para. (2) to pay a further annual sum during her life to be secured by a deed of covenant, it was submitted on behalf of the resp. that in the intention of the parties the first paragraph was an order to "secure" under Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1), & that the word "pay" in the first paragraph should have been "secure." The President made a declaration to the effect that, in accordance with what was the agreement of the parties in his view, the trustees of the settled funds specified should pay the annual sum fixed under para. (1) of the order only in so far as the income was sufficient, & that this should be the limit of liability under that para.—**PHILIPSON v. PHILIPSON** (1933), 148 L. T. 455; 49 T. L. R. 235.

**5410. Add. Annotations :—***Apld.* Turk v. Turk, Duffy v. Duffy, [1931] P. 116. **Consd.** Abbott v. Abbott (1930), 100 L. J. P. 36; Smith v. Smith (1931), 145 L. T. 23; Bennett v. Bennett (1934), 103 L. J. P. 38. **Refd.** Perkins v. Perkins, [1938] 3 All E. R. 116.

5410a. ——— No provision for variation in original order.]—There is no practice whereby a consent order for maintenance, not containing words of release such as “liberty to apply,” or “until further order,” cannot be varied by petition for increase or decrease, provided that the order could have been made under the statutory powers of the ct. otherwise than by consent of the parties. Where after a lapse of eight years a husband resp. petitioned for a reduction in a consent order for maintenance, expressed to be made “unconditionally,” the registrar refused to make an inquiry on the ground that he had no power to vary such an order, as it contained no such words of release. On appeal the judge referred back the petition for investigation.—SMITH v. SMITH (1931), 145 L. T. 23; 47 T. L. R. 368; 75 Sol. Jo. 331.

**5410b. ————— Agreement not to apply to vary.]**  
—A husband & wife, after divorce, carried in an order by consent to resolve the questions between them upon a petition for permanent maintenance. The consent order provided (*inter alia*): “Neither party to be at liberty to apply to vary the terms of this order as to maintenance.” In view of a change in the wife’s circumstances, the husband petitioned for a reduction of maintenance. The wife objected that no such petition lay in view of the provisions of the consent order. A summons was taken out to determine whether

**PART XIII. SECT. 22, SUB-SECT. 2.—**  
**F.**

**5404** 1. *Jurisdiction of court.*—Where an order for maintenance has been made by the Supreme Ct. in divorce proceedings, & where such order is subsequently registered in the magistrate's ct. pursuant to Destitute Persons Amendment Act, 1926, s. 8, the Supreme Ct. has, notwithstanding such registration, sole jurisdiction to vary, modify, & suspend such order.—

WILSON v. MORRIS, [1929] N. Z. L. R. 901.—N.Z.

5410a1. *Jurisdiction of court.—To increase maintenance.*—The ct. has no jurisdiction to increase the permanent maintenance ordered to be paid by a husband, on the ground of either the increased means of the husband or the increased necessities of the wife.—*HARRIS v. HARRIS*, [1926] N. Z. L. R. 274.—N.Z.

5410a il. ———. 1—When applica-

tion is made to the ct. under Divorce & Matrimonial Causes Act, 1908, s. 46, for the revision of a decree for permanent maintenance in favour of a wife or children of the marriage, the ct. may, in the case of children, either increase or reduce the order; but the ct. has no power to increase an order for permanent maintenance made in favour of the wife under sect. 42, though it may reduce it. —BUTRON v. BURTON, [1928] N. Z. L. R. 496. —N.Z.

the petition could lie:—*Held*: inasmuch as the consent order was based upon an agreement fully & freely entered into by the parties with the intention of putting an end to any further controversy upon the subject of maintenance, the petition ought not to lie.—*LAMBERT v. LAMBERT*, [1936] 3 All E. R. 20; 80 Sol. Jo. 838.

**5410c. — To increase maintenance.]—**The power to increase the amount provided by an order for permanent maintenance upon an increase in the means of a husband conferred by Matrimonial Causes Act, 1907 (c. 12), & Jud. (Consolidation) Act, 1925 (c. 49), which repeals & re-enacts the power given by the former Act, is retrospective in its operation & extends to dealing with orders made under the previous Act, namely, Matrimonial Causes Act, 1896 (c. 32).—**EDMUNDS v. EDMUNDS**, [1926] P. 202; 95 L. J. P. 151; 138 L. T. 186.

**5410d. Order of registrar.]**—The direction given by the registrar under r. 69 of Matrimonial Causes Rules, 1924, that an order on an application for maintenance or periodical payments should issue is a decision of the registrar within the meaning of r. 45 of the same rules & is therefore appealable. If the judge on the hearing of the appeal comes to the conclusion that the direction of the registrar was wrong & ought not to have been made, he can recall the order issued in pursuance of such direction & make such order as in his judgment he deems just. The judge on the hearing of the appeal should, of course, give due weight to the decision of the registrar, & should be slow to disturb that decision on a mere question of *quantum*, unless it clearly appears from the proved facts that it would be wrong to allow the amount ordered by the registrar to be secured or paid to stand.—**STIBBE v. STIBBE**, [1931] P. 105; 100 L. J. P. 82; 144 L. T. 742. C. A.

*Annotation* :—**Consd.** *Horniman v. Horniman*, [1933] P. 95.

5411a. ———.]—TURK v. TURK, DUFFY v.  
DUFFY, No. 5405b, *ante*.

5411b.       -].—On a petition for decrease of maintenance the President had laid down, in a preliminary judgment, the principle that if a woman divorce her husband, & is granted an award of maintenance, & thereafter increases her fortune by marriage with another man or otherwise, her former husband is entitled to have her improved position taken into account when he petitions for a decrease. The petition was adjourned for reconsideration of the parties' circumstances after six months:—*Held*: in view of a considerable loss of income by the former husband owing to business depression, & the present means of his former wife, the amount of maintenance payable by him to her would be reduced from £6 to £4 a week for a year.

**5411 H.** — *Offer of home by husband.*—Where an order has been made for the maintenance by a money payment of a destitute wife by her husband, the fact that the husband is subsequently ready & willing to maintain the wife with himself in a suitable home does not afford sufficient ground under Destitute Persons Act, 1881, s. 11, for remitting the order when the husband is able to comply with the

order for payment.—**MOLLOY v. MOLLOY**, [1927] S. A. S. R. 403.—**AUS.**

5416 l. — Increase in wife's means — *Dissolution suit.* — STANTON v. NEWTON, [1928] S. R. Q. 192. — AUS.

PART XIII. SECT. 22, SUB-SECT. 2.  
—G.

a l. — *Whether included.*—(1) Where in a divorce action alimony is awarded a wife guilty of adultery the

after which period the matter would be open for review.—*DUFFY v. DUFFY* (1932), 147 L. T. 18; 48 T. L. R. 323; 76 Sol. Jo. 397.

5414a. — — — Increase in income caused by own acts.]—N. v. N., No. 5382b, *ante*.

5416a. — — —.]—TURK v. TURK, DUFFY v.  
DUFFY, No. 5405b, *ante*.

**5418b.**                      **Remarriage of wife.]**—Where a woman, who has obtained a decree absolute of divorce on the ground of her husband's adultery, marries again, such remarriage is a factor which must be taken into account in considering whether her fortune has increased. Where in fact the second husband becomes a pecuniary asset to her, & she is saved the expense of maintaining a separate establishment & therefore to some extent saves on food, rent & household expenses, the former husband is entitled to a reduction in the amount of maintenance which he is bound to pay her proportioned to her increase in fortune, in accordance with Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), s. 190, notwithstanding that his income has remained stable.—**PERKINS v. PERKINS**, [1938] P. 210; [1938] 3 All E. R. 116; 107 L. J. P. 115; 54 T. L. R. 887; 82 Sol. Jo. 524.

**5424. Add. Annotations :—***Apld. Restall v. Restall*, [1930] P. 189. *Consd. Perkins v. Perkins*, [1938] 3 All E. R. 116. *Refd. Horniman v. man*, [1933] P. 95.

**5440.** *Add. Annotation:—***Consd.** Perkins v. Perkins, [1938] 3 All E. R. 116.

5443a. — — —.]—EDWARDS v. EDWARDS  
(OTHERWISE COWTAN), No. 5359a, *ante*.

**5446. Add. Annotation :—***Reid. Fanshawe v. Fanshawe*, [1927] P. 238.

**5447. Add. Annotation :—***Reid. Fanshawe v. Fanshawe* (1927), 43 T. L. R. 666.

**5449. Add. Annotation :—***Consd. Fanshawe v. Fanshawe*, [1927] P. 238.

5450. Add the following para. & citations:—On May 8, 1924, a wife obtained a decree *nisi* on the ground of her husband's adultery, which was made absolute on Nov. 24, 1924. On Dec. 22 the wife filed her petition for permanent maintenance, & on July 1, 1925, an interim order was made at the rate of £850 *per annum* for maintenance of the wife & her child. It appeared on the inquiry as to the husband's property that he had no capital other than chattels, but he was a sculptor who had been fortunate in obtaining work in connection with certain important war memorials, the payments for which had made his income up to £2,000 a year. There was no prospect of his continuing to earn nearly so large an income in the future. In July, 1925, before any final order for maintenance had been made, the husband assigned most of the moneys so owing to him to trustees of a settlement upon his second marriage, which he entered into on July 23, 1925.

order should contain a *dum sola et casta vixerit* provision. (2) Although the law enables the ct. to order the husband to secure to a divorced wife the amount ordered to be paid to her for alimony, there is no authority, without his consent, to deprive him of his property & to order its transfer to the wife.—*OLYNK v. OLYNYK*, [1932] 1 W. W. R. 825; 2 D. L. R. 785; 26 Alta. L. R. 485.—*CAN.*

This settlement did not attempt wholly to defeat petitioner, for it set aside £1,500 to satisfy any order that might be made against him for maintenance during the following three years. On Nov. 18, 1925, the registrar made a final order for the payment of maintenance to the petitioner at the rate of £550 a year for petitioner & £100 for the child, & for security to be given by the husband for a further £150 a year for life. On cross-applications by petitioner that the security should be given for £250 a year, & to admit of this being done that the settlement by the husband on his second marriage should be set aside, & by the husband that no order should be made for security:—*Held*: by HILL, J., although the Divorce Ct. had power to restrain a resp. husband by injunction from parting with his own property in order to defeat the claims of the petitioning wife to alimony or permanent maintenance which the ct. had already ordered, it had no power to set aside an assignment of his property made by him in consideration of a second marriage, even if the result might be to defeat the claim of the petitioner to maintenance not yet actually ordered. Therefore, the marriage settlement could not be set aside, but that the order of the registrar must be varied by increasing the annual payment to £700 for the petitioner & by omitting the order on the husband to give security for £150. On appeal by petitioner;—*Held*: by the Ct. of Appeal, the order of HILL, J., must be affirmed, & it was a fatal objection to petitioner's application to set aside the settlement that neither the trustees nor the second wife were before the ct.—[1926] P. 93; 95 L. J. P. 83; 135 L. T. 1; 42 T. L. R. 413; 70 Sol. Jo. 503, C. A.

*Add. Annotations*:—*Refd.* Fanshawe v. Fanshawe, [1927] P. 238; Gilbert v. Gilbert & Boucher, [1928] P. 1.

**5452a.** — *By consent.*—The ct. has no statutory power to order the payment of a lump sum by a resp. husband after a decree absolute for dissolution of the marriage by way of permanent maintenance for the wife petitioner. Where, however, both parties consent to such a course the ct. may make a consent order for the payment of the lump sum agreed upon.—JENKINS v. JENKINS (1930), 99 L. J. P. 63; 142 L. T. 656; 46 T. L. R. 309; 74 Sol. Jo. 170.

**5452b.** — —.—Although the ct. has no power under Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190, to order a lump sum to be paid to a wife by way of permanent maintenance, if the parties consent to such a course the ct. will make a consent order carrying out an agreement for the payment of a lump sum, or lump sums, & will include in the order a condition that no further proceedings be taken without the leave of a judge.—OLDING v. OLDING (1930), 99 L. J. P. 128; 143 L. T. 310; 46 T. L. R. 539; 74 Sol. Jo. 467.

**5459a.** No present order for maintenance justified—Future justification probable.—(1) Where the ct. cannot in the circumstances prevailing at the time of the application make an order for the maintenance of the wife under Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190, but is of opinion that in the event of a

change in the circumstances such an order might properly be made at some time thereafter, the proper course is to make an order on the husband to pay a nominal monthly or weekly sum so as to keep alive the jurisdiction conferred upon the ct. by proviso (b) to sect. 190 (2); & thus enable it under that proviso to increase the periodical payments should the occasion for such an increase arise.

(2) The insertion of the words "liberty to apply" in an order for maintenance does not enable the wife at a subsequent date to make an effective application for increased maintenance should her husband's income increase, and those words, therefore, should not form part of the order.—STEPHEN v. STEPHEN, [1931] P. 197; 100 L. J. P. 86; 145 L. T. 541; 47 T. L. R. 478; 75 Sol. Jo. 442, C. A.

*Annotation*:—*As to* (2) *Consd.* Lambert v. Lambert, [1936] 3 All E. R. 20.

**5463a.** —.—]—STEPHEN v. STEPHEN, No. 5459a, *ante*.

**5468.** *Add. Annotation*:—*As to* (1) *Refd.* Shearn v. Shearn (1930), 143 L. T. 772.

**5469.** *Add. Annotation*:—*Refd.* Clifton (otherwise Packe) v. Clifton, [1936] 2 All E. R. 886.

**5469a.** What court should consider.—(1) The ct. has no power to reserve liberty to apply for security in making an order for maintenance under Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1), (2), on a decree for divorce. The insertion of such a provision would permit the conversion at a subsequent date of an order to pay maintenance into an order to secure it, & this is *ultra vires* of the statute.

(2) In considering the question of security which must thus be ordered in the first instance, if at all, the interests of both spouses are to be considered. The maintenance ordered will be secured as far as circumstances permit, but in cases where the nature of the means of the husband renders it impossible to secure the whole maintenance proper to be ordered, the question arises whether it is in the interest of the wife to order security of a part, as compulsion of the husband to realise or transfer assets in order to give security under sub-sect. (1) may hamper him in earning the income out of which he may be ordered to make payments under sub-sect. (2). The wife has no greater inherent right to security than to an order for payment simply. Her right is to present maintenance, & if the property of the husband produces no present income or if an order for security would for any reason, such as the husband's absence from the jurisdiction, be unenforceable, it is more in the wife's interest that an order for payments should be made than an order to secure.

(3) *Qu.*: whether an order to secure a lump sum can be enforced under the Administration of Justice Act, 1920 (c. 81), ss. 10, 12.—SHEARN v. SHEARN, [1931] P. 1; 100 L. J. P. 41; 143 L. T. 772; 46 T. L. R. 652; 74 Sol. Jo. 586.

*Annotations*:—*As to* (1) *Consd.* Stephen v. Stephen, [1931] p. 197. *Generally, Refd.* Chichester v. Chichester (1936) 105 L. J. P. 38.

**5471.** *Add. Annotation*:—*Consd.* Shearn v. Shearn, [1931] P. 1.

5477. *Add. Annotation*:—*Reid. Re Nelson, Norris v. Nelson* (1918), [1928] Ch. 920, n.

5480a. — *Validity of agreement.*—*Pltf. & deft.* were divorced in 1925, & an interim order for maintenance was made on Dec. 21, 1925, for payment to pltf. of £3 10s. a week. In Feb. 1927, an agreement was entered into whereby deft. was to continue to pay £182 *per annum* but the payments were to be quarterly. The agreement also provided, *inter alia*, that each party should give to the other full discharge of all sums claimed & that all actions, claims, demands at law & otherwise were withdrawn by consent. Payment fell into arrears & pltf. brought an action in the Mayor's Ct. for the amount then owing. The defence was withdrawn & judgment consented to. Payments again fell into arrears & the present action was brought in respect of them. Deft. contended that, as the agreement provided for the payment of a sum which deft. was already liable to pay, it was void for want of consideration. Pltf. replied that deft. was estopped from relying on this defence by the proceedings in the Mayor's Ct. which arose out of a breach of the same agreement:—*Held*: (1) there was no estoppel inasmuch as there was no evidence that judgment in the Mayor's Ct. was based on the agreement. It might have been consented on because the money was in any event due under the maintenance order; (2) the settlement of all accounts & claims was good consideration for the agreement & the pltf. was entitled to succeed.—*MANN v. MANN*, [1936] 1 All E. R. 952; 80 Sol. Jo. 324.

5481a. — *Application by guilty wife in undefended suit.*—Where in an undefended divorce suit the guilty wife resp. enters no appearance, but thereafter decides to apply for a compassionate allowance, she must first ask the leave of the registrar to appear in the suit, &, if such leave be given, the procedure is to be by a judge's summons for leave to file a petition for maintenance.—*FERGUSON v. FERGUSON* (1931), 146 L. T. 212; 48 T. L. R. 86; 75 Sol. Jo. 814.

5486. *Add. Annotations*:—*As to* (1) *Reid. Ferguson v. Ferguson* (1931), 146 L. T. 212; *Mould v. Mould* (1933), 49 T. L. R. 242. *As to* (3) *Consd. Legge v. Legge* (1928), 45 T. L. R. 157. *Reid. Shearn v. Shearn* (1930), 143 L. T. 772; *Stephen v. Stephen*, [1931] P. 197. *As to* (4) *Expld. Legge v. Legge* (1928), 45 T. L. R. 157.

PART XIII. SECT. 22, SUB-SECT. 2.—  
J.

*sw. Effect of resumption of cohabitation.*—An order for maintenance having been made against a husband under Marriage Act, 1915, s. 84, the husband & the wife subsequently agreed to make good their differences & live together. They accordingly cohabited for ten months, when they again separated:—*Held*: the agreement to live together & resumption of cohabitation implied an agreement by both parties that the husband should be released from his obligations under the maintenance order, & an information by the wife against the husband for failure to comply with the order was rightly dismissed.—*STOKES v. STOKES*, [1928] V. L. R. 479; [1928] Argus L. R. 351.—*AUS.*

PART XIII. SECT. 22, SUB-SECT. 2.—  
K. (a).

5486 i. *Time for presenting petition*—

— — — — —]—*LEGGE v. LEGGE* (1928), 45 T. L. R. 157; 73 Sol. Jo. 59, C. A.

*Annotation*:—*Reid. Shearn v. Shearn* (1930), 143 L. T. 772.

5487b. *The hearing*—*Issue as to adultery.*—*PRACTICE NOTE*, No. 5343a, *ante*.

5493a. — *Time for*—*After decree absolute.*—*WARWICK v. WARWICK* (1928), 73 Sol. Jo. 12, C. A.

5494. *Add. Annotation*:—*As to* (1) *Consd. Shearn v. Shearn*, [1931] P. 1.

5497a. — *Past & probable future earnings.*—*SHERWOOD v. SHERWOOD*, No. 5498a, *post*.

5498. *Add. Annotations*:—*Expld. Sherwood v. Sherwood*, [1929] P. 120. *Consd. Stibbe v. Stibbe*, [1931] P. 105; *Spilsbury v. Spofforth*, [1937] 4 All E. R. 487.

5498a. — *Amount of deduction.*—(1) In estimating the disposable income of a divorced husband after meeting his liability for taxes for the purpose of allotting permanent maintenance to his wife in future within the principle of *Dayrell-Steyning v. Dayrell-Steyning*, No. 5498, the amount of deduction from his gross income in respect of income tax & super tax is the amount of those taxes chargeable on income received during the current year.

(2) There is no fixed rule that the ct. will allow to the wife one-third of the husband's disposable income as permanent maintenance. It is no more than a rough working rule & does not impose an absolute limit. Further, in estimating the amount of the allowance the ct. must not focus its attention only on the disposable income of the husband in the year preceding the making of the order, but must have regard to his earnings in previous years & to his probable earnings in the future.

(3) In making an order for permanent maintenance the ct. is given a wide discretion by Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1), with which the Ct. of Appeal will not readily interfere unless it is satisfied that the ct. below has proceeded on some wrong principle.—*SHERWOOD v. SHERWOOD*, [1929] P. 120; 98 L. J. P. 66; 140 L. T. 230; 45 T. L. R. 53; 72 Sol. Jo. 874, C. A.

*Annotation*:—*As to* (2) *Reid. Stibbe v. Stibbe*, [1931] P. 105.

5499. *Add. Annotations*:—*Apld. Warwick v. Warwick* (1928), 73 Sol. Jo. 12. *Reid. Gilbert v. Gilbert & Bougher* (1927), 96 L. J. P. 137; *Skipwith v. Skipwith* (1928), 139 L. T. 317; *Stephen v. Stephen*, [1931] P. 197.

for maintenance.—*BEXON v. BEXON*, [1932] 3 W. W. R. 334; 46 B. C. R. 238.—*CAN.*

PART XIII. SECT. 22, SUB-SECT. 2.—  
L.

*sx. Information for disobedience of order*—*After order quashed.*—An order for maintenance made against deft. in 1923 was quashed in Feb. 1928. In May, 1928, an information for disobedience of the maintenance order prior to the date of quashing was heard, & an order was then made that deft. be imprisoned until the maintenance order should be complied with:—*Held*: the maintenance order having been quashed, the justices had no jurisdiction to inquire into any disobedience of the order alleged to have been committed before it was quashed, & consequently the information ought to have been dismissed.—*GALLOWAY v. WATSON*, [1928] V. L. R. 308; [1928] Argus L. R. 201.—*AUS.*

—*After decree*—*Within reasonable time.*]

—The wife's application for maintenance must be made within a reasonable time after the decree absolute. What is a reasonable time depends on all the circumstances of the case, the lapse of time alone not being a bar. These principles, deducible from the English cases, are applicable in New Zealand.—*POOLEY v. POOLEY*, [1936] N. Z. L. R. 598; G. L. R. 433; 12 N. Z. L. J. 198.—*N. Z.*

PART XIII. SECT. 22, SUB-SECT. 2.—  
K. (e).

5508 i. *Time for making*—*Whether after decree absolute.*—A petition under Divorce Rules 65 *et seq.* for maintenance can be entertained after the decree absolute. A resp. who has not brought alleged misconduct on the part of his wife to the attention of the ct. as a bar to her petition for divorce cannot be heard to raise it as an answer to her subsequent petition

5513a. Order securing to wife provision made by order in lunacy.]—*C. L. v. O. F. W.*, No. 5360a, *ante*.

5513b. Order giving liberty to apply—For maintenance at future date.]—*STEPHEN v. STEPHEN*, No. 5459a, *ante*.

5513c. — With regard to security.]—*SHEARN v. SHEARN*, No. 5469a, *ante*.

*L. Enforcement of Order* (Vol. XXVII., p. 513).

5513d. Whether enforceable out of jurisdiction—Under Administration of Justice Act, 1920 (c. 81), ss. 10, 12.]—*SHEARN v. SHEARN*, No. 5469a, *ante*.

5515. *Add. Annotations*:—As to (6) *Consd. Allison v. Allison*, [1927] P. 308. *Generally, Refd. Shearn v. Shearn* (1930), 143 L. T. 772.

5523a. — — —.]—Under Jud. (Consolidation) Act, 1925 (c. 49), s. 187 (2), a reversionary interest of a husband is not an asset which can form part of the security to be ordered for his periodical payments to his wife, on his non-compliance with a decree of restitution of conjugal rights.—*ALLISON v. ALLISON*, [1927] P. 308; 96 L. J. P. 181; 137 L. T. 823; 43 T. L. R. 823; 71 Sol. Jo. 682.

5529. *Add. Annotation*:—*Refd. Shearn v. Shearn* (1930), 143 L. T. 772.

5529a. — — —.]—*TURK v. TURK, DUFFY v. DUFFY*, No. 5405b, *ante*.

5531a. — Application—After decree for divorce—Mode of application.]—Upon the occasion of a wife's petition for restitution of conjugal rights the ct. ordered the husband to make certain periodical payments to her for herself & the children of the marriage. Later, the wife obtained a decree *nisi* for divorce, but as she, at the expiration of six months, made no move to have the decree made absolute, her husband applied by motion, under Jud. (Consolidation) Act, 1925 (c. 49), s. 196, to have the periodical payments suspended or discharged:—*Held*: the husband could make the application by motion, & was not constrained to apply by petition under Matrimonial Causes Rules, 1924, rr. 63 & 70.—*SKIPWITH v. SKIPWITH*, [1929] P. 93; 97 L. J. P. 109; 139 L. T. 317, C. A.

5537a. — Application—After decree for divorce—Mode of application.]—*SKIPWITH v. SKIPWITH*, No. 5531a, *ante*.

5541a. — To order settlement on husband.]—Where a wife had refused to obey a decree of restitution of conjugal rights, & was in the enjoyment of a separate income, part of which was payable under the trusts of the marriage settlement, the ct. ordered her to settle a permanent maintenance on her husband.—*SWIFT v. SWIFT* (1890), 15 P. D. 118; 59 L. J. P. 61; 62 L. T. 669.

5542a. — To order settlement where wife not domiciled in England.]—(1) The property of a guilty wife, amenable, under Jud. (Consolidation) Act, 1925 (c. 49), s. 191, to the jurisdiction to order a settlement of it, is *prima facie* the property of a woman in England & subject to English jurisdiction. That jurisdiction can be invoked against a person not domiciled in England, & in respect of property beyond the jurisdiction, only subject to the principle that English cts. will not infringe the authority of foreign tribunals in their domestic affairs, or adjudicate with regard

to property when their judgment will be ineffective. Apart from jurisdiction over property, the exercise of jurisdiction in *personam* in such a case depends upon the question whether the party to be affected by it is within the reach of the compulsory process of the ct.

(2) The provisions of Matrimonial Causes Act, 1857 (c. 85), s. 42, for service out of the jurisdiction, apply to the service of the petition in a suit, & not to proceedings for a settlement.

(3) The practice with reference to appearance to a petition for a settlement is governed by Divorce Rules, rr. 71 & 72, & (4) an appearance under these rules, qualified during the proceedings upon it, by denial of the existence of jurisdiction, is not to be regarded as a submission to that jurisdiction.—*TALLACK v. TALLACK & BROEKEMA*, [1927] P. 211; 96 L. J. K. B. 117; 137 L. T. 487; 43 T. L. R. 467; 71 Sol. Jo. 521.

*Annotations*:—As to (1) *Consd. Go2 v. Goff*, [1934] P. 107. *Refd. Shearn v. Shearn* (1930), 143 L. T. 772.

5543. *Add. Annotations*:—As to (2) *Apld. Matheson v. Matheson*, [1935] P. 171. *Generally, Refd. Tallack v. Tallack & Broekema*, [1927] P. 211.

5543a. Petition for settlement—Service—Out of jurisdiction.]—*TALLACK v. TALLACK & BROEKEMA*, No. 5542a, *ante*.

5543b. — Appearance to—Practice.]—*TALLACK v. TALLACK & BROEKEMA*, No. 5542a, *ante*.

5543c. — — — Effect of—Whether submission to jurisdiction.]—*TALLACK v. TALLACK & BROEKEMA*, No. 5542a, *ante*.

5549. *Add. Annotations*:—As to (1) *Consd. Janion v. Janion* (1926), [1929] P. 237, n. *Refd. Hargreaves v. Hargreaves*, [1926] P. 42; *Melville v. Melville & Woodward*, [1930] P. 159; *Burnett v. Burnett*, [1936] P. 1. As to (2) *Refd. Jagger v. Jagger*, [1926] P. 93.

5551. *Add. Annotation*:—*Consd. Bosworthick v. Bosworthick* (1926), 95 L. J. P. 171.

5576. *Add. Annotations*:—*Refd. Tallack v. Tallack & Broekema*, [1927] P. 211; *Matheson v. Matheson*, [1935] P. 171.

5579. *Add. Annotation*:—*Refd. Tallack v. Tallack & Broekema*, [1927] P. 211.

5582. *Add. Annotation*:—*Refd. Fanshawe v. Fanshawe*, [1927] P. 238.

5583a. — — —.]—After a decree *nisi* for dissolution of marriage the ct. has no jurisdiction under Jud. (Consolidation) Act, 1925 (c. 49), s. 192, to entertain any application for an inquiry into, & variation of, settlements until after the decree has been made absolute.—*GILBERT v. GILBERT & BOUCHER*, [1928] P. 1; 96 L. J. P. 137; 137 L. T. 619; 43 T. L. R. 589; 71 Sol. Jo. 582, C. A.

5588. *Add. Annotations*:—*N.F. Webster v. Webster & Williamson*, [1926] P. 198. *Refd. Newson v. Newson* (1934), 151 L. T. 159.

5583a. — — —.]—Although there is the fullest power to vary settlements, the ct. will regard the interests of the children as the important element for consideration in varying a settlement. Where an ante-nuptial settlement did not provide for the contingency of one of the spouses dying & the survivor marrying again, the ct., when varying the settlement after dissolution of the marriage, declined to insert in the settlement a provision enabling the husband to appoint a portion of the trust

funds to a future wife & future children.—WEBSTER v. WEBSTER & WILLIAMSON, [1926] P. 198; 95 L. J. P. 97; 135 L. T. 670.

*Annotations*:—*Distd.* Scollick v. Scollick, [1927] P. 205. *Refd.* Newson v. Newson (1934), 151 L. T. 159.

**5588b.** —.]—In varying a settlement the ct. will exercise the wide powers conferred upon it by Jud. (Consolidation) Act, 1925 (c. 49), s. 192, with regard to the facts of the case & the interests of children. If on the facts before the ct. a child of a first marriage may gain advantages concurrently with the creation of a fresh power of appointment enabling children of a second marriage to share a settled fund with it, the ct. will create that power, although it is not originally existent in the settlement, & although its creation may eventually involve some pecuniary sacrifice on the part of the child of the first marriage.—SCOLICK v. SCOLICK, [1927] P. 205; 96 L. J. P. 96; 137 L. T. 485; 71 Sol. Jo. 584.

*Annotation*:—*Consd.* Newson v. Newson (1934), 151 L. T. 159.

**5588c.** In favour of after-taken spouse & issue—Necessity for protection of existing child.]—In the exercise of its wide powers under Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), s. 192, to make orders with reference to the application of the whole or any part of property settled by an ante-nuptial or post-nuptial settlement for the benefit of the children or the parties to the marriage, the ct. may in a proper case sanction a power of appointment, not contained in the settlement, to an after-taken spouse & issue of a subsequent marriage, provided that sufficient compensating advantage for the child or children of the dissolved marriage is forthcoming. In such cases the ct. must be satisfied of a definite countervailing advantage for existing children. The extinguishment of a guilty spouse's interest & the consequent acceleration of an existing child's interest is not *per se* a sufficient *quid pro quo*, but, where substantial advantages are forthcoming, if need be by way of covenants outside the actual variation, the ct. will assent to the creation of such a new power.—NEWSON v. NEWSON; TAGART v. TAGART & WHITE (1934), 151 L. T. 159; 50 T. L. R. 399.

**5596.** *Add. Annotation*:—*Refd.* Bosworthick v. Bosworthick, [1926] P. 159.

**5596a.** —.]—*Held*: the settlements ought not to be varied beyond what was necessary for the benefit of the injured wife & her child.—PRINSEP v. PRINSEP, [1930] P. 35; 99 L. J. P. 35; 142 L. T. 172; 46 T. L. R. 29, O. A.

*Annotations*:—*Consd.* Newson v. Newson (1934), 151 L. T. 159. *Refd.* Alston v. Alston, [1929] P. 311.

**5598.** *Add. Annotation*:—*Refd.* Newson v. Newson (1934), 151 L. T. 159.

**5599.** *Add. Annotations*:—*As to* (1) *Consd.* Goff v. Goff, [1934] P. 107. *As to* (2) *Refd.* Webster v. Webster & Williamson, [1926] P. 198.

**5600.** *Add. Annotations*:—*Refd.* Webster v. Webster & Williamson, [1926] P. 198; Colclough v. Colclough & Fisher, [1933] P. 143; Newson v. Newson (1934), 151 L. T. 159; Wadham v. Wadham, [1938] 1 All E. R. 206.

**5603.** *Add. Annotation*:—*Distd.* Webb v. Webb, [1929] P. 159.

**5604.** *Add. Annotation*:—*Consd.* Goff v. Goff, [1934] P. 107.

**5610.** *Add. Annotation*:—*Refd.* Clifton (otherwise Packe) v. Clifton, [1936] 2 All E. R. 886.

**5613a.** —.]—The ct. made an order for variation of a marriage settlement at the instance of the wife, who had been found guilty of adultery, & by whom the whole property affected had been brought into settlement, disregarding the possible interests of unborn children of volunteers under the settlement. The volunteers under the settlement consented. The husband did not appear.—BOWLES v. BOWLES, [1937] P. 127; [1937] 2 All E. R. 263; 106 L. J. P. 68; 157 L. T. 45; 53 T. L. R. 503; 81 Sol. Jo. 340.

**5614.** *Add. Annotation*:—*As to* (1) *Refd.* *Re* Monro's Settlement, Monro v. Hill, [1933] Ch. 82.

**5619.** *Add. Annotation*:—*Refd.* Melvill v. Melvill & Woodward, [1930] P. 159.

**5621.** *Add. Annotation*:—*Refd.* Selsdon v. Selsdon (1934), 50 T. L. R. 469.

**5621a.** Settlement on second wife—During subsistence of first marriage.]—(1) A husband made a post-nuptial settlement on his first wife, who subsequently divorced him. He later married another woman, who also divorced him. On an application by the second wife to vary the settlement under sect. 192 of Jud. Act, 1925, the ct. held that she was not entitled to succeed as the settlement was not made because of the marriage which was the subject of the decree of divorce on the second wife's petition, but was made in contemplation of or because of the marriage between the settlor & his first wife, which was subsisting at the time of the settlement. The legislature did not intend a spouse of an existing marriage to contemplate a second marriage so as to be able to execute a settlement which was "ante-nuptial" as regards such contemplated marriage when at the time the spouse was married & incapable of entering into a second marriage.

(2) An ante-nuptial settlement made by the husband on the second wife after the first divorce was also held to be incapable of variation on the petition of the second wife, the ct. having no power under sect. 192 to vary an appointment in such a way that the principal settlement would also be varied, though that settlement was not within sect. 192.—BURNETT v. BURNETT (1935), 153 L. T. 318; 51 T. L. R. 574; 79 Sol. Jo. 642.

**5621b.** Application to vary settlement on second wife—Resulting in variation of principal settlement—No jurisdiction to vary principal settlement.]—BURNETT v. BURNETT, No. 5621a, *ante*.

**5622.** *Add. Annotations*:—*Refd.* Bosworthick v. Bosworthick, [1926] P. 159; Brown v. Brown, [1936] 2 All E. R. 1616.

**5623.** *Add. Annotations*:—*Consd.* Brown v. Brown, [1936] 2 All E. R. 1616. *Refd.* Bosworthick v. Bosworthick, [1927] P. 64.

**5623a.** — Bond to secure annuity—Appointment of annuity.]—A post-nuptial provision for his life made by a wife for her husband by a bond, or by the exercise of her power of appointment, giving him an annuity for his life expectant upon her death, are post-



nuptial settlements within Matrimonial Causes Act, 1859 (c. 61), s. 5, & Jud. (Consolidation) Act, 1925 (c. 49), s. 192, & give rise on the dissolution of the marriage to the power of the ct. to vary the settlements.—*BOSWORTHICK v. BOSWORTHICK*, [1927] P. 64; 95 L. J. P. 171; 136 L. T. 211; 42 T. L. R. 719; 70 Sol. Jo. 857, C. A.

*Annotations*:—*Apprvd. Melvill v. Melvill & Woodward*, [1930] p. 159. *Consd. Brown v. Brown*, [1936] 2 All E. R. 1616.

**5623b. — Life policy—Contingent interest in policy money.**—A life policy effected after marriage by one of the spouses on the life of the spouse effecting it, with a contingent interest of the other spouse in the policy money, is a post-nuptial settlement, & after divorce the ct. has power, under Jud. (Consolidation) Act, 1925 (c. 49), s. 192, to make orders with reference to the application of the policy money.—*GULBENKIAN v. GULBENKIAN*, [1927] P. 237; 96 L. J. P. 53; 136 L. T. 800; 43 T. L. R. 267; 71 Sol. Jo. 311.

**5624a. — Settlement not made in contemplation of marriage.**—The expression “ante-nuptial or post-nuptial settlements,” in Jud. (Consolidation) Act, 1925 (c. 49), s. 192, does not, as regards the parties whose marriage is the subject of the decree, include a settlement of the property of either spouse not made in contemplation of any particular marriage, but giving the spouse power to appoint an interest to any future wife or husband.—*HARGREAVES v. HARGREAVES*, [1926] P. 42; 95 L. J. P. 31; 134 L. T. 543; 42 T. L. R. 252.

*Annotations*:—*Consd. Melvill v. Melvill & Woodward*, [1930] p. 159. *Appld. Burnett v. Burnett*, [1936] P. 1.

**5624b. — Settlement made by wife after commencement of divorce proceedings by husband—Subsequent marriage with co-respondent.**—A resp. wife after her husband had filed a petition seeking dissolution of his marriage with her on the ground of her adultery, executed a settlement of interests to which she was entitled under a will & under the marriage settlement of her parents, & settled them on herself for life with remainder to all or any of her children or child, of whom she had two by her then husband, who being males should attain the age of twenty-one years or being females should attain that age or marry, reserving a general power of appointment by will in default of any surviving children & further reserving a power of appointment both of capital & income in favour of any surviving husband. After decree absolute she executed a deed poll, declaring that her income under the settlement should be for her separate use without power of anticipation. Shortly after the execution of the deed poll she intermarried with co-resp. in the suit:—*Held*: the settlement was a “post-nuptial settlement” made on the parties whose marriage was “the subject of the decree,” & was therefore within the definition in Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 192, of the class of instrument with which the ct. had power to deal under the sect.—*MELVILL v. MELVILL &*

*WOODWARD*, [1930] P. 159; 99 L. J. P. 65; 143 L. T. 206; 46 T. L. R. 327; 74 Sol. Jo. 233, C. A.

*Annotations*:—*Distd. Burnett v. Burnett*, [1936] P. 1. *Consd. Brown v. Brown*, [1936] 2 All E. R. 1616.

**5625a. — Questions for consideration.**—*JANION v. JANION* (1926), [1929] P. 237, n.; 98 L. J. P. 111, n.; 141 L. T. 226, n.; 45 T. L. R. 381, n.

*Annotations*:—*Follid. Prinsep v. Prinsep*, [1929] P. 225. *Consd. Alston v. Alston*, [1929] P. 311. *Distd. Burnett v. Burnett*, [1936] P. 1.

**5625b. —**—(1) In deciding whether a settlement comes within the meaning of “post-nuptial settlement” on the parties within the purview of Jud. Act, 1925 (c. 49), s. 192, the material question is whether the settlement in question is upon the husband in the character of husband or on the wife in the character of wife or upon both in the character of husband & wife. Mere form is immaterial. The settlement may be one in the strictest sense or it may be, for instance, a covenant to pay by one spouse to the other or by a third party to a spouse. What is material is that the settlement should provide financial benefit for one or other or both of the spouses as spouses & with reference to their married state. (2) In dealing with a settlement under the powers conferred by sect. 192 the ct. will not be fettered in its application of the settled funds by remote & contingent interests therein of volunteers.—*PRINSEP v. PRINSEP*, [1929] P. 225; 98 L. J. P. 105; 141 L. T. 220; 45 T. L. R. 376; 73 Sol. Jo. 429; *subsequent proceedings*, [1929] P. 265; *varied*, 46 T. L. R. 29, C. A.

*Annotations*:—*As to* (1) *Consd. Melvill v. Melvill & Woodward*, [1930] P. 159; *Colclough v. Colclough & Fisher*, [1933] P. 143. *Distd. Burnett v. Burnett*, [1936] P. 1. *Consd. Brown v. Brown*, [1936] 2 All E. R. 1616.

**5625c. —**—During coverture the petitioning wife purchased from an insurance co. an annuity to be paid to resp. husband. The co. executed a deed by which they agreed with petitioner & resp. to pay the annuity to resp. On the dissolution of the marriage on the ground of the adultery of resp., petitioner presented a petition for variation of the annuity deed as a post-nuptial settlement. The answer of resp. set up that the annuity was an absolute gift by petitioner & that no settlement had been created:—*Held*: that when petitioner paid the consideration money for the purchase of the annuity she parted with the *plenum dominium* over the property transferred, an absolute gift of the annuity was made to resp. & there was no settlement.—*BROWN v. BROWN*, [1937] P. 7; [1936] 2 All E. R. 1616; 105 L. J. P. 103; 155 L. T. 418; 53 T. L. R. 9; 80 Sol. Jo. 817.

**5629. Add. Annotation**:—*As to* (1) *Follid. Bosworthick v. Bosworthick* (1926), 95 L. J. P. 171. *Consd. Brown v. Brown*, [1936] 2 All E. R. 1616; *Dodworth v. Dale*, [1936] 2 All E. R. 440.

**5630. Add. Annotations**:—*Refld. Webster v. Webster* (1926), 135 L. T. 670; *Scollick v. Scollick* (1927), 96 L. J. P. 96; *Melvill v. Melvill & Woodward*, [1930] P. 159; *Newson v. Newson* (1934), 151 L. T. 159.

5643. *Add. Annotation*:—*As to* (1) *Consd. Hyman v. Hyman*, [1929] A. C. 601.

5650. *Add. Annotations*:—*Apld. Matheson v. Matheson*, [1935] P. 171. *Refd. Webster v. Webster & Williamson*, [1928] P. 198; *Scollick v. Scollick*, [1927] P. 205.

5650a. —.]—Upon a petition for variation of settlements the ct. refused to sanction an arrangement acquiesced in by the petitioner, by which the resp. was to be permitted to withdraw a portion of her fund for resettlement on the co-*resp.* & on her children (if any) by him; ordered provision to be made, out of the income of resp.'s fund, for the maintenance of the child of the first marriage; directed that resp.'s powers of appointment in favour of a future husband & children should be limited so as to apply only to a husband married after the death of the petitioner & to the children of such a marriage; & extinguished resp.'s power to withdraw £10,000 from settlement during her lifetime, but permitted her to retain the power to dispose of that sum by will.—*LA TERRIERE v. LA TERRIERE & GREY* (1920), 124 L. T. 575; 37 T. L. R. 97, 98; *affd.* (1921), 37 T. L. R. 671, C. A.

5653. *Add. Annotations*:—*Refd. Webster v. Webster & Williamson*, [1928] P. 198; *Colclough v. Colclough & Fisher*, [1933] P. 143; *Newson v. Newson* (1934), 151 L. T. 159.

5653a. —.]—*Jud. Act, 1925* (c. 49), s. 191 (1), which confers upon the ct. a discretionary power after a decree for divorce or judicial separation to order a settlement of the property of a wife guilty of adultery for the benefit of the innocent party & the children of the marriage or any of them, is not intended to be used as a punishment of the wife or indirectly through the wife of a co-*resp.* whom she may marry. The main question for the ct. is the nature & extent of the pecuniary prejudice caused to the husband & children of a guilty wife by the breaking away of the wife with her property from the common home; the relative financial positions of the husband & wife after divorce are also material. The object of the sect. is to enable the ct. as nearly as may be to restore the pecuniary status of the parties as existing before the termination of the married life.—*MATHESON v. MATHESON*, [1935] P. 171; 104 L. J. P. 59; 153 L. T. 299; 51 T. L. R. 570; 79 Sol. Jo. 658.

5674. *Add. Annotation*:—*Generally, Refd. Tallack v. Tallack & Broekema*, [1927] P. 211.

5680a. — — — — —.]—*ALEXANDER v. ALEXANDER* (1929), 45 T. L. R. 193; 73 Sol. Jo. 127.

5680b. — Power in favour of after-taken spouse & issue of second marriage—*Acceleration*—*Notwithstanding benefit to guilty party.*—The operation of a power in a marriage settlement for the resettlement of the trust funds of a surviving party to the marriage upon his or her after-taken spouse & the children or issue of his or her subsequent marriage may be accelerated in the event of the dissolution of the marriage so far as to become effective without actual survivorship & during the lifetime of the other party. By varying the settlement accordingly the ct. may effect this acceleration for the benefit not merely of an innocent party but

also for that of a guilty spouse on the basis (*inter alia*) of the interest of the children of the dissolved marriage, in the opinion of the ct. being adequately protected by the terms & conditions of the acceleration.—*ALSTON v. ALSTON*, [1929] P. 311; 98 L. J. P. 155; 141 L. T. 542; 45 T. L. R. 642; 73 Sol. Jo. 544.

*Annotation*:—*Consd. Colclough v. Colclough & Fisher*, [1933] P. 143.

5680c. —.]—In variation of settlement after divorce the interests of children of the dissolved marriage are a principal concern of the ct., but it is contrary to usual practice that an innocent spouse should suffer a curtailment of powers conferred by the settlement. In a case in which the settlement gave each spouse power to withdraw funds from settlement & resettle them on a second marriage in the lifetime of the other spouse, the ct. reduced the power of a guilty wife to resettle but refused to diminish the power of resettlement by an innocent husband, holding that the interest of the child of the dissolved marriage was sufficiently secured by the diminution of the powers of resettlement by the wife.—*COLCLOUGH v. COLCLOUGH & FISHER*, [1933] P. 143; 102 L. J. P. 87; 149 L. T. 287; 49 T. L. R. 434; 77 Sol. Jo. 338.

5684a. *Power of withdrawal after death of spouse—Acceleration.*—By an ante-nuptial settlement, the wife's parents brought into settlement property worth £240,000, & the husband brought in property worth £10,000. The wife was to have the income from her fund for life, & the husband the income from his fund for life. After the death of the survivor, the trustees were to hold the property brought into settlement for the children or remoter issue of the marriage as the husband & wife should jointly appoint, & in default of appointment, in trust for the children of the marriage in equal shares. The survivor of the husband & wife was given a power after the death of the other, & either in contemplation of, or after, his or her future marriage, to appoint that part of the capital should be withdrawn from the settlement, & be held upon such trusts for the benefit of the after-taken husband or wife or such survivor & the issue of such future marriage. The power of withdrawal was limited to one third part if there were two or more children of the marriage who should attain twenty-one, or, in the case of a girl, marry under that age, & was limited to a half if there should be only one such child. There were two children of the marriage, & a decree *nisi* having been made for the dissolution of the marriage upon the petition of the wife, based on the adultery of the husband, the registrar recommended: (i) that the joint power of appointment over the wife's fund should be revoked, & that the wife should exercise that power as if she had survived the husband, & no objection was taken to this; (ii) that the power of withdrawal should be exercisable forthwith by the husband or the wife as if the other had died in his or her lifetime.—*Held*: (1) if the wife should secure a sum of £250 *per annum* gross to each of the two children on attaining the age of twenty-one or on marriage, her power of withdrawal should be varied as prayed; if she failed to secure such annual sum to the children, then her power of with-

drawal should be varied as prayed, but should be limited to two-thirds of the amount which she was empowered to withdraw upon the death of the husband; (2) the husband's power of withdrawal should not be varied in any way.—*WADHAM v. WADHAM*, [1938] 1 All E. R. 206; 82 Sol. Jo. 115.

5686. *Add. Annotation*:—*Dlst. Webb v. Webb*, [1929] P. 159.

5688. *Add. Annotation*:—*Consd. Webb v. Webb* [1929] P. 159.

5688a. ————.]—By a marriage settlement the settled fund of a wife who had obtained a dissolution of the marriage was held in the absence of issue in trust, if the husband survived her, to yield him a specified income for a term with an absolute interest in a part of the corpus & subject thereto for her next of kin absolutely & if the wife survived, for her absolutely. The ct. extinguished the interest of the husband in his wife's fund, but refused to order the fund to be reconveyed to her freed from the trust for her next of kin so as to extinguish their interest.—*WEBB v. WEBB*, [1929] P. 159; 98 L. J. P. 72; 140 L. T. 592; 45 T. L. R. 223; 73 Sol. Jo. 174.

5691. *Add. Annotation*:—*Dlst. Webb v. Webb*, [1929] P. 159.

5700. *Add. Annotation*:—*Refd. Bosworthick v. Bosworthick*, [1927] P. 64.

5710. *Add. Annotation*:—*As to* (1) *Refd. Perkins v. Perkins*, [1938] 3 All E. R. 116.

5718a. *Interests of volunteers*.]—*PRINSEP v. PRINSEP*, No. 5625b, *ante*.

5730a. ————.]—*TAYLOR v. TAYLOR* (1926), 161 L. T. Jo. 236.

5733a. *Circumstances existing at date of order—Not brought to notice of court.*]—Where an order has been made for variation of settlements, the ct. has power to review it in the light of facts existing at the date of the order but not brought to the notice of the ct. at that time.—*NEWTE v. NEWTE & KEEN*, [1933] P. 117; 102 L. J. P. 44; 148 L. T. 572; 49 T. L. R. 314; 77 Sol. Jo. 235.

5751a. *Leave unnecessary.*]—(1) The intention of Matrimonial Causes Rules, 1924, r. 29A, is to extend to ancillary proceedings in matrimonial causes the power to serve them abroad without leave, which in the case of principal petitions for dissolution of marriage has existed since the passing of Matrimonial Causes Act, 1857 (c. 85), s. 42. A petition to vary a marriage settlement is such an ancillary proceeding, & R. S. C., Ord. XI., r. 8A (b), which covers it & is imported by Matrimonial Causes Rule 29A, is merely machinery for giving effect to r. 29A.

R. S. C., Ord. XI., r. 1, does not apply, & there is no such limitation on service of divorce proceedings abroad without leave as is imposed by R. S. C., Ord. XI., in the case of writs of summons.

(2) The ct. has power to set aside service abroad, if it is impossible to make an effective order on the person served. A petition to vary a settlement was served without leave in New York on American trustees of the settlement. There was expert evidence that no action could be maintained in New York on a foreign judgment against a deft. who had not been personally served within the jurisdiction of the foreign ct. pronouncing the judgment, & that the same consequence would attach even if leave had been given by the foreign ct. for service out of its jurisdiction:—*Held*: although the service was good under the rules of the English ct. if effected abroad without leave, it should nevertheless be set aside on the general ground that no effective order could result against the party served.—*GOFF v. GOFF*, [1934] P. 107; 103 L. J. P. 57; 151 L. T. 36; 50 T. L. R. 318; 78 Sol. Jo. 299.

5751b. *Service set aside—Impossibility of making effective order—Trustees out of jurisdiction.*]—*GOFF v. GOFF*, No. 5751a, *ante*.

5752. *Add. Annotation*:—*Refd. Jagger v. Jagger*, [1926] P. 93.

5754. *Add. Annotation*:—*Refd. Dodworth v. Dale*, [1936] 2 All E. R. 440.

5760a. *Hearing in camera—Whether ordered—Question involving legitimacy.*]—*ROBERTSON v. ROBERTSON & BURT, Re ISSUE, ROBERTSON v. ROBERTSON* (1928), 72 Sol. Jo. 585.

5760b. *Jurisdiction of registrar—To inquire into matters antecedent to decree absolute.*]—Where a wife had obtained a decree absolute of divorce & on her petition for variation of settlements the resp. raised the plea that it had been a collusive divorce, the registrar held that he could not inquire into such matters nor accept evidence thereon:—*Held*: on submission of the registrar's report to the president, the registrar had no jurisdiction to investigate those matters antecedent to the decree absolute.—*MORRIS v. MORRIS* (1930), 143 L. T. 776.

5760c. *Appeal from Registrar—Hearing in open court.*]—*PRACTICE NOTE*, [1938] W. N. 232.

5766. *Add. Annotation*:—*Folld. Gilbert v. Gilbert & Bouche* (1927), 43 T. L. R. 589.

5770. *Add. Annotation*:—*Refd. Bosworthick v. Bosworthick* (1926), 136 L. T. 211.

5773a. ————.]—*DAVIES v. DAVIES* (1929), 73 Sol. Jo. 569.

5781a. *Child born before marriage.*]—In a divorce

PART XIII. SECT. 22, SUB-SECT. 5.—  
D. (d).

*sz. Whether ordered—Settlor deserted.*]—By a settlement in anticipation of her marriage, a woman settled certain property on herself for life, & thereafter on certain trusts for her issue by the intended or any future marriage & in default, for such persons as the settlor should by will appoint, with ultimate remainder, on the failure of these trusts, to herself. The marriage was dissolved on the ground of the settlor's desertion. The settlor had no issue:—*Held*: under sect. 106 of Marriage Act, 1928, an order might

be made for the vesting of the property in the settlor, freed of the trusts of the settlement.—*FITCHETT v. FITCHETT*, [1936] V. L. R. 250; 42 *Argus* L. R. 232.—*AUS.*

PART XIII. SECT. 22, SUB-SECT. 6.—  
A. (a).

*sz. Children removed from jurisdiction—Order valid according to law of place of residence.*]—Where the husband is domiciled in Alberta at the time an action for divorce is begun, the Supreme Ct. of Alberta has jurisdiction in such action to make an order award-

ing the custody of the children to the mother, even though they have been removed by the father to a foreign State & are residing therein at the time of the appln. for the order: & will where the merits warrant it make such an order provided it appears that under the laws of said State the order will be recognised as valid by the cts. thereof.—*GOPORTH v. GOPORTH*, [1929] 1 D. L. R. 58; [1928] 3 W. W. R. 483.—*CAN.*

*sz. Child en ventre sa mère.*]—*K. v. K.*, [1933] 3 W. W. R. 351; 41 *Man. L. R.* 504.—*CAN.*

suit, to which only the husband & wife were parties:—*Held*: an order giving to the husband custody of the child of the parties born before the marriage must be refused, as the ct. was not competent to find the facts necessary to make the child a legitimated child by virtue of Legitimacy Act, 1926 (c. 60).—*BEDNALL v. BEDNALL & SHIVUSAWA*, [1927] P. 225; 98 L. J. P. 150; 137 L. T. 632; 43 T. L. R. 599; 71 Sol. Jo. 453.

*Annotations*:—*Folld. Green v. Green*, [1929] P. 101. *Refd. Jones v. Jones* (1929), 98 L. J. P. 74.

**5781b.** —.]—The ct. has no jurisdiction to make an order for custody in divorce proceedings, in the case of a child of the parties who was born before their marriage & had not been declared legitimate, in accordance with Legitimacy Act, 1926 (c. 60). The word "children" in Jud. (Consolidation) Act, 1925 (c. 49), s. 193, means legitimate children.

Petitioner was given the "care & control" of the child by a direction of the ct., made under the general jurisdiction of the High Ct. in respect of infants.—*GREEN v. GREEN*, [1929] P. 101; 98 L. J. P. 58; 140 L. T. 93; *sub nom. G. v. G.*, 45 T. L. R. 7; 73 Sol. Jo. 111.

*Annotations*:—*Folld. Jones v. Jones* (1929), 98 L. J. P. 74. *Refd. Re Carroll (J. M.)*, [1931] 1 K. B. 317; *Lindsay v. Lindsay*, [1934] P. 162.

**5781c.** —.]—The re-registration, as provided for in the schedule to the Legitimacy Act, 1926 (c. 60), of the birth of a child originally illegitimate, the child having become legitimate by virtue of the provisions of that Act, is not a record of a binding decision. In a divorce suit between the parents of such a child, the child is not a party, & the ct. has therefore no jurisdiction to make an order for the child's "custody," but may make an order, as thought fit, providing for its "care & control," as in the case of *Green v. Green*, No. 5781b, *ante*.—*JONES v. JONES* (1929), 98 L. J. P. 74; 140 L. T. 647; 45 T. L. R. 292; 73 Sol. Jo. 192.

**5781d.** — *Adopted child.*—The decision in *Jones v. Jones*, No. 5781c, & *Green v. Green*, No. 5781b, whereby the ct. is debarred from pronouncing, in a matrimonial cause, an order for custody of a child of the parties born before wedlock, does not apply to an adopted child, & in this undefended nullity

suit the wife petitioner was granted an order for the custody of a child adopted by the parties after the ceremony of marriage.—*MARTIN (OTHERWISE CRAWLEY) v. MARTIN* (1930), 142 L. T. 560; 46 T. L. R. 257; 74 Sol. Jo. 216.

**5781e.** To vary order of magistrate made under Guardianship of Infants Acts.]—There is power in the Divorce Division to make an order for the custody of a child of parents who are parties to a suit for divorce notwithstanding an order made by a ct. of summary jurisdiction before the suit under Guardianship of Infants Acts, 1886 (c. 27), & 1925 (c. 45), for the custody of the child. This can be done after a decree *nisi* of the Divorce Division dissolving the marriage of the parents.—*VIGON v. VIGON & KUTTNER*, [1929] P. 157; *on appeal*, [1929] P. 245; 99 L. J. P. 9; 141 L. T. 610; 45 T. L. R. 641; 27 L. G. R. 786, C. A.

*Annotation*:—*Refd. R. v. Middlesex Justices, Ex p. Bond*, [1933] 2 K. B. 1.

**5781f.** Exclusive jurisdiction of Divorce Division.]—*R. v. MIDDLESEX JJ., Ex p. BOND*, No. 4776a, *ante*.

**5792a.** — *Father's disobedience to decree for restitution of conjugal rights.*—There is no settled practice that after a husband's disobedience to a decree for restitution of conjugal rights, the custody of children should be refused to the husband or given to the complaining wife. The paramount consideration must be the welfare of the children.—*W. v. W.*, [1926] P. 111; 95 L. J. P. 56; 135 L. T. 388; 42 T. L. R. 470.

**5802a.** — *Discharge of inchoate order.*—*VIGON v. VIGON & KUTTNER*, [1929] P. 245; 99 L. J. P. 9; 141 L. T. 293; 93 J. P. 112, n., C. A.

*Annotation*:—*Refd. R. v. Middlesex Justices, Ex p. Bond*, [1933] 2 K. B. 1.

**5821a.** Applications for special payments—*Procedure.*—After a final decree of dissolution of marriage, although orders for the custody & maintenance of the children of the dissolved marriage have been made & remain in existence, the ct. has jurisdiction, under Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193 (1), to entertain applications for special payments, additional to those already ordered, in respect of the

# PART XIII. SECT. 22, SUB-SECT. 6. — A. (b).

*sf. Guilty wife.*—Although in a husband's action for divorce he was found entitled to a decree on the ground of adultery, the wife was, in view of all the circumstances, given the custody of the children & maintenance for them & herself *dum sola et casta viveret*.—*LILLIE v. LILLIE*, [1926] 1 D. L. R. 866; [1926] 1 W. W. R. 298; 20 Saak. L. R. 442.—*CAN.*

# PART XIII. SECT. 22, SUB-SECT. 6. — A. (c).

**5791 i.** *Interests of children & parents.*—A wife obtained a decree of divorce for adultery in an action which also contained a conclusion for the custody of the two pupil children of the marriage. The Lord Ordinary, regarding the question solely from the point of view of the children's welfare, awarded the custody to the father.—*Held*: (1) Guardianship of Infants Act, 1925 (c. 45), s. 1, recognised & proceeded upon the existence of rights & preferences in the spouses to the custody of their children, & its effect was

not to abolish those rights & preferences, but to provide that they should not be enforced if the result would be adverse to the children's welfare; (2) the wife, as innocent spouse, had a primary claim to the custody of the children; (3) on the facts she was, from the point of view of the children's welfare, as suitable a guardian as the father.—*HUME v. HUME*, [1926] S. C. 1008.—*SCOT.*

*sp. Which parent innocent party—Sex of child.*—In a petition presented by a wife, who had obtained divorce from her husband on the ground of his adultery, for the custody of the only child of the marriage, a girl three years of age, it appeared that each parent was in a position to provide a comfortable home & proper attention for the child.—*Held*: in a case where the homes offered by each parent were equally suitable for the material comfort of the child, the ct. was entitled, in determining the question of the child's welfare, to take into consideration (a) that the child was a girl of tender years, and (b) that the mother was the innocent party in the divorce proceed-

ings. Custody awarded to the mother.—*CHRISTISON v. CHRISTISON*, [1936] S. C. 381.—*SCOT.*

# PART XIII. SECT. 22, SUB-SECT. 6. — B.

*p i.* —.]—Adultery by a wife ought not to be regarded for all time & under all circumstances as sufficient to disentitle her to access to or even to the custody of the children. The ct. will have regard to the particular circumstances of each case, always bearing in mind that the benefit & the interest of the infant is the paramount consideration.—*BOLTON v. BOLTON*, [1928] N. Z. L. R. 473.—*N.Z.*

*sk. Order for taxation as between solicitor & client—Jurisdiction of Supreme Court of British Columbia.*—The Supreme Ct. of British Columbia has jurisdiction to order that the costs in a divorce action shall be taxed as between solicitor & client. The present case held to be a proper one in which to make such an order.—*TRUES v. TRUES & BLAKE*, [1933] 3 W. W. R. 404; 47 B. C. R. 443.—*CAN.*

children. The proper procedure is for the person having the custody of the children to proceed by way of judge's summons under Matrimonial Causes Rules, 1924, r. 73A.—*Eyre v. Eyre* (1930), 99 L. J. P. 64; 142 L. T. 560; 46 T. L. R. 268; 74 Sol. Jo. 466.

**5884a.** — *Evidence inadmissible.*—In the taxation of costs of a divorce suit in which a husband petitioner was granted a decree, the registrar allowed (*inter alia*) certain items in respect of (i) witnesses who were intended to prove that the co-resp. to the suit was the same person who had been co-resp. in an entirely disconnected suit some ten years before, & (ii) fees for leading counsel & junior counsel amounting to three figures. The suit had been defended & serious counter-charges made against the husband, but at the hearing the case was no longer contested:—*Held*: (1) a witness can only be cross-examined on the subject of adultery with regard to adultery which he has chosen to deny. Unless, therefore, co-resp. had voluntarily given evidence in disproof of the alleged earlier adultery, he could not have been cross-examined with regard to that adultery, & the items ought not to have been allowed; (2) the test, with regard to the counsel's fees, was not the time occupied at the hearing, but the time which might have been occupied and the gravity of the issues which would have been contested if the wife & co-resp. had contested the suit. In the circumstances of the case the registrar's discretion ought not to be interfered with.—*PELSTER v. PELSTER & SAMUEL*, [1936] 3 All E. R. 783; 81 Sol. Jo. 17.

**5901.** *Add. Annotation*:—*N.F. Re Hedderwick, Morten v. Brinsley*, [1933] Ch. 669.

**5902a.** — — — *Arrears of alimony pendente lite.*—(1) An order for alimony *pendente lite* made by the Divorce Ct. does not create a legal debt by the husband, but only a liability to pay, which can be enforced only by attachment under Debtors Act, 1869 (c. 62). The payment of arrears due under the order cannot, therefore, be enforced after the husband's death against his estate, & that is so whether the estate be solvent or insolvent. (2) A wife filed her petition for dissolution of marriage on Feb. 26, 1929. In the petition she confessed to certain acts of adultery & asked the ct. to exercise its discretion in her favour. On June 28, 1929, the ct. made an order for alimony *pendente lite*. The hus-

band paid alimony under the order until the end of May, 1930, but made no payment thereafter. On Aug. 1, 1930, the King's Proctor intervened, alleging that petitioner had been guilty of adultery otherwise than as disclosed in her petition. On Nov. 12, 1930, the intervention was allowed, but the petition remained on the file. The husband died in Apr. 1932:—*Held*: even if payment of the arrears due up to Nov. 12, 1930, could have been enforced against the husband's estate, the order for alimony ceased to operate on that date by reason of the finding, on which the allowance of the intervention was based, that the wife had been guilty of the undisclosed adultery.—*Re HEDDERWICK, MORTEN v. BRINSLEY*, [1933] Ch. 669; 102 L. J. Ch. 193; 149 L. T. 188; 49 T. L. R. 381.

**5904.** *Add. Annotation*:—*Refd. Beaumont v. Beaumont*, [1933] P. 39.

**5913.** *Add. Annotations*:—*Consd. Re Blanchard, Ex p. Blanchard* (1932), 101 L. J. Ch. 313. *Fold. Re Hedderwick, Morten v. Brinsley*, [1933] Ch. 669.

**5914.** *Add. Annotation*:—*Refd. Re Hedderwick, Morten v. Brinsley*, [1933] Ch. 669.

**5915.** *Add. Annotation*:—*Consd. Gower v. Gower*, [1938] P. 106.

**5927.** *Add. Annotation*:—*Consd. Cotton v. Heyl*, [1930] 1 Ch. 510.

**5957a.** — — — *Process of sequestration in the Divorce Ct. is governed by Matrimonial Causes Rules, 1924, r. 79 (a), & not by R. S. C., Ord. 43, r. 6. According to the former a writ of sequestration is a remedy for non-payment of a sum of money at the time appointed, & is appropriate to the case of non-payment of an instalment of alimony. If it is contended that the issue of the writ would be futile or unreasonable by reason of the absence of available assets, the onus lies upon the party against whom relief is sought to establish that fact.*—*CAPRON v. CAPRON*, [1927] P. 243; 96 L. J. P. 151; 137 L. T. 568; 43 T. L. R. 667; 71 Sol. Jo. 711.

**5959.** *After this case add*  
“—*See, also, EXECUTION*, Vol. XXI., p. 594, Nos. 1751–1758.”

**5965.** *Add. Annotation*:—*Refd. Mann v. Mann*, [1936] 1 All E. R. 952.

**5968.** *Add. Annotations*:—*As to (1) Refd. Allison v. Allison*, [1927] P. 308; *Burrowes v. Burrowes* (1929), 141 L. T. 201.

#### PART XIII. SECT. 23, SUB-SECT. 3.—A.

**c i.** —.—*—*—An order for *interim* alimony may be enforced by execution.—*McCLUSKY v. McCLUSKY*, [1925] 2 W. W. R. 649.—CAN.

#### PART XIII. SECT. 23, SUB-SECT. 3.—B. (a).

**5912 iv.** —.—*—*—An order for the payment of alimony is an order for the payment of money within Divorce Rule 79 (a) & enforceable as such pursuant to said rule; it is not enforceable by attachment for contempt for non-compliance therewith.—*MACPHERSON v. MACPHERSON*, [1933] 1 W. W. R. 199; 46 B. C. R. 436.—CAN.

**5912 v.** —.—*—*—*K. B. Rule 755*, which provides for the making of an order that a judgment debtor pay the judgment debt within a certain time & which also provides that if afterwards the judgment debtor fails to make the payment so ordered, the ct.

or judge may, on a subsequent application, unless the debtor shows good cause to the contrary, order the debtor to be committed to gaol, applies to orders for permanent alimony. Therefore there is no jurisdiction to order the issue of a writ of attachment for non-payment of alimony where the second order referred to in said rule has not been obtained.—*ASHWIN v. ASHWIN*, [1934] 1 W. W. R. 641; 2 D. L. R. 763; 42 Man. L. R. 8.—CAN.

**5913 i.** —.—*Debtors (Ireland) Act, 1872 (c. 57).*—Resp. was ordered to pay to petitioner, alimony *pendente lite*, payments to be made weekly. Petitioner brought a summons for an order that debt. should be committed to prison for failing to pay such weekly instalments:—*Held*: payment of alimony *pendente lite* can be enforced by imprisonment under Debtors (Ireland) Act, 1872, s. 6, & such imprisonment can be awarded, in one order, in respect of default in payment

of more than one instalment.—*TEES v. TEES*, [1930] N. I. 156.—IR.

**5918 i.** *Costs.*—*FITZPATRICK v. FITZPATRICK*, [1934] 3 W. W. R. 734.—CAN.

#### PART XIII. SECT. 23, SUB-SECT. 3.—D.

**k i.** —.—*Non-payment of costs by co-respondent.*—*WEINBAUM v. WEINBAUM*, [1934] 1 W. W. R. 144.—CAN.

#### PART XIII. SECT. 23, SUB-SECT. 3.—E.

**n i.** —.—*—*—*MACPHERSON v. MACPHERSON* (No. 2), [1933] 1 W. W. R. 464.—CAN.

**sa.** *Order for maintenance.*—*A garnishee order cannot be obtained to enforce an order made under rule 69 (c) of Divorce Rules, 1926, for payments for maintenance.*—*THOMPSON v. THOMPSON*, [1933] 3 W. W. R. 511; 48 B. C. R. 68.—CAN.

5971. *Add. Annotation* :—*Consd. Re Landau, Ex p. Trustee*, [1934] Ch. 549.

5980. *Add. Annotation* :—*Consd. Burrowes v. Burrowes* (1929), 141 L. T. 201.

5984a. ——— & maintenance.—Husband in prison for non-payment of costs.]—A wife obtained against her husband an order for restitution of conjugal rights, followed by an order for maintenance, & an order for costs against the husband. In default of payment of these costs an order was made for payment within 14 days & on further default, the husband, who had considerable means, was committed to prison. The wife applied for the appointment of a receiver of certain property belonging to the husband & for an order that the receiver should use the proceeds thereof in payment of the arrears of maintenance & the costs above mentioned. An order was made for the appointment of the receiver & for the payment out of the proceeds of the property of the arrears of maintenance, but not of the costs. The wife appealed :—*Held* : no distinction could be drawn in respect of the two debts, & notwithstanding that the husband had been committed to prison for non-payment of the debt in respect of the costs, it remained a valid debt & it should be paid out of the proceeds of the property in respect of which the receiver had been appointed.—*JINKS v. JINKS*, [1936] 3 All E. R. 1051; 81 Sol. Jo. 97, C. A.

5989. *Add. Annotation* :—*Refd. Re Hedderwick, Morten v. Brinsley*, [1933] Ch. 669.

5990. *Add. Annotation* :—*Refd. Re Hedderwick, Morten v. Brinsley*, [1933] Ch. 669.

5993. *Add. Annotation* :—*Refd. Fanshawe v. Fanshawe*, [1927] P. 238.

5995a. ——— Restraint from receipt of dividends.—Until payment of costs.]—A wife was granted a decree of judicial separation on the ground of her husband's cruelty in an undefended petition, & an order for permanent alimony for herself & her four children was made at the rate of £950 a year. The husband had capital of at least £40,000. When each instalment of alimony became due he adopted an attitude of passive resistance, & on three successive occasions she secured payment only by execution on her husband's household effects, & on one occasion she secured a charging order on certain of his securities for the payment of a monthly instalment accrued due. Therefore she applied for an order to secure, under the control of the ct.

or of a receiver, sufficient of the husband's capital from which payments of the monthly instalments could be made to her as they became due. The judge held that owing to a defect in the matrimonial law the ct. had no power to grant the relief asked for. The summons must be dismissed, but the husband would pay the wife's costs :—*Held* : under the law as it now stood, the husband could not be treated as in contempt with regard to future payments, but as he was in contempt as regards past payments & had expressed an intention to disobey the order for alimony as regards future payments, the ct. while not overstepping the proper limitations with regard to future payments, would make an order restraining him from receiving any dividends in respect of investments to the extent of £395 16s. 8d., being the amount of the arrears of alimony & costs, directing that the solr. of resp. should receive the dividends & pay the same to the petitioner, & would give liberty to apply in chambers in regard to future arrears.—*BURROWES v. BURROWES* (1929), 141 L. T. 201; 45 T. L. R. 401, C. A.; *reversing S. C. sub nom. B. v. B.*, 73 Sol. Jo. 334.

5995b. ——— Until payment of alimony.]—*BURROWES v. BURROWES*, No. 5995a, *ante*.

6005. *Add. Annotation* :—*Refd. Fanshawe v. Fanshawe*, [1927] P. 238.

6006. *Add. Annotation* :—*Refd. Fanshawe v. Fanshawe*, [1927] P. 238.

6006a. ———.]—The ct. will interfere by way of injunction to restrain a husband from dealing with his property so as to defeat an order for costs or alimony *pendente lite*, when the amount of the latter has been fixed & an instalment of it is already due & in arrear, but will not so restrain him in respect of instalments of alimony to become due at a future date.—*FANSHAWE v. FANSHAWE*, [1927] P. 238; 96 L. J. P. 133; 137 L. T. 496; 43 T. L. R. 666; 71 Sol. Jo. 762.

6011. *Add. Annotation* :—*Refd. Fanshawe v. Fanshawe*, [1927] P. 238.

6012a. ———.]—*FANSHAWE v. FANSHAWE*, No. 6006a, *ante*.

6026a. ———.]—Petitioner, in 1919, went through a ceremony of marriage with resp. In 1923 resp. was convicted of bigamy, she having been lawfully married to A. on Dec. 26, 1903, which marriage was still subsisting. The ct. pronounced a decree *nisi* of nullity, & under the powers conferred by Jud. (Consolidation) Act, 1925 (c. 49),

PART XIII. SECT. 23, SUB-SECT. 3. —G.

p. i. ———.]—An order for payment of alimony or maintenance may be enforced by garnishee proceedings.—*THOMPSON v. THOMPSON*, [1935] 1 W. W. R. 732; 49 B. C. R. 555.—CAN.

PART XIII, SECT. 23, SUB-SECT. 3. —H.

5978 II. ———.]—A husband, who was pltf. in a divorce action, failed to comply with an order for interim alimony & costs, & a writ of execution against his goods was returned *nulla bona* :—*Held* : an order appointing a receiver his salary should be granted. The payment of interim alimony cannot be enforced by garnishee proceedings.—*PAULIN v. PAULIN & MARTIN*, [1936] 1 W. W. R. 499.—CAN.

5978 III. ———.]—An order may be

made for the appointment of a receiver to receive the husband's salary, to enforce a decree for alimony.—*WIGHTMAN v. WIGHTMAN* (1934), 49 B. C. R. 92.—CAN.

5978 IV. ———.]—The ct. has no power, under Wives & Children's Maintenance & Protection Act, R. S. M., 1913, ss. 8, 9, to appoint a receiver for the wages of a husband in enforcement of an alimony order.—*KUSS v. KUSS* [1935] 2 W. W. R. 561; 4 D. L. R. 77; 43 Man. L. R. 240; 5 F. L. J. (Can.) 52.—CAN.

PART XIII. SECT. 24, SUB-SECT. 1.

5996 I. *As to what matters granted—Restraint from molestation.*]—The ct. has jurisdiction, in an undefended suit

hearing of the suit, from molesting

petitioner by going to & remaining in petitioner's house.—*MULLENS v. MULLENS*, [1928] V. L. R. 55; [1928] *Argus* L. R. 6.—AUS.

PART XIII. SECT. 25, SUB-SECT. 1. —A.

sb. *Meaning of "pronouncing" decree nisi.*]—The "pronouncing" of the decree *nisi* within Divorce Rule 67 should be interpreted as referring to the date when the decree is entered. Since, however, the practice has been otherwise, & there was no suggestion of intervention in the present case, the decree absolute was granted although the decree *nisi*, granted over four months previously, was not entered until a few days before the motion for the decree absolute.—*HELUSKA v. HELUSKA* [1932] 3 W. W. R. 47.—CAN.



s. 183 (1), allowed petitioner to apply for the decree to be made absolute after the expiration of one month.—OSBORN v. OSBORN (OTHERWISE IVIL) (1926), 70 Sol. Jo. 388.

6029. *Add. Annotation* :—As to (2) *Refd. Fender v. Mildmay*, [1936] 1 K. B. 111.

6030a. — *Respondent—When granted.*—CHAPPELL v. CHAPPELL, [1938] 4 All E. R. 814.

6038. *Add. Annotation* :—*Refd. Fender v. Mildmay*, [1936] 1 K. B. 111.

6041a. — *Attempt to obtain larger maintenance.*—If a wife, after obtaining a decree *nisi* of divorce, delays in prosecuting her petition to decree absolute, the decree will not be made absolute without satisfactory explanation of the delay. The desire to obtain better terms of maintenance is not a satisfactory explanation of the delay.—HUNTER v. HUNTER, [1934] P. 92; 103 L. J. P. 41; 150 L. T. 515; 50 T. L. R. 236; 78 Sol. Jo. 256.

*Annotation* :—*Apld. Gower v. Gower*, [1938] P. 106.

6042a. — *Application for substitution of alternative decree—Judicial separation.*—Circumstances in which such application was granted.—ROCH v. ROCH (1926), 161 L. T. Jo. 395.

6053a. — *By respondent—Due to want of means—Application by respondent for decree absolute.*—Upon the petition of the wife, a decree *nisi* of dissolution was granted on Jan. 23, 1935, & the usual order was made that the husband should pay the taxed costs of the wife. The husband failed to pay these costs by reason, as the ct. found, of his lack of means. The wife, as the ct. also found, did not move the ct. to make the decree absolute, hoping in that way to force the husband to pay the costs. The husband brought this motion to make the decree absolute. The wife resisted the application, & by a cross-motion asked that the decree might be rescinded & that she might be granted a decree of judicial separation :—*Held* : the

ct. in the exercise of its discretion should allow the decree to be made absolute, because, although the husband was technically in contempt, such contempt was due to his misfortune rather than to his fault.—GOWER v. GOWER, [1938] P. 106; [1938] 2 All E. R. 283; 107 L. J. P. 43; 159 L. T. 21; 54 T. L. R. 614; 82 Sol. Jo. 336.

6069. *Add. Annotation* :—*Refd. Fender v. Mildmay*, [1937] 3 All E. R. 402.

6069a. — *Marriage annulled for incapacity.*—A final decree annulling a marriage on the ground of the incapacity of one of the parties to it to consummate it has retrospective operation, so that the effect of the decree amounts to a declaration that there is no marriage. The contract of marriage may be impeached & declared null & void if there was incapacity to implement it, notwithstanding that in certain cases the right to complain to the ct. may be lost by reason of the conduct of the party complaining.—NEWBOULD v. A.-G., [1931] P. 75; 100 L. J. P. 54; 144 L. T. 728; 47 T. L. R. 297; 75 Sol. Jo. 174.

*Annotation* :—*Refd. Siveyer v. Allison*, [1935] 2 K. B. 403.

6081a. — *—*—*R. v. LERESCHE* (1887), 56 L. J. M. C. 135; 35 W. R. 805, D. C.

6085a. *Only one justice present throughout hearing—Validity of proceedings.*—On the hearing by justices of an application by a wife under Summary Jurisdiction (Separation & Maintenance) Acts, 1895 to 1925, for a maintenance order, on the ground of her husband's wilful neglect to provide her with reasonable maintenance, there was an adjournment, after four justices had heard evidence. At the resumed hearing there were two justices present, only one of whom had been present at the first hearing, & they made an order against the husband :—*Held* : the proceedings were rendered null & void by there being present throughout only one justice, &

#### PART. XIII. SECT. 25, SUB-SECT. 2. —C. (b).

6040 1. *Liability to dismissal of petition—Unless delay justified.*—It is not proper for a solr. to agree that he will conduct a divorce action without payment until the decree *nisi* is obtained but will not proceed to the decree absolute without his bill of costs being provided for. In the present case wherein the explanation for pltf.'s delay of over two years in applying for a decree absolute was that she had been without funds & had proceeded to the decree *nisi* under the above arrangement with her solr. :—*Held* : under all the circumstances, the decree absolute should be made; but that conclusion should not be taken as a precedent for countenancing such delay again.—ROSE v. ROSE, [1936] 1 W. W. R. 117.—CAN.

#### PART XIII. SECT. 25, SUB-SECT. 3.

6053 1. *Non-payment of costs—By petitioner—Not valid ground.*—*Held* : the non-payment of the taxed costs of suit was not a sufficient ground on which to stay the granting of the decree absolute.—MOLLOY v. MOLLOY & BURG, [1929] S. A. S. R. 80.—AUS.

6060 1. *Pending provision for wife.*—Under Nova Scotia Act of 1866 the Judge Ordinary has power to make a decree absolute conditional upon the husband petitioner making provision for the maintenance of his guilty wife.—ATWELL v. ATWELL, [1937] 1 D. L. R. 588; 11 M. P. R. 170; 6 F. L. J. (Can.) 245.—CAN.

#### PART XIII. SECT. 25, SUB-SECT. 4.

*sd. Decree in undefended divorce action—Decree in absence liable to suspension.*—*Held* : a decree in an undefended action of divorce, was a decree in absence to which Ct. of Session (No. 1) Act, 1838, s. 5, applied, & it was, therefore, competent to bring a suspension of such decree.—CUNNINGHAM v. CUNNINGHAM, [1928] S. C. (Ct. of Sess.) 790.—SCOT.

#### PART XIII. SECT. 25, SUB-SECT. 6. —A.

*sf. Jurisdiction of court—To set aside on ground of fraud.*—A decree absolute for divorce had been granted against pltf. herein (the wife) in an undefended action in which the present deft. was pltf. He afterwards married the former wife of the alleged paramour; she too having obtained a divorce. The present action was brought to have said decree & the decree *nisi* declared null & void on the grounds (*inter alia*), that the divorce proceedings were collusive, & the decrees had been obtained by the perjury of pltf. therein in denying collusion, connivance & condonation, & by his non-disclosure of facts, which constituted an absolute or discretionary bar to the granting of the decree :—*Held* : assuming one or more of said grounds would be sufficient, if proved, to give the ct. jurisdiction to grant the relief prayed for, pltf.'s action must be dismissed because she had failed, on the evidence, to establish her case. *Semble* : with respect

to the alleged collusion, pltf.'s case, if proved, would have failed because of the applicability thereto of the maxims, *ex turpi causa non oritur actio*, & "no one can take advantage of his own wrong."—MCIPHERSON v. MCIPHERSON (No. 2), [1933] 2 W. W. R. 613.—CAN.

#### PART XIII. SECT. 27, SUB-SECT. 1.

*g 1. — Not by judgment for alimony.*—JOHNSON v. JOHNSON, [1935] 2 W. W. R. 672; 5 F. L. J. (Can.) 86.—CAN.

*g 11. —*—*Where proceedings for divorce have been instituted & a decree nisi for dissolution of the marriage has been granted by the Supreme Ct. :—Held* : a ct. of Petty Sessions has no jurisdiction to hear a complaint for the maintenance of the children of the marriage, made after the granting of the decree *nisi*.—R. v. BRISBANE POLICE MAGISTRATE & INGLIS, *Ex p. INGLIS* (1935), 29 Q. J. P. R. 2.—AUS.

*so. Husband not resident within Province.*—Under 'Deserted Wives' Maintenance Act, R. S. B. C., 1924, the magistrate referred to therein is given jurisdiction over a husband who is domiciled outside British Columbia in, at least, the case where the desertion took place in the province & the wife resides therein; & may order that substitutional service be made upon him outside the province.—GAGEN v. GAGEN, [1934] 3 W. W. R. 84; 4 D. L. R. 409; 48 B. C. R. 431.—CAN.



the matter must go back to the justices.—*Lewis v. Lewis* (1928), 92 J. P. 88; 72 Sol. Jo. 369; 26 L. G. R. 323.

**6085b. Power to make applicant elect—Summons containing several grounds of complaint.]—**

Where a summons under Summary Jurisdiction (Separation & Maintenance) Acts, 1895 to 1925, claiming an order for maintenance, non-cohabitation, & custody, contained two of the statutory grounds of complaint, namely, wilful neglect to provide reasonable maintenance & persistent cruelty, either of which, if established, would justify such an order being made, the justices have no right to put appct. to her election upon which ground only she will proceed. Both must be disposed of.—*TYRRELL v. TYRRELL* (1928), 138 L. T. 624; 92 J. P. 45; 26 L. G. R. 188; 28 Cox, C. C. 485, D. C.

**6086. Add. Annotation:—***Refd. Papadopoulos v. Papadopoulos*, [1936] P. 108.

**6087a. Summons for maintenance—Defence—Res judicata.]—**A wife obtained an order from the borough justices for maintenance on the ground of her husband's desertion. This order was subsequently revoked by the same bench on the ground that the wife had wilfully refused to return to her husband. Later the wife summoned her husband before the county justices in the same town for alleged wilful neglect to maintain her. This bench of justices overruled an objection that the matter was already *res judicata*, & that no new evidence had been adduced, & made an order in favour of the wife for 25s. a week. The husband appealed:—*Held*: a ct. of competent jurisdiction had found that the wife had refused to live with her husband & revoked the previous maintenance order. The county magistrates agreed that the only matters which they could entertain were happenings since the date of the revocation of the previous order, & there was not a scrap of evidence to support their decision to grant a fresh order, & their order must be discharged. Appeal allowed.—*ELLIS v. ELLIS* (1929), 93 J. P. 175.

*Annotation:—Refd. Balchin v. Balchin*, [1937] 3 All E. R. 733.

**6088. Add. Annotation:—***Refd. Diggins v. Diggins* (1926), 43 T. L. R. 37.

**6089a. ———.]—**During the pendency of a petition for divorce in the High Ct. no order for maintenance should be made under the Summary Jurisdiction & Maintenance Acts, 1895 to 1925, by a ct. of summary jurisdiction. Although the power of the High Ct. to order a provision for a wife is not an exclusive power, there is an obvious incon-

venience in holding that there is a concurrent jurisdiction in the High Ct. & in justices in the matter of ordering a provision for a wife to be made by her husband if proceedings in the Divorce Div. are on foot.—*Higgs v. Higgs*, [1935] P. 28; 104 L. J. P. 1; 152 L. T. 24; 98 J. P. 443; 51 T. L. R. 22; 78 Sol. Jo. 768; 32 L. G. R. 471; 30 Cox, C. C. 183, D. C.

*Annotation:—Apld. Knott v. Knott*, [1935] P. 158.

**6089b. ———.]—**During the pendency of a matrimonial suit in the High Ct. on an issue as to adultery, conflict of jurisdiction may arise from the simultaneous prosecution in a ct. of summary jurisdiction under the provisions of Summary Jurisdiction (Separation & Maintenance) Acts, 1895 to 1925, of proceedings incidentally raising the same issue. The issue as to adultery is paramount, the High Ct. alone having power to dissolve the marriage if adultery be established, while the jurisdiction exercised by the inferior ct. provides other relief during the continuance of matrimonial status. Proceedings in the inferior ct. should accordingly be stayed pending the decision of the paramount issue in the High Ct.—*KNOTT v. KNOTT*, [1935] P. 158; 104 L. J. P. 50; 153 L. T. 256; 99 J. P. 329; 51 T. L. R. 499; 79 Sol. Jo. 626; 33 L. G. R. 383; 30 Cox, C. C. 245, D. C.

**6094a. ——— Traveller—Wife living with mother by consent.]—**A wife, whose husband was a traveller, by the tacit consent of both of them, lived with her mother. At the hearing of her summons on which she was granted a maintenance order on the ground of her husband's desertion, evidence was given to the effect that he had sent her money from time to time, & that for the six weeks preceding the issue of the summons such money had in fact exceeded the 15s. a week ordered by the justices. Marital relationship had also taken place shortly before the issue of the summons. On an appeal by the husband against the order:—*Held*: there was no evidence of desertion, particularly in view of the tacit consent of both parties that the wife should live with her mother, & the justices were wrong in making the order they did make.—*GRAEFF v. GRAEFF* (1928), 93 J. P. 48; 27 L. G. R. 6, D. C.

**6098. Add. Annotations:—***Consd. Re Wheat* (1932), 48 T. L. R. 675. *Refd. Hyman v. Hyman*, *Hughes v. Hughes* (1928), 139 L. T. 416.

**6099a. ——— Occupation of separate rooms.]—**A wife who continued to live in the same house as her husband & to take meals with him, applied for a summons for alleged

**PART XIII. SECT. 27, SUB-SECT. 2.—**

**6098 i. ——— Refusal to cohabit—After temporary separation.]—**A husband & wife agreed to separate immediately after their marriage until the husband, a constable in the Royal Ulster Constabulary, had sufficient length of service to permit him to support his wife. When the agreement expired the husband refused to cohabit with his wife & refused & neglected to maintain her:—*Held*: the husband had deserted the wife.—*TIMONEY v. TIMONEY*, [1926] N. 75.—IR.

**k. i. ———.]—**In order to give a magistrate jurisdiction to issue a summons & make an order under sect. 26 (2) of Domestic Relations Act,

1927, against a husband who has deserted his wife, the magistrate must be applied to by the wife & must be "satisfied that her husband, being able wholly or in part to maintain his wife & family, has wilfully neglected so to do"; & he cannot be held to be so satisfied unless he has given a judicial consideration to evidence in support of that fact. A mere plea of guilty by the husband cannot be considered an admission of the different facts required to be found. *Qu.*: whether Part IV. of said Act is constitutionally valid.—*ROSKIWICH v. ROSKIWICH*, [1931] 1 W. W. R. 838; 3 D. L. R. 796; 55 Can. C. C. 376; 25 Alta. L. R. 300.—CAN.

**l. i. ———.]—**Deserted Wives' Main-

tenance Act, R. S. S., 1920, s. 2 (2), is not exclusive on the question as to whether a wife has been deserted within the meaning of the Act; but it is possible for a wife living apart from her husband to be "a married woman deserted by her husband," although the living apart is not due to the husband's legal cruelty or to his neglect or refusal to supply her with necessities. If the husband without being legally cruel has left her & gone to live elsewhere she is a deserted wife; she also is a deserted wife if he, without being guilty of such cruelty, has ordered her out of the house where he continued to reside.—*SCHWAB v. SCHWAB* (Sask.), [1929] 3 W. W. R. 188.—CAN.

desertion on the grounds that he treated her as nothing more than a servant, & insisted on their having separate rooms, & had refused to cohabit with her. The summons was dismissed:—*Held*: the justices had rightly dismissed the summons.—*STEVENS v. STEVENS* (1929), 93 J. P. 120; 27 L. G. R. 362, D. C.

6099b. ———.]—*TOBIN v. TOBIN* (1930), 94 J. P. Jo. 303.

6102a. ———. **Abnormal sexual acts—Must amount to cruelty.**—(1) On a complaint by a wife of abnormal sexual acts on the part of her husband, causing her to leave him, those acts if established must amount to cruelty in order to constitute constructive desertion by the husband.

(2) There is no absolute rule of law or evidence in such a case that corroboration of the wife is necessary, or as to the extent of that corroboration; but there must at least be sufficient general evidence for the ct. to infer that the acts occurred, that they were committed without the assent of the wife, & that injury to her health resulted, before the ct. can find constructive desertion as a fact.—*D. B. v. W. B.*, [1935] P. 80; *sub nom. B. v. B.*, 104 L. J. P. 25; 152 L. T. 419; 99 J. P. 162; 79 Sol. Jo. 216; 33 L. G. R. 182; 30 Cox, C. C. 204, D. C.

6102b. ———. **Whether corroboration necessary.**—*D. B. v. W. B.*, No. 6102a, *ante*.

6102c. ———. **Discovery of husband's adultery.**—(1) The time limit of six months, beyond which a complaint cannot be lodged in a ct. of summary jurisdiction, applies to a complaint founded on adultery under Matrimonial Causes Act, 1937 (c. 57), s. 11. In such a case, time commences to run from the date of the commission of the adultery, & not from that of its discovery.

(2) Where a wife leaves the matrimonial home upon the discovery of her husband's adultery, this can amount to constructive desertion by the husband only if it is shown that there is an intention on the part of the husband to persist in the adultery. The discovery of a past adulterous association is insufficient.—*TEALL v. TEALL*, [1938] P. 250; [1938] 3 All E. R. 349; 107 L. J. P. 118; 102 J. P. 428; 54 T. L. R. 960; 82 Sol. Jo. 682; 36 L. G. R. 574.

6106. *Add. Annotation*:—As to (2) *Consd. Herod v. Herod*, [1938] 3 All E. R. 722.

6108a. ———.]—On a wife's summons for wilful neglect to provide reasonable maintenance under Summary Jurisdiction (Separation & Maintenance) Acts, 1895 to 1925, it was shown that the wife left her husband of her own accord ten years ago & there had been no communication between them since. The justices made a maintenance order against the husband for £1 a week. The husband appealed:—*Held*: the wife having

left the husband of her own volition, the husband's liability to maintain her was latent or in a state of suspense & not immediately operative.—*BURROW v. BURROW* (1930), 143 L. T. 679; 94 J. P. 225; 28 L. G. R. 483; 29 Cox, C. C. 170, D. C.

*Annotation*:—*Reid. Markovitch v. Markovitch* (1934), 151 L. T. 139.

6109a. ———.]—*MEEK v. MEEK* (1930), 94 J. P. Jo. 56; 29 Cox, C. C. 170, D. C.

6119a. **Continuing offence.**—*Re WHEAT*, No. 6233c, *post*.

6123a. ———. **Assault after cessation of cohabitation.**—Although the operation of Summary Jurisdiction (Separation & Maintenance) Acts deals with & is limited to the relations of husband & wife, an act of violence committed by a husband against his wife after he has ceased to cohabit with her may amount to conduct on his part which can be taken into consideration together with his previous conduct as constituting the offence of persistent cruelty within the Acts.—*SIMCOCK v. SIMCOCK*, [1932] P. 94; 101 L. J. P. 38; 147 L. T. 17; 96 J. P. 226; 48 T. L. R. 374; 76 Sol. Jo. 345; 30 L. G. R. 216; 29 Cox, C. C. 445, D. C.

6124a. ———. **Termination of separation agreement—On bankruptcy of husband.**—*DEWE v. DEWE*, *SNOWDON v. SNOWDON*, No. 595a, *ante*.

6124b. ———. **Failure to continue payments under separation agreement.**—By an agreement of separation a husband undertook to pay his wife 17s. 6d. a week by way of maintenance, & the wife undertook that she would not by any means whatsoever endeavour to compel the husband to allow her any alimony or maintenance other than the above sum of 17s. 6d. a week. On the husband failing to continue payments under the agreement, the wife took out a summons under Summary Jurisdiction (Separation & Maintenance) Acts, 1895 to 1925 for an order against her husband, on the ground that he had wilfully neglected to provide reasonable maintenance for her & her infant child. The justices dismissed the summons, holding their jurisdiction was ousted by the undertaking of the wife, & the proper forum for her claim was the county ct.:—*Held*: as the payments under the agreement had not been maintained by the husband, the justices had jurisdiction, & if a case of wilful neglect were proved, to make an order, at any rate for an amount not exceeding 17s. 6d. a week.—*MC CREANNEY v. MC CREANNEY* (1928), 138 L. T. 671; 92 J. P. 44; 26 L. G. R. 185, D. C.

*Annotation*:—*Reid. Iles v. Iles* (1931), 145 L. T. 71.

6124c. ———.]—*FLETCHER v. FLETCHER* (1928), 92 J. P. 94; 26 L. G. R. 398, D. C.

#### PART XIII. SECT. 27, SUB-SECT. 2.—O.

6121 i. *Persistent cruelty—What amounts to.*—A husband who reflected on his wife's chastity & questioned the paternity of their child, displayed indifference to her physical welfare, threatened to put her out of the house & to do her bodily harm & actually assaulted her, although not severely, on two isolated occasions:—*Held*: guilty of persistent cruelty.—*McKERRAN v. McKERRAN*, [1926] 1 D. L. R. 558; [1926] 1 W. W. R. 199; 35 Man. L. R. 412.—CAN.

6121 ii. ———.]—*R. v. GARDNER* (Ont.) (1927), 47 Can. Crim. Cas. 180.—CAN.

6121 iii. ———.]—An order under Wives' & Children's Maintenance & Protection Act, R. S. M. 1913, c. 206, ss. 8, 9, based on a finding of "persistent cruelty," upheld.—*NEILSON v. NEILSON*, [1928] 2 D. L. R. 776; [1928] 1 W. W. R. 833; 37 Man. L. R. 337.—CAN.

see *What amounts to cruelty.*—On a complaint by a married woman

charging cruelty & neglect to maintain, evidence of violence towards the wife to enforce sexual intercourse during her periods, & of actual sexual intercourse then enforced on her is admissible.—*GOHRA v. GOHRA*, [1928] S. A. S. R. 186.—AUS.

see. ———.]—Forcing a wife to have connection when she is in a delicate condition after an operation is cruelty within Deserted Wives' & Children's Maintenance Act, R. S. O., 1927.—*MORRISON v. MORRISON* (1923), 59 O. C. C. 266.—CAN.

**6124d.** — Must be neglect amounting to misconduct.]—Before an order for maintenance can be made by justices on the ground of wilful neglect to maintain, the husband must be proved to have been guilty of such wilful neglect as amounted to misconduct.—*JONES v. JONES* (1929), 142 L. T. 168; 46 T. L. R. 33; 94 J. P. 31; 27 L. G. R. 771; 29 Cox, C. C. 33, D. C.

**6124e.** No jurisdiction to make separation order where no cruelty.]—In a case in which a married woman was granted a maintenance order on the ground of wilful neglect to provide reasonable maintenance, the justices, although there was no charge of cruelty, also made a non-cohabitation order. The Div. Ct., in dismissing an appeal against the order to pay, characterised the separation order as a very serious mistake, which was constantly being made, & struck it out.—*SNOW v. SNOW* (1932), 96 J. P. 477; 30 L. G. R. 517, D. C.

**6124f.** Duty to make order for maintenance.]—On a summons by a wife for a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), on the ground of persistent cruelty, the justices made a separation order but made no order as to maintenance. The wife appealed:—*Held*: the case must be remitted to the justices to consider & decide what should be the proper provision for the wife.—*CLEWS v. CLEWS* (1932), 96 J. P. 91; 30 L. G. R. 102, D. C.

**6124g.** Wife required to live with mother-in-law.]—An engaged couple agreed that after marriage they should live with the husband's mother at her house. After the marriage differences arose between the wife & her mother-in-law which resulted in the wife's leaving the husband. The wife summoned the husband for wilful neglect to provide her with reasonable maintenance. The husband offered to take her back to the mother's house, & said that it was the only home which he could afford to provide. The justices made a maintenance order for £1 a week for wife & child. The husband appealed:—*Held*: the justices were right. The husband's first duty was to provide his wife with a home according to his circumstances. The justices were right in holding that, by reason of the difficulty about the husband's

mother, he had failed in that duty by putting his mother first. In view of his small earnings the wife's allowance was reduced from 15s. to 12s. a week. Otherwise the appeal failed.—*MILLICAMP v. MILLICAMP* (1931), 146 L. T. 96; 95 J. P. 207; 75 Sol. Jo. 814; 29 L. G. R. 671; 29 Cox, C. C. 391.

*Annotations*:—*Distd. Jackson v. Jackson* (1932), 96 J. P. 97. *Consd. Grubb v. Grubb* (1934), 150 L. T. 420.

**6124h.** Wife required to live next door to mother-in-law.]—On a summons by a wife on the ground of wilful neglect to provide reasonable maintenance, it was found by the magistrates that the action of the husband in requiring his wife to live in a house next door to his mother, & in keeping control of the purse, & of the housekeeping with the assistance of his mother, constituted unbearable conditions for her. She had left the house with the infant child of the marriage after an altercation. The magistrates made an order against the husband for the payment of 30s. a week. The husband appealed:—*Held*: the wife had not made out her complaint, & the order must be discharged.—*JACKSON v. JACKSON* (1932), 146 L. T. 406; 96 J. P. 97; 48 T. L. R. 206; 76 Sol. Jo. 129; 30 L. G. R. 106; 29 Cox, C. C. 433, D. C.

**6124i.** Refusal of husband to permit re-cohabitation.]—If a wife absents herself from her husband for no reason at all he is not bound to maintain her, but if she changes her mind & intimates that she is quite willing to return to him, the husband must either take her back or maintain her.—*MARKOVITCH v. MARKOVITCH* (1934), 151 L. T. 139; 98 J. P. 282; 50 T. L. R. 416; 32 L. G. R. 317; 30 Cox, C. C. 115; *sub nom. MARCOVITCH v. MARCOVITCH*, 78 Sol. Jo. 368, D. C.

**6128.** After this case add:—

—.]—*See, now*, Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 1 (1) (4).

**6128a.** — Effect of Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 1 (1)—Neglect of marital duties by wife.]—On this appeal from justices the ct. explained the true effect of the change made by Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 1 (1), in sect. 4 of the principal Act of 1895, as not providing that a married woman was entitled

PART XIII. SECT. 27, SUB-SECT. 2.—D.

**6126 i.** Causing to leave & live apart—Husband's failure to pay allowance during separation—Or provide home.]—Appl., the husband, had, while intoxicated, threatened his wife, & she left home, being in fear of him. Subsequently she wrote suggesting reconciliation, but the letters were unanswered. The husband contributed nothing to her support except a sum of 10s. & her tram fare to Adelaide, & almost eight months after she had left him definitely refused to take her back or support her. On these facts the magistrate granted relief for neglect to maintain, but refused to grant relief for desertion on the ground mentioned above:—*Held*: desertion should have been found by the special magistrate.—*MORGAN v. MORGAN*, [1927] S. A. S. R. 140.—AUS.

n i. —.]—The question whether a wife for whom her husband has neglected or refused to supply necessities is "in destitute

or necessitous circumstances" within sect. 242 (3) of Criminal Code is one of fact in each case; & proof that she is receiving charity or is supported by relatives is not conclusive on the question, other facts have to be taken into account.—*R. v. WILSON*, [1933] 3 W. W. R. 417; [1934] 1 D. L. R. 295; 60 C. C. C. 309.—CAN.

n ii. —.]—On appeal from a conviction under sect. 242 (3) of Criminal Code, for that accused had neglected without lawful excuse to provide necessities for his wife & six children:—*Held*: although the wife & children were "on relief," their "necessitous circumstances" & the accused's lack of "lawful excuse" had been proven.—*R. v. STEVENSON*, [1936] 2 W. W. R. 111; 2 D. L. R. 793; 66 Can. C. C. 126.—CAN.

n iii. —.]—Accused was charged under sect. 242 (3) of Criminal Code, R. S. C., 1927, c. 36, with neglecting, without lawful excuse, to provide necessities for his wife & children, they being in destitute &

necessitous circumstances. While he had been in receipt of "emergency relief" payments he had been offered employment on farms & told of possibilities of obtaining such employment but had refused to accept or act upon them on the ground that the work would involve separation from his family. He had also been offered work on a highway but refused it because it would require him to walk too far from where he lived:—*Held*: his objections to said work did not constitute a "lawful excuse" within sect. 242 (3).—*R. (CONNELL) v. KLEIN*, [1937] 1 W. W. R. 734.—CAN.

sd. Neglect to maintain.]—A divorce may be granted on the ground that a husband habitually & wilfully failed during the five years preceding the commencement of the action to pay maintenance to his wife, notwithstanding that during some months of that period he lived, without cohabiting, at the same house as his wife & children, & paid board & lodging.—*COULTER v. COULTER*, [1934] S. A. S. R. 418.—AUS.

to maintenance even though she did not carry out her marital obligations.

The marriage took place twenty-two years ago, & there were a number of children. In Jan. 1929 the parties separated. Soon afterwards the wife summoned the husband for desertion, & her summons was dismissed. Later, solrs. for the wife wrote to the husband that she was willing to live with him again & make a fresh start. On Mar. 27, 1931, she summoned him for alleged desertion & wilful neglect to maintain her. At the hearing on Apr. 2, the justices heard the complaint on the basis that it was one for wilful neglect, & dismissed the summons. The wife appealed. The husband was not represented:—*Held*: the legislature had not provided that a married woman, who had not committed adultery, might in any circumstances whatever be entitled to an order for maintenance. The law still took account of the mutual character of marital obligations. The justices had thought that the wife had renounced her wifely duties, but the summons would be sent back to them so that they might state their precise reasons for their conclusion.—*CLARK v. CLARK* (1931), 145 L. T. 487; 95 J. P. 170; 75 Sol. Jo. 616; 29 L. G. R. 559; 29 Cox, C. C. 339, D. C.

*Annotation*:—*Reffid. Markovitch v. Markovitch* (1934), 151 L. T. 139.

**6128b. Effect of separation deed.**—This was an appeal from the decision of a metropolitan police magistrate dismissing a summons by a wife on the ground of wilful neglect to provide reasonable maintenance. She had entered into a common form separation deed which provided for the payment to her by the husband of £2 a week. The payments fell into arrears, & a judgment against the husband went unsatisfied. In the following year the wife entered into a deed by which in return for the payment of a lump sum to start her in a new life in Canada, both spouses covenanted (*inter alia*) not to petition for judicial separation, restitution of conjugal rights, or divorce, & the wife covenanted in all respects to support & maintain herself & indemnify her husband against all liabilities into which she might enter.

The wife was paid the money & went to Canada. She had a breakdown & returned to England. She summoned her husband

for wilful neglect, & said that he had become substantially better off. The summons was dismissed. She appealed:—*Held*: there was no evidence to show whether or not the magistrate had considered himself bound by the effect of the separation deeds to dismiss the summons. Whether the later deed operated as a final release of the husband was still an open question. It had never been decided what was the effect on the magistrate's matrimonial jurisdiction under the Summary Jurisdiction Acts of a wife's agreement to waive maintenance. Order rescinded, so that the matter might be reconsidered by the magistrate.—*BURTON v. BURTON* (1929), 142 L. T. 165; 94 J. P. 32; 29 Cox, C. C. 26, D. C.

**6133a. Jurisdiction to make—On summons for maintenance.**—Where a wife under Summary Jurisdiction (Separation & Maintenance) Acts, 1895 to 1925, merely asks in her summons for an order for maintenance on the ground of wilful neglect it is improper for justices to decree a separation or make an order for the custody of children.—*SMITH v. SMITH* (1930), 144 L. T. 156; 95 J. P. 17; 47 T. L. R. 9; 74 Sol. Jo. 755; 28 L. G. R. 644; 29 Cox, C. C. 187.

**6133b. Non-cohabitation clause unnecessary—Should not be included.**—Although the husband's previous conduct may have been such as to justify the wife in refusing an offer by him to resume cohabitation, it does not follow, if her complaint is on the ground of desertion, that the justices should stereotype the separation of the parties by inserting in their order a non-cohabitation clause, & transferring the custody of the children.—*THOMAS v. THOMAS* (1923), 129 L. T. 575; 39 T. L. R. 520; 27 Cox, C. C. 462, D. C.; *on appeal*, [1924] P. 194, C. A.

**6137a. Rule not applicable to wage-earners.**—This was an appeal from a maintenance order granted to a wife by the justices on the ground that her husband had wilfully neglected to provide reasonable maintenance. The husband was earning £3 a week, & the wife, in addition to living rent free as a caretaker of flats, was earning from 10s. to 15s. a week as a waitress. The magistrates made an order that the husband should pay his wife £1 a week, & the order

## PART XIII. SECT. 27, SUB-SECT. 2.

—*Intemperance amounting to inability to manage self or affairs.*—Where in an action for dissolution by the husband a charge of habitual drunkenness for three years has been established, it is also necessary to establish habitual neglect of domestic duties by the wife for the same period. The wife owes a duty to her husband to make their place of habitation a home, & this involves the task of management & supervision of the home & the comforts it should provide. The delegation of domestic duties to servants does not negative the existence of domestic duties on the part of the wife.—*ARDILL v. ARDILL*, [1934] S. A. S. R. 454.—*AUS.*

## PART XIII. SECT. 27, SUB-SECT. 3.—C. (a).

*sl. Variation of order of Children's Court.*—After service of a petition for divorce, a magistrate has jurisdiction to vary an order of a Children's Ct. directing the husband to pay main-

tenance for the support of his wife, either by reducing the amount, by suspending the order, or by directing payments under it to cease altogether.—*Exp. HOLDEN* (1929), 29 S. R. N. S. W. 575; 46 N. S. W. W. N. 194.—*AUS.*

*sg. Under Wives & Children's Maintenance & Protection Act—Enforcement—Sufficiency of proof of order.*—*ROSS v. ROSS*, [1931] 1 W. W. R. 134; 55 Can. C. C. 394; 39 Man. L. R. 364.—*CAN.*

*sl. Default in carrying out separation agreement.*—A separation agreement which makes reasonable provision for the maintenance of the wife is not a bar to her taking proceedings against her husband under Wives' & Children's Maintenance & Protection Act, R. S. M., 1913, where there has been default in providing such maintenance.—*WALKER v. WALKER*, [1934] 2 W. W. R. 554; 4 D. L. R. 590; 42 Man. L. R. 468; 83 C. C. O. 82.—*CAN.*

*so. Effect of separation agreement.*—The existence of the separation agreement in question herein between a husband & wife held not to

be a bar to the granting of an order for maintenance on an information laid by the wife under Wives' & Children's Maintenance & Protection Act, R. S. M., 1913.—*BENNETT v. BENNETT*, [1935] 1 W. W. R. 589; 2 D. L. R. 662; 43 Man. L. R. 33.—*CAN.*

*st. Means of support—Meaning of.*—*Sect. 43 of Maintenance Act, 1926*, is not directed to securing to a wife such a proportion of her husband's income as she might be awarded if a decree had been granted in a divorce ct. "Support" means support of a particular person. "Means of support" means money or property convertible into money which may be applied for such subsistence, and "adequate means of support," means such money or convertible property as being applied to such subsistence suffices for the purpose. Persons liable to provide adequate means of support are not to be ordered to provide the means necessary to keep the maintained person out of the bkpcy. ct. having regard to all that person's obligations.—*ASHBY v. ASHBY*, [1935] S. A. S. R. 119.—*AUS.*

included a non-cohabitation clause. The husband appealed:—*Held*: the non-cohabitation clause was unwarrantable & must be struck out. The magistrates were well warranted in their conclusion that there was wilful neglect to maintain. The conventional standard of maintenance in the Divorce Ct., one-third of the joint income, was not applicable to wage-earners. The allowance was reduced to 10s. a week.—*JONES (A.) v. JONES (D. L.)* (1929), 142 L. T. 167; 94 J. P. 30; 27 L. G. R. 768; 29 Cox, C. C. 30, D. C.

6144a. ———.—*ANSELL v. ANSELL* (1930), 94 J. P. Jo. 410, D. C.

6147a. Refusal of wife to live with husband—Without good reason—Effect of.]—Under Summary Jurisdiction (Married Women) Acts, 1895 (c. 39), & 1925 (c. 51), the ct. will find great difficulty in granting a wife's application for maintenance where she has disclaimed her proper obligations to her husband & has without good cause refused to live with him.—*WEATHERLEY v. WEATHERLEY* (1929), 142 L. T. 163; 94 J. P. 38; 46 T. L. R. 28; 73 Sol. Jo. 730; 28 L. G. R. 1; 29 Cox, C. C. 22, D. C.

*Annotation*:—*Refd. Markovitch v. Markovitch* (1934), 151 L. T. 139.

6151a. ———.—On summons for maintenance.]—*SMITH v. SMITH*, No. 6133a, *ante*.

6161. *Add. Annotation*:—*Consd. Price v. Price* (1927), 43 T. L. R. 609.

6164a. ———.—A complaint by a wife against her husband for wilful neglect to maintain her or her infant child need not, under Summary Jurisdiction Act, 1848 (c. 43), s. 11, be brought within six months from the time when by such neglect he caused her to live separately & apart from him, inasmuch as by Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 1 (1), the complaint may now be made notwithstanding that the neglect has not caused her to leave & live separately & apart from him.—*PRICE v. PRICE* (1927), 43 T. L. R. 609; 71 Sol. Jo. 432, D. C.

6165a. ———.—By the combined operation of the Summary Jurisdiction (Married Women) Act, 1895, s. 8 (1), & the Summary Jurisdiction Act, 1848, s. 11 (2), a complaint by a married woman under s. 4 of the former Act that her husband has been guilty of persistent cruelty towards her must be made & information laid within six calendar months from the time when the matter of the complaint arose. On complaint made of a single act of cruelty arising within the time limited a ct. of summary jurisdiction is entitled on a summons in respect of persistent cruelty to receive evidence of further acts committed before the time limited as well as of the general conduct of the husband falling short of actual cruelty in arriving at a decision whether a course of conduct is established which is "persistent cruelty" within the meaning of the section.

By consent of the parties further agreed facts may be stated on an appeal from a ct. of summary jurisdiction in addition to the

evidence before the ct. below.—*DONKIN v. DONKIN*, [1933] P. 17; 102 L. J. P. 18; 148 L. T. 58; 96 J. P. 472; 49 T. L. R. 10; 76 Sol. Jo. 799; 30 L. G. R. 518; 29 Cox, C. C. 558, D. C.

6167. *Add. Annotation*:—*Apld. Re Wheat* (1932), 48 T. L. R. 675.

6168. *Add. Annotation*:—*Refd. Herod v. Herod*, [1938] 3 All E. R. 722.

6168a. ———.—*Adultery*.]—*TEALL v. TEALL*, No. 6102c, *ante*.

6178. *Add. Annotation*:—*Consd. Clark v. Clark* (1931), 145 L. T. 487.

6177a. ———.—*New facts*.]—In May, 1936, a wife, who at the time was living separate from her husband, applied to a certain bench of justices for maintenance on the ground of desertion & wilful neglect to maintain. The justices dismissed the summons, having found that the husband was then making a genuine offer to take his wife back & provide her with a home, & that she was unreasonably refusing to accept that offer. In May, 1937, the wife applied to another bench of justices who were fully aware of the circumstances relating to the former order. The husband made a new offer to take his wife back, but the justices found that he was not telling the truth when he made the offer, & that it was an offer which the wife was not obliged to entertain. The justices accordingly made an order for maintenance. The husband appealed on the ground that it was for the wife to show that some new circumstance had arisen to justify her in bringing the new case, & she had taken no steps in the interval between the first & the second applications:—*Held*: the justices' findings in May, 1937, constituted a fresh set of facts, & the justices were entitled to come to the conclusion to which they had come.—*BALCHIN v. BALCHIN*, [1937] 3 All E. R. 733; 157 L. T. 392; 81 Sol. Jo. 653; 35 L. G. R. 486; 30 Cox, C. C. 620, D. C.

6177b. ———.—*Four summonses dismissed—Fifth summons on same cause of complaint*.]—On an appeal by a husband from an order directing him to pay his wife £1 a week for maintenance on the ground of his desertion, it was shown that four previous summonses taken out by the wife in the same ct. for desertion had been dismissed, & that the fresh proceedings disclosed no new facts. The order was discharged on the ground of *res judicata*.—*WALL v. WALL* (1930), 94 J. P. 200; 94 J. P. Jo. 303; 28 L. G. R. 477, D. C.

6179a. ———.—A wife's right to claim & obtain an order for maintenance from a bench of justices under Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), is not necessarily barred by a deed of separation which makes an allowance for her maintenance, but it must depend on the terms of the deed whether she is or is not deprived of that right.—*DIGGINS v. DIGGINS*, [1927] P. 88; 96 L. J. P. 14; 136 L. T. 224; 90 J. P. 208; 43 T. L. R. 37, D. C.

*Annotations*:—*Refd. McCreaney v. McCreaney* 1928), 138

L. T. 671; *Matthews v. Matthews* (1932), 48 T. L. R. 511; *Markovitch v. Markovitch* (1934), 151 L. T. 139.

**6179b.** -.]—A wife entered into a separation deed under which the husband covenanted to pay her *dum casta* during joint lives one-third of the joint incomes, his income to be ascertained in a prescribed manner & any dispute relating thereto to be settled by arbitration. After a small sum had been paid a dispute arose, & the wife was granted a maintenance order for £2 a week, on the ground of wilful neglect to maintain. The husband appealed on the ground that the jurisdiction of the magistrates was barred by the deed, but it was held that there was nothing in the deed to exclude the wife's statutory remedy, & the appeal was dismissed.—*ILES v. ILES* (1931), 145 L. T. 71; 95 J. P. 136; 47 T. L. R. 396; 75 Sol. Jo. 359; 29 L. G. R. 537, D. C.

**6179c.** -.]—An agreement for separation between husband & wife providing payments by the husband for the benefit of the wife, coupled with an agreement by her not to make any claim for maintenance or to institute proceedings for that purpose, does not oust the jurisdiction of the ct. under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), & Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), to inquire whether the husband has been guilty within the Acts of "wilful neglect to provide reasonable maintenance." The deed is of merely evidential value in proceedings for maintenance under the Acts & does not act as an estoppel, although it might have had that effect in proceedings at common law.—*MATTHEWS v. MATTHEWS*, [1932] P. 103; 101 L. J. P. 41; 147 L. T. 240; 96 J. P. 290; 48 T. L. R. 511; 76 Sol. Jo. 495; 30 L. G. R. 385; 29 Cox, C. C. 503, D. C.

**6180a.** -.]—On a wife's summons for maintenance on the ground of persistent cruelty, the only independent corroboration of the wife's charges related to an incident following a quarrel, after which wife & husband cohabited & within a few days, on going away for a holiday, she wrote him an affectionate letter. The justices made an order for fifteen shillings a week, with a non-cohabitation clause. The husband appealed:—*Held*: the cheerful return of the wife to cohabitation & her affectionate letter were strong evidence that she did not look upon the quarrel incident as cruelty, & there was no evidence of persistent cruelty. Order discharged.—*GOODMAN v. GOODMAN* (1931), 95 J. P. 95; 29 L. G. R. 273, D. C.

**6183.** *Add. Annotation*:—*Refd. Williams v. Williams* (1932), 96 J. P. 267.

**6184a.** *Form in accordance with repealed Act—Magistrates acting upon own knowledge—Order set aside.*—A husband & wife had entered into a deed of separation & the wife took out a summons for wilful neglect to maintain in the terms of the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), in disregard of the amending Act of 1925. Notwithstanding that the summons had been misconceived, the magistrates acting upon their own knowledge made an order in the terms of the summons without calling upon deft. for a statement or an explanation on oath of what appeared to the magistrates

to be essential matters:—*Held*: the case had not been tried out & the order in its present form must be set aside.—*CHURCH v. CHURCH* (1933), 148 L. T. 432; 97 J. P. 91; 49 T. L. R. 206; 31 L. G. R. 185; 29 Cox, C. C. 592, D. C.

**6184b.** *Adultery—Particulars.*—A summons by a wife for arrears of maintenance had been twice adjourned by reason of a statement by the husband that he intended to take counter-proceedings for the discharge of the order on the ground of the wife's adultery. Upon the summons coming on again the husband took out his counter-summons returnable on that same day & the case was then heard. The wife was offered an adjournment, which she refused. The summons merely charged adultery by the wife in general terms, not specifying with whom the adultery was committed, or any time or place; but a letter was handed to the wife with the summons stating that she was accused of committing adultery with a named person & had been living with him for 4 years:—*Held*: (1) there is no specified length of time for a return to a summons issued by a ct. of summary jurisdiction, & it is a common practice when a party is before the ct. to issue a supplemental summons returnable on that day; (2) it is very desirable that a summons should state particulars of adultery, but it is not bad in law if it does not do so; (3) any irregularity there might have been had been waived by the party continuing the case before the justices; (4) in all the circumstances & in view of the serious charge made against the wife & the alleged adulterer, an order should be made for a further hearing, but the wife should have no costs of the appeal.—*OLDING v. OLDING*, [1936] 3 All E. R. 189; 155 L. T. 528; 100 J. P. 524; 80 Sol. Jo. 955; 30 Cox, C. C. 479; 34 L. G. R. 616.

**6187.** *Add. Annotation*:—*Folld. Romilly v. Romilly* (1934), 151 L. T. 179.

**6188a.** -.]—It is the duty of magistrates in exercising the matrimonial jurisdiction to give a concise statement of the grounds for their decisions, especially in contested cases which may be the subject of appeals. Contested matrimonial cases in the summary jurisdiction should not be prolonged by a series of adjournments.—*POTTS v. POTTS* (1934), 151 L. T. 179; 98 J. P. 285; 50 T. L. R. 386; 78 Sol. Jo. 350; 32 L. G. R. 367; 30 Cox, C. C. 125, D. C.

**6188b.** -.]—Concise statements of the reasons for their decisions should be given by magistrates in matrimonial cases, especially in contested cases which may be the subject of appeals, & where the reasons are subsequently requested.—*ROMILLY v. ROMILLY* (1934), 151 L. T. 179; 50 T. L. R. 386; 78 Sol. Jo. 368; 30 Cox, C. C. 125, D. C.

**6188c.** -.]—We have already said several times during these appeals that it is the duty of the magistrates to give their reasons for their decisions. In future we shall have to send back all the cases that have no reasons properly stated (*BATESON, J.*).—*PRACTICE NOTE* (1934), 32 L. G. R. 368.

**6188d.** *Power of magistrates—To make applicant elect—Summons containing several grounds*



of complaint.]—*TYRRELL v. TYRRELL*, No. 6085b, *ante*.

6188e. Husband without legal representative—Whether ground for appeal.]—*LESLIE v. LESLIE* (1930), 94 J. P. Jo. 303.

6191a. ———— What amounts to—Cross-examination of husband.]—Where a wife seeks a separation & maintenance order on the ground of her husband's desertion, & the only evidence given is that of the husband & the wife, then the husband's evidence in cross-examination may be corroboration of her evidence so as to justify the justices in making an order.—*WILLIAMS v. WILLIAMS* (1928), 93 J. P. 32; 27 L. G. R. 4, D. C.

6191b. Degree necessary.]—On an appeal from a maintenance order made by the magistrate on Mar. 18, 1932, finding that the husband had deserted his wife in 1915, & directing him to pay her £2 a week, it was submitted that there was no corroboration of the wife's evidence as to desertion:—*Held*: the strict law of corroboration by independent evidence required under the ecclesiastical procedure in proceedings for desertion in the Divorce Ct. was not necessarily applicable to the matrimonial jurisdiction in the police cts. Nevertheless it was obvious that in matters of the greatest consequence between man & wife to act on evidence unsupported by a body of facts would be dangerous. When one found that during seventeen years the husband had not lived with his wife, & had not provided her with maintenance, there was a body of facts which, unless satisfactorily explained by applt., established the wife's case. The magistrate took the right view. The appeal was dismissed with costs.—*WILLIAMS v. WILLIAMS* (1932), 147 L. T. 219; 96 J. P. 267; 76 Sol. Jo. 461; 30 L. G. R. 362; 29 Cox, C. C. 499, D. C.

6192a. Statement by probation officer—Otherwise than as witness.]—In a case in which a wife summoned her husband for desertion the justices adjourned the hearing with a view to the probation officer using his good offices to effect a reconciliation. At the resumed hearing he informed the ct., not as a witness, that his efforts had been fruitless, & in the course of his statement expressed a favourable view as to the character of the husband. The justices refused to make an order, & on the wife's appeal it was urged that the justices' minds were biased in favour

of the husband by the probation officer's improper & unsolicited testimonial:—*Held*: the justices were entitled to come to their decision on the evidence. The note of the proceedings contained no reference to any observations by the probation officer & no extraneous evidence should be allowed in the Div. Ct.—*PEARCE v. PEARCE* (1929), 93 J. P. 64; 27 L. G. R. 364, D. C.

6201. Add. Annotation :—*Folld. Romilly v. Romilly* (1934), 151 L. T. 179.

6217a. Adjourned hearing before different justices—Only one justice present throughout whole hearing—Validity of proceedings.]—*LEWIS v. LEWIS*, No. 6085a, *ante*.

6217b. Necessity for same justices to act throughout.]—At the hearing of a wife's summons for maintenance the justices adjourned the summons for 3 months & made an interim order on the ground of neglect to maintain. Three months later the matter came up before the same ct., but of the four justices two, including the chairman, had not been present at the earlier hearing. The notes of the evidence of the witnesses taken on the previous hearing were read over to the ct. & the form was gone through of swearing the witnesses & then reading their evidence out, but there was no further examination or cross-examination. The justices then "confirmed" the earlier order. The husband appealed:—*Held*: (1) as the order was based on evidence which had never been heard *viva voce* by two of the justices, it could not be upheld; (2) if the original hearing terminated in a finding the original order was wrong, as an interim order cannot be made upon a finding, & if the original order was bad, it could not be confirmed at the second hearing; (3) if the original hearing terminated in an adjournment & not in any finding, there was no order which the justices at the second hearing could confirm.—*FULKER v. FULKER*, [1936] 3 All E. R. 636; 155 L. T. 541; 101 J. P. 8; 53 T. L. R. 96; 81 Sol. Jo. 36; 30 Cox, C. C. 496; 35 L. G. R. 52.

6230a. Attachment of husband's income—Discharge of maintenance order.]—Where a maintenance order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), has been discharged on the ground of the wife's adultery, she may nevertheless enforce payment of arrears accrued due down to the date of discharge & obtain an order for the attachment of her husband's income. Such

PART XIII. SECT. 27, SUB-SECT. 6.—D. (b).

c i. — Under Maintenance Orders (Facilities for Enforcement) Act, 1923.]—A maintenance order was made against one C. in England in 1908. A copy of the order, which was certified as a true copy by a person described as "clerk to the justices," was registered in N.S.W. in 1929. Proceedings were taken in this State against C. in Aug. 1930, to enforce payment of arrears of maintenance, the greater portion of which was referable to the period prior to registration. A sworn complaint by the original English complainant contained the only evidence of non-compliance prior to the date of registration. Proof of the identity of C. with the person against whom the original order was made consisted in a similarity of names, evidence that C. had been concerned in maintenance proceedings

in England, & evidence as to the nature of his occupation & his request as to service of the process. An order was made that C. be imprisoned until the arrears of maintenance had been paid, & against that order a rule nisi for prohibition had been granted:—*Held*: the sworn complaint was not a deposition within Maintenance Orders (Facilities for Enforcement) Act, 1923, s. 11, & could not be accepted as evidence of non-compliance with the order prior to the date of its registration in N.S.W.—*Re McMASTER, Ex p. CORMACK* (1929), 47 N. S. W. W. N. 148.—AUS.

c ii. — Statute repealed & replaced.]—A maintenance order made under Wives' & Children's Maintenance & Protection Act, R. S. M., 1913, which was repealed by Wives' & Children's Maintenance Act, 1936, can be the basis for the appointment of a receiver under sect. 26 (1) of the latter Act.—

*KUSS v. KUSS* (No. 2), [1936] 3 W. W. R. 537; 4 D. L. R. 781; 44 Man. L. R. 372; 6 F. L. J. (Can.) 164.—CAN.

c iii. — Order for payment out of money paid under Pension Act.]—Money paid under the Pension Act loses its character of pension as soon as it reaches the pensioner's hands, & accordingly is liable to an order for payment under Deserted Wife's Maintenance Act.—*HARRAP v. HARRAP* (1936), 51 B. C. R. 219.—CAN.

sg. Payment enforced as under order of affiliation—Construction in Ireland.]—In Married Women (Maintenance in case of Desertion) Act, 1886 (c. 52), s. 1 (1), the words "order of affiliation" must in Ireland be read as a reference to an order obtained by a Board of Guardians under Illegitimate Children (Ir.) Act, 1863.—*THE STATE (BRADLEY) v. DISTRICT JUSTICE FOR BRAY* (1934), 1. R. 355.—IR.



an order is not an order "under this Act" within Summary Jurisdiction (Married Women) Act, 1895, s. 6.—*OUTERBRIDGE v. OUTERBRIDGE*, [1927] 1 K. B. 368; 98 L. J. K. B. 74; 136 L. T. 303; 90 J. P. 204; 43 T. L. R. 33; 70 Sol. Jo. 1118; 28 Cox, C. C. 281, D. C.

**6231. Add. Annotations:—***Expld. Horsfield v. Brown*, [1932] 1 K. B. 355. *Refd. Knott v. Knott*, [1935] P. 158.

**6233a. — Form of warrant.**—A warrant issued by a magistrate for the enforcement of a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895 (c. 39), must contain the words "unless the said sum & all costs & charges be sooner paid": by sect. 9 of that Act, *Bastardy Laws Amendment Act*, 1872 (c. 65), s. 4; *Affiliation Orders Act*, 1914 (c. 6), s. 6 (1); *Bastardy (Forms) Order*, 1915; & *Bastardy (Forms) Amendment Order*, 1921. The omission of these words in the warrant renders it invalid, & a constable making an arrest under such an invalid warrant is not protected by *Criminal Justice Act*, 1925 (c. 86), s. 44.—*HORSFIELD v. BROWN*, [1932] 1 K. B. 355; 101 L. J. K. B. 177; 146 L. T. 280; 96 J. P. 123; 30 L. G. R. 153; 29 Cox, C. C. 422.

**6233b. — Made in Dominion—Maintenance Orders (Facilities for Enforcement) Act, 1920 (c. 33).**—A married woman obtained in a police ct. in Australia a maintenance order against her husband ordering him to pay £5 10s. per week for her & her child's maintenance. An application was subsequently made by her to a ct. of summary jurisdiction in England under the above Act to confirm that order as against her husband who was resident in England. Upon that application no evidence was submitted to the justices on behalf of the husband. The justices confirmed the order with the modification or variation of substituting £2 10s. per week, i.e., £2 for the married woman & 10s. for the child, in lieu of £5 10s. per week, they being of opinion that they were bound to reduce the amount payable under the order to the limit prescribed for such orders made by a ct. of summary jurisdiction under Summary Jurisdiction (Married Women) Act, 1895 (c. 39):—*Held*: (1) the justices had power to state a case for the opinion of the K. B. Div. on the question whether they were right in so deciding; (2) they were wrong in holding that in dealing with an order under the above Act of 1920 they were bound to limit the amount payable to the sum prescribed for orders made under the above Act of 1895.

(3) The expression "Summary Jurisdiction Acts" in sect. 7 of the above Act of 1920 does not include Summary Jurisdiction (Married Women) Act, 1895 (c. 39) (*AVORY, J.*).—*PEAGRAM v. PEAGRAM*, [1926] 2 K. B. 165; 95 L. J. K. B. 819; 135 L. T. 48; 90 J. P. 136; 42 T. L. R. 530; 70 Sol. Jo. 670; 28 Cox, C. C. 213, D. C.

*Annotation:—As to (1) Consd. Hague v. Hague*, [1937] 2 All E. R. 539.

#### PART XIII. SECT. 27, SUB-SECT. D. (c).

d i. — *Whether 'by divorce decree.'*—The fact that a wife who has obtained an order for separation & maintenance under *Wives' & Children's*

*Maintenance & Protection Act*, R.S.M., 1913, subsequently obtains a divorce decree absolute does not affect her rights under said order.—*KUSS v. KUSS*, [1935] 2 W. W. R. 561; 4 D. L. R. 77; 43 Man. L. R. 240; 5 F. L. J. (Can.) 52—CAN.

**6233c.**

—*]*—A provisional order for maintenance of a wife resident in South Africa was made in a magistrate's ct. in South Africa against her husband then domiciled & resident in England. The order came before a Metropolitan magistrate for confirmation, & he made an order confirming it:—*Held*: (1) as desertion is a continuing offence, there was evidence upon which the South African ct. could find that the wife was deserted in South Africa, although the commencement of the desertion had been elsewhere; (2) it was open to the husband, on the application to confirm, to raise the question of the jurisdiction of the magistrate's ct. in South Africa to make the provisional order, although that ground was not one of those enumerated in the statutory "statement" sent over by the South African ct. of the grounds upon which the application for maintenance might have been opposed by the husband if a party to the proceedings. Therefore, the ct. being satisfied, on consideration of the South African statutes, that the magistrate's ct. had jurisdiction, held that the Metropolitan magistrate's order confirming the provisional order was right.—*Re WHEAT*, [1932] 2 K. B. 716; 101 L. J. K. B. 720; 147 L. T. 437; 96 J. P. 399; 48 T. L. R. 675; 30 L. G. R. 396; 29 Cox, C. C. 535, D. C.

*Annotation:—As to (2) Consd. Hague v. Hague*, [1937] 2 All E. R. 539.

**6233d. — — — — —]—Applt. had since 1931 resided in England. His wife, whom he had married in the same year, took the two children of the marriage to South Africa & resided there until in 1936 she obtained from the magistrate in Johannesburg a provisional order for maintenance against applt. The order came before a petty sessional ct. in England for confirmation pursuant to *Maintenance Orders (Facilities for Enforcement) Act*, 1920 (c. 33), & the *Union of South Africa Statutes*, 1923, No. 15 (*Maintenance Orders*), & was duly confirmed. Upon appeal to a divisional ct. of the Probate, Divorce & Admiralty Division, the question was raised as to the jurisdiction of that ct. to hear the appeal:—*Held*: upon the construction of *Maintenance Orders (Facilities for Enforcement) Act*, 1920 (c. 33), s. 4 (7), the ct. had jurisdiction to hear the appeal.—*HAGUE v. HAGUE*, [1937] 2 All E. R. 539; 106 L. J. P. 70; 157 L. T. 239; 101 J. P. 304; 53 T. L. R. 641; 81 Sol. Jo. 379; 35 L. G. R. 297; 30 Cox, C. C. 608, D. C.**

**6236.** After this case add "*See, now, Criminal Justice Administration Act*, 1914 (c. 58),

**6241a.** After this case add "— — —  
*See, now, Summary Jurisdiction (Separation & Maintenance) Act*, 1925 (c. 51), s. 2 (2)."

**6242. Add. Annotations:—***Distd. Pastre v. Pastre*, [1930] P. 80; *Mezger v. Mezger*, [1937] P. 19. *Refd. Natborny v. Natborny* (1932), 96 J. P. 351; *Plunkett v. Plunkett*, [1937] 3 All E. R. 736.

d ii. — *Return to cohabitation.*—A return to cohabitation does not of itself annul an order of a ct. of summary jurisdiction to pay maintenance, which remains in force until discharged.—*McLACHLAN v. McLACHLAN*, [1935] S. A. S. R. 253.—AUS.

**6242a.** **Foreign divorce.**—In 1935 a maintenance order was made in a ct. of summary jurisdiction in England against M., a German subject. In 1930 a decree of divorce was pronounced between M. & his wife in Germany. Both parties had submitted to the jurisdiction of the ct. & the decree was pronounced on grounds that by insulting behaviour & incompatibility of temper the wife had failed to fulfil her marriage obligations. M. then applied for a revocation of the maintenance order. The justices refused the application for the following reasons: (i) they considered that the fact that the marriage had been dissolved in Germany on grounds which would not be recognised in England was not a sufficient reason for them to discharge the order, & (ii) the wife's financial position had not changed & was such that she required the maintenance payable under the order for her support, & the justices therefore exercised their discretion in her favour. The husband appealed:—*Held*: (1) the decree of the German ct. was valid & binding throughout the world & the justices were not concerned with the question whether the grounds of divorce were recognised in England; (2) in the case of a foreign divorce where the parties could not make any application to the Divorce Ct. in England the continuance of the award of maintenance is not a judicial exercise of the magistrates' discretion.

Observations on procedure on proof of a decree of dissolution of marriage by a foreign ct.—*MEZGER v. MEZGER*, [1937] P. 19; [1936] 3 All E. R. 130; 106 L. J. P. 1; 155 L. T. 491; 100 J. P. 475; 53 T. L. R. 18; 80 Sol. Jo. 916; 34 L. G. R. 608; 30 Cox, C. C. 467.

**6242b.** ——— **By consent of parties.**—*EBERT v. EBERT* (1930), 94 J. P. Jo. 56.

**6242c.** ——— **Effect of.—On right to recover arrears of maintenance.**—*OUTERBRIDGE v. OUTERBRIDGE*, No. 6230a, *ante*.

**6250.** *Add. Annotations*:—As to (1) *Appl.* *Outerbridge v. Outerbridge* (1926), 90 J. P. 204. *Refd.* *Peagram v. Peagram*, [1926] 2 K. B. 165; As to (2) *Refd.* *Knott v. Knott*, [1935] P. 158

**250a.** ——— **Necessity for strict proof.**—In this case justices refused to discharge a maintenance order which they had made on the ground of the husband's cruelty. The husband had applied for discharge of the order on the ground that since the order the wife had committed adultery. The justices found that the husband conducted to his wife's adultery by his failure to keep up payments under the order, & refused to discharge it. The husband appealed:—*Held*: the justices were not warranted on the facts in finding conduct conducing, which must be strictly proved & must be the direct cause of the adultery. A allowed & original order discharged. *NORRIS v. NORRIS* (1930), 94 J. P. 79; 28 L. G. R. 137.

**6250b.** ——— **Observations upon the administration of the jurisdiction conferred on justices by Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7, as amended by Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 2, to discharge a maintenance order on proof of the**

**wife's adultery.**—*BROADBENT v. BROADBENT* (1927), 43 T. L. R. 186, D. C.

*Annotation*:—*Refd.* *Knott v. Knott*, [1935] P. 158.

**250c.** ——— **Time for application.**—A complaint under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7, that a married woman has committed adultery, is subject to the six months' limitation imposed by Summary Jurisdiction Act, 1848 (c. 43), s. 11.

A wife obtained an order for separation & an allowance in 1922. In 1926 justices purported to discharge the order by reason of adultery of the wife found by them to have been committed in 1915:—*Held*: the justices had exceeded their jurisdiction.—*WALLER v. WALLER*, [1927] P. 154; 96 L. J. P. 58; 136 L. T. 542; 43 T. L. R. 285; 71 Sol. Jo. 232; 28 Cox, C. C. 329, D. C.

*Annotations*:—*Folld.* *Mellars v. Mellars* (1931), 145 L. T. 550. *Expld.* & *Distd.* *Natbony v. Natbony* (1932), 96 J. P. 351. *Refd.* *Dutch v. Dutch* (1928), 45 T. L. R. 33.

**6250d.** ——— **—A husband, in seeking the rescission of a maintenance order on the ground of the wife's subsequent adultery, must make his complaint within six months of the alleged act of adultery, or within six months of his knowledge, or his means of acquiring the knowledge, of the alleged act.**—*DUTCH v. DUTCH* (1928), 98 L. J. P. 44; 140 L. T. 96; 92 J. P. 197; 45 T. L. R. 33; 72 Sol. Jo. 796.

*Annotations*:—*Refd.* *Natbony v. Natbony* (1932), 101 L. J. P. 58; *Teall v. Teall*, [1938] 3 All E. R. 349.

**6250e.** ——— **—In this appeal from an order by magistrates the ct. took the point that, apart from the merits, the husband was out of time in applying for the revocation of a maintenance order made in Sept. 1904. The order was for 6s. The husband complained by summons towards the end of 1930 that his wife, now aged 60 years, had committed adultery with a man up to Mar. 1930, & claimed that the order be discharged. The wife's defence was a denial of adultery with the man for whom she had acted as house-keeper till his death in 1929. The justices found that adultery had been committed, & revoked the order on Jan. 5, 1931. The wife appealed on the ground that it was contrary to the weight of evidence:—*Held*: on the evidence before the justices the wife ought not to have been found guilty of adultery, but apart from that the husband was out of time in applying for the discharge of the order of 1904. The ground of the husband's complaint occurred more than six months before he took proceedings, & therefore the justices had no jurisdiction to hear the summons.**—*MELLARS v. MELLARS* (1931), 145 L. T. 550; 95 J. P. 169; 29 L. G. R. 563; 29 Cox, C. C. 344, D. C.

*Annotation*:—*Consd.* *Natbony v. Natbony* (1932), 96 J. P. 351.

**6250f.** ——— **—In Oct. 1924, a husband was ordered to pay his wife 30s. a week maintenance, subsequently reduced to 20s., on the ground of desertion. In Apr. 1931, he petitioned for divorce on the ground of his wife's adultery in Aug. 1928. On Dec. 5, 1931, he was granted a decree nisi, the suit being undefended. The decree was made absolute in May, 1932. On Dec. 16, 1931, the husband applied, under Summary Jurisdiction (Married Women) Act, 1895**

(c. 39), s. 7, for the discharge of the maintenance order of 1924 on the ground of fresh evidence, namely, the wife's adultery in 1928. The magistrate dismissed the summons on the ground that the proceedings were out of time & that decision was affirmed by the Div. Ct.:—*Held*: the husband's application for the discharge of the order might be made "at any time"; it was not limited to the "six calendar months" referred to in Summary Jurisdiction Act, 1848 (c. 43), s. 11, from the time when the matter of the complaint arose. The matter must therefore be sent back to the magistrate to deal with under the discretion left open to him under Summary Jurisdiction (Separation & Maintenance) Act, 1925 (c. 51), s. 2.—*NATBORNY v. NATBORNY* [1933] P. 1; 101 L. J. P. 58; 147 L. T. 252; 96 J. P. 351; 48 T. L. R. 590; 30 L. G. R. 447; 29 Cox, C. C. 509, C. A.

*Annotation*:—*Reid*. *Teall v. Teall*, [1938] 3 All E. R. 349.

**6250g. ——— Particulars of adultery.]—**

A wife had obtained an order under Summary Jurisdiction (Separation & Maintenance) Acts, 1895 to 1925, that her husband should pay her 30s. a week by way of maintenance. The order did not contain a non-cohabitation clause. Subsequently the husband took out a summons asking that the order for maintenance should be discharged, on the ground that the wife had committed adultery. The husband gave evidence that, since the date of the maintenance order, his wife had given birth to a child, & of non-access on his part. This was the only evidence of adultery. The justices found that the wife had committed adultery, & discharged the weekly order for maintenance:—*Held*: (1) the evidence of the husband of non-access to bastardise his child was not admissible, & the justices' order discharging the maintenance order must be set aside; (2) in proceedings under Summary Jurisdiction (Separation & Maintenance) Acts, 1895 to 1925, if there is a charge of adultery, the act or acts of adultery should be specified with particulars, if possible, of the place where, the time when, & the name of the person with whom it is alleged the adultery has been committed.—*BOSTON v. BOSTON* (1928), 138 L. T. 647; 92 J. P. 44; 26 L. G. R. 183.

*Annotations*:—*As to* (1) *Distd. Stewart v. Stewart* (1932), 96 J. P. 94. *Reid*. *Olding v. Olding*, [1936] 3 All E. R. 189.

**6251a. ——— Right to re-open whole case.]—**  
*THOMPSON v. THOMPSON* (1934), 78 Sol. Jo. 820, D. C.

**6251b. ——— Undertaking by husband's parents to make allowance—Alteration of status of parties—Cesser of allowance.]—**On an application by a husband for a reduction of the amount of a maintenance order pursuant to Summary Jurisdiction (Married Women) Act, 1895 (c. 39), ss. 5 (c), 7, the parents of the husband undertook to pay a lump sum in settlement of arrears under the order & to pay maintenance at a reduced rate. An order was drawn up in these terms, the parents giving their undertaking to the summary jurisdiction ct. On a subsequent application by the husband for further reduction on the grounds of reduced means & that a decree absolute of divorce had been pronounced dissolving the marriage of the husband & wife, the ct. of summary jurisdiction found that there was no reason to

justify a further alteration of the order, although it was stated that the parents of the husband had refused to pay. On appeal it was held by the Divisional Ct. that these circumstances did not suffice to justify a reduction. Since *Bragg v. Bragg*, [1925] P. 20, it is plain that dissolution of marriage does not have the effect of discharging an order for maintenance. If & when in such a case it is decided by a ct. of competent jurisdiction that the undertaking of third parties is not enforceable & that there are no means of compelling them to put the husband in funds to pay the maintenance ordered, it is open to the husband to allege before the ct. of summary jurisdiction that there is fresh evidence entitling him to a reduction of the order, but so long as the undertaking is not shown to be unenforceable its existence is plainly a circumstance that the ct. of summary jurisdiction can take into account in assessing the means of the husband to pay.—*PLUNKETT v. PLUNKETT*, [1937] P. 208; [1937] 3 All E. R. 736; 106 L. J. P. 104; 157 L. T. 367; 101 J. P. 508; 53 T. L. R. 967; 81 Sol. Jo. 687; 35 L. G. R. 491; 30 Cox, C. C. 616.

**6251c. Revival of order.]—**(1) A separation order granted to a wife, & made under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5, upon cause being shown upon fresh evidence to the satisfaction of the ct., if the order has been discharged by the justices, may be revived by them under Criminal Justice Administration Act, 1914 (c. 58), s. 30 (3). (2) A finding of adultery against a wife by justices is not conclusive, whereas a subsequent finding by a judge of the High Ct., that the adultery alleged was not committed, is conclusive. Such a finding by a judge of the High Ct. is a new fact, & the nature of his finding is also a new fact, & both these facts are "fresh evidence" within the statutes.—*PRATT v. PRATT* (1927), 96 L. J. P. 123; 137 L. T. 491; 43 T. L. R. 523; 71 Sol. Jo. 433; 28 Cox, C. C. 413.

*Annotation*:—*As to* (2) *Reid*. *Knott v. Knott*, [1935] P. 158.

**6252. Add. Annotations.]—***Reid*. *Colchester v. Peck* (1926), 135 L. T. 32; *R. v. Copestake*, *Ex p. Wilkinson* (1926), 90 J. P. 191.

**6255. Add. Annotations.]—***Reid*. *Colchester v. Peck*, [1926] 2 K. B. 366; *R. v. Copestake*, *Ex p. Wilkinson*, [1927] 1 K. B. 468.

**6255a. ———.]—***PRATT v. PRATT*, No. 6251c, *ante*.

**6255b. ———.]—**Where the justices had made a maintenance order on a wife's complaint that her husband had wilfully neglected to maintain her, & thereafter revoked the order on the husband's application, in view of his claim that he had undertaken to provide a home for her but she had refused to return; the wife appealed. It was submitted on her behalf that there was no cause shown on fresh evidence for the revocation of the maintenance order:—*Held*: it appearing from the correspondence which had passed since the maintenance order that the husband had offered to maintain her if she returned, & there being no evidence that the offer was not made *bona fide*, there was fresh evidence upon which the justices could act & the order was rightly revoked.—*KAY v. KAY* (1931), 95 J. P. 86; 29 L. G. R. 215, D. C.

**6255c. ———.]—**At the hearing of a wife's

summons for desertion the husband charged his wife with adultery & gave evidence in support thereof. The justices made a maintenance order. Two months later the justices revoked the order on the application of the husband raising the same case of adultery & adducing additional evidence in support of the charge:—*Held*: it was open to the husband to call the evidence at the hearing of his wife's summons which was afterwards given on his application to revoke. It was not fresh evidence & the appeal must be allowed. There would be no limit in the Divorce Ct. to the number of fresh trials if the evidence in this case was held to be fresh evidence.—*CROSS v. CROSS* (1931), 95 J. P. 86; 29 L. G. R. 276, D. C.

6271. *Add. Annotations*:—*Re*fd. *Mart v. Mart*, [1926] P. 24; *Stafford v. Kidd*, [1937] 1 K. B. 395.

6272. *Add. Annotation*:—*Distd. Peagram v. Peagram*, [1926] 2 K. B. 165.

6275a. — *Order made in Dominlon.*—*PEAGRAM v. PEAGRAM*, No. 6233b, *ante*.

6282a. — *Error by justices.*—Where a bench of justices reduced a maintenance order of 25s. a week to 2s. 6d. a week, the wife appealed, & it was held that this had been an error, & effect should be given to the justices' intention to make an order for 10s. a week.—*PHEASEY v. PHEASEY* (1932), 96 J. P. 93; 30 L. G. R. 100, D. C.

6283a. — *PEARCE v. PEARCE*, No. 6192a, *ante*.

6283b. *By consent.*—*DONKIN v. DONKIN*, No. 6165a, *ante*.

6286a. — *JONES (A.) v. JONES (D. L.)*, No. 6137a, *ante*.

6286b. *To rescind order—Dismissing summons.*—*BURTON v. BURTON*, No. 6128b, *ante*.

6286c. — *Discharging order for maintenance.*—Where an application was made by a husband for the discharge of a maintenance order

made by the magistrates on the ground of the wife's alleged adultery since the order, & the magistrates found that adultery had been committed & discharged the order, the Div. Ct. held on appeal that there was no evidence on which adultery could have been found. Order for discharge rescinded.—*GIBBONS v. GIBBONS* (1932), 147 L. T. 200; 96 J. P. 247; 29 Cox, C. C. 496, D. C.

6286d. *To remit to justices—For determination of question of offer to return to husband.*—Where a wife summoned her husband on the ground of desertion & the summons was dismissed, & she afterwards summoned him for alleged wilful neglect to maintain her, & the magistrates made a maintenance order, the husband appealed, principally on the ground that in coming to their decision the magistrates had considered matters already decided in his favour. The Div. Ct. remitted the case to the magistrates for consideration of the question whether since the dismissal of the first summons the wife had made a *bond fide* offer to return to the husband.—*GRUBB v. GRUBB* (1934), 150 L. T. 420; 98 J. P. 99; 50 T. L. R. 221; 78 Sol. Jo. 136; 32 L. G. R. 144; 30 Cox, C. C. 78, D. C.

6299. *Add. Annotation*:—*Consd. Re Thomsett, Thomsett v. Thomsett*, [1936] 3 All E. R. 649.

6300. *Add. Annotations*:—*Distd. Fletcher v. Fletcher*, [1928] P. 20. *Consd. Re Thomsett, Thomsett v. Thomsett*, [1936] 3 All E. R. 649.

6300a. — *Wife's appeal.*—A wife who has failed in her application before justices for a maintenance order on the ground of her husband's desertion, is not entitled to an order against her husband for security of the costs of her appeal against the justices' decision.—*FLETCHER v. FLETCHER*, [1928] P. 20; 97 L. J. P. 1; 138 L. T. 135; 91 J. P. 208; 44 T. L. R. 13; 71 Sol. Jo. 846.

*Annotation*:—*Consd. Re Thomsett, Thomsett v. Thomsett*, [1936] 3 All E. R. 649.

PART XIII. SECT. 27, SUB-SECT. 7.—  
B.

*sk. Dismissal of claim to money attached in favour of wife.*—Money was

attached in favour of a wife, under Deserted Wives' Maintenance Act, s. 11. A third party claimed the moneys, & on his application being

refused he appealed to the county ct.:—*Held*: it had no jurisdiction to hear the appeal.—*CHAPELAS v. COUKES* (1932), 45 B. C. R. 417.—*CAN.*

## INCOME TAX.

## Part I.—Administration.

- 1a. — Of division in which party resident—Jurisdiction to assess after removal of party to new division.]—*KELLY v. ROGERS*, No. 568a, *post*.

SUB-SECT. 1.—IN GENERAL (Vol. XXVIII., p. 5).  
Add the following case:—

- 9a. Delivery of lists by person in receipt of income belonging to others—Duty of bank.]—A bank is liable under 1918 Act, s. 103, to render returns of untaxed interest received on Govt. securities belonging to customers

but registered in the bank's name.—*A.-G. v. NATIONAL PROVINCIAL BANK, LTD.* (1928), 44 T. L. R. 701; 14 Tax Cas. 111.

- 9b. Right to pay tax before assessment.]—It is not necessary in all cases, in order to enable the Crown to receive tax money that there should be an assessment actually served of the sum which is ultimately paid.—*COCKERLINE (W. H.) & Co. v. INLAND REVENUE COMRS.* (1930), 144 L. T. 84; 47 T. L. R. 13, C. A.
10. Add. Annotation:—*Refd. Pickford v. Quirke, Pickford v. I. R. Comrs.* (1927), 138 L. T. 500.

## Part II.—Schedule A.

NOTE.—The property in Sched. A., No. II., was transferred to Sched. D., Case III., and the property in Sched. A., No. III. was transferred to Sched. D., Case I., by Finance Act, 1926 (c. 22), s. 28, Sched. III.

SECT. 1.—APPLICATION OF SCHEDULE (Vol. XXVIII., p. 6).

- 11a. General rule.]—(1) Income tax under Schedule A., as under every other Schedule, is assessed on profits & gains, & the test in regard to liability to tax under Schedule A. is not whether the person taxed had an independent ownership of the property, but whether he had profits & gains in respect of his occupation.

(2) A person who by a will is given a right of residence in a house rent free so long as he wishes, & who is in residence during the year of assessment, is assessable to income tax for that year under Schedule A. in respect of his beneficial occupation; & the amount at which he is assessed must be included in a return of the total income for super tax purposes in the following year.

(3) When the right of residence is given to two persons jointly, it is for the Special Comrs. to fix the proportion of the total assessment applicable to each person, & when such a finding has been made, it should be accepted in any higher ct.—*SHANKS v. INLAND REVENUE COMRS.*, [1929] 1 K. B. 342; 98 L. J. K. B. 341; 140 L. T. 157; 73 Sol. Jo. 76; 45 T. L. R. 28; 14 Tax Cas. 249, C. A.

Annotations:—As to (2) *Consd. Sutton v. Inland Revenue Comrs.* (1929), 45 T. L. R. 565. *Apprvd. I. R. Comrs. v. Miller*, [1930] A. C. 222.

12. Add. Annotations:—As to (2) *Consd. Golden Horse Shoe (New), Ltd. v. Thurgood*, [1933] 1 K. B. 548. *Refd. Birmingham Corp'n. v. Barnes*, [1934] 1 K. B. 484.

13. Add. Annotations:—As to (1) *Appld. Hughes v. British Burmah Petroleum Co.* (1932), 17 Tax Cas. 286. *Consd. Golden Horse Shoe (New), Ltd. v. Thurgood*, [1933] 1 K. B. 548. *Generally, Refd. Glenboig Union Fireclay Co. v. I. R. Comrs.* (1922), 12 Tax Cas. 427; *Naval Colliery Co.* (1897), *Ltd. v. I. R. Comrs.* (1928), 138 L. T. 593; *Ormond Investment Co. v. Betts*, [1928] A. C. 143; *Shingler v. Williams & Sons* (1933), 148 L. T. 474.

15. Add. Annotations:—As to (1) *Consd. Shanks v. I. R. Comrs.*, [1929] 1 K. B. 342. *Refd. Bertram v. Wightman*, [1936] 2 All E. R. 487; *Mitcham Golf Course Trustees v. Ercaut*, [1937] 3 All E. R. 450. As to (2) *Refd. Miller (Lady) v. I. R. Comrs.* (1930), 15 Tax Cas. 25.

- 16a. — House & grounds vacated.]—Applt. was assessed under Schedules A. & B. in respect of some 40 acres of land, consisting of lawns, gardens, drives, pathways, woods & shrubberies surrounding a house of which he was the owner. The property was vacated by applt. on Dec. 2, 1933, & since that date had been unoccupied. The proportion of tax charged in respect of the house & buildings had been discharged under Sched. A., No. VII., r. 4. The Comrs. held that applt. was properly chargeable as being the person who was the occupier of the property within the Income Tax Acts, & that the property was assessable to income tax whether or not the occupier chose to exercise his rights of occupation:—*Held*: the Comrs. were right. To hold, as applt. contended, that the words "having the use of any lands or tenements" in Sched. A., No. VII., r. 2, meant "actually using the lands" resulted in an apparent conflict between rule 4 and rules 1 & 2. That conflict could not have been intended & could

## PART I. SECT. 1, SUB-SECT. 2.

b i — Assessment in default of return—*Indian Income Tax Act*, 1922.]—*INCOME TAX COMR., UNITED & CENTRAL PROVINCES v. BADRIDAS RAMRAI SHOP* (1937), 81 Sol. Jo. 235, P. C.—

## IND.

## PART I. SECT. 2, SUB-SECT. 1.

sp. Consolidated returns by company—*Validity*.]—Prior to the enactment of sub-sect. (3) of sect. 35 of Income

War Tax Act by 23 & 24 Geo. 5, c. 41, s. 13, the Minister had no power to allow the filing of consolidated returns.—*WESTERN VINEGARS, LTD. v. MINISTER OF NATIONAL REVENUE*, [1938] S. C. R. 39.—CAN.

be disposed of by giving to the words in rule 2 the meaning "entitled to the beneficial use of any lands or tenements." The contention that "occupation" had the same meaning in the Income Tax Acts as in the law of rating was not supported by the dictum of SCRUTTON, L.J., in *Back v. Daniels*, [1925] 1 K. B. 526, relied on by applt. The difference between the law of rating & the income tax law was that the Statute of Elizabeth contained no definition of "occupier," & therefore occupation had to be treated as a question of fact, whereas in Income Tax Act, r. 2, provided that a certain person should be deemed to be the occupier although he did not occupy the lands in fact. But since the assessment on the lands was in the same amount as when they were occupied with the house, the case must be remitted to the Comrs. for them to ascertain the annual value of the lands apart from the house.—*BERTRAM v. WIGHTMAN*, [1936] 2 K. B. 521; [1936] 2 All E. R. 487; 105 L. J. K. B. 784; 155 L. T. 412; 52 T. L. R. 570; 80 Sol. Jo. 721; 20 Tax Cas. 411.

**16b. Factory.—Process machinery connected to freehold.**—Resp. co. owned & occupied the premises at which it carried on the business of soap manufacturers. The premises contained plant & machinery, of which part consisted of process machinery, i.e., plant & machinery used for the purposes of the manufacturing operations & trade processes. The assessments on the co.'s premises for each of the years from 1923–24 to 1930–31 inclusive were based on the 1923 valuation for rating purposes, which took into account the value of all plant & machinery in the factory, including the process machinery. Rating & Valuation Act, 1925 (c. 90), altered the basis of assessment for rating purposes by excluding therefrom the value of process machinery, & the annual value of the premises for rating purposes was computed accordingly as from 1929. The annual value so computed was adopted as the annual value for purposes of income tax, Sched. A., for the year 1931–32, being a year of re-assessment under Finance Act, 1930 (c. 28), s. 27. On appeal the co. contended (i) that annual value in No. I of Sched. A., had the same meaning as annual value in Parochial Assessments Act, 1836 (c. 96), s. 1, which had been held, in effect, to include process machinery, (ii) that while Rating & Valuation Act, 1925 (c. 90), had altered the meaning of annual value for rating purposes by excluding process machinery, no corresponding alteration had been made in the meaning of annual value under Income Tax Act, 1918, & (iii) that the assessment on its premises should accordingly be increased to include the process machinery. The General Comrs. found that the whole of the process machinery was definitely attached in one way or another to the freehold, & decided that the value thereof must be included in the Sched. A. assessment:—*Held*: without deciding the point raised in the co.'s contentions, the General Comrs.

had found that the process machinery was so annexed to the freehold or realty as to form part of the hereditament to be valued for Sched. A. purposes & in so finding they had made no error of law.—*CRAWFORD v. HUDSON* (R. S.), LTD. (1935), 19 Tax Cas. 434.

**20a. — Insurance premium.**—The lease of premises, of which applt. co. was the lessor, provided that the rent should be (for the year 1936–7) £104 *per annum*, & that the lessee should pay "a yearly sum by way of further rent equal to the amount of an insurance premium paid by the lessor." The insurance premium amounted to £1 *per annum* & the annual value of the premises for income tax was assessed at £105 (gross). The Comrs. confirmed the assessment & the co. appealed, contending that the premium did not affect the annual value for purposes of tax, & that the assessment should have been £104 only:—*Held*: dismissing the appeal, since the lease referred to the premiums as rent, the Comrs. were entitled to take the premiums into account in arriving at the annual value, based on the rack rent within Sched. A, No. 1., Rule 1 (2), & since Sched. A, No. V., Rule 8, deals expressly with the cost of insurance as a ground for claiming repayment of tax, the cost of insurance is also by implication included in the deductions allowed under No. V., Rule 7, & if a landlord is entitled to deduct from the gross annual value a sum in respect of insurance, the gross annual value must include provision for insurance.—*HOUSE & PROPERTY INVESTMENT CO., LTD. v. KNEEN*, [1938] 2 K. B. 274; [1938] 2 All E. R. 514; 107 L. J. K. B. 617; 159 L. T. 309; 54 T. L. R. 696.

**24a. Right of residence given to more than one person.**—*SHANKS v. INLAND REVENUE COMRS.*, No. 11a, *ante*.

**25. Add. Annotation.**—As to (2) *Refd.* *House Property & Investment Trust, Ltd. v. Kneen*, [1938] 2 K. B. 274.

**25a. Annual value—House let in apartments.**—Where a house or tenement is let in different apartments or tenements & occupied by two or more persons severally, the annual value, under 1918 Act, Schedule A., No. VII., r. 8 (c), is the aggregate of the hypothetical rack rents of the separate tenements, & not a hypothetical rack rent for the whole payable by one who would then sublet its separate tenements for the sake of profit.—*WILLIAMS v. SANDERS*, [1927] 2 K. B. 498; 96 L. J. K. B. 912; 137 L. T. 820; 43 T. L. R. 663; 11 Tax Cas. 673.

*Annotation.*—*Refd.* *Embleton v. Norwich Union Life Insce. Soc., Norwich Union Life Insce. Soc. v. Embleton* (1927), 11 Tax Cas. 681; *Lyons v. Collins*, [1936] 2 All E. R. 292.

**25b. — Blocks of flats.**—Certain premises consisted of a number of blocks or buildings, each containing a number of self-contained flats which had separate entrance doors from the public staircase. The rents payable by the tenants included the payment of rates & taxes & the maintenance, lighting & cleaning of staircases & the performance

#### PART II. SECT. 2, SUB-SECT. 1.

**25 II. — — — — —.**—The Finance Acts contain in each year, except in years of revaluation, a provision that the annual value of property which has been adopted for the purpose of

income tax under Sched. A. for one year shall be taken as the annual value of that property for the same purpose for the next year:—*Held*: this provision does not preclude an increase in the assessment or an additional first

assessment under Income Tax Act, 1918, s. 185, where the original assessment is found not to have included the whole annual value.—*INLAND REVENUE COMRS. v. DICKSON*, [1928] S. O. (Ct. of Sess.) 752.—*SCOT*.

of various other services by the landlord:—*Held*: (1) in accordance with 1918 Act, Schedule A., No. VII., r. 8 (c), one assessment must be made in respect of each block or building, & not a separate assessment in respect of each flat; (2) the allowance for repairs must also be made in respect of each building in accordance with Schedule A., No. V., r. 7; (3) the premises not being let at rack rent, in estimating the annual value the payments made by the owner for rates, etc., in the preceding year were to be excluded, as provided by Schedule A., No. IV., r. 1.—*NORWICH UNION LIFE INSURANCE SOCIETY v. EMBLETON, EMBLETON v. NORWICH UNION LIFE INSURANCE SOCIETY* (1927), 137 L. T. 415; 11 Tax Cas. 681.

*Annotations*:—As to (2) *Folld. Towle v. Improved Industrial Dwellings Co.* (1930), 46 T. L. R. 409. *Generally, Rejd. Williams v. Sanders*, [1927] 2 K. B. 498. *Rejd. Cadbury Bros., Ltd. v. Sinclair*, [1934] 2 K. B. 389.

25c. —.]—A block of buildings within the Metropolitan area comprising between fifty & sixty self-contained flats was assessed to income tax, Sched. A., for the year 1926–27, by eight assessments, the assessments being made on the basis that each group of flats approached from the street by a separate entrance was assessable in one sum by one assessment under Rule 8 (c), No. VII., Sched. A. A separate valuation had been made for each flat under Valuation (Metropolis) Act, 1869 (c. 67), & had been included in the valuation list which came into force on Apr. 6, 1928. The amounts of the “group” assessments were arrived at by adding together the valuation list valuations of the separate flats in the group:—*Held*: in the Ct. of Appeal, that the assessments were rightly made.—*TOWLE v. IMPROVED INDUSTRIAL DWELLINGS CO., LTD.*, [1931] 1 K. B. 263; 100 L. J. K. B. 37; 144 L. T. 281; 95 J. P. 51; 47 T. L. R. 74; 29 L. G. R. 41; 17 Tax Cas. 231, C. A.

*Annotation*:—*Consd. Johnstone v. Consolidated London Properties, Ltd.* (1932), 17 Tax Cas. 231.

25d. —.]—The owners of a building comprising eight residential flats & rooms for a porter appealed against eight assessments made under Sched. A., in respect of the flats, on the ground that they were entitled to allowances under Sched. A., No. V., r. 7 (1) (b), as amended by Finance Act, 1923 (c. 14), s. 28. The property was within the area to which Valuation (Metropolis) Act, 1869 (c. 67), applied, & in the valuation list in force during the tax year in question the gross value of each flat was shown separately, & the assessments complained of were in amounts corresponding to such gross values. All the flats were self-contained & had separate front doors abutting on to a common staircase inside the building, & there was one entrance to the street giving access to the whole building. Each flat was let to a separate tenant at a rent which included the rates & the cost of lighting & cleaning the common staircase & entrance & of providing a porter, with the result that the rents paid by the tenants largely exceeded the gross values contained in the valuation list. During the

year of assessment the amount of the total rents payable under the leases was admitted, but the owners refused to give the particulars necessary to arrive at any outgoings, which should by law be deducted in making the assessment. The owners contended (a) that the gross assessments in the valuation list were conclusive for the purpose of income tax under Valuation (Metropolis) Act, 1869 (c. 67), during the quinquennial period in question & that the actual outgoings during any specific year forming part of that period were irrelevant; (b) that under r. 7 of Sched. A., No. V., as amended by Finance Act, 1923 (c. 14), s. 28, they were entitled to the appropriate allowances from the gross Sched. A. assessments set out in para. 3 of that rule for the purpose of collection. The Crown contended (a) that under Sched. A., No. VII., r. 8 (c), the whole house was the unit of assessment & assessable in one sum, namely, the total amount of the gross values of the eight flats & the porter's rooms; (b) that, on the figures before the Comrs., the claim to reduction failed, since under Sched. A., No. V., r. 7 (2), as amended by Finance Act, 1923 (c. 14), s. 28, there was no title to the reduction claimed where the amount of the assessment was less than the rent by a sum greater than the authorised reduction which would be allowable if the assessment were on the amount of the rent after deducting from such rent any outgoing which should by law be deducted in making the assessment. The Comrs. were of opinion that the income tax assessments should follow the assessments as fixed under Valuation (Metropolis) Act, 1869 (c. 67), & therefrom the appropriate deductions allowed for repairs in the case of each flat, & they reduced the assessments in accordance with para. 3 of r. 7:—*Held*: (1) it was incompetent to the Crown to raise their first contention, as 1918 Act gave the Crown no right of appeal against an assessment; (2) if the tax-payer was to make good his claim to reduction, inquiry must be made as to outgoings, & the case should be remitted to the comrs. to determine what reduction, if any, should be allowed on the basis that the outgoings referred to in para. 2 of r. 7 were to be ascertained separately as to each flat & as to each year of assessment.—*CONSOLIDATED LONDON PROPERTIES, LTD. v. JOHNSTONE*, [1932] A. C. 351; 101 L. J. K. B. 224; 146 L. T. 429; 96 J. P. 134; 48 T. L. R. 229; 30 L. G. R. 133; 17 Tax Cas. 231, H. L.

25e. — Premium paid for lease.]—*Held*: the comrs. were entitled, in determining the annual value of premises, the lease of which had been assigned to applt., to take into account the premium originally paid by the assignor for the lease, plus interest thereon.—*DAVIES v. ABBOTT* (1927), 11 Tax Cas. 575, C. A.

25f. — Rack rent—Question of fact.]—Applt. obtained in 1931 the renewal of a lease of premises for a term of fourteen years from Dec. 25, 1929, the date on which the earlier lease expired. The rent reserved under the

25 iii. — Apartment suites.]—Where a large dwelling-house was converted into a number of unfurnished apartment suites:—*Held*: the proper

method of arriving at the annual value of the house for the purpose of Sched. A. was to take the aggregate rack-rental values of the separate

apartment suites.—*STEVENSON v. I. R. COMRS.*; *THOMSON v. I. R. COMRS.*, [1935] S. C. 788; 20 Tax Cas. 303.—*SCOT*.



not a profit arising out of lands or heritages within the meaning of Sched. A., & the board was not assessable under that Sched.—INLAND REVENUE COMRS. v. FORTH CONSERVANCY BOARD, [1929] S. C. (H. L.) 1. —SCOT.

37. *Add. Annotations*:—*Distd. I. R. Comrs. v. Forth Conservancy Board*, [1929] A. C. 213. *Apld. Curtis Brown, Ltd. v. Jarvis*; *Jarvis v. Curtis Brown, Ltd.* (1929), 14 Tax Cas. 744.
- 46a. *Assessment of tithe rentcharge—What may be deducted.*—*Appls.*, who owned the whole of the tithe in Wales, appealed against assessments made on them under Sched. A. for the year 1931–32 in respect of rectorial & vicarial tithe rentcharge issuing out of certain lands in a particular parish in Wales. In computing the amounts of these assessments there was deducted from the value of the tithe, estimated by reference to the net commuted value at Apr. 6, 1930, (i) the rates charged during the year 1929–30, & (ii) costs of collection. *Appls.* contended that the correct assessment of the tithe rentcharge was the rackrent that a hypothetical tenant would be prepared to pay for it, & that in the computation of this amount the following matters (*inter alia*) should be taken into account: (a) the payment of rates on the tithe some months before the tithe itself can be collected; (b) the cost of obtaining & maintaining a proper list of tithe-payers, & of insuring the tithe map, apportionment deeds & other documents relating to the tithe; (c) certain head office expenditure incurred by *appls.* in the administration of the whole of the tithe rentcharges vested in them; (d) provision against concerted action by the tithe-payers & expenses of litigation; & (e) provision of a profit for the tenant. The General Comrs. decided that *appls.* were not entitled to allowances in respect of any of the matters for which they claimed them:—*Held*: the General Comrs.' determination was one of fact & they had not made any error in law.—*CHURCH TEMPORALITIES COMRS. IN WALES v. BRYANT* (1935), 19 Tax Cas. 728.
- 50a. — *Blocks of flats.*—*NORWICH UNION LIFE INSURANCE SOCIETY v. EMBLETON, EMBLETON v. NORWICH UNION LIFE INSURANCE SOCIETY*, No. 25b, *ante*.
- 50b. — *Whether gross value in Valuation List conclusive as to rent.*—*Appls.* were the owners of premises within the Metropolitan area with regard to which it was admitted that for the years to which the appeal related, 1924–25 & 1925–26, the actual rentals received exceeded the gross Sched. A assessments by more than the authorised reduction mentioned in 1918 Act, rule 7 (2), No. V, Sched. A. They contended, however, that they were entitled

to a repairs allowance under rule 7 (1), because (a) in view of the Valuation (Metropolis) Act, 1869 (c. 67), no alterations merely in value of the hereditaments during the quinquennial period could during that period be taken into consideration for the purposes of rule 7 (2) (the repairs allowance had been granted for earlier years within the same quinquennial period—1921–22 to 1923–24); & (b) the gross value in the Valuation List was for all Income Tax purposes conclusive of the annual value & must be treated as the rent of the premises within rule 7 (2). The General Comrs. dismissed an appeal on these grounds against the assessments for the years 1924–25 & 1925–26. The co. appealed:—*Held*: *appls.* were not entitled to the allowance.—*METROPOLITAN PROPERTIES CO., LTD. v. DUNHAM* (1929), 14 Tax Cas. 740.

*Annotation*:—*Refd. Towle v. Improved Industrial Dwellings Co.*, [1931] 1 K. B. 263.

51. *Add. Annotations*:—*As to* (2) *Apld. I. R. Comrs. v. Glasgow Musical Festival Assocn.* (1926), 11 Tax Cas. 154; *Scottish Woollen Technical College, Galashiels v. I. R. Comrs.* (1926), 11 Tax Cas. 139. *Consd. Geologists' Assocn. v. I. R. Comrs.* (1928), 14 Tax Cas. 271; *Sir G. B. Hunter* (1922) "C" Trust, *Trustees v. I. R. Comrs.* (1929), 14 Tax Cas. 427. *Refd. Chesterman v. Taxation Federal Comr.*, [1926] A. C. 128; *Girls' Public Day School Trust v. Ereaut* (1930), 99 L. J. K. B. 643; *Re Hood, Public Trustee v. Hood* (1930), 143 L. T. 691; *Luipaard's Vlei Estate & Gold Mining Co. v. I. R. Comrs.*, [1930] 1 K. B. 593; *Keren Kayemeth Le Jisroel, Ltd. v. I. R. Comrs.*, [1931] 2 K. B. 465; *Re Smith, Public Trustee v. Smith*, [1932] 1 Ch. 153. *Refd. Master Mariners, Honourable Co. of, v. I. R. Comrs.* (1932), 17 Tax Cas. 298; *Peterborough Royal Foxhound Show Society v. I. R. Comrs.*, [1936] 1 All E. R. 813; *Scottish Flying Club, Ltd. v. I. R. Comrs.* (1935), 20 Tax Cas. 1. *Generally, Refd. I. R. Comrs. v. Falkirk Temperance Café Trust* (1926), 11 Tax Cas. 353; *I. R. Comrs. v. Peeblesshire Nursing Assocn.* (1926), 11 Tax Cas. 335; *I. R. Comrs. v. Yorkshire Agricultural Soc.* (1927), 44 T. L. R. 59; *General Medical Council v. I. R. Comrs.*, *English Branch Council of General Medical Council v. Same* (1928), 97 L. J. K. B. 578.
54. *Add. Annotation*:—*As to* (1) *Apld. Salisbury House Estate v. Fry* (1929), 98 L. J. K. B. 722.

## PART II. SECT. 3.

*sd. Costs of management—Payment in compensation for disturbance & expenses of resisting claim for disturbance.*—A claim for compensation for disturbance was made against a landlord by the tenants of a farm whose lease had expired. The tenants having applied for arbn., the landlord, who maintained that the claim was incompetent, brought an action of suspension & interdict against the tenants. After proof had been led in the action, the landlord paid the tenants a sum of £850, in settlement of their claim, & then expenses in the action of interdict. His own expenses in the action amounted to £244. The landlord claimed abatement of income tax in respect of these sums, on the ground that they were costs of management:—*Held*: the expression "cost of management" in Sched. A., No. V.,

r. 8, did not include a payment made under a claim for compensation for disturbance, or expenses incurred in resisting such a claim.—*INLAND REVENUE v. WILSON'S EXORS.*, [1934] S. C. 244; 18 Tax Cas. 20.—*SCOT.*

## PART II. SECT. 4, SUB-SECT. 1.

*se. Company for advancement of woollen industry.*—A limited co., membership of which was restricted to persons engaged in the woollen industry in Scotland, was formed "with a view to the advancement of the woollen industry in Scotland, to promote by means of a college systematic education, instruction & study in all branches of the industry." Its income & property were dedicated to these objects, & no profits could be distributed among its members. It owned & occupied a college at which classes were held for instruction in the prin-

ciples & practice of woollen & worsted cloth manufacture. The students were fifteen years of age & upwards, & paid fees for the courses of instruction:—*Held*: (1) the college was not a "public school"; (2) the college buildings were "heritages owned & occupied by a charity," & the co. was entitled to exemption under 1921 Act, s. 30 (1).—*SCOTTISH WOOLLEN TECHNICAL COLLEGE v. INLAND REVENUE COMRS.*, [1926] S. C. 934; 11 Tax Cas. 139.—*SCOT.*

## PART II. SECT. 4, SUB-SECT. 2.

*ki. — Woollen technical college.*—*SCOTTISH WOOLLEN TECHNICAL COLLEGE v. INLAND REVENUE COMRS.*, *ante*.—*SCOT.*

*m. Add. Citation*:—2 Tax Cas. 257. *oi. —*—A society was composed almost exclusively of medical

58a. — Convalescent home for members of friendly society.]—An unregistered friendly society, of which there were over two million members, had for its principal objects the relief of distressed members & the widows & orphans of members, & the promotion of social intercourse & recreation in its lodges. Members of the society paid a small subscription, which was divided & allocated to various benevolent funds. A house & grounds were bought by the society for use as a convalescent home by its members. The purchase price was paid partly by the society & partly by contributions by its members. The home was maintained by the society & was furnished to accommodate twenty or thirty members. No expense was incurred by a member during his residence at the home, & medical men gave their services to it gratuitously:—*Held*: the home was a hospital within 1918 Act, Schedule A., No VI., r. 1 (c), & the society was entitled to be allowed the amount of tax charged in respect of the premises of which the home was composed.—*ROYAL ANTE-DILUVIAN ORDER OF BUFFALOES v. OWENS*, [1928] 1 K. B. 446; 97 L. J. K. B. 210; 138 L. T. 644; 44 T. L. R. 122; 71 Sol. Jo. 928; 13 Tax Cas. 176.

59a. — —.]—Applts., a limited co., owned & carried on a high-class secondary school managed by governors who were partly elected by the shareholders & partly nominated by the Crown. By the co.'s arts. no profit was to be divided amongst members. Practically the whole of the receipts of the co. arose from fees paid for pupils:—*Held*: the elements of permanence connoted by the word "foundation" were part of the essence of a public school, & as these elements were absent applts. were not entitled to an allowance on the ground that the school was a public school.—*BIRKENHEAD SCHOOL, LTD. v. DRING* (1926), 43 T. L. R. 48; 11 Tax Cas. 273.

*Annotation*:—*Overd. Girls' Public Day School Trust v. Ereaud* (1930), 99 L. J. K. B. 643.

60. *Add. Annotation*:—*Expld. Ereaud v. Girls' Public Day School Trust* (1930), 99 L. J. K. B. 643.

62. *Add. Annotation*:—*Distd. Ereaud v. Girls' Public Day School Trust* (1930), 99 L. J. K. B. 643.

62a. — School carried on by company paying dividends.]—The Girls' Public Day School Trust was incorporated as a co., but its memo-

randum & articles were framed with the object of establishing schools that would give a good education at the lowest possible cost. The Trust School was open to the general public, a large proportion of its pupils were scholars from the public elementary schools, & a great proportion of its governing body were nominated by the local education authority, & further, the school was largely maintained by public moneys, & in the view of the Board of Education the school satisfied the regulation which prohibited any Parliamentary grant to a school conducted for private profit. In accordance with the Board's wishes it was provided that the co. should be converted into an educational trust at the end of a period & exceeding fifty years from 1905, & that in the event of a winding up before the end of that period the surplus assets of the co. should be subject to an educational trust & should not be distributed among the shareholders; that during the period above-mentioned the dividend paid on share capital should not exceed a sum equal to 4 per cent. a year. The Comrs. found on the facts the Trust School was a public school, & as such entitled to the benefit of the exemption from income tax provided for by 1918 Act, Sched. A., No. VI., r. 1 (c):—*Held*: there was ample evidence on which the Comrs. could find that this school was a public school, & the possibility of profit arising to an individual in the course of carrying on a school did not of necessity prevent the school having the character of a public school.

The existence of a perpetual foundation is not by itself conclusive, but only one of the factors to be considered. There is no distinction between money used for a public school raised by debentures at interest, & money raised by preference shares with limited interest. The judgments in *Blake v. London Corp.*, No. 60, were not intended to lay down a rule that no school from the conduct of which any person could derive pecuniary benefit could in any circumstances be a public school.—*GIRLS' PUBLIC DAY SCHOOL TRUST v. EREAUT*, [1931] A. C. 12; 99 L. J. K. B. 643; 95 J. P. 3; 46 T. L. R. 638; 74 Sol. Jo. 612; *sub nom.* *EREAUT v. GIRLS' PUBLIC DAY SCHOOL TRUST, LTD.*, 143 L. T. 715; 28 L. G. R. 603; 15 Tax Cas. 529, H. L.

63. *Add. Annotation*:—*Consd. Re De Carteret, Forster v. De Carteret*, [1933] Ch. 103.

men residing in the city of Aberdeen. Its objects were to facilitate the interchange of ideas on medical subjects & for social intercourse between its members; to bring them into touch with their colleagues elsewhere; to maintain their interest in the work of the university; to maintain a code of ethics for the guidance of members in their professional relations; & "to support & advance the interests of the medical profession." Its premises comprised a medical library for the use of members, & a hall where monthly meetings were held at which papers on medical subjects were read & discussed. These papers were published in the medical press:—*Held*: the Society's premises were not exempt from income tax in respect that it was not a literary or scientific institution, but was substantially "a professional assocn.—*INLAND REVENUE COMRS. v. ABERDEEN*

*MEDICO-CHIRURGICAL SOCIETY*, [1931] S. C. 625; 16 Tax Cas. 237.—*SCOT.*

*sg. Assembly Hall of Free Church.*—An Assembly Hall, held in trust for the Free Church, was used as the place for meeting of the General Assembly & Commissions of Assembly of the Church, & for other purposes connected with religion, charity & temperance:—*Held*: the hall did not belong to any class of buildings exempted by the first three clauses of No. VI., Sched. A., & the fourth clause covered only rents, & profits applied to charitable purposes. The hall therefore was not exempt from income tax.—*MAUGHAN v. FREE CHURCH OF SCOTLAND* (1893), 3 Tax Cas. 207.—*SCOT.*

#### PART II. SECT. 5.

*so. Under Taxation Act, R. S. B. O.*, 1911 (c. 229), s. 155—*Not income of non-residents derived from mines.*—

*KENT v. R.*, [1924] 4 D. L. R. 77; [1927] S. O. R. 388.—*CAN.*

*sd. Arrears—Where land under control of court—Liability of occupier.*—A receiver was appointed over certain lands in 1908. The owner of the lands, which were being sold under the Land Acts, was in occupation of them under a ct. lease up to the time of his death in 1917. After his death the lands were let for grazing under Court Grazing Agreements, & were subsequently let under a Court Letting Agreement for a year. Arrears of income tax having been claimed by the Revenue Comrs., the receiver applied to the land judge for directions:—*Held*: the owner of the lands who had been in occupation was liable for the arrears of tax under both Scheds. A. & B., up to the time of his death.—*Re FOLEY'S ESTATE*, [1928] I. R. 576.—*IR.*

69. *Add. Annotation*:—*Refd.* Fisher v. Oldham Corp., [1930] 2 K. B. 364.
71. *Add. Annotations*:—*Consd.* Reed v. Cattermole, [1936] 2 All E. R. 526. *Refd.* Miller (Lady) v. I. R. Comrs. (1930), 15 Tax Cas. 25.
74. *Add. Annotations*:—*As to* (1) *Consd.* Dawson v. Counsell, [1938] 3 All E. R. 5. *As to* (3) *Consd.* Fry v. Salisbury House Estate,

Ltd., Jones v. City of London Real Property Co., [1930] A. C. 432; Dennis v. Hick (1935), 19 Tax Cas. 219. *Refd.* Glanely (Lord) v. Wightman (1933), 149 L. T. 121; Bertram v. Wightman, [1936] 2 All E. R. 487; Long v. Belfield Poultry Products, Ltd. (1937), 21 Tax Cas. 221. *Generally, Refd.* Huxham v. Johnson (1926), 136 L. T. 410.

## Part III.—Schedule B.

- 75a. — Buildings occupied for trade—Lawns & paddocks attached to racecourse.]—A committee, which carried on the trade of racecourse proprietors, was the occupier under a lease of properties consisting of stands, stables, weighing-room & other buildings, & also of paddocks, lawns & enclosures. The whole of the properties were enclosed & had an extent of approximately eleven acres, of which about three acres were covered by the buildings. It was admitted that the buildings came within the above proviso (b) to rule I. of Sched. B. of 1918 Act:—*Held*: the paddocks, lawns & enclosures were not so closely connected with the buildings as also to come within proviso (b), & that they were not exempt from tax under Sched. B.—*SMITH v. YORK RACE COMMITTEE*, [1934] 1 K. B. 517; 103 L. J. K. B. 518; 151 L. T. 52; 50 T. L. R. 156; 78 Sol. Jo. 29; 18 Tax Cas. 541.
77. *Add. Citations*:—70 Sol. Jo. 586; 10 Tax Cas. 346.
- Add. Annotation*:—*Refd.* Huxham v. Johnson (1926), 136 L. T. 410.
- 77a. — — — — —.]—(1) Resp. co. carried on the business of poultry farming on certain land occupied by it under a lease which reserved to the lessor the right to grow crops & run sheep on the land, while the co. had the right to run poultry on the grass land, & on the rest of the land when not sown or under growing crops. The co. used the land mainly to rear pedigree cockerels, which were sent out to farmers who owned approved stock, & mated on their farms. The eggs produced were bought by the co. & hatched

in its incubators & the resulting chicks were mostly sold as day-old pedigree chicks. Some were reared on the land & sold later, & others were used to supply breeding stock for the co.'s operations. In addition, the co. undertook the hatching of eggs for customers, known as "custom hatching." On appeal by the co. against estimated assessments to income tax under Sched. D in respect of the profits of these activities, made on the basis that such profits were not covered by the assessments under Sched. B on the land occupied, the Special Comrs. decided that the whole of the co.'s activities (with the exception of the "custom hatching," the profits of which were properly assessable under Sched. D) fell within the description of husbandry & were assessable under Sched. B on that footing, & they reduced the assessments under appeal accordingly.

(2) In order to obtain hardy birds for its business of breeding & dealing in poultry applt. co. kept on its land a stock of birds possessing the required strain. Eggs produced by this stock were sent by the co. to approved suppliers, who had them hatched by their own hens & reared the progeny; the best cockerels were then mated with the suppliers' hens & the eggs produced were purchased by the co., which hatched them in its incubators & sold a large number of the chicks when a day old. Chicks not so sold were transferred to brooder houses, where they were fed on food acquired from outside sources, & after some eight weeks put out to run on the co.'s land. The chicks so reared were sold at varying ages, or became part of the co.'s breeding stock. Assessments to

### PART III.

77a. — — — — — *Silver fox farm.*]—Resp. obtained the lease of a dwelling-house & poultry run extending over some 55 acres, the proprietors reserving the right to graze stock, other than poultry on the land & to use the farm buildings thereon. Resp. had no right to crop any portion of the run, but certain ground was placed at his disposal for the growing of garden produce. By a subsequent agreement resp. was granted the exclusive right of tenancy of 14 acres of the land for silver fox breeding. This latter area was divided up into a number of ranches, each containing breeding pens & an open run; during the breeding season the foxes were confined to the pens, but for the remainder of the year they occupied the open runs. The foxes were fed largely on flesh & cereals, not produced on the holding, & on eggs & vegetables, mainly so produced. The silver fox does not pasture on the land, although a certain amount of grass is necessary

for its health. Resp. purchased foxes from other ranches, & sold foxes on condition that they remained in his care on terms under which he received a proportion of all litters born on the farm. His profits were derived almost wholly from the sale of live foxes, the selling of pelts representing only a very small part of the turnover. Throughout the material period no assessments were made on resp. under Sched. B. in respect of the lands occupied by him. Resp. was assessed under Sched. D. in respect of profits from the business of silver fox farming. On appeal the General Comrs. found that he fell to be assessed under Sched. B. & not under Sched. D., & that he was not occupying the land for the purpose of husbandry only, or mainly for that purpose. He was accordingly assessable under Sched. B. on one-third of the annual value of the land:—*Held*: the question at issue was one of fact, there was evidence upon which the Comrs. could arrive at their determination & they had not misdirected themselves in law.—IN-

LAND REVENUE COMRS. v. MELROSS (1935), 19 Tax Cas. 607.—SCOT.

e i. — — — — — *Poultry farm.*]—A poultry farm consisted of thirty-three acres of land, all of which was in grass except half an acre upon which green crops were grown for consumption by the poultry in winter along with other feeding stuffs. A permanent stock of about one thousand head of poultry was kept, & in addition forty-six sheep were grazed on the land, & some of the grass was cut for hay:—*Held*: the land was occupied for the purpose of husbandry, in respect that the fruits of the soil were used to a material extent for the sustenance of the poultry, & the poultry farmer was entitled to be assessed on the profits of the business under Schedule B., & not under Schedule D.—*LEAN v. INLAND REVENUE*, [1926] S. C. 15; *sub nom.* LEEN & DICKSON v. BALL, 10 Tax Cas. 341.—SCOT.

1. *Add. Citation*.—*sub nom.* MILLER v. ANDERSON (1922), 8 Tax Cas. 279.

income tax under Sched. D were raised on the co. to include the profits derived from the hatching of eggs supplied by other persons & the sale of the chicks, it being admitted that the co.'s other activities on the land were covered by the assessments under Sched. B. On appeal, the General Comrs. decided that the co. was carrying on two separate businesses, one the production of poultry farming, & the other the purchase of eggs & sale of chicks, which was quite independent & properly assessed under Sched. D:—*Held*: in each case, that the finding of the Comrs. was one of fact & that they had evidence before them on which they might reach their determination.—*LONG v. BELFIELD POULTRY PRODUCTS, LTD., THORNER BROS., LTD. v. MACINNIS* (1937), 81 Sol. Jo. 588; 21 Tax Cas. 221.

**77b. — Profits from brood mare.]—**

Applt. carried on business in partnership, the partnership's sole asset being a thoroughbred brood mare & her progeny. The mare was kept on a stud farm of which one of the partners was the tenant. A number of other animals was kept on the same farm, & no specific acreage was allotted to the mare & her progeny, nor to any other animals on the farm, which was used indifferently for all animals upon it. No part of the farm was ever assigned in writing to the partnership in connection with its activities. The mare's progeny were, as a rule, sent to yearly sales, but in some cases they were put into training to prove their merit on the race-course with a view to sale:—*Held*: the profits of the partnership must be divided into two parts, one being those derived from the thoroughbred brood mare as a brood mare, & the other those derived from racing & selling the progeny of the mare. The second class of profits was wholly assessable under Sched. D. The first class of profits was also assessable under Sched. D, but, in so far as they were profits of the partner who was the occupier of the farm, they would be included in his assessment under Sched. B, & to this extent they should be excluded from the assessment under Sched. D in order to avoid double taxation.—*DAWSON v. COUNSELL*, [1938] 3 All E. R. 5; 159 L. T. 176; 54 T. L. R. 874; 82 Sol. Jo. 474, C. A.

**77c. — Profits from racing & selling progeny of brood mare.]—***DAWSON v. COUNSELL*, No. 77b, *ante*.

**77d. Market garden—Part of land used for farming.]—**Applt., who carried on the business of a market gardener, was the occupier of 350 acres of land, consisting of (a) 80 acres of pasture, on which was grazed a considerable number of live stock, including horses used for work on the land, & cattle, pigs & poultry for breeding, fattening & for sale, (b) 7 acres fallow, & (c) 263 acres under cultivation for growth of vegetables. Of these 263 acres 212 acres were owned by applt. or occupied by him under ordinary tenancy agreements; the remaining 51 acres were hired by him from farmers under special agreements, for rather more than twelve months, by which the lessors agreed to prepare the land & to do all the work necessary to be done by horse labour, applt. providing manure & seed,

sowing the seed & digging the crop. It was agreed that applt. was the occupier of these 51 acres, which formed part of larger holdings & were included in the Sched. B. assessments on the lessors in respect of the assessable value of such holdings. The whole acreage occupied by applt. consisted of open fields & was worked as one entire holding by ordinary agricultural labour at ordinary agricultural rates of pay, but the cost per acre of the labour employed far exceeded that employed on ordinary farming. Manuring was much heavier than for ordinary farming; part of the manure used was derived from the stock on the holding. Applt. was assessed under rule 8 of Sched. B. as a market gardener on the profits arising from the whole of the 350 acres occupied by him. He appealed to the General Comrs., contending (*inter alia*) that the rule was not applicable to his holding which he claimed was an ordinary farm occupied wholly or mainly for the purposes of husbandry & chargeable on the assessable value of the land, & that the liability to tax in respect of the 51 acres occupied under special conditions was exhausted by the Sched. B. assessments on the lessors. The General Comrs. found (a) that the 263 acres were cultivated as a garden, that the land in applt.'s occupation was mainly devoted to market gardening, & that the farming operations carried on by him were ancillary to the market gardening business; (b) that he was accordingly properly assessable under rule 8 of Sched. B. in respect of his profits from the entire holding:—*Held*: the matters in issue were questions of fact for the determination of the Comrs. & there was evidence upon which the Comrs. could arrive at their conclusions.—*DENNIS v. HICK* (1935), 19 Tax. Cas. 219.

**78. Add. Annotation:—***Refd. Calder v. Allanson* (1935), 19 Tax Cas. 293.

**79a. — Family partnership.]—**Resp. was assessed under Sched. B. for the seven years to 1930–31, inclusive, as the occupier of two farms & land purchased by him in 1917, & also for the years 1926–27, 1927–28 & 1928–29 as occupier of land in another parish purchased by his son on Apr. 6, 1926. Resp. appealed to the General Comrs. contending that he was not the occupier of these lands during the years in question, & that the assessments should be made on a partnership consisting of his son & three daughters, all of whom resided with him at one of the farms of which he was the rated occupier throughout, up to Oct. 6, 1927, when one of the daughters left the farm, & thereafter, of the son & the other two daughters. Resp. stated in evidence that in 1920, owing to advancing years, he transferred his interest in the lands then owned by him to his son & three daughters, though there had never been a tenancy agreement & he had not received any rent, at any rate prior to Apr. 1929. The following facts were also found or admitted. There was no change in farming procedure in 1920. The buying & selling of stock was done by resp.'s son, but resp.'s advice was sought & acted upon. A deed of partnership was first drawn up in 1928. The capital for the farm was wholly provided by resp. The farm bank account was in the

name of resp., who signed all cheques, until Apr. 1929, when the balance of the account was transferred to a new account in the partnership name, all cheques thereafter being signed by two of the persons mentioned in the deed. No distribution of profits had been made apart from that transfer. Payments of money were made from time to time by applt. to his son & daughters, but a daughter not connected in any way with the farm or the alleged partnership shared in these. When one daughter married & left the farm in Oct. 1927, no statement of affairs was drawn up, nor did she receive any payment. As regards the land purchased by resp.'s son in 1926, there was no tenancy agreement between him & the alleged partnership. The land was let to another farmer from Apr. 6, 1929. The General Comrs. allowed the appeal:—*Held*: there was no evidence upon which the Comrs. could find that anybody other than resp. was in occupation of the lands purchased by him in 1917, but there was material before them on which they might arrive at their conclusion that he was not the occupier of the land purchased by his son in 1926.—*CALDER v. ALANSON* (1935), 19 Tax Cas. 293.

**79b.** — No beneficial occupation—House & grounds vacated.]—*BERTRAM v. WIGHTMAN*, No. 16a, *ante*.

**79c.** — Trustee in bankruptcy—Effect of doctrine of relation back.]—M. conveyed his interest in certain nurseries to resps., who went into possession on Sept. 30, 1931. In 1932 M. was adjudicated bkpt. & the trustee in bkpcy. moved to set aside all dispositions made by M., including the disposition to resps. An order declaring the dispositions to be void against M.'s creditors was duly made & on Oct. 26, 1932, the trustee went into possession of the nurseries. Sufficient assets having been realised to pay off the only creditor, the trustee went out of possession on Mar. 9, 1933, resps. returning into occupation. Resps. contended that, as the title of the trustee in bkpcy. related back under Bkpcy. Act, 1914 (c. 59), s. 37, to the time of the act of bkpcy., on a proper construction of Income Tax Act, 1918, Sched. A. No. VII., r. 2, resps. were not at any time until Mar. 9, 1933, "occupiers" of the nurseries for the purposes of Sched. B.:—*Held*: resps. were "occupiers" within Sched. A., No. VII., r. 2, & were properly assessed under Sched. B., from Sept. 30, 1931, to Oct. 26, 1932.—*JOLY v. PINHOE NURSERIES, LTD.*, [1936] 1 All E. R. 841; 80 Sol. Jo. 534; 20 Tax Cas. 271.

**79d.** — Trustees of golf course on common.]—Appls. carried on, under a licence granted by the conservators of a common, a golf course upon part of the common. Appls. had exclusive right to construct & maintain the golf course, to dig gravel & soil, & to cut turf

& gorse for the purpose of maintaining the course, & to turn out sheep for the purpose of keeping down the grass & making the turf suitable for playing golf. Any member of the public was entitled to play golf on the course upon payment of 1s. 6d. per round. The profits derived from the carrying on of the course were to be applied either to the improvement of the course for the benefit of the public or to paying an annual sum to the conservators for the upkeep of the common:—*Held*: appls. were not in occupation of the golf course within Sched. B.—*MITCHAM GOLF COURSE TRUSTEES v. EREAUT*, [1937] 3 All E. R. 450; 81 Sol. Jo. 612; 21 Tax Cas. 239.

**79e.** "Dealer in milk"—Land insufficient for keep of cattle—Liability to be assessed under Schedule D.]—Resp. occupied a farm which was charged to tax under Schedule B. on which he kept a number of cows for milking. The soil was of such a poor quality that resp. had to expend considerable sums yearly on feeding stuffs. The produce grown on the land represented only about thirty per cent. of the food required for the cows. Resp. sold his milk to regular customers in the district, & only purchased milk for resale when his own supply was insufficient for his customers' ordinary requirements. He sold his cows when they became dry. The general comrs. held that resp. was not a dealer in milk, & they discharged an assessment made upon him in accordance with 1918 Act, Schedule D., Case III., r. 4:—*Held*: resp. was a dealer in milk whose land was insufficient for the keep of the cows within the rule, & the further question whether the assessable value afforded no just estimate of the profits was for the comrs. to find, & the case must be remitted to them for that purpose.—*HUXHAM v. JOHNSON* (1926), 130 L. T. 410; 11 Tax Cas. 266.

*Annotation*:—*Reid. Stephenson v. Waller* (1927), 13 Tax Cas. 318.

**79f.** "Seller of milk"—Land insufficient for keep of cattle—Liability to be assessed under Schedule D.]—A farmer may be a "seller of milk" within 1918 Act, Schedule D., Case III., r. 4, even though he merely sells, by wholesale, the milk produced on his farm; & it is not necessary that, to come within the rule, he should own some outside trading organisation for the disposal of the milk.—*STEPHENSON v. WALLER* (1927), 44 T. L. R. 155; 72 Sol. Jo. 102; 13 Tax Cas. 318.

**83a.** Method of computation—"Gardens for the sale of produce"—What are—Bulb farm.]—Appls., who carried on a business described as "Spalding Bulb Farms," owned 204 acres of land, which was used as to some 60 acres for the cultivation of bulbs, some 50 acres for potatoes, & 94 acres for the more ordinary crops such as wheat, cereals, green crops, beans & mangolds. It was necessary to transplant bulbs to effect their preservation,

**83 i.** Claim to relief—As joint tenants—What amounts to partnership.]—Resp. & his sons for several years leased & worked a farm jointly, but without any deed of partnership. Resp. had supplied the capital, he conducted all buying & selling & he controlled the bank account, which was in his name. He made no regular payments to his sons, but supplied

them, on request, with such moneys as were necessary for their requirements. No record of these disbursements or of the financial results of the working of the farm was kept:—*Held*: the facts did not justify the inference that a partnership had existed.—*INLAND REVENUE COMRS. v. WILLIAMSON* (1928), 14 Tax Cas. 335.—*SCOT.*

**83.** Arrears—Liability of occupier.]—An occupier of lands, even though he be the owner, is not liable for arrears of income tax under Sched. B. of Income Tax Act, 1918, which should have been levied upon, & ultimately borne by, the former occupier.—*DOLAN v. JOYCE & KIRWAN*, [1928] I. R. 558.—*IR.*

which accounted for the surplus acreage over that under bulbs. The land had to be relieved of the burden of constantly growing bulbs. The land was assessed to income tax by the comrs. under r. 8 of Sched. B. of 1918 Act. *FINLAY, J.*, on June 1, 1932, reversed their decision, holding that the case did not come within r. 8 as the land was occupied as a garden, but not as a garden for the sale of produce. For the tax year ending Apr. 5, 1930, the sales produced £8,332 for blooms, £5,415 for bulbs, £1,823 for farm crops, & general labour charges were £5,454. The cost of the labour employed on the bulbs amounted to £27 per acre, a sum far in excess of the cost of labour for ordinary farming, which it was not disputed averaged in the locality £8 per acre. Appls. were bulb growers rather than flower growers, though the blooms were sold. The question was whether appls., the occupiers of the 20½ acres, should be taxed under Sched. B. as occupiers & husbandmen, or

whether r. 8 of that Sched. applied to the land. The relevant part of that rule was: "The profits arising from the land occupied as . . . gardens for the sale of produce . . . shall be estimated according to the provisions & rules applicable to Sched. D., but shall be assessed & charged under this Sched. as profits arising from the occupation of lands." Was the land occupied for the purpose of husbandry or as gardens for the sale of produce?—*Held*: (1) the question whether the land was or was not occupied as a garden was a question of fact for the comrs. to decide, & there was evidence upon which that question might properly be answered in the affirmative; (2) the words "for the sale of the produce" in r. 8 of Sched. B. did not limit the sale to be on or absolutely close to the land that was being used.—*MONRO & COBLEY v. BAILEY* (1933), 102 L. J. K. B. 471; 148 L. T. 505; 17 Tax Cas. 607, H. L.

*Annotation*:—*As to* (1) *Consd. Dennis v. Hick* (1935), 19 Tax Cas. 219.

## Part V.—Schedule D.

### 85a. Trust including securities issued free from tax—No appropriation—No right to refund.]—

*Resp.*, who was not resident or ordinarily resident in the United Kingdom, was entitled under a will to a life interest in a share of the residue of testator's estate after payment of an annuity to testator's widow, who was resident in the United Kingdom. The residuary estate was fully ascertained & was held by the trustee in investments some of which fell within sect. 46 of 1918 Act, some were ordinary British investments not within sect. 46, & some were foreign & colonial stocks & shares. Income tax had been deducted from all income received by the trustee. The trustee had only one banking account for the trust estate & had not appropriated any of the investments to the payment of the widow's annuity. *Resp.* preferred claims to repayment of income tax in respect of (a) his share of the trust income derived from British Govt. securities falling within sect. 46 & from foreign & colonial investments, on the ground that he was not ordinarily resident or resident in the United Kingdom; & (b) under sect. 24 of Finance Act, 1920 (c. 18), as a British subject not resident in the United Kingdom, the claims being computed on the basis that the widow's annuity was payable in the first instance out of the income from the British investments not falling within sect. 46. Repayment was made by the Comrs. of Inland Revenue on the basis that the annuity should be treated as charged rateably against the whole income. On appeal to the Special Comrs. in connection with the claim under sect. 24 of Finance Act, 1920 (c. 18), it was admitted on behalf of the Comrs. of Inland Revenue that the repayment claimed by *resp.* would have been allowed, in accordance with the existing practice, if there had been appropriation by the trustee:—*Held*: as there had not in fact been any appropriation of investments by the trustee to meet the widow's

annuity, it must be treated as payable rateably out of the whole income & accordingly the claims as preferred by *resp.* failed.—*INLAND REVENUE COMRS. v. CRAWSHAY* (1935), 153 L. T. 457; 79 Sol. Jo. 641; 19 Tax Cas. 715, C. A.

87. *Add. Annotations*:—*Consd. Machon v. McLoughlin* (1926), 11 Tax Cas. 83. *Expld. Shanks v. I. R. Comrs.*, [1929] 1 K. B. 342. *Dstd. I. R. Comrs. v. Miller*, [1930] A. C. 222. *Consd. Robinson v. Corry, Corry v. Robinson*, [1934] 1 K. B. 240. *Dstd. Weight v. Salmon* (1935), 19 Tax Cas. 174. *Apld. Reed v. Cattermole*, [1937] 1 K. B. 613. *Refd. Grainger v. Maxwell*, [1936] 1 K. B. 430; *Tollemache v. I. R. Comrs.* (1926), 136 L. T. 444; *Ormond Investment Co. v. Betts*, [1928] A. C. 143; *Tilling-Stevens Motors v. Kent County Council & Transport Minister* (1928), 97 L. J. Ch. 371; *I. R. Comrs. v. Dalgety & Co.* (1929), 98 L. J. K. B. 542; *Diggines v. Forestal Land, Timber & Railways Co.* (1930), 142 L. T. 509; *Sutton v. I. R. Comrs.* (1929), 14 Tax Cas. 662; *Daly v. I. R. Comrs.* (1934), 18 Tax Cas. 641; *Nicoll v. Austin* (1935), 19 Tax Cas. 531.

90. *Add. Annotations*:—*As to* (1) *Consd. Leeming v. Jones* (1929), 141 L. T. 472; *Glanely (Lord) v. Wightman* (1933), 149 L. T. 121; *Windsor Playhouse, Ltd. v. Heyhoe* (1933), 17 Tax Cas. 481. *Apld. National Association of Local Government Officers v. Watkins* (1934), 18 Tax Cas. 499. *Refd. Fry v. Salisbury House Estate, Ltd.; Jones v. City of London Real Property Co.*, [1930] A. C. 432. *Generally, Refd. Liverpool Corn Trade Assocn. v. Monks*, [1926] 2 K. B. 110.

91. *Add. Citations*:—[1926] 2 K. B. 110; 95 L. J. K. B. 519; 134 L. T. 756; 10 Tax Cas. 442.

*Add. Annotation*:—*Refd. National Association of Local Government Officers v. Watkins* (1934), 18 Tax Cas. 499.



- 91a. Unregistered trade union—Providing holiday camp for members & non-members—Profits from non-members.**—Appl't. Assocn., an unregistered trade union, was formed with the object of protecting the interests of employees in local government service & with power (*inter alia*) to promote the physical & social welfare of its members. In Feb. 1931, the Assocn. purchased an existing holiday camp to provide cheap holiday facilities for its members, their wives, families & friends. For the year 1931, however, bookings were accepted from non-members of the Assocn. who had previously used the camp. The property of the Assocn. belonged by its rules to the members themselves, & the profits of the camp, which were credited to its general funds, enured for the benefit of the members of the Assocn. as a whole & not of the camp users only. An assessment to income tax, Sched. D, was made for the year 1930-31 in respect of the proportion for the period from Feb. to Apr. 5, 1931, of the profits of the camp for the year 1931. On appeal the Assocn. contended that its liability should be confined to the profits made from non-members. The Crown contended that as the users of the camp were not identifiable with the whole membership of the Assocn. or even a part thereof, there was no mutual trading & the whole of the profits was properly assessed to income tax. The General Comrs. decided that the Assocn. was trading with its members as well as with the general public & was liable on the whole of the profits so derived:—*Held*: the Assocn.'s liability was confined to the profits made from non-members.—**NATIONAL ASSOCN. OF LOCAL GOVERNMENT OFFICERS v. WATKINS** (1934), 18 Tax Cas. 499.
- 92. Add. Annotation:—***Refd.* Spiers & Son, Ltd. v. Ogden (1932), 17 Tax Cas. 117.
- 93. Add. Annotation:—***Consd.* Ducker v. Rees Roturbo Development Syndicate, I. R. Comrs. v. Rees Roturbo Development Syndicate, [1928] A. C. 132.

## PART V. SECT. 1, SUB-SECT. 1.

**91 i. Trade association—Co-operative company.**—*Held*: the appl't., incorporated under Agricultural Assocs. Act, R. S. B. C. 1911, c. 6, & through which was marketed the milk & cream produced by its shareholders, was liable to pay income tax under the Dominion Income War Tax Act, 1917, upon the balance, less certain allowances, shown by its financial report for the year 1923 in respect of that year's operations & distributed among its shareholders as dividends or interest on paid-up capital.—**FRASER VALLEY MILK PRODUCER'S ASSOCN. v. MINISTER OF NATIONAL REVENUE**, [1929] 3 D. L. R. 19; S. C. R. 435; *aff.*, [1928] Ex. C. R. 215.—**CAN.**

**92 i. Add. Citation:—**[1914] A. C. 1001.

**93. Distribution of bonus—No option to shareholders to take cash—Distribution by company as capital.**—A co. resolved that its accumulated profits should be distributed as a bonus amongst the shareholders, & that the directors should be authorised to distribute such number of unissued shares of £1 each paid up to 10s. as should be equivalent to the amount to be capitalised in satisfaction of such bonus; & it was agreed that the co. should allot & issue to each shareholder his respective proportion of the unissued £1 shares each credited as paid up to 10s., that the shares should be credited as paid up to 10s., & that

the shares so credited should be accepted in satisfaction of the bonus. In the books of the co. each shareholder was credited with his proportion of the bonus in payment of 10s. in respect of each of the shares so allotted & issued to him:—*Held*: the proportion of the bonus so credited to each shareholder was "profits or bonus credited" to him within Income Tax Assessment Act, 1915-1921, s. 14 (b), & was properly included in his income.—**JAMES v. FEDERAL COMR. OF TAXATION** (1924), 34 C. L. R. 404.—**AUS.**

**94. Distribution of property on discontinuance of business by company—What is "income."**—A reserve made up of accretions to the value of real estate & goodwill is not "income" within Income War Tax Act, 1917, s. 3 (9), but a reserve made up to trading profits or that portion of a co.'s income which has not been paid out is undistributed income of the co., unless before the distribution it has become capital.—*Re* **ANDERSON ESTATE**, [1925] 4 D. L. R. 116; [1925] 3 W. W. R. 312; 35 Man. L. R. 279.—**CAN.**

**95. Money-lender, visiting Berlin on business, purchased a large consignment of toilet paper. Before delivery had been made, he found a purchaser in London, to whom he re-sold the whole consignment at a profit. The transaction was outside the scope of his ordinary business:—***Held*: the transaction, although isolated, was an adventure in the nature

- 93a. Exchange transaction.]—**Under an agreement made on Mar. 8, 1921, for the supply of marble by a co. to building contractors, the contractors agreed to advance £20,000 of the price, percentage deductions being made from the amount due on each consignment of marble until the advance had been repaid. On Mar. 17, 1921, the £20,000 was paid to the co., & in anticipation of the marble being purchased in Italy, though not till the autumn of 1921, the co. at once arranged for the conversion of the greater part of the £20,000 into lire at one hundred & three to the £, & a lira account was opened. In May, 1921, the lira had appreciated in value, & as the money was not yet required by the co., their nominee, without the co.'s knowledge or authority, directed the sale of the balance of the lira account, & at seventy-two to the £ the lire realised a profit of £6,707, which was received by the co. The lire were subsequently repurchased for the purposes of the contract for £19,386, which was allowed as a deduction from the co.'s profits for income tax purposes:—*Held*: in computing the co.'s profits for the purposes of assessment to income tax for the year 1922-23 the £6,707 was not a profit arising out of the contract for the supply of marble, but was merely an appreciation of a temporary investment, & was not assessable to income tax as part of the profits of the co.'s trade.—**MCKINLAY v. JENKINS** (II. T.) & SON, LTD. (1926), 10 Tax Cas. 372.

*Annotations:—***Distd.** Thompson v. I. R. Comrs., I. R. Comrs. v. Thompson (1927), 12 Tax Cas. 1091. *Refd.* Landes Bros. v. Simpson (1934), 19 Tax Cas. 62.

- 94a. Loan by solicitor to builder—Sum payable on resale.]—**A partner in a firm of solrs. agreed with certain builders, who were in want of a loan of money for the purchase of certain property, that, in consideration of the solr.'s personally lending, or arranging for the loan of, the whole of the purchase price of the property, the solr. should receive, on the

of trade, the profits of which were assessable to income tax under Sched. D., Case 1.—**RUTLEDGE v. INLAND REVENUE COMRS.**, [1929] S. C. 379; 14 Tax Cas. 490.—**SCOT.**

**95. i. —.**—**MORRISON v. MINISTER OF CUSTOMS & EXCISE**, [1928] 2 D. L. R. 759; [1928] Exch. C. R. 75.—**CAN.**

**96. a. i. —.**—From the date of incorporation to 1920 a co.'s profits were allowed to accumulate until G., the manager & owner of all the shares, declared a dividend of 92 per cent. amounting to \$40,000 paid out of such accumulated profits:—*Held*: such dividend was not a return of capital, but income & subject to taxation.—**GAGNE v. FINANCE MINISTER**, [1925] Exch. C. R. 19.—**CAN.**

**97. ii. —.**—**HOPE v. MINISTER OF NATIONAL REVENUE**, [1929] Ex. C. R. 158.—**CAN.**

**98. d. i. S. P. MACPHERSON v. TAXATION COMR.** (1927), 27 S. R. N. S. W. 105; 44 N. S. W. N. 33.—**AUS.**

**99. sk. Income of accumulated fund—Under will for benefit of testator's children after twenty-one years.]—***Held*: such income was taxable under Income War Tax Act, 1917, as amended by 10 & 11 Geo. 5, c. 49, s. 41.—**MCLEOD v. CUSTOMS & EXCISE MINISTER**, [1925] Exch. C. R. 105; *aff.*, [1926] 3 D. L. R. 531; [1926] S. C. R. 457.—**CAN.**

**100. si. —.**—**MINISTER OF NATIONAL REVENUE v. ROYAL TRUST CO.**, [1931] S. C. R. 485; 3 D. L. R. 474.—**CAN.**

resale of the property, a third of any resulting profit with a limit of £500. The solr. procured the loan, from a client of his firm, of part of the sum required, on a first mtge. of the property, & himself lent the balance on a second mtge. The property was subsequently resold at a profit which entitled the solr. to £500. On another occasion the solr. had agreed with the same builders to provide the whole of the money required to purchase another property, & it was agreed that the solr. should receive £300 regardless of the price on resale. The sums of £500 & £300 were received & retained by the solr. for his sole use & formed no part of the profits of his firm. The solr. took no part in the development of the property or in its sale:—*Held*: the sums of £500 & £300 were annual profits, & were liable to income tax.—*WILSON v. MANNOCH*, [1937] 3 All E. R. 120; 81 Sol. Jo. 529; 21 Tax Cas. 178.

95. *Add. Annotations*:—*Appld. Wilkinson v. I. R. Comrs.* (1931), 16 Tax Cas. 52. *Refd. I. R. Comrs. v. Fisher's Exors.*, [1926] A. C. 395.

- 95a. *Profits on "realisation"—Exchange of securities.*—*ROYAL INSURANCE CO., LTD. v. STEPHEN*, No. 309a, *post*.

- 95b. ———.]—During the years 1917 & 1918 applt. bank paid £7,505,000 for National War Bonds which, under the terms of the prospectus, they were entitled to convert into 5 per cent. War Loan 1929/47. On Apr. 21, 1922, the Treasury made an offer to the holders of National War Bonds entitling them to surrender their holdings in exchange for £134 3½ per cent. Conversion Loan for each £100 5 per cent. National War Bonds. In response to that offer the bank surrendered holdings of bonds to the value of £6,205,000, & subsequently, in exercise of their rights under the terms of the original issue, exchanged their remaining holdings into the 5 per cent. War Loan. If these transactions were equivalent to the realisation of the original holdings the profit would amount to £141,750, & the Inland Revenue authorities brought that sum into account in determining the profits of the bank's trade for purposes of income tax under Case I. of Sched. D. On the question whether there was a mere accretion of capital & in fact no realisation of profit:—*Held*: there had been a realisation for, as soon as the new securities were taken in place of the investment in the original War Bonds, a new venture was begun in relation to the new holding, & the fact that this transformation took place by the process of exchange did not avoid the conclusion that there had been a realisation of the security.—*WESTMINSTER BANK, LTD. v. OSLER*, [1933] A. C. 139; 102 L. J. K. B. 110; 148 L. T. 41; 49 T. L. R. 43; 76 Sol. Jo. 831; 17 Tax Cas. 381, H. L.

*Annotation*:—*Refd. Cross v. London & Provincial Trust, Ltd.*, [1938] 1 K. B. 792.

96. *Add. Citation*:—*affd.* (1924), 12 Tax Cas. 586, C. A.

*Add. Annotation*:—*Refd. Van den Berghs, Ltd. v. Clark* (1934), 151 L. T. 435.

- 96a. *Sale of patent rights.*—A syndicate formed to work & develop a group of English & foreign patents carried on business mainly by granting licences to manufacturers at royalties. Certain foreign manufacturers re-

fused to take licences, unless they were also given an option of purchase exercisable within a given period, & the syndicate entered into a contract with an American co. to grant them a licence to use & work the syndicate's American patents, with an option of purchase thereof. The co. having exercised its option of purchase, & paid to the syndicate a sum for the purchase of the American patents out & out, the Special Comrs. decided that profits on the sale of the patents arose in the course of the co.'s business & were chargeable to income tax:—*Held*: the Special Comrs. had not wrongly directed themselves, & there was ample evidence to support their conclusion of fact.—*DUCKER v. REES ROTURBO DEVELOPMENT SYNDICATE, INLAND REVENUE COMRS. v. REES ROTURBO DEVELOPMENT SYNDICATE*, [1928] A. C. 132, 97 L. J. K. B. 317; 138 L. T. 598; 44 T. L. R. 307; 72 Sol. Jo. 171; *sub nom. REES ROTURBO DEVELOPMENT SYNDICATE, LTD. v. DUCKER, REES ROTURBO DEVELOPMENT SYNDICATE, LTD. v. INLAND REVENUE COMRS.*, 13 Tax Cas. 366, H. L.

*Annotations*:—*Refd. Splers & Son, Ltd. v. Ogden* (1932), 17 Tax Cas. 117; *Wilson Box (Foreign Rights), Ltd. v. Brice*, [1936] 2 All E. R. 452.

97. *Add. Citation*:—*affd.* (1927), 43 T. L. R. 727; 11 Tax Cas. 730, H. L.

*Add. Annotations*:—*Folld. Mills v. Jones* (1929), 46 T. L. R. 118. *Consd. I. R. Comrs. v. Longmans, Green & Co.* (1932), 17 Tax Cas. 272; *Desoutter Bros., Ltd. v. Hanger & Co. & Artificial Limb Makers, Ltd.*, [1936] 1 All E. R. 535. *Expld. I. R. Comrs. v. British Salmson Aero Engines, Ltd.*, [1938] 2 K. B. 482. *Refd. Handley Page v. Butterworth* (1935), 19 Tax Cas. 328.

- 97a. *S. P. MILLS v. JONES* (1920), 142 L. T. 337; 46 T. L. R. 118; 14 Tax Cas. 760, H. L.

*Annotations*:—*Consd. I. R. Comrs. v. Longmans, Green & Co.* (1932), 17 Tax Cas. 272; *Handley Page v. Butterworth* (1935), 19 Tax Cas. 328. *Expld. I. R. Comrs. v. British Salmson Aero Engines, Ltd.*, [1938] 2 K. B. 482.

- 97b. *Payments for grant of shop rights of patented invention.*—*Applt.* was managing director of a co. engaged in the dyeing industry, & also carried on the business of selling yarn & machinery on his own account. He had invented new apparatus for dyeing which was patented in the United Kingdom & America. He exploited this invention by providing & selling the necessary machinery to firms in America, & he did not dispute that he was assessable to income tax, under Case I. of Sched. D., on the profits made on the machinery. Under the agreements made with these firms, however, in addition to the price paid for the machinery, he was entitled to further payments for grant of "shop rights," i.e. the right of the purchasers to use the machinery & processes in their own mills or within a limited area. *Applt.* contended that these payments were for the acquisition of an exclusive licence to use the patented processes in a limited area, that they were payment for portions of the patent rights & therefore capital payments in respect of which he was not assessable. The Special Comrs. found that the agreements were primarily for the sale of machinery & that the grant to the purchasers of "shop rights" was consequential on the sale; & therefore that the payments for the "shop rights" must be included with the payments for the

machinery in the receipts of applt.'s business:—*Held*: the Comrs. had decided rightly on the evidence before them.—**BRANDWOOD v. BANKER, BRANDWOOD v. INLAND REVENUE COMRS.** (1928), 14 Tax Cas. 44.

**97c. Ex gratia payment for surrender of quasi-monopoly.**—Resp. had great knowledge of & was a leader in the construction of aeroplanes. In 1909 a limited co. was registered to take over resp.'s business. The subject of an award of the Royal Commission for making awards to inventors was the design of a large bomb-carrying aeroplane. In 1917 the Govt. required such machines, & the co., at its request, in order to increase the output of these machines, imparted their special knowledge of their construction to other Govt. contractors, handing over to them all the necessary drawings, etc., & supplying them with trained staffs of engineers. One of the duties of the Royal Commission was (head 3) to ascertain a sum of money where it thought it appropriate that a sum should be given by the Treasury to the claimant. Any sum so given was an *ex gratia* payment. Under head 3 a sum of £30,483 was recommended to be & was paid to resp., the amount being arrived at as the compensation for his collaboration & assistance rendered to the common pool of knowledge out of which the aeroplanes used ultimately emerged:—*Held*: the sum of £30,483 was only received by resp. when it was paid to him by the co. in discharge of its contractual obligation to him.—**BUTTERWORTH v. PAGE** (1935), 153 L. T.

**98 i. Compensation for loss of office.**—Where a co. of managing agents obtained a certain sum of money as compensation for the liquidation of the principal co., the amount is a receipt arising from business & is, therefore, liable to be assessed to income tax.—*Re TURNER, MORRISON & Co., LTD.* (1928), 1 L. R. 56 Calc. 211.—**IND.**

**98 ii. Compensation for war injuries paid by American authorities.**—*Held*: on the facts found by the Comrs., their conclusion that the sums received were income & liable to taxation was not justified.—**LAIRD v. INLAND REVENUE COMRS.** (1929), 14 Tax Cas. 395.—**SCOT.**

**99 i. Stud fees.**—Applt. was a farmer & breeder of horses, & occupied three farms, in respect of which he was assessed to income tax under Schedule B. He was also the owner of a number of stallions which he used for the service of his own mares, & in addition he sold for fees their services to the mares of other owners, the stallions travelling "rounds" for this purpose in the care of his own servants. He appealed against assessments to income tax made upon him under Schedule D. In respect of stallion fees, & the comrs. decided that in regard to stallion fees the expenses required to make the profits from service to mares, plus any expenses of keeping up the stud to the number of stallions earning fees should be allowed, but the number of horses to be used for replacement should not exceed one-third of those earning fees:—*Held*: applt. was assessable to income tax under Schedule D. in respect of profits from stallion fees, in accordance with the principle laid down by the comrs.—**MARSHALL v. TWEEDY**, [1927] S. C. 243; 11 Tax Cas. 524.—**SCOT.**

**99 ii. —.**—*Held*: profits derived from stud fees of a stallion were not profits arising from the occupation of land, but were profits

of trade assessable to income tax under Sched. D.—**CLOGHRAN STUD FARM v. BIRCH**, [1936] 1 R. 1.—**IR.**

k. Read now "99a1."

sm. Money remitted from branch office.—Money remitted to the headquarters of a firm in British India, from a branch situated in a foreign country, is presumed to be profits & not capital, & is assessable to income tax.—*Re MURUGAPPA CHETTIAR* (1925), 1 L. R. 49 Mad. 465.—**IND.**

sn. Gift of money to jockey from race-horse owner after winning race.—*Held*: an emolument which arose or accrued to the jockey by reason of his vocation as such, & liable to assessment for income tax.—**WING v. O'CONNELL**, [1927] 1 R. 84.—**IR.**

sp. Compensation for detention of ships requisitioned by Government.—*Held*: a trading receipt, & chargeable.—**ALLIANCE & DUBLIN CONSUMERS' GAS CO. v. McWILLIAMS**, [1928] 1 R. 1.—**IR.**

sg. Profit on goods requisitioned by Government.—Applt. co. acquired stocks of barley for the purpose of brewing stout. These stocks, under the War Emergency Legislation, were requisitioned by the Royal Commission on Wheat Supplies, & disposed of in circumstances which resulted in a profit to applts. Income tax & excess profits duty were assessed on these profits, & the assessments were confirmed by the Special Comrs.:—*Held*: the profits in question were not annual profits or gains arising from the trade & business of applts. & the assessments were not properly made.—**GUINNESS & Co. v. INLAND REVENUE COMRS.**, [1923] 2 I. R. 186.—**IR.**

st. Profit from sale of land at enhanced price.—*Whether taxable.*—**STOTT v. INLAND REVENUE COMR.** (1927), 48 N. L. R. 471.—**S. AF.**

sw. Profits of company.—*Maintaining & conducting club for benefit of members*

34; *sub nom.* **HANDLEY PAGE v. BUTTERWORTH**, 19 Tax Cas. 328, H. L.

*Annotation*:—*Refd.* **British Salmson Aero Engines, Ltd. v. I. R. Comrs.**, [1937] 3 All E. R. 464.

**98. Add. Annotations**:—*Distd.* **Dewhurst v. Hunter** (1932), 146 L. T. 510. *Refd.* **Davis v. Harrison** (1927), 11 Tax Cas. 707; **Van den Berghs, Ltd. v. Clark** (1934), 151 L. T. 435; **Aeolian Co. v. I. R. Comrs.**, **I. R. Comrs. v. Aeolian Co.**, [1936] 2 All E. R. 219.

**99. Add. Citations**:—*sub nom.* **JERSEY'S (LORD) EXECUTORS v. BASSOM, DERBY (LORD) v. BASSOM**, 135 L. T. 274; 10 Tax Cas. 357.

*Add. Annotation*:—*Refd.* **Glanely (Lord) v. Wightman**, [1933] A. C. 618.

**99a. —. —.**—Applt. was the owner of a stud farm near Newmarket which was devoted to the purposes of breeding & racing horses. Among the stud was a stallion, a former winner of the Derby, which never left the farm, but was visited by, & served, mares of other owners. From these services of the stallion applt. received profits, though the business of the farm as a whole was conducted at a loss:—*Held*: the fees were profits in respect of the occupation of the farm & were chargeable to income tax under Sched. B, & not under Sched. D.—**GLANELY (LORD) v. WIGHTMAN**, [1933] A. C. 618; 102 L. J. K. B. 456; 149 L. T. 121; 49 T. L. R. 356; 77 Sol. Jo. 215; 17 Tax Cas. 634, H. L.

*Annotation*:—*Refd.* **Dawson v. Counsell**, [1938] 3 All E. R. 5

—*Whether taxable.*—*Re* **DIBRUGARH DISTRICT CLUB, LTD.** (1927), 1 L. R. 55 Calc. 971.—**IND.**

sy. — *Letting houses*—*Taxable.*—*Re* **COMMERCIAL PROPERTIES, LTD.** (1928), 1 L. R. 55 Calc. 1057.—**IND.**

sz. Profits from unlawful enterprise—*Sweepstakes.*—Profits derived from carrying out a sweepstake, being profits derived from a criminal enterprise, are not assessable to income tax.—**HAYES v. DUGGAN**, [1929] 1 R. 406.—**IR.**

sa. —. —.—A wine merchant, who owned a large quantity of rye whisky, invited two friends to assist him in exporting it to the United States for sale there. The latter agreed to contribute towards the cost of exporting the whisky, but took no share in the actual arrangements. It was agreed that the three parties should share the profits of the transaction. They knew that the import of whisky into the United States was against the laws of that country, & that it necessarily involved the making of untrue customs declarations in this country. The parties appealed against an assessment to income tax made upon them jointly under Sched. D. in respect of the profits of the transaction:—*Held*: (1) the question whether the transaction was undertaken in partnership was a question of fact, on which there was evidence to support the finding of the Comrs. that there was such a partnership; (2) the disposal of the whisky was an adventure "in the nature of trade"; (3) the fact that the adventure involved a contravention of the law did not preclude assessability to income tax in respect of the profits.—**LINDSAY v. INLAND REVENUE**, [1933] S. C. 33; 18 Tax Cas. 43.—**SCOT.**

sb. Profits from sale of rights of co.—*In pursuance of original scheme—Whether capital or income.*—Resp. co. acquired in pursuance of its objects certain platinum-bearing properties

**99b. Repaid excess profits duty.**—Where a trader was assessed to income tax on the amount of excess profits duty repaid to him:—*Held*: he had been rightly assessed.—*HILL v. MATHEWS* (1925), 10 Tax Cas. 25.

**99c.** —.—*NESBITT (A. & W.), LTD. v. MITCHELL* (1926), 11 Tax Cas. 211, O. A.

*Annotation*:—*Appl. Olive & Partington v. Rose* (1929), 73 Sol. Jo. 766.

**99d.** —.—*Repayment after trading ceased.*—*Held*: liable to be assessed to income tax.—*KIRKE'S TRUSTEES v. INLAND REVENUE COMRS.* (1926), 136 L. T. 582; 11 Tax Cas. 323, H. L.

*Annotations*:—*Appl. Olive & Partington v. Rose* (1929), 73 Sol. Jo. 766. *Consd. Rigden v. I. R. Comrs., I. R. Comrs. v. Urwick's Executors* (1935), 19 Tax Cas. 542; *Rhughes v. Bank of New Zealand*, [1937] 1 K. B. 419. *Reid. Duncan's Executors v. Adamson*, [1935] A. C. 398; *Astor v. Perry*, [1935] A. C. 398.

**99e.** —.—*Appropriate case.*—*Held*: the whole amount assessed under Case VI. was correctly so assessed.—*OLIVE & PARTINGTON, LTD. v. ROSE* (1929), 73 Sol. Jo. 766; 14 Tax Cas. 701.

*Annotation*:—*Consd. Rigden v. I. R. Comrs., I. R. Comrs. v. Urwick's Executors* (1935), 19 Tax Cas. 542.

**99f.** —.—*Sum set off against unpaid duty.*

*Appl.* became liable for the payment of excess profits duty in respect of the profits of his business in 1918 & 1919. By agreement with the Revenue authorities the greater part of that duty was not paid when due, but was allowed to stand over as an amount due to the Revenue. In 1920, however, *applt.*'s business suffered a big loss & there was a large deficiency in duty. By agreement in Jan. 1923, after setting off the sums due to the Revenue from *applt.* for excess profits duty

for 1918 & 1919 & those due to be repaid by the Revenue to *applt.* in respect of his losses in 1920, a small balance was due to *applt.* & was repaid to him in Jan. 1923. *Appl.* was assessed to income tax for 1923 on the amount of the excess profits duty so set off, the contention of the Revenue being that in effect the excess profits duty for 1918 & 1919 had been repaid to *applt.*:—*Held*: the mutual agreement to set off one claim against the other amounted to a payment by *applt.* within Finance Act, 1921 (c. 32), s. 36, & a repayment by the Revenue, & the amount of such repayment was a subject-matter of income tax for 1923.—*TARRANT v. ROBERTS* (1930), 47 T. L. R. 199; 75 Sol. Jo. 27; 15 Tax Cas. 754.

**99g. Profits made in illegal business.**—Income Tax Acts are not necessarily restricted in their application to lawful businesses only. The question is one of construction of the particular words used.—*MINISTER OF FINANCE v. SMITH*, [1927] A. C. 193; 95 L. J. P. C. 193; *sub nom. CANADIAN MINISTER OF FINANCE v. SMITH*, 136 L. T. 175; 42 T. L. R. 734; 70 Sol. Jo. 941, P. C.

*Annotations*:—*Consd. Mann v. Nash* (1932), 48 T. L. R. 287. *Fold. Southern v. A. F. B., Southern v. A. B., Ltd.*, [1933] 1 K. B. 713.

**99h.** —.—In the course of his business as an amusement caterer, to the conduct of part of which no objection could be taken on the grounds of illegality, *applt.* provided licensed victuallers & others with automatic machines for use for unlawful gaming:—*Held*: (1) although the profits derived from these transactions were the profits of an illegal

from a vendor syndicate. The co. began development work on one of the properties, opening up some of the claims & sinking a shaft, but on encountering a strong flow of water stopped the work on the ground that it did not want to expend money on a pumping plant, in view of the more important work of purchasing all properties upon which the reef discovered by the co.'s technical advisor was found by him to exist. The co. thereupon purchased certain further properties, thereby exhausting its cash resources. Thereafter one of the co.'s directors stated that the occurrence of platinum in the properties required a large working capital, & suggested that a new powerful co. should be formed to take over the rights held by resp. co. The board of resp. co. approved of this & an agreement was arrived at whereby in effect resp. co. sold its properties to the new co., resp. co. having been assessed to pay income tax on the profits arising out of the sale:—*Held*: the profits resulting from the sale to the new co. were obtained in an operation of business in a scheme for profit making & were therefore income & not accruals of a capital nature.—*INLAND REVENUE COMRS. v. LEYDENBERG PLATINUM, LTD.*, [1929] App. D. 137.—S. AF.

*sd.* *Deductions for elevator reserve & commercial reserve made from payments to farmer by co-operative wheat producers' association.*—*Held*: the deductions in question are but loans or advances under contract made by the farmers out of the price of their grain to the *applt.* for carrying on the business & acquiring elevators, which are all repayable to the grower, & are not gains or profits of the assocn. within Income War Tax Act, 1917, & are not taxable under the said Act.—*SASKATCHEWAN CO-OPERATIVE WHEAT PRODUCERS, LTD. v. MINISTER OF*

*NATIONAL REVENUE*, [1929] Ex. C. R. 180; *affd.*, [1930] S. C. R. 402; 3 D. L. R. 162.—CAN.

*st.* *Profits of storage of whisky by distillery company.*—A distillery co. owned bonded warehouses, in which, on certain conditions, it undertook to store its customers' whisky, after purchase, for three years, or for a longer period, as required. The conditions were (*inter alia*) that, in return for storage, customers should pay to the co. a sum calculated by taking a fixed rentcharge per cask of whisky for each week of storage, less a deduction for any deficiency due to leakage. The deduction for deficiencies could not be ascertained until the casks were removed at the conclusion of storage, & until then, no sum was demandable from customers. The Revenue maintained that, in estimating the co.'s profits & gains for purposes of income tax, the weekly rent charges fell to be treated as profits accruing week by week, & subject to an allowance being made for the deficiencies as ultimately ascertained, should be brought into account as profits of the year in which they accrued:—*Held*: the profits from storage contracts were neither earned nor ascertainable until those contracts had been completed, & ought not, therefore, to enter into the computation of the co.'s profits & gains for the purpose of income tax in any year before that in which the contracts were completed.—*DAILUAINE-TALISKER DISTILLERIES v. INLAND REVENUE COMRS.*, [1930] S. C. 878; 15 Tax Cas. 613.—SCOT.

*sk.* —.—A distillery co. owned bonded warehouses in which it undertook storage of immature whisky belonging to customers. The conditions were that customers should pay a sum calculated by taking a fixed rentcharge per cask for each week of

storage, less a deduction for any deficiency due to leakage. The net charges for storage were not ascertainable until the end of the particular storage period, which normally lasted several years, & were not demandable till then. The conditions of storage were, in all material respects, identical with those considered in *Dailuaine-Talisker Distilleries v. Inland Revenue*, [1930] S. C. 878, & in accordance with that decision, the profits derivable from storage contracts were not included in the computation of the co.'s profits until the year in which each contract was completed & the charges paid. During the currency of certain of its storage contracts, the co. sold its business to another co., & went into voluntary liquidation. The purchasers took over the co.'s warehouses, & the liquidator never had any concern in their management. He, however, informed the various customers having whisky stored there that the purchasing co. had agreed to continue storing their whisky on the same terms as hitherto, & called upon them to pay to him the storage charges accrued to the date of liquidation. By this means, he collected a sum of over £9,000 on account of storage charges, which he handed over to the purchasing co., who had purchased all the shares of the selling co. That sum was not included as a revenue receipt in the purchaser's account, or in the computation of their profits for assessment to income tax:—*Held*: the sum collected by the liquidator fell to be treated as income of the selling co. for purposes of tax, in respect that it represented profits accruing before the date of liquidation.—*INLAND REVENUE v. OBAN DISTILLERY CO. LIQUIDATOR*, [1933] S. C. 44; 18 Tax Cas. 33.—SCOT.

*sd.* *Damages for failure to repair ship within specified period.*—Based on loss of profits.—Shipowners purchased a

trade, they were chargeable to income tax; (2) profits made from the re-sale of certain of the machines were chargeable on the ground that only the use of the machines, & not their possession, was illegal.—*MANN v. NASH*, [1932] 1 K. B. 752; 101 L. J. K. B. 270; 147 L. T. 164; 48 T. L. R. 287; 76 Sol. Jo. 201; 16 Tax Cas. 523.

*Annotation*:—As to (1) *Appl. Southern v. A. B., Southern v. A. B., Ltd.*, [1933] 1 K. B. 721.

99j. —.]—Resps. carried on street betting & ready-money betting businesses which were wholly illegal:—*Held*: there was a "trade" carried on by resps. within Income Tax Act, 1918 (c. 40), Sched. D, Case I., & that being so, the fact that that trade was illegal did not prevent the profits arising therefrom being assessable to income tax.—*SOUTHERN (S.) v. A. B., SOUTHERN (S.) v. A. B., LTD.*, [1933] 1 K. B. 713; 102 L. J. K. B. 294; 149 L. T. 22; 49 T. L. R. 222; 77 Sol. Jo. 139; 18 Tax Cas. 59.

99k. Repayment of sum illegally demanded by Food Controller for licence to purchase milk.]—*Held*: in the computation of liability to income tax the amount repaid must be treated as a receipt of the year in which it was originally paid to the Food Controller.—*ENGLISH DAIRIES, LTD. v. PHILLIPS, ENGLISH DAIRIES, LTD. v. INLAND REVENUE COMRS.* (1927), 11 Tax Cas. 597.

*Annotations*:—*Refd.* *British Mexican Petroleum Co. v. Jackson, British Mexican Petroleum Co. v. I. R. Comrs.* (1932), 16 Tax Cas. 570; *Worsley Brewery Co. v. I. R. Comrs.* (1932), 17 Tax Cas. 349.

99l. Royalties.]—Appl. co. carried on business in the United Kingdom as literary agents, acting on behalf of authors in making arrangements with publishers & others for the publication or disposal of authors' literary productions. The co. remitted to the authors the royalties less the co.'s commission & expenses. The co. was assessed for the year 1925–26 in respect of sums paid under such arrangements to certain authors who were not resident in the United Kingdom. The books concerned were written out of the United Kingdom. The

co. appealed to the Special Comrs. The Comrs., in an interim decision, determined that the copyright royalties in question were not profits or gains arising from any trade, profession, or vocation exercised in the United Kingdom; that they were profits or gains arising from property in the United Kingdom; & that the non-resident authors were assessable in the name of the co. under rule 5 of the General Rules. At a further hearing the Comrs. held that the assessments should be under Case VI. of Sched. D, & they should be in the amount of the royalties less the agents' commission & incidental expenses, so far as they related to the royalties brought into charge, & not, as contended on behalf of the revenue, without any such deduction. Both parties appealed:—*Held*: that the royalties were annual profits or gains arising from property in the United Kingdom & so were assessable under Sched. D; & that allowance should be made in the assessments for the expenses indicated.—*CURTIS BROWN, LTD. v. JARVIS; JARVIS v. CURTIS BROWN, LTD.* (1929), 14 Tax Cas. 744; 73 Sol. Jo. 819.

99m. Purchase of bonds cum coupon & simultaneous sale ex coupon—Tax deducted from interest—Whether balance assessable.]—A co. carrying on business as a loan & finance co. had dealings in the course of this business in stocks, shares & other securities. They bought Treasury Bonds cum coupon & at the same time sold bonds of the same nominal value ex coupon. By cashing the coupons detached they received interest on the bonds less income tax deducted under Sched. C:—*Held*: the net interest received by the co. having been taxed under Sched. C. could not again be brought into account for the purpose of the assessment of income tax under Sched. D. in respect of the profits or gains of the co.'s business.—*THOMPSON v. TRUST & LOAN CO. OF CANADA*, [1932] 1 K. B. 517; 101 L. J. K. B. 342; 146 L. T. 369; 48 T. L. R. 209; 16 Tax Cas. 394, C. A.

*Annotation*:—*Refd.* *Hughes v. Bank of New Zealand*, [1937] 1 K. B. 419.

ship secondhand, which required extensive repairs. The vessel was immediately put into the hands of shipbuilders to carry out the repairs, but they failed to complete the repairs until five months after the expiry of the period specified in their tender. The owners having claimed as damages a sum based on the estimated profits which the ship would have earned during the five months, the claim was ultimately compromised by a payment of £3,000:—*Held*: this sum constituted profits on which the owners were liable to income tax, in respect that it was compensation for the loss of trading profits, not for injury to a capital asset.—*BURMAH STEAMSHIP CO. v. INLAND REVENUE COMRS.*, [1931] S. C. 156; 16 Tax Cas. 67.—*SCOT.*

se. Royalty.]—Resp., the owner of certain freehold land in Alberta, entered into an agreement with an oil co. under which she sold a part of her land to the co., & in consideration of the sale the co. agreed to pay her \$5,000 in cash, to issue to her 25,000 fully-paid shares of \$1 each in the co., & further, to deliver to her order "the royalty reserved . . . namely, 10 per cent. of all the petroleum, natural gas & oil produced & saved from the said lands free of costs." In 1927 the co. paid to resp. \$9,570.41 in respect of

the 10 per cent. royalty, & she was assessed to income tax on that sum on the ground that it came within the words "annual profit or gain from any other source" in Canadian Income War Tax Act, 1927, s. 3 (1):—*Held*: the royalty received was not a "profit or gain" but was of a capital nature (a part of the purchase price of the land) & was not assessable to income tax under 1927 Act.—*MINISTER OF NATIONAL REVENUE v. SPOONER*, [1933] A. C. 684; 102 L. J. P. C. 205; 50 T. L. R. 11, P. C. CAN.

sf. Payments by insurance company for loss of profits & fixed charges.]—*BRITISH COLUMBIA FIR & CEDAR LUMBER CO., LTD. v. MINISTER OF NATIONAL REVENUE*, [1930] Ex. C. R. 59.—*CAN.*

sl. Sale of land.]—Land had been purchased by or on behalf of three individuals (who, with their solr., were the co.'s only shareholders) who paid the purchase price. The land was transferred to the co. (which made no payment therefor), one lot by a conveyance (direct from the original vendor) in Feb. 1928, & the other lot by a conveyance in May, 1928. The land (upon which were rented buildings) was managed by one of the individuals, the same as if the co. did not exist. In 1929 the said three

individuals entered into an agreement to sell the land to a purchaser at a profit (the profit in question), which agreement was registered on Feb. 5, 1929. On the face of the agreement, it was a sale by the three individuals; the money was payable to them, & the proceeds of the sale were paid to them. In June, 1928, the co. had executed a conveyance of the land to the three individuals, for a nominal consideration, which conveyance was not registered until Feb. 5, 1929, a few minutes after the registration of said agreement of sale:—*Held*: the sale on which said profit was made was not a sale by the co. or on its behalf, the profit was not a profit of the co., & it was not liable for income tax thereon.—*DONALD (M.D.), LTD. v. BROWN*, [1933] S. C. R. 411; 4 D. L. R. 145.—*CAN.*

so. Premium on redemption of stock.]—*Held*: the premium paid by a corp. upon the redemption of its capital stock, in excess of the par value of the stock, is income & taxable under Income War Tax Act, R. S. C., 1927.—*NATIONAL TRUST CO. v. MINISTER OF NATIONAL REVENUE*, [1935] Ex. C. R. 167; [1936] 1 D. L. R. 129.—*CAN.*

sr. Dividends from accumulated profits.]—Part of the profits of a joint stock co., not a personal corp., which had been accumulated prior to

**99n. Remission of debt.**—In 1919 applt. co. entered into a contract with an oil-producing co. for the purchase of petroleum for a minimum period of twenty years. Applt. co. was adversely affected by the slump in the petroleum business in 1921 & was unable to meet its liability under the contract for oil supplied, etc. Accounts of applt. co.'s business were made up for the year ended June 30, 1921, & for the eighteen months ended Dec. 31, 1922. At June 30, 1921, the agreed amount owing to the oil-producing co. under the contract was £1,073,281; at Sept. 30, 1921, the amount was £1,270,232. Under the terms of an agreement dated Nov. 25, 1921, applt. co. paid to the producing co. the sum of £325,000 & was released by the producing co. from its liability to pay the balance remaining due, viz., £945,232. The amount so released was carried direct to applt. co.'s balance sheet & was shown as a separate item under the head "Reserve" at Dec. 31, 1922. The Crown contended that the amount released should be brought into account in computing applt. co.'s profits for purposes of income tax & Corporation Profits Tax, either in the account for the eighteen months to Dec. 31, 1922, or, alternatively, in the account for the year to June 30, 1921, that account being re-opened for the purpose. The Special Comrs. held that the amount released should be brought into the profit & loss account of the co. for the eighteen months to Dec. 31, 1922:—*Held*: the amount remitted should not be included as a receipt in the account for the eighteen months to Dec. 31, 1922, & the account for the year to June 30, 1921, should not be re-opened & adjusted by reference to the remission.—*BRITISH MEXICAN PETROLEUM CO., LTD. v. JACKSON, BRITISH MEXICAN PETROLEUM CO., LTD. v. INLAND REVENUE COMRS.* (1932), 16 Tax Cas. 570, H. L.

*Annotations*:—*Consd.* Gray v. Penrhyn (Lord), [1937] 3 All E. R. 468. *Refd.* Morley v. Tattersall, [1938] 3 All E. R. 296.

the end of 1929 & remained undistributed until 1934, were received in 1934 as dividends by another such co., applt. herein:—*Held*: the latter co. was liable under said Act for the income tax for 1934 on the amount so received.—*RE JACKSON (THOMAS) & SONS, LTD.*, [1936] 1 W. R. 717; 44 Man. L. R. 228; 6 F. L. J. (Can.) 84; *affd. sub nom.* JACKSON & SONS v. MUNICIPAL COMR., [1936] 4 D. L. R. 529; S. C. R. 610.—*CAN.*

*st. Sale of investments by Agricultural Credit Corporation.*—Profits made by the purchase & sale of investments by the Agricultural Credit Corp. formed under Agricultural Credit Act, 1927, are assessable as arising from the "trade" of the corp.—*AGRICULTURAL CREDIT CORP. v. VALE*, [1935] 1 R. 681.—*IR.*

*sw. Interest guaranteed by Government—Sum paid to make up interest.*—Moneys paid by the Govt. to a ry. co. under its contract to make up the minimum interest on their shares guaranteed by the Secretary of State for India in Council are assessable as income.—*RE AHMADPUR-KATWA RY. CO., LTD.* (1935), 1 L. R. 63 Calo. 109.—*IND.*

*sx. Ex gratia grant.*—*Ex gratia* grant to trader from British Govt. upon recommendation of the Irish Grants Committee, given to him on account of hardship & loss suffered by reason

of being a supporter of the British Govt.:—*Held*: not properly treated as income or revenue receipts from trade.—*ROBINSON v. DOLAN*, [1935] 1 R. 509.—*IR.*

*sa. Payment to shareholder by company not in liquidation.*—Applt. was a shareholder in Hy-Grade Coal Co. of Drumheller, Ltd., from its incorporation in 1919 until its voluntary liquidation in 1933. The co. was engaged in coal mining. In May, 1932, the co. distributed the sum of \$12,000 to its shareholders, of which amount applt. received \$5,028. Applt. was assessed income tax on this amount, which assessment was affirmed by the Minister of National Revenue, & from that decision applt. appealed:—*Held*: (1) a corp. not in liquidation can make no payment to its shareholders by way of return of capital except as a step in an authorised reduction of capital & that any other payment made to its shareholders can only be made by way of dividing profits; (2) until a reserve fund is effectively capitalised it retains the characteristics of distributable profits; (3) the payment of \$12,000 by the co. in 1932, while still a going concern, must be treated as a distribution of a dividend & not a return of capital, & applt.'s share of such distribution was taxable as income.—*McCONKEY v. MINISTER OF NATIONAL REVENUE*, [1937] Ex. O. R. 209; [1938] 1 D. L. R. 657.—*CAN.*

**99o. Subsidy.**—Advances, made under British Sugar Industry (Assistance) Act, 1931 (c. 35), to a co. carrying on business as manufacturers of sugar from beet grown in Great Britain:—*Held*: to be trading receipts of the co. & liable to income tax under Case I. of Sched. D. to 1918 Act.—*LINCOLNSHIRE SUGAR CO., LTD. v. SMART*, [1937] A. C. 697; [1937] 1 All E. R. 413; 106 L. J. K. B. 185; 156 L. T. 215; 53 T. L. R. 306; *sub nom.* SMART v. LINCOLNSHIRE SUGAR CO., LTD., 81 Sol. Jo. 215; 20 Tax Cas. 643, H. L.

*Annotation*:—*Refd.* Morley v. Tattersall, [1937] 4 All E. R. 339.

**99p. Cumulative dividend of English company guaranteed by foreign company—English company without funds—Dividend authorised by foreign company.**—By two deeds executed in 1920 an American co. guaranteed the payment by an associated English co. of the dividend on its preference shares at the rate of 6 per cent. The English co. later raised the rate of dividend to 7½ per cent. & without any further deed the American co. assumed liability for the additional dividend. The English co. in one year having no funds for such payment, the following procedure was followed: the American co. authorised the English co. to make the payment, & the latter co. issued dividend warrants for the amount of the dividend less tax. The English co. then debited the American co. with the gross amount of the dividend:—*Held*: the effect of the transaction was a payment of the gross amount by the American co. & not of the net amount; the payments when received by the shareholders were income in their hands & liable to tax; the co. was rightly charged under All Sched. Rules, r. 21.—*ÆOLIAN CO., LTD. v. INLAND REVENUE COMRS., INLAND REVENUE COMRS. v. ÆOLIAN CO., LTD.*, [1936] 2 All E. R. 219; 80 Sol. Jo. 736; 20 Tax Cas. 547.

**99q. Sale by liquidator.**—Applt. co. was formed in 1933 with a capital of £2,500 & was formed

*sd. Stock dividends—What amount to.*—Deft. co. was incorporated under the laws of the Dominion of Canada, with an authorised capital of \$250,000 divided into 25,000 shares of the par value of \$10 each. By-law of the co., enacted on Dec. 11, 1933, provided that: "For the amount of any dividend which the directors may lawfully declare payable in money they may issue shares of this co. as fully paid." On Dec. 11, 1935, the directors of the co. declared a dividend "on the issued share capital of this co. in the form of an issue of whole shares of this co.'s capital stock of such aggregate par value as shall be, as nearly as may be, equal in total amount to the surplus of this co. on Dec. 31, 1935, less the amount of a fair reserve for any taxes. . . . The surplus was determined at \$49,571.51, & the co. allotted & issued 4,957 shares of its capital stock to its shareholders of record at the close of business on Dec. 31, 1935, *pro rata* according to their holdings of issued shares of the co. as of that date, & these shares were paid up in full by the transfer from the "earned surplus" account of the co. of the sum of \$49,570 to the credit of the share capital account. This surplus thus capitalised was available prior to its capitalisation for the payment of cash dividends to the shareholders of deft. Deft. did not collect or withhold or pay the tax in respect to 4,907 of these shares allotted &



for & did in fact purchase the foreign right in a patent for £2,500 payable in the shares of the co. Subsequently all the holders of the shares agreed to sell those rights to two gentlemen for £50,000. This agreement was the subject of litigation, & in settlement thereof the following agreement was made. It was agreed that the previous agreement should be annulled & that the co. should go into voluntary liquidation & the liquidator should sell the Belgian, French & Italian rights in the patent to the purchasers for £20,000. This agreement was implemented & the £20,000 purchase money was distributed among the shareholders according to their respective shareholdings & treated as part of the distribution of the assets of the co. in the liquidation. The revenue authorities claimed that such sale of rights for £20,000 was a trading transaction, the profit of which was assessable to income tax.—*Held*: the realisation of the asset in question by the liquidator was not done in the course of carrying on the trade of the co., but merely in the performance of the liquidator's duty of realising the assets of the co. & bringing it to an end. The profit upon the transaction was therefore not a trading profit & not assessable to income tax.—*WILSON BOX (FOREIGN RIGHTS), LTD. (IN LIQUIDATION) v. BRICE*, [1936] 3 All E. R. 728; 156 L. T. 24; 80 Sol. Jo. 1034; 20 Tax Cas. 736, C. A.

*Annotation*:—*Refd.* *Baker v. Cook*, [1937] 3 All E. R. 509.

**99r. Unclaimed balances.**—A firm of auctioneers by their conditions of sale provided that vendors should receive the purchase money on the Monday week following the sale, & that no money would be paid or remittance sent by post without a written order. As a result of the operation of these conditions, large sums of money from time to time remained unclaimed in the hands of the firm. Upon the admission of a partner in 1922, £13,022 6s. 4d. in respect of unclaimed balances for years prior to 1908 was transferred to the capital account of the old

partner; & in 1935, upon the admission of a further partner, £10,406 10s. 1d. in respect of unclaimed balances between 1922 & 1928 was transferred partly to the current accounts & partly to the capital accounts of the former partners. A partnership deed in 1936 provided that such liability as subsisted in respect of these sums should be assumed by the partnership, that such unclaimed balances as first arose six years before the taking of each annual account should be transferred at such account to the credit of the partners in accordance with their shares in the partnership, that all liability in respect thereof should be borne by the partnership, but that the liability of the partnership should not appear in the annual general accounts:—*Held*: the unclaimed balances so received had not by the terms of the partnership deed of 1936 & the preparation of accounts in accordance therewith become trading receipts. These sums remained the money of the firm's clients & were not assessable to income tax.—*MORLEY v. TATTERSALL*, [1938] 3 All E. R. 296; 159 L. T. 197; 54 T. L. R. 923; 82 Sol. Jo. 453, C. A.

**100. Add. Annotations**:—*Consd.* *I. R. Comrs. v. Forth Conservancy Board*, [1929] A. C. 213; *Leeming v. Jones* (1929), 141 L. T. 472. *Refd.* *Forth Conservancy Board v. I. R. Comrs.*, [1931] A. C. 540.

**104. Add. Annotations**:—*Consd.* *I. R. Comrs. v. Forth Conservancy Board*, [1929] A. C. 213. *Apld.* *Forth Conservancy Board v. I. R. Comrs.*, [1931] A. C. 540. *Refd.* *Brighton College v. Marriott*, [1926] A. C. 192; *Salisbury House Estate v. Fry* (1929), 98 L. J. K. B. 722; *I. R. Comrs. v. Sneath* (1932), 48 T. L. R. 241; *Wolverton (Lord) v. I. R. Comrs.* (1931), 16 Tax Cas. 467; *Mitcham Golf Course Trustees v. Ercaut*, [1937] 3 All E. R. 450.

**104a. Government grant to dock company.**—Moneys received by a dock-owning co. from a grant made by the Unemployment Grants Committee under authority of a vote of

issued to a non-resident of Canada:—*Held*: these transactions were in effect a declaration of a stock dividend within the Income War Tax Act & deft. co. was liable to pay tax on the value of the shares issued to non-residents of Canada.—*R. v. JOHNSON MATTHEY & CO. (CANADA), LTD.*, [1938] Ex. C. R. 141; 7 F. L. J. (Can.) 307.—*CAN.*

#### PART V. SECT. 1, SUB-SECT. 2.

**p 1. — To public institution.**—The corpn. of C. supplied water (a) for public sanitary purposes within the borough; (b) to private consumers for trade purposes within the borough; (c) to private consumers for domestic purposes within the borough; (d) to certain public institutions situated within the borough for domestic purposes; & (e) to private consumers for domestic purposes outside the borough. The corpn. had authority to levy a water rate on all lands & hereditaments within the borough in respect of the supply of water for domestic purposes, but the corpn. did not in fact levy a separate water rate. If the receipts from the supply of water for trade purposes in any year were not sufficient to meet the full total expenditure on the waterworks in that year (including repayment of loans & interest) the deficit arising was made good out of the general sanitary rate. The general sanitary rate was levied on all tenements

within the borough of C. included in the poor law valuation lists, & on all lands to the extent of one-fourth of the sanitary rate. Certain public institutions in C. were not included in the poor law valuation lists, & were, therefore, not subject to the sanitary rate. The water supplied to these institutions by the corpn. was used for purely domestic purposes, & the price to be paid by the institutions for the water supplied was fixed by agreement with the corpn.:—*Held*: the moneys received by the corpn. for the supply of water to the above-mentioned public institutions should be regarded as trading receipts for the purpose of assessment to income tax.—*KIRBY v. CLONMEL CORPN.*, [1931] I. R. 526.—*IR.*

**q 1. — Increase in price to meet deficit in electricity undertaking.**—A town council incurred a deficit on the working of its electricity undertaking. The council was also the local authority carrying on the manufacture & distribution of gas within the area, & in order to meet the deficit on its electricity undertaking, it increased the price of gas by an amount estimated to yield an additional revenue of £5,000 a year surplus to the estimated requirements of the gas undertaking. Sums of £5,000 were thereafter annually debited in the accounts of the gas undertaking & credited in those of the

electricity undertaking:—*Held*: these sums of £5,000 were properly included in the profits of the gas undertaking for income tax purposes, irrespective of the purpose to which they were applied.—*ALLOA MAGISTRATES v. INLAND REVENUE COMRS.*, [1931] S. C. 656; 16 Tax Cas. 451.—*SCOT.*

**so. Transmission of electricity & supply of air through pipes.**—*Held*: the co. did not carry on the business of "manufacturer" within Assessment Act, s. 10 (1) (d).—*Re COLEMAN & NOR. ONT. LIGHT & POWER CO.* (1927), 60 O. L. R. 405.—*CAN.*

**so. Profits from Government contract**—*Surplus income appropriated by statute—To sinking fund.*—A co. is empowered by Act of Parliament to raise money upon mtgo. for the purpose of carrying out a Government contract, but is required by the same Act to establish a sinking fund for the extinction of the mtgo. debt. A sum is to be set aside for payment into the sinking fund out of each quarterly payment received under the contract or out of other moneys belonging to the co.:—*Held*: following the decision in *Mersey Docks & Harbour Board v. Lucas*, No. 104, the sums thus set aside are not allowable as a deduction in arriving at the co.'s assessable profits.—*CITY OF DUBLIN STEAM PACKET CO. v. O'BRIEN* (1912), 6 Tax Cas. 101.—*IR.*



Parliament to assist them in carrying through the work of extending their docks are not profits or gains of the trade carried on by the co. within Case 1 of Sched. D. of 1918 Act.—*CROOK v. SEAHAM HARBOUR DOCK CO.* (1931), 96 J. P. 13; 48 T. L. R. 91; 75 Sol. Jo. 830; 30 L. G. R. 37; *sub nom.* SEAHAM HARBOUR DOCK CO. *v.* CROOK (1931), 16 Tax Cas. 333, H. L.

*Annotations*:—*Distd.* Westcombe *v.* Hadnock Quarries, Ltd. (1931), 16 Tax Cas. 137. *Refd.* Birmingham Corp'n. *v.* Barnes, [1934] 1 K. B. 484; Smart *v.* Lincolnshire Sugar Co. (1935), 154 L. T. 107.

**104b. River dues—Surplus income applicable in discretion of Conservancy Board.**—A conservancy board was established by statute to preserve & improve a river & firth & to control the navigation therein. Its members were appointed or elected by local authorities, Govt. departments, railway cos. & ship-owners. It possessed wide powers to dredge, light, buoy & otherwise improve the navigation of the river, & it was empowered to levy dues on vessels entering the river or firth. These dues constituted its sole revenue, & were directed by statute to be applied to the purposes of the undertaking as the Board might determine:—*Held*: the board was assessable to income tax on the surplus revenue arising from these dues under Case VI. of Sched. D of 1918 Act.—*FORTH CONSERVANCY BOARD v. INLAND REVENUE COMRS.*, [1931] A. C. 540; 100 L. J. P. C. 193; 145 L. T. 121; 95 J. P. 160; 47 T. L. R. 429; 75 Sol. Jo. 359; 29 L. G. R. 541; *sub nom.* INLAND REVENUE COMRS. *v.* FORTH CONSERVANCY BOARD, 16 Tax Cas. 103, H. L.

*Annotations*:—*Consd.* Elliott *v.* Burn, [1934] 1 K. B. 109. *Refd.* Nicoll *v.* Austin (1935), 19 Tax Cas. 531.

**112. Add. Annotations**:—*Distd.* Forth Conservancy Board *v.* I. R. Comrs., [1931] A. C. 540. *Refd.* I. R. Comrs. *v.* Forth Conservancy Board (1928), 14 Tax Cas. 709.

**112a. Company—Carrying on several businesses.**—A co. may carry on more than one trade within 1918 Act, Schedule D., Case I. Whether the activities of a co. constitute one business or two separate businesses is a question of fact.—*SCALES v. THOMPSON (GEORGE) & CO., LTD.* (1927), 138 L. T. 331; 13 Tax Cas. 83.

*Annotation*:—*Consd.* H. & G. Kinemas, Ltd. *v.* Cook (1933), 18 Tax Cas. 116.

**113. Add. Citation**:—10 Tax Cas. 29.

*Add. Annotations*:—*Expld.* Leeming *v.* Jones (1929), 141 L. T. 472. *Distd.* Jones *v.* Leeming, [1930] A. C. 415. *Folld.* Townsend *v.* Grundy (1933), 18 Tax Cas. 140. *Consd.* *Re Debtor, Ex p. Debtor* (No. 490 of 1935), [1936] Ch. 237; Lowry *v.* Field, Lowry *v.* Williams, Titcomb *v.* Clancy, De Burgh Whyte *v.* Clancy, [1936] 2 All E. R. 735. *Refd.* *Re Bankruptcy Notice* (No. 292 of 1928) (1928), 44 T. L. R. 533; I. R. Comrs. *v.* Lysaght, [1928] A. C. 234; Rees Roturbo Development Syndicate *v.* I. R. Comrs., Rees Roturbo Development Syndicate *v.* Ducker (1928), 13 Tax Cas. 366; Forth Conservancy Board *v.* I. R. Comrs., [1931] A. C. 540.

**113a. ———.**—*TOWNSEND v. GRUNDY*, No. 459a, *post*.

**114. Add. Citations**:—[1927] A. C. 312; 96 L. J. K. B. 379; 136 L. T. 580; 43 T. L. R. 116; 71 Sol. Jo. 18; 11 Tax Cas. 297, H. L.; *affg.*, [1926] 1 K. B. 550.

*Add. Annotations*:—*Refd.* Kirke's Trustees *v.* I. R. Comrs. (1926), 136 L. T. 582; Nesbitt *v.* Mitchel (1926), 11 Tax Cas. 211; Constantinesco *v.* R. (1927), 11 Tax Cas. 730; Devon Mutual Steamship Insee. Assocn. *v.* Ogg (1927), 13 Tax Cas. 184; I. R. Comrs. *v.* Newcastle Breweries (1927), 12 Tax Cas. 927; Rees Roturbo Development Syndicate *v.* I. R. Comrs., Rees Roturbo Development Syndicate *v.* Ducker (1928), 13 Tax Cas. 366; Jones *v.* Leeming, [1930] A. C. 415; Taxes Comrs. *v.* British Australian Wool Realization Assocn., Ltd. (1930), 47 T. L. R. 57; Hennell *v.* I. R. Comrs., [1933] 1 K. B. 415; Golden Horse Shoe (New), Ltd. *v.* Thurgood, [1933] 1 K. B. 548; Handley Page *v.* Butterworth (1935), 19 Tax Cas. 328; Lowry *v.* Field, Lowry *v.* Williams, Titcomb *v.* Clancy, De Burgh Whyte *v.* Clancy, [1936] 2 All E. R. 735; Moss' Empires, Ltd. *v.* I. R. Comrs., [1937] 3 All E. R. 381; Wilson *v.* Mannooch, [1937] 3 All E. R. 120.

**114a. "Turning over" cotton mills.**—During the boom in the Lancashire cotton trade in 1919, applt., with other persons, engaged in the operation known locally as "turning over" a cotton mill, *i.e.* acquiring a controlling interest in the mill, organising its administration & finances, & reselling it to a new co. The operation was successful & applt. joined other syndicates, composed partly of the same persons engaged in "turning over" three other mills. In each case a profit resulted to applt. On Mar. 24, 1923, the additional comrs. for the division in which applt. resided signed the book containing an estimated assessment upon applt. to income tax under Schedule D. for the year 1919–20. The book was not delivered to the general comrs. until Apr. 18, 1923; notice was given to applt. on May 5, 1923, & the assessment was signed by the general comrs. on Sept. 5, 1923:—*Held*: (1) though each adventure of "turning over" a mill, taken singly, was not a trade, but a capital transaction, yet the succession of such adventures, in each of which applt. took part, might constitute the carrying on of a trade, & the Special Comrs., on an appeal against the assessment, were not estopped by their previous decisions from reconsidering the whole of the facts, & finding that applt. was carrying on a trade, on the profits of which he was liable to income tax; (2) the assessment was made in time, having been made when it was signed by the additional comrs. within the three years allowed by 1918 Act, s. 125 (2), & the subsequent steps need not be within that time.—*PICKFORD v. QUIRKE, PICKFORD v. INLAND REVENUE COMRS.* (1927), 138 L. T. 500; 44 T. L. R. 15; 13 Tax Cas. 251, O. A.

**114b. ——— Isolated transaction—Assignment of option.**—*Resp.* joined with three other persons in obtaining an option to purchase a rubber estate in the Malay Peninsula. As the

estate was too small for resale to a co. for public flotation, they acquired a further option to purchase an adjoining estate. Ultimately the two estates were sold to a co. at a profit. Resp. having been assessed to income tax on a sum representing his net share of the profit appealed. The Comrs. found that resp. acquired the property or interest in the property with the sole object of turning it over again at a profit, & that he at no time had any intention of holding the property or interest as an investment, & confirmed the assessment. They subsequently found, on the case being referred back to them, that the transaction was not a concern in the nature of trade:—*Held*: having regard to the finding of the Comrs. that the transaction was not a concern in the nature of trade, & to its being an isolated transaction of purchase & resale of property, the profits arising therefrom were not in the nature of income but were an accretion to capital, & were therefore not subject to tax under 1918 Act, Sched. D, Case VI.—*JONES v. LEEMING*, [1930] A. C. 415; 99 L. J. K. B. 318; 143 L. T. 50; 46 T. L. R. 296; 74 Sol. Jo. 247; *sub nom.* *LEEMING v. JONES*, 15 Tax Cas. 333, H. L.

*Annotations*:—*Consd.* *Lowry v. Field*, *Lowry v. Williams*, *Titcomb v. Clancy*, *De Burgh Whyte v. Clancy*, [1936] 2 All E. R. 735; *Wilson v. Mannooch*, [1937] 3 All E. R. 120.

**114c. Subscription to venture subsequently transformed into shares.**—A co. amongst its other activities prospected for, acquired options over, purchased & resold to development cos. mineral properties in various parts of the world. Certain persons who were not shareholders in the co. were invited to participate in these ventures, the co. & the participants each subscribing a certain sum of money, & the money being used for the expenses of prospecting the particular property concerned & acquiring an option over it. If the prospecting was satisfactory the option was exercised & a development co. formed, in which the co. & the participants were allotted shares. The participants did not in fact sell these shares. Certain participants were assessed upon the difference between the amount of their subscription to the venture & the nominal value of the shares allotted to them:—*Held*: the profit on the subscription to the venture was a profit of a capital nature & was not liable to tax. Where there is an investment of money there must be a possibility of the profit upon that money recurring for it to be a revenue profit.—*LOWRY v. FIELD*, *LOWRY v. WILLIAMS*, *TITCOMB v. CLANCY*, *DE BURGH WHYTE v. CLANCY*, [1936] 2 All E. R. 735; 20 Tax Cas. 679.

**115a. Sale of "round" to traveller—Profits retained in reduction of purchase-price.**—Prior to 1921 resp. carried on a business as a credit draper on a system by which travellers in his employment called on householders in defined working-class areas, or "rounds," offering articles of clothing for sale on credit, the price of goods sold being collected in instalments by the travellers. In 1919 he agreed to sell to one of his travellers the rounds which the traveller had been working, on the terms that the traveller was to continue in the service of resp. for a specified

period, & thereafter to purchase the rounds at a figure calculated by reference to the amount of the then outstanding book debts. The arrangement was that, after the expiration of the service period, the traveller, out of his weekly collections, should retain for himself a certain cash allowance, should pay for goods purchased by him from resp. for disposal on the round, & should hand over to resp. the balance in reduction of the purchase-price. The agreement further provided that the book debts & all future debts contracted until the purchase-money should have been paid should be the absolute property of the resp. & that, if the traveller failed to observe his part of the agreement or neglected the business, resp. should be at liberty to resell the book debts & recover from him any deficiency. Agreements on similar or substantially similar terms were made by resp. with the same traveller in respect of other rounds & also with other travellers. After completion of the agreements all sales by the travellers concerned continued to be made in resp.'s name & the accounts of the customers were as between the customers & resp. At the time material to the appeal the full purchase-price under the agreements had in no case been paid. Resp. was assessed to income tax under Sched. D. for the year 1925–26 to include the profits made on the sale of goods by travellers in his name on the rounds which were the subject of the agreements. On appeal he contended that these profits belonged to the travellers to whom the rounds had been sold, his right of retention of the book debts being merely a form of security for payment of the purchase-price of the rounds. The General Comrs. allowed the appeal:—*Held*: the effect of the agreements was that, while there was a contract to sell, the transfer of the rounds to the travellers concerned was postponed until the purchase-price had been paid in full, & that until then the profits of the rounds belonged to resp., who was assessable in respect thereof.—*BONNER v. FROOD* (1934), 18 Tax Cas. 488.

**115b. Sale of timber by farmer.**—Resp., who occupied two farms which he had owned for fifteen & eight years respectively, elected under rule 5 of Sched. B. to be assessed for a particular year under Sched. D., & submitted accounts in which was included the sum of £243, representing the proceeds of the sale of timber growing on those farms which he had cut & sold. On appeal against Sched. D. assessment resp. put forward various contentions as to the basis of the computation of the amount of the profits, if profits there were, from the sale of the timber. The General Comrs. decided that the profit from the sales of timber was £218, but that, having regard to the definition of "land" in Law of Property Act, 1925 (c. 20), s. 205 (1) (ix), the sale of timber came under the same legal definition as the sale of land & consequently the same incident of taxation applied & there was no liability for income tax in respect of the proceeds of sale of timber:—*Held*: the profit from the sales of timber arose out of the occupation of the farm lands & must be included in the profits of the resp. as a farmer for the purposes of assessment to income tax under Sched. D.—*ELMES v. TREMBATH* (1934), 19 Tax Cas. 72.

**116. Add. Annotations:—***Consd. Townsend v. Grundy* (1933), 18 Tax Cas. 140. *Refd.* *Down v. Compston*, [1937] 2 All E. R. 475.

**116a. Professional golfer.]—***Resp.*, a professional golfer, had, in addition to his other activities, for a number of years habitually engaged in private games of golf for bets of varying amounts. *Resp.* was assessed, under Sched. D., to include (*inter alia*) the balance of gains over losses arising out of the bets made on such games, on the ground that the winnings made could not accurately be called mere betting receipts, but were profits arising out of his vocation as a professional golfer:—*Held*: *resp.*'s winnings did not arise from his employment or vocation, & they were not analogous to gratuities for services rendered, nor was there any organisation to support the view that *resp.* was carrying on a business of betting. The assessment ought, therefore, to be discharged.—*Down v. Compston*, [1937] 2 All E. R. 475; 157 L. T. 549; 53 T. L. R. 545; 81 Sol. Jo. 358; 21 Tax Cas. 60.

**116b. Profits from ownership of land—Whether Schedule A. assessment conclusive—Company letting out offices—Rents & profits from contracts for services.]—**A co. formed to acquire, manage, & deal with a block of buildings let out the rooms as unfurnished offices to tenants. The co. provided a staff to operate the lifts & to act as porters & watch & protect the building. The co. also provided certain services, such as heating & cleaning, for the tenants if required, at an additional charge. For each of the four years ending April 5, 1925, 1926, 1927, & 1928 the co. was assessed under Sched. A to income tax on the gross value of the building as appearing in the valuation list under the Valuation (Metropolis) Act, 1869 (c. 67). The co. admitted its liability to be assessed in respect of its profits from the services supplied to the tenants under Sched. D, but the Crown claimed in making the assessments under Sched. D to include the rents of the offices as part of the receipts of the trade, making allowance for tax assessed under Sched. A:—*Held*: the rents were profits arising from the ownership of land in respect of which the assessment under Sched. A was exhaustive, & they therefore could not be included in the assessment under Sched. D as trade receipts of the co.—*FRY v. SALISBURY HOUSE ESTATE, LTD.*; *JONES v. CITY OF LONDON REAL PROPERTY CO., LTD.*, [1930] A. C. 432; 99 L. J. K. B. 403; 143 L. T. 77; 46 T. L. R. 336, 358; 74 Sol. Jo. 232; 15 Tax Cas. 266, H. L.; *affg.*, *S. C. SALISBURY HOUSE ESTATE, LTD. v. FRY*, [1930] 1 K. B. 304, C. A.; & *CITY OF LONDON REAL PROPERTY CO. v. JONES*, 45 T. L. R. 573, C. A.

*Annotations:—**Expld.* *Hoare & Co. v. Collyer* (1932), 48 T. L. R. 256. *Consd.* *Thompson v. Trust & Loan Co. of Canada* (1932), 48 T. L. R. 209; *Glanely v. Wightman* (1933), 149 L. T. 121; *Neumann v. I. R. Comrs.*, [1934] A. C. 215. *Apld.* *Elliott v. Burn* (1934), 50 T. L. R. 556. *Consd.* *Stewart v. Normanby Estate Co.* (1933), 18 Tax Cas. 244; *Windsor Playhouse, Ltd. v. Heyhoe* (1933), 17 Tax Cas. 481; *Loney (Alfred) & Co. v. Whelan*, [1934] 2 K. B. 511; *Simpson v. Grange Trust, Ltd.*, [1935] A. C. 422. *Apld.* *Elliott v. Burn*, [1935] A. C. 84. *Consd.* *Collyer v. Hoare & Co.* (No. 2), [1938] 1 K. B. 235; *I. R. Comrs. v. Cull*, [1938] 2 K. B. 109. *Refd.* *I. R. Comrs. v. Scottish Central Electric Power Co.* (1931), 145 L. T. 169; *Assam Railways & Trading Co. v. I. R. Comrs.*, [1933] 2 K. B. 576; *Heastie v. Veitch & Co.*, [1934] 1 K. B. 535; *Loughnan v. Marston's Dolphin Brewery, Ltd.*, *Whelan v. Alfred Loney & Co.*, [1936] 1 All E. R.

468; *Hughes v. Bank of New Zealand*, [1937] 1 K. B. 419; *I. R. Comrs. v. New Sharlston Collieries Co.*, [1937] 1 K. B. 583; *Dawson v. Counsell*, [1938] 3 All E. R. 5.

**116c. ——— Licensed houses owned by brewery company.]—***HOARE & CO., LTD. v. COLLYER*, No. 292b, *post*.

**116d. ——— & let to another brewer.]—**A brewery co. who held a number of tied houses, both freehold & leasehold, by several agreements & deeds agreed to grant & subsequently granted leases of the houses, with the plant & fixtures connected with their brewery & the exclusive right to supply beer to the tied tenants, to another brewery co. for a term of years at a rent fixed by reference to the average net profits of the lessors for a period of years. Another brewery co. by an instrument purporting to be a lease agreed to transfer their tied houses & brewery business together with the benefit of all covenants in connection with the premises & the right to use their trade marks, trade labels & advertisements, to a firm of brewers for a term of years at a yearly rent. The tied houses comprised in the agreements & leases were assessed to income tax on their annual values under Sched. A., & the tied tenants of these houses deducted the tax paid by them from the rent they paid to the lessees, who in turn deducted the same amount from the rent they paid the lessors under the agreements & leases. The aggregate amount of the rents paid under the agreements & leases over a period of years exceeded the aggregate amount of the assessments under Sched. A. of the annual value of the tied houses over the same period:—*Held*: the lessors having paid the tax under Sched. A. were not liable to tax under Sched. D. in respect of the surplus except so far as, in the second case, it represented personal goodwill, user of trade marks, trade labels & advertisements & other property not being corporeal hereditaments.—*WHELAN v. ALFRED LONEY & CO., LTD.*, *LOUGHNAN v. MARSTON'S DOLPHIN BREWERY, LTD.*, [1936] A. C. 393; [1936] 1 All E. R. 468; 105 L. J. K. B. 197; 154 L. T. 537; 52 T. L. R. 329; 80 Sol. Jo. 284; *sub nom.* *LONEY (ALFRED) & CO., LTD. v. WHELAN*; *MARSTON'S DOLPHIN BREWERY, LTD. v. LOUGHNAN*, 20 Tax Cas. 321, H. L.

*Annotation:—**Refd.* *Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee*, [1937] 2 All E. R. 298.

**116e. ——— Profits from letting cinema & café.]—***Applt.* co. built & equipped premises, including a cinema & a café, which it leased, together with the whole of the fixtures, fittings, etc., & also the goodwill of the businesses carried on at the cinema & café, to another co., for a period of twenty-one years at an annual rent, the lessees becoming responsible for maintenance & the rates & taxes being payable by the lessors. The rent reserved under the lease included the use of the furniture & other movable chattels in the café. The seats & other fittings in the cinema were affixed to & had become part of the freehold. In computing the co.'s profits for the purpose of assessment to income tax under Sched. D, the rent receivable under the lease was included as a receipt & the amount of the net assessment to income tax, Sched. A, on the premises was allowed as a deduction. On appeal, the co. contended that the rent was

wrongly included in the computation of profits, except such part of it as was applicable to movable furniture & fittings, & that, subject to this exception, the liability in respect of the rent was, on the authority of the case of *Salisbury House Estate, Ltd. v. Fry*, covered by the assessment under Sched. A. The General Comrs. confirmed the assessments:—*Held*: the whole of the rent receivable was properly brought into assessment as part of the co.'s profits assessable under Sched. D.—*WINDSOR PLAYHOUSE, LTD. v. HEYHOE* (1933), 17 Tax Cas. 481.

*Annotations*:—*Refd.* *Leney (Alfred) & Co. v. Whelan*, [1934] 2 K. B. 511; *Marston's Dolphin Brewery, Ltd. v. Loughnan* (1934), 151 L. T. 532.

116f. — *Payment by mineral owner for liberty to withdraw support.*—*ELLIOTT v. BURN*, No. 28c, *ante*.

116g. — *Whether easement within Finance Act, 1934 (c. 32), s. 21.*—An annual payment was made by a colliery co. to the surface owners under an agreement whereby the surface owners, in consideration of a minimum yearly payment of £1,000, granted to the co. leave to work a mine notwithstanding that such working might cause subsidence or withdrawal of support from the surface. The co. claimed that this sum should be allowed as a deduction in computing its profits & gains for the purposes of assessment:—*Held*: the payment was in respect of benefits over or derived from land within the scope of the extended definition in sect. 21 of Finance Act, 1934 (c. 32), & the co. was therefore not entitled, in computing its profits & gains for the purposes of assessment, to make a deduction in respect of the said payment.—*INLAND REVENUE COMRS. v. NEW SHARLSTON COLLIERIES CO., LTD.*, [1937] 1 K. B. 583; [1937] 1 All E. R. 86; 106 L. J. K. B. 375; 156 L. T. 279; 53 T. L. R. 280; 81 Sol. Jo. 56; 21 Tax Cas. 69, C. A.

118. *Add. Annotations*:—*Consd.* *Leeming v. Jones* (1929), 141 L. T. 472. *Distd.* *Glanely (Lord) v. Wightman* (1933), 149 L. T. 121. *Refd.* *Jersey's Exors. v. Bassom*, *Derby v. Bassom* (1926), 135 L. T. 274; *I. R. Comrs. v.*

*Lysaght*, [1928] A. C. 234; *Long v. Belfield Poultry Products, Ltd.* (1937), 21 Tax Cas. 221.

118a. — — — — —.]—*GLANELY (LORD) v. WIGHTMAN*, No. 99a, *ante*.

119a. “Trading” — What amounts to — Operations of partnership during winding up.]—Resp. firm carried on a large business of corn & seed merchants between Mar. 1923 & Mar. 31, 1926, when the partnership which was for a limited time came to an end. Under Partnership Act, 1890 (c. 39), s. 38, the partners, after dissolution, had authority to bind the firm, & their rights & obligations continued so far as necessary to wind-up the affairs of the partnership. At the time of dissolution, on Mar. 31, there were large contracts outstanding, & in the course of completing those contracts after dissolution a profit of £8,190 was made in the year ending Apr. 1927, which was assessed to income tax. In the course of the winding-up, large quantities of grain were delivered, payments for which were recovered & freight was paid; other items dealt with were discharging, lighterage, & storage of grain, arbitration fees, & gratuities to the late employees, bank charges, & interest. During the winding-up the partners & staff were thus employed, & the gratuities to the staff were given for their work. The comrs., on those facts, decided that the partners were trading during the winding-up, & the profits of such trading were consequently liable to income tax:—*Held*: what was done after dissolution constituted trading, the profits of which were rightly assessed to income tax.—*HILLERNS & FOWLER v. MURRAY* (1932), 146 L. T. 474; 48 T. L. R. 213; 17 Tax Cas. 77, C. A.

*Annotation*:—*Consd.* *Baker v. Cook*, [1937] 3 All E. R. 509.

119b. *Sale of slag—Business of ironmaster & coalowner no longer carried on.*—Resps., who had carried on business as a partnership, ceased to trade in 1911, but the partnership was not dissolved. Resps. owned a field covered with slag, & in 1925 they granted to a co. the right to get & carry away the slag for seven years in consideration of pay-

119 i. — — — — — *Poultry farm.*—*LEAN v. INLAND REVENUE COMRS.*, [1926] S. C. 15; *sub nom.* *LEAN & DICKSON v. BALL*, 10 Tax Cas. 341.—*SCOT*.

*sf. Difference in value of stock-in-trade on sale of business.*—Resp. & his partner sold their business to a co. They treated their stock-in-trade as being of the value of £43,357, but the co. treated it as being worth £58,383:—*Held*: the difference between the two sums was not a profit derived from the business of the partnership, & resp. was not assessable for income tax in respect of his share of such difference.—*DOUGHTY v. COMR. OF TAXES*, [1927] A. C. 327; 96 L. J. P. C. 45; 136 L. T. 706; 43 T. L. R. 207.—*N.Z.*

*sl. Sale by lumber company of timber at profit.*—*Held*: not a sale in the ordinary course of trading by the co., but a sale of part of its capital assets, & the amount received was an appreciation of capital.—*A.-G. FOR BRITISH COLUMBIA v. STANDARD LUMBER CO., LTD.*, [1926] 2 W. W. R. 167; 36 B. C. R. 481.—*CAN.*

*sm. Purchase, conversion, & re-sale of ship—Isolated transaction.*—A ship repairer, a blacksmith, & a fish salesman's employee, who had not previously been connected with each other in business, bought a cargo steamer,

converted it, partly by their own labour, into a steam drifter, & sold it within four months of the date of purchase at a profit:—*Held*: the transaction, though isolated, was the carrying on of a trade, the profits of which were assessable to income tax.—*INLAND REVENUE COMRS. v. LIVINGSTON*, [1927] S. C. 251; 11 Tax Cas. 538.—*SCOT*.

*sn. Carrying on a trade—What amounts to—Question of law.*—The question whether a taxpayer in buying & selling land was carrying on the trade or business of a land jobber so as to make the proceeds of such sales part of his gross income is a question of law, & an inference drawn by the Special Income Tax Ct. from the facts found by it does not bind the ct. to which a case has been stated under s. 60 of Act 40 of 1925.—*INLAND REVENUE COMR. v. STOTT*, [1928] App. D. 252.—*S. AF.*

*so. Statutory trustees managing recreation ground.*—A body of trustees were appointed under a provisional order to hold & manage certain land in a burgh as a recreation ground. The trustees were in part elected by the holders of season tickets of admission to the ground, & in part appointed by the town council of the burgh from among

its members. The ground was laid out in gardens, tennis courts, & bowling & putting greens & was open to the public on payment, admission being by season, monthly, fortnightly, or daily tickets. The great majority of those admitted were daily ticket holders. The revenue of the trustees from the sale of tickets exceeded the expenses of management:—*Held*: the trustees carried on a trade or business, & not a mutual assocn. for the benefit of a body of subscribers.—*INLAND REVENUE COMRS. v. STONHAVEN RECREATION GROUND TRUSTEES*, [1930] S. C. 206; 15 Tax Cas. 119.—*SCOT*.

*sv. Profits from change of investments.*—An insurance co. was empowered, in terms of its articles of assocn., “to sell, . . . deal with & turn to account any of the assets of the co.” The co. invested its reserve funds in British Govt. securities. From the date of the co.'s incorporation in 1919 till 1928 it occasionally changed its investments in these securities. In several years there were no sales of investments. In 1928 the co. made a profit of £4,800 on the realisation of certain investments. The General Comrs. found that this profit was not made by trading & was not assessable:—*Held*: the question whether a profit

ments on a royalty basis. In respect of these payments resps. were assessed to income tax. The Crown contended that these payments were the profits of a trade within Sched. D, or that they were profits from lands not in resps.' occupation or possession & that thus the payments fell within r. 7 of No. II. of Sched. A. The Special Comrs. found that resps. were not carrying on a trade:—*Held*: the payments were not profits from the land, but were in substance receipts from a sale of the slag, & resps. were not liable to be assessed in respect thereof.—*SHINGLER v. WILLIAMS (P.) & SONS* (1933), 148 L. T. 474; 49 T. L. R. 221; 77 Sol. Jo. 139; 17 Tax Cas. 574.

**119c. — Acquired on incorporation of company.]**

—Resp. co. was incorporated in 1899 to carry on (*inter alia*) the businesses of steel manufacturers, ironmasters & colliery proprietors. On incorporation the co. took over certain slag heaps, then worthless, to one of which it made additions. In 1915 the co.'s operations in iron & steel ceased, & thereafter its trading activity was essentially that of colliery proprietors. The co. did not at any time work the slag or in any way actively seek to dispose of it, but after 1920 accepted offers by various persons to buy the slag, which had become valuable for road-making purposes. On appeal by the co. against an assessment to income tax under Sched. D in respect of its trading profits, including the profits from the sales of slag, the General Comrs. found that the co. had not carried on any trading activity in relation to the disposal of the slag heaps & that the receipts from the sale of slag were not receipts arising from any of its trading operations & were not assessable:—*Held*: the question at issue was one of fact for the determination of the Comrs. & there was evidence on which they could arrive at their decision.—*BEAMS v. WEARDALE STEEL, COAL & COKE CO., LTD.* (1937), 81 Sol. Jo. 686; 21 Tax Cas. 204.

**119d. Advances by agent to principal—Exchange profits.]**

—Applts., who carried on business as fur & skin merchants & as agents, were appointed sole commission agents of a co. for the sale, in Britain & elsewhere, of furs exported from Russia, on the terms (*inter alia*), that they should advance to the co. a part of the value of each consignment. All the transactions between applts. & the co. were conducted on a dollar basis, & owing to fluctuations in the rate of exchange between the dates when advances in dollars were made by applts. to the co. against goods

consigned & the dates when applts. recouped themselves for the advances on the sale of the goods, a profit accrued to applts. on the conversion of repaid advances into sterling:—*Held*: the exchange profits arose directly in the course of applts.' business with the co. & formed part of applts.' trading receipts for the purpose of computing their profits under Case I of Sched. D.—*LANDES BROS. v. SIMPSON* (1934), 19 Tax Cas. 62.

**119e. Executors postponing realisation of partnership estate.]**—M., H. & R. carried on in partnership a trade of dealing in land. Land purchased by the partnership was, by agreement, developed & sold by a limited co., & the price to be paid to the partnership for the land so developed was fixed after the sale. H. died & at the date of his death certain land belonging to the partnership was in the course of development by the limited co. His exors. agreed that the most practicable way in which to realise the assets was to allow the development of the land to be completed, & to postpone the account until the land had been sold. His exors. were assessed for income tax on the profits made after H.'s death on the ground that they were carrying on the partnership business:—*Held*: there was no evidence that H.'s exors. had agreed to carry on the partnership business, the agreement being merely to postpone their right to an account & to their share of the proceeds until such time as it was practicable to realise the assets.—*MARSHALL AND HODD'S EXECUTORS AND ROGERS v. JOLY*, [1936] 1 All E. R. 851 80; Sol. Jo. 533; 20 Tax Cas. 256.

**119f. Trade carried on by company as agent for liquidator.]**—Under an agreement, whereby a co. sold all its assets to applt. co., it was agreed that, in the event of the liquidation of applt. co., applt. co. would sell & the vendor co. would purchase (*inter alia*) applt. co.'s goodwill, copyright in films, & the benefit of all booking agreements for certain films entered into by applt. co. It was provided that the vendor co. should perform & carry into effect on behalf of the liquidator of applt. co. all booking agreements entered into by applt. co. prior to the commencement of the winding up, & that the vendor co. should pay to the liquidator of applt. co. a sum equivalent to 90 per cent. of the gross moneys received by the vendor co. under such booking agreements after deducting therefrom all moneys which the vendor co. might have expended in performing & carrying into effect such booking agreements. The

was made by trading was one of fact & there was evidence justifying the finding of the Comrs.—*I. R. COMRS. v. SCOTTISH AUTOMOBILE & GENERAL INSURANCE CO.*, [1932] S. C. 87; 16 Tax Cas. 381.—*SCOT.*

*sz. "Punting."*—Applt., a grazier, made betting losses during the year 1928–29, amounting to £12,191 18s., & claimed that such losses were the result of carrying on the business of "punting" at horse & pony courses & therefore, such losses should be deducted from income derived by him from a grazing business in the same year. The Comr. refused to allow the deduction & the question for the Ct. was whether applt. was carrying on the business of betting between July 1, 1927, and July, 1929, when his betting activities came to a sudden end.

Applt. made a declaration which was forwarded to the Comr., stating that during the early part of 1927, he conceived the idea of the possibilities of utilising a racing system. The only system he adopted was that of endeavouring to get "the very best information." Applt. made a considerable number of wagers with bookmakers during the period & lost much money. He kept no books & no record of his wins or losses:—*Held*: applt. was not carrying on a business of betting.—*JONES v. FEDERAL TAXATION COMR.* (1932), 2 A. T. D. 16; 6 A. L. J. 201.—*AUS.*

*sz. Purchase of interest in legacies.]*—By itself the purchase of an interest in legacies, the subject of litigation, cannot be described as a trade or business.—*GANGARAJU v. MADRAS INCOME TAX*

*COMR.* (1934), I. L. R. 58 Mad. 363.—*IND.*

*so. Profits from ownership of land—Free coal from lessee mining company—Finance Act, 1934 (c. 32), s. 21.]*—Under the lease to a mining co. of the coal & other minerals on an estate of which resp. was the proprietor the co., in addition to payment of a fixed rent or of royalties, was bound while coal was being worked to furnish free to resp. all coal (not exceeding two hundred tons a year) which he might require for the use of his establishment on the estate:—*Held*: the free coal was rent paid in money's worth within sect. 21 of Finance Act, 1934, & resp. was accordingly assessable to income tax in respect of its value.—*INLAND REVENUE COMRS. v. BAILLIE*, [1936] S. O. 438; 20 Tax Cas. 187.—*SCOT.*

vendor co. was to retain for its services the remaining 10 per cent. Applt. co. went into liquidation, & the vendor co. duly carried out its obligations under the agreement. The question arose as to whether the liquidator was liable to pay tax upon the sums representing 90 per cent. of the moneys received under the booking agreements & paid to the liquidator of applt. co.:—*Held*: there was evidence on which the comrs. could find that the vendor co. was carrying on a trade on behalf of the liquidator of applt. co., who was therefore liable to be taxed upon the profits made.—*BAKER v. COOK*, [1937] 3 All E. R. 509; 81 Sol. Jo. 765; 21 Tax Cas. 339.

120. *Add. Annotations*:—As to (2) *Consd. Alabama Coal, Iron, Land & Colonization Co. v. Mylam* (1926), 11 Tax Cas. 232; *Leeming v. Jones* (1929), 141 L. T. 472. *Refd. Rees Roturbo Development Syndicate v. I. R. Comrs.*, *Rees Roturbo Development Syndicate v. Ducker* (1928), 13 Tax Cas. 366. *Generally, Refd. Hall v. I. R. Comrs.* (1926), 135 L. T. 759; *Spiers & Son, Ltd. v. Ogden* (1932), 17 Tax Cas. 117; *Neumann v. I. R. Comrs.* (1933), 148 L. T. 457.

121. *Add. Annotations*:—*Distd. Alabama Coal, Iron, Land & Colonization Co. v. Mylam* (1926), 11 Tax Cas. 232. *Refd. Taxes Comrs. v. British Australian Wool Realization Asscn., Ltd.* (1930), 47 T. L. R. 57.

122. *Add. Annotation*:—*Refd. Rees Roturbo Development Syndicate v. I. R. Comrs.*, *Rees Roturbo Development Syndicate v. Ducker* (1928), 13 Tax Cas. 366.

122a. — Land in settlement.]—Applt. co., which was incorporated in 1927 with wide powers (*inter alia*), to develop & dispose of lands & other property, acquired, by purchase, from the life tenant of certain settled estates, all the funds & properties subject to the settlement, including therein some twelve hundred acres of land adjoining a populous town. All the issued preference shares of the co. were allotted to the life tenant & all the issued ordinary shares, with the exception of seven shares to the subscribers of the memorandum of association, were allotted to the trustees of the settlement.

Applt. co. proceeded to develop a part of the land as building sites & to sell off portions of the estate as opportunities arose. Certain areas were laid out as desirable sites, involving expenditure on development by the co., & the developed sites were sold in plots to appts. Between the date of its incorporation & the date of the appeal to the Comrs., the co. sold 31 acres of land, including 14 acres for building purposes, in 411 transactions of sale. The co. throughout treated the proceeds of its sales of lands as transactions on capital account & no portion of these profits was distributed to the shareholders. The co. appealed against an assessment to income tax under Sched. D for the year 1930–31 in respect of “property dealings” on the ground that it was not carrying on any trade of dealers in land & property, but was merely continuing in a more convenient manner the scheme of development pursued by the trustees of the settlement & the tenant for life. The General Comrs. decided that the profits from the sales of lands were the profits of a trade or business & assessable to income tax:—*Held*: there was evidence on which the Comrs. could arrive at their conclusion of fact that the co. was carrying on a trade of dealing in property.—*ST. AUBYN ESTATES, LTD. v. STRICK* (1932), 17 Tax Cas. 412.

122b. — Managing trust lands for benefit of holders of Alabama bonds.]—*Held*: a trading co., & assessable on profits made in the realisation of such lands.—*ALABAMA COAL, IRON, LAND & COLONIZATION CO., LTD. v. MYLAM* (1926), 11 Tax Cas. 232.

*Annotation*:—*Consd. Taxes Comrs. v. British Australian Wool Realization Asscn., Ltd.* (1930), 47 T. L. R. 57.

122c. *Sale of property by builder.*]—Applt. co. was incorporated in 1908 to carry on the business of building & contracting. Its memorandum of association contained wide powers with regard to dealing in property. In its early years the co. confined itself to building for customers, but in course of time its activities came to include the buying of land & the erecting of buildings, which were let to tenants & subsequently sold. the buying, reconstruction & sale of buildings, & the buying & selling of property. On an appeal against assessments to income

#### PART V. SECT. 2, SUB-SECT. 1.—B.

d i. — Formed to acquire estate—Profit on resale.]—A limited co. was formed in 1911 to acquire a heritable estate belonging to a trust, the shareholders being the beneficiaries of the trust. The objects of the co., as set forth in its memorandum of assocn., included the purchase, development, & sale of heritable property. The co. held the estate till 1921, after which it gradually sold portions of it. It also bought in 1911, & re-sold in 1925, another heritable property:—*Held*: the co. was assessable to income tax under Sched. D, Case I., on the profits earned on these transactions, in respect that they were profits accruing from carrying on a trade of buying & selling heritable property.—*BALGOWNIE LAND TRUST, LTD. v. INLAND REVENUE COMRS.*, [1929] S. C. 790; 14 Tax Cas. 684.—*SCOT*.

d ii. — Company letting flats—Sale of flats—Realisation of capital.]—*INLAND REVENUE COMRS. v. HYNDLAND INVESTMENT CO., LTD.* (1929), 14 Tax Cas. 694.—*SCOT*.

sp. *Agricultural land.*]—*Held*: as the land had been bought as an investment of capital, the profit was an accretion to capital, & not taxable.—*WRIGHT v. DEPUTY COMR. OF TAXES*, [1927] S. A. S. R. 212.—*AUS*.

sq. *Profits on re-sale of land.*]—*Held*: the premises were bought with the intention of being used in the business of a tailor which applt. was then carrying on, & not with a view to profit on re-sale. The proper test is whether the gain made was an enlargement of capital arising from the mere realisation of property, or was a gain made in business operations in the course of carrying on a scheme for profit making.—*BROWN v. STATE TAXATION COMR.* (1927), 30 W. A. L. R. 30.—*AUS*.

sr. *Licensed premises—Sale of interest in—Sum recovered for goodwill.*]—The amount of the consideration received for the sale of the goodwill of a hotel property held by the vendor as lessee is income assessable to income tax under Income Tax Act, 1924, s. 11 (2).—*Re*

INCOME TAX ACT OF 1924 (No. 2), [1928] S. R. Q. 333.—*AUS*.

sw. *Fines & ground rents received by builder.*]—A builder took on lease a plot of ground for a term of years subject to a ground rent. On this plot he built several houses which he sold. The sale of these houses was effected by way of sub-demise for a term of years subject to a certain ground rent in each case. He also received a certain sum of money in each case by way of fine. For the purpose of his assessment to income tax under Sched. D, the total amounts of the fines were treated as receipts & a further amount was included in respect of the ground rents reserved by him, so far as they exceeded the ground rent payable by him, this amount being arrived at by estimating the capital value of such excess ground rents:—*Held*: the builder was not liable to be assessed under Sched. D, in respect of the amount of the fines or of a capitalised value of the ground rents received by him in respect of the houses.—*BIRCH v. DELANEY*, [1936] I. R. 517.—*IR*.



tax, Sched. D, for the years 1924-25 to 1928-29, which were made to include the profits arising from sales of property, the Special Comrs. held that the co. had from its incorporation carried on one trade only, of which the acquisition & sale of property was part, & that any profit derived from the sale of properties was assessable to income tax under Case I. of Sched. D together with the rest of the co.'s profits:—*Held*: on the facts of the case the Comrs. were justified in arriving at their conclusion.—SPIERS & SON, LTD. v. OGDEN (1932), 17 Tax Cas. 117.

*Annotation*:—*Refd.* St. Aubyn Estates, Ltd. v. Strick (1932), 17 Tax Cas. 412.

**122d. Ground annuals.**—A firm of builders carried on the business of purchasing vacant land, on which they built houses & then sold portions of the land with houses thereon. As purchase-price of each house with its portion of land they demanded & received a sum of money & a "ground annual," i.e., a perpetual annuity of a fixed sum secured upon the house & ground. Ground annuals have at any given date an ascertainable value in cash, which is estimated at seventeen years' purchase:—*Held*: the realisable value of ground annuals created during the builders' financial year must be included among their profits & gains for that year, & were chargeable to income tax under Sched. D.—EMERY (JOHN) & SONS v. INLAND REVENUE COMRS., [1937] A. C. 91; 156 L. T. 87, II. L.

**122e. Full purchase-price not paid.**—A co. carried on the business of buying land, building thereon small houses, & selling the houses & portions of the land. At the request of the co. a building society advanced to an intending purchaser of a house the whole of the purchase-money upon a mtge. of the purchaser's interest in the house. The purchase-money was repayable with interest thereon in equal monthly instalments. Part only of the purchase-money was paid to the co. & the balance was retained by the building society as a deposit by the co. until the purchaser had repaid an agreed part of the purchase-money. The sum deposited was then released. In the meantime the society allowed the co. interest upon the amount deposited:—*Held*: that sums so deposited by the co., if capable of valuation, should be valued for the purposes of income tax under Case I. of Sched. D. of Income Tax Act, 1918; but if not capable of valuation they should be treated as liable to tax only when they were released to the co.—HARRISON v. CRONK & SONS, LTD., [1937] A. C. 185; [1936] 3 All E. R. 747; 106 L. J. K. B. 70; 156 L. T. 20; 53 T. L. R. 154; *sub nom.* CRONK & SONS, LTD. v. HARRISON, 20 Tax Cas. 612, H. L.

*Annotation*:—*Refd.* Morley v. Tattersall, [1937] 4 All E. R. 339.

**PART V. SECT. 2, SUB-SECT. 1.—C. v. Charitable institution—Religious community—Profits from nursing home.**—Where a nursing home was carried on by a religious community in conjunction with a public hospital:—*Held*: a trade was carried on in respect of the nursing home which was accordingly assessable to income tax in respect of its profits.—DAVIS v. MATER MISERICORDIÆ HOSPITAL SUPERIORESS, [1933] I. R. 480.—IR.

**PART V. SECT. 2, SUB-SECT. 2.—A. e i. ———.**—Master mariner absent from the United Kingdom the whole of the year, his wife & family living in the United Kingdom, is liable to assessment under Sched. D.—ROGERS v. INLAND REVENUE (1879), 1 Tax Cas. 225.—SCOT.  
1. *Add. Citation*:—*sub nom.* LLOYD v. SULLEY, 2 Tax Cas. 37.—SCOT.  
g. *Add. Citation*:—*sub nom.* COOPER

**122f. Calculation of price.**—Applts. acquired certain land from the father of one of them, the purchase price being stated to be £15,000. At the same time the son received from the other applts. a joint undertaking in writing to pay him a minimum sum of £25,000 as & when they re-sold the whole of the land. On appeal against assessments upon applts. under Sched. D in respect of their business profits the General Comrs. held that the cost price of the land for income tax purposes was £15,000 & confirmed the assessments:—*Held*: the true cost of the land was £40,000.—BENNETT, OSWALD & WORSKETT v. BENNETT (1937), 81 Sol. Jo. 717; 21 Tax Cas. 209.

**122g. Capital value of ground rent.**—UTTING & CO., LTD. v. HUGHES, [1938] 4 All E. R. 411.

**123.** To cross-references before this case add: "See, also, Finance Act, 1927 (c. 10), s. 24."

**125. Add. Annotation**:—*Refd.* I. R. Comrs. v. Yorkshire Agricultural Soc. (1927), 44 T. L. R. 59.

After this case add: "see, now, Finance Act, 1924 (c. 21), s. 23."

**127. Add. Citations**:—95 L. J. K. B. 356; 10 Tax Cas. 213.

*Add. Annotations*:—*Generally*, *Consd.* Girls' Public Day School Trust v. Ereaut (1930), 99 L. J. K. B. 613. *Refd.* General Medical Council v. I. R. Comrs., *English Branch Council of General Medical Council v. Same* (1928), 97 L. J. K. B. 578; *Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc.*, etc. (1930), 143 L. T. 650.

**128. Add. Annotation**:—*Refd.* Levene v. I. R. Comrs., [1927] 2 K. B. 38.

**129. Add. Citation**:—10 Tax Cas. 424.  
*Add. Annotation*:—*Refd.* Levene v. I. R. Comrs., [1928] A. C. 217.

**130. Add. Annotation**:—*Consd.* I. R. Comrs. v. Lysaght, [1928] A. C. 234.

**131. Add. Annotations**:—*As to* (1) *Consd.* I. R. Comrs. v. Lysaght, [1928] A. C. 234; *Proctor v. Ryall*, Ryall v. Proctor (1928), 14 Tax Cas. 204. *Refd.* Robinson v. Corry, Corry v. Robinson (1933), 49 T. L. R. 590. *As to* (2) *Distd.* Chamney v. Lewis (1932), 17 Tax Cas. 318. *Appld.* McKenna v. Eaton-Turner, [1936] 1 K. B. 1. *Expld. & Appld.* Bennett v. Marshall, [1938] 1 K. B. 591. *Refd.* Fleming v. Wilkinson (1925), 10 Tax Cas. 416. *Generally*, *Refd.* Levene v. I. R. Comrs., [1927] 2 K. B. 38; *Eaton-Turner v. McKenna*, [1937] A. C. 162.

**131a. ————**—Applt. was employed by a British co. as general manager of their sugar estates in Demerara where he lived & where his salary was wholly earned & paid. He was in England on leave from June to Sept. 1918, & during that time the co., at his request, placed to the credit of his

CADWALADER, 5 Tax Cas. 101. SCOT.

*sk. Residence — Meaning of.*—*Residence*, in its simple & ordinary meaning, signifies a place where a human being, or his family or servants, eat, drink & sleep, & where there is some permanence or continuance of such eating, drinking & sleeping.—*RE CALCUTTA STOCK EXCHANGE ASSOCN., LTD.* (1934), 1 L. R. 62 Calc. 547.—IND.



banking account in England £525, being an advance on account of salary falling due before Apr. 5, 1919, & an assessment to income tax was made upon him for the year 1918–19 in respect of this sum under Schedule D., Case V. His wife had been for several years, & was throughout the year 1918–19, the owner of a house in Kent, towards the upkeep of which he contributed out of other income arising in England, but since Sept. 1917, she had been mainly living with him in Demerara, the house being left unoccupied. During his stay in England in 1918, applt. lived for the most part in hotels & in fact spent only one night at the house. The Special Comrs. having decided that applt. was resident in the United Kingdom during the year ending Apr. 5, 1919, & that he had been rightly assessed to income tax in respect of the above sum as having been received in the United Kingdom during that year from an employment abroad:—*Held*: inasmuch as applt.'s salary was payable in Demerara, the sum credited to him in the United Kingdom must be regarded as remitted to him from abroad & as constituting income from a foreign possession chargeable under Schedule D., Case V.—*FLEMING v. WILKINSON* (1925), 10 Tax Cas. 416, C. A.

- 131b. —.]—Consideration of the meaning of the expressions “resident” & “ordinarily resident” in Income Tax Act, 1918 (c. 40).—*LEVENE v. INLAND REVENUE COMRS.*, [1928] A. C. 217; 97 L. J. K. B. 377; 139 L. T. 1; 44 T. L. R. 374; 72 Sol. Jo. 270; 13 Tax Cas. 486 H. L.

*Annotations*:—*Distd. I. R. Comrs. v. Lysaght*, [1928] A. C. 234. *Consd. R. v. St. Marylebone Income Tax Comrs.*, *Ex p. Schlesinger* (1928), 13 Tax Cas. 746; *Fry v. Burma Corpn.* (1929), 98 L. J. K. B. 693; *I. R. Comrs. v. Combe* (1932), 17 Tax Cas. 405. *Refd. Duckworth v. Lowe*, [1937] 2 All E. R. 418.

- 131c. —.]—No special or technical meaning is attached to the terms “resident” & “ordinarily resident” as used in 1918 Act; accordingly the question whether a person is “resident” & “ordinarily resident” in the United Kingdom for the purposes of the Act is essentially a question of fact for the comrs.

A person is ordinarily resident in a country for income tax purposes, if his residence there is not casual or uncertain, but is in the ordinary course of his life.—*INLAND REVENUE COMRS. v. LYSAGHT*, [1928] A. C. 234; 97 L. J. K. B. 385; 139 L. T. 6; 44 T. L. R. 374; 72 Sol. Jo. 270; *sub nom. LYSAGHT v. INLAND REVENUE COMRS.*, 13 Tax Cas. 511, H. L.

*Annotations*:—*Consd. Morley v. Lawford & Co.* (1928), 140 L. T. 125; *Egyptian Delta Land & Investment Co. v. Todd*, [1929] A. C. 1. *Appld. R. v. St. Marylebone Income Tax Comrs.*, *Ex p. Schlesinger* (1928), 13 Tax Cas. 746. *Consd. I. R. Comrs. v. Combe* (1932), 17 Tax Cas. 405; *Ryall v. Du Bois Co.* (1933), 150 L. T. 386. *Refd. Duckworth v. Lowe*, [1937] 2 All E. R. 418.

- 131d. —.]—*INLAND REVENUE COMRS. v. ZORAB* (1926), 11 Tax Cas. 289.

*Annotation*:—*Refd. I. R. Comrs. v. Brown* (1926), 11 Tax Cas. 292.

## PART V. SECT. 2, SUB-SECT. 2.—B.

*st. General rule.*—A partnership resides, for purposes of income tax, at the place where its real business is carried on; & the real business is carried on where the central management & control of the whole of its

business actually abides. There may be two such places of residence, but the suggested second residence must not merely have a delegation of the management of some portion of the partnership business, however extensive, but a delegation of some portion of the management of the business as a whole.

- 131e. —.]—*INLAND REVENUE COMRS. v. BROWN* (1926), 11 Tax Cas. 292.

131f. Trade carried on by sales agent for foreign countries of manufacturers in United Kingdom.—*Appltd.* entered into separate agreements with each of a number of manufacturers in the United Kingdom under which he was appointed as their sales agent in specified “agency districts” in countries out of the United Kingdom, undertaking generally (*inter alia*) to promote in the district the sale of the manufacturer's goods. The manufacturers supplied advertising material but all other expenses were met by applt. out of his remuneration, which consisted of commission only, based on the net cash received by the manufacturer in respect of all goods shipped to the relative agency district, with a small guaranteed minimum. The whole of the commission was paid into an account in a bank in England. Between Nov. 16, 1916, & June 16, 1923, applt. was in the United Kingdom for the following periods only: Apr. 14, 1919, to Aug. 10, 1919; July 26, 1920, to Nov. 22, 1920; Dec. 20, 1921, to Apr. 12, 1922. He returned to England again on June 16, 1923. When in England applt. visited the manufacturers with whom he was under agreement, to discuss business matters & to receive instructions. He lived, when in England, at a house, the property of his wife, in which his wife & children lived continuously:—*Held*: the trade was at least in part carried on in the United Kingdom & that the assessments should be confirmed.—*SPIERS v. MACKINNON* (1929), 14 Tax Cas. 386.

132. *Add. Annotation*:—*Refd. Muller (London) v. Lethem, Muller (London) v. I. R. Comrs.*, [1927] 1 K. B. 780.

136. *Add. Annotations*:—*Apprvd. Egyptian Delta Land & Investment Co. v. Todd*, [1929] A. C. 1. *Refd. Baelz v. Public Trustee*, [1926] Ch. 863.

139. *Add. Annotations*:—*As to* (1) *Distd. Noble v. Mitchell* (1926), 43 T. L. R. 102. *Consd. Fry v. Burma Corpn.* (1929), 98 L. J. K. B. 693. *Refd. Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A. C. 122. *Generally, Consd. Egyptian Delta Land & Investment Co. v. Todd*, [1929] A. C. 1. *Refd. Bennett v. Marshall*, [1938] 1 K. B. 591.

140. *Add. Annotations*:—*As to* (1) *Refd. Cockerline (W. H.) & Co. v. I. R. Comrs.* (1930), 47 T. L. R. 13. *Generally, Refd. Kelly v. Rogers* (1935), 153 L. T. 428.

141. *Add. Annotations*:—*Consd. McKenna v. Eaton-Turner*, [1936] 1 K. B. 1. *Refd. Egyptian Delta Land & Investment Co. v. Todd*, [1929] A. C. 1; *Bennett v. Marshall*, [1938] 1 K. B. 591.

142. *Add. Annotations*:—*Consd. Fry v. Burma Corpn.* (1929), 98 L. J. K. B. 693; *McKenna v. Eaton-Turner*, [1936] 1 K. B. 1. *Refd.*

The question as to where the individual partners actually have their places of residence is a wholly irrelevant consideration in determining the place of residence of the firm.—*MADRAS INCOME TAX COMR. v. T. S. FIRM, ENJOORE AT NEGAPATAM* (1927), I. L. R. 50 Mad. 847.—*IND.*

Proctor v. Ryall, Ryall v. Proctor (1928), 14 Tax Cas. 204; Egyptian Delta Land & Investment Co. v. Todd, [1929] A. C. 1.

- 142a. ——— By resident director under power of attorney—Profits retained abroad.]—Applts., insurance & reinsurance brokers & agents in London, had an office in Paris for the purpose of direct insurance on behalf of cos. for which they acted as agents, & applts. in some cases represented the same cos. in London & in Paris. A resident director of applts. had the sole conduct of the Paris business under a power of attorney. The results of the Paris business were incorporated in applts.' balance-sheets, but no part of the French profits was remitted to London:—*Held*: as the power of attorney did not, except as against third parties, divest the directors in London of their power of control over the French business, applts. were assessable to income tax on the whole of their profits, including those of the Paris office.—*Noble* (B. W.), LTD. v. MITCHELL (1926), 43 T. L. R. 102; 11 Tax Cas. 372.

*Annotations*.—*Refd.* Van den Berghs, Ltd. v. Clark (1934), 151 L. T. 435; Whelan v. Dover Harbour Board (1934), 151 L. T. 288; Odhams Press, Ltd. v. Cook, [1938] 2 All E. R. 312.

- 142b. ———.]—An English co. was formed for the purpose of acquiring & carrying on an hotel at Denver, U.S.A. The head & seat & directing power of the co. were at the registered office in London. The meetings of the directors & shareholders were held, the accounts were kept, & the dividends were declared, in England. The hotel was under a salaried manager, who was a servant of the co., & resided at Denver. He was subject to the orders of the directors in England. The dividends of the English shareholders were paid in London, but those of American shareholders were paid in Denver out of funds of the co. there. It was contended on behalf of the co. that the assessment should be under Case V. of Sched. D., only on the amount of profits received in the United Kingdom:—*Held*: the case was governed by the direction in *San Paulo (Brazilian) Ry. Co. v. Carter*, No. 142.—*DENVER HOTEL CO., LTD. v. ANDREWS* (1895), 11 T. L. R. 238; 3 Tax Cas. 356; 43 W. R. 339, C. A.

144. *Add. Annotations*.—*Expld.* Egyptian Delta Land & Investment Co. v. Todd, [1929] A. C. 1. *Refd.* Baelz v. Public Trustee, [1926] Ch. 863.

#### PART V. SECT. 2, SUB-SECT. 2.—C.

144 1. *Registered office in England—Business & management abroad—General control by English office—Dual residence.*—A co. can carry on business in more places than one, & in places where it does not reside.

Three railway cos. were incorporated in England. A. co. owned a line of railway situate wholly in Portuguese East Africa. B. co. owned a line situate wholly in Portuguese East Africa with the exception of six miles situate in Southern Rhodesia, & C. co. owned a line situate wholly in Southern Rhodesia. C. co. had its head office & general control in England, but also had offices in Bulawayo, where a general manager & staff conducted & managed the line. C. co. worked the lines of A. co. & B. co. as one with its own, & the three cos. shared the profits & losses of the joint venture upon specified basis:—*Held*: A. co. & B. co. were in partnership with C. co.

& the partnership business was carried on within Southern Rhodesian territory by the latter co. within Southern Rhodesia Income Tax Ordinance 20 of 1915. *RHODESIA RYS. v. COMR. OF TAXES*, [1925] App. D. 438.—*S. AF.*

*eg. Business carried on in India—Dealings in differences abroad.*—*INCOME TAX COMR. BOMBAY PRESIDENCY & ADEN v. CHUNIAL MEHTA & CO.* (1938), 82 Sol. Jo. 603, P. C.—*IND.*

#### PART V. SECT. 2, SUB-SECT. 2.—D.

o 1. — *Business carried on in Australia—Debentures issued in Australia—Interest paid in England to English residents.*—A co. incorporated in England, & carrying on business in Australia, raised money on debentures, some of which were issued in England & entered on a register in London, & some issued in Australia & entered on a register in Melbourne. The co. paid in England interest upon the de-

- 144a. —.]—A co., which is registered in England but carries on its real business abroad, does not necessarily reside in England, so as to be liable to income tax, because it is obliged by law to perform in England certain duties which cannot be performed abroad, such as having a registered office & keeping a register of shareholders. For income tax purposes a co. resides where its real business is carried on.—*EGYPTIAN DELTA LAND & INVESTMENT CO., LTD. v. TODD*, [1929] A. C. 1; 98 L. J. K. B. 1; 140 L. T. 50; 44 T. L. R. 747; 72 Sol. Jo. 545; *sub nom.* *TODD v. EGYPTIAN DELTA LAND & INVESTMENT CO., LTD.*, 14 Tax Cas. 119, H. L.

145. *Add. Annotation*.—*As to* (1) *Consd.* Egyptian Delta Land & Investment Co. v. Todd, [1929] A. C. 1.

153. *Add. Annotations*.—*Refd.* I. R. Comrs. v. Cavan Central Co-op. Agricultural & Dairy Soc. (1917), 12 Tax Cas. 1; I. R. Comrs. v. Morgan-Grenville-Gavin, [1936] 1 All E. R. 895.

155. *Add. Annotations*.—*Apld.* Egyptian Delta Land & Investment Co. v. Todd, [1929] A. C. 1. *Mentd.* Baelz v. Public Trustee, [1926] Ch. 863.

156. *Add. Annotation*.—*Consd.* Michael Faraday, Rodgers & Eller v. Carter (1927), 11 Tax Cas. 565.

157. *Add. Annotations*.—*As to* (1) *Refd.* Rees Roturbo Development Syndicate v. I. R. Comrs., Rees Roturbo Development Syndicate v. Ducker (1928), 13 Tax Cas. 366; Whelan v. Dover Harbour Board (1934), 151 L. T. 288. *As to* (2) *Consd.* Egyptian Delta Land & Investment Co. v. Todd, [1929] A. C. 1. *Generally*, *Consd.* I. R. Comrs. v. British Salmson Aero Engines, Ltd., [1938] 2 K. B. 482. *Refd.* I. R. Comrs. v. Cavan Central Co-op. Agricultural & Dairy Soc. (1917), 12 Tax Cas. 1; Lysaght v. I. R. Comrs., [1927] 2 K. B. 55.

159. *Add. Annotation*.—*Consd.* Egyptian Delta Land & Investment Co. v. Todd, [1929] A. C. 1.

160. *Add. Annotation*.—*Consd.* Egyptian Delta Land & Investment Co. v. Todd, [1929] A. C. 1.

164. *Add. Annotation*.—*Refd.* Egyptian Delta Land & Investment Co. v. Todd, [1929] A. C. 1.

bentures to holders who were not resident nor domiciled in Australia that interest being paid out of revenue earned in Australia, where the money borrowed was used.—*Held*: by Income Tax Assessment Act, 1922-32, s. 20 (2) (b), the co. was liable to pay income tax in Australia, upon the interest paid by it in England to holders of debentures issued in England, & always registered in London, & held by persons not resident nor domiciled in Australia, as well as upon interest paid in England to holders of debentures issued in Australia to persons then resident & domiciled in Australia & registered in Melbourne & afterwards transferred to the London register & held during the year to which the assessment related by persons not resident nor domiciled in Australia. *COLONIAL GAS ASSCO., LTD. v. TAXATION COMR.* (1934), 40 Argus L. R. 187; 2 A. T. D. 457; 8 A. L. J. 68.—*AUS.*

166. *Add. Annotations*:—*Re*fd. *Maclaine v. Eccott*, [1926] A. C. 424; *Nielsen, Andersen v. Collins, Tarn v. Scanlan* (1926), 135 L. T. 744; *Whitney v. I. R. Comrs.*, [1926] A. C. 37; *Belfour v. Mace* (1928), 138 L. T. 338; *I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford*, [1928] A. C. 252.

168. *Add. Annotations*:—*Consd. Maclaine v. Eccott*, [1926] A. C. 424. *Appld. Tarn v. Scanlan, Neilsen, Andersen v. Collins, Muller* (London) *v. Lethem, Muller* (London) *v. I. R. Comrs.* (1927), 44 T. L. R. 53. *Re*fd. *Lysaght v. I. R. Comrs.*, [1927] 2 K. B. 55.

168a. — *Foreign shipping company.*—(1) With a view of avoiding delay in bringing before the ct. revenue appeals on cases stated by the General or Special Comrs., henceforward points of argument need not be delivered & the case may be set down by either party.

(2) A Danish co. & an English co. established a line of steamers between Copenhagen & Hull, & the English co. were appointed exclusive agents for the Danish co. at Hull. The English co. controlled the freights at this end, quoted rates, accepted consignments of goods & put them on board the steamers of the Danish co. The bills of lading were signed "for the master" by one of the English co.'s clerks. The English co. collected the freights for outward bound goods & any other moneys due from the consignors, & remitted what was due to the Danish co. On an appeal against assessments to income tax for the four years ended Apr. 5, 1913–1916 of the English co. as agents for the Danish co.:—*Held*: on the principle of *Erichsen v. Last*, No. 168, the Danish co. exercised a trade in the United Kingdom to the extent to which goods were taken on board their ships at Hull for carriage elsewhere, & this trade was carried

on by the British co. as their regular agents. Therefore, the Danish co. were assessable to income tax in the name of the British co. for the three years ended Apr. 5, 1915, under 1842 Act, s. 41, in respect of the profits arising from such trade, so far as regards freights collected by the British co. in respect of such goods, & for the year ended Apr. 5, 1916, under 1842 Act, s. 41, as amended by Finance (No. 2) Act, 1915 (c. 89), s. 31, in respect of all the profits arising from such trade, whether the freights were collected by the British co. or not.

(3) Two Dutch shipping companies owned four steamships known as the Batavier Line which traded regularly between Rotterdam & London. A Dutch firm, W. & Co., were the directors & had the management & control of both companies, & were also the shipping agents of both companies. By an agreement in 1899 made between the Dutch firm & one of the companies the firm were authorised to appoint sub-agents, where they deemed it necessary. In 1904, & again in 1916, the Dutch firm appointed appts. sole agents in London of the Batavier Line & thereafter appts. did all that was required to be done in connection with the ships of the Batavier Line in London. Assessments to income tax having been made on appts. as agents of the Dutch companies in respect of the profits of their business of shipowners:—*Held*: the Dutch companies were exercising a trade in the United Kingdom, even assuming that the Dutch firm, in appointing appts. as agents, acted as shipping agents & not as directors, they nevertheless constituted appts. direct agents of the two Dutch companies in London.—*TARN v. SCANLAN, NIELSEN, ANDERSEN & CO. v. COLLINS, MULLER* (W. H.) & CO. (LONDON) *v. LETHEM, SAME v. INLAND*

#### PART V. SECT. 2, SUB-SECT. 3.—A.

*xx. Salary earned & received in Canada by person residing in foreign country.*—*Held*: such person was not assessable by the corpn. of the city where he earned his salary.—*Re FOX & WINDSOR CORPN.* (1925), 57 O. L. R. 243.—CAN.

*xy. Royalties received in Canada by patentee residing in foreign country.*—*Held*: the patentee was chargeable.—*Re POPE ALLIANCE CORP., LTD.*, [1926] 4 D. L. R. 1152.—CAN.

*sa. Realisation of wool by Imperial Government—Whether profits earned in Victoria.*—Pursuant to an agreement between the Imperial & Commonwealth Governments, resp. co. was incorporated in 1920 in Victoria, with a head office at Melbourne, for the purpose of selling the undisposed of surplus of wool acquired for the war, & distributing the proceeds. The Commonwealth Govt. transferred to the co. its undivided half of the Australian wool & in cash its share of profits already realised, in consideration of the issue of priority wool certificates & fully-paid shares to its nominees, the wool suppliers. The co. also agreed with the Imperial Govt. to sell on its behalf for a commission all the rest of the wool, whether Australian or not. The wool was all sold during the years 1921 to 1924; the co. had no other dealings in wool. The contracts of sale were made, & deliveries & payments thereunder took place, outside Australia. The proceeds of the half share of the

Australian wool largely exceeded the sum at which it had been taken into the books of the co. The priority wool certificates were redeemed, & the whole of the capital credited as paid on the shares was paid off under successive schemes sanctioned by the ct.; there remained a large surplus in the hands of the liquidator of the co. Assessments were made upon the co. under the Income Tax Act, 1915, of Victoria, in respect of proportions of the surplus proceeds of sale & of the commission earned. The co. raised objections thereto, & a special case was stated:—*Held*: (1) the surplus resulted merely from the realisation of capital assets, & therefore no part of it was income chargeable to tax under sect. 35 of the Act; (2) no part of the surplus, or of the commission, was a profit "earned in or derived in or from Victoria" so as to be chargeable to tax under that sect.—*TAXES COMR. v. BRITISH AUSTRALIAN WOOL REALIZATION ASSOCN., LTD.*, [1931] A. C. 224; 100 L. J. P. C. 28; 144 L. T. 314, P. C.—AUS.

*sb. — Whether profits earned in Queensland.*—As the general scheme of the Queensland Income Tax Act of 1924 bases liability to tax thereunder upon the source of the income, not the residence of the taxpayer, being in Queensland, & as the power of a legislature to tax property, whether real or personal, is limited territorially, sect. 10 (2) of the Act, which purports to tax profits arising from the sale of "any personal property whatsoever," applies only to personal property in Queensland; so,

too, para. (ii) (b), which was added to sect. 10 (2) by an amending Act of 1926, & purports to tax money received from a co. in respect of shares issued in circumstances stated in para. (ii) (a), cannot be construed as referring to a co. which does not carry on business, or possess assets, or derive its profits from a source in Queensland. Consequently, a wool grower resident in Queensland is not liable to income tax under sect. 10 (2) of the above Act in respect of sums received by him as a shareholder in the British Australian Wool Realization Association, Ltd. Further, the excess of the sums so received over the market value of the shares when issued cannot be treated as an addition to the profits of the shareholder's business, because income tax having been paid by him upon the shares when issued they became property with its own incidence, if any, to tax.—*TAXES COMR. v. UNION TRUSTEE CO. OF AUSTRALIA, LTD.*, [1931] A. C. 258; 100 L. J. P. C. 21; 144 L. T. 326; 47 T. L. R. 203, P. C.—AUS.

*sm. Dissolution of business in Ceylon—Profits received in British India.*—On the dissolution of a partnership business in Ceylon, a portion of the capital of one of the partners resident in British India & his share of the profits were remitted to & received by him in British India:—*Held*: the profits received in British India were assessable under sect. 4 (2) of the Indian Income Tax Act.—*INCOME TAX COMR. v. P. R. A. L. MUTHUKARUPPAN CHETTIAR*, 62 L. R. Ind. App. 203.—IND.

- REVENUE COMRS., [1928] A. C. 34; 97 L. J. K. B. 267; 138 L. T. 241; 44 T. L. R. 53; 71 Sol. Jo. 1002; 13 Tax Cas. 91, 158, H. L.
- Annotations*:—*Refd.* Belfour v. Mace (1928), 138 L. T. 338; Calico Printers' Association, Ltd. v. Barclays Bank (1931), 145 L. T. 51.
169. *Add. Annotations*:—*As to* (2) *Consd.* Duckworth v. Lowe, [1937] 2 All E. R. 418. *Refd.* Whitney v. I. R. Comrs., [1926] A. C. 37; Belfour v. Mace (1928), 138 L. T. 338; I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford, [1928] A. C. 252.
170. *Add. Annotation*:—*Refd.* Belfour v. Mace (1928), 138 L. T. 338.
172. *Add. Citations*:—[1926] A. C. 424; 95 L. J. K. B. 616; 135 L. T. 66; 10 Tax Cas. 481.
- Add. Annotations*:—*As to* (2) *Apld.* Tarn v. Scanlan, Neilsen, Andersen v. Collins, Muller (London) v. Lethem, Muller (London) v. I. R. Comrs. (1927), 44 T. L. R. 53. *Generally*, *Refd.* I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford (1927), 96 L. J. K. B. 882.
173. *Add. Annotations*:—*As to* (1) *Refd.* Nielsen, Andersen v. Collins, Tarn v. Scanlan (1926), 135 L. T. 744; Muller (London) v. Lethem, Muller (London) v. I. R. Comrs., [1927] 1 K. B. 780. *As to* (2) *Apld.* Gavazzi v. Mace, Gavazzi v. I. R. Comrs., Boyd v. Stephen (1926), 135 L. T. 634. *Folld.* Belfour v. Mace (1928), 138 L. T. 338.
- 173a. ——— *C.i.f. & consignment business.*—Applt. acted as representative of an American co. in connection with the sale of the co.'s products in L. & in the North of England generally. There was no written agreement defining his position. The business was carried on in two ways: (a) "C.i.f. business." An offer to buy bacon or hams at prices stated by the bidder was received by applt. & cabled to the co. If the co. accepted it they cabled to applt. accordingly who notified the bidder, usually first by telephone & later in writing. The written acceptance sent to the bidder represented the transaction as a purchase by applt. for the bidder from the co. Applt. received neither the goods nor documents relating to them nor did he collect any moneys. He was paid a commission on all orders originating in his "territory." (b) "Consignment business." Consignments were sent by the co. to applt. to be sold on its behalf. They were sold by auction. The bills of lading were made out to applt. He collected the proceeds of the sales & was responsible for bad debts. He was paid the usual agency commission for such business:—*Held*: the co. exercised a trade within the United Kingdom.—*Rowson v. Stephen, Rowson v. Inland Revenue Comrs.* (1929), 14 Tax Cas. 543.
178. *Add. Citations*:—*affd.* (1928), 138 L. T. 338; 13 Tax Cas. 539, C. A.
179. *Add. Citations*:—*sub nom.* GAVAZZI v. MACE, GAVAZZI v. INLAND REVENUE COMRS., BOYD (T. L.) & SONS, LTD. v. STEPHEN, 135 L. T. 634; 10 Tax Cas. 698.
- Add. Annotation*:—*Consd.* Belfour v. Mace (1928), 138 L. T. 338.
180. *Add. Annotation*:—*Refd.* Muller (London) v. Lethem, Muller (London) v. I. R. Comrs., [1927] 1 K. B. 780.
181. *Add. Citations*:—[1926] A. C. 424; 95 L. J. K. B. 616; 135 L. T. 66; 10 Tax Cas. 481.
- Add. Annotations*:—*As to* (2) *Consd.* I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford (1927), 96 L. J. K. B. 882. *Apld.* Tarn v. Scanlan, Neilsen, Andersen v. Collins, Muller (London) v. Lethem, Muller (London) v. I. R. Comrs. (1927), 44 T. L. R. 53.
185. *Add. Annotations*:—*As to* (1) *Consd.* Belfour v. Mace (1928), 138 L. T. 338; Tarn v. Scanlan, Nielsen, Andersen v. Collins, Muller (London) v. Lethem, Same v. I. R. Comrs., [1928] A. C. 34; Taxes Comrs. v. British Australian Wool Realization Assocn., Ltd., (1930), 47 T. L. R. 57. *Refd.* MacLaine v. Eccott, [1926] A. C. 424; Rowson v. Stephen, Rowson v. I. R. Comrs. (1929), 14 Tax Cas. 543. *As to* (2) *Consd.* Scales v. Atalanta S.S. Co. of Copenhagen (1925), 134 L. T. 411.
186. *Add. Annotations*:—*Consd.* MacLaine v. Eccott, [1926] A. C. 424. *Refd.* Nielsen, Andersen v. Collins, Tarn v. Scanlan (1926), 135 L. T. 744; I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford (1927), 96 L. J. K. B. 882; Muller (London) v. Lethem, Muller (London) v. I. R. Comrs., [1927] 1 K. B. 780; Ormonde v. Brown (1932), 17 Tax Cas. 333; Cadbury Bros., Ltd. v. Sinclair (1933), 149 L. T. 412; Lambe v. I. R. Comrs., [1934] 1 K. B. 178; Perry v. Astor, [1935] 19 Tax Cas. 255.
- 186a. ——— *Agent appointed by agent of principal.*—*TARN v. SCANLAN, NIELSEN, ANDERSEN & Co. v. COLLINS, MULLER (W. H.) & Co. (LONDON) v. LETHEM, SAME v. INLAND REVENUE COMRS., No. 168a, ante.*
188. *Add. Annotation*:—*Consd.* Egyptian Delta Land & Investment Co. v. Todd, [1929] A. C. 1.
- 189a. *Dominion bank with English branch—Interest on securities bought out of English capital.*—The Bank of New Zealand, which was registered & resident in New Zealand, carried on banking business at a branch office in London. It was assessed to income tax on the profits arising from its trade exercised in London under Case I. of Sched. D of 1918 Act for the financial year 1928–29 in the sum of £94,448. It possessed, as part of the assets of its London branch, holdings of 5 per cent. War Loan, India Govt. 3 per cent. stock, & securities of the Grand Trunk Pacific Railway & the Auckland Electric Power Board, purchased out of the floating capital of the London branch, & other moneys obtained in New Zealand, to borrow which it had expended £41,262. The interest on the War Loan & other stocks amounted to £78,556 for the period in question:—*Held*: this sum of £78,556 was altogether exempt from income tax, the War Loan under sect. 46 of 1918 Act, the interest on the India Govt. Stock under rule 2 (d) of the General Rules applicable to Sched. C, & the interest on the other securities under rule 7 of the Miscellaneous Rules under Sched. D, & did not become taxable by being included in trading profits assessable under Case I. of Sched. D; (2) the bank was entitled for the purposes of assessment to deduct from its profits its proper trading expenses, including therein the sum of £41,262, being the expenses particularly attributable to the

earning of the said sum of £78,556 of interest, notwithstanding that the latter sum was immune from taxation.—*HUGHES v. BANK OF NEW ZEALAND*, [1938] A. C. 366; [1938] 1 All E. R. 778; 107 L. J. K. B. 306; 158 L. T. 463; 54 T. L. R. 542; 21 Tax Cas. 472, II. L.

193a. ———.]—*TARN v. SCANLAN, NIELSEN, ANDERSEN & Co. v. COLLINS, MULLER (W. H.) & Co. (LONDON) v. LETHAM, SAME v. INLAND REVENUE COMRS.*, No. 168a, *ante*.

200. *Add. Annotations*:—*Refd. Wild v. Madame Tussaud's (1926), Ltd. (1932)*, 17 Tax Cas. 127; *H. & G. Kinemas, Ltd. v. Cook (1933)*, 18 Tax Cas. 116.

200a. ——— *Purchase of business within three years—No evidence of vendor's profits.*—*Held*: it was the comrs.' duty to determine to the best of their judgment the average profits of the business for the three years respectively preceding the years of assessment.—*OGILVIE v. BARRON (1925)*, 11 Tax Cas. 503.

200b. *Foreign corporation—Registered office transferred to England.*—A mining co. incorporated, having a registered office & carrying on business in Burma, decided to transfer its registered office & the control of its business to London, which it did as from July 1, 1925, thereby becoming liable to be assessed to British income tax. An assessment was therefore made upon it for the year ending Apr. 5, 1926:—*Held*: the assessment should be under the rule applicable to Case I. of Sched. D. in respect of its profits "upon a fair & just average of three years ending on that day of the year immediately preceding the year of assessment." The fact that the seat of the co.'s continuing business was transferred to England did not mean that at the date of transfer its trade was "set up & commenced" within the meaning of rule 1 (2) applicable to Cases I. & II., so as to make it liable to assessment upon the profits of its first year's trading as a co. registered in England.—*FRY v. BURMA CORPN.*, [1930] 1 K. B. 219; 98 L. J. K. B. 693; 141 L. T. 361, C. A.; *affd.*, [1930] A. C. 321; 99 L. J. K. B. 305; 142 L. T. 609; 15 Tax Cas. 113, H. L.

*Annotations*:—*Apld. Back v. Whitlock (1932)*, 48 T. L. R. 289.

#### PART V. SECT. 2, SUB-SECT. 3.—B.

193 i. *Assessment on agent—Foreign shipping company—What deductions allowed.*—In the assessment of the income of a shipping co., of which the principal place of business is out of Australia & which carries passengers, etc., shipped in Australia, from the sum which represents 10 per cent. of the amount payable to it in respect of the carriage of passengers, etc., & upon which the agent of the co. is liable to pay income tax, no deduction can be made of so much of the assessable income as is available for distribution & is distributed to the members or shareholders of the co.—*UNION S.S. CO. OF NEW ZEALAND, LTD. v. FEDERAL COMR. OF TAXATION (1924)*, 35 C. L. R. 209; 31 Argus L. R. 337.—*AUS.*

#### PART V. SECT. 2, SUB-SECT. 4.

sz. *Under Assessment Act.*—*Re DONALD MASON & Co. (Ont.)*, [1927] 4 D. L. R. 1081; 61 O. L. R. 350.—*CAN.*

sa. *Deduction of "loss"—Actual loss in year of assessment.*—*Finance Act, 1926 (c. 22)*, s. 33 (1), refers only to an actual loss, & not to a statutory loss

computed by reference to an actual loss sustained in a preceding year.—*INLAND REVENUE v. ADAMSON*, [1933] S. C. 23; 17 Tax Cas. 679.—*SCOT.*

sc. *Cash basis—Deduction of outstandings.*—The profits of a civil engineer's profession had, up till & including the year 1916-17, been assessed to income tax upon a cash basis, that is, upon the excess of cash receipts over disbursements. From 1917-18 to 1927-28 inclusive the assessments were made upon an earnings basis. The inspector then arranged, at the request of the taxpayer, that, from & including the year 1928-29, the profits of the profession should once more be assessed upon the cash basis; & for 1928-29 he computed those profits at £1,665, being the excess of cash receipts over disbursements during 1927-28. The taxpayer contended that, as the figure of £1,665 to the extent of £1,362 represented outstandings as at Apr. 5, 1927 (that is, sums earned before but not paid until after that date), & as that figure of £1,362 had been taken into computation in ascertaining his income on the

*Consd. Carter v. Sharon*, [1938] 1 All E. R. 720. *Refd. Elmirst v. I. R. Comrs.*, [1937] 2 All E. R. 349.

200c. ——— *Company owning cinemas—New cinema opened—Whether new trade.*—*Appl. co.* was incorporated in May, 1929, with the objects (*inter alia*) of (a) acquiring a cinema at Portsmouth as a going concern; (b) carrying on the business of cinema theatre proprietors & managers & of producing cinema pictures, plays, etc.; & (c) constructing cinema theatres, etc.

The purchase of the Portsmouth cinema was completed in June, 1929, & in Aug. 1929, the co. started business at that house. In Sept. 1929, it acquired two sites in London, on one of which it arranged for a cinema to be built. In Feb. 1930, the co. acquired the lease of a cinema at Southsea & started business there a month later. In Dec. 1930, the cinemas at Portsmouth & Southsea were sold to another co. as going concerns. Immediately thereafter, the newly erected London cinema was opened, but the coincidence of dates was entirely fortuitous. Separate revenue accounts were prepared for the Portsmouth & Southsea theatres, but the results for the year were brought into a general profit & loss account & balance sheet of the whole of the co.'s business. On appeal against assessments made on it under Sched. D. for the year 1930-31, on the basis of its actual profits of the year ended Apr. 5, 1931, the co. contended that it carried on throughout one trade, that of running cinemas; that there was no discontinuance of this trade on the sale of the Portsmouth & Southsea theatres & no new trade was set up & commenced when the London cinema was opened; & that its liability should be on the profits for one year from the date of commencement of its trade. The Special Comrs. decided that a new trade was set up on the opening of the London cinema in Dec. 1930:—*Held*: there was evidence upon which the Special Comrs. could arrive at their conclusion of fact that a new trade was commenced in Dec. 1930.—*H. & G. KINEMAS, LTD. v. COOK (1933)*, 18 Tax Cas. 116.

*Annotation*:—*Refd. Humphries & Co. v. Cook (1934)*, 19 Tax Cas. 121.

203. *Add. Annotations*:—*Refd. Wild v. Madame Tussaud's (1926), Ltd. (1932)*, 17 Tax Cas.

earnings basis for the previous year, it had already been assessed to tax; & accordingly, the assessment for 1928-29 should be reduced by £1,362. It appeared that, upon the former change over from the cash basis, the profits for the first year of assessment on the earnings basis had been increased by the inclusion of the amount of outstandings at the end of the period on which the assessment was based, & the taxpayer argued that, on a return to the cash basis, the profits for the first year of assessment thereafter should be correspondingly reduced by the deduction of the amount of outstandings at the commencement of the period of assessment:—*Held*: the item of £1,362 represented outstandings at the commencement of the period of assessment, although an appropriate deduction in an assessment upon an earnings basis, was not a proper deduction in assessing profits on a cash basis, upon which basis the taxpayer had elected to be assessed.—*INLAND REVENUE v. MORRISON*, [1932] S. C. 638; 17 Tax Cas. 325.—*SCOT.*

127; *H. & G. Kinemas, Ltd. v. Cook* (1933), 18 Tax Cas. 116.

**204a.** — Date when accounts "usually" made up—Effect of change of date.]—*BORTHWICK (THOMAS) & SONS, LTD. v. NOLDER* (1926), 11 Tax Cas. 261.

**204b.** Money recovered under insurance policy—Stock destroyed by fire—Whether trade receipt.]—*Held*: the trader must bring the whole of such money received from the insurance co. in respect of the goods destroyed by fire into his profit & loss account as a trading receipt, in order to arrive at his profits for income tax purposes.—*GLIKSTEN J. & SON, LTD. v. GREEN*, [1929] A. C. 381; 98 L. J. K. B. 363; 140 L. T. 625; 45 T. L. R. 274; 14 Tax Cas. 364, H. L.; *affg. S. C. sub nom. GREEN v. GLIKSTEN (J.) & SON, LTD.*, [1928] 2 K. B. 193, C. A.

*Annotations*:—*Appl. R. v. B. C. Fir & Cedar Lumber Co.* (1932), 48 T. L. R. 284. *Consd. Gray v. Penrhyn (Lord)*, [1937] 3 All E. R. 468. *Reid, Rowson, Drew & Clydesdale, Ltd. v. I. R. Comrs.* (1931), 16 Tax Cas. 595; *Thomas Merthyr v. Colliery Co. v. Davis* (1932), 148 L. T. 32; *Van den Berghs, Ltd. v. Clark*, [1935] A. C. 431.

**204c.** Ascertainment of profits where stocks undervalued.]—When the opening & closing stocks of a business are both undervalued, the real profits of the year cannot be ascertained by merely raising the valuation of the closing stock & not taking into consideration the similar undervaluation of the opening stock.—*BOMBAY COMR. OF INCOME TAX v. AHMEDABAD NEW COTTON MILLS CO., LTD.* (1929), 46 T. L. R. 68, P. C.

**204d.** Finance Act, 1926 (c. 22), ss. 29, 34—Accounts customarily made up—What amounts to.]—*DUNHAM v. HOSCOTE (MALAYA) RUBBER ESTATES, LTD.*; *DUNHAM v. ALLIED SUMATRA PLANTATIONS, LTD.* (1929), 14 Tax Cas. 726.

— — — — —.]—*See, now*, Finance Act, 1930 (c. 28), s. 14.

**204e.** — Not applicable to additional assessment on discontinuance of business—Apportionment under Finance Act, 1926 (c. 22), s. 35.]—*Held*: (1) the computation of "the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs" for the purposes of an additional assessment under Finance Act, 1926 (c. 22), s. 31 (1) (b), could not be made by resort to Finance Act, 1926 (c. 22), s. 34 (1), as the profits or gains to be ascertained were not the profits or gains in the year preceding the year of assessment, but the profits or gains in the year to which the additional assessment related; (2) in a case where the annual accounts of the business were made up to a date other than Apr. 5 the profits could be ascertained by an apportionment under Finance Act, 1926 (c. 22), s. 35 of the Act.—*WESLEY v. MANSON*, [1932] A. C. 635; 101 L. J. K. B. 312; 147 L. T. 82; 48 T. L. R. 370; *sub nom. MANSON v. WESLEY, YOUNG v. BERNSTEIN*, 16 Tax Cas. 654, H. L.

**204f.** Option to be assessed otherwise than on basis of preceding year—Finance Act, 1926 (c. 22), s. 29 (3)—Necessity for receipt of profits in period preceding three years anterior to year of assessment.]—A co. took over a business as a going concern as from Apr. 3, 1925, & was assessed for the years 1925–26 & 1926–27 by reference to the average profits of pre-

ceding years as having succeeded to the trade. The profits of the business for each of the years ending Mar. 31, 1925, & Mar. 31, 1926, were less than the average annual profits for the six years ending Mar. 31, 1924. The co. having given due notice, claimed that it was entitled under Finance Act, 1926 (c. 22), s. 29 (3), to be assessed for the year 1927–28 on the basis of the average profits of the business for the three years ending Mar. 31, 1927:—*Held*: the co. not having been in possession of the source of the profits for any part of the period preceding the three years mentioned in the sub-sect., the sub-sect. was not applicable, notwithstanding that the co. fell to be treated for income tax purposes as successors in the business.—*BROWN (E. G.) & CO., LTD. v. STEWART* (1929), 14 Tax Cas. 423.

*Annotation*:—*Consd. Betts v. Laycock, Sons & Co.* (1930), 142 L. T. 506.

— — — — —.]—*Appl. co. was formed in Oct. 1924, to take over a partnership business of wool merchants, the partners themselves becoming the holders of practically all the shares. In the year ending Mar. 31, 1926, the co. sustained a loss of £64,016. Under Finance Act, 1926 (c. 22), Part IV., dealing with income tax, the assessment on a three years' average was abolished, & it was provided that the profits for income tax purposes should be computed on the amount for the year preceding the year of assessment. It being obvious that in the readjustment of the system in that way hardship would arise, to mitigate certain cases of hardship sect. 29 (3), was framed. The question in dispute was whether in the circumstances above set out the co. had shown that it was within the mischief which sub-sect. 3 aimed at alleviating. The co. contended that sects. 28 & 29 of Finance Act, 1926 (c. 22), were intended to cover all cases where the abolition of the three years' average would cause exceptional hardship, & also that in a case where there had been a change of ownership of the business during the three years on which the 1927–28 average would have been computed the new owners, in this case the co., should be treated as having been in notional possession of the source during the six years mentioned in sub-sect. 3 of sect. 29 preceding the three average years. On an appeal against an assessment to income tax Sched. D for the year ending Apr. 5, 1928, in £68,032 less £539 wear & tear allowance, the comrs. held that the co. came within the provisions of sect. 29 (3), & were entitled to the relief granted by that sub-sect., & they reduced the assessment to £5,480 less the £539.—*Held*: though the co. could bring their case within the first part of sect. 29 (3), it became impossible to apply that part of the sect. unless the co. could show that it was in possession of the profits during the six years, preceding the three years before 1926–27, but in fact the co. was not in possession of the profits for any portion of those six years. To work the sub-sect. the co. must have been in possession for some part of the six years, either all of it or part of it. The co. must have been in possession or the sub-sect. did not arise at all.—*BETTS v. LAYCOCK, SONS & CO., LTD.* (1930), 142 L. T. 506; 15 Tax Cas. 431, C. A.*



204h.

—.]—The taxpayer's wife succeeded on Feb. 1, 1924, to a business previously carried on by her father. Accounts of the business were made up for the eleven months to Dec. 31, 1924, & thereafter annually to Dec. 31, until Dec. 31, 1927. The taxpayer was assessed to income tax in respect of the profits of this business for the years 1927–28 & 1928–29 by reference to the profits of the preceding years ended Dec. 31, 1926, & Dec. 31, 1927, respectively. He appealed to the General Comrs. against the 1927–28 assessment & to the Special Comrs. against the 1928–29 assessment, claiming in respect of each year that he was entitled to be assessed on the average of the three preceding years by reference to Finance Act, 1926 (c. 22), s. 29 (3). The General Comrs. allowed the appeal for 1927–28. The Special Comrs. refused the appeal for 1928–29. Appeals were entered against each decision:—*Held*: as the taxpayer was not in possession of the business during any part of the six years preceding the three years upon the average of which he would have been assessed for 1927–28, *i.e.*, the three years ended Dec. 31, 1926, the case did not fall within the application of sect. 29 (3).—ALLEN v. MARGOLINSKY, MARGOLINSKY v. ALLEN (1931), 16 Tax Cas. 77.

204j.

— Validity of notice—Notice by accountants.]—A firm of chartered accountants had been employed by applt. co. as their accountants & auditors for many years. They had each year interviewed & corresponded with the appropriate inspector of taxes with regard to the co.'s income tax liabilities with a view to agreement as to the figures upon which liability was to be based. All returns were signed by the co.'s duly authorised officer. The co. was admittedly entitled to exercise the option with regard to the basis of assessment afforded by Finance Act, 1926 (c. 22), s. 29 (3), if it so desired.

The accountants informed the inspector in two letters dated Oct. 3 & 4, 1927, that the co. claimed "to be charged for the year 1927–28" as if sect. 29 had not been passed. No reference was made to the year 1928–29.

In a letter dated Oct. 25, 1927, the accountants purported to withdraw the claim. The amount of the liability for the year 1927–28 computed on the average basis was greater than the amount on the preceding year basis. The co. appealed against an additional assessment for the year 1927–28 on the difference between these amounts, contending, *inter alia*, that the accountants had no authority to give the notice required by the sect. & that valid & effective notice was not given. It was not suggested that the accountants had specific authority to lodge the notice or that the co. had confirmed the accountants' action:—*Held*: the accountants had not a general authority to bind the taxpayer in the matter; they had not been held out as having such authority; & further the notices were invalid as purporting to be made by reference to one year only. DRAYSON (A. W.) & SONS, LTD. v. YALLOP HOARE v. BRUCE (1929), 14 Tax Cas. 449.

204k. Trade set up within two years of year of assessment—Effect of Finance Act, 1926 (c. 22), s. 29 & Finance Act, 1927 (c. 10), s. 28.]—The K.

Rubber Estates, Ltd., commenced to trade on July 16, 1925. The co. claimed that the assessment made upon it under sched. D for the year 1927–28 should be reduced to the amount of the profits of the year of assessment, on the ground that sect. 23 of Finance Act, 1927, extended the application of proviso (a) of sect. 29 (1) of Finance Act, 1926, so as to cover any case where a trade had been set up or commenced within the period of two years referred to in sect. 23. The special comrs. on appeal refused the co.'s claim:—*Held*: sect. 23 of Finance Act, 1927, did not so extend the application of proviso (a) of sect. 29 (1) of Finance Act, 1926.—KUALA MUDA RUBBER ESTATES, LTD. v. TODD (1930), 15 Tax Cas. 440.

204l. Discontinuance of business.]—WESLEY v. MANSON, No. 204e, *ante*.

204m. — Reconstitution—Additional assessment under Finance Act, 1926 (c. 22), s. 31 (1) (b)—Meaning of "been charged."]—A change in the constitution of H. & Co. No. 1, a firm, took place in Mar. 1929, & H. & Co. No. 2 came into existence. No notice under r. 11 (1) of the Rules applicable to Cases I. & II. of Sched. D, as amended by Finance Act, 1926 (c. 22), s. 32 (1), that the tax should be computed as if the trade had been discontinued & a new trade set up, was given. In Mar. 1930, a change in the constitution of H. & Co. No. 2 took place, & H. & Co. No. 3 came into existence, & in this case due notice as above was given. The profits earned by H. & Co. No. 1 in the year ending Apr. 5, 1928, were £50,000; for the year ending Apr. 5, 1929, they earned £114,000. The profits of H. & Co. No. 2 for the year ending Apr. 5, 1930, were nil. H. & Co. No. 1 were assessed for the year ending Apr. 5, 1929, in £50,000. H. & Co. No. 2, by reason of the above notice, were assessed in the year ending Apr. 5, 1930, on the profits of that year under sect. 31 (1) (a), of 1926 Act—namely, nil—and not on £114,000, as would have been the case had the above notice not been given. By sect. 31 (1) (b) of 1926 Act: "If the profits . . . of the year ending on Apr. 5 in the year preceding the year of assessment in which the discontinuance [of the trade] occurs exceed the amount on which the person has been charged for that preceding year . . . an additional assessment may be made upon him." Under that sub-sect. an additional assessment of £64,000, being the difference between £50,000 & £114,000, was then made on H. & Co. No. 2 in respect of the year ending Apr. 5, 1929:—*Held*: H. & Co. No. 2 were not chargeable in the additional assessment, inasmuch as not they but H. & Co. No. 1 had "been charged" for that year within the sub-sect.—OSLER v. HALL & Co., [1933] 1 K. B. 720; 102 L. J. K. B. 676; 149 L. T. 19; 17 Tax Cas. 68.

204n. — Question of fact for Commissioners.]—Prior to Apr. 1, 1930, H. carried on the business of contracting with film cos. for the "processing" of films. He employed only a clerical staff, the technical work, under an arrangement between him & T., being done by T. at another address for an agreed price. H. delivered the finished products to the cos. & was paid by them for the whole of the work done, H. paying T. for his share in the



work. T.'s business was confined to orders given by H. On Apr. 1, 1930, H. took T. into partnership. The business of film processing was continued by the firm in the same manner & for the same customers as before, H. obtaining the contracts for the film processing on behalf of the firm & T. attending to the technical side of the work. The business was at first carried on at the same separate addresses of H. & T. as before & later on at additional premises. Up to & including 1929-30 H. & T. were separately assessed on the profits of their respective businesses. Each business was treated as permanently discontinued on Apr. 1, 1930, & the partnership was treated as having set up & commenced a new business as from that date. H. appealed against additional assessments made upon him for the years 1928-29 & 1929-30, under sect. 31 of Finance Act, 1926 (c. 22), & the partnership appealed against the assessment for 1930-31 which was made on the basis of its profits for the year of assessment. It was contended (a) that the business carried on by H. on his own account had not been permanently discontinued on Apr. 1, 1930, & that after that date he was engaged in the same trade but as a partner in a partnership, & (b) that, consequently, the additional assessments on H. for the years 1928-29 & 1929-30 should be discharged & the assessment on the partnership for the year 1930-31 should be computed on the basis of the profits of the preceding year in accordance with sect. 32 of Finance Act, 1926 (c. 22). The Special Comrs. found that on the formation of the partnership an amalgamation of two separate & distinct businesses took place, creating a new business, & they confirmed the assessments:—*Held*: the matters in issue were questions of fact for the determination of the Comrs. & there was evidence upon which the Comrs. could arrive at their conclusion.—*HUMPHRIES & Co. v. COOK* (1934), 19 Tax Cas. 121.

**204o. Assessment based on invoice price—Subsequent additional payments.]—**A co. which was under contract to supply ironstone at fluctuating prices, subject to a specified maximum, entered into negotiations with its customers with regard to the supply of larger quantities of ironstone at increased prices. An understanding, conditional upon the success of certain general negotiations in progress, was reached in Mar. 1919, as to a new schedule of prices to take effect as from May 1, 1919. A definitive agreement was

signed in Dec. 1925, & was deemed to have come into operation on Dec. 31, 1920. For some time after May 1, 1919, ironstone was invoiced by the co. to its customers at the old prices; but during subsequent accounting periods the co. was paid, by instalments, a sum representing the difference between the invoiced prices & the prices calculated according to the schedule agreed in Mar. 1919. On appeal against certain estimated assessments to income tax, the co. contended that this sum was received as a capital payment & not as the price of ironstone; or, alternatively, that the instalments could only be brought into account in the years in which they were paid. The Special Comrs. held that the amount in question was a revenue payment & must be related to the period during which the ironstone, by reference to which the sum was calculated, was delivered:—*Held*: the Special Comrs.' decision was correct.—*FRODINGHAM IRONSTONE MINES, LTD. v. STEWART* (1932), 16 Tax Cas. 728.

**204p. Reimbursement by auditors of sum misappropriated.]—**By the fraud of two quarry officials at resp.'s quarries larger amounts were entered in the wages sheets than were due for wages. These larger amounts were received, the wages were properly paid, & the officials took the balance for themselves. After a number of years the frauds were discovered, & the auditors, without admitting liability, admitted that a clerk was negligent in not making inquiries, & by arrangement they paid to resp. the whole amount of the defalcations:—*Held*: the sums paid by the accountants were trading receipts properly assessable to tax & should be brought into account in the year in which they were received.

*Semble*: instead of treating the whole amount as a receipt in the year in which the whole was received, it was open to the Crown to reopen the previous assessments & correct the accounts of those years in respect of the repayment in respect of the defalcations.—*GRAY v. PENRHYN (LORD)*, [1937] 3 All E. R. 468; 157 L. T. 164; 81 Sol. Jo. 749; 21 Tax Cas. 252.

**206a. French "Société en nom collectif."—**Applts. in these two cases were, for the years material in the present connection, the only persons interested in the profits of a *Société en nom collectif*, a business organisation under French law in many respects similar to a partnership. The *Société* was directed & controlled in France but carried on business in various

**PART V. SECT. 2, SUB-SECT. 5.—A.**

**sa. Whether partnership retrospective for income tax purposes.]—***Held*: a contract of co-partnership is not effectual for income tax purposes prior to the dates on which it is executed.—*AYRSHIRE PULLMAN MOTOR SERVICES & RITCHIE (D. M.) v. INLAND REVENUE COMRS.* (1929), 14 Tax Cas. 754.—*SCOT*.

**sb. Informal arrangement during coal strike.]—**A Glasgow coal merchant & a London firm of coal exporters & importers made, during a coal strike, an informal business arrangement, the main feature of which was that coal was invoiced by the firm to the merchant at cost, the merchant to pay also to the firm one-half of whatever net excess over this cost price he might

obtain from his customers. The arrangement continued for a few months only & was brought to an end by an accounting & division of profits between the parties. The special comrs. on appeal proceedings decided that, having regard to all the facts of the conduct of the business between the parties, the trade in question was carried on jointly within r. 10, Rules applicable to Cases I. & II., Sched. D, & they found as a fact that the transactions involved were partnership transactions. An assessment was accordingly confirmed charging the total profits in one sum separately from any other liabilities of the parties:—*Held*: the evidence justified the comrs.' decision.—*GARDNER (JOHN) & BOWRING, HARDY & CO., LTD. v. INLAND REVENUE COMRS.* (1930), 15 Tax Cas. 602.—*SCOT*.

**sd. Family corporation.]—***Held*: (1) sect. 22 of Income Tax Act is complete in itself & must be interpreted independently of sects. 30 & 31 of the Act, dealing with partnerships; (2) the shareholders of a family corp. having elected that the income of the corp. be dealt with as if the corp. were a partnership, each shareholder should be deemed to be a partner & should be taxable in respect of the income of the corp. according to his interest as a shareholder; (3) sect. 22 (4) renders the decision of the Minister final & conclusive solely in matters involving questions of fact; it does not vest the Minister with the power to adjudicate finally on questions of law, to the exclusion of the cts.—*PATRICK v. MINISTER OF NATIONAL REVENUE*, Ex. C. R. 38; 2 D. L. R. 274.—

countries including the United Kingdom. It was assessed in respect of the profits of the trade carried on in the United Kingdom:—*Held*: the *Société* was a legal person distinct from the individuals composing it & the profits in question were not the profits of a partnership within sect. 20 of 1918 Act.—*DREYFUS (C. L.) v. INLAND REVENUE COMRS., DREYFUS (L. L.) v. INLAND REVENUE COMRS.* (1929), 14 Tax Cas. 560, C. A.

207. *Add. Annotations*:—*Refd.* Seaham Harbour Dock Co. v. Crook (1930), 47 T. L. R. 23; Smart v. Lincolnshire Sugar Co. (1935), 154 L. T. 167.

207a. *Commencement of partnership.*—Applt., who had for many years carried on, solely, a practice as solr., informed his son on Dec. 31, 1928, that it was his intention to take him into partnership as from that date & on Jan. 1, 1929, instructed another firm of solrs., by letter, to draft a partnership deed. The deed, which was expressed to have effect as from Jan. 1, 1929, was executed on May 11, 1929. No formal notice of the partnership was at any time given by advertisement, circular or otherwise. No alteration of the name under which the practice was carried on, or in the business bank account, was made until after the date of the partnership deed. From Dec. 31, 1928, the son was credited with the share of profits to which he was entitled under the partnership deed. Applt. appealed to the General Comrs. against an assessment to income tax, Sched. D., made upon him for the year 1929–30, contending that a partnership existed between himself & his son as from Jan. 1, 1929. The Comrs. held that for income tax purposes the partnership commenced on May 11, 1929, the date of the partnership deed:—*Held*: the partnership constituted by the deed commenced on the date of the deed & there was no evidence before the comrs. of the existence of a partnership before that date.—*WADDINGTON v. O'CALLAGHAN* (1931), 16 Tax Cas. 187.

- 207b. *Payment of profits on dissolution of partnership.*—*MADRAS INCOME TAX COMR. v. P. R. A. L. MUTIUKARUPPAM CHETTIAR* (1935), 79 Sol. Jo. 501, P. C.

208. *Add. Annotations*:—*As to* (3) *Consd.* Fry v. Burma Corpn. (1929), 98 L. J. K. B. 693. *As to* (4) *Folld.* Elliott v. Duchess Mill (1926), 95 L. J. K. B. 963. *Consd.* Stewart & Young v. Walker (1926), 11 Tax Cas. 123. *Refd.* I. R. Comrs. v. Anderson, Frew & Co. v. I. R. Comrs. (1931), 16 Tax Cas. 355; Fiat (England), Ltd. v. Williams (1932), 17 Tax Cas. 105. *As to* (5) *Consd.* Leitch v. Emmott (1929), 98 L. J. K. B. 459. *Refd.* Martin v. Lowry, Martin v. I. R. Comrs., [1926] 1 K. B. 550. *Generally, Refd.* Betts v. Clare & Heyworth, [1926] 2 K. B. 289.

209. *Add. Annotation*:—*Expld.* James Shipstone & Sons, Ltd. v. Morris (1929), 14 Tax Cas. 413.

210. For existing catchwords, paragraph, & citations substitute:—

— *Whether profits in year of assessment may be considered.*—On Mar. 1, 1919, a firm set up a new trade. On Dec. 31, 1919, they made up the first account of the trade for the ten months from Mar. 1, 1919, to Dec. 31, 1919, that account showing a profit for that

period of £1,000. The firm sold the trade as from Jan. 1, 1920, to a co. consisting of the same persons. The co. made up an account of the profits of their trade for three months from Jan. 1, 1920, to Mar. 31, 1920, showing a profit for those three months of over £12,000. For the year ending Apr. 5, 1919, the assessment to income tax under 1918 Act, Sched. D., was made on the firm in a sum equal to a proportionate part, from Mar. 1 to Apr. 5, of the profits shown by the account to Dec. 1919, & it was agreed that that was correct. For year ending Apr. 5, 1920, assessments were made on the firm & the co. on a sum representing twelve-thirteenths of the profits shown by combining the two accounts for the respective periods of ten months & three months, that sum being apportioned between the firm & the co. according to their respective liabilities. The firm & co. appealed against the assessments on the ground that they ought to have been made on a sum representing twelve-tenths of the sum shown in the account for the ten months from Mar. 1 to Dec. 31, 1919, & the comrs. acceded to this argument:—*Held*: upon the true construction of r. 1 (2) of the rules applicable to Cases I. & II., except in the case of a trade set up within the year of assessment, the profits should be computed without bringing in any profits of the year of assessment.—*CLARE & HEYWORTH v. BETTS*, [1927] A. C. 443; 96 L. J. K. B. 645; 137 L. T. 306; *sub nom.* BETTS v. CLARE & HEYWORTH, LTD., 11 Tax Cas. 469, H. L.

*Annotation*:—*Distd.* Manson v. Perrys (Ealing) (1931), 16 Tax Cas. 60.

— — — — — *See, now, Finance Act, 1926* (c. 22), s. 36 (1), Sched. IV.

210a. — — — — — *Resp. co. was incorporated & commenced trading on Aug. 16, 1926. Its first account, for the period from Aug. 16, 1926, to Mar. 31, 1927, showed a loss & its second account, for the year ended Mar. 31, 1928, showed a profit. The co., on an appeal against an assessment for 1927–28 in respect of its trading profit contended that, having regard to the decision in the case of Betts v. Clare & Heyworth, No. 210, its liability for that year should be computed solely by reference to the account for the period ended Mar. 31, 1927. The Crown contended that the liability should be based on the results for the year ended Aug. 15, 1927, ascertained, in accordance with Finance Act, 1926 (c. 22), s. 35, by the inclusion in respect of the period Apr. 1 to Aug. 15, 1927, of the appropriate proportion of the profit shown by the account for the year ended Mar. 31, 1928:—Held: as a result of the amendments to r. 1 (2) of the rules applicable to Cases I. & II. of Sched. D. effected by Finance Act, 1926 (c. 22), s. 36, & Sched. IV., the decision in the case of Betts v. Clare & Heyworth, No. 210, had no application, & the 1927–28 assessment should be computed in accordance with the Crown's contentions.—MANSON v. PERRYS (EALING), LTD. (1931), 16 Tax Cas. 60.*

210b. — — — — — *Power to make additional assessment.*—*OSLER v. HALL & Co., No. 204m, ante.*

210c. — — — — — *Partnership.*—By a deed dated Nov. 22, 1922, A. & B., partners in a firm, dissolved partnership as from Apr. 1, 1922.

Upon the dissolution of the partnership A. continued to carry on business at the firm's address, but from Nov. 22, 1922, until his death in June, 1923, B. carried on, in his own name at his private address, a small amount of business previously done by the firm. By a deed dated Dec. 15, 1922, A. took C. into partnership as from Apr. 1, 1922. An assessment having been made on the firm for 1922-23 upon the average of the profits for the three years ended Mar. 31, 1922, the comrs. found that the partnership between A. & B. was not dissolved until Nov. 22, 1922, & that there had been no discontinuance of the business, but that A. had succeeded to the business of A. & B., & that A. & C. had succeeded to the business carried on by A. after the dissolution of his partnership with B.:—*Held*: there was evidence upon which the comrs. could come to their conclusions, & they had not misdirected themselves in law.—*FARADAY, RODGERS & ELLER v. CARTER* (1927), 11 Tax Cas. 565, C. A.

210d. — — — What amounts to.]—*PRATT v. STRICK* (1932), 17 Tax Cas. 459.

210e. — Absence of formal contract.]—During Mar. 1928, there were negotiations & detailed correspondence between the resp. co. & another co. who were proposing to purchase the business of resp. co., culminating in a letter dated Mar. 21, 1928, in which the prospective purchasers indicated that the terms contained in the correspondence, & as arranged at interviews between the parties, were generally accepted "subject to such terms being fully set out in a formal contract or agreement, to be submitted to us & finally approved of." On Mar. 29, 1928, two of the directors of resp. co. resigned & entered the service of the purchasers. On Mar. 30 resps. gave notice to their foreign agents terminating their engagements. The formal contract was dated Apr. 18, 1928. Resp. co. were assessed for the year 1927-28 in accordance with the provisions of rule 11 (2) on the footing that the succession took place after Apr. 5, 1928. The General Comrs. allowed their appeal against this assessment, finding that a contract for the sale & purchase of the business existed before Apr. 6, 1928. The Crown appealed:—*Held*: the correspondence did not constitute a contract & that there was no evidence of a *de facto* succession before Apr. 6.—*TODD v. JONES BROS., LTD.* (1930), 15 Tax Cas. 396.

210f. — Purchase from liquidator.]—A co. carried on business as (a) motor engineers, (b) cinema theatre proprietors, & until a short time before going into liquidation, (c) haulage contractors & char-a-banc proprietors. On the liquidation of the co. applts. purchased the co.'s lands & property & stock-in-trade, the purchase-price being £18,000, of which £15,850 was stated, in the agreement of sale, to be in respect of lands & property, & £150 in respect of stock. Applts. retained the co.'s employees & continued without any interruption the work in the co.'s hands. They carried on business as motor engineers & as cinema theatre proprietors but not at any time as haulage contractors & char-a-banc proprietors. The General Comrs. held that applts. had not succeeded to the business previously carried

on by the co.:—*Held*: there were no grounds for disturbing the Comrs.' decision as being erroneous in point of law.—*WILSON & BARLOW v. CHIBBETT* (1929), 14 Tax Cas. 407.

*Annotation*:—*Reid. Wild v. Madame Tussaud's* (1926), Ltd. (1932), 17 Tax Cas. 127.

210g. — Transfer of tied houses to different brewery.]—Applt. co., a brewery co., acquired the control of another co., the B. Brewery Co. by an arrangement whereby the shareholders in the latter exchanged their shares for shares in applt. co. The B. Co. then leased its brewery & its tied houses, comprising the whole of its property, licensed & unlicensed, to applt. co. at an annual rent. Applt. co. supplied its own products to the tied houses, which became "tied" to them, & brewing at the B. Co.'s brewery immediately ceased. Shortly after the date of the lease applt. co. purchased all the stock & loose effects of the B. co., & about a year later they purchased the brewery at a valuation, the lease, as regards the brewery, thus only remaining in effect for about eighteen months. Applt. co. appealed against assessments made on the footing that it had succeeded to the business of the B. Co. & that accordingly in arriving at applt. co.'s liability the profits of the B. Co. should be brought into the computation. The General Comrs. held that the assessments had been correctly so made:—*Held*: the matter was primarily a question of fact & there were no grounds for disturbing the Comrs.' decision.—*SHIPSTONE (JAMES) & SONS, LTD. v. MORRIS* (1929), 14 Tax Cas. 413.

*Annotations*:—*Reid. Reynolds, Sons & Co. v. Ogston* (1930), 15 Tax Cas. 501; *Wild v. Madame Tussaud's* (1926), Ltd. (1932), 17 Tax Cas. 127; *Leney & Co. v. Whelan* (1934), 151 L. T. 532; *Marston's Dolphin Brewery, Ltd. v. Loughnan* (1934), 151 L. T. 532.

210h. — Destruction of exhibition by fire—Restoration by new company.]—The building in which a co. carried on the business of a waxworks exhibition was partially destroyed by fire in Mar. 1925. Most of the waxwork exhibits perished but the wine bar, workshop & administrative offices escaped, & the stock of moulds for making waxworks remained intact. Delay occurred in the settlement of the co.'s insurance claim & the directors did not come to a decision as to their subsequent policy until Dec. 1925, when they advertised the property for sale. In the meantime the co. retained the services of a number of its employees, including its entire technical staff & the latter were employed in restoring & replacing the exhibits damaged & destroyed by fire. By agreement in July, 1926, the old co. agreed to sell to certain purchasers the freehold site, the goodwill of the business, the contents of the exhibition & the benefit of all licences held by it. The purchasers agreed to form & register a new co. to take over the contract from the purchasers & to rebuild & restore the exhibition. The old co. agreed to continue the work of restoration of models & preservation of the premises. The new co. was duly incorporated in July, 1926, & took over the benefit of the previous agreement. In Aug. 1926, it entered into possession of the premises & took over the services of the old co.'s employees & technical staff. It forthwith commenced the erection of a new building & continued the work of

restoring & replacing the exhibits. The new building was completed & opened to the public in Apr. 1928, the exhibition having been made to resemble as closely as possible the exhibition existing before the fire. On an appeal by the new co. against assessments to income tax, Sched. D, for the years 1928-29 & 1929-30, the Special Comrs. held that the new co. had succeeded to the business of the old co.:—*Held*: the Special Comrs.' decision was not wrong in law.—*WILD v. MADAME TUSSAUD'S (1926), LTD.* (1932), 17 Tax Cas. 127.

- 210j.** — **Succession to estate.**—Applt. co., which was controlled in London, owned estates in India. By an agreement dated Mar. 28, 1928, it acquired from another co., as from Apr. 1, 1928, a rubber estate in India, together with plantations, nurseries, factories, plant, etc., & the benefit of contracts & engagements whether with coolies or others, but did not take over any book debts or the vendor co.'s selling organisation. The agreement was sanctioned by resolution of the vendor co. on Apr. 5, 1928. The vendor co., which retained all crops harvested & collected before Apr. 1, 1928, to fulfil certain forward contracts or for sale on the market, went into liquidation in July, 1928. Applt. co. was assessed to income tax under Sched. D. for the year 1928-29 in respect of its trading profits on the basis that it had succeeded, before Apr. 6, 1928, to the trade previously carried on by the vendor co., the vendor co.'s profits for the year to Mar. 31, 1928, being included in computing those profits. The co. appealed on the grounds: (a) that it had acquired the estate & nothing more, & there had been no succession to a trade, & (b) alternatively, that if there was a succession on or before Apr. 5, 1928, the assessment for 1928-29 was incorrect, since (i) the old rule 11 of Cases I. and II. of Sched. D. had been superseded as from Apr. 6, 1928, by sub-sects. (1) & (2) of sect. 32, Finance Act, 1926 (c. 22), & (ii) the new rule 11 did not apply. It was admitted that if there was a succession the date thereof was before Apr. 6, 1928. The General Comrs. decided that applt. co. succeeded to the trade of the vendor co. & was assessable in respect of the vendor co.'s profits under rule 11 of Cases I. & II., Sched. D., & sect. 29, Finance Act, 1926 (c. 22):—*Held*: the Comrs. had evidence before them on which they could arrive at their conclusion that the co. had succeeded to the vendor co.'s trade, & the assessment for the year 1928-29 had been properly made.—*MALAYALAM PLANTATIONS, LTD. v. CLARK* (1935), 19 Tax Cas. 314.

*Annotation*:—*Refd.* *Laycock v. Freeman, Hardy & Willis, Ltd.*, [1938] 3 All E. R. 571.

- 210k.** — **Allowance for wear & tear.**—Applt. co. was incorporated in 1930, the main object being to acquire the undertakings of & to amalgamate two steel cos. on the terms of a scheme sanctioned under order of ct. under the Cos. Act, 1929 (c. 23), ss. 153 & 154. The scheme was carried out & the undertakings & properties of the two component cos. were vested in applt. co. in return for shares, the two cos. being dissolved. The businesses of the two cos. had been carried on at a loss for several years before the amalgamation in 1930 & these businesses were afterwards carried on without inter-

ruption in the name of applt. co. For the years 1936-37 applt. co. claimed to set off against its assessment for income tax (a) the accumulated losses & (b) wear & tear allowances of the two component cos. for the years prior to the amalgamation in 1930, in accordance with rule 6 of the Rules applicable to Case I. of Sched. D of 1918 Act, notwithstanding rule 11 of the same rules as amended by Finance Act, 1926 (c. 22), s. 32:—*Held*: applt. co. was entitled to deduct the allowances for wear & tear, but not for losses, in respect of the component cos. during the years before the amalgamation. Rule 11 is a rule of computation only & does not affect rule 6, which is a rule of charge; as amended by Finance Act, 1926 (c. 22), s. 32, it was designed to alter the method of assessment in cases where there was a succession to a trade, profession or vocation, & not to take away the existing rights of the successor under rule 6.—*UNITED STEEL COS., LTD. v. CULLINGTON*, [1938] 2 K. B. 566; [1938] 2 All E. R. 569; 107 L. J. K. B. 750; 159 L. T. 515; 54 T. L. R. 785.

- 210l.** — **Subsidiary companies—Taken over by retail company.**—Up to Apr. 1, 1935, resp. co. owned two subsidiary cos. which carried on the business of manufacturing & the wholesale sale of boots & shoes, which resp. co. sold by retail in its shops. The subsidiary cos. sold the whole of their output to resp. co. On Apr. 1, 1935, the two subsidiary cos. were wound up, & thereafter resp. co. carried on the manufacture of boots & shoes in the works which had belonged to these cos. as departments of its business:—*Held*: the trade of the subsidiary cos. ceased on Apr. 1, 1935, to be carried on as a trade & became merged in the different business of resp. co. There was, therefore, no succession within Sched. D, Cases I. & II., r. 11 (2), to the trade of the subsidiary cos. by resp. co.—*LAYCOCK v. FREEMAN, HARDY & WILLIS, LTD.*, [1938] 2 K. B. 836; [1938] 3 All E. R. 571; 107 L. J. K. B. 763; 82 Sol. Jo. 712; *affd.* [1938] 4 All E. R. 609, C. A.

- 210m.** — **Merger.**—*BRITON FERRY STEEL CO., LTD. v. BARRY*, [1938] 4 All E. R. 429.

- 211.** *Add. Annotations*:—**Consd.** *Reynolds, Sons & Co. v. Ogston* (1930), 15 Tax Cas. 501; *Laycock v. Freeman, Hardy & Willis, Ltd.*, [1938] 3 All E. R. 571. **Refd.** *Shipstone (James) & Sons, Ltd. v. Morris* (1929), 114 Tax Cas. 413; *Wild v. Madame Tussaud's (1926), Ltd.* (1932), 17 Tax Cas. 127.

- 212.** For existing para. & citation, read:—

A co. was incorporated in Jan. 1920, to take over the assets & business of a former cotton spinning co. The old co. had been very prosperous, its profits for the years 1912 to 1917 inclusive having averaged nearly £7,000 a year. For the three years 1918 to 1920 inclusive the average was about £22,000. The undertaking of the new co. proved unsuccessful, & for the year ending Feb. 26, 1921, it made a loss of £11,268. The co. having been assessed to income tax in respect of that year in the sum of £16,459, being £22,000 the average of the preceding three years less £6,000 depreciation, appealed, & contended that it was entitled to relief under the r. 11 of the rules applicable to Cases I. and II. of Sched. D. It appeared that in the latter half of 1919 & the first half

of 1920 there was an extraordinary boom in the cotton trade & in trade generally in the United Kingdom, but this was followed, as the comrs. found, by a depression in the cotton trade since Jan. 1920, which was extraordinary & abnormal, & did not arise merely from the ordinary fluctuations in business the comrs. further found that the profits & gains of the co.'s business had fallen short since that date from some specific cause (the depression) within the meaning of r. 11:—*Held*: (1) the findings of the comrs. justified them in giving special relief provided by r. 11, inasmuch as the co. had fulfilled requirements of both limbs of the rule, namely, it had shown that it had succeeded to a business previously carried on, & had established by evidence, which was accepted by the comrs., that the depression was abnormal; (2) an ordinary fluctuation in trade is not a "specific cause" within the meaning of r. 11, but an abnormal & extraordinary depression if accepted & so found by the comrs. may be so.

*Per SCRUTTON, L.J.*: "Specific cause" in r. 11 in itself means a precisely stated definite cause as distinguished from a mere statement "I have lost profits, because I have made less money," or words to that effect.—*ELLIOTT v. DUCHESSE MILL, LTD.*, [1927] 1 K. B. 182; 95 L. J. K. B. 963; 136 L. T. 51; 42 T. L. R. 707; 70 Sol. Jo. 891; 11 Tax Cas. 56, C. A.

*Annotations*:—As to (2) *Overd. Kneeshaw v. Clay & Horsfall*, [1929] 1 K. B. 285. *Consid. Fiat (England), Ltd. v. Williams* (1932), 17 Tax Cas. 105. *Generally, Reid. Borthwick v. Noidor* (1927), 11 Tax Cas. 261.

**212a.** ]—*Held*: in order to establish that there has been a falling short of the profits or gains of a trade within the exception to r. 11 of the Rules applicable to Cases I. & II. of Sched. D., it has only to be shown that the profits or gains in the year of assessment have fallen short from some specific cause, & not that the aggregate profits or gains since the change have so fallen short; & if the profits or gains in the year of assessment are found to have fallen short from some specific cause, income tax is computed on the actual profits or gains of that year instead of on the average of the three preceding years.—*KNEESHAW v. CLAY & HORSFALL*, [1929] 1 K. B. 285; 98 L. J. K. B. 325; 140 L. T. 188; 72 Sol. Jo. 809; 14 Tax Cas. 295, C. A.

#### PART V. SECT. 2, SUB-SECT. 5.—B.

1. *Add. citation, sub nom.* *WATSON BROS. v. LOTHIAN*, 4 Tax Cas. 441.—SCOT.

**213 ii.** ]—A firm of manufacturing confectioners, in which changes of partnership had taken place, claimed that a falling short of profits was due to two specific causes, (1) an increase in the price of sugar due to interference with the Cuban supplies by the American Govt., the formation of a speculative ring in New York, & curtailment of European supplies owing to the French occupation of the Ruhr, & (2) an increase in bad debts caused by the failure of inexperienced ventures in the confectionery trade:—*Held*: (1) the expression "specific cause" denoted an exceptional circumstance, which could be clearly identified, & to which the shortage or profits could substantially be attributed; (2) the causes of the falling off of profits alleged were not "specific causes."—*STEWART & YOUNG v. INLAND REVENUE COMRS.*, [1926] S. C. 883; 11 Tax Cas. 123.—SCOT.

#### PART V. SECT. 2, SUB-SECT. 7.—A.

o i. — *Farm land—Expenses of fencing.*—A farmer is entitled to deduct under Land & Income Tax Amendment Act, 1924, s. 31, expenditure for the purchase & erection of vermin proof fencing.—*LINDSAY v. TAXATION COMR.* (1927), 30 W. A. L. R. 24.—AUS.

o ii. — *Annuity.*—The payment of an annuity payable by a taxpayer & charged upon his land on which he carries on his business as a pastoralist is not money "wholly & exclusively laid out or expended for the purposes of his trade," within Income Tax Act, 1915, s. 19 (2) (g) (Vict.), & therefore, may not be deducted from his gross income.—*CALVERT v. VICTORIA TAXES COMR.* (1927), 40 C. L. R. 142.—AUS.

o iii. — *Donations to public, social, charitable & ecclesiastical institutions.*—*Held*: donations made to public, social, charitable & ecclesiastical institutions, at the request of friends of such institutions, as well as amounts paid in the office to casual visitors for

*Annotation*:—*Refd. I. R. Comrs. v. Anderson, Frew & Co. v. I. R. Comrs.* (1931), 16 Tax Cas. 355.

**214a.** — *Cessation of abnormally favourable conditions of preceding year.*—The taxpayers in these cases succeeded to businesses early in 1927 & were assessed to income tax, Sched. D., for 1927–28 on the profits of the respective businesses for the year ended Dec. 31, 1926. In each case the coal strike of 1926 has enabled large profits to be made during that year & the cessation of the conditions which had obtained during the strike was alleged as a "specific cause" in support of a claim under r. 11 for 1927–28:—*Held*: the cause alleged was a "specific cause" within r. 11.—*INLAND REVENUE COMRS. v. ANDERSON (A. & G.), FREW (ALEXANDER) & CO., LTD. v. INLAND REVENUE COMRS.* (1931), 48 T. L. R. 126; 16 Tax Cas. 355, H. L.

*Annotation*:—*Refd. Fiat (England), Ltd. v. Williams* (1932), 17 Tax Cas. 105.

**214b.** — *Competition.*—Up to Oct. 31, 1924, two English cos. acted, under an agreement, as the exclusive agents, in England, of an Italian motor car manufacturing co. Applt. co. was incorporated on Nov. 6, 1924, & became the exclusive agent of the Italian co., taking over the businesses of the two previous agent-cos. in circumstances which were held by the General Comrs. to constitute a succession within the meaning of r. 11 of the Rules applicable to Cases I. & II. of Sched. D. The actual profits of applt. co. for the period from Nov. 6, 1924, to Apr. 5, 1925, & for the years ended Apr. 5, 1926, & Apr. 5, 1927, fell short of the combined average profits of the previous cos. & applt. co. contented, on appeal, that it was entitled to relief under r. 11. The specific causes alleged were (a) the re-imposition by Finance Act, 1925, of import duties upon motor cars & accessories, & (b) abnormal trade competition during the period from Nov. 6, 1924, to Apr. 5, 1927, arising from the adoption by British car manufacturers of mass production methods. The General Comrs. found that the cause of the falling short of applt. co.'s profits was competition in the motor car industry & held that that competition was not a specific cause within r. 11:—*Held*: the General Comrs.' decision was not wrong in law.—*FIAT (ENGLAND), LTD. v. WILLIAMS* (1932), 17 Tax Cas. 105.

tickets to performances, lotteries, etc., under an alleged commercial practice, with the object of benefiting applt.'s business, & not for charitable purposes, are not disbursements or expenses "wholly, exclusively & necessarily laid out or expended for the purposes of earning the income," & cannot be deducted from the profits & gains of the co. in arriving at its taxable income.—*O'REILLY & BELANGER, LTD. v. MINISTER OF NATIONAL REVENUE*, [1928] Exch. C. R. 61.—CAN.

o iv. — *Loan to experimental company.*—A firm of law agents from time to time made advances to one of their clients, an experimental limited co. which had been formed to manufacture a new metal alloy. It was intended, after the business had been established, to promote a large public co. & the firm anticipated considerable legal work in this connection. The advances were not made by the firm as factors for the co. The co. having failed, the loans became irrecoverable, & the firm claimed to deduct the loss thus incurred

217. *Add. Annotation* :—*Refd. Simpson v. Grange Trust, Ltd.*, [1935] 19 Tax. Cas. 231.

217a. — *Advances made to company by company's solicitors.*—A firm of writers to the signet advanced money from time to time without security & without any written acknowledgment to a limited co. for which they had acted as law agents since its inception. The co. failed, & the advances were irrecoverable. On an appeal to the General Comrs. from an assessment to income tax under Sched. D. the firm claimed that the amount of the advances was a permissible deduction in ascertaining their profits & gains as writers to the signet :—*Held* : the loss was not a permissible deduction, as it did not represent moneys wholly & exclusively laid out or expended for the purposes of the firm's profession within r. 3 of the rules applicable to Cases I. & II.—*HAGART & BURN-MURDOCH v. INLAND REVENUE COMRS.*, [1929] A. C. 386; 98 L. J. P. C. 113; 141 L. T. 97; 45 T. L. R. 338; *sub nom.* *INLAND REVENUE COMRS. v. HAGART & BURN-MURDOCH*, 14 Tax Cas. 433, II. L.

217b. — *Rent—Proviso for abatement if profits insufficient.*—*Resp. co. was assessed to*

income tax for the years 1923–24 & 1924–25 under Sched. D. of 1918 Act, in respect of its profits in the respective sums of £800,000, less £450,000 wear & tear of plant & machinery & £800,000, less £350,000 for wear & tear. The co. claimed that as it had paid in 1922 & 1923 two sums of £630,000 & £960,000 respectively under a lease dated Dec. 29, 1921, those sums ought to be allowed as deductions from the profits in the years of assessment. The co., under the terms of that lease, was in possession of a very large number of properties in different parts of the world used by it for the purposes of its trade & for which under the lease it had to pay £960,000 a year. The document of Dec. 29, 1921, was in the form of a strict lease, but contained a proviso that if the profits of the business of the co. after providing for the rent therein reserved, should be insufficient to enable the co. to pay interest on debenture stock & specific mtgs., the dividend on preference shares, & a dividend of 10 per cent. on ordinary shares, then the rent should be abated to the extent of the deficiency ascertained. The comrs. held that the payments of £630,000 & £960,000 were not payments antecedent

in arriving at the profits of their profession for income tax purposes :—*Held* : the advances were not money "wholly & exclusively laid out for purposes" of business & the deduction of them was inadmissible.—*INLAND REVENUE COMRS. v. A. & B.*, [1929] S. C. (H. L.) 76.—*SCOT.*

*o v.* — *Cost of reconstruction of shop.*—*HYAM v. INLAND REVENUE COMRS.*, [1929] S. C. (Ct. of Sess.) 384.—*SCOT.*

*o vi.* — *Expenses of winter grazing of sheep.*—*INLAND REVENUE COMRS. v. MARSHALL & MITCHELL*, [1929] S. C. (Ct. of Sess.) 136.—*SCOT.*

*o vii.* — *Directors' fees.*—Although the amount of remuneration paid by a co. incorporated in New Zealand is that fixed by a resolution at a general meeting, in accordance with the arts. of assocn., the Comr. of Taxes in assessing the co. to income tax under Land & Income Tax Act, 1923, can inquire whether the amount was an expenditure "exclusively incurred in the production of the assessable income," so as to be a permissible deduction under sect. 80 (2) of the Act; the grounds upon which a deduction of the amount so fixed can be challenged are not confined to the payment being wholly or in part not remuneration for the directors' services. Where a deduction of an amount so fixed has been disallowed in part, & the evidence is not confined to proof of the resolution & payment thereunder, the question is whether the co. fully satisfied the *onus* under sects. 14 & 25 of showing that the assessment is excessive; in the present case that *onus* was not discharged.—*ASPRO, LTD. v. TAXES COMR.*, [1932] A. C. 683; 101 L. J. P. C. 177; 148 L. T. 22, P. C.—*N.Z.*

*ss. Rent—Premises sub-let.*—*Resp. co. leased premises at an annual rent for a period of ten years from June, 1927 (with a break in the co.'s favour at the end of five years), & occupied them for the purposes of its business until Nov. 30, 1929, at which date it ceased to carry on any part of its business there. Portions of the premises were thereafter sub-let by the co. until June, 1932, when the lease was terminated under the right contained in the lease. The co. claimed a deduction in computing its profits assessable to income tax for the year 1931–32 of an amount representing the difference*

between the rent paid by it under the lease & the rents received by it from the sub-tenants. The General Comrs., on appeal, allowed the deduction :—*Held* : the co. was entitled to the deduction.—*INLAND REVENUE COMRS. v. FALKIRK IRON CO., LTD.*, [1933] S. C. 546; 17 Tax Cas. 625.—*SCOT.*

*l. Add. Citations* :—*sub nom.* *WYLIE v. ECCOTT*, 50 So. L. R. 26; 6 Tax Cas. 128.

*so. Duplicand payable for school playing fields.*—*Resp. co. was assessed under Sched. D. in respect of profits which it derived from carrying on business as proprietors of a school. The properties in which the school was carried on were owned by the co., & consisted (inter alia) of playing fields which, together with other lands owned by the co., were subject to an annual feu-duty payable to the superiors of the ground. The feu charter provided that, in addition to the annual feu-duty, a duplicand of feu-duty over the ground was payable by the co. at intervals of twenty-one years. The proportion of the feu-duty allocated to the playing fields amounted to £280 4s., & the co. claimed to deduct as a trading expense a payment of £560 8s., representing the corresponding duplicand which under the terms of the feu charter it had made to the ground superiors on Feb. 28, 1917 :—Held* : the payment of the duplicand was made by the co. as a condition of the ownership of land & not as an expense of carrying on its business, & the payment in question was therefore not admissible as a deduction in arriving at the profits of the co. for the purpose of assessment under Case I. of Sched. D.—*Dow v. MERCHANTON CASTLE SCHOOL, LTD.*, [1921] S. C. 853; 8 Tax Cas. 149.—*SCOT.*

*sd. Construction of foreign railway—Payments under Convention.*—*Applt. co. was incorporated in the U.K. in 1889 with a registered office in London, & under a convention with the French Colonial Govt. constructed a railway in the French colony of P., making junction at the frontier of British India with the S. I. railway. By the convention applt. co. was to pay to the French Colonial Govt. half its net profits calculated as therein provided. In 1879 applt. co. entered into a work-reement with the S. I. Ry. Co. by that co. was to work the P.*

railway as an integral part of its own line, & out of the receipts make certain payments to applt. co. in India in rupees. For each of the financial years 1925–26 & 1926–27 the S. I. Co. paid sums due under the agreement to their agent at T., who was also agent for applt. co. for certain purposes. Under instructions from applt. co. he calculated & paid to the French Colonial Govt. the sums due under the convention, & remitted the balance to applt. co. in London by a bank draft payable there :—*Held* : the sums paid by the S. I. Ry. Co. had been "received" in British India, namely, at T. by applt. co. within Indian Income Tax Act, 1922, s. 4 (1), & constituted the profits & gains of a "business" carried on by them within sect. 2 (4) & sect. 6 (iv) of the Act, so as to render them chargeable to tax in respect thereof; further, applt. co. was not entitled to deduct the payments made under the convention as being expenditure "incurred solely for the purpose of earning such profits or gains" within sect. 10 (2) (ix) of the Act; it was unnecessary to decide whether the profits accrued or arose in British India, or were deemed to do so, or whether the business was carried on in British India.—*PONDICHERY RY. CO., LTD. v. INCOME TAX COMRS.* (1931), 58 L. R. Ind. App. 239.—*IND.*

*st. Dealer in trading stamps—Value of unredeemed stamps.*—*Applts. carried on business as dealers in trading stamps. The stamps were sold at a fixed rate to retail shopkeepers who distributed them to their customers with goods purchased. The customers were invited to collect the stamps in booklets & exchange for "redeem" them at any time for "gifts" offered by applts. by reference to the number of completed booklets presented for redemption. Applts. contended on appeal against assessments to income tax made upon them under Sched. D., that their profits in respect of stamps could only be ascertained on the exchange of the stamps for gifts, & that the value, i.e., the sale price, of all unredeemed stamps was properly treated as a liability & carried to reserve & should not be taken into account in computing their profits. The General Comrs. rejected applts.' contentions & disallowed a part of the reserve, which they considered to be excessive :—Held* : the whole of the



to or necessary to earn profits, but contingent payments dependent on & payable only out of profits earned & were not allowable deductions from profits assessable to income tax:—*Held*: the real substance of the transaction was that in the events specified there should be a rebate of the rent, & whatever was the rent after the application of that rebate was still to be paid and it still remained an expense necessarily incurred in earning the trading profits of the co.—**ADAMSON v. UNION COLD STORAGE CO., LTD.** (1931), 146 L. T. 172; *sub nom.* UNION COLD STORAGE CO., LTD. v. ADAMSON, 16 Tax Cas. 293, H. L.

*Annotations*.—**Consd.** British Sugar Manufacturers, Ltd. v. HARRIS, [1938] 2 K. B. 220. **Refd.** Indian Radio & Cable Communications Co. v. Income Tax Commr., Bombay Presidency & Aden, [1937] 3 All E. R. 709.

**217c.** — **Control of buildings essential to trade—Difference between rent & rent paid by sub-tenants.**—To enable applt. co. to distribute its newspapers quickly unimpeded transport was essential in the street in which its printing works were situated. Applt. co. accordingly acquired certain property opposite its printing works & erected a building thereon. The building was then sold to a subsidiary co. at its cost price, & applt. co. took a lease of the whole building. Applt. co. used part of the ground floor, the basement, while unlet, & the front of the building, & the remainder it sublet or endeavoured to sublet. Applt. co. sought to deduct as an expense wholly & exclusively laid out for the purposes of its trade within Sched. D., Cases I. & II., r. 3 (a), the difference between the rent which it paid for the buildings & the rents which it received from sub-tenants:—*Held*: as the control of the building was essential for the purposes of applt. co.'s trade, applt. co. was entitled to make the deduction claimed.—**ALLIED NEWSPAPERS, LTD. v. HINDSLEY**, [1937] 2 All E. R. 663; 81 Sol. Jo. 569; *affd.* [1937] 4 All E. R. 677, C. A.

**217d.** — **Value of tailings bought for extraction of gold.**—A co. which was formed for the purpose acquired the right to take away & retreat very large dumps of residual deposits resulting from the working of a gold mine & called "tailings." These tailings were known to contain a certain amount of gold, & by a new process of treatment some of this gold was recovered & sold:—*Held*: as the tailings were raw material already won & gotten, the amount expended in acquiring them was in the nature of an expenditure on the raw material of the co.'s trade, & therefore that for the purpose of assessing the co.'s profits or gains the cost of the tailings treated during the period of assessment was a proper

deduction from the proceeds realised by the sale of the gold extracted.—**GOLDEN HORSE SHOE (NEW), LTD. v. THURGOOD**, [1934] 1 K. B. 548; 103 L. J. K. B. 619; 160 L. T. 427; 18 Tax Cas. 280, C. A.

*Annotation*.—**Refd.** Van den Berghs, Ltd. v. Clark (1935), 19 Tax Cas. 390.

**217e.** — **Payments in compromise of action.**—(1) Payments properly made by a co. for the compromise of an action are proper deductions against profits. This is so though one of the items is a payment of £7,500 to one of the directors for the withdrawal of proceedings for alleged slander in connection with the co.'s business brought by him against a fellow-director.

(2) Where an order is made for the repayment of tax, interest is to be allowed at the rate of 3½ per cent.—**SCAMMELL & NEPHEW, LTD. v. ROWLES**, [1938] 3 All E. R. 577; 82 Sol. Jo. 761.

**217f.** **Excess profits duty—Holding company & subsidiary company.**—The whole of the share capital of resp. co. was held by another co., which accordingly was assessed to & paid excess profits duty on the profits of the two cos. as though the subsidiary co. were a branch of the main co. In the computation of the main co.'s income tax liabilities on the three years' average basis, allowance for excess profits duty paid was made in the same manner as a deduction would be allowed for an ordinary outgoing in the course of trade. The main co. went into voluntary liquidation in 1918, liability to income tax ceasing before Apr. 6, 1918. In consequence of the operation of the average basis for income tax, the main co. had received effective benefit in respect of a part only of the excess profits duty paid. Resp. co. claimed deductions in the computation of its income tax liabilities for subsequent years in respect of the excess profits duty paid, for which allowance had not effectively been given to the main co., in so far as such duty was attributable to its own profits. The General Comrs. on appeal allowed the claim & the Crown appealed:—*Held*: the co. was not entitled to any deduction.—**OGSTON v. REYNOLDS, SONS & CO., LTD., REYNOLDS, SONS & CO., LTD. v. OGSTON** (1930), 15 Tax Cas. 501, C. A.

*Annotation*.—**Consd.** Wild v. Madame Tussaud's (1926), Ltd. (1932), 17 Tax Cas. 127.

**220a.** **Quarry — Railway freights — Rebates — Whether capital repayments or discounts.**—Resp. co. purchased in Oct. 1924, certain quarries formerly owned & worked by a private firm, &, by arrangement with the parties concerned, took over their predecessors' rights & obligations under certain

sale price of the unredempted stamps could not properly be excluded in computing applts.' profits for income tax purposes, & while some reserve for unredempted stamps was necessary, the amount to be allowed was a question of fact which the General Comrs. were entitled to determine on the evidence before them.—**COWEN (B. D.) (TRADING AS IDEAL TRADING STAMP CO.) & COWEN'S IDEAL TRADING STAMP CO. (GLASGOW), LTD. v. INLAND REVENUE COMRS.** (1934), 19 Tax Cas. 155.—**SCOT.**

**aa.** **Payment to company in order to acquire operation & control.**—Applt. co. carried on in India the business of communication by wireless & another

co. carried on the business & undertaking in India of communication by cable. By an agreement entered into in Feb. 1932 by the two cos., the future operation & control of both businesses were to be conducted until Dec. 1944 by applt. co. As consideration applt. co. was to pay to the other co. (a) £90,000 payable by four equal quarterly payments in each year, & (b) one-half of the net profits of applt. co. for each of its financial years, payable as to 80 per cent. by such payments on account from time to time as the directors of applt. co. should consider justifiable, & as to the balance within 14 days after applt. co.'s accounts should have been adopted by the shareholders at their annual

general meeting. "Net profits" meant the profits for each year remaining after deducting from the gross revenue of applt. co. all ordinary expenses properly chargeable to revenue & depreciation, but before making any allowance for income tax & before placing any sum to reserve:—*Held*: the half share of the net profits payable under the agreement was not a proper deduction to be allowed in computing the profits of applt. co. for the purposes of income tax & super tax under the Indian Income Tax Act, 1922.—**INDIAN RADIO & CABLE COMMUNICATIONS CO., LTD. v. INCOME TAX COMM., BOMBAY PRESIDENCY & ADEN**, [1937] 3 All E. R. 709.—**IND.**



agreements made in 1921 & 1924 between the predecessors & a railway co. The agreements in question provided for the construction of siding accommodation at the quarries. The cost of construction was borne by the firm, & the railway co. agreed to allow to the firm at half-yearly intervals, as from Sept. 30, 1924, sums equal to 10 per cent. of the railway co.'s share of the receipts in respect of traffic conveyed to or from the siding, until the expiration of ten years from Sept. 30, 1924, or until the total amounts allowed to the firm should be equal to specified amounts expended by the firm in connection with the siding construction. Resp. co. received from the railway co. in the years 1927 & 1928 allowances calculated by reference to the terms of the agreement. The co. claimed that these allowances were repayments of capital sums expended & that the railway charges, before deduction of these allowances, were business expenses & admissible deductions in computing its profits for income tax purposes:—*Held*: in computing its profits for income tax purposes the co. was entitled to deduct only the difference between the railway traffic charges & the allowances granted in respect of those charges.—*WESTCOMBE v. HADNOCK QUARRIES, LTD.* (1931), 16 Tax Cas. 137.

**222a. Company.—Payment to director as inducement to retire.**—*Held*: a payment by a co. to a director in order to induce him to retire, in circumstances in which the other directors had come to the conclusion that it was essential in the interests of the co. that he should retire, was a business expense deductible from the co.'s profits for purposes of income tax.—*MITCHELL v. NOBLE (B. W.), LTD.*, [1927] 1 K. B. 719; 96 L. J. K. B. 484; 137 L. T. 33; 43 T. L. R. 245; 71 Sol. Jo. 175; *sub nom.* *NOBLE (B. W.), LTD. v. MITCHELL, MITCHELL v. NOBLE (B. W.), LTD.*, 11 Tax Cas. 372, C. A.

*Annotations*:—*Distd. Overy v. Ashford, Dunn & Co.* (1933), 49 T. L. R. 230. *Consd. Collins v. Adamson & Co.*, [1938] 1 K. B. 477. *Refd. Morley v. Lawford* (1928), 44 T. L. R. 716; *Anglo-Persian Oil Co. v. Dale* (1931), 47 T. L. R. 487; *Investment Trust Corp., Ltd. v. Singapore Traction Co.*, [1935] Ch. 615.

**222b. Payment to director as compensation for loss of office.**—The directors & sole shareholders of resp. co. sold all their shares, including their qualification shares, to a purchasing co. under the terms of an agreement which provided (*inter alia*) that a balance-sheet & profit & loss account should be taken as at the date of sale. In pursuance of this agreement a profit & loss account was taken which showed an amount of £5,928 standing as a profit. By a resolution of resp. co. it was resolved that that sum should be paid to the retiring directors, as to £2,928 thereof as "remuneration" & as to £3,000 as "compensation for loss of office," & these sums were duly paid:—*Held*: resp. co. were not entitled to deduct the sum of £3,000 from their assessment under Sched. D as "money laid out or expended for the purposes of the trade" within r. 3 of the Rules to Cases I. & II., of Sched. D.—*OVERY v. ASHFORD, DUNN & CO., LTD.* (1933), 49 T. L. R. 230; 17 Tax Cas. 497.

**223. Add. Annotation**:—*Folld. Thomas Merthyr Colliery Co. v. Davis* (1932), 48 T. L. R. 633.

**223a.**

—*Appls.*, a colliery co., were subscribing members of a coal-owners' assocn. which had been formed (*inter alia*) to indemnify its members against deficiency & stoppage of output by reason of strikes. Part of these contributions was applied by the association as a contribution to the Conciliation Board, & part was contributed to the funds of the Mining Association of Great Britain, which in some matters looked after the interests of coal-owners. *Appls.* claimed that their subscriptions to the assocn. were proper deductions in arriving at their profits:—*Held*: *appls.* were not entitled to deduct that part of their subscriptions which was applied towards an indemnity against loss of output by reason of strikes & to the funds of the Mining Assocn., but they were entitled to deduct the part which was applied as a contribution to the Conciliation Board.—*THOMAS MERTHYR COLLIERY CO., LTD. v. DAVIS*, [1933] 1 K. B. 349; 102 L. J. K. B. 25; 148 L. T. 32; 48 T. L. R. 633; 17 Tax Cas. 519, C. A.

**224. Add. Annotation**:—*Refd. Thomas Merthyr Colliery Co. v. Davis*, [1933] 1 K. B. 349.

**224a.** — *Applt. co.* was a member of the Cold Rolled Brass & Copper Assocn., an unincorporated body having as its objects the fixing of prices for goods manufactured by its members, & the provision of a common fund to be applied in the interests of its members. The common fund consisted of members' entrance fees & monthly payments proportional to output tonnage, & in the event of the Association being wound up was distributable between the members in proportion to their contributions. In 1918 the Ministry of Munitions had large surplus stocks of brass & copper & the Assocn. was specially authorised by its members to negotiate with the Ministry in regard to its disposal. As a result the Assocn. contracted to purchase the metal from the Ministry at fixed prices per ton, & this contract, & also the draft arrangement for the disposal of the metal to the Assocn.'s members, were subsequently approved by the Assocn. in general meeting. By these arrangements members were given, firstly, an option of purchasing a quantity of the metal proportional to their monthly output, at prices scheduled by the Association varying according to quality & size, & secondly, an option to apply for any residue. The whole of the metal was thus disposed of by the Association at prices higher than those paid to the Ministry, & the "profit" was carried to the common fund. *Appls.* debited in their accounts the full cost of the metal purchased by them from the Assocn., & did not bring into the accounts their share in the "profit." They were assessed to income tax under Case I. of Sched. D. on the basis that they were entitled to deduct only the net cost of the metal, i.e. the full cost less their share in the "profit":—*Held*: *appls.* were able to share in the distribution of the metal only on payment of the prices scheduled by the Assocn.; their share in the "profit" was in proportion, not to the price paid, but to the quantity taken; the profit carried to the common fund could not be regarded as the individual members' profit; & in the circumstances *appls.* were entitled to deduct

as a business expense the price paid by them to the Assocn.—*CLIFFORD & SON, LTD. v. PUTTICK, CLIFFORD & SON, LTD. v. INLAND REVENUE COMRS. (1928), 14 Tax Cas. 189.*

**224b. Subscription to guarantee fund of British Empire Exhibition.**—Applts., asphalters, subscribed to the guarantee fund of the British Empire Exhibition at Wembley, solely, as the General Comrs. found, in the hope of obtaining preferential treatment in the allocation of contracts for asphalt work within the exhibition grounds. They did not in fact obtain any contract at all from the exhibition authorities. Having been called upon to pay a considerable part of the amount guaranteed they sought to deduct the sum so paid from their profits assessable to income tax as a trade expense. The General Comrs. held it was an allowable deduction:—*Held*: the question was one of fact, & as there was evidence to support the finding of the General Comrs., their decision must be affirmed.—*MORLEY v. LAWFOOD & CO. (1928), 140 L. T. 125; 45 T. L. R. 30; 72 Sol. Jo. 825; 14 Tax Cas. 229, C. A.*

*Annotations*:—*Distd. Hagart & Burn-Murdoch v. I. R. Comrs., [1929] A. C. 386. Rejd. Bourne & Hollingsworth v. Ogden (1929), 45 T. L. R. 222; Golden Horse Shoe (New), Ltd. v. Thurgood, [1933] 1 K. B. 548.*

**224c. Subscription to hospital—Where employee treated.**—Applts., who gave considerable subscriptions to a hospital at which their employees were frequently treated, claimed to deduct the amount of the subscriptions as a trade expense under r. 3 (a) of the rules applicable to Cases I. & II. of Sched. D.:—*Held*: the question whether the subscriptions were given with the view of obtaining a staff that would earn profits, or whether they were given merely because the staff had in fact been treated at the hospital, was a question of fact for the Special Comrs., & their decision must be affirmed.—*BOURNE & HOLLINGSWORTH, LTD. v. OGDEN (1929), 45 T. L. R. 222; 73 Sol. Jo. 127; 14 Tax Cas. 349.*

**224d. Percentage of net profits payable to another company for benefit of experience.**—By an agreement dated May 18, 1926, a co., which was carrying on business as manufacturers of beet sugar, agreed to pay to two bodies in each of four years for division between them as they mutually agreed "20 per cent. of the net profits of the co. in consideration of their giving to the co. the full benefit of their technical & financial knowledge & experience & giving to the co. & its directors advice to the best of their ability respectively on all questions relating to manufacture & finance & disposal of the co.'s products":—*Held*: in ascertaining the profits or gains of the co. for any year assessable to income tax under Sched. D of 1918 Act, the sum payable to the two bodies under this agreement out of the earnings of the co. should be allowed as a deduction as being money wholly or exclusively laid out or expended for the purposes of the trade "within rule 3 (a) of the Rules applicable to Cases I. & II.

*Semle*: where an assessment has been made for purposes of income tax under Sched. D of 1918 Act, with full knowledge of the facts, & a certain deduction has been allowed in assessing the profits or gains, the mere fact that the Surveyor of Taxes afterwards changes his opinion as to the deduction

having been properly allowed is not a ground for making an additional assessment under sect. 125 of 1918 Act.—*BRITISH SUGAR MANUFACTURERS, LTD. v. HARRIS, [1938] 2 K. B. 220; [1938] 1 All E. R. 149; 107 L. J. K. B. 472; 159 L. T. 305; 82 Sol. Jo. 75; 21 Tax Cas. 528, C. A.*

**225a. Annual payment for goodwill.**—Resp. co. acquired by assignment, in Jan. 1928, the rights of the assignor under (a) an underlease by which he became lessee of premises used as a cinema hall, together with the use of fixtures, fittings & furniture at a yearly rent, & (b) a deed supplemental to the underlease, by which he was granted the goodwill of the cinema business carried on at these premises subject to a payment of £500 *per annum*. The deed, which was to run concurrently with the underlease, *i.e.*, for thirteen years, & was to cease if the underlease was terminated, included an option for the purchase of the head lease of the premises & the goodwill for £3,500. On appeal against assessments to income tax, Sched. D., for the years 1927–28, 1928–29 & 1929–30, resp. co. claimed a deduction in computing its assessable profits in respect of the payment of £500 *per annum* under the deed. The Crown contended that the payment was a capital payment, or an annual payment the deduction of which was prohibited by rule 3 (l), Cases I. & II., Sched. D. The Special Comrs. decided that the payment was not payment of a capital sum or a distribution of profits made by way of an annual payment but a necessary revenue expense of the co.:—*Held*: the payment under the deed was an admissible deduction in computing resp. co.'s liability.—*OGDEN v. MEDWAY CINEMAS, LTD. (1934), 18 Tax Cas. 691.*

**225b. Issue of shares to employees at par—Difference between par & market value.**—*LOWRY v. CONSOLIDATED AFRICAN SELECTION TRUST, LTD., [1938] 4 All E. R. 689.*

**225c. Consideration for surrender of lease.**—*UNION COLD STORAGE CO., LTD. v. ELLERKER, [1938] 4 All E. R. 692.*

**226a. Liability to bank on loans to meet acceptances—Subsequent compromise of bank's claim.**—Applt., who carried on business as an exporter of cloth, habitually financed his shipments by drawing bills on the buyer in Shanghai & borrowing from a bank in London on the security of the bills & shipping documents. In 1920 a buyer became unable to meet his acceptances, & applt. found himself responsible to the bank for a large sum. In computing his assessable profits for the year ended Mar. 31, 1921, he was allowed to deduct a sum of £22,410, being the estimated amount of the bank's claim against him, but subsequently he advanced certain contentions against the bank & eventually, at the end of 1922, the bank accepted £8,000 in settlement of its claim. Applt. objected to additional assessments made in order to bring into charge the difference between the £8,000 & the £22,410 previously allowed, contending that the sums advanced by the bank were a liability for the year ended Mar. 31, 1921, & that the subsequent reduction of the debt was immaterial in determining his liability for that or any later year:—*Held*: applt.'s transactions with the bank constituted part of his business & that the loss incurred was a trading loss; & the computations for the

purposes of income tax must be reopened & adjusted by reference to the actual amount of this loss.—**BERNHARD v. GAHAN**, **BERNHARD v. INLAND REVENUE COMRS.** (1928), 13 Tax Cas. 723, C. A.

*Annotation*.—**Refd.** **British Mexican Petroleum Co. v. Jackson**, **British Mexican Petroleum Co. v. I. R. Comrs.** (1932), 16 Tax Cas. 570.

**226b. Royalties—Deduction of commission & expenses of literary agents.**—**CURTIS BROWN, LTD. v. JARVIS**; **JARVIS v. CURTIS BROWN, LTD.**, No. 991, *ante*.

**226c. Legal costs—Income tax appeal.**—The resps. claimed as a deduction in computing their profits for income tax purposes the cost of employing solrs. & counsel in connection with an appeal to the Special Comrs. against assessments to income tax under Sched. D. in respect of their trading profits:—**Held**: the legal costs were not an admissible deduction.—**ALLEN v. FARQUHARSON BROS. & Co.** (1932), 17 Tax Cas. 59.

**226d. Expenses of earning profits exempt from tax.**—**HUGHES v. BANK OF NEW ZEALAND**, No. 189a, *ante*.

**227. Add. Annotations**.—**Consd. I. R. Comrs. v. Scottish Central Electric Power Co.** (1931), 145 L. T. 169. **Consd. Hoare & Co., Ltd. v. Collyer** (1932), 48 T. L. R. 256. **Refd. Naval Colliery Co. (1897), Ltd. v. I. R. Comrs.** (1928), 138 L. T. 593; **Miller (Lady) v. I. R. Comrs.** (1930), 15 Tax Cas. 25; **Cadbury Bros., Ltd. v. Sinclair** (1933), 149 L. T. 412; **Reed v. Cattermole**, [1936] 2 All E. R. 526; **Collyer v. Hoare & Co., Ltd.**, [1937] 3 All E. R. 491.

**228. Add. Annotation**.—**Refd. Cadbury Bros., Ltd. v. Sinclair** (1933), 149 L. T. 412.

**228a. — Deduction of owner's rates.**—A co. owned & occupied for the purposes of their business certain lands & heritages which were "mills, factories or other similar premises" within 1918 Act. The annual value of those mills & factories was £5,976, & the co. paid owner's rates in respect of these premises to the amount of £1,752 annually. Both in 1927 & 1928 the co. were, for the purposes of Sched. A, allowed to deduct the sum of £1,752 paid by them in respect of owner's rates from their assessment of £5,976, & in making their return for Sched. D they claimed to be allowed to deduct the £5,976 as the annual value of the premises & also the £1,752 as disbursement of money wholly & exclusively laid out or expended for the purposes of the trade:—**Held**: the owner's rates payable by a trader who owns the premises in which he conducts his trade are not a permissible deduction in the computation of his profits & gains for the purpose of assessment under Sched. D, whether or not the premises are of the nature of "mills, factories or other similar premises."—**INLAND REVENUE COMRS. v. SCOTTISH CENTRAL ELECTRIC POWER CO.** (1931), 145 L. T. 169; 15 Tax Cas. 761, H. L.

*Annotation*.—**Refd. Hughes v. Bank of New Zealand**, [1937] 1 K. B. 419.

**PART V. SECT. 2, SUB-SECT. 7.—B. p. i.**—A co. owned, & occupied for the purpose of its trade, land & heritages, which were "mills, factories or other similar premises," within Rules applicable to Cases I. & II.,

r. 5 (2):—**Held**: in estimating the profits or gains of the co. for the purpose of assessment to income tax under Schedule D, the whole annual value of its trading premises fell to be deducted, & not merely the amount

**228b. — Factory & dining hall assessed as one unit.**—A block of buildings, known as the dining block, & containing dining-rooms, kitchens, dressing & changing rooms, etc., was erected by the applt. co. & connected with their factory by bridges & covered ways. The annual value of the whole of the premises was assessed under Sched. A as one unit of assessment. In computing the deduction to be allowed to applt. co. from its trading profits in respect of the dining block as being a hereditament used for the purpose of the co.'s trade, the revenue authorities had treated the dining block as not being a mill or factory, or similar to a mill or factory, & therefore as not qualifying for the larger deduction allowed by the proviso to r. 5 (2) of Rules applicable to Cases I. & II. of Sched. D. On appeal by the co.:—**Held**: the factory, together with the dining block, must be treated as the unit of assessment, & there could be no splitting up or apportionment in respect of the dining block. The word "premises" in the proviso to r. 5 (2) means "the assessable unit."—**CADBURY BROS., LTD. v. SINCLAIR**, [1934] 2 K. B. 389; 102 L. J. K. B. 468; 148 L. T. 478; 49 T. L. R. 208; 77 Sol. Jo. 138; 18 Tax Cas. 157; *reusd.* on other grounds (1933), 149 L. T. 412, C. A.

**228c. — Statutory exemption of lands from taxation.**—Lands at K. leased to applts. on which they had erected a factory where they carried on their business, were, by a statute of Car. 2, exempt at all times thereafter from the payment of all taxes whatsoever thereafter to be imposed thereon, notwithstanding any statute law to the contrary. Having regard to the provisions of that statute no assessment had been made on the lands under Sched. A, but a deduction equivalent to the annual value of such lands had been allowed in computing the profits of the business carried on thereon for the purposes of Sched. D. After the passing of Finance Act, 1926 (c. 22), amending the 1918 Act, the revenue authorities disallowed any such deduction:—**Held**: applts. were still entitled to make the deduction of the annual value of the lands from the computation of the profits of their business for the purposes of Sched. D, notwithstanding the amendments by Finance Act, 1926 (c. 22), made to 1918 Act, as, if the privilege of making any such deduction were withdrawn, the sum on which the co. would have to pay tax would be larger, & thereby taxation would be imposed contrary to the express provisions of the statute of Car. 2. Though the ct. allowed the appeal on that ground which, though raised before **FINLAY, J.**, had not been referred to in his judgment, the ct. refrained from expressing any opinion as to the correctness of the decision of **FINLAY, J.**, upon the points which formed the ground of his decision.—**CADBURY BROS., LTD. v. SINCLAIR**, [1933] 103 L. J. K. B. 29; 149 L. T. 412; 18 Tax Cas. 157, C. A.

*Annotation*.—**Consd. Hughes v. Bank of New Zealand**, [1937] 1 K. B. 419.

at which the premises were actually assessed for the purpose of collection of tax under Schedule A.—**INLAND REVENUE COMRS. v. SCOTTISH CENTRAL ELECTRIC POWER CO.**, [1928] S. C. 260. —**SCOT.**

229. *Add. Annotations*:—**Consd.** *Fry v. Burma Corp.* (1929), 98 L. J. K. B. 693. **Refd.** *I. R. Comrs. v. Scottish Central Electric Power Co.* (1931), 145 L. T. 169; *Cadbury Bros., Ltd. v. Sinclair* (1933), 149 L. T. 412.

229a. *Partnership premises leased from senior partner.*—When under the terms of a partnership deed one of the partners permitted the partnership to have the use & occupation of premises for the partnership business on the partnership paying to him a rent which, although in excess of the net Sched. A. assessment in respect of the premises, had been found by the Comrs. for the special purposes of the Income Tax Acts to be a fair & proper rent:—**Held**: in computing the profits or gains of the partnership for the purposes of assessment to income tax under Sched. D., the rent was properly allowed as a deduction, having regard to rule 3 (c) of the Rules applicable to Cases I. & II.—**HEASTIE v. VEITCH & Co.**, [1934] 1 K. B. 535; 103 L. J. K. B. 492; 150 L. T. 228; 18 Tax Cas. 305, C. A.

*Annotation*:—**Refd.** *Dawson v. Counsell*, [1938] 3 All E. R. 5.

231. *Add. Annotations*:—**Consd.** *Collyer v. Hoare & Co.*, [1931] 1 K. B. 123. **Refd.** *Collyer v. Hoare & Co., Ltd.* [1937] 3 All E. R. 491.

235. *Add. Citation*:—12 Tax Cas. 227.

*Add. Annotations*:—**Consd.** *Morley v. Lawford & Co.* (1928), 140 L. T. 125. **Refd.** *Allen v. Farquharson Bros. & Co.* (1932), 17 Tax Cas. 59.

236. *Add. Citation*:—12 Tax Cas. 232.

*Add. Annotations*:—**Consd.** *Morley v. Lawford & Co.* (1928), 140 L. T. 125; *Mann v. Nash* (1932), 48 T. L. R. 287. **Refd.** *Finance Minister v. Smith* (1926), 95 L. J. P. C. 193; *Allen v. Farquharson Bros. & Co.* (1932), 17 Tax Cas. 59.

# PART V. SECT. 2, SUB-SECT. 7.—C.

230 iv. —.—The profits earned by that part of applt. co.'s ry. undertaking which was operated in the Bechuanaland Protectorate were liable to income tax in the Protectorate. Owing to the generally worn state of the track applts. completely relaid 33½ miles of track, the new line being of the same weight as the old line. On a further 40½ miles of the track the old rails were relaid, but new sleepers were put in—steel sleepers for 38½ miles & wooden sleepers for 2 miles. In their accounts for the year to Sept. 30, 1930, applts. debited a sum of £252,174 as "renewals of permanent way." The income tax collector of the Protectorate disallowed that deduction, & his decision was upheld by the Special Ct. of the Protectorate. On appeal:—**Held**: the expenditure was an outgoing "not of a capital nature" within Bechuanaland Protectorate Income Tax Proclamation, 1922, s. 15 (1) (a), & was "expended for the repairs of property occupied for the purpose of trade or in respect of which income is receivable" within sect. 15 (1) (b) of the Proclamation, & was, therefore, under the sect. an allowable deduction for income tax purposes.—**RHODESIA RAILWAYS, LTD. v. BECHUANALAND INCOME TAX COLLECTOR**, [1933] A. C. 368; 102 L. J. P. C. 72; 149 L. T. 3; 49 T. L. R. 376; 77 Sol. Jo. 235, P. C.—**BECHUANALAND**.

# PART V. SECT. 2, SUB-SECT. 7.—D.

sa. *Statutory company—Creation of reserve fund—Loss in realisation of investments forming part of fund.*—**Held**: since the words of the Act

authorising the creation of the reserve fund were permissive & enabling only, the exercise of the power was discretionary, & the loss was not an allowable deduction. *Semble*: it would have been otherwise, if the Act had imposed a duty on the co. to create a reserve fund.—**ALLIANCE & DUBLIN CONSUMERS' GAS CO. v. DAVIES**, [1926] 1 R. 372.—**IR**.

sb. *Bank—Losses written off during year—Method of computation.*—**Re BANK OF MONTREAL ASSESSMENT** (1909), 14 B. C. R. 282.—**CAN**.

sc. —.—*Losses on sales of temporary investments in Government securities.*—**Held**: such temporary investments could not be regarded as an investment of capital; the investment & realisation of such funds from time to time was merely part of the bank's ordinary business, & the loss incurred was a loss incurred in the production of income.—**TAXATION COMR. v. COMMERCIAL BANKING CO. OF SYDNEY** (1927), 27 S. R. N. S. W. 231; 44 N. S. W. W. N. 65.—**AUS**.

sd. *Carry forward of loss—Finance Act, 1926 (c. 22), s. 33.*—**Resp.** commenced business on June 1, 1929. The first accounts of his business were for the period of ten months to Mar. 31, 1930, & showed a loss of £61. His second accounts were for the year to Mar. 31, 1931, & showed a profit of £142. **Resp.**'s income tax liability was computed for the income tax years as follows:—

1929-30.	
Loss for ten months to Mar. 31,	
1930	— — — £61
	it - NIL.

236a. *Calls on shares in company formed to take over trading company's buying agency.*—**Held**: not a trading loss, but a loss of capital & not a sum that could be properly deducted.—**M. JACOBS YOUNG & Co., LTD. v. HARRIS** (1926), 11 Tax Cas. 221.

238. *Add. Annotations*:—**Consd.** *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1933] 1 K. B. 548. **Refd.** *Naval Colliery Co.* (1897), Ltd. v. I. R. Comrs. (1928), 138 L. T. 593; *Collyer v. Hoare & Co.*, [1931] 1 K. B. 123; *Hughes v. British Burmah Petroleum Co.* (1932), 17 Tax Cas. 286; *Birmingham Corp. v. Barnes* (1935), 19 Tax Cas. 195.

239. *Add. Annotations*:—*As to* (1) **Consd.** *Mallett v. Staveley Coal & Iron Co.*, [1928] 2 K. B. 405. **Refd.** *I. R. Comrs. v. Northfleet Coal & Ballast Co.* (1927), 12 Tax Cas. 1102; *Thompson v. I. R. Comrs.*, I. R. Comrs. v. Thompson (1927), 12 Tax Cas. 1091; *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1933] 1 K. B. 548.

240. *Add. Annotation*:—**Refd.** *Eastman v. Shaw* (1927), 43 T. L. R. 549.

241a. *Payment of liabilities of subsidiary company.*—**Held**: a loss of capital, & no deduction could be allowed.—**BAKER v. MABIE TODD & Co., LTD.** (1927), 13 Tax Cas. 235.

244. *Add. Annotations*:—**Refd.** *Mallett v. Staveley Coal & Iron Co.* (1927), 138 L. T. 201; *Collyer v. Hoare & Co.*, [1931] 1 K. B. 123.

244a. —.—A co. leased a cinematograph theatre with its fixtures, furniture, machinery, etc., for twenty-one years under a lease which provided for an annual rent & a premium payable by quarterly instalments over the whole period of the lease. The lessors reserved the right in certain circumstances to terminate the lease at six months' notice. If this right were exercised all

1930-31.

Loss for ten months to Mar. 31,	
1930	— — — £61
Profit for two months to	
May 31, 1930, i.e., one-	
sixth of £142	— — — 24
Loss	— £37
Assessment	— NIL.

1931-32.

Profit for year to Mar. 31,	
1931	— — — £142

An assessment was made for the year 1931-32 in the sum of £142, against which the inspector of taxes was prepared to agree to a set-off under Finance Act, 1926 (c. 22), s. 33, of £37.

**Resp.** claimed that under sect. 33 he was entitled to set the losses of £61 & £37, total £98, which he contended were "computed in like manner as profits & gains under the Rules applicable to Cases I. & II. of Sched. D. against the assessment of £142. The General Comrs. allowed the claim & reduced the 1931-32 assessment to £44 (£142 less £98).—**Held**: the relief granted by sect. 33 extended only to the actual loss sustained which, as computed, was £61, & that relief having been effectively given in 1930-31 to the extent of £24, the amount to be set-off against the 1931-32 assessment was the balance only of £37.—**INLAND REVENUE v. ADAMSON**, [1933] S. C. 23; 17 Tax Cas. 679.—**SCOT**.

sg. *Right to relief—Liquidator not entitled to decide.*—A liquidator of a co. is not entitled to reject a demand for duly assessed tax on the ground that the co. is entitled to relief under

future instalments of the premium were to be cancelled. In negotiations before the terms of the lease were settled there had been a provisional agreement under which a rent was to have been paid equal to the total annual payments of rent & premium secured by the lease. The General Comrs. on appeal proceedings allowed the co.'s claim to deduct from its profits for income tax purposes the instalments of the premium. The Crown appealed:—*Held*: the payments were capital expenditure.—*GREEN v. FAVOURITE CINEMAS, LTD.* (1930), 15 Tax Cas. 390.

*Annotation*.—*Consd. Ogden v. Medway Cinemas, Ltd.* (1934), 18 Tax Cas. 691.

**244b. Payments to lessor by lessee of hotel—In respect of structural improvements.**—Resp. was the lessee of a hotel &, in accordance with the terms of his lease as varied by supplemental agreements, paid to the lessor (*inter alia*) (a) a yearly occupation rent, & (b) "by way of rent," equal half-yearly sums, being "mixed instalments of capital & interest" in repayment of sums expended by the lessor on structural improvements to the hotel. The net Sched. A. assessment on the property was greater than the occupation rent but considerably less than the aggregate annual sums paid by the lessee. On appeal against assessments to income tax under Sched. D. in respect of his profits as a hotel keeper, resp. claimed that the total annual payments were rent for the use & occupa-

tion of the hotel & accordingly an admissible deduction in computing his profits. The Crown contended that the deduction must be limited to the net annual value of the hotel for Sched. A. purposes. The General Comrs. allowed the appeal:—*Held*: the half-yearly payments by resp. to the lessor in respect of the improvements were capital payments & accordingly inadmissible deductions in computing resp.'s liability under Case I of Sched. D.—*AINLEY v. EDENS* (1935), 19 Tax Cas. 303.

**248a. Payment in consideration of surrender of lease—Mining lease.**—Sums paid by a colliery co. to the lessor in consideration of the surrender of a portion of the area demised by a mining lease, & for the release of the co. from the obligations undertaken by the lease, are capital payments, & are not allowable deductions.—*MALLETT v. STAVELEY COAL & IRON CO., LTD.*, [1928] 2 K. B. 405; 97 L. J. K. B. 475; 139 L. T. 241; 13 Tax Cas. 772, C. A.

*Annotations*.—*Folld. Cowher v. Mills* (1927), 13 Tax Cas. 216. *Distd. Anglo-Persian Oil Co. v. Dale* (1931), 47 T. L. R. 487; Greyhound Racing Association (Liverpool), Ltd. v. Cooper, [1936] 2 All E. R. 742. *Consd. Collins v. Adamson & Co.*, [1938] 1 K. B. 477. *Reid. I. R. Comrs. v. Northfleet Coal & Ballast Co.* (1927), 12 Tax Cas. 1102; *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1933] 1 K. B. 548; *Van den Berghs, Ltd. v. Clark*, [1935] A. C. 431.

**248b. ———.**—Resps. carried on business at premises held on a lease expiring in 1923.

rule 8 (2) of rules applicable to Cases I. & II. of Sched. D. until title to relief has been decided by the General Comrs.—*Re AYR PICTURE HOUSES, LTD.* (1928), 13 Tax Cas. 675.—*SCOT.*

#### PART V. SECT. 2, SUB-SECT. 7.—E. (a).

**i. —Loss on trade branch.**—A trader having two branches in his trade (*viz.* a cloth business & a banking business) carried on both, each with borrowed capital; & as the cloth business ended in a loss, he had to close it in 1924; & all that portion of the borrowed capital which was sunk in the cloth business was lost before 1924. The trader having had to pay interest on that lost capital in 1924–25, the year of assessment, claimed deduction therefor from the assessable profits of his remaining banking business for the year 1924–25:—*Held*: though the branches were distinct, the trade was one, & though the lost capital was not available for use in the trade, *viz.* the banking business, in the year of assessment, the interest paid on it should be deducted under Indian Income Tax Act, s. 10 (2) (iii).—*ARUNACHALAM CHETTY v. INCOME TAX COMRS.* (1928), 1 L. R. 52 Mad. 296.—*IND.*

#### PART V. SECT. 2, SUB-SECT. 7.—E. (b).

**246 ii. —Instalment of purchase price—& costs of plant additions.**—*Held*: capital expenditure.—*ROSEBERRY-SURPRISE MINING CO. v. R.*, [1924] S. C. 445; [1924] 4 D. L. R. 197; [1924] 1 W. W. R. 1017.—*CAN.*

**246 iii. —Restoration of surface.**—Under the terms of a mineral lease, a colliery co. was obliged to restore to an arable state all ground occupied by it or damaged by its workings, or at its option, to pay the lessor for all such ground not so restored, at the rate of thirty years' purchase of the agricultural value thereof. In the exercise of its option, the co. paid the lessor a sum of £6,104, as representing the value of the damaged lands:—*Held*:

such payment was in the nature of capital expenditure, & was not therefore a proper deduction in computing the co.'s liability to income tax.—*ADDIE (ROBERT) & SONS' COLLIERIES, LTD. v. INLAND REVENUE COMRS.*, [1924] S. C. 231; 8 Tax Cas. 671.—*SCOT.*

**j. —**—The L. Corpn., having installed modern plant & machinery in their gas works, dismissed a number of their workmen in consequence. The corpn. had no power to pay any compensation by way of pensions or otherwise to these men, so they promoted a Private Bill to authorise them to do so. In computing the liability to income tax of the corpn. for the year in which the Bill was promoted, the Comrs. were of opinion that the cost of promoting the Bill was not in the nature of capital expenditure but was a proper debit item to be set against the incomings of the undertaking; that it was a necessary trading expense incurred in the course of carrying on the undertaking:—*Held*: the cost of promoting the Bill was an admissible deduction.—*MCGARRY v. LIMERICK GAS COMMITTEE*, [1932] 1 R. 125.—*IR.*

**so. Railway company—Expense of making deviations.**—*Held*: sums expended by a railway co. in making deviations in its line from time to time were expenditure of a capital nature.—*RHODESIA RYS. v. COMR. OF TAXES*, [1925] App. D. 438.—*S. AF.*

**st. Company owning one ship—Ship seized & used by enemy—Expenditure on reconditioning ship.**—*Held*: not a proper deduction, in respect that the expenses were not a recurring maintenance expenditure, but were of the nature of capital outlay.—*INLAND REVENUE v. GRANITE CITY S. S. CO.*, [1927] S. C. 705; 13 Tax Cas. 1.—*SCOT.*

**sh. Loss on conversion of plant & works—Under arrangement with Minister of Munitions.**—*Held*: a loss of capital, & not admissible as a deduction for income tax purposes.—*LOTHIAN CHEMICAL CO., LTD. v.*

*ROGERS, LOTHIAN CHEMICAL CO., LTD. v. INLAND REVENUE COMRS.* (1926), 11 Tax Cas. 508.—*SCOT.*

**sj. Value of wool on backs of sheep purchased with station.**—*WEBSTER v. WESTERN AUSTRALIA TAXATION DEPUTY COMR.* (1927), 39 C. L. R. 130; [1927] Argus L. R. 113.—*AUS.*

**sk. Cost of reconstruction of shop.**—*HYAM v. INLAND REVENUE COMRS.*, [1929] S. C. (Ct. of Sess.) 384.—*SCOT.*

**sl. Consideration for right to deposit material by carting contractor.**—*INLAND REVENUE COMRS. v. ADAM*, [1928] S. C. 738; 14 Tax Cas. 34.—*SCOT.*

**so. Costs of settling copyright action.**—A broadcasting co. whose income was derived from license fees paid by the owners of wireless receivers, to earn that income had to provide a programme, including musical items. The co. was threatened with an action for the infringement of copyright in connection with its broadcasting certain items, & it was necessary to satisfy the claims of the owners of the copyright. A compromise was reached, by which terms of payment for the use of the copyright items were fixed:—*Held*: the costs of negotiating the settlement was a revenue expenditure, necessary to enable the co. to carry on its business & earn its income, & was a fair charge against the income of the assessable year. The expressions "outgoings," "expenses" & "capital" must be understood in the sense in which they are accepted by practical men of affairs, according to the nature of the particular business & the circumstances of the particular case.—*CENTRAL BROADCASTERS, LTD. v. SOUTH AUSTRALIA DEPUTY FEDERAL TAXATION COMR.*, [1934] S. A. S. R. 50; 2 A. T. D. 434.—*AUS.*

**sq. Sum paid as compensation for termination of agency agreement.**—A firm of manufacturers' agents held for many years an agreement constituting them the sole selling agents in Scotland of an English co. In terms of the agreement the firm were entitled to receive a percentage on the value of

In 1916 the business was closed down, & the lessor agreed to accept a surrender of the lease in consideration of a sum to be paid by instalments of £250 a year, & resps. issued a debenture to the lessor securing the instalments by a floating charge on all their assets. In 1921 the lessor accepted £600 from resps. in satisfaction of all further liability under the debenture:—*Held*: the payment of £600 was not an admissible deduction.—*Cowcher v. Mills & Co., Ltd.* (1927), 13 Tax Cas. 216.

**248c. Payment in respect of indemnity against liability for surface damage.**—In each of these cases the co. carried on the business of colliery proprietor. Each co. had taken certain leases of coal seams, under which, in consideration of covenants by the lessors indemnifying the co. against liability for surface damage, the co. undertook to make payments to the lessors on specified accounting dates in respect of each acre or part of an acre beneath which coal had first been worked since the previous accounting date. Under all but one of these leases a payment in respect of a particular acre covered all liability in respect of subsequent workings beneath that acre; under the remaining lease separate payments, up to a maximum of four, were required to be made on the first working of each seam beneath a particular acre. The cos. contended that the payments to the lessors under the surface damage provisions of these leases were admissible deductions in computing profits for income tax purposes. The co. in the first case replaced a chimney which had become unsafe by a new chimney, erected on an adjacent site, which was admitted to be an improvement on the old one. No allowance under Finance Act, 1919 (c. 32), s. 18 (2), or of wear & tear, in respect of the old chimney, had ever been given. The co. claimed as a deduction in computing its profits for income tax purposes that part of the cost of the new chimney which was charged in its accounts for the year forming the basis period for the 1930-31 assessment. The Special Comrs. on appeal held that the sum paid by the cos. to the lessors in consideration for the indemnities against liability for surface damage were of the nature of recurring business expenditure & constituted necessary working expenditure, & allowed the sums as deductions. They also held that the replacement of the chimney was a replacement of a capital nature, & that no part of the expenditure upon it could be allowed:—*Held*: the Special Comrs.' decisions were correct.—*O'Grady v. Bullcroft Main Collieries, Ltd., O'Grady v. Markham Main Colliery, Ltd.* (1932), 17 Tax Cas. 93.

*Annotation*:—*Consd. Margrett v. Lowestoft Water & Gas Co.* (1935), 19 Tax Cas. 481.

all orders received from Scotland, the minimum sum payable to them annually being fixed at £2,000. The agreement was more than once renewed, & in Sept. 1932, it was continued for three years from Sept. 30, 1932. During the later years of the agreement the firm held about eleven agencies for various manufacturers, & their gross receipts averaged about £4,000 annually, including the fixed minimum payment of £2,000 from the English co.

In 1934, at the request of the English co., it was agreed that the agency agreement should be terminated on Sept. 30, 1934, being one year prior to its natural expiry. The English co. paid the firm the sum of £1,500 as compensation for the termination of their agreement before its natural expiry. The firm contended that this sum of £1,500 was not chargeable to income tax, on the ground that it was a capital payment made as compensa-

**248d. Purchase of oil wells.**—Resp. co. which carried on the business of oil producing & refining had for many years bought oil from an Indian oil co. By agreement, in 1928, the oil co. agreed to sell to resp. co. (a) its plant, equipment, casing, tanks, pipe-lines, etc., & (b) all oil won on & after Oct. 1, 1928, from its existing wells. The expressed consideration for the unwon oil was £70,000, which was stated to have been calculated by reference to the estimated production of the wells. The consideration was satisfied by the issue to the oil co. of shares in resp. co. A sum of £70,000 was placed to "Crude Oil Suspense Account" in the books of the resp. co. to represent the oil purchased, & as oil was produced, a sum equal to two rupees per barrel was transferred from that account to the co.'s revenue account to represent the actual purchase of oil. At July 31, 1929, £19,896 had been so transferred. Resp. co. contended that in principle the sum of £70,000 was an admissible deduction in computing its profits for income tax purposes & claimed a deduction in computing its profits for the year ended July 31, 1929, of the sum of £19,896, representing, as it contended, the cost of stock actually purchased in that year:—*Held*: the £70,000 was a capital expenditure & no part of it was admissible as a deduction.—*Hughes v. British Burmah Petroleum Co., Ltd.* (1932), 17 Tax Cas. 286.

**248e. Replacement of chimney.**—*O'Grady v. Bullcroft Main Collieries, Ltd., O'Grady v. Markham Main Collieries, Ltd., Income Tax, No. 248c, ante.*

**249. Add. Annotations:**—*Consd. British Insulated & Helsby Cables v. Atherton*, [1926] A. 205. *Refd. Mitchell v. Noble* (1926), 43 T. L. R. 100.

**249a. Payment to agent to terminate agency.**—The Anglo-Persian Oil Co. paid to its agents in Persia the sum of £300,000, in compensation for the latter relinquishing a contract of agency. The co. treated that sum in its books as a payment out of revenue, & charged instalments of £60,000 to revenue account during each of the following five years. The Crown claimed that these were not permissible deductions, but should be placed to capital account:—*Held*: (1) the question was not entirely one of fact, on which the decision of the comrs. was binding, for questions as to what are, or are not, permissible deductions turn upon certain defined principles of law, as laid down by Lord Cave in *British Insulated & Helsby Cables, Ltd. v. Atherton*, No. 264; (2) in making the payment the co. was not enlarging its operations, nor improving its goodwill. It was not, within the meaning of Lord Cave in *Atherton's Case*, "bringing into existence an asset or an advantage for the enduring benefit of its trade." The

tion for the disorganisation of the structure of their business:—*Held*: the sum was chargeable to income tax, in respect that it was really paid as compensation for loss of profits during the last year of the agency agreement.

Observed, that a different decision might have been reached if the agreement had had a considerable period still to run.—*Kelsall Parsons & Co. v. Inland Revenue*, [1938] S. C. 238.—SCOT.



payments were such as the co. might have made for cancellation of an onerous contract to supply its products; they were payments attributable not to fixed but to circulating capital & might properly be debited to revenue account.—**ANGLO-PERSIAN OIL CO., LTD. v. DALE**, [1932] 1 K. B. 124; 100 L. J. K. B. 504; 145 L. T. 529; 47 T. L. R. 487; 75 Sol. Jo. 408; 16 Tax Cas. 253, C. A.

*Annotations*:—*As to* (2) **Consd.** *Investment Trust Corp., Ltd. v. Singapore Traction Co.*, [1935] Ch. 615; *Collins v. Adamson & Co.*, [1938] 1 K. B. 477. **Refd.** *Hughes v. British Burmah Petroleum Co.* (1932), 17 Tax Cas. 286; *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1933] 1 K. B. 548; *Van den Berghs, Ltd. v. Clark*, [1935] A. C. 431; *Whelan v. Dover Harbour Board* (1934), 151 L. T. 288.

**249b. Payment to terminate pooling agreement.**—

An English co. with an issued share capital of £3,575,000, carried on a very extensive business as manufacturers of margarine & other substitutes for butter. Their articles of assocn. empowered them to act in many subsidiary capacities such as those of importers, dealers, cattle breeders, crushers & merchants of seeds, shipowners, warehousemen & others; & also to enter into trading arrangements with persons engaged in any enterprises which the co. was authorised to carry on. Their principal trade rivals in the manufacture of margarine were a Dutch co. In Feb. 1908, these two cos. entered into an agreement to share profits & losses in the proportion which, on an average of five years, the profits of the rival tradings in margarine bore to each other. In July, 1913, the former agreement was extended so as to include profits & losses in connection with the acquisition & exercise of certain patent rights granted for a process of hardening oils &, with this extension, was prolonged until the end of 1940. Each co. carried on its business independently & acted on the two agreements until the end of 1913. During the War the agreements could not be observed on either side. In Oct. 1920, a third agreement was entered into by which the former agreements were amended, & it was agreed that, as amended, they should continue in force until the end of 1940. In particular it was agreed that the results of trading in the year 1914 & later years should be ascertained by accountants on each side, & that any dispute arising under the agreements should be settled by arbn. Disputes arose & became the subject of an arbn. of such complexity & duration that the cos. came to terms by which the agreements were rescinded & the Dutch co. paid the English co. a sum of £450,000 "as damages"; but the parties did not specify the cause of action in respect of which the damages were paid.—**Held**: this sum was in the nature of a capital asset & not an income receipt to be included in computing the profits of trade of the English co.—**VAN DEN BERGHS, LTD. v. CLARK**, [1935] A. C. 431; 104 L. J. K. B. 345; 153 L. T. 171; 51 T. L. R. 393; 19 Tax Cas. 390, H. L.

*Annotations*:—**Distd.** *Greyhound Racing Association (Liverpool), Ltd. v. Cooper*, [1936] 2 All E. R. 742. **Consd.** *Collins v. Adamson & Co.*, [1938] 1 K. B. 477. **Refd.** *Du Cros v. Hyall* (1935), 19 Tax Cas. 444.

**250. Add. Annotations**:—**Apld.** *Marsden v. I. R. Comrs.* (1919), 12 Tax Cas. 217. **Refd.** *I. R. Comrs. v. Huntley & Palmers, Ltd.* (1928), 12 Tax Cas. 1209; *Odhams Press, Ltd. v. Cook*, [1938] 2 All E. R. 312.

**250a. Loss of subsidiary company written off trading account.**—**Applt.** co. had a number of wholly controlled subsidiaries for which it did printing work. One of these cos., C. F., Ltd., during the year 1933–34 made a loss upon its trading operations of £2,927. The charge for printing during that year was £10,118, & applt. co. wrote off £2,927 from that sum & contended that that sum of £2,297 was a proper deduction against profits. The Crown contended that the sum of £2,927 had no specific relation to the sum of £10,117 & that it was in fact capital put into the subsidiary co. to support it:—**Held**: the sum of £2,927 was capital put into the subsidiary co. to support it, & was not wholly laid out for the purpose of applt. co.'s trade. It fell, therefore, with the prohibitions of Sched. D, Cases I. & II., r. 3 (a), (e), (f), (i).—**ODHAMS PRESS, LTD. v. COOK**, [1938] 2 All E. R. 312; *affd.* [1938] 4 All E. R. 545, C. A.

**251. Add. Annotations**:—**Refd.** *Small v. Easson* (1920), 12 Tax Cas. 351; *British Insulated & Helsby Cables v. Atherton*, [1926] A. C. 205; *Mitchell v. Noble*, [1927] 1 K. B. 719; *Anglo-Persian Oil Co. v. Dale* (1931), 47 T. L. R. 487; *Rhodesia Railways, Ltd. v. Bechuanaland Protectorate Income Tax Collector*, [1933] A. C. 368; *Whelan v. Dover Harbour Board* (1934), 151 L. T. 288.

**252. Add. Annotations**:—**Refd.** *Mallet v. Staveley Coal & Iron Co.* (1927), 138 L. T. 201; *Anglo-Persian Oil Co. v. Dale* (1931), 47 T. L. R. 487.

**252a. Difference between cost & proceeds of sale of fixtures of branch shops.**—A trading co., with a number of branch shops controlled by a head office, followed a policy of opening & closing their branches in accordance with the local demands & the probabilities of profit or loss:—**Held**: the difference between the cost of new fixtures, fittings, & utensils for the new shops, & the receipts from the sales of equivalent second hand fixtures, etc., from the shops that were closed, was a capital expenditure, & was not a revenue expenditure which could be debited to the trading account of the co. in ascertaining the profits which were assessable to income tax.—**EASTMANS, LTD. v. SHAW, EASTMANS, LTD. v. INLAND REVENUE COMRS.** (1928), 45 T. L. R. 12; 72 Sol. Jo. 744; 14 Tax Cas. 218, H. L.

**252b. Finance company advancing money for hire-purchase contracts—Interest on advances from another finance company.**—**Applt.** co. was incorporated for the purpose of carrying on the business of finance in all its branches with a capital of £1,000, of which £904 was paid up, £900 of the capital being held by an American finance co. Its main business was the advancing of money for the acquisition of motor cars on the hire-purchase system. The co. bought the car in the first instance. The customer paid a deposit & entered into an agreement to hire the car from the co., paying instalments which, in the aggregate, amounted to the balance of the purchase-money plus an additional sum which represented the co.'s gross profit on the transaction. In order to finance the earlier transactions of applt. co., the American co. advanced an initial sum upon which interest was payable at a fixed rate per cent. *per annum*; as



to this interest, no question arose. Further advances were made by the American co., as & when required, to finance fresh hire-purchase transactions & interest on these advances was paid by reference to the amounts outstanding from day to day at rates fluctuating with the American bank rate. The advances were repaid from an account into which customers' instalments were paid. Applt. co. claimed that the interest on the additional advances was an admissible deduction in computing its profits for income tax purposes. The General Comrs., on appeal, refused the deduction, holding that the moneys advanced by the American co. were moneys employed or intended to be employed as capital in the trade:—*Held*: there was evidence upon which the Comrs. could arrive at their conclusion of fact & they had not misdirected themselves in law.—*EUROPEAN INVESTMENT TRUST CO., LTD. v. JACKSON* (1932), 18 Tax Cas. 1.

*Annotation*:—*Reidf. Ward v. Anglo-American Oil Co.* (1934), 19 Tax Cas. 94.

**252c. Note issue.**—In 1925 resp. co., whose trade consists wholly of selling in the United Kingdom (for sterling) petroleum products purchased in America for dollars, had the opportunity of acquiring control of another co.'s business by the purchase of shares for \$7,000,000 payable in dollars in New York. Being short of capital it arranged with New York bankers for the issue in New York of \$8,000,000 one year Gold Notes dated July 15, 1925, & payable on July 15, 1926, to pay for these shares & for the general purposes of its business. The bankers purchased the Notes for re-sale but did not actually pay the co. until July 20, 1925. In July, 1926, the co. having insufficient resources to finance fresh business & to repay the \$8,000,000 Notes due on July 15, 1926, arranged with the bankers for the issue of \$6,000,000 Gold Notes from July 1, 1926, in three series, the first series of \$2,000,000 being payable on July 1, 1927, & the other two (with which the appeal was not concerned) at later dates. The 1926 Note issue was not a renewal of a part of the 1925 loan but an entirely separate & distinct transaction. Each of the Notes in question bore coupons for a full year's interest to be paid in half-yearly instalments. Both principal & interest were payable at the bankers' office in New York in gold coin of the United States. The co. undertook to pay all expenses of preparation, issue & delivery of the Notes. On appeal against assessments under Sched. D., the co. contended that the 1925 Gold Notes & the first series of the 1926 Gold Notes were temporary loans, & that the interest thereon was not annual interest & was (together with the expenses of issue of the Notes & the amount of the exchange adjustments) an admissible deduction in computing its assessable profits:—*Held*: the interest on the Notes in question was annual interest; it was payable on money employed or intended to be employed as capital in the co.'s business, & the interest, the expenses of issue of the Notes & the amount of the exchange adjustments were not admissible deductions in arriving at the co.'s profits.—*WARD v. ANGLO-AMERICAN OIL CO., LTD.* (1934), 19 Tax Cas. 94.

**252d. Water company—New reservoir.**—*MARGRETT v. LOWESTOFT WATER & GAS CO.*, No. 268b, *post*.

**252e. Payment in advance for licence to use patent.**—By an agreement in writing dated Dec. 22, 1934, pltfs. granted to defts. a licence to make use, exercise & vend (for certain specified purposes & over a certain specified period) artificial legs or leg parts made in accordance with a patented invention of pltfs. In consideration of the licence & of the anticipated user of the invention defts. agreed to pay to pltfs. £3,000, £1,000 down & the remainder by instalments. In discharge of one instalment defts. paid £387 10s., being £500 less income tax at the current rate. Pltfs. contended that the sum of £500 was not income of pltfs. from which any income tax was lawfully deductible, but was an instalment of a capital sum & accordingly was capital:—*Held*: defts. were not entitled to deduct the income tax because the instalment of £500 was not by way of income, but was a capital sum.—*DESOUTTER BROS., LTD. v. HANGER & CO., LTD. & ARTIFICIAL LIMB MAKERS, LTD.*, [1936] 1 All E. R. 535; 80 Sol. Jo. 386.

*Annotation*:—*Fold. British Salmson Aero Engines, Ltd. v. I. R. Comrs.*, [1937] 3 All E. R. 464.

**252f. —.**—Rule 21 of the All Scheds. Rules to the Income Tax Act, 1918, does not make tax necessarily payable on any royalty or other sum paid in respect of the user of a patent. It must be determined on the facts of the particular case whether the payment is a capital or income payment, & income tax is payable on income payments only.—*INLAND REVENUE COMRS. v. BRITISH SALMSON AERO ENGINES, LTD., BRITISH SALMSON AERO ENGINES, LTD. v. INLAND REVENUE COMRS.*, [1938] 2 K. B. 482; [1938] 3 All E. R. 283; 107 L. J. K. B. 648; 159 L. T. 147; 54 T. L. R. 904; 82 Sol. Jo. 433, C. A.

**252g. Payment in respect of future rents.**—Applt. co. having acquired a racing track & equipped it for greyhound racing, fell into financial difficulties, & the debenture holders appointed a receiver. The latter hired the track to another co., at first for yearly periods, & then for the period from May 1, 1932, to Apr. 29, 1941. In Mar. 1934, the second co. desiring to go into voluntary liquidation, it became necessary to ascertain its liabilities, & the receiver was approached to fix a sum for which he would accept a full surrender of the hiring agreement. It was eventually agreed that a full surrender would be accepted on a payment of £15,640. That payment was included in the revenue account of applt. co.:—*Held*: the payment was a payment in respect of future rents & was to be treated as income & not as capital. The agreement for hiring the track was not an agreement which related to the whole structure of applt. co.'s business, & did not prevent it from acquiring other capital assets or from carrying on its business in connection with such assets in any manner it pleased.—*GREYHOUND RACING ASSOCN. (LIVERPOOL), LTD. v. COOPER*, [1936] 2 All E. R. 742; 80 Sol. Jo. 738; 20 Tax Cas. 373.

**252h. Acquisition of tangible asset—Whether necessary.**—The taxpayer was a member of

an Association of boilermakers having for its object the maintenance of prices by means of a pooling system. The Association, in order to secure the success of its object, purchased the undertaking of a co. which was a member of the Association in order to close it down & prevent its being acquired by persons outside the Association. It also made a grant to one of its members to enable that member to acquire a controlling interest in an outside competing business & bring its operations within the rules of the Association. The taxpayer sought to deduct from his trading profits for the purpose of income tax assessment his share of the Association's expenses in each instance:—*Held*: in each instance the payment made by the Association had created for the members of the Association advantages of an enduring nature properly to be treated as capital, & in neither case was the deduction which was claimed allowable.—*COLLINS v. ADAMSON (JOSEPH) & CO., ADAMSON (JOSEPH) & CO. v. COLLINS*, [1938] 1 K. K. 477; [1937] 4 All E. R. 236; 107 L. J. K. B. 121; 54 T. L. R. 64; 81 Sol. Jo. 923; 21 Tax Cas. 400.

**252j. Annual payment for licence to use buildings.]**—*RACECOURSE BETTING CONTROL BOARD v. WILD*, [1938] 4 All E. R. 487.

**254. Add. Annotation:—***Refd. Roebank Printing Co., Ltd. v. I. R. Comrs. (1928)*, 13 Tax Cas. 864.

**254a. Nature of estimate to be made.]**—Applts. were assessed under Sched. D. for the years 1921–22 & 1922–23 on the basis of a writing down in two years successively of a doubtful debt. That was done by agreement with the inspector of taxes, who had all the facts before him. Subsequently, by additional first assessments, the writing down of the doubtful debt was disallowed, on the ground that since the writing down of the debt was allowed, it has come to the surveyor's knowledge that applts. had permitted the debtors to increase their indebtedness to them. On an appeal against the additional first assessments, the General Comrs. were not satisfied that the debt or any part of its had been proved to be a bad debt within the meaning

of r. 3 (i) of Cases I. & II. of Sched. D., & they confirmed the additional first assessments:—*Held*: (1) the General Comrs. had not considered the right question. The question which they ought to have considered & decided was whether there had been a "discovery" by the surveyor within sect. 125 of 1918 Act. If they had considered that question there was no evidence which would have supported a decision in favour of the inspector of taxes. The word "discovers" does not mean a mere change of opinion on the same facts & figures. To justify an additional assessment the surveyor must ascertain some new fact which, if it had been known when the original assessment was made, would have resulted in an increased assessment; (2) an estimate of the value of a debt made in 1923 & 1924 on the then facts & probabilities was not overthrown by a finding of the General Comrs. that in 1930 it had not been proved that the debt or any part of it was a bad debt within the meaning of the rule. What the statute requires is an estimate of the extent to which a debt is bad for a profit & loss account. Such an estimate is not a prophecy to be judged by after events, but a valuation of the debt as an asset, to be judged as an estimate on the existing facts & probabilities.—*ANDERTON & HALSTEAD, LTD. v. BIRRELL*, [1932] 1 K. B. 271; 101 L. J. K. B. 219; 146 L. T. 139; 16 Tax Cas. 200.

*Annotation:—As to (1) Refd. Williams v. Grundy Trustees*, [1934] 1 K. B. 524; *Dodworth v. Dale*, [1936] 2 All E. R. 440.

**254b. Whether debt bad—Question of fact.]**—

Whether for the purposes of income tax a debt is wholly or partly & to what extent bad or irrecoverable is in every case, whether the debtor is an individual or a joint stock co. or other entity, a question of fact to be decided on a consideration of the relevant facts of the particular case, & there is no justification, on any principle or authority, for holding that a debt due from a limited co. which is still a going concern is incapable of being treated as a bad debt.—*DINSHAW v. BOMBAY INCOME TAX COMR. (1934)*, 50 T. L. R. 527; 78 Sol. Jo. 518, P. C.

#### PART V. SECT. 2, SUB-SECT. 7.—F.

**253 l. Loss on advances to saw-miller to secure supplies of timber—Advances written off as bad debts on liquidation of saw miller.]**—*Held*: the loss was properly deducted.—*HOGG & CO., LTD. v. COMR. OF TAXES*, [1925] N. Z. L. R. 206.—N.Z.

**254 i. Limited to trading debts—Whether debt of managing director to company included.]**—A calico printing co. paid its managing director in part by a commission on profits. During the first year of the arrangement the directors authorised him to draw two sums on account of his commission, & in subsequent years he drew sums on this account without special authority but with the knowledge of the directors. These sums were debited to a commission account. During the year ending Dec. 31, 1923, he drew out £5,141 in sums varying between £150 & £400. It was subsequently ascertained that no commission was due for that year, & the commission account showed a balance due by him to the co. of £3,391. In arriving at its profits for income tax purposes the co. claimed to be entitled to deduct this loss:—*Held*: the loss was a "loss not connected with or arising out of the

trade."—*ROEBANK PRINTING CO., LTD. v. INLAND REVENUE COMRS.*, [1928] S. C. (Ct. of Sess.) 701.—SCOT.

**sk. What are—Question of fact.]**—A debt due from a limited co. is capable of being treated as a bad debt in assessing the creditor to income tax, although the co. is still a going concern. Whether a debt is wholly or partly, & to what extent, bad or irrecoverable is in every case a question of fact to be decided by the appropriate tribunal upon a consideration of the relevant facts of that case.—*DINSHAW v. INCOME TAX COMMISSIONER (1934)*, 61 I. L. R. Ind. App. 318, P. C.—IND.

#### PART V. SECT. 2, SUB-SECT. 7.—G.

**o i. — Payment for qualification shares.]**—*SHAPIRO v. INLAND REVENUE COMRS. (1928)*, 49 N. L. R. 436.—S. AF.

**sn. Sums payable as compensation for delay in implementing agreement.]**—The Renfrew Town Council & the Clyde Navigation Trustees made an agreement in 1925 whereby the council, to whom the trustees were then under obligation to construct a quay at Renfrew in or before 1926, agreed to the construction of the quay being delayed on the terms that as full compensation for the delay the trustees

should (*inter alia*) pay to the council a specified annual sum until the construction of the quay was completed. The payments made by the trustees under this agreement were allowed as deductions in computing their trading profits for income tax purposes & were made without deduction of tax. Assessments to income tax, Sched. D., were made on the council on the sums received from the trustees. On appeal the council contended that these sums were not annuities or other annual payments & were not income chargeable to income tax, but were damages or compensation for breach of agreement resulting in a loss to the council of rateable value; alternatively, that even if they were annuities or other annual payments, they had been paid wholly out of profits & gains brought into charge to tax so that assessments on the council were precluded by General Rule 19. The Special Comrs. confirmed the assessments:—*Held*: (a) the sums in question were annual payments & were income chargeable to income tax in the hands of the council; and (b) they were not paid or wholly payable out of profits or gains brought into charge & were properly assessable upon the council.—*RENFREW TOWN COUNCIL v. INLAND*

- sp. Annual payment part of consideration for purchase of business.]—**Appits., a private limited co., who carried on the business of managing agents of A. co., receiving for their services a commission of 10 per cent. on the annual net profits of A. co., with a minimum of Rs.50,000 whether that co. should make any profits or not, had acquired that agency from B. co., their predecessors, under an assignment whereby B. co. transferred to appits. their whole right & interest as agents of A. co., subject, however, to their (B. co.'s) obligations under two

**265a. Superannuation funds—Contribution—What amounts to—Transfer of assets of fund to**

agreements with D. & E. respectively whereby B. co., who while the managing agents of A. co. had borrowed money for that co. from D. & E., had to pay to both D. & E., in addition to the interest they would receive from A. co. on the loan, 12½ per cent. of the commission earned by them (B. co.) under their agency agreement with A. co.:—*Held*: in computing their income, profits & gains for tax purposes appts. were not entitled to deduct the 25 per cent. of the commission earned & received from A. co. which they paid over to D. & E. under the agreements. That percentage of the commission paid to D. & E. was not expenditure incurred by appts. "solely for the

purpose of earning . . . profits or gains" of their business within the meaning of sect. 10 (2) (ix), of Indian Income Tax Act, 1922. The obligation to make the payments was undertaken by appls. in consideration of their acquisition of the right & opportunity to earn profits, that was, of the right to conduct the business, & not for the purpose of producing profits in the conduct of the business.—TATA HYDRO-ELECTRIC AGENCIES, LTD. (BOMBAY) v. INCOME TAX COMR., BOMBAY PRESIDENCY & ADEN, [1937] A. C. 685; [1937] 2 All E. R. 291; 106 L. J. P. C. 102; 157 L. T. 505; 53 T. L. R. 555; 81 Sol. Jo. 375, P. C.—IND.

new fund capable of approval.]—By an agreement in 1921, in pursuance of an agreement made on the formation of resp. co. & in exercise of powers in its Memorandum of Asscn., it was provided that a number of its ordinary shares should be set aside to form the nucleus of a benefit fund for its own employees & those of associated cos. The shares were duly allotted to trustees, & a deed between the co. & the trustees, setting out the trusts on which the fund was to be held, was executed in 1923; it provided that the co. might by instrument in writing under its common seal revoke or alter any of the trusts & might declare new trusts. The benefit fund was not capable of approval by the Comrs. of Inland Revenue as a "superannuation fund" within Finance Act, 1921 (c. 32), s. 32. In 1928, by which time the shares which formed the nucleus of the fund had been sold & the proceeds put into other investments, & substantial additional contributions had been made to the fund by the co., the co. exercised its power of revocation in respect of the greater part of the assets of the fund & transferred that part to a new trust which was approved by the Comrs. of Inland Revenue as a superannuation fund under the said sect.—*Held*: the assets transferred, whether derived from the sale of the shares originally forming the nucleus of the benefit fund or from cash contributions subsequently made by the co., were paid by the co. by way of contribution towards the superannuation fund within Finance Act, 1921 (c. 32), s. 32.—*LOWE v. PETER WALKER (WARRINGTON) & ROBERT CAIN & SONS, LTD.* (1935), 80 Sol. Jo. 32; 20 Tax Cas. 25, C. A.

266a. — Revenue applied under statute—For repayment of expenses of renewal of works—Harbour Mooring Commissioners.]—*HALL v. KING'S LYNN HARBOUR MOORINGS COMRS.* (1875), 1 Tax Cas. 23.

267. *Add. Annotations*: — *Consd.* Birmingham Corpn. v. Barnes, [1935] A. C. 292. *Refd.* Heyhoe v. Slough Theatre Co. (1933), 17 Tax Cas. 488.

268. *Add. Annotation*: — *Refd.* Glanely v. Wightman (1933), 149 L. T. 121.

#### PART V. SECT. 2, SUB-SECT. 7.—J.

b i. — *Diminished value of rails & sleepers.*—*Held*: a railway co. was not entitled to any deduction for such diminished value.—*RHODESIA RYS. v. COMR. OF TAXES*, [1925] App. D. 438.—S. AF.

b ii. — *Held*: an article is "useless" when it is unfit through wear & tear for the purposes for which it was used, & is incapable of being repaired, or is in such a condition that a reasonable business man would prefer to substitute a new implement rather than incur the cost of repairing the old.—*ROBERTSON v. COMR. OF TAXES*, [1928] S. A. S. R. 313.—AUS.

sa. "Repairs" & "renewal"—*Railway track.*—The words "repairs" & "renewal" are not expressive of a clear contrast. The fact that the wear of the rails & sleepers of a railway line although continuous is not made good annually does not render the work of renewal, when it comes to be effected, necessarily a capital charge. Expenditure may be a permissible deduction in assessing to income tax, although

the benefit derived from it extends beyond the year of assessment.

Upon assessment of appts. to income tax under Bechuanaland Protectorate Income Tax Proclamation, 1922, in respect of profits from 394 miles of their railway line in the Protectorate, they claimed to debit £252,174, which they had expended in the year of assessment in renewing 74 miles of the railway track. The work, which was part of a general scheme of renewal, included the supply of new rails, sleepers, & fastenings, where necessary; steel sleepers were used in place of wooden sleepers for about half the line renewed. The renewal brought back the worn track to normal condition; as renewed it was not capable of giving more service than the original line.—*Held*: appts. were entitled to the deductions claimed, because the sum expended was an outgoing "not of a capital nature" within sect. 15 (1) (a) of the Proclamation, & was "expended for repairs of property occupied for the purpose of trade or in respect of which income is receivable" within sect. 15 (1) (b).—*RHODESIA RAILWAYS, LTD. v. BECHUANALAND*

268a. — Books used for professional purposes—*Solicitor.*—The word "plant" in Finance Act, 1925 (c. 38), s. 16, does not include a solr.'s books which he consults for professional purposes.—*DAPHNE v. SHAW* (1926), 43 T. L. R. 45; 71 Sol. Jo. 21; 11 Tax Cas. 256.

*Annotation*: — *Refd.* Margrett v. Lowestoft Water & Gas Co. (1935), 19 Tax Cas. 481.

268b. — *Water tower.*—Resp. co., which supplied water to Lowestoft & district, erected a water tower & constructed a new reservoir. The water tower was built of ferro-concrete, except for certain auxiliary apparatus, comprising pumps, valves & pipes. It was used for increasing the pressure of the water supply & replaced a gas engine & pumps previously used for that purpose. The reservoir, which was of the covered-in type, replaced, but on a site some distance away, an old reservoir (of the open type) which was not worth repairing. It was twice the capacity of the old one & in several respects was an improvement on the old one. The General Comrs. decided (a) that the water tower was "plant" in respect of which the co. was entitled to a deduction for wear & tear under rule 6 of Cases I. & II. of Sched. D.; & (b) that the reservoir was partly a renewal & partly an improvement & that the amount expended on that part which was a renewal was, under rule 3 (d) of Cases I. & II. of Sched. D., an admissible deduction in computing the co.'s profits.—*Held*: there was no evidence upon which the Comrs. could arrive at their conclusions (a) that the water tower, apart from the auxiliary apparatus, was "plant" within rule 6 of Cases I. & II. of Sched. D., & (b) that any part of the cost of the reservoir was other than capital expenditure.—*MARGRETT v. LOWESTOFT WATER & GAS CO.* (1935), 19 Tax Cas. 481.

269a. — Renewals paid for by lessor.]—*UNION COLD STORAGE CO., LTD. v. SIMPSON* (1938), 55 T. L. R. 172.

270. For existing citations read: — 8 Tax Cas. 725, C. A., *affg.*, 129 L. T. 512.

*Add. Annotation*: — *Refd.* Hughes v. Bank of New Zealand, [1937] 1 K. B. 419.

276a. — "Actual cost"—Actual capital cost.]—Resp. co., which carried on the trade

PROTECTORATE INCOME TAX COLLECTOR, [1933] A. C. 368; 102 L. J. P. C. 72; 149 L. T. 3; 49 T. L. R. 376; 77 Sol. Jo. 235, P. C.—*BECHUANALAND*.

sd. *Depreciation—How calculated.*—Applt. by agreement in writing purchased, through an intermediary co., the assets of a co. bearing the same name as applt. & referred to as the "old" co. Applt. claimed a deduction in its income for depreciation on the assets purchased from the "old" co. The Minister of National Revenue refused to allow such deduction on the ground that the "old" co. had already been allowed full depreciation on such assets & that applt. co. had taken over those assets at an appreciated, rather than true, value. Applt. appealed from the Minister's decision.—*Held*: depreciation as provided for in sect. 5 (1) (a) of Income War Tax Act is to be computed on the real value of the articles concerning which depreciation is claimed, & not on the cost of such articles to the taxpayer.—*PIONEER LAUNDRY & DRY CLEANERS, LTD. v. MINISTER OF NATIONAL REVENUE*, [1938] S. C. R. 18.—CAN.

of cinematograph exhibitors, leased from another co. a sound projector system for a period of ten years. The agreement & lease with the supplemental agreements thereto, made between the two cos. provided (*inter alia*) that resp. co. was (a) to keep the equipment in good & efficient working order; (b) to bear the cost of such upkeep, with the exception that the lessor undertook to inspect the equipment periodically & perform certain minor adjustment services free of charge; & (c) at the termination of the lease, to deliver up the apparatus in good order & condition. The payments made by resp. co. under the lease by way of rent for the hire of the equipment & the cost of replacements, etc., were admitted as deductions in computing its profits assessable to income tax, Sched. D. On appeal against assessments for 1930-31 & 1931-32, resp. co. claimed under r. 6, Cases I. & II., Sched. D, an allowance for wear & tear of the equipment leased, contending (a) that, by reason of its obligations under the lease, it was within the terms of para. (2) of that Rule, & (b) that, for the purpose of para. (6) of the Rule, regard should be had to what would have been the actual cost to it of the equipment if it had been the owner. The General Comrs. allowed the deduction claimed:—*Held*: the words "actual cost" in r. 6 (6) mean actual capital cost, & as resp. co. had incurred no such cost it was not entitled to the deduction.—*HEYHOE v. SLOUGH THEATRE CO., LTD.* (1933), 17 Tax Cas. 488.

**276b.** — — — — —.]—By an agreement made in Apr. 1920, between the Birmingham Corpn. & the Dunlop Rubber Co. the Corpn. agreed to lay a tramway from the co.'s works to a point within the district of the corpn., & the co. agreed, if certain conditions were performed, to pay, & they did pay, a sum which in the event amounted to £10,806. The corpn. laid the tramway at the cost of £54,752. In 1922 the corpn. spent £271,399 on renewing its tramways & received from the Unemployed Grants Committee £46,238 in respect of the work done. By agreement between the corpn. & the Board of Revenue the life of the corpn.'s tramways was taken as twelve years; & for several years, in assessing their tramway undertaking to income tax, deductions of £4,562 (one-twelfth of £54,752) & £22,617 (one-twelfth of £271,399) were made by the corpn. & allowed by the revenue officer. The corpn., in making their returns for the purpose of assessment of their tramways to income tax, claimed to make for the years ending on Apr. 5, 1930, & Apr. 5, 1931, the same deduction as before. The Inspector of Taxes contended that "the actual cost" of the tramways to the corpn. was the total sum expended on them by the corpn.

after deducting the sums contributed by the co. & the Unemployment Grants Committee, & that the corpn. were only entitled to deduct one-twelfth of the balance after subtracting the sums contributed:—*Held*: "the actual cost" to the corpn. within Sched. D., Cases I., II., r. 6, was £54,752 in respect of the new tramway & £271,399 in respect of the renewed tramways, & in arriving at "the actual cost" the contributions of £10,806 & £46,238 were not to be deducted; & as the proposed allowances for wear & tear would not with the earlier allowances exceed the actual cost as defined above, the corpn. were entitled to claim them.—*BIRMINGHAM CORPN. v. BARNES*, [1935] A. C. 292; 104 L. J. K. B. 281; 152 L. T. 558; 51 T. L. R. 293; 79 Sol. Jo. 213; 33 L. G. R. 189; 19 Tax Cas. 195; *sub nom.* *BARNES v. BIRMINGHAM CORPN.*, 99 J. P. 173, H. L.

**276c. Replacement of obsolete plant or machinery**—*Meaning of obsolete—Question of fact for commissioners.*—*SOUTH METROPOLITAN GAS CO. v. DADD* (1927), 13 Tax Cas. 205.

**278. Add. Annotations:**—*Consd. Salisbury House Estate v. Fry*, [1930] 1 K. B. 304. *Refd.* *Brighton College v. Marriott*, [1926] A. C. 192.

**283a. Insurance company incapable of assessment under Sched. D., Case I.**—*Proviso (a) to 1918 Act, s. 33 (1), applies only to cases in which the Crown has power to tax under Case I. &, alternatively, under some other Case of Sched. D. Therefore the proviso does not apply in the case of a co. which is not carrying on a trade & is not chargeable under Case I. of Sched. D.*—*SIMPSON v. GRANGE TRUST, LTD.*, [1935] A. C. 422; 104 L. J. K. B. 276; 152 L. T. 517; 51 T. L. R. 320; 79 Sol. Jo. 287; 19 Tax Cas. 231, H. L.

**283b. Sum for which claim could be made under Sched. A., No. V., r. 8.**—*A co., whose business consisted mainly in the making of investments & therefore entitled to relief under 1918 Act, s. 33, such investments being mainly in real property, claimed relief under sect. 33 in respect of its expenses of management. Included in the claim were sums paid to the person who acted as the co.'s surveyor, valuer & rating expert, & to the co.'s assistant surveyor. No claim was made in respect of these sums under Sched. A., No. V., rr. 7 or 8:—Held: in so far as the sums paid to the surveyor & assistant surveyor were sums expended for the co.'s maintenance in respect of which a claim for relief could have been made under Sched. A., No. V., r. 8, they were not admissible for relief under sect. 33.*—*LONDON & NORTHERN ESTATES CO., LTD. v. HARRIS*, [1937] 3 All E. R. 252; 106 L. J. K. B. 823; 21 Tax Cas. 197.

**284. Add. Annotation:**—*Refd. Collyer v. Hoare & Co.*, [1931] 1 K. B. 123.

**PART V. SECT. 2, SUB-SECT. 7.—L. n. Add. Citations:**—33 Sc. L. R. 289; 3 Tax Cas. 415.

**p1. — Separate assessments under Schedules B. & D.]**—*A farmer bred horses & cattle on a considerable scale. He used his stallions for his own horse-breeding purposes, & also earned fees by sending them on journeys for the service of other owners' mares. In this connection he kept a reserve of stallions to replace any which might become incapacitated. All his stallions, of which only a small proportion earned*

*fees, formed part of one undivided stud. He was assessed to income tax, on the profits of his general farming business under Schedule B., & on the profits of his fee-earning stallions under Schedule D. As a method of fixing the amount of profits assessable under the latter Schedule, the comrs. determined to regard a certain number of stallions as exclusively used in earning fees, & to allow the deduction of the cost of their full upkeep & attendance, & to provide for replacements by allowing a similar deduction in respect of*

*other stallions in the stud to the extent of one-third of the number of travelling stallions. The farmer contended that his stallion-owning business should be treated as entirely separate from his farming business, & that the whole of the expenses & losses connected with his stallions should be set against the revenue derived from them:—Held: it was primarily a question for the comrs. to determine, & no cause had been shown for disturbing their determination.*—*MARSHALL v. INLAND REVENUE COMRS.*, [1927] S. C. 243.—*SCOT.*

- 285. Add. Annotations:—***Apld.* *Waldie v. I. R. Comrs.* (1919), 12 Tax Cas. 113. *Distd.* *Hagart & Burn-Murdoch v. I. R. Comrs.*, [1929] A. C. 386. *Refd.* *Bourne & Hollingsworth v. I. R. Comrs.* (1921), 12 Tax Cas. 483; *Baker v. Mabie Todd* (1927), 13 Tax Cas. 235; *Landes Bros. v. Simpson* (1934), 19 Tax Cas. 62.
- 287. Add. Annotations:—***Apld.* *Mallett v. Staveley Coal & Iron Co.*, [1928] 2 K. B. 405. *Consd.* *Morley v. Lawford* (1928), 140 L. T. 125. *Expld.* *Hagart & Burn-Murdoch v. I. R. Comrs.*, [1929] A. C. 386. *Distd.* *Fry v. Salisbury House Estate, Ltd.*, *Jones v. City of London Real Property Co.*, [1930] A. C. 432; *Collyer v. Hoare & Co.* (1930), 47 T. L. R. 7. *Follid.* *I. R. Comrs. v. Scottish Central Electric Power Co.* (1931), 145 L. T. 169. *Expld. & Distd.* *Hoare & Co. v. Collyer* (1932), 48 T. L. R. 256. *Consd.* *Thomas Merthyr Colliery Co. v. Davis*, [1933] 1 K. B. 349; *European Investment Trust Co. v. Jackson* (1932), 18 Tax Cas. 1; *Morse v. Stedeford* (1934), 18 Tax Cas. 457; *Collyer v. Hoare & Co., Ltd.*, [1937] 3 All E. R. 491. *Refd.* *Small v. Easson* (1920), 12 Tax Cas. 351; *Bourne & Hollingsworth v. I. R. Comrs.* (1921), 12 Tax Cas. 483; *British Insulated & Helsby Cables v. Atherton*, [1926] A. C. 205; *Mitchell v. Noble*, [1927] 1 K. B. 719; *Green v. Gliksten* (1928), 139 L. T. 12; *Rees Roturbo Development Syndicate v. I. R. Comrs.*, *Rees Roturbo Development Syndicate v. Ducker* (1928), 13 Tax Cas. 366; *Anglo-Persian Oil Co. v. Dale* (1931), 47 T. L. R. 487; *Mersey Docks & Harbour Board v. West Derby Assessment Committee*, *Bottomley v. West Derby Assessment Committee & Mersey Docks & Harbour Board*, etc., [1932] 1 K. B. 40; *Union Cold Storage Co. v. Adamson* (1931), 16 Tax Cas. 293; *Cadbury Bros., Ltd. v. Sinclair* (1933), 149 L. T. 412; *Whelan v. Dover Harbour Board* (1934), 151 L. T. 288; *Ward v. Anglo-American Oil Co.* (1934), 19 Tax Cas. 94; *Allied Newspapers, Ltd. v. Hindsley*, [1937] 2 All E. R. 663.
- 288. Add. Annotations:—***Consd.* *Morley v. Lawford & Co.* (1928), 140 L. T. 125; *Morse v. Stedeford* (1934), 18 Tax Cas. 457; *Collins v. Adamson & Co.*, [1938] 1 K. B. 477. *Refd.* *British Insulated & Helsby Cables v. Atherton*, [1926] A. C. 205; *Anglo-Persian Oil Co. v. Dale* (1931), 47 T. L. R. 487.
- 289a. —**—*Appl.*, who carried on the business of brewer & owned a number of licensed premises let to tied tenants, applied to the licensing justices for the removal of an existing licence to a new house to be erected, on the terms that a licence at another inn should at the same time be surrendered. In due course the removal was effected in the manner approved by the justices. Neither of the outgoing tenants of the two inns, the licences of which were thus withdrawn, became the tenant of the new inn, & certain sums were paid to them in 1931 as compensation in order to secure their consent to the application to the licensing justices. On appeal against assessments to income tax under Sched. D. for the years 1931–32 & 1932–33, *applt.* contended that the legal expenses incurred in connection with the applications to the licensing justices & the sums paid to the outgoing tenants as compensation were admissible deductions in computing the amount of his profits assessable under Sched. D. The General Comrs. confirmed the assessments:—*Held*: on the facts of the case, the General Comrs., in applying the principle in *Southwell v. Savill Bros., Ltd.*, No. 288, had not made an error of law.—*MORSE v. STEDEFORD* (1934), 18 Tax Cas. 457.
- 290. Add. Annotations:—***As to* (1) *Consd.* *Morley v. Lawford & Co.* (1928), 140 L. T. 125; *Allen v. Farquharson Bros. & Co.* (1932), 17 Tax Cas. 59; *Thomas Merthyr Colliery Co. v. Davis*, [1933] 1 K. B. 349; *Worsley Brewery Co. v. I. R. Comrs.* (1932), 17 Tax Cas. 349. *As to* (2) *Refd.* *Mitchell v. Noble*, [1927] 1 K. B. 719. *Generally, Refd.* *Small v. Easson* (1920), 12 Tax Cas. 351; *I. R. Comrs. v. Scottish Central Electric Power Co.* (1931), 145 L. T. 169; *Union Cold Storage Co. v. Adamson* (1931), 16 Tax Cas. 293; *Allied Newspapers, Ltd. v. Hindsley*, [1937] 2 All E. R. 663; *Hughes v. Bank of New Zealand*, [1937] 1 K. B. 419.
- 291. Add. Annotations:—***Consd.* *Hart v. Riversdale Mill Co.* (1927), 96 L. J. K. B. 691; *Morley v. Lawford & Co.* (1928), 140 L. T. 125. *Apld.* *Collyer v. Hoare & Co.* (1930), 47 T. L. R. 7. *Distd.* *Fry v. Salisbury House Estate, Ltd.*, *Jones v. City of London Real Property Co.*, [1930] A. C. 432. *Consd.* *Collyer v. Hoare & Co.*, [1931] 1 K. B. 123; *I. R. Comrs. v. Scottish Central Electric Power Co.* (1931), 145 L. T. 169. *Refd.* *I. R. Comrs. v. Lysaght*, [1928] A. C. 234; *Thomas Merthyr Colliery Co. v. Davis*, [1933] 1 K. B. 349; *Allied Newspapers, Ltd. v. Hindsley*, [1937] 2 All E. R. 663.
- 292a. —**—A brewery co., in the course of & for the purpose of their business, acquired licensed houses which were let to tenants subject to the usual tie covenants. The co. claimed that in the computation of their profits as brewers for assessment under Sched. D. the following expenses incurred in connection with these tied houses should be allowed: (a) compensation levy on tied houses; (b) premiums paid by the co. for insuring tied houses against fire; (c) the differences between the assessment to income tax, Sched. A., in respect of freehold tied houses or rents of leasehold houses on the one hand, & the rents received from the tied tenants on the other hand; (d) replacement of fixtures & fittings of tied houses; (e) repairs to tied houses. Having regard to the findings in the case, counsel for the Crown consented to an order reducing the assess-

## PART V. SECT. 2, SUB-SECT. 8.

1 i. — *Welfare service*—Whether admissible deduction.—The taxpayer, a life insurance society, derived income from premiums & from investments & other sources. It sought to deduct from its assessable income expenditure on a "welfare service," which consisted in the voluntary provision

by the society of a nursing service for assured persons & in the issue of pamphlets upon matters relating to health, & also expenditure in connection with consultant medical officers who advised the society upon matters relating to its life insurance business & upon information given in the pamphlets issued by it:—*Held*:

the expenditure was exclusively incurred in gaining the premium income within sect. 20 (5) (a) of Income Tax Assessment Act, 1922–30, & therefore, could not be deducted from the assessable income of the society.—*COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LTD. v. FEDERAL TAXATION COMR.* (1934), 49 C. L. R. 171.—AUS.



ment by the amount of the deductions claimed.—*YOUNGS, CRAWSHAY & YOUNGS, LTD. v. BROOKE* (1912), 6 Tax Cas. 393.

**292b. — Loss on individual rents of tied houses—**

**No loss on aggregate rents.]—**A brewery co. owned freehold & leasehold licensed houses, which they let to tenants who were tied to the co. for all the beer, wines, & spirits sold on the premises let to them. Under the decision in *Usher's Wiltshire Brewery, Ltd. v. Bruce*, No. 287, the co., where rent was forgone by reason of the tie, was entitled, in the computation of the profits of the trade for assessment under Sched. D. to income tax, to a deduction of the difference between the Sched. A. assessment of its freehold houses or the rents paid by the co. for its leasehold houses, on the one hand, & the rents received by it from the tied tenants, on the other hand, as an expense wholly incurred for the purposes of its trade. Some of the tied tenants paid premiums, & it was admitted, in the course of the hearing, that they must be taken into account in determining whether rent had been forgone by the co. by reason of the tie. In some cases the co. suffered a loss in respect of rent forgone, but in other cases the rents received by the co. exceeded the annual value or the rent paid by the co., as the case might be. In assessing the co. to income tax under Case I. of Sched. D. the Crown claimed that the amount of such excess should be brought into account under Sched. D., but so far only as was required to wipe out the debit above mentioned, & that for this purpose the whole of the houses must be aggregated:—*Held*: the claim of the Crown failed, on the ground that the profits & gains arising from the ownership of land, whether used for the purposes of trade or not, were determined exclusively by reference to annual value under Sched. A., & accordingly the rents received could not be included in an account under Sched. D. of the profits & gains of the trade for the purposes of which the land was used.—*HOARE & CO., LTD. v. COLLYER*, [1932] A. C. 407; 101 L. J. K. B. 274; 146 L. T. 469; 48 T. L. R. 256; 76 Sol. Jo. 165; 17 Tax Cas. 169, H. L.

*Annotation*:—*Consd.* *Collyer v. Hoare & Co.*, [1937] 3 All E. R. 491.

**292c. — Deficiency in rent—How calculated.]—**

A brewery co. had, during the years under assessment, from time to time purchased or acquired leases of licensed houses which it let on yearly tenancies, or for periods of years, to tenants who were tied to the co. for all the beer, wine & spirits sold on the premises so let. The co. had about a thousand such houses. It was not disputed that in computing the profits of its trade for assessment under Sched. D, Case I., the co. was entitled to a deduction of the difference between the rents paid by it for its leasehold houses, or the Sched. A. assessments on its freeholds, & the rents (including the annual equivalent of any premium from the tenant) received by it from the tied tenants. It was now claimed by the co. that, in computing the deficiency of rent in respect of any leasehold licensed house, the following sums, paid or foregone by the co. on its acquisition of the house, should be spread over the period of the lease, & the annual equivalent of each such sum added to the amount which the co. paid

in the name of rent: (a) a premium paid by the co. on the grant to it of a lease at a yearly rent; (b) a sum paid on the purchase by the co. of an existing lease; (c) a sum expended by the co. on alterations & improvements in a licensed house under a covenant so to do; & (d) the amount of a debt foregone on the assignment to the co. of a lease of premises in satisfaction of a debt due to the co.:—*Held*: in computing the deficiency of rent the comparison to be taken was between what the premises would fetch at a rack rent or the annual value, as assessed for the purposes of income tax under Sched. A, whichever is greater, on one side, & the aggregate of the rent paid by the tenant, plus the annual equivalent of any premium paid by the tenant for his lease, on the other; if alterations & repairs made by the brewers added to the value of the premises, such expenditure would be reflected in the rack rent, or in the annual value of the premises; & none of the deductions claimed could be allowed.—*COLLYER v. HOARE & CO., LTD.* (No. 2), [1938] 1 K. B. 235; [1937] 3 All E. R. 491; 107 L. J. K. B. 1; 158 L. T. 383; 53 T. L. R. 935; 81 Sol. Jo. 750; 21 Tax Cas. 318.

**293. Add. Annotation:—***Refd.* *Thomas v. Evans, Jones v. South-West Lancashire Coal-Owners' Assocn.* (1927), 11 Tax Cas. 790.

**294. Add. Annotation:—***Refd.* *Collins v. I. R. Comrs.* (1924), 12 Tax Cas. 773.

**295. Add. Annotation:—***Refd.* *Collins v. I. R. Comrs.* (1924), 12 Tax Cas. 773.

**295a. — Mutual Insurance—Surplus from other business done with fire policy holders—Whether liable to tax.]—**The main object of applt. co. which was incorporated as a co. limited by guarantee & not having a capital divided into shares, was to enable local authorities & other public bodies by co-operation to insure against fire & other risks on the most favourable terms. Since 1913 the co. had, in addition to the fire insurance business conducted on the mutual system, carried on an extensive business of a miscellaneous character & particularly employers' liability business. Considerable profits were derived from this miscellaneous business, & it was admitted that in general applts. were liable to be assessed to income tax in respect of these profits, but they claimed to be exempt in respect of any surplus arising from employers' liability or other miscellaneous business done with fire policy holders:—*Held*: as the principle of mutual insurance did not apply either to the employers' liability business or to the miscellaneous business, inasmuch as the fire policy holders in a body had not contributed, the surplus arising from any part of that business must be treated as profit & gains under Sched. D. & chargeable to income tax accordingly.—*MUNICIPAL MUTUAL INSURANCE, LTD. v. HILLS* (1932), 147 L. T. 62; 48 T. L. R. 301; 16 Tax Cas. 430, H. L.

**296. Add Citation:—**2 Tax Cas. 100.

*Add. Annotations:—As to* (2) *Consd.* *Thomas v. Evans, Jones v. South-West Lancashire Coal-Owners' Assocn.* (1927), 11 Tax Cas. 790. *Generally, Refd.* *Pegg & Jones v. I. R. Comrs.* (1919), 12 Tax Cas. 82; *I. R. Comrs. v. Westleigh Estates Co., I. R. Comrs. v. South*



Behar Ry., I. R. Comrs. v. Eccentric Club (1925), 12 Tax Cas. 657.

297. *Add. Annotations*:—*Appld.* Pegg & Jones v. I. R. Comrs. (1919), 12 Tax Cas. 82. *Consd.* Thomas v. Evans, Jones v. South-West Lancashire Coal-Owners' Assocn. (1927), 11 Tax Cas. 790. *Distd.* Adamson v. Union Cold Storage Co. (1931), 146 L. T. 172. *Consd.* Municipal Mutual Insurance, Ltd. v. Hills (1932), 48 T. L. R. 301. *Refd.* I. R. Comrs. v. Westleigh Estates Co., I. R. Comrs. v. South Behar Ry., I. R. Comrs. v. Eccentric Club (1925), 12 Tax Cas. 657; British Sugar Manufacturers, Ltd. v. Harris, [1938] 2 K. B. 220.

300. *Add. Annotations*:—*Consd.* I. R. Comrs. v. Westleigh Estates Co., I. R. Comrs. v. South Behar Ry., I. R. Comrs. v. Eccentric Club (1925), 12 Tax Cas. 657; Cornish Mutual Assee. v. I. R. Comrs., [1926] A. C. 281. *Distd.* Liverpool Corn Trade Assocn. v. Monks, [1926] 2 K. B. 110. *Consd.* Municipal Mutual Insurance, Ltd. v. Hills (1932), 48 T. L. R. 301. *Appld.* Jones v. South-West Lancashire Coal-Owners' Assocn., [1927] A. C. 827. *Consd.* National Association of Local Government Officers v. Watkins (1934), 18 Tax Cas. 499.

301. *Add. Annotation*:—*Refd.* Butler v. Mortgage Co. of Egypt (1927), 138 L. T. 328.

302. *Add. Annotations*:—*Consd.* European Investment Trust Co. v. Jackson (1932), 18 Tax Cas. 1. *Refd.* British Insulated & Helsby Cables v. Atherton, [1926] A. C. 205; A.-G. v. Metropolitan Water Board, [1928] 1 K. B. 833; Dott v. Brown (1935), 79 Sol. Jo. 610; Ward v. Anglo-American Oil Co. (1934), 19 Tax Cas. 94.

304. *Add. Annotations*:—*Distd.* Scales v. Thompson (1927), 138 L. T. 331. *\*Consd.* Butler v. Mortgage Co. of Egypt (1928), 139 L. T. 29; Hughes v. Bank of New Zealand, [1937] 1 K. B. 419.

305. *Add. Annotations*:—*Distd.* Scales v. Thompson (1927), 138 L. T. 331. *Consd.* Butler v. Mortgage Co. of Egypt (1928), 139 L. T. 29; Simpson v. Grange Trust, Ltd., [1935] A. C. 422. *Refd.* Fry v. Salisbury House Estate, Ltd., Jones v. City of London Real Property Co., [1930] A. C. 432.

307a. *Accident insurance—Mutual society.*—A mutual insurance assocn. was formed, its sole activity being the indemnity of its members, who were coal-owners, against liability for compensation in respect of fatal accidents to workmen. The members of the assocn. were the persons protected by it, every member being liable to contribute a sum not exceeding £25 in the event of a winding up. The assocn. formed a general fund by making calls upon members proportionate to the wages paid in their works for the time being, & the balance of the ordinary call fund was transferred to a reserve fund, into which any extraordinary calls were also paid. A member, on retirement, was entitled to get back in cash a proportion of his share in the above reserve fund, but, apart from this, members had no right at all to the cash in the reserve fund, though the interest accruing on the reserve fund could be used in diminution of members' calls:—*Held*: (1) the sums paid by the members to the assocn.

were admissible deductions in computing the profits made by a member for the purpose of assessment to income tax, as the money was laid out by the respective members on a true insurance principle; (2) the surplus funds of the assocn. were not assessable to income tax, as the assocn. was mere machinery for the purpose of enabling subscribing members to insure themselves.—*THOMAS v. EVANS (RICHARD) & CO., JONES v. SOUTH-WEST LANCASHIRE COAL OWNERS' ASSOCN.,* [1927] 1 K. B. 33; 95 L. J. K. B. 990; 135 L. T. 673; 42 T. L. R. 703; 11 Tax Cas. 790, C. A.; *affd. sub nom. JONES v. SOUTH-WEST LANCASHIRE COAL OWNERS' ASSOCN.,* [1927] A. C. 827; 96 L. J. K. B. 894; 137 L. T. 737; 43 T. L. R. 725; 71 Sol. Jo. 680, H. L.

*Annotations*:—*As to* (1) *Consd.* Municipal Mutual Insurance, Ltd. v. Hills (1932), 48 T. L. R. 301. *Refd.* Thomas Merthyr Colliery Co. v. Davis (1932), 148 L. T. 32.

307b. *Marine insurance company—Building ships—Cancellation of shipbuilding contracts.*—A marine insurance co., having entered into contracts for the building of four ships, accepted delivery of two of the ships & then, owing to a slump in the shipping trade, cancelled the contracts for the other two ships on payment of £70,000. It was contended that a new business of dealing in ships had been begun by the co., & that the £70,000 was a proper deduction in arriving at its profits:—*Held*: the co. was not carrying on any trade, from the profits of which the £70,000 was an admissible deduction.—*DEVON MUTUAL STEAMSHIP INSURANCE ASSOCN. v. OGG* (1927), 13 Tax Cas. 184.

309a. *Loss on investments—What amounts to.*—*Applts.*, an insurance co., had investments in British railway stocks, & it was admitted by the Crown that any loss suffered by *applts.* on such investments was deductible from their profits for purposes of income tax. The result of Railways Act, 1921 (c. 55), was that *applts.* received in exchange for their various railway holdings stocks in the four amalgamated railway cos. created by that Act. The market value of these new stocks was less than the original cost to *applts.* of the old stocks, & they claimed that the loss so occasioned to them should be allowed as a deduction from their profits for 1922 & 1923 in computing their income tax liability:—*Held*: as the effect of what had happened was that the old investments had been closed & realised, & new investments had been begun, *applts.* were entitled to the deduction claimed.—*ROYAL INSURANCE CO., LTD. v. STEPHEN* (1928), 44 T. L. R. 630; 14 Tax Cas. 22.

*Annotations*:—*Appld.* Westminster Bank v. Osler, [1933] A. C. 139. *Refd.* Cross v. London & Provincial Trust, Ltd., [1938] 1 K. B. 792.

310. *Add. Annotation*:—*Refd.* Mann v. Nash (1932), 48 T. L. R. 287.

312a. *Employment—Actress.*—The expression "employment" in Sched. E of 1918 Act means something analogous to an office or a post.

An actress earned her living by accepting & fulfilling engagements for which her professional qualifications fitted her. During the periods of assessment in question, she exercised her activities by (a) acting in various stage plays in England & one in the United States of America, under various contracts

with theatrical producers; (b) performing for the films; (c) performing on the wireless for the British Broadcasting Corp., & (d) performing for gramophone companies for reproduction on their records:—*Held*: the actress was assessable under Sched. D of 1918 Act in respect of the profits which she derived from her profession or vocation as an actress & not under Sched. E in respect of the profits of her employment.—*DAVIES v. BRAITHWAITE*, [1931] 2 K. B. 628; 100 L. J. K. B. 619; 145 L. T. 693; 47 T. L. R. 479; 75 Sol. Jo. 526; 18 Tax Cas. 198.

*Annotation*:—*Reid*. Bennet v. Marshall, [1937] 3 All E. R. 208.

**313. Add. Annotation**:—*Reid*. Stedeford v. Beloe (1932), 146 L. T. 456.

**313a. Remuneration of solicitor-trustee under trust.**—A solr.-trustee was empowered by clauses in the instruments creating the trusts to charge for work done by him in connection with the trusts. By agreement between himself, his co-trustees & the beneficiaries, his remuneration was calculated as a percentage of the annual income of the trust funds, which income had already been brought into charge to tax:—*Held*: this remuneration was chargeable to income tax against the solr. under 1918 Act, Schedule D, Case II., as his profits or earnings arising from an employment, & was not constituted of annual payments payable wholly out of profits or gains brought into charge to tax within Rules applicable to all Schedules, r. 19.—*JONES v. WRIGHT* (1927), 139 L. T. 43; 44 T. L. R. 128; 72 Sol. Jo. 86; 13 Tax Cas. 221.

*Annotation*:—*Apld.* Watson & Everitt v. Blunden (1934), 18 Tax Cas. 402.

**313b.** —[Appl., who was a practising solr., had, in partnership with other persons, purchased a brickyard & certain land with a view to working the brickyard & developing the property as a building estate. The property was vested in him & another person as trustees. Applt., who at the material times was entitled to a four-ninths share of the proceeds of the adventure, acted as solr. in all matters connected with the property. The costs for such work were paid to applt. by the trustees & were credited in full in the accounts of applt.'s practice. On appeal against the assessment made on him under Sched. D. for the year 1932-33, in respect of his profits as a solr., applt. claimed that, in computing these profits, four-ninths of the costs should be excluded, on the ground that he was, in effect, paying costs as a client to himself as a solr., since four-ninths of the costs were borne by him by way of deduction from his share of the moneys derived from the property. The Special Comrs. decided that the whole of the sum received by applt. from the trustees by way of costs was correctly included in his accounts as a receipt of his profession as a solr., & confirmed the assessment:—*Held*: the sums received by applt. from the trustees by way of costs were ordinary receipts of his practice as a solr. & he was correctly assessed on that basis.—*WATSON & EVERITT v. BLUNDEN* (1934), 18 Tax Cas. 402, C. A.

**315a. Setting up new profession—Barrister becoming King's Counsel.**—A junior barrister on becoming a King's Counsel does not "set up" a new profession within r. 1 (2) of the

Rules applicable to Cases I. & II. in Sched. D. to 1918 Act, & consequently, his earnings are not to be computed in accordance with that sub-rule.—*SELDON (F. E.) v. CROOM-JOHNSON*; *SELDON (F. E.) v. BRUCE THOMAS*, [1932] 1 K. B. 759; 101 L. J. K. B. 358; 147 L. T. 72; 48 T. L. R. 304; 76 Sol. Jo. 273; 16 Tax Cas. 740.

**315b. Actress—Profits of foreign tour.**—Resp. was an actress who resided in the United Kingdom. During the years 1925-26 to 1927-28, she acted in the United Kingdom in various stage plays, performed for the films & on the wireless, & gave performances for reproduction on gramophone records. She entered into a separate contract in respect of each play & each wireless appearance. In addition, during part of the year 1925-26, she acted in a play in America, the preliminary negotiations for which were made prior to her leaving the United Kingdom, although the actual contract was not made or signed until she arrived in America. The General Comrs. decided, on appeal, that resp. was assessable to income tax under Sched. E. for the years concerned & that the income received in respect of the American employments must be excluded from the assessments:—*Held*: (1) resp. exercised a profession, in respect of the profits of which she was assessable under Case II. of Sched. D.; (2) (on a supplemental case being stated) resp. carried on one profession only & was assessable for the year 1925-26 in respect of the whole of her earnings therefrom, including the earnings from the American engagement.—*DAVIES v. BRAITHWAITE* (1933), 77 Sol. Jo. 572; 18 Tax Cas. 198.

*Annotation*:—*Reid*. Bennet v. Marshall (1938), 158 L. T. 75.

**315c. Whether resident in United Kingdom.**—*WITHERS v. WYNYARD* (1938), 82 Sol. Jo. 274.

**316. Add. Annotations**:—As to (2) *Consd.* Westminster Bank v. Osler, [1933] A. C. 139. As to (3) *Apld.* Whelan v. Henning, [1926] A. C. 293. *Distd.* Ormond Investment Co. v. Betts, [1927] 2 K. B. 326. As to (3) *Expld.* Diggin v. Forestal Land, Timber & Railways Co. (1930), 142 L. T. 509. (*See* [1931] A. C. 380, H. L.). *Reid.* Kirke's Trustees v. I. R. Comrs. (1926), 136 L. T. 582; Turton v. Mitchell (1927), 138 L. T. 365; Leeming v. Jones (1929), 141 L. T. 472. *Generally, Reid.* Leitch v. Emmott, [1929] 2 K. B. 236; Miller (Lady) v. I. R. Comrs. (1930), 15 Tax Cas. 25; Cull v. Cowcher (1934), 18 Tax Cas. 449; Benn v. I. R. Comrs., [1937] 3 All E. R. 852; Hughes v. Bank of New Zealand, [1937] 1 K. B. 419.

**317. Add. Citations**:—[1926] 1 K. B. 430; 10 Tax Cas. 139.

*Add. Annotations*:—*Apld.* Turton v. Mitchell (1927), 138 L. T. 365. *Consd.* Leeming v. Jones (1929), 141 L. T. 472. *Apld.* Diggin v. Forestal Land, Timber, & Railways Co. (1930), 142 L. T. 509. *Reid.* Ormond Investment Co. v. Betts, [1927] 2 K. B. 326; (*see* [1913] A. C. 380, H. L.); Merrifield v. Wall-paper Manufacturers, Ltd., [1931] 2 K. B. 143. For cross-references following this case read "*see, now*, Finance Act, 1926 (c. 22), s. 22 (1)."

**317a. Different holdings of War Loan.**—Appl., who owned £2,350 5 per cent. War Loan inscribed in the books of the Bank of England, in June, 1924, converted this

holding into  $4\frac{1}{2}$  per cent. Conversion Loan, the interest on which was payable under deduction of income tax. Applt., however, continued throughout the year 1925–26 to hold a small amount of 5 per cent. War Loan Post Office issue, to which he had succeeded on the death of his daughter, & which he was not aware he could convert:—*Held*: applt. continued throughout the year 1925–26 to hold the same source of income, i.e., 5 per cent. War Loan, & under Schedule D, Case III., r. 2, he was assessable to income tax for that year in the full amount of the interest received from such War Loan in the preceding year.—*TURTON v. MITCHELL* (1927), 138 L. T. 365; 13 Tax Cas. 245.

**317b.** ————.]—The words “interest . . . on any securities issued under the War Loan Acts, 1914 to 1917,” in 1918 Act, Sched D, Case III., r. 1 (f), designated one taxable subject-matter & not several sources of income.

A taxpayer was the holder of a number of 5 per cent. National War Bonds, 1928 (Third Series). These bonds were on Dec. 1, 1924, converted into 5 per cent. War Loan Stock, 1929–47. The taxpayer in the following year purchased additional 5 per cent. War Loan Stock, 1929–47. Both the 5 per cent. National War Bonds, 1928, & the 5 per cent. War Loan Stock, 1929–47, were securities issued under the War Loan Acts. A question arose whether they were of the same class or source for the purposes of rr. 1 & 2 applicable to Case III. of Sched. D of the Income Tax Act. The taxpayer contended that they were the same source, & therefore the assessment for the year in question should be computed on the basis of the income arising within the year preceding the year of assessment. The Crown, on the other hand, contended that the income arising from 5 per cent. National War Bonds & 5 per cent. War Loan Stock was income arising from different sources, & therefore the assessment for the year in question ought to be computed on the income of the year of assessment:—*Held*: as both the 5 per cent. National War Bonds, 1928, & the 5 per cent. War Loan Stock, 1929–47, were securities issued under the War Loan Acts, 1914 to 1917, the interest arising from those securities arose from the same source & ought not to be split up for the purpose of charging income tax.—*MERRIFIELD v. WALLPAPER MANUFACTURERS, LTD.*, [1931] 2 K. B. 143; 100 L. J. K. B. 616; 145 L. T. 451; 16 Tax Cas. 40.

**317c.** ————]—**Holdings of husband & wife.**—Where applt.'s wife, who was living with him, was in receipt of £9 16s. 10d. interest of War Loan in the year preceding the year of assessment, in

which year applt. held no War Loan, & applt. in the year of assessment bought War Loan from which he received interest amounting to £3,662 10s.:—*Held*: applt. had been in possession of the source of such interest in the previous year, & was assessable only in the sum of £9 16s. 10d. in respect of interest of War Loan.—*WALKER v. HOWARD* (1927), 138 L. T. 367; 13 Tax Cas. 313.

*Annotation*:—*Overd. Lelitch v. Emmott*, [1929] 2 K. B. 236. Compare No. 570a, post.

**317d.** ————]—**Shareholder of unlimited company—Deposit—No interest in year of assessment.**—Applt. was one of the four shareholders of an unlimited liability co. carrying on the business of bankers, the management being conducted by a “board of partners” consisting of the shareholders. For several years the co. declared dividends, but none of the shareholders drew the whole amount due to him, the excess over what each required being left on deposit with the co. Interest on the sums on deposit was, under a mutual understanding, allowed by the co. & credited to the shareholders quarterly. Applt.'s deposit account was credited with interest for the year ending Mar. 31, 1930. During the year ending Mar. 31, 1931, the “board of partners” resolved, in view of the financial conditions then existing, to forgo interest on their deposit accounts for the time being. No interest on applt.'s deposit was accordingly paid or credited or became due in the year ending Mar. 31, 1931. Applt. was assessed to income tax, under Case III. of Sched. D., for the year 1930–31, on the basis of the amount of deposit interest arising to him within the year preceding. On appeal, he contended that the particular source of profits or income arising to him in the preceding year was the contract whereby interest was payable on the moneys deposited by him with the co. & that, when it was agreed that the payment of interest on the shareholders' deposits should be discontinued, he ceased to possess the particular source of profits or income. The Special Comrs. confirmed the assessment:—*Held*: the source of profits or income had not ceased in the year of assessment.—*CULL v. COWCHER* (1934), 18 Tax Cas. 449.

**319.** *Add. Annotation*:—*Refd. Stewart v. Normanby Estate Co.* (1933), 18 Tax Cas. 244.

**321.** *Add. Annotation*:—*Refd. Thompson v. Trust & Loan Co. of Canada* (1932), 48 T. L. R. 209.

**321a.** **Surrender of Victory Bonds in payment of death duties—Unpaid interest taken into account in valuation.**—Where Victory Bonds are surrendered in payment of estate duty, & the accrued but still unpaid interest is taken into account in the valuation of the bonds,

#### PART V. SECT. 4, SUB-SECT. 1.

**321a. 1. Surrender of Victory Bonds in payment of death duties.**—Applt.'s wife was entitled under the will of her father, who died in May, 1927, to receive, during her lifetime, one-fifth of the income of the residue of his estate. The exors. of the will had deposited, or undertaken to deposit, with the Comrs. of Inland Revenue, certain Victory Bonds with a view to their transfer in payment of death duties. Under sect. 34 of Finance Act, 1917, the exors. received, in satisfaction of the duties payab

(including interest thereon for the period for which payment was postponed), an allowance in respect of the interest which had accrued on these bonds as at the date when the bonds were transferred in payment of the duties. The interest so allowed appeared in the exors.' account of income & expenditure for the period to Dec. 31, 1928, as “Victory Bond interest appropriated against duties” & was shown as reducing the amount of the interest on unpaid death duties entered on the expenditure side of the account. The amount of the residuary income arrived at on this basis was

paid to the life tenants, & applt. was assessed to sur-tax for the year 1928–29 in a sum which included, as his wife's share of that income the amount actually paid to her by the exors. as increased by the income tax appropriate thereto. He appealed, contending that, on the authority of the decision in the case of *Monks v. Fox's Exors.*, accrued Victory Bond interest was not assessable to income tax & should be excluded from the exors.' account, & that the residuary income should be computed accordingly. The Special Comrs. decided that the form of account adopted by the exors. was

the interest is not subject to income tax.—*MONKS v. FOX'S EXECUTORS*, [1928] 1 K. B. 351; 97 L. J. K. B. 241; 138 L. T. 203; 44 T. L. R. 115; 72 Sol. Jo. 31; 13 Tax Cas. 171.

**321b. Payment to beneficiary out of capital.—To make up deficit of income.**—A testator by his will, after bequeathing an annuity to his wife for life as a prior charge upon his estate, directed the surplus income to be divided in equal shares between his wife & his three daughters. He authorised his trustees during the life of his wife to make payments on account of income to the persons for the time being entitled to the income of the trust fund, such payments in advance of income not to exceed a certain sum in respect of each share, but to be made out of money in the hands of the trustees whether representing capital or income & to be charged against income, any payment made out of capital to be recouped so far as practicable as & when the trustees should think fit:—*Held*: a recipient of payments made under this power on account & in advance of income, but in fact made out of capital, was chargeable in respect thereof to income tax under Sched. D.—*WILLIAMSON v. OUGH*, [1936] A. C. 384; 105 L. J. K. B. 193; 154 L. T. 524; 80 Sol. Jo. 244; 20 Tax Cas. 194, H. L.

**324a. Provision of plant.—Payment in respect of capital.**—A colliery co. & an urban district council entered into an agreement for the supply of surplus water from the co.'s collieries to the council, which carried on a water undertaking, on the terms (*inter alia*), that the co. should erect (according to designs, specifications & tenders previously approved by the council's engineer) such buildings, plant, etc., as were necessary for the pumping, distribution, etc., of the water, & that the council should pay annually to the co. (a) a fixed sum; (b) a sum equal to one-thirtieth of the cost of the works; (c) interest on any portion of such cost for the time being unpaid; & (d) a sum of 1d. per thousand gallons of water supplied. The agreement was to continue in force for thirty years (with an option of renewal to the council subject to a variation of the payments) at the end of which the buildings, plant, etc., were to remain the property of the co., but, in the event of the co. ceasing to work its collieries during the continuance of the agreement, the council were to be allowed to continue pumping the water:—*Held*: (1) the agreement between the co. & the council in effect provided for two distinct matters, viz., (a) a supply of water at an agreed price, & (b) the construction of the works necessary to provide the supply of water, upon terms

that the council should reimburse the co. the cost of these works; (2) the annual payments equal to one-thirtieth of such cost were not part of the payments for the supply of water but were repayments of the capital cost of the works, & were, accordingly, capital receipts not assessable to income tax in the hands of the co., & capital expenditure on the part of the council not admissible as deductions in computing its income tax liability.—*BOYCE v. WHITWICK COLLIERY CO., LTD., COALVILLE URBAN DISTRICT COUNCIL v. BOYCE* (1934), 151 L. T. 464; 78 Sol. Jo. 508; 18 Tax Cas. 655, C. A.

**326. Add. Annotations:—***Refd.* *Seaham Harbour Dock Co. v. Crook* (1930), 47 T. L. R. 23; *Smart v. Lincolnshire Sugar Co.* (1935), 154 L. T. 167.

**328a. Adjustment between local authorities.**—On the transfer on the appointed day of the functions of a poor law authority to county & county borough councils under sect. 1 of Local Govt. Act, 1929 (c. 25), the institutional property & liabilities of the authority were also so transferred under sect. 113 (2) (a), (b), & were divided between the councils, & in pursuance of sub-cl. (d), as soon as practicable after the appointed day an adjustment in respect of such properties & liabilities was made between the councils. By an agreement between the said councils, under sect. 113 (2) (d) (ii.), a certain sum on balance became due under the adjustment from the deft. to pltf. council, after valuations, inquiries, etc., on a date later than the appointed day by some sixteen months, which sum included a sum which, under this agreement, was called "interest" calculated as from the appointed day. Deft. council accordingly paid over this amount, which was the aggregate of the two said sums, deducting therefrom income tax on that part of it which represented the "interest":—*Held*: the latter part was not interest within the Income Tax Acts, but it was an element in the calculation of the capital sum, i.e., the total sum paid over, which had to be made for the purpose of the said adjustment, & that, accordingly, defts. had no right to deduct income tax therefrom.—*SOUTHPORT CORPN. v. LANCASHIRE COUNTY COUNCIL*, [1937] 2 K. B. 589; [1937] 2 All E. R. 626; 106 L. J. K. B. 609; 157 L. T. 63; 101 J. P. 398; 53 T. L. R. 684; 81 Sol. Jo. 460; 35 L. G. R. 268.

**328b. Loans by trustees to beneficiary.**—Under her husband's will applt. was entitled to a life rent of his whole estate, & the trustees (of whom she was one) were empowered to

correct & corresponded to the true nature of the transaction:—*Held*: only the difference between the interest on death duties & the interest accrued on the Victory Bonds was chargeable against the income of the estate & the amount actually received by applt's wife was income.—*MITCHELL v. INLAND REVENUE COMRS.* (1933), 18 Tax Cas. 108.—IR.

*sk.* **Dividends received by broker.—Deduction of interest on unpaid balance due to broker.**—*Held*: the client was not assessable for income in respect of the whole amount of the dividends received by the broker & credited to his account, but only in respect of the

difference between the sum of the dividends & the sum charged for interest.—*Re STOUT & TORONTO CITY*, [1927] 2 D. L. R. 1100; 60 O. L. R. 313.—CAN.

*sl.* **Dividends paid in Victory Bonds exempt from taxation.**—*W., Ltd.*, having accumulated profits, declared a dividend, & by consent of the shareholders, paid the same in Victory Bonds. *W.*, a shareholder, in his income return for that year, claimed he should not pay income tax on this dividend because it was paid in Victory Bonds which were exempt from income tax:—*Held*: the payment of the

distributed dividend in question in this case, in bonds, does not bring the transaction within the "obligation" of the bond in question which introduced the exemption in taxes. Such payment is not the payment of the capital of the bond at maturity nor is it the payment of interest upon presentation & surrender of coupons which is what is exempt from taxation. The amount so received as dividend represented by said bonds was liable to income tax as profits & gains.—*WATERHOUSE v. MINISTER OF NATIONAL REVENUE*, [1931] Ex. C. R. 108; *affd.*, [1933] S. C. R. 408; 3 D. L. R. 502.—CAN.

make advances to her out of capital if they were of opinion that the income of the estate was insufficient for her maintenance & that of a son. For some years the trustees made such advances, which the General Comrs., on appeal, had held to be income in the hands of applt. On May 8, 1934, the trustees & certain prospective beneficiaries under the will signed a minute purporting to empower the trustees to make loans from the trust funds to applt. In respect of each advance thereafter applt. gave a receipt expressing the sum received to be an advance on loan, & at the end of the year she gave to the trustees a personal bond for the total advances made to her during the year. On appeal against an assessment made upon applt. under Sched. D., Case III., in respect of the sums received by her, the General Comrs. decided that the payments purporting to be made under the minute of May 8, 1934, were in reality granted by the trustees & received by applt. for purposes of maintenance under the power in her husband's will & were income in her hands, & they confirmed the assessment:—*Held*: the General Comrs.' decision was correct. In the circumstances of this case the minute of May 8, 1934, was without legal effect.—*ESDALE v. INLAND REVENUE COMRS.* (1936), 20 Tax Cas. 700.

334. *Add. Annotations*:—*Consd.* Barlow v. I. R. Comrs. (1937), 21 Tax Cas. 354. *Refd.* I. R. Comrs. v. Holder, [1931] 2 K. B. 81.

336. *Add. Annotations*:—*Consd.* Perrin v. Dickson (1929), 98 L. J. K. B. 683; Boyce v. Whitwick Colliery Co. (1934), 151 L. T. 464; Dott v. Brown, [1936] 1 All E. R. 543; I. R. Comrs. v. Ramsay (1935), 154 L. T. 141. *Refd.* Leeming v. Jones (1929), 141 L. T. 472; Brodie v. I. R. Comrs. (1933), 17 Tax Cas. 432; Ainley v. Edens (1935), 19 Tax Cas. 303.

337. *Add. Annotations*:—*Consd.* *Re* Fitch's Will Trusts, Public Trustee v. Nives (1928), 139 L. T. 556; Perrin v. Dickson (1929), 98 L. J. K. B. 683; Dott v. Brown, [1936] 1 All E. R. 543; I. R. Comrs. v. Ramsay (1935), 154 L. T. 141. *Refd.* Glenboig Union Fireclay Co. v. I. R. Comrs. (1922), 12 Tax Cas. 427; I. R. Comrs. v. City of Buenos Ayres Tramways Co. (1904), (1926), 12 Tax Cas. 1125; Westcombe v. Hadnock Quarries, Ltd. (1931), 16 Tax Cas. 137; Brodie v. I. R. Comrs. (1933), 17 Tax Cas. 432; I. R. Comrs. v. Westminster (Duke) (1935), 104 L. J. K. B. 383; Ainley v. Edens (1935), 19 Tax Cas. 303; Commercial Union Assurance Co., Ltd. v. I. R. Comrs., [1937] 4 All E. R. 159.

345a. — *By insurance company*—In consideration for annual payments.]—A contract with an insurance co., by which the assured, in consideration of annual payments, is to receive other annual payments at a later date, does not create an annuity chargeable with income tax, except to the extent that the payments

made by the co. consist of interest on those made to them by the assured.—*PERRIN v. DICKSON*, [1930] 1 K. B. 107; 98 L. J. K. B. 683; 142 L. T. 29; 45 T. L. R. 621; 14 Tax Cas. 608, C. A.

*Annotations*:—*Refd.* Brodie v. I. R. Comrs. (1933), 17 Tax Cas. 432; Minister of National Revenue v. Spooner, [1933] A. C. 684; Commercial Union Assurance Co. v. I. R. Comrs., [1937] 4 All E. R. 159.

345b. — *Guarantee of fixed dividend.*]—Applts. guaranteed to pay for each of the first five financial years of the D. co., in case its profits should be insufficient to pay a fixed preferential dividend of 7½ per cent. less income tax, such a sum as would enable a dividend at that rate to be paid, & if in any of those five years no profits were made by the D. co. the guarantors undertook to pay a sum equivalent to that required to enable the 7½ per cent. dividend (less tax) to be paid. In each of the five years applts. were called upon to make, & made, payments under their guarantee, the payments varying in amount from year to year according to the sums required by the D. co. in order to pay the 7½ per cent. dividend less tax. Applts. were allowed to deduct the sums so paid as a necessary trading expense, & having been assessed under rule 21 of the All Scheds. Rules in respect of those sums as being "annual payments," appealed against the assessment:—*Held*: that the payments were "annual payments" within rule 21, & the fact that they were contingent & variable in amount did not affect their character as such; & consequently that they were chargeable to tax.

*Per* LORD MAUGHAM: The word "annual" in the rule must be taken to have the quality of being recurrent or being capable of recurrence, & in this case the payments had this quality.—*MOSS' EMPIRES, LTD. v. INLAND REVENUE COMRS.*, [1937] A. C. 785; [1937] 3 All E. R. 381; 106 L. J. P. C. 138; 157 L. T. 396; 53 T. L. R. 867; 81 Sol. Jo. 667; 21 Tax Cas. 264; [1937] S. C. (H. L.) 35, H. L.

347. *Add. Annotations*:—*Consd.* Perrin v. Dickson, (1929), 98 L. J. K. B. 683; Dott v. Brown, [1936] 1 All E. R. 543. *Refd.* I. R. Comrs. v. Ramsay (1935), 154 L. T. 141; British Salmson Aero Engines, Ltd. v. I. R. Comrs., [1937] 3 All E. R. 464; I. R. Comrs. v. Ledgard, [1937] 2 All E. R. 492; I. R. Comrs. v. Pyman (1937), 21 Tax Cas. 129.

349a. *Annual sum paid out of capital to make up annuity*—*Direction in will.*]—The trustees of a will were directed, on testator's death, which occurred in 1920, to hold on trust certain shares together with three-fourths of the residue of his estate & to pay the income thereof to his widow for her life, with the proviso that if, in any year, the income from these sources did not amount to £4,000, they were to raise & pay to her out of the capital of the estate such a sum as added to the income would make a total of £4,000, it

PART V. SECT. 4, SUB-SECT. 2.—A. sk. *Interest due but unpaid.*]—In 1920 applts. sold all their property in St. Lucia & ceased to reside or carry on business there. In 1921 interest upon the unpaid part of the purchase price was payable to them, but it was not paid. Applts. were liable to pay income tax for the year 1921 under the

Income Tax Ordinance, 1910, of St. Lucia, only if the interest above mentioned was "income arising & accruing" to them in 1921:—*Held*: though the interest was a debt accruing in 1921 it was not "income arising or accruing" in 1921, & applts. were not liable under the Ordinance to pay tax for that year; further, applt. not being

liable to assessment at all for 1921, it was not material that by sect. 25 of the Ordinance an assessment when entered in the list was to be "final & conclusive."—*ST. LUCIA USINES & ESTATES CO., LTD. v. ST. LUCIA (COLONIAL TREASURER)*, [1924] A. C. 508; 93 L. J. P. C. 212; 131 L. T. 267; 68 Sol. Jo. 456 P. C.—*ST. LUCIA*.

being testator's expressed intention that the income payable to her should not be less than £4,000 a year. During each of the years 1923-24 to 1929-30 inclusive, the income of the shares & of the specified part of the residuary estate together fell short of £4,000 & the trustees made payments to the widow of varying amounts out of the capital of the estate to make up that sum each year. The trustees' solrs. were informed by an officer of the Inland Revenue that no income tax would be claimed on these payments, but, later, assessments were made on the trustees under General Rule 21 for each of the years 1923-24 to 1929-30 inclusive in respect of the sums paid out of the capital of the estate. On appeal, the trustees claimed (i.) that these sums were not chargeable to income tax, & (ii.) that, in the circumstances of this case, Finance Act, 1927 (c. 10), s. 26, & Income Tax Act, 1918 (c. 40), s. 125, did not authorise the making of assessments for years up to & including the year 1928-29, & that such assessments were bad in law. The Special Comrs. decided (a) that the sums paid out of capital constituted an annuity or annual payment within the meaning of r. 21 & fell to be assessed on the appts., & (b) that sect. 125 did not apply to the case:—*Held*: income tax was payable in respect of the whole of the payment of £4,000 to the widow & the assessments had been correctly made. —*BRODIE v. INLAND REVENUE COMRS.* (1933), 17 Tax Cas. 432.

*Annotation*:—*Reid*. Lindus & Hortin v. I. R. Comrs. (1933), 17 Tax Cas. 442.

**349b.** — *Discretion to trustees in family arrangement.*—The trustees under a will were directed, on the death of testator's widow, which occurred in 1909, to hold in trust one-half of the residuary estate & to pay the income thereof to his daughter for her life without power of anticipation &, on her death, for her children in equal shares. The income from the daughter's moiety proved insufficient for the maintenance of herself & her home, & by a deed of family arrangement executed in 1925, in which the daughter & all her children joined, the trustees were authorised to supplement the income of the daughter arising from the trust funds by payment to her out of the capital of the fund of such sums as the trustees in their absolute discretions thought necessary & proper for the maintenance of herself & her home. During each of the years 1925-26 to 1929-30 inclusive the trustees paid the daughter sums out of the *corpus* of the trust fund in addition

to the income of the fund, while they also paid for her the rates, taxes, etc., on her house & other household expenses. On appeal against assessments made under General Rule 21 for these years on the amounts paid by the trustees out of the *corpus* of the fund, the Special Comrs. decided that the payments were income & not capital payments, & that they were not voluntary allowances:—*Held*: the payments were taxable income of the recipient. —*LINDUS & HORTIN v. INLAND REVENUE COMRS.* (1933), 17 Tax Cas. 442.

*Annotation*:—*Reid*. Brodie v. I. R. Comrs. (1932), 17 Tax Cas. 432.

**350a.** *Payment of debt by instalments.*—By an agreement of compromise in respect of a sum of money owed, resp. (*inter alia*) covenanted to pay to applt. two sums of £1,000 each on the dates therein mentioned & £250 on each succeeding Mar. 31 so long as applt. should live, such covenant to bind resp.'s estate after his death:—*Held*: the annual payments were instalments of capital & not of income & resp. was not entitled to make any deductions in respect of income tax. —*DOTT v. BROWN*, [1936] 1 All E. R. 543; 154 L. T. 484; 80 Sol. Jo. 245, C. A.

*Annotations*:—*Reid*. British Salmson Aero Engines, Ltd. v. I. R. Comrs., [1937] 3 All E. R. 464; I. R. Comrs. v. Ledgard, [1937] 2 All E. R. 492; I. R. Comrs. v. Pyman (1937), 21 Tax Cas. 129.

**354.** *Add. Annotations*:—*Consd.* Spilsbury v. Spofforth, [1937] 4 All E. R. 487. *Reid*. Sherwood v. Sherwood, [1929] P. 120; Sibbe v. Stibbe, [1931] P. 105.

**354a.** — *Right of wife to refund of personal allowance.*—On an order being made against a resp. living abroad, whose income was not subject to British tax, for payment of maintenance free of tax to his former wife living in England, he must remit a sum which, after the payment of income tax at the standard rate, gave petitioner the sum named in the order, & she was also entitled to the benefit of any personal allowance by way of refund from the income tax authorities. —*SHEARN v. SHEARN*, [1931] P. 1; 100 L. J. P. 41; 143 L. T. 772; 46 T. L. R. 652; 74 Sol. Jo. 536.

**356.** *Add. Annotations*:—*Apld.* South American Stores (Gath & Chaves) v. I. R. Comrs. (1926), 12 Tax Cas. 905. *Reid*. Taylor v. Taylor, [1937] 1 All E. R. 464.

**361.** *Add. Annotations*:—*As to* (1) *Apld.* Clack v. Clack, [1935] 2 K. B. 109. *Generally, Reid*. Shearn v. Shearn, [1931] P. 1; I. R. Comrs. v. Barnato, [1936] 2 All E. R. 1176; Taylor v. Taylor, [1938] 1 K. B. 320.

#### PART V. SECT. 4, SUB-SECT. 2.—C.

*sk. Annuity payable out of corpus.*—*Held*: an annuity chargeable upon the *corpus* of an estate rather than being payable out of a settled fund, & not dependent upon the production or use of any real or personal property in particular, is a gift & not taxable under Income War Tax Act, R. S. C. 1927.—*TORONTO GENERAL TRUSTS CORPN. v. MINISTER OF NATIONAL REVENUE*, [1936] Ex. C. R. 172; 4 D. L. R. 533.—*CAN.*

#### PART V. SECT. 4, SUB-SECT. 2.—E.

*sm. Mortgage interest.*—*RAJA RAGHUNANDAN PRASAD SINGH v. COMR. OF INCOME TAX, BIHAR & ORISSA* (1929), 1 L. R. 9 Pat. 48.—*IND.*

*so. Mortgage accepted in discharge of principal & interest under earlier mortgage.*—When a mtge. has been accepted in discharge of the principal & interest due under an earlier mtge. & the mtgee.'s books of account have not treated the interest as being thereby paid, the interest does not become a profit or gain assessable to income tax until the mtge. is realised. If the mortgaged property is sold under a mtge. decree, & is purchased by the mtgee., then so far as the purchase-price exceeds the principal sums advanced there is a realisation, & therefore payment, of the interest. In assessing the profit so arising sums paid by the mtgee. in respect of claims upon the mortgaged property which he knew of when he purchased are not permissible deductions from the pur-

chase-price. The purchase-price can properly be taken as the value of the property, although the valuation by the civil ct. for the purpose of the sale proclamation is lower.—*RAGHUNANDAN PRASAD SINGH v. INCOME TAX COMRS.* (1933), L. R. 60 Ind. App. 133, P. C.—

*sr. Interest payable out of rates.*—Certain municipal buildings which were charged with income tax, Sched. A., upon their annual value were erected with moneys borrowed on the security of the public rates, & the interest payable on the loans was raised out of the rates.—*Held*: the interest was chargeable with income tax, Sched. D.—*ABERDEEN SUPPLY COMRS. v. RUSSELL* (1900), 27 So. L. R. 759; 3 Tax Cas. 643.—*SCOT.*



**361a.** — — — — —.]—Where a maintenance order is made by a magistrate whereby a husband is ordered to pay a certain sum weekly to his wife, the husband is entitled to deduct income tax.—*CLACK v. CLACK*, [1935] 2 K. B. 109; 104 L. J. K. B. 271; 152 L. T. 588; 99 J. P. 243; 51 T. L. R. 341; 79 Sol. Jo. 306; 33 L. G. R. 210, D. C.

*Annotation*:—*Reff. Taylor v. Taylor*, [1937] 1 All E. R. 464.

**362a.** — Order for payment free of tax—Claim for repayment.]—Resp. obtained a decree absolute of divorce & an order for the payment of maintenance free of tax. At the end of the tax year she obtained a certificate that tax had been deducted & claimed repayment of the tax. The payments had in fact been allowed as deductions against the income of the divorced husband, being treated as a charge on his income:—*Held*: resp. was entitled to the repayment claimed.—*SPILSBURY v. SPOFFORTH*, [1937] 4 All E. R. 487; 21 Tax Cas. 247.

**367a.** — Agreement to pay super-tax on wife's income in excess of specified sum—Whether husband entitled to marshal wife's income.]—A husband & wife lived apart upon the terms of a separation deed by which the husband covenanted during the joint lives of himself & his wife to pay to trustees for the benefit of the wife such a sum in each year as, after deducting income tax at the current rate, should amount to the sum of £3,000. Clause 11 of the deed was in these terms: "In addition to all other payments by this indenture agreed to be made by the husband or his representatives after his decease he or they shall pay & discharge all super-tax which shall be payable in respect of the income of either the husband or the wife except any super-tax in respect of any income of the wife not coming to her under or by virtue of this indenture in excess of £1,400 for any year." Apart from the deed the wife had an income exceeding £1,400 a year:—*Held*: in computing the super-tax payable by the husband in respect of the income of the wife, the husband was not entitled to marshal the component parts of the wife's income so that one part, namely, the annual amount payable under the deed plus £1,400, should be exempt from super-tax as to £2,000 thereof, & as to the balance should bear the lower rates of tax, & that the higher rate of tax should fall upon another part, namely, the excess of the wife's total income over the first-mentioned part; but clause 11 of the deed required that the whole super-tax payable in respect of the total income of the wife should be divided in the proportion which the amount of one of the above-mentioned parts of the wife's income bore to the amount of the other, & that the husband should pay super-tax in the proportion which the first-mentioned part bore to that secondly mentioned.—*FLEETWOOD-HESKETH v. FLEETWOOD-HESKETH*, [1929] 2 K. B. 55; 98 L. J. K. B. 417; 141 L. T. 317, C. A.

**369c.** Payment of interest to debenture holders—Out of accumulated profits.]—The words "profits or gains brought into charge to tax" in rr. 19 & 20 of the All Schedules Rules to 1918 Act, mean profits or gains brought into charge to tax in the same year of assessment as the payment is made of the interest from which income tax is deducted.

A trading co. wrote off against capital depreciation a balance of £68,929 standing to the credit of its profit & loss account & representing accumulated past profits on which the co. had paid income tax in previous years. During years of charge the co. made no profits, but it paid debenture interest, deducting from the payments tax at the standard rate which is claimed to retain on the ground that the £68,929 was to be regarded as available for the payment of the interest, & that the interest was, therefore, "payable wholly out of profits or gains brought into charge to tax" within r. 19 of the All Schedules Rules under 1918 Act:—*Held*: as during each of the years of charge the co. had no profits or gains brought into charge to income tax, the interest had not been paid out of money already brought into tax within r. 19. The case, therefore, did not fall within r. 19, but within r. 21, by which the co. must account to the Crown for the amount of the tax which it had deducted.—*LUIPAARD'S VLEI ESTATE & GOLD MINING CO., LTD. v. INLAND REVENUE COMRS.*, [1930] 1 K. B. 593; 99 L. J. K. B. 330; 142 L. T. 589; 46 T. L. R. 204; 15 Tax Cas. 573, C. A.

*Annotations*:—*Apld. Central London Railway v. I. R. Comrs.*, *London Electric Railway v. I. R. Comrs.*, *Metropolitan Railway v. I. R. Comrs.* (1934), 151 L. T. 333. *Reff. Neumann v. I. R. Comrs.* (1933), 49 T. L. R. 212; *Trinidad Petroleum Development Co. v. I. R. Comrs.*, [1936] 2 K. B. 185.

**369d.** — Whether payable out of capital.]—A co., as empowered by a private Act of 1930, raised £850,000 by an issue of debenture stock. By sect. 118 of the private Act, the co. was allowed to charge to capital account the interest accruing till 1935 on money so raised. Interest, subject to deduction of income tax, was duly paid partly out of capital & was so debited in the co.'s accounts. An assessment to income tax was made in respect of the said interest on the ground that it had not been paid out of profits brought into charge to income tax. The co. maintained that it was entitled to retain as its own the tax deducted from the interest on the ground that, as there was income in its hands already subjected to tax which it could have used to pay the interest, the payment of interest debited to capital in the co.'s accounts ought to be treated as having been paid out of taxed profits:—*Held*: as the debiting of the interest to capital was not merely a matter of accounting, but a deliberate decision by the co. to charge the interest in question against capital & not against income, the co. was not entitled to retain the tax deducted.—*CENTRAL LONDON RY. CO. v. INLAND REVENUE COMRS.*, *LONDON ELECTRIC RY. CO. v. INLAND REVENUE COMRS.*, *METROPOLITAN RY. CO. v. INLAND REVENUE COMRS.*, [1937] A. C. 77; [1936] 2 All E. R. 375; 105 L. J. K. B. 513; 155 L. T. 66; 52 T. L. R. 581; 80 Sol. Jo. 686; 20 Tax Cas. 102, H. L.

*Annotation*:—*Consd. Fenton's Trustee v. I. R. Comrs.*, [1936] 1 All E. R. 116.

**373.** *Add. Annotation*.—*Consd. I. R. Comrs. v. Barnato*, [1936] 2 All E. R. 1176.

**373a.** Interest on sums omitted from accounts by trustees.]—An infant was entitled under two wills to funds on attaining his majority. On an account being taken the trustees were found to have made serious errors. The



*cestui que trust* issued a writ claiming an account & other relief but not alleging fraud or breach of trust. A consent order was made containing (*inter alia*) an admission by deft. trustees that they were chargeable with compound interest on all moneys due to pltf. The taking of the account was referred to accountants & a special referee, who drew up a detailed award in which certain sums were shown as interest. The Comrs. sought to assess these sums to super tax. The *cestui que trust* appealed to the Special Comrs. on the ground that the whole amount of the award was capital. The Special Comrs. found, in his favour, that the sums which had been calculated on an interest basis were interest in the nature of damages or compensation, & not interest within the Income Tax Acts. On appeal to the High Ct., the learned judge reversed this decision, & the *cestui que trust* appealed:—**Held**: (1) there was an allocation by the special referee of a sum calculated on an interest basis; (2) as there had been no breach of trust & the parties had consented to the order of the ct., this sum was interest payable not by way of damages or compensation, but under a contract & therefore liable to tax.—**INLAND REVENUE COMRS. v. BARNATO**, [1936] 2 All E. R. 1176; 155 L. T. 211; 20 Tax Cas. 455, C. A.

**Annotation**:—As to (2) **Apld.** *Barlow v. I. R. Comrs.* (1937), 21 Tax Cas. 354.

**375. Add. Annotations**:—**Consd.** *Martin v. Lowry*, *Martin v. I. R. Comrs.*, [1926] 1 K. B. 550; *Ward v. Anglo-American Oil Co.* (1934), 19 Tax Cas. 94; *Barlow v. I. R. Comrs.* (1937), 21 Tax Cas. 354. **Refd.** *European Investment Trust Co. v. Jackson* (1932), 18 Tax Cas. 1; *Torrens v. I. R. Comrs.* (1933), 18 Tax Cas. 262.

**376. Add. Annotation**:—**Refd.** *European Investment Trust Co. v. Jackson* (1932), 18 Tax Cas. 1.

**377. Add. Annotation**:—**Generally**, **Refd.** *I. R. Comrs. v. Holder*, [1931] 2 K. B. 81.

**378. Add. Annotations**:—**Refd.** *Re Jauncey, Bird v. Arnold*, [1926] Ch. 471; *I. R. Comrs. v. Holder*, [1931] 2 K. B. 81; *Marland v. I. R. Comrs.* (1934), 19 Tax Cas. 467.

**378a. ————**.]—By a mtgee. & two further charges a mtgee. lent £25,500 on the security of a reversionary interest. Clause 5 (B) of the mtge. (which also applied to the further charges) provided that in case before the falling into possession of the reversion any interest on the principal money or on any accumulations of interest arising under that provision & added to the principal money should not be paid within thirty days of the due date then the sum due in respect of the half-year's interest so unpaid should become principal money as from the day on which it became due & be added to the principal money & should carry interest at the same rate as that applicable to the principal money, "but so that all interest unpaid on the original principal sum hereby secured & on all sums converted into principal money . . . shall become accumulated in the way of compound interest with half-yearly rests." Sums were so added to the principal money amounting to £2,378 & these sums were always net interest after deduction of in-

come tax. The mtgee. then sold the reversion under his power of sale but left £25,500 on mtge. to the purchaser. The mtgee.'s solrs. received the balance of the purchase-money amounting to about £3,000 & paid thereout the sum of £2,378, & a sum of interest thereon as to which no question arose, to the mtgor. & paid the balance to a second mtgee. An assessment to income tax was made on the solrs. to the extent of a sum arrived at by grossing up the net sum representing interest & deducting therefrom the mtgor.'s taxed income for the relevant years, & the Crown claimed to recover income tax on the sum so assessed as being a payment of interest not made out of profits or gains brought into charge within rule 21 of the All Scheds. Rules to the Income Tax Act, 1918, as amended. **LAWRENCE, J.**, affirmed a decision of the Comrs. discharging the assessment & in so doing purported to follow *Inland Revenue Comrs. v. Holder*, [1932] A. C. 624; *Earl of Carnarvon v. Inland Revenue Comrs.* (1934), 19 Tax Cas. 455, & *Marland v. Inland Revenue Comrs.* (1934), 19 Tax Cas. 467, in holding that the interest on the mtge. must be treated as having been paid half-yearly out of money advanced by the mtgee. The Ct. of Appeal held that it was impossible so to hold, as *Holder's* case was distinguishable & did not justify **SINGLETON, J.**'s decision in *Earl of Carnarvon v. Inland Revenue Comrs.*, while *Marland's* case was wrongly decided, but dismissed the appeal on the ground that, as at each half-year the net interest only was added to the principal money & accepted by the mtgee. in full satisfaction for the interest, the solrs., when they paid the mtgee. out of purchase-money the sum so added to the principal money, were not making a payment of interest within the rule. They were paying a sum that had already suffered tax by deduction & were under no liability to make any further deduction.—**INLAND REVENUE COMRS. v. LAWRENCE, GRAHAM & Co.**, [1937] 2 K. B. 179; [1937] 2 All E. R. 1; 106 L. J. K. B. 772; 157 L. T. 219; 53 T. L. R. 481; 81 Sol. Jo. 277; 21 Tax Cas. 158, C. A.

**Annotation**:—**Consd.** *Cross v. London & Provincial Trust, Ltd.*, [1938] 1 K. B. 792.

**379. Add. Annotation**:—**Refd.** *Boyce v. Whitwick Colliery Co.* (1934), 151 L. T. 464.

**380a. Instalments paid after death of moneylender —Instalments not representing capital.**]—A moneylender made loans on promissory notes which provided for payment to him of monthly or more frequent instalments. Up to the date of his death he was assessed under Case I, Sched. D, in respect of the profits of this business, all instalments due & paid prior to his death being brought into the relative computations. Instalments falling due after his death were collected by the administrator of his estate but it was not suggested that the administrator was at any time carrying on any trade. Assessments were made on the administrator on the basis that so much of the instalments collected by him as did not represent repayment of capital was "interest of money" within rule 1, Case III., Sched. D. The administrator contended that the sums in question were not assessable as "interest of money" within Income Tax Acts:—**Held**: the sums

in question were "interest" assessable under Case III.—**BENNETT v. OGSTON** (1930), 15 Tax Cas. 374.

**380b. Interest payable abroad—By executors resident in England.**—A sum of money was advanced, on terms embodied in an agreement made in the United Kingdom, by K., who was resident in Kenya & was not resident in the United Kingdom, to B., who was resident both in Kenya & the United Kingdom. The loan was made to enable B. to buy all the shares & debentures in an English limited co. As security B. deposited with K. in Kenya the documents of title to a farm in Kenya & all his share certificates in the co. Interest was payable half-yearly in sterling in East Africa. B. died in 1928. His exors., resps., who were resident in the United Kingdom, obtained probate of his will in England & appointed attorneys in Kenya to one of whom letters of administration with the will annexed were granted by the Supreme Ct. in Nairobi. Four payments of interest were made to K. during the material period; the first two were made to him personally in London by resps. without deduction of tax, & the remaining two, paid under deduction of tax, were sent to Barclays Bank in London on behalf of resps., with instructions to pay the sums to K. through a branch of the bank in Nairobi. Assessments were raised upon resps. under General Rule 21 for the years 1928-29, 1929-30 & 1930-31 in respect of the interest payments in question. On appeal the Special Comrs. decided that during B.'s lifetime the debt would be regarded as situate in Kenya & the interest as arising there, & that, although resps. became the debtors for the interest on his death, the mere accident of their residence in the United Kingdom should not be regarded as changing what was foreign into British property, & they discharged the assessments:—**Held**: (1) the interest payments in question were made by resps. who were resident in the United Kingdom out of sources in the United Kingdom, & they were accordingly assessable upon resps. under General Rule 21; (2) on a point of "discovery" by reference to sect. 125, 1918 Act, the assessments had been validly made.—**INLAND REVENUE COMRS. v. BROOME'S (VISCOUNT) EXORS.** (1935), 19 Tax Cas. 667.

**391. After this case add:—**

*G. Royalties.*

**391a. Payments in respect of user of patents.**—A French firm, which had acquired from an American owner of patent rights the sole right of manufacture & sale, in the "eastern hemisphere," of certain machinery, entered into an arrangement with applt. co. under which the co. was appointed as the agent of the firm for the manufacture & sale of the machinery in the parts of the British Empire within this area, which included the United Kingdom. The terms of this arrangement were agreed verbally in Paris, were subsequently embodied in a letter, written in Paris, from the firm to the co. & were accepted by the co. by a letter written in England. Under the arrangement, the selling price of the machinery was to be fixed by applt. co. whose manufacturing costs, plus overhead

charges plus profit, were not to exceed certain specified percentages of the sales. Payments due by applt. co. to the French firm under the arrangement were in fact made direct to the American owner of the patent rights, the amounts due by the co. to the firm being the same as the amounts due by the firm to the American owner. The machines which formed the subject of the patent rights were manufactured in England & sold by the co. The co. appealed to the Special Comrs. against assessments made upon it under r. 21 of the General Rules, as amended by Finance Act, 1927 (c. 10), s. 26, to cover the payments under the arrangement, contending that the agreement between the French firm & the co. was made in France & that the payments under that agreement were not income arising from property in the United Kingdom:—**Held**: the payments under the agreement constituted income arising from property within the United Kingdom & were chargeable to income tax.—**INTERNATIONAL COMBUSTION, LTD. v. INLAND REVENUE COMRS.** (1932), 16 Tax Cas. 532.

**391b. Lump sum payment.**—Resp. co. entered into an agreement with a French author, whose usual place of abode was not within the United Kingdom, under which it acquired the exclusive right of translation & publication in the English language of a book written in French, & agreed to pay the sum of 500,000 French francs for the right to sell 28,000 copies of the best edition of the book. The agreement provided for annual payments to the author, at a proportionate rate, for copies of the best edition sold in excess of 28,000 & for a royalty of 10 per cent. on the published price of all copies of any cheaper edition. Only 7,000 copies of the book were, in fact, sold & resp. co. was assessed to income tax under sect. 26 of Finance Act, 1927 (c. 10), as extended by sect. 25 of the same Act, in respect of the sum of 500,000 francs payable under the agreement:—**Held**: the payment was a payment of or on account of royalties.—**INLAND REVENUE COMRS. v. LONGMANS GREEN & CO., LTD.** (1932), 17 Tax Cas. 272.

**391c. Assessment on person through whom payment made—Not limited to agent of recipient.**—B. was proposing to form a co. for producing in London an English version of a play by a French author resident in Paris. By a memorandum of agreement between the author & B. the author granted to B. a licence to make an adaptation of the play in the English language & to produce it in London & elsewhere, & B. agreed to pay the author on signing the agreement the sum of £300 in advance & on account of royalties. In pursuance of the agreement B. instructed a firm of solrs. to pay the author out of money in their hands, of which he had the disposal, £300 on account of royalties, & they made the payment by their cheque for that amount, which was cashed in due course:—**Held**: the solrs. were persons "by or through whom" payment was made of royalties in respect of copyright within rule 21 of All Schedules Rules, as amended by Finance Act, 1927 (c. 10), ss. 25, 26, so as to apply to cases where the usual place of abode of the owner

of the copyright is not within the United Kingdom.—*RYE & EYRE v. INLAND REVENUE COMRS.*, [1935] A. C. 274; 104 L. J. K. B. 401; 152 L. T. 493; 51 T. L. R. 318; 19 Tax Cas. 164, H. L.

**391d. Payment without deduction under separation agreement—Set-off.**—A separation agreement made in Aug. 1926, between a husband & wife provided that the husband should pay to the wife a specified weekly sum. The husband from time to time paid to the wife sums payable under the agreement without deducting the income tax thereon. In May, 1935, the wife brought an action against the husband claiming a sum as money remaining due to her under the agreement. It appeared that during the period from Aug. 1926, when the payments began, down to Aug. 1932, the husband had paid sums which were in the aggregate substantially equal in amount to those payable under the agreement for that period; but that during the subsequent period from Aug. 1932, to the date of the action he had paid in each year sums which were considerably less than were payable in that year under the agreement. The husband contended by way of defence that he would have been entitled under 1918 Act, General Rules applicable to All Scheds., r. 19 (1), to deduct from each & all of the payments made by him income tax thereon at the current rate, leaving his wife to recover the amount of the tax from the income tax authorities, that as he had not deducted any of that tax he had overpaid his wife by the full amount thereof, & that as that amount exceeded the sum claimed by the wife she could recover nothing in the action:—*Held*: although the sums payable under the agreement were payable weekly, yet, as they might continue for longer than a year, they were, within the meaning of rule 19 (1), an "annual payment," from which, in so far as it remained unpaid, the husband was entitled to deduct income tax "on making such payment," & on receipt of the "residue" of which the wife should allow the deduction, that as the husband had made the annual payment in full for each year down to 1932 he was no longer entitled to deduct tax in respect of these years, but that as he had not made that payment in full for any of the remaining years down to the time of the action & a residue remained payable in respect of these years he was entitled on making payment of that residue to deduct from his wife's claim thereto the amount of the tax thereon.—*TAYLOR v. TAYLOR*, [1938] 1 K. B. 320; [1937] 3 All E. R. 571; 107 L. J. K. B. 340; 53 T. L. R. 942; 81 Sol. Jo. 587, C. A.

**392. Add. Annotations:—Consd.** *Sterling Trust v. I. R. Comrs.*, *I. R. Comrs. v. Sterling Trust* (1925), 12 Tax Cas. 868. *Distd. Dickson v. Hampstead B. C.* (1927), 91 J. P. 146, *Apld. A.-G. v. Metropolitan Water Board*,

[1928] 1 K. B. 833. *Consd. I. R. Comrs. v. Dalgety & Co.* (1929), 98 L. J. K. B. 542; *Shanks v. I. R. Comrs.*, [1929] 1 K. B. 342; *I. R. Comrs. v. Scottish Central Electric Power Co.* (1931), 145 L. T. 169. *Refd. Birt, Potter & Hughes v. I. R. Comrs.* (1927), 12 Tax Cas. 976; *I. R. Comrs. v. Pakenham*, *I. R. Comrs. v. Longford*, *Gascoigne v. I. R. Comrs.*, [1927] 1 K. B. 594; *Birmingham Corp'n. v. I. R. Comrs.*, [1930] A. C. 307; *Fry v. Salisbury House Estate, Ltd.*, *Jones v. City of London Real Property Co.*, [1930] A. C. 432; *Sutton v. I. R. Comrs.* (1929), 14 Tax Cas. 662; *I. R. Comrs. v. Miller*, [1930] A. C. 222; *Jones v. Leeming*, [1930] A. C. 415; *Luipaard's Vlei Estate & Gold Mining Co. v. I. R. Comrs.*, [1930] 1 K. B. 593; *Miller (Lady) v. I. R. Comrs.* (1930), 15 Tax Cas. 25; *Hamilton v. I. R. Comrs.*, [1931] 2 K. B. 495; *Neumann v. I. R. Comrs.* (1933), 49 T. L. R. 212; *Kneen v. Martin*, [1935] 1 K. B. 499; *Leney (Alfred) & Co. v. Whelan*, [1934] 2 K. B. 511; *Dewar v. I. R. Comrs.*, [1935] 2 K. B. 351; *Fenton's Trustee v. I. R. Comrs.*, [1936] 1 All E. R. 116; *Birmingham Corp'n. v. Barnes* (1935), 19 Tax Cas. 195; *Central London Ry. Co. v. I. R. Comrs.*, *London Electric Ry. Co. v. I. R. Comrs.*, *Metropolitan Ry. Co. v. I. R. Comrs.*, [1936] 2 All E. R. 375; *Income Tax Comr., Bengal v. Mercantile Bank of India, Ltd.*, [1936] 2 All E. R. 857; *I. R. Comrs. v. Wilson's Executors* (1934), 18 Tax Cas. 465; *Reference Under Government of Ireland Act, 1920, s. 51*, [1936] 2 All E. R. 111; *Central London Ry. Co. v. I. R. Comrs.*, [1937] A. C. 77; *Leney (Alfred) & Co. v. Whelan* (1936), 20 Tax Cas. 321; *Trinidad Petroleum Development Co. v. I. R. Comrs.*, [1937] 1 K. B. 408; *Dawson v. Counsell*, [1938] 3 All E. R. 5.

**393. Add. Annotations:—Apld.** *Dickson v. Hampstead B. C.* (1927), 91 J. P. 146. *Refd. I. R. Comrs. v. Pakenham*, *I. R. Comrs. v. Longford*, *Gascoigne v. I. R. Comrs.* (1927), 136 L. T. 699; *A.-G. v. Metropolitan Water Board*, [1928] 1 K. B. 833; *Birmingham Corp'n. v. I. R. Comrs.*, [1930] A. C. 307; *Luipaard's Vlei Estate & Gold Mining Co. v. I. R. Comrs.*, [1930] 1 K. B. 593; *Birmingham Corp'n. v. Barnes* (1935), 19 Tax Cas. 195; *I. R. Comrs. v. Crawshaw* (1935), 153 L. T. 457; *Trinidad Petroleum Development Co. v. I. R. Comrs.*, [1936] 2 K. B. 185; *Central London Ry. Co. v. I. R. Comrs.*, [1937] A. C. 77.

**393a.**—*Under Housing of the Working Classes Acts & Metropolis Management Act, 1855 (c. 120), resps., a metropolitan borough council, assigned to the London County Council all rates authorised to be raised by resps. under Metropolis Management Act, 1855, or London Govt. Act, 1899 (c. 14), to secure money advanced by the London County Council. The money so raised was used by resps. in connection with the con-*

#### PART V. SECT. 4, SUB-SECT. 3.

**3921. Annual payments partly paid out of taxed income.**—*Apltd. corp'n.* had raised the funds required for a housing scheme by borrowing a small portion from the Board of Public Works & as to the remainder by borrowing on mortgages secured on the revenue of

the corp'n. The revenue account of the scheme for the year in question showed a deficit which was eventually made good from public funds. The loan interest was due & was paid out of the borough fund before the subsidy was received. The total taxed income of the corp'n. was sufficient to cover the whole of the loan interest payable.

The corp'n. was assessed under Finance Act, 1927 (c. 10), s. 26, on the same footing as in *Birmingham Corp'n. v. I. R. Comrs.*, No. 393b, & the assessment was upheld by the special comrs. on appeal. The corp'n. demanded a case:—*Held*: the corp'n. was rightly so assessed.—*BELFAST CORPN. v. TURNBULL* (1930), 15 Tax Cas. 474.—*IR.*

struction of flats for the working classes in pursuance of a scheme prepared by them under Housing, Town Planning, etc., Act, 1919 (c. 35), s. 1. In making payments of interest on the sums advanced resps. deducted income tax under Rules applicable to all Schedules, r. 21. The interest was paid out of the general fund in the hands of resps. into which fund were paid all profits or gains, whether derived from a housing scheme or from elsewhere. Resps. had only one banking account, out of which all payments, including the interest, were made & into which all receipts, including the profits & gains derived from resps.' electricity undertaking, or otherwise, were paid. No special fund in respect of any housing scheme was maintained. Resps. possessed profits or gains brought into charge to income tax sufficient for the payment of interest on the sums advanced, apart from any revenue derived under any housing scheme:—*Held*: as none of resps.' profits & gains other than the receipts of the housing scheme contributed to the payment of the interest, & as resps. had an indemnity against loss on the scheme, resps. were liable to account for the amount of the deductions.—*DICKSON v. HAMPSTEAD BOROUGH COUNCIL* (1927), 91 J. P. 146; 43 T. L. R. 595; 25 L. G. R. 402; 11 Tax Cas. 691.

*Annotations*:—*Apprvd.* Birmingham Corp'n. v. I. R. Comrs. [1929] 2 K. B. 187. *Refd.* Fenton's Trustee v. I. R. Comrs., [1936] 1 All E. R. 116; Birmingham Corp'n. v. Barnes (1935), 19 Tax Cas. 195.

**393b.** —[J]—The Birmingham Corp'n. undertook a Housing Scheme, under the provisions of the Town Planning Act, 1919 (c. 35), & under the provisions of sect. 7, the Local Govt. Board undertook to, & did, refund to them, by means of an Exchequer subsidy, the loss thereby incurred. In order to finance the scheme, the corp'n. issued housing bonds, & when paying interest upon them they deducted income tax. They alleged that that interest was paid out of their general borough fund, which was used in financing their markets, gas, electricity, tramways & other undertakings, & that as the income in respect of that fund & those undertakings had already been brought into charge for income tax purposes, they were entitled to retain the amounts deducted:—*Held*: as the corp'n. had an indemnity against loss on the housing scheme the interest so paid could not be regarded as a general payment out of profits brought into charge, & the corp'n. must account to the Revenue for the tax so deducted under rule 21 of the rules applicable to all Schedules.—*BIRMINGHAM CORPN. v. INLAND REVENUE COMRS.*, [1929] 2 K. B. 187; 98 L. J. K. B. 498; 141 L. T. 339; 93 J. P. 216; 45 T. L. R. 463; 27 L. G. R. 551, C. A.; *affd.*, [1930] A. C. 307; 99 L. J. K. B. 299; 142 L. T. 633; 94 J. P. 123; 46 T. L. R. 262; 28 L. G. R. 201; 15 Tax Cas. 172, H. L.

*Annotations*:—*Consd.* Fenton's Trustee v. I. R. Comrs. [1936] 1 All E. R. 116. *Refd.* Birmingham Corp'n. v. Barnes (1935), 19 Tax Cas. 195; Central London Ry. Co v. I. R. Comrs., [1937] A. C. 77.

**394.** *Add. Annotations*:—*Apld.* Birmingham Corp'n. v. I. R. Comrs., [1929] 2 K. B. 187. *Refd.* Sterling Trust v. I. R. Comrs., I. R. Comrs. v. Sterling Trust (1925), 12 Tax Cas. 868; Luipaard's Vlei Estate & Gold Mining Co. v. I. R. Comrs. (1930), 99 L. J. K. B. 330; I. R. Comrs. v. Crawshay (1935), 153 L. T.

457; Central London Ry. Co. v. I. R. Comrs., [1937] A. C. 77.

**394a.** —[J]—The profits of the Metropolitan Water Board were assessable under 1918 Act, Schedule A., No. III., r. 3, by reference to the profits of the year preceding the year of assessment. The accounts of the Board for the year ending Mar. 31, 1922, showed a loss, & no assessment was made for the year ending Apr. 5, 1923. The accounts for the year ending Mar. 31, 1923, showed a profit of over two millions, out of which the Board paid over one million interest on water stock, & debentures, deducting & retaining the income tax thereon. On an information claiming that the Board was liable to account for the amount of the tax so deducted, the Board contended that the interest paid for the year 1922-23 was payable out of profits brought into charge for 1922-23 within Rules applicable to all Schedules, r. 19, & was in fact paid out of the profits for 1922-23, & that, although the income tax for 1922-23 was to be measured by the profits of the preceding year, the profits for 1922-23 had been brought into charge, & rule 21 did not apply:—*Held*: as the Board had been assessed at zero under Schedule A for 1922-23, the interest had not been paid out of profits brought into charge, & the Crown was entitled to succeed.—*A.-G. v. METROPOLITAN WATER BOARD*, [1928] 1 K. B. 833; 97 L. J. K. B. 214; 138 L. T. 346; 44 T. L. R. 135; 72 Sol. Jo. 30; 13 Tax Cas. 294, C. A.

*Annotations*:—*Distd.* Sallsbury House Estate v. Fry (1929), 98 L. J. K. B. 722. *Apld.* Luipaard's Vlei Estate & Gold Mining Co. v. I. R. Comrs., [1930] 1 K. B. 593. *Consd.* Hamilton v. I. R. Comrs., (1931), 145 L. T. 303; Neumann v. I. R. Comrs., [1934] A. C. 215; Fenton's Trustee v. I. R. Comrs., [1936] 1 All E. R. 116; Central London Ry. Co. v. I. R. Comrs., [1937] A. C. 77. *Foldd.* Trinidad Petroleum Development Co. v. I. R. Comrs., [1937] 1 K. B. 408. *Consd.* I. R. Comrs. v. Cull, [1938] 2 K. B. 109. *Refd.* Paton v. I. R. Comrs., [1938] A. C. 341.

**394b.** *Bank interest added to loan account.*—In 1918 F. borrowed from a bank £250,000 on the security of certain property. At the material date F. had paid nothing on the account in reduction of principal or interest, the bank debiting the account each half-year with the interest thereon, & carrying forward the accumulated amount:—*Held*: the action of the bank in so debiting the account with interest did not constitute as between it & F. a payment of interest by F. within sect. 26 (1) of 1918 Act so as to entitle the trustee of F.'s estate to recover the amount of income tax thereon.—*PATON v. INLAND REVENUE COMRS.*, [1938] A. C. 341; [1938] 1 All E. R. 786; 107 L. J. K. B. 354; 158 L. T. 426; 54 T. L. R. 504; 82 Sol. Jo. 212, H. L.; *affg.* S. C. *sub nom.* FENTON'S TRUSTEE v. INLAND REVENUE COMRS., [1936] 2 K. B. 59, C. A.

**397.** *Add. Annotations*:—*Consd.* Sterling Trust v. I. R. Comrs., I. R. Comrs. v. Sterling Trust (1925), 12 Tax Cas. 868. *Apld.* Dickson v. Hampstead B. C. (1927), 91 J. P. 146. *Consd.* A.-G. v. Metropolitan Water Board, [1928] 1 K. B. 833; Fenton's Trustee v. F. R. Comrs., [1936] 1 All E. R. 116. *Refd.* Birmingham Corp'n. v. I. R. Comrs., [1930] A. C. 307; I. R. Comrs. v. Dalgety & Co., [1930] 1 K. B. 1; Luipaard's Vlei Estate & Gold Mining Co. v. I. R. Comrs., [1930] 1 K. B. 593; I. R. Comrs. v. Crawshay (1935),

153 L. T. 457; *Trinidad Petroleum Development Co. v. I. R. Comrs.*, [1936] 2 K. B. 185; *Central London Ry. Co. v. I. R. Comrs.*, [1937] A. C. 77.

**397a. Losses brought forward greater than net profits for year.**—A taxpayer, who has deducted tax when paying a sum representing interest on money, is assessable to tax on that interest under rule 21 of the All Scheds. Rules of the Income Tax Act, 1918, notwithstanding that he is entitled, under sect. 33 of Finance Act, 1926 (c. 22), to set off against his profits earned in the year of assessment losses, exceeding those profits, incurred by him in previous years.—*TRINIDAD PETROLEUM DEVELOPMENT CO., LTD. v. INLAND REVENUE COMRS.*, [1937] 1 K. B. 408; [1936] 3 All E. R. 801; 106 L. J. K. B. 635; 156 L. T. 90; 53 T. L. R. 133; 80 Sol. Jo. 993; 21 Tax Cas. 1, C. A.

**407. Add. Annotation:—***Consd. Shrewsbury & Talbot v. I. R. Comrs.* [1936] 2 All E. R. 101.

**407a. ———.**—By a deed, which was made under & followed the terms of a private Act for the settlement of estates, a lady was granted a jointure of £3,000 a year charged upon the settled estates & “clear of all deductions whatsoever for taxes or otherwise.” It was held by the Ct. of Appeal that on the true construction of these words of the Act & deed the jointure was granted free of income tax other than super tax, & it was accordingly paid to the lady without deduction of the income tax thereon, which was paid by the trustees of the settled estates:—*Held*: inasmuch as the lady received the jointure without deduction of income tax, she in effect received a sum equal to the jointure together with the income tax thereon, & she should be assessed to super tax & sur tax not on the jointure only but upon a sum made up of both the jointure & the income tax thereon.—*SHREWSBURY & TALBOT v. INLAND REVENUE COMRS.*, [1936] 2 K. B. 582; [1936] 2 All E. R. 101; 105 L. J. K. B. 634; 155 L. T. 254; 80 Sol. Jo. 408; 20 Tax Cas. 538.

**409. Add. Annotation:—***Refd. Shrewsbury & Talbot v. I. R. Comrs.*, [1936] 2 All E. R. 101.

**416a. ———. Debentures.**—A co. issued debentures, stating in the prospectus that the interest thereon would be payable “free of English income tax.” The debentures themselves, & the trust deeds by which they were secured, provided for payment of interest at 5½ per cent. *per annum* “free of English income tax,” & the co. undertook, in addition to the interest, to pay or indemnify the owner of each coupon against the English income tax on the interest to which the coupon related:—*Held*: the contract was void, as regards the stipulation for payment of interest free of income tax.—*SOUTH AMERICAN STORES (GATH & CHAVES), LTD. v. INLAND REVENUE COMRS.* (1926), 12 Tax Cas. 905.

**417a. Rate of interest fixed by articles—Whether agreement to pay without deduction presumed.**—A co., incorporated in 1860, under a power contained in its articles, in 1865 & subsequently accepted from its ordinary shareholders money paid up in advance of calls to bear interest at 6 per cent. At a later date further sums were paid up in advance of calls in pursuance of an offer by

the co. to pay interest at the rate of 4 per cent. *per annum* free of income tax. The co. regularly paid the interest on these advances, without deducting income tax:—*Held*: (1) as regards the payments at the rate of 6 per cent. the ct. could not presume that the co. had entered into a new contract with shareholders making such advances to pay those shareholders interest at such a rate as after deduction of tax thereon would yield a clear 6 per cent.; (2) as regards the payments made at the rate of 4 per cent. the contract could not be construed as a contract to pay interest at such a rate as after deducting income tax would leave a clear 4 per cent., & the agreement to pay interest free of income tax was void under rule 23 (2) of the All Scheds. Rules of 1918 Act.—*NOEL v. TRUST & AGENCY CO. OF AUSTRALASIA, LTD.*, [1937] Ch. 438; [1937] 2 All E. R. 673; 107 L. J. Ch. 21; 157 L. T. 493; 53 T. L. R. 672; 81 Sol. Jo. 436.

**422. Add. Annotation:—***Refd. Hall v. Marians* (1935), 19 Tax Cas. 582.

**425. Add. Annotations:—***Consd. I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford* (1927), 96 L. J. K. B. 882; *Archer-Shee v. Garland*, [1931] A. C. 212; *Sir Currimbhoy Ebrahim Baronetcy Trust Trustees v. Income Tax Comr., Bombay* (1934), 78 Sol. Jo. 206. *Kelly v. Rogers*, [1935] 2 K. B. 446. *Refd. Baker v. Archer-Shee*, [1927] A. C. 844; *I. R. Comrs. v. Crawshaw* (1935), 153 L. T. 457.

**425a. — Gifts made in United Kingdom.**—*Mrs. T.*, who died on Feb. 1, 1933, was a beneficiary under the will of a testator who gave two-eighths of his residuary estate to a Trust Co. of New York upon trust for investment & to collect the income thereof & after deducting legal charges & commission to accumulate the income until *Mrs. T.* attained the age of twenty-one years & afterwards upon trust to collect the income of the two-eighth shares & the accumulations & after deducting lawful charges & commissions to apply the net income quarterly or as often as the same should from time to time accrue to the use of *Mrs. T.* as long as she lived. The trusts of the will fell to be administered under the law of the State of New York, under which the whole estate in law & equity in the trust funds was vested in the Trust Co. & the trust gave the beneficiary merely the right to resort to a ct. of equity to compel the Trust Co. to discharge the task imposed upon it. Accordingly, following *Archer-Shee v. Garland*, [1931] A. C. 212, the assessments on *Mrs. T.*'s income were made as regards this property under rule 2 of Case V. of Sched. D., in respect of only the amounts of income received in or remitted to the United Kingdom. *Mrs. T.* from time to time directed the Trust Co. to pay certain allowances to her children. These allowances were all remitted to England either to the children or their bankers & were included in the assessments to income tax made upon *Mrs. T.* for the years 1924–25 to 1926–27 inclusive. On an appeal by her exors. against the assessments:—*Held*: the drafts sent to the United Kingdom in respect of the allowances did not become the children's property until they had been cashed &, although *Mrs. T.* could not be said to have

received the payments, she was "entitled" to the income when it reached England & was therefore assessable to income tax in respect of it under rule 1 of the Miscellaneous Rules applicable to Sched. D. when read in connection with rule 2 of the Rules applicable to Case V. of Sched. D.—*TIMPSON'S EXECUTORS v. YERBURY*, [1936] 1 K. B. 645; [1936] 1 All E. R. 180; 105 L. J. K. B. 749; 154 L. T. 283; 80 Sol. Jo. 184; 20 Tax Cas. 155, C. A.

*Annotation* :—*Distd. Carter v. Sharon*, [1936] 1 All E. R. 720.

**425b.** ———.—(1) Resp. was an American citizen not domiciled in the United Kingdom. In 1928, resp. visited England but she did not acquire a "residence" for income tax purposes. During her visit resp. received certain sums arising from shares in the United States. Resps. acquired a residence in England in 1929 :—*Held* : under Finance Act, 1926 (c. 22), s. 29, resp. was properly assessable for income tax in respect of the year 1929 on the sums received in 1928.

(2) Resp. had for some years paid to her daughter in England a monthly allowance. This allowance was paid by the purchase by resp.'s agent on resp.'s banking account in the United States of a banker's draft on a London bank, which was posted to the daughter & payable to her order. Evidence was given that by the law of California, the gift of the allowance was complete at the very latest at the time of the posting of the banker's draft in California :—*Held* : inasmuch as the gift of the sums paid as allowance was complete outside the United Kingdom, the sums were not sums which resp. received or was entitled to receive within Sched. D., Case V., r. 2, & the Miscellaneous Rules to Sched. D., r. 1, & were not liable to tax.—*CARTER v. SHARON*, [1936] 1 All E. R. 720; 80 Sol. Jo. 511; 20 Tax Cas. 230.

**426.** *Add. Annotation* :—*Consd. Kneen v. Martin*, [1935] 1 K. B. 499.

**427.** *Add. Annotation* :—*N.F. Manton's Trustees v. Steele, Steele v. Manton's Trustees* (1927), 11 Tax Cas 549.

**428a.** ———.—*Securities in control of foreign custodian of enemy property—Payment of dividends by Anglo-German Mixed Arbitral Tribunal—When interest accrues.*—Before the war one K., who was a naturalised British subject ordinarily resident in the United Kingdom, deposited certain securities, stocks, & shares with a bank in Germany for safe custody, & the bank collected the interest & dividends & put them to the credit of K.'s account. From the outbreak of war in 1914 K. ceased to operate the account & he died in 1916. The bank, however, continued to credit the account with the interest & dividends until 1917, when the German Govt. appointed a custodian to take over & administer enemies' property in Germany, & the bank then paid the interest & dividends to the custodian. K.'s last surviving exor. died in 1921, & resps., the exors. of such survivor, recovered the interest & dividends, together with interest thereon, through the Anglo-German Mixed Arbitral Tribunal. Resps. were assessed to income tax in respect of these sums for the years 1922-23 to 1926-27 under Cases IV. & V. of Sched. D. on the ground that they were income arising to resps. in those years

as they accrued only when received under the decree of the Tribunal :—*Held* : the dividends & interest accrued in the years when they were paid into the bank, & it was now too late to make assessments in respect of the years before K.'s death, & as to the years after his death assessments could be made only so far as the assessments were in time, & the further sum paid as interest thereon under the decree of the Tribunal was not income but was compensation comparable to damages for detention of a chattel & therefore was not assessable to income tax.—*SIMPSON v. MAURICE'S EXORS.* (1929), 45 T. L. R. 581; 14 Tax Cas. 580, C. A.

*Annotations* :—*Refd. Lambe v. I. R. Comrs.*, [1934] 1 K. B. 178; *Dewar v. I. R. Comrs.* (1935), 51 T. L. R. 360; *Paget v. I. R. Comrs.*, [1937] 3 All E. R. 890; *Barlow v. I. R. Comrs.* (1937), 21 Tax Cas. 334.

**428b.** ———.—& interest thereon—*Whether interest income.*—*SIMPSON v. MAURICE'S EXORS.*, No. 428a, *ante*.

**428c.** ———.—*Suspension of interest—Issue of funding bonds.*—Resp. co. was the holder of certain gold bearer bonds of the United States of Brazil. The Brazilian Govt., being unable to pay the interest as it fell due, put forward a funding plan, under which holders might exchange their interest coupons as they fell due for twenty-year funding bonds, carrying interest at 5 per cent. Resp. co. from time to time sold the funding bonds which they had received. For the years 1933-34 & 1934-35 resp. co. were assessed to income tax under Case IV. of Sched. D in sums intended to represent the value as at the dates of issue of certain of the funding bonds received & sold by them. The claim for tax having been rejected by *FINLAY, J.*, the Crown appealed. The question for the determination of the ct. was, were the funding bonds when received, "income arising from securities out of the United Kingdom" within Case IV. of Sched. D of 1918 Act. It was contended on behalf of the Crown that they were money's worth received in satisfaction of interest payable under the original bonds. Resp. co. contested this & contended that they had received no income from bonds, in that all they had received was a substituted promise to pay the interest at a future date with interest thereon in the meantime :—*Held* : where a debtor defaults & the appropriate income being money is not changed into something else but remains money which the debtor promises to pay at a later date, it cannot be said that the security has produced any income. The form of the funding bond was nothing but a promise to pay at a future date the interest in respect of which default had been made. Resp. co. was not therefore assessable to income tax under Case IV. of Sched. D of 1918 Act in respect thereof.—*CROSS v. LONDON & PROVINCIAL TRUST, LTD.*, [1938] 1 K. B. 792; [1938] 1 All E. R. 428; 107 L. J. K. B. 423; 158 L. T. 217; 54 T. L. R. 399; 82 Sol. Jo. 112, C. A.

**430.** *Add. Annotations* :—*Apld. Manton's Trustees v. Steele, Steele v. Manton's Trustees* (1927), 11 Tax Cas. 549. *Consd. Fry v. Burma Corpn.*, [1930] A. C. 321; *Kelly v. Rogers* (1935), 180 L. T. Jo. 145. *Refd. I. R. Comrs. v. Blackwell* (1925), 134 L. T. 372; *Baker v. Archer-Shee*, [1927] A. C. 844; *I. R. Comrs.*



*v. Pakenham, I. R. Comrs. v. Longford* (1927), 96 L. J. K. B. 882; *Hamilton v. I. R. Comrs.*, [1931] 2 K. B. 495; *Elmhirst v. I. R. Comrs.*, [1937] 2 All E. R. 349.

**430a.** — Foreign agreement for repayment by foreign company of loan with interest—Not a security.]—*MANTON'S (LORD) TRUSTEES v. STEELE, STEELE v. MANTON'S (LORD) TRUSTEES* (1927), 11 Tax Cas. 549, C. A.

*Annotation*.—*Reid, Æolian Co. v. I. R. Comrs., I. R. Comrs. v. Æolian Co.*, [1936] 2 All E. R. 219.

**430b.** — Company making investments on real estate abroad.]—A co. incorporated in the United Kingdom, & carrying on business there at its head office in the making of loans of money upon the security of land in Egypt, was assessed to income tax until Apr. 1, 1922, under Schedule D., Case I., upon the profits of the co.'s business. As from Apr. 1, 1922, the entire control of the business was removed to Egypt. The trade of the co. wholly consisted of the lending of money to approved borrowers in Egypt in accordance with Egyptian law, at rates of interest varying from 6 to 8½ per cent. No loans were entertained without good real security being given, & in the event of the borrower's default, proceedings were invariably taken in the local cts. to realise the security, & if it could not be sold immediately, the co. would go into possession:—*Held*: as from Apr. 1, 1922, the co., though it carried on a trade or business, was properly assessed to income tax under Schedule D., Case IV., in respect of income arising from securities in a place out of the United Kingdom, & was to be taxed in the full amount of such income, whether it was remitted to the United Kingdom or not. There was no evidence upon which the comrs. could find, as they had, that the taking of securities for the loans advanced was only "an incident" in such business; on the contrary it was an indispensable condition of the business. The case being one coming both under Case IV. & Case V. the Crown had an option to tax the co. under either case.—

#### PART V. SECT. 5.

**432 i. Deductions—Tax paid in foreign country—Income not chargeable in United Kingdom.**]—A British investment co. was chargeable to income tax in America, where its income arose. The income on which it was chargeable in America included profits on the realisation of investments, which profits are not chargeable to income tax in the United Kingdom. In computing its income from securities abroad under Sched. D, Case IV., the co. claimed a deduction in respect of the income tax paid in America on profits from the realisation of investments there:—*Held*: the deduction claimed was inadmissible, on the ground that, under rule 1 of Case IV., a deduction in respect of foreign income tax was allowable only with regard to income which was chargeable to income tax in the United Kingdom.—*SCOTTISH AMERICAN INVESTMENT CO. v. INLAND REVENUE*, [1938] S. C. 234.—*SCOT.*

*o. Add. Citation*.—*sub nom. SCOTTISH PROVIDENT INSTITUTION v. FARMER*, 6 Tax Cas. 34.

#### PART V. SECT. 6.

**q 1.** — Remittance under foreign decree of divorce.]—*Held*: annual remittances received by a woman in Scotland from her divorced

husband in Sweden, under a Swedish decree of divorce, fell to be taxed under Case V. in respect that "possessions" included not only corporeal possessions but also incorporeal possessions.—*INLAND REVENUE COMRS. v. ANDERSTROM*, [1928] S. C. 224; 13 Tax Cas. 482.—*SCOT.*

**q 11.** — Foreign bank overdrawn—Whether remittances to England capital or income.]—*Appl.*, who owned plantations in Ceylon, where he ordinarily resided, visited the United Kingdom for a period of at least six months during each of the years 1927–28—1930–31 & was accordingly chargeable to income tax for those years as a person residing in the United Kingdom. During his absences from Ceylon his plantations were managed, under a power of attorney, by his agents in Colombo, who received the income & paid the expenses in connection with the plantations. Certain sums were remitted by his agents in 1927–28 & 1930–31 to the credit of his account at a bank in London. *Appl.*'s account with his bank in Colombo was continuously overdrawn during the periods of his visits to the United Kingdom, & at the date of each of the remittances made to him by his agents his account in their books showed a debit balance, which, however, fluctuated constantly throughout the

*BUTLER v. MORTGAGE CO. OF EGYPT, LTD.* (1928), 139 L. T. 29; 13 Tax Cas. 803, C. A.

**431. Add. Annotations**.—*Consd. Denny (H. & A.) v. Reed* (1933), 18 Tax Cas. 254; *Barnes v. Hely Hutchinson*, [1938] 3 All E. R. 98. *Reid. Ormond Investment Co. v. Betts*, [1928] A. C. 143; *Æolian Co. v. I. R. Comrs.*, *I. R. Comrs. v. Æolian Co.*, [1936] 2 All E. R. 219.

**433. Add. Annotations**.—*As to* (1) *Consd. Fry v. Burma Corp.*, [1930] A. C. 321; *Astor v. Perry*, [1935] A. C. 398. *Distd. McKenna v. Eaton-Turner*, [1936] 1 K. B. 1; *Eaton-Turner v. McKenna*, [1937] A. C. 162; *Bennett v. Marshall*, [1938] 1 K. B. 591. *Reid. Whitney v. I. R. Comrs.*, [1926] A. C. 37; *Archer-Shee v. Baker* (1927), 11 Tax Cas. 749; *I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford* (1927), 96 L. J. K. B. 882; *Proctor v. Ryall, Ryall v. Proctor* (1928), 14 Tax Cas. 204; *Ormonde v. Brown* (1932), 17 Tax Cas. 333; *Duncan's Executors v. Adamson*, [1935] A. C. 398; *Kneen v. Martin*, [1935] 1 K. B. 499; *Rye & Eyre v. I. R. Comrs.*, [1934] 2 K. B. 270; *Browning v. Duckworth*, [1935] 1 K. B. 605. *As to* (2) *Expld. Fry v. Burma Corp.* (1929), 98 L. J. K. B. 693. *Generally, Reid. Leeming v. Jones* (1929), 141 L. T. 472; *Diggins v. Forestal Land, Timber & Railways Co., Ltd.* (1930), 142 L. T. 509; *I. R. Comrs. v. Dalgety & Co.*, [1930] A. C. 527; *Spiers v. Mackinnon* (1929), 14 Tax Cas. 386; *Robinson v. Corry, Corry v. Robinson*, [1934] 1 K. B. 240; *Denny (H. & A.) v. Reed* (1933), 19 Tax Cas. 254; *Ryall v. Du Bois Co.* (1933), 150 L. T. 386; *Carter v. Sharon*, [1936] 1 All E. R. 720; *I. R. Comrs. v. Broome's Executors* (1935), 19 Tax Cas. 667.

**437. Add. Annotation**.—*As to* (1) *Reid. Ormond Investment Co. v. Betts*, [1927] 2 K. B. 326.

**441. Add. Annotations**.—*Appl. Sutton v. I. R. Comrs.* (1929), 45 T. L. R. 326. *Consd. A.-G. v. Farrell* (1930), 99 L. J. K. B. 605. *Distd. Stedeford v. Beloe* (1931), 47 T. L. R. 408. *Reid. Tollemache v. I. R. Comrs.* (1926),

material periods. No particulars were furnished of the income arising from his possessions in Ceylon but it was not denied that it was substantial in amount, & it was not suggested that the reductions shown from time to time in the debit balances in the agents' books were not the result of receipts on revenue account. On appeal against assessments under Case V. of Sched. D. for the years 1927–28 & 1930–31, based on the amounts remitted to the United Kingdom in those years, *applt.* contended that these amounts were advances of capital or loans made by his agents, & that it was not material from what source the advances were repaid. The Special Comrs. held that the mere fact that *applt.*'s accounts with his agents & his bank in Ceylon were overdrawn at the time when the remittances were made was not sufficient to show that such remittances were capital, & they concluded on the information before them that the sums received by him from Ceylon were income arising from his possessions there:—*Held*: the Special Comrs. were entitled on the evidence before them to hold that the sums received by *applt.* from Ceylon were remittances of income & were accordingly assessable under Case V. of Sched. D.—*FELLOWS-GORDON v. INLAND REVENUE COMRS.* (1935), 19 Tax Cas. 693.—*SCOT.*



96 L. J. K. B. 766; *I. R. Comrs. v. Pakenham*, 1 R. Comrs. v. Longford (1927), 96 L. J. K. B. 882; *Garland v. Archer-Shee* (1930), 142 L. T. 443; *Chamney v. Lewis* (1932), 17 Tax Cas. 318; *Lindus & Hortin v. I. R. Comrs.* (1933), 17 Tax Cas. 442; *Johnstone Trust Settlement v. Chamberlain* (1933), 17 Tax Cas. 706; *Timpson's Executors v. Yerbury*, [1936] 1 All E. R. 186; *Allen v. Trehearne*, [1938] 2 K. B. 464.

- 441a.** ——— **Application of American law.**—Testator, a subject of the United States, directed that his residuary estate should be held upon trust to dispose of the income thereof to the use of his daughter, now the wife of applt., during her life. Testator's residuary estate consisted wholly of foreign securities & foreign stocks & shares, & the existing trustees were an American trust co. Applt. appealed against assessments to income tax made upon him in respect of his wife's income arising from the will under Case IV. & Case V., r. 1, as being income arising from foreign securities, stocks & shares, & chargeable to tax, whether received in the United Kingdom or not, & claimed that, by reason of the interposition of the title of the trustees, it should be assessed under Case V., r. 2, as being a foreign possession other than stocks & shares & chargeable only to the extent to which it was remitted to the United Kingdom. The assessments were ultimately upheld by the House of Lords upon the assumption that the American law was the same as the law of England. Upon an appeal by applt. against further assessments to income tax made upon him in respect of the same income for the three succeeding years, expert evidence was adduced as to the law of the United States to the effect that under that law the wife had no estate or interest in the securities, stocks or shares, but that her sole right was to compel the trustees to discharge their duties under the will:—*Held*: as the result of this evidence, the income in question was assessable under Case V., r. 2.—*ARCHER-SHEE v. GARLAND*, [1931] A. C. 212; 100 L. J. K. B. 170; 144 L. T. 508; 47 T. L. R. 171; *sub nom.* *GARLAND v. ARCHER-SHEE*, 15 Tax Cas. 693, H. L.

*Annotations*:—*Consd.* *Timpson's Executors v. Yerbury*, [1936] 1 All E. R. 186; *Perry v. Astor* (1935), 19 Tax Cas. 255. *Refd.* *Ormonde v. Brown* (1932), 17 Tax Cas. 333; *Duncan's Executors v. Adamson*, [1935] A. C. 398; *Kelly v. Rogers*, [1935] 2 K. B. 446.

- 442.** For the existing paragraph substitute the following paragraph:—

— — — — —]—Testator, a citizen of the United States left the residue of his property in trust for his daughter during her life. The trustees, who had full power over the investment of the trust fund, were a co. constituted under the law of the State of New York & resident therein. The trust fund consisted of foreign govt. securities, foreign stocks & shares, & other foreign property. The trustees paid over such of the sums they received as they considered to be income, after deducting expenses, to the order of the daughter at a bank in New York. No part of the income was remitted to the United Kingdom. *Resp.*, the husband of testator's daughter & resident in the United Kingdom, was assessed under

Schedule D., Case IV., in the full amount of the income of the trust:—*Held*: (1) the daughter was specifically entitled under the will in equity during her life to the interest & dividends of the securities, stocks, & shares comprised in the trust fund, & her husband was assessable under Case IV., r. 1, & Case V., r. 1, to income tax in respect thereof, except such, if any, as were shown to be "foreign possessions other than stocks, shares & rents," whether such interest & dividends were remitted to the United Kingdom or not; (2) the matter should be remitted to the comrs. to state which of the items of the trust fund were (a) "securities" within Case IV., r. 1, (b) "stocks, shares or rents" within Case V., r. 1, & (c) "possessions out of the United Kingdom other than stocks, shares or rents" within Case V., r. 2.—*BAKER v. ARCHER-SHEE*, [1927] A. C. 814; 96 L. J. K. B. 803; 137 L. T. 762; 43 T. L. R. 758; 71 Sol Jo. 727, H. L.; *revsq.* *S. C. sub nom.* *SHEE v. BAKER*, [1927] 1 K. B. 109; *sub nom.* *ARCHER-SHEE v. BAKER*, 11 Tax Cas. 749; *subsequent proceedings* (1928), 15 Tax Cas. 1, C. A.

*Annotations*:—*Expld.* *Garland v. Archer-Shee* (1930), 142 L. T. 443. *Appld.* *Archer-Shee v. Garland*, [1931] A. C. 212. *Consd.* *Perry v. Astor*, [1934] 1 K. B. 260. *Refd.* *Walker v. Howard* (1927), 138 L. T. 367; *Wolverton (Lord) v. I. R. Comrs.* (1931), 16 Tax Cas. 407; *I. R. Comrs. v. Crawshaw* (1935), 153 L. T. 457; *Kelly v. Rogers*, [1935] 2 K. B. 446.

- 444a.** ——— **Includes interest paid under foreign agreement for repayment by foreign company of loan with interest.**—*MANTON'S (LORD) TRUSTEES v. STEELE, STEELE v. MANTON'S (LORD) TRUSTEES* (1927), 11 Tax Cas. 549, C. A.

*Annotation*:—*Refd.* *Æolian Co. v. I. R. Comrs.*, *I. R. Comrs. v. Æolian Co.*, [1936] 2 All E. R. 219.

- 445.** *Add. Annotations*:—*Distd.* *Fry v. Burma Corpn.*, [1930] A. C. 321. *Consd.* *Leitch v. Emmott*, [1929] 2 K. B. 236; *I. R. Comrs. v. Cull*, [1938] 2 K. B. 109. *Refd.* *Egyptian Delta Land & Investment Co. v. Todd*, [1929] A. C. 1; [1931] 2 K. B. 495; *Neumann v. I. R. Comrs.*, [1934] A. C. 215; *Barnes v. Hely Hutchinson*, [1938] 3 All E. R. 98.

- 446a.** ——— **Advance on account of salary paid into banking account in United Kingdom.**—*FLEMING v. WILKINSON*, No. 131a, *ante*.

- 446b.** ——— **Sales agent for foreign countries of manufacturers in United Kingdom.**—*SPIERS v. MACKINNON*, No. 131f, *ante*.

- 446c.** ——— **Annuity under deed of separation executed abroad.**—Under a deed of separation executed in India, applt.'s husband agreed to allow applt. an annuity of £1,000 for the term of her life. The annuity was paid, by quarterly instalments, by the husband's bankers in London out of a fund derived partly from remittances from India & partly from taxed dividends received by the bankers in England as the husband's agents. The Special Comrs., on appeal, held that the annuity was income of applt. from a foreign possession & was assessable under Case V. of Sched. D:—*Held*: the Special Comrs.' decision was correct.—*CHAMNEY v. LEWIS* (1932), 17 Tax Cas. 318.

*Annotations*:—*Refd.* *Æolian Co. v. I. R. Comrs.*, *I. R. Comrs. v. Æolian Co.*, [1936] 2 All E. R. 219; *I. R. Comrs. v. Broome's Executors* (1935), 19 Tax Cas. 687.

448e. ——— Overdraft on London branch of bank—Transfer to Colombo branch—Loan discharged by sale of bonds in Colombo—Whether proceeds of bonds received in England.]—Resp.'s wife, who lived with her husband in London, was entitled to a share of the profits of a business carried on in Colombo. Her share was paid into her current account with the Colombo branch of a bank which was registered in the United Kingdom & had its head office in London. On her instructions, these profits were invested in Indian bonds. Between May, 1926, & Apr. 1930, she borrowed certain sums from the bank's head office in London. In Apr. 1930, she instructed the bank to transfer the loan to her current account with its Colombo branch; this was carried out by cross entries in the books of the two offices. A small credit balance in Colombo was thereupon converted into a debit balance. A few weeks afterwards, the overdraft & the interest accrued thereon, were discharged out of the proceeds of the sale in Colombo

446f. \_\_\_\_\_.]—Resp.'s wife, who lived with her husband in London, was entitled to a share of the profits of a business carried on in Colombo. Her share was paid into her current account with the Colombo branch of a bank which was registered in the United Kingdom & had its head office in London. On her instructions these profits were invested in Indian bonds. Resp.'s wife had from time to time borrowed certain sums from the bank in London on the security of the bonds. On Apr. 1, 1930, she requested the bank in London to instruct its Colombo branch to sell sufficient securities to extinguish the loan. On the next day the bank informed her that the amount of her loan account, with interest, was being debited to the Colombo branch which was being instructed to realise securities to pay it off. The transfer was effected by cross entries in the books of the two offices, the entry in the London books being dated April 3, 1930. A small credit balance in Colombo was thereupon converted into an overdraft on which interest was chargeable. A few weeks afterwards the overdraft & the interest accrued thereon were discharged in Colombo out of the proceeds of the sale of Indian bonds. Resp. had been assessed under rule 2 of Case V. of Sched. D. for the year 1931-32 in respect of the amount of the overdraft transferred from the London office of the bank to the Colombo branch on the footing that when the proceeds of sale of the bonds were credited to the Colombo account the debt due to the bank from resp.'s wife was extinguished & this constituted the receipt by her in the United Kingdom of a taxable remittance, but this assessment was discharged following a decision of the High Ct. on a case stated between the same parties. Resp. was then assessed under rule 2 of Case V. of Sched. D. for the years 1927-28 to 1932-33 inclusive on the basis, as regards assessments for years other than 1930-31, that income from foreign possessions was received by his wife in the United Kingdom as & when the advances were made to her in London by the London bank, & as regards the assessment for the year 1930-31, on the alternative basis, that

income from foreign possessions was received by her in the United Kingdom when the loan was transferred as at Apr. 3, 1930, from her London account to her account at the Colombo branch. On appeal the Special Comrs. discharged all the assessments:—*Held*: neither the loans made from time to time by the bank in London to resp.'s wife nor the transfer of the loan as at Apr. 3, 1930, from the bank in London to the Colombo branch constituted the receipt by her in the United Kingdom of income from foreign possessions within rule 2 of Case V. of Sched. D.—*HALL v. MARIANS* (1935), 19 Tax Cas. 582, C. A.

**446g.** — **Remittances from sources already taxed.**—The Duchess of Roxburghe, who was resident in the United Kingdom, was entitled to receive income from America (a) from a share in the trust estate of her father, the income from which was assessable under rule 2 of Case V. of Sched. D. by reference to the amounts remitted to the United Kingdom, & (b) from securities, stocks, shares & rents in her absolute ownership, the income from which was assessable under Case IV. & rule 1 of Case V. of Sched. D. on the basis of the amounts arising in America. The Duchess had in New York several accounts with the same bank, of which one dealt with income & capital receipts & payments without distinction, a second, known as the "Special Custodian Account," was opened in Nov. 1930, by a substantial credit from the first account, & a third was a time deposit account opened in Mar. 1931, by a transfer from the second account of \$300,000 representing capital & income which had already borne British income tax. The money in the third account was not deposited for any fixed period but was at the control of the Duchess, & the rate of interest depended partly on the length of time the deposit remained; the interest thereon was transferred, as it accrued, to the second account. On Aug. 23, 1931, the Duchess instructed her bank to remit to London a certain sum to be debited to the "Special Custodian Account" (which, it appeared, her advisers—though not the bank—regarded as including the amount on time deposit) & "to be provided out of accumulations of income other than income from the Goelet Trust of my Father." In fact, however, the bank left the amount on time deposit untouched & made the remittance of \$200,763 on Sept. 4, 1931, out of the second account, whose credit balance at that date consisted of an amount transferred from the first account, certain income from the trust estate, a tax refund from the United States Treasury, small sums of interest, & the proceeds of sale of stock (originally purchased out of income) which was realised to make up the balance of the remittance. It was agreed that \$31,112 of this remittance represented income already charged to income tax in the United Kingdom. On appeal to the Special Comrs. against an assessment under Case V. of Sched. D. for the year 1932–33 in respect of the amount so remitted, applts. (as exors. of the Duke, who died in Sept. 1932) contended (*inter alia*) (1) that it was open to the Duchess to remit income from whatever source she

saw fit & that the remittance made in Sept. 1931, following her instructions must be deemed to have been made from sources available already taxed or from capital, (2) that the manner in which the accounts were dealt with by the bank was not conclusive of the matter, & that the remittance was made out of capital & income already taxed, of which there was a sufficient amount available in the bank's hands, & (3) that there was no evidence upon which the Special Comrs. could competently find that the remittance in question was derived from income from foreign possessions. The Special Comrs. found as a fact that the money (*i.e.*, the \$300,000) remained on time deposit & was not available to meet the remittance in question, & that accordingly the moneys remitted were, with the exception of \$31,112, income from foreign possessions assessable under rule 2 of Case V. of Sched. D., & they confirmed the assessment:—*Held*: the remittance in question must be taken to have consisted of capital & income from foreign securities already subjected to tax in Great Britain.—*ROXBURGHE'S (DUKE) EXECUTORS v. INLAND REVENUE COMRS.* (1936), 20 Tax Cas. 711.

**446h.** — **Proceeds of sale of foreign investments—Remitted to United Kingdom.**—Resp., a widow, was a citizen of the United States of America, but had in 1925 purchased a house in this country in which she had since resided. She was possessed of certain American securities, stocks & shares, which she had deposited for safe custody at a bank in New York. In the years 1932 & 1933 she caused certain of these securities, stocks & shares to be sold in America & the proceeds remitted to her in this country. Estimated assessments to income tax were made upon her for £5,000 for each of the two years 1932 & 1933 under rule 2 of Case V. of Sched. D. On appeal by resp. the Special Comrs. found that the proper inference to be drawn from the facts of the case was that the actual sums remitted to resp. were all derived from the proceeds of the realisation of investments owned by her before 1925 & not from income, or the proceeds of the realisation of investments acquired out of income arising since that date, & that she was not resident in the United Kingdom before 1925. They accordingly discharged the assessments. On appeal by the Crown it was contended that under rule 2 of Case V. of Sched. D., the measure of liability to income tax in respect of income arising from possessions out of the United Kingdom was the full amount of the actual sums received in the United Kingdom:—*Held*: the opening words of Sched. D. & of Cases IV. & V. of that Sched. showed that the purpose of rule 2 of Case V. was to deal only with the income which accrued from possessions out of the United Kingdom to the person to be charged & which was remitted to this country. Rule 2 was part of the machinery for carrying out that purpose, & must be read as if the words "of income" were inserted after the word "sums" in that rule.—*KNEEN v. MARTIN*, [1935] 1 K. B. 499; 104 L. J. K. B. 361; 152 L. T. 337; 79 Sol. Jo. 31; 19 Tax Cas. 33, C. A.

*Annotation*:—*Reid. Hall v. Marians* (1935), 19 Tax Cas. 582.

**448a.** **Employment abroad.]—M.** was employed during the financial years 1933-35 as vice-president in charge of overseas sales of an American co. He resided in England & his duties under his employment, the terms of which were not contained in any written agreement, were to supervise the sales of the products of the American co. in all countries except U.S.A. & Canada, whether sold direct by them or through agents or subsidiary cos. His place of employment was at the office of the American co. in Ohio & he was paid from that place, & at his request payment was made to his credit in a banking account in Canada. Part of his work was done in England:—*Held*: as the agreement for employment under which his salary was payable & the actual payment were made outside the United Kingdom, M. was only assessable in respect of the income arising from his employment under Case V. as being "income arising from possessions out of the United Kingdom" & therefore by virtue of rule 2 of the Rules applicable to Case V. his assessment must be on so much only of that income as was remitted to this country.—*BENNETT v. MARSHALL*, [1938] 1 K. B. 591; [1938] 1 All E. R. 93; 107 L. J. K. B. 319; 158 L. T. 75; 54 T. L. R. 320; 82 Sol. Jo. 74, C. A.

**449a.** — **When income arises—New resident—Former foreign possessions continued.]—**Resp. who had resided in the Straits Settlements for many years, during which time he was in receipt of an income arising from stocks, shares & rents in the Straits Settlements, took up his permanent residence in England on Apr. 7, 1927. Thereafter he continued to receive such income, his holdings in Malayan investments being substantially the same as in previous years:—*Held*: resp.'s income did not first arise on Apr. 7, 1927, so as to entitle him, under Finance Act, 1926 (c. 22), s. 29 (1) (b), (ii), to have his income tax for the financial year 1928-29 computed on the income of that year.—*BACK v. WHITLOCK*, [1932] 1 K. B. 747; 101 L. J. K. B. 678; 147 L. T. 172; 48 T. L. R. 289; 70 Sol. Jo. 272; 16 Tax Cas. 723.

*Annotations*:—*Reid*. *Carter v. Sharon*, [1936] 1 All E. R. 729; *Elmhirst v. I. R. Comrs.*, [1937] 2 All E. R. 349.

**449b.** —.].—*CARTER v. SHARON*, No. 425b, *ante*.

**450.** *Add. Citations*:—95 L. J. K. B. 394; 10 Tax Cas. 263, H. L.

*Add. Annotations*:—*Apld.* *Grainger v. Maxwell*, [1926] 1 K. B. 430. *Consd.* *Diggins v. Forestal Land, Timber & Railways Co.*, [1931] A. C. 380. *Refd.* *I. R. Comrs. v. Drysdale Trustees* (1928), 13 Tax Cas. 565; *Garland v. Archer-Shee* (1930), 142 L. T. 443; *Hamilton v. I. R. Comrs.* (1931), 145 L. T. 303; *Henry v. Galloway* (1933), 148 L. T. 453;

**450 i. Assessment—No income received during year of assessment—From one foreign possession—Each foreign possession to be treated separately.]—**Resps. were interested as sleeping partners in a firm, & as shareholders in a limited co., both of which carried on business & were controlled in Australia. The company regularly paid dividends, & resps. were assessed for the year 1923-24 under rule 1 of Case V. on the average of the

amounts so arising in the three preceding years. Remittances were received from the firm in each of the three years 1920-21, 1921-22 & 1922-23, & the average amount of these remittances formed the basis of an additional assessment on resps. for the following year, 1923-24, under rule 2 of Case V. In 1923-24, however, no remittance was received from the firm, & resps. contended that there was therefore no

*Timpson's Executors v. Yerbury*, [1936] 1 All E. R. 186.

After this case add

—].—*See, now*, Finance Act, 1926 (c. 22), s. 22.

**450a.** **Foreign holdings aggregated.]—**By r. 1 of the Rules applicable to Case V. of Schol. D of 1918 Act: "The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I., whether the income has been or will be received in the United Kingdom or not":—*Held*: the income on the full amount whereof the tax was to be computed meant the income arising from the class of foreign possessions consisting of stocks, shares or rents, & not the income arising from the separate items making up that class.

An English co. holding shares in several foreign cos. claimed that for the purposes of assessment to income tax each holding should be treated as a separate source of income:—*Held*: the assessment for each year should be arrived at by including the average amounts of the whole of the dividends arising to the co. from foreign cos. in the three years of average.—*DIGGINES v. FORESTAL LAND, TIMBER & RAILWAYS CO.*, [1931] A. C. 380; 100 L. J. K. B. 145; 144 L. T. 514; 15 Tax Cas. 630, H. L.

*Annotation*:—*Apld.* *Merrifield v. Wallpaper Manufacturers, Ltd.*, [1931] 2 K. B. 143.

**450b.** — **Income received during less period than three years.]—**An investment co. received during the first year of its existence a dividend from foreign shares & had no other income from foreign possessions. In assessing the co. to income tax under Case V.:—*Held*: (1) Rules applicable to Cases I. & II., r. 1 (2), had no application to the receipt of dividends on foreign securities, & the only relevant rule was the rule applicable to Case I.; (2) Finance Act, 1924 (c. 21), s. 26, which was founded upon an erroneous assumption as to the effect of Case V., r. 1, could not be referred to for the purpose of interpreting that provision; (3) the assessment for the first year should be nil, & for the second year one-third of the amount of the dividend.—*ORMOND INVESTMENT CO. v. BETTS*, [1928] A. C. 143; 97 L. J. K. B. 342; 138 L. T. 600; 13 Tax Cas. 400, H. L.

*Annotations*:—*As to* (1) *Reid*. *Dewar v. I. R. Comrs.*, [1935] 2 K. B. 351. *As to* (2) *Reid*. *Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63. *Generally*, *Consd.* *Fry v. Burma Corp.* (1929), 98 L. J. K. B. 693. *Reid*. *Curtis Brown, Ltd. v. Jarvis, Jarvis v. Curtis Brown, Ltd.* (1929), 14 Tax Cas. 744; *Simpson v. Grange Trust, Ltd.* (1935), 19 Tax Cas. 231; *Benn v. I. R. Comrs.*, [1937] 3 All E. R. 852.

**452a.** —.].—*LEEMING v. JONES*, No. 114b, *ante*.

income from that source to be assessed:—*Held*: each foreign possession must be treated separately in determining whether or not liability existed for any year, & if in any year no income arose from a particular possession, no liability could exist for that year in respect of that possession.—*INLAND REVENUE COMRS. v. DRYDALE'S TRUSTEES* (1928), 13 Tax Cas. 565.—*SCOTT*.

453. *Add. Annotations* :—**Folld.** *Lyons v. Cowcher* (1926), 10 Tax Cas. 438. **Apprvd.** *Martin v. Lowry*, *Martin v. I. R. Comrs.* (1926), 43 T. L. R. 116; *Leeming v. Jones* (1929), 141 L. T. 472. **Consd.** *Jones v. Leeming*, [1930] A. C. 415. **Folld.** *Sherwin v. Barnes* (1931), 16 Tax Cas. 278. **Consd.** *Shipway v. Skidmore* (1932), 16 Tax Cas. 748; *Trenchard v. Bennet* (1933), 49 T. L. R. 226; *Lowry v. Field*, *Lowry v. Williams*, *Titcomb v. Clancy*, *De Burgh Whyte v. Clancy*, [1936] 2 All E. R. 735; *Wilson v. Mannooch*, [1937] 3 All E. R. 120.

457a. **Director's commission on underwriting shares.**—Applt., a co. director, received commission from a syndicate for underwriting shares in a new co., & he was assessed to income tax under Schedule D. for the year 1919–20 in respect of the commission. He was not concerned in any other underwriting transaction in 1919, 1920 & 1921 :—**Held** : the commission was an annual profit or gain within Schedule D., Case VI., & applt. had been properly assessed to income tax in respect of such commission.—**LYONS v. COWCHER** (1926), 10 Tax Cas. 438.

457b. **Commission on guaranteeing overdraft.**—Applt., who was a solr., entered into an agreement under which he & another person undertook to guarantee the bank overdraft of a third party, upon the terms (*inter alia*) that the guarantors should receive a bonus of £1,000 & if the overdraft was not paid off within a year, a further bonus calculated on specified terms. The overdraft was, in fact, paid off within a year & the bonus of £1,000 was paid to the guarantors in equal shares. Applt. was assessed to income tax under Case VI. of Sched. D. in respect of his share & the Special Comrs., on appeal, confirmed the assessment :—**Held** : the assessment appealed against was correctly made.—**SHERWIN v. BARNES** (1931), 16 Tax Cas. 278.

*Annotations* :—**Consd.** *Trenchard v. Bennet* (1933), 49 T. L. R. 226; *Wilson v. Mannooch*, [1937] 3 All E. R. 120.

459a. ———. **Resp., a manufacturer of agricultural implements, arranged with a firm of cotton brokers that he should have facilities for dealing in cotton futures, & over a period of years he engaged in a series of such transactions. Contracts in ordinary form were entered into by him for the purchase & sale of cotton at future dates, but resp. had no intention of either taking up or delivering cotton & only differences on settlement were either received or paid. The brokers were aware that no cotton was to be delivered & that the transactions were of a speculative character, but the merchants with whom the brokers dealt were unaware of the terms of the contracts between the brokers & resp. Between Feb. 1919, & Feb. 1923, there were sixteen such transactions, & in addition, resp. entered into a number of joint transactions of a similar nature between Dec. 1926, & Apr. 1928. Resp. was assessed to income tax under Sched. D. for each of the years from 1921–22 to 1928–29, inclusive, in respect of profits from these transactions. On appeal, he contended that the transactions were entirely disconnected with his business & were purely betting transactions on the prices of cotton, the profits of which were not assessable either**

under Case I. or Case II., as from a trade or vocation, or under Case VI. The General Comrs. decided that the transactions were not part of resp.'s trade & not a trade in themselves & were not liable under Case I. or Case VI. of Sched. D. :—**Held** : the profits arising from the transactions were annual profits or gains assessable to income tax under Case VI. of Sched. D.—**TOWNSEND v. GRUNDY** (1933), 18 Tax Cas. 140.

459b. — **Assignment of option.**—**LEEMING v. JONES**, No. 114b, *ante*.

460a. — **Purchase & sale of properties by builder.**—Applt. was a builders' foreman until Feb. 1923, & subsequently a director of a co. carrying on the business of a builder & contractor. During the years 1920 to 1924 he bought on his own account some seven properties, of which he sold four during the period, & still owned the remainder in 1926 :—**Held** : the profits, if any, were not assessable under Case VI. of Schedule D., & the case should be remitted to the Special Comrs. to consider whether the transactions in question constituted a trade assessable under Case I.—**PEARNE v. MILLER** (1927), 11 Tax Cas. 610.

*Annotations* :—**Apprvd.** *Leeming v. Jones* (1929), 141 L. T. 472. **Refd.** *Jones v. Leeming*, [1930] A. C. 415, *Lowry v. Field*, *Lowry v. Williams*, *Titcomb v. Clancy*, *De Burgh Whyte v. Clancy*, [1936] 2 All E. R. 735; *Wilson v. Mannooch*, [1937] 3 All E. R. 120.

460b. — **Sale of estate by architect.**—Applt., an architect in practice, was on a social occasion told by the owner of an estate that he wished to sell his property. Later he arranged a meeting between the owner & a client, the outcome of which was that the client purchased the estate on behalf of his co. Subsequently applt. entered into an agreement, which was recorded in correspondence, with the purchasing co., whereby he undertook to endeavour to dispose of the estate & in conjunction with the co., to negotiate with the parties concerned on the terms that the co. should pay him one-fourth of the net profits of the sale. The estate was sold soon afterwards & applt. received from the co. his share of the net profits thereof. He took no part in the negotiations for the acquisition or the re-sale of the estate; he was not consulted in regard thereto; & did no work in connection with the estate as a surveyor or architect beyond the preparation of a plan which was not in fact used. On appeal against an assessment to income tax, Sched. D., in respect of the sum received, applt. contended that it was not income assessable to income tax. The Special Comrs. confirmed the assessment under Sched. D., Case VI. :—**Held** : the payment to applt. was made in fulfilment of an enforceable contract for services & was correctly assessed under Sched. D., Case VI.—**BROCKLESBY v. MERRICKS** (1934), 18 Tax Cas. 576, C. A.

460c. — **Repayment of excess profits.**—Two partners in a business firm retired from the firm as from Dec. 31, 1920, on the terms that they should be paid in cash their shares in the partnership assets as at that date, the continuing partners being their debtors for such shares, with interest, till paid. Negotiations as to the value of the assets took place & in Dec. 1922, the retired partners agreed to accept a lump sum in settlement of their

shares of the assets, subject to the addition of a share of the excess profits duty repayable to the firm for the year 1920. The repayment of excess profits duty was made to the continuing partners in two instalments in Jan. & Oct. 1923, & a proportionate share was at once paid over by them to the retired partners. The total sum repaid was, with the continuing partners' assent, treated for income tax purposes as a profit of the business for the year 1923 & brought into average accordingly in computing the assessments on the firm, as then constituted, under Case I. of Sched. D. for 1924-25, 1925-26 & 1926-27. Later, the retired partners paid to the continuing partners a sum representing the income tax at the rates in force for 1924-25, 1925-26 & 1926-27 on the amounts by which the assessments on the firm for those years were increased by the inclusion in the profits of the year 1923 of the retired partners' share of the amount of the excess profits duty repayment. Applt. in the first case was one of the continuing partners. He appealed against assessments to supertax for 1925-26, 1926-27 and 1927-28 made on the footing that his income from the partnership for the respective preceding years must be deemed to be the share to which he was entitled during these years in the partnership profits as assessed to income tax & that no deduction could be allowed on the ground that in arriving at the income tax assessments the whole amount of the excess profits duty repayments in 1923 was brought into average. He contended (*inter alia*) that he was entitled to exclude from the computation of his income for super tax purposes the amount paid to the retired partners, whose income it was. The Special Comrs. decided that the basis on which applt. had been assessed was correct. Resps. in the second case were the exors. of one of the retired partners & they appealed against assessments to super tax for 1925-26, 1926-27 & 1927-28 made on the basis that a proportion, corresponding to his share in the partnership of the amounts by which the assessments made on the firm to income tax under Case I. of Sched. D. for the years 1924-25, 1925-26 & 1926-27 were increased by the inclusion of the amount of the excess profits duty repayment in the profits of the year 1923 formed part of the income of deceased for those years. They contended (*inter alia*) that the payments made by the continuing partners to the retired partners were capital payments being part of their share in the assets of the partnership, or alternatively, that the repaid excess profits duty was a profit of the firm for the year 1923, when the retired partners were no longer entitled to any share in the firm's profits. The Special Comrs. decided that no part of the payments could be regarded as the income of the deceased for 1924-25, 1925-26 & 1926-27, in which years he was not entitled to any share in the partnership profits & did not in fact receive any payment thereout:—*Held*: (1) the repayment of excess profits duty was a profit of the old partnership which should in strictness have

been assessed under Case VI. of Sched. D. on the old partners; (2) while the income tax assessments as made under Case I. of Sched. D. were conclusive for income tax purposes, the amount of the excess profits duty repayment included therein was not, as regards the share paid over to the retired partners, the beneficial income of the continuing partners & must be excluded in computing their income for super tax purposes; (3) while the share of the repayment paid over to the retired partners constituted income in their hands for income tax & super tax purposes, the super tax liability arose in the years 1923-24 & 1924-25 (the repayment having been made in the respective preceding years 1922-23 & 1923-24) & not in the years for which assessments under appeal were made.—*RIGDEN v. INLAND REVENUE COMRS., INLAND REVENUE COMRS. v. URWICK'S EXORS.* (1935), 19 Tax Cas. 542.

**462. Add. Annotations:—***Consd. Leeming v. Jones* (1929), 141 L. T. 472. *Distd. Fry v. Salisbury House Estate, Ltd., Jones v. City of London Real Property Co.,* [1930] A. C. 432. *Consd. Windsor Playhouse, Ltd. v. Heylloe* (1933), 17 Tax Cas. 481. *Refd. Brighton College v. Marriott,* [1926] A. C. 192; *Huxham v. Johnson* (1926), 136 L. T. 410; *Martin v. Lowry, Martin v. I. R. Comrs.,* [1926] 1 K. B. 550; *Neumann v. I. R. Comrs.,* [1934] A. C. 215; *Loughnan v. Marston's Dolphine Brewery, Ltd., Whelan v. Alfred Leney & Co.,* [1936] 1 All E. R. 468.

**462a. Commission for negotiating sale of shares—***When income arises.*—In the year 1920-21 applt. negotiated the sale of certain shares & became entitled to commission. He received part of the commission in 1920-21 & part in later years:—*Held*: for the purpose of assessment to income tax under Case VI. of Sched. D., the income arose when the payments on account of the commission were received.—*GREY v. TILEY* (1932), 16 Tax Cas. 414, C. A.

*Annotations:—Refd. Lambe v. I. R. Comrs.,* [1934] 1 K. B. 178. *Champney's Executors v. I. R. Comrs.* (1935), 19 Tax Cas. 375.

**462b. Consideration for guarantee of dividend—***Capital asset.*—By the terms of an agreement a co. incorporated with the object (*inter alia*) of acquiring stocks, shares, or securities of any co. carrying on or proposing to carry on the business of a steam & general laundry, undertook, in consideration of the allotment to it by a second co. of 250,000 Deferred shares of 1s. each of the second co. (which had been incorporated with the object of assisting the first-mentioned co., together with two other cos. to obtain finance for the acquisition of laundries) to guarantee the payment of the dividend on the 7 per cent. Preference shares of the second co.:—*Held*: the first co. was, in substance, a holding co. & the Deferred shares which it obtained from the second co. under its guarantee, & the value of which was £12,500, were in the nature of a capital asset not assessable to income tax, the giving of the guarantee in

#### PART V. SECT. 8.

*sd. Dividends paid from reserve funds.*—The dividends paid were not

distributions of capital but distributions of profits derived from the operations of the co. & therefore taxable as income received as dividends.—

*NORTHERN SECURITIES Co. v. R.,* [1935] Ex. C. R. 156; [1936] 1 D. L. R. 65.—CAN.



the circumstances of the case being a method of payment for the shares.—*TRENCHARD v. BENNETT* (1933), 49 T. L. R. 226; 77 Sol. Jo. 83; 17 Tax Cas. 420.

- 467a. — Tax on gross amount of dividend.]—**R. 20 of All Schedules Rules to Income Tax Act, 1918, provides that the profits or gains to be charged on a co. shall be computed in accordance with the provisions of the Act on "the full amount of the same before any dividend thereof is made" & that the co. "paying such dividend shall be entitled to deduct the tax appropriate thereto":—*Held*: by "the tax appropriate thereto" was meant the tax at the standard rate on the gross amount of the dividend paid by the co. & not a proportionate part of the tax paid by the co. in the year in which the dividend was paid in respect of its profits or gains; & therefore, in making the return of his total income for the purpose of surtax the shareholder must include the gross amount of the dividend, & not the proportionate part of the total income on which the co. had borne tax for the year of assessment in which the profits distributed were made.—*HAMILTON v. INLAND REVENUE COMRS.*, [1931] 2 K. B. 495; 100 L. J. K. B. 693; 145 L. T. 303; 16 Tax Cas. 213, C. A.

*Annotations*:—*Consd. Neumann v. I. R. Comrs.*, [1934] A. C. 215. *Reid. I. R. Comrs. v. Cull*, [1938] 2 K. B. 109.

- 467b. — Where holder of warrant entitled to cash in foreign currency.]—**Applt. co. in 1931 issued debentures, & in accordance with the terms of the issue, the principal money & interest were to be paid in sterling in London, or, at the option of the holder, in New York in dollars at the fixed rate of exchange of 4.86 dollars to the £, or in Amsterdam at the fixed rate of exchange of 12.11 Dutch florins to the £. The interest was to be paid by cheque or warrant sent through the post to the registered holder, & it was to be subject to United Kingdom income tax. In accordance with rule 21 (1) of the All Schedules Rules of 1918 Act, appts.

#### PART V. SECT. 9.

**470 i. Exemption of charities.—Charitable purposes.]—**By the law of Scotland a trust for "charitable or benevolent" purposes is a trust for "charitable" purposes alone, & is a trust for "charitable purposes only" within 1918 Act.—*JACKSON'S TRUSTEES v. INLAND REVENUE*, [1926] S. C. 579; 10 Tax Cas. 460.—SCOT.

**470 ii. — Stimulating interest in music.]—***INLAND REVENUE COMRS. v. GLASGOW MUSICAL FESTIVAL ASSOCN.*, [1926] S. C. 920; 11 Tax Cas. 154.—SCOT.

**470 iii. — Supplying nurses.]—**An assocn. was formed for the purpose of improving & extending nursing facilities in a county. The members were divided into three classes according to income, the largest class consisting of persons in comparatively poor circumstances. An annual membership fee was charged, varying, according to the class, from 2s. 6d. to 10s. 6d. *per annum*. The fees charged for the services of a nurse, or for admission to the assocn.'s hospital, varied from sums which, in the case of the poorest class, were considerably below the cost of the services rendered, to sums which, in the case of the wealthiest class, were reasonably equivalent to such cost. Nursing facilities, when not required for

members, were granted to non-members at increased rates. Funds were held by the assocn. which had been raised by public subscription, & the hospital had been acquired with funds similarly raised. In respect of special charitable donations, necessitous cases from certain parishes received the services of a nurse gratuitously:—*Held*: the assocn. was established for "charitable purposes only."—*INLAND REVENUE COMRS. v. PEEBLESHIRE NURSING ASSOCN.*, [1927] S. C. 215; 11 Tax Cas. 335.—SCOT.

**470 iv. — Promotion of temperance.]—**Testator expressed his desire that the leading of a sober life might be made more easy for the inhabitants of F., & with that object conveyed half of the residue of his estate to trustees for the purpose of providing F. with a temperance public-house. His trustees spent part of the funds in establishing a temperance hotel, containing a middle-class cafe & a cheap working-class cafe, free reading & recreation-rooms, & bedrooms, & a lecture-hall, which could be hired at moderate figures. Their policy was to make the hotel pay its way without earning profits, & the balance of the trust funds was invested & the interest was used to make good an annual deficit on the working of the hotel:—*Held*: the interest formed part of the income of a trust established for "charitable pur-

duly accounted for the tax so deducted. Owing to the depreciation of the £ in 1931, when England went off the gold standard, many debenture-holders encashed their warrants in New York, & a few in Amsterdam, the amounts so obtained being considerably in excess of the amount in sterling appearing on the warrants. Thereupon an additional assessment was made upon appts. in respect of the warrants cashed in New York & Amsterdam:—*Held*: the contract between appts. & the debenture-holders was an obligation to pay in sterling the balance that remained after deducting from the sterling sum the amount of the income tax at the then current rate calculated thereon; it was only of the balance so arrived at which the holder could at his option claim payment in the foreign currency; the time of the encashment of the warrant subsequent to its being drawn was of no relevance for the purpose of the Income Tax Act; & therefore the claim by the additional assessment of the Comrs. of Inland Revenue failed.—*RHOKANA CORPN., LTD. v. INLAND REVENUE COMRS.*, [1938] A. C. 380; [1938] 2 All E. R. 51; 107 L. J. K. B. 377; 159 L. T. 170; 54 T. L. R. 579; 82 Sol. Jo. 350; 21 Tax Cas. 552, H. L.

- 471. Add. Citation:—**10 Tax Cas. 73.

*Add. Annotations:—Reid. I. R. Comrs. v. Yorkshire Agricultural Soc.* (1927), 44 T. L. R. 59; *Institution of Civil Engineers v. I. R. Comrs.* (1931), 47 T. L. R. 466.

- 472a. Relief of members of medical association & dependants in necessitous circumstances.]—**Two societies whose funds were applied entirely to making grants for the relief of subscribing members or their dependants in necessitous circumstances:—*Held*: charities, & entitled to exemption from income tax.—*INLAND REVENUE COMRS. v. SOCIETY FOR RELIEF OF WIDOWS & ORPHANS OF MEDICAL MEN, INLAND REVENUE COMRS. v. MEDICAL CHARITABLE SOCIETY FOR WEST*

poses only," & was "applied to charitable purposes only."—*INLAND REVENUE COMRS. v. FALKIRK TEMPERANCE CAFE TRUST*, [1927] S. C. 261; 11 Tax Cas. 353.—SCOT.

**470 v. — Improvement of spiritual, intellectual, social & physical condition of young men.]—***YOUNG MEN'S CHRISTIAN ASSOCN. OF MELBOURNE v. FEDERAL COMR. OF TAXATION* (1926), 37 C. L. R. 351; [1926] *Argus L. R.* 97.—AUS.

**470 vi. — Amenity purposes in borough.]—**The Tayport Town Council held an amount of 3½ per cent. Conversion Loan Stock purchased with a sum bequeathed to the "Provost, Magistrates & Councillors of Tayport for amenity purposes in the said Burgh." The interest on the stock, received under deduction of income tax, was applied towards the cost of making a recreation ground. On appeal by the Council against a refusal of the Comrs. of Inland Revenue to admit a claim under sect. 37 of Income Tax Act, 1918, to repayment of the income tax deducted, the Special Comrs. held that amenity purposes in the Burgh must be treated as charitable purposes, & they allowed the claim accordingly:—*Held*: the Special Comrs.' decision was correct.—*INLAND REVENUE COMRS. v. TAYPORT TOWN COUNCIL* (1936), 20 Tax Cas. 191.—SCOT.



RIDING OF YORKSHIRE (1926), 136 L. T. 60; 42 T. L. R. 612; 70 Sol. Jo. 837; 11 Tax Cas. 1.

**472b.** ——— **Temperance reform.**—A society whose main object was “united action to secure legislative & other temperance reform”:—*Held*: not a body of persons established for charitable purposes only, & its income, inasmuch as it was not applied to charitable purposes only, was not entitled to exemption from income tax.—INLAND REVENUE COMRS. v. TEMPERANCE COUNCIL OF CHRISTIAN CHURCHES OF ENGLAND & WALES (1926), 136 L. T. 27; 42 T. L. R. 618; 10 Tax Cas. 748.

*Annotations*:—*Distd. Re Hood, Public Trustee v. Hood* (1930), 143 L. T. 691. *Reid. Bonar Law Memorial Trust v. I. R. Comrs.* (1933), 49 T. L. R. 220.

*Compare CHARITIES, No. 68a.*

**472c.** ——— **Seaside boarding-house with reduced charges.**—By a declaration of trust “a home or place of residence” was founded & endowed, “where persons requiring temporary rest & change of air for the benefit of their health may obtain same.” About half the income of the home came from payments by visitors, who included convalescents, persons needing rest & change, & holiday applicants:—*Held*: since on the construction of the trust deed there was throughout an overriding charity which fulfilled the character of a charitable convalescent home, the trustees were entitled to exemption from income tax on the ground that the trust was established for charitable purposes only.—INLAND REVENUE COMRS. v. ROBERTS MARINE MANSIONS TRUSTEES (1926), 43 T. L. R. 270; 11 Tax Cas. 425, C. A.

**472d.** ——— **Agricultural society.**—An agricultural society, founded mainly for the purpose of holding an annual agricultural show, had also among their objects the improvement of live stock & poultry & of machinery & appliances used in agriculture, & agricultural education & scientific research, & they claimed exemption from income tax upon the dividends from their investments, on the ground that they were a society established for charitable purposes only:—*Held*: there was evidence on which the Special Comrs. could find that the society was established for charitable purposes only.—INLAND REVENUE COMRS. v. YORKSHIRE AGRICULTURAL SOCIETY, [1928] 1 K. B. 611; 97 L. J. K. B. 100; 138 L. T. 192; 44 T. L. R. 59; 72 Sol. Jo. 68; 13 Tax Cas. 58, C. A.

*Annotations*:—*Appld. Geologists’ Asscn. v. I. R. Comrs.* (1928), 14 Tax Cas. 271. *Reid. Midland Counties Institution of Engineers v. I. R. Comrs.* (1928), 14 Tax Cas. 235; *Keren Kayemeth Le Jisroel, Ltd. v. I. R. Comrs.*, [1931] 2 K. B. 465; *Peterborough Royal Foxhound Show Society v. I. R. Comrs.*, [1936] 1 All E. R. 813.

**472e.** ——— **Society for promotion of foxhound breeding.**—*Appld.* society was founded to promote the interests of foxhound breeding, & for that purpose held annually a foxhound show:—*Held*: (1) the society was an agricultural society within Finance Act, 1924 (c. 21), s. 23 (2), being established for the purpose of promoting the interests of livestock breeding, & therefore under sub-sect. (1) the profits of the show were exempt from income tax; (2) the society was not a charity within sect. 37 of 1918 Act, or Finance Act, 1921 (c. 32), s. 30, as amended by Finance Act, 1927 (c. 10), s. 24, not being

a trust “for other purposes beneficial to the community” in the fourth category of “charities” stated by LORD MACNAGHTEN in *Income Tax Comrs. v. Pemsel*, & was therefore liable to income tax on its other profits.—PETERBOROUGH ROYAL FOXHOUND SHOW SOCIETY v. INLAND REVENUE COMRS., [1936] 2 K. B. 497; [1936] 1 All E. R. 813; 105 L. J. K. B. 427; 155 L. T. 134; 52 T. L. R. 391; 80 Sol. Jo. 448; 20 Tax Cas. 249.

*Annotation*:—*Consd. Re Stephens & Branthwaite & Otway*, [1938] 3 All E. R. 311.

**472f.** ——— **Resp. Association’s object** was to cultivate & encourage the improvement & exhibition of cage birds. It acted as a central body for a number of clubs in Glasgow devoted to breeding & exhibiting cage birds, & held an annual show at which members of the show committee were in attendance to instruct visitors in the proper breeding, feeding & housing of birds:—*Held*: the Association was an agricultural society within sect. 23 of Finance Act, 1924 (c. 21).—INLAND REVENUE COMRS. v. GLASGOW ORNITHOLOGICAL ASSOCN. (1938), 21 Tax Cas. 445.

**472g.** ——— **General Medical Council.**—*Held*: not a body established for charitable purposes only, & not entitled to exemption from income tax on the income from its funds.—GENERAL MEDICAL COUNCIL v. INLAND REVENUE COMRS., ENGLISH BRANCH COUNCIL OF GENERAL MEDICAL COUNCIL v. INLAND REVENUE COMRS. (1928), 97 L. J. K. B. 578; 139 L. T. 225; 44 T. L. R. 439; 13 Tax Cas. 819, C. A.

*Annotations*:—*Reid. Institution of Civil Engineers v. I. R. Comrs.* (1931), 47 T. L. R. 466; *Peterborough Royal Foxhound Show Society v. I. R. Comrs.*, [1936] 1 All E. R. 813.

**472h.** ——— **Simplified Spelling Society.**—The Simplified Spelling Society is not a body established for “charitable” purposes, & is therefore not entitled to exemption from income tax under 1918 Act, s. 37 (1) (b).—SIR G. B. HUNTER (1922) “O” TRUST, TRUSTEES v. INLAND REVENUE COMRS. (1929), 45 T. L. R. 344; 73 Sol. Jo. 284; 14 Tax Cas. 427.

**472j.** ——— **Recreation ground for employees of limited company.**—Certain land was conveyed to trustees to be held upon trust to permit the same to be used as a playing field & recreation ground (a) for the benefit of all persons for the time being employed by a named co., & (b) if the land should no longer be required for such purpose then for the inhabitants of the borough in which the land was situated. A trust, which had been formed for purposes which were admittedly charitable, spent a sum of money in putting up pavilions & laying out a bowling green & tennis cts. on the land. The trust claimed repayment of income tax on the sum so expended on the ground that the use of the land was charitable & that the money was applied for charitable purposes only within 1918 Act, s. 37 (1) (b):—*Held*: the money was not expended for charitable purposes only.—WERNHER’S CHARITABLE TRUST v. INLAND REVENUE COMRS., [1937] 2 All E. R. 488; 81 Sol. Jo. 421; 21 Tax Cas. 137.

**472k.** ——— **Provident Society.**—HUGH’S SETTLEMENT, LTD. v. INLAND REVENUE COMRS., [1938] 4 All E. R. 516.

473. *Add. Annotations:—*Consd. Salisbury House Estate v. Fry (1929), 98 L. J. K. B. 722. Reisd. Brighton College v. Marriott, [1926] A. C. 192.

476a. ——— *Temperance reform.*—INLAND REVENUE COMRS. v. TEMPERANCE COUNCIL OF CHRISTIAN CHURCHES OF ENGLAND & WALES, No. 472b, *ante*.

473 i. ——— *"Applied to charitable purposes only"*—*Promotion of temperance.*—INLAND REVENUE COMRS. v. FALKIRK TEMPERANCE CAFE TRUST, No. 470 iv, *ante*.—SCOT.

473 ii. ——— *Stimulating interest in music.*—INLAND REVENUE COMRS. v. GLASGOW MUSICAL FESTIVAL ASSOCN., [1926] S. C. 920; 11 Tax Cas. 154.—SCOT.

473 iii. ——— *General Nursing Council.*—*Held:* the duties performed by the Council were, at least in part, carried out in the professional interests of the registered nurses; & accordingly, the Council was not entitled to exemption from income tax under Income Tax Act, 1918, s. 37 (1) (b), as a body established for charitable purposes "only."—GENERAL NURSING COUNCIL FOR SCOTLAND v. INLAND REVENUE COMRS., [1929] S. C. 664; 14 Tax Cas. 645.—SCOT.

473 iv. ——— *Flying club.*—Appl't. co. was incorporated as a co. having no share capital & limited by guarantee, with the objects (*inter alia*) of promoting generally the pursuit of aviation, providing facilities for instructional & sporting flights by its members, & establishing, maintaining & conducting a club for the accommodation & convenience of its members. Membership of the club, which was open to British subjects over 18 years of age (without restrictions as to qualifications or capabilities but subject to election by the committee), carried with it membership of the co. The co. leased an aerodrome at which courses of instruction in aviation were given to members & aeroplanes were maintained for their use at fixed charges. The whole of the co.'s income, including an annual grant from the Govt., was applied exclusively to the furtherance of its objects & no part was paid by way of profits to its members. In May, 1930, the co. arranged an aerial pageant (subsequently repeated annually) at the aerodrome with the aim of furthering the objects of the co. & augmenting its income. Charges were made to the public for admission to the grounds of the aerodrome & for short flights & after payment of the expenses there remained a surplus which was added to the co.'s funds.

The co. claimed exemption from income tax in respect of the profits of the pageant & certain untaxed interest on the ground that it was a body established for charitable purposes only. The Special Comrs. refused the claim, holding that the co. was formed for the promotion of flying by its members & was primarily a club.—*Held:* the co. was not a body established for charitable purposes only.—SCOTTISH FLYING CLUB, LTD. v. INLAND REVENUE COMRS. (1935), 20 Tax Cas. 1.—SCOT.

473 v. ——— *Pharmaceutical Society.*—The Pharmaceutical Society of Ireland is a corporate body established by the Pharmacy Act (Ir.), 1875. The preamble of that Act recited that, to remedy the inconvenience to the public resulting from a deficiency of shops for the sale of medicines & compounding of prescriptions, it was expedient that such a Society should be formed. The Act requires the Society to keep registers of qualified pharmaceutical chemists & of chemists & druggists, & to cause

examinations to be held of candidates for registration. The Society is empowered to make regulations having statutory force, & in accordance with its regulations it maintains schools, charges fees for lectures & examinations, pays inspectors & causes proceedings to be instituted against unqualified persons who retail drugs or compound medicines, & against persons who infringe the provisions of certain statutes as to the sale of poisons. Rather more than one-quarter of the registered pharmaceutical chemists & druggists in Ireland are members or associates of the Society. The Act renders it unlawful for unregistered persons to retail poisons or compound prescriptions. Membership of the Society does not confer any pecuniary benefit & the Society exercises no special disciplinary or other control over the general body of registered persons. The Society was assessed to income tax under Sched. A in respect of premises which it owned & occupied, & under Sched. D in respect of income from securities & possessions, & profits from schools & examinations. The Society claimed to be entitled to the exemptions specified in sect. 37 of Income Tax Act, 1918, & sect. 30 of Finance Act, 1921, & claimed that the carrying on of schools & examinations did not constitute a "trade" within sect. 237 of Income Tax Act, 1918. These claims were rejected by the Special Comrs. of Income Tax & on appeal by the Circuit Ct. judge, who at the request of the Society, stated a case for the opinion of the High Ct.—*Held:* the Pharmaceutical Society of Ireland was established for two main purposes, (a) the provision of necessities for the health of the sick, which, being for the benefit of the public, was a charitable purpose; (b) the establishment of a professional Society to maintain a high standard of knowledge among pharmaceutical chemists by examination & teaching, & to secure that only those having such high standards should be permitted to keep open shop for the sale of poisons & the compounding of prescriptions, & this was not a charitable purpose. Accordingly the Society was not established "for charitable purposes only"; nor was its income applicable to such purposes only; further, the decision of the Circuit Ct. judge that the carrying on of the schools & examinations constituted a "trade" within the meaning of the Income Tax Acts was correct; the question whether or not any particular activity constituted a "trade" within the meaning of the Income Tax Acts was a question of fact. The Circuit Ct. judge was, therefore, correct in holding that the Society was not entitled to the exemptions claimed.—PHARMACEUTICAL SOCIETY OF IRELAND v. SPECIAL COMRS. OF INCOME TAX, [1938] I. R. 202.—IR.

st. *Exemption of person not ordinarily resident in United Kingdom.—Holder of securities issued free of tax.*—*Held:* the whole circumstances must be considered, & the Special Comrs. were entitled to find that appt. was ordinarily resident in the United Kingdom.—REID v. INLAND REVENUE, [1926] S. C. 589.—SCOT.

sv. ———.—*Held:* the Special Comrs. were entitled, on the facts stated, to find that appt. was ordinarily

Geologists' Association.]—The Special Comrs. found that the main function of the Geologists' Asscn. was the combination of members for scientific purposes & mutual improvement, that all the benefits of the Asscn. were enjoyed primarily by the members, & that although their studies tended indirectly to the promotion of education

resident in the United Kingdom.—PEET v. INLAND REVENUE COMRS., [1928] S. C. 205; 13 Tax Cas. 443.—SCOT.

sw. *Whether preferred shares "borrowed capital" within Income War Tax Act, 1917, s. 3 (H.).*—DUPUIS FRERES, LTD. v. CUSTOMS & EXCISE MINISTER, [1927] Exch. C. R. 207.—CAN.

sx. *Under statutory agreement with Government.—Construction of agreement.*—NOVA SCOTIA STEEL & COAL CO., LTD. v. FINANCE & CUSTOMS MINISTER, [1922] 2 A. C. 176, P. C.—CAN.

sa. *Onus of proof.*—The onus of proving that an income is exempt from taxation under the Taxing Act, is upon the one claiming such exemption.—KENNEDY v. MINISTER OF NATIONAL REVENUE, [1929] Ex. C. R. 36.—CAN.

sb. *Whether endowment necessary.*—I do not think it is necessary that there should be an endowment in the technical sense of the word, but that it will be sufficient to bring an institution within the exemption of the Act if it be maintained in whole or in part by voluntary contributions (*per* CUR.).—MUSGRAVE v. DUNDEE ROYAL LUNATIC ASYLUM (1895), 32 Sc. L. R. 579.—SCOT.

sd. *Land Company.—What amounts to.*—A co. incorporated with the object of dealing in land but which had limited the exercise of its powers to the purchasing & selling of lands required by a certain mercantile co. to which it leased said lands.—*Held:* a "land co." within exception in Income Tax Act, 1932 (Alta.), s. 8 (2).—RE T. EATON REALTY CO., LTD., [1935] 3 W. W. R. 154; 5 F. L. J. (Can.) 148.—CAN.

sk. *Income of charitable institution.—What amounts to.*—B., a Canadian citizen, in his lifetime transferred certain assets to the Trusts & Guarantee Co., Ltd., to be converted into cash & administered by it in accordance with the terms of an agreement entered into by them, which provided that after the expiration of twenty-one years following the death of B., the fund so established & all accumulations thereon should be paid to the Municipal Council of the Town of Colne in England, to be used by the said Council for the benefit of the aged & deserving poor of the said Town of Colne in such manner & without restriction of any kind, as shall be deemed prudent to the said Council. B. died on April 19, 1927. The income from this fund was assessed for income tax under the Income War Tax Act, such assessment being confirmed by the Minister of National Revenue, from whose decision the applt. appealed.—*Held:* there is but one trust with two trustees, & the trust fund is being administered by the Canadian trustee, in Canada, where it must remain until 1948, & where the income is taxable; (2) the persons who may in the future become beneficiaries of the trust fund are unascertained, & any interest of persons in the trust fund is a contingent one, & therefore the income is taxable as provided for in sect. 11 (2) of the Act; (3) the income here accumulating is not the income of a charitable institution with sect. 4 (e) of the Act; (4) sect. 66 of the Act does not vest a discretionary power in the ct. to forego interest on any tax recovered by a judgment of the ct.—BIRTWISTLE (PETER) TRUST v. MINISTER OF NATIONAL REVENUE, [1938] Ex. C. R. 95.—CAN.

generally, the Assocn. was not a body of persons established for charitable purposes only, & was therefore not entitled to exemption:—*Held*: the question was one of fact, & that there were no grounds on which the Comrs.' decision could be disturbed.—**GEOLOGISTS' ASSOCIATION v. INLAND REVENUE COMRS.** (1928), 14 Tax Cas. 271, C. A.

*Annotations*:—**Apld.** *Midland Counties Institution of Engineers v. I. R. Comrs.* (1928), 14 Tax Cas. 285. *Refd.* *Institution of Civil Engineers v. I. R. Comrs.* (1931), 47 T. L. R. 466; *Blessed Sacrament Convent, Brighton v. I. R. Comrs.* (1933), 18 Tax Cas. 76.

**476c. ——— Institution of Mining Engineers.]—**

The Special Comrs. found that the Institution of Mining Engineers was an association of persons for their mutual improvement in technical & professional knowledge, the acquisition of which, although beneficial to the public at large, through the better management of coal mines, was of direct advantage to the members in the practice of their profession. They decided therefore that the Institution was not a body of persons established for charitable purposes only & was not entitled to exemption from income tax:—*Held*: the question was one of fact, & the Comrs. had evidence before them to support their conclusion.—**MIDLAND COUNTIES INSTITUTION OF ENGINEERS v. INLAND REVENUE COMRS.** (1928), 14 Tax Cas. 285, C. A.

**476d. ——— Institution of Civil Engineers.]—**

The Institution of Civil Engineers is in law a charity & therefore is exempt from income tax.—**INSTITUTION OF CIVIL ENGINEERS v. INLAND REVENUE COMRS.**, [1932] 1 K. B. 149; 100 L. J. K. B. 705; 145 L. T. 553; 47 T. L. R. 466; 16 Tax Cas. 158, C. A.

*Annotation*:—**Consd.** *Master Mariners, Honourable Co. of v. I. R. Comrs.* (1932), 17 Tax Cas. 298.

**476e. ——— Zionist Association.]—**

An assocn. incorporated as a co. limited by guarantee had as its main object, as stated in its memorandum of assocn., "to purchase, take on lease or to exchange or otherwise acquire any land, forests, rights of possession & other rights, easements & other immovable property in . . . Palestine, Syria, or other parts of Turkey in Asia & the Peninsula of Sinai for the purpose of settling Jews on such lands." Then follow in the memorandum twenty-one specified objects & powers which included power to cultivate & improve any lands & erect buildings thereon, to let any land of the co. to any Jews, to acquire, construct & manage tramways, railways, harbours, docks, hydraulic works, telegraphs, telephones, factories & workshops, & to purchase & sell, work & develop mines & mining rights, & to carry on the business of mining & metallurgy. All the twenty-one objects or powers were stated to be subject to a proviso that they were to be "exercised only in such a way as shall in the opinion of the assocn. be conducive to the attainment of the said primary object." No part of the income of the assocn. was distributable by way of dividend, bonus or otherwise by way of profit to the members of the assocn., nor, in the event of a winding up, were the surplus assets distributable among them:—*Held*: the assocn. was not "a body of persons . . . established for charitable purposes only" within 1918 Act, s. 37 (1) (b), so as to be entitled to exemption from income tax in

respect of consolidated stock owned by it & representing donations. The assocn. had widely philanthropic objects, but it fell within none of the four principal divisions into which charity was divided.—**KEREN KAYEMETH LE JISROEL, LTD. v. INLAND REVENUE COMRS.**, [1932] A. C. 650; 101 L. J. K. B. 459; 147 L. T. 161; 48 T. L. R. 459; 76 Sol. Jo. 377, 17 Tax Cas. 27, H. L.

*Annotation*:—**Consd.** *Master Mariners, Honourable Co. of v. I. R. Comrs.* (1932), 17 Tax Cas. 298.

*Compare* **CHARITIES**, No. 215a, *ante*.

**476f. ——— Swedish Travel Association.]—**

*Held*: not a charity.—**ANGLO-SWEDISH SOCIETY v. INLAND REVENUE COMRS.** (1931), 47 T. L. R. 295; 75 Sol. Jo. 232; 16 Tax Cas. 34.

**476g. ——— Master Mariners' Company.]—**

*Appld.* co., formerly a co. incorporated under the Cos. Acts, was re-incorporated by Royal Charter in 1931. Its membership was limited in number & was confined to master mariners. Its objects were to provide a central representative body for the Merchant Navy in relation (*inter alia*) to matters affecting the interests or status of its officers; to maintain a high standard of proficiency & conduct among such officers; to collect & circulate information relating to the profession; to provide assistance to Royal Commissions & similar bodies; to facilitate the study of matters affecting the merchant service; to found scholarships & to provide for the support of dependants of deceased master mariners. The co. held monthly meetings at which papers were read & discussed on subjects of professional interest & certain of the papers were printed & circulated to other British & foreign associations. The co. claimed repayment of tax deducted from taxed dividends received by it, contending that it was entitled to exemption under Income Tax Act, 1918 (c. 37), s. 37 (1) (b), as a body established for charitable purposes only:—*Held*: the co. was not established for charitable purposes only.—**HONOURABLE COMPANY OF MASTER MARINERS v. INLAND REVENUE COMMISSIONERS** (1932), 17 Tax Cas. 298.

**476h. Bonar Law Memorial Trust.]—**The Bonar Law Memorial Trust, being a trust for the purpose of education in political matters in the interests of one party only:—*Held*: not to be a trust for charitable purposes only within the meaning of the Income Tax Act, 1918 (c. 40), s. 37.—**BONAR LAW MEMORIAL TRUST v. INLAND REVENUE COMRS.** (1933), 49 T. L. R. 220; 77 Sol. Jo. 101; 17 Tax Cas. 508.

**477. Add. Annotation:—***Refd.* *I. R. Comrs. v. Yorkshire Agricultural Soc.*, [1928] 1 K. B. 611.

**478. Add. Annotation:—***Refd.* *European Investment Trust Co. v. Jackson* (1932), 18 Tax Cas. 1.

**480. Add. Annotations:—***Refd.* *A.-G. v. Metropolitan Water Board*, [1928] 1 K. B. 833; *Timpson's Executors v. Yerbury*, [1936] 1 All E. R. 186.

**483. Add. Annotations:—***Apld.* *Marie Celeste Samaritan Soc. of London Hospital v. I. R. Comrs.* (1926), 43 T. L. R. 23. *Consd.* *Daw v. I. R. Comrs.*, *Duff-Dunbar v. I. R. Comrs.* (1928), 14 Tax Cas. 58. *Apld.* *I. R. Comrs. v. Smith*,

[1930] 1 K. B. 713; *Corbett v. I. R. Comrs.*, [1938] 1 K. B. 567. **Held.** *Wahl v. I. R. Comrs.* (1933), 149 L. T. 203; *Corbett v. I. R. Comrs.*, [1937] 3 All E. R. 808.

**483a.** ———.—]—Testator devised his residuary estate on trust for applts., who were a society established for charitable purposes only & were entitled to exemption from income tax on their income from investments. Pending completion of the administration the exors. paid to the trustees for applt. society certain sums on account of income. Applts. claimed repayment of income tax, but the Inland Revenue Comrs. refused repayment so far as related to income received by the exors. before the date when the residue was ascertained:—**Held:** as the income when it was received was the income only of the exors. & the money paid to the charity was only a sum equal to the income payable to the charity as a matter of equitable book-keeping in due course of administration, applts. were not entitled to the repayment claimed.—**MARIE CELESTE SAMARITAN SOCIETY OF LONDON HOSPITAL v. INLAND REVENUE COMRS.** (1926), 43 T. L. R. 23; 11 Tax Cas. 226.

*Annotation:*—**Apprvd.** *Corbett v. I. R. Comrs.*, [1938] 1 K. B. 567.

**483b.** Sums received under revocable disposition—Effect of Finance Act, 1922 (c. 17), s. 20 (1).—**INLAND REVENUE COMMISSIONERS v. ST. LUKE HOSTEL TRUSTEES, REGISTERED,** No. 576a, *post*.

**483c.** ——— Established in United Kingdom—What amounts to.].—A testator gave the balance of his property in England & Russia to establish a charitable home in Ontario. Testator was domiciled in Ontario, & the will was proved in 1925 by one exor. in England & by another in Ontario. In 1925 the Canada Trust Co. was by order of the ct. in Ontario appointed a trustee of the will in place of the Canadian exor. On Nov. 30 the English exor. paid over to the Canada Trust Co. £50,000 & received an indemnity & release therefor, but, as he was unable to obtain a release & indemnity in respect of the balance of the English & Russian estate in his hands, he retained the same. The income of this balance was assessed to English income tax, & the trustee claimed exemption therefor, as being the income of a charity:—**Held:** (1) the exemption of charities applies only to the income of bodies of persons or trusts established in the United Kingdom; (2) as two of the original trustees had been resident in the United Kingdom & one still was so resident, the trust was established in the United Kingdom, & the exemption applied.—**INLAND REVENUE COMRS. v. GULL**, [1937] 4 All E. R. 290; 54 T. L. R. 52; 81 Sol. Jo. 903; 21 Tax Cas. 374.

**483d.** Exemption of industrial societies—1918 Act, s. 39—Number of shares unlimited.].—**Resp. Society, which was registered under Industrial**

& Provident Societies Act, 1893 (c. 39), claimed exemption under Sched. D. on the ground that the number of its shares was not limited by its rules or practice. The Society was formed to carry on the business of (*inter alia*) manufacturers & dealers in butter, cheese, milk & other dairy products. Admission to membership was at the discretion of the committee & subject to taking up a qualifying number of shares; further every member was bound by the Society's rules to sell to the Society any milk produced on any lands farmed by him if required to do so. The number of shares held by any individual member was limited to 200. The majority of the members were dairy farmers, & milk dealers & consumers were not in practice admitted to membership. Approximately 98 per cent. of the Society's sales were made to non-members. The Crown contended that practically the whole of the Society's sales were to non-members, & that the restriction of membership in general to persons willing to supply milk to the Society & the exclusion of milk dealers constituted an effective limitation of shares. The General Comrs. found in favour of the Society:—**Held:** the number of the Society's shares was not limited within 1918 Act, s. 39 (4), either by its rules or practice, & it was entitled to the exemption.—**BENSTED v. MIDLAND DAIRY FARMERS, LTD. SOC.** (1928), 14 Tax Cas. 57.

**483e.** Trade carried on by beneficiaries—Finance Act, 1921 (c. 32), s. 30 (1) (c)—Profits of convent school.].—The Convent was a branch of a religious order established for the sanctification of its members by worship & by labour for the benefit of their fellow creatures, particularly by the Christian education of young girls & the care of the sick. The members of the community took vows of poverty & were entirely dependent on the Convent for their bodily needs. In addition to their training in matters of religion, they were educated to take part in carrying on the school or other work of the Convent of which they were members. The main work of the Convent was to carry on a school.

The Comrs. refused the Convent's claim for exemption from Income Tax in respect of the school profits for the years 1923–24 to 1926–27, inclusive, under Finance Act, 1921 (c. 32), s. 30 (1) (c). As from 1927–28, applts. had been allowed exemption under Finance Act, 1927 (c. 10), s. 24. The Special Comrs., on appeal, decided that the members of the Convent were not beneficiaries but the instruments of the work of the charity & of the trade so far as profits were made:—**Held:** the nuns were beneficiaries of the charity, which was accordingly entitled to exemption in respect of the profits of the school.—**BRIGHTON CONVENT OF THE BLESSED SACRAMENT v. INLAND REVENUE COMRS.** (1933), 18 Tax Cas. 76.

## Part VI.—Schedule E.

484. *Add. Citations*:—*revid.*, [1927] A. C. 417; 96 L. J. K. B. 523; 136 L. T. 770; 91 J. P. 75; 43 T. L. R. 279; 71 Sol. Jo. 191; 25 L. G. 123; 11 Tax Cas. 446, H. L.

486. *Add. Annotations*:—*Consd. Watson v. Rowles* (1926), 95 L. J. K. B. 959. *Reid. Ingle v. Farrand*, [1927] A. C. 417; *Seymour v. Reed*, [1927] A. C. 554; *Lysaght v. I. R. Comrs.*, [1928] A. C. 234; *Rees Roturbo Development Syndicate v. I. R. Comrs.*, *Rees Roturbo Development Syndicate v. Ducker* (1928), 13 Tax Cas. 366; *Morley v. Lawford & Co.* (1928), 140 L. T. 125; *Davies v. Braithwaite*, [1931] 2 K. B. 628; *May v. Falk* (1932), 17 Tax Cas. 218; *Henry v. Galloway* (1933), 148 L. T. 453.

488a. — *Headmaster—School established by congregation of secular priests.*—Applt., who was a member of a congregation of secular priests, was headmaster of a school established by the congregation. Under a scheme of government approved by the Board of Education, the school was under the management of a governing body subject to the ultimate control of the congregation. Applt. was originally appointed in 1910 by a resolution of the governing body. In Dec. 1924, in order to comply with the requirements of the Board of Education, a written agreement in the form prescribed by the local education authority was entered into between applt. & the governing body. In the school accounts the amount of applt.'s salary was included as an item of expenditure, while the same amount was entered in the receipts as a donation by the congregation. These entries were book entries only & no money passed. On appeal against an assessment to income tax made on him under Sched. E for the year 1924–25 in respect of his office as headmaster, applt. contended that his service was gratuitous & that he had no contractual right to the salary. The Special Comrs. decided that applt. had a legal claim to the salary against his employers, the governing body, & they confirmed the assessment:—*Held*: on the special facts of the case, applt.'s office was not an office or employment of profit for income tax purposes.—*READE v. BREARLEY* (1933), 17 Tax Cas. 687.

## PART VI. SECT. 1, SUB-SECT. 1.

§ i. —.—.—[Notwithstanding the provisions of sect. 100 of South Africa Act, which provides that the remuneration of judges of the Supreme Ct. appointed after Union shall not be diminished during their continuance in office, a judge of the Supreme Ct. appointed after Union is not exempted from paying income tax under Act 40 of 1925 on the amount of his salary.—*KRAUSE v. INLAND REVENUE COMRS.*, [1929] App. D. 286.—S. AF.

§ ii. — *Officer of Permanent Militia.*—The Special Income Tax Act, 1933 (Man.), is applicable to members of the Active Militia, Permanent Force.—*A.-G. FOR MANITOBA v. WORTHINGTON*, [1934] 3 W. W. R. 658.—CAN.

§ iii. — *Judges—Saskatchewan.*—The judges of the Ct. of Appeal, the Ct. of King's Bench, & the District Cts. of the Province of Saskatchewan are subject to the taxation authorised

by the Income Tax Act, 1932, of Saskatchewan, & their salary & allowances, paid pursuant to the Judges Act, R. S. C. 1927, must accordingly be included in their income for the purpose of the Income Tax Act, 1932. Judicial emoluments are not protected by any paramount principle making inapplicable to such income a tax imposed by a statute in terms wide enough to include it. Neither the independence nor any other attribute of the judiciary could be affected by a general income tax which charged their official incomes on the same footing as the incomes of other citizens.—*JUDGES, THE v. A.-G. FOR SASKATCHEWAN* (1937), 53 T. L. R. 464; 81 Sol. Jo. 186, P. C.—CAN.

§ g. *Ordinarily resident in Manitoba—Dominion minister.*—The question whether a person is resident in a certain place, within the meaning of an income tax Act, is, in the absence of a definition of the word in the Act,

489a. —.—.—[Applt., who at all relevant times was a person residing in the United Kingdom for the purposes of the Income Tax Acts, was employed by an English co. at the co.'s mines in West Africa, & the whole of his duties were performed outside the United Kingdom. The greater part of his remuneration was paid in London, & the remainder was paid abroad. Applt., having been assessed under Sched. E as amended by Finance Act, 1922 (c. 17), s. 18, in respect of the remuneration arising from his employment, contended that under the Acts there was no liability for income tax upon the profits of an employment carried on wholly outside the United Kingdom, & that his employment was not an employment of profit in the United Kingdom for any of the years of assessment within Sched. E., r. 6, which provides that "the tax shall be paid in respect of all the public offices & employments of profit within the United Kingdom . . ." :—*Held*: applt. in the circumstances was assessable to income tax in respect of his earnings under Sched. E., as his case clearly fell within Sched. D., Case II., which Finance Act, 1922 (c. 17), s. 18, transferred to Sched. E.; there was no case for the liberal construction applied in *Colquhoun v. Brooks*; Sched. E. must be widened in its scope to relate to the employments which were the subject of the transferred sub-paragraph.—*EATON-TURNER v. MCKENNA*, [1937] A. C. 162; [1936] 3 All E. R. 215; 106 L. J. K. B. 11; 155 L. T. 515; 53 T. L. R. 49; 80 Sol. Jo. 893, H. L.; *affg.*, *sub nom. MCKENNA v. EATON-TURNER*, [1936] 1 K. B. 1; 105 L. J. K. B. 246; 153 L. T. 288; 51 T. L. R. 557; 79 Sol. Jo. 609, C. A.

*Annotation*:—*Reid. Bennet v. Marshall*, [1937] 3 All E. R. 208.

489b. — *Foreign director of British company.*—Applt. in the first case was appointed foreign director of a British co. for fourteen years from 1918. The co. had subsidiary cos. on the Continent, the principal one being a French co. of which applt. was managing director. He was also a director of a German co., & had control over selling organisations in other European countries. He was thus responsible for the whole of the British co.'s

a question of law & fact, chiefly of fact. Residence is founded on actual physical presence in a place for some appreciable period of time, coupled with an intention to remain there. The intention may be inferred from the circumstances surrounding his presence or from the relationship which he bears to the place. Likewise the circumstances in which a person remains absent from a locality may determine whether he has ceased to reside in the locality. A Dominion cabinet minister who, upon his appointment to the cabinet, leased the house in which he had dwelt in Manitoba, placed his business there under a manager, & moved his family to Ottawa, where he & his family have ever since had their home, & whose visits to Manitoba have been infrequent & brief.—*Held*: not to be "residing or ordinarily resident" in Manitoba.—*Re INCOME TAX ACT (MANITOBA)*, [1933] 3 W. W. R. 189; 41 Man. L. R. 621.—CAN.

Continental business, & his only remuneration was a fixed salary payable by the British co. plus commission on the co.'s profits from trading on the Continent. Since 1918 applt. had lived in Paris with his family. He came to London once a month to attend the co.'s directors' meetings, his function being to report & advise the directors on questions affecting the Continental business. It was no part of his duty to attend to the general business of the co. Applt. was assessed in respect of salary & commission for each year from 1920-21 to 1928-27 by the General Comrs. for the division in which the co.'s registered office was situated:—*Held*: (1) his office was an office within the United Kingdom; (2) the General Comrs. had jurisdiction to assess for 1920-21 & 1921-22 as well as for later years.—*PROCTOR v. RYALL, RYALL v. PROCTOR* (1928), 14 Tax Cas. 204.

*Annotation*:—As to (1) *Consd. Robinson v. Corry, Corry v. Robinson*, [1933] 2 K. B. 521.

**489c. — Civil servant—Appointment abroad.**—An established Civil Servant was appointed by the Lords Comrs. of the Admiralty to a post which necessitated his residing in a colony for several years. During that time he received, in addition to the salary appropriate to his rank in the Civil Service, a colonial allowance to provide for the increased cost of living in the colony. During part of the time he occupied an official house provided for him, & during other parts of the time he received a housing allowance in lieu of an official house:—*Held*: (1) he was assessable to income tax under Sched. E, & the tax was chargeable, not only on the salary, but also on the colonial allowance & housing allowance, which must be brought into charge & were not deductible as expenses; (2) the annual value of the official residence was not income chargeable with tax, since it was not money, nor convertible into money by the Civil Servant.—*ROBINSON v. CORRY, CORRY v. ROBINSON*, [1934] 1 K. B. 240; 103 L. J. K. B. 228; 150 L. T. 250; 50 T. L. R. 125; 78 Sol. Jo. 12; 18 Tax Cas. 411, C. A.

*Annotation*:—*Generally, Reft. Weight v. Salmon* (1935), 19 Tax Cas. 174.

**489d. Office of profit—Director—Salary waived unless debenture interest earned.**—A director of a co. waived his salary unless the co. should earn the interest on its debentures. The debenture interest was not earned:—*Held*: nevertheless the director still held an "office of profit" & was assessable on the salary.—*HENRY v. GALLOWAY* (1933), 148 L. T. 453; 49 T. L. R. 191; 77 Sol. Jo. 64; 17 Tax Cas. 470.

*Annotations*:—*Consd. Cull v. Cowcher* (1934), 18 Tax Cas. 449. *Folld. Oliver v. Chuter* (1934), 18 Tax Cas. 570. *Reft. Dewar v. I. R. Comrs.* (1935), 19 Tax Cas. 561.

**489e. — Absolute waiver of fees.**—Applt., a director of a limited co., agreed, in view of unfavourable trade, conditions, to waive altogether his director's fees for the year ending Feb. 22, 1933, & informed the co. to that effect by letter dated Feb. 15, 1933. No director's fees were accordingly paid to him for the year 1932-33. On appeal against an assessment to income tax, Sched. E., made upon him for the year 1932-33, in respect of his office as director, on the basis of the amount of his fees for the preceding

year, applt. contended (a) that in the year of assessment he ceased to hold an office or employment of profit under the co., & (b) that the case was distinguishable from that of *Henry v. Galloway*, because the waiver of fees was absolute & not merely contingent. The Special Comrs. confirmed the assessment:—*Held*: the office of profit had not ceased merely because in the year of assessment no remuneration had been received.—*OLIVER v. CHUTER* (1934), 18 Tax Cas. 570, C. A.

*Annotations*:—*Reft. Cull v. Cowcher* (1934), 18 Tax Cas. 449; *Dewar v. I. R. Comrs.* (1935), 19 Tax Cas. 561.

**489f. — Of benevolent fund.**—Applt. was vice-president & a director of a Benevolent Fund incorporated under Special Acts of Parliament. By the rules of the Fund the directors were empowered to make reasonable allowances to persons affording assistance in the management of the Fund & to cause to be paid all expenses incidental thereto. During the year material to the appeal the applt. attended seventy-four directors' meetings & received one guinea in respect of each meeting. On appeal against an assessment to income tax made upon him under Sched. E in respect of these sums less an allowance of 25 per cent. for expenses, applt. contended (a) that his office of director was not an office or employment of profit assessable under Sched. E, & (b) that the whole sum paid was simply an allowance for sums expended wholly, exclusively & necessarily in the performance of his duties. The Special Comrs. decided that the sum paid to applt. constituted remuneration as a director in respect of which he was assessable under Sched. E, & in the absence of detailed evidence, which was not tendered, of applt.'s expenditure, that the allowance made in respect of expenses was adequate:—*Held*: the Special Comrs.' decision was correct.—*DINGLEY v. MACNULTY* (1937), 81 Sol. Jo. 588; 21 Tax Cas. 152.

**489g. Ordinarily resident in the United Kingdom—Question of fact.**—Prior to Apr. 24, 1926, resp. was resident & ordinarily resident in the United Kingdom. On that date he left the United Kingdom to enter the employment of a financial firm in New York. The employment was in the nature of an apprenticeship, with a view to his becoming a European representative of the firm. During each of the years 1926-27, 1927-28 & 1928-29, he visited the United Kingdom on his employers' business. He was not a householder in the United Kingdom, nor had he a fixed place of abode there, but he resided at hotels during his visits. On appeal, the General Comrs. decided that in each of the three years he was not resident in the United Kingdom:—*Held*: there was evidence on which the Comrs. could come to their finding of fact that resp. was not resident in the United Kingdom.—*INLAND REVENUE COMRS. v. COMBE* (1932), 17 Tax Cas. 405.

**490. Add. Annotations**:—As to (1) *Distd. Henry v. Foster (A.), Henry v. Foster (J.)* (1931), 145 L. T. 225. *Reft. Seymour v. Reed*, [1927] A. C. 554; *Benyon v. Thorpe* (1928), 97 L. J. K. B. 705; *Dewhurst v. Hunter* (1932), 146 L. T. 510; *Denny (H. & A.) v. Reed* (1933),



18 Tax Cas. 254. *As to* (2) **Consd.** *Shipway v. Skidmore* (1932), 16 Tax Cas. 748. **Refd.** *Stedeford v. Beloe*, [1931] 2 K. B. 610.

492. **Add. Annotations:**—**Apld.** *Seymour v. Reed*, [1927] A. C. 554. **Refd.** *Slaney v. Starkey*, [1931] 2 K. B. 148; *Stedeford v. Beloe* (1931), 47 T. L. R. 408; *Henry v. Foster* (Arthur), *Henry v. Foster* (Joseph), *Hunter v. Dewhurst* (1931), 145 L. T. 225; *Weight v. Salmon* (1935), 19 Tax Cas. 174.

493. **Add. Annotations:**—**Distd.** *Reed v. Seymour* (1927), 11 Tax Cas. 625. **Refd.** *Slaney v. Starkey*, [1931] 2 K. B. 148.

494. **Add. Annotation:**—**Consd.** *Reed v. Seymour* (1927), 11 Tax Cas. 625.

495. **Add. Annotations:**—**Consd.** *Seymour v. Reed*, [1927] A. C. 554; *Down v. Compston*, [1937] 2 All E. R. 475. **Refd.** *Hartland v. Diggins*, [1926] A. C. 289; *Slaney v. Starkey*, [1931] 2 K. B. 148; *Henry v. Foster* (Arthur), *Henry v. Foster* (Joseph), *Hunter v. Dewhurst* (1931), 145 L. T. 225.

495a. **Whitsuntide offerings to curate.]**  
A voluntary collection was taken in church at Whitsuntide for the benefit of the assistant stipendiary curate licensed by the Bishop to that church. Contributions were solicited by the Vicar in the parish magazine on the ground of the curate's "devoted & earnest ministry amongst us":—**Held:** the assistant stipendiary curate was the holder of an office or employment of profit within Sched. E of

1918 Act, & the Whitsuntide offerings were chargeable to income tax as emoluments of his office under Sched. E, r. 1, of 1918 Act.—**SLANEY v. STARKEY** (REV. E. S.), [1931] 2 K. B. 148; 100 L. J. K. B. 341; 145 L. T. 453; 47 T. L. R. 323; 75 Sol. Jo. 247; 16 Tax Cas. 45.

496a. ——— **Gift to directors of company.]—**  
**Held:** the payment, although called a gift, was extra remuneration paid to the directors, & was assessable to income tax.—**RADCLIFFE v. HOLT** (1927), 11 Tax Cas. 621.

496b. ——— **After retirement.]—**It was the custom of a co. to grant an annual allowance to members of its staff by way of pension on retirement. Resp. had been managing director of the co., & after his retirement the directors made him a voluntary allowance annually. They subsequently stopped this annual allowance & paid resp. a lump sum as a gift in lieu thereof:—**Held:** the allowances could not be regarded as supplementary salary. They were not "a profit or gain arising from an employment," nor could they be considered as receipts in respect of an office, but were merely gifts, & resp. was not liable to income tax on the sums so received by him.—**BENYON v. THORPE** (1928), 97 L. J. K. B. 705; 44 T. L. R. 610; 72 Sol. Jo. 453; *sub nom.* **BEYNON v. THORPE**, 14 Tax Cas. 1.

**Annotations:**—**Refd.** *Stedeford v. Beloe* (1931), 47 T. L. R. 408; *Donny (H. & A.) v. Reed* (1933), 18 Tax Cas. 254.

## PART VI. SECT. 1, SUB-SECT. 2.

1 i. — **Agent of company sharing in profits.]—Held:** liable to income tax.—**SEELY & CO. v. BROWN**, [1927] 1 W. W. R. 185; 37 B. C. L. 514.—**CAN.**

1 ii. — **Pay of locomotive engineer according to miles run by locomotive.]—Held:** not liable to taxation.—**RE ASSESSMENT ACT** (1902), 9 B. C. L. 209.—**CAN.**

sb. "Salary"—**Annual allowance to Bishop from Colonial Bishopric Fund.]—**The Lord Bishop of Lucknow received *ex officio* a gratuitous annual allowance from a certain fund known as the Colonial Bishopric Fund, London. The allowance was payable in London & was paid in London:—**Held:** "it came within the term "salary" in sect. 7 (1) of Income Tax Act, & the income, being payable on account of the payee being in British India, & there filling the character of the Lord Bishop of Lucknow, accrued or arose in British India, within sect. 4 (1), although it was received in London.—**RE LUCKNOW (Bp.)** (1931), 1 L. R. 54 All. 223.—**IND.**

sf. **Maintenance of priest-in-charge of Roman Catholic mission.]—Apld.** was the priest-in-charge of a Roman Catholic mission in the Archdiocese of Glasgow. He was appointed by the Archbishop & might be moved by him. The income of the mission was mainly derived from offertories & other contributions by church members which the Ordinances of the Roman Catholic Church in Scotland deem to be the property of the church & not gifts to the priest, but out of which the priest will receive what is needed for his "seemly maintenance." The income of the mission was paid into a bank account in the names of applt. & his Archbishop, & normally all the expenses of the mission were met by cheques drawn on this account by applt. Included among these disbursements was a salary of £50 to applt.

which was admittedly chargeable to income tax, & household expenses, viz., food, drink, fuel, wages, etc., incurred at the presbytery house where applt. in accordance with the regulations of the Archdiocese, lived communally with three curates. The priest-in-charge of a mission in Scotland is not necessarily the person who administers the funds, & in all cases the administration is subject to regular & effective control by the Archbishop or Bishop as the case may be, who may & does (*inter alia*) curtail or decrease at his discretion the expenditure on maintenance of the clergy. The Special Comrs. dismissed an appeal by applt. against an assessment to income tax, Sched. E., made on him in respect of his maintenance at the presbytery house:—**Held:** applt. was the trustee of the revenues of the mission, the maintenance was received by him in kind, & not being capable of conversion into money, was not assessable to income tax as part of the emoluments of his office.—**DALY v. INLAND REVENUE COMRS.**, [1934] S. C. 444; 18 Tax Cas. 641.—**SCOT.**

sg. **Payment to executor for services.]—**Testator by his will named three exors. including his son J. Subsequently one of the named exors. died. Later, by codicil, testator appointed two additional exors. By a subsequent codicil he directed that his son J. be paid \$500 a month "in addition to any sum which the ots. or other proper authorities may allow him in common with the other exors." Testator died on Dec. 5, 1923. Nothing was paid to J. in connection with said direction for payment of \$500 a month until Mar. 5, 1927, when a lump sum of \$19,500 was paid him to cover the period from testator's death to that date. From that date until his death in 1932, J. received the \$500 a month. The Minister of National Revenue claimed, under Income War Tax Act, R. S. C., 1927, for income tax in respect of the payments so received by J.: **Held:** (1) on interpretation of the will,

the \$500 a month directed to be paid to J. was not a legacy, but additional remuneration to him as exor., & as such, was taxable income; (2) the said lump sum of \$19,500 was assessable for income tax in respect of 1927, the taxation year in which it was actually received, notwithstanding the \$18,000 of that sum represented arrears that had fallen due during preceding years (the result being that, under the Act, a higher percentage of taxation was imposed than if \$6,000 had been allocated to each of the preceding three years).—**CAPITAL TRUST CORPN., LTD., & COFFEY v. MINISTER OF NATIONAL REVENUE**, [1937] S. C. R. 192; 1 D. L. R. 617.—**CAN.**

sp. **Lump sum payment on retire ment—Whether subject to tax—Indian Income Tax Act.]—****INCOME TAX COMR., MADRAS v. FLETCHER** (1937), 81 Sol. Jo. 609, P. C.—**IND.**

st. **Salary of partner—Paid after death.]—R.**, a member of a partnership, was entitled, under an agreement with the other members of the partnership by which his interest in the firm was established as that of a special partner, to a salary of \$15,000 per year "during his lifetime & to continue for six months after his death." R. died, & the firm paid to the exor. of his will the sum of \$3,750 as so much of the greater amount payable for six months after his death, under the terms of the agreement. The exor. treated this payment as an accretion to the capital of the estate. Under the terms of R.'s will the revenue from this sum of money was paid to R.'s widow. R.'s widow, applt. herein, was assessed income tax on the said sum of \$3,750, which assessment was confirmed by the Minister of National Revenue, from whose decision she appealed to this ct.:—**Held:** the assessment was improperly made & must be set aside.—**RIDDELL v. MINISTER OF NATIONAL REVENUE**, [1938] 5 Ex. C. R. 135.—**CAN.**



**496c.** **Headmaster's pension.]**—The Governing Body of a school, which was a corp'n. founded by Royal Charter, in exercise of their powers under the charter, granted an annual pension out of the school funds to a headmaster on his retirement. There was no scheme in existence under which the headmaster could have qualified for a pension, & the Governing Body had the right at any time to rescind the minute under which the pension was granted & to cease making payments to him:—*Held*: the pension was not chargeable to income tax under Sched. E. as amended by Finance Act, 1922 (c. 17), s. 18.—*STEDEFORD v. BELOE*, [1932] A. C. 388; 101 L. J. K. B. 268; 146 L. T. 456; 48 T. L. R. 291; 76 Sol. Jo. 217; 16 Tax Cas. 505, H. L.

*Annotations*:—*Distd. Lindus & Hortin v. I. R. Comrs.* (1933), 17 Tax Cas. 442. *Refd. Denny (H. & A.) v. Reed* (1933), 18 Tax Cas. 254; *Owens v. Inglis* (1933), 18 Tax Cas. 375; *Handley Page v. Butterworth* (1935), 19 Tax Cas. 328; *Kemp v. Evans* (1935), 20 Tax Cas. 14.

—*See, now*, Finance Act, 1932 (c. 25), s. 17.

**496d.** — **Voluntary pension of railway official—Effect of statutory amalgamation.]**—An official of the L. & S. W. Ry. Co. retired in 1911 & was granted, by way of addition to his pension from the co.'s superannuation fund, a further allowance payable during the pleasure of the directors. In 1923 the L. & S. W. Ry. Co. was absorbed, together with other cos., by the newly-formed S. R. Co., & it was provided by S. R. & O. that persons who had been members of superannuation funds of the amalgamated cos. should be entitled to the same benefits, rights & privileges as they would have been entitled to if the amalgamation had not taken place. The Special Comrs., on appeal, decided that for the year 1930–31 the further allowance was not a mere voluntary payment, but was a pension assessable under Sched. E.:—*Held*: the further allowance was, after the amalgamation, as before, a voluntary payment.—*OWENS v. INGLIS* (1933), 18 Tax Cas. 375.

**496e.** — **Applts. were employees of a firm of stockjobbers. In addition to their salary of a fixed amount, they both received from the firm for each of the years 1927–28 & 1928–29 the sum of £3,000; for the year 1929–30 they received the sums of £310 & £500, respectively. These additional sums, which were deducted as expenses in arriving at the firm's profits for income tax purposes, were paid to applts. at the sole discretion of the partners. No such payments were made to them for the year 1930–31. Applts. were assessed under Sched. E. in respect of these additional payments, for the year 1927–28 on the actual amounts received for that year, & for the years 1928–29 & 1929–30 on the amounts received for the respective preceding years. The amounts as assessed for the three years thus exceeded the actual receipts of the period. On appeal against the 1929–30 assessments, applts. contended (a) that the additional payments were gifts & as such not assessable; (b) that, as the amounts of the assessments were in excess of the actual receipts, there was a double assessment; & (c) that, even if the payments were assessable, Case VI. of Sched. D. provided the proper method of assessment. The Comrs. for the**

Public Offices in the City of London decided that the additional payments were perquisites or profits paid to applts. in respect of an office or employment of profit & were properly assessed under Sched. E.:—*Held*: (1) there was evidence upon which the Comrs. could find that the payments were assessable under Sched. E.; & (2) there was no double assessment.—*DENNY v. REEP* (1933), 18 Tax Cas. 254.

**497.** *Add. Annotation*:—*Distd. Jones v. Wright* (1927), 44 T. L. R. 128.

**498.** *Add. Annotations*:—*Folld. Shipway v. Skidmore* (1932), 16 Tax Cas. 748. *Refd. Denny (H. & A.) v. Reed* (1933), 18 Tax Cas. 254; *Weight v. Salmon* (1935), 19 Tax Cas. 174.

**498a.** — **Sum paid to salaried officer—For negotiating sale of business.]**—Resp., who was secretary of a limited co., was authorised by the directors of the co., to negotiate for the sale of the co.'s works, & it was agreed verbally that anything realised in excess of a specified amount should be paid to resp. Resp. arranged the sale of the works to a new co. & the directors of the old co. by minute, authorised the payment to resp. of the agreed excess amount "for services rendered by him in connection with the negotiations & completion of the sale." The amount was subsequently paid to resp. by the liquidator of the old co. & was described in the liquidator's accounts as a payment "for services rendered prior to liquidation." At the time when the payment was authorised resp. had ceased to perform the duties of secretary of the old co. or to receive any salary, though he remained secretary in name. Resp. was assessed to income tax under Sched. E. in respect of this sum, as representing profits of his office of secretary, & the General Comrs., on appeal, held that the sum was a gift & not taxable:—*Held*: there was no evidence upon which the Comrs. could come to their conclusion.—*SHIPWAY v. SKIDMORE* (1932), 16 Tax Cas. 748.

**499.** *Add. Citations*:—*affd.* (1926), 95 L. J. K. B. 959; 135 L. T. 614; 42 T. L. R. 691; 70 Sol. Jo. 796; 11 Tax Cas. 171, C. A.

**500.** *Add. Citation*:—10 Tax Cas. 609.

*Add. Annotation*:—*Consd. May v. Falk* (1932), 17 Tax Cas. 218.

**501.** For "(1926), 161 L. T. Jo. 235" read "No. 510, *post*."

**501a.** — **Applied in payment for shares.]**—Applt., the chairman & managing director of a co. in which he held shares, agreed that he would take up additional shares in the co., in payment for which sums due by the co. to him by way of remuneration were to be applied:—*Held*: applt. was assessable to income tax under Schedule E. in respect of the remuneration, notwithstanding that it had been applied in payment for shares.—*PARKER v. CHAPMAN* (1928), 138 L. T. 729; 513 Tax Cas. 677, C. A.

**501b.** — **Compensation for loss of office.]**—Resps. in these cases were directors of a limited co. They had no written contracts of service with the co. Art. 109 of the co.'s arts. provided that in the event of any director, who had held office for not less than five years, dying or resigning or ceasing to hold office for any cause other than mis-

conduct, bkpcy., lunacy or incompetence, the co. should pay to him or his representatives by way of compensation for loss of office a sum equal to the total remuneration received by him in the preceding five years. All three directors had held office for not less than five years. In cases (a) & (b) resp. resigned office as director & received from the co. as "compensation" a payment calculated in accordance with Art. 109. In case (c) resp. desired to retire from active management of the co., but his co-directors wished to be able still to consult him, & it was agreed that he should resign the office of Chairman, receive as "compensation" a lump sum in lieu of the provision under Art. 109, waiving any future claim under that article, & remain on the board of the co. at a reduced rate of remuneration:—*Held*: (1) in the Court of Appeal, in cases (a) & (b) the payment constituted a profit of the office of director & was properly assessable to income tax under Sched. E. for the last year of office. In these cases there was no appeal to the House of Lords; (2) in the House of Lords, in case (c) in the circumstances of that case the sum received was not income assessable to income tax.—*HENRY v. FOSTER* (A.), *HENRY v. FOSTER* (J.), *HUNTER v. DEWHURST* (1932), 16 Tax Cas. 605; *sub nom.* *DEWHURST v. HUNTER*, 146 L. T. 510, H. L.

*Annotations*:—As to (1) *Reid*. Van den Berghs, Ltd. v. Clark (1935), 19 Tax Cas. 390. As to (2) *Distd.* Prendergast v. Cameron, [1938] 2 All E. R. 617.

#### 501c. Right to take shares at par.]

S., the managing director of L. & Co., as such, was entitled to a yearly salary, but in addition, under resolutions each year, was given the right to apply for & take up at par "A" ordinary shares of the co. The shares in the years in question were very considerably above par. This was stated in the resolutions to be given to him for his special services as director. S., in fact, had not sold any of the shares so taken up. Assessments were made on S. in respect of the premium value of the allotted shares. S. alleged that he had not received a profit in respect of his office or employment of profit assessable to tax, but that he had received a non-transferable privilege which was not money. The right to apply for the shares at par was not transferable. The revenue contended that S. had received a valuable privilege for services rendered as director, & that privilege was convertible into money. The Special Comrs. upheld S.'s contention:—*Held*: the advantage given to S. as managing director by the allotment of the "A" ordinary shares of the co. came under the words "or profits whatsoever" in rule 1 of Sched. E. He was, therefore, assessable to income tax in respect of the profit given to & enjoyed by him.—*SALMON v. WEIGHT* (1935), 153 L. T. 55; 51 T. L. R. 333; *sub nom.* *WEIGHT v. SALMON*, 19 Tax Cas. 174, H. L.

*Annotation*:—*Reid*. Nicoll v. Austin (1935), 19 Tax Cas. 531.

501d. ——— Provision of residence & expenses of upkeep.]—Resp., who was a life governing director of & held a controlling interest in a co., entered into an agreement with the co. which provided (a) that he should be appointed managing director of the co. for ten years, or until prior determination of the agreement by resp. at twelve months' notice,

at a specified salary, together with any bonus & director's fees voted to him; & (b) that, during the continuance of the agreement, resp., who had intimated that, owing to the cost of upkeep, he might have to vacate the house which he owned & occupied as a residence, should, as requested by the co. for the convenience & prestige of its business, continue to reside in the house, the co. undertaking to pay all outgoings in respect of the house, including rates, taxes & insurance, & the cost of gas, electric light & telephone, & to maintain the house & gardens in proper condition. Resp. was assessed under Sched. E. in respect (*inter alia*) of the amount actually expended by the co. on the upkeep, etc., of the house & gardens. On appeal he contended that the payments by the co. did not constitute money nor were they capable of being converted into money or income chargeable to him as an emolument of his office as managing director of the co.; & that, even if they were part of his income, he was entitled to have them deducted as expenses wholly, exclusively & necessarily incurred in performing his duties as managing director. The General Comrs. decided that the sums expended by the co. were not in the nature of additional salary of resp. or an emolument of his office liable under Sched. E., & they discharged the assessment:—*Held*: (1) the sums in question were income of resp. & were profits of his office as managing director of the co. assessable under Sched. E.; (2) no deduction was admissible in respect of them under Sched. E., r. 9.—*NICOLL v. AUSTIN* (1935), 19 Tax Cas. 531.

*Annotation*:—*Reed v. Cattermole*, [1936] 2 All E. R. 526.

#### 501e. ——— Payment for retaining office.]—

Resp., who for many years had been a director of a co., towards the end of 1934 notified his fellow-directors of his intention to resign, as he was entitled to do under the articles. The other directors thereupon wrote asking him not to serve notice of resignation, & saying that, in consideration of his not doing so, the co. would pay him a sum of £45,000, & would enter into a formal deed to that effect. The co. shortly afterwards entered into a deed, which recited that the co., in the circumstances set out in the letter, & for the consideration therein specified, agreed to pay resp. £45,000, in two amounts of £35,000 & £10,000 respectively. The remuneration of directors was at all material times by resolution of the co. in general meeting. Resp., who, previous to the execution of the deed, had received a salary of £1,500 a year, agreed to remain a director at £400 a year, on the understanding that he would devote less time in the future to the co.'s business. Resp. contended that the possibility of his resigning was a contingent liability on the co., that this liability had in the meantime been discharged by payment of the said sum of £45,000, & that the case was therefore analogous to *Dewhurst's Case* (1932), 16 Tax Cas. 605; Digest Supp., & the said sum was not liable to income tax:—*Held*: (1) the payment was not made in discharge of a contingent liability, as the co. owed resp. nothing, & the case was not, therefore, analogous to *Dewhurst's Case*, *supra*; (ii) the payment, being made in consideration of resp. remaining a director of the co., & he never having ceased

to be such, constituted a profit arising from his office as director.—**PRENDERGAST v. CAMERON**, [1938] 2 All E. R. 617.

502. For existing para. & citations read the following para. & citations:—

A professional cricketer in the service of the Kent County Cricket Club might, by the rules of the club, be granted a benefit but this was on the express understanding that he allowed the proceeds to be invested in the name of trustees of the club during the pleasure of the committee. The invested sum was always, however, eventually handed over to him when his career as a cricketer was over, or when he found an investment of which the trustees approved. *Appl.*, a professional cricketer in the employment of the club, was granted a benefit, the proceeds from which, together with subscription, after being held by trustees on certain securities, were eventually handed to *appl.* & applied by him in the purchase of a farm. *Appl.* having been assessed under Sched. E., r. 1, of 1918 Act, on so much of the fund as represented the gate money at the match:—*Held*: *appl.* was not assessable in respect of this sum, inasmuch as it was a personal gift, & not a profit or perquisite arising from his employment within Sched. E., r. 1.—**SEYMOUR v. REED**, [1927] A. C. 554; 96 L. J. K. B. 839; 137 L. T. 312; 43 T. L. R. 584; 71 Sol. Jo. 488; 11 Tax Cas. 625, H. L.; *reusq.* S. C. *sub nom.* **REED v. SEYMOUR**, [1927] 1 K. B. 90, C. A.

*Annotations*:—**Consd.** **Davis v. Harrison** (1927), 11 Tax Cas. 707. **Refd.** **Stanley v. Starkey**, [1931] 2 K. B. 148; **Dewhurst v. Hunter** (1932), 146 L. T. 510; **Denny (H. & A.) v. Reed** (1933), 18 Tax Cas. 254; **Weight v. Salmon** (1935), 19 Tax Cas. 174.

- 502a. — **Accrued benefit—Professional footballer.**—*Resp.* was employed to play football for a club in return for payment, & on his being transferred in accordance with the rules of the Football Assocn. to another club, he was given by the first-named club a sum as accrued benefit:—*Held*: the payment was neither a gift nor compensation for loss of employment, but was really remuneration for services, & was assessable to income tax.—**DAVIS v. HARRISON** (1927), 96 L. J. K. B. 848; 137 L. T. 324; 43 T. L. R. 623; 11 Tax Cas. 707.

*Annotation*:—**Refd.** **Dewhurst v. Hunter** (1932), 146 L. T. 510.

- 502b. — **Actress.**—**DAVIES v. BRAITHEWAITE**, No. 312a, *ante*.

- 502c. — **Value of official house.**—**ROBINSON v. CORRY, CORRY v. ROBINSON**, No. 489c, *ante*.

- 503a. — **Manse.**—A minister of the Methodist Church, appointed minister of a circuit containing nine churches, resided in a manse provided, furnished, decorated & repaired by his employers, the Church, which manse was not part of larger premises belonging to the Church. It was a requirement of his appointment that he should reside in the manse in order to the better performance of his duties, & he was not allowed to sublet it or make any profit from his occupation. Sched. A. tax, rates & water rate in respect of the manse were paid on his behalf by the Church:—*Held*: the amount of such tax & rates did not form part of the emoluments of his office in respect of which he could be taxed under Sched. E.,

as his occupation of the manse was representative & not beneficial.—**REED v. CATTERMOLE**, [1937] 1 K. B. 613; [1937] 1 All E. R. 541; 106 L. J. K. B. 407; 156 L. T. 389; 53 T. L. R. 369; 81 Sol. Jo. 117; 21 Tax Cas. 35, C. A.

504. *Add. Annotations*:—**Distd.** **Dauncey v. Howlett** (1926), 135 L. T. 279. **Consd.** **Davis v. Harrison** (1927), 96 L. J. K. B. 848. **Refd.** **Borthwick v. Nolder** (1927), 11 Tax Cas. 261.

- 504a. — **Additional remuneration of company director.**—**DAUNCEY v. HOWLETT**, No. 510, *post*.

505. *Add. Annotations*:—**Distd.** **Edwards v. Roberts** (1935), 19 Tax Cas. 618. **Refd.** **Machon v. McLoughlin** (1926), 11 Tax Cas. 83; **Dewhurst v. Hunter** (1932), 146 L. T. 510.

- 505a. — **Beneficial interest in trust fund of employers.**—*Resp.* was employed by a co. under a service agreement dated Aug. 1921, which provided (*inter alia*) that, in addition to an annual salary, he should have an interest in a "conditional fund," which was to be created by the co. by the payment after the end of each financial year of a sum out of its profits to the trustees of the fund to be invested by them in the purchase of the co.'s shares or debenture stock. Subject to possible forfeiture of his interest in certain events, *resp.* was entitled (i) to receive the income produced by the fund at the expiration of each financial year, & (ii) to receive part of the capital of the fund (or, at the trustees' option, the investments representing the same) at the expiration of five financial years & of each succeeding year, & on death while in the co.'s service or on the termination of his employment by the co., to receive the whole amount then standing to the credit of the capital account of the fund, or the actual investments. *Resp.*, with the co.'s consent, resigned from its service in Sept. 1927, & at that date the trustees of the fund transferred to him the shares which they had purchased out of the payments made to them by the co. in the years 1922 to 1927. He was assessed under Sched. E. for 1927–28 on the amount of the current market value of the shares at the date of transfer. He appealed, contending (a) that, notwithstanding the liability to forfeiture of his interest in certain events, immediately a sum was paid by the co. to the trustees of the fund he became invested with a beneficial interest in the payment which formed part of his emoluments for the year in which it was made, & for no other year, & that, accordingly, the amount of the assessment for the year 1927–28 should not exceed the amount paid into the fund during the year of assessment, & (b) alternatively, that the assessment for 1927–28 ought not, in any event, to exceed the aggregate of the sums paid by the co. to the trustees, the difference between that amount & the value of the investments at the date of transfer representing a capital appreciation not liable to tax for any year:—*Held*: (1) *resp.* did not obtain a vested interest in the yearly payments made to the trustees at the dates when they were respectively made; (2) the value of the investments at the date of transfer to *resp.* by the trustees constituted additional remuneration of the year in which

the transfer took place.—EDWARDS v. ROBERTS (1935), 19 Tax Cas. 618, C. A.

506. *Add. Citations*:—95 L. J. K. B. 392; 10 Tax Cas. 247.

*Add. Annotations*:—*Refd.* Michelham's Trustees v. I. R. Comrs., Michelham (Lady), Exors. v. I. R. Comrs. (1930), 144 L. T. 163; Nicoll v. Austin (1935), 19 Tax Cas. 531; I. R. Comrs. v. Pearson, I. R. Comrs. v. Pratt, [1936] 2 All E. R. 731; Weight v. Salmon (1935), 19 Tax Cas. 174; Reed v. Cattermole, [1937] 1 K. B. 613.

507. *Add. Annotations*:—*Consd.* Sutton v. I. R. Comrs. (1929), 14 Tax Cas. 662. *Refd.* Machon v. McLoughlin (1926), 11 Tax Cas. 83; Robinson v. Corry, Corry v. Robinson (1933), 49 T. L. R. 590.

507a. S. P. MACHON v. McLOUGHLIN (1926), 11 Tax Cas. 83, C. A.

*Annotation*:—*Refd.* Weight v. Salmon (1934), 151 L. T. 410.

507b. *Voluntary pension*.]—Deceased applt. was for a number of years private chaplain at Clumber Church of the seventh Duke of Newcastle, who died in 1928. By his will the Duke authorised his trustees at their discretion to continue or discontinue the payment of any pension he was paying to any of his servants or employees at the date of his death, & to grant pensions of such amounts & for such periods as they thought fit to any other servants or employees. These pensions were to be payable by half-yearly payments out of the income of a fund to be set aside by the trustees, &, until such appropriation, out of the residuary estate. After the death of the Duke applt. continued to act as chaplain at Clumber until his retirement; during this period of service his salary was paid by the exors. of the Duke's will on an authority signed by the principal residuary legatees. On applt.'s resignation the same legatees signed a further authority to the exors. & trustees of the Duke, requesting them in their discretion to make a payment of £250 *per annum* to applt. by quarterly payments out of the income of the estate. The trustees acceded to this request, & on making the payments to applt. they deducted tax at the standard rate. Applt. was assessed under Sched. E. for each of the years 1932–33 & 1933–34 in the sum of £250. On appeal, he contended that the pension was an annual payment within General Rule 19, that he was entitled to the pension as a *cestui que trust*, the trustees having exercised their discretionary power of appointment under the will, & that, since he had already suffered tax by deduction on the payments, the assessments should be discharged. The General Comrs. decided that the payments in question constituted a voluntary pension & confirmed the assessments in principle, but they reduced the amounts to the actual sums received by applt.:—*Held*: the pension was payable not under the trustees' discretionary power but at the request of the residuary legatees, that the payments constituted a voluntary pension assessable under Sched. E. on the gross amount payable, & that the trustees

had acted erroneously in deducting tax.—KEMP v. EVANS (1935), 20 Tax Cas. 14.

507c. *Damages for breach of service agreement*.]—By an agreement made in 1919 it was agreed that applt. should continue to act as general manager of a co. for a period of years ending in 1932 on terms which included the payment of a fixed salary & a commission on profits & also a right, in events, of succession to the office of managing director of the co. In 1923 the co. repudiated the agreement whereupon applt., who rendered no further services to the co., commenced an action in the High Ct. against the co. for payment of arrears of salary & commission, & for damages for wrongful repudiation of the agreement. The co. defended the action, contending that the agreement was not binding on it, & counterclaimed for sums already paid to applt. The action was ultimately compromised in 1928, the terms of the settlement including the cancellation of the agreement, the withdrawal of the co.'s counterclaim, & the payment by the co. to applt. of the sum of £57,250 as "agreed damages." Applt. was assessed under Sched. E. for the years 1923–24 to 1926–27, inclusive, in sums totalling £57,250, allocated in accordance with the provision made in the co.'s accounts for commission contingently payable to applt. for these years. The General Comrs. decided that £27,500 of the sum paid to applt. was income of the years in question & apportioned that amount rateably according to the assessments:—*Held*: the whole of the sum paid to applt. in settlement of the litigation was a capital payment as damages for cancellation of the service agreement, & was not assessable to income tax.—DU CROS v. RYALL (1935), 19 Tax Cas. 444.

510. For the existing paragraph substitute the following paragraph:—

— *Additional remuneration of company director*.]—Resp. as director of a co. was entitled as remuneration for his services to £3,000 *per annum* free of income tax. Towards the close of the year of assessment the co. in general meeting resolved that the directors be paid by way of additional remuneration for their services such a sum as after the provision of income tax would entitle them to receive the further sum of £25,000 free of tax:—*Held*: resp.'s share of such additional remuneration was not a perquisite, but was assessable by additional assessments under Income Tax Act, 1918 (c. 40), Schedule E., rr. 1 & 5.—DAUNCEY v. HOWLETT (1926), 135 L. T. 279; 10 Tax Cas. 454.

512a. — *New office—Director becoming member of executive committee*.]—Resp. who had for many years, continuously, been the secretary & a director of a public co. resigned his position as secretary on Nov. 8, 1927, & was appointed a member of the executive committee. The executive committee met every week & in practice controlled & directed the ordinary conduct of the co.'s business, reporting to the full board of directors which met eight times a year. The members of

such sum were not taxed or paid within the year of assessment.—M'KOWN v. ROE, [1928] I. R. 195.—IR.

## PART VI. SECT. 2.

508 1. *Basia of assessment*.]—Where resp. was employed as solr. to a board:

—*Held*: he was chargeable to income tax for the year of assessment in respect of a sum for fees, notwithstanding that the bills of costs which included

the committee, who were all directors of the co., devoted their whole time to the co.'s business & received additional remuneration for their services on the committee. Resp. appealed to the Special Comrs. against an additional assessment to income tax under Sched. E. for the year 1928–29 made upon the basis that he entered on a new office, that of member of the executive committee, on Nov. 8, 1927, & was assessable to income tax for 1928–29 under the provisions of Finance Act, 1927 (c. 10), s. 45 (4) (ii.). The Special Comrs. held that on appointment to the executive committee resp. did not enter upon a new office:—*Held*: there was evidence upon which the Special Comrs. could arrive at their conclusion of fact & they had not misdirected themselves in law.—*MAY v. FALK* (1932), 17 Tax Cas. 218.

514. *Add. Annotations*:—*Consd.* *Shrewsbury & Talbot (Countess) v. I. R. Comrs.*, [1936] 2 All E. R. 101. *Refd.* *Hartland v. Diggin*, [1926] A. C. 289; *Nicoll v. Austin* (1935), 19 Tax Cas. 531; *I. R. Comrs. v. Pearson, I. R. Comrs. v. Pratt*, [1936] 2 All E. R. 731.

516. *Add. Annotations*:—*Expld.* *Proctor v. Ryall, Ryall v. Proctor* (1928), 14 Tax Cas. 204. *Consd.* *McKenna v. Eaton-Turner* (1934), 152 L. T. 465. *Refd.* *Robinson v. Corry, Corry v. Robinson* (1933), 40 T. L. R. 590.

516a. — *Company director—Registered office.*—*PROCTOR v. RYALL, RYALL v. PROCTOR*, No. 489b, *ante*.

519. *Add. Citation*:—10 Tax Cas. 118. *Add. Annotations*:—*Apld.* *Nolder v. Walters* (1930), 15 Tax Cas. 380. *Refd.* *Eagles v. Levy* (1934), 19 Tax Cas. 23.

526a. — — — — —.]—*MACHON v. McLoughlin*, 11 Tax Cas. 83, C. A.

*Annotation*:—*Refd.* *Weight v. Salmon* (1934), 151 L. T. 410.

526b. — *Rent & rates of medical officer of county hospital.*—Resp. was employed by a county council as assistant medical officer of a hospital at a specified annual salary. Under the terms of his employment, he was required to reside, & did reside with his wife & family, in a house within the precincts of the hospital. In respect of his occupation of the house he was required to pay an annual sum comprising charges for rent, rates & hot water. The assessment to income tax, Sched. A., on the house was made on the county council & that body paid the tax & also the rates in respect of the house. The General Comrs. decided, on appeal, that, in the assessment of his remuneration to income tax under Sched. E., resp. was entitled to a deduction in respect of the annual sum paid by him. The Crown appealed on a stated case to the High Ct. When the case came before the King's Bench Div. it was intimated that resp. had come to the conclusion that he could not resist the Crown's appeal. The King's Bench Div. accordingly gave judgment

allowing the appeal of the Crown.—*OSBORN v. SWYER* (1934), 18 Tax Cas. 445.

527a. — *Cost of motor-car & telephone—Air pilot.*—*Held*: an air pilot could not deduct for the purposes of income tax any part of the cost of a motor-car & a telephone, which were not used in the performance of his office, but only in preparing to perform it.—*NOLDER v. WALTERS* (1930), 46 T. L. R. 397; 47 Sol. Jo. 337; 15 Tax Cas. 380.

527b. — *Colonial allowance & house allowance of Civil Servant.*—*ROBINSON v. CORRY, CORRY v. ROBINSON*, No. 489c, *ante*.

527c. — *Costs of action to recover remuneration.*—Resp. commenced an action in the High Ct. against a co., of which he had been chairman & managing director, for the recovery of the balance of the remuneration to which he considered he was entitled under a service agreement which had been terminated by mutual consent. On the second day of the hearing the action was settled without an order of the ct. on the terms that resp. should receive from the co. an agreed sum, counsel for the co. stating in ct., in announcing the terms of the settlement, that "the sum is a comprehensive sum; there are no costs on either side in the matter." The General Comrs., on appeal by resp. against an assessment to income tax, Sched. E., in respect of his emoluments from the co., reduced the assessment by the amount of the costs incurred by him:—*Held*: (1) the costs of the action were not necessarily incurred by resp. in the performance of the duties of his office so as to be deductible from his emoluments under rule 9 of Sched. E.; & (2) as, on the evidence before them the General Comrs. could not properly come to any other conclusion than that the sum received by resp. in settlement of the action did not include any amount in respect of his costs, the whole of the sum received was assessable.—*EAGLES v. LEVY* (1934), 19 Tax Cas. 23.

527d. — *Residence provided for managing director.*—*NICOLL v. AUSTIN*, No. 501d, *ante*.

530. *Add. Annotations*:—*Refd.* *Machon v. McLoughlin* (1926), 11 Tax Cas. 83; *Reed v. Seymour* (1927), 11 Tax Cas. 625.

531. *Add. Annotation*:—*Refd.* *Magraw v. Lewis* (1933), 77 Sol. Jo. 589.

535a. *Pension from Dominion Government—Sums deducted by Government in respect of costs of action.*—In 1929 applt. was retired from the service of the Govt. of the Union of South Africa as medically unfit & was awarded a pension of £229 *per annum*. Since Mar. 1931, he had lived permanently in the United Kingdom, & from that time his pension was payable & had been paid through the High Comr. of the Union Govt. in London. On making payment of the pension, the High Comr., without applt.'s consent, deducted certain varying sums on account of the costs due by applt. to the Union Govt. in respect of an unsuccessful action which he had

#### PART VI. SECT. 3.

ri. — *Entertaining by Lieutenant-Governor.*—Applt. declared his income as Lieutenant-Governor to be £ & claimed a deduction therefrom of £ expended for social entertain-

ments, claiming that the latter amount was properly deductible as having been necessarily laid out for the purpose of earning the income:—*Held*: the expenses claimed as a deduction herein were not "wholly, exclusively & neces-

sarily laid out or expended for the purpose of earning the income" within sect. 8 (a) of Income War Tax Act, 1917, as amended by 13 & 14 Geo. 5, c. 52.—*Re* *LIEUTENANT-GOVERNORS SALARY*, [1931] Ex. C. R. 232.—*CAN.*

brought against that Govt. in 1930. Owing to the rate of exchange between South Africa & the United Kingdom being at a premium, the gross pension payable for the year 1931-32 amounted to £268 (sterling). Applt. was assessed under Sched. E. for that year, in respect of his pension, in the sum of £229. On appeal, he contended that the assessment should be reduced by the amounts deducted

by the High Comr. The General Comrs. decided that applt.'s pension was £229 (South African) *per annum*, that the sums deducted in respect of the costs were inadmissible as deductions in arriving at the assessment & that the assessment should be increased to £268 :—*Held* : General Comrs.' decision was correct.—*MAGRAW v. LEWIS* (1933), 77 Sol. Jo. 589; 18 Tax Cas. 222.

## Part VII.—General Allowances, Exemptions and Abatements.

**539a. Personal allowance—In respect of wife—Whether earned income of wife included in husband's total income.]**—*THOMPSON v. BRUCE* (1927), 11 Tax Cas. 607.

**539b. ——— Husband entitled to deduction in respect of sums paid for maintenance.]**—Resp., who was separated from his wife, wholly maintained her by the payment of an annual sum under a deed of separation approved by the ct. He claimed relief on the sum of £150, being the higher personal allowance provided by sect. 18 (1) Finance Act, 1920 (c. 18) (as amended). The Crown disputed his claim on the ground that the payments made by him for his wife's maintenance under the deed were annual payments deductible in computing his total income for the year of assessment. The General Comrs. allowed the claim. When the case came before the King's Bench Div., judgment was given, by consent, in favour of the Crown, but costs were withheld on the ground stated in the judgment.—*CRADDOCK v. GREENWOOD* (1934), 18 Tax Cas. 551.

**540a. ——— Child receiving instruction at "educational establishment."]**—A teacher's house, where he gives to individual pupils private lessons & directions for home study & practice, is not an "educational establishment" where a pupil receives full-time instruction, so as to entitle the father to a deduction from income tax under 1920 Act, s. 21 (1).—*HEASLIP v. HASEMER* (1927), 138 L. T. 207; 44 T. L. R. 112; 72 Sol. Jo. 31; 13 Tax Cas. 212.

**540b. ——— Income of child in own right—Payments at discretion of trustees.]**—*JOHNSTONE TRUST SETTLEMENT v. CHAMBERLAIN*, No. 597a, *post*.

**540c. Earned income relief—How calculated.]**—

Applt. was employed as assistant secretary to a limited co. whose superannuation fund had been approved by the Comrs. of Inland Revenue under 1921 Act, s. 32, & his annual contribution to the fund was therefore deducted as an expense in arriving at the net amount of his salary assessable to income tax. In the assessment one-sixth of the net amount was allowed as earned income relief, but applt. contended that one-sixth of his gross salary, before deducting the superannuation contribution, should be so allowed :—*Held* : earned income relief must be calculated on the net amount of remuneration assessable after deducting allowable expenses.—*FRAME v. FARRAND* (1928), 13 Tax Cas. 861.

**540d. ———.]**—Applt. made, under deduction of income tax, certain annual payments which were charged upon his total income. His income consisted of a salary & unearned income taxed at the source. The charges exceeded the taxed income. He claimed that in the assessment of his salary for the year 1927-28 he was entitled to an earned income allowance of one-sixth of the whole amount of his salary. He was given an allowance of one-sixth of the amount of his salary remaining after deducting from it the amount by which the charges exceeded the taxed income. The General Comrs. rejected his appeal on the point & he appealed to the High Ct. :—*Held* : the earned income allowance was rightly computed on the amount of salary remaining after deduction of the charges treated as paid out of it.—*ADAMS v. MUSKER* (1930), 15 Tax Cas. 413.

*Annotation* :—*Folld. Smith v. Eden* (1934), 19 Tax Cas. 110.

### PART VII. SECT. 1.

**536 ii. ——— Whether gross or net income under will.]**—*Held* : applt.'s income under her father's will, for the purposes of a claim to repayment of income tax in respect of personal allowance, etc., was one-half only of the net income of the estate after the deduction of all prior charges, including the expenses of management of the trust.—*MURRAY v. INLAND REVENUE COMRS.* (1926), 11 Tax Cas. 135.—*SCOT*.

**536 iii. ———.]**—A beneficiary was entitled to income from (*inter alia*) two trusts, under one of which, after the expenses of the trust were paid, he was entitled to a life rent annuity of the whole residue of the estate; & under the other, after the expenses of the trust were paid, to (1) an annual

sum, & (2) subject to a trust for accumulation for a particular purpose, the annual income of the estate during his life. The beneficiary, being a British subject resident abroad, was entitled to certain relief from British income tax under Finance Act, 1920, s. 24 (1) :—*Held* : in computing the "amount of his total income from all sources" for the purpose of this relief, the beneficiary was not entitled to include, along with the actual sums received by him from the trusts, the management expenses of the trusts.—*MACFARLANE v. INLAND REVENUE COMRS.*, [1929] S. C. (Ct. of Sess.) 453.—*SCOT*.

**536 iv. ——— Sums expended by trustees for benefit of taxpayer.]**—Trustees in performance of duties as prescribed by a will paid out certain sums for taxes, water rates, insurance, coal & wages with respect to a residence occupied by

testator's widow under the terms of the will. The "Minister" named in Income Tax Act, C. A., 1924, held that said sums were taxable income of the widow under said Act. On appeal :—*Held* : the Crown had not satisfied the onus which rests upon it in tax cases of showing that the Act applied to the sum in question.—*Re NANTON*, [1934] 3 W. W. R. 240; 42 Man. L. R. 461.—*CAN*.

**539a i. Personal allowance—Whether bankrupt entitled—Property in hands of trustee.]**—*Held* : during sequestration the income from the sequestrated estate, which was vested in the trustee, was the trustee's income & not the bkpt.'s, & that neither the trustee nor the bkpt. was entitled to claim the relief sought.—*INLAND REVENUE COMRS. v. FLEMING* (1928), 14 Tax Cas. 78.—*SCOT*.

**540e.** ———.]—Applt., a journalist & the owner & occupier of his residence, appealed against assessments made upon him under Sched. E. contending (*inter alia*), (a) that he was entitled to a deduction from the Scheds. A. & E. assessments in respect of expenses incurred by him in a law suit in connection with the purchase of his house, (b) he was entitled to relief (at the standard rate) in respect of the whole of the premium payable on a life insurance policy, although the premium exceeded one-sixth of his total income for each of the years in question, & (c) that in computing his earned income allowance no deduction should be made from his earnings in respect of the excess of mtge. interest & ground rent paid by him over the amount of the net Sched. A. assessment on his house. The General Comrs. decided against applt. on all points:—*Held*: the decision of the General Comrs. was correct — *SMITH v. EDEN* (1934), 19 Tax Cas. 110.

**540f.** ———. **Deduction of annual payments**—What amount to.]—Resp.'s mother by her will bequeathed certain shares in a limited co. to a bank to hold on trust & out of the income thereof &, if & so far as the income might be insufficient, out of the capital thereof, to pay an annuity to resp.'s sister. The bank had power to sell or mtge. the shares in whole or part in order to pay the annuity or to provide a capital fund to secure the annuity, provided that, if & so long as resp. should himself pay the annuity to his sister, the bank should permit him to receive any dividends on the shares & should not sell or dispose of the shares without his consent. No dividend was in fact paid on the shares in question at the material times & resp. paid the amount of the annuity out of his own moneys to the bank & the bank in turn paid the sum to the annuitant. Resp. claimed that, inasmuch as there was no contract or obligation on him to pay the annuity, the sums paid by him constituted voluntary payments which were not deductible in arriving at the amount of his income for income tax purposes on which earned income relief should be granted. The General Comrs. allowed his claim on appeal:—*Held*: the annuity was paid by resp. under the terms of the will & it was an annual payment to be deducted in arriving at the amount of his total income.—*DEALER v. BRUCE* (1934), 19 Tax Cas. 1, C. A.

**540g.** **Housekeeper allowance**—Claim by divorced person.]—Resp., who had obtained a divorce from his wife, preferred a claim under Finance Act, 1920 (c. 18), s. 19 (1), to relief from income tax in respect of a housekeeper:—*Held*: resp. was not entitled to the allowance.—*KLIMAN v. WINCKWORTH* (1933), 17 Tax Cas. 569.

**540h.** ———. **In year of wife's death.**]—The wife of applt. died in Oct. 1932, leaving him a widower with one child. Thereupon, a female relative of applt. resided with him to have the charge & care of the child. For the year of assessment to income tax 1932–33 applt. received the personal allowance as a married man under Finance Act, 1920 (c. 18), s. 18, in the assessment made on him under Sched. D. of 1918 Act:—*Held*: applt. was not also entitled to an allowance under Finance Act, 1920 (c. 18), s. 19, in respect of

the female relative in the year 1932–33, the correct way to interpret sects. 18 & 19 being to regard them as mutually exclusive in their application to any one year of assessment.—*ROSSI v. BLUNDEN*, [1934] 1 K. B. 357; 103 L. J. K. B. 192; 150 L. T. 360; 50 T. L. R. 164; 78 Sol. Jo. 48; 18 Tax Cas. 328.

**540j.** ———. **Claim by widow.**]—Applt. was a widow who had no occupation. She had no female relative of herself or her deceased husband who was willing & able to act as her housekeeper, & for ten years she & a friend had lived together. Her friend, who was paid no salary but received board & lodging free, paid applt.'s accounts out of money supplied by applt. & was responsible (*inter alia*) for the control of the household expenditure, the engaging of servants & for the general direction of the affairs of the household. On appeal against the refusal of a claim to housekeeper allowance, applt. contended that throughout the material period the relation which subsisted between her friend & herself was that of housekeeper & mistress, & that this relation ought not to be regarded as affected by the fact that they were also friends. The General Comrs. found that the friend was not an employee & that the allowance was not permissible:—*Held*: there was ample evidence upon which the General Comrs. could arrive at their conclusion of fact that the friend was not employed by applt., who was accordingly not entitled to the allowance claimed.—*MACFARLANE v. HUBERT* (1935), 19 Tax Cas. 660.

**540k.** ———. **Non-resident housekeeper.**]—A widower, who had no female relative of his own, or of his deceased wife, able & willing to keep his house, had employed a female person for that purpose. This female person was a married woman, who did not reside with the widower, but with her husband. She attended daily at the widower's house for the purpose of housekeeping, had entire responsibility for all domestic duties & received £60 *per annum* with full pay & subsistence allowance for 28 days' holiday each year. The widower claimed an allowance from the gross amount of an assessment made upon him of £50 under Finance Act, 1924 (c. 21), s. 22, in respect of the services of a housekeeper:—*Held*: as the housekeeper was not resident with the widower, the allowance claimed was not permissible.—*BROWN v. ADAMSON*, [1937] 2 All E. R. 792; 53 T. L. R. 646; 81 Sol. Jo. 479; 21 Tax Cas. 186.

**540l.** ———. **Widower separated from second wife.**]—Applt. was a widower for some years prior to 1932, when he remarried. In 1934 his second wife left him & remained separated from him. There was no deed of separation & his wife was in no way supported by him:—*Held*: applt., not being a widower, was not entitled to housekeeper allowance.—*GUEST v. GODDARD* (1937), 21 Tax Cas. 525.

**543.** **Add. Annotations**:—*Consd. Cadbury Bros., Ltd. v. Sinclair* (1933), 103 L. J. K. B. 29. *Reid. Ancholme Drainage & Navigation Commissioners v. Wedhen*, [1936] 1 All E. R. 759.

**543a.** ———. ———.]—By Ancholme Drainage Act, 1767, the navigation, towing paths, etc., thereby authorised were to be free to all



88

**545d.** —.]—The words “specified age” in 1918 Act, s. 25, mean an age expressed by a definite number of years, & not an age which can be ascertained only by reference to some other occurrence as, for instance, the death of testatrix, who has directed that an accumulated fund shall be paid to a beneficiary twenty years after her death.—*WHITE v. WHITCHER*, [1928] 1 K. B. 453; 97 L. J. K. B. 321; 138 L. T. 205; 44 T. L. R. 113; 13 Tax Cas. 202.

*Annotation*:—*Reid*, *Chamberlain v. Haig Thomas* (1933), 17 Tax Cas. 595.

**545e.** **Effect of power of appointment.**—By a settlement made on the marriage of resp.’s parents, certain stocks, shares & securities were transferred to the trustees of the settlement upon trust to pay the income thereof to resp.’s mother for life &, after her death, to stand possessed of such stocks, shares, etc., & the income thereof, in trust for all, or such one or more exclusively of the others or other, of the issue (whether children or more remote) of the marriage at such times, in such shares & generally in such manner as the resp.’s parents should jointly appoint, &, in default of such appointment, as the survivor alone should appoint, &, failing & until such appointment, in trust for all the children of the marriage who, being sons, should attain the age of twenty-one years of age or, being daughters, should attain that age or marry under that age, in equal shares. On the death of resp.’s mother in 1913, the joint power of appointment had not been exercised & the whole of the income of the settled fund was accumulated until 1922, when the husband, as survivor, irrevocably appointed that the trustees should hold the fund & the income thereof in trust for the absolute benefit of his three children, all of whom were then infants) in equal shares. Resp. became of age in Dec. 1929, & preferred a claim under sect. 25 of 1918 Act, to repayment of tax paid on, or deducted in respect of, one-third of the income of the settled fund which had been accumulated for his benefit contingently on his attaining the age of twenty-one. The General Comrs., on appeal, admitted the claim:—*Held*: the power of appointment under the settlement, while unexercised, did not affect income accumulated during the period of its non-exercise & did not take the claim out of the purview of sect. 25.—*CHAMBERLAIN v. HAIG THOMAS* (1933), 17 Tax Cas. 595.

**545f.** — **Double contingency.**—Resp.’s father, by a deed of settlement dated Dec. 29, 1915, vested in trustees certain funds in trust (*inter alia*) to hold the funds & accumulate the income thereof until his death, or until the youngest of his children attained the age of twenty-three, or until the trust funds should accumulate in value to a specified sum, if either of the latter events should happen prior to his death. Upon the occurrence of the earliest of these events the trustees were to divide & apply the free income, in whole or in part, as they might deem necessary, among his children equally. The deed further provided that, notwithstanding the direction to accumulate the income, the trustees should have power during the period of accumulation to pay to any one or more of the children, on attaining

the age of twenty-three, the share of the income to which he or she would have been entitled on the occurrence of the earliest of the events above-mentioned. Resp., one of the three surviving children of the settlor, attained the age of twenty-three on July 28, 1929. At that date none of the three main contingencies provided for in the deed of settlement had happened &, in the exercise of the discretionary powers which the deed conferred upon them, the trustees had from that date paid to resp. a one-third share of the trust income. Resp. claimed, under sect. 25 of 1918 Act, repayment of the tax paid on one-third of the trust income accumulated for the period of fourteen & a half years to June 30, 1929, on the ground that income of the trust fund had accumulated for his benefit contingent upon his attaining a specified age within sect. 25. The General Comrs. allowed the claim:—*Held*: resp. was not entitled to the relief claimed.—*DAIN v. MILLER* (1934), 18 Tax Cas. 478.

**545g.** **Lunacy percentage.**—Under Lunacy Act, 1890 (c. 5), & the Rules in Lunacy, 1892, the Crown is in certain circumstances entitled to receive 4 per cent., but not exceeding £400, of the clear annual income of a lunatic. A., a lunatic, had a considerable income & the whole of the funds were in ct. The income as it came in was credited to the lunatic’s account by the Paymaster-General, & the appropriate lunacy percentage was debited annually in that account. Applt., the committee of A., was assessed under Case III. of Sched. D. for the year 1926–27 in the sum of £452, the amount of War Loan interest arising in 1925–26; the remainder of the lunatic’s income was received under deduction of income tax. Applt. claimed that a deduction of £161, the lunacy percentage for 1925–26 on the whole of the lunatic’s income, should be made from the assessment, on the grounds that the lunacy percentage did not form part of the lunatic’s income & that there was no authority for charging it to income tax. The Crown contended that there was no provision in the income tax Acts for allowing such a deduction, that the payment was merely an application of the lunatic’s income, or alternatively that the deduction from the assessment should be restricted to the percentage appropriate to that source of income:—*Held*: lunacy percentage is a payment out of the lunatic’s income, & that no deduction is admissible for income tax purposes.—*A. B.’s COMMITTEE v. SIMPSON* (1928), 14 Tax Cas. 29.

*Annotation*:—*Apld.* *I. R. Comrs. v. Sneath* (1932), 48 T. L. R. 241.

—.]—*Compare*, No. 689a, *post*.

**545h.** **Repayment of tax on interest on advance from bank—To what sums applicable.**—Resps. guaranteed the indebtedness to its bankers of a co. in which they were interested. For a number of years the co. was indebted to the bank continuously. Interest on the amounts owing to the bank was debited half-yearly in the co.’s account with the bank &, except in one instance, the amount due to the bank increased each half-year. Resps. finally satisfied the whole indebtedness of the co. to the bank by a single payment, & they claimed repayment under sect. 36 of 1918 Act, in respect of so much of the amount

paid by them to the bank as represented the interest which had been debited to the co.'s account:—*Held*: resps. were not entitled to the repayment claimed.—*HOLDER v. INLAND REVENUE COMRS.*, [1932] A. C. 624; 101 L. J. K. B. 306; 48 T. L. R. 365; 76 Sol. Jo. 307; *sub nom.* INLAND REVENUE COMRS. v. *HOLDER* (H. C.) & *HOLDER* (J. A.), 147 L. T. 68; 16 Tax Cas. 540, H. L.

*Annotations*:—*Apld.* Carnarvon (Earl) v. I. R. Comrs., Markland v. I. R. Comrs., Rigden v. I. R. Comrs. (1935), 79 L. Jo. 134. *Distd.* I. R. Comrs. v. Lawrence, Graham & Co., [1937] 2 K. B. 179. *Consd.* Paton v. I. R. Comrs., [1938] A. C. 341.

545j. *Shareholder in foreign company.*—Resp. was a preference shareholder in an India co. The Indian co. was a shareholder in two English cos., the profits of each of which had suffered United Kingdom taxation. The dividends received by the Indian co. from the two English cos. formed 44·12 per cent. of the total profits of the Indian co., & resp. contended that he was to be treated as having borne 44·12 per cent. of the tax upon the dividends received by him from the Indian co.:—*Held*: notwithstanding the fact that the tax upon dividends from foreign cos. depends upon Sched. D, Case V., & Misc. Rules, r. 1, the principle against double taxation applies to foreign cos. so as to exempt shareholders in foreign cos. from suffering double taxation. Resp. was, therefore, entitled to relief from taxation upon his dividends to the extent of 44·12 per cent. thereof.—*BARNES v. HELY HUTCHINSON*, [1938] 3 All E. R. 98; 159 L. T. 107; 54 T. L. R. 936; 82 Sol. Jo. 476, C. A.

546. *Add. Annotations*:—*Refd.* *Whitney v. I. R. Comrs.*, [1926] A. C. 37; *I. R. Comrs. v. Gull*, [1937] 4 All E. R. 290.

548. *Add. Annotation*:—*Apld.* *R. v. Income Tax Special Comrs.*, *Ex p. Horner* (1932), 49 T. L. R. 3.

548a. —.—Where under the provisions of a life insurance policy the assured has obtained from the insurance co. loans to assist him in payment of the premiums, & where, on the maturity of the policy, the co. has deducted the amount of the loans from the sum payable under the policy, the assured is not entitled to claim, for the fiscal year in which the policy matured, a reduction of income tax in respect of the premiums for previous years, since in suffering the deduction the assured was not paying a premium but repaying a debt.—*R. v. INCOME TAX SPECIAL COMRS.*, *Ex p. HORNER* (1932), 49 T. L. R. 3; 76 Sol. Jo. 779, D. C.

548b. — *Premium paid by insurer under reduction of premium system.*—Resp.'s life was insured under a policy of whole-life insurance expressed to be at a yearly premium of £48 5s., which entitled him to participate in the insurance co.'s surplus funds by means of the "reduction of premium system." The insured had in each year the option of taking the reduction of premium for that year in cash or of converting it into the equivalent reversionary bonus. The co.'s premium notice showed £48 5s. as the

premium payable on the policy & £33 15s. 6d. as bonus, leaving £14 9s. 6d. as the "amount to be paid." Resp. remitted £14 9s. 6d. to the co. but claimed that the amount of the premium paid by him in the year was £48 5s.:—*Held*: the reduction of premium had been provided by the policy, that the amount of the premium paid by resp. was £14 9s. 6d., & that he was entitled to relief from income tax on that amount only.—*WATKINS v. JONES* (1928), 14 Tax Cas. 94.

549. *Add. Annotation*:—*Consd.* *Perrin v. Dickson* (1929), 98 L. J. K. B. 683.

549a. — *Policy on joint lives of two persons—Payment of premium shared equally.*—A person who has entered into an insurance on the joint lives of himself & another person at a single premium which is shared equally between them, has not "made an insurance on his life" within Income Tax Act, 1918 (c. 40), s. 32 (1), & is not entitled under that sect. to a deduction of the amount of the annual premium from his taxable profits.—*WILSON v. SIMPSON*, [1926] 2 K. B. 500; 95 L. J. K. B. 885; 135 L. T. 766; 42 T. L. R. 690; 10 Tax Cas. 753.

552. *Add. Annotations*:—*As to* (1) *Consd.* *Gold Fields American Development Co. v. Consolidated Gold Fields of South Africa*, [1926] Ch. 338. *As to* (3) *Consd.* *Hamilton v. I. R. Comrs.*, [1931] 2 K. B. 495. *Refd.* *I. R. Comrs. v. Dalgety & Co.* (1929), 98 L. J. K. B. 542.

553. *Add. Annotations*:—*Consd.* *Gold Fields American Development Co. v. Consolidated Gold Fields of South Africa*, [1926] Ch. 338. *Apld.* *I. R. Comrs. v. Dalgety & Co.* (1929), 98 L. J. K. B. 542. *Consd.* *Hamilton v. I. R. Comrs.*, [1931] 2 K. B. 495. *Refd.* *Neumann v. I. R. Comrs.* (1933), 49 T. L. R. 212.

555. *Add. Annotations*:—*Consd.* *Gold Fields American Development Co. v. Consolidated Gold Fields of South Africa*, [1926] Ch. 338. *Apld.* *I. R. Comrs. v. Dalgety & Co.* (1929), 98 L. J. K. B. 542. *Refd.* *Neumann v. I. R. Comrs.* [1934] A. C. 215.

556. *Add. Citations*:—[1926] Ch. 338; 95 L. J. Ch. 329; 135 L. T. 14.

*Add. Annotation*:—*Refd.* *I. R. Comrs. v. Cull*, [1938] 2 K. B. 109.

557. *Add. Citation*:—10 Tax Cas. 59.

*Add. Annotations*:—*Consd.* *Assam Railways & Trading Co. v. I. R. Comrs.*, [1933] 2 K. B. 576. *Refd.* *Assam Railways & Trading Co. v. I. R. Comrs.*, [1935] A. C. 445.

557a. *Right to relief on whole income paying Dominion tax—Without deduction of sums paid in debenture interest.*—A co. incorporated in England under Cos. Acts, carried on business in the United Kingdom & in New Zealand & Australia, & its income chiefly arose from trading operations in the latter countries. In respect of that income it was liable to income tax in the United Kingdom & in those Dominions. The co. having paid the full United Kingdom income tax on all its profits & gains & also Dominion

#### PART VII. SECT. 3.

sh. *Provincial income tax—Whether permissible deduction from income taxable under Dominion statute.*—*Held*: not a disbursement or expense "wholly,

exclusively & necessarily laid out or expended for the purpose of earning the income," & such amount cannot be legally deducted from the total income of the taxpayer in arriving at the income which is taxable by the

Dominion Govt. under Income War Tax Act, 1917.—*ROSENTHAL (C. W.) v. MINISTER OF NATIONAL REVENUE*, [1931] Ex. C. R. 1; 2 D. L. R. 90.—CAN.

income tax on so much as was earned by it in New Zealand & Australia, claimed relief from the double tax over a period of eight years ending on Apr. 5, 1924. The co. had issued debentures, the principal & interest of which were secured on its whole undertaking & assets, & in paying the interest on the debentures the co., as it was entitled to do, had deducted the full amount of United Kingdom income tax in respect of that interest. The sole question in dispute was whether the amount of relief was to be calculated on the whole of the profits earned by the co. in the Dominions or only on the balance of such profits remaining after deducting therefrom the excess of the interest paid by it on its debentures over the amount of income arising in the United Kingdom:—*Held*: (1) the word “income” in Finance Act, 1920 (c. 18), s. 27 (1), & the repealed sects. 43 of Finance Act, 1916 (c. 24), & 55 of Income Tax Act, 1918 (c. 40), meant “taxable income” & not “income less charges,” & the word “paid” in relevant sections must be construed in its natural sense & not as meaning “paid & ultimately borne,” & therefore the co. was entitled to relief under Finance Act, 1920 (c. 18), s. 27, & corresponding sections of earlier Acts in respect of all income (including that part applied in paying debenture interest) which had already borne Dominion income tax; (2) Income Tax Act, 1918 (c. 40), s. 17, had no application to the relief given by any of above-mentioned Acts.—INLAND REVENUE COMRS. v. DALGETY & CO., [1930] A. C. 527; 99 L. J. K. B. 342; 143 L. T. 191; 46 T. L. R. 349; 15 Tax Cas. 216, H. L.

*Annotations*:—As to (1) *Consd.* I. R. Comrs. v. National Mortgage & Agency Co. of New Zealand, Ltd., [1935] A. C. 524. *Generally, Held.* Hamilton v. I. R. Comrs., [1931] 2 K. B. 495; Neumann v. I. R. Comrs. (1933), 49 T. L. R. 512; Assam Railways & Trading Co. v. I. R. Comrs., [1933] 2 K. B. 576; Cadbury Bros., Ltd. v. Sinclair (1933), 149 J. T. 412.

**557b.** — Without regard to 1918 Act, s. 17.]—INLAND REVENUE COMRS. v. DALGETY & CO., LTD., No. 557a, *ante*.

**557c.** Deduction of interest on debentures in computing profits—Interest deducted in computing profits for Indian income tax.]—Applts., an English co., carried on business in Assam, & almost the whole of their income arose in India. That income was charged to British income tax, the profits so assessed being £186,750, but the same profits were assessed to income tax in India at £129,365, the difference being due to the fact that in India debenture interest was allowed as a deduction, whereas in the United Kingdom this deduction was not allowed. Applts. claimed relief based on £186,750, contending that though the Indian assessment was only at the figure of £129,365 it was an assessment on the whole of the profits of £186,750:—*Held*: applts. were only entitled to relief on the £129,365.—ASSAM RAILWAYS & TRADING CO., LTD. v. INLAND REVENUE COMRS., [1935] A. C. 445; 103 L. J. K. B. 583; 152 L. T. 26; 50 T. L. R. 540; 18 Tax Cas. 509, H. L.

*Annotation*:—*Consd.* I. R. Comrs. v. National Mortgage & Agency Co. of New Zealand, Ltd., [1935] A. C. 524.

**557d.** — Where in any year income tax has been paid in the United Kingdom & in a Dominion in respect of the profits of a business carried on by a co. in the Dominion,

then for the purpose of computing the amount in respect of which relief from United Kingdom income tax is granted by sect. 27 (1) of Finance Act, 1920 (c. 18), the amounts of the assessable income in respect of these profits in the two countries must be ascertained & relief be granted on the whole or such part of the assessable income in the United Kingdom as is equal in amount to the assessable income in the Dominion without regard to difference of allowances or deductions for expenses made in the two countries in arriving at the assessable income. Where a sum paid by the co. in respect of debenture interest is, under the law of the Dominion, excluded from the assessable income, but the co. pays the income tax in respect of it as agent for the debenture-holders, relief must be granted on the amount of the debenture interest so paid without regard to how the tax on that interest is ultimately borne.—INLAND REVENUE COMRS. v. NATIONAL MORTGAGE & AGENCY CO. OF NEW ZEALAND, [1938] A. C. 524; [1938] 2 All E. R. 88; 107 L. J. K. B. 393; 159 L. T. 418; 54 T. L. R. 586; 82 Sol. Jo. 412, H. L.

**557e.** Royalty payable in Colony—Consequential exemption from colonial income tax.]—In 1897 applt. co., whose registered office is in London & whose trade is carried on in Ashanti, entered into an agreement with the Governor of the Gold Coast Colony, whereby the co. enjoyed certain rights on conditions which included the payment to the Treasurer of the Gold Coast Colony of a yearly royalty of five per cent. of its gross receipts from certain metals, precious stones & oils. In 1901, by an Order in Council, Ashanti was placed under the jurisdiction of the Governor of the Gold Coast Colony, who was empowered to legislate by Ordinance for Ashanti. By an Ordinance of 1903 a tax, admitted to be a “Dominion income tax” for the purposes of sect. 27 of Finance Act, 1920 (c. 18), was imposed in Ashanti on holders of concessions, a duty of five per cent. being charged on their annual profits therefrom. The Ordinance, which is now incorporated in the Laws of Ashanti, expressly exempted applt. co. from the tax. It was stated in evidence that this exemption was given because of the payment which the co. was already making under the agreement of 1897. The co. claimed relief in respect of the payment of Dominion income tax under sect. 27 of Finance Act, 1920 (c. 18), contending that the so-called royalty payable under the 1897 agreement must be considered as being in the nature of a tax or duty, & that so much of it as was equivalent to duty assessed under the 1903 Ordinance was a tax corresponding to United Kingdom income tax payable by the co. under the law in force in Ashanti:—*Held*: the royalty payable under the agreement of 1897 was not a “Dominion income tax” within sect. 28 (8) (c) of Finance Act, 1920 (c. 18), & the co. was accordingly not entitled to the relief claimed.—ASHANTI GOLDFIELDS CORPN., LTD. v. MERRIFIELD (1934), 19 Tax Cas. 52.

**557f.** Relief in respect of double super tax.]—Resp. was resident in both the United Kingdom & the Irish Free State. For the year 1923–24 he paid United Kingdom & Irish Free State income tax, & a claim for relief

under Finance Act, 1920 (c. 18), s. 27, in respect of such double income tax was admitted. For the same year resp. had also suffered double super-tax, & he claimed relief in respect of such double super-tax:—*Held*: although the relief from income tax granted by sect. 27 could not be interpreted to include super-tax, the effect of the arrangements contained in the Relief in respect of Double Taxation (Irish Free State) Declaration,

1923, was to allow relief from income tax, including super-tax, & resp. was entitled to the relief claimed.—*MCCALMONT v. INLAND REVENUE COMRS.*, [1938] 3 All E. R. 174; 82 Sol. Jo. 522, C. A.

557g. Allowances & deductions granted in Dominion.]—*INLAND REVENUE COMRS. v. NATIONAL MORTGAGE & AGENCY CO., OF NEW ZEALAND*, No. 557d, *ante*.

## Part VIII.—Miscellaneous Provisions Applicable to the Duties Generally.

567. For existing paragraph & citation read —.—.]—*TARN v. SCANLAN, NIELSEN, ANDERSON & CO. v. COLLINS, MILLER (W. H.) & CO. (LONDON) v. LETHEM, SAME v. INLAND REVENUE COMRS.*, No. 168a, *ante*.

567a. —.— Literary agents—Royalties paid to non-resident authors.]—*CURTIS BROWN, LTD. v. JARVIS; JARVIS v. CURTIS BROWN, LTD.*, No. 991, *ante*.

568a. —.—.]—(1) Resp., a woman of American birth, married to an Englishman & residing in England, was appointed, under the will of her mother, an American citizen, trustee for her sister, whose domicile of origin was American & who suffered under an incapacity. The trust fund in the main consisted of stocks, shares & securities in

America:—*Held*: resp., being in receipt & control of the income of the trust fund, as trustee, was liable to be assessed on the whole of that income & not merely on that part of it which was brought over to this country & applied for the benefit of her sister, although the income did not arise in this country or under an English trust.

(2) In 1932 resp. left the S. division in which she had resided for some years, including the year 1926–27, & went to live elsewhere. In 1933 the Comrs. of the S. division made an assessment on her in respect of the year 1926–27:—*Held*: Comrs. of the S. division had jurisdiction to make the assessment.—*KELLY v. ROGERS*, [1935] 2 K. B. 446; 104 L. J. K. B. 616; 153 L. T. 428; 19 Tax Cas. 692, C. A.

### PART VIII. SECT. 1, SUB-SECT. 1.

k i. —.—.]—In Oct. 1923, a trustee was assessed in respect of the income of an estate, which he was directed to receive & accumulate until 1933, & then to distribute among persons not ascertainable until the date fixed for distribution:—*Held*: the assessment being made in 1923 for taxes payable in 1924, the validity of the assessment should be determined by reference to the Act in force at the date of the assessment.—*Re McLEOD & WINDSOR CORPN.*, [1925] 3 D. L. R. 89; 57 O. L. R. 15.—*CAN.*

k ii. —.— Payments to foreign company for user of films—Company making payments as trustee.]—*UNIVERSAL FILM MANUFACTURING CO. (AUSTRALASIA), LTD. v. THE STATE OF NEW SOUTH WALES* (1927), 40 C. L. R. 333.—*AUS.*

k iii. —.— Entire control of business by foreign firm.]—*FERGUSON v. DONOVAN*, [1929] I. R. 489.—*IR.*

k iv. —.—.]—Testator left a life rent of £20,000 & of one-third of the residue of his estate to each of his wife & daughter, & £20,000 & one-third of the residue to his son absolutely. The beneficiaries were all *capax* & resident in this country. Testator held £40,000 & per cent. War Stock, the interest on which was payable without deduction of tax. The interest due on June 1, & paid to the trustees on that date, amounting to £1,000, was treated by them as capital, & estate duty was paid thereon. The trustees, having been assessed to income tax on the £1,000 of interest, contended that trustees acting for behoof of a British resident who was *capax* were not assessable to income tax. The Comrs. decided that the trustees were assessable as regarded the two-thirds of the interest effecting to the portions destined to the testator's wife & daughter in life rent, but not as regarded

the one-third payable by them to the son:—*Held*: the trustees were assessable to tax on the whole interest, under Rule 1 of the Miscellaneous Rules applicable to Sched. D.—*KEIN'S TRUSTEES v. INLAND REVENUE COMRS.*, [1929] S. C. 439; 14 Tax Cas. 512.—*SCOT.*

k v. —.— "Income accumulating."—*Held*: the word "accumulating" used with the word "income" in sect. 11 (2) of Income War Tax Act, 1917, & Amendments, is there used gerundially, that is as a verbal noun rather than as a verb; it is used just to earmark it as the fund for unascertained persons or persons with contingent interest & which is taxable in the hands of the trustee.—*McLEOD v. MINISTER OF NATIONAL REVENUE*, [1932] Ex. C. R. 1.—*CAN.*

k vi. —.—.]—J., resident in the United States, by deed executed in the province of Quebec, gave to resp., a co. incorporated under the laws of Quebec & carrying on business in Canada, in trust, as a donation *inter vivos* & irrevocable, certain Canadian securities, to be held, together with all accumulations & additions thereto, upon trust for the benefit of J.'s surviving children until five years after J.'s death, "when the entire trust estate is to be equally divided amongst his surviving children, & in the event of any or all of his said children predeceasing J. or being unable to take, the division shall be made to the survivor or survivors, and the issue of such predeceased child or children, as representing their parent, *per stirpes*":—*Held*: the income was "accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests," & taxable in resp.'s hands. Such income accumulating in trust is distinctly a subject of taxation under s. 3 (6), regardless of

the residence, if ascertainable, of probable beneficiaries, whose interest is contingent during the taxation period.—*MINISTER OF NATIONAL REVENUE v. ROYAL TRUST CO.*, [1931] S. C. R. 485; 3 D. L. R. 474.—*CAN.*

k vii. Wife—Gift of income to—*Direction to maintain children—Whether liable as trustee.*]—Testator devised & bequeathed the whole of his property to his wife in trust for his children—the wife during her life to receive the income thereof for the support & maintenance of herself & the children, & after her death the proceeds of the sale of such property to be equally divided between the children:—*Held*: the wife was entitled to receive the income of testator's estate subject to no liability to account for its application, provided she discharged the duty of supporting & maintaining the children; & therefore, she was not a "trustee" within Income Tax Assessment Acts, 1922–1925, s. 4.—*MANNING v. FEDERAL COMR. OF TAXATION* (1928), 40 C. L. R. 506; [1928] Argus L. R. 165.—*AUS.*

ss. Whether liability confined to residents.]—Income War Tax Act, 1917, & amendments—now R. S. Can. 1927, c. 97—imposed an income tax on residents in Canada, & it was provided by a retrospective amendment of 1920, that "Income accumulating in trust for the benefit of unascertained persons, or persons with contingent interests, shall be taxable in the hands of the trustee . . . as if such income were the income of an unmarried person." Appl., a resident in Canada, was the sole surviving trustee under the will of a Canadian, who died in 1914. By the will the balance of the income of the estate, after certain dispositions, was to be divided into three equal parts, out of each of which the trustees were to apply so much as they thought

**569a.** —.]—SIR CURRIMBOY EBRAHIM BARONETCY TRUST, TRUSTEES v. INCOME TAX COMR., BOMBAY PRESIDENCY (1934), 78 Sol. Jo. 206, P. C.

**569b. Liability of executor—Agreement by deceased to pay composition for penalties.**—Following upon an investigation, it was agreed between representatives of the Inland Revenue & of a taxpayer that, by reason of under-statements of his income in his returns for tax purposes, he had underpaid income tax & super tax for past years to the extent of £10,134, of which only a small part was within date for assessment & was assessed. He had also rendered himself liable under the provisions of the Income Tax Acts to penalties amounting to approximately £10,113. He paid £4,193 on account & entered into an agreement in writing with the Comrs. of Inland Revenue to pay a further £10,000 in settlement. Before any part of that sum had been paid, however, he died & his exor., deft. co., after paying a sum in respect of the duties which were assessed, declined to pay the balance, contending, *inter alia*, that the Comrs. of Inland Revenue had no authority to enter into the agreement, & that it was only liable for such sums as were assessed. The opinion of the ct. was sought, on a special case stated by consent, to determine whether payment of the outstanding balance could be enforced from deft. co. as exor.:—*Held*: (1) the doctrine *actio personalis moritur cum persona* had no application to the case inasmuch as it was an action on a contract & not on a tort; (2) there was consideration for the agreement; (3) sect. 140 (1) of 1918 Act, did not, in the circumstances of the case, operate in any way to prevent a claim for penalties being made; (4) it was competent for the Comrs. of Inland Revenue to accept a sum in composition for penalties incurred under the Income Tax Acts even though proceedings had not been commenced for their recovery.—A.-G. v. MIDLAND BANK EXECUTOR & TRUSTEE CO., LTD. (1934), 19 Tax Cas. 136.

**569c.** — Years preceding year of death—**Untaxed income of deceased not returned.**—A testator died during the year of assessment, leaving a widow, without having delivered a statement of his profits or gains chargeable to tax, & an assessment in respect thereof was accordingly made on his executrix, applt., under the provisions of rule 18 of the All Scheds. Rules to the Income Tax Act, 1918:—*Held*: (1) the income of testator's wife "arose or accrued" to him within the meaning of the rule & must be included in the income to be so assessed, this being a question of assessment & collection & not of computation; (2) the executrix was assessable in respect of the profits & gains so arising or accruing to the testator before the year of

assessment & not only of those arising or accruing to him during the year of assessment; (3) the said profits which arose to testator *de die in diem* from the commencement of the year of assessment up to the time of his death in that year were apportionable.—PALMER v. CATTERMOLLE, [1937] 2 K. B. 581; [1937] 2 All E. R. 667; 106 L. J. K. B. 826; 157 L. T. 552; 53 T. L. R. 677; 81 Sol. Jo. 552; 21 Tax Cas. 191.

**569d.** — **Transfer of assets abroad by deceased—Retrospective operation of Finance Act, 1936, s. 18.**—COTTINGHAM'S EXORS. v. INLAND REVENUE COMRS., No. 570f, *post*.

**569e. Liability of receiver.**—A co. issued first debentures which provided that it charged with payment of the money thereby secured its undertaking & property, & that at any time after the principal money became payable the registered holder might with the concurrence of the holders of a majority in value of the debentures appoint a receiver of the property charged, who should have power to take possession of the property, to carry on or concur in carrying on the business of the co., to sell, & to make any arrangement or compromise. The co. afterwards issued second debentures containing provisions similar to those above mentioned & further expressly providing that a receiver appointed thereunder should be deemed to be the agent of the co., which should be solely responsible for his acts, defaults, & remuneration, & that these debentures were constituted a floating security. The holders of the first debentures appointed a receiver, & the holders of the second debentures afterwards appointed the same person to be receiver on their behalf. The co., through the receiver, paid off the first debentures:—*Held*: even if there was no succession by the receiver to the business of the co., the receiver, whether under the first or the second debentures, was the person "receiving or entitled to the income" of the co.'s property & business within the meaning of the Income Tax Act, 1918, Sched. D., Miscellaneous Rules, r. 1, during his receivership & was therefore assessable to income tax in respect of that income during such period; further, there was no succession by the receiver to the business of the co. within the contemplation of Sched. D., Rules applicable to Cases I. and II., rr. 9, 11, or at all.—INLAND REVENUE COMRS. v. THOMPSON, [1937] 1 K. B. 290; [1936] 2 All E. R. 651; 105 L. J. K. B. 643; 155 L. T. 252; 80 Sol. Jo. 706; 20 Tax Cas. 422.

**569f. Liability of executor—Sum payable on termination of office—Termination by death—Finance Act, 1927 (c. 10), s. 45 (5), (6).**—Where under a service agreement there was payable to the managing director of a co. in addition to a fixed salary & commission a

advisable to the support, maintenance, & education of each of testator's three children until they attained respectively twenty-five years of age, or until the period of distribution; any portion of any child's share not required for the above purpose was to be reinvested & form part of the residue bequeathed to that child; after the death or remarriage of testator's wife, the residue of the estate was to be equally divided between such of the three

children as should attain the above age, the share of any child who died before the period of distribution to be taken by his child or children:—*Held*: under sect. 11 (2) of the revised statute surplus income accumulating under the above provision of the will was taxable in the hands of the appellant irrespective of whether the children or any of them were resident in Canada; but the whole surplus income did not form an indivisible taxable integer,

as there were three distinct trusts, the income under each of which should be separately assessed.—HOLDEN v. MINISTER OF NATIONAL REVENUE, [1933] A. C. 526; 102 L. J. P. C. 115; 149 L. T. 315, P. C.—CAN.

s. *Agent of non-resident—Validity of notice to make return.*—INCOME TAX COMR. PUNJAB v. NAWAL KISHORE KHARATAI LAL (1937), 81 Sol. Jo. 999, P. C.—IND.



sum of £10,000 to be paid to him or his exors. on the termination of his service for any cause whatsoever (other than wilful default in the performance of his duties), & the sum of £10,000 became payable by reason of his death, his exors. were assessable to income tax on the sum of £10,000 as part of the emoluments of his office under sect. 45 (5), (6) of Finance Act, 1927 (c. 10).—*ALLEN v. TREHEARNE*, [1938] 2 K. B. 464; [1938] 2 All E. R. 698; 107 L. J. K. B. 597; 159 L. T. 270; 54 T. L. R. 826; 82 Sol. Jo. 413, C. A.

570. *Add. Annotation*:—*Refd. Neumann v. I. R. Comrs.*, [1934] A. C. 215.

570a. — *After death of husband.*—*Held*: the first year after her husband's death a widow in receipt of income from War Stock not taxed at source was liable to income tax under Case III. of Sched. D. computed on her income from the same source in the preceding year, notwithstanding that by proviso 1 to r. 16 of the Rules applicable to all Schedules that income was to be "deemed the profits of her husband." This proviso operated only to convert the wife's income into the husband's income for the purpose of collecting tax.—*LEITCH v. EMMOTT*, [1929] 2 K. B. 236; 98 L. J. K. B. 673; 141 L. T. 311; 14 Tax Cas. 633, C. A.

*Annotations*:—*Consd. Cowdray (Viscountess) v. I. R. Comrs.* (1930), 15 Tax Cas. 255. *Appl. Elmhurst v. I. R. Comrs.*, [1937] 2 All E. R. 349. *Consd. Palmer v. Cattermole*, [1937] 2 All E. R. 667. *Refd. Browning v. Duckworth*, [1935] 1 K. B. 605.

573a. *Although not resident in England.*—A lady on her marriage in 1925 went with her husband to Egypt where he carried on business & their permanent home was there. Every year she passed four & a half to five & a half months in England in order to escape the hot season in Egypt, & her husband also passed from two to four months in England during her yearly visit there. She owned certain War Loan stock, & assessments to income tax in respect of the interest thereon were made upon her for the years 1925–26 to 1929–30. She appealed against these assessments to the Comrs. on the ground that they had been made upon her in disregard of proviso (1) to rule 16 of Income Tax Act, 1918, General Rules. The appeal was argued on the footing that her husband was not resident in this country. The Comrs., without expressing any opinion as to the

lady's residence for the first two years, found that she was resident in the United Kingdom from the year 1927–28 onwards, but decided that the assessments were wrongly made upon her. On appeal to the High Ct. by the inspector of taxes:—*Held*: notwithstanding the assumption that her husband was resident in Egypt & the finding that she herself was resident in this country, the lady was "a married woman living with her husband" within rule 16, proviso (1), & consequently the assessments upon her were wrong & should be discharged.—*BROWNING v. DUCKWORTH*, [1935] 1 K. B. 605; 104 L. J. K. B. 259; 153 L. T. 278; 51 T. L. R. 179; 79 Sol. Jo. 49; 19 Tax Cas. 149.

573b. *Husband not resident in United Kingdom.*—*Appl.*, a partner in a firm of cotton brokers in Egypt, appealed against assessments made upon him by the Additional Comrs. of Income Tax in Liverpool in respect of War Loan, bank, & other interest received by his wife. The wife, who was ordinarily resident in the United Kingdom, had been held to be a married woman living with her husband, within the meaning of rule 16 of the General Rules of the Act of 1918, during the whole period of assessment. The husband was not resident in this country, he carried on no trade, profession, employment or vocation here, but he had paid short visits to the United Kingdom during each of the years for which assessments were made, & was at some time during each of those years at the offices of certain chartered accountants at 309, India Buildings, Water Street, Liverpool. The assessments appealed against were made upon him as at that address. For *appl.* it was contended that Miscellaneous r. 4 applied only to persons resident in the United Kingdom, & was exhaustive as to the place of assessment, & that the Income Tax Acts failed to provide any machinery for assessment in the particular circumstances of the case:—*Held*: 1918 Act, s. 102 (3), drew a clear distinction between a person who was "in" the parish & a person who "resided" in the parish; when that subject was read in conjunction with rule 4 (5), of the Miscellaneous Rules it was clear that persons who were not resident in the United Kingdom were liable to assessment whenever they came into the country, & the appeal must be dismissed, with costs.—*DUCK-*

# PART VIII. SECT. 1, SUB-SECT. 2.

570 i. *Liability of married woman to be charged*—*Married woman living in United Kingdom separate from husband*—*Income from property out of United Kingdom.*—The wife of a professor at Cairo University received annually a share of income from Canadian property, which was held by a body of Scottish trustees. Until 1922 she lived with her husband in Cairo, & accompanied him to England on furlough for three months every summer. During the furlough in 1922 the state of her health necessitated her removal to a nursing home, where she remained throughout the financial year 1923–24. The professor returned to Cairo at the end of his leave in 1923, visiting this country again the following summer. For the year 1923–24 the trustees were assessed to income tax upon the wife's share of Canadian income:—*Held*: the income was liable to be charged to income tax upon

the wife, & was not to be deemed to be the husband's profits.—*DERRY v. INLAND REVENUE*, [1927] S. C. 714; 13 Tax Cas. 30.—*SCOT*.

571 i. *Liability of husband to be charged*—*Whether married woman "living with her husband."*—Circumstances in which:—*Held*: a wife was not "living with her husband" so as to make her profits assessable & chargeable in the husband's name.—*DONOVAN v. OROFFE*, [1926] I. R. 477.—*IR*.

571 ii. — *Royalties paid to wife for right to publish novels.*—Where a novelist wrote books in the Union but granted to her publishers in England the right of printing & publishing her novels in book form in Gt. Britain & elsewhere, they undertaking to pay her a percentage of the published price of the novels as royalties:—*Held*: since her facilities were employed within the Union both in writing the novels & in dealing with her publishers, the

source of the income was in the Union & the royalties had rightly been included in the taxable income of her husband.—*MILLIN v. INLAND REVENUE COMR.*, [1928] App. D. 207.—*S. AF*.

571 iii. — *Income of wife—How assessed.*—*Held*: proviso (1) of rule 16 of the General Rules applicable to all Scheds. of the Income Tax Act, 1918, applies not merely for purposes of collection, but for all income tax purposes. The income of a married woman living with her husband must be assessed, measured, or computed as one entity, as if she were sole & unmarried. The properly assessable income of the wife as an individual must be ascertained in accordance with the provisions of the Income Tax Acts before the husband can be finally assessed & charged; the charge is upon the husband as a result of assessment of the joint taxable income of husband & wife.—*MULVEY v. KIERAN*, [1938] I. R. 87.—*IR*.



WORTH v. LOWE, [1937] 2 K. B. 560; [1937] 2 All E. R. 418; 106 L. J. K. B. 477; 157 L. T. 263; 53 T. L. R. 647; 81 Sol. Jo. 378; 21 Tax Cas. 145.

**573c.** — Three years' average—Wife's pre-nuptial income from foreign possessions.]—Applt. was assessed to income tax, & under the provisions of rule 16 of the All Scheds. Rules to the Income Tax Act, 1918, his wife's income was deemed to be his, & was included in his assessment. In computing the wife's income her income in the year preceding the year of assessment acquired before she married applt. was included:—*Held*: there was nothing in rule 16 to make the computation of the income of a married woman different from that of a *feme sole*. The operation of the proviso to rule 16, whereby that income was deemed to be that of her husband, was for the purposes only of assessment & charge to income tax.—ELMHIRST v. INLAND REVENUE COMRS., [1937] 2 K. B. 551; [1937] 2 All E. R. 349; 106 L. J. K. B. 416; 157 L. T. 119; 53 T. L. R. 566; 81 Sol. Jo. 437; 21 Tax Cas. 381.

**573d.** — Necessity for application for separate assessment.]—Additional assessments under Sched. A. for the years 1927–28 to 1932–33, inclusive, were made on applt. in Mar. 1933, in respect of the annual value of the house in which he & his wife resided, which was owned by his wife, who was at all material times the rated occupier. No formal application for separate assessment under General Rule 17 had been made within the prescribed time limit for any of the years in question. On appeal, applt. contended (a) that the assessments had been made upon him in contravention of rule 1 of No. VII. of Sched. A. since he was not, & never had been, the occupier, (b) that, as the house was part of his wife's separate estate, the assessments should have been made upon her, & (c) that, as the assessments had then only recently been made, formal applications for separate assessment could not have been made for any year within the prescribed time limit. The General Comrs. decided that, as applications had not been made for separate assessment for any of the years in question within the prescribed time limit, the assessments had

been correctly made on applt.:—*Held*: the General Comrs.' decision was correct.—SHORTT v. YALLOP (1936), 20 Tax Cas. 298.

**575.** *Add. Annotation*:—*Refd.* I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford (1927), 96 L. J. K. B. 882.

**575a.** Income payable to or for benefit of infant—Income applicable in paying premiums on educational endowment policy.]—The father of a young girl conveyed a sum of stock to appls. as trustees, & directed them to take out an educational endowment policy for such sum as could be insured for an annual payment of £30 for his daughter, the endowment to begin on her attaining the age of fifteen, & to continue for four years. The income of the trust fund was dedicated to the payment of the annual premiums. The trust further directed appls. to utilise the educational endowment payable under the policy & any other income available from the trust fund for the education & advancement of his daughter from the time when she became fifteen until her majority. If the daughter attained the age of twenty-one the capital of the trust fund was to be made over to her absolutely, but if she died before, the fund to revert to the trustor or his representatives. The trust deed contained no gift of income to the daughter. While the daughter was still under fifteen appls., on her behalf, claimed repayment of income tax deducted at the source from a sum of £33, the annual income of the stock, on the ground that that income was the income of the daughter for income tax purposes, & that, as she had no other income of her own, she was within the limit of total exemption:—*Held*: the daughter had no present beneficial right to receive the income & the claim failed.—DEWAR v. INLAND REVENUE COMRS., [1931] A. C. 566; 100 L. J. P. C. 189; 145 L. T. 395; 47 T. L. R. 427; *sub nom.* INLAND REVENUE COMRS. v. DEWAR, 10 Tax Cas. 84, H. L.

**575b.** — Under revocable disposition—Annuity payable "for some period less than the life of the child"—What amounts to.]—A father covenanted, by deed made in 1930, to pay during the joint lives of himself & his son an annual sum to trustees upon trust for his son, an infant, & empowered the trustees

**575b i.** Income payable to or for benefit of infant—Under revocable disposition—Annuity payable "for some period less than the life of the child"—What amounts to.]—The father of two minor children, by an *inter vivos* deed of trust, directed his trustees to apply the free annual income from certain trust funds for the benefit of his children until the youngest should attain majority. On that event, the estate was to be paid over to the children then surviving, unless the trustees deemed it inadvisable to do so or the trustor disapproved, in which case the trustees were to continue the payment of income. On the trustor's death the estate was to be paid over to the children then surviving, unless the trustor's wife, if then alive, should desire a further postponement of the period of division. A clause in the deed also declared that, in the event of a child marrying a non-Jew without its parents' approval, that child should forfeit the provisions in its favour. While the trustor's children were still in minority & unmarried, claims were made on their behalf for repayment of income tax upon the trust income

falling to them:—*Held*: on a sound construction of Finance Act, 1922 (c. 17), s. 20 (1) (c), & its provisos, the trust income was applicable for the benefit of the trustor's children for a period less than their lives, in respect that their enjoyment of the income was restricted to the period before the youngest child attained majority & depended upon their not incurring forfeiture by contracting an unapproved marriage, & also that their right to the capital was not absolute, but only contingent; & accordingly, the trust income fell to be treated as income of the trustor, & claim for repayment of tax disallowed.—LEVITT v. INLAND REVENUE, [1932] S. C. 629; 17 Tax Cas. 719.—SCOT.

*ad.* Transfer to wife in fulfilment of marriage contract whether transfer to evade taxation.]—By his marriage contract entered into on Mar. 28, 1913, wherein separation as to property was stipulated, M., resident in Montreal, P.Q., made to his future wife a donation *inter vivos* of the sum of \$20,000. By a deed made on Mar. 23, 1925, the said M. in fulfilment of the

conditions of his marriage contract with respect to the said donation, transferred & conveyed to his wife certain shares of the capital stock of various corps., the wife accepting such shares in full payment of the sum of \$20,000. The returns of income he made for the years 1925 to 1931 inclusive omitted the income derived from these shares. He died on Apr. 9, 1932. On Apr. 11, 1933, the Comr. of Income Tax sent notices of assessment to one of the exors. of the will of the said M., assessing the dividends paid on such shares between Mar. 23, 1925, & Dec. 31, 1931:—*Held*: the conveyance made by M. to his wife was not a transfer to evade taxation; it was made in fulfilment of his marriage contract & from the date of transfer he had no further interest in the shares transferred to his wife & was no longer liable to taxation on the income derived therefrom.—MOLSON & NATIONAL TRUST CO., LTD. v. MINISTER OF NATIONAL REVENUE, [1937] Ex. C. R. 55; 3 D. L. R. 789; *aff'd.*, [1938] 2 D. L. R. 481; [1938] S. C. R. 213.—CAN.

to apply the annuity for the son's maintenance, education & benefit, to accumulate any sum not so applied, & to resort at any time to the accumulations & apply them as if they were current income. The father by the deed reserved to himself a power of revocation exercisable with the consent of one of five named persons, which power he had not yet exercised. It was admitted that the limitation for the joint lives was the same for the purposes of Finance Act, 1922 (c. 17), s. 20, as if the limitation had been for the benefit of the beneficiary for life:—*Held*: sums so paid were, within sect. 20 (1), income of the son payable during his lifetime, & not for a less period, notwithstanding the power of revocation. That power did not limit the interest for a less period than the life of the child, as the limitation was in fact for the life of the child, subject to a power enabling that limitation to be set aside, but that did not prevent the limitation whilst it lasted from being for the life of the child, & that view was confirmed by the contrast between the provisions of subsect. 1 (c) & subsect. 1 (a) of sect. 20. Consequently the trustees were entitled on his behalf to relief from & repayment of income tax paid by his father in respect of instalments of the annuity.—*WIGGINS v. WATSON'S TRUSTEES*, [1934] A. C. 264; 102 L. J. K. B. 464; 49 T. L. R. 326; 77 Sol. Jo. 157, H. L.; *sub nom.* *WATSON'S TRUSTEES v. WIGGINS*, 148 L. T. 482; 17 Tax Cas. 728, H. L.

*Annotation*:—*Reid*. I. R. Comrs. v. Nettlefold, Nettlefold v. I. R. Comrs. (1933), 18 Tax Cas. 235.

**575c.** 'By virtue or in consequence of any disposition made directly or indirectly'—*Mutual trust deeds by brothers in favour of nephews.*—*INLAND REVENUE COMRS. v. CLARKSON-WEBB*, No. 691c, *post*.

**576a.** Person receiving income under revocable disposition—For period which cannot exceed six years—Meaning of "years."—*Resps.* were a body established for charitable purposes only, & a subscriber covenanted by a deed made in 1927 to pay to them annually for seven years a sum which would leave to them the sum of £8 after deduction of income tax. The period between the date when the obligation to make the first payment arose & the date when the last payment would

fall due was less than six years. *Resps.* claimed repayment of income tax:—*Held*: as the duration of the payments did not exceed six years the income was to be deemed the income of the subscriber, & the *resps.* were not entitled under 1918 Act, s. 37 (1), to repayment of the tax.—*INLAND REVENUE COMRS. v. ST. LUKE HOSTEL TRUSTEES, REGISTERED* (1930), 144 L. T. 50; 46 T. L. R. 580; 15 Tax Cas. 682, C. A.

**576b.** ———.]—On Mar. 2, 1934, C. B. H., Ltd., was incorporated, *resp.*, taking 199 of the 200 £1 shares, which were issued at a premium of £84 5s. 0d. On the same day M. G. G., Ltd., was incorporated, C. B. H., Ltd., taking 98 of the 100 £1 shares, which were issued at a premium of £191. The remaining shares in both cos. were taken by nominees of *resp.* On Mar. 5, 1934, *resp.* entered into a deed of covenant with M. G. G., Ltd., covenanting to pay M. G. G., Ltd., £3,000 a year for seven years in consideration of a payment of £19,100, which was paid to *resp.* On Mar. 19, 1934, C. B. H., Ltd., went into voluntary liquidation. *Resp.* duly paid £3,000 to M. G. G., Ltd., which declared a dividend of £3,019 10s. 0d., on its shares to C. B. H., Ltd. The liquidator of C. B. H., Ltd., thereupon paid out this £3,019 10s. 0d. to *resp.* *Resp.* claimed to deduct from his total income for sur tax purposes £4,000, the gross equivalent of the annual amount payable under the deed of covenant. The Special Comrs. held that the legal effect of the transactions was to diminish *resp.*'s statutory income. *Appls.* contended that the transaction was colourable & that *resp.* was not under any necessity to bear an annual sum by way of annuity or otherwise & had not in fact paid away £3,000 as claimed by him:—*Held*: *resp.* was entitled to deduct £4,000 from his total income for sur tax purposes, the Special Comrs. having found as a fact that the transaction was not a sham.—*INLAND REVENUE COMRS. v. MORGAN-GRENVILLE-GAVIN*, [1936] 1 All E. R. 895; 80 Sol. Jo. 573; 20 Tax Cas. 529.

**576c.** Meaning of "any income."] *Applt.* entered into an undertaking by deed to pay to a co. £28,000 by five annual amounts of £5,600 payable quarterly. When £14,690 had been paid, he entered into a fresh deed to pay the balance over a period

#### PART VIII. SECT. 1, SUB-SECT. 4.

**576a i.** Person receiving income under revocable disposition—Meaning of "otherwise howsoever."—In Finance Act, 1922 (c. 17), s. 20 (1) (a), the words "otherwise howsoever" in the clause "by means of the exercise of any power of appointment, power of revocation or otherwise howsoever" are wide enough to cover any & every lawful means, & are not limited to means *ejusdem generis* with powers of appointment & powers of revocation.—*HUGHES v. SMYTH* [1933] I. R. 253.—*IR.*

**ii.** Agreement to operate telegraph system—Undertaking by operating company to pay owning company's income tax on annual payments under agreement.]—*Held*: such undertaking could not be pleaded by the owning co. in answer to the Crown's claim for income tax.—*R. v. MONTREAL TELEGRAPH CO. & GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA*, [1925] Exch. C. R. 79.—*CAN.*

*sh.* Meaning of person.]—A co. in liquidation is not taxable as a "person" within Income Tax Act, 1932. The word "person" in said Act applies to a natural person, unless the context requires otherwise.—*RE SASKATCHEWAN CO-OPERATIVE ELEVATOR CO., LTD.*, [1933] 3 W. W. R. 669.—*CAN.*

*sk.* Personal corporation—Effect of *ath* of principal shareholder.]—*Applt.* co., capitalised at 10,000 shares, was incorporated in the Province of Ontario for the purpose of holding for & on behalf of one, James Harris, resident in Ontario, his bonds & securities in corps. located outside of Ontario, he holding 9,995 shares in *applt. co.*, the balance being held by the incorporators. James Harris died Jan. 1, 1929, & by his will, after providing for certain specific legacies, bequeathed the residue of his estate to the exors. named therein upon certain trusts, to pay income therefrom to his wife & children & dis-

tribute the *corpus* to his children on certain conditions. After the death of James Harris, as well as in his lifetime, *applt.* had no assets other than the securities assigned to it by him & the dividends from these securities constitute the only income *applt.* receives; this income is immediately turned over to the estate which pays all expenses. *Applt. co.* is controlled by the exors. & trustees named in the will of James Harris. *Applt.* from the date of incorporation & for five years after the death of James Harris, was assessed as a personal corpn. for income tax. In 1935 *applt.* was assessed as an ordinary corpn., the assessment being confirmed by the Minister of National Revenue, from which decision *applt.* appealed:—*Held*: *applt. co.* continued to be a personal corpn. for income tax purposes after the death of James Harris.—*PORT CREDIT REALTY, LTD. v. MINISTER OF NATIONAL REVENUE*, [1937] Ex. C. R. 88; 4 D. L. R. 17.—*CAN.*

of seven years in annual amounts decreasing in value from £5,800 to £700, such sums to be the net amount after deduction of tax. Upon this, three questions were raised: (a) whether the payments were capital payments or income payments, (b) whether the deed was made for valuable & sufficient consideration, & (c) whether these sums payable under the deed were within the meaning of the words "any income" in Finance Act, 1922 (c. 17), s. 20 (1) (b).—*Held*: (1) the payments were income payments; (2) the Comrs. having found as a fact that the deed was not entered into for valuable & sufficient consideration, that was a finding of fact which they were entitled to make & with which the Ct. would not interfere; (3) the only sum which could be said to come within the meaning of the words "any income" in Finance Act, 1922 (c. 17), s. 20 (1) (b), which, by the sect., had to be applicable for the benefit of a person other than the person by whom the disposition was made for the period of seven years, was the minimum sum of £700.—*INLAND REVENUE COMRS. v. MALLABY-DEELEY (SIR H.), MALLABY-DEELEY (SIR HARRY) v. INLAND REVENUE COMRS.*, [1938] 3 All E. R. 463; 82 Sol. Jo. 745, *reversd.* as to (1) [1938] 4 All E. R. 818, C. A.

**576d.** — *Income from foreign trust.*—Applt., by deed executed in 1922, assigned certain property to an American trustee upon trust (*inter alia*) to pay the net income to herself & her husband in equal shares during their joint lives. The deed contained a power of revocation & modification & applt., acting under this power, modified the provisions of the deed from time to time directing the trustee (*inter alia*) to make payment of irrevocable annuities to her children & other persons. In 1924, applt. relinquished, until Jan. 1, 1929, the power to revoke or recall to herself the trust estate or to modify the terms of the trust deed relating to her husband's interest except with the husband's consent. In 1929, applt., with the written consent of the beneficiaries, revoked the trust & by a separate deed, dated Apr. 25, 1929, transferred the trust estate to an American trust co., declaring trusts which provided for the payment of annuities to each of three persons named in the deed, as a charge on the whole fund, & for the payment to applt. & her husband of the annual sum of £6,000 each. This deed contained a power of revocation & modification which, to the extent that its exercise might infringe the rights of the three named annuitants was exercisable only with their written consent, but it was declared that revocations which should leave assets in the trust sufficient, in the judgment of the trustee, amply to assure payment of the annuities should not be deemed to infringe such rights. It was agreed that, subject to the determination of the question raised on the appeal, applt. was liable to income tax, under r. 2 of Case V. of Sched. D., only on remittances of income from the settlements to Great Britain, the law applicable to the trust being similar to the law of the State of New York in the case of *Garland v. Archer-Shee*. The Crown contended that by the exercise of the power of revocation contained in the trust deeds, applt. could, without the consent of any

other person, except her husband, obtain for herself the beneficial enjoyment of the whole income arising from the assets comprising the trust funds (except the sums required to meet the irrevocable annuities); that that income must, therefore, under Finance Act, 1922 (c. 17), s. 20 (1) (a), be deemed to be income of applt., & that applt. was assessable to income tax in respect of the whole income arising from the stocks, shares & securities comprising the trust funds, less the amount of the irrevocable annuities. The Special Comrs., on appeal, upheld the Crown's contentions.—*Held*: (1) sect. 20 (1) (a) did not operate to bring within the charge to income tax any income not within the ambit of the Income Tax Acts; (2) having regard to the whole of the documents the consent of the trustee certainly, & possibly of the annuitants, was necessary before applt. could obtain for herself the beneficial enjoyment of the income of the trust estate by means of revocation.—*ORMONDE v. BROWN* (1932), 17 Tax Cas. 333.

*Annotations*:—As to (1) *Consd. Astor v. Perry*, [1935] A. C. 398; *Duncan's Executors v. Adamson*, [1935] A. C. 398.

**576e.** — A beneficiary, a British national resident in this country, being absolutely entitled to certain foreign stocks & shares, transferred them by a deed of settlement to foreign trustees resident in a foreign country upon trust to collect the income & after paying taxes & other expenses to pay the balance of the income for the benefit of the beneficiary for life. By a clause in the settlement power was reserved to the beneficiary at any time during his life by deed to revoke the settlement or to change or modify it as he might think fit. It was agreed for the purposes of the case: (a) that the settlement was to be governed by the law of the foreign country; (b) that on a proper construction of the settlement under that law the beneficiary had no proprietary interest, legal or equitable, in either the corpus of the trust or the dividends or interest received by the trustees, that the whole legal & equitable proprietary interest therein was vested in the trustees, & that the sole right of the beneficiary was a right in equity to enforce performance of the trust by the trustees; (c) that by the foreign law the power of revocation reserved by the settlement was valid, but that until it was exercised it had no effect on the nature of the rights of the trustees & beneficiary respectively.—*Held*: as from the date of the settlement the beneficiary was assessable to income tax under Sched. D., Case V., rule 2, on the amount received in the United Kingdom, & not under rule 1 of that Case, for the whole income of the trust fund was not to be deemed to be his income under Finance Act, 1922 (c. 17), s. 20 (1) (a).—*ASTOR v. PERRY, DUNCAN v. ADAMSON*, [1935] A. C. 398; 104 L. J. K. B. 423; 153 L. T. 1; 51 T. L. R. 325; 79 Sol. Jo. 231; *sub nom. ADAMSON v. DUNCAN'S EXORS.*, 19 Tax Cas. 255, H. L.

*Annotation*:—*Reid. Carter v. Sharon*, [1936] 1 All E. R. 720.

**576f.** *Person transferring assets abroad—Avoidance of tax—Burden of proof of intention.*—Deceased, a Canadian by birth & domicile, who had been for some years before his death resident in the United Kingdom, became, apart from occasional lucid intervals, incap-

able of managing his own affairs. In 1933, with a view to protecting his property against dissipation by himself, deceased executed a settlement under which he would be unable to deal with his assets in any way. No question of taxation was considered or discussed at that time, but subsequently, & admittedly for the purpose of avoiding United Kingdom taxation, the assets of the deceased, consisting of shares in an English co., were sold to a Canadian co. (expressly formed for the purpose) in return for shares & non-interest bearing debentures in the Canadian co. The whole of these shares & debentures were by further settlements transferred to the trustees of the original settlement. Deceased died in Jan. 1936. It was held by the Income Tax Comrs. that the transfer of the shares in the English co. to the Canadian co. was made for the main purpose of avoiding taxation, within sect. 18 of Finance Act, 1936 (c. 34), & therefore the exors. of deceased were liable to be assessed to sur-tax on the estimated amount of deceased's income for the year 1935-36. The exors. appealed, contending that in order to arrive at the main purpose of the transactions the ct. must look at the "transfer & any associated operations" as a whole, & that the transfer of the assets was merely part of the machinery by which the main purpose of protecting the property was effected:—*Held*: (1) on the true construction of sect. 18 (1) of the Act of 1936 it was necessary for the taxpayer, in order to escape liability to tax, to show that both the transfer & any associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation, & on the admitted facts the finding of the Comrs. was right & the appeal must be dismissed; (2) para. 4 of the Second Sched. of the Act of 1936 incorporated all the provisions of the Income Tax Acts as to assessments, by sub-sect. (7) of sect. 18 the Act of 1936 was made retroactive as to liability to sur-tax, & that therefore under General Rule 18 of Income Tax Act, 1918, the assessment was rightly made on the exors. of deceased.—*COTTINGHAM'S EXORS. v. INLAND REVENUE COMRS.*, [1938]\*2 K. B. 689; [1938] 3 All E. R. 560; 107 L. J. K. B. 623; 159 L. T. 519; 82 Sol. Jo. 761; *affd.* [1938] 4 All E. R. 663n.

# PART VIII. SECT. 3.

581 i. *Time for making claim—Whether claim out of time—Relief in respect of United Kingdom income tax.*—The provision in sect. 51 of the Bechuanaland Protectorate Income Tax Proclamation, 1922, that no refund of an amount paid in excess of the amount chargeable under the Proclamation may be authorised unless the claim therefor is made within two years after the date when the payment was made, does not apply to a claim by an assessee to recover relief to which he is entitled under sect. 17 (2) of the Proclamation in respect of income tax payable in the United Kingdom, because under sect. 17 (1), income is to be assessed without any deduction for income tax there payable. Further, the language of sect. 51, in providing that the collector "may" authorise a refund, is inappropriate in the case of an assessee claiming under sect. 17 (2), a legal right which the collector has no discretion to refuse.—*RHODESIA RAILWAYS, LTD. v. BECHUANALAND PROTECTORATE, RESIDENT COMR. & TREASURER*, [1933] A. C. 362; 102 L. J. P. C. 62; 149 L. T. 1, P. C.—*BECHUANALAND*.

sh. *Death before dividends & interest payable—Apportionment Act inapplicable to claim for repayment.*—A taxpayer, whose total income was such as to entitle her to repayment of all income tax deducted from it, died before certain of the dividends & interest upon her investments fell due. Her exors. afterwards received payment of these dividends & interest under deduction of tax, & founding on the terms of the Apportionment Act, 1870 (c. 35), s. 2, claimed repayment of tax proportionate to the period of her survival:—*Held*: the Apportionment Act had no application to the question in dispute, & as the dividends & interest payable after the taxpayer's death never formed part of her income, her exors. were not entitled to repayment of any portion of the income tax deducted therefrom.—*INLAND REVENUE COMRS. v. HENDERSON'S EXORS.*, [1931] S. C. 681; 16 Tax Cas. 282.—*SCOT*.

sj. *Claim in respect of tax on rents paid to heir-at-law in heritage.*—Testator, by his will, directed that his wife should receive the free annual income of his residuary estate for her

life & that on her death his trustees should convert the residue into cash & distribute it among six named beneficiaries. Testator died, domiciled in Scotland, in 1903. The widow claimed her legal rights under Scottish law. She was accordingly paid a capital sum out of testator's movable estate & continued, up to the time of this case, to receive from the trustees one-third of the rents derived from the heritage. The remaining two-thirds of the rents were accumulated by the trustees for a period of twenty-one years when further accumulation became unlawful. Thereafter, in accordance with settled Scottish law, the two-thirds rents were paid by the trustees to the heir-at-law in heritage for the time being of testator. The *curator bonis* to the heir-at-law in heritage, a minor, claimed repayment of the income tax charged in respect of the amounts paid to him as curator, contending that those amounts represented income of the minor in his hands:—*Held*: the payments made to or for behoof of the minor were payments of income.—*DUNCAN v. INLAND REVENUE COMRS.* (1932), 17 Tax Cas. 1.—*SCOT*.

577. *Add. Annotations*:—*Reid. Whitney v. I. R. Comrs.*, [1926] A. C. 37; *Re Hulton, Hulton v. Midland Bank Exor. & Trustee, Ltd.* (1930), 99 L. J. Ch. 316; *Luipaard's Vlei Estate & Gold Mining Co. v. I. R. Comrs.*, [1930] 1 K. B. 593; *Re Reckitt, Reckitt v. Reckitt*, [1932] 2 Ch. 144; *McCalmont v. I. R. Comrs.*, [1937] 3 All E. R. 51.

580. *Add. Annotations*:—*As to* (3) *Appld. R. v. St. Marylebone Income Tax Comrs.*, *Ex p. Schlesinger* (1928), 13 Tax Cas. 746. *Reid. L. & N. E. Ry. v. Easington Union Assmt. Com. & Easington-with-Thorpe Parish Council* (1925), 95 L. J. K. B. 255.

585a. *Rate.*—*SCAMMELL & NEPHEW, LTD. v. ROWLES*, No. 217c, *ante*.

585b. *Sum claimed already allowed as deduction.*—*Appld. co. habitually financed its purchase by loans from its bankers repayable on demand; the loans were for no specified period, but were paid off with interest when the co. received payment for the goods, usually within three months. The interest was paid without deduction of income tax, & was debited in the co.'s profit & loss account as a business expense. It had been allowed as such in computing the profits on which the co. was assessed under Case I. of Sched. D. for the four years ended Apr. 5, 1925. The co. claimed repayment of tax under 1918 Act, s. 36, for these four years on the interest paid to the bank, contending that it should not have been allowed as a deduction in computing profits, that this error could be corrected by additional assessments, & that the interest must be treated as having been paid out of profits or gains brought into charge to tax. The Comrs. of Inland Revenue refused the claim, & on appeal the Special Comrs. upheld this decision:—Held*: as in fact the interest had been deducted in arriving at the assessable profits, it had not been paid out of profits brought into charge to tax, & that it was not open to the co. to claim revision of the assessments.—*MULLER & CO. LONDON, LTD. v. INLAND REVENUE COMRS.* (1928), 14 Tax Cas. 116.

585c. *Error in return—Finance Act, 1923 (c. 14), s. 24—Return in accordance with prevailing*

practice.]—Appl't. co., which held a number of railway wagons on hire purchase agreements, was assessed to income tax, Sched. D., for the years 1923–24 to 1928–29 inclusive, in certain sums returned for the purposes of assessment. In arriving thereat the deduction allowed in respect of the hire element (as distinct from the capital element) in the payments made under the hire purchase agreements was calculated on what is known as the "average" or "even spread" basis. As from 1929–30 an increased deduction computed by an alternative method, known as the "actuarial" basis, was admitted, in accordance with a decision of the Special Comrs. in another case, & the co. sought a like deduction for the years 1924–25 to 1928–29, inclusive, by way of a claim to repayment under Finance Act, 1923 (c. 14),

s. 24, on the ground that the assessments for these years were excessive by reason of an error or mistake in the returns or statements made by it for assessment purposes. The claim was rejected by the Comrs. of Inland Revenue under sect. 24 (2) on the ground that the assessments were made according to the practice generally prevailing at the time when the co.'s returns or statements were made. The Special Comrs., on appeal, accepted the evidence given by two inspectors of taxes that the basis generally followed during the years in question was that adopted by the co. & refused the claim:—*Held*: no point of law arose in connection with the computation of the co.'s profits & gains within the proviso to sect. 24 (5).—*ROSE SMITH & CO., LTD. v. INLAND REVENUE COMRS.* (1933), 17 Tax Cas. 586.

## Part IX.—Procedure after Assessment.

586. *Add. Annotations*:—As to (1) *Refd. R. v. Income Tax Special Comrs., Ex p. Elmhirst* (1935), 105 L. J. K. B. 50. As to (2) *Refd. Crawford v. R. S. Hudson, Ltd.* (1935), 19 Tax Cas. 434.

588. *Add. Annotation*:—As to (2) *Refd. Ingle v. Farrand*, [1927] A. C. 417.

589. *Add. Annotation*:—*Distd. R. v. St. Marylebone Income Tax Comrs., Ex p. Schlesinger* (1928), 13 Tax Cas. 746.

591a. *Whether assessment made in time.*—*PICKFORD v. QUIRKE, PICKFORD v. INLAND REVENUE COMRS.*, No. 114a, *ante*.

592a. *Discontinuance of business—Mode of computation—Finance Act, 1926 (c. 22), s. 31.*—*WESLEY v. MANSON*, No. 204e, *ante*.

592b. *When justified—What amounts to "discovery" by surveyor.*—*ANDERTON & HALSTEAD, LTD. v. BIRRELL*, No. 254a, *ante*.

592c. ———.]—Trustees under a will in making a return to income tax of the trust income stated in error but in good faith that by reason of the provisions of the will, which they misread, the income was not liable to income tax, & after production of the will & full discussion with them the inspector of taxes agreed, & no assessment was made. His successor discovered this error & additional assessments were made on the trustees in respect of the above income:—*Held*: the inspector, who was treated as if he were the first inspector, had "discovered," within sect. 125 (1) of 1918 Act, that profits chargeable to tax had "been omitted" from the first assessments within the meaning of

sect. 125 (1) of 1918 Act, notwithstanding his failure to discover it at the time of the first assessments, & subsequently, the Comrs. had power to make the additional assessments.—*WILLIAMS v. GRUNDY TRUSTEES*, [1934] 1 K. B. 524; 103 L. J. K. B. 204; 150 L. T. 378; 18 Tax Cas. 271.

592d. ———.]—*INLAND REVENUE COMRS. v. BROOME'S (VISCOUNT) EXORS.*, No. 380b, *ante*.

592e. ———.]—There is nothing in the Income Tax Acts to prevent the Comrs. from considering facts which arise in the preparatory year after the date fixed for the bringing in by assessors of their certificates of their assessment of annual values, or at any time in the year of revaluation.

By Finance Act, 1930, Sched. I., Part I, the assessors were bound in the year 1930 to being in the certificates of their assessments of annual values on Nov. 30, 1930. Certain property was at that time empty & was not occupied until Jan. 31, 1931. On Apr. 5, 1932, upon discovering the letting, the comrs. made an additional assessment, under 1918 Act, s. 125:—*Held*: the additional assessment was properly made.

On Jan. 30, 1930, the tenant of certain property let for a term of ten years from Dec. 25, 1920, at a rent of £180 *per annum*, made a return under the Valuation (Metropolis) Act, 1869 (c. 67). On Aug. 30, 1930, the tenant agreed to continue his tenancy for one quarter from Dec. 25, 1930, at a rent of £100 for the quarter. On Apr. 24, 1931, the property was let for a term of 21 years

### PART IX. SECT. 1.

<sup>see 1.</sup> *Jurisdiction of commissioner—Avoidance of tax owing to fraud.*—*MOREAU v. FEDERAL TAXATION COMR.* (1926), 39 C. L. R. 65.—AUS.

586 II. ——— *Alteration of assessment.*—Appl'ts. owned certain land the value of which for taxation purposes was, in 1923, £24,826. In 1924 a new assessment was made by the Comr. & the value fixed at £32,197. In 1925 the Comr. made a new assessment & fixed the value at £46,835:—*Held*: the only sect. under which the Comr. can alter

an assessment which has been made is sect. 37 of Land & Income Tax Assessment Act, 1907, & having once made an assessment the Comr. may let it stand or may alter it from time to time subject to the restriction imposed by the legislature for the benefit of the taxpayer to prevent his being harassed by frequent re-assessments.—*O'CONNOR v. STATE TAXATION COMR.* (1927), 30 W. A. L. R. 50.—AUS.

586 III. ———.]—*Held*: the second proviso to sect. 2 of Income Tax Act, 1922–1925, namely,

that no alteration or addition shall be made in or to any assessment made under the Acts repealed by that Act after three years from the date when the tax is payable unless the Comr. of Taxation has reason to believe that there has been an avoidance of tax owing to fraud or attempted evasion, does not apply to the making of alterations & additions before Sept. 26, 1925, the date when Income Tax Assessment Act, 1925, by which the proviso was enacted, received the royal assent.—*FEDERAL COMR. OF TAXATION v. REID* (1927), 40 C. L. R. 196.—AUS.

from Mar. 25, 1931, at a rent of £300 *per annum*. On Aug. 10, 1931, an assessment was made in ignorance of the agreement of Aug. 20, 1930, & of the lease of Apr. 24, 1931. Upon discovering these facts the Comrs. made an additional assessment under 1918 Act, s. 125:—*Held*: the additional assessment was properly made.—*KLIMAN v. STONE, HILLS v. LONDON FREEHOLD & LEASEHOLD PROPERTY CO., LTD.*, [1936] 1 All E. R. 859; 80 Sol. Jo. 512; 20 Tax Cas. 398.

**592f. Personal allowance—Married man—Marriage annulled.**—In 1921, a marriage between resp. & K. R., spinster, was solemnised. From 1921 to 1932, resp. having declared in the income tax returns made by him that he had his wife living with him or that his wife was wholly maintained by him during the years of assessment, was granted the statutory allowances applicable to a married man during those years. In 1933, resp. obtained a decree of nullity of the marriage by reason of the incapacity of his wife to consummate the marriage. In 1934, on the application of the inspector of taxes, additional assessments were made under sect. 125 of 1918 Act, on that portion of the personal allowance obtained by resp. in each of the five years ending & including 1932–33 in excess of the personal allowance which would have been due to resp. if he had been an unmarried man. The General Comrs. discharged the additional assessments, holding that for the purposes of income tax assessment the marriage of resp. subsisted until the decree of nullity was made final & that the personal allowances which had been granted to resps. had been rightly granted:—*Held*: (1) a marriage which was null on the ground of the incapacity of one of the spouses was voidable & not void; but when the decree of nullity made it void, it was void *ab initio*. It was not, however, void for all purposes. Transactions which had been concluded & things which had been done during the period of the supposed marriage, could not be undone or reopened after the marriage had been declared null & void; (2) Finance Act, 1920 (c. 18), s. 18, ought to be read as applying to a wife who was *de facto* a wife living with her husband & whose marriage had not yet been avoided; (3) the Revenue authorities had no power to make fresh assessments on resp. with reference to the years 1928 & following years by reason of a fact which came into existence after those years. In this case the fact which came into existence after the years of assessment was resp.'s decision to exercise his option to avoid the marriage. Therefore the additional assessments were rightly discharged by the General Comrs. & the appeal must be dismissed.—*DODWORTH v. DALE*, [1936] 2 K. B. 503; [1936] 2 All E. R. 440; 105 L. J. K. B. 586; 155 L. T. 290; 52 T. L. R. 512; 80 Sol. Jo. 690; 20 Tax Cas. 285.

*Annotation*.—*Refd.* Gray v. Penrhyn (Lord), [1937] 3 All E. R. 468.

**595a. Absence of accountant's certificate.**—Appls. delivered to the inspector

of taxes balance sheets & trading & profit & loss accounts of their business covering the period of three years, on the average profits of which their Sched. D. liability was to be computed; they also delivered to the assessor of taxes a statement showing the average profits to be £1,447 after making the adjustments required for income tax purposes. The inspector asked that the accounts should be certified by a qualified accountant in view of their magnitude, & appls. refused on the ground that there was no statutory authority for such a requirement. In due course the statement & accounts were laid before the Additional Comrs., who, not being satisfied, made an assessment of £2,000, against which appls. appealed. On the hearing of the appeal the General Comrs. were of opinion that examination of the books as proposed by appls. would occupy them for several weeks, & even then would not enable them to establish the correctness of the accounts because they were not professional accountants. The Comrs. accordingly, not being satisfied on the evidence tendered that the assessment was excessive, decided to confirm it unless within two months appls. should produce accounts audited by a qualified auditor. Appls. expressed dissatisfaction with the Comrs.' decision as being erroneous in point of law & required them to state a case:—*Held*: the Comrs.' decision was not *ultra vires*.—*HUNT & CO. v. JOLY* (1928), 14 Tax Cas. 165.

**595b. Assessments under Sched. A.**—Applt. was owner & occupier of premises, purchased by him in July 1932, which were rated at £60 (gross) for the years ended Mar. 31, 1933, & Mar. 31, 1934, & £54 (gross) for the year ended Mar. 31, 1935. On appeal against assessments under Sched. A. of £60 (gross) on the premises for each of the years 1932–33, 1933–34 & 1934–35, applt. contended that the annual value of the premises was not greater in the two years ended Apr. 5, 1934, than in the year ended Apr. 5, 1935, & that the assessment for each year should be reduced to £54. The General Comrs. confirmed the assessments for the years 1932–33 & 1933–34 & reduced the assessment for the year 1934–35 to £54:—*Held*: the General Comrs. were entitled to decide that the assessments for the years 1932–33 & 1933–34 had been rightly made.—*DENNY v. DAVIES* (1937), 21 Tax Cas. 65.

**596. Add. Citation**:—12 Tax Cas 147.

**597a. Children allowance.**—In the first case, applt. had been assessed to income tax, Sched. D., for the years 1924–25 to 1928–29 inclusive by the General Comrs. for the Division in which he resided during those years, & for 1929–30 by the General Comrs. for the H. Division, where he had resided since Sept. 1928. He had claimed & was allowed relief in respect of his children in the assessments thus made upon him. In 1931, the inspector of taxes discovered that the trustees of applt.'s ante-nuptial contract of marriage, in exercise of their discretion

PART IX. SECT. 2, SUB-SECT. 1.  
eg. *Appeal to Lieutenant-Governor in Council—Finality of.*—*Held*: where the right given by Income Tax Act,

s. 6 (4), to appeal to the Lieutenant-Governor in Council has been invoked & a decision has been given on that appeal the matter ends there & therefore, a *mandamus* will not be granted.—

R. (PIONEER GOLD MINES' OF B. C. LTD.) v. MINISTER OF FINANCE, [1934] 2 W. W. R. 501; 4 D. L. R. 27; *affd.*, [1935] S. C. R. 70; 1 D. L. R. 232.—CAN.



under the contract to pay income to & for behoof of the children, had paid to applt. considerable sums for the maintenance, etc., of the children. The sums so paid by the trustees exceeded the limits of income laid down in Finance Act, 1920 (c. 18), s. 21 (3). Additional assessments for the years 1924–25 to 1929–30 inclusive, which had the effect of cancelling the relief in respect of the children, were made on applt. by the General Comrs. for the H. Division. He appealed to the Special Comrs., contending (a) that the rights of the children under the contract were contingent & that the sums paid by the trustees were not income of the children in their own right; & (b) that, as regards the assessments for 1924–25 to 1928–29, the H. Comrs. had no jurisdiction to make the assessments. The Special Comrs. decided (a) that the assessments were good in law & that the H. Comrs. had jurisdiction to make them; & (b) that they had no jurisdiction to determine the question whether applt. had received allowances in respect of his children to which he was not entitled, & adjourned the appeals for that question to be decided by the H. Comrs.

In the second case, applt., in the first case (together with the Public Trustee) was trustee of a will, under the trusts of which applt.'s children, in the events which happened, were entitled in equal shares to income from certain War Stock. The income had been paid over by the Public Trustee to applt. without deduction of tax. On discovery of these facts, assessments were made in 1931 on the trustees for the years 1924–25 to 1929–30 inclusive by the General Comrs. for the H. Division. The trustees appealed to the Special Comrs. contending that (a) they were not residing in the H. Division during the years up to & including 1928–29 & the General Comrs. for that Division had no jurisdiction to make assessments on them for these years; & (b) that all the assessments were bad in law & that there was no power to make assessments upon the trustees jointly in the Division where only one of the parties assessed resided. The Special Comrs. confirmed the assessments:—*Held*: (1) the income, when it was paid over to the children, was income of the children, & applt. was not therefore entitled to relief

in respect of the children; (2) the Special Comrs. had jurisdiction to determine the questions in issue on the claim to relief when raised on appeal against an assessment under sect. 125; & (3) the additional assessments made in the H. Division were not bad in law; (4) the appeal failed.—*JOHNSTONE TRUST SETTLEMENT v. CHAMBERLAIN* (1933), 17 Tax Cas. 706.

*Annotation*:—As to (3) *Reid. Kelly v. Rogers*, [1935] 2 K. B. 446.

**597b. Notice of appeal—Withdrawal.**—Notice of appeal to the Special Comrs. was given by a taxpayer who subsequently gave notice that he withdrew the appeal:—*Held*: the appeal could not be withdrawn without the consent of the Special Comrs., since, when the notice of appeal was given, it became their duty to arrive at the true assessment, an appeal against an assessment under 1918 Act, being on a different basis from an appeal in private litigation.—*R. v. INCOME TAX SPECIAL COMRS., Ex p. ELMHIRST*, [1936] 1 K. B. 487; 105 L. J. K. B. 759; 154 L. T. 198; 52 T. L. R. 143; 79 Sol. Jo. 941; 20 Tax Cas. 381, C. A.

**602a. Duty to determine value—Effect of valuation under section 138.**—Resp. was the owner of certain premises in Leeds, & when the annual value of the premises was being assessed for purposes of income tax chargeable on them under Sched. A, a dispute arose in consequence of which resp., under sect. 138, asked that a valuation should be made by a person of skill. II. was appointed to make the valuation, & it was claimed that the valuation should have been higher & was wrong, as H. admitted he considered that sect. 138, set aside any necessity for him in his valuation to have regard to the rules under Sched. A. for ascertaining the annual value of the premises, & he made his valuation without regard to his knowledge of the rents paid:—*Held*: any valuation by a person of skill appointed to value premises for income tax purposes under sect. 138 did not take the place of the determination of the value to be made by the Comrs. whose duty it was to hear & determine an appeal against an assessment, & in the course of that determination power was given to them to appoint a person of skill; the annual value was to be determined not

#### PART IX. SECT. 2, SUB-SECT. 2.

**600 i. The hearing—Whether taxpayer entitled to be heard.**—In order to constitute a valid determination of the comr. under Income Tax Assessment Act, 1922, s. 21 (1), it is not necessary that the taxpayer shall have been heard.—*FEDERAL COMR. OF TAXATION v. AUSTRALIAN TESSELATED TILE CO. PROPRIETARY, LTD.* (1925), 36 C. L. R. 119; 31 Argus L. R. 218.—AUS.

**600 ii. Failure of appellant to submit evidence—Power of commissioners to confirm assessment.**—An assessment to income tax, Sched. D, was made upon applt. for the year 1922–23 in respect of remuneration for special services. The appeal proceedings before the General Comrs. were twice adjourned for the production by applt. of further information & on the occasion of the second adjournment applt. was warned that when the case was next put down for hearing he must be prepared to attend in person with a statement of the facts & arguments which he wished to sub-

mit to the Comrs. On the third hearing of the case applt. did not attend & his representative asked for a further adjournment. This the Comrs. refused. Applt.'s representative then gave a general statement of facts, under the reservation that he was not to be bound by any particular statement of fact, & contended that no liability to income tax arose in respect of the sum in question. In consideration that applt. had failed to submit facts or evidence to them, the General Comrs. dismissed the appeal & confirmed the assessment:—*Held*: the Comrs. had acted within their powers.—*HAMILTON (J.) v. INLAND REVENUE COMRS.* (1930), 16 Tax Cas. 28.—SCOT.

**sl. "Determination."**—The word "determination" in Income Tax Assessment Act, 1922, s. 21 (1), implies a communication of the determination to the taxpayer.—*FEDERAL COMR. OF TAXATION v. AUSTRALIAN TESSELATED TILE CO. PROPRIETARY, LTD.* (1925), 36 C. L. R. 119; 31 Argus L. R. 218.—AUS.

#### PART IX. SECT. 2, SUB-SECT. 3.—A.

**sn. Jurisdiction of High Court—To hear appeal by commissioner from Board of Appeal.**—*FEDERAL TAXATION COMR. v. MUNRO, BRITISH IMPERIAL OIL CO., LTD. v. FEDERAL TAXATION COMR.* (1926), 38 C. L. R. 153.—AUS.

**so. To review questions of fact.**—*FEDERAL COMR. OF TAXATION v. CLARKE* (1927), 40 C. L. R. 246.—AUS.

**sg. Conclusiveness of assessment.**—*Held*: assessments for Income Tax under Sched. D. of Income Tax Act, 1918, made upon a person who becomes bkpt., & from which no appeal had been taken, cannot be questioned by the official assignee upon proof of debts, & the Revenue Comrs. cannot be called upon to prove that the amounts assessed were just & proper, having regard to bkpt.'s income at the material times, the assessments being in default of appeal, "final & conclusive," under Income Tax Act, 1918, s. 195.—*Re QUINLAN*, [1928] 1 R. 548.—IR.



by that valuation but in accordance with it, & sect. 138 (3) made that plain. Further, H.'s valuation without regard to the rules for ascertaining the annual value of premises laid down in Sched. A. could not be said to be a valuation at all within the meaning of sect. 138.—*STEWART v. LYONS* (1934), 152 L. T. 291; 79 Sol. Jo. 31; 19 Tax Cas. 79; C. A.

*Annotation* :—*Reid. Lyons v. Collins*, [1936] 2 All E. R. 292.

**607a.** — Disagreement between landlord & tenant as to deduction.]—A building leased by pltf. to defts. was assessed to income tax (Sched. A.) on the rent. Under sect. 21 of Finance Act, 1930 (c. 28), the sum upon which the tax was calculated was reduced on the ground that parts of the building were empty during the year of assessment, & defts. paid tax on the reduced rent. Defts. in paying rent deducted the tax calculated on the original rent, pltf. claiming that it should have been calculated on the reduced rent. The difference having arisen defts. referred it to the General Comrs. of the division, under the provisions of r. 22 (1) (a) of the All Sched. Rules of the 1918 Act, pltf. not appearing, & the Comrs. upheld the deduction as made by defts. In an action by pltf. for the amount of the alleged over-deduction :—*Held* : the decision of Comrs. was final & the jurisdiction of the ct. was ousted.—*ECCLESIASTICAL COMRS. FOR ENGLAND v. SACKVILLE ESTATES, LTD.*, [1937] 2 K. B. 600; [1937] 2 All E. R. 720; 106 L. J. K. B. 798; 157 L. T. 555; 53 T. L. R. 702; 81 Sol. Jo. 571.

**611a.** — — — — —.]—*ANGLO-PERSIAN OIL CO., LTD. v. DALE*, No. 249a, *ante*.

**611b.** — — — — —.]—*Resps.*, in carrying out their undertaking of working the Dover Harbour, found it necessary for the safe & efficient user of the harbour to remove three ships which had been sunk at certain entrances to the harbour during the war. In the work of raising & removing the ships *resps.* made use of the dredging plant which they kept for the routine dredging of the harbour, together with certain lighters which they borrowed from the Admiralty. The Comrs. of Income Tax found that the expenditure so incurred by *resps.* was of a nature similar to ordinary dredging, & therefore such expenditure was an admissible deduction in computing the *resps.*' profits, which were liable to taxation under Sched. D. :—*Held* : the finding of the Comrs. meant that the money expended was money exclusively laid out & expended for the purpose of the trade or business, & they clearly indicated what their holding was upon the facts; therefore they decided a question of fact & not a question of law, & the ct. could

not interfere with such a decision.—*WHELAN v. DOVER HARBOUR BOARD* (1934), 151 L. T. 288; 18 Tax Cas. 555, C. A.

**618a.** — — — — —.]—With the object of reducing the amount of income tax payable in respect of the occupation of land & the profits from dealing in cattle, a farmer & his sons, who lived with him, entered into an agreement of partnership. The terms of the agreement were not carried out, & the General Comrs. were of opinion that there had been no partnership in fact, & refused the relief claimed in respect of each alleged partner :—*Held* : there was evidence to support the finding of the comrs., which could not be set aside.—*DICKENSON v. GROSS* (1927), 137 L. T. 351; 11 Tax Cas. 614.

*Annotation* :—*Reid. Calder v. Allanson* (1935), 19 Tax Cas. 293.

**614a.** — — — — —.]—*Applt.* appealed to the Special Comrs. against certain Sched. D assessments made upon him in respect of business profits & untaxed interest. The Comrs. refused to accept the accounts submitted by *applt.* as satisfactory evidence that the assessments were excessive & adjourned the proceedings for some months on his undertaking to furnish accounts certified, so far as might be possible, by an accountant. Such accounts were not produced & the assessments were confirmed :—*Held* : the question was one of fact which it was for the Comrs. to determine.—*WALL v. COOPER* (1929), 14 Tax Cas. 552, C. A.

— — — — —.]—*Ordinary residence.*—*Applt.* lived in the United Kingdom until 1909 when she went to India to be married. Her husband died in 1916. Except for one period of five months she was not in the United Kingdom between 1909 & July, 1919, when she returned to the United Kingdom & remained for fifteen months. She spent part of each of the income tax years 1921–22 to 1927–28 in the United Kingdom, the periods spent in the United Kingdom within each year ranging from forty days to one hundred & seventy-seven days in aggregate. She lived in hotels & had no house of her own either in this country or elsewhere. She had no property in this country except investments in War Loan. From 1921 her son was at school in this country. The Special Comrs. had found, in appeal proceedings for the year 1924–25, that she was not resident & not ordinarily resident in the United Kingdom. Her claim to exemption from income tax on income within the provisions of the sects. mentioned above for the year 1927–28 was refused by the I. R. Comrs. On her applying, under Finance Act, 1924 (c. 21), s. 27, for the claim to be determined by the Special Comrs., the

PART IX. SECT. 2, SUB-SECT. 3.—B.

**608 i.** *No appeal on question of fact—What is question of fact—Question of domicile.*—*IVEAGH v. REVENUE COMRS. & REVENUE COMRS. v. IVEAGH*, [1930] I. R. 386.—*IR.*

**608 ii.** — — — — —.]—*Ownership of business.*—In June, 1931, *applt.*, W. B., made a return for 1931–32 in which he entered £156 as income "from trade, profession or vocation." An estimated assessment was made on him for that year in respect of profits as a commission agent, against which he

appealed & produced to the inspector an account of bookmaking business certified by him as a correct account of "bookmaking business carried on under M. B." At the hearing of the appeal before the General Comrs., *applt.* stated in evidence that he was not the proprietor of the bookmaking business; that, since Nov. 1928, the licence duty for the business had been paid by his daughter, M. B., in whose name were the licences & bank books; & that he was an employee of his daughter, to whom the business had

belonged since Nov. 1928. *Applt.* had not, prior to the appeal, suggested to the inspector that he was not the sole owner of the business & the General Comrs. were unable to find further evidence of its transfer to the daughter. They decided that the business belonged to *applt.* & confirmed the assessment :—*Held* : the General Comrs. had before them evidence to justify their finding that *applt.* was the proprietor of the business.—*BERRY v. INLAND REVENUE COMRS.* (1933), 18 Tax Cas. 193.—*SCOT.*

Comrs. considered that having regard to the continuance of regular & lengthy visits to the United Kingdom the circumstances were different from those previously under consideration in relation to the year 1924-25, & they held she was resident & ordinarily resident in the United Kingdom. She appealed:—*Held*: the matter was a question of fact & the Comrs.' decision could not be disturbed as being erroneous in point of law.—*KINLOCH v. INLAND REVENUE COMRS.* (1929), 14 Tax Cas. 736.

618. *Add. Annotation*:—*Refd.* Owl Mill Co. (1920), Ltd. v. Croft, Elliott v. Duchess Mill (1926), 95 L. J. K. B. 635.

620. *Add. Annotation*:—*Refd.* Anderton & Halstead, Ltd. v. Birrell, [1932] 1 K. B. 271.

620a. —.—]—A co. which had succeeded to the business of a previous co. in 1920 was assessed to income tax, Sched. D., for the year 1923-24 in an estimated amount to represent the average profits of the three preceding years. It gave notice of appeal against this assessment, & subsequently claimed relief under r. 11 of the Rules applicable to Cases I. & II. of Sched. D. The Inspector of Taxes opposed the claim. The co. gave notice of appeal to the Special Comrs. against the refusal to admit the claim, & eventually the case was set down for hearing by the Special Comrs. both on the r. 11 claim & on a question of obsolescence. Before the date fixed for the hearing the co. withdrew the appeal & the withdrawal was accepted by the Special Comrs. Subsequently, the co. applied to the General Comrs. to hear & determine its claim contending that the claim made by it fell under r. 3 (3) of the Miscellaneous Rules applicable to Sched. D., & that only the General Comrs. had power to determine it.

6171. *When case may be stated—Rehearing by Board of Referees not condition precedent.*—*Held*: (1) it is open to any party to appeal by way of stated case to the High Ct. against a decision of the Special Comrs. on appeal to them under Finance Act, 1922 (c. 17), Sched. I., para. 1, against a direction issued under sect. 21 (1) of that Act, & a rehearing of the appeal by the Board of Referees under para. 2 of the Sched. is not a condition precedent to the statement of a case for the High Ct.; (2) it is not necessary for the Special Comrs. to be satisfied that there has been an intention to evade super tax before a direction can be made under Finance Act, 1922 (c. 17), s. 21; (3) in both cases there was evidence to justify the Special Comrs.' determination in confirming the directions.—*CARLAW (DAVID) & SONS, LTD. v. INLAND REVENUE COMRS.*, [1926] S. C. 870; 11 Tax Cas. 96.—*SCOT.*

#### PART IX. SECT. 2, SUB-SECT. 3.—C.

621 i. *When prohibition lies—To prohibit rehearing.*—A co. limited by guarantee & having its registered office in County Antrim claimed exemption from income tax on the ground that it was established for charitable purposes only. The claim was refused by the Comrs. of Inland Revenue &, on appeal, by the Special Comrs. sitting at Belfast. The co. thereupon required that its claim should be reheard by the Deputy Recorder of Belfast before whom, at a preliminary hearing, it contended that the decision in the case of *H. v. Recorder of Belfast (Ex parte Kelly)*, 18 Tax Cas. 586, related only to claims for repayment

of tax under sect. 36 of 1918 Act, & sect. 202 of 1918 Act was applicable to a claim for exemption on charitable grounds. The Deputy Recorder decided that he had jurisdiction to rehear the appeal, whereupon the Comrs. of Inland Revenue obtained from the High Ct. of Northern Ireland (King's Bench Div.) a conditional Order of Prohibition directed to the Deputy Recorder prohibiting him from hearing the appeal:—*Held*: making the conditional order absolute, the Deputy Recorder had no jurisdiction to re-hear the appeal.—*R. v. BELFAST DEPUTY RECORDER, Ex p. LINEN INDUSTRY RESEARCH ASSOCN.* (1937), 21 Tax Cas. 108.—*IR.*

623 i. *Where case will be remitted—Where method of assessment is wrong.*—Appl., the sole proprietor of a business, returned the profits of the business for the purposes of assessment to income tax under Sched. D. for the year 1932-33 as £233 & claimed an allowance of £10 for wear & tear of plant. He was assessed for that year in the sum of £400, & appealed against the assessment. In support of his appeal, he lodged a trading & profit & loss account for the year to May 31, 1931, & a balance sheet at that date. According to the trading & profit & loss account the profit amounted to £233, in arriving at which nothing was charged for depreciation of assets. In the balance sheet there was deducted from the capital at the beginning of the year £276 for "drawings" & to the balance was added the profit of £233, & out a reduced figure for at the end of the year. In the sheet a sum of £10 was written

The General Comrs. were of opinion that the claim was made by way of appeal under r. 11 & that the Special Comrs. had jurisdiction to deal with it. They refused to hear the claim. The co. obtained a rule nisi calling upon the General Comrs. to show cause why a writ of *mandamus* should not issue commanding them to hear & determine the claim:—*Held*: the rule should be discharged.—*R. v. WEST GORTON GENERAL COMRS., Ex p. BROOKS & DOXEY* (1920), Ltd. (1931), 16 Tax Cas. 210.

622. *Add. Annotations*:—*Appl.* Pickford v. Quirke, Pickford v. I. R. Comrs. (1927), 43 T. L. R. 659. *Refd.* R. v. St. Marylebone Income Tax Comrs., *Ex p. Schlesinger* (1928), 13 Tax Cas. 746; Anderton & Halstead, Ltd. v. Birrell (1931), 47 T. L. R. 528; Towle v. Improved Industrial Dwellings Co., [1931] 1 K. B. 263; Duckworth v. Lowe, [1937] 2 All E. R. 418.

625a. —.—]—*R. v. ST. MARYLEBONE INCOME TAX COMRS., Ex p. SCHLESINGER* (1928), 13 Tax Cas. 746, C. A.

628a. —.—]—Certain premises were leased to tenants for a term of seven years from Nov. 17, 1925, at a rent of £125 per annum by a lease dated Nov. 10, 1925. By a deed dated Nov. 11, 1925, the tenants agreed, in consideration of the owner undertaking to execute certain alterations & repairs, to pay, from the date of completion of the alterations, & for the remaining period of the lease, an additional £125 per annum. The additional £125 per annum was described as "rent." The owner, resp. in the present case, contended that it represented repayment by instalments of the tenants' obligation to him. The premises were assessed for the purposes of Sched. A for the year

off plant as depreciation. The General Comrs. decided, as a matter of fact, that applt.'s assessable profits for the year 1932-33 were £345 & reduced the assessment accordingly:—*Held*: the General Comrs. had indicated no evidence as ground for their finding that applt.'s assessable profits were £345 & that the case should be remitted to the Comrs. to reconsider the assessment.—*ANDERSON v. INLAND REVENUE COMRS.* (1933), 18 Tax Cas. 320.—*SCOT.*

o i. —.—]—*Where jurisdiction discretionary.*—*MOHAMMAD FARID-MOHAMMAD SHAH v. LAHORE INCOME TAX COMR.* (1927), 1 L. R. 9 Lah. 317.—*IND.*

o ii. —.—]—*To compel alteration of assessment.*—The High Ct. will not, by *mandamus* or process of a like nature compel the Federal Comr. of Taxation to exercise the power given him to make alteration in, or additions to, any assessment, where he does not think that such alterations or additions are necessary in order to insure the completeness & accuracy of the assessment.—*Ex p. CARPATHIA TIN MINING CO., LTD.* (1924), 35 C. L. R. 552; 31 Argus L. R. 22.—*AUS.*

o iii. —.—]—*To compel commissioner to state a case—Not on new points of law.*—*Held*: where an assessee seeks for a *mandamus* from the High Ct. against the Comr. of Income Tax requiring him to state a case on points of law different from those he had argued before the Comr. to state a case, his application cannot be entertained.—*A. K. A. C. T. V. CHETTYAR FIRM v. INCOME TAX COMR.* (1928), 1 L. R. 6 Ran. 492.—*IND.*

1926-27 in the amount of £250. The General Comrs. on appeal reduced the assessment to £125. The Crown appealed. The case was remitted to the General Comrs. for further findings & was subsequently settled by agreement.—*THORNLEY v. BROWN* (1929), 15 Tax Cas. 459, C. A.

**629a. — Discretion of court.**—Under 1918 Act, s. 149, it is within the discretion of the High Ct. to remit a case to the Comrs. for re-hearing & decision without requiring that it be amended & returned for the decision of the ct. itself.—*EDWARDS v. "OLD BUSHMILLS" DISTILLERY CO., LTD. (IN LIQUIDATION)* (1926), 10 Tax Cas. 285, H. L.

*Annotations*.—*Refd. Aylmer v. Mahaffy* (1925), 10 Tax Cas. 594; *I. R. Comrs. v. "Old Bushmills" Distillery Co.* (1927), 12 Tax Cas. 1118.

**629b. — Incomplete finding as to residence—Failure of commissioners to comply with directions of court—Consent of Crown to dismissal of appeal.**—Estimated assessments were made upon resp. for the years 1923-24 & 1924-25 in respect of literary profits, & she appealed against them on the ground, *inter alia*, that she was not resident in the United Kingdom. She was not present at the hearing of the appeal nor was any evidence called on her behalf, & an adjournment was therefore applied for on behalf of the Crown. The General Comrs. refused the application & found, on statements made by her representative, that she was "resident abroad," not that she was not resident in the United Kingdom, " & that the income was earned abroad." When the case first came before the K. B. Div. it was remitted to the Comrs. to hear evidence for the purpose of ascertaining "facts as to the residence of the resp. in the United Kingdom & whether the income accrued in the United Kingdom or not." The Comrs., however, after the rehearing of the appeal at which resp. was present, found only that she was "resident abroad," & that her profession was "exercised abroad," except as regards the three articles written in this country. On the case again coming before the K. B. Div., the A.-G. pointed out that the Comrs. had not complied with the directions of the ct. as to the form of their finding as regards residence, but said that, while he could not admit that on the facts proved the Crown were wrong in taking the view that resp. was resident in the United Kingdom, he would not, in all the circumstances, ask for the case to be again remitted & would consent to the appeal being

dismissed.—*FARRAND v. SATTERTHWAITE* (1929), 14 Tax Cas. 470.

**630. Add. Citation** :—12 Tax Cas. 166.

**631a. Notice requiring commissioners to state & sign case—Must be in writing—Oral application to commissioners insufficient.**—1918 Act, s. 149 (1), lays down the following rules to be observed in applying for a case stated, after the hearing by comrs. of an appeal against income tax assessment: (a) immediately after the determination, applt. or surveyor, if dissatisfied with it as being erroneous in law, may declare his dissatisfaction to the comrs.; (b) having declared his dissatisfaction, he may within twenty-one days, by notice in writing addressed to their clerk, require the comrs. to state & sign a case:—*Held*: the notice in writing to the clerk to the comrs. referred to in sect. 149 (1) (b), is a condition precedent, & if this condition is not satisfied, the comrs. have no jurisdiction to state a case.—*R. v. INCOME TAX COMRS. FOR EDMONTON, Ex p. THOMPSON*, [1929] 1 K. B. 220; 98 L. J. K. B. 201; 140 L. T. 380; 45 T. L. R. 91; *sub nom. R. v. EDMONTON INCOME TAX COMRS., Ex p. THOMSON*, 14 Tax Cas. 313, D. C.

**632a. Transmission of case after "receiving" same.**—After stating a case the comrs. sent it to the office of the person requiring it, the surveyor of taxes, at the office occupied by the latter at the time the appeal was before them, the address of which was on all the official documents in the appeal. The surveyor had left the office in the interval & gone to another one:—*Held*: the case had been "received" by the surveyor within 1918 Act, s. 149 (1) (d).—*GRAINGER v. SINGER*, [1927] 2 K. B. 505; 96 L. J. K. B. 917; 137 L. T. 692; 43 T. L. R. 591; 11 Tax Cas. 704.

**632b. Exchanging points of argument.**—(1) It is not necessary to exchange points of argument, but either party may, not later than ten days before the argument, give to the other party notice in writing of any point intended to be made which would be likely to take the other party by surprise, in default of which the ct. may adjourn the argument on such terms as may be just.

(2) A case may be set down by either party subject to the same conditions in all respects as cases have heretofore been set down by the party at whose instance they have been stated.—*PRACTICE NOTE*, [1926] W. N. 250.

# PART IX. SECT. 2, SUB-SECT. 3.—D.

*sp. Evidence—Not limited to material before Board of Appeal.*—*FEDERAL TAXATION COMR. v. LEWIS BERGER & SONS (AUSTRALIA), LTD.* (1927), 39 C. L. R. 468.—*AUS.*

*st. Burden of proof—On appellant—To establish right to benefit claimed.*—*MOREAU v. FEDERAL TAXATION COMR.* (1926), 39 C. L. R. 65.—*AUS.*

**634 1. Whether available—Not action for return of money—Assessment levied in default of return.**—*DR. R. N. SINGHA v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1927), 1 L. R. 5 Ran. 825.—*IND.*

*sy. Jurisdiction of Recorder to re-hear appeal.*—A resident in county Down, who carried on business in Belfast & elsewhere, claimed repayment of In-

come tax under sect. 36 of 1918 Act, & sect. 19 of Finance Act, 1925 (c. 36), on the ground that he had paid interest to a bank in Belfast out of profits or gains charged to income tax in Belfast. The claim was refused by the Comrs. of Inland Revenue &, on appeal, by the Special Comrs. sitting at Belfast. The claimant thereupon required that his appeal should be re-heard by the Recorder of Belfast before whom, at a preliminary hearing, he contended that the effect of sect. 19 (3) of Finance Act, 1925 (c. 36), was to make applicable to his claim the provisions of sects. 195 & 196 of 1918 Act, & thus give the Recorder jurisdiction to re-hear the appeal. The Comrs. of Inland Revenue contended that the Recorder had no such jurisdiction, the only right of appeal against the deter-

mination of the Special Comrs. under sect. 19 of Finance Act, 1925, being by way of case stated to the High Ct. &, alternatively, that, even if such an appeal lay under sect. 196, there was in this case no "assessment made" within the meaning of that sect. at a place within the Recorder's jurisdiction. The Recorder decided that he had jurisdiction to re-hear the appeal, whereupon the Comrs. of Inland Revenue obtained from the High Ct. of Northern Ireland a conditional order of prohibition directed to the Recorder forbidding him to hear the appeal:—*Held*: making the conditional order absolute, the Recorder of Belfast had no jurisdiction to re-hear the appeal.—*R. v. BELFAST RECORDER, Ex p. KELLY*, N. I. 162; 18 Tax Cas. 586.—

632c. —.]—*TARN v. SCANLAN, NIELSEN, ANDERSEN & Co. v. COLLINS, MULLER (W. H.) & Co. (LONDON) v. LETHAM, SAME v. INLAND REVENUE COMRS., No. 168a, ante.*

632d. *Setting down case.*]—PRACTICE NOTE, No. 632b, *ante.*

632e. —.]—*TARN v. SCANLAN, NIELSEN, ANDERSEN & Co. v. COLLINS, MULLER (W. H.) & Co. (LONDON) v. LETHAM, SAME v. INLAND REVENUE COMRS., No. 168a, ante.*

632f. *Remitting case to commissioners — For amendment—Grounds for granting or refusing application to remit.*]—*HAYTHORNTHWAIT & SONS, LTD. v. KELLY (1927), 11 Tax Cas. 657, C. A.*

632g. *Valuation of property by "person of skill"—Conclusiveness.*]—Where a person of skill appointed under sect. 138 of 1918 Act, has given a valuation which cannot be impeached on the face of it as bad in law, the annual value of the property must be determined in accordance with that valuation.

The only essential difference between sect. 138 & the previous legislation is that the verification on oath is now at the option of the Comrs.; & the only matter which the person of skill can be required to deliver

on oath is the verification of his valuation; &, in so doing, he cannot be required to justify or explain the means whereby he arrived at his conclusion.—*LYONS v. COLLINS, [1937] 1 K. B. 353; [1936] 3 All E. R. 788; 106 L. J. K. B. 299; 156 L. T. 59; 53 T. L. R. 140; 80 Sol. Jo. 974; 21 Tax Cas. 12, C. A.*

633a. *On appeal against assessment on person carrying on non-resident's regular agency—Order for costs made against agent.*]—*WILCOCK v. PINTO & Co. (IN THE NAME OF KUMMER) (1925), 10 Tax Cas. 415, C. A.*

638a. *Summary proceedings—Limitation of action—When time begins to run.*]—On Dec. 19 a collector of taxes commenced summary proceedings to enforce payment of an instalment of income tax payable "on or before" the preceding July 1. The first demand note in respect of the instalment in question had been issued on June 12. The magistrate dismissed the case on the ground that the period of six months within which the proceedings should have been commenced ran from June 12:—*Held*: proceedings could be commenced within six months from July 1.—*MANN v. CLEAVER (1930), 15 Tax Cas. 367, D. C.*

## Part X.—Penal Provisions.

642a. ——— *Survivorship.*]—Deceased had incurred liabilities to the inland revenue in respect of incorrect statements made in his returns for income tax for the years ending Apr. 5, 1932, & Apr. 5, 1933. No proceedings were taken against him during his lifetime, but proceedings were commenced against his executrix on July 26, 1937. The question was whether the cause of action in such a case by virtue of Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1), was made to survive against the estate of the deceased, & whether such proceedings were in respect of a cause of action in tort within the meaning of sect. 1 (3) of that Act:—*Held*: (1) the cause of action survived against the estate of deceased under sect. 1 (1) of the Act of 1934; (2) it was not a cause of action

in tort within the meaning of sect. 1 (3) of that Act.—*A.-G. v. CANTER, [1938] 2 K. B. 826; [1938] 3 All E. R. 329; 107 L. J. K. B. 690; 159 L. T. 412; 54 T. L. R. 954; 82 Sol. Jo. 494.*

642b. *Penalties—Power to compound.*]—Under 1918 Act, s. 222 (1), the comrs. may compound any penalties, which in their opinion have been incurred, without any proceedings to enforce such penalties having been taken.—*A.-G. v. JOHNSTONE (1926), 136 L. T. 31; 10 Tax Cas. 758.*

*Annotation.*—*Folld. A.-G. v. Midland Bank Executor & Trustee Co. (1934), 19 Tax Cas. 136.*

642c. ———.]—*A.-G. v. MIDLAND BANK EXECUTOR & TRUSTEE CO., LTD., No. 569b, ante.*

### PART X.

j i. — *Laying information—Within what time.*]—Criminal Code, s. 1142, applies to prosecutions under Income War Tax Act, 1917 (c. 28).—*R. v. DONEN, [1925] 1 D. L. R. 1141; [1925] 1 W. W. R. 567; 43 Can. Crim. Cas. 271; 34 Man. L. R. 597.—CAN.*

j ii. ———.]—*An information under Income War Tax Act, 1917 (c. 28), s. 8, for failing to make a return of income within thirty days after demand made therefor, must be laid within six months from the day or days as to which accused is charged with being in default, Criminal Code, s. 1142, being applicable thereto.—R. v. MEHAN, [1925] 2 D. L. R. 411; [1925] 1 W. W. R. 819; 43 Can. Crim. Cas. 325.—CAN.*

j iii. — *By "person who has not made return"—Who is.*]—Where on being charged for failing to make a return after demand made therefor, accused satisfies the magistrate that he had made a return when it was first due, he is not a "person who has not

made a return" within Income War Tax Act, 1917 (c. 28), s. 8, & is under no liability for failing to make another return upon the demand.—*R. v. BATTERS, [1925] 1 D. L. R. 726; [1925] 1 W. W. R. 275; 35 Man. L. R. 146.—CAN.*

j iv. — *Appeal—"Criminal cause."*]—Resp. having pleaded guilty on an information laid for a breach of Income War Tax Act, 1917 (c. 28), s. 8, the magistrate decided that he could impose a lesser penalty than that imposed by sect. 9 (1), & his decision was affirmed on appeal:—*Held*: special leave to appeal to the Supreme Ct. could not be granted, the proceeding being a "criminal cause" within Supreme Ct. Act, s. 36.—*R. v. BELL, [1925] 2 D. L. R. 57; [1925] S. C. R. 59; 43 Can. Crim. Cas. 286.—CAN.*

k i. — *Common law indictment.*]—An indictment against a deft. for defrauding the Revenue alleged that he, on Sept. 1, 1923, unlawfully, with intent to defraud & to the prejudice of our Lord the King & the Comrs.

of Inland Revenue, in a return of his total income from all sources for the year ending Apr. 5, 1923, made & delivered to the Special Comrs. of Income Tax for the purpose of assessment to super tax did falsely state that his total income from all sources, less charges, amounted to the sum of £3,927 16s. 6d., whereas in truth & in fact his total income from all sources less charges for that year largely exceeded that sum as he well knew at the time when he did so falsely pretend. There were similar counts for subsequent years. It was contended on behalf of the deft. that no such offence as was alleged in the indictment lay at common law against a taxpayer:—*Held*: the indictment was good.—*R. v. J., [1933] N. I. 73.—IR.*

sw. *Proceedings under Income War Tax Act—By whom instituted.*]—*R. v. ED (N. B.), [1926], 47 Can. Crim. Cas. 196.—CAN.*

sx. — *Appeals—Costs.*]—*R. v. ED (N. B.), [1927] 3 D. L. R. 826; 48 Can. Crim. Cas. 246.—CAN.*

## Part XI.—The Super Tax.

NOTE.—By the Finance Act, 1927 (c. 10), s. 38 (1) (b), *Super Tax is replaced by Sur-Tax for the year 1929-30 & subsequent years.*

644. *Add. Annotations*:—As to (1) *Refd. Re Reckitt, Reckitt v. Reckitt* (1932), 173 L. T. Jo. 452. As to (2) *Refd. Re Armaghdale, Craig v. Armaghdale* (1928), 44 T. L. R. 239.

645. *Add. Annotations*:—*Refd. Re Hulton, Hulton v. Midland Bank Executor & Trustee, Ltd.* (1930), 99 L. J. Ch. 316; *Re Reckitt, Reckitt v. Reckitt* (1932), 173 L. T. Jo. 452.

646a. *Nature of sur-tax*.—In every essential feature super-tax & sur-tax are the same tax. *Re HULTON, HULTON v. MIDLAND BANK EXECUTOR & TRUSTEE, Co., LTD.*, [1931] 1 Ch. 77; 99 L. J. Ch. 316; 144 L. T. 343; 46 T. L. R. 348; 74 Sol. Jo. 233.

*Annotation*:—*Consd. Re Reckitt, Reckitt v. Reckitt*, [1932] 2 Ch. 144.

646b. *Party chargeable dying insolvent—Super tax due in respect of several years—To what years appropriation of payments made.*—*Re CAMPBELL, COMMERCIAL BANK OF SCOTLAND v. CAMPBELL* (1923), 10 Tax Cas. 585.

648. *Add. Annotations*:—*Apprvd. Whitney v. I. R. Comrs.*, [1926] A. C. 37. *Refd. I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford* (1927), 96 L. J. K. B. 882.

649. *Add Citation*:—10 Tax Cas. 88.

*Add. Annotations*:—*Consd. Allen v. Trehearne*, [1938] 2 K. B. 464. *Refd. Birt, Potter & Hughes v. I. R. Comrs.* (1927), 12 Tax Cas. 976; *I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford* (1927), 96 L. J. K. B. 882; *Cockermine (W. H.) & Co. v. I. R. Comrs.* (1930), 47 T. L. R. 13; *United Kingdom Advertising Co. v. Whiting* (1931), 47 T. L. R. 420; *Perry v. Astor* (1935), 19 Tax Cas. 255.

654. *Add. Annotations*:—As to (1) *Refd. Whitney v. I. R. Comrs.*, [1926] A. C. 37. *Generally, Refd. I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford, Gascoigne v. I. R. Comrs.*, [1927] 1 K. B. 591; *I. R. Comrs. v. Cull*, [1938] 2 K. B. 109.

656a. *Income actually received.*—(1) Where interest on a loan had not been paid & might never be paid:—*Held*: the amount thereof ought not to be included in computing the tax-payer's income for income tax purposes for the year during which it was payable.

(2) The Comrs., & the Special Comrs., in confirming an assessment which included the above interest, informed the tax-payer that the duty thereon would not be collected until in fact the interest had been received by him:—*Held*: they had no power to do this. They could only confirm, discharge or modify an assessment on income received. There is no authority to make a contingent assessment.—*LAMBE v. INLAND REVENUE COMRS.*, [1934] 1 K. B. 178; 103 L. J. K. B. 69; 150 L. T. 190; 18 Tax Cas. 212.

*Annotations*:—As to (1) *Consd. Dewar v. I. R. Comrs.*, [1935] 2 K. B. 351. As to (1) *Refd. Champney's Executors v. I. R. Comrs.* (1935), 19 Tax Cas. 375.

656b. —.—[Under the will of a testator resp. was appointed one of the exors. & was be-

queathed a legacy of £1,000,000 free of legacy duty. Testator died on Apr. 11, 1930, & his will was duly proved in May of the same year. The exor.'s year expired on Apr. 11, 1931, when the legacy of £1,000,000 became payable & thenceforth in law carried interest at 4 per cent. *per annum* on each part of it as was for the time being unpaid. Testator's estate was at all material times sufficient to enable interest to be paid on the legacy. In Apr. 1932, resp., acting on the advice of his accountant, decided to allow the question of interest to stand over, & he had not at any material time received any sum in respect of interest. Resp. was assessed to sur tax in the sum of £50,180 for the year ending Apr. 5, 1933, which included a sum of £40,000, representing interest at 4 per cent. on the legacy of £1,000,000:—*Held*: as resp. had not received any of the interest there was no income in respect of it on which he could be charged to tax.—*DEWAR v. INLAND REVENUE COMRS.*, [1935] 2 K. B. 351; 104 L. J. K. B. 645; 153 L. T. 357; 51 T. L. R. 536; 79 Sol. Jo. 522; 19 Tax Cas. 561.

*Annotation*:—*Consd. Woodhouse v. I. R. Comrs.* (1936), 80 Sol. Jo. 705.

656c. *Sale of shares cum dividend—Finance Act, 1927 (c. 10), s. 33—Exemption from liability—“Exceptional” avoidance.*—A co. with a capital of £4,000, divided into 3,900 preference shares of £1 each & 1,000 ordinary shares of 2s. each, was in 1933 in a position to declare out of profits accumulated before July 5, 1932, a dividend of £100 on each ordinary share. Applt., who held the preference shares & all but forty of the ordinary shares admittedly avoided sur tax by selling all but five of his ordinary shares at £75 each, to about forty persons, with the promise, which he could fulfil by exercising his voting rights in respect of the preference shares, that the co. would declare a dividend. Many of the purchasers were employees of the co., & did not pay the purchase money till they received the dividends amounting to £75, £100 less income tax £25, which were immediately declared. Applt. having been assessed to sur tax on the amount of the dividends as assets within Finance Act, 1927 (c. 10), s. 33:—*Held*: though the dividends were assets falling into charge under that section, applt. escaped under the proviso to subsect. (4) in that the avoidance was “exceptional & not systematic.” Those words refer primarily to number, & a single act of avoidance does not cease to be exceptional because it is planned or designed, nor because it is carried out by a number of sales.—*BILSLAND v. INLAND REVENUE COMRS.*, [1936] 2 K. B. 542; [1936] 2 All E. R. 616; 105 L. J. K. B. 672; 155 L. T. 352; 52 T. L. R. 567; 20 Tax Cas. 446; *sub nom.* *INLAND REVENUE COMRS. v. BILSLAND*, 80 Sol. Jo. 675.

## PART XI. SECT. 1.

82. *At what rate leviable—Unincorporated association converted into company.*—*INCOME TAX COMR. v. WESTERN INDIA TURF CLUB* (1927), 55 L. R. Ind. 14.—IND.

656d. — — —.]—WOODHOUSE v. INLAND REVENUE COMRS. (1936), 80 Sol. Jo. 705.

661. *Add. Citations*:—[1926] 2 K. B. 246; 95 L. J. K. B. 694; 134 L. T. 699; 11 Tax Cas. 181. *Add. Annotation*:—*Refd.* I. R. Comrs. v. Wright, [1927] 1 K. B. 333.

662. *Add. Citations*:—134 L. T. 754; 10 Tax Cas. 351.

*Add. Annotation*:—*Refd.* Jones v. Down (1936), 80 Sol. Jo. 553.

662a. — — —.]—A co. having a sum consisting of accumulated profits standing to the credit of its reserve fund & being empowered so to do by its arts. of assocn., passed resolutions that its capital should be increased by the creation of new shares, & that it was desirable to capitalise the sum & make it available for distribution among the shareholders as capital free from income tax, & further resolutions pursuant to which the sum was applied in payment up of the new shares, which were to be offered to the shareholders in proportion to their existing shares with an option to them either to accept the new shares so fully paid up, or to take their nominal value in cash. A shareholder having accepted the whole of the new shares offered to him as fully paid, was assessed to super tax in respect thereof. The Special Comrs. having discharged the assessment:—*Held*: so far as the question raised was a matter of fact, it was concluded against the revenue by the finding of the Comrs., & so far as it was a matter of law, it was concluded against the revenue by *Bouch v. Sproule* (1887), 12 App. Cas. 385, *Inland Revenue Comrs. v. Blott*, *Inland Revenue Comrs. v. Greenwood*, No. 663, & *Inland Revenue Comrs. v. Fisher's Executors*, No. 664, the co. being dominant for all purposes, & the shares not bearing the character of income.—INLAND REVENUE COMRS. v. WRIGHT, [1927] 1 K. B. 333; 95 L. J. K. B. 982; 135 L. T. 718; 11 Tax Cas. 181, C. A.; *reversg.* S. C. *sub nom.* INLAND REVENUE COMRS. v. COKE, SAME v. WRIGHT, [1926] 2 K. B. 246.

*Annotation*:—*Distd.* Parker v. Chapman (1928), 138 L. T. 729.

662b. On amalgamation of company.]—*Held*: part of resp.'s income.—INLAND REVENUE COMRS. v. ROBERTS (1927), 13 Tax Cas. 277, C. A.

*Annotation*:—*Consd.* Thompson v. Trust & Loan Co. of Canada, [1932] 1 K. B. 517.

663. *Add. Annotations*:—*Apld.* I. R. Comrs. v. Fisher's Exors., [1926] A. C. 395; I. R. Comrs. v. Wright (1926), 95 L. J. K. B. 982. *Distd.* Parker v. Chapman (1928), 138 L. T. 729. *Consd.* Income Tax Comr., Bengal v. Mercantile Bank of India, Ltd., [1936] 2 All E. R. 857. *Refd.* Whitmore v. I. R. Comrs. (1925), 10 Tax Cas. 645; Martin v. Lowry, Martin v. I. R. Comrs., [1926] 1 K. B. 550; Baker v. Archer-Shee, [1927] A. C. 844; I. R. Comrs. v. Dalgety & Co. (1929), 98 L. J. K. B. 542; Gimson v. I. R. Comrs., [1930] 2 K. B. 246; Hamilton v. I. R. Comrs., [1931] 2 K. B. 495; Wilkinson v. I. R. Comrs. (1931), 16 Tax Cas. 52; Drew & Sons, Ltd. v. I. R. Comrs. (1932), 17 Tax Cas. 140; Neumann v. I. R. Comrs., [1934] A. C. 215; Lambie v. I. R. Comrs., [1934] 1 K. B. 178; Aldwarke Co. v. I. R. Comrs. (1933), 18 Tax Cas. 125; Dewar v. I. R. Comrs., [1935] 2 K. B. 351; *Re* Ward,

Ringland v. Ward, [1936] 2 All E. R. 773; *Re* Home Grown Sugar, Ltd., [1938] Ch. 219; I. R. Comrs. v. Cull, [1938] 2 K. B. 109; I. R. Comrs. v. National Mortgage & Agency Co. of New Zealand, Ltd., [1938] A. C. 524.

664. *Add. Citations*:—[1926] A. C. 395; 95 L. J. K. B. 487; 134 L. T. 681; 10 Tax Cas. 302, H. L.

*Add. Annotations*:—*Folld.* Whitmore v. I. R. Comrs. (1925), 10 Tax Cas. 645. *Apld.* I. R. Comrs. v. Wright (1926), 95 L. J. K. B. 982. *Consd.* Income Tax Comr., Bengal v. Mercantile Bank of India, Ltd., [1936] 2 All E. R. 857. *Refd.* Briggs v. I. R. Comrs. (1932), 17 Tax Cas. 11.

664a. — — — — —.]—A limited co. appropriated for distribution among its ordinary shareholders as a capital bonus £200,000 undivided profits which had been carried to the credit of its reserve account, the amount to be applied (1) in subscribing for one hundred & fifty £1,000 4 per cent. debentures of the co., & (2) in paying up in full fifty thousand £1 unissued ordinary shares of the co. All the ordinary shares were held by one of the directors. The debentures, all of which were issued to this shareholder, were redeemable at one month's notice by the co. at any time, & at one month's notice by the holder after May 25, 1920. On Apr. 16, 1920, the whole of the £150,000 due on the debentures was paid by the co. to the holder, interest being waived by him, & the co. thereupon borrowed £72,500 from him at 6 per cent. interest, a liability reduced to £33,117 by June 30, 1920:—*Held*: the debentures constituted a capital receipt in the hands of the shareholder, & he was not assessable to super tax for the year 1920–21 in respect of the amount of the debentures.—WHITMORE v. INLAND REVENUE COMRS. (1925), 10 Tax Cas. 645.

665. *Add. Annotations*:—*Distd.* Madras Income Tax Comr. v. P. R. A. L. Muthukaruppan Chettiar (1935), 79 Sol. Jo. 501. *Refd.* I. R. Comrs. v. Fisher's Exors., [1926] A. C. 395; I. R. Comrs. v. Wright (1926), 95 L. J. K. B. 982; Drew & Sons, Ltd. v. I. R. Comrs. (1932), 17 Tax Cas. 140; *Re* Metcalfe & Sons, Ltd., [1933] Ch. 142; Austins of East Ham, Ltd. v. I. R. Comrs., [1937] 4 All E. R. 275; *Re* Home Grown Sugar, Ltd., [1938] Ch. 219.

After this case add:—

— *Investment companies*.]—*See* Finance Act, 1936 (c. 34), s. 20 (6).

666. For the existing paragraph substitute the following paragraph:—

**Distribution of profits—Assets of company written up—Loans to directors written off.**—A partnership business was converted into a limited co. in 1916, practically the whole of the shares therein being held by two resps., the original partners, who were brothers, & were also the governing directors. The accounts showed profits of £117,000 for the three years ending Dec. 1919, but no dividends were declared or paid. The co., having power to lend money, granted loans amounting to £283,000 to resps. at 5 per cent. interest, against which the capital assets were increased in value by £226,000 & profits drawn upon to the extent of £57,000. The actual

cash lent was mainly provided by a bank overdraft. At a later date resps. duly passed resolutions purporting to cancel the debt of £283,000 by writing it off against the general reserve fund. Resps. having been assessed to super tax upon £283,000 :—*Held* : (1) the loans were genuine loans, which gave rise to no liability to super tax, even if cancelled, except as to the £57,000 taken from profit & loss account; (2) the purported release of the debt was wholly invalid & ineffectual, & resps. remained liable to the co. to repay the whole amount of the £283,000 but were not liable for any super tax thereon.—*HALL v. INLAND REVENUE COMRS.* (1920), 135 L. T. 759; 11 Tax Cas. 24, C. A.

**666a. Transfer of assets to subsidiary company—In consideration of shares—Distribution to shareholders in parent company.**—A colliery co. which had accumulated large reserves transferred certain of its assets, comprising land & houses, freehold minerals, railway wagons & outside investments, to a subsidiary co. formed in order to take over the assets. The consideration for the transfer was to be satisfied by the allotment to the parent co. of shares in the subsidiary co. The parent co. declared bonuses on its own shares to be satisfied by the issue to its shareholders of the shares to which it was entitled in the subsidiary co. & those shares were, in fact, allotted direct by the subsidiary co. to the shareholders in the parent co. The transaction was shown in the books of the parent co. by the transfer to the balance of profit & loss account of the balances standing to the credit of reserve & other accounts, & the distribution of bonus shares was recorded as having been made out of the balance of profit & loss account. The original shareholders in the subsidiary co. were identical with those in the parent co. The first directors of the subsidiary co. were the directors of the parent co. &, with one exception, the directors of the two cos. were the same throughout. It was the intention of the directors of the parent co. to retain under their control the assets transferred to the subsidiary co. & the two cos. were to a large extent inter-dependent, the parent co. being partially dependent on the subsidiary co. for finance. Applt. & his wife, as holders of shares in the parent co., received a distribution of shares in the subsidiary co. & an amount representing the value of the shares plus an appropriate addition for income tax was included in an assessment to super-tax made upon applt. The Special Comrs. on appeal held that the distribution was a release by the parent co. of assets to its shareholders & that to the extent to which the distribution represented a distribution of current or accumulated profits it was income assessable to super-tax :—*Held* : that the Special Comrs.' decision was correct.—*BRIGGS v. INLAND REVENUE COMRS.* (1932) 17 Tax Cas. 11.

**666b. Distribution of shares in another company—Acquired out of accumulated profits.**—A public limited co. promoted & registered a subsidiary co., subscribing in cash for the whole of its issued share capital, which was held by nominees of the parent co. The whole of the shares in the parent co. were subsequently purchased by a third co. under an agreement which provided that part of the consideration should be the assignment to the existing shareholders in the parent co. of the shares in the subsidiary co. & of a debt due by the subsidiary to the parent, in satisfaction of which a further issue of shares was made by the subsidiary. Under the authority of an extraordinary resolution of the parent co. the shares in the subsidiary, which were declared to be capital assets of the parent in excess of liabilities & paid up share capital, were distributed, in specie, among the shareholders of the parent co. in proportion to their respective holdings. Applt. was assessed to super tax in an estimated figure to cover the value of shares so distributed to him to the extent that they had been acquired by the parent co. out of accumulated profits. He appealed to the Special Comrs., contending that the distribution was a distribution of capital. The Special Comrs. held that to the extent that the shares distributed to applt. were acquired by the parent co. out of its accumulated profits they represented income liable to super tax in applt.'s hands :—*Held* : the Special Comrs.' decision on the point argued before them was correct, without prejudice, however, to the position which would arise in a case where shares acquired out of accumulated profits were required in the balance sheet to answer share capital.—*WILKINSON v. INLAND REVENUE COMRS.* (1931), 16 Tax Cas. 52.

**667. Add. Annotations :—As to (1) Consd. Perrin v. Dickson** (1929), 98 L. J. K. B. 683; 1 R. Comrs. v. Ramsay (1935), 154 L. T. 141. **Refd. Dott v. Brown**, [1936] 1 All E. R. 543. **As to (2) Refd. Minister of National Revenue v. Spooner**, [1933] A. C. 684. **As to (3) Apld. Westcombe v. Hadnock Quarries, Ltd.** (1931), 16 Tax Cas. 137.

**667a. Annual percentage of profits on sale of dental practice.**—On Sept. 28, 1932, resp. entered into an agreement to purchase the practice of a dentist in Wimpole Street, London. Clause 3 stated that the primary price to be paid by the purchaser should be £15,000, which sum should be subject to increase or diminish as thereafter provided. Under clause 4, £5,000 was to be paid on the exchange of the agreement & applt. was to pay to the vendor in respect of the balance of the purchase price each year for ten years from Aug. 16, 1932, 25 per cent. of the net profits of the practice, such sums to be paid to the vendor as capital sums paid in respect of the purchase price, & if the aggregate paid during the ten years should amount to more or less than £10,000 the primary price of

# PART XI. SECT. 3, SUB-SECT. 2.—B.

**r. 1. — Issue of bonus debentures.**—An investment co., carrying on business in India, capitalised its accumulated undistributed profits & issued to its shareholders bonus debentures, which were subsequently re-

deemed :—*Held* : the shareholders did not, as the result of those transactions, receive any taxable income, profits or gains within sect. 4 of Indian Income Tax Act, 1922.

The personal motive or purpose of the individual shareholders, even if they hold a controlling interest in the

co. is irrelevant, if it is made out that the co. has in fact capitalised the accumulated profits.—*INCOME TAX COMR. BENGAL v. MERCANTILE BANK OF INDIA, LTD.*, [1936] A. C. 478; [1936] 2 All E. R. 857; 105 L. J. P. O. 102; 155 L. T. 186; 52 T. L. R. 574 80 Sol. Jo. 593, P. C.—IND.



£15,000 should be increased or diminished accordingly. Clause 5 charged the balance of the purchase price for the time being remaining payable on the goodwill assets or profits of the practice into whosoever hands the same might come, which, with the personal covenant of the purchaser thereof, was the primary security therefor, & £5,000, part of the £10,000, was additionally secured by a mortgage of a policy which should be assigned by the purchaser to the vendor to be reassigned as soon as the vendor had received the £5,000. No provision was made for the event of the death of, or the discontinuance of the practice by the purchaser, in either of which cases therefore the £15,000 would neither be increased nor diminished. Resp. claimed to deduct, in making a return of the income for super tax purposes, £886 payable by him under the agreement for the tax year in question. The Special Comrs. held that he was entitled to make that deduction as the £886 was of the nature of income & not a capital sum. On July 25, 1935, FINLAY, J., confirmed their decision:—*Held*: the question to be determined was whether, under the terms of the particular agreement in question, the consideration for the purchase was a sum of money, though payable in instalments, or whether it was an annuity. Under the agreement the sum of £15,000 was made the purchase price from beginning to end, & the mere fact that in the result the amount paid might be greater or less than what was called the primary price did not alter the legal position; a definite purchase price was being dealt with by the agreement. Therefore the instalments were not annuities, but merely the method & the manner & the form in which a lump sum was paid; accordingly the £886 could not be deemed income, but was capital & not deductible from income for tax purposes.—INLAND REVENUE COMRS. v. RAMSAY (1935), 154 L. T. 141; 79 Sol. Jo. 987; 20 Tax Cas. 79, C. A.

*Annotations*:—*Consd.* *Dott v. Brown*, [1936] 1 All E. R. 543. *Reid*, *British Salmon Aero Engines, Ltd. v. I. R. Comrs.*, [1937] 3 All E. R. 484; *I. R. Comrs. v. Ledgard*, [1937] 2 All E. R. 492; *Commercial Union Assurance Co. v. I. R. Comrs.*, [1937] 4 All E. R. 159; *I. R. Comrs. v. Pyman* (1937), 21 Tax Cas. 129.

668. *Add. Citations*:—95 L. J. K. B. 465; 42 T. L. R. 239; 70 Sol. Jo. 366; 10 Tax Cas. 235.

*Add. Annotation*:—*Dtd.* *I. R. Comrs. v. Pakenham*, *I. R. Comrs. v. Longford*, *Gascoigne v. I. R. Comrs.*, [1927] 1 K. B. 594.

668a. — *Part retained by trustees*—*For payment of death duties.*—Appl't's first husband, by his trust disposition & settlement, gave the whole of his property, real & personal, to trustees for payment of his debts, except those heritably secured on his real estate, his funeral expenses, & the management expenses of the trust, any legacies he might leave, & an annuity to a niece, & subject thereto, in the events which happened, the trustees were to hold the whole of his property on trust to pay out of the free income thereof an annuity to his sister, & subject to the implement of all prior purposes of the trust, the trustees were, as soon as convenient after his death, to convey all his lands & estates to appl't. in life-rent during her life, with remainders over to a series of heirs, & to hold the whole of the residue of his property in trust for her in life-rent during her life & on

her death to the person then entitled to the landed estate in fee. In addition to all powers competent to them by statute or common law, testator conferred on his trustees all powers of administration competent to a fee simple proprietor, & in particular, power to sell any part of his property & to grant leases of any part of the heritable property. On the death of testator in 1919, heavy death duties became payable on the heritable estates, which were already heavily mortgaged. The trustees elected to pay the duties by sixteen half-yearly instalments, of which the earliest were met out of the proceeds of sale of testator's stocks & shares. Pending the realisation of such part of the heritable estates as, after necessary reductions of the charges thereon, would be sufficient to meet the remaining instalments, the trustees retained the estates & the management thereof in their own hands, & paid appl't. only the free annual income. On the footing that she was entitled to the life-rent of the estates from the date of her husband's death, appl't. was assessed to super tax for the year 1923–24 on the whole annual value of the estates as assessed to income tax, Sched. A., for the previous year, & this assessment was upheld by the Special Comrs. on appeal:—*Held*: appl't. was assessable to super tax for the year 1923–24 only on the amount of the free income actually receivable by her from the trustees for the preceding year, the trustees & not appl't. being owners of the estates for the purposes of Sched. A. for that year.—*DE ROBECK (LADY) v. INLAND REVENUE COMRS.* (1928), 13 Tax Cas. 345, H. L.

*Annotation*:—*Distd.* *Shanks v. Inland Revenue Comrs.*, [1929] 1 K. B. 342.

668b. — *During minority.*—Appl't's grandfather left a share of his estate in trust for his son, appl't's father, for life & after the father's death in trust for the issue of the father in such shares & on such conditions as the father should appoint: in default of appointment, in trust for those children equally who should attain the age of twenty-one. The father died in 1919. His will exercised the power of appointment mentioned above & provided, *inter alia*, that the property settled by the will of the grandfather should on the father's death be divided into as many shares as he should have children surviving him, & that each child's share should be held by trustees on trust to pay the income to the child for twenty years from the father's death & after that period, if the child survived, to transfer the corpus to him absolutely. As the result of Chancery proceedings with reference to the father's will the ct. ordered, *inter alia*, that a certain sum *per annum* should be paid to the guardian of appl't. out of the income of his share in the grandfather's estate, for his maintenance during minority. It was contended that this amount only should be brought into the computation of appl't's liability to super-tax:—*Held*: the income of the share of the estate appropriated to appl't. was all income of appl't. for super-tax purposes.—*STERN v. INLAND REVENUE COMRS.* (1929), 15 Tax Cas. 148, C. A.

669a. *Share of repaid excess profits duty paid over to retired partners.*—*RIGDEN v. INLAND*

REVENUE COMRS., INLAND REVENUE COMRS. v. URWICK'S EXORS., No. 160c, *ante*.

**670a. Partnership—Payments to widow of deceased partner—For use of firm name.]—**A partnership deed provided that in the event of death of a partner the remaining partners might continue to use the firm's name, marks, & goodwill, paying to the exors. of the deceased partner for this privilege the sum of £500 quarterly for a period of five years, "after which it may be enjoyed without further payment." One of the partners died, leaving one-half of his residuary estate in trust for his widow, *applt.* The value of deceased's share in the capital & income of the partnership was agreed & paid to the exors. in full discharge of all claims except the quarterly payments. These payments were duly made, at first in full, but later under deduction of income tax. *Applt.* was assessed to super tax for the year 1926-27 in respect of her half share of the four quarterly payments received in 1925-26 :—*Held*: the payments were income assessable to super tax.—**MACKINTOSH v. INLAND REVENUE COMRS.** (1928), 14 Tax Cas. 15.

**671a. Loans to controlling shareholder of private company—No dividends declared.]—***Applt.* was the controlling shareholder of five private limited cos. From time to time he withdrew from the business of each of the cos. sums which he used to finance the purchase in his own name of premises to be occupied by himself trading as a firm. The sums so withdrawn were described in the cos.' accounts as "loans" to *applt.* trading as such firm. Each of the cos. had power to advance money on loan, with or without security, but, while in some cases the loans shown in the accounts to have been made to *applt.* were subsequently approved formally in general meeting, no previous formal authorisation was given for any of the loans. The loans were not secured by any document,

& no provision was made as to repayment or interest thereon. None of the cos. ever declared a dividend for any of the years material to the case. The Special Comrs. decided that the loans in question had not been made in the course of the businesses carried on by the cos., & that they were not genuine loans but constituted income of *applt.* for the purposes of super tax :—*Held*: there was ample evidence before the Comrs. to support their conclusion of fact.—**JACOBS v. INLAND REVENUE COMRS.** (1925), 10 Tax Cas. 1.

**672. Add. Citation :—**134 L. T. 408,

*Add. Annotation :—***Reid. Thompson v. Trust & Loan Co. of Canada** (1932), 48 T. L. R. 209.

**672a. Arrears of interest received by purchaser of bonds.]—**Where a taxpayer purchases bearer bonds, on which the interest for several years is in arrear, & his purchase confers upon him the right to the arrears, & several years' arrears are subsequently paid to him in one sum, the whole of that sum forms for the purpose of super tax, under 1918 Act, s. 5 (3) (c), part of his income for the year in which payment was received.—**LEIGH v. INLAND REVENUE COMRS.**, [1928] 1 K. B. 73; 96 L. J. K. B. 853; 137 L. T. 303; 43 T. L. R. 528; 11 Tax Cas. 590.

*Annotations :—***Apld.** **Grey v. Tiley** (1932), 16 Tax Cas. 414. **Reid.** **Simpson v. Maurice's Exors.** (1929) 14 Tax Cas. 580; **Lambe v. I. R. Comrs.**, [1934] 1 K. B. 178; **Dewar v. I. R. Comrs.**, [1935] 2 K. B. 351; **Champneys' Executors v. I. R. Comrs.** (1935), 19 Tax Cas. 375.

**673. Add. Citations :—**135 L. T. 272; *affd.* (1928), 139 L. T. 26; 44 T. L. R. 420; 72 Sol. Jo. 239; 13 Tax Cas. 700, C. A.

**673a. — No effective declaration of trust.]—**In Aug. 1916, *applt.* who had no marriage settlement decided to make provision for his wife & daughter, & for that purpose to create a trust fund for their benefit. He accordingly informed his wife that as part of the said trust fund he was going to transfer certain

**PART XI. SECT. 3, SUB-SECT. 2.—C.**

**sa. Income received by settlor under voluntary settlement—Deductions—Outgoings by trustees.]—***Held*: only the free income paid over to the settlor after payment of the outgoings by the trustees with the appropriate addition for income tax, was his income for super tax purposes.—**INLAND REVENUE COMRS. v. HAMILTON (LORD) OF DALZELL** (1926), 10 Tax Cas. 406.—**SCOT.**

**sb. Free life rent use & enjoyment of house—All outgoings except tenant's taxes paid by trustees.]—***Held*: the assessments made to include the outgoings paid by the trustees, as increased by the appropriate addition for income tax, were properly made.—**DONALDSON'S EXECUTORS v. INLAND REVENUE COMRS.** (1927), 13 Tax Cas. 461.—**SCOT.**

**sd. Loan to associated company.]—**The Hong Kong Trust Corp., Ltd., lent money to the Bombay Trust Corp., Ltd., & the latter paid interest thereon. In respect of this interest the Hong Kong co. was assessed to income tax in the name of the Bombay co., as its agent under Indian Income Tax Act, 1922, ss. 42 (1), & 43, & such assessment was held good on appeal to the Privy Council. The loan was paid off through a common banker & a new loan from Arnold & Co. in China was substituted for it. All these cos., including the bankers,

were closely associated cos. & their share capitals were held almost exclusively by one family. The income tax authorities at Bombay disbelieving the reality of the transactions continued to assess the Hong Kong co. in the name of the Bombay co. as its agent :—*Held*: all the evidence went to show that the transaction by which the lender was charged was a real one & as the tax authorities were unable to prove the contrary by evidence the assessment was invalid & must be discharged.—**INCOME TAX COMR., BOMBAY PRESIDENCY & ADEN v. BOMBAY TRUST CORPN., LTD.**, [1936] 2 All E. R. 1679, P. C.—**IND.**

**st. Payment for liberty to withdraw support—Whether "easement." ]—***Resp.* was the proprietor of the surface & subjacent strata, other than the coal, of certain lands. In 1900 *resp.*'s predecessor entered into an agreement with the owner of the coal & the co. working the coal which provided that, in consideration of the payment of one penny upon every ton of coal or dross raised, the coal owner & the co. should be entitled to work the coal & lower the surface & also to make below the surface, in the strata belonging to the surface owner, any underground roads, accesses or communications necessary for the convenient working of the coal. The coal owner & the co. were bound to compensate the surface owner & his tenants & fears for all damage caused directly or indirectly by the working

of the coal. On appeal against an assessment to sur-tax for the year 1934-35 which included the sum paid to him (under deduction of income tax) by the colliery co. in respect of coal raised in that year, *resp.* contended (*inter alia*) (a) that the advantage of working coal free from interruption by the surface owner conferred by the agreement of 1900 did not create any easement or privilege in, over or derived from land, & that sect. 21 of Finance Act, 1934 (c. 32), did not apply to the payments made under that agreement; (b) that no part of the payments was referable to wayleaves, & (c) alternatively, that such part only of the payments as was referable to wayleaves should be included in the assessment. It was agreed that, if the payments were apportionable, they might fairly be apportioned as to 7/40ths to wayleaves & as to 33/40ths to the other working rights. The Special Comrs. decided that sect. 21 of Finance Act, 1934 (c. 32), did not apply to 33/40ths of the payments & that 7/40ths only thereof should be included in the assessment :—*Held*: the payments made in respect of the right to lower the surface were payments of rent in respect of an "easement" within sect. 21 of Finance Act, 1934, & accordingly the whole of the payments under the agreement fell to be included in the assessment to sur-tax on *resp.*—**INLAND REVENUE COMRS. v. HOPE**, [1937] S. O. 585; 21 Tax Cas. 116.—

shares in a private co. into the joint names of himself & his wife, & that in the meantime & until such transfer was completed he would himself hold the said shares upon trust. By his direction a trustee account in respect of these shares was opened in the books of the co., & the dividends on the shares were paid into that account & accumulated. A draft deed of trust had been submitted to applt. for his approval in Jan. 1917, but owing to various circumstances could not be finally completed until Apr. 1919:—*Held*: the parol declaration of trust was not an immediate & complete declaration of trust, but merely the declaration of an intention on the part of applt. to settle the shares & of his intention meanwhile to keep them *in medio* so that they might be ready when the trust was effectively declared. There was no effective trust declared of the income of these shares in Feb. 1917, & it remained the income of applt. up to the time when the deed was executed.—*ALLAN v. INLAND REVENUE COMRS.* (1925), 133 L. T. 9; *sub nom.* *INLAND REVENUE COMRS. v. ALLAN*, 9 Tax Cas. 234, H. L.

**673b. Income received by executor before assent to legacy.**—Under the will of his father, who died in Aug. 1921, resp. was entitled to a specific legacy of certain shares in two cos. Owing to difficulties in administration the exors. did not assent to the legacy until June, 1924, & in the meantime dividends had been declared upon the shares in Feb. & Aug. 1923, & in Mar. 1924, which dividends were retained by the exors. until their assent in June, 1924. Resp. was assessed to super tax upon these dividends for the years ending Apr. 5, 1924, & Apr. 5, 1925, respectively, on the basis that they were his income for the years when such dividends were payable by the cos. Resp. contended that as he was not in a position to require payment of the dividends from the exors. until June, 1924, they were not his income or receivable by him until then, & that he was wrongly assessed:—*Held*: the doctrine of relation of the exor.'s assent to the date of the death applied, & resp. was rightly assessed.—*INLAND REVENUE COMRS. v. HAWLEY*, [1928] 1 K. B. 578; 97 L. J. K. B. 191; 138 L. T. 710; 13 Tax Cas. 327.

*Annotations*:—*Refd.* *Grey v. Tilley* (1932), 16 Tax Cas. 414; *Æolian Co. v. I. R. Comrs.*, I. R. Comrs. v. *Æolian Co.*, [1936] 2 All E. R. 219.

**673c. Income from share of residue—When residue ascertained.**—Applt. on attaining the age of twenty-five became entitled to a quarter share in the capital & income of the residue of his father's estate, which consisted mainly of real property heavily mtged. The will provided that the property was to be divided when the youngest child attained twenty-five, which happened in 1916, & not before, & that until then the exors. & trustees should apply the surplus income, after payment of legacies, annuities, etc., in reduction of the mtge. debts. In fact the exors. did not divide the property & continued, from 1916 to 1925, to apply the surplus income to reducing the mtges. All testator's debts other than the mtge. debts had been paid off before Mar. 1919, & payment of certain legacies & annuities was begun in Dec. 1919, but no payment was made to the residuary

legatees until 1921, after which small annual payments were made. The delivery of a residuary account was not necessary in this case as no legacy duty was payable on the residue. Assessments to super tax for the years 1920–21 to 1925–26 were made upon the applt. to include one-fourth of the income from the property, less annual charges, but without deduction for repayment of mtges.:—*Held*: so long as the mtge. or other debts remained unpaid the exors. were entitled to retain any assets coming to their hands, the applt. did not enforce conveyance to himself of his share of the residue, & therefore the income arising from his share was not his income for super tax purposes.—*DAW v. INLAND REVENUE COMRS.*, *DUFF-DUNBAR v. INLAND REVENUE COMRS.* (1928), 14 Tax Cas. 58.

*Annotations*:—*Expld. & Distd.* *I. R. Comrs. v. Smith*, [1930] 1 K. B. 713. *Consd.* *Wahl v. I. R. Comrs.* (1933), 149 L. T. 203.

**673d. — Question of fact.**—A testator by his will devised & bequeathed all his real & personal estate to exors., whom he also appointed trustees upon trust to sell & convert, with power to postpone, & after payment of his funeral & testamentary expenses, debts & legacies, to divide the residue amongst his children in equal shares. At the time of testator's death the estate was subject to mtges. of considerable amount. The exors. had from time to time made advances to the children, & were in the habit of crediting a beneficiary's share of the income of the residuary estate in reduction of the interest on & if sufficient, the capital of the advances to him. One of testator's sons having been assessed to super tax for the year ending Apr. 5, 1926, on income which included the sum so credited to him in the preceding year, appealed against the assessment on the ground that the residue had not as yet been ascertained, inasmuch as there was a mtge. on the estate for a large sum, which was still outstanding, & therefore that he had no income from testator's residuary estate to which super tax could attach. The Comrs. held that in those circumstances they were precluded by *Daw v. Inland Revenue Comrs.*, No. 673c, from holding that the residue had been ascertained, & they discharged the assessment:—*Held*: the question whether the residue had been ascertained & the bequest assented to by the exors. was a question of fact to be determined by the Comrs. & not by the ct.; there was no rule of law that the mere existence of an outstanding mtge. prevented the residue from being ascertained; the Comrs. had misdirected themselves in law in holding that *Daw's* case, No. 673b, prevented them from coming to a decision on the facts, & the case must be remitted to them for a finding whether on the facts the residue had been ascertained so as to constitute a trust fund; also, *Daw's* case, No. 673b, decided no principle of law, but was merely a decision on the particular facts of that case.—*INLAND REVENUE COMRS. v. SMITH*, [1930] 1 K. B. 713; 99 L. J. K. B. 361; 142 L. T. 517; 15 Tax Cas. 661, C. A.

*Annotation*:—*Consd.* *Wahl v. I. R. Comrs.* (1933), 149 L. T. 203.

**673e. —**—An assessment to sur-tax in respect of an income of £31,239 was made on

resp., L. C., for the year ending Apr. 5, 1935. The assessment included a sum of £17,073, being the gross equivalent of a sum of £13,600 13s. 9d. placed to the credit of Mrs. D. G. C. (resp.'s wife) by the exors. of the will of her late father, R. G. Mrs. D. G. C. was entitled to a life interest in three-fifths of the residuary estate of R. G., who died on Apr. 22, 1934. The residuary estate was made up by the exors. as at May 7, 1935, & evidence was given at the hearing, which the Comrs. accepted, that it could not have been made up at an earlier date. In the balance sheet & income account as at Apr. 5, 1935, kept by the exors. there appeared the sum of £13,600 13s. 9d. placed to the credit of Mrs. D. G. C. This sum, with the appropriate addition of income tax thereon, amounted to the sum of £17,073, which was included in the assessment under appeal. On behalf of the resp. it was contended (a) that the residue of the estate of the testator was not ascertained before May 7, 1935; (b) that prior to the ascertainment of the residue no income within the meaning of the Income Tax Acts arose or accrued to resp.'s wife from the estate of the testator; (c) that no part of the £13,600 13s. 9d. was received by the wife of resp. as income; & accordingly (d) that the assessment made on the resp. for the year 1934-35 was excessive by the amount of £17,073. It was contended on behalf of the Crown (1) that resp.'s wife had received at least the £17,073 above referred to, (2) that the tenant for life, resp.'s wife, could only receive income, (3) that any sum received by resp.'s wife or credited to her formed part of resp.'s income for super-tax purposes. The Comrs. upheld the contention of the Crown, but the figures having been agreed they reduced the assessment to £26,305. On appeal LAWRENCE, J., held that Mrs. C. was not entitled to anything until the residue was ascertained, & that the sum which she then received, representing the share of income which had accrued during the period of administration, was not received as such income but a sum equal to the income, & the amount was therefore wrongly included in the computation of surtax. On appeal by the Crown:—*Held*: the case was governed by the principle laid down by the House of Lords in *Dr. Barnardo's Homes v. Special Comrs. of Income Tax*, [1921] 2 A. C. 1; 28 Digest 84, 483, that until the residue was ascertained in due course of administration the beneficiaries had no title to that residue; & (2) the existence of the rule in *Alhusen v. Whittell* (1867), L. R. 4 Eq. 295; 23 Digest 464, 5358, did not alter the fundamental fact that during the period of administration the income was the income of the exors. & of no one else.—CORBETT v. INLAND REVENUE COMRS., [1938] 1 K. B. 567; [1937] 4 All E. R. 700; 107 L. J. K. B. 276; 158 L. T. 98; 54 T. L. R. 279; 82 Sol. Jo. 34; 21 Tax Cas. 449, C. A.

674. *Add. Annotation*:—*Consd. Denny (H. & A.) v. Reed* (1933), 18 Tax Cas. 254.

674a. *Annual value of family mansion occupied under will.*—*Held*: the occupant of a family mansion, under the terms of a will by which trustees were given general powers of management of the real estate & a discretion to admit to the mansion the present occupant

or certain members of his family during his lifetime, must be regarded as being in occupation under the will, & the profits & gains representing the annual value of the house formed part of his income for purposes of super tax.—*TOLLEMACHE v. INLAND REVENUE COMRS.* (1926), 96 L. J. K. B. 766; 136 L. T. 444; 43 T. L. R. 58; 11 Tax Cas. 277.

*Annotations*:—*Consd. Shanks v. I. R. Comrs.*, [1929] 1 K. B. 342. *Apprvd. Sutton v. I. R. Comrs.* (1929), 45 T. L. R. 585. *Consd. Stedeford v. Beloe* (1931), 47 T. L. R. 408; *Lindus & Hortin v. I. R. Comrs.* (1933), 17 Tax Cas. 442; *Johnstone Trust Settlement v. Chamberlain* (1933), 17 Tax Cas. 706; *Reed v. Cattermole*, [1936] 2 All E. R. 526. *Reid. Miller (Lady) v. I. R. Comrs.* (1930), 15 Tax Cas. 25; *Nicoll v. Austin* (1935), 19 Tax Cas. 531.

674b. *Difference between net Schedule A. assessment & reduced rental paid under lease.*—*Resp.* negotiated for a lease of a house at a rent of £135 *per annum*, but it was eventually agreed that if resp. would pay £683, which was necessary to put the premises in a fit state for habitation, a lease would be granted at a rent of £35 *per annum*. The sum of £683 was paid before the execution of the lease. The circumstances in which the rent was fixed at £35 *per annum* were not set out in the lease, which was for a term of seven years, shortly afterwards extended for another year in consideration of resp. contributing £141 towards further repairs, but it was agreed therein that the rent under any new lease should be £140 *per annum*:—*Held*: the sums paid by resp. for repairs at the beginning of his tenancy were capital expenditure, & the difference between the net Schedule A. assessment on the house & the rent of £35 actually paid under the lease formed part of his total income for super tax purposes.—*INLAND REVENUE COMRS. v. FARGUS* (1926), 10 Tax Cas. 665.

*Annotations*:—*Consd. Shanks v. I. R. Comrs.*, [1929] 1 K. B. 342. *Reid. I. R. Comrs. v. Miller*, [1930] A. C. 222.

674c. *Beneficial occupation—Right of residence in house rent free.*—*SHANKS v. INLAND REVENUE COMRS.*, No. 11a, *ante*.

674d. ———.—*Testator* by his trust disposition & settlement directed his trustees to hold & retain his lands & estates at M. & to pay all duties & burdens & the cost of repair & maintenance & in the event of his death without issue, to allow his wife "to occupy & possess during her lifetime free of rent or taxes both landlord's & tenant's" the mansion-house of M. with the offices & furniture & other effects therein & the game on his estates. Testator having died without issue, his widow, under the terms of the trust, occupied the mansion-house & lands at M. during the year ending Apr. 5, 1920.

On an appeal by her to the Special Comrs. against an additional assessment to super tax for the year ending Apr. 5, 1921, on a sum representing (a) the annual value of the mansion-house & lands, & (b) certain payments by the trustees for rates & wages, the Comrs. upheld the additional assessment, but their determination was reversed by the First Division of the Ct. of Session as the Ct. of Exchequer in Scotland:—*Held*: (1) as occupier in her own right of the mansion-house & lands the widow was rightly assessed on the annual value of her free enjoyment as being income liable to super tax. The liability of the occupier to super tax is not determined by the question whether he has

power to let or otherwise to convert the annual value into money; (2) the money paid by the trustees for rates was paid for the benefit of the widow & ought to be included in her total income for super tax purposes.—*INLAND REVENUE COMRS. v. MILLER*, [1930] A. C. 222; 99 L. J. P. C. 87; 142 L. T. 497; 46 T. L. R. 207; 74 Sol. Jo. 138; *sub nom. MILLER (LADY) v. INLAND REVENUE COMRS.*, 15 Tax Cas. 25, H. L.

*Annotations*:—As to (1) *Distd. Reed v. Cattermole*, [1936] 2 All E. R. 526. *Generally*, *Consd. Fry v. Salisbury House Estate, Ltd.*, *Jones v. City of London Real Property Co.*, [1930] A. C. 432; *Reed v. Cattermole*, [1937] 1 K. B. 613. *Reid. Sutton v. I. R. Comrs.* (1929), 14 Tax Cas. 662; *I. R. Comrs. v. Scottish Central Electric Power Co.* (1931), 145 L. T. 169; *Michelham's Trustees v. I. R. Comrs.*, *Michelham (Lady) Exors. v. I. R. Comrs.* (1930), 144 L. T. 163; *Wolverton (Lord) v. I. R. Comrs.* (1931), 16 Tax Cas. 467; *Neumann v. I. R. Comrs.* (1933), 49 T. L. R. 212; *Brodie v. I. R. Comrs.* (1933), 17 Tax Cas. 432; *Nicoll v. Austin* (1935), 19 Tax Cas. 531; *I. R. Comrs. v. Wilson's Executors* (1934), 18 Tax Cas. 465.

**674e. Profits of partnership—Executor of deceased partner becoming partner.**—Applt. was the sole extrix. & residuary legatee of her late husband, who, until his death in 1916, was a partner in a firm. At the time of his death large sums were owing to the firm from residents in enemy countries, & by arrangement with the Inland Revenue these were allowed as bad debts, on the understanding that any sums received in respect of them should be brought into account for income tax as profits of the firm of the year in which they were received. On her husband's death applt. became a partner in the firm. In 1921 a sum was received in respect of the enemy debts, in respect of which the firm was assessed to income tax in the year ended Apr. 5, 1923. By arrangement between the partners applt. bore a proportion of the assessment in respect of the sum so received proportionate to her late husband's share of the profits:—*Held*: no part of the sum received in respect of the enemy debts formed any part of applt.'s total income for super tax purposes.—*LASSEN v. INLAND REVENUE COMRS.* (1927), 138 L. T. 463; 13 Tax Cas. 229.

*Annotation*:—*Consd. Rliden v. I. R. Comrs.*, *I. R. Comrs. v. Urwick's Executors* (1935), 19 Tax Cas. 542.

**674f. — Distributed by agreement after accumulation.**—In 1918 one of the partners in a firm died. Availing himself of certain provisions in the deed of partnership he had by his will nominated his son to be a partner & to succeed to his interests in the firm as from the date of his death. The partnership deed made such a nomination subject to the consent of the other partners, provided that such consent should not be unreasonably withheld. This consent was not given & was eventually, in 1926, formally refused. Throughout this period what would have been the deceased father's share of the profits was carried to a suspense account & remained undistributed. Under the provisions of the partnership deed if the son were admitted as a partner this share of the profits from the date of the father's death to the date of the son's admission would belong wholly to applt. in the first case; but if the son were not admitted these profits would be divisible equally between the first applt. & the three other partners. Two of the latter three retired & relinquished any claim they might have in the matter. It was agreed in

1926 that the accumulated profits should be distributed as to 25 per cent. to the one other then remaining original partner (whose exors. were appls. in the second case) & as to 75 per cent. to the first applt. This distribution was not actually made until 1928. The son in 1926 & again in 1928 attempted unsuccessfully to contest by litigation the validity of these proceedings. The Crown contended that the parties were entitled, on the basis of the 1926 agreement, to shares of 75 per cent. & 25 per cent. respectively in the profits in question year by year from 1918 onwards & were assessable to super tax accordingly. The special comrs. on appeal upheld this view. Appls. demanded cases:—*Held*: the first applt. was assessable in respect only of the 25 per cent. to which he was entitled in any event & in the second case there was no liability.—*FRANKLIN v. INLAND REVENUE COMRS.*, *SWAYTHLING'S EXORS. v. INLAND REVENUE COMRS.* (1930), 15 Tax Cas. 464.

**674g. Undistributed profits of company—Finance Act, 1922 (c. 17), s. 21—"Reasonable time"—Termination by liquidation.**—The share capital of a limited co. registered in 1922 was held by four persons, & the co. was a co. to which above sect. applied. In Feb. 1924, the directors came to the conclusion that the prosperity of the business, which was speculative, might not continue. Accounts for the year to Mar. 31, 1924, were prepared, showing a profit of approximately £34,000, & were presented at the general meeting on May 14, 1924. No dividend was declared & at the same meeting a resolution for the voluntary winding-up of the co. was passed, & a liquidator appointed. The Special Comrs. issued a direction to the co. that for super tax purposes the co.'s income for the year ended Mar. 31, 1924, should be deemed to be the income of the four shareholders. This direction was discharged by the Special Comrs. on appeal, but was restored by the Board of Referees on a re-hearing. The contention of the co. was that above sect. had no application in the circumstances of the case, & that on the passing of the resolution for winding-up it had no power to declare a dividend:—*Held*: the co., by going into liquidation while the "reasonable time" contemplated by the Act was still running, terminated that reasonable time, & that in view of the intended liquidation it would have been reasonable for them to have distributed the whole of the available income.—*SUTCLIFFE (LIONEL), LTD. v. INLAND REVENUE COMRS.* (1928), 14 Tax Cas. 171.

*Annotation*:—*Reid. Montague Burton, Ltd. v. I. R. Comrs.* (1934), 152 L. T. 8.

— **What amounts to income—Profits appropriated to endowment policies.**—Applt. co. was formed in 1918 as a private limited co. by a husband & wife, who at all times held all its issued capital except five one-shilling shares. The objects for which it was established did not include the carrying on of any business to which the Assurance Co. Act, 1909 (c. 49), applies. The only business that the co. carried on was the issuing of endowment policies & the management of the funds received by way of premiums for such policies. The only policies issued were a small number of policies issued to the

husband & wife in 1918 & 1919, payable in 1928 & 1929. After the surrender of certain policies in force only for a few months in 1918 & 1919 the only policies remaining were four policies, the consideration for each of which had been the transfer in one amount to the co. as a lump sum premium, of National War Bonds of a face value equal to the amount assured by the policy. Under these policies the co. undertook to repay the sum assured "together with any bonus which at the time of payment will be attached to the policy." There was no provision in the policies or in the co.'s articles giving the policy-holders a title to any share in the co.'s profits. The co. each year "appropriated" to the account kept for each of the policies an amount approximately corresponding to the interest on the bonds transferred as the premium for such policy & made corresponding investments, which were treated as held against the policy:—*Held*: the interest in question was income of the co. for the purposes of sect. 21.—*ENDOWMENT CO., LTD. v. INLAND REVENUE COMRS. (1929)*, 14 Tax Cas. 353.

674j. ————— Sums applied in repayment of share or loan capital or debt.]—A private limited co. was incorporated in Mar. 1915, to purchase from H. certain freehold & leasehold properties known as the C. Estate, subject to mtges. owing thereon amounting to £238,000, which were vested in H., who also held all the shares in the co. with the exception of two which were held by two directors of the co., who together with H. were the directors of the co. The Arts. of Assocn. of the co. contained an article, No. 95, which provided that "so long as any mtge. or charge affecting any property of the co. shall remain outstanding & unsatisfied the net profits of the co. shall be applied in the discharge & satisfaction, so far as the same shall be available, of the principal moneys & the moneys secured by any mtge. or charge for the time being outstanding & unsatisfied, unless the co. shall by special resolution direct to the contrary." There was also a deed poll executed by H. in Nov. 1915, by which it was provided that the net profits of the co. should be applied, without any deduction for interest on mtge. debts to which he was entitled, in the discharge & satisfaction of the principal moneys & interest payable in respect of the mtge. debts mentioned in the sched. to the deed poll, to which H. was not beneficially entitled. These outstanding mtges. were afterwards taken over by H. No dividends had ever been paid by the co., but the mtges. had been reduced from £238,000 to £186,000, & the co. had also accumulated a reserve fund of £80,000. The Special Comrs. made a direction under Finance Act, 1922 (c. 17), s. 21, which was confirmed by the Board of Referees, that for the purposes of assessment to super tax the actual income from all sources of the co. should for the periods ended June 24, 1924, 1925, & 1926, respectively, be deemed to be the income of the members of the co.:—*Held*: (1) neither art. 95 of the Arts. of Assocn. of the co. nor the fact that no special resolution had been passed by the co. altering the requirements of that article precluded the Special Comrs. from making a

direction under Finance Act, 1922 (c. 17), s. 21 (1), that the co. had not distributed a reasonable part of its income to its members, & therefore the income of the co. should for the purposes of assessment to super tax be deemed to be the income of its members; (2) the fact that Finance Act, 1927 (c. 10), s. 31 (1), expressly provided that sums expended or applied in redemption or repayment of any share or loan capital or debt should be regarded as income available for distribution among the members of the co.; & therefore in terms applied to the present case, did not prevent such sums being regarded as available for distribution among the members of the co. under the general provisions contained in Finance Act, 1922 (c. 17), s. 21 (1); (3) where there has been no distribution by a co. among its members of a reasonable part of its actual income, & in consequence a direction has been made by the Special Comrs. under Finance Act, 1922 (c. 17), s. 21 (1), that the actual income from all sources of the co. shall for the purposes of assessment to super tax be deemed to be the income of the members, the whole of the income of the co. & not merely that part of its income that might reasonably have been distributed by the co. among its members, is to be treated as being covered by the direction of the Comrs.—*COLVILLE ESTATE, LTD. v. INLAND REVENUE COMRS.*, [1930] 2 K. B. 393; 100 L. J. K. B. 101; 144 L. T. 28; 15 Tax Cas. 485.

674k. —————.]—G., Ltd., was a private co. incorporated in 1918. At all times material in the present case the whole capital was held by two persons, who were also the co.'s sole directors. G., Ltd., in pursuance of one of the objects for which it was formed, acquired in 1918 the whole issued share capital of another co. The funds necessary for this transaction were obtained partly by loans from the two directors, & partly by a loan from a bank obtained on the conditions (a) that all the shares so acquired were deposited with the bank as security, & (b) that all dividends on the shares were paid to the bank, as & when received, in reduction of the amount due to the bank. From 1919 to 1923 dividends were received & paid over under this arrangement. During these years G., Ltd., had no other income. Its expenses were met by loans from the directors who also from time to time lent to the co. further sums which were paid to the bank to reduce the balance due from the co. At May 21, 1922, the co.'s financial year ended on May 21, the amount owing to the bank was £4,965. In Nov. 1922, the bank advanced further sums with which the co. made other investments. The amount owing to the bank at May 21, 1923, was £7,933. The Special Comrs. issued "directions" under Finance Act, 1922 (c. 17), s. 21, that the dividends received by G., Ltd., during the year to May 21, 1922, £19,500, & during the year to May 21, 1923, £6,500, should be deemed to be income of the two shareholders for super tax purposes. On appeal the Special Comrs. discharged these "directions." The I. R. Comrs. required the case to be reheard by the Board of Referees, who restored the "directions." The co. appealed to the High Ct.:—*Held*:



(a) as regards the first year, the co. could not make any distribution & the decision of the Board of Referees could not stand; (b) as regards the second year, the Board of Referees were entitled to come to the decision which they had given, as there was a balance available for distribution, the amount of the dividends received having been in excess of the amount owing to the bank in respect of the 1918 loan.—*GLAZED KID, LTD. v. INLAND REVENUE COMRS.* (1930), 15 Tax Cas. 445.

*Annotations*:—*Consd. Colville Estate, Ltd. v. I. R. Comrs.* (1930), 100 L. J. K. B. 101; *Aldwarke Co. v. I. R. Comrs.* (1933), 18 Tax Cas. 125. *Refd. Montague Burton, Ltd. v. I. R. Comrs.* (1934), 152 L. T. 8; *Austins of East Ham, Ltd. v. I. R. Comrs.*, [1937] 4 All E. R. 275.

**674l.** **Income for period ending on date of winding-up resolution.**—A co. was incorporated in Feb. 1908, as a private co., & the principal shareholders on the material dates did not exceed five in number. By an agreement dated Nov. 16, 1928, the co. agreed for the sale of its assets & undertaking to a purchasing co. By clause 8 of the agreement it was provided that possession of the assets & undertaking of the co. should be retained by it up to completion on or before Dec. 15, 1928, & that from Aug. 31, 1928, the date up to which the annual accounts of the co. were made up, the co. should be deemed to be carrying on the business on behalf of the purchasing co., & should account & be entitled to be indemnified accordingly. On Dec. 20, 1928, the co. went into voluntary liquidation:—*Held*: notwithstanding the provision in clause 8 of the agreement, the income of the co. between Sept. 1 & Nov. 16, 1928, was under Finance Act, 1922 (c. 17), s. 21 (1), & Finance Act, 1927 (c. 10), s. 31 (4), income of the co. for the period from Sept. 1 to Dec. 20, 1928, available for distribution to the members of the co. which the Special Comrs. had rightly directed should be deemed, for the purpose of assessment to sur tax, income of the members of the co. to be apportioned among them.

*Per LORD HANWORTH, M.R., & SLESSER, L.J.*: The provision in sect. 21 (1) of 1922 Act, giving the Special Comrs. power so to direct only in respect of "a reasonable part of the actual income," is a limitation of the power which has no application to the income for a period ending on the date of a winding-up resolution or order, having regard to the provision in sect. 31 (4), of the latter Act that income of the period should be "deemed to be income available for distribution to the members of the co." & to the inapplicability to a period so ending of the considerations to be taken into account in fixing the reasonable part under the proviso to sect. 21 (1) of 1922 Act.—*COLLIER (H.) & SONS, LTD. v. INLAND REVENUE COMRS.*, [1933] 1 K. B. 488; 103 L. J. K. B. 33; 148 L. T. 199; 49 T. L. R. 46; 18 Tax Cas. 83, C. A.

*Annotation*:—*Refd. Montague Burton, Ltd. v. I. R. Comrs.* (1934), 152 L. T. 8.

**674m.** — **Direction by Special Commissioners — Construction of articles.**—*COLVILLE ESTATE, LTD. v. INLAND REVENUE COMRS.*, No. 674j, *ante*.

**674n.** — **Amount of income affected.**—*COLVILLE ESTATE, LTD. v. INLAND REVENUE COMRS.*, No. 674j, *ante*.

**674o.**

**"Reasonable part of income"**

**Sums carried to reserve.**—Appl. co.'s business was concerned with the dealing in & the ownership & management of property. The co.'s net profits for the year ended Mar. 25, 1928, were £38,868 & its income, computed as for income tax purposes, was approximately £26,000. Dividends were declared in respect of the year ended Mar. 25, 1928, amounting to £18,750 & £20,000 was transferred to reserve. A direction by the Special Comrs. under Finance Act, 1922 (c. 17), s. 22 (1), in respect of the year ended Mar. 25, 1928, was discharged on appeal & the appeal was re-heard by the Board of Referees. The co. contended that the allocation to reserve out of the profits of the year in question was reasonable & proper having regard, in general, to the co.'s need for a reserve for the maintenance & development of its business &, in particular, to the co.'s commitments in the way of redemption of mtgs. secured on its property & to a possible additional liability to income tax of some £20,000 dependent upon the final decision in the case of *Salisbury House Estate, Ltd. v. Fry*, which at the time of the allocation was under appeal to the Cts.). The Board of Referees held that the co. had not within a reasonable time after Mar. 25, 1928, distributed a reasonable part of its actual income for the year ended on that date & restored the Special Comrs.' direction:—*Held*: there was evidence upon which the Board of Referees could come to their decision, which was not wrong in law.—*LONDON & NORTHERN ESTATES CO., LTD. v. INLAND REVENUE COMRS.* (1931), 16 Tax Cas. 128.

*Annotations*:—*Consd. Aldwarke Co. v. I. R. Comrs.* (1933), 18 Tax Cas. 125. *Refd. Carnarvon Estates Co. v. I. R. Comrs.* (1935), 19 Tax Cas. 643.

**674p.** — **Current requirements & development of business to be considered.**—The Comrs. found that appl. co. had for the income tax year in question expended on the current requirements of its business, & other requirements advisable for the maintenance & development of that business, amounts far in excess of the profits of the year, & that the co.'s business had been so carried on as to bring it within the purview of Finance Act, 1922 (c. 17), s. 21, so that for purposes of super tax of the members of the co. the income of the co. for the year in question must be deemed to be the income of the members. The Special Comrs., the Board of Referees & FINLAY, J., & the Ct. of Appeal confirmed their decision:—*Held*: there was evidence upon which the Comrs. could find that the co., had not distributed a reasonable part of its income, & that therefore it came within the purview of sect. 21. The direction in the proviso to sect. 21 was that one of the relevant factors to which attention must be paid by the Comrs. & by the Board of Referees was the fact that the income, or sums equivalent to the income, had been spent on requirements necessary or advisable for the maintenance & development of the business; but the proviso did not mean that wherever that happened, then, whatever the facts were, the Comrs. were bound to hold that the requirements of sect. 21 had not been complied with.—*MONTAGUE BURTON LTD. v. INLAND REVENUE*



COMRS. (1936), 105 L. J. K. B. 236; 154 L. T. 355; 20 Tax Cas. 48, H. L.

674q. ——— “Under the control of not more than five persons”—Meaning of “control.”]—A private co. was formed with the object of acquiring an interest in the estate of a tenant for life under certain family settlements. Its nominal capital was £2,000 divided into 1,000 ordinary shares of £1 each & 1,000 preference shares of £1 each, there having been issued & fully paid 50 ordinary shares & 700 preference shares. The 50 ordinary shares had all along been held by the tenant for life. Of the 700 preference shares fourteen persons had acquired 50 each & had continuously held them except one who had transferred his shares to the now holder of them. The holders of the preference shares acquired them with their own moneys & were beneficial holders of them. None of them was under any agreement as to the manner in which he should use the voting powers attached to his shares. The tenant for life personally guaranteed to the preference shareholders the capital value of their shares & the dividends thereon, & in return these shareholders undertook not to dispose of their shares without first giving the tenant for life the opportunity to purchase them. The Arts. of Assocn. provided that the directors might issue the shares to such persons & on such terms as they thought fit; that seven days’ notice was to be given of all the co.’s meetings, & that the general nature of all special business must be notified to the co. in advance; & that all shares carried equal voting rights. There had been only two directors of the co. since its incorporation—namely, the tenant for life & a member of the firm of solicitors who acted for him:—*Held*: the co. was not under the “control” of not more than five persons within the meaning of Finance Act, 1922 (c. 17), s. 21 (6), as amended by Finance Act, 1927 (c. 10), s. 31, either as being under the control of the tenant for life alone or of him & his co-director jointly.

The terms of the definition clause before the ct. censured as unintelligible & ridiculous.—*HIMLEY ESTATES, LTD., & HUMBLE INVESTMENTS, LTD. v. INLAND REVENUE COMRS.*, [1933] 1 K. B. 472; 102 L. J. K. B. 383; 148 L. T. 319; 17 Tax Cas. 367, C. A.

674r. ——— Who are “members”—Whether trustees or beneficiaries.]—Directions were issued by the Special Comrs. under Finance Act, 1922 (c. 17), s. 21, in respect of applt. co.’s income for the period ending on Feb. 13, 1929, on which date the co. went into liquidation. The directions were not contested. Certain shares in the co. were held by trustees under wills, & beneficiaries under the wills were entitled for their lives to any income arising from the shares, other persons being entitled in remainder. The co. appealed against a notice of apportionment among the members of the co. of the co.’s actual income for the period in question which was issued by the Special Comrs. under Finance Act, 1922 (c. 17), Sched. I., para. 8, & contended, in regard to the shares held by the trustees, that any sums received by the trustees in the liquidation of the co. were capital & not income & that the trustees,

& not the beneficiaries, should be included in the apportionment as members of the co. The Special Comrs. confirmed the apportionment holding that, under Finance Act, 1927 (c. 17), s. 31 (4), the income of the co. for the period in question must be deemed to be income available for distribution to the members & that the beneficiaries were members of the co. within Finance Act, 1922 (c. 17), s. 21:—*Held*: the Special Comrs.’ decision was correct.—*DREW (ALEXANDER) & SONS, LTD. v. INLAND REVENUE COMMISSIONERS* (1932), 17 Tax Cas. 140.

674s. ———.]—Applt. co. was incorporated in 1924 with a nominal capital of £1,000 divided into 1,000 ordinary shares of £1 each, all but three or four of which were, in the material years, in the hands of one person. In 1925, the co. purchased the life estate in possession of certain estates from the principal shareholder of the co. in consideration of a cash payment & a specified weekly sum during his life, & entered into possession of the estates. The vendor became the managing director of the co. but received no remuneration for his services as such. The co. made profits for the years to Apr. 4, 1926, Apr. 4, 1927, & Apr. 4, 1928, amounting to £6,850, £2,411, & £8,828, respectively, but no dividend was declared by the co. in respect of any of those years. Directions were made under Finance Act, 1922 (c. 17), s. 21, that, for the purposes of assessment to super tax, the co.’s income for the three years ended Apr. 4, 1928, should be deemed to be income of the members. On appeal, the Special Comrs. confirmed the direction made in respect of the year to Apr. 4 1926, but discharged the directions made for the two later years. Both sides thereupon required a re-hearing of the appeal by the Board of Referees. On the re-hearing, the Board of Referees confirmed the direction in regard to the year to Apr. 4, 1926, & reversed the decision of the Special Comrs. in regard to the two later years:—*Held*: there was evidence on which the Board of Referees could arrive at their determination & that they had not made any error in law.—*ALDWARKE CO., LTD. v. INLAND REVENUE COMRS.* (1933), 18 Tax Cas. 125.

*Annotation*:—*Reid, Carnarvon Estates Co. v. I. R. Comrs.* (1935), 19 Tax Cas. 643.

674t. ———.]—Applt. co., an unlimited co. formed on Aug. 8, 1925, acquired by agreement dated Aug. 10, 1925 (*inter alia*) (a) a life interest in a landed estate, & (b) the fee simple of another estate in consideration of the allotment of shares in the co. to the vendor, Lord Carnarvon, who, throughout the material period, held all but one of the shares issued by the co. On Aug. 11, 1925, Lord Carnarvon was granted a lease for a yearly rent of part of one of the estates, the co. covenanting to pay rates & taxes. The lease did not comprise the shooting rights over the estate; during the year to July 31, 1931, they were let & yielded a profit; in the following year they were not let & Lord Carnarvon was allowed to shoot over the estate, no rent being charged to him by the co. During the two years ended July 31, 1932, the co. advanced sums of money to Lord Carnarvon, without security other than

deposit notes signed by him. No interest was paid on the small amount repaid during that period nor was interest credited in the co.'s accounts for these years. These accounts, which made no provision for either the depreciation of the co.'s securities or the wasting of the life interest acquired by it, showed profits in each year of over £4,000 & credit balances of £3,091 & £7,327 at July 31, 1931, & July 31, 1932, respectively. No dividend was paid by the co. for these years. Directions were made under Finance Act, 1922 (c. 17), s. 21 (1), that, for the purposes of assessment to sur tax, the co.'s income for the years ended July 31, 1931, & July 31, 1932, was to be deemed to be the income of its members for these years. On appeal the Special Comrs. confirmed the directions:—*Held*: there was evidence on which the Special Comrs. could arrive at their determination & they had not made any error of law.—*CARNARVON ESTATES CO. v. INLAND REVENUE COMRS.* (1935), 19 Tax Cas. 643, C. A.

**674u.** — — — — —.]—By agreement dated Dec. 11, 1934, applt. co., a private co. under the control of not more than five persons, agreed to sell its assets & undertaking to a newly incorporated co. as from Dec. 2, 1933, the date to which its last accounts prior to the agreement had been made up; as from that date applt. co. was to be deemed to have been carrying on business on behalf of the new co. & to account & be indemnified accordingly. On Dec. 22, 1934, a balance sheet & profit & loss account of applt. co. were made up, showing a profit on the sale of its business of £58,962, & the new co. also made up an account to that date showing profits earned in respect of the period prior to its incorporation (arrived at by apportioning the profits of the business from Dec. 3, 1933, to Dec. 22, 1934) amounting to £15,225. It was agreed that income tax should be charged in respect of applt. co.'s trading profits on the basis of this account. On appeal against a direction of the Special Comrs. under sect. 21 of Finance Act, 1922, in respect of the period ended Dec. 22, 1934, the co. contended that it could not after Dec. 22, 1934, have distributed to its members any part of its income for that period; it had no income within Income Tax Acts for that period; & the direction could not legally be made. The direction was discharged by the Special Comrs. on appeal, but on a re-hearing by the Board of Referees it was restored:—*Held*: the decisions in law of the Board of Referees were correct & they had evidence before them on which they could reach their conclusions.—*JOHN WHITE'S TRUST, LTD. v. INLAND REVENUE COMRS.* (1937), 21 Tax Cas. 391.

**674v.** — — — — — *Finance Act, 1936 (c. 34)—Investment company in liquidation before Act in operation.*—Applt. co. in the first case (an investment co. if within sect. 20 of Finance Act, 1936 (c. 34), & under the control of not more than five persons if within sects. 19 & 20 of that Act) went into liquidation on Aug. 2, 1935. Finance Act, 1936 (c. 34), received the Royal assent on July 16, 1936. On appeal against a direction of the Special Comrs. under sect. 21 of Finance Act, 1922 (c. 17), as extended by sect. 31 of Finance

Act, 1927 (c. 10), & sects. 19 & 20 of Finance Act, 1936 (c. 34), in respect of the period from July 1, 1934, to Aug. 2, 1935, the co. contended that these sects. could not be applied in respect of the period in question having regard to the fact that it went into liquidation before Finance Act, 1936 (c. 34), became law. The Special Comrs. confirmed the direction.

The facts in the second case were similar to those in the first case with the exception that applt. co. went into liquidation on Feb. 3, 1936, & that the Special Comrs. confirmed, on appeal, directions in respect of the year ended Dec. 31, 1935, & the period from Jan. 1, 1936, to Feb. 3, 1936:—*Held*: the Special Comrs.' decision in each case was correct.—*KASTAMONIA COPPER SYNDICATE, LTD. v. INLAND REVENUE COMRS.*, *BIRMINGHAM CRITERIONS, LTD. v. INLAND REVENUE COMRS.* (1938), 21 Tax Cas. 588.

**674w.** — — — — — *Apportionment to loan creditors—Amount apportionable.*—An investment co. had issued debentures, & the holder of the debentures was therefore a loan creditor within the meaning of the Finance Act, 1936 (c. 34), s. 20. For the year ending Nov. 30, 1935, the gross income of the co. was £8,020 6s. 5d. The gross expenditure was £983 10s. 10d. The Crown contended that the difference in these amounts, £7,036 15s. 7d., was the co.'s actual income, & should be apportioned, as to £225, to the shareholders, & as to £6,811 15s. 7d., to the loan creditor. The net income of the co. was £6,215 15s., the payments made to it being subject to deduction of tax. The expenditure of the co. was also subject to deduction of tax, & its net expenditure was £973 13s. 1d. The net cash available in the co.'s hands for the redemption of the debenture was £5,242 1s. 11d. The co. in fact paid the loan creditor £5,200 in part redemption of the debenture which was the instalment of capital agreed to be repaid in that year:—*Held*: (1) the Special Comrs. can only apportion to loan creditors the actual amount of the income expended in discharge of their loan capital, & not that amount grossed up by the addition of tax thereon; (2) the Special Comrs. could apportion to loan creditors only the sum actually paid in redemption of debt, & not a sum larger than that. Although the co. had income sufficient to redeem a larger amount of the debt, that larger sum was not a sum "available to be expended or applied in redemption" within Finance Act, 1936 (c. 34), s. 20 (4) (b).—*INLAND REVENUE COMRS. v. KERED, LTD.*, *KERED, LTD. v. INLAND REVENUE COMRS.*, [1938] 2 All E. R. 564.

**674x.** — — — — — *Finance Act, 1927 (c. 10), s. 31—Liquidation.*—Applt. co., the accounts of which had been made up to Mar. 31, 1934, entered into negotiations for the sale of its business. The co. went into voluntary liquidation on Apr. 30, 1935, without having distributed its profits for 1934–1935. The liquidator then sold the business of the co., as at Mar. 31, 1934, to a new co., & the accounts for the year to Mar. 31, 1935, were not prepared until after the sale had been completed. The Special Comrs. directed that the profits shown for the year 1934–1935 should be deemed to be the income of the

members of the co. for the purposes of surtax. The co. appealed:—*Held*: (1) in the event of a liquidation, the words in Finance Act, 1927 (c. 10), s. 31, relate to any period for which accounts have not in fact been made up, & the Special Comrs. were entitled to consider the period 1934–1935; (2) although it might have been reasonable to retain the profits in the business, had there been no liquidation, the fact of liquidation in this case made it no longer reasonable or possible to retain profits for the requirements of the business.—*AUSTINS OF EAST HAM, LTD. v. INLAND REVENUE COMRS.*, [1937] 4 All E. R. 275; 21 Tax Cas. 411.

**674y. Sums expended by trustees—Upkeep of trust property.**—Applt. was the tenant for life of a mansion & land under a will which provided that the trustees should pay all outgoing & expenses of keeping up the property. Applt. was assessed to super tax in respect of the sums so expended by the trustees:—*Held*: as applt. had had the benefit of the sums expended by the trustees, he was properly assessed to super-tax in respect thereof.—*SUTTON v. INLAND REVENUE COMRS.* (1929), 45 T. L. R. 565; 14 Tax Cas. 662, C. A.

*Annotations*:—*Reid*, I. R. Comrs. v. Forster (1935), 79 Sol. Jo. 657; *Reed v. Cattermole*, [1936] 2 All E. R. 526.

**674z. — Payment of rates.**—*INLAND REVENUE COMRS. v. MILLER*, No. 674d, *ante*.

**674aa. Dividends paid out of fund not assessed to income tax.**—Where a shareholder receives a dividend from a limited liability co. paid out of a fund consisting of income received by the co. in earlier years, which owing to the principles of measurement of income tax has not in fact been assessed to income tax, such dividend is not liable to assessment to the shareholder's super tax.—*GIMSON v. INLAND REVENUE COMRS.*, [1930] 2 K. B. 246; 99 L. J. K. B. 532; 143 L. T. 704; 15 Tax Cas. 595.

*Annotations*:—*Distd.* *Hamilton v. I. R. Comrs.*, [1931] 2 K. B. 495; *Neumann v. I. R. Comrs.*, [1934] A. C. 215; *Benn v. I. R. Comrs.*, [1937] 3 All E. R. 852. *Consd.* *I. R. Comrs. v. Cull*, [1938] 2 K. B. 109.

**674bb. —**—A co. owning real property in the City of London was assessed to income tax under Sched. A. The profits of the co. largely exceeded the amount at which it was assessed & on which it paid income tax. Out of a surplus of rents received over & above the amount of income tax paid, the co. on Apr. 4, 1930, distributed a dividend amounting in the case of one shareholder to the sum of £4,275:—*Held*: by virtue of rule 20 of the General Rules applicable to Schedules A., B., C., D., & E., & of Finance Act, 1927 (c. 10), ss. 38 (2), 39 (2), the shareholder was obliged to include this sum in his return for the purpose of an assessment to surtax as being part of his income tax income, although free from tax under Sched. D.—*NEUMANN v. INLAND REVENUE COMRS.*, [1934] A. C. 215; 103 L. J. K. B. 210; 150 L. T. 481; 50 T. L. R. 246; 78 Sol. Jo. 121; 18 Tax Cas. 332, H. L.

*Annotations*:—*Distd.* *I. R. Comrs. v. Pearson*, I. R. Comrs. v. Pratt, [1936] 2 All E. R. 731. *Expld. & Distd.* *Shrewsbury & Talbot (Countess) v. I. R. Comrs.*, [1936] 2 All E. R. 101. *Consd.* *Barnes v. Hely Hutchinson*, [1938] 3 All E. R. 98. *Distd.* *I. R. Comrs. v. Cull*, [1938] 2 K. B. 109. *Reid.* *Duncan's Executors v. Adamson*, [1935] A. C. 398; *Astor v. Perry*, [1935] A. C. 398; *Benn v. I. R. Comrs.*, [1937] 3 All E. R. 852; *Re Home Grown Sugar, Ltd.*, [1938] Ch. 219.

**674cc. Dividends paid out of profits assessed at nil.]**

—Applt., a shareholder in a co., received in 1923 two dividends less income tax deducted by the co., such dividends being the distribution of profits received by the co. from foreign possessions in the first year of its existence. Applt. was assessed to & paid super-tax upon these dividends & upon the income tax deducted from them. It was later decided by the House of Lords that, upon the proper construction of the rules, these profits were not assessable to income tax in the first year of the co.'s existence, though they would be assessable in later years. Under this decision the sum paid by the co. to the Inland Revenue in respect of the first year was returned to the co., & ultimately the co. paid to its shareholders a sum equal to the tax deducted in 1923. Applt. was assessed to surtax on the amount so paid to him:—*Held*: (1) these payments were properly chargeable to surtax & that did not amount to double taxation, because the distribution in 1923 was of profits assessed by reason of the rules at nil, & not of profits not assessable at all; (2) in any event Finance Act, 1931 (c. 28), s. 7, was applicable to the distribution.—*BENN v. INLAND REVENUE COMRS.*, [1937] 3 All E. R. 852; 81 Sol. Jo. 845.

**674dd. Dividends exceeding income of company for income tax purposes.**—Applt. was the holder of shares in a limited co. which, during the year 1928–29, paid dividends exceeding in amount the income of the co., as computed for income tax purposes, for the periods in respect of which the dividends were declared. The dividends were paid under deduction of income tax at the standard rate. On an appeal against an assessment to surtax, which included the full amount of the dividends, he contended that his income from to co., for surtax purposes, could not exceed the proportion received by him of the co.'s statutory income" for the relative periods, i.e. the total amounts on which the co. had borne or been liable to income tax by deduction or direct assessment, less the amount of interest or other annual payments on which it had recovered tax by deduction:—*Held*: the full amount of the dividends was properly included in the assessment of surtax.—*HAMILTON (F. H.) v. INLAND REVENUE COMRS.*, [1931] 2 K. B. 495; 100 L. J. K. B. 693; 145 L. T. 303; 16 Tax Cas. 213, C. A.

*Annotations*:—*Consd.* *Neumann v. I. R. Comrs.*, [1934] A. C. 215. *Reid.* *I. R. Comrs. v. Cull*, [1938] 2 K. B. 109.

**674ee. Income received as administrator—Administrator also sole beneficiary.**—Applt.'s father & brother died intestate leaving him sole next-of-kin, & he took out letters of administration to both estates. As such administrator he received both those estates chiefly in the form of cash & he invested the money—which was paid into a bank in his own name—in industrial securities. He was assessed to super tax in respect of the income from those securities. During the periods covered by the assessments there were admittedly unsettled claims outstanding for estate duty. There was not sufficient evidence that the income from the securities had been appropriated by applt. to his own use, & in those circumstances it was held that the income of the securities in the hands

of applt. remained income received by him in his capacity as administrator & was not assessable to super tax as his own income.—*WAHL v. INLAND REVENUE COMRS.* (1933), 149 L. T. 203; 49 T. L. R. 379; *sub nom.* *INLAND REVENUE COMRS. v. WAHL*, 17 Tax Cas. 744, H. L.

*Annotation* :—*Consd.* *Corbett v. I. R. Comrs.*, [1938] 1 K. B. 567.

**674ff. Annual sums payable to servants by deed.]—**

By a deed made in Aug. 1930, resp. covenanted to pay A., a gardener in his employment, a yearly sum of £98 16s. by weekly payments of £1 18s. for a period of seven years or during the joint lives of the parties, & it was agreed that the payments were without prejudice to the remuneration to which A. should be entitled for services, if any, thereafter rendered.

Before the deed was executed resp.'s solrs. on his instructions wrote to A. a letter the material parts of which were as follows: "On the 6th inst. we read over with you a deed of covenant which the Duke of Westminster has signed in your favour. . . . We explained that there is nothing in the deed to prevent your being entitled to & claiming full remuneration for such further work as you may do, though it is expected that in practice you will be content with the provision which is being legally made for you for so long as the deed takes effect with the addition of such sum, if any, as may be necessary to bring the total periodical payment while you are still in the Duke's service up to the amount of the salary or wages which you have lately been receiving. You said that you accepted this arrangement, & you accordingly executed the deed. . . . If you are still quite satisfied, we propose to insert the 6th inst. as the date of the deed, & we shall be obliged by your signing the acknowledgment at the foot of this letter & returning it to us." A. signed the acknowledgment accepting the provision made for him & agreeing to the deed being dated & treated as delivered & binding on the parties thereto. The acknowledgment was stamped with a sixpenny stamp :—*Held* : sums paid yearly under the above-mentioned documents were annual payments within Sched. D., Case III., r. 1, & r. 19, s. 1, of the Rules applicable to Scheds. A., B., C., D. & E. of 1918 Act, & were not payments of salary or wages; & consequently resp., being entitled to deduct tax from the payments, was entitled to deduct the payments themselves in arriving at his total income for the purposes of sur tax.—*INLAND REVENUE COMRS. v. WESTMINSTER (DUKE)*, [1936] A. C. 1; 104 L. J. K. B. 383; 153 L. T. 223; 51 T. L. R. 467; 79 Sol. Jo. 362; *sub nom.* *WESTMINSTER (DUKE) v. INLAND REVENUE COMRS.*, 19 Tax Cas. 490, H. L.

*Annotations* :—*Consd.* *Carnarvon (Earl) v. I. R. Comrs.* (1934), 19 Tax Cas. 455, *Refd.* *Kemp v. Evans* (1935), 20 Tax Cas. 14; *I. R. Comrs. v. Morgan-Grenville-Gavin*, [1936] 1 All E. R. 895; *Cronk & Sons, Ltd. v. Harrison* (1935), 153 L. T. 368; *Eastern National Omnibus Co. v. I. R. Comrs.*, [1938] 3 All E. R. 526.

**674gg. Dividends received by shareholder—Paid to other persons—Reorganisation of company.]**

—Applt., who owned or controlled the whole of the issued share capital, consisting wholly of ordinary shares, of a co., entered into an agreement on Dec. 10, 1928, for the sale to

purchasers of one-half of these shares. The agreement for sale provided (*inter alia*) (a) that a cash consideration should be paid to applt.; (b) that arrangements should be made for the increase of the co.'s nominal capital by the creation of 8 per cent. cumulative preference shares & additional ordinary shares, & for the issue of those new shares, & of the balance of the originally authorised ordinary share capital, to applt. & the purchasers in equal parts; (c) that applt. should nominate the purchasers as allottees of the preference shares to which he so became entitled; (d) that the purchasers should be entitled to receive any dividend declared by the co. after Sept. 30, 1927, in respect of their shareholding. The cash consideration was paid by Dec. 21, 1928. On the date of the agreement applt. gave the purchasers a blank transfer for one-half of the then issued ordinary shares. This transfer was not registered by the co., but later in Dec. 1928, applt. gave the co. a mandate to pay to the purchasers all future dividends on a moiety of the ordinary shares. The 8 per cent. cumulative preference shares & the additional ordinary shares were not issued & allotted until Dec. 11, 1929, prior to which date interim & final dividends for the year to Sept. 30, 1929, had been declared by the co. on the existing ordinary shares. Applt., however, directed the co. to pay to the purchasers, out of these dividends, amounts equal to those to which they would have been entitled if the 8 per cent. cumulative preference shares had been created & allotted on the date of payment by the purchasers of the cash consideration under the agreement. Applt. was assessed to sur tax for 1929–30 in a sum which included one-half of the total dividends declared for the year to Sept. 30, 1929. On appeal, he contended that his liability should be restricted to a sum equal to one-half of the difference between (a) the total ordinary dividends, & (b) a sum equivalent to a dividend of 8 per cent. for the period from Dec. 21, 1928, to Sept. 30, 1929, on the amount of the preference capital provided for in the agreement for sale. The Special Comrs. decided that the payments made to the purchasers by applt. out of the dividends payable on the unsold half of his ordinary shares in the co. were applications of part of his income, & the sums so paid remained part of his total income for sur tax purposes :—*Held* : the Special Comrs.' decision was correct.—*COLE v. INLAND REVENUE COMRS.* (1934), 18 Tax Cas. 387, C. A.

**674hh. Insurance premiums paid by company on behalf of annuitant—Out of annuity.]—**

By an agreement dated Apr. 5, 1928, resp. agreed to sell his life interest in certain settled lands to a co., the consideration to be satisfied partly by the allotment of shares & partly by a cash payment of £35,100 : the agreement further provided that the co. might at its option satisfy the cash payment & any interest thereon by paying a life annuity of £5,200 to resp. without deduction except for income tax. Resp. duly conveyed his life interest by conveyance dated May 8, 1928, which acknowledged allotment of the shares & receipt of the £35,100. By a deed dated May 24, 1928, the co. covenanted, in

consideration of the payment to it by resp. of the sum of £35,100, to pay to him for the remainder of his life the sum of £433 6s. 8d. monthly without deduction except for income tax. By a further deed dated Mar. 25, 1931, in consideration of the co.'s covenant to pay resp.'s premiums on certain assurance policies on his life for a period of 11 years from Apr. 5, 1931, resp. agreed as from that date not to demand or attempt to enforce payment of a specified part of the monthly sum of £433 6s. 8d. On appeal against additional assessments to sur tax for the years 1931-32 & 1932-33 made in respect of the amount of the premiums paid by the co., with an appropriate addition for income tax, resp. contended that this amount did not form part of his income for sur tax purposes:—*Held*: the amount of the premiums paid by the co. for resp. together with an appropriate addition for income tax, formed part of resp.'s total income for sur tax purposes.—INLAND REVENUE COMRS. v. FORSTER (1935), 79 Sol. Jo. 657; 19 Tax Cas. 738.

**674jj. Tax free dividend—Paid out of profits assessed to tax.**—In paying a dividend to a shareholder the co. stated that it had not exercised its right to deduct income tax & that the dividend was paid in full. The dividend was paid out of accumulated profits & income tax had been paid on profits for the year in the hands of the co.:—*Held*: the dividend so paid was the net & not the gross income, & in making his return for sur tax the shareholder must add to it the amount of income tax thereon at the standard rate for the year.—INLAND REVENUE COMRS. v. PEARSON, INLAND REVENUE COMRS. v. PRATT, [1936] 2 K. B. 533; [1936] 2 All E. R. 731; 105 L. J. K. B. 639; 155 L. T. 351; 52 T. L. R. 538; 80 Sol. Jo. 636; 20 Tax Cas. 433.

*Annotation*:—*Consd.* I. R. Comrs. v. Cull, [1938] 2 K. B. 109.

**674kk. — No profits of company assessable.**—A dividend declared on ordinary shares "without deduction of income tax" must, having regard to the Finance Act, 1931, be regarded as a dividend consisting of a net sum after deduction of income tax, & therefore, for the purpose of sur-tax, tax is payable by a shareholder in respect of his dividend on an amount arrived at by ascertaining the sum which after deduction of income tax is equal to the dividend received by him. It makes no difference that owing to losses in the preceding year no income tax is payable by the co. during the year in question, seeing that the profits & gains out of which the dividend is paid will be subjected to income tax in the following year, & that the gross amount so arrived at is not in excess of the profits or gains available for payment of the ordinary dividend.—INLAND REVENUE COMRS. v. CULL, [1938] 2 K. B. 109; [1938] 1 All E. R. 467; 107 L. J. K. B. 512; 158 L. T. 201; 54 T. L. R. 412; 82 Sol. Jo. 134, C. A.

**674ll. Arrears of debenture interest—Year of assessment.**—Applts. were the exors. of a holder of debentures issued by a private co. on which no interest had been paid up to 1920. In that year a scheme was adopted for the reorganisation of the debenture debt of the

co. by which for a certain consideration the debenture holders agreed to the cancellation of the debentures, to leave the accumulated arrears of interest thereon unsecured & to postpone their claims to such interest until the claims of unsecured creditors were satisfied. Eventually in 1928 & 1929 funds became available for the payment of some of the arrears of interest & in these years payment was made to the debenture holders of sums representing interest for the periods from Aug. 1904, to Sept. 1907, & from Sept. 1907, to Mar. 1910, respectively, income tax being deducted on each occasion at the rate in force at the time of payment. On appeal against an assessment to sur tax for the year 1929-30, which included the sum received in 1929 in respect of the interest for the period from Sept. 1907, to Mar. 1910, applts. contended (a) that the sum in question did not form part of the debenture holder's income for sur tax purposes for that year, (b) that, if it did form part of his income for sur tax purposes, it was receivable in the years 1907-8 to 1909-10 inclusive & not in the year in which it was actually received, & (c) that so much of the arrears of interest paid in 1929 as had accrued prior to Apr. 6, 1909, from which date super tax was first imposed, must be excluded from the computation for the purposes of assessment to super tax or sur tax. The Special Comrs. rejected these contentions & confirmed the assessments:—*Held*: the sum in question was paid under the arrangement made in 1920 & not under the obligations under the original debentures, that it did not become due & payable until 1929 & that accordingly, by virtue of Finance Act, 1927 (c. 10), s. 39, it must be deemed to be income of the year 1929-30 for sur tax purposes.—CHAMPNEY'S EXECUTORS v. INLAND REVENUE COMRS. (1934), 19 Tax Cas. 375, C. A.

*Annotation*:—*Refd.* Dewar v. Inland Revenue Comrs. (1935), 19 Tax Cas. 561.

**674mm. Sale of interest coupons.**—Miss P. was the owner of bearer bonds of the City of Budapest. Interest payments in sterling were stopped by a decree of the Hungarian Govt. & the Municipality of Budapest was required to pay into the Hungarian National Bank an equivalent sum in pengos to the credit of a foreign creditors' fund, out of which holders might obtain payment of their interest coupons in pengos, subject to the proceeds being applied to certain purposes within Hungary. Miss P. was also the holder of certain bearer bonds of the Kingdom of Yugoslavia. In respect of these bonds the Govt. of Yugoslavia suspended payment in New York, offering holders the option of payment in dinars in Belgrade, subject to restrictions on the use to which the dinars could be put, or payment of 10 per cent. in dollars, & the issue of funding bonds for the remainder. Miss P. did not avail herself of any of these options, but sold to agents, at a discount, the coupons of both sets of bonds as they fell due. The question to be determined was whether the gross sums received by Miss P. during the year ending Apr. 5, 1933, from the sale of the coupons of the City of Budapest bonds & the gross sums received by her during the year ending Apr. 5, 1934, from the sale of coupons of the bonds of

Yugoslavia respectively formed part of her total income from all sources for those two years, so as to render her liable to be assessed for sur-tax in respect of them. The Special Comrs. decided this question in favour of the Crown in relation to the Budapest bonds & in favour of Miss P. in relation to the Yugoslavia bonds. An appeal by the Crown & a cross-appeal by Miss P. were taken to FINLAY, J., who decided both in favour of Miss P. On an appeal to the Ct. of Appeal by the Crown in both cases:—*Held*: as to both sets of bonds that the proceeds of sale were not income arising to Miss P. either under Case IV. of Sched. D or under Sched. C, & did not fall to be included in her total income for the purposes of assessment to sur-tax.—INLAND REVENUE COMRS. v. PAGET, PAGET v. INLAND REVENUE COMRS., [1938] 2 K. B. 25; [1938] 1 All E. R. 392; 107 L. J. K. B. 657; 158 L. T. 187; 54 T. L. R. 404; 82 Sol. Jo. 172, C. A.

**674nn. Interest in residue—Whether vested or contingent.**—The trustees of a will were directed to hold, apply & convey the residue of testator's estate to & for the behoof of his son. It was declared (a) that, until the son should reach the age of twenty-five, the trustees should apply the whole or part of the income, at their discretion, for his maintenance, education & upbringing; (b) that, upon his attaining twenty-five years, the son should be paid one-half of the capital absolutely, & should receive the income of the remaining half until he was thirty, when that half was to be paid to him absolutely. It was further declared "that it shall be a condition of this bequest of capital of the residue to my said son that he shall be able to speak & write French & German fluently & shall pass the Civil Service examination & obtain a first-class certificate therein, & further that before he shall obtain the control of the capital of said residue or any part thereof he shall spend at least one year in making a voyage round the world outside the limits of the Continent of Europe." The trustees were also given power to settle the capital on the son for life with remainder to his issue. On appeal against assessments to sur tax made on the son on the footing that he had a vested interest in the residue of his father's estate, resps. (as the son's tutors) contended that the son, who had not attained twenty-five, had no vested interest in the residue because the bequest of capital was subject to suspensive conditions, & that in these circumstances his interest was contingent only. The Special Comrs. held that the residue was not vested in the son & they accordingly discharged the assessments:—*Held*: the Special Comrs.' decision was correct.—INLAND REVENUE COMRS. v. KIDSTON (1936), 20 Tax Cas. 603.

**674oo. Loan repaid by other company—Distribution.**—Applt. was an ordinary shareholder in a co. which in 1922 & 1923 advanced

sums at interest to another co. The interest on the loan was duly paid under deduction of income tax, but after Apr. 1924, the lending co. regarded the loan as a doubtful debt & applied all interest receipts to writing down its value. In 1933, however, the loan was repaid in full & the co. credited the surplus over the written-down value of the loan in its books to profit & loss account. In July, 1934, the co. distributed part of this amount as "capital (surplus or) profit" to its ordinary shareholders. On appeal against an assessment to sur-tax for the year 1934-35 which included the amount so received by him, with an appropriate addition for income tax, applt. contended that the distribution was a distribution of a capital surplus & did not form part of his income for sur-tax purposes; alternatively, that the sum received was not a net amount to which an addition on account of income tax should be made in computing liability to sur-tax. The Special Comrs. decided that the sum received by applt. represented a dividend paid out of a fund of taxed income & that the corresponding gross amount formed part of his income for sur-tax purposes for the year 1934-35:—*Held*: the Special Comrs.' decision was correct.—DIXON v. INLAND REVENUE COMRS. (1937), 21 Tax Cas. 365.

**674pp. Trust fund—Contingent gift—Liability of intermediate income.**—INLAND REVENUE COMRS. v. ABBEY (1938), 82 Sol. Jo. 729.

**675. Add. Annotation:—Apprvd.** Lewis v. I. R. Comrs., [1933] 2 K. B. 557.

**675a. —.**—For the purpose of an assessment to super tax of a partner under sect. 20 of 1918 Act, his income from the profits of the partnership is to be ascertained by dividing among the partners the income of the firm assessable to income tax under Sched. D. for the preceding year, & the division is to be made, first, by allocating to each partner any salary, commission, or interest on capital to which he is entitled for the year of assessment, & secondly, by dividing the balance of that income among the partners in the proportion provided by the partnership deed.—LEWIS v. INLAND REVENUE COMRS., [1933] 2 K. B. 557; 103 L. J. K. B. 689; 149 L. T. 511; 18 Tax Cas. 174, C. A.

**677. Add. Annotation:—Appld.** I. R. Comrs. v. Sneath (1932), 43 T. L. R. 241.

**677a. Super tax assessment for former year—Whether conclusive against taxpayer.**—INLAND REVENUE COMRS. v. SNEATH, No. 689a, *post*.

**680. Add. Annotations:—Refd.** Hartland v. Diggin, [1926] C. A. 289; Sutton v. I. R. Comrs. (1929), 45 T. L. R. 565; Hamilton v. I. R. Comrs., [1931] 2 K. B. 495; I. R. Comrs. v. Pearson, I. R. Comrs. v. Pratt, [1936] 2 All E. R. 731; Weight v. Salmon (1935), 19 Tax Cas. 174.

**PART XI. SECT. 3, SUB-SECT. 3.—A.**  
*st. Lump sum paid to retiring partner.*—One of the partners of a firm having retired, the partnership business was continued by the remaining partners, & the retiring partner received £1,500 "in full satisfaction of his whole share & interest in the profits of the year current at the date of dissolution of the original partnership,"

& it was further provided that there should be paid to him quarterly "out of the future profits of the business" sums amounting to £500 for the first year, & diminishing gradually to £100 for the fifth year:—*Held*: (1) the £1,500 was not a share of the profits of the firm, but the price or consideration paid for a discharge by the retiring partner of his claim to partici-

pate in the profits of the firm prior to his retirement, & the agreement did not affect the ascertainment of their share of the profits up to that date; (2) the quarterly payments "out of the future profits" did fall to be taken into account in estimating their profits after that date.—RUTHERFORD v. INLAND REVENUE COMRS., [1926] S. C. 689; 10 Tax Cas. 683.—SCOT.



681. *Add. Annotations*:—*Consd. Sutton v. I. R. Comrs.* (1929), 14 Tax Cas. 662. *Expld. Michelham's Trustees v. I. R. Comrs., Michelham (Lady), Exors. v. I. R. Comrs.* (1930), 144 L. T. 163.

681a. ———.]—Lord M., who died on Jan. 7, 1917, by his will bequeathed an annuity of £25,000 free of income tax to his wife. The Ct. of Chancery decided that the annuity was bequeathed free of both income & super tax. The trustees of the will appealed against assessments to income tax for the five years ended Apr. 5, 1926, made upon them in respect of so much of the annuity as was not paid out of profits & gains brought into charge to tax. The will provided for the payment of the annuity primarily out of the income of the residuary estate, but, if insufficient, resort might be had to the capital of the residuary estate from time to time to make good the deficiency. The trustees alleged that for the purpose of arriving at the assessment under r. 21 of the rules applicable to all scheds. & Finance Act, 1927 (c. 10), s. 26, the amount of the annuity ought to be taken to be £25,000 with the appropriate addition to make the grossed amount which would produce £25,000 net after deduction of income tax only, which for example in 1925–26 would have been £31,250; & no addition should be made in respect of any super tax. The Crown claimed that there ought to be added that portion of the super tax assessed on the recipient of the annuity which bore the same proportion to the total super tax assessed on the recipient as the sum of £25,000, together with additions calculated on a similar basis for the previous year bore to the total income from all sources of the recipient during that year, & that a further addition should then be made to the sum so arrived at sufficient to make the total sum, after deduction of income tax at the rate current during the year, produce the sum so arrived at. The comrs. held that the payment of the super tax by the trustees

was an additional annuity to Lady M., & that in computing the amount of the annuity for the purpose of assessment under r. 21 & sect. 26 the super tax with the income tax appropriate thereto must be included:—*Held*: there had been given to Lady M. an additional annuity of such a sum as, after the deduction of the income tax thereon, would leave the amount of super tax for which she was chargeable in respect of the annuity given by the will, & income tax was payable on that additional annuity. — *MICHELHAM'S TRUSTEES v. INLAND REVENUE COMRS., MICHELHAM (EXECUTORS OF DOWAGER LADY) v. INLAND REVENUE COMRS.* (1930), 144 L. T. 163; 15 Tax Cas. 737, C. A.

*Annotations*:—*Reid. Re Reckitt, Reckitt v. Reckitt* (1932), 173 L. T. Jo. 452; *Brodie v. I. R. Comrs.* (1933), 17 Tax Cas. 432; *I. R. Comrs. v. Pearson, I. R. Comrs. v. Pratt*, [1936] 2 All E. R. 731.

682. *Add. Annotations*:—*Consd. Grey v. Tiley* (1932), 16 Tax Cas. 414. *Reid. Lambe v. I. R. Comrs.*, [1934] 1 K. B. 178; *Æolian Co. v. I. R. Comrs., I. R. Comrs. v. Æolian Co.*, [1936] 2 All E. R. 219.

683. *Add. Annotations*:—*Distd. Wolverton (Lord) v. I. R. Comrs.* (1931), 16 Tax Cas. 467. *Reid. I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford, Gascoigne v. I. R. Comrs.*, [1927] 1 K. B. 594; *Jones v. Wright* (1927), 139 L. T. 43; *Perrin v. Dickson* (1929), 98 L. J. K. B. 883; *I. R. Comrs. v. Nettlefold, Nettlefold v. I. R. Comrs.* (1933), 18 Tax Cas. 235; *Solomon v. I. R. Comrs.* (1934), 18 Tax Cas. 227; *Dealler v. Bruce* (1934), 19 Tax Cas. 1; *Fenton's Trustee v. I. R. Comrs.*, [1936] 1 All E. R. 116; *Carnarvon v. I. R. Comrs.* (1934), 19 Tax Cas. 455; *Marland v. I. R. Comrs.* (1934), 19 Tax Cas. 467; *Westminster v. I. R. Comrs.* (1935), 19 Tax Cas. 490; *British Sugar Manufacturers, Ltd. v. Harris*, [1937] 3 All E. R. 702.

684. *Add. Annotations*:—*Apld. Perkins' Exor. v. I. R. Comrs.* (1928), 13 Tax Cas. 851.

#### PART XI. SECT. 3, SUB-SECT. 3.—B.

e. *Add. Citations*:—61 Sc. L. R. 375; 8 Tax Cas. 336.

f. *Annuity & income tax thereon*.—By an antenuptial marriage settlement a husband conveyed funds to trustees for payment of an annuity of £600 free of income tax to his wife, & for payment of the balance of the free income to himself. By a subsequent agreement, following upon divorce, the wife discharged her claims under the settlement, & the husband granted a mandate to the settlement trustees to pay an annuity of £600 free of tax to the wife, & the balance of the free income to himself. The intention of the agreement was declared to be that the wife should receive an absolutely free annuity of £600, & the husband bound himself to relieve her of income tax thereon in the event of her being found liable to pay it:—*Held*: in computing the husband's income for super tax he was entitled to deduct, in respect of the annuity, such a sum as would, after deduction of income tax, amount to £600; & that rule 23 (2) did not invalidate the payment of £600 in full to the wife, in respect (a) that the annuity was payable under the agreement out of net income belonging to the husband, which had already borne tax, & (b) that the husband had undertaken that the wife could receive such

a sum as, after deduction of tax, should amount to £600.—*HUTCHISON v. INLAND REVENUE COMRS.*, [1930] S. C. 293; 15 Tax Cas. 89.—*SCOT.*

gy. *Allowance by father to son*.—*Finance Act, 1922, s. 20 (1)*.—A father, who had paid a sum of money to his son, a married man, of full age, under a gratuitous bond by which he had bound himself to pay to the son an annuity for a period of three years, claimed to deduct the sum in question in calculating the amount of his total income for super tax purposes, on the ground that above sect. (c) applied to the case:—*Held*: the deduction was inadmissible, in respect that the income disposed fell exactly within the description contained in above sect. (b), being for a period of less than six years, & it must accordingly be deemed to be the father's income for super tax purposes.—*GILLIES v. INLAND REVENUE COMRS.*, [1929] S. C. 131; 14 Tax Cas. 329.—*SCOT.*

zz. *Loss on purchase of shares in other companies*.—In 1920 applt. co. was incorporated in India & entered into agreements with two English cos. what had promoted it & were at all times practically the only shareholders, to purchase from them a large block of shares in B. C. Ltd., the consideration being the allotment to them of an equal number of fully paid shares of

Rs. 200 each in applt. co. Half the shares were to be, & were, allotted immediately; the English cos. could retain the B. C. Ltd., shares for 3 years, & pledge them to secure their own liabilities. In 1923, no further shares having been allotted & no B. C. Ltd., shares delivered, a supplemental agreement was made under which the English cos. in 1924 sold all the B. C. Ltd., shares, the price realised & dividends being credited to applt. co.; it was part of this agreement that the shares already allotted should satisfy the original purchase consideration. In respect of super tax for 1924–25 under Indian Income Tax Act, 1922, applt. co. alleged that the transaction had resulted in a loss to them which they were entitled to deduct from profits otherwise accruing. They contended that in ascertaining the result of the transaction the allotted shares must be taken at their normal value of Rs. 200 each. It was found by the commissioner that in 1920 each share in applt. co. was worth Rs. 98:—*Held*: no loss was proved as the English cos. were liable to applt. co. for the amount by which the sum realised was less than the nominal value of the allotted shares.—*TRUSTEES CORPN. (INDIA), LTD. v. COMMISSIONER OF INCOME TAX* (1930), 57 L. R. Ind. App. 162, P. IND.



**Reid. I. R. Comrs. v. City of Buenos Ayres Tramways Co. (1904), Ltd. (1926), 12 Tax Cas. 1125; Glazed Kid, Ltd. v. I. R. Comrs. (1930), 15 Tax Cas. 445; I. R. Comrs. v. Thompson, [1936] 2 All E. R. 651.**

**684a. — Payable out of estate created by mortgage.]—**Applt. was entitled to the income for life of settled property after certain sums had been provided for other persons by accumulations out of the income. Before the sums in question had been wholly accumulated, applt., acting under powers conferred by a private Act, mtged. the income arising from the settled property during his life to raise the necessary balances. The mtges. were protected by policies upon the life of applt. The Act provided that every mtge. effected under its powers should pass an estate or interest for applt.'s life in priority to all existing interests. The mtges. were subsequently consolidated & later the consolidating mtge. was, under powers provided by another private Act, taken over by the trustees of the settled property. This second Act (*inter alia*) provided that the premiums on the life assurance policies should be a first charge on the income of the settled property & specifically directed the trustees to retain the necessary amounts out of the income & to pay the premiums as & when due. The comrs. of Inland Revenue contended that the amounts applied in payment of the premiums formed part of applt.'s income for super tax purposes:—**Held:** the income out of which the premiums were paid was not income of applt., & the amounts applied in payment of premiums did not form part of his income for super tax purposes.—**WOLVERTON (LORD) v. INLAND REVENUE COMRS. (1931), 16 Tax Cas. 467, H. L.**

**685. Add. Annotation:—Generally, Reid. I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford (1927), 96 L. J. K. B. 882.**

**687a. —.]—**The exor. of a deceased taxpayer appealed against super tax assessments which had been made on deceased in respect of his wife's income from settled funds & from certain shares. Deceased had obtained an advance of £11,000 from the trustees of his marriage settlement on the security of shares not forming part of the settled funds. Subsequently he had charged his life interest in the settled funds, thereby forfeiting it in favour of his wife. Later he was adjudicated bankrupt, & the mortgaged shares which had become practically valueless were sold by the Official Receiver for a nominal consideration to the wife, who thus became entitled to the equity of redemption. In 1920 the shares again became very valuable, & the trustees, to whom the £11,000 was still owing, issued an originating summons to the parties interested, & as a result the ct. sanctioned a compromise by which the trustees were to retain each year any amount by which the wife's aggregate income from the settled funds & the mortgaged shares, after deducting income tax & super tax on that aggregate income, should exceed £4,000. The whole balance of the debt to the trustee was thus paid off within fifteen months & deceased's exor. contended that the surplus income so applied should be deducted from the wife's total income in computing the

deceased's liability to super tax:—**Held:** the surplus income of the wife appropriated by the trustees formed part of deceased's income for purposes of super tax.—**PERKINS' EXECUTOR v. INLAND REVENUE COMRS. (1928), 13 Tax Cas. 851.**

**Annotation:—Reid. I. R. Comrs. v. Sneath (1932), 48 T. L. R. 241.**

**687b. Purchase-price of share of deceased partner.]—**By a deed of partnership it was provided (*inter alia*) that the partnership should not be determined as regards the other partners by reason of the death of one partner, & that "the purchase-money for the share of a deceased partner . . . shall be a sum equal to one-half of the share of profits for three years commencing from the first day of the month immediately following the death of such partner which would have been payable to such deceased partner had he continued to be a partner during the said period of three years." Upon the death of a partner in June 1933, sums were paid to his personal representatives on account of the purchase-price of his share for the periods July 1, 1933, to Dec. 31, 1933, & for the year ending Dec. 31, 1934. A surviving partner contended that these sums were annual payments & that, in computing his total income for surtax purposes for the years ending Apr. 5, 1934 & 1935, he was entitled to deduct his share of the sums so paid:—**Held:** payment for deceased partner's share was to be a lump sum to be paid at the end of the three years period. Such payment was a payment of a capital sum, & the surviving partner was not entitled to make the deduction claimed.—**INLAND REVENUE COMRS. v. LEDGARD, [1937] 2 All E. R. 492; 81 Sol. Jo. 378; sub nom. INLAND REVENUE COMRS. v. LEDGARD; INLAND REVENUE COMRS. v. PYMAN, 21 Tax Cas. 129.**

**Annotation:—Reid. British Salmson Aero Engines, Ltd. v. Inland Revenue Comrs., [1937] 3 All E. R. 464.**

**688a. — Single premium policy—Loan by company—Capitalisation of unpaid interest.]—**Applt. took out an insurance policy on his life in consideration of a single premium, a part of which was advanced to him by the insurance co. as a loan. The loan agreement provided that, if the interest on the loan, which was payable annually on a fixed date, was not paid on that date, it was to be deemed to be a new loan & capitalised & added to the original advance, the total amount of the loans & accrued interest being deductible from the moneys payable on the maturity of the policy. Applt. did not, as was open to him, pay in cash the loan interest as & when it fell due each year &, in accordance with the terms of the loan agreement, the net amount due, *i.e.*, after deduction of income tax, was added to the loan:—**Held:** having regard to the terms of the loan agreement, applt. must be deemed to have paid the interest payable each year by means of advances made for that purpose by the co. & such interest was accordingly admissible as a deduction in computing his income for sur tax purposes.—**CARNARVON (EARL) v. INLAND REVENUE COMRS. (1934), 19 Tax Cas. 455.**

**Annotations:—Folld. Marland v. Inland Revenue Comrs. (1934), 19 Tax Cas. 467. Consd. I. R. Comrs. v. Lawrence, Graham & Co., [1937] 2 K. B. 179.**

**688b.** ———.—]—Applt. took out two insurance policies on his life, the consideration in each case being a single premium. On the date of issue of each policy the insurance co. advanced to applt. a sum by way of a loan on the security of the policy. Under the terms of the loan agreements interest was payable on the loans each year & compound interest was to be charged on all interest remaining unpaid for more than one month after the due date, but the agreements provided that applt. was not to be personally liable for payment of any interest, which, together with the principal of the loans, could be retained by the co. out of the moneys payable on the maturity of the policies. Applt., although having ample funds for the purpose, did not pay in cash the loan interest at the due dates, & the interest, less income tax, was in each case added to the original loan in accordance with the terms of the loan agreements:—*Held*: having regard to the terms of the loan agreements between him & the co., applt. must be deemed to have paid the interest payable each year by means of advances made for the purpose by the co. & such interest was accordingly admissible as a deduction in computing his income for sur tax purposes.—*MARLAND v. INLAND REVENUE COMRS.* (1934), 19 Tax Cas. 467.

*Annotations*:—*Consd. Carnarvon (Earl) v. Inland Revenue Comrs.* (1934), 19 Tax Cas. 455; *I. R. Comrs. v. Lawrence, Graham & Co.*, [1937] 2 K. B. 179.

**688c.** ———.—]—*Interest paid.*—On Mar. 19, 1929, a life assurance policy was taken out in consideration of a single premium, a substantial part of which was met by a loan made to the assured by the co. on the security of the policy. Interest was payable on the loan each year on Mar. 19, & was in fact paid each year up to Mar. 19, 1932, inclusive. The assured died in July, 1932, & later the co. paid to his exors. the amount due on the policy & in accordance with the terms of the loan agreement, received, by way of set-off against such amount the principal of the loan & the interest due for the period from Mar. 19, 1932, to date of death. On appeal against an assessment made on them to sur tax for the year 1932–33, the exors. claimed a deduction in respect of the interest accrued from Mar. 19, 1932, to the date of death, contending that such interest was a payment whereby deceased's income for the year of assessment was or might be diminished within sect. 27 (1) (b) of 1918 Act:—*Held*: the income of deceased was not diminished by the interest in question inasmuch as it did not become due until the date of his death.—*RIGDEN'S EXECUTORS v. INLAND REVENUE COMRS.* (1934), 19 Tax Cas. 474.

**689a. Lunacy percentage.**—(1) Payments out of the income of a lunatic of his committee's remuneration & of the lunacy percentage on his clear annual income payable to the ct. under Lunacy Act, 1890 (c. 5), s. 148, & the Lunacy Rules, 1892, r. 133, cannot be deducted from a lunatic's gross income for the purpose of an assessment to super tax.

(2) A decision of the Comrs. for the Special Purposes of the Income Tax Acts in assessing super tax for a previous year that the above deductions can be made does not operate as a *res judicata* to prevent a contrary decision in assessing super tax for a later year.

*Per LORD HANWORTH, M.R. & GREER, L.J.*: The determination by Special Comrs. of the amount of an assessment to super tax is not a decision of a *lis inter partes* so as to create an estoppel by way of *res judicata*. The assessment is final & conclusive between the parties only in regard to the assessment for the particular year for which it is made.

*Per ROMER, L.J.*: The decision of the Special Comrs. upon any incidental question of fact or law, however necessary it may be for the purpose of ascertaining the income for the year of assessment, cannot be conclusive in reference to the ascertainment of the taxpayer's income for any subsequent year of assessment.—*INLAND REVENUE COMRS. v. SNEATH*, [1932] 2 K. B. 362; 101 L. J. K. B. 330; 146 L. T. 434; 48 T. L. R. 241; 17 Tax. Cas. 149, C. A.

*Annotation*:—*Reid, R. v. Income Tax Special Comrs.*, *Ex p. Elmhirst*, [1936] 1 K. B. 487.

———.]—*Compare* No. 545g, *ante*.

**689b. Remuneration of committee of lunatic.**—*INLAND REVENUE COMRS. v. SNEATH, No. 689a, ante.*

**689c. Annual sum payable by deed.**—Resp. covenanted by deed to pay a certain sum quarterly to a person (not being a child of his) for her life. The deed reserved to him a power of revocation subject to the written consent of a person named therein or of some person appointed by resp. other than his wife. Resp. claimed, in the computation of his sur-tax liability, a deduction for the payments made by him under the deed. The Special Comrs., on appeal, decided that the payments could not be deemed to be income in the hands of resp. under Finance Act, 1922 (c. 17), s. 20 (1) (a):—*Held*: resp. was entitled to the deductions claimed.—*INLAND REVENUE COMRS. v. FIRTH* (1933), 17 Tax Cas. 603.

**689d. Payments under deed to trustees for benefit of charity.**—By a deed executed in Aug. 1930, F. covenanted to pay to trustees from his general taxed income for the period of eight years from Apr. 6, 1930, or during his life, whichever should be the shorter, a specified monthly sum commencing on Apr. 6, 1930. These monthly sums were to be held by the trustees in trust for distribution among certain charities or persons, other than the disponor, as he should direct, any surplus remaining in the hands of trustees at the end of the year to be held by them for his children in such shares as they should determine. The amount of the monthly payments was increased by a supplementary deed executed in Nov. 1930. During the year 1930–31, the whole of the payments under the deeds were distributed by the trustees to various persons & societies under the disponor's directions. On appeal against an assessment to sur-tax for the year 1930–31, the disponor claimed that all the monthly payments as from Apr. 6, 1930, were deductions in arriving at his liability & that Finance Act, 1922 (c. 17), s. 20, did not apply to the deeds to make the payments part of his income for sur-tax purposes. The Special Comrs. allowed the deductions claimed, except the payments made under the principal deed for the months of Apr., May, June, & July, 1930:—*Held*: the payments made by the disponor under the deeds did

not constitute part of his income for sur-tax purposes.—*INLAND REVENUE COMRS. v. NETTLEFOLD, NETTLEFOLD v. INLAND REVENUE COMRS.* (1933), 18 Tax Cas. 235.

*Annotation* :—*Refd. Carnarvon v. I. R. Comrs.* (1934), 19 Tax Cas. 455.

**689e. Ground rent.**—Applt. was one of a group of persons who obtained a lease for ninety-nine years from Dec. 25, 1926, of certain land in the City of London, applt.'s interest being a three-thirty-seconds' share. The agreement for the lease provided for the demolition of the buildings on the site & for the erection of a new building thereon. A ground rent of a peppercorn was payable for the first eighteen months, & thereafter a specified annual rent was payable quarterly, commencing Sept. 29, 1928. The property was assessed under Sched. A., for the year 1928–29 in respect of rents from "hoardings," the amount of the assessment being less than the ground rent payable under the lease for that year. On appeal against the assessment to sur-tax made upon him for the year 1928–29, applt. claimed a deduction of the sum representing his proportion of the ground rent payable during that year. The Special Comrs. decided that the deduction in respect of the ground rent must be restricted to the amount of applt.'s share of the net income tax (Sched. A.) assessment on the property for 1928–29 :—*Held* : applt. was not entitled to the additional deduction claimed.—*SOLOMON v. INLAND REVENUE COMRS.* (1933), 18 Tax Cas. 227, C. A.

*Annotation* :—*Refd. I. R. Comrs. v. Nettlefold, Nettlefold v. I. R. Comrs.* (1933), 18 Tax Cas. 235.

**689f. Annuity—Fund appropriated insufficient—Advance charged on residue.**—By his will resp.'s father directed that the residue of his estate should be charged with an annuity to resp.'s mother & subject thereto should be held for resp. & his brother equally. The exors. appropriated certain investments as an annuity fund for the purpose of paying the annuity, & they retained other securities for the residuary fund. At the request of resp. & his brother the investments representing the residuary fund were not divided between them. The comrs. held this to be an assent by the exors. to the residuary bequest taking effect. In 1931 the income of the annuity fund was insufficient to pay the annuity. The income of the residuary fund was added, but the income still being insufficient, an overdraft was obtained, secured by the investments representing the residuary fund. Resp. sought to deduct as an annual payment for surtax purposes his share of the amounts borrowed to make up the deficiency in the annuity :—*Held* : the appropriation of the annuity fund & the assent did not release the residuary fund from the liability to make up any deficiency in the annuity. There was, therefore, no personal liability upon resp. to make any payment in respect of the annuity to bring the case within 1918 Act, s. 27 (1) (b), & the payments made were not made out of property belonging to resp., since under the will the annuitant had a right of recourse to the residuary fund. The deductions could not, therefore, be properly made.—*BOWEN v. INLAND REVENUE COMRS.*, [1937] 1 All E. R. 607 ; 81 Sol. Jo. 178 ; 21 Tax Cas. 93, C. A.

**689g. Yearly interest—What amounts to.**—In 1923 applt., one of the trustees of certain settlements, which he had made in favour of his children, realised the trust investments & re-invested the proceeds in his own name in unauthorised securities which subsequently fell in value. Subsequently, by deed dated Mar. 27, 1930, he covenanted to pay to his fellow trustees a "principal sum" made up of the proceeds of realisation in 1923 with compound interest thereon at 5 per cent. *per annum*, less income tax, from the date of realisation till Jan. 1, 1930. On appeal against assessments to sur-tax for the years 1929–30 to 1932–33 & against a refusal of the Comrs. of Inland Revenue to admit claims to relief from sur-tax under sect. 24 of Finance Act, 1923 (c. 14) (as extended by sect. 43 (3) of Finance Act, 1927 (c. 10)) for the years 1928–29 & 1929–30, applt. contended that the amount of compound interest included in the "principal sum" payable under the deed of Mar. 27, 1930, was yearly interest, & should be admitted as a deduction either for 1929–30 or for the years in which it was paid. The Special Comrs. decided that the amount in question was either a capital sum or, if it was interest, was not yearly interest by which applt.'s income was diminished for any of the years under appeal :—*Held* : the amount in question was yearly interest.—*BARLOW v. INLAND REVENUE COMRS.* (1937), 21 Tax Cas. 354.

**691. Add. Annotations** :—*Distd. Re Veale's Will & Codicils, Malone v. James* (1931), 75 Sol. Jo. 780. *Refd. Re Reckitt, Reckitt v. Reckitt* (1932), 173 L. T. Jo. 452.

**691a. — Or settlement.**—Where trustees of a settlement set apart certain sums annually for the maintenance of an infant beneficiary & allow the balance of the income to accumulate, the income that is being accumulated is "receivable" by the infant within 1918 Act, s. 5 (3) (c), & he is liable to be assessed to super tax in respect of it. But representative assessments to super tax cannot be made upon the trustees or the guardian of the infant beneficiary, either in respect of the actual total income of the infant, or in respect of a total income limited, as regards the particular trustee or guardian, to that income with which the trust or guardianship is concerned.—*INLAND REVENUE COMRS. v. LONGFORD (COUNTRESS), SAME v. PAKENHAM*, [1928] A. C. 252 ; 97 L. J. K. P. 438 ; 139 L. T. 121 ; 44 T. L. R. 410 ; 13 Tax Cas. 573, H. L.

*Annotation* :—*Refd. Re Reckitt, Reckitt v. Reckitt*, [1932] 2 Ch. 144.

**Chargeability of guardian of minor.**—*INLAND REVENUE COMRS. v. LONGFORD (COUNTRESS), SAME v. PAKENHAM*, No. 691a, *ante*.

**691c. — Payable to or for benefit of infant.**—By virtue of or in consequence of any disposition made, directly or indirectly—*Mutual trust deeds by brothers in favour of nephews.*—Resp., O., on May 28, 1929, covenanted by deed to pay to his brother, W., an annual sum by half-yearly instalments on trust for the infant son of W. until either the expiration of seven years from the date of the deed, or the death of O., or the death of W., or the death of the infant son

of W., or the death of the infant son of O., whichever should first happen. By a deed executed on the same date and in identical terms, *mutatis mutandis*, W. covenanted to pay to O. an annual sum of the same amount as that to be paid to him by O., on trust for the infant son of O., until the happening of either of the same events. It was admitted that resp. would not have made the dispositions made by him for the benefit of his nephew if his brother had not made similar provision for resp.'s own son. Resp. claimed a deduction from his total income for purposes of sur-tax of the annual amount paid by him to his brother, & not to bring into charge the amount paid by his brother to him, on the ground that neither of these sums was "income which was payable to or applicable for the benefit of a child of resp. by virtue or in consequence of any disposition made directly or indirectly by him":—*Held*: the two deeds must be read together as forming one disposition, & when they were so read, it became apparent that by making a disposition in favour of his nephew resp. directly procured the making of a similar disposition in favour of his own son which fell within Finance Act, 1922 (c. 17), s. 20. Assessment upheld, reversing the decision of the Special Comrs. & resp.'s claim disallowed.—INLAND REVENUE COMRS. v. CLARKSON-WEBB, [1933] 1 K. B. 507; 102 L. J. K. B. 253; 148 L. T. 330; 17 Tax Cas. 451.

696. After this case add:—

— Discretionary trust. ]—*See* Finance Act, 1933 (c. 19), s. 34.

696a. ——— ]—By his will testator bequeathed to his wife an annuity of such a sum as, after allowing for income tax at the highest rate for the time being & for super tax,

would yield her, free of all such tax, a cumulative net yearly sum of £3,500, & directed that there should be no apportionment of super tax between the annuity & the rest of his wife's income, but that the whole of the super tax payable by his wife up to but not exceeding super tax on £3,500 a year, with the income tax thereon added to it, should be attributed to the annuity & paid by his trustees:—*Held*: the trustees were not liable to repay to the annuitant out of residue a sum arrived at on the footing that the annuity was to bear the highest rates of super tax payable on the annuitant's total income, but were liable for no more than what would be payable on a super taxable sum of £3,500 with the income tax added thereto, namely, at the present rate of income tax, £4,200. With the present exemption, from super tax, of the first £2,000 of the income the trustees would thus have to pay the super tax payable on a total income of £6,200.—*Re* ARMAGHDALE (LORD), CRAIG v. ARMAGHDALE (LADY) (1928), 44 T. L. R. 239.

*Annotation*:—*Re*ld. Fleetwood-Hesketh v. Fleetwood-Hesketh, [1929] 2 K. B. 55.

697. *Add. Annotations*:—*Re*ld. Whitney v. I. R. Comrs., [1926] A. C. 37; I. R. Comrs. v. Pakenham, I. R. Comrs. v. Longford (1927), 96 L. J. K. B. 882; I. R. Comrs. v. Cull, [1938] 2 K. B. 109.

698. *Add. Annotation*:—*Re*ld. Elmhirst v. I. R. Comrs., [1937] 2 All E. R. 349.

700. *Add. Annotation*:—*Re*ld. Cowdray (Viscountess) v. I. R. Comrs. (1930), 15 Tax Cas. 255.

700a. ——— ]—COWDRAY (ANNIE, VISCOUNTESS) v. INLAND REVENUE COMRS. (1930), 15 Tax Cas. 255, C. A.

*Annotation*:—*Re*ld. Palmer v. Cattermole, [1937] 2 All E. R. 667.

## INDUSTRIAL, PROVIDENT AND SIMILAR SOCIETIES.

## Part I.—Nature and Objects.

4. After this case add:—  
Exemption from income tax.]—See Income

Tax Act, 1918 (c. 40), s. 39 (4), & INCOME TAX, No. 483c, *ante*.

## Part III.—Rules.

- 10a. — Allocation of part of profits to political fund.]—Where a co-operative society registered under Industrial & Provident Societies Act, 1893 (c. 39), is by its rules authorised to constitute & allocate a certain percentage of its net profits to an education & political fund, the application of these net profits for political purposes is not *ultra vires* the society & is lawful under Industrial & Provident Societies Act, 1893 (c. 39), s. 10 (6).

—CAHILL *v.* LONDON CO-OPERATIVE SOCIETY, LTD., [1937] Ch. 265; [1937] 1 All E. R. 631; 106 L. J. Ch. 92; 156 L. T. 256; 53 T. L. R. 360; 81 Sol. Jo. 199.

13. After this case add:—  
—.]—See, now, Industrial & Provident Societies (Amendment) Act, 1928 (c. 4), s. 1.  
14. Add. Annotation:—Consd. Cahill *v.* London Co-operative Society, Ltd., [1937] Ch. 265.

## Part V.—Membership.

- 27a. Withdrawal — Notice — Notice of insolvency before expiry of withdrawal notice—Effect on right to repayment.]—By the rules of an industrial & provident society incorporated under the Industrial & Provident Societies Act, 1893 (c. 39), with a capital consisting partly of withdrawable & partly of transferable shares, holders of withdrawable shares could at any time give six months' notice in writing to receive back the money paid up on their shares. An assocn. which was a member of the society gave notice dated Oct. 18, 1929, to withdraw some of its shares, & another notice dated Nov. 5, 1929, to withdraw more of them. On Mar. 18, 1930, the society's board of directors resolved to send out a notice calling an extraordinary general meeting of the society, & the notice was sent out on Apr. 8, 1930. The notice was accompanied by a circular showing that the continuance of the society was practically impossible. The meeting was held on Apr. 30, 1930, & a resolution to wind up was passed. On a summons by the liquidator asking (*inter alia*) (a) whether notices of withdrawal unexpired before the date of the notice calling the extraordinary general meeting but expired before the date of the winding-up resolution were effectual; & (b) whether the personal representatives of deceased holders of withdrawable shares who had died before the commencement of the liquidation were entitled by reason of the deaths of those shareholders to any priority in respect of repayment:—*Held*: (1) by the Court of Appeal, the assocn. having had notice during the currency of its withdrawal notices of circum-

stances which showed that the society could no longer carry on its business as a going concern, was not entitled to repayment on the maturing of its notices; (2) *Held*: by MAUGHAM, J., personal representatives of deceased shareholders were not entitled to any priority.—*Re* UNITED CITIZENS' INVESTMENT TRUST, LTD., [1932] 1 Ch. 395; 101 L. J. Ch. 17; 146 L. T. 213; 48 T. L. R. 124; 75 Sol. Jo. 869, C. A.

- 27b. — — — Effect on priority of representatives of deceased shareholders.]—*Re* UNITED CITIZENS' INVESTMENT TRUST, No. 27a, *ante*.  
27c. Right to inspect books—"Books containing the names of the members"—No right to inspect books containing names & addresses.]—A member of a registered society on Oct. 28, 1932, demanded to see the books containing the names of the members. At that time the only book containing the names of the members was a register containing, in addition to the names, the addresses & particulars of the share holdings of the members. This register was produced, open at the page containing the member's own account, but he was not allowed, as he claimed the right to do, to copy the names & addresses of the other members. Ultimately the society undertook to allow him to inspect the books containing the names of the members, & on Jan. 2, 1933, books prepared for the purpose, containing only a complete list of the names of the members without addresses or other particulars, were produced to him. Production of the register which he saw on

## PART III.

121. Alteration of rules—Profits applicable to non-members—Validity.]—An industrial & provident society can alter its rules from time to time so as to apply its profits to any lawful purpose, & is not bound to apply them only amongst its members. So long

as the purpose is lawful the rule is not contrary to the provisions of the Act, & the Registrar has a duty under sect. 7 (d) thereof to register the new rule.—*NEW ZEALAND FRUITGROWERS FEDERATION, LTD. v. REGISTRAR OF BUILDING SOCIETIES*, [1931] N. Z. L. R. 273.—N.Z.

st. Application of funds to candida-

ture of member of Parliament.—Validity.]—A society registered under 1893 Act may apply its profits to the promotion of the candidature of co-operative candidates for Parliament & local bodies, provided the rules of the society empower it to do so.—*LAFFERTY v. BARRHEAD CO-OPERATIVE SOCIETY* (1919), 1 S. L. T. 257.—SCOT.

Oct. 28, & which was still in existence, was refused. On summonses against the society for refusing to allow the member on Oct. 28, 1932, & again on Jan. 2, 1933, to inspect the books containing the names of the members, & against a director & the secretary of the society for aiding & abetting the commission of the second offence, the magistrate held that inspection of the register ought to have been given, & that the books produced on Jan. 2, 1933, were fabricated for the express purpose of defeating the member's rights:—*Held*: the words "the books containing the names of the members" could not be construed as "the books containing the names & addresses of the members." The member was not entitled to see the register, & the books produced on Jan. 2, 1933, were not fabricated, but were properly prepared for the purpose of complying with Industrial & Provident Societies Act, 1893 (c. 39), s. 17 (1), (2).—*FIRST MORTGAGE CO-OPERATIVE INVESTMENT TRUST, LTD. v. CHIEF REGISTRAR OF FRIENDLY SOCIETIES*, [1933] 2 K. B. 470; 103 L. J. K. B. 12; 149 L. T. 522; 97 J. P. 260; 49 T. L. R. 497; 77 Sol. Jo. 468; 31 L. G. R. 277; 30 Cox, C. C. 6, D. C.

35. *Add. Annotation*:—*Refd. Re Burradon &*

*Coxlodge Coal Co., Martin's Bank, Ltd. v. The Co.* (1930), 23 B. W. C. C. 7.

44. *Add. Annotations*:—*As to* (1) *Overd.* *Biddulph & District Agricultural Soc. v. Agricultural Wholesale Soc.*, [1927] A. C. 76. *Consd. Hole v. Garnsey*, [1930] A. C. 472.

45. *Add. Citations*:—*affd. sub nom.* *BIDDULPH & DISTRICT AGRICULTURAL SOCIETY v. AGRICULTURAL WHOLESALE SOCIETY*, [1927] A. C. 76; 95 L. J. Ch. 576; 136 L. T. 163; 42 T. L. R. 761, H. L.

*Add. Annotation*:—*Expld. & Distd. Hole v. Garnsey*, [1930] A. C. 472.

45a. — *Necessity for assent.*—An alteration in the rules of a Society registered under 1893 Act, requiring members of the Society to subscribe for additional shares is not binding on members who have neither voted for the alteration nor otherwise assented to it; consequently, such members cannot be placed on the list of contributories in the voluntary liquidation of the Society in respect of such additional shares.—*HOLE v. GARNSEY*, [1930] A. C. 472; 99 L. J. Ch. 243; 143 L. T. 153; 46 T. L. R. 312; 74 Sol. Jo. 214, II. L.; *revsg. S. C. sub nom. Re WILTS & SOMERSET FARMERS, LTD.*, [1929] 1 Ch. 321, C. A.

— *See, now*, Industrial & Provident Societies (Amendment) Act, 1928 (c. 4), s. 1.

## Part VI.—Property and Funds.

52a. *Exemption from income tax.*—*HUGH'S SETTLEMENT, LTD. v. INLAND REVENUE*

*COMRS.*, [1938] 4 All E. R. 516.

## Part VII.—Disputes.

57. *Add. Annotations*:—*As to* (2) *Refd.* *Biddulph & District Agricultural Soc. v. Agricultural Wholesale Soc.*, [1927] A. C. 76; *Vancouver*

*Malt & Sake Brewing Co. v. Vancouver Breweries, Ltd.*, [1934] A. C. 181.

## Part X.—Dissolution.

92. *Add. Annotation*:—*Generally, Consd. Re United Citizens' Investment Trust* (1931), 146 L. T. 213.

93a. — *Upon the final winding up of an industrial society in 1936, a dividend of just*

*over 2s. in the £ was paid, & the book debts owing to the society were assigned to pltf. Deft., a member of the society & a holder of capital paid up in the society to the extent of £7 10s., was a debtor to the society in*

### PART VI. SECT. 2.

*sf. Power to borrow—Restricted by rules.*—Where the rules of a society registered under Industrial & Provident Societies Act, 1908, which has no implied power to borrow money, authorise only borrowing by taking deposits or on bonds, borrowing by means of debentures is unauthorised & *ultra vires*.—*SADLER v. AUCKLAND CO-OPERATIVE SOCIETY, LTD.*, [1926] N. Z. L. R. 84.—N.Z.

*sk. — Duty of lender.*—A person proposing to lend money to a society registered under Industrial & Provident Societies Act, 1908, must satisfy himself as to its power to borrow, & must see that the loan which he is about to make is within the limits of that power.—*SADLER v. AUCKLAND CO-OPERATIVE SOCIETY, LTD.*, [1926] N. Z. L. R. 84.—N.Z.

*sm. Power to lend—Rural credits society.*—A rural credits society incorporated under Rural Credits Act, C. A., 1924 (c. 173), has no power to lend money directly, but merely power

to guarantee loans, & a loan made by the society cannot give it a lien or charge under the Act.—*ROBLIN RURAL CREDITS SOCIETY v. NEWTON*, [1927] 1 D. L. R. 105; 36 Man. L. R. 117; [1926] 3 W. W. R. 569.—CAN.

*so. Loan ultra vires—Guarantee by committee & shareholders—Liability.*—An industrial society, registered under Industrial & Provident Societies Act, 1893 (c. 39), obtained a loan from a bank exceeding the limit of amount allowed for borrowing under their rules. The loan was by way of an overdraft, & was arranged by the Chairman & committee of the society. A guarantee for repayment of the loan was given to the bank, signed by a number of the shareholders who were the members of the managing committee of the society. Subsequently the society got into difficulties, & eventually went into liquidation, & the bank sued on the guarantee. The guarantors admitted liability up to the limit of the borrowing powers allowed under the rules of the society, but they

contended that they were not liable for any further sum, such borrowing being *ultra vires*:—*Held*: having regard to the position of the guarantors in relation to the society both as shareholders & managing committee, & their knowledge of the limitation on their borrowing powers, their contention was unsustainable, & they were liable for the full amount guaranteed.—*MUNSTER & LEINSTER BANK, LTD. v. BARRY*, [1931] 1 I. R. 671.—IR.

### PART X. SECT. 1, SUB-SECT. 1.

*sp. Cancellation of registry.*—The ct. will make an order to wind up a society registered under 1893 Act, notwithstanding the cancellation of the registry under sect. 9 of that Act.—*Re CASTLECOMER CO-OPERATIVE SOCIETY*, [1926] 1 I. R. 238.—IR.

### PART X. SECT. 1, SUB-SECT. 3.

91 *1. Who are contributories—Liability on loan guarantee shares—Compulsory allotment.*—The F. Co.

respect of goods supplied to the extent of £22 14s. 1d. By a rule of the society, the business was to be conducted as far as possible for ready money, & credit was not to exceed four-fifths of the member's paid up share together with any other money the member might have in the society, & at the end of each quarter the capital was to be reduced by the amount of credit outstanding. It was contended that under the rule it was obligatory on the society to write down the member's capital in liquidation of his debt, & that the debt was therefore reduced accordingly, & debt. was entitled to a set-off against pltf. :—*Held* : the assignment to pltf. was an assignment subject to equities, & as the liquidator, if he had allowed such a set-off, would have been bound to call for a contribution in the liquidation of the same amount, there could be no such set-off against pltf., & he was entitled to recover the debt in full.—*LLOYD v. FRANCIS*, [1937] 4 All E. R. 489; 158 L. T. 37; 54 T. L. R. 134; 81 Sol. Jo. 1021, C. A.

- 96a. — Right to prove for loan—Ultra vires borrowing—Loan used to pay trading debts.]—The A. Co-operative Manufacturing Society entered into an agreement in 1882 with the C. Co-operative Society, one of its customers & shareholders, that all sums representing interest on the shares held by the C. Society in the A. Society together with all dividends declared on such shares, & with all bonuses on purchases made by the C. Society from the A. Society, should not be paid when due but retained as loans to the A. Society; & from

that date all such moneys upon becoming payable were transferred to a loan account & entered in an investment book of the A. Society. In that year the C. Society had subscribed & paid for 10 £1 shares in the A. Society, & in 1891 they acquired 10 more £1 shares. The loans so made were within the rules & the borrowing powers of the A. Society until Nov. 1884, when new rules were adopted, & then the said loans thereby became *ultra vires* the A. Society. In 1931 a resolution was passed for the voluntary winding-up of the A. Society. The C. Society carried in a proof for £523 0s. 6d. as due to them in respect of moneys advanced on loan under the said agreement. The liquidator rejected the proof on the ground that the debt was entirely contracted *ultra vires* the A. Society :—*Held* : (1) so much of the proof as represented moneys advanced on loan before the new rules of Nov. 1884, came into force must be admitted as being *intra vires* the society; (2) although the balance of the loan was incurred *ultra vires* the society, there was uncontradicted evidence that the moneys so borrowed were used in paying the proper trading debts of the A. Society, & were necessary to enable the receipts to balance the expenditure, & therefore on the equitable doctrine of subrogation the C. Society was entitled to rank as a creditor & to prove for the full amount of the loan.—*Re AIREDALE CO-OPERATIVE WORSTED MANUFACTURING SOCIETY, LTD.*, [1933] Ch. 639; 102 L. J. Ch. 229; 149 L. T. 92; 49 T. L. R. 365; 77 Sol. Jo. 267; [1933] B. & C. R. 114.

operative Agricultural Society, Ltd., was incorporated & registered under Industrial & Provident Societies Act, 1893. The committee were empowered by the rules of the society to obtain loans "to an extent not exceeding such amount as may be authorised by a general meeting." The rules further provided that, for the purpose of securing advances, the society might issue to every member such number of loan guarantee shares of the nominal value of £1 each as would be equal to the number of ordinary shares held by each such member, & that each member should be bound to apply for, & accept, allotment of such loan guarantee shares when making application for ordinary shares. When the allotment of the ordinary shares of the Society took place, no loan

guarantee shares were then issued or applied for. In consequence of losses which the society incurred, the committee found it necessary to obtain a bank overdraft amounting to £1,700. Subsequent trading proved unsuccessful, & in the year 1925 seven members of the committee gave their personal guarantees to the N. Banking Co., Ltd., in respect of the society's indebtedness. Notices were sent out convening a special meeting of the society & intimating that members would be asked to apply for loan guarantee shares, & that, failing applications, such shares would be issued to members to the extent to which they were obliged to accept the same. This meeting was held, & no applications for loan guarantee shares being received, such shares were forth-

with allotted to members in accordance with the terms of the notice convening the meeting. An order for the winding up of the society was made, & the chief clerk included in the list of contributories the names of the persons to whom loan guarantee shares had been allotted. The members affected moved to vary the chief clerk's certificate on the ground that they had been wrongly included in the list of contributories :—*Held* : the liability of each member to accept loan guarantee shares was an original liability from the time of his joining the society, & applts. were liable, as contributories, in respect of the loan guarantee shares allotted to them.—*Re FOREGLAN CO-OPERATIVE AGRICULTURAL SOCIETY, LTD.*, [1930] N. 1. 114.—1R.



# INFANTS AND CHILDREN.

## Part II.—The Crown as *parens patriæ*.

25. *Add. Annotation* :—*Consd. Re Carroll*, [1931] 1 K. B. 317.

## Part III.—Civil and Legal Capacity and Disabilities.

- 42a. ———.]—*Re KEANE, LUMLEY v. DESBOROUGH* (1871), L. R. 12 Eq. 115; 24 L. T. 780; 19 W. R. 1025; *sub nom. Re KEANE, Re LUMLEY v. DESBOROUGH*, 40 L. J. Ch. 617.
62. *Add. Annotation* :—*Refd. Re L. A. & B. F. M., Official Receiver v. The Debtors* (1926), 95 L. J. Ch. 258.
- 63a. ———.]—*Bill drawn during minority.*—A person is liable as acceptor of a bill of exchange, which was drawn while he was an infant, but was accepted by him after he came of age.—*STEVENS v. JACKSON* (1815), 4 Camp. 164; 171 E. R. 53, N. P.; *subsequent proceedings*, 6 Taunt. 106.
101. *Add. Annotation* :—*Refd. Re Mills, Mills v. Lawrence*, [1930] 1 Ch. 654.

## Part V.—Contracts.

145. *Add. Annotations* :—*Refd. Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181; *Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110.
146. *Add. Annotation* :—*Refd. Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110.
149. *Add. Annotation* :—*As to (2) Consd. Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181.
- 160a. *Contract for exchange of chattels.*—A contract for the exchange of chattels entered into by an infant is a contract for goods supplied, &, if not for necessities, is absolutely void under *Infants Relief Act, 1874* (c. 62), s. 1. But an action by an infant *pltf.* for the recovery of a specific chattel transferred to *deft.* under such a contract will not succeed, unless *pltf.* can show a total failure of consideration. The same principles apply in such an action as in an action for the recovery of money paid under a void agreement.—*PEARCE v. BRAIN*, [1929] 2 K. B. 310; 98 L. J. K. B. 559; 141 L. T. 264; 45 T. L. R. 501; 3 Sol. Jo. 402; 93 J. P. Jo. 380, D. O.
168. *Add. Annotations* :—*Generally, Refd. Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110; *Mercantile Union Guarantee Corp., Ltd. v. Ball*, [1937] 3 All E. R. 1.
181. *Add. Annotation* :—*Apld. Davies v. Beynon-Harris* (1931), 47 T. L. R. 424.
194. *Add. Annotation* :—*Refd. Skipp v. Kelly* (1926), 42 T. L. R. 258.
207. *Add. Annotation* :—*Apld. Pearce v. Brain*, [1929] 2 K. B. 310.
- 207a. ———.]—*Chattel transferred under void contract of exchange.*—*PEARCE v. BRAIN*, No. 160a, *ante*.
209. *Add. Annotations* :—*Consd. Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110. *Refd. Pontypridd Union Grdns. v. Drew* (1926), 90 J. P. 169.
210. *Add. Annotation* :—*Consd. Pontypridd Grdns. v. Drew* (1926), 95 L. J. K. B. 1030.
213. *Add. Annotation* :—*Refd. Pearce v. Brain*, [1929] 2 K. B. 310.
216. *Add. Annotations* :—*Refd. Jones v. Great Western Ry. Co.* (1930), 47 T. L. R. 39; *Winnipeg Electric Co. v. Geel* (1932), 48 T. L. R. 657; *Place v. Searle*, [1932] 2 K. B. 497; *Keane v. Mount Vernon Colliery Co.*, [1933] A. C. 309; *Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110.
231. *Add. Annotation* :—*As to (2) Apld. Elkington & Co. v. Amery*, [1936] 2 All E. R. 86.

### PART IV. SECT. 2, SUB-SECT. 3.

so. *Duty of municipality to maintain neglected children—Who are children "belonging to" municipality.*—If the child is not living with its father, the intention of the father in regard to the ultimate return of the child is an important matter for consideration.—*Re JOHNSON & JOHNSON*, [1932] 2 W. W. R. 593; 4 D. L. R. 636; 46 B. O. R. 1.—CAN.

### PART V. SECT. 2.

131 II. ———.]—*Contract by an infant for the purchase of a fox held to be for the infant's benefit & therefore binding on him.*—*MCGEE v. CUBACK*, [1936] 1 D. L. R. 157; 5 F. L. J. (Can.) 164.—CAN.

sa. *Life insurance.*—Under *Saskatchewan Insurance Act, 1925*, c. 20, of 1924–25, s. 175, a contract for life insurance entered into by an infant over 15 years old is fully binding on him, even though his promissory note is accepted as conditional payment of the first premium. He is not, however, liable on the note.—*WESTERN LIFE ASSURANCE Co. v. ARMSTRONG*, [1928] 2 W. W. R. 49.—CAN.

### PART V. SECT. 3.

142 II. ———.]—*IMPERIAL BANK OF CANADA v. REID*, [1928] 3 D. L. R. 198.—CAN.

k. *On appeal*, 28 Man. L. R. 229.

### PART V. SECT. 4, SUB-SECT. 2.

183 VII. ———.]—*SHEPARD v. BRUNER* (1915), 19 D. L. R. 869; 31 W. L. R. 721.—CAN.

sb. *Whole contract must be repudiated.*—A party to an entire contract who seeks to repudiate it on the ground of his infancy must repudiate it *in toto*, i.e. he cannot affirm provisions thereof which are beneficial to him & repudiate other provisions which he alleges to be prejudicial.—*HENDERSON v. MINNEAPOLIS STEEL & MACHINERY CO. OF CANADA, LTD.*, [1931] 1 D. L. R. 570; [1930] 3 W. W. R. 613.—CAN.

### PART V. SECT. 4, SUB-SECT. 3.

b. *On appeal*, 15 O. L. R. 53.

236. *Add. Annotations* :—*As to* (1) *Refd. Keane v. Mount Vernon Colliery Co.*, [1933] A. C. 309; *Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110.
240. *Add. Annotation* :—*Consd. Elkington & Co. v. Amery*, [1936] 2 All E. R. 86.
- 279a. *Flying instruction—Infant law student.*—*HAMILTON v. BENNETT* (1930), 94 J. P. Jo. 136; 74 Sol. Jo. 122, D. C.
280. *Add. Annotation* :—*Generally, Refd. Mercantile Union Guarantee Corpn., Ltd. v. Ball*, [1937] 3 All E. R. 1.
291. *Add. Annotation* :—*Refd. Keane v. Mount Vernon Colliery Co.*, [1933] A. C. 309.
- 298a. *Motor lorry—For business purposes.*—An infant, aged twenty, who carried on business as a haulage contractor, entered into a hire-purchase agreement for the purchase of a motor lorry to be used in his business. When sued for arrears of instalments due under the hire-purchase agreement, he set up the defence of infancy. The county ct. judge found that the contract was not for the benefit of the infant & that the defence of infancy succeeded. On appeal:—*Held*: the contract was not one of the class by which an infant could be bound, & further that ct. could not differ from the view of the county ct. judge that a contract for a large & expensive lorry on onerous hire-purchase terms was not a contract for the benefit of the infant.—*MERCANTILE UNION GUARANTEE CORPN., LTD. v. BALL*, [1937] 2 K. B. 498; [1937] 3 All E. R. 1; 106 L. J. K. B. 621; 157 L. T. 162; 53 T. L. R. 734; 81 Sol. Jo. 478, C. A.
- 315a. *Wedding & engagement rings.*—*Applt. in Aug. 1931, purchased from resp. co. certain jewellery & paid cash. In Jan. 1932, he purchased a lady's vanity bag for £20 10s. on credit. In June & Aug. 1932, he purchased also on credit two rings for £42 & £38 respectively. On the purchase of the first ring he brought a young lady with him & stated that he wanted an engagement ring. The second ring was treated as the wedding ring. All these transactions took place while applt. was under age. After he had attained his majority, proceedings were commenced against him, but were compromised upon his agreeing to pay the debt by instalments. After payment of one instalment, he made default & the present proceedings were brought against him for the balance outstanding. Applt. was the son of a former cabinet minister:—Held*: (1) the rings, being purchased as gifts to the person to whom applt. was engaged to be married, were necessities; (2) the vanity bag could not be regarded as such a gift & was not a necessary.—*ELKINGTON & CO., LTD. v. AMERY*, [1936] 2 All E. R. 86; 80 Sol. Jo. 465, C. A.
- 315b. *—Vanity bag.*—*ELKINGTON & CO., LTD. v. AMERY*, No. 315a, *ante*.
330. *Add. Annotation* :—*Generally, Refd. Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110.
338. *Add. Annotation* :—*Refd. Mercantile Union Guarantee Corpn., Ltd. v. Ball*, [1937] 3 All E. R. 1.
347. *Add. Citations* :—95 L. J. Ch. 258; [1926] B. & C. R. 19.

## Part VI.—Misrepresentation as to Age.

- 363a. *S. P. BARTLETT v. WELLS* (1862), 1 B. & S. 836; 31 L. J. Q. B. 57; 5 L. T. 607; 26 J. P. 228; 8 Jur. N. S. 762; 10 W. R. 229; 121 E. R. 924.
- Annotations* :—*Folld. De Roo v. Foster* (1862), 12 C. B. N. S. 272. *Consd. Miller v. Blankley* (1878), 38 L. T. 527.
- Refd. Brine v. G. W. Ry.* (1862), 2 B. & S. 402; *Saundrey v. Mitchell* (1863), 9 Jur. N. S. 968; *Leslie v. Shell*, [1914] 3 K. B. 807.
373. *Add. Annotation* :—*Refd. Re L. A. & B. F. M., Official Receiver v. The Debtors* (1926), 95 L. J. Ch. 258.

## Part VII.—Torts.

394. *Add. Annotation* :—*Consd. Knott v. London County Council*, [1934] 1 K. B. 126.
- 395a. *—*—*—*—*HAWLEY v. ALEXANDER* (1930), 74 Sol. Jo. 247.

### PART VI. SECT. 1.

360 viii. —.—*—Held*: a minor, who, by falsely representing himself to be a major, has induced a person to enter into a contract, is not estopped from pleading his minority to avoid the contract.—*KHAN GUL v. LAKHA SINGH* (1928), 1 L. R. 9 Lah. 701.—IND.

*st. Contract entered into through misrepresentation—Contract void—Whether infant estopped.*—Where an infant represents fraudulently or otherwise that he is of age & thereby induces another to enter into a contract with him, then in an action founded on the contract the infant is not estopped from setting up infancy as a bar to the action.—*GADIGEPPA BHIMAPPA v. BALANGANDA BHIMANGANDA* (1931), 55 I. L. R. Bom. 741.—IND.

### PART VI. SECT. 2, SUB-SECT. 2.

376 iii. —.—*—*—Where an infant has obtained an advantage by falsely stating himself to be of full age, equity will restore his ill-gotten gains & release the party deceived from obligations or acts in law induced by the fraud.—*KUMAR GANGANAND SINGH v. MAHARAJAH SIR RAMESHWAR SINGH BAHADUR* (1927), 1 L. R. 6 Pat. 388.—IND.

376 iv. —.—*—Held*: a minor, who has entered into a contract by means of a false representation as to his age, though not liable under the contract, may, in equity, be required to return the benefit he has received by making a false representation as to his age, whether he be a deft. or pltf.—*KHAN GUL v. LAKHA SINGH* (1928), 1 L. R. 9 Lah. 701.—IND.

### PART VII. SECT. 1.

*st. General rule.*—An infant is liable for his torts of all kinds, & the tenderness of his age is immaterial, except when the action is founded on malice or want of care.—*CONTINENTAL GUARANTY CORPN. OF CANADA, LTD. v. MARK* (B. C.), [1926] 4 D. L. R. 707; [1926] 3 W. W. R. 428.—CAN.

381 i. *Tort independent of contract—Infant liable.*—An infant who sells goods, of which he is in possession under a lien agreement, is liable in damages for the conversion, since it is not a wrong connected with the contract.—*MCCALLUM v. URCHAK* (Alta.), [1926] 1 W. W. R. 137.—CAN.

q 1. —.—A father, who negligently left a shot gun & shells where they were accessible to his eleven-year-old son :

## Part VIII.—Property.

### SECT. 2.—ACQUISITION.

#### SUB-SECT. 1.—IN GENERAL (p. 187).

449a. Mortgage to infant—Law of Property Act, 1925 (c. 20), s. 19 (6)—Appointment of trustees.]—EPSTEIN v. LLOYD (1933), 77 Sol. Jo. 319.

454a. ———.]—SALSBURY v. BAGOTT (1877), as reported in 2 Swan. 603; 36 E. R. 745.

Annotation :—Consd. Field v. Moore, Field v. Brown (1855), 7 De G. M. & G. 691.

481. Add. Annotation :—Refd. Doyle v. White City Stadium & British Boxing Board of Control (1935), 152 L. T. 32.

538a. ——— Right to sell timber.]—MASON v. MASON (1724), cited in Amb. at p. 371; Mos. at p. 224; 27 E. R. 246.

Annotation :—Consd. Tullit v. Tullit (1759), Amb. 370.

557. Add. Annotation :—Refd. The Fagernes, [1926] P. 185.

557a. ———.]—A lease granted to an infant is

binding on him unless he repudiates it within a reasonable time after attaining his majority. —DAVIES v. BEYNON-HARRIS (1931), 47 T. L. R. 424; 75 Sol. Jo. 442.

619. Add. Annotation :—Generally, Refd. Doyle v. White City Stadium, Ltd., [1935] 1 K. B. 110.

622. Add. Annotation :—Refd. Re Smith & Lonsdale's Contract (1934), 78 Sol. Jo. 173.

657a. ———.]—HASTINGS v. ORDE (1840), 11 Sim. 205; 59 E. R. 853.

666. Add. Annotation :—Generally, Refd. Republica de Guatemala v. Nunez, [1927] 1 K. B. 669.

669a. Covenant to disentail & resettle—Ineffective as resettlement.]—NIGHTINGALE v. FERRERS (EARL) (1733), 3 P. Wms. 206; 24 E. R. 1031.

Annotation :—Refd. Tarleton v. Liddell (1851), 17 Q. B. 390.

685a. ——— Not acceptance of jointure.]—LUCY v. MOORE (1730), 4 Bro. Parl. Cas. 343; 2 E. R. 232, H. L.

—Held : liable in damages to infant plff., who was injured by the discharge of the gun in the hands of the son. The fact that the mother of plff. might have prevented the accident did not prevent recovery against the father & son by plff. —BLACK v. HUNTER, [1925] 4 D. L. R. 285; [1925] 3 W. W. R. 393.—CAN.

q ii. ———.]—A father is not responsible at common law for the torts of his infant child, committed without his knowledge, consent or sanction, & not in the course of his employment of the child.—BOBBY v. CHODIKER, [1928] 3 W. W. R. 392.—CAN.

q iii. ———.]—Where although a minor is in a motor car which is in his sole or joint possession, another person is physically running it, the former is not "driving or operating" the car within sect. 12 of Motor-Vehicle Act Amendment Act (1927), 1926-27, which provides that while a minor is living with his parent the parent is civilly liable for loss or damage sustained by any person through the negligence of the minor "in driving or operating a motor vehicle on any highway." Deft., 16 years of age, hired a motor car from plff. co. to go for a drive, taking two other boys with him. The three boys agreed to share equally in paying for the hire of the car, although the contract was signed by W. only. The car, through reckless driving, was wrecked & W.'s two companions killed. All three took turns in driving, but at the time of the accident one of the boys killed was at the wheel. The co. sued the infant W., & also his father, for damages to the car, contending that the father was liable under said sect. 12. Action dismissed.—Held : the appeal should be dismissed as against the father & allowed as against the son.—VICTORIA U. DRIVE YOURSELF AUTO LIVERY v. WOOD & WOOD, [1930] 1 W. W. R. 522, 633; 2 D. L. R. 811; 42 B. C. R. 291.—CAN.

q iv. ———.]—The parents & guardians of infants are, in British Columbia, civilly liable for the negligent operation of motor vehicles by such infants.—THORNELOE v. STIRLING, [1934] 1 D. L. R. 615.—CAN.

q v. ——— To action by infant.]—An action of reparation founded on delict or quasi-delict is competent at the

instance of a minor son against his father.—YOUNG v. RANKIN, [1931] S. C. 499.—SCOT.

sg. Liability of stranger.]—Plff. was injured by a bullet from an air-rifle fired from a window in deft.'s house by a boy of fifteen years, a friend of deft.'s fourteen years old son.—Held : on the facts negligence on the part of deft. was not shown, & he could not be made liable for the wrongful act of the boy.—MONTE-SANTO v. DI UBALDO, [1927] 3 D. L. R. 1045; 60 O. L. R. 610.—CAN.

#### PART VIII. SECT. 1, SUB-SECT. 1.—C. (a).

c i. ———.]—Held : the estate of an infant, being an estate tail in possession, could be sold under R. S. O. 1877, c. 137.—Re GRAY (1895), 26 O. R. 355.—CAN.

sh. Execution of conveyance by infant—Application — By petition.]—Re MILLS, OWEN v. CAMPBELL (1854), 4 Gr. 630.—CAN.

#### PART VIII. SECT. 1, SUB-SECT. 1.—C. (b).

sj. Power to order sale—On application of official guardian—In foreclosure action.]—The rights of infants are protected & represented by the official guardian, who, in foreclosure actions, has the right to ask for a sale by the ct. in case he deems it in the interest of the infant, while in England no official is vested with the like powers.—KEMP v. BEATTIE, [1929] 1 D. L. R. 55; 63 O. L. R. 176.—CAN.

#### PART VIII. SECT. 3, SUB-SECT. 1.

r i. ———.]—A conveyance of land or mtge. made by an infant is not absolutely void, but voidable.—MILLS v. DAVIS (1860), 9 C. P. 510.—CAN.

#### PART VIII. SECT. 3, SUB-SECT. 2.

460 H. ———.]—L'HIRONDELLE v. THE KING (1917), 16 Exch. O. R. 196.—CAN.

#### PART VIII. SECT. 4, SUB-SECT. 1.

472 I. Person entering liable to account to infant—Whether applicable to tenant in common.]—The general rule in equity, that an infant is entitled to treat a person, who takes possession of his estate, as his bailiff or agent, applies to a case where the party in possession is a tenant in common with the infant, although there has not been

any ouster or exclusion of the infant, or any denial of his title.—COURCIER v. COURCIER (1879), 26 Gr. 307.—CAN.

#### PART VIII. SECT. 4, SUB-SECT. 3.

sk. Right to receive insurance moneys—Whether bond or security required.]—A guardian, appointed or constituted by Domestic Relations Act, 1927, c. 5 (Alta.), is authorised to receive & manage insurance moneys payable to the infant & to give a valid discharge therefor; & when such money or property is received without action, the guardian is not required to furnish a bond or other security, there being nothing in said Act authorising the ct. to require said guardian to give security. If, however, the guardian is forced to bring an action in order to obtain the money, the practice of the ct. would require the money to be paid into ct. subject to its order, & security would probably be required before the payment over to the guardian.—Re DOMESTIC RELATIONS ACT, 1927, Re POLKABREK, [1928] 4 D. L. R. 821; [1928] 3 W. W. R. 323.—CAN.

#### PART VIII. SECT. 5.

n i. ——— Foreign guardian—Right to funds in Province.]—If a foreign guardian is entitled by the law of domicile of the infants to funds of the infants in this Province, they should be paid to him.—KELLY v. O'BRIAN (1916), 37 O. L. R. 326.—CAN.

n ii. ——— Legacy in Ontario—Foreign domicile of guardian & infant.]—Where a mother & infant child are domiciled in England the mother cannot claim a share of an estate in Ontario, in which the infant is a beneficiary, without producing an order of an English ct. or proof that she is entitled under English law.—Re BURNETT, [1936] 4 D. L. R. 355; O. R. 506.—CAN.

#### PART VIII. SECT. 8, SUB-SECT. 2.—B. (a).

sl. By mother purporting to act as guardian—Rent accepted after infant attained majority.]—Where a Hindu married woman with her two major sons & she purporting to act as guardian for her third son, an infant, granted a lease of a certain property of which she was in possession, for 21 years with a covenant for renewal for another term of 10 years, & the infant, after attaining majority, ratified the lease by accepting

**731a. Settlement with sanction of court—Effect of.]—**A settlement made with the sanction of the ct. on the marriage of an infant, of certain funds alleged to represent the infant's

share under a will:—*Held*: not to operate as a confirmation of prior dealings by the trustees of the will.—*ZAMBACO v. CASSAVETTI* (1871), L. R. 11 Eq. 439; 24 L. T. 770.

## Part X.—Maintenance and Advancement.

**756. Add. Annotation:—***Refd. Coventry Corpn. v. Surrey County Council*, [1935] A. C. 199.

**810. Add. Annotations:—***Consd. Hyman v. Hyman*, [1929] A. C. 601. *Refd. H. v. H.* (1928), 97 L. J. P. 84.

**813a. Payment of income from contingent interest to person over twenty-one—Trust not carrying intermediate income—Protective trust.]—**Testator, who died on June 12, 1931, by his will gave his residuary estate upon trust, as to two-thirds thereof to his son J., & settled that share upon trust during the life of his said son upon the protective trusts contained in Trustee Act, 1925 (c. 19), s. 33, & after the son's death upon trust for the son's children & in default of children for testator's daughter Mrs. P. & her children, save & except that (a) whilst the son should be living & under the age of thirty years, the trustees should accumulate the income of the son's share in augmentation & so as to follow the destination of the capital of his share, & (b) if the son should attain the age of thirty-five years & no act or event should have been done or happened whereby his share would, if subject to an absolute trust for payment thereof to him, have become vested or charged in favour of some other person, the trustees should pay one-half of the share of the son to him for his own absolute use & benefit. The son J., who was born on July 9, 1905, at the date of testator's death had attained twenty-one & would not attain the age of thirty-five until July 6, 1940. In pursuance of the directions, in the will, the trustees accumulated & invested the income of the son's settled share. The question was whether, having regard to

Trustee Act, 1925 (c. 19), s. 31, the son was entitled to be paid the income arisen & to arise between the death of testator & the son's attainment of the age of thirty years in respect of the moiety of his settled share in the residuary estate of testator, until the happening of any event which would defeat his contingent right to a transfer of that moiety upon his attaining the age of thirty-five years, or whether the said income must be accumulated until such moiety should become transferable to him:—*Held*: Trustee Act, 1925 (c. 19), s. 31 (1) (ii), which imposed upon the trustees of the moiety of the son's settled share, to the income of which he was only contingently entitled on attaining the age of thirty-five years, a trust to pay to him the income thereof until the happening of either of the events in the clause mentioned, did not apply, because, owing to the possibility of a forfeiture of the said income under the protective trusts in the will, the trust did not carry the intermediate income in accordance with the requirements of Trustee Act, 1925 (c. 19), s. 31 (3). But for sub-sect. (3), notwithstanding sect. 69 of the Act (which is concerned only with powers conferred by the Act), the imperative direction in sect. 31 (1) (ii) to pay the income to the son would override the trust to accumulate the income contained in the will, which is inconsistent with the application of sect. 31 (1) (ii).

*Qu.*: whether the interest of the son's sister Mrs. P. & her children under the trust to accumulate the income could be treated as a "prior interest affecting the property," i.e., the moiety of the son's share, within sect. 31 (1).—*Re SPENCER, LLOYDS BANK, LTD. v.*

*rent:—Held*: the mother, who was not the guardian, could not enter into any contract on behalf of the infant which would be binding on him; & as the contract was void as regards the infant, it could not be made good by ratification.—*MAHENDRA NATH SRIMANI v. KAILASH NATH DAS* (1927), 1 L. R. 55 Calc. 841.—*IND.*

**PART X. SECT. 1, SUB-SECT. 1.—A.**

**757 II. —**—[It is the father's duty to maintain & educate his children, who are incapable of supporting themselves, & although the law has always recognised this duty, civil cts. have no direct means of enforcing this obligation so as to compel him to maintain them out of property in which they have no interest.—*WALTER v. WALTER* (1927), 1 L. R. 55 Calc. 731.—*IND.*

**sx. No civil liability to maintain.]—**Under the criminal code, s. 242 (3) (a), the existence of a legal duty to provide necessaries is a condition precedent to criminal liability; & there is no such legal duty under the civil law of Ontario, & no such legal duty has been imposed by the criminal law.—*R. v. WRIGHT*, [1931] 3 D. L. R. 200; 66 O. L. R. 456.—*CAN.*

**sg. Who is a "neglected child"—Child of Roman Catholic parents in Protestant home.]—**A child of Roman Catholic parents found in a Protestant home, & vice versa is not per se a "neglected

child" within Infants Act, R. S. B. C., 1924, s. 56.—*Re WARD, DILL v. CHILDREN'S AID SOCIETY OF CATHOLIC ARCHDIOCESE OF VANCOUVER* (1933), 3 D. L. R. 467; 60 C. C. C. 384; 46 B. C. R. 552.—*CAN.*

**PART X. SECT. 1, SUB-SECT. 1.—C. (a).**

**783 v. —**—*Medical services rendered to stepson.]—**WILLIAMS v. CLARK* (1927), 30 W. A. L. R. 11.—*AUS.*

**sy. Statutory liability—Priority of contractual as against.]—**Even if Wives' & Children's Maintenance & Protection Act, R. S. M., 1913, enables one who has maintained the infant children of another to hold their father liable to him for their maintenance apart from contract, nevertheless, where there is an express or implied contract between them on the subject the question of the liability of the father to the other party is governed thereby.—*DE CLERQ v. BELLENS* (Man.), [1929] 4 D. L. R. 1060; 2 W. W. R. 206.—*CAN.*

**sz. —**—*Action to enforce—Procedure.]—*In the absence of an express or implied contract between a parent liable under Maintenance Order Act, R. S. A., 1922, for the maintenance of a child & the person or institution which has maintained the child, the

procedure provided for by sect. 5 of the Act must be resorted to where payment for said maintenance is sought from the parent.—*SISTERS OF CHARITY OF THE PROVIDENCE GENERAL HOSPITAL OF DAYSLAND v. MARTY, EDMONTON, CITY v. MARY* (Alta.), [1929] 4 D. L. R. 797; 3 W. W. R. 265.—*CAN.*

**so. —**—*Jurisdiction of county court.]—*Infants Act, R. S. B. C., 1924, s. 80 (8), provides that "any order made under this sect. may be enforced in the same manner as an order made by a judge of the Supreme Ct.":—*Held*: the remedy so provided is the only one which can be resorted to, & therefore, the county ct. is without jurisdiction over an action brought under sect. 80 (4) of said Act by a municipality to recover expenses incurred for the maintenance of a "neglected" child.—*DISTRICT MUNICIPALITY, COLDSTREAM v. BELLEVUE* (B. C.), [1929] 4 D. L. R. 52; 2 W. W. R. 597.—*CAN.*

**PART X. SECT. 1, SUB-SECT. 2.—A**

**sp. Agreement by third party to maintain infant.]—**Where any person has expressly or impliedly undertaken to pay for the maintenance of a child, neither the child himself, nor, if he is dead, his estate is liable for such maintenance.—*McGUINNESS v. McGUINNESS*, [1925] N. Z. L. R. 456.—*N.Z.*

SPENCER, [1935] Ch. 533; 104 L. J. Ch. 127; 153 L. T. 121.

*Annotations*.—*Foll.* *Re* Ricarde-Seaver's Will Trusts, Midland Bank Executor & Trustee Co. v. Sandbrook, [1936] 1 All E. R. 580. *Consd.* *Re* Turner's Will Trusts, District Bank, Ltd. v. Turner, [1936] 2 All E. R. 1435.

**813b.** —.]—A testator gave one-fifth of the residue of his estate to those children of his son who should be living at his death & should attain or have attained 28 years. He laid down a complete code of maintenance directing the trustees to accumulate the income during the suspense of absolute vesting of any share. At his death three members of the class were living. Two attained 28 years & their shares vested; the third attained 21 after testator's death, but died a bachelor & intestate at 24. His estate, which was substantial, went to his mother, & his unvested share went to the two surviving members of the class. The accumulated income of his unvested share totalled about £3,000. Trustee Act, 1925 (c. 19), s. 31 (1) (ii), provides that if a person over 21 has a contingent interest in a fund, the trustees shall pay the income to him, & if this section were held to apply to the income of the unvested share, the accumulated income should have formed part of the deceased's estate. On an originating summons issued by the trustees to decide this question, it was held that the sect. imposed an imperative trust & did not confer a power. Defts., the mother & the survivors of the class appealed:—*Held*: (1) as Trustee Act, 1925 (c. 19), is a consolidating Act, the legislature could not have intended to change the existing law established by Law of Property Act, 1922 (c. 16), s. 88, under which the direction to pay over accumulations to the contingent beneficiary was made subject to a contrary direction in the trust instrument; (2) the totality of the provision of Trustee Act, 1925 (c. 19), s. 31, is one of "the powers conferred by this Act" within sect. 69 (2), & therefore only applies in the absence of a contrary direction in the instrument; (3) the direction contained in sect. 31 (1) (ii) is an essential part of the new statutory power of maintenance & ancillary to it.—*Re* TURNER'S WILL TRUSTS, DISTRICT BANK, LTD. v. TURNER, [1937] Ch. 15; [1936] 2 All E. R. 1435; 106 L. J. Ch. 58; 155 L. T. 266; 52 T. L. R. 713; 80 Sol. Jo. 791, C. A.

*Annotation*.—*Foll.* *Re* Watt's Will Trusts, Watt v. Watt, [1936] 2 All E. R. 1555.

**828.** *Add. Annotation*.—*Refd.* *Re* Senior, Senior v. Wood, [1936] 3 All E. R. 196.

**831a.** *Ascertainment of period of twenty-one years.*]—Testator, who died in Nov. 1893, gave his net residue, subject to certain life annuities which did not exhaust the income, in trust for a bachelor's children who should attain twenty-one, with a gift over in default. In Mar. 1896, the judge ordered the surplus income to be accumulated for twenty-one years from testator's death, i.e., until Nov. 6, 1914, or until the bachelor's previous death without leaving issue. During this twenty-one years' period the bachelor married & died leaving three children, two of whom were still living. Temporary orders for maintenance were made. In Nov. 1914, the judge declared that as from Nov. 6, 1914, the two children then living were entitled to maintenance under Conveyancing Act, 1881

(c. 41), s. 43 (1), but that notwithstanding sub-sect. 2 any income not so applied passed as on an intestacy. In July, 1927, the elder child attained twenty-one, & her contingent moiety vested in possession. The question having arisen whether, having regard to Law of Property Act, 1925 (c. 20), s. 165, the order of Nov. 1914 ought still to be acted on with regard to the younger child's contingent moiety:—*Held*: (1) the effect of sect. 165 was that the years of minority accumulation, which commenced during the twenty-one years' period, were not to be reckoned in ascertaining that period, & the income of the younger child's contingent moiety must in the first place be applied for her maintenance under Conveyancing Act, 1881, s. 43 (1), & the balance could be validly accumulated under sub-sect. 2; (2) quite apart from sect. 165, the moment the elder child attained a vested interest as a member of the contingent class, there could be no question of intestacy as to any part of the capital or income.—*Re* MABER, WARD v. MABER, [1928] Ch. 88; 97 L. J. Ch. 101; 138 L. T. 318.

**838.** *Add. Annotations*.—*Distd.* *Re* Reade-Revell, Crellin v. Melling, [1930] 1 Ch. 52. *Refd.* *Re* Raine, Tyerman v. Stansfield, [1929] 1 Ch. 716; *Re* Fulford, Fulford v. Hyslop, [1930] 1 Ch. 71; Stern v. I. R. Comrs. (1930), 15 Tax Cas. 148; *Re* Jones, Meacock v. Jones, [1932] 1 Ch. 642.

**840.** *Add. Annotation*.—*Refd.* *Re* Jones, Meacock v. Jones, [1932] 1 Ch. 642.

**844a.** — Settlement prior to Trustee Act, 1925—Appointment subsequent to Act.]—*Re* DICKINSON'S SETTLEMENT, BICKERSTETH v. DICKINSON (1938), 159 L. T. 614.

**889a.** —. —. —.]—A testator by his will bequeathed to his trustees a certain sum upon trust to invest it & to accumulate the income thereof for 21 years & thereafter to pay one-third of the income of the sum & the accumulations to his son E. during his life & after his death or from the expiration of the 21 years if E. should have died before the expiration thereof upon trust for such one or more of E.'s issue as he should by deed, will or codicil appoint, & in default of such appointment upon trust for all his children as should attain 21, & if more than one in equal shares, provided that notwithstanding the trust for accumulation the trustees might out of the income, investments or accumulations pay in respect of the maintenance or education of E.'s children for the time being under 21 any amount not exceeding £100 *per annum*. Testator died on Feb. 10, 1915. E. married in 1913 & had two sons, born respectively in 1916 & 1922. E.'s wife obtained a divorce in 1928 & was granted custody of the children, & by orders for permanent maintenance E. was directed to pay a certain annual sum to his wife & £150 & £100 *per annum* free of tax in respect of the two children. E. died in 1935 without having exercised his power of appointment. After E.'s death his wife paid for the maintenance of the children out of her own income. The trust for accumulation having come to an end on Feb. 10, 1936, the children issued a summons asking that £350 *per annum* free of tax might be allowed by the surviving trustee for the maintenance & education of each of the children as from

that date, & by amendment the summons further asked whether the trustee had power under Conveyancing Act, 1881 (c. 41), s. 43, to apply the income of each child's contingent interest in the trust fund in respect of the moneys expended in the past by their mother for the children's maintenance. The trustee in his discretion was not prepared to pay as much as £350 *per annum* in respect of each child:—*Held*: (1) no order should be made in respect of allowances for the children's maintenance; (2) there was no power under Conveyancing Act, 1881 (c. 41), s. 43, for the trustee to recoup the mother for the money expended out of her own income for the children's maintenance.—*Re SENIOR, SENIOR v. WOOD*, [1936] 3 All E. R. 196; 80 Sol. Jo. 952.

915. *Add. Annotation*:—*Generally*, *Refd. Re Gower's Settlement*, [1934] Ch. 365.

1006a. — *Whether limited to children living at date of will.*—*FREEMANTLE v. TAYLOR* (1808), 15 Ves. 363; 33 E. R. 791.

1057. *Add. Annotations*:—*Distd. Re Reade-Revell, Crellin v. Melling*, [1930] 1 Ch. 52. *Refd. Re Senior, Senior v. Wood*, [1936] 3 All E. R. 196.

1058a. —.]—*Testatrix*, who died after the commencement of Trustee Act, 1925 (c. 19), by her will directed the trustees thereof to set apart a specific sum, to accumulate & capitalise the income thereof, until A. should attain the age of twenty-one years; &, if A. should attain that age, then to pay to her the income of that sum during her life & after her death to hold the capital sum in trust for her children:—*Held*: as the trust for A., for a contingent interest for her life, did not carry the intermediate income, the trustees had, upon the proper construction of Trustee Act, 1925 (c. 19), s. 31, no power to apply that income towards A.'s maintenance.—*Re READE-REVELL, CRELLIN*

*v. MELLING*, [1930] 1 Ch. 52; 99 L. J. Ch. 136; 142 L. T. 177.

*Annotation*:—*Distd. Re Leng, Dodsworth v. Leng*, [1938] 3 All E. R. 181.

1058b. —.]—*Under a will* the trustees were directed to hold the testator's residuary trust fund, subject to the payment of an annuity, upon trust for his children who should attain the age of twenty-one years. The trustees were to retain the shares, & between the ages of twenty-one & twenty-five pay the income to the children or apply the same for their benefit, & accumulate the balance (if any) thereof, & after the age of twenty-five to pay the accumulations & the income to the children during their lives, & to hold the capital, including accumulations made during minority, for the children of each child who should attain twenty-one years, with gifts over to the other children of the shares of any dying without issue:—*Held*: the trustees had power under Trustee Act, 1925 (c. 19), s. 31, to apply intermediate income in the maintenance & education of the testator's infant children. Sect. 31 has in this respect made no alteration in the law contained in Conveyancing Act, 1881 (c. 41), s. 43, & the decisions thereunder.—*Re LENG, DODSWORTH v. LENG*, [1938] Ch. 821; [1938] 3 All E. R. 181; 159 L. T. 355; 54 T. L. R. 988; 82 Sol. Jo. 545.

1059. *Add. Annotations*:—*Consd. Re Raine, Tyerman v. Stansfield*, [1929] 1 Ch. 716. *Distd. Re Reade-Revell, Crellin v. Melling*, [1930] 1 Ch. 52.

1060. *Add. Annotation*:—*Distd. Re Reade-Revell, Crellin v. Melling*, [1930] 1 Ch. 52.

1066. *Add. Annotations*:—*As to* (2) *Folld. Re Stokes, Bowen v. Davidson*, [1928] Ch. 176. *Expld. Re Raine, Tyerman v. Stansfield*, [1929] 1 Ch. 716.

1074a. *To enable business to be carried on—Giving guarantee for firm of which son was*

#### PART X. SECT. 1, SUB-SECT. 2.—H. (c).

9341. *One fund supplementary to other—Resort had to primary fund first.*—*Testator* directed that sums of £3,000 should be invested & held for each of his children, & should be paid over to each of them at the age of twenty-five, & empowered his trustees, for marriage or equipment in business, to pay to a child, although not yet of that age, any portion of that sum. The residue of his estate he left in *lieu* to his wife & in fee to his children equally. In a question as to whether the wife's *lieu* or the income of the children's legacies was liable *primo loco* for the cost of maintaining & educating the children:—*Held*: as the children were vested in separate estate, the cost of their maintenance & education fell to be met in the first place out of the income of that estate.—*KER'S TRUSTEES v. KER*, [1927] S. C. 52.—*SCOT*.

#### PART X. SECT. 1, SUB-SECT. 2.—N.

10561. *Expression of contrary intention—What constitutes—Direction for accumulation of income until contingency.*—*Testator* bequeathed to each of his four daughters the sum of £1,000 if & when she should attain the age of 21, & in the meantime he directed that the money should be lodged on deposit receipt in a bank in the joint names of his trustees & each of his daughters, & should so remain

during the minority of each daughter, & on each daughter attaining the age of 21 the amount, with the accrued interest, was to be paid to her. & *testator* directed that his trustees should not otherwise invest the said moneys. Should any daughter die before attaining the age of 21, her legacy, with the accumulation of income, was to be divided equally among the surviving daughters. *Testator* devised & bequeathed all the remainder of his property to his son if & when his son should attain the age of 21, provided that during the minority of his son the income of *testator's* lands was to be paid to *testator's* wife for the support of herself & the children, & they were to have a right of residence in the *testator's* dwelling-house. The residue of *testator's* property, other than his lands, house property, & the furniture in his dwelling-house, was to be sold, & the sum realised placed on deposit receipt in a bank in the joint names of his trustees, & not otherwise invested, the interest thereon to accumulate, & the accumulation thereof with the principal to be paid to the *testator's* son on his attaining the age of 21. Provision was then made in the event of the son dying before attaining age. The income derived from the lands was found to be inadequate for the support of *testator's* wife & children:—*Held*: (1) the ct. had jurisdiction to apply the income derived from the money representing the legacies bequeathed to each of the children towards the maintenance,

support, & education of each such child during his or her minority if the ct. was of opinion that the moneys otherwise available for such maintenance, support, & education were insufficient, the direction in the will for the accumulation of income until each child should attain the age of 21 not being the expression of a "contrary intention" within Conveyancing Act, 1881 (c. 41), s. 43 (3), which would prevent the application of sub-sect. 1 of that section; (2) the ct. had jurisdiction to disregard the direction as to the lodgments of the amounts of the legacies on deposit receipt & to direct them to be invested in suitable securities, as the predominating object of *testator*, as expressed in his will, was to provide for the distribution of his property between his widow & children when the children came of age, & pending that period, for their suitable support, maintenance, & education; &, as the direction in the will that the amounts should remain on deposit receipt was subsidiary thereto & was in conflict therewith, it must give way & be disregarded.—*Re LYNCH'S TRUSTS, LYNCH v. LYNCH*, [1931] L. R. 517.—*IR*.

#### PART X. SECT. 2, SUB-SECT. 2.

*sv. Rule in India.*—*There is no presumption in India that property acquired by a father in the name of a child is intended for his advancement.*—*JOHNSTON v. GOPAL SINGH* (1931), L. R. 12 Lah. 546.—*IND*.

partner.]—*Held*: an advance to the son, within the description in a settlement of money advanced "to enable him to carry on his business."—*BERRY v. MORSE* (1847), 1 H. L. Cas. 71; 9 E. R. 678, H. L.

**1083a. Deposit with Lloyds.**—A testatrix had given her son a power of attorney in very wide terms over certain shares & money standing in her name at a bank abroad. When about to undergo an operation she told the son to get such shares & money transferred into his own name, as she wanted him to have them if anything should happen to her. The son accordingly, acting as her agent under the power of attorney, instructed the bank to transfer the shares & money into his name. The testatrix died a few days later. The question arose as to whether there had been a good *donatio mortis causa* of the shares & money or whether they formed part of the estate of the testatrix. By her will the testatrix gave her trustees a power of advancement in favour of the son (*inter alia*) for "the purchase of a business or a share in a business":—*Held*: the power of advancement did not extend to an advance of a sum

to be applied & invested with the trustees of Lloyd's as a fund which would be available to meet the son's liabilities, so as to enable him to become an underwriter at Lloyd's.—*Re CRAVEN'S ESTATE, LLOYDS BANK, LTD. v. COCKBURN* (No. 1), [1937] Ch. 423; [1937] 3 All E. R. 33; 106 L. J. Ch. 308; 157 L. T. 283; 53 T. L. R. 694; *sub nom. Re CRAVEN'S ESTATE, LLOYDS BANK, LTD. v. CRAVEN*, 81 Sol. Jo. 398.

—By petition.]—*Re COORE*, [1883] W. N. 169.

**1119a. High Court—Proceedings commenced in court of summary jurisdiction.**—Proceedings regarding the custody of an infant were commenced in the Hove Petty Sessional Ct. Resp. to those proceedings applied to the Ch. Div. to have them removed to the High Ct.:—*Held*: (1) there is no statutory right to have such proceedings removed from a ct. of summary jurisdiction; (2) the ct. will not entertain an application for the exercise of its inherent jurisdiction in such a case while the party making the application keeps the infant out of the jurisdiction.—*BEAUMONT v. BEAUMONT*, [1938] 2 All E. R. 226, C. A.

## Part XI.—Care and Custody.

**1143. Add. Annotation:—Refd. *Re Carroll*, [1931] 1 K. B. 317.**

### PART XI. SECT. 1.

**c. i.** —.]—A father has *prima facie* right to the custody of his child, of which he will be deprived only if his conduct makes such interference essential to the child's welfare.—*Re THOMPSON, THOMPSON v. THOMPSON* (1935), 10 M. P. R. 36.—CAN.

**c. ii.** —.]—The trial judge has a wide discretion in the matter of the custody of a child.—*ORTEOUS v. PAPINEAU*, [1937] 3 D. L. R. 592; 51 B. C. R. 522.—CAN.

**c. i. Under Children's Protection Act, 1927—Effect of proceedings in magistrate's court.**—Under Children's Protection Act, R. S. O. 1927, c. 279, s. 25, the fact that the proceedings in the magistrate's ct. do not prevent the judge of the Supreme Ct. from directing that the custody of the child be given to the parent, is recognised; but if the judge is of opinion that the parent has neglected & deserted the child, or has so conducted himself that in the opinion of the judge he ought not to be allowed to set up his *prima facie* right to the custody of the child, he may in his discretion decline to make the order.—*Re CHIEMLEWSKI*, [1928] 2 D. L. R. 49; 61 O. L. R. 651.—CAN.

**sq. Jurisdiction of Supreme Court—Of Ontario—Child adopted by defendant under Adoption Act, 1921—Effect of order of county court judge.**—*CULLEN v. KEMP*, [1925] 4 D. L. R. 579.—CAN.

**sr. Infant out of jurisdiction.**—The ct. has jurisdiction to make an order as to the custody of an infant although the infant is beyond the territorial jurisdiction of the ct.—*Re HARDING*, [1929] 2 D. L. R. 623; 63 O. L. R. 518.—CAN.

**st. Infants Act, R. S. S. 1920—Parents living apart—Right of mother.**—*SUTCLIFFE v. SUTCLIFFE*, [1930] 1 W. W. R. 625; 2 D. L. R. 645.—CAN.

**sv. Under Child Welfare Act, C. A., 1924—Successive applications.**—Child Welfare Act, C. A., 1924, does

not contemplate that applications under sect. 135 thereof for the custody of a child shall be made from ct. to ct. or from judge to judge. Where, therefore, such an application has been made by one parent to the Juvenile Ct. judge & he has adjudicated thereon, & there is no change of facts or circumstances, it is not open to a judge of King's Bench to entertain a subsequent application by the other parent.—*MARTIN v. MARTIN*, [1932] 3 W. W. R. 273; 40 Man. L. R. 634.—CAN.

### PART XI. SECT. 2, SUB-SECT. 1.

**p. i.** —.]—*In case of male child.*—Where the question of the custody of an infant is involved between parents, it is preferable in all ordinary circumstances in the case of a male child that it should be brought up by & have the care & guidance of its father.—*PARSONS v. PARSONS*, [1928] N. Z. L. R. 477.—N. Z.

**p. ii.** —.]—Although the welfare of an infant is the paramount consideration it is the settled practice that the claim of the father to custody must prevail unless the ct. is judicially satisfied that the welfare of the child requires that the parental right should be superseded.—*Re JOHNSON, JOHNSON v. HALL* (1930), 43 B. C. R. 328.—CAN.

### PART XI. SECT. 2, SUB-SECT. 4.—A.

**1126 iv.** —.]—A child is further protected by Children's Protection Act, R. S. O. 1927, c. 279, s. 25 (3), which provides that when it has been abandoned or deserted, or has been allowed by the parent to be brought up by a Children's Aid Society, or by another person, in circumstances which show that the parent was unmindful of his parental duties, the judge shall not give the child to the parent, unless satisfied that, having regard to the welfare of the child, he is a fit person to have the custody of it. When once a child has been taken from its parents & made a ward of a Children's

Aid Society & then placed out with foster parents, the parents have forfeited their natural rights, & others have acquired rights. The words "having regard to the welfare of the child" indicate that the intention of the statute is that the judge, in determining whether the parent is a fit person to have the child restored to him, should contrast the situation of the child in the care of its foster parents with that which it would occupy if restored to its natural parents.—*Re CHIEMLEWSKI*, [1928] 2 D. L. R. 49; 61 O. L. R. 651.—CAN.

**1126 v.** —.]—In exercising its jurisdiction, derived from the Ct. of Chancery, as to the custody of a child whom its parent has allowed to be brought up by another person at that person's expense, the duty & power of the K. B. of Saskatchewan to decide the question of custody in accordance with the principle of equity that the paramount consideration in such cases is the child's welfare in its widest sense is not limited or impaired by Infants' Act, R. S. S. 1920, c. 155, s. 7 (b). Therefore, although the ct. concludes that the parent has not been "unmindful of his parental duties" within said section, it should not, nevertheless, order the child to be restored to him if in its opinion the child's welfare in the widest sense, i.e. its material, moral, religious & physical well-being, requires that the order should be refused.—*Re ROSS, ROSS v. MCNEILL & MCNEILL*, [1928] 3 D. L. R. 351; [1928] 2 W. W. R. 161; 22 Sask. L. R. 565.—CAN.

**1131 iii.** —.]—Where a child, shortly after its birth & after the death of its mother, had been placed in charge of a relative by its father on account of his inability, under the circumstances, to retain personal custody of so young a child, & where, seven years later, the father having remarried, & being able to provide a comfortable home not inferior to that



seven years, & the ct. will in its discretion order such child to be delivered to the custody of its father, if the ct. see no ground to impute any motive to the father injurious to the health or liberty of such a child.—*Ex p. YOUNG* (1855), 26 L. T. O. S. 92; 19 J. P. 777; 4 W. R. 127.

**1156a.** —.]—The welfare of a child is the paramount consideration guiding the ct. in making an order as to its custody. But it is not the only consideration, & the next consideration is the right of a parent, particularly of a parent whose conduct has not been impeached, & effect will be given to a parent's right & desire for the custody of his

child where the welfare of that child does not require a contrary decision.—*Re THAIN, THAIN v. TAYLOR*, [1926] Ch. 676; 95 L. J. Ch. 292; 135 L. T. 99; 70 Sol. Jo. 634, C. A.

*Annotations* :—*Consd. Re Crichton* (1935), 79 Sol. Jo. 181. *Reid. Re Carroll*, [1931] 1 K. B. 317.

**1156b.** —.]—*Re CRICHTON* (1935), 79 Sol. Jo. 181.

**1158.** *Add. Annotation* :—*Reid. Re Carroll*, [1931] 1 K. B. 317.

**1160.** *Add. Annotation* :—*Reid. Re Carroll*, [1931] 1 K. B. 317.

**1163.** *Add. Annotation* :—*Reid. Re Carroll*, [1931] 1 K. B. 317.

in which the child had been cared for :—*Held* : the father was not lacking in affection, neither had he been un-mindful of his parental duties, nor had he surrendered his parental rights, & the presumption that it was in the child's best interests to be with its parent had not been rebutted, & the father's claim must accordingly be preferred to that of the foster-parent.—*Re BUTLER*, [1931] N. Z. L. R. 121.—N.Z.

**r i.** —.]—*Re ORR*, [1933] O. R. 213; 2 D. L. R. 77.—CAN.  
**r ii.** —.]—*Validity of agreement.*—*CHISHOLM v. CHISHOLM* (1908), 40 S. C. R. 115.—CAN.

**ti.** —.]—When a mother has been given the lawful possession of a child the father is not entitled to retake possession of the child against the mother's will except under the authority of the ct.—*Re CAMPBELL*, [1933] 1 W. W. R. 618; 3 D. L. R. 448; 60 C. C. C. 170; 41 Man. L. R. 145.—CAN.

#### PART XI. SECT. 2, SUB-SECT. 4.—B.

**1141 ii.** —.]—Where a daughter, then being past fourteen years & eight months of age & not without adequate intelligence to make a reasonable choice, expressed her desire to remain with resp. with whom she had been living happily for seven years, the ct. refused a writ of *habeas corpus* to the mother.—*MARSHALL v. FOURNELLE*, [1927] 2 D. L. R. 173; [1927] S. C. R. 48.—CAN.

#### PART XI. SECT. 4, SUB-SECT. 1.

**1151 xx.** —.]—*CODY v. CODY*, [1927] 3 D. L. R. 349; [1927] 1 W. W. R. 603; 21 Sask. L. R. 391.—CAN.

**1151 xxi.** —.]—*Re STANGER* (Man.), [1929] 1 D. L. R. 944.—CAN.

**1151 xxii.** —.]—A father held not entitled to have his 10-year old daughter, whose mother was dead, & who had, with his consent, lived for eight years with her grandparents, taken from them & committed to his custody, where, in the opinion of the ct., the interests of the child were incomparably better served by leaving her where she was.—*PLATZ v. LEAR & LEAR*, [1936] 3 W. W. R. 464.—CAN.

**1154 iv.** —.]—*Re YOUNG*, [1926] 1 D. L. R. 511; 58 N. S. R. 372.—CAN.

**1154 v.** —.]—*Re GEHM, GEHM v. GATJENS* (B. C.), [1927] 4 D. L. R. 382.—CAN.

**1154 vi.** —.]—The first & paramount matter for the consideration of the ct. is the welfare of the child, which is not to be measured by money only or by physical comfort only, but is to be taken in its widest sense. The moral & religious welfare of the child must be considered, as well as its physical well-being, nor are ties of affection to be disregarded though they are not conclusive.—*WALTER v. WALTER* (1927), 1 L. R. 55 Calc. 731.—IND.

**p. Citation** :—For " 579 " read " 98. "

**t i.** —.]—Upon an application by his step-mother after the death of his father for the custody of an infant, a boy of eight years of age, the evidence showed that the boy was then living with the mother, that the father had appointed the step-mother by his will guardian of the boy, that the mother had been divorced by the father on the ground of her adultery with a married man, & that although the father had been given the custody of the boy by the ct., he had remained with the mother until six weeks prior to the father's death. It was further shown that the mother had not completely disassociated herself from the man with whom she had committed adultery, though the association apparently was not of a guilty nature :—*Held* : having regard to the welfare of the infant no order should be made for his removal from the custody of his mother.—*Re AN INFANT* (1933), 50 N. S. W. W. N. 85.—AUS.

**t i.** —.]—A wife against whom a decree of divorce had been made, the husband being given the sole guardianship, custody & control of their infant daughter, with liberty to the wife to apply, applied under Equal Guardianship of Infants Act, R. S. B. C., 1924, to be given the guardianship, possession & control of the child. Shortly prior to the decree the husband placed the child with a Mr. & Mrs. J., where she had remained ever since. After the divorce the wife married the co-resp. The father of the child died & by his will appointed, pursuant to sect. 6 of said Act, his father & mother to act in his place as guardian. His mother afterwards resigned as guardian. No application was made for the removal of the child's grandfather as guardian & no case was made out for his removal :—*Held* : bearing in mind, in accordance with sect. 13 of said Act, on the questions of custody & right of access, the welfare of the child & the wishes of its parents, in view of the relative circumstances of its mother & those of its present custodians & grandfather, the care taken of the child by its custodians, the child's own feelings, & the wishes of its father, the custody of the child should remain for the present where it was &, since it would be useless to appoint the mother a guardian unless she got the custody of the child, the application for guardianship was also refused.—*Re RAY & CHRISTIAN*, [1936] 2 W. W. R. 263; 50 B. C. R. 447.—CAN.

**t ii.** —.]—An application by the maternal grandparents for the adoption of an illegitimate child, whose mother had died, granted, although the application was opposed by the putative father, it being found that the child's welfare in all pertinent respects would be better served by its being brought up in the home of appts. than if left with the putative father.—*Re SPAIDAL*, [1936] 1 W. W. R. 459.—CAN.

**t iii.** —.]—An unmarried mother of an infant placed him, shortly after his birth, with pltf., a Children's Aid Society approved as such under the Children's Protection Act, R. S. O., 1927, & pltf. placed him in the care of defts. on the agreement that the child should be brought up in the Roman Catholic faith, which agreement defts. did not observe. When the child was about ten years old, the present action was tried to determine who was entitled to custody of him :—*Held* : under said Act pltf. had not a legal right to call upon the ct. *ex debito justitiae* to deliver to it the custody of the child; & this ct. saw no reason to disagree with the views expressed in the cts. below that it was not in the child's interests to deprive defts. of custody of him.—*ST. VINCENT DE PAUL CHILDREN'S AID SOCIETY OF TORONTO v. SPENCE*, [1935] S. C. R. 652; [1936] 1 D. L. R. 672; 5 F. L. J. (Can.) 259.—CAN.

#### PART XI. SECT. 4, SUB-SECT. 2.—A.

**aa i.** —.]—A father will not be deprived of the custody of his children, merely because his wife prefers to live away from him.—*Re GRAY*, [1925] 4 D. L. R. 381.—CAN.

**aa ii.** *S. P. M. v. M.*, [1926] S. C. 778.—SCOT.

**aa iii.** —.]—Where a wife has deserted her husband & taken their children with her, but is unable to prove such conduct against him as would justify her in doing so, there is no just cause to deprive him of his legal right to the custody of the children.—*Re DZYZDZ, Re ROZECKI* (Man.), [1927] 1 D. L. R. 1110; [1927] 1 W. W. R. 380.—CAN.

**aa iv.** —.]—A father has an inalienable right to the custody of his minor son, unless there are overwhelming circumstances to the contrary.—*ABDUL AZIZ KHAN v. NANHE KHAN* (1926), 1 L. R. 49 All. 332.—IND.

**aa v.** —.]—*Re SIMONSON, SIMONSON v. SLAATEN* (Sask.), [1927] 3 D. L. R. 543.—CAN.

**aa vi.** —.]—On an application by a father to obtain from the mother custody of an infant son from six to seven years old, where there were no allegations of moral impropriety on either person's part :—*Held* : although from the point of view of the present happiness of the child, the ct. might hesitate to remove him from the custody of the mother, the paramount consideration of the future as well of the present welfare of the child, who was just approaching a time of life when a father's care & guidance would be all important, required that he should be in the custody of the father.—*Re HYLTON*, [1928] N. Z. L. R. 145.—N.Z.

**aa vii.** —.]—*Re THOMPSON* (1935), 5 F. L. J. (Can.) 85.—CAN.

1170. *Add. Annotation* :—*Re*ld. *Re* Carroll, [1931] 1 K. B. 317.

1174. *Add. Annotation* :—*Re*ld. *Re* Carroll, [1931] 1 K. B. 317.

1179. *Add. Annotation* :—*Re*ld. *Re* Carroll, [1931] 1 K. B. 317.

1236. *Add. Annotation* :—*Re*ld. *Re* Carroll, [1931] 1 K. B. 317.

1237a. *Guardian appointed in error by father residing abroad.*—Though a father residing abroad has the right to direct the custody of his child in this country, yet if it appears that he has under some misapprehension directed her to be in custody of a person, not a relative, the child will not, pending an application to him for direction, be removed from the care of her near relatives.—*Re* SUTTON (EMILY) (1860), 2 F. & F. 267.

1242. *Add. Annotation* :—*Re*ld. *Re* Carroll, [1931] 1 K. B. 317.

1246. *Add. Annotation* :—*Re*ld. *Re* Carroll, [1931] 1 K. B. 317.

1252a. —.]—The reigning Prince of Monaco in this action against Prince Pierre of Monaco, formerly his son-in-law, claimed an injunction to restrain him from removing Prince Rainier, Pierre's son, out of the United Kingdom except with his, the pltf.'s, consent, & for delivery up of the young prince to him or to such person as he should authorise. The young prince was now at school in this country. He & his father were Monégasques.

The boy was not a ward of ct. Deft. denied pltf.'s right to such relief. By Monégasque law the custody of infants was national & applied to the royal family as well as to others. No member of the sovereign family could marry without the reigning prince's consent. Petitions for annulment or difficulties arising in marriage in that family went to the Council of State, & the decision when ratified was enforced by the ordinance of the prince. Deft., in 1920, married the hereditary Princess Charlotte, pltf.'s daughter. There were two children—the young prince & a sister. In 1930 pltf., by ordinance, authorised a temporary separation of the married couple, & took the children into his personal custody. The Council of State ratified this & declared that the prince had full power to delegate any of his rights to whatever jurisdiction he thought fit. By a subsequent ordinance it was declared that he might delegate to the Supreme Ct. or the *Cour de Révision* according to the nature of the litigation. By a family pact the matter was referred to M. Poincaré, who made his award later. A family pact gave effect to this award, & the *Cour de Révision* decreed the personal & property separation of deft. & his wife. In 1933 the princess petitioned for dissolution. On the advice of the Council of State, the prince made an ordinance that he would retain the hearing & decision of all matters relating thereto, & declared that he then took over the personal custody of the

PART XI. SECT. 4, SUB-SECT. 2.—G.  
o. *Reved.*, [1925] 1 D. L. R. 761; [1925] 1 W. W. R. 378; 19 Sask. L. R. 247.

o i. —.]—Where a child, upon the death of its mother, had been placed temporarily by the father in the care of a near relative under an arrangement whereby he was to pay for its maintenance, but he had failed to keep up the payments, & upon his remarriage the relative refused the custody of the child to its father:—*Held*: in the circumstance, the father had not surrendered his parental right over the child, nor had the *prima facie* presumption that it was for the child's benefit that it should be in the custody of its natural parent been displaced.—*Re* MILLS, [1928] N. Z. L. R. 158.—N.Z.

PART XI. SECT. 4, SUB-SECT. 3.—A.

st. *Child handed to father—& in custody of father's relations.*—A wife, living apart from her husband, met him in the street, placed the younger child of the marriage, a girl aged five months & at that time in a delicate state of health, in his arms, & left the child with him. The mother made no inquiries as to the provision which the father was able to make for its care, nor did she afterwards make any inquiries as to its welfare. The father having died, the mother brought an action for delivery of the child against relatives of the father, in whose care the child had been placed by him. Circumstances in which the ct. ordered delivery of the child to the mother. *Semble*: the mother had not abandoned the child within Custody of Children Act, 1891 (c. 3).—*M'LEAN v. HARDIE*, [1927] S. C. 344.—SCOT.

sw. *Right as against deceased father's wife.*—*Habeas corpus* application by a mother for the delivery of her child to her. The child's father had died & the application was opposed by his widow with whom the child was living. *Appet.* & the father of the child were

Chinese; they had never married, but she had lived with him as his wife; & they & his wife had, apparently, lived together until over a year after the birth of the child. The child was five years old & the mother had recently married a Chinese who had suitable accommodation for himself & wife & the child; he wished his wife to have the child & said he was able to support them. There was nothing against the mother's character:—*Held*: the mother was entitled to the custody of the child.—*Re* LEE LAI KING, [1930] 3 W. W. R. 471.—CAN.

PART XI. SECT. 4, SUB-SECT. 3.—B.

b i. — *Adultery—Interest of child first consideration.*—*Adultery* by a wife ought not to be regarded for all time & under all circumstances as sufficient to disentitle her to access to or even to the custody of the children. The ct. will have regard to the particular circumstances of each case, always bearing in mind that the benefit & the interest of the infant is the paramount consideration.—*BOLTON v. BOLTON*, [1928] N. Z. L. R. 473.—N.Z.

PART XI. SECT. 7, SUB-SECT. 2.—A.

1216 ii. — *Right of court of appeal to interfere.*—*Re* PAISLEY, [1928] 1 D. L. R. 403.—CAN.

o i. —.]—*Re* HARDING. [1929] 2 D. L. R. 623; 63 O. L. R. 158.—CAN.

1221 i. *Infant to be freed from improper restraint.*—The writ of *habeas corpus* is the proper remedy of a mother who wishes to regain possession of her child illegally kept or detained from her.—*STEVENSON v. FLORANT*, [1925] 4 D. L. R. 530; [1925] S. O. R. 532; *affd.*, [1927] A. C. 211; 96 L. J. P. O. 1; 136 L. T. 265; 43 T. L. R. 6.—CAN.

1221 ii. —.]—The writ of *habeas corpus* is the proper remedy, as recognised by law & jurisprudence, of a parent who wishes to regain possession of a child alleged to be illegally kept

or detained from him.—*DUGAL v. LEFEBVRE*, [1934] S. C. R. 501; 4 D. L. R. 532; 62 C. C. C. 178.—CAN.

PART XI. SECT. 7, SUB-SECT. 2.—B. (c).

1239 i. *Nurse.*—The parents of a child placed it in the care of a nurse employed at an hospital shortly after its birth. The parents then had no home of their own, & were in poor circumstances, the mother was blind, & the father's sight seriously impaired. When the child was about three years old, the parents had a home of their own, & though the child was well treated at the hospital the parents did not have free access to him, & were losing touch with him:—*Held*: the child should be handed over to the father.—*Re* ROGERS (1923), 19 Tas. L. R. 11.—AUS.

sv. *Relative—Entrusted with custody by father & mother.*—*KIVENKO v. YAGOD*, [1928] 4 D. L. R. 955; [1928] S. C. R. 421.—CAN.

PART XI. SECT. 7, SUB-SECT. 4.

1252 i. — *Husband against wife—Child out of the jurisdiction.*—Upon an appln. under Infants' Act, R. S. O., c. 186, by the father of an infant, for an order for the custody of the infant, it was held as the infant was not at the time resident in Ontario, the Supreme Ct. of Ontario had no jurisdiction. As the procedure under Infants' Act is an alternative procedure to the procedure by writ of *habeas corpus*, the jurisdiction must be limited to cases where a writ would be granted; & a writ will not be granted where the person directed to be produced in ct. is without the jurisdiction. It is only in extraordinary circumstances that the ct. will appoint a guardian to an infant who resides abroad, & has no property in the jurisdiction; & in this case the circumstances were not so extraordinary as to call for the exercise of this jurisdiction.—*Re* SHAND, [1928] 2 D. L. R. 981; 63 O. L. R. 145.—CAN.

children. By a later ordinance he dissolved the marriage; & in Mar. 1936, he made a similar ordinance as to the custody of the children:—*Held*: on these facts *pltf.* was the lawful guardian & entitled to the custody of Prince Rainier, & it was ordered that *defd.* do deliver him to *pltf.* or to such other person as he, the prince, should authorise to receive him, & an injunction to restrain *defd.* from removing the young prince out of the United Kingdom without *pltf.*'s consent. *Pltf.* to have the costs of the action.—*MONACO v. MONACO* (1937), 157 L. T. 231.

**1253a. Order giving custody to mother under Guardianship of Infants Act, 1925 (c. 45), s. 7—Appeal—Whether security for costs ordered.**—A wife obtained from the justices an order under Guardianship of Infants Act, 1925 (c. 45), s. 7, giving her the custody of

the child of the marriage. The husband appealed against the order to a judge of the Chancery Div. & the wife applied for an order for security for her costs in the appeal, on the ground that she was not in a financial position to resist the appeal without some assistance or security. There was no evidence that the husband would not be able to pay the wife's costs if he were unsuccessful in his appeal:—*Held*: there were no special circumstances to justify the *ct.* in making the order asked for. The application must be dealt with in accordance with the usual practice of *cts.* of appeal in ordering security for costs of an appeal & not in accordance with the practice of the Divorce Ct. in ordering security for a wife's costs.—*Re THOMSETT, THOMSETT v. THOMSETT*, [1936] 3 All E. R. 649; 156 L. T. 48; 53 T. L. R. 106; 80 Sol. Jo. 933.

## Part XIa.—Adoption.

See Adoption of Children Act, 1926 (c. 29).

**1253b. Adopted less than twenty-one years older than child—But within prohibited degrees—Mother & illegitimate child.**—A husband & wife sought to adopt under Adoption of

Children Act, 1926 (c. 29), an infant, the daughter of the wife but no blood relationship of the husband. Both husband & wife were less than twenty-one years older than the infant:—*Held*: the phrase "within the

### PART XI. SECT. 8, SUB-SECT. 3.

**i. — Grounds for setting order aside—Order signed by two justices—Only one present at hearing.**—*Re MAILMAN*, [1927] 2 D. L. R. 529; 47 Can. Crim. Cas. 106; 59 N. S. R. 61; subsequent proceedings, [1927] 3 D. L. R. 1111; 59 N. S. R. 384.—CAN.

**ii. — Mistrial.**—On appeals by a father from orders made on petitions under the Act respecting the Adoption of Children, R. S. B. C. 1924, c. 6, whereby his infant children were taken from his custody & control & given for adoption into the care & custody of the respective petitioners:—*Held*: there had been a mistrial & a new hearing was ordered.—*PAINTER v. MCCABE, SHEPPARD v. MCCABE*, [1928] 2 D. L. R. 13; [1928] 1 W. W. R. 149; 39 B. C. R. 249.—CAN.

**iii. Implied right of further application.—Necessity for change of circumstances.**—The principle that orders as to the custody of children are subject to further application & are to be treated as if expressed to be made "until further order" does not enable applications for custody to be made from time to time under the same circumstances as those which existed at the time the existing order for custody was made. An order awarding the custody of a child is subject to the doctrine of *res judicata* with respect to all questions affecting the matter up to the time it was rendered. If, however, a change is shown to have arisen in the circumstances of the parties since the order was made which warrants a reconsideration of the question, the *ct.* will not be bound by the order, but will use its discretion in view of the altered conditions, always keeping in mind the fact that the welfare of the child is the paramount consideration.—*WALLIS v. WALLIS & GRANT*, [1929] 2 D. L. R. 253; 1 W. W. R. 631; 23 S. L. R. 489.—CAN.

**iv. Order not final.**—An order for custody of an infant is never final in the sense that it cannot be changed & while it is better for an infant generally that its custody should not be changed back & forth, yet it is much more

desirable that it should be changed than that it should remain where it is not in the best interest of the child that it should be.—*CAIRNS v. CAIRNS* (No. 2), [1932] 1 W. W. R. 364; 1 D. L. R. 774; 2 Alta. L. R. 145.—CAN.

### PART XIa.

**sc. Effect of—Under Adoption Act.**—*Re WARREN* (1926), 37 B. C. R. 322.—CAN.

**sd. — On jurisdiction to make order as to custody.**—In an action in which *pltf.* (the husband) was granted a decree *nisi* for divorce his prayer for relief asked for an order as to the custody of a child which had been adopted by the parties by order of a *ct.* in Alberta. The child was in the custody of *defd.*; & *pltf.* contended that its welfare would be best served by leaving the child with her for the present, although he did not repudiate or seek to avoid responsibility for its care & maintenance. It appeared that at the time of the adoption the adopting parents were domiciled in Saskatchewan & that the child was described as of Calgary:—*Held*: the effect of the Saskatchewan & Alberta legislation providing for the adoption of children was to bring the question to be decided in this case within the English decisions as to children alleged to be legitimated by subsequent marriage, wherein it was held that an order for custody implies a declaration of legitimacy & cannot be made by the *ct.* in divorce proceedings where the child & other parties possibly interested are not & cannot be represented. However, the *ct.* under its general jurisdiction in respect of infants, which is that of the High Court of Justice in England, should direct that the care & control of the child should remain until further order in *pltf.*—*CULVER v. CULVER & GAMMIE* (No. 2), [1933] 1 W. W. R. 435; 2 D. L. R. 793.—CAN.

**se. — Inheritance by adopted child.**—*IRELAND v. PAYNE*, [1934] 2 W. W. R. 188; 4 D. L. R. 375; 42 Man. L. R. 161.—CAN.

**sf. By agreement.**—Under Child

Welfare Act, C. A., 1924, c. 30, as amended in 1926, c. 4, s. 15, a person who, when a child within the said Act, was adopted under an agreement entered into prior to Sept. 1, 1921, between a person having his or her legal guardianship, & the adopting parent has the same status, including the right of inheriting from his or her foster parents dying after said amendment, except as to property expressly limited to heirs of the body, as if he or she were their child by natural birth, whether or not said adopted person was a "child" when the amendment came into force, & is, therefore, to be deemed the child of the foster parents for the purposes of Life Insurance Act, C. A., 1924, c. 99. The Act does not, however, create a new canon for the construction of wills. Therefore, where the adopted daughter was the niece of the foster father's wife, & his will, after making provision for said adopted daughter by name, gave part of the residue of his estate to his & his wife's next-of-kin, the daughter took under the residuary bequest as his wife's niece & not as testator's child.—*Re SCOTT ESTATE*, [1928] 1 W. W. R. 168.—CAN.

**sz. Registration of adoption.**—An authority to adopt was presented for registration by the adoptive son's natural father, who was then his nearest male agnate, treating the son as having passed into the adoptive family. Registration was effected, the registering officer having satisfied himself, as required by sect. 41, that the person presenting was entitled to do so according to sect. 40, & it not having been objected that he was not so entitled:—*Held*: the document was duly registered, since the natural father, as the adoptive son's nearest male agnate, was the proper person to act as his natural guardian in the absence of any guardian judicially appointed; further, that any doubt upon the facts was removed by the certificate of the registering officer.—*VENKATAPPA v. VENKATA RANGA RAO* (1928), 1 L. R. 52 Mad. 175.—IND.

**sa. Adoption order—Form of—Need**

prohibited degrees of consanguinity" in the proviso to sect. 2 (1) (b) of the Act of 1926, on its proper construction, defined the particular degree of blood relationship between the proposed adopter & the proposed adoptee which must exist in order to confer on the ct. the power of relaxing the prohibition contained in the sub-sect., & was not limited to the cases where the parties were of opposite sex. The female appct. & the infant were within the degrees of con-

sanguinity, but not the male appct., & accordingly there was no power to approve of the adoption by the male appct. either alone or jointly with the female appct. An order could, however, be made for the female appct. alone to adopt the infant.—*Re C.*, [1938] Ch. 121; 107 L. J. Ch. 65; 158 L. T. 371; 53 T. L. R. 995; 81 Sol. Jo. 650.

Effect of adoption order—On poor law settlement.]—*See* POOR LAW, No. 504a, *post*.

## Part XII.—Religion and Education.

1257. *Add. Annotation* :—*Re* *Carroll*, [1931] 1 K. B. 317.  
 1258. *Add. Annotation* :—*Re* *Carroll*, [1931] 1 K. B. 317.  
 1262. *Add. Annotation* :—*Re* *Carroll*, [1931] 1 K. B. 317.  
 1266. *Add. Annotation* :—*Re* *Carroll*, [1931] 1 K. B. 317.  
 1269. *Add. Annotation* :—*Re* *Carroll*, [1931] 1 K. B. 317.

- 1272a. —.]—*RADCLIFFE v. READETT* (1852), 18 L. T. O. S. 316.  
 1274. *Add. Annotation* :—*As to* (3) *Re* *Carroll*, [1931] 1 K. B. 317.  
 1302. *Add. Annotation* :—*As to* (1) *Re* *Carroll*, [1931] 1 K. B. 317.  
 1306. *Add. Annotation* :—*As to* (2) *Re* *Carroll*, [1931] 1 K. B. 317.

## Part XIII.—Guardianship.

1432. *Add. Annotation* :—*Re* *Carroll*, [1931] 1 K. B. 317.

1441a. Necessity for citation of next-of-kin of minor.]—The ct. refused to appoint the

*not show facts giving jurisdiction.*—*Re MOMBROQUETTE* (N. S.), [1929] 1 D. L. R. 794; 51 Can. Crim. Cas. 218.—CAN.

*st.* — *Appeal.*—*TUCK v. ROBINSON*, [1936] 2 W. W. R. 80.—CAN.

*sh.* — — —.]—*TUCK v. ROBINSON* (No. 2), [1936] 3 W. W. R. 254.—CAN.

*sb.* *Power of court to change name.*—*Re X.*, [1930] 3 W. W. R. 640.—CAN.

*sd.* *Exemption from succession duty.*—The child in question herein:—*Held*: to be one to whom testator in question stood for not less than ten years immediately prior to his death "in the acknowledged relationship of a parent," within sect. 2 of Succession Duty Act, R. S. B. C. 1924, & therefore, the amount going to her under his will was entitled to exemption under sect. 4 of said Act.—*REDMOND v. A.-G. FOR BRITISH COLUMBIA*, [1931] 3 W. W. R. 18; 44 B. C. R. 390.—CAN.

*st.* *Adoption of Roman Catholic infant by Protestants.*—An order having been made under Adoption Act, R. S. B. C., 1924, whereby a petition by a husband & wife for leave to adopt an infant was granted, the natural parents appealed on the ground that as they were Roman Catholics & resp., the adopting parents, were Protestants, the ct. had no jurisdiction to make the order, or at all events it was contrary to law:—*Held*: the appeal should be dismissed.—*BLAND v. AGNEW* (No. 2), [1933] 1 W. W. R. 681; 2 D. L. R. 645; 66 B. C. R. 491.—CAN.

*sk.* *Adoption of European child—By Maori.*—Under the Adoption of Children Act (No. 8 of 1895, New Zealand) a Maori can adopt a European born child, & the child so adopted has the rights of succession which a natural born child would have had.—*HINEITI RIREREIRI ARANI v. NEW ZEALAND PUBLIC TRUSTEE*, [1930] A. C. 198; 88 L. J. P. C. 160; 121 L. T. 460; 35 T. L. R. 671, P. C.—N.Z.

*sl.* *Right to inherit—Effect of Child Welfare Act, 1927 (Man.).*—The right of an adopted child to inherit under Child Welfare Act, C.A., 1924, is not displaced by the amending Act of 1927, which does not affect vested rights.—*IRELAND v. PAYNE*, [1934] 4 D. L. R. 375.—CAN.

*sn.* — — —.]—By sect. 132A of Child Welfare Act, C.A., 1924, added thereto by 1926, c. 4, it was provided that any agreement made prior to Sept. 1, 1921, between the Children's Home of Winnipeg or a person having the legal guardianship of a child & any person or persons for the adoption of such child, was thereby made absolute, & every child so adopted should be deemed to have been adopted under the preceding provisions of the Act. Said provisions gave to a child adopted thereunder the capacity of inheriting from the adopting parents as fully as their child by natural birth:—*Held*: on the facts, the adoption agreements had ceased to exist before any statute giving a right of inheritance was passed & the claimants had not shown that on any reasonable view of the facts the agreements should be considered to have been either revived or continued by the statutes subsequently enacted.—*Re YOUNG ESTATE*, [1935] 2 W. W. R. 407.—CAN.

*sp.* *Jurisdiction to make adoption order—Conflict of laws.*—An order for adoption may be validly made under sect. 127 of Child Welfare Act, 1923, where at the time of the making of the order the adopting parents, or parent, & the child to be adopted are either resident or domiciled in New South Wales. Where the order is based on residence merely, it will nevertheless be valid within New South Wales.—*Re AN INFANT* (1934), 34 S. R. N. S. W. 349; 51 N. S. W. W. N. 62.—AUS.

*st.* *Jurisdiction of county court.*—A Nova Scotia county ct. has statutory jurisdiction only, in the matter of child

adoption.—*Re GOUDEY & GIBBS*, [1937] 1 D. L. R. 732.—CAN.

### PART XII. SECT. 1, SUB-SECT. 1.

1263 *ii.* — — —.]—Where the wishes of a father as to the religious faith in which the child is to be educated conflict with the interest of the child, the child's welfare is the predominant consideration.—*DELAURIER v. JACKSON*, [1934] 1 D. L. R. 790; S. C. R. 149.—CAN.

### PART XII. SECT. 1, SUB-SECT. 2.

1265 *vi.* — — —.]—*Unless prejudicial to child.*—*Re LAURIN* (1927), 60 O. L. R. 409.—CAN.

*ki.* — *Not interfered with—Effect of Child Welfare Act, C. A., 1924 (c. 30), ss. 2, 186.*—*Re SKALESKI, POPHAM v. BERTRAND*, [1927] 1 D. L. R. 781; [1927] 1 W. W. R. 355; 47 Can. Crim. Cas. 81; 36 Man. L. R. 221.—CAN.

### PART XII. SECT. 1, SUB-SECT. 4.

*so.* *Child committed to Children's Aid Society—Duty of court to ascertain religious persuasion.*—It is the duty of a magistrate on committing a child to the custody of a Children's Aid Society to endeavour to ascertain the religious persuasion to which the child belongs, & on an application by way of *habeas corpus* with *certiorari* in aid the judge may see whether this endeavour was made, & if not the order of the magistrate may be quashed.—*Re BLAND*, [1934] 1 D. L. R. 646; 60 C. C. C. 339; 48 B. C. R. 45.—CAN.

### PART XIII. SECT. 1.

*sx.* *Infants Act, R. S. S., 1920 (c. 155), s. 20—Effect of.*—*Re NAKAUCHI ESTATE*, [1927] 3 D. L. R. 1087; [1927] 2 W. W. R. 607; 21 Sask. L. R. 87.—CAN.

*sy.* — — —.]—*Re SHERWIN ESTATE, Re LANGLEY ESTATE*, [1927] 3 D. L. R. 1098; [1927] 2 W. W. R. 609; 21 Sask. L. R. 644.—CAN.

paternal uncle guardian to a minor, for the purpose of instituting a suit on his behalf against the mother in reference to the validity of the will of the minor's father, without first citing the mother to show cause why such an appointment should not be made.—*In the Goods of JENKINS* (1869), L. R.

1 P. & D. 690; 38 L. J. P. & M. 72; 21 L. T. 300; 33 J. P. 712.

1448. *Add. Annotation*:—*Generally*, *Reid. Re Carroll*, [1931] 1 K. B. 317.

1491. *Add. Annotation*:—*Reid. Re Carroll*, [1913] 1 K. B. 317.

## Part XIV.—Legal Proceedings.

1532. *Add. Annotation*:—*Reid. Cooper v. Dummett* (1930), 70 L. Jo. 394. 1563a. ———.] — PRACTICE NOTE, [1926] W. N. 8.

### PART XIII. SECT. 2.

*sz. Surviving parent.*—Although Domestic Relations Act, 1927, c. 5 (Alta.), does not expressly provide that where only one parent is living that parent shall be the guardian, the obvious inference from its provisions is that so long as the surviving parent is a fit & proper person to have the guardianship, that parent is the guardian appointed or constituted by the Act, & the power given by sect. 64 to the ct. to appoint a guardian does not arise.—*Re DOMESTIC RELATIONS ACT, 1927*; *Re PULKABREK*, [1928] 4 D. L. R. 821; [1928] 3 W. W. R. 323.—CAN.

*sz. Surviving parent.*—Sect. 24 of Infants Act, R. S. S. 1920 (c. 155), as amended by 1925-26 (c. 42), provides: "On the death of either parent, the surviving parent shall be the guardian of their infant children":—*Held*: this sect. appoints & constitutes the surviving parent the guardian without an order from the ct. being necessary, & being so appointed & constituted the guardian has the charge & management of the estate under sect. 28 of said Act; & management of the estate includes authority to receive it.—*Re SHERRER*, [1930] 3 W. W. R. 229; 4 D. L. R. 1011.—CAN.

### PART XIII. SECT. 3, SUB-SECT. 2.

1377 *i. Necessity for probate.*—*Held*: not necessary.—*Re PRITCHARD*, [1930] 2 W. W. R. 112; 4 D. L. R. 1030; 24 S. L. R. 480.—CAN.

*sd. Appointment by surviving parent.*—Sect. 10 of Equal Guardianship of Infants Act, 1917, gives the right to a surviving parent to transfer to one or more persons any or all of his or her powers & duties with respect to, (a) the custody & control of their infant children, & (b) the management of the property of the children but not of their services & earnings; & a person to whom a transfer of all said powers, rights & duties is made is a guardian.—*Re BULLEN ESTATE, ROYAL TRUST CO. v. WARTER*, [1935] 1 W. W. R. 725.—CAN.

### PART XIII. SECT. 5, SUB-SECT. 1.—A.

*11. Jurisdiction to appoint when parents unfit.*—*Re STEELE*, [1930] 2 D. L. R. 212.—CAN.

*sg. Calcutta Supreme Court.*—On an application, made by the father to the High Ct. in its original jurisdiction, for being appointed a guardian of the person & property of the infant, there being no opposition on the part of any other relation of the infant;—*Held*: the Charter of the Supreme Ct. gave that ct. all the powers of the Ct. of Chancery in England & provided by clause 25 thereof that the Supreme Ct. should be authorised to appoint guardians & keepers for infants & their estates according to the order observed in England. Since Guardian & Wards Act, 1890, s. 3, saved this jurisdiction of the Chartered High Ct., this ct. had power to make the order

asked for.—*Re TARUNCHANDRA GHOSH* (1929), 1 L. R. 57 Calc. 533.—IND.

### PART XIII. SECT. 5, SUB-SECT. 1.—B.

1413 *iii.* ———.]—Guardians & Wards Act, VIII. of 1890, clearly shows that the ct. can exercise its jurisdiction to appoint a guardian of the person of the minor even if he be possessed of no property.—*WALTER v. WALTER* (1927), 1 L. R. 55 Calc. 731.—IND.

*m i.* ———.]—Where the husband is domiciled in Alberta at the time an action for divorce is begun the Supreme Ct. of Alberta has jurisdiction in such action to make an order awarding the custody of the children to the mother even though they have been removed by the father to a foreign state & are residing therein at the time of the appln. for the order; & will where the merits warrant it make such an order provided it appears that under the laws of said state the order will be recognised as valid by the cts. thereof.—*GOFORTH v. GOFORTH*, [1929] 1 D. L. R. 58; [1928] 3 W. W. R. 483.—CAN.

*so. Not infant having interest in property of undivided Mitacshara family.*—*GHARIB-UL-LAH v. KHALAK SINGH* (1903), 19 T. L. R. 447, P. C.—IND.

### PART XIII. SECT. 5, SUB-SECT. 2.

*sd. Consent of official guardian—Withdrawal of.*—*Re ADMINISTRATION ACT, Re HADDON*, [1927] 2 D. L. R. 747; [1927] 1 W. W. R. 737; 38 B. C. R. 328.—CAN.

### PART XIII. SECT. 5, SUB-SECT. 3.—A.

1456 *i. Discretion of judge—Not interfered with unless erroneously exercised.*—*Re STONE & BALMAIN* (1929), 1 M. P. R. 192.—CAN.

1468 *iii.* ———.]—It is not the practice of the ct. to appoint a married woman sole guardian of orphan children.—*Re HANCOCK*, [1932] N. Z. L. R. 318.—N.Z.

*so. Surviving parent—Notwithstanding statutory right.*—Notwithstanding the provisions of sects. 24 & 28 of Infants Act, R. S. S. 1920, with respect to constituting the surviving parent of infant children their guardian & conferring authority on him or her as such to take charge of & manage their estate, the ct. still has jurisdiction to make an order, on the application of such parent, appointing him or her to act as guardian, under bond, for the purpose of receiving certain moneys payable to the children.—*Re CLASON ESTATE*, [1931] 1 W. W. R. 504; 2 D. L. R. 530.—CAN.

*sf. Individual, not corporation.*—In appointing a guardian of the property of a minor the capacity & fitness of the individual have to be taken into consideration. It is for this reason that an individual only is appointed, by the ct., as guardian.—*ASHALATA RAY v. SOCIETY FOR THE PROTECTION OF*

CHILDREN IN INDIA (1930), 1 L. R. 58 Calc. 15.—IND.

### PART XIII. SECT. 7.

*sg. Vacation of consent order.*—The fact that an order appointing guardians of infants & providing for access by the mother was made by consent, does not prevent the ct. from vacating it, with a view to disposing of an application by the guardians to be permitted to adopt the infants, if the circumstances governing their welfare have changed since the order.—*HERRON*,

### PART XIV. SECT. 1, SUB-SECT. 1.

*sh. Consent or authority of next friend of infant plaintiff—Necessity for.*—*RYAN v. TRASK* (Alta.), [1926] 1 W. W. R. 772.—CAN.

*sr. Supervening insanity of infant.*—A pursuer in minority, to whom a curator *ad litem* had been appointed, became insane *pendente lite*:—*Held*: as the pursuer on becoming insane ceased to have any *persona standi in judicio*, procedure taken by the curator after incapacity had supervened was incompetent.—*MOODIE v. DEMPSTER*, [1931] S. C. 553.—SCOT.

### PART XIV. SECT. 1, SUB-SECT. 2.—B.

1520 *iv.* ———.]—A writ of summons in an action by an infant may be issued by a next friend, appointed before the issue of the writ.—*LOWTHER v. MOORE* (1936), 11 M. P. R. 124.—CAN.

*ki.* ———.]—The entering of an action in a Manitoba county ct. by an infant without the intervention of a next friend is not a nullity.—*STOCKTON v. WEBB*, [1932] 3 W. W. R. 471; [1933] 1 D. L. R. 218; 40 Man. L. R. 597.—CAN.

*sj. Action without next friend—Appearance by defendant—Waiver.*—The bringing of an action by an infant without a next friend is only an irregularity, which will be waived by an unconditional appearance by doct.—*HUBER v. SZULES & SZULES*, [1929] 3 D. L. R. 193; 2 W. W. R. 11; 23 S. L. R. 499.—CAN.

### PART XIV. SECT. 1, SUB-SECT. 2.—C. (1).

*p i.* ———.]—A married woman cannot be next friend of an infant pltf.—*DRINKWATER v. NATIONAL SAND & MATERIAL CO.*, [1938] 1 D. L. R. 799.—CAN.

### PART XIV. SECT. 1, SUB-SECT. 2.—D.

*sb. Consent in writing—Motion for leave to file after action begun.*—*GUTKIN v. WINNIPEG CITY*, [1933] 2 W. W. R. 254; 41 Man. L. R. 395.—CAN.

*sd. Leave to file nunc pro tunc.*—The filing of the consent in writing of the next friend in an infant's action is an act of procedure or practice;

- 1735a. —.]—It has always been my impression, that, on a change of the next friend, the ct. did not apportion the costs. If an infant came of age, & carried on a suit instituted in his name, he was responsible for the whole costs (PARKER, V.-C.).—BLIGH v. TREDGETT (1851), 5 De G. & Sm. 74; 21 L. J. Ch. 204; 15 Jur. 1101; 64 E. R. 1024.
1751. *Add. Annotation*:—*Reid. Re Clayton's Petn.* (1927), 43 T. L. R. 659.
1771. *Add. Annotation*:—*Consd. Re Picton, Picton v. Picton*, [1931] W. N. 254.
1772. *Add. Annotation*:—*Consd. Re Picton, Picton v. Picton*, [1931] W. N. 254.
- 1772a. —.]—HULBERT v. THURSTON, [1931] W. N. 171, C. A.
- 1772b. —.]—*Re PICTON, PICTON v. PICTON*, [1931] W. N. 254.
1841. For "Pltf.'s solr. ought to be appointed" read "Pltf.'s solr. ought not to be appointed."

& the omission to file the consent before or at the same time as the issue of the statement of claim is an error in procedure which can be remedied so as not to defeat the infant's claim. Where the rights of deft. are not prejudiced & where no fresh claims are set up in respect to the cause of action, the leave applied for *nunc pro tunc* should be granted.—JONASSON v. ROYAL TRANSPORTATION, LTD., [1936] 3 W. W. R. 540; 44 Man. L. R. 274.—CAN.

PART XIV. SECT. 1, SUB-SECT. 2.—G. (b).

1805 i. *Power to compromise*—If for benefit of infant.—Pltf., an infant, suing by his next friend, was given judgment in the county ct. for \$529 damages & costs. Deft. told the next friend that he, deft., was sure to win on the appeal, & proposed a settlement. The next friend being alarmed by deft.'s statement signed a settlement on the following day in the presence of deft. & the latter's solr., whereby, in consideration of the abandonment of the appeal, the judgment was reduced by \$150 & deft. was given time for its payment. On deft.'s appln. an order was made confirming the settlement & setting aside the execution. On appeal therefrom:—*Held*: the order should be set aside.—TRUEN v. BOZYNSKI, [1928] 3 D. L. R. 484; [1928] 2 W. W. R. 340; 37 Man. L. R. 363.—CAN.

PART XIV. SECT. 1, SUB-SECT. 6.

sk. *General rule*.—Where a suit is brought by a minor pltf. to the knowledge of, & without objection from, deft., & pltf. becomes a major before the suit is heard & decided, it is not a nullity, & is maintainable.—FULI BIBI v. KHOKAI MONDAL (1927), 1 L. R. 55 Calc. 712.—IND.

PART XIV. SECT. 1, SUB-SECT. 10.—B. (d).

h. *Revsd.*, 4 A. R. 449.

al. *Applications as to property*.—On applications respecting the property of infants costs must be kept down & the cheapest & most expeditious procedure adopted. Where there is a choice as to the manner of procedure & the more expensive procedure is taken, the solr. can recover only those costs which would have been allowed him had the cheaper procedure been followed.—ROYAL TRUST Co. v. BONSALE, [1925] 3 D. L. R. 141; [1925] 2 W. W. R. 103; 19 Sask. L. R. 518.—CAN.

PART XIV. SECT. 2, SUB-SECT. 2.—A.

1818 i. *Necessity for separate representation*.—SHAIK ABDUL KARIM v. THAKURDAS THAKUR (1928), 1 L. T. 55 Calc. 1241.—IND.

p1. —.]—JONES v. GIBBONS, [1929] 4 D. L. R. 1067; 40 B. C. R. 65.—CAN.

PART XIV. SECT. 2, SUB-SECT. 2.—B. (a) i.

sm. *Infant for whom appearance not entered*.—*Held*: it is competent to appoint a curator *ad litem*, to a pupil, called as defender in an action, for whom appearance has not been entered.—DRUMMOND'S TRUSTEES v. PEEL'S TRUSTEES, [1929] S. C. (Ct. of Sess.) 484.—SCOT.

PART XIV. SECT. 2, SUB-SECT. 2.—B. (a) ii.

sn. *Guardian responsible for document or transaction on which action founded*.—VENKATASOMESWARA RAO v. LAKSHMANASWAMI (1928), 1 L. R. 52 Mad. 275.—IND.

PART XIV. SECT. 2, SUB-SECT. 2.—B. (b).

1856 i. *Power to consent*—To decree.—KUMAR GANGANAND SINGH v. MAHARAJAH SIR RAMESHWAR SINGH BAHADUR, No. 19161, post.

sx. *Duration of appointment*.—A guardian *ad litem* appointed for a minor deft. by the trial ct. continues to represent him in all stages of the *lis*, until such guardian has been permitted to retire, or been removed, by the ct.; & it is he alone who can file an appeal on behalf of the minor.—LATAPAT ALI KHAN v. MUHAMMAD GAR KHAN (1929), 1 L. R. 53 All. 494.—IND.

PART XIV. SECT. 2, SUB-SECT. 5.

1898 ii. —.]—HEWETT v. SMITH, [1927] S. A. S. R. 338.—AUS.

PART XIV. SECT. 2, SUB-SECT. 7.—A.

1916 i. —.]—Where fraud or collusion can be alleged.—A suit by a minor to set aside a consent decree, on the allegation that a fraud was practised not on the ct. but on himself, is maintainable.

It is the duty of a guardian *ad litem* to be as vigilant in guarding the interests of the minor as he would be expected to be if his own interests were involved, & the ct. will ordinarily relieve the minor from the effect of a consent decree & give him an opportunity to defend the suit, if the guardian did no more than put his signature to

1942. *Add. Annotation*:—*Reid. Doyle v. White City Stadium, Ltd.* (1934), 78 Sol. Jo. 601.

1952. *Add. Annotation*:—*Apld. Mansfield v. Robinson*, [1928] 2 K. B. 353.

1981a. *Liability to solicitor employed by him*—General rule.—MARNELL v. PICKMORE (1796), 2 Esp. 472; 170 E. R. 244, N. P.

1968. *Add. Annotation*:—*Reid. Murray v. Schwachman, Ltd.*, [1937] 2 All E. R. 68.

1972a. *Sanction of Court of Appeal*—Action settled while appeal pending.—An infant pltf. obtained a judgment awarding damages in respect of personal injuries. Defts. gave notice of appeal, but, while the appeal was pending, the action was settled, the settlement being approved by CHARLES, J.:—*Held*: where an action on behalf of an infant is settled after notice of appeal has been entered, the settlement must be approved by the Ct. of Appeal.—WALSH v. GEORGE KEMP, LTD., [1938] 2 All E. R. 266; 54 T. L. R. 579; 82 Sol. Jo. 254, C. A.

a petition of compromise without considering for himself the question of benefit to the minor. But the ct. will not allow a minor to avoid a consent decree, if, in the circumstances, it considers that the settlement was for the benefit of the minor.—KUMAR GANGANAND SINGH v. MAHARAJAH SIR RAMESHWAR SINGH BAHADUR (1927), 1 L. R. 6 Pat. 388.—IND.

g1. —.]—*Negligence of guardian ad litem*.—"Gross negligence," which may be interpreted as culpable neglect of the interests of a minor deft., on the part of his guardian *ad litem* will entitle the minor to the avoidance of proceedings taken against him. The negligence must be such negligence as leads to the loss of a right which, if the suit had been defended with due care, must have been successfully asserted.—BRIJ RAJ v. RAM SARUP (1926), 1 L. R. 48 All. 44.—IND.

PART XIV. SECT. 2, SUB-SECT. 7.—B.

1922 ii. —.]—CLIBBORN v. FORSTALL (1843), 5 I. Eq. R. 531.—IR.

1922 iii. —.]—A decree for a sale in a mtge. cause ought not to give the infant a day to show cause.—CLINTON v. BERNARD (1844), Drury temp. Sug. 287.—IR.

1922 iv. —.]—A day to show cause ought not to be given to the minor.—HUTTON v. MAYNE (1846), 3 Jo. & Lat. 586.—IR.

1922 v. —.]—A final order of foreclosure should reserve a day for infant deft. to show cause.—LONDON & CANADIAN LOAN & AGENCY Co. v. EVERETT (1881), 8 P. R. 489.—CAN.

1922 vi. *Infant need not show cause*—Ontario practice.—It is not now necessary in a judgment for foreclosure that a day should be reserved for an infant deft. to show cause. The rights of infants are protected by the Official Guardian, who in foreclosure actions has the right to ask for a sale by the ct.—KEMP v. BEATTIE, [1929] 1 D. L. R. 55; 63 O. L. R. 176.—CAN.

PART XIV. SECT. 2, SUB-SECT. 10.—B

so. *Official guardian*—Defending as guardian *ad litem*—Where legal guardian capable of safeguarding infant's rights.—Although under Official Guardian Act, R. S. A. 1923, c. 22, the Official Guardian becomes a guardian *ad litem* on being served with the statement of claim in an action against an infant, yet, since by applying to the ct. he may be relieved of his position as guardian *ad litem* where there is a natural & legal



## Part XV.—Wards of Court.

**2027.** *Add. Annotations:—Apld. Greenway v. A.-G.* (1927), 44 T. L. R. 124. *Consd. McPherson v. McPherson*, [1936] A. C. 177. *Refd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579.

**2030.** *Add. Annotations:—As to (1) Refd. Re Lanyon, Lanyon v. Lanyon* (1927), 43 T. L. R. 714. *As to (2) Consd. Re May, Eggar v. May* (1931), 47 T. L. R. 515; *Re Borwick, Borwick v. Borwick*, [1933] Ch. 657. *Refd. Sifton v. Sifton*, [1938] 3 All E. R. 435.

**2036.** *Add. Annotation:—Consd. Re Liddell's Settlement Trusts, Liddell v. Liddell*, [1936] 1 All E. R. 239.

**2068a.** ———.]—Mrs. L., who was a British subject & the wife of a British subject, both being ordinarily resident in England, took the infant children of the marriage to the United States & was keeping them there without the consent & against the will of her husband. Proceedings were thereupon taken in the Chancery Div. to enforce the trusts of a settlement executed by the husband for the benefit of the children, who thereupon became wards of ct.; & thereafter an application was made for an injunction restraining Mrs. L. from keeping the infants out of the jurisdiction & requiring her to bring

them to this country. Notice of this was duly served upon her, & eventually an order was made by GREAVES-LORD, J., directing her to bring the infants to England. On appeal:—*Held*: (1) the ct. had jurisdiction to make the order, inasmuch as Mrs. L., having been properly served under R. S. C., Ord. XI., being ordinarily resident within the jurisdiction, was brought within the reach of the ct. & was thus in the same position as if she were in this country; (2) the making of the order was for the benefit of the infants, who as wards of ct. should not be permanently resident abroad but ought to be brought to this country.—*Re LIDDELL'S SETTLEMENT TRUSTS*, [1936] Ch. 365; [1936] 1 All E. R. 239; 105 L. J. Ch. 161; 154 L. T. 558; 52 T. L. R. 308; 80 Sol. Jo. 165, C. A.

**2069.** *Add. Annotation:—Refd. Re Carroll*, [1931] 1 K. B. 317.

**2087.** *Add. Annotation:—Refd. Re Carroll*, [1931] 1 K. B. 317.

**2088.** *Add. Annotation:—Refd. Re Carroll*, [1931] 1 K. B. 317.

**2167a.** ———.]—*Re OLIVE* (1863), 8 L. T. 567; 11 W. R. 819.  
*See, also*, No. 735, *ante*.

## Part XVI.—Employment of Infants.

*See, now, Children & Young Persons Act, 1932 (c. 46), Part IV., ss. 49–64.*

**2190.** *Add. Annotation:—Consd. Vann v. Eatough* (1935), 154 L. T. 109.

**2192a.** ———.]—Resp., who occupied a stall in a street in which a market was held under a charter, paid a toll as required by the charter. To teach his daughter, who was

under sixteen years of age, the business of selling from a stall, resp. employed her at his stall from which she sold goods:—*Held*: the facts disclosed a mode of street trading under Children & Young Persons Act, 1933 (c. 12), s. 20 (1).—*VANN v. EATOUGH* (1935), 154 L. T. 109; 99 J. P. 385; 52 T. L. R. 14; 79 Sol. Jo. 840; 33 L. G. R. 457, D. C.

## Part XVII.—Protection of Infants.

### SECT. 1.—PROTECTION OF INFANT LIFE (p. 349).

*See, now, Children & Young Persons Act, 1932 (c. 46), Part V., ss. 65–69.*

**2196.** *Add. Citation:—28 Cox, C. C. 43.*

guardian capable of safeguarding the infant's interests, he incurs the personal liability for costs of an ordinary guardian *ad litem* where, instead of applying to be so relieved, he sees fit to defend the action.—*SHEPPARD v. ROBINSON*, [1928] 3 D. L. R. 347; [1928] 2 W. W. R. 235; 23 Alta. L. R. 461.—CAN.

### PART XVII. SECT. 2, SUB-SECT. 3.

*sy. Causing child to be in danger of becoming immoral—Sufficiency of evidence—Parents unmarried.*—*R. v. OKRAINETZ*, [1930] 1 W. W. R. 826; 53 Can. C. C. 340.—CAN.

*sz.* ———.]—The mere fact that the father & mother of an illegitimate child are living together in

adultery in the home where the child is, is not sufficient to support a conviction where there is no evidence that the child's morals are endangered by the adultery.—*R. v. VAHEY*, [1932] O. R. 211; 3 D. L. R. 95; *affd.*, [1932] 4 D. L. R. 656; 58 C. C. C. 401.—CAN.

*sb.* ———.]—A conviction under sect. 215 (2) of the Criminal Code is not justified without proof of indulgence in sexual immorality & indulgence, which must be shown to be such that it would be apparent to a child capable of understanding.—*R. v. EASTMAN*, [1932] O. R. 407; 58 C. C. C. 218.—CAN.

*so. Contributing to child becoming juvenile delinquent—What must be proved.*—Before a person can be held

guilty under sect. 33 (b) of Juvenile Delinquents Act, 1929 (c. 46), of an act contributing to a child becoming a juvenile delinquent or likely to make such child a juvenile delinquent, the child in question must have become a juvenile delinquent.—*Re STROM*, [1930] 1 W. W. R. 878; 53 Can. C. C. 224.—CAN.

*sd.* ———.]—Immoral intercourse with the mother of a 17 month old child, in the presence of the child, will not support a conviction for contributing to juvenile delinquency.—*R. v. MACDONALD*, [1936] 3 D. L. R. 446; 66 Can. C. C. 230; *sub nom. Re MacDonald* (1936), 11 M. P. R. 91.—CAN.

*st. Child growing up without parental control.*—It appearing that a girl of



15 years was allowed to run the streets at night, & there being abundant evidence of her misconduct with men:—*Held*: a magistrate was justified in finding that she was "growing up without salutary parental control & education" within Children's Protection Act, R. S. O., 1927, sect. 1 (p) (viii), & was a neglected child within the Act.—*Re* I. M. (1930), 66 O. L. R. 385.—CAN.

sk. *Father unable to provide for child*.—A child is not neglected within Children's Protection Act, R. S. N. S., 1923, merely because the father is financially unable to provide for it.—*R. v. McCORRY* (1933), 6 M. P. R. 528; 60 C. C. C. 69.—CAN.

sm. *Liability of father of illegitimate child*.—Under Child Welfare Act, R. S. S., 1930, the father of an illegitimate child is liable for its maintenance & education even without any filiation order & an action for contribution may be brought against him in the civil cts. as for a debt; & he comes within the definition of "parent." Because

of these provisions he may be found guilty under sect. 242 (3) (b) of the Criminal Code, R. S. C., 1927, for neglecting or refusing, without lawful excuse, to provide necessaries for such child if it is in destitute or necessitous circumstances.—*R. v. McREYNOLDS*, [1936] 2 W. W. R. 449.—CAN.

PART XVII. SECT. 5, SUB-SECT. 1.

n i. — *Liability of town—Statement of claim*.—Statement of claim for expenses relating to child is sufficient if it sets out that the child was apprehended under the provisions of Children's Protection Act, R. S. N. S., & that the child has a settlement in the town.—*CHILDREN'S AID SOCIETY v. NORTH SYDNEY*, [1932] 2 D. L. R. 64; 4 M. P. R. 401.—CAN.

n ii. — *Necessity for notice*.—Notice in writing to a municipality is a condition precedent to the making of an order against such municipality imposing a duty under Children's Protection Act (Ont.).—*Re WEDDEN*,

[1937] 2 D. L. R. 74; O. R. 417; 68 Can. C. C. 69.—CAN.

n iii. — *Only the municipality where the child was born & where its parents had their matrimonial residence is liable under Children's Protection Act*, R. S. O., 1927, s. 10, for the maintenance of a neglected child.—*Re MORDEN*, [1936] 2 D. L. R. 726; O. R. 334; 66 Can. C. C. 67.—CAN.

n iv. — *Settlement fixed by Juvenile Court—No appeal*.—There is no appeal from an order of a judge of a Juvenile Ct. under Children's Protection Act, R. S. N. S., 1923, fixing the settlement of a neglected child.—*Re HERRIK'S SETTLEMENT*, [1937] 2 D. L. R. 463; 11 M. P. R. 381; 68 Can. C. C. 72.—CAN.

n v. — *Settlement fixed by magistrate—Appeal*.—There is no appeal from the order of a stipendiary magistrate fixing the settlement of neglected children under Children's Protection Act (N. S.).—*Re ZWICKER*, [1938] 1 D. L. R. 770; 69 Can. C. C. 414.—CAN.

# INJUNCTION.

## Part I.—Nature of Injunction.

5. *Add. Annotation*:—**Refd.** *Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401.

## Part II.—Jurisdiction.

14. *Add. Annotations*:—*As to* (1) **Apld.** *Stevens v. Willing & Co.*, [1929] W. N. 53. **Refd.** *Price v. Corpn. D'Énergie De Montmagny*, [1927] A. C. 363. *As to* (3) **Consd.** *Warner Brothers Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209.
20. *Add. Annotation*:—**Apld.** *Rex Co. & Rex Research Corpn. v. Muirhead & Comptroller-General of Patents* (1926), 44 R. P. C. 38.
- 22a. —.—.]—**BEDDOW v. BEDDOW** (1878), 9 Ch. D. 89; 47 L. J. Ch. 588; 26 W. R. 570.
- Annotations*:—**Consd.** *North London Ry. v. G. N. Ry.* (1883), 11 Q. B. D. 30. **Refd.** *Thomas v. Williams* (1880), 14 Ch. D. 804; *Quartz Hill Consolidated Gold Mining Co. v. Beall* (1882), 20 Ch. D. 501; *Bonnard v. Perryman*, [1891] 2 Ch. 269; *Jackson v. Barry Ry.*, [1893] 1 Ch. 238.
36. *Add. Annotations*:—**Apld.** *A.-G. v. Sharp* (1930), 99 L. J. Ch. 441. **Refd.** *Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485.
- 36a. —.—.]—In an action by the A.-G. to restrain the breach of a statute, the ct. has jurisdiction to grant an injunction although the statute imposes a penalty, for example, a fine, for the breach. The grant of an injunction is an additional or alternative remedy.—*A.-G. v. SHARP*, [1931] 1 Ch. 121; 99 L. J. Ch. 441; 143 L. T. 367; 94 J. P. 234; 46 T. L. R. 554; 74 Sol. Jo. 504; 28 L. G. R. 513, C. A.
- Annotation*:—**Consd.** *A.-G. v. Premier Line, Ltd.* (1931), 48 T. L. R. 104.
- 36b. —.—.]—The relators in this action had since 1928 operated a motor coach service between London & Aylesbury, & later under road service licences obtained under Road Traffic Act, 1930 (c. 43), s. 72 (1), & they alleged that defts. had operated a similar service on the same route without having first obtained a licence. In an action to restrain
- defts. from so operating the service, defts. contended that the action for an injunction did not lie, the only remedy being the statutory penalty:—**Held**: the claim for an injunction was maintainable although the statute created a new offence & provided a penalty.—*A.-G. v. PREMIER LINE, LTD.*, [1932] 1 Ch. 303; 101 L. J. Ch. 132; 146 L. T. 297; 48 T. L. R. 104; 75 Sol. Jo. 852; 30 L. G. R. 126.
39. *Add. Annotations*:—*As to* (2) **Consd.** *A.-G. v. Sharp* (1930), 99 L. J. Ch. 441. **Refd.** *Hughes v. Satchell* (1925), 134 L. T. 93. **Generally**, **Refd.** *Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485.
40. *Add. Annotations*:—**Refd.** *Preston v. Raphael Tuck*, [1926] Ch. 667; *Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485.
42. *Add. Annotation*:—**Apld.** *A.-G. v. Sharp* (1930), 99 L. J. Ch. 441.
45. *Add. Annotations*:—**Consd.** *A.-G. v. Sharp* (1930), 99 L. J. Ch. 441. **Refd.** *Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485; *Coles (J. H.) Proprietary, Ltd. v. Need*, [1934] A. C. 82; *Nicholls v. Ely Beet Sugar Factory, Ltd.*, [1936] Ch. 343.
47. *Add. Annotations*:—**Apld.** *A.-G. v. Sharp* (1930), 99 L. J. Ch. 441. **Refd.** *Salisbury & Fordingbridge District Drainage Board v. Southern Tanning Co.* (1920), Ltd., [1927] 2 K. B. 566; *Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485; *A.-G. v. Premier Line, Ltd.*, [1932] 1 Ch. 303.
49. *Add. Annotation*:—**Distd.** *Nicholls v. Ely Beet Sugar Factory, Ltd.*, [1936] Ch. 343.

### PART I. SECT. 1.

9 i. *Where court cannot enforce performance.*—**LAW v. OTTAWA CITY PUBLIC SCHOOL BOARD**, [1928] 4 D. L. R. 483; 63 O. L. R. 1.—**CAN.**

d i. —.—.]—The law of India differs materially from the law of England relating to injunctions. A ct. in India is not concerned with defts.'s conduct, but has to consider whether the invasion is such that pecuniary compensation would not afford adequate relief.—*POOZUNDAUNG BAZAAR CO., LTD. v. ELLERMAN'S ARRACAN RICE & TRADING CO., LTD.* (1934), 1 L. R. 12 Ran. 200.—**IND.**

### PART I. SECT. 2.

11 iii. —.—.]—In an action in a county ct. pltf. obtained an injunction restraining deft. co., its successors & assigns, from damming the waters of a river so as to drown a ford used by pltf. Thereafter deft. co. sold its mill

& dam to another co. The purchasing co. had full notice of the injunction, but, nevertheless, caused the ford to be flooded. Upon the application of pltf. an order was made in the county ct. action for the issue of a writ of sequestration unless the purchasing co. should obey the injunction order:—**Held**: the purchasing co. was bound by the injunction order, & sequestration was properly ordered for breach or contempt of it.—*RUTHIG v. STUART BROS., LTD.* (1923), 53 O. L. R. 558.—**CAN.**

### PART II. SECT. 1.

sa. *General rule.*—The discretionary power to grant an injunction must be exercised reasonably & in harmony with well-established principles.—*PRATT v. SCHEVECK (Sask.)*, [1926] 4 D. L. R. 1169; [1926] 3 W. W. R. 657.—**CAN.**

13 iii. —.—.]—**KAULBACH v. BOYLAN** (1906), 1 E. L. R. 136.—**CAN.**

### PART II. SECT. 4, SUB-SECT. 1.

36 iii. —.—.]—The A.-G. suing in respect of the violation of a prohibition created by a public statute is entitled to maintain an action for an injunction, unless his right to do so is expressly or impliedly taken away by statute. So long as an action brought by the A.-G. at the instance of a relator is to prevent the non-observance of statutory prohibitions by private individuals the ct. is not concerned with whether or not the relator had private interests to serve in inducing the A.-G. to sue.—*A.-G. FOR ALBERTA v. LEES & COURTNEY*, [1932] 3 W. W. R. 533.—**CAN.**

### PART II. SECT. 4, SUB-SECT. 2.

e i. —.—.]—Pltf., who was then chief constable of Vancouver, obtained an interim injunction restraining the police commission of that city from

from said office. The

## Part III.—Interlocutory Injunctions.

## 67. Add the following para. :—

After long acquiescence under such an order the ct. will not readily entertain an application for dissolving it.

105a. *S. P. GREAT WESTERN RY. Co. v. BIRMINGHAM & GLOUCESTER RY. Co.* (1844), 3 L. T. O. S. 317, L. C.113a. ———.]—*NEW NIMROD Co., LTD. v. PERUVIAN PACIFIC RY., LTD., INTERNATIONAL*

judge refused to continue the injunction until trial, & ptf. brought an interlocutory appeal from said refusal; an interim injunction was granted until the hearing of the appeal, but ptf. had been dismissed & a successor appointed before the order was served. Ptf. nevertheless, contended that said dismissal & appointment made since service of the notice of appeal were null & void & consequently, though ptf. had been *de facto* ousted from his office yet he was *de jure* the lawful occupant thereof & should be so declared by the ct. & reinstated therein up to the trial of the action when the rights of the parties could be determined after all the evidence on both sides had been fully heard & considered, which it was impossible to do at that early state of the proceedings when not even the pleadings defining the issues had been filed. Since the argument on the appeal a bill had passed its third reading in the legislature which purports to abolish from the time it receives the assent of the Lieutenant-Governor the present board of police comrs., composed of defts., & to create a new tribunal:—*Held*: since the intervention of the legislature as aforesaid it could not be seriously suggested that the new tribunal, specially created by statute for the express purpose (*inter alia*) of remedying the existing situation in Vancouver, should not be resorted to without delay for a reconsideration of the whole proceedings involved herein, particularly when the majority of its members will be judicial officers; such being the new situation that had arisen on the appeal it was clear that the case had now at least become one (however it might have been regarded before) wherein it would not be "just or convenient," as the Judicature Act says, from any point of view, to grant the interim injunction as prayed.—*EDGETT v. TAYLOR*, [1933] 2 W. W. R. 465; [1934] 1 D. L. R. 113; 47 B. C. R. 191.—CAN.

## PART III. SECT. 1, SUB-SECT. 1.

56 v. — *Alternative method of operation possible.*—Defts. in the carrying out of certain building operations made use of mechanical drills, which caused a noise, continuously during ordinary business hours, of so deafening a nature as to make it practically impossible for business to be carried on in a building owned by ptf. co. Despite the protests of the co., no effort had been made by defts. to conduct their operations during hours when business would not be affected, or during ordinary business hours in some less noisy method. Such

an alternative method could be used, though only at an increase in the cost & duration of the operations:—*Held*: defts. were bound to take, & had not taken, all reasonable precautions to minimise the nuisance created by them, & the injunction should be continued until the hearing of the suit to restrain the use of the drills during certain specified hours.—*DAILY TELEGRAPH Co., LTD. v. STUART* (1928), 28 S. R. N. S. W. 291; 45 N. S. W. W. N. 48.—AUS.

59 ii. ———.]—*CUMBERLAND COAL & RY. Co. v. McDUGALL* (1911), 9 E. L. R. 204.—CAN.

## PART III. SECT. 1, SUB-SECT. 2.—B.

k i. ———.]—*PRATT v. SCHEVECK* (Sask.), [1926] 4 D. L. R. 1169; [1926] 3 W. W. R. 657.—CAN.

## PART III. SECT. 1, SUB-SECT. 2.—C.

77 xxiv. ———.]—*The Apatcoo, Ltd.*, gave a debenture to M. to secure a certain sum, constituting a floating charge over all the assets of the co. present or future, & prohibiting the creation of any mtge. or charge in priority to it. Afterwards the co. gave a debenture to W. to secure portion of the purchase-money of certain goods sold to it by W., & constituting a floating charge over the assets so sold. Subsequently, W. recovered a judgment against the co. for portion of the money secured by his debenture, & issued execution, under which the sheriff seized goods of the co. M. claimed the goods & the sheriff interpleaded. M. then instituted a suit to restrain the sale of the goods by the sheriff:—*Held*: an injunction should be granted to restrain the sale for seven days, with leave to either party to apply for the appointment of a receiver or receivers of the goods, to which they were respectively entitled till the hearing of the case.—*MATHIESON v. WARLEN* (1928), 28 S. R. N. S. W. 189; 45 N. S. W. W. N. 47.—AUS.

## PART III. SECT. 1, SUB-SECT. 2.—D.

d i. — *Illegal borrowing by municipality.*—*SMITH v. VANCOUVER CITY*, [1935] 3 W. W. R. 116.—CAN.

f i. — *Injury to fishery.*—*MOORE, ETC. v. A.-G.*, [1927] 1 R. 569.—IR.

## PART III. SECT. 1, SUB-SECT. 2.—E.

117 xvi. ———.]—*MOORE, ETC. v. A.-G.*, [1927] 1 R. 569.—IR.

117 xvii. ———.]—*DEFOREST PHONOFILM OF CANADA, LTD. v. FAMOUS PLAYERS CANADIAN CORP.*, [1929] 1 D. L. R. 301; 31 Que. P. R. 278.—CAN.

*CONSTRUCTION & FINANCE SYNDICATE, LTD. & CRANKSHAW* (1907), 51 Sol. Jo. 737.

137. *Add. Annotation*:—*Refd. London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd.*, [1936] Ch. 78.

173. *Add. Annotation*:—*Refd. Page v. Scottish Insee. Corpn.* (1929), 98 L. J. K. B. 308.

177. *Add. Annotation*:—*Folld. Wall v. Exchange Investment Corpn.*, [1926] Ch. 143.

117 xviii. ———.]—*MCCALLUM, SMITH Co., LTD. v. BETCHERMAN*, [1932] 4 D. L. R. 397.—CAN.

## PART III. SECT. 1, SUB-SECT. 3.—B. (a).

sb. *Injunction involving continuation of illegal course of conduct.*—*Water Clauses Consolidation Act, 1897*, & subsequent legislation in lieu thereof, requires that grants of use of water thereunder shall be circumscribed in the manner in which the licences held by deft. co. are circumscribed; said licences provide that the territory within which the power to be generated by the use of the water thereby granted may be sold, bartered or exchanged is an area within 50 miles of Rossland. Therefore the continuance of an interim injunction restraining deft. co. from cutting off said power, which it had been supplying to a co. beyond such area, was refused, since it would require it to continue an illegal course of conduct.—*GRANBY CONSOLIDATED MINING, SMELTING & POWER Co. v. WEST KOOTENAY POWER & LIGHT Co.*, [1928] 4 D. L. R. 724; [1928] 3 W. W. R. 301; *affd.*, [1929] 2 D. L. R. 651; 2 W. W. R. 470.—CAN.

## PART III. SECT. 2.

194 i. *Whether granted after decision—To preserve property pending appeal.*—*Injunction to preserve rights pending an appeal, granted.*—*PREVEDOROS v. PREVEDOROS (B. C.)*, [1927] 3 W. W. R. 755.—CAN.

194 ii. ———.]—Any judge of the Appellate Div. has the power to grant an injunction to preserve property pending an appeal to that Div. so that the appeal will not be nugatory if successful.—*SPOONER OILS, LTD., & SPOONER v. TURNER VALLEY GAS CONSERVATION BOARD & A.-G. FOR ALBERTA* (No. 2), [1932] 2 W. W. R. 641; 4 D. L. R. 681.—CAN.

194 iii. ———.]—Defts. applied for an injunction to stay implementation of judgment, pending an appeal therefrom to the Supreme Ct. of Canada. The judgment, which was drawn up & entered before this application, ordered that the lands in question in this action be vested in ptf. There was no reservation of any kind in the judgment:—*Held*: under the circumstances the ct. had no jurisdiction to grant the injunction.—*ANDLER v. DUKE* (No. 2), [1932] 1 W. W. R. 672; 3 D. L. R. 210; 45 B. C. R. 256.—CAN.

194 iv. ———.]—*TETARENKO v. TETARENKO*, [1933] 2 W. W. R. 512.—CAN.

## Part IV.—Perpetual Injunctions.

199. *Add. Annotation*:—*Refd. Gottliffe v. Edleston*, [1930] 2 K. B. 378.
205. *Add. Annotation*:—*Consd. Wiltshire Bacon Co. v. Associated Cinema Properties, Ltd.*, [1938] Ch. 268.
- 205a. —.]—In a suit to restrain an alleged infringement of pltf.'s copyright in a design registered under 5 & 6 Vict. c. 100, deft.

does not lose his right to require pltf. to establish his title in an action at law, although he delays doing so until the hearing of the cause, & has previously moved to dissolve upon a ground which cannot be maintained. —*NORTON v. NICHOLIS* (1858), 4 K. & J. 475; 31 L. T. O. S. 282; 6 W. R. 764; 70 E. R. 198.

## Part V.—Mandatory Injunctions.

270. *Add. Annotation*:—*As to* (1) *Consd. Howard, Flanders v. Maldon Corpn.* (1926), 135 L. T. 6.
276. *Add. Annotation*:—*Refd. Fishenden v. Higgs & Hill, Ltd.* (1935), 153 L. T. 128.
298. *Add. Annotation*:—*Refd. Grant v. Derwent*, [1929] 1 Ch. 390.

## Part VI.—Injunction quia timet.

315. *Add. Annotation*:—*Consd. Peech v. Best* (1930), 99 L. J. K. B. 537.
325. *Add. Annotation*:—*Refd. Farnworth v. Manchester City Corpn.*, [1929] 1 K. B. 533.
- 327a. —.]—Deft. association had adopted a code of ethics which restricted the manner of advertising of its members. Pltf. was a member, but an advertisement, of which deft. association complained, was issued by a co. carrying on business at various branches, at one of which pltf. was manager. Deft. association wrote to pltf. calling his attention to the code of ethics & asked for an undertaking that he would not advertise prices or any special method of testing (these being the suggested breaches of the code). They then gave pltf. notice that a meeting would be held at which the council of the association would consider the removal of pltf.'s name from the list of members, & asked whether he wished to attend & be heard. Before the date fixed for the meeting, pltf. issued the writ in this action, claiming a declaration that it was *ultra vires* of deft. association to attempt to enforce on pltf. the code of ethics, & for a declaration that the association was not entitled to remove pltf.'s name from the register:—*Held*: pltf.'s action was premature, having been commenced before the holding of the meeting of the association at which his conduct would be considered, & it could not be said that the association were threatening or intending to do anything which they were not entitled to do & which would justify the commencement of a *quia timet* action.—*DRAPER v. BRITISH OPTICAL ASSOCN.*, [1938] 1 All E. R. 115; 54 T. L. R. 245; 82 Sol. Jo. 37.
332. *Add. Annotation*:—*Refd. Graigola Merthyr Co. v. Swansea Corpn.*, [1928] Ch. 235.
336. *Add. Annotation*:—*Refd. Graigola Merthyr Co. v. Swansea Corpn.*, [1928] Ch. 235.
339. *Add. Annotation*:—*Refd. Graigola Merthyr Co. v. Swansea Corpn.*, [1928] Ch. 235.
362. *Add. Annotation*:—*As to* (1) *Refd. Graigola Merthyr Co. v. Swansea Corpn.*, [1929] A. C. 344.
365. *Add. Annotations*:—*Folld. Clark, Ltd. v. Clark's Shoe Service* (1935), 52 R. P. C. 254. *Consd. Oliver v. Dickin*, [1936] 2 All E. R. 1004.
369. *Add. Annotation*:—*Consd. Peech v. Best* (1930), 99 L. J. K. B. 537.

### PART IV. SECT. 1, SUB-SECT. 2.

201 x. —.]—*COCKBURN v. EAGER* (1876), 24 Gr. 409.—CAN.

### PART IV. SECT. 1, SUB-SECT. 4.

217 vi. —.]—The ct. will not grant an injunction to restrain the breach of a contract for the sale & delivery of future chattels, expressed in an affirmative form, even though the contract so expressed involves a negative in substance, in a case where damages would be a complete remedy, where the contract is of such a nature that it cannot be specifically enforced, & where payment for the goods in question has not been made.—*WOOD v. CORRIGAN* (1928), 28 S. R. N. S. W. 492; 45 N. S. W. W. N. 134.—AUS.

### PART V. SECT. 2.

240 ii. —.]—To entitle pltf. to a mandatory injunction on an interlocutory application he must make out a strong *prima facie* case to the right which he asserts & for active

interference by the ct. If his right is reasonably clear, & particularly if there exists an urgent & paramount necessity for the injunction in order to prevent serious damage to pltf., the injunction will issue before trial.—*PRATT v. SCHEVECK* (Sask.), [1926] 4 D. L. R. 1169; [1926] 3 W. W. R. 657.—CAN.

### PART V. SECT. 3.

sd. *Injunction to remove building*.]—*GILPINVILLE, LTD. v. DUMARESQ* (N. S.), [1927] 1 D. L. R. 730.—CAN.

sd. *Postponement of compliance*.]—*VANCOUVER WATERFRONT, LTD. v. VANCOUVER HARBOUR COMRS.*, [1936] 1 W. W. R. 210; 1 D. L. R. 461.—CAN.

### PART V. SECT. 4.

267 ii. —.]—Mandatory injunction refused, where the injury complained of was capable of being compensated by a small money payment, & it would be oppressive to grant a mandatory injunction.—*CAMPF IMPORT CO., LTD.*

*v. BEATH & CO., LTD.*, [1927] N. Z. L. R. 37.—N. Z.

267 iii. —.]—A person cannot ask the ct. to sanction his wrongful act & allow him to pay monetary compensation only. He may be compelled to undo his wrongful act. But ct. in India have a wide discretion in granting mandatory injunctions, & as a rule such injunction will not be granted if the injury to pltf.'s legal rights is small, monetary compensation can be estimated, & is small, the granting of injunction is oppressive on deft. & specially if there is delay on pltf.'s part in protesting against the injury or in filing the suit.—*DAWSON v. ROUHAE ZAMANI BEGUM* (PRINCESS) (1928), 1 L. R. 6 Rad. 466.—IND.

### PART VI. SECT. 1, SUB-SECT. 2.

322 viii. —.]—*NEW ZEALAND TOWEL SUPPLY & LAUNDRY, LTD. v. NEW ZEALAND TRI-CLEANING CO., LTD.* (No. 2) (1935), 11 N. Z. L. J. 228.—N. Z.

## Part VII.—Damages in lieu of or in addition to Injunction.

371. *Add. Annotation* :—*As to* (1) *Apld.* Coplovitch v. Williams (1929), 73 Sol. Jo. 484.
376. *Add. Annotation* :—*Generally*, *Refd.* Hollywood Silver Fox Farm, Ltd. v. Emmett, [1930] 1 All E. R. 825.
388. *Add. Annotation* :—*Refd.* Bhagchand Dagdusa Gujrathi v. Secretary of State for India in Council (1927), 43 T. L. R. 617.
401. *Add. Annotation* :—*Consd.* Rely-A-Bell Burglar & Fire Alarm Co. v. Eisler, [1926] Ch. 609.
408. *Add. Annotations* :—*As to* (1) *Apld.* Price v. Hilditch, [1930] 1 Ch. 500. *Consd.* Wiltshire Bacon Co. v. Associated Cinema Properties, Ltd., [1938] Ch. 268. *Refd.* Horton's Estate v. Beattie (1926), 42 T. L. R. 701; Fishenden v. Higgs & Hill, Ltd. (1935), 153 L. T. 128. *Generally*, *Refd.* Farnworth v. Manchester City Corp., [1929] 1 K. B. 533.
409. *Add. Annotation* :—*Refd.* Fishenden v. Higgs & Hill, Ltd. (1935), 153 L. T. 128.

## Part VIII.—Effect of Conduct of Parties.

464. *Add. Annotation* :—*Refd.* Lynde v. Nash, [1928] 2 K. B. 93.
469. *Add. Annotation* :—*Refd.* A.-G. v. London & Home Counties Joint Electricity Authority, [1929] 1 Ch. 513.
507. *Add. Annotation* :—*Refd.* Aldridge v. Wright, [1929] 2 K. B. 117.
- 511a. — *Encouragement by plaintiff.*—*Coplovitch v. Williams* (1929), 73 Sol. Jo. 484.
528. *Add. Annotations* :—*Consd.* Ariff v. Rai Jadunath Majumdar Bahadur (1931), 47 T. L. R. 238. *Refd.* Canadian Pacific Ry. Co. v. R., [1931] A. C. 414.
551. *Add. Annotations* :—*Refd.* Grant v. Derwent, [1928] Ch. 902; Chatsworth Estates Co. v. Fewell, [1931] 1 Ch. 224.
568. *Add. Annotations* :—*Consd.* Marbé v. George Edwardes (Daly's Theatre) (1927), 96 L. J. K. B. 980. *Apprvd.* Herbert Clayton & Jack Waller, Ltd. v. Oliver, [1930] A. C. 209.
- 568a. — *Where, under an agreement containing mutual grants, plffs. had been put in possession of what was granted to them, & enjoyed it for several years, while defts. took no steps to require the performance of the stipulation for their benefit, but allowed the time to expire within which it should have been performed, the ct. granted an injunction to restrain the defts. from disturbing plff.'s enjoyment.*—*GREAT NORTHERN RY. CO. v. LANCASHIRE & YORKSHIRE RY. CO.* (1853), 1 Sm. & G. 81; 65 E. R. 36.
572. *Add. Annotations* :—*Consd.* Marbé v. George Edwardes (Daly's Theatre) (1927), 96 L. J. K. B. 980; Warner Brothers Pictures, Incorporated v. Nelson, [1937] 1 K. B. 209.
574. *Add. Annotation* :—*Consd.* Huntoon Co. v. Kolynos (Incorporated), [1930] 1 Ch. 528.
575. *Add. Annotation* :—*Refd.* United Indigo Chemical Co. v. Robinson (1931), 49 R. P. C. 178.
579. *Add. Annotation* :—*Consd.* Hyman v. Hyman, [1929] A. C. 601.

### PART VII. SECT. 1, SUB-SECT. 1.

*ss. Damages & account of profits.—Although defendant liable to penalty—Penalty not recoverable by party aggrieved.*—The right to grant damages in addition to an injunction, is not limited by a statute which imposes a penalty not recoverable at the action of the person aggrieved. Where the ct. found that plffs. were entitled to damages because deft. co. operated motor vehicles over routes to which plffs. had been given a certificate under Motor Carrier Act, it ordered that an account be taken of the amount of money received by the co. while so operating, for compensation, & that this amount be paid as damages. —*LOUNSBURY v. SUTHERLAND MOTOR BUS CO.* (1928), 54 N. B. R. 7.—*CAN.*

### PART VII. SECT. 1, SUB-SECT. 2.—B. (a).

411 i. *Quantum of damage sustained—Injury small.*—The rule laid down in *Shelfer v. London Lighting Co.* that damages in lieu of an injunction may be granted if the injury to plff.'s legal right is small, & capable of being estimated in money, & can be adequately compensated by a small money payment, & the case is one in which it would be oppressive to deft. to grant

an injunction, was applied herein, where plff. sought a mandatory injunction because of the encroachment of deft.'s building on a few inches of plff.'s lot.—*CLARK v. MCKENZIE*, [1930] 1 W. W. R. 67; 1 D. L. R. 226; 42 B. C. R. 71.—*CAN.*

### PART VII. SECT. 3.

*sk. Order for inquiry.*—Plffs.' board & agency, after obtaining *ex parte* an interim injunction restraining deft. from marketing, *inter alia*, potatoes, wholly discontinued the action; for the reason that they had been advised that they had no status to bring it. Deft. applied for an inquiry as to the amount of damages sustained by it as a result of the interim injunction. Deft. alleged that as a result thereof it had suffered damage in respect of eight cars of potatoes through loss of profit, costs of unloading, storage & reloading, & loss of market; & that it had also suffered because of the loss of business connections.—*Held*: the ct. should, in the exercise of its judicial discretion, order the inquiry. The contention that the ct., before directing the inquiry, must decide whether deft. was acting illegally in carrying on its business, was not sustained.—*BRITISH COLUMBIA INTERIOR VEGETABLE MARKETING BOARD v. KAMLOOPS PRO-*

*DUCE CO.*, [1938] 1 W. W. R. 773.—*CAN.*

### PART VIII., SECT. 5.

*ss. Whether plaintiff disentitled to relief.*—It is not every failure by the covenantor to observe stipulations entered into as part of transactions in which the covenant was given that disentitles the covenantor to an injunction. If by reason of the covenantor's own failure to perform interdependent covenants made by him, the covenant has ceased to bind the covenantor at law, there is no obligation to enforce by injunction. But there may be cases, both in covenant & in simple contract, where, although the obligation for the enforcement of which an injunction is sought continues to subsist at law, either because there has been an election to affirm, or because a right to treat the obligation as discharged did not arise, yet in equity an injunction would be refused because it would be inequitable to require the obligation to be carried out specifically by a person who has through the default of the other contracting party failed to obtain a material part of the consideration which induced him to enter into the obligation.—*PEARSON v. ARCADIA STORES, GUYRA, LTD.* (No. 1) (1935), 53 O. L. R. 571; 9 A. L. J. 120.—*AUS.*

## Part IX.—Against whom Injunction may be Granted.

**585a. Public official.**—*REX CO. & REX RESEARCH CORPN. v. MUIRHEAD & COMPTROLLER-GENERAL OF PATENTS*, No. 842a, *post*.

**608. Add. Annotation** :—*Refd.* *The Jupiter* (1927), 137 L. T. 333.

## Part X.—Matters in respect of which Injunction may be Granted.

**618. Add. Annotation** :—*As to* (1) *Refd.* *Peech v. Best* (1930), 99 L. J. K. B. 537.

**629. Add. Annotation** :—*Refd.* *Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181.

**638a. Enforcement of contract contrary to terms thereof.**—Injunction refused. — *SAVAGE SOUTH AFRICA, LTD. v. LONDON EXHIBITIONS, LTD.* (1899), 43 Sol. Jo. 751.

**638b. Contract between boxer & promoter**—Clause of regulations relating to public boxing before contest—*Whether incorporated.*—*HULLS v. FARR* (1937), 81 Sol. Jo. 669.

**649. Add. Annotation** :—*Consd.* *Re Wait*, [1927] 1 Ch. 606.

**663a.** —.]—By a contract in the usual form in the industry, a prominent film actress undertook during the term of the employment not to render any services for or in any other photographic stage or motion picture production or business of any other person or engage in any other occupation without the written consent of the producer:—*Held*: (1) where the enforcement of such negative covenants did not amount to a decree of the specific performance of the positive covenants, or to obliging the employee to remain idle or perform the positive covenants, they can be enforced by injunction; (2) the granting of such an injunction was discretionary & should be limited to what is reasonable in all the circumstances of the case; (3) in the circumstances of this case an injunction to enforce the negative stipulations should be granted limited in area to the jurisdiction of the ct. & in time to the duration of the contract or 3 years whichever period should be the shorter.—*WARNER BROTHERS PICTURES INC. v. NELSON*, [1937] 1 K. B. 209; [1936] 3 All E. R. 160; 106 L. J. K. B. 97; 155 L. T. 538; 53 T. L. R. 14; 80 Sol. Jo. 855.

**675. Add. Annotations** :—*Consd.* *Chatsworth Estates Co. v. Fewell*, [1931] 1 Ch. 224. *Refd.* *Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225.

**677a.** —.]—Where a breach of a restrictive covenant causes substantial damage the ct. has no discretion to award damages in lieu of a mandatory injunction. This rule applies whether the covenant is broken by the original covenantor, or by an assignee with notice.—*ACHILLI v. TOVELL*, [1927] 2 Ch. 243; 96 L. J. Ch. 493; 137 L. T. 805; 71 Sol. Jo. 745.

**706. Add. Annotations** :—*Consd.* *Warner Brothers Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209. *Refd.* *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108; *Rely-A-Bell Burglar & Fire Alarm Co. v. Eisler*, [1926] Ch. 609; *Re Wait*, [1927] 1 Ch. 606..

**713. Add. Annotation** :—*Refd.* *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108.

**714. Add. Annotation** :—*Refd.* *Warner Brothers Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209.

**715. Add. Annotation** :—*Refd.* *Warner Brothers Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209.

**716. Add. Annotations** :—*Folld.* *Rely-A-Bell Burglar & Fire Alarm Co. v. Eisler*, [1926] Ch. 609. *Refd.* *Warner Brothers Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209.

### PART IX. SECT. 1.

*sd. Harbour Commissioners—Blasting operations.*—*SILLIPHANT v. ST. JOHN HARBOUR COMRS.* (1931), 3 M. P. R. 145.—CAN.

### PART IX. SECT. 3.

*sf. General rule.*—An injunction, which is in the nature of an execution, will only be granted *in personam*, & will not be granted against any person not a party to the action.—*MOORE v. A.-G.*, [1930] 1 R. 471.—IR.

### PART X. SECT. 2, SUB-SECT. 2.

**621 v. —.**—*CHRISTIE v. FRASER* (1904), 10 B. C. R. 291.—CAN.

### PART X. SECT. 2, SUB-SECT. 3.—A.

*sk. Enforcement of agreement to deliver produce to company.*—By the arts. of assocn. of a co., whose business was to market the fruit grown by its members, it was provided that each member should deliver to the co.

ninety-five per cent. of his fruit immediately after each variety thereof should be ready, suitable & fit for harvesting or picking but not later than a certain date in each year :—*Held*: the obligation imposed on each member of the co. was not one in respect of which the ct. should at the instance of the co. grant an injunction.—*PAKENHAM UPPER FRUIT CO., LTD. v. CROSBY*, [1926] V. L. R. 27; 35 C. L. R. 386; 31 Argus L. R. 13.—AUS.

### PART X. SECT. 2, SUB-SECT. 3.—G. (b).

**655 iv.** — *Contract of agency.*—The contract in question which was between a fruit grower & certain assoons, for the marketing of the grower's crops was held by the ct. to be nothing more than a contract of agency not to be specifically enforced by way of injunction or receivership.—*KELOWNA GROWERS' EXCHANGE & OKANAGAN UNITED GROWERS v. DE*

*CAQUERAY* (1922), 70 D. L. R. 865; [1922] 3 W. W. R. 1115.—CAN.

**655 v.** —.]—*ROSS v. CANADIAN NATIONAL RYS.*, [1928] 2 D. L. R. 880; [1928] 1 W. W. R. 940; 37 Man. L. R. 279.—CAN.

**655 vi.** —.]—*Pitts.*, locomotive engineers in the employ of the Canadian National Railways, applied for an injunction restraining defts. from moving certain locomotive engineers from certain districts of the railway to another district. The injunction was refused, as being with respect to a contract for personal services.—*FIELD v. CANADIAN NATIONAL RAILWAY CO.*, [1934] 3 D. L. R. 383; 7 M. P. R. 232.—CAN.

### PART X. SECT. 2, SUB-SECT. 6.—A.

**666 x.** —.]—Injunction is the proper remedy to prevent the construction of a building in breach of a restrictive covenant, without proof of damage.—*MUNNION v. WINCH*, [1937] 2 D. L. R. 469.—CAN.

- PART X. SECT. 4, SUB-SECT. 1.—**  
**A. (B).**

*sp. To restrain unauthorised omnibus service competing with plaintiff.*—NEW BRUNSWICK POWER CO. v. MARITIME TRANSIT, LTD. (1936). 11 M. P. R. 174; 6 F. L. J. (Can.) 196; *affd.*, [1937] 4 D. L. R. 376; 12 M. P. R. 152.—CAN.

- n. Add " (1914), 20 B. C. R. 215."

**PART X. SECT. 4, SUB-SECT. 1.—C.**

150



**808a.** — **Cancellation of affiliation.]**—Injunction refused.—*WING v. BURN* (1928), 44 T. L. R. 258.

**811.** *Add. Annotation:*—*As to* (3) *Reid. Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485.

**813.** *Add. Annotation:*—*Reid. Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485.

**825.** *Add. Annotation:*—*Reid. Reid & Sigrist, Ltd. v. Moss & Mechanism, Ltd.* (1932), 49 R. P. C. 461.

**829.** *Add. Annotations:*—*Consd. Wessex Dairies, Ltd. v. Smith*, [1935] 2 K. B. 80. *Reid. Putsmann v. Taylor*, [1927] 1 K. B. 637.

**829a.** — — — — —.]—The first deft. entered the service of pltf. as a traveller under an agreement by which he agreed that he would not at any time thereafter "divulge or make known any of the trusts, secrets, accounts, or dealings of or relating to" pltf.'s business. Upon leaving pltf.'s service, he entered the service of the second defts., who knew of the terms of the above agreement, & he kept a list of pltf.'s customers in the district in which he travelled & divulged to a considerable extent to the second defts. the terms upon which pltf. did business:—*Held:* pltf. were entitled to an injunction against both defts., an order for delivery up of papers & books & damages.—*SUMMERS (WILLIAM) & Co., LTD. v. BOYCE & KINMOND & Co.* (1907), 97 L. T. 505; 23 T. L. R. 724.

**830a.** — — — — —.]—In 1909, V. & Co., defts. in an action, were endeavouring to perfect a system known as the "C. A. V." system, for lighting motor cars by electricity, & the A. I., Ltd. who were pltf., were licencees of patents for a dynamo suitable for the electrical lighting of motor vehicles. The parties, with a view to utilising pltf.'s dynamo in connection with the "C. A. V." system, agreed for one year that pltf. should give defts. the "sole selling agency" for the dynamo, which was to be supplied at cost price; defts. were to use their best endeavours to introduce & sell the dynamo, & were not to become directly or indirectly interested in the sale of any other dynamo, & the parties were to mutually communicate improvements in such dynamo. Defts. were to be allowed a commission of 10 per cent. on cost price, & the ultimate profits were to be equally divided, but the agreement was not to create a partnership. Defts. during the pendency of the agreement received certain

testimonials. After the termination of the agreement, pltf. brought an action to restrain defts. from using or publishing these testimonials, & moved for an interlocutory injunction:—*Held:* defts. were sole purchasers or sole consignees of pltf.'s goods upon special terms, that there could not be implied from the agreement a contract between the parties, that all information of which defts. became possessed during the pendency of the agreement should not afterwards be used by defts. for other purposes, & that a fiduciary relationship had not been established between the parties as would have existed had defts. been in pltf.'s agents.—*ACCUMULATOR INDUSTRIES, LTD. v. VANDERVELL (C. A.) & Co.* (1912), 29 R. P. C. 391.

**835a.** — — — — —.]—*NEW NIMROD Co., LTD. v. PERUVIAN PACIFIC RY., LTD., INTERNATIONAL CONSTRUCTION & FINANCE SYNDICATE, LTD. & CRANKSHAW* (1907), 51 Sol. Jo. 737.

**837.** *Add. Annotation:*—*Consd. Reid & Sigrist, Ltd. v. Moss & Mechanism, Ltd.* (1932), 49 R. P. C. 461.

**839a.** — — — — —.]—*Particulars.*—Pltf. in this action claimed an injunction to restrain deft., who had been in pltf.'s employment as works manager & chemist, & who during his employment had acquired knowledge of secret processes for the manufacture of various articles made of rubber sponge by pltf., from disclosing such processes. Deft. on this procedure summons asked for further & better particulars of the secret processes:—*Held:* deft. was entitled to such particulars, but that they must be disclosed only to three experts not trade rivals of pltf., deft. himself & his legal advisers, & the order must be in such a form as to prevent the persons to whom the secret processes were communicated from disclosing them, & copies of the particulars must be returned to pltf. when the proceedings were closed.—*SORBO RUBBER SPONGE PRODUCTS, LTD. v. DEFRIES* (1930), 47 R. P. C. 454.

**839b.** — — — — —.]—Pltf. co., who were manufacturers of a variety of chemical products, including a boiler disinfectant named "Algaloid" claimed that the latter was produced by a secret process. They sought to restrain deft., who had been in their service for some years & ultimately as works manager, from using or disclosing information obtained in their service. In particular pltf. alleged that deft. was only enabled to make & sell

PART X. SECT. 5.

**810 v.** — — — — —.]—A grocer kept on his premises a soda water fountain, from which he filled empty aerated water bottles tendered to him by members of the public. Among the bottles so tendered were some embossed with the name of a firm of aerated water manufacturers. The manufacturers intimated to the grocer that, when selling their waters, they always retained the property in their bottles, & that, in using their bottles without their consent, the grocer was participating in the illegal use of their property. The grocer having ignored their intimation, the manufacturers sought interdict against his use of

their bottles. After a proof as to the circumstances in which the manufacturers allowed to their customers & to the public possession of their bottles:—*Held:* members of the public were not precluded from acquiring a right to use the manufacturers' bottles, & the tendering by members of the public to the grocer of bottles embossed with the manufacturers' name did not certify the grocer that such bottles were in fact the property of the manufacturers, & the grocer was under no duty to the manufacturers to inquire into the history of each bottle tendered to him; interdict refused.—*LEITCH & Co., LTD. v. LEYDON; BARR & Co., LTD. v. MACGREGOR*, [1930] S. C. 41; *affd.*, 47 T. L. R.; 81 H. L.—*SCOT.*

PART X. SECT. 6.

*so. To restrain director & employee from setting up rival business—& canvassing former customers.*—The fact that deft. had been a director & employee of pltf. co. held not to entitle it to an injunction restraining him, after he had resigned his employment, from carrying on a rival business for himself or from canvassing customers of the co. with whom he became acquainted during such employment, where he had not taken away any written lists or other materials pertaining to the co.'s business & obtained by him in the course of his employment, although he continued to hold in the mere legal sense his position as director.—*WAITE'S AUTO TRANSFER, LTD. v. WAITE*, [1928] 3 W. W. R. 649.—*CAN.*

a product "Descalit" by the wrongful use of information. Pltfs. also alleged that deft. had made & taken away copies of had wrongfully carried in his memory extracts from a secret formulæ book. Deft. denied that there was any secret process & that he had wrongfully taken & used any information:—*Held*: deft. had not made or taken away copies of formulæ from the book, which in fact was a costings book, & deft. was not warned as to secrecy when he entered employment in which he learned the processes without difficulty; an injunction would not be granted to prevent using knowledge that had thus become his own; dishonest or surreptitious obtaining of knowledge would have been upon a different footing, but no obligation could be implied not to use knowledge honestly acquired.—UNITED INDIGO CHEMICAL CO., LTD. v. ROBINSON (1931), 49 R. P. C. 178.

842a. — Against public official.]—Where a public officer, e.g., the Comptroller-General of Patents, claims the right to disclose information to the public which pltf. in an action is *prima facie* entitled to withhold from publicity, it is proper to restrain that public official from taking a step which would result in that information being disclosed.—REX CO. & REX RESEARCH CORPN. v. MUIRHEAD & COMPTROLLER-GENERAL OF PATENTS (1926), 96 L. J. Ch. 121; 136 L. T. 568; 44 R. P. C. 38.

*Annotation*:—*Refd. Re Manasseh Giragos Sevag's Application* (1938), 55 R. P. C. 193.

853a. Conversion of goods—Perishable goods.]—Pltfs., who were an American co., carried on business as exporters of fruit. They had been exporting fruit from Colombia for many years, & they had a large number of contracts with the growers of bananas & dealt with about 97 per cent. of the exportable bananas in that country. Under those contracts the bananas which were to be sold to pltfs. became the property of pltfs. as soon as they were severed from the trees. Defts. imported into England a cargo of bananas, under contracts which they had made with a co-operative society formed by some of the banana growers in Colombia, who desired to break down pltfs.' monopoly & find another outlet for their produce. Pltfs. claimed that 2,041 stems of bananas, an unidentified part of the cargo imported by defts., were from growers with whom pltfs. had contracts, or were from estates covered by those contracts, & they obtained an interim injunction restraining defts. from converting to their own use or otherwise dealing with or in any way disposing of bananas, the property of pltfs., save by delivery of the same to pltfs. or their agents:—*Held*: the order for an interim injunction was unsatisfactory & embarrassing, because (1) the bananas were perishable; (2) the order did not identify the bananas, dealings in which it was sought to restrain; (3) it did not order delivery to pltfs. The order must be varied by ordering the sale of a

specified number of bananas to be selected.—UNITED FRUIT CO. v. FREDERICK LEYLAND & Co., LTD. (1930), 144 L. T. 97; 47 T. L. R. 33; 74 Sol. Jo. 735, C. A.

888. *Add. Annotation*:—As to (2) *Refd. Musical Performers' Protection Asscn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485.

890. *Add. Annotations*:—*Refd. R. v. International Trustee for Protection of Bondholders Akt.*, [1937] A. C. 500; *St. Pierre v. South American Stores (Gath & Chaves), Ltd. & Chilean Stores (Gath & Chaves), Ltd.*, [1937] 3 All E. R. 349.

904. *Add. Annotation*:—*Refd. Tolley v. Fry (J. S.) & Sons* (1929), 46 T. L. R. 108.

906a. — — —.]—A society, composed mainly of architects, was formed into a co. limited by guarantee under Cos. Acts. By its arts. of assocn. membership of the society was open to persons qualified in certain ways approved by the council of the society, & paying a certain entrance fee & yearly subscriptions; & members were authorised to use the letters "M. S. A." as a professional designation. Deft., who was an architect, but had never been & was not a member of the society, used the letters "M. S. A." as a professional designation. The society brought an action against him for an injunction, which he did not defend, & by its statement of claim alleged, among other things, that the continuous & exclusive use of the letters by its members had given the letters a definite meaning & value in the minds of the public, & the use of them by unauthorised persons would damage the society. On motion for judgment in default of appearance:—*Held*: pltfs. were not entitled to an injunction.—SOCIETY OF ARCHITECTS v. KENDRICK (1910), 102 L. T. 526; 26 T. L. R. 433.

906b. Use of professional designation implying membership—Of professional institution.]—Pltf. society was incorporated in 1885, under Cos. Act, 1867, as a co. not for gain without the use of the word "limited" under licence of the Board of Trade. In 1886 pltf. society recommended its members to adopt as their professional designation the use after their names of the term "Incorporated Accountant." By 1905 that designation had come to mean to that section of the public who had dealings with accountants a member of the society, which, by its system of tests & examinations, had conferred upon its members the valuable privilege of a recognised status for ability & integrity. In that year deft. association was incorporated under the Cos. Acts as a co. limited by guarantee. Shortly after its incorporation its council recommended its members to adopt the designation "Incorporated Accountant" with the addition of the abbreviation "Lon. Asscn." In an action by pltf. society against deft. assocn. & G., one of its members, claiming (a) an injunction to restrain G. from using in connection with

PART X. SECT. 8, SUB-SECT. 4.

b 1. Land bought with notice of prior equity.]—HOOPER v. SMITH & HAMILTON (1905), 7 Terr. L. R. 27; 2 W. L. R. 194.—CAN.

1. S. P. CANADIAN PACIFIC RY. CO. v. CALGARY (1887), 5 Man. L. R. 37.—CAN.

so. Assignment in fraud of creditors.]

—The ct. will grant an injunction *ex parte* to restrain an assignment of annuity benefits payable monthly intended as a fraud on creditors.—TALNOR v. THOMPSON, [1937] 4 D. L. R. 365; 12 M. P. R. 145.—CAN.

PART X. SECT. 14, SUB-SECT. 2.

906 1. Use of letters implying membership—Of professional institution.—"U. A."—INSTITUTE OF CHARTERED ACCOUNTANTS OF MANITOBA v. BEL-LAMY, [1927] 3 D. L. R. 1071; [1927] 2 W. W. R. 106; 36 Man. L. R. 453.—CAN.

his business of accountant the designation "incorporated accountant," & (b) an injunction to restrain deft. society from holding out, by advertisements or otherwise, that its members were entitled to use such designation:—*Held*: the designation "incorporated accountant" was a fancy & not a descriptive term, & had come to denote membership of the society, & therefore, that the unauthorised use of it inflicted an injury on pltf. society, in respect of which it was entitled to maintain an action. Pltf. society had a pecuniary interest in preventing deft. assocn. from attempting, by representations & inducements held out to members of the professions, to reduce the status of pltf. society by conferring improperly an indication of that status. Pltf. society was entitled to the injunctions which it claimed.—*SOCIETY OF ACCOUNTANTS & AUDITORS v. GOODWAY & LONDON ASSOCN. OF ACCOUNTANTS, LTD.*, [1907] 1 Ch. 489; 76 L. J. Ch. 384; 96 L. T. 320; 23 T. L. R. 286; 51 Sol. Jo. 248.

*Annotation*:—*Distd. Society of Architects v. Kendrick* (1910), 102 L. T. 526.

906c. — — — *After expulsion.*—Deft. took honours at the final examination for membership of the Institute of Chartered Accountants in England & Wales, but he was afterwards adjudicated a bkpt. & was excluded from membership under the provisions of the charter of the institute. After his exclusion deft. continued to use letter-paper headed "Honours Final. Institute of Chartered Accountants." In an action by the institute for an injunction the evidence was that this heading conveyed the impression that deft. was still connected with the institute:—*Held*: though deft. was entitled to state that he had obtained honours in the examination, the institute was entitled to an injunction against his making the statement in such a way as to lead to the belief that he was a member of the institute or was con-

nected with it.—*INSTITUTE OF CHARTERED ACCOUNTANTS OF ENGLAND & WALES v. HARDWICK* (1919), 35 T. L. R. 342, C. A.

923a. — *Misrepresentations*—As to what took place in court.]—*GILLETTE SAFETY RAZOR, LTD. v. PELLETT, LTD.* (1909), 26 R. P. C. 588.

928. *Add. Annotation*:—*Dbtd. R. v. Payne*, [1896] 1 Q. B. 577. In my opinion, in some instances, the cts. have gone rather too far (*LORD RUSSELL, C.J.*).

929a. *Publication by newspaper*—*Commenting on matters in dispute.*]—*GUILDING v. MOREL BROTHERS, CORBETT & SONS, LTD.* (1888), 4 T. L. R. 198.

#### SECT. 30.—OTHER PURPOSES.

959a. *Bottles of manufacturer marked with name*—*Whether refilling by another person restrained.*]—Applts., who were manufacturers of aerated water, marked their name on the bottles & claimed an exclusive right of property in them. Resp. was a grocer who had no contractual relationship with applts., & he had in his shop a soda fountain by means of which he supplied customers with aerated beverages for consumption off the premises. The customers had to bring a bottle or other receptacle, & in practice resp. filled it without examination & without inquiring into the customer's right to use it. Occasionally applts.' bottles were used in this way. In an action by applts. against resp. to restrain him from receiving from customers bottles marked with applts.' name for the purpose of filling them with beverages:—*Held*: there was no duty on resp. to ascertain which bottles were applts.' property, & the action failed.—*LEITCH (WILLIAM) & CO., LTD. v. LEYDON; BARR (A. G.) & CO., LTD. v. MACGEOGHEGAN*, [1931] A. C. 90; 100 L. J. P. C. 10; 144 L. T. 218; 47 T. L. R. 81; 74 Sol. Jo. 836, II. L.

## Part XI.—Procedure.

990. *Add. Annotation*:—*As to* (1) *Refd. Vanderpant v. Mayfair Hotel Co.*, [1930] 1 Ch. 138.

992. *Add. Annotation*:—*Refd. Vanderpant v. Mayfair Hotels Co.* (1929), 27 L. G. R. 752.

#### PART X. SECT. 27.

937 vii. — — —.]—In 1883 W. being seized of certain lands, conveyed half thereof to G. in fee, describing the same by metes & bounds, & afterwards, died, having devised the other half to M. There was a house on the lands in question so situate that half of it was on the portion granted to G., & half on the portion devised to M. No specific mention of the house was made either in the deed to G. or in the will. M. now commenced, in defiance of G.'s protests, to pull down the half of the house situate on the land devised to her, & G. applied in the present action for an injunction to restrain the same:—*Held*: he was entitled to the relief claimed.—*WRAY v. MORRISON* (1885), 9 O. R. 180.—CAN.

#### PART X. SECT. 30.

*sd. Bottles of dairyman*—*Use by another.*]—The intentional use by one dairyman of the bottles of another to

convey his milk to his customers is an actionable conversion, & may be restrained by an injunction.—*MODEL DAIRY PTY., LTD. v. WHITE* (1935), 41 *Argus* L. R. 432.—AUS.

*sl. Restraint of unprofessional advertising by foreign dentist.*]—*A. G. FOR BRITISH COLUMBIA COLLEGE OF DENTAL SURGEONS v. COWEN*, [1938] 2 W. W. R. 497.—CAN.

#### PART XI. SECT. 1, SUB-SECT. 1.—A.

b. *Revsd.*, 2 A. R. 220.

#### PART XI. SECT. 1, SUB-SECT. 1.—B. (a).

968 vi. — — —.]—In an action brought by a ratepayer as pltf. on behalf of himself & other citizens in the municipality, except the mayor, aldermen, & councillors thereof, for declarations & an injunction restraining the erection of a town hall, the A.-G. & the corpn. of the town were joined as deft.,

the only relief claimed against the A.-G. being a declaration:—*Held*: as pltf. was interested only as one of the public, the A.-G. was a necessary pltf., & in the absence of special circumstances the A.-G. was wrongly joined as a deft.—*QURBAN v. A.-G. & BRIGHTON CORPN.*, [1928] S. A. S. R. 457.—AUS.

#### PART XI. SECT. 2, SUB-SECT. 2.

*sp. Plaintiff*—*Having only equitable interest.*]—Injunction granted.—*BESINNETT v. WHITE*, [1926] 1 D. L. R. 95; *affg.*, [1925] 3 D. L. R. 560; 57 O. L. R. 171.—CAN.

*st.* — — — *Having mere interesse termini.*]—Pltf. having a mere *interesse termini* is not necessarily debarred from maintaining an action for injunction.—*MIDNAPUR ZAMINDARI & CO., LTD. v. RAM KANAI SINGH DEO DARPA SAHA* (1925), I. L. R. 5 Pat. 80.—IND.

1000. *Add. Annotation*:—**Refd.** Salisbury & Ford-  
ingbridge District Drainage Board v. Southern  
Tanning Co. (1920), Ltd., [1927] 2 K. B. 566.
1028. *Add. Annotation*:—**As to** (1) **Refd.** Catton v.  
Ashwell & Nesbit (1927), 44 T. L. R. 130.
- 1104a. Affidavits read on motion—Deponents not  
called at hearing of action.]—**Held**: where  
on a motion for an interim injunction ptff.  
had filed affidavits which were read on the  
hearing of the motion, but on the hearing of  
the action the deponents to the affidavits  
were not called as witnesses, deft.'s counsel  
was entitled to refer the judge to statements  
in those affidavits & to comment upon them.  
—**EARLES UTILITIES, LTD. v. JACOBS** (1934), 51  
T. L. R. 43; 52 R. P. C. 72; *sub nom.*  
**PRACTICE NOTE**, [1934] W. N. 198.
- 1104b. Evidence in previous proceedings.]—On a  
motion, although no notice is given by the  
party moving that he will read any evidence,  
the ct. may take notice of the matters given  
in evidence in previous proceedings in the  
cause, & may also refer to notes of the observa-  
tions of the ct. on such previous proceedings.  
—**LISTER v. LEATHER** (1857), 1 De G. & J.  
361; 26 L. J. Ch. 557; 29 L. T. O. S. 122,  
141, 142; 3 Jur. N. S. 433, 811; 5 W. R.  
550, 603; 44 E. R. 763.
1134. *Add. Citation*:—2 R. P. C. 73.
- 1168a. Order must identify goods—Injunction to  
restrain dealing with part of cargo.]—**UNITED**  
**FRUIT CO. v. FREDERICK LEYLAND & CO.,**  
**LTD.**, No. 853a, *ante*.
1190. *Add. Annotation*:—**Refd.** Sutherland Pub-  
lishing Co. v. Caxton Publishing Co., [1936]  
1 All E. R. 177.
1208. *Add. Annotation*:—**Refd.** Manchester Corpn.  
v. Farnworth, [1930] A. C. 171.
1216. *Add. Annotation*:—**Refd.** Horton's Estate v.  
Beattie (1926), 42 T. L. R. 701.

## Part XII.—Breach of Injunction and Remedies Therefor.

1346. *Add. Annotation*:—**Refd.** Boyce v. Morris Motors (1927), 44 R. P. C. 105.

## Part XIV.—Costs.

1477. *Add. Annotation*:—**Refd.** Vanderpant v.  
Mayfair Hotel Co. (1929), 27 L. G. R. 752.
1498. *Add. Annotation*:—**Refd.** Adamson v. Bir-  
kenhead Corpn., [1937] Ch. 279.
1500. *Add. Annotation*:—**Refd.** Adamson v. Bir-  
kenhead Corpn., [1937] Ch. 279.
1504. *Add. Annotation*:—**Refd.** Adamson v. Bir-  
kenhead Corpn., [1937] Ch. 279.
1540. *Add. Annotation*:—**Refd.** Donald Campbell  
v. Pollak, [1927] A. C. 732.
1545. *Add. Annotation*:—**Folld.** Clark, Ltd. v.  
Clark's Shoe Service (1935), 52 R. P. C. 254.

### PART XI. SECT. 2, SUB-SECT. 3.— B. (b).

1035 i. *Fact of appearance—Must be  
disclosed.*—**MACKEY v. MACKEY** (B. C.),  
[1929] 4 D. L. R. 668.—**CAN.**

### PART XI. SECT. 2, SUB-SECT. 3.—C.

1046 i. *Urgency—Preservation of  
property in dispute.*—**WILMOT v. MAIT-  
LAND** (1861), 2 Gr. 550.—**CAN.**

### PART XI. SECT. 2, SUB-SECT. 7.

1083 i. *The application—Necessity  
for full disclosure of facts.*—**YARMIE  
v. YARMIE**, [1925] 2 D. L. R. 1215.—**CAN.**

### PART XI. SECT. 3, SUB-SECT. 1.

d i. **S. P. DAVIDSON & VANCOUVER  
TERMINAL GRAIN CO. v. NORTH  
WESTERN DREDGING CO. & VANCOUVER  
HARBOUR COMRS.** (1925), 35 B. C. R.  
634.—**CAN.**

### PART XI. SECT. 5, SUB-SECT. 1.

sv. *Duration of injunction omitted  
from order—Right to amend.*—Deft.,  
who was employed by ptff., covenanted  
that he would not, in the event of the  
termination of that employment,  
directly or indirectly solicit or influence  
customers in a certain district for a  
period of three years. He committed  
a breach of the covenant, & ptff.  
brought an action claiming an injunc-  
tion restraining deft. for three years.  
An interim order was made restraining  
deflt. until a specified date, & subse-

quently, an order was made by consent  
whereby deflt. was restrained from  
committing, or attempting to commit,  
any breach of the covenant, simpliciter,  
& without stating the period for which  
the order operated:—**Held**: the in-  
tention of the parties was to restrain  
deflt. during the currency of the period  
of prohibition stated in the covenant;  
& the ct. had jurisdiction to correct  
the judgment.—**WARREN TEA CO.,  
LTD. v. REINGLASS**, [1928] S. R. Q. 29.  
—**AUS.**

### PART XI. SECT. 5, SUB-SECT. 2.

sw. *Judgment in default of defence.*  
—Where in an action for an injunction  
deflt. fails to deliver a defence & ptff.  
is given judgment by default he should  
be granted such an injunction as the  
facts alleged in the statement of claim,  
which because of the absence of a  
defence must be deemed to be admitted,  
show him to be entitled to.—**BRENNAN  
v. ARCADIA COAL CO., LTD. (Alta.)**,  
[1929] 4 D. L. R. 1025; 3 W. W. R.  
446.—**CAN.**

### PART XI. SECT. 5, SUB-SECT. 10.—A.

fi. — *Grounds for granting appeal.*  
—**WINNIPEG LAUNDRY v. CATERLEY  
(Man.)**, [1927] 4 D. L. R. 528.—**CAN.**

### PART XII. SECT. 2, SUB-SECT. 1.— A. (a).

1349 ii. — — — — —.]—The order of  
the ct. restraining a nuisance must be  
scrupulously obeyed; but where the

director of deflt. co. had stopped the  
noise during certain hours only in the  
honest belief that the injunction did  
not forbid the carrying-on of the co.'s  
business in ordinary working hours  
with the same machinery & plant, the  
ct. did not make an order of committal  
but ordered the managing director to  
pay the costs of the motion.—**THOMSON  
v. J. TAIT, LTD.**, [1930] N. Z. L. R. 36.  
—**N.Z.**

e i. — *Breach doubtful.*—**HOLDEN  
v. RYAN** (1913), 23 O. W. R. 961; 4  
O. W. N. 668; 10 D. L. R. 90.—**CAN.**

### PART XIII. SECT. 5, SUB-SECT. 2.

1413 xx. — — — — —.]—**PRILUTSKY v.  
ANDERSON** (1931), 2 M. P. R. 324.—  
**CAN.**

### PART XIV. SECT. 5.

xx. *Taxation on Supreme Court scale.*  
—In an action in the Supreme Ct. of  
Ontario for an injunction restraining  
deflt. from carrying on or being con-  
cerned in any business similar to that  
of ptffs. in whose business he had been  
employed, & for damages unspecified  
as to amount, the judge granted the  
injunction sought, but awarded no  
damages. He directed that ptffs.'  
costs should be paid by deflt., but did  
not give any special direction as to the  
scale of costs:—**Held**: ptffs. were  
entitled to costs on the Supreme Ct.  
scale.—**DOMINION LOOSE LEAF CO. v.  
MANUEL**, [1925] 3 D. L. R. 426; 57  
O. L. R. 84.—**CAN.**

## INNS AND INNKEEPERS.

## Part I.—In General.

1. *Add. Annotation:—Generally, Refd. Aria v. Bridge House Hotel (Staines) (1927), 137 L. T. 299.*
3. *Add. Annotations:—Consd. R. v. Sussex Confirming Authority, Ex p. Tamplin & Sons' Brewery (Brighton), Ltd., [1937] 4 All E. R. 106. Refd. Lorden v. Brooke-Hitching, [1927] 2 K. B. 237; Winkworth v. Raven, [1931] 1 K. B. 652.*
40. *In the "Held" paragraph for "(2) debts. were not entitled because," read "(2) debts. were not entitled to rely on Innkeepers Liability Act, 1863 (c. 4), s. 1, because."*

## Part II.—Duties and Liabilities of Innkeepers.

60. *Add. Annotation:—Refd. Winkworth v. Raven, [1931] 1 K. B. 652.*
75. *Add. Annotation:—Refd. Winkworth v. Raven, [1931] 1 K. B. 652.*
115. *Add. Citation:—2 Roll. Rep. 225.*
- 116a. — *Hole in floor.*—Pltf. went to a public-house by appointment to meet a friend, & as his friend had not arrived, walked into the parlour, & there fell through a hole in the floor, which was being repaired. As far as appeared his only object in going to the house was to meet his friend. In an action against the landlord for negligence in not fencing the hole, & in which pltf. alleged that he was in the house as a guest, the jury found for pltf. The ct. refused a rule to enter a nonsuit, which was asked for on the ground that there was no evidence, either of negligence on the part of deft., or of pltf. being in the house as a guest.—*AXFORD v. PRIOR (1866), 14 W. R. 611.*
118. *Add. Annotations:—Consd. Lee v. Luper, [1936] 3 All E. R. 817. Refd. Henaghan v. Rederiet Forangirene, [1936] 2 All E. R. 1426.*
- 118a. *Guest entering room marked "private."*—Pltf. went to deft.'s hotel to attend a lodge meeting. While there, wishing to find a water-closet, he passed along an unlighted passage & through a door marked "Private." He then attempted to switch on the light but failed & upon taking a further step forward he fell down some steps & injured himself.—*Held: pltf. was not entitled to recover as it was not the duty of an innkeeper to maintain in a safe condition those portions of his premises where the public are not likely to resort.—LEE v. LUPER, [1936] 3 All E. R. 817; 81 Sol. Jo. 15.*
120. *Add. Annotations:—Refd. Winkworth v. Raven, [1931] 1 K. B. 652; Hall v. Brooklands Auto-Racing Club (1932), 48 T. L. R. 546.*
125. *Add. Annotations:—Refd. Coleshill v. Manchester Corpn., [1928] 1 K. B. 776; McAlister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119.*
- 138a. *Extent of duty.*—An innkeeper is bound to supply only such accommodation for his guests & their goods as he in fact possesses, & undertakes only that the accommodation which he offers is reasonably fit for that purpose. He is not an insurer of his guest's goods against injury, though, subject to Innkeepers' Liability Act, 1863 (c. 41), he may be considered an insurer of them against loss. In the case of injury to the goods, he is responsible only if negligence on his part is proved. A guest at an hotel that was an inn placed his motor car in the hotel garage, a building suitable for protecting a car in ordinary weather, but not suitable for protecting a car with water in the radiator or

PART II. SECT. 1, SUB-SECT. 3.—  
A (b).

k i. — *In advance.*—Although a guest has been admitted to a hotel at a monthly rate, the hotel-keeper is entitled, in the absence of an agreement to the contrary, to demand payment of the amount of the rate in advance; & on the guest's failure to comply with the demand, to refuse him further accommodation. The mere omission to demand payment before the guest was given possession of a room at the monthly rate does not give him the right to occupy the room for a month, regardless of his ability to pay.—*BELLAIRS v. YALE HOTEL CALGARY, LTD., [1936] 1 W. W. R. 316.—CAN.*

PART II. SECT. 1, SUB-SECT. 3.—  
B. (a).

xx. *For breach of contract—Special contract to receive.*—*Held:* the fact that pltf. was received under a special

contract did not deprive him of his ordinary rights as a guest, but his claim in that capacity to damages was denied; he could not sue in contract & in tort. It was the contract duty of defts. to furnish him with a room at no more than \$1.50 a day; if they had no room at that price, another just as good should have been furnished at that price. The contract was broken by debarring pltf. from his room without giving him another room & by ordering him out of the house.—*LIPPERT v. FORD HOTEL OF TORONTO, LTD., [1930] 3 D. L. R. 722; 65 O. L. R. 340.—CAN.*

## PART II. SECT. 2, SUB-SECT. 1.

118 i. *Reasonable care—Limited to rooms where guest likely to go.*—While a person in attendance at a banquet given by an assocn. in a hotel is an invitee of the hotel proprietor, & not a mere licensee, the extent of the invitation is of the utmost importance,

& if an accident happens & the invitation did not extend to the time & place is circumstances of the accident, then the question whether the proprietor & liable is to be determined in view of the duty which he owes to a mere licensee.

Where a guest at such a banquet in deft.'s hotel, after the conclusion thereof, met his death by falling into a private-service elevator shaft:—*Held: deft. was not liable.—KNIGHT v. GRAND TRUNK PACIFIC DEVELOPMENT CO., [1927] 1 D. L. R. 498; [1926] S. C. R. 674.—CAN.*

123 i. *Invited visitor.*—In an action for damages for injuries resulting from a fall sustained when entering deft.'s hotel on a visit to one of the sample rooms:—*Held: the action must be dismissed, since the slope on which pltf. fell was not a "trap," & she had previous knowledge of it.—WAY v. LELAND HOTEL CO. (B. C.) [1927] 3 W. W. R. 224.—CAN.*

water jacket in time of severe frost. During his stay at the hotel there was a frost of great severity, & the water in the water jacket became frozen & the engine of the car was damaged:—*Held*: in relation to the car the innkeeper's duties were those of an innkeeper only, he was not negligent in not emptying the water from the water jacket, & in the absence of negligence, he was not liable for the damage to the car.—*WINKWORTH v. RAVEN*, [1931] 1 K. B. 652; 100 L. J. K. B. 206; 144 L. T. 594; 47 T. L. R. 254; 75 Sol. Jo. 120, D. C.

151. *Add. Annotation*:—*Refd. Aria v. Bridge House Hotel (Staines) (1927)*, 137 L. T. 299.

151a. — *Motor car stolen from parking place.*—A guest at an hotel parked his motor car in the space adjoining the hotel as directed by the hall-porter of the hotel, & which space was commonly used for the purpose. While the guest was at dinner at the hotel the car was stolen:—*Held*: there had been no alteration in the law regarding the liability of an innkeeper for the loss of goods brought on his premises by a guest, & where the relationship of innkeeper & guest existed as regards eating & drinking, that relationship extended also to the vehicle of the guest brought by him to the inn, & the common law rule still applied & was not affected by Innkeepers' Liability Act, 1863 (c. 41).—*ARIA v. BRIDGE HOUSE HOTEL (STAINES), LTD.* (1927), 137 L. T. 299.

154. *Add. Annotation*:—*Apld. Caldecutt v. Piesse* (1932), 49 T. L. R. 26.

157a. — *Guest house.*—A person who, though not an innkeeper, keeps a guest house for reward is under a duty at least to use ordinary care for the protection of the guests' goods.—*CALDECUTT v. PIESSE* (1932), 49 T. L. R. 26; 76 Sol. Jo. 799.

166. *Add. Annotation*:—*Consd. Winkworth v. Raven*, [1931] 1 K. B. 652.

169a. *Failure to empty radiator of car.*—*WINKWORTH v. RAVEN*, No. 138a, *ante*.

177a. — *CHAMIER v. DE VERE HOTELS LTD.* (1928), 72 Sol. Jo. 155.

185. *Add. Annotations*:—*Expld. & Distd. Carpenter v. Haymarket Hotel, Ltd.* (1930), 47 T. L. R. 11. *Folld. Wright v. Embassy Hotel* (1934), 79 Sol. Jo. 12.

186a. — *On Oct. 30, 1929, about 5.30 p.m., pltf. & her husband arrived at defts.' hotel with their suit cases & engaged a room for the night with a view to attending a dance in the neighbourhood. After having tea in their room they dressed for the dance. Pltf., having replaced a diamond ring which she was wearing by a pearl ring, put the diamond ring into a jewel-case & placed that in her suit case, which she latched but did*

not lock. When they went down to dinner pltf.'s husband locked the door of their room & took the key with him. After dinner they returned to their room, & on leaving it to go to the dance pltf.'s husband again locked the door & then handed the key in at the hotel office. About 2.30 a.m. the following morning they returned to their room in the hotel, having got the key from the hall porter. On getting up between 8 & 9 a.m. pltf. opened her suit case & jewel case & found that the diamond ring was missing. Defts. were immediately informed of the loss & search was made for the ring, but without result. Defts. had exhibited in the hotel a copy of Innkeepers' Liability Act, 1863 (c. 41), s. 1, & in the room occupied by pltf. a notice that all articles of value should be deposited at the office. Pltf. brought an action in the county ct. against defts. as insurers for damages for having failed to keep the ring safely. At the trial the above facts were proved or admitted, & it was found as a fact that the pltf. had taken reasonable care of the ring; but the judge, thinking that he was bound to do so by a previous case, gave judgment for defts. On appeal to the Div. Ct.:—*Held*: there was evidence to support the finding that pltf. had taken reasonable care of the ring & accordingly that the loss of it was not due to negligence on her part; the fact that she had not deposited the ring at the office in compliance with the notice did not imply that she had retained the protection of it in her own hands to the relief of defts.; & therefore that she was entitled to judgment against defts. in the action.—*CARPENTER v. HAYMARKET HOTEL, LTD.*, [1931] 1 K. B. 364; 100 L. J. K. B. 33; 144 L. T. 119; 47 T. L. R. 11; 74 Sol. Jo. 703, D. C.

*Annotation*:—*Distd. Wright v. Embassy Hotel* (1934), 79 Sol. Jo. 12.

186b. — *WRIGHT v. EMBASSY HOTEL* (1934), 79 Sol. Jo. 12.

208a. — *Notice in corridor.*—An innkeeper is required by Innkeepers' Liability Act, 1863 (c. 41), s. 3, to exhibit a copy of sect. 1 thereof in a conspicuous part of the hall or entrance to the inn. An inn was entered by a vestibule which led to a lounge, & from this lounge a corridor, in which was the reception office, led to the staircase & dining-room of the hotel. The notice was exhibited in this corridor above a chocolate case some 6 ft. from the ground:—*Held*: the notice was not exhibited in compliance with the Act in a conspicuous part of the hall or entrance to the inn.—*SHACKLOCK v. ETHORPE, LTD.*, [1937] 4 All E. R. 672; 54 T. L. R. 224; 82 Sol. Jo. 77; *reversd. on other grounds*, [1938] 2 All E. R. 315, C. A.

221. *Add. Annotation*:—*As to (2) Consd. Winkworth v. Raven*, [1931] 1 K. B. 652.

## PART II. SECT. 3, SUB-SECT. 1.—B.

*aw. Counterclaim for negligence.—In action for board & lodging.*—A guest sued for board & lodging may counterclaim for negligent non-delivery of goods received at the hotel for the guest, & also for false arrest.—*COM-*

*MERCIAL HOTEL, LTD. v. CAMPBELL*, [1937] 4 D. L. R. 657; 69 Can. O. C. 160.—CAN.

## PART II. SECT. 3, SUB-SECT. 1.—C.

*sa. Valuables exhibited publicly.*—*Held*: pltf.'s conduct in showing his

collection of precious stones to persons on the hotel, more or less publicly, was not such negligence as to deprive him of his rights against the innkeeper.—*SHERILL v. KING EDWARD HOTEL CO.*, [1929] 2 D. L. R. 612; 63 O. L. R. 528.—CAN.

## Part III.—Remedies of Innkeepers.

236. *Add. Annotation* :—*Consd. Elias v. Pasmore*, [1934] 2 K. B. 164.

**PART III. SECT. 2, SUB-SECT. 2.—**  
**A. (a).**

245 I. *Goods brought to inn by guest—Whether his own or another's.*—An innkeeper has a lien on the goods brought to the inn by the guest as his goods, whether they belong to the guest or not, & whether the innkeeper

is bound to receive them or not, in respect of the whole of his bill as innkeeper against the guest, including any charges in respect of the care of goods while the guest is staying at the inn as such, before the innkeeper has exercised his lien on the goods, but not any charges for keeping & taking care

of them after the detainer of the goods. —*PARK v. BERKERY* (1932), 25 *Tas. L. R.* 67.—*AUS.*

245 II. — *Although value of goods greatly in excess of amount owing.*—*NEWMAN v. WHITEHEAD* (1909), 9 *W. L. R.* 688; 2 *Sask. L. R.* 11.—*CAN.*



## INSURANCE.

## Part I.—General Principles.

3. *Add. Annotations*:—*As to (2) Refd. Greenhill v. Federal Insee. (1926), 95 L. J. K. B. 717. As to (3) Consd. Locker & Woolf, Ltd. v. Western Australian Insurance Co. (1935), 153 L. T. 334.*
- 11a. *Inconsistency between policy & proposal form—Policy prevails.*—KAUFMANN v. BRITISH SURETY INSURANCE CO., LTD., No. 218a, *post*.
13. *Add. Annotation*:—*Refd. Greenhill v. Federal Insee. (1926), 95 L. J. K. B. 717.*
- 18a. *Type calculated to elude observation—Insurers refused benefit of clause.*—*Deft. co. insured a quantity of leather, consigned c.i.f., for a voyage from New York to Tunis, by a certificate of insurance which provided: "This certificate represents & takes the place of the policy & conveys all the rights of the original policy-holder as fully as if the property were covered by a special policy direct to the holder of this certificate." One of the conditions of the policy was in much smaller print than other parts of the policy & was as follows: "In case of loss or damage to the property hereby insured the loss shall be reported to the representatives of the co., or, if there be no representative of the co., to Lloyd's agent, as soon as the goods are landed or the loss is known or expected." On the day after the arrival of the goods at Tunis the consignee sold them to pltf., who found them to have been damaged by salt water. In an action by pltf. on the certificate of insurance deft. co. contended, (1) that pltf. was not the right person to sue, & (2) that the clause in the policy as to giving notice*

*within a limited time had not been complied with:—Held: the certificate, having been issued by deft. co. itself, enured to the benefit of pltf., & since pltf. did not know of the condition as to notice, & since the clause as to notice was in such small print that it was not such as a reasonable man, reading with reasonable care, would regard as forming part of the contractual terms, pltf. was entitled to recover.*—KOSKAS v. STANDARD MARINE INSURANCE CO., LTD. (1926), 42 T. L. R. 692; *affd.* (1927), 137 L. T. 165; 43 T. L. R. 169; 17 Asp. M. L. C. 240; 32 Com. Cas. 160, C. A.

*Annotation*:—*Consd. De Monchy v. Phoenix Insee. Co. of Hartford (1928), 139 L. T. 703.*

20. *Add. Annotation*:—*Consd. Holt's Motors, Ltd. v. South East Lancashire Insurance Co. (1930), 35 Com. Cas. 281.*
26. *Add. Annotations*:—*Consd. Smith v. Cornhill Insurance Co., [1938] 3 All E. R. 145. Refd. Lake v. Simmons (1926), 95 L. J. K. B. 586.*
29. *Add. Annotation*:—*Refd. Stumbles v. Whitley (1929), 46 T. L. R. 37.*
- 36a. —.]—KAUFMANN v. BRITISH SURETY INSURANCE CO., LTD., No. 218a, *post*.
63. *Add. Citation*:—31 Com. Cas. 10.
93. *Add. Annotation*:—*Refd. Carras v. London & Scottish Assurance Corp., Ltd., [1936] 1 K. B. 291.*
105. *Add. Annotation*:—*Refd. Jones v. Birch Bros., Ltd. (1933), 49 T. L. R. 586.*
141. *Add. Annotation*:—*Refd. With v. O'Flanagan, [1936] Ch. 575.*

## PART I. SECT. 2.

b i. —.]—PEPPER v. LONDON LIFE INSEC. CO., [1936] 1 D. L. R. 55; 9 M. P. R. 183.—CAN.

c i. —.]—Where a contract of insurance is one that can be made orally it is not necessary for the insured to show in an action thereon that the agent with whom the contract was made was authorised to bind the insurers by such a contract. Where the loss insured against occurred when the only existing contract was the oral one, the fact that the insurers afterwards issued a policy, which was not signed & not intended to be signed by the insured, was held not to prevent the latter from suing on the oral contract & oblige them to sue for rectification of the policy where it did not conform to the oral contract; the fact that the insured accepted the policy after the loss but without knowing then that it differed from the oral contract did not affect their rights to enforce the original contract.—HOCHBAUM v. PIONEER INSURANCE CO., [1933] 1 W. W. R. 403; 46 B. C. R. 455.—CAN.

st. *Application of statutory conditions—Although no policy.*—The statutory conditions of Alberta Insurance Act, 1926, including the condition limiting the time within which an action for the recovery of a claim "under or by virtue of this policy" may be brought against the insurer, apply to an oral contract for insurance as well as to one evidenced by a policy.—GLOVER v. EQUITABLE FIRE & MARINE INSURANCE CO. (Alta.), [1929] 4 D. L. R. 946; 3

W. W. R. 352.—CAN.

## PART I. SECT. 3, SUB-SECT. 1.

m i. — *Duty of insurer.*—It is the duty of insurance cos. to make the policies issued by them accord with & not depart from the terms of their proposal form, & to express both documents in clear & unambiguous terms.—BRAUND v. MUTUAL LIFE & CITIZENS ASSURANCE CO., LTD., [1926] N. Z. L. R. 529.—N.Z.

## PART I. SECT. 3, SUB-SECT. 2.—B.

g. Read now "18a i."

## PART I. SECT. 4, SUB-SECT. 2.

sg. *Purchaser under conditional sales agreement.*—WATERLOO MOTORS, LTD. v. FLOOD, [1931] 1 D. L. R. 762; 3 M. P. R. 318.—CAN.

## PART I. SECT. 8.

q i. —.]—CLARKE v. UNION FIRE INSURANCE CO., CLAIM OF AGRICULTURAL FIRE INSURANCE CO. OF WATERTOWN, NEW YORK (1884), 6 O. R. 640.—CAN.

q ii. —.]—QUEEN INSURANCE CO. OF AMERICA v. BRITISH TRADERS INSURANCE CO. (1926), 37 B. C. R. 202; *affd.*, *sub nom.* BRITISH TRADERS INSURANCE CO. v. QUEEN INSURANCE CO. OF AMERICA, [1928] 2 D. L. R. 399; [1928] S. C. R. 9.—CAN.

q iii. — *To disclosure of all material facts.*—A re-insurer is entitled to the fullest disclosure of all facts known to the original insurer which are material to the risk; & the failure of the original insurer to disclose such a fact

invalidates the contract of re-insurance. The fact that the crops of an applicant for hail insurance had been visited by hail storms during the same season held a fact material to the risk.—FEDERAL INSURANCE CO. OF NEW JERSEY v. WESTCHESTER FIRE INSURANCE CO. (Alta.), [1929] 3 W. W. R. 646; [1930] 1 D. L. R. 525; 24 Alta. L. R. 330.—CAN.

## PART I. SECT. 9, SUB-SECT. 2.

sa. *Allegation of fraud—By insurers against agent—Onus on insurers.*—Pltfs. produced at the trial an original policy & a renewal certificate covering the date in question. The insurers contended, nevertheless, that the renewal premium had not in fact been paid before the date of the accident, & attempted to establish their position by showing that their own agent had been guilty of a fraud, for the benefit of himself or the insured or both, in concocting evidence to show that the premium had been paid in time:—*Held*: the evidence was insufficient to support the finding of fraud & the insurers had, therefore, failed to meet the onus on them of meeting the *prima facie* case made out by the production of the policy & renewal receipt.—WESTERN FINANCE CORPORATION, LTD. v. LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA, [1928] 3 D. L. R. 592; [1928] 2 W. W. R. 454.—CAN.

## PART I. SECT. 9, SUB-SECT. 3.—A.

sb. *Second policy.*—CRAWFORD v. WESTERN ASSURANCE CO. (1873), 23 C. P. 365.—CAN.

**143a. Valuation of property—Speculative prospect of appreciation.]—**If in a proposal to effect an insurance upon property the value put upon the property by the assured is based upon what he believes to be a reasonable prospect of appreciation, he must make it plain to the insurer that the value stated is not immediate but speculative. If the assured does not make this disclosure to the insurer, the insurance will be void even though the statement of value by the assured does not amount to a conscious & deliberate overvaluation.—*HOFF TRADING Co. v. UNION INSURANCE SOCIETY OF CANTON, LTD.* (1929), 45 T. L. R. 466, C. A.

**149a. Falsity known to insurer's clerk—Whether insurer estopped from repudiating policy.]—**If it is established by evidence that the duty of investigating & ascertaining facts has been delegated in the ordinary course of a co.'s business to a subordinate official, the co. will, in law, be bound by his knowledge in the same way as it is affected by the knowledge of the board of directors.

The claimant signed a proposal form for the insurance of his motor car with resps. That form contained (*inter alia*) the following questions: "For how long has proposer & proposer's driver (i) held a driving licence, (ii) had a practical experience of motor car driving?" to which the answer given was "5 years." That answer was untrue as referring to the experience of & length of licence held by the claimant. A policy was duly issued, containing a clause that the truth of the statements in the proposal form should be a condition precedent to liability on the part of resps. During the currency of the policy an accident occurred resulting in damage to the car & injuries to third parties, whereupon the claimant made a claim under the policy, in which, in answer to the question how long he had been driving motors, he answered, "six weeks." That document, together with the proposal form, was handed to resps.' claims superintendent, who was

authorised to deal with such matters, & was passed on by him, in accordance with the practice of the office, to a clerk for the purpose of checking the statements they contained & noting any discrepancies therein. The clerk noticed the discrepancy but did not call attention to it, considering it of no importance. Thereafter resps. paid the claim in respect of damage to the car & certain medical expenses, & took over the negotiation of the claims by third parties, but before settling these the claims superintendent became aware of the discrepancy between the statements in the proposal form & those in the claim form, whereupon resps. repudiated liability. In arbn. proceedings the umpire held that resps. could not repudiate liability after having obtained the information they had received through their agents, & notwithstanding that information, having paid the claimant & taken over the right of dealing with the third-party claims:—*Held*: the umpire's finding was justified on the evidence inasmuch as the knowledge of the clerk to whom was delegated, in accordance with the ordinary practice of the office, the duty of comparing the claim form with the proposal form, must be imputed to resps., who were therefore not entitled in the circumstances to rely on the discrepancy & to repudiate liability under the policy.—*EVANS v. EMPLOYERS MUTUAL INSURANCE ASSOCN., LTD.*, [1936] 1 K. B. 505; 105 L. J. K. B. 141; 154 L. T. 137, C. A.

**156. Add. Annotations:—***As to* (1) *Apld. Page v. Scottish Insee. Corpn.* (1929), 98 L. J. K. B. 308. *Refd.* *Sutherland v. German Property Administrator* (1933), 149 L. T. 47; *Morley v. Moore*, [1936] 2 All E. R. 79. *As to* (3) *Consd. Williams v. Atlantic Assurance Co., Ltd.* (1932), 37 Com. Cas. 304.

**158. Add. Annotation:—***Consd. Page v. Scottish Insee. Corpn.* (1929), 98 L. J. K. B. 308.

**160a. ——— Lost article subsequently found.]—***HOLMES v. PAYNE*, No. 3281a, *post*.

#### PART I. SECT. 9, SUB-SECT. 4.

**144 ix. ———.]—***MUMA v. NIAGARA DISTRICT MUTUAL INSURANCE CO.* (1862), 22 U. C. R. 214.—CAN.

**147 vii. ———.]—***JOHNSTON v. BRITISH AMERICAN INSURANCE CO.*, [1931] 3 D. L. R. 300.—CAN.

**147 viii. ——— Question of fact.]—**The question whether a misrepresentation in an application for insurance is material is one of fact, the test being whether if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium & in an action on the policy the onus is on the insurer to establish materiality.—*EVENDEN v. MERCHANTS CASUALTY INSURANCE CO.* (No. 1), [1935] 2 W. W. R. 484; 5 F. L. J. (Can.) 21.—CAN.

**147 ix. ———.]—**Failure to disclose the refusal of other cos. to renew policies is a fraudulent omission or misrepresentation.—*CHOPOWICH v. EAGLE STAR & BRITISH DOMINIONS INSEE. CO.*, [1935] 3 D. L. R. 776; *affd.*, [1936] 1 D. L. R. 801.—CAN.

**a i. ——— Verdict unsupported by evidence—Power of Court of Appeal.]—***BRODY v. DOM. LIFE ASS'N CO.*, [1938] 4 D. L. R. 529; *affd.*, [1938] 3 D. L. R. 241; 60 N. S. R. 116.—CAN.

**so. Policy repudiated—All provisions avoided.]—**Where a policy of insurance is repudiated in its entirety by the insurer no provision thereof can be invoked as a bar to an action on the policy.—*WOOD v. ARMSTRONG*, [1931] 2 W. W. R. 359; 3 D. L. R. 321.—CAN.

**st. Statement that policy has lapsed.]—**Where a policy has in fact lapsed there can be no damages for misrepresentation in stating that it has lapsed.—*MURPHY v. METROPOLITAN LIFE INSEE. CO.*, [1935] 3 D. L. R. 45; 9 M. P. R. 403.—CAN.

#### PART I. SECT. 11.

**157 iv. ———.]—**Where in a contract of insurance a provision for subrogation contains no limitations or restrictions the insurer's right of subrogation should not be restricted within narrower limits than equity would have given him in the absence of the provision. A motion by the insurer under such a contract for an order compelling the insured to permit the former to use the latter's name in suing third parties was therefore allowed, where the insured pressed for the order because of its belief that the cause of the loss might eventually be found to have been the result of a tort rather than a breach of contract.—*NORTHERN ASSOC. CO. v. MANITOBA POOL ELEVATORS*, [1928] 3 W. W. R. 154.—CAN.

**d i. ——— Under Saskatchewan Insurance Act, s. 213 (12).]—**Under sect. 213 (12) of Saskatchewan Insurance Act, 1925 (c. 20), the rights of an insurer as assignee of an insured's claim to recover damages from a third party for tort are the same as those of an assignee of a legal chose in action under the English Jud. Act, & therefore, in view of the weight of opinion on the interpretation of the latter Act, the said provision of the Insurance Act does not entitle the insurer to become the assignee of part only of the insured's claim. Therefore where only part of his claim is assigned to the insurer, the action against the third party must be brought in the insured's name.—*MITCHELL v. WORMWORTH*, [1930] 1 W. W. R. 961.—CAN.

#### PART I. SECT. 14, SUB-SECT. 1.

**m i. ———.]—***BINKLEY v. STEWART* (1912), 22 O. W. R. 330; 3 O. W. N. 1427; 4 D. L. R. 150.—CAN.

**sd. Liability for unauthorised use of company's funds—On liquidation.]—**Two telegrams sent to the agent of a fire casualty insurance co. which were signed by the co. & its liquidator respectively read as follows: "Notice being prepared by liquidator to cancel all fire policies stop suggest to make arrangements for placing fire business only elsewhere." There was some question as to which of the telegrams the agent received:—*Held*: regardless

170. *Add. Annotation*:—*As to* (2) *Apprvd. Newsholme v. Road Transport & General Insce.*, [1929] 2 K. B. 356.

171a. ———.]—A proposal form for the insurance of a motor-bus was signed by the person wishing to effect the insurance, but the answers to the questions therein, which were warranted to be true & to form the basis of the contract, were filled in by the insurance co.'s agent, who, although told the true facts, wrote, for some unexplained reason, answers which were untrue in a material respect. The agent was not authorised by the insurance co. to fill in proposal forms, & it did not appear that the co. knew that he had in fact done so. His duties were to procure persons to effect insurances & to see, as far as he could, that proposal forms were correctly filled up; he was not authorised to give a cover note or to enter into a policy of insurance. A policy was issued to the person who had signed the proposal form, & during its currency he made a claim under it, but the insurance co. repudiated liability on the ground of the untrue statements in the proposal form:—*Held*: the agent of the insurance co. in filling in the proposal form was merely the amanuensis of the proposer, that the knowledge of the true facts by the agent could not be imputed to the insurance co., & therefore that the insurance co. was entitled to repudiate liability on the ground of the untrue statements in the proposal form.—*NEWS-*

*HOLME BROS. v. ROAD TRANSPORT & GENERAL INSURANCE CO., LTD.*, [1929] 2 K. B. 356; 98 L. J. K. B. 751; 141 L. T. 570; 45 T. L. R. 573; 73 Sol. Jo. 465; 34 Com. Cas. 330, C. A.

*Annotations*:—*Consd. Dunn v. Ocean Accident & Guarantee Corp., Ltd.* (1933), 50 T. L. R. 32; *Evans v. Employers' Mutual Insurance Association, Ltd.*, [1936] 1 K. B. 505.

175. *Add. Annotation*:—*As to* (2) *Refd. Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

177. *Add. Annotations*:—*As to* (1) *Expld. Newsholme Bros. v. Road Transport & General Ince. Co.*, [1929] 2 K. B. 356. *Consd. Evans v. Employers' Mutual Insurance Assocn., Ltd.*, [1936] 1 K. B. 505. *As to* (2) *Distd. Newsholme Bros. v. Road Transport & General Insce. Co.*, [1929] 2 K. B. 356.

184. *Add. Annotation*:—*As to* (1) *Apprvd. Newsholme Bros. v. Road Transport & General Insce. Co.*, [1929] 2 K. B. 356.

192. *Add. Annotation*:—*Distd. Newsholme v. Road Transport & General Insce.* (1928), 45 T. L. R. 123.

193a. ———.]—*NEWSHOLME BROS. v. ROAD TRANSPORT & GENERAL INSURANCE CO., LTD.*, No. 171a, *ante*.

200. *Add. Annotations*:—*As to* (2) *Expld. & Distd. Newsholme Bros. v. Road Transport & General Insce. Co.*, [1929] 2 K. B. 356. *Refd. Dunn v. Ocean Accident & Guarantee Corp., Ltd.* (1933), 50 T. L. R. 32.

of which one reached him, it did not authorise him to use the co.'s funds then in his hands for the purpose of placing insurance of its customers in another co., & that he was liable to the liquidator for the amount so used.—*NEWTON v. BRANDON*, [1928] 1 W. W. R. 28; 22 Sask. L. R. 221.—*CAN.*

st. *Insurance adjuster—Who is.*—*R. v. ADKIN* (1931), 44 B. C. R. 295; 56 Can. C. C. 347.—*CAN.*

sk. *Sub-agent—Liability to company for premiums.*—*Deft.*, a sub-agent, issued policies of insurance countersigned by himself, without the intervention of the general agents of *pltf. co.* In order to carry on business it was necessary for *deft.* to obtain a licence under Insurance Act, 1925, & this he duly received in pursuance of a certificate filed with the superintendent of insurance by the general agents:—*Held*: he was liable to *pltf. co.* for the amount owing *pltf. co.* on said premiums, subject to *pltf.* showing that the general agents were indebted to it in at least that amount, although *deft.* had made certain payments to the general agents.—*NORWICH UNION FIRE INSURANCE SOCIETY, LTD. v. LEONG*, [1935] 2 W. W. R. 480; 3 D. L. R. 445; 50 B. C. R. 149.—*CAN.*

sm. *Duty to insured.*—An insurance salesman, P., who took an application for insurance from a woman who did not read English & who spoke it with difficulty:—*Held*: to be under the clearest kind of duty to see that she understood what she was signing.—*HARRIS v. BANKERS & TRADERS INSURANCE CO.*, [1936] 1 W. W. R. 657; *reversd.*, [1937] 2 W. W. R. 305; 1 D. L. R. 493.—*CAN.*

#### PART I. SECT. 14, SUB-SECT. 2.

170 iii. ———.]—*BANKERS' & TRADERS' INSURANCE CO., LTD. v. JUMNA KHAN* (1925), 27 S. R. N. S. W. 13.—*AUS.*

b i. ———.]—*ST. REGIS PASTRY SHOP v. CONTINENTAL CASUALTY CO.*,

[1929] 1 D. L. R. 900; 63 O. L. R. 337.—*CAN.*

e i. ———.]—Where *appet.* for an insurance policy was not to incur any liability until he should have accepted the policy, but the agent paid the premium before *appet.* had agreed to accept the policy:—*Held*: an action by the agent against *appet.*, to recover the amount of the premium as money paid for *deft.* at his request, could not succeed.—*BILBROUGH v. DEMAEER*, [1927] 1 D. L. R. 542; [1927] 1 W. W. R. 133; 21 Sask. L. R. 239.—*CAN.*

e ii. *S. P. HICKEY v. MCGUINNESS* (Alta.), [1927] 3 W. W. R. 565.—*CAN.*

#### PART I. SECT. 14, SUB-SECT. 3.

179 i. *Contract to grant policy—Fire insurance.*—There is no principle of law requiring it to be held that every agent of a fire insurance co. must be taken, regardless of the class of his agency or his instructions from his co., to have the actual, in the sense of implied, authority to bind his co., by an oral acceptance of a proposal for insurance, for a definite or indefinite interim period.—*POTVIN v. GLEN FALLS INSURANCE CO.*, [1931] 1 W. W. R. 330.—*CAN.*

sg. *Agent for two companies.*—An insurance agent holding agencies for different cos. cannot, without express authority, act as agent to bind one of those cos. to another when it is incumbent upon him to exercise a discretion in the interests of both parties.—*ELITE CAFÉ, LTD. v. BALOISE FIRE INSURANCE CO. & FIRST NATIONAL INSURANCE CO. OF AMERICA*, [1932] 3 W. W. R. 188; *affd.*, [1932] 3 W. W. R. 625.—*CAN.*

#### PART I. SECT. 14, SUB-SECT. 4.

190 iii. ———.]—*WOOD & MCILLAN v. CANADIAN INDEMNITY CO., LTD.*, [1933] 2 W. W. R. 185.—*CAN.*

k i. ———.]—*Appl.*, who was illiterate,

went to the local office of *resps.* to insure his house & furniture against fire, & at the request of the agent of *resps.*, signed a proposal form, the agent saying that he would fix everything up. The agent, without asking *appl.* any questions, filled in the form, & inserted in it an untrue answer to one of the questions:—*Held*: *resps.* were not prevented from relying upon the untruth of the answer in the proposal.—*JUMNA KHAN v. BANKERS & TRADERS INSURANCE CO., LTD.* (1925), 37 C. L. R. 451; 43 N. S. W. W. N. 98.—*AUS.*

k ii. ———.]—In an action on a policy of fire insurance it was shown that at the time of the fire the insured building was vacant & had been vacant for more than thirty consecutive days. The insurance co. relied on the statutory condition which relieves the insurer from liability where there has been a vacancy for such a period unless the permission of the insurer is given by the policy or endorsed thereon. No such permit had been given. The property was unoccupied at the time the application for insurance was made, & *pltf.* had no intention of making a false statement upon this point. One of the questions asked in the application form was: "Is the dwelling-house occupied all the year round?" *Deft.*'s agent, who filled in the form, believed that the building was occupied, & without putting the question to *pltf.* he wrote in the answer, "Yes." *Pltf.*, who cannot read English, signed the form at the agent's request, without having it read over or explained to him:—*Held*: the co. was not liable.—*SIKORSKI v. CONTINENTAL INSURANCE CO.*, [1933] 2 W. W. R. 388.—*CAN.*

#### PART I. SECT. 14, SUB-SECT. 5.

200 xix. ———.]—To a claim by *pltf.*, carrying on business in partnership, for the value of tobacco insured with *defts.* & destroyed by fire, *defts.* pleaded that it was a condition of the proposal for insurance that the tobacco

203. *Add. Annotation*:—*Expld. Newsholme Bros. v. Road Transport & General Insce. Co.*, [1929] 2 K. B. 356.

203a. ——— *Refusal of company to insure.*—Applts. were in possession of a motor car under a hire-purchase agreement, it being a term of the agreement that they would insure the car with the B. insurance co. The B. co. refused to accept the insurance "owing to information received" & told applts.' brokers that this was their reason for refusal; but the brokers did not communicate the fact to applts., but told them that the B. co. had refused the insurance because they did not cover that class of car. Applts.' brokers then succeeded in obtaining an insurance of the car with the L. co., but when the original period of that insurance was coming to an end the L. co. wrote that they could not invite renewal. Applts. had not in fact wished for a renewal & had not made any application to the L. co., & they then effected an insurance with the present resps. The proposal form of resps. contained a number of questions & a stipulation that the truth of the answers to those questions should be the basis of the contract. To a question "Has any co. or underwriter declined to insure?" applts. answered, No; the fact being that without applts.' knowledge the B. co. had declined to accept their insurance, & the L. co., as applts. were aware, had intimated that they would not renew. Applts. claimed on their policy with resps., & resps. refused to pay, on the ground that the question in the proposal form had been answered untruly & that there had been concealment of a material fact. Applts. brought an action on the policy & the judge, by whom the action was tried, gave judgment for resps. Applts. appealed:—*Held*: as regards the B. co. the answer of applts. was untrue, & the fact that they were

unaware of its untruth was immaterial; & as regards the L. co., although there had been no refusal to renew because there had not been any actual request for renewal the intimation that the co. would not invite renewal was a material fact which ought to have been disclosed to resps., & was in fact if not in words a refusal to insure within the meaning of the question.—*HOLT'S MOTORS, LTD. v. SOUTH EAST LANCASHIRE INSURANCE Co., LTD.* (1930), 35 Com. Cas. 281, C. A.

203b. ———.]—Where material facts are not disclosed in a proposal for insurance, the knowledge of those facts by the insurance co.'s agent does not render the co. liable on the policy.—*DUNN v. OCEAN ACCIDENT & GUARANTEE CORPN., LTD.* (1933), 50 T. L. R. 32, C. A.

209. *Add. Annotation*:—*Apld. Re National Benefit Assurance Co.*, [1931] 1 Ch. 46.

218a. *Representation of underwriter—Estoppel of insurer.*—The claimant owned a motor car which he sometimes let out on hire & sometimes used himself for his own pleasure. He wished to insure the car, & instructed brokers to effect an insurance. The brokers interviewed the underwriter of resps., & he showed them a form of policy & said that it would cover both private pleasure & private hire by the insured. The claimant on being informed of this signed a proposal form for a policy & his broker stated in the form that the purpose for which the car would be used was "private hire"; the broker meant thereby that private hire would be the principal risk. Resps. then issued to the claimant a policy which in words covered "private pleasure or private hire," but which provided that the signed proposal form was incorporated with it & formed the basis of the contract. An accident occurred while the claimant was using the car for his

should be the property of the firm only, whereas a portion was in fact the property of three of the members jointly. In their replication plts. alleged that defts.' agents had knowledge of the above fact at the time the proposal was made & issued the policy notwithstanding such knowledge, & that defts. were estopped from denying liability under the policy:—*Held*: an exception to the replication, as bad in law & disclosing no cause of action, should be dismissed.—*PETREAS & Co. v. LONDON GUARANTEE & ACCIDENT Co., LTD.*, [1925] App. D. 371.—S. AF.

200 xx. ———.]—L. & Co., agents of defts., who had no express power to do so, appointed M. as their local agent in a district, but did not inform defts., who neither approved of, nor ratified, the appointment. M. sent to L. & Co. particulars of a proposed insurance against fire for pltf. on his dwelling-house, & a policy was issued by defts. to pltf. The policy provided that if there was any misrepresentation as to any fact material to be known for estimating the risk, or any omission to state such fact, defts. should not be liable. Pltf. did not disclose the fact that his house had previously been burnt down & that an insurance co. had paid him in respect of that loss:—*Held*: (1) M. was not defts.' agent, & M.'s knowledge of the earlier fire, whenever acquired, could not be imputed to defts., & pltf. had concealed a material fact & thereby relieved defts. from all liability under the policy; (2) even if M. was defts.' agent, his

knowledge acquired prior to his appointment as agent could not be imputed to defts.—*O'KEEFE v. LONDON & EDINBURGH INSURANCE Co., LTD.*, [1928] N. I. 85.—IR.

200 xxi. ———.]—*Rocco v. NORTHWESTERN NATIONAL INSURANCE Co.*, [1930] 1 D. L. R. 472; 64 O. L. R. 559.—CAN.

st. *Express warranty of age.*—In an action on a policy of insurance on the life of W., which contained a warranty that W. did not exceed the age of fifty-nine years:—*Held*: (1) after the death of W. his unsworn declarations as to his own age, made several years before the date of the policy, were not admissible in evidence in proof of his age; (2) though the agent of the insurers, at the time of effecting the policy, had expressed himself satisfied as to the age of the life insured, as represented to him, this did not dispense with the necessity of proving the age as stated in the warranty.—*WESTROFF v. BRUCE* (1826), Batty, 155.—IR.

#### PART I. SECT. 14, SUB-SECT. 6.

r i. ———.]—Insured who accepts a policy incorporating an application containing an agent's non-disclosure, thereby makes the non-disclosure his own.—*GAGNE v. BELAND & CONSOLIDATED FIRE & CASUALTY Co.*, [1938] 1 D. L. R. 806.—CAN.

r ii. ———.]—*HARRIS & KAUFFMAN v. BANKERS' & TRADERS' INSC. Co., LTD.* (1936), 51 B. C. R. 407.—CAN.

r iii. ———.]—An insurance co. is not bound by the acts of an agent assuring coverage, which was not forwarded to, nor was any policy issued by, the co.—*TREWIN v. WAWANEA MUTUAL INSURANCE Co.*, [1938] 2 D. L. R. 454.—CAN.

r iv. ———.]—A fire insurance co. which employs agents for the purpose of submitting to it applications for insurance with a blank date in the application as to when the insurance is to commence, & which follows the practice of dating its policies from the date so filled in, this in the cases of new applications being usually the date upon which the application is made, cannot be heard to complain that its agent, knowing of that practice, assured an appet. that he would be protected from the day of the making of the application until either the policy was issued or the application rejected. Therefore, where the agent gave such assurance & a loss occurred before the application was rejected:—*Held*: the co. was liable.—*FREUDENSTEIN v. PORTAGE LA PRAIRIE MUTUAL INSURANCE Co.*, [1938] 2 W. W. R. 93; 2 D. L. R. 571.—CAN.

a i. ———.]—*PARSONS v. QUEEN INSURANCE Co.* (1889), 2 O. R. 45.—CAN.

sg. *As to overdue payments.*—The representation of an insurance agent that overdue payments could be "arranged" is not sufficient to save the policy from forfeiture for non-payment within the days of grace.—*BRAGALI v. CAPITAL LIFE ASSURANCE Co. OF CANADA*, [1933] 3 D. L. R. 798.—CAN.

own pleasure, & he made a claim under the policy. Resps. refused to pay, on the ground that as the proposal form was the basis of the policy & only related to the car while on hire an accident occurring while the car was not on hire was not covered. The dispute was referred to arbitration, & the arbitrator awarded in favour of the claimant, subject to the decision of a special case. On argument of the case:—*Held*: the arbitrator had acted rightly in admitting evidence of

the interview between the brokers & the underwriter, & even apart from such evidence, as there was an inconsistency between the proposal form & the policy, the later document must prevail. On the facts, resps. were estopped from disputing the claim because their underwriter knew that the claimant had taken out the policy in reliance on his representation that it would cover private pleasure.—KAUFMANN v. BRITISH SURETY INSURANCE CO., LTD. (1929), 45 T. L. R. 399.

## Part II.—Marine Insurance.

231. *Add. Annotation*:—*Apld. Re National Benefit Assee., Ex p. English Insee.*, [1928] Ch. 74.

232a. ———.]—The H. Co. entered into an agreement for reinsuring marine risks with the L. Co. Later, it was voluntarily wound up, & B., the liquidator, agreed the L. Co.'s claim for a large sum, & paid dividends in respect of the claim. Following the practice of the Co., B., notwithstanding the provisions of Stamp Act, 1891 (c. 39), & Marine Insurance Act, 1906 (c. 41), treated the agreement & the claim under it as valid. After the dissolution of the H. Co. he was advised that he should have disallowed the claim, & the dissolution was annulled, but an action to recover the money was dismissed, as no mistake of fact by B. was proved. On a misfeasance summons by a creditor of the co.:—*Held*: the combined effect of Stamp Act, 1891 (c. 39), ss. 93, 97, is that a contract of sea insurance not expressed in a sea insurance policy is null & void.—*Re HOME & COLONIAL INSURANCE CO., LTD.*, [1930] 1 Ch. 102; *sub nom. Re HOME & COLONIAL INSURANCE CO., MAY v. BAREHAM*, 99 L. J. Ch. 113; 142 L. T. 207; [1929] B. & C. R. 85.

233. *Add. Annotation*:—*Distd. Koskas v. Standard Marine Insee.* (1926), 42 T. L. R. 692.

234a. ———.]—By a contract between applt., a German insurance co., therein described as the principals, & resps., an English insurance co., therein described as the agents, it was provided that marine insurance risks accepted on the English market by resps. should be treated as having been accepted by them *pro tanto* on behalf of applt., resps. issuing the policies in their own name & retaining a specified share of the interest therein for applt. as undisclosed principals & the remaining share thereof for themselves. Resps. made a claim against applt. for a certain sum as applt.' proportion of the difference between premiums received & losses paid in respect of policies issued pursuant to the contract. Applt. relied by way of defence to the claim upon the provisions of the Stamp Act, 1891 (c. 39), ss. 92, 93, & Marine Insurance Act, 1906 (c. 41), ss. 22, 23, which require a contract of marine insurance to be expressed in a policy specifying the names of the underwriters. On a case stated by an arbitrator:—*Held*: the contract, by reason of its pro-

visions & the above enactments, was not an agency contract under which applt. were liable as principals to indemnify resps. for expenditure incurred by the latter as their agents, but it was a reinsurance contract, & applt., in the absence of a policy specifying their names as underwriters in accordance with the enactments, were not liable thereunder for the sum claimed.—*MOTOR UNION INSURANCE CO., LTD. v. MANNHEIMER VERSICHERUNGS GESELLSCHAFT*, [1933] 1 K. B. 812; 102 L. J. K. B. 871; 149 L. T. 94; 48 T. L. R. 522; 76 Sol. Jo. 495; 37 Com. Cas. 407; 18 Asp. M. L. C. 345.

236. *Add. Annotations*:—*Refd. Koskas v. Standard Marine Insee.* (1926), 42 T. L. R. 692; *De Monchy v. Phoenix Insee. Co. of Hartford* (1928), 138 L. T. 703; *Tredeggar v. Harwood*, [1928] Ch. 59.

237a. *Policy containing fire policy clause—Validity*.]—*SYMINGTON & Co. v. UNION INSURANCE SOCIETY OF CANTON*, No. 855a, *post*.

247. *Add. Annotation*:—*Refd. English Insee. v. National Benefit Assee.*, [1929] A. C. 114.

248. *Add. Annotation*:—*Refd. Cornish Mutual Assee. v. I. R. Comrs.*, [1926] A. C. 281.

252a. ———.]—By an agreement between two insurance cos., the E. Co. & the N. Co., therein described as a participation agreement, it was (*inter alia*) provided that the N. Co. should be entitled to & accept a quota of a one-eighth of all risks accepted by the E. Co. through its marine department. The participation was fixed at 50 per cent. of the share retained by the E. Co. at its own risk of all marine assurances accepted on or after a specified date, with a maximum limit on any one ship. The liability of the two cos. was to commence automatically at the same time, the expressed intention being that the two cos. should participate *pari passu* in all marine insurances accepted by the E. Co. The N. Co. was to be entitled to a proportionate part of the net premiums & other benefits received by the E. Co., & was to bear its proportionate share of losses. The E. Co. was alone to settle all claims which might arise under its policies & the N. Co. was to be bound by the settlement. The E. Co. was to receive from the N. Co. commissions on the net premiums & on the profits derived by the N. Co. from the whole of the business

under the agreement. By another clause in the agreement the N. Co. was absolutely bound in every case to follow the fortunes of the E. Co. No stamped policy of assurance was ever issued to the E. Co. by the N. Co. in respect of any risk coming within the agreement. The N. Co. having been ordered to be wound up by the ct., the E. Co. claimed to prove in respect of certain claims arising under the agreement. The liquidator disallowed the claim:—*Held*: the agreement was a contract for "sea insurance," & not being expressed in a duly stamped policy was invalid as not complying with the requirements of Stamp Act, 1891 (c. 39), & Marine Insurance Act, 1906 (c. 41).—*ENGLISH INSURANCE CO. v. NATIONAL BENEFIT ASSURANCE CO. (OFFICIAL RECEIVER)*, [1929] A. C. 114; 98 L. J. Ch. 1; 44 T. L. R. 801; *sub nom. Re NATIONAL BENEFIT ASSCE. CO., LTD., Ex p. ENGLISH INSC. CO., LTD.*, 140 L. T. 76; [1928] B. & C. R. 67, H. L.

*Annotations*:—*Apld.* Motor Union Insee. Co., Ltd. v. Mannholmer Versicherungs-Gesellschaft, [1933] 1 K. B. 812. *Refd.* *Re Norske Lloyd Insee. Co., Ltd.*, [1928] W. N. 99; *Re Home & Colonial Insee. Co., Ltd.* (1929), 45 T. L. R. 658; *Re National Benefit Assurance Co.*, [1931] 1 Ch. 48; *Motor Union Insurance Co. v. Mannheimer Versicherungs-Gesellschaft* (1932), 48 T. L. R. 522.

252b. *Effect on recovery of premium.*—*Re NATIONAL BENEFIT ASSURANCE CO., No. 2527a, post.*

252c. —. —. —. *MOTOR UNION INSURANCE CO., LTD. v. MANNHEIMER VERSICHERUNGS-GESELLSCHAFT, No. 234a, ante.*

253. *Add. Annotation*:—*Consd.* Royal Exchange Assce. v. Hope, [1928] Ch. 179.

254. *Add. Annotation*:—*Refd.* Royal Exchange Assce. v. Hope, [1928] Ch. 179.

291. *Add. Annotation*:—*Generally*, *Refd.* Lazard Bros. & Co. v. Brooks (1932), 37 Com. Cas. 224.

371. *Add. Annotation*:—*Apld.* Blaustein v. Maltz, Mitchell & Co., [1937] 2 K. B. 142.

374. *Add. Annotation*:—*Refd.* Savory & Co. v. Lloyds Bank, Ltd. (1932), 48 T. L. R. 344.

383. *Add. Annotation*:—*As to (1)* *Refd.* Locker & Woolf, Ltd. v. Western Australian Insurance Co. (1935), 153 L. T. 334.

410. *Add. Annotation*:—*Refd.* Ruby S.S. Corp., Ltd. v. Commercial Union Assurance Co. (1933), 150 L. T. 38.

432a. —. —. —. *Unless notice of agency acquired before repossession.*—By Marine Insurance Act, 1906 (c. 41), s. 53 (2), a broker who effects a policy of marine insurance on behalf of a person who employs him for that purpose has a lien on the policy in respect of any balance on any insurance account which may be due to him from that person, unless, when the debt was incurred, he had reason to believe that such person was only an agent:—*Semble*: the same knowledge which, under this sect., would defeat the establishment of a lien when the policy is effected is equally effective to defeat it if acquired between that

time & that at which possession of the policy is resumed after it has been parted with. The lien, therefore, of a broker in respect of a balance on an account under this sect. which is due to him from his employer, who, at the time when the policy was effected, he had no reason to believe was only an agent, does not revive if the broker, having parted with possession of the policy to his employer, knows or has reason to believe, when it comes again into his hands, that his employer was only an agent.—*NEAR EAST RELIEF v. KING, CHASSEUR & CO., LTD.*, [1930] 2 K. B. 40; 99 L. J. K. B. 522; 35 Com. Cas. 104.

433. *Add. Annotation*:—*Consd.* Near East Relief v. King, Chasseur & Co., [1930] 2 K. B. 40.

435. *Add. Annotation*:—*Refd.* Near East Relief v. King, Chasseur & Co., [1930] 2 K. B. 40.

440. *Add. Annotations*:—*Generally*, *Refd.* Near East Relief v. King, Chasseur & Co., [1930] 2 K. B. 40; Ruby S.S. Corp., Ltd. v. Commercial Union Assurance Co. (1933), 150 L. T. 38.

444. *Add. Annotation*:—*Refd.* Near East Relief v. King, Chasseur & Co., [1930] 2 K. B. 40.

459. *Add. Annotation*:—*Consd.* Reckitt v. Barnett, Pembroke & Slater, [1929] A. C. 176.

463. *Add. Annotations*:—*Consd.* Aron v. Miall (1928), 139 L. T. 562. *Refd.* Vandepitte v. Preferred Accident Insurance Co. of New York, [1933] A. C. 70.

476. *Add. Annotation*:—*Refd.* Ruby S.S. Corp., Ltd. v. Commercial Union Assurance Co. (1933), 150 L. T. 38.

478. *Add. Annotations*:—*Refd.* Vandepitte v. Preferred Accident Insurance Co. of New York, [1933] A. C. 70; Ruby S.S. Corp., Ltd. v. Commercial Union Assurance Co. (1933), 150 L. T. 38.

480a. —. —. —. *Before or after loss.*—A firm of sellers in Africa sold goods, which were resold by the purchasers to plffs. under a contract which required the second sellers to pass on to the second buyers the usual policy in the trade insuring against the usual risks. The goods were found to be damaged on delivery. A substantial part of the damage was caused at a time when plffs. were not interested in the goods covered by the insurance, but by an indorsement on the policy all claims under it were assigned to the holder of the policy:—*Held*: under Marine Insurance Act, 1906 (c. 41), s. 50, a marine policy was assignable, unless it contained terms expressly prohibiting the assignment, & it could be assigned either before or after loss. The effect of assigning the policy in the manner in which the policy was assigned, which was the ordinary manner in which policies were assigned in England, was to assign to the person holding the policy the right to sue on any claim which the assignor had on the policy, irrespective of the fact that at the time of the loss or damage the assignee was not interested in the subject-matter lost or damaged. Plffs. were the assignees of the

PART II. SECT. 5, SUB-SECT. 1.—E.  
418 L. —. —. —. *By usage—Custom of Lloyd's—Custom not introduced into Canada by 32 Geo. 3, c. 1.*—*L. & LYNCH OF CANADA, LTD.*

59 O. L. R. 335.—CAN.

PART II. SECT. 6, SUB-SECT. 4.  
*payable to bank & mort-  
ment to bank.*—*A bank  
ment of a marine policy  
payable to itself & a mtgee. of the*

vessel:—*Held*: the bank was entitled to claim the insurance proceeds to the extent of the amount due under the mtge.—*Re S.S. "DORN"*, [1935] 4 D. L. R. 526; *affd. sub nom. CANADIAN S. K. F. v. ROYAL BANK*, [1936] 9 D. L. R. 40; 10 M. P. R. 323.—CAN.



- policy; the assignor of the policy had a right to make a claim in respect of the damage; that claim was assignable, & it was in fact assigned to plffs., & they were entitled to sue the underwriters in respect of the damage.—*ARON (J.) & Co. v. MIALl* (1928), 98 L. J. K. B. 204; 139 L. T. 562; 34 Com. Cas. 18; 17 Asp. M. L. C. 529, C. A.
482. *Add. Annotation*:—*Refd. Williams v. Atlantic Assurance Co.* (1932), 37 Com. Cas. 304.
488. *Add. Annotation*:—*Consd. Aron v. Miall* (1928), 139 L. T. 562.
- 488a. ———.]—*ARON (J.) & Co. v. MIALl*, No. 480a, *ante*.
- 491a. ———.]—A firm of merchants in Egypt, C. & V., took out with applts., the Atlantic Assurance Co., an unvalued policy of marine insurance to the extent of £8,000, to cover certain textile goods, which they held as security for a debt, on a voyage from Egypt to England. The insured goods were lost on the voyage. Resp. W. had been in litigation with C. & V. & had obtained a judgment against them in the Egyptian Cts., & in part satisfaction of his judgment, & in consideration of other matters, he took from the liquidator of C. & V. an assignment of their rights under the policy, subject to a stipulation that he should pay to the liquidator the first £1,000 recovered by him under the policy. W. then sued applts. on the policy, & judgment was given in his favour for £4,000. Applts. now appealed against this judgment, & resp. W. cross-appealed on the ground that the amount of the judgment should not have been limited to £4,000. The ct., after consideration, allowed the appeal & dismissed the cross-appeal:—*Held*: (1) *per SCRUTTON, L.J.*, as the policy was an unvalued policy, it was essential that the value of the lost goods should be proved, and as the evidence was not sufficient to enable the ct. to fix any definite value the action failed; (2) *per GREER & SLESSER, L.JJ.*, as the assignment to resp. W. did not pass to him the whole of the beneficial interest in the policy under Marine Insurance Act, 1906 (c. 41), s. 50, W. could not sue on the policy without joining his assignors, & as the action was brought in his name alone it must fail; (3) *per cur.*, the expression "prime cost" in Marine Insurance Act, 1906 (c. 41), s. 16 (3), means the value to the owner at or about the date of shipment.—*WILLIAMS v. ATLANTIC ASSURANCE CO., LTD.*, [1933] 1 K. B. 81, 102 L. J. K. B. 241; 148 L. T. 313; 37 Com. Cas. 304; 18 Asp. M. L. C. 334, C. A.
- 491b. *Assignment of unvalued policy.*]—*WILLIAMS v. ATLANTIC ASSURANCE CO., LTD.*, No. 491a, *ante*.
497. *Add. Annotation*:—*Refd. Aron v. Miall* (1928), 139 L. T. 562.
- 505a. *Pontoon with crane fixed thereon.*]—*Held*: not a "ship or vessel" within the rules of an indemnity assocn., on the ground that the quality of adaptability for navigation was not sufficiently present to bring it within the meaning of those words in the rules.—*MERCHANTS' MARINE INSURANCE CO., LTD. v. NORTH OF ENGLAND PROTECTING & INDEMNITY ASSOCN.* (1926), 43 T. L. R. 107; 71 Sol. Jo. 82; 32 Com. Cas. 165, C. A.
512. *Add. Annotation*:—*Refd. The Humorous, The Mabel Vera*, [1933] P. 109.
- 519a. *What included in "tackle & furniture of the barge"*—*Moorings.*]—Pltf.'s barge was insured by defts. The insurance was expressed to be on the "body, tackle, apparel, ordnance, munition, artillery, boat, & other furniture" of the vessel, "while lying moored at Eastham Ferry stage or elsewhere, with liberty to be towed to any dock or place not beyond the Rock Light to load coal, for repairs & (or) overhaul, while there & until back again at her moorings or held covered; with liberty to moor in the Manchester Ship Canal while the operations for deepening the Eastham Canal are in progress. During the currency of the policy the moorings to which the insured barge was attached were damaged & plffs. claimed under the policy:—*Held*: the underwriters were liable.—*NEW LIVERPOOL EASTHAM FERRY & HOTEL CO., LTD. v. OCEAN ACCIDENT & GUARANTEE CORPN., LTD.* (1929), 142 L. T. 349; 35 Com. Cas. 37; 18 Asp. M. L. C. 68, C. A.
527. *Add. Annotations*:—*As to* (2) *Refd. Wadsworth Lighterage & Coaling Co. v. Sea Insurance Co.* (1929), 35 Com. Cas. 1. *Generally, Refd. Lind v. Mitchell* (1928), 98 L. J. K. B. 120.
- 551a. *Insurance of charges upon cargo—Whether freight included.*]—By a policy of insurance the deft. insurance co. insured plffs., who were shipowners, in respect of one of their steamships "on cargo as per form attached." The form attached provided that the insurance was (*inter alia*) "upon any charges of said assured upon said cargo or any portion thereof." The policy further provided that the term "cargo" as used in the policy included (*inter alia*) "charges of said assured upon said cargo or any portion thereof." During the currency of the policy plffs.' steamship became a total loss with all her cargo, & plffs. lost their right to recover from the different consignees the freight which was in process of being earned by them at the time of the casualty. Plffs. claimed to recover under the policy from deft. insurance co. in respect of that loss:—*Held*: the words "any charges of said assured upon said cargo" included, & were intended to cover, the freight that was in process of being earned by the ship, & therefore plffs. were entitled to recover under the policy in respect of that loss.—*GULF & SOUTHERN S.S. CO. (INCORPORATED) v. BRITISH TRADERS INSURANCE CO., LTD.*, [1930] 1 K. B. 451; 99 L. J. K. B. 208; 142 L. T. 406; 35 Com. Cas. 198; 18 Asp. M. L. C. 94.
585. *Add. Annotation*:—*Refd. Hoff Trading Co. v. De Rougemont* (1929), 34 Com. Cas. 291.
661. *Add. Annotations*:—*Consd. Vandepitte v. Preferred Accident Insurance Co. of New York*, [1933] A. C. 70. *Refd. Ruby S.S. Corpn., Ltd. v. Commercial Union Assurance Co.* (1933), 150 L. T. 38.
666. *Add. Annotations*:—*As to* (5) *Distd. Lind v. Mitchell* (1928), 98 L. J. K. B. 120. *Consd.*

PART II. SECT. 8, SUB-SECT. 3.—F.

80. *Interest of builder—To whom part of purchase-price due.*]—*QUEEN INSURANCE CO. OF AMERICA v. HOFFAR-BEECHING SHIPYARDS, LTD.*, [1932] 3 W. W. R. 240; 46 B. C. R. 233.—*CAN.*



*Pateras v. Royal Exchange Assurance* (1934), 78 Sol. Jo. 569. *Refd. Wadsworth Lighterage & Coaling Co., Ltd. v. Sea Insurance Co.* (1929), 35 Com. Cas. 1. *Generally, Refd. Banco de Barcelona v. Union Marine Insee.* (1925), 134 L. T. 350.

**711a. Statement as to guarantee of policy—Estoppel.**—A series of marine reinsurance policies were issued by the National Marine Insurance Co. to appcts., upon each of which a claim for loss or damages arose. At the top of each policy was printed in red ink the following indorsement: "The due fulfillment of the liabilities arising under this policy is guaranteed by the National Benefit Assurance Co., Ltd., established in 1890 & with assets exceeding £1,500,000."

The two cos., which were in liquidation, were closely associated, & shared the same chairman, managing director & underwriter, & the same offices & clerical staff. There was no evidence of any formal contract of guarantee of the policies between the two companies, & on this ground the liquidator of the National Benefit Co. rejected appcts.' proof:—*Held*: the co., on the evidence, was estopped from denying that the policies issued by the National Marine Co. bearing the above indorsement were so guaranteed, & the appcts. were therefore entitled to prove in the winding-up of the co.—*Re NATIONAL BENEFIT ASSURANCE CO., LTD.*, [1932] 2 Ch. 184; 101 L. J. Ch. 339; 147 L. T. 524 48 T. L. R. 612.

**712a. Effect of decrees of foreign State—On liability of foreign reinsurance company to discharge obligations.**—By virtue of decrees of the Soviet Govt., insurance business in Russia was declared to be the monopoly of the State, & financial transactions in Russia were regulated. In an action to determine the effect of the above decrees on treaties of reinsurance entered into between a Russian reinsurance co., having a branch office in London, & an English reinsurance co.:—*Held*: the decrees did not prevent the Russian co. from discharging their liabilities to the English co. under one of the treaties by a payment in London out of their assets outside Russia, or by means of a set-off against the liabilities of the English co. to them under the treaties.—*FIRST RUSSIAN INSURANCE CO. v. LONDON & LANCASHIRE INSURANCE CO.*, [1928] Ch. 922; 97 L. J. Ch. 445; 140 L. T. 337, 44 T. L. R. 583.

*Annotation*:—*Refd. Lazard Bros. & Co. v. Banque Industrielle de Moscou, Lazard Bros. & Co. v. Midland Bank, Ltd.* (1931), 101 L. J. K. B. 65.

**718. Add. Annotations:**—*Consd. Sowerby v. Lindsay* (1928), 139 L. T. 545. *Refd. Excess Insee. v. Mathews* (1925), 31 Com. Cas. 43; *Versicherungs Und Transport Aktiengesellschaft Daugava v. Henderson* (1934), 151 L. T. 392.

**719. Add. Annotations:**—*Consd. Firemen's Fund Insee. v. Western Australian Insee. & Atlantic Insee.* (1927), 138 L. T. 108; *Merchants' Marine Insee. v. Liverpool Marine & General Insee.* (1928), 97 L. J. K. B. 589; *Gurney v. Grimmer* (1932), 38 Com. Cas. 7. *Refd. Excess Insee. v. Mathews* (1925), 31 Com. Cas. 43; *Versicherungs Und Transport Aktiengesellschaft Daugava v. Henderson* (1934), 151 L. T. 392.

**720. Add. Annotations:**—*Consd. Firemen's Fund Insee. v. Western Australian Insee. & Atlantic Insee.* (1927), 138 L. T. 108; *Gurney v. Grimmer* (1932), 38 Com. Cas. 7.

**720a.** — — — — —.]—Pltfs. insured a consignment of gunpowder on a voyage & reinsured with defts. Both the original policy & the reinsurance policies covered perils of the sea & jettison, & were expressed to be "warranted free from loss arising from . . . destruction . . . in a port of distress or otherwise." The original policy contained no admission of seaworthiness, but the reinsurance policies did contain such an admission, & they provided that defts. would "pay as paid thereon," & that the payment should be subject to the same terms as in the original policy. The vessel carried, in addition to the gunpowder, drums of sulphuric acid, & owing to heavy weather some of the drums burst & the acid disabled the machinery, with the result that the ship had to put in to a port of distress. There the required repairs could not be carried out with the gunpowder on board, & it was thrown overboard & became a total loss. Pltfs. paid the owners as for a total loss, & claimed to be reimbursed by defts.:—*Held*: as the way in which the sulphuric acid was stowed & loaded affected the safety of the ship & rendered her unseaworthy, pltfs. were under no liability on the original policy, & they could not recover from defts. on the reinsurance policies.—*FIREMAN'S FUND INSURANCE CO. v. WESTERN AUSTRALIAN INSURANCE CO., LTD.* (1927), 138 L. T. 108; 43 T. L. R. 680; 17 Asp. M. L. C. 332; 33 Com. Cas. 36.

**720b.** "On a voyage."—Pltfs. insured a consignment of oranges from any port in Spain to Antwerp, & after the ship had left Valencia & had been in wireless communication with Gibraltar, they reinsured with deft. by a slip, which referred to the fact that the ship had been in such communication with Gibraltar & which contained the words "on a voyage," meaning, according to the evidence, that the risk should attach only from a named port in the course of the voyage. The ship stranded before she reached Gibraltar, the oranges were damaged, & pltfs. had to pay on the policy. In an action on the contract of reinsurance:—*Held*: on the true reading of the slip, the intention was to limit the risk to the voyage from Gibraltar, & the action failed.—*EAGLE, STAR & BRITISH DOMINIONS INSURANCE CO., LTD. v. REINER* (1927), 43 T. L. R. 259; 71 Sol. Jo. 176.

**720c.** Insured object in damaged condition at expiration of insurance—Continuation of risk for "immediate consequences" of such damage.]—Pltfs., reinsurers of a risk under a marine policy, reinsured that risk with defts. The policies were subject to the following conditions: "In the event of the vessel not being at the place of destination on the date of the expiration of the policy, the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination;" & "If the insured object is in a damaged condition at the time when the insurance expires, the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold." On the

date of the expiration of the policy, the vessel had not arrived at L. Bay, her first place of destination, but before reaching it she grounded on a reef & was taken into L. Bay badly damaged. Temporary repairs having been effected, she continued her voyage, but as she began to leak again she had to be run ashore in order to prevent sinking, & was subsequently sold as a wreck. Pltfs. having paid the original insurers as for a total loss, claimed against defts. on their reinsurance policy:—*Held*: the loss was an immediate consequence of the damage done by the original stranding, & the risk covered by the policy continued, until the vessel was repaired with no unnecessary delay, for the immediate consequences of the original damage.—*MERCHANTS' MARINE INSURANCE CO. v. LIVERPOOL MARINE & GENERAL INSURANCE CO.* (1928), 97 L. J. K. B. 589; 139 L. T. 184; 44 T. L. R. 512; 17 Asp. M. L. C. 475; 33 Com. Cas. 294, C. A.

729. *Add. Annotations*:—*Apld.* *Gurney v. Grimmer* (1932), 38 Com. Cas. 7. *Refd.* *Bergens Dampskibs Assurance Forening v. Sun Insurance Office, Ltd.* (1930), 143 L. T. 435; *Versicherungs Und Transport Aktiengesellschaft Daugava v. Henderson* (1934), 151 L. T. 392.

729a. Insurance against total or constructive or arranged total loss.—Meaning of “arranged” —Artificial total loss not included.]—The owners of a Norwegian steamship were insured with pltfs. & other underwriters. Pltfs. re-insured their risk with defts. The insured steamship stranded in the Black Sea but was floated off & eventually reached Constantinople. Owing to the absence of adequate repairing facilities at this port, it was extremely doubtful that the vessel's condition would permit her to reach a port where repairs could be carried out without the risk of her becoming a total loss. In these circumstances the owners & underwriters agreed to settle the matter: the vessel was to be regarded as a total loss & the underwriters were to pay an agreed sum which in fact was more than her full repaired value at the time. Pltfs. claimed a proportionate part of the sum so paid from defts. The material portion of the policy of re-insurance was as follows: “Insurance . . . upon hull & machinery, etc., valued as in original policy. Being against total & (or) constructive & (or) arranged total loss of vessel only as per Bergens Damp Club policies & to follow their settlements”:—*Held*: the action failed. On the true construction of the contract there must be either a constructive total loss or a genuine claim for one which claim is settled by arrangement. The word “arranged” really meant compromised & did not cover an artificial total loss created by the will of the parties.—*BERGENS DAMPSKIBS ASSURANCE FORENING v. SUN INSURANCE OFFICE, LTD.* (1930), 143 L. T. 435; 46 T. L. R. 543; 74 Sol. Jo. 568; 18 Asp. M. L. C. 172.

*Annotation*:—*Refd.* *Gurney v. Grimmer* (1932), 38 Com. Cas. 1.

- 729b. “Compromised &/or arranged total loss” —What amounts to.]—Pltf. & other underwriters insured the owners of a steamship against a number of risks, including total or constructive total loss. Pltf. then reinsured

part of his risk with deft., the reinsurance policy providing (*inter alia*), that the reinsurer would pay only in the event of total constructive compromised &/or arranged total loss. During the currency of the insurance the steamer stranded & the owners claimed for a constructive total loss. After negotiation, pltf. & his co-underwriters settled the claim of the owners by paying in full for a constructive total loss & by paying a further sum, which was less than the amount claimed, in respect of expenses incurred by the owners under the sue & labour clause. Pltf. now sought to recover from deft. under the reinsurance policy. Deft. denied that a constructive total loss had in fact occurred, & he also denied that the settlement made by pltf. with the owners was a “compromised &/or arranged total loss” within the meaning of those words in the reinsurance policy. It was agreed that the question whether there had in fact been a constructive total loss should not be dealt with until a decision of the ct. had been obtained on the meaning of the words “compromised &/or arranged”:—*Held*: *per SCRUTTON, L.J.*, as the total sum claimed by the shipowners had not been paid, but their claim as a whole had been compromised by payment of a sum smaller than the total claimed, the claim as a whole & each separate item of it had been “compromised” within the meaning of the reinsurance policy although one item had in fact been paid in full; *per LAWRENCE & GREER, L.JJ.*, whether there had or had not been a compromise of the shipowners' claim for constructive total loss that claim had been discussed & the payment of it had been “arranged” within the meaning of the policy.—*GURNEY v. GRIMMER* (1932), 38 Com. Cas. 7, C. A.

*Annotation*:—*Refd.* *Versicherungs Und Transport Aktiengesellschaft Daugava v. Henderson* (1934), 151 L. T. 392.

730. *Add. Annotation*:—*Refd.* *LEON v. CASEY* (1932), 48 T. L. R. 452.

731. *Add. Annotations*:—*As to* (1) *Consd.* *Gurney v. Grimmer* (1932), 38 Com. Cas. 7. *Refd.* *Versicherungs Und Transport Aktiengesellschaft Daugava v. Henderson* (1934), 151 L. T. 392. *Generally*, *Refd.* *Excess Insee. v. Matthews* (1925), 31 Com. Cas. 43.

733a. —Reinsurer not liable for costs of defending action brought by insured.]—Pltfs., an insurance co. carrying on business in Latvia, insured certain buildings at Riga against damage by fire. The buildings were the property of a co., called in this case the P. co., which was in liquidation, & the insurance covered only the buildings themselves & not their contents. Pltfs. reinsured part of their risk in England with a group of Lloyd's underwriters represented by one H., & part with another group represented by one C. During the currency of the policy a fire occurred on the insured premises, & the P. co. made a claim under their policy with pltfs. Pltfs. resisted the claim, but finally settled it by payment of an agreed sum. Pltfs. then claimed to be indemnified under their policies of reinsurance, & as these reinsurers refused to pay pltfs. brought these actions to recover the sums due from the two groups of underwriters respectively. The

two actions were tried together. The ground upon which payment by the reinsurers was refused was that they had been induced to grant the reinsurance by a statement that the insured buildings were warehouses which were & would continue to be empty, whereas in fact they were being used for the storage of flax, which was a highly inflammable substance:—*Held*: (1) whatever might be the general rights of insured persons as to a cause of action arising as soon as the subject matter of the insurance is affected by a peril insured against, in this particular policy the undertaking of deft. was to follow the settlements of pltf.s., & deft. was therefore under no liability until the pltf.s. had effected a settlement, & the correct rate of exchange was that existing at the date of the settlement; (2) in the absence of express provision to the contrary in the policy of reinsurance the insurer could not recover from the reinsurer the costs & expenses of resisting a claim by the assured.—*VERSICHERUNGS UND TRANSPORT A. G. DAUGAVA v. HENDERSON, VERSICHERUNGS UND TRANSPORT A. G. DAUGAVA v. CAMPBELL* (1934), 39 Com. Cas. 154; *affd.*, 151 L. T. 392; 78 Sol. Jo. 503; 39 Com. Cas. 312, C. A.

734. *Add. Annotations*:—*As to* (1) *Consd. Firemen's Fund Insee. v. Western Australian Insee. & Atlantic Insee.* (1927), 138 L. T. 108; *Versicherungs Und Transport A. G. Daugava v. Henderson, Versicherungs Und Transport A. G. Daugava v. Campbell* (1934), 39 Com. Cas. 154.

735a. *Unsuccessful action against insurer—Failure to pay costs—Liability of reinsurer to insurer.* —By a policy of marine insurance a vessel was insured by her owner with the present pltf., who by another policy reinsured the vessel against the risks, & for the period, covered by the original policy, for total loss only. A claim by the owner against the present pltf.s. on the original policy failed on the ground that the vessel had been scuttled; & the present pltf.s. obtained a judgment against the owner for costs, but it was impossible to recover the costs. The present pltf.s. then claimed these costs from the present deft., one of the underwriters of the reinsurance policy. There was in the reinsurance policy a sue & labour clause, but no express contract by the reinsurers to pay the costs in question:—*Held*: that the sue & labour clause was inapplicable to such a claim, & as there was neither an express nor an implied contract to pay the costs in question the action failed.—*SCOTTISH METROPOLITAN ASSURANCE CO., LTD. v. GROOM* (1924), 41 T. L. R. 35, C. A.

*Annotation*:—*Consd. Versicherungs Und Transport A. G. Daugava v. Henderson, Versicherungs Und Transport A. G. Daugava v. Campbell* (1934), 39 Com. Cas. 154.

- 735b. *Rate of exchange—As at date of settlement.* —*VERSICHERUNGS UND TRANSPORT A. G. DAUGAVA v. HENDERSON, VERSICHERUNGS UND TRANSPORT A. G. DAUGAVA v. CAMPBELL*, No. 733a, *ante*.

747. *Add. Annotation*:—*Refd. Boag v. Standard Marine Insurance Co.*, [1937] 2 K. B. 113.

748. *Add. Annotations*:—*Consd. Boag v. Standard Marine Insurance Co.*, [1937] 2 K. B. 113. *Refd. Goole & Hull Steam Towing Co. v. Ocean Marine Insee.* (1927), 44 T. L. R. 133.

760. *Add. Annotations*:—*As to* (2) *Refd. Williams v. Atlantic Assurance Co.* (1932), 37 Com. Cas. 304. *Generally, Refd. Aslan v. Imperial Airways, Ltd.* (1933), 149 L. T. 276.

763. *Add. Annotations*:—*Consd. Hoff Trading Co. v. De Rougemont* (1929), 34 Com. Cas. 291. *Refd. Merchants' & Manufacturers' Insurance Co. v. Davies*, [1937] 2 All E. R. 767.

765. *Add. Annotations*:—*As to* (1) *Refd. Merchants' & Manufacturers' Insurance Co. v. Davies*, [1937] 2 All E. R. 767. *As to* (2) *Appld. Hoff Trading Co. v. De Rougemont* (1929), 34 Com. Cas. 291.

766. *Add. Annotation*:—*Consd. Hoff Trading Co. v. De Rougemont* (1928), 34 Com. Cas. 180.

782. *Add. Annotation*:—*Refd. Lake v. Simmons* (1926), 95 L. J. K. B. 586.

786. *Add. Annotation*:—*As to* (2) *Appld. Kaufmann v. British Surety Insee. Co.* (1929), 45 T. L. R. 399.

791. *Add. Annotation*:—*Appld. Scindia Steamships (London), Ltd. v. London Assurance*, [1937] 1 K. B. 639.

799. *Add. Annotation*:—*As to* (2) *Consd. The Stranna*, [1937] P. 130.

800. *Add. Annotation*:—*Refd. Re Morgan & Provincial Insurance Co.*, [1932] 2 K. B. 70.

806. *Add. Annotations*:—*As to* (2) *Refd. Reardon Smith Lines, Ltd. v. Black Sea & Baltic General Insurance Co.*, [1938] 2 All E. R. 706. *As to* (3) *Refd. North & South Insurance Corp'n., Ltd. v. National Provincial Bank, Ltd.*, [1936] 1 K. B. 328.

845. *Add. Annotation*:—*Refd. Lindsay Blee Depots, Ltd. v. Motor Union Insee. Co.* (1930), 46 T. L. R. 572.

#### **Landing dispensed with by owner.]**

Pltf.s., a firm of merchants at O., imported a cargo of bunker coal from the Tyne, having insured the risk of the ocean transit with the P. co. until the goods were "discharged & safely landed," including "all risks of craft to & from vessel & whilst in craft awaiting landing." The storage risk, while at moorings at O., was covered by defts. Pltf.s.' practice was to have bunker coal discharged into barges & to leave it in the barges until a vessel required bunkers & then to supply that vessel from a barge alongside. When the coal in question had arrived at O. & 1,000 tons of it had been discharged into a barge, the barge sank during the following night & part of the coal was lost & part was damaged. Pltf.s. having claimed from defts., the latter compromised the claim & took third-party proceedings to recover a contribution from the P. co. on the ground of double insurance:—*Held*: as pltf.s. dispensed with landing the P. co.'s risk terminated when the discharge was completed, & as the discharge of the 1,000 tons had been completed, the proceedings against the third party failed.—*LINDSAY BLEE DEPOTS, LTD. v. MOTOR UNION INSURANCE CO., LTD.* (1930), 46 T. L. R. 572.

855a. *Effect of clause.*—*Claimants insured with defts. a quantity of cork from a port or place between Bordeaux & Nice to the United Kingdom. Claimants were cork growers & had a factory & warehouse near Algeciras, & they had sent from the factory to Algeciras quantities of cork for shipment, & had allowed*

it to accumulate on the jetty there until there should be enough for a cargo. While a quantity of cork was on the jetty awaiting shipment & before the policy was issued, a fire broke out on the jetty, & to prevent the fire spreading, the authorities jettisoned part of the cork & threw sea-water on the remainder, with the result that a large portion of the cork was lost or damaged. The policy, when issued, contained (*inter alia*) a marginal clause that the policy was not to enure to the benefit of any fire insurance co., but loss reasonably attributable to fire was covered. It also contained a warehouse to warehouse clause. A claim under the policy was referred to arbn., & the arbitrator treated the marginal clause as non-existent, on the ground that it was not included, or stipulated for, in the slip which represented the true contract between the parties, & he also found that the loss was one reasonably attributable to fire:—*Held*: (1) the goods on the pier at Algeiras, having come in the ordinary course of transit from the shippers' manufactory at San Roque, were covered by the policy; (2) there being an existing fire & an imminent peril, the damage caused by water, used either to extinguish the fire or to prevent it from spreading, was a proximate consequence of fire, which could be recovered under the general words of the policy, as being *ejusdem generis* with fire; (3) the underwriters were not relieved from liability by the restraint of princes clause; (4) the case must be remitted to the arbitrator upon the question whether the policy issued, so far as it contained the fire policy clause, was or was not contrary to the usual form of marine insurance on goods.—*SYMINGTON & Co. v. UNION INSURANCE SOCIETY OF CANTON* (1928), 97 L. J. K. B. 646; 139 L. T. 386; 44 T. L. R. 635; 18 Asp. M. L. C. 19; 34 Com. Cas. 23, C. A.

906. *Add. Annotation*:—*As to* (2) *Refd.* *Eagle, Star & British Dominions Insce. v. Reiner* (1927), 43 T. L. R. 259.

912a. *Vessel laid up—Continuation of voyage.*—Deft. corp. insured pl'tfs.' steamship *P.* for twelve calendar months from midnight July 30, 1930, to midnight, July 30, 1931, subject to "Institute Time Clauses as attached." Clause 13 of the Institute Time Clauses provided "warranted free from particular average under 3 per cent." Clause 16 provided: "The warranty & conditions as to average under 3 per cent. to be applicable to each voyage as if separately insured, & a voyage shall be deemed to commence at one of the following periods to be selected by the assured when making up the claim, namely, at any time at which the vessel (1) begins to load cargo, or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward & one homeward passage (including an intermediate ballast passage if made) or has carried & discharged two cargoes, whichever may first happen, &

further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port." The *P.* was chartered to load in the River Plate for Antwerp, & between Jan. 10, 1931, & the discharge of her cargo at Antwerp on Apr. 9, 1931, she sustained damage on three occasions. She then lay up at Antwerp till Aug. 27, 1931, owing to absence of freight. During the period of lying up she sustained damage on two occasions. The question for decision was whether the cost of repairs arising from these two later casualties could be added to the expenses incurred on the three earlier casualties so as to ascertain whether the 3 per cent. particular average was exceeded:—*Held*: on the clear wording of clause 16, which defined a "voyage," the voyage which had commenced on Jan. 10 was still continuing during the period of lying up. On any other construction there would be great difficulty in knowing what limit to put on the period of delay. The contention of pl'tfs. was right, & there must be judgment for them.—*PORTVALE STEAMSHIP CO., LTD. v. ROYAL EXCHANGE ASSURANCE CORPN.* (1932), 147 L. T. 217; 48 T. L. R. 441; 76 Sol. Jo. 415; 18 Asp. M. L. C. 309.

1052. *Add. Annotation*:—*As to* (3) *Refd.* *Compania Naviera Bachi v. Henry Hosegood & Son, Ltd.*, [1938] 2 All E. R. 189.

1087. *Add. Annotations*:—*Refd.* *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48; *Haynes v. Harwood*, [1935] 1 K. B. 146; *Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 249.

1099. *Add. Annotation*:—*Refd.* *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48.

1105. *Add. Annotation*:—*Refd.* *Beauchamp v. National Mutual Indemnity Insurance Co.*, [1937] 3 All E. R. 19.

1203a. ————]—*LITLEDAL V. DIXON* (1805), 1 Bos. & P. N. R. 151; 127 E. R. 417.

*Annotation*:—*Refd.* *Morrison v. Muspratt* (1827), 12 Moore, C. P. 231.

1206. *Add. Annotations*:—*As to* (3) *Consd.* *Greenhill v. Federal Insce.* (1926), 95 L. J. K. B. 717; *Hoff Trading Co. v. De Rougemont* (1928), 34 Com. Cas. 180.

1220. *Add. Annotation*:—*Refd.* *Glicksman v. Lancashire & General Assce.*, [1927] A. C. 139.

1252. *Add. Annotation*:—*Consd.* *Greenhill v. Federal Insce.* (1926), 95 L. J. K. B. 717.

1265a. ————]—In an action on a policy of marine insurance on a cargo of celluloid shipped from America to France, defts. pleaded that assured had wrongfully concealed certain facts material to be disclosed to them. The cargo had in fact been previously carried, partly on deck, in a protracted voyage from New York to Halifax, where the vessel being unable to proceed further, it was unloaded & part put in a warehouse, & the rest left on the open quay, exposed to severe weather, for over two months:—*Held*: these facts were material to be disclosed to the underwriters, & as they were not disclosed, & there

PART II. SECT. 16, SUB-SECT. 3.—B. (g).

a 1. ————]—*BOAK v. MERCHANTS' MARINE INSURANCE CO.* (1876), 10 N. S. R. (1 R. & C.) 288; *affd.* (1877), 1 S. C. R. 110.—CAN.

- was no waiver of non-disclosure, the policy was vitiated.—*GREENHILL v. FEDERAL INSURANCE CO.*, [1927] 1 K. B. 65; 95 L. J. K. B. 717; 135 L. T. 244; 70 Sol. Jo. 565; 31 Com. Cas. 289; 17 Asp. M. L. C. 62, C. A.
- Annotations*.—*Consd. Hoff Trading Co. v. De Rougemont* (1929), 34 Com. Cas. 291. *Refd. Williams v. Atlantic Assurance Co.* (1932), 37 Com. Cas. 304.
- 1308. Add. Annotations**.—*As to* (1) *Consd. News-holme Bros. v. Road Transport & General Insee. Co.*, [1929] 2 K. B. 356. *As to* (1) *Consd. Holt's Motors, Ltd. v. South East Lancashire Insurance Co.* (1930), 35 Com. Cas. 281. *Refd. Collins v. Associated Greyhounds Racecourses* (1929), 141 L. T. 529. *Generally, Refd. Re Drabble Bros.*, [1930] 2 Ch. 211.
- 1309. Add. Annotation**.—*Consd. Holt's Motors, Ltd. v. South East Lancashire Insee. Co.* (1930), 35 Com. Cas. 281.
- 1419. Citation**.—For "*previous proceedings*" read "*affg.*"
- 1434a. Warranty as to declaration of interest.**—By a contract of marine insurance made in Western Australia & contained in a floating policy appts. insured all shipments of goods made by resps. between a large number of ports against the usual marine risks, it being provided as follows: "Declarations of interest to be made to this society's agent at port of shipment where practicable or agent in London or Perth as soon as possible after sailing of vessel to which interest attaches." Resps. sued to recover a total loss of a shipment of goods as to which they had made a declaration, but had not done so as soon as possible after the sailing of the vessel.—*Held*: the provision as to the making of declarations was a promissory warranty within sect. 39 of Commonwealth Marine Insurance Act, 1909, which reproduces sect. 33 of the Marine Insurance Act, 1906 (c. 41), s. 33, & appts. were consequently not liable in respect of the loss.—*UNION INSURANCE SOCIETY OF CANTON, LTD. v. WILLS (GEORGE) & CO.*, [1916] A. C. 281; 85 L. J. P. C. 82; 114 L. T. 245; 32 T. L. R. 196; 13 Asp. M. L. C. 233; 21 Com. Cas. 169, P. C.
- 1442. Add. Annotations**.—*As to* (2) *Refd. Wadsworth Lighterage & Coaling Co. v. Sea Insee. Co.* (1929), 35 Com. Cas. 1. *Generally, Refd. Petrofina S. A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa* (1936), 53 T. L. R. 222.
- 1455. Add. Annotation**.—*Refd. Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 249.
- 1457. Add. Annotation**.—*As to* (2) *Refd. Marstrand Fishing Co. v. Beer*, [1937] 1 All E. R. 158.
- 1465. Add. Annotation**.—*As to* (1) *Consd. Fiumana Società Di Navigazione v. Bunge & Co.*, [1930] 2 K. B. 47.
- 1474a. Absence of panting beams.**—*Held*: the vessel was unseaworthy.—*LUND v. THAMES & MERSEY MARINE INSURANCE CO. LTD.* (1901), 17 T. L. R. 566.
- 1510. Add. Annotation**.—*Apld. Barrett v. London General Insurance Co.*, [1935] 1 K. B. 238.
- 1513. Add. Annotation**.—*Apld. Barrett v. London General Insurance Co.*, [1935] 1 K. B. 238.
- 1517. Add. Annotation**.—*Apld. Timm & Son, Ltd. v. Northumbrian Shipping Co.*, [1938] 1 All E. R. 774.
- 1518. Add. Annotation**.—*Consd. Timm & Son, Ltd. v. Northumbrian Shipping Co.*, [1937] 2 All E. R. 847.
- 1527. Add. Annotation**.—*Consd. Petrofina S. A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa* (1936), 53 T. L. R. 222.
- 1538. Add. Annotations**.—*As to* (2) *Refd. Barrett v. London General Insurance Co.*, [1935] 1 K. B. 238; *The Stranna*, [1938] P. 69.
- 1545. Add. Annotations**.—*Refd. Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool)* (1929), 143 L. T. 296; *Fiumana Società Di Navigazione v. Bunge & Co.*, [1930] 2 K. B. 47.
- 1547. Add. Annotations**.—*Consd. Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool)* (1929), 143 L. T. 296. *Refd. Barrett v. London General Insurance Co.*, [1935] 1 K. B. 238.
- 1557. Add. Annotation**.—*Consd. Greenhill v. Federal Insee.* (1926), 95 L. J. K. B. 717.
- 1567. Add. Annotation**.—*Consd. The Stranna*, [1937] P. 130.
- 1573a. — Onus of proof.**—*MARIS v. LONDON ASSURANCE* (1935), 79 Sol. Jo. 163.
- 1575. Add. Annotations**.—*Apld. The Stranna*, [1938] P. 69. *Refd. Wadsworth Lighterage & Coaling Co., Ltd. v. Sea Insee. Co.* (1929), 35 Com. Cas. 1; *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48; *Lazard Bros. & Co. v. Brooks* (1932), 37 Com. Cas. 224.
- 1578a. — Ship cast away.**—*PATERAS v. ROYAL EXCHANGE ASSURANCE* (1934), 78 Sol. Jo. 569.
- Annotation*.—*Consd. Maris v. London Assurance* (1935), 79 Sol. Jo. 163.
- 1578b. —**—*GRAUDS v. DEARSLEY* (1935), 79 Sol. Jo. 271.
- 1584. Add. Annotation**.—*As to* (1) *Consd. The Stranna*, [1938] P. 69.
- 1585. Add. Annotation**.—*Consd. The Stranna*, [1938] P. 69.
- 1589. Add. Annotation**.—*As to* (2) *Dbtd. Greenhill v. Federal Insee.* (1926), 95 L. J. K. B. 717.
- 1608a. What amounts to insurance against.**—A policy on a barge provided: "the insur-

## PART II. SECT. 18, SUB-SECT. 3.—B. (b).

**1349 i. Loss before departure from terminus a quo**—"From Quebec to Greenock vessel to go out in tow."—*Held*: towing from the loading berth to another part of the harbour was not a compliance with the warranty.—*PROVINCIAL INSURANCE CO. OF CANADA v. CONNOLLY* (1879), 5 S. C. R. 258.—CAN.

## PART II. SECT. 19, SUB-SECT. 1.—B.

**1548 ii. —**—*There is no implied warranty of seaworthiness under the*

law of Nova Scotia in ordinary time policies upon vessels.—*PORTER & SON, LTD. v. WESTERN ASSURANCE CO.*, [1938] 1 D. L. R. 619; 12 M. P. R. 469.—CAN.

**1555 i. Ship unseaworthy**—*Ship rendered unseaworthy by charterer without privity of assured*—*Assured entitled to recover.*—*PACIFIC COAST COAL FREIGHTERS, LTD. v. WESTCHESTER FIRE INSURANCE CO. OF NEW YORK, PACIFIC COAST COAL FREIGHTERS, LTD. v. WESTERN ASSURANCE CO. (B. C.)*, [1926] 4 D. L. R. 963; [1926] 3 W. W. R. 356; *affd.*, [1927] 2 D. L. R.

590; [1927] 1 W. W. R. 878; 38 B. C. R. 315.

## PART II. SECT. 20, SUB-SECT. 1.—A.

**1576 ii. —**—*MURRAY v. NOVA SCOTIA MARINE INSURANCE CO.* (1875), 10 N. S. R. (1 R. & C.) 24.—CAN.

## PART II. SECT. 20, SUB-SECT. 1.—E.

**1607 i. What amounts to**—*Not sail torn as result of accident.*—*HILL v. UNION INSURANCE SOCIETY, CANTON, LTD.*, [1927] 4 D. L. R. 718; 61 O. L. R. 201.—CAN.

- ance is against the risks of total &/or constructive &/or arranged loss including general average & salvage & damage to such vessel by collision with any other vessel or with any fixed floating or other object or by fire lightning stranding or sinking." The barge sank through general debility:—*Held*: the policy did not make the insurers liable for ordinary wear & tear, & therefore they were not liable although the word "sinking" was used in the policy.—*WADSWORTH LIGHTERAGE & COALING CO., LTD. v. SEA INSCOE CO., LTD.* (1929), 45 T. L. R. 597; 35 Com. Cas. 1, C. A.
- 1611a. —J.—*PHENIX INSURANCE CO. OF HARTFORD v. DE MONCHY*, No. 2404a, *post*.
1616. *Add. Annotation*:—*Refd.* *Wetherall & Co. v. London Assurance* (1931), 144 L. T. 645.
1624. *Add. Annotation*:—*Consd.* *The Stranna*, [1937] P. 130.
1641. *Add. Annotations*:—*Consd.* *Pateras v. Royal Exchange Assurance* (1934), 78 Sol. Jo. 569. *Refd.* *Banco de Barcelona v. Union Marine Insce.* (1925), 134 L. T. 350.
1648. *Add. Annotation*:—*Refd.* *Clan Line Steamers v. Board of Trade, The Clan Matheson*, [1929] A. C. 514.
1650. *Add. Annotations*:—*Consd.* *Board of Trade v. Hain S.S. Co.*, [1929] A. C. 534; *Merchants' Marine Insce. v. Liverpool Marine & General Insce.* (1928), 97 L. J. K. B. 589. *Refd.* *Mancomunidad del Vapor Frumiz v. Royal Exchange Assce.* (1926), 43 T. L. R. 103; *Clan Line Steamers v. Board of Trade, The Clan Matheson*, [1929] A. C. 514.
- 1660a. —J.—A sailing ship, of which pltf. was mtgee., was insured by a policy, underwritten by deft., against perils of the sea & fire, & as per Institute Time Clauses, clause 8, against loss of the vessel "caused through the negligence of master, mariners, engineers or pilots." The vessel was damaged by ice & she leaked badly, & the captain, expecting a gale in which he thought she would be lost, decided to abandon her, & he set fire to her to prevent her from being a danger to navigation, & he & the crew then abandoned her. In an action by the mtgee. on the policy deft. did not allege any misconduct by the assured, by the mtgee., or by the managing owner, & there was no evidence that the abandonment was a wilful casting away of the ship by the master:—*Held*: on the facts the abandonment was unreasonable on the part of the master & constituted negligence, & this negligence, resulting in the continuing action of a previously existing peril of the sea, was covered by clause 8, & even apart from that clause, as the peril of the sea had endangered the ship & the negligence of the master resulted in proper measures not being taken to save her, pltf. was entitled to recover under Marine Insurance Act, 1906 (c. 41), s. 55 (2) (a).—*LIND v. MITCHELL* (1928), 98 L. J. K. B. 120; 140 L. T. 261; 17 Asp. M. L. C. 562; 34 Com. Cas. 81; 45 T. L. R. 54, C. A.
1664. *Add. Annotation*:—*Refd.* *Vandepitte v. Preferred Accident Insurance Co. of New York*, [1933] A. C. 70.
1675. *Add. Annotations*:—*Refd.* *Firemen's Fund Insce. v. Western Australian Insce.* (1927), 43 T. L. R. 680; *Clan Line Steamers v. Board of Trade* (1928), 97 L. J. K. B. 735.
1678. *Add. Annotation*:—*Refd.* *Carras v. London & Scottish Assurance Corpn., Ltd.*, [1936] 1 K. B. 291.
1681. *Add. Annotation*:—*Refd.* *Carras v. London & Scottish Assurance Corpn., Ltd.*, [1936] 1 K. B. 291.
1684. *Add. Annotation*:—*Refd.* *Adelaide S.S. Co. v. A.-G.*, [1926] A. C. 172.
1687. *Add. Annotation*:—*Generally*, *Refd.* *Gulf & Southern S.S. Co. (Incorporated) v. British Traders Insce. Co.*, [1930] 1 K. B. 451.
1690. *Add. Annotation*:—*Refd.* *Carras v. London & Scottish Assurance Corpn., Ltd.* (1935), 40 Com. Cas. 288.
1695. *Add. Annotation*:—*As to* (1) *Refd.* *Young v. Merchants' Marine Insurance Co.* (1932), 48 T. L. R. 579.
1696. *Add. Annotation*:—*Refd.* *Wetherall & Co. v. London Assurance* (1931), 144 L. T. 645.
1700. *Add. Annotation*:—*Consd.* *Young v. Merchants' Marine Insurance Co.* (1932), 48 T. L. R. 579.
1701. *Add. Citations*:—31 Com. Cas. 145; 16 Asp. M. L. C. 579.
- 1702a. —J.—Where, pursuant to the terms of a towage contract between the owners of a steamship & the owner of the only tugs available at a port, the former pay to the latter a sum in respect of damage to a tug resulting from a collision during towage between the steamship & the tug caused solely by the negligent navigation of the tug, the owners of the steamship cannot recover the amount of that sum from the underwriters of a policy of marine insurance on the steamship containing a running-down clause in the usual form, inasmuch as that clause applies only to liabilities arising from tort & not to liabilities arising from contract.—*FURNESS WITHY & CO., LTD. v. DUDER*, [1936] 2 K. B. 461; [1936] 2 All E. R. 119; 105 L. J. K. B. 473; 154 L. T. 663; 80 Sol. Jo. 488; 18 Asp. M. L. C. 623.
- Annotation*:—*Consd.* *Hall Brothers S.S. Co. v. Young*, [1938] 3 All E. R. 234.
1703. *Add. Annotation*:—*Refd.* *Mancomunidad Del Vapor Frumiz v. Royal Exchange Assce.*, [1927] 1 K. B. 567.
1705. *Add. Annotation*:—*Consd.* *Mancomunidad Del Vapor Frumiz v. Royal Exchange Assce.*, [1927] 1 K. B. 567.
1706. *Add. Annotation*:—*Refd.* *Mancomunidad Del Vapor Frumiz v. Royal Exchange Assce.*, [1927] 1 K. B. 567.
1707. *Add. Annotation*:—*Refd.* *The Minerva* (1933), 49 T. L. R. 563.
- 1708a. "Collision with any object"—*Bumping on rocks.*—A policy of marine insurance on the hull & machinery of a steamer covered the ordinary perils of the sea & contained the following clause: "Subject to the Institute 'Free of Particular Average absolutely' time clauses as annexed, but this insurance to include damage received by collision with any object (ice included) other than water." The ship, having stranded, bumped on the rocks & damaged her bottom plates:—*Held*: the contact with the rocks was a "collision with an object" within the policy.—*MANCOMU-*

NIDAD DEL VAPORE FRUMIZ v. ROYAL EXCHANGE ASSURANCE, [1927] 1 K. B. 567; 96 L. J. K. B. 229; 136 L. T. 537; 43 T. L. R. 103; 17 Asp. M. L. C. 205.

**1708b. Collision with foreign pilot-boat—Payment of indemnity.**—Pltfs., the owners of the *T.*, sued defts. as one of the underwriters of a Lloyd's policy of marine insurance for the due proportion of a sum which they had had to pay in consequence of legal proceedings in France. In those proceedings pltfs. were sued by the pilotage authority of Dunkirk for damage done to a pilot-boat engaged by the *T.* in consequence of a collision between the two vessels, which it was agreed was in no way due to any negligence on the part of the *T.* Pltfs. counterclaimed in those proceedings for damage done to the *T.*, but this counterclaim was dismissed. The evidence of French lawyers showed that the claim of the pilotage authority was in the nature of an indemnity, & could be answered only by showing gross negligence on the part of the pilot-boat, & the claim was not, therefore, of a delictual or quasi-delictual character. The collision clause of the policy provided that the insurers should pay three-fourths of any sum paid by way of damages in respect of a collision:—*Held*: the sum paid in consequence of the action in the French cts. was not paid by way of damages, & therefore was not recoverable under the policy.—*HALL BROS. S.S. CO., LTD. v. YOUNG, THE TRIDENT*, [1938] 3 All E. R. 234; 159 L. T. 89; 54 T. L. R. 914; 82 Sol. Jo. 744; 43 Com. Cas. 284.

**1709. Add. Annotation:—Refd.** *Adelaide S.S. Co. v. A.-G.*, [1926] A. C. 172.

**1710. Add. Annotation:—Refd.** *Adelaide S.S. Co. v. A.-G.*, [1926] A. C. 172.

**1718. Add. Annotations:—Apld.** *Symington v. Union Insee. Soc. of Canton* (1928), 97 L. J. K. B. 646. *Refd.* *Tempus Shipping Co. v. Louis Dreyfus & Co.*, 144 L. T. 13.

**1719a. Damage caused by water—To extinguish or check fire.**—*SYMINGTON & Co. v. UNION INSURANCE SOCIETY OF CANTON*, No. 855a, *ante*.

**1727. Add. Annotation:—Apld.** *Symington v. Union Insee. Soc. of Canton* (1928), 97 L. J. K. B. 646.

**1732. Add. Annotation:—Refd.** *Foster v. Driscoll, Lindsay v. Attfield, Lindsay v. Driscoll* (1928), 98 L. J. K. B. 282.

**1736. Add. Annotation:—Refd.** *Adelaide S.S. Co. v. A.-G.*, [1926] A. C. 172.

**1740. Add. Annotation:—Refd.** *Société Belge des Betons Société Anonyme v. London & Lancashire Insurance Co.*, [1938] 2 All E. R. 305.

**1740a. — Revolutionary committee.**—Pltfs. were, under a contract with the Spanish Govt. for the authorities at Valencia, engaged in carrying out certain works in the harbour there. For this purpose, they had there certain vessels & their appurtenances which were insured with defts. The Govt. of Valencia after July, 1936, when the revolution in Spain commenced, passed, for practical purposes, into the hands of the Popular Executive Committee. The workmen employed upon the works in the harbour feared that the property & the business of pltfs.

would be confiscated by the Popular Executive Committee, & determined to take them over themselves. The representative of pltfs. at Valencia resisted this till resistance was no longer possible, when he was forced either to make his way to France or be killed by the workmen. Pltfs. then claimed for a total loss, & notice of abandonment was tendered but refused. It was found as a fact that the workmen had the support of the Popular Executive Committee, who were, at the material time, both the *de facto* & the *de jure* govt. of Valencia:—*Held*: this was a seizure by peoples & a loss by restraint of peoples, & therefore a constructive total loss, since recovery within a reasonable time was unlikely.—*SOCIÉTÉ BELGE DES BETONS SOCIÉTÉ ANONYME v. LONDON & LANCASHIRE INSURANCE CO., LTD.*, [1938] 2 All E. R. 305; 158 L. T. 352; 82 Sol. Jo. 316.

**1750a. — Action of port authority—Extinction of fire—Damage by water.**—*SYMINGTON & Co. v. UNION INSURANCE SOCIETY OF CANTON*, No. 855a, *ante*.

**1759. Add. Annotation:—As to** (1) *Consd.* *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantam S.S. Co.* (No. 2), [1938] 3 All E. R. 80.

**1764. Add. Annotation:—Refd.** *Marstrand Fishing Co. v. Beer*, [1937] 1 All E. R. 158.

**1766. Add. Annotation:—Refd.** *Clan Line Steamers v. Board of Trade, The Clan Matheson*, [1929] A. C. 514.

**1807. Add. Annotation:—Refd.** *Williams v. Atlantic Assurance Co.* (1932), 37 Com. Cas. 304.

**1809. Add. Citations:—**134 L. T. 350; 16 Asp. M. L. C. 604.

**1815. Add. Annotation:—Refd.** *The Stranna*, [1938] P. 69.

**1817. Add. Annotation:—Refd.** *Symington v. Union Insee. Soc. of Canton* (1928), 139 L. T. 386.

**1827. Add. Annotation:—Generally, Refd.** *MacColl & Pollock, Ltd. v. Indemnity Mutual Marine Assurance Co.* (1930), 47 T. L. R. 26.

**1828. Add. Annotations:—Consd.** *The Stranna*, [1938] P. 69. *Refd.* *Wadsworth Lighterage & Coaling Co. v. Sea Insee. Co.* (1929), 35 Com. as. 1.

**1829. Add. Annotation:—Consd.** *Scindia Steamships (London), Ltd. v. London Assurance*, [1937] 1 K. B. 639.

**1830a. Breakage of shafts.**—A time policy of marine insurance, by which a steamship belonging to pltfs. was insured by defts. & others, contained a clause known as the "Inchmaree" clause in the following terms: "This insurance also specially to cover (subject to free of average warranty) loss of or damage to hull or machinery directly caused by accidents in loading, discharging, or handling cargo, or in bunkering or in taking in fuel, or caused through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull." During the currency of the policy the steamship was in dry dock undergoing an operation which required the removal of the propeller & tail



shaft. While the propeller was being wedged off, the shaft broke owing to a latent defect therein, the end of the shaft with the propeller attached to it falling into the dock & a blade of the propeller being broken. Defts. admitted liability for the damage to the propeller. Pltfs. brought an action against defts., their claim being that defts. were liable under the above clause in the policy to the extent of their proportion in respect of the damage to & cost of repairing the shaft:—*Held*: pltfs.' claim failed in view of the following considerations, namely: (a) the words "breakage of shafts" in the clause could not be transferred from their context to a position immediately before the words in brackets, so as to read "This insurance also specially to cover breakage of shafts," inasmuch as such a construction would do undue violence to the clause; (b) the clause on its true construction meant that the insurance covered loss of or damage to hull or machinery occasioned by any of a number of occurrences which were arranged in groups, each group beginning with the expression "caused by" or "caused through"; the only two of these occurrences appropriate to the present case being "breakage of shafts" & "latent defect"; (c) though the shaft was part of the machinery, the damage involved in the breakage of the shaft was not damage to hull or machinery "caused through" breakage of the shaft, inasmuch as that expression could only refer to damage to some other part of the hull or machinery occasioned by the breakage of the shaft, & could not refer to damage involved in the breakage of the shaft itself; (c) for a similar reason, the damage involved in the breakage of the shaft through a latent defect therein was not damage to hull or machinery "caused through" that latent defect.—*SCINDIA STEAMSHIPS (LONDON), LTD. v. LONDON ASSURANCE*, [1937] 1 K. B. 639; [1937] 3 All E. R. 895; 106 L. J. K. B. 425; 157 L. T. 496; 42 Com. Cas. 121.

1838. *Add. Annotations*:—*Consd. Clan Line Steamers v. Board of Trade*, [1929] A. C. 514; *Hain S.S. Co. v. Board of Trade*, [1928] 2 K. B. 534. *Refd. Cayzer, Irvine v. Board of Trade*, [1927] 1 K. B. 269.

1849. *Add. Annotation*:—*Consd. Clan Line Steamers v. Board of Trade*, [1928] 2 K. B. 557.

1850. *Add. Annotations*:—*As to* (1) *Appld. Board of Trade v. Hain S.S. Co.*, [1929] A. C. 534. *Consd. Clan Line Steamers v. Board of Trade*, [1929] A. C. 514. *Generally, Refd. Adelaide S.S. Co. v. R.* (1925), 95 L. J. K. B. 213; *Cayzer, Irvine v. Board of Trade* (1926), 42 T. L. R. 731.

1851. *Add. Annotations*:—*Consd. Clan Line Steamers v. Board of Trade*, [1929] A. C. 514. *Refd. Hain S.S. Co. v. Board of Trade*, [1928] 2 K. B. 534.

1854. *Add. Annotations*:—*Consd. Clan Line Steamers v. Board of Trade*, [1929] A. C. 514. *Refd. Adelaide S.S. Co. v. A.-G.*, [1926] A. C. 172.

1858. *Add. Annotations*:—*Consd. Clan Line Steamers v. Board of Trade* (1928), 97 L. J. K. B. 735; *Merchants' Marine Insee. v. Liverpool Marine & General Insee.* (1928), 97 L. J. K. B. 589; *Board of Trade v. Hain*

*S.S. Co.*, [1929] A. C. 534. *Refd. Adelaide S.S. Co. v. A.-G.*, [1926] A. C. 172; *Lazard Bros. & Co. v. Brooks* (1932), 37 Com. Cas. 224.

1860. *Add. Annotations*:—*Consd. Hain S.S. Co. v. Board of Trade*, [1928] 2 K. B. 534; *Clan Line Steamers v. Board of Trade*, [1929] A. C. 514. *Refd. Board of Trade v. Cayzer, Irvine* (1927), 43 T. L. R. 625.

1865a. *Claims for damage caused "in relation to the removal of the wreck."*—*Pltfs.' steamer ran ashore & became a wreck within the jurisdiction of a harbour authority which had statutory power to remove at the owners' expense anything that might be an obstruction or danger to navigation. Pltfs. entered into a contract with a Danish firm under which that firm was to remove the wreck to the satisfaction of the harbour authority & to indemnify pltfs. in respect of claims made against them by reason of anything done or omitted to be done "in relation to the removal of the wreck."* *Pltfs. & the Danish firm then jointly took out a policy of marine insurance which was to cover the Danish firm's liability to pltfs. under the contract to remove the wreck, & to indemnify pltfs. against any claims made by the harbour authority, or any other parties, by reason of anything done or omitted to be done by the Danish firm "in relation to the removal of the wreck."* *In the result the Danish firm did not carry out their contract, & the harbour authority partly removed the wreck & charged pltfs. with the cost of doing so & the cost of buoying & lighting it before such partial removal & with a further sum for the future cost of buoying & lighting the remains of it. In an action by the ship-owners on the policy:—Held: the words "in relation to the removal of the wreck" were of general application & were not limited to something which arose during the actual removal, the Danish firm's failure to carry out their contract was covered by the policy, & therefore pltfs. were entitled to recover under it.—OCEANIC STEAM NAVIGATION CO., LTD. v. EVANS* (1934), 51 T. L. R. 67; 78 Sol. Jo. 838; 40 Com. Cas. 108, C. A.

1870a. ———. *Pltfs. were the owners of the steamship A. While loading a general cargo at New York a fire broke out & general average expenditure was incurred. The share of the cargo-owners amounted to 18,000 dollars, & this was paid to pltfs. After repairs & reloading the A. proceeded on her voyage, but was struck & sunk by another steamer. The cargo was discharged & the A. raised & taken into Chester, near Philadelphia, where the voyage was abandoned. Further general average disbursements were made. By the law & practice of Philadelphia cargo-owners were not liable to pay more than the salvaged value of the cargo. This they paid. The first defts., the London Assurance, were the insurers in part of the hull & machinery against perils of the sea & fire. The second defts., the British Traders Insurance Co., Ltd., were the insurers of part of the cargo's proportion of general average disbursements, & the fourth deft., A. H. Henderson, was an underwriter of a similar policy at Lloyds for the other part. The third defts., the United Kingdom Mutual Assurance Assocn., Ltd., were a club of which*

pltfs. were members, & as such entitled to be indemnified against liabilities for cargo's proportion of general average not otherwise recoverable. Pltfs. claimed under the policies. The London Assurance denied liability. The third defts. admitted liability if & when any balance was ascertained. The other insurers disputed the amount claimed & the method of computation. The bills of lading provided that general average should be adjusted under York-Antwerp Rules, 1890, & under the policies the same rules were to apply:—*Held*: the 18,000 dollars recovered in New York must be taken into account when computing the liability of the disbursements underwriters. In the case of the hull underwriters the values to be considered were those at the termination of the adventure & the loss incurred by reason of the diminution or extinction of the value of the cargo was a loss which fell upon the assured, the shipowner, & came within Marine Insurance Act, 1906 (c. 41), s. 66 (4). —*GREEN STAR SHIPPING CO., LTD. v. LONDON ASSURANCE*, [1933] 1 K. B. 378; 102 L. J. K. B. 351; 145 L. T. 160; 36 Com. Cas. 258; 18 Asp. M. L. C. 225.

1874. *Add. Annotations*:—As to (1) *Refd. Green Star Shipping Co. v. London Assurance* (1931), 145 L. T. 160; *Tempus Shipping Co. v. Drefus (Louis) & Co.*, [1931] 1 K. B. 195. As to (2) *Refd. Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 249.

1876. *Add. Annotations*:—*Consd. Boag v. Standard Marine Insurance Co.*, [1937] 2 K. B. 113. *Refd. Goole & Hull Steam Towing Co. v. Ocean Marine Insce.*, [1928] 1 K. B. 589.

1886. *Add. Annotation*:—*Refd. Green Star Shipping Co. v. London Assurance* (1931), 145 L. T. 160.

1887. *Add. Annotation*:—*Refd. Green Star Shipping Co. v. London Assurance* (1931), 145 L. T. 160.

1888. *Add. Annotations*:—*Consd. Green Star Shipping Co. v. London Assurance* (1931), 145 L. T. 160. *Refd. Tempus Shipping Co. v. Louis Dreyfus & Co.*, [1931] 1 K. B. 195; *Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 249.

1891a. "Prime cost"—Meaning of.]—*WILLIAMS v. ATLANTIC ASSURANCE CO., LTD.*, No. 491a, *ante*.

1931a. "Deckload."—A marine insurance policy which included transit by craft or lighter to & from the vessel contained the following clause: "Deckload warranted free from particular average unless the vessel or craft be stranded, sunk or burnt":—*Held*: the intention was that the underwriters should be free from liability for damage while the goods were actually deckload, but that they should pay for damage incurred while they were not actually deckload though they might afterwards become deckload.—*RENTON (G. H.) & CO., LTD. v. CORNHILL INSURANCE CO., LTD.* (1933), 149 L. T. 280; 49 T. L. R. 414; 18 Asp. M. L. C. 407.

1948. *Add. Annotation*:—*Refd. Mancomunidad Del Vapor Frumiz v. Royal Exchange Assee.*, [1927] 1 K. B. 567.

1965. *Add. Citation*:—[1904] P. 198, n.

*Add. Annotations*:—*Refd. The Normandy*, [1904] P. 187; *Mancomunidad Del Vapor Frumiz v. Royal Exchange Assee.*, [1927] 1 K. B. 567.

1970a. Clause covering ice damage irrespective of percentage.]—A policy taken out with defts. underwriters on Norwegian conditions, according to the Norwegian Insurance Plan of 1930 contained the clause "It is specially agreed that this policy covers ice damage irrespective of percentage":—*Held*: (1) the phrase "irrespective of percentage" did not exclude the underwriters' right to make deductions under para. 77 of the Norwegian Insurance Plan; (2) as regards the *proferentes* doctrine, an ambiguous clause in a policy must not necessarily be construed against the underwriter "it being left for determination in each case as regards any special provision in the policy whether the insured or the insurer are to be considered the *proferentes*" within the maxim "*verba chartarum fortius accipiuntur contra proferentem*."—*A/S OCEAN v. BLACK SEA BALTIC GENERAL INSURANCE CO.* (1935), 51 Ll. L. Rep. 305.

1981. *Add. Annotation*:—*Appl. Admiralty Comrs. v. S.S. Chekiang*, [1926] A. C. 637.

1982. *Add. Annotation*:—*Refd. Admiralty Comrs. v. S.S. Chekiang*, [1926] A. C. 637.

2010a. — Recovery of damages in collision action.]—Defts. insured pltfs.' steamer against the usual marine risks, the steamer being valued in the policy at £4,000. During the currency of the policy the steamer collided with another steamer. The ship was repaired at pltfs.' cost, & a collision action by pltfs. against the owners of the other steamer was settled, & the owners of the other steamer paid over to pltfs. £2,500, as being half the damages. In an action against defts. pltfs. contended that, as the balance of their loss was £2,500 they were entitled to recover that amount, it being less than the value of £4,000 put on the steamer in the policy:—*Held*: defts. were liable only for £1,500, being the difference between £4,000 & £2,500, the amount recovered by pltfs. from the owners of the other ship.—*GOOLE & HULL STEAM TOWING CO., LTD. v. OCEAN MARINE INSURANCE CO., LTD.*, [1928] 1 K. B. 589; 97 L. J. K. B. 175; 138 L. T. 548; 44 T. L. R. 133; 72 Sol. Jo. 17; 17 Asp. M. L. C. 409, 33 Com. Cas. 110.

2014a. Loss less than amount paid into court.]—*Resps. insured applts.' tug boat by a policy of marine insurance, which provided that, on a claim for a constructive total loss, the insured value was to be taken as the repaired value, & that nothing was to be taken into account for the damaged value, & also that all claims were to be subject to English law & usage. The tug was sunk by collision, & applts. at once gave notice of abandon-*

## PART II. SECT. 22, SUB-SECT. 5.—B.

*eg. Loss from external cause—Grain damaged by moisture & reconditioned.*—*RICHARDSON (JAMES) & SONS, LTD. v. STANDARD MARINE INSURANCE CO.*,

*LTD.*, [1936] S. C. R. 573; 3 D. L. R. 513.—CAN.

## PART II. SECT. 22, SUB-SECT. 5.—C.

(a). — By insurers—Subsequent sale

*of ship at profit—Rights of assured.*—*MEAGHER v. AETNA INSURANCE CO. HOME INSURANCE CO.* (1873), 20 Gr. 354.—CAN.

ment. Salvors employed by resps. raised the tug in a few days, & the abandonment was not accepted. The salvors, without the knowledge of applts., made an offer to resps. for the tug, & resps. requested them to put it into writing, which they did. The appellate ct., considering the evidence as to the probable cost of repair, held that there had been only a partial loss to an amount less than that paid into ct.:—*Held*: (1) the sinking was not an actual total loss; (2) resps. were not precluded from denying that they had accepted the abandonment; (3) there had been no constructive total loss within Marine Insurance Act, 1906 (c. 41), s. 60 (2) (i), since even at the date of the abandonment it was not unlikely that the tug could be recovered, & it was unnecessary to consider whether the old rule, that the crucial moment was the commencement of the action, had been modified by sects. 61 & 62; (4) the appellate ct. was not bound to accept the highest estimate of the cost of repairs given by resps.' witnesses, & the ct.'s finding as to the sum necessary, being justified by the evidence & not being based upon any error of principle, could not be questioned.—CAPTAIN J. A. CATES TUG & WHARFAGE CO. v. FRANKLIN INSURANCE CO., [1927] A. C. 698; 96 L. J. P. C. 132; 137 L. T. 709; 17 Asp. M. L. C. 819, P. C.

2055a. ———.]—CAPTAIN J. A. CATES TUG & WHARFAGE CO. v. FRANKLIN INSURANCE CO., No. 2014a, *ante*.

2067. *Add. Annotation*:—*Refd.* Marstrand Fishing Co. v. Beer, [1937] 1 All E. R. 158.

2074. *Add. Annotation*:—*Refd.* Lambert v. I. R. Comrs. (1927), 12 Tax Cas. 1053.

2082. *Add. Annotations*:—*As to* (1) *Refd.* Canada Atlantic Grain Export Co. (Inc.) v. Eilers (1929), 35 Com. Cas. 90; Cammell, Laird & Co. v. Manganese Bronze & Brass Co., [1934] A. C. 402.

2086. *Add. Annotation*:—*Refd.* Carras v. London & Scottish Assurance Corp., Ltd., [1936] 1 K. B. 291.

2086a. ———.]—(1) Pltfs. took out a policy with defts. in respect of the freight on the carriage of a grain cargo from the West Coast of South America to United Kingdom ports. The vessel loaded her cargo & started on her voyage in Dec. 1933, but shortly afterwards went ashore in the Straits of Magellan. She was later taken off by a salvage co. on the terms that they should be paid £11,000 in the event of success. The hull underwriters & pltfs. agreed to abandon the voyage on a payment by the underwriters, & the ship was abandoned to the salvors. The cargo owners were notified that the adventure was at an end & their underwriters paid as on a total loss. On a claim by pltfs. under the freight policy it appeared that the cost of temporary repairs to the vessel, sufficient to carry her to her destination, would exceed her repaired value:—*Held*: pltfs. were entitled to recover as for a total loss of chartered freight on the ground (*per* SLESSER & GREEN, L.J.J.) that it was shown that the cost of temporary repairs would exceed the repaired value of the vessel; on the ground (*per* SCOTT, L.J.) that there was an actual commercial loss of the vessel within the meaning of the charter-

party, or, alternatively, on the ground that in the circumstances known at the time to pltfs., their decision to treat it as an actual loss was justified under the charterparty contract & under the policy.

*Per* SCOTT, L.J.: Under a contract of affreightment transhipment is a privilege or liberty of the shipowner, & not a duty. An insurance policy on chartered freight is concerned only with the named ship, the insurance being against inability to carry the cargo to its destination in that ship.

(2) *Held*: further, pltfs. were entitled to interest at 4 per cent. on the amount recovered as from Mar. 1, 1934.—KULUKUNDIS v. NORWICH UNION FIRE INSURANCE SOCIETY, [1937] 1 K. B. 1; [1936] 2 All E. R. 242, 1488, n.; 105 L. J. K. B. 703; 155 L. T. 114; 52 T. L. R. 591; 80 Sol. Jo. 445; 41 Com. Cas. 239; 19 Asp. M. L. C. 37, C. A.

2087. *Add. Annotations*:—*Consd.* Petros M. Nomikos, Ltd. v. Robertson, [1938] 3 All E. R. 249. *Refd.* Carras v. London & Scottish Assurance Corp., Ltd., [1936] 1 K. B. 291. *Refd.* Kulukundis v. Norwich Union Fire Insurance Society, [1936] 2 All E. R. 242; Tatem, Ltd. v. Gamboa, [1938] 3 All E. R. 135.

2093a. *Ship stranded*.]—Under a charterparty dated Sept. 16, 1930, pltfs.' steamship was to proceed to Valparaiso to load cargo. The charterparty contained the usual exceptions including perils of the sea & the cancelling date was specified as Nov. 20, 1930. Pltfs. took out a policy for £4,000 part of £9,000 on freight &/or chartered freight &/or anticipated freight. The policy was subject to the Institute Voyage Clauses—Freight, which provide by clause 4: "In the event of the total loss, whether absolute or constructive, of the vessel, the amounts underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered"; & by clause 5: "In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value..." On Nov. 13, 1930, the steamer, while proceeding to Valparaiso through the Straits of Magellan, stranded, & on Nov. 17, 1930, the vessel was abandoned to the hull underwriters. The steamer was eventually refloated & brought by salvors to Magallanes, & on June 17, 1931, while she still lay at Magallanes, the hull underwriters compromised for a total loss, the owners retaining the ship but remaining liable to the salvors. Eventually the ship was surrendered to the salvors in discharge of their claim, & it was sold by them & repaired in 1932. The actual value of the ship when repaired was £13,000, but the insured value under the policy on ship was £30,000. The cost of repairs exceeded £13,000, but was less than £30,000:—*Held*: as, owing to perils of the sea, the ship could not make the cancelling date or be tendered according to contract to the charterers at Valparaiso, there was an actual total loss of freight. But if there had not been an actual total loss, the test whether the freight insurers would be liable as on a total loss would be analogous to that applicable to a ship policy in determining whether there had been a constructive total loss of ship. At the same time the expression 'con-

structive total loss" has no application to a freight policy & clause 5 of the Institute Voyage Clauses—Freight was therefore inapplicable in determining whether there was a total loss of freight, because the damage resulting to the ship from a peril of the sea could not be repaired except at a cost which the shipowners could not reasonably be required to incur.—*CARRAS v. LONDON & SCOTTISH ASSURANCE CORPN., LTD.*, [1936] 1 K. B. 291; 105 L. J. K. B. 689; 154 L. T. 69; 52 T. L. R. 123; 41 Com. Cas. 120; 18 Asp. M. L. C. 581, C. A.

*Annotations: Consd. Kulukundis v. Norwich Union Fire Insurance Society*, [1937] 1 K. B. 1; *Petros M. Nomikos, Ltd. v. Robertson*, [1938] 3 All E. R. 249.

2096. *Add. Annotations:—Consd. Carras v. London & Scottish Assurance Corp., Ltd.*, [1936] 1 K. B. 291; *Kulukundis v. Norwich Union Fire Insurance Society*, [1936] 2 All E. R. 242.

2110a. —. —.—*MAEBURN v. LECKIE* (1822), cited in *Abbott's Merchant Shipping*, 14th ed., p. 15.

*Annotation:—Consd. Alcock v. Royal Exchange Assce.* (1849), 13 Q. B. 292.

2118. *Add. Annotation:—Refd. Carras v. London & Scottish Assurance Corp., Ltd.* (1935), 40 Com. Cas. 288.

2120. *Add. Annotation:—Consd. Kulukundis v. Norwich Union Fire Insurance Society*, [1937] 1 K. B. 1.

2129. *Add. Annotation:—Refd. Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.*, [1934] A. C. 455.

2140. *Add. Annotation:—As to (1) Refd. Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.*, [1934] A. C. 455.

2145. *Add. Annotations:—Expld. Captain J. A. Cates Tug & Wharfage Co. v. Franklin Insce.*, [1927] A. C. 698. *Refd. Carras v. London & Scottish Assurance Corp., Ltd.* (1935), 40 Com. Cas. 288.

2152a. *What amounts to—General rule.*—(1) The taking of a ship by barrators is not in itself sufficient evidence of irretrievable loss to constitute "actual total loss."

(2) Constructive total loss of a ship is only established when, on the true facts at the time of abandonment, & not on the facts as they are known or appear at that time, it appears to a reasonable man that the balance of probabilities is against the recovery of the ship.—*MARSTRAND FISHING CO., LTD. v. BEER*, [1937] 1 All E. R. 158; 156 L. T. 196; 53 T. L. R. 287; 81 Sol. Jo. 36.

2152b. *Sunken ship—Recovery probable at date of abandonment.*—*CAPTAIN J. A. CATES TUG & WHARFAGE CO. v. FRANKLIN INSURANCE CO.*, No. 2014a, *ante*.

2167. *Add. Annotation:—Consd. Carras v. London & Scottish Assurance Corp., Ltd.*, [1936] 1 K. B. 291.

2185. *Add. Annotation:—Refd. Carras v. London & Scottish Assurance Corp., Ltd.*, [1936] 1 K. B. 291.

2188. *Add. Annotation:—Refd. Carras v. London & Scottish Assurance Corp., Ltd.*, [1936] 1 K. B. 291.

2189. *Add. Annotation:—Refd. Australia (Owners) v. Nautilus (Owners)* (1926), 95 L. J. P. 145.

2191. *Add. Annotation:—Refd. Tempus Shipping Co. v. Louis Dreyfus & Co.*, [1931] 1 K. B. 195.

2193. *Add. Annotation:—Refd. Carras v. London & Scottish Assurance Corp., Ltd.* (1935), 40 Com. Cas. 288.

2213. *Add. Annotations:—Consd. Marstrand Fishing Co. v. Beer*, [1937] 1 All E. R. 158. *Refd. Green Star Shipping Co., Ltd. v. London Assce.*, [1933] 1 K. B. 378; *Carras v. London & Scottish Assurance Corp., Ltd.* (1935), 40 Com. Cas. 288; *Société Belge des Bétons Société Anonyme v. London & Lancashire Insurance Co.*, [1938] 2 All E. R. 305.

2213a. —.—Pltfs. insured a cargo of timber on a voyage from a Baltic port to Garston by a policy dated Oct. 29, 1914, which was subscribed by deft. & was against war risk only as excluded by the f. c. & s. clause, including risk of mines, torpedoes & bombs, but excluding all claims arising from delay. The vessel started on Nov. 22, 1914, & on Nov. 23 Germany declared that wood was contraband. On Nov. 25 a German torpedo-boat stopped the vessel when outside the Falsterbo lightship, & the officer informed the master that no ships with contraband were allowed to pass the Sound but he might go to a Swedish or Danish port in the Baltic, & the master thereupon went to Stephens Klint, a Danish port. On Dec. 3 notice of abandonment was given by pltfs. to deft. but he refused to accept it. On Dec. 11, the master left Stephens Klint & passed through the Sound, & having called at Elsinore & Christiansand for orders he proceeded in accordance with the orders to Grimstad in Norway, where he arrived on Dec. 15 & discharged his cargo. The Norwegian Govt. placed no obstacle in the way of the cargo being reshipped for England. In an action brought on the policy upon the ground that there has been a constructive total loss, there was evidence that up to & including Dec. 3 all ships which had sailed before Nov. 23 had an option to proceed to ports on the east coast of Sweden & there discharge, & that many such ships carrying wood had done so & their cargoes had been railed across Sweden & had reached England:—*Held*: on Dec. 3 the total loss of the venture was not unavoidable & pltfs. were not entitled to recover.—*WILSON BROS., BOBBIN CO., LTD. v. GREEN* (1915), 31 T. L. R. 605.

2214. *Add. Annotations:—As to (1) Consd. Petros M. Nomikos, Ltd. v. Robertson*, [1938] 3 All E. R. 249. *As to (4) Apld. Holmes v. Payne*, [1930] 2 K. B. 301. *Refd. Carras v. London & Scottish Assurance Corp., Ltd.*, [1936] 1 K. B. 291.

2220a. —.—*Seizure by barrators.*—*MARRSTAND FISHING CO., LTD. v. BEER*, No. 2152a, *ante*.

2235. *Add. Annotation:—Refd. Carras v. London & Scottish Assurance Corp., Ltd.* (1935), 40 Com. Cas. 288.

#### PART II. SECT. 23, SUB-SECT.—4.

A. (e).

*sd. Provision as to survey—Application to total loss.*—*HAMILTON v. MONTREAL ASSURANCE CO.* (1864), 23 U. C. R. 437.—*OAN.*

#### PART II. SECT. 23, SUB-SECT. 4.—

C. (b).

2256 i. *Constructive total loss of ship.*—*Held*: there having been a constructive loss of the ship, the action of the underwriters in making repairs

& earning the freight would not prevent the assured from recovering as for a total loss of freight.—*TROOF & LEWIS v. MERCHANTS MARINE INSURANCE CO.* (1886), 12 S. G. R. 506; 6 C. L. T.

- 2259. Add. Annotations:—**Consd. *Carras v. London & Scottish Assurance Corp., Ltd.*, [1936] 1 K. B. 291; *Kulukundis v. Norwich Union Fire Insurance Society*, [1936] 2 All E. R. 242. Refd. *Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.*, [1934] A. C. 455.
- 2261a. — Cost of repairs greater than insured value.]—**Pltfs., who were the owners of a steamer, were by various policies dated Aug. 28, 1936, insured in respect of the hull & machinery of the steamer valued at £28,000 for twelve months from July 20, 1936. By a Lloyd's policy also dated Aug. 28, 1936, pltfs. were insured in respect of the steamer in the sum of £4,110 on freight chartered or otherwise for twelve months from July 20, 1936. The freight policy was subject to the Institute Time Clauses—Freight, which provided in clause 5 as follows: "In the event of the total loss, whether absolute or constructive, of the steamer, the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered." Pltfs. chartered the steamer to carry a cargo of oil from Venezuela to the United Kingdom at a certain freight. The steamer went to a port for repairs, & while there was on Oct. 31, 1936, badly damaged by an explosion followed by fire. The repairs were estimated to cost £37,400, but as the steamer when repaired would be worth £45,000 pltfs. did not abandon the steamer to the hull underwriters but repaired her at the estimated cost, & claimed as for a partial loss from the hull underwriters & were paid by them £27,000. The charter-party was not performed & pltfs. did not receive the freight payable thereunder. Pltfs. claimed £4,110 from the underwriters of the freight policy under clause 5 of the Institute Time Clauses attached to the freight policy, but the underwriters refused to pay & pltfs. brought an action to recover that amount:—*Held*: pltfs. were entitled to recover the amount insured by the freight policy from the freight underwriters, as there had been a constructive total loss of the steamer, inasmuch as the steamer had been so damaged by insured perils that pltfs. would be entitled on giving notice of abandonment to recover as for a constructive total loss from the hull underwriters; & it was not necessary that pltfs. should have actually given a notice of abandonment & have recovered as for a constructive total loss from the hull underwriters.—*PETROS M. NOMIKOS, LTD. v. ROBERTSON*, [1938] 2 K. B. 603; [1938] 3 All E. R. 249; 107 L. J. K. B. 504; 159 L. T. 130; 54 T. L. R. 882; 82 Sol. Jo. 475; 43 Com. Cas. 326, C. A.
- 2273. Add. Annotation:—**Refd. *Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.*, [1934] A. C. 455.
- 2286a. — — — — —]**VACUUM OIL Co. v. UNION INSURANCE SOCIETY OF CANTON, LTD. (1926), 32 Com. Cas. 53, C. A.
- 2333a. — Negotiations for ship between underwriters & third party.]—**CAPTAIN J. A. CATES TUG & WHARFAGE Co. v. FRANKLIN INSURANCE Co., No. 2014a, ante.
- 2388a. Notice given under mistake of fact.]—**NORWICH UNION FIRE INSURANCE SOCIETY, LTD. v. PRICE, LTD., No. 2468a, post.
- 2339. Add. Annotations:—**Consd. *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159. Refd. *Sheppy Glue & Chemical Works v. Medway River Conservators* (1926), 24 L. G. R. 457; *Allgemeine Versicherungs-Gesellschaft Helvetia v. German Property Administrator*, [1931] 1 K. B. 672.
- 2340. Add. Annotations:—**Consd. *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159. Refd. *Whitney v. I. R. Comrs.*, [1926] A. C. 37.
- 2341a. — — — — — Damages for negligence in watching wreck.]—**Defts. & other underwriters insured pltfs.' steamship *A.* against total loss, & to the extent of three-quarters against damages which pltfs. might have to pay for collisions with other vessels. The *A.* was sunk in a river & in fact was a constructive total loss. Notice of abandonment was given & acceptance thereof refused. Pltfs. & defts. agreed without prejudice to their rights to take joint action to save the property. The master of the *A.* employed a tug to watch the wreck & warn other vessels. Owing to the negligence of the crew of the tug the steamship *S.* came into collision with the *A.*, & both vessels sustained damage. In an action brought, in the names of pltfs., by & for the benefit of defts., against the *S.*, the owners of the *S.* counter-claimed & recovered judgment for the whole of their damages & costs, & the underwriters paid three-quarters of the damages & costs to the owners of the *S.*:—*Held*: the underwriters were jointly liable to indemnify pltfs. against the remaining one-quarter of the damages & costs of the *S.*, the liability not arising under the policy but upon the contract of indemnity.—*SUART & STEAMSHIP ALLEGHANY OF LONDON, LTD. v. MERCHANTS' MARINE INSURANCE CO., LTD.* (1898), 14 T. L. R. 564; 3 Com. Cas. 312.
- 2346. Add. Annotation:—**Refd. *Glen Line, Ltd. v. A.-G.* (1930), 46 T. L. R. 451.
- 2348. Add. Annotation:—**Refd. *Carras v. London & Scottish Assurance Corp., Ltd.*, [1936] 1 K. B. 291.
- 2351. Add. Annotations:—**Consd. *A.-G. v. Glen Line & Liverpool & London War Risks Insee. Assocn.* (1929), 34 Com. Cas. 309. Refd. *Petros M. Nomikos, Ltd. v. Robertson*, [1938] 3 All E. R. 249.
- 2352. Add. Annotation:—**Consd. *A.-G. v. Glen Line & Liverpool & London War Risks Insee. Assocn.* (1929), 34 Com. Cas. 309.
- 2355. Add. Annotations:—**As to (2) Consd. *A.-G. v. Glen Line & Liverpool & London War Risks Insee. Assocn.* (1929), 34 Com. Cas. 309; *Page v. Scottish Insee. Corp.* (1929), 98 L. J. K. B. 308. Refd. *Allgemeine Versicherungs-Gesellschaft Helvetia v. German Property Administrator*, [1931] 1 K. B. 672.
- 2356. Add. Annotation:—**Refd. *Glen Line, Ltd. v. A.-G.* (1930), 46 T. L. R. 451.
- 2369a. Reinsurance of liability for total loss—No reinsurance of running down clause—Application of principle of cross liabilities.]—**Defts. underwrote a policy of marine insurance on the *W.* against total loss, & also by a running down clause, against three-fourths of collision liability on the principle of cross liabilities. Defts. reinsured their liability for total loss only with pltf. During the currency of the

policy the *W.* was sunk as the result of a collision with the *M.* & became a total loss. In proceedings in the Admiralty Ct. both vessels were held equally to blame, & as the *M.*'s half damages exceeded the *W.*'s half damages, the *W.* had to pay the balance under the Admiralty rule of single liability. Defts. paid the owners of the *W.* for a total loss, & also a further sum under the running down clause, that sum being ascertained by bringing into account a payment treated as having been received in respect of the *M.*'s liability for the damage done by her to the *W.*, & the payment of a larger sum in respect of the damage done by the *W.* to the *M.* Pltf. claimed that he was entitled to the benefit of the credit in respect of the *M.*'s liability:—*Held*: pltf., not being a reinsurer of the liability under the running down clause, was not entitled to the benefit of the credit mentioned.—*YOUNG v. MERCHANTS' MARINE INSURANCE CO., LTD.*, [1932] 2 K. B. 705; 101 L. J. K. B. 567; 147 L. T. 236; 48 T. L. R. 579; 37 Com. Cas. 415; 18 Asp. M. L. C. 341, C. A.

**2375. Add. Annotations:—***Refd. A.-G. v. Glen Line & Liverpool & London War Risks Insee. Asscn.* (1929), 34 Com. Cas. 309; *Allgemeine Versicherungs-Gesellschaft Helvetia v. German Property Administrator*, [1931] 1 K. B. 672; *Sutherland v. German Property Administrator* (1933), 149 L. T. 47.

**2379. Add. Annotations:—***Consd. Boag v. Standard Marine Insurance Co.*, [1937] 2 K. B. 113. *Refd. Goole & Hull Steam Towing Co. v. Ocean Marine Insee.* (1927), 44 T. L. R. 133.

**2380a. Ordinary policy—Excess value policy—No right of contribution.**—The owners of a cargo of wheat insured it with the S. M. I. Co. for £885, which was then its full value. During the voyage the price of the wheat rose substantially, & the owners, without the knowledge of the S. M. I. Co., effected an increased value policy with underwriters for £215. The cargo subsequently became a total loss, its net sound value being £900. Both the co. & the underwriters paid the amounts of their respective policies in full, & received letters of subrogation from the cargo owners. Subsequently, as the result of general average adjustments, the owners received a sum of £532 4s. 8d. as salvage. The S. M. I. Co. claimed the whole of this sum; the underwriters claimed to be entitled to contribution in the proportion which their policy bore to the total value. On an interpleader to determine the respective rights of the co. & the underwriters, *BRANSON, J.* held that the underwriters were not entitled to contribution, but that the co. were entitled to receive the whole of the salvage. On appeal:—*Held*: the words "he [the insurer] is thereby subrogated to all the rights & remedies of the assured in & in respect to that subject-matter as from the time of the casualty causing the loss," in *Marine Insurance Act, 1906* (c. 41), s. 79 (1), merely gave effect to the well-recognised law with regard to subrogation, the result of which was that

it was an integral part of the primary policy that the S. M. I. Co. had a contingent right of subrogation which vested in them at the moment when the policy was effected; the contingency had occurred & the contingent right had become a vested right; therefore, the co. was entitled to the whole of the salvage.—*BOAG v. STANDARD MARINE INSURANCE CO., LTD.*, [1937] 2 K. B. 113; [1937] 1 All E. R. 714; 106 L. J. K. B. 450; 156 L. T. 338; 53 T. L. R. 414; 81 Sol. Jo. 157; *sub nom. BODEY, JERRIM & DENNING, LTD. & GRAHAM COCHRANE BOAG v. PENTIRON S.S. CO., LTD.*, 42 Com. Cas. 214, C. A.

**2401. Add. Annotation:—***Consd. Blaustein v. Maltz, Mitchell & Co.*, [1937] 2 K. B. 142.

**2404a. Prosecution of claim—Condition limiting time for.**—Pltfs. were interested in a certificate of insurance which was issued under two policies of marine insurance subscribed by defts. in respect of 100 barrels of pure gum turpentine shipped from Florida to Rotterdam. The policies provided for payment for "leakages from any cause in excess of 1 per cent. on each invoice." It was the practice of the trade, at the port of shipment, to gauge the barrels of turpentine & to express the result in gallons, & at the port of discharge to weigh it & to express the result in kilograms with an allowance for reduction on account of the varying temperature conditions of 3·25 kilograms to the gallon. The policies also contained a stipulation providing that no suit or action for the recovery of any claim should be maintainable in any ct. unless such suit or action be commenced within one year from the happening of the loss out of which the claim arose, but that limitation clause did not occur in the certificate. When the vessel was discharged a shortage in respect of the gallons of turpentine shipped was ascertained to have taken place. Defts. having refused to pay upon the ground that there was no sufficient evidence of the loss & that the claim was not instituted within the year, the present claim was brought by the pltfs. on the certificate:—*Held*: the limitation clause was not one which bound the certificate holder. The rights of the original policy holder, which were conveyed to the certificate holder, comprised the rights given by the policy qualified by all the conditions & warranties which affected the nature & extent of the insurance granted, but did not impose an obligation affecting only a limitation of time within which the rights so given were to be enforced; (2) an actual physical loss had been proved based upon the calculations, & there was no ground for imputing that loss to any cause other than leakages.—*PHOENIX INSURANCE CO. OF HARTFORD v. DE MONCHY* (1929), 141 L. T. 439; 45 T. L. R. 543; 18 Asp. M. L. C. 7; 35 Com. Cas. 67, H. L.; *affg. S. C. sub nom. DE MONCHY v. PHOENIX INSC. CO. OF HARTFORD* (1928), 138 L. T. 703, C. A.

**2445. Add. Annotations:—***Refd. Lothian v. Epworth Press* (1926), 137 L. T. 582, n.; *Re Burford, Burford v. Clifford*, [1932] 2 Ch.

122; Jones v. Birch Bros., Ltd. (1983), 49 T. L. R. 586.

2461. *Add. Annotation*:—*Consd. Holmes v. Payne*, [1930] 2 K. B. 801.

2463a. ———.]—A ship belonging to the Glen Line was insured, hull, machinery, etc., with the Liverpool & London War Risks Insurance Assocn., against the usual war risks. On the declaration of war on Aug. 4, 1914, the ship was seized by the German Government & was interned until after the Armistice. The Glen Line gave notice of abandonment, which was accepted by the Assocn. as for a constructive total loss on Aug. 4, 1914. After the peace the Glen Line presented a claim to the Mixed Arbitral Tribunal, under article 297 (e) of the Treaty of Versailles, in effect, for compensation for loss of prospective profits arising from the seizure of the ship by the Germans immediately on the outbreak of the war, & this claim was compromised for about £140,000. Thereafter the British Government, as reinsurers to the extent of 80 per cent. of the war risks undertaken by the Assocn., who made no claim to the compensation, claimed that the compensation was received by the Glen Line as trustees for the Assocn., & that the British Government were entitled to 80 per cent. of the trust moneys:—*Held*: the compensation recovered under the treaty was analogous to damages recovered for loss of freight in prospect secured by an existing charter & must therefore be treated as belonging to the owner & not to the abandoner.—*GLEN LINE, LTD. v. A.-G.* (1930), 46 T. L. R. 451; 36 Com. Cas. 1, H. L.; *revg.*, S. C. *sub nom.* A.-G. v. GLEN LINE, LTD. & LIVERPOOL & LONDON WAR RISKS INSCE. ASSOCN., LTD. (1929), 34 Com. Cas. 309, C. A.

2468a. ———.]—*Cargo not lost by peril insured against—Sold in consequence of condition—Lemons.*—Lemons were shipped from Messina to Sydney & insured under a policy of marine insurance. Believing from information received in Sydney that the lemons had been damaged by a peril insured against & sold in consequence, the insurers paid the insured value to the insured, who signed a document by which they agreed to transfer & abandon to the insurers the goods & their proceeds. It was ascertained later that the lemons had not been so damaged, but had been sold because they were found to be ripening. By the Commonwealth Marine Insurance Act, 1909, s. 68 (6)—which is identical with Marine Insurance Act, 1906 (c. 41), s. 62 (6)—“Where notice of abandonment is accepted, the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss & the sufficiency of the notice”:—*Held*: the insurers could recover the sum paid by them as money paid under a mistake of fact; the document above mentioned, having regard to its terms & the fact that it was given after the lemons had been sold, was not a notice of abandonment within sect. 68 (6) of the Commonwealth Act.

*Semble*: notice of abandonment, or its acceptance, given under a material mistake of fact is a nullity.—*NORWICH UNION FIRE INSURANCE SOCIETY, LTD. v. PRICE, LTD.*, [1934] A. C. 455; 103 L. J. P. C. 115; 151 L. T. 309; 50 T. L. R. 454; 78 Sol. Jo. 412; 40 Com. Cas. 132, P. C.

2527a. ———.]—*Unstamped insurance.*—In 1920 the E. co. & the Y. co. entered into a participation agreement effective as from Jan. 1, 1920, which was a reinsurance treaty binding the E. co. to cede & the Y. co. to accept a participation of all risks mentioned of the share retained by the E. co. accepted after Jan. 2, 1920. In Sept. 1921, the E. co. arranged that the N. co. should take over the Y. co.'s position as from Jan. 1, 1920; & in Jan. 1921, an agreement, hereinafter called “the Outwards Treaty,” on the same lines & with the same provisions as those of the agreement with the Y. co. was entered into between the E. co. & the N. co. In 1921 the N. co. & the E. co. entered into another participation agreement, hereinafter called “the Inwards Treaty,” the N. co. ceding & the E. co. accepting a share of all marine risks. The Inwards Treaty had no provisions for the issuing of policies, or for particulars sufficient to make possible the issuing of policies, to satisfy the provisions of Stamp Act, 1891 (c. 39), & Marine Insurance Act, 1906 (c. 41). No stamped policies were in fact issued under any of the three agreements, & no premiums were ever actually paid to the N. co., which was credited with the proper proportion of the net premiums received by the E. co. On the compulsory winding-up of the N. co. the E. co. claimed to be entitled to prove for sums paid by it for premiums under the Outwards Treaty, after allowing for sums paid or credited to it by the N. co. under the Inwards Treaty. The Official Receiver rejected the claim on the ground that both treaties were invalid & inadmissible in evidence, because they were contracts of marine insurance which did not comply with the requirements of Stamp Act, 1891 (c. 39), & Marine Insurance Act, 1906 (c. 41), & were unlawful; & upon a summons asking for an order that the proof should be allowed:—*Held*: (1) as the Outwards Treaty was invalid & void, the entries of premiums to the credit of the E. co. were not evidence of payment, & therefore no claim under Marine Insurance Act, 1906 (c. 41), s. 84, could be made; (2) even if premiums had been paid such a claim could not have been made, as Stamp Act, 1891 (c. 39), ss. 92, 93, 97, amounted to an implied prohibition of offences by incurring liability for premiums in respect of unstamped sea insurances, & there had therefore been “illegality” on the part of the E. co. with the result that a claim for return of premiums under Marine Insurance Act, 1906 (c. 41), s. 84, must fail.—*Re NATIONAL BENEFIT ASSURANCE CO., LTD.*, [1931] 1 Ch. 46; 100 L. J. Ch. 38; 144 L. T. 171; [1929–30] B. & C. R. 256.

PART II. SECT. 26, SUB-SECT. 2.—A. (b).

Recovery of interest—Although action tried without jury.—*PACIFIC*

COAST COAL FREIGHTERS, LTD. v. WESTCOAST FIRE INSURANCE CO. OF NEW YORK, PACIFIC COAST COAL FREIGHTERS, LTD. v. WESTERN ASSUR-

Co. (B. C.), [1926] 4 D. L. R. 963; [1926] 3 W. W. R. 356; *affd.*, [1927] 2 D. L. R. 590; [1927] 1 W. W. R. 378; 38 B. G. R. 315.—*CAN.*



## Part III.—Fire Insurance.

2534. *Add. Annotation*:—*Refd.* Boag v. Standard Marine Insurance Co., [1937] 2 K. B. 113.

2535. *Add. Annotation*:—*Refd.* Boag v. Standard Marine Insurance Co. [1937], 2 K. B. 113.

2542a. —.]—Where a policy of fire insurance has been assigned, the insurers, in the absence of an express contract to do so, are not bound, upon the application of the assignee, to pay him upon the policy.—*LONDON INVESTMENT CO. v. MONTEFIORE (SIR MOSES)* (1864), 3 New Rep. 389; 9 L. T. 688.

2544. *Add. Annotation*:—*Refd.* Halifax Building Society v. Keighley, [1931] 2 K. B. 248.

2546. *Add. Annotation*:—*Refd.* Halifax Building Society v. Keighley, [1931] 2 K. B. 248.

2548. *Add. Annotation*:—*As to* (1) *Refd.* Shell-Mex v. Elton Cop Dyeing Co. (1928), 34 Com. Cas. 39.

## PART III. SECT. 1, SUB-SECT. 1.

*sa. Renewal—Whether new contract.*]—Under Ontario Insurance Act a mercantile risk can only be insured for one year & may be renewed by a renewal receipt. This renewal is not a new contract of insurance.—*LIVERPOOL LONDON & GLOBE INSC. CO. v. AGRICULTURAL SAVINGS & LOAN CO.* (1903), 33 S. C. R. 94.—CAN.

## PART III. SECT. 1, SUB-SECT. 3.

2541 *lix.* —.]—*BUDGE v. MARBIN LUMBER CO., LTD., & MARTYN LUMBER CO., LTD.*, [1932] 2 W. W. R. 64; 45 B. C. R. 479.—CAN.

2541 l. —. *Policy payable to assured or "assigns."*—An assignee of a fire insurance policy whereby insured "& his assigns" are covered may recover on such a policy, although the co. has not given its permission to the particular assignee by endorsement on the policy.—*NOACK v. LANARK COUNTY MUTUAL FIRE INSC. CO.*, [1932] 4 D. L. R. 64; O. R. 580.—CAN.

*si. Insurance by liquidator—Liquidator becoming trustee for purchaser—No duty to inform insurers.*]—Where property was insured against fire by a liquidator in possession, & at the time of the loss he was still in possession, but then as trustee for persons who had meanwhile purchased the property, but had not yet received title:—*Held*: he had been under no legal duty to notify the insurers of said change.—*MONTREAL TRUST CO. v. CALEDONIAN INSURANCE CO. & ALLIANCE ASSURANCE CO.*, [1931] 2 W. W. R. 571; 3 D. L. R. 809; *affd.*, [1931] 3 W. W. R. 432; [1932] 1 D. L. R. 116; 26 Alta. L. R. 21; *affd.*, [1932] S. C. R. 581; 3 D. L. R. 657.—CAN.

*sd. Insurance of partnership property—By one partner in own name.*]—An insurance co. is not liable to one partner for damage by fire to partnership property, where the policy was issued in the name of the other partner, who alone paid the premium.—*CUMMING & EMERY v. HOMESTEAD FIRE INSURANCE CO.*, [1935] 2 D. L. R. 261; O. R. 161.—CAN.

## PART III. SECT. 1, SUB-SECT. 4.

*o i. Meaning of "husband."*]—In the proposals for insurance against fire in respect of a building & of furniture, etc., therein of the proponent, one of the printed questions was "Have you . . . or husband ever . . . had a fire?"—*Held*: the word "husband" there meant husband then living.—*BRADBURY v. THE LONDON*

*GUARANTEE & ACCIDENT CO., LTD.* (1927), 40 C. L. R. 127.—AUS.

*o ii. Alleged misstatement as to property in goods.*]—*NORTH BRITISH & MERCANTILE INSURANCE CO. v. McLELLAN* (1892), 21 S. C. R. 288.—CAN.

*o iii. Question relating to cancellation of previous policy—Meaning of cancellation.*]—A proposal for a policy contained the question, "Has the proponent . . . ever had . . . any policy cancelled by any insurance co.?" The assured had in fact had a policy in another office, & the premium thereon not having been paid, the insurance co.'s officer intimated that his co. did not desire to continue the policy, & if the assured was not prepared to pay the premium the co. would have no alternative but to cancel the policy. The premium not being paid the officer produced a cancellation voucher which he had taken with him when he went to call on assured, & assured then signed the voucher & the policy was cancelled:—*Held*: the termination of the insurance of the unilateral act of the co., & the policy was cancelled within the meaning of the question in the proposal.—*BYRCE v. MERCANTILE & GENERAL INSC. CO., LTD.*, [1930] N. Z. L. R. 231.—N.Z.

## PART III. SECT. 2, SUB-SECT. 2.

2560 *ii.* —.]—Where a loss is compensated from other sources, insurers are entitled to recover from insured any sum received by him from them in excess of the loss except his reasonable expenses in obtaining the compensation from other sources.—*BALDRE FIRE INSC. CO. v. MARTIN* [1937] 2 D. L. R. 24; O. R. 355.—CAN.

*t i. —. Whether action by insurer Chancery or common law action.*]—*ROYAL EXCHANGE ASSCE. CO. v. GRIMSHAW BROS., LTD.*, [1928] 2 D. L. R. 412; 62 O. L. R. 25.—CAN.

*t ii. Liability of insured—Refusal to subrogate.*]—*GLOBE & RUTGERS FIRE INSURANCE CO. v. TRUEDELL*, [1927] 2 D. L. R. 659; 60 O. L. R. 227.—CAN.

*t iii. —. Necessity to notify lessor of payment.*]—If an insurance co. pay the lessee sums alleged to be due to the negligence of the lessor, without notifying the lessor, they are not subrogated to the lessee's right of action against the lessor.—*GENERAL INSURANCE CO. v. DESCARY*, [1934] 2 D. L. R. 386.—CAN.

2553. *Add. Annotations*:—*As to* (2) *Consd.* Provincial Insurance Co. v. Morgan (1932), 102 L. J. K. B. 164. *Refd.* MacKay v. London General Insurance Co. (1935), 79 Sol. Jo. 271; Beauchamp v. National Mutual Indemnity Insurance Co., [1937] 3 All E. R. 19.

2560. *Add. Annotation*:—*As to* (1) *Consd.* Page v. Scottish Insc. Corp'n. (1929), 98 L. J. K. B. 308.

2562. *Add. Annotations*:—*Consd.* Page v. Scottish Insc. Corp'n. (1929), 98 L. J. K. B. 308. *Refd.* Williams v. Atlantic Assurance Co. (1932), 37 Com. Cas. 304; Sutherland v. German Property Administrator (1933), 149 L. T. 47; Morley v. Moore, [1936] 2 All E. R. 79.

2568. *Add. Annotations*:—*As to* (1) *Refd.* Vandepitte v. Preferred Accident Insurance Co. of New York, [1933] A. C. 70. *As to* (2) *Consd.* Lake v. Simmons (1926), 95 L. J. K. B. 586.

## PART III. SECT. 3, SUB-SECT. 1.

2566 v. —.]—*McKEE v. CULROSS MUTUAL FIRE INSC. CO.*, [1933] 1 D. L. R. 793.—CAN.

*ss. Party in whose name property placed.*]—*Pitf.* was held to have an insurable interest in property which had been placed in his name by his brother for the purpose of preventing his brother's creditors getting it.—*LAMBERT v. ANGLO-SCOTTISH GENERAL COMMERCIAL INSURANCE CO.* (1929), 64 O. L. R. 439.—CAN.

## PART III. SECT. 3, SUB-SECT. 2.—B.

*f* (p. 311). For "*affd.*" read "*affd. on other grounds.*"

*h* (p. 311) l. —.]—*CLARKE v. FIDELITY-PHOENIX FIRE INSURANCE CO. OF NEW YORK*, [1926] 1 D. L. R. 303; 58 O. L. R. 148.—CAN.

*l* (p. 311) l. —.]—A person who has made an agreement for the purchase of immovable property, although he does not thereby obtain a legal interest in or charge upon the property within sect. 54 of Transfer of Property Act, nevertheless has an insurable interest in the property, & can recover under a policy of insurance of the property the loss suffered by him on account of the property being destroyed or damaged by fire.—*GNANA SUNDARAM v. VULCAN INSURANCE CO.* (1931), 1 L. R. 9 Ran. 462.—IND.

*o i. —. Sale illegal.*]—A sale of a large quantity of intoxicating liquor to *pitf.* S. was found to be illegal under Liquor Control Act, R.S.O., 1927:—*Held*: no title to, or property in the liquor passed to S. by the sale, & so he had no insurable interest at the time of its destruction by fire.—*SMITH v. NATIONAL GUARANTY CO.*, [1929] 4 D. L. R. 486; 64 O. L. R. 240.—CAN.

*h* (p. 312) l. —.]—Where a mtgor. against whom foreclosure proceedings had been brought & continued until sale was still the registered owner of the property & in possession of it he was held to have an insurable interest at that time.—*FORDORCHUK v. CAB & GENERAL INSURANCE CORPN., LTD.*, [1931] 2 W. W. R. 586; 3 D. L. R. 387.—CAN.

*as* (p. 312) l. *Husband—Property conveyed to wife.*]—A husband has an insurable interest in property bought by him & conveyed to his wife, if the presumption of advancement arising in these circumstances is rebutted.—*DOWNTON v. HOME INSURANCE CO. OF NEW YORK*, [1934] 2 D. L. R. 617; 8 M. P. R. 1.—CAN.

2572. *Add. Citation*:—31 Com. Cas. 10.

2588. *Add. Annotation*:—*Distd. Evans v. Employers' Mutual Insurance Association, Ltd.* (1935), 152 L. T. 333.

### PART III. SECT. 5.

h i. — *Covering note issued by broker—Loss before issue of policy—Broker not liable as insurer.*—*BROIT v. BENNIE S. COHEN & SON (N. S. W.), LTD.* (1926), 27 S. R. N. S. W. 29; 44 N. S. W. N. 44.—AUS.

k i. —.]—*SUN INSURANCE OFFICE v. ROY (Can.)*, [1927] 1 D. L. R. 17; S. C. R. 8.—CAN.

k ii. —.]—The renewal of a fire policy is not a continuing contract relating back to the original policy, but a fresh contract & even if ante-dated to the date of expiry of the former policy, will not cover the risk of fire occurring before the acceptance of the renewal.—*RAM SINGH v. CENTURY INSURANCE CO., LTD.* (1932), 1 L. R. 60 Calo. 332.—IND.

### PART III. SECT. 7, SUB-SECT. 2.

2599 i. *Explosion—Grain-dust explosion.*—A policy of insurance against fire, which includes the condition that the co. shall make good loss or damage caused by the explosion of coal or natural gas in a building not forming part of gas works, & loss or damage by fire caused by any other explosion, covers loss caused by a grain-dust explosion, where, although the origin of the explosion cannot be positively proved, its most probable cause is found to have been the ignition of the particles of grain-dust suspended in the air.—*RIEDLE BREWERY, LTD. v. MERCHANTS FIRE ASSURANCE CORPN. OF NEW YORK (Man.)*, [1926] 1 W. W. R. 497.—CAN.

ii. —.]—A policy of fire insurance upon a building contained the words "only while the premises are occupied as a private dwelling." The premises were vacant when a fire occurred. In an action upon the policy:—*Held*: the words quoted were part of the description of the property insured.—*COOPER v. TORONTO CASUALTY INSC. CO.*, [1928] 2 D. L. R. 1007; 62 O. L. R. 311.—CAN.

iii. — *Use as "bunk house."*—An action upon a policy of fire insurance was resisted by deft. co. on the ground that at the time of the fire the house was not occupied as a private dwelling, contrary to a condition in the policy. One pltf. G. let the house to H., who said he was going to live in it, & G. understood that H. would occupy it with his wife & family. At the time of the fire H. had three men living with him. Once a week H.'s wife came in to keep things in order, & twice a week the wife of one of the other men did the same. Each of them contributed to the rent, that is, the other men paid their shares to H. who paid G. G. was never in the house while it was so occupied:—*Held*: the house was occupied as a private dwelling.—*GENDRON v. PROVIDENT ASSURANCE CO.*, [1931] 1 D. L. R. 418; 66 O. L. R. 147.—CAN.

iv. —.]—*Pltf. was insured against loss by fire of furniture in a house "only while occupied as a dwelling."*—*Held*: the words were used in the policy as part of the description of the property & not as a condition modifying the statutory conditions; a mere temporary vacancy or absence of the occupant reasonable in the circumstances will not be ground for a finding that the house was not "occupied as a dwelling."—*METCALFE v. GENERAL ACCIDENT ASSURANCE CO.*, [1930] 2 D. L. R. 265; 64 O. L. R. 643.—CAN.

i iv. —.]—In an action on fire

insurance policies on a house "while occupied only as a private dwelling" it was found that the house was to the knowledge of the insured vacant & not occupied as a dwelling when one policy was forwarded to him, & held that, since when or soon after he applied for that policy he intended to leave the house unoccupied, it was his duty to notify the insurer of that intention in order to enable the latter to judge of the risk to be undertaken, & that since the insured did not give such notice he had misrepresented or omitted to communicate to the insurer a circumstance material to the risk & since the insurer's agent did not know the facts, that policy never was in force.—*McGETTIGAN v. GUARDIAN ASSURANCE CO., LTD.*, [1936] 3 W. W. R. 345.—CAN.

v. — *"Occupied."*—By the terms of a policy, it covered the building insured "only while occupied, constructed & situated as described." A fire occurred while pltf. was not living in the building, though he had left some furniture & clothing there & no one else lived there:—*Held*: the property was not "occupied" within the meaning of the policy.—*LAMBERT v. ANGLO-SCOTTISH GENERAL COMMERCIAL INSURANCE CO.*, [1930] 1 D. L. R. 284; 64 O. L. R. 439.—CAN.

vi. —.]—Where the subject-matter of a policy of fire insurance is described as a certain building "only while occupied" for a specified purpose, as, e.g., "as a boarding & rooming house," the building is covered by the policy only so long as it is so occupied, & if at no time before the loss it so occupied the policy never attaches to the thing insured.—*SCHMIDT v. HOME INSURANCE CO. OF NEW YORK*, [1934] 1 W. W. R. 187; 2 D. L. R. 78; 41 Man. L. R. 537.—CAN.

sh. — *"Burning of prairie."*—*WEST RAND ESTATES, LTD. v. NEW ZEALAND INSURANCE CO., LTD.*, [1925] App. D. 245.—S. AF.

sk. — *Fire-proof safe.*—The ordinary or popular meaning of "fire-proof safe" is a safe which is reasonably regarded as capable of protecting the books, etc., from a fire which may occur on the premises where the safe is kept.—*GANGAT v. LICENCES & GENERAL INSURANCE CO., LTD.*, [1933] N. L. R. 261.—S. AF.

sm. — *"Communicating."*—A policy of fire insurance was expressed to cover a certain brick building " & its additions, communicating & in contact therewith . . . only while occupied as a restaurant." The brick building ceased to be used as a restaurant during the term of the policy. In contact therewith, at the rear, was a one-storey frame building occupied as living quarters. There was a solid brick wall between the two buildings; to enter the residence from the restaurant it was necessary to go out of doors. The whole structure had been used as a unit in operating the restaurant. A fire destroyed the living quarters & damaged the restaurant:—*Held*: the living quarters were "additions communicating & in contact" with the restaurant.—*MILLER v. PORTAGE LA PRAIRIE MUTUAL INSURANCE CO.*, [1936] 2 W. W. R. 104; 2 D. L. R. 787.—CAN.

### PART III. SECT. 7, SUB-SECT. 3.

2629 v. —.]—A condition, that the insurer is not liable for loss "if any subsequent insurance is

2610. *Add. Annotation*:—*Refd. Stumbles v. Whitley* (1929), 46 T. L. R. 37.

2622. *Add. Annotation*:—*Refd. Versicherungs Und Transport Aktiengesellschaft Daugava v. Henderson* (1934), 151 L. T. 392.

effected with any other insurer, unless & until the insurer assents thereto," is not applicable so as to defeat the insured's claim for loss, merely because, without the insurer's assent, he subsequently obtains from another co. a policy which never attaches by reason of the application of the condition therein, that "the insurer is not liable for loss if there is any, prior insurance with any other insurer."—*HOME INSURANCE CO. OF NEW YORK v. GAVEL*, [1927] 3 D. L. R. 929; [1927] S. C. R. 481.—CAN.

r (p. 320) i. — *Loss between issue of cover note & policy—Whether conditions of policy applicable.*—*NICHOLSON v. THE SOUTHERN STAR FIRE INSURANCE CO., LTD.* (1927), 28 S. R. N. S. W. 124; 45 N. S. W. N. 35.—AUS.

d (p. 320) i. — *On change of nature of occupation on insured premises.*—*WEST RAND ESTATES, LTD. v. NEW ZEALAND INSURANCE CO., LTD.*, [1925] App. D. 245.—S. AF.

ee (p. 320) i. —.]—*MISSISSQUOI & ROUVILLE MUTUAL FIRE INSC. Co. v. EASTERN TOWNSHIPS TELEPHONE CO.*, [1928] 1 D. L. R. 526; 43 Que. K. B. 122.—CAN.

ee (p. 320) ii. —.]—The words "stored or kept" in statutory condition 5 (b) in Sched. B to Alberta Insurance Act, 1926, do not apply to gasoline which is in actual use & course of consumption for domestic purposes, where, at least, the amount so in use is less than one quart.—*HALL v. CONNECTICUT FIRE INSURANCE CO.*, [1931] 2 W. W. R. 200; 3 D. L. R. 329.—CAN.

ff (p. 320) i. —.]—*LONSBERRY v. TRANS-CANADA INSURANCE CO.*, [1932] 1 D. L. R. 351.—CAN.

kk. (p. 320) i. —.]—A fireman on an oil-burning tug, desirous of ascertaining for the information of the captain whether there was enough fuel oil in the boat to enable her to proceed with her journey without reloading, opened a manhole on the boat, lit a match, & held the burning match over the man-hole with a view to seeing the quantity of fuel oil in the tank. Instantly the vapour in the tank caught fire, an explosion occurred & the boat was in the midst of flames. Very substantial loss was sustained by appts., the owners of the tug, & they sued resps. upon a policy of fire insurance for the amount of their entire loss. Resps. contended that they were not liable for the loss attributable to explosion, but only for that part of the loss actually caused by fire. The policy contained the following printed clause: "Unless otherwise provided by agreement in writing added hereto this co. shall not be liable for loss or damage occurring . . . (g) by explosion or lightning, unless fire ensue, & in that event, for loss or damage by fire only":—*Held*: by the terms of the policy recovery by appts. must be limited to the proportion for fire damage as distinguished from explosion damage.—*SIN MAC LINES, LTD. v. HARTFORD FIRE INSURANCE CO.*, [1936] S. C. R. 598; 3 D. L. R. 412.—CAN.

d (p. 321) i. — *What amounts to—Not clause reducing amount of insurance by amount paid on previous claim.*—*PAULS v. NATIONAL UNION FIRE INSURANCE CO.*, [1932] 2 W. W. R. 558.—CAN.

d (p. 321) ii. — *Co-insurance clause.*—A co-insurance clause limiting

**2635. Add. Annotation:—As to (2) Apld. Symington v. Union Insc. Soc. of Canton (1928), 97 L. J. K. B. 646.**

**2650a. — Failure to disclose other claim in respect of different subject-matter.]—Pltf. & S., who carried on business in partnership, bought certain premises in their joint names. In 1928 S. ceased to be a partner, but the premises remained in the joint names & S. from time to time lent sums of money to pltf. to enable the business to carry on. In 1930 pltf. effected an insurance on the premises & fixtures, & certain business utensils & tools. The insurance was renewed year by year. In 1936 pltf. made a claim under the policy for damage by fire.**

liability in the case of other insurance on the property is a variation in the statutory conditions within Quebec Insurance Act, s. 241.—**REPUBLIC FIRE INSURANCE CO. v. G. M. STRONG, LTD., [1938] 2 D. L. R. 273.—CAN.**

**sd. Statutory condition as to proof of loss.—Compliance with.]—In an action on a fire insurance policy pltf. relied on as proof of loss what purported to be a statutory declaration solemnly declared before a comr. for oaths; & in order to support his motion to be allowed to amend the proof of loss so as to set up a value consistent with his representation of value in his application for the policy, pltf. swore that he had not appeared before said comr., that he had never declared to the truth of the claim & the statements in the declaration & that he had signed the form of proof of loss provided by deft. co. & had left it with his agents to fill in, & that a slip attached to the form & stating the reasons for claiming the amount which was claimed was not on the form when he signed it:—**Held:** there had been no compliance with statutory condition No. 15 as to proofs of loss.—**FULTON v. WAWANESA MUTUAL INSURANCE CO., [1932] 2 W. W. R. 412; affd., [1932] 3 W. W. R. 404; [1933] 1 D. L. R. 131; 26 Alta. L. R. 469.—CAN.****

**st. — Overestimate — Whether evidence of fraud.]—In an action on policies of fire insurance held that the fact that the amount awarded the insured was only about half the amount claimed in the proofs of loss did not necessarily compel the ct. to infer fraud.—**FEFFERMAN v. NEW BRUNSWICK FIRE INSURANCE CO., [1932] 2 W. W. R. 507; 4 D. L. R. 342; 26 Alta. L. R. 412.—CAN.****

**sk. — Waiver.]—Statutory condition 15 in Fire Insurance Policy Act, 1925, as to proofs of loss cannot be waived by the co. except in the manner prescribed in statutory condition 22, i.e., by a waiver "clearly expressed in writing, signed by an agent of the co."—**DUBINSKI v. STUYVESANT INSURANCE CO. OF NEW YORK, [1934] 1 W. W. R. 669; 3 D. L. R. 291; 42 Man. L. R. 145.—CAN.****

#### PART III. SECT. 7, SUB-SECT. 4.

**fl. — Exception from liability for loss by theft—Truck stolen & burnt.—Onus of proof on company.]—**LUCIANI v. BRITISH AMERICA ASSURANCE CO., [1931] 1 D. L. R. 166; 65 O. L. R. 687.—CAN.****

**fi. — Exemption from liability for loss or damage resulting from earthquake or abnormal conditions arising therefrom.—Consideration of results of earthquake.]—**WAIROA FARMERS CO-OPERATIVE MEAT CO., LTD., & BANK OF NEW ZEALAND v. NEW ZEALAND INSURANCE CO., LTD. (1931), 7 N. Z. L. J. 267.—N.Z.****

**f. iii. — Fire after explosion.]—Insured cannot recover under a policy against "direct loss or damage by**

fire, or caused by the explosion of coal or natural gas whether fire ensues or not, or by fire caused by any other explosion," where fire has not preceded the explosion & there is no evidence of what caused it.—**MORTGAGE CORPN. OF NOVA SCOTIA v. LAW UNION & ROCK INSCE. CO., [1936] 4 D. L. R. 401; affd., [1937] S. C. R. 74.—CAN.**

#### PART III. SECT. 7, SUB-SECT. 5.

**n i. —.]—In an action on a policy of fire insurance a defence that the fire was of incendiary origin to the knowledge of pltf. must in order to amount to a charge of arson allege that the insured was in some way connected with it; but, in order in such an action to find that the insured was guilty of arson, it is not necessary that the evidence should be such as would be sufficient to procure his conviction on a criminal prosecution.—**ETTERMAN v. LONDON & SCOTTISH INSURANCE CORPN., LTD., ETTERMAN v. WAWANESA MUTUAL INSURANCE CO., [1935] 3 W. W. R. 70; revid. [1936] 2 W. W. R. 513; 4 D. L. R. 43.—CAN.****

**n ii. —.]—In the case of a defence of arson in an action on a fire insurance policy the presumption is against the crime which must be proved by a preponderance of evidence.—**ITALIAN REALTY CO. v. GUARDIAN ASSURANCE CO., [1935] 2 D. L. R. 425; 9 M. P. R. 137.—CAN.****

**n iii. — Onus.]—Where a defence of arson is set up by an insurance co. the onus is on the co. to prove circumstances which exclude any other explanation.—**ROTHSTEIN v. SENTINEL FIRE INSC. CO., [1936] 1 D. L. R. 310.—CAN.****

#### PART III. SECT. 9, SUB-SECT. 1.

**2650 ii. —.]—In 1925 pltf. made two proposals for fire insurance with deft. co., each containing the question, "Have you or your husband ever been a claimant on a fire insurance office or had a fire?" In one proposal the answer supplied was "Fire in 1914 from adjoining shops, Throssell Street, Collie," & in the other "known to company." Pltf. had lived apart from her husband for many years, & he had died in 1923. The husband had had one fire in 1898 & another in 1917. In the case of the first fire he had been convicted of arson, & the insurance co. concerned had refused to pay insurance in respect of the second fire:—**Held:** the answer was untrue.—**BRADBURY v. LONDON GUARANTEE & ACCIDENT CO., LTD., [1928] W. A. L. R. 38.—AUS.****

**g (p. 324) i. — Concealment of increased risk.]—**SMITH v. AMERICAN EQUITABLE ASSURANCE CO., [1931] 2 D. L. R. 830.—CAN.****

**m (p. 324) i. — Insurance by partnership.—Concealment of previous loss by partners individually.]—A policy of insurance against fire over the mer-**

chandise stock of pltf. who were carrying on business in partnership was effected with deft. co. The proposal form contained a question: "Has proponent, either individually or as a member of a partnership or co., or his or her wife or husband, ever had property damaged or destroyed by fire?"—**Held:** the question referred not only to loss in respect of the partnership property, but also to loss suffered by the partners individually before the formation of the partnership.—**NICHOLAS & BARNETT v. NEW ZEALAND INSC. CO., [1930] N. Z. L. R. 699.—N.Z.**

**m (p. 324) ii. — Unintentional non-disclosure.]—The inadvertent & unintentional non-disclosure of a material fact is not a "fraudulent" omission within Insurance Act, R. S. O., 1927.—**GINSBERG v. NEW YORK FIRE INSC. CO., [1937] 4 D. L. R. 585; O. R. 715.—CAN.****

**m (p. 324) iii. — Must be fraudulent.]—To avoid a policy of fire insurance it is necessary that non-disclosure of a material fact should be fraudulent.—**KOZA v. SEA INSURANCE CO., [1937] 4 D. L. R. 783.—CAN.****

**bb (p. 324) i. —.]—The fact that the party insured had two previous fires is a material fact which should be made known to the insurer.—**MELVIN v. BRITISH AMERICAN ASSURANCE CO., [1933] 1 D. L. R. 678; 6 M. P. R. 438.—CAN.****

**bb (p. 324) ii. —.]—A policy is void *ab initio* by reason of the failure to disclose a previous fire & the refusal of the co. in consequence to continue the insurance.—**SHERMAN v. AMERICAN INSURANCE CO., [1937] 4 D. L. R. 723.—CAN.****

**nn (p. 325) i. — Statement that applicant "owner" & property free from incumbrance.—Applicant purchaser under agreement & property subject to vendor's lien.—Policy vitiated by second representation.]—**BURBIDGE v. HALIFAX FIRE INSURANCE CO., [1931] 1 D. L. R. 818; 2 M. P. R. 479; aff., [1930] 4 D. L. R. 763.—CAN.****

**pp (p. 325) i. —.]—**SPEARLING v. GERMANIC FIRE INSURANCE CO., [1932] 2 D. L. R. 634.—CAN.****

**q (p. 326) i. —.]—Where an insurer against fire describes his property as brick when in fact it contains a substantial amount of timber, this amounts to a material misdescription, for wooden buildings in the east are highly inflammable.—**VULCAN INSURANCE CO. v. DAWSONS BANK (1933), 1 L. R. 11 Ran. 266; affd., 1 L. R. 13 Ran. 63, P. C.—IND.****

**sk. Application of statutory condition.—Necessity for fraud.]—In an action upon a fire insurance policy the defences were that when applying for the insurance pltf. failed to disclose certain material facts & that no valid contract of insurance ever became binding on deft. co. The non-dis-**

of a different subject-matter, nor was he bound to disclose the fact that another insurance co. had declined to renew an insurance upon a different subject-matter. Pltf. was not bound to disclose S.'s insurance history; (2) pltf.'s claim for the catalogue price of new goods to replace those lost in the fire was not fraudulent, but was merely a bargaining figure.—*EWER v. NATIONAL EMPLOYERS' MUTUAL GENERAL INSURANCE ASSOCN., LTD.*, [1937] 2 All E. R. 193; 157 L. T. 16; 53 T. L. R. 485.

- 2657. Add. Annotation:—***Consd. Looker v. Law Union & Rock Insce., [1928] 1 K. B. 554.*

**2860a.** — Insurance on premises—Concealment of refusal to insure car.]—The obligation on a person making a proposal for insurance against fire to disclose all material facts is not limited to matters exclusively relating to fire risks, but extends to any matter which would influence the judgment of the insurance co. in deciding whether to take or refuse the risk. The intending assured, in a proposal for fire insurance in respect of their premises, in answer to the question: "Has this or any other insurance of yours been declined by any other co.?" answered "No." Thereupon a policy was issued. It subsequently appeared that some time before that proposal the assured had applied to another co. for a policy on motor-cars, but the application was declined on the grounds of misrepresentation & non-disclosure of certain facts:—*Held*: the non-disclosure of this refusal of the motor car insurance was the non-disclosure of a material fact in the proposal for the fire insurance which therefore entitled the fire insurance co. to avoid the policy.—**LOCKER & WOOLF, LTD. v. WESTERN**

closure alleged was admittedly not fraudulent:—*Held*: deft. co. was not entitled to rescind the contract.—*KADISHEWITZ v. LAURENTIAN INSCR. CO.*, [1931] 4 D. L. R. 401; O. R. 529.—*CAN.*

*sm. Fraudulent omission.*]—In statutory condition 1 under sect. 98 of Insurance Act, R. S. O., 1927, voiding a policy if the appt. for insurance "misrepresents or fraudulently omits to communicate any circumstance which is material . . .," the word "fraudulently" connotes actual fraud.—*TAYLOR v. LONDON ASSURANCE CORPN.*, [1935] S. C. R. 422; 3 D. L. R. 129.—CAN.

**PART III. SECT. 9, SUB-SECT. 2.—C.**

t (p. 331) i. . . .]. During the term of a fire insurance policy on farm buildings, the insured, with his family, moved from the farm, & took up residence in a new home, intending to reside there permanently, to rent or sell the farm, which remained vacant. He gave no notice to the insurer of the vacancy. Within 30 days from the time the insured property became vacant, it was destroyed by fire.—*Held*: the insurer was liable on the policy. In view of statutory condition 5 (d) of Ontario Insurance Act, R. S. O., 1927, in the policy, vacancy for a period of 30 days was a risk contemplated by the policy & assumed by the insurer, & it was not open to the insurer to show that the mere fact of vacancy or non-occupancy for less than 30 days was a "change material to the risk" within statutory condition 7.—

**AUSTRALIAN INSURANCE Co., LTD., [1936]**  
1 K. B. 408; 105 L. J. K. B. 444; 154 L. T.  
667; 52 T. L. R. 293; 80 Sol. Jo. 185;  
41 Com. Cas. 342, C. A.

**Annotations :—***Consd. Ewer v. National Employers' Mutual General Insurance Assn., Ltd.*, [1937] 2 All E. R. 193.  
*Reid. Merchant's & Manufacturer's Insurance Co. v. Davies*, [1938] 1 K. B. 196.

**2870. Add. Annotation:—***As to (3) Consd. Provincial Insurance Co. v. Morgan (1932), 102 L. J. K. B. 164.*

**2703. Add. Annotation :—***Refd. Locker & Woolf v. Western Australian Insurance Co. (1936), 154 L. T. 667.*

2704a. **Within reasonable time—Whether condition precedent.]—**By the terms of a policy of fire insurance the conditions thereof were, “so far as the nature of them respectively will permit,” to be deemed to be conditions precedent to the right of the insured to recover. Condition IV. provided that on making a claim the insured should “give to the corpn. all such proofs & information with respect to the claim as may reasonably be required,” & that “No claim under this policy shall be payable unless the terms of this condition shall have been complied with.” A fire occurred on the claimant’s premises & he claimed to be indemnified by resp. corp’n. Resp. corp’n. repudiated liability, & the dispute was referred to arbn. The claimant used & controlled for the purposes of his business certain bank accounts in the name of his mother. Resp. corp’n. repeatedly, both before & during the arbn., requested the claimant to furnish them with information as to these accounts; but the claimant failed to disclose the said accounts until he was under cross-examination during the arbn. proceedings:—*Held*: Condition IV. was a condition precedent to the liability of the insurers, & the failure of the assured to give

LAURENTIAN INSURANCE Co. v. DAVIDSON, [1932] S. C. R. 491; 2 D. L. R. 750; *aff.*, [1931] 4 D. L. R. 720; O. R. 813.—CAN.

64 O. L. R. 521. — *CAN.*  
 64 O. L. R. 521. — *Removal of adjoining premises.* — Insurance on a barn. Defence, change in risk without notice to defendants. — *Held:* the removal of a farm dwelling-house from the neighbourhood of the barn, leaving the barn near a side road not much travelled & the removal of pltf. & his family from the farm leaving no one actually living in the house at the time of the fire were changes material to the risk within the condition in the policy. — WYDRICK V. SALTFLILET & BINBROOK MUTUAL FIRE INSURANCE CO., (1930) 1 D. L. R. 241: 64 O. L. R. 521. — *CAN.*

**PART III, SECT. 10, SUB-SECT. 1.**

2696 iii. Add citation:—*reversd.*, 44  
S. C. R. 40.

1 (p. 338) 1. ———— Agreement  
to pay claim of mortgagee.]—TAMSON  
v. PALATINE INSCR. CO., [1928] 2  
D. L. R. 867.—CAN.

p (p. 333) i. — *Insured arrested for arson.*—An insured under a policy of fire insurance was arrested for arson immediately after the fire & kept in custody, or under bail, for six months, when he was acquitted, & then endeavoured to comply with the insurer's requests for proof of loss. When the adjuster, who had been instructed to adjust the loss, learned of the criminal proceedings he had stayed his hand.—*Held:* the insured was relieved by reason of necessity & mistake from strict compliance with

the conditions in the policy as to furnishing proofs of loss.—*QUON v. BRITISH & EUROPEAN INSC. CO., LTD.*, [1928] 3 W. W. R. 545.—*CAN.*

(p. 333) 1. ———.] The document in question herein held to be not such a proof of loss as is required by clause 15 of the sched. to Fire Insurance Policy Act, 1925; since it did not declare that the account furnished by the insured was "just & true," but merely that it was "to the best of my knowledge & belief true," & it was not a solemn declaration.—*GLAGOVSKY v. NATIONAL FIRE INSURANCE CO. OF HARTFORD*, [1931] 1 W. W. R. 573.—CAN.

sa (p. 333) i. — — — — —.]  
In an action on a fire-insurance policy:  
*Held*: the defense that the proofs  
of loss contained "wilfully false"  
statements had not been established.  
In so concluding, consideration was  
given to the fact that def.'s adjuster,  
after taking possession of the premises  
had padlocked & barred them against  
the insured, & had carried off their  
books & vouchers & had refused to  
return them, & it was held that the  
insured should be treated as having  
been wrongly dispossessed of, &  
wrongly deprived of access to, the  
premises, & they had not had a reason-  
ably adequate opportunity to check  
over & appraise their loss. The fact  
that the adjuster had given the key  
to the landlord, without, however,  
notifying the insured that he had done  
so, did not extenuate the adjuster's  
"high-handed action."—*KIRKBY v.*  
*CANADIAN INDemnITY Co.*, [1933] 3  
*W. W. R.* 379.—CAN.

the information required within a reasonable time constituted a breach of that condition & a final bar to his claim.—*WELCH v. ROYAL EXCHANGE ASSURANCE*, [1938] 1 K. B. 757; [1938] 1 All E. R. 451; 107 L. J. K. B. 330; 158 L. T. 244; 54 T. L. R. 427; 44 Com. Cas. 27; *affd.* [1938] 4 All E. R. 289 C. A.

2718. *Add. Annotation*:—*Consd. Lake v. Simmons* (1926), 95 L. J. K. B. 586.

2732. *Add. Annotation*:—*Refd. Israelson v. Dawson* (1932), 102 L. J. K. B. 387.

2738. *Add. Annotations*:—*Consd. Bell v. Lever Bros., Ltd.*, [1932] A. C. 161. *Refd. Moolla*

(M. E.) Sons, Ltd. *v. Burjorjee* (P. R.) (1932), 48 T. L. R. 279; *Ley v. Hamilton* (1934), 151 L. T. 360.

2739. *Add. Annotation*:—*Refd. Versicherungs Und Transport Aktiengesellschaft Daugava v. Henderson* (1934), 151 L. T. 392.

2740. *Add. Annotation*:—*Generally, Refd. Lake v. Simmons* (1926), 95 L. J. K. B. 586.

2754. *Add. Annotation*:—*As to* (2) *Apld. Halifax Building Society v. Keighley*, [1931] 2 K. B. 248.

2767. *Add. Annotation*:—*Refd. Page v. Scottish Insee. Corpn.* (1929), 98 L. J. K. B. 308.

### PART III. SECT. 10, SUB-SECT. 2.

*s. 1. — Prior insurance disclosed.*—An insurer is not entitled to limitation of liability under Fire Insurance Policy Act, 1930 (N. S.) because of the existence of prior insurance which has been disclosed to him.—*REID v. HOME INSURANCE CO.*, [1936] 1 D. L. R. 676; 10 M. P. R. 84; 5 F. L. J. (Can.) 245.—CAN.

*s. 1. — By lumber company—Acceptance of customary arbitrary figure by jury—Validity.*—In an action in British Columbia, by lumber manufacturers upon policies providing that in the event of a fire upon the insured's premises causing a suspension of business the insurers would be liable to them in respect of the fixed charges & expenses of the business "to the extent only that such fixed charges & expenses would have been earned had no fire occurred" the jury, in valuing the stock-in-trade at the beginning & at the end of the period of suspension, can properly apply the arbitrary figure of \$15 per thousand feet, which is recognised widely in the industry & accepted by the income tax authorities, in the absence of evidence that in the particular case the application of that figure would be unjust or unreasonable.

*Qu.*: whether the above cited words of the policies prevent the insured from recovering thereunder unless he proves that but for the fire there would have been earned, not only part of the fixed charges & expenses, but also all other revenue charges necessary for the conduct of the business.—*MOUNT ROYAL ASSURANCE CO. v. CAMERON LUMBER CO., LTD.*, [1934] A. C. 313; 103 L. J. P. C. 34; 151 L. T. 23, P. C.—CAN.

*m. 1. —*—*MATERGIO v. CANADA ACCIDENT & FIRE ASSURANCE CO.*, [1926] 1 D. L. R. 1002; 58 N. S. R. 415.—CAN.

*q. 1. — Right of umpire to hear witnesses.*—An umpire under Insurance Act, R. S. O., 1927, may hear witnesses.—*RE LIONI & CO., & GLOBE RUTGERS INSURANCE CO.*, [1933] 3 D. L. R. 316.—CAN.

*q. 11. —*—It is only when replacing is something that a reasonable man would do that replacement value can properly be taken as a guide to the value of insured premises destroyed by fire. "Actual value" of the destroyed premises means value to the insured.—*SCHMIDT v. HOME INSURANCE CO. OF NEW YORK*, [1933] 3 W. W. R. 285; *affd.*, [1934] 1 W. W. R. 187; 2 D. L. R. 78; 41 Man. L. R. 637.—CAN.

*sn. After recovery of judgment against railway company responsible for fire—*9 *Edw. 7, c. 32, s. 9.*—*BANTING v. WESTERN ASSURANCE CO., BANTING v. LAW UNION & CROWN MORTGAGE CO.* (1911), 21 Man. L. R. 142.—CAN.

*so. Expenses of adjuster—Right of insurer to deduct.*—*MORIE & CAMPBELL, WILSON & HORNE, LTD. v. WORLD FIRE & MARINE INSUR. CO.*, [1928] 1 D. L. R. 1040; [1928] 1 W. W. R. 748.—CAN.

*sp. Amount of insurable interest at*

*time of loss—Agreement for sale of property—Part payment received.*—*WEEKS v. CUMBERLAND FARMERS' MUTUAL FIRE INSURANCE CO.*, [1930] 4 D. L. R. 588.—CAN.

*sw. Insurance against loss of profits.*—Fire insurance policies on a lumber mill provided that if the plant insured should be destroyed or damaged by fire "necessitating a total or partial suspension of business" resp. should be indemnified for the actual loss sustained, commencing with date of fire, consisting of "such fixed charges & expenses as must necessarily continue during a total or partial suspension of business to the extent only that such fixed charges & expenses would have been earned had no fire occurred." The policies provided for a *per diem* liability during total suspension limited to the actual loss sustained not exceeding 1/300 of the amount of the policy for each business day lost, due consideration to be given "to the experience of the business before the fire & the probable experience thereafter." They also fixed a maximum amount that might be recovered *per diem*. With respect to the evidence of cost of production, *pltf.*, the insured, contended that a fixed arbitrary value, *viz.* that authorised by the Dominion government for income tax purpose, might be taken. The insurers contended that the jury should find the real cost of production by taking all the accounting factors into account.—*Held*: the jury were justified in adopting the arbitrary figure.—*CAMERON LUMBER CO., LTD. v. MOUNT ROYAL ASSURANCE CO.*, [1933] 2 W. W. R. 129; *affd.*, [1934] 1 D. L. R. 785; 1 W. W. R. 193, P. C.—CAN.

*sz. Actual value—Old buildings.*—Where old buildings are destroyed by fire, then actual value & not the cost of replacement should be considered in estimating the loss.—*VANDERBURGH v. ONEIDA FARMERS' MUTUAL FIRE INSURANCE CO.*, [1935] 1 D. L. R. 257; O. R. 67.—CAN.

### PART III. SECT. 12.

*s. 1. —*—The holder of a fire policy subject to the statutory condition & of Fire Insurance Policy Act, 1930 (N. S.), who insures with a second insurer can claim for 60 per cent. of his loss from the first insurer only, & this insurer pays a ratable proportion of the 60 per cent. with the second insurer.—*Re GERHARDT'S INSURANCE, GERHARDT v. BRITISH EMPIRE ASSURANCE CO.*, [1933] 2 D. L. R. 617; 6 M. P. R. 449.—CAN.

PART III. SECT. 13, SUB-SECT. 2.—A. 2740 *11. —*—*SWIFT v. NEW ZEALAND INSURANCE CO., LTD.*, [1927] V. L. R. 249; 48 A. L. T. 182; [1927] Argus L. R. 194.—AUS.

### PART III. SECT. 13, SUB-SECT. 2.—B.

*11. — Purchaser of property subject to mortgage—Although fire before registration of transfer.*—*ROYAL INSURANCE CO., LTD. v. MYLIUS* (1926), 38 C. L. R. 477; [1927] V. L. R. 1.—AUS.

*111. —*—*]*—Since it is evident that Saskatchewan Insurance Act, R. S. S., 1930, was intended to provide a complete code respecting the law of insurance in the province of Saskatchewan, it follows that whatever may have been the state of the law prior to the time when said Act came into force it alone must be looked to for the purpose of determining the rights of any persons arising thereunder. It contains no provisions similar to that of the Imperial Act of 14 Geo. 3, c. 78, & sect. 83 of that Act is no longer in force in Saskatchewan. Therefore, since the right to rebuild insured premises destroyed by fire is confined by the statutory provisions of said Saskatchewan statute to the insurer, no other person, *e.g.* as in this case, an equitable mortgagee can demand of the insurer that the insurance moneys shall be applied to rebuilding the premises instead of paying them to the insured or his assignees.—*ROYAL BANK OF CANADA v. PISCHKE & TRADER'S FINANCE CORPN.*, [1933] 1 W. W. R. 145.—CAN.

*1111. — Delay in reinstatement—Right to claim loss of rent & profits.*—Pursuant to Imperial Acts Application Act, 1922, s. 49, *pltf.*, as a person interested in or entitled to buildings which had been destroyed by fire, requested *def.* insurance co. to cause the money for which such buildings had been insured to be laid out or expended as far as the same would go towards rebuilding or reinstating the buildings. *Def.* failed to comply with the request within a reasonable time. *Pltf.*, having established his right to compliance claimed to be entitled to damages for loss of rent & profits occasioned by *def.*'s default.—*Held*: the sect. conferred on *pltf.* no right beyond that to have the money laid out or expended as far as it would go towards rebuilding or reinstating the buildings.—*MYLIUS v. ROYAL INSURANCE CO., LTD.*, [1928] V. L. R. 126; [1928] Argus L. R. 98.—AUS.

*sq. Effect of avoidance of policy.*—*Held*: the insurance moneys referred to in Fire Prevention (Metropolis) Act, 1744 (c. 78), s. 83, were those which were properly payable by the insurance co. upon adjustment pursuant to the policy, & if no moneys were payable by reason of the avoidance of the policy, then there was nothing upon which the lessor's claim to reinstatement could operate.—*AUCKLAND CITY CORPN. v. MERCANTILE & GENERAL INSEC. CO., LTD.*, [1930] N. Z. L. R. 809.—N.Z.

### PART III. SECT. 14.

*n. 1. — Assignment.*—The right of a person insured against fire to recover damages against a tort-feasor can be assigned to the insurer to the extent to which it has indemnified the insured. If the insurer has indemnified the insured to the extent of his whole claim against the tort-feasor & obtains an assignment of all of the insured's rights & causes of action against him, the insurer may sue him in its own

2771a. Claim for repayment—& costs of investigating fraudulent claim.]—LONDON ASSURANCE v. CLARE, ADAIR v. CLARE, BRITISH

EQUITABLE ASSURANCE CO., LTD. (CONSOLIDATED) v. CLARE (1937), 81 Sol. Jo. 258.

## Part IV.—Life Insurance.

2780a. Policy—Endorsement altering amount payable—Whether stamp necessary.]—An industrial policy of life assurance for £12 8s. was granted to a person whose age therein was stated as fifty-one next birthday. Subsequently the assured informed the insuring co. that she had wrongly stated her age, which was forty-nine next birthday. This alteration, on the co.'s tables, involved the payment of a larger sum on death. The co. accordingly endorsed on the policy a memorandum that having received notice that "the age of the person whose life is assured

by the within policy . . . has been incorrectly stated . . . the sum within assured is adjusted to £13 12s. in accordance with the tables of the co." :—*Held* : the memorandum was a separate policy for the difference between these two sums, & must bear an *ad valorem* stamp.—PRUDENTIAL ASSURANCE CO., LTD. v. INLAND REVENUE COMRS., [1935] 1 K. B. 101; 104 L. J. K. B. 195; 152 L. T. 214.

2789. Add. Annotation :—*Apld. Re* National Benefit Assurance Co., [1931] 1 Ch. 46.

name without joining the insured as a plaintiff. But where no such complete assignment has been made & the insured has been indemnified only in part, the insurer cannot maintain an action for damages for the tort without joining the insured.—LONDON GUARANTEE & ACCIDENT CO., LTD. v. NORTH-WESTERN UTILITIES, LTD., [1932] 2 W. W. R. 430.—CAN.

### PART III. SECT. 15.

2769 i. Right to—Moneys made payable to third party in policy.]—*Re* WILNER, [1928] 2 D. L. R. 396.—CAN.

2769 ii. —Insurance by administrator beneficiary as owner—Whether estate entitled to proportionate part.]—FULLERTON v. PHILADELPHIA FIRE ASSOCN., [1929] 1 D. L. R. 543; 60 N. S. R. 294.—CAN.

2769 iii. —Insurance effected by mortgage—Loss payable to third party—Order of distribution.]—Under an agreement for the sale of land mortgaged to a co. the purchaser assumed payment of the mtg. & covenanted to insure the buildings on the land with loss payable to the vendor. Part of the purchase-money was advanced by the mtgee, which took from the purchaser as security an assignment of his interest in the land & in the agreement for purchase. The mtgee. then insured the buildings under a policy in which said purchaser was made the assured, & the loss was made payable to itself & the vendor as their interests might appear :—*Held* : although the mtgee. was not legally obliged to insure for the vendor's protection, yet as it had done so by the wording of the policy, he had the right to take advantage of its provisions in his favour, & in the distribution of the insurance moneys the mtg. co. as mtgee. ranked first, the vendor's lien for unpaid purchase-money came next, & the mtg. co. as assignee of the purchaser's interest was third.—*Re* McMILLAN ESTATE & CALGARY BREWING & MALTING CO., LTD. (Alta.), [1929] 4 D. L. R. 940; 3 W. W. R. 202.—CAN.

1. Insurer without interest—Money not held on trust.]—Where property is insured against fire by a person having no insurable interest in it, he does not hold policy moneys paid him on trust, since he has no title at all to such moneys.—RHINELANDER v. MONT (1933), 2 D. L. R. 508; 6 M. P. R. 273.—CAN.

2. Right to—Mortgagee.]—A mtgee. is a person to whom any part of insurance money is payable.—MCNAVIN v. WESTERN ASSURANCE CO., [1935] 3 D. L. R. 557.—CAN.

3. Order for payment into court—When obtainable—Conflicting claims.]—Sect. 183a of Alberta Insurance Act, 1926, does not apply to the case where there are adverse claims to the fund for which the insurer admits liability.—*Re* SASKATCHEWAN MUTUAL FIRE INSURANCE CO. & BENNER, [1936] 1 W. W. R. 391; 5 F. L. J. (Can.) 307.—CAN.

4. Payment to municipality for unpaid taxes.]—Sect. 123 of Assessment Act, 1934, provides that where taxes are unpaid on insured property damaged by fire the amount payable to "the insured" shall to the extent of the taxes be paid to the municipality. It does not define "the insured". :—*Held* : "the insured" means a person who would be the insured "within Manitoba Insurance Act, 1932, & the sect. applies only to moneys payable to "the insured", & not to those payable to third parties such as mtgees.—BANK OF TORONTO v. WEST KILDONAN RURAL MUNICIPALITY, [1936] 24 Man. L. R. 431; [1937] 1 W. W. R. 416; 1 D. L. R. 331.—CAN.

### PART IV. SECT. 3.

1. Application for special policy—Ordinary policy sent.]—Where an appct. for life insurance applies for a certain special kind of insurance he is not bound to accept anything but a policy on that special plan, even though the co. knows that he wishes to get ordinary insurance if he cannot have the special kind asked for, & therefore, where the co. sends him an ordinary policy no contract comes into existence if he dies before there is an opportunity of his assenting thereto.—SCHUMLAND v. SASKATCHEWAN LIFE INSURANCE CO., [1934] 2 W. W. R. 13 D. L. R. 211.—CAN.

### PART IV. SECT. 4, SUB-SECT. 1.

1. Application of statute—Insurance on one's life—For benefit of another.]—*Re* MORRIS, HATTER v. BOWMAN'S ELDERS, SUPPLIES (Ont.), [1927] 1 D. L. R. 805.—CAN.

### PART IV. SECT. 5.

1. The mere fact that a life insurance policy names a beneficiary, where at least the beneficiary is not within the class of "preferred beneficiaries," does not give him the beneficial interest in the insurance money.—CANADIAN CREDIT MEN'S TRUST ASSOCN., LTD. (PALLESSEN DAIRY & CREAMERY CO., LTD.) v. TOOLE PEET TRUST CO. (PALLESSEN ESTATE), [1937] 1 W. W. R. 262; 2 D. L. R. 45; 6 F. L. J. (Can.) 291.—CAN.

2. Under the Act to secure to wives & children the benefit of life insurance, R. S. O. 1887, c. 136, s. 6 (1), as amended by 51 Vict. c. 22, s. 3, & 53 Vict. c. 39, s. 6, the insured has no power to declare by his will that others than those for whose benefit he has effected the policy or declared it to be, shall be entitled to the insurance money, nor to apportion it among others than those for whose benefit he has effected the policy or declared it to be.—*Re* GRANT (1895), 26 O. R. 120.—CAN.

3. *Re* MURPHY, [1932] 2 D. L. R. 588.—CAN.

4. *Who may contest.*—Where there is a change of beneficiary the validity of the change can only be contested by the former beneficiary or those claiming under him.—BELAND v. BEAUDOIN & TRAVELLERS INSC. CO., [1938] 1 D. L. R. 804.—CAN.

5. *Insurance for benefit of named wife & daughter—Death of wife—Second wife not designated.*—L. was insured by the society for \$2,000, payable to "my wife," naming her, "one-half," & the other half to his daughter. His named wife predeceased him, & he married again. His second wife & daughter both survived him. He made no change in the designation of beneficiaries :—*Held* : his second wife was entitled to the \$1,000 made payable to "my wife."—*Re* LLOYD & ANCIENT ORDER OF UNITED WORKMEN (1913), 29 O. L. R. 312 5 O. W. N. 5.—CAN.

6. *A husband effected a policy of assurance on his life under the provisions of the Life, Fire & Marine Insurance Act, 1902. The policy was expressed to be "for the absolute benefit of the wife of the assured in the event of the assured reaching the selected age of maturity of the policy during her lifetime, or should she become the assured's widow, failing which for such of the children of the assured as shall be alive when the policy moneys become payable." The wife divorced her husband, & he married again. The husband died. The only child was that of the first marriage :—*Held* : the policy moneys went to the child.—*Re* BEST (1936), 36 S. R. N. S. W. 58; 53 N. S. W. W. N. 44.—AUS.*

7. *Effect of wife's death.*—A husband effected a policy of assurance on his life under the provisions of Life Assurance Cos. Act of 1901, of Queensland, which is substantially identical with the Life, Fire & Marine Insurance Act, 1902, of New South Wales.



**2826. Add. Annotation:—Folld. Re Gladitz, Guaranty Executor & Trustee Co. v. Gladitz, [1937] 3 All E. R. 173.**

**2835. Add. Annotation:—Refld. Beresford v. Royal Insurance Co., [1937] 2 K. B. 197.**

The policy was expressed to be "for the absolute benefit of the wife of the assured should she become the assured's widow, falling which for the absolute benefit of such of the children of the assured as shall survive the assured, & attain the age of twenty-one years." The wife died, & the husband married again. There were children only of the first marriage. The husband died:—*Held*: the policy moneys went to the children.—*LODGE v. DOWIE* (1936), 36 S. R. N. S. W. 52; 53 N. S. W. W. N. 47.—*AUS.*

**r i.** — *Subsequent bequest of policies in trust for wife & mother.*—Testator obtained two policies of insurance upon his life & designated his wife as beneficiary in both policies. Subsequently, in his will, he directed that his policies should be held in trust for the use & benefit of his wife & mother upon the same trusts as if the proceeds had formed part of the residue of his estate:—*Held*: this altered the designation of the wife as preferred beneficiary to the limited extent of giving effect to the interest conferred on the mother by the will.—*Re MACINNES*, [1934] 3 D. L. R. 302; O. R. 371; [1935] 1 D. L. R. 401.—*CAN.*

**r ii.** — *A wife who is a preferred beneficiary, & who is named as beneficiary under a policy providing for the total disability of the insured, is entitled to the policy moneys, which must be held in trust for her by the husband or his representative.*—*Re GOODERHAM*, [1935] 2 D. L. R. 329.—*on appeal, sub nom. TORONTO GENERAL TRUSTS CORP. v. GOODERHAM*, [1936] S. C. R. 149; 2 D. L. R. 545; 6 F. L. J. (Can.) 37.—*CAN.*

**r iii.** *Insurance for benefit of intended wife—Followed by marriage—Valid.*—*Re WYTHE*, [1927] 2 D. L. R. 1161; 60 O. L. R. 323.—*CAN.*

**a i.** — *Subsequent bequest including insurance.*—Testator used these words: "I give, devise, & bequeath unto my wife, M., one-half of all the rest & residue of my estate, both real & personal, of whatever nature & wheresoever situate, including insurance, & I give, devise, & bequeath the balance of my estate unto my children, E., K., & J., or their heirs in equal shares." Prior to the execution of his will testator took out a policy of life insurance on his own life & prior to the execution of the will this policy was made payable to M., testator's wife:—*Held*: above clause did not operate as a declaration in favour of the children of any part of the insurance moneys.—*Re GRINDLAY*, [1933] O. R. 28; 1 D. L. R. 318.—*CAN.*

**a ii.** — *Re ROGERS* (1935), 5 F. L. J. (Can.) 100.—*CAN.*

**sq.** *Insurance for benefit of six named children—Death of three—Alteration of will.*—A person insured his life for the benefit equally of six of his children, three of whom died without issue in his lifetime. By his will he altered the shares of the three survivors, giving a portion to another child & portions to four grandchildren, & caused the policies to be cancelled & re-issued payable to "his exors. in trust," & died in 1894, while R. S. O. 1887, c. 136, was in force:—*Held*: the apportionments to the four children were valid, but those to the grandchildren, while valid as legacies, were invalid as against creditors.—*McINTYRE v. SLOOCH* (1898), 29 O. R. 593; *affd.* (1899), 30 O. R. 488.—*CAN.*

**sr.** *Insurance for benefit of children—*

*Names struck out—Re-marriage—Right of children to take.*—*Held*: insured's attempt to cancel or alter the declaration designating his children as beneficiaries was ineffective.—*Re JAMIESON & INDEPENDENT ORDER OF FORESTERS*, [1931] 2 D. L. R. 404; 66 O. L. R. 487.—*CAN.*

**st.** *Invalid change of beneficiary—Collection of moneys by first beneficiary on behalf of second—Duty to pay over.*—*ZWICKER v. PETTINGILL*, [1931] 2 D. L. R. 95; 2 M. P. R. 465.—*CAN.*

**sx.** — *Declaration for purpose of defeating creditors.*—An action brought by a creditor of an insured after his death for a declaration that the designation by the insured of his wife as a preferred beneficiary was fraudulent & void, as having been made with intent to defeat creditors, was dismissed on the ground that the money became the property of the wife absolutely & therefore, his creditors were not prejudiced.—*ROYAL BANK v. DUMART*, [1932] 3 D. L. R. 430; O. R. 661.—*CAN.*

**sy.** *Whether declaration applicable to new policy.*—*Defn.*, the widow, contended that the insurance proceeds were subject to a trust in favour of herself & children because of a declaration made by the insured in purported compliance with Life Insurance Act. The policy in question was one which the insured had taken out in exchange for two policies then held by him. It was made payable to his exors., administrators & assigns. The declaration relied on was made in a testamentary document dated about a year previously, & it, the declaration, enumerated (*inter alia*) one of said two then existing policies. This will was found to be invalid because the witnesses had not signed in the presence of each other and probate was granted of an earlier will. The widow contended that the declaration applied to the new policy. When applying for the new policy the insured had signed documents relating to the then existing policies, in which he certified that they were "not now assigned." The application for the new policy was made subsequently to the letter of Jan. 14, in which the insured confirmed on behalf of himself & his wife the understanding that a life insurance policy was to be deposited as security for the performance of the lease. The policy was not, however, then deposited. The policy so deposited was the new policy. The widow's claim was not upheld.—*PORTAGE AVENUE DEVELOPMENT CO., LTD. v. DIAMOND*, [1932] 3 W. W. R. 81; 4 D. L. R. 376; 40 Man. L. R. 502.—*CAN.*

**sz.** *Insurance payable to "legal heirs."*—A policy of life insurance payable to testator's "legal heirs" is payable in Prince Edward Island to the estate to be administered by the exors.—*Re HARPER*, [1935] 4 D. L. R. 317; 8 M. P. R. 374.—*CAN.*

**ab.** *Policy payable to "heirs"—Meaning of.*—*HARPER v. CANADIAN ORDER OF FORESTERS* (1935), 5 F. L. J. (Can.) 116.—*CAN.*

**sd.** *Declaration—What amounts to—Statement in holograph will.*—An insured, his wife & infant son died of asphyxiation in the same disaster. He left a paper which, prior to this motion, had been granted probate as a holograph will. In it he directed payment of certain bills, & under the total thereof wrote "Insurance 2,961.00," & after directing that not

more than \$786 be spent "on our burial" added "paying 1,000 to mother." Under sect. 151 of Manitoba Insurance Act, 1932, the insured's wife was presumed to have died before him, the result being, his father having predeceased him & the deceased infant being his only child, that his mother was the only member of the class of preferred beneficiaries who survived him:—*Held*: the writing was a "declaration" within the said Act, & by it the mother was made a preferred beneficiary for \$1,000, but as to the amount which was listed among the bills to be paid as payable to her she should be treated merely as an ordinary creditor.—*Re RICHARDSON'S ESTATE*, [1936] 3 W. W. R. 142; 3 D. L. R. 121; 44 Man. L. R. 350.—*CAN.*

#### PART IV. SECT. 9, SUB-SECT. 1.—A.

**sv.** *Effect of Ontario Insurance Act, 1927—Doctrine limited to misrepresentations within knowledge of assured.*—The words "within his knowledge" in Insurance Act, R. S. O., 1927, sect. 125 (1) & the word "conscious" in sect. 125 (2) introduced in the revision of 1924, have the effect of modifying the doctrine stated in *Jordan v. Provincial Provident Institution* (1898), 28 Can. S. C. R. 554, to the extent of limiting misrepresentation & failure to disclose to such things as are within the knowledge of the insured & are material to the risk.—*ZIMMERMAN v. NORTHERN LIFE ASSURANCE CO. OF CANADA*, [1931] 2 D. L. R. 489; 66 O. L. R. 560.—*CAN.*

#### PART IV. SECT. 9, SUB-SECT. 1.—B.

**r i.** — *TURNER v. BRITISH COLUMBIA MUTUAL BENEFIT ASSOCN. (B. C.)*, [1927] 4 D. L. R. 541; [1927] 3 W. W. R. 341.—*CAN.*

**2855 vi.** — *Non-disclosure of a significant previous illness held a material misrepresentation.*—*PENTREATH v. HOME ASSURANCE CO.*, [1938] 1 D. L. R. 806.—*CAN.*

**2855 vii.** — *Failure to disclose treatment of disease a material misrepresentation.*—*J. P. v. ORDRE DES FORESTIERS, CATHOLIQUES*, [1938] 1 D. L. R. 807.—*CAN.*

**2855 viii.** — *A statement by the insured that she was in sound health, whereas she was in fact suffering from heart failure & pulmonary adema, is a "conscious" suppression of material facts & will avoid the policy.*—*BYRNE v. PRUDENTIAL INSURANCE CO.*, [1937] 4 D. L. R. 416; 12 M. P. R. 204.—*CAN.*

**2855 ix.** — *The failure of insured to disclose that he is suffering at the time of application for insurance, from angina pectoris, is evidence of misrepresentation.*—*PALTER v. GREAT WEST LIFE ASSURANCE CO.*, [1936] 2 D. L. R. 327.—*CAN.*

**a i.** — *Returned Soldiers' Insurance Act.*—R. applied for insurance under Returned Soldiers' Insurance Act, & printed on the form provided for the application for insurance were certain instructions, one reading: "Give full statement of illness or injury of a serious nature, etc." In his written application, in answer to the question "Are you in good health?" he answered "Yes," & the question "If not, what is the nature of your illness or injury?" he left unanswered. The policy issued on this application. R. at the time of applying was & had been for some time, to his knowledge, afflicted with a chronic valvular disease



be avoided if any statement in the proposal was untrue. The policy provided that it should be avoided by any "fraudulent or untrue" statement on the subject of the insurance, & that it should be subject to the rules of the society. These rules stated that the policy would be avoided if there were any fraudulent statement as to the health of the person whose life was insured. The claimant's father had heart disease, but the claimant, being unaware of this, stated in good faith on the proposal form that his father's health was sound. On the father's death resps. refused to pay the sum due on the policy. The claimant contended that, as the rules avoided the policy for fraud & did not avoid it for an innocent untruth, the latter had no effect:—*Held*: the claimant's misstatement was a warranty, that the word "untrue" in the policy included innocent misstatements, & the rules were not inconsistent with the other provisions of the contract, & therefore resps. were not liable on the policy.—*HOLMES v. SCOTTISH LEGAL LIFE ASSURANCE SOCIETY* (1932), 48 T. L. R. 306.

- 2859. Add. Annotation :—****Refd.** Provincial Insurance Co. v. Morgan (1932), 102 L. J. K. B. 164.
- 2862. Add. Annotation :—****Refd.** Holt's Motors, Ltd. v. South East Lancashire Insurance Co. (1930), 35 Com. Cas. 281.
- 2871. Add. Annotations :—****Consd.** Provincial Insurance Co. v. Morgan (1932), 102 L. J. K. B. 164. **Refd.** Beauchamp v. National Mutual Indemnity Insurance Co., [1937] 3 All E. R. 19.
- 2895. Citation :—**Add 24 T. L. R. 871, C. A.
- 2902. Add. Annotation :—****Refd.** Holt's Motors, Ltd. v. South East Lancashire Insurance Co. (1930), 35 Com. Cas. 281.
- 2906. Add. Annotation :—****Apld.** Looker v. Law Union & Rock Insce., [1928] 1 K. B. 554.
- 2907. Add. Annotation :—****Apld.** Looker v. Law Union & Rock Insce., [1928] 1 K. B. 554.
- 2907a. —.]—**On July 10 L. sent to defts. a proposal for an insurance on his life, in which he stated that he was "now free from serious disease or ailment." The proposal contained

of the heart, from which he later died. His widow now sues to recover the amount of the policy.—**Held:** (1) as the very basis of the contract of insurance was the information conveyed in the application therefor, R.'s concealment of the truth regarding his condition constituted in law a fraudulent misrepresentation which voided the policy; (2) the fact that R.'s heart condition was revealed in an application for pension, or in the report of a vocational officer, did not constitute a communication as to his condition to health or life insurance officers of the Dept. of Govt., charged with the administration of the Act here in question, & could not here be introduced as constituting an answer to the questions above mentioned.—**ROACH v. R.** [1931] Ex. C. R. 238.—**CAN.**

c 1. — *Of surrender value*—By agent.]—The life of S. was insured by a twenty-year endowment policy which provided that at the end of the term he could exercise one of three options, including that of surrender of the policy on receipt of a sum to be ascertained in a specified manner. About ten months before the policy expired he wrote to the co. asking for

the amount payable on surrender, which was promptly furnished, & more than a year later, he brought action for a larger cash payment & in the alternative for rescission of contract for insurance & return of the premium paid with interest alleging that when he applied for the insurance he was informed by the agent of the co. that the cash value of the policies surrendered would be the larger amount claimed.—*Held*: as S. did not swear nor the evidence he adduced establish that he was induced to enter into the contract by the representations of the agent that the sum payable on surrender & it might be ascertained that had he been given the true figures he would still have taken the policy, his action must fail.—*SHAW v. MUTUAL LIFE CO.* (1819). 48 S. C. R. 806.—*CAN.*

**PART IV. SECT. 9, SUB-SECT. 2.—D.**

2906 1. *Material alteration in health.*—A., after making a proposal for a policy of life insurance & undergoing, on Mar. 8, a medical examination, consulted a doctor the next day, & on his advice was, on Mar. 16, operated upon for hydrocele. On Mar. 15 the premium had been paid & a provisional

this declaration : " It is hereby declared that the above particulars are true, & it is agreed that this proposal & declaration shall be the basis of the contract of assurance." On July 15 defts. replied stating " The proposal made by you . . . has this day been accepted & if the health of the life proposed remains meanwhile unaffected, the policy will be issued on payment of the first premium. . . . The risk of the co. will not commence until receipt of the first premium, & the directors meanwhile reserve the power to alter or withdraw this acceptance." On July 21 L. began to feel ill, & on the next day a friend filled in a cheque for the first premium, which L. signed in bed. The cheque was not sent off till the evening of July 24, by which time L. was seriously ill with pneumonia. On July 26 defts. received the cheque, & thereupon they sent to L. a certificate of that date stating that the proposal had been accepted, & that upon the payment of the first quarterly premium a policy would be issued in due course. On July 27 L. died. His administrators sued defts. for the sum insured :—*Held* : (1) the acceptance of the proposal by defts. was made in reliance upon the continued truth of the representations therein, & as the risk had been materially increased between proposal & acceptance, a condition which defts. had made a condition going to the root of the contract had not been fulfilled ; (2) since contracts of insurance were contracts *uberrimæ fidei*, there was a duty of disclosure on the part of the assured to inform defts. of his change of health, which was a material change in the risk insured, & the position was here even stronger because defts. had inserted express terms in their documents to protect themselves.—*LOOKER v. LAW UNION & ROCK INSURANCE CO., LTD.*, [1928] 1 K. B. 554; 97 L.J. K. B. 323 ; 187 L. T. 648 ; 43 T. L. R. 691.

- 2917. Add. Annotation :—***As to* (2) **Refd. Jenkins v. Deane** (1933), 103 L. J. K. B. 250.
- 2918. Add. Annotation :—****Expld. Schlesinger & Joseph v. Mostyn**, [1932] 1 K. B. 349.
- 2920a. — Offer by mortgagee to pay.**—By the terms of a policy of insurance upon the life of the assured, the policy moneys were

receipt given, & on Mar. 20 the co.'s acceptance of the risk was posted. A. died from heart failure on Mar. 24. — **Held:** (1) non-disclosure of any material circumstances arising at any moment between the proposal & the completion of the contract avoided the contract; (2) the consultation on Mar. 9 & the operation were material facts, which A. ought to have communicated to the co. — **WALL v. SOUTHERN CROSS ASSURANCE CO., LTD.,** [1927] N. Z. L. R. 106. — **N-Z.**

**PART IV. SECT. 10.**

\* 1. — *Provided doctor not seen since medical examination—Effect of consultation—Policy never effective.*—*RITCHIE v. NEW YORK LIFE INSURANCE CO.*, [1930] 4 D. L. R. 790.—CAN.

sw. *Lapse—Whether policy resuscitated.*—*BIRKETT v. NORTHERN L. ASS'CE CO.*, [1927] 4 D. L. R. 91; 60 O. L. R. 666.—CAN.

**PART IV. SECT. 11, SUB-SECT. 1.**

2920 wil. ——— Cheque  
accepted subject to completion of applica-  
tion for restoration—Alleged writer of  
—Rosa v. IMPERIAL LIFE

expressed to be payable provided the insurance co. received the premiums on the dates specified, & it was provided that 30 days of grace were allowed for the payment of premiums. The policy was taken out as security for a loan, the mtge. providing that if the assured should at any time make default in payment of any of the premiums it should be lawful for the claimant to pay the same. On Apr. 9, 1936, the claimant, being aware of the assured's financial difficulties, called on the insurance co.'s district manager & offered to pay the premium for Mar. 15, 1936. The district manager declined this offer & said he was arranging for a cheque to be paid by the assured in a few days. On Apr. 17, 1936, the district manager received a cheque signed by the assured & post-dated to Apr. 23, 1936. The district manager in the premium account described this premium as outstanding. He did not state that the policy had lapsed. On Apr. 20, 1936, the assured died. The claimant claimed the policy moneys, but the insurance co. repudiated the policy on the ground that it had lapsed, owing to non-payment of the premium due on Mar. 15, 1936:—*Held*: (1) the insurance co. could not, in the circumstances, be heard to say that the premium due on Mar. 15, 1936, had not been tendered to it by the claimant on Apr. 9; (2) although it might not have been within the scope of the district manager's authority to waive the condition requiring payment of the premium on Mar. 15, 1936, or within 30 days thereafter, the insurance co. ought not, after the refusal of the premium, to be allowed to raise that question.—*FARQUHARSON v. PEARL ASSURANCE CO., LTD.*, [1937] 3 All E. R. 124.

**2937a.** — *Application of bonus to revive policy.* — *ROWAN v. ATLAS ASSURANCE CO., LTD.* (1928), 72 Sol. Jo. 285.

**2939.** *Add. Annotations*:—*Distd. Newsholme Bros. v. Road Transport & General Insnce. Co.*, [1929] 2 K. B. 356. *Refd. Evans v. Employers' Mutual Insurance Association, Ltd.*, [1936] 1 K. B. 505.

**2945.** *Add. Annotation*:—*Consd. Beresford v. Royal Insurance Co.*, [1937] 2 K. B. 197.

*ASSCE. CO., LTD. (Alta.)*, [1928] 3 W. W. R. 593.—*CAN.*

**2920 viii.** — *Policy not complying with application.*—Where appt. for a policy of life insurance paid an interim premium thereon covering the period expiring with the date fixed for payment of the annual premium, & the policy was delivered to him & he subsequently gave a promissory note for the full amount of the annual premium, which note was dishonoured, he was held liable on the note, even though the policy was not in the terms of the proposal therefor.—*GREAT WEST LIFE ASSURANCE CO. v. BELFHEY*, [1930] 3 W. W. R. 280; [1931] 1 D. L. R. 53; 25 Alta. L. R. 122.—*CAN.*

**2920 ix.** — *Necessity for presentment.*—If sect. 119 (2) of Manitoba Insurance Act, 1932, is relied on as a defence to an action on a policy the presentment of the note for payment either at or after its maturity must be specifically pleaded & proved.—*DYKACZ v. MONARCH LIFE INSURANCE CO.*, [1936] 2 W. W. R. 315; 3 D. L. R. 374; 44 Man. L. R. 189.—*CAN.*

**b i.** — *Indebtedness exceeding reserve value—Termination of policy.*—*TEASDALL v. SUN LIFE ASSURANCE CO. OF CANADA*, [1927] 2 D. L. R. 502; 60 O. L. R. 201.—*CAN.*

**d i.** — *Non-payment at maturity.*—Where a lapsed policy of term insurance on life was revived upon the insurer agreeing in a written document separate from the policy that the policy should be void on non-payment at maturity of a promissory note given for the premium, non-payment of the note was held to have terminated the contract.—*VALSH v. EXCELSIOR LIFE INSURANCE CO.*, [1935] 4 D. L. R. 183; *affd.*, [1936] 2 D. L. R. 107; O. R.

**sp.** *Notice of continuance as non-participating insurance—Error.*—Error of an insurance co. in inserting in its notice to assured a longer term for which a lapsed policy will be continued as non-participating insurance will not render it liable according to the tenor of the notice.—*COLWIN v. METROPOLITAN LIFE INSURANCE CO.*, [1936] 2 D. L. R. 263; O. R. 160.—*CAN.*

**2949.** *Add. Annotation*:—*Consd. Beresford v. Royal Insurance Co.*, [1937] 2 K. B. 197.

**2950.** *Add. Citations*:—*Affd.*, [1927] 1 Ch. 55; 95 L. J. Ch. 434; 135 L. T. 558; 42 T. L. R. 504, C. A.

*Add Annotations*:—*Refd. Royal London Mutual Insnce. Soc. v. Barrett*, [1928] Ch. 411; *Beresford v. Royal Insurance Co.*, [1937] 2 K. B. 197.

**2952.** *Add. Annotation*:—*Consd. Beresford v. Royal Insurance Co.*, [1937] 2 K. B. 197.

**2954.** *Add. Annotation*:—*As to (1) Distd. Royal London Mutual Insnce. Soc. v. Barrett*, [1928] Ch. 411.

**2955a.** — *Within one year from commencement of policy.*—The personal representative of a person, who, having insured his life, commits suicide while sane, cannot recover the policy moneys from the insurance co., for it would be contrary to public policy to assist a personal representative to recover the fruits of the crime committed by the assured. It makes no difference in law that the policy on its true construction binds the insurance co. to pay in the event of the assured's suicide while sane, after the expiry of a year from the commencement of the insurance, for the ct. will not enforce a provision which is illegal or contrary to public policy.—*BERESFORD v. ROYAL INSURANCE CO., LTD.*, [1938] A. C. 586; [1938] 2 All E. R. 602; 107 L. J. K. B. 464; 158 L. T. 459; 54 T. L. R. 789; 82 Sol. Jo. 431, H. L.

**2959.** *Add. Annotation*:—*As to (2) Consd. Beresford v. Royal Insurance Co.*, [1938] A. C. 586.

**2962a.** — *—*—An assurance co. issued a policy containing the following condition: "5. Suicides, etc. The policy shall be void if the life assured dies by suicide or by the hands of justice. In any such case the directors may allow to the policy-holder such part of the sum assured as they shall think fit, & the policy shall remain in force to the extent of the pecuniary interest of third parties *bonâ fide* acquired for valuable consideration, satisfactory proof of which will be required, provided notice thereof in writing shall have been received & admitted

#### PART IV. SECT. 11, SUB-SECT. 2.

**xx.** *Cancellation of re-insatement—What amounts to—Direction to insurer to apply funds to premiums of another policy.*—*McEWEN v. NORTH AMERICAN LIFE ASSCE. CO.*, [1930] 3 D. L. R. 526.—*CAN.*

#### PART IV. SECT. 11, SUB-SECT. 5.—A.

**a i.** — *Death in garage—Deceased working on motor vehicle while engine running—Deceased aware of danger from so doing.*—*Held*: on the evidence it was not a case of suicide.—*LONDON LIFE INS. CO. v. LANG SHIRT CO.'S TRUSTEE*, [1929] 1 D. L. R. 328; S. C. R. 117; 51 Can. Crim. Cas. 81; *revsq. S. C. sub nom. LANG SHIRT CO.'S TRUSTEE v. LONDON LIFE INS. CO.*, [1927] 3 D. L. R. 89; 60 O. L. R. 476.—*CAN.*

**xx.** *Onus of proof.*—The burden of proof is on the party alleging suicide, & a finding by the jury of accidental death, on facts consistent with accident or suicide, will not be disturbed.—*MADER v. SUN LIFE ASSURANCE CO.*, [1934] 4 D. L. R. 59; 7 M. P. R. 524.—*CAN.*

by the directors at least one month prior to the date of death." The co. advanced money to the assured on a mtge. of leasehold property & on assignment to them of the policy by way of security. It was provided by a clause in the mtge. that the co. should satisfy themselves primarily out of the policy money. The assured committed suicide, & the co. commenced an action against his extrix, for the purpose of enforcing their security:—*Held*: upon the true construction of clause 5, the expression "third parties" did not include the assurer, & the co. was entitled to proceed to enforce the security against the leasehold property, & the policy was void.—*ROYAL LONDON MUTUAL INSURANCE SOCIETY v. BARRETT*, [1928] Ch. 411; 97 L. J. Ch. 177; 139 L. T. 208; 44 T. L. R. 363; 72 Sol. Jo. 240.

2966. *Add. Annotation*:—*Consd.* Royal London Mutual Insce. Soc. v. Barrett, [1928] Ch. 411.

2968. *Add. Annotation*:—*Consd.* Beresford v. Royal Insurance Co., [1938] A. C. 586.

2969. *Add. Annotations*:—*Consd.* Royal Exchange Assce. v. Hope, [1928] Ch. 179; *Re Pitts*,

*Cox v. Kilsby*, [1931] 1 Ch. 546; *Re Sigs-worth, Bedford v. Bedford*, [1935] Ch. 89; *Beresford v. Royal Insurance Co.*, [1938] A. C. 586. *Reid. James v. British General Insce.*, [1927] 2 K. B. 311; *Perrin v. Dickson* (1929), 98 L. J. K. B. 683; *Re Collier*, [1930] 2 Ch. 37; *Cousins v. Sun Life Assurance Society*, [1933] Ch. 126; *Re Foster, Hudson v. Foster*, [1938] 3 All E. R. 357; *Re Sinclair's Life Policy*, [1938] 3 All E. R. 124.

2971a. *Condition against flying except on special expedition.*—*ARUNDELL v. PROVIDENT MUTUAL LIFE ASSURANCE ASSOCN.* (1934), 78 Sol. Jo. 319.

2987. *Add. Annotation*:—*As to* (1) *Reid. Beresford v. Royal Insurance Co.*, [1937] 2 K. B. 197.

2993a. *Extension of period of policy by insured—Effect of.*—By an insurance policy dated Aug. 13, 1925, an assurance co. agreed to pay the assured, his exors., administrators or assigns £1,000 in the event of his death on or before July 31, 1926. The assured assigned the benefit of the policy to deft. In July, 1926, the assured arranged for an extension of the period of insurance to Oct. 31, 1926,

#### PART IV. SECT. 11, SUB-SECT. 7.

sy. *Limitation of liability where death due to flying—Unless in active service of Militia.*—A life insurance policy issued in 1924 provided that if the insured should die within five years from the date thereof as a direct or indirect result of making or attempting to make any aeronautic flight, only 25 per cent. of the amount of the policy would be payable thereunder, but that this exception should not apply if the aeronautic ascension were made "while the insured is engaged in the active service of the Militia of Canada." In June, 1927, insured was killed as a result of making an aeronautic flight while engaged in the performance of his duty as an officer in the Permanent Active Air Force of Canada.—*Held*: after reviewing the statutes in force at the time the policy was issued, which statutes remained unaltered throughout the life of the contract, & also the King's Regulations & Orders for the Royal Canadian Air Force, effective Apr. 1, 1924, the insured was not in the service of the Militia; & even if it could be said that he was in the service of the Militia, he was not "in the active service" of it.—*TORONTO GENERAL TRUST CORPN. v. GREAT WEST LIFE ASSURANCE CO.*, [1930] 1 W. W. R. 881; 2 D. L. R. 770.—*CAN.*

sz. *Condition against fighting—Death while lawfully defending person—Right to recover sum assured.*—An exception in an accident insurance policy which provides that the indemnity shall not be payable for injuries received by the insured while fighting does not apply to a situation where an injury is the result of a personal encounter in which the insured was not the aggressor & was acting in lawful defence of his person & had reasonable grounds for believing that his adversary intended to cause him serious personal injury.—*HORWITZ v. LOYAL PROTECTIVE INSURANCE CO.*, [1932] 3 D. L. R. 378; *O. R.* 467.—*CAN.*

so. *Sum payable on death or disablement during life of policy—Accident during life of policy—Disablement or death after lapse.*—An accident during the life of a policy resulting in total disability within one year after the lapse of the policy gives no right to recover under a policy payable on total disability or death during the life of the policy.—*KUPINA v.*

*LIFE INSURANCE CO.*, [1933] 4 D. L. R. 815.—*CAN.*

ss. *Condition for surrender—When contract for surrender complete.*—An insurance policy contained a provision that "after five years' premiums have been paid this policy may be surrendered for a cash payment, which in no case will be less than one-third of the whole premiums received." A., a holder of the policy, who had paid five premiums, on Dec. 12, 1906, wrote to the insurance co.: "I have decided that I will accept the surrender value of my Full Return policy, & shall be glad to have the money as soon as possible. If there are any special forms to fill up, kindly forward them to me." At the request of the co. A. forwarded his policy, & it was there-after returned to him with a receipt for the surrender value indorsed on it for his signature. A. did not return the policy, & in consequence the surrender value was not paid to him. On Feb. 13, 1907, A. intimated a claim under the policy. In an action by A. against the co.:—*Held*: the provision in the policy was a standing offer on behalf of the co. which was accepted by A.'s letter of Dec. 12, 1906, & thereby a contract was concluded for the surrender of the policy.—*INGRAM-JOHNSON v. CENTURY INSURANCE CO.*, [1909] S. C. 1032.—*SCOT.*

sk. *Death arising in course of violation of law.*—A clause preventing recovery in case of death arising "in violation of law by the insured" does not apply when insured was a passenger, & he & the driver were not engaged in a joint adventure, & the accident was caused by the negligence of the driver of the other car.—*MILLIGAN v. CROWN LIFE INSCE. CO.*, [1938] 1 D. L. R. 210; 7 F. L. J. (Can.) 148.—*CAN.*

sm. *Condition relating to proof of incapacity—Whether benefits run from disability or date of proof.*—*BAIRD v. EQUITABLE LIFE ASSURANCE SOCIETY*, [1938] 2 W. W. R. 553.—*CAN.*

#### PART IV. SECT. 13, SUB-SECT. 1.—A.

2988 i. *Whether assignable.*—(1) A policy of life insurance is assignable.

(2) A past consideration, e.g. a prior loan of money, is insufficient to render a beneficiary of a life insurance policy a "beneficiary for value" within sect. 23 (1) of Manitoba Insurance Act, C. A., 1924.—*Re SUN LIFE ASSURANCE*

*CO. OF CANADA, STEADMAN v. ADMINISTRATION & TRUST CO.*, [1933] 2 W. W. R. 348; 41 Man. L. R. 413.—*CAN.*

fl. i.—The trustee for the creditors of a bkpt. co. having been authorised by a majority of the validly appointed inspectors of the estate to assign to a bank a life insurance policy in which the co. was named as the beneficiary & on which it had paid the premiums in pursuance of an agreement with the insured:—*Held*: the trustee had permission under sect. 43 of Bkpcy. Act, R. S. C., 1927, to execute assignments of the policies to the bank & the bank was entitled thereunder to exercise any rights which the co. possessed in respect of the policies.

The policies provided that the "owner" might elect to surrender them for their cash values:—*Held*: in view of the use of the words "owner" & "insured" throughout the policies, the word "owner" in the provision for surrender referred to the "insured"; & in the absence of proof of an agreement that said co. was to have all the insured's rights under the policies, neither it nor its assignee the bank had the right to surrender the policies & receive the cash surrender value thereof.—*BANQUE CANADIENNE NATIONALE v. MUTUAL LIFE INSURANCE CO. OF NEW YORK & SHRAGGE*, [1933] 1 W. W. R. 508.—*CAN.*

fl. i.—*For mortgage—Subrogation.*—*SIMPSON v. CHAMBERLAIN*, [1923] 2 D. L. R. 1033; 33 Man. L. R. 81; [1923] 2 W. W. R. 99.—*CAN.*

fl. ii.—*To non-preferred beneficiary—Validity.*—*Re MURPHY (P. E. I.)*, [1926] 4 D. L. R. 1136.—*CAN.*

sg. *Whether revocable.*—Assignment intended to be absolute, & communicated to co., held to be irrevocable.—*WILSON v. HICKS* (1910), 21 O. L. R. 623; *affd.* (1911), 23 O. L. R. 496.—*CAN.*

sl. *Involuntary assignment—Seizure for debts—Exemption.*—A joint policy payable to father & son or the survivor is within Husbands' & Parents' Life Insurance Act, R. S. Q., 1925, which exempts such insurances from seizure for debts of the insured or beneficiaries.—*GROSTEN v. KOURI*, [1936] 1 D. L. R. 373; *affd.*, S. O. R. 264; 3 D. L. R. 9.

& this extension was given effect to by indorsing on the policy a declaration "that the sum assured shall be payable in the event of the death of the life assured on or before Oct. 31, 1926." No assignment was ever made of the benefit of this extension. The assured died on Oct. 1, 1926 :—*Held* : (1) the extension of the period of the policy by indorsement was not a new contract of insurance, but a variation of the original contract of which the benefit was vested in deft., & she was entitled to recover the policy money by virtue of the assignment to her of the policy ; (2) the effect of the transaction was that the assured entered into the contract for the extension of the policy for the benefit of deft. & as trustee for her, & deft. was, on that ground, entitled to the policy money.—*ROYAL EXCHANGE ASSURANCE v. HOPE*, [1928] Ch. 179 ; 97 L. J. Ch. 153 ; 138 L. T. 446 ; 44 T. L. R. 160 ; 72 Sol. Jo. 68, C. A.

*Annotations* :—As to (1) *Reid*, *Prudential Assurance Co. v. I. R. Comrs.*, [1935] 1 K. B. 101. As to (2) *Reid*, *Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

3007. *Add. Annotation* :—*Reid*. *Re Foster, Hudson v. Foster*, [1938] 3 All E. R. 357.

3050. *Citations* :—For "*Ex p. LANCASTER*" read "*Re JACOB'S ESTATE, LANCASTER v. GASELEE, Ex p. LANCASTER.*"

3052a. ————*]*—The grantee of an annuity effected a policy on the life of the grantor, at his own expense. The grantor had a power of redemption on payment of £2,500, & it was provided that in case the grantor should, "at the time of making such repurchase," by notice in writing elect to take the policy, the grantee would assign to him any policy "then vested" in him, which might be effected in respect of the annuity ; but it was declared that it should not be incumbent on the grantor to keep on foot any policy. The policy became valuable, & the grantor gave the month's notice of repurchase, & declared his election to take the policy :—*Held* : (1) the grantee had no right afterwards to surrender the policy for his own profit. *Semble* : (2) although he might have let the policy drop, he was not, at any time, entitled to surrender it for his own.—*HAWKINS v. WOODGATE* (1844), 7 Beav. 565 ; 8 Jur. 743 ; 49 E. R. 1185.

3052b. ————*Contract to redeem annuity—Whether insurance policy included.*—*MILWARD v. LYSONS* (1836), Donnelly, 51 ; 47 E. R. 220, L. C.

3052c. ————*Annuity not redeemed by grantor.*—Upon the execution of a mtge. from A. to B.

to secure an annuity, B. insured A.'s life, & wrote to A. a letter, stating that the policy was to be assigned to A. as soon as the annuity was redeemed & all arrears & expenses paid. A. died without having redeemed the annuity. B. paid all the premiums on the policy till A.'s death :—*Held* : B. was entitled to receive the policy money from the assurance co. & the bonuses payable in respect thereof.—*BASHFORD v. CANN* (1863), 33 Beav. 109 ; 9 L. T. 43 ; 11 W. R. 1037 ; 55 E. R. 308.

*Annotation* :—*Reid*, *Preston v. Neale* (1879), 12 Ch. D. 760.

3058. *Add. Annotation* :—*Consd. Re Foster, Hudson v. Foster*, [1938] 3 All E. R. 357.

3066. *Add. Annotations* :—*Consd. Royal Exchange Assc. v. Hope*, [1928] Ch. 179. *Apld. Re Smith, Bilham v. Smith*, [1937] 3 All E. R. 472. *Consd. Re Foster, Hudson v. Foster* (No. 2), [1938] 3 All E. R. 610. *Reid*, *Smith v. Wood* (1928), 139 L. T. 250.

3067a. ————*]*—In Nov. 1908, a father took out a policy of insurance upon the life of his son, the policy moneys to be payable on the death of the son on or after his twenty-first birthday. The father died on July 25, 1925, having up to that time paid all the premiums accruing due upon the policy. The son attained twenty-one years of age on Sept. 26, 1916. After the death of the father, all premiums were paid either by the son or upon his behalf. The son died on June 2, 1936, & it was held that the policy moneys belonged to the estate of the father. In 1932, the son became of unsound mind, & an order was made by the master in lunacy ordering the premiums due on the policy to be paid by the receiver of the son's estate, the order also stating that the policy was part of the absolute property of the son. It was found as a fact that all parties concerned acted at all times under the mistaken belief that the policy belonged to the son, & the payment of premiums by the son & by the receiver was made on that basis :—*Held* : the personal representative of the son was entitled to a charge on the policy moneys for the premiums paid by him or on his behalf.—*Re FOSTER, HUDSON v. FOSTER* (No. 2), [1938] 3 All E. R. 610 ; 159 L. T. 279 ; 54 T. L. R. 1059 ; 82 Sol. Jo. 665.

3083. *Add. Annotation* :—*Consd. Re Foster, Hudson v. Foster* (No. 2), [1938] 3 All E. R. 610.

3091. *Add Citations* :—95 L. J. Ch. 195 ; 133 L. T. 374.

*Add. Annotations* :—*Consd. Cousins v. Sun Life Assurance Society*, [1933] Ch. 126.

PART IV. SECT. 13, SUB-SECT. 1.—E. m i. ————*]*—*Re BENJAMIN* (1926), 59 O. L. R. 392.—CAN.

PART IV. SECT. 14, SUB-SECT 2.—A. 3065 i. *General rule.*—A third person paying premiums is entitled to a lien on the policy for premiums & interest.—*Re OGILVIE & SONS OF SCOTLAND BENEVOLENT ASSOCN.* (1922), 52 O. L. R. 136.—CAN.

PART IV. SECT. 14, SUB-SECT. 2.—B. ss. *Deposit with insurers as collateral security for advances—Protected policies—Marshall—Protected fund primarily liable.*—*Re HOL LAND* ; *Ex p. HOLLAND* (1928), 28

S. R. N. S. W. 369 ; 45 N. S. W. W. N. 88.—AUS.

PART IV. SECT. 14, SUB-SECT. 3.

sd. *Insurance of two lives payable to survivor—Agreement for purchase of shares by survivor to value of insurance—From deceased's widow.*—*Re NORTHERN LIFE ASSURANCE CO. & FAWCETT*, [1932] 1 W. W. R. 44.—CAN.

PART IV. SECT. 15, SUB-SECT. 1.

sl. *Payment into court—Adverse claims—Whether order made ex parte.*—An order, under sect. 200 (1) (a) of Saskatchewan Insurance Act, R. S. S., 1930, permitting an insurer to pay the insurance moneys into ct. on the

ground that the insurer admits liability & there are adverse claimants, should not be made on an *ex parte* application.—*Re GREAT WEST LIFE ASSURANCE CO. & APPLEBY*, [1934] 1 W. W. R. 13.—CAN.

PART IV. SECT. 15, SUB-SECT. 2. n i. ————*Application for declaration as to—Who may apply—Ontario Insurance Act, 1924, s. 154 (2).*—*Re TURNER & CANADIAN ORDER OF FORESTERS*, [1926] 4 D. L. R. 793 ; 59 O. L. R. 348.—CAN.

sq. *Production of grant of probate—Necessity for.*—*NATIONAL LIFE INSURANCE CO. v. MCCOUBRAY*, [1926] 2 D. L. R. 550 ; [1926] S. C. R. 277.—CAN.

- Fold. Re Gladitz, Guaranty Executor & Trustee Co. v. Gladitz**, [1937] 3 All E. R. 173.
- 3097. Add. Annotation:—Generally, Reifd. Tredegar v. Harwood** (1927), 44 T. L. R. 17.
- 3104. Add. Citation:—134 L. T. 557.**  
**Add. Annotation:—Reifd. Buerger v. New York Life Assce.** (1927), 43 T. L. R. 601.
- 3104a. — To unauthorised agent—Receipt forged—No discharge.]—EDMISTON v. SCOTTISH TEMPERANCE & GENERAL ASSURANCE CO., LTD.** (1929), 168 L. T. Jo. 70.
- 3104b. — Proviso for conclusiveness of receipt.]—**An assurance co. issued to Mrs. C. three policies on her life for sums amounting to about £45. Each policy provided for payment of the sum assured to the exors. or administrators of the assured & then contained the following proviso: "Provided always that the production of a receipt for the sum payable hereunder signed by any person being either an exor. or administrator or the husband or wife or a relation by blood or connection by marriage of the assured shall be a discharge to the co. for the same & shall be final & conclusive evidence to all intents & purposes that such sum has been duly paid to & received by the person or persons lawfully & rightfully entitled to the same & that all claims & demands whatsoever against the co. in respect of this policy have been fully satisfied." The assured died on May 6, 1932, having by her will left all her property, which included the policy moneys, to her child B. O'R. After the death of the assured, D. R., a niece of the assured, claimed payment by the co. of the policy moneys &, on production by her of the policies & a letter signed by deceased assured stating that she was insured in the co. for about £50 & expressing her wishes that after payment of her debts her clothes & remaining money should go to her said niece, the co. on May 20, 1932, in ignorance of the will & in good faith paid to Miss R. the moneys due on the policies & took from her a receipt which was expressed to be in full discharge of all her claims under the policies. On Sept. 22, 1933, letters of administration with the will annexed were granted to Mrs. O'R., & in the capacity of administratrix of the assured she claimed against the co. to be paid the moneys due under the policies less a sum expended on the assured's funeral expenses:—**Held**: (1) the proviso was not repugnant to the covenant to pay to the exors. or administrators of the assured but formed an integral part of the contract & qualified the covenant; (2) the exclusive right of the administratrix to receive & give a discharge for the policy moneys was subject to the terms of the contract entered into by the assured; (3) the receipt from Miss R. therefore operated as a valid discharge to the assurance co., with the result that the administratrix's claim failed.
- Per ROMER & MAUGHAM, L.J.J.**: *Qu.*: whether the assurance co. could take advantage of the proviso if they made payment to some one other than the exors. or administrators at a time when they knew that there were exors. or administrators in existence.
- Per MAUGHAM, L.J.**: *Qu.*: whether the assurance co. could take advantage of the proviso if they knew that the assured's estate was large enough to be liable for estate duty.—**O'REILLY v. PRUDENTIAL ASSURANCE CO., LTD.**, [1934] 1 Ch. 519; 103 L. J. Ch. 323; 151 L. T. 215; 50 T. L. R. 359; 78 Sol. Jo. 349, C. A.
- 3110a. — Insufficient stamp.]—**(1) Where a charge to secure a current account without a limit is stamped with a stamp sufficient to cover advances up to a certain sum & the current account subsequently exceeds that sum, the charge is a valid security properly stamped for that sum, but is unenforceable as to the remainder of the loan until properly stamped. (2) Where an insurance co. wrongfully, but acting in good faith, refuses to pay the policy moneys to the assured & his assignee on the date when the policy matures, but subsequently pays the moneys into ct., it is liable to pay interest at 4 per cent. *per annum* from the date when the policy matured until the date when it paid the moneys into ct.—**Re WATERHOUSE'S POLICY**, [1937] Ch. 415; [1937] 2 All E. R. 91; 106 L. J. Ch. 284; 156 L. T. 413; 53 T. L. R. 487; 81 Sol. Jo. 317.
- 3125a. — — Dispute as to validity of assignment—Money paid into court.]—Re WATERHOUSE'S POLICY**, No. 3110a, *ante*.
- 3128. Add. Annotations:—Consd. Home & Colonial Insce. v. London Guaratee & Accident Co.** (1928), 45 T. L. R. 134. **Reifd. Jones v. Waring v. Gillow**, [1926] A. C. 670; **Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.**, [1934] A. C. 455.

## Part V.—Accident Insurance: Insurance against Liability for Accidents to Third Persons.

- 3134a. Liability of broker for negligence—Failure to inform insurer of alteration in business of assured.]—COOLEE, LTD. v. WING, HEATH & Co.** (1930), 47 T. L. R. 78.
- 3139. Add. Annotation:—As to (2) Apld. News-**
- holme v. Road Transport & General Insce.** [1929] 2 K. B. 356.
- 3140. Add. Annotation:—Consd. Smith v. Cornhill Insurance Co.**, [1938] 3 All E. R. 145.
- 3141. Add. Annotations:—Apld. Roberts v. Anglo-**

### PART IV. SECT. 15, SUB-SECT. 6.

3127 1. *Policy effected in fraud of insurance company.]—*Order for repayment of policy moneys, the policy having been issued in consequence of fraudulent misrepresentation.—**SUN LIFE ASSURANCE CO. OF CANADA v. RHOX & ALBERT** (1932), 5 M. P. R.

193; *affd.*, 6 M. P. R. 309.—**CAN.**

### PART V. SECT. 1, SUB-SECT. 1.

f 1. — *Earnings of assured.]—*In an action on policy of accident insurance.—**Held**: the misrepresentation of earnings was a misrepresentation of a material fact.—**STEVENSON v.**

**CONTINENTAL CASUALTY CO.** (1933), 6 M. P. R. 550.—**CAN.**

*sp. Issue of policy—No proof of proposal.]—*In an accident insurance policy issued upon the life of an aircraft pilot, a copy of application was attached to the policy, but it was not shown in evidence that any applica-

Saxon Insee. Assocn. (1927), 96 L. J. K. B. 590.  
 Consd. Provincial Insurance Co. v. Morgan  
 (1932), 102 L. J. K. B. 164.

**3141a.** ———.]—Resps. insured a motor vehicle with applts. The policy was consequent on a proposal form in which there was a statement: "State (a) the purposes (in full) for which the vehicle will be used; & (b) the nature of the goods to be carried." The answer was "(a) Delivery of coal; (b) coal"; & there followed a declaration that the questions were truthfully answered & that the insured agreed that the declaration & answers should be the basis of the contract. By the recital to the policy it was agreed that the proposal & declaration should be of a promissory nature & effect & should be the basis of the contract. Condition 6 of the policy provided that it was a condition precedent to any liability of the insurers that the conditions & endorsements of the policy so far as they related to anything to be done or complied with by the insured should be faithfully observed & that the statements made & answers given in the proposal were true, correct & complete. The insured were described in the sched. to the policy as coal merchants, & under the heading: "Endorsements & Use Clauses" were the words: "Transportation of own goods in connection with insured's own business within stated." A collision occurred between the motor lorry insured & a motor car, resulting in damage covered by the risks insured against under the policy. Resps. had occasionally used the motor lorry for carrying timber, & on the day of the accident a journey had been made carrying timber, but in fact on the journey when the accident happened coal only was being carried.—*Held*: there had been no breach of a condition on which the policy was issued as the words used did not mean

that the use of the motor vehicle was to be exclusively confined to that of carrying coal & that any temporary & incidental use for carrying goods other than coal would completely defeat the policy. To state in full the purposes for which the motor vehicle was to be used was not the same thing as to state in full the purposes for which the vehicle would be exclusively used.—*PROVINCIAL INSURANCE CO. v. MORGAN & FOXON*, [1933] A. C. 240; 102 L. J. K. B. 164; 49 T. L. R. 179; 38 Com. Cas. 92; *sub nom.* *MORGAN v. PROVINCIAL INSURANCE CO.* 148 L. T. 385, H. L.; *affg.* S. C. *sub nom. Re MORGAN & PROVINCIAL INSURANCE CO., LTD.*, [1932] 2 K. B. 70, C. A.

*Annotations*:—*Consd. Izzard v. Universal Insurance Co.*, [1936] 2 All E. R. 1565; *Beauchamp v. National Mutual Indemnity Insurance Co.*, [1937] 3 All E. R. 19. *Refd.* *Piddington v. Co-operative Insurance Society*, [1934] 2 K. B. 236.

**3144.** *Add. Annotation*:—*As to* (1) *Apprvd. News-holme Bros. v. Road Transport & General Insee. Co.*, [1929] 2 K. B. 356.

**3145.** *Add. Annotation*:—*As to* (3) *Refd. Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

**3148.** *Add. Annotations*:—*As to* (1) *Consd. Smith v. Cornhill Insurance Co.*, [1938] 3 All E. R. 145. *Generally, Refd.* *Lake v. Simmons* (1926), 95 L. J. K. B. 586.

**3155.** *Add. Annotation*:—*Refd. Rowett, Leaky v. Scottish Provident Institution* (1926), 95 L. J. Ch. 434.

**3157a.** ——— "In charge of any vehicle."—By a policy of insurance against death by accident the insurers undertook to pay £250 in case of death, "if the reader while a pedestrian in a public thoroughfare be killed by accidental impact with a moving vehicle," provided that "the reader be not at the time of the accident in charge of any vehicle." An

tion was in fact made:—*Held*: assuming the application to be binding upon pltf., the answers therein could only avoid the policy if false, & they were not.—*NORTHERN AERIAL MINERAL EXPLORATION, LTD. v. BANKERS INDEMNITY INSURANCE CO.*, [1932] O. R. 238; 2 D. L. R. 367.—*CAN.*

**st. Accident due to inadvertent act not known to be criminal.**—An inadvertent act not known to be unlawful, e.g. carrying a loaded gun contrary to a statute, is not sufficient to avoid an accident insurance on the principle that it is contrary to public policy to indemnify against a criminal act.—*LANGLEY v. FIDELITY INSURANCE CO.*, [1935] 4 D. L. R. 89; O. R. 424.—*CAN.*

**st. Designation of beneficiary.**—By will.—*Held*: (1) a designation of a beneficiary in the event of the death of the insured can be made by will or by word of mouth; (2) the will in question which referred to "all & any life & accident insurance policies now or hereafter taken out by me upon my life or payable in respect of my death," did make such a designation with reference to the particular policy in question, although there was a specific declaration made after the will with respect to said policy; but (3) said later designation of the deft. altered effectively in her favour the designation made by the will.—*TORONTO GENERAL TRUSTS CORPN. v. SHEPPARD*, [1937] 3 W. W. R. 22; 7 F. L. J. (Can.) 115.—*CAN.*

**st. Non-payment of premium—Acceptance after period of grace**

*Estoppel.*—In an action on an accident insurance policy deft. denied liability on the ground that the policy had lapsed automatically because of non-payment of the premium within the period of grace & continued inoperative until reinstated by payment of the premium which was not paid until after the accident occurred, & that the policy as reinstated was subject to statutory condition 22 that a reinstated policy covered only injuries sustained after the reinstatement:—*Held*: deft. was estopped by its course of conduct over a number of years in repeatedly accepting payment of premiums from pltf. after expiration of the period of grace & in paying previous claims under similar circumstances without ever having raised the question of lapse or reinstatement. The forwarding to pltf. of the form of "intermediate statement of claimant" amounted to a negotiation as to settlement, or to an invitation to negotiate, & was a further fact estopping deft.—*BRUNK v. CONTINENTAL CASUALTY CO.*, [1938] 1 W. W. R. 283; 1 D. L. R. 783.—*CAN.*

#### PART V. SECT. 1, SUB-SECT. 4.—A.

**3149 v.** ——— "Engaging" in hazardous occupation—*Isolated act forming the part of hazardous occupation.*—*DOMINION OF CANADA GUARANTEE & ACCIDENT INSEE. CO. v. MAHONEY Can.*, [1929] 4 D. L. R. 823; *affd.*, [1930] S. C. R. 123.—*CAN.*

**3149 vi.** ——— *Effect of failure to file classification of risks.*—The filing of a table of rates & classification of risks in accordance with statutory condition No. 3 in Sched. E of Alberta Insurance

Act, 1926, is a condition precedent of any right in the insurer to reduce, pursuant to said condition, the amount payable to the insured on the ground that his injury occurred while he was engaged in an occupation which is more hazardous than that stated in the policy to be his. A mere reference in a field document to a form classifying risks does not constitute a filing of the form in accordance with said condition. The filing of a classification of risks after the happening of the accident cannot be relied on to invoke the benefit of said condition.—*HYMAN v. METROPOLITAN LIFE INSURANCE CO.*, [1932] 3 W. W. R. 703.—*CAN.*

**3149 vii.** ——— "While performing unlawful act"—*Driving without lights.*—One of the conditions of a "personal accident & sickness policy" provided that the policy did not cover "injuries sustained while the insured is by intoxicating liquors, narcotic drugs, etc., rendered less capable of taking care of himself or by or while performing any unlawful act." While a person who was insured under the policy was driving in a buggy after sunset without any light on the buggy, contrary to sect. 18 (1) of Police Offences Act, 1928, he was run into by a motorist & so injured that he shortly afterwards died:—*Held*: at the time when the insured received the injuries he was performing an unlawful act within above condition & the word "while" therein having a temporal & not a causal connotation he was not protected by the policy.—*ABEALOM v. UNITED INSURANCE CO., LTD.*, [1933] V. L. R. 494; *Argus L. R.* 378.—*AUS.*



insured person, who was riding a bicycle, got off at the foot of a hill, &, having pushed it some way, stopped to speak to another man & stood holding his bicycle, & an unattended motor-car came running down the hill & struck the insured person & caused his death:—*Held*: the word "vehicle" included a bicycle, &, as the deceased man was "in

charge of" the bicycle within those words in the policy, the insurers were not liable.—*HARPER v. ASSOCIATED NEWSPAPERS, LTD.* (1927), 43 T. L. R. 331.

3157b. *S. P. HANSFORD v. LONDON EXPRESS NEWSPAPER, LTD.* (1928), 44 T. L. R. 349; 72 Sol. Jo. 240.

3158 iv. —.]—*MACGINN v. FIDELITY & CASUALTY CO. OF NEW YORK*, [1928] 3 D. L. R. 814.—*CAN.*

m i. —.] *Injury self-inflicted.*—*BULLAS v. EMPIRE LIFE INSURANCE CO.*, [1931] 4 D. L. R. 443.—*CAN.*

o i. —.] *Sufficiency of evidence.*—An insured held to be "totally & permanently disabled" within a policy of accident & sickness insurance. Where such a policy provides that the benefits thereunder shall be payable if "evidence satisfactory to the co." is received by it of the insured's total & permanent disability, the co. cannot avoid liability on the ground that the evidence of disability submitted to it was not "satisfactory" if such evidence is sufficient to satisfy the co.—*TEUR v. LONDON LIFE INSURANCE CO.*, [1935] 2 W. W. R. 99; *reversd.*, [1936] 1 D. L. R. 161; [1935] 3 W. W. R. 368; 43 Man. L. R. 393.—*CAN.*

st. *Newspaper insurance—Finality of adjudication as to next of kin.*—*Held*: it was a condition precedent to payment, that the person claiming should produce the decision of the proprietors of the paper that he was the next of kin of deceased.—*LAW v. NEWNES, LTD.* (1894), 21 R. (Ct. of Sess.) 1027.—*SCOT.*

sv. —.]—Where deceased left three brothers & a sister, & the editor adjudged the sister next of kin & paid the money to her:—*Held*: the brothers had no right to share in the sum so paid.—*HUNTER v. HUNTER* (1904), 7 F. (Ct. of Sess.) 136.—*SCOT.*

sw. *Condition against second insurance—Life insurance policy providing for partial prepayment for disability.*—*SOUTH BRITISH INSURANCE CO., LTD. v. WILLIAM BARCLAY NICOL*, [1928] S. R. Q. 53; 22 Q. J. P. 1.—*AUS.*

sx. *Husband & wife covered—Both killed in same accident—Whether liability limited.*—A policy of assurance, whereby the assurer indemnified the assured against certain risks with respect to his motor car & accidents arising out of use of the motor car, contained a clause reading: "Accidents to owner. This policy covers the assured & the assured's wife against personal accidents occurring to themselves while riding in, mounting, or dismounting from, any motor car to the following extent, & subject to the limits as set forth:—(a) Death.—The underwriters will pay to the assured's execs., administrators or assigns the sum of £1,000 in the event of death." The deceased & his wife were both killed in a collision between the assured's motor car & a train:—*Held*: the risks assured against were the death of the assured & his wife, but that the policy was limited in amount to one sum of £1,000.—*RE CAIRE, PUBLIC TRUSTEE v. HOOD*, [1927] S. A. S. R. 220.—*AUS.*

sy. *Defence to claim by insured—Breach of law.*—An insured under an accident insurance policy accidentally discharged a shot-gun into his foot with the result that the foot had to be amputated. To an action on the policy the insurers set up the defence that the accident occurred while the insured was breaking the law by hunting & shooting ducks out of season in violation of Migratory Birds Convention Act (Dom.) & Game Act, 1924 (Sask.), & by carrying a loaded shot-gun in an automobile contrary to the

latter Act:—*Held*: while the insured may have hunted ducks during the day of the accident, he was not in the act of doing so when he shot himself, the hunting being then over & abandoned; the evidence was insufficient to justify a finding that the gun was being carried loaded in the automobile.—*WESTERN FINANCE CORPN., LTD. v. LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA*, [1928] 3 D. L. R. 592; [1928] 2 W. W. R. 454.—*CAN.*

sz. *Death due to "disablement" of car—Death by drowning.*—A policy of accident insurance covered death "sustained by the wrecking or disablement of any privately owned automobile . . . in which the insured is riding or driving, or is accidentally thrown from within such wrecked or disabled automobile." A clause of the general conditions provided that the insurance did not cover "injuries fatal or unfatal of which there shall be no visible marks or contusion on the exterior of the body at the place of injury." A motor car which the insured was driving had been brought across a river on a ferry, & when the insured, who had taken his seat in it, started it in order to drive off the ferry it backed off the ferry into the water. The assured & the other occupants were able to climb on to the roof of the car, but the car, after drifting some distance, went to the bottom & the insured was drowned. There was no evidence of the cause of the backing of the car. The judge dismissed the action, holding that the insured's death was not due to the wrecking or disablement of the car but to drowning. On appeal:—*Held*: the appeal should be allowed.—*NEWCOM v. HOME ASSURANCE CO. OF CANADA (Alta.)*, [1930] 1 D. L. R. 121; [1929] 3 W. W. R. 590.—*CAN.*

sd. *Wholly disabled "at once & continuously."*—Where a policy indemnifies insured against being "at once & continuously" disabled from working it is not applicable to the case of an insured person returning to work & being subsequently disabled by the original injury.—*MATTHEWS v. CONTINENTAL CASUALTY CO.*, [1932] 3 W. W. R. 289; 4 D. L. R. 667; 46 B. C. R. 213.—*CAN.*

st. *Car not to be operated by person bodily deformed or maimed.*—Insurance held void where operator had an artificial leg.—*DESCARY v. MARTINEAU*, [1933] 1 D. L. R. 280.—*CAN.*

sl. *Passenger on a public conveyance.*—A passenger on a public conveyance includes a passenger who is injured by falling from the pullman-car steps while he is trying to re-enter the train after a halt.—*LINTON v. WESTERN ASSURANCE CO.*, [1934] 2 D. L. R. 396; 6 M. P. R. 608.—*CAN.*

sp. *Death resulting from violation of law—Accident while exceeding speed limit.*—Where assured caused an accident, was convicted of speeding, & subsequently died from the results this was within an exception in an accident policy relating to death resulting from violation of law.—*INGLES v. SUN LIFE ASSURANCE CO.*, [1937] 1 D. L. R. 706; O. R. 373.—*CAN.*

sr. *Permanent disability.*—In view of the provisions of the accident & sickness insurance policy herein requir-

ing the insured to furnish on demand proof of the continuance of his disability, although proof of this disability had been previously accepted by the insurer:—*Held*: the word "permanent" in the phrase "total & permanent disability" was not intended to be given full effect.

The insured, a trainman, was suffering from tuberculosis. The medical testimony was that his disability prevented him from performing the work on which he had been formerly employed & rendered him unfit for any but certain very light work:—*Held*: the fact that the insured could earn a living if he could obtain an improbable position involving the doing of practically no work should not exclude him from the benefit of the policy.—*LANG v. METROPOLITAN LIFE INSURANCE CO.*, [1937] 2 W. W. R. 453.—*CAN.*

st. *"Insured or his wife"—Insured married woman.*—Resp. was insured with applt. under a comprehensive automobile policy one of the terms of which provided that if "the insured or his wife" should, in circumstances defined, sustain any bodily injury applt. would pay to the "insured or to his legal personal representatives" the compensation specified, which in the case of death was \$1,000. The insured was a married woman, which fact was known to applt. at the time when the policy was issued. During the currency of the policy an accident occurred, in circumstances which were within the definition in the policy, in which the husband of the insured was killed. The insured claimed for the death of her husband under the above clause:—*Held*: the words "the insured or his wife" in the clause in the policy did not include the case of an "insured or her husband," & therefore the insured was not entitled to recover under the terms of the policy for the death of her husband.—*AUTOMOBILE FIRE & GENERAL INSURANCE CO. OF AUSTRALIA, LTD. v. DAVEY* (1936), 54 C. L. R. 534; 10 A. L. J. 34; 42 Argus L. R. 202.—*AUS.*

sz. *Use of car for "private purposes."*—The insured was insured against the risk of accidental death while travelling in a motor vehicle which did not belong to him & which was being used for "private purposes." "Private purposes" were defined as including social, domestic, & pleasure purposes & use by the insured in person in connection with his business. The insured was a dealer in sheep, travelling in a motor vehicle that did not belong to him to attend a stock sale. At the time of the accident causing his death, at the request of the person controlling the vehicle, he was driving the car. The vehicle was in control of the agent of a co. (the owners), & was driven to a town where a stock sale was to be held. The agent, his wife, & child, the insured, & another sheep dealer C. were all in the car. C. intended to buy sheep at the sale & the agent undertook the journey in the course of his duty, but would not have undertaken it if C. had not gone; the insured had no definite intention of purchasing sheep; the agent's wife & child took the journey as a pleasure trip:—*Held*: the car was being used for "private purposes" within the meaning of the definition of those words in the policy, & the insurer was liable



**3168. Add. Annotation:—***Consd. Smith v. Cornhill Insurance Co.*, [1938] 3 All E. R. 145.

**3172. Add. Annotation:—***Consd. Smith v. Cornhill Insurance Co.*, [1938] 3 All E. R. 145.

**3175a. Death following treatment of pimple—No evidence of accident.]—***WEYERHAEUSER v. EVANS* (1932), 76 Sol. Jo. 307.

**3176. Add. Annotation:—***Refd. Rowett, Leaky v. Scottish Provident Institution* (1926), 95 L. J. Ch. 434.

**3180a. Concussion.]—**A policy of insurance was expressed to be payable on the death of the insured occurring "as the result solely of bodily injury caused by violent, accidental, external & visible means sustained by the

insured whilst riding in, mounting into or dismounting from, the insured car." The insured, a strong vigorous woman of about thirty-one years of age, & a motorist for many years, one evening left Bristol alone in her car to drive to Nailsworth, a distance of some 40 miles. The next morning the car was found badly damaged & lying on its side on a track some yards below the level of the road. A very wavy track, which had been forced through bushes near the car, finally led to a river, & there the insured was found standing almost upright with the water a few inches over her head. There was a strong overhanging branch quite close to her, by which she could have pulled herself out of the water. A post-mortem examination showed that

under the policy.—*See* ARBITRATION BETWEEN EXECUTOR TRUSTEE & AGENCY CO. OF SOUTH AUSTRALIA, LTD. & LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD., [1936] S. A. S. R. 365.—AUS.

#### PART V. SECT. 1, SUB-SECT. 4.—B.

**3161 v. ———.]—***Pltf.* was insured with *deft. co.* under a policy which provided, *inter alia*, that if he sustained the loss of a foot, caused directly & solely by violent, accidental, external & visible injury, he should be entitled to receive £250, subject, however, to the condition that the policy did not cover injuries arising from provoked assault, fighting or breach of the peace. During a family dispute *pltf.* was threatening his brother with an iron bar, when he was designedly shot in the leg by his father, & as the result of the injury his foot had to be amputated. The father was convicted of unlawfully wounding.—*Held*: the injury was accidental within the policy, but that it was the result of a provoked assault, & *pltf.*'s claim therefore failed.—*GRANT v. SOUTHERN CROSS ASSURANCE CO., LTD.* (1927), 30 W. A. L. R. 65.—AUS.

**3164 i. Injury by lifting weight.]—***Pltf.* by attempting to lift a heavy iron jack from the ground strained his back. The lifting of the jack was one of his ordinary & necessary duties which he had frequently performed without injuring himself.—*Held*: the injury was sustained through "accidental means" within the meaning of the policy of accident insurance under which *pltf.* claimed.—*SEMKOW v. MERCHANTS' CASUALTY INSURANCE CO.*, [1937] 2 W. W. R. 669.—CAN.

**3165 i. Sunstroke.]—**A policy against death from "bodily injuries, effected directly & independently of all other causes, through external violent & accidental means" does not cover death from heat-stroke while at work as a street sweeper.—*WYMAN v. DOMINION OF CANADA GENERAL INSURANCE CO.*, [1936] 2 D. L. R. 268; O. R. 164; 5 F. L. J. (Can.) 277.—CAN.

**3170 iii. ———.]—***BARNABY v. UNION ASSURANCE SOCIETY*, [1931] 1 D. L. R. 1002; 2 M. P. R. 492.—CAN.

**3170 iv. ———.]—**Insured under a policy of accident insurance accidentally broke his leg. A few days later infection set in which gradually spread through his system & since his physical condition apart from the accident was such that his kidneys were incapable of performing their full functions, a condition of uremia ensued which resulted in his death. The policy provided that "the insurance given by this policy is against loss of life . . . resulting from personal bodily injury . . . which is effected solely & independently of all other causes by

the happening of a purely accidental event." The beneficiary sued to recover the amount payable for loss of life.—*Held*: the claim was covered by the terms of the policy since there was no doubt that the injury, *i.e.* the broken leg, without which death would not have ensued when it did was caused, by nothing but the accident.—*CASEY v. CONTINENTAL CASUALTY CO.*, [1933] 1 W. W. R. 282; 2 D. L. R. 46; on appeal, *sub nom.* CONTINENTAL CASUALTY CO. v. CASEY, [1934] 1 D. L. R. 577; S. C. R. 54.—CAN.

**p i. — Through blister.]—**An accident insurance policy insured against "bodily injury which is the sole cause of the loss & which is caused solely by accidental means." The insured while walking over rough country roads in a pair of light shoes which he had worn only a few times sustained a blister on his heel caused by the rubbing of the shoe. The blister became infected & the infection caused the insured's death. *EWING, J.*, held that the death so caused came within the terms of the policy. The insurance co. appealed.—*Held*: the appeal should be allowed & the action dismissed, there being nothing accidental in the cause or means occasioning the injury.—*SLOBODA v. CONTINENTAL CASUALTY CO.*, [1938] 2 W. W. R. 237.—CAN.

**sz. Injury caused by unlawful wounding.]—***Pltf.* was insured with *deft. co.* under a policy which provided (*inter alia*) that if he sustained the loss of a foot, caused directly & solely by violent, accidental, external, & visible injury he should be entitled to receive £250 subject, however, to the condition that the policy did not cover injuries arising from provoked assault, fighting or breach of the peace. During a family dispute *pltf.* was threatening his brother with an iron bar, when he was designedly shot in the leg by his father, & as the result of the injury his foot had to be amputated. The father was convicted of unlawfully wounding.—*Held*: the injury was accidental within the meaning of the policy, but it was the result of a provoked assault, & *pltf.*'s claim therefore failed.—*GRANT v. SOUTHERN CROSS ASSURANCE CO., LTD.*, [1928] W. A. L. R. 65.—AUS.

**sd. Throwing ball.]—***Resp.*, who was used to playing games & was in perfect & normal health, severely sprained his shoulder by the voluntary act of throwing a tennis ball. He made a claim against *applt.* under a policy of insurance which covered losses sustained by "bodily injury caused solely & directly by accidental violent external & visible means." On appeal from a judgment of the Supreme Ct. allowing *resp.*'s claim.—*Held*: *resp.* not having given evidence pointing to any involuntary, unforeseen, or unexpected movement, the evidence did not warrant a conclusion that the

injury was other than the natural result of his purely voluntary act.—*LONG v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LTD., COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LTD. v. LONG*, [1931] N. Z. L. R. 528.—N.Z.

**sg. Accident causing death.]—**In an action on a life insurance policy providing for double indemnity in case of accidental death.—*Held*: a statement by the insured, that he had slipped or tripped & injured his leg in coming up the steps, made to a witness who had found him leaning in distress against a bannister in her hallway, was admissible as evidence of the manner in which he received the abrasion which, it was found, resulted in his death.—*SOMERVILLE v. PRUDENTIAL INSURANCE CO. OF AMERICA*, [1935] 3 W. W. R. 81.—CAN.

**sl. Slip on ice.]—**An accident insurance policy insured *pltf.* against loss "resulting from bodily injuries effected directly & independently of all other causes through external violent & accidental means." The insured while engaged in a curling bonspiel slipped, but did not fall, on the ice when he suddenly began to sweep. His heart was to his knowledge slightly affected & he had been advised by his doctor not to do any vigorous sweeping if he took part in curling. A few days later he was found to be suffering from acute dilatation of the heart & he had to remain in bed almost continuously for three months. The trial judge's finding, on evidence which on the appeal was held to justify it, was that *pltf.*'s disability was due to (a) the exhaustion from the three days of curling, (b) the accidental slip on the ice, & (c) the sweeping which followed the slip. He gave judgment for *pltf.* On appeal.—*Held*: even leaving (a) out of consideration, it being (*semble*) a condition other than a cause, there were two contributing co-ordinate & practically contemporaneous factors the combination of which constituted the proximate cause of the injury & since one of them, the sweeping, was not accidental, it followed that the injury was not effected independently of all other causes by the accidental means, *i.e.*, the slipping on the ice, & therefore, was not within the terms of the policy.—*HARMON v. TRAVELERS INSURANCE CO.*, [1937] 1 W. W. R. 424; 2 D. L. R. 175.—CAN.

**sp. Drug self-administered.]—**A policy against death through "external violent & accidental means" does not cover death from insulin self-administered by needle in treatment for diabetes.—*PRICE v. DOMINION OF CANADA GENERAL INSURANCE CO.*, [1937] 2 D. L. R. 369; 11 M. P. R. 490; 6 F. L. J. (Can.) 260; *reversd.*, [1938] 2 D. L. R. 337; [1938] S. C. R. 235.—CAN.

there was no water in her lungs or stomach, & that she died before or at the moment her face reached the surface of the water. It was found as a fact that she had suffered from severe mental & physical shock as a result of this injury to the brain, & that in a state of mental confusion she had wandered aimlessly through the bushes into the water. It was contended that death was not due to any cause covered by the terms of the policy:—*Held*: the real cause of death was the accident, as each subsequent event was due to the brain injury resulting from the accident. *Pltf.* was therefore entitled to recover under the policy.—*SMITH v. CORNHILL INSURANCE CO., LTD.*, [1938] 3 All E. R. 145; 54 T. L. R. 869; 82 Sol. Jo. 625.

PART V. SECT. 1, SUB-SECT. 6.

3181 ix. —.—.]—If benefits are conditional on giving notice of disability within specified time, relief cannot be given against failure to give such notice.—*HEAGLE v. GREAT WEST LIFE ASSURANCE CO.*, [1938] 1 D. L. R. 794; 7 F. L. J. (Can.) 198.—CAN.

PART V. SECT. 1, SUB-SECT. 7.

c i. —.—.]—An insurer repudiated liability after an accident on the ground of misrepresentation. The policy contained a condition that policy moneys should be paid within sixty days of proof of claim. Action was brought within four days of proof, in reliance upon deft.'s repudiation:—*Held*: the action was premature, since, as the contract was not executory, the time of payment could not be accelerated by any anticipatory refusal to pay.—*MELANSON v. DOMINION OF CANADA GENERAL INSURANCE CO.*, [1934] 2 D. L. R. 459; 7 M. P. R. 1.—CAN.

c ii. —.—.]—*NEW YORK LIFE INSURANCE CO. v. HANDLER*, [1937] S. O. R. 127; 1 D. L. R. 481; 6 F. L. J. (Can.) 243.—CAN.

st. *Defence of suicide—Onus of proof.* —In an action upon an accident insurance policy where the defence raised is suicide, the onus is on deft. to prove facts quite inconsistent with any other explanation.—*MACPHADYEN v. EMPLOYERS' LIABILITY ASSURANCE CO.*, [1933] 2 D. L. R. 462; *revid.*, [1933] 3 D. L. R. 505.—CAN.

sw. *Insurance against total disability—Onus of proof—Failure to discharge.* —*WILSON v. METROPOLITAN LIFE INSURANCE CO.*, [1934] 1 D. L. R. 416.—CAN.

PART V. SECT. 1, SUB-SECT. 8.

c. For "*Held*: defts. were liable to pay indemnity for subsequent illness notwithstanding receipt" read, "*Held*: deft.'s liability upon the policy was limited to one claim for one accident."

PART V. SECT. 2, SUB-SECT. 1.

sd. *Workmen's Compensation—Accident fund—Payments by Board—Account.* —*Re WORKMEN'S COMPENSATION ACT (ACCIDENT FUND)*, [1938] 2 W. W. R. 220.—CAN.

PART V. SECT. 2, SUB-SECT. 2.

n i. —.—.]—"*Business of farmer*" —*What is.* —*CARR v. GUARDIAN ASSURANCE CO., LTD. & CRACKNELL & CRIMP*, [1928] N. Z. L. R. 108.—N.Z.

n ii. —.—.]—*Notice to agent—Whether compliance with condition in policy.* —In an action against deft. co., *pltf.* claimed indemnity against a judgment recovered against him by one B. on account of bodily injuries sustained by B. as the result of the operation of *pltf.*'s motor car. The action was

based upon a provision in the policy insuring *pltf.* against legal liability for bodily injuries sustained by any one in respect of the operation of his car. The defence relied upon *pltf.*'s failure to give written notice to the co. in the manner required by the policy. *Pltf.* had notified deft. co.'s agent on the day following the accident by exhibiting to him the letter from the injured party's solr. threatening action unless the compensation claimed was paid. Evidence was given to show that on previous occasions verbal notice was given to the agent, & notices so given were recognised & acted upon by payment of claims:—*Held*: the agent was authorised to act for the co. notwithstanding the provision in the policy requiring the insured promptly to give written notice to the co.; verbal notices given were sufficient within the meaning of the contract & the defence of absence of written notice failed.—*DUNPHY v. SCOTTISH METROPOLITAN ASSURANCE CO.*, [1928] 1 D. L. R. 420; 59 N. S. R. 476.—CAN.

sw. *Insurer interfering in litigation—Counterclaim asserted by insurer's solicitors.* —*MALLET v. LUMBERMEN'S MUTUAL CASUALTY CO.*, [1928] 3 D. L. R. 150.—CAN.

sz. *Liability to third party—Effect of release from insured.* —*Pltf.* in an action brought under Insurance Act, 1925, s. 24, had been injured by a motor car owned by M., who was insured by deft. co. against liability for such injuries. Following the accident the adjuster for the co. paid M. a sum of money, & she gave him a receipt, which the trial judge found to be a release of the co. from any further liability to her arising out of the accident. *Pltf.* sued M. & recovered, in default of defence a judgment for damages, but, being unable to obtain satisfaction thereof, brought this action against the co.:—*Held*: the release given by M. barred *pltf.*'s action, since his right of action under the sect. was "subject to the same equities as the insurer would have if the judgment had been satisfied."—*BARLOW v. MERCHANTS CASUALTY INSURANCE CO.*, 1; 3

sy. —.—.]—*Car driven by person other than insured.* —*Appl.* obtained a judgment in British Columbia against B.'s daughter for damages for personal injuries caused by her negligence while driving B.'s motor car with his permission. Execution issued, but nothing was recovered. B. had effected in respect of his car an insurance in his own name with resps., & they had taken charge of the defence of the action. By the policy resps. agreed to indemnify the insured against party risks, & that the ind. should be available to any person operating the car with the permission of the insured. *Appl.* sued resps. to recover the amount of the unsatisfied

3183. *Add. Annotation*:—*Reid. Welch v. Royal Exchange Assurance*, [1938] 1 K. B. 757.

3187. *Add. Annotations*:—*As to* (1) *Appl. Freshwater v. Western Australian Insurance Co.* (1932), 102 L. J. K. B. 75. *As to* (2) *Consd. Stevens & Sons v. Timber & General Mutual Accident Insurance Assn., Ltd.* (1933), 49 T. L. R. 224.

3194a. —.—.]—*JAMES v. BRITISH GENERAL INSURANCE CO.*, No. 3214a, *post*.

3195a. *Whether disease "contracted" during currency of policy—Disease of gradual onset—Workmen's compensation insurance.* —In 1927 *appls.*, who carried on business as file cutters, took out with resp. insurance co. a policy against liability in respect of disease

judgment, conl that B.'s daughter was against the liability by the policy, & that resps. were therefore liable to her under (British Columbia) Insurance Act, 1925, s. 24:—*Held*: the sect. above mentioned applies only where the person liable under the judgment is insured by an actual contract in law, & the action failed, as there was no evidence that B. had contracted on behalf of anybody but himself; even if the sect. had a wider application the action failed, because there was no evidence that B. intended to create a beneficial interest for his daughter, nor did the fact that the resps. conducted the defence of the action raise an estoppel available to *appl.*—*VANDEPITTE v. PREFERRED ACCIDENT INSURANCE CORP. OF NEW YORK*, [1933] A. C. 70; 102 L. J. P. C. 21; 148 L. T. 169; 49 T. L. R. 90; 76 Sol. Jo. 793, P. C.—CAN.

so. —.—.]—Insured owner of a car cannot recover from the insurers in respect of a sum awarded as damages against a person driving the car with the consent of the owner.—*HORN BROOK v. TORONTO CASUALTY FIRE & MARINE INSURANCE CO.*, [1934] 1 D. L. R. 350.—CAN.

sd. —.—.]—The provision in the contract of automobile insurance in question herein which purported to insure against liability for personal injuries to third persons, not only the insured but also any person using the car with his consent:—*Held*: to give no enforceable right to any one.—*CROWN BAKERY, LTD. v. PREFERRED ACCIDENT INSURANCE CO. OF NEW YORK*, [1933] 2 W. W. R. 33; 4 D. L. R. 117.—CAN.

sz. *Failure to pay supplementary premium.* —*Appl.* co. insured D. under an indemnity policy against liabilities resulting from Workmen's Compensation Act for a period of one year from Jan. 26, 1924. The premium was based upon the whole remuneration of the insured's employees during the period of the policy as follows: a "minimum" premium & an "estimated premium" were stipulated to be paid, & were in fact paid, in advance by the employer, & at the expiry of the policy, an adjustment was to be made so that a supplementary premium may then be due by the insured or a reimbursement may be made by the co., according to the amount of wages paid by the insured during the life of the policy; but, in any case, the "minimum" premium was to be retained by the co. On Aug. 2, 1924, an employee of D., L., was injured, but a petition to sue the employer under the Act was served on Jan. 28, 1925, & on the same day, D. made an assignment in bkpy. L. having been granted permission to sue the trustee, one G., obtained judgment for \$5,300 & costs against the

"which during the continuance of this policy shall be . . . contracted by any workman while in the employers' direct employ." In 1928 one H., who had been employed as a file cutter for many years, entered the employment of applt. in that capacity, & he continued at that work till June 16, 1930, when he was put on different work. On June 16, 1930, the policy lapsed. In 1931 H. left applt.' employment & became unemployed. In 1932 he was certified as totally disabled by silicosis & tuberculosis, & the total disablement was certified as having begun on July 18, 1932. H. claimed compensation under the Silicosis Scheme, & applt. paid him compensation. In an arbn. between applt. & resp. insurance co. the arbitrator found that H. had contracted the disease before the lapse of the policy but that it was a gradual process & it was impossible to fix a date at which it began, & that it was contributed to by his employment with the applt. though it was impossible to say that it began after H. entered their service. It appeared that after the issue of the policy applt. sent to resps. a letter stating that the policy would protect them against claims in respect of silicosis:—*Held*: on a case stated, whether on the true construction of the policy the disease had or had not been "contracted" while the policy was in existence, applt. must, in view of their letter, be held to be liable on the policy. —SMITH (R.) & SON v. EAGLE STAR & BRITISH DOMINIONS INSURANCE CO., LTD. (1934), 50 T. L. R. 208; 78 Sol. Jo. 121; 27 B. W. C. O. 1, C. A.

3197. *Add. Annotation*:—*Consd. Welch v. Royal Exchange Assurance*, [1938] 1 K. B. 757.

3200. *Add. Annotation*:—*Refd. Koskas v. Standard Marine Insee.* (1926), 42 T. L. R. 692.

3202a. — *Condition against acting to detriment of insurer—Failure to raise defence of diplomatic privilege—By order of diplomatic superior.*—*Deft.*, who was First Secretary of the Peruvian Legation, took out a policy of insurance against legal liability to members of the public in connexion with the driving of his motor-car, the policy providing that "the assured . . . shall not in any way act to the detriment or prejudice of the (insurance) co.'s interests," & that "the co. is entitled to take absolute control of all negotiations & proceedings." *Pltf.* brought an action for personal injuries against *deft.*, & the latter served on the insurance co. a third-party notice claiming an indemnity. An appearance without protest was entered in the action on behalf of *deft.*, & as the Peruvian Minister forbade *deft.* to raise the

plea of diplomatic immunity, no such plea was inserted in the defence. The jury found a verdict for *pltf.* for damages, & the insurance co. repudiated liability on the ground that *deft.* had broken the conditions of the policy by insisting that the plea of diplomatic immunity should not be raised:—*Held*: the privilege of diplomatic immunity was waived by the entry of appearance without protest, & as *deft.* was bound to obey the direction of his Minister there was no breach of the conditions of the policy, & *deft.* was entitled to the indemnity claimed.—*DICKINSON v. DEL SOLAR*, [1930] 1 K. B. 376; 99 L. J. K. B. 162; 142 L. T. 66; 45 T. L. R. 637.

3202b. — *Condition against liability if vehicle unroadworthy*—*Vehicle must be unroadworthy at commencement of journey.*—

By a policy of motor car insurance *defts.* agreed to indemnify the assured against third party risks, "liability in respect of any accident while driving the car in an unsafe or unroadworthy condition" being excluded:—*Held*: applying the principle of marine insurance that there is an implied warranty that a ship is seaworthy at the time of sailing but no warranty that she shall continue seaworthy throughout the voyage, the policy must be taken to mean that, for the assured to be covered by it, the car must be roadworthy when it set out on its journey but need not continue to be roadworthy throughout the journey. An assignee of the assured was, therefore, entitled to recover in an action against *defts.* on the policy where *defts.* (on whom lay the onus of proving unroadworthiness) failed to prove that the car was unroadworthy when it began its journey & only showed that, by reason of a defective brake, it was unroadworthy at the time of the accident.—*BARRETT v. LONDON GENERAL INSURANCE CO., LTD.*, [1935] 1 K. B. 238; 104 L. J. K. B. 15; 152 L. T. 256; 51 T. L. R. 97; 78 Sol. Jo. 898; 40 Com. Cas. 125.

*Annotation*:—*Dbtd. Trickett v. Queensland Insurance Co.*, [1936] A. C. 159.

3202c. — *Condition against driving car in unsafe condition—Whether knowledge of driver material.*—A general exceptions clause in a private motor vehicle insurance policy provided that: "No liability shall attach to the co. under this policy in respect of . . . any personal accident to the insured occurring: (1) while any motor vehicle in connection with which indemnity is granted under this policy is: (e) being driven in a damaged or unsafe condition." The insured, while driving at night a motor car covered by the policy, was involved in a collision with another

*affg.*, 30 Que. P. R. 214.—*CAN.*

sa. *One person—Injury to wife—Recovery of maximum by husband & wife.*—A third party insurance policy contained this clause: "Limits & amounts—One person \$5,000 & subject to the said limit for each person \$10,000 for one accident." In an accident in which a married woman was injured:—*Held*: the wife was entitled to \$5,000 & the husband was also entitled to \$5,000 in respect of injuries to his wife.—*KELLY v. CONSTITUTION INDemnITY CO. OF PHILADELPHIA*, [1933] O. R. 57; 1 D. L. R. 382; *revid.*, [1933] 3 D. L. R. 50 O. R. 467.—*CAN.*

present resp. who had succeeded G. as trustee. On Jan. 27, 1925, one day after the expiry of the policy & one day prior to the service of the petition on D., an adjustment had been made as provided for in the policy & a supplementary premium of \$1,020.58 was thereby shown to be due by D. On Jan. 22, 1927, resp. sued applt. co. for the payment of \$6,490, being L.'s claim of \$5,300 & the costs, under the judgment secured against resp. which he had not yet paid. Applt. co. repudiated its liability on the ground that the supplementary premium of \$1,020.58 had not been paid by the insured:—*Held*: applt. co. was liable for the amount claimed by the resp.

Under the terms of the policy, the obligations of each party were not simultaneous & that of the insurer to indemnify was not made subject to the obligation of the insured to pay the supplementary premium. Applt.'s liability was complete & absolute on the date of the accident, i.e. Aug. 2, 1924; on that day, applt., having received all the premiums then due, became bound to pay to the employer the amount of the indemnity to be awarded to the injured employee under the Workmen's Compensation Act.—*EMPLOYERS' LIABILITY ASSURANCE CO. v. LEFAIVRE*, [1930] S. O. R. 1; 1 D. L. R. 689; 11 O. B. R. 290; *affg.*, 45 Que. K. B. 224; 10 O. B. R. 559;

motor car & was killed. At & about the time of the accident the lights of his motor car were not shining. On a claim under the policy by the insured's daughter as assignee of the rights under the policy from the legal personal representative of the insured:—*Held*: (1) at the time of the accident the motor car driven by the insured was in a damaged or unsafe condition within the exceptions clause, & the insurance co. was accordingly relieved from liability under the policy irrespective of whether or not the insured was aware at the time of the accident of the damaged or unsafe condition of the car. The terms of the exceptions clause were unambiguous & plain, & there was no justification for supplementing them by adding "to the knowledge of the driver," or for reforming the contract into which the insured had entered; (2) the position of a motor car on land cannot be assimilated to that of a ship at sea & the same code of law rigidly applied to both cases so as to make the exceptions clause to the policy only applicable where the motor vehicle was in a damaged or unsafe condition at the beginning of its journey. Such an argument based on the identity of the conditions which govern the seaworthiness of a ship at sea & the road-worthiness of a motor car on land is unsound. —*TRICKETT v. QUEENSLAND INSURANCE CO., LTD.*, [1936] A. C. 159; 105 L. J. P. C. 38; 154 L. T. 228; 52 T. L. R. 164; 80 Sol. Jo. 74; 41 Com. Cas. 143, P. C.

**3202d.** *Material time for unsafe condition.*—*TRICKETT v. QUEENSLAND INSURANCE CO., LTD.*, No. 3202c, *ante*.

**3202e.** *Precautions against accidents—Demolition by explosives.*—A builder who had not previously undertaken any demolition work took out a policy of insurance to cover the demolition of a mill. He was asked in the proposal form "are there any explosives used?" & answered "no": & agreed that his answer should form the basis of the contract between himself & the assurer. The policy of insurance contained a condition "the insured shall take reasonable precautions to prevent accidents." Pltf. proceeded to demolish the mill, & in the course of such demolition used explosives. Three persons were killed by falling masonry & upon a claim being made under the policy, the insurance co. repudiated liability:—*Held*: (1) the denial of the use of explosives amounted to a warranty that they would not be used; (2) even if it amounted to a mere description of the risk to be insured, the cause or contributing cause of the accident was the use of explosive; (3) there had been a change

in the risk, for the co. insured a non-explosive demolition.—*BEAUCHAMP v. NATIONAL MUTUAL INDEMNITY INSURANCE CO., LTD.*, [1937] 3 All E. R. 19.

**3203a.** *Insurer defending claim—Claim not covered by policy—Repudiation—Estoppel.*—*ETCHELLS, CONGDON & MUIR, LTD. v. EAGLE STAR & BRITISH DOMINIONS INSC. CO., LTD.* (1928), 72 Sol. Jo. 242.

**3205.** *Add. Annotation:—Apld.* *Wales v. Iron Trades Employers' Assocn.* (1928), 21 B. W. C. C. 316.

**3205a.** *S. P. WALES v. IRON TRADES EMPLOYERS' ASSOCN., LTD.* (1928), 21 B. W. C. C. 316, C. A.

**3205b.** — — — — —]—A workman was employed by a co., which went into liquidation, & ceased to carry on business. The co. were insured at the time of an accident to the workman with an assocn., whose arts. formed the contract of insurance. By the arts. the assocn. undertook liability if compensation became payable for more than six months, so long as the insured co. remained a member of the assocn. Membership was to cease if the co. went into liquidation, or ceased to carry on business. The workman having applied for an award of weekly compensation as against both his employers & the assocn., on the ground that the rights of his employers against the assocn. had been transferred to him:—*Held*: on the contract, the undertaking of liability by the assocn. after compensation had been paid for more than six months did not vest that liability once & for all, but merely indemnified the co. during its continuance of membership, & membership having ceased, the contract of insurance lapsed, & the assocn. was under no liability to the workman.—*HINDMARCH v. CARTERTHORNE COLLIERY, LTD. & DURHAM COLLIERY OWNERS' MUTUAL PROTECTION ASSOCN.* (1928), 21 B. W. C. C. 44, C. A.

*Annotations:—Consd.* *Re Bebside Coal Co.* (1929), 45 T. L. R. 327; *Vickers v. Cumberland Coal Owners' Mutual Indemnity Co. & Whitehaven Colliery Co.* (1934), 27 B. W. C. C. 56.

**3206.** *Add. Annotations:—Distd.* *Hindmarch v. Carterthorne Colliery Co. & Durham Colliery Owners' Mutual Protection Assocn.* (1928), 21 B. W. C. C. 44. *Consd.* *Wales v. Iron Trades Employers' Assocn.* (1928), 21 B. W. C. C. 316. *Distd.* *Vickers v. Cumberland Coal Owners' Mutual Indemnity Co. & Whitehaven Colliery Co.* (1934), 27 B. W. C. C. 56. *Consd.* *Wooding v. Monmouthshire & South Wales Mutual Indemnity Society, Ltd.*, [1938] 3 All E. R. 625.

**3206a.** — — — — —]—A miner was totally incapacitated by an accident while employed

#### PART V. SECT. 2, SUB-SECT. 3.

q i. — — — — —]—Pltf., a workman employed by the M. Co., was injured, & obtained an award for compensation under Workmen's Compensation Act, 1902. At the date of the award the M. Co. were being wound up. Pltf. alleged that the C. Co., were liable to indemnify the M. Co. against losses or liability under the award, & brought an action for a declaration that he had a first charge upon the money which the M. Co. were entitled to receive from the C. Co., & for an order for payment. The C. Co. admitted that they had issued a policy which was valid & subsisting at the date of pltf.'s

injuries, by which they agreed to indemnify the M. Co. against loss for damages on account of bodily injuries suffered within the period of the policy by any employee.—*Held*: pltf. had no status to maintain the action.—*DISOURDI v. SULLIVAN GROUP MINING CO. & MARYLAND CASUALTY CO.* (1910), 15 B. C. R. 305.—*CAN.*

q ii. — — — — —]—The words "Every such policy shall provide that the insurer shall, as well as the employer, be directly liable to any worker insured under such policy & in the event of his death, to his dependants, to pay the compensation for which an employer is liable, & that the insurer shall be

bound by, & subject to, any order, decision or award made against the employer of such worker under the provisions of this Act," appearing in Workmen's Compensation Act, 1926, s. 18 (3), mean that when compensation has been assessed & awarded against the employer, the insurer as well as the employer is liable to pay its & that the original proceedings for the establishment of the liability must be between the worker & his dependant, on the one side, & the employer on the other.—*DEVINE v. DEVINE & QUEENSLAND INSURANCE CO., LTD.* (1928), 28 S. R. N. S. W. 503; 46 N. S. W. W. N. 140.—*AUS.*

by a colliery co. While he was in receipt of weekly compensation the colliery co. went into voluntary liquidation. The colliery co. was a contributing member of a mutual indemnity co. which kept a register of protected mines. There was no policy of insurance, but the terms of the insurance were to be found in the Memorandum & Arts. of Assocn. of the indemnity co. which contained the following clause: "As to non-fatal accidents the indemnity shall only cover payments applicable to the period of membership of any member ceasing to be a member, & such member shall discharge his own liabilities from the date when he ceases to be a member." Shortly before going into liquidation the colliery co. lost possession of its mines, which were thereupon removed from the register of protected mines kept by the indemnity co. By the Arts. of Assocn. of the indemnity co. the colliery co. ceased to be a member six weeks after it had lost protection for its mines. The indemnity co. continued to pay compensation to the workman for a period sufficient to cover the six weeks & then denied liability for any further period. The workman claimed compensation from the indemnity co. & the colliery co. in the alternative. The county ct. judge dismissed the application as against the indemnity co. but made an award for the workman against the colliery co. The workman appealed:—*Held*: the workman had no greater rights against the indemnity co. than the colliery co. had, & when the colliery co. had ceased to be a member of the indemnity co. the indemnity co. was no longer liable to indemnify the colliery co. for any weekly payments made in respect of a non-fatal accident & could not therefore be made liable for any further payments to the workman.—*VICKERS v. CUMBERLAND COAL OWNERS' MUTUAL INDEMNITY CO., LTD. & WHITEHAVEN COLLIERY CO., LTD. (1934), 27 B. W. C. C. 58, C. A.*

**3210. Add. Citation :—**95 L. J. K. B. 25.

**Add. Annotations:**—As to (1) *Dlstd. Hindmarch v. Carterthorne Colliery Co. & Durham Colliery Owners' Mutual Protection Assocn.* (1928), 21 B. W. C. C. 44. *Generally, Consd. Wales v. Iron Trades Employers' Assocn.* (1928), 21 B. W. C. C. 316; *Wooding v. Monmouthshire & South Wales Mutual Indemnity Society, Ltd.*, [1938] 3 All E. R. 625.

**3212a. Liability of insurer must exist—At date of winding-up.]—Held:** Workmen's Compensation Act, 1925 (c. 84), s. 7, applied only where at the date of the winding-up there was some liability of insurers, the benefit from which was capable of being transferred to the workmen, & it could not apply to a case where the liability had come to an end before that date.—*Re BEESIDE COAL CO., LTD.* (1929), 45 T. L. R. 327; 22 B. W. C. C. 239.

**Annotations:—***Apld. Re Burradon & Coxlodge Coal Co., Martin's Bank, Ltd. v. The Co. (1930), 23 B. W. C. C. 7. Reid v. Vickers v. Cumberland Coal Owners' Mutual Indemnity Co. & Whitehaven Colliery Co. (1934), 27 B. W. C. C. 58.*

**8212b.** At time of appointment of receiver for debenture-holders.]—A colliery co. entered into a contract with insurers in respect of liability under Workmen's Com.

pensation Acts by becoming a member of an owners' mutual protection association. Under the arts. of assocn. power was given to make calls on members in order to meet claims & current expenses; if a call were not paid before the date fixed the contract of insurance was to expire fifteen days after such date. On June 12, 1928, calls were made, & the co. having failed to pay on June 27, being the date fixed, its contract of insurance expired, in accordance with the arts. of assocn., fifteen days after the failure to pay. The co. had issued a debenture to a bank secured by a fixed & floating charge, & under the powers in the debenture the bank, on Oct. 13, 1928, appointed a receiver. In a debenture-holders' action brought by the bank the ct. appointed the same person receiver & manager. The bank took out a summons to decide whether in view of the contract made with insurers workmen claiming under the Act were preferential creditors or not:—*Held*: the material date was that of the appointment of the receiver (*viz.*), Oct. 13, 1928, & as the contract with insurers had expired before that date, it could not operate to deprive the workmen of their preferential rights.—*Re BURRADON & COX-LODGE COAL CO., LTD., MARTIN'S BANK, LTD. v. THE COMPANY* (1930), 23 B. W. C. C. 7, O. A.

3213a. *S. P. WALES v. IRON TRADES EMPLOYERS' ASSOCN., LTD.* (1928), 21 B. W. O. C. 316, C. A.

**3214. Add. Annotations :—***As to (1) Fold. James v. British General Insee., [1927] 2 K. B. 311. As to (3) Fold. James v. British General Insee., [1927] 2 K. B. 311. Consd. Haseldine v. Hosken, [1933] 1 K. B. 822. Generally, Refd. Beresford v. Royal Insurance Co., [1937] 2 K. B. 197.*

**3214a.** —. —.]—A policy of insurance provided that the insurance co. would indemnify the assured against all sums which he might be legally liable to pay for damages or compensation to any person for accidental bodily injury or accidental damage to property where such injury or damage was caused by the driving of the insured's motor car, including law costs when incurred with the consent of the co. While the insured was driving his motor car a collision took place between it & a motor cycle, the result being that the driver of the latter vehicle was injured, a passenger thereon was killed, & both vehicles were damaged. At the time of the collision the insured was drunk through his own unpremeditated folly. The insured was convicted of the manslaughter of the deceased passenger. The injured driver brought an action for personal injuries against the insured, in which he was awarded damages & costs, & the insured incurred costs. The insured also incurred costs in repairing the vehicles, in attending an inquest on deceased, & in defending himself in the police ct. proceedings before his trial. In an action by the insured against the co. for indemnity against these damages & costs:—*Held*: (1) the policy covered liabilities of the insured for accidental bodily injury to any person or accidental damage to property caused by his negligence, even though gross & attended by criminal consequences; (2) the

policy, by covering these liabilities, was not void as against public policy, & the insured was entitled to the indemnity which he claimed.—*JAMES v. BRITISH GENERAL INSURANCE CO.*, [1927] 2 K. B. 311; 96 L. J. K. B. 729; 137 L. T. 156; 43 T. L. R. 354; 71 Sol. Jo. 273.

*Annotations*:—As to (1) & (2) *Consd. Haseldine v. Hosken*, [1933] 1 K. B. 822. As to (2) *Consd. Beresford v. Royal Insurance Co.*, [1937] 2 K. B. 197.

**3215. Add. Annotations**:—As to (3) *Consd. Tattersall v. Drysdale*, [1935] 2 K. B. 174. *Refd. Vandepitte v. Preferred Accident Insurance Co. of New York*, [1933] A. C. 70.

**3216a.** ———. —.]—*JAMES v. BRITISH GENERAL INSURANCE CO.*, No. 3214a, *ante*.

**3216b. Protection against criminal consequences.** —*JAMES v. BRITISH GENERAL INSURANCE CO.*, No. 3214a, *ante*.

**3217a.** ———. **Actual driver also insured—**

**Ratable contribution.**]—G. took out with the M. co. a motor car insurance policy covering himself & any friend driving with G.'s consent, & providing as following: "Condition 6. The extension of the indemnity to friends or relatives of the insured is conditional upon such friend or relative being a licensed & competent driver & not being insured under any other policy. Condition 10. If at the happening of any accident, injury, damage, or loss covered by this policy there shall be subsisting any other insurance or indemnity of any nature whatever covering same, whether effected by insured or by any other person, then the co. shall not be liable to pay or contribute towards any such damage or loss more than a ratable proportion of any sum payable in respect thereof for compensation." L., G.'s brother-in-law, took out with the G. co. a similar policy, providing that "insured will also be indemnified hereunder while personally driving a car not belonging to him provided that there is no other insurance in respect of such other car whereby insured may be indemnified," & that "if at the time of the occurrence of any accident, loss or damage there shall be any other indemnity or insurance subsisting whether effected by insured or by any other person the corp'n. shall not be liable to pay or contribute more than a ratable proportion of any sums payable in respect of such accident loss or damage." While L. was driving G.'s car with G.'s consent it had a collision, & L. had to pay damages. G., as trustee for L., claimed against the M. co., & L. on his own behalf claimed against the G. co.:—*Held*: in each policy the provision as to ratable contribution qualified the preceding clause, & each co. was liable to pay claimants half the amount claimed.—*GALE v. MOTOR UNION INSURANCE CO., LTD., LOYST v. GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPN., LTD.*, [1928] 1 K. B. 359; 96 L. J. K. B. 199; 138 L. T. 712; 43 T. L. R. 15; 70 Sol. Jo. 1140.

*Annotation*:—*Consd. Weddell v. Road Transport & General Insurance Co.* (1931), 146 L. T. 162.

#### PART V. SECT. 2, SUB-SECT. 4.

**32171. Motor driven by relation of assured—With assured's authority.**—An accident occurred while a motor car was being driven by C., a duly licensed driver. The car belonged to

C.'s wife & was being operated with her permission. Judgment was recovered by the injured party against C., but was unsatisfied:—*Held*: C. was "a person insured against liability for injury or damage to persons or property of others within Ontario Insurance Act,

**3217b.**

—.]—A motor-car accident policy issued by resp. co. to J. extended the insurance to a relative driving the car, provided that the latter was not entitled to indemnity for the same risk under another policy. L., a relative of J., while driving the car, injured a third party, who claimed damages. L. was himself insured with the O. insurance co. against claims for injuries caused by him while driving a car not belonging to him, provided that he was not entitled to an indemnity in respect thereof from another co. Resps. denied liability on the ground of the proviso in their policy exempting them where the claimant was entitled to indemnity under another policy:—*Held*: on the proper construction of the policies, the insurance clause in each policy expressed to be cancelled by the co-existence of a similar clause in the other policy should be excluded from the category of co-existing cover, & that therefore resps., not being protected by their proviso, were liable.—*WEDDELL v. ROAD TRANSPORT & GENERAL INSURANCE CO., LTD.*, [1932] 2 K. B. 563; 101 L. J. K. B. 620; 146 L. T. 162; 48 T. L. R. 59; 75 Sol. Jo. 852.

*Annotation*:—*Refd. Tattersall v. Drysdale*, [1935] 2 K. B. 174.

**3217c. Action by repairer against insurers for repairs—Right of insurers to be subrogated to owner's rights against repairer.**]—In an action by the repairer of a motor car against an insurance co. for repairs executed at their request, the co. contended that they were entitled to set-off, on the principle of subrogation, the claims of the assured, the owner of the car, against the repairer, who had been driving the car on the occasion of a collision. The insurance co. had commenced an action, in the name of the owner, against the repairer for the damage done to the car by his negligent driving, but, at the date of the commencement of the action by the repairer, certain claims of the assured under the policy in regard to third party risks, etc., were still unsettled:—*Held*: the fact that these claims were then unsettled prevented the insurance co. from being subrogated to the owner's rights against the repairer, & the co. were not entitled to rely on these as a set-off to the repairer's claim.—*PAGE v. SCOTTISH INSURANCE CORPN., FORSTER v. PAGE* (1929), 98 L. J. K. B. 308; 140 L. T. 571; 45 T. L. R. 250; 73 Sol. Jo. 157; 34 Com. Cas. 236, C. A.

**3217d. Condition as to efficient condition of vehicle.**]—The claimants were the holders of a policy by which resp. co. had undertaken liability for damage caused by or to a motor car. The policy contained a condition that "the insured shall take all reasonable steps to maintain such vehicle in efficient condition." & it provided that the observation of the conditions should be a condition precedent to the liability of the co. The claimants removed the foot-brake from the vehicle, leaving only a hand-brake, & in this state of affairs the vehicle caused damage,

1927, s. 85 (1), & pl'ts. were entitled to recover from the insurance co. the amount of the unsatisfied judgment obtained against C.—*SCHOENFELD v. PILOT AUTOMOBILE & ACCIDENT INSURANCE CO.*, [1930] 2 D. L. R. 1; 65 O. L. R. 29.—CAN.



& was itself damaged, in an accident, but the exact cause of the accident could not be ascertained:—*Held*: the condition was a condition precedent, & as it had been broken the co. was not liable on the policy.—*JONES & JAMES v. PROVINCIAL INSURANCE CO., LTD.* (1929), 46 T. L. R. 71.

**3217e. Policy covering any car used "instead of the insured car"—Insured car sold—Whether new car covered.]—Defts. contracted by a policy of insurance to indemnify pltf. against "all sums which the assured shall become legally liable to pay as compensation for . . . bodily injury . . . caused to any person or persons by a motor car described in the schedule hereto." The car was thereafter referred to as the "insured car." The policy further provided that "this insurance shall cover the legal liability as aforesaid of the assured in respect of the use by the assured of any motor car (other than a hired car) provided that such car is at the time of the accident being used instead of the insured car." Pltf. exchanged the insured car for a new car of a similar type. While pltf. was using the new car an accident occurred, causing injury to a third person, & pltf. referred the claim to defts., who repudiated liability on the grounds that pltf. was not using the new car "instead of" the old one & that when the insured car was sold the**

insurance ceased. In an action for a declaration that defts. were liable to indemnify pltf. against the claim:—*Held*: the policy necessarily implied that the insured car should be the subject-matter of the insurance at the time of the accident, & therefore the action failed.—*ROGERSON v. SCOTTISH AUTOMOBILE & GENERAL INSURANCE CO., LTD.* (1931), 146 L. T. 26; 48 T. L. R. 17; 75 Sol. Jo. 724; 37 Com. Cas. 23, H. L.

*Annotations*:—*Folld. Tattersall v. Drysdale*, [1935] 2 K. B. 174. *Consd. Peters v. General Accident & Life Assurance Corp., Ltd.*, [1937] 4 All E. R. 628.

**3217f. Effect of non-disclosure—Previous theft of car.]—Pltf. insured a motor car against loss, the policy providing that the proposal should be incorporated in the contract. The proposal, which was signed by pltf., concluded with the declaration: "I hereby declare that the above motor car is my own sole property & that all the particulars stated above are true, & that no facts have been omitted or any information withheld with which the underwriters should be acquainted. I further agree that this declaration shall be the basis of the contract between us." Among the questions contained in the proposal form was the following: "How many accidents or losses have arisen during the past three years in connection with this or any other motor vehicle owned or driven by**

**3217g i. Compulsory third party insurance—What may be recovered—Wages & expenses of additional assistance awarded to injured party.]—In an action arising out of a motor collision special damages were awarded to pltf. in respect of wages paid by him for additional assistance & also in respect of moneys paid by him for the board & lodging of the persons giving such assistance:—*Held*: the damages were within the indemnity under the contract of insurance created by sect. 6 of the Motor Vehicles Insurance (Third Party Risks) Act, 1928.—*SOUTH BRITISH INSURANCE CO., LTD. v. FEELY & SOTEROS*, [1932] N. Z. L. R. 1392; G. L. R. 680.—N.Z.**

**3217g ii. — Liability to employer of injured party for loss of services.]—Pltf., while negligently driving his wife's car with her authority collided with a car belonging to the T. M. Co. in which one C. was a passenger. The T. M. Co. sued pltf. for damages, including a claim for damages for the loss of C.'s services. The car driven by pltf. was insured with deft. co. both under Motor-vehicles (Third-party Risk) Act, 1928, & under comprehensive policy covering third-party risk. Delt. co. accepted liability to indemnify pltf. in respect of the whole claim by the T. M. Co. save only the claim for the loss of C.'s services:—*Held*: (1) the statutory right to indemnify from liability to pay damages on account of "death or bodily injury of any person" did not include an indemnity from liability to pay damages to an employer of a person injured for loss of the services of such person; (2) the provisions of the policy as to third-party property risks indemnifying against "liability at law for damage to property (including animals) other than property of the assured or in his custody or control" related only to tangible property & did not create a right of indemnity in respect of liability to the employer of a person injured for loss of his services.—*JOYES v. NATIONAL INSURANCE CO. OF NEW ZEALAND, LTD.*, [1932] N. Z. L. R. 802; G. L. R. 195, 287.—N.Z.**

**3217g iii. — Negligent driving by friend of assured—Whether assured**

**liable.]—Road Traffic Act, 1930 (c. 43), s. 35 (1), does not render the owner of a motor car, who is duly insured both with regard to himself & to other persons permitted by him to use the car, liable for loss caused by the negligence of a person permitted by him to drive a car for him, the driver's own purposes.—*LINDSAY v. ROBERTSON*, [1933] S. C. 158.—SCOT.**

**3217g iv. — "Plying for hire"—What amounts to.]—The first deft., the owner, owned a motor car. The second deft., the driver, agreed to carry Mr. & Mrs. A. from the Lower Hutt to Auckland & back, together with Mrs. A.'s mother on the return journey, for a sum no more than sufficient to pay for the benzine & oil used on the journey. The driver agreed to carry pltf. who had heard of the proposed journey, & her daughter to Hamilton for £1. The owner knew of this arrangement, & lent the car to the driver for the purpose of the journey. The relation between the owner & the driver was that of bailor & bailee. There was no evidence (a) that the bailment had been for a period of fourteen days or more, or (b) that the car ever plied for hire or was ever used in the course of the business of carrying passengers for hire, except the evidence as to the occasion on which the accident occurred. Pltf. was injured through the driver's negligence, & judgment had been given against him. In dismissing the claim against the owner & the third deft., the statutory indemnifier of the owner.—*Held*: (1) the vehicle was not a vehicle "plying for hire" within sect. 6 (4) (c) of Motor-vehicles Insurance (Third-party Risks) Act, 1928; that term implying some measure of solicitation or holding out to the public or a section of the public to use the vehicle; (2) the vehicle was not being "used in the course of the business of carrying passengers for hire" within sect. 6 (4) (c) of Motor-vehicles Insurance (Third-party Risks) Act, 1928, the transaction being an isolated one; (3) the extension of liability under sect. 3 (1) of the Act is expressed to be "for the purpose of this Act, & of every contract of insurance there-**

under" & must be limited accordingly.—*SHIRLEY v. MACDOUGALL & ROYAL INSURANCE CO., LTD.*, [1934] N. Z. L. R. 1059; G. L. R. 696.—N.Z.

**3217g v. — Condition against use of trailer—Accident while trailer used.]—An insurance policy against third-party risks covered the use of a motor lorry except when drawing a trailer. In a prosecution charging the owner of the lorry with a contravention of Road Traffic Act, 1930, s. 35, in respect that the lorry had been used with a trailer without there being in force an insurance policy in terms of that sect., it was maintained on behalf of accused that, although he had been in breach of the conditions of the policy in using a trailer, there had been no contravention of the sect. in respect that the policy was not void, but only voidable, & that, in these circumstances, the terms of Road Traffic Act, 1934, s. 10 (1), entitled third parties to have recourse against the insurer:—*Held*: (1) 1934 Act, s. 10, had no application, in respect that liability for third-party risks while the lorry was drawing the trailer was not a risk "covered by the terms of the policy"; (2) there was, therefore, no insurance policy against third-party risks in force while the lorry was being so used; (3) the accused had been guilty of a contravention of 1930 Act, s. 35 (1).**

*Observed*, that 1934 Act, s. 10 (1), was intended to apply only to cases where, although *ex facie* of the policy liability in respect of third-party risks bore to be covered, the insurer might be entitled to avoid or cancel the policy on such grounds as the non-disclosure of some material fact or a representation of fact which was false in some material particular.—*ROBB v. M'KECHNIE*, [1936] S. C. (J.) 25.—SCOT.

**3217g vi. — "Use" of car—What amounts to.]—Bodily injury caused by the driver of a stationary motor-lorry in dropping upon a person on the footpath a crate that he was wheeling on a hand-trolley on to the tray of the motor-lorry is not the result of an accident "sustained or caused by or through or in connection with the use" of a motor-vehicle within the**



you or your driver?" *Pltf.* in his answers did not disclose the fact that within three years he had had another car which on three occasions was abstracted or stolen, but on each occasion was recovered a few hours later. The insured car was stolen & *pltf.* sued the underwriters:—*Held*: the undisclosed information was material & therefore the action failed.—*FARRA v. HETHERINGTON* (1931), 47 T. L. R. 465; 75 Sol. Jo. 542.

**3217g.** — Question relating to conviction for driving offences—Previous convictions for absence of mirror & insurance policy.]—*REVELL v. LONDON GENERAL INSURANCE CO., LTD.*, No. 3217t, *post*.

**3217h.** Effect of misrepresentation—Answers immaterial—Policy void.]—*MACKAY v. LONDON GENERAL INSURANCE CO., LTD.* (1935), 79 Sol. Jo. 271.

**3217j.** Policy covering "personal luggage"—Meaning of.]—The words "personal luggage"

in a policy of insurance in respect of a private motor car are not necessarily confined to the meaning given to them in cases relating to railway carrying rates or to liability to customs duties. In railway cases the words may have a narrower sense than they have in a policy of insurance against the risks of travel by motor car. By a policy of insurance on a motor car, an insurance society undertook to indemnify the insured against liability in respect of accidental injury to any person, subject to exceptions (*inter alia*) (a) while the car was "being used for other than private pleasure," or (b) while it was "conveying goods other than personal luggage." The insured accidentally ran over & killed a man while he was driving the car at a time when there were fastened on the top of the car two laths with which the insured proposed to repair some trellis work in his garden:—*Held*: the word "pleasure" in the policy was used in contradistinction to "business,"

meaning of sect. 6 (1) of Motor-vehicles Insurance (Third-party Risks) Act, 1928.—*COMMERCIAL UNION INSURANCE CO., LTD. v. COLONIAL CARRYING CO. OF NEW ZEALAND, LTD.*, [1937] N. Z. L. R. 1041; 13 N. Z. L. J. 320.—N.Z.

**r i.** — Notice — Sufficiency of.]—Where notice by an insured under a policy of automobile insurance that a claim for damages had been made upon it was given, through its solrs., to the insurer's agents five days after the insured received the claim:—*Held*: the notice had been given "promptly" within the meaning of statutory condition 8, sched. D, & the notice in question was one of the accident as well as of the claim, & if not perfect, was imperfect so that sect. 258, empowering the ct. to relieve from the forfeiture or avoidance of a policy where there has been "imperfect compliance" as to anything to be done by the insured, was applicable.—*NORTH LETHBRIDGE GARAGE, LTD. v. CONTINENTAL CASUALTY CO.*, [1930] 1 W. W. R. 491; 2 D. L. R. 835; 24 Alta. L. R. 390; *revsq.*, [1930] 1 W. W. R. 37.—CAN.

**r ii.** — Receipt by insurance adjusters.]—Insurance adjusters employed by agents of an insurance co. to adjust only a particular case of loss resulting from damage to an automobile held not to be agents of the co. who could bind it by the receipt of the notice, called for by statutory condition 8 (1), sect. 154 of Insurance Act, 1925 (c. 20), of a claim made against the insured on account of the accident; but an oral notice subsequently given to the agents was held sufficient to justify the ct. under sect. 12 of Automobile Insurance Policy Act, R. S. B. C., 1924, from relieving against the forfeiture of the policy on that ground; moreover the co. was held to be estopped by the acts of its agents from raising the lack of notice as a defence.—*MARSH v. QUEENS INSURANCE CO. OF AMERICA*, [1932] 1 W. W. R. 721.—CAN.

**t i.** — Statutory condition 2 of Automobile Insurance Act, 1932 (N. S.) is not violated unless the insured not only knew the car was being driven, but also knew that the driver was unlicensed.—*SEARS v. CANADIAN FIRE*

*INSURANCE CO.*, [1936] 1 D. L. R. 524; 10 M. P. R. 268.—CAN.

**b i.** — Accident — Insurance — material false answers that any co. had cancelled, etc., & that no previous claims.—*WOOD v. CANADIAN INDEMNITY CO., LTD.*, [1933] 3 D. L. R. 778; 2 W. W. R. 185; 41 Man. L. R. 234.—CAN.

**c i.** — A clause in an insurance policy was as follows: "No liability shall attach to the co. under this policy in respect of any loss, damage, or liability occurring while any motor-vehicle in connection with which indemnity is granted under this policy is, with the knowledge and/or consent of the insured or of any person to whom indemnity is granted by this policy, being driven by or is in charge of any person under the influence of liquor."—*Held*: the clause exempted the co. from liability when the motor vehicle was being driven by insured himself whilst under the influence of liquor.—*JURY v. NORTH ISLAND MOTOR UNION MUTUAL INSOE. CO.*, [1930] N. Z. L. R. 562.—N.Z.

**c ii.** — "Collision with another object"—Shoulder of bridge.]—An insurance co. agreed to indemnify deft. against direct loss or damage to his motor vehicle "if caused solely by accidental collision with another object either moving or stationary":—*Held*: the shoulder of a bridge against which the vehicle struck owing to a defective highway was an "object" within the policy.—*AUSTIN v. JORDAN*, [1931] 4 D. L. R. 292; O. R. 526.—CAN.

**c iii.** — Objects hurled at car by explosion.]—*SANFORD v. CANADIAN FIRE INSURANCE CO.*, [1931] 3 W. W. R. 316.—CAN.

**c iv.** — "Direct result" of physical injuries.]—An insurance policy provided that if the insured was injured by an accident sustained in direct connection with any motor-vehicle or while riding in or dismounting from any motor-vehicle the co. should pay compensation in accordance with a scale, which provided, *inter alia*, £1,000. "If the insured shall . . . die solely as the direct result of the actual physical injuries received in the accident. . . . Provided that . . . no compensation shall be payable . . . when death . . . is due to a disease which is the direct or indirect result of the injuries received in the accident." The insured, falling out of a motor-vehicle on to a road, sustained an abrasion, & an infection of tetanus (from which she died) occurred when she was injured:—*Held*: the insured's death was due to a disease which was the direct or

indirect result of the injuries received in the accident.—*VICTORIA INSURANCE CO., LTD. v. HARRISON-WILKIE*, [1938] N. Z. L. R. 375.—N.Z.

**sy.** Conditions of policy—Breach by insured—Waiver.]—Where conditions of a policy of insurance against liability imposed by law on the insured for injuries suffered by another person are that the insured "shall not voluntarily assume any liability" & "shall co-operate with the insurer, except in a pecuniary way, in all matters which the insurer deems necessary in the defence of any action," & the solr. for the insurance co., after undertaking the defence of an action brought by an injured person against the insured, learns that the latter has broken said conditions, but, nevertheless, elects to continue to defend the action, the insurance co., is precluded from raising the defence to an action against it on the policy that the policy was avoided by said breach.—*CADEDDU v. MOUNT ROYAL ASSURANCE CO.*, [1929] 2 D. L. R. 867; 2 W. W. R. 161; 41 B. C. R. 110.—CAN.

**st.** — — — — —]—ENGLAND v. DOMINION OF CANADA GENERAL INSURANCE CO., [1931] 3 D. L. R. 489; O. R. 264.—CAN.

co. with knowledge of the breach of a condition of the policy has elected by word or act to treat the liability under the policy as still existing, it cannot rely upon such breach.—*STENHOUSE v. GENERAL CASUALTY INSURANCE CO. OF PARIS, NICHOL v. GENERAL CASUALTY INSURANCE CO. OF PARIS, KRILL v. GENERAL CASUALTY INSURANCE CO. OF PARIS*, [1934] 3 W. W. R. 564; [1935] 1 D. L. R. 193.—CAN.

**sz.** — — — — —]—Effect—Assured cannot recover amount of judgment recovered against him.]—*OBORG v. MERCHANTS CASUALTY INSURANCE CO.*, [1930] 2 D. L. R. 156; 42 B. C. R. 317.—CAN.

**sp.** — "Immediate" notice of accident—Meaning of "immediate."—A policy of insurance on a motor vehicle required immediate notice of an accident to be given:—*Held*: "immediate" meant reasonably immediate having regard to the circumstances of the case; & a delay of nine days was therefore a breach of the condition.—*HEAN v. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPN., LTD.*, [1931] N. L. R. 215.—S. AF.

**st.** Condition for co-operation of insured with insurer—Omission—Effect of.]—Where a policy of insurance insuring a motorist against liability for damages contains the statutory condition calling for co-operation between

& the words "personal luggage" in contradistinction to "merchandise"; the insured's garden was his pleasure & not his business; the laths were personal luggage & not merchandise; & therefore the society were liable on the policy.—*PIDDINGTON v. CO-OPERATIVE INSURANCE SOCIETY, LTD.*, [1934] 2 K. B. 236; 103 L. J. K. B. 370; 151 L. T. 399; 50 T. L. R. 311; 78 Sol. Jo. 278; 39 Com. Cas. 221.

**3217k. Policy taken out by firm—Admission of new partner.**—(1) Where a policy against third-party claims arising out of the use of a motor vehicle has been taken out by a firm, the subsequent admission of a new partner to the firm, without the consent of the insurer, does not relieve the insurer from indemnifying from liability those who were partners of the firm at the time the policy was effected, provided that such a partner claiming indemnity retains his undivided interest in the insured vehicle.

*Per* GODDARD, J.: Such a policy is not forfeited should one who was a partner of

the firm at the time the policy was effected retire from the firm without the consent of the insurer.

(2) In a contract of insurance of a motor vehicle against third-party claims there were conditions exempting the insurer (a) whilst the insured vehicle is conveying any load in excess of that for which it was constructed; (b) whilst it has a trailer attached thereto; & (c) in the case of loss through the driving of the insured vehicle in an unsafe condition. The insured vehicle, a Ford truck, took in tow a Manchester lorry that had broken down, also owned by the assured &, through the negligence of both drivers & through a defective tow-chain, a third party was killed:—*Held*: no breach of conditions (a) could occur by the insured vehicle taking another vehicle in tow, for weight carried has no relation to weight drawn; (3) on condition (b) & (c) that the lorry was not a "trailer" & the tow-chain was not a part of "the insured vehicle."

(4) This contract of insurance also provided that if at the time of the injury there should

the insured & the co. in defending an action based on an accident, compliance by the insured with this condition is essential to the success of an action brought by an injured third person under sect. 24 of Insurance Act, 1925, c. 20, against the insurance co.—*WALTERS v. OCEAN ACCIDENT & GUARANTEE CORPN., LTD.*, [1935] 1 W. W. R. 516; 2 D. L. R. 241; 49 B. O. R. 428.—*CAN.*

**sa. Omission of statutory conditions—Effect of.**—When a contract of insurance is one to which Part IV. of Alberta Insurance Act, 1926, applies, i.e. a contract made in Alberta for other than life, accident or sickness insurance, & the insurer has neglected to incorporate in or with the policy the statutory conditions, with such variations or additions, if any, as he desires to make, properly designated, such conditions cannot be taken advantage of by him to the prejudice of the insured or any beneficiary, but the statutory conditions would apply when for the benefit of the latter.—*NORTH LETHBRIDGE GARAGE, LTD. v. CONTINENTAL CASUALTY CO.*, [1930] 1 W. W. R. 491; 2 D. L. R. 835; 24 Alta. L. R. 390; *revers.*, [1930] 1 W. W. R. 37.—*CAN.*

**sb. Construction of Insurance Act, R. S. O. 1927, s. 85.**—*Pltf.* had been injured by S.'s automobile & had recovered judgment for damages & costs against S. & issued execution which was returned unsatisfied. *Pltf.*, under Insurance Act, R. S. O. 1927 (c. 222), s. 85, sued *deft.*, which had insured S. against liability for injury to another, for the amount of her judgment:—*Held*: the right of action given by s. 85 is simply a right to sue on the policy in the place & stead of the insured; *pltf.* must establish liability on the policy against the insurer in the same manner & to the same extent as if the action had been brought by the insured; & the facts, required to be established as part of *pltf.*'s case, that the bodily injury to another, insured against, had been inflicted by the insured's automobile, & that the insured was legally liable in damages to *pltf.* for the injury, are not established as against the insurer by the production of the judgment obtained by *pltf.* against the insured. But in the present case *deft.*, by reason of an admission at the trial, was precluded from contending that the liability of S. to *pltf.* had not been established by production of the judgment against S.—*CONTINENTAL CASUALTY CO. v. YORKE*, [1930]

S. C. R. 180; 1 D. L. R. 609; *affy.*, [1929] 3 D. L. R. 662; 64 O. L. R. 109.—*CAN.*

**sm. Notice of cancellation—Meaning of "registered mail"—Not Canadian registered mail.**—*CLAPP v. TRAVELLERS' INDEMNITY CO.*, [1932] 1 D. L. R. 551; O. R. 116.—*CAN.*

**so. Company liable for accident by car used with designated trailer—Accident while used with designated trailer & another—No liability.**—*BOYCE v. NORWICH UNION FIRE INSURANCE SOCIETY*, [1931] 4 D. L. R. 117; O. R. 545.—*CAN.*

**sp. Vehicle bailed for period exceeding fourteen days—Whether bailor liable.**—By Motor-vehicles Insurance (Third-party Risks) Act, 1928, s. 2, "owner" in relation to a motor-vehicle, has the same meaning as in the Motor-vehicles Act, 1924, viz. "Owner includes a bailee to whom a motor-vehicle is bailed for any period exceeding fourteen days, & also includes a person in possession of a motor-vehicle pursuant to a bill of sale. Where there are more owners of a motor-vehicle than one, every such owner is an owner for the purposes of this Act." *Deft. W., Ltd.*, disposed of a motor car to *defts. C. & I.* on May 24, 1932, by a hire-purchase agreement, admitted to be a bailment, under which the car was bailed for a period exceeding fourteen days. On the same day notice of the sale was given & the car transferred to the names of the bailees, who were registered as owners, the car was licensed, & an insurance effected under Motor-vehicles Insurance (Third-party Risks) Act, 1928, for the year commencing June 1, 1932, the fees for all these purposes being paid by the bailees. On May 26, 1932, the son of *pltf.* was injured, & later died, as the result of a collision between his bicycle & the said car, driven at the time of the accident by a son of *Collins*. In an action brought by *pltf.* against both the bailees & the bailor, on an argument by consent before trial on the question of law whether *W., Ltd.*, the bailor, was liable to *pltf.*, it was admitted that that co. was not so liable at common law:—*Held*: in the definition of "owner" the specifying of the bailee as the owner in relation to a motor-vehicle bailed for a period exceeding fourteen days excluded any other person claiming under a different right from the meaning of "owner" in relation to that vehicle, the Act not

contemplating that under a bailment the general owner (the bailor) & the special owner (the bailee) were both to be regarded as owners for the purposes of the Acts & subjected to the liabilities of ownership as imposed by the Acts. Therefore, *W., Ltd.*, the bailor, was not liable to *pltf.*—*ANTUNOVICH v. COLLINS*, [1933] N. Z. L. R. 124.—*N.Z.*

**sq. Representation that car to be kept in garage.**—In an automobile insurance policy a representation that the car will be kept in a garage is material & the policy is avoided if it is kept on a road.—*NOVA SCOTIA ACCEPTANCE CORPN. v. CANADA GENERAL INSC. CO.*, [1933] 1 D. L. R. 406; 6 M. P. R. 14.—*CAN.*

**st. Effect of refusal of Highway Traffic Act, R. S. O. 1927—On existing right of action.**—On repeal of Highway Traffic Act, R. S. O. 1927, s. 87 (4), an existing right of action against an insurance co. to recover damages paid to a person injured by negligent driving is not lost, but is enforceable by virtue of Automobile Insurance Act, 1932.—*WINTER v. TRANS-CANADA INSC. CO.*, [1934] 3 D. L. R. 17; O. R. 318; *affd.*, [1935] S. C. R. 184; 1 D. L. R. 272.—*CAN.*

**sv. Compulsory third party insurance—Rights of third party.**—The owner of a car against whom a decree in an action of damages had been pronounced, failed to make payment when charged, & his estates were sequestrated. Therefore the pursuer brought an action against the insurance co. with whom the owner of the car was insured for payment of the sum decreed for. The co. averred that, because of certain false statements made by the owner of the car in his proposal to them for insurance, the policy was *ab initio* void; & they maintained that, in any event, as a question was raised as to the validity of the policy, this matter, in terms of the policy, fell to be submitted to *arbn.* The pursuer maintained that, in a question with a third party, these contentions were not open to the co.:—*Held*: (1) the provisions of Road Traffic Act, 1930, did not confer on an injured third party a right to bring a direct action against the insurance co. for recovery of the damages suffered by him; (2) although Third Parties (Rights Against Insurers) Act, 1930, did confer such a right of direct action, that right was subject to all the conditions in the policy binding on the

be any other insurance subsisting, whether effected by the assured or any other person, covering the same the insurer should be liable to contribute only rateably. The insurer proved only that there was a policy in existence on the Manchester lorry against third-party claims at the time of the injury:—*Held*: the insurer, to succeed in his claim to contribute only rateably, must prove that there was a subsisting policy on the Manchester lorry covering the injury in question upon which that insurer could be called upon to pay.—*JENKINS v. DEANE* (1933), 103 L. J. K. B. 250; 150 L. T. 314; 78 Sol. Jo. 13.

**3217l. Limitation of load—Effect of towing lorry.**—*JENKINS v. DEANE*, No. 3217k, *ante*.

**3217m. Prohibition against attaching trailer—Lorry taken in tow.**—*JENKINS v. DEANE*, No. 3217k, *ante*.

**3217n. Provision for ratable contribution by other insurers—Insurance on tow.**—*JENKINS v. DEANE*, No. 3217k, *ante*.

**3217o. Agreement between insurers—Effect on right of assured to sue for negligence.**—Pltf., whose motor car had been injured through deft.'s negligence, recovered a sum less than the whole amount of the damage sustained from his insurance co., who, in pursuance of a "knock-for-knock" agreement with deft.'s insurance co., requested pltf. not to make any claim against deft. Nevertheless pltf. brought an action in tort for & recovered from deft. the full amount of the damage:—*Held*: the fact of the request of pltf.'s insurers did not prevent pltf. from recovering, but he would hold the amount to the extent of the sum received from his insurers as trustee for them, they being subrogated to his rights.—*MORLEY v. MOORE*, [1936] 2 K. B. 359; [1936] 2 All E. R. 79; 105 L. J. K. B. 421; 154 L. T. 646; 52 T. L. R. 510; 80 Sol. Jo. 424, C. A.

*Annotation*:—*Consd.* *Groom v. Crocker*, [1938] 2 All E. R. 394.

**3217p. Use limited to business or pleasure of insured—Accident while car used for business**

*insured.*—*GREENLEES v. PORT OF MANCHESTER INSURANCE CO.*, [1933] S. C. 383.—*SCOT*.

**sz. Claim of third party paid without knowledge of insured—Estoppel.**—An insurance co. which settles a claim for personal injuries sustained by a third party, without the knowledge or consent of the insured, cannot recover the amount paid from the insured, on discovering that he was driving the car in a state of intoxication, which was prohibited by the policy.—*MERCHANTS CASUALTY INSURANCE CO. v. WATERLOO TRUST & SAVINGS CO.*, [1936] 1 D. L. R. 361; O. R. 67; 5 F. L. J. (Can.) 198.—*CAN.*

**sd. Use for "private" purpose—What is.**—The use of a private car by the assured in & for the business of another person is not a use for "private" purposes, even though the car be driven by the assured himself & he be paid for its use, or though that other person is a private co., not a one-man co., the equivalent of the assured, in which he has a substantial though separate interest.—*Re CARROLL & N. I. M. U. INSURANCE CO., ARBITRATION*, [1935] N. Z. L. R. 897.—*N. Z.*

**sf. Joinder of insurance company as third party.**—An insurance co. defending an action against assured has the right under Insurance Amendment Act,

1935 (Ont.) is be added as third party.—*MARSHALL v. ADAMSON*, [1936] 1 D. L. R. 635; O. R. 103.—*CAN.*

**sk. Liability of insurer for hospital expenses of voluntary passenger.**—D. H. a voluntary passenger (not carried for hire or reward or by reason or in pursuance of a contract of employment) in A. C.'s private motor car, was injured in a collision between the car & an omnibus. He was taken to the R. V. Hospital where he remained for treatment for over two months as an intern patient. He sued A. C. & the owners of the omnibus for damages & recovered against A. C., the claim against the omnibus being dismissed. No claim was made for hospital expenses. The R. V. Hospital sued for these expenses the insurers of A. C., who had, pursuant to A. C.'s policy, paid the amount of the judgment & the Recorder of B. dismissed the civil bill. The R. V. Hospital appealed & *BEST, L.J.*, stated a case for the opinion of the Ct. of Appeal:—*Held*: as defts. were "authorised insurers" who had made a payment in respect of the voluntary passenger's injury under a policy issued under Part II. of the Motor Vehicles & Road Traffic Act (Northern Ireland), 1930, they were bound by the terms of sect. 12 (1) of that Act to pay also pltf.'s expenses of the voluntary passenger's treatment

of insured & another.]—By a policy of insurance against third party risks it was provided that the insurers should not be liable if an accident occurred while the insured motor car was being used otherwise than in accordance with a "Description of Use" clause in the policy. By that clause the use was limited to social, domestic & pleasure purposes & to the insurer's business, which was that of representative of a mercantile firm. An accident occurred while the car was being used by the insured & another representative of the same firm on their respective businesses:—*Held*: the car was being used at the time of the accident otherwise than in accordance with the "Description of Use" clause, & therefore the policy did not cover a loss sustained by the insured as a result of that accident.—*PASSMORE v. VULCAN BOILER & GENERAL INSURANCE CO., LTD.* (1935), 154 L. T. 258; 52 T. L. R. 193; 80 Sol. Jo. 167.

**3217q. Provision for control of proceedings by company—Admission of negligence of insured.**—Pltf. took out with an insurance co. a motor insurance policy containing a clause that pltf. would not incur any expense whether in respect of litigation or otherwise or make any payment, settlement, arrangement, or admission of liability for which the co. might be liable under the policy without the written authority of the co., & that the co. should have absolute conduct & control of all or any proceedings against pltf. Pltf.'s car was run into by a motor lorry, the collision being caused solely by the negligence of the lorry driver. A passenger in pltf.'s car was seriously injured, & issued a writ against the owners of the lorry & also, at their request, against pltf. The latter informed the insurance co., & left the matter in its hands, as he was bound to do under the policy. The co. sent the papers to its solrs., who entered an appearance to the writ & acted in the conduct of the defence. Neither the co. nor the solrs. ever at any time communicated with pltf. in any way, & eventually the solrs. delivered a defence on behalf of pltf. admitting that

in the hospital.—*ROYAL VICTORIA HOSPITAL v. LONDON GUARANTEE & ACCIDENT CORPN., LTD.*, [1937] N. I. 64.—*IR.*

**sm. Misrepresentation after accident.**—A false representation by insured that he had not consumed intoxicating liquor & that there were no witnesses of the accident precludes recovery.—*MARSHALL v. ADAMSON*, [1936] 4 D. L. R. 383; O. R. 391; *reversd.*, [1937] 4 D. L. R. 292; O. R. 872.—*CAN.*

**sp. Payment by company—Right to reimbursement.**—Payment by an insurance co. of a consent judgment on claims against a minor, the car being illegally driven & the co. not liable, is not a voluntary payment so as to prevent reimbursement.—*GUILDHALL INSURANCE CO. v. DENNY*, [1937] 1 D. L. R. 437; O. R. 36.—*CAN.*

**sr. Operation of car by employee.**—A liability policy issued to an automobile dealer covering injuries resulting from the "operation of any automobile of the insured by any employee of the insured whose salary is included in the pay roll forming the basis of the premium" does not cover a "courtesy car" operated by a prospective buyer, to whom it has been given by the dealer pending the arrival of the car ordered.—*POOLE & THOMPSON, LTD. v. LONDON & LANCASHIRE GUARANTEE*

the accident was caused solely by his negligence & wrote a letter to this effect to the solrs. opposing them. Having accidentally found out what was happening, pltf. protested to the local agent of the insurance co., to which agent the later wrote: "If we had repudiated liability we ran a very serious risk of the ct. holding a different view." At the trial of that action, judgment was entered against the present pltf. for £1,124 12s. 10d., damages & costs, which sums were at once discharged by the insurance co. Pltf. then claimed damages against the solrs. & the insurance co. for breach of duty, negligence & libel:—*Held*: (1) the terms of the policy clearly entitled the insurers to nominate a solr. to act in the conduct of the proceedings; (2) such solr. was bound to act *bond fide* in the common interest of the insurers & the insured, & upon the facts, he had not done so; (3) the damages for breach of duty were only nominal, since the sums recovered in the action were at once paid by the insurance co. Pltf. could only sue the solrs. in contract & had no cause of action against them in tort; (4) assuming that the occasion upon which the letter admitting negligence was written was a privileged one, there was evidence of malice.—*GROOM v. CROCKER*, [1938] 2 All E. R. 394; 158 L. T. 477; 54 T. L. R. 861; 82 Sol. Jo. 374, C. A.

**Liability of company—Whether attachable by garnishee proceedings.**—See *ISRAELSON v. DAWSON*, EXECUTION, No. 2087a, *ante*.

**Duty not to inform jury of insurance.**—See *NEGLIGENCE*, Vol. XXXVI., p. 127, No. 842, & Supp.

**Compulsory third party insurance.**—See *Road Traffic Act, 1930* (c. 43), ss. 35–44; *Road Traffic Act, 1934* (c. 50), ss. 10–17.

**3217r. — Invalidity of condition subsequent avoiding liability—What amounts to.**—*Road Traffic Act, 1930* (c. 43), s. 38, provides that "Any condition in a policy . . . issued or

given for the purposes of this Part of this Act providing that no liability shall arise under the policy . . . in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy . . . shall be of no effect. . . ."

A policy of insurance insuring resp. against third-party risks contained a condition that "the corpn. shall not be liable for any accident loss or damage caused or sustained while any motor cycle in respect of which indemnity is granted under this policy is carrying a passenger unless a sidecar is attached." Resp., who on a certain date drove a motor cycle on a road with another person sitting behind him as a passenger on the pillion without a side-car being attached to the motor cycle, was charged with the offence of using a motor vehicle on a road without there being in force in relation to the user of the vehicle such a policy of insurance in respect of third-party risks as complied with the requirements of Part II. of *Road Traffic Act, 1930* (c. 43). The justices dismissed the information on the ground that the condition in the policy was of no effect by reason of *Road Traffic Act, 1930* (c. 43), s. 38, & that therefore the policy of insurance was in force on that occasion. On appeal to the Div. Ct.:—*Held*: *Road Traffic Act, 1930* (c. 43), s. 38, applied only to a condition in a policy "providing that no liability shall arise under the policy . . . in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy," whereas in the present case the condition circumscribed the operation of the policy from the beginning. Therefore, there was no policy in force where a passenger was being carried otherwise than in a side-car.—*BRIGHT v. ASHFOLD*, [1932] 2 K. R. 153; 101 L. J. K. B. 318; 147 L. T. 74; 96 J. P. 182; 48 T. L. R. 357; 76 Sol. Jo. 344; 30 L. G. R. 212; 29 Cox, C. C. 455, D. C.

& ACCIDENT CO., [1937] 1 D. L. R. 588; 6 F. L. J. (Can.) 213; *affd.*, [1938] 1 D. L. R. 335.—CAN.

**st. — For private purpose—Owner insured for business use.**—A woman, whose son was killed as a result of a motor accident, sued the driver of the vehicle involved, & obtained a decree against him for damages & expenses. She failed to recover anything under the decree. She thereafter sued the owner of the vehicle, averring that he had entrusted it to the driver, who was his farm manager, without placing any restrictions upon its use; that at the time of the accident the driver was using the vehicle with the owner's permission, but for his own private purposes; that the use of the vehicle was insured against third party risks only when it was being used in connection with the owner's business; & that the owner was in breach of his duty under sect. 35 (1) of *Road Traffic Act, 1930*, in permitting the vehicle to be used when its use was not so insured. Pursuer claimed the amount of the damages & expenses awarded to her in her action against the driver. The ct. allowed a proof before answer of these averments, in respect (a) that a breach of the duty enjoined by sect. 35 (1) would, if proved, infer civil liability, notwithstanding that the sect. provided a penalty; & (b) that pursuer's averments that the owner had permitted the driver to use the

vehicle were relevant to be admitted to proof.

Opinion, *per LORD MONCRIEFF*, that pursuer had rightly based her claim of damages upon the amount of the damages & expenses which she had been awarded against the driver, & that the award against the driver having been made in a defended action, the owner would be entitled to challenge the amount of damages only upon specific averments that it was excessive.—*HOUSTON v. BUCHANAN*, [1937] S. C. 460.—SCOT.

**sc. Accident while car lent.**—Where an action is brought against an automobile owner for damage caused by the operation of the car while in the custody of a person to whom the owner had lent it, the insurer of the owner is entitled in deciding whether to defend the action on his behalf to rely on the statement made to it by him the person to whom he had entrusted the car was the person he named.—*ANDERSON v. CALEDONIA INSURANCE CO.*, [1938] 2 W. W. R. 401.—CAN.

**ss. Effect of Law Reform Act, 1936.**—The effect of sect. 9 of *Law Reform Act, 1936*, read in conjunction with the *Motor-vehicles Insurance (Third-party Risks) Act, 1928*, is that, provided deft. in an action is financially able to pay the judgment, pltf. is not concerned as to whether deft. can, as against his indemnifier, prove that within subsect. (7) of sect. 9 of *Law Reform Act,*

1936, the sum awarded is "within the limits fixed by the contract of insurance between the indemnifier & the insurer"; the word "limits" being given a wide interpretation to include "liability." If, on the other hand, deft. is bkpt., etc., the onus would be on pltf. in a suit against the insurer, instituted under sub-sects. (4) & (5) of sect. 9, of proving that the damages claimed are covered by the contract of insurance.—*PETHERICK & PETHERICK v. WATERS & N. I. M. U. INSURANCE CO.* (No. 2), [1937] N. Z. L. R. 309; 13 N. Z. L. J. 110.—N.Z.

**sg. Extent of owner's liability for agent.**—The effect of the *Motor-vehicles Insurance (Third-party Risks) Act, 1928*, is to make any person other than the owner who is in charge of a motor-vehicle the agent of the owner only for the purpose of creating in favour of the representatives of a person killed or of an injured person a cause of action against the owner; it does not make the owner liable in respect of some act or omission, such as fraud, committed by the agent after the owner's liability to pay damages has become complete, as the statute goes no further than to deem the person in charge of the car the owner's agent so far as acts or omissions in relation to the use of the car result in liability for damages for death or bodily injury.—*HURLSTONE v. STRADMAN*, [1937] N. Z. L. R. 708; 13 N. Z. L. J. 208.—N.Z.

3217s.

—[Pltf. made to deflt. & other underwriters a proposal for insurance of a motor car, & disclosed the fact that he was a garage proprietor. The underwriters issued a policy which provided (*inter alia*) for indemnity against liability to third persons in respect of bodily injury in the event of accident arising out of the use of the car. The policy also expressly provided that it should not cover liability caused, sustained or incurred while the car was being used otherwise than for "private purposes," which were defined as meaning "social, domestic & pleasure purposes & use by the assured in person in connection with his business or profession. The term 'private purposes' does not include . . . use for any purposes in connection with the motor trade." A certificate of insurance under Part II. of the Road Traffic Act, 1930 (c. 43), containing a similar limitation was also issued to pltf. While using the car, as the judge found, for a purpose in connection with the motor trade pltf. had an accident, as a result of which a third party claimed damages for personal injuries. The underwriters having refused to indemnify pltf., he claimed a declaration that they were bound to do so :—*Held* : (1) there was no inconsistency in the clause defining "private purposes" between the words "use by the assured in person in connection with his business" & the words excluding "use for any purposes in connection with the motor trade," & the fact that pltf. had disclosed that he was a garage proprietor did not entitle him to rely on the first part of the clause & ignore the second. The true construction was that the second half took out of the protection of the policy something which, but for it, the first half would have brought in, namely, use by a garage proprietor personally for the purposes of his business; (2) in view of the limitation appearing on the certificate, the issue of the certificate created no estoppel; (3) sect. 36 of 1930 Act merely defines the cover which a driver must obtain in order to escape the penal consequences of driving without a policy under sect. 35. Sect. 38 does not avoid a condition limiting the cover under a policy: it merely prevents an underwriter escaping liability to a third party by reason of some act or omission of the assured after the claim has arisen. The effect of a breach of the conditions in the policy is not to throw on the underwriter a burden which he has never agreed to undertake, but merely to put the assured, so far as the insurance provisions of the 1930 Act are concerned, in the same position as if he had never taken out a policy at all.—GRAY v. BLACKMORE, [1934] 1 K. B. 95; 103 L. J. K. B. 145; 150 L. T. 99; 50 T. L. R. 23; 77 Sol. Jo. 765.

3217t.

—[—](1) A policy of insurance against third party risks was based on a proposal which contained the question: "Have you or any of your drivers ever been convicted of any offence in connection with the driving of any motor vehicle?" to which the insured answered "No." In fact, she & her driver had been convicted of two offences, namely, (a) of driving a motor vehicle without any suitable reflecting mirror, & (b) of unlawfully using a motor vehicle without having in force an insurance policy against

third party risks :—*Held* : the answer was not untrue, since neither of the two convictions was in connection with the driving of a motor vehicle.

(2) The policy contained a condition whereby it was provided that if a claim under the policy was made & rejected, & an action was not commenced within three months of such rejection, all benefit under the policy should be forfeited :—*Held* : the condition was void under Road Traffic Act, 1930 (c. 43), s. 38, in so far as it purported to invalidate a claim to be indemnified against third party risks.—REVELL v. LONDON GENERAL INSURANCE CO., LTD. (1934), 152 L. T. 258.

3217u.

—Issue of false certificate of insurance—Statement as to date of commencement—Premium unpaid.]—An insurance co. issued a public liability motor car policy of insurance covering third-party risks, valid for a year & any further period for which they might accept payment for renewal. The policy was subject to a condition that no liability should arise until payment of the premium. At the expiration of the year, on June 3, no premium was paid, but it was paid on June 11, when a receipt was given acknowledging a renewal of the policy as from June 3. On the former date the co. also issued a certificate of insurance containing the statement alleged to be false, that the date of commencement of the insurance was June 4 :—*Held* : even assuming the statement to be false in fact, that alone was not sufficient to justify a conviction for issuing a certificate which was false to the knowledge of the co. within Road Traffic Act, 1930 (c. 43), s. 112 (3), & the conviction must be quashed.—OCEAN ACCIDENT & GUARANTEE CORPN., LTD. v. COLE, [1932] 2 K. B. 100; 101 L. J. K. B. 362; 147 L. T. 78; 96 J. P. 191; 48 T. L. R. 392; 76 Sol. Jo. 378; 30 L. G. R. 206; 29 Cox, C. C. 464, D. C.

3217v.

—Effect of issue of certificate.]—I have a very strong feeling that the Legislature intended that the insurance co. should be bound, & that when they had once given a certificate which entitled a person to obtain a licence it should not be open to them afterwards to say that they had not in fact insured that person. While I am sure that was the intention of the Legislature, I am not at all certain they have carried out that intention in the language which has been employed in the Act of Parliament [Road Traffic Act, 1930 (c. 43)] (RIGBY SWIFT, J.). —ADAMS v. LONDON GENERAL INSURANCE Co. (1932), 42 Ll. L. R. 56.

Annotation :—Consd. Israelson v. Dawson, [1933] 1 K. B. 301.

3217w.

—[—]*Held* : (1) on learning that insured had made a false statement in the proposal form the co. were entitled to consider their position for a reasonable time before deciding to repudiate liability, & on the facts, a reasonable time had not been exceeded; (2) sect. 1 (1) of Third Parties (Rights against Insurers) Act, 1930 (c. 43) only transferred to the injured third party such rights as the insured himself might have against the insurer, & the insurer was entitled as against the third party to rely on any defence which he could have raised against the insured; (3) sect. 36 (4) of Road Traffic

Act, 1930 (c. 43), did not deprive an insurance co. of the right to repudiate liability on a policy obtained by fraud, misrepresentation or concealment; (4) the issue of a certificate of insurance under sect. 36 (5) of Road Traffic Act, 1930 (c. 43), did not amount to an undertaking to all the world that the policy referred to was valid for all purposes & did not prevent the insurance co. from repudiating a policy obtained by fraud.—*McCORMICK v. NATIONAL MOTOR & ACCIDENT INSURANCE UNION, LTD.* (1934), 50 T. L. R. 528; 78 Sol. Jo. 633; 40 Com. Cas. 76, C. A.

**3217x. — Car lent to uninsured person—Accident—Right to recover against owner—Without suing driver.**—The owner of a motor car who, in contravention of Road Traffic Act, 1930 (c. 43), s. 35 (1), permits his car to be used by a person who is not insured against third party risks, is liable in damages to a third party who has been injured by the negligent driving of the uninsured person. In such a case the object & purview of the Act show that the penalties prescribed by sect. 35 (2) were not intended to be the sole remedy for a breach of the owner's statutory duty. Where a person uninsured against third party risks is permitted by the owner to use a car, & injury is caused by his negligent driving to a third party, the latter may, where the uninsured person is without means, sue the owner of the car directly for damages for breach of his statutory duty & need not first sue the uninsured person.—*MONK v. WARBEY*, [1935] 1 K. B. 75; 104 L. J. K. B. 153; 152 L. T. 104; 51 T. L. R. 77; 78 Sol. Jo. 783, C. A.

*Annotations*.—*Expld.* *Richards v. Port of Manchester Insurance Co.* (1934), 152 L. T. 413. *Distd.* *Daniels v. Vaux*, [1938] 2 K. B. 203.

**3217y. — — — — — Loss due to delay in suing driver.**—In 1932 A., who was at all material times the registered owner of an M. G. car, lent or gave it to her son B., who used it as his own until Mar. 1934, when he negligently knocked down & injured C., a policeman on duty on the highway. At the time of the accident & to the knowledge of both A. & B. the policy of insurance for third-party risks which had been kept on foot by A. had expired, but before its expiration A. had informed both B. & the insurers that B. must in future pay the premiums himself. C. did not take proceedings against B., but there were negotiations between them for a settlement of C.'s claim, which were not concluded in Nov. 1936, when B. died.—*Held*: in an action by C. against A., (1) B. was not the servant or agent of A. in driving the car; (2) A. was not liable in damages for breach of the statutory duty to insure under Road Traffic Act, 1930 (c. 43), s. 35; for an action could have been brought against B. in his lifetime, & judgment would have been satisfied out of B.'s assets, so that C. had suffered no damage in consequence of the breach.—*DANIELS v. VAUX*, [1938] 2 K. B. 203; [1938] 2 All E. R. 271; 107 L. J. K. B. 494; 159 L. T. 459; 54 T. L. R. 621; 82 Sol. Jo. 335.

**3217z. — — — — —** *GRAY v. BLACKMORE*, No. 3217s, *ante*.

**3217aa. — Cancellation of certificate in 1934—Judgment obtained in 1935—Effect of Road Traffic Act, 1934 (c. 50), s. 10 (1).**—An insurance co. issued to the owner of a motor

vehicle a policy of insurance against third party risks & delivered to him a certificate of insurance. A cause of action covered by the policy arose in favour of third parties against the insured. Subsequently, the co., having a right to do so, elected to avoid the policy on certain grounds, & the policy was avoided & the certificate of insurance was properly cancelled. Thereafter, but before Road Traffic Act, 1934 (c. 50), s. 10, had come into force, the third parties brought their action against the insured, & after that sect. had come into force, they recovered judgment in that action. In an action brought under that sect. by the third parties against the insurance co. to recover the amount of the judgment:—*Held*: pltf's. were entitled to recover; inasmuch as a certificate of insurance had in fact been delivered to the insured within the meaning of the sect., the judgment sued upon had been obtained after the coming into force of the sect., & defts. had not obtained a declaration under sub-sect. (3) of the sect. that they were entitled to avoid the policy; & notwithstanding that the earlier action had been brought & the policy & certificate of insurance cancelled before the coming into force of the sect.—*CROXFORD v. UNIVERSAL INSURANCE CO., LTD.*, [1935] 2 K. B. 409; 104 L. J. K. B. 566; 153 L. T. 151; 51 T. L. R. 572; 79 Sol. Jo. 559.

**3217bb. — Permitting user without insurance—What amounts to.**—A motor car was let on hire by its owner, the second deft., to a hiree, who was a member of the Jewish race. The owner gave to the hiree a cover note against third party risks under a policy issued by the first defts. The cover note was subject to a condition excluding from the insurance various classes of persons, including Jews. Whilst driving the car the hiree collided with & injured pltf.:—*Held*: (1) the first defts. had not "permitted" the car to be used without an insurance against third party risks, as required by Road Traffic Act, 1930 (c. 43), s. 35, & had not committed a breach of statutory duty under that sect.; (2) the second deft. had "permitted" the car to be so used, & the pleadings disclosed a cause of action against him, notwithstanding that no judgment had been obtained against the hiree, & that the hiree had not been made a party to the action.—*RICHARDS v. PORT OF MANCHESTER INSURANCE CO., LTD.* (1934), 152 L. T. 261; *affd.*, 152 L. T. 413, C. A.

**3217cc. — Extension of insurance to car driven with assent of assured—Effect of Road Traffic Act, 1930 (c. 43), s. 36.**—(1) A motor insurance policy declared that "this insurance shall extend to indemnify any person who is driving on the assured's order or with his permission" in respect of various liabilities, which included third party risks:—*Held*: upon the true construction of above sect., the insurers were freed from the requirements of Life Assurance Act, 1774 (c. 48), as to insurable interest & the presence in the policy of the name of the assured, & the insurers were legally bound to indemnify all "persons or classes of persons" referred to in the policy, whether parties to the contract of insurance or not. (2) Where in a motor insurance policy a particular car is specified as the subject of insurance, & by a



clause in the policy its benefits are extended to the assured when driving another car with the owner's permission, the interest of the assured ceases when he parts with the specified car, & the extending clause falls together with the rest of the policy.—*TATTERSALL v. DRYSDALE*, [1935] 2 K. B. 174; 104 L. J. K. B. 511; 153 L. T. 75; 51 T. L. R. 405; 79 Sol. Jo. 418.

*Annotation*:—As to (2) *Consd. Peters v. General Accident & Life Assurance Corp., Ltd.*, [1937] 4 All E. R. 628.

**3217dd.** ——— **Effect of disposal of specified car.]**

—*TATTERSALL v. DRYSDALE*, No. 3217cc, *ante*.

**3217ee.** ——— **Premium advanced by finance company—Certificate delivered to company.]**—A policy of insurance in respect of a motor car was prepared for & signed by S., the premium being paid by M. F., Ltd., who by agreement were to be repaid by S. in instalments. Until the premium had been repaid in full M. F., Ltd., were to retain the policy & the certificate, which were delivered to them by the insurers. S. never saw the certificate. When driving the motor car S. was stopped & requested to produce his certificate of insurance. M. F., Ltd., produced the certificate within five days. Upon an information preferred against S. for unlawfully using a car without having in force in relation thereto a policy of insurance, the justices held that the certificate had not been delivered within Road Traffic Act, 1930 (c. 43), s. 36 (5) to S., whom the justices held to be the person by whom the policy had been effected, & they convicted S. On appeal, S. pleaded that the delivery of the certificate to a person designated by the insured was sufficient compliance within sect. 36 (5) & alternatively that M. F., Ltd., were the persons by whom the policy was effected & delivery to them was a sufficient compliance with that sect.:—*Held*: (1) inasmuch as there was no evidence that M. F., Ltd., had received the certificate as agents for S., it could not be said that the certificate had been delivered to S.; (2) the policy was effected by S., & not by M. F., Ltd., & there was, therefore, no delivery to the person by whom the policy was effected within sect. 36 (5).—*STARKEY v. HALL*, [1936] 2 All E. R. 18; 80 Sol. Jo. 347, D. C.

**3217ff.** ——— **Passenger carried by reason of contract of employment.]**—A policy of insurance was taken out by D. in respect of a motor vehicle. The policy, which was headed "Commercial motor policy," incorporated a previous proposal by D. in which he had given a warranty or undertaking that passenger risk was not to be covered; it provided that the vehicle would be used only for general haulage & other trades, & that the insurance co. would indemnify D. against liability in respect of "death of or bodily injury to any person caused by or arising out of the use of the vehicle. . . . Provided always that the co. shall not be liable in respect of . . . (b) death of or bodily injury to any person in the employment of the insured arising out of & in the course of such employment; (c) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon . . . such vehicle":—*Held*: the language of clause (c) was not to be construed as

applying only to the death of or injury to a person in the employment of D. while being carried on the vehicle; it applied to any person being carried in pursuance of a contract of employment with another employer; & therefore when such a person, while being carried on the vehicle, was killed owing to the negligence of the driver, the insurance co. was bound to indemnify D. in respect of his liability to the representative of the deceased person.—*IZZARD v. UNIVERSAL INSURANCE CO., LTD.*, [1937] A. C. 773; [1937] 3 All E. R. 79; 106 L. J. K. B. 460; 157 L. T. 355; 53 T. L. R. 799; 81 Sol. Jo. 475; 42 Com. Cas. 352, H. L.

**3217gg.** **Passenger in car—Payment for journey.]**—Pltf. was a passenger in a motor car insured against third-party risks with debts. Pltf. & a friend had arranged to travel to London by train; but the owner of the car, having to go to London to give evidence, offered to take them for 25s. each. Upon the journey the car collided with a lorry. Pltf. recovered judgment for damages & costs against the owner of the car, & then brought this action to recover the sum so awarded from deft. insurance co., relying upon Road Traffic Act, 1934 (c. 50), s. 10. The car was insured under a private motor car policy for use for social, domestic & pleasure purposes. The owner was not, so far as was known, in the habit of carrying persons for payment, & pltf. was a stranger to him:—*Held*: (1) the policy did not cover the use which was made of the car on the journey in question; (2) the owner of the car was not bound by Road Traffic Act, 1930 (c. 43), s. 36 (1), to have in force a policy of insurance to cover any liability he might incur to pltf. in the circumstances of this journey, which was an isolated occasion. The effect of the sub-sect. is only to require the owner to have such a policy in force where the vehicle is habitually used for the carriage of passengers for hire or reward.—*WYATT v. GUILDHALL INSURANCE CO., LTD.*, [1937] 1 K. B. 653; [1937] 1 All E. R. 792; 106 L. J. K. B. 421; 156 L. T. 292; 53 T. L. R. 389; 81 Sol. Jo. 358.

*Annotation*:—As to (1) *Distd. MacCarthy v. British Oak Insurance Co.*, [1938] 3 All E. R. 1.

**3217hh.** ——— **Road Traffic Act, 1934 (c. 50), s. 10—When available.]**—Road Traffic Act, 1934 (c. 50), s. 10, is a sect. which makes insurers liable in the circumstances & under the conditions specified in the whole of that sect., & not merely those specified in sub-sect. (1). Therefore insurers may protect themselves from liability under sect. 10 (1) if they comply with the conditions set out in sub-sect. (3) & obtain a declaration that the policy was obtained by the non-disclosure of a material fact or by a representation of some fact which was false in some material particular, such action for a declaration being brought within three months after the commencement of the proceedings in the running-down action in which judgment was given. In *Croxford's* case the running-down action was brought on Aug. 3, 1934, & therefore the last day on which the insurance co. could commence an action for a declaration was Nov. 3, 1934; but sect. 10 of the Act of 1934 did not come into operation until Jan. 1, 1935, & therefore the insurance co. could not



have taken proceedings under sect. 10 (3) to obtain protection under that sect. because at that time the sect. had not come into operation, & it did not have a retrospective effect. In *Norman's* case it had been found as a fact that there was no contract of insurance between the insurance co. & the assured at the time of the accident. The running-down action was brought on Oct. 26, 1934, & therefore the three months within which the insurance co. must bring their action for a declaration would expire on Jan. 26, 1935:—*Held*: in neither case could sect. 10 of the Act of 1934 be applied so as to make the insurance co. liable.—*CROXFORD v. UNIVERSAL INSURANCE CO., LTD., NORMAN v. GRESHAM FIRE & ACCIDENT INSURANCE SOCIETY, LTD.*, [1936] 2 K. B. 253; [1936] 1 All E. R. 151; 105 L. J. K. B. 294; 154 L. T. 455; 52 T. L. R. 311; 80 Sol. Jo. 164, C. A.

*Annotation*:—*Reff. Dolan v. Dominion of Canada General Insurance Co.*, [1936] 2 All E. R. 1354.

**3217jj.** ———.—]—A pedestrian was knocked down & injured by a motor car on Jan. 12, 1934. The pedestrian recovered damages against the motorist, which damages were not paid. The pedestrian thereupon brought an action against the motorist's insurance co., basing her claim on Road Traffic Act, 1934 (c. 50), s. 10. The Act of 1934 received the royal assent on July 31, 1934, & sect. 10 came into operation on Jan. 1, 1935:—*Held*: sect. 10 was not retrospective to an accident which occurred before the sect. came into operation, & the action could not be maintained.—*DOLAN v. DOMINION OF CANADA GENERAL INSURANCE CO.*, [1936] 2 All E. R. 1354.

**3217kk.** ———.—]—Pltf. obtained a judgment against T. in respect of injuries caused by the negligent driving of T.'s motor car. T. having no means, pltf. sued T.'s insurers, deft. corp., under the provisions of Road Traffic Act, 1934 (c. 50), s. 10 (1). T.'s insurance policy covered the use of his car "for social, domestic & pleasure purposes," & for use "in connection with his business or profession" as stated in the schedule. T. was a motor mechanic, & was described as such in the schedule, but in his spare time farmed a few sheep. At the time of the accident, which caused the injuries, the car was being used to convey some sheep. Pltf. relied (*inter alia*) upon the provisions of Road Traffic Act, 1934 (c. 50), s. 12 (d):—*Held*: (1) T. must be regarded as carrying on a business of sheep-farming, as a sideline. At the time of the accident, his car was therefore being used not in connection with his business of a motor mechanic, but for the carriage of goods in connection with a business other than that stated in the policy & pltf. could not recover in this action; (2) this was not a question of the actual nature of the goods carried or their physical characteristics within Road Traffic Act, 1934 (c. 50), s. 12 (d).—*JONES v. WELSH INSURANCE CORPN., LTD.*, [1937] 4 All E. R. 149; 157 L. T. 483; 54 T. L. R. 22; 81 Sol. Jo. 886.

**3217ll.** ———.—]—The vendor of a motor van insured by defts. handed over the insurance policy with the van to the purchaser. The policy contained the usual clause extending the cover to any person driving with the consent or permission of the insured. Pltf.,

who had been injured by the van after the sale had been completed, obtained a judgment against the purchaser, & in the present action sought to recover the damages he had been awarded from the present defts. under the provisions of Road Traffic Act, 1934 (c. 50), s. 10. The motor van was sold for £10, of which £5 was paid when the van was handed over & the remaining £5 after the occurrence of the accident:—*Held*: (1) at the time of the accident, the purchaser could not be said to be driving the van by the order or with the permission of the vendor, as the van was then the purchaser's own property; (2) the insured was not entitled to assign his policy to a third party. An insurance policy is a contract of personal indemnity, & the insurers cannot be compelled to accept responsibility in respect of a third party who may be quite unknown to them.—*PETERS v. GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORPN., LTD.*, [1938] 2 All E. R. 267; 158 L. T. 476; 54 T. L. R. 663; 82 Sol. Jo. 294; 30 L. G. R. 583, C. A.

**3217mm.** ———.—]—By a policy of motor insurance, issued in Nov. 1935, defts. agreed to indemnify F. against third-party risks in respect of a motor vehicle. During the currency of that policy, an accident occurred, involving F., the owner of the motor vehicle, & two other persons, B. & C. B. brought an action against F. in respect of the accident, & C. was served with a third-party notice in that action. Notice of that third-party notice was duly given to the insurers. C., the third party, counterclaimed for damages against F., & recovered judgment against F. on the counterclaim. No notice of the counterclaim by the third party was given to the insurers. As that judgment remained unsatisfied, the third party brought an action against the insurers under Road Traffic Act, 1934 (c. 50), s. 10, claiming the amount of the judgment & costs:—*Held*: as the insurers had had no notice of the counterclaim in which the judgment was given, pltf. could not recover against the insurers. "The proceedings in which the judgment was given" in sect. 10 (2) (a) meant "the proceedings begun by a person who may for this purpose be regarded as a pltf., which results in the judgment upon which reliance is placed as against the insurers."—*CROSS v. BRITISH OAK INSURANCE CO., LTD.*, [1938] 2 K. B. 167; [1938] 1 All E. R. 383; 107 L. J. K. B. 577; 159 L. T. 286.

**3217nn.** ———.—]—W. was insured with deft. co. against third-party risks in respect of a side-car, & the policy provided that deft. co. should not be liable in respect of any accident incurred while any motor cycle was being driven by or was for the purpose of being driven by him in the charge of any person other than the insured. W., while driving with a friend, fell ill, & allowed the friend to drive the side-car. While being so driven the side-car collided with a lorry, with the result that pltf. was injured. In an action against W., pltf. recovered damages & now sought to recover them from the insurance co. W., in a friendly & casual conversation with an agent of the insurance co., had mentioned that an action had been brought against him:—*Held*: (1) upon the construction of the policy the exception

applied & W. would not have been able to recover thereunder, &, therefore, *pltf.* could not recover in this action under Road Traffic Act, 1934 (c. 50), s. 10; (2) notice to an insurance co. of proceedings against the insured must be something more formal than a casual mention of the proceedings in a conversation. There must be something which indicates that notice is being given.

*Semble*: such notice can be given to an agent of the insurance co.—*HERBERT v. RAILWAY PASSENGERS ASSURANCE CO.*, [1938] 1 All E. R. 650; 158 L. T. 417.

**3217oo.** —.]—*Pltf.*, who had been involved in a motor accident & suffered personal injuries, recovered judgment for £1,401 19s. 6d. against the impecunious driver of the car in fault. The judgment being unsatisfied, he brought the present action against the insurers under Road Traffic Act, 1934 (c. 50), s. 10 (1). The co. pleaded that the car was not being used for social, domestic, or pleasure purposes, but was being used for hire, within the limitations as to use set out in the certificate of insurance & the descriptions of use in the policy. The car belonged to C., a garage proprietor, & was insured by him, with other cars. He had occasionally employed R. as a professional driver, but on this occasion R. had

borrowed the car in question, without payment, to take a party of his friends to Southend. The trip had been arranged some time before the day of the accident. When R. fetched the car from the garage, he filled up with oil & petrol, for which he paid C. about 10s. This expenditure was subsequently reimbursed to R. by his friends:—*Held*: the car was being used for social & domestic purposes within the meaning of the policy, & there was no such arrangement as would amount to a hiring. *Pltf.* was therefore entitled to recover the damages awarded in the previous accident.—*MCCARTHY v. BRITISH OAK INSURANCE CO., LTD.*, [1938] 3 All E. R. 1; 159 L. T. 215; 82 Sol. Jo. 568.

**3217pp.** Condition relating to weight & characteristics of goods—What amounts to.] *JONES v. WELSH INSURANCE CORPN., LTD.*, No. 3217kk, *ante*.  
— Effect on validity of arbitration clauses.] —See *ARBITRATION*, Nos. 294b, 294c, *ante*.

SUB-SECT. 5.—INSOLVENCY OF INSURERS. Rights of third parties.]—See Third Party (Rights Against Insurers) Act, 1930 (c. 25); *BANKRUPTCY*, Nos. 5958a; & *COMPANIES*, Nos. 6056b-6056d.

## Part VI.—Guarantee Policies.

**3218a.** —.]—Leaving out the proviso altogether, the object of the instrument is to guarantee the payment of money to the *mtgee.* Whether the *mtgor.* is insolvent or not, or whether the property has depreciated or not, it is an absolute guarantee to pay the principal & interest if the *mtgor.* does not pay according to his covenant (*HAWKINS, J.*).—*MORTGAGE INSURANCE CORPN., LTD. v. INLAND REVENUE COMRS.* (1887), 20 Q. B. D. 645; 57 L. J. Q. B. 174; 58 L. T. 766; 36 W. R. 477; 4 T. L. R. 172.

**3234a.** ——— Statements of fact as to duties.]—In an application for a policy of fidelity guarantee to be issued by *resps.* in respect of a *solr.* employed by the claimants to receive *mtge.* moneys, the claimants in reply to certain questions stated (*inter alia*), that the

*solr.* was required to send daily statements of cash received & to pay over such cash to the claimants as soon as it was received. Before the policy was renewed the claimants discovered that the *solr.* was not in fact handing over money as soon as it was received, but this fact was not communicated to *resps.*, & the policy was duly renewed. The claimants suffered loss through the acts or defaults of the *solr.*, & they claimed indemnity under the policy. *Resps.* denied liability, alleging that the answers to the questions in the application were warranties & made the basis of the contract, & that by a condition in the policy it was rendered void by wrong answers to such questions:—*Held*: the answers to the questions were merely statements of fact as to the duties of the *solr.*

### PART VI. SECT. 1.

**3220 iii.** *S. P. VICTORY v. SAS-KATHEWAN GUARANTEE & FIDELITY CO., LTD.*, [1927] 3 D. L. R. 647; [1927] 2 W. W. R. 577; 21 Sask. L. R. 551; *varied*, [1928] 2 D. L. R. 829; [1928] S. C. R. 264.—CAN.

**3220 iv.** ———.]—*Semble*: guarantee bonds or policies are contracts *uberrimae fidei*.—*CLARKSON v. CANADA ACCIDENT & FIRE ASSURANCE CO.*, [1931] O. R. 787; 4 D. L. R. 769; *affd.*, [1932] O. R. 405; 3 D. L. R. 188.—CAN.

### PART VI. SECT. 2.

**ss. Consecutive bonds—Extent of liability.**]—In an action upon certain fidelity bonds issued by *deft.* insurance co., in consecutive years, under Real Estate Agents' Licensing Act, as it stood from time to time:—*Held*: they

were distinct & independent contracts & *deft.* was liable under each of three of them to the extent of the amount stated in each of them for the payment of any damages sustained by reason of wrongful or dishonest dealing, on the part of the holder of the licence under said Act for whom the bonds were furnished, during the term of any licence held by him concurrent with the period for which each bond stood. With respect to another bond, the last bond issued, there was no liability thereunder, since the bonded agent did not hold a licence after the date the bond was issued, & the expression therein, "during the term of any real estate agent's licence, held by him under said Act," could not reasonably be interpreted as referring to any period before said date.—*WEBSTER v. GENERAL ACCIDENT ASSURANCE CO. OF CANADA*, [1933] 2 W. W. R. 60; 47 B. C. R. 226.—CAN.

### PART VI. SECT. 3.

**3233 iii.** ———.]—*RURAL MUNICIPALITY OF ENFIELD v. LONDON GUARANTEE & ACCIDENT CO., LTD.* (Sask.), [1926] 4 D. L. R. 37; [1926] 2 W. W. R. 737.—CAN.

**3233 iv.** ———.]—*GRAIN CLAIMS BUREAU, LTD. v. CANADIAN SURETY CO.* (No. 2), [1927] 3 W. W. R. 1; 37 Man. L. R. 76; *reversed*, [1928] 1 D. L. R. 677; [1928] 1 W. W. R. 263; 37 Man. L. R. 235.—CAN.

**3233 v.** ———.]—There is no difference in principle between a statement of fact & an undertaking that some particular thing shall be done. Both may be matters bearing upon the risk, & therefore each may be a warranty.—*RENFREW COUNTY v. UNITED STATES FIDELITY & GUARANTEE CO.*, [1933] O. R. 796; 4 D. L. R. 564.—CAN.

& were not warranties that such duties would be strictly performed. There was no proof that before the renewal the claimants were aware of dereliction of duty by the solr., though they may have known that the duties had not been strictly performed, & they were entitled to recover.—*HEARTS OF OAK BUILDING SOCIETY v. LAW UNION &*

ROCK INSURANCE CO., LTD., [1936] 2 All E. R. 619; 80 Sol. Jo. 755.

3243a. Guarantee of payment of bonds—Bond containing gold clause—Whether insurance of payment on gold basis.—*STURGE & Co. v. EXCESS INSURANCE CO., LTD.*, [1938] 4 All E. R. 424.

## Part VII.—Insurance against Burglary and Theft.

3249. *Add. Annotation*:—*Refd. Stevens & Sons v. Timber & General Mutual Accident Insurance Asscn., Ltd.* (1933), 49 T. L. R. 224.

3252. *Add. Citations*:—*affd.*, [1927] A. C. 139; 136 L. T. 263; 43 T. L. R. 46; 70 Sol. Jo. 1111; 32 Com. Cas. 62, H. L.

*Add. Annotations*:—*Refd. Farra v. Hetherington* (1931), 47 T. L. R. 465; *Locker & Woolf, Ltd. v. Western Australian Insurance Co.* (1935), 153 L. T. 334.

3256. *Add. Annotation*:—*Refd. Lake v. Simmons* (1926), 95 L. J. K. B. 586.

3257. *Add. Annotation*:—*Generally, Refd. Lake v. Simmons* (1926), 95 L. J. K. B. 586.

3258. *Add. Citations*:—*reversd.*, [1926] 2 K. B. 51; 95 L. J. K. B. 586; 135 L. T. 129; 42 T. L. R. 425; 70 Sol. Jo. 584; 31 Com. Cas. 271, C. A.; *reversd.*, [1927] A. C. 487; 96 L. J. K. B. 621; 137 L. T. 233; 43 T. L. R. 417; 71 Sol. Jo. 369; 33 Com. Cas. 16, H. L.

3243 i. *Embezzlement*—Committed within twelve months prior to notice of discovery—What amounts to.—*LONDON GUARANTEE & ACCIDENT CO., LTD. v. CITY OF HALIFAX*, [1927] 1 D. L. R. 1129; [1927] S. C. R. 165.—CAN.

3243 ii. — *How construed*.—When the insurer bound himself to pay the insured (employer) such "pecuniary losses . . . as (the insured) shall have sustained of money or other personal property . . . by any act or acts of larceny or embezzlement on the part of" (an employee), it is sufficient to find these acts to have been fraudulent or dishonest & such indeed as to amount to embezzlement, if not in the technical sense, at least in the non-technical or popular sense, of the word. The word "embezzlement" should not be construed in the same way & with the same specific meaning as it would be construed when used in an indictment under the criminal law.—*CANADIAN SURETY CO. v. QUEBEC INSURANCE AGENCIES, LTD.*, [1936] S. C. R. 281; 2 D. L. R. 690; 66 Can. C. C. 48.—CAN.

3243 ii. — — —.—A fidelity bond against acts of larceny or embezzlement, given by the secretary of a school board covers any dishonesty or fraudulent conversion, & hence shortages in the secretary's accounts.—*CANADIAN SURETY CO. v. DOUCETT*, [1936] 2 D. L. R. 619; 10 M. P. R. 403; 66 Can. C. C. 94; 6 F. L. J. (Can.) 3.—CAN.

sb. *Larceny or embezzlement*—Loss caused by neglect of duty.—*JACKSON BROS. GRAIN CO, LTD. v. UNITED STATES FIDELITY & GUARANTY CO.*, [1934] 3 W. W. R. 485; 42 Man. L. R. 469.—CAN.

sc. *Misrepresentation*.—On appeal from a judgment in favour of pltf. in an action on a fidelity bond:—*Held*: the answers by pltf. in his application for the insurance, as to the salary of the bonded employee & as to the system of check or supervision of pltf.'s accounts were untrue in fact & material

misrepresentations which induced deft. to enter into the contract; & moreover, that, since the truth of said answers, & the maintenance of the system of accounting & of compensation of the employee were, under the conditions of the bond, conditions precedent to pltf.'s right of recovery, pltf.'s failure to comply therewith rendered the bond void *ab initio*.—*MCCAMMON v. ALLIANCE ASSURANCE CO., LTD.*, [1931] 2 W. W. R. 621; 4 D. L. R. 811.—CAN.

### PART VI. SECT. 4.

3245 i. *Non-disclosure of material fact*.—*CLARKSON v. CANADA ACCIDENT & FIRE ASSURANCE CO.*, [1931] 4 D. L. R. 769; *affd.* [1932] O. R. 405; 3 D. L. R. 188.—CAN.

### PART VII. SECT. 1.

3248 i. *Commencement of risk*—Covering note issued by broker—Loss before issue of policy—Broker not liable as insurer.—*BROIT v. BENNIE S. COHEN & SON (N. S. W.) LTD.* (1926), 27 S. R. N. S. W. 29; 44 N. S. W. W. N. 44.—AUS.

so. *Condition that books to be kept by assured*.—A policy of insurance against robbery of a shop was expressed to be subject to the following condition: "The co. shall not be liable for loss or damage . . . unless books & accounts are kept by the assured & are kept in such manner that the co. can accurately determine therefrom the amount of loss." There were no statutory conditions applicable to such a policy:—*Held*: it was a condition precedent to the co.'s liability that reasonably sufficient books of account should be available in support of the proofs of loss.—*FREEDMAN v. UNITED STATES FIDELITY & GUARANTY CO.*, [1932] 1 W. W. R. 118; 1 D. L. R. 557; 40 Man. L. R. 160.—CAN.

### PART VII. SECT. 2.

sa. *Burglary from "safe or vault*

*described in schedule*."—Where money stolen by burglars was, at the time of the burglary, in a vault so described, but was not in the safe in the vault:—*Held*: the assurance was not confined to money in the safe.—*WOODWARD'S, LTD. v. UNITED STATES FIDELITY & GUARANTY CO.*, [1927] 2 D. L. R. 126; [1927] 1 W. W. R. 529; 38 B. C. R. 171.—CAN.

sb. *"Visible marks of force & violence made by a tool"*.—A policy of burglary insurance provided for indemnity against loss occasioned by felonious entry by "actual force & violence" of which force & violence "there shall be visible marks made upon the premises at the place of such entry by tools, etc." The visible mark upon the premises in question was a hole in the wire netting of a window screen which was rusty, but intact before the entry, & through which it was admitted the burglar had entered. A small piece of wood with rust marks on it was found outside the window:—*Held*: the trial judge was justified in inferring, as he did, that force & violence had been used to effect the entry, & that the visible mark thereof had been made by a tool of some sort. A stick used to break the wire netting of a screen is a "tool" within the meaning of the policy.—*MULLETT v. UNITED STATES FIDELITY & GUARANTY CO.*, [1929] 3 D. L. R. 140; 2 W. W. R. 146; 41 B. C. R. 81.—CAN.

sc. *"Excluding infidelity"*—Effect of theft by director or servant of company.—The expression "excluding infidelity" in an insurance policy indemnifying a co. against the loss of moneys while looked up in a safe in specified premises excludes a theft of the money by any director of the co., as also theft by a servant of the co. who owes a duty of faithfulness to the co. in respect of its moneys.—*FRENCH HAIRDRESSING SALOONS, LTD. v. NATIONAL EMPLOYERS' MUTUAL GENERAL INSC. ASSOCN., LTD.*, [1931] App. D. 60.—S. AF.

quence of which they incurred loss, & they brought this action to recover the amount of such loss from their underwriters:—*Held*: whatever might be the limitations suggested by the recital the operative part of the policy was unambiguous, & upon a true construction of the words used applts.' loss was covered, & their claim must therefore succeed.—*LAZARD BROS. & CO., LTD. v. BROOKS* (1932), 38 Com. Cas. 46, H. L.

**3260a. "Dishonesty"**—[Discounting bills of exchange subsequently dishonoured.]—Pltf. was insured by two policies, subscribed by deft., against loss or deprivation of bills of exchange through theft & any other loss whatsoever through theft or other dishonesty. During the currency of the policies pltf. was induced by false representations to discount certain bills of exchange. The bills were dishonoured, & pltf. brought an action on the policies on the ground that he had suffered a loss through having dealt in the bills. Deft. contended that the above provision in the policies only covered accidental loss of documents or physical deprivation of the possession of documents:—*Held*: pltf.'s loss was caused by dishonesty within the policy.—*WASSERMAN v. BLACKBURN* (1926), 43 T. L. R. 95.

*Annotation*:—*Consd.* *Lazard Bros. & Co. v. Brooks* (1932), 37 Com. Cas. 224.

**3260b. "Money made away with by theft"**—[Bonds fraudulently issued by branch manager.]—Resps., pltf. in the action, were a Belgian bank, with headquarters at Brussels & branches at a number of towns throughout Belgium. In the course of their business as bankers resps. took money from customers on deposit, & it was their practice when receiving money on deposit to give the customer a bond undertaking to repay the money on a stated date. For a long time bonds of this kind were issued both by the head office & by the branches of resps.; but at the end of 1929 they decided that, in order to keep a better account of bonds outstanding, for the future bonds should only be issued by the head office. They accordingly instructed their branch managers that when after that date a customer should wish to place money on deposit the branch manager concerned must inform the head office, & the head office would then issue the necessary bond. Not-

withstanding those instructions the manager of resps.' Malines branch, who had retained in his possession a number of the old bond forms, continued, without the knowledge of the head office, to issue bonds to customers who left money with him on deposit, & he used the money so left with him for his own purposes. Subsequently the fraud of the branch manager was discovered, & resps. were obliged to pay to the customers the face value of the bonds which he had issued. At the time when the branch manager was thus acting fraudulently resps. held at Lloyd's policy of insurance, of which the present applt. was one of the underwriters, protecting them against all direct losses suffered by them by reason, *inter alia*, of any money in which they were interested being lost or made away with by theft. They claimed to be indemnified under the policy for the sums which they had lost owing to the branch manager's fraud, & as the underwriters refused to pay they brought this action to enforce their claim:—*Held*: in the circumstances resps. were bound to honour the bonds which had been fraudulently issued by the branch manager; the money paid to the branch manager by the customers for those bonds was money in which resps. were interested or the custody of which they had undertaken, & which had been made away with by the theft of the branch manager; & the loss therefore came within the terms of the policy.—*ALGEMEENE BANKVEREENIGING v. LANGTON* (1935), 40 Com. Cas. 247, C. A.

**3264. Add. Annotation**:—*Consd.* *Philadelphia National Bank v. Price*, [1937] 3 All E. R. 391.

**3269. Add. Annotation**:—*Refd.* *Lake v. Simmons* (1926), 95 L. J. K. B. 586.

**3269a. "Shall keep proper books of account."**—[A condition in a burglary insurance policy provided that "the insured shall keep proper books of account with a complete record of all purchases or sales, & all such books shall be regularly entered up as soon as such purchases or sales shall have taken place":—*Held*: the condition meant that the insured was to keep proper books of account giving a complete record of all transactions, whether they were purchases or sales.—*JACOBSON v. YORKSHIRE INSURANCE CO., LTD.* (1933), 49 T. L. R. 389.

## Part VIII.—Other Kinds of Insurance.

**3272a. Loss of cash in transit**—"In & around London"—[Whether Winchester included.]—*RICHARDSON v. ROYLANCE* (1933), 50 T. L. R. 99.

**3279a.**—[To be used only for commercial travelling—Damaged whilst carrying passengers.]—*Held*: a statement in a proposal form that a motor car was to be used only for commercial travelling was a statement descriptive of the risk covered by the insur-

ance, & the insurers were not liable for an accident which happened while the motor car was being used to carry passengers, carrying passengers not being within the description.—*ROBERTS v. ANGLO-SAXON INSURANCE ASSOCN.* (1927), 96 L. J. K. B. 590; 137 L. T. 243; 43 T. L. R. 359, C. A.

*Annotation*:—*Consd.* *Provincial Insurance Co. v. Morgan* (1932), 102 L. J. K. B. 164.

### PART VIII.

d l. — *Racehorse*.—*RAMSAY v. HARTFORD LIVE STOCK INSURANCE CO.*, [1930] 2 D. L. R. 805.—*CAN.*

g l. — *Misstatements in proposal*—*What amount to*.—A motor vehicle

in the possession of the purchaser under a hire-purchase agreement was destroyed by fire. An action was brought by the two parties to the hire-purchase agreement under a policy issued in the names of both parties. Defts. pleaded that all benefit under the

policy had been forfeited through misstatements in the proposal. The proposal began "I/we, the undersigned desire to insure my/our motor vehicle." After the words "owner's full name," was written the names of both pltf. "for their respective rights

**3279b. Concealment—Refusal of company to insure.]—HOLT'S MOTORS, LTD. v. SOUTH EAST LANCASHIRE INSURANCE CO., LTD., No. 203a, ante.**

**8279c. ——— Business car driven by son & others—Failure to disclose convictions against**

son.].—Applt took out with resps. a motor car policy of insurance in respect of a car of which he was the owner. Applt. employed more than one driver in the course of his business, & at the time when the insurance was effected the agent of resps. told him that

& interests." The question "Have you ever made a claim against any insurance co.," was answered "No." The proposal was signed by only one pltf. Although pltf. who signed the proposal had never made a claim, the other had done so: Held: a non-suit, on the ground that the evidence proved the plea, should be set aside.—MEYERS & PADDINGTON MOTOR SERVICE, LTD. v. DALGETY & CO., LTD. (1926). 26 S. R. N. S. W. 195; 43 N. S. W. N. 39.—AUS.

**g** il. —————.—J-A proposal  
for the insurance of a motor car con-  
tained the question, "Has any proposal  
for insurance, or any policy ever been  
withdrawn, declined or cancelled?"  
**P**ltf.'s answer was "No." Pltf. had  
held a policy over the car with another  
co., but by arrangement, & to oblige  
pltf., this policy had been terminated :—  
**H**eld : the word "cancelled" meant  
the determination of the policy by  
the unilateral act of the co., & the  
termination of the policy by mutual  
arrangement did not amount to a  
cancellation, & the answer to the  
question in the proposal was true.—  
**WILLCOCKS v. NEW ZEALAND INSURANCE CO.**, [1926] N. Z. L. R. 805.—  
**N.Z.**

g. iii. — — — — —.]—*Held*: a statement that the motor car insured was a new one, whereas in fact it was a second-hand one, was a material representation which avoided the policy.—*ABASS v. GLOBE & RUTGERS F. INS. CO.*, [1927] 1 D. L. R. 435; 59 N. S. R. 81.—*CAN.*

g iv. — *Driver under influence of drink—Whether assured entitled to recover—Construction of policy.*—BALNATH v. ATLAS ASSURANCE CO., LTD. (1927), 48 N. L. R. 467.—S. AF.

g v. ————].—It is contrary to public policy for a person driving a car when intoxicated to recover under a policy of insurance, if he has not been charged.—HOME INSURANCE CO. of NEW YORK & UNITED STATES FIDELITY & GUARANTY CO. v. LINDAL & BEATTIE, [1934] S. C. R. 33; 1 D. L. R. 497.—CAN.

**g vi. — Insurance not to be effective until payment of premium.—Failure to pay premium.]—Held:** the insurance co. was not entitled to sue the assured for a short period premium, as the contract was not complete until the premium was paid & accepted, & the handing over to the assured of the policy containing the proviso did not amount to a waiver of the condition.—**SOUTH BRITISH INSURANCE CO., LTD. v. STENSON (1928), I. L. R. 52 Bom. 532.—IND.**

§ vii. — *Amount recoverable.*—On an appraisal of the value of an automobile which has been stolen & destroyed by fire, the fact that the sound value & the replacement value are found to be the same is not error on the face of the award, but is only another way of saying there was a total loss.

SEARLE v. ALLIANCE INSURANCE CO. (No. 3), [1926] 4 D. L. R. 1173; [1926] 3 W. W. R. 563; 36 Man. L. R. 110.—CAN.

**g viii.**— *Condition that car not operated by assured's son*—Car driven at son's request—Son present.—A policy of insurance upon a motor car contained a term that it was not covered if the car was "operated" by assured's son (naming him). The car was taken out by the son without assured's consent, & against his express prohibition & was destroyed by fire.

upon a highway. The fire occurred when the car was being driven by a friend of the son, at the son's request, the latter being in the car with the driver:—*Held*: the son was still "operating" the car within the prohibitive term, & an action by the assured upon the policy was dismissed. —O'REILLY v. CANADA ACCIDENT & FIRE ASS'CE CO., [1928] 4 D. L. R. 415; 62 O. L. R. 654; *reversed*, 63 O. L. R. 413.—CAN.

§ 1x. — *After returning from hire*  
— *Insured for "private personal use."*  
— The owner of a motor car insured it against loss or damage by fire. Condition 3 of the policy was that it should apply "only to a car for private personal use," & that no liability should be incurred if & when it was being used otherwise; & condition 4 expressly excluded liability for loss or damage arising while the car was "let out for hire." The car was normally used in a private hiring business conducted by the owner, & was only rarely employed by him for private personal purposes. After returning from a hire late one night it was put in its garage, & was shortly afterwards destroyed by fire. The owner made a claim under the policy, but the co. denied liability:—*Held*: the co. was not liable, in respect that the risk to which the car was exposed while in the garage was incidental to its ordinary employment, i.e. in the hiring business, & accordingly, the loss was one which was excluded by the policy. — *MURRAY v. SCOTTISH AUTOMOBILE & GENERAL INSURANCE CO., LTD.*, [1929] S. C. 49. — *SCOT.*

g x. — Condition rendering policy void if interest passed from insured to third party.—*Except by will or operation of law—Sub-hiring from hirer.*—REILLY BROS. v. MERCANTILE MUTUAL INSURANCE CO., LTD. (1928), 30 W. A. L. R. 72.—AUS.

g xi. — Insurance of interest of hirer—Condition against transfer of interest—Effect of sub-hiring.]-REILLY BROS. v. MERCANTILE MUTUAL INSURANCE CO., LTD., [1928] W. A. L. R. 72 —AUS.

**g xlii.**—*Statutory condition against mortgage—What amounts to mortgage—Chattel mortgage as collateral security.*—**GATEHOUSE v. MERCHANTS CASUALTY CO.,** [1930] 1 W. W. R. 927; 2 D. L. R. 895.—**CAN.**

§ xlii. — *Statutory condition, against permitting car to be driven by intoxicated person*—*Onus of proof.*—Where a statutory condition provides that an insurer shall not be liable under a policy of automobile insurance while the automobile is being driven "with the knowledge, consent or connivance of the insured by an intoxicated person," a finding that the insured was intoxicated when he was driving the automobile at the time of the accident in question supports the claim of the beneficiary that the insurer is not under the burden of proving that the accident was due to intoxication. The meaning of "intoxication" discussed.—*GENERAL CASUALTY INSURANCE CO. OF PARIS v. LAMBERT & VANCE, (1930) 2 W. W. R. 548; 3 D. L. R. 1007; 43 B. C. R. 133.—CAN.*

g xiv. ———— *Meaning of "intoxicated."*—"An intoxicated person," within sect. 154 (5) of the statutory conditions of Insurance Act, 1923 (c. 20), is one who has taken alcohol in such quantity as to render himself an unsafe person to be in charge of an

automobile.—MCKNIGHT v. GENERAL CASUALTY INSURANCE CO. OF PARIS, [1930] 3 W. W. R. 73; 4 D. L. R. 816; *affd.*, [1931] 2 W. W. R. 315; 3 D. L. R. 476; 44 B. C. R. 1.—CAN.

**§ XV. — — — Includes insured.]**—Statutory condition 5 of Sched. D of Alberta Insurance Act, 1926, provides that the insurer under an automobile insurance policy shall not be liable under the policy "while the automobile, with the knowledge, consent, or connivance of the insured, is being driven by a person under the age limit fixed by law, or, in any event under the age of sixteen years, or by an intoxicated person" :—*Held*: the condition as to intoxication does not apply to the insured himself.—**HOME INSURANCE Co. of New York & UNITED STATES FIDELITY & GUARANTY Co. v. LINDAL & BEATTIE, [1934] S. C. R. 33; 1 D. L. R. 497.—CAN.**

**g xvi.** — *Use of car for "business or pleasure" — Efficiency test.* — Deft. co. issued to pltf. a policy of insurance by which the co. agreed to pay for or make good any loss of or damage to his motor car. The policy provided that the co. should not be liable for loss or damage by mechanical break down, and under its conditions the co. was not to be liable in respect of anything which might occur whilst the car was engaged in racing or reliability, speed, or other trial, or if it were used for any purpose other than business & pleasure. Preparatory to its use in a race in which he intended to compete, pltf. entrusted the car to an engineer to be overhauled. Whilst the engineer was driving the car along a road for the purpose of testing its efficiency, the car caught fire & was destroyed: — *Held*.: (1) even if the insured had at the time of the proposal for insurance the intention of using the car for the purposes of competing in races or in reliability, speed or other trials, that intention was not a fact material to the risk, & its non-disclosure did not avoid the policy; (2) at the time when the loss occurred, the car was not engaged in a reliability, speed or other trial within the condition of the policy; (3) the purpose for which the car was then being used was one within the meaning of the terms "business & pleasure." — **ORTNER v. AUTOMOBILE INSURANCE CO. OF AUSTRALIA, LTD.** (1930), V. L. R. 194; **Argus L. R. 194.** — **AUS.**

g xvii. ——— *Option of insurer to repair*  
*—Exercise of option amounts to new*  
*contract.]—***MAHER v. LUMBERMEN'S**  
**MUTUAL CASUALTY CO.,** [1932] 2  
D. L. R. 593; 4 M. P. R. 376.—**CAN.**

**g xviii.** — *Impossibility of repair—Discharge of insurer.*—Pliffs' motor car was damaged by accident on Jan. 30, 1931, & on the same day towed to a garage in Napier. The motor car was insured under Lloyd's New Zealand motor-car policy, which was subscribed, amongst others, by deft. While still in the garage an agent of deft. authorised the car to remain there & instructed the proprietors to make an estimate of the damage. The estimate was prepared, but on Feb. 3, 1931, the garage was damaged by earthquake & completely destroyed by fire following earthquake. The fire completely destroyed the motor car. The material provisions of the policy were that the underwriters should "indemnify the insured" as to "any damage occasioned by accidental external means" one of the conditions

if he paid an extra premium the policy would protect him whoever might be driving the car, & applt. paid the extra premium accordingly. During the currency of the policy the car, while being driven by a son of applt., came into collision with a cyclist. The cyclist brought an action against applt. for damages, & applt. referred the claim to

resps., who repudiated liability on the ground that at the time when the policy was taken out applt. had failed to disclose a material fact. It appeared that before the insurance was effected applt.'s son had been convicted several times of motoring offences, chiefly in relation to a motor-cycle, & resps. contended that this was a material fact which

being that the underwriters "repair, reinstate, or replace any motor car or any part thereof destroyed or damaged, or may settle for the damage in money":—*Held*: on the construction of the policy the only legal obligation imposed on the underwriters was to repair, reinstate, or replace, & settlement in money was only at the option of the underwriters; & as, through no fault of the underwriters, it had become impossible to repair, they were discharged from liability.—*WRIGHT, STEPHENSON & CO., LTD. v. HOLMES*, [1932] N. Z. L. R. 815.—N.Z.

**g xix.** — *Non-disclosure of lien—Avoidance.*—The existence of an undisclosed lien on a car is sufficient to avoid the liability of the insurance co., even though its existence is known to the agent of the co.—*SEREDA v. CONSOLIDATED FIRE & CASUALTY CO.*, [1934] 3 D. L. R. 504; O. R. 502.—CAN.

**o i.** ——.—Applt. was insured by resp. co. against loss or damage to his automobile by fire, the policy covering other hazards also. His application, made a part of the policy, stated, item 4, that the automobile "will be chiefly used for private purposes only"; & item 8, that he had made no claim for loss by fire within the last three years preceding the application in respect of the ownership or operation of any automobile; & that if the applicant knowingly misrepresented or omitted to communicate any circumstance required by the application to be made known to the insurer, the contract should be void as to the risk undertaken in respect of which the misrepresentation or omission was made. The policy provided, under the heading "Exclusions from Perils," that resp. should not be liable for loss or damage arising while the automobile was being used otherwise than for the purposes specified in said item 4, or "if rented or leased." During the term of the policy, applt., who had taken the car to B.'s garage for repair, agreed, on request of B., who stated he was overhauling his own car & promised, for his use of applt.'s car, to make certain adjustments & repairs, to allow B. to use his car & to leave it in B.'s garage until said work was done, but stipulated that applt. or his wife could use the car whenever they wished, & they did use it while it remained at B.'s garage. While B. was driving the car it took fire (supposedly from self-ignition caused by the wires having become wet). B. had as yet made no adjustments or repairs. Applt. sued resp. to recover the loss by fire.—*Held*: applt. was entitled to recover.—*JOHNSON v. BRITISH CANADIAN INSURANCE CO.*, [1932] 4 D. L. R. 281; S. C. R. 681.—CAN.

**q i.** ——.—*MacDONALD v. GUARDIAN ASSCE. CO.*, [1929] 1 D. L. R. 518; 60 N. S. R. 262.—CAN.

**r i.** — *Joint insurance of hirer & party hiring—Breach of condition by one party.*—Where two persons are jointly insured, the breach of a condition by the one in whose sole power it is to observe such condition will contaminate the whole insurance if the innocent person contracted with full knowledge of & subject to such condition, notwithstanding that the interests of the two insured are distinct

& notwithstanding that the contract might be construed as a separate insurance for each.—*McLAREN & CO. v. NEW ZEALAND INSCOE. CO.*, [1930] N. Z. L. R. 437.—N.Z.

**r ii.** — *While on ferry—Car falling into water.*—A car policy covering insured while on a ferry or inland steamer against loss by stranding, sinking, burning or derailment of such conveyance does not cover damage to the car by falling into the water between the ferry boat & the wharf.—*BRITISH EMPIRE UNDERWRITERS v. WAMPLER* (1921), 62 S. C. R. 591.—CAN.

**c (p. 422) i.** — *Necessity for insurable interest—Meaning of "the insured."*—*Held*: "the insured" within Alberta Insurance Act, 1926, s. 284 (a), is the person who is really intended to be insured. Therefore where with the authorisation of the owner of a crop it is insured in his name, but for the benefit of another who pays the premiums but has no interest in the crop, the policy is a wagering policy & void; even though at the time the true facts are known to the insurer's local & general agents through whom it is issued.—*MOHRING v. GLEN FALLS INSURANCE CO. (Alta.)*, [1929] 3 W. W. R. 737; [1930] 3 D. L. R. 456.—CAN.

**c (p. 422) ii.** — *Sale of land—Right of vendor to share of indemnity.*—Pftfs., purchasers of land under an agreement for sale calling for crop payments, sued deft. municipal hail insurance assocn. to recover certain sums which they alleged were due to them as the balance of indemnities for damage to their crops by hail. The lands had been assessed for hail insurance purposes to pftfs. Deft. pleaded that pftfs.' claims were referred, in compliance with Municipal Hail Insurance Act, R. S. S., 1930, to its directors who apportioned the indemnities for the damage in question between pftfs. & their vendor, & that under sect. 47 of the Act the decision of the directors both as to the amount of the indemnities & the apportionment thereof was final & conclusive. Pftfs. replied that the directors had no jurisdiction to apportion any part of the indemnities to the vendor, & that sect. 47 was *ultra vires* in so far as it constituted the board of directors a judicial body. Judgment for pftfs., but appeal allowed.—*LITVENENKO & OLENIKOFF v. SASKATCHEWAN MUNICIPAL HAIL INSURANCE ASSOCN.*, [1936] 2 W. W. R. 545; 4 D. L. R. 428.—CAN.

**c (p. 422) iii.** — *Notice of cancellation.*—Saskatchewan Municipal Insurance Assocn. being a corp. created by statute its powers must be found in the statute creating it; & since under sect. 32 of that statute, Municipal Hail Insurance Act, R. S. S., 1930, a notice of cancellation of hail insurance must be sent "not later than" July 31, & there is no provision in the Act which enables a notice to be forwarded after July 31, a notice mailed after that date is a nullity & the action of the assocn. in purporting to accept it as if it had been mailed on July 31 is also a nullity.—*PROLEMY v. SASKATCHEWAN MUNICIPAL HAIL INSURANCE ASSOCN.*, [1937] 2 W. W. R. 181.—CAN.

**sa.** *Aircraft insurance—Flight contrary to Government regulations.*—

*ORAIISKI CHIBOUGAMAU MINING CO. v. AERO INSURANCE CO.*, [1932] S. C. R. 540; 3 D. L. R. 25.—CAN.

**so.** *Insurance of electric sign against "fire, wind, storm or external causes"—Loss from wind pressure.*—*NEON TUBE LIGHTS, LTD. v. ALLIANCE INSURANCE CO.*, [1932] 2 D. L. R. 741.—CAN.

**se.** *Sickness—"Necessarily & continuously confined within the house."*—A covenant in a sickness insurance policy to pay the stated indemnity for the period during which the insured by reason of a disabling sickness is "necessarily & continuously confined within the house & throughout which he is therein regularly visited by a legally qualified physician" should not be so literally interpreted as to exclude the case where the insured is so sick that he is treated in a hospital instead of a house or the case where the insured's condition is so hopeless that no physician can do anything for him & therefore, he is not visited regularly by a physician within a house.—*KEMPFERT v. CONTINENTAL CASUALTY CO.*, [1932] 3 W. W. R. 154; *revid.*, [1933] 1 W. W. R. 70; 1 D. L. R. 800.—CAN.

**st.** *Illness—When loss occasioned by sickness occurs.*—*Held*: the word "loss" in Saskatchewan Insurance Act, 1930, s. 336, as applied to the contract & case in question, meant "expenses incurred as a result of illness or disease," & the "loss" occurred when the expenses were incurred, & not, as contended by the co., when the illness began.—*HOLDEN v. WESTERN MUTUAL CASUALTY INSURANCE CO.*, [1935] 3 W. W. R. 342; 4 D. L. R. 761.—CAN.

**sg.** *Indemnity—Accident through operation of gas plant—Break in service pipe.*—Applt., an insurance & indemnity co., issued to resp. a gas co., a policy by which it agreed to indemnify resp. "for any & all sums which the assured (resp.) shall by law be liable to pay for (*inter alia*) damages to property . . . as a result of any one accident caused by or arising out of the operation of natural gas . . . by or for the assured"; the policy further provided that it was "understood & agreed that the policy (was) issued to indemnify the assured (resp.) as the result of accidents caused by, or arising out of, all the assured's operations in drilling, handling & distribution of natural gas." While the policy was in force, gas accidentally escaped through a break in the service pipe located under the premises of a customer & caused a conflagration which did extensive damage to the customer's premises, the break resulting from the negligent installation of the pipe by resp.'s servants some years before. For this damage resp. was adjudged liable, & after satisfying the judgment brought an action against applt. on the policy for indemnity. The service pipe belonged to the owner of the building, but, like all other such pipes in the city, was installed by the resp. for the owner, who paid for it. Resp.'s action was maintained by the trial judge, which judgment was affirmed by the appellate ct.—*Held*: the liability of resp. for the damages so arising was one covered by the express terms of the policy.—*CENTURY INDemnITY CO. v. NORTHWESTERN UTILI-*



ought to have been disclosed by applt. Before the policy was issued applt. had received a proposal form from resps. & had answered all the questions in that form fully & truthfully, & he did not know that any further information was required. At that time he had not his son in mind. Applt.'s claim against resps. was referred to arbn. as required by the policy, & the arbitrator awarded in favour of resps. on the ground that a material fact had not been disclosed. Applt. now appealed to the Div. Ct. to have the award set aside:—*Held*: the arbitrator had decided rightly & the award must be confirmed.—*BOND v. COMMERCIAL ASSURANCE CO.* (1930), 35 Com. Cas. 171, D. C.

**3279d. — Effect of removal of motive power.]—**

The claimant made to resps. a written proposal that they should insure a motor lorry, & in reply to a question on the proposal form he stated that the vehicle would be garaged on his own premises. Resps. accepted the proposal & issued a policy which covered damage to the vehicle & to its necessary accessories by accidental fire. During the currency of the policy the claimant, finding it necessary to repair the lorry, removed the engine from the lorry in the garage to a workshop of his at some distance. The night after the repair of the engine was completed the engine was destroyed by fire. On a claim under the policy the resps. repudiated liability on the ground (*inter alia*) that a lorry was not a motor lorry when it had been deprived of its motive power:—*Held*: the engine & body together constituted the insured lorry, & the mere fact of the removal of the engine from the body for the time being did not deprive the claimant of his right to an indemnity under the policy.—*SEATON v. LONDON GENERAL INSURANCE CO., LTD.* (1932), 48 T. L. R. 574; 76 Sol. Jo. 527.

**3282. Add. Annotations:—***Refd. Lake v. Simmons*, [1927] A. C. 487; *Holmes v. Payne*, [1930] 2 K. B. 301.

**3282a. — Goods supplied in replacement of goods lost—Right to retain although lost goods subsequently found.]—(1) By a Lloyd's policy pltf. & other underwriters insured deft. against "all loss wheresoever which the assured may sustain by the loss of or damage to" certain specified articles, one of which**

was a pearl necklace. During the currency of the policy deft. missed the necklace & informed the representative of the underwriters that she had lost it. She made a thorough search of her house for it, & afterwards at the suggestion of the underwriters a further search & inquiries were made, but without result. An agreement was then entered into between the underwriters & deft. that they should give her by way of replacement of the necklace other articles of jewellery up to its insured value. After she had received under the agreement articles of somewhat less than a third of that value the necklace was found at her house, where it fell out of an evening cloak in which it had become concealed. In an action by pltf. against deft. claiming a declaration that the necklace had not been lost, rescission of the replacement agreement, & the return of the articles which she had received under that agreement:—*Held*: the replacement agreement was in the circumstances a valid & binding agreement unaffected by mistake or misrepresentation on its true construction it did not contain an implied term that if the necklace should be found the agreement should be void; & under it deft. was entitled to retain the articles which she had received & to receive other articles up to the agreed value, the underwriters taking the necklace as salvage.

(2) Uncertainty as to recovery of the thing insured is, in my opinion, in non-marine matters the main consideration on the question of loss. In this connection it is, of course, true that a thing may be mislaid & yet not lost, but, in my opinion, if a thing has been mislaid & is missing or has disappeared, & a reasonable time has elapsed to allow of diligent search & of recovery, & such diligent search has been made & has been fruitless, then the thing may properly be said to be lost (*ROCHE, J.*).—*HOLMES v. PAYNE*, [1930] 2 K. B. 301; 99 L. J. K. B. 441; 143 L. T. 349; 46 T. L. R. 413; 74 Sol. Jo. 464; 35 Com. Cas. 289.

**3282b. — Meaning of "lost."] — HOLMES v. PAYNE, No. 3282a, ante.**

**3282c. — Baggage policy—Condition for declaration of "specially valuable articles"—Furs & fur coats not included.]—(1) A policy of**

*TIES, LTD.*, [1935] S. C. R. 291; 3 D. L. R. 35.—*CAN.*

**af. Jewellers block policy—Whether fire insurance included by mistake.]—***BRESLAUER & WARREN v. FIREMAN'S FUND INSURANCE CO.*, [1935] 2 W. W. R. 289; 3 D. L. R. 503; 43 Man. L. R. 158.—*CAN.*

**al. Loss of profits—Meaning of profit.]—**In a claim on an insurance policy against loss of profits:—*Held*: on the sale of merchandise a merchant cannot arrive at a "profit" until he has deducted the expenses of earning it. Overheads must therefore be deducted in arriving at "profits" for the purpose of a policy.—*FAMOUS CLOAK & SUIT CO. v. PHOENIX ASSURANCE CO.* (1932), 46 B. C. R. 349.—*CAN.*

**ao. Insurance against disability occurring after payment of first premium.]—**A policy insuring an employee against "disability occurring at any time after payment of the first premium" does not entitle assured to claim for tuberculosis developed after application for insurance & issue of the policy

but before payment of the first premium.—*MADISON v. PRUDENTIAL INSCE. CO.*, [1936] 2 D. L. R. 586; 10 M. P. R. 413; 6 F. L. J. (Can.) 81.—*CAN.*

**ar. Disability.]—**Pltf. was insured under policies containing a total & permanent disability clause which provided for the payment of a disability monthly income during the continuance of a disability under which he would be "continuously & wholly prevented thereby for life from engaging in any occupation or employment for wage or profit." In 1931 pltf.'s vision began to fail &, as the result of the acceptance of a claim made by him under said clause, monthly payments were made to him until Dec. 1936, when the insurer refused to continue the payments. Pltf.'s disease was an incurable one, known as *retinitis pigmentosa*, which in such cases as pltf.'s progresses from early middle life until its ends in total blindness at about the age of sixty. In pltf.'s case it was then approaching its final stage. Prior to his disability pltf. had been the manager of a bottling

co. His duties required him to do a lot of travelling by automobile & otherwise but, when his sight began to fail, his doctors forbade him to drive a car, or to cross streets without a guide; he was also unfitted, because of the eye strain involved, for office work. He, therefore, ceased work altogether in 1931:—*Held*: it was pltf.'s capacity for employment or for an occupation yielding a profit, not his chance of securing or engaging in the same in an uncertain market, that was contemplated by said clause. Therefore, it being found that pltf. was wholly & permanently disabled from engaging in his former regular occupation or employment & in view of his age (fifty-one) & condition had no appreciable capacity to engage in any other occupation or employment for wage or profit, & his incapacity was permanent, that his case fell within said clause & he was entitled to the benefits thereof.—*BORODITSKY v. TRAVELERS' INSURANCE CO.*, [1937] 3 W. W. R. 665; 4 D. L. R. 653; 45 Man. L. R. 457.—*CAN.*



insurance against accidental loss of baggage contained a condition that "the whole of the baggage must be insured, & not merely a portion of same either in respect of value or package":—*Held*: this condition did not mean that if the baggage were underestimated, that would be an answer to the policy. The condition merely meant that the insurance was to apply to the whole of the baggage in bulk & value.

(2) By condition 5 of the policy: "Jewelry, watches, field-glasses, cameras, & other fragile or specially valuable articles must be separately declared & valued":—*Held*: the condition enumerated things by description, classes, & not individual things. Where the question was whether a fur coat said to have been worth £240 & found to be worth £175 should have been separately declared & valued, the question of construction was not whether that fur coat was a specially valuable article but whether furs or fur coats, as a class, were specially valuable articles within the meaning of the condition. Applying the *ejusdem generis* rule, the question was whether furs or fur coats were specially valuable articles in the same sort of sense that jewelry, watches, field-glasses, & cameras were fragile or specially valuable articles; (3) also, furs or fur coats, being worn as a common-place article of dress by any woman of any sort of comfortable means, were not such specially valuable articles within the meaning of condition 5.—*KING v. TRAVELLERS' INSURANCE ASSOCN., LTD.* (1931), 48 T. L. R. 53; 75 Sol. Jo. 797.

**3282d.** Condition that whole of the baggage to be insured—Effect of underestimate.]—*KING v. TRAVELLERS' INSURANCE ASSOCN., LTD.*, No. 3282c, *ante*.

**3284.** *Add. Annotation*:—*Re*ld. *Banco de Bilbao v. Rey, Banco de Bilbao v. Sancha*, [1938] 2 All E. R. 253.

**3284a.** Becoming enemy property on outbreak of war.]—Pltfs. were registered as a joint stock co. in Natal, their only property being a gold mine owned & worked by them in the Transvaal. Before Oct. 1899, when war was declared between the Transvaal Republic & this country, pltfs. had effected with deft., a British subject, a policy of insurance of certain gold products of their mine, the perils insured against including "enemies," & "arrests, restraints, & detentions of kings, princes, & people." A few days after war was declared the agents of the Transvaal Government seized & carried away some of the gold products insured. Pltfs. had shut down their mine when war was declared, & there was nothing to show that they intended to continue their business or mining operations in the Transvaal afterwards. In an action on the policy to recover in respect of the gold products so seized:—*Held*: there was no ground of public policy which prevented the policy of insurance from continuing in force after war was declared, & therefore pltfs. were entitled to recover.—*NIGEL GOLD MINING CO., LTD. v. HOADE*, [1901] 2 K. B. 849; 70 L. J. K. B. 1006; 85 L. T. 482; 50 W. R. 108; 17 T. L. R. 711; 6 Com. Cas. 268.

*Annotation*:—*Re*ld. *British & Foreign Marine Insce. Co. v. Gaunt*, [1921] 2 A. C. 41.

**3288.** *Add. Annotations*:—*Folld. Re Clay's*

*Policy of Assurance, Clay v. Earnshaw*, [1937] 2 All E. R. 548; *Re Foster, Hudson v. Foster*, [1938] 3 All E. R. 357; *Re Sinclair's Life Policy*, [1938] 3 All E. R. 124. *Re*ld. *Royal Exchange Assee. v. Hope*, [1928] Ch. 179; *Perrin v. Dickson* (1929), 98 L. J. K. B. 683; *L. R. Comrs. v. Clarkson-Webb*, [1933] 1 K. B. 507.

**3289.** *Add. Citation*:—95 L. J. Ch. 24.

**3289a.** —Death of assured before maturity of policy—Moneys part of assured's estate.]—In 1919, J. G. S. took out an endowment policy in his own name for the benefit of his godson to mature in seventeen years. J. G. S. died in 1924:—*Held*: there was no trust in favour of the godson; & Law of Property Act, 1925 (c. 20), s. 56 (1), gave no beneficial interest in the policy money to the godson, & it formed part of the estate of J. G. S.—*Re SINCLAIR'S LIFE POLICY*, [1938] Ch. 799; [1938] 3 All E. R. 124; 107 L. J. Ch. 405; 159 L. T. 189; 54 T. L. R. 918; 82 Sol. Jo. 545.

*Annotation*:—*Folld. Re Foster, Hudson v. Foster*, [1938] 3 All E. R. 357.

**3289b.** Policy by father on life of son—Right to policy money.]—In Nov. 1908, the father took out a policy of insurance upon the life of his son, the policy moneys to be payable on the death of the son on or after his twenty-first birthday. The father died on July 25, 1925, having paid up to that time all the premiums accruing due upon the policy. The son attained twenty-one years of age on Sept. 26, 1916. After the death of the father, all premiums were paid either by the son or upon his behalf. Upon the death of the son, the insurance moneys became payable, & the question was whether they were payable to the personal representative of the father or to the personal representative of the son:—*Held*: (1) the father had not constituted himself a trustee for the son; (2) the Law of Property Act, 1925 (c. 20), s. 56, did not, in the circumstances of this policy, give the son a legal right to receive the policy moneys; (3) the policy moneys were, therefore, payable to the legal personal representative of the father.—*Re FOSTER, HUDSON v. FOSTER*, [1938] 3 All E. R. 357; 54 T. L. R. 993; 82 Sol. Jo. 584.

**3289c.** Machinery — Latent defect — Whether a casualty.]—Pltfs., who were marine engineers, took out a policy on "machinery & the like (sundry small contracts & repair jobs . . .) from & during construction." The insurance covered "all risks incidental to testing the machinery" & was "also specially to cover cost of repairs &/or loss of &/or damage to the interest . . . through any latent defect in the thing insured." Pltfs. contracted to fit a steamer with a new intermediate pressure cylinder, but the cylinder, when tried under steam, was found to be defective, & a second one having also been found to be defective, pltfs. had to fit a third. In an action on the policy:—*Held*: as the existence of a latent defect was not a casualty & the cost of replacing a thing which had a latent defect was not recoverable as loss or damage due to latent defect, & as the words "cost of repairs" did not cover expenditure on the replacement of material which was inherently defective, & as the testing merely revealed, & did not cause, the latent defect,

the action failed.—**MACCOLL & POLLOCK, LTD. v. INDEMNITY MUTUAL MARINE ASSURANCE Co., LTD.** (1930), 47 T. L. R. 26.

**3289d. Solicitor's indemnity policy—Damages paid in respect of champertous agreement.**—A solr. took out an indemnity policy, which insured him against loss arising by reason of any neglect, omission or error while acting in his professional capacity. During the currency of the policy he sustained loss through having, without realising the fact, entered into a champertous agreement. On a claim to be indemnified:—**Held**: (1) the agreement being champertous, & therefore illegal & contrary to public policy, a claim in respect of loss due to having contracted it was not maintainable; (2) the loss in respect of which indemnity was claimed did not arise by reason of any neglect, omission or error committed by the solr. in his professional capacity, but arose from his entering into a personal speculation.—**HASELDINE v. HOSKEN**, [1933] 1 K. B. 822; 102 L. J. K. B. 441; 148 L. T. 510; 49 T. L. R. 254, C. A.

*Annotations*:—As to (2) **Refd.** *Davies v. Hosken*, [1937] 3 All E. R. 192. *Generally, Refd.* *Beresford v. Royal Insurance Co.*, [1937] 2 K. B. 197.

**3289e. Fraud by employee.**—Certain solrs. had taken out an insurance policy against loss arising from any claim which might be made against them by reason of any "neglect, omission or error" committed on the part of the solrs. or any person employed by them, in or about the conduct of any business conducted by or on behalf of the solrs. in their professional capacity as solrs. A clerk employed by the solrs. received sums of money from clients of the solrs. for investment in securities which did not, & were not intended to, exist & these sums the clerk had applied to his own purposes. The facts being discovered, the solrs. paid their clients' claims & sought to be indemnified under the

insurance policy:—**Held**: the wording of the policy was not apt to cover the loss sustained by the solrs. as a result of the clerk's fraudulent acts.—**DAVIES v. HOSKEN**, [1937] 3 All E. R. 192; 53 T. L. R. 798; 81 Sol. Jo. 589.

**3289f. Loss due to advances on invalid documents—Daily advances on invoices.**—By a policy of insurance, under which pltf. bank was to be indemnified against all losses to which it might be put by reason of its having made loans against documents which might prove to have been invalid, it was provided that the insurers were to pay claims only for the excess of \$25,000 ultimate net loss "by each & every loss or occurrence." Pltf. bank agreed in Mar. 1924, to make advances to one B., upon the security of B.'s promissory notes & invoices in respect of goods sold by B., in the course of his business. Almost daily from Apr. 1924, to Nov. 1930, B. sent to pltf. bank a number of invoices together with a promissory note for the total amount of the invoices. The amount of the note & invoices was debited to B.'s loan account & credited to his current account, upon which B. was able to draw. From time to time payments of the invoices were received from B. & these were credited to the loan account. The total amount of the invoices on any one day never exceeded \$25,000. By sending fictitious invoices, B. obtained from the bank on loan \$400,000 more than was owed to him by his customers. In Nov. 1930, B. was insolvent, & in Apr. 1931, he was adjudicated bkpt. The bank sought to recover the amount of its loss under its policy of insurance:—**Held**: each day's loan was a separate loss or occurrence, & as the loan on any one day never exceeded \$25,000, pltf. bank could recover nothing under the policy.—**PHILADELPHIA NATIONAL BANK v. PRICE**, [1938] 2 All E. R. 199; 158 L. T. 342; 51 T. L. R. 631; 82 Sol. Jo. 312; 43 Com. Cas. 238, C. A.

## Part IX.—Wagering Policies.

**3318. Add. Annotation**:—**Refd.** *Hoff Trading Co. v. De Rougemont* (1929,) 34 Com. Cas. 291. | **3330. Add. Annotation**:—**Refd.** *Weddle, Beck v. Hackett*, [1929] 1 K. B. 321.

### PART X. SECT. 1.

**p i.** ———.—**R. v. 1500 CLUB OF CALGARY** (Alta.), [1926] 3 W. W. R. 468; 46 Can. Crim. Cas. 276.—**CAN.**

**sd.** *Discrimination in rates charged—Investigation by Superintendent of Insurance under Ontario Insurance Act, 1924, s. 262—Position & duties of Superintendent.*—**Re GENERAL ACCIDENT ASSURANCE Co.**, [1926] 2 D. L. R. 390; 58 O. L. R. 479.—**CAN.**

**ss.** *Capital—Statutory limitation.*—In 1865, applt. co. was incorporated by an Act of the late province of Canada, with power to carry on the business of insurance generally, & its capital was stated to be two million dollars, with power to increase the same to four million dollars. By an Act of Parliament of 1870, the capital was reduced to one million dollars with power to increase the same to four million dollars in sums of not less than one million dollars. The business of the

co. was to be carried on in two distinct branches, Life & Accident Insurance business, & to be known as the Life Branch, & other forms of insurance to be known as the General Branch business. The capital stock of one million dollars was to apply to the Life Branch only, with power to increase the same to two million dollars; authority was given to raise one million dollars for the purposes of the General Branch business with power to increase the same to two million dollars. In 1871, the powers of the co. were by statute restricted to Life & Accident Insurance, & it was further provided that "All provisions of the Act of Incorporn. of the said co., & the Act amending the same, which are inconsistent with the provisions of this Act, are hereby repealed." In its report to the Department of Insurance the co. stated its capital to be four million dollars, & the Superintendent of Insurance ruled that it could only

be two million dollars & amended the report accordingly. Hence the present appeal:—**Held**: the capital of the co. for Life & Accident Insurance business was fixed at two million dollars by the Act of 1870 & was not altered by subsequent legislation. The ruling of the Superintendent of Insurance was upheld, & the appeal dismissed.—**SUN LIFE ASSURANCE Co. OF CANADA v. SUPERINTENDENT OF INSURANCE**, [1930] Ex. C. R. 21; *affd.*, [1930] S. C. R. 612; [1931] 1 D. L. R. 113; *revid.*, [1931] 4 D. L. R. 43; 3 W. W. R. 295, P. C.—**CAN.**

**sg.** *Refusal of registration of foreign company—Appeal lies from Superintendent to Court of Exchequer.*—**Held**: the report of the Superintendent of Insurance to the Minister of Finance, that registration of a foreign insurance co. be refused because the name of such co. is similar to that of a Canadian or British co., constitutes a ruling from which an appeal lies to the Exchequer

## Part XI.—Mutual Insurance Associations.

- 3386.** *Add. Annotation* :—**Refd.** *Dominion Iron & Steel Co. v. Invernairn*, [1927] W. N. 277.
- 3387.** *Add. Annotation* :—**Refd.** *Cornish Mutual Assce. v. I. R. Comrs.*, [1926] A. C. 281.
- 3388.** *Add. Annotations* :—**Refd.** *Cornish Mutual Assce. v. I. R. Comrs.*, [1926] A. C. 281; *Greenberg v. Cooperstein*, [1926] Ch. 657; *Re United General Commercial Insce. Corp'n.*, [1927] 2 Ch. 51.
- 3396.** *Add. Annotations* :—**Refd.** *Brown v. Harrison* (1927), 96 L. J. K. B. 1025; *The Minerva* (1933), 49 T. L. R. 563.
- 3397.** *Add. Annotation* :—**Consd.** *Brown v. Harrison* (1927), 96 L. J. K. B. 1025.
- 3398.** *Add. Annotation* :—**Refd.** *Brown v. Harrison* (1927), 96 L. J. K. B. 1025.
- 3399a.** Sums payable to member—Whether costs deducted from money recovered.]—By a rule of a shipowners' protection assocn., "All moneys recovered for any member shall be paid over to him without deduction of any commission or other sum, except where a

pending proceeding has been settled or compromised for a lump sum which includes costs or without any provision being made for the payment of costs, in either of which events the member shall suffer such deduction, or make such payment, as may be fixed by the directors in respect of costs." An action brought by a member with the support of the assocn. had been settled by a money payment to the member. The terms of the settlement included the following words: "each party to pay their own costs." The assocn. afterwards claimed from the member half the costs which had been incurred by the assocn. on behalf of the member in the litigation :—**Held** : the claim of the assocn. was unfounded because the settlement contained a provision for the payment of costs in the words "each party to pay their own costs."—**BRITISH S.S. OWNERS' ASSOCN. v. CHAPMAN (R.) & SONS** (1935), 51 T. L. R. 516; 41 Com. Cas. 14, H. L.

- 3406.** *Add. Annotation* :—**Refd.** *Re National Benefit Assurance Co.*, [1931] 1 Ch. 46.

Ct. under sect. 34 of 1932.—*Re FOREIGN INSURANCE COS. ACT, 1932*, [1933] Ex. C. R. 212.—**CAN.**

### PART XI. SECT. 1.

**ss.** *Distribution of profits.*—In the distribution of the profits of a mutual insurance co., as dividends all policy holders of the same class must be treated alike; discrimination between them would violate the principles of

equality & good faith & destroy the principle of mutuality upon which such cos. are founded.—**WUNDERLICH BROS. v. NORTHWESTERN MUTUAL FIRE ASSOCN.**, [1936] 1 W. W. R. 297.—**CAN.**

### PART XI. SECT. 4, SUB-SECT. 1.

**sk.** *Provision for lien on ships insured for proportion of losses incurred—Validity.*—*Re TUCKER, Ex p. MARINE*

**INSURANCE CLUB** (1886), 7 Nfld. L. R. 123.—**NFLD.**

**sm.** *Manitoba Insurance Act, Part XIII.—Whether applicable.*—**Held** : the provisions of Part XIII. of Manitoba Insurance Act did not apply to applt., a mutual insurance co. incorporated under special Act of the Dominion.—**BAGAN v. PORTAGE LA PRAIRIE MUTUAL INSURANCE CO.**, [1934] 2 W. W. R. 515; 4 D. L. R. 634; 42 Man. L. R. 230.—**CAN.**

## INTERPLEADER.

## Part I.—Nature and Purpose.

1. *Add. Annotation*:—**Consd.** *De La Rue v. Hernu Peron & Stockwell, Ltd.*, [1936] 2 K. B. 104.
3. After this case add—  
— **Whether action in tort—Proceedings between husband & wife.**—*See HUSBAND & WIFE*, No. 2291a, *ante*.

## Part II.—Interpleader in the High Court.

10. *Add. Annotation*:—**Apld.** *Republica de Guatemala v. Nunez*, [1927] 1 K. B. 669.
42. *Add. Annotation*:—**Refd.** *The Jupiter* (No. 3) (1927), 137 L. T. 333.
87. *Add. Annotation*:—**Refd.** *Israelson v. Dawson* (1932), 102 L. J. K. B. 387.
88. *Add. Annotation*:—**Refd.** *Earle v. Hemsworth R. D. C.* (1928), 44 T. L. R. 605.
- 173a. ———.]—The sheriff in possession of goods under a writ of *fi. fa.* being served with notice of an adjudication in bkpcy. against debtor, & notice by the assignee to quit possession, the execution creditor obtained an order requiring the sheriff to make a return to the writ. The sheriff sold the goods:—**Held**: he was entitled to file a bill of interpleader against the assignee & the execution creditor, & the assignee was, on interpleader, entitled to the proceeds of the sale.—**CHILD v. MANN** (1867), L. R. 3 Eq. 808; 16 L. T. 49.
- 178a. **Claim of equitable nature.**]—The sheriff having taken in execution goods which deft., who was one of the administrators of an intestate, had become possessed of under a sale from his co-administrator, was served with a notice from another party, that he & others were also entitled to shares in the goods, as next of kin to the intestate, & that, upon a bill filed by them in the Ct. of Ch. deft. had been restrained by injunction from selling, mortgaging, or disposing of the goods, & that they should hold the sheriff answerable for all loss & damage occasioned by the seizure:—**Held**: this was not such a claim as entitled the sheriff to apply for relief under Interpleader Act, 1831 (c. 58).—**ROACH v. WRIGHT** (1841), 8 M. & W. 155; 1 Dowl. N. S. 56; 10 L. J. Ex. 267; *sub nom.* **ROUGH v. WRIGHT**, 5 Jur. 755.
- Annotations*:—**Refd.** *Bird v. Crabb* (1861), 30 L. J. Ex. 318; *Richards v. Jenkins* (1886), 17 Q. B. D. 544.

## PART II. SECT. 1.

101. *Source of jurisdiction*—**R. S. C., Ord. 57.**]—All interpleader matters since the passing of Jud. Act are authorised & regulated by Ord. 57 & its rules. Sect. 71 of County Ct. Act, R. S. N. B., 1927, does not include interpleader proceedings.—**ROBINSON & McBRIDE v. JOHNSON, [1931] 3 M. P. R. 548.—**CAN.****

82. *Ability of applicant to pay claim without incurring liability to other claimants.*]—An interpleader order should not be made when appct. can pay the subject-matter of the claim to one of the claimants without incurring any liability to any other claimant.—**IRWIN v. BOYD BROS. & COTTON**, [1930] 1 W. W. R. 693; 3 D. L. R. 314; 24 S. L. R. 570.—**CAN.**

**PART II. SECT. 3, SUB-SECT. 2.—C.**  
70 v. ———.]—**WESTERN CANADA LOAN & SAVINGS CO. v. COURT** (1877), 26 Gr. 161.—**CAN.**

**PART II. SECT. 3, SUB-SECT. 2.—K.**

89 ii. ———.]—The contention of a first mtgee. that a policy of fire insurance with loss payable to the insured (the mtgor.) had been assigned in equity to said mtgee. by virtue of the covenant in the mtge. to insure:—**Held**: one which should not be disposed of summarily, & the discretionary order made in Chambers, which directed an issue to decide the ownership of the proceeds of the policy which had been paid into ct., to be one which should not be disturbed.—**PATRIOTIC ASSURANCE CO., LTD. v. SIDDALL**, [1936] 2 W. W. R. 464.—**CAN.**

**PART II. SECT. 3, SUB-SECT. 2.—L.**

99 ii. ———.]—*Adverse claimants under settlement.*]—Two parties claiming adversely an estate under limitations of a settlement which contained a power of leasing, brought actions at law against a tenant for rent reserved by a lease made under the power:—**Held**: the case was a proper one for interpleader.—**BIRMINGHAM v. TUIE** (1872), 7 I. R. Eq. 221.—**IR.**

**PART II. SECT. 3, SUB-SECT. 3.—C. (a).**

140 i. *Necessity for notice of claim to execution creditor.*]—**FRASER v. EKSTON & MASSEY** (1900), 7 Terr. L. R. 1.—**CAN.**

**PART II. SECT. 4, SUB-SECT. 1.—B.**

202 v. ———.]—The taking of an indemnity by the sheriff or his bailiff, from one of two rival claimants to property in his hands, does not of itself establish collusion, & in the absence of actual collusion, does not disentitle the sheriff to relief by way of interpleader.—**CROTHERS v. GRANT**, [1934] V. L. R. 120; 40 Argus L. R. 127.—**AUS.**

**PART II. SECT. 5, SUB-SECT.**

80. *Purchaser from agent—Whether vendor general agent within C. S. C., c. 59.*]—**HAYS v. O'CONNOR** (1861), 21 U. C. R. 251.—**CAN.**

8d. *Assignee of judgment—& execution creditor of assignor—Rights of assignee.*]—On an interpleader issue wherein the claimant contended that a certain judgment, on which moneys

had been realised under execution, had been assigned to him in consideration of a debt owed him by the assignor, & deft. in the issue, an execution creditor of the assignor, contended that the assignment did not cover said judgment:—**Held**: for the purposes of the issue, the parties were in the same position as if the dispute as to the right to the money was being litigated between the claimant & the assignor, that is, the claimant could only assert, against the execution creditor, whatever claim he might have against his assignor, & the execution creditor stood, as against the claimant, exactly in the shoes of the assignor.—**RYGUS v. ZAWITROWSKI & ROSS**, [1928] 1 D. L. R. 521; [1928] 1 W. W. R. 332; 22 Sask. L. R. 305.—**CAN.**

**PART II. SECT. 5, SUB-SECT. 4.—C.**

248 i. *Necessity for—By claimant—Unless impracticable from circumstances.*]—**NICHOL v. SUGARMAN**, [1928] 3 D. L. R. 292.—**CAN.**

**PART II. SECT. 6, SUB-SECT. 1.**

8g. *Notice of motion.*]—A sheriff having applied by way of notice of motion for an interpleader order the execution creditor objected that the sheriff could proceed only *ex parte*:—**Held**: the sheriff's procedure was correct.—**MEAD v. MEAD**, [1937] 1 W. W. R. 405.—**CAN.**

**PART II. SECT. 6, SUB-SECT. 4.—A.**

273 i. *Necessity for affidavit.*]—On a sheriff's application for an interpleader order claimant must file an affidavit substantiating his claim & disclosing

- 443a.** ——.]—On Aug. 20 the sheriff, under a *fi. fa.* against A., took possession of B.'s furniture in A.'s house. Both before & after seizure B. gave formal notice to the sheriff that the furniture was his, & on the 23rd issued a writ in an action against the sheriff for an injunction & damages. On the 25th the sheriff issued an interpleader summons, under which an issue was directed & an order made for the sheriff withdrawing from possession on payment of £100 into ct. & the sheriff withdrew from possession on Sept. 1. B.'s title was afterwards admitted by the judgment creditor, & the £100 paid out to B. B. having brought the action to trial against the sheriff for damages & costs:—*Held*: the sheriff had not exceeded the scope of his duty in retaining possession till ordered to withdraw under the interpleader order, & the action must be dismissed, but without costs, on the ground that the sheriff might have applied to the judge, under the interpleader

A bill of sale holder claimed goods of a judgment debtor which the sheriff had seized under a writ of *fi. fa.*, & the sheriff interpleaded. On the hearing of the interpleader summons the validity of the bill of sale was admitted & an order was made for the sale of sufficient goods to pay the claim & the claimant's costs, the execution creditor's

k 1. —.]—A summary decision in an interpleader issue is final notwithstanding that leave to appeal is granted. —**PICTOU FOUNDRY & MACHINE Co. v. DICKS**, [1935] 2 D. L. R. 593; 8 M. P. R. 366.—**CAN.**

costs, & the sheriff's costs, & for payment of the balance to the execution debtor. Pending the sale the execution debtor became bkpt., & the official receiver stopped the sale before it was completed:—*Held*: the claimant's costs & the execution creditor's costs of the interpleader were not "costs of the execution" which the sheriff could deduct from the proceeds of sale as against the official receiver.—*Re ROGERS, Ex p. SUSSEX SHERIFF*, [1911] 1 K. B. 104.

541. *Add. Annotation*:—*Consd. Townshend v. Child* (1932), 48 T. L. R. 575.

541a. *Costs reserved until trial of issue*—*Issue discharged*.]—After the usual interpleader order had been made by which the question of costs were reserved, *deft.* obtained an order to discharge the interpleader order

unless *pltf.* took certain steps within a given time. *Pltf.* failed to take these steps within the time & *deft.* then obtained an order that *pltf.* should pay the costs:—*Held*: the *ct.* had jurisdiction to make the order, as an interpleader order does not remove the case from the control of the *ct.*—*WICKS v. WOOD* (1878), 26 W. R. 680.

553a. *Appearance by creditor*—*No goods liable to execution*.]—An execution creditor served with a sheriff's rule under the Interpleader Act, is not bound to appear where there are no goods liable to his execution. Where, therefore, such creditor appears upon the rule, but does not insist upon any goods being liable to his execution, he is not entitled to the costs of his appearance.—*GLASIER v. COOKE* (1835), 5 Nev. & M. K. B. 680.

## Part III.—Interpleader in County Courts.

595. *Add. Annotations*:—*Folld. West v. Automatic Salesman, Ltd.*, [1937] 2 K. B. 398. *Refd. Conquer v. Boot*, [1928] 2 K. B. 336.

595a. ———.]—Where, in proceedings on an interpleader summons under County Cts. Act, 1888 (c. 43), s. 157, between a claimant to goods taken in execution & the execution creditor, the claimant has made a successful claim to the goods but no claim for damages, he cannot afterwards maintain a separate action against the execution creditor for damages.—*WEST v. AUTOMATIC SALESMAN,*

*LTD.*, [1937] 2 K. B. 398; [1937] 2 All E. R. 706; 106 L. J. K. B. 769; 53 T. L. R. 711; 81 Sol. Jo. 457, C. A.

600. *Add. Annotation*:—*Consd. West v. Automatic Salesman, Ltd.*, [1937] 2 K. B. 398.

617. *Add. Annotation*:—*Folld. Koffman v. Sunshine*, [1932] 1 K. B. 606.

621. *Add. Annotation*:—*Folld. Koffman v. Sunshine*, [1932] 1 K. B. 606.

622. *Add. Annotation*:—*N.F. Koffman v. Sunshine*, [1932] 1 K. B. 606.

### PART II. SECT. 11, SUB-SECT. 3.—B.

556 iv. ——— *Except where accurate division impossible*.]—While, where each party to an interpleader issue succeeds in part, the rule is that, where possible, each should receive that portion of the costs which is applicable to that part of the issue on which he has succeeded, yet, in the present case, the order of the trial judge that no costs should be allowed was held to have been the proper one since the nature of the case would not allow of an accurate division of the costs & the order did substantial justice.—*RYGUS v. ZAWITKOWSKI & ROSS*, [1928] 1 D. L. R. 521; [1928] 1 W. W. R. 332; 22 Sask. L. R. 305.—*CAN.*

### PART III. SECT. 1.

o i. ———.]—*KELLINGTON v. ROSA* (Sask.), [1927] 2 W. W. R. 309.—*CAN.*

d i. *Issues involving under \$800*.]—The district *ct.* has jurisdiction in interpleader matters where the value of the goods does not exceed \$800.—*KNOX v. SHAW*, [1927] 3 D. L. R. 1185; [1927] 2 W. W. R. 494; 21 Sask. L. R. 593; 8 C. B. R. 331.—*CAN.*

o i. ———.]—A district *ct.* judge has no jurisdiction to deal with an interpleader issue which brings the title to land in question, although the issue is sought as a result of a seizure of land

by the sheriff under an execution under a district *ct.* judgment.—*FARMERS' MUTUAL HAIL INSURANCE CO. v. FOSTER*, [1925] 3 D. L. R. 746; [1925] 2 W. W. R. 515; 19 Sask. L. R. 587.—*CAN.*

s1. *To set aside bill of sale as fraud on creditors*.]—In an interpleader issue the district *ct.* has jurisdiction to set aside a bill of sale, on the ground that it is a fraud on creditors, as being relief ancillary to a matter falling within the jurisdiction of the *ct.* under District Courts Act, R. S. S., 1920 (c. 40), s. 27.—*KNOX v. SHAW*, [1927] 3 D. L. R. 1185; [1927] 2 W. W. R. 494; 21 Sask. L. R. 593; 8 C. B. R. 331.—*CAN.*





# INTOXICATING LIQUORS.

## Part I.—Definitions.

- 9a. — Addition of quinine.]—Whether the addition of quinine to wine makes the mixture cease to be a wine within Licensing (Consolidation) Act, 1910 (c. 24), so as to exempt the seller from holding a justice's licence, depends on the proportion of the mixture.—*SHARP v. SPARKES* (1926), 70 Sol. Jo. 1069, D. C.
12. Add. Annotation:—*Refd. Lorden v. Brooke-Hitching*, [1927] 2 K. B. 237.

## Part II.—Licenses.

- 30a. —.]—*R. v. GRAHAM-CAMPBELL, Ex p. HERBERT*, No. 625a, *post*.

## Part III.—Application for Licenses.

46. Add. Annotation:—As to (1) *Refd. R. v. Liverpool Justices, Ex p. Liverpool Corpn.*, [1934] 2 K. B. 277.
49. Add. Annotations:—As to (2) *Consd. R. v. Southampton County Confirming Committee, Ex p. Slade*, [1929] 1 K. B. 263. *Refd. Denby & Sons, Ltd. v. Minister of Health*, [1936] 1 K. B. 337.
- 55a. — Whether co-extensive with parish.]—*R. v. SMETHWICK CONFIRMING AUTHORITY, Ex p. HOLT BREWERY CO., LTD.*, No. 366a, *post*.
- 63a. Application in notice for full on-license—Application to justices for off-license only.]—The licensing justices are the judges of the sufficiency of the notices given, on an application for a new justices' license, under Licensing (Consolidation) Act, 1910 (c. 24), s. 15 (2), which sub-sect. is to be read in a practical & not a merely theoretical manner. Therefore, where notice was given of an application for a full publican's license, & at the licensing meeting only an off-license in respect of part of the premises was asked for:—*Held*: the justices being satisfied that no one had been misled, & the license actually asked for being less extensive than & included in that for which notice was given, the justices were entitled to grant & confirm the off-license. Other considerations might apply if the license applied for were wider than that named in the notice.—*R. v. KINGSTON-UPON-THAMES CONFIRMING AUTHORITY, Ex p. SCALES*, [1933] 1 K. B. 535; 102 L. J. K. B. 367; 148 L. T. 423; 97 J. P. 34; 49 T. L. R. 151; 31 L. G. R. 116, D. C.
92. Add. Annotation:—*Refd. Thomas v. Newington Licensing J.J.* (1926), 136 L. T. 638.

### PART I.

1 i. "Spirits"—*Include rum—Inland Revenue Act, R. S. C.*, 1906 (c. 51), s. 185.]—*Re R. v. MCKENZIE* (1926), 45 Can. Crim. Cas. 144; 58 N. S. R. 313.—CAN.

e i. "Liquor."—The word "Liquor" in Liquor Act, 1925, 1924-25, c. 53, includes "beer" unless the context otherwise requires.—*R. v. CRUTT*, [1924] 4 D. L. R. 581; [1924] 2 W. W. R. 377; 50 Can. Crim. Cas. 143; 22 Sask. L. R. 525.—CAN.

e ii. "Beer"—Coupled with "fluid capable of producing intoxication."—Liquor Act, 1912 (N. S. W.), s. 3, defines "liquor" as meaning & including "wine, spirits, beer, porter, stout, ale, cider, perry or any spirituous or fermented fluid whatever, capable of producing intoxication":—*Held*: the words "wine, spirits, beer, porter, stout, ale, cider, perry" must be construed according to their ordinary popular meaning, & the words "capable of producing intoxication" in the definition qualify only the words "any spirituous or fermented fluid whatever."—*RUSSELL v. GALE* (1928), 40 C. L. R. 587; 45 N. S. W. N. 120.—AUS.

e iii. — Percentage of alcohol not sufficient—*Excise Act.*—*BRADLEY v. DE COSTE* (1931), 3 M. P. R. 193; 57 C. O. C. 184.—CAN.

sa. "Residence"—*Temperance Act (Man.)*, 1924 (c. 118)—*Liquor Control*

*Act (Man.)*, 1924 (c. 117).]—*R. v. HUBIN*, [1926] 4 D. L. R. 863; [1926] 2 W. W. R. 768; 46 Can. Crim. Cas. 202; 36 Man. L. R. 11.—CAN.

sb. — Amendment of latter Act by 1926 (c. 28), s. 1.]—*R. v. LEVINE*, [1926] 3 W. W. R. 550; 46 Can. Crim. Cas. 342; 36 Man. L. R. 95.—CAN.

sc. — — — — —.]—*R. v. RYALL (Man.)*, [1927] 1 W. W. R. 635; 48 Can. Crim. Cas. 360.—CAN.

sd. — — — — —.]—*R. v. DRASHCOVICH (Man.)*, [1927] 3 W. W. R. 40; 48 Can. Crim. Cas. 401.—CAN.

se. — — — — —.]—*R. v. WHITE* (1928), 49 Can. Crim. Cas. 254.—CAN.

ki. — — — — —.]—*HABERLACK v. BURR*, [1926] 1 D. L. R. 252; [1926] 1 W. W. R. 120; 45 Can. Crim. Cas. 58; 20 Sask. L. R. 293.—CAN.

k ii. — — — — —.]—*R. (JOHNSTON) v. BUSIKIEWICZ (Sask.)*, [1926] 4 D. L. R. 715; [1926] 2 W. W. R. 759; 46 Can. Crim. Cas. 145.—CAN.

k iii. — — — — —.]—*R. v. CLARK (Sask.)* (1926), 45 Can. Crim. Cas. 265; [1926] 2 W. W. R. 373.—CAN.

k iv. — — — — —.]—*R. v. ROTTERMAN (Ont.)* (1926), 47 Can. Crim. Cas. 44.—

k v. — — — — —.]—*Manitoba Temperance Act, C. A.*, 1924 (c. 118).]—*R. (EDDIE) v. GROSNEY*, [1927] 1 D. L. R. 1001;

[1927] 1 W. W. R. 295; 47 Can. Crim. Cas. 257; 36 Man. L. R. 249.—CAN.

k vi. — — — — —.]—*R. v. DIGERNESS (Sask.)*, [1927] 3 W. W. R. 689; 49 Can. Crim. Cas. 185.—CAN.

sf. — Effect of keeping lodgers.]—The accused, who was charged with having liquor in a place other than the residence in which she resided, lived in a house in which she had five lodgers, one of whom was her daughter, & another the latter's husband, who came there only twice a month. The daughter & son-in-law usually had their meals with the accused in the kitchen. The other three were not boarders. The liquor in question was a case of beer which was found on the stairway leading from the kitchen to the basement. The magistrate dismissed the charge & the Crown appealed, contending that the keeping of said lodgers & boarders had destroyed the character of the premises as a "private dwelling-house":—*Held*: the appeal should be dismissed.—*R. v. MACKLIN*, [1928] 4 D. L. R. 717; [1928] 2 W. W. R. 468; 50 Can. Crim. Cas. 171; 37 Man. L. R. 405.—CAN.

sg. "Occupant."—*R. v. DIETSCH* (1928), 49 Can. Crim. Cas. 220.—CAN.

sh. "Guest."—A non-paying guest of a hotelkeeper may be a *bona fide* guest within Liquor Act, 1925.—*R. v. HENDERSON (Sask.)*, [1926] 2 W. W. R. 430; 45 Can. Crim. Cas. 373.—CAN.

## Part IV.—Grant of Licenses.

128. *Add. Annotation*:—As to (1) *Consd. Appenrodt v. Central Middlesex Assessment Committee*, [1937] 2 K. B. 48.

140. *Add. Annotation*:—*Refd. Thomas v. Newington Licensing JJ.* (1926), 136 L. T. 638.

141. *Add. Annotation*:—*Refd. Thomas v. Newington Licensing JJ.* (1926), 136 L. T. 638.

141a. ——— Pending hearing of summons against applicant.]—Applts., the licensee & the owners of a public-house, applied to the licensing justices on Mar. 1 for a renewal of the licence, which was due to expire on Apr. 4. The justices, on the ground that summonses were pending against the licensee for supplying liquor for consumption on the premises, adjourned the consideration of the application to the next transfer sessions to be held on Apr. 12. On Mar. 4 the licensee was convicted on the summonses, & on Apr. 12 the licensing justices refused the renewal:—*Held*: the adjournment did not amount to a refusal of the renewal.—*THOMAS v. NEWINGTON LICENSING JJ.* (1926), 136 L. T. 638; 43 T. L. R. 181; *sub nom. THOMAS v. NEWINGTON LICENSING JJ., MEUX'S BREWERY CO., LTD. v. NEWINGTON LICENSING JJ.*, 91 J. P. 37; 25 L. G. R. 109.

143. *Add. Annotation*:—*Consd. R. v. Wandsworth Licensing Justices*, [1936] 2 All E. R. 394.

144a. ——— Adjournment necessary in public interest.]—The Licensing Rules, 1921, provide: "4. Where it is intended to consider any proposal to make or vary any order" relating (*inter alia*) to permitted hours "the clerk to the justices shall cause a notice thereof . . . to be published. . . . 5. Upon the consideration of any proposal . . . the justices shall take such steps as seem to them fit for the purpose of ascertaining local opinion. . . ."

On Feb. 7, 1936, licensing justices held their general annual licensing meeting at which they decided provisionally not to vary the permitted hours, & adjourned that meeting to Mar. 6, 1936. On Mar. 3, 1936, the justices were informed by their clerk that at the adjourned meeting an application would be made, on behalf of persons interested, to re-open the question of permitted hours on the ground that the position of licensees in the division had become acute because an adjoining division had adopted a later terminal hour. On Mar. 6, 1936, the adjourned meeting was held, when the said application was made to the justices, who considered the desirability of re-opening the question, decided that in the altered circumstances it was in the public interest to ascer-

tain public opinion in the district, &, being unable to do more until notice had been published, further adjourned the meeting to Mar. 20, 1936. On Mar. 20, 1936, due notice thereof having been given, the second adjourned meeting was held at which the justices, after hearing persons as to local opinion, made an order that the permitted hours should be varied as therein specified:—*Held*: on the true construction of the enactments & rules & in the circumstances above stated, the order of the justices varying the hours was valid, inasmuch as, (a) at the adjourned meeting held on Mar. 6, 1936, within one month of the original meeting, the justices had gone so far as to consider a proposal to vary an order within the meaning of these words in rule 4; (b) the justices, having begun to consider that proposal at an adjourned meeting held within one month of the original meeting, & being unable to deal with it fully at that meeting, were entitled to adjourn the meeting further for the consideration of the same proposal, as distinct from any new business, to Mar. 20, 1936, though that date was not within one month from the date of the original meeting.—*R. v. WANDSWORTH LICENSING JJ., Ex p. ROGERS*, [1937] 1 K. B. 144; [1936] 2 All E. R. 394; 105 L. J. K. B. 628; 155 L. T. 162; 100 J. P. 363; 52 T. L. R. 530; 80 Sol. Jo. 635; 34 L. G. R. 297, D. C.

149. *Add. Annotation*:—*Apld. Frome United Breweries Co. v. Bath JJ.*, [1926] A. C. 586.

158. *Add. Annotations*:—*Refd. Maclean v. Workers' Union*, [1929] 1 Ch. 602; *R. v. Huntingdon Confirming Authority*, [1929] 1 K. B. 698.

159a. "Knowingly acts as justice"—Construction.]—The words "knowingly acts as a justice" in Licensing (Consolidation) Act, 1910 (c. 24), s. 40 (4), are to be taken in their plain meaning & are not to be confined to cases of deliberate contravention of the Act.—*A.-G. v. COZENS* (1934), 50 T. L. R. 320; 78 Sol. Jo. 298.

202a. Applicant's willingness to contribute to compensation fund.]—A question arose which of two adjacent licensed houses should be granted a renewal of its licence, & which should be suppressed. The owners of each house submitted to the licensing justices plans of proposed alterations, & the owners of one of the houses offered to pay £1,250 to the compensation fund if the alterations were sanctioned. The same licensing justices sat as compensation authority to consider the question of redundancy, & decided to renew the licence of the house whose owners had offered the contribution, it appearing from the evidence that that house, when

## PART IV. SECT. 2, SUB-SECT. 2.

a]. *Application not complying with statutory requirements—Adjournment of licensing court.*]—A licensing ct., constituted under Liquor Acts, 1912 to 1926, has no jurisdiction to adjourn an appln. for a provisional certificate for a licensed victualler's licence which does not comply with sect. 27 (a) & (b) of the Acts, or otherwise to deal with such an appln. than by dismissing it. The ct. may, however, by adjourning

itself, enable such an appln. to be made, after compliance with the statutory conditions as to notices, at an adjourned sitting.—*R. v. KNYVETT, Ex p. WEBER* (1928), 22 Q. J. P. R. 138.—AUS.

## PART IV. SECT. 2, SUB-SECT. 6.—A. (b) ii.

a. *Where old licence has been forfeited or "otherwise ceased to exist"—Cessation due to no-licence vote.*]—Sect. 30 (1) of New Zealand Licensing Act, 1910, as amended in 1920, provided that no

new publican's licence should be granted in any licensing district except when a licence had been forfeited or had "otherwise ceased to exist":—*Held*, the words "otherwise ceased to exist" did not apply to a ceasing to exist owing to a no-licence vote, & therefore an application by a publican for a licence in an area which since 1903 had been a no-licence area by vote could not be heard.—*SCALES v. YOUNG*, [1931] A. C. 685; 100 L. J. P. C. 164; 145 L. T. 316, P. C.—N.Z.

altered, could be made the better of the two. They then, as licensing justices, approved the alterations to that house:—*Held*: (1) in considering the question of the contribution offered to the compensation fund the licensing justices had taken extraneous matter into account, & as this must necessarily have affected their minds as compensation authority, their decision must be quashed; (2) it was contrary to the spirit of the Licensing Acts, though it might be within the letter of them, that the powers of the compensation authority should be delegated to the licensing committee so that the two bodies were identical, it being clearly intended that they should be separate & independent bodies.—*R. v. SHEFFIELD JJ., Ex p. RAWSON (T.) & Co., LTD. (1927), 138 L. T. 234; 91 J. P. 193; 44 T. L. R. 43; 25 L. G. R. 536, D. C.*

204. *Add. Annotation*:—*Consd. R. v. London County Council, Ex p. Entertainments Protection Asscn., Ltd., [1931] 2 K. B. 215.*

206. *Add. Annotation*:—*Refd. Short v. Poole Corpn., [1926] Ch. 66.*

233. *Add. Annotation*:—*Refd. Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc., etc. (1930), 143 L. T. 650.*

234. *Add. Annotation*:—*Refd. R. v. Holborn Licensing JJ., Ex p. Stratford Catering Co. (1926), 90 J. P. 159.*

263. *Add. Annotation*:—*Refd. Stepney Borough Council v. Walker (John) & Sons, Ltd., [1934] A. C. 365.*

267. *Add. Annotations*:—*As to (1) Consd. R. v. Southampton County Confirming Committee, Ex p. Slade, [1929] 1 K. B. 263. Refd. R. v. Sheffield JJ., Ex p. Rawson (1927), 91 J. P. 193.*

268. *Add. Annotation*:—*Expld. R. v. Southampton County Confirming Committee, Ex p. Slade, [1929] 1 K. B. 263.*

270a. ————.]—By Licensing (Consolidation) Act, 1910 (c. 24), s. 14 (1) (a), the licensing justices on the grant of a new justices' on-licence shall attach to the grant of the licence such conditions as they think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear "when licensed, & the value of the same premises if they were not licensed":—*Held*: the words "if they were not licensed" do not mean "if they were not so licensed," but "if they had no licence at all," & that, upon the assumption that the effect of the grant of the spirit licence coupled with the old beerhouse licence was that the premises became fully licensed, the monopoly value of the premises was the difference between their value when fully licensed & their value if unlicensed, & was not the difference between their value when fully licensed & their value with the beerhouse licence.—*CUSTOMS & EXCISE COMRS. v. CURTIS, [1914] 2 K. B. 335; 83 L. J. K. B. 931; 110 L. T. 584; 78 J. P. 173; 30 T. L. R. 232; 78 J. P. Jo. 4, C. A.*

272. *Add. Annotation*:—*Refd. Appenrodt v. Central Middlesex Assessment Committee, [1937] 2 K. B. 48.*

291a. ———— *Order for special removal—After termination of lease—Licensee in unlawful* |

occupation.]—Licensed premises consisted mainly of premises held by a brewery co. on lease & to a lesser extent of an extension of the original premises built on an adjoining site held by the co. in fee simple, the licensee being an employee of the co. The lease expired on May 6, 1933, but the co. & the licensee remained in occupation of the whole premises. On July 18 a private Act became law by which local authorities were empowered to acquire certain property, including the premises in question, to aid in the construction of a tunnel. On Oct. 6, in proceedings instituted by the lessors under the lease, an order was made for the possession of the leasehold part of the premises as from May 6. On Oct. 21 the licensee gave notice of an application to the licensing justices under Licensing (Consolidation) Act, 1910 (c. 24), s. 24 (2) (a), for the special removal of the licence to other premises owned by the brewery co. on the ground that the premises in respect of which the licence had been granted were about to be pulled down under an Act for a public purpose. On Oct. 24 the co. & the licensee ceased to occupy the premises:—*Held*: (1) as the licensee was the holder of the licence which had been granted in respect of the premises & as the premises were about to be pulled down under an Act for a public purpose, the licensing justices were entitled in their discretion to grant the licensee an order for the special removal of the licence, although at the time of his application therefor he was not in lawful occupation of the leasehold part of the premises.

*Per CUR.*: there is no provision in the Licensing (Consolidation Act), 1910 (c. 24), which requires appct. for the special removal of a licence to be in actual occupation of the licensed premises at the time of his application.

(2) The order being for a special as distinct from an ordinary removal, the consent of the lessors to the order was not necessary; (3) as the lessors were never in a position to apply for the transfer of the licence to their nominee or its removal to other premises belonging to them so long as the licensee remained the holder of the licence & he & the co. remained in occupation of the premises or part of them, they had not been deprived of any right vested in them so to do & were, therefore, not entitled to a writ of *certiorari* to quash the order.—*R. v. LIVERPOOL JJ., Ex p. LIVERPOOL CORPN., [1934] 2 K. B. 277; 103 L. J. K. B. 625; 151 L. T. 327; 98 J. P. 341; 50 T. L. R. 425; 32 L. G. R. 289, D. C.*

292a. ————.]—Though licensing justices have no jurisdiction to make the grant of an ordinary removal of a licence subject to any condition as to payment of monopoly value, they are entitled to refuse the removal upon the sole ground that it would confer a great pecuniary gain upon appct., & that he ought to apply for a new licence & pay monopoly value.—*R. v. SOUTHAMPTON COUNTY CONFIRMING COMMITTEE, Ex p. SLADE, [1929] 1 K. B. 263; 98 L. J. K. B. 62; 140 L. T. 167; 93 J. P. 37; 45 T. L. R. 72; 72 Sol. Jo. 873, C.A.*

292b. *Order for special removal—Position of lessor—Consent unnecessary.*—*R. v. LIVERPOOL JJ., Ex p. LIVERPOOL CORPN., No. 291a, ante.*

- 292c.** **Whether entitled to certiorari.]—***R. v. LIVERPOOL JJ., Ex p. LIVERPOOL CORPN., No. 291a, ante.*
- 293.** **Add. Annotations:—***Consd. R. v. Barnstaple Justices, Ex p. Carder, [1938] 1 K. B. 385. Refd. Nash v. Stevenson Transport, Ltd., [1935] 2 K. B. 341.*
- 293a.** **Grounds for refusal of removal—Great pecuniary gain conferred on applicant.]—***R. v. SOUTHAMPTON COUNTY CONFIRMING COMMITTEE, Ex p. SLADE, No. 292a, ante.*
- 299.** **Add. Annotation:—***Apld. R. v. Holborn Licensing JJ., Ex p. Stratford Catering Co. (1926), 90 J. P. 159.*
- 299a.** **— Security of tenure.]—**On an application for the transfer of a license the licensing justices may consider the security of tenure given to the proposed licensee as a matter affecting his "fitness or propriety." They may also adopt a certain standard length of notice as generally desirable, & if they do so, it is convenient that they should make it publicly known, provided that it is not made a hard & fast rule to be applied indiscriminately.—*R. v. HOLBORN LICENSING JJ., Ex p. STRATFORD CATERING CO., LTD. (1926), 136 L. T. 278; 90 J. P. 159; 42 T. L. R. 778; 24 L. G. R. 509, D. C.*
- 328.** **Add. Annotations:—***Refd. R. v. Sheffield JJ., Ex p. Rawson (1927), 91 J. P. 193; R. v. London County Council, Ex p. Entertainments Protection Assocn., Ltd., [1931] 2 K. B. 215.*
- 339.** **Add. Annotation:—***As to (2) Folld. R. v. Sheffield JJ., Ex p. Rawson (1927), 91 J. P. 193.*
- 340a.** **— All relevant matters—Means of access to premises.]—**Appcts. desired to alter licensed premises in a manner requiring the consent of the licensing justices. The justices refused to sanction the proposed alterations, unless appcts. bricked up a door which was in the yard behind the premises, & which gave access to a site on which a public

market place was being erected:—*Held*: the words of Licensing (Consolidation) Act, 1910 (c. 24), s. 71, which were descriptive of the alterations requiring the justices' consent, did not limit the justices to consideration of those named matters; & it was their duty to consider all relevant matters, of which the means of access to the premises might be one.—*R. v. WATFORD LICENSING JJ., Ex p. TRUST HOUSES, LTD., [1929] 1 K. B. 313; 98 L. J. K. B. 198; 140 L. T. 350; 93 J. P. 41; 45 T. L. R. 89; 72 Sol. Jo. 825; 27 L. G. R. 8, D. C.*

- 342.** **Add. Annotation:—***Refd. R. v. Watford Licensing JJ., Ex p. Trust Houses, [1929] 1 K. B. 313.*

**343a.** **— Extension of premises.]—**A licensee of licensed premises made an application to the local justices for approval of certain alterations to the premises, involving the inclusion of certain adjoining premises, which had hitherto been entirely separate from the licensed premises, & an enlargement of the existing saloon bar. Plans of the proposed alterations were duly deposited with the clerk to the justices. The justices came to the conclusion that they had no power to grant the application, as the bulk of the alterations was to premises not already licensed, but they were ready to approve the alterations in so far as they related to the premises already licensed:—*Held*: the justices came to a correct conclusion, because, under Licensing (Consolidation) Act, 1910 (c. 24), s. 71, they had no power to sanction alterations which involved an extension of the licensed premises, as was here obviously contemplated by the licensee.—*R. v. WESTON-SUPER-MARE LICENSING JJ., Ex p. POWELL, [1938] 4 All E. R. 133; 159 L. T. 617; 102 J. P. 504; 55 T. L. R. 48; 82 Sol. Jo. 911, D. C.*

- 355.** **Add. Annotation:—***Folld. R. v. Leicester JJ., Ex p. Allbrighton, [1927] 1 K. B. 557.*

- 358.** **Add. Annotation:—***Consd. China Navigation Co. v. A.-G. (1932), 48 T. L. R. 375.*

## Part V.—Confirmation of Justices' Licenses.

- 366.** **Add. Annotation:—***As to (2) Dbtd. R. v. Smethwick Confirming Authority, Ex p. Holt Brewery Co., Ltd. (1929), 98 L. J. K. B. 678.*

- 366a.** **— — —.]—**(1) A confirming authority has jurisdiction to consider the adequacy of notices of an application for the provisional ordinary removal of a justices' license for the sale of intoxicating liquors, required by Licensing (Consolidation) Act, 1910 (c. 24), ss. 15, 20, 33, although no objection was taken to the adequacy of such notices at the hearing before the licensing justices.

(2) *Held*: the word "place" in Licensing (Consolidation) Act, 1910 (c. 24), s. 15 (1) (b), did not of necessity denote a lesser area or

unit than the word "parish."—*R. v. SMETHWICK CONFIRMING AUTHORITY, Ex p. HOLT BREWERY CO. (1929), 98 L. J. K. B. 678; 141 L. T. 586; 93 J. P. 233; 45 T. L. R. 530; 27 L. G. R. 544, D. C.*

- 368a.** **— — — Objection to condition by licensing justices—Duty to consider objection—In presence of parties.]—**An application was made to licensing justices for a new license to premises at S. The application was opposed, but the license was granted unconditionally. The confirming authority, after hearing the case for & against the application, confirmed the license subject to two conditions. Notice of this decision was given to the licensing justices, who told the confirming authority

### PART IV. SECT. 2, SUB-SECT. 7.— D. (a).

*sk. After destruction of premises—Removal to other premises—Excise Licences Act, 1825 (c. 81), s. 11.]—*The above sect. does not contemplate the grant of a new licence, the existing

licence being altered by the substitution therein of the new premises for the destroyed premises.—*A.-G. (MACKEN) v. CAVAN, [1928] 1 R. 98.—IR.*

### PART IV. SECT. 2, SUB-SECT. 10.

*sl. Power to deal with costs—On*

*reference of petition for inquiry.]—*A licensing ct. has no jurisdiction to deal with costs on a reference to it of a petition for inquiry under Liquor (Amendment) Act, 1919, s. 6.—*Ex p. SOUTHOX, Re SOMERVILLE (1927), 23 S. R. N. S. W. 185.—AUS.*

that they did not agree to the second condition. At a further meeting of the confirming authority it was decided to confirm the grant subject only to the first condition. No notice was given to the parties, & they had no opportunity of appearing at this meeting & arguing as to the variation of the conditions. A rule *nisi* for *certiorari* to quash the order of the confirming authority was obtained on the ground that the authority acted without jurisdiction in confirming the license:—*Held*: (1) as soon as the confirming authority had ascertained the views of the licensing justices it was their duty to sit judicially in the presence of the parties interested to determine whether or not the alterations made by the licensing justices should be accepted. As this had not been done, the order made by the confirming authority was a nullity, & the matter must go back to them to hear & determine it in the presence of the parties interested; (2) the meeting of the confirming authority ought to be constituted of the same members as were present at the original meeting.—*R. v. HUNTINGDON CONFIRMING AUTHORITY*, [1929] 1 K. B. 698; *sub nom.* *GEORGE & STAMFORD HOTELS, LTD. v. HUNTINGDON CONFIRMING AUTHORITY*, 98 L. J. K. B. 331; 141 L. T. 75; 45 T. L. R. 260; 73 Sol. Jo. 173; 27 L. G. R. 319; *sub nom.* *R. v. HUNTINGDON CONFIRMING AUTHORITY, Ex p. GEORGE & STAMFORD HOTELS, LTD.*, 93 J. P. 81, C. A.

368b. ———— **Constitution of meeting.]**  
—*R. v. HUNTINGDON CONFIRMING AUTHORITY*, No. 368a, *ante*.

368c.

**Validity.]**—The licensing justices confirmed the grant of a licence for the sale by retail of any intoxicating liquor which might be sold under a spirit retailer's (or publican's) licence for consumption either on or off the premises, subject to certain conditions, one of which was in the following terms: "There shall be no sale on the premises to any person other than travellers who hold current tickets issued by South-down Motor Services, Ltd.," who were the owners of the premises in respect of which the licence was granted. Objection was taken, on the ground that a condition could not be attached to a justices' licence whereby the licensee was prohibited from serving intoxicating liquor to any but members of a limited class, & that, therefore, in imposing such a condition, the confirming authority was acting without jurisdiction:—*Held*: (1) there was no excess or usurpation of jurisdiction, as the condition was imposed after proper consideration by the confirming authority of the relevant facts of the particular case, & in proper exercise of their discretion under Licensing (Consolidation) Act, 1910 (c. 24), s. 14 (1); (2) it was wrong to assume that there could be no licensed premises unless they had the characteristics of an inn.—*R. v. SUSSEX CONFIRMING AUTHORITY, Ex p. TAMPLIN & SONS' BREWERY (BRIGHTON), LTD.*, [1937] 4 All E. R. 106; 157 L. T. 590; 101 J. P. 562; 54 T. L. R. 46; 81 Sol. Jo. 885; 35 L. G. R. 593, D. C.

369. *Add. Annotation*:—*Appld. R. v. Huntingdon Confirming Authority*, [1929] 1 K. B. 698.

## Part VII.—Compensation.

381. For the existing paragraph substitute the following paragraph:—

——— **Instructing solicitor to oppose.]**—On an application to the licensing justices of a county borough for the renewal of an old on-licence the justices referred the matter to the compensation authority of the borough under Licensing (Consolidation) Act, 1910 (c. 24), s. 19, & at a further meeting they resolved that a solr. should be instructed to appear before the compensation authority & oppose the renewal on their behalf. The solr. duly appeared & opposed, & the compensation authority refused the renewal, subject to payment of compensation. Three of the justices who sat & voted as members of the compensation authority had been parties to the resolution of the licensing justices authorising a solicitor to appear on their behalf:—*Held*: the three justices were disqualified from sitting on the compensation tribunal on the ground of bias, & the decision of the tribunal must be set aside.—*FROME UNITED BREWERIES CO. v. BATH JJ.*, [1926] A. C. 586; 95 L. J. K. B. 730; 135 L. T. 482; 90 J. P. 121; 42 T. L. R. 571; 24 L. G. R. 261, H. L.; *reusg.* S. C. *sub nom.* *R. v. BATH COMPENSATION AUTHORITY*, [1925] 1 K. B. 685, C. A.

*Annotation*:—*Distd. R. v. Leicester JJ., Ex p. Allbrighton*, [1927] 1 K. B. 557.

381a.

—.]—The mere fact that a licensing justice has originated an objection to the renewal of a licence, which, consequently, is referred by him & other justices to the compensation authority, does not disqualify him by reason of interest from sitting & adjudicating, as a member of that authority, upon the matter of that licence.—*R. v. LEICESTER JJ., Ex p. ALLBRIGHTON*, [1927] 1 K. B. 557; 96 L. J. K. B. 310; 136 L. T. 635; 91 J. P. 31; 43 T. L. R. 183; 25 L. G. R. 149, D. C.

381b. **Delegation of powers to licensing justices—Improper.]**—*R. v. SHEFFIELD JJ., Ex p. RAWSON (T.) & Co., LTD.*, No. 202a, *ante*.

394. *Add. Annotation*:—*Folld. R. v. Sheffield JJ., Ex p. Rawson* (1927), 91 J. P. 193.

416. *Add. Annotation*:—*Appld. R. v. Customs & Excise Comrs.*, [1928] A. C. 402.

420. *Add. Annotation*:—*Consd. Appenrodt v. Central Middlesex Assessment Committee*, [1937] 2 K. B. 48.

421. *Add. Annotation*:—*Generally, Refd. Appenrodt v. Central Middlesex Assessment Committee*, [1937] 2 K. B. 48.

## Part VIII.—Decisions of Licensing Justices.

455. After this case add :—

### C. Other Cases.

455a. **Withdrawal of certificate for extension.**—There is no appeal to quarter sessions from a decision of licensing justices withdrawing their certificate granted in respect of licensed premises under Licensing Act, 1921 (c. 42), s. 3 (2), without which the holder of the licence is not entitled to elect under Licensing Act, 1921 (c. 42), s. 3 (1), to keep the licensed premises open for one hour after the permitted hours for the sale or supply of intoxicating liquor for consumption at a meal supplied at the same time in the part of the premises set apart for meals.—*Re COLETTA*, [1932] 1 K. B. 501; 101 L. J. K. B. 208; 146 L. T. 180; 48 T. L. R. 113; 30 L. G. R. 109; *sub nom.* *R. v. LONDON COUNTY JUSTICES*, *Ex p. METROPOLITAN POLICE COMRS.*, 96 J. P. 16, C. A.

463. *Add. Annotation* :—Generally, *Refd. R. v.*

Leicester JJ., *Ex p. Allbrighton*, [1927] 1 K. B. 557.

543. *Citation* :—Add *sub nom.* *Re NUTTALL, R. v. SHERRARD* (1888), 4 T. L. R. 540.

*Add. Annotation* :—*Refd. Lorden v. Brooke-Hitching*, [1927] 2 K. B. 237.

548. *Add. Annotations* :—*Refd. R. v. Leicester JJ., Ex p. Allbrighton*, [1927] 1 K. B. 557; *I. R. Comrs. v. Sneath* (1932), 48 T. L. R. 241.

553a. — **On appeal from licensing justices.**—Where, under Licensing (Consolidation) Act, 1910 (c. 24), s. 29 (1), there is an appeal to quarter sessions against the refusal of licensing justices to grant a renewal, transfer or special removal of a justices' licence, the judgment of quarter sessions, by sect. 29 (5), is final, & no appeal from it lies to the High Ct. by way of case stated.—*PIPER v. ST. MARYLEBONE LICENSING JJ.*, [1928] 2 K. B. 221; 97 L. J. K. B. 602; 139 L. T. 144; 92 J. P. 87; 44 T. L. R. 510; 26 L. G. R. 308, D. C.

## Part IX.—Hours of Sale.

575a. *Add. Citations* :—[1926] 2 K. B. 519; 96 L. J. K. B. 1; 90 J. P. 155; 24 L. G. R. 471.

577. *Add. Annotation* :—*Refd. Pill v. Furse, Pill v. Mutton & Son* (1933), 97 J. P. 197.

579a. **In case of six-day licence.**—Licensing justices granted special orders of exemption under Licensing (Consolidation) Act, 1910 (c. 24), s. 57, to the holder of a six-day licence in respect of certain ry. refreshment rooms. The special orders authorised the licensee to sell intoxicants on nineteen Sundays during the summer months, being the occasions on which the ry. co. ran excursion steamers & trains to & from the place at which the refreshment rooms were situated :—*Held* : the justices had no power to grant the special orders; (1) because the holder of a six-day licence is absolutely prohibited by sect. 58 of the Act from selling intoxicants to the public on Sunday; (2) because the occasions were not "special occasions" within sect. 57 (1).—*R. v. LANCASHIRE JJ., Ex p. COMRS. OF CUSTOMS & EXCISE* (1934), 151 L. T. 376; 98 J. P. 307; 32 L. G. R. 265, D. C.

581. *Add. Annotation* :—*Refd. Miller v. Pill, Pill v. Furse, Pill v. Mutton & Son* (1933), 49 T. L. R. 437.

582. *Add. Annotations* :—*Refd. Miller v. Pill, Pill v. Furse, Pill v. Mutton & Son* (1933), 49

T. L. R. 437; *R. v. Sussex Justices, Ex p. Bubb* (1933), 49 T. L. R. 495.

582a. — **Summer time.**—The statutory period of summer time is not a "special occasion" within the meaning of the Licensing (Consolidation) Act, 1910 (c. 24), s. 57 (1).

The justices, who were the local authority for a division including a coastal area, on an application under Licensing (Consolidation) Act, 1910 (c. 24), s. 57 (1), made an order purporting to be a special order of exemption thereunder exempting the holder of a justices' on-license in that area from the general provisions relating to permitted hours, for the hours between 10 p.m. & 10.30 p.m. on every day except Good Friday & Sundays, during the statutory period of summer time in the year 1933 as being a "special occasion" within the sub-sect. The application had been made on behalf of a number of specified licensees in the division, & the justices had decided to grant the special order to those licensees whose premises were in the coastal area & who might apply therefor, the above order being one of the intended orders which had been applied for & drawn up. The divisional police having obtained an order *nisi* for a *certiorari* to remove the order of the justices into the High Ct. :—*Held* : the order of the justices was not such

### PART VIII. SECT. 1, SUB-SECT. 1.

s. 1. — *Previous information withdrawn.*—*Ex p. HENDERSON, Ex p. BRODER, Ex p. STEWART, Ex p. JOE GO GET*, [1930] 1 D. L. R. 420; 25 Can. Crim. Cas. 95.—CAN.

### PART VIII. SECT. 3, SUB-SECT. 1.—B.

sn. *Person aggrieved.—Licensing inspector.—Formal objection lodged by inspector to application for license.*—A licensing inspector lodged notice of intention to object to an appln.,

for the grant of a licensed victualler's license, &, on the hearing of the appln., stated that the objection was lodged as a mere formal objection, & that he did not desire to give or offer evidence or to address the ct., &, after the license had been granted by the ct., treated the license as being valid in subsequent proceedings before the licensing ct. He, subsequently, moved for a writ of *certiorari* to quash the grant of the license :—*Held* : he was a person aggrieved, & competent to make the appln., but by his conduct he had disqualified himself from relief

by way of *certiorari* & *certiorari* was withheld.—*R. v. THE LICENSING AUTHORITY AT DALRY, Ex p. KELLY*, [1928] S. R. Q. 151.—AUS.

### PART VIII. SECT. 3, SUB-SECT. 1.—C.

sn. *To quash conviction.—Time for making application for.*—*Ex p. CROWLEY, Ex p. KENNETH STAPLES DRUG CO.*, [1928] 4 D. L. R. 561; 50 Can. Crim. Cas. 378.—CAN.

so. — *—*—*R. v. BEGIN, Ex p. CARON* (1928), 50 Can. Crim. Cas. 69.—CAN.

a special order of exemption as they had jurisdiction to make under the sub-sect., inasmuch as the period of summer time for which it was granted was not a "special occasion" within the sub-sect., & the extent of the area & the number of the licensed premises to which it was applicable showed that it was general in its scope; as the justices in making the order had exceeded their jurisdiction, *certiorari* would lie in the absence of any provision to the contrary, & there was no such provision in sect. 102 of the Act or elsewhere; & consequently that the order *nisi* should be made absolute.—*R. v. SUSSEX JJ., Ex p. BUBB*, [1933] 2 K. B. 707; 102 L. J. K. B. 577; 149 L. T. 537; 97 J. P. 237; 49 T. L. R. 495; 77 Sol. Jo. 503; 31 L. G. R. 307, D. C.

*Annotation*.—*Distd. R. v. Sussex Justices, Ex p. Bubb* (1934), 50 T. L. R. 410.

**582b.** — *Excursion days.*—*R. v. LANCASHIRE JJ., Ex p. COMRS. OF CUSTOMS & EXCISE*, No. 579a, *ante*.

**582c.** *Extension during summer time.*—The licensing justices have no power under Licensing Act, 1921 (c. 42), s. 1, to increase the permitted hours by half an hour throughout the period of summer time only.—*R. v. SUSSEX LICENSING JJ., Ex p. BUBB* (1934), 50 T. L. R. 410; 78 Sol. Jo. 412, C. A.

**582d.** "Special requirements of the district."—On an application to licensing justices for an extension from 10 P.M. to 10.30 P.M. of permitted hours under Licensing Act, 1921 (c. 42), s. 1 (1), evidence was given that the main livelihood of the district was fruit-growing & agriculture, & that in the summer months people were often at work in the fields until 10 P.M.:—*Held*: it was an essential part of the scheme of legislation with regard

to permitted hours to call in & rely on the local justices to adjust & correct the general rule if they were satisfied that the special requirements of their district rendered it desirable, & the evidence of the principal means of livelihood in the district entitled them to find special requirements in the present case.—*R. v. WISBECH, ISLE OF ELY, LICENSING JUSTICES, Ex p. PAYNE*, [1937] 2 K. B. 706; [1937] 3 All E. R. 767; 106 L. J. K. B. 874; 157 L. T. 533; 101 J. P. 515; 53 T. L. R. 981; 81 Sol. Jo. 718; 35 L. G. R. 533; 30 Cox, C. C. 634.

**582e.** —.]—Certain licensing justices made an order under Licensing Act, 1921 (c. 42), s. 1, directing that with regard to licensed premises within their jurisdiction the permitted hours should be extended during the summer months as specified in the order. Before making the order, the justices heard evidence which satisfied them that the special requirements of the district rendered the order desirable. The evidence was to the effect that during the summer months many inhabitants by reason of recreation & hours of work could not obtain reasonable refreshment before 10 o'clock. Appct. sought to have the order quashed, on the ground that it was made without jurisdiction, in that there was no evidence before the justices of any "special requirements of the district" within sect. 1 of the Act of 1921:—*Held*: quite apart from the weight of the evidence, which was essentially a matter for the justices themselves, there was a mass of evidence of "special requirements of the district," upon which the justices were entitled to make the order, & there was no usurpation of jurisdiction.—*R. v. BRADFORD LICENSING JJ., Ex p. ILLINGWORTH*, [1938] 4 All E. R. 48, D. C.

## Part X.—Occasional Excise Licences.

**588a.** — *Application by nominee of Secretary of State in State management district.*—Whether Secretary of State successor of Liquor Control Board within Licensing Act, 1921 (c. 42), Sched. III., clause 9.]—*F.*, a nominee of the Secretary of State, applied to justices for an occasional licence under Licensing (Consolidation) Act, 1910 (c. 24), s. 64, to sell alcoholic liquor on the racecourse at Carlisle races. The justices declined jurisdiction on the ground that the structures owned by the

racecourse proprietors, & marquees, provided by the State management, on the racecourse where the liquor would be sold, would be in the occupation of the State within the meaning of clause 9 of Sched. III. to Licensing Act, 1921 (c. 42), & that therefore no licence was required:—*Held*: that these structures & marquees were not so occupied & the justices must hear & determine the application.—*R. v. CUMBERLAND JUSTICES, Ex p. FEARNLEY* (1930), 144 L. T. 246, D. C.

## Part XII.—Offences.

**607a.** *Sale of wine to which quinine added.*—*SHARP v. SPARKES*, No. 9a, *ante*.

**615.** *Add. Annotation*:—*Refd. Nash v. Stevenson Transport, Ltd.*, [1935] 2 K. B. 341.

**617.** *Add. Annotation*:—*Refd. Fitzpatrick v. Bate, Mitchell v. Page* (1934), 151 L. T. 17.

**618.** *Add. Annotation*:—*Apld. Mizen v. Old Florida, Ltd.; Egan v. Mizen* (1934), 50 T. L. R. 349.

### PART XII. SECT. 1, SUB-SECT. 1.—A. (a).

*sp. Evidence of.—Empty bottles found without Government labels.*—*R. v. McMILLAN* (1927), 49 Can. Crim. Cas. 350.—CAN.

*sq. — Purchase of more beer than*

*income justified.—Persons found on premises with empty glasses & bottles.*—*R. v. DZIURA*, [1928] 1 D. L. R. 828; 49 Can. Crim. Cas. 229.—CAN.

*sr. — Purchase of large quantities of liquor.—No bottles found on premises.*—*R. v. PATRUADE* (1928), 49 Can.

Crim. Cas. 384.—CAN.

*st. — One bottle of gin found in shed.—No evidence of ownership.*—*R. v. LEE* (1928), 49 Can. Crim. Cas. 346.—CAN.

*sv. Conviction for sale to persons unknown.—Amendment of.*—*YOUNG v.*



625. *Add. Annotation*:—*Consd. R. v. Graham-Campbell, Ex p. Herbert*, [1935] 1 K. B. 549.

625a. —.—The House of Commons has the privilege of regulating its own internal affairs & procedure, including the sale, within the precincts of the House, of intoxicating liquor without a licence, through its employees in the Refreshment Department of the House.

Appct. applied in the police ct. for summonses against certain members of the Kitchen Committee of the House of Commons & the manager of the Refreshment Department of the House on the ground that they had on two occasions unlawfully sold by retail intoxicating liquor for the sale of which they did not hold a justices' licence as required by Licensing (Consolidation) Act, 1910 (c. 24), s. 65. The magistrate held that, assuming that there had been a sale of liquor without a licence, his jurisdiction was excluded by the privileges of the House & he declined jurisdiction. Rules *nisi* having been obtained by the appct. for orders in the nature of *mandamus* calling on the magistrate, the members of the Kitchen Committee affected & the manager of the Refreshment Department to show cause why the magistrate should not proceed to hear & determine the applications for the summonses:—*Held*: in the sale of liquor in the precincts of the House without a licence, the House was acting, through its Kitchen Committee & its employee, the manager of the Refreshment Department, in a manner which fell within the scope of the internal affairs of the House & therefore, within the privileges of the House so that no ct. of law had jurisdiction to interfere.—*R. v. GRAHAM-CAMPBELL, Ex p. HERBERT*, [1935] 1 K. B. 594; 104 L. J. K. B. 244; 152 L. T. 556; 51 T. L. R. 198; 79 Sol. Jo. 12; 33 L. G. R. 136; 30 Cox, C. C. 209, D. C.

626. *Add. Annotation*:—*Consd. Jones v. Mighall, Nelson v. Mighall* (1932), 48 T. L. R. 636.

626a. *Unlicensed room in licensed premises—Buying from licensed premises for customer.*—Applt. J. was acting as "city waiter" at a meeting of a Buffalo Lodge of which he was a member. The meeting was held in an unlicensed room within the curtilage of licensed premises of which applt. N. was the

licensee. It was J.'s duty to obtain the refreshments ordered by the members. He was observed on several occasions to go to the bar of the licensed premises & purchase, & pay for a number of glasses of beer, which he carried on a tray to the room where the meeting was held, & distributed to the members who had ordered them, receiving the price (but no more) which he had paid at the bar. The justices convicted J. of selling intoxicating liquor without a licence & N. of being privy to the sale:—*Held*: on these facts there was no evidence of a sale by J. The beer was not at any time his property.—*JONES v. MIGHALL, NELSON v. MIGHALL* (1932), 96 J. P. 395; 48 T. L. R. 636; 30 L. G. R. 412, D. C.

627a. *Club—Bought at outside wine dealers—Place of appropriation.*—(1) For the purposes of the Licensing Acts a sale of intoxicating liquor takes place at the premises where the liquor is appropriated to the contract.

(2) Licensing Act, 1921 (c. 42), s. 5 (b), does not authorise a sale of intoxicating liquor during non-permitted hours.—*MIZEN v. OLD FLORIDA, LTD.; EGAN v. MIZEN* (1934), 50 T. L. R. 349; 78 Sol. Jo. 298, D. C.

678a. —. —. —. *Seizure of liquor not condition precedent to conviction of persons.*—It is not a condition precedent to a presumption under Licensing (Consolidation) Act, 1910 (c. 24), s. 82 (3), being raised that a person found on premises is there for the purposes of illegally dealing in intoxicating liquor, that the constable who has entered under a search warrant under sect. 82 (1) should have seized & removed any intoxicating liquor found therein. In order to comply with sect. 82 (1), it is not necessary for the constable to seize all the intoxicating liquor found on the premises which there is reasonable ground to suppose is there for the purpose of unlawful sale. Hence where forty-six persons, non-members, were found on the premises of a registered club unlawfully dealing in intoxicating liquor the seizure of five glasses of beer was held to be a sufficient seizure.—*HAMMOND v. HANLON*, [1935] 1 K. B. 474; 104 L. J. K. B. 239; 153 L. T. 13; 99 J. P. 134; 51 T. L. R. 195; 33 L. G. R. 12; 30 Cox, C. C. 215, D. C.

ALLCHURCH, [1927] S. A. S. R. 185.—AUS.

sw. *More liquor on premises than reasonably required for use of residents—Evidence of unlawful sale.*—Proof of the fact of there being on the premises of an unlicensed person more liquor than is reasonably required for the use of the persons residing therein is, by Licensing Act, 1915, s. 237, to be deemed *prima facie* evidence both of an unlawful sale of liquor & that that sale was made by the person whose premises they are, whether independent evidence of a sale given or not.—*SCALES v. CHARLESTON*, [1929] V. L. R. 184; [1929] Argus L. R. 167.—AUS.

PART XII. SECT. 1, SUB-SECT. 1.—A. (e) II.

635 II. —. —. —. *Two offences not exactly of same kind.*—Under Liquor Act, 1925, 1924–25, c. 53, a person convicted for any one of the acts which sect. 78 declares to be offences & who is subsequently convicted for another of such acts is guilty of a second offence even though the two offences were not

exactly of the same kind.—*R. v. POLLARD*, [1928] 4 D. L. R. 623; [1928] 3 W. W. R. 78; 50 Can. Crim. Cas. 157.—CAN.

o (p. 82) I. —. —. —. *Ex p. O'HEARN (N. S.)* (1928), 51 Can. Crim. Cas. 23.—CAN.

o (p. 82) II. —. —. —. *R. v. HOSHEM (N. S.)* (1928), 51 Can. Crim. Cas. 26.—CAN.

PART XII. SECT. 1, SUB-SECT. 3.—A.

656 II. —. —. —. —. *Where a few minutes to closing-time on a busy evening a drunken man entered a bar, where there were from fifty to seventy people, & the barman told him to get out, & the man having turned towards the door, the barman, thinking he had left the premises, took no further effective steps to see that he had done so, & a few minutes later the police found the man standing at another part of the bar-counter:—Held: to constitute the offence of "permitting" drunkenness on licensed premises there must be evidence that the licensee,*

or his servants or agents, consented to, or consciously allowed, the drunken man to remain on the premises, & a "permission" in this sense had not been established.—*McFARLAND v. SPARKS*, [1926] N. Z. L. R. 689.—N.Z.

PART XII. SECT. 1, SUB-SECT. 3.—B.

669 II. —. —. —. —. *Complaint charging licensee personally.*—In a prosecution under a complaint which charged an hotel-keeper that "you did supply" liquor to a person in a state of intoxication, it was proved that the liquor had not been supplied by accused, but by his son & assistant in the accused's absence. The accused was convicted of the offence charged:—*Held*: the complaint was not lacking in specification, in respect that, in a prosecution under Licensing Acts, it was unnecessary to state the name of the person through whom the offence had been committed, unless special circumstances required such a statement in fairness to accused dismissed.—*HALL v. BEGG*, [1928] S. C. (J.) 29.—SCOT.

708. *Add. Annotation*.—*Refd.* Allen v. Whitehead (1929), 45 T. L. R. 655.

716. *Add. Annotation*.—*Expld.* Allen v. Whitehead (1929), 45 T. L. R. 655.

716a. —.]—The proprietor of a refreshment-house, resp., was charged with harbouring prostitutes, contrary to Metropolitan Police Act, 1839 (c. 47), s. 44. It was proved that, though resp. received the profits of the business, he did not manage it, but left it in charge of a manager, to whom he had given express instructions not to allow prostitutes to assemble on the premises. Resp. only visited the premises once or twice a week, & there was no evidence that any offence had been committed in his presence or with his knowledge.—*Held*: having delegated all his authority to the manager & become a mere absentee, he was responsible for the acts of the manager, & was liable to conviction.—ALLEN v. WHITEHEAD, [1930] 1 K. B. 211; 99 L. J. K. B. 146; 142 L. T.

141; 45 T. L. R. 655; 94 J. P. 17; 27 L. G. R. 652; 29 Cox, C. C. 8, D. C.

*Annotation*.—*Refd.* Wilson v. Murphy, [1937] 1 All E. R. 315.

733a. — Sale by unauthorised servant.]—A boy of sixteen, employed by the holder of an off-licence solely as an errand boy, supplied bottles of whisky to a customer in his employer's absence, at a time when the premises were not open for business, & outside the permitted hours. He had never at any time been authorised to sell to or supply customers.—*Held*: he was not a servant or agent of the employer within Licensing Act, 1921 (c. 42), s. 4 (a), so as to make the employer liable under that sect. for supplying intoxicating liquor otherwise than during the permitted hours.—ADAMS v. CAMFONI, [1929] 1 K. B. 95; 98 L. J. K. B. 40; 139 L. T. 608; 92 J. P. 186; 44 T. L. R. 822; 28 Cox, C. C. 538; 26 L. G. R. 542, D. C.

733b. — Wine ordered during prohibited hours—For immediate delivery.]—MIZEN v. OLD FLORIDA, LTD.; EGAN v. MIZEN, No. 627a, ante.

PART XII. SECT. 1, SUB-SECT. 5.—B.

xx. *Onus on Crown*—To prove importation.]—Deft. was arrested, indicted & tried & convicted for harbouring a quantity of dutiable goods, to wit, spirituous liquors unlawfully imported into Canada, of the value of over \$200, whereon the duties lawfully payable had not been paid, in violation of Customs Act, Dominion Acts, 1907, c. 11. On the trial the evidence showed that the liquor in question was found in an automobile owned & driven by deft., & some evidence was offered by the Crown indicating unlawful importation. The trial judge instructed the jury that the burden of proof of lawful importation & payment of duty was upon deft., & the Crown was only bound to establish harbouring without lawful excuse.—*Held*: under the instructions given to them the jury would be likely to place the whole burden upon accused, whereas, under the wording of the statute, the necessity of proof by the Crown of importation was implied, & consequently, there should be a new trial.—R. v. SHELLMAN, [1928] 1 D. L. R. 657; sub nom. R. v. SCHELLMAN, 59 N. S. R. 535.—CAN.

PART XII. SECT. 1, SUB-SECT. 6.—A. (a).

xy. *Minor supplied with liquor—Evidence necessary to prove—Magistrate deciding from appearance of minor.*—R. v. WHITTAL (1928), 50 Can. Crim. Cas. 343.—CAN.

PART XII. SECT. 3, SUB-SECT. 1.

xi. *Aiding persons to commit offence of being found unlawfully on premises after closing hours.*—Where persons are found unlawfully on licensed premises after closing hours, even though the licensee was not a consenting party to their original entry, & after their entry pressed them to depart, but showed looseness & lack of control not desirable in a licensee, & did not turn such persons out of the premises, the licensee is guilty of aiding & assisting such persons to commit the offence of being found unlawfully on licensed premises after closing hours.—ARMSTRONG v. KELLEHER, [1925] N. Z. L. R. 422.—N.Z.

PART XII. SECT. 3, SUB-SECT. 2.—A.

727 vi. —.]—Liquor supplied on licensed premises, by way of gift, by the wife of the licensee to her guests, at a time when such persons were not lawfully entitled to be supplied.—*Held*: an offence under Licensing Act,

1908, s. 205 (e).—WATERSON v. LOW, [1926] N. Z. L. R. 751.—N.Z.

728 ix. —.]—A resident in a licensed hotel was visited by three friends, who were non-residents. After the permitted hours for the sale or supply of liquor, he ordered & paid for three rounds of drinks, which were consumed by himself & his guests.—*Held*: the hotelkeeper had supplied the liquor to the resident's guests, & had been guilty of a contravention of Licensing Act, 1921 (c. 42), s. 4 (a).—M'BAIN v. MITCHELL, [1927] S. C. (J.) 57.—SCOT.

xi. —.]—A licensee of a hotel, who was seated on a form outside the hotel, was asked to supply liquor to an unexpected person. He went inside the hotel, came out & handed the liquor to the person, who paid him. There was a light in a room in the hotel described by witnesses as the saloon bar.—*Held*: an offence had been committed against Licensing Act, 1917, s. 185, & the ct. would take judicial notice of the fact that liquor was kept in a saloon bar.—ALLOHURCH v. HEALEY, [1927] S. A. S. R. 370.—AUS.

xii. — Customer bringing empty bottle—Bottle filled & delivered at customer's house.]—A customer entered a licensed grocer's shop outwith permitted hours & asked for a half-bottle of wine, handing the grocer an empty bottle & the sum of 10d. The grocer put the wine in the bottle & handed it to a message boy in his employment with directions to deliver it at the customer's house. In fact the customer took it from the boy a few yards from the shop.—*Held*: the transaction was a completed sale of intoxicating liquor in contravention of Licensing Act, 1921, s. 4 (a), & sect. 5 (b) was inapplicable in respect that it applied only to transactions which do not amount to a completed sale.—VALENTINE v. BELL, [1930] S. C. (J.) 51.—SCOT.

733a i. — Sale by servant.]—Where a servant supplies his own guests with liquor after closing hours without the knowledge of the licensee, the latter cannot be convicted of unlawfully allowing liquor to be consumed on his premises.—O'CONNELL v. CLAUSEN, BURKE v. CLAUSEN, [1928] N. Z. L. R. 227.—N.Z.

sm. *Proof that person making illegal sales licensee's agent—Takings from legal & illegal sales placed in same cash register.*—R. v. RICHARDSON (Sask.) (1925), 45 Can. Crim. Cas. 142.—CAN.

sn. *Proclamation prohibiting sale*

during specified hours of named day—Validity of.]—*Held*: the power conferred upon the Governor in Council by Liquor Act, 1912 (N. S. W.), s. 57 (1) (b), was a power to name a day during the whole of which licensed premises shall not be open for the sale of liquor & no power was given to direct that, during specified hours of a named day, licensed premises should not be open for the sale of liquor.—DELANEY v. GANT (1927), 40 C. L. R. 174.—AUS.

so. *Bye-law prohibiting sale on New Year's day—Sale to bond fide traveller.*—A county licensing ct. issued a bye-law that all licensed premises within the district, including inns & hotels, except as regarded travellers & lodgers therein, should be closed wholly on New Year's day, & when New Year's day fell on a Sunday, then on Monday, Jan. 2.—*Held*: under this bye-law a Monday falling on Jan. 2 must be treated as a Sunday, & accordingly, an hotel-keeper who had supplied a customer on such a Monday, outwith the permitted week-day hours, had not infringed his certificate where the customer was a bond fide traveller who could lawfully have been supplied on Sunday.—HENDERSON v. ROSS, [1928] S. C. (J.) 74.—SCOT.

sr. *Powers of magistrate—View.*—In a charge of keeping open in prohibited hours, the magistrate has no power to take a view of the locus in quo unless by consent.—R. v. CRUICK (1936), 50 B. O. R. 473.—CAN.

PART XII. SECT. 3, SUB-SECT. 2.—B.

sp. *Light in bar.*—FRANCE v. HUMPHREYS, [1926] S. A. S. R. 214.—AUS.

sq. *Customers leaving premises during prohibited hours—Carrying bottles.*—A licensee was convicted upon information alleging that a disposal of liquor unlawfully took place on his licensed premises during prohibited hours. The evidence for the prosecution was that during prohibited hours two men were seen coming out of deft.'s licensed premises, & that one of them was carrying six bottles of beer, & the other four bottles. No evidence was called by deft., who was convicted.—*Held*: no inference could be drawn from the evidence before the ct. that the beer in question was disposed of after closing time rather than before; the liquor was presumed to have been lawfully acquired until the contrary was shown, & the conviction should be quashed.—WALSH v. MACKERRAS, [1928] V. L. R. 186; [1928] Argus L. R. 67.—AUS.

750. *Add. Annotation*:—*Consd. Evans v. Fletcher* (1926), 135 L. T. 153.

751. *Add. Annotation*:—*Reid. Evans v. Fletcher* (1926), 135 L. T. 153.

752. *Add. Annotation*:—*Folld. Evans v. Fletcher* (1926), 135 L. T. 153.

755a. — During non-permitted hours.]—Resp., the licensee of a public-house, was found drunk in the kitchen of the premises at 10.30 p.m. during non-permitted hours, the front door being wide open at the time, & he was summoned for being found drunk on licensed premises under Licensing Act, 1872 (c. 94), s. 12. The justices dismissed the summons on the ground that the time at which resp. was found drunk was after the hours when the sale of intoxicating liquor was permitted:—*Held*: since at the time in question the premises were open & there was nothing to prevent the sale of food & non-intoxicating liquor at that time, the justices ought to have convicted resp.—

#### PART XII. SECT. 3, SUB-SECT. 3.

sr. *What amounts to permitting*.]—A person "permits" the unlawful consumption of liquor on his licensed premises if this takes place with his knowledge or connivance or by his failure to use due diligence to prevent it.—*JOLLY v. VIRGO*, [1927] S. A. S. R. 188.—AUS.

#### PART XII. SECT. 4, SUB-SECT. 1.—A.

756 i. *To what persons applicable*.—*Lodger or inmate*.]—Deflt. had been residing with his wife & family for many years in licensed premises of which his wife's mother was the licensee. Deflt. was charged under Licensing Act, 1872, s. 18, with being drunk & disorderly on the licensed premises & refusing to leave them at the request of a sergeant of the Civic Guard who had been sent for by the licensee. This took place at 8 p.m. while the premises were open for the sale of intoxicating liquor to the public. Summons dismissed as deflt. was in his own home:—*Held*: deflt. should be convicted, as sect. 18 does not exempt a lodger or a guest residing in the licensed premises.—*A.-G. v. FEELY*, [1932] I. R. 265.—IR.

#### PART XII. SECT. 4, SUB-SECT. 1.—B. (a).

st. *What constitutes offence*.]—The mere fact of being drunk in a public place is not an offence under Criminal Code, s. 238 (f). It is the creating of a disturbance which is aimed at by that provision.—*R. v. OSJORM*, [1927] 3 D. L. R. 1018; [1927] 2 W. W. R. 703; 49 Can. Crim. Cas. 1; 22 Alta. L. R. 582.—CAN.

#### PART XII. SECT. 4, SUB-SECT. 1.—B. (b).

764a i. "Intoxicated"—*What amounts to*.]—In order to be guilty of driving a motor car while intoxicated, the driver's intoxication must be of that degree which renders his driving of the car a danger to the public.—*McRAE v. McLAUGHLIN MOTOR CAR CO., LTD. (Alta.)*, [1926] 1 D. L. R. 372; [1926] 1 W. W. R. 161.—CAN.

#### PART XII. SECT. 6.

b i. — *What must be proved*.—On a prosecution for unlawful possession of a still it must be proved that informant was an officer of the Inland Revenue Department or was authorised to take the proceedings, that accused's arrest was under warrant, & the liquor referred to in the certificate of analysis was that which was seized.—*R. v. MCKENZIE (Man.)*, [1927] 1 W. W. R. 549; 45 Can. Crim. Cas. 137.—CAN.

b ii. — *Prior charge of hiding still dismissed—Autrefois acquit*.]—*R. v. MCKENZIE (Man.)* (1926), 45 Can. Crim. Cas. 380.—CAN.

b iii. — *Penalty for—Jurisdiction of magistrates to mitigate fine*.]—D. was summarily convicted by justices & fined £1 in respect of an offence under Illicit Distillation (Ireland) Act, 1831, s. 16. The prosecutor objected to this fine, on the ground that under sect. 39 of the same Act the justices could not reduce the penalty to a sum less than £6.—*Held*: the justices had jurisdiction under Finance Act, 1923, s. 13, to impose any penalty not exceeding £500, notwithstanding the fact that Illicit Distillation (Ireland) Act, 1831, s. 39, limited the power of mitigation by prescribing a minimum penalty of £6.—*R. v. ARMAGH JJ.*, [1929] N. I. 71.—IR.

b iv. — *Prosecution before police magistrate—Intervention of justice of peace*.]—A justice of the peace, having intervened in a prosecution under Excise Act by assuming to adjourn the trial on the non-appearance of the police magistrate before whom the information was laid & who had issued a summons to deflt. to appear before him, a conviction made on the adjourned date of trial by another police magistrate, before whom deflt. refused to plead & to whose jurisdiction he objected, was quashed, since said intervention was in direct violation of sect. 134 of said Act.—*R. v. PYKE*, [1928] 1 W. W. R. 590; 49 Can. Crim. Cas. 186; 23 Alta. L. R. 341.—CAN.

b v. — *Right of accused to list of goods seized—Sufficiency of list*.]—In order to comply with Excise Act, s. 82, the list of goods seized, a copy of which that section requires to be served on the party from whom they were taken, must include all the goods seized, & the preparation & service of a proper list is a condition precedent to the magistrate's jurisdiction.—*Re TESOSKI*, [1928] 1 W. W. R. 433; 49 Can. Crim. Cas. 343.—CAN.

c i. — *Proof of*.]—*R. (WILLIAMS) v. YARISH (Man.)*, [1926] 3 W. W. R. 586.—CAN.

sg. *Removal without permit*.]—*Held*: (1) a contravention of Spirits Act, 1880 (c. 24), s. 107 (1) (a), had taken place where whisky exceeding the quantity of 1 gallon was proved to be in the course of being removed without a permit although not at the destination labelled, the essence of the offence being the act of removing, not the place to which the spirits are removed; (2) the whisky thus removed, although contained in several flasks, the contents of which varied in strength, was

nevertheless spirits "of the same denomination" within sect. 105 (7).—*HELIHY v. CAMPBELL*, [1926] S. C. (J.) 35.—SCOT.

757. *Add. Annotation*:—*Generally, Reid. Evans v. Fletcher* (1926), 135 L. T. 153.

758. *Add. Annotation*:—*Apld. R. v. Southampton Justices, Ex p. Tweedie* (1932), 102 L. J. K. B. 11.

764. *Add. Annotation*:—*Reid. Ledwith v. Roberts*, [1937] 1 K. B. 232.

764a. "Drunk"—*Question of fact*.]—Whether accused is "drunk" within Criminal Justice Act, 1925 (c. 86), s. 40 (1), is a question for the jury.—*R. v. PRESDEE* (1927), 20 Cr. App. Rep. 95, C. C. A.

764b. *Severity of sentence—Wanton driving—By person "under influence of drink"*.]—*R. v. BURDON* (1927), 20 Cr. App. Rep. 80, C. C. A.

788. To the cross-references following this case add "—Sale or supply in prohibited hours."—*See Nos. 733a, 733b, ante.*

nevertheless spirits "of the same denomination" within sect. 105 (7).—*HELIHY v. CAMPBELL*, [1926] S. C. (J.) 35.—SCOT.

#### PART XII. SECT. 8.

sx. *Making part of rectifying apparatus suitable for rectification of spirits—Effect of absence of still*.]—*R. v. WOLOCHUK*, [1930] 3 W. W. R. 408; 54 Can. C. C. 389.—CAN.

#### PART XII. SECT. 11.

r (p. 105) i. — "Hall's wine."—*R. v. AXLER* (1917), 40 O. L. R. 304.—CAN.

d (p. 105) i. — *Mens rea*.]—*R. v. LAMBERT (Ont.)*, [1926] 2 D. L. R. 362; 45 Can. Crim. Cas. 300.—CAN.

k (p. 105) i. — *Whether place must be specified*.]—*R. v. IVAN (Ont.)* (1926), 45 Can. Crim. Cas. 237.—CAN.

p (p. 105) i. — *Sawczuk v. Padgett*, [1927] 1 D. L. R. 849; 47 Can. Crim. Cas. 78; 59 O. L. R. 638.—CAN.

ppp (p. 105) i. — *Transportation by rail*.]—*R. v. O'KEEFE'S BEVERAGES, LTD.*, [1926] 1 D. L. R. 520; 45 Can. Crim. Cas. 153; 58 O. L. R. 221.—CAN.

r (p. 106) i. — *Motor car in which liquor for sale found*.]—*R. v. MARTON (Ont.)* (1926), 46 Can. Crim. Cas. 92.—CAN.

a (p. 106) i. — *Discretion of magistrate to alter charge*.]—*R. v. HEALY (P. E. I.)* (1926), 46 Can. Crim. Cas. 298.—CAN.

b (p. 106) i. — *Grounds for allowing—Stenographer not sworn*.]—*R. v. JACOBS (Ont.)* (1926), 45 Can. Crim. Cas. 280.—CAN.

d (p. 106) i. *Liquor Control Act (Ont.)*, 1927—*Right of Province to prohibit keeping of intoxicating liquor within its bounds*.]—Deflt. was convicted by a police magistrate of an offence committed in Dec. 1927, against Liquor Control Act (Ont.), 17 Geo. 6, c. 70, s. 72 (2). The liquor which he was found to have had unlawfully in his possession was beer manufactured in the Province of Québec, & was intoxicating liquor, within the Act, which deflt. had imported into Ontario.—*Held*: the Province had the right to prohibit the keeping of intoxicating liquor within its bounds for purposes other than those authorised by Dominion Legislature; s. 72 (2) should be viewed as a measure of control of the liquor traffic in the Province & enacted for the purpose of making control by the Province not as a pro-  
—*R. v. RUDDICK*,

[1928] 3 D. L. R. 208; 49 Can. Crim. Cas. 323; 62 O. L. R. 248.—CAN.

d (p. 106) ii. — *Sale to person whose permit has been cancelled—Native wine.*—*Held:* having regard to Liquor Control Act, R. S. O., 1927, s. 94, & other sects. of the Act, sect. 84 of that Act has no application to the case of a manufacturer of native wine, but relates solely to the sale of intoxicating liquor by a Govt. vendor to a person whose permit has been cancelled.—*R. v. DOMINION WINEGROWERS, LTD.*, [1930] 1 D. L. R. 460; (1929), 52 Can. Crim. Cas. 156; 64 O. L. R. 427.—CAN.

d (p. 106) iii. — *Residence ceasing to be residence by conviction—Effect on occupant of part.*—*R. v. COWAN (Ont.)*, (1929), 51 Can. Crim. Cas. 187.—CAN.

d (p. 106) iv. — *What is illegal place.*—If, while in course of transportation through Ontario, the liquor gets out of the custody of a common carrier, whether in a warehouse or elsewhere in the possession of one who is not a common carrier, it is in an illegal place within Liquor Control Act, s. 90.—*Re WINDSOR TERMINAL WAREHOUSE & TRANSPORT CO., LTD.*, [1929] 3 D. L. R. 926; 52 Can. Crim. Cas. 38; 63 O. L. R. 630.—CAN.

d (p. 106) v. — *Who is occupant—Whether husband—House owned by wife.*—*R. v. JOLEY (Ont.)* (1929), 52 Can. Crim. Cas. 147.—CAN.

d (p. 106) vi. — *Who is guest—Father of proprietor living in hotel.*—*R. v. HAHN (1929)*, 53 Can. C. C. 327.—CAN.

d (p. 106) vii. — *Sale by wife—Liability of absent husband.*—*R. v. WHITE*, [1930] 3 D. L. R. 151; 53 Can. C. C. 240.—CAN.

d (p. 106) viii. — *Liability of employer for act of employee—Onus of proof.*—*R. v. BUSH (1930)*, 54 Can. C. C. 242.—CAN.

d (p. 106) ix. — *No formal conviction made—Powers of Appellate Court as to conviction.*—*R. v. BOWORTH (1930)*, 54 Can. C. C. 231.—CAN.

d (p. 106) x. — *Keeping for sale—Finding based on inference—Conviction quashed.*—*R. v. BOURGET*, [1933] 2 D. L. R. 791; 60 O. C. C. 65.—CAN.

d (p. 106) xi. — *Action to recover wrongful payments—Limitation.*—An action to recover payments made in contravention of Ontario Temperance Act, 1916 (Ont.), is a penal action & barred after one year by Limitations Act, R. S. O., 1927, s. 43 (1) (i).—*YARROWS v. FROWDE, LTD.*, [1934] 2 D. L. R. 532; O. R. 221; *affd.*, [1934] 3 D. L. R. 711; O. R. 526; 62 C. O. C. 101.—CAN.

d (p. 106) xii. — *Validity of information—Duplicity.*—On information under Liquor Control Act, R. S. O., 1927, for "selling or keeping for sale" is bad for duplicity.—*R. v. BUSH (1932)*, 57 O. C. C. 399.—CAN.

d (p. 106) xiii. — *Effect of Canada Temperance Act, 1927.*—The Governor General in Council referred the following questions: (1) Are the provincial laws respecting intoxicating liquor as restrictive since the coming into force of Liquor Control Act of Ontario, as amended in 1934, as Canada Temperance Act 1 (2) If the answer to question 1 is in the negative, is Part II. of Canada Temperance Act in operation in said counties?—*Held:* question 1 should be answered in the negative, & question 2 in the affirmative.—*REFERENCE, RE OPERATION OF CANADA TEMPERANCE ACT IN COUNTIES OF PERTH, HURON & PEEL IN ONTARIO*

d (p. 106) xiv. — *Referendum—Who may petition.*—Petitioners for referendum under Ontario Liquor Control Act, R. S. O., 1927, amended 1935,

are limited to those whose names appear in Part I. of the last revised voters' list of the municipality.—*MCINTYRE v. SOMERS*, [1936] 2 D. L. R. 225; O. R. 181; 65 O. C. C. 236.—CAN.

d (p. 106) xv. — *Powers of Board as to carriage.*—The Liquor Control Board has power under Ontario Liquor Control Act, R. S. O. 1927, to the methods of carriage & of liquor & to define by who is a common carrier.—*KERR v. BRIGHT (T. G.) & Co., LTD.* (1937), 68 Can. C. C. 104.—CAN.

d (p. 106) xvi. *Liquor Control Act, 1934—Issue of permit for sale—Effect of vote in favour of Government store.*—The Liquor Control Board is not prohibited from issuing permits for sale under Liquor Control Act, 1934 (Ont.), by the mere vote of electors in favour of a Govt. store.—*Re WHITE & LIQUOR CONTROL BOARD*, [1935] 3 D. L. R. 254; 63 O. C. C. 261.—CAN.

ar. *Carriage of Liquor Act (Ont.)—Not applicable to carriage on person.*—*R. v. TURCOTTE (Ont.)*, [1926] 3 D. L. R. 138; 48 Can. Crim. Cas. 59.—CAN.

bb (p. 106) i. — *Service of summons—Sufficiency.*—*Re BROWN*, [1927] 2 D. L. R. 849; 47 Can. Crim. Cas. 314; 59 N. S. R. 303.—CAN.

cc (p. 106) i. *Temperance Act (N. S.)*, 1923—*Charge of keeping liquor for sale—Previous conviction for harbouring same liquor under Customs Act*, 1927.—*Re WILNEFF*, [1928] 4 D. L. R. 869; 50 Can. Crim. Cas. 196.—CAN.

cc (p. 106) ii. — *Evidence of agent provocateur—Whether corroboration necessary.*—*R. v. RICE (N. S.)* (1929), 52 Can. Crim. Cas. 380; *revg.*, 52 Can. Crim. Cas. 137.—CAN.

cc (p. 106) iii. — *Sufficiency of evidence.*—*R. v. DAUPHINEE (N. S.)*, [1930] 2 D. L. R. 133; 52 Can. Crim. Cas. 401; *affd.*, [1929] 3 D. L. R. 622; 51 Can. Crim. Cas. 428.—CAN.

cc (p. 106) iv. — *Unsaleable quantity.*—*R. v. KERWIN (1930)*, 53 Can. C. C. 257; 1 M. P. R. 172.—CAN.

cc (p. 106) v. — *Conviction for second offence under—Previous conviction more than limitation period for prosecutions before.*—*Ex p. WOODS (N. S.)*, [1928] 2 D. L. R. 771; 49 Can. Crim. Cas. 141.—CAN.

cc (p. 106) vi. — *Jurisdiction of additional stipendiary for City of Sydney.*—*R. v. MORRISON*; *R. v. HILLMAN (N. S.)* (1929), 52 Can. Crim. Cas. 388.—CAN.

cc (p. 106) vii. — *Right of appeal from county court judge—Sitting in appeal from magistrate.*—*R. v. VERGE (N. S.)*, [1930] 1 D. L. R. 924; 1 M. P. R. 45; (1929), 52 Can. Crim. Cas. 406.—CAN.

cc (p. 106) viii. — ———.—*R. v. COFFEY*, [1930] 2 D. L. R. 213; 53 Can. C. C. 42; 1 M. P. R. 325.—CAN.

cc (p. 106) ix. — *Writ of assistance—Issued as of course.*—*Re WRITS OF ASSISTANCE*, [1930] 2 D. L. R. 499; 53 Can. C. C. 208; *sub nom. Ex p. A.-G. NOVA SCOTIA*, 1 M. P. R. 286.—CAN.

cc (p. 106) x. — *Amendment by 1929 Act—Effect on right of inspector to costs.*—*R. v. BONNER (1930)*, 53 Can. C. C. 46; 1 M. P. R. 331.—CAN.

cc (p. 106) xi. — *Power of county court judge—To set aside conviction—New evidence.*—*R. v. ADORÉ*, [1931] 3 M. P. R. 466.—CAN.

cc (p. 106) xii. — ———.—*R. v. YORCZYSEVYN*, [1931] 3 M. P. R. 262; 55 Can. C. C. 28.—CAN.

cc (p. 106) xiii. *Nova Scotia Liquor Control Act, 1930—"Having" liquor—Prima facie case.*—*R. v. RITCHIE*, [1931] 4 M. P. R. 77.—CAN.

cc (p. 106) xiv. — *Power to cross-examine as to previous convictions.*—*R. v. SPEARS*, [1931] 3 D. L. R. 790;

8 M. P. R. 226; 55 Can. C. C. 333.—CAN.

cc (p. 106) xv. — *Appeal to county court judge—Warrant of commitment—To be issued by magistrate.*—*R. v. RANSOME (No. 1)*, [1931] 3 M. P. R. 410.—CAN.

cc (p. 106) xvi. — *Right of hotel proprietor to liquor in own bedroom.*—*R. v. RANSOME (No. 2)*, [1931] 3 M. P. R. 445.—CAN.

cc (p. 106) xvii. — *Proceedings civil not criminal.*—*R. v. OICKLE*, [1931] 3 M. P. R. 447; 55 Can. C. C. 145.—CAN.

cc (p. 106) xviii. — *Conviction for "selling" liquor—Subsequent conviction for "having" liquor—Amounts to second offence.*—*R. v. GILMET*, [1932] 2 D. L. R. 454; 4 M. P. R. 311; 57 C. O. C. 271.—CAN.

cc (p. 106) xix. — *Unlawful possession—Recital of previous conviction in information—Conviction invalid.*—*R. v. HENNICK (1931)*, 56 Can. C. C. 169.—CAN.

cc (p. 106) xx. — *Conviction of two persons—Validity.*—Under N. S. Liquor Control Act there is nothing unsound in the conviction of two persons for an offence in respect of possession of the same liquor.—*R. v. WILSON (1933)*, 6 M. P. R. 566.—CAN.

cc (p. 106) xxi. — *Appeal—Conditions precedent.*—The right of appeal under Nova Scotia Liquor Control Act, 1930, s. 149, is dependent upon the fulfilment of the statutory requirements of the Act as to (*inter alia*) granting a summons within fifteen days of service of notice of appeal.—*Re QUINN (1932)*, 5 M. P. R. 314.—CAN.

cc (p. 106) xxii. — *Service of notice.*—Notice of appeal from dismissal of a charge under N. S. Liquor Control Act, 1930, must be served on the person who is the solr. of accused at the time of such service.—*R. v. PHILLIPS*, [1934] 3 D. L. R. 73; 61 C. O. C. 305; 7 M. P. R. 238.—CAN.

cc (p. 106) xxiii. — *Conviction affirmed—Copy of order sent to magistrate—Validity of conviction.*—When a conviction under N. S. Liquor Control Act, 1923, is confirmed on appeal by a county ct. judge, the jurisdiction of the magistrate to commit is not affected by reason of the fact that a copy only of the order of the judge is sent to the magistrate.—*Re McDONALD (1933)*, 7 M. P. R. 161.—CAN.

cc (p. 106) xxiv. — *Effect of lapse of time.*—*R. v. QUINN (1932)*, 58 C. O. C. 336.—CAN.

cc (p. 106) xxv. — *Possession of liquor—Plea of guilty—Admissibility of evidence of value.*—Evidence as to value of liquor may be heard notwithstanding a plea of guilty, in a charge of having liquor in possession, under Nova Scotia Liquor Control Act, 1930 (N. S.), s. 66 (2).—*R. v. DRYSDALE*, [1933] 1 D. L. R. 60; 59 C. C. C. 83.—CAN.

cc (p. 106) xxvi. — *Lawfully purchased.*—It is illegal under N. S. Liquor Control Act, 1930, to possess liquor, after an order to that effect has been issued, although it has been lawfully purchased.—*R. v. McEACHERN*, [1935] 3 D. L. R. 298; 9 M. P. R. 366; 63 C. O. C. 335; 5 F. L. J. (Can.) 20.—CAN.

cc (p. 106) xxvii. — *"Part of a building"—What is.*—A kitchen attached to a house & a restaurant is not "part of a building actually & exclusively used as a residence" within Nova Scotia Liquor Control Act, 1930, s. 2 (u).—*R. v. DUNN*, [1933] 2 D. L. R. 577; 59 C. O. C. 242; 6 M. P. R. 247.—CAN.

cc (p. 106) xxviii. — *Form of information.*—Nova Scotia Liquor Control Act, 1930, as amended by Acts 1932, c. 60, s. 8, creates a "statutory aggravation" of the offence charged

which ought to be charged in the information if the prisoner is to be dealt with on the footing that he is guilty of the statutory aggravation.—*Re DRYSDALE* (1932), 5 M. P. R. 317.—CAN.

cc (p. 106) xxix. —.—.—.]—In an information for having possession of intoxicating liquor, contrary to N. S. Liquor Control Act, 1930, s. 66 (2), it is sufficient to allege the "having" without any averment of the circumstances making the "having" unauthorized.—*Re FOREN & CHRISTIAN* (1933), 6 M. P. R. 492.—CAN.

cc (p. 106) xxx. —.—.—.]—In view of sect. 3 of c. 50, Acts 1932, amending Nova Scotia Liquor Control Act, 1930, s. 66 (2), an information cannot be impeached on the ground that it charges more than one offence, & does not state specifically the offences charged.—*R. v. ABBOTT* (1933), 7 M. P. R. 270; 61 C. C. 180.—CAN.

cc (p. 106) xxxi. —.—.—.]—*Amendment.*—An amendment to an information under Nova Scotia Liquor Control Act, 1930, made after the expiration of the time for laying a charge, which does not affect the ingredients of the offence, does not take away jurisdiction.—*Re CAMERON* (1934), 8 M. P. R. 255; 62 C. C. 123.—CAN.

cc (p. 106) xxxii. —.—.—.]—An information under sect. 66 of Nova Scotia Liquor Control Act containing words constituting an offence under sect. 106, is valid.—*Re STEPHENSON* (1937), 68 Can. C. C. 143.—CAN.

cc (p. 106) xxxiii. —.—.—.]—*Appeal by case stated.*—Nova Scotia Liquor Control Act, 1930, s. 149, takes away the right to state a case to the Supreme Ct.—*R. v. COULTER* (1934), 8 M. P. R. 326; 63 C. C. 60.—CAN.

cc (p. 106) xxxiv. —.—.—.]—*Appeal from closing order.*—There is no appeal from a closing order made under Nova Scotia Liquor Control Act, 1930, s. 144 (1).—*R. v. HERON & ROYAL HOTEL* (1934), 8 M. P. R. 346; 63 C. C. 67.—CAN.

cc (p. 106) xxxv. —.—.—.]—*Notice of hearing.*—Under Nova Scotia Liquor Control Act, 1930 (N. S.), resp. must have at least four clear days' notice of hearing.—*R. v. WESTHAVER*, [1935] 2 D. L. R. 155; 8 M. P. R. 381; 63 C. C. 169.—CAN.

cc (p. 106) xxxvi. —.—.—.]—*Conviction quashed on appeal—No costs against Crown.*—No costs against the Crown in quashing conviction under Nova Scotia Liquor Control Act, 1930 (N. S.).—*R. v. ROCHE* (1934), 62 Can. C. C. 18.—CAN.

cc (p. 106) xxxvii. —.—.—.]—*Illegal sale—Onus of proof.*—Nova Scotia Liquor Control Act, 1930, effects a statutory shifting of the burden of proof & a person charged with illegal sale is not entitled to acquittal on the ground of reasonable doubt.—*R. v. ACKER* (1934), 62 Can. C. C. 269.—CAN.

cc (p. 106) xxxviii. —.—.—.]—*Who may be liable.*—A father living in a house leased to his sons & occupied by them cannot be convicted under Nova Scotia Liquor Control Act, s. 111, for unlawful sales by an employee of the sons.—*R. v. SIMMONS*, [1938] 1 D. L. R. 372; 69 Can. C. C. 297.—CAN.

cc (p. 106) xxxix. —.—.—.]—*Effect of plea of guilty.*—A plea of guilty to an information under Nova Scotia Liquor Control Act, 1930, s. 66 (2), is an admission of every statement & circumstance charged in the information.—*R. v. MACKENZIE*, [1936] 1 D. L. R. 159; 65 Can. C. C. 104; 9 M. P. R. 559; 5 F. L. J. (Can.) 198.—CAN.

cc (p. 106) xl. —.—.—.]—*Analysis.*—*R. v. MACGOWAN* (1935), 5 F. L. J. (Can.) 115.—CAN.

cc (p. 106) xli. —.—.—.]—*Effect of repeal & re-enactment.*—*Re GREEN & JAMAIL* [1936] 2 D. L. R. 153; 65 Can. C. C.

353; 10 M. P. R. 335; 6 F. L. J. (Can.) 37.—CAN.

cc (p. 106) xlii. —.—.—.]—The repeal & re-enactment of Nova Scotia Liquor Control Act, 1930, s. 66 (2), by sect. 3 of 1930 Act did not render convictions under the earlier Act unavailable as convictions as for a second offence.—*R. v. BRUNT*, [1936] 2 D. L. R. 150; 65 Can. C. C. 233; *sub nom. Re BRUNT*, 10 M. P. R. 340.—CAN.

cc (p. 106) xliii. —.—.—.]—*Appeal—Conditions.*—The right of appeal under Nova Scotia Liquor Control Act, 1930, is conditional on grant of summons for hearing within 15 days of service of notice of appeal.—*R. v. DAUPHINEE*, [1936] 2 D. L. R. 232; 65 Can. C. C. 280.—CAN.

cc (p. 106) xliv. —.—.—.]—*Notice—Contents.*—Nova Scotia Liquor Control Act, s. 150 (2), requires that grounds of appeal should be set out in the notice of appeal in precise terms.—*R. v. ROBERTSON*, [1937] 2 D. L. R. 192; 11 M. P. R. 371; 68 Can. C. C. 59.—CAN.

cc (p. 106) xlv. —.—.—.]—Validity of notice of appeal under Nova Scotia Liquor Control Act, 1930.—*Re FAVRETTO*, [1938] 1 D. L. R. 230; 12 M. P. R. 339; 69 Can. C. C. 229.—CAN.

cc (p. 106) xlvi. —.—.—.]—*"Having."*—As to what constitutes "having" within Nova Scotia Liquor Control Act.—*R. v. SIMMONS*, [1937] 1 D. L. R. 791; 68 Can. C. C. 263; 11 M. P. R. 330.—CAN.

cc (p. 106) xlvii. —.—.—.]—*"Possession."*—Liquor found hidden in a confectionery store, ownership being disclaimed by the proprietor, held sufficient to warrant conviction for illegal possession within Nova Scotia Liquor Control Act, 1930.—*R. v. HEISLER* (1936), 67 Can. C. C. 394.—CAN.

cc (p. 106) xlviii. —.—.—.]—Picking up a bottle of beer belonging to the owner of a car while sitting therein & handing it to an officer is not illegal "possession" within Nova Scotia Liquor Control Act, 1930.—*R. v. BENNETT* (1936), 67 Can. C. C. 307.—CAN.

cc (p. 106) xlix. —.—.—.]—Passing a bottle to a companion to drink in a restaurant & then hiding it is "having" within Nova Scotia Liquor Control Act.—*R. v. SIMMONS* (1937), 68 Can. C. C. 167.—CAN.

cc (p. 106) l. —.—.—.]—*"Residence."*—A sleeping room at the back of a grocery store, distinct from the proprietor's family residence, is not his "residence" within Nova Scotia Liquor Control Act.—*R. v. WHYNOT* (1937), 69 Can. C. C. 395.—CAN.

cc (p. 106) li. —.—.—.]—A person is not liable for "having" liquor under N. S. Liquor Control Act, 1930, when the liquor was left in his cellar by a neighbour without his knowledge.—*R. v. MUNRO*, [1937] 2 D. L. R. 806; 12 M. P. R. 81; 68 Can. C. C. 231.—CAN.

cc (p. 106) lii. —.—.—.]—*Appeal—Evidence.*—In appeals under Nova Scotia Liquor Control Act the depositions taken below may be read.—*R. v. LEGGE* (1936), 11 M. P. R. 144.—CAN.

cc (p. 106) liii. —.—.—.]—*Amendment of conviction.*—On appeal against unauthorised conviction under Nova Scotia Liquor Control Act the convicting magistrate may be directed to amend the conviction under Summary Convictions Act, R. S. N. S. 1923.—*Re BLACKBURN* (1938), 12 M. P. R. 557.—CAN.

cc (p. 106) liiv. —.—.—.]—*Application by officer for closing order—Appeal.*—An officer applying by notice for a closing order under Nova Scotia Liquor Control Act, 1930, is not an informant or complainant & has no appeal from a

refusal to grant an order.—*Re FARMER*, [1937] 2 D. L. R. 529; 68 Can. C. C. 50; 11 M. P. R. 306.—CAN.

cc (p. 106) liv. —.—.—.]—*Liquor in house occupied by husband & wife—Possession of husband.*—Where liquor is found in a house occupied by a husband & wife there is a presumption that the house & contents are in the possession of the husband.—*R. v. MACDONALD*, [1937] 1 D. L. R. 288; 67 Can. C. C. 106.—CAN.

cc (p. 106) lv. —.—.—.]—*Proof of character of liquor seized.*—*R. v. MELANSON* (1937), 11 M. P. R. 395.—CAN.

cc (p. 106) lvi. —.—.—.]—*When conviction set aside.*—A conviction under Nova Scotia Liquor Control Act will not be set aside merely because the magistrate considered evidence of another charge, where this did not influence his decision.—*R. v. BLACKBURN*, [1937] 3 D. L. R. 130; 68 Can. C. C. 307.—CAN.

aaa (p. 106) i. *Temperance Act* (Man.) 1924 (c. 118)—*Second offence—First conviction more than six months previously—Conviction for second offence invalid.*—*R. v. ZAMPHIER* (Man.), [1926] 2 W. W. R. 721; 46 Can. Crim. Cas. 76.—CAN.

aaa (p. 106) ii. —.—.—.]—*Conviction for second offence valid.*—*R. v. MCLWAIN*, [1927] 1 D. L. R. 1150; [1927] 1 W. W. R. 353; 47 Can. Crim. Cas. 264; 36 Man. L. R. 349.—CAN.

aaa (p. 106) iii. —.—.—.]—*Whether under different section of Act.*—*R. v. SNARE* (Man.), [1927] 1 W. W. R. 138; 47 Can. Crim. Cas. 115.—CAN.

aaa (p. 106) iv. —.—.—.]—*Act mandatory.*—*R. v. CHERRY*, [1927] 3 D. L. R. 455; [1927] 2 W. W. R. 290; 48 Can. Crim. Cas. 180; 36 Man. L. R. 565.—CAN.

aaa (p. 106) v. —.—.—.]—*Notwithstanding 1927 (c. 33), s. 5.*—*R. v. GASPARD* (Man.), [1927] 3 W. W. R. 301; 48 Can. Crim. Cas. 358.—CAN.

aaa (p. 106) vi. —.—.—.]—*Arrest—Without warrant—Failure to prove arrest by constable—Arrest invalid.*—*R. v. ZENICK* (Man.), [1927] 3 W. W. R. 424; 48 Can. Crim. Cas. 398.—CAN.

aaa (p. 106) vii. —.—.—.]—*On Sunday—Arrest valid.*—*R. v. SMITH*, [1927] 2 D. L. R. 982; [1927] 1 W. W. R. 734; 47 Can. Crim. Cas. 345; 36 Man. L. R. 386.—CAN.

aaa (p. 106) viii. —.—.—.]—*Keeping for sale.*—*R. v. NEPP*, [1927] 3 W. W. R. 353; 48 Can. Crim. Cas. 275; 37 Man. L. R. 5.—CAN.

aaa (p. 106) ix. —.—.—.]—*Unlawful possession of liquor—Liquor on premises not private dwelling-house—Previous conviction in respect of same premises.*—*R. v. RICARD*, [1927] 4 D. L. R. 777; [1927] 2 W. W. R. 584; 48 Can. Crim. Cas. 252; 37 Man. L. R. 1.—CAN.

aaa (p. 106) x. —.—.—.]—*Trial—Whether local venue.*—*R. v. DEE* (Man.), [1927] 4 D. L. R. 1065; [1927] 3 W. W. R. 529; 49 Can. Crim. Cas. 57.—CAN.

aaa (p. 106) xi. —.—.—.]—*Stay of proceedings—Crown entitled to stay proceedings.*—*R. (THOMPSON) v. HAMMATT* (Man.), [1926] 3 W. W. R. 350.—CAN.

aaa (p. 106) xii. —.—.—.]—*Sentence—Imprisonment with hard labour—Invalid.*—*R. v. STEELE* (Man.), [1926] 2 W. W. R. 370; 45 Can. Crim. Cas. 259.—CAN.

aaa (p. 106) xiii. —.—.—.]—*Power of court to amend.*—*R. v. HALE* (Man.), [1927] 2 W. W. R. 320; 49 Can. Crim. Cas. 253.—CAN.

aaa (p. 106) xiv. —.—.—.]—*Fine—Amount—Offence by company.*—*R. v. SHEA'S WINNIPEG BREWERY, LTD.*, [1927] 3 W. W. R. 258; 48 Can. Crim. Cas. 322; 37 Man. L. R. 13.—CAN.

aaa (p. 106) xv. —.—.—.]—*Appeal—Hearing by county court judge—Cannot be reviewed by certiorari.*—*R. v. CHAPMAN*

Man.) (1926), 45 Can. Crim. Cas. 286.—CAN.

aaa (p. 106) xvi. — *Compliance with Excise Act—Whether defence.*—The giving of the notice provided for by sect. 195 of Excise Act, R. S. C. 1927, is not a defence to a charge of unlawfully having liquor not purchased from the commission under Government Liquor Control Act, 1928.—R. v. MCKATOR, [1932] 1 W. W. R. 46; 2 D. L. R. 159; 40 Man. L. R. 103; 57 C. C. C. 200.—CAN.

aaa (p. 106) xvii. — *Costs—Of informant—Taxation.*—R. v. SIMONVICH (Man.), [1927] 3 W. W. R. 503; 48 Can. Crim. Cas. 399.—CAN.

aaa (p. 106) xviii. — *Proprietor of hotel with bottle in hallway—Mens rea.*—*Mens rea* is an essential element of the offence, under Manitoba Temperance Act, of having intoxicating liquor in a place other than the dwelling-house in which accused resides, without the licence therefore required by the Act. Therefore, where a hotel proprietor charged with said offence was convicted mainly on the fact that he was found in the hallway of the hotel with an open bottle in his hand containing intoxicating liquor, his explanation of its possession being that he had picked it up in the hall, thinking it to be empty, & intending to remove it, it was held, on appeal, that the explanation was a reasonable one, & since if true, as it appeared to be, it established an absence of *mens rea* the conviction should be quashed.—R. v. MCMALE, [1928] 2 D. L. R. 621; [1928] 1 W. W. R. 849; 49 Can. Crim. Cas. 320; 37 Man. L. R. 311.—CAN.

aaa (p. 106) xix. — *Proof of conviction under.*—A document headed "Certificate of Conviction" & purporting to be a copy of a conviction under Manitoba Temperance Act, 1924, is not proof under Govt. Liquor Control Act, 1928, s. 151 (4), of a conviction under the former Act.—R. v. RICEBERG, [1929] 1 D. L. R. 220; 50 Can. Crim. Cas. 387; [1928] 3 W. W. R. 534.—CAN.

aaa (p. 106) xx. *Liquor Control Act, 1927—Reasons for judgment given by judge—Judgment effective without notice to accused.*—Re R. v. GALBRAITH (1925), 50 Can. Crim. Cas. 398.—CAN.

aaa (p. 106) xxi. *Government Liquor Control Act, 1928—Previous conviction—Meaning of.*—"Previous conviction" in above Act, s. 178, means a conviction under that Act, & does not refer to convictions under prior Acts now repealed.—R. v. RICEBERG, [1929] 1 D. L. R. 220; 50 Can. Crim. Cas. 387; [1928] 3 W. W. R. 534.—CAN.

(p. 106) xxii. — *Order of proceedings.*—Sect. 178 (a) of Government Liquor Control Act, 1928, which prescribes the order of the proceedings where a previous conviction is charged, is directory only; & if the case is one in which evidence of a previous conviction is a necessary element of the subsequent offence, the spirit of the sect. is not violated by the production of this evidence before the accused is questioned as to the previous conviction, where the essential condition of the sect. that the accused be not questioned before there is an adjudication on the second offence is observed.—R. v. BILOWUS, [1930] 2 W. W. R. 251; 3 D. L. R. 743; 53 Can. C. C. 278; 39 Man. L. R. 15.—CAN.

aaa (p. 106) xxiii. — *Liquors which are intoxicating.*—*Whether "beer" & "wine" within words.*—The fact that a beverage with respect to which a charge is laid under Govt. Liquor Control Act, 1928, is called "beer" or "wine" is not sufficient to enable a magistrate to determine judicially that it is intoxicating. The Act does not deal with everything which goes under the name of "beer" or "wine," whether it be intoxicating or not. The

words "which are intoxicating" in sect. 2 (21), which defines "liquor," refer to all classes of "liquor" dealt with by the Act.—R. v. MOXLEY, [1929] 1 D. L. R. 202; 50 Can. Crim. Cas. 408; [1928] 3 W. W. R. 537, 576.—CAN.

aaa (p. 106) xxiv. — *Unlawful possession of liquor—Home-made wine.*—R. v. TILBURY, [1928] 3 W. W. R. 127.—CAN.

aaa (p. 106) xxv. — *Necessity for mens rea.*—R. v. NEDELEC (Man.), [1929] 4 D. L. R. 896; 52 Can. Crim. Cas. 34.—CAN.

aaa (p. 106) xxvi. — *—*—*—*—*Held:* on a prosecution for unlawfully having liquor in a prohibited place the fact that the accused did not know that the place was prohibited is no defence where, at least, he did not have, & had not applied for, a permit, & it is found that the liquor discovered on the premises belonged to him.—R. v. JENSEN, [1937] 1 W. W. R. 561; 2 D. L. R. 600; 45 Man. L. R. 47; 68 Can. C. C. 35.—CAN.

aaa (p. 106) xxvii. — *—*—*—*—*Held:* for the reasons given in R. v. Jensen:—*Held:* knowledge by the accused that the premises were prohibited was not essential to his guilt on a charge of having liquor in a prohibited place, contrary to Govt. Liquor Control Act, 1928.—R. v. BUDNARSKI, [1937] 1 W. W. R. 604; 2 D. L. R. 675; 45 Man. L. R. 88; 68 Can. C. C. 171.—CAN.

aaa (p. 106) xxviii. — *Burden of proof.*—R. v. TOKARCHUK (Man.), [1929], 51 Can. Crim. Cas. 380.—CAN.

aaa (p. 106) xxix. — *Evidence of.*—Bottles of liquor & empty bottles concealed under garage floor held sufficient to prove unlawful possession under Govt. Liquor Control Act, 1928 (Man.).—R. v. BIAS, [1936] 3 D. L. R. 796; 66 Can. C. C. 157.—CAN.

aaa (p. 106) xxx. — *Circumstances raising presumption that liquor kept for sale.*—R. v. BLOOM (Man.), [1929], 52 Can. Crim. Cas. 45.—CAN.

aaa (p. 106) xxxi. — *Issue of permit—Effect.*—Where a general permit for the purchase of liquor has been issued under Govt. Liquor Control Act, 1928, after proper approval given, with respect to a "residence" of the kind defined in sect. 2 (33) (b) of the Act, the permit holder has the right, after the expiration of the permit, to keep on said premises liquor which he lawfully purchased while the permit was in force.—R. v. HAMELIN, [1930] 1 D. L. R. 672; [1929] 3 W. W. R. 375; 52 Can. Crim. Cas. 200; 38 Man. L. R. 318.—CAN.

aaa (p. 106) xxxii. — *Object of Act—Suppression of transactions & not manufacture.*—R. v. NEDELEC (Man.), [1929] 4 D. L. R. 896; 52 Can. Crim. Cas. 34.—CAN.

aaa (p. 106) xxxiii. — *Having liquor in place other than residence.*—R. v. TWARDOWSKI, [1930] 1 W. W. R. 651; 53 Can. C. C. 202 38 Man. L. R. 627.—CAN.

aaa (p. 106) xxxiv. — *—*—*—*—*A conviction for having liquor in a place other than the residence of the accused affirmed on the ground that the accused was guilty by virtue of sect. 181 of Government Liquor Control Act, 1928, which provides that an aider or abettor of an offence under the Act is a party to & guilty of that offence. The liquor was found in a motor car which was being driven by the accused.*—R. v. LICKLIDER, [1933] 2 W. W. R. 585; 60 C. C. C. 131; 41 Man. L. R. 375.—CAN.

aaa (p. 106) xxxv. — *"Public place"—What amounts to.*—*Held:* the rural shop in question herein was a "public place" during the hours it was open for business.—R. v. SEILKE, [1930] 1 W. W. R. 653; 3 D. L. R.

630; 53 Can. C. C. 237; 38 Man. L. R. 549.—CAN.

aaa (p. 106) xxxvi. — *Inference from frequency of purchase.*—Sect. 171 of Government Liquor Control Act, 1928, which empowers a magistrate, on trying a charge of unlawfully selling or purchasing liquor or of unlawfully having or keeping it, to draw inferences of fact from the kind & quantity of liquor found in possession of the accused or on his premises, etc., & from the frequency with which liquor was received therein "or is removed therefrom," applies to liquor which the accused is shown to have purchased prior to the laying of the charge but which was not found on his premises or in his possession.—R. v. PAUWELS, [1932] 1 W. W. R. 68; 2 D. L. R. 339; 40 Man. L. R. 117; 57 C. C. C. 178.—CAN.

d (p. 107) i. — *Offences under sect. 20 triable by single justice.*—Ex p. LEVASSEUR (N. B.) (1926), 46 Can. Crim. Cas. 126.—CAN.

d (p. 107) ii. *Intoxicating Liquor Act (N. B.), 1927—Conviction under—Contents of affidavit on appeal from.*—R. v. CHATEAU RESTIGOUCHÉ, [1928] 4 D. L. R. 292; 50 Can. Crim. Cas. 331.—CAN.

d (p. 107) iii. — *Sale of liquor by employee—Contrary to orders of corporation—Liability of corporation.*—R. v. CHATEAU RESTIGOUCHÉ, [1928] 4 D. L. R. 292; 50 Can. Crim. Cas. 331.—CAN.

d (p. 107) iv. — *Appeal to county judge—Proof of service of notice of appeal.*—R. v. CYR, [1928] 4 D. L. R. 239; 50 Can. Crim. Cas. 316.—CAN.

d (p. 107) v. — *Sufficiency of notice.*—R. v. HANSON (1931), 55 Can. C. C. 406.—CAN.

d (p. 107) vi. — *Lawful possession of liquor—Onus of proof of crime on Crown.*—R. v. GIBBS (N. B.) (1929), 52 Can. Crim. Cas. 179.—CAN.

d (p. 107) vii. — *Restriction order of Control Board—Must prescribe period to remain in force.*—R. v. NEW BRUNSWICK LIQUOR CONTROL BOARD, [1931] 3 M. P. R. 290.—CAN.

d (p. 107) viii. — *Onus of proof.*—The principle laid down in Winnipeg Electric Co. v. Geel, [1932] A. C. 690, is applicable to cases under Intoxicating Liquor Act, 1927.—R. v. JONES, [1934] 2 D. L. R. 499; 6 M. P. R. 599; 61 C. C. C. 346.—CAN.

d (p. 107) ix. — *Sufficiency of evidence.*—Under Intoxicating Liquor Act, R. S. N. B., 1927, there must be sufficient evidence of possession to establish a *prima facie* case.—R. v. LORETTE, [1935] 2 D. L. R. 711; 8 M. P. R. 534; 63 C. C. C. 297.—CAN.

d (p. 107) x. — *Illegal possession—Evidence of.*—There is *prima facie* evidence of illegal possession under N. B. Intoxicating Liquor Act, 1927, when liquor not purchased from the commission is found in an outhouse belonging to deft.—R. v. REARDON, [1935] 4 D. L. R. 415; 10 M. P. R. 131; 64 Can. C. C. 292.—CAN.

d (p. 107) xi. — *—*—*—*—*One who has unlawful possession of a bottle which he throws away to escape conviction may be convicted of unlawful possession.*—R. v. MARTIN, [1936] 4 D. L. R. 335; 66 Can. C. C. 286.—CAN.

d (p. 107) xii. — *Appeal—Conditions precedent.*—Custody of accused or his recognisance are conditions precedent to hearing of appeal under New Brunswick Intoxicating Liquor Act.—R. v. GIDNEY, [1936] 3 D. L. R. 800; 66 Can. C. C. 153.—CAN.

d (p. 107) xiii. — *Certificate of analyst—Whether applicable to charge under Customs Act.*—On a charge under sect. 217 of Customs Act, R. S. C. 1927.—*Held:* the certificates of analysis of a provincial analyst are



only made evidence by Intoxicating Liquor Act, R. S. N. B., for the purpose of that Act.—*R. v. LANTIERNE* (1938), 12 M. P. R. 571; 7 F. L. J. (Can.) 260.—CAN.

¶ (p. 107) i. — *Whether mens rea necessary.*—*R. v. WESTLAKE*, [1936] 1 W. W. R. 139; 3 D. L. R. 70; 65 Can. C. O. 382.—CAN.

¶ (p. 107) i. — *Appeal—Costs—Taxation.*—*R. v. BROWN* (Sask.) (1925), 45 Can. Crim. Cas. 268.—CAN.

¶ (p. 107) ii. — *Sale of beer*  
*Judicial notice of nature of beer.*—Beer, being a spirituous & also a malt liquor, comes within the first of the three classes of liquor referred to in the definition of "liquor" in above Act, the Act in force at the time of the transaction in question herein, & falls within the absolute prohibitions of sects. 10 & 41 of said Act without any proof that it is intoxicating. Judicial notice of the fact that beer is both a spirituous & malt liquor may be taken once the liquor in question is shown to be beer.—*QUINN v. HUEL*, [1928] 3 W. W. R. 716.—CAN.

¶ (p. 107) iii. *Liquor Act (Sask.)*, 1925 (c. 53)—*Affidavit of merits—Condition precedent to appeal.*—*By corporation or association.*—*R. (McDOUGALL) v. ARMY & NAVY VETERANS ASSOC. OF REGINA* (Sask.), [1926] 3 W. W. R. 695; 46 Can. Crim. Cas. 389.—CAN.

¶ (p. 107) iv. — *Unlawful possession of liquor—What amounts to.*—*R. v. HAGERUP* (Sask.) (1927), 48 Can. Crim. Cas. 95.—CAN.

¶ (p. 107) v. — *Second offence—First conviction more than six months previously—Increased penalty for second offence applicable.*—*R. v. MERRITT* [1927] 1 D. L. R. 940; [1927] 1 W. W. R. 53; 47 Can. Crim. Cas. 74; 21 Sask. L. R. 237.—CAN.

¶ (p. 107) vi. — *Conviction for purchasing greater quantity than allowed—Uncorroborated evidence of accomplice.*—The rule that it is dangerous to convict on the uncorroborated evidence of an accomplice applied in quashing, on appeal, a conviction for unlawfully purchasing from the Govt. Liquor Board a greater quantity of liquor than is allowed to be purchased on any one day. The witness held to have been an accomplice was a person whom the accused had asked to purchase the liquor for him as an agent & who knew that the accused had already purchased his lawful quantity.—*R. v. BEALE*, [1928] 2 D. L. R. 325; [1928] 1 W. W. R. 657; 49 Can. Crim. Cas. 292; 22 Sask. L. R. 293.—CAN.

¶ (p. 107) vii. — *Charge of selling liquor—Sale of beer proved—Onus of proof of right on accused.*—The word "liquor" in Liquor Act, 1925, 1924-25, c. 53, includes "beer" unless the context otherwise requires. Therefore, where an accused is charged with selling liquor unlawfully, sect. 135, which places on a person so accused the burden of proving the right to sell it, covers the case where the evidence for the prosecution establishes a sale of "beer."—*R. v. CHUTT*, [1928] 4 D. L. R. 581; [1928] 2 W. W. R. 377; 50 Can. Crim. Cas. 143; 22 Sask. L. R. 525.—CAN.

¶ (p. 107) viii. — *Keeping for sale—Whether proof of intoxicating character necessary.*—Where on the hearing of a charge of keeping liquor for sale contrary to sect. 78 of Liquor Act, 1925, it is proved that the accused had beer for sale, evidence of its intoxicating character is not necessary to sustain a conviction.—*R. v. CORBELL*, [1930] 2 W. W. R. 334; 53 Can. C. O. 319; 24 S. L. R. 607.—CAN.

¶ (p. 107) ix. — *Power of Liquor Board to sue & be sued.*—Liquor Board of Saskatchewan was created by Liquor Act, 1925, & as a board distinct in entity from the members thereof & from the Crown &, although not

expressly declared to be a body corporate empowered to sue & be sued, the necessary intendment of the Act in view of the powers given the Board is that it may under its designated name avail itself of & be made amenable to the ordinary process of the courts; it is not necessary in order to support a finding of that intendment to conclude that the Board is a body corporate.—*BANK OF MONTREAL v. BOLE*, [1931] 1 W. W. R. 203.—CAN.

¶ (p. 107) x. *Liquor Act, R. S. S., 1930—Appeal—Time for—Extension.*—*R. v. PELLETIER*, [1931] 1 W. W. R. 720.—CAN.

¶ (p. 107) xi. — *Service of notice by informant—Validity.*—The informant himself served the notice of appeal upon the justice of the peace who had heard the charge & upon the accused. Counsel for the accused objected that the ct. had, therefore, no jurisdiction to hear the appeal.—*Held*: the objection should be sustained & the appeal dismissed with costs.—*R. v. KENNEDY*, [1933] 2 W. W. R. 213.—CAN.

¶ (p. 107) xii. — *Possession in place other than dwelling-house—Whether detached buildings included.*—*R. (COREY) v. MOSER*, [1932] 1 W. W. R. 35.—CAN.

¶ (p. 107) xiii. — *"Appliance"—Barrel used as refrigerator.*—*R. (FELKER) v. CHOUINARD*, [1932] 3 W. W. R. 669.—CAN.

¶ (p. 107) xiv. — *Validity of sect. 111.*—The offence under sect. 111 of Liquor Act, R. S. S., 1930, of bribing a police officer to permit the briber to sell liquor contrary to said Act is not an offence covered by sect. 157 of the Criminal Code. Sect. 111 is ancillary to the regulation of a matter within provincial jurisdiction &, since it does not, with respect at any rate to said offence, infringe on sect. 157 of the Code, it is not in said respect at least *ultra vires*.—*R. v. YUEN WONG*, [1933] 2 W. W. R. 215; 3 D. L. R. 746; 60 C. C. O. 1.—CAN.

¶ (p. 107) xv. — *Onus of proof.*—On a charge of unlawfully keeping liquor for sale the Crown makes out a *prima facie* case by proving that the accused had in his possession or charge or control liquor in respect of which he is being prosecuted, & then the burden is on the accused of proving the right to have it or that it is kept for a lawful purpose.—*R. v. GILCHRIST*, [1936] 1 W. W. R. 725; 3 D. L. R. 238; 65 Can. C. O. 356.—CAN.

¶ (p. 107) xvi. — *Since sect. 116 (3) of Liquor Act, R. S. S., 1930, provides that, if liquor is found in a place for which a search warrant has been issued or in any place to which sect. 115 applies, the occupant of the premises & the owner of the liquor "shall, until the contrary is proved, be deemed to have kept such liquor for sale contrary to the provisions of this Act," the common law rule as to the onus of proof is thereby abrogated, & the accused must prove his innocence to the satisfaction of the magistrate.*—*R. (MITCHELL) v. KIEHL*, [1937] 1 W. W. R. 68.—CAN.

¶ (p. 107) xvii. — *Liability for aiding commission of offence.*—The effect of sect. 108 of Liquor Act, R. S. S. 1930, is that every person who contributes to the effecting of an unlawful sale of liquor is liable to be convicted for unlawfully selling. Therefore a taxi driver who with money given him by a customer for that purpose bought liquor from a bootlegger was guilty of unlawfully selling the liquor.—*R. (McDOUGALL) v. BALBAR*, [1937] 3 W. W. R. 394.—CAN.

¶ (p. 107) xviii. — *Conviction for subsequent offences.*—In order for a man convicted of violations of sect. 78 of Liquor Act, R. S. S., 1930, to be found guilty as a second or third offender, it is not necessary that the offences should be exactly the same.—

*R. v. McCRAIG*, [1936] 1 W. W. R. 651; 3 D. L. R. 605; 66 Can. C. O. 113.—CAN.

¶ (p. 107) xviii. — *Validity of information & conviction.*—*Appl't.* was convicted for that he "did unlawfully have liquor in a package other than one which had been sealed, with the official seal or wrapped in an official wrapper whilst containing the liquor, contrary to the provisions of sect. 97 of Saskatchewan Liquor Act." The information was in the same words:—*Held*: the words "not including a decanter or other receptacle containing a supply for immediate consumption," which words were not included in the conviction or information, describe a necessary ingredient of the offence, since to constitute illegality in the possession of liquor formation & conviction in question did not describe an offence, & the conviction should be quashed.—*R. v. WALCHUK*, [1938] 1 W. W. R. 208; 1 D. L. R. 776; 7 F. L. J. (Can.) 246.—CAN.

¶ (p. 107) xix. — *What is legal container.*—*R. v. SWANSON*, [1938] 2 W. W. R. 463.—CAN.

¶ (p. 107) i. *Government Liquor Act (B. C.)*, 1924 (c. 146)—*Keeping liquor in hotel—What is part of hotel—Question of fact.*—*R. (LITTEGOS) v. RILEY* (B. C.), [1926] 2 W. W. R. 534.—CAN.

¶ (p. 107) ii. — *In restaurant—Liquor found in place accessible to public—Conviction quashed.*—*R. v. LEE KAM WAY* (B. C.), [1927] 3 W. W. R. 143.—CAN.

¶ (p. 107) iii. — *For sale—Liquor inside chocolates.*—*R. v. PURDY* [1927] 1 W. W. R. 890; 48 Can. Crim. Cas. 152; 38 B. C. R. 267.—CAN.

¶ (p. 107) iv. — *One sale only.*—Appeal from a conviction for unlawfully keeping liquor for sale. The evidence on which the conviction was made was of one sale in a house owned by accused's husband & in which she lived with him.—*Held*: the appeal must be allowed.—*R. v. CRAMER*, [1937] 2 W. W. R. 93.—CAN.

¶ (p. 107) v. — *Purchase of immoderate amount.*—Where a person is charged with unlawfully keeping intoxicating liquor for sale, the fact that the accused purchased an immoderate amount of liquor from the government vendor is in itself evidence of an overt act of wrongdoing which the accused is called upon to answer & from which the justice may, under sect. 90 of Government Liquor Act, R. S. B. C., 1924, infer the commission of such an act. The question of what constitutes an immoderate amount of liquor is one of fact depending on all the circumstances of the case.—*R. v. OULLETTE*, [1930] 3 W. W. R. 37; 53 Can. C. O. 405.—CAN.

¶ (p. 107) vi. — *Supplying liquor to infant—Mens rea not necessary.*—*R. v. McDONALD*, [1927] 1 W. W. R. 867; 48 Can. Crim. Cas. 208; 38 B. C. R. 298.—CAN.

¶ (p. 107) vii. — *Interdiction order—Conditions precedent.*—*R. v. GRANT* (B. C.), [1926] 4 D. L. R. 784; [1926] 3 W. W. R. 253; 46 Can. Crim. Cas. 182.—CAN.

¶ (p. 107) viii. — *Burden of proof—On accused.*—*R. v. NEW DOMINION CLUB* (1925), 35 B. C. R. 502.—CAN.

¶ (p. 107) ix. — *Accused entitled to benefit of reasonable doubt.*—*R. (ANDERSON) v. PERRI*, [1926] 1 W. W. R. 551; 48 Can. Crim. Cas. 36; 37 B. C. R. 289.—CAN.

¶ (p. 107) x. — *—*—*R. v. LONG*, [1933] 3 W. W. R. 211.—CAN.

¶ (p. 107) xi. — *—*—*Where liquor legally purchased is legally possessed or controlled, some overt act of an illegal nature must be proved by the Crown in order to raise the presumption created by sect. 91*



of the Government Liquor Act, R. S. B. C., 1924; but where there is evidence of either illegal purchase or illegal possession, sect. 91 casts upon the accused the onus of proving his innocence of a charge of violating the Act in one of the ways referred to in sect. 91.—R. v. ZAWADA, [1930] 1 W. W. R. 92; 53 Can. C. C. 411.—CAN.

rr (p. 107) xii. — *Trial—Whether local venue.*—R. v. LYNCH, [1927] 1 W. W. R. 502; 47 Can. Crim. Cas. 176; 38 B. C. R. 134.—CAN.

rr (p. 107) xiii. — *Previous conviction charged—Procedure.*—Under sect. 83 (a) of Government Liquor Act, R. S. B. C., 1924, where a person accused under the Act is also charged with a previous conviction, the proper procedure for the magistrate trying the case to follow is that he should in the first instance read to the accused only that portion of the information dealing with the subsequent offence & should adjudicate thereon before asking the accused whether he was so previously convicted; moreover he should not before adjudicating on the subsequent offence read the whole information himself.—R. v. BRANDOLIN, [1930] 1 W. W. R. 890; 54 Can. C. C. 122; 42 B. C. R. 536.—CAN.

rr (p. 107) xiv. — *Room in an inn.*—R. v. ROWAN, [1930] 2 W. W. R. 277; *sub nom. Ex p. ROWAN*, 54 Can. C. C. 197; 42 B. C. R. 559.—CAN.

rr (p. 107) xv. — *"Room in an inn"—What amounts to.*—A room in the rear of the ground floor of a rooming house was used exclusively by the proprietor & his family as a kitchen & living-room, & the roomers were admitted therein only on special invitation.—*Held:* the room was not a "room in an inn" within sect. 48 (2) of Government Liquor Act, R. S. B. C., 1924.—R. v. STEWART, R. v. DE GRASSIO, R. v. KISSELL, [1930] 1 W. W. R. 941.—CAN.

rr (p. 107) xvi. — *Previous conviction—Proof of.*—Where an information under Government Liquor Act, R. S. B. C., 1924, alleges a previous conviction, it is not contrary to sect. 93 thereof for the magistrate to read the whole of the information to the accused before proceeding with the hearing of the charge of the subsequent offence. The certificate in question herein, purporting to be that of the registrar of a county ct.—*Held:* not to comply with the requirements of sect. 93 (b) as to proof of a previous conviction.—R. v. DALBERGH, [1931] 1 W. W. R. 260; 55 Can. C. C. 177; 43 B. C. R. 474.—CAN.

rr (p. 107) xvii. — *Police spy—Whether accomplice.*—A police spy purchasing liquor is not liable as an accomplice under Govt. Liquor Act, R. S. B. C. 1924.—R. v. GERWIN (1937), 68 Can. C. C. 282.—CAN.

rr (p. 107) xviii. *Government Liquor Act, 1930—Unlawful keeping—Charge against wife of owner.*—Where a husband is the owner of premises where liquor is unlawfully kept, his wife cannot be charged with unlawful keeping, under Govt. Liquor Act, 1930.—R. v. CRAMER, [1937] 2 D. L. R. 76; 68 Can. C. C. 129.—CAN.

s (p. 108) i. — *Western Wine & Liquor Co., R. v. WOOTEN (Alta.),* [1918] 1 W. W. R. 55; 39 D. L. R. 897; 39 Can. Crim. Cas. 307.—CAN.

sg (p. 108) i. — *Supplying liquor to infant—Ignorance of age immaterial.*—R. v. MAINFROID, [1926] 1 D. L. R. 1013; [1926] 1 W. W. R. 465; 45 Can. Crim. Cas. 204; 22 Alta. L. R. 17.—CAN.

hh (p. 108) i. — *No appeal from statutory judgment on filing of copy of conviction of corporation.*—R. v. ST. ELMO HOTEL CO., LTD. (Alta.), [1926] 4 D. L. R. 864; [1926] 3 W. W. R. 324; 46 Can. Crim. Cas. 301.—CAN.

hh (p. 108) ii. — *Local option areas—Creation.*—*Re LOCAL OPTION PROVISION OF GOVERNMENT LIQUOR CONTROL ACT OF ALBERTA*, R. HARDISTY & RIBSTONE, [1927] 4 D. L. R. 83; [1927] 2 W. W. R. 711; 22 Alta. L. R. 592.—CAN.

hh (p. 108) iii. — *"A hamlet" & territory contiguous thereto were created a local option area, & a plebiscite was taken therein which was decided in the negative. After the creation of the area, but before the taking of the plebiscite, the hamlet was created a village, with an area wholly within that of said local option area. On a reference by the Lieutenant-Governor in Council for the opinion of the ct.—Held:* it was competent for the Lieutenant-Governor in Council to create such village a local option area for the purpose of taking a local option plebiscite therein before the expiration of two years from the taking of the plebiscite in said enlarged hamlet.—*Re FAIRVIEW*, [1930] 2 W. W. R. 542; 54 Can. C. C. 160; 24 Alta. L. R. 603.—CAN.

hh (p. 108) iv. — *Seizure on Sunday—Legality.*—A search & seizure made, without warrant, by a preventive officer of the Alberta Liquor Control Board under the authority conferred on him by sect. 113 (2) of the Government Liquor Control Act of Alberta is not illegal because made on a Sunday.—*Re ex rel. BEAUMONT v. POSTERNAK*, [1929] 2 W. W. R. 487; 51 Can. Crim. Cas. 426; 24 Alta. L. R. 302.—CAN.

hh (p. 108) v. — *WRIGHT (Alta.),* [1929] 1 W. W. R. 917; 52 Can. Crim. Cas. 285.—CAN.

hh (p. 108) vi. — *Interdiction order—Jurisdiction to make ex parte.*—A valid interdiction order under sect. 101 of Government Liquor Control Act of Alberta can be made *ex parte*.—R. v. JONES, [1931] 1 W. W. R. 808; 4 D. L. R. 199; 55 Can. C. C. 359; *revg.*, [1931] 1 W. W. R. 742.—CAN.

hh (p. 108) vii. — *Forfeiture of car—What must be proved.*—A magistrate is not justified in ordering the forfeiture of a motor car under sect. 116 of Government Liquor Control Act of Alberta unless the fact that the car had been seized has been established by evidence properly receivable or unless, where the accused pleaded guilty, there was an allegation in the information & complaint that the car was under seizure.—*Re KIRKHAM & R.*, [1930] 3 W. W. R. 10; *sub nom. Re R. v. SNYDER*, 54 Can. C. C. 149.—CAN.

hh (p. 108) viii. — *Room ceasing to be private residence.*—Accused was convicted under Government Liquor Control Act of Alberta of having liquor in his possession without a permit entitling him to do so. The facts found by the magistrate were that the accused had an individual permit under which the liquor in question was bought, that the liquor was found in his possession in the room in which he resided, but that the room had ceased to be a private residence within the meaning of the Act because of the fact that a prior occupant had been convicted of a breach of the Act, & that there was no evidence that the accused had notice of that fact.—*Held:* the conviction should be affirmed.—R. v. PEARNS, [1930] 2 W. W. R. 296; 54 Can. C. C. 194; 24 Alta. L. R. 530.—CAN.

hh (p. 108) ix. — *Unlawful possession—Compliance with Excise Act—Whether defence.*—The fact that a person has given the notice provided for by sect. 195 of Excise Act, R. S. C., 1927, that he intends to make home-brew, & has received an acknowledgment thereof from the Collector of National Revenue, is not a defence to a charge laid under sect. 80 (3) of Government Liquor Control Act

Alberta, 1924, of having in his possession liquor not purchased from an official vendor or a druggist authorised to sell same.—R. v. EDGERLY, [1932] 2 W. W. R. 109.—CAN.

hh (p. 108) x. — *Purchase by police officer.*—The fact that a purchase of liquor which if made by anyone else would be a violation of Govt. Liquor Control Act of Alberta, 1924, is made by a police officer for the purpose of obtaining evidence on which to prosecute the seller, is not a ground for holding that the officer is not guilty of the offence, unless he comes within the protection of sect. 11 (5), (6) of Alberta Police Act, R. S. A., 1922.—R. v. PETHERAN, [1936] 1 W. W. R. 287; 2 D. L. R. 24; 65 Can. C. C. 151; 5 F. L. J. (Can.) 291.—CAN.

sr. *Alcoholic Liquor Act (Que.), 1925—Necessity for notice of appeal—Right of justices to suspend sentence.*—*QUEBEC LIQUOR COMMISSION v. THIBAUDEAU* (1927), 50 Can. Crim. Cas. 434; 44 Que. K. B. 417.—CAN.

sv. — *Illegal sale—Who may be liable.*—A person purchasing liquor at the request of agents of the liquor Commission, receiving no commission for so doing, is not liable for illegal sale under Liquor Act, R. S. Q., 1925.—*COUTRE v. QUEBEC LIQUOR COMMISSION*, [1936] 1 D. L. R. 596; 65 Can. C. C. 69.—CAN.

st. *Customs Act, R. S. C., 1906 (c. 48)—Burden of proof—Of legal importation of goods—On accused.*—*Re R. v. MCKENZIE* (1926), 45 Can. Crim. Cas. 144; 58 N. S. R. 313.—CAN.

sv. S. P. *Re R. v. BLANK*, [1926] 1 D. L. R. 323; 45 Can. Crim. Cas. 82; 58 N. S. R. 294.—CAN.

sw. — *Not on bail.*—*R. v. LE BLANC (N. B.)*, [1927] 2 D. L. R. 793; 47 Can. Crim. Cas. 302.—CAN.

sx. — *Removal of liquor unlawfully imported into Canada.*—*R. v. BAIG*, [1927] 1 D. L. R. 896; 47 Can. Crim. Cas. 58; 59 N. S. R. 86.—CAN.

sy. — *Appeal—Right of.*—*R. v. BAIG*, [1927] 1 D. L. R. 896; 47 Can. Crim. Cas. 58; 59 N. S. R. 86.—CAN.

sz. — *Non-compliance with sect. 82.*—*R. v. ROCHIE* (1927), 48 Can. Crim. Cas. 210; 59 N. S. R. 218.—CAN.

sa. *Inland Revenue Act, R. S. C., 1906 (c. 51)—Unlawful brewing—Evidence.*—*R. v. SMITH (Ont.)*, [1926] 3 D. L. R. 419; 46 Can. Crim. Cas. 218.—CAN.

sb. — *Prosecution under—Condition precedent—Giving of list of seized articles.*—*R. (WILLIAMS) v. YARISH (Man.)*, [1926] 3 W. W. R. 586.—CAN.

sc. — *Certificate of analysis—Contents.*—*R. (WILLIAMS) v. YARISH (Man.)*, [1926] 3 W. W. R. 586.—CAN.

sd. — *Conviction—Form of.*—*R. (D. L. R.)*, [1926] 2 W. W. R. 582; 40 Can. Crim. Cas. 151; 20 Sask. L. R. 591.—CAN.

se. *Excise Act, R. S. C., 1906 (c. 51)—Possessing wash—Conviction—Form of.*—*R. v. DRAGANI*, [1927] 1 W. W. R. 914; 47 Can. Crim. Cas. 301; 38 B. C. R. 420.—CAN.

sf. — *Brewing beer without licence.*—*R. (HANNA) v. ERNEST (B. C.)*, [1927] 1 W. W. R. 961; 48 Can. Crim. Cas. 190.—CAN.

sg. *Excise Act, R. S. C. 1927, c. 60—Unlawful possession under—Beer brewed for own use—After notice.*—*R. v. KOSTYNIUK* (1928), 50 Can. Crim. Cas. 374.—CAN.

sj. — *TUDDENHAM (N. B.)*, [1929] 1 D. L. R. 813; 51 Can. Crim. Cas. 24.—CAN.

sl. — *Sufficiency of evidence.*—*R. v. BADIUK*, [1929] 2 W. W. R. 419; 51 Can. Crim. Cas. 417; 38 Man. L. R. 239.—CAN.

**am.** — *Certificate of analyst.*—R. v. KOLKOWKA, [1933] 1 W. W. R. 299.—CAN.

**manufacture or importation under Excise Act** may be proved by certificates of analysts that the liquor is not of the kind sold by the Liquor Commission.—DESROCHERS v. R. (1937), 69 Can. C. C. 322.—CAN.

**sp.** — *Beaudet v. R.* (1937), 69 Can. C. C. 389.—CAN.

**sr.** — *Necessity for mens rea.*—R. v. BLAIR, [1931] 2 W. W. R. 893.—CAN.

**st.** — *In order to be guilty under sect. 176 of Excise Act, R. S. C. 1927, of unlawfully having a still, etc., "in his possession," an accused in whose actual possession such apparatus is found must have known what it was.*—R. v. HOARE, [1932] 1 W. W. R. 470; 44 B. C. R. 557.—CAN.

**sq.** — *Possession by captain of ship.*—A ship's crew are not liable under Excise Act, R. S. C. 1927, for illegal possession, where the liquor was in the possession of the captain.—R. v. CREASER (1933), 59 C. C. 178.—CAN.

**st.** — *Seizure of still by excise officer—After seizure by provincial officer.*—After part of a still had been seized at the residence of the accused by a provincial officer & placed in the vault in the Law Courts for safe keeping, it was there seized by an excise officer acting under a writ of assistance.—*Held:* without dealing with the legality of the seizure by the provincial officer, that the seizure by the excise officer was properly made.—R. v. DUROUSSEL, [1933] 1 W. W. R. 278; 2 D. L. R. 446; 41 Man. L. R. 15; 59 C. C. 263.—CAN.

**sn.** — *Brewing beer for sole use of family—Possession of utensils.*—R. v. KALYN, [1930] 2 W. W. R. 365; 54 Can. C. C. 98; 24 S. L. R. 594.—CAN.

**so.** — *Writ of assistance—Whether authority to search house.*—R. v. OLLASSOFF (Sask.), [1930] 1 D. L. R. 830; (1929), 52 Can. Crim. Cas. 249.—CAN.

**sp.** — *The power of search under a writ of assistance issued under Excise Act is not restricted to any particular time of the day or night or to any particular building or other place, & therefore extends to the searching of a private dwelling in the night time.*—R. v. KOSTACHUK, [1930] 2 W. W. R. 464; 54 Can. C. C. 189; 24 S. L. R. 485.—CAN.

**sq.** — *Necessity for imprisonment.*—R. v. L'HEUREUX, [1932] 3 W. W. R. 433; 1 D. L. R. 692; 40 Man. L. R. 582; 59 C. C. 69.—CAN.

**sv.** — *On making a conviction under sect. 181 of Excise Act, R. S. C. 1927, the magistrate must impose imprisonment as well as a fine of at least the minimum penalty with respect to each of said forms of punishment.*—R. v. NYKOLAICHUK, [1933] 1 W. W. R. 303; 2 D. L. R. 107; 59 C. C. 269.—CAN.

**sb.** — *A magistrate must impose a fine & imprisonment on an accused guilty of an offence under Excise Act, R. S. C. 1927, s. 181.*—*Re R. & WHITTAKER*, [1933] O. R. 190; 1 D. L. R. 779; 59 C. C. 261.—CAN.

**sd.** — *R. v. LESCHIUTTA* 1933, 47 B. O. R. 407.—CAN.

**sr.** — *No power to suspend sentence.*—R. (BRETHERTON) v. CAMPBELL & THOMPSON, [1932] 3 W. W. R. 272.—CAN.

**so.** — *Effect of permit.*—A permit for the manufacture of home-brew under Excise Act, 1927, s. 195, does not permit manufacture in New Brunswick

of a strength exceeding that allowed by Intoxicating Liquor Act, R. S. N. B. 1927.—R. v. McGUIRE, [1933] 2 D. L. R. 884; 59 C. C. 246; 6 M. P. R. 55.—CAN.

**sd.** — *Disagreement of justices—Power to lay new information.*—Where two justices disagree in the case of a charge under Excise Act a new information containing the same charge may be laid.—LANE v. KRENKEWICH (1932), 60 C. C. 61.—CAN.

**sf.** — *Effect of Criminal Code, s. 708.*—Criminal Code, s. 708, as amended overrides Excise Act, ss. 127, 128, & allows the institution of proceedings before one justice.—R. v. STACPOOLE, [1934] 4 D. L. R. 666; 62 C. C. 125; 41 Man. L. R. 670.—CAN.

**sh.** — *Whether articles part of still—Question of fact for trial judge.*—The finding of a trial judge as to whether certain articles were part of a still, in a prosecution under Excise Act, R. S. C. 1927, s. 176, will not be disturbed on appeal.—R. v. MCCORMICK (1932), 6 M. P. R. 540; 59 C. C. 195.—CAN.

**sl.** — *Place of offence—Evidence on appeal.*—A charge of violating sect. 181 of Excise Act having been dismissed because the prosecution had failed to prove the place where the offence was committed:—*Held:* on appeal, said fact might then be proved.—R. v. HOMINUK, [1935] 1 W. W. R. 139.—CAN.

**sn.** — *Possession of wash—Necessity for notice.*—Excise Act, R. S. C. 1927, s. 176, which requires notice to be given of the possession of wash, does not apply to the use of a common barrel for the making of home brew.—LUSSIER v. R., [1935] 1 D. L. R. 530; 62 C. C. 251.—CAN.

**sp.** — *Conviction under—Whether previous conviction for purpose of Excise Act, 1934, s. 169.*—A conviction under Excise Act, 1927, s. 181, now repealed is not a previous conviction so as to bring into operation Excise Act, 1934, s. 169, relating to increased penalties for subsequent offences.—R. v. BOGURLAVSKY, [1935] 2 D. L. R. 224; O. R. 203; 63 C. C. 365.—CAN.

**st.** — *Whether liquor alcohol—Sufficiency of evidence.*—An analyst's certificate is conclusive evidence that liquor is alcohol, in a prosecution under Excise Act.—R. v. ROUSSEAU, [1935] 2 D. L. R. 462; 63 C. C. 188.—CAN.

**sv.** *Excise Act, 1934—Illegal possession.*—A hotel keeper cannot be convicted of illegal possession under Excise Act, 1934 (Can.) merely because a bottle of liquor illegally manufactured or imported is found on the hotel premises, having been entrusted to him by a guest for safe keeping.—NOISEAUX v. R. (1936), 65 Can. C. C. 268.—CAN.

**sw.** — *Possession of wash.*—Although a substance contains the ingredients set forth in sect. 3 (a) of Excise Act, 1934, it is not "a wash suitable for the manufacture of spirits," within sect. 164 (e) of said Act, unless something has been consciously done by the accused with the intention that it become suitable for the manufacture of spirits. The onus of proving some act revealing that intention is on the Crown.—R. v. SLIWORSKI, [1935] 3 W. W. R. 375; [1936] 1 D. L. R. 366; 65 Can. C. C. 110; 43 Man. L. R. 482.—CAN.

**sz.** — *Seizure of still.*—Under Excise Act, 1934, ss. 86, 87, it is lawful to seize not only a still, but also anything part of or connected with a still, e.g., a boiler.—OUELLETTA v. COMR. OF EXCISE, [1937] 4 D. L. R. 355; 69 Can. C. O. 90.—CAN.

**sc.** — *Still in operation—Offences.*—Where a still is in operation, accused may be guilty under Excise Act of possession of still, possession of wash,

distilling, or possession of spirits unlawfully manufactured.—R. v. ADAMS & HOLLOCK, [1938] 2 D. L. R. 608.—CAN.

**sf.** — *Possession of still.*—Appeal from conviction & sentence on a charge laid under sect. 573 of Criminal Code of conspiring to commit an indictable offence, viz. to set up a still for the manufacture of spirits, without having a licence under Excise Act, 1934, to set up a still, & on a charge under sect. 164 (e) of Excise Act, 1934, of possession of parts of a still. Applt. contended that the conviction was solely on the evidence of an accomplice which was not corroborated & that the jury were misdirected as to corroboration. The conviction & sentence were affirmed.—R. v. POLLOCK, [1938] 1 W. W. R. 535.—CAN.

**sg.** — *"Manufacturing spirits."*—One who mixes Chinese liquor, alcohol, herbs & a snake skin is not liable for unlawfully manufacturing spirits within Excise Act.—R. v. WING HEM (1936), 67 Can. C. C. 110.—CAN.

**d (p. 109) i.** — *Form of.*—A conviction for an offence against the above Act omitted the provision in respect to the issuing of a warrant of distress, & the imposition of imprisonment in default:—*Held:* the conviction was bad.—R. v. McFARLANE 1891, 24 N. S. R. (12 R. & G.) 54.—CAN.

**dddd (p. 109) i.** — *Suspension of operation by Province—Right of Governor-General to revoke suspending order.*—SHEETAN v. SHAW, [1928] 2 D. L. R. 468; 49 Can. Crim. Cas. 357.—CAN.

**eeee (p. 109) i.** — *Illegal possession of liquor—Sufficiency of evidence.*—Appeal against conviction for having liquor in possession contrary to Prohibition Act, 1918, P. E. I., allowed on ground of insufficiency of evidence.—R. v. VESSEY (1932), 58 C. C. C. 383.—CAN.

**eeee (p. 109) ii.** — *Validity of conviction.*—A conviction under the Prohibition Act of Prince Edward Island for sale of liquor is valid although no property rights exist in such liquor.—PRYOR v. R. (1938), 12 M. P. R. 409.—CAN.

**ex.** *Canada Temperance Act, 1927, s. 149—No appeal from magistrate having jurisdiction.*—R. v. GRAHAM (1930), 54 Can. C. C. 328.—CAN.

**c (p. 110) i.** *Forfeiture of license—Right of municipal corporation—Where power to enforce bye-laws given by statute.*—The power given to municipal corps., under I. S. O. 1887, c. 184, s. 285, "to determine the time during which victualling licenses shall be in force," does not confer any power to forfeit such licenses, but merely to fix the duration of the license. The power to create a forfeiture of property is one which must be expressly given to a corp. by the Legislature, & such an extraordinary power is least of all to be inferred where the Legislature has provided other means of enforcing bye-laws by means of fine & amercement, as in this case.—BANNAN v. TORONTO CORPN. (1932), 22 O. R. 274.—CAN.

**c (p. 110) ii.** — *Conditions of.*—A publican's license is not subject to forfeiture under Licensing Act, 1917, s. 185, unless all three offences have been committed whilst deft. has been the holder of the same license.—R. v. MUIRHEAD, *Ex p.* LYONS, [1927] S. A. S. R. 116.—AUS.

**p (p. 110) i.** — *Believed to be Japanese.*—R. v. BENNETT (1930), 55 Can. C. C. 27.—CAN.

**p (p. 110) ii.** — *Also minor.*—R. v. BROWN (1930), 55 Can. C. C. 29.—CAN.

p (p. 110) iii. ———.]—The accused was convicted under Indian Act, R. S. O. 1927, s. 126 (a), for having sold, supplied or given an intoxicant to an Indian. On an application for *certiorari* it was shown that the magistrate had used the word "liquor" instead of "intoxicant" in reading the charge & that he had refused the accused's request for an adjournment. The accused had previously been charged under the Govt. Liquor Control Act, 1928, c. 31, for an offence alleged to have been committed on the same day. The hearing of this charge had been adjourned, & when Crown counsel had been advised that the Indian Department was laying a charge under the Indian Act he so informed the accused's counsel & that it would be in effect the same charge as that under the Govt. Liquor Control Act & suggested an adjournment of the hearing of the latter charge until the accused was served under the new charge; this suggestion accused's counsel refused to consider.—*Held*: although the word "liquor" is not defined in the Indian Act its use by the magistrate when reading the charge could not have misled or prejudiced the accused & gave no right to *certiorari*. The magistrate in refusing the adjournment had not exercised his discretion in any improper manner which would justify the issue of the writ.—*BYAK v. R.*, [1938] 2 W. W. R. 153.—CAN.

ii (p. 110) i. ——— *Minor—Necessity for knowledge.*—The selling of beer by a beer licensee on his licensed premises to a person under twenty-one years of age is not an offence against Government Liquor Control Act, 1928, if the licensee does not know that such person is under age.—*R. v. KIDD*, [1930] 1 D. L. R. 730; [1929] 3 W. W. R. 377; 52 Can. Crim. Cas. 191; 38 Man. L. R. 321.—CAN.

ii (p. 110) ii. ——— *Sale by servant.*—Serving minors with liquor is absolutely prohibited by Liquor Control Act, R. S. O. 1927, amended by 1934 (Ont.), & licensees are liable if their servants serve minors in breach of instructions.—*R. v. KERR*, [1935] 1 D. L. R. 24; 62 C. C. C. 320.—CAN.

ooo (p. 110) i. ——— *Sale in violation.*—Where a sale of liquor in violation of Government Liquor Act, R. S. B. C., 1924, is made by a servant while acting within the general scope of his employment, the master can be convicted therefor, even though the sale was made by the servant in contravention of his master's express instructions.—*R. v. VAN BROS.*, LTD., [1930] 1 W. W. R. 559; 53 Can. C. C. 29; 42 B. O. R. 340.—CAN.

ooo (p. 110) ii. ——— *Held: under sect. 128 of Government Liquor Control Act, 1928, a licensed brewing co. was liable for a violation of the sect. by its servants although its manager had no knowledge thereof & had expressly instructed its employees not to break the law.*—*R. v. KIEWEL BREWING CO.*, [1930] 1 W. W. R. 238; 2 D. L. R. 227; 53 Can. C. C. 56; 38 Man. L. R. 441.—CAN.

ooo (p. 110) iii. ——— *Includes offering for sale.*—Since selling includes offering for sale, a conviction on an information charging "selling or offering for sale" under Excise Act, 1930 (Can.), is good.—*R. v. BOGUSLAVSKY, R. v. SHORT* (1932), 59 C. C. C. 73.—CAN.

aaaa i. ——— *When complete—Necessity for payment & delivery.*—*R. v. LABOENAIRE* (1931), 3 M. P. R. 128; 5 C. O. C. 219.—CAN.

dddd i. ——— *Mens rea necessary.*—*R. v. NADON* (1926), 46 Can. Crim. Cas.—CAN.

dddd ii. ———.]—*R. v. SIMON* (Ont.) (1927), 47 Can. Crim. Cas. 167.—CAN.

dddd iii. ——— *By druggist—Evi-*

dence.]—*Re CARROLL* (N. S.) (1926), 48 Can. Crim. Cas. 208; 59 N. S. R. 83.—CAN.

dddd iv. ———.]—*R. v. YORCZYNSZYN* (1931), 55 Can. C. C. 28.—CAN.

dddd v. ———.]—*R. v. LANDRY*, [1930] 3 M. P. R. 262; 55 Can. C. C. 48; 2 M. P. R. 462.—CAN.

eeee i. ———.]—*Deft. had no license to sell liquor, but kept a boarding-house, which was patronised exclusively by foreigners. The police made a search of his premises, & found 92 bottles of beer, 5 gallons of wine, & a five gallon keg containing wine. He was charged with unlawfully dealing in liquor. Deft. called evidence to show that the beer was the property of one of the boarders who proposed taking it away with him to the country. As to the wine, he stated that some of his boarders preferred wine with their meals rather than tea, & that he supplied it to such boarders without extra charge.—Held*: in the circumstance the wine was kept for sale, & the magistrate should have convicted deft. on the evidence as to the wine even if he accepted deft.'s story about the beer.—*VALE v. GNANI*, [1931] W. A. L. R. 40.—AUS.

g (p. 111) i. ——— *Liquor seized not identified with sample analysed—Conviction quashed.*—*R. v. HYDE* (Ont.) (1926) 2 D. L. R. 998; 45 Can. Crim. Cas. 397.—CAN.

c (p. 111) i. *Conviction for second offence—Invalid—Where first conviction quashed.*—*R. v. WOODS* (N. S.) (1926), 46 Can. Crim. Cas. 171.—CAN.

f (p. 111) i. *Licensing Act, 1917—Exposure for sale—Sale from motor car—Bottles not proved to be exposed to view.*—The holding of a publican's license does not exempt the holder from Licensing Act, 1917, s. 163. Where the holder of a publican's license was on a public road having a motor car loaded with bottles of liquor, two of which were sold to a constable, but were not proved to be exposed to view.—*Held*: the liquor had not been "exposed for sale."—*BADMAN v. ALLCHURCH*, [1927] S. A. S. R. 174.—AUS.

f (p. 111) ii. ——— *Carrying liquor about—Onus of proving not exposed for sale.*—The holder of a publican's license was on a public road having a motor car loaded with bottles of liquor. The licensee had carried the liquor in question, some of which was exposed to view, from his hotel to a road some hundreds of yards distant. Licensing Act, 1917, s. 280, provides that where liquor is carried about from one place to another the burden of proving that such liquor was not . . . exposed for sale shall be cast on the person exposing the same.—*Held*: the liquor had been carried about, & the onus under the statute had not been discharged by the licensee.—*BADMAN v. ALLCHURCH*, [1927] S. A. S. R. 174.—AUS.

(p. 111) i. ——— *Onus of proof.*—Where an accused is charged with unlawfully keeping liquor for sale the mere possession of the liquor is not sufficient under Gov. Liquor Act, R. S. B. C., 1924, s. 91, to place the onus on him of proving his innocence if the liquor was legally purchased by him & found in a place where he was legally entitled to have liquor.—*R. v. CHAL* (B. C.), [1929] 1 W. W. R. 797.—CAN.

o (p. 111) ii. ——— *Husband & wife.*—Defts., husband & wife, were charged with the offence of unlawfully keeping intoxicating liquor for sale in their dwelling-house in contravention of Liquor Control Act (Ont.). The husband was convicted on evidence of a sale made by the wife in that house, & the wife was acquitted.—*Held*: although she might have been convicted of selling, she was properly

acquitted upon the charge of keeping for sale.—*R. v. HAND* (1930), 55 Can. C. 65; 66 O. L. R. 570.—CAN.

f (p. 111) i. ——— *Delegation of authority.*—A delegation by a superior officer of authority to execute a writ of assistance issued to him under Excise Act, R. S. C., 1927, c. 60, must be direct & specifically directed to each search & seizure authorised, & must be exercised with due & proper discretion.—*R. ex rel. KELLY v. ROBINSEY* (Man.), [1929] 1 W. W. R. 313; 52 Can. Crim. Cas. 253.—CAN.

r (p. 111) ii. ——— *Outside Province—Intent to keep in Province.*—*R. v. ROY*, [1931] 1 D. L. R. 1006; 2 M. P. R. 28.—CAN.

sk. *Unlawful possession of liquor—Evidence.*—*R. v. HALL* (Sask.) (1925), 45 Can. Crim. Cas. 147.—CAN.

sl. ———.]—*Re COADY* (N. S.) (1926), 46 Can. Crim. Cas. 327.—CAN.

sm. ———.]—*R. v. DRUZ* (Ont.) (1927), 47 Can. Crim. Cas. 250.—CAN.

sn. ——— *Mens rea necessary.*—*R. v. ORAWFORD* (N. B.), [1927] 2 D. L. R. 565; 47 Can. Crim. Cas. 134.—CAN.

so. ———.]—*R. v. ROSSIGNOL, R. v. MARQUIS, R. v. MICHAUD* (N. B.), [1929] 1 D. L. R. 745; 51 Can. Crim. Cas. 86.—CAN.

sp. ———.]—*R. v. GODBOUT* (N. B.), [1929] 1 D. L. R. 606; 51 Can. Crim. Cas. 201.—CAN.

sq. ——— *What amounts to—Possession of undrinkable mash—Conviction quashed.*—*R. v. BOONE* (Ont.) (1925), 45 Can. Crim. Cas. 148.—CAN.

sr. ——— *Gin given to patient by doctor.*—*R. v. VERGE* (N. S.) (1929), 52 Can. Crim. Cas. 146.—CAN.

st. ———.]—While the facts proved may be sufficient to establish an illegal sale, they will not necessarily justify a conviction for illegal possession of liquor.—*R. v. ROBERTS* (HARRY) (1935), 5 M. P. R. 566.—CAN.

sk. ———.]—There is an offence under Excise Act, 1934, s. 169, in the case of possession, without lawful excuse, of spirits unlawfully imported wherever manufactured.—*R. v. HOBBS*, [1935] 2 D. L. R. 763; 9 M. P. R. 361; 63 C. C. C. 351; 5 F. L. J. (Can.) 4.—CAN.

sm. ——— *Possession prima facie evidence of guilt.*—Possession of liquor contrary to Excise Act, 1934, is *prima facie* evidence of guilt.—*R. v. GERTLER*, [1936] 2 D. L. R. 771; 66 Can. C. C. 83.—CAN.

sv. ——— *Appeal—Extension of time—After sentence partly served—Application refused.*—*R. v. HENNEBERRY* (1926), 45 Can. Crim. Cas. 156; 58 N. S. R. 425.—CAN.

sw. ——— *Possession in private guest room—What amounts to.*—*MacMILLAN v. BOHME* (Ont.) (1929), 52 Can. Crim. Cas. 92.—CAN.

sa. ——— *Conviction under Dominion & provincial statutes—Validity.*—*R. v. BOYKO* (Alta.), [1929] 1 W. W. R. 929.—CAN.

so. ——— *Not purchased from Commission—Onus of proof.*—On a charge of unlawfully having liquor not purchased from the Commission the fact that the liquor was found in the residence of the accused, a permit holder, is not now sufficient to shift back upon the Crown the onus of proving that the liquor was not purchased from the Commission.—*R. v. SMITH*, [1929] 3 W. W. R. 387; 52 Can. Crim. Cas. 174; 38 Man. L. R. 325.—CAN.

ss. ——— *Sufficiency of evidence.*—*R. v. TANCHUK*, [1935] 1 W. W. R. 257; 2 D. L. R. 792; 63 C. C. C. 193.—CAN.

st. ———.]—*R. v. BROTMAN*, [1935] 1 W. W. R. 243; 63 C. C. C. 177.—CAN.

## Part XV.—War Legislation.

843. Add. Annotation:—*Reid, Adams v. Camfoni* (1928), 189 L. T. 608.

ad. — *On Indian reserve—What amounts to.*—The possession of an intoxicant by a white person in the temporary or permanent abode of an Indian is not an offence under sect. 126 (c) of the Indian Act, R. S. C., 1927, where such place of abode is not on an Indian reserve. The words "on any reserve" in sect. 126 (c), with the subsequent words of the sub-sect. govern the whole sub-sect.—*R. v. Thompson* (B. C.), [1929] 3 W. W. R. 333; 52 Can. Crim. Cas. 278.—CAN.

af. — *Sufficiency of evidence of illegality of acquisition.*—*R. v. McLoche* (1932), 58 C. C. C. 382.—CAN.

ag. — *Improbable defence.*—*R. v. Bourdais* (1932), 59 C. C. C. 214.—CAN.

ak. — *Appeal—Costs.*—On a successful appeal against a conviction for illegal possession of liquor, applt. will not get his costs if he failed to produce his defence & his witnesses in the ct. below.—*R. v. Roberts* (Hubert) (1933), 5 M. P. R. 565.—CAN.

as. *Improper use of label—Mens rea necessary.*—*R. v. Savich* (Ont.), [1927], 47 Can. Crim. Cas. 262.—CAN.

sa. *Certificate of analyst—Presumption arising from.*—*R. v. Johnston* (Ont.), [1926], 48 Can. Crim. Cas. 360.—CAN.

sg. — *Validity.*—Where on a prosecution under Excise Act, R. S. C., 1927, the certificate put before the magistrate as *prima facie* evidence of its contents, by virtue of sect. 176 (3) of the Act, was clearly more than a "certificate of analysis," in that it not only certified to the content in proof spirits of the sample of the liquid analysed but also contained the words "and that this sample has the characteristics of spirits of illicit manufacture."—*Held:* the magistrate was within his rights in rejecting it in its entirety; although, *semble*, he might have received it as evidence of the analysis & have rejected the objectionable part.—*R. v. Bandura*, [1933] 3 W. W. R. 544; [1934] 1 D. L. R. 595; 61 C. C. C. 15.—CAN.

sk. — *The analysis, the certificate of which under sect. 113 of Excise Act, 1934, shall be accepted as "prima facie" evidence of the facts stated therein,* being manifestly a chemical one, the words here quoted mean that the certificate may contain any fact ascertainable by chemical analysis of the sample which establishes some ingredient of an offence charged under the Act. On a charge under sect. 164 (e) of said Act of possessing a quantity of wash suitable for the manufacture of spirits, the departmental analyst's certificates stated, besides the alcoholic content of the samples, that it "contained saccharine matter & yeast & was suitable for the manufacture of spirits." The magistrate ordered deleted from the record the statement quoted, on the ground that these matters could not be proven by certificate.—*Held:* the facts referred to being ingredients of the offence the statement thereof should not have been rejected.—*R. v. Shur*, [1935] 3 W. W. R. 381; [1936] 1 D. L. R. 50; 64 Can. C. C. 350; 43 Man. L. R. 456.—CAN.

h (p. 111) i. — *Right of—By Crown.*—*R. v. Hodgson* (1927), 47 Can. Crim. Cas. 171; 59 N. S. R. 202.—CAN.

h (p. 111) ii. — *To what court.*—*R. v. Clark* (1879) 44 U. C. R. 385.—CAN.

h (p. 111) iii. — *Power of appellate court—Cannot review order for destruction of liquor.*—*Re Khattar, Re Therbault*, [1927] 2 D. L. R. 647; 47

Can. Crim. Cas. 184; 59 N. S. R. 191.—CAN.

hh (p. 111) i. — *Effect of—Licence transferred—Intoxicating Liquor (General) Act, 1924 (No. 62 of 1924), ss. 16-18.*—*A. G. (Butler) v. Sheehan*, [1927] 1 R. 546.—IR.

sb. *Information under Excise Act—Description of informant—Sufficiency.*—*Ex p. Henderson, Ex p. Broder, Ex p. Stewart, Ex p. Joe Go Get*, [1930] 1 D. L. R. 420; 52 Can. Crim. Cas. 95.—CAN.

sd. — *Cote v. Boucher* (1932) 58 C. C. C. 158.—CAN.

sf. — *Presumption that informant excise officer.*—*R. v. Kusi*, [1930] 2 W. W. R. 607; 54 Can. C. C. 151; 39 Man. L. R. 199.—CAN.

sg. — *Dismissal of—Right of town & mayor to appeal.*—*R. v. Lee*, [1930] 2 W. W. R. 15; 53 Can. C. C. 255; 24 S. L. R. 384.—CAN.

sk. — *Assisting in distilling or rectifying.*—In an information under Excise Act, R. S. C., 1927, s. 176 (b), it should be alleged that deft. assisted in distilling or rectifying spirits "on an unlicensed place."—*Re Ettinger* (1932), 5 M. P. R. 503.—CAN.

sl. *Confiscation of motor vehicle—Liquor not found therein—But seen to be thrown out.*—*R. v. Lewis* (N. S.), [1929], 52 Can. Crim. Cas. 43.—CAN.

sm. — *Owner innocent.*—Where the owner of a vehicle is an innocent person with respect to a breach of the Act by a person to whom he has entrusted the vehicle, i.e. has been in no way associated with such breach, an order for the forfeiture of the vehicle should not be made.—*R. v. Howlett, Re Wiggins & Globe Mortgage & Loan Co., Ltd.*, [1930] 3 W. W. R. 452; *sub nom. Re R. v. Howlett, Ex p. Wiggins & Globe Mortgage & Loan Co.*, 54 Can. C. C. 386; 39 Man. L. R. 206.—CAN.

so. — *Discretion of magistrate.*—Sect. 204 (2) of Govt. Liquor Control Act, 1928, provides that a constable may seize any vehicle in which he finds liquor that is had or kept unlawfully & that the magistrate "may" in & by the conviction or by a separate order declare the vehicle & liquor to be forfeited to His Majesty.—*Held:* said word "may" is not imperative but means that the magistrate must exercise a discretion.—*R. v. Standard Finance Corp., Ltd.*, [1935] 1 W. W. R. 189; 2 D. L. R. 76; 63 Can. C. C. 141; 43 Man. L. R. 110.—CAN.

sp. — *Appeal against forfeiture—Compliance with statutory conditions—Necessity for.*—*Re Johnson* (Walter) (1932), 4 M. P. R. 446.—CAN.

sr. — *Plea of guilty of having liquor—Forfeiture void.*—*R. v. Moubrant*, [1933] 1 W. W. R. 585; 4 D. L. R. 762; 59 C. C. C. 334; 41 Man. L. R. 214.—CAN.

sv. *Seizure of truck in which liquor illegally stored—Truck property of innocent third party—Not liable to forfeiture.*—When goods seized under the Excise Act are the property of an innocent third party who has duly claimed them in accordance with sect. 124 of the Act, they are not subject to forfeiture to the Crown.—*Re The Excise Act (Man.)*, [1929] 4 D. L. R. 164; 2 W. W. R. 553.—CAN.

sw. — *Liability to forfeiture.*—A vehicle, otherwise undisputably liable to forfeiture under s. 181 of Excise Act, R. S. C., 1927, is, on construction of s. 181 & the Act as a whole, to be held so liable notwithstanding

that its legal owner had, prior to seizure, no notice or knowledge of the illegal use which was being made of it.—*R. v. Krakowec, Dahlberg & Eklund & Continental Guaranty Corp. of Canada, Ltd.*, [1932] S. C. R. 184; 1 D. L. R. 316; 57 Can. C. C. 96.—CAN.

On July 26, 1928, an person rented a certain garage, & on the same day the truck in question herein was driven into the garage by R., a hired truckman, & the owner thereof, who locked it therein. The truck, to the knowledge of R., had on it a "still" used or to be used in violation of the Excise Act in the production of spirits, & which truck was used for removing the still from one place to another. On Aug. 1, 1928, the truck was seized by an excise officer, under sect. 95 (2) of the Act, as forfeited. R. pleaded guilty before the Criminal Ct. of illegally having a still in his possession. He was condemned & paid the fine. He contended that a discretion was vested in this ct. to direct the restoration to him of the truck, as being an innocent wrongdoer & already sufficiently penalised.—*Held:* the truck was legally seized & forfeited & the ct. had no discretion vested in it to remit the penalty.—*R. v. Roubie*, [1931] Ex. C. R. 236.—CAN.

ss. *Service of notice of appeal—Necessity to take out summons.*—*R. v. Johnson* (1932), 57 C. C. C. 381.—CAN.

## PART XIII.

sh. *Interdiction order—Removal of—Applicant proved to have refrained from drunkenness for twelve months.*—When on an appln. under Govt. Liquor Act, R. S. B. C. 1924, c. 146, s. 69, to a county ct. judge to set aside an interdiction order it is proved that applt. has refrained from drunkenness for at least twelve months it is obligatory on the judge to set the order aside.—*Re Corano*, [1928] 2 W. W. R. 695; 50 Can. Crim. Cas. 199.—CAN.

sj. — *Conditions of issue.*—Before a person can be interdicted under Govt. Liquor Act, R. S. B. C. 1924, c. 146, he must clearly be found to be within the class of persons who "by excessive drinking, etc." are subject to interdiction under sect. 66 of the Act. A magistrate or other interdiction official has no power to make the order without first giving the person against whom the order is sought an opportunity to show cause why it should not be made.—*R. v. St. Elol*, [1928] 2 W. W. R. 692.—CAN.

so. *Powers of magistrate.*—Proof of personal inspection by a magistrate & production of certificates of two medical practitioners, even though there may be some defect of form in one of them, is sufficient evidence for a magistrate, pursuant to s. 3 of Inebriates Act, 1912, to order that a person, proved to the satisfaction of the magistrate to be an inebriate, be placed in an institution within the meaning of the Act.—*O. v. O.* (1936), 10 A. L. J. 41; 36 S. E. N. S. W. 679, n. 53 N. S. W. W. N. 255, n. AUB.

## PART XIII. SECT. 7.

p (p. 433) i. — *To what court—Sittings nearest to place where cause of complaint arose.*—*R. v. Conway* (B. C.), 59 Can. Crim. Cas. 161; [1929] 3 W. W. R. 268.—CAN.

## PART XIV. SECT. 1, SUB-SECT. 2.

f i. — *Payment for customs dues.*—*Farmman v. Bennett* (P. E. L.), [1926] 2 D. L. R. 975.—CAN.

## JUDGMENTS AND ORDERS.

## Part I.—Definitions.

10. *Add. Annotation*:—*Reid*. Christopher (Hove), *Ltd. v. Williams*, [1936] 3 All E. R. 68.
- 14a. *Order of Registrar-General—Under Legitimacy Act, 1926 (c. 60)*.—The re-registration, as provided for in the sched. to above Act, 1926, of the birth of a child originally illegitimate, the child having become legitimate by virtue of the provisions of that Act, is not a record of a binding decision.—*JONES v. JONES* (1929), 98 L. J. P. 74; 140 L. T. 647; 45 T. L. R. 292; 73 Sol. Jo. 192.
21. *Add. Annotation*:—*Apld.* Northwood v. L. O. C. (1927), 137 L. T. 49.
30. *Add. Annotation*:—*Consd.* Butcher Wetherly & Co. v. Norman, [1934] 1 K. B. 475.
- 30a. — *Order dismissing application to postpone hearing of action*.—An order made by a judge dismissing an application to postpone the hearing of an action in his list, & ordering appct. to pay the costs, is a "judgment or order," from which an appeal lies by leave to the Ct. of Appeal.—*MAXWELL v. KEUN*, [1928] 1 K. B. 645; 97 L. J. K. B. 305; 138 L. T. 310; 44 T. L. R. 100; 72 Sol. Jo. 48, C. A.
- Annotation*:—*Reid*. Evans v. Bartlam, [1937] A. C. 473.
44. *Add. Annotation*:—*Apld. Re Debtor*, [1929] 2 Ch. 146.

## Part II.—Classification.

52. *Add. Annotations*:—*Reid*. The Goulondris, [1927] P. 182; Ingenohl v. Wing On (Shanghai) (1927), 44 R. P. C. 343; Salvesen (or von Lorang) v. Austrian Property Administrator, [1927] A. C. 641.
- 54a. — *Decree annulling marriage*.—A decree g a marriage on the ground of im-
101. *Add. Annotation*:—*Reid*. Campbell v. Pollak, [1927] A. C. 732.
- potence is a judgment *in rem* altering the status of the parties.—*INVERCLYDE (OTHERWISE TRIPP) v. INVERCLYDE*, [1931] P. 29; 100 L. J. P. 16; 144 L. T. 212; 95 J. P. 73; 47 T. L. R. 140; 29 L. G. R. 353.

## PART I. SECT. 1.

d i. —.]—A wife obtained on Nov. 7, 1928, a decree for judicial separation & costs. The costs were taxed, & execution issued on Feb. 22, 1929, & a return *nulla bona* made three days later. In the meantime, she had obtained on Jan. 23, 1929, in the same proceedings a decree for permanent alimony, none of which was paid. Her husband had conveyed property to the other deft. herein on Nov. 26, 1928, before the costs were taxed:—*Held*: the first mentioned decree was a judgment of the Supreme Ct. & the wife was a creditor entitled to invoke the provisions of Fraudulent Conveyances Act, R. S. B. C., 1924 (c. 96), with respect to said conveyance by her husband.—*MACKEY v. MACKEY & MAGUR*, [1930] 1 W. W. R. 604; 3 D. L. R. 497; 42 B. C. R. 440.—CAN.

## PART II. SECT. 2, SUB-SECT. 1.

63 i. *Final for one purpose—Whether for all purposes*.—Where no is filed to a statement of claim which specifically claims damages & judgment by default is entered for damages to be assessed this judgment precludes deft. from questioning the right of pltf. to damages, & leaves the quantum of damages the only question to be determined. Such a judgment, though interlocutory as to the assessment of damages, is final as to pltf.'s right to damages.—*HILL v. STEPHEN MOTOR & AERO CO. LTD.*, [1929] 3 D. L. R. 676; 2 W. W. R. 97; 23 S. L. R. 552; *revq.*, [1929] 2 D. L. R. 556.—CAN.

65 iii. —.]—Applying the rule that when the ct. decides the substantial question of liability & merely refers the assessment of damages to a referee, reserving nothing to itself,

the judgment ought to be regarded as a final judgment for the purposes of appeal:—*Held*: on an appeal from a judgment in an action for damages for the wrongful cutting of timber on pltf.'s lands, & for an injunction, the appeal in question was an interlocutory appeal; & the preliminary objection that it was out of time was sustained.—*MAIR v. DUNCAN LUMBER CO.*, [1928] 1 W. W. R. 108; 39 B. C. R. 260.—CAN.

65 iv. —.]—The word "judgment" in clause 13 of Letters Patent is intended to cover an order as well as a decree, but the effect of the adjudication must be such as to put an end to the suit or proceeding so far as the ct. before which the suit or proceeding is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding. If it has this effect, the adjudication is a judgment, otherwise not.—*CHIDAM-BARAM CHETTIYAR v. CHETTIYAR FIRM* (1928), 1 L. R. 6 Kan. 703.—IND.

o (p. 128) i. —.]—*Order on application under Devolution of Estates Act*.—An application on originating notice by an administrator for the advice of the ct. as to whether a certain person is entitled to share as a beneficiary in the estate of an intestate is not interlocutory but final.—*Re JOHNSON ESTATE, JOHNSON v. JOHNSON & WOOD*, [1929] 3 D. L. R. 80; 1 W. W. R. 275; 23 S. L. R. 436.—CAN.

a i. —.]—*Order allowing set-off of costs*.—*BARCOCK v. STANDISH* (1900), 19 P. R. 196.—CAN.

74 iii. —.]—*BULGER v. HOME INSURANCE CO.*, [1927] 3 D. L. R. 1044; [1927] S. C. R. 451; *on appeal*, [1929] 1 D. L. R. 47; [1928] S. C. R. 436.—CAN.

1 (p. 130) i. —.]—*Subject to reference to assess damages*.—Where the ct.

decides the substantial question of liability in an action & merely refers the assessment of damages to a referee, reserving nothing to itself, the judgment should be regarded as a final judgment for the purposes of appeal.—*BOSLUND v. ABBOTSFORD LBR., MIN. & DEV. CO.*, [1927] 1 D. L. R. 279; 86 B. C. R. 386.—CAN.

o (p. 130) i. —.]—*Setting aside award*.—*Held*: the judgment sought to be appealed from was not a "final judgment."—*TORONTO CITY CORPN. v. THOMPSON*, [1933] S. C. R. 77; 1 D. L. R. 735.—CAN.

o (p. 130) ii. —.]—In an action brought b. lfts. as testamentary exors. or eses, a judgment dismissing a preliminary exception to the form, alleging that their appointment by judges of the Superior Ct. was void for want of jurisdiction, is not a "final judgment" within sects. 2 (e) & 36 of the Supreme Court Act.—*DAVIS v. ROYAL TRUST CO.*, [1932] S. C. R. 203; 2 D. L. R. 681.—CAN.

q i. —.]—*Order fixing remuneration of executor*.—*Re DAVIES, DAVIES v. DUGGAN* (1927), 38 B. C. R. 249.—CAN.

q ii. —.]—*Order directing sheriff to proceed with execution*.—*Held*: the order was an interlocutory order.—*MAINLAND POTATO COMMITTEE OF DIRECTION v. TOM YEE*, [1931] 1 W. W. R. 529; 1 D. L. R. 990; 43 B. C. R. 453.—CAN.

q iii. —.]—*Order under Execution Act*.—An order made under sect. 38 of Execution Act, R. S. B. C., 1924, for the sale of real property as to which a certificate of judgment has been registered in the land registry office is an interlocutory order.—*THORNE v. COLUMBIA POWER CO. LTD.*, [1936] 3 W. W. R. 46; 4 D. L. R. 808; 60 B. C. R. 504.—CAN.

127. *Add. Annotation*:—*Folld. Earl v. Earl & Kyle, Earl v. Earl* (1926), 96 L. J. P. 23.

129a. *Order dismissing action as statute-barred.*—Pltf. claimed in 1936 to be indemnified from certain losses, the latest of which accrued to him in 1929, by reason of an agreement made between his predecessor in title & deft. Deft. pleaded that the statement of claim disclosed no cause of action which was not statute-barred & pltf. did not deliver a reply. The master ordered this issue to be tried as a preliminary point of law. With the consent of both parties, the matter was heard by the same master acting as a special referee. He decided that all claims were statute-barred, & dismissed the action. He also refused to allow pltf. to deliver a reply or to have an adjournment. Pltf. appealed to the Divisional Ct., who held that the statement of claim was ambiguous, & did not allege when any cause of action arose; & that the master should not have ordered a trial of the preliminary point, but should have allowed pltf. to deliver a reply. The master's order dismissing the action was set aside, & pltf. given leave to deliver a reply or to amend his statement of claim. The master's order for the trial of the preliminary point was also ordered to be set aside. Deft. appealed to the Ct. of Appeal. Pltf. contended that this was an appeal against a final judgment, & therefore, under Supreme Ct. of Judicature (Amendment) Act, 1935 (c. 2), s. 1 (f), the leave of the Divisional Ct. to appeal was necessary, which leave had been refused:—*Held*: (1) the order made by the Divisional Ct. was interlocutory, & not final, so that leave to appeal was unnecessary; (2) the statement of claim made it clear that all alleged causes of action arose more than 6 years before the delivery of the writ; (3) the refusal to allow an adjournment was a matter for the master's discretion, which should not be interfered with; (4) the Divisional Ct. had no jurisdiction to deal with the master's order for the trial of the preliminary point as the appeal on this order lay to a judge in chambers.—*KRONSTEIN v. KORDA*, [1937] 1 All E. R. 357; 81 Sol. Jo. 176, C. A.

158. *Add. Annotation*:—*Refd. The Lord Strathcona* (No. 2), [1926] P. 18.

176a. ———.—[The ct. will not, in a special case, make a declaration of a future right.

G. made his will as follows:—"I give devise & bequeath all my real & personal estate whatsoever & wheresoever unto & to the absolute use of my dear wife H., her heirs, exors., administrators & assigns in full

confidence that she will do what is right as to the disposal thereof between my children either in her lifetime or by her will after her decease. The construction of this will being submitted to the ct. on a special case, to which the widow H. was pltf. & the children defts.:—*Held*: the widow was unquestionably entitled to testator's estate for her life, but the ct. declined to make any declaration as to the future rights of the parties or to make any order as to costs.—*SMITH v. GIBSON* (1871), 25 L. T. 559; 20 W. R. 88.

184. *Add. Annotations*:—*As to* (1) *Distd. Kynaston v. A.-G.* (1933), 49 T. L. R. 300. *Consd. Re Carnarvon Harbour Acts, 1793-1903, Thomas v. A.-G.*, [1927] Ch. 72. *Refd. A.-G. for Ontario v. McLean Gold Mines*, [1927] A. C. 185; *Wigg v. A.-G. of Irish Free State*, [1927] A. C. 674. *As to* (2) *Apld. Jaeger v. Jaeger Co.* (1927), 44 R. P. C. 437. *Generally, Refd. Ruislip-Northwood Urban District Council v. Lee* (1931), 145 L. T. 208; *Thomas v. A.-G.*, [1936] 2 All E. R. 1325.

185. *Add. Annotations*:—*Refd. Whitney v. I. R. Comrs.*, [1926] A. C. 37; *Wigg v. A.-G. of Irish Free State*, [1927] A. C. 674; *Grant v. Knaresborough U. C.*, [1928] Ch. 310.

185a. ———.—[Upon the establishment of the Irish Free State, the two appls., who were established civil servants of the Crown, were transferred to the service of that State. They retired in consequence of the change of Government, & being dissatisfied with the retiring allowances granted to them by the Minister of Finance, they brought an action against the A.-G. for the Irish Free State claiming declarations as to their rights:—*Held*: appls. could assert their rights by an action against the Attorney-General, as in *Dyson v. A.-G.*, No. 185.—*Wigg v. A.-G. FOR IRISH FREE STATE*, [1927] A. C. 674; 96 L. J. P. C. 88; 137 L. T. 460; 43 T. L. R. 457, P. C.

187a. ———.—[*Held*: an action against the Air Council for a declaration that a patent was valid was not maintainable.—*ROWLAND v. AIR COUNCIL* (1923), 39 T. L. R. 228; 67 Sol. Jo. 365; 40 R. P. C. 87; *on appeal*, 39 T. L. R. 455, C. A.

187b. *S.P. ROWLAND & MACKENZIE-KENNEDY v. AIR COUNCIL* (1927), 96 L. J. Ch. 470; 137 L. T. 794; 43 T. L. R. 717; 44 R. P. C. 453, C. A.

*Annotation*:—*Refd. Gilleghan v. Minister of Health* (1931), 47 T. L. R. 439.

190. *Add. Annotations*:—*Consd. Jacobs v. Aveling-Barford, Ltd.*, [1936] 1 All E. R. 297. *Refd. Cooper v. Wilson*, [1937] 2 K. B. 309.

## PART II. SECT. 2, SUB-SECT. 5.—A.

bb i. ———.—[Pltf. having begun an action by a specially indorsed writ, moved before a judge in chambers for speedy judgment under R. S. C. (B. C.), Ord. 14, r. 1, & it was ordered that judgment should be entered for pltf. for the principal sum & that the action should proceed as to interest:—*Held*: the order for judgment was a final judgment.—*NATIONAL LIFE INSURANCE Co. v. MCCOUBRAY*, [1926] 2 D. L. R. 550; [1926] S. C. R. 277.—CAN.

kk i. ———.—[An appeal from the judgment of Appellate Division, Ont., setting aside the awards of the official arbitrator fixing the rentals to be paid

upon the renewal of certain leases, & referring the matter back to him for reconsideration, with liberty to supplement the evidence already given, was quashed for want of jurisdiction, on the ground that the judgment appealed from was not a "final judgment" within sects. 2 (b) & 36 of the Supreme Court Act.—*TORONTO v. THOMPSON*, [1930] S. C. R. 120; *sub nom. Re THOMPSON & TORONTO*, [1930] 1 D. L. R. 999.—CAN.

sb. *Judgment maintaining inscription in law.*—*Held*: a final judgment.—*DOMINION TEXTILE Co. v. SKAIFE*, [1926] S. C. R. 310.—CAN.

sd. *Judgment granting decree nisi.*—*Apltd. appealed from two judgments*

of the Ct. of Appeal for Ontario affirming, in each case, the judgment at trial, granting a decree *nisi* against her in her husband's action for divorce, & dismissing her action for alimony:—*Held*: there was jurisdiction in this ct. to entertain the appeal in the alimony action; but not the appeal in the divorce action, as the decree *nisi* was not a "final judgment" within Supreme Ct. Act, s. 2 (b).—*HARRIS v. HARRIS*, [1932] S. C. R. 541; 3 D. L. R. 553; O. R. 304.—CAN.

## PART II. SECT. 2, SUB-SECT. 6.

157 II. ———.—[*LESLIE v. CANADIAN CREDIT CORPN., LTD.*, [1928] 3 D. L. R. 178; [1928] S. C. R. 238.—CAN.



198. *Add. Citation* :—12 Tax Cas. 166.  
*Add. Annotation* :—*Refd.* Stockwell v. Southgate Corpn., [1936] 2 All E. R. 1343.
- 198a. — Must enforce private right.]—What weighs with me in the matter is that the right in question which *pltf.* seeks to have set up by a declaratory order is not a private right at all. *Pltf.* has no personal right to have sewers kept in proper condition. It is a matter, as LORD HALSBURY says, for the whole district; it is a matter committed to the special jurisdiction of a department which is a Government department, who have to act, not with regard to the interests of any particular individual, but with regard to the interests of the district generally. I am not aware that any *ct.* has ever in such a case made a declaration at the suit of a member of the public, & still less in a case where, as I have said, I am not satisfied that any real principle of justice requires the *ct.* to determine the matter (MAUGHAM, J.).—CLARK v. EPSOM RURAL DISTRICT COUNCIL, [1929] 1 Ch. 287; 98 L. J. Ch. 88; 140 L. T. 246; 93 J. P. 67; 45 T. L. R. 106; 27 L. G. R. 328.
199. *Annotations* :—*Delete* Anderson v. Equitable Life Assce. Soc. of the United States (1925), 42 T. L. R. 123.  
*Add. Annotations* :—*Consd.* Ruislip-Northwood Urban District Council v. Lee (1931), 145 L. T. 208; Odhams Press, Ltd. v. London & Provincial Sporting News Agency (1929), Ltd., [1936] 1 All E. R. 217; Jacobs v. Aveling-Barford, Ltd., [1936] 1 All E. R. 297.
201. *Add. Annotation* :—*Refd.* Ruislip-Northwood Urban District Council v. Lee (1931), 145 L. T. 208.
- 202a. *Right to proceed to trial*—*Notwithstanding default of defence.*]—Where *pltf.* could not have obtained a declaration of the nature sought (*see* RATES & RATING, No. 1158a, *post*), on a motion for judgment in default of defence without evidence, & he was clearly entitled to the declaration at the date of the writ, subject to his substantiating his case by proper evidence :—*Held* : he was entitled to proceed to trial for that purpose & obtain his declaration with costs.—GRANT v. KNARESBOROUGH URBAN COUNCIL, [1928] Ch. 310; 97 L. J. Ch. 106; 138 L. T. 488; 92 J. P. 30; 44 T. L. R. 224; 26 L. G. R. 165; (1928-31), 1 B. R. A. 238.
- 202b. *Exercise of statutory powers.*]—The clerk to the Carnarvon Harbour Board took out a summons under R. S. C., Ord. 54A, r. 1A, to which the A.-G., as representing the public, was made *def.*, to determine whether the Board, as trustees for the purposes of putting into execution the Carnarvon Harbour Acts, 1793 to 1903, had all the powers conferred by Settled Land Act, 1925 (c. 18), s. 29, on a tenant for life & on the trustees of a settlement, & could exercise the powers of sale & leasing thereby conferred, without regard to the provisions as to advertisement & public auction contained in sect. 24 of Carnarvon Harbour Act, 1809, as amended by the Pier & Harbour Orders Confirmation Act, 1877 (No. 3). They had at no time so purported to exercise the powers in question :—*Held* : no particular exercise of any power being called in question, the *ct.* should not entertain the application. If the trustees of the Board were to purport to exercise any particular power, the A.-G. would have a discretion whether or not to intervene, & an individual claiming to be aggrieved by the purported exercise of the power might have a right of action without the intervention of the A.-G. The making of a declaration might fetter the A.-G. in the exercise of his discretion, & the declaration might not be binding upon an individual claiming to be aggrieved by the purported exercise of a particular power, or, if it were, it might well be a cause of grievance to a person who desired to bring proceedings himself.—*Re* CARNARVON HARBOUR ACTS, 1793 to 1903, THOMAS v. A.-G., [1937] Ch. 72; [1936] 2 All E. R. 1325; 106 L. J. Ch. 11; 155 L. T. 312; 80 Sol. Jo. 612.
- 202c. —.]—Where a statutory body is alleged to have acted without jurisdiction its decision can properly be questioned in an action for a declaration that the decision is null & void.—COOPER v. WILSON, [1937] 2 K. B. 309; [1937] 2 All E. R. 726; 106 L. J. K. B. 728; 157 L. T. 290; 101 J. P. 349; 53 T. L. R. 623; 81 Sol. Jo. 357; 35 L. G. R. 436, C. A.
- 208a. *Right to commission.*]—*Pltf.* was a general commercial agent carrying on business in Bucharest, Roumania. In Aug. & Sept. 1934, *defts.*, who were manufacturers of road rollers, instructed *pltf.* to negotiate with a Roumanian firm with a view to securing for *defts.* a contract whereby road rollers of *defts.* manufacture might be exported to Roumania. The contract was, in fact, secured, & *defts.* admitted that *pltf.* had rendered some assistance "in or about the negotiation of the said contract." *Defts.* further admitted that as consideration for the securing of the contract *pltf.* was entitled to receive reasonable remuneration in respect of his services, but that such remuneration would not become payable until after the contract had become operative & payments thereunder had been made by the Roumanian firm to *defts.* *Pltf.* claimed a declaration as to his rights in respect of commission :—*Held* : this was a proper case for a declaratory judgment.—JACOBS v. AVELING-BARFORD, LTD., [1936] 1 All E. R. 297; 80 Sol. Jo. 305.
210. *Add. Annotation* :—*Consd.* British Trawlers' Federation, Ltd. v. London & North Eastern Ry. Co., [1933] 2 K. B. 14.
- 213a. —.]—A claim for a declaration not followed by any claim for consequential relief is as a rule useless & should be discouraged. For example, a landlord who claims that a tenancy was terminated by notice to quit ought to ask for possession. Similarly a tenant who relies on a lease void at law for want of a seal ought to ask for specific performance.—GRAY v. SPYER, [1921] 2 Ch. 549; 91 L. J. Ch. 98; 126 L. T. 238; *reversd.* on other grounds, [1922] 2 Ch. 22, C. A.
214. *Add. Citation* :—2 B. R. A. 779.  
*Add. Annotation* :—*Refd.* Stockwell v. Southgate Corpn., [1936] 2 All E. R. 1343.
219. *Add. Annotations* :—*Consd.* Ruislip-Northwood Urban District Council v. Lee (1931), 145 L. T. 208. *Consd.* Odhams Press, Ltd. v. London & Provincial Sporting News Agency (1929), Ltd., [1936] 1 All E. R. 217. *Refd.* Jaeger v. Jaeger Co. (1927), 44 R. P. C.



- 437; *Jacobs v. Aveling-Barford, Ltd.*, [1936] 1 All E. R. 297; *Stockwell v. Southgate Corpn.*, [1936] 2 All E. R. 1343; *Cooper v. Wilson*, [1937] 2 K. B. 309; *De Bearn (Prince) v. La Compagnie D'Assurances La Federale De Zurich* (1937), 42 Com. Cas. 189.
- 219a. —.—]—The male deft. owned two fields in which were a number of vehicles with structures on them or structures on wheels which had been vehicles, owned by his wife, the other deft., & let by the male deft. to persons who resided in them. Pltf. council brought an action in the King's Bench Div. against defts. claiming (only) a declaration that these structures were "temporary buildings" within Public Health Acts Amendment Act, 1907 (c. 53), s. 27. The trial judge made that declaration. On appeal it was contended for defts. (a) that there being a remedy provided by sects. 6 & 27 of the Act by which pltf. council could sue for penalties in a summary manner, there was no jurisdiction in the High Ct. to grant the declaration; & (b) that as the council had not claimed an injunction & could not have claimed an injunction, which is a remedy for the protection of personal and proprietary rights, & as there was no actual dispute between the parties, there was no jurisdiction in the High Ct. to grant the declaration:—*Held*: (1) this case was distinguishable from *Barracough v. Brown*, No. 222. In that case it was decided that where a statute gave a right to recover expenses in a ct. of summary jurisdiction from a person who was not otherwise liable, pltf. had no right to sue for these expenses in the High Ct. In the present case by sect. 27 (4) of the Act of 1907 pltf. council had a right to pull down or remove these structures if they were "temporary buildings" within the sect. without reference to any ct., & there was jurisdiction in the High Ct. to grant the council the declaration for which they asked:—*Held*: (2) since *Guaranty Trust Company of New York v. Hannay & Co.*, No. 219, & *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade, Ltd.*, No. 199, R. S. C., Ord. 25, r. 5, is shown to be *intra vires*, & the language of that rule must be read in its natural & ordinary meaning. On the assumption that pltf. council in this case could not have claimed an injunction, the High Ct. had jurisdiction to make this declaration.—*RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL v. LEE* (1931), 145 L. T. 208; 95 J. P. 164; 29 L. G. R. 335, C. A.
- Annotation*:—*Refd. Stockwell v. Southgate Corpn.*, [1936] 2 All E. R. 1343.
220. *Add. Annotations*:—*Refd. The W. H. Randall*, [1928] P. 41; *Horwood v. Statesman Publishing Co.* (1929), 98 L. J. K. B. 450.
222. *Add. Annotations*:—*Consd. Clark v. Epsom R. D. Co.*, [1929] 1 Ch. 287. *Apld. Musical Performers' Protection Asscn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485. *Distd. Ruislip-Northwood Urban District Council v. Lee* (1931), 145 L. T. 208. *Refd. Wigg v. A.-G. of Irish Free State* (1927), 96 L. J. P. O. 88; *Farrow v. Orttewell*, [1933] Ch. 480; *Allen v. Waters & Co.*, [1935] 1 K. B. 200; *Stockwell v. Southgate Corpn.*, [1936] 2 All E. R. 1343.
224. *Add. Annotations*:—*Refd. Salisbury & Fordingbridge District Drainage Board v. Southern Tanning Co. (1920), Ltd.*, [1927] 2 K. B. 566; *A.-G. v. Sharp* (1930), 99 L. J. Ch. 441; *Musical Performers' Protection Asscn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485; *A.-G. v. Premier Line, Ltd.*, [1932] 1 Ch. 303.
- 226a. —.—]—*Dramatic & Musical Performers' Protection Act, 1925 (c. 46)*.—*MUSICAL PERFORMERS' PROTECTION ASSCN., LTD. v. BRITISH INTERNATIONAL PICTURES, LTD.* (1930), 46 T. L. R. 485.
230. *Add. Annotation*:—*Consd. Everett v. Ryder* (1926), 135 L. T. 302.
231. *Add. Annotations*:—*Apld. Groedel v. Hungarian Property Administrator* (1927), 44 T. L. R. 65. *Refd. Groebel v. Hungarian Property Administrator* (1925), 70 Sol. Jo. 345.
- 231a. *Power of local authority to pull down building.*]—*RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL v. LEE*, No. 219a, *ante*.
232. *Add. Annotation*:—*Refd. Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.
236. *Add. Annotation*:—*Refd. Stockwell v. Southgate Corpn.*, [1936] 2 All E. R. 1343.
239. *Add. Annotations*:—*Consd. Odhams Press, Ltd. v. London & Provincial Sporting News Agency* (1929), *Ltd.*, [1936] 1 All E. R. 217. *Refd. Layzell v. Thompson* (1926), 43 T. L. R. 58; *Jaeger v. Jaeger Co.* (1927), 44 R. P. C. 437.
- 240a. —.—]—*Copyright*.]—The starting prices or final betting odds on horses engaged in horse-races were ascertained, agreed, & noted down at the start of each race by two journalists employed by pltf. working together from information collected on the course from bookmakers & others, & after the result of the race were communicated to a representative of the Press, then to bookmakers, & then publicly announced on the course. *EVE, J.*, held that the entries in the notebook of starting prices were not a literary compilation & therefore not the subject of copyright within Copyright Act, 1911 (c. 46). On appeal pltf. abandoned their claim for damages for infringement of copyright, as they admitted that they were unable to point to any specific infringement, but obtained the leave of the ct. to amend their notice of appeal by confining it to a claim for a declaration that they were joint owners of the copyright in the starting prices or betting odds recorded by their representatives:—*Held*: by the Ct. of Appeal, without deciding whether the entries in question were a literary compilation & so the subject of copyright, inasmuch as no specific document was named in which copyright was claimed & no evidence of any specific infringement had been given, the case was not one in which the ct. would exercise its discretionary power under R. S. C., Ord. 25,

PART II. SECT. 3, SUB-SECT. 3.—A.

- 191 I. *Exercise of discretion*.]—*KENT COAL CO., LTD. v. D. L. R. 337*; 6 F. L. J. (Can). 163.—OAN.
- WESTERN UTILITIES, LTD.*, [1936] 2 W. W. R.

- r. 5, by making the declaratory order asked for.—**ODHAMS PRESS, LTD. v. LONDON & PROVINCIAL SPORTING NEWS AGENCY (1929), LTD.**, [1936] Ch. 357; [1936] 1 All E. R. 217; 105 L. J. Ch. 195; 154 L. T. 277; 52 T. L. R. 229; 80 Sol. Jo. 145, O. A.
241. *Add. Annotation*.—**Refd. Odhams Press, Ltd. v. London & Provincial Sporting News Agency (1929), Ltd.**, [1936] 1 All E. R. 217.
251. *Add. Annotations*.—**Consd. R. v. Grain, Ex p. Wandsworth Grdns.**, [1927] 2 K. B. 205. **Refd. A.-G. v. Sharp (1930)**, 99 L. J. Ch. 441.
- 254a. **Proceedings of Army Council.**—**KYNASTON v. A.-G.** (1933), 49 T. L. R. 300, C. A.
- 260a. **As to validity of foreign judgment.**—**Circumstances (see CONFLICT OF LAWS, No. 1135a, ante) in which:—Held: the ct. had power to make the declaration asked for.**—**ELLERMAN LINES, LTD. v. READ (1927)**, 44 T. L. R. 7; *reversd.* on other points (1928), 44 T. L. R. 285, C. A.
- 262a. **As to whether structure "temporary building."**—**RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL v. LEE**, No. 219a, *ante*.

## Part IX.—Effect of Judgments and Orders.

282. *Add. Citation*.—[1925] B. & C. R. 265.
320. *Add. Annotation*.—**Refd. Knight v. Knight (1925)**, 95 L. J. Ch. 33.
337. *Add. Citation*.—*reversg.* S. C. sub nom. **Re SNEYD, Ex p. OXFORD (Bf.)**, 52 L. J. Ch. 724.

### PART II. SECT. 3, SUB-SECT. 3.—E. (c).

*sd. When made.*—Declaratory judgment made in action for declaration of title to land.—**ARMSTRONG v. CURRIE**, [1934] 2 D. L. R. 747; 6 M. P. R. 591.—CAN.

### PART II. SECT. 3, SUB-SECT. 3.—E. (d).

*so. Of bye-law.*—Although sect. 62 (8) of King's Bench Act, 1931, provides that the ct. may make binding declarations of right whether or not any consequential relief is or could be claimed, yet it does not follow that an action will lie for merely a declaration that a certain municipal bye-law is invalid when *pltf.* has nothing more than a general or political or public interest in the bye-law; he must be shown to have such a personal interest therein as affects or reasonably may affect him with respect to his rights as to status, person or property.—**JOHANSON v. WINNIPEG CITY**, [1935] 2 W. W. R. 329; 43 Man. L. R. 201; 5 F. L. J. (Can.) 68.—CAN.

### PART II. SECT. 3, SUB-SECT. 3.—E. (e).

*sg. As to construction of charitable bequest—During precedent life tenancy.*—The ct. will not make a declaration that a charity comes within the description of a bequest during the running of a precedent life estate.—**RE LOCKYER**, [1934] O. R. 22; 1 D. L. R. 687.—CAN.

*sl. Rights of beneficiaries.*—A declaratory judgment may be made, whatever the procedure, on application by an administrator for directions involving no claim against the interests of beneficiaries.—**Re CARCADEN**, [1936] 2 D. L. R. 114.—CAN.

### PART II. SECT. 3, SUB-SECT. 5.

*q i.*—Although *pltf.* does not ask for a declaration of title, the ct. may make such an order.—**MEINER v. MASON**, [1931] 2 D. L. R. 156; 3 M. P. R. 427.—CAN.

*q ii.*—In an action against the trustee for the creditors of a merchant, for damages for the alleged wrongful conversion of flour & cereals which *pltf.* had consigned to the merchant for sale on *pltf.*'s behalf, *pltf.* contended that a declaration was necessary for their future protection in their relationship with others who might become trustees for creditors.—**Held: the declaration should not be made, it being sufficient to determine the rights of the parties in the present case.**—**LAKE OF THE WOODS MILLING CO., LTD., & SPILLERS' CANADIAN MILLING CO., LTD. v. TRADERS TRUST CO.**, [1933] 3 W. W. R. 161.—CAN.

[1933] 3 W. W. R. 161.—CAN.

*q iii.*—*Rights of mortgagor.*—**WAKIM v. EQUITABLE AGENCY CO. & BEYEA**, [1934] 8 M. P. R. 170.—CAN.

*q iv.*—An option holder for the purchase of land is an "owner" for the purpose of applying for a declaration that a municipal bye-law does not affect the lands in question.—**BLAINIE v. TORONTO**, [1935] 4 D. L. R. 328.—CAN.

*r i.*—The rule that the cts. should not be called on to decide merely theoretical propositions applied to an appl. by the liquidator for the approval by the ct. of his action in not redeeming certain property of the co. from a tax sale.—**Re GREAT WEST PERMANENT LOAN CO.**, [1928] 3 W. W. R. 628.—CAN.

*so. Declaration as to poor law settlement.*—**MAHONEY v. BLOCKHOUSE OVERSEERS**, [1934] 4 D. L. R. 255.—CAN.

*sd. Declaratory Judgments Act, 1908—Discretion of court—Anticipatory construction.*—The jurisdiction of the ct. to give or make a declaratory judgment or order under sect. 3 of the above Act is discretionary, & the ct. will not give or make such judgment or order by way of anticipatory interpretation or construction of statutory powers in the abstract, without knowledge of the facts & circumstances under which such powers might be exercised, or without any certitude that many of the powers will ever be exercised. Neither will the ct. exercise its discretion to give or make any judgment or order on a question of construction which, whichever way it is decided, does not necessarily put an end to the litigation.—**DAIRY PROPRIETARY ASSOCN. (INC.) v. NEW ZEALAND DAIRY PRODUCT CONTROL BOARD**, [1936] N. Z. L. R. 535.—N.Z.

*so. Whether binding on Crown.*—The Crown is not bound by the above Act, in a case where the question raised involves a decision affecting a monetary claim against the Crown.—**McDOUGALL v. A.-G.**, [1925] N. Z. L. R. 104.—N.Z.

### PART VIII.

274 iii. —.—Under Land Registry Act, R. S. B. C., 1924, the question of priority as between an applicant to register a mtge. & a registered judgment creditor is not settled by the mere fact of the prior registration of the judgment. A mtgee. can, if the facts warrant it, secure registration in priority to a judgment registered after the execution of the mtge.—**GREGG v. PALMER**, [1932] 2 W. W. R. 161.—CAN.

274 iv. —.—Mtge. executed prior to judgment but registered after

registration of judgment held entitled to priority.—**GREGG v. PALMER (1932)**, 45 B. C. R. 267.—CAN.

### PART IX. SECT. 2.

*ci.*—*Lands subject to mortgage.*—Registered judgment binds only the interest of the debtors existing at the time of registration, & therefore cannot affect a mtge. already given by debtor before the judgment.—**YORKSHIRE GUARANTEE & SECURITIES CORPN v. EDMONDS (1900)**, 7 B. C. R. 348.—CAN.

*ci.*—*Lands acquired by debtor subsequently to unsatisfied execution—Whether bound by judgment.*—**BENT v. BANKS (1872)**, 9 N. S. R. (2 N. S. D.) 504.—CAN.

*ci.*—*Entered on warrant of attorney—Executed by husband & wife—Whether valid against wife's real estate.*—When a woman, entitled to real estate, joined with her husband in executing a warrant of attorney on which a judgment was entered & recorded, in order to bind such real estate, the Ct. of Probate is not justified in treating the judgment as a nullity.—**Re NELSON'S ESTATE (1856)**, 3 N. S. R. (2 Thom.) 1.—CAN.

*ci.*—*Subsequent death of debtor insolvent—Right to issue execution against representative.*—Where a judgment has been duly recorded in the lifetime of a deceased party, & his estate has been declared insolvent by the Probate Ct., an execution may nevertheless be issued on such judgment, on a proper suggestion of the facts on the record, against his exor. or administrator, but can be extended only on the land bound by such judgment.—**BURROWS v. ISNOR**, Cong. Dig. 670.—CAN.

### PART IX. SECT. 5.

*sg. Unsatisfied judgment—Collateral remedies unaffected.*—A judgment until it is satisfied is but a security for the particular cause of action in which it is recovered, & until then does not operate to affect any collateral concurrent remedy which the creditor may have.—**COMMERCIAL LIFE ASSURANCE CO. OF CANADA v. CADENHEAD**, [1931] 3 W. W. R. 653.—CAN.

### PART IX. SECT. 6.

336 i. *Effect of covenant to pay interest—Mortgage.*—By a mtge. the mtgor. covenanted, by a separate covenant, to pay interest. The mtgee. obtained judgment against the mtgor. for the principal & interest due.—**Held: the security of the mtge. was not merged in the judgment.**—**LOWRY v. WILLIAMS**, [1895] 1 I. R.

## Part XIII.—Enforcement of Judgments and Orders.

- 366a. —.—]—*GRIFFITHS v. HUGHES* (1847), 16 M. & W. 809; 4 Dow. & L. 719; 2 New Pract. Cas. 231; 16 L. J. Ex. 176; 9 L. T. O. S. 57; 11 Jur. 313; 153 E. R. 1418.
- 366b. —.—]—*GIBBS v. FLIGHT* (1853), 13 C. B. 803; 1 C. L. R. 329; 22 L. J. C. P. 256; 17 Jur. 1034; 138 E. R. 1417.
- 368a. —.—]—A rule for taxation of costs, & an *allocatur* thereon, do not amount to a "rule" or "order" within the above sect., so as to be capable of being registered as a judgment.—*SHAW v. NEALE* (1858), 6

H. L. Cas. 581; 27 L. J. Ch. 444; 31 L. T. O. S. 190; 4 Jur. N. S. 695; 6 W. R. 635; 10 E. R. 1422, H. L.; *reversg.* on other points (1855), 20 Beav. 157.

371. After this case add "— Order of Probate Division.]—*See* EXECUTORS, Vol. XXIII., p. 281, No 3486."
386. *Add. Annotation*:—*Refd. Re Hedderwick, Morten v. Brinsley*, [1933] Ch. 669.
387. *Add. Annotation*:—*Refd. Re Hedderwick, Morten v. Brinsley*, [1933] Ch. 669.
388. *Add. Annotation*:—*N.F. Re Hedderwick, Morten v. Brinsley*, [1933] Ch. 669.

## Part XVI.—Interest on Judgments and Orders.

*See, now*, Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 3.

- 407a. —.— *Erroneous decree*.—*HAMILTON v. HOUGHTON* (1820), 2 Bli. 169; 4 E. R. 290, H. L.
- Annotation*:—*Consd. Bateman v. Margerison* (1853), 16 Beav. 477.
- 419a. —.— *Costs ordered to be charged on property.*] *Held*: as the costs were an equitable charge, they bore interest at four per cent.—*LIP-PARD v. RICKETTS* (1872), L. R. 14 Eq. 291; 41 L. J. Ch. 595; 20 W. R. 898.
- Annotations*:—*Consd. Eardley v. Knight* (1889), 41 Ch. D. 537. *Apprvd. Re Drax, Savile v. Drax*, [1903] 1 Ch. 781.
- 422a. —.—]—The ct. will give interest on costs payable out of a fund which cannot be immediately realised.—*Re CAMPBELL'S TRUSTS* (1871), 19 W. R. 427.

430. *Add. Citation*:—16 Asp. M. L. C. 524.

432a. *Discretion of court.*]—Finally, there is the question which may arise as to payment of interest, either on any sums payable to the Comrs. or on any sums payable by the Comrs. To get rid of the last question at once it seems to be plain, having regard to Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 3, that the matter is one in my discretion. That being so, this is a case in which I am not disposed to give interest to either side; it is not, I think, a case in which there should be payment of any interest (*FARWELL, J.*).—*TEES CONSERVANCY COMRS. v. JAMES*, [1935] Ch. 544; 104 L. J. Ch. 260; 153 L. T. 146; 99 J. P. 149; 51 T. L. R. 219; 33 L. G. R. 124.

### PART XIII. SECT. 1, SUB-SECT. 1.—A. (a).

*sf. General rule.*]—An action lies on a judgment for a sum certain even though the judgment recoverable therein will have no more binding effect than the former judgment; & the ct. has no power to prevent the judgment creditor from bringing the action & recovering thereon & no power to impose terms on him for so doing.—*MUIRHEAD v. NEWMAN*, [1931] 1 W. W. R. 589; 2 D. L. R. 519; 26 Alta. L. R. 94.—CAN.

### PART XIII. SECT. 1, SUB-SECT. 2.

*sg. Judgment in favour of legatee of one partner—Against other partner as executor—Previous judgments against same partner—By secured & simple contract creditors.*—*HARPER v. HARPER* (1890), 2 B. C. R. 15.—CAN.

*sh. Judgment obtained by default in Quebec—Defendant resident & served with writ in Ontario.*]—Deft. who was resident & domiciled in the Province of Ontario, was served there with a writ of summons by which an action for the price of goods sold & delivered was commenced against him in the Superior Ct. of Quebec. The cause of action arose partly, at least, in Ontario. He did not appear, & judgment was entered against him by default. In an action upon that judgment brought in a Division Ct. in Ontario by same plff. against same deft. the latter pleaded that the Quebec judgment was of no effect in Ontario, & that in truth he was not indebted to plff.:—*Held*: the provisions now found in Jud. Act, R. S. O. 1927, c. 88,

ss. 51, 52, which were enacted by an Act of the Province of Canada in 1860, 23 Vict. c. 24, must be confined to actions upon judgments obtained in the Province of Quebec, which, according to the principles of international law, applicable as between the different Provinces of the Dominion, are entitled to extra-territorial recognition, i.e. to those cases in which the writ was served within the Province of Quebec upon a person domiciled & resident therein & who owed allegiance to the laws of Quebec.—*LUNG v. LEE*, [1929] 1 D. L. R. 130; 63 O. L. R. 194.—CAN.

*sj. Judgment against lands—Enforcement of—Necessity to sue out execution.*]—*BANK OF UPPER CANADA v. BEATY* (1862), 9 Gr. 321.—CAN.

### PART XIV.

*sk. Judgment not registered—Priority of mortgage.*]—*MINERAL PRODUCTS CO. v. CONTINENTAL TRUST CO.* (1906), 37 S. C. R. 517.—CAN.

### PART XVI. SECT. 1.

*sp. Action by municipality against street railway company.*]—Interest is allowable upon a disputed debt claimed by a municipality for the use of its streets by a railway co.—*OTTAWA v. OTTAWA ELECTRIC RY. CO.*, [1936] 4 D. L. R. 539; O. R. 547; *affd.*, [1937] 2 D. L. R. 534; O. R. 358.—

### PART XVI. SECT. 2.

434 v. —.—]—Interest runs from the date of a judgment on award, although varied by an Appellate Ct.—*GILLINGHAM v. SHIFFER-HILLMAN*

*CLOTHING MANUFACTURING CO., LTD.*, [1934] 4 D. L. R. 112; *affd.*, [1934] 4 D. L. R. 801; O. R. 524.—CAN.

*sa. From date of order.*]—Plffs. brought an action to recover a liquidated sum. Deft. defended the action, & delivered a counterclaim. A consent was entered into between the parties, by which it was provided that all proceedings in the action should be stayed upon certain terms. By these terms deft. agreed to pay to plffs. a certain sum by instalments, & if the instalments should be in arrear for more than seven days, the balance then due should immediately become payable by deft. Deft. was to withdraw his counterclaim, & the consent was to be made a rule of ct. An order was subsequently made staying the action on these terms. Default having been made by deft. in the payment of the instalments, a writ of *fi. fa.* was issued, directing the sheriff to levy execution on the goods of deft. for a certain sum, which included the balance then due & interest thereon at the rate of 4 per cent. *per annum* from the date of the said order of the ct. Deft. applied for an injunction to restrain the sheriff from acting under the *fi. fa.*:—*Held*: since the order of the ct. was one for the payment of a sum of money, it followed that interest was leviable at 4 per cent. *per annum*, & that it ran from the date of the order. Accordingly the amount for which the *fi. fa.* was issued was correct, & the sheriff could not be restrained by injunction from levying execution.—*FARBENBLOOM v. MOREL (GLASGOW), LTD., & SHERLOCK*, [1930] 1 R. 361.—IR.

438a. ———.—]—BELGIAN GRAIN & PRODUCE Co., LTD. v. COX & Co. (FRANCE), LTD., [1919] W. N. 317, C. A.

448a. S. P. FOX v. CHARLTON, CHARLTON v. FOX (1865), 6 New Rep. 352.

## Part XVII.—Judicial Decisions as Authorities.

498a. ———.—]—(1) When any tribunal is bound by the judgment of another ct., either superior or co-ordinate, it is bound by the judgment itself, & if from the opinions delivered it is clear what the *ratio decidendi* was which led to the judgment, then that *ratio decidendi* is also binding. But if it is not clear, then it is not part of the tribunal's duty to spell out with great difficulty a *ratio decidendi* in order to be bound by it.

(2) If a decision of the House of Lords rests upon the special & peculiar circumstances of the case, the case does not bind the House, or any ct., by a general principle; but if the decision rests upon a general doctrine, it binds all cts. & the House, & that doctrine is part of the law of the land until the legislature be moved to interfere.—GREAT WESTERN RY. Co. v. MOSTYN (OWNERS), THE MOSTYN, [1928] A. C. 57; 97 L. J. P. 8; 138 L. T. 403; 92 J. P. 18; 44 T. L. R. 179; 26 L.G. R. 91; 17 Asp. M. L. C. 367, H. L.

501a. ———.—]—Not decision of fact.]—A decision of fact in one case cannot bind a judge who has to decide a similar question of fact in another (TALBOT, J.).—WILLIAMS-ELLIS v. COBB, [1935] 1 K. B. 310; 104 L. J. K. B. 109; 152 L. T. 133; 99 J. P. 93; 51 T. L. R. 131; 79 Sol. Jo. 11; 33 L. G. R. 39, C. A.

506. Add. Annotation.—*Refd. Koskas v. Standard Marine Insce.* (1926), 42 T. L. R. 692.

508a. ———.—]—It is the duty of a judge to ascertain the construction of the instrument before him, & not to refer to the construction put by another judge upon an instrument, perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion & error, in this way, that if you look at a similar instrument, & say that a certain construction was put upon it, & that it differs only to such a slight degree from the document before you, that you do not think the difference sufficient to alter the construction, you miss the real point of the case, which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the judge who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have,

in fact, no guide whatever; & the result, especially in some cases of wills, has been remarkable. There is, first, document A., & a judge formed an opinion as to its construction. Then came document B., & some other judge has said that it differs very little from the document A., not sufficiently to alter the construction, therefore, he construes it in the same way. Then comes document C., & the judge there compares it with document B., & says it differs very little, & therefore, he shall construe it in the same way; & so the construction has gone on until we find a document which is in totally different terms from the first, & which no human being would think of construing in the same manner, but which has by this process come to be construed in this manner (JESSEL, M.R.).—ASPDEN v. SEDDON (1874), 10 Ch. App. 396, n.; 44 L. J. Ch. 361, n.; 31 L. T. 626; on appeal (1875), 10 Ch. App. 394, L. JJ.

Annotation:—*Apld. Re Whiting, Ormond v. De Launay* (1913), 82 L. J. Ch. 309.

506b. Cases decided on demurrer.]—*Todd v. Flight*, 9 C. B. N. S. 377, was decided on demurrer; that is to say, if statements in the declaration were true, did they give a right of action against deft.? And cases decided on demurrer in that way are not authorities for what would be the case if there were other statements in the declaration. They are authorities on the question, statements in the declaration being taken as true: Do they give a cause of action? (SCRUTTON, L.J.).—*ST. ANNE'S WELL BREWERY Co. v. ROBERTS* (1928), 140 L. T. 1; 92 J. P. 180; 44 T. L. R. 703; 26 L. G. R. 638, C. A.

508a. ———.—]—Two reasons were given by all the members of the Ct. of Appeal for their decision & we are not entitled to pick out the first reason as the *ratio decidendi* & neglect the second, or to pick out the second reason as the *ratio decidendi* & neglect the first; we must take both as forming the ground of the judgment (GREER, L.J.).—*LONDON JEWELLERS, LTD. v. ATTENBOROUGH, LONDON JEWELLERS, LTD. v. ROBERTSONS (LONDON), LTD.*, [1934] 2 K. B. 206; 103 L. J. K. B. 429; 151 L. T. 124; 50 T. L. R. 436; 78 Sol. Jo. 413; 39 Com. Cas. 290, C. A.

517a. ———.—]—It is difficult to know the circumstances in which, in the course of the hearing of a case, a judge makes an interlocutory observation, & I think it would be most

### PART XVII. SECT. 1.

p. i. ———.—]—Cts. should be very careful about applying to this country English decisions in regard to constructive notice, & should do so only when they are quite sure that the circumstances are really similar.—*KALYANI v. KRISHNAN NAMBIAR* (1932), 1 L. R. 55 Mad. 519.—IND.

p. ii. ———.—]—The Indian income tax Act differs materially from the English

income tax statutes, & at any rate in the present case, decisions under the English statutes are of little assistance in applying the Indian Act.—*INCOME TAX COMR. v. SHAW, WALLACE & Co.* (1932), 59 L. R. Ind. App. 206.—IND.

p. i. ———.—]—It is well settled by judgments of the Privy Council both that sect. 11 of Code of Civil Procedure, 1908, is not exhaustive of the subject of *res judicata*, & that for the general principles applicable thereto it

is legitimate to refer to decisions in the English cts.—*MUNNI BIBI v. TIRLOKI NATH* (1931), 58 L. R. Ind. App. 158, P. C.—IND.

494 i. What part of decision binding.—Only *ratio decidendi*.—Only the principle upon which a case is decided is binding upon a court of co-ordinate jurisdiction & inferior cts.—*Re MA MYA v. MA THEIN* (1926), 1 L. R. 4 Ran. 313.—IND.

unsatisfactory to rely upon such an interlocutory observation as an authority which binds me (BENNETT, J.).—*Re BURRADON & COXLODGE COAL CO., LTD., MARTIN'S BANK, LTD. v. BURRADON & COXLODGE COAL CO., LTD.* (1930), 23 B. W. C. C. 7, C. A.

517b. — *Obiter dicta.*—It is of course perfectly familiar doctrine that *obiter dicta*, though they may have great weight as such, are not conclusive authority. *Obiter dicta* in this context means what the words literally signify—namely, statements by the way. If a judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case & the reasons for the decision (TALBOT, J.).—*FLOWER v. EBBW VALE STEEL, IRON & COAL CO.*, [1934] 2 K. B. 132; 103 L. J. K. B. 465; 151 L. T. 87; 78 Sol. Jo. 154, C. A.; *on appeal*, [1936] A. C. 206, H. L.

525a. —.]—In doubtful cases the cts. attach some importance to the fact that a decision has stood unchallenged for a considerable time, but neither the House of Lords nor the Ct. of Appeal has shown the slightest compunction in overruling cases of much higher authority than the decision in this case [*Birkenhead Guardians v. Brookes* (1906), 95 L. T. 359, decided by RIDLEY & DARLING, J.J.] if, when the matter is presented to them for consideration, they are of opinion that the decisions are wrong (SCRUTTON, L.J.).—*PONTYPRIDD UNION v. DREW*, [1927] 1 K. B. 214; 95 L. J. K. B. 1030; 136 L. T. 83; 90 J. P. 169; 42 T. L. R. 677; 70 Sol. Jo. 795; 24 L. G. R. 405, C. A.

526a. —.]—Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted & rights determined. But where they are plainly wrong, & especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, & practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them. (LORD LOREBURN, C.).—*WEST HAM UNION v. EDMONTON UNION*, [1908] A. C. 1; 77 L. J. K. B. 85; 98 L. T. 1; 72 J. P. 9; 24 T. L. R. 108; 6 L. G. R. 39, H. L.

*Annotation* :—*Consd. Bourne v. Keane*, [1929] A. C. 815.

529a. — *Original construction erroneous.*—Originally, the Act of Parliament in question did not receive that construction which the language put seems to warrant; but we are bound by the weight of authority, & however we may regret that the true construction of the Act seems to have been departed from, we cannot now put that construction upon it which, unfettered by authority, we might be inclined to do (HUTLOCK, B.).—*BOOTH v. IBBOTSON* (1827), 1 Y. & J. 354; 148 E. R. 707.

542. *Add. Annotation* :—*Refd. United States Shipping Board v. Strick*, [1926] A. C. 545.

551. *Add. Citations* :—[1926] A. C. 545; 81 Com. Cas. 357; 17 Asp. M. L. C. 40.

559a. *Affecting revenue.*—Tax cases ought not to be unsettled (LORD SUMNER).—*SMITH (JOHN) & SON v. MOORE*, [1921] 2 A. C. 13; 90 L. J. P. O. 149; 125 L. T. 481; 87 T. L. R. 613; 65 Sol. Jo. 492; 12 Tax Cas. 260, H. L.

562a. *Affecting rating assessment.*—The fact that that decision has stood for forty years & has regulated the practice of rating during that period held not to preclude the House from overruling it on finding that it was erroneous in law & its operation unjust by placing an unjustifiable burden on the occupiers of other hereditaments.—*ROBINSON BROS. (BREWERS), LTD. v. DURHAM COUNTY ASSESSMENT COMMITTEE* (AREA No. 7), [1938] A. C. 321; 158 L. T. 498; 102 J. P. 313; 82 Sol. Jo. 452; 36 L. G. R. 357; *sub nom.* *ROBINSON BROS. (BREWERS), LTD. v. HOUGHTON & CHESTERLE-STREET ASSESSMENT COMMITTEE*, [1938] 2 All E. R. 79; 107 L. J. K. B. 369; 54 T. L. R. 568, H. L.

569a. —.]—Where a broad principle has been decided by the House of Lords it is very undesirable that it should be frittered away by fine distinctions (LORD CAVE, C.).—*NEWTON v. GUEST, KEEN & NETTLEFOLDS, LTD.* (1926), 135 L. T. 386; 70 Sol. Jo. 689; 19 B. W. C. C. 119, H. L.

*Annotations* :—*Apld. Robertson v. S.S. Appalachee, Rovira v. S.S. Appalachee* (1928), 136 L. T. 488; *Moule v. Marmite Food Extract Co.* (1927), 20 B. W. C. C. 446.

569b. —.]—When a question of law has been clearly decided by the House of Lords. it is undesirable that the decision should be weakened or frittered away by fine distinctions (LORD CAVE, C.).—*JONES v. SOUTH-WEST LANCASHIRE COAL OWNERS' ASSOCN.*, [1927] A. C. 827; 96 L. J. K. B. 894; 137 L. T. 737; 43 T. L. R. 725; 71 Sol. Jo. 680; *sub nom.* *THOMAS v. EVANS (RICHARD) & CO.*; *JONES v. SOUTH-WEST LANCASHIRE COAL OWNERS' ASSOCN.*, 11 Tax Cas. 790, H. L.

569c —.]—*GREAT WESTERN RY. Co. v. MOSTYN (OWNERS), THE MOSTYN*, No. 498a, *ante*.

573a. —.]—Decisions of the House of Lords upon matters of fact are not binding upon the House or upon any other ct. Decisions of the House of Lords upon matters of law are binding upon the House itself, & of course, upon any subordinate tribunal. (SCRUTTON, L.J.).—*WILKINSON (TAUNTON REVENUE OFFICER) v. SIBLEY & DONOVAN*, [1932] 1 K. B. 194; 101 L. J. K. B. 26; 146 L. T. 1; 95 J. P. 208; 29 L. G. R. 633; 2 B. R. A. 926, C. A.

573b. *Decision on question of fact.*—*WILKINSON (TAUNTON REVENUE OFFICER) v. SIBLEY & DONOVAN*, No. 578a, *ante*.

577. *Add. Annotation* :—*Refd. Hart v. Riversdale Mill Co.* (1927), 96 L. J. K. B. 691.

588a. —.]—A decision of the appellate ct. in a colony which is regulated by English law is not assumed to be wrong, because it conflicts with a decision of the Ct. of Appeal in England; it is otherwise if the conflict is with a decision

#### PART XVII. SECT. 3.

548 ii. —.]—The cts. must always hesitate to overrule decisions which are not manifestly erroneous & mis-

chievous, which have stood for many years unchallenged, & which from their nature may reasonably be supposed to have affected the conduct of a large portion of the community in matters

relating to rights of property.—*MUKHDOO SINGH v. HARAKH NARAYAN SINGH* (1932), 1 L. R. 11 Pat. 112.—IND.

of the House of Lords or of the Judicial Committee of the Privy Council.—**ROBINS v. NATIONAL TRUST CO.**, [1927] A. C. 515; 96 L. J. P. C. 84; 137 L. T. 1; 43 T. L. R. 243; 71 Sol. Jo. 158, P. C.

**Pulp & Paper** [A. C. 289.] **Corpn. v. Spanish River**

**588b.** —.—.]—**GREAT WESTERN RY. CO. v. MOSTYN (OWNERS), THE MOSTYN**, No. 498a, *ante*.

**588c. Decision on question of law.**—**WILKINSON (TAUNTON REVENUE OFFICER) v. SIBLEY & DONOVAN**, No. 573a, *ante*.

**588d. Decision on question of fact.**—**WILKINSON (TAUNTON REVENUE OFFICER) v. SIBLEY & DONOVAN**, No. 573a, *ante*.

**595a. Question of maritime law.**—A judgment of the House of Lords upon a proper maritime question, whether given in an English or in a Scottish appeal, is of equal authority in all the Admiralty Cts. of the kingdom.—**CURRIE v. MCKNIGHT**, [1897] A. C. 97; 66 L. J. P. C. 19; 75 L. T. 457; 13 T. L. R. 53; 8 Asp. M. L. C. 193, H. L.

**Annotation** :—**Refd. Blairmore S.S. Co. v. Macredie**, [1898] A. C. 593.

**597. Add. Annotations** :—**Consd. Barton-upon-Irwell Union v. Wycombe Union**, [1926] 2 K. B. 3. **Refd. Wycombe Grdns. v. Barton-upon-Irwell Grdns.** (1926), 43 T. L. R. 89.

**600. Add. Annotation** :—**Consd. Re Transferred Civil Servants (Ireland) Compensation**, [1929] A. C. 243.

**601. Add. Annotation** :—**Consd. Re Transferred Civil Servants (Ireland) Compensation**, [1929] A. C. 243.

**602. Add. Annotation** :—**Refd. Re Article X of Articles of Agreement for Treaty between Great Britain & Ireland** (1928), 45 T. L. R. 57.

**603a.** —.—.]—The English cts. are not bound by the judgments of the Privy Council. They pay them the greatest respect, but there are numerous cases where the House of Lords has declined to follow judgments of the Privy Council (**SCRUTTON, L.J.**).—**SERVICE v. SUNDELL** (1929), 99 L. J. K. B. 55; 46 T. L. R. 12; 73 Sol. Jo. 729, C. A.

#### PART XVII. SECT. 4. SUB-SECT. 1.—B.

**589 i. Reasons for judgment—How far binding.**—**On Colonial Court of Appeal.**—**Held**: the Ct. of Appeal is bound not only by the actual decision of the House of Lords in **Russell v. Russell**, but also by the expressions of opinion as to the *ratio decidendi* in the majority decisions.—**R. v. SEATON**, [1933] N. Z. L. R. 548.—N.Z.

**sm. On colonial court—Contrary decision of Privy Council.**—**LOBE v. ROOKWOOD RURAL CREDIT SOCIETY**, No. 608 ii, *post*.—CAN.

**sm. On Supreme Court of Canada.**—The Supreme Ct. of Canada is not bound by or subject to the decisions of the House of Lords unless & until the Parliament of Canada shall so declare, that Parliament being now, as the result of the Imperial Conference of 1926, the only authority which has jurisdiction to make such a binding declaration upon the cts. of this nation; & where a decision of the Supreme Ct. is now found to be in conflict with a decision of the House of Lords the law as declared by the former should be followed by the other cts. in Canada.—**GEORGIA CONSTRUCTION CO. v. PACIFIC GREAT EASTERN RY. CO.**, [1929] 1

D. L. R. 77; [1928] 3 W. W. R. 466; *on appeal*, [1929] 4 D. L. R. 161; S. C. R. 630.—CAN.

**sp. On Land Valuation Appeal Court—Questions of derating.**—The Land Valuation Appeal Ct. in deciding questions of derating under Rating & Valuation (Apportionment) Act, 1928, will follow decisions of the House of Lords where applicable.—**ABERDEEN ASSESSOR v. COLLIE**, [1932] S. C. 304.—SCOT.

#### PART XVII. SECT. 4. SUB-SECT. 2.

**603 ii.** —.—.]—**Contrary decision by House of Lords.**—While a decision of the Privy Council on a point actually decided by it is binding on a Canadian ct., even though there is a contrary decision on the same point by the House of Lords, yet where a statement of law cited from a judgment of the Privy Council is merely a dictum, the Canadian ct. is free to follow the House of Lords.—**LOBE v. ROOKWOOD RURAL CREDIT SOCIETY**, [1926] 2 D. L. R. 819; [1926] 2 W. W. R. 1; 35 Man. L. R. 499.—CAN.

**603 iii.** —.—.]—Where Canadian law with subject in hand is E. law, & a point thereof has been in one

**604. Add. Annotation** :—**Refd. Venn v. Tedesco**, [1926] 2 K. B. 227.

**605. Add. Annotations** :—**Consd. Venn v. Tedesco**, [1926] 2 K. B. 227; **Lynn v. Bamber**, [1930] 2 K. B. 72.

**608. Add. Citations** :—95 L. J. K. B. 866; 90 J. P. 185; 42 T. L. R. 478; 24 L. G. R. 496. **Add. Annotation** :—**Refd. Lynn v. Bamber**, [1930] 2 K. B. 72.

**608a.** —.—.]—Now ought I to follow *Bulli's Case*? It is not technically binding on me. . . . In my view, the decision of the Privy Council in *Bulli's Case* is one which should be followed. It accords with equity principle. It is supported by powerful opinion & decisions. It is agreeable to good sense & justice with respect to fraud. I therefore hold that it represents the existing law in these cts. (**MCCARDIE, J.**).—**LYNN v. BAMBER**, [1930] 2 K. B. 72; 99 L. J. K. B. 504; 143 L. T. 231; 46 T. L. R. 367; 74 Sol. Jo. 298.

**609. Add. Annotations** :—**Refd. Venn v. Tedesco**, [1926] 2 K. B. 227; **Lynn v. Bamber**, [1930] 2 K. B. 72.

**614a.** —.—.]—**Colonial appellate court.**—**ROBINS v. NATIONAL TRUST CO.**, No. 588a, *ante*.

**615a.** —.—.]—As a rule, this ct. ought to treat the decisions of the Ct. of Appeal in Chancery as binding authorities, but we are at liberty not to do so where there is a sufficient reason for overruling them (**COTTON, L.J.**).—**MILLS v. JENNINGS** (1880), 13 Ch. D. 639; 49 L. J. Ch. 209; 42 L. T. 169; 28 W. R. 549, C. A.

**616. Add. Annotation** :—**Consd. Morgan v. Provincial Insurance Co.** (1932), 147 L. T. 52.

**618a.** —.—.]—**Exchequer Chamber.**—A decision of the Exchequer Chamber . . . is an authority binding the English cts. up to & including the Ct. of Appeal (*per CUR.*).—**MAINE & NEW BRUNSWICK ELECTRICAL POWER CO. v. HART**, [1929] A. C. 631; 98 L. J. P. C. 146; 141 L. T. 370, P. C.

**624a.** —.—.]—**Question of fact.**—A decision of the Court of Appeal on fact is not binding on any other court, except as between the same parties. When the decision is that from

way by the Privy Council & subsequently in a contrary way by the House of Lords in a decision in which it expressly states in what respect the Privy Council erred, a Canadian ct. must apply the law as so settled by the House of Lords.—**WILL v. BANK OF MONTREAL**, [1931] 2 W. W. R. 364; 3 D. L. R. 526.—CAN.

**603 iv.** —.—.]—**Courts in India.**—A decision of the Privy Council binds all the cts. in India, at any rate as soon as the decision is promulgated & comes to the knowledge of a ct. in India.—**NINGAPPA MARBASAPPA ARLESHVAR v. GYANAJI POURAJI MARWADI** (1926), 1 L. R. 61 Bom. 231.—IND.

**603 v.** —.—.]—The decisions of the Privy Council are absolutely binding on all cts. in India.—**RE MA MYA v. MA TEWIN** (1926), 1 L. R. 4 Ran. 313.—IND.

#### PART XVII. SECT. 4. SUB-SECT. 3.

**624 iv.** —.—.]—A decision of the Appellate Div. is binding on it & on trial judges within the province, unless & until it is overruled by a higher ct. The belief that a higher ct. would take a different view from that expressed by the Appellate Div., though founded on general reasoning in other cases

certain facts certain legal consequences follow, the decision is, I think, binding on the Court of Appeal in any case raising substantially similar facts (*SCRUTTON, L.J.*).—*NEWSHOLME BROS. v. ROAD TRANSPORT & GENERAL INSURANCE CO.*, [1929] 2 K. B. 356; 98 L. J. K. B. 751; 141 L. T. 570; 45 T. L. R. 573; 34 Com. Cas. 330, C. A.

628a. ———.]—(1) Where a Ct. of Appeal has before it a series of judgments of the Ct. of Appeal which do not appear to be consistent with each other, & the later judgment was given when the Lords Justices were not aware of some of the previous decisions, in such circumstances, as a matter of judicial comity, it is open to the ct. to consider all the previous decisions of the Ct. of Appeal & to form its own views as to which are the more accurate & which it shall follow.

(2) A Ct. of Appeal consisting of three Lords Justices is not entitled to overrule a decision of a Ct. of Appeal expressed by two Lords Justices (*ATKIN, L.J.*).—*GLASKIE v. WATKINS*, [1927] 2 K. B. 181; 96 L. J. K. B. 469; 137 L. T. 132; 43 T. L. R. 314; 71 Sol. Jo. 192, C. A.

628b. ——— Conflicting decisions.]—*GLASKIE v. WATKINS*, No. 628a, *ante*.

628c. ———.]—Observations by *SCRUTTON & SARGANT, L.JJ.*, where there were conflicting decisions of the Ct. of Appeal as to the construction of a rule of ct., on the right of the ct. to consider & decide the matter for itself.—*SMITH v. SCHILLING*, [1928] 1 K. B. 429; 97 L. J. K. B. 276; 138 L. T. 475; 44 T. L. R. 109, C. A.

629a. ——— Court of Criminal Appeal.]—*PRACTICE NOTE* (1928), 20 Cr. App. Rep. 185.

630a. ——— Exchequer Chamber.]—*MAINE & NEW BRUNSWICK ELECTRICAL POWER CO. v. HART*, No. 618a, *ante*.

631a. ——— Colonial appellate court.]—*ROBINS v. NATIONAL TRUST CO.*, No. 588a, *ante*.

631b. ——— Question of fact.]—*NEWSHOLME BROS. v. ROAD TRANSPORT & GENERAL INSURANCE CO.*, No. 624a, *ante*.

decided by the higher ct., is not a sufficient reasoning for not following the decision of the Appellate Div.—*DOWSETT v. EDMUNDS* (Alta.), [1926] 4 D. L. R. 796; [1926] 3 W. W. R. 447; 46 Can. Crim. Cas. 330.—CAN.

631 iii. ———.]—A decision of the English Ct. of Appeal, which is not in conflict with a decision of the Supreme Ct. of Canada & has not been departed from by the Privy Council or overruled by the House of Lords, is binding on the K. B. of Manitoba with respect to the interpretation of an Act in the same terms as those of the Act interpreted in the Ct. of Appeal's decision, even though that decision is contrary to one given by a Ct. of Appeal of another province.—*LOWERY v. LAMONT* (Man.), [1927] 1 D. L. R. 669; [1927] 1 W. W. R. 95.—CAN.

i i. ———.]—*DOWSETT v. EDMUNDS* (Alta.), No. 624 iv, *ante*.—CAN.

ii. ———.]—Decisions of the highest ct. of a province are absolutely binding on all subordinate cts. in that province.—*Re MA MYA v. MA THEIN* (1926), 1 L. R. 4 Ran. 313.—IND.

iii. ——— Courts of other Provinces.]—As a general rule the decision of the highest ct. of one province upon a Dominion statute should be followed in the other provinces. The real reason for the rule seems to be that the law is

in fact the same in all the provinces & it is unseemly for the provincial cts. to declare that it is not so, where there is a higher ct. which can correct any error with propriety, & Parliament is equally able to do so.—*R. v. GLENFIELD, R. v. STEIN, R. v. AMBREY, R. v. HUGHES, R. v. WONG CHEW*, [1934] 3 W. W. R. 465; [1935] 1 D. L. R. 37; 62 O. C. C. 334.—CAN.

#### PART XVII. SECT. 4, SUB-SECT. 5.

641 i. On another Divisional Court—Court equally divided.]—The decision of an equally divided Div. Ct. is binding on all Div. Cts.—*DRISCOLL v. COLLETT*, [1926] 2 D. L. R. 428; 58 O. L. R. 444.—CAN.

645 i. Court equally divided.]—The decision of a Divisional Court, though the result of an equal division of opinion, is, by the Judicature Act, s. 31 (1), binding on another ct. of co-ordinate jurisdiction, & must be followed unless it may be departed from by the concurrence of the judges who gave the earlier decision.—*DONALD v. LEWIS*, [1929] 4 D. L. R. 351; 64 O. L. R. 301; *aff.*, [1929] 1 D. L. R. 649; 63 O. L. R. 310.—CAN.

#### PART XVII. SECT. 4, SUB-SECT. 6.

sn. On court itself.]—The ct. having reached the conclusion that its previous decision was erroneous, refused to

642. *Add. Annotation* :—*Refd. Lowther v. Clifford*, [1927] 1 K. B. 130.

642a. ——— Conflicting decisions.]—Where there are two previous decisions of the Div. Ct., one of which was decided by a ct. of two judges & the other by a ct. of three judges, the rule of the Div. Ct. is to respect the decision of the ct. of three judges.—*DE VRIES v. SMALLRIDGE*, [1928] 1 K. B. 482; 97 L. J. K. B. 244; 138 L. T. 497, C. A.

642b. ———.]—Observations, where there were two inconsistent lines of authorities as to the construction of Rent Restriction Acts, on the duty of the ct. to consider & decide the matter for itself.—*RATKINSKY v. JACOBS*, [1929] 1 K. B. 24; 97 L. J. K. B. 566; 138 L. T. 739; 92 J. P. 142; 44 T. L. R. 548; 72 Sol. Jo. 354; 26 L. G. R. 380, D. C.

658a. ———.]—While a judge of the High Ct., who is called upon to decide a point of law, should allow great weight to the decision of another judge of that ct. in a previous case upon the same point, he is not bound by that decision or relieved thereby from considering the point for himself.—*GREEN v. BERLINER*, [1936] 2 K. B. 477; [1936] 1 All E. R. 199; 105 L. J. K. B. 662; 155 L. T. 486; 52 T. L. R. 221; 80 Sol. Jo. 247.

661a. ———.]—When there is the decision of a ct. of co-ordinate jurisdiction upon the point, unreversed by a ct. of error, we ought to consider ourselves bound by it (*WILDE, C.J.*).—*BARKER v. STEAD* (1847), 3 C. B. 946; 5 Ry. & Can. Cas. 45; 16 L. J. C. P. 160; 8 L. T. O. S. 390; 11 Jur. 90; 136 E. R. 379.

669a. ——— Law of Property Acts.]—Where a learned judge, after consideration, has come to a definite decision on a matter arising out of this exceedingly complicated & difficult legislation [the Law of Property Acts], it is very desirable that the ct. should follow that decision (*MAUGHAM, J.*).—*Re SMITH, VINCENT v. SMITH*, [1930] 1 Ch. 88; 99 L. J. Ch. 27; 142 L. T. 178.

follow it.—*R. v. THOMPSON*, [1931] 2 D. L. R. 282; 1 W. W. R. 26; 55 Can. C. C. 33; 39 Man. L. R. 277.—CAN.

#### PART XVII. SECT. 4, SUB-SECT. 7.—A.

653 i. General rule.]—Where cts. have co-ordinate jurisdiction the practice in India appears to be that the decisions of one such ct. are not regarded as binding another.—*Re MA MYA v. MA THEIN* (1926), 1 L. R. 4 Ran. 313.—IND.

so. Application to High Court—Application previously refused by Supreme Court.]—An appln. pursuant to Service & Execution of Process Act, 1901-1924, s. 19, for leave to execute in Victoria a writ of attachment issued out of the Supreme Ct. of New South Wales having been refused by the Supreme Court of Victoria, an appln. under the same section was made for leave of a justice of the High Ct. to execute the writ in any state other than New South Wales :—*Held*: the High Ct. ought not to make an order which had been refused by a ct. of co-ordinate jurisdiction in the matter on facts identical with those brought before the High Ct.—*JONES v. JONES* (1928), 40 C. L. R. 315; [1928] V. L. R. 112; [1928] Argus L. R. 46.—AUS.



**679a.** —.].—*Seems*: a decision of the Exchequer Chamber, where the judges were equally divided, will be regarded as binding on the Ct. of Appeal.—*HART v. RIVERSDALE MILL CO.*, [1928] 1 K. B. 176; 96 L. J. K. B. 691; 137 L. T. 864; 91 J. P. 135; 43 T. L. R. 396; 71 Sol. Jo. 407, C. A.; on appeal from S. C. *sub nom.* *RIVERSDALE MILL CO. v. HART*, [1927] 1 K. B. 624, D. C.

**680a.** —.].—If one authority were produced to me, & my own opinion were the other way, I would not follow that authority; but if the authorities are numerous, I admit that I must be bound (*JESSEL, M.R.*).—*Re BETHLEHEM HOSPITAL* (1875), L. R. 19 Eq. 457; 44 L. J. Ch. 406; 23 W. R. 644.

*Annotation*:—*Reid. Ex p. St. Katherine Hospital* (1881), 17 Ch. D. 378.

**685a.** —.].—Of course, if other judges have expressed different views as to the construction, & their decisions are binding on this ct., this ct. has simply to bow & submit, whatever its own opinion may be (*JESSEL, M.R.*).—*Re WRIGHT, Ex p. WILLEY* (1883), 23 Ch. D. 118; 52 L. J. Ch. 546; 48 L. T. 380; 31 W. R. 553, C. A.

*Annotations*:—*Consd. Dashwood v. Magniac*, [1891] 3 Ch. 306. *Reid. Bourne v. Keane*, [1919] A. C. 815.

**705a.** *Tax cases.*—One ought, especially in tax cases, which apply equally in Scotland & in England, to pay the very greatest deference to decisions of the Scottish cts. (*GREER, L.J.*).—*SHANKS v. INLAND REVENUE COMRS.*, [1929] 1 K. B. 342; 98 L. J. K. B. 341; 140 L. T. 157; 14 Tax Cas. 249, C. A.

*Annotation*:—*Reid. I. R. Comrs. v. Miller*, [1930] A. C. 222.

**705b.** —.].—Although I think it is quite true that the general considerations on which this case falls to be determined are the same in Scottish & English law, it is quite a different thing to say that Scottish & English law are as much the same that you can quote cases & make them Scottish authorities (*LORD DUNEDIN*).—*LEITCH (WILLIAM) & CO., LTD. v. LEYDON, BARR (A. G.) & CO., LTD. v. MACGEOGHEGAN* [1931] A. C. 90; 100 L. J. P. C. 10; 144 L. T. 218, H. L.

**707a.** —.].—*Rating & Valuation (Apportionment) Act, 1928 (c. 44).*—We have before us a volume containing nearly one hundred Scottish decisions, many of them relating to

trades & hereditaments very similar to those coming before the English cts. The English cts. are not, of course, bound by those decisions, though they are naturally carefully considered by us; for it is eminently undesirable that exactly similar hereditaments should be derated in Scotland but not in England (*SCRUTTON, L.J.*).—*BAILEY (STOKE-ON-TRENT REVENUE OFFICER) v. POTTERIES ELECTRIC TRACTION CO., LTD.*, [1931] 1 K. B. 385; 100 L. J. K. B. 1; 143 L. T. 650; 94 J. P. 177; 46 T. L. R. 601; 74 Sol. Jo. 504; 28 L. G. R. 550, C. A.; on appeal, [1931] A. C. 151, H. L.

**709a.** —.].—Decisions of the cts. in Ireland are not binding on an English ct., & if they conflict with decisions in England, or if they are not consistent with the ct.'s view of the English law, the ct. will decline to follow them.—*Re INMAN, INMAN v. INMAN*, [1903] 1 Ch. 241; 72 L. J. Ch. 120; 88 L. T. 173; 51 W. R. 188; 47 Sol. Jo. 92.

**714.** *Add. Citations*:—95 L. J. K. B. 936; 135 L. T. 618; 42 T. L. R. 609; 70 Sol. Jo. 734, C. A.; *affd. sub nom.* *NEWCASTLE BREWERIES, LTD. v. INLAND REVENUE COMRS.* (1927), 96 L. J. K. B. 735; 137 L. T. 426; 43 T. L. R. 476; 12 Tax Cas. 927, H. L.

**718.** *Add. Annotation*:—*Reid. Buerger v. New York Life Assce.* (1927), 96 L. J. K. B. 930.

**728a.** —.].—*Shipping decisions.*—American shipping decisions, while treated with great respect, do not necessarily control the shipping decisions of the English cts.—*GOSSE MILLARD v. CANADIAN GOVERNMENT MERCHANT MARINE*, [1928] 1 K. B. 717; 138 L. T. 421; 44 T. L. R. 143; 17 Asp. M. L. C. 385; 33 Com. Cas. 139, C. A.; *sub nom.* *GOSSE MILLARD v. CANADIAN GOVERNMENT MERCHANT MARINE, AMERICAN CANNING CO. v. CANADIAN GOVERNMENT MERCHANT MARINE*, 97 L. J. K. B. 193; on appeal [1929] A. C. 223, H. L.

**730.** *Add. Annotation*:—*Consd. Laverdure v. Du Tremblay*, [1937] A. C. 666.

**730a.** —.].—The conclusions of French Cts. or French jurists upon articles of a Code similar, if not identical, with those in the Civil Code now under consideration, though entitled to great respect, are not of binding authority in Quebec (*LORD MAUGHAM*).—*LAVERDURE v. DU TREMBLAY*, [1937] A. C. 666; 106 L. J. P. C. 107, P. C.

#### PART XVII. SECT. 4, SUB-SECT. 7.—D.

693 H. S. P. ROSS v. FISER, [1926] 3 D. L. R. 289; [1926] 2 W. W. R. 422; 20 Sask. L. R. 553.—CAN.

#### PART XVII. SECT. 4, SUB-SECT. 12.

*sp. Not binding on Canadian courts.*—Irish cases are not binding on Canadian Cts., especially on unanalogous rules of practice.—*GURTON v. EWART*, [1936] 1 D. L. R. 399; 5 F. L. J. (Can.) 164.—CAN.

#### PART XVII. SECT. 4, SUB-SECT. 13.

*st. India.*—The decisions of the Sudder Dewani Adawlat & the Sudder Nizamat Adawlat are not binding on the High Cts.—*Re MA MYA v. MA THEIN* (1926), I. L. R. 4 Ran. 313.—IND.

*sv. —.*—Decisions of the highest ct. of a province are absolutely binding

on all subordinate cts. in that province, & ordinarily decisions of a full bench of a superior ct. are binding on benches other than full benches of that ct. & on all judges of that ct. sitting singly, & decisions of benches are binding on single judges.—*Re MA MYA v. MA THEIN* (1926), I. L. R. 4 Ran. 313.—IND.

*sw. — Burma—Chief Court of Lower Burma—Whether binding—On High Court.*—The High Ct. in the exercise of its ordinary original & appellate jurisdictions is not bound by decisions of the Chief Ct. of Lower Burma, although its decisions are conditional authorities of the highest value to which the greatest weight & respect must be attached.—*Re MA MYA v. MA THEIN* (1926), I. L. R. 4 Ran. 313.—IND.

*sv. — On subordinate courts.*—On points where there is no decision of the High Ct., subordinate cts. in Lower Burma are still bound by the rulings of the Chief

Ct., & subordinate cts. in Upper Burma are still bound by the decisions reported in Upper Burma Rulings. Under Govt. of India Act, s. 107, the High Ct. has power, if it so desires, to direct the subordinate cts. in Upper Burma to regard themselves as bound by the decisions of a bench of the Chief Ct. or even of a single judge of that ct.—*Re MA MYA v. MA THEIN* (1926), I. L. R. 4 Ran. 313.—IND.

*sz. Australia—Decisions upon British North America Act.*—Much caution should, I think, be used in applying decisions upon the British North America Act to questions arising upon the Commonwealth Constitution. The instruments are very different & few or none of the difficulties to which sects. 91 & 92 of Canadian Constitution continue to give rise have any real counterpart in the Australian Constitution.—*WEST v. TAXATION COMR.* (N. S. W.) (1937), 56 C. L. R. 657; 43 Argus L. R. 498; 11 A. L. J. 70; 4 A. T. D. 275.—AUS.

- 736a. ——— *Estates Gazette Digest*.]—Two of the cases cited to me are only reported in the *Estates Gazette Digest of Cases*, 1931, purporting to be a book, the reports for which are supplied by a barrister. Therefore, according to the rules on those matters, I can look at it (HORRIDGE, J.).—TROLLOPE (GEO.) & SONS v. MARTYN BROS. (1934), 150 L. T. 376; 50 T. L. R. 228; 78 Sol. Jo. 174; *on appeal*, [1934] 2 K. B. 436, C. A.
- 739a. *Discrepancy between reports*.]—Where a case was reported in 1893 both in the *Law Reports* & in the *Law Times*, & the reports differed both in the narrative of facts & in the words of the judgments, LORD BUCKMASTER assumed that in the *Law Reports* there was a revision by the judges of the judgments that they delivered & accepted that as an authoritative statement.—FAIRMAN v. PERPETUAL INVESTMENT BUILDING SOCIETY, [1923] A. C. 74; 92 L. J. K. B. 50; 128 L. T. 386; 87 J. P. 21; 39 T. L. R. 54, H. L.
- 739b. *Duty of counsel to cite authorised report when existing*.]—PRACTICE NOTE, [1931] W. N. 121, H. L.
- 739c. *Practice note*.]—Practice notes have no statutory force & very little judicial force, as they are directions given without argument (MAUGHAM, J.).—*Re DORMAN, LONG & CO., LTD., Re SOUTH DURHAM STEEL & IRON CO., LTD.*, [1934] Ch. 635; 103 L. J. Ch. 316; 151 L. T. 347; 78 Sol. Jo. 12.
- 752a. ——— *Cooper's Reports*.]—I may observe, in passing, that *Sir George Cooper's* reports are not reports of the very highest authority, & though they are sufficiently accurate, it should be remembered that SIR W. GRANT did not correct his decisions in those reports, whilst he did his decisions reported in *Merivale* (STUART, V.C.).—BAKER v. PECK (1860), 8 L. T. 656; 9 W. R. 186; *on appeal* (1861), 4 L. T. 3, L. C. & L. JJ.
- 753a. ———.]—*Mr. Dickens* was not a very accurate reporter (LEACH, M.R.).—LIVESHEY v. HARDING (1830), as reported in Taml. 460; 48 E. R. 183.
- 763a. ——— *Kelyng's Reports*.]—With regard to *Kelyng's Reports* the critics have greatly differed. *Sir John Kelyng* was Chief Justice of the King's Bench. He died in 1671, & whatever opinion may be held about him as a judge, the critics have differed greatly upon the value of his Reports. *Lord Campbell* says: "He compiled a folio volume of decisions in criminal cases which are of no value whatever." But, on the other hand, there are others who regard the book as of high authority (VISCOUNT SANKEY, C.).—WOOLMINGTON v. PUBLIC PROSECUTIONS DIRECTOR, [1935] A. C. 462; 104 L. J. K. B. 433; 153 L. T. 232; 51 T. L. R. 446; 79 Sol. Jo. 401; 25 Cr. App. Rep. 72; 30 Cox, C. C. 234, H. L.; *reversing* S. C. *sub nom.* R. v. WOOLMINGTON, 179 L. T. Jo. 256, C. C. A.
772. *Add. Annotation*.]—*Re*fd. *Lynn v. Bamber*, [1930] 2 K. B. 72.
- 787a. ———.]—Except on points of practice, the *Weekly Notes* should only be cited as interim reports of cases during the period required for their publication in the *Law Reports* (SWINFEN EADY, J.).—*Re SMITH'S SETTLEMENT, WILKINS v SMITH* (1902), as reported in [1903] 1 Ch. 373.
- 789a. ———.]—I do not think the *Weekly Notes* ought to be cited as authority on will cases (LORD COZENS-HARDY, M.R.).—*Re HOWELL, Re BUCKINGHAM, LIGGINS v. BUCKINGHAM*, as reported in [1915] 1 Ch. 241.

## JURIES.

## Part VI.—Juries of Inquiry and Presentment.

## SECT. 2.—GRAND JURIES (p. 216).

NOTE.—The grand jury is now abolished by Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 1.

## Part VII.—Juries of Issue and Assessment.

87a. Order of call.]—It is not necessary that the names of the jurors should be called over in the order in which they stand on the panel, & that course may be departed from when convenience requires; that the order in which the names were called in this case was convenient, & did not become illegal from having been suggested by the counsel for the Crown.—*MANSELL v. R.* (1857), 8 E. & B. 54; *Dears & B.* 375; 8 State Tr. N. S. 881; 27 L. J. M. C. 4; 22 J. P. 19; 4 Jur. N. S. 432; 169 E. R. 1048, Ex. Ch.

121. Add. Annotation:—*Refd. R. v. Thomas* (1933), 149 L. T. 544.

233. Add. Annotation:—*Refd. Ras Behari Lal v. King-Emperor* (1933), 102 L. J. P. C. 144.

256a. ———.]—Since 7 & 8 Will. 3, c. 32, talesmen can only be taken from the panel of the jury summoned to try the other cause, & not from the bystanders.—*R. v. HILL* (1825), 1 C. & P. 667.

265a. ———.]—Plea of guilty & not guilty on third.]—Appct. pleaded guilty to two counts of an indictment charging him with housebreaking & larceny. On a third count charging him with assault on a police officer in the execution of his duty he pleaded not guilty:—*Held*: the plea of guilty on the first two counts should not have been mentioned when appct. was given into the charge of the jury on the third count.—*R. v. DARKE* (1937), 26 Cr. App. Rep. 85, C. C. A.

278a. ———.]—The son of a jurymen summoned & returned, having answered to his father's name when called on the panel, & served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict, as for a mistrial.—*HILL v. YATES* (1810), 12 East, 228; 104 E. R. 89.

288. Add. Annotation:—*Consd. Ras Behari Lal v. King-Emperor* (1933), 77 Sol. Jo. 571.

## PART I.

dl. ———.]—Pltf. alleged that when eating bread made & sold by deft. she swallowed small pieces of wire therein, with consequent injury to her health. Deft. appealed from an order for trial by jury:—*Held*: since the order appealed from was a discretionary one & it had not been shown that the discretion had been exercised on a wrong principle it should not be interfered with.—*DANDO v. BRYON BAKERY, LTD.* (1936) 1 D. L. R. 253; [1935] 3 W. W. R. 468; 5 F. L. J. (Can.) 260.—CAN.

sa. Order granting—"Common" inadvertently inserted—*Amendment of order.*—*Held*: the order should be amended by striking out the word "common".—*BRADSHAW v. B. O. RAPID TRANSIT*, [1937] 1 D. L. R. 599; 88 B. C. R. 64.—CAN.

## PART VI. SECT. 2, SUB-SECT. 1.

a 1. ———.]—*Right to present fresh bill to subsequent jury.*—If a bill is not found by a grand jury a fresh bill may afterwards be preferred to a subsequent grand jury.—*R. v. LENETT*, [1934] 2 D. L. R. 208; 7 M. P. R. 196.—CAN.

## PART VII. SECT. 1.

a 1. ———.]—*North-West Territories Act, 1886, ss. 66, 67—Effect of Order in Council of June 15, 1929.*—*R. v. BROWNE, R. v. SPEIDEL*, [1930] 1 W. W. R. 422; 1 D. L. R. 823; 4 D. L. R. 1021; 59 Can. C. C. 311; 24 Alta. L. R. 421.—CAN.

## PART VII. SECT. 2.

72 III. ———.]—Accused, except in cases of trial for high treason or misprision of treason, has no right to

inspect the jury panel.—*R. v. BAUM* (1927), 27 S. R. N. S. W. 401; 44 N. S. W. W. N. 136.—AUS.

sb. Original panel inadequate—*Power of judge to add to.*—Deft. was arrested, indicted & tried & convicted for harbouring a quantity of dutiable goods, to wit, spirituous liquors unlawfully imported into Canada, of the value of over \$200, whereon the duties lawfully payable had not been paid, in violation of Customs Act, Dominion Acts, 1907, c. 11. On the trial a number of jurors, previously summoned, were absent, & others were excused from serving & a new panel was summoned. The original panel was not discharged, but the names on both panels were thrown into one box, & the jury, impanelled for deft.'s trial, drawn from the names as so combined:—*Held*: the effect of the legislation Acts of 1919, c. 7, s. 41, was to give the trial judge authority to retain the panel summoned, & to increase the number by additions thereto, & the objection to the composition of the jury drawn for deft.'s trial failed.—*R. v. SHELLMAN*, [1928] 1 D. L. R. 657; *sub nom. R. v. SHELLMAN*, 59 N. S. R. 535.—CAN.

sc. Right to inspect.]—While the Jury Act, R. S. S., 1920 (c. 43), makes no provision as to when interested parties should be permitted to inspect the jury panel in the hands of the local registrar (the panel is never in custody of the sheriff in Saskatchewan), the custom of allowing such inspection at any time within 10 days of the opening of the ct. is a wise practice, & any departure from it by the local registrar should be made only on the order of a judge.—*R. v. BROTFMAN* (No. 2), [1930] 8 W. W. R. 78; 4 D. L. R. 1036.—CAN.

## PART VII. SECT. 5, SUB-SECT. 3.—B. (a).

sg. Effect—On right of challenge for cause.]—A peremptory challenge by the accused prevents a challenge for cause.—*MOLEAN v. R.*, [1933] S. C. R. 688; [1934] 2 D. L. R. 440; 61 C. C. C. 9.—CAN.

## PART VII. SECT. 5, SUB-SECT. 3.—C. (b) 1.

183 i. *Revised*, 34 S. C. R. 228.

## PART VII. SECT. 5, SUB-SECT. 4.

sd. Several actions tried together.]—Five actions were brought by different plffs. against two defts. & were by consent tried together before a judge & jury:—*Held*: the consent to try the actions together did not give a right to more than four peremptory challenges on each side.—*GAY CO., LTD. v. TRICK*, [1927] 1 D. L. R. 1091; 60 O. L. R. 8.—CAN.

## PART VII. SECT. 6, SUB-SECT. 1.

e 1. ———.]—*Panel improperly summoned.*—Pltf. in an action in a Division Ct. required a jury, pursuant to s. 124 of Division Cts. Act. The clerk of the ct. summoned a jury, but not in the manner prescribed by the Act. Deft. objected & the judge disposed of the difficulty by calling a jury from the body of the ct. The action was tried by the jury thus formed & judgment was entered for pltf. upon the jury's verdict:—*Held*: the judge had no power to deprive either party of the right to have a trial by a jury qualified & summoned according to the strict requirements of the Act.—*FOLEY v. SANGSTER*, [1929] 3 D. L. R. 279; 64 O. L. R. 23.—

292a. [Necessity for request or consent of defence.]—Counsel for the prosecution should not ask for the jury to be dismissed from ct., for the purpose of a discussion taking place, when the defence objects to the withdrawal of the jury. The jury should be dismissed only at the request of, or with the consent of, the defence.—*R. v. ANDERSON* (1929), 142 L. T. 580; 21 Cr. App. Rep. 178; 29 Cox, C. C. 102, C. C. A.

295a. Communications to judge—Right of counsel to inspect.]—*HOBBS v. TINLING, HOBBS v. NOTTINGHAM JOURNAL*, No. 304a, *post*.

301a. ———.]—Where a jury, before hearing all the evidence for the defence, finds a verdict for pltf., it is in the discretion of the judge to decide whether the jury should be discharged or whether the case should be continued before the same jury.—*DE FREVILLE v. DILL* (1927), 43 T. L. R. 431; 71 Sol. Jo. 430, C. A.

Annotation :—*Refd. Hobbs v. Tinling, Hobbs v. Nottingham Journal*, [1929] 2 K. B. 1.

304a. ——— Whether ground for new trial.]—In an action for libel pltf. set out in his statement of claim the alleged libel, & in a separate paragraph alleged an innuendo which practically repeated, but somewhat extended, the statements in the alleged libel. Defts. did not plead justification or fair comment, but paid 20s. into ct. in respect of the alleged libel as sufficient damages; they made no payment into ct. in respect of the innuendo; & they gave notice under R. S. C., Ord. 36, r. 37, of their intention to give in evidence certain matters in mitigation of damages. At the trial pltf. gave evidence that save for one lapse he was a man of unblemished reputation. Thereupon he was cross-examined as to specific incidents not mentioned in the libel or in the particulars served under R. S. C., Ord. 36, r. 37, it being suggested that he was a man of bad reputation. This line of cross-examination was objected to, but was allowed. Before the conclusion of the cross-examination the jury intervened with an intimation that they desired to find for the defts., which they then did without any summing up. On appeal :—*Held* : (1) the cross-examination was admissible as cross-examination to credit, but if the incidents were denied by pltf. no further evidence could be called to rebut pltf.'s denials, & the jury should have been told that while they were not bound to accept pltf.'s denials, those denials, though unaccepted, afforded no evidence that the incidents had taken place; (2) the cross-examination was not admissible to mitigate damages, & the jury ought to have been directed to this effect; (3) the jury should have been told that their intervention was

premature, & they must hear the pltf.'s case to the end & be directed as to the issues they had to try; & (4) the trial having been in those respects unsatisfactory, there must be a new trial.

(5) Communications from the jury to the judge should be shown to the parties' counsel (*per SCRUTTON, L. J.*).

While the better practice is for communications from the jury to be shown to parties' counsel, the question whether they should be shown or not is one for the discretion of the judge (*per SANKEY, L. J.*).—*HOBBS v. TINLING, HOBBS v. NOTTINGHAM JOURNAL*, [1929] 2 K. B. 1; 98 L. J. K. B. 421; 141 L. T. 121; 45 T. L. R. 328; 73 Sol. Jo. 220, C. A.

327. *Add. Annotation* :—*Refd. Hobbs v. Tinling, Hobbs v. Nottingham Journal*, [1929] 2 K. B. 1.

335. *Add. Annotation* :—*As to* (1) *Consd. In the Estate of Wright, Lambert v. Woodham*, [1936] 1 All E. R. 877.

385. *Add. Annotation* :—*Refd. Ras Behari Lal v. King-Emperor* (1933), 102 L. J. P. C. 144.

386a. ———.]—The jury, being unable to agree upon a verdict, intimated their inability to agree & returned into ct. The learned judge thereupon directed them that in the interests of the parties, it was their duty to do their utmost to reach agreement. & if the minority could, without doing violence to a reasoned conviction, give way to the majority, they ought to do so :—*Held* : this was a proper direction, as it did not amount to a direction that the minority should, without being convinced at all, & without any real conversion, surrender their own judgment & agree with the majority.—*In the Estate of WRIGHT, LAMBERT v. WOODHAM*, [1936] 1 All E. R. 877, C. A.

391. *Add. Annotations* :—*As to* (1) *Refd. Croker v. Croker* (1932), 48 T. L. R. 597. *As to* (2) *Refd. Place v. Searle*, [1932] 2 K. B. 497.

#### A. In Criminal Trials.

412a. Continuance with eleven—Necessity for assent in writing.]—It is important that the requirement of Criminal Justice Act, 1925 (c. 86), s. 15, with regard to the necessary assent being given in writing should be strictly observed. Where, however, counsel for the Crown & counsel for the prisoner, after consultation with the prisoner, had both verbally agreed to the trial proceeding with eleven jurors :—*Held* : in the circumstances of the particular case, there had been no miscarriage of justice & the conviction was not invalidated by absence of consent in writing.—*R. v. DAVIS* (1937), 26 Cr. App. Rep. 15, C. C. A.

#### PART VII. SECT. 10, SUB-SECT. 4.

*sd. Agreement after further consideration for few minutes—No ground for setting verdict aside.*—*BARRY v. RUBENSTEIN* (N. B.), [1926] 1 D. L. R. 445.—CAN.

#### PART VII. SECT. 10, SUB-SECT. 6.

*sd. Right to visit locus in quo privately & communicate result to fellow-jurymen.*—Although a jurymen is entitled to apply to the subject before the jury the general knowledge which each man is supposed to have, he ought

not to attempt to inform his mind as to the particular facts of a case from outside sources. If he is personally acquainted with any material fact, he should submit to be sworn as to it :—*Held* : where a matter in dispute depended upon the condition of things existing at a certain locality, it was an improper & irregular proceeding for some of the jurymen to visit the locality privately, & a direction to the jury that they were entitled to take into consideration what might be told to them by any of their fellows as to what they had seen & observed for

themselves was a wrong direction.—*WAY v. WAY* (1928), 28 S. R. N. S. W. 345; 45 N. S. W. W. N. 101.—AUS.

#### PART VII. SECT. 10, SUB-SECT. 8.—B. (a).

*sd. Discharge for misconduct—How vacancy made good.*—Where a juror misconducts himself, he should be discharged, & either a new juror added, or the whole jury discharged & a fresh jury impanelled. Such juror may be taken from the persons present in the ct. room if there be none of the sum-

421. *Add. Annotation*:—*Refd. Campbell v. Pollak*, [1927] A. C. 732.
- 423a. — *Jury finding verdict before all evidence given.*—*DE FREVILLE v. DILL*, No. 301a, ante.
- 423b. — *Jury informed that defendant insured.*—Where the established rule of practice, that in an accident case it should not be intimated to a jury that deft. is insured, has been violated, it is within the discretion of the judge to discharge the jury at the expense of the party whose advocate has violated the rule.—*GRINHAM v. DAVIES*, [1929] 2 K. B. 249; 98 L. J. K. B. 703; 139 L. T. 379; 44 T. L. R. 523; 72 Sol. Jo. 303, D. C.
452. *Add. Annotation*:—*Consd. Millensted v. Grosvenor House (Park Lane), Ltd.*, [1937] 1 K. B. 717.
453. *Add. Annotation*:—*Consd. Millensted v. Grosvenor House (Park Lane), Ltd.*, [1937] 1 K. B. 717.
456. *Add. Annotation*:—*Consd. Millensted v. Grosvenor House (Park Lane), Ltd.*, [1937] 1 K. B. 717.
475. *Add. Annotation*:—*Refd. Dew v. United British S.S. Co.* (1928), 139 L. T. 628.
476. *Add. Annotation*:—*Expld. Dew v. United British S.S. Co.* (1928), 139 L. T. 628.
560. *Add. Annotation*:—*Refd. Glassbrook Bros. v. Leyson*, [1933] 2 K. B. 91.
563. *Add. Annotations*:—*As to (2) Apld. R. v. Thomas*, [1933] 2 K. B. 489. *Consd. Ras Behari Lal v. King-Emperor* (1933), 102 L. J. P. C. 144.
- 571a. — — —.—Where an action for damages, based on a breach of a statutory regulation made under Merchant Shipping Act, 1894 (c. 60), was tried by a judge with a jury, & several questions were left to the jury,

which they answered:—*Held*: as the answers of the jury to the questions left to them were sufficient to determine the case, the judge was not entitled to ask them to reconsider their findings on the question of the effective cause of the accident, & the judge had thereby misdirected the jury.—*Dew v. UNITED BRITISH S.S. Co., LTD.* (1928), 98 L. J. K. B. 88; 139 L. T. 628; 17 Asp. M. L. C. 513, C. A.

*Annotation*:—*Refd. Service v. Sundell* (1929), 99 L. J. K. B. 55.

631. *Add. Annotation*:—*Apld. R. v. Thomas*, [1933] 2 K. B. 489.

640a. — *Juror unable to understand English.*—Where a verdict in a criminal trial, at which the evidence was given partly in English & partly in Welsh, was delivered in the sight & hearing of all the jury without protest, the Ct. of Criminal Appeal refused to admit affidavits by two of the jurors showing that they did not understand the English language sufficiently well to follow the proceedings.—*R. v. THOMAS*, [1933] 2 K. B. 489; 102 L. J. K. B. 646; 149 L. T. 544; 49 T. L. R. 546; 77 Sol. Jo. 590; 30 Cox, C. C. 14; 24 Cr. App. Rep. 91, C. C. A.

*Annotation*:—*Dtd. Ras Behari Lal v. King-Emperor* (1933), 50 T. L. R. 1.

640b. — — —.—A number of accused persons in India were convicted of murder, & in some cases were sentenced to death & in others to transportation for life. It subsequently transpired that at the trial one of the jury did not understand English, the language in which some of the evidence, counsel's addresses, & the judge's charge were given:—*Held*: the convictions & sentences must be set aside on the grounds that the effect of the incompetence of the juror was to deny to the accused persons an essential part of

moned jurors present.—*REBATI MOHAN CHAKAVARTY v. EMPEROR* (1928), 1 L. R. 56 Calc. 150.—IND.

sg. — — —.—Every judge has an inherent power to discharge the jury for misconduct.—*ABDUR RAHIM v. EMPEROR* (1929), 1 L. R. 56 Calc. 1032.—IND.

#### PART VII. SECT. 10, SUB-SECT. 8.—B. (b).

g i. — — —.—The power given a trial judge by King's Bench Act, R. S. S., 1920 (c. 39), s. 47 (1), to dispense with a jury, although a jury has been claimed by one of the parties, is one which should be exercised with judicial discretion, i.e., the judge must give some good reason for depriving the party of his right to a jury.—*BLOOMART v. DUNLOP (Sask.)*, [1926] 4 D. L. R. 275; [1926] 2 W. W. R. 817.—CAN.

g ii. — *Issue left to jury immaterial.*—In an action against a police officer for assault & battery, malicious prosecution & malicious arrest, the trial judge dispensed with the jury in the trial of the claim for assault & battery. He also ruled that in the trial of the claim for malicious prosecution it was his duty under Jud. Act, R. S. O. 1914, c. 58, s. 62, to decide all questions both of law & fact as to the existence of reasonable & probable cause; & he said that the jury would be called upon to try only the issues as to malice & damages. A jury was then called & sworn & the trial proceeded. The evidence being closed, & the jury having retired, the trial judge gave judgment, dismissing the claim for assault, & finding that there was reasonable &

probable cause for the prosecution. He also held, on the facts, as a matter of law, that there was no foundation for the claim for malicious arrest. He, therefore, dismissed the whole action & discharged the jury:—*Held*: having regard to Jud. Act, R. S. O. 1927, c. 88, ss. 54–57, 63, the trial judge had a discretion to dispense with the jury, & his discretion was properly exercised.—*OWENS v. MARTINDALE*, [1928] 4 D. L. R. 932; 63 O. L. R. 87.—CAN.

#### PART VII. SECT. 13, SUB-SECT. 1.

461 i. *Verdict must be unanimous.*—Trial by jury is a fundamental right of the subject & not a matter of mere procedure, & unanimity in the jury's verdict upon the trial of criminal issues is an essential part of that right. Statutes affecting trial by jury are to be construed strictly. Jury Act, 1936 (Tasmania), provides that, on the trial of criminal issues, the decision of ten jurors shall in certain circumstances be taken as the verdict of the jury:—*Held*: the Act must be construed as referring only to the trial of issues joined after its enactment, & not to trial thereafter of issues joined before.—*NEWELL v. R.* (1936), 55 C. L. R. 707; 42 Argus L. R. 457; 10 A. L. J. 290.—AUS.

466 ii. — — —.—*MAYES CASE v. PRESOTT* (1925), 52 N. B. R. 272.—CAN.

so. *By seven jurors—When permitted.*—Sect. 54 of Juries Act, R. S. N. S., 1923, which permits a verdict by seven jurors after four hours' deliberation is mandatory as to the

time. The time during which evidence is read over to them & the luncheon period should not be included in time of deliberation.—*HELPARD v. FARMERS, LTD.*, [1932] 1 D. L. R. 403; 4 M. P. R. 175.—CAN.

#### PART VII. SECT. 13, SUB-SECT. 3.—C.

538 ii. — — —.—*McTAVISH BROS. v. LANGER (B. C.)*, [1929] 4 D. L. R. 465; *affd.*, [1931] 4 D. L. R. 209, P. C.—CAN.

#### PART VII. SECT. 13, SUB-SECT. 4.

551 i. *Special matter—Statement of reasons.*—*Held*: the reasons could not be ignored.—*SUTTON v. SMITH*, [1927] 3 D. L. R. 1008; [1927] 2 W. W. R. 481; 38 B. C. R. 455.—CAN.

#### PART VII. SECT. 15.

571 ii. — — —.—If an answer given by a jury to a question is not clear or sufficiently explanatory, it is a proper course for the trial judge to ask them to retire again & answer such supplementary questions as may be submitted to them for the purpose of further elucidation.—*PATTERSON v. SASKATCHEWAN CREAMERY CO., LTD.*, [1921] 3 W. W. R. 554; 62 D. L. R. 387; 14 Sask. L. R. 544.—CAN.

571 iii. — — —.—Where a jury has given a general answer to a question & has been sent back to give a more definite answer & does answer more definitely, the last answer is its real answer & the one which must govern.—*BARLOW v. CANADIAN PACIFIC RY.*, [1926] 2 D. L. R. 956; [1926] 2 W. W. R. 11; 31 Can. Ry. Cas. 414; 35 Man. L. R. 517.—CAN.

the protection afforded to them by law, & that the result of the trial was a miscarriage of justice.—*RAS BEHARI LAL v. KING-EMPEROR* (1933), 102 L. J. P. C. 144; 150 L. T. 3; 50 T. L. R. 1; 77 Sol. Jo. 571; 30 Cox, C. C. 17, P. C.

644. *Add. Annotation*:—*Overd. Hagen v. National Provincial Bank, Ltd.*, [1937] 3 All E. R. 617.

644a. ———.—The Master or the judge in Chambers has power under the Rules to order a cause, which is not a commercial cause, to be tried in London with a City of London special jury.

The practice which has arisen, since the decision of SCRUTTON, J., in *Barnes v. Lawson* (1911), 16 Com. Cas. 74; 30 Digest 261, 644, that in all actions, including those which are

not commercial causes, where notice has been given for trial with a City of London special jury, of applying to the judge in charge of the Commercial List to transfer the action to the Commercial List with the object of ordering trial of the action with a London special jury, is not justified by the Judicature Act or by the Rules made under the Judicature Act.

The judge in charge of the Commercial List is justified in refusing to transfer to the Commercial List an action, which is not a commercial cause, merely to enable it to be tried with a City of London special jury.—*HAGEN v. NATIONAL PROVINCIAL BANK, LTD.*, [1938] 1 K. B. 169; [1937] 3 All E. R. 617; 107 L. J. K. B. 417; 157 L. T. 421; 53 T. L. R. 968; 81 Sol. Jo. 668; 42 Com. Cas. 381, C. A.

# LAND IMPROVEMENT.

## Part I.—Apart from Statute.

14. *Add. Annotations* :—As to (2) *Apld. Re Jacques Settled Estates*, [1930] 2 Ch. 418. Generally, *Reid. Re Borough Court Estate*, [1932] 2 Ch. 39.

## Part II.—Under Improvement of Land Acts.

67a. Charge by absolute owner—Assignment to lender—Bankruptcy of owner—Rights of party

carrying out improvement.]—*Re GOZZETT* (1935), 79 Sol. Jo. 964, C. A.

## Part III.—Under Settled Land Act, 1925.

72a. —.]—*Re SHERBORNE'S* (LORD) SETTLED ESTATE, No. 79a, *post*.

79a. **Authorised improvements**—Improvements executed before Settled Land Act, 1925 (c. 18).—(1) A tenant for life of certain settled estates had expended on the settled property large sums of money for improvements, repairs & other works. Among the items of expenditure so incurred were certain electric light installations to the mansion house & the erection of batteries. These particular works had been carried out before the coming into force of above Act, & were therefore not "authorised improvements" under Settled Land Acts, 1882 to 1890, for which the ct. could have granted repayment to the tenant for life out of capital, although under the new Act of 1925 they would be "authorised improvements." On an application by the tenant for life to be recouped out of capital these sums so expended by him :—*Held* : notwithstanding the fact that these works were executed prior to above Act, there was, under the new Act, jurisdiction in the ct., if it thought fit, to order repayment of these sums to the tenant for life out of capital moneys ; & consequently as these particular items were "authorised improvements" under above Act, they could be repayable out of capital, notwithstanding the fact that they were incurred on works executed before Jan. 1. 1926. Having regard, however, to the fact that certain of the works had been carried out several years previously, there would have to be a rebate to allow for a diminished value.

(2) The tenant for life having further claimed that he should be repaid a proportion of the proceeds of sale of a part of the settled land, for tenant right valuation, on the ground that by his careful management before the sale he had enhanced its value :—*Held* : such a claim was really one to be repaid out of capital moneys, for an improvement not within Settled Land Acts, & the ct. had no jurisdiction to allow it.—*Re SHERBORNE'S* (LORD) SETTLED ESTATE, [1929] 1 Ch. 345 ; 98 L. J. Ch. 273 ; 141 L. T. 87.

*Annotations* :—As to (1) *Reid. Re Jacques Settled Estates* [1930] 2 Ch. 418 ; *Re Borough Court Estate*, [1932] 2 Ch. 39.

**Effect of sale of land.**—A tenant for life of settled property comprising a mansion house & land carried out in 1920 improvements not all of which were authorised by Settled Land Acts, 1882 to 1890.

He did not submit, as required by the Act of 1882, a scheme for approval by the Settled Land Act trustees or by the ct. ; & he paid for the improvements himself. In 1923 he sold most of the land, & in 1929 he sold the remainder of the land & the mansion house. On a summons by him asking (*inter alia*) that, pursuant to Settled Land Act, 1925 (c. 18), s. 87, the trustees might be directed or authorised to raise out of the capital moneys comprised in the settlement & to pay to him the costs of improvements authorised by the Settled Land Acts & executed at the cost of the tenant for life, notwithstanding that a scheme was not, before the execution of the improvements, submitted for approval, as required by the Settled Land Act, 1882, to the trustees of the settlement or the ct. :—*Held* : (1) the ct. could authorise recoupment of the expenditure by the tenant for life on the settled land incurred before 1926, in so far as it was expenditure on "improvements" within Settled Land Act, 1925 (c. 18) ; (2) having regard to Settled Land Act, 1925 (c. 18), ss. 84, 87, the sale of the property did not terminate the ct.'s jurisdiction to order repayment ; (3) as the appct. must at the time have expected himself to pay the sums spent on improvements which after 1925 came within Settled Land Act, 1925 (c. 18), Sched. III., Part 2, the jurisdiction ought not to be exercised.—*Re BOROUGH COURT ESTATE*, [1932] 2 Ch. 39 ; 101 L. J. Ch. 316 ; 147 L. T. 476 ; 75 Sol. Jo. 830.

79c. — **Electric lighting.**—*Re SHERBORNE'S* (LORD) SETTLED ESTATE, No. 79a, *ante*.

79d. — —.]—*Re WELD-BLUNDELL ESTATE*, *MOWBRAY* (LORD) *v.* *WELD-BLUNDELL* (1929), 73 Sol. Jo. 585.

79e. — —.]—In 1919 the tenant for life of settled land effected the installation of electric light in the mansion house & adjoining cottages, which had previously been lit by oil lamps. The cost of the installation was paid by the tenant for life out of his own money. The tenant for life now asked the ct. to authorise the trustees of the settlement to apply out of capital moneys the cost of the installation, the amount of such cost to be repaid to them out of the income of the settled land in fifteen years from the date of the order in half-yearly instalments :—*Held* : the improvement being one that would have



had to be made sooner or later, the order asked for should be made, repayment to be made by twenty half-yearly instalments, whereof the first must be regarded as having fallen due on June 30, 1920.—*Re JACQUES SETTLED ESTATES*, [1930] 2 Ch. 418; 99 L. J. Ch. 534; 144 L. T. 103.

*Annotation* :—*Apld. Re Borough Court Estate*, [1932] 2 Ch. 39.

88. *Add. Annotations* :—*Consd. Re Smith, Vincent v. Smith*, [1930] 1 Ch. 88. *Refd. Re Whitaker, Rooke v. Whitaker*, [1929] 1 Ch. 662.

129. *Add. Annotation* :—*Consd. Re Insole's Settlement*, [1938] 3 All E. R. 406.

139. *Add. Annotation* :—*Refd. Re Insole's Settled Estate*, [1938] Ch. 408.

143a. "Structural additions."—The tenant for life of a settled estate erected a range of buildings, consisting of garage, chauffeur's flat, workshop, engine-room, battery-room, tool shed, boiler-house, potting shed & green-houses, at a short distance in rear of the principal house on the estate, which he was improving for the purpose of personal occupation :—*Held* : these were "structural additions to . . . buildings" within *Settled Land Act*, 1925 (c. 18), Sched. III., Part II., para. (v), & therefore improvements the cost of which could be defrayed out of capital money. The test was not whether the structural addition was physically attached to the principal house, but whether it formed with the principal house a whole or unit.—*Re INSOLE'S SETTLED ESTATE*, [1938] Ch.

812; [1938] 3 All E. R. 406; 107 L. J. Ch. 344; 159 L. T. 203; 54 T. L. R. 1009; 82 Sol. Jo. 583, C. A.

145. *Add. Annotation* :—*As to (5) Consd. Re Insole's Settlement*, [1938] 3 All E. R. 406.

147a. —Principal house let—Smaller house used by tenant for life.—The tenant for life of a settled estate was for financial reasons unwilling to retain as the principal mansion house a very large house with ten reception rooms & fifty-two bedrooms. The house had in fact been let, & was now let for a long term as a school. The tenant for life had at considerable expense adapted another house on the estate as a residence for himself, expending over £13,000 in making alterations, including drainage work & the installation of electric light. It was contended that the latter house had become the principal mansion house within *Settled Land Act*, 1925 (c. 18) :—*Held* : the question whether or not a particular house is the principal mansion house is a question of fact, & in the circumstances, the first house had ceased to be, & the second house had become, the principal mansion house of the estate.—*Re FEVERSHAM SETTLED ESTATE*, [1938] 2 All E. R. 210; 82 Sol. Jo. 333.

205. After this case add :—

*Creation of rentcharge—Some improvements unauthorised—Whether forfeiture caused.*—*See SETTLEMENTS*, No. 1003a, *post*.

208. *Add. Annotation* :—*Refd. Re Borough Court Estate*, [1932] 2 Ch. 39.

## Part IV.—Under Private Improvement Acts.

210. *Add. Annotation* :—*Refd. A.-G. v. Smethwick Corpn.* (1932), 96 J. P. 105.

216a. *When effective.*—An improvement rentcharge imposed on land within the improvement area under London County Council (Improvements) Act, 1899, s. 61 :—*Held* : not an effective charge on the land until after a resolution of the council approving the assessment, notwithstanding that the

improvement itself had been completed at an earlier date; & if the land was contracted to be sold free from incumbrances after the completion of the improvement but before the date of such resolution, the purchaser was not entitled to a conveyance of the land free from the improvement rentcharge.—*Re FARRER & GILBERT'S CONTRACT*, [1914] 1 Ch. 125; 83 L. J. Ch. 177; 110 L. T. 23; 58 Sol. Jo. 98, C. A.

### PART VI.

*sd. By locatee of Crown land—Basis of assessment.*—*HIGHLAND v. SHERRY* (1900), 32 O. R. 371.—*CAN.*

## LAND TAX.

12. *Add. Annotation* :—*Refd.* I. R. Comrs. v. Forth Conservancy Board, [1929] A. C. 213.
116. *Add. Annotation* :—*Refd.* Parr v. A.-G., [1926] A. C. 239.
122. *Add. Annotation* :—*Refd.* Elder v. Northcott, [1930] 2 Ch. 422.

### SECT. 4, SUB-SECT. 4.

h i. — *In ascertaining unimproved value—Land held under Crown leases.*

—*JOWETT v. FEDERAL TAXATION COMR.* (1926), 38 C. L. R. 325.—AUS.  
h ii. — — *Licensed premises.*—

*Re LAND TAX ACTS, WILSON'S CASE,*  
[1927] V. L. R. 399; 49 A. L. T. 54;  
[1927] Argus L. R. 328.—AUS.

## LANDLORD AND TENANT.

## Part I.—Relation of Landlord and Tenant.

1. *Add. Annotation*:—*Refd.* Oakley v. Wilson, [1927] 2 K. B. 279.
90. *Add. Annotation*:—*Refd.* Greer v. Kettle, [1938] A. C. 156.
100. *Add. Annotations*:—*Refd.* *Re* Bruce, Brudenell v. Brudenell, [1932] 1 Ch. 316; Wirra, Estates, Ltd. v. Shaw (1932), 96 J. P. 1431 C. A.
140. Add the following paragraph:—

The lessee of premises created a yearly tenancy under which pltf. became tenant & occupier of the premises. On the same day the lessee mtgd. the premises by way of sub-demise without obtaining the permission of the lessor. The lease contained a covenant not to assign, underlet, or part with the possession of the premises without the consent in writing of the lessor, & a clause providing for re-entry upon breach of any of the covenants. The lessee, who had been adjudicated bkpt., failing to pay the interest, the mtgees. appointed a receiver, to whom pltf. paid a quarter's rent due at the following Midsummer. Before

the next quarterly rent became due the lessor issued a writ to recover possession of the premises; but the writ, which was served on the pltf. (as occupier) & others, did not contain a statement of the ground of forfeiture. Pltf. after appearance in that action, but before delivery of statement of claim specifying the cause of forfeiture, paid the rent falling due at Michaelmas to the receiver. He refused to pay the rent falling due at Christmas, & the receiver, under the powers given by the Conveyancing Act, 1881, distrained. In an action by pltf. against the receiver for a wrongful distress:—*Held*: the payment of rent to the receiver by pltf., after the service upon him of the writ to recover possession of the premises, did not estop him from showing, on a claim for subsequent rent, that the title of the mtgees. had determined, inasmuch as the mtgees. were not misled by the payment.—*SERJEANT v. NASH, FIELD & Co.*, [1903] 2 K. B. 304; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510, C. A.

## PART I. SECT. 1.

n 1. — *Necessity for exclusive possession*.—Exclusive possession is necessary to tenancy, & therefore where the owner of a room hired to another retains the right to pass through it & use it when the party to whom it is hired is away, there is no tenancy.—*FURNISHERS, LTD. v. BOOTH*, [1933] 1 D. L. R. 54.—CAN.

## PART I. SECT. 2, SUB-SECT. 1.

xx. *Contract of guarantee*.—By an agreement defts. guaranteed fulfilment of the conditions of the transfer of a lease, including payment of rent to O., the lessor & his son, the transferor. This agreement contained a clause providing that, should B., the transferee, become insolvent, O. & his son might claim from defts. immediate payment of the balance of the sum of \$10,250, being the amount due by B. under the assignment, & upon payment of that balance, defts. should be entitled to the benefit of the term allowed under the original lease & the transfer thereof. B. made an assignment under Bkpcy. Act, by virtue whereof the term created by the lease & transfer became vested in the trustee, who did not elect to retain the premises or to disclaim:—*Held*: the effect of the transfer, lease, & guarantee was to establish the relation of lessor & lessee between O. & B.—*OLIVIER v. SOLLOWAY, MILLS & Co.*, [1930] 3 D. L. R. 851; 65 O. L. R. 356; 11 C. B. R. 356.—CAN.

## PART I. SECT. 2, SUB-SECT. 2.—A.

291. *Definition*.—*Substitution of landlord by tenant*.—Attornment is not a mere agreement in favour of a third party to pay rent, but has been defined as the act of the tenant in putting one person in the place of another as his landlord.—*JUGENDRA LAL SARKAR v. MOHESH CHANDRA SADRIR* (1928), 1 L. R. 55 Cal. 1013.—IND.

sp. *Necessity for intention to create relationship*.—It is essential to the creation of the relationship of landlord & tenant under an attornment clause in an agreement for the sale of land

that the tenancy be a real one at a real rental. The test is whether there was a *bond fide* intention in the parties to create such a tenancy at the time they made the agreement.—*WEED v. SIMPSON*, [1931] 3 W. W. R. 753.—CAN.

## PART I. SECT. 2, SUB-SECT. 2.—B.

sa. *Under clause in agreement for sale*.—In deciding whether an attornment clause in an agreement for the sale of land created the relationship of landlord & tenant between the vendor & the purchaser the ct. has to determine whether the parties introduced the clause *bond fide*, & this question must be determined on the circumstances of the particular case. Although the fact that the rental reserved is fluctuating is not usually of much point, yet it is a circumstance to be considered.—*BLOOMART v. DUNLOP*, [1927] 3 D. L. R. 57; [1927] 1 W. W. R. 1014; 21 Sask. L. R. 424.—CAN.

## PART I. SECT. 3, SUB-SECT. 1.—A.

63 xxvi. —.—.—*VERTANNES v. ROBINSON* (1927), 1 L. R. 5 Can. 427.—IND.

63 xxvii. —.—.—*McDONALD v. ARBUCKLES* (1889), 22 N. S. R. 67.—CAN.

63 xxviii. —.—.—*BROCK v. BENNES* (1898), 29 O. R. 468.—CAN.

63 xxix. —.—.—*In an action in ejectment by a landlord who put the tenant into possession, the tenant is estopped from denying the landlord's title at the point of time of the demise, & further cannot put forward in defence any adverse title to a portion of the demised premises acquired by him during the tenancy. The estoppel operates in the case of a tenant who remains in possession even after the termination of the tenancy by notice to quit.*—*MUJIBAR RAHMAN v. ISUB SURATI* (1928), 1 L. R. 56 Cal. 15.—IND

63 xxx. —.—.—*In an action of ejectment:—Held*: defts. were in possession as tenants of pltf. & were

estopped from denying pltf.' title.—*GRANT & DOMINION COAL CO. v. McDONALD* (1933), 6 M. P. R. 574.—CAN.

sb. *Lessor unincorporated society*.—*Held*: an unincorporated society such as the Chinese National League of China, although not within the prohibition of sect. 8 of the Companies Act, R. S. B. C., 1924, inasmuch as it has not "for its object the acquisition of gain," is incapable of making a lease; the appellate ct. erred in holding that applt. was estopped from setting up incapacity of the alleged landlords on the ground that to do so would be tantamount to impeaching the title to the premises of the persons by whom it was let into possession of them as tenant. To extend the estoppel, which exists where the relationship of landlord & tenant is admitted or established, & which prevents the tenant questioning the landlord's title, so as to make it apply to a case in which the real question is as to the existence of that relationship, seems to be wrong in principle & is quite unwarranted by the authorities.—*CANADA MORNING NEWS CO. v. THOMPSON & BINNINGTON, LOW YEE QUAN & WAI HON*, [1930] S. C. R. 338; 3 D. L. R. 833; *revg.*, [1929] 2 D. L. R. 114; 1 W. W. R. 548; 41 B. C. R. 24; *revg.*, [1928] 4 D. L. R. 628; 3 W. W. R. 35; 40 B. C. R. 230.—CAN.

## PART I. SECT. 3, SUB-SECT. 1.—E.

1541. *Whether tenant estopped*.—*While possession retained*.—*After expiration of tenancy*.—*In an action in ejectment by a landlord who put the tenant into possession, the tenant is estopped from denying the landlord's title at the point of time of the demise, & further cannot put forward in defence any adverse title to a portion of the demised premises acquired by him during the tenancy. The estoppel operates in the case of a tenant who remains in possession even after the termination of the tenancy by notice to quit.*—*MUJIBAR RAHMAN v. ISUB SURATI* (1928), 1 L. R. 56 Cal. 15.—IND.

182. *Add. Annotations*:—*Consd. Official Trustee of Charity Lands v. Ferriman Trust, Ltd.*, [1937] 3 All E. R. 85. *Refd. Taylor v. Twinberrow*, [1930] 2 K. B. 16.
204. *Add. Annotations*:—*Consd. Rodenhurst Estates, Ltd. v. Barnes, Ltd.*, [1936] 2 All E. R. 3. *Refd. Official Trustee of Charity Lands v. Ferriman Trust, Ltd.*, [1937] 3 All E. R. 85.
230. *Add. Annotations*:—*Apld. Weld v. Petre*, [1929] 1 Ch. 33. *Refd. Barratt v. Richardson & Cresswell*, [1930] 1 K. B. 686.
232. *Add. Annotation*:—*Consd. Official Trustee of Charity Lands v. Ferriman Trust, Ltd.*, [1937] 3 All E. R. 85.
267. *Add. Annotation*:—*Refd. Canadian Pacific Ry. Co. v. R.*, [1931] A. C. 414.

## Part II.—Agreements for Lease.

- 380a. —.]—*DOE d. HASTINGS v. WATERS* (1850), 16 L. T. O. S. 213.
362. *Add. Annotation*:—*As to* (1) *Refd. Franco-British Ship Store Co. v. Compagnie des Chargeurs Française* (1926), 42 T. L. R. 735.
365. *Add. Annotation*:—*Refd. Caney v. Leith*, [1937] 2 All E. R. 532.
368. *Add. Annotations*:—*Consd. Todd v. Jones Bros., Ltd.* (1930), 15 Tax Cas. 396. *Refd. Keppel v. Wheeler*, [1927] 1 K. B. 577; *Trollope (Geo.) & Sons v. Martyn Bros.*, [1934] 2 K. B. 436.
- 370a. — Agreement "subject to the terms of a lease."—*Deft. employed house agents to let shop premises at 155, High Street, Bromley, Kent, & on Dec. 9, 1930, pltf., after inspecting the premises, offered to take a lease. In reply the house agents wrote to him on the same day: "Corner shop, 155, High Street, Bromley. Referring to our conversation this morning on the telephone, we confirm that, subject to the terms of a lease, our client is prepared to accept your offer to take the above premises on a 7, 14 or 21 years' lease at a rent of £350 per annum for the first 14 years, rising to £375 for the last 7 years. . . . We have instructed Mr. Bromley's solrs. to put the draft lease in hand immediately to forward to your solrs. . . ." The draft lease was forwarded on the same day, & after negotiations as to its terms deft.'s solrs. wrote on Dec. 29, 1930, to pltf.'s solrs.: "We have now received our client's instructions on the draft lease, & he is prepared to accept your client's alterations. We are, therefore, having the lease engrossed, & will forward you a counterpart for execution by your client in due course." This was done, but deft. then refused to execute the lease, & on Jan. 24, 1931, granted a lease of the premises to some one else. On Feb. 3, 1931, pltf. commenced proceedings for specific performance, or, alternatively, damages:—*Held*: there was no binding contract to grant a lease, as the expression "subject to the terms of a lease" in the letter of Dec. 9, 1930, meant "subject to the terms to be contained in a lease executed by the lessor." It followed that even if deft.'s solrs. were the agents of deft. to communicate by their letter of Dec. 29, 1930, the fact that deft. had himself agreed to the terms of the lease, so that this letter was a sufficient memorandum of the agreement signed by the deft.'s duly authorised agents within Law of Property Act, 1925 (c. 20), s. 40, there was no binding contract, because the result of the letter of Dec. 9, 1930, was that there could be no concluded agreement until the lease had been executed.—*RAINGOLD v. BROMLEY*, [1931] 2 Ch. 307; 100 L. J. Ch. 337; 145 L. T. 611.*
381. *Add. Annotation*:—*As to* (1) *Refd. Blay v. Pollard & Morris*, [1930] 1 K. B. 628.
390. *Add. Annotation*:—*Refd. Hawkesworth v. Turner* (1930), 46 T. L. R. 389.
- 396a. — Letter purporting to enclose engrossment—& engrossment.—A prospective lessee having orally agreed to take a lease from a prospective lessor, a draft lease embodying the terms was approved by their respective solrs. By arrangement the engrossments of the lease & counterpart were then prepared by the lessee's solrs., who subsequently wrote to the lessor's solr. purporting to enclose the

### PART I. SECT. 3, SUB-SECT. 1.—I. (a).

167 v. —.]—Where after a tenant has been let into possession a party other than the one who let him into possession claims to be entitled to the rent, the tenant may dispute his title even though the tenant has agreed to pay & has actually paid rent to him.—*HEBERT v. GEORGE*, [1933] 3 W. W. R. 399; 4 D. L. R. 658.—CAN.

### PART I. SECT. 3, SUB-SECT. 3.

*sd. Lease by life tenant to reversioner—Until death of lessor.*—A lease by a life tenant for a term certain to the reversioner, containing a covenant by the lessee to pay rent to the lessor, "her heirs & assigns," does not estop the lessee from showing that he has become owner on the lessor's death.—*THATCHER v. BOWMAN* (1889), 18 O. R. 265.—CAN.

### PART II. SECT. 3, SUB-SECT. 1.

337 vi. —.]—Land Titles Act, R. S. S., 1930, s. 99 (b), provides

that there is an implied covenant by a lessee to keep & yield up the demised land in good & tenantable repair, "accidents & damage to buildings from fire, storm, or tempest or other casualty & reasonable wear & tear excepted":—*Held*: the words "or other casualty" are not restricted to a casualty of the same nature as fire, storm, or tempest, but mean any unforeseen & unavoidable occurrence as distinguished from a happening which could have been avoided. Also, the word "fire," because of its conjunction with the words preceding & following it, must be limited to such fires as are purely accidental, with the result that, with respect at least to a tenant for a term of years, sub-sect. (b) has not made any change in his liability for fires, it being still governed by Statute of Marlbridge, 52 Hen. 3, c. 23, s. 2, as limited by 14 Geo. 3, c. 78, s. 86, which provides in effect that no person is liable for any fire accidentally begun.—*ROBERTS v. MOMANNIS*, [1935]

1 W. W. R. 193.—CAN.

337 vii. —.]—14 Geo. 3, c. 78, s. 86, which is in force in Saskatchewan, protects a tenant from liability for damage to the leased premises caused by fire therein only in the case of "accidental" fire, i.e. a fire not due to his negligence or wilful act. Damage to leased premises caused by a fire resulting from a tenant's positive act, either wilful or negligent, is voluntary waste. Damage caused by his failure to take precaution to prevent a fire is permissive waste. The fact that a landlord has agreed with his tenant to insure the demised building against fire & has not done so does not disentitle him to recover damages he may otherwise be entitled to for negligence of the tenant resulting in the burning of the building, nor does the fact that the tenant believed the landlord had insured the building raise any estoppel against the landlord in such an action.—*CHERRY v. SMITH*, [1933] 1 W. W. R. 305.—CAN.

engrossment of the lease for his signature, & saying they had written to the lessee & expected to exchange parts shortly. By mistake the engrossment of the counterpart was enclosed to the lessor's solr., & the engrossment of the lease to the lessee, who subsequently delivered it to the lessor's solr.'s messenger in exchange for the engrossment of the counterpart. Shortly after this the lessee, relying (*inter alia*) on Stat. Frauds, repudiated the oral contract:—*Held*: the lessee's solrs.' letter purporting to enclose the engrossment of the lease coupled with that engrossment, subsequently handed over by the lessee in person, constituted a sufficient memorandum of the oral contract.—*HORNER v. WALKER*, [1923] 2 Ch. 218; 92 L. J. Ch. 573; 129 L. T. 782.

444. *Add. Annotation*:—*Refd. Flexman v. Corbett*, [1930] 1 Ch. 672.

463a. —. —.]—*BOWERS v. CATOR* (1798), 4 Ves. 91; 31 E. R. 47.

470a. —. —.]—Pltf. agreed to let certain premises to deft. for seven years, but no lease was ever granted. Def. entered into possession, & subsequently, with pltf.'s consent, assigned his interest in the agreement & premises. Before the expiration of the term pltf. commenced an action against deft. for rent, the action being heard after the expiration of the seven years provided for by the agreement:—*Held*: specific performance of the agreement could have been granted & the action was therefore maintainable.—*GILBEY v. COSSEY* (1912), 106 L. T. 607; 56 Sol. Jo. 363, D. C.

472a. —. —.]—*ANON.* (1718), 2 Eq. Cas. Abr. 48; 22 E. R. 42, L. C.

476. *Add. Annotation*:—*Consd. Ariff v. Rai Jadunath Majumdar Bahadur* (1931), 47 T. L. R. 238.

482. *Add. Annotations*:—*Consd. Ariff v. Rai Jadunath Majumdar Bahadur* (1931), 47 T. L. R. 238. *Refd. Canadian Pacific Ry. Co. v. R.*, [1931] A. C. 414.

487a. —. —.]—Under an oral agreement, in 1913, applt. leased to resp. a small piece of land in India. It was intended in due course to execute a lease in writing for five years, renewable every five years, & in anticipation thereof resp. erected substantial structures

on the leased land. No lease was, in fact, ever executed. In 1922 applt. served notice to quit upon resp., asserting that resp. was a monthly tenant; & in 1923 a suit for possession of the land was instituted by applt. It was established that in 1918 resp. had notice that applt. refused to perform the terms of the oral agreement of 1913:—*Held*: the acts of resp. were all referable to the oral contract of 1913 which was enforceable against applt. for a certain time, but resp. had allowed his right to enforce that contract to become statute-barred.—*ARIFF v. RAI JADUNATH MAJUMDAR BAHADUR* (1931), 47 T. L. R. 238.

499. *Add. Annotation*:—*Refd. Rye v. Purcell*, [1926] 1 K. B. 446.

501. *Add. Annotation*:—*Refd. Rye v. Purcell*, [1926] 1 K. B. 446.

503a. —. —.]—*ALLAN v. BOWER* (1790), 3 Bro. C. C. 149; 29 E. R. 459, L. C.

*Annotations*:—*Distd. Brodie v. St. Paul* (1791), 1 Ves. 326. *Refd. Clayton v. A.-G.* (1834), 1 Coop. temp. Cott. 97.

522. *Add. Annotation*:—*Refd. Knapp-Fisher v. Crisp*, [1936] 3 All E. R. 560.

547. *Add. Annotation*:—*Consd. Ladies' Hosiery & Underwear v. Parker* (1929), 46 T. L. R. 43.

568. *Add. Annotations*:—*As to* (1) *Refd. Ariff v. Rai Jadunath Majumdar Bahadur* (1931), 47 T. L. R. 238. *As to* (2) *Distd. Borman v. Griffith*, [1930] 1 Ch. 493.

600. *Add. Annotations*:—*Refd. Torbay Hotels v. Jenkins*, [1927] 2 Ch. 225; *White v. Bijou Mansions, Ltd.*, [1937] 3 All E. R. 269.

637. *Add. Annotation*:—*Apld. Curtis Moffat, Ltd. v. Wheeler*, [1929] 2 Ch. 224.

639. *Add. Annotation*:—*As to* (2) *Apld. Curtis Moffat, Ltd. v. Wheeler*, [1929] 2 Ch. 224.

749. *Add. Annotation*:—*Consd. Alexander v. Rayson*, [1936] 1 K. B. 169.

749a. *Fraud—Lease & collateral agreement in fraud of rating authority.*] The principle, that where it appears that the subject-matter of an agreement is intended to be used for an unlawful purpose the ct. will refuse to enforce it, applies equally where it is intended to use for the purpose of effecting an unlawful purpose documents containing the terms of an agreement.

PART II. SECT. 4, SUB-SECT. 1.—D.

417 i. *Tenant—Sufficiency of identification.*]—In an action for specific performance of an agreement for a lease the memorandum relied on by pltf. as satisfying sect. 4 of Statute of Frauds, R. S. B. C. 1936, was a letter addressed to deft. by real estate agents, in which they said, *inter alia*, "We are authorised on behalf of a client to make you the following offer. . . . The premises will be used by the Lessee as a Restaurant. . . . We enclose herewith our cheque for \$100.00 as a deposit . . . to be applied on account of the first month's rent." Def. contended that the proposed lessee was not sufficiently identified by the letter:—*Held*: the proposed lessee was so described that his identity could not be fairly disputed, & therefore, the statute was satisfied.—*LITRAS v. MATTERN*, [1938] 1 W. W. R. 381; 2 D. L. R. 401.—CAN.

PART II. SECT. 4, SUB-SECT. 2.—C. (a) ii.

472 i. *Whether part performance—Entry & expenditure with acquiescence of lessor.*]—Where there was a parol agreement between pltf. & deft. to the effect that pltf. would grant a permanent lease to deft. in respect of a piece of land, & where no lease was either executed or registered, but deft. was put into possession & erected structures thereon to pltf.'s knowledge, where it appeared that pltf. must have realised that deft. would not have constructed the same unless he was assured of the possession of a permanent right in the land, & that if the intention of pltf. was not to grant such a lease it might reasonably be expected that he would have objected to the construction of such a building:—*Held*: in a suit of ejectment by the lessor, deft., not having obtained a lease in conformity with Transfer of Property Act, s. 107, read with Registration Act, s. 49, could

resist ejectment only if the case could be brought within the range of one or other of those principles of equity which have been held to apply to this country.—*ARIFF v. JADUNATH MAJUMDAR* (1928), 1 L. R. 55 Cal. 1090.—IND.

PART II. SECT. 6, SUB-SECT. 1.

se. *Extent of obligation.*]—The Indian law does not make a distinction in principle between the obligation of a lessor & of a vendor, so far as regards the duty to give a good title, though the incidents of these different types of contract may be different as regards the obligation to give disclosure or to furnish proof thereof.—*JYOTIPRASAD SINGH DEO v. H. V. LOW & Co.* (1929), 1 L. R. 57 Cal. 1189.—IND.

PART II. SECT. 8, SUB-SECT. 1.—C. (a).

st. *Valuation of furniture.*]—*WALKER v. KELLY* (1874), 24 O. P. 174.—CAN.

A landlord leased a flat for a rent of £450 *per annum*, & at the same time contracted in writing with the tenant for the provision of certain services at an annual payment of £750—£1,200 in all. The services under the contract were substantially the same as those already provided for under the lease. Although the actual terms of the two documents were not illegal, immoral or contrary to public policy, their execution was alleged to have been obtained by the landlord for the purpose of defrauding a valuation authority, by deceiving them as to the true rateable value of the premises, & by inducing them to believe that the true rent received by the landlord in respect of the premises was £450, & by concealing from them the terms of the contract:—*Held*: if this were true, the landlord could not seek the assistance of the ct. to obtain either rent under the lease or payments under the contract. Although the hypothesis might be that the

intention of the landlord was to use the two documents, & not their subject-matter, the flat, for an unlawful purpose, the principle applicable was the same.—*ALEXANDER v. RAYSON*, [1936] 1 K. B. 169; 105 L. J. K. B. 148; 154 L. T. 205; 52 T. L. R. 131; 80 Sol. Jo. 15, C. A.

750. *Add. Annotation*:—*Consd. Jardine v. A.-G. for Newfoundland* (1932), 48 T. L. R. 199.
796. *Add. Annotation*:—*As to* (1) *Refd. Burnham-on-Sea Urban District Council v. Channing* (1933), 77 Sol. Jo. 177.
834. *Add. Annotation*:—*Refd. York Glass Co. v. Jubb* (1925), 134 L. T. 36.
- 845a. — *Failure to perform condition precedent.* — *FISCHER v. KAMALA NAICKER* (1860), 8 Moo. Ind. App. 170; 2 L. T. 94; 8 W. R. 655; 19 E. R. 495, P. O.
864. *Add. Annotation*:—*Refd. Re Gough* (1927), 71 Sol. Jo. 470.

## Part III.—Leases.

981. *Add. Annotation*:—*Refd. Palmer v. Crone* [1927] 1 K. B. 804.
- 1082a. — — — — — *DUCK v. BRADDYLL* (1824), M'Cle. 217; 13 Price, 455; 147 E. R. 1047.
- Annotation*:—*Folld. Doe d. Kettle v. Lewis* (1830), 10 B. & C. 673.
- 1161a. — *Lease of rabbit warren—One thousand construed as twelve hundred.*—In a lease (*inter alia*) of a rabbit warren, lessee covenanted that, at the expiration of the term, he would leave on the warren 10,000 rabbits, the lessor paying for them £60 per thousand:—*Held*: in an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term, that parol evidence was admissible to show that, by the custom of the country where the lease was made, the word thousand, as applied to rabbits, denoted twelve hundred.—*SMITH v. WILSON* (1832), 3 B. & Ad. 728; 1 L. J. K. B. 194; 110 E. R. 266.
- 1195a. — — — — — *SUSSEX (COUNTRESS) v. WROTH* (1582), Cro. Eliz. 5; 78 E. R. 272; *sub nom. SUSSEX (COUNTRESS) & WORTHS CASE*, 4 Leon. 65.

- 1197a. — — — — — *SLOCOMB v. HAWKINS* (1612), Yelv. 222; 80 E. R. 145; *sub nom. SHECOMB v. HAWKINS*, Cro. Jac. 318.
- Annotations*:—*Consd. Berry v. White* (1662), O. Bridg. 82. *Refd. Mun v. Baylies* (1673), Freem. K. B. 340; *Winter v. Loveday* (1697), 1 Com. 37.
1208. *Add. Annotation*:—*Refd. Hanson v. Newman*, [1934] Ch. 298.
- 1225a. — — — — — *ANON.* (1553), Bro. N. C. 95, pl. 437; 73 E. R. 895.
1258. *Add. Annotation*:—*Refd. Manchester Corp'n. v. Audenshaw U. C. & Denton U. C.*, [1928] Ch. 763.
1265. *Add. Annotation*:—*Refd. Cadogan v. Guinness*, [1936] Ch. 515.
1267. *Add. Annotation*:—*Refd. Cadogan v. Guinness*, [1936] 2 All E. R. 29.
1295. *Add. Citation*:—*sub nom. R. v. HASTINGS POOR LAW UNION GUARDIANS*, 13 L. T. 362.
- 1308a. *Lease in excess of power—Law of Property Act, 1925 (c. 20), s. 152—Onus of proof of invalidity.*—*KISCH v. HAWES BROS., LTD.*, No. 6165a, *post*.

### PART II. SECT. 8, SUB-SECT. 1.— F. (p).

814 ff. — *Right of party to waive condition in his favour.*—*PARAMOUNT THEATRES, LTD. v. BRANDENBERGER*, [1928] 4 D. L. R. 573; 62 O. L. R. 579.—*CAN.*

### PART II. SECT. 8, SUB-SECT. 2.— A. (b) i.

m i. — *Breach due to former tenant holding over.*—*Defts. leased to p'tfs. premises for a term of five years commencing Sept. 1. 1928. The T. co. refused to vacate the premises, contending that they were in possession under an oral lease, & an action was brought by the T. co. which failed & was dismissed; but it was not until Sept. 7, 1929, that the present p'tfs. obtained possession under their lease: & this action was brought to recover damages suffered by reason of the delay. Defts. brought in T. co. as third parties:—*Held*: p'tfs. were entitled to succeed & to recover more*

than nominal damages.—*REGENT TAILORS, LTD. v. MCARTHUR*, [1931] 1 D. L. R. 492; 66 O. L. R. 169.—*CAN.*

### PART II. SECT. 8, SUB-SECT. 2.— A. (c).

p i. — *To set off money paid under agreement against damages.*—On the breach of a contract, forfeiture does not attach, in the absence of a stipulation therefor, to money handed over, not as a deposit to bind the bargain, but merely as a part payment under the contract; but the party to whom the money was paid is entitled to have set off, as against the claim for the return thereof, whatever sum he may be entitled to as damages for the breach.—*ENG CHOW v. BALFOUR*, [1928] 3 D. L. R. 608; [1928] 2 W. W. R. 158; 22 Sask. L. R. 556.—*CAN.*

### PART III. SECT. 1, SUB-SECT. 6.

sg. *Unincorporated body—Effect of lease to.*—A lease cannot be made to an unincorporated body by name, & any

attempt to do so is nugatory. The utmost effect that can be given to such an attempted lease is to construe it as a lease to the members of the body as the membership existed at the date of the agreement.—*HENDERSON v. TORONTO GENERAL TRUSTS CORPN.*, [1928] 3 D. L. R. 411; 62 O. L. R. 303.—*CAN.*

### PART III. SECT. 2, SUB-SECT. 1.

972 v. — — — — — *WILLIAMS MACHINE CO. OF WINNIPEG, LTD. v. WINNIPEG STORAGE, LTD. (Man.)*, [1928] 4 D. L. R. 1167; [1928] 3 W. W. R. 451; *revid.*, [1928] 1 D. L. R. 12; [1927] 3 W. W. R. 665.

### PART III. SECT. 6.

n i. — *"Rights, liberties, privileges & appurtenances."*—*Held*: to pass the right to advertise premises by means of a man standing with an advertisement board at the entrance to an arcade.—*HENRY, LTD. v. M'GLADE*, [1926] N. 144.—*IR.*

1313. *Add. Annotation*:—*Reid. Taylor v. Twinberrow*, [1930] 2 K. B. 16.

1355. *Add. Annotation*:—*Reid. Lowther v. Clifford*, [1927] 1 K. B. 130.

1372a. — *Destruction of premises—By fire.*—*Deft. demised to plffs. for three years a piece of land with a factory on it, & plffs. were to keep the inside of the factory in repair. The agreement said nothing as to the repair of the outside & as to insurance, but gave plffs. an option of purchase during the term. Deft. insured the factory against fire, & on the occurrence of a fire which almost completely destroyed it, he received compensation from the insurance co. Plffs. then gave notice of the exercise of their option of purchase & paid a deposit, but*

*deft. declined to reinstate the walls & roof, & alleged that in exercising the option plffs. had to take the property as it was. In an action for a declaration that plffs. were not bound to proceed with the purchase deft. counterclaimed for specific performance:—Held: since at the date of the exercise of the option plffs., to the knowledge of deft., thought that he was going to re-erect the factory, the parties were never ad idem, & plffs. were entitled to a return of their deposit, & the counterclaim for specific performance failed.*—*LONDON HOLEPROOF HOSIERY CO., LTD. v. PADMORE* (1928), 44 T. L. R. 499, C. A.

1408. *Add. Annotation*:—*Reid. Cruse v. Mount* (1932), 102 L. J. Ch. 74.

## Part IV.—Underleases.

1424. *Add. Annotation*:—*Apld. Re Russ & Brown's Contract*, [1934] Ch. 34.

1425. *Add. Annotation*:—*Consd. Re Russ & Brown's Contract*, [1934] Ch. 34.

1469. *Add. Annotation*:—*Reid. Melzak v. Lilienfeld*, [1926] Ch. 480.

1470. *Add. Annotations*:—*As to (2) Apld. Flexman v. Corbett*, [1930] 1 Ch. 672. *Reid. Melzak v. Lilienfeld*, [1926] Ch. 480.

PART III. SECT. 12, SUB-SECT. 1.—A. *sp. Option to purchase on sale being arranged—Whether sale bond fide.*—*GRAND THEATRE, LTD. v. ROYAL TRUST CO., ROYAL TRUST CO. v. LEACH*, [1937] 2 W. W. R. 615; 3 D. L. R. 760.—CAN.

PART III. SECT. 12, SUB-SECT. 1.—B. (a).

1373 i. *Presumption of exercise.*—*CAHUAC v. SCOTT, CAHUAC v. ERLE* (1872), 22 C. P. 551.—CAN.

PART III. SECT. 12, SUB-SECT. 1.—B. (b).

a 1. —.—An agreement to lease made between deft. as lessor & pltf. as lessee contained an option to purchase, of which the following are material portions: " & it is hereby declared & agreed that if the lessee at any time prior to the expiration of the term hereby granted shall give to the lessor one month's notice in writing that he desires to purchase the freehold of the said land hereby demised the lessor on or before the expiration of such notice will . . . transfer the said demised premises to the lessee," etc. The notice of his desire to exercise the option was given by pltf. to deft. on Nov. 27, 1928. The term of the lease expired on Dec. 1, 1928:—*Held: the option required for its exercise that one month's notice thereunder should be given at a time to expire within the term of the lease & this condition, which must be strictly construed, not having been complied with there was no binding contract of sale.*—*GARDINER v. FLUX*, [1929] N. Z. L. R. 697.—N.Z.

PART III. SECT. 12, SUB-SECT. 1.—C.

g 1. —.—"Balance to be arranged."—An option given the lessee of a hotel to purchase it within a year for \$45,000; \$15,000 cash & "the balance to be arranged," held to be unenforceable because incomplete.—*MCSORLEY v. MURPHY*, [1928] 4 D. L. R. 790; [1928] 3 W. W. R. 589; 40 B. C. R. 403; *affd. sub nom. MURPHY v. MCSORLEY & PRINCE EDWARD HOTEL, LTD.*, [1929] 4 D. L. R. 247; S. C. R. 542.—CAN.

PART III. SECT. 13, SUB-SECT. 1.—A.

sk. *Premises no longer available for*

*purposes contemplated.*—A fishery co. were the tenants of salmon fishings under a lease for nineteen fishing seasons. During the currency of the lease, the President of the Air Council, acting under statutory powers, made bye-laws converting the greater part of the area occupied by the fishings into a danger zone for the purposes of aerial gunnery & bombing practice. The bye-laws provided that practice would take place within the zone four days a week throughout the year, & that, during practice, no person might enter the zone, or bring thereon any vehicle, animal, vessel, aircraft or thing, & penalties were imposed for contraventions of the bye-laws. The effect of a due observance of these bye-laws would be to render the fishings incapable of possession for the purposes of the lease, & although bombing & firing practice had taken place only on a portion of the days reserved, the fishery co. had not attempted, since the bye-laws were promulgated, to exercise their right of fishing. In an action by the fishery co. against their landlord for declarator that they were entitled to abandon the lease:—*Held: as the effect of the bye-laws was to cause total eviction from the fishings, the landlord could no longer maintain the pursuers in possession of the subjects of the lease, as he was bound to do, & accordingly, pursuers were entitled to abandon the lease.*—*TAY SALMON CO. v. SPEEDIE*, [1929] S. C. (Ct. of Sess.) 593.—SCOT.

PART III. SECT. 13, SUB-SECT. 2.

f 1. —.—A printed form of lease contained the following covenant: " & the said lessee for heirs, exors., administrators & assigns hereby covenant with the said lessor heirs & assigns to pay rent & to pay taxes & to repair." A notary public who completed the form in typewriting on oral instructions from two of three lessees typewrote "their" in the first space & "his" in the second space. The lease so prepared but unexecuted was taken by defts. to pltf., & on his saying that he wanted it signed before his solr., they went to the latter's office. The solr. made a number of

interpolations in ink in the type-written parts of the lease. These defts. said, were read & explained by the solr. to them. The lease, which is under seal, was then executed. The lessor sued for, *inter alia*, breach of covenant to pay taxes, the taxes having been paid by him for the demised period. Defts. pleaded that the words " & to pay taxes " had been left in the lease by mistake, that pltf. never suggested or requested defts. to pay taxes until notice to terminate the lease had been given him, & they asked that the lease be rectified by striking out said words:—*Held: the lease should be rectified.*—*PALLONE v. CHIKOWSKI*, [1935] 1 W. W. R. 641; 2 D. L. R. 597; 43 Man. L. R. 43.—CAN.

sl. *Terms introduced differing from terms of agreement—Lease executed under order for specific performance.*—Where a lease has been executed under an order of Ct. for the specific performance of an agreement, the party obtaining such lease is not estopped from proving that conditions & covenants have been introduced into it different from those which were contained in the original agreement.—*FREEMAN v. KENNY* (1817), 1 Nfld. L. R. 3.—NFLD.

PART IV. SECT. 3, SUB-SECT. 1.

1435 iii. —.—*BEJOY LAL SEAL v. BENARASIDAS KHANDEI WAL* (1927), 1 L. R. 54 Calo. 948.—IND.

1435 iv. —.—Under Transfer of Property Act, 1882, having regard to s. 105 & s. 108 (j), an underlease for the entire residue of the under lessor's term operates, in the absence of a contract to the contrary, as an underlease, & does not, as ordinarily under English law, constitute an assignment of the lease.—*HUNRAJ v. BEJOY LAL SEAL* (1929), 57 L. R. Ind. App. 110, P. C.—IND.

PART IV. SECT. 5, SUB-SECT. 2.

1471 i. *By what covenants underlessee bound—Usual covenants—Underlease of licensed premises.*—*MCGARRITY v. CONDY* (1927), 37 S. R. N. S. W. 217; 44 N. S. W. W. N. 61.—AUS.



1514. *Add. Citations*:—95 L. J. Ch. 305; 135 L. T. 145.

1526a. — Underlessee of sub-term in mortgaged premises—Covenant for further assurance in mortgage—Underlessee entitled to conveyance of legal estate—Law of Property Act, 1925 (c. 20), Sched. I., Part II., paras. 3, 6 (d).—A. in 1926 had become entitled to a sub-term in certain mortgaged leasehold premises acquired by purchase by a predecessor in title from a mtgee. The original mtge. was made in 1848, & contained a covenant by the then mtgor. with the then mtgee. his exors. administrators & assigns (*inter alia*) for further assurance of the nominal reversion in the three outstanding days in the head lease, thereby mortgaged, if required. In the head lease were certain covenants by the lessee for repair of the premises. The freehold of the demised property ultimately became absolutely vested in pltf. for an estate in fee simple. A. had gone into possession of the mtgd. premises, but relinquished such possession before the trial of the action. Pltf. alleged that there had been a breach of the covenant to repair contained in the head lease & claimed (*inter alia*) damages against A. It appeared that the nominal reversion in the head lease had never been got in by any one, & A. denied that, as there was no privity of estate between him & pltf., he could be held liable under the repairing covenant contained in the head lease. It was alleged, however, by pltf., that having regard to the fact that A., by reason of the covenant for further assurance contained in the mtge., was a person "entitled to require a legal estate to be conveyed to or otherwise vested in him" under Law of Property Act, 1925 (c. 20), Sched. I., Part II., para. 3, such legal estate, namely, the nominal reversion, vested in him by Sched. II., Part II., para. 6 (d), & rendered him liable on the repairing covenants contained in the head lease:—*Held*: on the facts

of the case, A. was liable by reason of the operation of Sched. I., Part II., paras. 3 & 6 (d), as a person entitled to require a legal estate to be conveyed to or otherwise vested in him; & further, that he had not availed himself of the provisions of the Sched. to the Law of Property (Amendment) Act, 1926 (c. 11), enabling persons to disclaim the vesting of any legal estate affected by onerous covenants.—*PRACHY v. YOUNG*, [1929] 1 Ch. 449; 98 L. J. Ch. 237; 140 L. T. 608.

*Annotation*:—*Refd.* *St. Germans v. Barker*, [1936] 1 All E. R. 849.

1526b. Mortgagee by sub-demise—Equity of redemption statute-barred—No declaration of vesting of head term.—Prior to 1926 the equity of redemption of leaseholds, which had been mtgd. by subdemise without any trust of the nominal reversion, became statute-barred. The mtgees. did not after 1925 execute a declaration that the head term had become vested in them under Law of Property Act, 1925 (c. 20), s. 89 (3). Upon the expiration of the lease, the reversioners sought to make the mtgees. liable upon the repair covenant in the lease, on the ground that the whole term had automatically vested in them under the transitional provisions of the Law of Property Act, 1925 (c. 30):—*Held*: this was not a case within Law of Property Act, 1925 (c. 20), Sched. I., Part II., para. 3. The words "entitled to require any legal estate to be conveyed" did not cover the case of a person who under sect. 89 (3) had power to declare a legal estate vested in himself; but only applied to cases where he could "require" someone to convey to or vest the legal estate in him, & the mtgees. were not liable on the covenant to repair.—*ST. GERMAN (EARL) v. BARKER*, [1936] 1 All E. R. 849; 105 L. J. Ch. 219; 154 L. T. 495; 80 Sol. Jo. 307.

1538. *Add. Annotation*:—*Refd.* *Espir v. Basil Street Hotel, Ltd.*, [1936] 3 All E. R. 91.

## Part V.—Agreements Collateral to Leases.

1569. *Add. Annotations*:—*Consd.* *Jameson v. Kinnell Bay Land Co.* (1931), 47 T. L. R. 410. *Apld.* *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K. B. 113. *Refd.* *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment*

*Co.*, [1936] 2 All E. R. 1039; *Otto v. Bolton & Norris*, [1936] 1 All E. R. 960; *Terrene, Ltd. v. Nelson*, [1937] 3 All E. R. 739.

1578. *Add. Annotation*:—*Refd.* *Re Savile Settled Estates, Savile v. Savile*, [1931] 2 Ch. 210.

## Part VI.—Licence.

1593. *Add. Annotation*:—*Refd.* *Trico Products Corp. & Trico-Folberth, Ltd. v. Romac Motor Accessories, Ltd.* (1933), 51 R. P. C. 90.

*Add. Annotation*:—*Refd.* *Re Timber Re-*

*gulations, Refund of Dues under*, [1935] A. C. 184.

1604. *Add. Annotation*:—*Refd.* *Re Timber Regulations, Refund of Dues under*, [1935] A. C. 184.

### PART VI. SECT. 2, SUB-SECT. 1.—B. (b).

*ss. Use of theatre for boxing contests.*—On May 3, 1929, applt., being the owner of the Unity Theatre, entered into a written agreement with one H., of which the material terms were as

follows: "Draft agreement . . . for the lease of Unity Theatre for conducting boxing from May 3, 1929, to Nov. 23, 1929, inclusive. The . . . lessee . . . to conduct one boxing contest each week to be held on Friday night . . . & to pay a rental of £9 per

week, the rent to be paid each night of a boxing contest . . . in the event of the lessee failing to carry out the above contract . . . the theatre can be leased to any other tenant for the purpose of conducting boxing." H. conducted boxing contests in accordance with the

1609. *Add. Annotation* :—**Refd.** *Peech v. Best* (1930), 99 L. J. K. B. 537.
1611. *Add. Annotations* :—**Consd.** *Re* Southern Ry. Co. (1935), 153 L. T. 105. **Refd.** *New Liverpool Eastham Ferry & Hotel Co., Ltd. v. Ocean Accident & Guarantee Corpn., Ltd.* (1929), 142 L. T. 349; *Gooding v. Benfleet Urban District Council* (1933), 49 T. L. R. 298.
1641. *Add. Annotation* :—**Consd.** *Westminster Corpn. v. Southern Ry. Co.*, [1936] 2 All E. R. 322.
1642. *Add. Annotation* :—**Consd.** *Westminster Corpn. v. Southern Ry. Co.*, [1936] 2 All E. R. 322.
1643. *Add. Annotations* :—**Consd.** *Westminster Corpn. v. Southern Ry. Co.*, [1936] 2 All E. R. 322. **Refd.** *L. C. C. v. Hackney B. C.*, [1928] 2 K. B. 588.
1647. *Add. Annotation* :—**Consd.** *Westminster Corpn. v. Southern Ry. Co.*, [1936] 2 All E. R. 322.
1649. *Add. Annotation* :—**Consd.** *Clore v. Theatrica Properties, Ltd., & Westby & Co.*, [1936] 3 All E. R. 483.
1650. *Add. Annotations* :—**Consd.** *Clore v. Theatrical Properties, Ltd., & Westby & Co.*, [1936] 3 All E. R. 483. **Refd.** *Chaplin v. Smith*, [1926] 1 K. B. 198; *Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.*, [1931] 1 Ch. 274; *Re Timber Regulations, Refund of Dues under*, [1935] A. C. 184.
- 1650a. —.]—By an indenture, which is ordinarily called an agreement for the front of the house rights of a theatre, it was provided that : "the lessor doth hereby demise & grant unto the lessee the free & exclusive use of all the refreshment rooms . . . of the theatre . . . for the purpose only of the supply to & the accommodation of the visitors to the theatre & for no other purpose whatsoever." There was a condition that the lease should not be assigned nor sublet except with the lessor's consent. The definition clause stated that the terms lessor & lessee should include their executors administrators & assigns. An assignee of the lessor sought to prevent assignees of the lessee from exercising any of the rights conferred upon the lessee by the indenture :—**Held** : (1) the indenture was not a lease but a licence ; (2) being a personal contract, it could only be enforced by persons between whom there was privity of contract, & this was so even if it was a restrictive covenant. The assignee of the lessee had therefore no rights under the document.—**Clore v. THEATRICAL PROPERTIES, LTD., & WESTBY & CO., LTD.**, [1936] 3 All E. R. 483, C. A.
1651. *Add. Annotation* :—**Refd.** *Gee v. Hazleton*, [1932] 1 K. B. 179.
- 1653a. —.]—**GEE v. HAZLETON**, No. 7041b,
1655. *Add. Annotation* :—**Consd.** *Westminster Corpn. v. Southern Ry. Co.*, [1936] 2 All E. R. 322.
1657. *Add. Annotation* :—**Refd.** *Johnson v. Clarke*, [1928] Ch. 847.
- 1664a. *Acquiescence.*—Whether any & what restrictions exist on the power of a licensor to determine a revocable licence to occupy land depends upon the circumstances of each case. In 1926 the Crown proceeded against appts. alleging that poles, carrying telegraph wires, which they had erected on the roadway of a Canadian Govt. railway, were a trespass thereon, & claiming damages ; alternatively the Crown claimed a declaration of appts.' rights, if any. As to the main section of the telegraph line, the poles, as they stood in 1926, had been erected upon the roadway between 1905 & 1910 without leave or licence. As to two branch lines, the poles had been erected in 1893 & 1911 respectively, in each case while an agreement was in negotiation though no agreement was eventually concluded. The whole telegraph line, which was about 500 miles in length, was used by the public as well as by appts. :—**Held** : (1) on the facts, at the date of the proceedings all the poles were on the roadway with the licence of the Crown. Although appts. had originally been trespassers in respect of the main line poles, many years' acquiescence & a claim to the payment of rent, had long since prevented them from being so regarded ; in the case of the branch lines, it was to be inferred that the poles had been erected by licence ; (2) the licence was revocable in the absence of any facts from which a contract

agreement until July 25, 1929, when, in consideration of the payment to him of \$150, he assigned his rights under the agreement to the resp. Notice of the assignment was given to applt. on July 26, & it thereupon, by written notice to H., purported to cancel the agreement. The same evening (a Friday) it excluded H. & resp. from the theatre, & prevented them from conducting a boxing entertainment that had been arranged. Resp. & H. sued, claiming a declaration that the lease was valid & subsisting, & resp. also claimed damages. Applt. contended that the agreement only amounted to a license revocable at will, & that it had been so terminated & that the agreement was lease & not a mere license revocable at will.

PERTH TRADES HALL v. STADIUM (PERTH), LTD., [1932] W. A. L. R. 3.—AUS.

**PART VI. SECT. 2. SUB-SECT. 2.**

r l. —.]—NEW BRUNSWICK &  
NOVA SCOTIA LAND CO. v. KIRK (1849),  
6 N. B. R. (1 All.) 443.—CAN.

r 11. —.—DuCONDU v. DUPUY

(1883), 9 App. Cas. 150; 53 L. J. P. C. 12; 50 L. T. 129, P. C.—CAN.

s i. —.]—**RUTTER v. ORDE** (B. C.) (1918), 59 S. C. R. 658; 49 D. L. R. 691.—**CAN.**

**aff. —.]—ROYAL BANK OF CANADA**  
**v. R. (1921), 62 S. C. R. 313; 68**  
**D. L. R. 23.—CAN.**

2 D. L. R. 1139.—CAN.

*51. Agreement to display advertisements in movable frames on spaces in post offices.*—*Held:* not a lease, but a licence to use the spaces.—*U. K. ADVERTISING Co. v. GLASGOW BAG-WASH LAUNDRY*, [1926] S. C. 303.—*SCOT.*

sk. *Agreement for operation of theatres.*—Def'ts., the lessees from pl'ts. of two theatre buildings entered into an agreement with the P. co. for the operation by it of the theatres. The agreement contained no words of demise or grant, no provision for exclusive occupation, & did not purport to confer upon the P. co. any estate or interest in the land upon which the buildings stood.—*Held*: notwithstanding the use of the word

not a lease but a licence ; (2) being a personal contract, it could only be enforced by persons between whom there was privity of contract, & this was so even if it was a restrictive covenant. The assignee of the lessee had therefore no rights under the document.—*CLORE v. THEATRICAL PROPERTIES, LTD., & WESTBY & Co., LTD.*, [1936] 3 All E. R. 483, C. A.

**1651. Add. Annotation :—***Reid. Gee v. Hazleton*,  
[1932] 1 K. B. 179.

1658a. —.]—GEE v. HAZLETON, No. 7041b.

**1855.** *Add. Annotation :—***Consd.** Westminster  
Corpn. v. Southern Ry. Co., [1936] 2 All E. R.  
322.

**1657. Add. Annotation :—***Refd. Johnson v. Clarke*,  
[1928] Ch. 847.

**1864a. Acquiescence.]**—Whether any & what restrictions exist on the power of a licensor to determine a revocable licence to occupy land depends upon the circumstances of each case. In 1926 the Crown proceeded against applt. alleging that poles, carrying telegraph wires, which they had erected on the roadway of a Canadian Govt. railway, were a trespass thereon, & claiming damages; alternatively the Crown claimed a declaration of applt.' rights, if any. As to the main section of the telegraph line, the poles, as they stood in 1926, had been erected upon the roadway between 1905 & 1910 without leave or licence. As to two branch lines, the poles had been erected in 1893 & 1911 respectively, in each case while an agreement was in negotiation though no agreement was eventually concluded. The whole telegraph line, which was about 500 miles in length, was used by the public as well as by applt.s. :—*Held*: (1) on the facts, at the date of the proceedings all the poles were on the roadway with the licence of the Crown. Although applt. had originally been trespassers in respect of the main line poles, many years' acquiescence & a claim to the payment of rent, had long since prevented them from being so regarded; in the case of the branch lines, it was to be inferred that the poles had been erected by licence; (2) the licence was revocable in the absence of any facts from which a contract

"rent" in the agreement, & notwithstanding that it provided for exclusive management by the P. co., the agreement was not to be regarded as a lease, but as a licence, & plaintiffs were not entitled to forfeit the lease to defendants for breach of the covenant therein contained not to assign or sublet without leave. To be a lease, a document must confer a right of exclusive occupation.—BROOKVILLE v. DOBBIE & RITCHIE, BROCKVILLE v. PARAMOUNT THEATRES, LTD., BROCKVILLE v. DOBBIE, RITCHIE & PARAMOUNT THEATRES, LTD., [1929] 3 D. L. R. 583 : 64 O. L. R. 75.—CAN.

**al. Agreement for supply of service station equipment.**—By an agreement purporting to be a lease A. demised to B. the exclusive privilege of installing oil & gasoline dispensing equipment in the service station owned by A., for five years at a rent. Lessee lent lessor \$3,500 secured on service station & also the equipment. Lessor agreed to purchase all oil, gasoline, etc., from lessee. **Held** : a licence, not a lease.—**CITIES SERVICES OIL CO. v. PAULEY**, [1931] O. R. 685.—**CAN.**

that it should be irrevocable could be implied; (3) having regard to the circumstances, the licence could be revoked only by a notice determining it upon a specified future date such as would give applts. sufficient time, not only to remove the poles & wires, but also to arrange for erecting them elsewhere.—*CANADIAN PACIFIC RY. CO. v. R.*, [1931] A. C. 414; 100 L. J. P. C. 129; 145 L. T. 129, P. C.

**1668a.** Licence to advertise granted to tenant—Assignment of right to advertise by tenant.]—Deft. was the underlessee of premises used as a petrol-filling station, & included in the parcels of the lease was the right to use the flank walls of the adjoining premises for advertising purposes. He granted to Odhams Press, Ltd., the owners of a business called the Borough Billposting Co., the right to advertise on the flank walls. Pltf., the successor in title to the underlessor, sought an injunction to restrain deft. from permitting any person other than himself to use the flank walls for advertising purposes, on the grounds that the right to advertise was not assignable, or, alternatively, was not assignable apart from the land upon which the petrol station was situated, & also that there was an implied term that the walls would be used only for advertisements connected with the business of the petrol-filling station:—*Held*: (1) the underlease contained nothing restricting the legal right of deft. to deal freely with the subjects of the grant & he could advertise anything he chose upon the flanks in question; (2) there being no restriction upon the right to advertise, the right was not an easement, as there was no connection as to user between the dominant & the servient tenements.—*CLAPMAN v. EDWARDS*, [1938] 2 All E. R. 507; 82 Sol. Jo. 295.

**1677a.** —.]—*CANADIAN PACIFIC RY. v. R.*, No. 1664a, *ante*.

**1682.** *Add. Annotation*:—*Refd. Messenger v. British Broadcasting Co.* (1927), 97 L. J. K. B. 251.  
**1685.** *Add. Annotation*:—*Refd. Canadian Pacific Ry. Co. v. R.*, [1931] A. C. 414.  
**1686.** *Add. Annotation*:—*Refd. Candian Pacific Ry. Co. v. R.*, [1931] A. C. 414.  
**1693.** *Add. Annotation*:—*Refd. Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.*, [1931] 1 Ch. 274.  
**1694.** *Add. Annotation*:—*Consd. O'Cedar v. Slough Trading Co.*, [1927] 2 K. B. 123.  
**1694a.** — Use of Government railway roadway for telegraph poles.]—*CANADIAN PACIFIC RY. CO. v. R.*, No. 1664a, *ante*.  
**1700.** *Add. Annotation*:—*Refd. Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.*, [1931] 1 Ch. 145.  
**1705.** *Add. Annotation*:—*Refd. Johnson v. Clarke*, [1928] Ch. 847.  
**1708.** *Add. Annotation*:—*Refd. Gee v. Hazleton*, [1932] 1 K. B. 179.  
**1711.** *Add. Annotations*:—*Consd. Re Southern Ry. Co.* (1935), 153 L. T. 105. *Refd. Salisbury House Estate v. Fry* (1929), 98 L. J. K. B. 722; *Johnstone v. Consolidated London Properties, Ltd.*, *Towle v. Improved Industrial Dwellings Co., Ltd.* (1932), 17 Tax Cas. 231.  
**1717.** *Add. Annotation*:—*Consd. Re Southern Ry. Co.* (1935), 153 L. T. 105.  
**1727.** *Add. Annotation*:—*Apld. Caldecutt v. Piesse* (1932), 49 T. L. R. 26.  
**1728.** *Add. Citation*:—2 C. L. R. 1449.  
**1757.** *Add. Annotation*:—*Refd. Reed v. Cattermole*, [1936] 2 All E. R. 526.  
**1758.** *Add. Annotation*:—*Refd. Reed v. Cattermole*, [1936] 2 All E. R. 526.  
**1758a.** —.]—*HUNT v. COLSON* (1833), 3 Moo. & S. 790.  
**1761.** *Add. Annotation*:—*Refd. Reed v. Cattermole*, [1936] 2 All E. R. 526.

## Part VII.—Premises Included in the Demise.

**1783a.** — Garden not included.]—*ANON.* (1561), Moore, K. B. 24, pl. 82; Dal. 29, pl. 5; 72 E. R. 415.

**1788.** *Add. Annotation*:—*Refd. Callard v. Beeney*, [1930] 1 K. B. 353.

**1810a.** — Liberty of passage for pipes—Extent of right.]—Deft. co. were the lessees from a firm of architects for a determinable term of twenty-one years from June 24, 1923, & also occupiers of the first floor of a block of build-

### PART VI. SECT. 4.

**1665 H.** —.]—*MACLAREN CO. v. ELEC. REDUCTION CO. (Can.)*, [1926] 4 D. L. R. 593.—*CAN.*

### PART VI. SECT. 5, SUB-SECT. 1.

**1669 iv.** —.]—*FIELDER v. BANNISTER*, (1860) 8 Gr. 257.—*CAN.*

**1669 v.** —.]—Deft. conducted a race meeting upon its land &, upon payment by pltf. of the admission charge, granted to pltf. a licence to enter on its land & view certain horse races. Pltf. duly entered on the said land for this purpose but, before the completion of the meeting, deft. purported to revoke its licence & requested pltf. to leave the land. Upon refusing to leave, pltf. was forcibly removed & thereupon brought an action for damages against deft. for assault & false imprisonment. Upon demurrer:—*Held*: the licence though granted

for value was revocable & there must be judgment for deft. upon demurrer.—*NAYLOR v. CANTERBURY PARK RACE-COURSE CO., LTD.* (1935), 35 S. R. N. S. W. 281; 52 N. S. W. N. 82.—*AUS.*

**1669 vi.** —.]—Applt. brought an action at common law against resp. for damages for assault. The defence was that applt. was trespassing on resp.'s land & that resp.'s servants & agents requested him to leave the land, which he refused to do, & resp.'s servants & agents thereupon removed him, using no more force than was necessary for that purpose, & that that removal was the alleged assault. Applt., for reply on equitable grounds, said that resp. was conducting a race meeting on the land & that in consideration of applt. paying four shillings resp. promised to allow him to remain on the racecourse & view the races, gave him leave & licence to

enter & remain on the racecourse for that purpose & promised not to revoke the licence; that applt. paid four shillings but resp., in breach of the promise alleged, revoked the leave & licence & assaulted applt. in ejecting him from the racecourse. Resp. demurred to this pleading:—*Held*: the licence, although given for value, did not create a proprietary interest in the land, but created a contractual right only, & was revocable at common law; & equity did not preclude deft. from effectively revoking the licence or relying upon its revocation.—*COWELL v. ROSEHILL RACECOURSE CO., LTD.* (1937), 56 C. L. R. 605; 43 Argus L. R. 273; 11 A. L. J. 32.—*AUS.*

### PART VII. SECT. 1, SUB-SECT. 2.—B.

**1773 i.** *What is appurtenant to house or messuage—Not space between shop-front & street.*—*REID v. MIMICO*, [1927] 1 D. L. R. 235; 59 O. L. R. 579.—*CAN.*

ings known as I. Court under a lease which contained a reservation "excepting & reserving unto the lessors & the person or persons for the time being occupying the other parts of the building the passage of gas water & other pipes & electric wires through the demised premises & the free running of water & soil in & through the pipes connected with the demised premises." In May, 1924, pltf. took a lease of the second floor of I. Court from the firm, subject to a similar reservation. In exercise of the right reserved to the lessors & persons occupying other parts of the premises pltf. conducted pipes from her

premises through deft. co.'s part of the premises. Deft. co., after the operations had proceeded for some time, alleged that great inconvenience would be caused to them, & cut the pipes:—*Held*: the reservation gave no right to the lessors or pltf. to introduce any new pipes or wires into the premises.—*TAYLOR v. BRITISH LEGAL LIFE ASSURANCE Co.* (1925), 94 L. J. Ch. 284; 133 L. T. 453; 23 L. G. R. 585, C. A.

1817. *Add. Annotation*:—*As to* (4) *Refd.* *Matania v. National Provincial Bank, Ltd. & Elevant Syndicate, Ltd.* (1936), 155 L. T. 74.

## Part VIII.—Nature, Creation, and Duration of Tenancies.

1825. *Add. Annotation*:—*Refd.* *Ladies Hosiery & Underwear, Ltd. v. Parker*, [1930] 1 Ch. 304.

1843. *Add. Annotation*:—*As to* (1) *Consd.* *Taylor v. Twinberrow*, [1930] 2 K. B. 16.

1848. *Add. Annotation*:—*As to* (2) *Refd.* *Lowther v. Clifford*, [1927] 1 K. B. 130.

1968. *Add. Annotation*:—*Refd.* *Anchor Trust Co. v. Bell*, [1926] Ch. 805.

1975a. *Duty of tenant from year to year*—*To use premises in tenantlike manner.*—A tenant from year to year is under an implied obligation to use the demised premises in a tenantlike manner & to yield them up so used at the end of the tenancy. The obligation continues as long as he continues tenant. If he alters the character of the premises, he commits a breach of the obligation, & is liable in damages for the injury to the reversion.—*MARSDEN v. EDWARD HEYES, LTD.*, [1927] 2 K. B. 1; 96 L. J. K. B. 410; 136 L. T. 593, C. A.

1978a. — *Option to take lease "for any term suitable to" occupier.*—Where premises had been for some years in the occupation of R., who produced a letter addressed to him in 1915 & signed by the landlord, purporting to give R. an indefinite option of purchase, & alternatively an option to take a lease of the property for any term suitable to R., & an undertaking that so long as R. remained sole tenant the rent agreed on should not be increased:—*Held*: on the true construction of the agreement R. was merely a tenant from year to year.—*JOHNSON v. CLARKE*,

[1928] Ch. 847; 97 L. J. Ch. 337; 139 L. T. 552; 72 Sol. Jo. 556.

1982. *Add. Annotation*:—*Consd.* *Ladies Hosiery & Underwear, Ltd. v. Parker*, [1930] 1 Ch. 304.

2011a. —.]—By a lease of 1838, land at the rear of four houses, numbered 16, 18, 20, & 22, was leased for a term ending Sept. 29, 1923, & by an underlease of 1906 was sub-let to J. till May 9, 1923. By an agreement of Oct. 10, 1914, J. let it to P. for three years from Oct. 12, 1914, at a rent of £2 a week, payable weekly. On the land, & extending along the rear of Nos. 16, 18, & 20, was a shed, in which P. carried on the business of a general dealer until 1923, when he assigned the business to his wife & thereafter managed it for her. In 1919 pltf. co. took an assignment of the land behind Nos. 16, 18, 20, & 22 for the rest of the term comprised in the lease of 1838, subject to the underlease of 1906. On July 8, 1920, the Midland Bank acquired the leasehold reversion immediately expectant on P.'s tenancy under the agreement of 1914: & on Oct. 6 in the same year pltf. co. acquired No. 18 & the land behind for fifty years from Sept. 29, 1920, subject to the lease of 1838. After the end of his tenancy in 1917, P. had continued in possession of the land & the shed, paying rent first to J., & after Mar. 1923, at J.'s direction, to the Midland Bank, which, in 1925, acquired the freehold reversion of the

### PART VIII. SECT. 4, SUB-SECT. 1.—A.

*sd. Under Soldier's Settlement Act.*—The Soldier's Settlement Board entered into an agreement with McC. for the sale of land to him as authorised by the Act. This agreement, & the Act itself, provided that such agreement could only be cancelled for default by the settler to comply with the terms thereof, & in the case of land the same could only be re-possessed upon & after the Board giving to the settler thirty days' notice of its intention to rescind said agreement:—*Held*: the tenancy at will, mentioned in sect. 22 (6) & sect. 31 of the Soldier's Settlement Act, is a special statutory tenancy at will, & is not the tenancy at will known to the common law; it is a modified or conditional tenancy at will. After the notice has been given, the settler, if he remains on the land, becomes merely a tenant at will.—*MCLELLAN v. R.*, [1932] Ex. C. R. 13; *reversd.*, [1932] S. C. R. 617; 4 D. L. R. 79.—CAN.

### PART VIII. SECT. 4, SUB-SECT. 1.—B.

a 1. —.]—A tenancy at will may be implied where a person enters into & remains in occupation of lands & the enjoyment of the profits, by arrangement with the owner, without payment of rent, & not as agent, or under any express contract of tenancy. If the owner visits the lands in the character of owner, & exercises rights of ownership *animo possidentis*, such visits may prevent the Statute of Limitations from running in favour of the tenant at will.—*WOODHOUSE v. HOONEY*, [1915] 1 I. R. 296.—IR.

### PART VIII. SECT. 4, SUB-SECT. 1.—D.

1855 iii. —.]—*DOE d. PURDY v. PETERS* (1838), 2 N. B. R. (Ber.) 530.—CAN.

### PART VIII. SECT. 4, SUB-SECT. 2.—C. (a) 1.

1884 vii. —.]—A. having

given to B. his bond in £2,500, conditioned, among other things, that C. & D. should reside on a certain lot of land so long as they conducted themselves in a manner agreeable to A.:—*Held*: no notice or demand was necessary before bringing ejectment.—*TISDALE v. TISDALE* (1860), 10 C. P. 106.—CAN.

### PART VIII. SECT. 5, SUB-SECT. 1.

1946 i. — *Purchaser under agreement for sale at price payable by instalments—After forfeiture for non-payment.*—*PRINCE v. MOORE* (1864), 14 C. P. 349.—CAN.

### PART VIII. SECT. 5, SUB-SECT. 2.

a 1. *Action for damages—Against landlord—Removal of roof by landlord.*—*Held*: damages not recoverable.—*HASTINGS v. LEONIDAS*, [1927] S. R. Q. 389; 21 Q. J. P. 156.—AUS.

land at the rear of Nos. 20 & 22. No rent was paid by P. to pltf. co. There were negotiations at a later date for apportioning the rent between the bank & pltf. co. which did not result in a concluded agreement. In Sept. 1928, defts. entered into an agreement to purchase from the Bank the land at the rear of Nos. 20 & 22, & at the same time their solrs. wrote to pltf. co.'s solrs., asking if the co. would grant them a lease of the land in the rear of No. 18. After some correspondence pltf. co. refused to grant a lease of the land, & in Apr. 1929, commenced this action, claiming a declaration that it was entitled to the land, & alleging that deft. P. was at most a weekly tenant:—*Held*: by MAUGHAM, J. (a) mere continuance in possession by one originally in possession as tenant under a legal title, with the consent of the person who has become the landlord, may lead to the inference of a consensus that the one so continuing shall be a yearly tenant, but on the facts a consensus that P. should become a yearly tenant of pltf. co. could not be inferred; (b) the inference of a tenancy from year to year, which is drawn from the payment of rent by a tenant after the expiration of his tenancy, ought to be drawn only when such payments are by reference to a yearly rent, & P.'s payments of £2 a week rent to J. or the Midland Bank, after the expiration of the term granted by the agreement of 1914, were not so paid; by the Court of Appeal, on the facts there was no consensus between pltf. co. & defts. giving rise to the relation of landlord & tenant, without deciding the question whether, if there had been such a consensus, it would in law have created a yearly or a weekly tenancy.—*LADIES' HOSIERY & UNDERWEAR, LTD. v. PARKER*, [1930] 1 Ch. 304; 99 L. J. Ch. 201; 142 L. T. 299; 46 T. L. R. 171, C. A.

*Annotation*:—*Consd. Swift v. Ambrose* (1931), 47 T. L. R. 594.

2042. *Add. Annotation*:—*Consd. Swift v. Ambrose* (1931), 47 T. L. R. 594.

2042a. ——— *Payment of rent after expiration of renewed tenancy.*—Pltf., by an agreement dated Mar. 5, 1928, let a flat to deft. from that date until Mar. 3, 1929, with an option to renew the tenancy for a further

period of one year. Deft. exercised the option, & on the expiration of the renewed tenancy on Mar. 3, 1930, remained in occupation of the flat & continued to pay the rent reserved by the agreement, but no definite arrangement was arrived at between the parties as to the terms on which deft. occupied:—*Held*: in these circumstances a tenancy from year to year was created by implication of law & deft. continued liable to pay rent until the determination of the tenancy by a proper notice to quit.—*SWIFT v. AMBROSE* (1931), 47 T. L. R. 594.

2053. *Add. Annotation*:—*Refd. Taylor v. Twinberrow*, [1930] 2 K. B. 16.

2064. *Add. Annotation*:—*Refd. Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56.

2065a. *Five years certain*—*Subject to six months' notice thereafter.*—*JONES v. CORY BROS. & Co., LTD.* (1934), 51 T. L. R. 359; 79 Sol. Jo. 362, C. A.

2078. *Add. Annotations*:—*Consd. Swift v. Ambrose* (1931), 47 T. L. R. 594. *Refd. Lowther v. Clifford*, [1927] 1 K. B. 130.

2079. *Add. Annotations*:—*Refd. Rye v. Purcell*, [1926] 1 K. B. 446; *Snowdon v. Ecclesiastical Comrs. of England*, [1935] Ch. 181.

2080. *Add. Annotation*:—*Refd. Lowther v. Clifford*, [1927] 1 K. B. 130.

2084. *Add. Annotation*:—*Refd. Snowdon v. Ecclesiastical Comrs. for England*, [1935] Ch. 181.

2090. *Add. Annotation*:—*Refd. Rye v. Purcell*, [1926] 1 K. B. 446.

2097. *Citations*:—Delete [1926] 1 K. B. 185 & add [1927] 1 K. B. 130; 90 J. P. 113; 24 L. G. R. 231.

*Add. Annotations*:—*Apld. Olive v. Paynter*, [1932] 2 K. B. 666. *Refd. Mansfield v. Robinson*, [1928] 2 K. B. 353; *Paul (R. & W.), Ltd. v. Wheat Commission* (1935), 152 L. T. 352.

2101. *Add. Annotation*:—*Refd. Lowther v. Clifford*, [1927] 1 K. B. 130.

2111. *Add. Annotation*:—*Refd. Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56.

2150a. *Demise to two & their children—Whether after-born children entitled.*—*STEVENS v. LAWTON* (1588), Cro. Eliz. 121; 78 E. R. 379.

PART VIII. SECT. 6, SUB-SECT. 2.—  
B. (b).

2034 x. ———.—*HAMBURG v. CAPE BRETON ELEC. CO.*, [1926] 4 D. L. R. 683; 58 N. S. R. 341.—CAN.

2034 xi. ———.—*STURDEE v. MERRITT* (1848), 5 N. B. R. (3 Kerr) 641.—CAN.

PART VIII. SECT. 6, SUB-SECT. 4.—  
A. (a).

2101 i. ——— *As to option to purchase.*—A Crown lease provided that the lessee upon paying a certain stated sum would be entitled to a conveyance of the lands in fee simple. The lessees failed to renew their lease but held over. In 1927, the present occupants sent the Crown a cheque for the amount mentioned in the lease & requested a

deed to the lands in question. The Crown returned the cheque & refused to convey the land for the sum offered, hence the present petition of right:—*Held*: the option to purchase contained in the lease in question herein, being unlimited as to time, was therefore inoperative & void because of the rule against perpetuities, & was not exercisable. The tenant who holds over with the consent of the landlord becomes a tenant from year to year & holds upon the terms created by the lease, so far as they are applicable to a tenancy from year to year. An option contained in a lease to purchase the reversion & so destroy the tenancy is not one of the terms of the tenancy; it is a provision outside of the terms which regulate the relations between the landlord as landlord, & the tenant as tenant, & is not one of the terms of

the original tenancy which will be incorporated into the terms of the yearly tenancy created by the tenant holding over after the expiration of the lease.—*TORNEY v. R.*, [1930] Ex. C. R. 178.—CAN.

PART VIII. SECT. 6, SUB-SECT. 5.—A.

*sm. Agreement to purchase—Agreement not carried out.*—*Held*: the tenancy was not determined.—*CROSKILL v. WORTMAN* (1863), 10 N. B. R. (5 All.) 648.—CAN.

PART VIII. SECT. 9, SUB-SECT. 3.

*sm. Sub-lease for life & years.*—*Held*: the term of years was reversionary & not concurrent, & began to run when the life died.—*ADAMS v. M'GOLDRICK*, [1927] N. I. 127.—IR.

## Part IX.—Renewal of Tenancies.

**2242. Add. Annotation:—**Consd. *Swift v. Ambrose* (1931), 47 T. L. R. 594.

**2243. Before this case, for “See, now, Law of Property Act, 1925 (c. 20), s. 145,” read “See, now, Law of Property Act, 1922 (c. 16), s. 145.”**

**2263. Add. Annotation:—**Refd. *Curtis Moffat v. Wheeler*, [1929] 2 Ch. 224.

**2282a. —.]—**STONE *v.* THEED (1787), 2 Bro. C. C. 243; 29 E. R. 135, L. C.

**Annotations:—**Consd. *White v. White* (1804), 9 Ves. 554. **Expld.** *Allan v. Backhouse* (1813), 2 Ves. & B. 65. **Consd.** *Shaftesbury Earl v. Marlborough Duke* (1833), 2 My. & K. 111. **Refd.** *Bradford v. Brownjohn* (1868), 37 L. J. Ch. 198.

**2282b. —.]—**KEMPTON *v.* PACKMAN (1790), cited in 7 Ves. at p. 176; 32 E. R. 72.

**2286a. —.]—**KEIR *v.* ROBINS (1838), 2 Jur. 773.

**2287a. —.]—**GREENWOOD *v.* EVANS (1841), 4 Beav. 44; 49 E. R. 254.

**Annotations:—**Apld. *Jones v. Jones* (1846), 5 Hare, 440. **Expld.** *Hudleston v. Whelpdale* (1852), 9 Hare, 775. **Refd.** *Hayward v. Pile* (1870), 22 L. T. 893; *Bute (Marquis) v. Ryder* (1884), 53 L. J. Ch. 1090.

### SECT. 5.—TENANCIES OF BUSINESS PREMISES.

See *Landlord & Tenant Act*, 1927 (c. 36).

**2306a. Application for new lease—Time for—**Extension of time—**Jurisdiction of county court.]—**Under the rules of procedure made under *Landlord & Tenant Act*, 1927 (c. 36), a county court judge has no jurisdiction to grant an extension of time to a tenant who

desires to make application to the court for a new lease at a time later than the time prescribed by sect. 5 (1) of the Act.—**DONEGAL TWEED Co., LTD. v. STEPHENSON** (1929), 98 L. J. K. B. 657; 141 L. T. 262; 45 T. L. R. 503; 73 Sol. Jo. 367; 93 J. P. Jo. 380, D. C.

**2306b. Service of notice before Act in**

**force—Effect of.]—**A tenant whose tenancy expired on Mar. 25, 1929, sent on Mar. 23, 1928, a notice in the prescribed manner by registered post to his landlords requiring them under sect. 5 of above Act, which Act came into force on Mar. 25, 1928, to grant him a new lease of his premises in lieu of claiming compensation under sect. 4 of the Act. In the county ct. the judge took the objection that the notice having been served before the Act was in force, he had no jurisdiction. That decision having been affirmed by the Div. Ct., pltf. appealed:—**Held:** the landlord having in his possession on the day when the Act came into force a notice containing all the requisites for a proper claim, & that day being a day more than a year before the termination of the tenancy, the county ct. judge had jurisdiction to hear the claim.—**DOBBIN v. OGDEN** (1929), 98 L. J. K. B. 321; 141 L. T. 51; 45 T. L. R. 349; 73 Sol. Jo. 190, C. A.

**2306c. — Who may apply—Receiver for debenture holders—Notwithstanding liquidation.]—**A co. was the lessee of certain premises under a lease expiring on June 24, 1930. In 1925 the co. issued a debenture by which

### PART IX. SECT. 2, SUB-SECT. 1.—B.

**2159 v. —.]—**A covenant to renew runs with the land, & can be specifically enforced by the assignee of a portion of the holding.—**SECRETARY OF STATE FOR INDIA IN COUNCIL v. VOLKART BROTHERS** (1926), 1 L. L. R. 50 Mad. 595.—IND.

### PART IX. SECT. 2, SUB-SECT. 3.

**n i. —.]—**Where a renewal clause in a lease confers on the lessee the right to obtain from the lessor on the expiry of the old term, but not until then, the grant of a new lease *in presenti* in continuation of the old, the lessor cannot, during the currency of the lease, though himself presently willing to grant a new lease, compel the lessee to accept it, even though the latter may have given notice of his intention to exercise his right of renewal.—**KENNEDY v. BERRYMAN**, [1925] N. Z. L. R. 178.—N.Z.

### PART IX. SECT. 2, SUB-SECT. 5.

**2181 v. —.]—**SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* VOLKART BROTHERS, No. 2159 *v. ante.*—IND.

**2184 i. Representative of lessee—Executor.]—**NUGENT *v.* MCLELLAN, [1927] 4 D. L. R. 845.—CAN.

**p i. — Not after transfer of leasehold interest to others.]—**JOGBEH CHANDRA ROY *v.* ANNADA CHARAN CHAUDHURY (1926), 1 L. R. 53 Calc. 590.—IND.

### PART IX. SECT. 2, SUB-SECT. 6.

**sp. Renewal by former partner.]—****Held:** the lease was held in trust for the partnership.—**PONG v. QUONG**,

[1927] 3 D. L. R. 128; [1927] S. C. R. 271.—CAN.

### PART IX. SECT. 2, SUB-SECT. 9.—A.

**2200 v. — Agreement indefinite.]—**GEARY *v.* CLIFTON Co., [1928] 3 D. L. R. 64; 62 O. L. R. 257.—CAN.

**r i. —.]—**A lease of a house & consulting-rooms contained a covenant for renewal & an option to purchase, under which the house was purchased:—**Held:** the covenant for renewal only applied to the entirety of the premises, & not to the consulting-rooms alone.—**MORRIS v. DUNSTONE**, [1925] S. A. S. R. 340.—AUS.

**r ii. —.]—**SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* VOLKART BROTHERS (1928), L. R. 5, Ind. App. 423.—IND.

**sq. Notice of exercise of option—To whom given.]—**A clause in defts.' sub-lease, which was for two years, gave them an option for a further period of three years at a named rental, “three months' notice in writing to be given in the event of this option being exercised.” In the head lease to R. & Co. it was provided that the lessors should appoint & keep some person residing in the city of T. where the building was, “as their agent, to whom the lessees may pay their rent & give all notices, & who will be authorised to receive applications for & grant all legal consents, waivers & other concessions to the lessees.” On Nov. 30, 1927, defts. addressed to the owners who resided in the United States, & to B. of the city of T. “their agent,” a notice of their election to continue as tenants for the further period of three years. The notice was not served upon the owners but upon

B.:—**Held:** the notice was properly given to the original landlords, to whom R. & Co. had previously released their interest; defts. were not bound to go to the United States & serve the landlords, wherever they were to be found.—**GRAY v. CHAMANDY & SONS**, [1929] 2 D. L. R. 706; 63 O. L. R. 495.—CAN.

### PART IX. SECT. 2, SUB-SECT. 11.—B (a).

**2243 ii. —.]—**A covenant in a lease, which provides for a renewal of the term, in order to be valid must designate with reasonable certainty the date of the commencement & the duration of the renewal term to be granted. This certainty as to duration must appear from the express limitation of the parties or from reference to some collateral matter, itself certain or capable of being made so before the renewal lease takes effect which may, with equal certainty, be applied in measurement of the continuance of the term. In the present case (where the lease was of certain rooms & hallway in the lessor's building which adjoined the lessee's hotel, the leased premises being used in connection with the hotel):—**Held:** the language used showed that the intention was to provide for a right of renewal for such period as the lessees should need the use of the rooms for purposes specified, & as there was nothing in the covenant which enabled the ct. to determine the duration of the lessees' need for the rooms, the covenant was too indefinite to be enforced, & was therefore void for uncertainty.—**GOURLAY & BILLINGS v. CANADIAN DEPARTMENT STORES, LTD.**, [1933] S. C. R. 329; 3 D. L. R. 238.—CAN.

it charged all its undertaking & all its property, present & future, including its uncalled capital in favour of the debenture holders. On Apr. 22, 1929, the co. gave notice to the landlords under Landlord & Tenant Act, 1927 (c. 36), s. 5, requiring them to grant to it a new lease of the premises. In July, 1929, the debenture holders in exercise of the power on that behalf in the debenture appointed a receiver of the property & assets therein comprised. The landlords having failed to comply with the co.'s request for the grant of a new lease the receiver on Sept. 23, 1929, commenced an action in the county ct. in the name of the co. to obtain the grant of a new lease. On Oct. 15 a compulsory order was made to wind up the company & a liquidator was appointed. At the hearing in the county ct. preliminary objections were taken on behalf of the landlords: (a) that an order having been made to wind up the co. the receiver could no longer continue the action, & (b) that the notice by the co. requiring the grant of a new lease was not in the "form prescribed" by County Court (Landlord & Tenant) Rules, 1928, Ord. 50B, r. 2. The county court judge upheld the preliminary objections. On appeal:—*Held*: (1) the right to apply for a renewal of the lease under sect. 5 was a right given by the co. to the debenture holders as part of their security, & the receiver was entitled to enforce that right notwithstanding the liquidation of the co.; (2) sect. 5 did not require that the notice of claim for a new lease should be in any prescribed form, & therefore Ord. 50B, r. 2, so far as it required that the notice should be in a prescribed form was *ultra vires*. —*GOUGH'S GARAGES, LTD. v. PUGSLEY*, [1930] 1 K. B. 615; 99 L. J. K. B. 225; 143 L. T. 38; 46 T. L. R. 283; 74 Sol. Jo. 215; 28 L. G. R. 239, D. C.

*Annotation*:—*Generally*, *Refd.* *Smith v. Metropolitan Properties Co.*, [1932] 1 K. B. 314.

**2306d. Whether prescribed form necessary—County Court (Landlord and Tenant) Rules, 1928, Ord. 50B, r. 2.**—*GOUGH'S GARAGES, LTD. v. PUGSLEY*, No. 2306c, *ante*.

**2306e. Proof of attachment of goodwill.**—*SIMPSON v. CHARRINGTON & CO., LTD.*, No. 2306l, *post*.

**2306f. Grant of new lease—What included—Incorporeal right—Fishing.**—Where an incorporeal right, such as a right of fishing, is demised along with corporeal hereditaments by the same lease, & the lessee uses both for the purpose of his trade or business, the incorporeal right is part of the "premises" within Landlord & Tenant Act, 1927 (c. 36), s. 5. Therefore, on the expiration of such a lease, the lessee, if he can show that the compensation for goodwill to which under the Act he would be entitled would not compensate him for the loss of goodwill if he removed to & carried on his trade or business in other premises, may require a new lease of the premises which shall include the incorporeal right demised by the original lease. —*WHITLEY v. STUMBLES*, [1930] A. C. 544; 99 L. J. K. B. 518; 143 L. T. 441; 46 T. L. R. 555; 74 Sol. Jo. 488, H. L.; *affg.*, S. C. *sub nom.* *STUMBLES v. WHITLEY*, [1930] 1 K. B. 393, C. A.

**2306g. Basis of compensation.**—(1) *Held*: the basis of compensation under the Act is not the loss suffered by the tenant, but the benefit accruing to the landlord.

(2) Under sect. 4 (1) it is irrelevant to inquire whether the "higher rent" is derived from a letting for the purpose for which the premises were previously let or for any other purpose; & if the landlord could let the premises for any other purpose at a higher rent than they would have realised for the same purpose, goodwill included, he will not be liable to pay compensation to the tenant. —*HUDD v. MATTHEWS*, [1930] 2 K. B. 197; 99 L. J. K. B. 621; 143 L. T. 383; 94 J. P. 204; 46 T. L. R. 495; 74 Sol. Jo. 465; 28 L. G. R. 486, D. C.

*Annotation*:—*As to* (1) *Refd.* *Whiteman Smith Motor Co. v. Chaplin*, [1934] 2 K. B. 35.

**2306h.** —[*Pltfs.* were the tenants of premises at which they & their predecessor in title had carried on the trade or business of a motor garage, repair works, & petrol-filling station for nearly fourteen years. They claimed under Landlord & Tenant Act, 1927 (c. 36), s. 5, that a new lease of the premises should be granted to them on the ground that the sum that could be awarded to them as compensation for goodwill under sect. 4 would not compensate them for the loss they would sustain if they removed & carried on their business elsewhere. The referee appointed under sect. 21 of the Act adopted the following process in arriving at the value of the goodwill under the Act. Having assessed the average annual profits of the business at £750, he took one-third of that sum, *i.e.*, £250, & capitalised it at two & a half years' purchase, making the capital value of the adherent profit £625. With that sum he compared the capital value of the increase in rental value of the premises due to causes irrespective of the tenants' trade or business. He found, as a fact, that the increase in rental value due to causes other than the trade or business was £50 a year. That sum he capitalised on what was called "the 7 per cent. table," or, at approximately, fourteen & a quarter years' purchase, arriving at a sum of over £700, & as that sum was more than the £625 capitalised value of the adherent profit, the referee was of the opinion that no compensation for goodwill was payable to *pltfs.* under the Act, & he could not recommend that a new lease should be granted to them. His report was adopted by the county ct. judge, who refused to grant a new lease on the ground that *pltfs.* had not shown a goodwill entitling them to compensation:—*Held*: the referee had adopted a wrong process in arriving at the value of the goodwill within sect. 4 of the Act. The test required by that sect. was to ascertain the difference between the rental value with goodwill & the rental value without goodwill. —*WHITEMAN SMITH MOTOR CO., LTD. v. CHAPLIN*, [1934] 2 K. B. 35; 103 L. J. K. B. 328; 150 L. T. 354; 50 T. L. R. 301, D. C.

*Annotation*:—*Consd.* *Charrington & Co. v. Simpson*, [1935] A. C. 325.

**2306j.** — *What may be considered.*—In considering whether a tenant is entitled to compensation for goodwill extraneous circumstances, such as the changing conditions



& character of the neighbourhood & inhabitants & of the business, are properly taken into consideration; for a tenant is not entitled to compensation for goodwill which is attributable solely to those circumstances.—*CHARRINGTON & Co., LTD. v. SIMPSON*, [1935] A. C. 325; 104 L. J. K. B. 226; 152 L. T. 469; 51 T. L. R. 270; 79 Sol. Jo. 144, H. L.; *affg.*, *S. C. sub nom. SIMPSON v. CHARRINGTON & Co., LTD.*, [1934] 1 K. B. 64, C. A.

**2306k.** —.]—Upon a claim under Landlord & Tenant Act, 1927 (c. 26), for compensation for loss of goodwill in respect of licensed premises, it was proved that the tenant had increased the trade of the house by inducing a number of clubs to meet upon the premises, had worked up a considerable dining-room trade, but that during the time immediately before the determination of the lease the business had not progressed as rapidly as other neighbouring houses. It was also shown that there was a considerable body of custom created by him which was so personal to him that it attached to him, & not to the premises:—*Held*: (1) the club trade & the dining-room trade were properly taken into consideration in assessing the compensation for loss of goodwill; (2) the comparison with other neighbouring houses did not bar a right to compensation, so long as it was shown that appct. & his predecessors had made some relevant addition to the value of the premises; (3) as the personal goodwill could not be made the subject of compensation under the Act, this was a case in which a new lease ought to be granted.—*DARTFORD BREWERY Co., LTD. v. FREEMAN* (No. 2), [1938] 4 All E. R. 78.

**2306l. Action for compensation—Time for bringing.**—*Held*: a tenant is not entitled, before the tenancy has expired & before he has quitted the holding, to bring an action to recover compensation under Landlord & Tenant Act, 1927 (c. 26), s. 4 (1).—*SMITH v. METROPOLITAN PROPERTIES Co., LTD.*, [1932] 1 K. B. 314; 101 L. J. K. B. 110; 146 L. T. 133; 48 T. L. R. 32; 75 Sol. Jo. 813, D. C.

**2306m. Premises for which compensation payable—Licensed premises.**—The tenant of premises licensed for the sale of intoxicating liquor for consumption off the premises gave notice to his landlord under sect. 4 (1), that he claimed to be entitled, at the termination of his tenancy on quitting the holding, to be paid by the landlord compensation for goodwill, & further that, as the sum that could be awarded under sect. 4 would not compensate him for the loss of goodwill he would suffer

if he removed & carried on business elsewhere, he claimed, in the alternative, to be entitled to a new lease in accordance with sect. 5. The premises had been licensed during the whole of appct.'s tenancy:—*Held*: (1) the claim was not invalid by being stated in the alternative; (2) the terms of proviso (c) to sect. 4 (1) did not debar a tenant of premises where the sale of intoxicating liquor was the sole trade carried on from claiming compensation; (3) the tenant, in order to prove that goodwill had become attached to the premises was not bound to show that he had done more than any tenant of ordinary capacity & energy would have done; (4) the tribunal under the Act of 1927 for determining the amount of compensation payable to a tenant for goodwill, or determining whether a new lease should be granted to him, is the county ct.; & in dealing with a report made by a Referee under sect. 21 the county ct. judge may if he thinks fit adopt, vary or disregard the findings of the Referee; (5) on an appeal from the decision of the county ct. in such a case the appellate tribunal is bound by the findings of the county ct. judge unless (a) there was no evidence to support them, or (b) the findings are mixed questions of fact & law which turn upon the construction of the statute, (b) a finding as to goodwill is a proper subject of appeal.—*SIMPSON v. CHARRINGTON & Co., LTD.*, [1934] 1 K. B. 64; 103 L. J. K. B. 49; 150 L. T. 103; 50 T. L. R. 46, C. A.; *on appeal, sub nom. CHARRINGTON & Co., LTD. v. SIMPSON*, [1935] A. C. 325; 104 L. J. K. B. 226; 152 L. T. 469; 51 T. L. R. 270; 79 Sol. Jo. 144, H. L.

*Annotations*:—As to (4) *Consd.* *Freeman v. Dartford Brewery Co.*, [1938] 3 All E. R. 120. *Generally, Consd.* *Whiteman Smith Motor Co. v. Chaplin*, [1934] 2 K. B. 35, D. C.

**2306n. Ability to let premises at higher rent—Purpose of letting—How far material.**—*HUDD v. MATTHEWS*, No. 2306g, *ante*.

**2306o. Contracting out of Act—Adequacy of consideration.**—*HOLT v. CADOGAN* (1930), 40 T. L. R. 271, C. A.

**2306p. Form of notice.**—*SIMPSON v. CHARRINGTON & Co., LTD.*, No. 2306m, *ante*.

**2306q. County court—Powers in relation to referee's report.**—*SIMPSON v. CHARRINGTON & Co., LTD.*, No. 2306m, *ante*.

**2306r. — Appeal from—On finding as to goodwill.**—*SIMPSON v. CHARRINGTON & Co., LTD.*, No. 2306m, *ante*.

**2306s. — — — Questions of act.**—*SIMPSON v. CHARRINGTON & Co., LTD.*, No. 2306m, *ante*.

## Part X.—Particular Properties.

**2330. Add. Annotations**:—*Refd.* *Ariff v. Rai Jadunath Majumdar Bahadur* (1931), 47 T. L. R. 238; *Canadian Pacific Ry. Co. v. R.*, [1931] A. C. 414.

**2331. Add. Annotation**:—*Refd.* *Bernard v. Williams* (1928), 139 L. T. 22.

**2337. Add. Annotation**:—*Refd.* *Waring v. Foden Waring v. Booth Crushed Gravel Co.* (1931) 101 L. J. Ch. 33.

**2350. Add. Annotation**:—*Generally, Refd.* *Jardine v. A.-G. for Newfoundland* (1932), 48 T. L. R. 199.

### PART X. SECT. 2, SUB-SECT. 3.—A.

*st. Land leased in lots by reference to plan—Lessor not entitled to depart from plan.*—*BURNS v. DILWORTH TRUST BOARD*, [1925] N. Z. L. R. 485.—N.Z.

**2361. Add. Annotation:—***Reid. A. G. v. Leeds Corpn.*, [1929] 2 Ch. 291.

**2371. Add. Annotation:—***As to (1) Reid. O' Cedar v. Slough Trading Co.*, [1927] 2 K. B. 123.

**2375. Add. Annotations:—***Apld. Noble v. Harrison*, [1926] 2 K. B. 832. *Reid. Pontardawe Rural District Council v. Moore-Gwyn*, [1929] 1 Ch. 656; *Western Engraving Co. v. Film Laboratories, Ltd.*, [1936] 1 All E. R. 106; *Collingwood v. Home & Colonial Stores, Ltd.*, [1936] 3 All E. R. 200.

**2381. Add. Annotations:—***Consd. Morgan v. Incorporated Central Council of the Girl's Friendly Society*, [1936] 1 All E. R. 404.

*Reid. Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776.

**2387. Add. Annotation:—***Reid. Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776.

**2389. Add. Annotation:—***Consd. Western Engraving Co. v. Film Laboratories, Ltd.*, [1936] 1 All E. R. 106.

**2390. Add. Annotation:—***Reid. Booth v. Thomas* (1926), 95 L. J. Ch. 160.

**2392. Add. Annotations:—***Consd. Cunard v. Antifire, Ltd.* (1932), 49 T. L. R. 184; *Bishop v. Consolidated London Properties, Ltd.* (1933), 102 L. J. K. B. 257.

**PART X. SECT. 5, SUB-SECT. 1.**

*sw. Common court—Repair—Extent of obligation.*—The wife of the tenant of a house in a tenement brought an action against the proprietors for damages in respect of injuries, which she alleged she had sustained in consequence of a fall caused by her foot catching in a depression in the pavement of a common court at the back of the tenement. Pursuer averred that the depression had been there, & the condition of the pavement had been defective & dangerous, for some years, & that the defective state of the pavement was open & obvious. She did not aver that she was unaware of the defect, or that she had ever complained of it to defenders, nor did she deny defenders' averment that she had lived in the tenement for years:—*Held*: pursuer's averments were not relevant to infer liability against defenders.—*YOUNG v. CAMPBELL*, [1924] S. O. 157.—*SCOT.*

*sz. Clause exempting landlord from liability in specified cases—Whether negligence included.*—While the janitor of an apartment block was using highest gasoline in ridding one of the rooms of vermin, about which the tenant of the room had complained, an explosion occurred & the tenant was burned & her effects destroyed. The janitor was authorised by the president of deft. co., which was the landlord, to so use the gasoline, & the work required the removal & replacing of fixed boards & rails which were part of the permanent structure of the building. The lease exempted the landlord from all liability for any accident, loss or damage arising in or about the building or premises from heating, steam, water, gas or electric lighting, or from any plant or appliances incident thereto, & whether arising from fire, frost, rain, weather or defects in construction or materials "or from any cause whatsoever"; it also exempted the landlord from liability for any acts of any agent, servant or workmen in any way occupied or engaged in or about the building or premises or in any capacity whatsoever; it also provided that "the lessors are not responsible for the cleaning or caretaking" of the demised premises:—*Held*: even if the janitor's acts constituted negligence, the work was not "cleaning" within the meaning of the lease; the *ejusdem generis* rule was not applicable to the acts referred to in the exemption clauses; the expression "agent, servant or workmen" included all persons acting for deft. for whose acts it would be held responsible & thus included deft.'s president; & the exemption clauses covered negligent acts.—*FINKEMORE v. T. UNDERWOOD, LTD.*, [1930] 2 W. L. R. 348; 3 D. L. R. 939; 24 Alta. L. R. 616; *revers.*, [1930] 2 D. L. R. 873; 1 W. W. R. 665.—*CAN.*

*y. Railing on porch.*—The male tenant was one of two suites which comprised the upper floor of a

building owned by deft. The female pltf., wife of her co-pltf., was shaking a rug on a porch at the rear of the suite when the railing thereon gave way & she was injured. In an action for damages pltfs. contended that the railing, in the condition it was, was a trap:—*Held*: after reviewing the facts as to the situation of the porch & its relation to the two suites, the railing was part of the demised premises, & therefore, pltfs. had no right of recovery against deft.—*AGNEW v. HAMILTON*, [1932] 3 W. W. R. 57; 46 B. C. R. 147; *affd.*, 46 B. C. R. 362.—*CAN.*

*sz. Damage by fire—Inflammable refuse by elevator shaft.*—Pltf.'s husband leased from deft. a suite in deft.'s apartment building. On each floor, beside the freight elevator, & separated from the hall by swinging wooden doors, was a platform on which were garbage receptacles. A fire occurred in the building, & in efforts to escape pltf. was injured & her husband was killed. For this & for property loss pltf. sued for damages. The jury found that deft. was negligent in that it caused or allowed inflammable refuse to be deposited beside the elevator shaft & failed to safeguard such refuse against the danger of fire; that such condition amounted to a trap or concealed danger created by deft. & caused the injuries, death & loss; & judgment was entered for damages. The judgment was set aside by the Ct. of Appeal. Pltf. appealed:—*Held*: pltf. could not recover.—*HEAKE v. CITY SECURITIES CO., LTD.*, [1932] S. C. R. 250.—*CAN.*

*sz. Unguarded lightwell—Liability to guests of caretaker.*—Pltf. at night fell into an unguarded lightwell adjoining a path or ramp leading to a door forming an access to the caretaker of deft.'s flats. Pltf. was unaware of the lightwell & had received no warning. The caretaker occupied rooms in the flats for which she paid. The purpose of pltf.'s visit was to ask her to do some domestic work by the day elsewhere. The lightwell was plainly visible in daylight; but in darkness, owing to its unusual character, position, & construction, it amounted to a danger of a kind which a visitor who had not been warned would not reasonably anticipate:—*Held*: (1) pltf. came neither as a trespasser nor as an invitee but as a licensee; (2) the obligation of deft. as occupier of the premises towards such a visitor as pltf. was to take reasonable care to prevent harm to her from a state or condition of the premises known to deft. but unknown to the visitor, which the use of reasonable care on the visitor's part would not disclose & which, considering the nature of the premises, the occasion of the leave & licence & the circumstances generally, a reasonable man would be misled into failing to anticipate or suspect; (3) the facts (a) that the injured person was brought upon the premises by a tenant of rooms therein (the caretaker) who took them with an access in the condition com-

plained of, (b) that the danger existed in the premises when the implied licence was given by deft. as occupier for the entry of such persons as pltf., (c) that the danger was not hidden, except by darkness, were all circumstances which must be considered in determining whether the occupier has omitted to use the care to which the licensee was entitled, but none of them was in itself decisive of that question; (4) that the condition of the place constituted a hidden danger from which it was the duty of deft. to exercise reasonable care to safeguard a licensee such as pltf.; (5) deft. had failed in that duty & pltf., who was not guilty of contributory negligence, was entitled to recover damages for her injuries.—*LIPMAN v. CLENDINNEN* (1932), 48 C. L. R. 550; 6 A. L. J. 150.—*AUS.*

**PART X. SECT. 5, SUB-SECT. 2.**

**2380 viii.** — — — — —*J. WATT v. ADAMS BROTHERS HARNESSE MANUFACTURING CO. (Alta.)*, [1928] 1 D. L. R. 59; [1927] 3 W. W. R. 580.—*CAN.*

**2386 iv.** — — — — —*Liability to stranger.*—Where a landlord has covenanted to light the premises & knows or ought to know that, if he does not do so sufficiently, he will expose a person rightfully using the premises without warning to a concealed danger or trap, he owes a duty to such persons to use reasonable care to prevent, by notice or sufficient lighting, damages from such danger.—*BENTLEY v. VANCOUVER EXHIBITION ASSOCN.*, [1935] 3 W. W. R. 129; 50 B. C. R. 343; *revers.*, [1936] 1 W. W. R. 480; 2 D. L. R. 128.—*CAN.*

*sz. Defective lift—Injury to licensee.*—Pltf. was sent by his employers to deliver a message to a firm of solrs. who occupied offices in a building owned by defts., & let by them to various tenants, the passages, approaches, & lift of which were under the control of the owners. Pltf., as he approached the lift way, thought he could see the outline of the lift, whereupon he opened the door to the liftway & stepped in, & as the lift was not there, fell to the basement & sustained serious injuries. The lift was of the automatic type & the door to the lift way should not have been opened unless the lift was there. In an action for damages against the owners for alleged negligence in allowing the lift way to be out of repair, unsafe, & dangerous, in that there was a defective lock to the door & that the approach to the lift way was unlighted:—*Held*: the inadequate lighting & defective lock did not constitute a hidden danger which pltf. could not, having regard to his own safety, have detected by reasonable care & observation, pltf. was a licensee, there was no proof that defts. actually knew of the defective lock, & the action must fail.—*HAMILTON METHODIST CHURCH TRUSTEES v. JONES* (1934), 29 M. C. R. 47.—*N.Z.*

**2396a.** —.]—Pltf. was on his way to visit the tenants of offices in a building owned by defts. The door leading to the lift was partially open, & pltf. thinking that the lift was there, stepped through the door, fell down the shaft & was injured. In an action for damages for the injuries received defts. contended that they had contracted with independent contractors to keep the lift in good working order, & that they did not know & could not reasonably be expected to know that the lift was out of order:—*Held*: pltf. was a licensee of defts.; the negligence was that of the independent contractors & not of defts.; there was no trap of which defts. knew or ought to have known; there was no contributory negligence on the part of pltf.—*MORGAN v. GIRL'S FRIENDLY SOCIETY (INCORPORATED CENTRAL COUNCIL)*, [1936] 1 All E. R. 404; 80 Sol. Jo. 323.

**2400.** *Add. Annotations*:—*As to* (1) *Consd. Stillwell v. Windsor Corpn.* (1932), 76 Sol. Jo. 433. *Refd. Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63.

**2405.** *Add. Annotation*:—*Refd. Flexman v. Corbett*, [1930] 1 Ch. 672.

**2406.** *Add. Annotation*:—*Refd. Flexman v. Corbett*, [1930] 1 Ch. 672.

**2433.** *Add. Citation*:—134 L. T. 319.

**2446.** *Add. Annotation*:—*As to* (2) *Refd. Foley v. Classique Coaches, Ltd.*, [1934] 2 K. B. 1.

**2455.** *Add. Annotation*:—*Refd. James Shipstone & Sons, Ltd. v. Morris* (1929), 14 Tax Cas. 413.

**2467.** *Add. Annotation*:—*Refd. Foley v. Classique Coaches, Ltd.*, [1934] 2 K. B. 1.

**2470.** *Add. Annotations*:—*Refd. Hillas & Co., Ltd. v. Arcos, Ltd.* (1932), 147 L. T. 503; *Hvalfangerselskapet Polaris Aktieselskap v. Unilever, Ltd.*, *Hvalfangerselskapet Globus Aktieselskap v. Unilever, Ltd.* (1933), 39 Com. Cas. 1.

**2488.** *Add. Annotations*:—*Distd. Charrington & Co. v. Simpson*, [1935] A. C. 325. *Refd. Whiteman Smith Motor Co. v. Chaplin*, [1934] 2 K. B. 35.

**2494.** *Add. Annotation*:—*Refd. Gee v. Hazleton*, [1932] 1 K. B. 179.

## Part XI.—Covenants.

**2498.** *Add. Annotation*:—*Consd. Flexman v. Corbett*, [1930] 1 Ch. 672.

**2498a.** — *Question of fact.*—By an agreement, in the form of a letter dated Dec. 12, 1928, & signed by deft., deft. agreed to purchase from pltf. for £800 a leasehold house for the residue of the term of 94 years comprised in a

lease of 1849. The letter stated that deft. understood the ground floor & basement to be let to a tenant holding over as a yearly tenant at a rent of £60 a year, payable quarterly, & it fixed Mar. 25, 1929, as the date for completion. Pltf. signed an acknowledgment agreeing the terms as in the letter.

### PART X. SECT. 5, SUB-SECT. 4.

**2395 iv.** —.]—*CONNOR v. NELSON, MOATE & Co.*, [1925] N. Z. L. R. 123.—N.Z.

**2395 v.** —.]—Deft., the owner of an apartment house, retained in his possession or under his control the entrances, passageways & an automatic elevator. Pltf., who lived elsewhere, entered the building for the purpose of taking his father to a doctor. His father was staying in one of the suites of which pltf.'s sister was the tenant. Pltf., thinking he saw the elevator standing at the main floor, did not press the button, but slid aside the outer door & on making a step fell to the bottom of the shaft. Under a contract entered into by deft. the elevator had been inspected weekly & repaired when necessary; & deft. employed a janitor whose duty it was to ascertain & report whether the elevator was working in an unusual way & the janitor was competent to do so. It was found that deft. neither knew nor should have known that there was a condition existing which might permit the door to open when the elevator was not level with the floor; & it could not be found, on the evidence, that the premises were not properly lighted. A warning reading in part, "Be sure elevator has landed before stepping in," was posted at or near the elevator door:—*Held*: pltf. was a bare licensee, & the extent of deft.'s duty towards him was not to expose him to a hidden peril or trap, i.e., a peril not apparent to the licensee but the existence of which was known or ought to have been known to deft.—*SEIDER v. RAY*, [1937] 1 W. W. R. 440. CAN.—

**b 1.** —.]—Where a landlord lets suites of rooms to separate tenants

& provides a common means of access which they must, or are entitled to make use of, he is under an implied contractual obligation of inspecting the access from time to time, & when necessary, repairing it so as to prevent the risk of accident, & is liable in damages for injuries sustained by the tenant because of his failure to carry out this duty. This rule was applied in the present case to the giving way of the railing on a rear balcony which served as a rear exit & entrance to the pltf.'s suite & those of the other tenants on the same floor. *Semble*: the balcony railing in the condition it was at the time of the accident constituted a trap.—*MCPHERSON v. CREDIT FONCIER FRANCO CANADIEN (Alta.)*, [1930] 1 D. L. R. 179; 24 Alta. L. R. 240; [1929] 3 W. W. R. 348; *aff.*, [1929] 4 D. L. R. 395; 2 W. W. R. 623.—CAN.

### PART X. SECT. 7, SUB-SECT. 3.—B. (a).

**1 i.** — *Other trade carried on—Consequent refusal of justices to renew.*—*Held*: as the tenant had brought about the refusal of the renewal of the licence by her own act, the lessor was entitled to recover possession of the premises & damages for breaches of covenants.—*MAGUIRE v. DAY*, [1926] N. 180.—IR.

**1 ii.** — *Proposed transfer of license to other premises—Leaving demised premises unlicensed.*—Pltf. were the owners of certain premises to which a seven-day license was attached, & deft. was their lessee & the holder of the license. The lease contained a covenant by the lessee not to do, or suffer to be done, on the premises any

act whereby the license might be forfeited or the renewal thereof withheld, & also a covenant that he would insure the license against forfeiture in the joint names of the lessors & the lessee in the sum of £500. The lessee further covenanted to deliver up the premises on the expiration of the lease in all respects in such condition as should be consistent with the due performance & observance of the said covenants. Deft., who was also the owner of other premises, situate in the same licensing area, & to which a six-day license was attached, served notice to have the seven-day license transferred to the premises to which the six-day license was attached:—*Held*: as the effect of the transfer would be that pltf.'s premises, to which the seven-day license was attached, would, for the purposes of Licensing (Ir.) Act, 1902, be statutorily deemed never to have been licensed, so that when the lease expired pltf. would get back premises to which no license was attached, they were entitled, in view of the covenants in the lease, to an injunction to restrain deft. from exercising the right of transfer conferred on him by Intoxicating Liquor Act, 1927, s. 11 (1).—*HEATHCOTE v. MAGUIRE*, [1929] 1 R. 170.—IR.

### PART X. SECT. 14.

**sy.** *Lease of warehouse space.*—A lessee of warehouse space sued his lessor for damages caused by the freezing & bursting of a standpipe in the warehouse. There was no provision in the lease as to heating:—*Held*: the landlord was under no duty to prevent the standpipe from freezing.—*SCYTHES v. GIBSONS, LTD.*, [1927] 2 D. L. R. 834; 5 C. C. R. 352.—CAN.

In the lease of 1849 were lessee's covenants to do outside painting, deliver up, repair, insure, produce assignments, not to allow building without consent, & not to carry on offensive trades or do "any . . . thing which may be to the annoyance, damage, or inconvenience of the occupiers of the neighbouring premises"; & there was a proviso for re-entry on non-performance of any of the covenants. The abstract was sent to deft.'s solrs. on Jan. 15, 1929, deft. meanwhile, to pltf.'s knowledge, negotiating for the purchase of the freehold. On Mar. 4 deft.'s solrs. wrote to pltf.'s solrs. that deft. would not buy the house unless H., the tenant, who was in arrear with the rent & was not, as pltf. had represented her to be, a desirable tenant, was bought out. They added that there was no binding contract, which they later explained to mean that the lease of 1849 had not been produced to deft. Deft. did not complete by the date fixed. In an action by pltf. for specific performance:—*Held*: (1) the question whether covenants in a lease are "usual covenants" is in each case a question of fact for the ct. to decide upon the evidence.

I think it right to express my opinion, after having heard & considered all the numerous authorities which have been cited to me, that the question whether particular covenants are usual covenants is a question of fact, & that the decision of the ct. on that point must depend upon the admissible evidence given before the ct. in relation to that question. I think that it is proper to take the evidence of conveyancers & others familiar with the practice in reference to leases & that it is also permissible to examine books of precedents. It is permissible to obtain evidence with regard to the practice in the particular district in which the premises in question are situated (MAUGHAM, J.).

(2) A covenant to do nothing to the "inconvenience of occupiers of neighbouring premises" is usual only in leases of properties on large estates, & in a lease of one house is unusual & onerous; (3) the proviso for re-entry on breach of any of the covenants in the lease must be held on the authorities & on the evidence to be an unusual & onerous provision; (4) in the circumstances deft.'s right to object to the lease as containing unusual & onerous covenants had not been waived.—*FLEXMAN v. CORBETT*, [1930] 1 Ch. 672; 99 L. J. Ch. 370; 143 L. T. 464.

**2501a.** — Reference to opinion of conveyancers.]—*FLEXMAN v. CORBETT*, No. 2498a, *ante*.

**2501b.** — Reference to books of precedents.]—*FLEXMAN v. CORBETT*, No. 2498a, *ante*.

**2501c.** — Reference to practice in district where premises situated.]—*FLEXMAN v. CORBETT*, No. 2498a, *ante*.

**2502.** *Add. Annotation*:—*Consd. Flexman v. Corbett*, [1930] 1 Ch. 672.

**2524.** *Add. Annotation*:—*Consd. Flexman v. Corbett*, [1930] 1 Ch. 672.

**2525.** *Add. Annotation*:—*Consd. Flexman v. Corbett*, [1903] 1 Ch. 672.

**2526a.** —.—.]—*FLEXMAN v. CORBETT*, No. 2498a, *ante*.

**2529.** *Add. Annotation*:—*Refd. Flexman v. Corbett*, [1930] 1 Ch. 672.

**2537a.** — Construction of covenant.]—By a lease of certain premises, the lessees covenanted that they would "within 2 calendar months next after the execution of every assignment or underlease (except in connection with lettings or assignments of such lettings of flats for terms not exceeding 7 years . . .) of the demised premises or any part thereof produce or cause to be produced such assignment or underlease or the counterpart thereof . . . to the lessor or his successors in title for the time being entitled in immediate reversion on the term hereby granted . . . & will permit a docket or minute of every such assignment or underlease . . . to be made & retained by or for the use of the lessor or his successors in title entitled as aforesaid." The lessees demised the premises to M. & on the same day M. sub-let part of the demised premises to the lessees. The lessees objected to produce this sub-lease in accordance with the above-mentioned covenant on the ground that the covenant did not apply to a sub-term which was not derived immediately out of the term granted by the head lease:—*Held*: the covenant was not limited, as suggested by the lessees, & it applied to the sub-lease in question. The lessees were therefore bound to produce it for registration.—*PORTMAN v. LYONS (J.) & Co., LTD.*, [1937] Ch. 584; [1936] 3 All E. R. 819; 106 L. J. Ch. 277; 156 L. T. 141; 53 T. L. R. 148; 80 Sol. Jo. 1015.

**2537b.** Covenant to nothing to the inconvenience of occupiers of neighbouring premises—Lease of single house.]—*FLEXMAN v. CORBETT*, No. 2498a, *ante*.

**2570.** *Add. Annotation*:—*Refd. Peech v. Best* (1930), 99 L. J. K. B. 537.

**2573.** *Add. Annotation*:—*Refd. O'Cedar v. Slough Trading Co.*, [1927] 2 K. B. 123.

**2589.** *Add. Annotations*:—*Consd. Taylor v. Webb*, [1936] 2 All E. R. 763. *Refd. Taylor v. Webb*, [1937] 2 K. B. 283.

**2590.** *Add. Annotation*:—*Refd. Taylor v. Webb*, [1937] 2 K. B. 283.

**2613.** *Add. Annotations*:—*Consd. Cruse v. Mount*, [1933] Ch. 278. *Refd. Bottomley v. Banister* (1931), 101 L. J. K. B. 46.

**2641.** *Add. Annotation*:—*As to* (2) *Folld. Booth v. Thomas*, [1926] Ch. 397.

**2651.** *Add. Annotation*:—*As to* (1) *Consd. Booth v. Thomas*, [1926] Ch. 397.

**2663.** *Add. Annotations*:—*As to* (1) *Refd. Port v. Griffith*, [1938] 1 All E. R. 295. *Generally. Refd. O'Cedar v. Slough Trading Co.*, [1927] 2 K. B. 123.

**2664.** *Add. Annotations*:—*Consd. Peech v. Best* (1930), 99 L. J. K. B. 537. *Refd. Wenner v. Morris* (1935), 79 Sol. Jo. 252.

**2666a.** Consent given to one lessee subject to consent of second lessee—Consent of second lessee not obtained.]—In 1925 the whole of certain premises were demised to deft. bank with a restriction against alteration without the consent of the lessor. In 1933 the bank demised the second & third floors of the premises to pltf. with the usual covenant for quiet enjoyment & to perform & observe the covenants in the head lease. In 1934 defts., the Elevenist Syndicate, wished to take the first floor of the building &

for this purpose extensive alterations were necessary. The bank obtained the consent of the head lessor to the alterations subject to the consent being obtained of all the sub-lessees, & the bank subsequently gave a similar consent subject to the same terms & conditions. Pltf.'s consent was never obtained. The Elevenist Syndicate, however, proceeded to instruct contractors to carry out the alterations, & no proper precautions being taken, pltf. suffered damage by reason of the dust & noise caused by such building operations. Pltf. brought an action for damages for breach of the covenant for quiet enjoyment, nuisance & trespass:—*Held*: (1) as the consent to the alterations being carried out was subject to pltf.'s consent being obtained, & this was never obtained, the position was that there was no proper consent to the alterations being effected; (2) the bank's consent being subject to the consent of pltf. which was not obtained by the Elevenist Syndicate, there was no breach of the covenant for quiet enjoyment & no derogation from the grant; (3) although the Elevenist Syndicate had employed independent contractors, they were liable in damages for nuisance since the work to be done in its very nature involved a risk of damage being done to pltf.; (4) as the bank had covenanted with pltf. that it would observe all the covenants of the head lease & were in default upon this covenant, the appeal must be allowed without costs.—*MATANIA v. NATIONAL PROVINCIAL BANK, LTD. & ELEVENIST SYNDICATE, LTD.*, [1936] 2 All E. R. 633; 106 L. J. K. B. 113; 155 L. T. 74; 80 Sol. Jo. 532, C. A.

2696. *Add. Annotation*:—*Generally*, *Refd.* Metcalfe v. Boyce, [1927] 1 K. B. 758.

2697. *Add. Annotations*:—*As to* (2) *Apld.* Booth v. Thomas, [1926] 2 Ch. 397. *As to* (3) *Consd.* Matania v. National Provincial Bank, Ltd. (1935), 154 L. T. 103. *Refd.* Booth v. Thomas, [1926] Ch. 397.

2700. *Add. Annotation*:—*Refd.* Matania v. National Provincial Bank, Ltd. (1935), 154 L. T. 103.

2703. *Add. Annotations*:—*Consd.* Port v. Griffith, [1938] 1 All E. R. 295. *Refd.* O'Cedar v. Slough Trading Co., [1927] 2 K. B. 123; Matania v. National Provincial Bank, Ltd. (1935), 154 L. T. 103.

2707. *Add. Annotations*:—*Refd.* O'Cedar v. Slough Trading Co., [1927] 2 K. B. 123; Matania v. National Provincial Bank, Ltd. (1935), 154 L. T. 103; Port v. Griffith, [1938] 1 All E. R. 295.

2709. *Add. Annotation*:—*As to* (1) *Consd.* Re Simeon, [1937] 3 All E. R. 149.

2711. *Add. Annotation*:—*Refd.* Matania v. National Provincial Bank, Ltd. (1935), 154 L. T. 103.

2717. *Add. Annotation*:—*Generally*, *Refd.* Port v. Griffith, [1938] 1 All E. R. 295.

2719. *Add. Annotation*:—*Apld.* Booth v. Thomas, [1926] Ch. 397.

2727a. *Suit in equity*.—*HUNT v. DANVERS* (1680), T. Raym. 370; 83 E. R. 193.

*Annotations*:—*Refd.* Dennett v. Atherton (1872), L. R. 7 Q. B. 316; Tebb v. Cave (1900), 82 L. T. 115.

2741. *Add. Annotations*:—*Refd.* O'Cedar v. Slough Trading Co., [1927] 2 K. B. 123; Aldridge v. Wright, [1929] 2 K. B. 117; Vanderpant v. Mayfair Hotel Co. (1929), 27 L. G. R. 752; Liddiard v. Waldron, [1933] 2 K. B. 319; Matania v. National Provincial Bank, Ltd. (1935), 154 L. T. 103; Thomas v. Lewis, [1937] 1 All E. R. 137; Port v. Griffith, [1938] 1 All E. R. 295.

2741a. —.—*Deft.* was the tenant of certain property, part of which he worked as a quarry. Pltf. was the owner of adjoining property which he occupied as a farm. Pltf. had been the sub-tenant of deft.'s predecessor in title of part of deft.'s property, & when deft. became tenant of this part he agreed verbally to grant to pltf. the grazing rights. Deft. had worked his quarry for a number of years before this agreement. In an action for damages for injury suffered by pltf. as a result of the working of the quarry:—*Held*: (1) it was an implied condition of the agreement whereby deft. had granted the grazing rights to pltf., that deft. should continue to work the quarry, & in the absence of improper use of the quarry pltf. could not complain of injury to the land, the subject of deft.'s grant; (2) no such condition could be implied with regard to pltf.'s own land, & he could sue for any damage to such land from a wrongful act by deft.—*THOMAS v. LEWIS*, [1937] 1 All E. R. 137; 81 Sol. Jo. 98.

2760. *Add. Annotation*:—*Refd.* Stoney v. Eastbourne R. D. C. & Devonshire (1925), 90 J. P. 133.

2769. *Add. Annotation*:—*Refd.* Grant v. Edmondson, [1931] 1 Ch. 1.

2776. After this case add "See, now, Law of Property Act, 1925 (c. 20), s. 79."

2783. After this case add "See, now, Law of Property Act, 1925 (c. 20), s. 79."

2789. *Add. Annotation*:—*Refd.* Grant v. Edmondson, [1931] 1 Ch. 1.

PART XI. SECT. 5, SUB-SECT. 4.—  
A. (b) ii.

2695 iii. —.— *Institution of action to enforce right of re-entry*.—*Held*: the institution by a lessor of legal proceedings against a lessee to enforce the lessor's alleged right to re-enter under the lease was not a breach of the lessor's covenant for quiet enjoyment, & did not give the lessee a right to equitable relief.—*DAVID JONES, LTD. v. LEVENTHAL* (1927), 40 C. L. R. 357; [1928] Argus L. R. 49.—*AUS.*

PART XI. SECT. 5, SUB-SECT. 4.—  
A. (b) v.

i. *Closure of communicating door*.—

*WHITE v. PIGGELY WIGGLY (CANADIAN), LTD.*, [1932] 2 W. W. R. 234; 3 D. L. R. 791.—*CAN.*

PART XI. SECT. 5, SUB-SECT. 4.—  
A. (b) vii.

2720 iii. —.— *Failure to comply with order as to fire appliances—Necessitating the closing of portion of premises*.—*MCINTYRE v. THOMPSON*, [1928] 1 W. W. R. 907.—*CAN.*

PART XI. SECT. 5, SUB-SECT. 4.—  
A. (b) viii.

aa. *Eviction for breach of covenant—After inadequate notice of breach*.—*GORDON v. WILHELM (Saak.)*, [1926] 4 D. L. R. 1042; [1926] 3 W. W. R.

641.—*CAN.*

PART XI. SECT. 5, SUB-SECT. 4.—C.

ab. *Defence—Breach of covenant not to assign*.—*Action for trespass & breach of covenant for quiet enjoyment dismissed as covenant not to assign without leave had been broken*.—*RUNNING v. MARSHALL*, [1933] 2 D. L. R. 629.—*CAN.*

PART XI. SECT. 5, SUB-SECT. 4.—D.

2756 i. *Varied*, [1926] 4 D. L. R. 527; [1926] 3 W. W. R. 11.

so. *Right to damages—Breach of covenant to erect buildings—Forfeiture of lease*.—*CROSS v. KENNEDY*, [1931] 2 D. L. R. 990.—*CAN.*

**2792a.** — — —.]—Certain premises were let for twenty-one years in consideration of (a) a premium of £1,000, of which £200 was paid on the execution of the lease, & (b) a yearly rent. The lease provided that the lessee would pay "that portion viz. £800 of the premium of £1,000 hereby reserved which is not paid on the execution hereof" by certain instalments, "provided that in the event of the term hereby granted being determined by re-entry . . . all the premium unpaid at the date of such re-entry shall become immediately due & payable." A right of re-entry was given if the rent reserved or any instalment of the premium should be in arrear for a certain time. During the currency of the lease, & before the balance of the premium had been paid, the premises, which had been mortgaged by the lessor, were sold to the lessee by the mtgees. in exercise of their powers of sale. Thereupon the lessor sued the lessee to recover the unpaid balance of the premium. The lessee contended that on the determination of the lease all his obligations thereunder, including the obligation as

to the premium, were extinguished:—*Held*: the premium was not a "demand . . . in, to, or on the property" within Law of Property Act, 1925 (c. 20), s. 63 (1), or a "covenant or provision . . . having reference to the subject-matter" of the lease within sect. 141 (1) of that Act, but was a sum which the lessee had agreed to pay in order to obtain the lease, & therefore, that his obligation to pay the full amount of the premium was not extinguished by the determination of the lease.—*HILL v. BOOTH*, [1930] 1 K. B. 381; 99 L. J. K. B. 49; 142 L. T. 80 46 T. L. R. 50; 73 Sol. Jo. 782, C. A.

**2798.** *Add. Annotation*:—*Generally, Refd. Re Rutherford's Conveyance*, [1938] Ch. 396.

**2801.** *Add. Annotation*:—*Refd. Grant v. Edmondson*, [1931] 1 Ch. 1.

**2806.** *Add. Annotation*:—*Refd. Grant v. Edmondson*, [1931] 1 Ch. 1.

**2809.** *Add. Annotation*:—*Refd. Grant v. Edmondson*, [1931] 1 Ch. 1.

## Part XII.—Restrictions on Use of Premises.

**2854.** *Add. Annotation*:—*Consd. Alexander Rayson*, [1936] 1 K. B. 169.

**2855.** *Add. Annotation*:—*Consd. Alexander Rayson*, [1936] 1 K. B. 169.

**2860.** *Add. Annotation*:—*Consd. Alexander Rayson*, [1936] 1 K. B. 169.

**2862.** *Add. Annotation*:—*Refd. Alexander v. Rayson*, [1936] 1 K. B. 169.

**2863.** *Add. Annotation*:—*As to (1) Consd. Alexander v. Rayson*, [1936] 1 K. B. 169.

**2870.** *Add. Annotation*:—*Consd. Barton v. Reed*, [1932] 1 Ch. 362.

**2871.** *Add. Annotation*:—*As to (1) Folld. Barton v. Reed*, [1932] 1 Ch. 362.

**2872.** *Add. Annotation*:—*Consd. Melzak v. Lilienfeld*, [1926] Ch. 480.

**2884.** *Add. Annotation*:—*As to (3) Dlst. Re Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter*, [1933] Ch. 611.

**2909.** *Add. Citations*:—95 L. J. Ch. 52; 135 L. T. 91.

**2909a.** — Use as solicitor's office.]—*ANGELL v. BURN* (1933), 77 Sol. Jo. 337.

**2912.** After this case add "Housing & Town Planning Act, 1919 (c. 35), s. 27, is now replaced by Housing Act, 1925 (c. 14), s. 102."

**2913a.** Part of premises sublet.]—In 1906 there was granted to K., as lessee a dwelling-house & premises for a term of ninety-nine years at a ground rent of £8 a year, & the lessee covenanted with the lessors that he would not, without the lessors' previous licence in writing, use the demised house, or any part thereof, "for any purpose whatsoever other than for the purpose of a private dwelling-house, wherein no business of any kind is carried on." There was a further covenant by the lessee that he would not do or suffer to be done in or on the demised premises anything which might, in the judgment of the lessors, be or grow to the injury or annoyance of the lessors or their tenants, or the occupiers of adjoining premises. In 1914 the lessee, without the knowledge of or licence from the lessors, sublet three rooms of the first floor of the demised house to a subtenant, whose tenancy expired in June, 1926. On July 19 the lessee, without any licence from the lessors, sublet the same three rooms to P. as a subtenant at a rent of £1 a week. In an action by the lessors against K. & P., & the mtgees. of K., claiming possession of the house as against all defts., on the ground that the lease had been forfeited by reason of the breaches of the two

### PART XI. SECT. 6, SUB-SECT. 8.—M.

*sd. To pay proportion of sale price to landlord on assignment.*]—A covenant in a lease by which the lessee bound himself to pay to the landlord *haq-i-chaharum*, i.e. one-fourth of the sale price whenever he sold his interest in the land, cannot be enforced against the transferee, although he purchased with notice of the covenant. This cannot be considered a restrictive covenant of the kind dealt with in English law as in the case of *Tulk v. Moxhay*.—*ABDUL SHAKUR v. NAND LAL* (1931), 1 L. R. 53 All. 742.—*IND.*

### PART XII. SECT. 2.

*sp. "Alteration" — Construction of covenant.*]—Business premises in a shopping district were leased "together with the fixtures & fittings" specified in Sched. I. to the lease. A tailoring business had been carried on in the premises prior to the making of the lease, & the fixtures & fittings in question were suitable for & had been used in carrying on such a business. These fixtures were set out in the Sched. There was a covenant not to carry on noxious, noisy or offensive trades, & also a covenant to keep demised premises & all permitted additions &

landlord's fixtures & fittings in good tenantable repair & condition, & not to make an alteration. There was a covenant to yield up premises, fixtures, fittings & additions in good & tenantable repair:—*Held*: "alterations" must be construed in accordance with the context, & an assignee of the lease who proposed to remove the fittings & fixtures & store them in a safe place on the premises & to erect other fixtures & fittings necessary for the purpose of using the premises as a retail creamery shop, had not committed a breach of the covenant as to alterations.—*WHITE v. RYAN*, [1932] J. R. 169.—*IR.*

covenants:—*Held*: (1) there had been a forfeiture of the lease by breaches of both the restrictive covenants, & the words in the first covenant, "wherein no business of any kind is carried on," must be construed as adding to the stringency of the covenant that the house should be used as a private dwelling-house; (2) Rent Restriction Acts afforded no defence to the action, as K. was in actual possession of the whole of the dwelling-house in the interval between the two tenancies, & 1923 Act, s. 2 (1), came into operation, & the premises had become decontrolled.—*BARTON v. KEEBLE*, [1928] Ch. 517; 97 L. J. Ch. 215; 139 L. T. 136.

2922. *Add. Annotation*:—*Refd. Re Debtor* (No. 3 of 1926) (1926), 135 L. T. 689.

2928. Add the following paragraph & citation:—  
A covenant not to use a house for "the exercise or carrying on of any art, trade or business, occupation or calling," is broken by using the house for the purposes of a hospital assocn., established, without a view to profit, to provide accommodation for patients able & willing to pay for it.—27 Ch. D. 81, n.

2929. *Add. Annotations*:—*Refd. Re Debtor* (No. 3 of 1926) (1926), 135 L. T. 689; *Frost v. Caslon*, *Frost v. Wilkins*, [1929] 2 K. B. 138.

2932a. — Conversion of dwelling-house into flats—Services supplied to tenants.]—By a lease dated Apr. 11, 1865, the Governors of a College granted to D. the lease of a private dwelling-house on their estate, the amenities of which they were very desirous to safeguard, for a long term of years. There was a covenant in the lease by D. that he would not (*inter alia*) suffer the demised premises to be used for carrying on thereon any trade or business or for any purpose that might be deemed by the Governors or their successors an annoyance or inconvenience to the neighbourhood. There was the usual power of re-entry for breach of any covenant. In 1894 the lease was assigned to deft. R., subject, however, to an underlease to G. This underlease, which contained the same terms as the headlease, was in 1928 assigned to deft. P. P., the underlessee, having by certain internal structural alterations of the demised premises converted them into three separate flats, proceeded, without the knowledge or consent of plffs., who were the successors in title to the Governors who had originally granted the lease & also the present reversioners in fee simple expectant on the determination thereof, to let them out to tenants at various rentals. P. also contracted to supply the tenants with certain services, hot water, heat, lighting, etc. It was proved in evidence that R. knew of the acts of P., but took no steps to prevent the letting or stop the acts in any way. Plffs. thereupon sought to recover possession on the ground of alleged breaches of the covenants in the headlease as to user:—*Held*:

(1) what P. had done constituted the carrying on of a business, inasmuch as she retained control of an important portion of the demised premises & was under liability to supply certain services, such as hot water, etc. She had therefore committed a breach of both the covenants as to user contained in the underlease & as to acts deemed by plffs. to cause an annoyance or inconvenience to the neighbourhood; (2) R., by knowingly permitting the letting out of the demised premises in flats & taking no steps to prevent what she had been informed would constitute a breach of the covenants in the headlease, had committed a breach of the covenant "not to suffer the same to be used for the carrying on of any . . . business or for any purpose that might be deemed by the Governors or their successors to be an annoyance or inconvenience to the neighbourhood." Plffs. were therefore entitled to an order for possession of the demised premises.

(3) The words "permit" & "suffer" have been the subject of judicial decision, & in one case I think it was said they were synonymous; but whether this is in accordance with other decisions is not material to this case. Speaking for myself, with all possible respect to the learned judge who said so, I think there may well be as a matter of construction a substantial difference between the word "permit" & the word "suffer," but, as I say, it is not material to consider it here. The word in the case before me is "suffer," and at any rate that must cover allowing something to be done which the covenantor has the complete power to prevent (*LUX-MOORE, J.*)—*BARTON v. REED*, [1932] 1 Ch. 362, 375; 101 L. J. Ch. 219; 146 L. T. 501.

2932b. — Covenant not to "suffer" premises to be used for business—Failure to sue for breach by under-tenant.]—*BARTON v. REED*, No. 2932a, *ante*.

2932c. — Distinction between "suffer" & "permit."]—*BARTON v. REED*, No. 2932a, *ante*.

2943a. Covenant not to carry on trade of alehouse, beerhouse or tavern keeper or licensed victualler—Carrying on of restaurant.]—A covenant in a lease that the trades or businesses of alehouse keeper, beerhouse keeper, tavern keeper, or licensed victualler should not be carried on on the demised premises, is not broken by the carrying on of a restaurant with a wine & beer on-licence subject to the condition that alcoholic liquor should only be served with meals.—*LORDEN v. BROOKE-HITCHING*, [1927] 2 K. B. 237; 96 L. J. K. B. 400; 137 L. T. 60; 91 J. P. 81; 43 T. L. R. 268; 71 Sol. Jo. 332.

2945. *Add. Annotation*:—*Refd. Lorden v. Brooke-Hitching*, [1927] 2 K. B. 237.

2952. *Add. Annotation*:—*Refd. Lorden v. Brooke-Hitching*, [1927] 2 K. B. 237.

2953. *Add. Annotation*:—*Refd. Lorden v. Brooke-Hitching*, [1927] 2 K. B. 237.

PART XII. SECT. 3, SUB-SECT. 4.—  
B. (a).

\* 1. — Tea & refreshment rooms—Letting premises for use as tea-rooms only.]—*Held*: a breach of covenant, & the person injured by the breach of

covenant was entitled to an interdict restraining such breach.—*SAHEEBOLAY v. WOOLFSON*, [1925] App. D. 38.—S. AF.

\* 2. — Grocery or meat business—Delicatessen.]—Lessors covenanted with the lessee not to let certain

premises for the purpose of carrying on a grocery or meat business. They let the premises to a delicatessen store:—*Held*: no breach of covenant.—*STOP & SHOP, LTD. v. INDEPENDENT BUILDERS, LTD., & KOURY*, [1933] O. R. 150; 1 D. L. R. 727.—CAN.



**2981a.** — Subletting part of premises.]—*BARTON v. KEEBLE*, No. 2913a, *ante*.

**2981b.** — Conversion of dwelling-house into flats.]—*BARTON v. REED*, No. 2932a, *ante*.

**2994.** *Add. Citations*.—95 L. J. Ch. 1; 134 L. T. 56.

**2995.** After this case add :—  
— — — — —.]—*See, now*, Landlord & Tenant Act, 1927 (c. 36), s. 19 (2).

**2995a.** — — — — — Making openings in party-wall.]—*LILLEY & SKINNER, LTD. v. CRUMP* (1929), 73 Sol. Jo. 366.

*Annotations*.—*Folld. Ball Bros., Ltd. v. Sinclair*, [1931] 2 Ch. 325. *Consd. Woolworth & Co. v. Lambert*, [1936] 2 All E. R. 1523; *Lambert v. Woolworth & Co.* (No. 2), [1938] 2 All E. R. 664.

**2995b.** — — — — — Alteration amounting to improvement.]—By a lease dated Apr. 2, 1930, certain premises were demised to deft. for a term of years. The lease contained covenants by the lessee (*inter alia*) (a) not to make any alteration or addition to the premises, except such as might from time to time have been authorised by the landlord in writing; (b) not to cut, maim or injure any of the walls or timbers thereof; & (c) not to assign or under-let the premises or any part thereof without the written consent of the landlord. The lessee having contracted to sub-let the premises to A., & for this purpose desiring to carry out certain structural alterations, which included the alteration of the position of a staircase, in pursuance of the covenant in the lease, asked the landlord for his permission. The landlord refused his sanction to the suggested alterations except on certain conditions, which were unacceptable to the lessee. The lessee thereupon threatened to carry out the alterations, & the landlord commenced an action for an injunction to restrain him from so doing. Questions arose (a) whether Landlord & Tenant Act, 1927 (c. 36), s. 19 (2), applied, & (b) whether the landlord had under the circumstances unreasonably withheld his consent :—*Held* : (1) the sub-sect. applied & must be read into the appropriate covenant, & the landlord could not unreasonably withhold his consent if the alteration or addition sought to be made would in fact effect an improvement. The circumstances under which an alteration or addition constitutes an improvement considered; (2) in the circumstances of the case, the withholding of consent on the part of the landlord was unreasonable, & the alteration could have been made

without any further application to him.—*BALLS BROS., LTD. v. SINCLAIR*, [1931] 2 Ch. 325; 100 L. J. Ch. 377; 146 L. T. 300.

*Annotation*.—*As to* (1) *Consd. Woolworth & Co. v. Lambert*, [1936] 2 All E. R. 1523; *Lambert v. Woolworth & Co.* (No. 2), [1938] 2 All E. R. 664.

**2995c.** Onus of proof of unreasonable withholding.]—In a lease in which resps. were the lessors & appts. were the lessees, appts. covenanted (*inter alia*), that they would not make any structural alterations on the demised premises without the previous consent in writing of the landlords, & would not commit, or permit to be committed, waste, & that they would use & occupy the demised premises as a first-class shop. Appts. acquired a lease of a piece of land behind the demised premises, & desiring to erect one large shop over the whole property, they proposed pulling down the back wall of the shop on the demised premises, moving the main staircase, lavatories & ventilating apparatus, & making other structural alterations. Resps. would only grant their consent upon payment by appts. of the sum of £7,000. Appts. regarded this sum as unreasonable & offered instead : (a) a covenant to reinstate the premises at the expiration of the lease; (b) an insurance with an insurance co. to be approved by resps. to secure the fulfilment of such covenant; & (c) payment of a sum equalling any diminution in value of the demised premises, "whatever sum a ct. thinks reasonable & proper to be paid." Upon resps. refusing to agree to these terms, appts. sought a declaration under Landlord & Tenant Act, 1927 (c. 36), s. 19 (2), that resps. were unreasonably withholding their consent & that appts. were entitled to make the proposed alterations without further request for consent or licence subject to : (a) an undertaking to reinstate the demised premises at the expiration or sooner determination of the term in the condition in which the premises now are; (b) securing the performance of this undertaking by a policy of insurance; & (c) paying to resps. such sum (if any) as the ct. shall deem to be reasonable :—*Held* : (1) the onus of proving that the licence or consent was unreasonably withheld was upon appts., & as there was insufficient evidence to show whether the sum demanded, viz., £7,000, was reasonable or unreasonable, the ct. could not hold that the consent was being unreasonably withheld; (2) appts. having

PART XII. SECT. 3, SUB-SECT. 4.—  
C.

*sk. What constitutes breach—Flats.*]—A lease made in 1862 of a plot of ground contained covenants by the lessee to build "one substantial dwelling-house" & also to maintain & keep in repair the same when built. It also contained a covenant by the lessee "not to employ or use, or permit to be employed or used, any part of the said demised premises, or any house or buildings thereon, as a shop or tavern or public-house, nor for the purpose of the trade or business of a soap-boller, chandler, baker, butcher, fishmonger, poulterer, greengrocer, distiller, sugar-baker, brewer, druggist, apothecary, tanner, skinner, lime-burner, brick-burner, tile-burner, hatter, silversmith, copper-smith, pewterer, founder, black-smith, paper manufacturer, or any

other offensive or noisy trade, business or profession whatsoever. . . ." The house was erected pursuant to the above-mentioned covenant, & the lessee's interest in the lease subsequently became vested in deft., who, by erecting internal partitions & by fitting gas fires, cookers, & geysers, converted the house into fifteen self-contained flats. The lessor brought an action claiming an injunction to restrain deft. from letting out the flats to tenants & to restore the premises :—*Held* : although the covenant prohibited deft. from carrying on certain specified trades or businesses & from carrying on all noisy or offensive trades, the letting of flats was neither noisy nor offensive & therefore there had been no breach of the covenant. Further, on the evidence, deft.'s acts did not amount to waste.—*VERNON & BARLEE v. SMALL*, [1936] 1 R. 677.—*IR.*

PART XII. SECT. 3, SUB-SECT. 5.—A.

*b i. — Screaming baby.*]—The landlord sought to evict the tenant because of the screaming of the tenant's two-year-old child; & contended that he "believes" that the tenant was permitting the premises to be used for the purpose of disturbing other tenants when the baby screamed therein, & that his, the landlord's, "belief" was the sole test of a breach of the covenant. There was no question but that the other tenants were seriously disturbed by the child's crying, but there was evidence that the tenant was doing all he could to quiet it :—*Held* : it was impossible to hold, on the evidence, that the landlord could have had any honest belief that the tenant was committing a breach of said covenant.—*JOHANNSON v. BERMAN*, [1930] 2 W. W. R. 569; [1931] 1 D. L. R. 255 39 Man. L. R. 161.—*CAN.*

adduced evidence at the trial that £7,000 was a reasonable sum, could not then ask the judge to refer the question of what sum was reasonable to an official or special referee, though they might have asked him, in his discretion, to do so before adducing evidence. Further, where evidence has been so adduced before the trial judge, the Ct. of Appeal cannot be asked to refer the matter.

The appeal was dismissed on the above ground, but their Lordships stated their views upon the construction of Landlord & Tenant Act, 1927 (c. 36), s. 19 (2), as follows: (3) improvements within the sub-sect. must be improvements from the point of view of the tenant & not necessarily from that of the landlord; (4) (GREENE, L.J., dissenting): such improvements are not necessarily alterations increasing the value of the demised property regarded separately & by itself, but include alterations by which the tenant can, consistently with the other conditions of the lease, obtain the most beneficial user of the premises as premises, & include the user of the premises along with other premises, subject always to a provision for reinstatement. Such alterations may still be improvements, although they include the removal of party walls & fixtures from the demised premises, provided they are reinstated at the determination of the term; (5) (GREENE, L.J., dissenting): the alteration of the demised premises by making them together with other premises into a composite shop, is not a breach of a covenant to use them as a first-class shop; (6) such alteration to form a composite shop was not a breach of a covenant against waste, because that covenant must be read subject to the previous covenant not to make alterations without the consent of the landlord; (7) the words in sect. 19 (3) requiring the landlord to grant his consent upon payment of a sum found by the ct. to be reasonable, only apply to that sub-sect. & have no reference to the other sub-sects. of that sect.—WOOLWORTH (F. W.) & CO., LTD. v. LAMBERT, [1937] Ch. 37; [1936] 2 All E. R. 1523; 106 L. J. Ch. 15; 155 L. T. 236; 52 T. L. R. 732; 80 Sol. Jo. 703, C. A.

*Annotation*:—As to (3) *Consd.* Lambert v. Woolworth & Co. (No. 2), [1938] 2 All E. R. 664.

**2995d.** ——— **Consent subject to payment of sum—Assessment of sum.**—WOOLWORTH (F. W.) & CO., LTD. v. LAMBERT, No. 2995c, *ante*.

**2995e.** ——— **What amounts to alteration.**—WOOLWORTH (F. W.) & CO., LTD. v. LAMBERT, No. 2995c, *ante*.

**2995f.** ——— **What amounts to unreasonable withholding.**—Pltfs. were the lessors & deft. co. the lessee of certain shop property. Deft. co. desired to convert this property, together with other property of which it had secured a lease, into a composite shop. The

proposed alterations included pulling down the back wall of the shop on the demised premises, moving the main staircase, & making other material alterations. In previous proceedings, the Ct. of Appeal had by a majority expressed the view that what was intended to be done was an improvement within Landlord & Tenant Act, 1927 (c. 36), but dismissed the appeal upon other grounds. Deft. co., after the conclusion of the appeal, wrote to pltfs. stating that it was desirous of executing the works, & offering an undertaking to reinstate the premises upon the determination of the lease, an undertaking to pay all costs & expenses & to provide security for the performance of the undertaking to reinstate. Pltfs. withheld their consent to the execution of the works upon these terms, & refused to go to arbn. upon the question of the amount of the compensation or to place that question before any tribunal. Pltfs. then brought this action, claiming a declaration that the proposed works were breaches of certain covenants in the lease & that the licence to perform such works had not been unreasonably withheld within Landlord & Tenant Act, 1927 (c. 36), s. 19 (2). Deft. co. counterclaimed for a declaration that the proposed works were improvements within the Act:—*Held*: (1) the question of whether or not an alteration is an improvement must be considered from the point of view of the tenant; (2) the alterations here proposed were improvements; (3) the landlord's consent in this case had been unreasonably withheld; (4) (*per* SLESSER, L.J.): the question of improvement must be limited to an improvement of the demised property; (5) (*per* SLESSER, L.J.): the onus of proving that the withholding by a landlord of his consent is unreasonable is upon the tenant. If, however, the landlord merely refuses, but gives no reason for so doing, the onus is upon him to show that his action was reasonable.—LAMBERT v. WOOLWORTH & CO., LTD. (No. 2), [1938] Ch. 883; [1938] 2 All E. R. 664; 107 L. J. K. B. 554; 159 L. T. 317; 54 T. L. R. 806; 82 Sol. Jo. 414, C. A.

**2997. Add. Annotation**:—*Refd.* Torbay Hotel v. Jenkins, [1927] 2 Ch. 225.

**2998. Add. Annotation**:—*Refd.* Ward v. Paterson, [1929] 2 Ch. 396.

**3002. Add. Annotation**:—*Refd.* Lorden v. Brooke-Hitching, [1927] 2 K. B. 237.

**3007. Add. Annotations**:—*Consd.* Southwark Revenue Officer v. Hoe (R.) & Co. (1930), 143 L. T. 544. *Refd.* Shaw v. Public Trustee (1929), 141 L. T. 465; New Plymouth Borough Council v. Taranaki Electric Power Board, [1933] A. C. 680.

**3019a. Restriction to particular trade—Whether implied restriction on adjoining premises.**—Defts. let a shop for a term of twenty-one

## PART XII. SECT. 3, SUB-SECT. 7.—A.

**2998 i. Not to let for particular trade—What amounts to breach.**—Where premises were let to a confectioner, & the landlord covenanted not to let any shop in the same block of buildings for a similar purpose, but subsequently let adjoining shops to a grocer & a greengrocer & fruiterer:—*Held*: there had been a breach of covenant by the landlord.—SUTHERLAND v. DEVEREUX, [1928] N. Z. L. R. 171.—N.Z.

**2998 ii.** ———.—In a lease to pltf., by deft. co.'s manager, of premises part of a hotel building for use as a store, the lessee agreed to use the store for the display & sale of certain specified kinds of goods, & lessor agreed "not to enter into any leases herein during the term of this lease which shall be used for the purpose of selling any of the above-mentioned articles." After the making of the lease, deft. co. made a renewal lease to G. of

store premises immediately adjoining those leased to pltf., the business to be carried on therein by G. being that of selling precisely the same kind of goods that pltf. was to sell:—*Held*: the renewal of G.'s lease was a breach of the agreement with pltf. not to enter into any such lease, & deft. co. was liable to pltf. in damages by reason of the breach.—GEARY v. OLFERTON CO., [1928] 3 D. L. R. 64; 63 O. L. R. 257

years to pltf., the latter covenanting to use & occupy the premises & to permit the same to be used & occupied as a shop for the retail business for the sale of wool & general trimmings, & for no other purpose without the consent in writing of defts. Some six years later, defts. let the adjoining shop subject to a similar covenant, the business stated being for the sale of tailor & dress-making trimmings & cloths. Pltf. contended that this was a derogation from the grant of the lessor, as frustrating the purpose for which, in the contemplation of both parties, the premises were let to pltf. :—*Held*: it was not within the reasonable contemplation of the parties that defts. were putting themselves under an obligation not to let their adjoining property to a trade rival of pltf.'s.—*PORT v. GRIFFITH*, [1938] 1 All E. R. 295; 82 Sol. Jo. 154.

**3026a.** Not to allow placards, posters or advertisements other than plates or other similar announcements—Illuminated sign.]—*Held*: a breach of the covenant.—*GIFFORD v. DENT* (1926), 71 Sol. Jo. 83.

**3027.** In second catchword for "grantor" read "grantee."

**3033.** *Add. Annotation*:—*Refd. Richardson v. Moncrieffe* (1926), 43 T. L. R. 32.

**3035a.** Obligation of lessor as to adjacent premises.]—*O'CEDAR, LTD. v. SLOUGH TRADING Co.*, No. 5070a, *post*.

**3067.** *Add. Citations*:—[1926] Ch. 620; 95 L. J. Ch. 445; 135 L. T. 107.

**3070a.** ——— Building scheme.]—Pltf. was the lessee for a term of years of a house built on a plot of land which formed part of an estate laid out, as the ct. assumed for the purpose of the decision, as a building estate under a scheme. One of the lessee's covenants was not to convert use or occupy the premises into or for certain purposes or use the same otherwise than as a private dwelling-house without the consent in writing of the lessor having been first obtained. Deft. as the successor in title to the original lessor was the owner of the alleged building

estate, including the house leased to pltf., & of divers other houses held by lessees subject to covenants identical with those in the pltf.'s lease. Pltf. alleged that under an implied condition in the general building scheme deft. was not entitled to permit any relaxation of or to remit any of the covenants in respect of the several parts of the estate so as substantially to depreciate the value of the other parts of the estate; & he claimed an injunction to restrain deft. from permitting any lessee or purchaser to use any part of the estate otherwise than in accordance with the scheme:—*Held*: the words "without the consent in writing of the said lessor having been first obtained," must be read in their natural sense as conferring on the lessor the widest possible power of giving or withholding his consent. The lessor was therefore entitled to authorise whatever user of the property he desired without regard to anything but his own wishes. Pltf.'s action consequently failed.—*PEARCE v. MARYON-WILSON*, [1935] Ch. 188; 104 L. J. Ch. 169; 152 L. T. 443; 78 Sol. Jo. 860.

**3076a.** ——— Notice of covenant—Onus of proof—Effect of Law of Property Act, 1925 (c. 20), s. 44 (5).]—The first deft.'s property was, under a deed of 1852, subject to a restrictive covenant running with the land, forbidding the owner or owners thereof for the time being from carrying on or making or permitting or suffering to be carried on or to be made upon the said property or any part thereof any trade, business, process or deposit which should be noisy, noxious, dangerous or offensive to the neighbourhood, or to the owners or occupiers of any of the land delineated on a specified plan. The second deft. was a tenant of the first deft. & it was alleged that by carrying on a garage & motor-repairing business, such second deft. was liable for a breach of the covenant:—*Held*: under Law of Property Act, 1925 (c. 20), s. 44 (5), the onus was upon pltf. to show that the second deft. had notice of the covenant in question & such notice not being proved, the second deft. was not liable for any breach of the covenant.—*SHEARS v. WELLS*, [1936] 1 All E. R. 832.

## PART XII. SECT. 3, SUB-SECT. 3.

*sv. To keep open continuously—Lease of hotel.*]—Deft. leased to pltf. certain hotel properties consisting of an inn & an annex. Pltf. covenanted to continually conduct & carry on the business of a high-class inn:—*Held*: the agreement meant keeping open the hotel in the way that was usual. Therefore, it was no breach that the main building was, according to custom, closed during the winter months, the annex being kept open continuously.—*Q. R. S. CANADIAN CORPN., LTD. v. COLEMAN*, [1931] 1 D. L. R. 277; 65 O. L. R. 462; *affd.*, [1931] 3 D. L. R. 577; 8 C. R. 708.—

## PART XII. SECT. 3, SUB-SECT. 11.—A. (b).

*b 1.* ———.]—A lease provided that the premises were let "for the purpose of a retail merchandise store." The lessee

covenanted not to sublet the premises or assign the lease without the written consent of the lessor, such consent not to be unreasonably withheld. In 1935 the lessee sublet to one B., without having obtained the lessor's consent; it, the consent, had been applied for but the lessor did not reply to the requests made for it. In 1936 B. sublet to O., who used the premises as a pool room. The lessor sued for damages for breach of the covenant & also asked for an injunction. His claim for relief was founded upon the allegation that deft. sublet the premises early in 1936 & upon the further statement that the premises were used as a pool room & not "for the purpose of a retail merchandise store" as provided in the lease. There was no complaint that deft., without the consent of pltf., assigned the lease to B. in May, 1935. Judgment was given pltf. for \$100 as nominal damages with costs to the

def't. was given costs incurred after the payment in, with a set-off. Pltf. appealed & def't. cross-appealed:—*Held*: the appeal should be dismissed & the cross-appeal allowed. The claim for damages against def't. was misconceived. The judgment of the trial judge was founded upon the assignment of the lease by def't. to B., a cause of action which was not pleaded, or relied upon during the trial or on the argument of the appeal. Def't., however, in subletting to B. parted with or assigned its whole interest in the premises, & as it gave no assent to the subletting by B. to O. & as B. was not its servant or agent it was in no sense responsible for the breach of a particular covenant on the part of either B. or O.—*MILLAR v. WOOLWORTH (F. W.) CO., LTD.*, [1938] 1 W. W. R. 401; 1 D. L. R. 780; 7 F. L. J. (Can.) 261.—*CAN.*

## Part XIII.—Fitness of Premises.

**3081. Add. Annotations:—**Consd. *Jameson v. Kinnell Bay Land Co.* (1931), 47 T. L. R. 410. *Apld.* *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K. B. 113. *Refd.* *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment Co.*, [1936] 2 All E. R. 1039; *Otto v. Bolton & Norris*, [1936] 1 All E. R. 960; *Terrene, Ltd. v. Nelson*, [1937] 3 All E. R. 739.

**3102. Add. Annotation:—***Refd.* *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K. B. 113.

**3111. Add. Annotation:—**Consd. *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46.

**3120. Add. Annotations:—**Consd. *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46. *Refd.* *Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56; *Otto v. Bolton & Norris*, [1936] 1 All E. R. 960; *Shirvell v. Hackwood Estates Co.*, [1938] 2 All E. R. 1.

**3120a.** —.]—At common law in the absence of express contract a landlord of an unfurnished house is not liable to his tenant, nor is a vendor of real estate liable to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if the defects are due to his construction or are within his knowledge.

A firm of builders, having built several houses on an estate of which they were the owners, sold to one C. a house which was nearly completed. They agreed to complete the house by the end of Oct. 1929, & to make it fit for habitation, & like in decoration & design to the other houses on the estate. The agreement contained a clause enabling C. to go into possession before completion as tenant at will. The house, like the others on the estate, was fitted with a particular make of boiler, which was placed in the kitchen & was heated by a Bunsen gas burner. Above the kitchen was a bathroom. From a cupboard in the bathroom a linen chute ran down to a cupboard in the kitchen connected with the boiler by a pipe. There was no flue to carry gas or fumes from the burner to the outward air. C. with his wife & child went into occupation on Sept. 28. The C. Gas Co.'s inspector examined the gas fittings & set the regulator fitted to the burner so that

45 cubic feet of gas & no more passed into the burner per hour. On Oct. 26, C. & his wife were found dead in the bathroom, poisoned by carbon monoxide gas. A few days afterwards the regulator was found so set that much more than 45 cubic feet could pass into the burner in an hour. The boiler with its burner & the linen chute were parts of the realty. The boiler with the burner properly regulated was not dangerous. It was the business of the Gas Co. & not that of the builders to regulate the flow of gas to the burner. In an action under Fatal Accidents Act, 1846 (c. 93), by the administrators of C. & his wife against the builders:—*Held*: there was no evidence of a breach of any duty which the law cast upon defts. as vendors or lessors of the house towards C. or his wife, & plffs. could not recover.—*BOTTOMLEY v. BANNISTER*, [1932] 1 K. B. 458, 459; 101 L. J. K. B. 46; 146 L. T. 68; 48 T. L. R. 39, C. A.

*Annotations:—*Consd. *McAllister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. *Refd.* *Otto v. Bolton & Norris*, [1936] 1 All E. R. 960; *Perry v. Sharon Development Co.*, [1937] 4 All E. R. 390.

**3120b. Unfurnished flat.**—A grant of a lease of an unfurnished flat does not imply a warranty that the flat is fit for habitation & should it prove not to be fit for it, the tenant cannot allege breach of implied warranty as a ground entitling him to be awarded either damages or rescission or termination of the lease. In this particular case, however, the ct. held that though the tenant was liable for the rent the landlord had, by causing the tenant to leave the flat, broken the covenant for quiet enjoyment & was liable to the tenant in damages for such breach.—*CRUSE v. MOUNT*, [1933] Ch. 278; 102 L. J. Ch. 74; 148 L. T. 259; 49 T. L. R. 87; 76 Sol. Jo. 902.

**3120c.** —.]—*BELBRIDGE PROPERTY TRUST, LTD. v. MILTON* (1934), 78 Sol. Jo. 489.

**1322. Add. Annotation:—**Consd. *Cruse v. Mount*, [1933] Ch. 278.

**3157. Add. Annotations:—**Consd. *Haskell v. Marlow*, [1928] 2 K. B. 45. *Apld.* *Cruse v. Mount*, [1933] Ch. 278. *Refd.* *Taylor v. Webb*, [1937] 2 K. B. 283.

### PART XIII. SECT. 3, SUB-SECT. 1.—B. (a).

**f i. —.]—***Hoyd v. DICKERSON*, [1930] 2 D. L. R. 96.—CAN.

**f ii. —.]—**Pltf.'s claim for £14 3s. 7d., the rent of a certain tenement, was admitted but deft. filed a counterclaim for damages for breach of an alleged warranty that the tenement was habitable & free from any defect. It appeared that pltf.'s agent when asked about the condition of the premises told deft. that they were "all right," whereupon deft. agreed to rent the premises. Soon after taking possession he found that the common house bug had established itself in the premises & after complaint to pltf. the premises were fumigated with hydrocyanic acid gas on the order of the City Council. The bugs soon returned & deft. terminated his tenancy. Some of his furniture had become infested with bugs & had to be destroyed & the claim was for its value & certain other expenses:—*Held*: on the evi-

dence, the statement of the agent was in the circumstances a warranty; the damage complained of was a direct result of the breach thereof & pltf. was entitled to recover the value of the furniture he had to destroy.—*PUBLIC TRUSTEE v. THOMPSON* (1937), 32 M. C. R. 63.—N.Z.

### PART XIII. SECT. 3, SUB-SECT. 2.—D. (b) ii.

**3151 ii. — Defect of repair.**—*KELPON v. STEWART*, [1928] 3 W. W. R. 640.—CAN.

### PART XIII. SECT. 3, SUB-SECT. 2.—E.

**3156 i. Breach—What amounts to—***Hot ashes left in yard.*—Defts. agreed for reward to provide board & lodging for infant pltf., who was injured while playing in the yard of the premises through coming in contact with some hot ashes placed there by one of defts.:—*Held*: defts. were liable.—*IRWIN v. HAMAL*, [1927] N. Z. L. R. 7.—N.Z.

### PART XIII. SECT. 3, SUB-SECT. 2.—F.

**so. Room in building leased to unincorporated association—Injury to member of association—Failure to provide fire-escapes.**—A building in the city of L. was owned by deft. co. & occupied by the co. & various tenants. It was four storeys in height, & on the fourth storey were two rooms fitted up & used as lodge-rooms. Dft. co. had leased one of these rooms to an unincorporated fraternal association or lodge, & the premises were occupied by the lodge under that lease in Jan. 1927, when a fire broke out in the building. Pltf., a member of the lodge, was attending a meeting in the lodge-room at the time, & was severely injured in attempting to escape from the burning building. There were no fire-escapes, & the building was so constructed as to make it a fire-trap:—*Held*: pltf. was not an invitee, but a mere licensee, of defts., though an invitee of defts.' tenant; he did not come upon defts.' premises for any

**3159. Add. Annotation:—**Refd. *Fisher v. Walters* (1926), 90 J. P. 195.

**3160. Add. Citations:—**90 J. P. 195; 24 L. G. R. 327.

**3160a.** —.]—The tenant of an industrial dwelling-house, which, as regards rent, came within Housing Act, 1925 (c. 14), & Increase of Rent & Mtge. Interest (Restrictions) Act, 1920 (c. 17), & the rent of which had been increased under the latter Act, sought to recover from his landlords, deft. corpn., his medical expenses & damages for loss of work incurred by reason of an accident suffered by him when, in opening one of the windows of the house, as soon as he had unlatched the top sash it fell owing to the breaking of the sash cord & severely crushed his hands. He based his claim on the alleged failure of the landlords to perform their statutory obligations under Housing Act, 1925, to keep the house "in all respects reasonably fit for human habitation" &, alternatively, under Increase of Rent & Mtge. Interest (Restrictions) Act, 1920, to keep the house in "good & tenantable repair":—**Held:** (1) whatever was the effect of the above mentioned Acts upon a landlord's responsibility for the condition or state of repair of houses coming within the scope of those Acts, upon which, as applied to the facts, the ct. was not unanimous, it was a

condition precedent to the liability of the landlord that notice of latent, as well as of patent, defects should be given to him by the tenant, whether or not the landlord had a right of access to inspect the state of repair of the house, & the absence of such notice was fatal to pltf.'s claim. (2) Observations upon the meaning of the words "in all respects reasonably fit for human habitation" in Housing Act, 1925, s. 1.—**MORGAN v. LIVERPOOL CORPN.**, [1927] 2 K. B. 131; 96 L. J. K. B. 234; 136 L. T. 622; 91 J. P. 26; 43 T. L. R. 146; 71 Sol. Jo. 35; 25 L. G. R. 79, C. A.

**Annotation:—**As to (1) Refd. *Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56.

**3160b. Rent—How calculated.]—**Upon a claim based upon the condition implied by Housing Act, 1936 (c. 51), s. 2, that a house was fit for human habitation, it appeared that the actual rent paid to the landlord was 12s. 6d. per week. This, however, included a sum of 3s. 8d. in respect of rates, so that the rent exclusive of rates was 8s. 10d. The Act required the premises to be let at a rent not exceeding £26 *per annum* in order that the benefit of the implied condition might attach:—**Held:** the rent referred to in the Act was the rent exclusive of rates, & the condition of fitness for human habitation was to be implied.—**JONES & JONES v. NELSON**, [1938] 2 All E. R. 171.

## Part XIV.—Fixtures.

**3161. Add. Annotation:—**Refd. *Spyer v. Phillipson*, [1931] 2 Ch. 183.

**3163. Add. Annotation:—**Consd. *Spyer v. Phillipson*, [1931] 2 Ch. 183.

purpose in which he & defts. had a common interest, & there was no contractual relation between them.—**TAYLOR v. PEOPLE'S LOAN & SAVINGS CORPN.**, [1929] 1 D. L. R. 160; 63 O. L. R. 202; *affd.*, [1930] S. C. R. 190; 2 D. L. R. 891.—**CAN.**

**sd. Theatre—Heating-plant inadequate.]—****DAVEY v. CHRISTOFF** (1915), 9 O. W. N. 291, 481; 35 O. L. R. 162.—**CAN.**

**se. Restaurant & rooming house—Premises represented "clean."—**Where on the renting of premises & the contemporaneous purchase by the lessee of the furniture & other chattels therein for the purpose of immediate use in conducting a restaurant & rooming house, the lessor or his agent represented the premises to be "clean":—**Held:** at least in view of the purpose for which the lease & purchase were entered into, the representation should be interpreted as including a warranty that the premises were free from rats & bed-bugs; moreover, under the circumstances, there was an implied condition that the premises were in a fit state for the purposes for which they were to be used at the commencement of the tenancy, & as because of the presence of rats & bed-bugs they were not so fit, deft. was entitled to repudiate both the lease & the purchase of the chattels.—**BOWES v. FEO (OR FEOZ)**, [1933] 1 W. W. R. 101.—**CAN.**

### PART XIV. SECT. 1.

**sf. General rules.]—**Whether an article has become in law affixed to land or not is to be determined in the same way as between vendor & pur-

chaser, mtgor. & mtgee. or landlord & tenant, but a tenant has the right as against his landlord to detach & remove trade or ornamental fixtures installed by him, during or at the expiration of his term. If an article is embedded in the soil or is attached to any building or permanent erection thereon by a permanent fastening, it is *primâ facie* a fixture. Unless so attached, an article is not regarded as "embedded" in the soil merely because it is placed on a brick, concrete or wood foundation, or even in holes constructed in the foundation to receive it, or because it sinks accidentally into the foundation, or because earth or other matter accidentally accumulates round it so as to give it the appearance of being embedded. A bolt carried from shafting to a machine for the purpose of working it is not in itself sufficient to make the machine a fixture. The connection of a hydraulic press with underground water-pipes, or the insertion of the nozzle of a bellows in a hole which it tightly fits in some part of a forge affixed to the premises, is sufficient to make the press, or the bellows, *primâ facie* a fixture. If an article is proved, *primâ facie*, to be a fixture, the onus of showing that it was intended to continue a chattel lies on those who contend that it is a chattel. The relevant evidence to prove the intention is the circumstances of the case, & mainly the degree of annexation & the object of annexation. Declarations of intention by the party who affixed the article are not relevant. An article which is no further attached to the premises than by its own weight

is *primâ facie* not a fixture, but it will be held to be a fixture (a) if it is part of a machine or other article which is a fixture; (b) if it can be inferred from the circumstances that it was intended to become a part of the freehold. If an article which is fixed is taken out of its place by a mtgor., & an equally good or better article is substituted for it, the mtgee. is not entitled to claim both articles as fixtures; he must elect which he will have.—**Re MAY BROS., LTD.** (1929), S. A. S. R. 508.—**AUS.**

### PART XIV. SECT. 2, SUB-SECT. 1.—A. (o).

**3177 i. General rule.]—**A building not attached to the land, except by its own weight, cannot be considered as part of the realty unless the circumstances show that it was intended to be part of the land; & the onus of showing such intention is upon the party who asserts that it is not a chattel.—**CUNNINGHAM v. SIGFUSON & SIGFUSON**, [1930] 2 W. W. R. 189; 3 D. L. R. 955; 24 S. L. R. 589.—**CAN.**

### PART XIV. SECT. 2, SUB-SECT. 1.—A. (d).

**se. Bottlers.]—****COLEMAN v. MONAHAN** (N. B.), [1927] 2 D. L. R. 209.—**CAN.**

**sd. Manure lying in heaps.]—**Manure lying in heaps in a barn-yard is a chattel which may be taken away by the outgoing tenant, even after his tenancy has expired, & trover will lie for it if held or taken away by the landlord.—**FOSEY v. BARNES** (1869), 12 N. B. R. (1 Han.) 450.—**CAN.**

3204. *Add. Annotation*.—*Re*ld. Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1936] 1 K. B. 585.

3206. *Add. Annotation*.—*Re*ld. Bottomley v. Bannister (1931), 101 L. J. K. B. 46.

3211. *Add. Annotations*.—*As to* (2) *Consd.* Spyer v. Phillipson, [1931] 2 Ch. 183. *Re*ld. Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1936] 1 K. B. 585.

3212. *Add. Annotation*.—*Re*ld. Spyer v. Phillipson, [1931] 2 Ch. 183.

3219a. —.]—The lessee of a flat, which he held for a term of twenty-one years, without the consent of the lessor installed in some of the rooms certain valuable antique panelling, ornamental chimney-pieces & so-called "period" fireplaces. No portion of the structure of these rooms was altered in order to fix the panelling, but it was placed in position by inserting into the walls wooden plugs to which it was attached by screws. Some slight structural alteration was effected in fixing the new chimney-pieces & fireplaces. The lessee having died during the currency of the term, his exors. claimed the right to remove the panelling, chimney-pieces & fireplaces, alleging that these installations were tenant's fixtures, & as such removable by them. The lessor, on the other hand, contended that the panelling & chimney-pieces had been fixed & installed in such a way as to become part of the structure of the demised premises; that their removal would cause damage to the structure; that the installations by the lessee constituted landlord's fixtures, & that his exors. were not entitled to remove them. In an action by the lessor to restrain the exors. from removing the fixtures:—*Held*: (1) in determining whether a particular chattel was a tenant's or a landlord's fixture the ct. had to consider what were the object & purpose of the annexa-

tion, & what would happen if the annexed chattel were removed. So long as the chattel could be removed without doing irreparable damage to the demised premises, neither the method of attachment nor the degree of annexation, nor the *quantum* of damage that would be done either to the chattel itself or to the demised premises by the removal, had any bearing on the right of the tenant to remove it, except in so far as it threw a light upon the question of the intention with which the tenant affixed the chattel to the demised premises; (2) the ct. could not infer an intention on the part of the tenant that the fixtures in question should become part of the demised premises, but the proper inference to be drawn was that the tenant intended himself to enjoy them & not to benefit the demised premises. Therefore the fixtures were tenant's fixtures, & the exors. were entitled to remove them.—*SPYER v. PHILLIPSON*, [1931] 2 Ch. 183; 100 L. J. Ch. 245; 144 L. T. 626; 74 Sol. Jo. 787, C. A.

3225. *Add. Annotations*.—*Consd.* Spyer v. Phillipson, [1931] 2 Ch. 183. *Re*ld. Golden Horse-shoes (New), Ltd. v. Thurgood (1934), 150 L. T. 427; Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1935] 1 K. B. 585.

3251a. *Oak panelling*.—*SPYER v. PHILLIPSON* No. 3219a, *ante*.

3251b. *Ornamental chimney-piece*.—*SPYER v. PHILLIPSON*, No. 3219a, *ante*.

3251c. *Period fireplaces*.—*SPYER v. PHILLIPSON*, No. 3219a, *ante*.

3275. *Add. Annotation*.—*Re*ld. Taylor v. Webb, [1937] 2 K. B. 283.

3327. *Add. Annotation*.—*Consd.* Spyer v. Phillipson, [1931] 2 Ch. 183.

3343. *Add. Annotation*.—*Apld.* Spyer v. Phillipson, [1931] 2 Ch. 183.

PART XIV. SECT. 2, SUB-SECT. 2.—C. (b) ii.

3256 ii. —.]—*Re* ROY WOLF BREWING CO. (Ont.), [1926] 2 D. L. R. 1002; 7 C. B. R. 625.—CAN.

3256 iii. —.]—On an interpleader issue, between a judgment creditor of the manager of a newspaper & printing business & the latter's father, who owned the business & the premises in which it was carried on, held that the printing presses were the property of the father. The evidence favoured the view that he, & not the son, was their real purchaser; & moreover, they were part of the realty, since they were attached to the building for the better enjoyment & use thereof as a printing establishment, & because their removal would disfigure & disturb the building itself.—*RICHARDSON v. HARDIE*, [1928] 2 W. W. R. 246.—CAN.

PART XIV. SECT. 2, SUB-SECT. 2.—E.

3279 i. *Boiler—& other machinery*.—*ROGERS v. ONTARIO BANK* (1891), 21 O. R. 416.—CAN.

so. *Theatre seats*.—Evidence showed that certain seats were necessary for the use of a theatre as a theatre; it could not have been opened without them. At first they were put up hurriedly, & were fixed to the floor with brads; later they had to be re-arranged. They were then placed in rows, each row being connected with a horizontal rod. These rows stood on the sloping portion of the floor, which

inclined very slightly, to the extent of 4½ degrees. In the middle of these rows a space was left for some sixty armchairs. The grouping of the rows of tip-up seats had a direct relation to the means of entrance to & exit from the theatre. Each individual seat was held in position by screws, which passed through the flanges at the foot of the standards of the seats, there being nine screws holding each pair of seats to the floor. The theatre was sometimes used for dances, but on such occasions the arm-chairs only were removed & it was not necessary to alter the position of the seats which had been screwed down as already described. In an action by *pltf.* claiming from *def.* the delivery of such seats or damages for their detention:—*Held*: giving judgment for *def.*, upon the evidence, the tip-up seats had been sufficiently affixed to the freehold to cast upon *pltf.* the onus of showing that they remained chattels, & that, *pltf.* having failed to discharge this burden of proof, the seats must be regarded as fixtures, & must be judged to be the property of *def.*—*COLLEDGE v. CURLETT (H. C.) CONSTRUCTION CO., LTD.*, [1932] N. Z. L. R. 1060.—N.Z.

PART XIV. SECT. 3, SUB-SECT. 1.

3294 vi. —.]—*GRAY v. LOUNT*, [1933] 1 W. W. R. 51.—CAN.

PART XIV. SECT. 3, SUB-SECT. 2.

3320 ii. —.]—*Machinery* purchased by a fisheries co., intended for a subsidiary co., is a trade fixture & is

removable against the lessor but not against a mtgee. prior to the lease.—*FISH MEAL CO. v. NICKERSON*, [1936] 2 D. L. R. 284.—CAN.

sf. *Equipment of timber company*.—Railway rails, ties, a telephone line, & an unloading outfit, the principal item of which was a donkey engine, all of which properties were bought, paid for, & placed by a timber co. to be used by it as aids to the removal of timber, & were in fact so used up to the time of its bkpy. :—*Held*: not to be fixtures belonging to the owner of the fee, under whom said co. was a tenant or licensee, but to be chattels belonging to the co.—*CANADIAN CREDIT MEN'S TRUST ASSOCN., LTD., & DINNING v. INGRAM*, [1933] 1 W. W. R. 8; 46 B. C. R. 300; *affd.*, [1933] 3 W. W. R. 305; 4 J. L. R. 626; 47 B. C. R. 358.—CAN.

sh. *Electric lighting, elevator, & hot air furnaces*.—Electric lighting, elevator & hot air furnaces installed by a lessee for the better enjoyment of the premises for business purposes, & not for the improvement of the building are tenant's fixtures.—*CLARK v. BRASER*, [1934] 3 D. L. R. 265; 8 M. P. R. 157.—CAN.

PART XIV. SECT. 6, SUB-SECT. 2.

sg. *Hot water system*.—An electrically heated hot-water service pump & equipment were installed by *def.* upon *pltf.*'s premises. A rotary pump was fixed by screws to a log platform which was not affixed to the soil, but the



3390. *Add. Citation*.—[1926] Ch. 877.  
 3418. *Add. Annotation*.—*Refd.* *Spyer v. Phillipson*, [1931] 2 Ch. 183.  
 3477. *Add. Annotation*.—*Refd.* *Williams-Ellis v. Cobb*, [1935] 1 K. B. 310.

3483. *Add. Annotation*.—*Refd.* *Berry v. Berry*, [1929] 2 K. B. 316.  
 3494. *Add. Annotation*.—*Refd.* *Spyer v. Phillipson*, [1931] 2 Ch. 183.

## Part XV.—Rent.

3548. *Add. Annotation*.—*Refd.* *Re Winterbottom (Leeds), Ltd.*, [1937] 2 All E. R. 232.  
 3565. *Add. Annotation*.—*Refd.* *Re Savile Settled Estates, Savile v. Savile*, [1931] 2 Ch. 210.  
 3574. *Add. Annotation*.—*Refd.* *Berry v. Berry*, [1929] 2 K. B. 316.  
 3586. *Add. Annotation*.—*Refd.* *Grant v. Edmondson*, [1931] 1 Ch. 1.

3590. *Add. Citations*.—*sub nom.* *WINSTON v. PINKNEY*, 3 Keb. 137; 2 Lev. 80; T. Raym. 222.

*Add. Annotation*.—*Refd.* *Brownlow v. Hewley* (1696), 1 Ld. Raym. 58.

3635. *Add. Annotation*.—*Appld.* *Maine & New Brunswick Electrical Power Co. v. Hart*, [1929] A. C. 631.

pump was connected by electric wires which penetrated the wall of the house, with a switch-board inside. A hot-water cylinder was placed on the balcony & encased with wooden slabs which were screwed to pieces of wood which were nailed to the walls. From this cylinder pipes led to various bathrooms & tanks & penetrated the house walls in several places. The whole apparatus was affixed by defts. in such manner as to be readily removable & so as to do the least possible injury to the fabric of the house.—*Held*: the object of the installation was not for its more convenient use as a chattel, but for rendering more convenient the occupancy of the house, & the service & equipment were fixtures.—*ADAMS v. MEDHURST & SONS PRY., LTD.* (1931), 24 Tas. L. R. 48.—AUS.

### PART XIV. SECT. 7, SUB-SECT. 2.—B. (b).

3434 vi. —.—.—.]—Fixtures which a tenant is entitled to remove must be removed during the tenancy or within such time beyond the original term as the tenant holds the premises under a right still to consider himself a tenant. This rule applies whether the lease expired by effluxion of time or was properly determined during its currency.—*NATIONAL TRUST CO., LTD. v. PALACE THEATRE, LTD.*, [1928] 1 W. W. R. 502, 805; [1928] 2 D. L. R. 59, 739; 23 Alta. L. R. 427.—CAN.

### PART XIV. SECT. 7, SUB-SECT. 4.

3461 iv. —.—.—.]—*GLOBE LAND CO. v. HEASLIP*, [1927] 3 D. L. R. 604; 60 O. L. R. 499.—CAN.

### PART XIV. SECT. 7, SUB-SECT. 8.—B. (d).

ee. *Covenant to deliver up personal property specified in lease & additions thereto.*—A lease provided that: "The lessee will, at the expiration or other sooner determination of the said term, peaceably surrender & yield up unto the said lessor the said demised premises with the appurtenances thereon & together with all buildings, erections & fixtures thereon, & the personal property included in Schedule A. hereto attached & any personal property brought upon the demised premises in addition thereto or in lieu or in substitution therefor"—*Held*: the personal property covered by the covenant included all the personal property in question herein brought upon the premises for use in the theatre, whether brought thereon by the lessor or by the lessee; it being held that such of said property as did not displace any of the personal property

theretofore in the theatre was "in addition thereto," within the meaning of that phrase in the covenant, & such of it as took the place of any property theretofore in it was "in lieu of or in substitution therefor."—*NATIONAL TRUST CO., LTD. v. PALACE THEATRE, LTD.*, [1928] 1 W. W. R. 502; [1928] 2 D. L. R. 59, 739; 23 Alta. L. R. 427.—CAN.

### PART XIV. SECT. 8, SUB-SECT. 1.

st. *Conversion—During continuance of term—Liquidator of tenant company permitting removal.*—*GEELENG CITY BUILDING PTY., LTD. v. BENNETT*, [1928] V. L. R. 214; [1928] Argus L. R. 138.—AUS.

### PART XV. SECT. 3, SUB-SECT. 1.

sg. *Payment of deposit—Interest as part payment of rent.*—A lease provided that the lessee should deposit a certain amount with the lessor, that the interest on the amount deposited was to be taken in part payment of the rent, & that the principal amount was to be taken in discharge of the last year's rent. Upon default in payment of the first year's rent, & re-entry upon the land by the lessor, the lessee sued to recover the full amount deposited by him with the lessor.—*Held*: (1) the amount left by the lessee with the lessor was not a deposit, in the strict legal sense of the term, liable to be forfeited on default of payment of rent; (2) the lessee was entitled to recover the return of his deposit, less the rent that became payable in the first year.—*VARADARAJA PERUMAL KOIL v. MUNIAPPA PILLAI* (1929), 1 L. R. 53 Mad. 141.—IND.

sm. *Tenant paying rent to be fixed by arbitration—Sub-tenant paying amount so fixed—Construction.*—*MEIKLE CO., LTD. v. BIRKETT & SON, LTD.*, [1931] 3 D. L. R. 684.—CAN.

### PART XV. SECT. 3, SUB-SECT. 8.

3657 iii. —.—.—.]—An agreement between a landlord & tenant for the increase or reduction of rent does not of itself create a new tenancy.—*CLARK v. CHITTICK* (1934), 42 Man. L. R. 205.—CAN.

h i. —.—.—.]—Pltf. co. leased to deft. the half of a shop in which deft. carried on the business of selling *lingerie*. The other half was occupied by deft. co. There was a term in the lease that should the premises be damaged by fire the rent should be reduced for the time occupied in repairing such part or parts "as may be rendered untenable & incapable for use & occupancy by the lessee." A fire took place on pltf.'s premises from which

smoke penetrated to deft.'s shop, disfiguring the walls & ceiling.—*Held*: the damage was caused by the fire, & having regard to the nature of the goods dealt in by deft., the premises were so injured by fire as to render them "untenantable & incapable" for use & occupancy by the lessee.—*UNITED CIGAR STORES, LTD. v. BULLER & HUGHES*, [1931] 2 D. L. R. 144; 66 O. L. R. 593.—CAN.

### PART XV. SECT. 3, SUB-SECT. 9.—B. (a).

sp. *On tenant's business being facilitated by legislation.*—*CAPITAL BREWING CO., LTD. v. R.*, [1933] S. C. R. 226; 2 D. L. R. 141.—CAN.

sr. *Lease of hotel—Proviso for increase when of "possible."*—*Held*: the word "possible" should be interpreted as "reasonably possible" or "practicable."—*Re CENTRAL HOTEL & HOMFRAY & BRAL*, [1934] 3 W. W. R. 360.—CAN.

### PART XV. SECT. 3, SUB-SECT. 9.—B. (b) i.

3680 iv. —.—.—.—.]—A lease provided that, on breach of any of certain covenants, the lessees should forfeit & pay unto the lessor a further additional rent or sum of fifty pounds sterling. The trial judge decided that this additional yearly rent was not in reality rent, but was in the nature of a penalty; & taking as the measure of the damages the injury to the reversion, he assessed damages at one shilling.—*Held*: the additional rent was in the nature of a penalty, & the damages had been assessed on a proper basis.—*BRADSHAW v. LEMON*, [1929] N. I. 159.—IR.

### PART XV. SECT. 4, SUB-SECT. 1.—D.

3734 i. *What amount to days of grace—Whether postponement of forfeiture.*—*Appt.* & *first resp.* were lessor & lessee respectively under an agreement of lease which provided (*inter alia*) (a) that the rent should be payable in advance on the first day of every month without demand or notice; (b) that in the event of the non payment of rent within 7 days from the date thereof the lessor should be entitled to cancel; (c) that nothing in (b) should be taken as giving the lessee the right to claim 7 days' grace within which to pay the instalment of rent.—*Held*: clauses (b) & (c) indicated that the parties contemplated that there should be 7 days of grace before forfeiture operated.—*FEIGENBAUM v. MILLS* (1929), 50 N. L. R. 235.



3751. *Add. Annotation*:—*Apld. Re Wells*, [1929] 2 Ch. 269.
3752. *Add. Annotation*:—*Refd. Re Winterbottom (Leeds), Ltd.*, [1937] 2 All E. R. 232.
3779. *Add. Annotation*:—*Refd. Rye v. Purcell*, [1926] 1 K. B. 446.
3808. *Add. Annotation*:—*Dlstd. British & North European Bank v. Zalstein*, [1927] 2 K. B. 92.
- 3829a. *Recovery by tenant—Rent paid by sub-tenant to avoid re-entry.*—*Eaton v. Donegal Tweed Co., Ltd.* (1935), 79 Sol. Jo. 342, C. A.
3854. *Add. Annotation*:—*Refd. Re Pinto Leite & Nephews, Ex p. Des Oliveira (Visconde)*, [1929] 1 Ch. 221.
3867. *Add. Annotation*:—*Refd. Tredegar v. Harwood* (1928), 97 L. J. Ch. 392.
3878. *Add. Annotation*:—*As to (1) Refd. Eaton v. Donegal Tweed Co.* (1935), 79 Sol. Jo. 342.
- 3906a. *Demolition order.*—*Deft. was plffs.' tenant of certain premises, which became the subject of a dangerous structure notice served by the London County Council on deft. & on plffs.' superior landlords. The deft. forwarded the notice to the plffs., but it was not complied with. Two further notices were served & demolition orders obtained. Eventually the county council entered the premises & under their powers under London Building Act, 1930, s. 133, carried out the work necessary to comply with the dangerous structure notices, & in the course of such work they demolished & pulled down two storeys*

of the premises. In an action for arrears of rent, deft. pleaded that he had been evicted from part of the premises by the London County Council on the default of plffs., & that such eviction constituted eviction by title paramount. Alternatively he pleaded that the eviction was due to the act or default of plffs. in permitting the premises to become dangerous, &/or in omitting to remedy the dangerous condition of the premises, &/or in failing in breach of statutory duty to comply with the dangerous structure notices & demolition orders, & he pleaded that the lease was frustrated. Deft. counterclaimed an apportionment & reduction of the rent payable & damages for breach of plffs.' covenant for quiet enjoyment:—*Held*: (1) there was no eviction of deft. by title paramount; (2) there was no frustration of the lease; (3) there had been no breach of plffs.' covenant for quiet enjoyment, & deft. was liable for the full amount of the rent.—*POPULAR CATERING ASSOCN., LTD. v. ROMAGNOLI*, [1937] 1 All E. R. 167.

3930. *Add. Annotations*:—*Consd. Dalton v. Pickard* (1911), [1926] 2 K. B. 545, n.; *Richmond v. Savill*, [1926] 2 K. B. 530.
3958. *Add. Annotation*:—*As to (1) & (2) Refd. Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.*, [1931] 1 Ch. 274.
3990. *Add. Annotations*:—*As to (2) Apld. Cruse v. Mount*, [1933] Ch. 278. *As to (4) Consd. Haskell v. Marlow*, [1928] 2 K. B. 45. *Generally, Refd. Taylor v. Webb*, [1937] 2 K. B. 283.

PART XV. SECT. 4, SUB-SECT. 2.—C. (a).

3765 i. *General rule.*—*PEPPER v. BUTLER* (1875), 37 U. C. R. 253.—CAN.

PART XV. SECT. 4, SUB-SECT. 3.

sh. *Assignee—Assignment after expiry of term—Lease containing covenant for renewal.*—*BENGAL NATIONAL BANK, LTD. v. JANAKI LATH ROY* (1927), I. L. R. 54 Calc. 813.—IND.

PART XV. SECT. 5, SUB-SECT. 1.—B.

sj. *Failure to keep premises in tenantable repair.*—*The landlord of a house brought an action against the tenant for decree for payment of the rent due. In defence the tenant averred that the landlord was in breach of his obligation to keep the premises in tenantable condition, in respect that he had failed to renew certain piping which he knew or ought to have known was defective, with the result that a pipe burst & defender's effects were damaged, & she was compelled to leave the house. Defender retained the rent, & also counterclaimed for the damage suffered by her:—*Held*: a landlord's claim for rent was liquid only if he had fulfilled his obligations under the mutual contract of lease, & defender was entitled to retain her rent, & also to counterclaim for the damage she alleged she had suffered.*—*FYNGLAND & MITCHELL v. HOWIE*, [1926] S. C. 319.—SCOT.

PART XV. SECT. 6, SUB-SECT. 1.—A.

3882 ii. —.—*The doctrine that eviction entitles a tenant to suspend payment of rent is a doctrine of common law of England which has been introduced in India as one based on justice equity & good conscience. It applies to cases where the rent is lump rent & every bit of the leased property is liable for that rent,—*

*RAMESHWAR LAL v. BUTTO KRISTO RAI* (1934), I. L. R. 13 Pat. 396.—IND.

PART XV. SECT. 6, SUB-SECT. 1.—B. (a).

sk. *Whether forcible expulsion necessary—Attornment by tenant to person with title paramount.*—*To constitute eviction forcible expulsion is not necessary. It is not necessary that the tenant should go out of possession; & if, upon a claim being made by a person with title paramount, the tenant consents to an attornment to such person to change the title under which he holds, or enters into a new arrangement for holding under him, this will be equivalent to an eviction & a fresh taking.*—*JOGENDRA LAL SARKAR v. MOHESH CHANDRA SADHU* (1928), I. L. R. 55 Calc. 1013.—IND.

PART XV. SECT. 6, SUB-SECT. 1.—B. (e).

sl. *Error in area leased—Claim for rectification.*—*The Crown leased from suppliant a certain space on two floors of a building owned by it, by a written lease duly executed by the Minister as provided for by sect. 18 of Public Works Act, & under authority of an Order in Council. The measurements stated in this lease were made by officers of the Department of Public Works & the contract & plans accompanying the same were prepared by them. It was claimed by suppliant, concurrently with the execution of the lease, that the superficial area mentioned in the lease was in error & should be greater & that the total rental based thereon should be accordingly increased. It was agreed between the parties that the area leased was improperly measured, & thereupon a second or amending Order in Council was passed recognizing that an error*

had been made in stating the area in square feet leased & authorising the amending of the first Order in Council accordingly. No new contract, however, was executed in conformity with this amending Order in Council. The Crown took possession under the lease, & later, before its termination, rescinded the several Orders in Council, vacated the premises & returned the keys, & repudiated its obligation to be bound under the lease. Suppliant then notified the Crown that it would hold it responsible for the rent for the balance of the term, but that it would endeavour to rent the space vacated on the Crown's account, & would give the Crown credit for any sums so received:—*Held*: the acts of the suppliant did not constitute eviction of the Crown from the leased premises, & the Crown was liable for the rent for the entire term of the lease.—*JOURNAL PUBLISHING CO., LTD. v. R.*, [1930] Ex C. R. 197; 4 D. L. R. 644.—CAN.

PART XV. SECT. 6, SUB-SECT. 2.

sm. *Application of rule to India.*—*SUSIL KUMAR BISWAS v. RASANI KANTA CHAKRAVARTI* (1927), I. L. R. 55 Calc. 689.—IND.

PART XV. SECT. 6, SUB-SECT. 5.—C.

3994 i. *Lands inundated.*—*Unless there is any stipulation in the agreement of tenancy to the contrary, a tenant is not entitled to claim abatement of rent on the ground that the productive powers of the land have deteriorated by reason of its liability to inundation at high water. It is only when a part of the premises leased is entirely lost by inundation of the sea that an abatement of rent on that account can be claimed.*—*VISHWANATH v. RANKISHVA* (1925), I. L. R. 50 Bom. 94.—IND.

4058. *Add. Annotation*:—*Consd.* Holmes v. Watt, [1935] 2 K. B. 300.

4086. *Add. Annotations*:—*Refd.* Gee v. Harwood [1933] Ch. 712; Cohen v. Donagall Tweed Co. (1935), 79 Sol. Jo. 592.

4105. *Add. Annotations*:—*Refd.* Dalton v. Pickard (1911), [1926] 2 K. B. 545, n.; Richmond v. Savill, [1926] 2 K. B. 530.

4116a. ———.]—A grantee of a rent reserved on a lease for years may sue the lessee for the rent where the lessee has attorned.—GOODMAN v. PACKER (1870), T. Jo. 1; Freem. K. B. 1; 84 E. R. 1116.

*Annotation*:—*Refd.* Brownlow v. Hewley (1896), 1 Ld. Rayn. 82.

4141a. *Cestui que trust*—*Effect of Law of Property Act, 1925 (c. 20), s. 141 (2).*—Law of Property Act, 1925 (c. 20), s. 141 (2), which deals only with procedure, means that a person who is entitled to the rent to the exclusion of all others can recover it, although, but for the sub-sect. he would not have been able to sue in his own name, but would have been obliged to use the name of the person in whom the legal estate was vested. The sub-sect. does not entitle a *cestui que trust* to distrain for rent in respect of the trust property merely because he is beneficial owner of that property.

J. N. sublet to pltf. part of certain premises which he himself held under a long lease. J. N. then executed a declaration of trust by which he declared that he held the property in trust for J. N., Ltd. Pltf. having fallen into arrear with his rent, J. N., Ltd., distrained. In an action for illegal distress:—*Held*: J. N., Ltd., were not entitled to distrain.—SCHALIT v. JOSEPH NADLER, LTD., [1933] 2 K. R. 79; 102 L. J. K. B. 334; 149 L. T. 191; 49 T. L. R. 375, D. C.

4142a. ———. *Sufficiency of consideration*.]—A declaration set out an agreement in writing, whereby pltf. agreed to let, & T. to take, a house, at a yearly rent, & deft. thereby also agreed to see the rent paid

by T., or to pay it for him. Averment, that pltf. let the house, & T. became tenant on the terms of the agreement. Breach, that neither T. nor deft. paid the rent:—*Held*: the consideration for deft.'s promise was the letting of the house.—CABALLERO v. SLATER (1854), 14 C. B. 300; 23 L. J. C. P. 67; 2 W. R. 198; 139 E. R. 123; *sub nom.* CAVALIERO v. SLATER, 22 L. T. O. S. 243.

4147. *Add. Annotation*:—*Refd.* Consolidated Entertainments, Ltd. v. Taylor, [1937] 4 All E. R. 432.

4157. *Add. Annotation*:—*Refd.* British & French Trust Corp. v. New Brunswick Ry. Co., [1937] 4 All E. R. 516.

4158. *Add. Annotation*:—*Refd.* British & French Trust Corp. v. New Brunswick Ry. Co., [1937] 4 All E. R. 516.

4161a. ———. *Landlord under covenant to repair*.]—A landlord covenanted in an underlease to keep the outside walls & roofs in tenantable repair as he was required by the head lease to do. The covenant in the head lease contained an exception of damage by fire & fair wear & tear. The tenant complained that the landlord had not in accordance with such covenant repaired certain glass roofs & skylights. The landlord contended that: (a) the want of repair complained of was within the exception; (b) the glass roofs were fixtures & therefore within a covenant by the tenant to repair the interior & all fixtures; (c) the tenant being in arrear with his rent could not sue upon the covenant to repair:—*Held*: (1) the repair here was not within the exception. Where there is a failure to repair defects due to fair wear & tear, the consequences which ensue because the defects grow & spread cannot always be said to be due to fair wear & tear; (2) the glass roofs were not fixtures but part of the building itself. A fixture is something brought on to a completed building; (3) the covenant to repair & the covenant to pay rent are independent & a breach of one is no defence to

## PART XV. SECT. 7.

4005 i. *Whether future rent released—Refusal of rent for specified period*.]—A landlord's refusal of rent for a certain rental period does not in itself free the tenant from the obligation of paying, or at least tendering, subsequent rent as it falls due.—BLACK v. STEBNICKI, [1930] 1 W. W. R. 437; 2 D. L. R. 875; *on appeal*, [1930] 4 D. L. R. 715; 2 W. W. R. 656; 39 Man. L. R. 123.—CAN.

## PART XV. SECT. 9, SUB-SECT. 3.—C.

so. *Land & chattels let at single rent—Land & chattels subject to mortgage*.]—An owner of lands & chattels thereon made an equitable mtge. of both the land & chattels. Subsequently, by virtue of Conveyancing Act, 1881, s. 18, he made a lease of both the lands & chattels, reserving a single rent:—*Held*: the rent was not apportionable between the lands & the chattels, as the rent issued out of the lands to the exclusion of the chattels.—MUNSTER & LEINSTER BANK, LTD. v. HOLLINSHEAD, [1930] 1 L. R. 187.—IR.

## PART XV. SECT. 10, SUB-SECT. 2.—B.

4094 i. *General rule—Letting into full possession necessary*.]—Where there is no dispute as to the identity of a lease

but the tenant denies that he has got possession of them, it is for the landlord to prove that he has discharged his obligation to put the tenant in possession before he can enforce the tenant's obligation to pay rent. The landlord must show not only that the tenant is in possession but that the possession is attributable to the lease, or might be so. That onus cannot be satisfied where, before rent has been paid, the sisters of the tenant, as heirs of their father, have obtained a decree against the landlord declaring their right to possession of their appropriate share in the property according to Mahomedan law.

Cases are distinguishable where the tenant has already paid rent under the lease, or where the tenant alleges, & the landlord denies, that certain subjects, of which possession has not been given, were within the subjects let; in cases of that nature the onus is primarily on the tenant.—JOSEPH CHANDRA ROY v. EMDAD MEAH (1931), 59 L. R. Ind. App. 29.—IND.

## PART XV. SECT. 10, SUB-SECT. 2.—E. (e).

sp. *Some heirs or successors-in-interest*.]—A suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased

tenant, without bringing all the heirs or successors-in-interest on the record.—JAGAN MOHAN SARKAR v. BROJENDRA KUMAR CHAKRABARTI (1925), 1 L. R. 53 Calc. 197.—IND.

## PART XV. SECT. 10, SUB-SECT. 2.—F. (d).

4154 i. *Validity of lease—Lease by statutory body—Not in accordance with statute*.]—A. sued as clerk to comrs. exercising a public trust under an Act of Parliament, 3 Vict. c. 53, upon an alleged demise of tolls for a year, at a rent payable every fortnight in advance, sect. 27 of that Act requiring the rent to be made payable monthly; the lease stated in the declaration is said to be subject to the Act:—*Held*: on demurrer to the declaration, pltf., as clerk to the comrs., could not be permitted to recover on such a contract, because it was a contract substantially different from the one which the comrs. were expressly directed by the statute to make.—IRELAND v. NOBLE (1847), 3 U. C. R. 235.—CAN.

4154 ii. ———. *Corporate seal of lessors not attached—Tenant never in possession*.]—NEWPORT INDUSTRIAL DEVELOPMENT CO. v. HUGHAN, [1928] 3 D. L. R. 547; 62 O. L. R. 364; *affd.*, [1929] 3 D. L. R. 108; S. C. R. 491.—CAN.

a claim in respect of a breach of the other.—*TAYLOR v. WEBB*, [1937] 2 K. B. 283; [1937] 1 All E. R. 590; 106 L. J. K. B. 480; 156 L. T. 326; 53 T. L. R. 377; 81 Sol. Jo. 137, C. A.

4162. *Add. Annotation*:—*Refd. Hardie & Lane v. Chilton*, [1928] 2 K. B. 306.

4163. *Add. Annotation*:—*Refd. Hoystead v. Taxation Comr.*, [1926] A. C. 155.

4167a. *Rescission of purchase agreement deter-*

*mining tenancy*.]—*TURNER v. WATTS*, No. 6636a, *post*.

4260. *Add. Annotation*:—*Refd. Swift v. Ambrose* (1931), 47 T. L. R. 594.

4262. *Add. Annotation*:—*Refd. Akt. Dampskibs Steinstad v. Pearson* (1927), 137 L. T. 533.

4276. *Add. Annotation*:—*Refd. Oakley v. Wilson*, [1927] 2 K. B. 279.

4329. *Add. Citation*:—*NEWPORT v. HARDY* (1845), 2 Dow. & L. 921.

## Part XVI.—Rates and Taxes.

4356. *Add. Citation*:—(1926–31), 1 B. R. A. 80, C. A.

4357. *Add. Annotations*:—*Consd. Elliott v. Burn*, [1934] 1 K. B. 109; *Bertram v. Wightman*, [1936] 2 All E. R. 487. *Refd. Solomon v. I. R. Comrs.* (1934), 18 Tax Cas. 227; *Stewart v. Normanby Estate Co.* (1933), 18 Tax Cas. 244.

4368. *Add. Annotation*:—*Refd. Miller (Lady) v. I. R. Comrs.* (1930), 15 Tax Cas. 25.

4369. *Add. Annotation*:—*Refd. British Photomaton Trading Co., Ltd. v. Henry Playfair, Ltd.* (1933), 49 T. L. R. 439.

4375. *Add. Annotations*:—*Consd. Solomon v. I. R. Comrs.* (1934), 18 Tax Cas. 227; *Stewart v. Normanby Estate Co.* (1933), 18 Tax Cas. 244. *Refd. Neumann v. I. R. Comrs.* (1933), 49 T. L. R. 212; *Westminster (Duke) v. I. R. Comrs.* (1934), 151 L. T. 489; *Carnarvon (Earl) v. I. R. Comrs.*, *Markland v. I. R. Comrs.*, *Rigden v. I. R. Comrs.* (1935), 79 L. Jo. 134; *Leney (Alfred) & Co., Ltd. v. Whelan* (1936), 20 Tax Cas. 321.

4375a. — Deduction made by sub-tenant—

*Tenant's rent paid before sub-tenant's*.]—A sub-tenant of certain premises had, by May 4, 1931, paid the Sched. A. income tax for 1930–31 in respect of those premises of which his immediate landlords, pltf's., were lessees from defts., the lessors, under a lease terminating in Dec. 1931. The sub-tenant's half-yearly rent was payable on June 24, 1931, but he did not in fact pay it to pltf's. until July 1, 1931, when, as he was entitled to do in accordance with the provisions of r. 1 of No. VIII. of Sched. A. of the Income Tax Act, 1918 (c. 40), he deducted from his rent payable to pltf's. the Sched. A. tax that he had paid in May. Pltf's., who were liable to their lessors, defts., in the same sum for rent as they received from their sub-tenant, in fact paid on June 23, 1931, the rent due from them to defts. on June 24, 1931, without deduction of the Sched. A. income tax. The payment of rent due on June 24, 1931, was the last that pltf's. had to make to defts. under the lease, & there was therefore no future payment of rent from which, in accordance with the provisions of Income Tax Act,

### PART XV. SECT. 10, SUB-SECT. 2.— F. (f).

4166 i. *Cancellation of lease—After accrual of rent—No bar to action*.]—*PETERS v. CONFEDERATION LAND CORPN.*, [1930] 2 D. L. R. 315.—CAN.

sl. *Premises never occupied*.]—A lease made in May, 1935, for five years from Sept. 23, 1935, provided that "The sum of one hundred dollars to be deposited as good faith & should the lessee fail to occupy the premises on the above mentioned date, viz.: the 23rd day of Sept. 1935, he shall forfeit his deposit." The \$100 was so deposited & was retained by the lessor. The lessee never occupied the premises. The lessor sued for five years' rent from said Sept. 23, or, alternatively, for damages for breach of the lease:—*Held*: the agreement was understood by the parties to mean & should be construed as meaning that if deft. failed to occupy the premises he forfeited the said deposit of \$100 & that was the end of the whole matter, i.e., the agreement was satisfied by the forfeiture of the said sum of \$100.—*PITT-CROSS v. MALNICK*, [1936] 3 W. W. R. 276; 51 B. C. R. 77.—CAN.

### PART XV. SECT. 10, SUB-SECT. 2.—G.

st. *On bankruptcy—Effect of Landlord & Tenant Act, R. S. O., 1927, s. 37*.]—Rent was payable monthly in advance beginning on Aug. 27, with a provision that on bkcy, the current & the following three months rent should be payable. Nothing was paid & a petition was filed on Sept. 24:—

*Held*: Landlord & Tenant Act, R. S. O. 1927, s. 37 (1), overrode the lease & four months' rent only could be recovered.—*Re CLAYTON'S WOMEN'S WEAR, LTD.*, [1933] 2 D. L. R. 767; O. R. 492.—CAN.

### PART XV. SECT. 10, SUB-SECT. 3.— C. (b).

sy. *Occupation by agent of defendant—Ownership of plaintiff unknown to defendant*.]—A commission agent for the sale of deft.'s goods who was obliged by his agency contract to provide storage for the goods during the lifetime of the contract & for four months after its termination stored the goods in a barn on property in which pltf., although not the registered owner, had an interest, & which the agent occupied under an arrangement with pltf. to pay the taxes & the insurance thereon. After the termination of said arrangement & of the agency contract the agent left the goods in pltf.'s barn for over a year. During nearly the whole of this period deft. was unaware of pltf.'s interest in the barn, & at the termination of the agency contract the agent was indebted thereunder to deft. Pltf. sued for a certain sum as rent or as mesne profits or as compensation for use & occupation:—*Held*: in view of the creditor & debtor relationship between the agent & deft., & the lack of privity between pltf. & deft., it was too late for pltf. to put forward a claim that deft. was indebted to him or was liable to him for rent, compensation or damages.—*ARMSTRONG v. OLIVER*, 2 W. W. R. 462.—CAN.

### PART XV. SECT. 10, SUB-SECT. 3.— C. (a).

sz. *Holding over after judgment in favour of landlord—No resumption of possession by landlord*.]—In an action to recover rent of premises leased by deft. from pltf., deft. pleaded, *inter alia*, that the tenancy had been determined. The issue was decided in favour of pltf., & judgment was entered in pltf.'s favour & no appeal taken. No notice to quit was given, & there was no surrender of the premises, & no acceptance of surrender, & no resumption of possession by pltf.:—*Held*: dismissing deft.'s appeal with costs, pltf. was entitled to recover for rental of the premises for the time subsequent to the recovery of the previous judgment.—*GANNON v. FARQUHAR TRADING CO.* (1928), 60 N. S. R. 80.—CAN.

### PART XV. SECT. 10, SUB-SECT. 3.— C. (c).

4268 ii. — *Assignee of agreement for lease—Lease granted to original lessee*.]—Where the assignee of an agreement for a lease enters upon the subject premises & exercises acts of ownership thereon & also pays money to the lessor in accordance with the amount mentioned as rent in the agreement for a lease, he is liable to the lessor in an action for use & occupation, even though after entry by him the lessor grants a lease of the premises to the original lessee under the terms of the agreement for a lease.—*OWEN v. BECHER* (1928), 25 S. R. N. S. W. 527; 45 N. S. W. N. 87.—AUS.

1918 (c. 40), they could deduct tax. When plffs. in July received their tenant's rent less the tax, they sought to recover that sum as tax deductible from the rent which they had paid to defts. in June:—*Held*: plffs. had no cause of action to recover the amount of the tax because they did not come within the second proviso to Sched. A., No. VIII., r. 4 (1), in that there had been no tax "actually paid" by them as stipulated by the proviso as a condition of recovery. On June 23, 1931, when plffs. paid their rent their sub-tenant had not paid his to them & had not deducted the tax as against them at that date, & therefore it could not be said that plffs. had actually paid the tax when they paid their rent.—*BRITISH PHOTOMATON TRADING CO., LTD. v. HENRY PLAYFAIR, LTD.*, [1933] 2 K. B. 508; 102 L. J. K. B. 562; 149 L. T. 256; 49 T. L. R. 439.

**4375b. Effect of repairs allowance.**—Under No. VIII., r. 4, of Sched. A. of the Income Tax Act, 1918 (c. 40), a person paying rent or any other annual sum to a landlord, owner, or proprietor charged with tax under the Sched. is entitled to deduct & retain thereout the income tax thereon for the period covered by the payment (the just proportion of any sums allowed by the Comrs. being first deducted) & every person to whom such payment is to be made is to allow the deduction. The lessors of premises let at £550 *per annum*, but sublet at higher rents, & assessed for income tax at £730, claimed that under the above rule the lessees were bound to deduct £47 10s., being the "just proportion" of an allowance under a covenant to execute repairs, from the quarterly instalment of rent before deducting income tax thereon, & that income tax could be deducted only from the balance:—*Held*: this claim was incorrect & was expressly contrary to Sched. A., No. VIII., r. 11. The tenant was entitled to

deduct the tax from the full amount of the rent. The repairs allowance referred to in rule 4 is to be deducted not from the rent but from the tax.—*EGYPTIAN HOUSE PROPERTIES v. MAYNARDS, LTD.*, [1934] Ch. 681; 103 L. J. Ch. 331; 151 L. T. 496; 50 T. L. R. 367; 78 Sol. Jo. 349.

**4381. Add. Annotations.**—*Re*fd. *Perrin v. Dickson*, [1929] 98 L. J. K. B. 683; *Boyce v. Whitwick Colliery Co.* (1934), 151 L. T. 464; *Dott v. Brown* (1935), 79 Sol. Jo. 610; 1 R. Comrs. v. Ramsay (1935), 79 Sol. Jo. 626.

**4382. Add. Annotation.**—*Re*fd. *Shanks v. I. R. Comrs.*, [1929] 1 K. B. 342.

**4385. After this case add:**—*See, now, Finance Act, 1926 (c. 22), s. 26.*

**4397. Add. Annotation.**—*As to (2) Re*fd. *R. v. Customs & Excise Comrs.*, [1928] A. C. 402.

**4401. Add. Annotation.**—*Re*fd. *Re Airedale Garage Co., Anglo-South American Bank, Ltd. v. Airedale Garage Co.* (1932), 101 L. J. Ch. 289.

**4406a. — Covenant by sub-lessee—Whether assignee of head-lease liable.**—By a head-lease of which plffs. were assignees, the lessor covenanted to pay all rates, etc., in respect of the demised premises. Deft. was assignee of a sub-lease which contained a covenant to pay to plffs. all rates, etc.:—*Held*: the covenant in the sub-lease was not subject to an implied term that plffs. should themselves pay or be liable to pay the rates.—*READ (W. H.) & CO., LTD. v. WALTER* (1931), 48 T. L. R. 15.

**4416. Add. Annotation.**—*Re*fd. *Musmann v. Engelke* (1927), 96 L. J. K. B. 824.

**4447. Add. Annotation.**—*Re*fd. *R. v. Customs & Excise Comrs.*, [1928] A. C. 402.

**4457a. Right to deduct from rent—Under landlord's covenant to refund excess over specified sum.**—The lease of a flat beginning at mid-

#### PART XVI. SECT. 1, SUB-SECT. 2.—B.

**sr. Agreement altering incidence of tax—What amounts to.**—A landlord & a tenant entered into a preliminary agreement for a lease of certain premises for £90 per week, the tenant to pay all taxes, including land taxes. Prior to the execution of the lease the lessor discovered that the provision that the tenant was to pay land tax was contrary to the terms of Federal & State Land Tax Acts. The landlord then required that the lease should provide for a rent of £100 per week, & promised that he would make a voluntary annual allowance to the lessee of an amount equal to the difference between the amount of the Federal & State land tax paid by the lessor in respect of the premises & £520, the latter sum being the annual amount of £10 per week. The lease was then executed, stipulating for a rent of £100 per week:—*Held*: the above facts did not disclose a "contract, agreement or arrangement" of altering the incidence "of any land tax within Land Tax Act Assessment Act, 1910-1926, s. 63, or Land Tax Act, 1915, s. 68.—*Re LUCKS, LTD.*, [1928] V. L. R. 180; [1928] *Argus L. R.* 155.—*AUS.*

#### PART XVI. SECT. 2, SUB-SECT. 3.

**st. Local improvement rates.**—Plffs. as lessees of lands of University of Toronto held liable for local improvement rates under Local Improvement Act, R. S. O., 1927, University of

Toronto Act, R. S. O., 1927, & clause 3 of the agreement confirmed by 1889 (Ont.), c. 53.—*MCPHEDRAN & CLELAND v. TORONTO*, [1932] 1 D. L. R. 439; O. R. 65; 2 D. L. R. 203; O. R. 198.—*CAN.*

#### PART XVI. SECT. 2, SUB-SECT. 4.—A.

**hi. — "Which now are."**—Deft., in 1872, leased a farm from plff. for a year from Sept. 27, 1872:—*Held*: deft. was not liable for the taxes for 1872, for the words, "all rates, etc., which now are," referred to the kind or character of the taxes assessable against the land.—*MAGNAUGHTON v. WIGG* (1874), 35 U. C. R. 111.—*CAN.*

#### PART XVI. SECT. 2, SUB-SECT. 4.—C.

**xx. Covenant to pay "any future land tax"—Rate imposed under bridge Act not included.**—*JONES (DAVID), LTD. v. LEVENTHAL* (1927), 27 S. R. N. S. W. 350; 44 N. S. W. W. N. 105.—*AUS.*

**ss. Covenant to pay "any future land tax—Bridge rate."**—By a lease dated Nov. 30, 1909, appnts. demised certain business premises in Sydney to resps., who thereby covenanted to pay all rates, taxes & outgoings, parliamentary, municipal, local, or otherwise imposed or to be imposed upon the premises or payable by the owner or occupier in respect thereof, landlord's property tax or land tax only excepted. Appnts., as lessors, signed a memorandum dated Mar. 31, 1910, under seal, which recited that it should be read with the lease, & thereby agreed to pay "the land tax at present

assessed & any future land tax or municipal tax upon the unimproved capital value." *Sydney Harbour Bridge Act* of 1922, enacted by the Parliament of New South Wales, provided for the erection of a high level bridge across Sydney Harbour, two-thirds of the expense to be borne by the Exchequer of the State, & one-third to be paid out of the proceeds of "a rate leviable yearly of one half-penny in the pound upon the unimproved value of" (*inter alia*) "all lands within the city of Sydney & rateable under Sydney Corporation Act, 1902." By sect. 10 the Sydney Council were required to collect the rate & pay the proceeds to a special account at the Treasury:—*Held*: resps. in refusing to pay the bridge tax had not committed a breach of covenant as the bridge tax was a land tax being a tax on land directly imposed by the Legislature of the State, & the fact that the area of the tax was limited to the city of Sydney & certain specified shires was immaterial; therefore the bridge tax was within the meaning of the memorandum & payable by appnts. as lessors.—*MORRIS LEVENTHAL v. DAVID JONES, LTD.*, [1930] A. C. 259; 99 L. J. P. C. 161; 142 L. T. 468, P. C.—*AUS.*

#### PART XVI. SECT. 3, SUB-SECT. 2.

**sb. Limited to proportion of taxes covenanted to be paid—Not penalties accruing on non-payment by tenant.**—*POLLOCK v. MILLIGAN (Sask.)*, [1929] 4 D. L. R. 27.—*CAN.*

summer at a rent of £400 a year, payable in advance at the rate of £100 on each quarter day, contained a covenant by the lessors that, in case the total sum paid by the tenant in any one year of the term in respect of rates & taxes should exceed £125, the lessors would, on production of the relative receipts, refund to the tenant the difference between the total sum paid by him & £125. If this difference were not refunded by the lessors within fourteen days of demand the tenant was to be at liberty to deduct such difference from the next instalment of rent. The lease contained a covenant by the tenant that he would duly

& punctually pay & discharge all rates, taxes, duties, charges, assessments, & outgoings payable in respect of the demised premises. The tenant in a year of the tenancy between midsummer & midsummer paid three half-years' rates, amounting in all to over £125, & having demanded the refund of the excess from the landlords, & having failed to get payment of the same within fourteen days of the demand, deducted it from his next instalment of rent:—*Held*: under the landlords' covenant to refund, the tenant was entitled to make the deduction.—*SOWERBY v. LINDSAY* (1928), 139 L. T. 545; 44 T. L. R. 714, C. A.

## Part XVII.—Assessments, Charges, Outgoings, etc.

- 4458.** *Add. Annotation* :—Generally, *Refd.* Lowther v. Clifford, [1927] 1 K. B. 130.
- 4464.** *Add. Annotations* :—*Refd.* Calder's Yeast Co. v. Stockdale (1926), 96 L. J. Ch. 357; Lowther v. Clifford, [1927] 1 K. B. 130.
- 4465.** *Add. Annotation* :—*Refd.* Lowther v. Clifford (1926), 135 L. T. 200.
- 4467.** *Add. Annotation* :—*Refd.* Lowther v. Clifford, [1927] 1 K. B. 130.
- 4468.** *Add. Annotation* :—*Refd.* Lowther v. Clifford (1926), 135 L. T. 200.
- 4471.** *Add. Citations* :—[1927] 1 K. B. 130; 95 L. J. K. B. 570; 135 L. T. 200; 90 J. P. 113; 24 L. G. R. 231.
- Add. Annotation* :—*Refd.* Mansfield v. Robinson, [1928] 2 K. B. 353.
- 4475.** *Add. Annotation* :—*Refd.* Lowther v. Clifford, [1927] 1 K. B. 130.
- 4477.** *Add. Annotation* :—*Refd.* Lowther v. Clifford, [1927] 1 K. B. 130.
- 4479.** *Add. Annotation* :—*Refd.* Lowther v. Clifford, [1927] 1 K. B. 130.
- 4482a.** *Special expenses rate—Sewerage purposes.*—A special expenses rate levied for the purposes of sewerage is, like a poor rate, an outgoing for which the occupier, & not the owner, of a property is liable.—*CALDER'S YEAST CO. v. STOCKDALE*, [1928] Ch. 340; 96 L. J. Ch. 357; 136 L. T. 458; 91 J. P. 57; *sub nom.* CALVER'S YEAST CO. v. STOCKDALE, 25 L. G. R. 354. C. A.
- 4489.** *Add. Annotation* :—*Apld.* Lowther v. Clifford, [1927] 1 K. B. 130.
- 4503.** *Add. Annotation* :—*Refd.* Lowther v. Clifford (1926), 135 L. T. 200.
- 4510.** *Add. Annotation* :—*Refd.* Dependable Upholstery, Ltd. v. Brasted (1931), 47 T. L. R. 521.
- 4534a.** *To what tenancies applicable.*—Finance (1909–10) Act, 1910 (c. 8), s. 46, does not apply to tenancies entered into after the passing of the Act.—*R. v. CUSTOMS & EXCISE COMRS.*, [1928] A. C. 402; 97 L. J. K. B. 771; 44 T. L. R. 775; *sub nom.* *R. v. CUSTOMS & EXCISE COMRS.*, *Ex p. PEGLER*, 138 L. T. 617; 92 J. P. 173; 26 L. G. R. 587, H. L.

## Part XVIII.—Repairs.

4546. *Add. Annotation* :—**Refd.** *Grant v. Edmondson*, [1913] 1 Ch. 1.
4552. *Add. Annotation* :—*As to* (3) **Refd.** *Grant v. Edmondson*, [1931] 1 Ch. 1.
4568. *Add. Annotation* :—**Consd.** *Morgan v. Liverpool Corpn.*, [1927] 2 K. B. 131.
4569. *Add. Citations* :—90 J. P. 195 ; 24 L. G. R. 327.
- 4569a. ———. ] — **MORGAN v. LIVERPOOL CORPN.**, No. 3160a, *ante*.
4570. *Add. Annotation* :—*As to* (1) **Refd.** *Bishop v. Consolidated London Properties, Ltd.* (1933). 102 L. J. K. B. 257.

**PART XVII. SECT. 1, SUB-SECT. 1.**

**11. Irish Land Commission—Bound by Acts.**—The Irish Land Commission, suing in ejectment, is bound by the provisions of the Increase of Rent & Mortgage Interest (Restrictions) Acts.—**IRISH LAND COMMISSION & BOARD OF PUBLIC WORKS v. ANDREW, [1938] I. R. 148.—IR.**

**PART XVII. SECT. 1, SUB-SECT. 4.**

**4487 1. Drainage expenses.**—By a covenant in a lease of licensed premises the lessee undertook to pay, satisfy, & discharge all rates, taxes, charges, assessments, impositions, & outgoings whatsoever at any time charged or imposed upon or in respect of the

demised premises. Pursuant to an order of a licensing inspector a septic tank sanitary system was installed in substitution for the sanitary system already in use:—*Held*: the covenant imposed upon the lessee the obligation to pay the cost of installation.—*LOMAX v. LOVE*, [1929] V. L. R. 84; [1929] *Argus* L. R. 88.—*AUS.*

**PART XVII. SECT. 2, SUB-SECT. 1.**

**n i. — Church assessment.]**  
Resp. leased to applt. a property situated in the city of Montreal; & the lease contained, *inter alia*, the following stipulation under the heading "Conditions": ". . . the lessee binds itself . . . to pay all taxes, assessments & rates general & special which

may be imposed on or in respect of the said property. . . ." The parties submitted a stated case, under Art. 509 *et seq.* C. C. P., as to whether "applt. (was) liable for the payment of . . . church assessment under the provisions of the lease"—**Held:** the church assessment provided for in the Parish & Fabrique Act, R. S. Q., 1925, of which the material provisions are outlined in the judgment of the ct., is one of the "taxes, assessments or rates" in respect to which the parties have stipulated in the above clause of the lease; & further, such assessment is a tax in respect of the property leased to applt. by resp.—**MCKESSON & ROBBINS, LTD. v. BIERMANS, [1937] S. C. R. 113: 2 D. L. R. 544.—CAN.**

**4575a.** **Water system.**—Defts. demised to pltf. a flat on the fourth floor of certain premises. The lease contained a covenant that the lessee would permit the lessors, or their agents, or others, to enter upon the premises demised for the purpose (*inter alia*) of seeing to & repairing any defects in the water-pipes or watercourses passing through the premises or communicating with or affecting other parts of the building. Another covenant was in the following terms: "[The lessors] will keep the exterior of the premises, & all parts of the building, including halls, staircases, & passages not the subject of this or some other letting in good repair." At a higher level than the flat let to pltf. was a boxroom, under the roof & on the outside of which water was conveyed in an open gutter into a lead trough, & thence into another lead trough, & ultimately into a downfall pipe. The boxroom, gutter, troughs, & pipes were not the subject of the above or any other letting, & remained under defts.' control. A young dead pigeon got into the water system & was eventually carried into the downfall pipe. This caused a serious obstruction & overflow of water through the ceiling of the flat let to pltf. & damage was caused thereby. Pltf. claimed as against defts. damages for breach of covenant &, alternately, damages for negligence:—**Held:** the covenant to keep the exterior of the premises in good repair extended to the water system, & there had been a breach of that covenant, defts. being none the less liable, though they might show that the cause of the defect was fortuitous & beyond their control.

**Semble:** defts., as the persons in charge & control of the water supply, apart from any contractual duty, were under a common law duty as occupiers of adjacent premises to take reasonable care to prevent the escape of water, & on the facts found would have been liable in tort for negligence.—**BISHOP v. CONSOLIDATED LONDON PROPERTIES, LTD.** (1933), 102 L. J. K. B. 257; 148 L. T. 407.

**Annotation:**—**Consd. Greg v. Planque**, [1936] 1 K. B. 669.

**4575b.** — **Roof—Includes skylight.**—**TAYLOR v. WEBB**, No. 4161a, *ante*.

**4578.** **Add. Annotations:**—**Refd. Fisher v. Walters**, [1926] 2 K. B. 315; **Morgan v. Liverpool Corpn.**, [1927] 2 K. B. 131.

**4580a.** **To keep in good repair—Fair wear & tear excepted—Damage to interior through disrepair of exterior.**—**TAYLOR v. WEBB**, No. 4161a, *ante*.

**4582.** **Add. Annotations:**—**Consd. Griffin v. Pillet**, [1926] 1 K. B. 17; **Bishop v. Consolidated London Properties, Ltd.** (1933), 102 L. J. K. B. 257. **Refd. Fisher v. Walters**, [1926] 2 K. B. 315; **Morgan v. Liverpool Corpn.**, [1927] 2 K. B. 131.

**4584.** **Add. Annotations:**—**Distd. Fisher v. Walters**,

[1926] 2 K. B. 315. **Refd. Morgan v. Liverpool Corpn.**, [1927] 2 K. B. 131.

**4588.** **Add. Annotations:**—**As to (2) Consd. Fisher v. Walters**, [1926] 2 K. B. 315; **Morgan v. Liverpool Corpn.**, [1927] 2 K. B. 131.

**4588a.** — — — **MORGAN v. LIVERPOOL CORPN.**, No. 3160a, *ante*.

**4589.** **Add. Annotations:**—**Fold. Bishop v. Consolidated London Properties, Ltd.** (1933), 102 L. J. K. B. 25. **Consd. Greg v. Planque**, [1936] 1 K. B. 669.

**4589a.** — — — **BISHOP v. CONSOLIDATED LONDON PROPERTIES, LTD.**, No. 4575a, *ante*.

**4609.** **Add. Annotation:**—**As to (1) Refd. Marsden v. Heyes**, [1927] 2 K. B. 1.

**4614a.** **Covenant to pay fixed sum—In lieu of repairing—At election of landlord—Construction.**—**PLUMMER v. RAMSEY** (1934), 78 Sol. Jo. 175.

**4614b.** — — — **Time for giving notice of election.**—**PLUMMER v. RAMSEY** (1934), 78 Sol. Jo. 175.

**4615.** **Add. Annotation:**—**Refd. Cadogan v. Guinness**, [1936] Ch. 515.

**4622.** **Add. Annotation:**—**Consd. Jardine v. A.-G. for Newfoundland** (1932), 48 T. L. R. 199.

**4622a.** — — — **A farming lease contained the two following clauses:**—

First, "the said S. C. (the lessee) doth hereby covenant with E. J. (the lessor), in manner following: that he the said S. C. shall from time to time & at all times during the continuance of the said term hereby granted, at his own costs & charges, in all things well & sufficiently repair & glaze the windows of the said messuage, & also the hedges, ditches, etc., of & belonging to the said demised premises, & all fixtures, additions, & improvements thereto, during the said term, in & by & with all & all manner of needful & necessary reparations, cleansings, & amendments, when & as often as occasion shall require, the said farm-house & buildings being previously put in repair & kept in repair by the said E. J." The second clause was as follows: "And it is hereby agreed, by & between the said parties hereto, that the said E. J. shall & will, within eighteen months from the date of the lease, erect & build (*inter alia*) a new shed & stalls for feeding cattle, complete, at the upper end of the barn, etc.; & the whole of which is agreed to be left to the superintendence of the said S. C. & E. J., her son":—**Held:** the latter words in the first clause amounted to an absolute & independent covenant on the part of E. J. to put the premises in repair.—**CANNOCK v. JONES** (1849), 3 Exch. 233; 18 L. J. Ex. 204; 13 J. P. 570; 154 E. R. 829; *affd. on another point, sub nom. JONES v. CANNOCK* (1850), 5 Exch. 713, Ex. Ch.

**PART XVIII. SECT. 2, SUB-SECT. 2.—D. (a).**

**sv. Repairs creating trap—Liability of landlord to person residing with tenant.**—Where a landlord, in making repairs, creates a trap which is known to him, or should be known to him, & an injury is caused thereby to one who has a right to be on the premises & who is ignorant of the trap the landlord is liable.—**FRASER v. PEARCE**,

[1928] 2 D. L. R. 54; 1 W. W. R. 837; 39 B. C. R. 338.—**CAN.**

**PART XVIII. SECT. 3, SUB-SECT. 1.**

**so. Alterations necessary to comply with law.**—Where a receipt for rent of a moving-picture theatre stated that "all repairs & alterations" were to be at the lessee's expense, & at the time the lease was made it was not contemplated by the parties that the building was, as in fact it was, con-

trary to the regulations under Moving Picture Act:—**Held:** the word "alterations" was not intended to cover such alterations as might be necessary to make the building comply with the law, & therefore said receipt was not an "agreement to the contrary" within sect. 17 (3) of Fire Marshal Act.—**McMORRIS v. FORBES** (B. C.), [1929] 5 W. W. R. 159; *affd.*, [1930] 2 W. W. R. 203; 3 D. L. R. 398; 42 B. C. R. 486.—**CAN.**

- PART XVIII. SECT. 3, SUB-SECT. 2.—**  
**D. (a) vii.**

4729 i. — *Wall.*]—STAPLES & CO.  
v. BERRYMAN, No. 4726 i, *ante.*  
sw. — *Roof.*]—STAPLES & CO. v.  
BERRYMAN, No. 4726 i, *ante.*

ex. To yield up in good repair—

57. To leave premises in original state—*[Destruction by fire.]*—Pltf. let his house to deft. co. to be used as liquor warehouse, deft. co. agreeing to make the necessary structural alterations to suit their purpose, & to restore the house to pltf. at the end of the lease in its original state. During the period

of the lease, one night, in the absence of a watchman, the liquor store-room & the whole house were destroyed by fire. In a suit by the lessor for damages:—*Held*: though, under a general covenant such as the above, a lessee would under the English law be liable for all damage including one arising from fire, yet, under Indian Transfer of Property Act, s. 108 (e), he is not liable for damage by fire in the absence of proof that the fire was due to his negligence.—*EAST INDIA DISTILLERS' v. MATHIAS* (1928), *L. L. R.* 51 Mad. 994.—*IND.*



(f) *Measure of Damages.*

(Vol. XXXI., p. 339.)

*See, now, Landlord & Tenant Act, 1927 (c. 36), s. 18 (1).*

**4828a.** ———.]—E. was the tenant of part of certain premises under a lease for a term of 98 years, & he sublet that part to B. for the unexpired residue of that term less the last 15 days. E.'s superior landlord then let to B., for a term of 999 years, the whole of the premises, subject to E.'s interest in the part. B., in breach of a covenant in his sublease, made considerable structural alterations to the whole of the premises, which B. used for the purpose of running an hotel. E. brought an action against B. for breach of the conditions in the sublease. The county ct. judge awarded E. £80 damages, which he assessed on the basis of the restoration work which would have to be done to that part of the premises in which E. had an interest, before E. could let that part to some other person. B. appealed:—*Held*: (1) the proper measure of damages was the diminution in the value of E.'s reversion due to B.'s breach of covenant, & not the cost of restoring the premises; (2) as B. was entitled to possession of the whole of the premises for 999 years, apart from E.'s reversion of part for 15 days, & B. had acquired possession of the whole of the premises for the unitary purpose of running an hotel, there was no evidence of diminution in the value of E.'s reversion & E. was entitled only to nominal damages.—*ESPIR v. BASIL STREET HOTEL, LTD.*, [1936] 3 All E. R. 91; 80 Sol. Jo. 894, C. A.

**4828b.** *Form of covenant.*—Certain premises were leased by pl'tfs. to def't. co.'s assignors. The lessees covenanted to expend £500 *per annum* on repairs & decoration or to pay the lessors the difference between £500 & the amount actually expended. It was found as a fact that from 1933 to 1935 the lessees did not spend the stipulated sum. This action was brought by the lessors claiming damages for breach of covenant, or, alternatively, for money due on the covenant:—*Held*: (1) since the passing of Landlord & Tenant Act, 1927 (c. 36), s. 17 (1), a covenant in the above form is illegal; (2) this was not an action for money due, but one founded on breach of covenant. It was, therefore, by virtue of Landlord & Tenant Act, 1927 (c. 36), s. 18 (1), essential for the lessor to prove damage to the reversion. No such damage having been proved, the action ought to be dismissed.—*OLYMPIA (LIVERPOOL), LTD. v. MOSS' EMPIRES, LTD.*, [1938] 3 All E. R. 166; *sub nom.* MOSS' EMPIRES, LTD. *v.* OLYMPIA (LIVERPOOL), LTD., 159 L. T. 206; 54 T. L. R. 956; 82 Sol. Jo. 564, C. A.

**4830.** *Add. Annotation*:—*Reid. Espir v. Basil Street Hotel, Ltd.*, [1936] 3 All E. R. 91.

**4838a.** ———.]—*Forfeiture of term—No set-off for appreciation in value by forfeiture.*—A lessee having neglected to carry out the covenants in the lease as to painting & repairing the demised premises, was sued by the landlords for possession & damages for the breaches of covenant. No defence having been put in it was adjudged that the landlords had judgment for possession, & mesne profits & damages, to be assessed & certified by a

master. The master assessed the damages at the amount by which the reversion in possession at the date of the forfeiture of the lease (namely, the date of the issue of the writ) was diminished by non-repair. The tenant, having claimed that he was entitled to set off the amount found by the master to be the difference between the value of the reversion in possession at the date of the forfeiture & the value of the reversion expectant on the expiration of the term if the lease had not been forfeited, the master refused the claim & decided that the tenant was not entitled to any set-off by reason of the acceleration of the reversion consequent upon the forfeiture. The tenant, relying on Landlord & Tenant Act, 1927 (c. 36), s. 18, appealed to the judge:—*Held*: there could be no set-off, & in assessing damages under the sect. in the circumstances of the case the ct. had to ascertain the actual value of the property in its unrepaid state at the date of re-entry & the value which the property would then have had if there had been no breach of covenant, & the amount of damage sustained by the landlords was the difference between the value of the property as it stood & the value it would have had if the tenant had carried out his obligations under the covenants in the lease.

The expression "whether immediate or not" in the above passage is, I think, explained by reference to the case of *Joyner v. Weeks*, [1891] 2 Q. B. 31, to which our attention has been called. A reversion may not be a reversion in possession (i.e., it may not be immediate) by reason of the freeholder having granted a reversionary lease, & in that case the reversionary lease is to be disregarded in assessing the damages. In my judgment what the ct. has to do in assessing damages under the section in the circumstances of this case is to ascertain the actual value of the property at the date of re-entry & the value which the property would then have had if there had been no breach of covenant; & the difference between these two values is the amount of the damages sustained by the landlord (that is to say) the difference between the value of the property as it stands & the value which it would have had in case the tenant had fulfilled his obligations under the covenants in the lease (*LAWRENCE, L.J.*).—*HANSON v. NEWMAN*, [1934] Ch. 298; 103 L. J. Ch. 124; 150 L. T. 345; 50 T. L. R. 191, C. A.

**4841.** *Add. Annotations*:—*Folld. Terroni v. Corsini*, [1931] 1 Ch. 515. *Consd. Westminster v. Duncombe* (1938), 82 Sol. Jo. 235.

**4841a.** ———.]—*Grant of reversionary lease before determination of original lease.*—*JOYNER v. WEEKS*, No. 4841, *ante*.

**4841b.** ———.]—*What is "reversion"*—Landlord & Tenant Act, 1927 (c. 36), s. 18 (1).—Pl'tfs. & def't. were partners. One of the partnership assets was the lease of the premises on which the business was carried on, expiring on Mar. 25, 1930. On Oct. 7, 1929, the landlord granted to the three partners a reversionary lease for fourteen years from Mar. 25, 1930, at an increased rent. On Oct. 29, 1929, by an agreement made between the parties for dissolution of the partnership, it was provided that the partnership assets should be sold to the

highest bidder of the three partners & proceeds divided, deft.'s share being one-half; also, that the date for completion should be Nov. 18, 1929, & that deft. should out of his share make certain payments, & should pay the rent under the lease, all rates, taxes & outgoings in respect of the premises, & "all trade debts & other liabilities whatsoever in respect of the said premises & business" down to the date fixed for completion, making these payments out of his share of the proceeds of sale. The agreement came before the ct. for construction, & it was declared that the phrase, "other liabilities whatsoever in respect of the said premises," included the liability in respect of damages which the landlord could, on Nov. 18, 1929, have recovered for breach of the repairing covenants in the lease. On an application for a decision whether at that date the damages recoverable by him in respect of non-repair were to be estimated on the basis of the depreciation in market value of the reversion expectant on the determination of the lease, or of that expectant on the determination of the reversionary lease:—*Held*: the "reversion" was the immediate reversion expectant on the lease, & the fact that a reversionary lease had been granted, to take effect at a date after the date for the assessment of damages, was immaterial.—*TERRONI & NECCHI v. CORSINI*, [1931] 1 Ch. 515; 100 L. J. Ch. 289; 145 L. T. 95.

*Annotation*:—**Consd.** Westminster v. Duncombe (1938), 82 Sol. Jo. 235.

**4847.** *Add. Annotation* :—As to (2) **Refd.** **Snowdon v. Ecclesiastical Comrs. for England**, [1935] Ch. 181.

**4857. Add. Annotation:—***Refd. Walton Harvey, Ltd. v. Walker & Homfrays, Ltd., [1931] 1 Ch. 145.*

**4866.** After this case add :—

**Duty to give notice — Compliance with dangerous structure notice.] — See METROPOLIS, No. 119a, *post*.**

**4886a. "Executing repairs"—Cleaning flue.]—**The ground floor of a larger building was demised to applt., who carried on business therein as a ct. dressmaker. Through the part so demised, but not forming part of the demise, there ran a flue which served the other parts of the building. The lease provided that applt. would "permit the lessor or his . . . agents & workmen . . . to enter the said premises . . . for executing repairs & alterations of or upon the other parts of the said message . . . making good all damage thereby occasioned." During the currency of the lease the lessor by his agents entered the demised premises for the purpose of cleaning the flue, & as a consequence of the work that was done a quantity of soot was scattered over applt.'s stock of dresses, thereby damaging them. On a claim in respect of this damage:—*Held*: (1) the cleaning

of the flue was "executing repairs" within the meaning of the lease; (2) the words "making good all damage thereby occasioned" were not to be restricted to structural damage to the premises but were wide enough to cover damage to applt.'s stock-in-trade; (3) in assessing the quantum of damage regard must be had to the question whether the applt. had taken reasonable precautions for minimising the amount of damage.—*GREG v. PLANQUE*, [1936] 1 K. B. 609; 105 L. J. K. B. 415; 154 L. T. 475, C. A.

**4866b. "Making good all damage"—Damage to stock-in-trade.]—GREG v. PLANQUE, No. 4866a, ante.**

**4867. Add. Annotation :—**Consd. *Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56.

**4868.** *Add. Annotation* :—**Reid.** St. Anne's Well Brewery Co. v. Roberts (1928), 140 L. T. 1.

**4869.** *Add. Annotations:—***Consd.** Wilchick v. Marks & Silverstone, [1934] 2 K. B. 56. *Generally, Refd.* St. Anne's Well Brewery Co. v. Roberts (1928), 140 L. T. 1.

**4869a.** — Notwithstanding concurrent liability of landlord.]—**WILCHICK v. MARKS & SILVERSTONE.** No. 4891a. *post.*

**4879. Add. Annotations:—**Distd. St. Anne's Well Brewery Co. v. Roberts (1928), 140 L. T. 1. Consd. Cunard v. Antifyre, Ltd. (1932), 49 T. L. R. 184; Wilchick v. Marks & Silverstone. [1934] 2 K. B. 56.

**4881. Add. Annotation :—**Consd. *Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56.

**4882. Add. Annotation :—**Consd. *Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56.

**4883. Add. Annotations:—***Rcfld. St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L. T. 1; *Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56.

**4885. Add. Annotation :—**Refd. *Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56.

**4887. Add. Annotation :—***Refd. St. Anne's Well Brewery Co. v. Roberts (1928), 140 L. T. 1.*

**4889. Add. Annotation :—***Reid. Morgan v. Liverpool Corpn.*, [1927] 2 K. B. 131.

**4890. Add. Annotation:—***Refd. Bishop v. Consolidated London Properties, Ltd.* (1933), 102 L. J. K. B. 257.

**4891. Add. Annotation :—**As to (2) **Refd. Fisher v. Walters** (1926), 90 J. P. 195.

**4891a. Notice to landlord—Right to repair reserved by landlord—No contractual liability to repair.]**  
—Pltf. was walking along a highway when she suffered personal injury by the fall of a defective shutter from a house abutting on the highway. The premises were owned by defts. A. & J., by whom they had been let, since 1914, to deft. M. on a weekly tenancy. The original rent of 35s. a week had been from time to time increased as permitted by

**PART XVIII. SECT. 5, SUB-SECT. 1.**  
—B. (b).

4880 iii. ———.]—Even with respect to a visitor who is a mere licensee, an owner who has undertaken with a tenant to make all necessary repairs on the leased premises owes a duty, even though not in occupation or exclusive control of the premises, to so use any measure of control or

authority he has over the premises to avoid injury to such a person from a concealed danger which exists to his knowledge at the time he leases the premises.—*ELGETT v. SMITH*, [1937] 1 W. W. R. 346; *affd.*, [1937] 3 W. W. R. 114; 4 D. L. R. 199; 7 F. L. J. (Can). 131.—CAN.

4881 i. *Add. citation*:—*reversd.*, [1925]  
2 D. L. R. 1022.

**PART XVIII. SECT. 5, SUB-SECT. 1.—**  
**B. (a).**

4887 iii. —Where a balcony common to all the tenants was in a defective condition & was unsafe, & the landlord was notified of such condition, but did not repair it, & thereafter a tenant fell from the balcony & was injured:—*Held*: the landlord was liable. —*AMIN v. EBRAHIM* (1926). 47 N. L. R. 1.—S. AF.

the Rent Restriction Acts to £2 13s. 8d., the increases including the percentage allowed on the basis that the landlords were responsible for the whole of the repairs. The tenancy was oral, except so far as its terms were contained in the rent book, &, as the judge found, there was no contractual liability on either landlords or tenant to repair, though the rent book contained a clause reserving to the landlords the right to enter & do repairs if they thought fit. The defective condition of the shutter had been known to the tenant for a considerable time, & he had, as the judge found, informed the landlords of it. Pltf. brought her action against the landlords & the tenant, alleging a failure by both, or alternatively by one or the other, to keep the shutter in a secure condition so that it would not fall & injure passers-by. The tenant issued a third-party notice against his co-defts. claiming to be indemnified by them if he should be held liable to pltf. :—*Held* : (1) the landlords were not estopped by having increased the rent on the basis of their doing the repairs from denying that they were liable, as against the tenant, to repair. In the absence of any contractual liability, the landlords, though they might do, & in fact did, repairs, were not bound to do them, nor to indemnify the tenant if he were held liable for non-repair. The third-party proceedings therefore failed; (2) though the landlords were under no contractual liability to the tenant to repair, yet, having reserved the right to repair, there was a duty on them, arising from proximity, to prevent injury to persons using the highway from a nuisance on the premises of which they had knowledge, & that they were therefore liable to the pltf.; (3) the liability of the landlords did not exclude the liability of the tenant for a nuisance on premises occupied by him, & he also was liable to pltf.—*WILCHICK v. MARKS & SILVERSTONE*, [1934] 2 K. B. 56; 103 L. J. K. B. 372; 151 L. T. 60; 50 T. L. R. 281; 78 Sol. Jo. 277.

**4894. Add. Annotations:—**As to (1) & (2) Consd  
Cunard v. Antifyre, Ltd. (1932), 49 T. L. R.

184. *Generally, Reqd.* Otto v. Bolton & Norris, [1936] 1 All E. R. 960.

**4895. Add. Annotations :—****Consd.** *Shirvell v. Hackwood Estates Co.*, [1938] 2 All E. R. 1.  
**Refd.** *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46; *Nicholson v. Southern Ry. Co. & Sutton & Cheam Urban District Council*, [1935] 1 K. B. 588; *Otto v. Bolton & Norris*, [1936] 1 All E. R. 960.

**4896. Add. Annotations:—**Consd. *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46; *Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56; *Shirvell v. Hackwood Estates Co.*, [1938] 2 All E. R. 1. Refd. *Otto v. Bolton & Norris*, [1936] 1 All E. R. 960.

**4898. Add. Annotation:—***Refd.* Western Engraving Co. v. Film Laboratories, Ltd., [1936] 1 All E. R. 106.

**4899a. Want of repair in part of premises retained by landlord—Liability to sub-tenant.]—**Pltfs. were husband & wife, the husband being sub-tenant from M. of a part of a house including a kitchen with a glass roof projecting beyond the wall of the floor above. M. was lessee from deft. co. of a part of the building excluding the main roof. There was no contractual relation between pltfs. & deft. co. Some defective guttering fell from the main roof through the glass roof of pltfs.' kitchen, causing injury to them & to their property:—*Held*: (1) pltfs.' claim, if any, against defts. was for negligence, not nuisance; (2) deft. co. owed a duty to pltfs. to keep the guttering reasonably safe, & a breach of that duty having occurred with resultant damage, pltfs. were entitled to recover.—**CUNARD v. ANTIFYRE, LTD.**, [1933] 1 K. B. 551; 103 L. J. K. B. 321; 148 L. T. 287; 49 T. L. R. 184, D. C.

*Annotation* :—As to (2) **Consd.** *Shirvell v. Hackwood Estates Co.*, [1938] 2 All E. R. 1.

**4900. Add. Annotations:—**Consd. *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46; *Shirvell v. Hackwood Estates Co.*, [1938] 2 All E. R. 1. **Refd.** *Morgan v. Liverpool Corpn.*, [1927] 2 K. B. 131; *McAlister v. Stevenson* (1932), 101 L. J. P. C. 119; *Hillen v. I. C. I.*

**PART XVIII. SECT. 5, SUB-SECT. 2.—**  
**A. (a).**

**a i. — To licensee.]**—Pitts., husband & wife, lived in a two-room suite on the second floor of a rooming, or apartment, house owned by deft. The suite had been rented by deft. to the husband. The only means of access egress to & from the suite was by way of an outside balcony reached by steps at the middle thereof. The balcony was the possession & under the control of deft. Pitts. intending to make a social call on a friend living in another suite, walked along the balcony; & the male pitf. while chatting with his friend leaned against the railing. It gave way; the male pitf. fell to the ground; & his wife, whose hand had been on his shoulder, fell with him. Pitts. based their action for damages on tort. The trial judge found that the railing was in such a state of decay & disrepair as to constitute a concealed danger. He awarded both pitfs. damages. Deft. appealed:—**Held:** the appeal should be allowed. Both pitfs. were in respect to their use of that part of the balcony in front of the neighbouring suite mere licensees. Deft. did not know of the concealed danger.—**POWER & POWER v. HUGHES, [1938] 2 W. W. R. 359.—CAN.**

f i. — *To licensee.*—Pltf. employed by tenants in a building to remove debris fell down the elevator, owing to the defective condition of the elevator interlocking safety device, & to his own contributory negligence:—*Held:* he was a licensee with an interest & could recover against the landlord, his damages being apportioned under the Negligence Act.—*GILLINGHAM v. SHIFFER-HILLMAN*, [1933] 3 D. L. R. 134; O. R. 543; *affd. sub nom. GREISMAN v. GILLINGHAM & SHIFFER-HILLMAN CLOTHING MANUFACTURING CO.*, [1934] S. C. R. 375; 3 D. L. R. 472.—[CAN.]

k1. ———.]—In Dec. 1930, a tenant reported to her landlord's representative that the hand-rail of a stair in her house was loose, & an undertaking was given on behalf of the landlord that the rail would be repaired. The rail was not repaired, but the tenant continued to occupy the house. Eight months later, in Aug. 1931, the rail, which had become looser, gave way while the tenant was using it, & in consequence she fell & sustained injuries:—*Held*: the tenant was not barred, by continuing to occupy the house, from recovering damages for her injuries from the landlord, in respect that her continued occupation did not infer acceptance by her of the

risk arising from the defect, in view of its trivial nature & of the landlord's undertaking to repair it.—MULLEN v. DUNBARTON COUNTY COUNCIL, [1933] S. C. 380.—SCOT.

**PART XVIII. SECT. 5, SUB-SECT. 2.—**  
**A. (b).**

4900 il. ———.]—Male pltf. was tenant of a furnished apartment, which contained a gas heater used for heating water for use in the apartment & in the other apartments in the same house. The heater was defective to the knowledge of the landlord, & owing to an escape of burning gas from the heater female pltf. was seriously burned.—*Held*: the landlord was liable to both pltfs., for although the heater was not part of the demised premises, there was a positive agreement to keep it in repair, which gave rise to an action by the tenant for damages for breach of contract.—*HORNE v. MOULDS (Alta.)*, [1927] 2 D. L. R. 839; [1927] 1 W. W. R. 827.—CAN.

m 1. ——— Unless undertaking to repair acknowledged.)—In a house rented by pltf. from deft. there was a defective chimney, which deft. undertook to rebuild. He also undertook to reshingle the roof. Two months after pltf. had moved into the

(Alkali), Ltd., [1934] 1 K. B. 455; Wilchick v. Marks & Silverstone, [1934] 2 K. B. 56; Otto v. Bolton & Norris, [1936] 1 All E. R. 960; Parker v. Oloxo, Ltd. & Senior, [1937] 3 All E. R. 254.

4901. *Add. Annotation*:—*Refd. McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119.

4903. *Add. Annotation*:—*Refd. Fisher v. Walters* (1926), 90 J. P. 195.

## Part XIX.—Waste.

4932. *Add. Annotation*:—*Apld. Marsden v. Heyes*, [1927] 2 K. B. 1.

4943. *Add. Annotations*:—*As to* (1) *Consd. Stevens v. Willing & Co.*, [1929] W. N. 53. *Refd. Price v. Corp'n. d'Energie de Montmagny*, [1927] A. C. 363.

4970. *Add. Annotation*:—*Refd. Spyer v. Phillipson*, [1931] 2 Ch. 183.

4978a. *Cutting down trees—Excepted from lease.*—*FOSTER'S CASE* (1585), Gouldsb. 1; 75 E. R. 955.

4998. *Add. Annotation*:—*Consd. Marsden v. Heyes*, [1927] 2 K. B. 1.

5003. *Add. Annotation*:—*Refd. Marsden v. Heyes* (1926), 96 L. J. K. B. 410.

5006. *Add. Annotations*:—*As to* (1) *Refd. Snowden v. Ecclesiastical Comrs. for England*, [1935] Ch. 181. *As to* (2) *Refd. Rye v. Purcell*, [1926] 1 K. B. 446.

5016. *Add. Annotation*:—*Consd. Haskell v. Marlow*, [1928] 2 K. B. 45.

5050. *Add. Annotations*:—*As to* (1) *Refd. Marsden v. Heyes*, [1927] 2 K. B. 1. *As to* (2) *Refd. Gottliffe v. Edelston*, [1930] 2 K. B. 378.

5058. *Add. Annotation*:—*As to* (1) *Refd. Espir v. Basil Street Hotel, Ltd.*, [1936] 3 All E. R. 91.

## Part XX.—Insurance and Damage by Fire.

5069. *Add. Annotation*:—*Refd. Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

5069a. In named office "or in some other responsible insurance office to be approved by the lessor"—*Duty of lessor.*—A lease of a messuage for a term of ninety-nine years contained a covenant by the lessee to insure against fire in the following terms: "The lessee shall & will . . . insure & ever afterwards during the said term keep insured the said messuage . . . in the joint names of the lessee & lessor in the Law Fire Office or in some other responsible insurance office to be approved by the lessor. . . ." Resp., who was an assignee of the lease, did not

continue the policy in the Law Fire Office which was in existence at the time of the assignment, but took out a policy in the Atlas Co. Applt., who was the ground landlord of the premises & also of a large number of other houses on the same estate, refused to approve of the Atlas Co. on the ground that for purposes of estate management he required that all houses upon his estate should be insured in the same office. Resp. declined to insure in the Law Fire Office, & insisted that under the covenant she had an option to insure either in the Law Fire Office or in some other responsible office to be approved by the lessor. In an action brought

house & placed his chattels in it, the house was burnt down & with it pltf.'s chattels, the undertaking to repair & reshingle not having been fulfilled. The fire was caused by sparks from the chimney reaching the old shingles on the roof. Pltf., who had repeatedly warned deft. of the danger, sued in tort for the value of his chattels:

—*Held*: deft. was properly held liable. The rule requiring a tenant to minimise his loss by himself repairing at the expense of his landlord does not apply where the landlord acknowledges his undertaking & promises to fulfil it. By his agreement deft. assumed the duty of repairing within a reasonable time; & his neglect to do so after repeated warnings was negligence entitling pltf. to sue in tort.—*AMELL v. MALONEY*, [1929] 4 D. L. R. 514; 64 O. L. R. 285.—CAN.

n i. —.—.—.]—Where the owner of an hotel leased the premises, & pltf. fell through an opening in a verandah.—*Held*: pltf. was not entitled to recover as against the owner, even if there were an express covenant by him to make outside repairs, as pltf. was a stranger to the covenant.—*MARVILLE v. DONNELLY* (1909), 14 O. W. R. 1044; 1 O. N. W. 195.—CAN.

n ii. —.—.—.]—Premises, the property of deft., were let to W. who let different portions to sub-tenants, including an upstairs room to D. The letting to W. was within Rent Restriction Act, N. L., 1925 (c. 12). Pltf., a district nurse, having visited D., descended the stairs, & whilst taking the last step on to the hall the floor gave way, & pltf. received serious injuries:—*Held*: pltf. could not succeed either in contract or the statutory obligation to repair implied in the letting, or in tort.—*O'REILLY v. DOHERTY*, [1923] N. L. 32.—IR.

### PART XIX. SECT. 2, SUB-SECT. 1.—A.

4933 iii. —.—.—.]—*Held*: the lessees of a canal-slip, by enlarging it & making other alterations, had not committed waste: the permanent character of the property demised was not substantially altered, & there was no loss to the inheritance.—*RENE v. CARLING EXPORT BREWING & MALTING CO.*, [1929] 2 D. L. R. 861; 63 O. L. R. 582.—CAN.

### PART XIX. SECT. 2, SUB-SECT. 1.—B.

aa. *Stones collected by tenant to improve cultivation*—*Property in.*—A

tenant who, for the purpose of clearing the land & rendering it more fit for cultivation, collects the stones therefrom, has the property in the stones, & the landlord has no interest in them, & is liable for their value if he disposes of them.—*LEWIS v. GODSON* (1888), 15 O. R. 252.—CAN.

ab. *Bushes cut along river*—*Necessary for exercise of fishing rights.*—Pltf., by indenture under seal, leased to deft. for a term of years, with the right to renew, pltf.'s land on the East River, G. County, for fishing purposes, with the right to enter & use the same in such a way as might be necessary for fishing in said river. Damages claimed by pltf. were for cutting bushes along the bank of the river:—*Held*: the burden of proof was upon pltf., & the right to fish from the bank of the river involved the right to do such cutting as was necessary for that purpose.—*McKEEN v. FATTILLO* (1927), 59 N. S. R. 452.—CAN.

ac. *Cultivating waste land.*—A lessee who cultivates waste land of the colony is not to be presumed to have done so with the concurrence of his lessor, & for his benefit.—*NEWMAN v. GORF* (1817), 1 Nfld. L. R. 26.—NFLD.

by the applt. against resp., in form for forfeiture of the lease of breach of covenant, but in effect, to obtain a decision of the ct. on the construction of the covenant:—*Held*: upon the true construction of the covenant, the primary obligation of the resp. was to insure in the Law Fire Office, & applt. had an absolute right to withhold his approval of an alternative office without entering upon reasons. Assuming, contrary to the decision of the House, that an implied term was to be imported into the contract that the lessor's approval was not to be unreasonably withheld, the grounds of applt.'s disapproval were reasonable.—*TREDEGAR v. HARWOOD*, [1929] A. C. 72; 97 L. J. Ch. 392; 139 L. T. 642; 44 T. L. R. 790, H. L.

**5070a.** Not to do anything to impose heavier insurance burden on premises—Obligation of lessor as to adjacent premises.—Lessees of factory premises for a term of twenty-one years covenanted to pay as additional rent such sums as the lessors might expend in effecting or maintaining the insurance of the demised premises against fire, & not to do or suffer anything on the demised premises which would render payable an increased or extra premium for the insurance of the demised premises or other premises adjacent thereto. The lessors covenanted to keep the demised premises insured against fire & that the lessees should have quiet enjoyment of them. Subsequently, the lessors let premises adjacent to the demised premises to another lessee, whose trade as a wood-

worker rendered it impossible for the insurance of the demised premises to be effected except at considerably increased premiums:—*Held*: (1) the lessors, by dealing with the adjoining premises in a way which was not unreasonable or unbusinesslike, which did not affect the originally demised premises physically & which had rendered it, not less easy or legal, but substantially more expensive to conduct on them the business for which they had been demised, had not so interfered with the purpose for which those premises had been demised as to have derogated from their own grant of them; (2) the covenant by the lessees not to do or suffer anything on the originally demised premises which would render payable an increased or extra premium for the insurance of those, or adjacent, premises did not impliedly put the lessors under a similar obligation with regard to their user of adjacent premises.—*O'CEDAR, LTD. v. SLOUGH TRADING CO.*, [1927] 2 K. B. 123; 96 L. J. K. B. 709; 137 L. T. 208; 43 T. L. R. 382.

*Add. Annotations*:—*Generally Refd.* *Matania v. National Provincial Bank, Ltd.*, (1935), 154 L. T. 103; *Port v. Griffith*, [1938] 1 All E. R. 295.

**5075.** *Add. Annotations*:—*Refd.* *Tredegar v. Harwood* (1927), 44 T. L. R. 17.

**5122.** *Add. Annotations*:—*Appld.* *Schlesinger & Joseph v. Mostyn*, [1932] 1 K. B. 349.

**5139.** *Add. Annotations*:—*Refd.* *Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.*, [1931] 1 Ch. 145.

## Part XXI.—Assignment and Devolution of Leases.

**5186a.** Covenant not to "part with possession"—Necessity for entire exclusion from legal possession.—A lessee's covenant not to "part with the possession of the demised premises or any part thereof" is broken only if the lessee entirely excludes himself from the legal possession of part of the premises. On the particular facts & documents in the particular case a seven years' exclusive licence to erect an advertisement hoarding against the front wall of the lessee's house followed by its erection was held no breach of the above covenant.—*STENING v. ABRAHAMS*, [1931] 1 Ch. 470; 100 L. J. Ch. 278; 145 L. T. 18.

*Annotation*:—*Refd.* *Gee v. Hazleton*, [1932] 1 K. B. 179.

**5187.** *Add. Annotations*:—*Consd.* *Rodenhurst Estates, Ltd. v. Barnes, Ltd.*, [1936] 2 All E. R. 3.

**5192.** *Add. Annotations*:—*Refd.* *Chaplin v. Smith*, [1926] 1 K. B. 198; *Clore v. Theatrical*

*Properties, Ltd. & Westby & Co.*, [1936] 3 All E. R. 483.

**5192a.** —Erection of advertisement hoarding—Covenant not to "part with possession."—*STENING v. ABRAHAMS*, No. 5186a, *ante*.

**5204.** *Add. Annotations*:—*Refd.* *Roe v. Russell*, [1928] 2 K. B. 117.

**5226.** *Add. Annotations*:—*Appld.* *Chaplin v. Smith*, [1926] 1 K. B. 198. *Refd.* *Pincott v. Moorstons, Ltd.*, [1937] 1 All E. R. 513.

**5228.** *Add. Annotations*:—*Refd.* *Pincott v. Moorstons, Ltd.*, [1937] 1 All E. R. 513.

**5229.** *Add. Annotations*:—*Refd.* *Wilkins v. Carlton Shoe Co.* (1930), 94 J. P. 207.

**5239.** *Add. Annotations*:—*Refd.* *Roe v. Russell*, [1928] 2 K. B. 117.

**5241.** *Add. Annotations*:—*Appld.* *Chaplin v. Smith*, [1926] 1 K. B. 198. *Consd.* *Pincott v. Moorstons, Ltd.*, [1937] 1 All E. R. 513.

### PART XX. SECT. 2, SUB-SECT. 2.

**5145** 1. *Under covenant to rebuild—Extent of liability.*—*DUNKELMAN v. LISTER*, [1927] 4 D. L. R. 612; 61 O. L. R. 89.—CAN.

*sy. Neglect of furnace.*—The omission of a tenant of a dwelling-house to take the proper care of a furnace therein which he is entitled to use in order to heat the house amounts to permissive waste.—*ROBERTS v. McMANIS*, [1933] 1 W. W. R. 193;

*affd.*, [1933] 3 W. W. R. 248.—CAN.

### PART XXI. SECT. 1, SUB-SECT. 2.—B. (a) iii.

*sz. General rule.*—Unless there is a restriction against the alienation of any portion of the demised property, a restraint upon alienation of the demised premises does not prevent the alienation of a portion.—*CUTINHA v. SALVADORA MINAZES* (1926), 1 L. R. 50 Mad. 331.—IND.

### PART XXI. SECT. 1, SUB-SECT. 2.—B. (c).

*st. Possession given to tenant at will.*—A prohibition in a lease against subletting implies a prohibition against allowing a tenant at will to occupy, because the intention of the parties in agreeing to the prohibition is that the right of occupation is to be limited to the lessee himself.—*AKOON v. JHAVARY*, [1934] N. L. R. 282.—S. AF.

*D. Assignment subject to Landlord's Consent.*

(Vol. XXXI., p. 379.)

See Landlord & Tenant Act, 1927 (c. 36), s. 19.

5259. *Add. Annotation*:—*Refd.* Woolworth & Co. v. Lambert, [1937] Ch. 37.

5269a. *Effect of Landlord & Tenant Act, 1927 (c. 36), s. 19 (1) — On breach before Act in force.*—(1) Where a landlord, who is also a brewer, consents to the assignment of the lease of a free public-house, but stipulates that, for the remainder of the term of the lease, the house shall be a tied house, such stipulation is a "fine" or benefit "in the nature of a fine" within Law of Property Act, 1925 (c. 20), s. 144.

(2) Landlord & Tenant Act, 1927 (c. 36), s. 19 (1), does not apply to a breach of contract, which took place before the Act came into force.—*GARDNER & Co. v. CONE*, [1928] Ch. 955; 97 L. J. Ch. 491; 140 L. T. 72.

*Annotation*:—*As to* (2) *Refd.* Ward v. British Oak Insurance Co., [1932] 1 K. B. 392.

5272. *Add. Annotation*:—*Refd.* Curtis Moffat v. Wheeler, [1929] 2 Ch. 224.

5282. *Add. Annotation*:—*Distd.* Farr v. Ginnings (1928), 44 T. L. R. 249.

5282a. *Covenant to repair.*—Where a lease contains a covenant by the lessee to repair, & a provision that the lessor's consent to an assignment by the lessee is not to be unreasonably withheld, the mere fact that the lessee is committing a continuing breach of the covenant to repair does not necessarily entitle the lessor to refuse his consent to an assignment, at all events where the amount of disrepair is not very serious.—*FARR v. GINNINGS* (1928), 44 T. L. R. 249.

5284. *Add. Annotation*:—*Refd.* Premier Confectionery (London) Co. v. London Commercial Sale Rooms, Ltd., [1933] Ch. 904.

5286. *Add. Annotations*:—*Dbtd.* Tredegar v. Harwood, [1929] A. C. 72. *Refd.* Premier Confectionery (London) Co. v. London Commercial Sale Rooms, Ltd., [1933] Ch. 904; Lambert v. Woolworth & Co. (No. 2), [1938] 2 All E. R. 664.

5287a. *Assignor tenant of two tobacconist shops—Proposed assignment of one detrimental to property.*—The assignee of the benefit of two agreements under which two tobacconist's shops, forming part of a large block of buildings used as business premises, were respectively let to the assignor for terms of fourteen years, applied to the landlord for a licence to assign one of the shops to a respectable tenant. Each of the agreements contained a covenant by the tenant to use the premises as a tobacconist's shop only & not to assign the premises without the previous consent in writing of the landlord. The landlord refused to grant the licence in the belief that the occupation of the two shops by separate tenants would be detrimental to the property:—*Held*: the landlord's consent had not been unreasonably

withheld.—*PREMIER CONFECTIONERY (LONDON) CO., LTD. v. LONDON COMMERCIAL SALE ROOMS, LTD.*, [1933] Ch. 904; 102 L. J. Ch. 353; 149 L. T. 479; 77 Sol. Jo. 523.

5288. *Add. Annotation*:—*Consd.* Balfour v. Kensington Gardens Mansions, Ltd. (1932), 49 T. L. R. 29.

5291a. *Conditional upon covenant by under-lessee to observe all covenants of head-lease.*—The lease of a flat, let at £700 a year, contained the following covenant by the tenant:—

"Not to assign, sublet, or part with the possession of the flat or any part thereof without the previous consent of the lessors or their agent, such consent to any assignment or sub-lease to an individual not to be unreasonably withheld on proof being furnished of the respectability & financial responsibility of the proposed assignee or subtenant. Provided always that the lessors may as a condition of such consent to any assignment or sublease require the proposed assignee or sublessee to enter into direct covenants with the lessors to perform & observe all the covenants on the tenant's part herein contained, & non-compliance with such condition shall be deemed to be a reasonable ground for refusing such consent notwithstanding the respectability & financial responsibility of the proposed assignee or underlessee." The tenant desired to sublet the flat to a respectable & responsible tenant at £450 a year, the best rent obtainable, but the landlords refused their consent except on the terms that the subtenant should enter into a direct covenant with them to pay the rent of £700 a year reserved by the lease:—*Held*: in the circumstances the landlords had unreasonably refused their consent to the subletting.—*BALFOUR v. KENSINGTON GARDENS MANSIONS, LTD.* (1932), 49 T. L. R. 29; 76 Sol. Jo. 816.

5295a. *Stipulation converting free public-house into tied house.*—*GARDNER & Co. v. CONE*, No. 5269a, *ante*.

5298. *Add. Annotation*:—*Apld.* Gardner v. Cone, [1928] Ch. 955.

5310. *Add. Annotation*:—*Refd.* Curtis Moffat v. Wheeler, [1929] 2 Ch. 224.

5321. *Add. Annotation*:—*Refd.* Curtis Moffat v. Wheeler, [1929] 2 Ch. 224.

5329. *Add. Annotation*:—*Refd.* Lambert v. Woolworth & Co. (No. 2), [1938] 2 All E. R. 664.

5333. *Add. Annotation*:—*As to* (2) *Refd.* Dixon (J. J.) v. Taylor & Cowells (trading as Pineexx Liquid & Disinfectant Soap Co.) (1933), 50 R. P. C. 405.

5341. *Add. Annotation*:—*Refd.* Curtis Moffat v. Wheeler, [1929] 2 Ch. 224.

5361. *Add. Annotation*:—*Consd.* Curtis Moffat v. Wheeler, [1929] 2 Ch. 224.

5367. *Add. Annotation*:—*As to* (2) *Refd.* *Re* Griffiths, Jones v. Jenkins, [1926] Ch. 1007.

PART XXI. SECT. 1, SUB-SECT. 2.—  
D. (a) iv.

*sa. Refusal to consent to assignment to foreign company.*—*Held*: that the reason alleged for withholding consent

was not adequate to prevent the withholding of such consent being unreasonable.—*CHARLES ATKINS & CO., LTD. v. BACKHOUSE*, [1928] S. A. S. R. 179.—*AUS.*

PART XXI. SECT. 2, SUB-SECT. 1.—B. *sd. General rule.*—An assignment of a lease can be validly made only by deed, even though the lease was created by parole.—*GLASGOW LUMBER*

**5450. Add. Annotations:—**Consd. Dalton v. Pickard (1911), [1926] 2 K. B. 545, n.; Richmond v. Savill, [1926] 2 K. B. 530.

**5454. Add. Annotation:—**Apld. Curtis Moffat v. Wheeler, [1929] 2 Ch. 224.

**5492. Add. Annotation:—**Refd. Liggett (Liverpool) v. Barclays Bank (1927), 137 L. T. 443.

**5494. Add. Annotations:—**Apld. Taylor v. Twinberrow, [1930] 2 K. B. 16. Refd. Official Trustee of Charity Lands v. Ferriman Trust, Ltd., [1937] 3 All E. R. 85.

**5508. Add. Annotation:—**Refd. Akt. Dampskibs Steinstad v. Pearson (1927), 137 L. T. 533.

**5522a. ———.**—[The lease of certain property which the tenant used in connection with his business, contained a covenant against assigning without the landlords' consent. The tenant assigned his business to a limited co., agreeing to transfer to them all existing leases. A licence to assign the lease of the property was duly granted by the landlords, & the co. went into possession & for a time paid the rent to the landlords. No assignment of the lease was in fact completed. In an action against the co. for the recovery of rent, the co. contended that, being mere equitable assignees of the lease, there was no privity of contract between it & the landlords & it was not liable for the payment of the rent. The county ct. judge held that inasmuch as the landlords' consent was to the co. being in possession of the premises as assignees & not otherwise, the co. was on the facts estopped from denying that it was an assignee & liable for the rent. The co. appealed:—*Held*: there was evidence upon which the county ct. judge could rightly hold that the co. was so estopped.—RODENHURST ESTATES, LTD. v. BARNES, LTD., [1936] 2 All E. R. 3; 80 Sol. Jo. 405, C. A.]

*Annotation:—*Refd. Official Trustee of Charity Lands v. Ferriman Trust, Ltd., [1937] 3 All E. R. 85.

**5522b. ———.**—[Pltfs., as owners of the fee simple of land subject to a lease, in an action to recover possession of a number of houses on the ground of forfeiture for breach of covenant to repair, alleged that deft. co. held the premises as assignees of the lease. Deft. co. denied that the lease was vested in it, & averred that it held the land referred to in the lease as underlessee & by virtue of an underlease for the term of the lease less 3 days, that there was no privity between it & pltfs., & that it could not be sued upon the covenants in the lease. Pltfs. contended that deft. co. was estopped from denying that it was the assignee of the lease, as deft. co. & its predecessor in title had, since 1888, paid to pltfs. & their predecessors in title the rent reserved by the lease & remained in possession, whereby pltfs. were induced to believe that deft. co. & its predecessors were assignees of the lease:—*Held*: (1) mere payment of rent & possession did not amount to a

representation by deft. co. that it intended to induce pltfs. to believe that it was the assignee of the head lease; (2) as the payment of rent could be made by deft. co. either as lessees' agent or as underlessee or as assignee, the landlords were not entitled to abstain from inquiring & to assume for their own benefit that deft. co. was making the payments of rent as the assignee; (3) deft. co., therefore, was not estopped from denying that it was the assignee, although it was estopped from denying pltfs.' title to the land.—OFFICIAL TRUSTEE OF CHARITY LANDS v. FERRIMAN TRUST, LTD., [1937] 3 All E. R. 85.

**5523. Add. Annotation:—**Consd. Official Trustee of Charity Lands v. Ferriman Trust, Ltd., [1937] 3 All E. R. 85.

**5524. Add. Annotations:—**Consd. Rodenhurst Estates, Ltd. v. Barnes, Ltd., [1936] 2 All E. R. 3. Refd. Official Trustee of Charity Lands v. Ferriman Trust, Ltd., [1937] 3 All E. R. 85.

**5542. Add. Annotation:—**Refd. Consolidated Entertainments, Ltd. v. Taylor, [1937] 4 All E. R. 432.

**5587. Add. Annotation:—**Refd. Brooks Wharf & Bull Wharf, Ltd. v. Goodman Bros., [1937] 1 K. B. 534.

**5604. Add. Annotation:—**Refd. Brooks Wharf & Bull Wharf, Ltd. v. Goodman Bros., [1937] 1 K. B. 534.

**5636. Add. Annotations:—**As to (1) Consd. Re Harrington Motor Co., *Ex p.* Chaplin, [1928] Ch. 105. Refd. Josselson v. Borst, [1938] 1 K. B. 723.

**5657a. Covenant to repair—**Failure by lessee to repair—Effect of entry into possession by assignee.—[Pltf. contracted with deft. to assign to him the lease of certain property. Under the lease the lessee was required (*inter alia*) to keep a tennis court in good repair. This pltf. had not done, & deft. required an indemnity in respect thereof. Deft. had meanwhile entered into possession. Deft. required pltf. to put the court into good order at once; but pltf. was only prepared to give an undertaking to do this at the end of the term. Deft. refused to accept this & thereupon vacated the premises, having been in possession about three months. In an action for specific performance pltf. contended that deft. by entering into possession with full knowledge that the covenant had not been observed had waived his right to object to the title:—*Held*: (1) deft. by entering into possession had not waived his right to require the court to be put in good repair; (2) pltf. had ample time to put the court in order before deft. vacated; (3) even if pltf. now put the court in good repair, he would not be entitled at this late stage to an order for specific performance.—RELLIE v. PYKE, [1936] 1 All E. R. 345.]

CO., LTD. v. FETTES, [1932] 1 W. W. R. 195; [1933] 1 D. L. R. 66.—CAN.

over.—McCROHAN v. EDWARDS (Alta.) [1927] 1 D. L. R. 490; [1927] 1 W. W. R. 9.—CAN.

lessor, but the assignment is equitable & not legal, although the equitable assignee has entered into possession, no action lies against him for rent, nor for use & occupation.—THORNTON v. THOMPSON, [1930] S. A. S. R. 310.—AUS.

*h. ii. ———.* Renewal of lease.—DELCO APPLIANCE CORPN. v. SELBY, [1934] S. C. R. 684; 4 D. L. R. 276.—CAN.

**PART XXI. SECT. 10, SUB-SECT. 1.—B.**

**5463 i. ———.** Express covenant by lessee for payment.—Where a lease contains an express covenant to pay rent, the lessee continues liable on his covenant, although the lease is assigned

**PART XXI. SECT. 10, SUB-SECT. 3.—B. (b).**

*h. i. ———.* Position of equitable assignee.—Where a lease is assigned by a lessee with the consent of the



## Part XXII.—Assignment and Devolution of Reversion.

5698. *Add. Annotation*:—*Refd.* Grant v. Edmondson, [1931] 1 Ch. 1.  
 5701. *Add. Annotations*:—*Refd.* Rye v. Purcell, [1926] 1 K. B. 446; *Snowdon v. Ecclesiastical Comrs. for England*, [1935] Ch. 181.  
 5714. *Add. Annotation*:—*Consd.* Rye v. Purcell, [1926] 1 K. B. 446.  
 5722. *Add. Annotation*:—*Refd.* Snowdon v. Ecclesiastical Comrs. for England, [1935] Ch. 181.  
 5725. *Add. Annotation*:—*Refd.* Booth v. Thomas, [1926] Ch. 397.  
 5737. *Add. Annotation*:—*Apld.* Rye v. Purcell, [1926] 1 K. B. 446.

## Part XXIII.—Notice to Quit.

5776. *Add. Annotation*:—*Consd.* Woolwich Equitable Building Society v. Preston, [1938] Ch. 129.  
 5776a. — *Agreement for lease for term certain.*—Where a tenant entered under an agreement for a lease for seven years, which was never executed:—*Held*: he was not entitled to notice to quit at the end of the seven years.—*DOE d. TILT v. STRATTON* (1828), 4 Bing. 446; 1 Moo. & P. 183; 6 L. J. O. S. C. P. 50; 130 E. R. 839.  
 5788a. — *DOE d. AUSTIN v. COWDEROY* (1837), 1 Jur. 793.  
 5795. *Add. Annotation*:—*Refd.* Wilchick v. Marks & Silverstone, [1934] 2 K. B. 56.  
 5796. *Add. Annotations*:—*Refd.* Roe v. Russell, [1928] 2 K. B. 117; *Skinner v. Geary* (1931), 47 T. L. R. 597.  
 5803. *Add. Annotation*:—*Refd.* Canadian Pacific Ry. Co. v. R., [1931] A. C. 414.  
 5833. *After this case add*:—*“— — — — — See, now, Law of Property Act, 1925 (c. 20), s. 61.”*  
 5835. *Add. Annotation*:—*Refd.* Walton Harvey, Ltd. v. Walker & Homfrays, Ltd., [1931] 1 Ch. 274.  
 5840. *Add. Annotation*:—*Distd. & N.F.* Newman v. Slade, [1926] 2 K. B. 328.  
 5841. *Add. Citations*:—95 L. J. K. B. 894; 135 L. T. 640; 42 T. L. R. 607.  
 5866. *Add. Annotation*:—*As to* (2) *Apld.* Newman v. Slade, [1926] 2 K. B. 328.

### PART XXIII. SECT. 1, SUB-SECT. 3.

*sm. Lease subject to landlord's right to sell—Whether term determined by sale.*—A lease reserved to the landlord “the right to sell the land at any time, but the lessee shall have the right to reap any crop he has sown.”—*Held*: this clause did not sufficiently provide that on a sale the term would be determined *ipso facto*; but, at the most, only reserved the right to sell & to determine the term, & unequivocal notice of determination had to be given.—*ERNEWEIN v. WELCH*, [1928] 2 W. W. R. 265; 22 Sask. L. R. 522.—CAN.

### PART XXIII. SECT. 2, SUB-SECT. 1.

*so. Must be reasonable—Not necessarily determining lease at end of year of tenancy.*—In the case of a lease not governed by Transfer of Property Act, 1882, s. 106, the notice to quit need not necessarily determine the lease at the end of the year of the tenancy, but it must be reasonable. It is, however, for the final ct. of fact, in each case, to determine what is reasonable notice.—*DAMODAR PRASAD TEWARI v. LACHEMI PRASAD SINGH* (1928), 1 L. R. 7 Pat. 496.—IND.

*sp. Lease for five years—Terminable on “— month's notice”—Two months given.*—A lease of land for five years contained a provision that the tenancy might be determined at the end of any year by either of the parties giving to the other at least “— month's notice” in writing of his intention to determine at the end of the then current year.—*Held*: two months' notice terminated the tenancy.—*Re JOHNSTON & LITTLE*, [1931] 4 D. L. R. 327; O. R. 711.—CAN.

### PART XXIII. SECT. 2, SUB-SECT. 3.—A.

5817 H. — *—*.—In the case of a rural tenancy from year to year a

year's notice to quit is not necessary, a reasonable notice only being required. Notice given in Jan. to quit at the end of the following June is reasonable.—*TSHABALALA v. VAN DER MERWE* (1926), 47 N. L. R. 75.—S. AF.

5819 III. — *—*.—Where a tenancy from year to year is created by express agreement, & there is no special stipulation providing for its termination, or where such a tenancy is implied by law, a notice to quit in order to be sufficient must be a half-year's notice expiring at the end of the first or some other year of tenancy.—*WALKER v. ORAM* (Alta.), [1929] 3 D. L. R. 734; 1 W. W. R. 876.—CAN.

### PART XXIII. SECT. 2, SUB-SECT. 3.—D.

5837 IV. — *Where tenant held over after termination of tenancy.*—A weekly tenant, who, after the termination of his tenancy, holds over with the consent of his landlord, without any agreement other than that implied by law from the continuance in possession & acceptance of a weekly rent, continues to hold as a weekly tenant & is not entitled to one month's notice under Conveyancing Act, 1910, s. 127, for the determination of such tenancy.—*BURNHAM v. CARROLL MURGROVE THEATRES, LTD. & VICTORIA ARCADE, LTD.* (1927), 28 S. R. N. S. W. 169; 45 N. S. W. N. 23; *affd.*, 41 C. L. R. 640.—AUS.

5837 v. — *Week's rent payable in advance in arrear.*—Where in a weekly tenancy of a dwelling-house, there being no finding as to the area of the premises, it appeared that the rent was payable weekly in advance, & that, at the date of the service of notice to quit, a week's rent in advance was owing:—*Held*: the tenant was not entitled to the statutory notice of at least 28 days prescribed by Fair Rents Act of 1920, s. 14, in the case of a lessee who duly pays the rent of the

dwelling-house leased by him & otherwise performs the conditions of his lease.—*INNES v. ARUNDELL, Ex p. ARUNDELL* (1928), 22 Q. J. P. 83.—AUS.

5840 I. *What amounts to week's notice.*—In order that a weekly tenancy may be determined by a notice to quit, the notice must be one which expires at the end of a periodic week from the commencement of the tenancy.—*How v. MANSFIELD*, [1923] N. Z. L. R. 91.—N. Z.

5842 VII. — *—*.—*HART v. NADBAU, Hart v. HANSON* (Alta.), [1927] 2 W. W. R. 318.—CAN.

5842 VIII. — *—*.—In the case of a monthly tenancy neither party, in the absence of an express agreement, can determine the tenancy except by a month's notice expiring at the end of a periodic month from the commencement of the tenancy, i.e. the time set out in the notice must be co-terminous with the last day of the monthly period.—*JOHNSON v. SOLWAY*, [1933] 2 W. W. R. 75.—CAN.

### PART XXIII. SECT. 4, SUB-SECT. I.

5869 I. — *Weekly tenancy.*—In order that a weekly tenancy may be determined by a notice to quit, the notice need not be one which expires at the end of a periodic week from the commencement of the tenancy.—*MORRANE v. ALL RED CARRYING CO. PTY., LTD.*, [1935] V. L. R. 341; 41 Argus L. R. 436.—AUS.

### PART XXIII. SECT. 5, SUB-SECT. 1.—A.

*st. Whether demand for possession may be included.*—A notice of determination of a lease & a demand for possession may be contained in the same document.—*ERNEWEIN v. WELCH* (1928), 4 D. L. R. 498; [1928] 2 W. W. R. 628.—CAN.

5924a.

Effect of tenant staying on.]

—A party occupied premises, under an agreement for three years, at £45 a year, which expired at Midsummer, 1826; he did not then go out, nor did his landlord take any steps to compel him, but at the Michaelmas following, gave him notice to quit at Ladyday, 1827, or pay the rent of £50 a year. He continued in, but refused to pay more than the £45 rent:—*Held*: under the circumstances, he must be taken to have acquiesced with the new proposal, & was bound to pay the rent of £50.—*ROBERTS v. HAYWARD* (1828), 3 C. & P. 432.

5926. *Add. Annotation*:—*Apld.* *Wheeler v. Wirral Estates, Ltd.*, [1935] 1 K. B. 294.

5927. *Add. Annotation*:—*Apld.* *Wheeler v. Wirral Estates, Ltd.*, [1935] 1 K. B. 294.

5956. *Add. Annotation*:—*Refd.* *Fordree v. Barrell* (1931), 95 J. P. 141.

5958. *Add. Annotation*:—*Refd.* *Smith v. Kinsey*, [1936] 3 All E. R. 73.

5979. *Add. Annotation*:—*Consd.* *Smith v. Kinsey*, [1936] 3 All E. R. 73.

After this case add:—

"*See, now*, Law of Property Act, 1925 (c. 20), s. 140 (1), (2); Law of Property (Amendment) Act, 1926 (c. 11), s. 2."

5979a. —.]—Upon a sale of five cottages & the gardens attached, the five cottages & four of the gardens were sold together, but the remaining garden was sold separately to pltf. The cottage & garden had been let together to deft. In due course pltf. gave notice to quit & possession not being given, he sued for possession. It was contended that the reversion having been severed it was necessary for the purchaser of the cottage to concur in the notice to quit:—*Held*: pltf. was entitled to possession although the reversion had been severed, & the effect of the Law of Property Act, 1925 (c. 20), s. 140, was to overrule *Re Bebington's Tenancy, Bebington v. Wildman*, No. 5979.—*SMITH v. KINSEY*, [1936] 3 All E. R. 73; 53 T. L. R. 45; 80 Sol. Jo. 853, C. A.

5980. *Add. Citation*:—95 L. J. Ch. 49.

5996. *Add. Annotation*:—*Refd.* *Taylor v. Twinberrow*, [1930] 2 K. B. 16.

6065. *Add. Annotation*:—*Refd.* *Wilkins v. Carlton Shoe Co.* (1930), 94 J. P. 207.

## Part XXIV.—Determination of Term.

6111. *Add. Annotation*:—*Expld. & Dlst.* *Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.*, [1931] 1 Ch. 274.

6113. *Add. Annotation*:—*Refd.* *Re Airedale Garage Co., Anglo-South American Bank, Ltd. v. Airedale Garage Co.* (1932), 101 L. J. Ch. 289.

6144. *Add. Annotations*:—*As to* (1) *Dlst.* *Turner v. Watts* (1928), 138 L. T. 680. *As to* (2) *Consd.* *Turner v. Watts* (1927), 44 T. L. R. 105.

6165a. *Plea of possession under lease granted by plaintiff's predecessor.*—A tenant for life by deed granted a lease of certain premises to defts. to take effect more than twelve months

after its date. The grantor died, & her successor sued for possession of the premises. Defts. pleaded possession under R. S. C., Ord. XXI., r. 21, but were allowed to amend their defence so as to rely on the lease granted to them by pltf.'s predecessor & claim protection under Law of Property Act, 1925 (c. 20), s. 152 (1):—*Held*: (1) the plea of possession denied pltf.'s title, & therefore that was a forfeiture which entitled her to re-enter; (2) assuming there has been no forfeiture, it was for defts. to show that the lease granted to them was valid & within the power of the then tenant for life to grant.

### PART XXIII. SECT. 5, SUB-SECT. 1.—B.

5945 ii. *S. P. SANDISON v. ORDER OF ELKS* (Alta.), [1927] 2 D. L. R. 1024.—CAN.

### PART XXIII. SECT. 5, SUB-SECT. 1.—F.

*sg. Notice in case of sale by lessor—Sufficiency.*—A lease provided that if the lessor proposed to effect a sale of the premises he should first offer to sell the same to the lessee at the same price & on the same terms as he was willing to sell to any other purchaser. The next previous paragraph provided that in event of the lessor effecting a sale he should give the lessee a forty-five days' notice of termination of the lease. The lessor secured a purchaser & tentatively arranged for a sale. He therefore gave the lessee a forty-five days' notice of termination of the lease & by the same notice also offered to sell the premises at the same price & on the same terms "as he is willing to sell to another to whom he will sell in the event of your failing to within fifteen days from this date, inform him by writing of your being then ready & willing to purchase at the price & on the terms hereinafter contained." Then followed the complete terms on which he proposed to sell to

another. The lessee refused to quit & the lessor took possession after the lapse of the forty-five days:—*Held*: the notice was sufficient & the lessee's claim for damages failed.—*BRISCO v. HEIDE*, [1935] 2 W. W. R. 429; 2 D. L. R. 407, 50 B. C. R. 161.—CAN.

### PART XXIII. SECT. 6, SUB-SECT. 1.—A.

1 i. *Lessor after agreement to sell leased land.*—The fact that a landlord had agreed to sell the leased land to a third party did not render Landlord & Tenant Act, R. S. S. 1920, c. 160, inapplicable. He had the right under the terms of the lease to terminate it upon such a sale.—*ERNEWEIN & WELCH*, [1935] 4 D. L. R. 498; [1928] 2 W. W. R. 628.—CAN.

### PART XXIII. SECT. 6, SUB-SECT. 2.

5994 ii. —.]—In the case of joint tenants, each is intended to be bound, & it has long been decided that service of notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants.—*BODORDOJA v. AJJUDDIN SARKAR* (1929), 1 L. R. 57 Cal. 10.—IND.

### PART XXIV. SECT. 1, SUB-SECT. 2.—A. (b) i.

6100 vi. —.]—A lessor who has

demised his whole interest subject to a right of re-entry on breach of a condition may enter on the condition being broken.—*PUBLIC OIL & GAS, LTD. v. HINDS*, [1937] 2 W. W. R. 372; 3 D. L. R. 434.—CAN.

### PART XXIV. SECT. 1, SUB-SECT. 2.—A. (b) ii.

sa. *Express right of non-payment for five days—Terms of lease misunderstood by lessee.*—Upon an application for ejectment, the lessees set up the answer that they had mistaken the terms of the lease & were under the impression that the terms were similar to those of a previous lease, which gave them seven days' grace to pay the arrear rent:—*Held*: as the provision in the lease giving only five days' grace was clear & unambiguous, the answer was no defence.—*ILLING v. MANNE & MANNE* (1925), 46 N. L. R. 58.—S. AF.

### PART XXIV. SECT. 1, SUB-SECT. 2.—A. (d) i.

1 ii. —.]—The English rule as to forfeiture for denial of landlord's title by matter *in pais* does not apply in India.—*RACHOTAPPA ISHWARAPPA v. KONER ANNARAO* (1934), 1 L. R. 69 Bom. 194.—IND.

This they had failed to do, & pltf. was therefore entitled to the relief claimed.—*KISCH v. HAWES BROS., LTD.*, [1935] Ch. 102; 104 L. J. Ch. 86; 152 L. T. 235.

6192. *Add. Annotation*:—*Consd. Richmond v. Savill*, [1926] 2 K. B. 530.

6195. *Add. Annotation*:—*As to* (2) *Refd. Jardine v. A.-G. for Newfoundland* (1932), 48 T. L. R. 199.

6228. *Add. Annotation*:—*Refd. Cohen v. Donegal Tweed Co.* (1935), 79 Sol. Jo. 592.

6231. *Add. Annotation*:—*Consd. Richmond v. Savill*, [1926] 2 K. B. 530.

6235. *Add. Annotation*:—*Refd. Fairclough & Sons, Ltd. v. Berliner*, [1931] 1 Ch. 60.

6238. *Add. Annotation*:—*Refd. Cohen v. Donegal Tweed Co.* (1935), 79 Sol. Jo. 592; *Woolwich Equitable Building Society v. Preston*, [1938] Ch. 129.

6242. *Add. Annotations*:—*As to* (2) *Refd. Cohen v. Donegal Tweed Co.* (1935), 79 Sol. Jo. 592. *Generally, Refd. Gee v. Harwood*, [1933] Ch. 712.

6307a. *Agreement by tenant to pay arrears of rent & give up possession.*—The rent of premises being in arrear, the landlord obtained judgment against the tenant for possession of the premises. Subsequently a document was signed by the tenant, which provided that, if the landlord would withhold the writ of possession, the tenant would pay the rent & give up possession of the premises at the end of the quarter:—*Held*: the document was not inconsistent with the tenant's right to obtain relief against forfeiture under Jud. (Consolidation) Act, 1925 (c. 49), s. 46.—*NANCE v. NAYLOR*, [1928] 1 K. B. 263; 97 L. J. K. B. 39; 138 L. T. 165; 44 T. L. R. 11, C. A.

6308a. *Other breaches of covenant.*—Relief against a forfeiture under a covenant for re-entry for non-payment of rent not granted where the recovery in ejectment was also upon breach of other covenants.—*WADMAN v. CALCRAFT* (1804), 10 Ves. 67; 32 E. R. 708.

#### PART XXIV. SECT. 1, SUB-SECT. 3.

sb. *Power given to lessor to cancel lease—On breach of covenant to pay rent—After giving notice to tenant—Sufficiency of notice.*—A wharfside site in the B. Harbour, E. London, had been leased to applt. by the Union of S. Africa, who was the owner of the site, & an action for ejectment had been brought by the S. African Rys. & Harbours. Clause 2 of the lease of the site provided that "should the lessees fail to pay the said rental on the day on which the same shall fall due, the administration, after posting written notice to the lessee's address, & receiving no payment within a further period of fourteen days, shall have the right to cancel this lease. The rent being in arrear the administration purported to give the notice required by clause 2 of the lease & thereafter to cancel the lease:—*Held*: a written notice to the effect that the rent was in arrear & calling upon the lessee to pay the same within 14 days from date was a sufficient compliance with the clause.—*WINTER v. S. AFRICAN RYS. & HARBOURS*, [1929] App. D. 100.—S. AF.

#### PART XXIV. SECT. 1, SUB-SECT. 4.—B. (b) 1.

6221 1. *Re-letting—To new tenant.*—

When following notice of forfeiture of pltf.'s lease the lessor executed a lease of the same premises to another lessee:—*Held*: there had been an effectual re-entry.—*WINTER v. CAPILANO TIMBER CO.*, [1927] 4 D. L. R. 36; *varying*, [1927] 2 D. L. R. 784; [1927] 1 W. W. R. 811; 38 B. C. R. 401.—CAN.

#### PART XXIV. SECT. 1, SUB-SECT. 4.—C. (a) 1.

6308 xiv. —.—*GORDON v. WILHELM* (Sask.), [1926] 4 D. L. R. 1042; [1926] 3 W. W. R. 641.—CAN.

6317 iii. —.—*In Saskatchewan*, where a lessor has actually re-entered for non-payment of rent, although the re-entry has been without process of law, the ct. cannot grant relief against forfeiture of the lease.—*RAMSAY v. HILDRED*, [1930] 2 W. W. R. 692; 4 D. L. R. 494.—CAN.

xx. *Effect of breach of other covenant.*—Forfeiture for mere non-payment of rent on its due date has always been looked upon as a thing against which a ct. of equity should afford relief. With respect to an alleged breach of a covenant by the tenant to insure, held that, in view of the conduct of the parties in relation to the covenant

6308b. —.—*Upon the marriage of A., the grandson of W., from whom A. had large expectations, certain property, amongst other things a house & lands, was settled upon A., & it was agreed that W., the grandfather, should occupy the house & lands, & also some glebe lands belonging to A. There was some evidence as to the rent that was to be paid, which was about the actual value. A. never enforced the rent during the eight years of his grandfather's occupancy, which ceased with his death, but had received various sums in money & goods equal to about half the alleged rent. The Vice-Chancellor allowed an exception to the Master's report allowing the rent as alleged. But the Lord Chancellor reversed the decision of the Vice-Chancellor, coming to the conclusion that there was either an express contract to pay the alleged rent, or an agreement to occupy as any other tenant, & pay quantum meruit; the sums & goods paid to go towards the rent.*—*ALINGTON v. BOOTH* (1856), 3 Jur. (N. S.) 50.

6315a. *On payment of rent—How rent calculated.*—*DOE d. HARCOURT v. ROE* (1813), 4 Taunt. 883; 128 E. R. 579.

(a) *Notice of Breach.*

(Vol. XXXI., p. 483.)

*See Landlord & Tenant Act, 1927* (c. 36), s. 18 (2), (3).

6326. *Add. Annotation*:—*Refd. Cohen v. Donegal Tweed Co.* (1935), 79 Sol. Jo. 343.

6329a. *Breach incapable of remedy—Covenant relating to user.*—*RUGBY SCHOOL v. TANNAHILL*, No. 6333a, *post*.

6332. *Add. Annotations*:—*As to* (1) *Folld. Rugby School (Governors) v. Tannahill*, [1935] 1 K. B. 87. *Consd. Druce & Co. v. Beaumont Property Trust, Ltd.*, [1935] 2 K. B. 257.

6333a. —.—*Proviso for re-entry on breach of covenant relating to user.*—*Deft. lessee committed a breach of her covenant not to use the premises for illegal or immoral purposes.*

during the thirteen years which had elapsed since the making of the lease, the lessors should not be allowed to invoke the breach as a ground for refusing the lessees relief from forfeiture for non-payment of rent; although some condition as to the insurance might be made a term upon which such relief should be granted.—*GODSON & RAY v. PANTAGES*, [1930] 3 W. W. R. 401; [1931] 1 D. L. R. 429; 43 B. C. R. 241.—CAN.

#### PART XXIV. SECT. 1, SUB-SECT. 4.—D. (a) 1.

6322 viii. —.—*Where a grant of land to the congregation of S. provided that if the congregation should become united with any other congregation or to exist as a separate & independent congregation, the grant should become absolutely null & void, & a power of re-entry was reserved to the grantor, & the grantor served a notice demanding possession on the ground that the grant had become null & void by reason of the union of the congregations of C. & S.:—*Held*: a sufficient notice was a condition precedent to enforcing the forfeiture, & the notice given was not sufficient.*—*WALSH v. WIGHTMAN*, [1927] N. I. 1.—IR.

Notice to quit served on her in consequence did not require her to remedy the breach nor to make compensation in money under Law of Property Act, 1925 (c. 20), s. 146 (1) (b), (c):—*Held*: (1) the breach was not remedied by ceasing to commit the breach; (2) the breach was not capable of remedy; & consequently, the omission in the notice to require it to be remedied did not invalidate the notice; (3) the notice was not invalidated by the omission to require payment of compensation in money although the breach was incapable of remedy, because if the landlords did not require compensation they need not ask for it.—*RUGBY SCHOOL v. TANNAHILL*, [1935] 1 K. B. 87; 104 L. J. K. B. 159; 152 L. T. 198; 51 T. L. R. 84; 78 Sol. Jo. 801, C. A.

*Annotation*:—*As to* (2) & (3) *Consd.* *Druce & Co. v. Beaumont Property Trust, Ltd.*, [1935] 2 K. B. 257.

**6334.** *Add. Annotation*:—*As to* (1) *Consd.* *Rugby School (Governors) v. Tannahill*, [1935] 1 K. B. 87.

**6338.** *Add. Annotations*:—*Consd.* *Rugby School (Governors) v. Tannahill*, [1935] 1 K. B. 87; *Blewett v. Blewett*, [1936] 2 All E. R. 188.

**6339.** *Add. Annotation*:—*Consd.* *Blewett v. Blewett*, [1936] 2 All E. R. 188.

**6341.** *Add. Annotation*:—*As to* (1) *Consd.* *Blewett v. Blewett*, [1936] 2 All E. R. 188.

**6342a.** *Notice requiring work not within covenant.*—In 1877 a lease of two cottages was granted to deft.'s father to take effect on the death of pltf.'s father. On the death of deft.'s father intestate in 1898, the lease vested in his wife & upon her death in 1915 it vested by her will in the five children. Pltf.'s father died in 1926. By a family arrangement, deft. was allowed to live rent free in one of the cottages on condition that he kept both cottages in repair. In 1934 pltf. served a notice upon deft.'s brother, who was one of the lessees & who managed the family affairs, requiring him to do certain repairs under a covenant in the lease. No repairs were done & pltf. brought an action for possession. The county ct. judge found that some of the work required to be done was not repair work within the covenant & that other work was of a more expensive character than the covenant required, & he held that the notice was therefore not a good notice within Law of Property Act, 1925 (c. 20), s. 146, & he gave judgment for deft. Pltf. appealed:—*Held*: (1) the notice was not bad merely because it included work which pltf. was not entitled to require to be done under the lease; (2) the notice was bad because it was not served on all the lessees & the appeal ought to be dismissed.

*Semble*: the lease vested in the Public Trustee by virtue of Law of Property Act, 1925 (c. 20), Sched. I., Part IV., para. 1 (4), & notice ought to have been served on the

Public Trustee.—*BLEWETT v. BLEWETT*, [1936] 2 All E. R. 188, C. A.

**6352a.** *On person on premises.*—Where a notice addressed to the lessee is left with a person on the premises, & there are reasonable grounds for supposing that that person will pass it on to the lessee, the service is good within Law of Property Act, 1925 (c. 20), s. 196 (3).—*CANNON BREWERY CO., LTD. v. SIGNAL PRESS, LTD.* (1928), 139 L. T. 384; 44 T. L. R. 486; 72 Sol. Jo. 285.

**6353a.** *Leaseholds held in undivided shares—Whether service on all lessees necessary.*—*BLEWETT v. BLEWETT*, No. 6342a, *ante*.

**6353b.** *Whether service on Public Trustee necessary.*—*BLEWETT v. BLEWETT*, No. 6342a, *ante*.

**6356.** *Add. Annotations*:—*Refd.* *Field v. Curnick*, [1926] 2 K. B. 374; *Marsden v. Heyes*, [1927] 2 K. B. 1.

**6358.** *Add. Annotations*:—*Apld.* *Sedgwick, Collins v. Rossia Insee. of Petrograd* (1926), 136 L. T. 72. *Refd.* *Employers' Liability Assee. Corp'n. v. Sedgwick, Collins*, [1927] A. C. 95.

**6361a.** *Joint tenants—Application by one.*—Where joint lessees hold under a lease, no one of them alone is "the lessee" within Law of Property Act, 1925 (c. 20), s. 146 (2). The co., as lessor, after serving a schedule of dilapidations & two notices on B. & L., who were joint lessees, brought this action, by which they sought, against both defts., to recover possession of premises comprised in two leases. The leases contained full repairing covenants, which defts. had neglected to perform. Defts. originally appeared by the same solrs., & put in a defence signed by counsel on their behalf. But at the date of the hearing deft. L. appeared by another counsel instructed by another firm, while B. did not instruct solrs. but appeared in person. L. asked for relief against the forfeiture under sect. 146 (2); B. did not desire such relief, preferring to give up possession:—*Held*: relief against forfeiture, where there are joint lessees, cannot be granted on the application of only one of them.—*FAIRCLOUGH (T. M.) & SONS, LTD. v. BERLINER*, [1931] 1 Ch. 60; 100 L. J. Ch. 29; 144 L. T. 175; 74 Sol. Jo. 755, *sub nom.* *BERLINER v. FAIRCLOUGH (T. M.) & SONS, LTD.*, *FAIRCLOUGH (T. M.) & SONS, LTD. v. BERLINGER* (1930), 47 T. L. R. 4; 74 Sol. Jo. 703.

**6370a.** *Application to be made to vary covenant—Change in character of neighbourhood.*—*ANGELL v. BURN* (1933), 77 Sol. Jo. 337.

**6386.** *Add. Annotation*:—*Refd.* *The Edison* (No. 2), [1934] P. 115.

**6388.** *Add. Annotation*:—*Refd.* *Tredegar v. Harwood* (1928), 97 L. J. Ch. 392.

**6391.** *Add. Annotation*:—*As to* (2) *Refd.* *Re Griffiths, Jones v. Jenkins*, [1926] Ch. 1007.

**PART XXIV. SECT. 1, SUB-SECT. 4.—**  
D. (a) ii.

**63341.**  
*precise—Covenant to sell only goods authorised by lessor.*—*GORDON v. WILHELM (Sask.)*, [1926] 4 D. L. R. 1042; [1926] 3 W. W. R. 641.—*CAN.*

**PART XXIV. SECT. 1, SUB-SECT. 4.—**  
D. (b) ii.

*s. i. — Acceptance of rent by lessor's agent.*—Where at the time a lease was entered into the lessor's rental agents agreed with the lessee that she could sub-let & thereafter with knowledge of the sub-letting accepted rent derived

from the sub-tenants:—*Held*: the lessee was entitled on general equitable principles, apart from the Law of Declaratory Act, to be granted relief from forfeiture because of the breach of a covenant in the lease not to sub-let without leave.—*MATTERN v. WELCH*, [1930] 1 W. W. R. 398; 2 D. L. R. 231; 42 B. C. R. 111, C. A.—*CAN.*

6393. *Add Annotations*:—*Apld.* Chaplin v. Smith, [1926] 1 K. B. 198. *Consd.* Pincott v. Moorstons, Ltd., [1937] 1 All E. R. 513.

6399. *Add. Annotation*:—*Refd.* Gee v. Harwood, [1933] Ch. 712.

6399a. — *After making of winding-up order.*—By an underlease dated Sept. 10, 1928, *deft.* demised to *pltf.*, the B. Co., Ltd., certain lands & buildings at B., Lincs., known as B. S., for a period of fifty years, less one month, from Mar. 25, 1927. On May 22, 1930, a petition to wind up the co. was presented, & on June 2, 1930, a compulsory winding-up order was made. On the facts as found *deft.* was from then until Oct. 23, 1930, trying by means other than action to put an end to the underlease, & on Oct. 23, 1930, the liquidator commenced these proceedings asking for (a) a declaration that the underlease was still on foot; (b) (alternatively) relief against forfeiture; & (c) a declaration that *pltf.* co. was at liberty to assign the premises comprised in the underlease to *pltf.* G. without obtaining *deft.*'s consent:—*Held*: by LUXMOORE, J., (1) on the facts the underlease had not been determined before the winding-up order; (2) the underlease was not a lease of mines or minerals or of property with respect to which the personal qualifications of the tenant were of importance for the preservation of the value or character of the property so as to bring the case within Law of Property Act, 1925 (c. 20), s. 146 (9); (3) the co.'s interest in the underlease had not been sold within one year from the winding-up so as to bring the case within sect. 146 (10) (a); (4) as the proceedings for relief had been commenced within a year of the beginning of the winding-up it was within the discretion of the ct. to grant relief from forfeiture on such terms as it thought fit, having regard to sub-sects. 2, 10 (b) of the sect., although the proceedings for relief did not come on for hearing till after the year had expired, & relief was granted on terms. There was no appeal from LUXMOORE, J.'s decision on the second & third points:—*Held*: by the COURT OF APPEAL, affirming the decision of LUXMOORE, J., on these points, (1) there had been no re-entry for nonpayment of rent by *deft.* before the date of the winding-

up order; (4) the ct. had discretion under Law of Property Act, 1925 (c. 20), s. 146, to grant relief from forfeiture, as the case fell within sub-sect. 10 (b) of the sect., which on its true construction entitled the liquidator to apply for relief within a year of the winding-up, when the demised property had not been sold, & neither limited the relief given to that period nor made it necessary that the application should be heard within that period; & (5) relief had been granted on proper terms.—GEE v. HARWOOD, [1933] Ch. 712; 102 L. J. Ch. 257; 149 L. T. 128; 49 T. L. R. 322, C. A.; *affd.* as to (4), *sub nom.* PEARSON v. GEE & BRACEBOROUGH SPA, LTD., [1934] A. C. 272; 103 L. J. Ch. 151; 151 L. T. 21; 50 T. L. R. 324, H. L.

6399b. — — Application for relief within one year of winding up.—GEE v. HARWOOD, No. 6399a, *ante*.

6399c. — — Lease of mines & minerals—What amounts to.—GEE v. HARWOOD, No. 6399a, *ante*.

6399d. — — Lease of property with respect to which personal qualifications of tenant are material—What amounts to.—GEE v. HARWOOD, No. 6399a, *ante*.

6415. *Add. Annotation*:—*Refd.* Cunningham v. Shackleton (1935), 79 Sol. Jo. 381.

6419. *Add. Annotation*:—*As to* (2) *Refd.* Cohen v. Donegal Tweed Co. (1935), 79 Sol. Jo. 343.

6426. *Add. Annotation*:—*Refd.* Barton v. Reed, [1932] 1 Ch. 362.

6450. Add the following para.:—  
“Nor is it waived by the acceptance of rent accruing due before the expiration of the three months.”

6528. *Add. Annotation*:—*As to* (1) & (2) *Refd.* Barratt v. Richardson & Cresswell, [1930] 1 K. B. 686.

6530. *Add. Annotation*:—*Refd.* Jardine v. A.-G. for Newfoundland (1932), 48 T. L. R. 199.

6534. *Add. Annotations*:—*As to* (2) *Consd.* Rugby School (Governors) v. Tannahill, [1935] 1 K. B. 87. *Refd.* Gee v. Harwood (1932), 48 T. L. R. 606.

6537. *Add. Annotation*:—*Refd.* Cohen v. Donegal Tweed Co. (1935), 79 Sol. Jo. 592.

6558. *Add. Annotation*:—*Consd.* Turner v. Watts (1928), 97 L. J. K. B. 403.

PART XXIV. SECT. 1, SUB-SECT. 4. —  
D. (e).

6396 i. *Breaches excluded from relief—Re-entry on bankruptcy—Lease of licensed house & other premises.*—*Held*: a lease of a licensed house & premises, with the out-offices, yard & garden & two small dwelling-houses at the rear was a lease of “a house used or intended to be used as a public-house or a beer-shop” within Conveyancing Act, 1892, s. 2 (3) (c), as the inclusion of the two small dwelling-houses in the lease did not exclude it from the sub-section.—*Re* DREW, [1929] 1 R. 504.—*IR*.

*eg.* Lease of agricultural land—What amounts to.—R. F. & Co., *appts.*, lessees of thirty-seven acres & a half of land in Antrim, on which a factory & certain other buildings were erected, went into liquidation, & thereby incurred a forfeiture for breach of covenant in the lease. The liquidator, in order to obtain relief against the forfeiture under Conveyancing Act,

1891 (c. 41), s. 14 (1), (2), (6) & Conveyancing Act, 1892 (c. 13), s. 2 (2), (3) (a), entered into a conditional contract for sale within one year from the date of the liquidation. In an action by R. F. & Co. claiming that *deft.* was not entitled to enforce a right of forfeiture:—*Held*: (1) notwithstanding the demise of the factory & machinery, the lease was a lease of agricultural land within Conveyancing Act, 1892 (c. 13), s. 2 (2), & accordingly the sub-sect. did not apply to the lease; (2) a sale within Conveyancing Act, 1892 (c. 13), s. 2 (3) (a), must either be completed by conveyance or be an absolute contract for sale.—FERGUSON & CO. v. FERGUSON, [1924] 1 I. R. 22.—*IR*.

PART XXIV. SECT. 1, SUB-SECT. 5. —  
A. (a).

6436 iii. — *Covenant by landlord to supply goods—Landlord offering to supply goods after serving notice of breach of covenant—No waiver.*—*Re* JACKSON (J. B.), LTD. & GETTAS, [1926] 2 D. L. R. 721; 58 O. L. R. 564.—*CAN.*

PART XXIV. SECT. 1, SUB-SECT. 5. —  
A. (b) i.

6455 xx. — —.—GRIFFIN v. BEATTIE (N. S.), [1929] 4 D. L. R. 698.—*CAN.*

PART XXIV. SECT. 1, SUB-SECT. 5. —  
A. (d).

6511 iii. — —.—A landlord cannot, during the currency of the lease, re-enter for non-payment of rent for which he has distrained on goods still held by him under the distress.—BLACK v. STEBENCKI, [1930] 2 W. W. R. 556; 4 D. L. R. 715; 39 Man. L. R. 123.—*CAN.*

6517 i. *Where insufficient distress on premises.*—In an action to recover possession of premises under a lease providing for forfeiture for non-payment of rent:—*Held*: the lessor must prove that he has distrained, & that no sufficient distress was to be found on the premises countervailing the rent; & an insufficient distress is not a waiver of the right of re-entry.—HARVEY v. JOHNSTON (1901), 8 Nfld. L. R. 494.—*NFLD.*

**6573. Add. Annotations:—***Apld. Turner v. Watts* (1927), 44 T. L. R. 105. *Refd. Turner v. Watts* (1928), 138 L. T. 680.

**6595. Add. Annotation:—***Refd. Re Katherine et cie, Ltd.*, [1932] 1 Ch. 70.

**6596. Add. Annotations:—***Refd. Re Bruce, Brudenell v. Brudenell*, [1932] 1 Ch. 316; *Wirral Estates, Ltd. v. Shaw* (1932), 96 J. P. 143.

**6606a. ———.]—**Any arrangement between the landlord & tenant which operates as a fresh demise will work a surrender of the old tenancy, & this may result from an agreement under which the tenant gives up part of the premises & pays a diminished rent for the remainder; & I would add that it may result from the mere alteration in the amount of rent payable (MAUGHAM, J.).—*Re SAVILE SETTLED ESTATES, SAVILE v. SAVILE*, [1931] 2 Ch. 210; 100 L. J. Ch. 274; 145 L. T. 17.

*Annotation:—**Refd. Re Bruce, Brudenell v. Brudenell*, [1932] Ch. 316.

**6623. Add. Annotation:—***Refd. Re Savile Settled Estates, Savile v. Savile*, [1931] 2 Ch. 210.

**6628a. ———.]—***Re SAVILE SETTLED ESTATES, SAVILE v. SAVILE*, No. 6606a, *ante*.

**6636a. Substitution of licence or tenancy at will under purchase agreement—Rescission of agreement.]—**By an agreement in writing dated Aug. 28, 1926, deft., the weekly tenant of a house to which Rent Restriction Acts applied, agreed to buy it from pltf., the landlord, for £900. The agreement provided that deft. acknowledged owing pltf. £63 10s. arrears of rent, & that pltf. would accept £50 in settlement; that, until certain mtges. had been transferred from pltf. to deft., pltf. should remain in absolute ownership of the premises; & that, until completion of the conveyance, deft., who was to remain in possession, should pay to pltf. interest on the £950 at the rate of 6 per cent. with interest on interest dating from Sept. 1, 1926. Deft. also agreed to pay certain deposits, pltf., on failure of such payments, to be entitled to rescind the agreement & enter into possession of the house. Deft. agreed to maintain the house in a good state of repair & to pay rates, taxes, & insurance. On Feb. 27, 1927, pltf. rescinded the agreement under the powers reserved in it, but deft. refused to give him possession of the house:—*Held*: (1) the effect of the agreement, as indicating

the intention of the parties, was to determine the weekly tenancy, & to substitute for it either a licence or a tenancy at will, which, in its turn, was revoked or determined by the rescission of the purchase agreement, & deft. had no contractual right to resist the claim for possession; (2) deft. was not protected by Rent Restriction Acts, because after Aug. 28, 1926, deft. remained in possession of the house by virtue of the contract of purchase, & not as a statutory tenant, & under that contract she was either a licensee or a tenant at will, & after its rescission, if she had been a licensee, she was not a tenant who had held over under the Acts, & if she had been a tenant at will, her tenancy had been at no rent, & by Increase of Rent & Mtge. Interest (Restrictions) Act, 1920 (c. 17), s. 12 (7), it must be ignored, with the result that the house was to be treated as untenanted & pltf. had an unrestricted right to recover possession of it; (3) the rescission of the purchase agreement did not deprive pltf. of his right to the arrears of rent which had accrued due to him before the agreement was made, but it did destroy deft.'s right to enforce the agreement with pltf. to accept a less sum than that which was in fact owing.—*TURNER v. WATTS* (1927), 97 L. J. K. B. 92; 44 T. L. R. 105; 26 L. G. R. 78, D. C. *Afd.* (1928), 97 L. J. K. B. 403; 138 L. T. 680; 92 J. P. 113; 44 T. L. R. 337; 26 L. G. R. 261, C. A.

**6656. Add. Annotation:—***Refd. Metcalfe v. Boyce*, [1927] 1 K. B. 758.

**6674a. ———.]—**In 1910, deft., a county police constable, became quarterly tenant of a house. In 1912 the county police authority, which had till then made a grant in aid of the rent of houses occupied by police constables, decided that for the future the chief constable should be the tenant of those houses, that the constables should occupy them as servants, that the chief constable should pay all rent, rates & taxes, & that a deduction should be made in respect thereof from the men's pay. Deft. knew of, & made no demur to, this arrangement, but no express notice to determine his tenancy was given. From 1912 onwards the demands for rent were sent to deft., addressed to the county authority. These deft. took to

**PART XXIV. SECT. 2, SUB-SECT. 2.—**  
A. (a).

**6573 i. Form of words.]—**Pltf., the owner of a building of which defts. as sublessees, occupied a part, sought by this action to eject them. Defts. claimed the right to remain, having accepted, as they alleged, an option for a continuance of their tenancy, provided for in their sublease. Before pltf. became the owner of the building, R. & Co., the lessees of the whole building, whose subtenants defts. were, executed in favour of their landlords the then owners of the building, a document dated Sept. 17, 1927, which recited their lease & default in payment of rent & taxes, & witnessed that they, called in the document the "releasors," abandoned all their rights, privileges, & benefits under the lease & released & quitted claim unto the landlords, called the "releasees" all their right, title, & claim under the lease, upon the understanding & agreement that the releasees did not by or under the document or by any subse-

quent acts in taking possession of or dealing with the premises, assume any responsibility to the releasors or any one claiming under them in respect of the lease:—*Held*: this document was a surrender & not merely evidence of a forfeiture.—*GRAY v. CHAMANDY & SONS*, [1929] 2 D. L. R. 706; 63 O. L. R. 495.—*CAN.*

**PART XXIV. SECT. 2, SUB-SECT. 3.—**  
A.

**b i. ———.]—**The doctrine of surrender of a lease by operation of law is a branch of the law of estoppel, & it is a question in every case whether the acts of the lessor have been so inconsistent with the continuance of the lease, that he is estopped from asserting that the lease has continued. The surrender does not operate until the lessee elects, on being asked to pay the rent, to set up the estoppel.—*Re MARLOW ROLLS THEATRES, LTD., Ex p. EMPIRE THEATRES, LTD.*, [1934], 51 N. S. W. W. N. 193.—*AUS.*

*sb. Abandonment.]—*WONG FON

*HONG v. CHANSEY WONG FONG*, [1932] 1 W. W. R. 89; 1 D. L. R. 562; 45 B. C. R. 14.—*CAN.*

**PART XXIV. SECT. 2, SUB-SECT. 3.—**  
B. (b) i.

*sd. Agreement acted on by parties.]—*The renunciation of an existing lease by the tenant, & the grant of a new lease by the landlord, can be inferred from a written obligation on the part of the landlord to grant a new lease followed by actings of parties amounting to *rei interventus* & by possession on the part of the tenant, not only where the landlord is a fee-simple proprietor, but also where he is an heir of entail in possession; & a lease so constituted is binding upon succeeding heirs of entail.—*CAMPBELTOWN COAL CO. v. ARGYLL (DUKE)*, [1926] S. C. 126.—*SCOT.*

**PART XXIV. SECT. 2, SUB-SECT. 3.—**  
C. (b) i.

**k i. ———.]—***LE CAIN v. WIELAND* (1862), 4 R. & G. 71, n.—*CAN.*

the police office, received the full amount due, & paid it at the estate office of the landlord, being given a receipt acknowledging payment by the county authority, which receipt he sent to the county treasurer. No demands for rates & taxes were made to deft. This course of business continued for fourteen years, deft. continuing to occupy the house & his name remaining on the estate books as tenant. There was no written surrender or assignment of the tenancy:—*Held*: (1) there was evidence from which the inferences of fact could be drawn that in 1912 deft. agreed with the landlord that he would forthwith surrender his tenancy, that the landlord agreed with deft. to accept the surrender & accept the chief constable as his tenant, & that the deft. would in future occupy the house as a servant of the chief constable & not as a tenant, & on those facts there had been a surrender of the tenancy by operation of law; (2) deft. was in the circumstances estopped from denying that he had surrendered or assigned the tenancy.—*METCALFE v. BOYCE*, [1927] 1 K. B. 758; 96 L. J. K. B. 376; 136 L. T. 606; 91 J. P. 55; 43 T. L. R. 149, D. C.

6709. *Add. Annotation*:—*Refd.* Wirral Estates, Ltd. v. Shaw (1932), 96 J. P. 143.

6715. *Add. Annotation*:—*Consd.* Metcalfe v. Boyce, [1927] 1 K. B. 758.

6734. *Add. Annotation*:—*Refd.* *Re* Grosvenor Settled Estates, Westminster (Duke) v. McKenna, [1932] 1 Ch. 232.

6735. *Add. Annotation*:—*Distd.* Taylor v. Twinberrow, [1930] 2 K. B. 16.

6737. *Add. Annotation*:—*Refd.* Taylor v. Twinberrow, [1930] 2 K. B. 16.

6742. *Add. Annotation*:—*As to* (1) *Refd.* Canadian Pacific Ry. Co. v. R., [1931] A. C. 414.

6762. *Add. Annotations*:—*Consd.* Dalton v. Pickard (1911), [1926] 2 K. B. 545, n.; Richmond v. Savill, [1926] 2 K. B. 530.

6764. *Add. Annotation*:—*As to* (2) *Consd.* Richmond v. Savill, [1926] 2 K. B. 530.

6765a. ———.]—*ESPIR v. MILLWARD* (1929), 73 Sol. Jo. 158.

6766. *Add. Annotation*:—*Consd.* Richmond v. Savill, [1926] 2 K. B. 530.

6767. *Add. Citations*:—95 L. J. K. B. 1052, n.; 136 L. T. 21, n.

*Add. Annotation*:—*Consd.* Richmond v. Savill, [1926] 2 K. B. 530.

6768. *Add. Citations*:—95 L. J. K. B. 1042; 136 L. T. 15.

6772. *Add. Annotation*:—*Refd.* Symons v. Southern Ry. Co. (1935), 153 L. T. 98.

6774. *Add. Annotation*:—*Refd.* Symons v. Southern Ry. Co. (1935), 153 L. T. 98.

6790. *Add. Annotation*:—*Refd.* Symons v. Southern Ry. Co. (1935), 153 L. T. 98.

6799. *Add. Annotation*:—*Refd.* Symons v. Southern Ry. Co. (1935), 153 L. T. 98.

6837. *Add. Annotation*:—*Fold.* Simons v. Associated Furnishers, Ltd. (1930), 47 T. L. R. 118.

6838a. *Performance of covenants between giving notice & expiry of notice—Validity.*—By a lease dated Dec. 31, 1925, pltf. demised certain buildings to defts. for a term of years at a yearly rent. The lease contained covenants by defts. that they would at all times during the term keep & at the expiration or sooner determination of the lease yield up the demised premises in substantial repair. The lease contained a proviso that if defts. should desire to determine the lease at the expiration of the first five or ten years of the lease & should give to the lessor six calendar months' notice in writing of such desire, & should, up to the time of such determination, perform & observe the covenants on their part, then immediately on the expiration of such five or ten years, as the case might be, the demise & everything therein contained should cease & be void, but without prejudice to the remedies of either party against the other in respect of an antecedent breach of covenant. On Aug. 17, 1929, defts. served pltf. with a notice in writing to determine the lease on Feb. 28, 1930. Pltf., having refused to recognise the validity of the notice on the ground that at the date thereof breaches of the repairing covenants remained unremedied by defts., brought this action claiming a declaration that the lease was still subsisting & binding on defts.:—*Held*: (1) the condition to perform the covenants in the lease upon which defts. were empowered to determine the lease was a condition precedent; (2) as the breaches, although they were unremedied at the date of the notice, had been remedied by the time the notice expired, the condition was fulfilled, with the result that the lease had been effectually determined.—*SIMONS v. ASSOCIATED FURNISHERS, LTD.*, [1931] 1 Ch. 379; 100 L. J. Ch. 234; 144 L. T. 559; 47 T. L. R. 118; 75 Sol. Jo. 27.

6848. *Add. Annotations*:—*Consd.* *Re* Wells, Swinburne-Hanham v. Howard, [1933] Ch. 29. *Refd.* Morris v. Harris, [1927] A. C. 252; *Re* Katherine et cie, Ltd., [1932] 1 Ch. 70.

After this case add:—

———.]—*See, now*, Companies Act, 1929 (c. 23), s. 296.

## SECT. 11.—RIGHT OF TENANT TO COMPENSATION FOR IMPROVEMENTS AND GOODWILL.

*See* Part IX., Sect. 5, p. 47, ante.

### PART XXIV. SECT. 2, SUB-SECT. 3.—C. (b) ii.

6675 iv. ———.]—In an action for rent wherein the lessee set up the defence that the conduct of the parties had amounted to a surrender of the lease:—*Held*: the defence could not be sustained since the lessee had failed to show that the lessor had acted in a way which was absolutely incompatible with the continuance of the lease. The fact that the lessor had received payments of rent from another person in possession was not in itself sufficient.—*REGINA PLUMBING & HEAT-*

*ING CO., LTD. v. BRUCE ROBINSON ELECTRIC, LTD.*, [1933] 3 W. W. R. 469.—*CAN.*

### PART XXIV. SECT. 2, SUB-SECT. 3.—D. (b).

6688 iii. ———.]—*PETROPOLIS v. CLARKE*, [1928] 1 D. L. R. 1012; 60 N. S. R. 22.—*CAN.*

p i. ———.]—*Held*: retention of the keys & advertising the house for rent were ambiguous acts; they were, upon the evidence, referable to the lessor's promise to try to rent the house, & did not show an acceptance of a

surrender.—*GREEN v. TRESS* (1927), 60 O. L. R. 151.—*CAN.*

### PART XXIV. SECT. 3, SUB-SECT. 1.—A.

6771 ii. ———.]—*DALYE v. ROBERTSON* (1860), 19 U. C. R. 411.—*CAN.*

### PART XXIV. SECT. 6.

sa. *Forfeiture clause—Object of.*—*Re STAVISS, ETC.* (1928), 66 Que. S. C. 474.—*CAN.*

### PART XXIV. SECT. 10, SUB-SECT. 2.

sd. *Who may be liable.*—The liability of a tenant who holds over to double



## Part XXV.—Delivery and Recovery of Possession.

**6917a.** Action for declaration of title to possession—Whether lease terminated.]—*COHEN v. DONEGAL TWEED CO., LTD.* (1935), 79 Sol. Jo. 592, C. A.

**6925.** *Add. Annotation* :—As to (1) *Refd.* Marsden v. Heyes, [1927] 2 K. B. 1.

**6930a.** — Value of premises during period of dispossession—Holding over by sub-tenant.]—*CITY TAILORS, LTD. v. BARDER, CITY TAILORS, LTD. v. ROGERS* (1929), 73 Sol. Jo. 235.

**6955a.** .]—Applt. was in the employment of resp. as farm foreman, the terms of his engagement being "so much a week & a cottage." Resp. served a notice on applt. in the following terms: "Please take one week's notice to quit my service." Subsequently notice under the Small Tenements Recovery Act, 1838 (c. 74), was served on applt. On a case stated:—*Held*: this amounted to a weekly tenancy, & an order for possession was properly made.—*SMITH v. HUGHES* (1930), 169 L. T. Jo. 399, D. C.

**6957a.** — Determination of tenancy by notice to quit "or otherwise"—Mortgagor attorning tenant—Provision for notice in mortgage deed.]—A mtge. deed contained a clause by which the mtgor. attorned tenant from year to year to the mtgees. at a nominal rent. It was also provided that, if the mtgor. made default in payments under the deed, the mtgees. might give to the mtgor. seven days' notice in writing to determine the tenancy created by the deed. The mtgor.

defaulted & the mtgees. served on him a notice to quit. The mtgor. refused to give up possession:—*Held*: the term or interest of the mtgor. in the mortgaged property had been "duly determined by a legal notice to quit or otherwise" within above Act, & therefore, justices had power to issue a warrant to give possession of the property to the mtgees.—*DUDLEY & DISTRICT BENEFIT BUILDING SOCIETY v. GORDON*, [1929] 2 K. B. 105; 98 L. J. K. B. 486; 141 L. T. 583; 93 J. P. 186; 45 T. L. R. 424; 27 L. G. R. 448, D. C.

**6968a.** — Statutory tenancy—Closing order—Rent Restriction Acts not in contemplation of parties at commencement of tenancy.]—Deft.'s husband was from 1917 to his death in 1925 the weekly tenant of an old cottage, & after his death deft. continued to occupy the cottage by virtue of Rent Restriction Acts. The landlords having failed to comply with their obligation under Housing Act, 1925 (c. 14), s. 1, to keep the cottage reasonably fit for habitation, a closing order was made in 1930 under the Act. In an action by the landlords for possession deft. counter-claimed for damages for loss of her tenancy & the county ct. judge gave her £25 damages:—*Held*: when the tenancy commenced in 1917, it could not have been within the contemplation of either the landlords or the tenant that in 1930 the tenant would have under the Rent Restriction Acts security of tenure which would prevent the landlords from determining the tenancy by a week's

rent under Landlord & Tenant Act, 1927, R. S. O., does not apply to one holding over in good faith.—*ORD v. PUBLIC UTILITIES COMMISSION OF MITCHELL*, [1936] 1 D. L. R. 540; O. R. 61.—CAN.

## PART XXV. SECT. 2

**6916** 1. *Grounds for interference by court.*]—Where, following a dispute, a settlement was made, by which the tenant was to quit the premises, & the tenant vacated accordingly:—*Held*: the tenant's claim for damages for eviction & to set aside the agreement for settlement should be dismissed, as the tenant was not at such a disadvantage with the landlord as to call for the intervention of the ct. for his protection, & he must stand by the bargain he made.—*MCKAY v. SEXSMITH* (1914), 29 W. L. R. 210; 20 D. L. R. 986.—CAN.

**q i.** *Tenant holding over & paying rent—Subsequent non-payment of rent.*]—Ejectment lies for non-payment of rent under Consol. Stat., c. 83, s. 19, where the tenant continues in possession & pays rent after the expiration of the lease.—*DOE d. DEVEBER v. ROE* (1888), 27 N. B. R. 494.—CAN.

**sv.** *Failure to pay rent—Notice—How calculated.*]—Good Friday is included within the 3 days notice to vacate premises on failure to pay rent, under Landlord & Tenant Act, R. S. O., 1927, s. 75 (3).—*Re GOW & DOWNER*, [1935] 3 D. L. R. 607.—CAN.

## PART XXV. SECT. 3, SUB-SECT. 2.—A.

**a i.** — *Double rent.*]—Where the lessee holds over after the expiry of the term of his lease contumaciously, the proper measure of damages in a

suit by the lessor is double the normal rent according to English law, & the same has been held to be ordinarily a suitable guide in such cases in this Province.—*SUNDER SINGH v. RAM SARAN DAS* (1931), 1 L. L. R. 14 Lah, 137.—IND.

## PART XXV. SECT. 4, SUB-SECT. 2.—D.

**o i.** — *When applicable—Not to land purchased at tax sale.*]—*FYHRI v. BURKE*, [1924] 4 D. L. R. 445; [1924] 3 W. W. R. 328; 19 Sask. L. R. 28.—CAN.

**o ii.** — *Not by purchaser under agreement for sale—No assignment of lease.*]—*Re BERGEN & MOTT*, [1924] 1 D. L. R. 499; [1924] 1 W. W. R. 494; 18 Sask. L. R. 290.—CAN.

**o iii.** — *Questions determinable.*]—On a summary proceeding under Landlords & Tenants Act, R. S. M., 1913 (c. 109), against an overholding tenant it is competent for & the duty of the county ct. judge to determine the question of tenancy & the termination of it; & he may do so on conflicting evidence.—*TUFFS v. THOMSON*, [1929] 1 D. L. R. 896; 1 W. W. R. 329; 38 Man. L. R. 51; *affg*, [1928] 3 W. W. R. 666.—CAN.

**o iv.** — *Necessity for relationship of landlord & tenant.*]—The summary procedure under Landlord & Tenant Act, 1931, against overholding tenants can be resorted to only where the relationship of landlord & tenant exists between the parties directly or by attornment or some recognition of a tenancy.—*MANITOBA FARM LOANS ASSOCN. v. ZALONDEK*, [1933] 1 W. W. R. 559; 3 D. L. R. 128; 41 Man. L. R. 115.—CAN.

**ov.** — *Purchaser tenant by attornment.*]—Where the relationship of landlord & tenant is created as between a vendor & purchaser by an attornment clause in an agreement for the sale of land, the vendor is entitled, on determining the contract in accordance with its terms because of the default of the purchaser, to invoke the summary method of obtaining possession provided for by Landlord & Tenant Act, 1931.—*RICHARDSON v. EDGE*, [1933] 1 W. W. R. 242.—CAN.

**f i.** — *Appeal—Order by judge in chambers.*]—No appeal lies to the Ct. of Appeal from an order made by a judge of the K. B. in chambers, on an appeal to him from an order made by a district ct. judge on an application under Landlord & Tenant Act for a writ of possession.—*CANADA TRUST CO. v. SCHULTZ* (Sask.), [1926] 4 D. L. R. 724; [1926] 2 W. W. R. 797.—CAN.

**f ii.** — *Proceedings for—Whether applicable in involved case.*]—Pltf. sold a property in Vancouver to defts. under agreement for sale for \$40,000. Defts. went into possession & after paying \$21,000 were in default. The parties then entered into a further agreement whereby the option to purchase was still in force, but the payments to be made were expressed in rent. After making further payments amounting to \$2,500, defts. were again in default, & pltf. applied for & obtained a writ of possession under the overholding sections of Landlord & Tenant Act.—*Held*: In a case so involved & in which if action had been brought relief against forfeiture might be considered, the section of Landlord & Tenant Act invoked did not apply; summary remedy should not be invoked except

notice to quit; the question of damages must therefore be considered without regard to the Rent Restriction Act, & as the tenant had been given more than a week to vacate the premises she could recover no damages.—

JOHN WATERER SONS & CRISP, LTD. v.  
HUGGINS (1981), 47 T. L. R. 305, D. C.

**7008. Add. Annotations :—***Refd. Gee v. Harwood*, [1933] Ch. 712; *Times Furnishing Co. v. Hutchings*, [1938] 1 K. B. 775.

## Part XXVII.—Rent and Mortgage Restriction Acts.

*See Rent & Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32).*

7027a. Notwithstanding tenant ceasing personally to reside on premises—Members of tenant's family residing on premises.]—KREITMAN v. VIDOFKY (1927), 43 T. L. R. 335, D. C.

**Annotation :—Overd.** *Skinner v. Goary* (1931), 47 T. L. R. 597.

**7028a. Operation of Acts—In rem.]—**Certain huts built by H.M. Office of Works in 1915 for munition workers became vacant in 1923. They were subsequently let to tenants. In 1928 the Crown sold the property to the W. Estates, Ltd., who leased the same to pltf. The rental value of the premises brought them within Rent Restrictions Act. Pltf. sought possession of the premises occupied by the two defts., whose tenancies commenced from Oct. 1924. The county ct. judge dismissed the claim, holding that the premises were controlled. Pltf. appealed. The case was argued on the footing that the Acts did not bind the Crown. It was also admitted that the Crown had vacant possession after July 31, 1923:—*Held*: both appeals must be allowed. The Crown was not bound by Rent Restrictions Acts, otherwise there was no necessity for 1920 Act, s. 12 (10). The Rent Restrictions Acts operated *in rem* & not *in personam*, & so if the principal Act did not apply to the premises, the Act of 1923 also did not apply. There must, therefore, be an order for possession in both cases.—**CLARK v. DOWNES, CLARK v. MAWBY** (1931), 145 L. T. 20; 29 L. G. R. 571. D. C.

**Annotations:—***Distd. Wirral Estates, Ltd. v. Shaw* (1932), 48 T. L. R. 281. *Apld. Clark v. Mead* (1933), 149 L. T. 308. **Consd.** *Wheeler v. Wirral Estates, Ltd.*, [1935] 1 K. B. 294.

**7028b. Acts not binding on Crown.]—CLARK v. DOWNES, CLARK v. MAWBY, No. 7028a, ante.**

**7028c.**      **Effect of sale by Crown—Subject to existing tenancy.]—Rent Restrictions Acts, 1920 & 1923, do not affect premises owned by the Crown, even when they fall within the limits laid down by those Acts. But upon a sale or assignment by the Crown this prerogative comes to an end, save only that**

where the premises are once sold subject to an existing tenancy that exemption continues until that tenancy is determined.—*WIRRAL ESTATES, LTD. v. SHAW*, [1932] 2 K. B. 247; 101 L. J. K. B. 370; 147 L. T. 87; 96 J. P. 143; 48 T. L. R. 281; 76 Sol. Jo. 185; 30 L. G. R. 171. C. A.

**Annotations :—***Appl. Clark v. Mead* (1933), 49 T. L. R. 433.  
*Expld. Wheeler v. Wirral Estates, Ltd.*, [1935] 1 K. B. 294.

7028d. ——— On time for calculation of standard rent.]—CLARK *v.* MEAD, No. 7123a, *post*.

**7028e.** — — — — —.] — Premises belonging to the Crown were let to pltf. in 1916 at a rent of 9s. 6d. per week, subsequently reduced by the Crown to 7s. 2d. per week. The Rent Restriction Acts did not apply, because those Acts did not affect the Crown. Subsequently, in 1928, the Crown sold the premises to defts. subject to pltf.'s tenancy at the same rent of 7s. 6d. per week. The Acts then applied to the premises except during the continuance of pltf.'s original tenancy. In 1929 defts. gave pltf. notice to quit with an alternative, in the same document, of an increase of the rent to 10s. 6d. per week, being the permitted increase on the basis of a standard rent of 9s. 6d., at which rent the premises had been in fact first let to pltf. :—*Held* : (1) the words "first let" in Increase of Rent & Mtge. Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (a), meant first let in fact without reference to the Rent Restriction Acts, &, therefore, the premises were first let in 1916, & the statutory rent was consequently 9s. 6d. per week ; (2) the rent of the premises after the sale by the Crown, 7s. 2d. & 10s. 6d. per week, was not a "progressive rent" within the above sect., a progressive rent being a rent under one single tenancy which automatically rises during the continuance of that tenancy. The above rents were payable under different tenancies ; (3) the notice to quit was good, there being no reason why the notice terminating the tenancy & the notice to increase the rent should not be on the same piece of paper.—*WHEELER v. WIRRAL ESTATES, LTD.*, [1935] 1 K. B. 294 ; 104 L. J. K. B. 30 ; 152 L. T. 111 ; 51 T. L. R. 73 ; 78 Sol. Jo. 802, C. A.

in cases of the ordinary relationship of landlord & tenant.—RAY v. RUBY Hou, [1928] 1 D. L. R. 177; 39 B. C. R. 128 —CAN.

† iii. — *Injunction against enforcement of—Action pending to determine construction of lease.*—*WELCH v. ERNEWEIN*, [1928] 3 W. W. R. 20.—CAN.

q 1. — *Based on wrong decision—Irregularities in proceedings—Validity of order.*—The fact that summary proceedings under Landlords & Tenants Act were not entitled in the ct., as provided by sect. 21 of the Act, & the fact that the papers were not served as provided in sect. 18 thereof, are irregularities which cannot be attacked except in the proceedings themselves.

or on an appeal.—TUFTS v. THOMSON, [1928] 3 W. W. R. 666.—CAN.

**sh. Action for damages—In County Court—Tenant under void lease.]—**A tenant who has entered & paid rent under a parol lease void under Statute of Frauds can maintain an action in the county ct. for damages for wrongful eviction. The argument that the tenant in such a case is relying on acts of part performance, & that he may do so only in a ct. which has jurisdiction, which the county ct. has not, to grant specific performance was held immaterial since pltf. did not require specific performance & was entitled in the county ct. to rely on the common law rule under which on entry & pay-

ment of rent under a lease void under the Statute of Frauds a tenancy from year to year is created.—*GEBLER v. PALMASON, McDONALD v. PALMASON* (Man.), [1930] 1 D. L. R. 475; [1929] 3 W. W. R. 534; 38 Man. L. R. 371.—*CAN.*

**PART XXVII. SECT. 1, SUB-SECT. 1.**

7022 1. *Application to premises—Letting not necessary.*—The provisions of Rent & Mtge. Restrictious Act, 1923 (No. 19 of 1923), relating to the restriction of rent, only apply as between landlord & tenant, & are applicable only to a house which is let.—*WALLACE v. FOGARTY, [1926] I. R. 856, 857.—IR.*

- 7032. Add. Annotations:—***Consd. Skinner v. Geary* (1931), 47 T. L. R. 597; *Holden v. Howard*, [1938] 1 K. B. 442. **Refd.** *Roe v. Russell*, [1928] 2 K. B. 117; *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103.
- 7036. Add. Annotations:—***As to (2) Apprvd. Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103. **Refd.** *Catto v. Curry*, [1926] 1 K. B. 460.
- 7037. Add. Citation:—**24 L. G. R. 321.  
**Add Annotations:—***As to (1) Dbtd. Brooks v. Liffen*, [1928] 2 K. B. 847. **Apprvd.** *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103. **Apld.** *Ratkinsky v. Jacobs*, [1929] 1 K. B. 24. **Refd.** *Oakley v. Wilson*, [1927] 2 K. B. 279.
- 7037a. ———.**—*LLOYD v. COOK, GOUDGE v. BROUGHTON, SIMSON v. MIATT, BARTRAM v. BROWN, BARKER v. HUTSON*, No. 7352e, *post*.
- 7037b. Rent-free tenancy.**—The Rent Restriction Acts afford no protection to a tenant who is rent-free.—*BRACEY v. PALES*, [1927] 1 K. B. 818; 96 L. J. K. B. 305; 136 L. T. 282; 43 T. L. R. 69; 25 L. G. R. 156, D. C.
- Annotation:—****Refd.** *Turner v. Watts* (1927), 44 T. L. R. 105.
- 7037c. ———.**—*TURNER v. WATTS*, No. 6636a, *ante*.
- 7038a. Part of premises sub-let after passing of 1923 Act.]—***Held:* where, after the passing of 1923 Act the mesne tenant of a whole house sub-lets to a tenant rooms which were not previously sub-let & which constitute a dwelling-house, 1920 Act applies to those rooms by virtue of proviso to sect. 2 (1) of 1923 Act.—*CHARVONIA v. ESTERMAN*, [1931] 2 K. B. 541; 100 L. J. K. B. 737; 145 L. T. 419; 95 J. P. 171; 47 T. L. R. 533; 75 Sol. Jo. 459; 29 L. G. R. 493, D. C.
- 7040. Add. Annotations:—***As to (1) Dlst. Leslie v. Cumming*, [1926] 2 K. B. 417; *Ebner v. Lascelles*, [1928] 2 K. B. 486. **Refd.** *Gee v. Hazleton*, [1932] 1 K. B. 179. *As to (2) Apld.* *Ratkinsky v. Jacobs*, [1929] 1 K. B. 24. **Consd.** *Fordree v. Barrell* (1931), 95 J. P. 141; *Haskins v. Lewis*, [1931] 2 K. B. 1. **Refd.** *Thompson v. Rolis*, [1926] 2 K. B. 426; *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103.
- 7041. Add. Citations:—**95 L. J. K. B. 1007; 24 L. G. R. 315.  
**Add. Annotations:—***As to (1) Consd.* *Fordree v. Barrell* (1931), 95 J. P. 141. **Refd.** *Ebner v. Lascelles*, [1928] 2 K. B. 486. *As to (2) Refd.* *Thompson v. Rolis*, [1926] 2 K. B. 426.
- 7041a. ———.**—Where the tenant of an entire house within the limits of the Rent Restriction Acts sub-lets part as a dwelling-house & thereby becomes mesne tenant of the whole premises, the part sub-let remains under the protection of the Acts by reason of the proviso to 1923 Act, s. 2 (1).—*DOMENDIETTI v. RYAN* (1929), 141 L. T. 239; 93 J. P. 206; 45 T. L. R. 432; 73 Sol. Jo. 318; 27 L. G. R. 451, D. C.
- 7041b. Grant of licence.**—Where the tenant of premises protected by Rent Restriction Acts has granted to another person a licence, under which the paramount user of part of the premises is to be user for the purpose of the business of that other person, that part of the premises is no longer protected by the Acts; & the position is not affected by the fact that a licence only & not a sub-tenancy has been granted.—*GEE v. HAZLETON* [1932] 1 K. B. 179; 100 L. J. K. B. 644; 145 L. T. 545; 95 J. P. 176; 47 T. L. R. 528; 49 L. G. R. 498, D. C.
- 7047. Add. Citation:—**24 L. G. R. 147.  
**Add. Annotations:—****Dlst.** *Cohen v. Gold*, [1927] 1 K. B. 865. **Apprvd.** *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103. **Refd.** *Catto v. Curry*, [1926] 1 K. B. 460; *Oakley v. Wilson*, [1927] 2 K. B. 279.
- 7049. Add. Annotations:—****Consd.** *Jewish Maternity Soc. Trustees v. Garfinkle* (1926), 95 L. J. K. B. 766. **Dlst.** *Barton v. Keeble*, [1928] Ch. 517. **Consd.** *Thomas v. Metropolitan Housing Corp., Ltd.*, [1936] 1 All E. R. 210. **Refd.** *Brooks v. Liffen*, [1928] 2 K. B. 347.
- 7051. Add. Citations:—**135 L. T. 476; 24 L. G. R. 543.  
**Add. Annotation:—****Generally**, **Refd.** *Kearns v. Bedford* (1934), 50 T. L. R. 348.
- 7052a. ———.**—*SHOOTER v. GAITLEY* (1935) 80 Sol. Jo. 74, C. A.
- 7057a. ———.**—Certain premises, part of which was used as a shop, had been let to a tenant who resided on these premises. The landlord having served upon the tenant a notice

PART XXVII. SECT. 1, SUB-SECT. 2.

**7040 i. Continuation of application of Acts—Sub-letting furnished of unfurnished house—Destruction of identity.]**—The widow of a tenant of a house let unfurnished sub-let the house furnished:—*Held:* the widow by sub-letting the house furnished made it cease to be a house to which Rent & Mtge. Restrictions Act, 1923 (No. 19 of 1923), applied.—*KAVANAGH v. WHITTLE*, [1926] 1 R. 425, 428.—IR.

PART XXVII. SECT. 1, SUB-SECT. 3.—A. (a).

**7045 ii. ———. Rent & Mortgage Restrictions Act, 1923 (No. 19 of 1923), s. 3 (1).—**The words "let as a separate dwelling" apply to "a house," as well as to "a part of a house."—*WALLACE v. FOGARTY*, [1926] 1 R. 255, 257.—IR.

**sp. Dwelling-house used for holidays only.]—**A proof disclosed that defender, whose permanent residence was a house in Glasgow of which he was tenant, had for a number of years rented a house in Largs under a lease which was renewed annually by tacit relocation. The house was not occupied during the winter months, & for the greater part of the summer was sublet, being used by the tenant himself only during the period of his annual summer holiday. In his evidence he explained that he had taken the house at Largs in anticipation of his retirement from business. Both houses were controlled within the sense of the Rent Restriction Acts. In an action for summary removal from the house in Largs:—*Held:* the tenant was not entitled to the protection of the Rent Restriction Acts.—*MENZIES v. ———*, [1938] S. C. 74.—SCOT.

PART XXVII. SECT. 1, SUB-SECT. 3.—A. (b).

**7055 i. Shop.]—**Premises in a country town were let to a tenant under a single contract of lease, & at an unapportioned rent of less than £70. The subjects consisted of a dwelling-house, & of a room used as a shop, & constructed to serve that purpose. The house & the shop had separate entrances from the street, but there was internal communication between them. The landlord having brought an action of removing from the shop:—*Held:* the unit of location was a complex one consisting in part of a dwelling-house & in part of a shop, the latter was not part of the dwelling-house, & accordingly Increase of Rent & Mortgage Interest (Restrictions) Act, 1920, did not apply to it; & decree of removing granted.—*M'CORMY'S TRUSTEES v. ROSS*, [1929] S. C. (Ct. of Sess.) 585.—

to increase the rent, the tenant claimed to be protected under the Rent Restriction Acts:—*Held*: as the tenant dwelt in the house & had a right to dwell there, the house was a dwelling-house, & the fact that part of it was used for business purposes did not prevent it being a dwelling-house to which 1920 Act, s. 12 (2), applied.—*HICKS v. SNOOK* (1928), 93 J. P. 55; 73 Sol. Jo. 43; 27 L. G. R. 175, C. A.

**7058. Add. Annotation:**—*Consd.* *Hiller v. United Dairies* (London), Ltd., [1934] 1 K. B. 57.

**7061. Add. Annotation:**—*Consd.* *Leslie v. Cumming*, [1926] 2 K. B. 417.

**7062. Add. Annotations:**—*Refd.* *Leslie v. Cumming*, [1926] 2 K. B. 417; *Ebner v. Lascelles*, [1928] 2 K. B. 486; *Gee v. Hazleton*, [1932] 1 K. B. 179.

**7063. Add. Citations:**—95 L. J. K. B. 1; 134 L. T. 21; 24 L. G. R. 27.

*Add. Annotations:*—*As to* (1) *Folld.* *West Wales Joint Board for the Mentally Defective v. Evans* (1928), 139 L. T. 382. *Consd.* *Fordree v. Barrell* (1931), 95 J. P. 141. *Dbtd.* *Haskins v. Lewis*, [1931] 2 K. B. 1. *Consd.* *Gee v. Hazleton*, [1932] 1 K. B. 179. *Refd.* *Leslie v. Cumming*, [1926] 2 K. B. 417; *Thompson v. Rolls*, [1926] 2 K. B. 426; *Ebner v. Lascelles*, [1928] 2 K. B. 486.

**7063a. Separate use of part as business premises—Other part sub-let.**—A house & shop were let to a tenant in 1900. The house consisted of two rooms in the basement, a shop & parlour on the ground floor, two rooms on the first floor & two rooms on the second floor. The tenant originally carried on a tailor's business in the shop & resided in the house with his family. Subsequently he ceased to carry on the tailor's business & his daughter carried on a drapery business on the ground floor, & his son carried on a betting business on the first floor. In 1927 the tenant moved to another house where he resided with his family; he then sub-let the two rooms in the basement to one sub-tenant as a residence, and the two rooms on the second floor to another sub-tenant as a residence. The landlord served notice to quit upon the tenant, & then commenced proceedings in the county ct. to recover possession of the premises. The tenant relied upon the protection given by Rent Restriction Acts. The county ct. judge found as a fact that the ground floor & the first floor constituted business premises, & that the tenant had sub-let the remainder of the premises & so parted with possession of them. He accordingly held that the tenant was not entitled to the protection of Rent Restriction Acts & gave judgment for the landlord for possession:—*Held*: an order could be made for the recovery by the landlord of possession of the whole of the premises, notwithstanding that the basement & second floor had been sub-let to two tenants as

residences, those sub-tenants being protected by 1920 Act, s. 5 (5) & s. 15 (3), & becoming tenants of the landlord.—*HASKINS v. LEWIS*, [1931] 2 K. B. 1; 100 L. J. K. B. 180; 144 L. T. 378; 95 J. P. 57; 47 T. L. R. 195; 29 L. G. R. 199, C. A.

*Annotations:*—*Consd.* *Fordree v. Barrell* (1931), 95 J. P. 141. *Apld.* *Skinner v. Geary* (1931), 47 T. L. R. 587; *Hiller v. United Dairies* (London), Ltd., [1934] 1 K. B. 57. *Consd.* *Williams v. Williams & Nathan*, [1937] 2 All E. R. 559. *Refd.* *Gee v. Hazleton*, [1932] 1 K. B. 179; *Reldy v. Walker*, [1933] 2 K. B. 266.

**7067a. Dwelling-house taken for purpose of subletting.**—A dwelling-house consisted of a ground floor & basement. The tenant did not herself occupy the dwelling-house or any part of it, but sublet the ground floor furnished, & the basement unfurnished, to sub-tenants whose occupation ceased shortly before the end of the tenancy:—*Held*: 1920 Act was not prevented from applying to the dwelling-house, so as to entitle the tenant to rely upon sect. 2 (3), because (1) the tenant took & used the dwelling-house only for the purpose of subletting it, inasmuch as the taking & user of premises only for that purpose did not make them business premises to which the Act did not apply; (2) the tenant did not herself occupy the dwelling-house, & her sub-tenants ceased to occupy it before the end of the tenancy; (3) the tenant had sublet the ground floor furnished to sub-tenants, who ceased to occupy it before the end of the tenancy.—*EBNER v. LASCELLES*, [1928] 2 K. B. 486; 97 L. J. K. B. 497; 139 L. T. 140; 92 J. P. 114; 44 T. L. R. 460; 72 Sol. Jo. 303; 26 L. G. R. 295, D. C.

*Annotations:*—*As to* (2) *Dbtd.* *Fordree v. Barrell* (1931), 95 J. P. 141. *As to* (3) *Consd.* *Fordree v. Barrell* (1931), 95 J. P. 141.

**7088. Add. Annotation:**—*Distd.* *Stanton v. Laws* (1934), 78 Sol. Jo. 802.

**7088a. — — — — —**—*STANTON v. LAWS* (1934), 78 Sol. Jo. 802, C. A.

**7090. Add. Annotation:**—*Refd.* *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103.

**7091. Add. Citation:**—24 L. G. R. 250.

*Add Annotations:*—*Apld.* *Doulin v. Purcell* (1926), 136 L. T. 633. *Apprvd.* *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103. *Folld.* *Domendietti v. Ryan* (1929), 141 L. T. 239. *Consd.* *Charvonia v. Esterman* (1931), 47 T. L. R. 533. *Folld.* *Lefevre v. Hirst* (1931), 100 L. J. K. B. 733. *Refd.* *Oakley v. Wilson*, [1927] 2 K. B. 279.

**7091a. — — — — —**—*LEFEVRE v. HIRST*, No. 7336c, *post*.

**7092a. Onus of proof—Valuation list must show value for whole dwelling-house.**—In an action brought by landlords to recover arrears of rent of a dwelling-house, the tenant claimed that the landlords were not entitled to recover the full amount of the arrears on the ground

PART XXVII. SECT. 1, SUB-SECT. 3.—  
D.

c. For the word "hotel" in the catchwords substitute the word "house."

c 1. — — — — —]—A farmhouse was let with a farm, the tenancy expiring at Martinmas 1923. In Mar. 1922, the tenant sub-let the house, garden, &

certain offices at a rent of £20, the ratable value of the garden & offices being less than one-quarter of that of the house. On the expiry of the farm tenancy at Martinmas 1923, the landlord let to the subtenant the house, garden, & offices, with the steading & farmyard, at a rent of £35. The ratable value of the garden, offices, steading, a farmyard was more than one-quarter

of that of the house:—*Held*: as the value of the land & other premises let with the house since Martinmas 1923 exceeded one-quarter of that of the house, 1920 Act did not apply to the subjects, the addition of the farmyard & steading having altered the identity of the house, & thus elided sect. 12 (6) of the Act.—*HALDANE v. SINCLAIR*, [1927] S. C. 562.—*SCOT*.

that the house had become decontrolled by the Act of 1933. In support of his claim he produced a copy of the following entry appearing in the quinquennial valuation list for 1930 with respect to the premises: "ground floor exempt, rooms on first floor are of gross value £16, rateable value £12 " :—*Held*: the tenant had failed to show that the house was still controlled: the onus of showing that the rateable value was less than £45 a year was on him: & he had not discharged that onus by putting in evidence an entry in the valuation list showing that part of the premises was exempted from rates & that the remaining part was rated at less than £45 a year.—*WHITE v. BEMBRIDGE*, [1935] 1 K. B. 241; 104 L. J. K. B. 250; 162 L. T. 62; 51 T. L. R. 31; 78 Sol. Jo. 734. C. A.

**Annotation :—***Folld. Heginbottom v. Watts*, [1936] 2 K. B. 6.

7095. *Add. Citation* :—24 L. G. R. 321.

**Add Annotations.**—**D**btd. *Brookes v. Liffen*, [1928] 2 K. B. 347. **A**pprvd. *Lloyd v. Cook*, *Goudge v. Broughton*, *Simson v. Miatt*, *Bartram v. Brown*, *Barker v. Hutson*, [1920] 1 K. B. 103. **C**onsd. *Ratkinsky v. Jacobs*, [1929] 1 K. B. 24. **R**efd. *Oakley v. Wilson*, [1927] 2 K. B. 279.

**7097. Add. Annotations:—**As to (1) *Dlstd. Lovibond (J.) & Sons v. Vincent*, [1929] 1 K. B. 687. **Consd.** *Skinner v. Geary* (1931), 47 T. L. R. 597. **Generally, Refd.** *Roe v. Russell*, [1928] 2 K. B. 117.

7097a. Meaning of "family"—1920 Act, s. 12 (1) (g).]—PRICE v. GOULD, No. 7107b, *post*.

**7101.** *Add. Annotations*:—**Distd.** Ebner v. Lascelles, [1928] 2 K. B. 486. **Consd.** West Wales Joint Board for the Mentally Defective v. Evans (1928), 139 L. T. 382; Haskins v. Lewis, [1931] 2 K. B. 1; Skinner v. Geary (1931), 47 T. L. R. 597.

**7103a.** — — —.]—SPURLING v. PUGH  
(1926), cited, [1931] 2 K. B. at p. 263, D. C.

*Annotation*.—*Apprvd.* *Fordree v. Barrell* (1931), 95 J. P. 141.

7103b. .]—The tenant of a dwelling-house which was within the rental limits of 1920 Act, sub-let furnished three rooms of the house to one person & two rooms to another, reserving for herself merely one room & the scullery. The sub-tenants were given by the tenant the right as against herself to exclusive possession of the rooms in question. On becoming aware of the sub-letting the landlord of the house gave notice to terminate the tenancy, & thereafter took proceedings to recover possession of the rooms which had been sub-let:—*Held*: the rooms which had been sub-let had by virtue of sect. 12 (2) of 1920 Act become separate dwelling-houses to which the Act did not apply & therefore the landlord was entitled to recover possession of those rooms.—*BARRELL v. FORDREE*, [1932] A. C. 676; 101

L. J. K. B. 529; 96 J. P. 278; 48 T. L. R. 482; *sub nom.* FORDREE v. BARRELL, 147 L. T. 206; 30 L. G. R. 271, H. L.

7103c. ——— Application of 1920 Act, s. 2 (3).]  
—EBNER v. LASCELLES, No. 7067a, *ante*.

7103d. — — —.]—Where there has been no default by a tenant under 1923 Act, s. 4, no order at all for possession or ejectment can be made in respect of premises protected by the Act, so long as they are lawfully occupied; & the fact that a tenant has sublet the whole & does not occupy any part himself will not be a ground for an order for possession being made against either tenant or sub-tenant.—WEST WALES JOINT BOARD FOR MENTALLY DEFECTIVE v. EVANS (1928), 139 L. T. 382; 44 T. L. R. 565; 26 L. G. R. 447. D. C.

7103e. ———.]—(1) For a considerable period before 1919 deft. was tenant & occupier of a dwelling-house at N., which came within Rent Restriction Acts. In 1919 he went to live at a house in another locality of which house his wife was tenant. By permission of deft. a sister of his wife, with her husband then went to reside in the house at N. In May, 1930, notice to quit the premises at N. was served by pltf., the landlord, on deft., who thereby became statutory tenant of the premises. In June, 1930, deft.'s sister-in-law left the premises, & deft. permitted his sister to live in them. In an action brought by pltf. against deft. for possession of the house, the county ct. judge found that deft. was not in actual occupation of the house at the material time & that he did not retain possession within Rent Restriction Acts by the occupation of his wife's or his own relations, since the purpose of that occupation was not to preserve the house as a residence for himself. The county ct. judge accordingly made an order for possession of the house, & this order was affirmed by the Div. Ct. On appeal:—*Held*: the appeal should be dismissed on the ground (*per* SCRUTTON & SLESSER, L.JJ.) the fundamental principle of the Rent Restriction Acts being to protect a tenant who is residing in a house, a tenant, to be entitled to the protection of the Acts, must be in personal occupation or actual possession of the premises in respect of which he seeks that protection, & (*per* GREER, L.J.) the findings of the county ct. judge involved that deft. had sub-let the house & so was, by virtue of 1923 Act, s. 4 (*h*), precluded from claiming to retain possession.

(2) In my view *Collis v. Flower*, No. 7105, was wrong, for the reasons that I have been stating. The common law tenancy was terminated. The exor. had a common law tenancy, & it was terminated by notice to quit. He did not remain in occupation of the house, &, in my view, the original tenant having no right, as we have now decided, to

**PART XXVII. SECT. 2, SUB-SECT. 4.**

**7100 i. Person not in occupation.**—The restrictions imposed by Increase of Rent & Mtge. Interest (Restrictions) Act, 1923, s. 4, on the right of a landlord to recover possession of a dwelling-house to which the Act applies are not intended to benefit a tenant who is not in occupation of the premises.—**FOLEY v. GALVIN, [1932] I. R. 339.—IR.**

7101 l. — Where tenant has sub-

*let.*—Pltf. let two rooms in a certain house to the National Union of Railwaymen as a meeting-place for the members of the Union. Subsequently the Union sub-let one of the rooms to a shoemaker, who used the room solely for the purposes of his trade. Pltf. obtained a decree in ejectment against the Union & recovered possession of the room occupied by them. He then brought ejectment proceedings against the sub-tenant in respect of the room

occupied by him. The sub-tenant relied on Increase of Rent & Mtge. Interest (Restrictions) Act, 1923:—*Held*: deft. was protected by the Act, as, whether the Union was using the rooms "for business, trade, or professional purposes" or not, plff. was the "landlord" of the room & deft. the "tenant," & the latter used the room for business premises.—O'BRIEN v. WALLACE. [1932] I. R. 308.—IR.

dispose of the property by will, had no right to give any statutory right to the exor., & the exor., who had not lived in the house, could not claim to be a statutory tenant. In my view, therefore, *Collis v. Flower*, No. 7105, is no longer an authority.

The administrator case stands on a different footing, because one has to look in all these cases to see what the facts were. The administrator case is the case of *Mellows v. Low*, No. 7097. There the facts were different. The original tenant was a weekly tenant. It was a common law tenancy, & during her tenancy she died intestate. Consequently, whatever rights she had in her common law tenancy remained to her representatives in an intestacy. No notice to quit was ever given. Consequently the common law tenancy remained. Then the landlord claimed that on the death of the tenant intestate, with no member of her family residing in the house, the tenancy lapsed. It was held that the administratrix was a person who derived title under the original tenant, & consequently, that the residence could not be interfered with. The point of that case which renders it a right decision is that no notice to quit the common law tenancy had ever been given. The common law tenancy, therefore, remained, & it remained in the person who at common law was entitled to it, & her tenancy had never been terminated. Consequently *Mellows v. Low*, No. 7097, on the facts, is right, but if notice to terminate the common law tenancy had been given the ct. could not, in my opinion, have said, unless the matter could be brought within the very curious clause about intestacy to which I have referred, that such an administratrix not being in possession is entitled to be protected by the Act (*SCRUTTON, L.J.*).—*SKINNER v. GEARY*, [1931] 2 K. B. 546; 100 L. J. K. B. 718; 145 L. T. 675; 95 J. P. 194; 47 T. L. R. 597; 29 L. G. R. 599, C. A.

*Annotations*:—As to (1) *Consd. Sutton v. Dorf* (1932), 76 Sol. Jo. 359. *Appl. Reidy v. Walker*, [1933] 2 K. B. 266; *Hillier v. United Dairies (London), Ltd.*, [1934] 1 K. B.

**7103f.** —.]—*HASKINS v. LEWIS*, No. 7063a, *ante*.

**7103g.** **Limited company.**—A limited co. cannot claim the protection afforded to tenants by the Rent Restriction Acts.—*REIDY v. WALKER*, [1933] 2 K. B. 266; 102 L. J. K. B. 424; 149 L. T. 238; 49 T. L. R. 386; 77 Sol. Jo. 267, D. C.

*Annotation*:—*Apprvd. Hillier v. United Dairies (London), Ltd.*, [1934] 1 K. B. 57.

**7105 i. Executor of tenant.**—*Held*: a tenant's rights under 1920 Act were altogether personal, & no interest in deceased's tenancy could devolve on defts. as her exors.—*DRURY v. JOHNSTON*, [1928] N. I. 25.—*IR.*

*sd. Widow or member of deceased tenant's family.*—*Ptft.* was the owner of a dwelling-house subject to Increase of Rent & Mtge. Interest (Restrictions) Act, 1920. The premises had been let as a weekly tenancy, in or about 1923, to N., who was then in *ptft.*'s employment, at the rent of 5s. per week. N. died intestate in June, 1926, leaving deft. his widow, who up to the time of his death resided with him. On the death of her husband, deft. remained in occupation & entered into

legal possession of the house under Increase of Rent, etc. (Restrictions) Act, 1920, s. 12 (1) (g). Deft. married again in Mar. 1928, & her second husband & his children came to reside in the house occupied by her. The landlord instituted ejectment proceedings against deft., who claimed the protection of Increase of Rent (Restrictions) Act. Increase of Rent & Mtge. Interest (Restrictions) Act, 1920, s. 12 (1) (g), provides that "the expression tenant includes the widow of a tenant dying intestate who was residing with him at the time of his death."—*Held*: the widow acquired a vested interest as tenant, & there was nothing in Increase of Rent & Mtge. Interest (Restrictions) Act, 1920, which divested this interest on her

**7103h.** —.]—A limited co. is not entitled to the protection afforded to tenants by the Rent Restriction Acts.—*HILLIER v. UNITED DAIRIES (LONDON), LTD.*, [1934] 1 K. B. 57; 103 L. J. K. B. 5; 150 L. T. 74; 50 T. L. R. 20, C. A.

*Add. Annotations*:—*Distd. Lovibond (J.) & Sons v. Vincent*, [1929] 1 K. B. 687. *Overd. Skinner v. Geary* (1931), 47 T. L. R. 597. *Reid. Roe v. Russell*, [1928] 2 K. B. 117.

**7105a.** —.]—*SKINNER v. GEARY*, No. 7103e, *ante*.

**7106a.** —.]—*SKINNER v. GEARY*, No. 7103e, *ante*.

**7107.** *Add. Annotation*:—*Consd. Price v. Gould* (1930), 143 L. T. 333.

**7107a. Daughter of deceased tenant.**—*Deft.*'s father, who was the statutory tenant of a dwelling-house to which Rent Restriction Acts applied, died intestate & leaving no widow. Deft. was admittedly a member of her father's family, "residing with him at the time of his death," within 1920 Act, s. 12 (1) (g). When he died deft.'s father owed six months' rent to the landlord of the house:—*Held*: deft. was a statutory tenant of the premises, & had to observe all the terms & conditions of the contract of tenancy which her father had originally held, but her statutory tenancy had begun with her, & she was not liable to pay the arrears of rent owing by her father at the time of his death, they being a liability which had been incurred by a preceding tenant.—*TICKNER v. CLIFTON*, [1929] 1 K. B. 207; 98 L. J. K. B. 69; 140 L. T. 136; 93 J. P. 57; 45 T. L. R. 35; 72 Sol. Jo. 762, D. C.

*Compare* No. 7107c, *infra*.

**7107b. Brothers & sisters of deceased woman tenant.**—The word "family" in sect. 12 (1) (g) of the 1920 Act includes brothers & sisters. The primary meaning of the word "family" was children, but that meaning is susceptible of a wider meaning according to the context in which it is used, & the Legislature used the word "family" to introduce a wide & flexible term.—*PRICE v. GOULD* (1930), 143 L. T. 333; 94 J. P. 210; 46 T. L. R. 411; 74 Sol. Jo. 437; 28 L. G. R. 651.

**7107c. Death of widow of tenant.**—No further statutory protection.—On the death of the statutory tenant of certain premises within the limits of the Rent Restriction Acts, his widow continued to occupy by virtue of 1920 Act, s. 12 (1) (f). The widow subsequently died, & her daughter, who had been living with her on the premises, contended that by

second marriage.—*APSLEY v. BARR*, [1928] N. J. 183.—*IR.*

PART XXVII. SECT. 2, SUB-SECT. 7.

**7108 i. "Separate" — Whether physically separate—Or partitioned off.**—*Ptft.*, the owner of a house consisting of four floors & a basement, erected in each of the back rooms on the first & second floors a partition, which converted each large back room into two rooms. He put electric fittings in each floor, & did other work in connection with the gas & water supply, & let portion of the house to deft. describing it in the agreement as "consisting of a flat of three rooms & front basement on parlour floor." It had not a separate bath or separate sanitary accommodation & there was no physical

virtue of the same sect. the right of tenancy passed to her:—*Held*: as the Acts do not confer any right of property, but merely a personal right of occupation, the tenancy of the deceased tenant passed to his widow only under the above sect., & did not pass to any one else after his widow's death.—*PAIN v. COBB* (1931), 146 L. T. 13; 95 J. P. 201; 47 T. L. R. 596; 29 L. G. R. 623, D. C.

**Death of tenant testate.**—*See* Increase of Rent & Mtge. Interest (Restrictions) Act, 1935 (c. 13).

**7112. Add. Annotation:—Apprvd. Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson, [1929] 1 K. B. 103.**

**7115a. — Deduction of rates chargeable.**—To arrive at the "net rent" within 1920 Act, s. 12 (1) (c), the full rates chargeable on the occupier are to be deducted from the standard rent, & not the compounded rates in fact paid pursuant to certain Acts by the landlord in place of the occupier.—*STROOD ESTATES CO., LTD. v. GREGORY*, [1938] A. C. 118; [1937] 3 All E. R. 656; 106 L. J. K. B. 752; 157 L. T. 338; 53 T. L. R. 973; 81 Sol. Jo. 748, H. L.

**7118a. "Progressive rent"—What amounts to.**—*WHEELER v. WIRRAL ESTATES, LTD.*, No. 7028e, ante.

**7123a. Crown property—Sale by Crown.**—Premises belonging to the Crown were let in 1916 at 9s. 6d. a week, & in 1928, when the rent had been decreased to 7s. 3d. a week, the Crown sold the premises, & the purchasers determined the contractual tenancy. On an application to fix the standard rent under the Rent Restriction Acts:—*Held*: as the Acts did not affect premises owned by the Crown the standard rent was not affected by the letting by the Crown & was to be fixed by reference to the 7s. 3d. a week which was the rent at the time of the purchase from the Crown.—*CLARK v. MEAD* (1933), 149 L. T. 308; 49 T. L. R. 433; 77 Sol. Jo. 404, D. C.

*Annotation:—Overd. Wheeler v. Wirral Estates, Ltd., [1935] 1 K. B. 294.*

**7125. Add. Annotations:—Consd. Phillips v. Copping, [1935] 1 K. B. 15. Refd. Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson, [1929] 1 K. B. 103.**

**7129. Add. Annotation:—Generally, Refd. Wheeler v. Wirral Estates, Ltd., [1935] 1 K. B. 294.**

**7132. Add. Annotation:—As to (2) Refd. Leslie v. Cumming, [1926] 2 K. B. 417.**

*Add. Annotation:—As to (1) Consd. Bracey v. Pales* (1926), 43 T. L. R. 69.

separation of it, as a residence, from the rest of the house:—*Held*: (1) the dwelling-house had not been "bond fide reconstructed by way of conversion into two or more separate & self-contained flats" within Rent & Mtge. Restrictions Act, 1923 (No. 19 of 1923).

The rent being in arrear, pltf. served notice to quit on deft., & instituted ejectment proceedings:—*Held*: (2) the letting was a new letting of portion of altered premises, so as to entitle pltf. to charge a rent without regard to the standard rent of the whole house; (3) deft.'s claim for apportionment of the rent must be dismissed;

(4) pltf. was entitled to an order for possession, the ct. granting a stay for a limited period, the order for possession not to issue if the rent was paid within that period.—*BOYLE v. FITZSIMONS*, [1920] 1 I. R. 378.—*IR.*

**7109 1. "Self-contained"—Whether complete residence—Necessity for partition.**—*BOYLE v. FITZSIMONS*, No 7108 1, ante.—*IR.*

**PART XXVII. SECT. 3, SUB-SECT. 2.—B. (c).**

**7128 1. House converted into flats—Whether rent at first letting as flat.**—

**7139. Add. Annotation:—As to (1) Overd. Phillips v. Copping, [1935] 1 K. B. 15.**

**7139a. In respect of improvement or structural alterations—Replacement of sanitary fittings.]—STROOD ESTATES CO., LTD. v. GREGORY, No. 7115a, ante.**

**7140a. — — —.]—Where, since Aug. 1914, a dwelling-house to which the Rent Restrictions Acts apply has been let at a rent lower than the standard rent, there is nothing in the Rent Restrictions Acts to preclude a landlord, by giving notice of increase of rent, from raising the agreed rent to the standard rent.—*PHILLIPS v. COPPING*, [1935] 1 K. B. 15; 104 L. J. K. B. 78; 152 L. T. 175; 50 T. L. R. 533; 78 Sol. Jo. 617, C. A.**

**7145a. What amounts to increase.]—By a local Act, the rates in S. were consolidated & became a comprehensive borough rate. In May 1927, by virtue of the Act, which provided that in certain cases owners might be rated instead of occupiers, the city council passed a resolution transferring the liability for the rate as regards premises of which the ratable value did not exceed £10. The resolution took effect on Oct. 5, 1927. The rate, which the owners became liable to pay, was calculated on the basis of nine-tenths of the amount in the pound of the full consolidated rate previously payable by the occupier. The landlords of certain premises of a ratable value not exceeding £10 claimed that they were entitled to increase the rent of one of their tenants, under 1920 Act, by the amount of the full consolidated rate previously payable by the tenant:—*Held*: under sect. 2 (1) (b), the landlords were entitled to increase the rent, as there had been an increase in the amount of the rates for the time being payable by the landlords over the corresponding amount paid by them in the period specified by the sect.; but the amount of the permitted increase was an amount equivalent to nine-tenths of the full consolidated rate, & not the full amount of that rate.—*HODGKINSON v. HEWITT* (1928), 139 L. T. 401; 44 T. L. R. 694; 93 J. P. 23; 27 L. G. R. 210, D. C.**

*Annotation:—Refd. Strood Estates Co v. Gregory, [1936] 2 All E. R. 355.*

**7149. Add. Annotations:—Apld. Hodgkinson v. Hewitt (1928), 139 L. T. 401. Folld. Evans v. Baxter (1930), 94 J. P. Jo. 173. Refd. Strood Estates Co. v. Gregory, [1937] 3 All E. R. 656.**

**7149a. — — —.]—Where a landlord pays the rates & receives an allowance he is not entitled under 1920 Act, s. 2 (1) (b), to increase the rent by the full amount of the**

*BOYLE v. FITZSIMONS*, No. 7108 1, ante.—*IR.*

*sa. Rates previously paid by landlord—Right to throw upon tenant.]—*Apart from any question of special agreement, Increase of Rent & Mortgage Interest (Restrictions) Act, 1923, prevents a landlord of premises to which the Act applies, so long as he is not entitled to obtain possession, from throwing upon the tenant the burden of rates, which he, the landlord, habitually pays or allows, though his contract to pay the rates may be void in law.—*MOORE v. DAVY*, [1928] 1 I. R. 346.—*IR.*



rates but only by that amount less the allowance.—*EVANS v. BAXTER* (1930), 46 T. L. R. 270; 74 Sol. Jo. 284, D. C.

*Annotation:—Refd. Strood Estates Co. v. Gregory*, [1936] 2 All E. R. 355.

**7150. Add. Annotation:—***Refd. Elvington Tenants v. Hatton* (1928), 139 L. T. 211.

**7154. Add. Annotation:—***As to (2) Consd. Harris v. Norris* (1930), 143 L. T. 230.

**7155. Add. Annotation:—***As to (1) & (2) Consd. Harris v. Norris* (1930), 143 L. T. 230.

**7155a. Tenant of part of dwelling-house—Right to notice from landlord of part.]—**On Aug. 4, 1914, a house was let in two parts, upper & lower, each part being let at a rent of 8s. 6d. a week. Subsequently the tenant of one part became tenant of the whole house at 17s. a week, & the landlord gave him notice to increase the rent under 1920 Act, s. 3 (2). Resp. having become tenant of the whole house, desired to sublet the lower part, as had been done previously, & he sublet to applt. at a rent of half the whole rent resp. himself paid for the whole house, namely, 8s. 6d. plus half the permitted increase. Applt. contended that the 8s. 6d. a week was the standard rent of the part he occupied, & that as no notice was served upon him of the permitted increase he was not liable to pay any more. Resp. sued for possession on the ground of non-payment of rent & rates in respect of the sub-tenancy. The county ct. judge gave judgment for resp. as pltf. Deft. appealed:—*Held*: resp. could not charge a rent in excess of the standard rent unless he could bring himself within the last

sentence of sub-sect. (2) of sect. 3 "where a notice of increase of rent which at the time was valid has been served on any tenant, the increase may be continued without service of any fresh notice on any subsequent tenant," but the reference there to the tenant was to the tenant of the dwelling-house in respect of which the question arose & the landlord of part was not entitled to increase the rent of the part unless notice of increase was given to the tenant of the part.—*HARRIS v. NORRIS* (1930), 143 L. T. 230; 94 J. P. 199; 46 T. L. R. 330; 74 Sol. Jo. 201; 28 L. G. R. 246, D. C.

**7165. Add. Annotation:—***Generally, Refd. Abbey v. Barnstyn*, [1930] 1 K. B. 660.

**7171. Add. Annotations:—***Consd. Phillips v. Copping*, [1935] 1 K. B. 15; *Wheeler v. Wirral Estates, Ltd.*, [1935] 1 K. B. 294. *Refd. Roe v. Russell*, [1928] 2 K. B. 117.

**7174a. Validity of notice—Notice combined with alternative increase.]—***WHEELER v. WIRRAL ESTATES, LTD.*, No. 702Sc, ante.

**7175. Add. Annotation:—***Refd. Roe v. Russell*, [1928] 2 K. B. 117.

**7181a. Decision of county court judge—Right of appeal to High Court.]—**Landlords served on one of their tenants a notice of increase of rent, purporting to increase his rent on account of their liability for repairs & other grounds. The tenant ultimately disputed the increase on the ground of repairs only. The landlords applied to the county ct. under 1920 Act, s. 2 (6), to determine the question whether the notice of increase was valid, whether they were responsible for the

**PART XXVII. SECT. 3, SUB-SECT. 3.—**  
C. (a).

**sl. Service of notice—Proof.]—***Held*: (1) as 1920 Act required no particular formalities or solemnities to be observed in connection with the service of notices, service could be proved by evidence in the ordinary way; (2) upon the facts it must be inferred that notice had been received by the tenant.—*GUTHRIE v. STEWART*, [1926] S. C. 743.—*SCOT*.

**sm. Agreement for increased rent.]—**Deft. resisted a claim on the ground that, as no notice to quit had been served, nor any valid notice of increase of rent, the increase was irrecoverable under Increase of Rent & Mortgage Interest (Restrictions) Acts of 1920 & 1923, pltf. contending that the latter Act authorised an agreement for an increased rent, not exceeding the limits prescribed by the Act, although a notice to quit & a valid notice of increase of rent had not been served. The circuit judge gave a decree for the amount claimed:—*Held*: the decision must be affirmed.—*LANGLEY v. POWER*, [1928] 1 R. 351.—*IR*.

**PART XXVII. SECT. 3, SUB-SECT. 3.—**  
C. (b).

**sn. Notice increasing rent during currency of lease.]—**A notice to be a valid notice must be correct in substance as well as in form.

A notice is not valid which purports to increase the rent during the currency of the original term of years for which the tenant holds the premises.—*SAMMON v. BYRNE*, [1926] 1 L. L. 411, 415.—*IR*.

**sp. Notice altering terms of tenancy.]—**A notice is not valid which purports to alter the terms & conditions of the original contract of tenancy, by altering the liability for repairs.—*SAMMON*

*v. BYRNE*, [1926] 1 R. 411, 415.—*IR*.

**sq. Immaterial errors—Effect of.]—**In an action for recovery of arrears of rent, the tenant maintained that a previous notice of intention to increase rent was invalid, in respect that (1) the notified increase of rates was inaccurate, & (2) a charge for stair gas had wrongly been included in the increased rates:—*Held*: as the tenant had suffered no prejudice, & as the notice did not contain any statement which was false or misleading in any material respect, & was as accurate as it could be in the circumstances at the time when it was given, the notice was not invalid.—*CLYDEBANK INVESTMENT CO., LTD. v. MARSHALL*, [1927] S. C. 860.—*SCOT*.

**PART XXVII. SECT. 3, SUB-SECT. 3.—**  
C. (c).

**sr. As to amount of rent.]—**A notice of intention to increase rent, which was in writing & in the statutory form, was objected to by the tenant as incompetent, on the ground that the landlord had stated, as the "rent payable," not the standard rent, but a higher amount which he was receiving at the date of the notice, & had further failed to set forth how the existing excess over standard rent had become due:—*Held*: as the tenant had already for some time been paying without objection rent at the figure stated in the notice, the *onus* was upon him to establish that the amount in excess of standard rent was not legally exigible, & as he had failed to do so, his objection fell to be repelled.—*M'KELLAR v. M'MASTER*, [1926] S. C. 754.—*SCOT*.

**7167 i. Amendment—Mode of.]—**A notice of intention to increase rent, which was in writing & in the statutory form, showed under the appropriate headings how the proposed increase

was made up. As the item of occupier's rates was subsequently found to have been overestimated, the original notice was amended by a corrective notice, sent by the landlord's factors & received by the tenant before any increased rent had become due:—*Held*: amendment of a defective notice was not restricted to the method prescribed by 1923 Act, s. 6, the primary purpose of which was to validate defective notices which had been acted on, & it was competent to amend the notice by the method adopted.—*M'KELLAR v. M'MASTER*, [1926] S. C. 754.—*SCOT*.

**7167 ii. — Jurisdiction of court.]—**Increase of Rent & Mtge. Interest (Restrictions) Act, 1926 (No. 24 of 1926), s. 14, has been framed to put the ct. into the position of being able to do substantial justice between landlords & tenants, & the power conferred goes far beyond the mere correction of clerical errors or the rectifying of mistakes of fact.—*HIGGINS v. WARREN*, [1927] 1 R. 558.—*IR*.

**7167 iii. — Effect of.]—**The ct. made amendments in the notices on terms which appeared to the ct. to be just & reasonable, & gave judgment for the landlord for portion of the rent claimed:—*Held*: as a result of this procedure, the tenant, instead of holding continuously under her agreement, became a statutory tenant as from the date upon which the first of the amended notices was deemed to have taken effect.—*NOLAN v. GRAVES*, [1929] 1 R. 7.—*IR*.

**PART XXVII. SECT. 3, SUB-SECT. 3.—**  
D.

**st. As condition precedent to increase of rent—Agreement for increased rent.]—***LANGLEY v. POWER*, [1928] 1 R. 351.—*IR*.

whole of the repairs, & if not for what proportion they were responsible:—*Held*: although questions of law were involved in the matters submitted, the terms of the Act made the decision of the county ct. judge final, & no appeal lay from it.—*ELVINGTON TENANTS, LTD. v. HATTON* (1928), 139 L. T. 211; 92 J. P. 92; 44 T. L. R. 453; 72 Sol. Jo. 319; 26 L. G. R. 303, D. C.

**7188a. Necessity for apportionment—Onus of proof.**—The tenant of part of a dwelling-house to which the Rent Restriction Acts applied proved, on an application by him for an apportionment of the rent of the whole house to determine the standard rent of the rooms occupied by him, that the whole house was let on Aug. 3, 1914:—*Held*: he had established a *prima facie* case of necessity for an apportionment, & the onus was then cast on the landlord to show that the rooms occupied by the tenant were let as a separate dwelling-house on Aug. 3, 1914, & so had a standard rent of their own, an apportionment of the rent of the whole house being thus rendered unnecessary.—*PLATMAN v. FROHMAN*, [1929] 1 K. B. 376; 98 L. J. K. B. 351; 140 L. T. 405; 93 J. P. 134; 45 T. L. R. 184; 27 L. G. R. 150, D. C.

**7195. Add. Annotation:—***As to (1) Refd. Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103.

**7218. Add. Annotation:—***Apld. Gee v. Harwood*, [1933] Ch. 712.

**7219. Add. Annotations:—***Apld. Gee v. Harwood*, [1933] Ch. 712. *Refd. Re Keystone Knitting Mills Trade Mk.* (1928), 97 L. J. Ch. 316.

**7225. Add. Annotation:—***Consd. Elvington Tenants v. Hatton* (1928), 139 L. T. 211.

**7225a. Who is tenant—1920 Act, s. 12 (1).**—*TICKNER v. CLIFTON*, No. 7107a, *ante*.

**7231. Add. Annotation:—***Refd. Wilkins v. Carlton Shoe Co.* (1930), 94 J. P. 207.

**7235a. ————**—*]*—*BOND v. PETTLE* (1921), *Times*, Jan. 15, D. C.

*Annotations:—Distd. Lever Bros., Ltd. v. Caton* (1921), 37 T. L. R. 664. *Fold. Murton v. Aldis* (1929), 141 L. T. 168.

**7235b. ————**—*]*—*MURTON v. ALDIS*, No. 7318b, *post*.

**7237. Add. Annotations:—***Refd. Roe v. Russell*, [1928] 2 K. B. 117; *Lovibond J. & Sons v. Vincent* (1929), 98 L. J. K. B. 402.

**7238a. ————**—*]*—*DOMENDIETTI v. RYAN*, No. 7041a, *ante*.

**7250. Add. Annotation:—***Refd. Turner v. Watts* (1927), 44 T. L. R. 105.

**7254. Add. Annotations:—***Distd. Campbell v. Lill* (1926), 135 L. T. 26. *Consd. Roe v. Russell*, [1928] 2 K. B. 117. *Apld. Lovibond (J.) & Sons v. Vincent*, [1929] 1 K. B. 687. *Consd. Price v. Gould* (1930), 143 L. T. 333; *Sutton v. Dorf* (1932), 76 Sol. Jo. 359. *Refd. Ebner v. Lascelles*, [1928] 2 K. B. 480; *Haskins v. Lewis*, [1931] 2 K. B. 1; *Skinner v. Geary* (1931), 47 T. L. R. 597; *Hiller v. United Dairies (London), Ltd.*, [1934] 1 K. B. 57; *Strood Estates Co. v. Gregory*, [1936] 2 All E. R. 355.

**7254a. — By will.**—The right of a statutory tenant under 1920 Act is a purely personal right, & cannot be transmitted by will.—*LOVIBOND (JOHN) & SONS, LTD. v. VINCENT*, [1929] 1 K. B. 687; 98 L. J. K. B. 402; 141 L. T. 116; 93 J. P. 161; 45 T. L. R. 383; 73 Sol. Jo. 252; 27 L. G. R. 471, C. A.

*Annotations:—Consd. Price v. Gould* (1930), 143 L. T. 333; *Sutton v. Dorf* (1932), 76 Sol. Jo. 359. *Refd. Abbey v. Barnstyn*, [1930] 1 K. B. 660; *Skinner v. Geary* (1931), 47 T. L. R. 597.

**7254b. —**—*]*—Where a statutory tenant purports to assign his interest & makes a declaration of trust in favour of the assignee, who is thereupon put into possession, the effect is to terminate the statutory tenancy & the assignee acquires no title or right to possession of the premises, but is simply a trespasser.—*WILKINS v. CARLTON SHOE CO., LTD.* (1930), 94 J. P. 207; 46 T. L. R. 415; 74 Sol. Jo. 463; 28 L. G. R. 358, C. A.

**7254c. Right to sublet.**—A statutory tenant of a dwelling-house, holding upon terms which do not prohibit subletting, may sublet part of the dwelling-house, provided the remainder is not already sublet. His power to sublet is subject to apportionment of the standard rent of the dwelling-house.

The words “lawfully sublet” in 1920 Act, s. 15 (3), & in 1923 Act, ss. 2 (2), 4 (5), & 7 (1), do not apply exclusively to a dwelling-house of which the tenant is a contractual tenant, but apply also to a dwelling-house of which the tenant is a statutory tenant.—*ROE v. RUSSELL*, [1928] 2 K. B. 117; 97 L. J. K. B. 290; 138 L. T. 253; 92 J. P. 81; 44 T. L. R. 278; 26 L. G. R. 145, C. A.

*Annotations:—Consd. Lovibond (J.) & Sons v. Vincent*, [1929] 1 K. B. 687; *Sutton v. Dorf* (1932), 76 Sol. Jo. 359. *Refd. Fordree v. Barrell* (1931), 95 J. P. 141; *Haskins v. Lewis*, [1931] 2 K. B. 1; *Skinner v. Geary* (1931), 47 T. L. R. 597.

—*]*—*See, also*, Nos. 7041, 7237.

**Whether property within Bankruptcy Acts.**—*See BANKRUPTCY*, Nos. 7681b, 7782b.

PART XXVII. SECT. 3, SUB-SECT. 4.—  
B.

**7189 1. Where house reconstructed—Conversion into flats.**—*BOYLE v. FITZSIMONS*, No. 7108 1, *ante*.—*IR.*

PART XXVII. SECT. 3, SUB-SECT. 6.—  
A.

*eg. Who may recover—Personal representative.*—Rent paid in excess of the amount permitted by the Increase of Rent & Mortgage Interest (Restrictions) Act, 1923, is not recoverable by the personal representative of the tenant from the landlord.—*TWOMEY v. CROININ*, [1937] I. R. 324.—*IR.*

PART XXVII. SECT. 3, SUB-SECT. 6.—  
B.

**7218 1. Recovery by action—Whether in time.**—The tenant of a dwelling-house, to which the Increase of Rent & Mtge. Interest (Restrictions) Act, 1923, applied, brought an action against her landlord (a) for the recovery of sums paid by her as rent in excess of the amount permitted by the Act—which sums are, by sect. 12 of the Act, made recoverable from the landlord by the tenant, & (b) for the recovery of a sum paid by her as a premium, on the granting of the tenancy—which sum is, by sect. 13 of the Act, recoverable by the person by whom it is made:—*Held*: the action, so far as it related to the claim for the repayment of the amount

of the premium, did not come within the scope of that portion of sect. 20 of Common Law Procedure Amendment Act (Ireland), 1853, which applied to actions brought to recover “penalties, damages, or sums of money given to the party grieved, by any statute,” since the words “damages or sums of money” must be construed as meaning damages or sums of money of a penal nature, which the premium paid was not. Accordingly the two years’ limit of time within which such an action must be brought, imposed by that sect., did not apply: further, the action, as regards both claims, was one brought upon the statute, the period of limitation for which was twenty years.—*LOWE v. GILCHRIST*, [1936] I. R. 435.—*IR.*

**7261. Add. Annotation:—**Refd. *Middlesex County Council v. Hall*, [1929] 2 K. B. 110.

**7262a. ————]**—**Refd.** was the owner of a controlled dwelling-house which was let to deft. at a weekly rent of 11s. 10 $\frac{1}{2}$ d. Deft. had sublet two rooms at a weekly rent of 7s., the sublet part being also a controlled dwelling-house within the meaning of the Act. The judge apportioned the rent attributable to the sublet portion as  $\frac{1}{4}$  of the whole rent. The rent of the sublet portion therefore exceeded the recoverable rent in respect of that portion by 1s. 7 $\frac{1}{2}$ d. per week. The judge thereupon made an order for the recovery of possession of the sublet portion of the house. It was contended for deft. that the judge ought to have considered the question of whether or not the order made would necessarily result in overcrowding, as pltf. had a wife & four sons, & the order for recovery of possession applied to the sublet portion only, & was sought for the purpose of pltf. & his family going into possession thereof:—**Held:** once the fact of overcharging had been established, the judge was entitled to make an order for possession under sect. 4 (1), provided that he was of the opinion that it was reasonable so to do. The judge having stated that he had considered all the circumstances of the case, presumably including the question of the possibility of overcrowding, the Ct. of Appeal would not disturb his finding.—**BOULTON v. SUTHERLAND**, [1938] 1 All E. R. 488; 54 T. L. R. 388; 82 Sol. Jo. 214, C. A.

**7264. Add. Annotation:—**Consd. *Roe v. Russell*, [1928] 2 K. B. 117.

**7265. Add. Annotations:—**Expld. *Lovibond (J.) & Sons v. Vincent*, [1929] 1 K. B. 687. **N.F. Sutton v. Dorf** (1932), 76 Sol. Jo. 359. **Refd. Roe v. Russell**, [1928] 2 K. B. 117.

**7268. Add. Annotation:—**Refd. *Skinner v. Geary* (1931), 47 T. L. R. 597.

**7278a. Tenant overcharging sub-tenant.]—****BOULTON v. SUTHERLAND**, No. 7262a, ante.

**PART XXVII. SECT. 5, SUB-SECT. 2.—**  
**B. (a).**

**7275 I. Breach of covenant—Adjudication as bankrupt.]—**Where a lease of premises contained a proviso that, on the bkpcy. of the lessee, it should be lawful for the lessor to re-enter upon the premises, & that, thereupon, the tenancy should absolutely cease, & as the lessee had been adjudicated a bankrupt, the ct. granted the appln. of the lessor for the recovery of possession of the premises, made within a year of the bkpcy. of the lessee, as, since Conveyancing Act, 1892, s. 2 (3) (c), applied, sub-sect. 2 of that section did not apply to the lease; & accordingly, the restrictions imposed by Conveyancing Act, 1881, s. 14 (1), did not apply to the lessor's right of re-entry. The term of years for which the lease was granted expired in 1924, but the lease continued to remain in possession:—**Held:** the lessee was not entitled to the protection of Increase of Rent & Mortgage Interest (Restrictions) Act, 1923, as he had broken one of the conditions of his tenancy by allowing himself to be adjudicated bkpt., & therefore, he was no longer entitled to possession, even as a statutory tenant.—**Re DREW**, [1929] 1 R. 504.—**IR.**

**PART XXVII. SECT. 5, SUB-SECT. 2.—**  
**B. (b).**

**7276 I. Premises used for immoral or**

**illegal purpose—What amounts to—**  
**Offence against licensing laws.]—**A tenant of licensed premises was convicted of an offence against the licensing laws, but the conviction was not recorded on the licence:—**Held:** the tenant had been convicted of using the premises for an illegal purpose, & the ct., considering it reasonable to do so, made an order for possession.—**FOLAN v. LEE**, [1926] 1 R. 87.—**IR.**

**PART XXVII. SECT. 5, SUB-SECT. 2.—**  
**B. (d).**

**sv. "Greater hardship"—Limited to tenant personally.]—**Where deft. was tenant of a house, which was occupied, not by him, but by his sister & her husband, & in proceedings for possession it was contended that the ct. should consider hardship to deft.'s sister & her family:—**Held:** "hardship" under Rent & Mgtg. Restrictions Act, 1923 (No. 19 of 1923), s. 4 (1) (d), was hardship to a tenant personally, & no hardship borne by third parties could be taken into consideration.—**COOLEY v. WALSH & COONEY**, [1926] 1 R. 239.—**IR.**

**sw. ——— What amounts to.]—****KAVANAGH v. WHITTLE**, [1926] 1 R. 425, 428.—**IR.**

**PART XXVII. SECT. 5, SUB-SECT. 3.**

**ss. Where tenant disentitled to protection—Tenant not in occupation.]—**Prior to 1920 F. C. became tenant of a

**7280. Add. Annotations:—**Apld. *De Vries v. Sparks* (1927), 137 L. T. 441. **Distd. Turner v. Watts (1927), 44 T. L. R. 105.**

**7281. Add. Annotations:—**Consd. *Standingford v. Bruce*, [1926] 1 K. B. 466; *De Vries v. Sparks* (1927), 137 L. T. 441.

**7281a. Notice to quit—What amounts to.]—**An agreement made by a tenant with his landlord for good consideration to give up possession cannot constitute a notice to quit within 1920 Act, s. 5 (1) (c), as substituted for the original sect. by 1923 Act, s. 4, so as to entitle a landlord, who on the strength of the agreement has contracted to sell the premises, to recover possession of same.—**DE VRIES v. SPARKS** (1927), 137 L. T. 441; 43 T. L. R. 448; 25 L. G. R. 497, D. C.

**7291. Add. Citations:—**95 L. J. K. B. 901; 24 L. G. R. 531.

**Add. Annotation:—**Generally, **Refd. Fordree v. Barrell** (1931), 95 J. P. 141.

**7298. Add. Annotations:—**As to (1) **Folld. Hicks v. Snook** (1928), 93 J. P. 55. **Refd. Gee v. Hazleton**, [1932] 1 K. B. 179.

**e. Premises Required by Local Authority or for Statutory Undertaking (Vol. XXXI., p. 581).**

Add the words "or for Purpose in Public Interest."

**7298a. "In public interest"—What is—Whether extension of trade.]—****GOOCH v. STRATMAN** (1927), 43 T. L. R. 475, D. C.

**7301a. ———]**—**WEST WALES JOINT BOARD FOR MENTALLY DEFECTIVE v. EVANS**, No. 7103b, ante.

**7302a. ———]**—**EBNER v. LASCELLES**, No. 7067a, ante.

**7307. Add. Citation:—**24 L. G. R. 141.

**Add Annotation:—**Refd. *De Vries v. Sparks* (1927), 137 L. T. 441.

**7308c. Part of premises sub-let—Remainder used for business purposes.]—****HASKINS v. LEWIS**, No. 7063a, ante.

dwelling-house under a contract of tenancy from month to month at the monthly rent of £1 15s. 8d. In 1920 F. C. went to reside elsewhere & never subsequently returned to the house. In 1920 F. C.'s brother, J. C., went, with F. C.'s permission, to reside in the house. A notice of increase of rent was served in 1920, subsequent to J. C. going into occupation. F. C. & J. C. were partners in business, & the rent of the dwelling-house was paid from the office of their firm, & was debited in the firm's accounts to J. C.'s salary or to his share of the profits. J. C. was rated in respect of the occupation of the dwelling-house. Both F. C. & J. C. stated in evidence that there was no assignment of the tenancy from F. C. to J. C. The landlord brought an action in the Circuit Court against both F. C. & J. C. to recover possession:—**Held:** the proper inference from the evidence was that J. C. occupied the dwelling-house as tenant at will to his brother F. C.; accordingly the proviso to sect. 4 (1) of the 1923 Act, applied; it therefore followed that the landlord was not precluded from obtaining an order for possession against F. C.; it further followed that, as the dwelling-house had been lawfully sublet to J. C. before proceedings were commenced, J. C. was entitled to retain possession under sect. 4 (2) of the 1923 Act, notwithstanding the judgment for recovery of possession against F. C.—**SISK v. CROMIN**, [1930] 1 R. 98.—**IR.**

**7318. Add. Annotation:—***Dbtd. Murton v. Aldis* (1929), 141 L. T. 168.

**7318a. — — — — —.]—***BOND v. PETTLE* (1921), *Times*, Jan. 15, D. C.

**Annotations:—***Distd. Lever Bros., Ltd. v. Caton* (1921), 37 T. L. R. 664. *Consd. Murton v. Aldis* (1929), 141 L. T. 168.

**7318b. — — — — —.]—**On an application for possession of a cottage made before justices under Small Tenements Recovery Act, 1838 (c. 74), it was proved that M. worked for C. at certain gas works from Apr. 1920, till Jan. 1921. Adjoining the gas works was a cottage, the property of C., which was let to M. at the commencement & in consequence of his employment. In Jan. 1921, on the termination of his employment, M. "received notice to quit the cottage, & was asked to pay a certain sum for rent. He applied to the county ct. & the rent was settled by the county ct. judge at 5s. per week." M. paid this rent up to Sept. 8, 1928. On June 1, 1928, C. having sold the gas works, including the cottage, to a limited liability co., conveyed the same to the co. On Sept. 22, 1928, the co. served a notice to quit on M., who subsequently tendered the rent due from Sept. 8 to 22, which was refused. On Oct. 13, 1928, the statutory notice under the Act of 1838 was served by the co. on M. The cottage was reasonably required by the co. as a residence for a man engaged in their whole-time employment at the gas works. The existence of alternative accommodation was not proved by the landlord. The justices found that no new tenancy had been created & that there was no obligation on the co. to prove alternative accommodation. Accordingly they ordered that a warrant of ejectment should issue:—*Held*: at the time ejectment was sought the cottage was not let to applt. in consequence of his employment, the tenancy then being held under an entirely new contract, & that there were no materials on which the justices could find that no new tenancy had been created. Accordingly, as resp. had not proved the existence of alternative accommodation, the order that a warrant of ejectment should issue must be quashed.—*MURTON v. ALDIS* (1929), 141 L. T. 168; 93 J. P. 184; 27 L. G. R. 509, D. C.

**7320. Add. Citation:—**24 L. G. R. 192.

**7322. Add. Annotation:—***Apld. Middlesex County Council v. Hall*, [1929] 2 K. B. 110.

**7322a. — — — — —.]—**The alternative accommodation which must be offered to the tenant by an applicant for possession under the Rent Restriction Acts of premises used as a dwelling-house & also as business premises, need only be as regards their user as a dwelling-house, & not as regards their user as business premises.—*MIDDLESEX COUNTY COUNCIL v. HALL*, [1929] 2 K. B. 110; 98 L. J. K. B. 482; 141 L. T. 243; 93 J. P. 188; 45 T. L. R. 474; 73 Sol. Jo. 366; 27 L. G. R. 427, D. C.

**7336a. Duty of judge to consider jurisdiction to**

make order for recovery.]—(1) Where, in an action in the county ct. to recover possession of a dwelling-house, the evidence is sufficient to put the judge upon inquiry whether the house is one to which the Rent (Restrictions) Rules, 1920, to inquire & determine whether the house is within the Act &, if it is, to decide whether the Act permits him, & whether it is reasonable, to make an order or give judgment for the recovery of possession thereof.

(2) The Div. Ct. thought that as no one had expressly mentioned the Rent (Restrictions) Act in the county ct. they ought not to consider its effect. I do not agree with that decision. In my opinion the Act imposes upon the county ct. judge the duty of deciding whether the property comes within its provisions &, if it does, whether he should make or refuse an order for possession (*SCRUTTON, L.J.*).—*SALTER v. LASK*, [1924] 1 K. B. 754; 93 L. J. K. B. 685; 130 L. T. 323; 68 Sol. Jo. 420; 22 L. G. R. 296, C. A.

**Annotation:—***As to* (2) *Fold. Lefevre v. Hirst* (1931), 100 L. J. K. B. 733.

**7336b. Appeal to High Court—Right to raise point of law not taken in county court—Jurisdiction of county court judge to make order for recovery.]—***SALTER v. LASK*, No. 7336a, *ante*.

**7336c. — — — — —.]—**(1) The tenant of a dwelling-house within the scope of the Rent Restrictions Acts sub-let three rooms forming a part thereof, & early in 1929 came into possession of that part. On Lady Day, 1929, he again sub-let the same three rooms to a sub-tenant, & later determined the contractual tenancy so created by a notice to quit. In an action brought by him to recover possession of the three rooms deft. claimed that his tenancy had become a statutory one, & relied on sect. 2 (1) of 1923 Act. Pltf. contended that when he came into possession of the whole house in 1929, the whole house thereby became decontrolled. He also contended that because of the wording of the first proviso to sect. 2 (1) & of the fact that the Act has been held to operate *in rem*, the part sub-let to deft. was not part of a dwelling-house to which the principal Act applied:—*Held*: the first proviso to sect. 2 (1) of 1923 Act applied; the dwelling-house let to deft. was not decontrolled; & that pltf. was not entitled to an order for possession.

(2) Deft. had not raised the point on which he now relied in the county ct.:—*Held*: the general rule that it is a condition precedent to the raising by an applt. of a point of law on appeal from a county ct. that that point should have been raised at the trial of the action does not apply to cases within r. 18 of Increase of Rent & Mtge. Interest (Restrictions) Rules, 1920.—*LEFEVRE v. HIRST* (1931), 100 L. J. K. B. 733.

**7342. Add. Annotation:—***Refd. Sheffield Corpn. v. Luxford, Sheffield Corpn. v. Morrell*, [1929] 2 K. B. 180.

[1933] S. C. 478.—*SCOT*.

**PART XXVII. SECT. 5, SUB-SECT. 5. —B.**

*p. Read "7342 i."*

**7342 ii. — — — — —.]—***BOYLE v. FITZ-SIMONS*, No. 7108 i, *ante*.—*IR*.

**PART XXVII. SECT. 5, SUB-SECT. 4.**

*ed. Agricultural holding—What is.]—Held*: production by the landlords of a certificate by the Department of Agriculture which bore that the house was required for an agricultural worker, that person being in fact a whole-time

employee, satisfied the conditions imposed by sect. 4 (1) (d) of the 1923 Rent Act; further, an "agricultural holding" in the sense of sub-sect. (1) meant land used for agricultural purposes, irrespective of whether it was in the occupation of a landlord or of a tenant.—*KEMP v. BALLACHULISH ESTATE CO.*,

**7346a.** Dispute not on question arising under Rent Restriction Acts—Dispute as to renewal of lease.]—*Held*: 1920 Act, s. 17 (2), applied.—*BRANCH v. BENNETT'S DAIRIES, LTD.* (1928), 44 T. L. R. 605.

**7351a.** — Lessee at rent less than two-thirds of ratable value.]—*LLOYD v. COOK, GOUDGE v. BROUGHTON, SIMSON v. MIATT, BARTRAM v. BROWN, BARKER v. HUTSON*, No. 7352d, *post*.

**7351b.** — Assignee of lease.]—In 1913 *pltf.* became the assignee of a lease of a house with twenty-six years unexpired. He went into occupation with his family & lived there until 1925, when he let three rooms on the ground floor to *deft.* on a weekly tenancy, the rooms constituting a separate dwelling-house within the Acts. He afterwards claimed to recover possession from *deft.*, on the ground that 1923 Act, s. 2 (1), applied so as to decontrol the premises:—*Held*: the possession by *pltf.* of the whole house at the passing of 1923 Act & up to the time of the letting to *deft.* (1) was not possession of the "dwelling-house" in question, (2) nor was it possession by him in the capacity of "landlord," & sect. 2 (1) did not apply so as to decontrol the premises.—*COHEN v. GOLD*, [1927] 1 K. B. 865; 96 L. J. K. B. 419; 136 L. T. 723; 43 T. L. R. 376; 25 L. G. R. 198, D. C.

*Annotations*:—*Overd.* *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103. *N.F. Ratkinsky v. Jacobs*, [1929] 1 K. B. 24. *Consd.* *Domendietti v. Ryan* (1929), 141 L. T. 239; *Lefevre v. Hirst* (1931), 100 L. J. K. B. 733. *Refd.* *Barton v. Keeble*, [1928] Ch. 517; *Kingsley v. Adler*, [1929] 1 K. B. 525.

**7352a.** — Quarterly tenant.]—A quarterly tenant of a dwelling-house which he has sublet may be the "landlord" of the premises within 1923 Act, s. 2, so that, if he obtains possession of the whole of the dwelling-house after the passing of that Act, the house becomes decontrolled.—*OAKLEY v. WILSON*, [1927] 2 K. B. 279; 96 L. J. K. B. 783; 137 L. T. 479; 43 T. L. R. 521; 71 Sol. Jo. 409; 25 L. G. R. 316, D. C.

*Annotations*:—*Consd.* *Thomas v. Jacobs* (1935), 79 Sol. Jo. 231. *Refd.* *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103; *Ratkinsky v. Jacobs*, [1929] 1 K. B. 24.

**7352b.** — Mesne tenant—Part subsequently sublet.]—In Nov. 1922, P. became tenant of an entire house on a three years' lease from a superior landlord. In Nov. 1924, he sublet four of the rooms therein to D., who subsequently applied that the standard rent of his rooms should be fixed by an apportionment of the rent of the entire house:—*Held*: the opening words of the proviso to 1923 Act, s. 2 (1), were merely descriptive of the position at the time when the question of decontrol arose, & should be construed as "where part of a dwelling-house is or during the currency of this Act shall be lawfully sublet," & D.'s rooms were saved from decontrol by the proviso.—

*DOULIN v. PARCELL* (1926), 136 L. T. 633; 43 T. L. R. 140; 25 L. G. R. 71, D. C.

*Annotations*:—*Apprvd.* *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103. *Refd.* *Oakley v. Wilson*, [1927] 2 K. B. 279.

**7352c.** — — — — —.]—*THOMAS v. JACOBS* (1935), 79 Sol. Jo. 231.

**7352d.** — Tenant at rent less than two-thirds of ratable value.]—The tenant of a dwelling-house under a ninety-eight years' lease at a rent which was less than two-thirds of the ratable value of the house was in possession of the house at the passing of 1923 Act:—*Held*: notwithstanding 1920 Act, s. 12 (7), the tenant was not, as against the freeholders, to be deemed to be the landlord of the house for the purposes of 1923 Act, s. 2 (1), so as to cause the house to become decontrolled.—*BROOKES v. LIEFFEN*, [1928] 2 K. B. 347; 138 L. T. 676; 92 J. P. 102; 44 T. L. R. 350; 26 L. G. R. 199, C. A.

*Annotations*:—*Consd.* *Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson*, [1929] 1 K. B. 103. *Apld.* *Ratkinsky v. Jacobs*, [1929] 1 K. B. 24. *Consd.* *Domendietti v. Ryan* (1929), 141 L. T. 239; *Thomas v. Jacobs* (1935), 79 Sol. Jo. 231.

**7352e.** — — — — —.]—(1) The expression "landlord" in 1923 Act, s. 2 (1), is not to be construed in the strict sense as requiring a tenant & a contract of tenancy, but it must be used either in the looser sense of "owner," or in the still looser sense of a person who at a later stage is going to appear as a landlord contesting with a tenant the terms of his tenancy. Neither in 1920 Act, nor in 1923 Act, is the word "landlord" used in its technical sense of a person between whom & the tenant a contractual relationship of landlord & tenant exists.

Where a person who is a "landlord" within 1923 Act, s. 2 (1), can prove either that he was in possession of the whole of the dwelling-house at the date of the passing of 1923 Act, or at any time since that date, 1920 Act ceases to apply to that dwelling-house & to every part of it. The whole house & every part of it is decontrolled, & a subsequent letting of the dwelling-house, or of any part of it, cannot revive control.

(2) The expression "the tenant" in 1923 Act, s. 2 (2), refers to the sitting tenant, *i.e.* the person who is the tenant at the time when the lease referred to in the sub-sect. is granted.

(3) Where a lessee at a rent less than two-thirds of the ratable value is in actual possession of the dwelling-house after July 31, 1923, the dwelling-house is thereby decontrolled, because, under 1920 Act, s. 12, the lessee must be treated as the landlord, & a subsequent sub-letting of certain rooms forming part of that dwelling-house does not revive control.—*LLOYD v. COOK, GOUDGE v. BROUGHTON, SIMSON v. MIATT, BARTRAM v. BROWN, BARKER v. HUTSON*, [1929] 1 K. B. 103; 97 L. J. K. B. 657; 139 L. T. 452; 92 J. P. 199; 44 T. L. R. 761; 72 Sol. Jo. 533; 26 L. G. R. 609, C. A.

*Annotations*:—*As to* (1) *Consd.* *Ratkinsky v. Jacobs*, [1929] 1 K. B. 24; *Domendietti v. Ryan* (1929), 141 L. T. 239.

**PART XXVII. SECT. 6.**  
7355 i. *By recovery of possession by landlord—What amounts to possession—Actual distinguished from notional possession.*—The tenant of a dwelling-house, to which the Acts applied,

gave notice of intention to remove at Whitsunday 1924. In Mar. 1924, the landlord let the house as from Whitsunday 1924 to a new tenant. At the Whitsunday term the old tenant removed from the house, & the new tenant entered into possession:—

*Held*: the landlord had not come into "actual possession" of the house within 1923 Act, s. 2, & 1920 Act continued to apply to the house.—*CALEDONIAN HERITABLE ESTATES, LTD. v. METHVEN*, [1927] S. C. 39.—*SCOT.*

*As to (2) Folld. Kingsley v. Adler, [1929] 1 K. B. 525. Consd. Abbey v. Barnstyn, [1930] 1 K. B. 600. As to (3) Consd. Thomas v. Jacobs (1935), 78 Sol. Jo. 231. Generally, Refd. Clark v. Downes, Clark v. Mawby (1931), 145 L. T. 20; Lefevre v. Hirst (1931), 100 L. J. K. B. 733; Holden v. Howard, [1938] 1 K. B. 442.*

**7356a.** — **New tenancy antedated.]—**  
**KEARNS v. BEDFORD (1934), 50 T. L. R. 348; 78 Sol. Jo. 368, D. C.**

**7356b.** — **Key placed in landlord's letter-box.]—**The tenant of a flat controlled under the Rents Acts sublet one of the rooms. She relinquished her tenancy of the flat & a sub-tenant agreed with the landlords to rent the flat immediately on the expiry of her tenancy, & signed a form of application. On the Saturday preceding the expiry of her tenancy the outgoing tenant moved out with her belongings & her key was dropped into the letter-box of the landlords' agent's office, which was closed for the week-end. The sub-tenant remained in occupation of the flat & became tenant of it, according to his agreement, on the following Mon. He fell in arrears with his rent & the landlords distrained. He then claimed that the distress was illegal because the premises had never become decontrolled, & brought an action for a declaration to this effect, for an injunction, & for return of rent over-paid. His action was dismissed, & he appealed:—*Held*: the surrender of the key gave the landlord "actual possession" within the Rent Acts, & the premises were decontrolled.—**THOMAS v. METROPOLITAN HOUSING CORPN., LTD., [1936] 1 All E. R. 210; 80 Sol. Jo. 205, C. A.**

**7356c.** — **Possession by trespasser.]—**On the death of the tenant of controlled premises after the passing of the 1923 Act, a trespasser went into occupation of the premises until they were let to him by the landlord:—*Held*: the landlord had never come into "actual possession" of the premises under sect. 2 (1), (3) of the Act so as to render them decontrolled premises. During the occupation of the premises by the trespasser the landlord was entitled to possession but was not in "actual possession" of the premises.—**HOLDEN v. HOWARD, [1938] 1 K. B. 442; [1937] 4 All E. R. 483; 107 L. J. K. B. 163; 158 L. T. 59; 54 T. L. R. 251; 81 Sol. Jo. 1039, C. A.**

**7358a.** — **Where, at the date of the passing of 1923 Act, a landlord was in possession of one part of a dwelling-house, & he had a tenant in possession of the other part, & the tenant subsequently gave up possession of his part:—Held**: the house became decontrolled, & a subsequent tenant was not protected by Rent Restrictions Acts.—**RATKINSKY v. JACOBS, [1929] 1 K. B. 24; 97 L. J. K. B. 566; 138 L. T. 739; 92 J. P. 142; 44 T. L. R. 548; 72 Sol. Jo. 354; 26 L. G. R. 380, D. C.**

*Annotation:—Apprvd. Lloyd v. Cook, Goudge v. Broughton, Simson v. Miatt, Bartram v. Brown, Barker v. Hutson, [1929] 1 K. B. 103.*

**7358b.** — **—BARTON v. KEEBLE, No. 2913a, ante.**

**7358c.** — **Application of proviso to 1923 Act, s. 2 (1).—HARRIS v. STACEY (1929), 73 Sol. Jo. 568, C. A.**

**7358d.** — **Failure to register—Certificate of reasonable excuse—Effect of.]—**In 1923 pltf. purchased a dwelling-house in the Metro-

politan police district of a rateable value of £13 *per annum*, the standard rent being 8s. 6d. a week. On Oct. 10, 1932, she came into possession of the whole of the dwelling-house, which thereupon became decontrolled by virtue of Rent & Mtge. Interest Restrictions Act, 1923 (c. 32), s. 2. She let the dwelling-house to deft. from Nov. 5, 1932, on a weekly tenancy at an agreed rent of 25s. a week. On July 18, 1933, the Rent & Mtge. Interest Restrictions (Amendment) Act, 1933 (c. 32), was passed. Pltf. failed to register the dwelling-house under sect. 2 of that Act within three months, but subsequently obtained from the county ct. a certificate that there was reasonable excuse for the failure to register. Application for registration in pursuance of the certificate was made in Jan. 1934:—*Held*: where an application for registration was made in pursuance of a certificate of the county ct., the effect was to place the house, as from that date, in the same position as though it had been registered within three months, & the landlord suffered no further detriment through the delay than such as might result from the application of the Act of 1933 between July 18, 1933, & the application to register.—**STOKES v. LITTLE, [1935] 1 K. B. 182; 104 L. J. K. B. 38; 152 L. T. 18; 51 T. L. R. 62; 78 Sol. Jo. 784, C. A.**

*Annotations:—Consd. Pearman v. Dyer, [1935] 2 K. B. 149. Refd. Brooks v. Brimcome, [1937] 2 All E. R. 637.*

**7358e.** — **—Where a landlord who has failed to apply within three months of the passing of the Rent & Mtge. Interest Restrictions (Amendment) Act, 1933 (c. 32), for registration of a dwelling-house of a rateable value not exceeding the amounts mentioned above which had become decontrolled under Rent & Mtge. Interest Restrictions Act, 1923 (c. 32), s. 2, obtains a certificate that there is reasonable excuse for the delay & within seven days thereafter applies for & secures the registration of the premises, the premises become decontrolled premises as from the date of the application for registration, notwithstanding that in the interval after the expiry of the three months' period part of the premises had been let to a tenant who had obtained an apportionment order under Increase of Rent & Mtge. Interest (Restrictions) Act, 1920 (c. 17), s. 12 (3).—**PEARMAN v. DYER, [1935] 2 K. B. 149; 104 L. J. K. B. 660; 153 L. T. 43; 51 T. L. R. 368; 79 Sol. Jo. 342, C. A.****

**7359a.** **By grant of lease to tenant—Who is tenant.]—****LLOYD v. COOK, GOUDGE v. BROUGHTON, SIMSON v. MIATT, BARTRAM v. BROWN, BARKER v. HUTSON, No. 7352e, ante.**

**7359b.** — **—Pltf. was the landlord & deft. the tenant of a dwelling-house, containing nine rooms. Subsequently pltf. let to deft. part of the dwelling-house, consisting of six rooms, & forming a separate dwelling-house, for a period of four years terminating after June 24, 1926:—Held**: that within 1923 Act, s. 2 (2), pltf. was the landlord of the part of the dwelling-house let to the tenant, & deft. was the tenant, although at the time the long lease was granted he was only the tenant of the whole house, & the part consisting of the six rooms was not in existence as a separate dwelling, & consequently, the said part of the dwelling-house was decon-

trolled.—KINGSLEY v. ADLER, [1929] 1 K. B. 525; 98 L. J. K. B. 218; 140 L. T. 438; 93 J. P. 107; 45 T. L. R. 226; 73 Sol. Jo. 93; 27 L. G. R. 220, D. C.

**7359c.** — — — **Contractual tenant.**—By an agreement for a lease dated Jan. 31, 1919, the shop & premises, No. 9, C. S., B., were let to W. for a term of two years from Mar. 25, 1919, at a rent of £45 *per annum*, the tenancy to continue thereafter, but to be terminable by six months' notice in writing. On Sept. 16, 1921, the landlord gave W. six months' notice to determine the tenancy, which expired on Mar. 25, 1922, but W. continued to occupy the premises at a rent of £54 *per annum* after the notice expired. On May 7, 1926, W. died, having by his will appointed his wife his sole executrix & universal legatee. Mrs. W. did not go into physical possession of the premises before May 26, 1926, when she entered into an agreement to take the premises on a three years' tenancy at the same rent. On July 26, 1926, she assigned the benefit of the agreement to deft. On Dec. 5, 1927, pltf's. acquired the freehold of the premises, & on Jan. 5, 1928, gave notice to deft. terminating the tenancy at the expiration of the term. Deft., however, claimed to hold over under Rent & Mortgage Interest Restriction Acts, 1920 & 1923, & pltf's. brought these proceedings for possession, claiming that although the premises had been a dwelling-house within the Acts they had been decontrolled as a result of the agreement of May 26, 1926. On appeal from an order made by the county court judge for possession:—*Held*: (1) there was evidence before the county court judge to support his finding that W. became a contractual tenant at the increased rent after the termination of the tenancy agreement of Jan. 31, 1919; (2) Mrs. W. was consequently a contractual tenant at the date of the agreement of May 26, 1926; (3) the agreement of May 26, 1926, therefore operated to decontrol the premises. There is no reason for giving "the tenant" in 1923 Act, s. 2 (2), the limited meaning of statutory tenant.—*ABBEY v. BARNSTYN*, [1930] 1 K. B. 660; 99 L. J. K. B. 369; 142 L. T. 619; 94 J. P. 196; 46 T. L. R. 293; 28 L. G. R. 313, D. C.

**7359d.** **Meaning of "valid lease"—Lease at rent exceeding standard rent.**—A dwelling-house within the scope of the Rent Restriction Acts was let by the landlord to the tenant for a term of more than two years at a rent which exceeded the standard rent together with the increases permitted by the Acts. The lease conferred on the tenant an option to determine at the end of the first

year:—*Held*: (1) the lease was a "valid lease" within sect. 2 (2) of 1923 Act notwithstanding that the rent received exceeded the rent chargeable thereunder; (2) the tenant's option to determine at the end of the first year did not prevent the term being a "term of not less than two years" within the sub-sect., & consequently that the Acts had ceased to apply to the dwelling-house as from the commencement of the term.—*QUINLAN v. AVIS* (1933), 149 L. T. 214; 77 Sol. Jo. 355, D. C.

**7359e.** — — — **Meaning of "term of not less than two years"—Lease with option to determine by tenant.**—*QUINLAN v. AVIS*, No. 7359d, *ante*.

**7359f.** **Whether premises recontrolled—Rent & Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 2.**—On July 18, 1933, the date of the passing of the Act of 1933, a dwelling-house in the district, & of the rateable value above mentioned, was occupied by the landlord, & accordingly decontrolled under the Act of 1923, & after that date it was vacated by the landlord & let to a tenant at a rent of 14s. 9d. a week:—*Held*: by the Ct. of Appeal the house was not recontrolled by sect. 2 (1) of the Act of 1933, for the reasons: (a) that it was not a "dwelling-house" within that sub-sect., inasmuch as, not having been let as a separate dwelling at the date of the passing of the Act, it did not come within the definition of that expression in sect. 16 (1) of the Act; & (b) that sub-sect. had not a retrospective operation as regards a house which was decontrolled & unlet at the date of the passing of the Act, & did not recontrol such a house.—*BROOKS v. BRIMECOME*, [1937] 2 K. B. 675; [1937] 2 All E. R. 637; 157 L. T. 417; 53 T. L. R. 727; 81 Sol. Jo. 435, C. A.

**7359g.** — — —.—*FOX v. MARSHALL*, [1938] 4 All E. R. 773, C. A.

**7361a.** — — —.—*R. & P. PROPERTIES, LTD. v. BALDWIN*, [1938] 4 All E. R. 845, C. A.

**7361b.** **Onus of proof.**—*WHITE v. BEMBRIDGE*, No. 7092a, *ante*.

**7361c.** — — —.—Since the passing of the Rent & Mtge. Interest Restrictions (Amendment) Act, 1933 (c. 32), the onus lies upon the tenant of a dwelling-house of showing that the house is still controlled, even though the rateable value of the house is less than £20 a year, & not upon the landlord of showing that the house has been decontrolled.—*HEGIN-BOTTAM v. WATTS*, [1936] 2 K. B. 6; [1936] 2 All E. R. 153; 105 L. J. K. B. 337; 155 L. T. 14; 52 T. L. R. 498; 80 Sol. Jo. 405, C. A.





## Part IV.—The Statement.

**109a. Accusation of causing religious unrest.]—**STRICKLAND v. BONNICI (1934), 78 Sol. Jo. 820, P. C.

**109b. Accusation of being informer.]—**Pltf. was a member of a club in which there had been some gambling machines. As a result of a complaint being made to the police, the machines were removed. A lampoon, which pltf. alleged referred to him & suggested that it was he who had informed the police, was put up on a wall in the club. The concluding words of the lampoon were: "But he who gave the game away, may he byrnn in hell & rue the day." Defts., husband & wife, were the proprietors, & the female deft. the secretary of the club. In an action for libel pltf. alleged that the words were defamatory & that defts. had published them by allowing the lampoon to remain on the wall:—*Held*: (1) it is not defamatory to say of a man he has informed the police of a crime; (*per* SLESSER & GREENE, L.J.J.) the words in the present case were not defamatory; (*per* GREER, L.J.) the words were defamatory, because they meant something more than the mere fact that the police had been informed of a crime. They meant that the pltf. had been guilty of disloyalty to fellow-members of his club; (2) (SLESSER, L.J.; dissenting in the case of the male deft.): there was evidence of publication against both defts.—*BYRNE v. DEANE*, [1937] 1 K. B. 818; [1937] 2 All E. R. 204; 106 L. J. K. B. 533; 157 L. T. 10; 53 T. L. R. 469; 81 Sol. Jo. 236, C. A.

**109c. Letters between insurance company & solicitors—Relating to admission of negligence of insured.]—**Pltf. took out with an insurance co. a motor insurance policy containing a clause that pltf. would not incur any expense whether in respect of litigation or otherwise or make any payment, settlement, arrangement or admission of liability for which the co. might be liable under the policy without the written authority of the co., & that the co. should have absolute conduct & control of all or any proceedings against pltf. Pltf.'s car was run into by a motor lorry, the collision being caused solely by the negligence of the lorry driver. A passenger in pltf.'s car was seriously injured, & issued a writ against the owners of the lorry & also, at their request, against pltf. The latter informed the insurance co., & left the matter in its hands, as he was bound to do under the policy. The co. sent the papers to its solrs., who entered an appearance to the writ & acted in the conduct

of the defence. Neither the co. nor the solrs. ever at any time communicated with pltf. in any way, & eventually the solrs. delivered a defence on behalf of pltf. admitting that the accident was caused solely by his negligence & wrote a letter to this effect to the solrs. opposing them. Having accidentally found out what was happening, pltf. protested to the local agent of the insurance co., to which agent the latter wrote: "If we had repudiated liability we ran a very serious risk of the ct. holding a different view." At the trial of the action, judgment was entered against pltf. for £1,124 12s. 10d., damages & costs, which sums were at once discharged by the insurance co. Pltf. now claimed damages against the solrs. & the insurance co. for breach of duty, negligence & libel:—*Held*: (1) the terms of the policy clearly entitled the insurers to nominate a solr. to act in the conduct of the proceedings; (2) such solr. was bound to act *bond fide* in what he considered to be the common interest of the insurers & the insured, & upon the facts, he had not done so; (3) the damages for breach of duty were only nominal, since the sums recovered in the action were at once paid by the insurance co. Pltf. could only sue the solrs. in contract & had no cause of action against them in tort; (4) assuming that the occasion upon which the letter admitting negligence was written was a privileged one, there was evidence of malice.—*GROOM v. CROCKER*, [1938] 2 All E. R. 394; 158 L. T. 477; 54 T. L. R. 861; 82 Sol. Jo. 374, C. A.

**109d. Allegation that firm refused to accept award of conciliation board.]—**Pltf. co., a firm of haulage contractors, & its managing director, brought actions for libel against six newspapers. In five of the cases the words complained of alleged that pltf. co. had refused to accept an interim wages award of a joint conciliation board for the road transport industry, & that, in consequence of that, members of a trades union had refused to handle the firm's goods at Hull & Liverpool Docks. In the sixth action, the words complained of were similar, but it was also stated that the managing director was chairman of the Yorkshire Area Joint Conciliation Board, & had taken an active part in the formulation of the Yorkshire employers' scheme. In the innuendo, it was pleaded in each action that the words meant, *inter alia*, that pltf. co. had refused to honour the award, but had been compelled so to do by the refusal of the

### PART IV. SECT. 1, SUB-SECT. 1.—B.

92 H. *Publication of authorised patent medicine testimonial.]—*Deft. published in the newspapers a testimonial purporting to have been given by pltf. recommending the use of a patent medicine sold by deft. Pltf. had not given or authorised the publication of the testimonial:—*Held*: the testimonial was capable of being held defamatory &, on the evidence, defamation had been established.—*MAZATTI (OR MASOTTI) v. ACME PRODUCTS, LTD.*, [1930] 3 W. W. R. 43; 4 D. L. R. 601.—*CAN.*

*n.l. Accusation of being spy.]—*Pltf.

alleged that he had been called a Nationalist spy, but alleged no special circumstances:—*Held*: the words were not *per se* defamatory.—*HARDAKER v. TABBING* (1927), 48 N. L. R. 145.—*S. AF.*

### PART IV. SECT. 1, SUB-SECT. 1.—C. (a).

*sb.* "I have taken judgment against you."—*Resp.*, being indebted to G. & Co. on an account for goods purchased upon which summons had been issued, called upon G. & Co. for the purpose of pointing out that the account was wrong. He was accompanied by a

friend L. who knew the object of his visit. While discussing the account applt., a director of the firm, said to *resp.* in the hearing of L. & P. (an employee of the firm): "I have taken judgment against you & you can do what you like." G. & Co. had not in fact taken judgment, applt.'s statement being based upon incorrect information obtained by telephone, during the course of the interview, by P. from the firm's solrs., & conveyed by P. to applt.:—*Held*: the words were not defamatory *per se*, but were capable of a defamatory meaning.—*SMITH v. LAWRENCE* (1929), 50 N. L. R. 183.—*S. AF.*

unions to handle its goods, that it was carrying on business in an illegal & unworthy manner, & that the managing director was the cause thereof, & was unfitted to retain such position :—*Held*: (1) the words complained of in their natural & ordinary meaning were defamatory, being such as might convey to a fair-minded man a reflection upon pltf.; (2) there should be no new trial: *per* GREER, L.J., because the words were not defamatory; *per* SLESSER, L.J., because the plea of justification was bound to succeed; (3) in the sixth action the words were defamatory & there should be a new trial.—*HOLDSWORTH, LTD. v. ASSOCIATED NEWSPAPERS, LTD.*, [1937] 3 All E. R. 872; 107 L. J. K. B. 69; 157 L. T. 274; 53 T. L. R. 1029; 81 Sol. Jo. 685, C. A.

109e. Reflection on prowess of boxer.]—*MCCORMICK v. BENNISON* (1938), 82 Sol. Jo. 869, C. A.

109f. Reflection on umpire at tennis match.]—*WILLIAMS v. ASSOCIATED NEWSPAPERS, LTD.* (1938), 82 Sol. Jo. 294, C. A.

121. *Add. Annotations*:—*As to* (2) *Apld.* *Tolley v. Fry & Sons, Ltd.*, [1931] A. C. 333. *As to* (3) *Refd.* *British Russian Gazette & Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, *Talbot v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616. *As to* (4) *Consd.* *Lockhart v. Harrison* (1928), 139 L. T. 521. *Generally*, *Consd.* *Cassidy v. Daily Mirror Newspapers*, [1929] 2 K. B. 331.

129a. Accusation of being Jew hater—Member of business largely carried on by Jews.]—Pltf. was employed by D., a member of the Diamond Corp'n., under an agreement for a year beginning on Jan. 1, 1928. The agreement provided that: "It is the intention of both parties to renew this agreement on expiry for a further period if mutually satisfactory terms can then be arranged." Pltf. continued in D.'s employment until he was given notice of dismissal, on Nov. 19, 1935, to take effect on Dec. 31, 1935. Pltf. alleged that deft. had made to D. certain statements defamatory of pltf., & he also alleged that deft. wrongfully & maliciously induced D. to commit a breach of contract by dismissing pltf. from his employment without proper notice. In an action for damages, the jury found (*inter alia*) that the expression "[ptf.] is a Jew-hater" was defamatory, & that the words referred to pltf. in relation to his business, but that no special damage had been proved. The jury also found that D. had committed a breach of his contract with pltf., & that deft. had wrongfully & maliciously induced such breach. Deft. & D. were both of the Jewish faith, & the diamond business is largely carried on by persons of that faith:—*Held*: (1) to call a person a Jew-hater is defamatory; (2) the words complained of were spoken of pltf. in relation to his business, & so were actionable without proof of special damage; (3) the contract was not a yearly hiring, & pltf. was entitled to reasonable notice. There had therefore been a breach of this contract; (4) (SLESSER,

L.J., dissenting) such breach had been procured by deft., & pltf. was therefore entitled to recover damages.—*DE STEMPEL v. DUNKELS*, [1938] 1 All E. R. 238; 158 L. T. 85; 54 T. L. R. 289; 82 Sol. Jo. 51, C. A.

135. *Add. Annotation*:—*Consd.* *Tolley v. Fry J. S. & Sons* (1929), 46 T. L. R. 108.

145. *Add. Annotation*:—*Refd.* *Sim v. Stretch*, [1936] 2 All E. R. 1237.

146. *Add. Annotation*:—*Apld.* *Tolley v. Fry J. S. & Sons* (1929), 46 T. L. R. 108.

167. *Add. Annotation*:—*Refd.* *Sim v. Stretch*, [1936] 2 All E. R. 1237.

167a. Amateur sportsman—Imputation of professionalism.]—Defts., a firm of chocolate manufacturers, issued, as an advertisement of their goods, a caricature of pltf., a prominent amateur golfer, depicting him as playing golf, with a packet of their chocolate protruding from his pocket, & a caddy was represented with him, who also had a packet of chocolate, the excellence of which he likened to the excellence of pltf.'s drive. The advertisement was published without the knowledge or consent of pltf., who thereupon brought an action claiming damages, alleging that it constituted a libel. By his statement of claim he alleged that "defts. thereby meant, & were understood to mean, that pltf. had agreed or permitted his portrait to be exhibited for the purpose of the advertisement of defts.' chocolate; that he had done so for gain & reward; that he had prostituted his reputation as an amateur golf player for advertising purposes; that he was seeking notoriety & gain by the means aforesaid; & that he had been guilty of conduct unworthy of his status as an amateur golfer." At the trial evidence was given by golfers to the effect that if an amateur golfer lent himself to a scheme for advertising, people might think he was not maintaining his amateur status, & that he might be called upon to resign his membership of any reputable club. It appeared from correspondence passing between defts. & their advertising agents that the question of the possible effect on the amateur status of pltf. & others similarly caricatured had been brought to the attention of the defts.:—*Held*: in the circumstances in which the publication took place, as explained by the evidence, the caricature was capable of bearing the meaning alleged in the innuendo, & there ought to be a new trial limited to the assessment of damages.—*TOLLEY v. FRY (J. S.) & SONS, LTD.*, [1931] A. C. 333; 100 L. J. K. B. 328; 145 L. T. 1; 47 T. L. R. 351; 75 Sol. Jo. 220, H. L.

*Annotation*:—*Refd.* *Byrne v. Deane*, [1937] 1 K. B. 818.

167b. Jockey—Statement as to being warned off.]—*COOKSON v. HAREWOOD*, [1932] 2 K. B. 478, n.; 101 L. J. K. B. 394, n.; 146 L. T. 550, n., C. A.

*Annotations*:—*Consd.* *Chapman v. Ellesmere*, [1932] 2 K. B. 431. *Refd.* *Wells v. Myddleton* (1935), 78 Sol. Jo. 270.

167c. ———.]—By rule 17 of the Rules of Racing of the Jockey Club: "The Stewards

#### PART IV. SECT. 1, SUB-SECT. 1.— C. (b) vi.

*ad. Illegal business.*]—An action of defamation cannot be maintained by a person who pursues an unlawful voca-

tion or engages in unlawful acts or transactions if to do so he must rely upon that vocation or those acts or transactions or any reputation arising out of them. He is not, however, deprived of protection to his

character or reputation *ultra* that vocation or those acts or transactions.—*WILKINSON v. SPORTING LIFE PUBLICATIONS, LTD.* (1934), 49 C. L. R. 365.—AUS.

of the Jockey Club have power, at their discretion, to grant, & to withdraw, licences to officials, trainers, jockeys, & racecourses; to refuse to allow any person to act or continue as an authorised agent; to fix the dates on which all meetings shall be held; to make inquiry into & deal with any matters relating to racing, & to warn any person off Newmarket Heath; & to authorise the publication in the *Racing Calendar* of their decisions respecting any of the above matters." Pltf., who was a horse trainer, received from the stewards of the Jockey Club a trainer's licence to train horses to run under the Rules of Racing during the year 1930. The licence was expressed to be subject to conditions, condition 3 of which provided that a trainer's licence might be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, & such withdrawal or suspension might be published in the *Racing Calendar*, the recognised organ of the Jockey Club, for any reason which might seem proper to them, & that the stewards should not be bound to state their reasons. Pltf. trained a horse which ran in a race at a meeting held under the Rules of the Jockey Club. After the race the acting stewards of the meeting ordered an examination of the horse, & on receiving a report of that examination they referred the matter to the stewards of the Jockey Club. The stewards held an inquiry, & their decision was communicated by the Club's agents to the Press agencies & the *Times*, & was published by them. It was also published in the *Racing Calendar*. The decision contained the following statement: "The stewards of the Jockey Club . . . after further investigation, satisfied themselves that a drug had been administered to the horse for the purpose of the race in question. They disqualified the horse for this race & for all future races under their rules & warned C. C. Chapman the trainer of the horse off Newmarket Heath." In an action by the trainer against the stewards, their agents & the Times Publishing Co., the proprietors of the *Times*, for libel, HORRIDGE, J., after holding that there was no evidence of malice, left questions to the jury which they answered to the effect that this statement was not true in the natural meaning of the words but meant that pltf. was a party to the actual doping of the horse, & they fixed the damages at £10,000, £3,000 & £3,000, in respect of the publication in the *Racing Calendar*, to the news agencies & in the *Times* respectively. Judgment was accordingly entered for £13,000 against the stewards & their agents for publication in the *Racing Calendar* & to the news agencies, & £3,000 against the stewards, their agents, & the Times Publishing Co. for publication in the *Times*. On appeal:—*Held*: (1) in finding that the words published were not true in their natural meaning, the jury must have meant that the statement, which was literally true, involved an untrue innuendo which was defamatory; (2) the publication of the decision of a domestic tribunal in the terms in which the tribunal *bond fide* embodied it, in the publication chosen by the parties as the means of communication between the tribunal & the section of the public interested, was privileged; (3) the publication in the *Racing Calendar* of the stewards' decision

was therefore privileged, & as pltf. had agreed to publication in that periodical of the stewards' decision, it was immaterial that the jury put a meaning on the words in which it was *bond fide* embodied by the stewards different from that which was intended by them; (4) HORRIDGE, J. was right in holding that there was no evidence of malice, & the action in regard to the privileged publication in the *Racing Calendar* therefore failed; (5) the publication to the news agencies & in the *Times* was not privileged, but the damages awarded both in respect of these publications as well as in respect of the publication in the *Racing Calendar* were excessive; (6) there must in regard to the claims in respect of the publication to the news agencies & in the *Times* be a new trial, which ought not in all the circumstances to be limited to the question of damages, but to go also to the question whether there had been a libel.

(7) *Per* SLESSER, L.J. As publication of the stewards' decision in the *Racing Calendar* was assented to by pltf. & the publication was in fact a true statement of their decision, the principle of *volenti non fit injuria* applied, & no claim for damages in respect of that publication would lie. The fact that the decision was published in such a way as to give rise to a defamatory innuendo was a risk which pltf. by consenting to a report of the decision being published in the *Racing Calendar*, had elected to run.

(8) *Per* ROMER, L.J. The privilege given by the common law to reports of proceedings before a ct. of justice open to the public does not extend to a proceeding before a domestic tribunal, such as the stewards of the Jockey Club, at which the public are not entitled to be present.—*CHAPMAN v. ELLESMERE*, [1932] 2 K. B. 431; 101 L. J. K. B. 376; 146 L. T. 538; 48 T. L. R. 309; 76 Sol. Jo. 248, C. A.

*Annotation*:—As to (5) *Conrad, Standen v. South Essex Recorders, Ltd.* (1934), 50 T. L. R. 365.

171a. Charge of having borrowed money from servant.]—Pltf.'s housemaid re-entered the service of deft. on Apr. 12, 1934. On that date deft. addressed & sent a telegram to pltf. containing the following words: "Edith has resumed her service with us to-day. Please send her possessions & the money you borrowed, also her wages to Old Barton.—Sim." Pltf. claimed damages for libel, alleging that these words were defamatory, & further that by them deft. meant & was understood to mean that pltf. was in pecuniary difficulties, that by reason thereof he had been compelled to borrow & had in fact borrowed money from his housemaid, that he had failed to pay her her wages, & that he was a person to whom no one ought to give any credit. Deft. denied that the words were reasonably capable of a defamatory meaning or of any of the meanings ascribed to them in the innuendo:—*Held*: the words complained of were not reasonably capable of a defamatory meaning, & judgment should therefore be entered for deft.—*SIM v. STRETCH*, [1936] 2 All E. R. 1237; 52 T. L. R. 669; 80 Sol. Jo. 703, H. L.; *reversg.* S. C. *sub nom.* *STRETCH v. SIM*, 79 Sol. Jo. 453, C. A.

*Annotations*:—*Apld.* *Holdsworth, Ltd. v. Associated News-Ltd.*, [1937] 3 All E. R. 872. *Reid, De Stempel v.*, [1938] 1 All E. R. 238.

174. *Add. Annotation*:—*Consd. Tolley v. Fry J. S. & Sons* (1929), 46 T. L. R. 108.
177. *Add. Annotation*:—*As to* (2) *Consd. De Stempel v. Dunkels*, [1938] 1 All E. R. 238.
188. *Add. Annotation*:—*Refd. Tolley v. Fry J. S. & Sons* (1929), 46 T. L. R. 108.
229. *Add. Annotation*:—*As to* (1) *Refd. Watt v. Longsdon* (1929), 98 L. J. K. B. 711.
292. *Add. Annotation*:—*Consd. Tolley v. Fry J. S. & Sons* (1929), 46 T. L. R. 108.
343. *Add. Annotation*:—*Refd. De Stempel v. Dunkels*, [1938] 1 All E. R. 238.
346. *Add. Annotation*:—*Refd. Byrne v. Deane*, [1937] 1 K. B. 818.
349. *Add. Annotation*:—*Refd. De Stempel v. Dunkels*, [1938] 1 All E. R. 238.
457. *Add. Annotation*:—*Refd. De Stempel v. Dunkels*, [1938] 1 All E. R. 238.
- 525a. *Candidate for seat in Parliament*.]—Defamatory words, which are actionable in them-

selves, are not the less so because they are alleged to have been spoken of one as a candidate to serve in parliament.—*HARWOOD v. ASTLEY* (1804), 1 Bos. & P. N. R. 47; 127 E. R. 375, Ex. Ch.

*Annotation*:—*Refd. Pankhurst v. Hamilton* (1887), 3 T. L. R. 500.

541. *Add. Annotation*:—*Refd. Broome v. Agar* (1928), 138 L. T. 698

577. *Add. Annotation*:—*Consd. Cassidy v. Daily Mirror Newspapers*, [1929] 2 K. B. 331.

672a. ———.]—*PLUNKET v. GILMORE* (1725), *Fortes. Rep.* 211; 8 *Mod. Rep.* 215; 92 E. R. 822.

771a. "He robbed J. W."—The words, "He robbed J. W." are actionable, as imputing an offence punishable by law. If they were used in any other sense deft. must show it.—*TOMLINSON v. BRITTELBANK* (1833), 4 B. & Ad. 630; 1 Nev. & M. K. B. 455; 2 L. J. K. B. 105; 110 E. R. 593.

PART IV. SECT. 1, SUB-SECT. 2.—  
B. (a).

178 i. *Words of uncertain import*.]—*ROBERTSON v. ROBERTSON* (1932), 45 B. C. R. 460.—CAN.

so. *Imputation of adultery*—*Not amounting to crime of seduction*.]—*MERKOFF v. PAWLUK*, [1931] 1 W. W. R. 669.—CAN.

PART IV. SECT. 2, SUB-SECT. 1.—  
C. (a).

240 i. ———. *Dishonest trading*.]—*RAHIM BAKSH v. BACHCHA LAL* (1928), 1 L. R. 51 All. 509.—IND.

PART IV. SECT. 2, SUB-SECT. 1.—  
D. (a).

347 i. *Profession or calling must be carried on at time of publication*.]—It is not defamatory to say of a man that he should not be allowed to follow his calling because of injuries, which would make the pursuit of that calling dangerous to him, when there is no disparagement of him which lowers his reputation in the judgment of his fellow men, although such a statement, if false, might give rise to an action for injurious falsehood. The rule that a statement is not actionable *per se* as reflecting on another in the way of his calling unless he exercises or holds it at the time of the publication applies to actions for libel as well as to actions for slander. The rule, however, does not prevent a statement reflecting on a man in the discharge of a former office from being actionable *per se* where it is also defamatory of him as a man.—*HENDERSON v. THOMPSON*, [1934] N. Z. L. R. 444.—N.Z.

sd. *Accusation of unethical practice*.]—Deft. dictated to his stenographer a letter addressed & sent to pltf., who was a real estate agent, in which it was stated that pltf. was guilty of "unethical practice".—*Held*: an imputation upon pltf. in the way of his vocation & touching his calling & actionable without proof of special damage.—*LAWRENCE v. FINCH*, [1931] 1 D. L. R. 689; 66 O. L. R. 451.—CAN.

PART IV. SECT. 2, SUB-SECT. 1.—  
D. (b).

se. *Painter*—*Imputation of non-membership of trade union*.]—*Held*: not defamatory, as the words did touch pltf. in his vocation, nor were they spoken of him in the way of his calling, so as to be actionable without special damage.—*M'CALLAN v. MUR-HALL & FARRELL*, [1929] 1 R. 470.—IR.

PART IV. SECT. 2, SUB-SECT. 1.—  
D. (c).

sm. *Intemperance*.]—Words which

impute conduct to a clergyman which in his denomination would be ground for his removal or degradation are slanderous *per se*. Deft. referred, in a debate, to the case of a clergyman going to a wedding, at which he officiated, after he had "loaded up his family, & with a bottle of home-brew in his hip pocket, another under his arm," etc. The words were understood by many of those who heard them to refer to pltf.:—*Held*: said imputation was slanderous *per se*.—*STELZER v. DOMM*, [1932] 2 W. W. R. 139.—CAN.

PART IV. SECT. 2, SUB-SECT. 1.—  
D. (f).

st. *Stevedore*.—*Misconduct as member of trade union*.]—Pltf., a wharf-labourer, had accused deft., the union secretary, of being short in his cash. A meeting of the union was called to consider pltf.'s conduct, & thereat deft. called pltf. & others "dirty stinking soaks & parasites," & stated that they were the first three men, in the event of industrial trouble, the union would have to fight. After discussion, the meeting resolved that pltf. apologise to deft., or in default, should resign. Pltf. did not do either, & at a subsequent meeting, was expelled from the union for not abiding by a decision of the meeting. Deft. thereafter successfully objected to pltf. being employed as a stevedore.—*Held*: the words were not applicable to pltf.'s conduct in his calling, & were not actionable *per se*.—*TAYLOR v. HAMILTON*, [1927] S. A. S. R. 314.—AUS.

sw. *Railway employee*.—*Misconduct with traveller*.]—A letter of dismissal falsely charging a railway employee with misconduct with a woman passenger constituted actionable libel without proof of malice, when the letter remains on the files of the employer accessible to other employees.—*EDGEWORTH v. NEW YORK CENTRAL*, [1936] 2 D. L. R. 577; O. R. 460.—CAN.

PART IV. SECT. 2, SUB-SECT. 1.—  
E. (b).

sv. *Treasurer*.]—Pltf. who was treasurer of a social service assocn. published a financial statement of the society & submitted it to a meeting of the society. The statement did not contain the name of deft. among those who contributed to the funds of the assocn. Deft. later stated to third parties that he had contributed to the assocn. by the payment of \$5 by cheque.—*Held*: the statement made by deft. might be most injurious to pltf., & if true would justify his removal from office, & the repetition of the words was the natural consequence of deft. ttering them.—*COOPER v.*

*WARBURTON*, [1931] 44 B. C. R. 328.—CAN.

PART IV. SECT. 2, SUB-SECT. 1.—  
E. (c) iii.

525 i. *Member of Parliament*.]—The term "office" includes the position of a member of Parliament, whether or not such person holds an office in the strict common-law sense of the term.—*PRATTEN v. THE LABOUR DAILY, LTD.*, [1928] V. L. R. 115; 47 A. L. T. 147; [1928] *Argus L. R.* 152.—AUS.

PART IV. SECT. 2, SUB-SECT. 2.—  
A. (a).

549 i. *Description of crime in technical terms unnecessary*.]—In order for words to be actionable *per se* as an imputation of the commission of a crime they need not describe the crime in technical language.—*BUREAU v. CAMPBELL*, [1928] 3 D. L. R. 907; [1928] 2 W. W. R. 535.—CAN.

sp. "Serious misdemeanour".]—The words "serious misdemeanour" are *prima facie* defamatory, & an innuendo is not necessary.—*HELPS v. NATAL WITNESS, LTD.*, [1937] A. D. 45.—S. AF.

PART IV. SECT. 2, SUB-SECT. 2.—  
A. (c).

sg. *Stealing names & addresses from files*.]—*LAWRENCE v. FINCH*, [1931] 1 D. L. R. 689.—CAN.

PART IV. SECT. 2, SUB-SECT. 2.—  
B. (a).

559 iii. ———.]—Words which impute, not the actual commission of a crime, but merely that the person spoken of would, if given the opportunity, commit a particular crime are not slanderous *per se*.—*DUBORD v. LAMBERT*, [1928] 3 D. L. R. 538; [1928] 2 W. W. R. 529; 23 *Alta. L. R.* 491.—CAN.

PART IV. SECT. 2, SUB-SECT. 2.—  
E. (j).

sl. *Misappropriation of trust funds*.]—The question of whether a statement charging the manager of an insurance co. with misappropriation of trust funds is libellous as charging the commission of a crime is a question of fact for the jury.—*WALKINSHAW v. DRW*, [1936] 4 L. R. 685; 67 *Can. C. O.* 152.—CAN.

PART IV. SECT. 2, SUB-SECT. 3.

844 ii. ———.]—In the course of a quarrel, at which applt. was not present, between applt.'s wife & daughter on the one side & resp. & her sister on the other, resp. used words inferring that applt. was a bad character & suffered from a venereal disease.—*Held*: although applt. had not suffered any very serious injury.

SUB-SECT. 4.—IMPUTATION OF UNCHASTITY IN

**866a. Photograph of husband of plaintiff with another woman—Alleged to be engaged.]—**(1) Defts. published in a newspaper a photograph of one C. & a Miss X. together with the words "Mr. C., the race-horse owner, & Miss X., whose engagement has been announced." Pltf. was, & was known among her acquaintances as, the lawful wife of C.; but defts. did not know this:—*Held*: the publication was capable of conveying a meaning defamatory of pltf. & the jury having found that it conveyed to reasonably minded people an aspersion on her moral character, that she was entitled to damages.

It is impossible for the person publishing a statement which, to those who know certain facts, is capable of a defamatory meaning in regard to A., to defend himself by saying: "I never heard of A. & did not mean to injure him." If he publishes words reasonably capable of being read as relating directly or indirectly to A. & to those who know the facts about A., capable of a defamatory meaning, he must take the consequences of the defamatory inferences reasonably drawn from his words (*SCRUTTON, L.J.*).—*CASSIDY v. DAILY MIRROR NEWSPAPERS*, [1929] 2 K. B. 331; 98 L. J. K. B. 595; 141 L. T. 404; 45 T. L. R. 485; 73 Sol. Jo. 348, C. A.

*Annotations*:—*Consd. Ralston v. Ralston*, [1930] 2 K. B. 238; *Youssoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T. L. R. 581. *Bruce v. Odhams Press, Ltd.*, [1936] 1 All E. R. 287. *Refd. British Russian Gazette & Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, *Talbot v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616.

**866b. Inscription on tombstone erected to living wife.]—**Pltf. married deft. in 1893. In 1899 the parties separated under a deed of separation & thenceforward lived apart. By the deed of separation deft. covenanted to pay an annuity to pltf., & the deed also contained a covenant for further assurance. After the separation pltf. set up in business as a garage proprietor, & she subsequently converted this business into a private limited co. in which she held the majority of the shares &

also was the chairman & managing director. In 1929 she saw in a churchyard near her husband's residence a tombstone on which was the following inscription: "In loving memory of Jennie the dearly beloved wife of W. R. Crawshaw Ralston of the Bungalow, Valley. Died 20th May, 1916." Deft. was the W. R. Crawshaw Ralston mentioned in the inscription & he had caused the inscription to be made. Pltf. brought an action against her husband for libel & also for a declaration that she was the lawful wife of deft.:—*Held*: though the inscription was capable of a defamatory meaning, the pltf., by reason of Married Women's Property Act, 1882 (c. 75), s. 12, could not sue her husband on it, the action being for a tort & not for the protection & security of her separate property.—*RALSTON v. RALSTON*, [1930] 2 K. B. 238 99 L. J. K. B. 266; 142 L. T. 487.

**866c. Statement that woman has been ravished.]—***YOUSSEPOFF v. METRO-GOLDWYN-MAYER PICTURES, LTD.*, No. 24b, *ante*.

**883. Add. Annotation:—***As to* (1) *Consd. Tolley v. Fry J. S. & Sons* (1929), 46 T. L. R. 108.

**885. Add. Annotations:—***Refd. R. v. Denyer*, [1926] 2 K. B. 258; *Auto-Mart (London) v. Chilton* (1927), 43 T. L. R. 463; *Hardie & Lane v. Chilton* (1927), 96 L. J. K. B. 1040; *Cookson v. Harewood* (1931), 101 L. J. K. B. 394, n.; *Thorne v. Motor Trade Assocn.*, [1937] 3 All E. R. 157.

**900. Add. Annotations:—***Consd. Broome v. Agar* (1928), 138 L. T. 698. *Apld. Cassidy v. Daily Mirror Newspapers*, [1929] 2 K. B. 331.

**907a. —.]—***CASSIDY v. DAILY MIRROR NEWSPAPERS*, No. 866a, *ante*.

**931. Add. Annotation:—***Refd. Tolley v. Fry J. S. & Sons* (1929), 46 T. L. R. 108.

**944a. — "Tenets."—***STRICKLAND v. BONNICI* (1934), 78 Sol. Jo. 820, P. C.

**951. For the existing paragraph substitute the following paragraph:—**

— — — — —]—Pltf. complained of a statement published by defts., in which it was alleged that pltf., then Free State Minister

or any real damage at all, it was a very serious matter for any person to say of another that he suffered from venereal disease, & the justice of the case would be met by awarding appt. & damages & costs.—*CONWAY v. WESTWOOD* (1936), N. L. R. 245.—S. AF.

**858 i. Charge of having had disease.]—**An imputation of past infection is not actionable *per se*.—*HALLS v. MITCHELL* (1927), 59 O. L. R. 590; *revid. on other grounds*, [1928] 2 D. L. R. 97; [1928] S. C. R. 125.—CAN.

PART IV. SECT. 2, SUB-SECT. 4.

**h i. —.]—**In order to succeed in an action under Libel Act, R. S. M. 1913 (c. 113), s. 12, the words complained of must unequivocally charge adultery, etc.; the action does not lie for words which may bear both an innocent & injurious meaning.—*WILLIAMS v. BROWN*, [1927] 3 W. W. R. 305; 36 Man. L. R. 161.—CAN.

**h ii. —.]—**A suit for defamation in respect of spoken words imputing unchastity is maintainable by a Hindu woman on the Original Side of the High Ct. without proof of special damage.—*NARAYANA SAH v. KAN-NAMMA BAI* (1931), I. L. R. 65 Mad. 727.—IND.

PART IV. SECT. 4, SUB-SECT. 1.

**867 vi. —.]—***SUTTER v. BROWN*, [1926] App. D. 155.—S. AF.

**867 vii. —.]—**In arriving at the meaning of words alleged to be defamatory, the words must be construed to have the meaning which a reasonable person reading them in their context would be likely to give them.—*JOHNSON v. RAND DAILY MAILS*, [1928] App. D. 190.—S. AF.

**875 v. —.]—**Deft. published of the directors of ptfs., an incorporated building society, in a newspaper, a notice stating, amongst other matters, that "certain persons representing themselves to be directors of the society had been self-appointed by the most despicable, foul, & fraudulent means, & in consequence, all business transacted by them . . . is wholly & entirely contrary to rules & regulations & law":—*Held*: the paragraph was capable of the meaning attributed to it, namely, that the business of the society was being illegally transacted, & as such it was defamatory of ptfs.—*OWEN SOUND BUILDING & SAVINGS SOCIETY v. MEIR* (1893), 24 O. R. 109.—CAN.

PART IV. SECT. 4, SUB-SECT. 2.

**883 i. Unless special circumstances**

*proved.*—Applt. & resp. were neighbouring shopkeepers. There was trade rivalry between the parties, which interested the whole township. Both applt. & resp. were known to every one. Warfare was conducted by placards. Resp. placed in his window a placard "One man, one trade, one wife." Applt., who was a married man living apart from his wife, & had a housekeeper who was separated from her husband, claimed that the words imputed improper relationships between him & his housekeeper, & claimed damages for libel:—*Held*: the words were capable of bearing the defamatory meaning complained of, & it was a reasonable inference that they referred to the relations between applt. & his housekeeper.—*CLARK v. VARE*, [1930] N. Z. L. R. 430.—N.Z.

PART IV. SECT. 5, SUB-SECT. 2.—A.

*se. Words not ordinary English words.]—*Where the words complained of are not ordinary English words, & pltf. adduces no evidence to show that they were understood in the sense alleged in the innuendo, he fails to establish a cause of action.—*MEIER v. KLOTZ* (Sask.), [1928] 1 D. L. R. 91; [1927] 3 W. W. R. 716; *revid.*, [1928] 4 D. L. R. 4; [1928] 2 W. W. R. 84; 22 S. L. R. 385.—CAN.

of Labour & head of the Free State Military Secret Service, was responsible for the murder of L., & knew who were the men implicated in an attack on British troops at Queenstown. Defts., in their plea of justification, did not justify the allegation of murder nor the allegation that pltf. was a murderer. But they said: "If & in so far as the words complained of meant or were understood to mean or were capable of meaning that pltf. took no steps to bring to justice persons guilty of the death of L. or of the attack on the British troops at Queenstown, or that pltf. was unfit to hold any office of trust or responsibility, or of any kind, or that pltf. was a person with whom no honest or responsible man ought to have anything to do, such words were & are true in substance & in fact." Pltf. having obtained an order for particulars of the justification, defts. delivered particulars of seventy-two murders committed in Ireland over a period of five years with an allegation that pltf. had assisted to organise them or had employed people to organise them:—*Held*: notwithstanding that defts., in their plea of justification had avoided justifying the allegations of murder, the particulars delivered by defts. were admissible.—*MACGRATH v. BLACK* (1926), 95 L. J. K. B. 951; 135 L. T. 594, C. A.

- 1006. Add. Annotation :—**Consd. Broome v. Agar (1928), 138 L. T. 698.
- 1010. Add. Annotations :—***As to* (1) Consd. Tolley v. Fry J. S. & Sons (1929), 46 T. L. R. 108. **Refd.** Cassidy v. Daily Mirror Newspapers, [1929] 2 K. B. 331; Sim v. Stretch, [1936] 2 All E. R. 1237. *Generally Refd.* Watt v. v. Longsdon (1929), 98 L. J. K. B. 711; Minter v. Priest, [1930] A. C. 558; Chapman v. Ellesmere (1932), 101 L. J. K. B. 376.

**1014. Add. Annotation :—***Reid. Tolley v. Fry J. S. & Sons* (1929), 46 T. L. R. 108.

**1019. Add. Annotations:—**As to (1) **Consd. Broome v. Agar** (1928), 138 L. T. 698; **Lockhart v. Harrison** (1928), 139 L. T. 521.

**1032. Add. Annotation :—***Consd. Broome v. Agar*  
(1928), 138 L. T. 698.

1045a. —.]—Pltf., a chauffeur, brought an action for slander against his former mistress, complaining that she had falsely alleged that he gave "joy rides" in her motor car. Deft. pleaded justification. The jury found that deft. had uttered the words complained of, but that they were not defamatory of pltf.:—*Held*: the question of libel or no libel was peculiarly a question for the jury, & it was only in the most extreme cases that the judge should allow his view to overrule that of the constitutional tribunal.—*BROOME v. AGAR* (1928), 138 L. T. 698; 44 T. L. R. 339 C. A.

**Annotations:**—*Folld. Lockhart v. Harrison* (1928), 139 L. T. 521. *Conrad. Yousoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T. L. R. 581.

**1045b.** —.]—In a libel action, where the words complained of are not of necessity defamatory, & the question of libel or no libel has been properly left to the jury, the verdict arrived at by them that the words were not defamatory must stand.

It is not true to say that a jury's verdict in these circumstances can never be assailed. A plain & obvious defamation incapable of any innocent explanation, if found by the jury to be non-libellous, would certainly be set aside (LORD BUCKMASTER).—LOCKHART v. HARRISON (1928), 139 L. T. 521; 44 T. L. R. 794, H. L.

**Annotation:—***Reid. Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T. L. R. 581.

## Part V.—Publication.

- 1069.** *Add. Annotations:*—*Consd. Watt v. Longsdon* (1929), 98 L. J. K. B. 711. *N.F. Osborn v. Boulter* (Thomas) & Son, [1930] 2 K. B. 226.
- 1071a.** *Failure to remove libel attached to premises by third party.*—*BYRNE v. DEANE*, No. 109b, ante.
- 1084.** *Add. Annotation:*—*N.F. More v. Weaver*, [1928] 2 K. B. 520.
- 1084a.** — — — — —.]—(1) If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission & treatment

of that communication which are in accordance with the reasonable & usual course of business; & it is in accordance with the reasonable & usual course of business for a business man to dictate his business letters to a typist, even although these letters contain statements defamatory of a third person.

(2) *Semble* (per SCRUTTON & SLESSER, L.JJ.): Where a document containing defamatory statements is published by being read out to a third person, or where the publication of the defamatory statement is

**PART IV. SECT. 6, SUB-SECT. 1.**

964 ll. ————.]—ROBINSON v. SUGARMAN (1897), 17 P. R. 419.—CAN.  
964 ll. ————.]—In an action for libel or slander the statement of claim must set out the exact words complained of.—SHANNON v. KING, [1931] 2 W. W. R. 913; 44 B. O. R. 383.—CAN.

984 iv. ———.]—An alleged  
defamatory statement must be set  
out *verbatim* in the statement of claim  
& if in a foreign language the transla-  
tion must accompany it.—PIRIE v.  
CARROLL, [1931] 4 M. P. R. 127.—CAN.

**PART IV. SECT. 6. SUB-SECT. 2.—A.**

979 H. —.]—EVANS v. MARTYN,  
[1926] 2 D. L. R. 698 ; 87 B. C. R. 281.  
—CAN.

**PART IV. SECT. 7, SUB-SECT. 1.—B.**

1011 v. —.]—Where the line can be clearly drawn between what are statements of fact & expressions of opinion, a judge may rule as a matter of construction that the words complained of are incapable of being anything but statements of fact.—*ST. LEDGER v. BRENNAN* (1927), 28 S. R. N. S. W. 23.—*AUS.*

1011 vl. ———.]—In a suit for damages for libel based upon an article published in defts.' newspaper, plff. alleged the article imputed to him the heinous crime of being a member of a terrorist organisation to murder a certain class of persons. Defts. pleaded privilege & fair comment in a matter of public interest:—**Held:** it is for the ct. in such a case in the

first place to rule whether or not as a matter of law the article is capable of the construction suggested by pltf., & next to decide whether it is so as a question of fact, i.e. whether an ordinary man likely to read the article would understand it in the sense alleged by pltf.—SUBHAS CHANDRA BOSE v. KNIGHT & SONS (1923), 1 L. R. 55 Calc. 1121.—**IND.**

**PART V. SECT. 1, SUB-SECT. 1.—**  
**A. (c) 1.**

1084 v. ————,]—GREENAN  
v. MINNEAPOLIS THRESHING MACHINE  
Co. & CHRISTIANSEN (Alta.), [1929] 4  
D. L. R. 501; 3 W. W. R. 215.—CAN.

1084 vi. ————.]—HALL v.  
GEIGER (B. C.), [1929] 4 D. L. R. 420;  
3 W. W. R. 80.—CAN.



to a clerk to whom it is dictated, the communication in either case amounts to slander & not to libel.

*Semble* (per GREER, L.J.): Such communication amounts to libel.—OSBORN v. BOULTER (THOMAS) & SON, [1930] 2 K. B. 226; 99 L. J. K. B. 556; 143 L. T. 460, C. A.

1085. *Add. Annotation*:—*Refd.* Gottliffe v. Edleston, [1930] 2 K. B. 378.

1086. *Add. Annotation*:—*Refd.* Gottliffe v. Edleston, [1930] 2 K. B. 378.

1087. *Add. Annotations*:—*As to* (1) *Refd.* Smith v. Schilling, [1928] 1 K. B. 429; *Ley v. Hamilton* (1934), 151 L. T. 380; *Mechanical & General Inventions Co. v. Austin & Austin Motor Co.*, [1935] A. C. 346. *Generally*, *Refd.* Martin v. Benson, [1927] 1 K. B. 771.

1104. *Add. Annotations*:—*As to* (2) *Appld.* Bradstreets British, Ltd. v. Mitchell (1932), 48 T. L. R. 670. *Refd.* The Edison (1931), 147 L. T. 141; *Howard v. Odhams Press, Ltd.*, [1937] 2 All E. R. 509.

1104a. —.]—A contract between a mercantile inquiry agency, which furnishes reports on the financial stability of cos., firms, & persons engaged in trade, & a trading co., providing that all information furnished by the agency to its subscriber, the trading co., is supplied in strict confidence for the exclusive use of the subscriber in the subscriber's business, & that the subscriber shall indemnify the agency in respect of any loss or damage which it may suffer or incur from the breach by the subscriber of any of the conditions of the contract, is not void as being against public policy on the ground that the fundamental element of the contract is the desire on the part of the agency to protect itself against the risk of actions for libel resulting from reports issued by it to subscribers. If, however, a subscriber does disclose information supplied by the agency with the result that the agency has to pay to a third party damages for a libel on that third party contained in the information in question, no special damage being suffered by the third party, the only damages recoverable by the agency from the subscriber in an action for breach of contract are nominal damages, the *causa causans* of the liability to pay damages being the unlawful act of the agency in publishing a libel & the disclosure by the subscriber being only the *causa sine qua non*.—BRADSTREETS BRITISH, LTD. v. MITCHELL, [1933] Ch. 190; 102 L. J. Ch. 34; 148 L. T. 111; 48 T. L. R. 670.

PART V. SECT. 1, SUB-SECT. 3.—A.  
1106 III. —.]—HARKINS v. DONEY (1888), 17 O. R. 22.—CAN.

PART V. SECT. 1, SUB-SECT. 3.—  
C. (a) II.

1134 IV. —.]—*Prima facie* the person who is the "declared printer" of a newspaper is responsible for everything that is printed in it. He can, however, escape liability by showing that he was absent *bona fide*, that is, not with the purpose of evading responsibility, when a particular article complained of was printed. But if he does so, he is bound to give evidence as to who the actual printer of the paper in his absence was.—HAR SWARUP v. MUHAMMAD SIRAJ (1928), 1 L. R. 60 All. 806.—IND.

PART V. SECT. 1, SUB-SECT. 4.—A.  
sg. *Effect of course of trial*.—Where a deft. enters upon his defence at the trial, although *pltf.*, by reason of the failure to prove some essential issue, has not yet made out a *prima facie* case, & deft. makes out that issue, it ensures to the benefit of *pltf.* & supports the action. On an appeal by defts. from a judgment against them for libel, defts. contending that publication had not been proved nor, as held by the trial judge, admitted in the pleadings:—*Held*: all parties were bound by the course of the trial & there was no good ground for disturbing the verdict.—PATCHING v. HOWARTH, [1930] 3 W. W. R. 129; 4 D. L. R. 489; 43 B. C. R. 108; *affg.*, [1930] 2 D. L. R. 776; 1 W. W. R. 335.—CAN.

1119. *Add. Annotation*:—*Consd.* Sun Life Assurance Co. of Canada v. Smith (W. H.) & Son, Ltd. (1934), 150 L. T. 211.

1120. *Add. Annotations*:—*Consd.* Bottomley v. Woolworth & Co. (1932), 48 T. L. R. 521; *Sun Life Assurance Co. of Canada v. Smith* (W. H.) & Son, Ltd. (1934), 150 L. T. 211.

1122. *Add. Annotations*:—*Consd.* Bottomley v. Woolworth & Co. (1932), 48 T. L. R. 521; *Sun Life Assurance Co. of Canada v. Smith* (W. H.) & Son, Ltd. (1934), 150 L. T. 211.

1124a. —.]—Consideration of the responsibilities of persons who distribute magazines containing a libel not written by themselves.—BOTTOMLEY v. WOOLWORTH (F. W.) & CO., LTD. (1932), 48 T. L. R. 521, C. A.

*Annotation*:—*Refd.* Sun Life Assurance Co. of Canada v. Smith (W. H.) & Son, Ltd. (1934), 150 L. T. 211.

1124b. —.]—A poster was displayed on which was printed in large letters the words: "More Grave Sun Life of Canada Disclosures." It was held that the poster was capable of a libellous meaning. The probabilities were in favour of its being read as meaning: "More grave disclosures about the Sun Life of Canada" rather than: "More grave disclosures by the Sun Life of Canada." The poster was displayed under contract by defts., who were newsgagents at ry. station bookstalls. Defts. gave evidence that at their head office newspaper poster contents bills arrived in such quantities & had to be dispatched with such speed, that they had no time to open & consider them. The manager of a bookstall was granted no discretion as to whether he should withdraw a publication on the ground that it was libellous. There were district superintendents of bookstalls, but each had a large number of bookstalls to cover. A jury found (*inter alia*) that there was negligence on the part of defts. in not knowing that the poster or the newspaper to which it referred contained a libel:—*Held*: there was evidence upon which the jury could so find.—SUN LIFE ASSURANCE CO. OF CANADA v. SMITH (W. H.) & SON, LTD. (1933), 150 L. T. 211, C. A.

1133. *Add. Annotation*:—*Refd.* R. v. Wicks, [1936] 1 All E. R. 384.

1135. *Add. Annotation*:—*As to* (2) *Refd.* R. v. Wicks, [1936] 1 All E. R. 384.

1154. *Add. Annotation*:—*Refd.* Byrne v. Deane, [1937] 1 K. B. 818.

1168. *Add. Annotation*:—*Consd.* Osborn v. Boulter (Thomas) & Son, [1930] 2 K. B. 226.

1177. *Add. Annotation*:—*Refd.* The Fagernes, [1926] P. 165.

sh. *Admission — What amounts to*.—In an action for slander or libel an alternative plea of justification which also denies that the words complained of or any words were spoken of *pltf.* by deft. is not an admission of the publication of the slander; & the trial judge may permit the plea to be withdrawn at the trial.—NAGY v. WEBB, [1930] 1 W. W. R. 357; 2 D. L. R. 234; 24 S. L. R. 269.—CAN.

PART V. SECT. 1, SUB-SECT. 4.—  
B. (b).

s). *Notice under Libel & Slander Act, s. 8*.—SENTINEL-REVIEW Co. v. ROBINSON, [1927] 4 D. L. R. 232; 61 O. L. R. 62; *reversd.*, [1928] 3 D. L. R. 97; [1928] S. O. R. 852.—CAN.

**1199a. — Allegation of assisting publication.]—**Pltf. sued for libel the author, printers & publishers of a novel, & also the printers of the advertising wrapper, which contained a striking picture & a reference to the contents of the book, though no directly defamatory matter. Against these defts. he pleaded that they had "assisted to publish" the libels in the book. The judge in chambers ordered this part of the statement of claim to be struck out & pltf. appealed:—*Held*: (1) an allegation of assisting in publication is identical with an allegation of publication; (2) the question of whether these defts. were a party to the publication was one of fact to be decided on the evidence at the hearing & the claim in respect thereof should not have been struck out.—*MARCHANT v. FORD*, [1936] 2 All E. R. 1510; 80 Sol. Jo. 791, C. A.

**1201a. — As to source of information—Libel by trade protection society.]—**Defts., an assocn. of traders formed for the purpose (*inter alia*) of supplying information to its members, issued a report in which appeared an inquiry as to the address of pltf. Pltf. sued defts. in

respect of this publication, alleging that by it defts. meant & were understood to mean that he had moved from the address where he had resided for eight years, & where he still resided without leaving any indication of his movements, with the object of avoiding payment of his debts. Defts. denied the innuendo & pleaded that the words were published on a privileged occasion & without malice. Defts. by their particulars stated that a member of their assocn. made an inquiry with regard to pltf., & the secretary, in pursuance of his duty to further the objects of the assocn., instructed their inquiry officer to inquire for pltf., & that the inquiry officer was informed that pltf. had left, & thereupon defts. in the honest belief that this was true published the information for the benefit of the members. On an application by pltf. for further & better particulars:—*Held*: defts. were bound to give further particulars to enable pltf. to test the question whether the inquiry was made by a member of deft. assocn.—*ELKINGTON v. LONDON ASSOCN. FOR PROTECTION OF TRADE* (1911), 27 T. L. R. 329, C. A.

## Part VI.—Defences.

**1216. Add. Annotation:—**Consd. *Morriss v. Baines & Co.*, [1933] 1 K. B. 540.

**1245. Add. Annotation:—**Refd. *Godman v. Times Publishing Co.*, [1926] 2 K. B. 273.

**1262. Add. Annotation:—**Consd. *Morriss v. Baines & Co.*, [1933] 1 K. B. 540.

**1272. Add. Annotation:—**As to (3) Refd. *Sim v. Stretch*, [1936] 2 All E. R. 1237; *Holdsworth, Ltd. v. Associated Newspapers, Ltd.*, [1937] 3 All E. R. 872.

**1302a. Imputation as to disclosure of confidential information—By solicitor—Proof of disclosure of communications made by clients**

**to solicitor.]—***MOORE v. TERRELL* (1833), 4 B. & Ad. 870; 1 Nev. & M. K. B. 559; 110 E. R. 683.

*Annotation:—*Refd. *Taylor v. Blacklow* (1836), 3 Bing. N. C. 235.

**1310. Add. Annotation:—**Refd. *Godman v. Times Publishing Co.*, [1926] 2 K. B. 273.

**1312a. Time for.]—**In a libel action where justification was pleaded as a defence, an application for particulars of justification was ordered to be stood over until after discovery:—*Held*: this was not a proper practice. Full particulars of justification

### PART V. SECT. 2, SUB-SECT. 1.—A.

*sk. Words overheard by third party.]—*There is publication of a slander if the defamatory words are overheard by a third person regardless of whether the utterer knew of his presence or not.—*GRANDY v. McNICOL*, [1931] 1 W. W. R. 814; 3 D. L. R. 284; 39 Man. L. R. 442; *affd.*, [1932] 1 D. L. R. 225; [1931] S. C. R. 696.—CAN.

### PART V. SECT. 4, SUB-SECT. 1.

*q i. — [.]—*IRISH PEOPLE'S ASSURANCE SOCIETY v. DUBLIN CITY ASSURANCE CO., LTD., [1928] I. R. 204; on appeal, [1929] I. R. 25.—IR.

*q ii. — Days of publication.]—*In an action for libel based on the circulation of a certain petition to the Minister of Justice in the months of Nov. & Dec. prior to the bringing of the action, one of defts. moved to strike out the statement of claim because of pltf.'s failure to furnish as required by an order for particulars the particular days in those months on which the publication was alleged to have taken place:—*Held*: the order was in this respect too wide & the motion was dismissed without costs.—*FROCK v. LA VALLEY* (Alta.), [1929] 2 D. L. R. 370; 1 W. W. R. 873.—CAN.

*sm. Publication to specified person*

*must be pleaded.]—*In an action for libel the statement of claim alleged publication but did not state the person to whom publication was made. No particulars were asked for, & at the trial pltf., without objection, gave evidence of publication to deft.'s stenographer. At the end of the trial the judge said he would hear applications to amend, but counsel for deft. then said he did not wish to amend & relied on his preliminary objection that, since publication to a third person was not pleaded, the statement of claim disclosed no cause of action. The judge agreed with this contention & dismissed the action. Pltf. appealed:—*Held*: the appeal should be allowed & judgment go for pltf. for the amount of damages the trial judge would have allowed had he given judgment for pltf.—*HALL v. GEMER*, [1930] 2 W. W. R. 790; 3 D. L. R. 644; 42 B. C. R. 335; *revg.*, [1929] 4 D. L. R. 420; 3 W. W. R. 80; 41 B. C. R. 431.—CAN.

### PART VI. SECT. 1, SUB-SECT. 2.—A.

*sk. Where libel divisible.]—*O'CALLAGHAN v. THOMSON D. C. & CO., [1928] S. C. (Ct. of Sess.) 532.—SCOT.

### PART VI. SECT. 1, SUB-SECT. 3.—A.

*1274 ii. — [.]—*Under a plea of justification the onus lies on deft. to prove that each defamatory statement

to which the plea is pleaded, is true & for the public benefit by reason of the facts set out in the plea which facts deft. is also bound to prove, & upon failure to prove any one of these matters the plea fails.—*MUTCH v. SLEEMAN* (1928), 29 S. R. N. S. W. 125; 46 N. S. W. W. N. 52.—AUS.

### PART VI. SECT. 1, SUB-SECT. 3.—B. (b).

*1282 i. General rule—Same strictness of proof required as on indictment.]—*MAYS v. DEGENERESS (Sask.), [1929] 4 D. L. R. 771.—CAN.

*sj. Newspaper article imputing dishonesty—Admission by plaintiff of sexual misconduct.]—*MALING v. S. BENNETT, LTD. (1928), 29 S. R. N. S. W. 280; 46 N. S. W. W. N. 113.—AUS.

### PART VI. SECT. 1, SUB-SECT. 3.—C.

*sk. Unreasonable verdict—Set aside.]—*Where the jury found that the words complained of, if defamatory, were true, & on appeal it was admitted that some of the allegations were untrue:—*Held*: the verdict was such an one "as no jury could have found as reasonable men," & should be set aside, & a new trial had.—*ROFE v. SMITH'S NEWSPAPERS, LTD.* (1927), 27 S. R. N. S. W. 313; 44 N. S. W. W. N. 37, P. C.—AUS.

should be given when the defence in a libel action is delivered.—*GOLDSCHMIDT v. CONSTABLE & Co.*, [1937] 4 All E. R. 293; 81 Sol. Jo. 863, C. A.

1313. *Add. Annotation*:—*Consd. Godman v. Times Publishing Co.*, [1926] 2 K. B. 273.

1317. *Add. Annotation*:—*Apld. Godman v. Times Publishing Co.*, [1926] 2 K. B. 273.

1318a. As to witnesses to be called.]—*EMDEN v. BURNS* (1894), 10 T. L. R. 400.

1329. *Add. Annotations*:—As to (1) *Refd. More v. Weaver*, [1928] 2 K. B. 520. As to (2) *Refd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579.

1339. *Add. Annotations*:—As to (1) *Refd. O'Connor v. Waldron*, [1935] A. C. 76. As to (3) *Refd. Collins v. Whiteway*, [1927] 2 K. B. 378. Generally, *Refd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579.

1341. *Add. Annotations*:—As to (1) *Apld. Veal v. Heard* (1930), 46 T. L. R. 448. *Refd. Bottomley v. West Derby Assessment Committee, etc., etc.* (1931), 47 T. L. R. 468.

1345. *Add. Annotation*:—*Consd. Chapman v. Ellesmere* (1932), 48 T. L. R. 309.

1346. *Add. Annotations*:—*Consd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579. *Refd. O'Connor v. Waldron*, [1935] A. C. 76.

1347. *Add. Annotations*:—*Refd. Collins v. Whiteway*, [1927] 2 K. B. 378; *Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579.

1347a. Court of referees—Under Unemployment Insurance Act, 1920 (c. 30).]—A ct. of referees, constituted under the above Act & the regulations thereunder for the purpose of deciding claims made upon the unemployment insurance funds, is a ct. discharging administrative duties only, & communications made to that ct. are not absolutely privileged,

as would be the case if they were made to a judicial body in the discharge of its duties.—*COLLINS v. WHITEWAY (HENRY) & Co.*, [1927] 2 K. B. 378; 96 L. J. K. B. 790; 137 L. T. 297; 43 T. L. R. 532.

*Annotations*:—*Consd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579. *Fold. Mason v. Brewis Bros., Ltd.*, [1938] 2 All E. R. 420.

1347b. Under Unemployment Insurance Act, 1935 (c. 8).]—Pltf. brought an action for libel against his late employers in respect (*inter alia*) of a letter written by them to a labour exchange in response to a request from the labour exchange for certain information relating to pltf. The jury found that the letter was defamatory, & written with malice. It was contended by defts. that the question of malice was irrelevant, as the document was the subject of absolute privilege. In view of the decision in *Collins v. Henry Whiteway & Co.*, [1927] 2 K. B. 378; Digest Supp., it was admitted that such a document would not have been absolutely privileged up to 1930, but it was submitted that the Unemployment Insurance Act, 1930, changed the law in this respect, such change being unaltered by the Unemployment Insurance Act, 1935, which consolidated the law:—*Held*: such a communication was not absolutely privileged, the 1930 Act having made no change in the law in this respect.—*MASON v. BREWIS BROS., LTD.*, [1938] 2 All E. R. 420; 82 Sol. Jo. 523.

1374. *Add. Annotation*:—*Consd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579.

1395. *Add. Annotation*:—*Refd. De Freville v. Dill* (1927), 96 L. J. K. B. 1056.

1407. *Add. Annotations*:—*Refd. More v. Weaver*, [1928] 2 K. B. 520; *R. v. Wicks*, [1936] 1 All E. R. 384.

#### PART VI. SECT. 1, SUB-SECT. 4.—A.

k i. —.]—If deft. does not in his plea of justification state the specific facts or instances on which he relies, he must do so in his particulars.—*BARNES v. SYKES (Man.)*, [1926] 3 W. W. R. 476.—CAN.

k ii. —.]—*BURNES v. SYKES (Man.)*, [1927] 1 D. L. R. 382.—CAN.

m i. —.]—*Bossy v. NATIONAL PRESS, LTD.*, [1930] 1 W. W. R. 638; 2 D. L. R. 1003.—CAN.

#### PART VI. SECT. 2, SUB-SECT. 2.—A. (a).

sm. *Rule in Roman-Dutch law.*]—Law 17 (1859), s. 1 (p.) (2), requiring the ct. to recognise as the law of Natal the general rules & exceptions of the English law of evidence does not authorise the introduction of the English rule that there is absolute immunity from liability in respect of words used in judicial proceedings. In Roman-Dutch law such immunity is only qualified.—*KNIGHT v. FINDLAY*, [1934] N. L. R. 185.—S. AF.

#### PART VI. SECT. 2, SUB-SECT. 2.—A. (b).

m i. —.]—*Under Municipal Act, R. S. O.*, 1914 (c. 192).—*NIXON v. O'CALLAGHAN* (1927), 60 O. L. R. 76.—CAN.

#### PART VI. SECT. 2, SUB-SECT. 2.—A. (c) ii.

1358 v. —.]—*NIRSO NARAYAN SINGH v. R.* (1926), 1 L. R. 6 Pat. 224.—IND.

1358 vi. —.]—*MIR ANWARUDIN v. FATHIM BAI ABIDIN* (1926), 1 L. R. 50 Mad. 687.—IND.

1358 vii. —.]—*M. BANERJEE v. ANUKUL CHANDRA MITRA* (1927), 1 L. R. 55 Calc. 85.—IND.

1358 viii. —.]—Advocates & attorneys in drawing pleadings or conducting cases in open ct. enjoy a qualified privilege & not an absolute privilege.—*FINDLAY v. KNIGHT*, [1935] App. D. 68.—S. AF.

#### PART VI. SECT. 2, SUB-SECT. 2.—A. (c) iv.

c i. —.]—Pltf. applied for & obtained a protection order at petty sessions to enable him to carry on the business of a publican. At the next ct. of petty sessions deft., who was the district inspector for the district, stated to the Bench that pltf. had obtained the protection order by "humbugging the ct. & that he intended to appeal to quarter sessions. The Bench on the latter occasion consisted partly of magistrates who were present when the protection order was granted, & partly of others, & there were reporters present:—*Held*: the occasion was not privileged.—*KEENAN v. WALLACE* (1916), 51 L. T. 19.—IR.

d i. —.]—*Held*: where criminal proceedings are taken for defamatory statements alleged to be made by parties to judicial proceedings in affidavits filed by them, the accused cannot claim the protection of the English rule of absolute privilege, & if the statements are in fact defamatory, the accused can protect himself duly under one of the exceptions to

Indian Penal Code, s. 499.—*MULL CHAND v. BUGA SINGH* (1930), 1 L. R. 8 Ran. 359.—IND.

#### PART VI. SECT. 2, SUB-SECT. 2.—A. (d).

sl. *Inquiry under Combines Investigation Act.*]—An inquiry held under Combines Investigation Act, R. S. C., 1927, is not an absolutely privileged occasion so as to render the comr. appointed to conduct it immune from an action for defamation in respect of words uttered by him during the proceedings. The rule as to proceedings before judicial tribunals does not apply, because a comr. under the above Act has not attributes similar to those of a ct. of justice, nor does he act in a manner similar to those in which such cts. act; he performs the administrative function of inquiring whether offences have been committed, & it is not material that for that purpose he has powers to summon witnesses, administer oaths, & punish disobedience to his orders.—*O'CONNOR v. WALDRON*, [1935] A. C. 76; 104 L. J. P. C. 21; 152 L. T. 269; 51 T. L. R. 125; 78 Sol. Jo. 869, P. C.—CAN.

#### PART VI. SECT. 2, SUB-SECT. 2.—B. (a).

1414 ii. —.]—Words spoken by a member of Parliament in Parliament are absolutely privileged; the ct. has no jurisdiction to entertain an action in respect of them, & will, upon motion, set aside the writ of summons & statement of claim in such an action.—*DILLON v. BALFOUR* (1887), 20 L. R. Ir. 600.—IR.

1429. *Add. Citation*:—134 L. T. 286.

1446a. —.]—To constitute a communication made on a privileged occasion there must be a legal, moral, or social duty to make the communication, as well as an interest in the recipient to receive it, & the question, which is for the judge & not the jury, whether such a duty exists depends on the circumstances, the nature of the information, & the relation of the recipient & the informant.

One B., the foreign manager of a co. which carried on business abroad, but was in voluntary liquidation, wrote to deft., who was a director & was also the liquidator of the co. in England, a letter containing gross charges of immorality, drunkenness, & dishonesty on the part of pltf., who was the managing director of the co. abroad. Deft. wrote in answer that he had long suspected the pltf. of immorality, & asked B. whether he could obtain a sworn statement of the matters disclosed in his letter from the persons mentioned therein as his informants, adding that it might "even be necessary to bribe" them, & that he understood that one of them was "a woman of the lowest type on earth—a prostitute all her life"; that pltf.'s wife was an old friend of his, & that he would be unfair to an old friend if he did not place the facts before her, but that without a sworn statement he would not speak. Without obtaining any corroboration of the allegations in B.'s letter, & without communicating with pltf., deft. showed B.'s letter first to S., the chairman of the board of directors & the largest shareholder in the co., & then to pltf.'s wife. The allegations in B.'s letter were unfounded, but deft. believed them to be true:—*Held*: (1) the publications to S. & B. were made upon privileged occasions, but the publication to the pltf.'s wife was not upon a privileged occasion; (2) in the circumstances relating to the publications to S. & to B. & to pltf.'s wife there was evidence of malice which ought to be left to a jury.—*WATT v. LONGSDON*, [1930] 1 K. B. 130; 98 L. J. K. B. 711; 142 L. T. 4; 45 T. L. R. 619; 73 Sol. Jo. 544, C. A.

*Annotation*:—*As to* (1) *Refd. Ley v. Hamilton* (1934), 151 L. T. 360.

1453. *Add. Annotation*:—*Refd. Farmer v. Hyde*, [1937] 1 K. B. 728.

1453a. —.]—*DAVIS v. LONDON EXPRESS NEWSPAPER, LTD.* (1938), 55 T. L. R. 207.

*sg. Report in course of official duty—Police officer.*—A report on a fellow officer, made by one police officer to another in the course of his official duty, is subject only to qualified privilege, & can be made the subject of an action for libel where the existence of express malice is shown.—*GIBBONS v. DUFFELL*, [1932] *Argus* L. R. 339; 47 O. L. R. 520; 33 S. R. N. S. W. 219; 50 N. S. W. W. N. 84; 6 A. L. J. 145.—*AUS.*

PART VI. SECT. 2, SUB-SECT. 2.—C. (b).

1428 II. —.]—A report made by a police officer to a magistrate falls within the class of communications relating to state matters made by one public official to another, & is accordingly absolutely privileged. In India state matters must include public matters, particularly matters connected with the administration of justice, & a state officer must include a public officer whose duty it is to make inquiries & investigations into allegations of commission of criminal offences.—*BENI MADHO PRASAD v.*

*WAJID ALI I. L. R.*, [1937] All. 390.—*IND.*

PART VI. SECT. 3, SUB-SECT. 1.  
1437 1. *General rule.*—*SAPIRO v. LEADER PUBLISHING CO.*, [1936] 3 D. L. R. 68; [1936] 2 W. W. R. 288; 20 Sask. L. R. 449.—*CAN.*

PART VI. SECT. 3, SUB-SECT. 3.—A. (a).

1500 VIII. —.]—The underlying principle on which is founded protection for a communication otherwise actionable as defamatory, is "the common convenience & welfare society." The communication is only protected when it is fairly warranted by some reasonable occasion or exigency, & when made in discharge of some public or private duty such as would be recognised by people of ordinary intelligence & moral principles, or is fairly made in the legitimate defence of a person's own interests. It is not sufficient that the person making the statement believes, honestly & not without some ground, that the duty or interest exists. There must,

1455. *Add. Annotation*:—*As to* (2) *Consd. Watt v. Longsdon* (1929), 98 L. J. K. B. 711.

1457a. —.]—*WATT v. LONGSDON*, No. 1446a, *ante*.

1460. *Add. Annotations*:—*As to* (1) *Refd. R. v. Rule*, [1937] 2 K. B. 375. *As to* (3) *Consd. Minter v. Priest*, [1930] A. C. 558.

1466a. —.]—*WATT v. LONGSDON*, No. 1446a, *ante*.

1466b. —.]—In an action for defamation it is for the judge & not for the jury to decide whether an occasion is privileged or not, & the question of express malice, which destroys the privilege, if it is qualified privilege, ought to be put to the jury only after the judge has ruled that the occasion is privileged.—*MINTER v. PRIEST*, [1930] A. C. 558; 99 L. J. K. B. 391; 143 L. T. 57; 46 T. L. R. 301; 74 Sol. Jo. 200, H. L.

*Annotation*:—*Refd. Harris v. Harris* (1930), 47 T. L. R. 15.

1470. *Add. Annotations*:—*Consd. Spigelman v. Hocken, Goldblatt v. Hocken* (1933), 150 L. T. 256. *Refd. Robinson v. South Australia State* (No. 2), [1931] A. C. 704.

1484. *Add. Annotation*:—*Refd. Bruce v. Odhams Press, Ltd.*, [1936] 1 All E. R. 287.

1485. *Add. Annotation*:—*Consd. Osborn v. Boulter* (Thomas) & Son, [1930] 2 K. B. 226

1486. *Add. Annotation*:—*Apld. Osborn v. Boulter* (Thomas) & Son, [1930] 2 K. B. 226.

1487. *Add. Annotation*:—*Consd. Osborn v. Boulter* (Thomas) & Son, [1930] 2 K. B. 226.

1489. *Add. Annotations*:—*As to* (1) *Consd. Chapman v. Ellesmere* (1932), 48 T. L. R. 309. *As to* (4) *Apld. Watt v. Longsdon* (1929), 98 L. J. K. B. 711. *Consd. Osborn v. Boulter* (Thomas) & Son, [1930] 2 K. B. 226.

1500. *Add. Annotation*:—*Consd. Watt v. Longsdon* (1929), 98 L. J. K. B. 711.

1520. *Add. Annotation*:—*Consd. Watt v. Longsdon* (1929), 98 L. J. K. B. 711.

1521. *Add. Annotations*:—*Consd. Watt v. Longsdon* (1929), 98 L. J. K. B. 711. *Refd. Hardie & Lane v. Chilton* (1927), 96 L. J. K. B. 1040; *Tolley v. Fry J. S. & Sons, Ltd.* (1929), 46 T. L. R. 108; *Ley v. Hamilton* (1935), 153 L. T. 384.

1526. *Add. Annotation*:—*Refd. Collins v. White-way*, [1927] 2 K. B. 378.

in fact, be such a duty or interest as, under all the circumstances, warrants the communication.—*HALLS v. MITCHELL*, [1928] 2 D. L. R. 97; [1928] S. C. R. 125.—*CAN.*

PART VI. SECT. 3, SUB-SECT. 3.—A. (b) iii.

*sd. Statement to member of Parliament—By departmental officer.*—A member of Parliament, having received complaints from one of his constituents as to certain action of the police, interviewed deft., who was the permanent head of the department charged with the administration of the police force. Deft. made inquiries, & wrote to the member a letter which contained a statement defamatory of pltf. Pltf. brought an action:—*Held*: the occasion was privileged, & there being no evidence of malice, the action failed.—*MORAN v. CHAPMAN* (No. 2), [1935] V. L. R. 13.—*AUS.*

*sl. Report to town clerk as to integrity of special constable.*—A written report was requested by the town clerk of a corps. from deft. as to the suitability of pltf. for continued employment as a



1626. *Add. Annotation*:—*Consd. Watt v. Longsdon* (1929), 98 L. J. K. B. 711.

1630a. *Communication to member of Parliament.*—Applt. wrote to the member of Parliament for his constituency two letters containing defamatory statements about a police officer & a justice of the peace for the place where he resided. He was charged with publishing defamatory libels & pleaded that the libels were published on a privileged occasion. The trial judge ruled that the occasion was not privileged & applt. was convicted:—*Held*: by the Ct. of Criminal Appeal, a member to whom a written communication is addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct on the part of some public official acting in that constituency in relation to his office, has sufficient interest in the subject-matter of the complaint to render the occasion of such a publication a privileged occasion, & that in the absence of evidence of malice on the part of applt. the conviction could not stand.—*R. v. RULE*, [1937] 2 K. B. 375; [1937] 2 All E. R. 772; 106 L. J. K. B. 807; 157 L. T. 48; 53 T. L. R. 720; 26 Cr. App. Rep. 87; 30 Cox, C. C. 598, C. C. A.

1635. *Add. Annotation*:—*As to* (1) *Consd. Chapman v. Ellesmere* (1932), 101 L. J. K. B. 376.

1637a. *Letter in newspaper commenting on proceedings at meeting of local authority.*—Comments in a newspaper on the proceedings at a meeting of a local authority are not published on a privileged occasion.—*STANDEN v. SOUTH ESSEX RECORDERS, LTD.* (1934), 50 T. L. R. 365.

1638. *Add. Annotation*:—*Refd. Chapman v. Ellesmere* (1932), 48 T. L. R. 309.

1638a. ———.—*THOMAS WITHERS & SONS, LTD. v. SAMUEL WITHERS & CO., LTD.* (1926), 44 R. P. C. 19.

1638b. ———.—*An advertisement in a public paper, strongly reflecting upon the character of an individual who has been declared bkpt. is libellous, although published with the*

avowed intention of convening a meeting of the creditors for the purpose of consulting upon the measures proper to be adopted for their own security if the legal object might have been attained by means less injurious.—*BROWN v. CROOME* (1817), 2 Stark. 297; 171 E. R. 652.

*Annotation*:—*Consd. Chapman v. Ellesmere*, [1932] 2 K. B. 431.

1642. *Add. Annotation*:—*Refd. Watt v. Longsdon* (1929), 98 L. J. K. B. 711.

1654a. *Report of decision of domestic tribunal.*—In my judgment any one who knows that a man has been convicted of larceny at a criminal trial before a ct. of competent jurisdiction is entitled to say, without being used for slander or libel, that that man has, in fact, been convicted. It seems to me that also in the case where a man submits to a domestic tribunal, any person is entitled to record the fact that that domestic tribunal decided against him. If it is a question relating to a school, & a boy is properly expelled by the competent authority, I think that any one can say, without being sued for slander or libel, that the boy was, in fact, expelled. The same thing would apply to expulsion from a club. When a man subjects himself to a domestic tribunal he must be in exactly the same position as regards complaining of a record of that domestic tribunal as every citizen who has to submit himself to the lawful tribunals of the country (*GREER, L.J.*).—*COOKSON v. HAREWOOD*, [1932] 2 K. B. 478, n.; 101 L. J. K. B. 394, n.; 146 L. T. 550, n., C. A.

*Annotation*:—*N.F. Chapman v. Ellesmere*, [1932] 2 K. B. 431.

1654b. ———.—*To what publications privilege applicable.*—*CHAPMAN v. ELLESMERE (LORD)*, No. 167c, *ante*.

1654c. ———.—*Assent to publication.*—*CHAPMAN v. ELLESMERE (LORD)*, No. 167c, *ante*.

1661. *Add. Annotation*:—*Refd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579.

1662. *Add. Annotation*:—*Refd. Hearts of Oak*

PART VI. SECT. 3, SUB-SECT. 3.—B.

1631 vi. ———.—*To clothe an occasion with privilege on the ground of common interest, the common interest must be in the subject-matter of the communication complained of.*—*SAPIRO v. LEADER PUBLISHING CO.*, [1926] 3 D. L. R. 68; [1926] 2 W. W. R. 268; 20 Sask. L. R. 449.—*CAN.*

*sm. Statements reflecting on missionary appealing for funds.—To committee formed to aid appeal.*—*HATFORD v. FORRESTER-PATON*, [1927] S. C. 740.—*SCOT.*

*sg. Statement reflecting on doctor.—By nurse to insurance company.*—*A nurse employed by deft. society to pay calls on alling policyholders visited a Mrs. B., whose child was insured with deft. society, & another woman, who had no interest in the society, was present during that visit. Mrs. B. appeared very ill, & the nurse diagnosed the case as one of diphtheria although informed by Mrs. B., that her doctor was attending her & treating her for a less serious complaint. The nurse asked for the name of the doctor & the patient gave pltf.'s name, whereupon the nurse was alleged to have uttered the following words: "Oh, him! Like a few more of his cases! I have never had the pleasure of meeting Dr. R. but when I see him I will*

*tell him what I think of him":—Held*: assuming that she uttered the words complained of, the nurse was acting within the scope of her employment; the occasion was privileged & the fact that they were spoken in the presence of a person having no common interest did not destroy the privilege, provided they were spoken *bona fide* & without malice.—*RICHARDS v. AUSTRALASIAN TEMPERANCE & GENERAL MUTUAL LIFE ASSURANCE SOCIETY, LTD.*, [1931] N. Z. L. R. 618.—*N.Z.*

*sk. Statement by consul to employer.*—*Pltf. was an official of the local office of a German co. Deft., who was the German Consul for the western provinces, wrote a letter to pltf.'s superior officer in the co. containing defamatory statements concerning pltf., & also distributed copies of the letter at a meeting of a society to which both pltf. & deft. belonged; he also spoke defamatory words concerning pltf. at the said meeting & on another occasion, to one S. Deft. pleaded qualified privilege & alternatively justification:—Held*: (1) the defamatory statements contained in the letter had not been proved by a preponderance of evidence to be true, but in the circumstances the occasion & writing of the letter were privileged, & pltf. had not satisfied the onus on him of proving that deft. was not using the

occasion honestly but was actuated by some indirect or ulterior motive such as malice; (2) as to the distribution of the letter at the meeting, the publication was privileged as dealing with subject-matters in which deft. & the other members of the society present had a legitimate common interest, & also on the ground that the letter was relevant to an attack made upon deft. by pltf. at the said meeting.—*MAASS v. SEELHEIM*, [1936] 3 W. W. R. 450; 4 D. L. R. 267; 44 Man. L. R. 310.—*CAN.*

PART VI. SECT. 3, SUB-SECT. 3.—C.  
1649 xii. ———.—*HENN v. SMITH* (1912), 11 E. L. R. 1; 6 D. L. R. 48.—*CAN.*

PART VI. SECT. 3, SUB-SECT. 4.—A.  
*st. Report of hospital commissioners.*—*A report by commissioners on hospitals appointed by the Provincial Government is entitled to qualified privilege.*—*NEWTON v. VANCOUVER CITY* (1932), 46 B. C. R. 67.—*CAN.*

PART VI. SECT. 3, SUB-SECT. 4.—B. (b).

*sn. Publicly heard before a Court of Justice.—Libel & Slander Act, R. O. S. 1914.*—*COWIE v. ROBINSON*, [1928] 3 D. L. R. 776; 62 O. L. R. 351.—*CAN.*



Assurance Co. v. A.-G. (1931), 47 T. L. R. 579.

1665. *Add. Annotations*:—*Consd. Farmer v. Hyde*, [1937] 1 K. B. 728. *Refd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579.

1666. *Add. Annotation*:—*As to* (1) *Consd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579.

1667. *Add. Annotation*:—*Generally Refd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579.

1668a. *Application by interrupter*.]—During the hearing of a libel action counsel for pltf. in his opening speech criticised the behaviour of a person D. Pltf., who was the only witness who gave evidence in the case, also commented adversely upon D.'s behaviour. Thereupon D. said to the judge: "May I make an application? I am the Rector of Stiffkey, & I want to contradict the many lies that have been told in this ct." That intervention was reported in five newspapers, & pltf. brought actions for libel against the proprietors of the five newspapers alleging that the reports in the newspapers were defamatory of him:—*Held*: the application which D. made to the ct. was made in the course of proceedings publicly heard before a ct. exercising judicial authority, & it did not make any difference that in the course of the application defamatory matter was published about some one, & as the report was a fair & accurate report & was published contemporaneously it was protected by sect. 3 of Law of Libel Amendment Act, 1888 (c. 64).—*FARMER v. HYDE*, [1937] 1 K. B. 728; [1937] 1 All E. R. 773; 106 L. J. K. B. 292; 156 L. T. 403; 53 T. L. R. 445; 81 Sol. Jo. 216, C. A.

1671a. *Application by person not party to action*.]—*FARMER v. MORNING POST, LTD.* (1936), 80 Sol. Jo. 345, C. A.

1690. *Add. Annotation*:—*Refd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579.

PART VI. SECT. 3, SUB-SECT. 4.—  
B. (c).

so. *Publication of exhibit—Privileged*.]—*BUTLER v. SASKATOON STAR-PHENIX, LTD.* (Sask.), [1929] 3 W. W. R. 672; [1930] 1 D. L. R. 1009; 24 S. L. R. 283.—CAN.

PART VI. SECT. 3, SUB-SECT. 4.—  
B. (d).

sp. *Under Libel & Slander Act*.]—*HANSEN v. NUGGET PUBLISHERS, LTD.*, [1927] 4 D. L. R. 791; 61 O. L. R. 239.—CAN.

sq. —.]—*SENTINEL-REVIEW CO. v. ROBINSON*, [1927] 4 D. L. R. 232; 61 O. L. R. 62.—CAN.

PART VI. SECT. 3, SUB-SECT. 4.—  
B. (e) i.

1678 ii. —.]—*HUGHES v. SUN PUBLISHING CO.* (1925), 35 B. C. R. 422.—CAN.

PART VI. SECT. 3, SUB-SECT. 4.—  
B. (e) ii.

1693 i. —. *Report of judgment alone*.]—*DUNCAN v. ASSOCIATED SCOTTISH NEWSPAPERS, LTD.*, [1929] S. C. (Ct. of Sess.) 14.—SCOT.

g i. —.]—A newspaper report of a trial which purports to report the questions put to a witness in cross-examination & his answers thereto but

omits some of the explanations given by him cannot be held a fair & accurate report within the law of libel. Comment in order to be justifiable as fair comment must appear as comment & must not be so mixed up with the facts that the reader cannot distinguish between what is report & what is comment.—*THOMPSON v. "TRUTH" & "SPORTSMAN," LTD.*, [1933] 1 W. W. R. 306, P. C.—AUS.

sr. *Report of erroneous translation by interpreter*.]—Appl. co., having published a statement alleged to have been made by resp., who was Commissioner of Police in Western Samoa, that the attempted arrest of a certain native was a mistake, was successfully sued by the latter for libel in the High Ct. of Western Samoa. On appeal:—*Held*: the report, being a report in English purporting to set out what resp. said in English, was libellous notwithstanding that it may be a true report of what the interpreter said in Samoan.—*SAMOAN GUARDIAN NEWSPAPER & PRINTING CO. v. MCCARTHY*, [1930] N. Z. L. R. 593.—N.Z.

PART VI. SECT. 3, SUB-SECT. 4.—D.

1723 i. *What is a public meeting*.]—The meeting in question herein, one at which a lecture or address was given, to which an admission fee was charged, & which was entirely under the control of the lecturer & at which there was

*Add. Annotation*:—*As to* (1) *Refd. Mackenzie-Kennedy v. Air Council*, [1927] 2 K. B. 517.

1700a. —. *Reporter unaware that part of charge withdrawn*.]—Pltfs. took a motor car from the yard of a hotel & went for a ride, while the owner was inside the hotel. Pltfs. were charged (i) with theft, & (ii) with having taken a car away without the owner's consent contrary to the Road Traffic Act, 1930 (c. 43), s. 28. At the police ct. the charge of theft was withdrawn, & both pltfs. were convicted on the charge under the Road Traffic Act, 1930 (c. 43). Reports appeared in certain newspapers headed, "Stole motor car" & "Motor car theft." The reporters present at the police ct. did not hear the withdrawal of the charge of theft, & this was found to have been due to inattention:—*Held*: (1) the reports were not fair & accurate, & pltfs. were entitled to damages for libel; (2) Law of Libel (Amendment) Act, 1888 (c. 64), s. 5, under which a jury may apportion damages between defts. in consolidated libel actions, applies to a judge sitting alone. In the present case the damages & costs should be apportioned equally.—*MITCHELL v. HIRST, KIDD & RENNIE, LTD.*, [1936] 3 All E. R. 872.

1711. *Add. Annotation*:—*Consd. Farmer v. Hyde*, [1937] 1 K. B. 728.

1729a. *Alteration of words used—Substantial accuracy—No malice*.]—*DE NORMANVILLE v. HEREFORD TIMES, LTD.* (1935), 80 Sol. Jo. 423.

1735. *Add. Annotation*:—*Refd. Broome v. Agar* (1928), 138 L. T. 698.

1739. *Add. Annotations*:—*As to* (1) *Appl. Burton v. Board*, [1929] 1 K. B. 301. *Consd. Tudor-Hart v. British Union for Abolition of Vivisection*, [1938] 2 K. B. 329.

1845. *Add. Annotation*:—*As to* (2) *Consd. Tudor-Hart v. British Union for Abolition of Vivisection*, [1938] 2 K. B. 329.

1846. *Add. Annotation*:—*Consd. Tudor-Hart v. British Union for Abolition of Vivisection*, [1938] 2 K. B. 329.

nothing in the nature of a discussion:—*Held*: not to have been a "public meeting" within Libel & Slander Act, R. S. S., 1922 (c. 56), s. 10.—*HEFFERMAN v. "REGINA DAILY STAR,"* [1930] 3 W. W. R. 656.—CAN.

PART VI. SECT. 4, SUB-SECT. 2.

1738 ii. —.]—The "rolled up plea" to an action for libel is a plea of fair comment only, & where there is no plea of justification, evidence is not admissible to prove the truth of defamatory allegations of fact, & the defence of fair comment is no answer to such allegations.—*LEACH v. LEADER PUBLISHING CO., LTD.*, [1926] 3 D. L. R. 28; [1926] 1 W. W. R. 873; 20 Sask. L. R. 337.—CAN.

1738 iii. *S.P. BARNES v. STYKES* (Man.), [1926] 3 W. W. R. 476.—CAN.

1738 iv. —.]—In an action for libel, under the "rolled up plea" deft. has the right, without pleading justification, to adduce evidence to establish the truth of allegations of fact upon which comment is based, as distinguished from comment itself.—*BOYS & STAR Ptg. & Pub. Co.*, [1927] 3 D. L. R. 847; 60 O. L. R. 592.—CAN.

PART VI. SECT. 4, SUB-SECT. 6.

1844 ii. —.]—*Bossey v. NATIONAL PRESS, LTD.*, [1930] 1 D. L. R. 813.—CAN.



1847. *Add. Annotation*:—*Consd. Tudor-Hart v. British Union for Abolition of Vivisection*, [1938] 2 K. B. 329.

1847a. ———.]—*HAVARD v. CORBETT* (1899), 15 T. L. R. 222, C. A.

1847b. ———.]—Where defts. to an action in the High Ct. make a counterclaim for damages for libel, & pltf. in his reply & defence to the counterclaim relies upon the plea of fair comment in the form known as the "rolled-up plea," i.e. "In so far as the said words complained of are statements of fact they are true in substance & in fact, & in so far as they are expressions of opinion they are fair comment upon the said facts which are a matter of public interest," the ct. will not order pltf. to deliver particulars stating which of the allegations in the words complained of he relies on as being statements of fact, & which as being expressions of opinion; nor will the ct. order him to give particulars of the facts on which he relies as being the basis of his comments, where the plea, as above, limits those facts to "the said facts."—*TUDOR-HART v. BRITISH UNION FOR ABOLITION OF VIVISECTION*, [1938] 2 K. B. 329; [1937] 4 All E. R. 475; 107 L. J. K. B. 501; 158 L. T. 162; 54 T. L. R. 154; 81 Sol. Jo. 1020, C. A.

1849a. *Right to give particulars*—Although no plea of justification.]—Where deft. in an action for libel pleads that the words complained of are fair comment, made in good faith & without malice, on matters of public interest, he is entitled to give particulars of the facts upon which he based his comments, although those facts are defamatory of pltf. & there is no plea of justification.—*BURTON v. BOARD*, [1929] 1 K. B. 301; 98 L. J. K. B. 165; 140 L. T. 289, C. A.

1854a. *Indemnity—& plea of justification*—*Separate trial of issue as to indemnity*.]—In a libel action defts. pleaded justification, & that pltf. had, in return for payment, undertaken in writing to indemnify them against any actions for libel. Pltf., in his reply, disputed his signature, & said that he was not bound by the alleged undertaking. Pltf. then applied for an order that the issue as to the alleged undertaking & its construction should be tried separately before the other issues:—*Held*: when pltf. asked for an order that one issue should be disposed of before the trial of the other issues, the order should be made only when there were special circumstances justifying it, & as there were none in the present case, the order must be refused.—*BOTTOMLEY v. HURST & BLACKETT, LTD. & HOUSTON* (1928), 44 T. L. R. 451, C. A.

## Part VII.—Malice.

1857. *Add. Annotation*:—*Refd. Woolmington v. Public Prosecutions Director* (1935), 104 L. J. K. B. 433.

1868. *Add. Annotations*:—*Consd. Watt v. Longsdon* (1929), 98 L. J. K. B. 711; *Minter v. Priest*, [1930] A. C. 558. *Refd. Cassidy v. Daily Mirror Newspapers*, [1929] 2 K. B.

331; *Tolley v. Fry J. S. & Sons* (1929), 46 T. L. R. 108; *Chapman v. Ellesmere* (1932), 101 L. J. K. B. 376.

1876. *Add. Annotation*:—*Consd. Crozier v. Wishart & Co. & Western Printing Services, Ltd.*, [1936] 1 All E. R. 1.

1848 i. — *Plea of fair comment not justification*.]—*LEECH v. LEADER PUBLISHING CO., LTD.*, No. 1738 II,

1848 II. *S. P. BARNES v. SYKES* (Man.), No. 1738 III, ante.—CAN.

1848 III. ———.]—In an action for libel by pltf. against defts. in respect of a portion of an article published in the *N.Z. Financial Times* on Nov. 10, 1931, defts. pleaded the "rolled-up plea." The learned judge, on the evidence, held that in certain respects the facts stated in the article were not truly stated, & further, that the imputation of malice in fact was not well founded:—*Held*: the "rolled-up plea" in an action for libel, viz. that in so far as the words complained of consist of allegations of fact, they are in their natural & ordinary meaning true in substance & in fact; & in so far as the words consist of expressions of opinion, they are fair comment made in good faith & without malice for the benefit of the public upon the said facts which are a matter of public interest, is not a plea partly of justification & partly of fair comment, but is a plea of fair comment only. Since the judgment of the House of Lords in *Sutherland v. Slopes*, [1925] A. C. 647, No. 1739, the decision of the Ct. of Appeal in *Norton v. Bertling* (1910), 29 N. Z. L. R. 1099, is no longer law, the Dominion Ct. being bound to follow the decision of the supreme tribunal to settle English law.—*GOOCH v. N.Z. FINANCIAL TIMES* (No. 2), [1935] N. Z. L. R. 257.—N.Z.

st. ———.]—Where the defence of

fair comment is pleaded the comments must be warranted by the facts stated in the writing complained of, in the sense that the facts must afford a reasonable foundation for the comments, & it is not legitimate for defender, by the averment of new facts in his defences, to extend the limits of inquiry.—*WHEATLEY v. ANDERSON & MILLER*, [1927] S. O. 133.—SCOT.

### PART VI. SECT. 6.

sv. *No libel—Innuendoes covered*.]—*DALY v. IRISH TRANSPORT & GENERAL WORKERS' UNION*, [1926] I. R. 118.—CAN.

sw. *Implied request to publish*.]—J. was employed as a reporter by the proprietors of "The Mercury," a daily newspaper, & was also employed by the committee of a trotting club to take notes of a private inquiry held by the stewards into the running of pltf.'s horse. As a result of this inquiry, the stewards purported to disqualify a certain horse, its owner & rider for three months, but inasmuch as the owner was not summoned to answer the charge made against him at the inquiry, the disqualification was void. On the morning following the inquiry, the libel complained of was published in "The Mercury," the material portion of which read: "The stewards decided the charge was sustained, & disqualified the horse, owner, & rider for three months." It was proved that defts. issued no instructions to J. not to report information he received at such inquiries, but all other press representatives were excluded:—*Held*: there was sufficient evidence to justify

the jury in concluding that the libel had been published at defts.' implied request.—*PATMORE v. BOON*; *BOON v. PATMORE*, 22 Tas. L. R. 75.—AUS.

sz. *Defamatory statement contradicted in same article*.]—Dft. newspaper published a statement that in a book written by a German & translated into English certain British officers had deserted wives whom they had married in Persia. Certain Australian officers, of whom pltf. was one, were named in the article as being included in the allegations made in the book. These officers were not named in the book, & were not present in Persia at the time referred to in the article. In the same article were contained statements of a Major-General commanding a force in Persia to the effect that the charges were unfounded, & Bolshevik propaganda:—*Held*: the allegations were defamatory, & the contrary statements contained in the article did not prevent the article being libellous.—*SAVAGE v. NEWS, LTD.*, [1932] S. A. S. R. 240.—AUS.

### PART VII. SECT. 2, SUB-SECT. 2.—A.

1875 xli. ———.]—*DUNNET v. NELSON*, [1926] S. C. 764.—SCOT.

### PART VII. SECT. 2, SUB-SECT. 2.—B. (a).

1878 xlii. ———.]—The burden is on pltf. to prove malice if the occasion is privileged, & this onus is not dispensed with by a finding by the judge that deft. stepped outside the privilege.—*ARTHUR v. MASSEY HARRIS & CO.*, [1934] 2 D. L. R. 124.—CAN.

1910a. *Accusation of incompetence—Whether proof of competence in other transactions admissible.*—*BRINE v. BAZALGETTE* (1849), 3 Exch. 692; 18 L. J. Ex. 348; 154 E. R. 1024.

1948a. ———. ———.]—*MINTER v. PRIEST*, No. 1466b, *ante*.

1948a. ———. ———.]—Where deft. establishes a qualified privilege for a publication, & pltf. fails to adduce any evidence of malice, the judge is not obliged then & there to withdraw the case from the jury, but, if deft. proposes to call evidence, may in his discretion defer ruling on the question of malice until he has heard the evidence for deft. In the exercise of this discretion the

position of deft. who has to adduce evidence upon other issues in the action should be considered.—*MARBE v. GEORGE EDWARDS (DALY'S THEATRE), LTD.*, [1928] 1 K. B. 269; 96 L. J. K. B. 980; 138 L. T. 51; 43 T. L. R. 809, O. A.

1953. *Add. Annotation*:—*Refd.* South Suburban Co-operative Society, Ltd. v. Orum & Croydon Advertiser, Ltd., [1937] 3 All E. R. 133.

1955. *Add. Annotation*:—*Refd.* Crozier v. Wishart & Co. & Western Printing Services, Ltd., [1936] 1 All E. R. 1.

1983. *Add. Annotation*:—*Refd.* Crozier v. Wishart & Co. & Western Printing Services, Ltd., [1936] 1 All E. R. 1.

## Part VIII.—Damages and Costs.

1988. *Add. Annotations*:—*Consd.* Hobbs v. Tinling, Hobbs v. Nottingham Journal, [1929] 2 K. B. 1; Tolley v. Fry J. S. & Sons (1929), 46 T. L. R. 108. *Refd.* Ley v. Hamilton (1934), 151 L. T. 360; Farmer v. Hyde, [1937] 1 K. B. 728.

1989. *Add. Annotations*:—*Refd.* Thomson v. McNulty (1927), 71 Sol. Jo. 744; Cassidy v. Daily Mirror Newspapers, [1929] 2 K. B. 331.

1992. *Add. Annotation*:—*Refd.* Hobbs v. Tinling, Hobbs v. Nottingham Journal, [1929] 2 K. B. 1.

2020. *Add. Annotation*:—*As to* (2) *Consd.* Hobbs v. Tinling, Hobbs v. Nottingham Journal, [1929] 2 K. B. 1.

2037. *Add. Annotation*:—*Expld.* Hobbs v. Tinling, Hobbs v. Nottingham Journal, [1929] 2 K. B. 1.

2041a. ———. ———.]—In an action for libel pltf. set out in his statement of claim the alleged libel, & in a separate paragraph alleged an innuendo which practically repeated, but somewhat extended, the statements in the alleged libel. Defts. did not plead justifica-

tion or fair comment, but paid 20s. into ct. in respect of the alleged libel as sufficient damages; they made no payment into ct. in respect of the innuendo; & they gave notice under R. S. C. Ord. 36, r. 37, of their intention to give in evidence certain matters in mitigation of damages. At the trial pltf. gave evidence that save for one lapse he was a man of unblemished reputation. Thereupon he was cross-examined as to specific incidents not mentioned in the libel or in the particulars served under R. S. C. Ord. 36, r. 37, it being suggested that he was a man of bad reputation. This line of cross-examination was objected to, but was allowed. Before the conclusion of the cross-examination the jury intervened with an intimation that they desired to find for the defts., which they then did without any summing up. On appeal:—*Held*: (1) the cross-examination was admissible as cross-examination to credit, but that if the incidents were denied by pltf. no further evidence could be called to rebut pltf.'s denials, & that the jury should have been told that while they were not bound to accept pltf.'s denials, those denials, though unaccepted, afforded no evidence that the

1878 xiv. ———. ———.]—In an action for slander based on statements made by a former employer of pltf. to a new employer the judge found that the occasion was one of qualified privilege but that deft. had been actuated by malice. Neither pltf. nor deft. was a witness at the trial. Pltf. relied on the evidence of the person to whom deft. made the statement sued on, & also on part of the examination of deft. on discovery. Deft. did not adduce evidence but relied on the alleged insufficiency of pltf.'s evidence. On appeal:—*Held*: the ct. was in as good a position as the judge to form an opinion on the evidence & to draw inferences therefrom; & in view of the finding of privilege the onus was on pltf. to establish express malice & he had not discharged that onus.—*ANDERSON v. SMYTHE*, [1935] 2 W. W. R. 442; 4 D. L. R. 72; 50 B. O. R. 112; 5 F. L. J. (Can.) 52.—CAN.

PART VII. SECT. 2, SUB-SECT. 2.—B. (b).

1. ———. ———.]—Declining to give an

apology is not evidence of malice.—*HALLS v. MITCHELL* (1927), 59 O. L. R. 590.—CAN.

PART VII. SECT. 2, SUB-SECT. 2.—B. (c) iii.

1928 ii. ———.]—Evidence of defamatory statements made on occasions which were not privileged is admissible to show malice in a subsequent publication for which privilege is claimed.—*HAZAREE v. KAMALUDIN*, [1934] A. D. 108.—S. AF.

PART VII. SECT. 2, SUB-SECT. 4.—A.

1957 ii. ———.]—*COLE v. THE OPERATIVE PLASTERERS FEDERATION OF AUSTRALIA (N. S. W. BRANCH) & HUDSON* (1927), 28 S. R. N. S. W. 62; 45 N. S. W. W. N. 33.—AUS.

PART VII. SECT. 2, SUB-SECT. 4.—B. (a).

1. ———. ———.]—*Additional slanders.*—*MERCEREAU v. HOCK*, [1930] 1 W. W. R. 821; 3 D. L. R. 159; 24 S. L. R. 483.—CAN.

PART VIII. SECT. 1, SUB-SECT. 1. 1984 v. ———.]—*GEMDIE v. RINK*,

[1935] 1 W. W. R. 87.—CAN.

PART VIII. SECT. 1, SUB-SECT. 2.—B. (a).

xx. *Conduct of both parties.*—Pltf. in opening his case to the jury, stated that he would be satisfied with an undertaking by deft. to publish an apology in their newspaper, & further stated that the defamatory article complained of by him was false from beginning to end. Deft. by his counsel, thereupon offered to give such an undertaking as asked for by pltf. This offer pltf. refused to accept. During the course of the trial, cross-examination was directed to show the truth of the article complained of, though the character of pltf. was not attacked in the article. Pltf. was awarded a verdict & damages were assessed at one farthing:—*Held*: the jury may take into consideration the conduct of both parties, even up to the moment when it returns its verdict.—*LEMAIRE v. SMITH'S NEWSPAPERS, LTD.* (1927), 28 S. R. N. S. W. 161.—AUS.

incidents had taken place; (2) the cross-examination was not admissible to mitigate damages, & the jury ought to have been directed to this effect.—*HOBBS v. TINLING, HOBBS v. NOTTINGHAM JOURNAL*, [1929] 2 K. B. 1; 98 L. J. K. B. 421; 141 L. T. 121; 45 T. L. R. 328; 73 Sol. Jo. 220, C. A.

*Annotation*:—Generally, *Reid. Farmer v. Hyde*, [1937] 1 K. B. 728.

2045. *Add. Annotation*:—As to (1) *Apprvd. Hobbs v. Tinling, Hobbs v. Nottingham Journal*, [1929] 2 K. B. 1.

2086. *Add. Annotations*:—*Consd. Interoven Stove Co. v. British Broadcasting Corp.* (1935), 79 Sol. Jo. 921. *Reid. Ormond Engineering Co. v. Knopf* (1932), 49 R. P. O. 634; *Bruce v. Odhams Press, Ltd.*, [1936] 1 All E. R. 287.

2093. *Add. Annotation*:—*Reid. Newton v. Hardy* (1933), 149 L. T. 165.

2174. *Add. Annotations*:—*Consd. Tallent v. Coldwell & Tailor & Cutter, Ltd.*, [1938] Ch. 653. *Reid. Smith v. Schilling*, [1928] 1 K. B. 429.

2180. *Add. Annotation*:—*Reid. Martin v. Benson*, [1927] 1 K. B. 771.

2184. *Add. Annotation*:—*Reid. Campbell v. Pollak*, [1927] A. C. 732.

2191a. —. —. —.]—*MORRIS v. BAINES & CO., LTD.*, No. 2297a, *post*.

2195. *Add. Annotation*:—As to (1) *Reid. Martin v. Benson*, [1927] 1 K. B. 771.

2198a. — Consideration of all circumstances.]—

Where an action for defamation is tried by a judge with a jury, & *pltf.* recovers nominal damages only, the judge, in deciding whether there is "good cause" for depriving *pltf.* of costs, should take into consideration all the circumstances of the case, both before & after the issue of the writ. The smallness of the damages is only one element for consideration. The judge must exercise a discretion independent of any view expressed by the jury on the question of costs.—*MARTIN v. BENSON*, [1927] 1 K. B. 771; 96 L. J. K. B. 405; 137 L. T. 183; 43 T. L. R. 247.

*Annotation*:—*Consd. Morris v. Baines & Co.*, [1933] 1 K. B. 540.

2200. *Add. Annotation*:—*Reid. Martin v. Benson*, [1927] 1 K. B. 771.

2202. *Add. Annotation*:—*Reid. Martin v. Benson*, [1927] 1 K. B. 771.

2203. *Add. Annotation*:—*Reid. Martin v. Benson*, [1927] 1 K. B. 771.

2203a. —. —. —.]—*MARTIN v. BENSON*, No. 2198a, *ante*.

2206. *Add. Annotations*:—*Reid. Campbell v. Pollak*, [1927] A. C. 732; *Martin v. Benson*, [1927] 1 K. B. 771.

2207. *Add. Annotation*:—*Consd. Martin v. Benson*, [1927] 1 K. B. 771.

## Part IX.—Injunction.

2225. *Add. Annotation*:—*Reid. Broome v. Agar* (1928), 138 L. T. 698.

2263. *Add. Annotation*:—*Reid. Tolley v. Fry J. S. & Sons* (1929), 46 T. L. R. 108.

### C. Mitigation of Damages.

For "Sect. 3, *ante*," read "Sect. 1, sub-sect. 3, *ante*."

## Part X.—Pleading, Practice and Evidence.

2273a. —. —. —.]—*Held*: since Jud. Act there is no power to pay money into ct. in actions of libel & slander without admitting liability.—*VEALE v. REID* (1904), 117 L. T. Jo. 292.

2278. *Add. Annotation*:—*Consd. Morris v. Baines & Co.*, [1933] 1 K. B. 540.

2279. *Add. Annotation*:—*Reid. Millensted v. Grosvenor House (Park Lane), Ltd.*, [1937] 1 K. B. 717.

2297a. — Smaller amount awarded by jury—No jurisdiction to order repayment.]—*Defts.* in an action against them for libel paid £525 into ct. under R. S. O., Ord. 22, r. 1, with an

PART VIII. SECT. 1, SUB-SECT. 3.—C. 3080 vi. —. —.]—*SOLOMON v. ROBINSON & Co., LTD.* (1927), 48 N. L. R. 125.—S. AF.

PART VIII. SECT. 1, SUB-SECT. 4.—B. (b).

2156 iv. —. —.]—In libel it is not necessary to prove special damage, for the law presumes that some damage will flow in the ordinary course of things from the mere invasion of *pltf.*'s rights, & the falsity of the imputation is presumed in favour of *pltf.*—*HALL v. MITCHELL* (1927), 59 O. L. R. 590.—CAN.

PART VIII. SECT. 2, SUB-SECT. 1. sy. *Security for costs—Action against newspaper.*]—*CARROLL v. NATIONAL PRESS, LTD.* (Man.), [1927] 3 W. W. R. 683.—CAN.

sz. —. —. —.]—*BARTMAN v. UKRAINIAN PUBLISHING CO. OF CANADA*,

[1927] 3 D. L. R. 478; [1927] 2 W. W. R. 308; 36 Man. L. R. 581.—CAN.

sb. — Discretion of court.]—*PRONIUK v. PETRYK*, [1933] 1 W. W. R. 648; *affd.*, [1933] 3 W. W. R. 223.—CAN.

sd. —.]—*KELLEY v. HART*, [1934] 1 W. W. R. 333; 2 D. L. R. 288; 61 C. C. C. 364.—CAN.

PART VIII. SECT. 2, SUB-SECT. 2.—A.

2180 xiii. —. —.]—*LAMBERT & LAMBERT v. ROBERTS DRUG STORES, LTD.* (No. 2), [1933] 3 W. W. R. 283; 41 Man. L. R. 322.—CAN.

PART IX. SECT. 1, SUB-SECT. 2.

2228 i. *Whether slander included.*]—*Pltf.* & *deft.* carried on the same class of business. In order to meet the competition of *pltf.*, *deft.*, while not ex-

pressly authorising slander authorised conduct on the part of its salesmen which almost inevitably led to slander. A salesman in the employ of *deft.* in the course of his employment on two occasions made slanderous statements concerning *pltf.* in the way of its business to customers of *pltf.* In an action based on these statements an injunction was granted restraining *deft.*, its servants & agents, from publishing words defamatory of *pltf.* in the way of its business:—*Held*: (1) there is jurisdiction to grant injunctions in actions for slander; (2) the injunction should be limited to restrain *deft.*, its servants & agents, from publishing defamatory statements of or concerning *pltf.* in the way of its business by repeating to *pltf.*'s customers the words complained of or words to the like effect.—*CRESCENT SALES PTY., LTD. v. BRITISH PRODUCTS PTY., LTD.*, [1936] V. L. R. 336; 42 Argus L. R. 452.—AUS.

admission of liability. Pltf., acting upon R. S. C., Ord. 22, r. 5, took the money out of ct. & went on with his action. At the hearing the jury awarded pltf. one farthing damages. Pltf. claimed to retain the money taken out, on the ground that as it had been taken out of ct. before trial the ct. had no power to order its return:—*Held*: (1) the money in question was now the property of pltf. & the ct. had no power to order its return to defts.; (2) pltf. was entitled to his costs of action up to the date of payment in.

(3) *Seem*: when deft. has paid money into ct. with an admission of liability pltf. may take out the money at any time before the conclusion of the trial.

(4) *Seem*: the ct. in such circumstances has no power to allow a deft. to amend his pleadings by denying liability, revoking payment into ct. & pleading justification after pltf. has taken the money out of ct.—*MORRIS v. BAINES & Co., LTD.*, [1933] 1 K. B. 540; 102 L. J. K. B. 629; 148 L. T. 428; 49 T. L. R. 196; 77 Sol. Jo. 84.

2297b. No jurisdiction to order amendment of pleadings.—*MORRIS v. BAINES & Co., LTD.*, No. 2297a, *ante*.

2297c. Time for taking out.—*MORRIS v. BAINES & Co., LTD.*, No. 2297a, *ante*.

2298a. —.—*HALL v. BRYCE* (1890), 6 T. L. R. 344, C. A.

2298b. Identity of plaintiff.—Defts. published an article in a newspaper published by them in which they referred to certain aeroplane smuggling exploits of "an Englishwoman." Pltf. brought a libel action against defts., & in her statement of claim she alleged that the words "an Englishwoman," "she," & "her," in the article, referring to the woman who was alleged to have been guilty of plane smuggling, meant pltf., but pltf. was not identified in the article by name or description as the woman referred to. Defts. applied for an order for particulars of the allegation that the words complained of referred to pltf. The master made an order that pltf. should deliver to defts. particulars of the allegation in the statement of claim, that the words complained of were published of pltf., & that "Englishwoman," "she," & "her," in the words meant pltf., stating the facts from which it was to be inferred that the words were published of pltf. & that the said specific words meant the pltf. The Judge in Chambers reversed the order of the master. On appeal:—*Held*: the material facts on which a pltf. must rely in a libel action

necessarily included the facts & matters from which it was to be inferred that the words were published of pltf. Without a statement of those facts & matters it was impossible for defts. to be in a position to decide how to plead to the statement of claim. The matters & facts referred to in the order of the master were material facts on which pltf. relied as a matter of necessity in support of her allegation that she was defamed by the article in question, & under the provisions of R. S. C., Ord. 19, r. 4, such facts ought to have been stated in the statement of claim, & if not so stated defts. were entitled to have further particulars of the allegation that the words referred to pltf.—*BRUCE v. ODHAMS PRESS, LTD.*, [1936] 1 K. B. 697; [1936] 1 All E. R. 287; 105 L. J. K. B. 318; 154 L. T. 423; 52 T. L. R. 224; 80 Sol. Jo. 144, C. A.

2300a. — Separate actions for same libel.—Where two pltf. bring two separate actions against same defts. in respect of the same alleged libel, the ct. has jurisdiction to order consolidation of the two actions. Whether an order for consolidation should be made in any particular case is in the discretion of the judge or the master.—*HORWOOD v. STATESMAN PUBLISHING CO.* (1929), 98 L. J. K. B. 450; 141 L. T. 54; 45 T. L. R. 237; 73 Sol. Jo. 110, C. A.

*Annotation*:—*Expld. & Apld. Bailey v. Curzon of Kedleston. Bailey v. Duggan*, [1932] 2 K. B. 392. *Reid. Marchant v. Ford*, [1936] 3 All E. R. 104.

2300b. — Different libels in same book.—By the writing & publishing of one book, it was alleged that the female pltf. had been libelled by portraying her as a grossly immoral woman & that her father had been libelled by portraying him as a coarse, brutal & unsympathetic father, who had driven the daughter into an immoral life. Justification had been pleaded by two of defts. The daughter & her father brought separate actions in respect of these libels & an order was made consolidating the actions:—*Held*: the actions ought not to be consolidated on account of the embarrassment to the judge & jury in trying such actions together & the hardship to one party to wait through the trial while matters quite irrelevant to that party's case were being tried, with the consequent responsibility for costs.—*MARCHANT v. FORD, PETER DAVIES, LTD., GUERNSEY STAR & GAZETTE CO., LTD., & McLEAGAN & CUMMING*, [1936] 3 All E. R. 104; 80 Sol. Jo. 893, C. A.

## Part XI.—Criminal Proceedings.

2301a. —.—*W.* had been concerned in litigation with an insurance co. In a letter to *C.*, whom the co. had charged with an offence *W.* published a defamatory libel concerning *G.*, the solr. acting for the co. For this he was charged & convicted:—*Held*: the libel was not one which the jury

would have been justified in regarding as trivial; the prosecution are not bound to prove that the libel would have been unusually likely to provoke a breach of the peace; the slender link of common interest between *W.* & *C.* could not authorise the publication of false & defamatory statements

PART XI. SECT. 1, SUB-SECT. 1.—A. sm. *General rule*.—It is not the law that the publication of a libel cannot

be a criminal offence unless it is shown that it had per se a tendency to disturb the public peace.—*R. v.*

[1938] 1 W. W. R. 347; 1 D. L. R. 69; 69 Can. C. C. 205; 7 F. J. L. 175.—CAN.

about a third person whose character was irrelevant to any question which was the legitimate concern of C., & the occasion was not privileged; the jury were entitled in the absence of evidence to the contrary to draw the inference that as W. had an intimate knowledge of G. he knew the libel to be false; in the absence of a plea of justification, the statements must be assumed to be false.—*R. v. Wicks*, [1936] 1 All E. R. 384; 154 L. T. 471; 52 T. L. R. 253; 80 Sol. Jo. 289; 25 Cr. App. Rep. 168; 30 Cox, C. C. 370, C. C. A.

2307. *Add. Annotation*:—Generally, *Reid. Martin v. Benson*, [1927] 1 K. B. 771.

2441. *Add. Annotation*:—*Reid. Broome v. Agar* (1928), 138 L. T. 698.

2468. *Add. Annotation*:—*Consd. R. v. De Montalk* (1932), 23 Cr. App. Rep. 182.

2488. *Add. Annotation*:—*Reid. R. v. Brixton Prison, Ex p. Shure*, [1926] 1 K. B. 127.

2489a. Questions by judge as to truth—No plea of justification.]—On the trial of a prisoner for publishing defamatory libels there was no plea of justification, but after the close of the case for the defence the judge called a number of witnesses, including the two persons alleged to have been libelled, & put to them a number of questions which, as the ct. held, might have suggested to the jury that the issue was whether the words complained of were true:—*Held*: the calling of these witnesses was irregular, & the conviction must be quashed.—*R. v. McMAHON* (1933), 24 Cr. App. Rep. 95, C. C. A.

2498. *Add. Citation*:—26 State Tr. 529.

2511. *Add. Annotation*:—*Reid. R. v. Sandbach, Ex p. Williams* (1935), 51 T. L. R. 430.

2525. *Add. Annotation*:—As to (1) *Reid. Killen v. MacMillan* (1931), 48 R. P. C. 380.

## Part XII.—Slander of Title.

2528a. —.]—*CRUSH v. CRUSH* (1605), Yelv. 80; 80 E. R. 55.

2536a. Title need not be shown.]—*MARVIN v. MAYNARD* (1595), Cro. Eliz. 419; 78 E. R. 661.

2551. *Add. Annotation*:—*Reid. Balden v. Shorter*, [1933] Ch. 427.

2552. *Add. Annotation*:—*Reid. Balden v. Shorter*, [1933] Ch. 427.

2555a. —.]—*NURSE v. POUNFORD* (1629), Het. 161; 124 E. R. 421.

2560a. —.]—In slander of title for alleging that another had a lease for one thousand years of pltf.'s land, it is no defence that such a lease was actually made, because deft. took upon himself the knowledge of the law.—*MILDMAY'S CASE* (1584), 1 Co. Rep. 175 a; Jenk. 247; 76 E. R. 379; *sub nom. MILDMAY v. STANDISH*, Cro. Eliz. 34; Moore, K. B. 144.

*Annotations*:—*Reid. Rowe v. Roach* (1813), 1 M. & S. 304; British Ry. & Traffic & Electric Co. v. C. R. C. Co., Ltd. & L. C. C., [1922] 2 K. B. 260.

2560b. —.]—*MILLMAN v. PRATT* (1824), 2 B. & C. 486; 3 Dow. & Ry. K. B. 728; 107 E. R. 465.

2579. *Add. Annotation*:—*Consd. Farr v. Weatherhead & Harding* (1932), 49 R. P. C. 262.

2582a. —.]—*JOHNSON v. SMITH* (1584), Moore, K. B. 187; 72 E. R. 522.

2587a. —.]—If one hath colour of title to land, an action of the case will not lie against him for saying, I have better title to the land than you, though his title be not so good as the other's title is.—*ANON.* (1654), Sty. 414; 82 E. R. 823.

2591a. —.]—Where a trade circular is issued *bonâ fide* an interim injunction will not be granted to restrain it unless it is in violation of some contract between pltf. & deft., however much the balance of convenience may be in favour of granting.—*SOCIÉTÉ ANONYME DES MANUFACTURES DE GLACES v. TILGHMAN'S PATENT SAND BLAST CO.* (1883), 25 Ch. D. 1; 53 L. J. Ch. 1; 49 L. T. 451; 48 J. P. 68; 32 W. R. 71; *Griffin's Patent Cases* [1884–86], 209, C. A.

*Annotation*:—*Apld. Houshold & Rosher v. Fairburn & Hall* (1884), 51 L. T. 498.

## Part XIII.—Slander of Goods.

2609a. *Requisites of action*.]—*INTEROVEN STOVE CO., LTD. v. BRITISH BROADCASTING CORPN.* (1935), 79 Sol. Jo. 921.

2612. *Add. Annotation*:—*Reid. Jay's, Ltd. v. Jacobi* (1933), 49 T. L. R. 239.

### PART XI. SECT. 1, SUB-SECT. 1.—B.

2303 1. *Proceedings maintainable*.]—The accused (applt.) was tried on a charge in two counts, (1) the publishing of a defamatory libel knowing it to be false; (2) the publishing of a defamatory libel. The writing complained of was a printed leaflet headed, "Bankers' Toadies," followed by the words, *inter alia*, "God made Bankers' Toadies, just as he made snakes, slugs, snails & other creepy-crawly treacherous & poisonous things. Never, therefore, abuse them, just exterminate them." On the reverse side, under the heading, "Bankers' Toadies," were the names of nine citizens of Edmonton & the institutions with which they are

associated; & underneath their names were the words, in larger type, "Exterminate Them." The jury returned a verdict of guilty on the first count & the accused was sentenced to three months' imprisonment:—*Held*: the leaflet was beyond question defamatory of the persons named.—*R. v. UNWIN*, [1938] 1 W. W. R. 339; 1 D. L. R. 539; 69 Can. C. O. 197; 7 F. L. J. (Can.) 275.—CAN.

### PART XI. SECT. 1, SUB-SECT. 4.—A. (b).

*sa. Advocating force to effect mental, industrial, or economic change.*—*R. v. WEIR* (Ont.) (1929), 52 Can. Crim. Cas. 111.—CAN.

### PART XI. SECT. 2, SUB-SECT. 10.

*sd. Recovery against private prosecutor—Who is—Attorney-General.*]—Where the A.-G. or his agent prefers a charge of criminal libel he is not a private prosecutor within the meaning of sect. 1045 of the Criminal Code. The liability of a private prosecutor for costs thereunder is the same whether he acts with the consent of a judge or of the A.-G. *Semble*: if the charge has been preferred by the A.-G. or his agent at the instance of a private complainant, the latter is a private prosecutor within said sect.—*MALONEY v. FULPES*, [1935] 1 W. W. R. 332; D. L. R. 752; 60 C. C. C. 7.—CAN.

## LIEN.

### Part II.—Legal or Possessory Lien Generally.

- 27a. —.]—MULLINER v. FLORENCE, No. 193, 180. *Add. Annotation*:—As to (8) *Refd. Albemarle Supply Co. v. Hind* (1927), 43 T. L. R. 783.
148. *Add. Annotation*:—Generally, *Refd. Nippon Yusen Kaisha v. Ramjiban Serowgee*, [1938] A. C. 429.
152. *Add. Annotations*:—*Refd. Lowther v. Harris*, [1927] 1 K. B. 393. *Mentd. Lloyds Bank v. Chartered Bank of India, Australia & China*, [1929] 1 K. B. 40.
171. *Add. Annotation*:—*Apld. Near East Relief v. King, Chasseur & Co., Ltd.*, [1930] 2 K. B. 40.
184. *Add. Annotation*:—*Refd. Albemarle Supply Co. v. Hind* (1927), 43 T. L. R. 783.
193. To the existing paragraph add as follows:—  
“Distinction between a pledge & a lien discussed.”
- 208a. —.]—ROGERSON v. REID (1830), 1 Knapp, 362; 12 E. R. 357, H. L.
212. *Add. Annotation*:—*Refd. The Rehears* (1933), 49 T. L. R. 559.

### Part III.—General Lien.

242. *Add. Annotation*:—*Consd. Near East Relief v. King, Chasseur & Co.*, [1930] 2 K. B. 40.

### Part IV.—Particular Lien.

321. *Add. Annotation*:—*Refd. Albemarle Supply Co. v. Hind* (1927), 43 T. L. R. 783.
322. *Add. Annotation*:—*Refd. Albemarle Supply Co. v. Hind* (1927), 43 T. L. R. 783.
- 322a. — No authority to create lien.]—B. hired three taxicabs from pltf's. under hire-purchase agreements which required him to keep the cabs & their equipments in good

repair, & prohibited him from selling, pledging or parting with possession of the cabs without pltf's consent, & from creating a lien upon them in respect of such repairs. B. kept the cabs & two others at the garage of the defts., who cleaned them, supplied them with tyres, grease, oil & petrol, & did all necessary repairs to & charged rent for them. At first B. paid defts.' weekly bills

#### PART I.

*sm. Origin of—Necessity for statutory authority—In clear & unambiguous language.*]—A lien is not to be considered to be imposed without a plain declaration of the intention of the Legislature to impose it, shown in clear & unambiguous language.—*Re HARDY*, [1929] 1 D. L. R. 300; *affg.*, 62 O. L. R. 367.—CAN.

#### PART II. SECT. 9, SUB-SECT. 3.

*so. When tender unnecessary.*]—Appl't., a warehouseman & carrier, had a lien on goods of the resp. for storage & other charges. Resp. offered to pay these charges, & appl't. then claimed a lien for further charges to which it was not entitled, & so conducted itself as to show that a tender of the amount to which it was entitled would not have been accepted:—*Held*: on the evidence, no tender of the correct amount was necessary.—*GAMBLINGS, LTD. v. WESTONS, LTD.*, [1933] S. A. S. R. 26.—AUS.

#### PART II. SECT. 9, SUB-SECT. 4.—A.

178 1. *Claim of general lien—Waiver of tender—For amount of particular lien.*]—Where the holder of goods detains them for different claims, as to one of which he has a lien & the other not, the owner must tender the proper amount, unless the holder either expressly or by fair implication dispenses with it.—*BUFFALO & LAKE HURON RY. CO. v. GORDON* (1858), 16 U. C. R. 283.—CAN.

#### PART III. SECT. 4.

*sq. Lien of carrier—Goods subject to bill of sale.*]—Furniture on certain premises became subject to a bill of

sale which contained a covenant against its removal from the premises without the consent of the bill of sale holder. Without such consent the grantor of the bill of sale, who remained in possession of the furniture, employed a co. carrying on the business of carriers & storemen to remove the furniture & store it in its warehouse. The removal contract provided that the removal charge was payable on demand, contained an endorsement about a sum payable weekly, & gave the removers a lien for its charges. A second contract was then entered into for removing & storing the furniture, which specified the charge for storage & contained a similar term as in the former contract, giving a lien for all moneys payable to the co. Subsequently the bill of sale holder demanded the furniture from the co. The co. refused to deliver up the furniture, claiming a lien for its charges. In an action for detinue in the District Ct., the claim to a lien was disallowed & a verdict returned against the co., which appealed:—*Held*: (1) the contract was not a contract of common carriage but a composite special agreement to carry & store the furniture & no common carrier's lien attached for the carrying charges; (2) the co. could not maintain any claim to a special lien or contractual lien for the removal & storage charges since the bill of sale holder had not expressly authorised the removal & storage, & no implied authority arose from the fact that the grantor of the bill of sale had been left in the possession of the furniture.—*KILNERS, LTD. v. JOHN DAWSON INVESTMENT TRUST, LTD.* (1935), 35 S. R. N. S. W. 274; 52 N. S. W. W. N. 88.—AUS.

#### PART IV. SECT. 1.

11. — *Sale of building—Balance of proceeds after payment of sundry accounts paid into court.*]—*KELLY Bros. & Co. v. TOURIST HOTEL CO.* (1910), 15 O. W. R. 29; 20 O. L. R. 267.—CAN.

m 1. — *Merchant giving vessel to planter & undertaking to supply vessel for fishery—Failure of merchant to supply vessel.*]—*Held*: the merchant's peculiar lien upon the profits of the vessel ceased to attach.—*GILL v. POWER* (1851), 3 Nfld. L. R. 197.—NFLD.

#### PART IV. SECT. 2, SUB-SECT. 1.—A.

*xx. Lien for repairs—Enforceable against conditional sale vendor.*]—The common-law lien for repairs to a chattel may be maintained against the vendor where the chattel is subject to a conditional-sale agreement, even though the work was done at the request of the purchaser.—*EARLY (J. H.) MOTOR CO., LTD. v. SEKAWITCH*, [1931] 3 W. W. R. 521.—CAN.

#### PART IV. SECT. 2, SUB-SECT. 1.—B. (a).

315 1. *General rule.*]—An artificer's lien arises only when the work in respect of which the charges arose has been done by the order or at the request of the owner or of some person authorised by him.—*FISHER v. AUTOMOBILE FINANCE CO. OF AUSTRALIA, LTD.* (1928), 41 C. L. R. 167.—AUS.

322a 1. *Order given by hire-purchaser—No authority to create lien.*]—*Held*: the vendor was entitled to a return of the subject-matter of the agreement without payment of the cost of repairs

in full. He then fell into arrear, but defts. allowed him to take the cabs out daily to ply for hire on condition that the cabs continued "in pawn" & were returned to the garage each night. Defts.' weekly accounts then debited B. with the amounts in arrear brought forward; credited the amount paid by B., which was sometimes a lump sum & sometimes the exact amount of the current week's bill; & carried forward the balance. B. then fell into arrear with his hire-purchase instalments, & plffs. terminated the agreements & demanded the three cabs from defts., who claimed a lien for £113 18s. 3d. the balance of their general account for all five cabs due from B., but they also gave plffs. full details of the charges for each of their three cabs. Plffs., relying on their agreements, made no tender to defts., but commenced this action for detinue. Defts. then sought to appropriate the total sum received from B. to items for which they had no lien against plffs., & to appropriate the balance to plffs.' three cabs, leaving £94 11s. 1d. unpaid, for which they claimed a lien as against the £113 18s. 3d. originally claimed:—*Held*: (1) a contractual limitation of authority not communicated to the repairer did not limit the implied authority derived from the hirer being allowed to possess & use the car, & defts. were entitled to a lien in respect of repairs executed by them; (2) the conditional agreement between B. & defts. that the cabs might be taken out daily to ply for hire, did not prevent the repairer's lien from continuing; (3) defts. had not in the circumstances lost their lien by demanding too large a sum at first, or by basing it partly on the wrong ground; that

their attempted appropriations were too late; & that there must be an inquiry how much of the amount of the lien they claimed represented items for repairs to the three cabs.

A person claiming a lien must either claim it for a definite amount or give the owner particulars from which he himself can calculate the amount for which a lien is due. The owner must then, in the absence of express agreement, tender an amount covering the lien really existing. If he does not, unless excused, he has no answer to a claim of lien. He may be excused from tendering (a) if he has no knowledge, or means of knowledge, of the right amount; or (b) if the person claiming the lien for a wrong cause or amount makes it clear that he will not release the goods unless his full claim is satisfied, & that claim is wrongful. The fact that the claim is made for more than the right amount does not matter unless the claimant gives no particulars from which the right amount can be calculated, or makes it clear that he insists on the full amount of the right claimed (*per cur.*).—*ALBEMARLE SUPPLY CO., LTD. v. HIND & CO.*, [1928] 1 K. B. 307; 97 L. J. K. B. 25; 188 L. T. 102; 43 T. L. R. 783; 71 Sol. Jo. 777, C. A.

*Annotation*:—*Reid*. Near East Relief v. King, Chasseur & Co., Ltd., [1930] 2 K. B. 40.

324. *Add. Annotation*:—*Reid*. Albemarle Supply Co. v. Hind (1927), 43 T. L. R. 652.

332. *Add. Annotation*:—*As to* (1) *Distd.* Albemarle Supply Co. v. Hind (1927), 43 T. L. R. 652.

370. *Add. Annotation*:—*Reid*. I. R. Comrs. v. Holder, [1931] 2 K. B. 81.

371. *Add. Annotation*:—*Reid*. Jebara v. Ottoman Bank, [1927] 2 K. B. 254.

ordered by the hire-purchaser.—*ALLIANCE FINANCE CO. & STANDARD MOTORS, LTD. v. SIMONS GARAGE & GOODCHAP* (1926), 36 B. C. R. 117.—*CAN.*

322a ii. ———.—*Held*: the repairers had not acquired a lien, in respect that the hirer's title excluded the right to create a lien.—*LAMONEY v. FOULDS, LTD.*, [1928] S. C. 89.—*SCOT.*

322a iii. ———.—Although in a hire-purchase agreement there may be a clause expressly negating any authority to create a lien, it does not prevent a lien arising for repairs done to the subject-matter of the agreement.—*MOYES v. MAGNUS MOTORS, LTD.*, [1927] N. Z. L. R. 906.—*N. Z.*

322a iv. ———.—Where an agreement for the conditional sale of a motor car contained the following clause: "We shall not at any time (that is, the buyer) suffer or permit any charge or lien whether possessory or otherwise to exist against said automobile," it was held that this clause negated the idea that the buyer could authorise the doing of repairs in such a way as to give the repairer a lien.—*ALLIANCE FINANCE CO. & STANDARD MOTORS, LTD. v. SIMONS*, [1928] 3 W. W. R. 621.—*CAN.*

322a v. ———.—An artificer's lien arises only when the work in respect of which the charges arose was done by the order or at the request of the owner or some person authorised by him. Where the owner of a motor car let it to another under a hire-purchase agreement, which provided that repairs to the car should be made by the owner's nominee only, & the hirer caused the car to be repaired by a person who was not the owner's nominee:—*Held*: the person who

repaired the car was not entitled to a lien for his charges as against the owner.—*FISHER v. AUTOMOBILE FINANCE CO. OF AUSTRALIA, LTD.*, [1928] A. L. R. 363; [1928] V. L. R. 946.—*AUS.*

322a vi. ———.—Def. sold an auto-truck, taking a lien agreement to secure the balance of the purchase price, which was duly registered. The owner having an accident, brought the truck to plff., who made extensive repairs, & held the truck for the cost of the repairs. On the truck being taken for trial by an ostensible buyer, after the owner was in default under the lien agreement, it was seized by deft.'s bailiff under the lien agreement. In an action to recover the truck it was held that plff. was entitled to hold the car subject to his lien:—*Held*: where the vendor had not taken possession & where there had been no default up to the time of repair, the purchaser had the right & duty to have the property repaired so as to give rise to a common law lien in favour of the person who did the work.—*GUREVITCH v. MELCHOR* (1921), 29 B. C. R. 394.—*CAN.*

322a vii. ———.—*Acquiescence of vendor*.—A motor car sold under a conditional sale agreement & lent by the buyer to a friend for his temporary use was damaged while in the latter's possession & left by him with a mechanic to be repaired. The agent of plff., the vendor's assignee, saw the car in the mechanic's garage while it was yet unrepaired & without questioning the authority of the borrower of the car to order the repairs, which were obviously necessary suffered it to remain there, merely asking the mechanic what the repairs would cost & how long it would take to make

them, & requesting him to send in an account of his charges against the car:—*Held*: the agent had so conducted himself as to justify the mechanic in concluding that plff. expected him to make the repairs, & therefore, what-

ever was the extent of the borrower's authority to order them, plff. could not be heard to say that the mechanic had no authority to make them; & the mechanic was, therefore, entitled to a lien for the repairs.—*STERLING SECURITIES CORPN., LTD. v. HICKS MOTOR CO., LTD.*, [1928] 4 D. L. R. 155; [1928] 2 W. W. R. 74; 22 Sask. L. R. 507.—*CAN.*

o i. ———.—A person setting up a salvage lien for necessary expenses must prove the actual amount expended & establish that, but for such expenditure, the thing over which the lien is claimed would, in the circumstances, necessarily either have depreciated or perished.

In the absence of evidence to show that the garaging of a motor car has saved it from depreciation, the ct. will not infer that it has had that effect.—*KING'S HALL MOTOR CO. v. WICKENS & MCNICOL* (1931), 52 N. L. R. 37.—*S. A.*

#### PART IV. SECT. 2, SUB-SECT. 1.—O.

343 I. *Dyer*.—*For price of dyeing*.—In Canada dyers may have a particular lien for work done, but are not entitled to a general lien.—*BANK OF MONTREAL v. GUARANTY SILK DYEING & FINISHING CO., LTD.*, [1935] 4 D. L. R. 483; O. R. 493.—*CAN.*

m. *Revd.*, 15 S. C. R. 194.  
so. *Manufacturer of bricks*.—*For owner of brickyard*.—*ROBERTS v. BANK OF TORONTO* (1894), 25 O. R. 194; 21 A. R. 629.—*CAN.*



## Part V.—Equitable Lien.

437. *Add. Annotations*:—*Reid. Ariff v. Rai Jadunath Majumdar Bahadur* (1931), 47 T. L. R. 238; *Canadian Pacific Ry. Co. v. R.*, [1931] A. C. 414.

454. *Add. Annotations*:—*Consd. Re Foster, Hudson v. Foster* (No. 2), [1938] 3 All E. R. 610. *Reid. Royal Exchange Assce. v. Hope*, [1928] Ch. 179; *Smith v. Wood* (1928), 139 L. T. 250; *Re Smith, Bilham v. Smith*, [1937] 3 All E. R. 472.

## PART IV. SECT. 2, SUB-SECT. 4.

*sp. Wharfinger.*—It is not necessary that the proprietor of a wharf or quay upon navigable waters, used for the loading & unloading of vessels, should have a warehouse or shed or other convenience for the storage of goods & protection thereof from the weather; & as such wharfinger he is entitled to a lien on goods unloaded at his wharf, for money due to him for wharfage.—*SILLS v. BICKFORD* (1879), 26 Gr. 512.—CAN.

## PART IV. SECT. 3.

*f i. — Excessive seizure.*—A threshers' Lien Act, 57 Vict. c. 36, maintain a lien on grain for the threshing of which he has been paid, to recover the price of a subsequent unpaid threshing.—*SIMPSON v. OAKES* (1902), 14 Man. L. R. 262; 23 C. L. T. 54.—CAN.

*f ii. — By assignee of lien.*—Pltf.'s grain on his farm was seized by defts., purporting to be assignees of C., who had threshed the grain for pltf. & who was, as defts. alleged, entitled to a lien on the grain under Threshers' Lien Ordinance. At the time of the seizure only \$38.89 was owing by pltf. to C., & that sum was, by agreement between pltf. & C., not then payable. The alleged assignment to defts. was after this agreement. It was a general assignment of all earnings of a threshing machine used by C. in threshing pltf.'s grain:—*Held*: defts. had no legal right to make the entry & seizure; & defts.' seizure being for \$160, it was, at all events, for an excessive amount, & illegal.—*SEMPLE v. SAWYER-MASSEY CO.* (1910), 13 W. L. R. 428.—CAN.

*f iii. — Damages claimed from threshers for delay.*—Deflt. on Sept. 9 agreed to thresh pltf.'s crop as soon as he finished other threshing. He finished the other threshing in Oct., but, except for a few hours on Dec. 21, he failed to thresh for pltf. until May. Damages were held recoverable by pltf., as being fairly supposed to have been in contemplation of the parties, on several heads. When deflt. finished threshing in May he seized under the Threshing Lien Act:—*Held*: as pltf.'s existing claims, being for damages as above & a claim for teams supplied which should have been supplied by deflt., were not in the nature of payment made on account of threshing, but in the nature of counterclaim, the seizure was lawful & pltf. could not claim damages for conversion.—*FINLAYSON v. SILZER*, [1921] 1 W. W. R. 882; 14 Sask. L. R. 169.—CAN.

*f iv. —*—*POOL ELEVATORS, LTD. v. MCPHERSON*, [1930] 1 D. L. R. 271.—CAN.

*v. — Notice of claim—Time for* *g.*—While Threshers' Lien Act, M., 1913, notice of the retention of grain under a claim of lien need not be given forthwith after completion of the threshing, it must be given within thirty days thereof.—*UNRAU v. MARTENS*, [1931] 3 W. W. R. 502; [1932] 1 D. L. R. 145.—CAN.

457. *Add. Annotation*:—*Reid. Re Prevost, Lloyds Bank, Ltd. v. Barclays Bank, Ltd.*, [1930] 2 Ch. 383.

475. *Add. Annotations*:—*As to* (2) *Reid. Mercantile Bank of India, Ltd., Australia & China & Strauss & Co. (No. 2)*, [1937] 4 All E. R. 651. *Generally, Reid. Madras Official Assignee v. Mercantile Bank of India, Ltd.*, [1935] A. C. 53.

*f vi. — What amounts to.*—So long as a document establishes, even though it be a mere acknowledgment, that the owner of grain had notice within the prescribed time of a threshers' intention to exercise the power given him by sect. 3 of Threshers' Lien Act, R.S.S., 1930, it is a sufficient notice with said section.—*ADVANCE-RUMELY THRESHER CO. v. BRAUNSTEIN*, [1932] 1 W. W. R. 321.—CAN.

*f vii. — "Straight combining."*—Threshers' Lien Act, R.S.S., 1930, is remedial & should be given a liberal interpretation. "Straight combining" will give a lien under said Act.—*OSTEVIK v. PIONEER GRAIN CO., LTD.*, *Re NICOUUM v. OSTEVIK*, [1932] 3 W. W. R. 148.—CAN.

*f viii. —*—Threshers' Lien Act, R. S. M., 1913, does not give a lien for the hauling of the grain to an elevator or to market. A threshers with a valid lien for threshing loses that lien when in exercising it he combines with it a claim, *e.g.*, one for hauling, for which no lien is given him. Where grain was seized & sold to satisfy a single claim for both hauling & threshing:—*Held*: the legal taking could not be separated from the illegal taking & the seizure & sale were void *ab initio*.—*BARKER v. BUCK*, [1934] 1 W. W. R. 223; 2 D. L. R. 652; 41 Man. L. R. 558.—CAN.

*f ix. Thresher employee's lien—On earnings of employer—Nature & extent of.*—The "claim" which Thresher Employees Act, R. S. S. 1920, c. 209, s. 3, gives to a person employed on or about a threshing machine is not a mere right to make a demand but an actual charge on the earnings of the machine, which takes effect as soon as the wages are earned. The claim is restricted, however, to the amount of wages earned with respect to threshing done for the particular person in whose hands are the earnings against which the claim is asserted.—*STEEDSMAN v. CHRUNIK*, [1928] 2 W. W. R. 281.—CAN.

*f x. — Exemption — Meaning of "earnings."*—*WACHNOW v. MYERS* (No. 2), [1931] 3 W. W. R. 289.—CAN.

*k i. — Under Business Profits War Tax Act, 1916 (c. 11), s. 24—Necessity for registration.*—*CANADIAN PEERLESS JEWELRY CO. & ROYAL TRUST CO. v. R.* (1926), Q. R. 64 S. C. 574.—CAN.

*k ii. — Priority over subsequent mortgage.*—*Re ANDREW MOTHERWELL OF CANADA, LTD. (Ont.)*, [1927] 1 D. L. R. 80; 8 O. B. R. 58.—CAN.

*k iii. —*—*Re MCKENZIE CO.*, [1928] 1 D. L. R. 336.—CAN.

*k iv. For sale tax—Special War Revenue Act, 1923—Effect of.*—*R. v. JACK PINE LUMBER CO., LTD. & CANADIAN BANK OF COMMERCE*, [1928] 4 D. L. R. 976; [1928] 3 W. W. R. 419.—CAN.

*k v. — Effect of.*—*Re WILNER*, [1928] 2 D. L. R. CAN.

*m i. — Enforcement—By sale* *SOUNDING CEREAL*, [1927] 2 D. L. R.

136; [1927] 1 W. W. R. 481; 22 Alta. L. R. 546.—CAN.

*o i. Garagemen.*—The lien given by Garagemen's Lien Act, 1937, c. 77, for "servicing" includes, in the case of "garageman" as defined by the Act, a lien for the price of gasoline & oil. The lien given by said Act takes priority over the lien of a seller of the motor car under a conditional sale agreement although the latter lien existed before the garageman acquired his lien.—*Re GOLLAN & EDMONTON CREDIT CO.*, [1938] 1 W. W. R. 670; 8 F. L. J. (Can.) 4.—CAN.

*sa. For rates.*—*BURCHELL v. SYDNEY CORPN.*, [1927] 1 D. L. R. 486 59 N. S. R. 94.—CAN.

*sb. Under Rural Credits Act, C. A., 1924 (c. 173).*—A rural credit society's statutory lien under the above Act binds growing crops & crops to be grown, & takes priority over an execution which did not come into the sheriff's hands until after the making of the loan by the society.—*LOBB v. ROCKWOOD RURAL CREDITS SOCIETY*, [1926] 2 D. L. R. 819; [1926] 2 W. W. R. 1; 35 Man. L. R. 499.—CAN.

## PART V. SECT. 3, SUB-SECT. 8.—A.

*d i. —*—*FLETCHER v. CLAGGETT*, [1927] 3 D. L. R. 751; [1927] 2 W. W. R. 362; 21 Sask. L. R. 682.—CAN.

*d ii. —*—*AUMANN v. MCKENZIE*, [1928] 3 W. W. R. 233.—CAN.

*d iii. —*—*MATEYCHUK v. KUCHARNOWSKI*, [1930] 1 D. L. R. 367.—CAN.

## PART V. SECT. 3, SUB-SECT. 8.—C. (a).

438 *iii. —*—*FREEBURG v. FARMERS' EXCHANGE BANKERS*, [1922] 1 W. W. R. 845; 63 D. L. R. 142; 15 Sask. L. R. 318.—CAN.

## PART V. SECT. 3, SUB-SECT. 9.

464 *xi. —*—A certificate of judgment obtained by a mtgee. under sect. 87, para. (o) (44) of Judicature Act, R.S.A., 1922, & registered in the land titles office does not create a lien on the debtor's land within sec. 43 of Trustee Act, R. S. A., 1922.—*TOOLE PRUIT TRUST CO. v. LONDON LIFE INSURANCE CO.*, [1935] 3 W. W. R. 311; 4 D. L. R. 586; 5 F. L. J. (Can.) 179.—CAN.

## PART V. SECT. 3, SUB-SECT. 12.

*sk. Advance for improvement of Church property.*—Pltf. having advanced money for the improvement of certain Church property was held entitled to a lien on the property for the money, as the congregation, the priest & the Bishop had all taken an active part in what was done.—*GLAVASKY v. STADNICK*, [1937] 1 D. L. R. 473; O. R. 35.—CAN.

## PART V. SECT. 3, SUB-SECT. 18.—B. (b).

523 *i. Default of purchaser.*—A purchaser paying earnest money & then refusing to complete the purchase does

not obtain a charge on the property for the earnest money.—*ADAMI SANYASI v. NOOKALAMMA* (1930), 1 L. R. 8.

#### PART V. SECT. 3, SUB-SECT. 20.

1 (p. 273) i. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*MULLER v. SHIBLEY* (1908), 8 W. L. R. 42; 13 B. C. R. 348.—CAN.

1 (p. 273) ii. — *Person working with his own team.*—Pltf. who had hauled poles with his own team under an agreement for payment at so much per lineal foot, & who did all the work himself except for some gratuitous help given him by his young son, held to have been, not a bare contractor, but a wage-earner entitled to a lien under the Woodmen's Lien for Wages Act, R. S. B. C. 1924, c. 278.—*SCHMIDT v. STUCKEY & PEARSE*, [1928] 2 D. L. R. 928; [1928] 1 W. W. R. 913.—CAN.

1 (p. 273) iii. — *Person hauling timber to place of shipment.*—*AIKEN v. O'BRIEN*, [1928] 2 D. L. R. 731.—CAN.

1 (p. 273) i. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*HENDSBEE v. SONORA TIMBER CO., LTD.*, [1928] 1 D. L. R. 642; 59 N. S. R. 457.—CAN.

1 (p. 273) i. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*BAKTER v. KENNEDY* (1900), 35 N. B. R. 179.—CAN.

1 (p. 273) i. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*WOODMEN'S LIEN ACT, R.S.N.S., 1923*, does not apply to an independent contractor.—*BLADES v. NELSON*, [1935] 2 D. L. R. 655.—CAN.

1 (p. 273) ii. — *"Gipso contractor."*—*BOYD & ANDERSON v. SUPERIOR SPRUCE MILLS, LTD. (B. C.)*, [1927] 2 W. W. R. 34.—CAN.

1 (p. 273) i. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*SHEERWASH v. DEER MOUNTAIN LUMBER CO. (1925)*, 37 B. C. R. 418.—CAN.

1 (p. 273) ii. — *Married woman—Engaged by husband to cook for crew of men engaged to get lumber.*—*PATTERSON v. BOWMASTER* (1904), 37 N. B. R. 4.—CAN.

1 (p. 273) iii. — *Not volunteer or trespasser.*—*RODDICK v. GRAHAM*, [1929] 1 D. L. R. 535; 60 N. S. R. 257.—CAN.

1 (p. 273) i. — *Person receiving logs.*—*VAN KOUENET v. QUAIFE & ROGERS*, [1930] 1 W. W. R. 214.—CAN.

1 (p. 273) ii. — *Work for which woodman's lien attaches.*—*HAGLUND v. DEER* (1927), 38 B. C. R. 435.—CAN.

1 (p. 273) i. — *Deals & manufactured lumber.*—*BAKTER v. KENNEDY* (1900), 35 N. B. R. 179.—CAN.

1 (p. 273) ii. — *Separate operations in different localities.*—Work done in one logging operation does not give a lien under the Woodmen's Lien for Wages Act, R. S. B. C. 1924, c. 278, on logs cut in a separate & distinct operation at another locality, although the work was done for the same employer & the employment was continuous in the sense that there was no discharge &

[1938] 1 556; 2 D. L. R. 143.—CAN.

1 (p. 273) i. — *Filing woodman's lien—Affidavit—Sufficiency.*—*NELSON v. AFFORD* (B. C.), [1927] 3 W. W. R. 181.—CAN.

1 (p. 273) ii. — *Time for—Within statutory period—When period begins.*—*HEANEY v. LOBLEY* (1909), 11 545.—CAN.

1 (p. 273) iii. — *Statement of claim for woodman's lien—Power of court to amend—As to location of logs.*—*MONTREAL TRUST CO. v. CAN. LUMBER YARDS, LTD.*, [1928] 2 D. L. R. 37; [1928] 1 W. W. R. 509; 39 B. C. R. 325.—CAN.

1 (p. 273) i. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*ARNOLDI v. GOUIN* (1875), 22 Gr. 314.—CAN.

1 (p. 273) i. — *Work done for purchaser under executory agreement for sale of mine.*—*RODENHISER & TYPERT v. NOVA MAC MINES & POWER CORPN.*, [1932] 1 D. L. R. 548; 4 M. P. R. 168.—CAN.

1 (p. 274) i. — *Employed at rate per hour.*—*DUNN v. SEDZIAK* (1908), 17 Man. L. R. 484; 7 W. L. R. 563.—CAN.

1 (p. 274) i. — *Workman for materialman.*—*ALLEN v. HARRISON* (1908), 9 W. L. R. 198.—CAN.

1 (p. 274) i. — *Sub-contractor supplying material.*—*MONTJOY v. HEWARD SCHOOL DISTRICT CORPN.* (1908), 10 W. L. R. 282.—CAN.

1 (p. 274) ii. — *Sub-contractor.*—*KEENAN BROS., LTD. v. LANGDON*, [1928] 2 D. L. R. 849; [1928] S. O. R. 203; *revers*, *sub nom. LANGDON v. KING*, 32 O. W. N. 407.—CAN.

1 (p. 274) i. — *Ross v. Gorman* (1908), 1 Alta. L. R. 516; 9 W. L. R. 319.—CAN.

1 (p. 274) ii. — *Installation of furnace.*—*MALLET v. KOVAR* (1910), 14 W. L. R. 327.—CAN.

1 (p. 274) iii. — *Devaluing mine in consideration of grant of option to purchase.*—*KOSOBUSKI v. EXTENSION MIN. CO.*, [1929] 3 D. L. R. 379; 64 O. L. R. 8.—CAN.

1 (p. 274) iv. — *Plumbing work—Later "trifling work"—Indivisible contract.*—*CARR v. DEMPSEY*, [1931] 1 D. L. R. 984; 43 B. C. R. 305.—CAN.

1 (p. 274) v. — *Contract incomplete owing to owner's default.*—Pltf. partially completed a plumbing contract in deft.'s house while it was under construction, when deft. stopped work & was unable to complete the house. Pltf. was unable to continue his plumbing until construction work was resumed on the house & after one year he filed a lien for the balance due on the plumbing work already done.—*Held*: as long as the contract remained incomplete owing to the owners default, pltf. was entitled to file a lien & he was entitled to judgment for the balance due & to a lien on the property charged.—*TAYLOR v. FORAN*, [1931] 44 B. C. R. 529.—CAN.

1 (p. 274) vi. — *Alterations.*—Under Mechanics' Lien Act, R.S.B.C. 1924, temporary alterations & changes in, or additions to, a building which are essential to the use & purpose for which it was designed are a proper foundation for a lien for the work done & materials furnished thereupon; & this is particularly so with respect to property used in the production of shows & entertainments where the alterations & additions to the buildings & land would necessarily be, in, e.g., the case of a general amusement or exhibition park, continuous & relatively frequent. Pltf. claimed liens against deft., the owner of the building, for work or service & for material used in erecting a track for a six-day bicycle race in a building used as a skating & hockey rink & sports arena. The track was built for the purposes of holding said race under a six-day lease of the building entered into between deft. & a cycle-race assoc. co. whereunder the co. was allowed two days before the race & two days thereafter for erecting & removing the track. The track was, after some delay, removed after the race.—*Held*: the liens were enforceable against deft.—*STIRN v. VAN COUVER ARENA CO., LTD.*, [1932] 2 W. W. R. 851; 4 D. L. R. 361; 46 B. C. R. 161.—CAN.

1 (p. 274) vii. — *Timber supplied for pit props.*—A lease of a mine provided that the mining should be done in a miner-like manner. Resp. supplied timber to the mine for the purpose of props for which purpose it

was used.—*Held*: he was entitled to a lien therefor under sect. 6 of Mechanics' Lien Act, R. S. B. C. 1924, even though all the timber had not been used.—*PAVICH v. TULAMEN COAL MINES, LTD.*, [1936] 3 W. W. R. 593; [1937] 1 D. L. R. 72; 51 B. O. R. 210.—CAN.

1 (p. 274) i. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*BEAVER LUMBER CO., LTD. v. KOROTKY* (Sask.), [1927] 1 W. W. R. 945.—CAN.

1 (p. 274) ii. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*HOFFSTROM v. STANLEY* (1902), 14 Man. L. R. 227; 22 C. L. T. 337.—CAN.

1 (p. 274) iii. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*CUNNINGHAM v. SIGFUSSEN*, [1928] 1 D. L. R. 726; [1928] 1 W. W. R. 16; 22 Sask. L. R. 310.—CAN.

1 (p. 274) iv. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*FREEDMAN v. GUARANTY TRUST CO.*, [1929] 4 D. L. R. 32; 64 O. L. R. 200.

1 (p. 274) v. — *Deflt. co., owner of and, leased a portion of it to a club. It was a term of the lease that the club should erect a club-house & the club entered into a contract with pltf. co. to erect the building. On a claim of lien against lessor by pltf. co.:—Held*: there must be something in the nature of direct dealing between contractor & person whose interest is sought to be charged: mere knowledge of, or consent to, the work being done, is not sufficient.—*STUART & SINCLAIR, LTD. v. BILTMORE PARK ESTATES* (1931), 3 D. L. R. 345; O. R. 315.—CAN.

1 (p. 274) vi. — *Person hiring out team for logging operations—Driven by employee of contractor.*—Where work has been done or materials furnished on premises at the immediate instance of the tenant, & it is sought to enforce a mechanics' lien therefor against the interest of the owner of the fee by virtue of his alleged "privity or consent," within the definition of "owner" in sect. 2 (c) of Mechanics' Lien Act, R.S.M., 1913, it is necessary to show that there was some direct dealing between him & the contractor: proof of his mere knowledge & assent is not enough.—*PATRIDGE v. DUNHAM*, [1932] 1 W. W. R. 99; 1 D. L. R. 600; 40 Man. L. R. 165.—CAN.

1 (p. 274) i. — *Work done with "privity or consent."*—*MICHAELIS v. RYAN MOTORS*, [1923] 1 D. L. R. 1186; 16 Sask. L. R. 352; [1923] 1 W. W. R. 401.—CAN.

1 (p. 274) i. — *Person hiring out team for logging operations—Driven by employee of contractor.*—In order that an agent may bind an owner under Mechanics' Lien Act, R.S.O., 1927, the building must have been erected & the materials furnished with the owner's privity & consent, & there must have been a request by the owner. Such a request may be implied if circumstances warrant it.—*NAFTOLIN v. SKENE*, [1932] 1 D. L. R. 412; O. R. 97.—CAN.

1 (p. 274) i. — *Sale of property before lien filed—Draft drawn on vendors for part of lien.*—*MAKINS v. ROBINSON* (1884), 6 O. R. 1.—CAN.

1 (p. 274) i. — *Sub-contractors claiming for work or material—Contractor fully paid though unable to complete.*—*GODDARD v. COULSON* (1834), 10 A. R. 1.—CAN.

1 (p. 274) i. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*TRAVIS v. BRECKENRIDGE - LUND LUMBER & COAL CO. (1910)*, 43 S. O. R. 59.—CAN.

1 (p. 274) iii. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*CANADIAN EQUIPMENT & SUPPLY CO. v. BELL & SCHISSEL* (1913), 24 W. L. R. 415; 11 D. L. R. 820.—CAN.

1 (p. 274) iv. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*SCHOOL BOARD v. MALLET v. KOVAR* (1910), 14 W. L. R. 327.—CAN.

1 (p. 274) v. — *Person hiring out team for logging operations—Driven by employee of contractor.*—*Person entitled under agreement to purchase.*—*MONTJOY v. HEWARD SCHOOL DISTRICT CORPN.* (1908), 10 W. L. R. 282.—CAN.

1 (p. 274) vi. — *Church erected for unincorporated congregation.*—*ROHL v. PFAFFENROTH* (1915), 31 W. L. R. 197.—CAN.

553a. —.]—TOPHAM v. CONSTANTINE (1829), 564. Add. Annotation:—Refd. Halifax Build-  
Taml. 135; 48 E. R. 54. Society v. Keighley, [1931] 2 K. B.

560. Add. Annotation:—Refd. Lowther v. Harris,  
[1927] 1 K. B. 393.

ooo (p. 274) vii. —.]—Agreement made with husband of owner.—BOGACH v. HUEN (Man.), [1929] 4 D. L. R. 1061; 2 W. W. R. 249.—CAN.

ooo (p. 274) viii. —.]—Protection against claim.—The delivery of receipted pay rolls under Mechanics' Lien Act, R. S. B. C., 1924, s. 15, operates as a statutory protection to the owner.—ROBERTSON & HACKETT SAWMILLS, LTD. v. METROPOLITAN TABERNACLE & FALLS, [1933] 2 D. L. R. 797.—CAN.

ooo (p. 274) i. —.]—SECURITY LUMBER CO. v. ANAKA, [1927] 2 D. L. R. 987; [1927] 1 W. W. R. 975; 21 Sask. L. R. 459.—CAN.

ooo (p. 274) ii. —.]—JACKSON WATER SUPPLY CO. v. BARDECK (1915), 31 W. L. R. 151; 8 W. W. R. 468.—CAN.

ooo (p. 274) iii. —.]—Right to abandon lien on part.—SPARKS & MCKAY v. LORD, DOMINION LUMBER & COAL CO. v. LORD, [1929] 2 D. L. R. 32; 63 O. L. R. 393.—CAN.

ooo (p. 274) iv. —.]—Mechanics' Lien Act, R. S. O., 1927, s. 5, gives to one who erects a building a lien on the owner's estate or interest in the "building & appurtenances & the land occupied thereby or enjoyed therewith." It is a question of fact in each case what land this includes, to be determined from all the circumstances. The fact that an owner has acquired land in one connected parcel by a single conveyance & has included it all in one or more mtgs. does not necessarily imply that those entitled to liens in connection with a building erected on a part of it are entitled to place their liens on the whole parcel. In the case in question it was held that the land to be enjoyed with the building erected for the owner had been severed from the rest of the property by the owner & leased, to be occupied & enjoyed by the lessee, separate from the rest of the owner's property, & this leased land, & including, with regard to the lien, one-half of the wall of an adjoining building, which wall was used as a wall of the new building, was the only land upon which the lien was acquired, & therefore the claim of lien, which was filed against it only, was properly so confined, the contention of applt., second mtgee. of all the land & purchaser thereof at a sale made under power of sale in the first mtge., that the lien should have been filed against all the land, being rejected.—STEEDMAN v. SPARKS & MCKAY & LORD, STEEDMAN v. DOMINION LUMBER & COAL CO., LTD. & LORD, [1930] S. C. R. 351; 3 D. L. R. 185; varg., [1929] 2 D. L. R. 32; 63 O. L. R. 393.—CAN.

mmmm i. —.]—Single contract—Single lien may be filed.—COUTU v. JAMES (B.C.), [1926] 2 W. W. R. 87.—CAN.

mmmm ii. —.]—Whether lien claim divisible.—BARR & ANDERSON v. PERRY & CO. (1912), 21 W. L. R. 236.—CAN.

mmmm iii. —.]—LEE v. HILL (1909), 11 W. L. R. 611.—CAN.

mmmm iv. —.]—Lien for entire sum upon all buildings.—BOAKE v. GUILD, [1932] 4 D. L. R. 217.—CAN.

mmmm v. —.]—"Entire contract" means one contract for all the buildings as distinguished from separate contracts for each building, & either a material man or a wage earner is entitled to a general lien on all the buildings if he can prove that the

materials were supplied or the work was done pursuant to one contract or arrangement in respect to the erection of all the buildings.—BOAKE v. GUILD, [1932] O. R. 617; affd., sub nom. CARREL v. HART, [1934] S. C. R. 10; [1933] 4 D. L. R. 401; varied, [1934] 1 D. L. R. 537.—CAN.

nnnn i. —.]—Homestead.—RICHERT CO. v. LARKIN, [1928] 4 D. L. R. 861; [1928] 3 W. W. R. 305.—CAN.

nnnn ii. —.]—Mining property—Materials ancillary to mining operations.—TAYLOR HARDWARE, LTD. v. CANADIAN ASSOCIATED GOLD FIELDS, LTD., [1929] 3 D. L. R. 709; 64 O. L. R. 94.—CAN.

nnnn iii. —.]—Municipal hospital.—A mechanics' lien can attach to a municipal hospital.—ALBERTA LUMBER CO. v. HINES, [1931] 2 W. W. R. 558; [1931] 3 D. L. R. 315.—CAN.

nnnn iv. —.]—Unpatented lands.—Under Mechanics' Lien Act, 1930, there may be a valid lien against an interest in unpatented lands, although, since in such a case there is no certificate of title a "registration" of the lien within the strict meaning of that term in Land Titles Act is impossible.—UNION DRILLING & DEVELOPMENT CO., LTD. v. CAPITAL OIL & NATURAL GAS CO., LTD., [1931] 3 D. L. R. 656; affd., [1931] 2 D. L. R. 851; 2 W. W. R. 508; affd., [1931] 1 W. W. R. 786.—CAN.

nnnn v. —.]—Interest without value.—Pltf. registered a mechanics' lien in 1921 "upon the estate of" deft. Z. in certain land & the house thereon. Z. had purchased the land under an agreement for sale in 1920, & had bought the materials covered by the lien without the cognisance of the vendor of the land. Z. fell into arrears in respect of interest & taxes & in 1926 the vendor agreed to cancel the agreement on certain terms. In pursuance of the agreement for cancellation deft. delivered to Z. all of the latter's notes which deft. held, & Z. gave deft. a quit-claim deed of all his estate & interest in the land, & gave up possession of the land. In an action to enforce the lien, judgment was given for pltf. declaring the lien to be a first charge on the land. On appeal: Held: on the evidence, the interest of Z. in the land was of no value; the settlement made by the vendor, including the return of the notes, was made for the purpose of enabling him to obtain possession. There was, therefore, nothing against which the lien could be charged.—DEWEY-GARDNER CO., LTD. v. ZACHORECKY & MOORHOUSE & MOORHOUSE, [1936] 2 W. W. R. 423.—CAN.

h (p. 275) i. —.]—FITZGERALD v. APPERLEY (Sask.), [1926] 3 D. L. R. 734; [1926] 2 W. W. R. 689.—CAN.

h (p. 275) ii. —.]—BEAVER LUMBER CO., LTD. v. CUBRY (Sask.), [1926] 4 D. L. R. 619; [1926] 3 W. W. R. 404.—CAN.

h (p. 275) iii. —.]—Whether lien defeated by sale.—To purchaser without notice.—WANTY v. ROBINS (1888), 15 O. R. 474.—CAN.

h (p. 275) iv. —.]—Although contract payable by future instalments.—BEATON v. NEDRUVAN, [1930] 1 D. L. R. 826; 1 M. P. R. 65.—CAN.

n (p. 275) i. —.]—LEVIN v. LUKEWIECKI, [1933] 2 W. W. R. 599; 4 D. L. R. 604.—CAN.

q (p. 275) i. —.]—MAGURN v. MAGURN (1883), 10 P. R. 570.—CAN.

e (p. 275) i. —.]—RUSSELL

v. ONTARIO FOUNDATION & ENGINEERING CO., [1926] 1 D. L. R. 780; 58 O. L. R. 260.—CAN.

aa (p. 275) i. —.]—IRWIN v. BEYNON (1887), 4 Man. L. R. 10.—CAN.

aa (p. 275) ii. —.]—HALL v. HOGG (1890), 20 O. R. 13.—CAN.

aa (p. 275) iii. —.]—VOKES HARDWARE CO. v. GRAND TRUNK RY. CO. (1908), 12 O. L. R. 344; 7 O. W. R. 537; 8 O. W. R. 24.—CAN.

aa (p. 275) iv. —.]—CLARKE v. MOORE & SIMPSON (1908), 8 W. L. R. 405, 411; 1 Alta. L. R. 49.—CAN.

aa (p. 275) v. —.]—SMITH v. BERNHART (1909), 11 W. L. R. 623.—CAN.

dd (p. 275) i. —.]—T. McAVITY & SONS, LTD. v. WALSH (B. C.), [1927] 1 W. W. R. 242.—CAN.

dd (p. 275) ii. —.]—BRIGGS v. LEE (1880), 27 Gr. 464.—CAN.

dd (p. 275) iii. —.]—Fraction of day.—CLARKE v. MOORE & SIMPSON (1908), 8 W. L. R. 405, 411; 1 Alta. L. R. 49.—CAN.

dd (p. 275) iv. —.]—Work done after period expired.—For purpose of preserving lien.—SHERITT v. MCCALLUM (1910), 12 W. L. R. 637.—CAN.

dd (p. 275) v. —.]—For purpose of making plant efficient.—WHIMSTER v. CROW'S NEST PASS COAL CO. (1910), 13 W. L. R. 621.—CAN.

dd (p. 275) vi. —.]—Sub-contractor's lien.—In a mechanics' lien action brought by a sub-contractor to enforce a lien for what were called "extras" it was contended that the lien had not been registered in time & that pltf. was trying to support it by later work which he had done under his original contract. The amount which it was originally agreed pltf. should receive had been already paid him.—EDWARDS v. YOUNG WOMEN'S CHRISTIAN ASSOC. & TREMBLAY, [1932] 1 W. W. R. 1; 1 D. L. R. 755; 40 Man. L. R. 87.—CAN.

dd (p. 275) vii. —.]—Completion of contract—What is.—DAY v. CROWN GRAIN CO. (1907), 39 S. C. R. 258.—CAN.

ff (p. 275) i. —.]—LARSEN v. NELSON & FORT SHEPARD RY. CO. (1895), 4 B. C. R. 151.—CAN.

ff (p. 275) ii. —.]—KNOTT v. CLINE & BECKWITH (1896), 5 B. C. R. 120.—CAN.

ff (p. 275) iii. —.]—Inclusion of claim for materials.—WELLER v. SHUPE (1897), 6 B. C. R. 58.—CAN.

ff (p. 275) iv. —.]—Misdescription of land—Application to amend made ex parte after time for filing claim expired.—MCDONALD v. MCKENZIE (1914), 29 W. L. R. 890; 7 W. W. R. 804; 19 D. L. R. 418; 7 Alta. 435.—CAN.

ff (p. 275) v. —.]—Made by agent.—MCARTHUR & CO. v. FAGAN, [1928] 2 D. L. R. 875; [1928] 2 W. W. R. 6; 39 B. C. R. 554.—CAN.

ff (p. 275) i. —.]—By two partners—Others undisclosed—Validity.—A claim of mechanics' lien for material supplied by a partnership, which consisted of three members, began as follows: "C. C. & H. M., both of the City of W., etc., carrying on business under the firm name & style of Chiock Lumber & Fuel Co., under Mechanics' Lien Act, claim a lien. . . ." The claim of

598. *Add. Annotation*:—*As to* (2) *Refd. Weld v. Petre* (1928), 97 L. J. Ch. 399.

615. *Add. Annotation*:—*Refd. Re Tilden, Cou-brough v. Royal Society of London* (1938), 82 Sol. Jo.

lien was signed: Chick Lumber & Fuel Co., per O. J., H. M." The affidavit verifying the claim was made by C. O., "one of the partners named in the above claim." The referee in Chambers set aside the lien on the ground that a lien cannot be claimed by one party which in fact belongs to another & that the lien herein was claimed by two of the partners only, & not by the partnership as a whole. On appeal:—*Held*: the claim was one filed by & on behalf of the firm through the agency of the two partners. The fact that the name of the third partner was not mentioned was not in any way an assertion of a lien in their favour to her exclusion.—CHICK LUMBER & FUEL CO. v. MOOREHOUSE, [1933] 3 W. W. R. 465; [1934] 1 D. L. R. 364.—CAN.

rr (p. 275) i. ———.—MONARCH LUMBER CO. v. GARRISON (1911), 18 W. L. R. 686.—CAN.

rr (p. 275) ii. ———.—Notice of lien under Mechanics' Lien Act, R. S. O., 1927, s. 11 (4), is not sufficient unless it is such notice as would cause the owner to know that a lien was being claimed under the Act.—ANGLIN & CO. v. SIMMONS, [1933] 2 D. L. R. 794.—CAN.

aaa (p. 275) i. ———.—*Effect of Materialman's—What payments subsequently made by owner valid.*—MCBEAN v. KINNEAR (1892), 23 O. R. 313.—CAN.

aaa (p. 275) ii. ———.—*In respect of more goods than delivered—How far valid.*—RAT PORTAGE LUMBER CO., LTD. v. WATSON & ROGERS (1912), 17 B. O. R. 489.—CAN.

fff (p. 275) i. ———.—BAINES v. HARMAN, [1927] 2 D. L. R. 743; 60 O. L. R. 233.—CAN.

dddd (p. 275) i. ———.—*Not limited to price of materials supplied within six years of beginning of action.*—FITZGERALD v. APPERLEY (Sask.), [1926] 3 D. L. R. 734; [1926] 2 W. W. R. 889.—CAN.

dddd (p. 275) ii. ———.—*Amount payable by owner to contractor—Right of owner to deduct damages for delay & amount to satisfy wages lien.*—MCBEAN v. KINNEAR (1892), 23 O. R. 313.—CAN.

dddd (p. 275) iii. ———.—LUNDY v. HENDERSON (1908), 9 W. L. R. 327.—CAN.

dddd (p. 275) iv. ———.—*On property against which lien enforced.*—A declaration of a mechanics' lien against a certain property must be limited to the amount remaining unpaid, the costs of the lien, on the contract with respect to that property; it is improper to include therein an amount due for work done on another piece of property, even though it is owned by the same debt.—MACDONALD & YOUNG v. HUGGETT & HUGGETT, [1931] 1 D. L. R. 1011; [1930] 3 W. W. R. 645.—CAN.

dddd (p. 275) v. ———.—*Contractor to receive half amount to be borrowed—Failure of owner to borrow on mortgage or to pay—Right of contractor to interest.*—HURST v. DOWNARD (1921), 64 D. L. R. 279; 60 O. L. R. 35.—CAN.

aaa. Amount due from owner to contractor paid into court—Claims of lienholder against contractor exceeding that sum—Owner granted costs against contractor—Right of owner to payment out of fund in court.—PATTEN v. LAIDLAW (1895), 26 O. R. 189.—CAN.

sb. Right of lienholder—To pay off unpaid purchase-money on land affected by lien & to add amount to lien.—

RICHERT CO. v. LARKIN, [1928] 4 D. L. R. 881; [1928] 3 W. W. R. 305.—CAN.

sc. Sale under Farm Implement Act—Statutory provisions not complied with—New lien note given marked "renewal"—Whether Act still applicable.—FLOWMAN TRACTOR CO. v. ANDREWS, [1928] 1 D. L. R. 544; [1928] 1 W. W. R. 329.—CAN.

sd. Mechanics' Lien Act, B. C. 1893, c. 23—Whether applicable to Dominion railways.—LARSEN v. NELSON & FORT SHEPPARD RY. CO. (1895), 4 B. C. R. 161.—CAN.

sg. Protection of owner—When arising.—Mechanics' Lien Act, R. S. B. C., 1924, s. 15, gives the owner statutory protection on delivery of receipted pay rolls, & if he does not avail himself of this protection he is liable to both labourer & material man.—ROBERTSON & HACKETT SAWMILLS, LTD. v. METROPOLITAN TABERNACLE (1932), 45 B. O. R. 539.—CAN.

sl. Workmen's Liens Acts, 1893 & 1896—Construction & application of.—PITT, LTD. v. GLENELG TOWN CORPN., [1927] S. A. S. R. 501.—AUS.

so. Wages Protection & Contractors' Lien Acts—Who is a worker.—The definition of "worker" in Wages Protection & Contractors' Liens Act, 1908, is not confined to persons engaged in manual labour.—LEYLAND MOTORS, LTD. v. NAPIER HARBOUR BOARD, [1930] N. Z. L. R. 113.—N.Z.

sq. ———.—Who is a contractor—Architect.—An architect who prepares the plans & specifications for, & supervises the construction of, a building for an employer, performs "work" as a "contractor" within Wages Protection & Contractors' Liens Act, 1908 & 1914.—BROWN v. E. G. LAURIE, LTD., [1930] N. Z. L. R. 23.—N.Z.

st. ———.—Effect of employer's bankruptcy.—Rights of workers under Wages Protection & Contractors' Liens Act, 1908, are not lost by the employer's bkcy.—LEYLAND MOTORS, LTD. v. NAPIER HARBOUR BOARD, [1930] N. Z. L. R. 113.—N.Z.

sw. ———.—Whether binding on Crown.—The Crown is not bound by the provisions of Wages Protection & Contractors' Liens Act, 1908.—ANDREW v. ROCKELL, [1934] N. Z. L. R. 1056.—N.Z.

sz. Action against registrar—Limitation of action.—A mechanics' lien constitutes an equitable interest in land & the damages sustained by a lienholder who by the act of the registrar is deprived of the benefits of his mechanics' lien are damages sustained "through deprivation of land" within sect. 155 of Land Titles Act, R. S. A., 1922, which provides that an action for the recovery of such damages must be brought within six years from the date of such deprivation.—RICHERT (F. C.) CO., LTD. v. REGISTRAR OF LAND TITLES FOR SOUTH ALBERTA, [1936] 2 W. W. R. 473; 4 D. L. R. 666; 6 F. L. J. (Can.) 131; aff'd., [1937] 4 D. L. R. 540.—CAN.

sd. Waiver of right to lien.—Under a contract by which ptfr. agreed to cut timber for deft. & to haul it to deft.'s mill site, deft. agreed to pay ptfr. at the stipulated rate "immediately on receipt of the returns from the sale of the lumber & other products produced from the said timber, the said lumber & other products to be shipped as soon as manufactured".—*Held*: said provision as to payment was inconsistent with the existence of a lien under

Woodmen's Lien for Services Act, R. S. M., 1913, & constituted a waiver of the right thereto.—JORGENSEN v. SITAR & ELLOR, [1937] 2 W. W. R. 251; 3 D. L. R. 196; 45 Man. L. R. 265.—CAN.

#### PART V. SECT. 3, SUB-SECT. 21.—A.

e. *Revald.*, [1919] 3 W. W. R. 366.

572 i. ———.—*Right in equity.*—BAKER v. DEWEY (1869), 15 Gr. 668.—CAN.

qi. ———.—TRACEY v. ALLEN (1932), 4 M. P. R. 513.—CAN.

sk. *Necessity for interest in land.*—A vendor's lien cannot arise in favour of a vendor who has no interest at all, legal or equitable, in the land sold. The alleged "squatters' right" relied on herein as the foundation of such a lien was held not to have given the "squatter" any interest in the land.—HORN v. SANFORD, [1929] 3 D. L. R. 130; 2 W. W. R. 33; 23 S. L. R. 509.—CAN.

#### PART V. SECT. 3, SUB-SECT. 21.—B. (a) i.

sl. Land bought by several parties.—BOULTON v. GILLESPIE (1860), 8 Gr. 223.—CAN.

#### PART V. SECT. 3, SUB-SECT. 21.—B. (a) ii.

592 ii. ———.—In an instrument of transfer of certain land, the consideration was stated as being in consideration of the purchaser having by deed of covenant covenanted to pay to the vendor during her lifetime an annuity of a stated amount:—*Held*: after the execution of the deed of covenant, the vendor was not entitled to any equitable lien in respect of the land.—WOSIDLO v. CATT (1944), 52 O. L. R. 301; 40 Argus L. R. 425; 8 A. L. J. 304.—AUS.

sm. Payment of mortgage as part of purchase price.—HAMILTON PROVIDENT LOAN & INVESTMENT CO. v. SMITH (1888), 17 O. R. 1.—CAN.

#### PART V. SECT. 3, SUB-SECT. 21.—D.

622 i. Assignees—Purchaser for value without notice—Covenantor under Land Titles Act.—A vendor's implied lien for unpaid purchase-money cannot persist as against a bona fide purchaser for value without notice. The liability assumed under the covenant implied by sect. 54 of the Land Titles Act on the part of the transferee of mortgaged land is sufficient to make the transferee a purchaser for value.—SKALUK v. COREY, [1930] 1 W. W. R. 424; 2 D. L. R. 239.—CAN.

#### PART V. SECT. 3, SUB-SECT. 21.—F.

i i. ———.—L., the registered owner of land in Saskatchewan, who had agreed to sell it to MacF., assigned the benefits of the agreement to H. in exchange for land in California, the documents being delivered in escrow. H. obtained a decree of specific performance of the exchange agreement from the California Ct. & it was not until it was carried out that he received an assignment of the MacF. agreement or a transfer of the property. In the meantime, while said action was pending H. got the liens against the California land released on giving ptfrs. herein an assignment of the MacF. agreement in trust for the lien creditors. Later when H. & L. carried out the exchange agreement H. assigned to L. two specific amounts of interest due under the MacF. agreement. Ptfrs. obtained a final order against MacF.,

721. *Add. Annotation:—As to (1) Consd. Tsang Chuen v. Li Po Kwai, [1932] A. C. 715.* 761. *Add. Annotation:—Refd. Cohen v. Roche, [1927] 1 K. B. 169.*

as vendee, in an action for specific performance or cancellation of the agreement for sale. At the time of the order nisi it was agreed & so ordered that the issue between pliffs. & L., arising from L.'s claim of a vendor's lien for the amounts due him, be adjourned. On the trial of the issue:—*Held*: since the prior assignment to pliffs. also carried the vendor's lien H. had no lien to assign to L. except what equity there might be after the creditors for whom pliffs. were trustees were paid. Moreover, since L. with the knowledge that H. was using his contract with L. to satisfy the lien creditors gave an absolute assignment of the MacF. agreement to H. with no reservations, he was estopped from now asserting a reservation of a vendor's lien.—*FICKLING v. MACFADYEN, [1936] 1 W. W. R. 27.—CAN.*

## PART V. SECT. 4.

t (p. 289) i. — *As against mortgage.* — *THOMSON v. HARRISON, [1927] 3 D. L. R. 526; 60 O. L. R. 484.—CAN.*

t (p. 289) ii. — *As against equitable mortgage with notice.* — A vendor's lien on lands sold to secure the unfulfilled obligation of the purchaser is independent of any contract between the parties, & exists whether the consideration is an annuity or a sum of money to be paid at the time of the transfer or subsequent to it. The giving of some particular & special security for the payment of the purchase money may be a complete performance of the purchaser's obligation, but the mere insertion into the conveyance of a covenant for the payment of the purchase money is not a circumstance from which an agreement for the substitution of the security of the covenant for the usual vendor's lien can be inferred. A vendor's lien will rank in priority to a subsequent equitable mtge. by deposit when the mtgee. had notice. A payment of rent by such equitable mtgee. to avoid the eviction of the lands charged ranks as a salvage claim & in priority to a vendor's lien.—*MUNSTER & LEINSTER BANK, LTD. v. MCGILVERAN, [1937] 1 R. 525.—IR.*

dd i. — *—ROGERS LUMBER YARDS LTD. v. JACOBS, [1924] 3 D. L. R. 814; [1924] 2 W. W. R. 1128; 21 Alta. L. R. 56.—CAN.*

dd ii. — *—MANNERS v. CAIN, [1927] 3 D. L. R. 1054; 60 O. L. R. 644.—CAN.*

ee i. — *—INDEPENDENT LUMBER CO. v. BOZC (1911), 16 W. L. R. 316; 4 Sask. L. R. 103.—CAN.*

ee ii. — *—RICHARDS v. CHAMBERLAIN (1878), 25 Gr. 402.—CAN.*

ee iii. — *—REINHART v. SHUTT (1888), 15 O. R. 325.—CAN.*

ee iv. — *—KENNEDY v. HADDOX (1890), 19 O. R. 240.—CAN.*

ee v. — *—COOK v. BELSHAW (1893), 23 O. R. 545.—CAN.*

ee vi. — *—MCDONALD v. CONSOLIDATED GOLD LAKE CO. (1902), 40 N. S. R. 363.—CAN.*

ff i. — *Value of property increased.* — *NATIONAL TRUST CO. v. BATTLE (1916), 33 W. L. R. 738; 9 W. W. R. 1265.—CAN.*

g (p. 290) i. — *—TOLLEY v. GUERIN, [1926] 4 D. L. R. 825; [1926] S. C. R. 566.—CAN.*

g (p. 290) ii. — *—STEVENSON v. GREEN, [1926] 2 D. L. R. 687; 58 O. L. R. 546.—CAN.*

g (p. 290) iii. — *Abandonment of priority—What amounts to.* — *BEAVER LUMBER CO., LTD. v. CUBRY (1926) 4 D. L. R. 619; [1926] W. W. R. 404.—CAN.*

g (p. 290) iv. — *—GOODING*

*v. CROCKER, [1927] 1 D. L. R. 1078; 60 O. L. R. 60.—CAN.*

d (p. 290) v. — *—As against a prior mtgee. or charge, a mechanic's lien is not upon the land but upon the increased value by the doing of work or placing of materials.* — *COOK v. KOLDOFFKY (1910), 35 O. L. R. 555.—CAN.*

e (p. 290) i. — *As against debenture holder.* — Purchasers of debentures or bonds subsequent to & without notice of liens, either actual or by registration under a bond mtge., which is a prior mtge. within Mechanics' Lien Act, are not entitled to rank prior to the liens.—*INGLIS v. QUEENS PARK PLAZA CO., [1932] 1 D. L. R. 235; O. R. 110.—CAN.*

k (p. 290) i. — *Priority of mortgage to lienholder.* — *O'BRIEN v. MCCHOIG, [1929] 1 D. L. R. 906; 63 O. L. R. 351.—CAN.*

k (p. 290) ii. — *Effect of fraud.* — Although the priority which under sect. 13 (1) of Mechanics' Lien Act, R. S. S., 1920, a registered mtge. takes over a subsequently registered mechanic's lien may be attacked on the ground that the mtge. was registered in fraud of the lienholder.—*Held*: the evidence in the present case did not establish fraud on the part of the mtgee. The fact that the mtgee. on taking the mtge. knows that another person has a mechanic's lien which he is entitled to have registered under Mechanics' Lien Act does not constitute fraud.—*SECURITY LUMBER CO., LTD. v. ACME PLUMBING SHOP, LTD., [1930] 2 W. W. R. 683; 4 D. L. R. 454; revsd., S. C. sub nom. SECURITY LUMBER CO. v. LYONS, [1930] 3 D. L. R. 283; 1 W. W. R. 709.—CAN.*

k (p. 290) iii. — *Priority of lienholder to equitable mortgage.* — In an action to enforce mechanic's liens it was found that deft. S. was entitled to priority over the liens with respect to a claim put forward by him as equitable mtgee. of the lands against which the liens were registered.—*Held*: the transactions did not give S. priority; his right was at most an unregistered equitable right & it conferred upon him no greater right than if he had an unregistered legal mtge. & the liens, being registered, obtained priority.—*PANNILL DOOR CO., LTD. v. STEPHENSON, [1931] 4 D. L. R. 456; O. R. 594.—CAN.*

k (p. 290) iv. — *Questions of priorities with respect to mechanic's liens existing under Mechanics' Lien Act, R. S. A., 1922, are not affected by sect. 41 of Mechanics' Lien Act, 1930. Said sect. 41 deals with procedure only.* — *HAYWARD LUMBER CO., LTD. v. MCLEACHERN, [1931] 3 W. W. R. 658.—CAN.*

k (p. 290) v. — *Priority of bondholders.* — *EASTERN TRUST CO. v. BOCHNERS, LTD., [1932] 3 D. L. R. 19.—CAN.*

k (p. 290) vi. — *Under Mechanics' & Wage Earners' Lien Act, R. S. O., 1914, priority of registration, in the absence of actual notice, must prevail.* — *STERLING LUMBER CO. v. JONES (1916), 36 O. L. R. 153.—CAN.*

t (p. 290) i. — *Over railway property.* — By 54 Vict. c. 11, s. 15, the Crown was given a lien upon the rails, etc., of railways receiving financial aid from the Province, but such lien was only to take effect in case the railway should cease to operate. A railway ceased to operate & a manager was appointed by 4 Geo. 5, c. 57, s. 1. This sect. further provided that "any excess of operating expenses over earnings shall become & be a first lien or charge upon said railway & rolling stock of the co."—*Held*: the lien created by the 1891 Act had not

ceased to exist on the passing of the 1914 Act, but the lien created by the latter Act had priority.—*A. G. OF NEW BRUNSWICK v. COHEN (1929), 54 N. B. R. 356.—CAN.*

sp. *As against purchaser in good faith for valuable consideration—Lien note unregistered.* — *WILLIE v. DELISLE (1915), 30 W. L. R. 918; 21 D. L. R. 407.—CAN.*

sq. *Lien for wages—Under Builders' & Workmen's Act, 1902—As against creditors.* — *BRYSON v. ROSSER MUNICIPALITY (1909), 18 Man. L. R. 658.—CAN.*

st. *Under Wages Protection & Contractors' Lien Act, 1908, Part I.* — The claims of workers under Wages Protection & Contractors' Liens Act, 1908, Part I., take an absolute priority over the claims of contractors & sub-contractors under Part III., & are a first & paramount charge upon moneys due by the employer to the contractor.—*ELLERSLIE PARISH TRUST BOARD v. WATKINS, ELLERSLIE PARISH TRUST BOARD v. CLOSBY, [1932] N. Z. L. R. 673.—N.Z.*

## PART V. SECT. 5, SUB-SECT. 1.

g (p. 291) i. — *Supreme Court.* — *MARTIN v. RUSSELL & JOHNSON & THE BRITISH COLUMBIA PAPER MANUFACTURING CO., LTD. (1892), 2 B. C. R. 98.—CAN.*

g (p. 291) ii. — *County court—Claim for personal order to pay.* — *POST v. JONES (1892), 2 B. C. R. 250.—CAN.*

g (p. 291) iii. — *—FREEZE v. CAREY, MCKAY v. CAREY (1907), 7 W. L. R. 287; 1 Alta. L. R. 81.—CAN.*

g (p. 291) iv. — *Master in chambers—Setting aside judgment of official referee—On failure of defendant to appear.* — *GUEST v. LINDEN (1912), 21 O. W. R. 303; 3 O. W. N. 750; 1 D. L. R. 908.—CAN.*

g (p. 291) v. — *Liability of guarantor.* — The liability of a guarantor may be dealt with in proceedings under Mechanics' Lien Act, R. S. O., 1927, s. 35 (3). — *FOREMAN v. MCGOWAN, [1934] 3 D. L. R. 766; O. R. 584.—CAN.*

bb (p. 291) i. — *—BANK OF MONTREAL v. HAFNER (1884), 10 A. R. 592.—CAN.*

d (p. 292) i. — *—HOWLETT & BELL v. DORAN & GALLANT (1913), 24 W. L. R. 401; 4 W. W. R. 674; 11 D. L. R. 372.—CAN.*

d (p. 292) ii. — *—BUNTING v. BELL (1876), 23 Gr. 584.—CAN.*

d (p. 292) iii. — *—BLACK v. WIEBE (1906), 4 W. L. R. 218.—CAN.*

d (p. 292) iv. — *—MCIVER v. CROWN POINT MINING CO. (1900), 10 P. R. 335; 21 O. L. T. 127.—CAN.*

d (p. 292) v. — *—BAGSHAW v. JOHNSTON (1901), 3 O. L. R. 58; 23 C. L. T. 33.—CAN.*

d (p. 292) vi. — *—BRITISH COLUMBIA MILLS, TIMBER & TRADING CO. v. HORROBIN, HENSHAW & SENKLER (1907), 12 B. C. R. 426.—CAN.*

d (p. 292) vii. — *—Summons insufficiently stamped.* — *JAMES HENDERSON & SONS v. RUSSELL HOUSE, LTD., & DARTT, [1931] 1 W. W. R. 842.—CAN.*

d (p. 292) viii. — *—An amendment of affidavit of lien in accordance with an amended plaint under Mechanics' Lien Act will only be*

allowed if the parties concerned are prejudiced by anything in the claim.—  
RICHARDSON v. LOHN (1932), 46 B. C. R. 224.—CAN.

d (p. 292) ix. ————  
CAMPBELL v. TURNER & CURTIS, [1937] 1 W. W. R. 228; 1 D. L. R. 665.—CAN.

d (p. 292) x. ————  
Where debt. in a mechanic's lien action has paid money into ct. to secure cancellation of the lien & the action is discontinued as premature, the ct. is not justified in refusing payment of the sum to debt.—NIXON v. SUMNER, [1937] 4 D. L. R. 806.—CAN.

e (p. 292) i. ————  
TOWNSLEY v. BAWLDIN (1889), 18 O. R. 403.—CAN.

e (p. 292) ii. ————  
NELSON v. BREWSTER (1906), 7 Terr. L. R. 458; 3 W. L. R. 362.—CAN.

e (p. 292) iii. ————  
IMPERIAL ELEVATOR CO. v. WELCH (1906), 4 W. L. R. 51; 16 Man. L. R. 136.—CAN.

e (p. 292) iv. ————  
GIDNEY v. MORGAN (1910), 16 B. C. R. 18.—CAN.

e (p. 292) v. ————  
WHITMAN v. HARVEY (1910), 13 W. L. R. 287.—CAN.

e (p. 292) vi. ————  
[Counter-claim.]—A master has no jurisdiction to determine a counterclaim for damages for faulty workmanship or materials in an action to enforce a lien.—NERI v. BENHAM, [1934] 2 D. L. R. 803.—CAN.

f (p. 292) i. ————  
Affidavit.]—Where an affidavit in support of a claim of a mechanic's lien is made by an agent of the claimant & the agent has no personal knowledge of the facts stated, the affidavit is fatally defective. The curative section does not afford relief in such a case. A bookkeeper whose only knowledge is the inferences drawn by him from the charge slips which he has entered in the claimant's books cannot be said to have the required "personal knowledge."—  
KYDD BROS. v. TAYLOR, BRITISH COLUMBIA PLUMBING SUPPLIES CO. v. TAYLOR, [1932] 3 W. W. R. 109.—CAN.

f (p. 292) ii. ————  
[—]—EMPIRE BRASS MANUFACTURING CO., LTD. v. MILLIGAN & MILLIGAN, [1935] 3 W. W. R. 189.—CAN.

o (p. 292) i. ————  
COOKE v. MCCROFT, [1926] 1 W. W. R. 827; 36 B. C. R. 393.—CAN.

o (p. 292) ii. ————  
CHRISTY v. MCKAY (1905), 15 Man. L. R. 612; 2 W. L. R. 308.—CAN.

o (p. 292) iii. ————  
HOVENDE v. ELLISON (1877), 24 Gr. 448.—CAN.

o (p. 292) iv. ————  
McPHERSON v. GEDGE (1883), 4 O. R. 246.—CAN.

o (p. 292) v. ————  
HALL v. HOGG (1890), 14 P. R. 45.—CAN.

o (p. 292) vi. ————  
BICKERTON v. DAKIN (1891), 20 O. R. 192, 695.—CAN.

o (p. 292) vii. ————  
GARDNER v. GORMAN, ROSS v. GORMAN (1908), 7 W. L. R. 630; 1 Alta. L. R. 106.—CAN.

o (p. 292) viii. ————  
LEIBROCK v. ADAMS (1908), 17 Man. L. R. 575.—CAN.

o (p. 292) ix. ————  
McEWEN v. BOUCK, [1921] 3 W. W. R. 267.—CAN.

o (p. 292) x. ————  
ROGERS LUMBER CO. v. GRAY & HOSMER (1913), 23 W. L. R. 920; 10 D. L. R. 698; 4 W. W. R. 294.—CAN.

o (p. 292) xi. ————  
IMPERIAL LUMBER YARDS, LTD. v. McMANUS, [1928] 2 D. L. R. 150; [1928] 1 W. W. R. 409; 22 Sask. L. R. 278.—CAN.

r (p. 292) i. ————  
HOWLETT & BELL v. DORAN & GALANT (1913), 24 W. L. R. 401; 4 W. W. R. 674; 11 D. L. R. 372.—CAN.

r (p. 292) ii. ————  
HALL v. PILZ (1886), 11 P. R. 449.—CAN.

r (p. 292) iii. ————  
COBBAN MFG. CO. v. LAKE SIMCOE HOTEL CO. (1903), 23 C. L. T. 183; 5 O. L. R. 447; 2 O. W. R. 48, 310.—CAN.

a (p. 292) i. ————  
WAGNER v. O'DONNELL (1891), 14 P. R. 254.—CAN.

a (p. 292) ii. ————  
SHERLOCK v. POWELL (1899), 18 P. R. 312.—CAN.

a (p. 292) iii. ————  
GILLIES SUPPLY CO. v. ALLAN (1910), 15 B. C. R. 375.—CAN.

oe (p. 292) i. ————  
Interest.]—FITZGERALD v. APPERLEY (Sask.), [1926] 3 D. L. R. 734; [1926] 2 W. W. R. 689.—CAN.

oe (p. 292) ii. ————  
—BEAVER LUMBER CO., LTD. v. CURRY (Sask.), [1926] 4 D. L. R. 619; [1926] 3 W. W. R. 404.—CAN.

oe (p. 292) iii. ————  
Nature of action.]—HUTSON v. VALLIERES (1892), 19 A. R. 154.—CAN.

oe (p. 292) iv. ————  
Payment into court.—Right of materialman to payment out.]—BROOKFIELD BROS., LTD. v. SHOPER (N. S.), [1929] 4 D. L. R. 638; *revedi*, [1930] 2 D. L. R. 137; 1 M. P. R. 186.—CAN.

oe (p. 292) v. ————  
Jurisdiction of District Court.]—The District Ct. has exclusive jurisdiction over actions, including counterclaims, to realise under a mechanic's lien.—FRASER v. HUMBOLDT OIL & REFINING CO., LTD., [1935] 2 W. W. R. 49.—CAN.

ii (p. 292) i. ————  
Exhaustion of lien remedies.—Right to personal judgment.]—A. W. CASSIDY & CO. v. HICKS (Sask.), [1929] 2 D. L. R. 353.—CAN.

st. Enforcement by assignee.]—A party who is assignee of lien claims amounting to over \$1,000 must proceed in the Supreme Ct.—MCGILVRAY v. QUEENSBORO SAWMILLS CO., [1935] 2 D. L. R. 784; 50 B. C. R. 63.—CAN.

sv. Enforcement against witness.—Necessity for promise to pay or estoppel.]—A person signing a lien note as a witness is not liable on the note unless a promise to pay or an estoppel is established.—HAYES v. WILSON & RICHARDSON (1914), 20 D. L. R. 569.—CAN.

#### PART V. SECT. 7, SUB-SECT. 1.— A. (b) i.

sw. By claim for rescission.]—RE MAINLAND PORTLAND CEMENT CO., [1927] 2 D. L. R. 742; 38 B. C. R. 417.—CAN.

#### PART V. SECT. 7, SUB-SECT. 1.— B. (b) i.

sz. Waiver of mechanic's lien claim.—Form of waiver signed by mistake.]—PALFREY v. BROWN (1915), 31 W. L. R. 535.—CAN.

#### PART V. SECT. 7, SUB-SECT. 2.

r i. ————  
Revival of lien.]—EDMUND HIND LUMBER CO. v. AMALGAMATED BUILDING CO., [1932] 1 D. L. R. 795.—CAN.



## LIMITATION OF ACTIONS.

## Part I.—The Statutes of Limitation Generally.

8. *Add. Annotation*:—*Reid. Harnett v. Fisher*, [1927] A. C. 573.

**SUB-SECT. 1.—ARBITRATION (p. 315).**

*See Arbitration Act, 1934 (c. 14), s. 16.*

15. *Add. Annotations*:—*Apprvd. Ramdutt Ramkissendass v. Sassoon E. D. & Co.*, (1929) 98 L. J. P. C. 58. *Consd. Naamlouze Vennootschap Handels-en-Transport Maatschappij Vulcaan v. Ludwig Mowinckels Rederi A/S* (1937), 42 Com. Cas. 200. *Reid. Board of Trade v. Cayzer, Irvine*, [1927] A. C. 610; *Lynn v. Bamber*, [1930] 2 K. B. 72.
16. *Add. Citations*:—[1927] 1 K. B. 269; 136 L. T. 7, C. A.; *affd. sub nom. Board of Trade v. Cayzer, Irvine & Co.*, [1927] A. C. 610; 96 L. J. K. B. 872; 137 L. T. 419; 43 T. L. R. 625; 71 Sol. Jo. 560; 17 Asp. M. L. C. 281; 32 Com. Cas. 351, H. L.
- Add. Annotations*:—*Consd. Ramdutt Ramkissendass v. Sassoon E. D. & Co.* (1929), 98 L. J. P. C. 58; *Naamlouze Vennootschap Handels-en-Transport Maatschappij Vulcaan v. Ludwig Mowinckels Rederi A/S*, [1938] 2 All E. R. 152.
- 16a. — *Arbitration Act, 1934 (c. 14), s. 16*—

**Arbitration begun before Act.**—(1) In the absence of any agreement to the contrary, it is an implied term of an agreement of reference to arbn. (in a case prior to the operation of the Arbn. Act, 1934) that the arbitrator should decide the dispute according to the existing law of contract, & give effect to defences under the Statutes of Limitation.

(2) Where no arbitrator has been named by either party within an agreed period from the date of the notice by one of the parties, the proceedings by arbn. shall be held to have commenced on the date when the agreement to refer the dispute to a single named arbitrator was entered into.—*NAAMLLOOZE VENNOOTSCHAP HANDELS-EN-TRANSPORT MAATSCHAPPIJ "VULCAAN" v. A/S LUDWIG MOWINCKELS REDERI*, [1938] 2 All E. R. 152; 43 Com. Cas. 252, H. L.

28. *Add. Annotation*:—*Reid. Weld v. Petre* (1928), 97 L. J. Ch. 399.
31. *Add. Annotation*:—*Reid. Weld v. Petre* (1928), 97 L. J. Ch. 399.
36. *Add. Annotation*:—*Reid. Weld v. Petre* (1928), 97 L. J. Ch. 399.

## Part II.—Simple Contract Debts and Personal Actions.

49. After this case add:—  
*See, also*, Nos. 665–672, p. 384, *post*.
52. *Add. Annotations*:—*Reid. Liesbosch S.S. Owners v. Edison S.S. Owners*, [1933] A. C. 449; *The Napier Star*, [1933] P. 136.
56. *Add. Annotations*:—*Consd. Aylott v. Westham Corpn.*, [1927] 1 Ch. 30. *Distd. Tees Conservancy Comrs. v. James*, [1935] Ch. 544. *Consd. Gutsell v. Reeve*, [1936] 1 K. B. 272.

- 56a. — *Recovery of contribution from Conservancy Commissioners.*—The Tees Conservancy Act, 1907, s. 4, provides: "Subject to the provisions of this Act every officer & servant of the Comrs. . . shall contribute annually for the purposes of this Act a percentage amount of his salary or wages according to the scale laid down by the Act such amount to be from time to time deducted

**PART I. SECT. 1.**

2 i. *Nature—Rule of procedure.*—It is a settled principle that there is no vested right in procedure. Statutes of Limitation cannot be considered as anything else than matters relating to procedure & ordinarily, such statutes have their operation from the date fixed in the statute & govern all matters brought before the ct. after the commencement of the operation of the statute.—*KHONDKAR MAHAMMAD SALEH v. CHANDRA KUMAR MUKHERJI* (1929), 1 L. R. 56 Calo. 1117.—*IND.*

**PART I. SECT. 2, SUB-SECT. 1.**

15 i. *Submission to arbitration—Whether defence of limitation excluded.*—In a reference to arbn. it is an implied term of the contract that the arbitrators must decide the dispute according to the existing law of contract, & that every defence which would have been open in a ct. of law, including limitation, can be raised unless that defence

has been excluded by agreement of the parties.—*RAM DUTT RAMKISSENDASS v. SASSOON F. D. & Co.* (1929), 56 L. R. Ind. App. 128.—*IND.*

**PART II. SECT. 2, SUB-SECT. 1.**

47 iv. —.—.—*Ptff. sued to recover balance on account of advances made to deft. pursuant to a contract of hypothecation. The agreement provided that the advances should be repaid on demand, & also provided for repayment towards the advances by the sale proceeds of consignments of the goods hypothecated, & sent by deft. to ptff. in Calcutta for sale.*—*Held*: the account was not a mutual open & current account, & Art. 59 of Limitation Act (IX. of 1908) applied.—*TEA FINANCING SYNDICATE, LTD. v. CHANDRA KAMAL BEZBORUAH* (1929), 1 L. R. 56 Calo. 575.—*IND.*

**PART II. SECT. 2, SUB-SECT. 5.—B.**

b i. — *Highway Traffic Act, 1923 (c. 48), ss. 43a, 54—Effect of.*—

*CARLINO v. ZIMBLARTE*, [1927] 9 D. L. R. 945; 60 O. L. R. 269.—*CAN.*

xx. *Damages for wrongful tax-sale.*—*Held*: action on the case within Statute of Limitations.—*KOWNATZKI v. BEAR LAKE MUNICIPAL DISTRICT*, [1930] 3 W. W. R. 353; [1931] 1 D. L. R. 334; *reversd. on other grounds*, [1931] 1 W. W. R. 757; 2 D. L. R. 318; 25 Alta. L. R. 251.—*CAN.*

so. *Trespass to the person—Injury by poisoning.*—*Held*: clause (d) of sect. 3 (1) of Limitation of Actions Act, 1931, applied to the present action, one in which ptff., an employee of deft. printing & lithographing co., alleged that her system had been poisoned by working with "gold dust" as a result of deft.'s negligence in not giving her proper warnings & in not providing a proper place in which to work & the apparatus necessary to protect her from the poison.—*PULS v. BULMAN BROS., LTD.*, [1933] 3 W. W. R. 485; [1934] 1 D. L. R. 208; 41 Man. L. R. 474.—*CAN.*



from the salary or wages payable to him & to be carried to & form part of the superannuation fund. . . .” Sect. 11 defines which officers or servants of the Comrs. shall be entitled on ceasing to hold their offices or employments “to receive during life out of the superannuation fund a superannuation allowance according to the scale laid down in this Act.”

Defts. were employed by the Tees Conservancy Comrs. & were subject to the provisions of the Tees Conservancy Act, 1907, which established a contributory scheme of superannuation. From 1915 onwards, the Comrs. paid a bonus to their servants, but failed to deduct any contributions in respect of it for the fund & calculated the superannuation allowances which became payable under the Act on the basis that it was not “wages or salary.” In 1933, it was held by the Ct. of Appeal that the bonus was “wages or salary” & that the superannuation allowances must be calculated on that footing:—*Held*: (1) nothing in sect. 4 imposes on an employee any liability to pay contributions otherwise than by permitting the Comrs., to make deductions from his salary or wages according to the scale laid down by the Act; (2) in the case of superannuated employees, the Comrs. could not recover from them the amount of the contributions which should have been deducted in respect of bonus; (3) in the case of persons still in the employment of the Comrs. deductions of the appropriate contributions should be made in each year; but the Comrs. had no power to make further deductions in respect of any sums which should have been deducted in some other year; (4) Limitation Act, 1923 (c. 16), applied to the employees’ claim for unpaid superannuation allowance, which was thereby subject to a limitation of six years.—*TEES CONSERVANCY COMRS. v. JAMES*, [1935] Ch. 544; 104 L. J. Ch. 260; 153 L. T. 146; 99 J.P. 149; 51 T. L. R. 219; 33 L. G. R. 124.

57. *In Annos.* for “20 J. P. 99” read “90 J. P. 99.”

*Add. Annotations*:—As to (1) *Consd. Gutsell v. Reeve*, [1936] 1 K. B. 272. *Refd. Pratt v. Cook Son & Co. (St. Paul’s), Ltd.*, [1938] 2 K. B. 51.

- 58a. — **Negligence—Action for personal injuries to step-child.**—On Oct. 1, 1934, a step-parent commenced an action in which he claimed expenses incurred by him consequent upon an accident on Jan. 12, 1929, in which his stepchild had been injured by a motor lorry driven by deft.’s servant. Deft. relied on Stat. Limitations, 1923 (c. 16), which provides that actions on the case (other than for slander) must be commenced & sued on within six years, & actions of trespass to the person within four years, next after the cause of such actions:—*Held*: as pltf.’s cause of action would formerly have constituted an action on the case & not an action of trespass, the period of limitation applicable was six & not four years, & pltf.’s claim was maintain-

able.—*BARNES v. POOLEY* (1935), 153 L. T. 78; 51 T. L. R. 391.

59. *Add. Annotations*:—*Distd. Aylott v. West Ham Corp.*, [1927] 1 Ch. 30. *Consd. Gutsell v. Reeve*, [1936] 1 K. B. 272; *Pratt v. Cook Son & Co. (St. Paul’s), Ltd.*, [1938] 2 K. B. 51. *Refd. Dennerley v. Prestwich U. D. C.* (1929), 141 L. T. 602; *Royal Trust Co. v. A.-G. for Alberta* (1929), 46 T. L. R. 25.
65. *Add. Citation*:—[1927] 1 Ch. 30.
- Add. Annotations*:—*Consd. Gutsell v. Reeve*, [1936] 1 K. B. 272. *Refd. Dennerley v. Prestwich U. D. C.* (1929), 141 L. T. 602; *Stevens v. Hampstead Borough Council*, [1929] 2 Ch. 239; *Pratt v. Cook Son & Co. (St. Paul’s), Ltd.*, [1938] 2 K. B. 51.
71. *Add. Annotation*:—*Consd. Austrian Property Administrator v. Russian Bank for Foreign Trade* (1931), 47 T. L. R. 550.
73. *Add. Annotations*:—*Föld. Hungarian Property Administrator v. Finegold* (1931), 100 L. J. K. B. 383. *Refd. Mackenzie-Kennedy v. Air Council*, [1927] 2 K. B. 517.
74. *Add. Annotation*:—*Consd. Austrian Property Administrator v. Russian Bank for Foreign Trade* (1931), 47 T. L. R. 550.
77. *Add. Annotation*:—*Refd. Re Mason* (1928), 97 L. J. Ch. 321.
78. *Add. Annotations*:—*Consd. Re Mason* (1928), 97 L. J. Ch. 321. *Apld. Hungarian Property Administrator v. Finegold* (1931), 100 L. J. K. B. 383. *Refd. Wigg v. A.-G. of Irish Free State* (1927), 96 L. J. P. C. 88.
79. *Add. Citations*:—[1927] 1 K. B. 269; 136 L. T. 7, C. A.; *affd. sub nom. BOARD OF TRADE v. CAYZER, IRVINE & Co.*, [1927] A. C. 610; 96 L. J. K. B. 872; 137 L. T. 419; 43 T. L. R. 625; 71 Sol. Jo. 560; 17 Asp. M. L. C. 281; 32 Com. Cas. 351, H. L.
- Add. Annotation*:—*Refd. Ramdutt Ramkissendass v. Sassoon (E. D.) & Co.* (1929), 98 L. J. P. C. 58.
80. After this case add:—  
— **Action by administrator of enemy property.**—*See ALIENS*, Nos. 215r, 215s, ante.
84. *Add. Annotation*:—*Consd. Dennerley v. Prestwich U. D. C.* (1929), 141 L. T. 602.
93. *Add. Annotation*:—*Refd. Lowe v. Bentley* (1928), 44 T. L. R. 388.
94. *Add. Annotation*:—*Consd. Lowe v. Bentley* (1928), 44 T. L. R. 388.
- 111a. **Claim to interest on loan—Claim to principal barred.**—Pltfs., as the exors. of N. who died in 1921, alleged that about Nov. 4, 1907, N. lent to deft. a sum of £1,500, the loan to bear interest at the rate of 5 per cent. *per annum*, & claimed in this action, the writ in which was issued on Nov. 1, 1928, payment of the loan with the interest thereon which accrued during the six years ending on Nov. 1, 1928. In spite of the fact that the recovery of the loan was barred by the Limitation Act, 1923, on June 30, 1926, that was to say, six years after June 30, 1920, the date when the last

PART II. SECT. 2, SUB-SECT. 7.

sa. *Note given under Municipalities Seed Grain Act—Failure to observe conditions of Act.*—*CARMICHAEL RURAL MUNICIPALITY v. GILBERG*, [1929] 1 D. L. R. 124; [1928] 3 W. W. R. 454.—CAN.

PART II. SECT. 2, SUB-SECT. 9.—A.

sb. *Claim for injurious affection—Within Statute of Limitations (Nova Scotia), s. 2 (d).*—*MILLER v. R.*, [1927] Exch. C. R. 52.—CAN.

payment of interest was made, as plffs. admitted at the trial, plffs. nevertheless proceeded with their claim for payment of so much of the interest as accrued between Nov. 1, 1922, & June 30, 1926, the date at which the claim for the principal was barred, on the footing that at each half-year during that period a cause of action accrued in respect of each half-year's payment of interest:—*Held*: the principal sum having been barred by the statute, the interest so claimed was, as being only accessory to the principal, barred with it.—*ELDER v. NORTH-COTT*, [1930] 2 Ch. 422; 99 L. J. Ch. 548; 143 L. T. 614.

- 111b. *Action against employer for wages—Payment of less than statutory minimum.*—Under a contract of service plff. was employed by deft. as an agricultural labourer from June, 1925, to May, 1927, at a wage of £1 2s. 0d. subsequently raised to £1 3s. 0d. a week. These wages were less than the minimum wages prescribed for farm workers in Sussex by the Agricultural Wages Board under Agricultural Wages (Regulation) Act, 1924 (c. 37), during that period. In June, 1935, he brought the present action claiming £39 8s. 6d., being the difference between the amount of the wages received by him from deft. under the contract & the amount of the minimum wages to which he was entitled under the Act:—*Held*: the action was not an action for debt upon a statute, but was one based on the contract as amended by substituting for the amount provided by the contract the amount of the minimum rate of wages provided by the statute. Therefore, the action was not on a specialty, but for a simple contract debt, & was barred by Limitation Act, 1923 (c. 16).—*GUTSELL v. REEVE*, [1936] 1 K. B. 272; 105 L. J. K. B. 213; 154 L. T. 1; 52 T. L. R. 55; 79 Sol. Jo. 796, C. A.

*Annotation*:—*Consd. Pratt v. Cook Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51.

128. *Add. Annotation*:—*Refd. Weld v. Petre* (1928), 97 L. J. Ch. 399.

- 131a. *Assault.*—To an action of assault & battery a plea of no assault within six years, is bad; for Stat. Limitations limits it to four years, & the statute must be precisely, & not argumentatively pleaded.—*BLACKMORE v. TIDDERLEY* (1705), 2 Ld. Raym. 1099; 11 Mod. Rep. 38; 2 Salk. 423; 6 Mod. Rep. 240; 88 E. R. 869.

136. *Add. Annotations*:—*Apld. Betts v. Metropolitan Police District Receiver* (1932), 96 J. P. 327. *Distd. Copper Export Assocn. Inc. v. Mersey Docks & Harbour Board* (1932), 48 T. L. R. 542.

## PART II. SECT. 5, SUB-SECT. 1.

134 vi. — *Undischarged bankrupt.*—Where a creditor, having obtained the leave of the Insolvency Ct., sued an insolvent in an ordinary civil Ct. to recover a debt the adjudication being in force, the former was not entitled in computing the period of limitation for the suit, to exclude the time during which the insolvency proceedings were pending.—*MACHANJEE AHMED v. K. GOVINDA PRASAD* (1928), 1 L. R. 51 Mad. 862.—IND.

## PART II. SECT. 5, SUB-SECT. 2.—A.

sd. *Crop-payment agreement.*—A

lessee under a crop-payment lease agreed to deliver in the name of the lessor one-third of the crop & in addition enough thereof to pay certain taxes. He finished delivering wheat to the lessor's credit on Oct. 9, 1923, & on that date had marketed all the remainder of the crop in his own name. The amount delivered for the lessor was not sufficient to fulfil the terms of the covenant to deliver:—*Held*: the breach of the agreement was committed on said date & Stat. Limitations commenced to run therefrom, & the agreement not being under seal, the period of limitation was six years.—*GORDON v. RIBBOROUGH* [1931] 2 W. W. R. 331.—CAN.

- 139a. — *Arbitration condition precedent.*—The Crown requisitioned appcts.' ship under a charterparty, which provided that any dispute under the charter should be referred to arbn. under Arbn. Act, 1889 (c. 49), & which concluded as follows: " & it is further mutually agreed that such arbn. shall be a condition precedent to the commencement of any action at law." In July, 1917, the ship was lost, but appcts. did not proceed to arbn. until Dec. 1923. The Crown contended that, as the arbn. was not commenced within six years of the loss, the claim was barred by Stat. Limitations, 1923 (c. 16):—*Held*: under the arbn. clause no cause of action arose until the award was made, & time did not run until the making of the award, & the claim was not barred.—*BOARD OF TRADE v. CAYZER, IRVINE & Co.*, [1927] A. C. 610; 96 L. J. K. B. 872; 137 L. T. 419; 43 T. L. R. 625; 71 Sol. Jo. 560; 17 Asp. M. L. C. 281; 32 Com. Cas. 351, H. L.; *affg. S. C. sub nom. CAYZER, IRVINE & Co. v. BOARD OF TRADE*, [1927] 1 K. B. 269, C. A.

*Annotations*:—*Consd. Ramdutt Ramkissendass v. Saasoon (E. D.) & Co.* (1929), 98 L. J. P. C. 58; *Naamloze Venootschap Handels-en-Transport Maatschappij Vulcan v. Ludwig Mowinkel's Rederi A/S* (1937), 42 Com. Cas. 200.

143. *Add. Annotation*:—*Refd. Lynn v. Bamber*, [1930] 2 K. B. 72.

148. *Add. Annotation*:—*Refd. Tate v. Crewdson*, [1938] 3 All E. R. 43.

- 154a. *Date of document—Bill treated as promissory note.*—On Mar. 23, 1920, the branch of British Trade Corp'n., Ltd., at Batoum, drew a document in the following form: " At sight pay this sole exchange to the order of Mr. B. L. Mailoff the sum of one thousand pounds sterling value received which place to account No. 2." The document was signed " For British Trade Corp'n." by the manager & account, & it was addressed at the foot " To the British Trade Corp'n., 13 Austin Friars, London, E.C." By successive indorsements plff. became the holder, & on Dec. 20, 1923, his agents presented the document at the London offices of the Corp'n. Payment was refused, as it was required that the indorsements should have a banker's certification. On Nov. 23, 1926, a special resolution was passed for the voluntary winding up of the corp'n. in connection with an amalgamation with the Anglo-Austrian Bank, Ltd. On Apr. 6, 1931, plff. sought to prove in the winding up for £1,000 in respect of the document, but the liquidator rejected the proof on the ground that it was barred by the Statute of Limitations, as more than six years had elapsed since the date of the document before the winding-up resolution.

## PART II. SECT. 5, SUB-SECT. 2.—C. (a).

147 i. *Date of making.*—Where a promissory note is payable with interest on demand, Stat. Limitations begins to run from the date of the note.—*IMPERIAL BANK OF CANADA v. SIMPSON MAN.*, [1927] 3 W. W. R. 500.—CAN.

147 ii. —.—With respect to a promissory note payable on demand the Stat. Limitations begins to run in favour of the maker from the date of the note.

An exor. is not *virtute officii* an express trustee within Limitation of Actions Act, 1931, s. 34.—*HEUBACH v.*

The holder took out a summons claiming to have his proof admitted & he elected to treat the document as a promissory note:—*Held*: the document when treated as a promissory note did not need to be presented for payment in order to render the maker liable, because, in order that a place of payment should be specified "in the body" of the note within Bills of Exchange Act, 1882 (c. 61), s. 87 (1), it must be embodied in the actual terms of the contract for payment. Time therefore began to run under Stat. Limitations, as from date of the document, & it was barred before the date of winding-up resolution.—*Re BRITISH TRADE CORPN., LTD.*, [1932] 2 Ch. 1; 101 L. J. Ch. 273; 147 L. T. 46, C. A.

182. *Add. Annotations*:—*Refd.* *Dennerley v. Prestwich* U. D. C. (1929), 141 L. T. 602; *Tate v. Crewdson*, [1938] 3 All E. R. 43.

185. *Add. Annotations*:—*Expld.* *Elder v. Northcott*, [1930] 2 Ch. 422; *I. R. Comrs. v. Holder*, [1931] 2 K. B. 81.

188. *Add. Annotation*:—*Refd.* *Re Chetwynd's Estate, Dunn Trust, Ltd. v. Brown*, [1936] 3 All E. R. 254.

206. *Add. Annotations*:—*As to* (1) *Apld. Re Mason* (1928), 97 L. J. Ch. 321. *Refd.* *Re Blake, Re Minahan's Petition of Right* (1931), 100 L. J. Ch. 251.

210. *Add. Annotation*:—*Consd.* *Dennerley v. Prestwich* U. D. C. (1929), 141 L. T. 602.

217. *Add. Annotation*:—*Refd.* *Douglass v. Lloyds Bank* (1929), 34 Com. Cas. 263.

219. *Add. Annotation*:—*As to* (1) *Refd.* *Tate v. Crewdson*, [1938] 3 All E. R. 43.

226. *Add. Annotation*:—*As to* (1) *Apld.* *Societe Anonyme Metallurgique de Prayon, Trooz, Belgium v. Koppel* (1933), 77 Sol. Jo. 800.

229. *Add. Annotation*:—*Refd.* *Dennerley v. Prestwich* U. D. C. (1929), 141 L. T. 602.

254. *Add. Annotations*:—*Refd.* *Lagh v. Lagh* (1930), 143 L. T. 151; *Lynn v. Bamber*, [1930] 2 K. B. 72.

256. *Add. Citations*:—[1927] 1 K. B. 402; 96 L. J. K. B. 55, C. A.; *affd.*, [1927] A. C. 573;

96 L. J. K. B. 856; 137 L. T. 602; 91 J. P. 175; 43 T. L. R. 587; 71 Sol. Jo. 470; 25 L. G. R. 454, H. L.

*Add. Annotation*:—*Consd.* *De Freville v. Dill* (1927), 96 L. J. K. B. 1056.

264. *Add. Annotation*:—*As to* (2) *Refd.* *Betts v. Metropolitan Police District Receiver* (1932), 96 J. P. 327.

284. *Add. Annotation*:—*Refd.* *Harnett v. Fisher*, [1927] A. C. 573.

315. *Add. Annotation*:—*Refd.* *Gottliffe v. Edelston*, [1930] 2 K. B. 378.

355. *Add. Annotation*:—*Apld. Re Blucher (Prince), Ex p. Debtor*, [1931] 2 Ch. 70.

356a. — *Promise to pay directors' fees—By adoption of balance sheet including fees.*—Balance sheets including fees due to directors, & signed by directors pursuant to Cos. (Consolidation) Act, 1908 (c. 69), s. 113, are not acknowledgments of those fees within Lord Tenterden's Act.

After an order for the compulsory winding up of the co. the applicant put in a proof for £950 in respect of creditors' fees. The liquidator rejected the proof to the extent of £350, allowing only £600 on the ground that all directors' fees which had accrued due more than six years before the date of the winding-up order were barred by Stat. Limitations. The director's fees due to appct. appeared from balance sheets duly signed by two directors & passed by the co. Upon a summons taken out by the applicant asking that the decision of the liquidator rejecting his proof to the extent of £350, might be reversed, & that the proof might be allowed in the full sum of £950:—*Held*: (1) a board of directors, acting as a board, & passing a resolution adopting a balance sheet which includes directors' fees, does not bind the co. to pay those fees; (2) a balance sheet so adopted & signed by directors pursuant to Cos. (Consolidation) Act, 1908 (c. 69), s. 113, is not a written promise by the co. or its agents to pay the directors' fees.—*Re COLISEUM (BARROW), LTD.*, [1930] 2

PART II. SECT. 5, SUB-SECT. 2.—J.

222 vi. —.]—In an action to recover a balance alleged to be due for services as solr. & counsel:—*Held*: Stat. Limitations, which deft. pleaded, afforded no defence, it being found that the account was an open running account on which payments were made from time to time, the last on May 2, 1929 (the action was begun on Apr. 27, 1935). Moreover letters written in 1931 & 1932 by the present solrs. for deft. constituted a sufficient acknowledgment to take the debt out of the statute.—*CAMERON v. PARSONS*, [1936] 3 W. W. R. 237; 51 B. C. R. 70.—CAN.

PART II. SECT. 5, SUB-SECT. 2.—M.

22. *Money repayable "as soon as possible"*—Time runs from date of ability to pay.—*INGREBRETTEN v. CHRISTENSEN*, [1927] 3 W. W. R. 135; 37 Man. L. R. 93.—CAN.

PART II. SECT. 5, SUB-SECT. 2.—U.

235 ii. — *Proviso for compensation by will—Time does not run until death of employer.*—*HUNTER v. THOMPSON*, [1927] 2 D. L. R. 340; 60 O. L. R. 185.—CAN.

PART II. SECT. 5, SUB-SECT. 3.—A.

2. *Statute barred claim for damages—*

*Property rendered useless by other causes.*—*TURGEON v. QUEBEC*, [1928] 2 D. L. R. 273; *affd.*, 40 Que. K. B. 453.—CAN.

PART II. SECT. 5, SUB-SECT. 3.—B.

1 i. —.]—*KERR v. ATLANTIC & NORTH-WEST RY. Co.* (1895), 25 S. C. R. 197.—CAN.

PART II. SECT. 5, SUB-SECT. 3.—F.

sh. *Slander—From cessation of disability—Infancy.*—The period of limitation of an action for slander by an infant plff. begins to run only from the time of cessation of the disability.—*TYLEY v. DOUGHERTY*, [1932] S. A. S. R. 307.—AUS.

PART II. SECT. 5, SUB-SECT. 4.—

C (a) i.

285 iii. —.]—An action brought in 1937 on a judgment recovered against deft. in 1930 in Saskatchewan where he was then resident. In 1933 deft. removed to British Columbia:—*Held*: the words "beyond the seas" in sect. 9 of Stat. Limitations, R. S. B. C., 1924 (identical with 4 & 5 Anne, c. 3) are to be interpreted as equivalent to outside of the jurisdiction & the statute did not begin to run against plff. until deft. came to British Columbia.—

COMMERCIAL SECURITIES CORPN., LTD. v. DAVIES, [1937] 2 W. W. R. 25; 51 B. C. R. 481.—CAN.

PART II. SECT. 5, SUB-SECT. 4.—C (s).

sk. *Person entering on lands of lunatic—Holds as bailiff.*—The doctrine applicable to entry on the lands of a minor applies also to entry on the lands of a lunatic. A person entering on the lands of a lunatic, with notice of the lunacy & of the rights of the lunatic, becomes a bailiff in respect of the lunatic's estate in the lands, & where the lands are held by the lunatic under a contract of tenancy, & a new letting is subsequently made to the person so entering, such new letting will be deemed a graft on the old tenancy.—*SMYTH v. BYRNE*, [1914] 1 I. R. 53.—IR.

PART II. SECT. 6, SUB-SECT. 2.—A.

sm. *Action barred by Drought Area Relief Act, 1922.*—*WILLIAMS v. SAUTNER (Alta.)*, [1929] 3 W. W. R. 195.—CAN.

PART II. SECT. 8, SUB-SECT. 2.

o i. —.]—*GANDA SINGH v. BHAG SINGH-BHAGWAN SINGH, Mst. BHANI* (1926), 1 L. L. R. 7 Lah. 403.—IND.

Ch. 44; 99 L. J. Ch. 423; 143 L. T. 423; [1929-30] B. & C. R. 218.

**400a.** ——— **Retrospective operation.**—Above Act came into operation on Jan. 1, 1829:—*Held*: an action commenced in Hilary term, 1829, could not be maintained upon a verbal promise made before the passing of the Act.—*TOWLER v. CHATTERTON* (1829), 6 Bing. 258; L. & Welsb. 74; 3 Moo. & P. 619; 8 L. J. O. S. C. P. 30; 130 E. R. 1280.

*Annotations*:—*Expld. Moon v. Durden* (1848), 2 Exch. 22. *Consd. R. v. Leeds & Bradford Ry. Co.* (1852), 18 Q. B. 343; *Wright v. Hale* (1860), 6 H. & N. 227. *Refd. Paddon v. Bartlett* (1836), 3 Ad. & El. 884; *Batchelor v. Middleton* (1848), 6 Hare, 75; *R. v. Crown (Inhabitants)* (1849), 13 Jur. 1099; *Leary v. Patrick* (1850), 14 Jur. 932; *Henshall v. Porter*, [1923] 2 K. B. 193.

**449. Add. Annotations**:—*Refd. Re Coliseum* (Barrow), Ltd., [1930] 2 Ch. 44; *Ward v. Tibbatts*, [1936] 2 All E. R. 656.

**484. Add. Annotations**:—*Consd. Ward v. Tibbatts*, [1936] 2 All E. R. 656; *Re Wilson, Wilson v. Bland*, [1937] 3 All E. R. 297.

**490. Add. Annotations**:—*Refd. Ward v. Tibbatts*, [1936] 2 All E. R. 656; *Re Wilson, Wilson v. Bland*, [1937] 3 All E. R. 297.

**504. Add. Annotations**:—*Refd. Re Wilson, Wilson v. Bland*, [1937] 3 All E. R. 297; *Re Wilson, Ex p. Wilson v. Trustee*, [1937] Ch. 675.

**506a. Bare admission of partnership agreement.**—Pltf. alleged that he made nine loans to deft. over a period of six months in the years 1922, 1923. In respect of these an action was commenced on Oct. 10, 1935. Pltf. relied upon an acknowledgment contained in a letter written on Oct. 31, 1929, which included the following: "I am sorry I cannot agree with L.'s inference that money was loaned to A. or to me. The cash I received from you was to enable me to accept the partnership arrangement in the farming venture & as you doubtless remember you arbitrarily dissolved the partnership. Any money I received from you was for expenses incurred on the trip. Your father, against

my inclination, insisted on discussing the question & in definite terms advised me not to consider repayment. I told him that I regarded it as an obligation, & as soon as I was able to dispose of it I would do so. I am still of the same mind. As you probably realise I have only just returned to business & am, therefore, not in a position to make any definite promises. You may be assured that immediately I am able to, I shall commence reducing my obligation & I propose adding simple interest at 5 per cent. *per annum* until the whole amount is disposed of. I shall be glad to know that this is agreeable to you. I would like you to understand that this is entirely my affair & any money accruing to A. under her father's will, will not be accepted by me to benefit my financial position or obligation":—*Held*: this letter was not an acknowledgment of the debt. It was a mere admission of partnership agreement, under which there might be something due to pltf. The letter contained no promise to pay.—*WARD v. TIBBATS*, [1936] 2 All E. R. 656; 80 Sol. Jo. 793.

**578. Add. Annotation**:—*Refd. Harnett v. Fisher*, [1927] A. C. 573.

**621. Add. Annotations**:—*As to* (1) *Refd. Re Wilson, Wilson v. Bland*, [1937] 3 All E. R. 297.

**623. Add. Annotation**:—*Refd. Stepney Corpn. v. Osofsky*, [1936] 3 All E. R. 494.

**625. Add. Annotations**:—*Refd. Re Wilson, Wilson v. Bland*, [1937] 3 All E. R. 297.

**627. Add. Annotations**:—*Consd. Re Wilson, Ex p. Wilson v. Trustee*, [1937] Ch. 675.

**650a.** ———.]—Between 1923 & 1925, applt. lent sums amounting to £4,200 to the debtors who were in partnership as farmers. In Oct. 1924, £10 was paid in cash by way of interest, this being the only cash payment made by the debtors to applt. In 1926 applt. asked

**PART II. SECT. 8, SUB-SECT. 6.—A.**  
**409 viii.** ———.]—*PHUL SINGH v. BHORAJ* (1927), 1 L. R. 49 All. 801.—*IND.*

**409 ix.** ———.]—In order for a writing to be sufficient to take a case out of Stat. Limitations it must amount either to an express promise to pay the debt or to a clear & unqualified admission of a still-subsisting liability from which an express promise to pay the debt will be implied by law. A conditional promise will not suffice unless there be proof of the fulfilment of the condition, but, if such proof be offered, a promise either express or implied will be converted into an absolute one, & as such will support a claim alleging a promise to pay on request.—*REED v. THIEL*, [1928] 4 D. L. R. 72; [1928] 2 W. W. R. 115; 22 Sask. L. R. 495.—*CAN.*

**409 x.** ———.]—*MACBAIN v. MACBAIN*, [1929] S. C. (Ct. of Sess.) 218.—*SCOT.*

**PART II. SECT. 8, SUB-SECT. 6.—C.**

*sh. Account stated—Effect of general acknowledgment.*—Where a chitna contained a series of items of debt, all taken by deft. from pltf. with the dates of the loans mentioned therein, & in the end bore the following indorsement "Examined the account. It is correct":—*Held*: each item was a separate debt in itself, & the indorsement was merely an acknowledgment

of the existing debt, giving a fresh start to limitation in respect of such items only as were not, at the date of indorsement, barred by limitation.—*DEORAJ TEWARI v. INDRASAN TEWARI* (1929), 1 L. R. 8 Pat. 706.—*IND.*

**PART II. SECT. 8, SUB-SECT. 6.—D.**

**450 xi.** ———.]—*CHAPMAN v. PAULSON* (Man.), [1926] 4 D. L. R. 590.—*CAN.*

**PART II. SECT. 8, SUB-SECT. 6.—E (a).**

**474 vi.** ———.]—A letter cont the words "I cannot see any prospect of paying any old notes," & concld "That is all I can say at present. Hoping this answer satisfactory at present":—*Held*: a sufficient acknowledgment.—*BANK OF MONTREAL v. ROBESHAU* (1930), 44 Man. L. R. 114.—*CAN.*

**PART II. SECT. 8, SUB-SECT. 6.—E (b).**

**485 ii.** ———.]—*Re WAHN ESTATE*, [1927] 4 D. L. R. 440; [1927] 3 W. W. R. 138; 37 Man. L. R. 1.—*CAN.*

**PART II. SECT. 8, SUB-SECT. 6.—N.**

*sh. Use of technical expression by layman.*—Deft., against whom pltf. claimed a total sum of \$1,000 upon various causes of action, some well founded & some not, gave pltf. a

document in these words: "In case of my becoming bankrupt & death I owe you \$1,000 for money lent"; in law none of the causes of action were money lent, although a layman might have so described them:—*Held*: there was an absolute acknowledgment sufficient to take the causes of action out of the Stat. of Limitations.—*COHEN v. COHEN* (1929), 42 C. L. R. 91; 3 A. L. J. 102; [1929] Argus L. R. 204.—*AUS.*

**PART II. SECT. 9, SUB-SECT. 1.—A.**

**621 ii.** ———.]—A part payment within the Statute must not be intended as a payment in full.—*WARNER v. MEISNER*, [1935] 3 D. L. R. 95; 9 M. F. R. 354; 5 F. L. J. (Can.) 101.—*CAN.*

**PART II. SECT. 9, SUB-SECT. 1.—F. (a).**

**650 ii.** ———.]—In order for a part payment of a debt to avoid the effect of Stat. Limitations it is not necessary that the payment should actually pass from the debtor to the creditor in the form of money. Therefore, where the debtor, the maker of a promissory note, performed work for the creditor for which he was entitled to a certain sum & they agreed that it should be applied on the note then overdue & the creditor so applied it:—*Held*: the arrangement took the debt out of the Statute.—*WILSON v. BROWN*, [1931] 2 W. W. R. 733.—*CAN.*

the debtors to pay interest on the loan, but he was told by them that they were unable at that time to do so, but that they hoped to pay it before long. In 1927 an arrangement was made whereby the debtors' obligation to pay interest was to be discharged or partly discharged by applt. living on one of the partnership farms rent & rates free & being provided with farm produce without charge. This continued until 1935. In Dec. 1935, the debtors entered into a deed of arrangement for the benefit of their creditors. Applt. sought to have his claim for £4,200 admitted to proof. The trustee of the deed of arrangement contended that the debt was statute-barred:—*Held*: the services rendered to applt. in pursuance of the arrangement in 1927 constituted a continuous acknowledgment of the debt, which was, therefore, not statute-barred & ought to be admitted to proof.—*Re WILSON, Ex p. WILSON v. TRUSTEE OF DEED OF ARRANGEMENT*, [1937] Ch. 675; 106 L. J. Ch. 371; 158 L. T. 62; [1936-7] B. & C. R. 165; *sub nom. Re WILSON, WILSON v. BLAND*, [1937] 3 All E. R. 297, 917, n.; 53 T. L. R. 869; 81 Sol. Jo. 551, D. C.

651. *Add. Annotations*:—*Consd. Re Wilson, Wilson v. Bland*, [1937] 3 All E. R. 297.

659. *Add. Annotation*:—*Refd. Rhokana Corpn., Ltd., v. I. R. Comrs.*, [1938] A. C. 380.

667. *Add. Annotations*:—*Consd. Siqueira v. Noronha*, [1934] A. C. 332. *Refd. Bishun Chand Firm v. Seth Girdhari Lal* (1934), 50 T. L. R. 465.

672a. —.]—An account stated may take the form only of a mere acknowledgment of a debt; in that case though it amounts to a promise from which the existence of a debt may be inferred that inference may be rebutted, & then there is no consideration & no binding promise. But there is another form in which the account stated includes items on both sides, & the parties have agreed that there shall be a set-off & that only the balance shall be paid; in that case there is a promise for good consideration to pay the balance even though some of the debts were barred by limitation. The account stated in the present case being in the latter form, it was unnecessary to decide whether the implied promise was "a promise made in writing" so as to be, by sect. 25 (3) of the India Contract Act, 1872 (which

applied locally), an effective agreement to pay statute barred debts although it was made without consideration.—*SIQUEIRA v. NORONHA*, [1934] A. C. 332; 103 L. J. P. C. 63; 151 L. T. 6, P. C.

672b. *Moneylending transactions.*]—Applts., who carried on business as moneylenders in India, had for twenty-five years been lending money to resps. On the debit side of applts.' ledger was the entry: "Balance due to be received after adjusting the account up to Sept. 26, 1925, Rs.10,043," & an entry on the same page that that sum was due to be paid by them was signed by both resps. The last loan granted to resps. was in fact in Aug. 1921, & the date of the previous acknowledgment of the accounts by them was also in 1921. No payment having been made, after request, of the sum due on Sept. 26, 1925, applts., on Aug. 17, 1927, began the present proceedings for its recovery. Resps., relying on the Indian Limitation Act, 1908, pleaded that "within three years from the date of the institution of the suit" they had neither contracted any debt to applts. nor paid them any sum of money. The trial judge found that there was in fact a settlement of account between the parties on Sept. 26, 1925, so that the balance then struck became itself a debt which was to carry future interest, & he gave judgment for the moneylenders, holding that there was an "account stated" within sect. 64 of Indian Limitation Act, 1908. On appeal that judgment was reversed on the ground that the words "account stated" could not properly be applied to a moneylending transaction where the borrower was always the debtor of the lender; such transactions, it was held, were entirely unilateral & there could be no statement of a mutual account so as to satisfy the words in the Limitation Act, "accounts stated between them":—*Held*: the decision of the trial judge should be upheld. The closest parallel to the present case was that of accounts between banker & customer, & it had not been doubted that in law there could be a settled or stated account between banker & customer.—*BISHUN CHAND FIRM v. SETH GIRDHARI LAL* (1934), 50 T. L. R. 465; 78 Sol. Jo. 446, P. C.

696. *Add. Annotation*:—*Generally, Mentd. Smith v. Wood* (1928), 139 L. T. 250.

## PART II. SECT. 9, SUB-SECT. 1.—F. (b).

652 ii. —. —. —.]—Pltf. sued on an I.O.U. for \$300, dated Jan. 24, 1923, & on a promissory note for \$250, dated Apr. 7, 1924. Debt. set up Stat. Limitations. Pltf. did not receive any money from debt., but did get a suit of clothes for which pltf. said he told debt. he would allow him \$25:—*Held*: pltf. was entitled to judgment.—*JONES v. SMITH* (1932), 4 M. P. R. 520.—CAN.

## PART II. SECT. 9, SUB-SECT. 1.—F. (d).

1 i. —. —.]—Where two persons who are mutually indebted agree that the smaller account, although doubtful in some respects, shall be acknowledged in full as part payment of a larger, but not fully ascertained, amount owing by the person setting up the former account, such an arrangement, although made orally, interrupts the running of the Stat. of Limitations with respect to the balance of the

larger account.—*GUILBERT v. CUMMINGS* (Man.), [1929] 4 D. L. R. 705; 3 W. W. R. 39.—CAN.

## PART II. SECT. 9, SUB-SECT. 3.—A.

o i. —. —.]—In order to take a claim out of the operation of Limitation of Actions Act, 1931, S. M., 1931, s. 12 (1), a payment on account of the claim must be made by some person liable or entitled to make the payment, or his agent, & an acknowledgment must be such that a promise may be inferred in fact, not merely implied in law.—*BUCKLEY v. TAYLOR*, [1937] 2 W. W. R. 663; 45 Man. L. R. 232; 7 F. L. J. (Can.) 67.—CAN.

## PART II. SECT. 9, SUB-SECT. 3.—C. (a).

b i. —. —.]—The provision of Mercantile Law Amendment Act, 1856, that a payment by one joint debtor shall not keep the debt alive as against his co-debtor, is in force in Saskatchewan. Even if it be not in force,

the common law rule that a payment by one joint debtor keeps the liability of all alive does not apply where the relationship between the debtors is that of principal & surety & the payment is made by the principal debtor.—*IMPERIAL BANK OF CANADA v. KUSZKO*, [1932] 3 W. W. R. 186.—CAN.

## PART II. SECT. 9, SUB-SECT. 3.—I.

sd. *Payment by order of court*—*In presence of debtor.*]—A payment made under an order of the Landed Estates Ct. in presence of a debtor on account of the creditor's demand, is an acknowledgment of the debt by part payment, within the limitation sects. of Common Law Procedure Amendment Act (Ireland), 1853.

*Semble*: decisions upon 3 & 4 Will. 4, s. 40, are applicable to questions raised upon Common Law Procedure Amendment Act (Ireland), 1853, s. 22.—*CROWN v. DENNEY* (1869), 3 Ir. C. L. 289.—IR.

742. *Add. Annotation:—Refd. Stepney Corpn. v. Osotsky*, [1936] 3 All E. R. 494.

### Part III.—Specialties.

- 753. Add. Annotations :—***Consd. Dennerley v. Prestwich* U. D. C. (1929), 141 L. T. 602; *Gutsell v. Reeve*, [1936] 1 K. B. 272; *Pratt v. Cook Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51. **Refd.** *Royal Trust Co. v. A.-G. for Alberta* (1929), 46 T. L. R. 25.
- 754. Add. Annotations :—***Consd. Gutsell v. Reeve*, [1936] 1 K. B. 272. **Refd.** *Tees Conservancy Comrs. v. James*, [1935] Ch. 544.
- 755. Add. Annotation :—***Refd. Dennerley v. Prestwich* U. D. C. (1929), 141 L. T. 602.  
After this case add :—  
**Right of action under Truck Acts.]—See**  
**FACTORIES, No. 239a, ante.**
- 757. Add. Annotations :—***Distd. Dennerley v. Prestwich* U. D. C. (1929), 141 L. T. 602. **Refd.** *Weld v. Petre* (1928), 97 L. J. Ch. 399.
- 758. Add. Annotation :—***Refd. Dennerley v. Prestwich* U. D. C. (1929), 141 L. T. 602.
- 758a. — In balance sheet.]—**A balance sheet contained in an annual report sent by a co. to its shareholders, & filed with the registrar of companies, & stating the total amount of the co.'s indebtedness under its debentures for principal & interest accrued thereon since their issue is, although not sent to the debenture-holders, a sufficient acknowledgment by the co. of its liability under the debentures to take the case out of the operation of Civil Procedure Act, 1833 (c. 42), s. 3.—*Re ATLANTIC & PACIFIC FIBRE IMPORTING & MANUFACTURING CO., BURNHAM (VISCOUNT) v. ATLANTIC & PACIFIC FIBRE IMPORTING & MANUFACTURING CO.*, [1928] Ch. 886; 97 L. J. Ch. 369; 140 L. T. 18; 44 T. L. R. 702; 72 Sol. Jo. 598.

Part IV.—Money Charged Upon or Payable out of Land or Rent, or Secured by a Judgment, and Legacies, and Personal Estates of Intestates.

819. *Add. Annotation:—Refd. Weld v. Petre* (1928), 97 L. J. Ch. 399. *Minahan's Petition of Right* (1931), 100 L. J. Ch. 251.
834. *Add. Annotation:—Refd. Re Blake, Re* [1927] 2 Ch. 142. *848. Add. Annotation:—Refd. Purnell v. Roche,*

**PART II. SECT. 9. SUB-SECT. 5.—A.**

740 II. \_\_\_\_\_).—When a creditor holds two promissory notes made by the same debtor a payment made generally on account prevents Stat. Limitations from running as against the whole debt. The fact that after such payments equalled the amount due on one of the notes the creditor handed it over to the debtor at the latter's request after crediting to it all the payments made up to that time cannot alter the character of the payments as of the date when each of them was made.—WOOD v. RICHMOND, [1928] 3 W. W. R. 737.—CAN.

**PART III. SECT. 1.**

**sp. Debenture.**].—Deft. issued a series of debentures, dated June 31, 1914, in the following form: "On presentation of this debenture to the treasurer of the H. Club, Incorporated, the bearer will be entitled to receive on Jan. 31, 1919, the sum of ten pounds for value received." The instrument was executed under the seal of the club:—**Held:** a debenture does not cease to be such by reason that it may also be brought within the definition of a "promissory note." Being under the seal of the club, they were deeds & specialty contracts, & under Civil Procedure Act, 1833 (c. 42), s. 3, they were not statute-barred.—**GOODSON v. HAWKES LAW TENNIS & CROQUET CLUB, INC.**, [1931] N. Z. L. R. 1086.—N.Z.

**PART IV. SECT. 1, SUB-SECT. 1.—B.**

st. When time begins to run.—H.

died Jan. 10, 1911, intestate. S., his widow, thereupon entered into possession of the deceased's estate & effects & remained in possession until her death on Jan. 23, 1932. On May 11, 1922, S. took out a grant of administration to his estate. S. appointed C., one of defts., the exor. of her will. Pltf. took out a grant *de bonis non* to the estate of the said H. & sought the aid of the ct. in administering the estate. It was argued on behalf of pltf. that the extraction of administration by the said S. constituted an acknowledgment within Law of Property Amendment Act, 1860 (c. 38), s. 13, or alternatively that the period of limitation under sect. 13 did not commence to run until a grant of administration had been taken out:—**Held:** (1) under sect. 13 the period of limitation runs from the date of the death of the Intestate; (2) the taking out of a grant of administration does not constitute an acknowledgment under sect. 13 or otherwise prevent the Statute running in favour of the administrator.—*Re DEENEY, DEENEY v. DOHERTY & DEENEY*, [1933] N. I. 80.—IR.

**PART IV. SECT. 1. SUB-SECT. 1.—C.**

816 li. —.]—An administrative action cannot be sustained by a judgment creditor who for twelve years has received neither payment nor acknowledgment on foot of his judgment, even although such judgment may not have been registered as a

mtge.—SHERWOOD v. HANNAN (1886),  
17 L. R. Ir. 270.—IR.

di. —.] — *Re* LING (1908), 43  
N. S. R. 60 : 6 E. L. R. 264.—CAN.

m i. — *Decree in equity.*]—A suit to revive a final decree for the payment of a sum of money cannot be sustained if not commenced within twenty years from the day on which the decree was made, no payment or acknowledgment having been made in the meantime.—*DUNNE v. DOYLE* (1860), 10 I. C. L. R. 502.—[R.]

q1. — *Receivership order.*—A receivership order based on a judgment does not become ineffective, when the remedy on the judgment becomes barred by Stat. Limitations.—*WILKINS v. MINER (Alta.)*, [1927] 1 D. L. R. 286; [1926] 3 W. W. R. 778.—CAN.

q ii. —. )—Limitations Act, R.S.O., 1927, s. 23, does not apply to an action to enforce a judgment in which a debt has merged.—**THOMPSON v. DONLANDS PROPERTIES, LTD.**, [1934] 4 D. L. R. 234; O. R. 541.—CAN.

s). *How judgment kept alive—Revivor.*—Where a judgment is about to become barred by Stat. Limitations, twelve years having nearly run, it may be kept alive by applying for leave to enter on the judgment roll a suggestion reviving the judgment & allowing execution to be issued thereon. *Ptfr.'s* alternative is to renege on the judgment. —**SECURITY LUMBER CO., LTD. v.**  
(1924) 11 W. W. R. 548. —**CAN.**

862. *Add. Annotation*:—*Consd. Barratt v. Richardson & Cresswell*, [1930] 1 K. B. 686.

864a. — *Effect of statute—Loss of right of re-entry.*—In 1912 freshhold land was conveyed to purchasers in consideration of & subject to a perpetual yearly rentcharge of £25 a year issuing out of the land & the buildings to be erected thereon, payable half-yearly in Mar. & Sept. The grantees entered into a covenant for payment, & the conveyance also contained a power of re-entry exercisable by the vendor, his heirs, executors, administrators & assigns, owner or owners for the time being of the said rentcharge if & whenever the rentcharge should be in arrear & unpaid for one year, but limited to take effect during the lives of the parties thereto & the lives of the issue then living of Her late Majesty Queen Victoria & the survivors & survivor of them, & twenty-one years after the death of the survivor, & such other period (if any) as should be lawful. No part of the yearly rentcharge of £25 was ever paid, & in 1931 the vendor sued to recover possession with mesne profits. *Def't.* pleaded that the rentcharge & all remedies to recover the same were statute barred:—*Held*: on the true construction of the deed, *pl'tf.* was not entitled to enforce the right of re-entry given him by that deed unless at the time when he sought to enforce that right he was in a position to assert that he was the owner of the rentcharge thereby created. It was conceded by *pl'tf.* that on Mar. 26, 1925, the rentcharge ceased to exist. At that time, therefore, his right to enforce or recover any arrears of rentcharge came to an end. That being so, it was impossible for *pl'tf.* to assert that at the date when he issued the writ in this action he was the owner of the rentcharge. The action therefore failed, & the appeal must be allowed.—*SYKES v. WILLIAMS*, [1933] Ch. 285; 101 L. J. Ch. 418; 148 L. T. 121; 49 T. L. R. 9; 76 Sol. Jo. 798, C. A.

#### PART IV. SECT. 1, SUB-SECT. 1.—E.

852 II. — *A debt under a covenant in a mtge. executed under seal is a specialty debt, & the period of limitation applicable thereto is twelve years.*—*INVESTORS' MORTGAGE SECURITY CO. v. McDONALD & HENRY*, [1927] 1 W. W. R. 671; 21 Sask. L. R. 409.—CAN.

853 III. — *In mortgage not under seal.*—An action on the personal covenant in a mtge., which is registered against land in Alberta but which is not under seal, is an action on a simple contract debt, & the period of limitation applicable thereto is six years.—*SOCIÉTÉ BELGE D'ENTREPRISES INDUSTRIELLES IMMOBILIÈRES v. WEBSTER & MILL* (Alta.), [1928] 1 D. L. R. 465; 23 Alta. L. R. 129; [1927] 3 W. W. R. 817.—CAN.

852 IV. — *M., by mtge. under seal & registered, mtged. land in the province of Alberta to pl'tf., & subsequently, by transfer, not under seal, made pursuant to Alberta Land Titles Act, & registered transferred the land to B., who thereby became liable to pl'tf., under the covenant implied by virtue of s. 54 (1) of said Act, to pay the mtge. money. More than six years, but less than 12 years, after registration of the transfer or any payment on account or written acknowledgment of liability by B., B. died. B. in Alberta for payment.—*Held*: B.'s liability to pl'tf. was not statute barred. The period of limitation in Alberta for bringing action to recover*

money secured by mtge. made under Alberta Land Titles Act is 12 years.—*TRUSTS & GUARANTEE CO., LTD. v. BUXTON*, [1929] 3 D. L. R. 883; S. C. R. 529; *revers.*, [1928] 4 D. L. R. 784; 3 W. W. R. 205; 23 Alta. L. R. 565.—CAN.

852 V. — *ASHIQ HUSAIN v. CHATARBHUI & AHMAD-ULLAH KHAN* (1927), 1 L. R. 50 All. 328.—IND.

sa. *Power of sale for arrears of interest under mortgage deed—Whether extending to repayment of principal.*—*JOSEPH v. JOSEPH* (1925), 1 L. R. 6 Ran. 771.—IND.

sl. *Breach of condition in mortgage deed.*—A simple mtge., executed on May 1, 1909, for a term of three years, contained a stipulation to the effect that, if the mtgor. transferred the mortgaged property, the mtgee. should be at liberty to sue before the expiry of the term. On Mar. 8, 1911, the mtgor. stood surety for one A. in the amount of R.'s 50 & hypothecated a small share in the property covered by the deed of 1909. No actual notice of this transaction was given to the first mtgee. A suit was filed on the mtge. of 1909, on Mar. 27, 1924, & the plea of limitation was set up by *def'ts.*:—*Held*: the suit was within time.—*ASHIQ HUSAIN v. CHATARBHUI & AHMAD-ULLAH KHAN* (1927), 1 L. R. 50 All. 328.—IND.

PART IV. SECT. 1, SUB-SECT. 1.—H. am. *Money due on covenant—In agreement for sale.*—*Real Property Limitation Act*, R. S. M., 1913 (c. 116), s. 24, applies to an action on a covenant

873. *Add. Annotation*:—*Refd. Dennerley v. Prestwich U. D. C.* (1929), 141 L. T. 602.

901. *Add. Annotation*:—*Generally, Consd. Re Edwards' Will Trusts, Brewer v. Gething*, [1937] 3 All E. R. 58.

901a. — *By his will testator, who died in 1865, bequeathed all his real & personal estate to trustees, giving successive life interests therein to M. E., his wife, to E. G., his grandson's wife, & to J. G., his grandson, & directing that after their death the property should be held in trust for their children who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry, in equal shares. In 1895, F. G., being one of the sons of J. G. & E. G., mtged. his share in the freehold & leasehold properties to which he was entitled under testator's will, & in 1896 he further mtged. all his interest under testator's will. The amounts secured thereby were not discharged & no payments of interest were made. In 1919, on the death of J. G. the trust in favour of his children took effect. In 1935, the share of F. G. being then represented by a sum of money on deposit at a bank, the trustees of the will of testator sent to the persons representing the estates of the respective mtgees. the estate accounts of testator's estate & the distribution statement:—*Held*: (1) the trustees of testator's will were not agents of the mtgee. for the purpose of making an acknowledgment within sect. 8 of Real Property Limitation Act, 1874 (c. 57), & accordingly, the sending of the estate accounts & the distribution statement did not constitute such an acknowledgment; (2) therefore, the debt secured by the first mtge. was barred, inasmuch as it was a mtge. of land; (3) the debt secured by the second mtge. was also barred in so far as the security comprised land at the date of the mtge.—*Re EDWARDS' WILL TRUSTS, BREWER v. GETTING*, [1937] Ch. 553; [1937] 3 All E. R.*

in an agreement for sale for payment of the purchase-price.—*LOWERY v. LAMONT (Man.)*, [1927] 1 D. L. R. 669; [1927] 1 W. W. R. 95.—CAN.

so. *Guarantee of payments to be made under agreement for sale.*—A guarantee of payments to be made under an agreement for the sale of land is not a charge upon land within sect. 8 of Real Property Limitation Act, 1874, c. 57 (Imp.). Where the guarantee is under seal the period of limitation is twenty years as provided by sect. 3 of Civil Procedure Act, 1833, c. 42 (Imp.), which is in force in Alberta. Such limitation applies even though the lands are situate in another province.—*MCPIERSON v. MCBAIN*, [1932] 3 W. W. R. 617.—CAN.

#### PART IV. SECT. 1, SUB-SECT. 2.—C. (a).

sg. *Legacy charged on land—Payable to trustees—No trustee—Time runs from determination of life interest.*—Where a legacy, charged upon the residuary real estate, was bequeathed to trustees, in trust for B. for life, & after his death for his children, & there was not, during the life of B., from 1808 to 1863, any payment made on foot of the legacy, or any trustee capable of giving a discharge for it:—*Held*: on a bill filed by the children of B. after his death, to raise the legacy out of the real estate so charged with it, Stat. Limitations did not begin to run against the children until the death of B.—*CARROLL v. HARGRAVE* (1870), 5 Ir. Eq. 123.—IR.



58; 106 L. J. Ch. 347; 156 L. T. 527; 53 T. L. R. 699; 81 Sol. Jo. 377.

912. *Add. Annotation*:—As to (2) *Refd. Edwards' Will Trusts, Brewer v. Gething*, [1937] 3 All E. R. 58.

915. *Add. Annotation*:—As to (1) *Refd. Weld v. Petre* (1928), 97 L. J. Ch. 399.

925. *Add. Annotation*:—Generally, *Consd. Re Edwards' Will Trusts, Brewer v. Gething*, [1937] 3 All E. R. 58.

930. *Add. Annotation*:—*Consd. Hodgson v. Salt*, [1936] 1 All E. R. 95.

942a. — Same person entitled to pay & receive—*First & second mortgages vested in trustees—One common trustee—First mortgagees in possession.*—The first & second mtges. upon certain property each became vested in two trustees. In each case H. was one of the trustees, & the first mtgees. having gone into possession, H., by common consent, received the rents of the property & applied them in payment of the interest on the first mtge. & the surplus rents in reduction of the capital of that mtge. over a period of 24 years. It was admitted there was no acknowledgment. The first mtgees. then sold the property for a sum greater than the principal of their mtge. remaining unpaid. They sold & also claimed to retain the proceeds of sale as absolute owners. The second mtgees. claimed an account of the proceeds of sale & that they were entitled to the surplus after all moneys properly due to the first mtgees. had been paid:—*Held*: the hand to pay & to receive being the same, Stat. Limitations did not run in favour of the first mtgees., & the second mtgees. were entitled to the account claimed.—*HODGSON v. SALT*, [1936] 1 All E. R. 95.

956a. — — — — —]—By an indenture of lease dated Feb. 9, 1909, the predecessor in title of pltf. demised certain premises to deft., R., for the term of ninety-nine years from Dec. 25, 1903, at a yearly rent of £8 6s., payable quarterly on the usual quarter days. R. covenanted for himself & his assigns to pay the rent on the said days, & it was provided that, if & when any part of the rent should have been legally demanded or not, it should be lawful for the lessor to re-enter upon the premises. On Apr. 30, 1924, the term became vested in deft., C. Neither on Dec. 25, 1914, nor thereafter to the date of the writ, did either

R. or C. pay to pltf. the rent due under the lease. In an action by pltf. for possession of the premises, begun on Jan. 28, 1928:—*Held*: (1) although pltf.'s right to re-enter upon the premises first accrued to him in respect of the non-payment of rent on Dec. 25, 1914, his claim to possession was not barred by Real Property Limitation Act, 1874 (c. 57), s. 1, & Civil Procedure Act, 1833 (c. 27), s. 3, as not having been made within twelve years next after the time at which the right to make such entry had first accrued, but his right to re-enter accrued afresh in respect of each subsequent quarter day whenever any part of the rent reserved under the lease was in arrear for twenty-one days, & he was, therefore, entitled to rely on the last non-payment of rent before writ issued or any previous non-payment up to twelve years before writ; (2) the case was governed by s. 3 of the Real Property Limitation Act, 1833 (c. 42), s. 3, which provides that all actions for debt for rent there mentioned shall be commenced & sued within twenty years after the cause of such action, but not after, & not by Real Property Limitation Act, 1833 (c. 27), s. 42, which provides that no arrears of rent shall be recovered by any action but within six years next after the same shall have become due, & that, therefore, deft., C., would have to pay or tender to pltf. all, & not merely six years of, the arrears of rent owing under the lease in order to defeat pltf.'s claim by recourse to Common Law Procedure Act, 1852 (c. 76), s. 212, & to obtain relief under Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), s. 46.—*BARRATT v. RICHARDSON & CRESSWELL*, [1930] 1 K. B. 686; 99 L. J. K. B. 451; 142 L. T. 606; 46 T. L. R. 279.

*Annotation*:—As to (1) *Refd. Sykes v. Williams* (1932), 101 L. J. Ch. 418.

959. *Add. Annotation*:—*Consd. Barratt v. Richardson & Cresswell*, [1930] 1 K. B. 686.

964a. — — — — —]—*HORTON v. THOMPSON* (1855), 25 L. T. O. S. 292, L. JJ.

976. *Add. Annotations*:—*Refd. Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385; *Lewis v. McKay*, *Algate v. Vugler*, *Clark v. Potter* (1924), 98 L. J. K. B. 840.

976a. — — — — —]—The allowance of interest upon a legacy charged upon real estate, & due upwards of six years, is to be calculated from

PART IV. SECT. 1, SUB-SECT. 4.—  
B. (a).

913 i. *Principal & surety—Payment by surety.*—Where a mtgor. & another person are jointly & severally liable to the mtgee. for the payment of the mtge. debt, a payment of interest by the latter is a payment within sect. 8 of Real Property Limitation Act, 1874, which is in force in Alberta & therefore, one which keeps alive the mtge. in its entirety.—*CREDIT FONCIER FRANCO CANADIEN v. SINGER*, [1933] 3 W. W. R. 257.—CAN.

k i. — — — — —]—*SERVAIS v. SHEAR*, [1928] 1 D. L. R. 549; 61 O. L. R. 490; *revid. on other grounds*, [1929] 2 D. L. R. 633; 68 O. L. R. 381.—CAN.

k ii. — — — — —]—Mtgor. of land transferred it subject to the mtge. to S., who registered the transfer, & he transferred it subject to the mtge. to G., who registered his transfer, & made payments on the mtge. In an action on the covenant, C., one of the mtgor.

& S. who was another of the mtgor., & G. were made defts. G. did not defend & the other two defts. pleaded Limitation of Actions Act.—*Held*: the payments by G. interrupted the running of the Act as against both the other defts. although G. had not been in any manner a party to the contract between mtgor. & mtgee.—*NORTH OF SCOTLAND CANADIAN MORTGAGE CO., LTD. v. CAMPBELL*, [1932] 1 W. W. R. 631; 1 D. L. R. 697.—CAN.

PART IV. SECT. 1, SUB-SECT. 4.—  
B. (b) ii.

sl. *Legacy payable in instalments.*—Testator bequeathed the sum of £250 to A., to be charged upon certain lands & to be paid by yearly instalments of £20 per annum, from the day of her marriage with consent, but not until then; & in case A. should intermarry without such consent, then she should be entitled to one shilling; such portion of £250 to be paid & payable by

yearly instalments of £20 per annum from the day of her marriage, but not until then; with power to A. or her lawful husband, to distrain in case of non-payment of the £20; & he desired that said annuity or instalment be paid to A. or her lawful husband by two half yearly payments of £10 each, until the aforesaid sum of £250 be paid to her or her assigns; & he further desired that his two sons, B. & C. (to whom he devised the lands), should contribute, jointly & severally, to support & clothe A. in a reasonable manner; & that, upon doing so, no interest should arise upon the said sum of £250; but if they neglected such support & clothing, he desired that said sum of £250 be liable to interest at 6 per cent. until A.'s marriage, but by no means after:—*Held*: the instalments were periodical payments of a sum of money charged upon lands, & as such within sect. 42 of Stat. Limitations.—*UPFINGTON v. TARRANT* (1861), 19 I. C. L. R. 362.—IR.

the filing of the bill, & not from the date of the decree, though the bill is not filed by the legatee.—*CHAPPELL v. REES* (1852), 1 De G. M. & G. 393; 20 L. T. O. S. 57; 16 Jur. 415, 417; 42 E. R. 603, L. C.

*Annotations*:—*Refd. Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch.

385; *Lewis v. McKay, Algate v. Vugler, Clark v. Potter* (1924), 93 L. J. K. B. 840.

1003. *Add. Annotation*:—*Refd. Barratt v. Richardson & Cresswell*, [1930] 1 K. B. 686.

1011. *Add. Annotation*:—*Refd. Re Wait*, [1927] 1 Ch. 606.

## Part V.—Land or Rent.

1029. *Add. Annotation*:—*Refd. Palmer v. Crone*, [1927] 1 K. B. 804.

1033. *Add. Annotation*:—*Refd. Weld v. Petre* (1928), 97 L. J. Ch. 399.

1037. *Add. Annotation*:—*Refd. Barratt v. Richardson & Cresswell*, [1930] 1 K. B. 686.

1041. *Add. Annotations*:—*As to* (1) *Refd. Purnell v. Roche*, [1927] 2 Ch. 142; *Barratt v. Richardson & Cresswell*, [1930] 1 K. B. 686.

1088. *Add. Annotations*:—*As to* (1) *Folld. Salisbury & Fordingbridge District Drainage Board v. Southern Tanning Co.* (1920), Ltd., [1927] 2 K. B. 566. *Refd. Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63.

1130a. —.]—*BARRATT v. RICHARDSON & CRESSWELL*, No. 956a, *ante*.

### PART V. SECT. 1.

*o i.* — *As against Crown*.—An adverse possession of land in Newfoundland for sixty years is a bar to the rights of the Crown, & the same kind of possession for seventy years will deprive the Crown of its right of entry upon those lands.—*R. v. KOUGH* (1819), 1 Nfld. L. R. 172.—Nfld.

*o ii.* — *Statute of Limitations 1868*. s. 9.—*PATTERSON v. MCPHERSON* (1875), 10 N. S. R. (1 R. & C.) 116.—CAN.

*o iii.* — *When question for jury—Rights of plaintiff*.—*DOE d. LYONS v. CRAWFORD* (1842), 6 O. S. 334.—CAN.

*o iv.* — *Re-entry by registered owner*.—Where a person has by uninterrupted possession of land for over twelve years acquired the right to exclusive possession thereof under Limitation of Actions Act, that right cannot be destroyed in favour of the registered owner merely by the latter regaining possession for a period less than the statutory one.—*SHIRTLIFFE v. LEMON*, [1924] 1 W. W. R. 1059.—CAN.

*o v.* — *Action for purchase price by vendor of land*.—*BRANDON v. DALE*, [1930] 1 W. W. R. 277; 2 D. L. R. 272; 24 S. L. R. 302, C. A.—CAN.

### PART V. SECT. 3, SUB-SECT. 1.—B. (a) i.

1057 v. —.]—*NOBLE v. NOBLE* (1912), 27 O. L. R. 342; 4 O. W. N. 559; 9 D. L. R. 735.—CAN.

1057 vi. —.]—*Tenant holding over*.—*DOE d. CHARLES v. COTTON* (1851), 8 U. C. R. 313.—CAN.

1057 vii. —.]—*PIPER v. STEVENSON* (1913), 28 O. L. R. 379; 4 O. W. N. 961; 12 D. L. R. 830.—CAN.

1057 viii. —.]—Where it is found by the trial judge, & the evidence supports such finding, that defts. & those under whom they claim have been in possession of the land in question, & exercising acts of ownership for a period of more than 20 years, & that plffs. & those under whom they claim have been out of possession for a corresponding period, Stat. Limitations bars any action by the latter against the former in respect to the ownership of the land.—*HALIFAX POWER CO. v. CHRISTIE* (1915), 48 N. S. R. 264.—CAN.

1057 ix. —.]—*SOULIS v. ARMSTRONG* (1917), 51 N. S. R. 315; 36 D. L. R. 778.—CAN.

1057 x. —.]—*MONTREAL TRUST*

*Co. v. CROSBY*, [1931] 2 D. L. R. 534; 3 M. P. R. 244.—CAN.

*t i.* —.]—*WESTERN CANADA LOAN CO. v. GARRISON* (1889), 16 O. R. 81.—CAN.

*ii.* —.]—*TOWNSHIP OF COLCHESTER SOUTH v. HACKETT*, [1927] 4 D. L. R. 317; 61 O. L. R. 77; *affd. sub nom. HACKETT v. COLCHESTER SOUTH MUNICIPAL CORPN.*, [1928] 3 D. L. R. 107.—CAN.

*t iii.* —.]—*Re BELL* (1871), 3 Ch. Ch. 239.—CAN.

*t iv.* —.]—*CREIGHTON v. KUHN*, *Cass. Dig.* 2nd ed. 845.—CAN.

*t v.* —.]—*Held*: plff. had established an actual, visible, undisturbed, & continuous possession of a town lot, of which she or her husband or both had been in possession since 1891, by themselves or their tenants, & which had been used or cultivated as a garden, for more than twelve years; & she was entitled, under Imperial Real Property Limitation Act, 1874, to a declaration that all the rights of defts. in the lot had been extinguished in her favour.—*BRADSHAW v. PATTERSON* (1911), 18 W. L. R. 402; 4 Sask. L. R. 208.—CAN.

### PART V. SECT. 3, SUB-SECT. 1.—B. (a) ii.

*z i.* —.]—*Agreement for possession during life*.—*ROAN v. KRONSBEN* (1886), 12 O. R. 197.—CAN.

### PART V. SECT. 3, SUB-SECT. 1.—B. (b) i.

*o i.* —.]—*Acts done with consent of owner*.—*Held*: the operation of Stat. Limitations in favour of the owner was not suspended.—*KAULBACH v. COOK* (1906), 39 N. S. R. 500.—CAN.

*o ii.* —.]—*CLARK v. BABBITT*, [1927] 2 D. L. R. 7; [1927] S. C. R. 148.—CAN.

*d i.* *Cutting wood on upland & grass on meadow*.—*Held*: not of very serious importance in establishing a title by occupation without more.—*DUNCANSON v. ATWELL* (1914), 14 E. L. R. 348.—CAN.

### PART V. SECT. 3, SUB-SECT. 1.—B. (b) iv.

1089 i. *Adverse title may be acquired—Land acquired for public undertaking*.—A title by possession may be acquired as against a railway co. to land originally obtained by them for railway purposes.—*ERIE & NIAGARA RT. CO. v. ROUSSEAU* (1890), 17 A. R. 483.—CAN.

### PART V. SECT. 3, SUB-SECT. 1.—B. (b) v.

1094 i. *Non-user not abandonment*.—In the case of mineral rights, non-user does not amount to abandonment of possession on the part of the owner, whose right is not barred so long as the minerals are not worked by some one else; & by working a part of the minerals or opening up particular quarries, possession over a continuous field of minerals or of quarries cannot be obtained.—*GOPI RAM BHOTICA v. THAKUR JAGARNATH SINGH* (1929), 1 L. R. 9 Pat. 447.—IND.

### PART V. SECT. 3, SUB-SECT. 1.—B. (b) xii.

*n i.* —.]—*Conflicting grants*.—*LAWSON v. WHITMAN* (1851), 1 N. S. R. (1 Thom.) 208.—CAN.

*sg.* *Isolated acts of trespass*.—*SHERREN v. PEARSON* (1887), 14 S. C. R. 581.—CAN.

### PART V. SECT. 3, SUB-SECT. 1.—B. (b) xiii.

*r i.* —.]—*CUNARD'S LESSEE v. IRVINE* (1853), 2 N. S. R. (James) 31.—CAN.

*r ii.* —.]—*Tenant at will of remainder—Right of owner to enter*.—Where a party was allowed to enter on a lot of wilderness land, with the privilege of clearing & chopping a portion of it, but under such an arrangement as to the remaining portion as would make him a tenant at will of the whole; but the owner also entered from time to time & cut & disposed of the timber:—*Held*: Stat. Limitations did not run in favour of the tenant except as to the part exclusively occupied by him.—*DOE d. MCKENZIE v. MOSHER* (1874), 2 Pug. 355.—CAN.

*o i.* —.]—*MUNISH v. MUNRO* (1875), 25 C. P. 290.—CAN.

*t i.* —.]—*Re LINET* (1871), 3 Ch. Ch. 230.—CAN.

*t ii.* —.]—*COSGROVE v. CORBELL* (1868), 14 Gr. 617.—CAN.

*sn.* *No occupation by anyone for nearly twenty years*.—*WALLBRIDGE v. GILMOUR* (1872), 22 C. P. 185.—CAN.

*so.* *Possession under conditional agreement—Failure of owner to observe condition*.—*BISHOP v. COX*, [1928] 2 D. L. R. 990.—CAN.

*sp.* *Willingness to pay rent—Adverse possession under order of court*.—*GOPIKA RAMAN ROY v. ATAL SINGH* (1929), 56 L. R. Ind. App. 119.—IND.

- PART V. SECT. 3, SUB-SECT. 1.—C.**  
 ¶ 1. — *Occupation of room in building.*—**IREDALE v. LOUDON** (1908),  
 40 S. C. R. 313.—**CAN.**

q l. ———.—A decree against a Hindu

**PART V. SECT. 3. SUB-SECT. 8—A.**

**PART V. SECT. 3. SUB-SECT. 8—A.**

**PART V. SECT. 5.**

The owner of a house allowed his sisters to reside therein & contributed to their support. He paid the rent & taxes & executed all necessary repairs:—*Held*: the occupation was in the character of guests & not of tenants at will & Stat. Limitations did not run as against the owner.—**PEAKIN v. PEAKIN**, [1895] 2 I. R. 359.—**IR.**

• 1. — — Acknowledgment by agent.]—An acknowledgment of title by an agent is ineffectual to satisfy the provisions of Real Property Limitation Act, 1833, s. 14.—*MCLEOD v. PEARSON*, [1931] 3 W. W. R. 4; 4 D. L. R. 873.—CAN.

1850 Ill. —.—]—DOE d. MCGREGOR  
v. HAWKE, DOE d. MCGREGOR v. CROW  
(1837), 5 O. S. 496.—CAN.

1350 v. — *Real Property Limitation Act, R. S. M., c. 89.*—*STOVER v. MARCHAND* (1895), 10 Man. L. R. 322. —CAN.

mtgc. are also extinguished & the effect of the extinguishment is to vest the land in the mtgor. free from any rights of the mtgee., as if a release had been executed; & the mtgor. has the right to have the mtgc. discharged.

COCKSHUTT PLOW Co., LTD. v. KORNYSYN, [1931] 3 W. W. R. 171; *affd.*, [1932] 1 W. W. R. 369.—CAN.

1355 1. Acknowledgment of right—*Insufficient when given by mortgagee to himself—Clause in will.*—EASTERN TRUST CO. v. MCALDER, [1931] 1 D. L. R. 509; 2 M. P. R. 93.—CAN.

sq. *Assignment under Insolvent Act, 1875.*—COURT v. WALSH (1883), 9 A. R. 294.—CAN.

sr. Right of equitable mortgagee to recover—Notwithstanding personal remedy barred.]—*Re CONLAN'S ESTATE* (1892), 29 L. R. Ir. 199.—IR.

st. *Recovery of judgment in action of*

effect within twenty years before suit for foreclosure.]—Held: Stat. Limitations was prevented from operating except from the judgment.—**McKEEN v. McKAY** (circa 1873), R. E. D. 121.—CAN.

d. 1. — *Not possession by lease of*

Co. v. SHANTZ, [1928] 2 D.  
[1928] S. C. R. 213.—CAN.

- 1410. Add. Annotation:—***Apld. Hodgson v. Salt*, [1936] 1 All E. R. 95.
- 1436. Add. Annotation:—***Consd. Weld v. Petre* (1928), 97 L. J. Ch. 399.
- 1463. Add. Annotation:—***As to (1) Consd. Dismore v. Milton*, [1938] 3 All E. R. 762.
- 1478. Add. Annotation:—***Refd. Taylor v. Twinberrow*, [1930] 2 K. B. 16.
- 1485. Add. Annotation:—***Apld. Taylor v. Twinberrow*, [1930] 2 K. B. 16.
- 1486a. Effect of purchase of freehold reversion on lessor's right of re-entry.**—In 1900 *pltf.'s* father became the yearly tenant of a cottage, which he thereupon allowed *deft.'s* husband to occupy rent free as tenant at will. In Feb. 1919, *pltf.'s* father purchased the freehold of the cottage. In 1925 *deft.'s* husband died & she continued to occupy the cottage

on the same terms. In 1928 *pltf.'s* father died, having by his will devised the cottage to *pltf.* In Oct. 1929, *pltf.* brought an action in the county ct. against *deft.* for possession of the cottage, in which a plea by *deft.* that the claim was statute barred was overruled, & judgment was given for *pltf.* On appeal:—*Held*: when *pltf.'s* father purchased the freehold of the cottage in 1919 his yearly tenancy merged in the freehold & the rights which *deft.'s* husband had acquired against him as yearly tenant under Real Property Limitation Acts, 1833 & 1874, were gone, & as the new statutory period against him as freeholder under these Acts had not determined at the date when the action was brought, *deft.'s* plea failed & the judgment in favour of *pltf.* should be affirmed.—*TAYLOR v. TWINBERROW*, [1930] 2 K. B. 16; 99 L. J. K. B. 313; 142 L. T. 648.

## Part VI.—Actions against Trustees.

- 1532. Add. Annotation:—***Consd. Irish Catholic Church Property Insee. v. I. R. Comrs.* (1918), 12 Tax Cas. 13.
- 1539a.** —.]—Where the administrator of an intestate estate has given a power of attorney to act in the administration, & the attorney has obtained a transfer to himself of property knowing that it belongs to the estate, a suit by the administrator to make him accountable is a suit against a person in whom property has become vested in trust for a "specific purpose," with sect. 9 of the Limitation Ordinance of the Straits Settlements, & accordingly is not barred by any length of time.—*CHETTIAR (C. KASIVISVANATHAN) v. CHETTIAR (C. V. S. CHOKALINGHAM)*, [1935] A. C. 163; 104 L. J. P. C. 27; 152 L. T. 265, P. C.
- 1548. Add. Annotation:—***Refd. Windsor Steam Coal Co.* (1901), Ltd., [1928] Ch. 609.
- 1551. Add. Annotation:—***Consd. Irish Catholic Church Property Insee. v. I. R. Comrs.* (1918), 12 Tax Cas. 13.
- 1568a.** — — —.]—*Testatrix*, who died in 1890, gave her residuary real & personal estate to two persons whom she appointed her exors. upon trust for sale & conversion,

& out of the proceeds to set aside £2,000 upon trust to pay the income to L. during widowhood & after L.'s death or marriage, to fall into residue & subject thereto gave the proceeds of sale of the residue to her six children in equal shares. L. died in 1916. An action was commenced in 1925 by persons interested in a share of residue against the personal representatives of the two exors., who were dead, claiming a declaration that certain sums of Consols & bank stock had been wrongfully expended or disposed of by or converted to the use of the exors., & an order that these sums should be replaced. *Defts.* alleged that these sums had been expended in 1894 in satisfying liabilities of *testatrix*, & pleaded the appropriate statute of limitation. The exors. had set aside sums to answer the £2,000 legacy in part, & on L.'s death payments of capital were from time to time made to the persons interested in remainder, the last payment being made in June, 1921. If the stock had been paid away in 1894, the statute of limitation afforded a good defence except in regard to the share of the £2,000 legacy, which only fell into possession in 1916:—*Held*: (1) as the claim was against exors. holding on

### PART V. SECT. 12, SUB-SECT. 2.—A. (a).

**1398 i. Entry by mortgagee.**—*DEDFORD v. BOULTON* (1878), 25 Gr. 561.—CAN.

**1398 ii. — Twenty years' delay after decree for redemption.**—*Re LESLIE* (1893), 23 O. R. 143.—CAN.

**sv. Sale by mortgagee—Whether remainderman barred.**—When a *mtgee.* has transferred possession of the *mtgd.* property for a valuable consideration, a suit to redeem by a *pltf.* who at the date when the *mtgee.* transferred possession had a contingent interest in remainder in the property is governed by Art. 140 & not by Art. 134 of Indian Limitation Act, 1908, the suit consequently is not barred, if it is brought within twelve years from the date when *pltf.'s* estate falls into possession, even though it is brought

more than twelve years after the date of the transfer under which *deft.* claims.—*SKINNER v. NAUNHAL SINGH* (1929), L. R. 56 Ind. App. 192.—IND.

### PART V. SECT. 12, SUB-SECT. 2.—B.

**1483 v. —.**—Where of five tenants in common of a farm, three acquired a title against the other two by virtue of the Statute of Limitations.—*Held*: that the title so acquired by the three tenants in common was a joint tenancy of the two-fifths, & they were then tenants in common of their original three-fifths, & joint tenants of the two-fifths so acquired.—*Re LIVINGSTONE* (1901), 21 O. L. T. 521; 2 O. L. R. 381.—CAN.

### PART V. SECT. 16.

**e i. —.**—*COOK v. COOK* (1915), 8 W. W. R. 506.—CAN.

### PART VI. SECT. 1, SUB-SECT. 1.—D.

**1571 i. Interest in possession—Date of breach of trust.**—*COUCH v. WESTERN TRUST CO.*, [1925] 3 D. L. R. 1117; [1925] 2 W. W. R. 678.—CAN.

### PART VI. SECT. 1, SUB-SECT. 2.

**aa. Payment into Treasury by trustee company—Order of court for payment out.**—Where money has been paid into the Treasury pursuant to National Trustees, Executors & Agency Co. of Australasia Limited Act, s. 19, the power conferred by s. 20 of the Act on the Supreme Ct. or a Judge thereof to order payment out to a claimant is, subject to the specified exceptions, limited to the period of six years after such payment in, whatever procedure is adopted.—*NELSON v. THE NATIONAL TRUSTEES, EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD.*, *Re GIBBS*, [1928] V. L. R. 384; [1928] Argus L. R. 243.—AUS.

express trusts, it was not a claim to recover a legacy within Real Property Limitation Act, 1874 (c. 57), s. 8, & the statute of limitation applicable was Trustee Act, 1888 (c. 59), s. 8, under which the period for which the statute had to run in order to afford a defence was only six years; (2) the payments relied on, being payments in respect of the part of testatrix's estate accounted for, did not constitute an acknowledgment of liability in regard to that part which the exors. were said to have misapplied; (3) the statute afforded a good defence in regard to the share of the £2,000 legacy also.—*Re OLIVER, THEOBALD v. OLIVER*, [1927] 2 Ch. 323; 96 L. J. Ch. 496; 137 L. T. 788; 71 Sol. Jo. 710.

1584a. — Misapplication of fund—Payments in respect of sum accounted for.—*Re OLIVER, THEOBALD v. OLIVER*, No. 1568a, ante.

1588a. —.]—Stat. Limitations cannot be pleaded by trustees, in answer to a charge of breach of trust, to defend them from the consequences of neglecting their duty in having sold an estate charged with the payment of

a sum of money, without satisfying that demand.—*MILNES v. COWLEY* (1817), 4 Price, 103; 146 E. R. 408; *subsequent proceedings* (1820), 8 Price, 620.

1632. *Add. Annotation*:—*Refd. Re Blake, Re Minahan's Petition of Right* (1931), 100 L. J. Ch. 251.

1636. *Add. Annotation*:—*Refd. Douglass v. Lloyds Bank* (1929), 34 Com. Cas. 263.

1651. *Add. Annotation*:—*Apld. Re A Debtor*, [1927] 1 Ch. 410.

1653. *Add. Annotation*:—*Refd. Weld v. Petre* (1928), 97 L. J. Ch. 399.

1665. *Add. Annotation*:—*Refd. Re Mason* (1928), 97 L. J. Ch. 321.

1674. *Add. Annotations*:—*Refd. Re Mason* (1928), 97 L. J. Ch. 321; *Re Blake, Re Minahan's Petition of Right* (1931), 100 L. J. Ch. 251.

1677. *Add. Annotations*:—*As to* (1) *Refd. Re Mason* (1928), 97 L. J. Ch. 321; *C. Kasivisvanathan Chettiar v. S. V. S. Chokalingam Chettiar*, [1935] A. C. 163. *As to* (2) *Refd. Re Blake, Re Minahan's Petition of Right* (1931), 100 L. J. Ch. 251.

## Part VII.—Equity and the Statutes of Limitation.

1687. *Add. Annotations*:—*As to* (2) *Refd. Weld v. Petre* (1928), 97 L. J. Ch. 399; *Naamlooze Vennootschap Handels-en-Transport Maatschappij "Vulcaan" v. A/S Ludwig Mowinckels Rederi*, [1938] 2 All E. R. 152. *Generally, Refd. Re Blake, Re Minahan's Petition of Right*, [1932] 1 Ch. 54.

1702. *Add. Annotation*:—*As to* (1) *Refd. Naamlooze Vennootschap Handels-en-Transport Maatschappij Vulcaan v. Ludwig Mowinckels Rederi A/S*, [1938] 2 All E. R. 152.

1709. *Add. Annotation*:—*Refd. Weld v. Petre* (1928), 97 L. J. Ch. 399.

1709a. — — —.]—In 1900 W. mortgaged shares to L. to secure a loan with interest. L. received dividends to clear the interest up to 1908, when they ceased & the shares became of practically no value, L. retaining them, but without foreclosing. In 1916 & thereafter the value of the shares increased enormously, & such large dividends were paid that by 1921 L. had received sufficient to pay off the capital of the loan & all interest in arrear. He died in 1923. Pltfs., who were entitled to the equity of redemption of the mtgee., took out a summons claiming redemption, & also repayment of the excess of the amount of dividends received by L.

or his exors. over & above the amount due under the mtge.:—*Held*: (1) equity ought not to deprive a mtgor. of his right to redeem if the debt had been or could be repaid, the security were still available, & the position of the mtgee. had not been altered to his prejudice by the delay; (2) the limit of twelve years applicable by Real Property Limitation Act, 1874 (c. 57), in the case of a mtge. of realty would not, by equitable principles, be extended so as to support a plea of delay & laches & be made applicable to a mtge. of personality.—*WELD v. PETRE*, [1929] 1 Ch. 33; 97 L. J. Ch. 399; 139 L. T. 596; 44 T. L. R. 739; 72 Sol. Jo. 569, C. A.

1734. *Add. Annotation*:—*Refd. Naamlooze Vennootschap Handels-en-Transport Maatschappij Vulcaan v. Ludwig Mowinckels Rederi A/S* (1937), 42 Com. Cas. 200.

1745. *Add. Annotation*:—*Refd. Naamlooze Vennootschap Handels-en-Transport Maatschappij Vulcaan v. Ludwig Mowinckels Rederi A/S* (1937), 42 Com. Cas. 200.

1758. *Add. Annotations*:—*Consd. Re Blake, Re Minahan's Petition of Right* (1931), 100 L. J. Ch. 251. *Refd. Re Mason* (1928), 97 L. J. Ch. 321.

### PART VII. SECT. 2, SUB-SECT. 1.

1704 i. — *Unless inequitable to do so.*—Though the Stat. of Limitations by its terms does not operate directly upon equitable remedies, such remedies are barred in pts. of equity by analogy to the Statute. The analogy is found in the case of constructive trusts, where the equity is fastened upon the trustee not because he intended to become the fiduciary of property, but because of the character of his dealings & in spite of his intention to take the property for himself. But pts. of equity have refused to see any analogy when a person, intending to act in a capacity which is fiduciary,

has received as & for the beneficial property of another, something which he is to hold, apply, or account for specifically for his benefit. Such a person is either an express trustee or, if that name does not in strictness belong to him, he stands in the same position as a direct or express trustee. Therefore, where pltf. entrusted the sale of her furniture to deft. & authorised him to receive the proceeds on her behalf, & where deft. received money from an insurance co. on account of a loss sustained by pltf.:—*Held*: deft. was under an obligation to account specifically for the money, the receipt of which was not intended to create a mere debt; &, therefore, the

Stat. of Limitations did not apply to an action to recover such sums; but where pltf. was entitled to payment of a sum of money from a person in Germany & authorised deft. to obtain such money & pay it to her, the transaction which the parties performed to enable deft. to acquire such money showed that he was not expected to account specifically for the money he received or the goods into which it was transformed or the proceeds of these goods, & this cause of action was subject to the Stat. of Limitations.—*COHEN v. COHEN* (1929), 42 C. L. R. 91; 3 A. L. J. 102; [1929] *Argus* L. R. 204.—*AUS.*

1761. *Add. Annotations*:—**Consd.** *Re* Mason (1928), 97 L. J. Ch. 321. **Refd.** *Re* Blake, *Re* Minahan's Petition of Right (1931), 100 L. J. Ch. 251.

1761a. — **Petition of right.**—Circumstances (see DESCENT, No. 336a, *ante*), in which:—**Held**: suppliants' petition was barred by Stat. Limitations, 1623 (c. 16).—**Re** MASON [1929] 1 Ch. 1; 97 L. J. Ch. 321; 139 L. T. 477; 44 T. L. R. 603; 72 Sol. Jo. 545, C. A.

*Annotations*:—**Consd.** *Re* Blake, *Re* Minahan's Petition of Right (1931), 100 L. J. Ch. 251. **Refd.** Anglo-Scottish Beet Sugar Corp'n., Ltd. v. Spalding Urban District Council, [1937] 3 All E. R. 335.

1761b. —.]—B. died in London in

1876, intestate & without any surviving issue. Under an order of the ct. dated 1883 B.'s personal estate was paid to the Crown. M., the suppliant, as legal personal representative of a grandson of B.'s paternal aunt, by this petition of right claimed to be entitled to the estate:—**Held**: Stat. Limitations, 1623, barred the claim, & also there were no facts alleged in the petition which established a trust in respect to any part of the money, stocks & funds constituting or representing the personal estate of the said B., or forming part of the consolidated fund.—**Re** BLAKE, *Re* MINAHAN'S PETITION OF RIGHT, [1932] 1 Ch. 54; 100 L. J. Ch. 251; 145 L. T. 42; 47 T. L. R. 357.

## Part VIII.—Fraud and the Statutes of Limitation.

1776. *Add. Annotation*:—**Refd.** *Lynn v. Bamber*, [1930] 2 K. B. 72.

1793. *Add. Annotation*:—**Refd.** *Lynn v. Bamber*, [1930] 2 K. B. 72.

1795. *Add. Annotations*:—**Dbtd.** *Lynn v. Bamber*, [1930] 2 K. B. 72. **Consd.** Naamlouze Vennootschap Handels-en-Transport Maatschappij *Vulcaan v. Ludwig Mowinckels Rederi A/S* (1937), 42 Com. Cas. 200. **Refd.** Board of Trade v. Cayzer, Irvine, [1927] A. C. 610; Ramdutt Ramkissendass v. Sassoon E. D. & C. (1929), 98 L. J. P. C. 58.

1797. *Add. Annotation*:—**Refd.** Townend v. Askern Coal & Iron Co., [1934] Ch. 463.

1798. *Add. Annotations*:—**Folld.** *Lagh v. Legh* (1930), 143 L. T. 151; *Lynn v. Bamber*, [1930] 2 K. B. 72.

1807a. —.]—Pltf. & deft. went through a form of marriage in 1922. Deft. had told pltf. that he had not previously been married, & in the pre-nuptial contract & marriage certificate he was described as a bachelor. In 1924 deft. denied a suggestion that he was a married man. In 1932 he answered a further suggestion by admitting a Gretna Green marriage which he said had not been legal. Deft. had, in fact, been legally married in 1900, but he had not seen his wife, nor heard from or of her for about 22 years before he met pltf. In an action for breach of promise & for fraud, deft. contended that in 1922 he thought that his wife was dead & that he was free to marry, & he denied that he had fraudulently concealed the fact that he had been previously married. As regards the breach of promise, he relied on Stat. Limitations. The jury were directed that if deft. had fraudulently concealed the fact that he was married & they were satisfied that pltf. did not know the true facts till within six years of the issue of the writ, they should find for pltf. The jury found for pltf. & judgment was entered accordingly.—**BEYERS v. GREEN**, [1936] 1 All E. R. 613.

1813. *Add. Annotations*:—**Consd.** *Gutsell v. Reeve*, [1936] 1 K. B. 272. **Refd.** *Aylott v. West Ham Corp'n.*, [1927] 1 Ch. 30; *Pratt v. Cook*

*Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51.

1814. *Add. Annotation*:—**Consd.** *Lynn v. Bamber*, [1930] 2 K. B. 72.

1815. *Add. Annotation*:—**Refd.** *Lynn v. Bamber*, [1930] 2 K. B. 72.

1816. *Add. Annotation*:—**Refd.** *Lynn v. Bamber*, [1930] 2 K. B. 72.

1817. *Add. Annotations*:—**N.F.** *Lagh v. Legh* (1930), 143 L. T. 151; *Lynn v. Bamber*, [1930] 2 K. B. 72.

1818. *Add. Annotations*:—**Consd.** *Lagh v. Legh* (1930), 143 L. T. 151. **N.F.** *Lynn v. Bamber*, [1930] 2 K. B. 72.

1819. *Add. Annotations*:—**Apld.** *Lagh v. Legh* (1930), 143 L. T. 151. **Consd.** *Lynn v. Bamber*, [1930] 2 K. B. 72; *Barnes v. Pooley* (1935), 153 L. T. 78.

1819a. —.]—In an action for an account where the plea of limitation is raised, a reply that there has been a fraudulent concealment of the true facts is a good answer to the plea, & the doctrine of equity will apply & time only begin to run from the time the truth became known.—**LEGH v. LEGH** (1930), 143 L. T. 151.

*Annotation*:—**Folld.** *Lynn v. Bamber*, [1930] 2 K. B. 72.

1819b. —.]—Since the Judicature Acts the equitable principle that active & fraudulent concealment on the part of deft. constitutes a good reply to Stat. Limitations is applicable even to pure common law causes of action; & even without the element of active concealment the Statute is no answer to a claim based on fraud.

In 1921 deft. sold pltf. plum trees warranted as "Purple Pershore." Pltf. some years afterwards, finding that the trees were not "Purple Pershore," brought an action in 1928 claiming damages for breach of warranty. Deft. denied the breach & pleaded the Stat. Limitations. In his reply pltf. alleged fraudulent representation by deft. & also fraudulent concealment of the

### PART VIII. SECT. 1, SUB-SECT. 2.—B.

ss. *When time begins to run*—*Conversion*—*From first intimation of person in possession.*—**PUGH v. ASHUTOSH SEN** (1928), L. R. 56 Ind. App. 93.—**IND.**

breach:—*Held*: (1) either of these pleas was relevant in answer to the Stat. Limitations; (2) pltf. upon the evidence had failed to establish the charge of fraud.—*LYNN v. BAMBER*, [1930] 2 K. B. 72; 99

**L. J. K. B. 504 ; 143 L. T. 231 ; 46 T. L. R. 367 ; 74 Sol. Jo. 298.**

**1820. Add. Annotations:—**Consd. Legh v. Legh (1930), 143 L. T. 151; Lynn v. Bamber, [1930] 2 K. B. 72.

## Part IX.—Penal Actions and Other Proceedings.

**1837a.** —.—.—|—When a statute gives a penalty to the King & to the informer, & the informer does not sue within the year the King may sue for the whole penalty at any time within two years.—*R. v. FRANKLIN* (1704), 8 Mod.

Rep. 220 ; 2 Ld. Raym. 1038 ; 3 Salk. 351 ;  
87 E. R. 971.

**1839a.** — Person suing for damages for pound-breach.]—*BEVIR v. BRITISH WAGON CO., LTD.* (1935), 80 L. Jo. 162.

## Part XI.—Process to Prevent Statutory Bar.

**1878.** *Add. Annotation:—*Refd. *Hunt v. Rice & Son, Ltd.*, [1937] 3 All E. R. 715.

1879. Add the following paragraph & citations:—  
Pltf., suing as assignee of a debt, issued a writ for money lent, without having given notice of the assignment to deft.; & he afterwards applied to amend his writ by adding the assignor as a party to entitle him to sue. Between the date of the issue of the writ & the application to amend, Stat. Limitations had barred the remedy, & a judge at chambers had given pltf. unconditional leave to amend the writ as of the date of its issue:—*Held*: pltf. ought not to be allowed to make such amendment, as it would take away from deft. a defence which had already accrued to him by virtue of the statute, & would change the substantial rights of the parties (1889), 61 L. T. 772, D. C.; *affd.* (1890), 34 Sol. Jo. 228, C. A.

**Annotation :—***Folld. Mabro v. Eagle, Star & British Dominions Insurance Co.*, [1932] 1 K. B. 485.

1879a. \_\_\_\_\_,]—The ct. will not, under R. S. C., Ord. 16, r. 2, allow a person to be added as pltf. to an action if thereby the defence of Stat. of Limitations would be defeated.—*MABRO v. EAGLE, STAR & BRITISH DOMINIONS INSURANCE CO., LTD.*, [1932] 1 K. B. 485; 101 L. J. K. B. 205; 146 L. T. 433. C. A.

**1882.** *Add. Annotation* :—**Overd. Mabro v. Eagle, Star & British Dominions Insurance Co.,**  
[1932] 1 K. B. 485.

1893. *Add. Annotation*:—**Consd. Marshall v. London Passenger Transport Board**, [1936] 3 All E. R. 83.

1894. *Add. Annotation*:—**Consd. Mabro v. Eagle, Star & British Dominions Insurance Co.,**  
[1932] 1 K. B. 485.

1894a. —. —Pltt., on Aug. 12, 1935, was injured in a collision between his bicycle & a tramcar. On Oct. 15, 1935, he issued a writ claiming damages for personal injuries & consequential loss sustained by reason of the negligence of defts., their servants or agents. The case was remitted to the county ct. & on Nov. 22, 1935, particulars of claim were delivered to which were added particulars of negligence setting up a case of negligent driving. On May 1, 1936, further particulars were by leave of the registrar added which set up a case of neglect to keep the tram track & highway in repair, describing the neglect as a breach of statutory duty. On appeal the county ct. judge reversed the decision of the registrar & disallowed the amendment:—*Held*: the amendment introduced a new case which if set up in an action commenced at the date of the amendment would have been barred by lapse of time, & the amendment must be disallowed; the indorsement of the writ did not contain sufficient particulars of the nature of the claim as it did not specify what duty the deft. had failed to perform. This defect had, however, been remedied by the statement of claim; the indorsement of the writ being in too general terms, the amendment could not be supported as being within the claim there made.—*MARSHALL v. LONDON PASSENGER TRANSPORT BOARD*, [1936] 3 All E. R. 83; 80 Sol. Jo. 893, C. A.

**1901a. Amendment of defence.]**—In my judgment, therefore, the Public Authorities Protection Act, 1893, is the Stat. of Limitations, & the only Stat. of Limitations which applies to this action. If pleaded it would have been a complete answer. It, & not the statute of James, is the statute which by way of amendment should have been pleaded in

**PART IX. SECT. 1, SUB-SECT. 2.**

1898 l. Who is "party grieved"—  
Provincial Treasurer of Alberta.]—R. v.  
CANADIAN NORTHERN RY. Co., [1923]  
A. C. 714; 93 L. J. P. C. 18; 39 T. L. R.  
691.—CAN.

which has not been renewed by order, the claim of ptlf. cannot be affected by the fact that the period limited by Stat. Limitations has run between the date of the issue of the writ & the date of the acceptance of service.—  
MORRISON v. BENTALL (No. 2), [1928]  
3 W. W. R. 663.—CAN.

disclaimed personal liability on the ground that the note in question was given by them as trustees of school section 44, that the money was obtained & used by them for school purposes, that piti. was aware of the facts & that at the time of action brought defts. had ceased to be trustees for the section:—*Held*: an order allowed, adding as parties the trustees of school section 44, should have been made only upon terms reserving defts.' rights under Stat. Limitations.—*DOWGLAS v. R. WARDING*, [1928] 1 D. L. R. 463; 59 N. S. R. 519.—*CAN.*

**PART XI. SECT. 1 SUB-SECT. 8.**

20. *Writ out of time—Acceptance of service.*—When a solr. has accepted service of a writ which was issued more than twelve months prior to the date of the acceptance of service &

PART XI. SECT. 2, SUB-SECT. 1.—  
C. (b).

d i. — *Reservation of rights under statute.*]—In an action against defts. as makers of a promissory note defts.



1925. But it is not pleaded. Accordingly, unless leave is now given to resp. to amend his defence by rectifying that omission, he has, in my judgment, no answer to this appeal. But Mr. Neilson applied for leave to amend his defence in that respect should amendment be necessary. I entirely agree

that in the circumstances leave to amend should be granted, & on terms which are not onerous (LORD BLANESBURGH).—*HARNETT v. FISHER*, [1927] A. C. 673; 96 L. J. K. B. 856; 137 L. T. 602; 91 J. P. 175; 43 T. L. R. 567; 71 Sol. Jo. 470; 25 L. G. R. 454, H. L.

## Part XII.—Pleading and Practice.

1934. *Add. Annotation* :—*Refd.* *Dismore v. Milton*, [1938] 3 All E. R. 762.

1935a. —.]—In an action for slander, it appeared from the statement of claim that, except in one instance, the alleged slanderous statements had been uttered more than two years before the issue of the writ. It has been ordered upon an application by summons that so much of the statement of claim as referred to the alleged slanderous statements, except that in the one instance above referred to, should be struck out :—*Held* : where it appears from a statement of claim that pltf.'s cause of action arose at a time before the period prescribed by the Statute of Limitations, it is not possible for deft. to have the statement of claim struck out on the ground that it discloses no cause of action, except in cases to which the Real Property Limitation Acts apply.—*DISMORE v. MILTON*, [1938] 3 All E. R. 762; 159 L. T. 381; 55 T. L. R. 20; 82 Sol. Jo. 695, C. A.

1946. *Add. Annotations* :—*Consd.* *Re Wilson, Ex p. Wilson v. Trustee*, [1937] Ch. 675. *Refd.* *Ward v. Tibbatts*, [1936] 2 All E. R. 656.

1948. *Add. Annotations* :—*Apld.* *Cheang Thye Phin v. Lam Kin Sang*, [1929] A. C. 670. *Expld.* *Elder v. Northcott*, [1930] 2 Ch. 422.

1960. *Add. Annotation* :—*As to* (1) *Consd.* *Re Wilson, Ex p. Wilson v. Trustee*, [1937] Ch. 675.

1969. *Add. Annotation* :—*Distd.* *Re Wheater*, [1928] Ch. 223.

1975. *Add. Annotation* :—*Consd.* *Lowe v. Bentley* (1928), 44 T. L. R. 388.

1976a. *Counterclaim need not be barred when action brought.*—*Stat. Limitations* 1623 (c. 16), s. 3, bars a counterclaim on a cause of action which arose more than six years before the delivery of the counterclaim, though less than six years before the issue of the writ in the action.—*LOWE v. BENTLEY* (1928), 44 T. L. R. 388; 72 Sol. Jo. 254.

1977. *Add. Annotation* :—*Refd.* *Lowe v. Bentley* (1928), 44 T. L. R. 388.

1985. *Add. Annotation* :—*Refd.* *Dismore v. Milton*, [1938] 3 All E. R. 762.

2002. *Add. Annotation* :—*Refd.* *Purnell v. Roche*, [1927] 2 Ch. 142.

2016. *Add. Annotation* :—*Refd.* *Campbell v. Pollak*, [1927] A. C. 732.

### PART XI. SECT. 7.

*sw. Fieri facias—Sale under—Property bought in by defendant—Claim not revived.*—*JONES v. HUTTON* (1853), 11 U. C. R. 554.—CAN.

### PART XII. SECT. 2.

*r.l.* —.]—*PULSIFER v. KING*, [1926] 1 D. L. R. 1006; 58 N. S. R. 412.—CAN.

### PART XII. SECT. 3.

1998 III. —.]—In an action for trespass & conversion alleged to have been committed between certain dates by entering upon pltf.'s land & cutting timber thereon, the combined effect of the statement of claim & of

*Stat. Limitations* was to confine pltf.'s right of redress to wrongs committed within the last seven months of the period alleged. The jury returned a general verdict in favour of pltf. :—*Held* : the evidence was such that the jury could not reasonably have found that a wrong had been committed within the period within which it must have been committed in order for pltf. to succeed.—*HUGHES v. BEBAN LUMBER Co.*, [1928] 1 D. L. R. 244; [1928] 1 W. W. R. 35; 39 B. C. R. 132.—CAN.

1998 IV. —.]—Deft. signed an authorisation to pltf. to make use of his name as next friend in an action against him for damages, & so became liable to pltf. for his account for legal

services, unless there was an agreement to the contrary. Deft. & his mother swore that there was such an agreement, & the trial judge found against deft. :—*Held* : on appeal, it still remained for pltf. to prove that his cause of action arose within six years, or, otherwise, that it was kept alive by payment, & the burden was not upon deft. to prove a negative, & there being clear proof that the cause of action did not arise within six years, deft.'s appeal must be allowed.—*FULLERTON v. BLENKHORN*, [1928] 1 D. L. R. 409; 59 N. S. R. 494.—CAN.

### PART XII. SECT. 4.

2005 IX. —.]—*CURTIS v. HARRIS*, [1928] 4 D. L. R. 317.—CAN.

## LITERARY AND SCIENTIFIC INSTITUTIONS.

## Part I.—Definitions and Nature.

- |   |   |
|---|---|
| <p>4. <i>Add. Annotation</i> :—<i>As to</i> (2) <b>Consd.</b> <i>Re</i> Prevost, Lloyds Bank, Ltd. <i>v.</i> Barclays Bank, Ltd., [1930] 2 Ch. 383.</p> <p>5. <i>Add. Annotations</i> :—<b>Consd.</b> <i>Institution of</i> Civil Engineers <i>v.</i> I. R. Comrs. (1931), 47</p> | <p>T. L. R. 466. <b>Refd.</b> <i>Midland Counties Institution of Engineers v. I. R. Comrs.</i> (1928). 14 <b>Tax Cas.</b> 285; <i>Master Mariners, Honour, able Co. of, v. I. R. Comrs.</i> (1932), 17 <b>Tax Cas.</b> 298.</p> |
|---|---|

## Part II.—Property.

- |  |  |
|--|--|
| <p>10a. <b>Power to purchase—Statuary—Construction of Chantrey bequest.</b>—<i>Re</i> CHANTREY'S WILL,</p> | <p>LEIGHTON <i>v.</i> HUGHES &amp; A.-G. (1889), 5 T. L. R. 554, C. A.</p> |
|--|--|

# LOAN SOCIETIES.

## PART I. SECT. 2.

**ss. Registration—Refusal of registrar to issue certificate—Mandamus.**—On appeal from the refusal of a prerogative writ of mandamus directed to the registrar of cos. compelling him to issue a certificate under Savings & Loan Association Act, 1927, c. 62, s. 80, to enable applt. to continue in business as an assocn. with guaranteed shares:—*Held*: the conditions which, under s. 80, had to be fulfilled before the certificate could be obtained had not been complied with, & the certificate & the writ of mandamus had been rightly refused.—*Re PIONEER SAVINGS & LOAN SOC. & Re REGISTRAR OF COMPANIES*, [1928] 1 D. L. R. 830; [1928] 1 W. W. R. 361; 39 B. C. R. 372.—CAN.

**sb. Membership—Whether question for arbitration.**—Savings & Loan Associations Act, 1926-27, c. 62, s. 20, does not remit to arbitration the question whether a person is or is not

a member.—*FURNESS v. GUARANTEE SAVINGS & LOAN ASSOCN.*, [1928] 3 D. L. R. 175; [1928] 2 W. W. R. 337.—CAN.

## PART II. SECT. 4, SUB-SECT. 1.

**sc. Instalment savings certificate—Application for cancellation—Misrepresentation by society.**—Deft. assocn., under Savings & Loan Assocns. Act, B. C., could issue four classes of shares, including "instalment shares" & "savings shares." Its agent, C., obtained from pltf. an application, on deft.'s printed form, for an "instalment savings certificate," & deft. issued to pltf. a certificate for "instalment shares." It had no power to issue an "instalment savings certificate." Pltf., after ascertaining his rights & obligations under the certificate issued to him, sued for cancellation of the application & certificate & for return of moneys paid, on the grounds, (a) that the application was a nullity;

(b) that it was for a savings certificate, & in view of the kind of certificate issued, was not accepted; & (c) misrepresentation by C.:—*Held*: the application should be declared null & void unless it was clearly established that by "instalment savings certificate" both pltf. & C. meant a certificate for a certain specific kind of share which deft. could issue; & the *onus* of establishing that their minds were *ad idem* as to this rested on deft.—*BAKER v. GUARANTY SAVINGS & LOAN ASSOCN.*, [1931] S. C. R. 199; [1931] 1 D. L. R. 968; *revsg.*, [1930] 3 D. L. R. 475.—CAN.

**st. Charge of interest for expenses—Statutory regulation.**—A loan co. limited by statute to a certain rate of interest for "expenses necessarily & in good faith incurred" cannot charge any higher rate of interest for expenses not so incurred.—*KELLIE v. INDUSTRIAL LOAN & FINANCE CORPN.*, [1937] 1 D. L. R. 57.—CAN.



## LOCAL GOVERNMENT.

NOTE.—See, now, Local Government Act, 1933 (c. 51), which came into force June 1, 1934. Statutory references in this Title should be checked with the Comparative Tables in Hart's "Local Government Act, 1933."

### Part I.—The Ministry of Health.

1. *Add. Annotations*.—*Distd. A.-G. v. Sunderland Corpn.* (1929), 46 T. L. R. 10. *Reffd. A.-G. v. Manchester Corpn.*, [1931] 1 Ch. 254.
5. *Add. Annotation*.—*Distd. A.-G. v. Sunderland Corpn.* (1929), 46 T. L. R. 10.

### Part II.—Local Authorities generally.

9. After this case add :—  
—.]—See Local Government Act, 1929 (c. 17), s. 10 (1).
13. *Add. Annotation*.—*Consd. R. v. Davies, Ex p. Penn* (1932), 48 T. L. R. 666.
- 14a. — Employment as roadman by county council—Office held under urban district council—Roads taken over by urban district council.—D. was prior to the passing of Local Government Act, 1929 (c. 17), employed as a roadman by the M. County Council, on a main road in the A. urban district. He was elected a member of the A. Urban District Council in 1928. When the

Local Government Act, 1929 (c. 17), came into force the A. Urban District Council claimed to exercise the functions of maintenance & repair in respect of county roads in the district, & D. was employed as before, his wages being now paid by the urban district council, which was entitled to be reimbursed by the county council.—*Held*: D. was disqualified for being elected or being a member of the A. Urban District Council under Local Government Act, 1929 (c. 17), s. 46, as the holder of a "paid office" under the Urban District Council.—*R. v. DAVIES, Ex p. PENN* (1932), 148 L. T. 19; 96 J. P. 416; 48 T. L. R. 666; 30 L. G. R. 419.

#### PART II. SECT. 3, SUB-SECT. 2.—A.

15 l. *Being concerned in any contract with authority*.—Deft. had been elected reeve of a township corpn. in Jan. 1918, & again in Jan. 1919, by acclamation, & continued to act as reeve until June 23, 1919, when he disclaimed the office, owing to proceedings having been taken to unseat him. A new election took place on July 14, 1919, when deft. was again elected reeve. At a meeting of the township council held on June 25, 1919, all claims which deft. had against the township corpn. were settled; & on July 3, 1919, deft. signed a receipt for \$48, "being in payment of . . . all accounts, claims & demands of every nature & kind against the said municipality".—*Held*: this release removed all possible disqualification of deft. in respect of any claims that he had against corpn., & he was not disqualified by Municipal Act, R. S. O., 1914, s. 53 (p), as a person having an interest in a contract with corpn.—*R. (DART) v. CURRY* (1919), 46 O. L. R. 297.—CAN.

15 ll. —.]—Resp.'s father was the agent of an insurance co. & employed resp. at a salary, but not on commission, as a canvasser. The father asked the city council to take a renewal of a policy, & resp. supported him in his request. The council decided to take the renewal, & a policy was issued & was in force at the time of the municipal election in Jan. 1923, at which resp. was a successful candidate for the office of alderman.—*Held*: resp. had no interest in any contract with the city corpn., & so was not ineligible as a candidate within sect. 53 (1) (p) of Consolidated Municipal Act, 1922.—*R. (GARDINER) v. KETCHUMSON* (1923), 53 O. L. R. 525.—CAN.

d l. —.]—In the year 1931, applt. held the office of alderman of the city of Montreal & was re-elected in 1932. Previous to his election he owned lots on Allard street, & in 1931, he built a

three-storey house thereon. Sometime in the early part of 1931 applt. suggested to the chief of police that this house would be suitable for a police sub-station, alleged to be needed; & after examination of the premises & reports by officials of the city, on Apr. 23, 1931, the city's notary received instructions to prepare a lease of the property at \$125 per month. On Apr. 27 applt. transferred his property to his daughter for a sum of \$9,500, payable in five years, nothing being paid on account, applt. reserving his *privilege de bailleur de fonds* & an hypothec on the property for the full amount. On June 6, 1931, a lease was signed between the city & applt.'s daughter for a term of ten years at \$125 for the first five years & \$150 for the other five years.—*Held*: applt. was disqualified as alderman of the city of Montreal, as, according to the facts of the case, he was "directly or indirectly interested" in the lease to which, by its terms, his daughter & the city were the parties.—*ANGRIGNON v. BONNIER & MONTREAL CITY*, [1935] S. C. R. 38; 1 D. L. R. 417.—CAN.

d ll. —.]—*Re ROWE*, [1937] 1 W. W. R. 392; 1 D. L. R. 478.—CAN.

sz. *Non-payment of taxes*.—In Aug. 1927, resp. purchased land in the township of G. The taxes for 1927, being then due & unpaid, were assumed by resp. In Oct. 1929, resp. agreed to convey the land to D. upon certain terms, one of which was that she should assume payment of the unpaid taxes.—*Held*: resp.'s taxes being at the time of the election in 1930 overdue & unpaid, he was not eligible to be elected a member of the township council or to sit or vote therein.—*R. v. SMUCK*, [1930] 3 D. L. R. 714; 65 O. L. R. 213.—CAN.

sz. —.] Town Act, R.S.S., 1930, provides, by sect. 19, that every person shall be eligible for election as mayor or councillor who is a British subject, etc., & not subject to any disqualifica-

tion under said Act or Controverted Municipal Elections Act. Sect. 20 provides that no person indebted to the town shall be qualified to be a member of the council.—*Held*: the fact that at the times of his nomination & election a person elected mayor had not paid the taxes levied against him did not disqualify him, taxes not being a debt unless expressly declared so by statute, & there being no such declaration in said Act.—*R. (ISMAN) v. TRAN*, [1936] 1 W. W. R. 405.—CAN.

sb. —.]—The Calgary Charter provides that any person having "any unsettled or disputed account with or claim against the city" shall not be capable of being elected or serving as mayor or alderman. At the time of the election of resp. as an alderman in 1935 for a two-year term expiring on Dec. 31, 1937, the business taxes imposed against her for 1934 & 1935 were unpaid & at the time of the commencement of the *quo warranto* proceedings herein said tax for 1936 was also unpaid.—*Held*: taxes are not contracts & "unsettled" does not necessarily mean "unpaid," & therefore, the non-payment of said tax did not constitute an "unsettled or disputed account" within said provision.—*R. (ARMSTRONG) v. WILKINSON*, [1937] 1 W. W. R. 394; 6 F. L. J. (Can.) 308.—CAN.

sd. *Violation of Municipal Act in expenditure of money*.—Four members of a township council voted for a resolution that the township should borrow \$100,000 from a Public Utilities Commission, but the resolution said nothing about the application of the money.—*Held*: not a breach of the Municipal Act, R. S. O., 1927, s. 314.—*R. v. LITTLE*, [1931] 3 D. L. R. 522; O. R. 353.—CAN.

st. *Person with claim against city—Claim for unemployment relief*.—*Re CALGARY CITY CHARTER*, [1933] 3 W. W. R. 385.—CAN.

**26a. Conviction—Local Government Act, 1933** (c. 51), s. 59 (1) (e).—On July 6, 1932, deft. was convicted of perjury & sentenced to be imprisoned for a period exceeding three months without the option of a fine. In an action under Local Government Act, 1933 (c. 51), s. 84, aforesaid for a declaration that deft., who was acting as a duly elected member of a local authority, was disqualified from so acting on the ground of her conviction and sentence within five years before her election:—*Held*: (1) upon the proper construction of Local Government Act, 1933 (c. 51), s. 59, deft., notwithstanding that she was, on the ground of that conviction & sentence, disqualified for election, was not thereby disqualified from acting as a member of the local authority to which she had been duly elected; (2) upon the true construction of the proviso to sect. 84 (1) of that Act, the "date on which he so acted" meant the earliest date after election on which he so acted & the period of limitation began to run from that date; accordingly, deft. having first acted as a member more than six months before the issue of the writ, the action did not lie.—*BISHOP v. DEAKIN*, [1936] Ch. 409; [1936] 1 All E. R. 255; 105 L. J. Ch. 193; 154 L. T. 691; 100 J. P. 201; 52 T. L. R. 284; 80 Sol. Jo. 165; 34 L. G. R. 345.

**27a. — — —**.—Pltf. sued deft. for a £50 penalty for acting as a comr. in the execution of a local Act without being qualified. Deft. proved that he was qualified in the particular manner specified by the Act, but did not prove that he had taken & subscribed the oath:—*Held*: a verdict was properly found for deft., since he was sued as acting as a comr. without being qualified, & not for acting as a comr. without having taken & subscribed the oath.—*TUPPER v. NEWTON* (1853), 14 C. B. 114; 2 C. L. R. 85; 22 L. T. O. S. 103; 17 J. P. 824; 2 W. R. 36; 139 E. R. 48.

**27b. — — —**.—A member of a local board, who having been concerned in a contract by the board has thereupon ceased to be such member by force of P. H. Act, 1875, Sched. II. r. 64, is a person disabled from acting as a member by a provision of the Act within r. 70, & if afterwards he does so act, he is liable to a penalty of £50.—*FLETCHER v.*

*HUDSON* (1881), 7 Q. B. D. 611; 51 L. J. Q. B. 48; 46 L. T. 125; 46 J. P. 372; 30 W. R. 349, C. A.

*Annotation*:—*Apld.* R. v. Rowlands, [1906] 2 K. B. 292.

**28. Add. Annotation**:—*As to* (3) *Consd.* R. v. Hendon Rural District Council, *Ex p.* Chorley (1933), 97 J. P. 210.

**39. Add. Annotation**:—*Refd.* Witham Outfall Board v. Boston Corpn. (1926), 136 L. T. 756.

**48a. — — — Increase to meet cost of living—Whether war bonus—Construction of local superannuation Act.**—The ct. held that increases in remuneration granted during the war to an employee to meet the increased cost of living were not, for the purpose of a local superannuation Act, "war bonuses granted as such."—*CANNON v. SOUTHWARK BOROUGH COUNCIL* (1929), 45 T. L. R. 403.

**48b. — — — Retrospective remuneration—Validity.**—*Re* MAGRATH, No. 86a, *post*.

**49. Add. Annotation**:—*Refd.* Brown v. Dagenham Urban Council, [1929] 1 K. B. 737.

**50. Add. Annotations**:—*Refd.* Brown v. Dagenham Urban Council, [1929] 1 K. B. 737; Fisher v. Oldham Corpn., [1930] 2 K. B. 364.

**52a. — — — After dismissal—Remuneration accrued due.**—*BROWN v. DAGENHAM URBAN COUNCIL*, No. 212a, *post*.

**54. Add. Annotation**:—*Consd.* Brown v. Dagenham Urban Council, [1929] 1 K. B. 737.

**59. Add. Annotation**:—*Refd.* *Re* Magrath, [1934] 2 K. B. 415.

**60. Add. Annotation**:—*Refd.* A.-G. v. Still (1927), 44 T. L. R. 102.

**61. Add. Annotation**:—*Refd.* *Re* Magrath, [1934] 2 K. B. 415.

**68. Add. Annotation**:—*Refd.* R. v. North Worcestershire Assessment Committee, *Ex p.* Hadley, [1929] 2 K. B. 397.

**69a. Resolutions contravening Trade Disputes & Trade Unions Act, 1927 (c. 22)—Duty of local authority.**—Prior to above Act various committees of a local authority passed resolutions, which were confirmed by the council, to the effect that certain of their employees be required to become members of one of the trade unions in the resolutions referred to. By above Act it was provided that it should not be lawful for any local or other public authority to make it a condition

#### PART II. SECT. 4.

**sa. Contract for public utilities—Charge of rates under.**—*Ex p.* MONCTON TRAMWAY ELECTRICITY & GAS CO. (N. B.), [1927] 3 D. L. R. 1112.—*CAN.*

**sb. Acceptance of tenders—Favouritism—Whether court will interfere.**—The fact that on the acceptance of tenders by a city council the alderman who voted for the acceptance of the highest tenders, & who comprised the majority of the council, were actuated in doing so by favouritism towards "closed shops"—*Held*: not to be a ground on which the ct. could interfere in the matter.—*HIGNELL v. WINNIPEG CITY*, [1933] 9 W. W. R. 193.—*CAN.*

#### PART II. SECT. 5, SUB-SECT. 1.—A.

**sd. Right to acquire—Under Ordinance 4, 1926.**—Ordinance 4, 1926, does not expressly or impliedly authorise a Health Board to acquire immovable property.—*MAYVILLE LOCAL ADMINISTRATION & HEALTH BOARD v. GIELINK* (1928), 49 N. L. R. 148.—*S. AF.*

#### PART II. SECT. 6.

**53 i. Duration of office—42 Vict. c. 1, s. 66.**—*LETTENEY v. DILLON* (1885), 18 N. S. R. (6 R. & G.) 146.—*CAN.*

**sd. Municipal employee retained after termination of employment by public utility Board—Liability for remuneration.**—An inquiry having been made under sect. 102 of Public Utilities Act, 1923, into deft. town's finances a recommendation was made by the board which was approved in accordance with sect. 104 of the Act. A subsequent estimate of the town's revenue & expenses provided \$625 for pltf.'s salary. The board forwarded to the town a copy of its order approving these estimates together with a covering letter pointing out that the board would not approve the retention of pltf.'s services after a certain date, the end of the period for which said salary was provided. The town, however, continued pltf.'s employment for nine months beyond that date. Pltf. knew of said notice from the board:—*Held*: the town was not liable to pltf.

for said nine months' salary or for one month's wages in lieu of notice of termination of his agreement.—*STEWART v. BEVERLY TOWN*, [1937] 2 W. W. R. 541; *reversd.*, [1937] 3 W. W. R. 239; 4 D. L. R. 221.—*CAN.*

#### PART II. SECT. 7.

**sz. Dates of meetings fixed at first meeting—Right to alter.**—The fact that a municipal council has exercised its discretionary power to fix the dates for its regular meetings to be held throughout the year, does not prevent it from subsequently advancing the date of one of said meetings, at least where it does so by unanimous resolution of all its members passed at a regular meeting.—*SHILOTO DRUG CO. v. HANNA*, [1931] 3 W. W. R. 108; 3 D. L. R. 567.—*CAN.*

#### PART II. SECT. 8.

**so. Cannot exercise powers reserved to municipal council as a whole.**—*SIMON v. GASTONGUAY*, [1931] 2 D. L. R. 75; 2 M. P. R. 470.—*CAN.*

of the employment, or continuance in employment, of any person that he should or should not be a member of a trade union; & that any such condition should be void. Shortly after the passing of above Act instructions were given by a committee that only men belonging to a specified trade union should be employed in respect of certain casual labour; & an employee, who was dismissed accordingly, obtained a declaration in the county court that his dismissal was illegal. A member of the council thereupon brought forward a motion having for its object that instructions should be given that the resolutions of the committees should cease to be operative; but the motion was defeated:—*Held*: in the circumstances the ct. should declare that it was not lawful for the local authority to require any person, as a condition of employment or continuance in employment, to become or to be a member of a trade union; *Semle*: it was not obligatory on the local authority upon the passing of the Act, to resolve that the resolutions of the committees were no longer to have effect.—*A.-G. v. BIRKENHEAD CORPN.* (1928), 93 J. P. 33; 27 L. G. R. 192.

SUB-SECT. 2.—ACCOUNTS AND AUDIT.  
(Vol. XXXIII., p. 19.)

*See, now*, Audit (Local Authorities) Act, 1927 (c. 31).

- 77a. — *Audit (Local Authorities) Act, 1927 (c. 31)*—*Appeal to Minister of Health—Discretion of Minister as to costs.*—The Div. Ct. having allowed an appeal on a case stated by the Minister of Health under above Act, raising the question whether or not resp., a district auditor, had rightly disallowed certain sums paid by applt., a local education authority, for paving the playgrounds of two non-provided schools:—*Held*: (1) on the construction of the provisions of sect. 2 of above Act, the questions of applt.' costs of the appeal & of resp.'s right to be paid his costs of the appeal out of the funds of applt., were in the discretion of the Minister of Health; (2) on the construction of these provisions, the ct. had power to grant resp. leave to appeal from its decision to the Ct. of Appeal.—*LANCASTER (COUNTY PALATINE)*

PART II. SECT. 9, SUB-SECT. 1.  
*sd. Debentures—Priority—Debentures issued by Lethbridge Northern Irrigation District.*—*HOME INVESTMENT & SAVINGS ASSCOON. v. LETHBRIDGE NORTHERN COLONISATION MANAGER.* [1927] 1 D. L. R. 437; [1927] 1 W. W. R. 1; 22 Alta. L. R. 338.—*CAN.*  
*se.* — *To be held as collateral security—Rights of holder.*—*Held*: the debentures of plff. municipal corpn. issued & placed in the lands of deft. commission were by Hydro-Electric Railway Act, 1914, 4 Geo. V. c. 31, s. 11 (2), to be held by the commission as collateral security to the commission's own bonds issued under sect. 6 This statutory duty was not interfered with by the subsequent legislation. Holding the debentures as collateral security implied making that use of them which was in practice made of collateral security.—*ST. CATHERINES CORPN. v. HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO.* [1928] 3 D. L. R. 200; 82

PART II. SECT. 9, SUB-SECT. 2.  
*o l.* — *Right to investigate payments made prior to period under audit.*—A clerk of a rural district council received, during the period from Mar. 1, 1920, to Sept. 30, 1925, a bonus in addition to his salary, & this bonus, he contended, had been duly granted to him. During that period the payments made to him were entered in the expenditure book & submitted to various inspectors of the Local Govt. Department, who passed them as correct, & such payments up to Oct. 1924, were audited by auditors of the said Department & certified as correct. In Nov. 1925, B., an auditor of the said Department, commenced his audit of the council's accounts for the two half-years ending respectively Mar. 31, & Sept. 30, 1925. He informed the clerk that the legality of the payment of the bonus had been questioned in the Ministry of Local Govt. by reason of the clerk's claim for superannuation:—*Held*: B. had jurisdiction to investigate payments made prior to the period under audit.—*WALSH v. LOCAL*

*COUNCIL v. CROWE* (No. 2), [1929] 1 K. B. 604; 98 L. J. K. B. 358; 140 L. T. p. 560; 93 J. P. p. 40; 45 T. L. R. p. 173; 27 L. G. R. p. 102, D. C.

*Annotation*:—*Refd.* *Stoke Newington Borough Council v. Richards* (1929), 45 T. L. R. 650.

- 77b. — *Appeal to Court of Appeal—Power of Divisional Court to grant leave.*—*LANCASTER (COUNTY PALATINE) COUNCIL v. CROWE* (No. 2), No. 77a, ante.
81. *Add. Annotation*:—*Apld.* *A.-G. v. London & Home Counties Joint Electricity Authority*, [1929] 1 Ch. 513.
83. *Add. Annotations*:—*Apld.* *Woolwich Corpn. v. Roberts* (1927), 96 L. J. K. B. 757. *Consd.* *Brown v. Dagenham Urban District Council*, [1929] 1 K. B. 737. *Distd.* *Field v. Poplar Corpn.*, [1929] 1 K. B. 750. *Apld.* *A.-G. v. Tynemouth Union*, [1930] 1 Ch. 616. *Consd.* *Re Magrath*, [1934] 2 K. B. 415. *Refd.* *R. v. Grain, Ex p. Wandsworth Grdns.*, [1927] 96 L. J. K. B. 563; *R. v. Health Minister, Ex p. Dore*, [1927] 1 K. B. 765; *A.-G. v. Smethwick Corpn.* (1932), 96 J. P. 105.
84. *Add. Citations*:—*affd.* (1927), 25 L. G. R. 347; *sub nom.* *WOOLWICH BOROUGH COUNCIL v. ROBERTS*, 96 L. J. K. B. 757; 91 J. P. 121; 43 T. L. R. 576; 71 Sol. Jo. 488, H. L.
- 84a. *Inspection of accounts—What may be inspected—"Vouchers"*—*Application forms of students applying for bursaries.*—Under Local Govt. Act, 1933 (c. 51), s. 224 (1), a right is given to all persons interested of inspecting "all rate books, account books, deeds, contracts, accounts, vouchers & receipts relating to the accounts" of a local authority prior to the annual audit by the district auditor. Application forms, as approved by the Board of Education, of students applying to the authority for bursaries or allowances are not "vouchers" within the sub-sect. & accordingly are not open to inspection thereunder.—*R. v. MONMOUTHSHIRE COUNTY COUNCIL, Ex p. SMITH* (1935), 153 L. T. 338; 99 J. P. 246; 51 T. L. R. 435; 79 Sol. Jo. 383; 33 L. G. R. 279, D. C.
- 84b. — *Accounts of board constituted by local Act.*—A board to provide & run omnibuses was constituted by a local Act which incorporated the enactments relating to audit of accounts & the incidental & consequential

GOVERNMENT & PUBLIC HEALTH MINISTER, [1929] 1 R. 377.—*IR.*

*sk.* *Submission of accounts to Public Utilities Board.*—Under sect. 107 of Public Utilities Act, 1923, which requires a municipality which is subject to the Board to submit annual estimates of its revenues & expenditures for the Board's approval, it is only "as long as any order of the Board continues in force" that such obligation exists, & since in the present case there was no evidence given of any such order of the Board, there was no ground for the application of sect. 107 & even with an order, there is nothing in sub-sect. (1) of sect. 107 to limit the town's authority to the terms of the estimates, & sub-sect. (2) seems to show that there was not intended to be any binding restriction upon a local authority such as the deft. until a second order had been made after failure to comply with the terms of a programme approved by the Board.—*STEWART v. BEVERLEY TOWN*, [1937] 3 W. W. R. 239.—*CAN.*



effects of audit. At the time the local Act was passed these provisions were contained in the Local Govt. Act, 1894 (c. 73), s. 94. Later, the 1894 Act was repealed, & in 1933 a Local Govt. Act was passed, of which sect. 283 (4) provided that the accounts of a local authority, & the auditor's report thereon, should be open to the inspection of any local govt. elector. Appct., as a local govt. elector, contended that he was entitled to such inspection, on the ground that the repeal of the 1894 Act did not affect the provision of the 1894 Act incorporated in the local Act, which had not been repealed, & that the provisions of sect. 283 (4) of the Act of 1933 were now incorporated in the local Act:—*Held*: (1) appct. was entitled to the inspection claimed; (2) in the circumstances, whether or not the board was a local authority, the inspection of the accounts of the board was governed by the Act of 1933, which was now the enactment relating to the audit of accounts & the incidental & consequential effects of audit.—*R. v. WEST MONMOUTHSHIRE OMNIBUS BOARD, Ex p. PRICE*, [1938] 1 All E. R. 220; 36 L. G. R. 156.

- 86a. — **Unauthorised allowance to county accountant—Relief under Audit (Local Authorities) Act, 1927 (c. 31), s. 2 (2).**—In view of the increased duties imposed in consequence of Finance Act, 1920 (c. 18), & the Roads Act, 1920 (c. 72), upon local authorities in the levying & collection of Road Fund licences as from Jan. 1, 1921, the Minister of Transport, in 1920, issued a circular to local authorities that he would be prepared to give the fullest consideration to any representation made to him as to increasing the salaries of their officers. Nothing was then done by the Durham County Council in the matter, but in 1925 that council resolved that the county accountant, upon whom the new duties had been imposed, should be paid an additional sum of £100 *per annum* as from Feb. 1, 1925. Nothing was then said with regard to the preceding years—1921 to 1925—during which the same duties had been performed. In 1931 the county council adopted a report of their committee recommending that as £1,575 had been received from the Minister for the supervision & control of the department by the county accountant, & as £800 only had so far been granted to that officer, he should be paid the sum of £700 out of the money so received, & accordingly that amount was paid to him. That payment was disallowed by the district auditor & the councillors who had voted for the recommendation were surcharged. On appeal from that decision it was sought by affidavits of members of the county council to show that the increase of salary granted to the county accountant in 1925 was provisional only, & that in respect of the period 1921–1925 the matter of his remuneration was still open to review:—*Held*: (1) there being nothing in the records of the county council to show that the grant of additional salary made in 1925 was provisional only, it was not open to the council to make the further payment in 1931 in respect of the years 1921–1925, & therefore the auditor was right in disallowing it as being retrospective & made without consideration; (2) in the circumstances relief

from the surcharge should be granted; (3) certain ratepayers who had appeared, as they were entitled to do under Public Health Act, 1875 (c. 55), s. 247 (6), before the auditor in support of their objection to the payment, were entitled, by implication, to appear on the hearing of the appeal to protect the disallowance they had obtained.—*Re MAGRATH*, [1934] 2 K. B. 415; 103 L. J. K. B. 660; *sub nom. LEE v. MCGRATH*, 151 L. T. 553; 50 T. L. R. 518; *sub nom. Re MCGRATH*, 78 Sol. Jo. 586; *sub nom. LEE v. MAGRATH*, 32 L. G. R. 380, C. A.

- 86b. — **Members voting for resolution—Warning by clerk of illegality.**—By a resolution dated Sept. 9, 1936, an urban district council resolved to make a contribution of £30 out of the rate fund in support of a march of unemployed persons to London to protest against the unemployment assistance regulations. The resolution was passed, although the clerk to the council advised that such a payment would be illegal & that the members of the council responsible therefor would be liable to be surcharged. On Sept. 23, the present applt. obtained an interim injunction in the High Ct. restraining the council from making the proposed contribution from the rate fund. On Sept. 28, the matter was further considered at a special meeting of the council when counsel's opinion was submitted to the meeting & a resolution was passed rescinding the minute of Sept. 9 authorising the contribution of £30, & agreeing to abide by the injunction. The council also authorised the clerk to instruct counsel to appear in ct. & consent to the injunction being made perpetual, but to object to the payment by the council of the costs incurred. The ct., however, ordered the council to pay the costs of the proceedings which had been brought about by the council's resolution of Sept. 9. The amount of the taxed costs was £65 5s. 8d., & in addition the costs of the London agents of the clerk to the council amounted to £19 16s. 4d. The bills of costs were presented to the next council meeting on Dec. 9, when it was resolved that the total costs of £85 2s. should be paid. Later, the district auditor was asked to surcharge that amount upon the members of the council responsible for the resolution of Sept. 9, & also on the members of the council who on Dec. 9 authorised payment of the costs. After consideration, the auditor found that the members of the council who passed the resolution of Dec. 9 had acted legally & properly, as the said costs consisted of debts legally & properly due by the council, & that the action of the members who voted in support of the resolution of Sept. 9 was not an act which called for surcharge under Local Govt. Act, 1933 (c. 51), s. 228 (1) (d), which imposed a duty on the district auditor "to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred." Thereupon this appeal was brought, & it was now contended that the members of the council who voted for the resolution of Sept. 9 were persons guilty of negligence or misconduct, & that the said sum of £85 2s. paid by the council was a loss or deficiency incurred by reason of that negligence or misconduct:—*Held*: as

members of the council who passed the resolution of Sept. 9 did so notwithstanding the advice of the clerk to the council that the proposed contribution was illegal, & without disputing the correctness of such advice, they were guilty of misconduct within Local Govt. Act, 1933 (c. 51), s. 228 (1) (d), & as the costs incurred amounted to a loss or deficiency caused by such misconduct, the said sum of £85 2s. should be surcharged upon those members who voted for the resolution of Sept. 9.—*DAVIES v. COWPERTHWAITHE*, [1938] 2 All E. R. 685; 159 L. T. 43; 102 J. P. 405; 36 L. G. R. 459.

86c. Appeal from auditor.—Right of ratepayers to appear.]—*Re MAGRATH*, No. 86a, ante.

91. *Add. Annotations*:—As to (1) *Consd. Clarke v. Epsom R. D. C.*, [1929] 1 Ch. 287; *Musical Performers' Protection Assn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485. *Refd. Stepney Borough Council v. Walker (John) & Sons, Ltd.*, [1934] A. C. 365.

96. *Add. Annotation*:—*Refd. Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401.

99. *Add. Annotations*:—*Consd. Scammell v. Attlee*, [1929] 1 K. B. 419. *Refd. Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1; *Monk v. Warbey*, [1935] 1 K. B. 75.

100. *Add. Annotation*:—*Refd. Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401.

105a. — Action on contract—Statutory requirements not fulfilled.]—*Pltf.*, clerk to comrs. of a local lighting & watching Act, drew up a contract to be executed by defts., who had accepted a tender for work to be done according to certain proposals of the comrs., one of which was that the contract should be prepared by the solr. to the comrs., at the expense of the contractors. Defts., as contractors, offered to execute the contract, but refused to pay *pltf.* his charges for drawing it up, on the ground that they were unreasonable. By the local Act the contract, on the part of the comrs., was required to be signed by five or more of them, which was not done, & by the metropolitan general paving Act, the comrs. are entitled to sue or be sued in the name of their clerk:—*Held*: *pltf.* could not sue defts. for refusing to execute the contract in his capacity of clerk, as the contract on the part of the comrs. had not been signed by five or more of them, when tendered to defts., as required by the local Act, & as the charges made by *pltf.* on defts. for preparing the contract were due to him in his individual character, & not as clerk to the comrs.—*CURLING v. JOHNSON* (1833), 10 Bing. 89; 3 Moo. & S. 496; 2 L. J. C. P. 264; 131 E. R. 839.

110. *Add. Annotation*:—As to (1) *Refd. Crediton Gas Co. v. Crediton U. C.*, [1928] Ch. 447.

110a. Transfer of parishes—Refusal of Minister to consider representations—*Mandamus*.]—A district council made an application to the

Minister of Health under Local Govt. Act, 1929 (c. 17), s. 46 (5), calling on him to consider representations that certain parishes should be transferred from the administrative area of the district council to that of an adjoining county borough. The county borough concurred in the representations, but they were opposed by the county council in whose area the district council & the parishes in question were situated:—*Held*: the Minister was entitled to refuse to consider the representations. Rule nisi for a *mandamus*.—*R. v. MINISTER OF HEALTH, Ex p. NEWHAVEN RURAL DISTRICT COUNCIL* (1933), 31 L. G. R. 372, D. C.

110b. Extension of time for proposals—Powers of Minister.]—*PURFLEET URBAN DISTRICT COUNCIL v. MINISTER OF HEALTH & ESSEX COUNTY COUNCIL*, No. 112a, post.

110c. What amounts to review of area.]—Proposals under Local Government Act, 1929 (c. 17), s. 46, were submitted to the Minister of Health by the Middlesex County Council. In Aug., 1933, the Minister wrote to the county council saying (*inter alia*) that he could not resist the conclusion on the present evidence that Hampton should be included in a larger area & going on to suggest that the proposals made should be modified by the formation of one large borough. The letter then confirmed certain alterations of the boundaries of Hampton. In Feb. 1934, an order was made in respect of the alteration of boundaries. In Nov. 1935, the Minister gave notice that he intended to make an order amalgamating Hampton with certain other areas:—*Held*: in the circumstances the Minister had made no previous decision or order in respect of the proposals made under Local Government Act, 1929 (c. 17), s. 46, & he was not barred from making an order now by the provisions of sect. 47 (1) of that Act.—*R. v. MINISTER OF HEALTH, Ex p. HAMPTON URBAN DISTRICT COUNCIL*, [1936] 3 All E. R. 169; 34 L. G. R. 604.

112a. Reference back by Minister for supplementary proposals—Validity.]—A county council, in discharge of their duties under Local Govt. Act, 1929 (c. 17), s. 46, convened a conference with representatives of the councils of the districts within their county preliminary to a review by the county council of the circumstances of the districts within the county & a consideration whether it was desirable to effect any of the changes referred to in the sect. On June 24, 1932, the county council sent to the Minister of Health a report with certain proposals for altering the boundaries & for uniting some of the parishes & districts. Objections to those proposals having been made by local authorities affected, a local inquiry was held. On May 10, 1933, the Minister wrote to the county council a letter containing his decisions with regard to the county council's proposals, & invited them to submit supplementary proposals with regard to one area which comprised a number of urban & rural districts, including the

PART II. SECT. 10.  
*nl. Reference to arbitration*.—Under 12 & 13 Geo. 5, c. 140 (*Ont.*).—*Arbitrators not entitled to submit questions for opinion of court except upon matters of law*.—*Re TOWNSHIP OF YORK &*

TOWNSHIP OF NORTH YORK (1925), 57 O. L. R. 644.—CAN.

PART II. SECT. 11, SUB-SECT. 1.—A.  
*sd. Restraint of exercise of powers*—

*Rights of ratepayers*.—A ratepayer is entitled to demand inquiry by the cts. into the acts of a municipality where grants or *ultra vires* acts are in question.—*SENECAL v. QUEBEC PAVING CO.*, [1934] 3 D. L. R. 507.—CAN.

urban district of Purfleet. The county council submitted supplementary proposals which were different from those suggested by the Minister, & those proposals, after a further local inquiry, were approved, with slight modifications, by the Minister, who made a draft order accordingly on Jan. 16, 1934. The Purfleet Urban District Council obtained a rule *nisi* for prohibition calling on the Minister to show cause why he should not be prohibited from making the above order. The council also obtained rules *nisi* for *certiorari* & *mandamus*:—*Held*: (1) there was nothing in the Act to prevent the Minister, before he reached a decision, from asking the county council to reconsider their original proposals & to submit such modified or altered proposals as they thought more suitable in all the circumstances; (2) the provision in sect. 46 (1) that the proposals were to be completed "before the 1st day of April, 1932, or such later date as the Minister may in any case allow," could not be construed as meaning that there must be a formal order by the Minister extending the time before any proposals could be submitted after that date. In such a case it was within the Minister's discretion to extend the time or to refuse to do so.

*Per LORD MACMILLAN*: It would be preferable when granting an extension of time that it should be dealt with expressly rather than left to implication.—*PURFLEET URBAN DISTRICT COUNCIL v. MINISTER OF HEALTH & ESSEX COUNTY COUNCIL* (1935), 105 L. J. K. B. 44; 52 T. L. R. 33; 79 Sol. Jo. 838; *sub nom.* *R. v. MINISTER OF HEALTH, Ex p. PURFLEET URBAN DISTRICT COUNCIL*, 154 L. T. 35; 99 J. P. 413; 33 L. G. R. 481, H. L.

*Annotation*:—*Folld. R. v. Minister of Health, Ex p. Hampton Urban District Council*, [1936] 3 All E. R. 169.

115. *Add. Annotation*:—*Refd. Oxfordshire County Council v. Oxford City Council*, [1938] 2 K. B. 415.

117a. — *Loss due to local Act.*—The Oxford Extension Act, 1928, which came into operation on Apr. 1, 1929, transferred from the county of Oxford to the city of Oxford parts of certain rural districts & parts of certain poor law districts, & directed that there should be an equitable adjustment of financial relations as between the county & the city in respect thereof. By virtue of Local Govt. Act, 1929 (c. 17), which came into operation on Apr. 1, 1930, one year after the first-mentioned Act, the county council of the said county became responsible for the maintenance of the district roads in these & other rural districts in the county, & for the administration of public assistance in these & other poor law districts in the county:—*Held*: (1) although the burden of the maintenance of district roads & of public assistance would not have been thrown upon the ratepayers of the county at all unless the Act of

1929 had come into force, yet such increase of that burden as might be attributable to the transfer of the above-mentioned areas from the county to the city was a consequence not of that Act but of the Oxford Extension Act, 1928, & that provision for it should, therefore, be made by an arbitrator appointed under the last-mentioned Act to determine what sum should be paid by way of financial adjustment by the city to the county in respect of the transfer of these areas; (2) regard being had to the maximum amounts payable by way of compensation under the Rules contained in Local Govt. (Adjustments) Act 1913 (c. 19), Sched., Part II., as amended by Local Govt. (County Boroughs & Adjustments) Act, 1926 (c. 38), s. 5, & to the fact that during the year intervening between the dates on which the Acts of 1928 & 1929 respectively came into force the county did not incur any liability in respect of these matters, that the sum payable by the city to the county as compensation should comprise in respect of roads the average annual increase of burden for twenty years, & in respect of public assistance the average annual increase of burden for fourteen years.—*OXFORDSHIRE COUNTY COUNCIL v. OXFORD CITY COUNCIL*, [1938] 2 K. B. 415; [1938] 1 All E. R. 801; 107 L. J. K. B. 724; 159 L. T. 73; 102 J. P. 219; 54 T. L. R. 529; 82 Sol. Jo. 272; 36 L. G. R. 299, C. A.; *reversd.* [1938] 4 All E. R. 721, H. L.

124. *Add. Annotation*:—*Refd. Oxfordshire County Council v. Oxford City Council*, [1938] 2 K. B. 415.

129a. — *Statutory relief from liability for road repair.*—In 1928 the parish of A., rural district of G., was on the extension of the boundaries of the county borough of C., transferred to that county borough. The burden thrown on the ratepayers of the rural district in meeting the cost of the maintenance of roads in their district in consequence of the transfer of the parish of A. was £1,150 *per annum*. The parish of A. had been, in the matter of roads, a beneficial parish to the rural district of G. In arbn. proceedings as to the amount of compensation to be paid:—*Held*: (1) the arbitrator was entitled & bound to take into account, in ascertaining the payment to be made by C. to G. the fact G. had been relieved of the cost of maintaining the roads in its district by reason of the statutory provisions in Local Government Act, 1929 (c. 17); & (2) the arbitrator could not award anything in respect of the period after Apr. 1, 1930, when Local Government Act, 1929 (c. 17), came into operation.—*GODSTONE RURAL DISTRICT COUNCIL v. CROYDON CORPN.* (1932), 102 L. J. K. B. 34; 148 L. T. 87; 96 J. P. 363; 48 T. L. R. 649; 30 L. G. R. 460, C. A.

*Annotation*:—*As to* (1) *Consd. Oxfordshire County Council v. Oxford City Council*, [1938] 2 K. B. 415.

## Part III.—The Parish.

176. *Add. Annotation* :—*Refd.* London (City) Corpn. v. London County Council (1930), 99 L. J. K. B. 577.

## Part V.—The Urban District.

191. *Add. Annotation* :—*Refd.* A.-G. v. Leeds Corpn., [1929] 2 Ch. 291.  
 196. *Add. Citations* :—[1927] 1 Ch. 128; 96 L. J. Ch. 38; 136 L. T. 235.  
 210. *Add. Annotation* :—*Consd.* Brown v. Dagenham Urban Council, [1929] 1 K. B. 737.  
 212a. ————]—(1) Under P. H. Act, 1875, s. 189, an urban district council have power to remove their clerk from his office at pleasure & without cause or notice, & this power cannot be negated or impaired by any provision as to notice to be given to terminate the employment in any contract of service entered into between the parties. (2) The clerk can maintain an action against the council for salary accrued due to him at the time of his removal from office.—*BROWN v. DAGENHAM URBAN COUNCIL*, [1929] 1 K. B. 737; 98 L. J. K. B. 565; 140 L. T. 615; 93 J. P. 147; 45 T. L. R. 284; 73 Sol. Jo. 144; 27 L. G. R. 225.

*Annotations* :—*Distd.* Field v. Poplar Corpn., [1929] 1 K. B. 750.  
*Refd.* McManus v. Bowes, [1938] 1 K. B. 98.

*See, now*, Local Government Act, 1933 (c. 51), s. 121.

- 215a. ———— *Inspection by agent.*]—A ratepayer in an urban district, who was also the secretary of the local ratepayers' assocn., appointed an accountant, who was not a ratepayer in the district, to inspect with him the books & accounts of the local authority under Public Health Act, 1875 (c. 55), s. 247 (4), & to report to the assocn. thereon. The officers of the council permitted the

accountant to inspect all the books & accounts to which Rating & Valuation Act, 1925 (c. 90), s. 60 (which expressly authorises inspection by an agent of the ratepayer), applied, but they declined to permit him to inspect the general books & accounts of the council, on the ground that he was not himself a "person interested," & that Public Health Act, 1875 (c. 55), s. 247, did not authorise a person interested to inspect by an agent. The books & accounts were produced to the ratepayers themselves :—*Held* : (1) a person interested was entitled under sect. 247 (4) to inspect by an agent, & (2) a rule for *mandamus* commanding the council to permit the accountant to inspect the books, must be made absolute. The remedy by prosecution of the officers of the council under sect. 247 (4) was not "equally convenient, beneficial & effectual" since it would not result in giving inspection of the books.—*R. v. BEDWELLTY URBAN DISTRICT COUNCIL*, *Ex p.* PRICE, [1934] 1 K. B. 333; 103 L. J. K. B. 152; 150 L. T. 180; 98 J. P. 25; 50 T. L. R. 91; 31 L. G. R. 430, D. C.

- 215b. ———— *Enforcement by mandamus.*]—*R. v. BEDWELLTY URBAN DISTRICT COUNCIL*, *Ex p.* PRICE, No. 215a, *ante*.  
 220. *Add. Annotation* :—*Generally*, *Refd.* *R. v. Grain*, *Ex p.* Wandsworth Grdns., [1927] 1 K. B. 540.  
 230. *Add. Citations* :—[1927] 1 K. B. 765; 96 L. J. K. B. 322; 137 L. T. 30; 91 J. P. 45; 43 T. L. R. 263; 71 Sol. Jo. 160; 25 L. G. R. 166.

## Part VII.—The Borough.

271. *Add. Annotation* :—*Refd.* Edwards v. A.-G. for Canada, [1930] A. C. 124.  
 277a. *Proceedings for declaration of disqualification—Limitation of action.*]—*BISHOP v. DEAKIN*, No. 26a, *ante*.  
 282. *Add. Annotation* :—*Refd.* Brown v. Dagenham Urban Council (1929), 98 L. J. K. B. 565.

303. *Add. Annotations* :—*Refd.* St. Nicholas Acons v. L. C. C., [1928] A. C. 469. *Mentd.* Stevens v. Willing & Co. (1929), 167 L. T. Jo. 178.  
 307. *Add. Annotation* :—*Refd.* A.-G. v. Poole Corpn., [1938] Ch. 23.  
 350. *Add. Annotation* :—*Distd.* *R. v. Transport Minister*, *Ex p.* H. C. Motor Works, [1927] 2 K. B. 401.

**PART VII. SECT. 2, SUB-SECT. 1.—A.**  
*sg. Jurisdiction—When court may interfere.*]—A municipal council is a legislative body having a limited & delegated jurisdiction. When it has acted within its jurisdiction, the ct. cannot interfere; the justness or fairness of its action cannot be questioned by the ct. When it goes beyond its jurisdiction, or when it is shown that members of the council are corruptly seeking to advance, by municipal legislation, their own ends, or those of some favoured individual, the ct. may interfere.—*Re HOWARD & TORONTO CORPN., Re SWEET & TORONTO CORPN.*, [1928] 1 D. L. R. 952; 61 O. L. R. 563.—CAN.

**PART VII. SECT. 2, SUB-SECT. 1.—B. (a).**  
*ex. Implied power to insure—Power exercised for ulterior purpose—Whether contract valid.*]—*QUEENSLAND INSURANCE CO., LTD. v. SUBIACO MUNICIPALITY* (1927), 30 W. A. L. R. 32.—AUS.

**PART VII. SECT. 2, SUB-SECT. 1.—B. (e) i.**  
 346 *III.* ————]—*R. v. COUNCIL OF THE TOWN OF CHARLEVILLE*, *Ex p.* CORONES, [1928] S. R. Q. 155.—AUS.

**PART VII. SECT. 2, SUB-SECT. 1.—C.**  
*e i.* ———— *Unauthorised expendi-*

*ture.*]—A councillor having acted in good faith & under a misunderstanding cannot be held liable for unauthorised expenditure in connection with public works.—*TACHE RURAL MUNICIPALITY v. MARCOUX*, [1936] 2 D. L. R. 536.—CAN.

**PART VII. SECT. 2, SUB-SECT. 2.—B.**  
*q* (p. 63) i. ————]—*R. (HARDING) v. BENNETT* (1896), 27 O. R. 314.—CAN.

*bb i.* ———— *Necessity for residence in ward—Candidate cannot be resident of two wards.*]—*HOKANSON v. LAMPLE (Man.)*, [1927] 1 W. W. R. 725.—CAN.

403. *Add. Annotation*:—*Refd.* Clark's Appeal (1937), 26 Ry. & Can. Tr. Cas. 61.

473. *Add. Annotation*:—*Refd.* Burnham-on-Sea Urban District Council v. Channing (1933), 77 Sol. Jo. 177.

508a. *Senior sanitary inspector—Remuneration—Reduction—Conditions precedent.*—A borough council reduced the salary of the senior sanitary inspector. They had not dismissed him nor had he resigned, & he did not consent to the reduction. The council did not obtain the unconditional consent of the Minister of Health to the reduction:—*Held*: the council had no power to make the reduction.—*FIELD v. POPLAR CORPN.*, [1929] 1 K. B. 750; 98 L. J. K. B. 575; 140 L. T. 691; 93 J. P. 157; 45 T. L. R. 333; 73 Sol. Jo. 158; 27 L. G. R. 370.

549. *Add. Annotation*:—*Refd.* A.-G. v. Leeds Corpn. (1929), 99 L. J. Ch. 9.

550. *Add. Annotation*:—*Refd.* A.-G. v. Leeds Corpn., [1929] 2 Ch. 291.

PART VII. SECT. 2, SUB-SECT. 2.—C. (b).

r i. — *Registrar of births, deaths, & marriages.*—The functions of parish councils were transferred to the county councils under Local Government (Scotland) Act, 1929 (c. 50), s. 1. These functions included the election of a registrar of births, deaths, & marriages for each parish on the occurrence of a vacancy in that office; the levying of the amount required for payment of the registrar's remuneration & the payment thereof, subject to the right of the registrar to initiate, through the Registrar-General, an application to the sheriff for an increase in his remuneration; & power to the county council to apply to the sheriff for removal of the registrar on the grounds of failure or incompetence to perform his duties. The county council issue no instructions to, & have no control or supervision over, the registrar, who is responsible for the performance of his duties to the Sheriff & the Registrar-General. The registrar is not an officer or servant of the county council for the purpose of superannuation:—*Held*: a registrar of births, deaths, & marriages was disqualified under sect. 9 (2) of the 1889 Act for membership of the county council, in respect that his office was held "under" the county council within the section, in view of the council's powers of election, payment, & initiation of proceedings for removal.—*BLACK v. LANARKSHIRE COUNTY COUNCIL*, [1931] S. C. 561.—SCOT.

PART VII. SECT. 2, SUB-SECT. 2.—C. (c).

f (p. 66) i. — — — — —.]—*R. (HARDING v. BENNETT)* (1896), 27 O. R. 314.—CAN.

d (p. 67) i. — — — — —.]—A member of a municipal council who had at the time of his election a claim for payment for services which he had performed for the corpn. is ineligible under Municipal Act, R. S. O., 1927, s. 53 (1) (p), to be elected or sit or vote, notwithstanding that the services were rendered to save the corpn. money, & notwithstanding how the payment is designated.—*R. v. DEAN*, [1932] 1 D. L. R. 324; O. R. 40.—CAN.

m (p. 68) i. S. P. ELLIOTT v. ST. CATHERINES MUNICIPAL CORPN. (1908), 18 O. L. R. 57; 13 O. W. R. 89.—CAN.

PART VII. SECT. 2, SUB-SECT. 3.

eg. *Disqualification—Receipt of unemployment relief.*—Persons in receipt of unemployment relief are disqualified from holding the office of mayor or alderman.—*Re MAYOR & ALDERMEN (QUALIFICATION FOR) REFERENCE*, [1934] 1 D. L. R. 55.—CAN.

PART VII. SECT. 2, SUB-SECT. 4.—A.

447 i. *Qualifications—Business assessment—What amounts to assessment.*—

PART VII. SECT. 3, SUB-SECT. 2.—A.

p i. — *Necessity for statutory authority.*—The payment of remuneration or indemnities to members of a municipal council for services performed or expenses incurred by them is illegal unless expressly authorised by statute. The acceptance by deft. councillors of mileage for trips made by them with respect to the purchase & distribution of "relief" fodder:—*Held*: the payment of "further or other remuneration" than that provided for by Rural Municipality Act, R. S. S., 1930, & therefore, they were liable to the penalties provided for by sect. 49 thereof.—*ST. JOHN v. ZERFING*, [1932] 3 W. W. R. 605.—CAN.

sy. *Suspension—Municipal Act, R. S. N. S., 1923, s. 118—Not applicable to office held during good behaviour.*—*MCDONALD v. MCKAY*, [1930] 4 D. L. R. 500; *revg.*, [1930] 2 D. L. R. 50.—CAN.

PART VII. SECT. 3, SUB-SECT. 2.—D.

sj. *Secretary-treasurer—Appointment to run till successor appointed—Right to notice.*—Pltf. was appointed secretary-treasurer of deft. municipality under a bye-law which provided for the appointment of certain officials "for the year 1926, or until their successors be appointed." By another bye-law passed on Feb. 3, 1927, a successor to pltf. was appointed; but no notice of dismissal was given pltf., & he sued for the salary for the month of Feb. 1927:—*Held*: the meaning of the bye-law appointing pltf. was that his hiring was for the whole of the year 1926 & thereafter until his successor was appointed; & therefore, his contract came to an end on the appointment of his successor, & he was entitled to be paid, with respect

550a. *Maintaining printing, bookbinding & stationery works—Intra vires.*—A corpn., whose statutory duties imposed upon them an expenditure of between \$5,000 & \$8,000 annually on printing, stationery, & bookbinding, resolved to establish a centralised system whereby instead of each department sending out its own printing work & making its own stationery purchases, a printing, stationery, & bookbinding department should be organised employing direct labour under a manager on corpn. premises, & printing & other machinery should be purchased, involving a capital outlay of \$1,000 & an annual expenditure of about \$1,420. An action was brought by the A.-G. at the relation of a ratepayer claiming a declaration that it was unlawful & *ultra vires* the corpn. & contrary to the provisions of Municipal Corporations Act, 1882 (c. 50), to expend any part of the general rate fund of the borough for the purpose of establishing or carrying on a printing, bookbinding, or stationery works & an injunction to restrain them from so doing:—*Held*: (1) the formation of a

to Feb. only for the time during that month that he rendered services.—*BLAKELEY v. CHARLESWOOD RURAL MUNICIPALITY*, [1928] 2 D. L. R. 657; [1928] 1 W. W. R. 828; 37 Man. L. R. 331.—CAN.

PART VII. SECT. 3, SUB-SECT. 3.

q i. — — — — —.]—A town council may dismiss its officers without notice & without cause.—*NEWBY v. BROWNLEE* (1916), 34 W. L. R. 278; 10 W. W. R. 249.—CAN.

q ii. S. P. WILSON v. YORK (1881), 46 U. C. R. 289.—CAN.

q iii. — — — — —.]—*LARKINS v. SUMMERSIDE*, [1928] 4 D. L. R. 841.—CAN.

r i. — *B. C. Municipal Act.*—*ZEIGLER v. VICTORIA CITY*, [1922] 1 W. W. R. 75; 70 D. L. R. 722; 30 B. C. R. 389.—CAN.

si. — — — — — *Validity of resolution.*—Where the necessary majority could only be obtained by including the vote of an alderman who had attended meetings at which the question of dismissal had been considered, but who had not been present at a meeting at which important evidence was taken:—*Held*: the resolution of dismissal was null & void.—*FOSTER v. HALIFAX*, [1926] 1 D. L. R. 125; 57 N. S. R. 268.—CAN.

si. — — — — — *Right of—Delegated by council to departmental heads.*—The municipal council of Sydney passed a resolution providing that the discharge or disrating or suspension of any employee should be left in the hands of the heads of the respective departments subject to appeal to the town clerk, whose decision was to be final. An employee who was subsequently dismissed by a departmental head brought an action against the council for wrongful dismissal:—*Held*: the council had power to delegate its authority to discharge employee; the power given to departmental heads in that respect was revocable, & the council had not denuded itself of its authority & the dismissal was lawful.—*BAYLY v. MUNICIPAL COUNCIL OF SYDNEY* (1927), 28 S. R. N. S. W. 149; 45 N. S. W. W. N. 40.—AUS.

PART VII. SECT. 4.

r i. — *Funds in hand to meet payment—Refusal of corporation to accept goods.*—*NEPTUNE METER CO. v. HALIFAX CITY* (1909), 7 E. L. R. 2.—CAN.

department to do the printing, bookbinding, & stationery work of the corp'n. was incidental to or consequential upon the carrying out of the corp'n.'s statutory duties & was not therefore *ultra vires*; (2) the expenses of forming & carrying on the department were expenses "necessarily incurred in carrying this Act into effect" within Municipal Corporations Act, 1882 (c. 50), Sched. V., Part II., para. 12, & were therefore payments authorised to be made out of the general rate fund by sect. 140 of the Act. It was immaterial that the expenditure on machinery was of a capital nature, as there were payments authorised in Sched. V. on other matters which involved capital expenditure.—*A.-G. v. SMITHWICK CORPN.*, [1932] 1 Ch. 562; 101 L. J. Ch. 137; 146 L. T. 480; 96 J. P. 105; 48 T. L. R. 227; 30 L. G. R. 117, C. A.

**557a.** — *Improvement of navigation.*—The corp'n. of N. restrained from soliciting, at the expense of the borough fund a bill in Parliament to enable them to improve the navigation of the river W.—*A.-G. v. NORWICH CORPORATION* (1851), 21 L. J. Ch. 139; 18 L. T. O. S. 58, L. JJ.; *previous proceedings* (1848), 16 Sim. 225.

*Annotations* :—*Consd.* Munt v. Shrewsbury & Chester Ry. Co. (1850), 13 Beav. 1. *Appl.* *A.-G. v. Plymouth Corp'n.* (1853), 1 W. R. 445. *Refd.* *A.-G. v. Wigan Corp'n.* (1854), Kay, 268.

**643.** *Add. Annotation* :—*Distd.* Westminster Coaching Services, Ltd. v. Piddlesden, Hackney Wick Stadium, Ltd. v. Piddlesden (1933), 97 J. P. 185.

**662.** *Add. Annotation* :—*Refd.* Brown v. Dagenham Urban Council, [1929] 1 K. B. 737.

**662a.** — *Contribution to superannuation fund—Deduction from bonus.*—By sect. 4 of Tees Conservancy Act, 1907, every officer & servant as therein specified "shall contribute annually for the purposes of this Act a per-

centage amount of his salary or wages according to the scale laid down by this Act, such amount to be from time to time deducted from the wages or salary payable to him & to be carried to & form part of the superannuation fund" established by the Act. From 1915 onwards the Tees Comrs. paid a bonus to their employees, but, not considering the bonus as wages or salary for the purpose of the superannuation fund, made no deductions from it for the fund. In 1933 the Ct. of Appeal held that such bonus was wages or salary & that the superannuation allowances payable under the Act were to be calculated on that footing:—*Held*: there was nothing in sect. 4 of the Act which imposed on the employees an obligation to pay contributions to the fund otherwise than by permitting the Comrs. to make the authorised deductions from wages or salary. Accordingly, in the case of their superannuated employees, the Comrs. had no power to recover from them the amount of the deductions from bonus which they had failed to make, or to deduct such amount from the superannuation allowances payable. In the case of employees still employed the Comrs. were only entitled to make in each year the deductions from wages or salary (including bonus) authorised for that year, & could not recover the amount which they had failed to deduct in earlier years; further, the claim of the employees for unpaid superannuation allowance was subject to the limitation of six years under Limitation Act, 1623 (c. 16), because the claim was against a common fund, enforceable by action on the case & not by action for debt on the statute.—*TEES CONSERVANCY COMRS. v. JAMES*, [1935] Ch. 544; 104 L. J. Ch. 260; 153 L. T. 146; 99 J. P. 149; 51 T. L. R. 219; 33 L. G. R. 124.

*Annotation* :—*Refd.* Jones v. London County Council, [1936] Ch. 50.

## Part XII.—The County.

**699.** *Add. Annotations* :—*As to* (1) *Consd.* Collins v. Whiteway, [1927] 2 K. B. 378. *Refd.*

*Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579.

### PART VII. SECT. 5, SUB-SECT. 1.— B. (a) ix.

*sk.* *Building prison.*—*R. v. NEWCASTLE JJ.* (1830), Dra. 214.—*CAN.*

*so.* *Grants made under "general welfare" clause.*—The making of the money grants in question herein, made by the city of Edmonton, under resolutions of the council, to certain organisations:—*Held*: to be within the powers of the council, under the "general welfare clause" of the charter which provides that "The council may make bye-laws and regulations for the peace, order, good government, & welfare of the City. . . ." The meaning of "bonus" & "bonusing" in the Edmonton Charter, 1913, is the popular or common use of the terms in municipal charters, viz. aid & the giving of aid in some form or other to induce or entice some undertaking to establish or maintain itself within the city. The grants in question herein were not "bonuses," & therefore, could be made by resolution of the council without submission to the burgesses for their assent.—*WARD v. EDMONTON CITY*, [1932] 3 W. W. R. 461.—*CAN.*

### PART VII. SECT. 5, SUB-SECT. 3.

1 l. — *Where* loan bye-laws of a municipality recite that funds for repayment are to be raised by taxing both land & improvements, a bye-law taxing land alone is valid since the Municipal Act, R.S.B.C., 1924, gave express power to exempt improvements from taxation.—*MACDONALD-BUCHANAN v. COLDSTREAM*, [1935] 1 D. L. R. 213; 49 B. C. R. 163.—*CAN.*

### PART VII. SECT. 8, SUB-SECT. 1.

*n.* *Varied*, 9 Alta. L. R. 343.

### PART VII. SECT. 8, SUB-SECT. 3.— C. (e).

*n* 1. — *To restrain increase of remuneration of council.*—An action for an injunction restraining a municipal council from acting on a bye-law passed by it increasing the remuneration of the members of the council does not lie.—*ROBERTSON v. TORONTO*, [1930] 4 D. L. R. 793; 66 O. L. R. 38.—*CAN.*

### PART X. SECT. 2, SUB-SECT. 1.

*sk.* *Reeve—Qualifications—Property—"Rated."*—Resp.'s name appeared on the assessment roll as the owner of land of the "taxable assessed value" of \$420, & as the owner of exempted buildings thereon of the value, according to the roll, of \$290:—*Held*: the word "rated" in Municipal Act does not mean "assessed" or "taxed"; therefore resp. was qualified for election as reeve.—*HUNT v. FORTNEY*, [1937] 1 W. W. R. 609; 2 D. L. R. 792; 45 Man. L. R. 1; 6 F. L. J. (Can.) 309.—*CAN.*

### PART X. SECT. 4, SUB-SECT. 1.

*sq.* *Order for payment by Municipal & Public Utility Board—Validity.*—*Re* ST. VITAL RURAL MUNICIPALITY & MUNICIPAL & PUBLIC UTILITY BOARD, [1936] 2 W. W. R. 382; 3 D. L. R. 765; 44 Man. L. R. 185.—*CAN.*

### PART XII. SECT. 3, SUB-SECT. 1.

*so.* *Allowances.*—In a special case to determine the liability of a county council for payment of the allowances

**701a. Expenses of councillors.]**—The expenses permitted to be defrayed by a county council under Local Government Act, 1933 (c. 51), s. 294 (1), which provides that "a county council may defray any expenses necessarily incurred by members of the council in travelling to & from meetings of the council," are limited to expenses of actual conveyance or transport & do not include expenses incurred by members for the purpose of bodily subsistence required by them by reason of absence from home on account of travelling to & attending meetings & returning therefrom.—**GLAMORGAN COUNTY COUNCIL v. AYTON**, [1936] 3 All E. R. 210; 155 L. T. 509; 100 J. P. 483; 53 T. L. R. 35; 80 Sol. Jo. 877; 34 L. G. R. 549.

A. In General (p. 107).

**717a. Who may vote—Education Act, 1921 (c. 51), s. 9.]**—Under sect. 9 of Education Act, 1921 (c. 51), the county councillors elected for an electoral division consisting wholly of a borough or urban district whose council are a local education authority for the purpose of elementary education, or of some part of such a borough or district, are prohibited from voting in respect of any question arising before the county council which relates to elementary education. Under sect. 75 of Local Govt. Act, 1933 (c. 51), a county councillor elected for an electoral division consisting wholly of a county district or of some part of a county district shall not vote on any matter involving only expenditure for which the county district is not for the time being liable to be charged :—*Held* : both these prohibitions applied to voting not only at meetings of the county council but also at meetings of the education committee of the council & any sub-committee thereof, & the second prohibition under Local Govt. Act, 1933 (c. 51), applied to voting both at meetings of the council itself & at meetings of the public health & housing committee & of the maternity & child welfare sub-committee of that committee on all questions of maternity & child welfare.

Pltf. as a member of the Essex County Council for an electoral division of Colchester, a borough the council of which was the local education authority for the purposes of elementary education, & a separate district for the purposes of the Maternity & Child Welfare Act, 1918 (c. 29), was therefore within the above prohibitions, & could not vote at any meetings of these committees or sub-committees on any matters delegated or referred to them.—**ALDERTON v. ESSEX COUNTY COUNCIL**, [1937] Ch. 541; [1937] 3 All E. R. 219; 106 L. J. Ch. 314; 157 L. T.

100; 101 J. P. 434; 53 T. L. R. 834; 81 Sol. Jo. 528; 35 L. G. R. 409.

**717b. — Local Government Act, 1933 (c. 51), s. 75.]**—**ALDERTON v. ESSEX COUNTY COUNCIL**, No. 717a, *ante*.

**718. Add. Annotation :—Apld. A.-G. v. London & Home Counties Joint Electricity Authority**, [1929] 1 Ch. 513.

SUB-SECT. 1.—THE CLERK OF THE PEACE AND OF THE COUNTY COUNCIL.

(Vol. XXXIII., p. 108.)

NOTE.—These offices are now separate.

See Local Government (Clerks) Act, 1931 (c. 45), & references in MAGISTRATES, Part XI. Sect. 3, sub-sect. 2, *post*.

**735. Add. Annotations :—As to (3) Consd. A.-G. v. Sharp** (1930), 99 L. J. Ch. 441. *Generally*, *Refd.* Damps Selsk Svendborg v. London, Midland & Scottish Ry. Co. (1929), 20 Ry. & Can. Tr. Cas. 67.

**754a. Proceeds of local taxation licences & Exchequer grants—Discontinuance of grants—Effect of Local Government Act, 1929 (c. 17), s. 85.]**—An order was made in 1891 which provided for the equitable distribution of the proceeds of local taxation licences & certain grants between the Lancashire County Council & the councils of certain county boroughs. By the operation of Local Government Act, 1929 (c. 17), the grants were discontinued, but the proceeds of the local taxation licences remained distributable. The question was raised by special case whether upon the proper construction of Local Government Act, 1929 (c. 17), s. 85 (5), the order ceased to have effect altogether or only so far as it related to the discontinued grants :—*Held* : the proper construction of the sub-section was that it required a new agreement to be entered into in the manner therein prescribed.—**LIVERPOOL CORPN. v. LANCASHIRE COUNTY COUNCIL**, [1937] Ch. 190; [1936] 3 All E. R. 945; 106 L. J. Ch. 113; 156 L. T. 68; 101 J. P. 107; 53 T. L. R. 164; 80 Sol. Jo. 1012; 35 L. G. R. 123, C. A.

SUB-SECT. 5.—ACCOUNTS AND AUDIT (p. 113).

**758a. Right of inspection—By agent—Minutes.]**—The appct. desired by an agent skilled in accounts to inspect certain matters involving accounts & finance in the minutes of a county council. The county council refused to allow the agent to inspect the minutes, whereupon a rule *nisi* was obtained for a writ of

set forth in Local Government (Scotland) Act, 1929, s. 17 (1), & Sched. IV. :—*Held* : (1) school management committees, district councils, & joint committees are committees of the county council; (2) on the terms of the council's resolution adopting sect. 17, which bore that the rates were to be the "maximum rates," the members of the county council & of its committees & sub-committees were entitled in all cases to payment of the allowances authorised by sect. 17 (1) at the maximum rates fixed by Sched. IV.; (3) the words "time necessarily lost

from ordinary employment" in sect. 17 (1) & Pt. III. of Sched. IV., imported a contract of service &, accordingly, the right to the allowances prescribed by Pt. III. was limited to persons whose attendance at meetings would involve loss of wages; (4) railway service in the sense of Pt. I. of Sched. IV. meant a railway service which was direct & reasonably expeditious.—**FIFE COUNTY COUNCIL v. ARBUCKLE**, [1932] S. C. 68.—SCOT.

*sp. —.*]—A county council having resolved to pay allowances under Local Govt. (Scotland) Act, 1929,

s. 17 (1), a claim was made by one of its members, who was a member of a district council for one of the districts of the county & also of a joint committee of a town council & district council, for payment of expenses incurred in attending meetings of these bodies :—*Held* : a district council & a joint committee are not committees or sub-committees of the county council, & accordingly, a member of these bodies is not entitled to the allowances authorised by sect. 17 (1).—**MIDLOTHIAN COUNTY COUNCIL v. ALBERT**, [1934] S. C. 392.—SCOT.



*mandamus* to issue to the county council to allow inspection by such agent. The county council later withdrew their opposition. The ct. upon a full statement of the position made the rule absolute.—R. v. GLAMORGANSHIRE

COUNTY COUNCIL, *Ex p.* COLLIER, [1936] 2 All E. R. 168; 155 L. T. 31, D. C.

759. *Add. Annotation* :—*As to* (1) *Consd.* Aylott v. West Ham Corp., [1927] 1 Ch. 30.

PART XII. SECT. 7.

*st. Action for damage to bridge.*—The corp., of a county can maintain an action for damages to, or destruction of, a bridge lying within its limits.—WELLINGTON COUNTY CORPN. v. WILSON (1865), 16 C. P. 124.—CAN.

## LUNATICS AND PERSONS OF UNSOUND MIND.

NOTE.—The cases in this Title must be read subject to the provisions of Mental Treatment Act, 1930 (c. 23), by which the term "asylum" is replaced by "mental hospital"; "pauper" by "rate-aided person," "rate-aided patient" or "rate-

aided" & "lunatic" (except criminal lunatic & lunatic outside England), by "person of unsound mind," "person," "patient," "patient of unsound mind" or "of unsound mind," or such other expression as the context requires.

## Part I.—In General.

1. To cross-references before this case add "See, also, Mental Deficiency Act, 1927 (c. 33), s. 1."
10. *Add. Annotation*:—*Refd. Re Belliss, Polson v. Parrott* (1929), 141 L. T. 245.
- 26a. "Legally incapable"—Issue of lunacy commission.]—*WINTHROP v. WINTHROP* (1845), 1 Coop. temp. Cott. 196; 5 L. T. O. S. 325; 47 E. R. 815, L. C.; *subsequent proceedings* (1846), 15 L. J. Ch. 403, L. C.

## Part II.—Civil Capacity.

- 151a. —.]—*HILL* (OTHERWISE JONES) *v. HILL* (1932), 173 L. T. Jo. 243.
- 186a. —.]—Whenever a person did an act... which act if done by a person with a perfect mind would make him civilly or criminally responsible to the law, if the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature & consequences of the act which he was doing, that was an act for which he would be civilly or criminally responsible (LORD ESHER, M.R.).—*HANBURY v. HANBURY* (1892), 8 T. L. R. 559, C. A.; *previous proceedings*, [1892] P. 222.
204. *Add. Annotations*:—As to (1) *Consd. In the Estate of Bohrmann*, [1938] 1 All E. R. 271. As to (3) *Apld. Re Belliss, Polson v. Parrott* (1929), 141 L. T. 245.
- 204a. —.]—Where a woman aged 93 executed an alleged will a few months before her death altering the principle of equal division of her property between her children, two married daughters, which had been followed in her previous testamentary dispositions & in family benefactions during her lifetime, it was held (a) that testatrix entertained an illusory belief that she had benefited one daughter far more than the other, & (b) that her memory had so far failed that she could no longer remember her past actions towards her daughters so as to displace illusory notions. Therefore she had not at the time of the making of the alleged will a disposing mind & understanding within the definition in *Banks v. Goodfellow*, No. 204, & the alleged will was pronounced against.—*Re BELLISS, POLSON v. PARROTT* (1929), 141 L. T. 245; 45 T. L. R. 452; 73 Sol. Jo. 628.
- 206a. —.]—He [testator] had such a degree of knowledge & understanding as to . . . know

PART II. SECT. 2, SUB-SECT. 1.—A.  
47 iii. —.]—Contracts by way of sale & purchase made by a person apparently sane, but afterwards found to be insane, will not be set aside as against those who dealt with him on the faith of his being a person of competent understanding.—*WILSON v. R.*, [1937] Ex. C. R. 186; [1938] 1 D. L. R. 729.—CAN.

PART II. SECT. 2, SUB-SECT. 2.—A. (a) i.

146 i. *Whether marriage invalidated—Degree of incapacity.*—Mental capacity to contract marriage may co-exist with many forms of "insanity." Where, however, at the time of the marriage ceremony in question herein the woman had by reason of mental disease no real appreciation of the nature of the engagement apparently entered into, the marriage was declared null & void. Under such circumstances the marriage is, it seems, not merely voidable, but void *ab initio* & incapable of ratification. In any event, in the present case the evidence showed that the wife was mentally incapable of ratifying it.—*BROSSEAU & BROSSEAU v. BELLAND*, [1932] 2 W. W. R. 632.—CAN.

146 ii. —.]—In order to find that a person is an idiot within Divorce Act, 1869, s. 19 (3), it is not sufficient to find that he is a mere imbecile; he cannot be an idiot unless his faculties have not at all been developed & he has not acquired any appreciable intelligence.—*TITLI alias TEREZA v. JONES* (1933), 1 L. R. 56 All. 428.—IND.

PART II. SECT. 2, SUB-SECT. 2.—H.

m i. —.]—A higher degree of mental capacity is required for the execution of a power of attorney than for a will.—*MASON v. CAMPBELL* (1932), 6 M. P. R. 341.—CAN.

PART II. SECT. 3, SUB-SECT. 2.—A. (a) i.

150 i. *Whether marriage invalidated—Degree of incapacity—Party incapable of understanding nature of contract.*—The mental capacity required for a valid contract of marriage is the capacity to understand the nature of the contract & the duties & responsibilities which it creates. In an action for the annulment of a marriage on the ground that deft. was at the time of the marriage mentally incapable of entering into the contract the evidence

sufficient to establish that conclusion must be of a very clear & definite character.—*CHERTKOW v. FEINSTEIN* (Can.), [1930] 1 D. L. R. 137; [1930] S. C. R. 335; *affg.*, [1929] 3 D. L. R. 339; 2 W. W. R. 257; 24 Alta. L. R. 188; *revesg.*, [1929] 1 D. L. R. 980; 1 W. W. R. 467.—CAN.

PART II. SECT. 7.

r i. —.]—A holograph letter, without date, & written while *non compos mentis*, held not a valid codicil.—*SCARROW v. McMURTRY*, [1938] 2 D. L. R. 270.—CAN.

sg. *Negligence—Onus of proof of insanity.*—In an action for damages for personal injuries inflicted on plff. by the negligence of deft. in driving a motor car, the defence relied on was that, at the time of the occurrence, deft. was insane. About five months after the occurrence he had been certified as insane, his case being diagnosed as arterio-sclerosis, which is a slowly progressive disease:—*Held*: the onus was on deft. to make out said defence.—*BARON v. WHALEN*, [1938] 1 W. W. R. 145; 1 D. L. R. 787; 7 F. L. J. (Can.) 243.—CAN.

pltf. quite well, to remember that pltf. & he had been engaged in preparing his will & to appreciate that he was asked to execute as his will the document which was then put before him . . . Applying the principle laid down in *Parker v. Felgate*, 8 P. D. 171, testator's execution of the will so far as it had been resolved upon while he had the capacity, was *pro tanto* good execution (LORD MERRIVALE, P.).—*THOMAS v. JONES* (1928), as reported in 139 L. T. 214; 44 T. L. R. 467.

264a. Disposition valid—Capacity when instructions given.]—Where a testator is of sound mind when he gives instructions for a will, but at the time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions:—

*Held*: he must be deemed to be of sound mind when it is executed.—*PERERA v. PERERA*, [1901] A. C. 354; 70 L. J. P. C. 46; 84 L. T. 371; 17 T. L. R. 389, P. C.

Annotation:—*Consd. Thomas v. Jones* (1928), 139 L. T. 214.

265a. —.]—*HOBY v. HOBY* (1828), 1 Hag. Ecc. 146; 162 E. R. 537.

294. *Add. Annotation*:—*Refd. In the Estate of Musgrove*, *Davis v. Mayhew*, [1927] P. 264.

339. *Add. Annotation*:—*As to* (2) *Consd. Re Belliss*, *Polson v. Parrott* (1929), 141 L. T. 245.

341. *Add. Annotation*:—*Consd. Re Belliss*, *Polson v. Parrott* (1929), 141 L. T. 245.

353. *Add. Annotation*:—*As to* (1) *Refd. Ahamath v. Sariffa Umma*, [1931] A. C. 799.

## Part III.—Presumptions and Proof of State of Mind.

469a. —.]—*MORFORD v. BURN* (1834), 6 Nev. & M. 152, n.

Annotation:—*Refd. Doe d. Tatham v. Wright* (1836), 1 Har. & W. 729.

## Part V.—Jurisdiction of Chancery Division of High Court of Justice.

498a. —.]—*NORRIS v. SANDFORD* (1851), cited in 16 Beav. at p. 361; 51 E. R. 818; *sub nom. MORRIS v. SANDFORD*, 1 W. R. at p. 95.

Annotation:—*Refd. Norris v. Stuart* (1852), 16 Beav. 359.

512. *Add. Annotation*:—*Refd. C. L. v. C. F. W.*, [1928] P. 223.

### PART II. SECT. 8, SUB-SECT. 2.—A.

208 i. *Degree of mental soundness.*]—The testamentary capacity essential for the making of a valid will means that degree of mental power, including the powers of memory & understanding, which is needful for doing rationally what is in fact done.—*Re FRASER ESTATE*, [1932] 3 W. W. R. 381; 26 Alta. L. R. 551.—CAN.

*st. Caprice.*]—The fact that a deceased was a man actuated by capricious or, perhaps, unjust ideas does not necessarily prove that he was lacking in testamentary capacity.—*ROMANKO & ROMANKO v. HAWRYSH & SAMETZ*, [1936] 3 W. W. R. 13.—CAN.

### PART II. SECT. 8, SUB-SECT. 2.—C.

216 iii. —.]—A mental delusion which has, or is calculated to have, an influence on the testamentary disposition, invalidates a will.—*Re DUFFY, SMITH v. DUFFY* (1934), 8 M. P. R. 249.—CAN.

b i. —.]—The mere existence of an insane delusion will not invalidate a will unless shown to affect its provisions.—*Re WATTS ESTATE*, [1932] 2 D. L. R. 800; 6 M. P. R. 47.—CAN.

b ii. —.]—In order to set aside a will there must be something more than mere delusions which do not affect the disposition of property.—*Re MCGUIRE, DAYE v. DENLEY*, [1935] 3 D. L. R. 734; *sub nom. Re MCGUIRE'S ESTATE*, 9 M. P. R. 292; 5 F. L. J. (Can.) 63.—CAN.

223 i. *Delusions affecting will*—*As*

*to particular person.*]—In deciding whether or not a testator at the time of making his will was influenced by insane delusions to which it is shown he had been subject, all the circumstances of the case must be considered. In the present case it was held on the evidence, that, at the time of the making of the will, the delusions, which were as to the character & conduct of testator's wife, were present & affected testator's mind so that he could not rationally take into consideration the interest of his wife; & therefore he lacked the capacity to make a will & the will should not be admitted to probate.—*OUDEKIRK v. OUDEKIRK*, [1936] S. C. R. 619; 2 D. L. R. 417.—CAN.

230 i. *Delusions not affecting will*—*Delusions as to health.*]—*In the Estate of UZKING, KING v. KING*, [1931] 3 M. P. R. 367.—CAN.

### PART II. SECT. 8, SUB-SECT. 2.—E.

243 ii. —.]—More eccentricity or nervous attacks will not invalidate a will.—*Re ROBERSON*, [1937] 3 D. L. R. 335.—CAN.

### PART II. SECT. 8, SUB-SECT. 3.—A.

264a i. *Disposition valid—Capacity when instructions given.*]—*ROGERS v. DAVIS*, [1932] S. C. R. 407.—CAN.

### PART II. SECT. 8, SUB-SECT. 4.—B. (a).

281 ii. —.]—The proof necessary to establish a will is not an absolute

or conclusive one, but such proof as would satisfy a prudent man. The burden of proof as to the execution & the testamentary capacity of testator, at the time of the execution of a will, lies upon its propounder, who has to explain away the suspicious circumstances appearing in the case.—*SURENDRA NATH CHATTERJI v. JAHNAVI CHARAN MUKHERJI* (1925), 1 L. R. 56 Calc. 390.—IND.

281 iii. —.]—*ROYAL TRUST CO. v. ALLEN* (1936), 51 B. C. R. 128.—CAN.

### PART V. SECT. 3, SUB-SECT. 1.

*sb. To appoint person to convey—Property of lunatic sold in partition action.*]—Where in a partition action the ct. has sold lands the property of a person of unsound mind not so found, a judge of the Ch. Div. exercising the jurisdiction conferred by Trustee Act, 1893, ss. 30, 31, 33, will appoint a person to convey the lands on behalf of the person of unsound mind.—*KEATING v. KEATING*, [1918] 1 I. R. 453.—IR.

*sd. Mortgages vested in two trustees.*]—*Re J. J. D.*, [1928] I. R. 538.—IR.

*sf. To order payment of sums within jurisdiction—To foreign guardian.*]—Guardian appointed by foreign ct. of a person of unsound mind not so found held entitled to delivery of moneys on deposit & securities with deft. bank.—*THOMPSON v. ROYAL BANK OF CANADA* (1936), 10 M. P. R. 191; 5 F. L. J. (Can.), 309.—CAN.

## Part VI.—Jurisdiction in Lunacy.

**529a. Jurisdiction to direct settlement of lunatic's property—Change of circumstances—Causing party to "suffer an injustice"—Law of Property Act, 1925 (c. 20), s. 171 (1).—**A lunatic not so found had been of unsound mind since 1882. She was a spinster aged eighty-one, & was possessed of personal property of the value of £2,000. From the time when she became of unsound mind she had lived under the care of an uncle & aunt, who had provided £2,076 towards her maintenance. The uncle died in 1885 & the aunt in 1907. By the will of the latter an annuity of £300 was bequeathed for the support of the lunatic. Upon the death of the aunt a sister of the lunatic was appointed receiver of her estate & acted until 1920, when she was relieved & a sister of appcts. was appointed in her place. On her death in 1925 one of appcts. was appointed & was receiver of the lunatic's estate. In 1880 before her reason left her the lunatic made a will, by which she bequeathed her property to her three sisters, all of whom were dead. On an application by appcts., the residuary legatees under the aunt's will & second cousins of the lunatic, to the ct. to exercise the powers vested in it by sect. 171 of the above Act, & to direct a settlement to be made of the property of the lunatic:—*Held*: (1) the phrase "suffer an injustice" in sect. 171 (1) (c) must not be rigidly confined to a deprivation of a strict legal right, since that would stultify the operation of the sect. altogether, but it must in its context include the destruction of a clear moral claim, or even the disappointment of a thoroughly legitimate & well founded expectation, & in the circumstances appcts. would "suffer an injustice" if the recent change in the law of intestacy were allowed to defeat the moral claim which they had to succeed to the estate of the lunatic, particularly in view of the continuous recognition, pecuniary & otherwise, which their side of the family had throughout shown of the obligations imposed on them by their kinship to the lunatic; (2) there had been "a change of circumstances" within the sub-sect. since the execution by the lunatic of her will, by reason of the deaths of her three sisters to whom she had left her property; (3) the case was one in which the ct. ought to exercise the discretion vested in it by sect. 171, by directing the receiver to execute a settlement of the property of the lunatic, to be approved by the judge in lunacy, which must be subject during the life of the lunatic to her right to be maintained out of the income, & if & so far as might be necessary out of the capital thereof, & subject also to any effective disposition by will or deed which the lunatic might make should she recover.—*Re FREEMAN*, [1927] 1 Ch. 479; 96 L. J. Ch. 225; 136 L. T. 657; 71 Sol. Jo. 272, C. A.

*Annotation*:—As to (1) *Consd. Re Greene, Re Whitworth, Re E. A., Re Fraser, Re Wood*, [1928] Ch. 528.

**529b. ————.]—Under a marriage settlement dated Oct. 16, 1879, personalty funds were settled by a husband & wife upon trusts under which, after the death of the**

husband in 1915, the wife was entitled to the income for life with a power of appointment by deed or will among the issue of the marriage, & in default of appointment the funds were settled in trust for the two surviving children, now aged forty-six & forty-four years, who by inquisitions in 1902 & 1910 had been certified to be of unsound mind. In default of children who attained twenty-one or being daughters married, the wife's fund would have passed to the wife absolutely & the husband's fund to the husband, who had given all his property to his wife. By his will the wife's father, who died in 1885, gave his residuary real & personal estate upon trusts under which, in the events which had happened, his daughter, the wife, received the income for her life with a power of appointment by deed or will amongst her issue. In default of appointment the residue was settled on trusts under which the wife's two children were the only beneficiaries. Neither of the children had made a will &, apart from their mother & an aunt aged eighty-two, who was a spinster of unsound mind, their next of kin were second cousins, so that if they survived their mother & aunt, the Crown would take on their deaths under an intestacy. In these circumstances the wife took out summonses under the above sect., asking the ct. to direct settlements of the children's personal property under the marriage settlement & her father's will, which should include trusts in her favour absolutely after the death of each child or, alternatively, a general power of appointment by will so as to enable her to benefit friends & charities in which the family had always been interested. Before the applications were heard an arrangement was come to between the wife & the Crown by which, subject to the approval of the ct., the Crown consented to the wife's having a general power of appointment over the whole of the marriage settlement funds & over the father's residuary personal estate to the extent of £21,140, being the amount provided by the wife out of her own money as a maintenance fund for the children, upon the wife's abandoning all claim to the rest of her father's residuary estate, valued at about £285,000, & agreeing to supplement the income of the maintenance fund for the benefit of the children as theretofore:—*Held*: there was no ground justifying the ct. in making a settlement in respect of the wife's father's residuary estate, for no injustice would be suffered by the wife within sect. 171 (1) (c), if each child's share of the property was allowed to devolve as on an intestacy on his or her death, nor ought the trusts to be altered under sect. 171 (1) (b); but as the Crown did not oppose a settlement of the marriage settlement funds, orders would be made for settlements of the two children's shares so as to give the wife a general power of disposal over the funds. The provision of the maintenance fund of £21,400 did not afford a ground for directing settlements under sect. 171, but the wife would remain free to apply for recoupment under Lunacy Act, 1890 (c. 5), s. 117, if so advised.

An application for a settlement was made by a widow, aged eighty-one years, & first cousin of the patient, who was sixty-two years of age. The only other near relatives of the patient were two first cousins, who were born in 1847 & 1850 respectively & who were & always had been resident in South America. Appct. stated that by reason of her own great age & that of her two cousins in South America any settlement which the ct. might be pleased to direct would not be of any material benefit to the patient's next of kin, unless its scope were extended to include children of any deceased first cousins of the patient's mother:—*Held*: there was no sufficient ground shown for directing a settlement to be made.

A patient had made a will in 1887, by which he had disposed of his residuary estate equally between his wife & children as a class. The wife had since died, as had also one of patient's sons, leaving issue. The patient's family were desirous that the deceased son's issue should be in no worse position than they would have been if their father had survived the patient:—*Held*: the case was a proper one for the exercise by the ct. of its discretion under sect. 171, by directing a settlement.

The property of a patient was derived under the will of his maternal grandfather. It had been settled by the patient's mother on her marriage with his father, whom she had divorced in 1877, & who had not since been heard of. The object of an application for a settlement was to exclude any claim by the father or his family:—*Held*: a settlement ought to be directed.

A patient had made a will in 1922, leaving the whole of his property to his wife, & in 1925 became of unsound mind. The will had been lost. On an application by the wife for a settlement, evidence was produced which satisfied the ct. as to the fact of the loss & as to the contents of the will:—*Held*: a settlement carrying out the terms of the will ought to be directed.—*Re* GREENE, *Re* WHITWORTH, *Re* E. A., *Re* FRASER, *Re* WOOD, [1928] Ch. 528; 97 L. J. Ch. 378; 139 L. T. 152; 44 T. L. R. 449, C. A.

539. *Add. Annotation*:—As to (1) *Consd. Re Silva, Silva v. Silva*, [1929] 2 Ch. 198.

545a. — Patient desiring to make will.]—PRACTICE NOTE, [1935] W. N. 54.

545b. Jurisdiction to authorise action by committee.]—*Re* HINCHLIFFE, No. 1428, *post*.

## Part VII.—Judicial Inquisitions as to Lunacy.

681. *Add. Annotations*:—*Consd. Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579. *Refd. Greenway v. A.-G.* (1927), 44 T. L. R. 124; *McPHERSON v. McPHERSON*, [1936] A. C. 177.

778a. — By natural daughter of bastard lunatic

tenant for life—As check on remainderman.]—*Re* WEBB (1846), 2 Ph. 116; 2 Coop. temp. Cott. 102; 17 L. J. Ch. 276; 41 E. R. 885, L. C.

820. *Add. Citation*:—previous proceedings, 2 L. T. O. S. 325, L. C.

## Part VIII.—Appointment of Receiver.

827a. Committee infirm.]—*Re* BIRCH (1808), Shelford on Lunatics, 2nd ed. 187.

827b. — Committee resident at distance from estate.]—*Re* SEAMAN (1808), Shelford on Lunatics, 2nd ed. 187.

829. After this case add "On jurisdiction of other courts to enforce claims against lunatic's estate."]—*See* HUSBAND & WIFE, No. 5360a, *ante*."

## Part X.—Judicial Powers over Estate.

980. *Add. Annotation*:—*Refd. Re Freeman*, [1927] 1 Ch. 479. | 981. *Add. Annotation*:—*Refd. Re Freeman*, [1927] 1 Ch. 479.

### PART VI. SECT. 1, SUB-SECT. 2.

537 ii. — Policy of Public Trustee disregarded.]—There is nothing in the 1930 amendments to Hospitals for the Insane Act, 1927, made by 20 Gen. 5 (c. 86), to indicate that the jurisdiction & power of the ct. to make lunacy orders affecting inmates of provincial hospitals for the insane has been taken away or interfered with; & the ct. upon an application for an order declaring lunacy will be governed, not by any consideration of the policy of the Public Trustee, but by consideration of the rights & welfare of the alleged lunatic & those dependent upon him, having regard to the nature

of his estate.—*Re* RIDLER, [1930] 4 D. L. R. 597; 65 O. L. R. 559.—CAN.

### PART VII. SECT. 4, SUB-SECT. 7.—A.

sk. No traverse where person found sane.]—There is no statutory authority practice at common law, judicial authority, or other legal warrant for a traverse to an inquisition upon which a person alleged to be of unsound mind has been found to be sane. The writ of *melius inquirendum* never had any application to the subject-matter of sanity.

If there were irregularity or illegality in the finding, the Chief Justice would have authority to quash the inquisition

& issue a new commission.—*Re* H. M. (No. 2), [1933] I. R. 383.—IR.

### PART IX. SECT. 4.

m i. — Non-compliance with statutory requirements—Person in fact insane—Habeas corpus not granted.]—*Ex p. Bowyer* (1930), 54 Can. C. C. 392.—CAN.

### PART X. SECT. 1, SUB-SECT. 1.—A.

q i. — Accounts.]—The passing of his accounts by the Public Trustee under Mental Hospitals Act, s. 87, is a matter for a surrogate judge & the next-of-kin of a certified patient may intervene.—*Re* TRENT, [1937] 2 D. L. R. 140; O. R. 410.—CAN.

1009a. -.]—*Re FISHER* (1850), 2 H. & Tw. 449; 19 L. J. Ch. 521; 14 Jur. 233; 47 E. R. 1759, L. O.

1012. *Add. Annotation*:—*As to* (1) *Refd. C. L. v. C. F. W.*, [1928] P. 223.

1069. *Add. Annotation*:—*Refd. C. L. v. C. F. W.*, [1928] P. 223.

1070. *Add. Annotation*:—*Refd. C. L. v. C. F. W.*, [1928] P. 223.

1091. After this case add "See, also, No. 1378a, *post*."

1229. *Add. Annotation*:—*Refd. Re Price*, [1928] Ch. 579.

1236. *Add. Annotation*:—*Refd. Re Stillwell, Stillwell v. Stillwell*, [1936] Ch. 637.

1242a. War Savings certificates—Nomination—Surrender of property under order of court—Whether "disposition" under Lunacy Act, 1890 (c. 5), s. 123.—The receiver of the property of a person of unsound mind (who before he became of unsound mind nominated certain National Savings Certificates to a nominee in accordance with the provisions of the War Savings Certificates Regulations) in pursuance of an order of the Master in Lunacy surrendered the certificates to the Post Office & the proceeds were invested in 3½ per cent. War Stock:—*Held*: that which was done under the order of the Master was a disposition by the receiver under the powers of Lunacy Act, 1890 (c. 5); sect. 123 (1) of that statute applied; & the nominee was entitled to the property.—*Re STILLWELL, STILLWELL v. STILLWELL*, [1936] Ch. 637; [1936] 1 All E. R. 757; 105 L. J. Ch. 217; 155 L. T. 17; 52 T. L. R. 377; 80 Sol. Jo. 288.

22a. *Guardian appointed by Minister of Public Works & Mines under Hospital Act, R. S. N. S.*, 1923—*Powers & duties—Analogous to powers & duties under Lunacy Act.*—*Re CURRAN & EASTERN TRUST CO.*, [1930] 3 D. L. R. 287.—CAN.

PART X. SECT. 1, SUB-SECT. 1.—B. (a).

r i. — *Transfer of funds to—Lunatic not absolutely entitled—Inquiries ordered.*—*Re CHARTERIS* (1878), 25 Gr. 376.—CAN.

t i. *Foreign committee—Recognition by court.*—*Re HICKSON*, [1927] 4 D. L. R. 607; 61 O. L. R. 180.—CAN.

PART X. SECT. 1, SUB-SECT. 3.

r i. — *Time for.*—The ct. will not pass & settle a guardian's accounts, & fix his compensation, before the "expiration of his trust" as provided by Lunacy Act, R. S. W. S., 1923, s. 8.—*Re DAUPHINEE*, [1936] 4 D. L. R. 143.—CAN.

PART X. SECT. 2, SUB-SECT. 3.—A.

1057 ii. — — — — —.]—A sale of the homestead of a lunatic so found made, under an order of the ct., by the committee of his estate cannot be deemed a voluntary sale, & therefore, the proceeds of the sale are exempt from seizure. Where the estate of a lunatic so found was insolvent, & it was necessary to provide for his future maintenance:—*Held*: in determining the priority as between claims for maintenance & those of the creditors that the Lunacy Act did not expressly cover the case, what was omitted must be supplied by applying the decisions

under the English statutes dealing with the same subject, & in view of them & of the facts of the case, priority must be given to the maintenance charges; but considering the advanced age of the lunatic, the net proceeds of the sale of the "exemptions" should be sufficient for that purpose.—*Re ALEXANDER ESTATE*, [1930] 1 W. W. R. 985; 2 D. L. R. 688; 11 C. B. R. 365.—CAN.

PART X. SECT. 2, SUB-SECT. 3.—E. (b).

sd. *Estate insolvent.*—A person of unsound mind had been placed in a private mental hospital at a fixed annual charge for maintenance & treatment, which had been sanctioned by an order of the ct. She died intestate, & her estate was insufficient to meet all claims:—*Held*: payment should be made in the following order of priority: (1) funeral expenses; (2) the lunacy "percentage"; (3) the committee's costs of dismissing the matter out of lunacy; (4) arrears due to the hospital for maintenance. The assets were not sufficient to meet the payment next in priority, viz., the general costs of the committee.—*Re P.*, [1926] 1 R. 422.—IR.

PART X. SECT. 2, SUB-SECT. 3.—I.

See case in Sect. 2, sub-sect. 3, E. (b), *ante*.

PART X. SECT. 5, SUB-SECT. 1.—A.

t i. *Lunatic foreigner residing abroad—Sale of land in Ontario—Power of court.*—A man resident in the State of New York was declared a lunatic. He was the owner, subject to a mtge.,

1336a. One of several trustees insane.]—Testator devised real estate to trustees, their heirs & assigns, upon certain trusts. The surviving trustee devised all estates vested in him as a trustee to three persons, one of whom, after proving his testator's will, became of unsound mind. A petition was presented for the appointment of new trustees, & for the appointment of a person to convey on behalf of the devisees of the surviving trustee:—*Held*: the petition was properly presented in Lunacy as well as in Chancery.—*Re MASON* (1875), 10 Ch. App. 273; 44 L. J. Ch. 678; 23 W. R. 787, L. JJ.

*Annotations*:—*Expld. Re Gardner's Trusts* (1878), 10 Ch. D. 29. *Consd. Re M.*, [1899] 1 Ch. 79. *Refd. Caswell v. Sheen* (1893), 69 L. T. 854.

1336b. Jurisdiction of Chancery Division—Sole trustee insane—& out of jurisdiction.]—A petition for the appointment of new trustees & for a vesting order, where the existing sole trustee is of unsound mind & out of the jurisdiction, need not be presented in Lunacy as well as in Chancery.—*Re GARDNER'S TRUSTS* (1878), 10 Ch. D. 29; 40 L. T. 52; 27 W. R. 164.

*Annotations*:—*Consd. Caswell v. Sheen* (1893), ( ) L. T. 854; *Re M.*, [1899] 1 Ch. 79.

1336c. Not so found.]—The High Court has jurisdiction under the Trustee Act, 1893 (c. 53), to appoint a new trustee in the place of a sole surviving trustee who is a lunatic not so found.—*Re M.*, [1899] 1 Ch. 79; 68 L. J. Ch. 86; 47 W. R. 267; 15 T. L. R. 54; *sub nom. Re J. M.*, 79 L. T. 459; 43 Sol. Jo. 76.

*Annotation*:—*Consd. Re James' Mortgage Trusts*, [1919] 1 Ch. 61.

of land in Ontario, & the foreign committee applied to the Supreme Ct. of Ontario for an order declaring him a lunatic, with a view to obtaining authority to sell the land:—*Held*: the ct. had power to declare the man to be a lunatic, to appoint a committee & to authorise & direct the committee to sell the land, although the lunatic was a foreigner in a foreign land, & under the care & custody of the law of that land.—*Re PIPER*, [1927] 4 D. L. R. 924; 61 O. L. R. 257.—CAN.

t ii. — — — — —.]—As regards land situate in Ontario, the provisions of Lunacy Act, authorising the sale of land, apply only where the lunatic has been so found by an Ontario ct.—*Re HICKSON*, [1927] 4 D. L. R. 607; 61 O. L. R. 180.—CAN.

PART X. SECT. 6.

1233 i. *Will prior to lunacy—Sale of property specifically bequeathed—Ademption.*—A specific bequest is adeemed by an order for sale in lunacy.—*MOUNTAIN v. MOUNTAIN* (1937), 12 M. P. R. 87.—CAN.

PART X. SECT. 8, SUB-SECT. 1.—D.

1261 i. *Stock in name of joint trustees—Lunacy of one—New trustee appointed by deed containing vesting declaration—Form of order.*—*Re G. H. L.*, [1928] 1 R. 543.—IR.

ii. *Shares held in joint tenancy—Lunacy of one tenant.*—*Held*: the ct. had power under its statutory jurisdiction to sever such joint tenancy, & to realise the lunatic's share, if his interest & benefit so required.—*O'CONNELL v. HARRISON*, [1927] 1 R. 330.—IR.

*D. Other Powers (p. 227).*

**1378a. Powers of guardian.]**—The patient, a lunatic, of whose estate a receiver had been appointed under Lunacy Act, 1890 (c. 5), s. 116 (1) (c), was the sole guardian of her infant son:—*Held*: under Lunacy Act, 1890 (c. 5), s. 128, the ct. had jurisdiction to authorise the receiver to exercise the powers of custody, control, maintenance & education of the infant vested in the patient as guardian.—*Re* L. H. B., [1935] Ch. 643; 104 L. J. Ch. 328; 153 L. T. 356, C. A.

**1378a.** —.]—On May 26, 1927, the receiver of a lunatic's estate, who had been authorised to continue the lunatic's business, obtained an order from the master directing him to distribute £1,800 amongst certain scheduled creditors of the business whose debts had been incurred subsequently to the date of the receivership order. The scheduled creditors were not parties to the order. On May 29, three days after the order was pronounced & before it was completed, the lunatic died. The order was subsequently completed on June 14. In July the exors. of the lunatic's will applied for an order for payment out of ct. to them of the fund representing the lunatic's residuary estate, & on July 28 the master refused to make the order except upon the terms of effect being given to the order of May 26. Subsequently to the making of this order an order was made for the administration of the lunatic's estate:—*Held*: (1) the order of May 26 was a mere direction to the receiver to make the payments in question which might have been varied or rescinded at any time by the master before it was finally completed, & it gave the creditors no equitable charge on the £1,800 thereby ordered to be distributed among them; (2) the jurisdiction in lunacy ceased on the death of the lunatic, & the master had no jurisdiction to direct that effect should be given to the order of May 26; (3) the exors. were entitled to the fund in ct. without regard to the order of May 26, but inasmuch as an order had since been made for the administration of the lunatic's estate, the fund must be paid to the credit of the administration action.—*Re* WHEATER, [1928] Ch. 223; 97 L. J. Ch. 97; 138 L. T. 433; 44 T. L. R. 156; 72 Sol. Jo. 17, C. A.

**1391a.** —.]—*Re* WHEATER, No. 1378a, *ante*.

**1404. Add. Annotation:—As to (1) Apld. Re** Wheeler, [1928] Ch. 223.

**1411. Add. Annotation:—Apld. Re** Wheeler, [1928] Ch. 223.

**1419.** After this case add "Whether deduction admissible for income tax purposes."—*See* INCOME TAX, Nos. 545g, 689a, *ante*."

**1419a. Claim for increased percentage after death of patient.]**—(1) The percentage payable in lunacy under the Rules in Lunacy, 1892, r. 127, on the annual income of property of a patient (being a person mentioned in Lunacy Act, 1890 (c. 5), s. 116 (1) (d)), which is "dealt with or made available" by any order in lunacy may be increased by a claim to percentage on additional income made after the death of the patient.

(2) Under the will of a testator who died in 1900, trustees were directed at their discretion to pay or apply the whole or any part of the income of residuary estate for the maintenance, clothing, comfort & benefit of a person in respect of whose property a receiver was appointed in 1925 under Lunacy Act, 1890 (c. 5), s. 116 (1) (d), & to accumulate the surplus income. Owing to the statutory period for accumulations having come to an end in 1921 the patient as sole next of kin of testator was thereafter entitled to the surplus income; but the trustees invested & retained it until they were ordered by the order appointing the receiver to lodge the investments with the Paymaster-General. After the date of the order the trustees continued to apply part of the income of the residuary estate for the benefit of the patient under the discretionary trust, but paid the balance of the income to the receiver, who had been authorised by the order appointing him to give a discharge for all dividends, interest, & income of the patient, the patient having died on Feb. 2, 1933:—*Held*: a percentage was payable under rule 127 of the Rules in Lunacy, 1892, in respect of (a) the investments so lodged with the Paymaster-General, & (b) the sums applied by the trustees under the discretionary trust after the date of the order.—*Re* W. D. J., [1934] Ch. 174; 103 L. J. Ch. 221; 150 L. T. 226, C. A.

**1419b. On what sums payable—Surplus income accumulated under trust.]—Re** W. D. J., No. 1419a, *ante*.

**1419c.** — Sums applied to patient under discretionary trust.]—*Re* W. D. J., No. 1419a, *ante*.

**1419d. Lunatic brought to England from foreign country—Whether "resident" in England.]**—In 1934 the patient, who was domiciled in a British dominion & temporarily resident in England for educational purposes, left for a short visit to America. Whilst there he became mentally deranged & was declared mentally & legally insane. He was sent back to this country as being a British subject, where on Oct. 26, 1934, he was certified as a person of unsound mind. On June 21, 1935, a receiver of his property was appointed for a period of twelve months. At the expiration of that period the patient left the mental home where he had been residing & in July, 1936, he was formally discharged. In Dec. 1936, the receiver was discharged. In June, 1936, whilst the receiver was administering the affairs of the patient an account was sent in by him & on that account the percentage payable under the Lunacy Acts & Rules was assessed at £1,000 based on the patient's total income from his dominion property, which amounted to over £33,000 a year. The receiver appealed from the assessment, but the Master in Lunacy affirmed it. On appeal from the Master the receiver contended that the patient, having been brought back to this country from U.S.A. without being able to exercise any volition on the matter of his residence, must be deemed not to be resident in England within the proviso to sub-sect. (3) of sect. 27 of Lunacy Act, 1891 (c. 65):—*Held*: "residence" was a term which could be applied to a lunatic & it could not be said that



he was incapable of residing because he was incapable of the necessary volition, & the patient did not therefore come within the proviso to sub-sect. (3) of sect. 27 of the Act of 1891 as being "a person residing out

of England." Therefore the case fell within rule 148 (2) of Patients' Estates Rules, 1934, & the appropriate percentage fee had been charged.—*Re X. Y.*, [1937] Ch. 337; 106 L. J. Ch. 258, C. A.

## Part XI.—Actions.

1459a. —.]—*CHARLTON v. WEST* (1861), 3 De G. F. & J. 156; 30 L. J. Ch. 815; 4 L. T. 455; 7 Jur. N. S. 614; 9 W. R. 511; 45 E. R. 837, L. JJ.

1466. After this case add "Married woman." —*See HUSBAND & WIFE*, Nos. 2189, 2189a."

## Part XII.—Costs.

1606. *Add. Annotation* :—*Consd. Re Wheater*, [1928] Ch. 223.

## Part XIII.—Administration in Regard to Reception and Care of Lunatics.

1670a. When criminal information granted.] —*Ex p. LOWE* (1872), 36 J. P. Jo. 760.

1688. *Add. Annotation* :—*Refd. Stoke Newington Borough Council v. Richards* (1929), 45 T. L. R. 650.

1688a. Claim for return of contributions —On dismissal.]—*McMANUS v. BOWES*, No. 1688d, *post*.

1688b. ——— Limitation of action.]—*McMANUS v. BOWES*, No. 1688d, *post*.

1688c. ——— Decision of Minister of Health—Whether certiorari lies.]—W. commenced his employment as a shoemaker in a county mental hospital in 1915 during the War. His employment was at first considered temporary, but, in fact, it was continued until 1934. He was never considered by the committee as a permanent employee, & they at all times refused to accept from him subscriptions in respect of the superannuation allowance. After the termination of his employment, his application for a superannuation allowance was refused by the committee, but granted by the Minister on appeal. Asylums Officers' Superannuation Act, 1909 (c. 48), s. 15, provides that the decision of the Minister shall be final. The difference between the view taken by the Minister & that taken by the committee was, shortly,

whether, upon the proper construction of the Act, an officer who had served less than twenty years could be entitled to an allowance. A rule *nisi* for certiorari was granted for the decision of the Minister to be quashed, on the ground that the Minister had acted without jurisdiction :—*Held* : the Minister had not acted without jurisdiction, &, although his decision was in effect the construction of the provisions of the Act of 1909, it could not be questioned by the grant of a writ of certiorari.—*R. v. MINISTER OF HEALTH, Ex p. GLAMORGAN COUNTY MENTAL HOSPITAL (COMMITTEE OF VISITORS)*, [1938] 4 All E. R. 32; 159 L. T. 508; 102 J. P. 497; 55 T. L. R. 4; 82 Sol. Jo. 869, C. A.

1688d. ——— Dismissal—Powers of visiting committee.]—In 1923 a doctor was appointed by the visiting committee of an asylum as assistant medical officer in the asylum. On Oct. 21, 1927, the doctor was dismissed by the committee with three months' notice. He was at the same time suspended from his duties & given three months' salary. The doctor put forward a claim for a superannuation allowance under Asylums Officers' Superannuation Act, 1909 (c. 48), s. 10. On Nov. 9, 1930, the Minister of Health, to whom the matter was referred under sect. 15, gave a decision adverse to the doctor's claim.

### PART XI. SECT. 2, SUB-SECT. 2.

1511 i. *Validity of service*.]—In an action for divorce wherein deft. was alleged to be a person of unsound mind detained in a public hospital for the insane the affidavits of service of the writ of summons showed that it was served not only upon the administrator of the estates of the mentally incompetent but also upon the superintendent of the mental hospital at Battleford :—*Held* : the Ct. of Appeal was warranted in receiving the affidavits of the superintendent & assistant superintendent of the mental hospital at Battleford which showed

that deft. had been committed to & received at the hospital & was still detained there & that he was when received & still was a lunatic within the Mental Diseases Act, R. S. S., 1930.—*WHITING v. WHITING & WATSON*, 1937 2 W. W. R. 135.—CAN.

### PART XI. SECT. 6, SUB-SECT. 1.

b i. — *Appointment of curator ad Rem*.]—*DAVIDSON v. SCOTT'S SHIP-BUILDING & ENGINEERING CO., LTD.*, [1926] S. C. 970.—SCOT.

### PART XII. SECT. 2, SUB-SECT. 1.

k i. — *Costs of conveying lunatic to*

*hospital*.]—The fact that on the passing of the accounts of the guardian of a lunatic's estate the judge before whom the accounts came refused to make any order with respect to the cost of conveying the lunatic from his home in the Northwest Territories to the mental hospital at Ponoka, Alberta :—*Held* : not to have been a final disposition of the matter, subject only to appeal, but left it open to ptf. herein who had defrayed said expenses to assert his claim to recover them from the lunatic's estate.—*Re BAROUCHEAS, MINISTER OF JUSTICE OF CANADA v. MARTIN*, [1938] 2 W. W. R. 428.—CAN.

On Oct. 20, 1933, the doctor brought an action, against (*inter alia*) the visiting committee, for wrongful dismissal & for return of his superannuation allowance contributions:—*Held*: (1) *pltf.*'s claim both for wrongful dismissal & also for the return of his contributions was barred by Public Authorities Protection Act, 1893 (c. 61), as the dismissal was an act done, & the neglect to pay the contributions was the neglect of an act done, "in pursuance, or execution . . . of any Act of Parliament" & the action was not brought within six months of such act or neglect; (2) the power given by Lunacy Act, 1890 (c. 5), s. 276, to the visiting committee to remove any officer appointed under that sect. must be construed as a power to remove at pleasure, & any limitation of that power contained in any agreement made with an individual officer would, to that extent, be *ultra vires*.

*Per GREER, L.J.*: Lunacy Act, 1890 (c. 5), s. 276, gave the visiting committee of an asylum power to make agreements with the officers & servants whom they appointed upon such terms as were necessary in order to obtain the services of such officers &

servants.—*McMANUS v. BOWES*, [1938] 1 K. B. 98; [1937] 3 All E. R. 227; 107 L. J. K. B. 51; 157 L. T. 385; 101 J. P. 455; 53 T. L. R. 844; 81 Sol. Jo. 497; 35 L. G. R. 539, C. A.

**1768a. Old age pension.—Receiver appointed during lunatic's life.**—A patient in a rate-aided institution attained the age of seventy years, & became entitled to an old age pension. The master in lunacy made the usual order appointing the appropriate public assistance officer, in effect, to be receiver of the pension & to accumulate the same. The order gave a charge to the county council for any sum then due, & future sums becoming due, to them, but this charge was not to be enforceable without the leave of the master until the death of the patient. It was contended, on behalf of the county council, that the order should have made the pension immediately available:—*Held*: the order was not only one which the master had jurisdiction to make, but was also a wise & just one in the circumstances, & there was no reason for interfering with it.—*Re T. R. M.*, [1938] 4 All E. R. 194; 159 L. T. 561; 55 T. L. R. 56; 82 Sol. Jo. 889, C. A.

## Part XIV.—Certification, Reception, Treatment and Discharge of Lunatics.

**1852. Add. Annotations:**—*Apld.* *De Freville v. Dill* (1927), 96 L. J. K. B. 1056. *Apprvd.* *Harnett v. Fisher*, [1927] A. C. 573.

**1856a.** —[*Pltf.* was certified by *deft.*, a medical man, to be a lunatic & a person to be detained under care & treatment:—*Held*: (1) *deft.*, inasmuch as he undertook the statutory duty of certifying *pltf.* as a lunatic, owed a duty to him to exercise reasonable care; (2) since no reception order could have been made by a magistrate without the certificate of a doctor, & as the certificate was given by *deft.* with a view to the obtaining of such an order, the giving of the certificate was the direct cause of the order & of *pltf.*'s detention.—*HARNETT v. FISHER*, [1927] 1 K. B. 402; 96 L. J. K. B. 55; 135 L. T. 724; 42 T. L. R. 745; 70 Sol. Jo. 917, C. A.; *on appeal*, [1927] A. C. 573, H. L.

*Annotations*:—*As to* (1) *Folld.* *De Freville v. Dill* (1927), 96 L. J. K. B. 1056. *As to* (2) *Folld.* *De Freville v. Dill* (1927), 96 L. J. K. B. 1056.

**1856b. S. P. DE FREVILLE v. DILL** (1927), 96 L. J. K. B. 1056; 138 L. T. 83; 43 T. L. R. 702.

**1856c. Effect of certificate.**—*HARNETT v. FISHER*, No. 1856a, *ante*.

**1856d. S. P. DE FREVILLE v. DILL** (1927), 96 L. J. K. B. 1056; 138 L. T. 83; 43 T. L. R. 702.

### SECT. 1A.—TEMPORARY TREATMENT WITHOUT CERTIFICATION.

*See Mental Treatment Act, 1930 (c. 23), s. 5.*

**1859. Add. Annotation:**—*Refd.* *De Freville v. Dill* (1927), 96 L. J. K. B. 1056.

**1862. Add. Annotations:**—*As to* (1) *Apld.* *De Freville v. Dill* (1927), 96 L. J. K. B. 1056. *Refd.* *Harnett v. Fisher*, [1927] A. C. 573. *As to* (2) *Refd.* *Place v. Searle*, [1932] 2 K. B. 497.

**1863. Add. Annotation:**—*Refd.* *De Freville v. Dill* (1927), 96 L. J. K. B. 1056.

**1864. Add. Annotation:**—*Consd.* *Fletcher v. Ilkeston Corpn.* (1931), 96 J. P. 7.

**1865. Add. Annotation:**—*Refd.* *De Freville v. Dill* (1927), 96 L. J. K. B. 1056.

**1867. Add. Annotation:**—*Refd.* *De Freville v. Dill* (1927), 96 L. J. K. B. 1056.

**1869. Add. Annotations:**—*Refd.* *De Freville v. Dill* (1927), 96 L. J. K. B. 1056; *Harnett v. Fisher*, [1927] A. C. 573.

### PART XIV. SECT. 2, SUB-SECT. 2.

*eg. Action for laying information—Defence of "reasonable care."*—Mental Diseases Act, 1924, provides that "No person . . . who lays an information under this Act . . . shall be liable to

any civil proceedings in respect thereof . . . if such person has acted in good faith & with reasonable care":—*Held*: the question of the good faith & reasonable care of *deft.* must be determined by what in the circum-

stances would have been the conduct of the reasonable or ordinarily prudent & cautious man.—*DURAND v. PREJET*, [1932] 2 W. W. R. 545; 4 D. L. R. 694; 40 Man. L. R. 428; 59 C. C. C. 197.—CAN.

## Part XV.—Offences, Penalties and Proceedings.

1882a. — Annoyance of receiver & lunatic.]—*Re SEATON*, [1928] W. N. 307; 166 L. T. Jo. 438.

1886a. Lunatic out on licence—Negligence.]—L., a defective, had been convicted many times for various forms of assault, some of a serious character, & was finally sentenced to be detained during His Majesty's pleasure. After some time in a criminal lunatic institution he was transferred to the Calderstone Institution in Lancashire. His brother made an application for him to be let out on licence, stating that he would take a holiday & so be at home to look after him. This application was refused because L. had not been in the institution for a year. A later application was granted for a fortnight's absence, & no inquiry was then made as to whether the brother's former undertaking was renewed, & in fact, the brother was neither seen nor questioned by any one. At the end of the fortnight the licence was extended for another fortnight without further inquiry, & then for another month. The licence was signed by the deputy superintendent. During the period of the extended licence L. visited the pltf.'s house when the female pltf. was there alone & savagely assaulted her. The jury were directed that they should not find an officer negligent if he had merely committed an error of judgment; but should only do so if they found that he had failed to exercise that care & control necessary having regard to the character & past history of the patient. The jury found all three defts., the hospital board, the superintendent & the deputy superintendent, negligent.—*HOLGATE v. LANCASHIRE MENTAL HOSPITALS BOARD, GILL & ROBERTSON*, [1937] 4 All E. R. 19.

1893. For cross-reference preceding this case "See, now, Mental Treatment Act, 1930 (c. 23), s. 16."

1896. *Add. Annotation*:—*Apld. Re Frost*, [1936] 2 All E. R. 182.

1896a. — — —.]—*EASTON v. JOHNSON, EASTON v. POTTS* (1929), 168 L. T. Jo. 537, C. A.

1896b. Application for leave to bring action—Mental Treatment Act, 1930 (c. 27), s. 16 (2)—When granted.]—Pltf., aged 75, on Aug. 24, 1935, having attended his wife's funeral, became highly excitable & commenced drinking heavily. Upon the request of his daughter, a doctor in a letter recommended him for hospital treatment & to be kept under observation. The local authority then sent an ambulance to his home in which he was removed to an institution. He was there examined by the assistant medical officer & put into a mental ward. The medical officer later issued a certificate for his detention, although he had not personally examined him. After four days' detention in the mental ward the pltf. was moved to the ordinary male medical ward. On Sept. 9 his daughter asked for his removal home & he was allowed to return home on the following day:—*Held*: in acting upon the doctor's letter, which was not a certificate within the statutory requirements, the local authority had acted without reasonable care, & leave under Mental Treatment Act, 1930 (c. 27), s. 16 (2), ought to be given to pltf. to bring an action in respect thereof against the local authority. The claim must be restricted to the first four days.—*Re FROST*, [1936] 2 All E. R. 182; 80 Sol. Jo. 464, C. A.

*Annotation*:—*Reid. Shoemith v. Lancashire Mental Hospital Board*, [1938] 3 All E. R. 186.

## Part XVI.—Mental Deficiency.

1897. For cross-reference before this case read "See Mental Deficiency Acts, 1913–1927."

*Add. Annotation*:—*As to* (2) *Distd. Woodward v. Oldfield* (1927), 96 L. J. K. B. 796.

1900a. Costs of petition—Jurisdiction of judicial authority.]—The judicial authority under the Act has jurisdiction in a proper case to order the costs of a petition to be paid by the local authority.—*R. v. RADCLIFFE (JUDGE), Ex p. OXFORDSHIRE COUNTY COUNCIL*, No. 1897, *ante*.

1900b. Detention—Continuance order—Validity of.]—On June 11, 1929, an order under the Act was made in respect of appt., expiring on June 24, 1930. On June 23, 1930, a continuance order was made expiring on June 24, 1931. Further purported con-

tinuance orders were made on June 29, 1931 (expiring June 24, 1936), & on July 6, 1936. With regard to the order dated June 29, 1931, the special report & certificate of the medical officer was referred back to the medical officer by a Comr. on June 23, 1931, for amendment. They were returned on July 4, 1931, & were submitted to another Comr., who directed their acceptance on July 7, 1931. On an application for *habeas corpus* on the ground that the order of July 6, 1936, was invalid (a) as being made out of time & (b) as purporting to continue the order of 1931, which was itself invalid because it was made out of time, the Div. Ct. held that, though the intention of the Legislature was quite clearly that there should be no gaps, the Act must not be construed with unreason-

### PART XV. SECT. 3.

1894 ii. — — —.]—Circumstances in which an application under Mental Diseases Act, R. S. A., 1922 (c. 223), s. 25, for the stay of an action against a doctor for negligence in that pltf. had

been committed to an asylum without a proper inquiry being held, was refused.—*HIBBERD v. JAMINSON (Alta.)*, [1927] 4 D. L. R. 807, 1925; [1927] 3 W. W. R. 543.—CAN.

1894 iii. — — —.]—In an application to stay proceedings against a

doctor under Mental Hospitals Act, R. S. B. C., 1924, s. 45:—*Held*: as appt. acted to the best of his ability, knowledge & skill, & without any ulterior motive whatever, the action should be stayed.—*OWENS v. DOBSON* (1934), 49 B. C. R. 283.—CAN.

able strictness, &, as the statutory consideration of the reports had taken place at the proper time, the actual sealing of the order might, in the absence of *mala fides*, take place within a reasonable time thereafter:—*Held*: the continuation order dated June 29, 1931, was invalid, as it was not made until after the expiration of the previous order on June 24, 1931, & further that the continuation order of June 29, 1931, was on its face a nullity, because it contained a statement that the Board of Control having considered the requisite reports & certificates & the means of care & supervision were satisfied that the continuance of the order of June 23, 1930, was required, whereas the satisfaction of the Comr. was not in fact arrived at until July 7, 1931. As the order of June 29, 1931, was ineffective, its purported continuance by the order of July 6, 1936, was equally ineffective & the man was therefore not being validly detained, & the rule for *habeas corpus* must be made absolute.—*R. v. BOARD OF CONTROL, Ex p. WINTERFLOOD*, [1938] 2 K. B. 366; [1938] 2 All E. R. 463; 107 L. J. K. B. 409; 159 L. T. 345; 54 T. L. R. 698; 82 Sol. Jo. 373.

**1902. Add. Annotations:—***Consd. Worcestershire County Council v. Warwickshire County Council*, [1934] 2 K. B. 288. *Folld. London County Council v. Cambridgeshire County Council*, [1936] 2 K. B. 298. *Consd. Re X. Y.*, [1937] Ch. 337.

**1902a.** —.]—By Mental Deficiency Act, 1927 (c. 33), s. 9, where an order is made in respect of a mental defective in a certified institution, that person shall, for the purpose of determining who is liable for his maintenance, be deemed to have resided in the "place which was his place of residence

immediately before he was received into the institution":—*Held*: another certified institution could be such "place or residence." —*WORCESTERSHIRE COUNTY COUNCIL v. WARWICKSHIRE COUNTY COUNCIL*, [1934] 2 K. B. 288; 103 L. J. K. B. 460; 151 L. T. 378; 98 J. P. 347; 50 T. L. R. 430; 32 L. G. R. 213; 30 Cox, C. C. 137, D. C.

**1902b.** — — —.]—A mental defective was convicted of larceny at Cambridge & was ordered to be sent to a certified institution. He was born in 1913, & had lived in London until he was eighteen years of age. He then left home & wandered about the country, being employed on occasional work at different places. He had on occasions stayed in casual wards in different parts of the country. He had no settled residence for any length of time at any particular place. In May, 1935, he came into Cambridge, & committed the offence of which he was ultimately convicted:—*Held*: as it was not proved that the mental defective resided in some place other than the place where the offence was committed, Mental Deficiency Act, 1913 (c. 28), s. 44 (1), of the Act applied, & he was presumed for the purposes of sect. 43 (1) to have resided in the place where the offence was or was alleged to have been committed. Therefore, the local authority responsible for providing for his accommodation was the Cambridgeshire County Council. Also, no case of doubt had arisen with regard to his place of residence, & therefore no question of poor law settlement within sect. 44 (4) had to be considered.—*LONDON COUNTY COUNCIL v. CAMBRIDGESHIRE COUNTY COUNCIL*, [1936] 2 K. B. 298; [1936] 2 All E. R. 15; 105 L. J. K. B. 476; 155 L. T. 26; 100 J. P. 219; 52 T. L. R. 463; 80 Sol. Jo. 513; 34 L. G. R. 245; 30 Cox, C. C. 420, D. C.

## MAGISTRATES.

## Part II.—Qualifications and Disqualifications.

45. *Add. Annotation*:—*Apld. R. v. North Worcestershire Assessment Committee, Ex p. Hadley*, [1929] 2 K. B. 397.
81. *Add. Annotation*:—*As to* (1) *Refd. R. v. Surrey County Assessment Committee, North-Eastern Area, Ex p. Woolworth & Co.* (1932), 97 J. P. 46.
- 82a. *Interest as fellow trade unionist*—No trade dispute involved.]—Upon a summons by the wife for a separation order on the ground of desertion under the Summary Jurisdiction (Separation & Maintenance) Acts, 1895 & 1925, the wife complained that her husband had refused to cohabit with her & treated her only as a servant, though they continued to live under the same roof & breakfasted & took their Sunday midday meal together. The justices dismissed the summons. The wife appealed, & submitted that as one of the sitting justices was a member of the same trade union as the husband, that justice must be regarded as an interested person, & therefore the decision was null & void:—*Held*: it would be stretching the law to say that a magistrate could not sit if one of the parties happened to be a member of the same trade union as he in a matter in which no trade dispute was involved.—*STEVENS v. STEVENS* (1929), 93 J. P. 120; 27 L. G. R. 362, D. C.
83. *Add. Annotation*:—*Dlst. R. v. Leicester JJ., Ex p. Allbrighton*, [1927] 1 K. B. 557.
84. *Add. Annotation*:—*Refd. Maclean v. Workers' Union*, [1929] 1 Ch. 602.
97. *Add. Annotations*:—*Apld. R. v. Essex JJ., Ex p. Perkins*, [1927] 2 K. B. 475. *Refd. Cooper v. Wilson*, [1937] 2 K. B. 309; *R. v. Salford Assessment Committee*, [1937] 2 K. B. 1.
- 97a. *Clerk's firm acting against defendant in earlier proceedings*.]—(1) *Certiorari* will issue to quash a maintenance order made by justices, when it is shown that the justices' clerk is a member of a firm of solrs. which acted for the wife at an earlier stage of the

same proceedings, even though it is proved that the wife's business was conducted exclusively by a managing clerk in charge of a branch office, & that the justices' clerk was in fact quite unaware that his firm had ever acted for her. The test is not whether there is in fact bias, but whether a reasonable man concerned in the proceedings might think that the tribunal was not impartial.

(2) *Appct. for a certiorari* in such circumstances does not waive his right to take objection to the presence of the clerk by not having exercised it, when he does not know that he was entitled to it.—*R. v. Essex JJ., Ex p. PERKINS*, [1927] 2 K. B. 475; 96 L. J. K. B. 530; 137 L. T. 455; 91 J. P. 94; 43 T. L. R. 415; 28 Cox, C. C. 405, D. C.

*Annotations*:—*Generally, Refd. Cooper v. Wilson*, [1937] 2 K. B. 309; *R. v. Salford Assessment Committee*, [1937] 2 K. B. 1.

100. *Add. Annotation*:—*Refd. R. v. Surrey County Assessment Committee, North-Eastern Area, Ex p. Woolworth & Co.* (1932), 97 J. P. 46.
102. *Add. Annotation*:—*Refd. Maclean v. Workers' Union*, [1929] 1 Ch. 602.
105. *Add. Annotations*:—*Consd. R. v. London County Council, Ex p. Entertainments Protection Assocn., Ltd.*, [1931] 2 K. B. 215. *Refd. R. v. Sheffield JJ., Ex p. Rawson* (1927), 91 J. P. 193; *R. v. Hendon Rural District Council, Ex p. Chorley* (1933), 97 J. P. 210.
109. *Add. Annotations*:—*Refd. Maclean v. Workers' Union*, [1929] 1 Ch. 602; *R. v. Huntingdon Confirming Authority*, [1929] 1 K. B. 898.
- 112a. — *Licensing magistrate member of council interested in site*.]—A licensing confirming authority, which included six members of the local council who were also justices, refused to confirm an order for the provisional removal of a publican's licence to proposed premises at another address. *Appct. alleged* that the refusal was made by a bench of justices including justices who were disqualified by bias, in that (a) they were

## PART I. SECT. 1.

a i. — *Reduction of salary*.]—Application for rescission of resolution reducing salary of stipendiary. Refused as rescission justified.—*Re MACGILLIVRAY* (1933), 6 M. P. R. 507.—CAN.

## PART I. SECT. 2.

n i. — *Appointment as town magistrate—Effect on jurisdiction*.]—The fact that a police magistrate holding an appointment for the province of Manitoba is appointed by a later commission a police magistrate for a certain town therein does not cancel the former appointment or affect his jurisdiction thereunder.—*R. v. PLUMMER (Man.)*, [1929] 3 W. W. R. 518; [1930] 1 D. L. R. 766; 38 Man. L. R. 391; 52 Can. Crim. Cas. 288.—CAN.

PART I. SECT. 4, SUB-SECT. 2.—A. 19 ix. —.]—*R. v. HARRY FONG*, [1930] 3 W. W. R. 479.—CAN.

PART II. SECT. 2, SUB-SECT. 1.—  
A. (b) i.

d i. — *Magistrate insurance agent placing part of insurance on municipal property—Prosecution for breach of municipal bye-law*.]—*R. (KINGSETT) v. McELHINNEY (Alta.)*, [1927] 3 D. L. R. 1189; [1927] 3 W. W. R. 284; 49 Can. Crim. Cas. 13.—CAN.

ss. *Magistrate partner of defending counsel*.]—*R. v. McMONAGLE*, [1931] 3 M. P. R. 543.—CAN.

PART II. SECT. 2, SUB-SECT. 1.—  
B. (a).

h i. — *Settlement advised*.]—Bias in a magistrate will not be inferred merely because he interviewed the parties & advised a settlement.—*R. v. DURLING*, [1936] 2 D. L. R. 241; 10 M. P. R. 258; 65 Can., C. C. 247.—CAN.

PART II. SECT. 2, SUB-SECT. 1.—  
B. (b) i.

i i. — *Magistrate member of police board instituting proceedings*.]—In pursuance of general directions of the chief of police of Winnipeg a police officer laid a charge against *appct.* herein for carrying on his ordinary business as a retail grocer on Sunday. The chief of police was carrying out instructions received from the board of police comrs. of the city. Prohibition was sought against the hearing & determining of the charge by the police magistrate on the ground that it was likely or reasonably to be apprehended that he would be biased in favour of the prosecution since he was a member of said board & had been a party to said instructions:—*Held*: the order for prohibition should go.—*NICHOLS v. GRAHAM*, [1937] 2 W. W. R. 464; 3 D. L. R. 795; 68 Can. C. C. 349; *sub nom. Ex p. NICHOLS*, 7 F. L. J. (Can.) 68.—CAN.

members of the city council, which had an interest in the refusal of the application, as it had already been considered by the council under the Town Planning Act & refused, although subsequently granted on appeal; (b) the city council were interested in another site, which was competitive with the site referred to; (c) the city council had recently been in litigation with appct. about another licensed house; & (d) one of the justices had previously given public utterance to sentiments of hostility to similar applications:—*Held*: the allegations were too unsubstantial to support the contention that the justices were unable to bring impartial minds to bear on the case & thus were disqualified by reason of bias.—*R. v. SHEFFIELD CONFIRMING*

*AUTHORITY, Ex p. TRUSWELL'S BREWERY CO., LTD., [1937] 4 All E. R. 114; 36 L. G. R. 38, D. C.*

*Annotation*:—Insert "Apld." before "*R. v. Middlesex JJ.*"

118. *Add. Annotation*:—*Refd. R. v. Salford Assessment Committee, [1937] 2 K. B. 1.*
119. *Add. Annotation*:—*Refd. R. v. North Worcestershire Assessment Committee, Ex p. Hadley, [1929] 2 K. B. 397.*
128. *Add. Annotation*:—*Refd. Maclean v. Workers' Union, [1929] 1 Ch. 602.*
138. *Add. Annotation*:—*Refd. Cooper v. Wilson, [1937] 2 K. B. 309.*
- 150a. ———.—*R. v. ESSEX JJ., Ex p. PERKINS, No. 97a, ante.*

## Part VI.—Jurisdiction of Courts of Summary Jurisdiction, etc.

### SECT. 7.—JUVENILE COURTS (p. 316).

*See, now, Children & Young Persons Act, 1932 (c. 46), Part I, ss. 1–8.*

329a. Publication of proceedings—Children & Young Persons Act, 1933 (c. 12), s. 49 (1)—Irregularities in court—Whether defence.]—

*ROBERTS v. DOLBY, USHER v. DOLBY (1935), 80 Sol. Jo. 32, D. C.*

### PART II. SECT. 2, SUB-SECT. 1.—E.

149 iii. ———.—*R. v. BROWN (P. E. I.), [1929] 1 D. L. R. 687; 51 Can. Crim. Cas. 248.—CAN.*

157 i. *Effect of waiver on power of justice.*—The consent or acquiescence of any party will not supply the defect or want of jurisdiction on a magistrate.—*PARASHURAN DATARAM v. COCKE (1929), 1 L. R. 53 Bom. 716.—IND.*

### PART IV. SECT. 1.

sm. *Police magistrate for Minto Police District.*—*R. v. PALMER, Ex p. McCoy, [1929] 3 M. P. R. 344.—CAN.*

sp. *Accused within jurisdiction—Offence committed outside jurisdiction.*—A magistrate may hold a preliminary inquiry over an offence committed outside his jurisdiction, if the accused is within, or resides within, his jurisdiction.—*R. v. BURKE (1900), 5 Can. C. O. 29.—CAN.*

### PART VI. SECT. 2.

302 i. *Creature of statute—Offence must be strictly within statute.*—In order for a magistrate to have jurisdiction, under Criminal Code, Part XVI., to try a charge summarily without the consent of the accused it must plainly appear that the case is one with respect to which such jurisdiction is conferred.—*R. v. FRAY, [1928] 3 D. L. R. 205; [1928] 1 W. W. R. 670; 49 Can. Crim. Cas. 316; 23 Alta. L. R. 344.—CAN.*

305 i. *Matters not cognisable by justices under summary jurisdiction—Offence punishable by fine & imprisonment.*—*R. v. MANUEL, [1928] 2 D. L. R. 755; 50 Can. Crim. Cas. 32.—CAN.*

p i. ———.—A police magistrate has no jurisdiction to try summarily without the consent of the accused a charge under Criminal Code, s. 295, of assault occasioning actual bodily harm, & therefore, cannot have such jurisdiction over said offence conferred on him merely by the laying of the charge under sect. 274 for unlawfully wounding or inflicting grievous bodily

harm.—*R. v. LETENDRE, [1928] 3 W. W. R. 580; 50 Can. Crim. Cas. 419.—CAN.*

p ii. ———.—A police magistrate in Manitoba has no jurisdiction to try summarily, without the consent of the accused, all the offences, except one, set forth in sect. 773 of the Criminal Code. The amendment, by 1932–33, c. 53, s. 11 of sect. 777, gives him this power.—*R. v. JONES, [1933] 3 W. W. R. 455; 61 O. C. C. 74; 41 Man. L. R. 579.—CAN.*

sb. *Offence at time committed not triable summarily.*—*R. v. HEISLER, [1928] 3 D. L. R. 221; 49 Can. Crim. Cas. 341.—CAN.*

sd. *Disobedience of maintenance order—Information heard after order quashed.*—An order for maintenance made against deft. in 1923 was quashed in Feb. 1928. In May, 1928, an information for disobedience of the maintenance order prior to the date of quashing was heard, & an order was then made that deft. be imprisoned until the maintenance order should be complied with:—*Held*: the maintenance order having been quashed, the justices had no jurisdiction to inquire into any disobedience of the order alleged to have been committed before it was quashed, & consequently, the information ought to have been dismissed.—*GALLOWAY v. WATSON, [1928] V. L. R. 308; [1928] Argus L. R. 201.—AUS.*

### PART VI. SECT. 3.

st. *Action to recover debt—Failure of debtor to appear—Warrant issued to arrest party.*—*CLARKE v. PLUMMER & MARCELLUS, [1928] 1 D. L. R. 941; [1928] 1 W. W. R. 234.—CAN.*

sh. ———.—*Contracted in district in which action brought.*—*Re LEWIS, Ex p. ELECTROLUX, LTD. (1928), 28 S. R. N. S. W. 578; 45 N. S. W. N. 185.—AUS.*

sj. ———.—*Action for rates.*—*BRISSANE CITY COUNCIL v. HODGE [1928] S. R. Q. 102; 22 Q. J. P. R. 63.—AUS.*

### PART VI. SECT. 4.

d i. ———.—*On waiver of priority by justice in favour of acting police magistrate.*—An information under Liquor Act, R.S.S., 1930, having been laid before a justice of the peace, he, by endorsement thereon, authorised & requested a certain named acting police magistrate in & for the city of Saskatoon to adjudicate on the complaint. When the complaint came up for hearing & before the acting police magistrate had dealt with it in any way, the police magistrate had resumed his duties & he tried the case & convicted the accused:—*Held*: the fact that the acting police magistrate did not formally request the police magistrate to adjudicate did not prevent the latter from having jurisdiction. Moreover the waiver of priority by the justice of the peace to the named acting police magistrate was not to be taken as a waiver to the latter personally but to the acting police magistrate & *ipso facto*, to the police magistrate.—*R. v. JIM SING, [1935] 1 W. W. R. 136.—CAN.*

g i. ———.—*Qu.*: whether a magistrate within Part XVI. of the Code has power to suspend sentence when acting under Part XV. of the Code.—*R. v. MORRELL (1933), 7 M. P. R. 312; 61 C. C. C. 247.—CAN.*

sk. *Theft—Goods under \$25.*—One justice of the peace has no jurisdiction to try charges for theft of goods under the value of \$25.—*R. v. DEAN, [1938] 1 D. L. R. 591; 12 M. P. R. 361.—CAN.*

### PART VI. SECT. 6.

p i. *In respect of violation of Customs Act—Whether limited by value of goods.*—*R. v. BOUTILIER, [1928] 2 D. L. R. 555; 49 Can. Crim. Cas. 312.—CAN.*

sk. *No power to convict under Customs Act, 1927, s. 217.*—*R. v. DEAN, [1931] 2 D. L. R. 84; 55 Can. C. C. 11; 3 M. P. R. 15.—CAN.*

sl. ———.—*Re BATES, [1931] 1 D. L. R. 940; 55 Can. C. C. 64; 3 M. P. R. 459.—CAN.*

## Part VII.—Indictable and Summary Offences.

**331a. Duty of justices.]—**Under Criminal Justice Act, 1925 (c. 86), s. 24 (1), justices are required, as a preliminary to any decision as to dealing summarily with an indictable offence, to take into consideration the character & antecedents of the accused.—*R. v. SHERIDAN*, [1937] 1 K. B. 223; [1936] 2 All E. R. 883; 106 L. J. K. B. 6; 155 L. T. 207; 100 J. P. 319; 52 T. L. R. 626; 80 Sol. Jo. 535; 34 L. G. R. 447; 26 Cr. App. Rep. 1; 30 Cox, C. C. 447, C. C. A.

*Annotations:—**Reid. R. v. Grant*, [1936] 2 All E. R. 1156; *R. v. Manchester JJ., Ex p. Lever*, [1937] 2 K. B. 96.

**334a. ———— “Before charge gone into.”]**—Deft., who was represented by a solr., was charged before a ct. of summary jurisdiction with an offence for which, if convicted, he would be liable to imprisonment for a term exceeding three months. He was not informed of his right to trial by a jury on appearing before the ct., before the charge

was gone into, but he was so informed afterwards, when all the evidence had been heard, but before the ct. had announced their decision. Deft. protested twice by his solr. that he could not at that stage be put to this election, but on being informed by the chairman that if he did not elect, the case would be sent for trial, he stated by his solr. that he would be dealt with summarily. Deft. was then convicted & fined:—*Held*: the proceedings were a nullity as the giving of that information to the person charged on his appearing before the ct., “before the charge is gone into,” in accordance with above sect. is a condition precedent to the validity of the subsequent proceedings. Accordingly the conviction was quashed.—*R. v. DIXON*, SOUTHAMPTON JUSTICES, *Ex p. PORTEOUS* (1929), 142 L. T. 597; *sub nom. R. v. HAMPSHIRE JUSTICES, Ex p. PORTEOUS*, 94 J. P. 70; 46 T. L. R. 157; 28 L. G. R. 84; 29 Cox, C. C. 113, D. C.

### PART VI. SECT. 7.

**sm. Discretion to order trial before regular court.]—**While under Juvenile Delinquents Act, 1929, the Juvenile Ct. has jurisdiction to conduct the trial of any offence committed by a child within the statutory age limit, yet, since sect. 9 of the Act provides that he may in his discretion order the child to be proceeded against by indictment in the ordinary course, it would seem that the better course for him to pursue is to make such an order where the alleged offence is a very grave one, such as arson.—*R. v. H.*, [1931] 2 W. W. R. 917.—CAN.

**sn. when tried.]—**The Juvenile Ct. extends to the case where, although the offender was under eighteen years of age at the time the offence was committed, he is over that age when put on trial.—*R. v. OARDA-RELLI* (B. C.), [1930] 1 D. L. R. 575; [1929] 2 W. W. R. 223; 52 Can. Crim. Cas. 267.—CAN.

**so. Duty of judge of ordinary court—To quash charge against juvenile delinquent.]—***R. v. Roos*, [1932] 3 W. W. R. 372; 46 B. O. R. 235.—CAN.

**sq. Review of decision—Whether certiorari lies.]—**On a motion for a writ of certiorari for the quashing of an order made in the Juvenile Ct., under Child Welfare Act, C. A., 1924, & amendments, for the maintenance of a neglected child:—*Held*: since it was within the jurisdiction of the Juvenile Ct. judge to make the findings he made, on the evidence, as to the date of the apprehension & the place of residence of the child, & there was a right of appeal given by the Act, these findings could not be questioned on certiorari.—*Re KOWALUK, CHILDREN'S AID SOCIETY OF WINNIPEG v. BROOKLANDS (VILLAGE)*, [1933] 3 W. W. R. 476; [1934] 1 D. L. R. 678; 41 Man. L. R. 463; 61 C. O. C. 27.—CAN.

**so. Expenses—How payable.]—**The effect of Children & Young Persons (Scotland) Act, 1932, is to make the juvenile cts. set up thereby part of the justice of the peace ct.; the justices' fiscal & clerk are the proper persons to act respectively as prosecutor & clerk; & the consequent expense falls to be defrayed by the county council out of the rates.—*BOASE v. FIRE COUNTY COUNCIL*, [1937] S. O. (H. L.) 28.—SCOT.

### PART VII. SECT. 2.

**kk i. ———.]—***R. v. LEE SOW* (B. C.), [1922] 2 W. W. R. 208; 66 D. L. R. 146; 37 Can. Crim. Cas. 196.—CAN.

**kk ii. ———.]—**The consent of accused is necessary to trial by a police magistrate of a charge of intoxication while in charge of a car.—*R. v. BIXEL* (1933), 60 C. C. C. 83.—CAN.

**kk iii. ———.]—**There must be formal election or express waiver in a trial under Part XIV.—*R. v. DAUPHINEE*, [1935] 1 D. L. R. 480; 8 M. P. R. 320; 63 C. C. C. 90.—CAN.

**mm i. ———.]—**Where on being charged with an offence under sect. 392 (a) of Code (taking, etc., without consent of the owner cattle found astray) the accused elects to be tried summarily, & the magistrate finds that the evidence does not establish the offence charged but is of opinion that it does establish an offence (a greater offence) under sect. 369 (theft of cattle) & amends the information, the accused should be informed specifically in compliance with sect. 781 of the Code, of the nature of the new charge & of his right to elect to be tried summarily or otherwise, & only when the accused then elects to be tried summarily does the magistrate have jurisdiction on the new charge.—*HAZLETT v. ROSS*, [1934] 1 W. W. R. 252; 62 C. C. C. 193.—CAN.

**nn i. ———.]—**Where new trial ordered—*Jury trial asked for in notice of appeal.*—*R. v. MATTENS*, [1928] 4 D. L. R. 831; 50 Can. Crim. Cas. 285.—CAN.

**nn ii. ———.]—**Where a new trial is ordered of a charge on which the accused had the right to, & did, elect a speedy trial, he is not entitled to re-elect.—*R. v. GEE DUCK LIM*, [1936] 3 W. W. R. 170; 4 D. L. R. 464; 66 Can. C. C. 304; 51 B. O. R. 61; *reversed*, [1937] 4 D. L. R. 660; 69 Can. C. C. 86.—CAN.

**nn iii. ———.]—***Corporation.*—Where a corp. is charged with keeping a disorderly house contrary to sect. 229 of Criminal Code, the jurisdiction of a magistrate to try the charge in a summary way under Part XVI. of the Code is dependent upon the consent of the corp. given by its attorney appearing on its behalf.—*R. v. CALGARY CLUB*, [1931] 3 W. W. R. 601; [1932] 1 D. L. R. 443; 57 Can. C. C. 158; 26 Alta. L. R. 113.—CAN.

**qq i. ———.]—**A magistrate may try accused without her consent for

keeping a disorderly house.—*R. v. BADIE*, [1935] 2 D. L. R. 75; 63 C. C. C. 192; 8 M. P. R. 378.—CAN.

**rr i. ———.]—***R. v. NELSON* (1901), 8 B. C. R. 110.—CAN.

**ggg i. Proceedings under Opium & Narcotic Drug Act, 1923.]—***R. v. LEW HING LOY* (B. C.), [1926] 2 W. W. R. 543; 46 Can. Crim. Cas. 75.—CAN.

**ggg ii. ———.]—***R. v. SAM HING*, [1926] 1 D. L. R. 1000; 45 Can. Crim. Cas. 202; 58 O. L. R. 370.—CAN.

**ggg iii. ———.]—***R. v. DENIS* (Man.), [1927] 3 W. W. R. 400; 49 Can. Crim. Cas. 8.—CAN.

**ggg iv. ———.]—***Re R. v. RUTHERFORD* [1927] 4 D. L. R. 434; 48 Can. Crim. Cas. 237; 60 O. L. R. 654.—CAN.

**mmm i. ———.]—***Necessity for consent of accused.*—*LAMBERT v. R.* (1926), 47 Can. Crim. Cas. 159; Q. R. 42 K. B. 91.—CAN.

**mmm ii. ———.]—***R. v. BONNIS* (1927), 47 Can. Crim. Cas. 193; 60 O. L. R. 189.—CAN.

**mmm iii. ———.]—***R. v. JOHNSON MCKENZIE* (1927), 48 Can. Crim. Cas. 255; 59 N. S. R. 326.—CAN.

**mmm iv. ———.]—***R. v. ZANINE*, [1931] 1 W. W. R. 193; 1 D. L. R. 941.—CAN.

**ooo i. ———.]—***R. v. DENIS* (Man.), [1927] 3 W. W. R. 400; 49 Can. Crim. Cas. 8.—CAN.

**ooo ii. ———.]—***Opium & Narcotic Drugs Act.*—Under Opium & Narcotic Drugs Act, a magistrate may hear a charge summarily, without putting the accused to his election.—*VIAU v. OTIS* (1927), 44 Que. K. B. 406.—CAN.

**sm. Indictable offences triable summarily—Incest.]—**The Juvenile Ct., or the magistrate presiding in that ct. has no jurisdiction to summarily try an adult for incest.—*LEBOUX v. R.*, [1928] 1 D. L. R. 299; 49 Can. Crim. Cas. 111; 44 Que. K. B. 308.—CAN.

**sp. Indecent assault.]—**Where a person is charged before a magistrate in British Columbia (& in the other provinces & territories mentioned in

accused without the accused's consent, unless in the magistrate's opinion the assault charged was with intent to commit rape. The magistrate's opinion is to be arrived at after such an inquiry as indicated by sect. 781, i.e. by an



343. *Add. Annotation*:—*Folld. R. v. Dixon, Southampton Justices, Ex p. Porteous* (1929), 142 L. T. 597.

345. *Add. Annotation*:—*As to* (1) *Folld. R. v. Dixon, Southampton Justices, Ex p. Porteous* (1929), 142 L. T. 597.

## Part VIII.—Procedure under Summary Jurisdiction.

377. *Add. Annotation*:—*Refd. Joel v. Barclay*, [1937] 1 All E. R. 309.

432. *Add. Citation*:—2 B. R. A. 626.

433. After this case add:—*Service by post.*—*See Service of Process* (Justices) Act, 1933 (c. 42).

433a. — *Omission in copy—Signature.*—Where a summons, issued by a magistrate at a metropolitan police ct., commanding a deft. to answer an information for breach of a nuisance order previously made against deft. in the ct., is in all respects in the proper form & duly signed by the magistrate, the omission

informal examination of Crown witnesses &, in any event, before calling upon the accused. The conviction for indecent assault need not, however, set forth that in the magistrate's opinion the assault was not with intent to commit rape.—*R. v. AH SING*, [1937] 3 W. W. R. 185.—CAN.

*sr.* —.]—The fact that a conviction by a magistrate, exercising absolute jurisdiction under sects. 777, 773 (h) of Criminal Code, for an indecent assault on a female does not show on its face that he had formed the opinion that the offence did not amount to an attempt to commit rape, does not render the conviction invalid, although the forming of said opinion is a prerequisite of his jurisdiction to convict for indecent assault.—*R. v. OLLECH*, [1938] 1 W. W. R. 651; 2 D. L. R. 574; 8 F. L. J. (Can.) 35.—CAN.

*sv. Obstructing officer.*—A stipendiary magistrate has jurisdiction to try the offence of obstructing an officer without consent of accused.—*R. v. RHODENHIZER* (No. 1) (1936), 67 Can. C. C. 259.—CAN.

PART VIII. SECT. 1, SUB-SECT. 1. d i. —.]—*R. v. O'HARA* (N. B.) (1927), 48 Can. Crim. Cas. 231.—CAN.

f i. —.]—*Scmble*: a sworn information should never be amended unless re-sworn.—*R. v. NEEDHAM*, [1931] O. R. 303; 55 Can. C. C. 338.—CAN.

f ii. — *On appeal.*—Where guilt is established from the evidence, a defective information should be cured on appeal under sect. 1124 of the Code.—*R. v. REID*, [1935] 3 D. L. R. 547; 64 Can. C. C. 124; 5 F. L. J. (Can.) 84; *sub nom. Re Reid*, 9 M. P. R. 457.—CAN.

so. *Information laid by telephone.*—C. signed an information for an offence against Canada Temperance Act, leaving the date & a place for the magistrate's name in blank, & mailed it to magistrate J. He, being ill, handed the information to magistrate M. C. then requested magistrate M., over the telephone, to take the information & to issue a summons thereon. Summons was issued &, at the hearing, after the evidence was all in, deft.'s counsel appeared & objected to the magistrate's jurisdiction, but took no further part in the proceedings.—*Held*: the information was improper, because not laid & signed before the magistrate & the magistrate acted without jurisdiction.—*R. v. MURRAY, Ex p. COFF* (1910), 40 N. B. R. 289; 9 E. L. R. 519.—CAN.

sp. *Disagreement of justices—Right to lay second information.*—(1) Where on the hearing by two justices of the peace of an information laid under Excise Act, R. S. O., 1927, they are divided in opinion &, therefore, fail to reach a decision, sect. 129 of said Act does not prohibit the laying of a new information before two other justices.

(2) *Scmble*: it is not open to the judge on an appeal from a conviction on the new information to find lack of jurisdiction. The better, if not the only, course for the accused to take is to raise the question of jurisdiction by *certiorari*.

(3) Notwithstanding sect. 1122 of the Criminal Code, the taking of the appeal is not a waiver of objection to the jurisdiction.—*LANE v. KREKEWICH*, [1933] 1 W. W. R. 522.—CAN.

st. *Summons issued after information sworn—Right to elect whether to proceed on summons or information.*—The prosecutor was arrested on Aug. 26, 1933, & charged with being unlawfully & knowingly concerned in the illegal importation of cattle, contrary to Customs Consolidation Act, 1876 (c. 36). He was remanded on bail until Sept. 11, 1933. An order was made on Sept. 11, 1933, adjourning the trial until Oct. 9. An information was sworn on Oct. 4, 1933, by an officer of Customs & Excise in which it was charged that the prosecutor was knowingly concerned in an attempted evasion of Customs duty on cattle imported from the Irish Free State into Northern Ireland with intent to defraud the Revenue. A summons, dated Oct. 4, 1933, to attend on Oct. 9, 1933, was issued against the prosecutor in pursuance of the information. The prosecutor attended at the petty sessions ct. to answer the charge for which he had been arrested, when it was stated by the solr. who appeared for His Majesty's Customs & Excise that he would withdraw the original charge & proceed on foot of the summons. The solr. for the prosecutor then withdrew from the case & the ct. heard the summons & convicted the prosecutor of the offence charged & adjudged that he should pay the sum of £269 6s. 6d. or in default be imprisoned for six months:—*Held*: the procedure adopted was perfectly regular, & the ct. had power to elect, right up to the time of conviction, whether to proceed on information or on summons.—*R. (MACKIN) v. ARMAGH COUNTY JUSTICES*, [1934] N. I. 204.—IR.

sw. *Amendment of complaint—Clerical error.*—Leave to amend a clerical error in a sworn complaint may be granted at the hearing.—*BELL v. PARENT* (1903), 7 Can., C. C. 465.—CAN.

sz. *Committal for trial on defective information.*—An accused may be committed for trial upon an information which is too defective to support a conviction.—*R. v. EDWARDS*, [1938] 1 D. L. R. 525; 69 Can. C. C. 305; [1938] O. R. 12.—CAN.

PART VIII. SECT. 1, SUB-SECT. 4.

362 v. —.]—District Ct. Rules, r. 8, which was made applicable to proceedings under Customs Acts by r. 58, provides that where it is intended that a summons only shall issue to

bring a deft. before the ct., the information or complaint may be made either in writing or orally, as the district justice of the peace shall see fit:—*Held*: therefore, an information in writing required by Customs & Inland Revenue Act, 1879, was no longer a necessary preliminary to the issue of a summons charging an offence under Customs Acts.—*A.-G. v. HEALY*, [1928] I. R. 460.—IR.

362 vi. —.]—Where a deft. illegally brought before justices objects that there is no written complaint or summons, & is nevertheless convicted without either, the conviction is not sustainable & will be quashed as having been made without jurisdiction.—*MCCULLOCH v. BOLKIN, Ex p. BOLKIN*, [1929] S. R. (Q.) 113; 23 Q. J. P. R. 59.—AUS.

PART VIII. SECT. 1, SUB-SECT. 5.—A. (a).

367 i. *Whether alternative offences may be charged.*—The accused co. was convicted by a police magistrate on an information which charged that it "did sell or cause to be sold" a certain quantity of sugar purporting to be sold by weight as 10 pounds which was short of that weight by one pound, contrary to sect. 63 of Weights & Measures Act, R. S. C. 1927. The conviction followed the terms of the information:—*Held*: the information was bad for uncertainty in that it charged two offences in the alternative, but since said defect was one of substance within sect. 753 of Criminal Code & the proof required by that sect. as a condition precedent to applt.'s objection being allowed, viz. proof that the objection had been raised before the justice, had not been made, judgment could not be given in its favour; but the ct. had power to require the prosecution to elect on which charge it would proceed.—*R. v. SAFEWAY STORES, LTD.* (No. 1), [1938] 2 W. W. R. 479.—CAN.

377 i. *What amount to separate offences—Not "having optimum & cocaine."*—*R. v. CHOW BEN* (1925), 45 Can. Crim. Cas. 152; 36 B. C. R. 319; [1926] 1 W. W. R. 384.—CAN.

PART VIII. SECT. 1, SUB-SECT. 5.—A. (b).

382 i. *Necessity to state time.*—A magistrate has no jurisdiction to convict when no time of the commission of the offence is stated in the information.—*R. v. PALMER, Ex p. GORMERLY* (1933), 6 M. P. R. 68; 60 C. C. C. 226.—CAN.

387 vi. —.]—*R. v. ISBELL*, [1928] 4 D. L. R. 322; 50 Can. Crim. Cas. 81; 62 O. L. R. 489; *affd.*, [1929] 2 D. L. R. 732; 51 Can. Crim. Cas. 362; 63 O. L. R. 384.—CAN.

sp. *Necessity to state value of property—Nature of proceedings dependent on value.*—*R. v. THOMPSON*, [1928] 4 D. L. R. 859; 50 Can. Crim. Cas. 183; 62 O. L. R. 610.—CAN.

through inadvertence from the copy of the summons which is served upon deft. of the signature of the magistrate or any signature is a mere defect in form which does not invalidate that copy of the summons or the service thereof.—*R. v. HAY HALKETT, Ex p. RUSH*, [1929] 2 K. B. 431; 98 L. J. K. B. 497; 141 L. T. 519; 93 J. P. 209; 45 T. L. R. 507; 27 L. G. R. 523; 28 Cox, C. C. 648, D. C.

435a. ———.—[A summons by a wife for arrears of maintenance had been twice adjourned by reason of a statement by the husband that he intended to take counter-proceedings for the discharge of the order on the ground of the wife's adultery. Upon the summons coming on again the husband took out his counter-summons returnable on that same day & the case was then heard. The wife was offered an adjournment, which she refused. The summons merely charged adultery by the wife in general terms, not specifying with whom the adultery was committed, or any time or place; but a letter was handed to the wife with the summons stating that she was accused of committing adultery with a named person & had been living with him for 4 years.—*Held*: there is no specified length of time for a return to a summons issued by a ct. of summary juris-

diction, & it is a common practice when a party is before the ct. to issue a supplemental summons returnable on that day; it is very desirable that a summons should state particulars of adultery, but it is not bad in law if it does not do so; any irregularity there might have been had been waived by the party continuing the case before the justices; in all the circumstances & in view of the serious charge made against the wife & the alleged adulterer, an order should be made for a further hearing, but the wife should have no costs of the appeal.—*OLDING v. OLDING*, [1936] 3 All E. R. 189; 155 L. T. 528; 100 J. P. 524; 80 Sol. Jo. 955; 30 Cox, C. C. 479; 34 L. G. R. 616.

439. *Add. Annotation*.—*Consd. Horsfield v. Brown*, [1932] 1 K. B. 355.

448a. ———.—*When power to take oath.*—*OATH BEFORE JUSTICES CASE* (1611), 12 Co. Rep. 130; 77 E. R. 1405.

*Annotation*.—*Apld. Bane v. Methuen* (1824), 2 L. J. O. S. C. P. 121.

460. *Add. Annotation*.—*Consd. R. v. Philips, R. v. Quayle*, [1938] 3 All E. R. 674.

470. *Add. Annotation*.—*Refd. Williams v. Russell* (1933), 149 L. T. 190.

500a ———.—*Not necessarily right of property.*—*A local Act authorised the corpn. to*

PART VIII. SECT. 1, SUB-SECT. 6.—A.

*sq. Attorney-General—Where prosecution not instituted by minister, department of State or authorised person.*—A district justice raised a preliminary objection to the hearing of a summons charging an offence under Customs Act, viz.—that complainant was the Attorney-General, the district justice being of opinion that under Customs & Inland Revenue Act, 1879, s. 11, an officer of the customs & excise must be the complainant.—*Held*: the objection was unsustainable as Criminal Justice Administration Act, 1924, s. 9 (2), authorised the A.-G. to prosecute in any ct. of summary jurisdiction in all cases in which a prosecution is not instituted by a minister, dept. of State, or authorised person.—*A.-G. v. HEALY*, [1928] 1 R. 460.—IR.

PART VIII. SECT. 1, SUB-SECT. 7.

a l. ———.—*R. (REID) v. YOURECHUK*, [1933] 2 W. W. R. 511.—CAN.

PART VIII. SECT. 2, SUB-SECT. 1.—D.

d i. ———.—*Constable must show accused could not conveniently be met with.*—*Re MUSIAL (N. S.)*, [1929] 1 D. L. R. 708; 51 Can. Crim. Cas. 142.—CAN.

d ii. ———.—[Where a summons is not served personally, its nature must be explained to the person with whom it is left.—*CUMMISKEY v. R.* (1938), 12 M. P. R. 420; *sub nom. Ex p. CUMMISKEY*, 7 L. Jo. 245.—CAN.

f i. ———.—*Impossibility of waiver.*—A summons issued under Highway Traffic Act was not served within 10 days of the offences as required by sect. 52 of the Act.—*Held*: appearance & plea did not waive the delay. A statutory time limit cannot be so waived.—*Re ELLERBY* (1930), 53 Can. C. C. 355; 65 O. L. R. 167.—CAN.

g i. ———.—*Re DAVID (N. S.)*, [1929] 2 D. L. R. 701; 51 Can. Crim. Cas. 199.—CAN.

PART VIII. SECT. 2, SUB-SECT. 2.—A.

sr. *Before whom returnable.*—Where a magistrate or justice with general

jurisdiction, takes an information for an indictable offence under the Code, ss. 653, 654, & issues his warrant, that warrant is returnable before him or before any other "justice" having territorial jurisdiction at the place where the issuing justice had his jurisdiction, but subject to the right of the latter to direct that the accused person be brought before him, if convenient.—*R. v. ISBELL*, [1928] 4 D. L. R. 322; 50 Can. Crim. Cas. 81; 62 O. L. R. 489.—CAN.

PART VIII. SECT. 4, SUB-SECT. 1

sa. *Summary trial of indictable offence—Criminal Code, s. 884.*—*R. v. ROBERTS (Sask.)*, [1928] 1 D. L. R. 260; [1927] 3 W. W. R. 844.—CAN.

sb. *Effect of adjournment—On jurisdiction of magistrate—Child Welfare Act.*—The word "heard" in sect. 184 (2) of Child Welfare Act, C. A., 1924 (c. 30), includes "partly heard"; & if a case is continued from day to day it is "heard" on each day it is spoken to until it is finally heard, tried, determined & adjudged.—*DIRECTOR OF CHILD WELFARE v. ST. CLEMENTS, RURAL MUNICIPALITY OF*, [1930] 1 W. W. R. 395; 2 D. L. R. 255; 38 Man. L. R. 482.—CAN.

PART VIII. SECT. 4, SUB-SECT. 2.

k i. ———.—*New magistrate—Duty to rehear evidence.*—*R. v. CLAREMONT* (1931), 56 Can. C. C. 197.—CAN.

k ii. ———.—*Evidence on another similar charge heard—Conviction invalid.*—*R. v. KOCHÉ* (1931), 56 Can. C. C. 203.—CAN.

o i. ———.—*Power to authorise another justice to act.*—The Magistrates Act, R. S. S., 1920, s. 9, which provides that at the request of the justice before whom the information or complaint was made any other justice may "take part in the case," does not merely empower the first justice to call in another justice to act with him in the case, but empowers him to authorise another justice to adjudicate solely in the matter.—*BABIUK v. ANDERSON*, [1929] 3 D. L. R. 944; 1 W. W. R. 728; 52 Can. Crim. Cas. 23; 23 S. L. R. 377.—CAN.

PART VIII. SECT. 4, SUB-SECT. 3.—A.

st. *Arraignment—Necessity for plea by defendant.*—Accused was convicted before a stipendiary magistrate on a charge of having been in possession of a still, contrary to the provisions of Excise Act. On an application for a writ of *habeas corpus* with *certiorari* in aid, the proceedings disclosed that accused had not been called upon to plead to the charge.—*Held*: calling upon accused to plead is an essential part of the arraignment & the conviction should be quashed.—*R. v. CHEW DEB* (1928), 41 B. C. R. 403.—CAN.

PART VIII. SECT. 4, SUB-SECT. 3.—B. (a).

471 ii. ———.—[The rule that there is no power to subpoena a deft. to an information as a witness or to serve him with process in the nature of a *subpoena duces tecum* in order to bring his body into ct. for the purpose of identification, applies to a prosecution for an offence created by a by-law of the city of Edmonton.—*R. v. KELLAS*, [1932] 3 W. W. R. 225.—CAN.

PART VIII. SECT. 4, SUB-SECT. 3.—B. (b) iii.

484 i. ———.—*Further charge preferred.*—When accused is brought before a magistrate after being properly arrested he can be proceeded against on a fresh charge, although a summons commanding his appearance or warrant for arrest has not been issued thereunder.—*Re LAMB (Man.)*, [1927] 1 W. W. R. 432; 47 Can. Crim. Cas. 277.—CAN.

PART VIII. SECT. 4, SUB-SECT. 3.—B. (b) iv.

490 i. ———.—*Objection taken at time of appearance.*—*R. v. MURRAY, Ex p. COFF* (1910), 40 N. B. R. 289; 9 E. L. R. 519.—CAN.

PART VIII. SECT. 4, SUB-SECT. 5.

q i. ———.—*R. v. McDONALD*, [1928] 2 D. L. R. 787; 50 Can. C. C. 65.—CAN.

make a bye-law prohibiting the playing of mechanical organs anywhere in the borough. In 1892 the corpn. made such a bye-law. The applt. was summoned for playing such an organ in the borough in breach of that bye-law on Apr. 7, 1928. He claimed a right so to play the organ by virtue of a licence which had been given to him by the lord of the manor, & contended that the jurisdiction of the justices was thereby ousted. The justices convicted him, & stated a case:—*Held*: the appeal must be allowed & the conviction quashed, because (a) the local Act expressly saved "all rights of a profitable or beneficial nature in, over or affecting the commons" that had been exercised before the passing of the Act; (b) the lord of the manor had, before 1890 & continuously until these proceedings, licensed the playing of such organs on the commons & had received between £300 & £400 annually in respect of such licence; (c) the applt. had played his organ on a part of the commons in pursuance of such a licence; & (d) the claim was not "possible

in law" & ousted the jurisdiction of the justices; *Semble*: there is no sufficient authority for the proposition that the right which alone will avail is the right of property.—*ANDREWS v. CARLTON* (1928), 93 J. P. 65, D. C.

503a. — Breach of bye-laws—Playing football in street—Open space intersected by public footpaths—Claim overruled.]—*PEARSON v. WHITFIELD* (1888), 52 J. P. Jo. 708, D. C.

503b. — Auction held in street.]—A bye-law made it an offence to sell goods, etc., by auction in any street of a city without the leave of the constable. C. being summoned for selling on a plot of ground, set up the defence that it was private property, & not part of a street:—*Held*: this was a *bonâ fide* claim of title, & the justices properly declined jurisdiction.—*PHILLIPS v. CANHAM* (No. 1) (1872), 38 J. P. 310.

545. *Add. Annotation*:—*Appld. R. v. Southampton Justices, Ex p. Tweedie* (1932), 102 L. J. K. B. 11.

#### PART VIII. SECT. 4, SUB-SECT. 7.

so. *Power to order arrest of witness*—*Criminal Code*, s. 675.]—*Ex p. COYLE* (P. E. I.), [1927] 4 D. L. R. 1129; 49 Can. Crim. Cas. 91.—CAN.

#### PART VIII. SECT. 4, SUB-SECT. 8.

sd. *Must be according to rules of evidence*.—*R. v. DUNN* (Ont.), (1926), 45 Can. Crim. Cas. 139.—CAN.

g i. —.—.]—*R. v. LAPOINTE*, [1931] 1 D. L. R. 933; 55 Can. C. C. 9.—CAN.

p i. —.—.]—A justice of the peace has no authority to administer an oath to accused, & examine him thereunder, after he has pleaded guilty.—*R. (ALDRIDGE) v. BROWN*, [1927] 3 W. W. R. 335.—CAN.

p ii. —.—.]—*Necessity for*.—In the case at least where the jurisdiction of a magistrate is restricted to a certain subdivision, e.g., an electoral district, of the more publicly well-known divisions of the province, such as counties, he cannot take judicial notice that the place of an alleged offence is within the area of his jurisdiction.—*R. v. WONG SIM*, [1934] 3 W. W. R. 253; 62 C. C. O. 268.—CAN.

r i. —.—.]—*R. v. STEPHENS, R. v. LAHAY* (Ont.), (1926), 45 Can. Crim. Cas. 123.—CAN.

a i. —.—.]—The drawing of the inference of guilt from circumstantial evidence is for the magistrate & not for the Ct. of Appeal.—*R. v. ATHERTON & WATSON* (1933), 6 M. P. R. 103.—CAN.

b i. —.—.]—A conviction should not be quashed merely because the evidence at the hearing is not shown to have been taken by a stenographer who was a "duly sworn official stenographer" as provided in *Criminal Code*, 1927, s. 683.—*R. v. FIALKA*, [1934] O. R. 354.—CAN.

sv. *Identification—Sufficiency of*.—On the hearing of an information for an offence deft. who had been served with the summons did not himself appear, but was represented by his solr. The only evidence to identify deft. with the offender was that the offender had at the time of the offence given, as his own, a name & address which corresponded with those of deft. Deft. was convicted:—*Held*: the evidence was admissible, & was in the circumstances sufficient to justify the conviction.—*BLYTE v. CARTER*, [1933] V. L. R. 433; *Argus* L. R. 434.—AUS.

sz. *Power of magistrate to call witness*.—A ct. of petty sessions has no right to call a witness *proprio motu* if either side objects, unless something has arisen *ex improviso* on the part of deft. which no human ingenuity could have foreseen.—*DAWSON v. ZAMMIT, Ex p. ZAMMIT*, [1936] Q. S. R. 322; 30 Q. J. P. R. 163.—AUS.

#### PART VIII. SECT. 4, SUB-SECT. 9.

545 ii. —.—.]—*R. v. HENDERSON, Ex p. BRINDLE* (N. B.), [1926] 2 D. L. R. 583; 45 Can. Crim. Cas. 310.—CAN.

#### PART VIII. SECT. 4, SUB-SECT. 10.

st. *To call further evidence*.—It is within a magistrate's discretion to allow the prosecution to adduce further evidence after its case has been closed.—*R. (PARKER) v. SMITH*, [1927] 4 D. L. R. 410; [1927] 2 W. W. R. 722; 48 Can. Crim. Cas. 249; 21 Sask. L. R. 600.—CAN.

#### PART VIII. SECT. 4, SUB-SECT. 11.

556 iii. —.—.]—On a prisoner being brought before a magistrate for trial on the day of the arrest the magistrate was informed, both by the prisoner & by telegram from a counsel, that the latter had been retained for the defence & was requested by them to grant an adjournment to permit of the counsel's attendance:—*Held*: the refusal under such circumstances of a reasonable remand was a wrongful denial to the accused of the right given him by *Criminal Code* to make a full defence & have his counsel present. The discharge of the prisoner was, therefore, ordered.—*R. v. HALLCHUK (ELCHUK)*, [1928] 1 D. L. R. 731; [1928] 1 W. W. R. 646.—CAN.

d (p. 345) i. —.—.]—*R. v. DUPRAS, LTD., R. v. LATRAVERSE*, [1927] 3 D. L. R. 399; 47 Can. Crim. Cas. 324.—CAN.

d (p. 345) ii. *Discretion to adjourn—Length of time*.—Where an accused is out on bail an adjournment of a preliminary inquiry may be for more than eight days; the limitation of eight days imposed by sect. 679 (c) of the *Criminal Code* on a "remand" is entirely for the benefit & protection of an accused who is in custody.—*R. v. SOLLOWAY, R. v. MILLS*, [1930] 1 W. W. R. 486; 53 Can. C. C. 180; 24 Alta. L. R. 404.—CAN.

g i. —.—.]—*Number of adjournments*.—*MESSINGER v. PARKER* (1885), 18

N. S. R. (3 R. & G.) 237; 6 C. L. T. 444.—CAN.

sl. *Effect of adjournment—Charge under Liquor Act—Whether magistrate deprived of jurisdiction*.—*HALL v. TAYLOR*, [1926] 3 D. L. R. 34; [1926] 2 W. W. R. 175; 46 Can. Crim. Cas. 50; 20 Sask. L. R. 463.—CAN.

sp. *Irregular adjournment—Loss of jurisdiction—Recovery by appearance of accused*.—Where a magistrate lost jurisdiction over the person by reason of irregular adjournments, he was held to have recovered it by the appearance of the accused at the adjourned hearing.—*Re STEPHENSON*, [1937] 1 D. L. R. 796; 11 M. P. R. 149.—CAN.

#### PART VIII. SECT. 4, SUB-SECT. 13.

h i. —.—.]—*Evidence as to one*.—Applt. was convicted after a summary trial by consent for unlawfully issuing trading stamps, to one H. & others. The only evidence adduced at the trial was directed to the sale to H. alone, & that sale was proven. On appeal:—*Held*: whatever might be said in support of the contention that the conviction was one for more than one offence & therefore bad for duplicity, it could not be said that any substantial wrong or miscarriage of justice had occurred, & therefore, the appeal was dismissed.—*R. v. SMITH*, [1932] 1 W. W. R. 131; 44 B. C. R. 422.—CAN.

sm. *Charge not supported by evidence—Substituted charge—Whether two charges*.—Justices cannot convict a man unless a legal offence is proved, & they cannot convict him of an offence with which he has not been charged, but, if he is properly before them on an information which discloses no offence, or which charges an offence which is not supported by the evidence, he may be orally charged with any other offence which the evidence is sufficient to support, & subject to being given a proper opportunity of meeting it, may be convicted of it. In such a case there are not two independent charges pending against applt. at the same time.—*Re SINGLETON, Ex p. WILLIAMS* (1928), 28 S. R. N. S. W. 616; 45 N. S. W. W. N. 189.—AUS.

#### PART VIII. SECT. 5, SUB-SECT. 1.—A.

d i. —.—.]—Deft. was convicted by a district justice of an offence under *Fisheries Act*, 1924, but the district justice omitted to order a forfeiture of the fish as required by the Act:—

593. *Add. Annotation*:—*Consd. Pointon v. Cox* (1926), 136 L. T. 506.

603. *Add. Annotation*:—*Consd. Pointon v. Cox* (1926), 136 L. T. 506.

631a. *Improper consideration of previous convictions—Inquiry into previous convictions not in open court.*—At a ct. of summary jurisdiction the three appts. were charged for that they then being in a certain fishing district under the control of a board of conservators, unlawfully did fish for salmon or trout otherwise than by means of an instrument which they were duly licensed to use contrary to sect. 63 (1) of the Salmon & Fresh Water Fisheries Act, 1923 (c. 16), s. 63 (1).

The charges related to alleged offences on July 6 & 20, 1929. At the conclusion of the hearing as to the charges relating to July 6, the justices retired to their ante-room, & after they had decided to convict each of appts., sent for information as to any convictions for previous fishing offences by appts. for the purpose of considering the appropriate penalty for each appt. They were informed that two of appts. had been twice previously convicted, & one of them once previously convicted of such offences. They obtained this information from their clerk & did not see the police reports of appts. nor obtain information with regard to anything but these alleged convictions for fishing offences. The justices then returned into ct. & announced that appts. were convicted & each of them fined £5.

Thereupon the charges relating to July 20 were commenced. In opening the case against appts., the solr. for the prosecution referred to the convictions which had just been recorded against each of appts. Objection was taken to this by appts.' solr., but the justices proceeded with the case & again convicted appts. & fined each of them £5:—*Held*: all the convictions must be quashed. On the charges first heard, the justices, having decided to convict, should have returned into ct. & then publicly & openly in the presence of appts. made inquiries into any previous convictions there might be against them, in which case appts. would have had the opportunity of dealing with the matter. As to the charges subsequently heard the prosecuting solr. not only referred to the convictions that had just been recorded against appts., but to convictions which had been vitiated as already stated. The question was not whether substantial injustice had been done, but whether the rules had been observed. They had not been observed.—*HASTINGS v. OSTLE* (1930), 143 L. T. 707; 94 J. P. 209; 94 J. P. Jo. 222; 46 T. L. R. 331; 28 L. G. R. 324; 29 Cox, C. C. 177, D. C.

*Annotation*:—*Apld. Hill v. Tothill* (1936), 34 L. G. R. 430.

631b. ————*—HILL v. TOTHILL* (1936), 80 Sol. Jo. 572; 34 L. G. R. 430.

*Annotations*:—*Refd. Cooper v. Wilson*, [1937] 2 K. B. 309; *Davies v. Griffiths*, [1937] 2 All E. R. 671.

631c. ————*Reference by solicitor to convictions improperly obtained.*—*HASTINGS v. OSTLE*, No. 631a, *ante*.

*Held*: the conviction is the spoken pronouncement of the district justice, & the note in the justice's minute book of his decision, prescribed by District Ct. Rules, r. 50, stating the effect of the conviction is the record of that punishment.—*TANGNEY v. KERRY COUNTY DISTRICT JUSTICE*, [1928] 1 R. 358.—*IR*.

#### PART VIII. SECT. 5, SUB-SECT. 1.—B. (a).

584 vi. ————*—R. v. BARRY* (N. S.) (1926), 46 Can. Crim. Cas. 143.—*CAN.*

584 vii. ————*—R. v. RODGERS* (Ont.), [1926] 4 D. L. R. 609; 46 Can. Crim. Cas. 372.—*CAN.*

#### PART VIII. SECT. 5, SUB-SECT. 1.—B. (b).

603 ii. ————*—Held*: Justices Procedure Act, 1910, s. 26, which provides "the description or statement of any offence in the words of . . . the Act . . . creating the offence or in similar words . . . shall be sufficient in law" still leaves it necessary to specify in a criminal charge all the particular facts which are the essential ingredients of a concrete case.—*BURNETT v. BROWN* (1931), 24 Tas. L. R. 23.—*AUS.*

#### PART VIII. SECT. 5, SUB-SECT. 1.—B. (c).

sn. *Value of articles stolen or amount of injury done—Criminal Code, s. 376.*—A conviction under sect. 376 of the Criminal Code for the theft of part of a fence which imposes a penalty greater than \$20 without an adjudication upon & finding by the magistrate of the "value of the article or articles stolen or the amount of injury done" is invalid with respect to the penalty. The intention of the sect. is to permit the magistrate, in addition to imposing a fine payable to His Majesty, to order the amount of the value of

the article stolen or the amount of the injury done to the fence in question to be paid to the owner thereof.—*R. ex rel. ARNOLD v. WESTERLAND* (Alta.), [1929] 3 W. W. R. 408; 52 Can. Crim. Cas. 127.—*CAN.*

#### PART VIII. SECT. 5, SUB-SECT. 1.—D. (a).

613 i. *Proper hearing of accused party.*—Criminal Code, s. 721, does not authorise any interrogation of prisoner by a magistrate other than the asking him whether he has any cause to show why he should not be convicted. This can be done by asking, "What does he say, guilty or not," but if the reply be not a clear admission of all the elements of the crime, the magistrate must proceed to inquire into the charge without further questioning.—*R. v. LEE*, [1925] 2 W. W. R. 190; 45 Can. Crim. Cas. 280; 35 B. C. R. 401.—*CAN.*

613 ii. ————*—R. v. JOHNSON MCKENZIE* (1927), 48 Can. Crim. Cas. 255; 59 N. S. R. 326.—*CAN.*

a 1. ————*Statement of value of articles stolen.*—A conviction under sect. 376 of Criminal Code for the theft of part of a fence which imposes a penalty greater than \$20 without an adjudication upon & finding by the magistrate of the "value of the article or articles stolen or the amount of injury done" is invalid with respect to the penalty. The intention of the section is to permit the magistrate, in addition to imposing a fine payable to His Majesty, to order the amount of the value of the article stolen or the amount of the injury done to the fence in question to be paid to the owner thereof.—*R. ex rel. ARNOLD v. WESTERLAND* (Alta.), [1929] 3 W. W. R. 408; 52 Can. Crim. Cas. 127.—*CAN.*

so. *Offence charged proved—Right to convict of minor offence.*—Where an

accused is charged with having opium in his possession contrary to sect. 4 of Opium & Narcotic Drug Act, R. S. C. 1927 (c. 144), & under the magistrate's findings that offence is proved, it is not legally open to the magistrate to refuse to convict therefor & to convict instead of the minor offence of smoking opium, even though he finds that the purpose of the accused in possessing the opium was to smoke it himself & not to traffic in it.—*R. v. LOUIE YEE*, [1929] 2 D. L. R. 452; 1 W. W. R. 882; 51 Can. Crim. Cas. 405; 24 Alta. L. R. 16.—*CAN.*

sq. *Plea of guilty.*—A magistrate may pass sentence after a plea of guilty, provided that the procedure laid down in sect. 776 of the Criminal Code is complied with.—*R. v. SIROY* (1934), 7 M. P. R. 519; 62 C. C. C. 71.—*CAN.*

st. *Three cases—Decision postponed until all heard.*—Where a magistrate, in trying three separate cases arising out of the same incidents, postponed his decision until all three cases had been heard, & on appeal being made from a conviction, admitted that he did not feel justified in saying that he was not influenced by evidence in one case, which had not been repeated in the case in which he had convicted, the possibility of his having been influenced is sufficient to nullify the conviction.—*BUTLER v. NORRIS*, [1937] N. Z. L. R. 743; 13 N. Z. L. J. 246.—*N.Z.*

sw. *Two charges—Judgment on first reserved—Conviction on second—First dismissed.*—If a magistrate trying two charges against accused reserves judgment on the first until after the trial of the second, & then dismisses the first & convicts on the second, the conviction will not be set aside if it is clear that the evidence on the first charge did not influence the conviction on the second.—*Re BLACKBURN* (1937), 12 M. P. R. 126.—*CAN.*

631d. — Decision to convict before previous convictions heard.]—Applt. was charged with having (i) been guilty of conduct which might lead to breaches of the peace, contrary to the common law, (ii) obstructed a police inspector while in the execution of his duty. Having heard the evidence, the justices retired to consider their decision, & having decided to convict on both charges, they returned into ct. without announcing their decision to convict, but asked if there was anything previously known against applt. Thereupon his previous convictions were supplied to the justices in ct., & admitted by applt. The justices then retired a second time to consider what penalty, if any, they should impose on applt., after which they returned into ct. & announced their decision to impose a fine of £5 & £5 5s. costs on the first charge, & to order him to pay costs in respect of the second charge. Applt.'s solr. objected to the justices' procedure, in not announcing in ct. their decision to convict before hearing the previous convictions, as irregular, but they informed him that they had come to a decision during their first retirement, before they were informed of applt.'s previous convictions:—*Held*: (1) the only course open to the justices as regards the first charge was, if they thought fit, to bind applt. over to keep the peace, & perhaps to find sureties, & they therefore erred in point of law by fining applt. on the basis that he had committed a substantive offence to which a penalty might apply; (2) as regards the second charge, the procedure of the justices was not sufficient to invalidate the conviction, although it would have been better if the justices had

announced their decision to convict before inquiring into the previous history of applt.—*DAVIES v. GRIFFITHS*, [1937] 2 All E. R. 671; 157 L. T. 23; 101 J. P. 247; 53 T. L. R. 680; 81 Sol. Jo. 359; 35 L. G. R. 252; 30 Cox, C. C. 595, D. C.

642. *Add. Annotation*:—*Refd. Pointon v. Cox* (1926), 136 L. T. 506.

643. *Add. Annotation*:—*Appld. R. v. Surrey Justices, Ex p. Witherick*, [1932] 1 K. B. 450.

643a. — — —.]—Applt. was convicted before justices on an information which charged him with driving a motor vehicle on a road "without due care & attention or without reasonable consideration for other persons using the road contrary to Road Traffic Act, 1930 (c. 43), s. 12":—*Held*: the section created two separate offences & that the conviction was bad for duplicity, applt. having been charged with those two offences in the alternative.—*R. v. SURREY JUSTICES, Ex p. WITHERICK*, [1932] 1 K. B. 450; 101 L. J. K. B. 203; 146 L. T. 164; 95 J. P. 219; 48 T. L. R. 67; 75 Sol. Jo. 853; 29 L. G. R. 667; 29 Cox, C. C. 414, D. C.

*Annotation*:—*Consd. R. v. Wilmot* (1933), 97 J. P. 149.

643b. — — —.]—*R. v. MILLS* (1932), 173 L. T. Jo. 57.

669. *Add. Annotation*:—*Consd. R. v. Manchester JJ., Ex p. Lever*, [1937] 2 K. B. 96.

679. *Add. Annotation*:—*Refd. Palmer v. Crone*, [1927] 1 K. B. 804.

707. *Add. Annotation*:—*As to (2) Refd. Gough v. Rees* (1929), 46 T. L. R. 103.

#### PART VIII. SECT. 5, SUB-SECT. 1.— D. (c).

f i. — — —.]—*Re BAKER* (1900), 20 C. L. T. 16.—CAN.

#### PART VIII. SECT. 5, SUB-SECT. 1.— D. (d).

so. *Conviction under Excise Act, s. 180—Whether in respect of more than one offence.*—A conviction under Excise Act, s. 180, for that the accused "unlawfully did conceal or keep, or allow, or suffer to be concealed or kept," etc., is not one in respect of two or more offences.—*R. v. CHENG TONG SENG*, [1928] 1 W. W. R. 33; 49 Can. Crim. Cas. 79; 39 B. C. R. 157.—CAN.

#### PART VIII. SECT. 5, SUB-SECT. 1.— D. (e).

644 i. *Joint trial—Separate convictions.*—A magistrate has no jurisdiction to hear separate offences against different persons together, even where the persons charged consent to the adoption of that course, & the proceedings in such cases are void *ab initio*.—*RUSSELL v. BATES* (1927), 27 S. R. N. S. W. 257; 44 N. S. W. W. N. 79; *reversd.* 40 C. L. R. 209.—AUS.

#### PART VIII. SECT. 5, SUB-SECT. 1.—E.

n i. — — —.]—A magistrate may, before making the appropriate entry in the Criminal Record Book, alter his decision as to the quantum of punishment imposed; but if the alteration is made for a purpose which constitutes an improper exercise of his discretion in the matter of punishment, such alteration is irregular, & the detention of accused in pursuance thereof is illegal.—*Re CAYENNETT*, [1928] N. Z. L. R. 755.—N.Z.

r i. — — —.]—*On habeas corpus.*—The prisoner had been convicted by a magistrate of keeping a common bawdy house & sentenced to nine months' imprisonment & that period was set out in the warrant of commitment, although the maximum punishment provided by the Code, R. S. C. 1927, c. 36, is six months. The prisoner applied by way of *habeas corpus* for his release on the ground of the illegality of said warrant. No question was raised as to the propriety of the conviction:—*Held*: sect. 1124 of the Code did not apply, since the powers of amendment thereunder are given only when the proceedings are removed by *certiorari* but that sect. 1120 was applicable, & the ct. should in the exercise of the powers conferred thereby direct the magistrate to amend the conviction & warrant to accord with the law.—*R. v. HAWRELIUK*, [1937] 3 W. W. R. 699; 4 D. L. R. 780; 69 Can. C. C. 316.—CAN.

#### PART VIII. SECT. 5, SUB-SECT. 3.— A. (a).

697 v. — — —.]—Applt. was convicted before a stipendiary magistrate for harbouring spirits unlawfully imported into Canada whereon the duties had not been paid, contrary to Customs Act, 1927, s. 217. The warrant of commitment did not show that the value of the goods was under \$200, & was, on that ground, attacked as bad on its face, as not showing jurisdiction in the convicting ct.:—*Held*: in not showing such value to be under \$200 the warrant of commitment did not fail to show jurisdiction.—*Re MANUEL*, [1929] 1 D. L. R. 661; S. C. R. 109; 51 Can. Crim. Cas. 60.—CAN.

697 vi. — — —.]—*Ex p. McDONALD* (N. S.) (1928), 51 Can. Crim. Cas. 30.—CAN.

m i. — — —.]—Costs of conveying to gaol need not be stated in the warrant of commitment, if subsequently endorsed on the warrant.—*Re ANTHONY* (1932), 5 M. P. R. 498; 59 C. C. C. 158.—CAN.

m ii. — — —.]—A warrant is valid although it omits to state the costs of commitment & conveying to gaol.—*Re WOODWORTH* (1934), 61 C. C. C. 294.—CAN.

#### PART VIII. SECT. 5, SUB-SECT. 3.— A. (b) i.

705 iii. — — —.]—*Offence under Opium & Narcotic Drug Act, s. 5A (2) (c).*—*R. (WAUGH) v. WONG MAH* [1922] 1 W. W. R. 67; 66 D. L. R. 517; 36 Can. Crim. Cas. 319; 17 Alta. L. R. 363.—CAN.

712 ii. — — —.]—*Re SHAW* (N. S.) (1929), 52 Can. Crim. Cas. 79.—CAN.

p i. *Release on bail pending sentence—Subsequent appearance on another charge—Right of magistrate to sentence for previous charge.*—*R. v. WEDMARK* (1928), 50 Can. Crim. Cas. 443.—CAN.

sd. *Substitution of new warrant—Term of imprisonment extended—New warrant invalid.*—*Re WHETON* (N. S.) (1926), 46 Can. Crim. Cas. 247.—CAN.

se. *Duplicate warrant—Original warrant lost or destroyed.*—*Re MOZELLE* (1928), 50 Can. Crim. Cas. 44.—CAN.

sm. *Previous conviction set out—No proof of previous conviction.*—*Re PARIS* (1931), 3 M. P. R. 461; 56 Can. C. C. 108.—CAN.

sp. *Reference to statute & section—Sufficiency.*—*R. v. SCHWANBECK*; *R. v. DE LA GORGENDIERRE* (1931), 55 Can. C. C. 396.—CAN.

744a. —.]—Appct. was convicted of obstructing a police constable in the execution of his duty, by warning a street book-maker of the approach of the police & so enabling him to evade arrest. Evidence was given at the police ct. that appct. had already been convicted of similar offences several times & that the infliction of a fine was no deterrent. The magistrate ordered appct. to enter into a recognisance to be of good behaviour in the sum of £20 with two sureties of £10 each, or in default to be imprisoned for two months. Appct. sought a rule for a *certiorari* to quash the magistrate's order on the ground that the magistrate had no jurisdiction to make it, because (a) there was no actual or apprehended breach of the peace, by, or as a result of the conduct of appct., & (b) the order, in effect, imposed a penalty different from & possibly more severe than the maximum which would be imposed for the offence of which appct. was actually convicted:—*Held*: the rule must be discharged, because the matter was within the discretion of the magistrate, who had exercised his discretion properly.—*R. v. SANDBACH, Ex p. WILLIAMS*, [1935] 2 K. B. 192; 104

L. J. K. B. 420; 153 L. T. 63; 99 J. P. 251; 51 T. L. R. 430; 79 Sol. Jo. 343; 33 L. G. R. 268; 30 Cox, C. C. 226, D. C.

755. *Add. Annotations*:—*Folld. R. v. Sandbach, Ex p. Williams*, [1935] 2 K. B. 192. *Apld. Thomas v. Sawkins*, [1935] 2 K. B. 249.

756. *Add. Annotation*:—*Apld. Thomas v. Sawkins*, [1935] 2 K. B. 249.

761. *Add. Annotation*:—*Consd. Duncan v. Jones*, [1936] 1 K. B. 218.

788. *Add. Annotation*:—*Refd. London County Council v. Betts, London County Council v. Downes*, [1936] 1 All E. R. 144.

793. *Add. Annotations*:—*Consd. Musical Performers' Protection Asscn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485; *Ruislip-Northwood Urban District Council v. Lee* (1931), 145 L. T. 208. *Refd. Clark v. Epsom R. D. C.*, [1929] 1 Ch. 287; *Allen v. Waters & Co.*, [1935] 1 K. B. 200.

793a. —. —.]—*MUSICAL PERFORMERS' PROTECTION ASSCN., LTD. v. BRITISH INTERNATIONAL PICTURES, LTD.* (1930), 46 T. L. R. 485.

## Part X.—Clerks to Justices.

807. *Add. Annotation*:—*Refd. R. v. Salford Assessment Committee*, [1937] 2 K. B. 1.

808. *Add. Annotation*:—*Consd. R. v. Ely JJ., Ex p. Mann* (1928), 45 T. L. R. 92.

811a. Should not act as solicitor for prosecution—At quarter sessions.]—It is highly undesirable that the clerk to county justices, who have committed a prisoner for trial at quarter sessions, should act at quarter sessions as solr. for the prosecution, &, if quarter

sessions on proper materials come to the conclusion that he has done so, they are entitled, after prisoner has been convicted, to take that conclusion into consideration in deciding whether they should order the costs of the prosecution to be paid out of the county fund under Costs in Criminal Cases Act, 1908 (c. 15), s. 1.—*R. v. ELY JJ., Ex p. MANN* (1928), 93 J. P. 45; 45 T. L. R. 92; 72 Sol. Jo. 861; 27 L. G. R. 35, D. C.

## Part XI.—Quarter or General Sessions.

SUB-SECT. 2.—CLERK OF THE PEACE.

(Vol. XXXIII., p. 377.)

865. After this case add:—

*e, now, Local Government (Clerks) Act, 1931 (c. 45), s. 4.*

874. For cross-reference after this case read "*See, now, Local Government (Clerks) Act, 1931 (c. 45), s. 2.*"

880. For cross-reference after this case read "*See, now, Local Government (Clerks) Act, 1931 (c. 45), s. 4.*"

PART VIII. SECT. 5, SUB-SECT. 3.—  
A. (b) iii.

724 ii. —.]—Where a valid warrant of commitment has been substituted for an invalid one before the return of a writ of *habeas corpus*, an order for the prisoner's discharge will not be made.—*R. v. SCHWANBECK, R. v. DE LA GORGENDIERRE*, [1931] 3 D. L. R. 745; 3 W. W. R. 59; 56 Can. C. C. 94.—CAN.

PART VIII. SECT. 5, SUB-SECT. 3.—  
A. (c).

d i. — *Validity*.]—After sentencing an accused to six months' imprisonment the convicting magistrate ordered that the warrant of commitment be withheld for 24 hours. Within that time the accused voluntarily left the city but returned thereto about three months later, when she was arrested under said warrant & imprisoned. She applied by way of

*habeas corpus* for her release:—*Held*: the arrest & imprisonment were lawful; the order for the withholding of the warrant was beyond the magistrate's powers, he then being *functus officio*, & in no way affected the sentence.—*R. v. SCOTT (Man.)*, [1929] 3 W. W. R. 70; 52 Can. Crim. Cas. 139.—CAN.

st. *Runs from date of arrest*—*Not date of conviction*.]—*Re HILTZ (N. S.)* (1929), 52 Can. Crim. Cas. 93.—CAN.

PART VIII. SECT. 5, SUB-SECT. 3.—  
A. (e).

735 iii. — *Common assault*.]—Imprisonment may be ordered for a common assault notwithstanding that there is no imposition of fine & subsequent default.—*R. v. BRENNAN* (1933), 61 C. C. O. 72.—CAN.

sg *Power to suspend sentence*—*Summary conviction under Criminal Code, Part XV.*—*R. v. BROWNLEE*,

[1927] 4 D. L. R. 703; 48 Can. Crim. Cas. 218; 61 O. L. R. 28.—CAN.

PART VIII. SECT. 5, SUB-SECT. 4.

aa i. — *Under Liquor Act.*]—In making a conviction under Liquor Act, 1925, 1924-25, c. 53, a justice of the peace has no authority to order that the costs be paid to him, & such a provision in the conviction cannot be treated as a nullity on an appln. for *habeas corpus*.—*R. v. RABUUK*, [1928] 1 W. W. R. 588; 50 Can. Crim. Cas. 348; 22 Sask. L. R. 479.—CAN.

sp. *Right of magistrate to fee*—*Proceedings under Criminal Code, Part XVI.*]—*R. v. SERVETNYK (Sask.)* (1926), 45 Can. Crim. Cas. 280.—CAN.

PART IX. SECT. 9, SUB-SECT. 3.—M.

sq. —. —.]—*R. v. SWITZKI*, [1930] 2 W. W. R. 479; 54 Can. C. C. 332; 24 S. L. R. 587.—CAN.

889. For statutory cross-references before this case "*See, now, Local Government (Clerks) Act, 1931 (c. 45), s. 3.*"

890. *Add. Annotation*:—*Re*ld. Stoke Newington Borough Council *v.* Richards (1929), 45 T. L. R. 650.

891. *Add. Annotation*:—*Re*ld. Stoke Newington Borough Council *v.* Richards, [1930] 1 K. B. 222.

897. Before this case read "*See Local Government (Clerks) Act, 1931 (c. 45), ss. 7, 8.*"

## Part XII.—Jurisdiction of Quarter Sessions.

930. *Add. Annotation*:—*Re*ld. *R. v. Manley* (1932), 97 J. P. 6.

958a. — Under Levy of Fines Act, 1822 (c. 46).]—By above Act the ct. of quarter sessions are empowered to discharge a forfeited recognisance in those cases only where the party has been committed to gaol, or has given security to appear at the sessions, & therefore, where a party, whose recognisance had become forfeited for not appearing to an indictment, & against whom process had issued, paid to the sheriff the sum mentioned in the recognisance, in order to prevent a sale of his goods, & the justices at sessions afterwards by an order mitigated the recognisance to a small sum, & directed the sheriff to discharge the residue from the recognisance:—*Held*: such order was void, & the party was not entitled to recover from the sheriff the sum which the justices had ordered to be discharged.—*HAYNES v. HAYTON* (1827), 7 B. & C. 293; 5 Man. & Ry. K. B. 307, n.; 5 L. J. O. S. M. C. 136; 108 E. R. 733; *subsequent proceedings*, 6 L. J. O. S. K. B. 231.

*Annotations*:—*Distd.* *Harper v. Hayton* (1829), 8 L. J. O. S. M. C. 129. *Expld. & Distd.* *Re Thornton, R. v. West Riding of Yorkshire* (1837), 7 Ad. & El. 583.

958b. — — — — —.]—Above Act empowers the ct. of quarter sessions to discharge a forfeited recognisance in cases where the sheriff has levied part of the amount, & the party has been committed to prison for the remainder; & if, in such a case, the sessions discharge the recognisance while the money so levied in part is in the hands of the sheriff, he must refund it to the party.—*HARPER v. HAYTON* (1829), 5 Man. & Ry. K. B. 305; 3 Man. & Ry. M. C. 13; 8 L. J. O. S. M. C. 129.

958c. — — — — —.]—Where a party bound in recognisance to keep the peace is subsequently convicted at petty sessions of an assault, & the conviction is returned to the quarter sessions, the justices there are not authorised, under above Act, to order an estreat of the recognisance; but the proceeding for that purpose must be by *scire facias*, as before the statute.—*R. v. WEST RIDING OF YORKSHIRE JUSTICES, Re THORNTON* (1837), 7 Ad. & El. 583; 2 Nev. & P. K. B. 457; Nev. & P. M. C. 385; 112 E. R. 590; *sub nom.* *R. v. WEST RIDING OF YORKSHIRE JUSTICES, Ex p. THORNTON*, 7 L. J. M. C. 9.

*Annotation*:—*Distd.* *R. v. Ely Justices* (1855), 5 E. & B. 489.

958d. — — — — —.]—A party who had applied for a beer licence, under 9 Geo. 4, c. 61, which

was refused, appealed against the refusal to the Oct. quarter sessions, & entered into a recognisance to try the appeal, abide the judgment of the ct., & pay such costs as the ct. might award. The appeal was dismissed; & the ct. ordered applt. to pay costs to resp., "forthwith." A blank was left in the order, as to the sums, which the clerk of the peace had not time to fix before the sessions adjourned. The sessions adjourned to the next November. Before the adjournment day, the clerk of the peace fixed the costs, & filled up the order. After the adjourned sessions had terminated, but before the next sessions, which were held on the next Jan., payment was demanded of applt., who did not pay. On affidavit of this, the sessions holden in Jan. estreated the recognisance:—*Held*: the sessions had power to estreat the recognisance, & that process might be taken upon it under above Act.—*R. v. ELY JUSTICES* (1855), 5 E. & B. 489; 25 L. J. M. C. 1; 26 L. T. O. S. 57; 20 J. P. 116; 1 Jur. N. S. 1017; 4 W. R. 5; 119 E. R. 563.

*Annotation*:—*Re*ld. *Rawnsley v. Hutchinson* (1871), L. R. 6 Q. B. 305.

### SECT. 4.—PROCEDURE.

#### SUB-SECT. 1.—IN GENERAL (p. 386).

960a. *Borstal prosecutions.*]—Applt. was committed to quarter sessions with a view to his being detained in a Borstal Institution. At quarter sessions no counsel was instructed to prosecute. After the clerk of the ct. had informed the ct. how applt. came to be there & the police officer had given evidence, the ct., without giving applt. an opportunity of addressing it, passed sentence of three years' detention at a Borstal Institution:—*Held*: the foundation of the jurisdiction of the ct. of quarter sessions was that they should have inquired into all the circumstances of the case, not only the circumstances in which applt. was convicted, but also the information with regard to his previous convictions. The conviction was quashed.—*R. v. RIORDAN*, [1937] 2 All E. R. 62; 156 L. T. 426; 101 J. P. 211; 53 T. L. R. 433; 81 Sol. Jo. 180; 35 L. G. R. 191; 30 Cox, C. C. 573; 26 Cr. App. Rep. 30, C. C. A.

991. *Add. Annotation*:—*Folld.* *R. v. Judge, Ex p. Isle of Ely Justices* (1931), 100 L. J. K. B. 350.

991a. — — — — —.]—Though disobedience to a Crown Office subpoena is contempt

### PART XI. SECT. 3, SUB-SECT. 2.—D.

*sb. Fees under Naturalisation Act—Taxable.*]—Fees payable under Naturalisation Act, 1914 (Can.), to

the Clerk of the Peace, come to him by virtue of his office, & the Public Officers Fees Act, R. S. O., 1927, applies & taxes him in respect of the moneys so received.—*Re IRWIN &*

*A.-G. FOR ONTARIO*, [1932] 2 D. L. R. 77; O. R. 195; *affd. sub nom. IRWIN v. A.-G. FOR ONTARIO*, [1932] 3 D. L. R. 668; O. R. 490.—CAN.



of the High Ct., disobedience to a subpoena from quarter sessions is not.—*R. v. JUDGE, Ex p. ISLE OF ELY JUSTICES*, [1931] 2 K. B. 442; 100 L. J. K. B. 350; 144 L. T. 647; 95 J. P. 97; 47 T. L. R. 263; 75 Sol. Jo. 120; 29 L. G. R. 418, D. C.

**995a. Duty to make up record—Although sessions irregular.]—**A party found guilty by a jury at a session irregularly holden is entitled to have the record of the proceedings correctly made up according to the fact; & this ct. will grant a *mandamus* to the justices to make up such record.—*Re BOWMAN, R. v. MIDDLESEX JJ.* (1834), 5 B. & Ad. 1113.

**1001a. Power to alter sentence—Prisoner absent.]—**A prisoner was sentenced by a Chairman of Quarter Sessions to three years' penal servitude for attempted larceny. Subsequently the Chairman sought to alter that sentence to one of two years' imprisonment with hard labour, & instructed the clerk of

the peace to make the necessary alteration in the record, & the record was altered accordingly. There was no evidence before the ct. that the sessions had been adjourned to any specified date. The purported alteration of sentence had taken place in the absence of the prisoner:—*Held*: it being at least doubtful whether the Chairman had any power to make the purported alteration, the original sentence of three years' penal servitude must be regarded as the sentence actually passed, & as that sentence was not warranted in law, it must be reduced.—*R. v. CASEY* (1932), 23 Cr. App. Rep. 193, C. C. A.

**1002a. Power to reduce charges—To found jurisdiction.]—**Charges of sufficient gravity should not be reduced merely to found the jurisdiction of petty or quarter sessions, but should be committed to assizes.—*R. v. BENNETT* (1928), 20 Cr. App. Rep. 188, C. C. A.

## Part XIII.—Appeals from Courts of Summary Jurisdiction.

### SECT. 1.—TO QUARTER SESSIONS (p. 390).

See Summary Jurisdiction (Appeals) Act, 1933 (c. 38).

**1015. Add. Citations:—***sub nom. HARRUP v. BAYLEY*, 6 E. & B. 218; 25 L. J. M. C. 107; 2 Jur. N. S. 882; 119 E. R. 845; *sub nom. R. v. HARROSS*, 4 W. R. 461.

**1019. Add. Annotation:—***Consd. R. v. Kent JJ., Ex p. Metropolitan Police Comr.*, [1936] 1 K. B. 547.

**1039. Add. Annotation:—***Refd. Queen Anne's Bounty v. Pitt-Rivers*, [1936] 2 All E. R. 161.

**1085. Add. Annotation:—***Refd. Glassbrook Bros. v. Leyson*, [1933] 2 K. B. 91.

**1100. Add. Citation:—**2 B. R. A. 1135.

**1114. Add. Annotation:—***As to (1) Refd. R. v. Kent JJ., Ex p. Metropolitan Police Comr.*, [1936] 1 K. B. 547.

**1115. Add. Annotation:—***Distd. R. v. Kent JJ., Ex p. Metropolitan Police Comr.*, [1936] 1 K. B. 547.

**1115a. — Who may appear—Justices.]—**(1) A deft., convicted & sentenced at petty sessions for an offence to which he had pleaded guilty, appealed to quarter sessions against his sentence only. At the hearing of the appeal neither the prosecutor nor any one else opposed the appeal as resp. or otherwise, & the ct. of quarter sessions, without hearing a witness who was present to speak to the circumstances of the conviction, made an order not only allowing the appeal & striking out the sentence but quashing the conviction also:—*Held*: the order quashing the con-

viction was made without jurisdiction & should itself be quashed.

(2) *Qu.*: whether on an appeal by a deft. from petty sessions to quarter sessions, which the prosecutor does not oppose as resp., the comr. of police is entitled to appear & take part in the proceedings as a resp. or otherwise.

(3) On an appeal from petty sessions to quarter sessions the justices of the ct. of petty sessions are entitled as of right to appear before the ct. of quarter sessions to support their decision & to give that ct. their assistance, & by so doing they do not make themselves a party to the appeal or liable for costs.

Where an appeal by a deft. from petty sessions to quarter sessions is not to be opposed by the prosecutor as resp., it is the duty of the clerk to the ct. of petty sessions, with a view to affording assistance to the ct. of quarter sessions, to inform the justices of petty sessions of the matter, so that if they so desire they may themselves appear at the hearing of the appeal, or may request the Director of Public Prosecutions to do so or may arrange for some public authority to act on their behalf (*per CUR.*).—*R. v. KENT JJ., Ex p. METROPOLITAN POLICE COMR.*, [1936] 1 K. B. 547; 105 L. J. K. B. 201; 154 L. T. 133; 100 J. P. 17; 52 T. L. R. 78; 80 Sol. Jo. 54; 33 L. G. R. 517; 30 Cox, C. C. 284, D. C.

— *Commissioner of Metropolitan Police.]—R. v. KENT JJ., Ex p. METROPOLITAN POLICE COMR.*, No. 1115a, *ante*.

**1129a. To quash conviction—Appeal against sentence.]—***R. v. KENT JJ., Ex p. METROPOLITAN POLICE COMR.*, No. 1115a, *ante*.

**PART XIII. SECT. 1, SUB-SECT. 2.—A. f i. —.]—***R. v. POOCK, R. v. ELLISON (Ont.)*, [1927] 4 D. L. R. 1121; 49 Can. Crim. Cas. 95.—CAN.

**g i. — From finding by justices—***After remission from High Court on case stated.]—*D. was summoned before justices, & convicted, for not

& not maintaining a legal free gap in his weir. A case was stated for the opinion of the High Ct., which reversed the conviction for not making, but remitted the case to the justices for conviction on a question of fact relating to not maintaining:—*Held*: the abandonment of the right of appeal to Quarter Sessions by stating a case, did not preclude deft. from appealing to

Quarter Sessions from the subsequent conviction.—*R. v. WATERFORD JJ.*, [1900] 2 I. R. 307.—IR.

**PART XIII. SECT. 1, SUB-SECT. 4.—G. st. Request for jury—Discretion to grant or refuse—**36 Vict. c. 58, s. 2.]—*R. v. WASHINGTON* (1881), 46 U. C. R. 221.—CAN.

**1170. Add. Annotations:—***Refd. R. v. Edmonton Income Tax Comrs., Ex p. Thompson, [1929] 1 K. B. 220; R. v. Newport (Salop) Justices, Ex p. Wright, [1929] 2 K. B. 416.*

**1175a. —**—Where an information for a criminal offence has been dismissed by a ct. of summary jurisdiction, that ct. has jurisdiction, on the application of the unsuccessful prosecutor, to state a case on a question of law, & in the event of its refusal the High Ct. has jurisdiction to compel it to do so.—*R. v. NEWPORT (SALOP) JUSTICES, Ex p. WRIGHT, [1929] 2 K. B. 416; 98 L. J. K. B. 555; 141 L. T. 563; 93 J. P. 179; 45 T. L. R. 477; 73 Sol. Jo. 384; 27 L. G. R. 518; 28 Cox, C. C. 658, D. C.*

**1176. Add. Annotation:—***As to (2) Refd. R. v. Newport (Salop) Justices, Ex p. Wright, [1929] 2 K. B. 416.*

**1180. Delete name & citations & substitute as follows:—**

On an information before justices at petty sessions, the evidence was partly heard when, on objection, the justices decided that they had no jurisdiction, because one of them was interested in the subject-matter, & they stopped the further hearing. They then granted a case for the opinion of a superior ct. under 20 & 21 Vict. c. 43, as to whether such justice was interested or not:—*Held*: it was not competent to grant such a case, because there had been no hearing & determination of the information or complaint.—*WAKEFIELD LOCAL BOARD v. WEST RIDING RY. CO. (1866), 30 J. P. 628.*

*Annotation:—Fold. Pratt v. A. A. Sites, Ltd., [1938] 2 K. B. 459.*

**1180a. —**—Complaints were preferred by applt. against resps. before justices, who decided that they had no jurisdiction to hear the complaints. The justices subsequently stated a case for the opinion of the ct. whether they had come to a correct determination in point of law:—*Held*: as the justices had not heard & determined the complaints but had declined jurisdiction, they had no power to state a case.—*PRATT v. A. A. SITES, LTD., [1938] 2 K. B. 459; [1938] 2 All E. R. 371; 107 L. J. K. B. 478; 158 L. T. 522; 102 J. P. 278; 54 T. L. R. 719; 82 Sol. Jo. 547; 36 L. G. R. 344, D. C.*

**1215. Add. Annotation:—***Apld. R. v. Edmonton Income Tax Comrs., Ex p. Thompson, [1929] 1 K. B. 220.*

**1219. Add. Citations:—***96 L. J. K. B. 49; 28 Cox, C. C. 261.*

**1229. For existing paragraph & citations substitute the following:—**

(1) Clauses (d) & (f) of Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49),

s. 31, have to be read together, & when so read, they allow of an appeal being brought to the Ct. of Appeal from the decision of the Divisional Ct. on a case stated by justices when leave to appeal has been given.

(2) The recognisance required in the case of a corpn. appealing by case stated from a decision of justices can properly be entered into by a duly authorised attorney doing so on behalf of, & binding the goods of, the corpn. A recognisance entered into by the clerk of the corpn. in his own name & binding only his own goods is insufficient.—*LEXTON URBAN DISTRICT COUNCIL v. WILKINSON, [1927] 1 K. B. 853; 96 L. J. K. B. 383; 137 L. T. 10; 91 J. P. 64; 43 T. L. R. 326; 71 Sol. Jo. 293; 25 L. G. R. 188, C. A.*

*Annotation:—Distd. Lawrence v. Martin, [1928] 2 K. B. 454.*

**1229a. Appeal by clerk of urban district council—Recognisance entered into by clerk—Validity.]—**On the application of a clerk of an urban district council for a case to be stated for the opinion of the High Ct., the clerk himself entered into the recognisance conditioned to prosecute the appeal, rendered necessary by Summary Jurisdiction Act, 1857 (c. 43), s. 3. On a preliminary objection at the hearing of the appeal, that the recognisance should have been entered into by the clerk on behalf of the council, so as to render their goods liable, for the reason that the council had by resolution authorised the clerk to lay the original information & if unsuccessful, to carry the proceedings further, & that the clerk "duly authorised" had sworn the information, & entered into the recognisance "as principal":—*Held*: the recognisance was good, in that in fact the clerk as informant was applt., being at liberty by virtue of Public Health Act, 1875 (c. 55), s. 259 to institute & carry on any proceedings which the local authority was authorised to institute, & the above words of authorisation were surplusage.—*LAWRENCE v. MARTIN, [1928] 2 K. B. 454; 97 L. J. K. B. 707; 139 L. T. 373; 92 J. P. 112; 44 T. L. R. 621; 26 L. G. R. 454.*

**1236. Add. Annotation:—***Distd. Marsland v. Taggart, [1928] 2 K. B. 447.*

**1236a. — Death of one justice—Signature by surviving justices.]—**A complaint was heard by three justices, who unanimously dismissed it, but agreed to state a case for the opinion of the High Ct. Before the case was stated one of the justices died, & the case was signed by the surviving two justices only:—*Held*: as the obligation of the justice to sign the case was created by law & not by voluntary contract, & as his failure to fulfil that obligation was due to his death & not to any spontaneous act on his part, the

**PART XIII. SECT. 2, SUB-SECT. 2.—B. (a).**

**1178 II. —**Where complainant failed to appear.]—The right of appeal given by Criminal Code, s. 749, against the dismissal of an information or complaint does not exist when the dismissal is due to the complainant's or informant's failure to appear.—*GHITTERMAN v. RALPH, [1928] 2 W. W. R. 631; 50 Can. Crim. Cas. 282.—CAN.*

**PART XIII. SECT. 2, SUB-SECT. 3.—A.**

*sp. On relation of Inspector of*

*Radio.]—*A justice of the peace may be required to state a case under sect. 764 of Criminal Code at the instance of the Crown on the relation of an Inspector of Radio.—*R. (JES-ROCHERS) v. MASSICOTTE, [1938] 2 D. L. R. 141.—CAN.*

**PART XIII. SECT. 2, SUB-SECT. 4.—B. (a).**

**1231 II. —**—A case stated by a magistrate under sect. 761 of the Criminal Code must state the grounds upon which the proceeding is questioned & it is only such grounds, which more-over must be legal grounds, that the

Appeal Ct. can be called upon to consider. The method of presenting the case by way of questions asked by the magistrate is not what the sect. authorises.—*R. v. McDONNELL, [1935] 1 W. W. R. 175; 1 D. L. R. 532; 63 C. C. C. 150.—CAN.*

*sw. Annexation giving reasons for decision—Whether authorised.]—Held*: an annexation should not be made to a stated case giving reasons for the decision brought under review, there being no warrant for such an annexation in Summary Jurisdiction (Scotland) Act, 1908.—*COCKBURN v. GORDON, [1928] S. C. (J.) 87.—SCOT.*

- Crown had jurisdiction to proceed with the matter.—*MARSLAND v. TAGGART*, [1928] 2 K. B. 447; 97 L. J. K. B. 787; 139 L. T. 192; 92 J. P. 118; 44 T. L. R. 543; 26 L. G. R. 377; 28 Cox, C. C. 511, D. C.
1242. For cross-reference before this case read :—*See, now*, R. S. C., Ord. 59, r. 22 (a).
1244. *Add. Annotation* :—*Apld. Williams v. Watkins* (1933), 97 J. P. Jo. 132.
- 1246a. ————.]—On failure to transmit a case to the High Ct. within three days, as required by Summary Jurisdiction Act, 1857 (c. 43), s. 2, the whole case was restated & redated by the justices within the time allowed for a case to be stated :—*Held* : not a sufficient compliance with the statute.—*WILLIAMS v. WATKINS* (1933), 49 T. L. R. 315; 77 Sol. Jo. 198, D. C.
1257. *Add. Annotation* :—*Consd. Atholl (Duke) v. Read*, [1934] 2 K. B. 92.
1262. *Add. Annotation* :—*Consd. Atholl (Duke) v. Read*, [1934] 2 K. B. 92.
1265. *Add. Annotation* :—*Refd. Atholl (Duke) v. Read*, [1934] 2 K. B. 92.
1266. *Add. Annotation* :—*Refd. Atholl (Duke) v. Read*, [1934] 2 K. B. 92.
1269. *Add. Annotation* :—*Distd. Atholl (Duke) v. Read*, [1934] 2 K. B. 92.
1270. *Add. Annotation* :—*As to* (1) *Consd. Atholl (Duke) v. Read*, [1934] 2 K. B. 92.
1275. For cross-reference before this case read :—*See, now*, R. S. C., Ord. 59, r. 22 (a).  
*Add. Annotation* :—*Folld. Atholl (Duke) v. Read*, [1934] 2 K. B. 92.
1277. *Add. Annotation* :—*N.F. Atholl (Duke) v. Read*, [1934] 2 K. B. 92.
- 1277a. ————.]—The giving of the notice of the appeal, with a copy of the case stated, to resp. before the case is transmitted to the High Ct. is a condition precedent to the jurisdiction of the ct. to entertain the appeal & cannot be waived.—*ATHOLL (DUKE) v. READ*, [1934] 2 K. B. 92; 103 L. J. K. B. 417; 150 L. T. 499; 98 J. P. 176; 50 T. L. R. 264; 78 Sol. Jo. 193; 32 L. G. R. 123; 30 Cox, C. C. 85, D. C.
- 1301a. ————.]—*SCOTT v. TILLEY* (1937), 81 Sol. Jo. 804, D. C.
1311. *Add. Annotation* :—*Apld. R. v. Newport (Salop) Justices, Ex p. Wright*, [1929] 2 K. B. 416.
- 1316a. *Facts incorrectly stated—Costs of restatement.*—Where the justices had in stating a case set forth the facts incorrectly & afterwards in pursuance of an order of the ct. had restated the case, the ct. made an order against the justices to pay the costs of & occasioned by the restatement.—*EDGE v. EDWARDS* (1932), 48 T. L. R. 449, D. C.
1376. *Add. Annotation* :—*Consd. R. v. London County Council, Ex p. Entertainment Protection Assocn., Ltd.*, [1931] 2 K. B. 215.

PART XIII. SECT. 2, SUB-SECT. 4.—  
D. (a).

c i. *Criminal Code, s. 761—Strict compliance therewith—Necessity for.*—In the absence of rules of ct. providing otherwise, the time for serving & filing a case stated under sect. 761 of the Criminal Code is three days from its receipt as provided by sect. 761 (3) (c), & where it was possible to serve & file the case within those three days & it was not served or filed within that time the ct. has no jurisdiction to hear the case.—*R. v. EMBRYK*, [1930] 2 W. W. R. 331; 54 Can. C. C. 95; 39 Man. L. R. 48.—CAN.

PART XIII. SECT. 2, SUB-SECT. 6.—A.

1294 ii. ————.]—*Under Excise Act—Unauthorised intervention of justice.*—A justice of the peace having intervened in a prosecution under Excise Act by assuming to adjourn the trial on the non-appearance of the police magistrate before whom the information was laid & who had issued a summons to de ft. to appear before him, a conviction made on the adjourned date of trial by another police magistrate, before whom de ft. refused to plead & to whose jurisdiction he objected, was quashed, since said intervention was in direct violation of sect. 134 of said Act.—*R. v. PYKE*, [1928] 1 W. W. R. 590; 49 Can. Crim. Cas. 186; 23 Alta. L. R. 341.—CAN.

xx. *To inquire as to authority & jurisdiction of magistrate—& as to manner in which authority exercised.*—Upon a motion to quash an information & proceedings taken before a police magistrate or justice of the peace, the ct. may inquire as to his authority & jurisdiction, & as to whether his powers & authority were exercised in such a manner & in such place or places as to bring his acts within his jurisdiction territorial & otherwise.—*R. v. ISBELL*, [1928] 4 D. L. R. 322; 50 Can. Crim. Cas. 81; 62 O. L. R. 489; *affd.*, [1929] 2 D. L. R. 732; 51 Can. Crim. Cas. 362; 63 O. L. R. 384.—CAN.

xy. *To set aside judgment—Irrelevant considerations introduced by magistrate—No opportunity given to applicant to explain.*—*ROUWER v. MASONDO* (1928), 49 N. L. R. 62.—S. AF.

PART XIII. SECT. 2, SUB-SECT. 6.—C.

1301 vi. ————.]—*R. v. COWELL* (1928), 50 Can. Crim. Cas. 381.—CAN.

1301 vii. ————.]—*R. v. WIGGINS* (1928), 50 Can. Crim. Cas. 193.—CAN.

1301 viii. ————.]—*R. v. HILL*, [1929] 1 D. L. R. 349; 50 Can. Crim. Cas. 319.—CAN.

1301 ix. ————.]—*ANSON v. PARKER* (1928) N. Z. L. R. 490.—N.Z.

PART XIII. SECT. 2, SUB-SECT. 6.—D.

1302 vi. ————.]—*R. v. BOUTILLER* (N. S.) (1928), 50 Can. Crim. Cas. 186.—CAN.

k i. ————.]—*SUTHERLAND v. SHIACH*, [1928] S. C. (J.) 49.—SCOT.

PART XIII. SECT. 2, SUB-SECT. 8.—A.

sz. *Liability of justice—Refusal to include material facts in case stated.*—The refusal of a justice of peace to include in a stated case important facts & points found or raised before him held to be arbitrary & unreasonable, & therefore, he was held liable for the costs of an application to the ct. on behalf of the prosecution to require him to do so, although before the application came on for hearing a further case was stated by the justice which covered the ground as requested by the appt.—*R. ex rel. DONALD v. THOMPSON* (Sask.), [1929] 2 W. W. R. 574; 52 Can. Crim. Cas. 13.—CAN.

PART XIII. SECT. 3, SUB-SECT. 3.—  
A. (a).

sc. *Summons or warrant matter for discretion.*—*Mandamus* will not be granted to a magistrate to issue a warrant instead of a summons, this being a matter of discretion for the magistrate.—*R. v. HOBBS*, [1936] 1

D. L. R. 306; 65 Can. C. C. 67; 5 F. L. J. (Can.) 197; *sub nom. Re R. v. HOBBS*, 9 M. P. R. 562.—CAN.

PART XIII. SECT. 3, SUB-SECT. 3.—  
A. (b) i.

1350 iv. ————.]—An appeal was taken from a summary conviction on the ground that the conviction was bad in that the costs directed to be paid by the accused were not fixed & that the person to whom they were to be paid was not named. After hearing argument on each side of that question, the county ct. judge quashed the conviction for said reasons. Thereafter an order of *mandamus* was obtained directing the county ct. judge to hear & determine the appeal on the merits notwithstanding any defect in the conviction. From that order the accused appealed :—*Held* : the appeal should be allowed without costs & the order of *mandamus* vacated.—*R. v. STUBBS, Re GROSS*, [1930] 2 W. W. R. 219; *sub nom. Re GROSS*, 4 D. L. R. 299; 53 Can. C. C. 384; 39 Man. L. R. 1; *revsd.*, [1930] 3 D. L. R. 404; 1 W. W. R. 902; 53 Can. C. C. 175.—CAN.

PART XIII. SECT. 3, SUB-SECT. 3.—  
A. (b) ii.

1380 i. *Jurisdiction declined.*—A *mandamus* goes where a person having a jurisdiction to exercise declines to exercise it because of his decision on a preliminary question which does not go to the merits of the case as regards either the facts or the law. On the opening of an appeal from a conviction by a magistrate for a breach of sect. 176 (e) of the Excise Act, applt. objected that the Crown had not filed in the ct. appealed to a transcript of the evidence taken in the police ct., & had made no attempt to order that it should be so filed. The county ct. judge adjourned the hearing of the appeal & ordered the Crown to file the depositions; the Crown having failed to do so, he allowed the appeal & quashed the conviction. The Crown

**1393a.** —.—.]—*Mandamus* will issue to justices who have refused to hear an application under Small Tenements Recovery Act, 1838 (c. 74), because they have adopted a general practice not to hear such cases on the ground that the county ct. is a more suitable tribunal.—*R. v. KENT JJ., Ex p. TRIPLOW* (1927), 137 L. T. 25; 91 J. P. 38; 43 T. L. R. 227; 25 L. G. R. 120, D. C.

then applied for a *mandamus* commanding the judge to enter continuances of the appeal, hear the charge & the witnesses on which the conviction was made, & make a decision thereon.—*Held*: the *mandamus* asked for should be granted.—*R. v. POCHREBNY* (1930) 1 W. W. R. 139; *affd.*, [1930] 1 W. W. R. 688; 53 Can. C. O. 163; 38 Man. L. R. 593.—CAN.

### PART XIII. SECT. 3, SUB-SECT. 3.—B. (b).

**aa.** To make order for detention of suspected person.—*Order refused on grounds unsustainable in law—Offer to state case.*—Where an appln. has been made to a district justice for an order under Public Safety Act, 1927 (No. 31 of 1927), s. 16 (2), for the detention of a person suspected of an offence under the Act, & the district justice refuses to make the order on grounds unsustainable in law, *mandamus* lies, notwithstanding that the district justice has offered to state a case for the High Ct., a case stated not being equally convenient & effective in the circumstances.—*A. G. v. M'BRIDE*, [1928] 1 R. 451.—IR.

### PART XIII. SECT. 4.

**1** (p. 429) i. —.—.]—*Irregularity in trial—At request of appellant.*—Where an alleged irregularity in the course of a trial, viz., in the taking of a view by the magistrate, had been brought about at the express request of applt. he was held to have no just ground of complaint.—*R. v. COX*, [1929] 2 D. L. R. 785; 1 W. W. R. 542; 51 Can. Crim. Cas. 203; 41 B. C. R. 9.—CAN.

**bb** (p. 430) i. —.—.]—Justices of the peace & police magistrates cannot give themselves jurisdiction by erroneously & capriciously deciding preliminary points contrary to all evidence. Children's Protection Act, R. S. N. B., 1927, defines a child as a "boy or girl actually or apparently under sixteen years of age." Where the only evidence of the age of a girl before a police magistrate was a statement by the girl herself that she did not know her age, but thought she was sixteen:—*Held*: the police magistrate acted without jurisdiction in finding that she was a child under sixteen years of age, & his order & all proceedings before him were quashed.—*R. v. LIMERICK, Ex p. QUEENS COUNTY* (1928), 54 N. B. R. 467.—CAN.

**bb** (p. 430) ii. —.—.]—*Jurisdiction in fact existing—Magistrate misdescribing himself.*—*R. v. MULLINS, R. v. TRUCKER* (1930), 54 Can. C. O. 118.—CAN.

**hh** (p. 430) i. —.—.]—Where a magistrate exceeds his jurisdiction *certiorari* will be granted notwithstanding the existence of a right of appeal.—*R. v. FELLETTIER & ELD*, [1934] 1 D. L. R. 222; 60 C. C. C. 228.—CAN.

**hh** (p. 430) ii. —.—.]—*Probability of prejudice.*—Where a legal practitioner, having no direct interest in a local ct. action, on the morning on which judgment in the action was to be delivered, discussed the action with one of the justices who heard the action, & made certain statements calculated to pre-

judice him against one of the parties:—*Held*: an order in the nature of a writ of *certiorari* should be granted removing the hearing of the action into the Supreme Ct.—*BURKE v. STAEHR, Re ADELAIDE LOCAL COURT ACTION* (1927), S. A. S. R. 180.—AUS.

**hh** (p. 430) iii. —.—.]—*Ex p. BOEHNER* (N. S.) (1929), 52 Can. Crim. Cas. 412; [1930] 1 D. L. R. 662.—CAN.

**hh** (p. 430) iv. —.—.]—*Certiorari* will not be granted unless there is some good reason for not taking advantage of a right of appeal, where such exists.—*R. v. LIMERICK, Ex p. HILL* (1932), 5 M. P. R. 430.—CAN.

**kk** (p. 430) i. —.—.]—*Certiorari* to quash does not lie after an appeal has been taken.—*R. v. McLATCHY, Ex p. GOULETTE* (1932), 5 M. P. R. 257.—CAN.

**kk** (p. 430) ii. —.—.]—*Sufficiency of record—Not clear whether accused questioned as to having defence.*—*R. v. MCGILL* (N. S.), [1930] 1 D. L. R. 961; 1 M. P. R. 85; 62 Can. Crim. Cas. 397.—CAN.

**kk** (p. 430) iii. —.—.]—*Failure to hear evidence.*—*FITCHITT v. HRENO, FITCHITT v. SORECK*, [1929] 1 W. W. R. 737; 51 Can. Crim. Cas. 229; 23 S. L. R. 622.—CAN.

**kk** (p. 430) iv. —.—.]—*Witness improperly sworn.*—*R. v. CUMMINSKEY* (1930), 54 Can. C. C. 306.—CAN.

**h** (p. 431) i. —.—.]—*Absence of jurisdiction.*—The "Nat Bell" case does not have the effect of depriving an appt. for *habeas corpus* with *certiorari* in aid from proving *dehors* the record that the magistrate had no jurisdiction to convict him.—*R. v. HENDERSON* (B. C.), [1929] 4 D. L. R. 984; 2 W. W. R. 209; 52 Can. Crim. Cas. 82.—CAN.

**h** (p. 431) ii. —.—.]—While *Rez v. Nat Bell Liquors, Ltd.*, holds that, if the jurisdiction of the magistrate is conceded, then the formal conviction is conclusive & excludes from consideration on *certiorari* the sufficiency of the evidence supporting the conviction as to the facts alleged therein, yet the decision does not go so far as to prevent the receipt of extrinsic evidence to show that an accused person pleading not guilty in a ct. with limited territorial jurisdiction was deprived of the right to have it established in the course of the evidence as a condition precedent to the exercise of the jurisdiction that the charge was one triable in the ct. purporting to deal with it.—*R. v. GUSTAFSON* (B. C.), [1929] 3 W. W. R. 209; 52 Can. Crim. Cas. 151.—CAN.

**h** (p. 431) iii. —.—.]—Two orders were made by police magistrates directing confiscation of certain parcels of intoxicating liquor which had been seized by liquor inspectors for alleged contravention of the Liquor Control Act. Upon motion to quash the orders:—*Held*: the judge had no jurisdiction to inquire whether there was evidence to support the orders or whether the magistrates had misdirected themselves in considering the evidence.—*Re WINDSOR TERMINAL WAREHOUSE & TRANSPORT CO., LTD.*, [1929] 3 D. L. R. 926; 52 Can. Crim. 18; 63 O. L. R. 630.—CAN.

**1409. Add. Annotation.**—*Reid. R. v. London County Council, Ex p. Entertainments Protection Asscn., Ltd.*, [1931] 2 K. B. 215.

**1424. Add. Annotation.**—*Reid. Ashton v. Wainwright*, [1936] 1 All E. R. 805.

**1433a. Justices must be sitting in judicial capacity.**—*R. v. BARNSTAPLE JJ., Ex p. CARDER*, No. 1461a, *post*.

**h** (p. 431) iv. —.—.]—*In re COLLEGE OF PHYSICIANS & SURGEONS & MAHOOD*, [1929] 4 D. L. R. 123; 2 W. W. R. 461; 24 Alta. L. R. 219.—CAN.

**h** (p. 431) v. —.—.]—While *Rez v. Nat Bell Liquors, Ltd.*, [1922] 2 W. W. R. 30, holds that, if the jurisdiction of the magistrate is conceded, then the formal conviction is conclusive & excludes from consideration on *certiorari* the sufficiency of the evidence supporting the conviction as to the facts alleged therein, yet the decision does not go so far as to prevent the receipt of extrinsic evidence to show that an accused person pleading not guilty in a ct. with limited territorial jurisdiction was deprived of the right to have it established in the course of the evidence as a condition precedent to the exercise of the jurisdiction that the charge was one triable in the ct. purporting to deal with it.—*R. v. GUSTAFSON* (B. C.), [1929] 3 W. W. R. 209; 52 Can. Crim. Cas. 151.—CAN.

**h** (p. 431) vi. —.—.]—*Identity.*—On application under Liberty of the Subject Act, R. S. N. S., 1923, for an order in the nature of a writ of *certiorari*:—*Held*: the identity of the prisoner with a person previously convicted is a matter for the magistrate.—*Re RISSEB*, [1934] 4 D. L. R. 382; 62 C. C. O. 73.—CAN.

**h** (p. 431) vii. —.—.]—On a motion to quash on the ground that the evidence did not show that the value was such as to give the magistrate jurisdiction, the ct. cannot inquire as to the sufficiency of the evidence of amount.—*R. v. ORDE*, [1935] 3 D. L. R. 329; 9 M. P. R. 373; 63 Can. C. O. 353; 5 F. L. J. (Can.) 19.—CAN.

**k** (p. 431) i. —.—.]—*Reference to repealed Act—Offence in fact committed.*—Where a conviction is attacked on *certiorari* on the ground that the Act referred to therein & on which it purports to be based had been repealed at the time when the offence was alleged to have been committed, then sect. 1124 of the Criminal Code requires the judge who hears the application to peruse the depositions & determine the guilt of the accused, & if he is satisfied that the offence actually alleged in the conviction has been committed or if the depositions show that an offence of the nature described in the conviction has been committed, the conviction should not be held invalid. Sect. 1124 should not be applied, however, unless the judge is satisfied of the guilt of the accused beyond a reasonable doubt.—*R. v. LOO YIP YEN*, [1930] 1 W. W. R. 351; 53 Can. C. C. 38; 42 B. C. R. 377.—CAN.

**m** i. —.—.]—A motion for an order for *certiorari* & to quash an order for the destruction of two automatic machines found in a common gaming house & for the forfeiture of the moneys which might be therein. Appt. alleged that he, & not the person convicted of keeping the common gaming house, was the owner of the machines, & that the magistrate had no jurisdiction, because the machines were in ct. under a search warrant issued under sect. 641 of the Criminal Code which was executed by a person other than the person to whom it was addressed:—*Held*: the order was a conviction *in rem*, & since

**1461a. Justices must be sitting in judicial capacity.]**

—A county council delegated, under Cinematograph Act, 1909 (c. 30), s. 5, to justices sitting in petty sessions the council's powers under sect. 2 of the Act to "grant licences to such persons as they think fit to use the premises specified in the licence for the purposes" of a cinematograph theatre.

Owing to the absence of any provision in the statute for the granting of provisional licences in respect of buildings not yet erected, a practice grew up of applying to justices to approve plans of a proposed building, it being understood that if the plans were approved—all opposition, if any, being heard

on that application—a subsequent application for a licence would be granted as a matter of course when the building was completed in accordance with the plans:—*Held*: since no power was given by the Act to the county council or to justices to approve plans, the justices in so doing, or in refusing to do so, were engaging in an extra-judicial proceeding which the ct. could not control by *certiorari* or *mandamus*.—*R. v. BARNSTAPLE JJ., Ex p. CARDER*, [1938] 1 K. B. 385; [1937] 4 All E. R. 263; 107 L. J. K. B. 127; 158 L. T. 409; 101 J. P. 547; 54 T. L. R. 36; 81 Sol. Jo. 963; 35 L. G. R. 651, D. C.

it was regular on its face, a consideration of the merits was not open.—*R. v. DENABURG*, [1935] 2 W. W. R. 558; 4 D. L. R. 399; 64 C. C. C. 216; 43 Man. L. R. 332.—CAN.

mm (p. 431) i. — *Application to speedy trial.*—*R. v. O'NEIL & SMITH* (1931), 56 Can. C. C. 379.—CAN.

nn (p. 431) i. — *Order for maintenance—Attack on original committal order.*—Where the judge of a Juvenile Ct. has admitted as evidence a committal order made under Child Welfare Act & regular on its face, & has used that order as the basis for making a maintenance order against a municipality & the municipality has not availed itself of its right of appeal, the Ct. of Appeal should not allow an attack to be made on the original order on a motion to quash the subsequent order as made without jurisdiction.—*RURAL MUNICIPALITY OF COLDWELL v. CHILDREN'S AID SOCIETY OF ST. ADELARD*, [1929] 1 D. L. R. 909; 1 W. W. R. 333; 51 Can. Crim. Cas. 180; 38 Man. L. R. 31.—CAN.

nn (p. 431) ii. — *Failure to hear evidence—Nature of evidence need not be disclosed.*—*YORKE v. MICHAIS*, [1930] 2 W. W. R. 62; *sub nom. R. v. MICHAIS*, 53 Can. C. C. 250; 24 S. L. R. 414.—CAN.

nn iii. — *Indecent assault—Depositions disclosing case of rape—Committal for trial.*—*R. v. CASS* (1932), 5 M. P. R. 307.—CAN.

ddd (p. 431) i. — *Before a judge can substitute a conviction for a magistrate's conviction which on being removed on certiorari he holds to be invalid he must be satisfied beyond a reasonable doubt & from a perusal of the deposition as his only guide that the accused has been guilty of an offence of the nature described in the invalid conviction. Where he is not so satisfied the conviction must be quashed: there is no provision in the Code warranting the remitting of the case to the magistrate for rehearing.*—*R. ex rel. ARNOLD v. WESTERLAND* (Alta.), [1929] 3 W. W. R. 408; 32 Can. Crim. Cas. 127.—CAN.

ddd (p. 431) ii. — *Before a judge can substitute a conviction for a magistrate's conviction which on being removed on certiorari he holds to be invalid he must be satisfied beyond a reasonable doubt & from a perusal of the deposition as his only guide that the accused has been guilty of an offence of the nature described in the invalid conviction. Where he is not so satisfied the conviction must be quashed: there is no provision in the Code warranting the remitting of the case to the magistrate for rehearing.*—*R. ex rel. ARNOLD v. WESTERLAND* (Alta.), [1929] 3 W. W. R. 408; 32 Can. Crim. Cas. 127.—CAN.

eee (p. 431) i. — *Before a judge can substitute a conviction for a magistrate's conviction which on being removed on certiorari he holds to be invalid he must be satisfied beyond a reasonable doubt & from a perusal of the deposition as his only guide that the accused has been guilty of an offence of the nature described in the invalid conviction. Where he is not so satisfied the conviction must be quashed: there is no provision in the Code warranting the remitting of the case to the magistrate for rehearing.*—*R. ex rel. ARNOLD v. WESTERLAND* (Alta.), [1929] 3 W. W. R. 408; 32 Can. Crim. Cas. 127.—CAN.

cc. *Order for return of depositions.*—Where a magistrate causes depositions to be taken by a stenographer, ap-

pointed by himself pursuant to the authority given him by sect. 37 of Summary Convictions Act, R. S. B. C., 1924, & the depositions are ordered to be returned on *certiorari*, the depositions or transcripts must be deemed to be in the custody or power of the magistrate.—*R. v. WONG YORK* (B. C.), [1929] 3 W. W. R. 199; 52 Can. Crim. Cas. 196; *revid.*, [1930] 1 W. W. R. 388; 2 D. L. R. 552; 53 Can. C. C. 68; *sub nom. Re JOHNSTON*, 42 B. C. R. 246.—CAN.

sd. *Extension of time for.*—*Re BROWN*, [1931] 3 D. L. R. 205.—CAN.

sp. *Costs—Motion unopposed & misconduct not shown.*—*Re MURPHY* (1931), 2 M. P. R. 440.—CAN.

sr. *Bias of magistrate.*—An order of acquittal made by a chairman & justices of quarter sessions (assuming one of the justices to have been biased) cannot be quashed on *certiorari*. The order of a biased tribunal is voidable only, not void.—*R. v. GALWAY JJ.*, [1906] 2 I. R. 499.—IR.

st. *Order committing for trial or admitting to bail.*—The decision of justices of the peace, committing a deft. for trial, or admitting him to bail, under Petty Sessions (Ireland) Act, 1851 (c. 93), s. 15, cannot be brought up by *certiorari*.—*R. v. ROSCOMMON JJ.*, [1894] 2 I. R. 158.—IR.

sw. *When order quashed.*—A magistrate intimidated a Crown witness by telling him that he did not believe him, that he was committing perjury & was liable to 14 years' imprisonment. He then told him to think it over & return & tell the truth or he would have a charge laid against him. He then had counsel for the accused ejected for objecting:—*Held*: a miscarriage of justice & conviction quashed.—*R. v. LOCKERBY* (1933), 49 B. C. R. 247.—CAN.

sz. — *Order will be quashed on certiorari where the record shows that accused did not plead, & there was no evidence & no depositions.*—*Re NELSON*, [1936] 1 D. L. R. 28; O. R. 31; 65 Can. C. C. 94.—CAN.

**PART XIII. SECT. 7.**

t (p. 432) i. — *To first sittings in county where conviction took place.*—*R. v. FRASER*, [1928] 1 D. L. R. 803; 49 Can. Crim. Cas. 189.—CAN.

f (p. 432) ii. — *By case stated—Statutory right.*—An appeal under Summary Convictions Act, R. S. B. C., 1924, by way of a stated case is a purely statutory appeal, & there must be a strict compliance with sect. 89 of the statute, i.e. a very substantial compliance though not a compliance to the letter, in the matter of the application to the magistrate to state a case in order to give the ct. jurisdiction.—*R. v. CHIN HONG*, [1936] 1 W. W. R. 711; 3 D. L. R. 307; 60 B. C. R. 423; 65 Can. C. C. 334.—CAN.

kk (p. 432) i. — *To what sittings applicable.*—Where notice of an appeal governed by sect. 750 of the Criminal

Code is duly given for the proper sittings of the ct., the ct. has jurisdiction to enter & hear the appeal at any time during the sittings, & if it is not entered or heard at that sittings the ct., is without jurisdiction to consider it at a subsequent sittings.—*R. v. REKUSH*, [1930] 1 W. W. R. 669; 53 Can. C. C. 199; 24 Alta. L. R. 431.—CAN.

see (p. 432) i. — *After payment of fine—What amounts to payment.*—On an appeal under Summary Convictions Act, R. S. B. C., 1924, from a conviction for a violation of Motor Vehicle Act, under which a fine was imposed:—*Held*: on the facts the amount which had been paid by the accused following his conviction had been paid, under the alternative method mentioned in sect. 78 (c) of the former Act, as a deposit of a sum sufficient to cover the sum adjudged to be paid together with the further sum which the justice deemed sufficient to cover the costs of the appeal; & therefore, the objection that since applt. had paid the fine imposed the ct. was without jurisdiction to hear the appeal should be overruled.—*R. v. TALBOT*, [1930] 3 W. W. R. 299; *affd.*, [1931] 3 D. L. R. 676; 1 W. W. R. 662; 65 Can. C. C. 364; 43 B. C. R. 485.—CAN.

see (p. 432) ii. — *From decision of judge in chambers on case stated.*—*R. v. BAER* (1930), 54 Can. C. C. 372.—CAN.

hhh (p. 432) i. — *Findings of fact.*—*R. v. BELLMAN* (Ont.), (1925), 45 Can. Crim. Cas. 145.—CAN.

hhh (p. 432) ii. — *Where conviction within fourteen days of next sitting of appeal court.*—*R. v. NORMAN* (1923), 49 Can. Crim. Cas. 405.—CAN.

hhh (p. 432) iii. — *Where conviction within fourteen days of next sitting of appeal court.*—*R. v. MORRIS* (1924), 49 Can. Crim. Cas. 389.—CAN.

hhh (p. 432) iv. — *Where conviction within fourteen days of next sitting of appeal court.*—*R. v. WENN* (1928), 49 Can. Crim. Cas. 401.—CAN.

can (p. 432) v. — *Extension of—After expiration of fixed period.*—*R. v. BOUTILLIER* (1928), 50 Can. Crim. Cas. 186.—CAN.

sv. *Who may appeal—Under Criminal Code, s. 749.*—*R. v. HICKS*, [1926] 1 W. W. R. 182; 46 Can. Crim. Cas. 94; 37 B. C. R. 280.—CAN.

aaaa i. — *To nearest court—How nearest court ascertained.*—*R. v. HOLT* (1925), 46 Can. Crim. Cas. 40; 36 B. C. R. 391; [1926] 1 W. W. R. 47.—CAN.

aaaa ii. *S.P.R. v. CANADIAN ROBERT DOLLAR CO., LTD.* (1926), 87 B. C. R. 264.—CAN.

dddd i. — *Where conviction within fourteen days of next sitting of appeal court.*—*R. v. McLATCHY, Ex p. STEWART* (N.B.), [1926] 2 D. L. R. 394; 45 Can. Crim. Cas. 293.—CAN.

dddd ii. — *No power to set aside own decision.*—*R. v. MARTINELLO*, [1931] 1 D. L. R. 989; 55 Can. C. C. 43; 2 M. P. R.

dddd iii. ——— *To order new trial.*—*AMHERST v. COULSON*, [1932] 2 D. L. R. 670; 58 C. C. C. 96; 4 M. P. R. 464.—CAN.

dddd iv. ——— *—R. (CRUMP) v. LOMBARDO & WRIGHT*, [1933] 3 W. W. R. 177.—CAN.

dddd (p. 433) v. ——— *—Sembie: a county ct. judge may consider findings of fact on appeal from a police magistrate.*—*DRUET v. GROAT*, [1935] 2 D. L. R. 351.—CAN.

dddd (p. 432) vi. ——— *—A county ct. in Nova Scotia has inherent power to fix or adjourn the hearing of an appeal.*—*R. v. RHODENHIZER* (No. 2) (1936), 67 Can. C. C. 262.—CAN.

o (p. 433) i. ——— *"Nearest to place where cause of action arose."—Proof of nearness.*—*R. v. ZARELLI & NEWELL*, [1931] 2 W. W. R. 108.—CAN.

p (p. 433) i. ——— *Nature of—Whether trial de novo.*—*R. v. LAURIENTE*, [1928] 3 W. W. R. 265.—CAN.

p (p. 433) ii. ——— *Duty of court.—To consider findings of magistrate.*—*R. v. AULENBACH* (N. S.), [1929], 52 Can. Crim. Cas. 374.—CAN.

p (p. 433) iii. ——— *—R. v. GILES* (1930), 55 Can. C. C. 76; 2 M. P. R. 447.—CAN.

p (p. 433) iv. ——— *—R. v. HILL* (1930), 55 Can. C. C. 167; 2 M. P. R. 486.—CAN.

p (p. 433) v. ——— *—R. v. OICKLE*, [1931] 3 M. P. R. 447; 55 Can. C. C. 145.—CAN.

p (p. 433) vi. ——— *—R. v. GILES* (1930), 55 Can. C. C. 76; 2 M. P. R. 447.—CAN.

p (p. 433) vii. ——— *No right to jury—1900 (N. S.), c. 44.*—*R. v. LAWRENCE* (1930), 53 Can. C. C. 172; 1 M. P. R. 402.—CAN.

p (p. 433) viii. ——— *Security—Time for.*—*R. v. RITZOLZ OPTICAL CO., LTD.*, [1935] 1 D. L. R. 681; 63 Can. C. C. 212; 5 F. L. J. (Can.) 5.—CAN.

p (p. 433) ix. ——— *Right to jury.*—There is no right to a jury on appeal to the county ct. under Nova Scotia Summary Convictions Act, R. S. N. S. 1923.—*R. v. EISENBAUER*, R. v. HUMMELMAN (1936), 67 Can. C. C. 334.—CAN.

t (p. 433) i. ——— *Appeal—Security for costs.*—Sect. 750 (c) of Criminal Code, R. S. C. 1927, applies only to an appeal by the accused. Therefore, on an appeal from the dismissal of a charge applt. is not bound to give security for the accused's costs.—*R. v. CROWE* (No. 2), [1938] 2 W. W. R. 306.—CAN.

t (p. 433) ii. ——— *Successful appeal—Costs.*—*R. v. CROWE* (No. 3), [1938] 2 W. W. R. 308.—CAN.

t (p. 433) iii. ——— *Motion to quash.*—*R. v. CROWE* (No. 1), [1938] 2 W. W. R. 305.—CAN.

t (p. 433) iv. ——— *Appeal by person "aggrieved."*—*R. v. CROWE*, [1938] 1 W. W. R. 806.—CAN.

e (p. 433) i. ——— *—On an appeal, under sect. 797 of Criminal Code, R. S. C. 1927, applt. must inter alia prove that the recognizance required by sect. 750 (c) was actually filed.*—*R. v. DUREAULT*, [1935] 3 W. W. R. 302; [1936] 1 D. L. R. 395; 64 C. C. C. 338.—CAN.

g (p. 433) i. ——— *—On an appeal from a summary conviction under the Code it is the charge or complaint, on which the conviction was made, not the conviction, that must be heard & determined. Unless it discloses an offence there are no merits to try. Therefore, an amendment of the charge or complaint or the swearing of a new information should not be permitted on the appeal.*—*R. v. URIDGE* (No. 2), [1937] 3 W. W. R. 467; 7 F. L. J. (Can.) 211.—CAN.

bb (p. 433) i. ——— *—An appeal lies to the district ct. from a conviction by a magistrate for a violation of sect. 130 of The School Act, R. S. S., 1930.*—*MENZIES v. MARCOTTE*, [1936] 1 W. W. R. 69; 1 D. L. R. 63; 65 Can. C. C. 99.—CAN.

bb (p. 433) ii. ——— *Jurisdiction.*—On an appeal from a summary conviction under Criminal Code it is compliance with the conditions of appeal, & not proof of such compliance, that gives jurisdiction to the district ct. to hear the appeal; therefore, so long as the case is properly kept alive by adjournments said proof may be made at any time, & thereupon the ct. will be justified in exercising the jurisdiction thus shown to exist.—*R. v. HOLAYCHUK* (Alta.), [1929] 1 D. L. R. 706; 1 W. W. R. 278; 51 Can. Crim. Cas. 98.—CAN.

dd (p. 433) i. ——— *Ontario—Offence punishable on summary conviction—Appeal does not lie.*—*R. v. MARTIN* (1931), 55 Can. C. C. 325.—CAN.

ee (p. 433) i. ——— *Over sentence.*—*R. v. SKIBO*, [1931] 1 W. W. R. 297; 55 Can. C. C. 124; 39 Man. L. R. 355.—CAN.

ee (p. 433) ii. ——— *As to depositions taken before magistrate.*—*R. v. CRUIKSHANKS* (1930), 53 Can. C. C. 184; 1 M. P. R. 394.—CAN.

ee (p. 433) iii. ——— *—Ct. of Appeal will not interfere with a sentence unless trial judge has proceeded on wrong principle.*—*R. v. AWALT* (1936), 10 M. P. R. 502; 66 Can. C. C. 132.—CAN.

ff (p. 433) i. ——— *—An appeal lies from a county ct. judge hearing an appeal under Summary Convictions Act, R. S. N. S., 1923, s. 58.*—*R. v. ROCHE*, [1936] 2 D. L. R. 214; 10 M. P. R. 74; 65 Can. C. C. 35.—CAN.

ff (p. 433) ii. ——— *—If there is any evidence on which the magistrate could convict, the Court of Appeal will hesitate to interfere.*—*BIRTWISTLE v. DOYLE* (1935), 8 M. P. R. 532.—CAN.

gg (p. 433) i. ——— *—On an appeal from a conviction founded on an alleged plea of guilty, it is open to accused to raise the point that he did not, in the true legal sense, plead guilty to the information or complaint preferred against him, since he did not understand the nature of the charge & pleaded guilty in ignorance.*—*R. v. OLNEY* (B. C.), [1926] 4 D. L. R. 869; [1926] 3 W. W. R. 273; 46 Can. Crim. Cas. 190.—CAN.

gg (p. 433) ii. ——— *—R. v. GALSKEY*, [1931] 2 W. W. R. 475; 55 Can. C. C. 330.—CAN.

gg (p. 433) iii. ——— *Discretion of judge to allow withdrawal of plea.*—*Ex p. STANTON* (1928), 28 S. R. N. S. 516; 45 N. S. R. W. N. 118.—AUS.

hh (p. 433) i. ——— *In favour of Crown.*—*R. v. GILES*, [1930] 3 D. L. R. 273; 53 Can. C. C. 248.—CAN.

bbb (p. 433) i. ——— *Right of Crown to estreat bail bond.*—On an application to estreat a bail bond given to secure payment of costs on an appeal from a summary conviction to which Part XV. of the Criminal Code was applicable, which appeal was dismissed with costs & the costs subsequently taxed:—*Held:* the Crown was entitled to an order estreating the recognizance & directing that it be enforced against the bondsmen.—*R. v. MATHESON & MADER*, [1930] 1 W. W. R. 609; 53 Can. C. C. 228; 24 S. L. R. 577.—CAN.

bbb (p. 433) ii. ——— *Security—Sufficiency—Question for judge.*—The magistrate & not the applt. is judge of the sufficiency of the deposit to cover costs of appeal, & the error of the magistrate is therefore not permitted to oust the jurisdiction of the ct.—*R. v. SLIPP*, *Ex p. BASQUE* (1932), 4 M. P. R. 238.—CAN.

eee (p. 433) i. ——— *—On the hearing of a general appeal under Justices of the Peace Act, 1927, it is necessary in applying the English authorities to note that in England the appeal from an order of the justices is by way of case stated, namely, an appeal on point of law only. Therefore, the appellate ct. cannot consider independently the weight of evidence, although it might have taken a different view of the weight of evidence had it been open to it to do so, & had the appeal been what a general appeal under Justices of the Peace Act, 1927, is in New Zealand—namely, to all intents & purposes a new trial. The function of the appellate ct. in New Zealand is, in such an appeal, to decide the matter on the facts in evidence before it & not to inquire merely whether the magistrate's decision has been shown to be wrong.*—*LARSEN v. AUBREY*, [1933] N. Z. L. R. 755.—N.Z.

sw. *Postponement of appeal—Grounds for granting.*—*R. v. CUMYOW*, [1926] 1 D. L. R. 623; 45 Can. Crim. Cas. 172; 36 B. C. R. 435.—CAN.

sz. *Appeal to Division Court—From conviction imposing fine & imprisonment.*—*Re R. v. KNOWLES* (Ont.), (1929), 52 Can. Crim. Cas. 377.—CAN.

sy. ——— *On case stated.*—Under the combined operation of Summary Convictions Act of Ontario, R. S. O., 1927, s. 3, & sect. 761 of the Criminal Code of Canada, an appeal upon a stated case lies from a conviction by a magistrate. The forum for hearing the appeal is the Div. Ct. of the Appellate Division.—*R. v. RED LINE, LTD.*, [1930] 2 D. L. R. 149; 53 Can. C. C. 47; 65 O. L. R. 11.—CAN.

sz. *Payment of fine under protest—Right to appeal preserved.*—*R. v. MCGILL* (B. C.) (1929), 52 Can. Crim. Cas. 141.—CAN.

sa. *Powers of appellate court—To recall witnesses called in inferior court.*—On an appeal under the provisions of the Justices Act, 1921, the judge upon the hearing of the appeal has power in a proper case & in the exercise of a judicial discretion to take further evidence, & for that purpose to order that the witnesses called in the lower ct. be recalled & examined in his presence.—*HUNTER v. WALSH* (1928), S. A. S. R. 336.—AUS.

sd. ——— *No power to amend sentence already served.*—*R. v. CHRISTOPHER* (1931), 56 Can. C. C. 388; 2 M. P. R. 439.—CAN.

se. *Informant admitting perjury—Conviction quashed.*—*R. v. LE BRETON* (1927), 54 N. B. R. 580.—CAN.

sk. *Refusal to allow—Appeal.*—*R. v. MCNEIL*, [1932] 1 D. L. R. 349; 6 M. P. R. 8; 59 C. C. 169.—CAN.

sm. *Appeal to King's Bench—From county court—Powers of judge.*—*R. v. LABOVITCH*, [1933] 3 W. W. R. 149; 2 D. L. R. 367; 61 C. C. C. 88; 41 Man. L. R. 393.—CAN.

sp. *Enforcement of conviction after appeal—Conviction not remitted to magistrate.*—A magistrate may enforce a conviction after an unsuccessful appeal, notwithstanding the failure to remit the conviction to the magistrate.—*R. v. McDONALD* (1933), 61 C. C. C. 70.—CAN.

sr. *Appeal from judge in chambers.*—No appeal lies from an order of a judge in chambers on case stated.—*R. v. YOUNG* (No. 2), [1935] 2 D. L. R. 160; 63 C. C. C. 64; 8 M. P. R. 343.—CAN.

st. *Right of appeal taken away by statute.*—If a statute takes away the right of appeal there is no right to appeal by case stated from magistrates.—*R. v. YOUNG* (No. 1), [1935] 2 D. L. R. 153; 63 C. C. C. 62; 8 M. P. R. 323.—CAN.

sw. *Appeal to District Court—Effect on application to quash.*—An application by way of certiorari to quash a conviction under sect. 63 of Weights

## Part XIV.—Appeals from Quarter Sessions.

**1607.** *Add. Annotation* :—**Apld.** *Piper v. St. Mary-lebone Licensing JJ.*, [1928] 2 K. B. 221.

**1622a.** *Proper heading.*—In a case of *D. v. P.* the appeal was by resp. The case was headed & set down as *P. v. D.*

AVORY, J., said that the rule was that, as the parties were at quarter sessions, so they remained. The present case ought to have been headed between “*D. & P.*, resp.”—**PRACTICE NOTE** (1930), 47 T. L. R. 168.

**1622b.** *Amendment—With consent of parties.*—Under Quarter Sessions Act, 1849 (c. 45), s. 2, it is competent for the parties to consent to an amendment or alteration of the special case subject to the approval of the ct. The special case before the Court of Appeal was adjusted before the recent decisions of the House, & did not afford sufficient information of the exact nature of the uses to which the hereditament was put, & a further statement was asked for by & supplied to the House.—*TOOGOOD & SONS, LTD. v. GREEN*, [1932]

A. C. 663; 101 L. J. K. B. 453; 147 L. T. 201; 96 J. P. 249; 43 T. L. R. 463; 76 Sol. Jo. 458; 30 L. G. R. 301, H. L.

**1622c.** — *Grounds for—Appeal to House of Lords.*—*TOOGOOD & SONS, LTD. v. GREEN*, No. 1622b, *ante*.

**1645.** *Add. Citation* :—1 B. R. A. 549.

**1656.** *Add. Annotation* :—**Consd.** *Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc.*, etc. (1930), 143 L. T. 650.

**1676a.** — *For further information—Order not appealable.*—The Ct. of Appeal cannot interfere with the exercise of the power of the Div. Ct. to remit a case for further information under Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49).—*SOUTHWARK REVENUE OFFICER v. HOE (R.) & Co.* (1930), 143 L. T. 544; 94 J. P. 170; 46 T. L. R. 528; 28 L. G. R. 446; (1926–31), 2 B. R. A. 723.

## Part XVI.—Appeal to Court of Appeal.

**1713a.** *Right of appeal with leave.*—*LEYTON URBAN DISTRICT COUNCIL v. WILKINSON*, No. 1229, *ante*.

& Measures Act, R. S. C. 1927, dismissed on the ground that an appeal had been taken by the appt. to the District Ct.—*R. v. SAFEWAY STORES, LTD.* (No. 2), [1938] 2 W. W. R. 81;

2 D. L. R. 415; *affd.*, [1938] 2 W. W. R. 486.—**CAN.**

### **PART XVII. SECT. 3, SUB-SECT. 1.**

*sl. Payment of fine under protest.*—

The payment of a fine “under protest” is improper, because fines cannot be paid in that way.—*R. v. SUTHERLAND* (1928), 43 B. C. R. 277.—**CAN.**



## MALICIOUS PROSECUTION AND PROCEDURE.

## Part I.—Distinguished from Trespass and False Imprisonment.

14. For existing citations read

MAGNAY v. BURT (1843), Dav. & Mer. 652 ;  
sub nom. BIRT v. MAGNAY, 7 Jur. 127 ; onappeal, sub nom. MAGNAY v. BURT, 5 Q. B.  
381, Ex. Ch.18. Add. Annotation :—As to (2) Consd. Herniman  
v. Smith, [1938] A. C. 305.

## Part II.—Malicious Prosecution and Abuse of Criminal Proceedings.

32. Add. Annotation :—Refd. Herniman v. Smith, [1936] 2 All E. R. 1377.

## Part III.—Malicious Abuse of Civil Proceedings.

100a. ——— Omission to pass money through court.]—An order was made against pltf. in a county ct. committing him to prison, but was suspended so long as he paid £1 a month into court. Deft., the judgment creditor, asked him to pay him the £1 direct, & promised to pass it through the ct. Pltf. paid the deft. the money, but deft. did not pass it through the ct. Pltf. having been imprisoned was held entitled to damages.—CHAPMANN v. MORLEY (1891), 7 T. L. R. 257.

101a. No 'detention—Bail given.]—In an action for a malicious arrest, pltf., in order to support an averment in his declaration, that he had been arrested, proved the writ ; the warrant ; that the officer sent a messenger

to him, informing him that he had such a warrant, the messenger not having it then with him, & desiring him to give bail ; that he sent word that he would on the following day ; & that he accordingly did so, giving a bail-bond at the officer's house ; but never being actually detained :—Held : these facts did not amount to an arrest ; & therefore, the averment was not proved.—BERRY v. ADAMSON (1827), 6 B. & C. 528 ; 9 Dow. & Ry. K. B. 558 ; 108 E. R. 546 ; sub nom. BERRY v. SEMPRONIUS, 5 L. J. O. S. K. B. 215.

Annotations :—Consd. George v. Radford (1828), 3 C. & P. 464. Apld. Reece v. Griffiths (1829), 5 Man. & Ry. K. B. 120 ; Amor v. Blofield (1832), 9 Bing. 91 ; Bates v. Pilling (1834), 2 Cr. & M. 374. Refd. Brown v. Chapman (1848), 6 C. B. 365.

## PART II. SECT. 1.

20 i. General rule.]—The definition of "prosecution" is not confined to proceedings before a magistrate or a criminal ct. The proceedings relating to the granting of sanction to prosecute, though they may not lead to imposition of fine or imprisonment, render the person charged liable to fine or imprisonment, & therefore, come within the meaning of the term "prosecution."—RABINDRA NATH DAS v. JOGENDRA NATH DEB (1928), 1 L. R. 56 Calo. 432.—IND.

20 ii. ———.]—A prosecution exists when a criminal charge is made before a judicial officer or tribunal.—NAGENDRA NATH RAY v. BASANTA DAS BAIKAGYA (1929), 1 L. R. 57 Calo. 25.—IND.

33 ii. ———.]—A suit for damages for malicious prosecution cannot proceed when the proceeding alleged to give rise to the cause of action had ended in the dismissal of the complaint under Code of Criminal Proceedings, 1898, s. 203, & no process had been issued against pltf., & the mere fact that pltf. had cross-examined the witnesses for complainant cannot alter

the character of the proceedings.—SULHAG CHAMAR v. NAND LAL SARHU (1928), 1 L. R. 8 Pat. 285.—IND.

## PART II. SECT. 2, SUB-SECT. 2.

40 iii. ———.]—In any country where, as in India, the prosecution is not private, an action for malicious prosecution, in the most literal sense of the word, cannot be raised against any private individual. But giving information to the authorities, which, naturally, leads to prosecution, is just the same thing.—NAGENDRA NATH RAY v. BASANTA DAS BAIKAGYA (1929), 1 L. R. 57 Calo. 25.—IND.

## PART II. SECT. 3, SUB-SECT. 1.

74 i. Who may bring action.]—There is no such thing as a joint cause of action for damages for malicious prosecution.—LEARY & DUPPERON v. MCGHEE (Sask.), [1929] 2 D. L. R. 201 ; 1 W. W. R. 228.—CAN.

## PART III. SECT. 1:

78 vi. ———.]—RAMA ROW v. SOMA-SUNDARAM ASARY (1927), 1 L. R. 51 Mad. 642.—IND.

## PART III. SECT. 8.

ab. 'Divorce proceedings.]—Deft. petitioned for the dissolution of her marriage upon the ground that her husband had committed adultery with pltf. Pltf. obtained leave to intervene in the suit to answer the charge, whereupon deft. abandoned the charge, & was granted leave to amend her petition by striking out the charge of adultery. Pltf. then brought this action to recover damages. The declaration contained two counts, one for defamation, the other for malicious prosecution on the ground that the charge of adultery was made maliciously & without reasonable & probable cause. The first count was abandoned :—Held : the declaration did not disclose a cause of action, as the bringing of civil proceedings, however maliciously, will not support a subsequent action for malicious prosecution, except in the case of the presentation of a bkpoy. petition against a trader or the presentation of a petition for winding up a trading co.—FENN v. PAUL (1932), S. R. N. S. W. 315 49 N. S. W. W. N. 130.—AUS.

## Part IV.—Essentials to Action.

148. *Add. Annotations*:—*Apld. Morriss v. Winter* (1929), 45 T. L. R. 643. *Refd. Copper Export Asscn. Inc. v. Mersey Docks & Harbour Board* (1932), 48 T. L. R. 542.

232. *Add. Annotation*:—*Refd. Woolmington v.*

Public Prosecutions Director, [1935] A. C. 462.

248. *Add. Annotation*:—*Refd. Herniman v. Smith*, [1936] 2 All E. R. 1377.

345. *Add. Annotation*:—*Refd. Herniman v. Smith*, [1936] 2 All E. R. 1377.

## PART IV. SECT. 1, SUB-SECT. 1.—A.

121 ii. ———.—]—Pltf. must prove that he was innocent, & that his innocence was pronounced by the tribunal before which the accusation was made. Where a *nolle prosequi* is entered, although it establishes that the proceedings terminated in favour of pltf., it does not establish his innocence.—*RICH v. FORMAN* (1927), 29 W. A. L. R. 13.—AUS.

## PART IV. SECT. 1, SUB-SECT. 1.—B. (a).

133 ix. ———.—]—On the trial of an action for malicious prosecution the question whether pltf. was innocent or guilty of the criminal charge of which he complains is still open & consequently, where the case is one in which all the facts resulting in that charge were within the knowledge of the two parties, a finding in the civil action that pltf. was really guilty, notwithstanding his acquittal, necessarily determines in favour of deft. the issue whether there was reasonable & probable cause for the laying of the criminal charge.—*MRIER v. ELDER*, [1931] 1 D. L. R. 553; [1930] 3 W. W. R. 551; 25 S. L. R. 199.—CAN.

## PART IV. SECT. 1, SUB-SECT. 2.

d i. *Discontinuance of proceedings*.—*DALLING v. MCKENDRICK* (P. E. I.), [1926] 2 D. L. R. 999.—CAN.

## PART IV. SECT. 2, SUB-SECT. 1.—A.

182 xvi. ———.—]—*METCALFE v. STEWART*, [1930] 1 D. L. R. 1001; 42 B. C. R. 96.—CAN.

## PART IV. SECT. 2, SUB-SECT. 1.—B. (a).

205 xi. ———.—]—In a suit to recover the price of goods sold, goods in a store were seized under an order of attachment. The suit failed as against A. F., who claimed to be the owner of the business, & the order of attachment was dissolved. A. F. then brought action for damages.—*Held*: the action was not maintainable either for maliciously suing out process, because of the absence of malice & the existence of reasonable & probable cause; or for trespass, because, even assuming A. F. was the owner of the goods, as to which the ct. was not satisfied, the seizure was under a valid attachment order.—*FEINSTEIN v. PAULIN CHAMBERS CO., LTD.*, [1921] 1 W. W. R. 554; 59 D. L. R. 605.—CAN.

## PART IV. SECT. 2, SUB-SECT. 2.—A.

230 i. *Acting without just cause or excuse*.—*MANNING v. NICKERSON* (B. C.), [1927] 3 D. L. R. 728; [1927] 2 W. W. R. 623.—CAN.

230 ii. ———.—]—*PAULSON v. CLEMENTS* (Alta.), [1927] 3 D. L. R. 716.—CAN.

230 iii. ———.—]—Govt. Liquor Act. R. S. B. C. 1924, c. 146, has not changed the law with respect to malicious prosecution. Where in an action against a chief of police for malicious prosecution because of his applying for & the execution of a search warrant issued under sect. 73 (1) of said Act. the most charitable view that could be taken of his action was under the

information given him by his informant he was requested to investigate & instead of making a proper investigation, he immediately applied for the warrant, it was held that said view coupled with the finding already made of an absence of reasonable & probable cause would support a finding of malice.—*GRADY & GRADY v. DEVITT*, [1928] 1 W. W. R. 924.—CAN.

230 iv. ———.—]—*NICKERSON v. MANNING*, [1928] 3 D. L. R. 494; [1928] S. C. R. 91.—CAN.

241 vi. ———.—]—*HENDERSON v. BAILLEUL*, [1927] 3 D. L. R. 374; [1927] 2 W. W. R. 197; 36 Man. L. R. 519.—CAN.

241 vii. ———.—]—Deft. took proceedings against pltf.'s mother, under Lunacy Act, 1898, s. 4, charging her with being a person deemed to be insane wandering at large. A warrant was issued & she was arrested, but upon being brought before a magistrate she was discharged. She then brought an action for malicious prosecution. Deft. admitted that he was not justified in swearing that she was wandering at large, but he said that he had acted in good faith & in order to prevent her, in her own interests, from disposing of her property. The judge, in directing the jury, told them that on that admission the proceedings must be deemed to have been taken without reasonable or probable cause, but that in determining whether they were taken maliciously they should consider whether the deft. was actuated by an honest desire to protect pltf.'s property in her own interest or by some indirect or improper motive.—*Held*: they were properly directed.—*RAPLEY v. RAPLEY* (1929), 30 S. R. N. S. W. 94; 47 N. S. W. W. N. 36.—AUS.

241 viii. ———.—]—There is sufficient malice to support proceedings for malicious prosecution when an action is brought against the maker of a bad cheque solely for the purpose of compelling payment.—*HOFLEY v. RADIO OIL REFINERIES, LTD.*, [1937] 3 D. L. R. 63; 45 Man. L. R. 227.—CAN.

## PART IV. SECT. 2, SUB-SECT. 2.—B.

252 i. *Holding to bail—Solicitor taking note in own name for debt due to client*.—*BOURGEOIS v. MITTON*, [1931] 1 D. L. R. 998; 2 M. P. R. 1.—CAN.

m i. ———.—]—*JONES v. ECKLEY*, [1928] 2 D. L. R. 943.—CAN.

## PART IV. SECT. 2, SUB-SECT. 3.

275 i. *Malice & absence of reasonable & probable cause—Both must be proved*.—In an action for damages for malicious prosecution, a jury found that deft. honestly believed that pltf. was guilty of the offence with which he had been charged, but that deft. was actuated by malice in prosecuting pltf. —*Held*: deft.'s honest belief not being in the circumstances reasonable, the finding of malice was sufficient to entitle pltf. to succeed.—*CRUISE v. BURKE*, [1919] 2 I. R. 182.—IR.

## PART IV. SECT. 2, SUB-SECT. 4.—A.

284 xiv. ———.—]—*MECKLENBURG v. CANADIAN PACIFIC RY. CO.* (Alta.), [1926] 1 D. L. R. 706.—CAN.

284 xv. ———.—]—*MORAE v. McLAUGHLIN MOTOR CAR CO., LTD.* (Alta.), [1926] 1 D. L. R. 372; [1926] 1 W. W. R. 161.—CAN.

284 xvi. ———.—]—*VARDINI v. McLENNAN* (1932), 5 M. P. R. 387.—CAN.

sa. *Perseverance in prosecution—After discovery that facts relied on are not true*.—A prosecution, even if commenced under a *bond fide* belief in the guilt of the accused, may become *malā fide* by continuance after it is discovered that the facts upon which it was based are not true.—*RABINDRA NATH DAS v. JOGENDRA NATH DEB* (1928), 1 I. L. R. 56 Calc. 432.—IND.

## PART IV. SECT. 3, SUB-SECT. 2.—A.

362 v. ———.—]—While, in an action for malicious prosecution, malice may be inferred from want of reasonable & probable cause, yet that inference cannot be drawn where all the facts & circumstances of the case would tend to show that there could be no malice in the sense of the initiation of proceedings in a malicious spirit, i.e. from an indirect & improper motive.—*O'LOUCHLIN v. GRANDJEAN*, [1929] 1 D. L. R. 198; [1928] 3 W. W. R. 740.—CAN.

362 vi. ———.—]—*PHILLIPS v. CODERRE* (Sask.), [1929] 4 D. L. R. 658.—CAN.

362 vii. ———.—]—*GREEN v. HARRY* (B. C.), [1929] 4 D. L. R. 410.—CAN.

362 viii. ———.—]—No action will lie for the institution of criminal proceedings, however malicious, unless they have been commenced without reasonable & probable cause. The fact that deft. commenced the criminal proceedings as the result of a mistaken view of a question of law (in the present instance the sufficiency of an endorsement on a cheque) does not necessarily amount to lack of reasonable & probable cause.—*JOHNSON v. STACK*, [1934] 1 W. W. R. 388.—CAN.

i i. ———.—]—*Held*: upon the evidence, deft. failed to make a full & fair statement of all the facts either to his solr. upon whose advice he said he acted, or to the magistrate, & therefore the advice & direction said to have been received by them did not afford an answer to pltf.'s contention that there was a lack of reasonable & probable cause.—*LOVE v. DENNY & VINCENT*, [1929] 4 D. L. R. 363; 64 O. L. R. 290.—CAN.

m i. ———.—]—*Police constable*.—In the absence of a professional adviser, the fact that the prosecutor sought the best advice obtainable in the neighbourhood (that of a police constable), & that he acted on that opinion, will not in itself be a sufficient defence to an action for malicious prosecution.—*ASHETON v. MERRETT*, [1928] S. A. S. R. 11.—AUS.

378 ii. ———.—]—*Resp. was arrested for maliciously setting fire to grass. He was tried on this charge, which was dismissed, & brought an action for wrongful arrest against applts., members of the police force. The evidence showed that applts. had acted after consultation with an inspector of police & on the advice of a solr. in the Crown Law Department, & also showed that certain inquiries were*

418. *Add. Annotations*:—As to (4) *Consd. Herniman v. Smith*, [1938] A. C. 305. *Generally*, *Refd. Herniman v. Smith*, [1936] 2 All E. R. 1377.

441. *Add. Annotation*:—*Refd. McArdle v. Egan* (1933), 150 L. T. 412.

449. *Add. Annotations*:—*Refd. McArdle v. Egan* (1933), 150 L. T. 412; *Herniman v. Smith*, [1938] A. C. 305.

455a. ———.—]—In an action for malicious prosecution, the function of the jury is to find what are the relevant facts, if these are in dispute. When the facts operating on the mind of the prosecutor are ascertained, it is for the judge to decide whether they afford reasonable & probable cause for prosecuting the accused person.

It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but

whether there is reasonable & probable cause for a prosecution. Circumstances may exist in which it is right, before charging a man with misconduct, to ask him for an explanation; but no general rule can be laid down, & where a person is satisfied, or has apparently sufficient evidence, that he has in fact been cheated, there is no obligation to call on the cheat & ask for an explanation, inasmuch as to ask for this may only have the effect of causing material evidence to disappear or be manufactured.—*HERNIMAN v. SMITH*, [1938] A. C. 305; [1938] 1 All E. R. 1; 107 L. J. K. B. 225; 82 Sol. Jo. 192, H. L.

479a. ———.—] *HERNIMAN v. SMITH*, No. 455a, *ante*.

493. *Add. Annotations*:—As to (1) *Apprvd. Herniman v. Smith*, [1938] A. C. 305. *Generally*, *Refd. Herniman v. Smith*, [1936] 2 All E. R. 1377.

## Part V.—Evidence.

574. *Add. Annotations*:—*Refd. Campbell v. Pollak*, [1927] A. C. 732; *Martin v. Benson*, [1927] 1 K. B. 771.

## Part VII.—Pleading and Practice.

586. *Add. Annotation*:—*Refd. La Radiotechnique v. Weinbaum* (1927), 137 L. T. 638.

omitted to be made by them, the result of which would probably have shown that the charge was not sustainable. These inquiries were not suggested by the inspector or the solicitor.—*Held*: the good faith of the officers being unquestioned & a substantial degree of caution having been exhibited a reasonable allowance should be made for occasional errors of judgment & the action should be dismissed.—*BOURKE v. ROBINSON*, [1935] S. A. S. R. 78.—AUS.

*o i.* ———.— *Plaintiff about to leave jurisdiction.*—*DANSEY v. ORCUTT*, [1928] 4 D. L. R. 27.—CAN.

PART IV. SECT. 3, SUB-SECT. 3.—E.

417 i. *Absence of probable cause not implied.*—*SHUBERT v. SHAMS-UDDIN* (1928), 1 L. R. 50 All. 713.—IND.

417 ii. ———.— *Successful plea of autrefois convict.*—*Pitf.*, driving a car while drunk, had an accident whereby two persons named D. & the child of *pitf.* were hurt. An information was laid for causing grievous bodily harm while in charge of an automobile. He pleaded guilty & was sentenced. *Deft.* road of the trial & thought he was tried for injuring D. She laid an information for criminal negligence causing bodily harm to her child. This was dismissed upon plea of *autrefois convict*. In an action by *pitf.* for malicious prosecution:—*Held*: there was reasonable & probable cause, & although there was evidence of malice the most express

malice is immaterial if there is reasonable & probable cause.—*VANVOLKINBURG v. GOMMER*, [1931] 3 D. L. R. 735; O. R. 384.—CAN.

417 iii. ———.—]—In an action for malicious prosecution the onus of proving want of reasonable & probable cause cannot be discharged merely by proof of *pitf.*'s acquittal in the criminal case.—*MOHAMMAD HAROON v. ASGHAR HUSSAIN* (1931), 1 L. R. 10 Pat. 842.—IND.

*ex. Plaintiff committed for trial.*—The fact that *pitf.* in an action for malicious prosecution was committed for trial after a preliminary hearing is not *prima facie* proof that *deft.* had reasonable & probable cause for such prosecution.—*HALL v. GEIGER* (No. 2), [1930] 2 W. W. R. 794; 3 D. L. R. 854; 43 B. C. R. 116.—CAN.

PART IV. SECT. 3, SUB-SECT. 4.—A.

432 vi. ———.—]—*OWENS v. MARTINDALE*, [1928] 4 D. L. R. 932; 63 O. L. R. 87.—CAN.

PART IV. SECT. 3, SUB-SECT. 4.—B. (a).

436 xii. ———.—]—*PIDGEEON v. HOLMAN* (P. E. I.), [1926] 3 D. L. R. 480.—CAN.

436 xiii. ———.—]—In an action for malicious prosecution the question whether there was a want of reasonable & probable cause is one for the judge alone to decide &, if the facts pertaining

to it are not in dispute, there is, therefore, nothing for the jury to pass on; but where the evidence as to the facts is conflicting the judge does not abdicate his functions by asking the jury: "Did *deft.* take reasonable care to inform himself of the true facts of the case?" & by instructing it that if it finds in the negative then there is a want of reasonable & probable cause.—*PERRY v. WOODWARDS, LTD.* (B. C.), [1929] 4 D. L. R. 751; 3 W. W. R. 49.—CAN.

*d i.* ———.—]—*CROFT v. DUNPHY*, [1932] 1 D. L. R. 749; 4 M. P. R. 438.—CAN.

PART IV. SECT. 3, SUB-SECT. 4.—C. (a).

467 iv. ———.—]—*PIDGEEON v. HOLMAN* (P. E. I.), [1926] 3 D. L. R. 480.—CAN.

480 iii. ———.—]—In a suit for damages based on the allegation that *deft.* had maliciously obtained a temporary injunction & kept *pitf.* out of possession of certain house property:—*Held*: in India in a case like this the question of reasonable & probable cause was purely one of fact.—*HABIB ULLAH v. ATMA SINGH* (1932), 1 L. R. 14 Lah. 46.—IND.

PART V. SECT. 1, SUB-SECT. 2.

537 ix. ———.—]—*PIDGEEON v. HOLMAN* (P. E. I.), [1926] 3 D. L. R. 480.—CAN.

## MARKETS AND FAIRS.

### Part II.—Creation and Proof of Markets and Fairs.

18. *Add. Annotation* :—As to (4) **Consd. London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd.**, [1936] Ch. 78.
45. *Add. Annotation* :—As to (1) **Refd. West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt** (1932), 96 J. P. 159.

### Part III.—Rights and Liabilities in connection with Markets and Fairs.

52. *Add. Annotation* :—**Consd. Hall v. Brooklands Auto-Racing Club** (1932), 48 T. L. R. 546.
57. *Add. Annotation* :—**Refd. London Corpn. v. Lyons, Son & Co. (Fruit Brokers)**, [1936] Ch. 78.
- 59a. — **To sell—On payment of tolls.**—A trader has the same right on paying the proper tolls to sell by auction in a market the marketable goods of others as he has to use the market for selling his own goods by private treaty, & there is the same obligation on the market owner to provide him with accommodation. Where, therefore, the owners of a market refused for reasons other than lack of room to allow a trader to use the market for sales by auction of the marketable goods of others, they could not maintain an action to restrain the trader from carrying on auctions in premises close to but outside the market, in a manner which did not amount to the setting up of a rival market, on the ground that he was causing a disturbance of the market.—**LONDON CORPN. v. LYONS, SON & CO. (FRUIT BROKERS), LTD.**, [1936] Ch. 78; 105 L. J. Ch. 1; 153 L. T. 344; 51 T. L. R. 563; 79 Sol. Jo. 558, C. A.
60. *Add. Annotation* :—**Apprvd. London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd.**, [1936] Ch. 78.
68. *Add. Annotation* :—**Refd. Hardie & Lane v. Chiltern** (1927), 96 L. J. K. B. 773.

### Part IV.—Holding of Markets and Fairs.

91. *Add. Annotation* :—**Consd. London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd.** [1936] Ch. 78.
94. *Add. Annotation* :—As to (3) **Refd. London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd.**, [1936] Ch. 78.
98. *Add. Annotation* :—As to (2) **Refd. London Corpn. v. Lyons, Son & Co. (Fruit Brokers)**, [1936] Ch. 78.
103. *Add. Annotation* :—**Refd. Layzell v. Thompson** (1927), 137 L. T. 106.
106. *Add. Annotation* :—**Refd. Re Southern Ry. Co.** (1935), 153 L. T. 105.

### Part VI.—Tolls and Stallages.

258. *Add. Annotation* :—**Refd. London Corpn. v. Lyons, Son & Co. (Fruit Brokers)**, [1936] Ch. 78.

### Part VII.—Disturbance.

302. *Add. Annotation* :—As to (1) **Consd. London Corpn. v. Lyons, Sons & Co. (Fruit Brokers), Ltd.**, [1936] Ch. 78.
305. *Add. Annotation* :—**Refd. London Corpn. v. Lyons, Son & Co. (Fruit Brokers)**, [1936] Ch. 78.
312. *Add. Annotation* :—**Refd. Layzell v. Thompson** (1926), 91 J. P. 89.
316. *Add. Annotation* :—**Refd. London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd.**, [1936] Ch. 78.

#### PART II. SECT. 1.

ss. *Whether structure divided into shops forms private market—Goods displayed on pavement.*—**BOMBAY MUNICIPALITY v. YENKANNA ELLAPPA** (1928), 1 L. R. 52 Bom. 780.—IND.

#### PART II. SECT. 3, SUB-SECT. 1.

36 l. *Acquisition of site—Necessity for*

*bye-law.*—**CITY OF EDMONTON v. MACDONALD (Alta.)** (1907), 7 W. L. R. 201.—CAN.

#### PART V. SECT. 3, SUB-SECT. 1.

ss. *Weighmaster—Appointment—Acting as evidence of.*—Evidence of acting in a public office, e.g. public

weighmaster, is evidence to go to the jury of a title to that office, as against a wrongdoer, though the title be put in issue by the pleadings, & the appointment is required to under seal.—**DEXTER v. HAYES** (1860), 11 I. C. L. R. 106; *affd. sub nom. HAYES v. DEXTER* (1861), 13 I. C. L. R. 22, Ex. Ch.—IR.

322. *Add. Annotation*:—*Refd.* London Corpn. v. Lyons, Son & Co. (Fruit Brokers), [1936] Ch. 78.

330. *Add. Annotation*:—*Refd.* London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd., [1936] Ch. 78.

332. *Add. Annotation*:—*Refd.* London Corpn. v. Lyons, Son & Co. (Fruit Brokers), [1936] Ch. 78.

339a. *Right to prevent sale in dwelling-house.*—*DUNSTABLE (PRIOR) v. B.* (1433), Y. B. 11 Hen. 6, fo. 19, pl. 13.

*Annotations*:—*Consd.* London City Case (1610), 8 Co. Rep. 121 b; *Hutchins v. Player* (1663), O. Bridg. 272. *Appld.* *Moseley v. Chadwick* (1782), 3 Doug. K. B. 117; *Tewksbury Corpn. v. Bricknell* (1809), 2 Taunt. 120. *Consd.* *Mosley v. Walker* (1827), 7 B. & C. 40. *Expld.* *Macleod*

*field Corpn. v. Chapman* (1843), 12 M. & W. 18. *Penryn Corpn. v. Best* (1878), 3 Ex. D. 292. *Manchester Corpn. v. Lyons* (1882), 22 Ch. D. 287. *Refd.* *Ballard v. Bennet* (1759), 2 Burr. 775; *Llandaff & Canton District Market Co. v. Lyndon* (1861), 25 J. P. 295; *G. E. Ry. Co. v. Goldsmid* (1884), 9 App. Cas. 927.

352. *Add. Annotation*:—*As to* (5) *Consd.* London Corpn. v. Lyons, Son & Co. (Fruit Brokers), [1936] Ch. 78.

406. *Add. Annotation*:—*Refd.* London Corpn. v. Lyons, Son & Co. (Fruit Brokers), [1936] Ch. 78.

415. *Add. Annotations*:—*Consd.* A.-G. v. Sharp (1930), 99 L. J. Ch. 441; *Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485.

## Part IX.—Sale in Market Overt.

472a. —. —.]—Although a sale by a tradesman in a shop in the City of London is a sale in market overt, a sale to a tradesman in a shop in the

City of London is not a sale in market overt. —*ARDATH TOBACCO CO., LTD. v. OCKER* (1930), 47 T. L. R. 177.

## Part XI.—Hawkers, Pedlars, etc.

528. *Add. Annotations*:—*Refd.* R. v. Minister of Health, *Ex p. Yaffe*, [1930] 2 K. B. 98; *British Trawlers' Federation, Ltd. v. London & North-Eastern Ry. Co.* (1932), 147 L. T. 313.

531. *Add. Annotations*:—*Folld.* *Edwards v. Wan-stall* (1929), 46 T. L. R. 101. *Consd.* *Etherington v. Carter*, [1937] 2 All E. R. 528.

### PART VII. SECT. 1, SUB-SECT. 3.—C.

*st. Buying goods outside market.*—Although no market tolls are chargeable by an owner of a market, buyers can disturb, in an actionable sense, the market by buying outside its limits.—*LOUGHEEY v. DOHERTY*, [1928] 1 R. 103.—IR.

### PART XI. SECT. 1, SUB-SECT. 1.—A.

501 ii. — *What amounts to.*—R. v. THORNBERT, [1925] 2 W. W. R. 175; 19 Sask. L. R. 429.—CAN.

### PART XI. SECT. 1, SUB-SECT. 2.—A.

*sk. Sale by agent of company—Tax imposed by Corporations Taxation Act, R. S. S., 1920 (c. 31), paid by company.*—R. v. AUNE, [1925] 2 W. W. R. 539; 44 Can. Crim. Cas. 194; 19 Sask. L. R. 566.—CAN.

### PART XI. SECT. 1, SUB-SECT. 3.

531 i. — *Hawking prohibited in certain streets during certain hours.*—A municipal bye-law that "no person shall act as a hawker or pedlar or trade or exhibit his wares in other such capacity" in certain specified portions of the municipality save between the hours of 6 a.m. & 2 p.m. is *intra vires* sect. 6 (3) of Ordinance 4 of 1928 (Transvaal).—*FEINSTEIN v. BAILETA*, [1930] App. D. 319.—S. AF.

*k i. — Restriction for benefit of local shopkeepers.*—A county council passed a bye-law providing that hawkers should pay a license fee of 25 every half-year. It was admitted that the fee was fixed so high to restrict the trade of hawkers in favour of that of local shopkeepers.—*Held*: the bye-law was void for unreasonableness.—*HAMILTON v. YATES*, [1930] N. Z. L. R. 359.—N.Z.

### PART XI. SECT. 1, SUB-SECT. 4.

533 i. *License given to servant—Hawking by master & servant.*—*Held*: *Hawkers Act, 1888*, authorises a

hawker to substitute his servant for himself as the person entitled to trade under his licence, but does not authorise both the hawker & his servant to trade separately & simultaneously under the licence. Deft. had committed an offence as he had handed over the licence to his son & authorised his son to trade under it as his servant, & therefore, had not the licence in his possession while trading, & did not "immediately produce it upon demand."—*O'BROIN v. COX*, [1932] 1 R. 559.—IR.

### PART XI. SECT. 2.

*l i. — Sale of controversial religious books.*—R. v. STEWART (1929), 53 Can. C. C. 24.—CAN.

*n i. — Sale of commodity made by pedlar.*—Resp. who was peddling a polish from door to door that he made on his own premises:—*Held*: liable for a licence fee under a trade licence bye-law.—*GOWER v. CAMPBELL* (1932), 45 B. C. R. 414.—CAN.

### PART XI. SECT. 3.

*q i. — Offer of goods in exchange for trading stamps—Whether sale or offering for sale.*—Deft. arranged with various retail merchants that each should receive from him trading stamps the property in which, however, was to remain in him, & should pay him fifty cents per hundred stamps, & give one to each customer for every ten cents of cash purchases, while deft. should advertise the merchants in certain directories & otherwise. A blank space was left in these directories for pasting in such stamps, & every customer who brought to deft. one of the directories with a fixed number of stamps pasted in was entitled to receive in exchange any article he might select out of an assortment of goods kept in stock by deft. Apart from this the goods were not for sale.—*Held*: these transactions did not constitute a selling or offering for sale by deft.

within a municipal bye-law, passed under R. S. O. 1897, c. 223, s. 583 (30), (31).—R. v. LANGLEY (1899), 31 O. R. 295; 20 C. L. T. 2.—CAN.

*t i. — For principals assessed in municipality—Though non-resident.*—R. v. MURRAY (1903), 24 C. L. T. 183.—CAN.

*t ii. — For non-resident trader—Ostensibly acting for resident trader.*—R. v. GIBB (1928), 50 Can. Crim. Cas. 366.—CAN.

*a i. — Not company selling goods at premises rented for two months.*—R. v. DOMINION GENERAL JOBBERS, LTD., [1925] 3 D. L. R. 570; [1925] 2 W. W. R. 289; 44 Can. Crim. Cas. 229; 35 Man. L. R. 57.—CAN.

*a ii. — Person peddling bread from wagon.*—R. v. MACKEYS BREAD, LTD. (Ont.) (1929), 52 Can. Crim. Cas. 314.—CAN.

*c i. — In case of company.*—A co. incorporated under the Dominion Companies Act is subject to a municipal bye-law, enacted under statutory authority, which requires transient traders to take out a licence, where the real objects of the bye-law are the raising of revenue & regulation & it is not intended, or made, to apply to federally incorporated cos. specially.—R. v. CONTINENTAL SALVAGE CORPN., LTD., [1930] 2 W. W. R. 562; 54 Can. C. C. 145; 39 Man. L. R. 70.—CAN.

*h i. —*—The conviction was for that deft., being a transient trader, occupying a place of business in the town of M., did sell certain goods, wares & merchandise, contrary to a bye-law:—*Held*: the want of an allegation in the conviction that deft. was a transient trader whose name had not been duly entered on the assessment roll for the current year was fatal.—R. v. CATON (1888), 18 O. R. 11.—CAN.

*h ii. — Proof of one sale—No proof that goods to be supplied by person doing business outside municipality.*—R. v. OGLE (1910), 15 W. L. R. 325.—CAN.



## MASTER AND SERVANT.

## Part I.—The Relationship.

8. *Add. Annotations*:—*As to* (1) *Consd. Templeton v. Parkin Wm. & Co.* (1929), 140 L. T. 519. *Refd. Williams v. Larsen* (1928), 21 B. W. C. C. 339.
13. *Add. Annotations*:—*Apld. Williams v. Larsen* (1928), 21 B. W. C. C. 339. *Consd. Templeton v. Parkin Wm. & Co.* (1929), 140 L. T. 519.
14. *Add. Annotation*:—*Refd. Templeton v. Parkin Wm. & Co.* (1929), 140 L. T. 519.
15. *Add. Annotations*:—*Consd. Roberts v. Gardner* (1928), 21 B. W. C. C. 154; *Templeton v. Parkin Wm. & Co.* (1929), 140 L. T. 519; *Hobbs v. Royal Arsenal Co-operative Society* (1930), 144 L. T. 10; *Wardell v. Kent County Council*, [1938] 3 All E. R. 473. *Refd. Williams v. Larsen* (1928), 21 B. W. C. C. 339; *Petrie v. Red Bank Manufacturing Co.* (1935), 28 B. W. C. C. 423.
20. *Add. Annotations*:—*Refd. McGee v. Muir Wm. & Co.* (1929), 140 L. T. 546; *Unsworth v. Pease & Partners, Ltd.*, [1937] 2 All E. R. 817.
25. *Add. Annotation*:—*Consd. Willard v. Whiteley, Ltd.*, [1938] 3 All E. R. 779.
- 25a. —.]—Where the general servant of a master is hired out to another for a particular employment, & while engaged in that employment, causes damage to his master, the servant is to be deemed, for anything done in the course of that employment, the servant of the hirer & the master is entitled to recover from the hirer for the damage caused to him. —*LEGGOTT (G. W.) & SON v. NORMANTON (C. H.) & SON* (1928), 98 L. J. K. B. 145; 140 L. T. 224; 45 T. L. R. 155, D. C.
- Annotation*:—*Refd. Willard v. Whiteley, Ltd.*, [1938] 3 All E. R. 779.
- 25b. —.]—Pltf., who owned a number of lorries, let one of them out on hire, with a driver, to defts., in order to remove some furniture. Defts. paid a lump sum for the use of the lorry, & could instruct the driver where to go & when to go, but had no power to dismiss him. His wages continued to be paid by pltf. In the course of the hiring, an accident occurred which resulted in damage to the lorry. Pltf. contended that during the hiring the driver was the servant of defts.:—*Held*: on the facts of this case, the driver was still employed by pltf., who could not, therefore, recover against defts.—*WILLARD v. WHITELEY, LTD.*, [1938] 3 All E. R. 779; 82 Sol. Jo. 711, C. A.
27. *Add. Annotations*:—*Consd. Bull v. West African Shipping, etc. Co.*, [1927] A. C. 686. *Refd. Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191; *Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56; *Egginton v. Reader*, [1936] 1 All E. R. 7.
29. *Add. Annotations*:—*Consd. Bull v. West African Shipping, etc. Co.*, [1927] A. C. 686. *Refd. Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191; *Daniels v. Vaux*, [1938] 2 K. B. 203; *Willard v. Whiteley, Ltd.*, [1938] 3 All E. R. 779.
34. *Add. Annotation*:—*Refd. Egginton v. Reader*, [1936] 1 All E. R. 7.
44. *Add. Annotation*:—*Consd. Templeton v. Parkin Wm. & Co.* (1929), 140 L. T. 519.
46. *Add. Annotation*:—*Consd. Bull v. West African Shipping, etc. Co.*, [1927] A. C. 686.
49. *Add. Annotations*:—*Consd. Bull v. West African Shipping, etc. Co.*, [1927] A. C. 686. *Distd. Clelland v. Edward Lloyd, Ltd.*, [1937] 2 All E. R. 605. *Consd. Willard v. Whiteley, Ltd.*, [1938] 3 All E. R. 779. *Refd. Leggott (G. W.) & Son v. Normanton (C. H.) & Son* (1928), 98 L. J. K. B. 145; *Egginton v. Reader*, [1936] 1 All E. R. 7.
51. *Add. Annotations*:—*Consd. Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364. *Refd. Strangeways-Lesmere v. Clayton*, [1936] 1 All E. R. 484; *Lindsey County Council v. Marshall*, [1936] 2 All E. R. 1076; *Wardell v. Kent County Council*, [1938] 3 All E. R. 473.
52. *Add. Annotations*:—*Consd. Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364; *Strangeways-Lesmere v. Clayton*, [1936] 1 All E. R. 484; *Lindsey County Council v. Marshall*, [1936] 2 All E. R. 1076. *Distd. Wardell v. Kent County Council*, [1938] 3 All E. R. 473. *Refd. Dryden v. Surrey County Council & Stewart*, [1936] 2 All E. R. 535.
54. *Add. Annotations*:—*Consd. Bull v. West African Shipping, etc. Co.*, [1927] A. C. 686. *Distd. Clelland v. Edward Lloyd, Ltd.*, [1937] 2 All E. R. 605.
55. *Add. Annotation*:—*Consd. Leggott (G. W.) & Son v. Normanton (C. H.) & Son* (1928), 98 L. J. K. B. 145.
- 55a. *Lightermen hired with lighter.*]—*Applts. let on hire to resps. a lighter manned by two native lightermen. The lighter was moored to resps.' ship, & was used by them during the day in loading the ship. During the night*

## PART I. SECT. 1.

a 1. *Hospital & nurses.*—*NYBERG v. PROVOST MUNICIPAL HOSPITAL BOARD*, [1927] 1 D. L. R. 989; S. C. R. 226.—*CAN.*

## PART I. SECT. 2, SUB-SECT. 1.—A. (b).

21 i. For "CAN." read "SHANG-HAI."

## PART I. SECT. 2, SUB-SECT. 1.—B. (a).

24 vi. —.]—*MURANYI v. VAL-LANCE COAL & CARTAGE CO. & SMITH BROS. & WILSON, LTD.*, [1932] 1 W. W. R. 182.—*CAN.*

24 vii. —.]—A man may have two masters, the habitual employer & the employer for the time being.—*RITCHIE v. RAYNER* (1933), 5 M. P. R. 568; *affd.*, [1933] 4 D. L. R. 808.—*CAN.*

24 viii. —.]—Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment must be dealt with as the servant of the person to whom he is lent, although he remains the general servant of the person who lends him.—*MASON v. R.*, [1933] Ex. C. R. 1; *affd.*, [1933] S. C. R. 332.—*CAN.*

*Hospital servants.*—*See MEDICINE, Part III., Sect. 3, sub-sect. 1, H., post.*



the lightermen negligently left the lighter, which got adrift, & owing to the absence of the lightermen, was carried out to sea, ran ashore, & broke up:—*Held*: the lightermen being under the orders & control of resps. during the night as well as during the actual loading, resps. were responsible for their negligence & were liable to applts. in damages.—*BULL (A. H.) & Co. v. WEST AFRICAN SHIPPING, ETC. Co.*, [1927] A. C. 686; 96 L. J. P. C. 127; 137 L. T. 498; 43 T. L. R. 548; 17 Asp. M. L. C. 292, P. C.

*Annotation*:—*Folld. Legrott (G. W.) & Son v. Normanton (O. H.) & Son* (1928), 98 L. J. K. B. 145.

**55b. Servant lent to contractor—No request by contractor.**—Defts. were occupiers of paper mills on which an independent contractor, the E. Co., was installing an electrical power plant. Defts. instructed M., one of their own electrical apprentices, to work with the E. Co.'s men under the E. Co.'s foreman, J. This instruction was not given in response to any request from or agreement with the E. Co. for the loan to them of M.'s services, but was merely a part of M.'s training in his trade. By J.'s orders, M. erected a platform to enable pltf., one of the E. Co.'s men, to reach his work. M. used a defective plank (not supplied by defts.) which broke, causing injury to pltf.:—*Held*: (1) defts. were not liable as occupiers of the premises; but (2) since M. was not working with the E. Co.'s men in response to any request from or under any agreement with the E. Co., he remained the servant of defts., who were therefore liable to pltf. for his tortious act.—*CLELLAND v. EDWARD LLOYD, LTD.*, [1938] 1 K. B. 272; [1937] 2 All E. R. 605; 106 L. J. K. B. 626; 157 L. T. 236; 53 T. L. R. 644; 81 Sol. Jo. 438.

**66. Add. Citations**:—96 L. J. K. B. 170; 136 L. T. 377.

*Add. Annotations*:—*Reffd. Budberg v. Jerwood & Ward* (1934), 51 T. L. R. 99; *Lloyds Bank, Ltd. v. Bank of America National*

*Trust & Savings Assocn.*, [1937] 3 All E. R. 312.

**71. Add. Annotation**:—*Reffd. Marconi's Wireless Telegraph Co. v. Newman*, [1930] 2 K. B. 292.

**72. Add. Annotations**:—*As to* (2) *Consd. Egginton v. Reader*, [1936] 1 All E. R. 7. *Reffd. Belcher's Appeal, Re Essex Flour & Grain Co.*, [1938] 3 All E. R. 244.

**75a. Salesman driving own car.**—The driver of a motor car negligently knocked down & injured a pedestrian. The driver was the owner of the car, but he used it to carry samples of the goods of B. & A. G., Ltd., which he received each morning & returned or accounted for each evening. In order to sell such goods he visited such places & persons as he thought fit without being subject to any direction by B. & A. G., Ltd., & he was not prohibited from acting as agent or servant of any other person or co., & indeed, was at liberty to refuse to call on any person B. & A. G., Ltd., might suggest. He was remunerated by a commission on sales & was paid £1 per week towards the cost of his petrol. It was not, however, a term of the agreement between the driver & B. & A. G., Ltd., that he should use the said or any car. There was no binding agreement upon the driver to work at all, but upon his failure to procure orders, B. & A. G., Ltd. would have terminated the payment for petrol:—*Held*: in the circumstances the driver was not the employee or agent of B. & A. G., Ltd., & pltf. was not entitled to recover damages for negligence against B. & A. G., Ltd.—*EGGINTON v. READER*, [1936] 1 All E. R. 7; 52 T. L. R. 212; 80 Sol. Jo. 168.

**89. Add. Annotations**:—*Reffd. Brooke v. Bool*, [1928] 2 K. B. 578; *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191; *North-western Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A. C. 108.

#### PART I. SECT. 3, SUB-SECT. 5.— A. (a).

**so. Insurance agent.**—The duties of an agent of a life insurance society were stated in his contract to be to obtain proposals for the society, to collect the required premiums, & to arrange for proponents to be medically examined. He was paid no salary, but only commission which was to include his expenses & was allowed to undertake any other work provided it was not insurance business. The society had no right of supervision or control over the methods employed by the agent who was free to obtain proposals or not as he pleased:—*Held*: he was not a servant of the society, but an independent contractor for whose negligent acts the society was not liable.—*COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LTD. v. MACDONALD*, [1931] App. D. 412.—S. AF.

#### PART I. SECT. 3, SUB-SECT. 5.— A. (c).

**sa. Mining operations.**—Resp. had charge of the mining operations in applt.'s mine. Applt. supplied the dynamite, the tools & accessories. Resp. hired the men, paid them, controlled them, & discharged them. He was allowed to do the work as he pleased, except that he was indicated where the mining should take place. He was not in any way the subordinate

of the co., his whole obligation towards the latter consisting in supplying a sufficient quantity of mineral rock of a given size for the run of the mill. He was responsible in damages if he failed in this respect. He was paid twenty cents per wagon; & in addition, applt. paid the insurance premiums required by the Workmen's Compensation Board to cover accidents to resps.' employees; but this was done as the result of an express condition of the agreement between resp. & applt. Resp. had to deliver rock of the required size. The rock was loaded into small wagons & carried to the mill. The loading was done by means of a steam shovel operated by one of the employees of applt. co. When the rock was found too large, it was laid aside & it became resp.'s duty to reduce it to the required size. Resp., while performing the latter operation, & while engaged in drilling a hole in one of the rocks, was seriously injured by an explosion of dynamite:—*Held*: resp. was an independent contractor.—*QUEBEC ASBESTOS CORPN. v. COUTURE*, [1929] 3 D. L. R. 601; S. C. R. 166.—CAN.

#### PART I. SECT. 3, SUB-SECT. 5.— A. (d).

90 ff.—*PHELAN v. MAIN ROADS BOARD* (1927), 30 W. A. L. R. 16.—AUS.

**sb. Power to veto employment & to insist on dismissal of any employee.**—*Held*: in the circumstances, a brusher, engaged by a colliery co. to drive a stonemine in one of their pits at a fathomage rate, & permitted by the contract to engage two miners to assist him in the work, was a servant, & not an independent contractor.—*FARK v. WILSONS & CLYDE COAL CO., HAGGERTY v. WILSONS & CLYDE COAL CO.*, [1928] S. C. 121; *affd.*, [1929] S. C. 38. H. L.—SCOT.

#### PART I. SECT. 3, SUB-SECT. 5.—B.

**sc. Liability of master for payment of sub-contractor.**—Pltf. was a truck driver employed by B., the owner of the truck & one of the members of a partnership composed of defts., who were carrying on a trucking business. Under the partnership agreement each of the partners was to be paid for the work done by his truck in the partnership business, as if he were an independent truck driver & owner. Pltf. sued for the wages owing to him for driving B.'s truck. The partnership had a contract with the city of W., & the work done by pltf. with the truck was done in the performance of that contract. B. had made an assignment of the moneys due to him from the partnership on that work & it was found that pltf. had acquiesced in that assignment. The assignee had been paid

## Part II.—Particular Classes of Servants.

114. *Add. Annotation*:—*Refd.* Belcher's Appeal, *Re Essex Flour & Grain Co.*, [1938] 3 All E. R. 244.
138. *Add. Annotations*:—*Apld.* *Re Mackay, Re Rowland, Re Barry* (1928), 44 T. L. R. 688. *Refd.* *Birmingham Corp'n. v. Labour Minister, Re Lee, Re Hudson* (1927), 92 J. P. 17; *Re Blackpool Corp'n. & Barritt, etc.* (1931), 95 J. P. 103.
- 155a. *Police appointed by watch committee of borough.*—The police appointed by the watch committee of a borough corp'n., if they arrest & detain a person unlawfully, do not act as the servants or agents of the corp'n. so as to render that body liable to an action for false imprisonment.—*FISHER v. OLDHAM CORPN.*, [1930] 2 K. B. 364; 99 L. J. K. B. 569; 143 L. T. 281; 94 J. P. 132; 46 T. L. R. 390; 74 Sol. Jo. 299; 28 L. G. R. 293; 29 Cox, C. C. 154.
156. *Add. Annotation*:—*Folld.* *Fisher v. Oldham Corp'n.*, [1930] 2 K. B. 364.
160. *Add. Annotations*:—*Refd.* *Dryden v. Surrey County Council & Stewart*, [1936] 2 All E. R. 535; *Re Frost*, [1936] 2 All E. R. 182; *Lindsey County Council v. Marshall*, [1937] A. C. 97; *Wardell v. Kent County Council*, [1938] 3 All E. R. 473.
162. *Add. Annotation*:—*Expld. & Distd.* *Fisher v. Oldham Corp'n.*, [1930] 2 K. B. 364.
163. *Add. Annotation*:—*Consd.* *Fisher v. Oldham Corp'n.*, [1930] 2 K. B. 364.

## Part III.—The Contract of Service.

171. *Add. Annotation*:—*Consd.* *Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110.
179. *Add. Annotation*:—*Refd.* *Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110.
190. *Add. Annotations*:—*Refd.* *Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110; *Mercantile Union Guarantee Corp'n., Ltd. v. Ball*, [1937] 3 All E. R. 1.
191. *Add. Annotation*:—*Refd.* *Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181.
- 191a. *Licence from Boxing Board of Control.*—Pltf., who was under twenty-one years of age, applied in Mar. 1932, for a licence as a boxer in the following words: "I hereby apply for a licence as a boxer & if the licence is granted me, I declare to adhere strictly to rules of the British Boxing Board (1929) as printed & abide by any further rules or alterations to existing rules as may be passed." A licence was duly granted & renewed for a further year on Mar. 1, 1933. A copy of the rules was supplied to pltf. at the time of his application, & reg. 20, para. 16, provided that the boxer's money might be stopped only when he was disqualified "for committing a deliberate foul, for not trying, or retiring without sufficient cause, or if the referee gives a no contest decision." This paragraph was altered on June 17, 1932, to read: "Boxers in case of disqualification are only entitled to receive bare travelling expenses, pending the decision of the board . . . when the board . . . may deal with the money as it thinks fit." No notice of the altered rules was given to pltf.
- On July 12, 1933, pltf. agreed to box at the White City Stadium on the terms that he should receive £3,000 win, lose or draw. At the contest pltf. was disqualified for hitting below the belt. The promoters of the contest paid the sum of £3,000 to the Board of Control at their request, & after holding an inquiry the Board withheld the money from pltf. on the ground that he had been disqualified. Pltf. brought proceedings to recover the amount against White City Stadium, Ltd., & the Board of Control:—*Held*: (1) the contract with the Board of Control was too closely connected with a contract as to employment that it was binding on the infant pltf., having regard to the fact that the contract as a whole was for his benefit; (2) notice of the altered rules was unnecessary in order to make them binding on pltf. in view of the terms of his application for a licence.—*DOYLE v. WHITE CITY STADIUM, LTD.*, [1935] 1 K. B. 110; 104 L. J. K. B. 140; 152 L. T. 32; 78 Sol. Jo. 601, C. A.
196. *Add. Annotation*:—*Consd.* *Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181.
- 200a. —.]—The first pltf., who was at the time about 17 years of age, on Feb. 18, 1935, entered into a deed of apprenticeship with defts., the Gravesend Aviation, Ltd., whereby the latter covenanted that they would, through their officers during the term of 2 years to the best of their power, teach him or cause him to be taught the business or profession of a ground engineer. The second

therefrom; but a part of the amount due B. was still held in defts.' hands under a garnishee issued by one of defts.:—*Held*: B. was a sub-contractor within Builders' & Workmen's Act, R. S. M., 1913, & pltf. was entitled to payment of the amount remaining in defts.' hands; the garnishee being one of defts., his garnishee process did not affect that amount. The payments to the assignee could not be attacked by pltf.—*LOFT v. HALLIDAY*, [1933] 2 W. W. R. 581; 41 Man. L. R. 444.—CAN.

PART II. SECT. 9.  
*st. Inspector appointed under Noxious Weeds Act.*—Where a municipality appoints an officer to perform a public service in which the corp'n. has no special interest, & from which it derives no special benefit in its corporate capacity, such officer is not the servant or agent of the municipality, & therefore, it is not liable for his negligence in the performance of his duties.—*MEAD v. MARQUIS RURAL MUNICIPALITY*, [1928] 2 D. L. R. 524; [1928] 1 W. W. R. 756.—CAN.

PART II. SECT. 10.  
*xx. Representative before Liquor Board.*—The relationship between deft. brewery co. & pltf., who was deft.'s representative before the Liquor Board of Saskatchewan & who was remunerated by a commission on beer sold through him to the Board, held to be that of master & servant & not that of principal & agent.—*BOLE v. PELLS LTD.*, [1931] 1 D. L. R. 483; [1930] 3 W. W. R. 610; 25 S. L. R. 10.—CAN.

fore any negligence in adopting a wrong system was the negligence of the co. & not of a fellow servant of the infant pltf., & the defence of common employment was not available; (v) the infant pltf. was a mere pupil & had no knowledge & appreciation of the risk of swinging the propeller in such circumstances & the doctrine of *volenti non fit injuria* did not apply; (vi) the premium of £100 was not recoverable by the second pltf.—**OLSEN v. CORRY & GRAVESEND AVIATION, LTD.**, [1936] 3 All E. R. 241; 155 L. T. 512; 80 Sol. Jo. 855.

- 212a. *Pitman.*]—ORD. v. BURKUS (1843), 1 L. T. O. S. 35.
230. *Add. Annotation*:—*Refd. Marbé v. George Edwardes* (Daly's Theatre) (1927), 96 L. J. K. B. 980.
237. *Add. Annotation*:—*Refd. Sagar v. Ridehalgh & Son, Ltd.*, [1931] 1 Ch. 310.
- 244a. —.]—ELLIOTT v. HUNTER (1909), 128 L. T. Jo. 196.
252. *Add. Annotations*:—*Consd. Marbé v. George Edwardes* (Daly's Theatre) (1927), 96 L. J. K. B. 980. *Apprvd. Herbert Clayton & Jack Waller, Ltd. v. Oliver*, [1930] A. C. 209.
252. After this case add:—  
— — —.]—*See, further, THEATRES*, Vol. XLII., p. 910. Nos. 68 et seq. & Supp.

**262.** *Add. Annotation* :—**Distd.** Milsted v. Hamp & Ross & Glendinning (1927), 71 Sol. Jo. 845.

- 262a.** — — —.]—Pltfs. agreed to employ deft., & deft. agreed to serve pltfs., for three years & thereafter from year to year subject to three months' notice by pltfs. Deft. was to devote the whole of his time to the business:—*Held:* the agreement was wholly one-sided & unenforceable.—**MILSTED (W. H.) & SON, LTD. v. HAMP & ROSS & GLENDINNING. LTD. (1927).** 71 Sol. Jo. 845.

- 262b. — [What amounts to.]—Pltf. was employed by deft. co. upon the terms of a letter, dated Dec. 24, 1925, which provided that the engagement would be for a minimum of 3 years, subject to defts.' right to cancel the agreement in case of wilful default. The

letter continued: "The co. shall have the right to terminate the agreement after the expiration of the above-mentioned period by giving 6 months' notice in writing prior to the ensuing Dec. 31, & in the absence of such notice the engagement to remain in force as a permanent one." Defts. gave the pltf. 6 months' notice, to expire on Dec. 31, 1936. Pltf. brought an action for wrongful dismissal:—*Held*: in the absence of notice to determine the employment at the end of the three years ending Dec. 31, 1928, pltf.'s engagement was to be for his life, & there had been a breach of the agreement.—*SALT v. POWER PLANT CO., LTD.*, [1936] 3 All E. R. 322. C. A.

296. After this case add:—  
 “*See, also, Nos. 387, 388,*

237 1. *To prove usage*—Where usage universal.—A custom cannot be read into a written contract of service unless it is so universal that no workman could be supposed to have entered into the service without looking to it as part of the contract, & even where because of their generality or universality certain rights may fairly be said to constitute a custom there can be no justification for presuming that a workman who did not in fact know of them entered into his hiring having them in mind.—YOUNG v. CANADIAN NORTHERN RY. CO. (1929) 4 D. L. R. 452; 2 W. W. R. 385; 38 Man. L. R. 283; *affd.*, [1931] 1 W. W. R. 49; 1 D. L. R. 645, P. C.—CAN.

sd. To prove value of services.]—In an action brought on a *quantum meruit* for work done & services rendered

evidence was given of an agreement, not in writing, whereby deft. agreed to pay a certain weekly salary & also a sum of £200 at the end of two years. It was also proved that deft. had paid the weekly salary but had refused to pay the sum of £200. — *Held* : Although the oral agreement was one to which Statute was applicable, it was nevertheless admissible as evidence of the value of plif.'s services. — *WARD v. GRIFFITHS BROS., LTD.* (1928), 28 S. R. N. A. W. 425 ; 45 N. S. W. N. 130. — *AUS.*

22. *Whether yearly or for unlimited term.*—Resp. alleged a verbal contract of lease or hire of his services as assistant manager of appit. co. "at an annual salary of \$6,000 per annum" dating from May 1, 1927, payable \$500.00 a month "with the free use & occupancy of a dwelling-house belonging to"

the co.; & he further alleged that this oral agreement had been confirmed by a letter from the president of the co., dated May 5, 1927, as follows: "Mr. Cook has agreed to join us on the conditions mentioned at \$6,000 per annum, & use of the oral promise. Applt. also alleged that oral agreement was for three months to August; but the only evidence tendered on either side was the letter of May 5. Resp. continued in the discharge of his duties until Aug. 31, 1929, when he was dismissed & paid \$1,875, being his salary to that date plus three months' pay in lieu of notice. Resp. then brought an action claiming the balance of his salary up to May 1, 1930, on the ground that he was entitled to his salary up to the end of the current year.—*Held*: resp. was not entitled to the surplus of salary claimed by him.—**ASSISTOS CORPN., LTD. v. COOK, (1933) S. C. R. 84; (1934) 1 D. L. R. 81.—CAN.**

327. *Add. Annotation*:—**Refd.** *De Stempel v. Dunkels*, [1938] 1 All E. R. 238.
387. *Add. Annotation*:—**Distd.** *Jacks Wm. & Co. v. Palmers Shipbuilding & Iron Co.* (1928), 98 L. J. K. B. 366.
388. *Add. Annotation*:—**Folld.** *Jacks Wm. & Co. v. Palmers Shipbuilding & Iron Co.* (1928), 98 L. J. K. B. 366.
392. *Add. Annotation*:—**Consd.** *De Stempel v. Dunkels*, [1938] 1 All E. R. 238.
396. *Add. Annotations*:—**Consd.** *Savage v. British India Steam Navigation Co., Power v. Same* (1930), 46 T. L. R. 294. **Refd.** *De Stempel v. Dunkels*, [1938] 1 All E. R. 238.
- 396a. ————**].**—In actions by the captain & by the chief officer of an ocean passenger steamer for alleged wrongful dismissal there was no written contract of employment, & the only documents relating to employment were various circulars dealing with the age at which officers must retire, their rights to pension, & their right to leave on full pay after certain periods of service. The circulars made it clear that pensions were only to be paid at the discretion of the employers:—**Held**: the contract of employment was determinable by either party at any time on reasonable notice, & in the case of the chief officer reasonable length of notice would have been 12 months, & he was entitled to judgment for 12 months' salary. In the case of the captain the action was dismissed.—*SAVAGE v. BRITISH INDIA STEAM NAVIGATION CO., LTD., POWER v. BRITISH INDIA STEAM NAVIGATION CO., LTD.* (1930), 46 T. L. R. 294.
- Annotation*:—**Consd.** *Edmonson v. Ropner & Co.* (1935), 79 Sol. Jo. 777.
- 396b. **Chief officer.**—*SAVAGE v. BRITISH INDIA STEAM NAVIGATION CO., LTD., POWER v. BRITISH INDIA STEAM NAVIGATION CO., LTD.*, No. 396a, *ante*.
401. *Add. Annotation*:—**Refd.** *Edmonson v. Ropner & Co.* (1935), 79 Sol. Jo. 777.
- 401a. ————**Responsible clerk.**—Pltf. was employed by D., a member of the Diamond Corpn., under an agreement for a year beginning on Jan. 1, 1928. The agreement

provided that: "It is the intention of both parties to renew this agreement on expiry for a further period if mutually satisfactory terms can then be arranged." Pltf. continued in D.'s employment until he was given notice of dismissal, on Nov. 19, 1935, to take effect on Dec. 31, 1935. Pltf. alleged that deft. had made to D. certain statements defamatory of pltf., & he also alleged that deft. wrongfully & maliciously induced D. to commit a breach of contract by dismissing pltf. from his employment without proper notice. In an action for damages, the jury found, *inter alia*, that the expression "[the pltf.] is a Jew-hater" was defamatory, & that the words referred to pltf. in relation to his business, but that no special damage had been proved. The jury also found that D. had committed a breach of his contract with the pltf., & that deft. had wrongfully & maliciously induced such breach. Deft. & D. were both of the Jewish faith, & the diamond business is largely carried on by persons of that faith:—**Held**: (1) to call a person a Jew-hater is defamatory; (2) the words complained of were spoken of pltf. in relation to his business, & so were actionable without proof of special damage; (3) the contract was not a yearly hiring, & pltf. was entitled to reasonable notice. There had therefore been a breach of this contract; (4) (SLESSER, L.J., dissenting) such breach had been procured by deft., & pltf. was therefore entitled to recover damages.—*DE STEMPEL v. DUNKELS*, [1938] 1 All E. R. 238; 158 L. T. 85; 54 T. L. R. 289; 82 Sol. Jo. 51, C. A.

- 414a. **Chief officer.**—*SAVAGE v. BRITISH INDIA STEAM NAVIGATION CO., LTD., POWER v. BRITISH INDIA STEAM NAVIGATION CO., LTD.*, No. 396a, *ante*.
- 414b. **Tutor.**—The ct. held that in the circumstances pltf., a private tutor, was entitled to three months' salary in lieu of notice.—*WILSON v. UCCELLI* (1929), 45 T. L. R. 395.
431. *Add. Annotation*:—**As to** (2) **Refd.** *Elof Hansson Agency, Ltd. v. Victoria Motor Haulage Co.* (1938), 54 T. L. R. 666.

**PART IV. SECT. 1, SUB-SECT. 3.—A.**

m i. ————**].**—Applt. entered into pltf.'s service at a weekly remuneration of £7 per week as foreman of a packing-shed. Nothing was said as to the period of service, but applt. had inquired by telegram whether the position was permanent or seasonal, & a telegram was sent by resp. informing him that the position was permanent:—**Held**: the period of service was weekly.—*TYENS v. BARMER PACKING CO., LTD.*, [1930] S. A. S. R. 123.—**AUS.**

m ii. ————**].**—*GYLES v. CANADIAN OIL COS., LTD.*, [1938] 1 W. W. R. 364; 1 D. L. R. 587.—**CAN.**

**PART IV. SECT. 2, SUB-SECT. 1.**

so. **Termination by servant—Induced by fraudulent misrepresentation of master.**—*MALCOLM v. WESTERN CANADIAN MAGIC SILVER BLACK FOX & FUR CO. (B. C.)*, [1929] 4 D. L. R. 580.—**CAN.**

**PART IV. SECT. 2, SUB-SECT. 10.—B. (a).**

eg. **Weekly hiring—Week's notice.**—A weekly hiring may be terminated

by a week's notice, & one week's wages only may be recovered on dismissal without notice.—*MCDONALD v. SWIFT CANADIAN CO.* (1935), 9 M. P. R. 530.—**CAN.**

**PART IV. SECT. 2, SUB-SECT. 10.—B. (b) (i).**

393 v. ————**].**—*MESSER v. BARRETT CO.*, [1927] 1 D. L. R. 284; 59 O. L. R. 566.—**CAN.**

393 vi. ————**].**—There is an implied obligation to give reasonable notice of intention to terminate the agreement, usually six months.—*CARTER v. BELL & SONS (CANADA), LTD.*, [1936] O. R. 290.—**CAN.**

**PART IV. SECT. 2, SUB-SECT. 10.—B. (b) ii.**

412 i. **Manager.**—Resp., whose contract of service as manager of a co. provided for termination of the contract upon notice, was granted by resolution of the co. four months' leave on full pay commencing from a certain date, but this resolution was at the request of resp., who desired to take his leave overseas, subsequently altered by substituting six months' leave subject to the exigencies of the business

& at a time convenient to resp. Before resp. took his leave his contract of service was terminated by notice from the co.:—**Held**: resp. was entitled to damages which should be assessed at a sum equal to six months' salary.—*WALLACE'S PRINTING & PUBLISHING CO., LTD. v. WALLACH*, [1932] App. D. 46.—**S. AF.**

sk. **Physician.**—Pltf., a physician whose employment as a specialist on a part-time basis by deft. hospital had been so continued after the expiration of the second year of a hiring which had been for one year subject to a renewal for another year:—**Held**: entitled to reasonable notice of dismissal, e.g. four months.—*HAGUE v. ST. BONIFACE HOSPITAL*, [1936] 2 W. W. R. 230; 3 D. L. R. 363; 44 Man. L. R. 129; 6 F. L. J. (Can.) 68.—**CAN.**

so. **Mine manager.**—In the case of a mine manager employed on an indefinite hiring:—**Held**: in the absence of cause justifying dismissal, the employment was terminable on reasonable notice only, & under all the circumstances, three months' notice would have been reasonable.—*BLAIR v. MUTUAL SUPPLIES, LTD.*, [1935] 3 W. W. R. 578.—**CAN.**

— — —.]—*FISHER v. DICK & Co., LTD.*,  
[1938] 4 All E. R. 467.

**444a. Written notice required—Agreement for verbal notice.**—A written contract for service which requires a written notice on either side before it can be terminated, can be terminated by word of mouth by mutual agreement.—*LATCHFORD PREMIER CINEMA, LTD. v. ENNION & PATERSON*, [1931] 2 Ch. 409; 100 L. J. Ch. 397; 145 L. T. 672; 47 T. L. R. 595.

**453. Add. Annotations:**—*Refd. Brown v. Dagenham U. D. C.*, [1929] 1 K. B. 737; *McManus v. Bowes*, [1937] 3 All E. R. 227.

**463. Add. Annotations:**—*As to (2) Apprvd. Bouzourou v. Ottoman Bank*, [1930] A. C. 271. *Apld. Ottoman Bank v. Chakarian*, [1930] A. C. 277.

**470a. — — — Order relating to place of work.**—An order by a master to his servant to remain in a place within the area of his employment is a lawful order unless it involves immediately threatening danger by violence or disease to the person of the servant.

Applt., a Christian Turkish subject in the employment of resp. bank, was ordered by them to be transferred from their Stamboul branch to their branch at Mersina, a distant place in Turkish Asia Minor. He refused to go on the grounds: (a) that Mersina was not within the area of his employment; (b) that the order was unreasonable in the view of his ignorance of Turkish, & the hostile attitude of the Turkish civil authorities to him. He was thereupon dismissed without notice, & brought an action for wrongful dismissal:—*Held*: (1) on the facts, Mersina was within the area of applt.'s employment, & (2) as he did not suggest that compliance with the order would involve him in personal danger, the order was lawful & his disobedience to it a *faute grave* which under the contract justified his dismissal.—*BOUZOUROU v. OTTOMAN BANK*, [1930] A. C. 271; 99 L. J. P. C. 166; 142 L. T. 535, P. C.

**470b. — — — — —.]—Resp., an Armenian & a Turkish subject, was in the permanent employment of applt. bank. In 1922, while employed at their Smyrna branch, he was sent on business of the bank to the head office at Constantinople, & was given temporary employment there. He informed applt. that his life was in danger in Constantinople from the Turkish authorities, & asked to be transferred to a branch outside Turkey. That being refused he fled from**

Constantinople. He was dismissed without notice, & brought an action for wrongful dismissal:—*Held*: as the evidence established that resp.'s personal safety was in real danger in Constantinople, his flight was not a *faute grave* entitling applt. under the contract to dismiss him; & as his disability to perform his contract, whether in Constantinople or elsewhere, could not at the date of his dismissal be regarded as permanent, his offer to serve outside Turkey entitled him to maintain the action.—*OTTOMAN BANK v. CHAKARIAN*, [1930] A. C. 277; 99 L. J. P. C. 97; 142 L. T. 465, P. C.

*Annotation*:—*Refd. Ottoman Bank of Nicosia v. Dascalopoulos*, [1934] A. C. 354.

**479. Add. Annotation:**—*Refd. Holloway v. Donaldson, Line, Ltd.* (1935), 41 Com. Cas. 47.

**481a. — — — By violence or disease.**—*BOUZOUROU v. OTTOMAN BANK*, No. 470a, *ante*.

**481b. — — —.]—OTTOMAN BANK v. CHAKARIAN, No. 470b, *ante*.**

**483. Add. Annotations:**—*Consd. Maloney v. St. Helens Industrial Co-operative Society, Ltd.*, [1933] 1 K. B. 293. *Refd. Lind v. Johnson*, [1937] 4 All E. R. 201.

**491. Add. Annotation:**—*Refd. Edmonson v. Ropner & Co.* (1935), 79 Sol. Jo. 777.

**491a. — — —.]—EDMONSON v. ROPNER (SIR R.) & Co., LTD. (1935), 79 Sol. Jo. 777.**

**491b. What amounts to.]—VAN WEYENBERGH (E.) v. BRITISH ACETATE SILK CORPN., LTD. (1930), 74 Sol. Jo. 90.**

**502. Add. Annotations:**—*As to (1) Refd. Harrods, Ltd. v. Lemon*, [1931] 2 K. B. 157. *As to (2) Consd. Ramsden v. David Sharratt & Sons, Ltd.* (1930), 35 Com. Cas. 314. *Generally, Refd. A.-G. v. Goddard* (1929), 98 L. J. K. B. 743.

**506. Add. Annotations:**—*Consd. Ramsden v. David Sharratt & Sons, Ltd.* (1930), 35 Com. Cas. 314. *Refd. Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258.

**506a. Single act of misconduct—When summary dismissal justifiable.**—The manager of the life insurance department of an insurance co. recommended the issue of an endowment policy upon a life which the managing governor had a few days earlier refused to re-insure. He was thereupon dismissed, being given his current month's salary & a month's salary in lieu of notice:—*Held*: (1) upon the facts the manager was entitled to more than one month's notice, & the dismissal must be treated as a summary dismissal; (2) the one act of misconduct of the manager justified a summary dismissal.

#### PART IV. SECT. 2, SUB-SECT. 10.— B. (c) ii.

**421 ii. — — —.]—Where a contract of employment is for a definite time, & the employee is dismissed without cause, he may at once commence action for the breach of contract. The measure of damages is the actual loss sustained; the amount of damages may be much less than the wages for the unexpired period, depending upon pltf.'s success in obtaining equally good employment elsewhere. In the case of menial servants, however, usage has established the right to dismiss at any time by giving a month's notice, or a month's wages in lieu of notice. A farm hand is a menial servant within the meaning of this rule.**—*PREID v. BONAS*, [1931] 1 W. W. R. 225; 2 D. L. R. 362.—CAN.

**421 iii. — — —.]—(1) In an action for damages for wrongful dismissal, deft. having agreed in writing to employ pltf. for one year "to operate & manage" deft.'s farm:—*Held*: pltf. was not a menial servant entitled only to one month's notice or one month's wages in lieu thereof.**

(2) The agreement also provided that pltf. should have the use of one cow & be entitled to all the eggs "from the poultry owned by the employer" during said term. Deft. owned only one cow & it ceased giving milk shortly after pltf. was dismissed:—*Held*: the provision should be construed with regard to this fact, & therefore, pltf. was not entitled to recover an allowance for milk for the unexpired portion of the term.—*LITTLE v. LAING*, [1932] 1 W. W. R. 210.—CAN.

#### PART IV. SECT. 2, SUB-SECT. 10.—D.

**p i. — — —.]—A notice served on Apr. 4 to take effect on May 3 is not 30 days' notice.**—*PIERCE v. MYLOR SCHOOL DISTRICT*, [1929] 3 D. L. R. 49; 1 W. W. R. 223; 23 S. L. R. 365.—CAN.

#### PART IV. SECT. 2, SUB-SECT. 11.— A. (a).

**t i. — — —.]—Where the dismissal of an employee is for cause, he is not entitled to any notice.**—*VAILLANCOURT v. R.*, [1927] Exch. C. R. 21.—CAN.

**t ii. — — —.]—ROSS v. WILLARDS CHOCOLATES, LTD. (Man.), [1927] 2 D. L. R. 461.—CAN.**

*Per CUR.* The immediate dismissal of an employee is a strong measure, & it can be only in exceptional circumstances that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence.—JUPITER GENERAL INSURANCE Co., LTD. v. SHROFF (ARDESHIR BOMANJI), [1937] 3 All E. R. 67, P. C.

509. *Add. Annotation* :—**Reid. Brown v. Dagenham** U. D. C. (1929), 140 L. T. 615.

**580a. Driving motor car to common danger.]—**Pltf., a commercial traveller, was employed by defts. under an agreement which provided that pltf. was to use a motor car for the carriage of samples. Pltf. was convicted of driving the car to the common danger & was fined, & his driving licence was suspended for three months. Defts. terminated pltf.'s employment, on the ground that these facts constituted misconduct justifying dismissal. In an action for wrongful dismissal defts. also pleaded that, before the agreement was made, pltf. ought to have informed them that he had previously been convicted of being drunk when in charge of a motor car & been sentenced to imprisonment for driving it in a manner dangerous to the public:—*Held*: (1) there was no obligation on pltf. to disclose his previous conviction for a motoring offence; (2) the conviction during the currency of the agreement, even although pltf.'s licence was suspended, was not a ground for terminating the agreement, as pltf. could have got someone to drive the car.—*HANDS v. SIMPSON*, FAWCETT & Co., LTD. (1928), 44 T. L. R. 295; 72 Sol. Jo. 138.

- 565. Add. Annotations:—***Apld. Hands v. Simpson*, Fawcett & Co. (1928), 44 T. L. R. 295. **Refd.** *Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258.

**565a. What are material facts—Employment of commercial traveller—Not previous conviction for motoring offence.]—HANDS v. SIMPSON, FAWCETT & Co., LTD., No. 530a, ante.**

565b. Omission to disclose past misconduct.]—  
HEALEY v. SOCIÉTÉ ANONYME FRANÇAISE  
RUBASTIC, No. 506, *ante*.

- 565c. —.]—It is said that there is a contractual duty of the servant to disclose his past faults. I agree that the duty in the servant to protect

his master's property may involve the duty to report a fellow-servant whom he knows to be wrongfully dealing with that property. The servant owes a duty not to steal, but when he has stolen is there superadded a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from the well-established usage of mankind & would be to create obligations entirely outside the normal contemplation of the parties concerned. If a man agrees to raise his butler's wages, must the butler disclose that two years previously he received a secret commission from the wine merchant; & if the master discovers it, can he, without dismissal or after the servant has left, avoid the agreement for the increase in salary & recover back the extra wages paid? If he gives his cook a month's wages in lieu of notice can he, on discovering that the cook has been pilfering the tea & sugar, claim the return of the month's wages? I think not. He takes the risk; if he wishes to protect himself he can question his servant, & will then be protected by the truth or untruth of the answer (LORD ATKIN).—*BELL v. LEVER Bros., Ltd.*, [1932] A. C. 161; 101 L. J. K. B. 129; 146 L. T. 258; 48 T. L. R. 133; 76 Sol. Jo. 50; 37 Com. Cas. 98, H. L.

*Annotation* :—**Reid**. *Swain v. West (Butchers), Ltd.*, [1936]  
3 All E. R. 261.

- 594.** Add the following paragraph :—

Another replication to the same plea alleged that pltf. was an African & a negro, & that negroes were enslaved in divers States of the United States of America, & bought & sold as slaves by the citizens of the same States; that the captain of the C. before pltf. deserted, threatened to sell him as a slave to certain citizens of the United States; that San Francisco is in one of the said United States, to wit California; & pltf. had just & reasonable grounds for believing & did believe, that, on the arrival of the C. at San Francisco, the captain was about to carry his threat into execution; & thereupon pltf., in order to prevent the captain from selling him as a slave, deserted the C.:—*Held*: on demurrer, a bad replication, as not showing that California was a State in which pltf. could be sold as a slave.

**PART IV. SECT. 2, SUB-SECT. 11.—**  
**A. (g) ii.**

o i. — *Non-observance of moral code of hospital by physician.*—Plt.'s contract as a physician required him to conform with the moral code by which all Catholic Hospitals are governed." He admitted that he had authorised a newspaper to report, & that it had reported, that he thought "legalised euthanasia would be an admirable thing":—*Held:* the phrase referring to the "moral code" was too vague to permit of the adjustment of legal rights thereby, & for lack of evidence, it could not be said that plt.'s statement was a violation of said code.

Under said contract the hospital agreed to pay pltf. "in consideration of the services duly & properly executed in accordance with this contract & to the satisfaction of the Superior of the Hospital." The Superior gave no grounds for the dismissal which appeared in the evidence:—*Held*: the Superior's dissatisfaction which would justify pltf.'s dismissal without notice must be a reasonable one, & its reasonableness was determinable by the ct.:

& in the absence of evidence, it must be found that the Superior dismissed pltf. without giving any reason upon the sufficiency of which the ct. could pass.—HAGUE v. ST. BONIFACE HOSPITAL, [1936] 2 W. W. R. 230; 3 D. L. R. 363; 44 Man. L. R. 129; 6 F. L. J. (Can.) 68.—CAN.

**PART IV. SECT. 2, SUB-SECT. 11.—**  
**A. (g) iii.**

**ad. Possibility of future prejudicial conduct.**—*Held*: the mere apprehension that an employee may act in a manner incompatible with the due & faithful performance of his duty affords no ground for dismissing him & in order to justify dismissal the employee must be guilty of some conduct in itself incompatible with his duty & the confidential relation between himself & his employer. — **BLUTH CHEMICALS, LTD. v. BUSHNELL (1933), 49 C. L. R. 66; 6 A. L. J. 457.—AUS.**

**PART IV. SECT. 2, SUB-SECT. 11.—**  
**A. (g) iv.**

**k i.** — *Onus of proof.*]—Where in an action for damages for wrongful

**PART IV. SECT. 2, SUB-SECT. 11.—**  
**A. (g) vii.**

548 ii. —.]—A native servant addressed a remark of a grossly insolent & insulting nature to one of his employer's customers, a European. in the presence of a gang of native fellow servants:—*Held*: the master was justified in summarily dismissing him, & was not liable for salary for the unexpired portion of the month.—*GOGI v. WILSON & COLLINS* (1927), 48 N. L. R. 21.—S. AF.

**PART IV. SECT. 2, SUB-SECT. 11.—**  
**A. (j).**

566 v. — — —.]—LUCAS v.  
PREMIER MOTORS, LTD., [1928] 4  
D. L. R. 526; [1928] 3 W. W. R. 192.  
—CAN.

## Part V.—Remuneration.

- 613a.** —.]—Applt. alleged that he had made an agreement with resp. that applt. should obtain & send to resp. information relating to gold mines & concessions in West Africa, & that applt. should introduce concessions for acquisition by resp., & that resp. would protect applt.'s interests in respect of concessions acquired, & give to applt. the customary, or a reasonable, share in the same, & should pay to applt. a reasonable sum in respect of information & reports. Applt. claimed damages & other relief, on the ground that resp. had broken the agreement, in that he failed to give to applt. a share in respect of certain concessions obtained by applt., the profits on the sale whereof amounted to about £1,000,000. Applt. also contended that, if he was entitled to be paid by resp. only upon *quantum meruit*, the ct., in ascertaining the amount to be paid, was entitled, & bound, to have regard to such matters as the parties themselves considered reasonable & usual, namely, what profit was in fact made on the sale, & was not limited to fixing a fee. Resp. contended that there was no evidence of any contract, that there was no agreement sufficiently certain or definite to be enforceable, & that the amount of profit made on the re-sale was not a proper basis for assessing the amount due:—*Held*: (1) there was no concluded contract between the parties as to the amount of the share or interest that the applt. was to receive, & it was impossible for the ct. to complete the contract for them; (2) there was, however, a contract of employment between the parties, which clearly indicated that the work was not to be done gratuitously, & applt. was therefore entitled to a reasonable remuneration on the implied contract to pay him a *quantum meruit*; (3) on the evidence of the parties themselves, the basis of remuneration by fee should be rejected; (4) in fixing remuneration for services, the ct. was entitled to pay regard to the previous conversation of the parties, & in the circumstances, applt. was entitled to the sum of £5,000 as a reasonable remuneration, calculated on the basis of some reasonable participation.—*WAY v. LATILLA*, [1937] 3 All E. R. 759; 81 Sol. Jo. 786, H. L.
- 615.** *Add. Annotations*:—*Refd.* *Hillas & Co. v. Arcos, Ltd.* (1932), 147 L. T. 503; *May & Butcher, Ltd. v. R.*, [1934] 2 K. B. 17, n.
- 626.** *Add. Annotation*:—*Refd.* *Maloney v. St. Helens Industrial Co-operative Society, Ltd.*, [1933] 1 K. B. 293.
- 628.** *Add. Annotations*:—*Distd.* *Stevens v. Hampstead Borough Council*, [1929] 2 Ch. 239.

*Refd.* *Dennerley v. Prestwich U. D. C.* (1929), 141 L. T. 802; *Pratt v. Cook Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51.

- 628a.** —.]—*ADAMS v. LIVERPOOL CORPN.* (1927), 137 L. T. 396; 91 J. P. 106; 25 L. G. R. 359, C. A.

*Annotations*:—*Folld. Kelsey v. Birmingham Corpn.* (1927), 92 J. P. 12; *Stevens v. Hampstead Borough Council*, [1929] 2 Ch. 239.

- 628b.** —.]—*KELSEY v. BIRMINGHAM CORPN.* (1927), 92 J. P. 12.

- 628c.** —.]—*War bonus not included—Contract to pay "full regular pay."*—A borough council passed a resolution that all employees volunteering for military service during the war should be paid "full regular pay," less allowances by the Govt., & their positions should be kept open until their return. Pltf. enlisted in Nov. 1914, & served till July, 1919. Between those dates several increments of pay & war bonuses were awarded to the council's employees:—*Held*: the "full regular pay" was the pay he had been receiving down to the date of enlistment & did not include any increases or bonuses.—*STEVENS v. HAMPSTEAD BOROUGH COUNCIL*, [1929] 2 Ch. 239; 98 L. J. Ch. 289; 142 L. T. 229; 45 T. L. R. 430; 93 J. P. Jo. 285; 27 L. G. R. 590.

- 629.** *Add. Annotations*:—*Distd.* *Adams v. Liverpool Corpn.* (1927), 137 L. T. 396. *Appld.* *Aylott v. West Ham Corpn.*, [1927] 1 Ch. 30. *Distd.* *Stevens v. Hampstead Borough Council*, [1929] 2 Ch. 239. *Refd.* *Tibbals v. Port of London Authority*, [1936] 2 All E. R. 819.

- 630.** *Add. Annotations*:—*Appld.* *Adams v. Liverpool Corpn.* (1927), 137 L. T. 396. *Folld.* *Stevens v. Hampstead Borough Council*, [1929] 2 Ch. 239. *Refd.* *Tibbals v. Port of London Authority*, [1936] 2 All E. R. 819.

- 639.** *Add. Annotations*:—*Refd.* *Littlejohn v. London County Council*, [1937] 3 All E. R. 43; *Lind v. Johnson*, [1937] 4 All E. R. 201.

- 640a.** *What amounts to "sickness"—Accident.*—A wages award made in an arbn. between employers & employees affecting large bodies of workers contained a clause in these terms: "Wages during sickness. Wages to be paid as below during periods of sickness where absence from duty is properly vouched for by medical evidence:—A total of three weeks' full wages & three weeks' half wages in the aggregate in any one year." Pltf. was employed by defts. at a weekly wage of £3 under a contract which incorporated the above-quoted clause. In the course of his employment pltf. crushed his thumb & was

### PART V. SECT. 2, SUB-SECT. 1.—A.

*m i.* —.]—A presumption arises from the relationship of aunt & niece that nursing services rendered by the latter are gratuitous.—*MERCANTILE TRUST v. CAMPBELL* (1918), 43 O. L. R. 57.—CAN.

*sb.* *Must be contract between workman & employer.*—*Held*: pltf. had no right to sue under the wage schedule agreement entered into between his Union & defts. co. There was no contract under which pltf. as an

individual could maintain an action for violation of the wages schedule.—*ARIS v. TORONTO, HAMILTON & BUFFALO RY. CO.*, [1933] O. R. 142; 1 D. L. R. 634.—CAN.

*sd.* *Agreement between owner & contractor—To pay trade union rate—Action by workman against owner—No privity.*—*ORR v. BENNETT & WHITE CONSTRUCTION CO., LTD.*, [1934] 3 W. W. R. 744.—CAN.

### PART V. SECT. 2, SUB-SECT. 1.—C.

*q i.* —.]—*"Net profits"—Right of*

*employer to deduct bad debts.*—*MARWOOD v. CANADIAN CREDIT CORPN.*, [1930] 3 D. L. R. 719.—CAN.

### PART V. SECT. 2, SUB-SECT. 1.—D. (b).

*637 vii.* —.]—*HEINBIGNER v. KINZEL*, [1931] 2 W. W. R. 639.—CAN.

*so.* *Servant in receipt of sickness benefit—Under Old Age Pensions & National Health Insurance Act, 1900.*—*Held*: servant not entitled to wages during incapacity.—*ANON.* (1933), *The Times*, March 17, 1933.—I.O.M.



in consequence absent from duty for six weeks, that absence being properly vouched for by medical evidence. He claimed to be paid under the clause three weeks' full wages & three weeks' half wages. Defts., while admitting liability to pay compensation under Workmen's Compensation Act, refused to acknowledge pltf.'s claim under the clause, contending that it applied only where absence from duty was due to sickness caused by disease as distinguished from accident :—*Held* : the word "sickness" in the clause covered absence from duty owing to incapacity whether due to disease or accident, & therefore that pltf. was entitled to recover. —*MALONEY v. ST. HELENS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD.*, [1933] 1 K. B. 293; 102 L. J. K. B. 85; 148 L. T. 196; 49 T. L. R. 22, C. A.

- 644. Add. Annotation:—***Refd.* Mellor v. Beardmore (1927), 44 R. P. C. 175.
- 647. Add. Annotation:—***Folld.* Mountford v. London County Council, [1935] 2 K. B. 243.
- 649. Add. Annotations:—***As to* (1) *Refd.* Eshelby v. Federated European Bank, Ltd., [1932]

1 K. B. 423; A.-G. of Trinidad & Tobago v. Gordon Grant & Co., [1935] A. C. 532. *Generally, Rejd. Pockney v. Atkinson* (1929), 142 L. T. 135.

700. *Add. Annotation*.—**Refd.** *Brown v. Dagenham U. D. C.*, [1929] 1 K. B. 737.
701. *Add. Annotations*.—**Refd.** *Brown v. Dagenham U. D. C.*, [1929] 1 K. B. 737; *Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364.

**711a. Agreement to pay commission—Onus of proof.**—Pltf., a solr., claimed from defts. an account in respect of sums alleged to be due under a verbal agreement of July, 1924. At that date it was agreed that pltf., who was then an articulated clerk, should transfer his articles to defts., who agreed to pay him a salary & commission. Certain payments had been made to him: these, defts. said, were gifts, & they denied the agreement:—**Held**: the onus of proof was on pltf. & as there was no explanation of those sums & no account of them in the books he had failed to satisfy this onus, & the action failed.—**HART v. BENNETT & Co. (1928)**, 72 Sol. Jo. 285.

## Part VI.—Breach of Contract and Remedies Therefor.

- 732. Add. Annotations :—***Reid. Guy-Pell v. Foster*, [1930] 2 Ch. 169; *Huntoon Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528.
- 732a. Failure to obtain permit—Employment of alien.]—***BARANOWSKI v. EINSTEINS ELECTRO-CHEMICAL PROCESS, LTD., BARANOWSKI v. EINSTEINS ELECTRO-CHEMICAL PROCESS, LTD. (CONSOLIDATED)* (1931), 75 Sol. Jo. 247
- 739. Add. Annotations :—***Consd. Fowler v. Commercial Timber Co.*, [1930] 2 K. B. 1. *Appl. Re Gramophone Records, Ltd.* (1930), 69 L. Jo. 201.
- 739a. — — —.]—**By a written agreement ptlf. was appointed managing director of deft. co. for five years at a certain salary. Before the expiration of the five years a resolution,

which was supported by pltf., was duly passed for the voluntary winding up of the co. as by reason of its liabilities it could not continue its business. In an action by pltf. claiming damages for breach of the agreement to employ him for five years:—*Held*: a term could not be implied in the agreement that if the co. went into voluntary liquidation with the assent or approval of pltf. he should lose all right to recover damages for the breach of the agreement, & that he was entitled to damages for that breach.—**FOWLER v. COMMERCIAL TIMBER Co., LTD.**, [1930] 2 K. B. 1; 99 L. J. K. B. 529; 143 L. T. 391, C. A.

*Annotation* :—**Reid**. *Re Farrer* (T. N.), Ltd., [1937] Ch. 352.

**PART V. SECT. 2, SUB-SECT. 1.—G.**

648 vi. ———.]—A farm labourer, hired for the season at so much per month, is entitled to payment of his wages at the end of each month, unless the contract provides to the contrary.—COWAN v. EISLER, [1927] 2 D. L. R. 713; [1927] 1 W. W. R. 776; 36 Man. L. R. 464.—CAN.

**PART V. SECT. 2, SUB-SECT. 4.**

k i. — *Debts of customers.*—NEW-COMB v. ROBERTSON BAKERIES, LTD., [1933] 1 W. W. R. 271.—CAN.

**ad. Deduction—Assessments under Workmen's Compensation Act.]—**An agreement between a workman & his employer that the latter may deduct from the former's wages assessments payable by the employer under Part I. of Workmen's Compensation Act, R.S.B.C., 1924, is illegal, except with respect to deductions for medical aid.—**MCAILLISTER v. BELL LUMBER & POLE CO. LTD.**, [1931] 3 W. W. R. 787; [1932] 1 D. L. R. 802; 45 B. C. R. 30.—**CAN.**

**PART V. SECT. 2, SUB-SECT. 6.—**  
**A. (b).**

o 1. ————.]—An infant, who has become emancipated from the

control of his father, is entitled to recover wages earned by him by working for a stranger, even though he agreed, at the time of the hiring, that his wages should be credited on a debt due from his father to his employer.—LEZETC v. METHERAL (Sask.), [1927] 1 W. W. R. 990.—CAN.

*st. Against whom maintainable—Merchant supplying planter—Wages of planter's servants.*—DOOLEY v. BURKE & HACKETT (1819), 1 Nfld. L. R. 190.—**NFLD.**

**PART V. SECT. 2, SUB-SECT. 6.—**  
**A. (o).**

**sj. Want of notice—Of shipping of  
servant—21 Vict. c. 9.]—GOFF v.  
BARRON (1859), 4 Nfld. L. R. 286.—  
NFLD.**

**PART VI. SECT. 1, SUB-SECT. 2.**

n i. — *Whether Wages Agreement part of contract.*—Appl. was verbally engaged in 1920 by resp., a railway co., as a machinist in their shops at the “going rate” of wages. In 1927 he received notice of dismissal on the ground of reduction of staff. He sued for wrongful dismissal, contending that a written agreement, entered into by resp. with a labour organisation & called Wages Agreement No. 4, formed

part of his contract of employment, and that under it resps. could not dismiss him upon a reduction of staff, as they had retained men junior to him. The agreement had been applied to applt., who was not a member of the organisation, as to the amount of his wages, the notice given him, & in other respects; resps. stated at the trial that they had applied the agreement to all the men employed in their shops:—*Held*: Wage Agreement No. 4 did not form part of the contract for the employment of applt., the fact that resps. had applied it to him being equally consistent with the view that they had done so as a matter of policy. Further, that having regard to the terms & nature of the agreement it did not by itself constitute a contract between any individual employee & his employer; observance of its terms by an employer could not be enforced by action even by the organisation, but only by calling a strike.—*YOUNG v. CANADIAN NORTHERN RY. Co.*, [1931] A. C. 83; 100 L. J. P. C. 51; 144 L. T. 255, P. C.—*CAN.*

*am. Failure to send out traveller—Remuneration thereby reduced.*—**ERSON v. GAULTS, LTD.**, [1930] 1 W. W. R. 905; 2 D. L. R. 999; 38 Man. L. R. 613; *reversg.*, [1930] 1 D. L. R. 544.—**CAN.**

739b. —.—*Re* GRAMOPHONE RECORDS, (1930), 69 L. Jo. 201; 169 L. T. Jo. 193; [1930] W. N. 42.

744a. **Hindering performance of work—Employment of efficiency expert.**—The second defts. advised industrial firms on means to obtain increase of output & reduction of the cost of production by a system of "human power measurement" which involved timing men at their work. The system was introduced into the works of the first deft. Pltfs., workmen who were engaged at the works on a piece-rate system of wages, complained that the method of "time-studying" produced in them a state of nervous tension, distracting their attention, & preventing concentration on work, & that this resulted in reduced output & loss of wages. They claimed a declaration that it was an implied term of their contracts of employment that the first defts. would not do or cause anything to be done to prevent or hinder them from performing their contracts of employment, & they sought to recover the amounts alleged to have been lost:—*Held*: assuming that such a term was to be implied, it could not be so wide as to prevent the employers, the first defts., by themselves or their agents, seeing that workmen were properly performing their work, or observing them at work so as to suggest improvements, or substituting other work, or enabling savings to be made in the conduct of the work; what the employers had done was within their rights; there was no breach of contract by the first defts., & no procuring of any breach by the second defts.; & the action was wholly misconceived.—*DAVIES v. RICHARD JOHNSON & NEPHEW, LTD.* (1934), 51 T. L. R. 115; 78 Sol. Jo. 877.

753a. —.—**Miners.**—*EBBW VALE STEEL, IRON & COAL CO. v. TEW*; *EBBW VALE STEEL, IRON & COAL CO. v. RICHARDS*; *EBBW VALE STEEL, IRON & COAL CO. v. LEWIS* (1935), 79 Sol. Jo. 593, C. A.

759. *Add. Annotations*:—*Refd. Huntoon Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528.

762. *Add. Annotations*:—*Refd. Guy-Pell v. Foster*, [1930] 2 Ch. 169; *Huntoon Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528.

769a. —.— **Meaning of "year to year."**—Applt. was by an agreement of service appointed by the resps. as a London manager for a period of six months from Dec. 1, 1928, at a named salary subject to renewal, & by clause 6 of the agreement it was provided that if at the expiration of six calendar

months the governing director on behalf of the co. should in his sole & absolute discretion think fit the engagement of applt. should continue from year to year, & by sub-clause (c) it was provided that in the event of the agreement being extended the co. should as soon as practicable appoint applt. to be a director of the co. The six months from Dec. 1, 1928, would expire on May 31, 1929. Applt. was not appointed a director, & at the end of a year from the time when the six months expired the co., by their letter dated May 29, 1930, gave him six months' notice to terminate the agreement, whereupon applt. brought an action claiming damages, & the matter went to arbn.:—*Held*: (1) the "year to year" period began at the end of the trial period, i.e. at the end of the six months, when the governing director exercised his option & that the applt. was therefore entitled to one year's loss of salary; & there were no materials on which any damages could be awarded for loss of salary as a director; (2) applt. was not entitled to recover damages for loss of prestige &/or publicity.—*Re GOLOMB & PORTER (WILLIAM) & CO., LTD.'S ARBITRATION* (1931), 144 L. T. 583, C. A.

771a. —.— **Damages for loss or prestige or publicity.**—*Re GOLOMB & PORTER (WILLIAM) & CO.'S ARBITRATION* No. 769a, *ante*.

782. *Add. Annotation*:—*Refd. Brown v. Dagenham U. D. C.*, [1929] 1 K. B. 737.

788. *Add. Annotations*:—*Consd. Marbé v. George Edwardes (Daly's Theatre)* (1927), 96 L. J. K. B. 980. *Refd. Re Golomb & Porter & Co.'s Arbn.* (1931), 144 L. T. 583.

790. *Add. Annotations*:—*Consd. Re Golomb & Porter & Co.'s Arbn.* (1931), 144 L. T. 583; *Withers v. General Theatre Corp., Ltd.*, [1933] 2 K. B. 536. *Refd. Marbé v. George Edwardes (Daly's Theatre)* (1927), 43 T. L. R. 460; *Groom v. Crocker*, [1938] 2 All E. R. 394.

792a. **Liability to income tax if employment had not terminated.**—In an action for wrongful dismissal no deduction from the damages may be made in respect of income tax for which the employee would have been liable if the contract had not been wrongfully determined by the employers.—*FAIRHOLME v. FIRTH & BROWN, LTD.* (1933), 149 L. T. 332; 49 T. L. R. 470; 77 Sol. Jo. 485.

793. *Add. Annotation*:—*Consd. Savage v. British India Steam Navigation Co., Power v. Same* (1930), 46 T. L. R. 294.

#### PART VI. SECT. 3, SUB-SECT. 2.—A.

*sa. Agreement between company & union—Union supplying men.*—An agreement between a labour union & an employer, a newspaper publishing co., whereby the latter agreed to employ only members of the union provided the union supplied enough competent members to enable the co. to issue its publications promptly & regularly, & the union agreed to furnish such members:—*Held*: not to constitute a contract of service between the co. & individual members of the union who had worked in pursuance of the agreement, but to be a collective agreement in the full sense of the word; & its breach, assuming it to have been broken, by refusing to continue the employment of certain

members of the union, did not give them a cause of action for wrongful dismissal.—*WRIGHT v. (CALGARY) HERALD, LTD.*, [1938] 1 W. W. R. 1; 1 D. L. R. 111; 7 F. L. J. (Can.) 259.—CAN.

#### PART VI. SECT. 3, SUB-SECT. 2.—B. (c) iii.

793 iii. —.—**Where a contract of employment provides that either party may terminate it on notice given at a certain time the servant can recover as damages for wrongful dismissal only the equivalent of the amount of wages agreed on for the period so provided, i.e., where 30 days' notice is provided for he can recover only 30 days' wages.**—*PIERCE v. MYLOR SCHOOL DISTRICT*, [1929]

3 D. L. R. 49; 1 W. W. R. 223; 23 S. L. R. 365.—CAN.

#### PART VI. SECT. 4.

809 xiii. —.—**In an action to recover for services rendered as a farm hand under an agreement for payment on a monthly basis for the portion of the year during which spring & summer work usually lasted & upon a rate per day basis during the harvesting & threshing operations:—Held**: in view of the contradictory nature of the evidence & the absolute unreasonableness of pltt.'s claim as to both the monthly & daily rates over the greater portion of the period, there had been no agreement between the parties as to said rates, except for the 1927 monthly rates, or as to the date for the

811. *Add. Annotation* :—**Refd.** *Thomas v. Hammersmith Borough Council*, [1938] 3 All E. R. 203.
831. *Add. Annotation* :—**Consd.** *Sagar v. Ridehalgh & Son, Ltd.*, [1931] 1 Ch. 310.
832. *Add. Annotation* :—**Refd.** *Sagar v. Ridehalgh & Son, Ltd.*, [1931] 1 Ch. 310.
848. *Add. Annotation* :—**Refd.** *Pratt v. Cook Son & Co. (St. Paul's), Ltd.*, [1938] 2 K. B. 51.
- 854a. — — **Work-sharing agreement—Allegation of breach by employer.**—**CONNEELY v. UPTON COLLIERY CO., LTD.** (1936), 81 Sol. Jo. 81. D. C.

## Part VII.—Duties and Liabilities of Master.

- 880. Add. Annotations:—***Refd. James v. British General Insee.*, [1927] 2 K. B. 311; *Bradstreets British, Ltd. v. Mitchell (Harold) & Carapanayoti & Co.*, [1933] Ch. 190; *Haseldine v. Hosken*, [1933] 1 K. B. 822.

## Part VIII.—Duties and Liabilities of Servant.

- 890. Add. Citations:**—96 L. J. K. B. 152; 136 L. T. 271.
- 893a.**—[.]—A servant who, while still in the service of his master, solicits the customers of his master to transfer their custom to himself, even though that transfer is to take effect only after the service has terminated, commits a breach of his duty to his master, & for that breach he is liable in damages.—*WESSEX DAIRIES, LTD. v. SMITH*, [1935] 2 K. B. 80; 104 L. J. K. B. 484; 153 L. T. 185; 51 T. L. R. 439, C. A.
- 895. Add. Annotation:**—*Refd. Re A Debtor* (No. 229 of 1927), [1927] 2 Ch. 367.
- 903a. Duty to disclose fraud of fellow-employee.**—Pltf. was employed for a term of 5 years as general manager of deft. co. His contract of service provided (*inter alia*) that he would “do all in his power to promote, extend & develop the interests of the co.” The managing director gave pltf. certain unlawful orders, which orders pltf. carried out. The matter came to the notice of the chairman of the board of directors, who, in an interview with pltf., told pltf. that if he gave conclusive proof of the managing director’s dishonesty, he would not be dismissed. Pltf. duly supplied the information required. Pltf. was then dismissed, defts. alleging fraud & dishonesty. Pltf. did not deny the allegations, but he brought an action for breach of con-
- tract & wrongful dismissal on the grounds that, under the terms of the verbal agreement between pltf. and the chairman, it was not open to defts. to rely upon information given by pltf. relating to his own fraud & dishonesty:—*Held*: (1) it was pltf.’s duty, as part of his contract of service, to report to the board of directors any acts which were not in the interests of the co.; (2) there was therefore no consideration for the alleged verbal agreement, & deft. co. was not prevented from relying upon the information received from pltf.—*SWAIN v. WEST (BUTCHERS), LTD.*, [1936] 3 All E. R. 261; 80 Sol. Jo. 973, C. A.
- 908. Add. Annotations:**—*As to* (1) *Refd. Harrods, Ltd. v. Lemon*, [1931] 2 K. B. 157. *As to* (2) *Consd. A.-G. v. Goddard* (1929), 98 L. J. K. B. 743. *Generally, Refd. Ramsden v. David Sherratt & Sons, Ltd.* (1930), 35 Com. Cas. 314.
- 926. Add. Annotation:**—*Consd. Reid & Sigrist, Ltd. v. Moss & Mechanism, Ltd.* (1932), 49 R. P. C. 461.
- 927. Add. Annotations:**—*Refd. United Indigo Chemical Co. v. Robinson* (1931), 49 R. P. C. 178; *Reid & Sigrist, Ltd. v. Moss & Mechanism, Ltd.* (1932), 49 R. P. C. 461; *Wessex Dairies, Ltd. v. Smith*, [1935] 2 K. B. 80.
- 928. Add. Annotations:**—*Consd. Wessex Dairies, Ltd. v. Smith*, [1935] 2 K. B. 80. *Refd. Putman v. Taylor*, [1927] 1 K. B. 637.

commencement of spring work in each year, &, therefore, it was necessary to apply the *quantum meruit* principle.  
—ADAMS v. JENNINGS, [1935] 1 W. W. R. 425.—CAN.

**PART VII. SECT. 1.**

**sk. Contract to supply medical attention—Extent of Liability.**—Pitt., who was an employee of deft. co., brought this action against the co. upon a contract whereby it agreed to furnish him with medical and surgical treatment in case of illness, in consideration of moneys deducted from time to time from his monthly salary. Falling ill, he was treated in the company's hospital by physicians & surgeons employed by the co. He asserted breach of contract in that he had not been skillfully & properly treated:—**Held:** the co. having exercised due care & skill in selecting its medical

staff, had done all it undertook to do & was not to be regarded as warranting that in all details of treatment the physicians & surgeons selected would exercise reasonable care & skill, & the action was dismissed.—JARVIS v. INTERNATIONAL NICKEL CO., [1929] 2 D. L. R. 842; 63 O. L. R. 564.—CAN.

**al. —** *No liability for negligence of doctor.*—Where an employer contracts with a properly qualified physician to furnish medical services to his employees, payment therefor, being provided for by periodical deductions from their pay, the employer is not liable in damages to an employee who contracted an infectious disease as the result of the negligence of the physician in not diagnosing as such disease a disease which was prevalent among the employees.—**HAMILTON v. PHENIX LUMBER CO., LTD., & BUNN, [1931] 1 W. W. R. 43; 1 D. L. R. 777; 25 Alta. L. R. 166.—CAN.**

**PART VIII SECT. 1, SUB-SECT. 2.**

907 v. —. —.]—A master is entitled to recover from his servant the earnings or profits made by the servant from employment in another business competing with his master's.—BENNETT-PACAUD Co., LTD. v. DUNLOP, [1933] O.R. 246; 2 D.L.R. 237.—CAN.

**PART VIII. SECT. 2, SUB-SECT. 1.**

923 iii. ————J—An employee, after leaving his employment, may use confidentially acquired knowledge of processes, details of management & particulars of customers, which have been obtained by him in the course, & as a necessary consequence, of his employment, but may not use knowledge, details or particulars possessed by him in an objective form, e.g., written particulars.

—ORMONDS ROOFING & ASPHALTS, LTD. v. BITUMENOIDS, LTD. (1931), 31 S. R. N. S. W. 347; 48 N. S. W. W. N. 66.—AUS.

**934a.** —Use distinguished from disclosure.]  
—The first of the two clauses upon which this action is brought is a covenant not to communicate or divulge information as to the customers or affairs of plffs. acquired by deft. whilst in their employment; that is, it is a covenant against certain definite overt acts. The statement of claim, however, asked for an injunction not merely against such acts as were expressly mentioned in the first clause, but further against using such information acquired by deft., & so on, which would include, I suppose, making use even in deft.'s own mind, possibly unconsciously, without divulging any fact to another person. No such injunction as this against using information could or ought to be granted unless there were an express agreement in terms to that effect, that is, against using such information, which there is not here, even if such an injunction could then be granted (JOYCE, J.).—HERBERT MORRIS, LTD. v. SAXELBY, [1915] 2 Ch. 57; 84 L. J. Ch. 521; 112 L. T. 354; 31 T. L. R. 370; 59 Sol. Jo. 412, C. A.; on appeal, [1916] 1 A. C. 688, H. L.

*Annotations*.—*Fould*, United Indigo Chemical Co. v. Robinson (1931), 49 R. P. C. 173. *Refd.* *Pellow v. Ivey* (1933), 49 T. L. R. 422; *Wyatt v. Kreglinger & Fernau*, [1933] 1 K. B. 793.

**934b.** — — — — —.]—Pltf. co., who were manufacturers of a variety of chemical products, including a boiler disinfectant named "Agaloid," claimed that the latter was pro-

duced by a secret process. They sought to restrain deft., who had been in their service for some years & ultimately as works manager, from using or disclosing information obtained in their service. In particular plffs. alleged that deft. was only enabled to make & sell a product "Descalit" by the wrongful use of information. Plffs. also alleged that deft. had made & taken away copies or had wrongfully carried in his memory extracts from a secret formulæ book. Deft. denied that there was any secret process & that he had wrongfully taken & used any information:—*Held*: deft. had not made or taken away copies of formulæ from the book, which in fact was a costings book, & deft. was not warned as to secrecy when he entered employment in which he learned the processes without difficulty; an injunction would not be granted to prevent using knowledge that had thus become his own; dishonest or surreptitious obtaining of knowledge would have been upon a different footing, but no obligation could be implied not to use knowledge honestly acquired.—UNITED INDIGO CHEMICAL CO., LTD. v. ROBINSON (1931), 49 R. P. C. 178.

**938.** *Add. Annotation*.—*Refd.* *Boorne v. Wicker*, [1927] 1 Ch. 667.

**941.** *Add. Annotation*.—*Refd.* *Putsman v. Taylor*, [1927] 1 K. B. 637.

## Part IX.—Liability of Master to Third Persons.

**962a.** *Authority to sell.*—SENIOR v. WOLMER (1623), Benl. 132; 73 E. R. 990; *sub nom.* SEIGNIOR & WOLMER'S CASE, Godb. 360.

**966.** *Add. Annotations*.—*Refd.* *Bull v. West African Shipping, etc. Co.*, [1927] A. C. 686; *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.

**970a.** —.]—*Respondeat superior* extends to civil matters only.—R. v. LEVER (1746), Barnes, 34; 94 E. R. 793.

**971.** *Add. Annotations*.—*Consd.* *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628; *Radcliffe v. Ribble Motor Services, Ltd.*, [1938] 2 K. B. 345. *Refd.* *Fanton v. Denville*, [1932] 2 K. B. 309; *Holloway v. Donaldson Line, Ltd.* (1935), 41 Com. Cas. 47.

**972.** *Add. Annotations*.—*As to* (1) *Consd.* *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628; *Radcliffe v. Ribble Motor Services, Ltd.*, [1938] 2 K. B. 345. *Refd.* *Fanton v. Denville*, [1932] 2 K. B. 309; *Metcalfe v. London Passenger Transport Board*, [1938] 2 All E. R. 352.

**987.** *Add. Annotations*.—*Consd.* *Kleinwort, Sons & Co. v. Associated Automatic Machine Corpn., Ltd.* (1932), 77 Sol. Jo. 12; *Aitchison v. Page Motors, Ltd.* (1935), 154 L. T. 128. *Refd.* *Kreditbank Cassel G.m.b.H. v. Schenkens*, [1927] 1 K. B. 826; *Reckitt v. Barnett, Pembroke & Salter*, [1926] 2 K. B. 244; *Sun Life Assurance Co. of Canada v. Smith (W. H.) & Son, Ltd.* (1934), 150 L. T. 211; *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment Co.*, [1936] 2 All E. R. 1039.

### PART IX. SECT. 3, SUB-SECT. 1.

**964 II.** — — — — —.]—ANDERSON v. ROYER, [1928] 3 D. L. R. 248.—CAN.

**964 III.** — — — — —.]—A master is liable for the conduct of his servant whom he selects & puts in his place to discharge the duty he has undertaken, & this law is applicable in a case of bailment. The conduct of the servant is then the conduct of the master, & the master is liable to the bailor.—VAN GEEL v. WARRINGTON, [1929] 1 D. L. R. 94; 63 O. L. R. 143.—CAN.

### PART IX. SECT. 3, SUB-SECT. 4.—A.

**981 xxi.** — — — — —.]—ESTATE VAN DER BYL v. SWANEPOEL, [1927] App. D. 141.—S. AF.

**981 xxii.** — — — — —.]—BURRIS v. DARTMOUTH TOWN (1927), 59 N. S. R. 227.—CAN.

**981 xxiii.** — — — — —.]—*Dog shot by servant.*—SWABEY v. PALMER (1869), (1900—1911), 1 Can. Dig. 51.—CAN.

**981 xxiv.** — — — — —.]—Where a co. holding a miner's prospecting licence sent employees into the wilderness to prospect for it under conditions which made it necessary for them to cook their own food & supplied them with the cooking utensils:—*Held*: the employees in making a fire to cook breakfast preparatory to their day's work were acting within the scope of their employment, & the co. was, therefore, liable for damages caused by their negligence in failing to put out the

fire.—MURDOCH v. CONSOLIDATED MINING SMELTING & POWER CO., [1928] 1 D. L. R. 853; [1928] 1 W. W. R. 578; 39 B. C. R. 386; *revid.*, [1929] 1 D. L. R. 913; S. C. R. 141.—CAN.

**985 I.** — — — — —.]—*Servant acting for master's benefit.*—WING KEE v. BUTT (B. C.), [1927] 2 D. L. R. 641.—CAN.

*sg. Authorised act — Unauthorised method.*—Where a servant's act is within the class of acts which he is expressly or impliedly authorised to do the master is liable for the consequences thereof even though the servant adopts a wrongful & unauthorised method of doing the act.—TWERDOCHIE v. HANNS, [1935] 1 W. W. R. 533; 2 D. L. R. 363; 5 F. L. J. (Can.) 35.—CAN.

988. *Add. Annotation*:—*Refd. Aitchison v. Page Motors, Ltd.* (1935), 154 L. T. 128.
989. *Add. Annotation*:—*Refd. Sun Life Assurance Co. of Canada v. Smith (W. H.) & Son, Ltd.* (1934), 150 L. T. 211.
991. *Add. Annotations*:—*Consd. Kreditbank Cassel G.m.b.H. v. Schenkens*, [1927] 1 K. B. 826; *Reckitt v. Barnett, Pembroke & Slater*, [1928] 2 K. B. 244. *Distd. Slingsby v. District Bank, Ltd.* (1931), 48 T. L. R. 114. *Appl. Kleinwort, Sons & Co. v. Associated Automatic Machine Corp., Ltd.* (1932), 77 Sol. Jo. 12. *Refd. Britt v. Galmoye & Nevill* (1928), 44 T. L. R. 204; *Lloyds Bank v. Chartered Bank of India, Australia & China* (1928), 97 L. J. K. B. 609; *Sun Life Assurance Co. of Canada v. Smith (W. H.) & Son, Ltd.* (1934), 150 L. T. 211; *Aitchison v. Page Motors, Ltd.* (1935), 154 L. T. 128.
996. *Add. Annotations*:—*Consd. Poland v. Parr*, [1927] 1 K. B. 236. *Refd. Britt v. Galmoye & Nevill* (1928), 44 T. L. R. 204.
1002. *Add. Annotation*:—*Refd. Knott v. London County Council*, [1934] 1 K. B. 126.
1005. *Add. Annotations*:—*Distd. Addie R. & Sons (Collieries) v. Dumbreck*, [1929] A. C. 358. *Refd. Cunard v. Antifyre, Ltd.* (1932), 49 T. L. R. 184; *Donovan v. Union Cartage Co.* (1932), 49 T. L. R. 125.
1011. *Add. Annotations*:—*Consd. Lloyds Bank v. Chartered Bank of India, Australia & China* (1928), 97 L. J. K. B. 609; *Reckitt v. Barnett, Pembroke & Slater*, [1928] 2 K. B. 244. *Refd. Fenton Textile Assocn. v. Thomas* (1929), 45 T. L. R. 264; *Lloyds Bank, Ltd. v. Savory & Co.* (1932), 49 T. L. R. 116.
1054. *Add. Annotation*:—*Expld. & Distd. Fisher v. Oldham Corp., [1930] 2 K. B. 364.*
- 1062a. *Fraud involving forgery.*—*UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY v. PICKARD*, [1938] 4 All E. R. 324.
- 1080a. — *Accident during dinner hour.*—*HIGBID v. R. C. HAMMETT, LTD.* (1932), 49 T. L. R. 104, C. A.

PART IX. SECT. 3, SUB-SECT. 4.—C.  
997 III. —.] — M'INTOSH v. CAMERON, [1929] S. C. (Ct. of Sess.) 44.—SCOT.

PART IX. SECT. 3, SUB-SECT. 6.—D.

1026 I. *General rule—Master not liable—Act outside scope of authority.*—Where a servant, acting on the assumption, not reasonably founded, that property of his master & also property of another were in common peril, took upon himself to interfere, with a view to saving his master's property, with the result that the other owner's property was destroyed:—*Held*: the servant having no express authority so to act, no authority was to be implied.—*BROKEN HILL ASSOCIATED SMELTERS PTY. v. MONAGHAN*, [1928] S. A. S. R. 400.—AUS.

1027 I. *General rule—Master not liable—Act without direction or assent of master.*—A master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master.—*MCCORQUODALE v. SHELL OIL CO. OF AUSTRALIA, LTD.* (1933), 33 S. R. N. S. W. 151; 50 N. S. W. W. N. 77.—AUS.

1030 I. —.] — *Where act contrary to orders.*—*Deft. J.*, who was the servant of *deft. L.*, was driving his master's motor truck upon a highway, upon the master's business, when he overtook *pltf.* & invited him to get into the truck. *Pltf.* did so & the truck proceeded upon its way. *J.* drove so recklessly & at such a speed that *pltf.* was injured. *J.* had been forbidden by *L.* to take a passenger on the truck:—*Held*: *L.* was not liable to *pltf.* for the negligence of *J.*—*CROTON v. LEONARD & JOHNS*, [1931] 2 D. L. R. 38; 66 O. L. R. 566.—CAN.

PART IX. SECT. 3, SUB-SECT. 13.—A.

1085 I. *Foundation of liability—Relationship of master & servant must exist.*—A firm employing a travelling salesman on commission, & exercising control over his territory, is liable for his negligence in driving a car in the course of his work; he is not an independent contractor.—*WRIGHT v. JEFFREY*, [1937] 1 D. L. R. 227; 6 F. L. J. (Can.) 133.—CAN.

• 1. — *Relationship of master & servant must exist.*—*Deft. co.* hired to *M.* a derrick & one of its employees, *F.*, who was to take part in the erection of the derrick. After the derrick had been erected upon *M.*'s premises, a test as to its efficiency was attempted

to be made, in the course of which a cable broke, the derrick fell to the ground, & the mast struck & killed *M.* In an action by the widow & child of *M.* against the co. to recover damages for his death, it was found that *F.* was guilty of negligence which caused *M.*'s death; but as *deft. co.* did not contract to erect the derrick itself but placed *F.* under *M.*'s control for the purpose of the work, he became the servant of *M.* & his negligence was not the negligence of *deft. co.*—*MUIR v. SARNIA BRIDGE CO.*, [1931] 1 D. L. R. 742; 66 O. L. R. 365.—CAN.

• II. —.] — *Deft. G.* was the superintendent of *deft. irrigation co.* In an action based on an automobile accident which occurred while he was driving a car belonging to the co. it was found that the accident was due to his negligence & he & the co. were held liable. The co. appealed, on the ground that he was not engaged on its business at the time of the accident. Owing to friction between the co. & water users in an area over which it had no control, the co. had obtained *G.*'s appointment by the Minister of Lands as a water bailiff with jurisdiction in that area. His work as such was subject to the direction of the Minister & the govt. water engineer, but the co. relieved the govt. of the payment of the bailiff's statutory remuneration. The co. made this arrangement with the idea that its interests would be advanced thereby. It was while he was performing his duties as bailiff in said area that the accident occurred:—*Held*: the appeal should be allowed, on the ground that *G.* was not engaged on the co.'s business at the time of the accident.—*OFFERDAHL v. OKANAGAN CENTRE IRRIGATION & POWER CO., LTD.*, [1937] 3 W. W. R. 130; 4 D. L. R. 405; 52 B. C. R. 23.—CAN.

PART IX. SECT. 3, SUB-SECT. 13.—B. (a).

1083 XII. —.] — *A bank is liable for the negligent operation of a car by an employee using the car to transfer funds of the bank, when there is neither prohibition relating to the car, nor authority for its use.*—*BANQUE PROVINCIAL v. RICCIARDI*, [1935] 4 D. L. R. 699.—CAN.

1083 XIII. —.] — *The female pltf. was injured by being struck by a motor car driven by deft. H., a salesman employed by deft. oil distributing co. The accident, which was found to have been due to his negligence, occurred when he was driving to his home in New Westminster after attend-*

*ing an evening lecture for salesmen at the co.'s head office in Vancouver. He had no specified hours for work, but had a roving commission to sell the co.'s products in a wide area tributary to New Westminster. He was on a salary & used his own car, but the cost of its operation was borne by the co. whether it was being used for co. or private purposes. Under his contract he was obliged to attend upon business, including salesmen's lectures, at the co.'s head office. He had no office, in the ordinary meaning of the word, in his district. The co.'s head office was not his headquarters or his working office, except that he attended there for said lectures & to receive memos of instructions, etc. He worked from his home & picked up telephone or mail orders at a gasoline station in New Westminster. It was his duty to solicit orders from customers on his road home & he might on arriving home go out again that evening to solicit business:—Held*: *H.*'s home was his business headquarters & the co.'s sales headquarters in his district, & therefore, & because of the terms of his employment, the accident occurred in the course of his employment.—*DALLAS v. HINTON & HOME OIL DISTRIBUTORS, LTD.*, [1937] 1 W. W. R. 350; 51 B. C. R. 327; on appeal, [1937] 3 W. W. R. 145; 4 D. L. R. 260; 7 F. L. J. (Can.) 195.—CAN.

1083 XIV. —.] — *A garage owner is liable for the negligence of a garage mechanic driving out a customer's car to test it & causing injuries to the customer riding therein.*—*KOOS v. McVEY*, [1937] 2 D. L. R. 496; O. R. 369.—CAN.

1086 II. —.] — *Where a servant owns an automobile which, by arrangement with his master, he uses in the ordinary course of his employment by the master, & while it is being so used & driven by the servant the automobile causes the death of a person, the master will be liable in damages to the estate of such person, if the death be caused by the negligence of the servant.*—*DRULAK v. HARVEY & GENERAL STEEL WARES, LTD.*, [1935] 3 W. W. R. 65; 43 Man. L. R. 335.—CAN.

PART IX. SECT. 3, SUB-SECT. 13.—B. (b).

1090 III. —.] — *When where an employer is sought to be held liable for the negligence of a servant, e.g. one employed to drive a motor car, the question arises whether the accident occurred while the driver was in the*

1093. *Add. Annotations* :—*Distd. Britt v. Galmoye & Nevill* (1928), 44 T. L. R. 294. *Refd. Aitchison v. Page Motors, Ltd.* (1935), 154 L. T. 128.

1094. *Add. Annotation* :—*Consd. Aitchison v. Page Motors, Ltd.* (1935), 154 L. T. 128.

1095a. —.]—Pltf. sent her car for repair to the garage of defts., who were motor dealers & garage proprietors, & thereby defts. became bailees of the car for reward. By arrangement with pltf. defts. sent the car to the manufacturers' works for repair, & when the repairs were completed their service manager at the garage went to fetch it back. He signed a delivery book at the works & drove the car away, but, instead of driving it to defts.' garage, drove it off elsewhere & the same night collided with an omnibus, with the result that the car was wrecked beyond repair & the service manager himself killed. Pltfs. claimed damages from defts. for loss of the car :—*Held* : (1) although it was no part of his ordinary duties, the service manager had actual authority to take delivery of cars belonging to defts., if he thought fit to do so, provided it did not interfere with the performance of his duties at the garage; (2) it was in the course of the service man-

ager's employment to fetch the car from the works, & defts. were answerable for the manner in which he conducted himself in performing that service. Pltf. was, accordingly, entitled to recover, despite the fact that it was a breach of duty on the part of the manager to use the car as he did for a private purpose unconnected with defts.' business.—*AITCHISON v. PAGE MOTORS, LTD.* (1935), 154 L. T. 128; 52 T. L. R. 137.

1100. *Add. Annotation* :—*Consd. Aitchison v. Page Motors, Ltd.* (1935), 154 L. T. 128.

1100a. —.]—A., who had B. in his employment as a van-driver, lent him his private motor car, after the day's work was finished, to take friends to a theatre. B. by his negligent driving injured pltf. :—*Held* : as the journey was not on the master's business & the master was not in control, he was not liable for his servant's act.—*BRITT v. GALMOYE & NEVILL* (1928), 44 T. L. R. 294; 72 Sol. Jo. 122.

1112. *Add. Annotation* :—*Consd. Haynes v. Harwood*, [1935] 1 K. B. 146.

1132. *Add. Annotation* :—*Refd. Collingwood v. Home & Colonial Stores, Ltd.*, [1936] 3 All E. R. 200.

course of his employment, the master should be held liable unless the proper finding is that at the time of the accident the servant was on an independent & separate journey of his own; in other words, the master is liable even if the proper finding is that the servant was doing something appertaining to the course of his employment, even if at the same time he may also have been carrying out a purpose of his own.—*WEST & WEST v. MACDONALD'S CONSOLIDATED, LTD., & MALCOLM*, [1931] 2 W. W. R. 657; 3 D. L. R. 812.—*CAN.*

1090 iv. —.]—*BATTISTONI v. THOMAS*, [1932] S. C. R. 144; 1 D. L. R. 877.—*CAN.*

1090 v. —.]—*JARVIS v. SOUTHARD MOTORS, LTD.*, [1931] 2 W. W. R. 812; *affd.*, [1932] 2 W. W. R. 221; 2 D. L. R. 218; 45 B. O. R. 144.—*CAN.*

PART IX. SECT. 3, SUB-SECT. 13.—  
B. (e).

1096 iv. —.]—*BOYD v. SMITH*, [1931] 3 D. L. R. 748; O. R. 361.—*CAN.*

1096 v. —.]—Pltf. was injured by being struck by a bicycle ridden by deft. P. P. had been sent by his employer, deft. B. O. District Telegraph & Delivery Co., Ltd., to deliver a parcel & it was his duty to take back to his employer's office, within a reasonable time, a receipt as proof of its delivery. On returning from the errand but before completing it by turning in the receipt he telephoned the proper official of his employer for permission, which was given him, to go home for lunch at that time. It was while then going home that the accident occurred. The accident was found to have been due to his negligence, & judgment was given against both him & the employer. On appeal :—*Held* : the employer was not responsible for P.'s negligence at the time in question.—*GIBSON v. BRITISH COLUMBIA DISTRICT TELEGRAPH & DELIVERY CO., LTD. & PETTIPiece*, [1936] 3 W. W. R. 241; 4 D. L. R. 582; 50 B. C. R. 494.—*CAN.*

PART IX. SECT. 3, SUB-SECT. 13.—  
B. (e).

1111 i. *Servant*.—In the absence of authority to the driver of a vehicle to

entrust another employee with the duty of driving it, the owner is not responsible for the negligence of the substituted driver.—*TUDHOPE v. HENDERSON, HENDERSON v. TUDHOPE*, [1930] 3 D. L. R. 245; 65 O. L. R. 238.—*CAN.*

1115 iii. —.]—Applt. employed a man to take his horse from his business premises to a paddock. Without the authority of applt., the man entrusted this duty to a young boy, who rode the horse so recklessly that resp. was knocked down & injured :—*Held* : applt. was not liable.—*THOMSON v. HAMILTON*, [1927] N. Z. L. R. 11.—*N.Z.*

1115 iv. —.]—The fact that an employee in charge of a motor car belonging to his employer permits in violation of his instructions, another person to drive the car, does not necessarily relieve the employer from liability for injuries resulting from the negligence of such other person.—*KUPROSKI v. NORTH STAR OIL CO., LTD.*, [1934] 2 W. W. R. 7; 3 D. L. R. 450; *affd.*, *sub nom.* *GILLESPIE GRAIN CO., LTD. v. KUPROSKI & NORTH STAR OIL CO., LTD., HART, COLBY & WILKIE*, [1935] S. C. R. 13; 1 D. L. R. 81.—*CAN.*

PART IX. SECT. 3, SUB-SECT. 13.—  
B. (f).

sw. *Servant towing plaintiff's car.*—Deft.'s motor service truck with pltf.'s car in tow collided with a motor car coming in the opposite direction with the result that pltf. was injured. Pltf.'s car was not under its own power but its steering was controlled by pltf., its sole occupant. Pltf. had hired the service truck & its driver for towing purposes, deft. making a charge therefor. The driver of the service truck was found to have been negligent :—*Held* : he was driving the truck as the servant or agent of deft.—*POINTER v. KENN'S SERVICE GARAGE, LTD.*, [1935] 2 W. W. R. 625.—*CAN.*

sz. *Bank messenger*.—Not in permanent employment of bank.—The manager of a branch of deft. bank had at intervals during three years employed deft. G. when it was necessary to send messengers by motor car to the bank's main office in Winnipeg for cash for use in the branch. In per-

forming the service G. used his own car & drove it himself. He had no licence to run a taxi or to do commercial work with his car. After having been so called upon & while returning with cash from the main office to the branch accompanied by two members of the bank staff, G. negligently injured pltf. :—*Held* : G. was a servant of the bank at the time of the accident.—*TULLY v. GENEVEY & BANK OF TORONTO*, [1938] 2 W. W. R. 397.—*CAN.*

PART IX. SECT. 3, SUB-SECT. 13.—C.

1135 ii. —.]—Pltfs. occupied premises in a building directly below those of the defts. They closed their premises at 1 p.m. on Saturday & they remained closed until Monday morning, when they were found to be flooded by water from the defts.' upstairs shop. The water had run from an open tap which was at the base of a hot-water tank. On Saturday afternoon & evening city officials had cut off the water supply from the building for several hours. During the time the water was off some person turned the tap on the hot-water tank & left it open. Saturday afternoon was a holiday for defts.' general staff, but two of their employees had returned to do some unpacking of stock. They were alone except for a few minutes when the caretaker of the building came in & spoke to them. The judge came to the conclusion that finding no water available in the wash-basin for washing their hands they tried to draw it from the hot-water tank & that one of them had left the tap of it open :—*Held* : the employees' leaving of the tap open was negligence within the scope of their employment & defts. were liable.—*BISHOP PRINTING CO., LTD. v. ONTARIO BEAUTY SUPPLY CO., LTD.*, [1934] 2 W. W. R. 289; 3 D. L. R. 510; 42 Man. L. R. 129.—*CAN.*

PART IX. SECT. 3, SUB-SECT. 13.—E.

sj. *Negligence in effecting arrest.*—Where a co. has statutory power to employ &, practically, to appoint constables, & a constable so appointed acts negligently in attempting to effect an arrest in the course of his employment by the co., he renders the co. liable for the damage caused thereby.—*VIGNITCH v. BOND*, [1928] 1 W. W. R. 449; 50 Can. Crim. Cas. 273; 37 Man. L. R. 435.—*CAN.*

- 1138. Add. Annotations:—***Consd. Haynes v. Harwood*, [1935] 1 K. B. 146. *Refd. Donovan v. Union Cartage Co.* (1932), 49 T. L. R. 125.
- 1143. Add. Annotations:—***Consd. Williams v. Larsen* (1928), 21 B. W. C. O. 339; *Templeton v. Parkin Wm. & Co.* (1929), 140 L. T. 519.
- 1145a. —**—*THE ENTERPRISE, STRONG v. TAYLOR* (1853), 9 L. T. 302.
- 1149. Add. Annotation:—***Consd. Fisher v. Oldham Corp.*, [1930] 2 K. B. 364.
- 1150. Add. Annotation:—***Refd. Purkis v. Walthamstow Borough Council* (1934), 151 L. T. 30.
- 1172a. Assault.**—*DAVIES v. SHANLY (M. W.) (PARK CHAIRS NO. 1), LTD.* (1936), 81 Sol. Jo. 59.
- 1173a. —**—*R. v. LEVER*, No. 970a, *ante*.
- 1178. Add. Annotation:—***Consd. Allen v. Whitehead* (1929), 45 T. L. R. 655.
- 1190. Add. Annotation:—***Consd. Jones v. Mighall, Nelson v. Mighall* (1932), 48 T. L. R. 636.
- 1202. Add. Annotation:—***Consd. Abercromby v. Morris* (1932), 48 T. L. R. 635.
- 1214. Add. Annotation:—***Refd. Flower v. Prechtel* (1934), 150 L. T. 491.
- 1231. Add. Annotations:—***Refd. Silverman v. Imperial London Hotels* (1927), 137 L. T. 57; *Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401; *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 336; *Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546; *Skilton v. Epsom & Ewell Urban District Council*, [1937] 1 K. B. 112.
- 1234. Add. Annotations:—***Refd. Brooke v. Bool*, [1928] 2 K. B. 578; *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.
- 1239. Add. Annotations:—***Refd. Dryden v. Surrey County Council & Stewart*, [1936] 2 All E. R. 535; *Re Frost*, [1936] 2 All E. R. 182; *Lindsey County Council v. Marshall*, [1937] A. C.
- 97; *Wardell v. Kent County Council*, [1938] 3 All E. R. 473.
- 1240. Add. Annotations:—***Consd. Fisher v. Oldham Corp.*, [1930] 2 K. B. 364; *Strangeways-Lesmere v. Clayton*, [1936] 1 All E. R. 484; *Lindsey County Council v. Marshall*, [1936] 2 All E. R. 1076. *Dlstd. Wardell v. Kent County Council*, [1938] 3 All E. R. 473. *Refd. Dryden v. Surrey County Council & Stewart*, [1936] 2 All E. R. 535.
- 1243. Add. Annotation:—***Refd. Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.
- 1255. Add. Annotations:—***Refd. Brooke v. Bool*, [1928] 2 K. B. 578; *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191; *North-western Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A. C. 108.
- 1262. Add. Annotation:—***Refd. McAlister (or Donoghue) v. Stevenson* (1932), 48 T. L. R. 494.
- 1263. Add. Annotation:—***Refd. Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.
- 1264. Add. Annotations:—***Refd. Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191; *Flower v. Prechtel* (1934), 150 L. T. 491; *Daniel v. Rickett Cockerell & Co.*, [1938] 2 K. B. 322.
- 1266. Add. Annotations:—***Consd. Matania v. National Provincial Bank, Ltd. & Elevenist Syndicate, Ltd.*, [1936] 2 All E. R. 633. *Refd. Brooke v. Bool*, [1928] 2 K. B. 578; *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.
- 1267. Add. Annotations:—***Consd. Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159. *Refd. Oceanic Steam Navigation Co. v. Evans* (1934), 51 T. L. R. 67.

**sk. Operation of snow-plough—Accident to person on toboggan.**—*Deft. co. owned land & operated for hire to the public a toboggan slide. A member of the public was injured by running into a servant of the co. who was clearing off snow with a snow plough:—Held: the co. was liable for the negligence of the servant.*—*PARKINSON v. ST. JOHN HORTICULTURE ASSOC.* (1932), 5 M. P. R. 89.—*CAN.*

**sm. Molasses spilled on step.**—*Liability of master for negligence of servant in spilling molasses on steps whereby pltf. injured.*—*NEAL v. LEVITSON*, [1933] 3 D. L. R. 800; 7 M. P. R. 152.—*CAN.*

#### PART IX. SECT. 3, SUB-SECT. 19.

**sp. Assault.**—*The owner of a race horse is liable for an assault by his stableman upon a former trainer of the horse.*—*BAILEY v. MCNEILL*, [1935] 4 D. L. R. 97.—*CAN.*

#### PART IX. SECT. 6, SUB-SECT. 2.—A.

**1216 viii. —**—*Defts., a railway co., being authorised to construct a line of railway, entered into a contract with A. for that purpose. The contractors, in order to get ballast to complete the road, laid down a track across pltf.'s land, leading to a gravel pit, & used it for the transportation of gravel to the railway.—Held: defts. were not liable for the acts of the contractors, the trespass having been*

*committed without their authority, & being merely collateral to the work which they had agreed with A. to perform.*—*PAYNE v. FREDERICTON RY. CO.* (1871), (1825-1897) N. B. Dig. 753.—*CAN.*

**1216 ix. —**—*—BALCOVSKE v. STANLEY THEATRE CO., LTD.* (1934), 48 B. C. R. 433.—*CAN.*

**1240 i. —**—*—NYBERG v. PROVOST MUNICIPAL HOSPITAL BOARD*, [1927] 1 D. L. R. 969; S. C. R. 226.—*CAN.*

#### PART IX. SECT. 6, SUB-SECT. 2.—B. (c) i.

**1257 iv. —**—*—In consideration of a sum paid by pltf. to deft. co. the latter agreed to instruct pltf. in Diesel engineering including instructions in acetylene welding, part of the full fee being charged for the latter course. Deft. agreed to pay the N. M. "co., a partnership, for providing the acetylene welding instructions in said co.'s premises. While taking such instructions from the N. M. co. pltf. was injured through the negligence of one of its partners.—Held: whether or not the N. M. co. was the servant of deft. co. or an independent contractor, deft. co. was liable.*—*SANFORD v. HEMPHILL DIESEL ENGINEERING SCHOOLS, LTD.*, [1937] 1 W. W. R. 220.—*CAN.*

**1257 v. —**—*—Deft., who owned a building adjoining a public road, engaged an independent contractor to demolish such building.*

*Neither deft. nor the contractor took any precautions for the safety of the public using the road & in the course of the demolition a wall collapsed, fell upon pltf.'s husband who was using the road & killed him:—Held: the liability of deft. depended upon the question whether the demolition was a dangerous operation in the sense that public safety was imperilled by it unless precautions were taken to obviate that peril.*—*DUKES v. MARTINSEN*, [1937] A. D. 12.—*S. AF.*

**1266 i. Fire spreading to adjoining land—Contract to cut & burn bush.**—*NATIONAL TRUST CO., LTD. v. HANSON*, [1930] 1 W. W. R. 966; 3 D. L. R. 149.—*CAN.*

**1266 ii. —**—*—ROUSSEAU v. LYNCH & FOURNIER*, [1931] 4 D. L. R. 595; 3 M. P. R. 355.—*CAN.*

**1266 iii. Fire spreading to adjoining land—Contractor lighting fire during prohibited period.**—*Appl. employed an independent contractor to fumigate rabbits on his land; in the course of doing so, the independent contractor, during a prohibited season of the year, lit a fire, which was a usual & ordinary method used in the fumigation & destruction of rabbits. The fire spread to & on the neighbours' land & there caused damage.—Held: the employer of the independent contractor was liable for the damage thus caused.*—*MCINNIS v. WARDLE* (1932), 45 C. L. R. 648; [1932] *Argus* L. R. 230.—*AUS.*



**1268a. Taking flashlight photographs in theatre.]**

—Where a person employs an independent contractor to do work which involves special danger to another's premises, he must take reasonable precautions to see that the work does not cause damage to the premises. Where, therefore, pltf's. had procured defts., as independent contractors, to take photographs of the interior of a cinematograph theatre, & owing to defts.' negligence the premises were damaged by fire:—*Held*: pltf's. were liable to the owners of the theatre for the damage caused by the negligence of defts., & therefore were entitled to recover damages from defts. for breach of contract or negligence in taking the photographs.—*HONEYWILL & STEIN, LTD. v. LARKIN BROS. (LONDON'S COMMERCIAL PHOTOGRAPHERS), LTD.*, [1934] 1 K. B. 191; 103 L. J. K. B. 74; 150 L. T. 71; 50 T. L. R. 56, C. A.

*Annotations*:—*Consd. Matania v. National Provincial Bank, Ltd. & Elevenist Syndicate, Ltd.*, [1936] 2 All E. R. 633. *Refd. Russell v. Criterion Film Productions, Ltd.*, [1936] 3 All E. R. 627.

**1271. Add. Annotations**:—*Consd. Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191. *Refd. Brooke v. Bool*, [1928] 2 K. B. 578; *Morgan v. Incorporated Central Council of the Girl's Friendly Society*, [1936] 1 All E. R. 404.

**1274. Add. Annotations**:—*Consd. Reigate Corp'n. v. Surrey County Council*, [1928] Ch. 359. *Refd. Cunard v. Antifyre, Ltd.* (1932), 49 T. L. R. 184; *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.

**1275. Add. Annotations**:—*Consd. Matania v. National Provincial Bank, Ltd. & Elevenist Syndicate, Ltd.*, [1936] 2 All E. R. 633. *Refd. Brooke v. Bool*, [1928] 2 K. B. 578; *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.

**1276. Add. Annotations**:—*Consd. Matania v. National Provincial Bank, Ltd. & Elevenist Syndicate, Ltd.*, [1936] 2 All E. R. 633. *Refd. Brooke v. Bool*, [1928] 2 K. B. 578; *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.

**1278a. Alteration to upper floor—Nuisance to tenant of lower floor.**—In 1925 the whole of

certain premises were demised to deft. bank with a restriction against alteration without the consent of the lessor. In 1933 the bank demised the second & third floors of the premises to pltf. with the usual covenant for quiet enjoyment & to perform & observe the covenants in the head lease. In 1934 defts., the Elevenist Syndicate, wished to take the first floor of the building & for this purpose extensive alterations were necessary. The bank obtained the consent of the head lessor to the alterations subject to the consent being obtained of all the sub-lessees, & the bank subsequently gave a similar consent subject to the same terms & conditions. Pltf.'s consent was never obtained. The Elevenist Syndicate, however, proceeded to instruct contractors to carry out the alterations, & no proper precautions being taken, pltf. suffered damage by reason of the dust & noise caused by such building operations. Pltf. brought an action for damages for breach of the covenant for quiet enjoyment, nuisance & trespass:—*Held*: as the consent to the alterations being carried out was subject to pltf.'s consent being obtained, & this was never obtained, the position was that there was no proper consent to the alterations being effected; the bank's consent being subject to the consent of pltf., which was not obtained by the Elevenist Syndicate, there was no breach of the covenant for quiet enjoyment & no derogation from the grant; although the Elevenist Syndicate had employed independent contractors, they were liable in damages for nuisance since the work to be done in its very nature involved a risk of damage being done to pltf.; as the bank had covenanted with pltf. that it would observe all the covenants of the head lease & were in default upon this covenant, the appeal must be allowed without costs.—*MATANIA v. NATIONAL PROVINCIAL BANK, LTD. & ELEVENIST SYNDICATE, LTD.*, [1936] 2 All E. R. 633; 106 L. J. K. B. 113; 155 L. T. 74; 80 Sol. Jo. 532, C. A.

**1296. Add. Annotations**:—*Consd. Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546; *Myers (G. H.) & Co. v. Brent Cross Service Co.*, [1934] 1 K. B. 46. *Refd. McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119.

## Part X.—Rights of Master against Third Persons.

**1306. Add. Annotation**:—*Overd. Wessex Dairies, Ltd. v. Smith*, [1935] 2 K. B. 80.

**1306a.** —]—*v. PRIE* (1373), Y. B. 47 Edw. 3, fo. 14, pl. 15.

*Annotation*:—*Consd. Lumley v. Gye* (1853), 2 E. & B. 216.

**1306b.** —]—*ANON.* (1469), Y. B. 9 Edw. 4, fo. 31, pl. 4.

**1306c.** —]—*ADAMS & BAFFALDS CASE* (1591), 1 Leon. 240; 74 E. R. 219.

*Annotation*:—*Consd. Lumley v. Gye* (1853), 2 E. & B. 216.

**1307. Add. Annotations**:—*Refd. Scammell G. & Nephew v. Hurley*, [1929] 1 K. B. 419; *Place v. Seale* (1932), 101 L. J. K. B. 465; *Re Simms, Ex p. Trustee*, [1934] Ch. 1; *De*

### PART IX. SECT. 6. SUB-SECT. 2.— B. (a) II.

*sk. Duty to give warning of danger.*—Persons lawfully doing a work which interferes with a public right, e.g. contractors working on a highway, must use reasonable care not to injure persons lawfully exercising that right,

&, therefore, must take reasonable precautions to warn such persons of dangers created by the doing of the work which the latter could not with reasonable care discover.—*McCulloch v. STAR CONSTRUCTION CO.*, [1928] 1 D. L. R. 970; [1928] 1 W. W. R. 211; 22 Saak. L. R. 231.—*CAN.*

### PART IX. SECT. 3.

*sg. Liable with sub-contractor.*—Where right of occupancy.—A principal contractor is liable equally with his sub-contractor for damages caused by vibration, if he has some right of occupancy of the land.—*AIKMAN v. NULLE & Co.*, [1934] 4 D. L. R. 264; O. R. 597.—*CAN.*

Jetley Marks v. Greenwood, [1936] 1 All E. R. 863; McManus v. Bowes, [1937] 3 All E. R. 227.

1313. *Add. Annotation*.—*Refd.* De Stempel v. Dunkels, [1938] 1 All E. R. 238.

1315. *Add. Annotations*.—*Refd.* Place v. Searle, [1932] 2 K. B. 497; A.-G. v. Valle-Jones, [1935] 2 K. B. 209.

1320. *Add. Annotations*.—*Refd.* Hardie & Lane v. Chilton, [1928] 2 K. B. 306; *Re* Simms, *Ex p.* Trustee, [1934] Ch. 1; De Jetley Marks v. Greenwood, [1936] 1 All E. R. 863; Thorne v. Motor Trade Assocn., [1937] 3 All E. R. 157; De Stempel v. Dunkels, [1938] 1 All E. R. 238.

1322. *Add. Annotations*.—*Refd.* Place v. Searle, [1932] 2 K. B. 497; De Jetley Marks v. Greenwood, [1936] 1 All E. R. 863.

1377. *Add. Annotation*.—*Consd.* Beetham v. James, [1937] 1 K. B. 527.

1378a. — *Father & mother unmarried.*—The foundation of an action for seduction is not the relationship of parent & child but that of master & servant, & the right of a putative father to sue for damages for the seduction of his daughter is not affected by the fact that he is not married to the girl's mother, if at the time of the seduction the girl is living, & performing services to him, in the household which he maintains & of which he is the head & master.—*BEETHAM v. JAMES*, [1937] 1 K. B. 527; [1937] 1 All E. R. 580; 106 L. J. K. B. 363; 156 L. T. 244; 53 T. L. R. 364; 81 Sol. Jo. 201.

1456a. — *Action by Crown.*—As the result of a collision between a motor lorry belonging to deft. & a motor cycle, which was caused by the negligence of deft.'s driver, two aircraftsmen of the Royal Air Force who were riding on the motor cycle sustained injuries which rendered them for a time incapable of service. The men recovered damages against deft. in which no sum was included for loss of wages or rations or for medical expenses, because their wages & rations had been continued

during their incapacity & they had received treatment in a Royal Air Force hospital. On a Crown information against the deft. in that behalf:—*Held*: the Crown was entitled to maintain a claim against deft. for loss of service of the men by the tortious act of his driver, & to recover any damage which it had thereby suffered; the measure of that damage was the amount of the wages & rations of the men during their incapacity & of the expenses of their hospital treatment, the amount of which payments, allowances & expenses, if they had not been borne by the Crown, could have been recovered by the men from deft. as damages.—*A.-G. v. VALLE-JONES*, [1935] 2 K. B. 209; 104 L. J. K. B. 358; 152 L. T. 513; 51 T. L. R. 239; 79 Sol. Jo. 126.

1470. *Add. Annotation*.—*Refd.* A.-G. v. Valle-Jones, [1935] 2 K. B. 209.

1478. *Add. Annotations*.—*Consd.* Rose v. Ford, [1937] 3 All E. R. 359. *Refd.* Flint v. Lovell, [1935] 1 K. B. 354; Grein v. Imperial Airways, Ltd., [1937] 1 K. B. 50.

1479. *Add. Annotation*.—*Expld.* Flint v. Lovell, [1935] 1 K. B. 354.

1480. *Add. Annotation*.—*As to* (1) *Refd.* Rose v. Ford, [1937] 3 All E. R. 359.

1488. *Add. Annotation*.—*Refd.* Cammell, Laird & Co. v. Manganese Bronze & Brass Co., [1933] 2 K. B. 141.

1489. *Add. Annotations*.—*Consd.* Flint v. Lovell, [1935] 1 K. B. 354. *Refd.* The Edison, [1932] P. 52; A.-G. v. Valle-Jones, [1935] 2 K. B. 209; Grein v. Imperial Airways, Ltd., [1937] 1 K. B. 50; Rose v. Ford, [1937] 3 All E. R. 359.

1490. *Add. Annotation*.—*Expld. & Distd.* Fisher v. Oldham Corpn., [1930] 2 K. B. 364.

1490a. *Pay & allowances.*—*A.-G. v. VALLE-JONES*, No. 1456a, *ante*.

1490b. *Cost of hospital treatment.*—*A.-G. v. VALLE-JONES*, No. 1456a, *ante*.

## PART X. SECT. 2, SUB-SECT. 1.—A.

b i. — *Not in absence of enticement or promise.*—An action for seduction does not lie where the intercourse did not result from enticement or promises on the part of deft.—*CLINE v. BATTLE*, [1928] 4 D. L. R. 189; [1928] 3 W. W. R. 11.—*CAN.*

b ii. — *Pregnancy following second seduction.*—The fact that a man has seduced an unmarried female without resulting damage does not preclude her from succeeding in an action brought under sect. 5 of Seduction Act, R. S. S., 1930, where his subsequent seduction of her is followed by pregnancy or illness & consequent loss.—*BILINSKI v. KOWRELL*, [1931] 2 W. W. R. 245; 4 D. L. R. 756; 25 S. L. R. 223; 57 C. C. C. 244; *aff.*, [1930] 3 W. W. R. 638.—*CAN.*

am. *Statutory right of action—Necessity for damage.*—In an action by a father for the seduction of his daughter the nature of the action at common law as one in which damage is the basis of the action has not been changed by Seduction Act, R.S.A., 1922; & therefore, unless loss of service or of ability to serve has resulted from the seduction there is no cause of action.—*MACMILLAN & MACMILLAN v. BROWNLEE*, [1935] 1 W. W. R. 199; 1 D. L. R. 481; *revers.*, [1937] 2 D. L. R.

273; S. C. R. 318; 68 Can. C. C. 7.—*CAN.*

## PART X. SECT. 2, SUB-SECT. 1.—B.

1344 viii. —. —In Jan. 1924, pltf.'s daughter, who was then 16 years of age, went into the service of O'L. The terms of the hiring were not proved, but appeared to be for about 11 months, from Jan. till Christmas, as she continued in O'L.'s service till the end of 1924, & re-entered it in Jan. 1925. During the year 1925 she made the acquaintance of deft., & became on friendly terms with him. About Christmas, 1925, she told deft. that she was not going back to O'L. the following year, but would look for another place. Deft. induced her to re-engage with O'L. During the year 1926 immoral relations took place between her & deft. Towards the end of 1926 she told deft. that she was not going back to O'L. the following year; but again, at the request of deft., she re-engaged with O'L. in Jan. 1927, for that year. Misconduct took place between them again in that year, 1927, & she became pregnant in Nov. 1927. She remained in O'L.'s employment until Jan. 1928, & then took service with other people. She subsequently went into the Union Hospital, where she gave birth to a child on Aug. 5, 1928. Pltf. brought a civil bill against

deft., claiming damages for his daughter's seduction by deft., & also for fraudulently inducing her to enter into the service of O'L. In the years 1926 & 1927 for the purpose of seducing her, with allegations of consequent pregnancy & loss of service. The Circuit Ct. judge dismissed the civil bill. Pltf. appealed to the High Ct.:—*Held*: by the High Ct., & on appeal, by the Supreme Ct., that the decision of the Circuit Ct. judge was correct, as at the time of the seduction pltf.'s daughter was in the service of O'L. & not that of pltf., & the fact that she was under age was immaterial. Deft. was not estopped from relying upon the existence of the contract of service made between pltf.'s daughter & O'L., although he, deft., had induced her to enter into it in order that he might carry on the illicit intercourse which had commenced in the previous year.—*SHINE v. ARCHDEACON*, [1931] 1 R. 466.—*IR.*

## PART X. SECT. 2, SUB-SECT. 3.—A. (a).

1373 v. —. —A mother may maintain an action for seduction at common law of her married daughter who is acting as her servant, although the seduction took place in the father's lifetime.—*OAKES v. HINDMAN*, [1934] 4 D. L. R. 190; O. R. 642; 62 C. C. C. 299.—*CAN.*

## Part XI.—Liabilities of the Servant to Third Persons.

1505. *Add. Annotation* :—**Consd.** *Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364.
1513. *Add. Annotation* :—**Consd.** *Scammell G. & Nephew v. Hurley*, [1929] 1 K. B. 419.
1525. *Add. Annotation* :—**Consd.** *Leitch (William) & Co. v. Leydon, Barr (A. G.) & Co. v. Macgeoghegan* (1930), 47 T. L. R. 81.
1539. *Add. Citation* :—*sub nom.* *MARKWETH v. REYNOLDS & WESTWOOD*, 2 Barn. K. B. 327.

## Part XII.—Rights of the Servant against Third Persons.

1549. *Add. Annotation* :—**Distd.** *Pharmaceutical Society Council of Great Britain v. Fuller* (1932), 96 J. P. 422.
1553. *Add. Annotations* :—**Refd.** *Hardie & Lane v. Chilton*, [1928] 2 K. B. 306; *Hampton v. West Cannock Colliery Co.*, [1932] 2 K. B. 293; *Place v. Searle*, [1932] 2 K. B. 497; *Thorne v. Motor Trade Assocn.*, [1937] 3 All E. R. 157.
1556. *Add. Annotation* :—**Refd.** *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
1564. *Add. Annotations* :—**Refd.** *Bottomley v. Bannister*, [1932] 1 K. B. 458; *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119; *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.
1565. *Add. Annotations* :—**Consd.** *Silverman v. Imperial London Hotels* (1927), 137 L. T. 57; *Forbes, Abbott & Lennard v. G. W. Ry.* (1927), 138 L. T. 286. **Apld.** *Compania Mexicana de Petroleo "El Aguila" v. Essex Transport & Trading Co.* (1929), 141 L. T. 106. **Consd.** *The Hayle*, [1929] P. 275. **Refd.** *Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776; *Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546; *Hillen v. I. C. I. (Alkali), Ltd.*, [1934] 1 K. B. 455; *Knott v. London County Council*, [1934] 1 K. B. 126; *Marshall v. Lindsey County Council*, [1935] 1 K. B. 516; *Weigall v. Westminster Hospital*, [1936] 1 All E. R. 232.
1567. *Add. Annotations* :—**Consd.** *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46; *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. **Refd.** *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.
1569. *Add. Annotations* :—**Consd.** *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46. **Refd.** *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.
1570. *Add. Annotations* :—**Consd.** *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46; *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119; *Cunard v. Antifyre, Ltd.* (1932), 49 T. L. R. 184. **Refd.** *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606; *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781; *Parker v. Oloxo, Ltd. & Senior*, [1937] 3 All E. R. 524.
1571. *Add. Annotations* :—**Consd.** *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. **Refd.** *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.
1572. *Add. Annotation* :—**Refd.** *Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776.
1579. *Add. Annotation* :—**Refd.** *Halliwell v. Venables* (1930), 99 L. J. K. B. 353.

## Part XIII.—Liability of Master in Case of Accident or Death.

1583. *Add. Annotation* :—*As to* (1) **Refd.** *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.
1586. *Add. Annotations* :—*As to* (1) **Consd.** *Wilsons & Clyde Coal Co. v. English*, [1938] A. C. 57. **Refd.** *Fanton v. Denville*, [1932] 2 K. B. 309.

### PART XI. SECT. 2, SUB-SECT. 2.

1508 II. —.]—ANANTAPUR DISTRICT BOARD (PRESIDENT) *v.* ISMAIL SAHIB (1927), 1 L. R. 51 Mad. 512.—IND.

### PART XI. SECT. 2, SUB-SECT. 5.

sk. *Effect of order under Child Welfare Act.*—BILINSKI *v.* KOWBELL, [1930] 3 W. W. R. 638; *affd.*, [1931] 2 W. W. R. 245.—CAN.

### PART XII. SECT. 1.

1553 III. —.]—Pltf. had been employed by deft. on work for which deft. had the general contract. Deft.

discharged him & pltf. threatened deft. that he would "get even with" him. Pltf. then obtained employment by the hour with a sub-contractor on the same contract. Pltf.'s services could be dispensed with at any time with or without cause. Deft. asked the sub-contractor to discharge pltf., &, because of this request, pltf.'s employment was discontinued by the sub-contractor, although he was satisfied with pltf.'s work. Pltf. sued for damages. The trial judge found that there was justification for deft.'s interference with pltf.'s employment with the sub-contractor, & dismissed the action. Pltf. appealed :—**Held** : the

appeal should be dismissed.—*DRIVERS v. BURNETT*, [1930] 1 W. W. R. 150; 1 D. L. R. 930; 42 B. C. R. 203.—CAN.

### PART XIII. SECT. 1, SUB-SECT. 1.—A.

r i. —.]—Pltf., a brakeman employed by deft. railway co., was injured at or near a coal dock. After the freight train on which pltf. was working had spotted six cars on the siding leading to the dock, pltf. alighted, backwards, from the ladder on one of the cars to the ground. He stepped to the ground upon his left foot, &, in taking the next step on his right foot, stepped upon a stone &

- 1588. Add. Annotation:—***Refd.* Flower v. Ebbw Vale Steel, Iron & Coal Co., [1934] 2 K. B. 132.
- 1590. Add. Annotations:—***Consd.* Fanton v. Den-ville, [1932] 2 K. B. 309. *Refd.* Knott v. London County Council, [1934] 1 K. B. 126; Wilsons & Clyde Coal Co. v. English, [1937] 3 All E. R. 628.
- 1593. Add. Annotation:—***Consd.* Fanton v. Den-ville, [1932] 2 K. B. 309.
- 1604. Add. Annotation:—***Generally, Refd.* Wilsons & Clyde Coal Co. v. English, [1937] 3 All E. R. 628.
- 1611. Add. Annotation:—***As to (2) Dbtd. & Distd.* Fanton v. Denville, [1932] 2 K. B. 309. (Nor can I find in that case any such statement of the law as appears in the headnote, *per* SLESSER, J.) *Generally, Refd.* Wilsons & Clyde Coal Co. v. English, [1937] 3 All E. R. 628.
- 1621. Add. Annotation:—***As to (2) Consd.* Fanton v. Denville, [1932] 2 K. B. 309.
- 1628. Add. Annotation:—***Refd.* Fanton v. Den-ville, [1932] 2 K. B. 309.
- 1646. Add. Annotations:—***Refd.* Higgins v. Harrison (1932), 25 B. W. C. C. 113; Murray v. Schwachman, Ltd., [1937] 2 All E. R. 68.
- 1647. Add. Annotations:—***As to (1) Apld.* Fanton v. Denville, [1932] 2 K. B. 309; Metcalfe v. London Passenger Transport Board, [1938] 2 All E. R. 352. *Refd.* Holloway v. Donald-son Line, Ltd. (1935), 41 Com. Cas. 47; Wilsons & Clyde Coal Co. v. English, [1937] 3 All E. R. 628. *As to (2) Consd.* Wheeler v. New Merton Board Mills, Ltd., [1933] 2 K. B. 669. *Generally, Refd.* Radcliffe v. Ribble Motor Services, Ltd., [1938] 2 K. B. 315.
- 1657. Add. Annotations:—***As to (1) Expld.* Fanton v. Denville, [1932] 2 K. B. 309. *Consd.* Rudd v. Elder Dempster & Co., [1933] 1 K. B. 566. *Refd.* Dew v. United British S.S. Co. (1928), 139 L. T. 628; Chapman v. Ellesmere (1932), 101 L. J. K. B. 376; Wheeler v. New Merton Board Mills, Ltd., [1933] 2 K. B. 669; Olsen v. Corry & Gravesend Aviation, Ltd., [1936] 3 All E. R. 241; Russell v. Criterion Film Productions, Ltd., [1936] 3 All E. R. 627; Wilsons & Clyde Coal Co. v. English, [1937] 3 All E. R. 628.

twisted his ankle. When alighting pltf. was on his way to the engine to complete the switching in the yard. The evidence as to the construction of the siding, as it existed at the time of the accident, showed that it had been permitted to become peculiarly & unnecessarily dangerous:—*Held*: deflt. had failed in its duty to exercise due care to have the place in question in a safe & proper condition so as to protect their employees working upon it against unnecessary dangers.—*LANGLEY v. CANADIAN NATIONAL RAILWAYS*, [1938] 1 W. W. R. 406; 1 D. L. R. 632; 7 F. L. J. (Can.) 291.—*CAN.*

# **PART XIII. SECT. 1, SUB-SECT. 1.—B.**

**1602 v. —**—[*REGAL OIL & REFINING CO., LTD. & REGAL DISTRIBUTORS, LTD. v. CAMPBELL*, [1936] S. C. R. 309; 2 D. L. R. 609.—*CAN.*

**1613 vii. —**—[*Held*: the contract between employer & employed involved on the part of the former the duty of taking reasonable care to provide proper appliances, & to maintain them in a proper condition, & so to carry on his operations as not to subject those employed by him to unnecessary risk.—*HURLEY v. BOYCE*, [1928] 1 D. L. R. 1053; 61 O. L. R. 618.—*CAN.*

**1 (p. 198) i. —**—& give warning of dangerous character of work.—[*TREMBLAY v. PROULX* (Can.), [1929] 3 D. L. R. 469; *affg.*, 43 Que. K. B. 504.—*CAN.*

**a. Permitting servant to act in contravention of by-law—***Liability of master.*—A bye-law of Toronto provided that no vehicle should be driven upon any street in the city in charge of any driver less than sixteen years old.—*Held*: the prohibition of the bye-law was not for the protection of the driver, but for the protection of the public; & the breach of it by the employer of a boy under sixteen, in permitting the boy to drive a horse on public streets, did not give the boy a cause of action against his employer for injury sustained while so driving.—*MILLIGAN v. THORN* (1914), 32 O. L. R. 195; 7 O. W. N. 310.—*CAN.*

**1623 i. Duty to maintain premises—***Free from concealed danger.*—[*Circumstances in which:—Held*: the master was not liable.—*SIGERSETH v. PEDERSEN*, [1927] 2 D. L. R. 651; S. C. R. 342.—*CAN.*

**c (p. 198) i. —**—[For an employer to allow ice & snow to accumulate at a place where its employees are required to go in performing their duties may constitute negligence.—*TRACHE v. CANADIAN NORTHERN RY. CO.*, [1929] 2 D. L. R. 321; 1 W. W. R. 100; 35 C. R. C. 258; 23 S. L. R. 576.—*CAN.*

**st. Provision of defective ladder.**—[*Pltf.*, a shoe salesman employed by deflt., fell from a step-ladder while he was attempting to get a box of shoes for a customer from a shelf in the stock-room. The ladder was found to have been defective. It was an old ladder which had been patched & repaired & had served its purpose in that condition for several years. *Pltf.* could see its condition for himself, but deflt. knew that *pltf.* was afflicted with a rigidity of the back & neck & knew the dangers to which he was subject when using the ladder:—*Held*: deflt. was negligent, & liable for the damages resulting therefrom, but *pltf.*'s general serious physical defects were not attributable to the accident.—*COLLETT v. EATON (T.) CO., LTD.*, [1935] 3 W. W. R. 43.—*CAN.*

# **PART XIII. SECT. 1, SUB-SECT. 1.—D.**

**1624 v. Varied**, 14 D. L. R. 575.

# **PART XIII. SECT. 1, SUB-SECT. 3.—B.**

**1657 iii. —**—[Shipping co. held liable for injuries to cargo supervisor falling from accommodation ladder at wharf insecurely fastened.—*KIRCHNER v. UNITED BRITISH S.S. CO.*, [1936] 2 D. L. R. 336.—*CAN.*

**h i. —**—[*Pltf.*, a chambermaid, after making up a room at the end of a corridor on a Dec. afternoon, left the room, & after taking a few steps, fell over a man lying on the floor, & was injured. The corridor was fairly dark at the time & was not lighted. The man *pltf.* fell over disappeared immediately after the accident. The jury found defts. were negligent in not having the corridor properly lighted:—*Held*: the verdict should not be disturbed.—*BOOTH v. FORD & SHAW* (1927), 38 B. C. R. 279.—*CAN.*

**h ii. —**—[In an action by a farm helper for injuries caused by a bull owned by deflt., *pltf.*'s employer, & kept on a farm which was run by a foreman under deflt.'s instructions:—*Held*: since deflt. knew, or must be because of the foreman's knowledge be

held to have known, of the bull's dangerous disposition & took no precautions to protect his workmen from it, he was liable.—*SHELFONTUCK v. LE PAGE*, [1937] 2 W. W. R. 16; *affd.*, [1938] 1 W. W. R. 193; 1 D. L. R. 513; 45 Man. L. R. 578.—*CAN.*

**sw. Defect in place of employment.**—[*Pltf.*, a waitress' helper employed at a basement lunch counter owned & conducted by deflt. co. in its department store, was injured by slipping on the floor of the passageway between the counter & the kitchen inside the enclosure made by the counter:—*Held*: (1) *pltf.* was not a domestic servant within Workmen's Compensation Act, R.S.B.C., 1924; said part of deflt. co.'s business was not one to which Part I. of Workmen's Compensation Act applied, but one to which Part II. thereof applied; the place of employment & its equipment was part of the ways, buildings & premises connected with & used by deflt. in its business; the floor was to the knowledge of deflt. defective owing to its slippery condition; the defect caused *pltf.*'s injuries; there had been no voluntary assumption of the risk.—*TAYLOR v. HUDSON'S BAY CO.*, [1935] 2 W. W. R. 590; 50 B. C. R. 157.—*CAN.*

# **PART XIII. SECT. 1, SUB-SECT. 3.—C.**

**1658 vii. —**—[*ARMSTRONG v. CANADIAN NORTHERN RY. (Man.)*, [1917] 3 W. W. R. 219; 35 D. L. R. 568.—*CAN.*

# **PART XIII. SECT. 1, SUB-SECT. 3.—D. (a).**

**m i. —**—[*Pltf.*, the manager of deflt.'s farm, was injured while operating deflt.'s tractor-binder, by being caught in a universal joint on a revolving shaft which connected the tractor to the grain binder. The tractor was being used at the time without a platform beneath the driver's seat & over the revolving shaft. *Pltf.* alleged, *inter alia*, that deflt. was negligent in requiring or permitting him to operate the machinery without having a guard over the shaft. *Pltf.*'s testimony was that deflt. told him the wooden platform which was sometimes used on the tractor could not be used when the tractor was connected with the binder because it would be in the way of the lever, & that deflt. took it off the tractor & put it on the trailer.

1665. *Add. Annotation* :—**Refd.** *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.
1673. *Add. Annotation* :—**Refd.** *Fanton v. Denville*, [1932] 2 K. B. 309.
1681. *Add. Annotations* :—*As to* (1) **Consd.** *Fanton v. Denville*, [1932] 2 K. B. 309. *Generally*, **Refd.** *Knott v. London County Council*, [1934] 1 K. B. 126.
1682. *Add. Annotations* :—**Refd.** *Russell v. Criterion Film Productions, Ltd.*, [1936] 3 All E. R. 627; *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.
1683. *Add. Annotation* :—**Consd.** *Fanton v. Denville*, [1932] 2 K. B. 309.
1684. *Add. Annotation* :—**Consd.** *Fanton v. Denville*, [1932] 2 K. B. 309.
1697. *Add. Annotations* :—*As to* (1) **Consd.** *Fanton v. Denville*, [1932] 2 K. B. 309. **Refd.** *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.
1698. *Add. Annotations* :—**Consd.** *Fanton v. Denville*, [1932] 2 K. B. 309. **Refd.** *Rudd v. Elder Dempster & Co.*, [1933] 1 K. B. 566; *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.
1717. *Add. Annotations* :—**Consd.** *Radcliffe v. Ribble Motor Services, Ltd.*, [1938] 2 K. B. 345. **Refd.** *Fanton v. Denville*, [1932] 2 K. B. 309.
1725. *Add. Annotation* :—**Consd.** *Bull v. West African Shipping, etc. Co.*, [1927] A. C. 686.
1726. *Add. Annotations* :—**Refd.** *Fanton v. Denville*, [1932] 2 K. B. 309; *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.
1728. *Add. Annotation* :—*As to* (1) **Refd.** *Fanton v. Denville*, [1932] 2 K. B. 309.
- 1729a. ———. ]—**Pltf.**, a cattleman employed to tend cattle on a steamship of defts. on a voyage from Canada to England, was injured by falling off a ladder leading to the cattle-men's quarters on the steamship. He brought this action against defts. for damages, on the ground that the accident had occurred through the ladder being in an unsafe condition & that its unsafe condition was due to negligence on the part of some member of the crew employed by defts. It appeared that **ptf.** was employed by the owner of the cattle to look after them on the voyage, but he had also signed the ship's articles & was receiving a nominal wage & his food & passage from defts. The judge found as a fact that the ladder at the time of the accident was in an unsafe condition owing to the negligence of some member of the crew of the ship & **ptf.**'s injuries were due to that

negligence, but he also found that, besides being in the employment of the owner of the cattle, pltf. was also in the employment of defts. Pltf.'s injuries were therefore caused by the negligence of a fellow-servant with whom he was in common employment, & the claim must fail.—*HOLLOWAY v. DONALDSON LINE, LTD.* (1935), 41 Com. Cas. 47.

- 1731. Add. Annotations :—***Consd. Fanton v. Denville*, [1932] 2 K. B. 309. **Refd.** *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.
- 1732. Add. Annotation :—***Refd. Bromiley v. Collins*, [1936] 2 All E. R. 1061.
- 1733a. —.**—*OLSEN v. CORRY & GRAVESEND AVIATION, LTD.*, No. 200a, *ante*.
- 1741. Add. Annotation :—***As to (2) Refd. Fanton v. Denville*, [1932] 2 K. B. 309; *Holloway v. Donaldson Line, Ltd.* (1935), 41 Com. Cas. 47.
- 1742. Add. Annotations :—***Consd. Fanton v. Denville*, [1932] 2 K. B. 309. **Distd.** *Olsen v. Corry & Gravesend Aviation, Ltd.*, [1936] 3 All E. R. 241. **Refd.** *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.
- 1747. Add. Annotation :—***As to (1) Expld. Fanton v. Denville*, [1932] 2 K. B. 309.
- 1750. Add. Annotations :—***Consd. Radcliffe v. Ribble Motor Services, Ltd.*, [1938] 2 K. B. 345. **Refd.** *Holloway v. Donaldson Line, Ltd.* (1935), 41 Com. Cas. 47; *Metcalfe v. London Passenger Transport Board*, [1938] 2 All E. R. 352.
- 1753a. Drivers of different coaches.]—**In every contract of service there is implied by law an undertaking by every employee that he accepts the risk of injury by the negligence of his fellow employees engaged in common employment with him. In order to bring a case within the exemption from liability by reason of common employment it is not sufficient merely to show that the negligent employee & the one who is claiming damages based on that negligence were servants of a common master; it must be shown that the men were engaged in the same common work under a common employment. But two men may be in common employment, within the doctrine relating to common employment, even though they are working in different departments of duty. Two employees together carrying out the same or similar orders of their employer in close juxtaposition to one another are engaged in common employment.
- Defts., who were motor-coach proprietors, in accordance with three contracts, supplied

Deft.'s testimony was that he told  
pltf. to put the platform on but that  
the latter said he did not want it.  
Pltf. awarded \$6,000 & costs.—  
WENDEL v. WALL, [1935] 2 W. W. R.  
163.—CAN.

n l. —.]—SIGERSETH v. PEDERSEN,  
No. 1623 l. ante.—CAN.

**sm. Plant let with crew to third party—Plant unfit for required purpose—Owner of plant not informed as to required purpose.]—Held:** the owner was not liable for damages for the death of one of the crew.—**DUBE v. ALGOMA STEEL CORP., LTD.** (1916), 35 O. L. R. 371; 9 O. W. N. 389.—**CAN.**

AM. Amount of damages recoverable.]—

**BELLAMY v. GREEN, [1927] 2 D. L. R. 327; 38 B. C. R. 182.—CAN.**

**PART XIII. SECT. 1, SUB-SECT. 5.—**  
**C. (a).**

1697 xviii. — — —.]—M'EWAN v.  
EDINBURGH & DISTRICT TRAMWAYS  
Co. (1899), 6 S. L. T. 400.—SCOT.

1897 xix. — — —.]—BERGKLINT  
v. WESTERN CANADA POWER CO. (1914),  
50 S. C. R. 39.—CAN.

1897 xx. — — —.]—WESTERN  
CANADA POWER CO. v. BERGELINT  
(1916). 54 S. C. R. 285.—CAN.

1897 xxi. — — —.]—SHARP CON-  
STRUCTION Co. v. BEGIN (1917), 59  
S. C. R. 680.—CAN.

o l. —.])—In Nova Scotia the Crown is entitled to raise the defence of common employment.—**CONROD v. R.** (1913), 14 Exch. C. R. 472.—**CAN.**

**PART XIII. SECT. 1, SUB-SECT. 5.—**  
C. (d) II.

xx. *Master & crew.*—Doctrine of common employment held not to apply between a lashkar member of the crew & the master, where the owners were sued for the negligence of the master in failing to take reasonable & proper care of the lashkar while ill.—*BROCKLEBANK (T. & J.), LTD. v. NOOR ALMODE, I. L. R., [1938] 1 Cal. 216.—IND.*

six motor-coaches to take three parties from Liverpool to New Brighton. The coaches picked up the excursionists at the same place & at the same time, took them to the Cathedral & waited until the three parties of excursionists had resumed their seats. The six coaches then went as a team through the Mersey Tunnel to New Brighton, where they discharged their passengers. The drivers' instructions were to return direct to the garage, but each driver could go by any route he chose. The coaches started to come back as a team; but there was some disorganisation at the Mersey Tunnel. The deceased man R., after passing through the Tunnel, proceeded to take his coach back to the garage by a certain route, & he was followed by J., who was driving another coach, & by another driver. R.'s coach stopped, & R. got down to see what was wrong. J., who was behind R., endeavoured to get in front of R. & then to stop & go to R.'s assistance. J., however, did not see R., who was standing on the off-side of his coach, & unfortunately R. was crushed & received injuries from which he died. The trial judge found that the accident was due to the negligence of J. In an action brought by R.'s widow against his employers under the Fatal Accidents Acts:—*Held*: J. & R. were, at the time of the accident, not only in the employ of the same master, but were engaged in the same common work, & were therefore in common employment, & their employers were therefore exempt from liability.—*RADCLIFFE v. RIBBLE MOTOR SERVICES, LTD.*, [1938] 2 K. B. 345; [1938] 1 All E. R. 71; 107 L. J. K. B. 209; 158 L. T. 124; 54 T. L. R. 260; 82 Sol. Jo. 75, C. A.

*Annotation*:—*Consd. Metcalfe v. London Passenger Transport Board*, [1938] 2 All E. R. 352.

1757. *Add. Annotations*:—*Consd. Radcliffe v. Ribble Motor Services, Ltd.*, [1938] 2 K. B. 345. *Refd. Metcalfe v. London Passenger Transport Board*, [1938] 2 All E. R. 352.

1757a. *Employees of amalgamated undertakings.*—*Pltf.* was a bus conductor who was injured as a result of a collision between his bus & a tram, due to the negligence of the tram driver. Both *pltf.* & the tram driver were in the employ of the London Passenger Transport Board, & it was contended that the doctrine of common employment applied. Against this contention, it was argued that, as the crews of two ships belonging to the same co. were not in common employment, the doctrine was not applicable to these circumstances. *Pltf.* had been in the service of the London General Omnibus Co. before that co. was absorbed in the London Passenger Transport Board:—*Held*: the doctrine of common employment applied, & *pltf.* was not entitled to recover.—*METCALFE*

*v. LONDON PASSENGER TRANSPORT BOARD*, [1938] 2 All E. R. 352; 107 L. J. K. B. 406; 159 L. T. 35; 102 J. P. 309; 54 T. L. R. 678; 82 Sol. Jo. 296; 36 L. G. R. 285.

1758. After this case add:—*Camerman & film artiste.*—*See NEGLIGENCE*, No. 83b, *post*.

1759. *Add. Annotations*:—*Consd. Fanton v. Denville*, [1932] 2 K. B. 309. *Refd. Rudd v. Elder Dempster & Co.*, [1933] 1 K. B. 566.

1761. *Add. Annotation*:—*Refd. Fanton v. Denville*, [1932] 2 K. B. 309.

1767. *Add. Annotation*:—*Refd. Russell v. Criterion Film Productions, Ltd.*, [1936] 3 All E. R. 627.

1769. *Add. Annotations*:—*Refd. Fanton v. Denville*, [1932] 2 K. B. 309; *Holloway v. Donaldson Line, Ltd.* (1935), 41 Com. Cas. 47.

1773. *Add. Annotations*:—*Consd. Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628. *Refd. Fanton v. Denville*, [1932] 2 K. B. 309; *Holloway v. Donaldson Line, Ltd.* (1935), 41 Com. Cas. 47.

1777. *Add. Annotation*:—*Refd. Holloway v. Donaldson Line, Ltd.* (1935), 41 Com. Cas. 47.

1782. *Add. Annotations*:—*Refd. Cunard v. Antifire, Ltd.* (1932), 49 T. L. R. 184; *Bromiley v. Collins*, [1936] 2 All E. R. 1061.

1783. *Add. Annotation*:—*Refd. Bromiley v. Collins*, [1936] 2 All E. R. 1061.

1784a. — *Invitation to assist.*—Certain employees of deft. finding themselves unable to move a heavily laden trailer called for volunteers. *Pltf.*, a lad of eighteen, volunteered & was injured by the shifting of the load. It was found as a fact that there was no immediate urgency for the removal of the trailer:—*Held*: if there was an implied request by deft., the volunteer could have no higher right than the servants of deft. & was unable to recover by reason of the doctrine of common employment. If there was no implied request, he was a trespasser & could not recover. Although *pltf.* was invited to help, he was still a volunteer.—*BROMILEY v. COLLINS*, [1936] 2 All E. R. 1061.

1785. *Add. Annotation*:—*Refd. Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.

1787. *Add. Annotations*:—*Consd. Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776. *Refd. Silverman v. Imperial London Hotels* (1927), 137 L. T. 57; *Weigall v. Westminster Hospital*, [1936] 1 All E. R. 232; *Bromiley v. Collins*, [1936] 2 All E. R. 1061.

1789. *Add. Annotation*:—*Consd. Bromiley v. Collins*, [1936] 2 All E. R. 1061.

PART XIII. SECT. 1, SUB-SECT. 5.—  
C. (d) iv.

1770 iv. —.—.—*M'Cartan v. Belfast Harbour Comrs.*, [1911] 2 I. R. 143, H. L.—*IR.*

PART XIII. SECT. 1, SUB-SECT. 5.—  
C. (d) v.

1782 ii. —.—.—*Switzer v. Ottawa*, [1928] 4 D. L. R. 991; 63 O. L. R. 168.—*CAN.*

PART XIII. SECT. 1, SUB-SECT. 5.—  
C. (e) i.

1790 xiv. —.—.—*A* hotel employee was injured by slipping on a floor left wet by a fellow-employee:—*Held*: master was not liable since he had used reasonable care to select competent fellow servants.—*DUNCAN v. NORTON-PALMER HOTEL CO.*, [1933] 1 D. L. R. 24; O. R. 88.—*CAN.*

*sa. Action by Crown servant.*—*T.*, a carpenter, was engaged in doing certain carpentering on a building at

the Experimental Farm, at St. Anne de la Pocatière, a public work of Canada. He & his co-employees were shown certain planks by the foreman in charge & told to build their own scaffold & to be careful in the selection of planks & to test them; & upon *T.* there were only old planks, he —.—: there are some new & some —.—, but the old are good. *T.*, in the course of scaffolding, was standing on that part of the scaffold across which the planks are placed on which to stand while working, & asked his co-

1791. *Add. Annotation*:—*Refd.* *Fanton v. Den-ville*, [1932] 2 K. B. 309.

1802. *Add. Annotations*:—*Refd.* *Dew v. United British S.S. Co.* (1928), 139 L. T. 628; *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] A. C. 206.

1809. *Add. Annotations*:—*As to (2) Consd.* *Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1. *As to (1) Refd.* *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.

1815. *Add. Annotations*:—*Consd.* *Higgins v. Harrison* (1932), 25 B. W. C. 113. *Distd.* *Rudd v. Elder Dempster & Co.* (1932), 49 T. L. R. 202. *Consd.* *Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1; *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 2 K. B. 609. *Refd.* *Dew v. United British S.S. Co.* (1928), 139 L. T. 628; *Scammell, G. & Nephew v. Hurley*, [1929] 1 K. B. 419; *Knott v. London County Council*, [1934] 1 K. B. 126; *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] A. C. 206; *Monk v. Warbey*, [1935] 1 K. B. 75; *Craze v. Meyer-Dumore Bottlers' Equipment Co.*, [1936] 2 All E. R. 1150; *Kearns v. Gee, Walker & Slater, Ltd.*, [1936] 3 All E. R. 151; *Murray v. Schwachman, Ltd.*, [1937] 2 All E. R. 68; *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1938] 3 All E. R. 21.

1816. *Add. Annotations*:—*Consd.* *Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1. *Refd.* *Rudd v. Elder Dempster & Co.* (1932), 49 T. L. R. 202; *Monk v. Warbey*, [1935] 1 K. B. 75.

1818. *Add. Annotation*:—*Refd.* *Dew v. United British S.S. Co.* (1928), 139 L. T. 628.

1819a. —.]—Pltf. was the widow of a man employed by deft. co. as a derrick. Deceased had left the barge on which he was employed & volunteered to act temporarily as tipper on a second barge in order to relieve a fellow-workman. The fellow-workman was in fact a director of the co., but at the time he was acting merely as a foreman over the job, & was not there as representing the board of directors. While engaged as a tipper in these circumstances he stumbled & fell into the hold, sustaining minor injuries. He was removed to hospital & given an anæsthetic under which he collapsed & died. The post-mortem examination showed that he had a diseased heart, but neither the history of the man's activities nor the use of a stethoscope did or would have disclosed the man's condition. At the trial it was held that the death was due to the negligence of defts., who were ordered to pay to pltf. £785, of which sum £300 was not to be recoverable in any event. On appeal:—*Held*: (1) on the facts there was no negligence on the part of defts.; (2) the fact that the fellow-worker was

a member of the board of directors did not in a case where he was in fact acting as a foreman bar the defence of common employment; (3) on the work upon which deceased was engaged at the time he was merely a volunteer & the defence of *volenti non fit injuria* applied; (4) the administration of the anæsthetic was not a wrongful act intervening between the accident & the death, & could not be relied on as a case of *novus actus interveniens*; (5) where there is an appealable matter, the ct. should not, as a condition of granting a stay of execution, order to be paid to pltf. & to be irrecoverable in any event any sum to which it is possible that it may ultimately be decided that pltf. has no title.—*BLOOR v. LIVERPOOL DERRICKING & CARRYING CO., LTD.*, [1936] 3 All E. R. 399, C. A.

1824. *Add. Annotation*:—*Apprvd.* *Fanton v. Den-ville*, [1932] 2 K. B. 309.

1824a. —.]—An employer does not warrant to his employees that the plant & property used in his business are safe; he only undertakes that he will use reasonable care to see that they are safe; & he fulfils this obligation by using reasonable care to appoint persons of competent care & skill as his delegates to provide & use the plant & property required for the business, he supplying them with the necessary financial means for this purpose. If the employer satisfies these conditions, he is not liable for injury caused to one of his servants by the negligence of such a delegate in the use of the plant.—*FANTON v. DENVILLE*, [1932] 2 K. B. 309; 101 L. J. K. B. 641; 147 L. T. 243; 48 T. L. R. 433, C. A.

*Annotations*:—*Consd.* *Knott v. London County Council*, [1934] 1 K. B. 126; *Hunt v. Rice & Son, Ltd.*, [1937] 3 All E. R. 715. *Distd.* *Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628. *Refd.* *Rudd v. Elder Dempster & Co.*, [1933] 1 K. B. 566; *Russell v. Criterion Film Productions, Ltd.*, [1936] 3 All E. R. 627; *Radcliffe v. Ribbles Motor Services, Ltd.*, [1938] 2 K. B. 345.

1824b. *Fellow-servant supplying unsafe system of working.*—The provision of a safe system of working in a mine is an obligation of the owner, who, if he appoints an agent to perform it, remains vicariously responsible for the agent's negligence.

An agent in performing the owner's duty of providing a safe system of working in the mine is not engaged in common employment with an ordinary workman in the mine; he is performing the duty of the owner, not the duty of an employee, & consequently the defence of common employment is not available to the mine owner, where injury has been caused to a workman through the negligence of the agent.—*WILSONS & CLYDE COAL CO., LTD. v. ENGLISH*, [1938] A. C. 57; [1937] 3 All E. R. 628; 106 L. J. P. C. 117; 157 L. T. 406; 53 T. L. R. 944; 81 Sol. Jo. 700, H. L.

employee B. to hand him a plank to put across. This B. did, & T. placed it across the support, & upon T.'s walking upon it, the plank snapped & T. fell to the ground & was injured. The plank had a knot in it running transversely, at which point it broke. The Crown claimed T. was warned, & that being an expert carpenter he should have noticed the defect, & failing to do so, he was the victim of his own negligence:—*Held*: the injury to T. resulted from the negligence of an officer or servant of the Crown while

acting within the scope of his duties or employment on a public work, & T. was entitled to recover from the Crown for the damage he had suffered. The question of responsibility is to be decided according to the law of the province where the cause of action arose. The Crown was in law held to see that only competent & prudent foremen were engaged to see to the safety of the men, & the fact of the foreman furnishing the defective plank in question & stating the used ones were good, coupled with the act of a

co-employee in handing it to him, was negligence for which the Crown was responsible.—*THIBOUTOT v. R.*, [1932] Ex. C. R. 189.—CAN.

#### PART XIII. SECT. 2, SUB-SECT. 2.

1836 1. — *Superintendent also engaged in manual work.*—A dock labourer, who was one of a gang employed by a stevedore to unload a ship, was injured while so employed. The foreman of the gang acted as hatchmouthman, & had a duty to see that cargo was lifted out of the hold,



1838. *Add. Annotation* :—*Refd. Pratt v. Cook Son & Co. (St. Paul's), Ltd., [1938] 2 K. B. 51.*

1867. *Add. Annotation* :—*Consd. Robertson v. Kinneil Cannel & Coking Coal Co. (1931), 101 L. J. P. C. 44.*

1876. *Add. Annotation* :—*Apld. Robertson v. Kinneil Cannel & Coking Coal Co. (1931), 101 L. J. P. C. 44.*

1881a. *Trench.*—A builder's labourer was engaged digging a trench 6 ft. deep in connection with the erection of a block of flats. The side of the trench was not secured by boards. Owing to the unsuspected existence of an old drain near one side of the trench, that side fell in & the labourer was fatally injured. In an action founded (*inter alia*) upon Employers' Liability Act, 1880 :—*Held* : (1) the trench was not a part of the "ways," but it was a part of the "works" of deft. co. within Employers' Liability Act, 1880 (c. 42), s. 1 (1); (2) there was no negligence in failing to board the trench nor in failing to discover the old drain.—*HUNT v. RICE & SON, LTD., [1937] 1 All E. R. 576.*

1884. *Add. Annotation* :—*As to (1) Refd. Cutler v. United Dairies (London), Ltd., [1933] 2 K. B. 297.*

1892a. *Defect in good working condition.*—Under Employers' Liability Act, 1880 (c. 42), s. 1 (1), an employee injured by an accident can claim compensation if he establishes that the accident was due to a defect in the condition of the ways & works in a mine when from any cause they are unfit for the uses for which they were designed & to which they were intended to be put, & by sect. 2 (1) the liability is limited to a case where the defect has arisen from or has not been remedied owing to the negligence of the employer or some person in his service & entrusted by him with the duty of seeing that the ways or works are in proper condition :—*Held* : (1) the defect in condition referred to is a defect in good working condition, & it is not confined to the presence of the physical parts of machinery or plant; (2) it is not necessary that the person under sect. 2 (1) entrusted with the duty should be a person superintending, & therefore the failure of an employee whose duty it was to adjust a clip on a running hutch, with the result that it ran away & killed another employee, was the failure of a person entrusted with a duty

within the sub-section which rendered the deceased man's employers liable for the accident.—*ROBERTSON v. KINNEIL CANNEL & COKING COAL CO. (1931), 101 L. J. P. C. 44; 146 L. T. 312, H. L.*

1892b. *Defect due to negligence of person entrusted with duty of seeing plant in proper condition—Fellow servant.*—*ROBERTSON v. KINNEIL CANNEL & COKING COAL CO., LTD., No. 1892a, ante.*

1900. *Add. Annotation* :—*Apld. Robertson v. Kinneil Cannel & Coking Coal Co. (1931), 101 L. J. P. C. 44.*

1976. *Add. Annotation* :—*As to (3) Refd. Fanton v. Denville, [1932] 2 K. B. 309.*

1977. *Add. Annotation* :—*Consd. Wheeler v. New Merton Board Mills, Ltd., [1933] 2 K. B. 669.*

2021a. *Proceedings by widow but not by children.*—In respect of an accident, in which four workmen in the employment of resp. railway co. were killed, proceedings were brought against the co. by each of the respective widows claiming damages under Fatal Accidents Acts, 1846 (c. 93) and 1864 (c. 95), & Employers' Liability Act, 1880 (c. 42), & proceedings claiming compensation under the Workmen's Compensation Act, 1925 (c. 84), were brought by the children of each of the four workmen. The county ct. judge awarded damages under the Acts of 1846 & 1864 to each of the four widows, without taking into account any loss suffered by the children; & similarly, in awarding compensation to the children as dependants he disregarded the fact that the widows had recovered damages :—*Held* : in assessing the damages recoverable by the widows in the actions brought by them the county ct. judge was right to ignore the fact that the children were claiming compensation in respect of the same accident under the Workmen's Compensation Act; & similarly, in respect of the claims by the children to compensation he was right to ignore the fact that the widows were claiming damages.—*EVERY v. LONDON & NORTH EASTERN RY. CO., HARRIS v. LONDON & NORTH EASTERN RY. CO., BONNER v. LONDON & NORTH EASTERN RY. CO., WATSON v. LONDON & NORTH EASTERN RY. CO., [1938] S. C. 606, [1938] 2 All E. R. 592; 107 L. J. K. B. 546; 159 L. T. 241;*

without swinging, by a winch operating through a derrick, & as part of this duty, to stop the winch, when necessary, by signalling to the winchman. He failed to discharge this duty of stopping the winch, with the result that two bales struck the hatch & fell from the derrick & injured the dock labourer. In an action of damages brought by the dock labourer against the stevedore, it was proved that the foreman's duties, in addition to his foregoing duty as hatchmouthman, were to engage & dismiss the gang; to allocate to them their work, which they carried out under his orders & supervision; & to assist in guiding the load, when it was raised, towards, & arranging it on, a barrow, on which it was wheeled to the quayside. He was made a higher wage than the rest of the gang :—*Held* : (1) the foreman's principal duty was that of superintendence, & since any manual labour he performed was subsidiary to that duty, he could not be regarded as "ordinarily

engaged in manual labour" within Employers' Liability Act, 1880, s. 8; (2) as the accident had happened through the foreman's negligence while in the exercise of his duty of superintendence, defender was liable in reparation to pursuer.—*RONALD v. GILMARTIN, [1935] S. C. 437; 51 Ll. L. Rep. 256.—SCOT.*

PART XIII. SECT. 2, SUB-SECT. 3.—D. (b).

1887 i. *Need not be in employer—Ship's machinery or plant.*—A labourer, employed by stevedores, brought actions for damages, on account of personal injuries sustained by him through the fall of a stanchion when engaged in discharging cargo, against the shipowners & his own employers :—*Held* : (1) the action against the shipowners was relevant; (2) the action against the stevedores fell to be dismissed as irrelevant, in respect that the stevedores were under no duty of inspecting the vessel to see to its safety

for their servants.—*M'LACHLAN v. THE PEVERILL S.S. CO., LTD. & MACGREGOR & FERGUSON (1896), 23 R. (Ct. of Sess.) 753; 33 Sc. L. R. 634; 4 S. L. T. 19.—SCOT.*

PART XIII. SECT. 2, SUB-SECT. 4.

1918 ii. ———.—*RONALD v. GILMARTIN, No. 1836 i, ante.*

PART XIII. SECT. 2, SUB-SECT. 8.—B.

1972 ii. *Add. Citation* :—*affd. (1902), 32 S. C. R. 721.*

eg. *Defect in plant or premises.*—The absolute liability of a master for defect in plant or premises under Workmen's Compensation Act (Ont.) does not attach if the accident is due to the conduct of the workman.—*LEWIS v. NESBITT & AULD, LTD., [1933] 3 D. L. R. 414; O. R. 595; revid., [1934] 3 D. L. R. 241; S. C. R. 333.—CAN.*

54 T. L. R. 794; 82 Sol. Jo. 582; 31 B. W. C. C. 133, H. L.

2022. *Add. Annotation*:—*Refd.* Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.

2026. *Add. Annotations*:—*Appld.* Doyle v. White City Stadium, Ltd., [1935] 1 K. B. 110. *Refd.* Mercantile Union Guarantee Corp'n., Ltd. v. Ball, [1937] 3 All E. R. 1.

## Part XIV.—Workmen's Compensation Acts.

2045. *Add. Annotations*:—*Consd.* *Re* National Health Insurance Act, 1924, *Re* Professional Players of Association Football, [1934] 2 K. B. 265. *Refd.* Roberts v. Gardner (1928), 21 B. W. C. C. 154; Wardell v. Kent County Council, [1938] 3 All E. R. 473.

2054a. ———.]—A workman was employed at tree-felling, hedge-cutting, & tree-planting at irregular intervals, & was paid at the end of each job. After he had completed one of these jobs & been paid for it, he inquired of the man for whom he had been working the price of a load of firewood. On being told he said that he could not afford to pay but would do odd jobs for it. He came to work for the firewood by loading timber, but while doing so he was injured by an accident. He claimed compensation for the

injury. The county ct. judge held that the applicant was not working under a contract of service at the time of the accident. He further held that, if he were working under a contract of service, it was illegal under Truck Act, 1831, & he refused to exercise his discretion under sect. 3 (3) in favour of the injured man. *Appt.* appealed:—*Held*: the matter was a question of fact for the county ct. judge, & there was evidence to support the conclusion to which he came.—*HARDCASTLE v. SMITHSON* (1933), 26 B. W. C. C. 152, C. A.

2057. *Add. Citations*:—136 L. T. 322; 20 B. W. C. C. 139.

*Add. Annotation*:—*Refd.* Watson v. Government Instructional Centre (Birmingham) (1928), 97 L. J. K. B. 596.

### PART XIV. SECT. 1.

i. ———.]—*NIELSEN v. DORATY*, [1927] 1 D. L. R. 358; [1927] 1 W. W. R. 20; 21 Sask. L. R. 228.—*CAN.*

ii. ———.]—A motor truck is not a "factory" within Workmen's Compensation Act, R. S. S. 1920, c. 210, s. 5, which provides that "factory means a building, workshop or place where machinery driven by steam, water or other mechanical power is used . . ."—*READER v. MOORE JAW CARTAGE CO.*, [1928] 3 D. L. R. 532; [1928] 2 W. W. R. 404; 22 Sask. L. R. 395.—*CAN.*

sp. *Benevolent interpretation.*—*CLARKE v. WENTWORTH STORES, LTD.*, [1928] 2 D. L. R. 796.—*CAN.*

sr. "Industry"—*Farming.*—*Farming* is an "industry" within Workmen's Compensation Act, R. S. B. C., 1924.—*HINDLEY v. BURNS* (1933), 48 B. C. R. 73.—*CAN.*

st. ———.]—A steam tug, engaged in towing in a river, is an "industry" within New Brunswick Workmen's Compensation Act.—*HASLETT v. WORKMEN'S COMPENSATION BOARD*, [1936] 2 D. L. R. 110; 5 F. L. J. (Can.) 244.—*CAN.*

sw. ———.]—Bakery is an "industry" within Workmen's Compensation Act (Ont.).—*WIZNOSKI v. PETEROFF*, [1938] 2 D. L. R. 205; O. R. 113.—*CAN.*

### PART XIV. SECT. 2, SUB-SECT. 1.—A.

i. ———.]—*LYNCH v. LIMERICK COUNTY COUNCIL*, [1926] 1 I. R. 176.—*IR.*

ii. ———.]—*Workgang collected & paid by foreman.*—A steamship co. employed a number of dock labourers, without the intervention of a stevedore or other independent contractor, to unload their vessel at a rate of remuneration which depended, not on the days or hours worked by each man, but on the number of tons of grain taken off the vessel. The rate of remuneration for the work to be done was a fixed sum per ton, & the aggregate amount was paid by the co. to certain representatives of the men, who divided it equally amongst those who had done the work. There were 56 men, divided into 8 gangs of 7

each. One member of each gang was called a "foreman," but he did the same work & received the same remuneration as the other men. While unloading the vessel one of these men was fatally injured, & his dependants claimed compensation. *Resp.* contended that they had no control, & in fact, exercised no control or supervision over the men's work, & that, in view of all the facts, the deceased was not a workman in their employment within the meaning of the Act. The judge found as a fact that he was a workman in their employment:—*Held*: there was evidence to support the finding of the judge.—*SCANLON v. HARTLEPOOL SEATONIA STEAMSHIP CO., LTD.* (No. 2) [1928], 22 B. W. C. C. 945.—*IR.*

ci. ———.]—*Nurse.*—*Held*: not within Act 25, 1914.—*LOWE v. BRUCE* (1926), 47 N. L. R. 459.—*S. AF.*

c ii. ———.]—"Domestic service."—A worker who resided at his own home was employed by a retired manufacturer to do gardening & attend generally to the wants of the latter's household, & while engaged in cutting a branch off a tree in his employer's garden fell & suffered injuries from which he died:—*Held*: deceased was engaged in "domestic service" within Workers Compensation Act, 1922.—*GOUGH v. CHAPMAN*, [1930] N. Z. L. R. 81.—*N. Z.*

c iii. ———.]—*Voluntary work—Assistance by neighbour.*—*Appl.* & *resp.* were neighbouring farmers. *Appl.* being ill, asked *resp.* to look after his farm for a few days while he went away. *Resp.* consented, but no remuneration was discussed. During the harvesting of *appl.*'s crop *resp.* was removing an obstruction from the harvester when the horses, being restive on account of the proximity of a bush fire, moved on, & *resp.*'s hand was caught in the machinery & injured:—*Held*: there was no contract of service.—*WILLIAMS v. GOODWIN*, [1928] W. A. L. R. 107.—*AUS.*

c iv. ———.]—*Pupil at private hospital.*—*Pt.* a pupil-dietician, was employed by deft. hospital, a private institution, at a small weekly salary, & was injured by an accident in the hospital, caused by the fall of a dumb-waiter or hoist

which she was operating:—*Held*: the hospital was an "establishment" & *pt.* a "workman" within sect. 1 (i), (p) of Workmen's Compensation Act, R. S. O., 1927.—*JARVIS v. OSBORN HOSPITAL*, [1931] 4 D. L. R. 914; O. R. 482.—*CAN.*

c v. ———.]—*Insurance agent.*—*Held*: deceased did not work under a contract of service & was therefore not a "worker."—*PAGE v. AUSTRALASIAN TEMPERANCE & GENERAL MUTUAL LIFE ASSURANCE SOCIETY, LTD.*, [1930] W. C. R. 140.—*AUS.*

c vi. ———.]—*Jockey.*—A jockey, while riding for fee or reward in a hurdle race run under the management of the Australian Jockey Club at Randwick, received personal injury when his horse fell & broke its neck. The jockey's earnings were £2 10s. per week & he was entitled to claim compensation from the Club in pursuance of sect. 6 (10). He, however, claimed compensation from *resp.*, a race-horse trainer & owner, alleging that he (*appt.*) was working under a contract of service with *resp.*; that he was a "casual" worker who had worked under successive contracts of service with two or more employers in the "horse racing industry"; & that his average weekly earnings should be deemed to be not less than the living wage of £3 8s. 6d. in terms of sect. 14 (e). The Commission found that (1) *appt.* jockey did not work under a "contract of service" with *resp.*, who neither exercised nor retained control over the manner in which *appt.* rode as a hurdle jockey in a measure sufficient to constitute the relationship of employer & employee; & (2) on the facts the claim under sect. 14 (e) failed.—*CARTER v. MURRAY*, [1937] W. C. R. 231.—*AUS.*

sg. *Mixed question of law & fact.*—The question whether a person performing labour is a "workman" within Workmen's Compensation Act, R. S. S., 1920, is a mixed question of law & fact, & the whole of such question, that part of it which is made up of fact as well as that part which consists of a proposition of law, is appealable. A person is not a "workman" within the definition of "workman" Act there is the relationship of ser-

**2057a.** — **Unemployed youth undergoing industrial training.**—In Government instructional centre.]—*Held*: not a workman within Workmen's Compensation Acts.—*WATSON v. GOVERNMENT INSTRUCTIONAL CENTRE, BIRMINGHAM* (1926), 97 L. J. K. B. 596; 139 L. T. 290; 44 T. L. R. 576; 72 Sol. Jo. 384; 21 B. W. C. C. 174, C. A.

**2057b.** — **Film actress.**—An actress employed to perform in a crowd was injured during the making of a film. The county ct. judge found that she had not entered into a contract of service, but was only employed to render certain services, & therefore held that she was not a "workman" within the Act. The appct. appealed:—*Held*: there was evidence to support the finding & no misdirection. Appeal dismissed.—*ARMOUR v. BRITISH INTERNATIONAL PICTURES* (1930), 23 B. W. C. C. 367, C. A.

**2057c.** — **Representative of firm payable by commission.**—Manufacturers appointed a man under a written agreement as their representative for a certain area, payment to be made by commission. By the terms of this agreement the manufacturers had the right in their discretion to refuse any order sent to them by the man or by customers obtained by him; he was not during the continuance of the agreement to sell or deal in any other goods of the same class as those supplied by them except as their representative; the price lists supplied to him were to remain the property of the manufacturers & were to be returned to them on the termination of the agreement; he was to report "at least three times each week (preferably daily) on the forms provided" & "to well & properly call upon all buyers in his territory." The agreement was subject to one month's notice on either side, unless the representative committed a breach of it, in which case dismissal might be immediate. If there was any dispute regarding overlapping of territory, the matter was to be settled by arbitration, the arbitrator being the managing director for the time being of the manufacturing co., whose decision should be final:—*Held*: such an agreement constituted the relationship of principal & agent & was not a contract of service. The representative was not therefore a "workman" within the meaning of the Act. Appeal dismissed.—*PETRIE v. RED BANK MANUFACTURING CO., LTD.* (1935), 28 B. W. C. C. 423, C. A.

**2057d.** — **Salvation Army officer.**—Applt., who was an officer in the Salvation Army, when

working at the Army's Hall fell over a bucket, & sustained injuries. She claimed compensation under the Workmen's Compensation Act:—*Held*: upon the construction of the "orders & regulations for officers of the Salvation Army" & of the form which set out applt.'s rights & duties, & which was signed by applt. when she became an officer of the Salvation Army, the relationship between applt. & the General of the Salvation Army was a purely spiritual, & not a contractual, one, & the fact that applt. received money for her maintenance according to a scale & that deductions had been made therefrom for a pension fund did not affect that relationship. Applt. was therefore not a "workman" within 1925 Act, s. 3, & was not entitled to compensation under that Act.—*ROGERS v. BOOTH*, [1937] 2 All E. R. 751; 156 L. T. 487; 53 T. L. R. 741; 81 Sol. Jo. 418; 30 B. W. C. C. 188, C. A.

**2057e.** **Hospital nurse.**—Appct., who was a fully qualified hospital nurse, was employed as a temporary nurse in a hospital owned & controlled by resps. Appct. had been instructed by the sister in charge of the ward in which she was working to prepare & apply to a patient an antiphlogistine poultice. While applt. was heating the preparation it exploded & caused injuries to applt. in respect of which she claimed compensation. It appeared from the evidence that applt. was subject to the rules & regulations of the hospital as to the times of sleeping, meals & recreation, & was generally under the control of the matron. When in the ward applt. was subject to the control of the sister in charge of the ward, & she was carrying out the instructions of the sister when the accident happened. The matron said that the sister would give the nurse instructions as to what was to be done during her absence. In case of disagreement as to the method of carrying out the sister's orders the nurse would be obliged to obey the sister's instructions. In a claim for compensation under the Workmen's Compensation Act the county ct. judge sitting as arbitrator made an award in favour of resps. on the ground that applt. was not a "workman" within the meaning of the Workmen's Compensation Act, the contract between her & resps. being one for services & not of service. Upon appeal to the Ct. of Appeal:—*Held*: applt. was a "workman" within the Workmen's Compensation Act, as she was working under a contract of service with resps., & therefore was entitled to compensation in respect of

vant & master between him & the person by whom he is employed.—*CASSIDY v. BLAINE LAKE RURAL TELEPHONE CO., LTD.*, [1933] 3 W. W. R. 641.—CAN.

al. *Person receiving public relief from municipal corporation.*—Ontario Workmen's Compensation Act applies to municipal corps., & a person receiving public relief from such a corps. is a "workman."—*HUMPHREYS v. CITY OF LONDON*, [1935] 1 D. L. R. 300; on appeal, [1935] 3 D. L. R. 39; O. R. 295.—CAN.

sp. *Valid contract of service.*—*Work in breach of Sunday Observance Act.*—Appct. was a commercial traveller who on a Sunday afternoon journeyed from M. to U., a distance of 27 miles,

in his employer's motor car, for the purpose of there soliciting an order for goods for his employer. On the return journey, owing to a defect in the steering gear of the motor car which applt. was driving, he sustained personal injury causing him incapacity for work, & claimed compensation. Liability was denied by resp., its defence being based, *inter alia*, on the Sunday Observance Act, 1877. The Commission found that applt. was a "workman," & at the time of the happening of the injury was in the course of his employment "doing worldly labour, business or work" of his "ordinary calling" on a Sunday afternoon. The work in question could lawfully have been performed on some day or night other than Sunday. It was performed

on a Sunday for business convenience. He was committing a breach of the Sunday Observance Act, 1877, by performing work on a Sunday, but was doing what he was employed by resp. to do, notwithstanding the illegality of such work. The Commission exercised its judicial discretion under sect. 40 of Workers' Compensation Act, 1926–1929, in favour of applt., & dealt with the matter as if applt. had at the time of the injury been "a worker under a valid contract of service." The injury having arisen out of & in the course of applt. worker's employment with resp., an award of compensation was made.—*SAWYER v. AMALGAMATED ELECTRICAL & BATTERY ENGINEERS, LTD.*, [1935] W. C. R. 231.—AUS.

her injuries, which were caused by an accident arising out of & in the course of her employment.—**WARDELL v. KENT COUNTY COUNCIL**, [1938] 2 K. B. 768; [1938] 3 All E. R. 473; 159 L. T. 337; 102 J. P. 432; 54 T. L. R. 1026; 82 Sol. Jo. 663; 36 L. G. R. 554; 31 B. W. C. C. 266, C. A.

**2067a. Termination of employment by wreck.]—**A deck hand signed on under a running agreement for a voyage to the Iceland fishing grounds in Nov. After encountering bad weather the vessel ran aground in the early morning on a desolate section of the coast of Iceland. The crew remained on board for four & a half hours exposed to strong, cold winds & rain before the master ordered the abandoning of the vessel at 9 a.m. They waded fifteen to twenty yards through the surf, which was between knee & waist deep, & then set out to obtain aid. The deck hand was in good health, & one of the best of the party. They were without food, & had to cross several deep streams, encountering heavy sandstorms on the way. At 1.30 p.m. the deck hand stumbled in one of these streams & was completely submerged, after which he lost heart & strength, & by 2.15 p.m. was losing consciousness & unable to walk. He was carried by his companions until dark, when the party huddled together for warmth under a sandbank. At dawn the deck hand was found to be dead. To a claim by his widow for compensation the employers answered that he was no longer in their employment at the time of the accident. The county ct. judge found that death was due to personal injury by accident arising out of & in the course of the employment, & made an award in favour of the dependants. The employers appealed, & argued that by Merchant Shipping Act, 1894 (c. 60), s. 158, & Merchant Shipping (International Labour Conventions) Act, 1925 (c. 42), s. 1 (1), the employment terminated when the vessel was wrecked:—**Held**: there was evidence to support the finding, & such finding did not run counter to the argument put forward by the employers founded on the Merchant Shipping Acts.—**MAVER v. "SALON" SHIP OWNERS** (1929), 22 B. W. C. C. 424, C. A.

**2079a. — Not born within normal period of gestation.]—**A claim for compensation in respect of such a child:—**Held**: rightly rejected.—**RACE v. WARDSEND STEEL CO.** (1927), 20 B. W. C. C. 280, C. A.

**2086. Add. Citations:—**96 L. J. K. B. 135; 136 L. T. 290; 19 B. W. C. C. 457.

**Add. Annotation:—**Refd. **Ward v. Dorman**, Long & Co., [1933] 2 K. B. 658.

**2086a. Adopted child.]—**A workman & his wife obtained an order under Adoption of Children Act, 1926 (c. 29), to adopt a child. Eighteen months afterwards the workman was killed by an accident arising out of & in the course of his employment within 1925 Act, sect. 1:—**Held**: the effect of the adoption order was not to make the adopted child stand to the workman for all purposes in the position of a child born to him in lawful wedlock; it did not constitute the child a member of the workman's family within sect. 8 of 1925 Act, & accordingly no compensation was payable by the employers in respect of the adopted child as a dependant on the earnings of the deceased workman.—**WARD v. DORMAN, LONG & CO., LTD.**, [1933] 2 K. B. 658; 120 L. J. K. B. 635; 149 L. T. 298; 49 T. L. R. 512; 77 Sol. Jo. 484; 26 B. W. C. C. 394, C. A.

**Annotation:—****Overd. Coventry Corpn. v. Surrey County Council**, (1935) A. C. 199.

—.]—**See, now**, Adoption of Children (Workmen's Compensation) Act, 1934 (c. 34).

**2111. Add. Annotations:—****Folld. Bloor v. Ship Sutton** (1920), 20 B. W. C. C. 12. **Consd. Jackson v. Canham** (1935), 28 B. W. C. C. 30.

**2112a. —.]—**A father brought a claim for compensation on the ground of his partial dependency on the earnings of his deceased son. The county ct. judge held on the facts that the family had enough for the ordinary necessities of life without any contribution from the son, & dismissed the father's application. The father appealed:—**Held**: the existence of dependency was a question of fact for the judge, & there was no misdirection.—**MALCOLM v. SOUTH GARESFIELD COLLIERY CO., LTD.** (1930), 23 B. W. C. C. 44, C. A.

**2112b. —.]—**A dustman employed by a District Council had always supported his wife & children out of the wages received from his employers. He became the putative father of an illegitimate child, & then worked at odd jobs outside his contract of employment with the Council, giving anything he so made to the mother of the illegitimate child. As a result of an accident arising out of & in the course of his employment with the Council, he died. The Council admitted liability & paid into ct. a lump sum as compensation to the dependants. A claim to a share in that sum was made on behalf of the illegitimate child. The county ct. judge found that the illegitimate child was not dependent on the deceased's earnings under his contract of employment with the Council:—**Held**: it was a question of fact for the county ct. judge, & there was evidence to support his

**PART XIV. SECT. 2, SUB-SECT. 1.—**  
E. (b).

**2068 v. —.]—**Members of a crew hiring a vessel for a fishing enterprise under the quarter-lay system are not "workmen".—**ERICKSON v. SWIM BROS., LTD.**, [1936] 4 D. L. R. 651.—**CAN.**

**PART XIV. SECT. 2, SUB-SECT. 2.—A.**

**2086 1. — Of widow of workman—****Workman not the father.]—****Held**: the word "child" includes illegitimate children of the worker, but does not include other people's children to whom

he stands *in loco parentis*.—**CLARKSON v. CORRIMAL BALGOWNIE COLLIERIES, LTD.** (1928), 28 S. R. N. S. W. 583; 45 N. S. W. W. N. 184.—**AUS.**

**2a. Brother — Whether half-brother included.]—**The term "brother" in its primary sense means a brother of the whole blood, & it is only in a secondary & extended sense that the term is deemed to include a brother of the half blood. Whether the term is to be taken in its primary or secondary sense depends in each case upon the context in which it is found. In the Workmen's Compensation Act, which is a quasi-penal statute, the term "minor brother" in sect. 2 (1) (d)

of the Act means a minor brother of the whole blood, & does not include a minor half-brother.—**Re MAUNG KYAN** (1930), 1. L. R. 9 Ran. 46.—**IND.**

**3a. Adopted child.]—**An adopted daughter of a Hindu is not a "dependent" within sect. 2 (1) (d) of Workmen's Compensation Act, 1923.—**Re MUNSHI RAM** (1931), 1. L. R. 12 Lah. 658.—**IND.**

**PART XIV. SECT. 2, SUB-SECT. 2.—**  
C. (a).

**2100 III. —.]—****CASBY v. GREY COUNTY COUNCIL**, [1929] N. Z. L. R. 125.—**N.Z.**

finding.—*GRIFFITH v. WILLIAMS & PORTMADOC URBAN DISTRICT COUNCIL* (1932), 26 B. W. C. C. 46, C. A.

**2113a. Validity of marriage—Onus of proof.**—A workman was killed leaving dependent upon his earnings a woman who claimed to be his wife & a daughter of the woman by a former marriage. On a claim for compensation made by these two persons the employer disputed liability on the ground that they were not members of the deceased's family within 1925 Act, sect. 4 (3). He put forward as the lawful wife of the deceased one A., who had gone through a form of marriage with the deceased in 1895. To this the applicants answered that such marriage was invalid, A. being herself a married woman at the time. At the hearing A. was called as a witness, & it was proved that A. had married D. in 1882, but that in 1887 D. deserted her & had never been heard of since. The county ct. judge held that in order to succeed appts. must displace the validity of the 1895 marriage, & in order to displace the validity of that marriage they must prove that D. was alive in 1895. He found that they had failed to prove that D. was alive in 1895, & made his award in favour of the employer. Appts. appealed:—*Held*: it was a question of fact for the judge & there was no misdirection. Appeal dismissed.—*MONCKTON v. TARR* (1930), 23 B. W. C. C. 504, C. A.

**2113b. Right of arbitrator to use knowledge of local conditions.**—Appls. were the father & mother & two sisters of a coal-cutter who was fatally injured by an accident arising out of, & in the course of, his employment in resps.' collieries. The family lived together, & appls. claimed to be partial dependants of the deceased, whose earnings were £3 2s. 4d. a week. The father received 26s. unemployment benefit, & the two sisters earned respectively 21s. 8d. & 19s. 3d. a week. The total sum of £6 9s. 3d. a week was handed to the mother, who spent it on maintaining the family, but by the workman's death it was reduced to £3 6s. 11d. On an application by appls. for compensation the arbitrator found that 17s. per week per person in a family in the class & position of appls. was sufficient for the provision of ordinary necessities of life, & in arriving at this conclusion he took into consideration the evidence & his judicial knowledge of local conditions & of the wages of miners in the district. In the result the arbitrator awarded a lump sum to the mother, who was admitted by resps. to be a partial dependant, but he awarded no compensation to the other appls. on the ground that they were not to any extent dependent on the deceased:—*Held*: within reasonable limits the arbitrator was entitled to use his own judicial knowledge properly applied, & he was entitled to come to the decision at which he had arrived.—*KEANE v. MOUNT VERNON COLLIERY CO., LTD.*, [1933] A. C. 309; 102 L. J. P. C. 97; 149 L. T. 73; 49 T. L. R. 306; 77 Sol. Jo. 157; 26 B. W. C. C. 245, H. L.

**2114. Add. Annotations:**—*Consd.* Fife Coal Co. v. M'Arthur (1926), 96 L. J. K. B. 330. *Expld.* Welsh Navigation Steam Coal Co. v. Evans, [1927] A. C. 834. *Consd.* Keane v. Mount Vernon Colliery Co., [1933] A. C. 309.

*Refd.* Jackson v. Canham (1935), 28 B. W. C. C. 30.

**2115. Add. Annotations:**—*Consd.* Fife Coal Co. v. M'Arthur (1926), 96 L. J. K. B. 330; Welsh Navigation Steam Coal Co. v. Evans, [1927] A. C. 834; Keane v. Mount Vernon Colliery Co., [1933] A. C. 309; Jackson v. Canham (1935), 28 B. W. C. C. 30.

**2117. Add. Annotations:**—*Consd.* Welsh Navigation Steam Coal Co. v. Evans, [1927] A. C. 834; Keane v. Mount Vernon Colliery Co., [1933] A. C. 309; Jackson v. Canham (1935), 28 B. W. C. C. 30.

**2118. Add. Annotations:**—*As to* (1) *Apprvd.* Keane v. Mount Vernon Colliery Co., [1933] A. C. 309. *Refd.* Welsh Navigation Steam Coal Co. v. Evans, [1927] A. C. 834. *As to* (2) *Refd.* Welsh Navigation Steam Coal Co. v. Evans, [1927] A. C. 834. *As to* (3) *Refd.* Gregson v. Swift (1936), 29 B. W. C. C. 166. *As to* (4) *Refd.* Nugent v. Londonderry Collieries (1929), 141 L. T. 619.

**2120a. ———.]**—The expression "ordinary necessities of life" in Workmen's Compensation Act, 1925 (c. 84), s. 4, indicates food, clothing, & shelter, but does not extend to such a thing as savings out of the surplus in earnings.—*WELSH NAVIGATION STEAM COAL CO. v. EVANS*, [1927] A. C. 834; 96 L. J. K. B. 906; 137 L. T. 775; 43 T. L. R. 730; 71 Sol. Jo. 694; 20 B. W. C. C. 537, H. L.; *reusg.* S. C. *sub nom.* EVANS v. WELSH NAVIGATION STEAM COAL CO. (1926), 96 L. J. K. B. 290, C. A.

*Annotations:*—*Apld.* Malcolm v. South Garesfield Colliery Co. (1930), 23 B. W. C. C. 44; Keane v. Mount Vernon Colliery Co., [1933] A. C. 309. *Refd.* Jackson v. Canham (1935), 28 B. W. C. C. 30.

**2127a. Probability of future support.]**—A cab-driver was regularly employed at £2 5s. per week but, on the death of that employer, remained out of work for eighteen months. At the end of that time he obtained occasional employment driving to funerals, but his wages at this form of work only averaged 5s. a week. On returning from driving to a funeral he fell from the seat of his cab, & died from a fracture of the skull. At the time of his death he was wholly, & his widow mainly, dependent on a son's assistance. On a claim for compensation brought by the widow, as a dependant, the county ct. judge, in making an award in favour of the employer, said that he must be satisfied that there was a partial dependency at the time of death before he could speculate as to what the future might or might not bring forth. The dependant appealed:—*Held*: the probability of the workman, if he had lived, regaining full employment, & once more supporting the dependant being a factor to be considered in deciding whether there was dependency, & it being doubtful whether this factor had been taken into account, the case must go back to the county ct. judge to consider such a probability.—*LEE v. MUNRO* (1928), 98 L. J. K. B. 49; 140 L. T. 129; 72 Sol. Jo. 779; 21 B. W. C. C. 401, C. A.

*Annotation:*—*Consd.* Nugent v. Londonderry Collieries (1929), 141 L. T. 619.

**2128a. Probability of increase in earnings.]**—*Held*: in deciding whether dependency existed at the death the probability that but for the accident the deceased's earnings would have increased between the date of the accident

& the date of his death may be taken into account.—*NUGENT v. LONDONDERRY COLLIERIES, LTD.*, [1930] 1 K. B. 159; 99 L. J. K. B. 34; 141 L. T. 619; 45 T. L. R. 623; 22 B. W. C. C. 474, C. A.

2134. *Add. Annotation*:—As to (2) *Consd. Athey v. Pickerings* (1926), 96 L. J. K. B. 250.

2137a. *Wife in asylum.*—On the death of a workman, who was a labourer, killed by an accident arising out of & in the course of his employment, a claim was made for compensation under the Act on behalf of the widow as dependent on the earnings of the deceased workman. The widow, for two years before the accident, had been in an asylum suffering mentally from the after effects of childbirth. On the hearing of the arbn. in the county ct. no medical evidence was given as to the condition then of the widow, or of the probability or possibility of her future recovery. The county ct. judge held that there was no intention shown by deceased of bringing the legal relation of a husband to a dependent wife to an end, & he said that it was common knowledge that in many cases women whose mental condition had been deranged by childbirth did recover. The asylum authorities, after consideration of the circumstances that the workman was only earning £2 7s. 1d. a week & was helping to support his mother & had a child to whose maintenance he was contributing, made no claim during his lifetime or after his death, but on an application the county ct. judge ordered an arbn. in which the widow was to be represented. The employers appealed:—*Held*: the county ct. judge, without medical evidence, could not find a probability of the widow's recovery, or that there was any evidence upon which a finding of dependency could be based.—*BACON v. LONGRAKE SPAR CO., LTD.* (1931), 146 L. T. 115; 24 B. W. C. C. 432, C. A.

2143. *Add. Annotations*:—*Consd. Bacon v. Longrake Spar Co.* (1931), 146 L. T. 115. *Foll.* *Peters v. Overhead, Ltd.* (1934), 27 B. W. C. C. 190. *Refd.* *McArthur v. Fife Coal Co.* (1926), 19 B. W. C. C. 669; *Lee v. Munro* (1928), 98 L. J. K. B. 49; *Brazewell v. Emmott & Wallshaw* (1929), 140 L. T. 603; *Nugent v. Londonderry Collieries* (1929), 141 L. T. 619.

2143a. —.]—A workman, in 1931, deserted his wife & family, who had to be maintained by the Poor Law Authorities. He was subsequently killed by accident arising out of & in the course of his employment when working under an assumed name. The widow, after learning the facts in 1934,

brought a claim on behalf of herself & her children for compensation as dependants. The county ct. judge held on the facts that there was no dependency or any reasonable probability of dependency & made his award for the employers. The widow appealed:—*Held*: the question of dependency was one of fact & could not be presumed from the legal obligation to support. There was evidence to support the finding of fact & no misdirection.—*PETERS v. OVERHEAD, LTD.* (1934), 27 B. W. C. C. 190, C. A.

2143b. *Motive of marriage immaterial—Marriage while in dying condition.*—In 1913, the sister of the wife of a workman came to live with both of them. In 1915 the wife died & the sister-in-law stayed on as the workman's housekeeper, becoming entirely dependent on him for her support. In Dec. 1925, the workman was operated on for scrotal epithelioma, but resumed work in June, 1926. In Mar. 1928, he was certified as suffering from an industrial disease & underwent another operation. In Apr. he went to hospital, but was discharged after four days on the ground that his case was incurable, & it was then thought that he was in a dying condition. On June 7, he married his sister-in-law with the view of making her a dependant within the Act. On July 21, 1928, he died. At the time of his death he was in receipt of a weekly payment of compensation from his employers. The widow claimed compensation on the ground of total dependency. The county ct. judge found that the widow would not have been a dependant at the time of his death but for the accident, & therefore, refused compensation. The widow appealed:—*Held*: appct. having proved that, if the workman had not been incapacitated from earning wages, she would at the time of his death have been totally dependent upon him, & having also proved that at that time she was in fact his wife, she was entitled to an award. The fact that she married him after he had become incapacitated was immaterial, & any motive she may have had for marrying him was irrelevant.—*BRAZEWELL v. EMMOTT & WALLSHAW, LTD.* (1929), 140 L. T. 603; 45 T. L. R. 194; 73 Sol. Jo. 126; 22 B. W. C. C. 152, C. A.

*Annotation*—*Apld. Nugent v. Londonderry Collieries, Ltd.* (1929), 141 L. T. 619.

2146. *Add. Annotations*:—*Consd. Bacon v. Longrake Spar Co.* (1931), 146 L. T. 115. *Refd.* *Lee v. Munro* (1928), 98 L. J. K. B. 49.

2151. *Add. Annotations*:—*Consd. Bacon v. Longrake Spar Co.* (1931), 146 L. T. 115. *Refd.* *Lee v. Munro* (1928), 98 L. J. K. B. 49.

PART XIV. SECT. 2, SUB-SECT. 2.—  
C. (a) ii.

sd. "Unmarried daughter"—*Widow.*]  
—"Unmarried daughter" in Workmen's Compensation Act, s. 2 (1) (d), includes a widowed daughter.—*SOLEMAN BIBI v. EAST INDIAN RY.* (1933), 1 L. L. R. 60 Cal. 820.—*IND.*

PART XIV. SECT. 2, SUB-SECT. 2.—  
C. (a) iii.

2154 iii. — Sum less than cost of own maintenance.]—There is no inference of partial dependency in the case of a member of the workman's family who contributes to a family

pool, entirely spent upon the necessities of life of the whole family, a sum less than the proportion of the fund actually spent upon his own necessities, while retaining surplus earnings sufficient to allow him to contribute his whole proportion.—*ELLIOT v. GOW HARRISON & CO.* (1929), 22 B. W. C. C. 854.—*SCOT.*

st. *Mother having pension.*—A son lived with his mother & up to the year 1928, had contributed to her maintenance & the upkeep of the home. After 1928 the earnings of the son, who was a watersider, fell away, & his average earnings for the three years prior to the accident resulting in his death were

about £1 15s. 6d. weekly. His mother had a pension of £2 weekly. The son engaged in certain activities which contributed in some degree to the upkeep of the home, but these were incapable of estimate in terms of money:—*Held*: on the evidence, the mother was not a dependant of the son.—*MANN v. ADELAIDE STEVEDORING CO., LTD.*, [1935] S. A. S. R. 123.—*AUS.*

PART XIV. SECT. 2, SUB-SECT. 2.—  
C. (a) iv.

k i. — Meaning of "unmarried."]  
—On the construction of "unmarried sister" in Workmen's Compensation Act:—*Held*: although ordinarily "un-



**2161. Add. Annotation:—Consd.** Thompson v. London & North Eastern Ry. Co., [1935] 2 K. B. 90.

**2166a. ———.]—A workman, when on shore, which was about three months in a year, lodged with his married sister & paid her 30s. a week, & he also paid her £1 a week whilst at sea, out of which, after paying the expenses of his keep, she made a profit. The county ct. judge found that the sister was partially dependent on his earnings:—*Held*: it was a question of fact, & there was evidence to support the finding, & no misdirection.—BLOOR v. SUTTON (OWNERS) (1926), 20 B. W. C. C. 12, C. A.**

**2167. Add. Citation:—19 B. W. C. C. 394.**

*Add. Annotations:—Folld.* Shotts Iron Co. v. Curran, [1929] A. C. 409. *Refd.* Ward v. Dorman, Long & Co., [1933] 2 K. B. 658.

**2169. Add. Annotation:—Refd.** Ropner S.S. Co. v. Morgan, Miller v. Morgan, [1935] 1 K. B. 1.

**2170a. ——— After payment into court—Death before award.]—A fireman employed on a ship by applt. lost his life on Nov. 15, 1933, when the ship foundered, his dependants at that date being his wife & his father & mother, & applt. on Jan. 2, 1934, paid £300 (less £10 which they had advanced to the father & mother) into ct. under rule 61 of Workmen's Compensation Rules, 1926, with an admission of liability. On Jan. 10, 1934, the fireman's wife died. On Apr. 21, 1934, the county ct. judge awarded £100 to the fireman's father & mother & £200 to the personal representative of his widow & refused an application by the employers for repayment to them of any part of the sum paid into ct. On an appeal by the employers against the award of £200 to the widow's personal representative:—*Held*: the effect of sect. 2 (3) of 1925 Act, & rr. 7 & 61 of Workmen's Compensation Rules, 1926, was that the award of £200 to the widow's personal representative should be discharged & that sum should be repaid to applt. —ROPNER S.S. CO., LTD. v. MORGAN, MILLER v. MORGAN, [1935] 1 K. B. 1; 104 L. J. K. B. 1; 151 L. T. 318; 50 T. L. R. 448; 78 Sol. Jo. 472; 27 B. W. C. C. 222, C. A.**

**2173. Add. Annotations:—As to (1) Dlst.** Lee v. Breckman (1928), 138 L. T. 610. *Consd.* Smith v. Stepney Corpn. (1929), 22 B. W. C. C. 451.

**2179a. ——— Expenses.]—Applt., a traveller employed by resps., had been engaged at a salary of £450 a year, but subsequently resps. by a letter agreed at his request to**

show his remuneration as being £150 salary & £300 for expenses. Applt. met with an accident & applied for compensation. The county ct. judge found that the agreement in the letter was a thing done for income tax purpose, & that applt.'s earnings must be treated as £450 a year, & that he was not a workman within Workmen's Compensation Acts:—*Held*: as there was no evidence as to what applt.'s expenses in fact were, the judge's decision was right.—SKIDMORE v. BULLOCK, LADE & CO., LTD. (1928), 44 T. L. R. 575; 21 B. W. C. C. 109, C. A.

**2181. Add. Annotation:—Refd.** Summers v. Rhondda Urban District Council, [1938] 3 All E. R. 585.

**2187. Add. Annotation:—Refd.** Trim v. Gillett (1933), 26 B. W. C. C. 157.

**2189a. ———.]—A farm labourer, aged sixty-seven, did general farm work for a farmer. He worked when he liked at a rate of 3s. 6d. a day. Sometimes he worked three days a week, sometimes four, sometimes one. Some weeks he did no work at all. While cutting a hedge for the farmer he fell & injured himself. After hearing the evidence the county ct. judge found that the labourer was not a "workman" within the Act. The workman appealed:—*Held*: it was purely a question of fact for the county ct. judge.—TRIM v. GILLETT (1933), 26 B. W. C. C. 157, C. A.**

**2199. Add. Annotations:—As to (1) Consd.** Nimmo v. Thomas Jones (Estates), Ltd. (1929), 22 B. W. C. C. 642. *Folld.* Farleigh v. Parker & Lang (1930), 23 B. W. C. C. 490.

**2202. Add. Annotation:—Consd.** Farleigh v. Parker & Lang (1930), 23 B. W. C. C. 490.

**2203. Add. Annotation:—Refd.** Farleigh v. Parker & Lang (1930), 23 B. W. C. C. 490.

**2204a. ———.]—A casual labourer was employed by a builder in the doing of the repairs to the roof of a farmhouse & was paid by the hour. The farmer, for whom the repairs were being done, suggested to the builder that when the job was finished the builder's men should assist in removing the branch of a tree which was overhanging & damaging the roof. The builder agreed, but nothing was said as to terms. The work on the roof having been finished at dinner-time, the labourer climbed the tree, & in the course of sawing the branch, fell off the tree & was injured. He claimed compensation from the builder & the farmer in the alternative. The county ct. judge found as facts that the contract of service between the labourer &**

married" means a person who has never been married, the expression is susceptible of meaning "a sister whose husband is not alive at the time when the question arises"; if the surrounding circumstances indicate that the word was intended to be used in the statute in that sense.—MUSAMMAT MOTI BAI v. AGENT, NORTH-WESTERN RAILWAY (1931), 1 L. L. R. 12 Lab. 228.—JND.

#### PART XIV. SECT. 2, SUB-SECT. 2.—D.

*eg. On death of workman.]—An award of "the sum of \$1,800 payable in monthly instalments of \$30" does not terminate at death.—Re MORRISKEY, [1935] 3 D. L. R. 260; 9 M. P. R. 309; 5 F. L. J. (Can.) 36.—CAN.*

#### PART XIV. SECT. 3, SUB-SECT. 1.—A.

*st. Factory manager.]—Pltf. brought an action under Deaths by Accidents Compensation Act, 1908, claiming damages in respect of the death of her husband who had been employed as manager of deft.'s factory. Apart from deceased, seven, & sometimes eight, persons were employed in connection with the factory. The manager's salary was over £400 a year, with free house & other allowances; he had supervision & control of the other employees, with power to dismiss men, & to engage men, generally with the approval of the managing directors; he was responsible for the entire working of the factory & for the quality of the produce manufactured; it was his duty to give advice, when necessary, to suppliers,*

*& he had to watch the overrun. He did a great deal of manual work as part of his job. Application was made under sect. 52 of Workers' Compensation Act, 1922, to have the question determined whether deft. was liable to pay compensation under that Act in respect of deceased's death, & if so, to have such compensation assessed.—*Held*: deceased was "a persn employed otherwise than by way of manual labour."—SMILLIE v. RANGITIKI CO-OPERATIVE DAIRY CO., LTD., [1934] N. Z. L. R. 238.—N.Z.*

#### PART XIV. SECT. 3, SUB-SECT. 2.—A.

*t 1. — Nurse.]—*Held*: employed to perform work of a casual nature.—LOWE v. BRUCE (1926), 47 N. L. R. 459.—S. AF.*



the builder came to an end at dinner-time & that there was an implied contract that the farmer should pay the labourer for his labour, & held that, although the labourer's employment was of a casual nature, the lopping of the tree was work done for the purposes of the farmer's trade or business. He therefore made an award for the labourer against the farmer. The farmer appealed:—*Held*: there was evidence to support the findings & no misdirection. Appeal dismissed.—*FARLEIGH v. PARKER & LANG* (1930), 23 B. W. C. C. 490, C. A.

**2204b.** — *Decorating premises.*—A woman who made her living by letting furnished rooms met a painter & whitewasher in the street & told him that her house needed whitewashing. He agreed to do the job. After working on the job for a few days he was unable to continue as he had contracted dermatitis by using caustic soda for the washing. He was certified by a certifying surgeon as suffering from an industrial disease & claimed compensation. The county ct. judge held that the painter's employment was of a casual nature, & that he was employed otherwise than for the purposes of the employer's trade or business & made his award for resp. Appct. appealed:—*Held*: it was a question of fact for the judge, & there was no misdirection. Appeal, dismissed.—*NASH v. NANI* (No. 2) (1932). 25 B. W. C. C. 275, C. A.

**2206a.** — *—*—*HARDCASTLE v. SMITHSON*, No. 2054a, *ante*.

**2212.** *Add. Annotation:—Distd.* *Templeton v. Parkin Wm. & Co.* (1929), 140 L. T. 519.

**2213a.** — *Jobbing glazier—Supplying own tools.*—*Held*: there was evidence to support the finding of the county ct. judge that appct. was an independent contractor.—*WILLIAMS v. LARSEN, LTD.* (1928), 21 B. W. C. C. 339, C. A.

**2216.** *Add. Citation:—subsequent proceedings*, 15 B. W. C. C. 257, C. A.

*Add. Annotations:—Consd.* *Templeton v. Parkin Wm. & Co.* (1929), 140 L. T. 519. *Refd.* *Williams v. Larsen* (1928), 21 B. W. C. C. 339.

**2216a.** — *Club collector.*—A club collector was appointed by a co-operative society & received a shilling in the pound on

all contributions collected by him. The society reserved the right to terminate the appointment with or without notice, & prohibited the collector from canvassing for any other firm in competition with the society. He was not obliged to work on any particular day or hour &, provided he did not keep money over the week-end, could pay in money collected whenever he pleased & at any branch. He could not go on holiday without the consent of the society. He was given further elaborate written instructions which dealt in detail with the method in which he should carry out his duties. The county ct. judge found that the collector was a workman & not an independent contractor:—*Held*: the question was one of fact & there was evidence to support the finding & no misdirection. Appeal dismissed.—*HOBBS v. ROYAL ARSENAL CO-OPERATIVE SOCIETY, LTD.* (1930), 144 L. T. 10; 23 B. W. C. C. 254, C. A.

**2220.** *Add. Annotations:—Consd.* *Roberts v. Gardner* (1928), 21 B. W. C. C. 154. *Refd.* *Hobbs v. Royal Arsenal Co-operative Society* (1930), 144 L. T. 10.

**2220a.** — *—*—A co., who carried on the business of manufacturing cutlery, let out the grinding of knives to one T. on a verbal agreement, terminable by a month's notice on either side. Under this agreement T. occupied a part of the co.'s premises, for which he paid rent, & was provided with power, water, light, & coal. He on his part provided the necessary labour, grinding wheels & other accessories. He could employ & dismiss what men he liked, & the co. could not object to any workman he employed except by terminating the agreement. Work was given out to him by the co.'s foreman at agreed prices & he made his profit out of the prices. He was allowed to do the work in his own way & in his own hours. He was not paid overtime, & had a key of the room in which he worked. The co. had first claim on his time & their foreman frequently came to see how the work progressed, but gave no directions. If the work had to be finished in a certain time, he was bound to finish it in that time, the co., if necessary, directing him to work overtime or get extra assistance. When work was slack, he was allowed to take in work for other firms, but the co.'s

#### PART XIV. SECT. 3, SUB-SECT. 4.

*sd. Accident abroad—Service to be substantially performed within territorial limits.*—A workman is entitled to claim compensation in the Free State under Workmen's Compensation Act, 1906, where both he & his employer are resident & domiciled in the Free State & the contract of service was made, & the service was substantially to be performed in, the Free State, although the accident in respect of which the claim arises occurred outside the territorial limits of the Free State.—*KEEGAN v. DAWSON*, [1934] I. R. 232; 27 B. W. C. C. Supp. 136.—*IR.*

#### PART XIV. SECT. 3, SUB-SECT. 5.

**2213 iv.** — *—*—*Deceased & his partner contracted with appct. to cut & cart 1,000 cubic feet of clay at 5s. 3d. per cubic yard.* They used their own tools & lorry, paid their own assistants, & worked when they liked, the only stipulation being that they had to deliver sufficient clay to keep

the pottery working. Appct. indicated what part of the pit the clay was to be taken from & where the loads were to be dumped at the pottery. Deceased was killed by a fall of clay in the pit:—*Held*: deceased was an independent contractor.—*WEST AUSTRALIAN POTTERY CO., LTD. v. NEIL*, [1928] W. A. L. R. 105.—*AUS.*

**o i.** — *—*—*Pltf. engaged with deft. to sink a well at an agreed rate per foot. Deft. exercised no control or direction over pltf. in the execution of the work, pltf. being an expert well-sinker:—Held: pltf. was an independent contractor.*—*DELOW v. BELL*, [1927] N. Z. L. R. 140.—*N.Z.*

**2220 i.** — *Engagement at weekly wages.*—*Resp., requiring a sewerage system & a hot & cold water supply put into the house, got into communication with appct., who was a plumber, & he agreed to do the work. He was to be paid £4 4s. a week for doing it, & it was to take six weeks. Appct.'s son occasionally helped appct., & the £4 4s. a week was to include any*

help that the son might give. *Resp. also employed "a handy man" at 5s. a day & another man to assist appct., & she paid both these men. Before beginning the work appct. went to the house, which was vacant, & measured up what it would take to do the work. He dictated a list of the materials required, & these were ordered, & resp. paid for them. A friend of resp.'s, a farmer, showed appct. where to lay the pipes & where the bath was to be put. Resp. on one occasion spoke to appct. about the line one drain would take as regards certain flower beds, but did not tell him where to run the drain. Otherwise appct. was left to himself as to how he would do the work. During the course of the work appct. was injured:—*Held*: there was clear evidence that appct. had entered into a contract of service at the weekly wage of £4 4s. for the period required for completing a specified work, & accordingly appct. was entitled to compensation.*—*LOGUE v. PENTLAND*, [1930] I. R. 6; 23 B. W. C. C. 646.—*IR.*

work continued to take precedence. His National Health Insurance cards were stamped by the co. In 1919 he had been paid compensation by the co. for an accident. In Oct. 1927, he ceased working regularly & on Jan. 24, 1928, he was certified as suffering from silicosis. On a claim for compensation, the county ct. judge held on these facts that T. was employed under a contract of service & was a workman entitled to compensation. The co. appealed:—*Held*: there was no evidence of any right on the part of the co. to control & direct how the work was to be done. The man was an independent contractor & not a workman within the meaning of the Act.—*TEMPLETON v. PARKIN WM. & Co., LTD.* (1929), 140 L. T. 519; 22 B. W. C. C. 110, C. A.

**2220b.** — *Plumber.*—A plumber who did odd jobs was engaged by a farmer to do various repairs. On one day he reglazed a skylight; on another day, with the assistance of the farmer, he repaired a water-pipe. On the second occasion the farmer suggested that the plumber should do some repairs to the roofs of a cottage & farmhouse & said that if he required help he could have the loan of a farm labourer, but no arrangement was made as to price or time of payment. For these repairs the plumber brought his own tools & provided his own sand & cement, but the farmer supplied a ladder. On the third day of the job the plumber fell off the ladder & was injured. On a claim for compensation the county ct. judge found that the plumber was an independent contractor & not a workman within the Act. Appct. appealed:—*Held*: the finding was supported by the evidence & there was no misdirection. Appeal dismissed.—*OLDROYD v. TURNER* (1935), 28 B. W. C. C. 369, C. A.

**2225.** *Add. Annotation*:—*Reffd. Murphy v. Henderson & Glass* (1930), 23 B. W. C. C. 91.

**2227a.** — — —.]—The beneficiaries under the will of J. formed themselves into a limited co. for the purpose of managing testator's estate consisting of a large amount of house property. Under its memorandum & arts. of assocn. it had power to carry on, *inter alia*, the business of builders, contractors, & dealers in building materials. The co. employed a contractor to do certain house repairs. A labourer employed by the contractor on this work was injured by the collapse of a scaffolding, & claimed compensation from the co. on the ground that the agreement with the contractor had been entered into in the course of or for the purposes of its trade or business & relied on the powers given the co. by its memorandum &

arts. The county ct. judge found as a fact that, notwithstanding the memorandum & arts., the co. was formed for the purposes of managing the estate & making a distribution among the beneficiaries. He held that the co. was not carrying on a trade or business & was not, therefore, liable to pay compensation as a principal under sect. 6. The workman appealed:—*Held*: the nature of the purposes for which the co. was formed was a question of fact for the county ct. judge. The finding was supported by the evidence & there was no misdirection.—*NIMMO v. THOMAS JONES (ESTATES), LTD.* (1929), 22 B. W. C. C. 642, C. A.

**2229.** *Add. Annotation*:—*Dlst. Watson v. Government Instructional Centre (Birmingham)* (1928), 97 L. J. K. B. 596.

**2232a.** *Limited company managing estate of deceased.*—*NIMMO v. THOMAS JONES (ESTATES), LTD., No. 2227a, ante.*

**2234a.** — — —.]—M., Ltd., agreed to deliver a crane to H. & G. & to provide a skilled erector & the necessary unskilled assistance for its erection at their works. The erector sent by M., Ltd., was given authority to engage unskilled assistance but had no express authority to engage or pay for overtime. The crane was late in delivery & H. & G. pressed the erector of M., Ltd., to erect it as quickly as possible. The erector, therefore, asked the wages clerk of H. & G. whether a foreman in the regular employment of H. & G. could remain & work overtime on a Sat. afternoon. The foreman duly worked overtime as an unskilled assistant & was paid by the erector. On the following Tues. one of the partners of H. & G. pressed the erector to work overtime again &, after a discussion as to which of them should pay for overtime, suggested that the erector had better have the foreman as before. The partner called the foreman, & the following conversation took place between the partner & the foreman: "C., the erector, wants you to stay. Will you help?" "Yes, I will." "The same arrangement as Sat." On the same day the partner wrote a letter to M., Ltd., in which he said, "We have instructed your foreman to work overtime to-night & our foreman will help him. . . . We, of course, will debit you with the cost of our man's time." At 9 p.m. that night the foreman fell from a ladder while assisting in the erection of the crane & was killed. H. & G. & M., Ltd., were each made resps. to an application for arbn. by the dependants of deceased workman. The county ct. judge found that the workman had ceased his

#### PART XIV. SECT. 4, SUB-SECT. 1.

**q i.** — *Grantor of a right to take timber.*—An agreement whereby a landowner grants to another the right of access to his land to take timber therefrom for which the grantee pays a royalty is not a contract or "part of or a process in the trade or calling" of a farmer within Workers' Compensation Act, s. 13, & consequently the landowner is not a principal & cannot be made jointly & severally liable with the grantee pursuant to the provisions of that sect.—*MICALICK v. MCGREGOR*, [1929] N. Z. L. R. 245.—N. Z.

**2232 i.** *Foreigner resident abroad—Accident to workman in this country.*—

*SCANLON v. HARTLEPOOL SEATONIA S.S. CO., LTD.* (No. 1), [1929] I. R. 96.—IR.

**sv.** *Contract to keep employee covered by compensation—Failure to transmit name to Board—Liability of employer.*—An employer contracted to keep an employee covered by workmen's compensation. After an accident the Board decided that the claimant was disentitled to recover solely because the employer had failed to transmit his name to the Board:—*Held*: this adjudication was conclusive, & the employer was liable to his employee.—*BERG v. PIGEON TIMBER CO., LTD.*, 3 D. L. R. 124; O. R. 357.—

**sw.** *Workmen's Compensation Board—Liability to medical practitioner.*—An injured workman is entitled to such medical & surgical aid as may be necessary, & the Board is liable to the medical practitioner as a matter of statutory duty, not contract.—*FLECK v. WORKMEN'S COMPENSATION BOARD*, [1934] 3 D. L. R. 301; 8 M. P. R. 33.—CAN.

**sz.** *Levy of Board—Priority.*—The levy of the Workmen's Compensation Board under a Provincial Statute has priority over the claim of a bank on a security under Bank Act, R.S.C. 1927.—*WORKMEN'S COMPENSATION BOARD v. ROYAL BANK*, [1935] 2 D. L. R. 250; 8 M. P. R. 482; *affd.* [1936] S. C. R.

employment with H. & G. on the Tues. at 5 p.m. & was then engaged by M., Ltd. He made an award for appcts. against M., Ltd. M., Ltd., appealed:—*Held*: there was misdirection, & no evidence to support the finding of a fresh contract of service with M., Ltd. The contract of service with H. & G. was still subsisting at the time of the accident, & the workman was lent or let on hire within sect. 5 (1), & therefore H. & G. remained liable.—*MURPHY v. HENDERSON & GLASS* (1930), 23 B. W. C. C. 91, C. A.

2238. *Add. Annotation*:—*Refd.* Geddes v. Dunfermline District Committee (1927), 20 B. W. C. C. 815.

2239. *Add. Annotation*:—*Consd.* Nimmo v. Thomas Jones (Estates), Ltd. (1929), 22 B. W. C. C. 642.

2243. *Add. Annotation*:—*Consd.* Nimmo v. Thomas Jones (Estates), Ltd. (1929), 22 B. W. C. C. 642.

2256. *Add. Annotation*:—*Refd.* Geddes v. Dunfermline District Committee (1927), 20 B. W. C. C. 815.

2261. *Add. Annotations*:—*Consd.* McFarlane v. Hutton (Stevedores) (1926), 96 L. J. K. B. 357. *Refd.* Muscroft v. Stewarts & Lloyds (1928), 21 B. W. C. C. 274; Collinson v. Manvers Main Collieries, Ltd. (1937), 30 B. W. C. C. 280.

2264. *Add. Annotations*:—*Apld.* McFarlane v. Hutton (Stevedores) (1926), 96 L. J. K. B. 357; *Ferguson v. Shotts Iron Co.* (1927), 20 B. W. C. C. 741. *Consd.* Walker v. Bairs & Dalmellington, Ltd. (1935), 153 L. T. 322. *Apld.* Collinson v. Manvers Main Collieries, Ltd. (1937), 30 B. W. C. C. 280. *Consd.* Ormond v. Holmes & Co., [1937] 2 All E. R. 795. *Refd.* Flanagan v. Ackers Whitley (1926), 19 B. W. C. C. 399; Raeburn v. Lochgelly Iron & Coal Co. (1926), 20 B. W. C. C. 637; Muscroft v. Stewarts & Lloyds (1928), 21 B. W. C. C. 274; Wiles v. Ellerman's Wilson Line (1928), 21 B. W. C. C. 194; Brown v. Aveling & Porter (1929), 22 B. W. C. C. 165; James v. Patridge Jones & John Paton, Ltd. (1932), 25 B. W. C. C. 328; Treloar v. Falmouth Docks & Engineering Co. (1932), 147 L. T. 271; Walker v. Brown (John) & Co. (1932), 25 B. W. C. C. 166.

2265. *Add. Annotations*:—*Consd.* Lander v. British United Shoe Machinery Co. (1933), 176 L. T. Jo. 7. *Distd.* Lander v. British United Shoe Machinery Co. (1933), 102 L. J. K. B. 768. *Consd.* Martin v. Finch, [1937] 2 All E. R. 631; Ironmonger v. Vinter (1938), 31 B. W. C. C. 90.

2270a. ———.]—A railway signalman died on Feb. 28, 1931, from pneumonia following a chill. It was alleged by his widow that on Feb. 20, 1931, which was a fine, dry day, after the end of his shift the relief man found him drying his cardigan at the cabin fire. It was the practice at the close of a shift to leave a clean bucket of water in the cabin

& it was alleged that the deceased workman got wet & could only have got wet by falling with the bucket when climbing the steps of the signal cabin. On a claim for compensation by the widow the county ct. judge in making his award said that if he were to find that deceased had met with an accident or, supposing there to have been an accident, that that accident had contributed to his death, he would be going into the realms of guess, conjecture, or surmise. He therefore made his award for the employer. The widow appealed:—*Held*: it was entirely a question of fact for the county ct. judge & there was no misdirection. Appeal dismissed.—*BOWLES v. SOUTHERN RY. CO.* (1931), 24 B. W. C. C. 478, C. A.

2270b. ———.]—A market porter alleged that he had strained his back while carrying a box of oranges. The county ct. judge found that he was suffering from muscular rheumatism unconnected with any strain or accident & made an award dismissing his claim for compensation. The workman appealed:—*Held*: it was a question of fact for the county ct. judge & there was no misdirection. Appeal dismissed.—*ROGERS v. DAN WUILLE & Co., LTD.* (1935), 28 B. W. C. C. 498, C. A.

2274a. *Inhalation of dust.*]—A workman inhaled a cloud of dust which burst from the machine at which he was working & collapsed. He was then found to be suffering from a disease of the silicosis type which was neither scheduled as an industrial disease nor came within any silicosis scheme. There was evidence that the cloud of dust had aggravated the disease. The county ct. judge found that the incapacity was due to an accident & made an award in favour of the workman. The employers appealed:—*Held*: there was evidence to support the findings & no misdirection.—*BREEN v. MORGAN CRUCIBLE CO., LTD.* (1933), 26 B. W. C. C. 368, C. A.

2274b. *Blister.*]—A collier, after having been no strike for four months, during which time his hands had softened, returned to work in soft coal, when he experienced a general soreness of the hands. After a week he began to work in hard coal & within a few days his left hand became blistered. When the hand became very tender he was treated by the ambulance man who broke a blister & sent him to his doctor. His doctor found sepsis beneath the blister. As a result the workman was incapacitated from work for five weeks & claimed compensation for those five weeks from his employer on the ground that the formation of that particular blister during a particular shift was a personal injury by accident. The county ct. judge, on the ground that he could not hold that the forming of an unbroken blister in the course of heavy manual work was either fortuitous or unexpected, dismissed the application. The workman appealed:—*Held*: it is not necessary for a workman who alleges that he has been injured by accident arising out of &

560; 4 D. L. R. 9; 6 F. L. J. (Can.) 195.—CAN.

PART XIV. SECT. 4, SUB-SECT. 3.—B.  
o 1. ——— *Erecting electric cable for railway company.*]—*RABIA v. GREAT INDIAN PENINSULAR RY.* (1928), 1 L. R. 53 Bom. 203.—IND.

PART XIV. SECT. 4, SUB-SECT. 3.—D.

sa. *Workman receiving weekly payments from contractor.*]—*Workman son of contractor.*]—*Held*: although the contractor explained that he would not have made the payments but for the fact that the workman was his

son, the facts justified the arbitrator in finding that the son had elected to take his father as his debtor in the obligation to pay compensation, & he was barred from claiming against the principal.—*GEDDES v. DUNFERMLINE DISTRICT COMMITTEE*, [1927] S. C. 797; 20 B. W. C. C. 815.—SCOT.

in the course of his employment to show that the injury which he has sustained is not one which might naturally be expected from the work which he was doing in the condition in which he was. The workman, having proved that this particular blister was a particular event happening at a particular time in the course of his employment, was entitled to compensation.—**COLLINSON v. MANVERS MAIN COLLIERIES, LTD.** (1937), 30 B. W. C. C. 280, C. A.

**2276. Add. Annotations:—Consd. Walker v. Bairds & Dalmellington, Ltd.** (1935), 153 L. T. 322. **Refd. Raeburn v. Lochgelly Iron & Coal Co.** (1926), 20 B. W. C. C. 647; **Bradley v. London & North Eastern Ry. Co.** (1931), 145 L. T. 30.

**2278. After this case add:—**

— — — — —.]—*See, also*, No. 2281, *post*.

**2281. Add. Annotation:—Consd. Bradley v. London & North Eastern Ry. Co.** (1931), 145 L. T. 30.

**2284. Add. Annotations:—Consd. Walker v. Bairds & Dalmellington, Ltd.** (1935), 153 L. T. 322; **Smith v. Cornhill Insurance Co.**, [1938] 3 All E. R. 145. **Refd. Raeburn v. Lochgelly Iron & Coal Co.** (1926), 20 B. W. C. C. 637.

**2285. Add. Annotation:—Consd. Dixon v. Ayresome S.S. Owners** (1930), 99 L. J. K. B. 250.

**2286. Add. Annotation:—Consd. Walker v. Bairds & Dalmellington, Ltd.** (1935), 153 L. T. 322.

**2287. Add. Annotation:—Consd. Walker v. Bairds & Dalmellington, Ltd.** (1935), 153 L. T. 322.

**2288. Add. Annotation:—Consd. Walker v. Bairds & Dalmellington, Ltd.** (1935), 153 L. T. 322.

**2297. Add. Annotation:—Distd. Lee v. Breckman** (1928), 138 L. T. 610.  
After this case add “*See, also*, Nos. 2586–2589b, *post*.”

**2299. Add. Annotation:—Consd. Lee v. Breckman** (1928), 138 L. T. 610.

**2300. Add. Annotations:—As to (1) Refd. Simpson v. London, Midland & Scottish Ry. Co.**, [1931] A. C. 351. **As to (2) Consd. Lee v. Breckman** (1928), 138 L. T. 610; **Holden v. Premier Waterproof & Rubber Co.** (1930), 144 L. T. 519.

**2301. Add. Annotation:—Refd. Smith v. Stepney Corpn.** (1929), 22 B. W. C. C. 451.

**2302. Add. Annotation:—Consd. Ormond v. Holmes & Co.**, [1937] 2 All E. R. 795.

**2304. Add. Annotations:—As to (2) Consd. Bradley v. London & North Eastern Ry. Co.** (1931), 145 L. T. 30. **Refd. Raeburn v. Lochgelly Iron & Coal Co.** (1926), 20 B. W. C. C. 637; **Ferguson v. Shotts Iron Co.** (1927), 20 B. W. C. C. 741.

**2305. Add. Annotation:—Consd. Bradley v. London & North Eastern Ry. Co.** (1931), 145 L. T. 30.

**2307. Add. Annotation:—Refd. Timmins v. Brodsworth Main Colliery Co.**, [1934] 2 K. B. 361.

**2308. Add. Annotations:—As to (1) Apld. Raeburn v. Lochgelly Iron & Coal Co.** (1926), 20 B. W. C. C. 637. **Consd. Bradley v. London & North Eastern Ry. Co.** (1931), 145 L. T. 30; **Collinson v. Manvers Main Collieries, Ltd.** (1937), 30 B. W. C. C. 280. **Refd. Ferguson v. Shotts Iron Co.** (1927), 20 B. W. C. C. 741. **Generally, Refd. Leary v. Deptford S.S. Owners** (1935), 28 B. W. C. C. 235; **Ormond v. Holmes & Co.**, [1937] 2 All E. R. 795.

**2309. Add. Annotations:—Consd. Cole v. L. & N. E. Ry.** (1928), 21 B. W. C. C. 87. **Refd. Ferguson v. Shotts Iron Co.** (1927), 20 B. W. C. C. 741.

**2310. Add. Annotations:—Consd. Cole v. L. & N. E. Ry.** (1928), 21 B. W. C. C. 87. **Refd. Ferguson v. Shotts Iron Co.** (1927), 20 B. W. C. C. 741; **Smith & Son v. Eagle Star & British Dominions Insurance Co.** (1934), 27 B. W. C. C. 1; **Morgan v. Amalgamated Anthracite Collieries, Ltd., Hutchings v. Amalgamated Anthracite Collieries, Ltd.** (1935), 28 B. W. C. C. 358.

**2310a. — Anthracosis.]—**A platelayer employed by a railway co. worked in tunnels on an average of two days a week. From May 10 to Aug. 2, 1924, he was at work continuously in a long tunnel where a considerable amount of work was being done, & the full train service was running. On Aug. 2, he coughed up a lump of black stuff, & consulted a doctor, who, on Oct. 1, certified that he was suffering from anthracosis, a form of dust disease. He obtained light work as a gardener, but abandoned that on Oct. 9, 1925, & did no further work. No notice of any accident was given, nor was any claim made, until he commenced proceedings for an award some three years after he had given up work as a platelayer. The county ct. judge held appt. had not discharged the burden of proving that his past or present incapacity was due to injury by accident which arose out of or in the course of his employment by resps.:—**Held:** the judge was bound in law to come to the conclusion to which he did, & there was no misdirection.—**COLE v. LONDON & NORTH EASTERN RY. CO.** (1928), 21 B. W. C. C. 87, C. A.

**2311. Add. Annotation:—Refd. Ormond v. Holmes & Co.**, [1937] 2 All E. R. 795.

**2313. Add. Annotation:—Consd. Ormond v. Holmes & Co.**, [1937] 2 All E. R. 795.

**2314. Add. Annotation:—Refd. Ormond v. Holmes & Co.**, [1937] 2 All E. R. 795.

**2314a. Paralysis.]—**A blacksmith's striker who had followed this at times strenuous occupation for years on Sept. 27, 1935, had a stroke at home. He returned to work on Oct. 9. On Dec. 20 he gradually became ill at work

**PART XIV. SECT. 5, SUB-SECT. 1.—**  
C. (c).

**2282 la. S. P. BRESAND v. NORTHERN S.S. CO., LTD.**, [1928] N. Z. L. R. 461.—N.Z.

**PART XIV. SECT. 5, SUB-SECT. 1.—**  
C. (d).

**ab. Heart failure caused by**  
**No evidence of excessive**  
**Whether injury by accident.]—**A work-

man, who was employed as a brusher in a mine, began a shift at 11 p.m. on Dec. 30. It was the last shift of the year, & the man worked more vigorously than usual in order to finish early for his own purposes. About 12.20 a.m. on Dec. 31, he complained of a pain in his side. He collapsed while at work about ten minutes later, & died shortly afterwards. Death was due to heart failure, caused by the strain of the whole work of the shift

operating upon a diseased condition of the heart. There was no proof of any particular or exceptional strain, & it was not proved that the extra vigour with which the deceased had been working caused his death:—**Held:** the arbitrator was entitled to hold that the workman's death was not caused by injury by “accident” within Workmen's Compensation Acts.—**MILLAR v. COLTNESS IRON CO., LTD.**, [1929] S. C. (Ct. of Sess.) 429.—SCOT.

& collapsed at 10 a.m. The county ct. judge found on the medical evidence that the work the man was actually engaged on neither caused, nor contributed to, nor accelerated the second stroke & that he could not associate the second stroke with the work the man was engaged upon on Dec. 20 nor with any particular work done before then:—*Held*: the workman's incapacity was due to disease no doubt aggravated by his work, but as it was impossible to point to any specific event that was responsible for his change in condition, there was no accident within Workmen's Compensation Act, 1925, s. 1 (1).—*ORMOND v. HOLMES & Co., LTD.*, [1937] 2 All E. R. 795; 107 L. J. K. B. 21; 157 L. T. 56; 53 T. L. R. 779; 81 Sol. Jo. 478; 30 B. W. C. C. 254, C. A.

**2316. Add. Annotations:—***Apld.* Flanagan v. Ackers Whitley (1926), 19 B. W. C. C. 399. *Consd.* McFarlane v. Hutton (Stevedores) (1926), 96 L. J. K. B. 357. *Distd.* Ferguson v. Shotts Iron Co. (1927), 20 B. W. C. C. 741; Muscroft v. Stewarts & Lloyds (1928), 21 B. W. C. C. 274. *Consd.* Davis v. London, Midland & Scottish Ry. Co. (1930), 23 B. W. C. C. 368; Jones v. Blaenavon Co. (1931), 24 B. W. C. C. 148. *Apld.* Davies v. Vipond & Co. (1932), 146 L. T. 498; Treloar v. Falmouth Docks & Engineering Co. (1932), 147 L. T. 271; James v. Partridge Jones & John Paton, Ltd. (1933), 26 B. W. C. C. 277. *Consd.* Walker v. Brown (John) & Co. (1932), 25 B. W. C. C. 166; Davis v. McNamara & Co. (1921), Ltd. (1932), 25 B. W. C. C. 550; Walker v. Bairds & Dalmellington, Ltd. (1935), 153 L. T. 322; Whittle v. Ebbw Vale Steel, Iron & Coal Co., [1936] 2 All E. R. 1221; Ormond v. Holmes & Co., [1937] 2 All E. R. 795. *Refd.* Bradshaw v. Richards, Westgarth & Co. (1931), 24 B. W. C. C. 64; Hayman v. Pensford & Bromley Collieries (1921), Ltd. (1932), 25 B. W. C. C. 37; Hilton v. Billington & Newton, Ltd., [1936] 3 All E. R. 292.

**2317. Add. Annotations:—***Apld.* McFarlane v. Hutton (Stevedores) (1926), 96 L. J. K. B. 357. *Distd.* Muscroft v. Stewarts & Lloyds (1928), 21 B. W. C. C. 274. *Refd.* Ferguson v. Shotts Iron Co. (1927), 20 B. W. C. C. 741; Hayman v. Pensford & Bromley Collieries (1921), Ltd. (1932), 25 B. W. C. C. 37.

**2317a. Workman with heart disease—Death from strain.]—**A workman, employed in a mine, exerted himself in the ordinary course of his employment in lifting & replacing the wheels of a tub which had left the rails. He immediately complained of pain. He went to work the following day, & on his way home fell dead. Death was due to the bursting of the right auricle, owing to the walls of the heart having steadily become thinner over a period of years. Medical evidence was given to the effect that the strain of lifting would tend to make the workman's condition more critical & so lead to the collapse. The county ct. judge held the workman's death was caused by an accident, & he awarded compensation:—*Held*: it was a question of fact, as to which there was evidence to support the finding.—*FLANAGAN v. ACKERS WHITLEY & Co.* (1926), 19 B. W. C. C. 399, C. A.

**2317b. ———.]—**A stevedore, who for many years had done his work without ailing, while

employed unloading a ship had to fill a tub with iron ore, & at a certain point in the transit of the tub to deflect it so as to allow it to clear an obstacle. While pulling the tub into the right position he suddenly said "Oh!" & ceased work for a moment, but, recovering, put some iron ore into the tub, when he again felt ill & stopped. He lay down, & within half an hour from his saying "Oh!" was dead. On a *post mortem* examination it was found that he suffered from coronary disease of the heart, which sooner or later would have caused death:—*Held*: death resulted from a strain incurred in the ordinary exercise of the man's work, & this amounted to an accident, as to establish an accident it was not necessary to find a sudden or special strain, & an award should be made in favour of the dependant.—*McFARLANE v. HUTTON BROTHERS (STEVEDORES), LTD.* (1926), 96 L. J. K. B. 357; 136 L. T. 547; 20 B. W. C. C. 222, C. A.

*Annotations:—**Consd.* Muscroft v. Stewarts & Lloyds (1928), 21 B. W. C. C. 274. *Apld.* Hore v. General Steam Navigation Co. (1929), 22 B. W. C. C. 100. *Expld.* Davies v. Vipond & Co. (1932), 146 L. T. 498. *Apld.* James v. Partridge Jones & John Paton, Ltd. (No. 2) (1932), 25 B. W. C. C. 328; Treloar v. Falmouth Docks & Engineering Co. (1932), 147 L. T. 271. *Refd.* Walker v. Brown (John) & Co. (1932), 25 B. W. C. C. 166; Whittle v. Ebbw Vale Steel, Iron & Coal Co., [1936] 2 All E. R. 1221.

**2317c. ———.]—**A dock labourer left his home soon after 5 a.m., apparently in good health. Soon after reaching the docks where he was employed he felt unwell, but the attack passed off. At 6 a.m. he commenced work & was engaged with others in loading & unloading bags of china clay & of sugar, each weighing from 1 to 2 cwt., carried in slings to & from the ship. At 8.30 a.m. he had breakfast. He resumed work at 9 a.m. & was loading china clay. By piling the bags of clay one upon another he & his mates formed a temporary platform about 3 feet high, on which they received the slings. Each sling carried eleven bags, which the men stowed in convenient position on the ship. The deceased man was minded to move one of the bags on the platform. He was sitting on another bag at the time. He raised his hook above his head in order to lay hold of the bag he wished to shift. Then he fell forward & died. The man suffered from heart disease, but the nature of the disease was uncertain. His panel doctor, who had died before the proceedings mentioned below, had given a certificate assigning the cause of death to myocarditis & syncope. In proceedings by the widow & sole dependant of the deceased workman, the county ct. judge held that there was not sufficient evidence of an accident arising out of or in the course of the man's employment; for that any slight muscular movement might have caused his death at any time, & that there was nothing fortuitous about it:—*Held*: on the evidence it could not be doubted that the work the deceased man was doing contributed to his death; when that was proved it established that the death was due to an accident arising out of & in the course of his employment, unless the contrary was shown, & in applying as the test the question whether the death was to be expected at any time, the county ct. judge had misdirected himself.—*FALMOUTH DOCKS & ENGINEERING Co., LTD. v. TRELOAR,*

[1933] A. C. 481; 102 L. J. K. B. 708; 49 T. L. R. 250; *sub nom.* TRELOAR v. FALMOUTH DOCKS & ENGINEERING CO., LTD., 148 L. T. 507; 26 B. W. C. C. 214, H. L.

*Annotations*:—*Folld. Lochgelly Iron & Coal Co. v. Walkenshaw* (1935), 28 B. W. C. C. 230. *Consd. Whittle v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] 2 All E. R. 1221. *Refd. Davis v. McNamara & Co.* (1921), Ltd., (1932), 25 B. W. C. C. 550; *Walker v. Bairds & Dalmellington, Ltd.* (1935), 153 L. T. 322.

**2320. Add. Annotation**:—*Refd. Davis v. London, Midland & Scottish Ry. Co.* (1930), 23 B. W. C. C. 368.

**2321. Add. Annotation**:—*Refd. Timmins v. Brodsworth Main Colliery Co.* (1934), 50 T. L. R. 458.

**2322a. Death from strain.**—A workman who, at the time of his death & for some time before, had been suffering from disease of the coronary arteries, collapsed & died ten minutes after he had stopped working as a dipper in the galvanising department of the resps.' works. His widow accordingly made a claim for compensation against the resps. upon the ground that the death was caused by accident arising out of & in the course of his employment:—*Held*: the county ct. judge had not misdirected himself in law, & there was evidence to support his finding of fact, that the work & the disease together contributed to his death.—*PARTRIDGE JONES & JOHN PATON, LTD. v. JAMES*, [1933] A. C. 501; 102 L. J. K. B. 760; 148 L. T. 553; 49 T. L. R. 233; 77 Sol. Jo. 100; *sub nom.* JAMES v. PARTRIDGE JONES & JOHN PATON, LTD., 26 B. W. C. C. 277, H. L.

*Annotations*:—*Folld. Lochgelly Iron & Coal Co. v. Walkenshaw* (1935), 28 B. W. C. C. 230. *Consd. Whittle v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] 2 All E. R. 1221; *Ormond v. Holmes & Co.*, [1937] 2 All E. R. 795. *Refd. Walker v. Bairds & Dalmellington, Ltd.* (1935), 153 L. T. 322; *Hilton v. Billington & Newton, Ltd.*, [1936] 3 All E. R. 292.

**2322b. — — —**—A brusher, employed in a colliery, was engaged in his ordinary work on night shift. He had been trying to bring down part of the roof at which he was working. He had just decided that it was too hard to bring down with the pick & that he would require to fire a shot to bring it down, when he felt a pain in his chest & a choking sensation in his throat. Thereafter, with the help of a companion, a shot was prepared & fired. He was able to carry on with his work intermittently, but felt sick & complained of pain. He went home before the shift was over & never worked since. The workman filed a request for arbn. At the hearing the Sheriff-Substitute

found the workman had had sudden heart failure due to two causes: (a) the bad state of the heart & arteries, & (b) the heavy brushing work on which he had been engaged during the shift. He accordingly made an award of compensation in the workman's favour. The employer appealed. In answer to certain questions put by the judges of the First Division the arbitrator reported that there was a definite change in the condition of the workman after the night in question, that he had suffered from an attack of cardiac insufficiency which was suddenly manifested while he was engaged in strenuous physical exertion & the capacity of the heart was severely damaged, & that as a result of the cardiac breakdown the workman had been since that date & continued to be totally incapacitated for work. The First Division on the resumed consideration of the case affirmed the determination of the sheriff-substitute. The employer appealed to the House of Lords:—*Held*: upon the findings of the Sheriff-Substitute the case could not be distinguished from the cases of *Falmouth Docks & Engineering Co. v. Treloar*, No. 2317c, & *Partridge Jones & John Paton, Ltd. v. James*, No. 2322a. Appeal dismissed.

The hard work on which the claimant was engaged induced the breakdown of his enfeebled heart. This involved a definite change in his condition on Apr. 29 (Lord TOMLIN).—*LOCHGELLY IRON & COAL CO., LTD. v. WALKENSHAW* (1935), 28 B. W. C. C. 230, H. L.

**2327. Add. Annotations**:—As to (1) *Refd. Raeburn v. Lochgelly Iron & Coal Co.* (1926), 20 B. W. C. C. 637; *Ferguson v. Shotts Iron Co.* (1927), 20 B. W. C. C. 741; *Bradley v. London & North Eastern Ry. Co.* (1931), 145 L. T. 30.

**2329. Add. Annotation**:—*Folld. Bradley v. London & North Eastern Ry. Co.* (1931), 145 L. T. 30.

**2329a. — — —**—*BRADLEY v. LONDON & NORTH EASTERN RY. CO.*, No. 2737a, *post*.

**2331a. — — —**—A workman, employed as a ripper, was subject to the disease of osteo-periostitis, rendering his bones brittle & even liable to a spontaneous fracture, but he was able to do his work, & in 1919, by an accident whilst so employed, suffered a fracture of his right femur. He received compensation, but in 1920 resumed work, & continued so to work until 1924, when the seam on which he was employed was shut down & he ceased to

#### PART XIV. SECT. 5, SUB-SECT. 1.— C. (f) iv.

*st. Facial paralysis—Resulting from chill.*—Award in workman's favour upheld.—*BURT v. BROKEN HILL SOUTH, LTD.* (1926), 26 S. R. N. S. W. 307; 43 N. S. W. W. N. 69.—*AUS.*

*sk. Disease proceeding from bacilli.*—A disease proceeding from bacilli may be a personal injury by accident.—*SIMPSON v. FINLAYSON* (1926), 26 S. R. N. S. W. 280; 43 N. S. W. W. N. 60.—*AUS.*

*sl. Infective jaundice.*—*Held*: there was evidence on which the arbitrator was entitled to hold the contracting of the disease was an accident, & the workman's death resulted from an injury by accident.—*RAEBURN v. LOCHGELLY IRON & COAL CO., LTD.*, [1927] S. G. 21.—*SCOT.*

*st. Caisson disease.*—Appt. had been employed in the construction of the new bridge in the city of L. over the river Foyle. Part of the work was done in a cylinder, sunk in the river, in which compressed air with a pressure of two or three atmospheres was used to drive out the water. On coming out of the cylinders the workers, before coming into the outside air, passed into a decompressing chamber, where the atmospheric pressure was gradually lowered. If this were not done, they would sustain serious injury called "Caisson Disease":—*Held*: appt. was entitled to proceed under sect. 1 of Workmen's Compensation Act, 1927, in respect of injury resulting from an industrial disease, the facts being such as to warrant the finding of accident within that sect.; also the failure of the decompressing chamber

to safeguard appt. from "Caisson Disease" constituted an "accident" within Workmen's Compensation Acts.—*SWAN v. DORMAN, LONG & CO., LTD.*, [1934] N. I. 158.—*IR.*

*sv. Dysentery.*—A ship's cook died of dysentery, contracted through either drinking the water or eating the food supplied to him on board in terms of his contract of service. The arbitrator refused to award compensation to the dependants, being of opinion that the infection could not be called "injury by accident." The dependants appealed:—*Held*: the infection was "injury by accident," & also "injury by accident arising out of the employment."—*MITTUN v. CHRISTIAN SALVESSEN & CO.*, [1934] S. O. 20; 26 B. W. C. C. Suppt. 117.—*SCOT.*



work. In Aug. 1925, he was out for a walk, & after walking two or three miles & while standing still his right tibia suddenly snapped, & he claimed compensation for the injury, on the ground that it was attributable to the accident suffered by him in 1919. The medical theory advanced was that, after the injury suffered from the accident in 1919, the muscles of the leg became inelastic, & if he slipped his power of recovering himself would be affected. There was no evidence that he did slip when the tibia snapped in Aug. 1925. The county ct. judge held the injury was due to the first accident in 1919, & awarded compensation:—*Held*: there was no evidence to support the finding, & the award must be set aside.—*WERRIN v. UNITED NATIONAL COLLIERIES, LTD.* (1926), 20 B. W. C. C. 166, C. A.

**2336. Add. Annotations:—***Distd. Lawrence v. Matthews* (1924), *Ltd.* (1928), 97 L. J. K. B. 758. *Consd. Lee v. Breckman* (1928), 138, L. T. 610; *Brooker v. Thomas Borthwick & Sons (Australasia), Ltd. & Connected Appeals*, [1933] A. C. 669. *Refd. Holden v. Premier Waterproof & Rubber Co.* (1930), 144 L. T. 519; *Lander v. British United Shoe Machinery Co.* (1933), 102 L. J. K. B. 768.

**2339. Add. Annotations:—***As to* (1) *Distd. McCullum v. Northumbrian Shipping Co.* (1931), 146 L. T. 124. *Expld. & Distd. Northumbrian Shipping Co. v. McCullum* (1932), 48 T. L. R. 568. *Consd. Todd v. MacCallum* (1933), 25 B. W. C. C. Supp. 155. *Refd. Moule v. Marmite Food Extract Co.* (1927), 20 B. W. C. C. 446; *Codling v. Ridley* (1933), 26 B. W. C. C. 3. *As to* (2) *Consd. Gorman v. Barclay Curle* (1925), 19 B. W. C. C. 564; *Allen v. Siddons* (1932), 25 B. W. C. C. 350; *Alderman v. Great Western Ry. Co.*, [1937] A. C. 454. *Refd. Robertson v. S.S. Appalachee, Rovira v. Same* (1926), 136 L. T. 488; *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351; *Blee v. London & North Eastern Ry. Co.*, [1938] A. C. 126. *Generally, Refd. Brentnall v. London & North Eastern Ry. Co.* (1932), 25 B. W. C. C. 265.

**2340a. —.**—*PRUCE v. DAVEY*, No. 2460b, *post*.

**2340b. —.**—*A foreman was engaged by a contractor for earthworks at a fixed weekly*

wage. He had to work at various places. On the day in question he had to be at his work by 7.30 a.m. He left home for work on a motor cycle at 7 a.m., & in ten minutes met with an accident from which he died. His widow claimed compensation. At the arbn. the employer said that the hours of employment were from 7 a.m. to 5 p.m., but that on the day in question he was not concerned with what the workman did before 7.30 a.m., so long as he reached his place of work by that time. The county ct. judge held that the accident arose out of & in the course of the employment, & made an award in favour of the widow. The employer appealed:—*Held*: there was misdirection. Although the employer might have had the right to give orders to the workman at any time after 7 a.m., he did not on this occasion exercise that right & the workman's employment in fact began at 7.30 a.m. The accident having happened merely when the workman was going to work it did not arise out of & in the course of his employment.—*ALLEN v. SIDDONS* (1932), 25 B. W. C. C. 350, C. A.

*Annotation:—Consd. Blee v. London & North Eastern Ry. Co.*, [1936] 3 All E. R. 286.

**2340c. Distinction between negligence & performance of act in unusual manner—Question of fact.**—Deceased was the driver of a steam lorry. He left the lorry, which had been proceeding along the high road, for purposes of his own for a few minutes. Returning to the road he beckoned to the steersman of the lorry to come on. Apparently he attempted to board the lorry when in motion; he slipped & fell under the wheels & was killed. His widow claimed compensation. The county ct. judge held that the act of the deceased was not done for the purposes of & in connection with his employers' trade or business & made an award in favour of the employer:—*Held*: the distinction between negligently doing an act which was within the authority & doing an act which you are employed to do in such an unusual way as to take it outside the authority had not been sufficiently considered by the county ct. judge. It was a question of degree & of fact. The matter must therefore go back

#### PART XIV. SECT. 5, SUB-SECT. 2.—A.

**2332 II. —.**—Where it cannot be said that it was part of the workman's duty to hazard, to suffer or to do the act which was the cause of his injury, it follows that the accident was not one "arising out of" the employment, within Workmen's Compensation Act, R. S. S. 1920, c. 210, s. 4.—*KILGREN v. BROWNING RURAL MUNICIPALITY*, [1928] 3 W. W. R. 699.—CAN.

**2332 III. —.**—The rule that "arising out of the employment" means arising out of the work which the workman was employed to do, applied in holding that *pltf.*, who was employed as a blacksmith in or about the construction of a railroad, was entitled to recover for an injury from a piece of molten babbit which exploded while he was engaged in "babbitting" & when he was looking into an axle-box on machinery used in the construction work to ascertain if sufficient babbit had been poured. It was held on the evidence that it was part of *pltf.*'s duty to do the babbitting on the occasion of the accident; & that when for said purpose he looked into the axle-box,

while his assistant was pouring the metal, he did something incident to his employment.—*WELL v. MORGAN*, [1929] 2 D. L. R. 155; 23 S. L. R. 241; [1928] 3 W. W. R. 710.—CAN.

*p 1. — Fighting with fellow-workman.*—Appot. was employed in a room of resp.'s factory with instructions, he alleged, to prevent employees from other rooms from loitering there. An employee from another room having entered, appot. ordered him to leave, following which blows ensued between this employee & appot., & appot. received facial injuries:—*Held*: the accident to appot. did not arise out of or in the course of his employment.—*BROWN v. ALBANY BELL, LTD.* (1927), 29 W. A. L. R. 132.—AUS.

**2337 I. "In the course of the employment."**—*WELLS v. MORGAN*, [1928] 3 W. W. R. 710.—CAN.

*q 1. —.*—*RALLY BROS. v. PERUMAL* (1929), 1 L. R. 62 Mad. 747.—IND.

*sk. Accident while attending staff outing—Attendance compulsory.*—A worker, employed under an Industrial Agreement between resp. & the Federated Gas Employees' Industrial

Union, while attending the 1935 Annual Picnic of resp.'s employees, & acting in a reasonable manner, received personal injury, & claimed compensation from resp. who denied liability. Resp. having in practice made its employees' attendance at the picnic compulsory, in default of which it inflicted the penalty of loss of a day's wages, & appot.'s attendance at the picnic having been in pursuance of the duty thus imposed on him by resp., the Commission:—*Held*: the injury arose out of & in the course of the workers' employment with resp.—*JACKSON v. NEWCASTLE GAS & COKE CO., LTD.*, [1936] W. C. R. 287.—AUS.

*sm. Jurisdiction of Board—To reverse own decision.*—The Workmen's Compensation Board cannot, under Workmen's Compensation Act, 1932 (N. B.), s. 43, reverse its decision on the question of whether an injury arose within the course of the employment.—*R. v. WORKMEN'S COMPENSATION BOARD*, [1934] 3 D. L. R. 763.—CAN.

*sp. —.*—*Re WORKMEN'S COMPENSATION ACT* (1935), 9 M. P. R. 186.—CAN



for reconsideration.—*TAYLOR v. LOCK* (1930), 99 L. J. K. B. 245; 142 L. T. 537; 23 B. W. C. C. 55, C. A.

*Annotation:—Refd. Knowles v. Southern Ry. Co.*, [1937] A. C. 463.

**2342. Add. Annotation:—***Consd. Howells v. G. W. Ry.* (1928), 97 L. J. K. B. 183.

**2342a.** —[—]—A dock labourer was employed to load cargo into a steamer in a dock. He could have reached the shed where he worked by a provided route over a metalled road, but as this was a long way round he took a shorter cut, which involved his crossing a number of railway lines on the level, & while doing so was knocked down & killed by a light engine. The county ct. judge found that deceased could have used the provided way through the docks, but as he did not do so, but used an unauthorised route, albeit one commonly used to the knowledge & with the implied permission of the co.'s officials by a large number of workmen, & as at the time when the accident happened he was not doing anything which he was under any obligation to do, the accident did not arise in the course of the employment:—*Held*: this was a misdirection. On the facts, the workman was on the employers' premises, proceeding to work over an accustomed & permitted, though not a provided, route, & the accident arose out of & in the course of the employment.—*HOWELLS v. GREAT WESTERN RY. CO.* (1928), 97 L. J. K. B. 183; 138 L. T. 544; 21 B. W. C. C. 18, C. A.

*Annotations:—Distd. Black v. Hesperides S.S. Owners* (1929), 22 B. W. C. C. 295. *Consd. Goring v. Southern Ry. Co.* (1938), 31 B. W. C. C. 68. *Refd. Foster v. Edwin Penfold & Co.* (1934), 27 B. W. C. C. 240.

**2342b.** —[—]—A station porter lived some four-fifths of a mile from the station at which he was employed & could reach it by the public road, or, more conveniently, by climbing up on to the railway to a cinder path running along the side of the track. He used that route in the dark on a stormy windy morning in Feb., & when crossing the main line at a short distance from the station he was run down from behind by a locomotive & killed. Rule 15 of the railway co.'s regulations prohibited this route to the station, but excepted from the prohibition the crossing of the rails in cases where because of the duties of employees it was permitted. The evidence was that notwithstanding this rule the route in question had been used for a long time by every grade of employee & had never been objected to by the co. The county ct. judge found as a fact that the use of the route on the railway had been permitted by the co., & that being so, rule 15 was no defence to the claim. He accordingly found that the accident arose out of & in the course of the employment & made his award for the widow. The employers appealed:—*Held*: there was evidence to support the finding of fact & no misdirection. Appeal dismissed.—*GORING v. SOUTHERN RY. CO.* (1938), 31 B. W. C. C. 68, C. A.

**2345. Add. Annotation:—***Refd. Sparey v. Bath R. D. C.* (1930), 23 B. W. C. C. 263.

**2347. Add. Annotations:—***Consd. Clark v. Stephens, Sutton, Ltd.* (1937), 30 B. W. C. C. 340. *Refd. Anderson v. Hickman H. & Co.* (1938), 21 B. W. C. C. 369.

**2348. Add. Annotations:—***Consd. Sparey v. Bath R. D. C.* (1930), 23 B. W. C. C. 263; *Dunning v. Binding* (No. 2) (1932), 148 L. T. 378; *Stokes v. Fox* (1932), 25 B. W. C. C. 371. *Refd. Lye v. British & Argentine Meat Co.* (1923), Ltd. (1927), 20 B. W. C. C. 341.

**2348a. — Butcher's assistant calling for orders on way to work.]—**A butcher's assistant lived several miles from his employer's shop & went to his work on a motor cycle. It was left to his discretion to call on customers for orders on his way to the shop, which he usually reached about 7 a.m. He was injured in a collision at 6.45 a.m., while riding his motor cycle after calling on a customer, having left home specially early to make the call. The county ct. judge found that the workman's employment commenced when he left home in the morning & held that the accident arose out of & in the course of the employment. He therefore made his award for the workman. The employer appealed:—*Held*: there was evidence to support the finding & no misdirection.—*STOKES v. FOX* (1932), 25 B. W. C. C. 371, C. A.

**2348b. — Emergency employment.]—**A ganger in the service of a railway co. was, by the terms of his contract of service, liable to be called upon in case of emergency to go to the place where the emergency had arisen, notwithstanding that he might have finished his normal day's work, & when so called upon after his normal day's work he was entitled to be paid overtime from the hour he left his home in order to proceed to the place where the emergency had arisen. One night, after he had completed his day's work & after he had gone to bed, he received a message requiring him to go to a certain siding to assist in replacing a derailed truck, & in compliance with that order he rose & was proceeding to the siding when he was knocked down in the street by a motor car & sustained injuries from the effects of which he died. On a claim for compensation by his widow:—*Held*: as the deceased man was obliged by the terms of his contract to obey an emergency call at any hour, as he was paid from the time he left his home in obedience to the call, & as he was obliged to proceed with reasonable despatch to the place where his services were required, there was evidence to support the finding of the county ct. judge that the accident arose out of & in the course of the deceased man's employment, & therefore, that his widow was entitled to compensation.—*BLEE v. LONDON & NORTH EASTERN RY. CO.*, [1938] A. C. 126; [1937] 4 All E. R. 270; 107 L. J. K. B. 62; 158 L. T. 185; 54 T. L. R. 71; 81 Sol. Jo. 941; 30 B. W. C. C. 364, II. L.

**2348c. — Injury on private property—Public user by licence.]—**A coal trimmer employed by the owners of a ship then in dock was returning home along the quay-side from his employment when he tripped over a hawser

PART XIV. SECT. 5, SUB-SECT. 2.—B. (a) 1.

**2344 1. — Customary way across employers' property.]—***Re HIS MAJESTY THE KING FOR THE CANADIAN GOVERNMENT RAILWAYS* (1934), 8 M. P. R. 25.—OAN.

attached to a bollard & was injured. The route which the workman was using when he met with his injury lay on private property, but was used by members of the general public with the leave & licence of the owners. On a claim for compensation made by him against his employers, the county ct. judge held that as the workman was compelled by reason of his work to be on private property & was leaving it in a reasonable way he was entitled under the decision of *Northumbrian Shipping Co., Ltd. v. McCullum* (1932), 25 B. W. C. C. 284; Digest Supp., to compensation & made his award for the workman. The employers appealed:—*Held*: the workman when returning from work along a route used by members of the public was acting as a member of the public & was not exposed to a risk special to his employment, & the accident did not therefore arise out of & in the course of his employment. Appeal allowed.—CLARK v. STEPHENS, SUTTON, LTD. (1937), 81 Sol. Jo. 1038; 30 B. W. C. C. 340, C. A.

**2349. Add. Annotations:—**N.F. Dunning v. Binding (1932), 147 L. T. 520. *Consd.* Dunning v. Binding (No. 2) (1932), 148 L. T. 378.

**2349a. —**—[B. was employed by applt. as a commercial traveller in Bristol & district. He lived at P., about ten miles out of Bristol, & travelled up each day from P. by the 9.35 a.m. train to Bristol, & returned each night by the 5.35 p.m. train. On Dec. 8, 1931, he arrived at Stapleton-road Station, Bristol, to catch the 5.35 p.m. train home, but before it arrived fell from the platform in front of a train & was killed. His widow claimed compensation as a dependant on the earnings of the deceased workman on the ground that the accident arose out of & in the course of his employment. The county ct. judge held that the work of a commercial traveller began when he left home, & finished only when he had returned home, & therefore, the accident arose out of & in the course of the employment, & the widow was entitled to compensation:—*Held*: the county ct. judge had misdirected himself. The test was whether the workman at the time of the accident was doing something in discharge of a duty to his employer imposed upon him by his contract of service. The appeal must therefore be allowed & the case sent back for the county ct. judge to come to a decision by applying that test to the circumstances of this case.—DUNNING v. BINDING (1932), 147 L. T. 520; 25 B. W. C. C. 361, C. A.

**2349 i. Commercial traveller—Accident on way home after canvassing.**—C. was employed as a travelling salesman. Under the terms of his agreement he was to devote the whole of his time to the development of the sales of his employers' products, & was to be paid a commission on all orders obtained by him for them, but was to pay his own travelling & out-of-pocket expenses. When he entered the firm's employment he purchased a motor van with money advanced to him by his employers, the money to be repaid by him to them out of his commissions. While driving this van along the street, he collided with a horse-drawn van driven by K., a workman employed by W. & Son, & K. was injured. K. was awarded compensation against W. & Son. W. & Son claimed to be indemnified by C.'s employers. C. could drive his motor van for his own

pleasure or on any business that he might have other than his employers' without consulting them; if he was not selling his employers' goods or collecting their debts, he could drive his van wherever he pleased. On the day of the collision with K., C. had been endeavouring to sell some of his employers' goods, & was returning home with some of their goods in his van, but he went out of his way to call & see a relative. While so driving his van out of his direct way home the collision occurred. The Circuit Ct. judge made an award of indemnity in favour of W. & Son against C.'s employers. C.'s employers appealed to the High Ct.:—*Held*: there was evidence upon which the Circuit Ct. judge could hold that at the time of the collision C. was acting as the servant of the firm who employed him, in such a manner as to make the firm liable for the injury

**2349b. —**—[Applt. was the widow of the deceased workman, & claimed compensation as a dependant on his earnings. She alleged that the accident by which he was killed arose out of & in the course of his employment. The county ct. judge held the accident arose out of & in the course of the employment. The Ct. of Appeal sent the case back for rehearing. (See No. 2349a, ante). The county ct. judge on the rehearing held the accident did not arise out of & in the course of the employment, as the deceased at the time of the accident was doing no act in discharge of a duty owed to his employers:—*Held*: the county ct. judge had directed himself correctly in accordance with the authorities & there was abundant evidence on which he could come to the conclusion he did, & it was one which the Ct. of Appeal could not interfere with. Decision of the county ct. judge affirmed.—DUNNING v. BINDING (C. E.) (TRADING AS THE GLOBE CARRIER BAG CO.) (No. 2) (1932), 148 L. T. 378; 25 B. W. C. C. 655, C. A.

**2349c. — Accident while leaving premises of employer.**—A commercial traveller used a motor car which was his own property for the purpose of travelling for his employers who made a weekly payment towards its upkeep. The employers' premises stood between a public highway & a wharf which was not their property. On the wharf stood a garage which was leased by them. Employees were allowed to park their cars on the private wharf. There was a private passage at the back of the employers' premises by which access could be obtained to the wharf. On a very foggy night, after the workman had finished his day's work, he went from his employers' premises out on to the wharf to get his car. He was never seen alive again, but the car was observed in the fog with its lights on & the engine running & driven against a bollard on the wharf. The workman's body was later recovered from the river under the wharf. The widow claimed compensation as a dependant. The county ct. judge found that deceased workman was under no duty to park his car on the wharf, the car was not a business car & as he had finished his work for the day, he was engaged in his private affairs when he fell into the river. He inferred that the workman ran his car against the bollard & fell into the river when investigating the obstruction. He therefore held that the widow had failed to discharge the onus of proof which lay on

which K. had sustained. Appeal dismissed.—KELLY v. JOHN WALLIS & SON, AUTOMATIC SCALE CO. (IRELAND), LTD. (1930), 24 B. W. C. C. Supp. 204.—IR.

**t i. —**—[—HOLDING v. SOUTH AUSTRALIAN RAILWAYS COMR., [1925] S. A. S. R. 92.—AUS.

**c i. — Partly due to wilful misconduct of workman.**—BAKER v. NEW SOUTH WALES RAILWAY COMRS. (1927), 28 S. R. N. S. W. 50; 45 N. S. W. W. N. 21.—AUS.

**c ii. — Own route chosen.**—A coolie choosing his own route to work, & receiving a snake-bite whilst on the road, does not incur an accident arising out of & in the course of his employment.—BURMA OIL CO., LTD. v. MA HWE YIN (1935), 1 L. R. 13 Ran. 553.—IND.

her. The widow appealed:—*Held*: the county ct. judge had misdirected himself in failing to apply the proper principles to the facts found. The accident occurred while the workman was using a permitted means of egress from his work & on a spot where the workman happened to be not as a member of the public but in virtue of his employment, the ownership or control of the spot being immaterial. The accident therefore arose in the course of the employment.—*FOSTER v. EDWIN PENFOLD & Co., LTD.* (1934), 27 B. W. C. C. 240, C. A.

**2349d. Accident on way to customers.**—A commercial traveller left home earlier than usual & was knocked down & killed by a motor vehicle. It subsequently transpired that he had proposed at some time to call on some customers whose office was near the spot where he was killed. On a claim by the widow, as dependant, for compensation, the county ct. judge held that there was no evidence that the accident arose out of & in the course of the employment. The widow appealed:—*Held*: there was no evidence on which the county ct. judge could come to any other conclusion than he did. Appeal dismissed. *LOUDON v. MACFARLANE (WALTER) & Co.* (1935), 28 B. W. C. C. 496, C. A.

**2349e. Engine driver—Accident after coming off duty.**—In hostel provided by employer.]—A railway co. provided a hostel in Sheffield for the use of their employees when such employees were not able to return home between the hours of employment. When such hostels were provided the employees were expected to sleep there unless leave had been obtained to sleep elsewhere. Resp., who was an engine driver, after booking off, was walking down an asphalt slope, part of the premises of the hostel, when he slipped & fell whereby he suffered injury, & he thereupon claimed compensation from appts. upon the ground that the accident arose out of & in the course of his employment with appts.:—*Held*: on the facts the accident arose out of the employment. It also arose in the course of the employment in view of the circumstances that it was part of resp.'s employment that he should go to the hostel & take adequate rest which was essential for the proper performance of his work.—*LONDON & NORTH EASTERN RY. Co. v. BRENTNALL*, [1933] A. C. 489; 102 L. J. K. B. 438; 148 L. T. 530; 49 T. L. R. 229; 77 Sol. Jo. 116; *sub nom.* *BRENTNALL v. LONDON & NORTH EASTERN RY. Co.*, 26 B. W. C. C. 225, H. L.

*Annotations*:—*Consd.* *Dunning v. Binding* (No. 2) (1932). 148 L. T. 378. *Refd.* *Gaskell v. St. Helon's Colliery Co.* (1934), 150 L. T. 506; *Alderman v. Great Western Ry. Co.*, [1937] A. C. 454.

#### PART XIV. SECT. 5, SUB-SECT. 2.— B. (a) ii.

• 1. — *Workman riding in jigger belonging to fellow workman.*—Pltf. was employed by deft. corpn. as a plate-layer on a length of tram line, approximately two miles in length, running between the H. waterworks dam & quarry. A construction camp had been erected near the dam, & pltf. & other workmen elected to live at this camp. Pltf.'s work was confined to

the section of the line running between the dam & the quarry. Pltf. often spent week-ends at the H. Bay, & with other workmen he frequently returned from H. Bay to the camp on a jigger owned by one of the men. Such use of the jigger was known to & acquiesced in by the corpn.'s officers. Pltf. was returning to the camp on the morning of Aug. 3, 1929, on the jigger, when the latter was derailed & pltf. seriously injured. The place of the accident

**2350. Add. Annotations**:—*Consd.* *Sparey v. Bath R. D. C.* (1930), 23 B. W. C. C. 263. *Refd.* *Dunning v. Binding* (1932), 147 L. T. 520.

**2353. Add. Annotation**:—*Refd.* *Foster v. Edwin Penfold & Co.* (1934), 27 B. W. C. C. 240.

**2354a. — Leaving dock side for ship.**—The deceased workman signed on as boat-swain for a voyage, & joined the ship when lying in Swansea Harbour. The contract of service contemplated that he might be called on to act as night watchman with overtime payment. He was acting as such when, returning from his home to the ship, he disappeared, after calling at a public-house just outside the entrance to the dock premises, which were private property, & his body was found in the water a thousand yards from the ship:—*Held*: deceased, by taking on the special duty of night watchman, did not divest himself of the character of a seaman, & as he must be inferred at the time of the accident to have been on the private premises of the harbour in which the ship lay, & sustained the accident by reason of risks incidental to his employment, which he would not have encountered but for his employment, therefore the accident arose out of & in the course of the employment. The principle in all the cases of a seaman returning from shore leave to his ship in a public harbour is that the question to be decided must be whether the risk run was shared with all the public, or was incidental to the seaman's employment.—*NORTH-UMBRIAN SHIPPING Co., LTD. v. McCULLUM* (1932), 101 L. J. K. B. 664; 48 T. L. R. 568; 76 Sol. Jo. 494; 23 B. W. C. C. 284; *sub nom.* *McCULLUM v. NORTHUMBRIAN SHIPPING Co., LTD.*, 147 L. T. 361, H. L.

*Annotation*:—*Appl.* *Clark v. Stephens, Sutton, Ltd.* (1937). 30 B. W. C. C. 340.

**2355. Add. Annotations**:—*Consd.* *Sparey v. Bath R. D. C.* (1930), 23 B. W. C. C. 263. *Refd.* *Black v. Hesperides S.S. Owners* (1929), 22 B. W. C. C. 205.

**2355a. Road repairer—Accident on scene of repairs.**—Applt. was a workman who was employed by resps. in road repairing & tar spraying. The work consisted in sweeping & tarring the road; the last portion of his work for the day was to sweep another portion of the road above the section which had been tarred. On July 5, 1929, the foreman blew his whistle at five o'clock, & the men knocked off work. Applt. got to his work on a bicycle, which he left just off the road, & when work ceased he proceeded in the ordinary way to get his bicycle. At the end of the swept portion of the road were some horses belonging to a separate contractor & used for moving the tarring machines. As he passed the horses he was kicked by one of them, knocked off his bicycle

was some two miles & a half from the nearest part of the section of line at which he would normally have reported for duty:—*Held*: though pltf. had a right to be at the place where the accident happened, at the time he was not then there in pursuance of his obligation to deft. & his claim must fail.—*FLOWERDAY v. AUCKLAND CITY CORPN.*, [1930] N. Z. L. R. 331.—*N.Z.*  
• ii.—*Re VANCE*, [1933] 1 D. L. R. 393; 5 M. P. R. 515.—*CAN.*

& severely injured. On those facts the county ct. judge found that the accident did not arise in the course of applt.'s employment:—*Held*: the decision of the county ct. judge raised a question not of fact but of law, & the proper legal inference to be drawn from the facts was that the accident did not occur in the course of applt.'s employment. When he mounted his bicycle & started off to ride home he had resumed his freedom of action as a citizen on the public highway.—*SPAREY v. BATH RURAL DISTRICT COUNCIL* (1931), 146 L. T. 285; 48 T. L. R. 87; 75 Sol. Jo. 813; 24 B. W. C. C. 414, H. L.

*Annotations*:—*Consd.* *Dunning v. Binding* (No. 2) (1932), 148 L. T. 378; *Foster v. Edwin Penfold & Co.* (1934), 27 B. W. C. C. 240; *Alderman v. Great Western Ry. Co.*, [1937] A. C. 454. *Refd.* *Blee v. London & North Eastern Ry. Co.*, [1936] 3 All E. R. 286.

**2356. Add. Annotations**:—*Consd.* *Dixon v. Ayresome S.S. Owners* (1930), 99 L. J. K. B. 250. *Refd.* *Morrison v. S.S. Aboukir, Woods v. Same* (1928), 21 B. W. C. C. 163; *Black v. Hesperides S.S. Owners* (1929), 22 B. W. C. C. 295; *Northumbrian Shipping Co. v. McCullum* (1932), 25 B. W. C. C. 284.

**2357. Add. Annotations**:—*Consd.* *Howells v. G. W. Ry.* (1928), 97 L. J. K. B. 183; *Sparey v. Bath R. D. C.* (1931), 48 T. L. R. 87; *Northumbrian Shipping Co. v. McCullum* (1932), 25 B. W. C. C. 284; *Foster v. Edwin Penfold & Co.* (1934), 27 B. W. C. C. 240; *Clark v. Stephens, Sutton, Ltd.* (1937), 30 B. W. C. C. 340.

**2360. Add. Annotations**:—*Apld.* *Howells v. G. W. Ry.* (1928), 97 L. J. K. B. 183. *Folld.* *Anderson v. Hickman H. & Co.* (1928), 21 B. W. C. C. 369. *Apld.* *Foster v. Edwin Penfold & Co.* (1934), 27 B. W. C. C. 240.

**2361. Add. Annotations**:—*Refd.* *Dunning v. Binding* (1932), 147 L. T. 520; *Foster v. Edwin Penfold & Co.* (1934), 27 B. W. C. C. 240.

**2364. Add. Annotations**:—*Apld.* *M'Pherson v. Reid M'Farlane* (1926), 19 B. W. C. C. 575; *Pruce v. Davey* (1926), 136 L. T. 601; *Robertson v. S.S. Appalachee, Rovira v. Same* (1926), 136 L. T. 488. *Consd.* *Lye v. British & Argentine Meat Co.* (1923), Ltd. (1927), 20 B. W. C. C. 341; *Moule v. Marmite Food Extract Co.* (1927), 20 B. W. C. C. 446; *Howells v. G. W. Ry.* (1928), 97 L. J. K. B. 183; *Black v. Hesperides S.S. Owners* (1929), 22 B. W. C. C. 295; *Sparey v. Bath R. D. C.* (1931), 48 T. L. R. 87. *Apld.* *Medler v. Medler* (1931), 24 B. W. C. C. 345. *Consd.* *Dunning v. Binding* (1932), 147 L. T. 520; *Brentnall v. London & North Eastern Ry. Co.* (1932), 25 B. W. C. C. 265. *Apld.* *Dunning v. Binding* (No. 2) (1932), 148 L. T. 378. *Consd.* *Brentnall v. London & North Eastern Ry. Co.*, [1933] A. C. 489. *Apld.* *Gaskell v. St. Helen's Colliery Co.* (1934), 150 L. T. 506. *Consd.* *Foster v. Edwin Penfold & Co.* (1934), 27 B. W. C. C. 240. *Refd.* *Anderson v. Hickman, H. & Co.* (1928), 21 B. W. C. C. 369; *Allen v. Siddons* (1932),

25 B. W. C. C. 350; *Alderman v. Great Western Ry. Co.*, [1936] 1 All E. R. 571; *Izzard v. Universal Insurance Co.*, [1936] 2 All E. R. 1565; *Blee v. London & North Eastern Ry. Co.*, [1938] A. C. 126.

**2365. Add. Annotation**:—*Refd.* *Izzard v. Universal Insurance Co.*, [1936] 2 All E. R. 1565.

**2366. Add. Annotations**:—*Apld.* *Robertson v. S.S. Appalachee, Rovira v. Same* (1926), 136 L. T. 488; *Moule v. Marmite Food Extract Co.* (1927), 20 B. W. C. C. 446. *Consd.* *Foster v. Edwin Penfold & Co.* (1934), 27 B. W. C. C. 240. *Refd.* *Anderson v. Hickman H. & Co.* (1928), 21 B. W. C. C. 369; *Sparey v. Bath R. D. C.* (1931), 48 T. L. R. 87; *Brentnall v. London & North Eastern Ry. Co.* (1932), 25 B. W. C. C. 265; *Dunning v. Binding* (1932), 147 L. T. 520; *Gaskell v. St. Helen's Colliery Co.* (1934), 150 L. T. 506; *Blee v. London & North Eastern Ry. Co.*, [1938] A. C. 126.

**2367a. Accident while riding motor cycle.**—A fruiterer had a business in N. & a small branch at L. One of his sons lived at L., but not over the L. premises. The son periodically travelled between L. & N. to assist his father in N. & would tell him of the requirements of the L. branch. He travelled by motor cycle except in wet weather, when he went by train. While riding his motor cycle from L. to N. the son collided with a lorry & was killed. The widow claimed compensation. There was no evidence forthcoming in the arbn. as to whether the son had called at the L. branch before leaving for N. The county ct. judge made an award in favour of the widow. The employer appealed:—*Held*: there was no evidence that at the time of the accident the workman was engaged on his employer's business & it was not therefore proved that the workman was in the course of his employment at the time. Appeal allowed.

In the present case the facilities had been provided by the employer, & the deceased chose to travel to his work by motor cycle (*LAWRENCE, L.J.*).—*MEDLER v. MEDLER* (1931), 24 B. W. C. C. 345, C. A.

**2368a. No obligation to use conveyance.**—Employers used female labour for the picking of potatoes on their farm. In order to induce women to come from a distance they provided a horse lorry to convey them to & from their homes, but the women were under no obligation to use the lorry. The usual course was for the women, when they had finished their work, to walk back to the employers' yard, where the lorry was waiting. On a particular day the worker, having finished her work, was standing in the yard with her fellow-employees, & the employers' foreman told them to load up on the lorry. The women sat as usual with their legs dangling over the side of the lorry. As the lorry left the yard one of the worker's legs was crushed

PART XIV SECT. 5, SUB-SECT. 2.—  
B. (b).

**2368 i. Conveyance provided by farmer.**—A berrypicker was engaged to work on a fruit farm eight miles distant from her home, on the understanding that wages would be paid her at a daily rate & that she would be conveyed by her employer to &

from her work. The hour of commencing work on the farm was generally 7 a.m., but was sometimes 8 a.m., & each evening the workers were informed when the employer's conveyance would call for them on the following morning. No other means of conveyance was available to the berrypicker, & she would not have accepted the employment except on

the condition that her employer conveyed her to & from work. While travelling to work on a lorry belonging to her employer she was injured through the lorry being accidentally overturned:—*Held*: the accident to the worker had not arisen in the course of her employment.—*CRAWFORD v. FOREST*, [1931] S. C. 634; 24 B. W. C. C. Supp. 67.—*SCOT.*

between the lorry & a gate-post. The county ct. judge held that the worker was not in the yard under any express or implied term of her contract of service, that the yard was not within the ambit of her work, & that it was unnecessary for her to be there either for the performance of her duties or for the purpose of going home, & made an award in favour of the employers. The worker appealed:—*Held*: the case was covered by authority, & the accident arose out of & in the course of the worker's employment. It is sufficient for a workman to show that an accident occurs when he is on his employer's premises & travelling by a permitted route.—*ANDERSON v. HICKMAN H. & Co., LTD.* (1928), 21 B. W. C. C. 369, C. A.

*Annotation*:—*Consd.* *Foster v. Edwin Penfold & Co.* (1934), 27 B. W. C. C. 240.

**2369. Add. Annotation**:—*Refd.* *Robertson v. S.S. Appalachee, Rovira v. Same* (1926), 136 L. T. 488.

**2370. Add. Annotation**:—*Refd.* *Robertson v. S.S. Appalachee, Rovira v. Same* (1926), 136 L. T. 488.

**2370a. — Different boat used by workman.**—*ROBERTSON v. APPALACHEE (OWNERS), ROVIRA v. SAME, No. 2552a, post.*

**2372. Add. Annotation**:—*Consd.* *Gorman v. Barclay Curle* (1925), 19 B. W. C. C. 564.

**2380. Add. Annotation**:—*Consd.* *Alderman v. Great Western Ry. Co., [1936] 1 All E. R. 571.*

**2381. Add. Annotation**:—*Distd.* *Standen v. Smith* (1927), 20 B. W. C. C. 305.

**2371 I. Bicycle provided by employer—Parcel delivered after closing time—Accident next morning on way to work.**—A firm of cycle dealers carried on a parcels-delivery service, & engaged youths, each of whom they provided with a bicycle & a cape for the transport & protection of parcels. Each youth was permitted to use the bicycle as a means of transport to & from his home. If a call came near closing time the messenger, having carried out his mission, would be compelled to take his bicycle home with him, there being no place at deft.'s premises where he could leave it after closing time. While pltf.'s son, one of the youths so employed, was riding the cycle & carrying the cape, to which reference has been made, from his home on his way to work after having delivered a message shortly before closing time on the previous evening, he was struck by a motor vehicle & killed. In an action by his mother for compensation in respect of his death:—*Held*: the accident arose out of & in the course of his employment.—*CLAUSEN v. COUCHMAN CYCLE CO., LTD., [1935] N. Z. L. R. 368.—N.Z.*

**sl. Lorry—No obligation to use.**—A labourer, while engaged on work at a distance from his home, was conveyed over part of the distance on a motor lorry which was provided by his employers. There was no express contract between the workman & his employers for the use of this conveyance; but, before accepting the job, the workman knew that the lorry would be provided free of cost, & he would not have accepted the offer of employment if it had not been available. This free conveyance was entirely optional, but it was used by employees who resided at a distance from the work. There was no direct transport connection between the workman's home & place of work, &

travel by the ordinary route would have materially increased both the cost & the time of the journey. While being conveyed to his work, the workman fell from the lorry & was killed:—*Held*: as the workman was not under any contractual obligation to use the lorry, his death while he was proceeding to his work on that conveyance was not the result of an accident arising in the course of his employment within sect. 1 (1) of Workmen's Compensation Act, 1925.—*BLACK v. ATKENHEAD & SON, [1938] S. C. 291.—SCOT.*

#### PART XIV. SECT. 5, SUB-SECT. 2.—B. (c).

**so. Injury while attempting to obtain access to premises.**—Pltf., housekeeper at an hotel, whose duty it was to prepare breakfast for guests, stayed with friends one night, & rising about 6 a.m. next morning went to the hotel. Being unable to obtain admission at the front door of the hotel, the only means of access, she went round a street corner to the side of the hotel to awaken a porter by knocking on an iron fence bounding the hotel premises. While hurrying back to the front door after attracting the porter's attention, she slipped & broke her leg as she turned to take a short cut through a neighbouring petrol station:—*Held*: the worker had not reached the ambit or sphere of her employment, & was not in the course of her employment when she met with the accident.—*OWEN v. BURRELL, [1933] N. Z. L. R. Supp. 38.—N.Z.*

#### PART XIV. SECT. 5, SUB-SECT. 2.—C.

**2381 I. Accident occurring in meal time.**—During the luncheon interval applt. was strolling on a recreation ground attached to the workshops at which he was employed, & owned by

**2384a. —**—A butcher's boy was allowed to go home for his tea, for which there was not a fixed time, & generally he was told to deliver or take orders from customers on his way there or back. If he had orders to deliver, he rode a bicycle, & on Dec. 17, 1926, he was told he might go for his tea, & was to deliver an order on the way, & take two orders coming back. He delivered the order, had his tea, & was bicycling back, but before he had called for the two orders he was knocked down by a motor lorry & injured. The county ct. judge found that at the time of the accident the boy was engaged on his own affairs in returning from tea, & that the accident did not arise out of & in the course of his employment:—*Held*: there was evidence to support the finding, & no misdirection.—*LYE v. BRITISH & ARGENTINE MEAT CO. (1923), LTD. (1927), 20 B. W. C. C. 341, C. A.*

**2384b. —**—A workman employed on a night shift was permitted to leave the premises to get his supper. There was no necessity for this, & he could do as he pleased. He did in fact leave the premises for his supper & met with an accident in a public street:—*Held*: the accident did not arise out of & in the course of the employment, because at the time of the accident the workman was not doing anything in discharge of a duty which he owed to his employers.—*MOULE v. MARMITE FOOD EXTRACT CO. (1927), 20 B. W. C. C. 446, C. A.*

**2384c. —**—*KNIGHT v. HOWARD WALL, LTD., [1938] 4 All E. R. 667, C. A.*

**2385a. Railwayman in lodgings away from home—Accident on way to station.**—Appt., a

resp., when he was struck in the eye with a cricket ball hit probably by one of his fellow workers who were playing cricket there. As a result of the accident applt. lost his right eye:—*Held*: applt. was not entitled to compensation under sect. 6 of Workmen's Compensation Act, 1912–24 (W. A.), as the accident arose neither "out of" nor "in the course of" his employment.—*WHITTINGHAM v. RAILWAYS (W. A.) COMM., [1932] Argus L. R. 8; 5 A. L. J. 324; 46 C. L. R. 22.—AUS.*

**sb. Accident while returning from giving evidence for employer.**—B. & O'L. were employed at a theatre in Waterford. Their employer, the owner of the theatre, was charged with a criminal offence & was returned for trial at Dublin. B. & O'L. were necessary witnesses for the defence, & each was served with a subpoena & given a vaticum to attend the trial. They were driven to Dublin by their employer in his motor car & gave evidence at the trial, which lasted some days. All the expenses of their stay in Dublin were paid by their employer, & he also paid their wages while they were in Dublin. The employer was acquitted, & on the conclusion of the trial he told B. & O'L. to remain at the hotel in Dublin until the following day. B. & O'L. remained, & on the following day he called for them in his car which he drove himself. On the way to Waterford there was an accident in which O'L. & B. were killed. In a claim by the daughter of B. & the widow of O'L. under Workmen's Compensation Act:—*Held*: the journey to Dublin & the return journey to Waterford were not in the performance of any duty imposed by the contracts of service, & therefore the accident did not arise out of & in the course of the employment.—*BUTLER & O'LOUGHLIN v. BREEN, [1933] I. R. 47; 26 B. W. C. C. Supp. 139.—IR.*

travelling ticket collector in the employment of resp. railway co., had, in the course of his duty, to travel from Oxford, where his home was, to Swansea, where he had to stay overnight, returning thence on the following day to Oxford. Being also qualified as a guard & as such, liable to be called upon in an emergency, he was required by the railway co. to leave, & he in fact left with them, the address of his Swansea lodgings. Apart from this obligation he had an unfettered right as to how he spent his time at Swansea between signing off & signing on, & he could reach the station by any route or by any method he chose. In proceeding one morning from his lodgings to Swansea station to perform his usual duty, he fell in the street & sustained an injury in respect of which he claimed compensation:—*Held*: while in the street proceeding from his lodgings to the station, appct. was not performing any duty under his contract of service; therefore, the accident did not arise in the course of his employment; & consequently he was not entitled to compensation.—*ALDERMAN v. GREAT WESTERN RY. CO.*, [1937] A. C. 454; [1937] 2 All E. R. 408; 106 L. J. K. B. 335; 156 L. T. 441; 53 T. L. R. 594; 81 Sol. Jo. 337; 30 B. W. C. C. 64, H. L.

*Annotation*:—*Refd.* Blee v. London & North Eastern Ry. Co., [1938] A. C. 126.

**2388a.** —[*A watchman was employed on an estate in which sewers were being constructed in a trench by the side of a highway. He could go anywhere on the estate, but had to give special attention to the open trench & to look after the red lights at night-time. He was provided with a watchman's box & a coke brazier. During one of his watches, which was twenty-four hours in length, he took the brazier into a workman's day shelter on the estate, but 300 yards from the trench, covered the shelter completely over with a tarpaulin, took his boots off, & lay down to sleep. He was later found dead in this situation, having been suffocated by the fumes from the coke brazier. On a claim by the widow the county ct. judge held that, as the deceased was on his employer's premises in pursuance of his duty, the accident arose out of & in the course of the employment. The employers appealed:—Held: there was, on the evidence, no causal connection between the employment & the death, & therefore, the accident did not arise out of & in the course of the employment.*—*BUCKLAND v. FRENCH (W. & C.)* (1929), 45 T. L. R. 193; 22 B. W. C. C. 182, C. A.

**2390.** *Add. Annotation*:—*Refd.* Dixon v. Ayresome S.S. Owners (1930), 99 L. J. K. B. 250.

**2395.** *Add. Annotations*:—*Consd.* Dixon v. Ayresome S.S. Owners (1930), 99 L. J. K. B. 250; Dyson v. Vickers-Armstrong, Ltd. (1929), 142 L. T. 340. *Refd.* Shephard v. London Midland & Scottish Railway (1930), 143 L. T. 220.

PART XIV. SECT. 5, SUB-SECT. 2.—  
D. (b) i.

*sn.* *Workman standing by open door of railway carriage—Door left open.*—*Held*: the workman had not exposed himself to any greater risk than that to which an ordinary traveller in the train would have been exposed, & the accident had arisen out of his employ-

ment.—*GREAT INDIAN PENINSULAR RY. CO. v. KASHINATH CHIMAJI* (1927), 1 L. R. 52 Bom. 45.—*IND.*

*sp.* *Workman on way to customer—Stopping to turn straying cattle.*—*A workman's duties included the carrying of milk to his employer's customers. On Nov. 19, 1932, he left the hotel with a can of milk to be delivered to one of the customers. On his way he had to*

**2401.** *Add. Annotations*:—*Consd.* Durie v. Anchor-Donaldson Line (1925), 19 B. W. C. C. 512. *Apld.* Gorman v. Barclay Curle (1925), 19 B. W. C. C. 564.

**2407.** *Add. Annotations*:—*Consd.* Taylor v. Lock (1930), 99 L. J. K. B. 245; Taylor v. Lock (No. 2) (1930), 144 L. T. 428. *Refd.* Altobelli v. Ellis (1926), 136 L. T. 602.

**2407a.** *Injured workman leaning on tubs.*—*A workman injured his finger while working underground in a coal pit, & went to the underground first-aid station, a quarter of a mile away, to have it dressed. He returned to his work along the haulage way. Going in the same direction as himself, & at the same pace, was a line of empty tubs. He availed himself of this line of tubs by leaning on them as he walked, & putting his lamp into one of them. As he approached his place of work he leaned over the edge of the tub to get his lamp without noticing that the roof immediately in front was low. He was caught between the tub & the roof & injured his spine. The county ct. judge accepted the workman's story of the accident, & held that he had not added a peril to his employment. The employers appealed:—Held: there was evidence to support the finding, & no misdirection. Appeal dismissed.*—*BAKER v. WEST CANNOCK COLLIERY CO., LTD.* (1931), 24 B. W. C. C. 231.

**2407b.** *Miner cleaning out sump—Descending by standing on tank instead of using ladder.*—*A workman was employed in applt's mine as an onsetter & was instructed to clean out the sump hole which was 78 ft. deep & 18 ft. broad below the level of the pit bottom. He was put in charge of five men to do the job. A tank 3 ft. 6 in. by 2 ft. was lowered to the sump filled with mud & water & raised & emptied again & again. There were two platforms on the way down the shaft & ladders to each of them were provided. It was complained that the job was not proceeding as quick as it should, & after that intimation the workman travelled up & down the shaft standing on the tank & helping the men at the top to empty it. He did that some sixteen times & then fell off & received injuries from which he died. On a claim for compensation made by those dependent on the earnings which deceased workman made, the county ct. judge held that they were entitled to compensation as the accident arose out of & in the course of the employment as what the deceased was doing at the time of the accident was done for the purposes of his job & was an act done within the sphere of his employment:—Held: there was ample evidence upon which the county ct. judge could come to that conclusion, as what deceased was doing at the time of the accident was within the sphere of his employment, as contemplated by the terms of that employment, & it was a question*

*cross the road, & when he was in the "middle" or "centre" of the road, he helped a woman to turn or "kop" some straying cattle, & after having done so, & as he was turning towards the footpath, he was struck by a cyclist & died as the result of his injuries:—Held: the accident arose out of & in the course of the employment.*—*HANNA v. EAGLESON*, [1935] N. I. 19.—*IR.*



of degree & fact which was for the county ct. judge to decide.—*TALBOT v. ACKERS, WHITLEY & ABRAMS COAL CO., LTD.* (1934), 150 L. T. 444; 27 B. W. O. C. 22, C. A.

*Annotation*.—*Refd. Privett v. Darracq Motor Engineering Co.* (1934), 27 B. W. O. C. 163.

**2407c. Slip while stopping leak.**—A workman was employed as a labourer on the work of fixing filters & pipes at open air baths. While he was taking refreshment in company with his foreman & other workmen outside the door to the filter room one of his fellow-workmen remarked that water was coming through the discharge pipe through which water was emptied from the baths. Without the authority or the knowledge of his foreman the workman climbed on top of the filters to stop up the mouth of the pipe with clay. He did not take enough clay & in going back for more he stepped on a plank which the workmen used when their work took them to the top of the filters. The plank slipped & the workman fell twelve feet & injured himself. On the workman's application for compensation the county ct. judge found that it was unnecessary to block up the pipe as not sufficient water was splashing through to do any harm, but that the workman acted as he did because he considered that the presence of the water was harmful. The county ct. judge found that the workman was doing an act reasonably incidental to his employment, that he had not added a peril to his employment, & that the accident arose out of & in the course of the employment & made his award for the workman. The employers appealed:—*Held*: there was evidence to support the findings & no misdirection. Appeal dismissed.—*COOK v. BELL BROS.* (1937), 30 B. W. O. C. 132, C. A.

**2409. Add. Annotation**.—*Refd. Stephen v. Cooper*, [1929] A. C. 570.

**2415. Add. Annotations**.—*Consd. Altobelli v. Ellis* (1926), 136 L. T. 602; *Edwards v. Gwauncae-gurwen Colliery Co., James v. Same, Jenkins v. Same* (1926), 96 L. J. K. B. 337; *James v. Penderyn Limestone Quarries (Hirwain)* (1926), 20 B. W. O. C. 27; *Jardine v. Steel Co. of Scotland* (1926), 19 B. W. O. C. 726; *Clarke v. Southern Ry.* (1927), 96 L. J. K. B. 572; *Stephen v. Cooper*, [1929] A. C. 570. *Apld. Davison v. Holmside & South Moor Collieries, Napper v. Lambton, Hetton & Joicey Collieries* (1929), 140 L. T. 511. *Consd. Dixon v. Ayresome S.S. Owners* (1930), 99 L. J. K. B. 250; *Dyson v. Vickers-Armstrong, Ltd.* (1929), 142 L. T. 340; *Quickfall v. London & North-Eastern Ry. Co.* (1929), 142 L. T. 315; *Shepherd v. London, Midland & Scottish Railway* (1930), 143 L. T. 220; *Hannaby v. Ilay Main Collieries, Ltd.*, [1931] 1 K. B. 602; *Thomas v. Ocean Coal Co.*,

[1933] A. C. 100. *Refd. Durie v. Anchor-Donaldson Line* (1925), 19 B. W. O. C. 512; *Taylor v. Lock* (No. 2) (1930), 144 L. T. 428; *Muteham v. Gentle (F. W.) & Son* (1931), 24 B. W. O. C. 310; *Knowles v. Southern Ry. Co.*, [1936] 2 All E. R. 682; *Matthews v. Victoria Spinning Co. (Rochdale), Ltd.* (1935), 28 B. W. O. C. 246; *Ramsay v. Gramophone Co.*, [1936] 2 All E. R. 752; *Cook v. Bell Bros.* (1937), 30 B. W. O. C. 132.

**2417. Add. Annotation**.—*Consd. Dixon v. Ayresome S.S. Owners* (1930), 99 L. J. K. B. 250.

**2417a. Workmen repairing hydraulic apparatus—Not using ladder provided—Electrocution.**—Deceased workmen, whilst employed on Oct. 24, 1929, by resps. in the repair of hydraulic apparatus, met with a fatal accident. When the repair was effected it was necessary to go about 100 yards in the works to turn on a valve starting the water power to see whether the repair would resist the water pressure, & if it failed to resist the pressure some one had to turn off the valve as soon as possible. The obvious & proper route to the valve was up a ladder & along an air pipe, using the hydraulic pipe as a handrail, & for an ordinary able workman this was neither difficult nor dangerous. Deceased went to the valve by this route, turned it on, but returned another way, which involved his going along the crane-way, on which there was a danger from moving cranes & a live electric wire, & he put his hand on this wire & was electrocuted. Directly the valve was turned on the workman gave or received a signal from the workmen at the place of repair. The county ct. judge found that one of the objects of the deceased in returning by the way he did was to give or receive a signal as soon as possible, but held that the deceased workman, in adopting that route for the purpose of effecting that object, had acted in an unnecessary & unreasonable way & had by so acting stepped outside the sphere of his employment, & therefore the accident did not arise out of the employment, & consequently s. 1 (2) did not apply:—*Held*: there was evidence to support the finding of the county ct. judge, & being a question of fact the Ct. of Appeal could not interfere with the finding.—*SHEPHERD v. LONDON, MIDLAND & SCOTTISH RAILWAY* (1930), 143 L. T. 220; 23 B. W. O. C. 105, C. A.

**2419a. Workman putting hand into exhaust pipe—To find hammer.**—The workman was employed as a labourer by resps., & occasionally as a grinder. The grinders' shop had some fifteen pipes running into it, all of which except one were in exhaust pipes to draw the dust, arising from the grinding, out of the

**PART XIV. SECT. 5, SUB-SECT. 2.—**  
**D. (b) ii.**

**g i. — Workman urinating by stationary truck—Without preliminary inquiry as to shunting.**—*M'INTOSH v. CARMICHAEL*, [1939] S. C. (Ct. of Sess.) 200.—*SCOT.*

**g ii. — Cycling along platform.**—A workman, employed at a railway station on shunting & other duties, was instructed to deliver a letter at a signal cabin 300 yards distant from the station. The usual & only recognised method of doing so was for the

messenger to go on foot along the platform & across several sets of rails. The workman, however, borrowed a fellow-servant's bicycle which had been left in the station office. He proceeded to ride along the platform, but failed to keep a straight course & fell from the platform to the rails, sustaining injuries from which he died:—*Held*: while the accident had happened in the course of the deceased's employment, he had taken a risk, in using the bicycle, which was not reasonably incidental to his employment, but was an added peril to which by his own

conduct he had exposed himself; & accordingly, the accident did not arise out of the employment.—*ROONEY v. LONDON & NORTH EASTERN RY. CO.*, [1931] S. C. 34; 23 B. W. O. C. 606.—*SCOT.*

**sp. Workman employed to water sheep & look after & bring in horses—Death through accidental discharge of gun—Use of gun expressly forbidden.**—*Held*: the accident did not arise out of deceased's employment.—*DORIZZI v. MACKEY* (1925), 27 W. A. L. R. 93.—*AUS.*



air. One was an exhaust pipe with a strong draught of air into the shop. Some days before the accident the workman, whilst employed in the shop, mislaid his hammer, & being told that sometimes the hammers were put in the mouth of a pipe he put his hand in one of the inhaust pipes & drew out his hammer, the end of the hammer being visible. He again mislaid the hammer, & next day, Sept. 19, 1928, put his hand again in the same pipe, but not finding it there, tried the next pipe which was the exhaust pipe which had a fan close to the mouth, & his fingers were cut off. He claimed compensation under the Act. It would have been possible without danger to have put his hand in any of the pipes except the exhaust one. The county ct. judge held that the act of the man in searching in the mouth of the pipe was an added peril to his employment, & a peril voluntary superinduced by him on what arose out of the employment; the accident did not arise out of & in the course of his employment, & further, the act being entirely unnecessary because the hammer could have been seen if it had been placed in the exhaust with the fan so near the mouth of the pipe, & absolutely unreasonable because the outward draught was very strong & quite sufficient to show that there must have been a rapidly revolving fan close to the outlet, the act was not within the sphere of the employment at all:—*Held*: the question whether this act of the workman was one within the scope of his employment was one of fact involving a question of degree, & therefore a question to be decided by the county ct. judge, & his award could not be interfered with.—*DYSON v. VICKERS-ARMSTRONG, LTD.* (1929), 142 L. T. 340; 22 B. W. C. C. 551, C. A.

**2421a.** — *Workman drying leggings.*—A workman was employed in certain washing work which was done in sack leggings as it necessitated standing in water. The leggings had to be dried at the end of each day & for this purpose the workman was allowed to make use of the out-draught from a turbine in an adjoining motor-room. On taking his leggings to the motor-room to dry the workman found that another man had already put leggings round the iron braces of the turbine, whereupon the workman put his own leggings inside the casing behind part of the turbine & close to the revolving fan, having to use force to push them in against the draught. The fan caught the leggings & drew his right hand in with them. As a result he lost his hand. The county ct. judge found that it was in the course of his employment to dry his leggings but that by his act he had added a peril to his employment which no workman without acting in extreme rashness would have undertaken, & held that the accident therefore did not arise out of the employment. The workman appealed:—*Held*: it was a question of degree & therefore of fact for the county ct. judge, there was evidence to support the finding & no misdirection. Appeal dismissed.—*HARRIS v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LTD.* (1937), 30 B. W. C. C. 389, C. A., *reversd.* [1938] 4 All E. R. 831, H. L.

**2425.** *Add. Annotations*:—*Consd. Edwards v. Gwauncaeurgwen Colliery Co., James v.*

*Same, Jenkins v. Same* (1926), 96 L. J. K. B. 337; *Clarke v. Southern Ry.* (1927), 96 L. J. K. B. 572. *Appld. Howells v. G. W. Ry.* (1928), 97 L. J. K. B. 183; *Stephen v. Cooper*, [1929] A. C. 570. *Consd. Dyson v. Vickers-Armstrong, Ltd.* (1929), 142 L. T. 340; *Quickfall v. London & North-Eastern Ry. Co.* (1929), 142 L. T. 315; *Shepherd v. London, Midland & Scottish Railway* (1930), 143 L. T. 220; *Taylor v. Lock* (1930), 99 L. J. K. B. 245; *Codling v. Ridley* (1933), 26 B. W. C. C. 3. *Refd. Hannaby v. Llay Main Collieries, Ltd.*, [1931] 1 K. B. 602; *Taylor v. Lock* (No. 2) (1930), 144 L. T. 428; *Dugdale v. Johnson & Phillips, Ltd.* (1931), 24 B. W. C. C. 502; *Muteham v. Gentle* (F. W.) & Son (1931), 24 B. W. C. C. 310; *Thomas v. Ocean Coal Co.*, [1933] A. C. 100; *Cook v. Bell Bros.* (1937), 30 B. W. C. C. 132; *Rossiter v. Constable Hart & Co.* (1936), 29 B. W. C. C. 32.

**2425a.** *Workman walking along line—Short cut.*—An electrician was employed in the erection of an overhead cable to convey electrical current across country. The work had reached a stage where the cable was being carried over a single line of railway. The workman entered his employment when he met his foreman in the morning, but he had to walk a mile & a half after meeting the foreman, to the spot where he had to work. The proper route to this spot was along a road, then along a footpath, & then across a field, but a considerable distance could be saved by walking part of the way along the railway line. The workman chose to trespass along the line, but, as a gale was blowing, he walked with his head down against the wind. He thus failed to notice the approach of a train which struck & killed him. The widow claimed compensation. The county ct. judge made his award for the widow on the ground that the workman was merely acting negligently in the course of his employment. The employers appealed:—*Held*: the workman was not employed to trespass on the railway, & the accident arose out of the added peril to which he had thereby exposed himself & not out of the employment. Appeal allowed.—*STEPHENSON v. BRITISH INSULATED CABLES, LTD.* (1930), 23 B. W. C. C. 549, C. A.

**2426.** *Add. Annotation*:—*Refd. Taylor v. Lock* (1930), 99 L. J. K. B. 245.

**2426a.** *Alighting from train in motion.*—*ALTOBELLI v. JOHN ELLIS & SONS, LTD.*, No. 2574a, *post*

**2430a.** — *Taking short cut through danger area.*—The deceased workman was a general labourer employed by resps. as a stand-by man around a mechanical navy to assist the engine-driver. During a short interval when he was not required at the navy, he went away to a neighbouring kiln to warm his hands or to warm himself, which he was entitled to do. He returned to his proper place for his work by taking a "short cut" which brought him under the bucket of the navy. This he had been warned by his employers not to do. As he was proceeding back to work by this "short cut," the engine-driver's foot slipped off the controls, with the result that the bucket fell on the workman's head & killed him:—*Held*: the workman was performing the work which

he was employed to do in a way in which he was warned not to do it, but he was, nevertheless, doing something for the purposes of his employment. The case therefore came within Workmen's Compensation Act, 1925 (c. 84), s. 1 (2), & the widow was entitled to compensation.—*BROTHERTON v. JACKSON (J. & A.)* (1928), 98 L. J. K. B. 76; 140 L. T. 271; 21 B. W. C. C. 382, C. A.

**2437. Add. Annotations:—***Consd. Altobelli v. Ellis* (1926), 136 L. T. 602; *Clarke v. Southern Ry.* (1927), 98 L. J. K. B. 572; *Taylor v. Lock* (No. 2) (1930), 144 L. T. 428. *Refd.* *Davison v. Holmside & South Moor Collieries*, *Napper v. Lambton, Hetton & Joicey Collieries* (1929), 140 L. T. 511; *Dixon v. Ayresome S.S. Owners* (1930), 99 L. J. K. B. 250; *Taylor v. Lock* (1930), 99 L. J. K. B. 245; *Dugdale v. Johnson & Phillips, Ltd.* (1931), 24 B. W. C. C. 502; *Thomas v. Ocean Coal Co.*, [1933] A. C. 100; *Bullers v. Altus Shoemakers, Ltd.* (1934), 27 B. W. C. C. 132.

**2437a. Attempt to board lorry in motion.]—**Deceased workman at the time of the accident was twenty-five years old, & an active man. He was employed by resp. as driver of a motor steam lorry of about 7 tons burden, & a steersman was also employed on the lorry. On Apr. 12, 1929, whilst driving, he got down & went across a field, in which he had seen his father, to get some tobacco from him. After he had got the tobacco he relieved nature against the hedge, & joined the road some 300 yards in front of the lorry. He beckoned to the steersman, who then drove on at three miles an hour, & whilst it was moving the deceased attempted to get on, but fell & was run over by the hind wheel & killed. The steersman did not see what happened, but felt a bump when the lorry went over the deceased. There was a step about 17 inches from the ground, & then an iron platform 12 inches by 13 inches next to the small door leading into the cab where the driver sat. The door opened outwards on to the iron platform. There was no handrail or handle on the outside of the lorry to give any help to any one entering the cab. There was evidence that men got on to these lorries every day when going at three miles an hour. The question arose whether the accident arose out of & in the course of the employment. The county ct. judge held that it was a question of degree, & taking into consideration the speed of the steam lorry, its weight, its construction, & its accessibility whilst moving at three miles an hour, the deceased, in attempting to enter it & trying to get through the open door or clambering over it, added a hazard & needless peril to his employment, & was thereby doing something different in kind from what he was employed to do, & voluntarily exposing himself to a risk which was not reasonably incident to his employment; & therefore the accident did not arise out of & in the course of the employment:—*Held*: the county ct. judge had not misdirected himself in law & there was some evidence on which he could come to the conclusion he did, therefore his award could not be interfered with.—*TAYLOR v. LOCK* (No. 2) (1930), 144 L. T. 428; 23 B. W. C. C. 444, C. A.

**2438a. — Delivery of message.]—**The workman was employed as a time-keeper & costings

clerk by a firm of contractors who were engaged in certain works in connection with an estate. One evening, after work had ceased for the day, the surveyor employed by the estate owners became desirous of conveying certain instructions to the foreman before work was resumed the next morning. That evening he saw the workman at an hotel & told him of his wish that the message should reach the foreman before work was resumed the next morning. The workman said that he would deliver the message to the foreman in the morning. In fact he went forthwith to the site of the works in order to deliver the message to the night watchman & in so doing fell into a trench on account of the darkness & was seriously & permanently disabled. In his evidence in chief the workman said that the surveyor wanted the message delivered that same evening. In cross-examination, the workman admitted that the surveyor had not said in so many words that he wanted the message delivered that evening. The county ct. judge made his award for the employers. The workman appealed:—*Held*: there was no evidence that the surveyor asked the workman to imperil himself by going in the dark to deliver the message to the night watchman & the accident accordingly did not rise out of & in the course of the employment. Appeal dismissed.—*ROSSITER v. CONSTABLE HART & Co., LTD.* (1936), 29 B. W. C. C. 32, C. A.

**2439a. Farm hand adjusting mower.]—**A workman employed as a harvest hand on a farm was engaged in driving a two-horse mower with a cutting-blade for cutting the corn, & had occasion to replace a chain which had become detached from the back-band of one of the horses. He did not put the cutting-blade out of gear, but stood up from his seat on the machine & attempted to walk out on the pole between the horses in order to reach the detached chain. There was no express prohibition against walking on the pole, but the customary & proper method of replacing a chain was to stop the mower, put the cutting-blade out of gear, fasten the reins, dismount from the machine & walk to the horses' heads. The weight of the workman on the pole caused the horses to start, setting the cutting-blade in motion. He fell on to the blade & was seriously & permanently injured. In a claim for compensation the arbitrator found that the injury sustained was not due to an accident arising out of the employment. On appeal by the workman it was held by the Second Division of the Ct. of Session that there was evidence on which the arbitrator could make that finding. The workman again appealed:—*Held*: the accident arose from an added peril to which the workman had voluntarily exposed himself & consequently did not arise out of his employment.—*STEPHEN v. COOPER*, [1929] A. C. 570; 98 L. J. P. C. 97; 141 L. T. 300; 45 T. L. R. 413; 73 Sol. Jo. 268; 22 B. W. C. C. 339, H. L.

*Annotations:—**Apld.* *Stephenson v. British Insulated Cables, Ltd.* (1930), 23 B. W. C. C. 549. *Distd.* *Thomas v. Ocean Coal Co.*, [1933] A. C. 100. *Refd.* *Quickfall v. London & North-Eastern Ry.* (1929), 142 L. T. 315; *Shephard v. London, Midland & Scottish Ry.* (1930), 143 L. T. 220; *Taylor v. Lock* (No. 2) (1930), 144 L. T. 428; *Muteham v. Gentle (F. W.) & Son* (1931), 24 B. W. C. C. 310; *Race v. Postmaster-General* (1932), 146 L. T. 489; *Dugdale v. Johnson & Phillips, Ltd.* (1931), 24 B. W. C. C. 502;

*Privett v. Darracq Motor Engineering Co.* (1934), 151 L. T. 211; *Cook v. Bell Bros.* (1937), 30 B. W. C. C. 132; *Harris v. Associated Portland Cement Manufacturers, Ltd.* (1937), 30 B. W. C. C. 389.

**2439b. Riding bicycle along railway platform carrying heavy weight.**—A workman in the course of his employment had to take a mud-door from the ship on the repair of which he was engaged to get it repaired. The mud-door was a piece of metal about 9 in. by 4 in. & weighing 7 lb. to 8 lb. He walked with it down the pier to the shore-end where the repairing shop was, & when it was mended got on to a bicycle & rode along a platform on the east side of the pier reserved for passengers. A railway ran down the centre of the pier & on each side was a raised platform about 7 ft. wide, the one on the eastern side for passengers the other for traffic. Public notices were put up at the water end of the pier that the eastern platform was for pedestrians only, & at the other end that the western platform was for traffic only. The man fell in front of an approaching train & was killed. His widow claimed compensation as being dependent on the earnings of the deceased workman, but the county ct. judge held that she was not entitled, as though the accident arose in the course of the employment it did not arise also out of the employment, as the getting on the bicycle was an act which it was no part of his employment to hazard or do, & therefore the accident, not being within sect. 1 (1) of the Act, it was immaterial that in fact the act was done for the purposes of & in connection with the employers' trade or business, since before sect. 1 (2) was applicable, the workman must show that the act arose out of the employment within sect. 1 (1):—*Held*: the riding of the bicycle along the pier was something different in kind from anything the man was required or expected to do in his employment, & such an act was outside of the sphere of the employment, consequently the accident did not arise out of the employment, & sect. 1 (2) of the Act of 1925 had no operation.—*QUICKFALL v. LONDON & NORTH-EASTERN RY. CO.* (1929), 142 L. T. 315; 22 B. W. C. C. 653, C. A.

**2439c. Postman using motor cycle—Permission to use bicycle—Accident at level crossing.**—An auxiliary postman was employed to deliver letters in relief of his father who was sub-postmaster of a country post office. Ten years earlier the father had obtained permission to use a bicycle on the round. In the course of this round it was necessary to go across a level crossing. The son went on the round on a motor cycle & crossed the level crossing in front of an approaching train riding his motor cycle with the engine in gear. As he was crossing the engine of the train caught the motor cycle. He was thrown off & died of his injuries. His widow claimed compensation. At the arb. it was conceded on behalf of the employer that the permission granted to the father to use a bicycle extended to the son, but it was also argued on the employer's behalf that the deceased workman

by using a motor cycle instead of a pedal cycle had added a peril to his employment & was doing something different in kind from what he was employed to do. The county ct. judge found that the permission to use a bicycle did not cover the use of a motor cycle & found that the accident did not arise out of the employment. The widow appealed:—*Held*: the deceased workman by riding a motor cycle as he did at the level crossing was doing an act outside the scope of his employment.

Appeal dismissed.—*RACE v. POSTMASTER-GENERAL* (1932), 146 L. T. 489; 25 B. W. C. C. 24, C. A.

**2439d. Steward getting drunk—Fall over side of ship.**—A steward employed on board ship, was seen to be drunk at 5 p.m. At 7 p.m. he was still so drunk as to be incapable of performing his duties. At about that time he went to the port side & put his two hands on the bulwark, & appeared to a witness to be about to vomit. He then pitched overboard & was drowned. The sea was perfectly calm. On a claim for compensation by his widow, the county ct. judge found that deceased met his death when at the side of the vessel where he would not have been but for the fact that he was drunk & desired to vomit & therefore that the accident did not arise out of & in the course of his employment. The widow appealed:—*Held*: deceased workman by his own act in getting drunk on board ship had added a peril to his employment & the accident did not therefore arise out of or in the course of that employment. Appeal dismissed.—*BOANAS v. BARR-WHIN S.S. OWNERS* (1936), 29 B. W. C. C. 40, C. A.

**2439e. Cleaning steam-roller in motion.**—An engine-driver's mate was cleaning the engine of his employer's steam-roller when his hand became caught in the moving machinery & in consequence he was seriously & permanently disabled. The driver had left the steam-roller stationary & had stopped the engine, leaving the workman to clean it. It was the workman's duty to clean the engine only when it was stationary. In the engine-driver's absence, the workman set the engine in motion before proceeding to clean it. The county ct. judge found that it was no part of the workman's employment to start the engine or to clean it while it was in motion, & that consequently the acts occasioning the injury were altogether outside the sphere of his employment; therefore although these acts were done for the purposes of & in connection with the employer's business, the accident never arose out of & in the course of the employment. The workman appealed:—*Held*: there was evidence to support the findings of fact & no misdirection. Appeal dismissed.—*TUCKNOTT v. EAST SUSSEX COUNTY COUNCIL* (1935), 28 B. W. C. C. 42, C. A.

**2440. Add. Annotations:—***Consd. Poland v. Parr*, [1927] 1 K. B. 236; *Rossiter v. Constable Hart & Co.* (1936), 29 B. W. C. C. 32.

PART XIV. SECT. 5, SUB-SECT. 2.—  
D. (c).

ef. —.—[Applts.' husbands, miners, in the employ of M. Co., lost their

lives when they went down a disused mine shaft on M. Co.'s property in an attempt to rescue fellow employees who were overcome by gas in attempting to rescue children, who while play-

ing, had gone into the shaft & been overcome by gas. Workmen's Compensation Board disallowed applts. claims for compensation under Workmen's Compensation Act, N.B., 1932,

- 2445. Add. Annotation :—***Refd.* *Dermoddy v. Higgs & Hill, Ltd.*, [1937] 4 All E. R. 379.
- 2446. Add. Annotation :—***As to* (1) *Refd.* *James v. Penderyn Limestone Quarries (Hirwain)* (1926), 20 B. W. C. O. 27.
- 2446a. Helping fellow-workman to start engine.]—**A workman was employed by resps. in road-making. The driver of an engine belonging to his employers had difficulty in starting the engine, & the workman went to assist him. The engine backfired, with the result that the workman's wrist was broken. The county ct. judge found that, when the workman met with the accident, he was doing an act outside his employment, but one which was for his master's benefit. As, however, there was no emergency, the workman was not entitled to recover. The workman appealed:—*Held*: the act was one which was reasonable for a fellow-workman to do in the circumstances for the purpose of enabling his master's work to proceed, & the accident arose out of & in the course of the man's employment.—*DERMODDY v. HIGGS & HILL, LTD.*, [1937] 4 All E. R. 379; 81 Sol. Jo. 1020; 30 B. W. C. C. 351, C. A.
- 2447. Add. Annotations :—***Appld.* *Painter v. C. & S. L. Ry.* (1926), 20 B. W. C. O. 157. *Refd.* *Vickers v. Miners, Thames Steam Tug & Lighterage Co. v. Ingram* (1927), 96 L. J. K. B. 490.
- 2448a. ———.]—**A porter, after a gate of a train had been shut, got on to the small piece of platform outside the gate to talk to the gateman, & as the train gathered speed very quickly, was carried into the tunnel & seriously injured. He acknowledged that the only time a porter had a right to be on the platform of a train was for the purpose of removing luggage. There was also a regulation forbidding any porter to do what he was doing at the time of the accident. The county ct. judge held the accident did not arise out of the employment, & as the act that caused it was not done for the purposes of & in connection with the employers' trade or business, the accident was not to be deemed to have arisen out of the employment:—*Held*: there was evidence to support the award, & no misdirection.—*PAINTER v. CITY & SOUTH LONDON RY. CO.* (1926), 20 B. W. C. O. 157, C. A.
- 2449. Add. Annotation :—***Refd.* *Taylor v. Lock* (1930), 99 L. J. K. B. 245.
- 2452. Add. Annotations :—***Refd.* *Durie v. Anchor-Donaldson Line* (1925), 19 B. W. C. O. 512; *Gorman v. Barclay Curle* (1925), 19 B. W. C. C. 564.
- 2456. Add. Annotations :—***Consd.* *Pruce v. Davey* (1926), 136 L. T. 601; *Robertson v. S.S. Appalachee, Rovira v. Same* (1926), 136 L. T. 488; *Moule v. Marmite Food Extract Co.* (1927), 20 B. W. C. C. 446. *Refd.* *Brentnall v. London & North Eastern Ry. Co.* (1932), 25 B. W. C. C. 265; *Todd v. MacCallum* (1933), 25 B. W. C. C. Supp. 155.
- 2459. Add. Annotation :—***Consd.* *Knowles v. Southern Ry. Co.*, [1937] A. C. 463.
- 2460. Add. Annotations :—***Consd.* *Taylor v. Lock* (1930), 99 L. J. K. B. 215. *Refd.* *Knowles v. Southern Ry. Co.*, [1937] A. C. 463.
- 2460a. Farm labourer—Carting turf to own cottage.]—***Appltd.* was employed by resp., his cousin, as a farm labourer. He had all his meals in the farmhouse & was paid 10s. a week. Resp. allowed him to cut turf & use it for his own purposes, & also allowed him to have the use of a horse & cart to cart the turf to his cottage. While so carting it, he was run into by a motor car & received serious injuries:—*Held*: the accident did not arise out of & in the course of appltd.'s employment.—*STANDEN v. SMITH* (1927), 20 B. W. C. C. 305, C. A.
- 2460b. Leaving premises to purchase provisions.]—**Deceased was employed as the only shop assistant in a shop, & used to have his tea in the shop & went to fetch the milk for his tea from across the road. The shop was left open during his tea hour if he liked. While crossing the road to get the milk, he was knocked down by a motor cyclist, & was killed. Deceased paid for his own milk for his tea, & if he chose to might have got his tea out:—*Held*: the injury having occurred at the time when deceased had left the place of & the course of his employment to get the milk for his tea at his own cost for his own purposes, the accident did not arise out of & in the course of his employment, as he was not within the test laid down in *Parker v. Black Rock (Owners)*, No. 2456, & by *LORD ATKINSON* in *St. Helens Colliery Co., Ltd. v. Hewitson*, No. 2364.—*PRUCE v. DAVEY* (1926), 136 L. T. 601; 20 B. W. C. C. 237, C. A.
- 2467a. ———.]—***Appltd.*, a youth sixteen years of age, was employed by resps. in their wire-drawing shop. On Jan. 14, 1930, he was given some wire to take to put in an oven, a large brick erection heated from underneath. He went into the oven with another employee, who was unwell, & they sat down.

& its decision was affirmed by the Appeal Div. of the Supreme Ct. of New Brunswick:—*Held*: "Mine rescue work" included under the term "Mining" in the Act, should not be construed as applying only to the occurrence of a peril which places in jeopardy the lives of miners in a mine which is in actual operation. There is no warrant for limiting the meaning of the words so as to exclude rescue in a mine shaft in which actual operations have ceased or been suspended, if circumstances arise to create a peril there; or so as to apply only to the rescue of miners.—*BETTS & GALLANT v. WORKMEN'S COMPENSATION BOARD*, [1934] S. O. R. 107; 1 D. L. R. 438.—CAN.

**sq. Farm labourer taking gun to shoot crows.]—**A man, who was em-

ployed by a farmer to do general work on the farm, was working in a potato field, grubbing potatoes. He was using, with the assistance of another man, a grubber, which was a machine drawn by two horses. He had taken his employer's gun from a storeroom in a house on the farm without his employer's permission, & he fired at a crow which flew down. He then placed the gun on the grubber, the gun shortly afterwards accidentally went off, & he received injuries from which he died. Evidence was given that a number of crows were in the field earlier in the day & that crows would injure the potatoes. The employer had a licence for the gun, enabling him to shoot over his own land. He did not use the gun himself & he had no ammunition. He never gave the work-

man permission to use the gun. The workman had no licence:—*Held*: the act of the workman in carrying a loaded gun was entirely different in kind from the class of acts which he was employed to do; the risk occasioned by so doing was not a risk incidental to his employment; & the workman was not acting in a manner which was reasonably within the contemplation of the parties when the contract of service was made, & accordingly that the accident did not arise out of the employment.—*LOUGHRAY v. MORRISON*, [1930] I. R. 93; 23 B. W. C. C. 660.—IR.

#### PART XIV. SECT. 5, SUB-SECT. 2.—

b. For "accident arose" read "accident did not arise."

Several other youths, employed also by resps., shut the oven door. Applt. called to be let out & then put his eye to the keyhole to see what they were doing outside, & lime was thrown, which got in his eye, the sight of which was lost. On a claim by applt. for compensation for an accident which he alleged arose out of & in the course of his employment, the county ct. judge, acting as an arbitrator under the Act, found that, though applt. himself was injured whilst following his proper occupation, the risk he ran from larking by other boys engaged in the same employment was not a special risk & therefore not one incidental to his employment by resps., but that the larking of boys was a risk common to the public at large, & it followed that therefore the accident did not arise out of his employment. It was alleged on behalf of applt. that larking by the employees had occurred on many other occasions before the accident in question here, but that the county ct. judge did not take that fact into consideration:—*Held*: the question whether applt. in the circumstances of his employment did run some special risk was a question of fact to be decided by the county ct. judge, & he having decided in this case that there was no such risk, therefore the accident was not one which arose out of the employment.—*CALTON v. SAMUEL FOX & Co., LTD.* (1938), 158 L. T. 402; 31 B. W. C. C. 43, C. A.

**2471a.** —.]—A workman in charge of a cotton-machine saw that it was not working properly. The machine had a locking device which prevented the guard being removed while the machine was in motion, but on that day the device was out of order. Although acting in contravention of an order, implied or otherwise, from his employer not to attend to any defect while the machines were in motion, the workman removed the guard to adjust a defect in the machine. He slipped & caught his left hand in the moving machinery, sustaining a serious injury. On a claim for compensation the county ct. judge found that although the workman had acted in contravention of his employer's orders, the act was done for the purposes of his employer's business. He also found that the workman had done something so dangerous as to prevent him obtaining the benefit of the provisions of sect. 1 (2). He accordingly made his award for the employers. The workman appealed:—*Held*: the county ct. judge had not followed the principles laid down in *Thomas v. Ocean Coal Co., Ltd.*, No. 2511a. Having found that the workman was doing something for the purposes of his employer's business which would have been within his employment

except for the prohibition, he ought to have applied the provisions of sect. 1 (2), & held that the accident was one deemed to have arisen out of the employment. In such circumstances the fact that the act done is a dangerous one does not prevent the application of this sub-sect. Appeal allowed.—*MATTHEWS v. VICTORIA SPINNING Co. (ROCHDALE), LTD.* (1935), 29 B. W. C. C. 242; *sub nom. VICTORIA SPINNING Co. (ROCHDALE), LTD. v. MATTHEWS*, [1936] 2 All E. R. 1359; 105 L. J. K. B. 521; 155 L. T. 363 52 T. L. R. 708; 80 Sol. Jo. 735, H. L.

**2472. Add. Annotations:—***Consd. Edwards v. Gwauncaegurwen Colliery Co., James v. Same, Jenkins v. Same* (1926), 136 L. T. 494. *Refd. Hannaby v. Llay Main Collieries, Ltd.*, [1931] 1 K. B. 602.

**2475a. Consumption of intoxicating liquor on duty.]**—Resp. railway co. had a rule that "employees must not consume intoxicating liquor while on duty." This rule was well known to the co.'s employees, including the deceased man, a carter, whose duty it was to drive a pair-horse van. On the day of the accident giving rise to the claim for compensation, while he was taking a load from one depot to another he stopped his van outside a public-house, descended from the box seat, & having put a chain on the near side wheel & removed a trace he went some distance up a side street to a public-house for the purpose of getting a glass of beer & also for the purpose of using the lavatory; but the county ct. judge found as a fact that the man's dominant purpose was to drink the beer. On his return to the van he removed the chain, replaced the trace, took the reins in his hands, & was in the act of mounting to his seat when, probably owing to the horses starting to move, he slipped & fell under the wheel & sustained injuries which caused his death. On a claim for compensation by his widow:—*Held*: (1) the accident did not arise in the course of the deceased man's employment, seeing that it happened before he had completed the series of acts—unchaining the wheel, refastening the trace, taking possession of the reins—which, owing to his breach of duty, had to be performed before he could regain effective control of the horses for the purpose of re-starting them; (2) the accident could not be deemed to have arisen out of & in the course of the deceased man's employment within sect. 1 (2) of the Act, inasmuch as the act he was doing in contravention of a regulation applicable to his employment was attempting to regain his seat on the van as one part of a composite act of consuming intoxicating liquor while on duty, which act, being expressly forbidden by the terms of the employment, could not be said to be an act

**PART XIV. SECT. 5, SUB-SECT. 2.—**  
E. (a).

*st. Workman standing by open door of railway carriage—in disobedience of notice.]—Held*: the notice was framed for securing the safety of passengers in general, & not of workmen, & the employer was liable.—*GREAT INDIAN PENINSULAR RY. Co. v. KASHINATH CHIMAJI* (1927), 1 L. R. 52 Bom. 45.—*IND.*

*sv. Warning ignored—No disobedience.]—Where an employee is injured*

while actually performing his employer's business the fact that he was contributorily negligent in forgetting a warning, but not wilfully disobedient of orders, does not deprive him of the benefits of Part 2 of Workmen's Compensation Act, 1924, if the master was guilty of negligence.

But his contributory negligence is to be taken into account in assessing damages.

Employees in the retail-shop trade, where not brought by regulation under Part 1 of the said Act, are covered by

Part 2 thereof, which sets up a new code which renders obsolete a large part of the common law governing actions by servants against masters for personal injuries.—*WEBBER v. FIFTH AVENUE, LTD.*, [1934] 1 W. W. R. 589; 3 D. L. R. 68; 42 Man. L. R. 261.—*CAN.*

**PART XIV. SECT. 5, SUB-SECT. 2.—**  
E. (b) 1.

*sa. Craneman neglecting to use safety ladder.]—A craneman in charge of an electric crane climbed from his cabin, which was 16 feet above the floor of*

"done by the workman for the purposes of & in connection with his employer's trade or business" within the sub-sect.—*KNOWLES v. SOUTHERN RY. CO.*, [1937] A. C. 463; [1937] 2 All E. R. 403; 106 L. J. K. B. 339; 156 L. T. 461; 53 T. L. R. 620; 81 Sol. Jo. 475; 30 B. W. C. C. 76, H. L.

**2475b. Act done for benefit of employer.]**—A labourer was occasionally given the task of operating an overhead crane worked by electric power. The cab from which the crane was operated was normally reached by a ladder placed at the crane's usual stopping place. If the crane stopped away from its ladder the proper method of access for the crane driver was to mount some other ladder into another crane & ride in the other crane until the two were close together, when the crane driver could climb into his own crane. During great pressure of work the workman in order to avoid the lengthy method prescribed of reaching his own crane climbed up a stanchion close to his crane & was electrocuted by live wires & immediately killed. Evidence was given to the effect that the deceased man was an eager & good workman & it was found as a fact by the county ct. judge that it was not an act done out of bravado or laziness but was done for the purposes of & in connection with his employer's trade or business, although he had been expressly warned of the danger of not going up to his crane by the prescribed method. The county ct. judge held that on those facts the accident must be deemed to have arisen out of & in the course of the employment within the meaning of sect. 1 (2) & made his award for the widow. The employer appealed:—*Held*: there was evidence to support the finding & no misdirection.—*PARMLEY v. ENFIELD ROLLING MILLS, LTD.* (1938), 31 B. W. C. C. 187, C. A.

**2475c. Injury during act which workman employed to do.]**—*HAWKER v. DONCASTER AMALGAMATED COLLIERIES, LTD.*, [1938] 4 All E. R. 577, C. A.

**2479a. ———.]**—A young girl was injured while cleaning a machine for pulping cheese. She was employed to dust bottles & sweep the floors & not to do any work in connection with the machine, & permission to help on the machine had been refused:—*Held*: as the girl was injured when doing something entirely different in kind from what she was employed to do, the accident did not arise out of or

in the course of her employment, & Workmen's Compensation Act, 1923 (c. 42), s. 7, did not apply to such a case.—*DENNISON v. KEILLER, LTD.* (1926), 19 B. W. C. C. 409, C. A.

**2483. Add. Annotation:—***Reid. Clarke v. Southern Ry.* (1927), 98 L. J. K. B. 572.

**2486. Add. Citation:—**136 L. T. 208.

**2486a. Lorry boy cranking up engine.]**—An infant was employed as a lorry boy, & his duties were to keep the lorry clean & obey the orders of the driver, whom he accompanied on his round. Books of instructions were issued to the storekeeper in which lorry boys were expressly prohibited from cranking up the engine of a lorry under any circumstances whatever, but the workman had no knowledge of this prohibition. The workman was under the mistaken impression that the driver of his lorry ordered him to crank up the engine & he attempted to do so. As a result he received injuries to his arm. He claimed compensation for the accident. The county ct. judge held that the workman had to obey the orders of his driver, & his lack of knowledge of the prohibition did not limit the scope of his employment. He therefore made his award for the workman. The employer appealed:—*Held*: the appeal must be allowed.—*CARTWRIGHT v. SHELL-MEX & B.P., LTD.* (1932), 25 B. W. C. C. 650, C. A.

**2488a. Riding on engine.]**—The duty of C., a workman in the employ of the S. Railway, required him to go from point A. to point B. on their premises. Instead of going by a public road he proceeded to walk along the permanent way, a shorter route, in disregard of an emphatic prohibition. It was a common practice, acquiesced in by the railway's responsible officers, though forbidden by their rules, for workmen passing between A. & B. to travel on an engine if one happened to be running at a convenient time. When C. had walked about three-quarters of the distance along the line an engine going in the same direction passed him at a low speed, & to save himself the trouble of completing the journey on foot, he attempted to mount the engine in motion, with the result that he was seriously & permanently injured. The county ct. judge found that, although the prohibition was a very real one, C. was entitled to compensation, as he was acting "for the purposes of & in connection with" the railway's business within Workmen's Compensation Act, 1925 (c. 84), s. 1 (2):—

the works, to the top platform of the crane, in order to inspect the mechanism, as the crane had failed to act. Such inspection was part of his duty. The cabin was connected by an inside safety ladder with the top platform, around which, for the purposes of safety, was a handrail. The crane-man's duties required him to return, on completion of his inspection, to his cabin. He attempted to descend from the platform by climbing over the handrail, & clambering down the outside structure, & in doing so he fell to the floor of the works, & was fatally injured:—*Held*: the arbitrator was entitled to hold that the accident did not arise out of the employment, as the workman was doing a prohibited act.—*M'CORMACK v. STEWARTS & LLOYDS*, [1930] S. C. 1038; 23 B. W. C. C. 585.—SCOT.

*ad. Working near live wires.]*—Appets. claimed compensation under Workmen's Compensation Act, 1906, as

dependants of a deceased workman employed by resps. Deceased was employed by resps. in connection with their work in carrying out an electrical installation in a number of houses. On the day of his death, his work included fixing shackles & insulators to a pole or standard for the purpose of the main wires being connected to the house. Without a specific order or direction to do so at that time, he placed a ladder against the pole & ascended it, carrying shackles & insulators. He apparently lost his balance at the top of the ladder, clutched the main wires, & was electrocuted. The evidence for resps. was that deceased had been instructed that when he had finished his prior work, he was to report to the engineer or to the foreman that he wanted the line switched out & that he was ready to ascend the pole; & that no one was to ascend the pole without a note in

writing from the operator or engineer. There was also evidence, corroborated by one of appets.' witnesses, that a few days previously deceased had started to ascend a pole; that the foreman had warned him that the line was "live" & that he should not attempt to go up & had bidden him never to do it again. The foreman also gave evidence of the existence of a book of safety rules (including one forbidding any man to work on live contacts) which he said he had, some time before, in another town, read out to a number of workmen, including deceased:—*Held*: it was outside the scope & sphere of the employment of the deceased to ascend the pole unless & until he had applied to have the electric current cut off & had received a note in writing that this had been done; & accordingly, the application must be refused.—*HUTCHINSON v. IRISH ELECTRICAL CONSTRUCTION CO.* (1935), 28 B. W. C. C. Suppl. 139.—IR.



*Held*: the above sub-sect. did not extend compensation to workmen who were not in their employment at all, & as C. in going into a definitely prohibited area, had gone outside his sphere of employment, he could not recover.—CLARKE v. SOUTHERN RY. CO. (1927), 96 L. J. K. B. 572; 137 L. T. 200; 20 B. W. C. C. 309, C. A.

*Annotations*:—*Distd.* Brotherton v. Jackson (1928), 98 L. J. K. B. 76. *Consd.* Quickfall v. London & North-Eastern Ry. Co. (1929), 142 L. T. 315; Shephard v. London, Midland & Scottish Railway (1930), 143 L. T. 220. *Apld.* Stephenson v. British Insulated Cables, Ltd. (1930, 23) B. W. C. C. 549. *Refd.* Talbot v. Ackers, Whitley & Abrams Coal Co. (1934), 150 L. T. 444.

2489. *Add. Annotations*:—*Consd.* Edwards v. Gwauncaegurwen Colliery Co., James v. Same, Jenkins v. Same (1926), 96 L. J. K. B. 337; Jardine v. Steel Co. of Scotland (1926), 19 B. W. C. C. 726; Clarke v. Southern Ry. (1927), 96 L. J. K. B. 572. *Apld.* Stephen v. Cooper, [1929] A. C. 570. *Expld. & Follid.* Hannaby v. Llay Main Collieries, Ltd., [1931] 1 K. B. 602, C. A. *Refd.* Dixon v. Ayresome S.S. Owners (1930), 99 L. J. K. B. 250; Dyson v. Vickers-Armstrong, Ltd. (1929), 22 B. W. C. C. 551; Shephard v. London, Midland & Scottish Railway (1930), 143 L. T. 220; Race v. Postmaster-General (1932), 146 L. T. 489; Thomas v. Ocean Coal Co. [1933] A. C. 100; Knowles v. Southern Ry. Co., [1936] 2 All E. R. 682.

2492a. —[—]—Some miners had been conveyed from their work at the face to the shaft in a train of tubs provided by the employers. Some conveyance was necessary in order to enable the men to leave the pit within the limit of seven hours permitted for each shift. Subsequently the employers provided a "spake," i.e., a train of special vehicles containing seats. On the occasion of the accident the driver in charge of the spake, for some purpose of his own, did what he had sometimes done before, namely, instead of using the spake used a train of tubs for conveying the miners, who knew that riding on tubs was prohibited, but did not complain. The train of tubs broke & overturned, & two of the miners were killed, & one was slightly injured:—*Held*: the prohibition was of the class that dealt with conduct within the sphere of the employment, & Workmen's Compensation Act, 1925 (c. 84), s. 1 (2), applied. It was necessary for the employers that the men should leave within a specified time, & the act was done for the purposes of the employers' trade or business, & compensation should be awarded to the dependants of the two miners who were killed, but not to the slightly injured miner, who was, for that reason, not covered by sect. 1 (2).—EDWARDS v. GWAUNCAEGURWEN COLLIERY CO., JAMES v. SAME, JENKINS v. SAME (1926), 96 L. J. K. B. 337; 136 L. T. 494; 20 B. W. C. C. 75, C. A.

*Annotations*:—*Consd.* Brotherton v. Jackson (1928), 98 L. J. K. B. 76. *Expld.* Hannaby v. Llay Main Collieries, Ltd.,

PART XIV. SECT. 5, SUB-SECT. 2.—  
E. (b) iii.

2498 iii. — *Firing shots—Shot firer connecting cable with charge—Premature firing by miner.*—*Held*: the shot firer was entitled to compensation.—WOOD v. GARSOUBE COLLIERY CO., LTD., [1927] S. C. 877; 20 B. W. C. C. 837.—SCOT.

b i. — *Fireman converting electric detonator into fuse detonator.*—*Held*:

the workman, when injured, was doing an act not within the scope of his employment, & even assuming it was done for the purposes of the employer's business, it was not an act to which Workmen's Compensation Act, 1923 (c. 42), s. 7, applied.—M'CORQUINDALE v. CARNBROE COAL CO., LTD., [1927] S. C. 14.—SCOT.

d i. *Allowing burning material to lie about mine.*—*Held*: (1) a smouldering

[1931] 1 K. B. 602. *Consd.* Dugdale v. Johnson & Phillips, Ltd. (1931), 24 B. W. C. C. 502. *Refd.* Muteham v. Gentle (F. W.) & Son (1931), 24 B. W. C. C. 310; Matthews v. Victoria Spinning Co. (Rochdale), Ltd. (1935), 28 B. W. C. C. 246.

2494. *Add. Annotations*:—*As to* (1) *Consd.* Hannaby v. Llay Main Collieries, Ltd., [1931] 1 K. B. 602, C. A. *Refd.* James v. Penderyn Limestone Quarries (Hirwain) (1926), 20 B. W. C. C. 27; Stephen v. Cooper, [1929] A. C. 570. *As to* (2) *Refd.* Mersey Docks & Harbour Board v. West Derby Assessment Committee, Bottomley v. West Derby Assessment Committee & Mersey Docks & Harbour Board, etc., [1932] 1 K. B. 40.

2494a. —[—]—A shunter was employed to accompany a short train & to get down to open gates, through which the train had to pass, & also to do the necessary shunting. He should have ridden in the front waggon, but used to ride by means of his coupling stick on the buffer so as to enable him to get off & on more easily. Whilst so engaged the train went over a stone & jolted him off, & the injury he received resulted in the loss of a leg. Riding on a waggon by means of a coupling pole was prohibited:—*Held*: the prohibition was not one defining the sphere of the man's employment, though the breach of it, apart from Workmen's Compensation Act, 1925 (c. 84), s. 1 (2), would have prevented the accident arising out of the employment. There was evidence to support the finding of the county ct. judge that the act done was for the purposes of & in connection with the employers' trade or business, & the accident, by sect. 1 (2), was to be deemed to arise out of the employment.—JAMES v. PENDERYN LIMESTONE QUARRIES (HIRWAIN), LTD. (1926), 20 B. W. C. C. 27, C. A.

*Annotations*:—*Apld.* Davison v. Holmside & South Moor Collieries, Napper v. Lambton, Hutton & Jolley Collieries (1929), 140 L. T. 511. *Consd.* Quickfall v. London & North-Eastern Ry. Co. (1929), 142 L. T. 315; Hannaby v. Llay Main Collieries, Ltd., [1931] 1 K. B. 602. *Refd.* Stokoe v. Mickley Coal Co. (1928), 138 L. T. 566.

2496. *Add. Annotations*:—*As to* (1) *Consd.* Ford v. Wellerman Bros. (1930), 99 L. J. K. B. 600. *Refd.* Edwards v. Gwauncaegurwen Colliery Co., James v. Same, Jenkins v. Same (1926), 96 L. J. K. B. 337.

2498. *Add. Annotation*:—*Distd.* Paleokas (or Pollock) v. Mount Vernon Colliery Co., [1931] A. C. 597.

2499. *Add. Annotations*:—*As to* (1) *Consd.* Edwards v. Gwauncaegurwen Colliery Co., James v. Same, Jenkins v. Same (1926), 96 L. J. K. B. 337; *Apld.* M'Corquindale v. Carnbroe Coal Co. (1926), 20 B. W. C. C. 689. *Consd.* Clarke v. Southern Ry. (1927), 96 L. J. K. B. 572. *Distd.* Wood v. Garscube Colliery Co. (1927), 20 B. W. C. C. 837; Brotherton v. Jackson (1928), 98 L. J. K. B. 76. *Refd.* Dennison v. Keiller (1926), 19 B. W. C. C. 409. *Expld.* Hannaby v. Llay Main Collieries, Ltd., [1931] 1 K. B. 602.

cigarette was "burning material" within Coal Mines General Regulations, 1913, r. 12; (2) there was evidence on which the arbitrator was entitled to hold that the workman had been guilty of serious & wilful misconduct, in respect that the facts showed that he had created a dangerous situation as a result of a deliberate act of the will.—SMITH v. WEMYSS COAL CO., [1928] S. C. 180.—SCOT.



**Apld. Paleokas (or Pollock) v. Mount Vernon Colliery Co.,** [1931] A. C. 597. **Consd. Stephenson v. British Insulated Cables, Ltd.** (1930), 23 B. W. C. C. 549; **Muteham v. Gentle (F. W.) & Son** (1931), 24 B. W. C. C. 310; **Dugdale v. Johnson & Phillips, Ltd.** (1931), 24 B. W. C. C. 502; **Manley v. Openshaw** (1933), 150 L. T. 232; **Privett v. Darracq Motor Engineering Co.** (1934), 78 Sol. Jo. 550; **Manley v. Openshaw** (1933), 26 B. W. C. C. 625; **Victoria Spinning Co. (Rochdale), Ltd. v. Matthews**, [1936] 2 All E. R. 1359. **Refd. Race v. Postmaster-General** (1932), 173 L. T. Jo. 131. *As to* (2) **Apld. Edwards v. Gwauncaegurwen Colliery Co., James v. Same, Jenkins v. Same** (1926), 96 L. J. K. B. 337. **Consd. James v. Penderyn Limestone Quarries (Hirwain)** (1926), 20 B. W. C. C. 27; **Carter v. British Thomson-Houston Co.** (1927), 137 L. T. 329. **Apld. Stokoe v. Mickley Coal Co.** (1928), 138 L. T. 566. **Consd. Stephenson v. British Insulated Cables, Ltd.** (1930), 23 B. W. C. C. 549. **Apld. Thomas v. Ocean Coal Co.,** [1933] A. C. 100. **Refd. Clarke v. Southern Ry.** (1927), 96 L. J. K. B. 572; **Talbot v. Ackers, Whitley v. Abrams Coal Co.** (1934), 150 L. T. 444. *Generally, Refd. Davison v. Holmside & South Moor Collieries, Napper v. Lambton, Hetton & Joicey Collieries (1929), 140 L. T. 511; **Quickfall v. London & North-Eastern Ry. Co.** (1929), 142 L. T. 315; **Keeley v. English Electric Co.** (1935), 28 B. W. C. C. 118; **Knowles v. Southern Ry. Co.,** [1936] 2 All E. R. 682; **Tucknott v. East Sussex County Council** (1935), 28 B. W. C. C. 42.*

**2499a. — — — Order by unauthorised contractor.**—Resps., coal masters, employed a contractor to win coal in a pit they were working, & the contractor employed applt. as a mine worker for that purpose. It having become necessary to fire certain shots in this pit, the shot-firing was entrusted by the resps. to a duly appointed fireman, who alone was authorised to fire the shots. The fireman, in breach of Explosives in Coal Mines Order of Sept. 1, 1913, allowed the contractor to couple up the cable employed in the process of shot-firing to the shot, the fireman then connecting the other end of the cable to the firing apparatus & firing the shot. After six shots had been fired in this way, the contractor, without informing the fireman, instructed applt. to couple up the cable to the seventh shot, & while applt. was in the act of coupling up the cable the charge exploded & seriously & permanently injured him. Upon an application by applt. for compensation from resps., the arbitrator found in law that the accident arose out of & in the course of his employment & made an award in favour of the applt. :—*Held*: the accident to applt. did not arise out of or in the course of his employment, but arose out of & in the course of the prohibited act, & 1925 Act, sect. 6 (1), did not apply, as applt. was not employed on any work which the contractor had undertaken with the principal to execute.—**PALEOKAS (OR POLLOCK) v. MOUNT VERNON COLLIERY CO., LTD.,** [1931] A. C. 597; 100 L. J. P. C. 225; 145 L. T. 460; 47 T. L. R. 485; 24 B. W. C. C. 283, H. L.

**2501. Add. Annotations:—Consd. Edwards v. Gwauncaegurwen Colliery Co., James v. Same**

**Jenkins v. Same** (1926), 96 L. J. K. B. 337. **Distd. Carter v. British Thomson-Houston Co.** (1927), 137 L. T. 329. **Consd. Dugdale v. Johnson & Phillips, Ltd.** (1931), 24 B. W. C. C. 502; **Thomas v. Ocean Coal Co.,** [1933] A. C. 100. **Refd. James v. Penderyn Limestone Quarries (Hirwain)** (1926), 20 B. W. C. C. 27; **Stokoe v. Mickley Coal Co.** (1928), 138 L. T. 566; **Hannaby v. Llay Main Collieries, Ltd.,** [1931] 1 K. B. 602; **Knowles v. Southern Ry. Co.,** [1936] 2 All E. R. 682; **Murray v. Schwachman, Ltd.,** [1936] 2 All E. R. 478.

**2506. Add. Annotations:—Consd. Stokoe v. Mickley Coal Co.** (1928), 138 L. T. 566. **Refd. Guest v. Gaston,** [1927] 1 K. B. 1; **Dugdale v. Johnson & Phillips, Ltd.** (1931), 24 B. W. C. C. 502.

**2506a. — — — — —**—[S., a stoneman, was employed by resps. driving a drift through rock by shotfiring & was found dead within three yards of the working face, his body being very badly damaged & his left arm practically blown off, he being a left-handed man. The drill & ratchet were found burnt, broken, & twisted a few yards from the working face, & the standard some way from the face & undamaged. The drill & ratchet together with the standard were used for drilling holes to put the shots in, but if a shot misfired & the stemming was drilled out the standard was not used. S. was a licensed shot firer, & his duty would be to deal with the case of a misfire, but the use of a hole in which a shot had misfired was prohibited, as also the drilling out of it the stemming in order to put in another charge, it being directed that a fresh hole must be bored not less than a foot from the old hole. There was no evidence that there had been any attempt to drill a fresh hole. The county ct. judge held the man was killed whilst doing a prohibited act, but, as his motive was to save himself the trouble of drilling a fresh hole, he was not at the time of the accident doing an act for the purposes of & in connection with the employers' trade or business within Workmen's Compensation Act, 1925 (c. 84), s. 1 (2), & his dependant was not entitled to recover compensation:—*Held*: the personal motive of the man in doing the prohibited act was not a criterion as to whether he was doing it for the purposes of & in connection with the employers' trade or business, & as the man was engaged at the working face within the sphere of his employment he must be deemed to have acted for the purposes of & in connection with the employers' trade or business, & though doing a prohibited act, he was brought back within sect. 1 (1), & compensation was payable as for an accident arising out of & in the course of the employment.—**STOKOE v. MICKLEY COAL CO., LTD.** (1928), 138 L. T. 566; 21 B. W. C. C. 70, C. A.

*Annotation:—Refd. Davison v. Holmside & South Moor Collieries, Napper v. Lambton, Hetton & Joicey Collieries* (1929), 140 L. T. 511.

**2511. Add. Citations:—96 L. J. P. C. 17; 136 L. T. 66.**

*Add. Annotations:—As to* (1) **Distd. Thomas v. Ocean Coal Co.,** [1933] A. C. 100. *As to* (2) **Consd. James v. Penderyn Limestone Quarries (Hirwain)** (1926), 20 B. W. C. C.

27. *Apld. Stokoe v. Mickley Coal Co.* (1928), 138 L. T. 566. *Refd. Davison v. Holmside & South Moor Collieries, Napper v. Lambton, Hetton & Joicey Collieries* (1929), 140 L. T. 511; *Privett v. Darracq Motor Engineering Co.* (1934), 151 L. T. 211; *Knowles v. Southern Ry. Co.*, [1936] 2 All E. R. 682; *Matthews v. Victoria Spinning Co. (Rochdale), Ltd.* (1935), 28 B. W. C. C. 246. *Generally, Consd. Thomas v. Ocean Coal Co.* (1931), 146 L. T. 183.

2511a. —.]—Applt.'s husband, who was employed as a hitcher at resps.' colliery, had the duty (*inter alia*) of controlling full trams & sending them up to the surface. He performed his duties on both sides of the pit bottom & could pass from one side to the other by a way round the shaft or by crossing the shaft bottom, but by a statutory regulation, "No person shall attempt to go on or across the uncovered space of the shaft bottom, except for the purpose of working in the shaft bottom, & no person shall be allowed to work in such space unless the cages are stopped." He crossed the shaft bottom when he was in charge of it as a hitcher, & a descending cage crushed & killed him. The county ct. judge found that the man's act was for the purposes of the employers' business:—*Held*: the accident arose out of the man's employment, & it was also in the course of his employment apart from the statutory prohibition, & as the judge had found the act to have been done for the purposes of the employers' business, the accident was, notwithstanding the prohibition, to be deemed to have arisen in the course of the man's employment, & therefore applt. was entitled to compensation.—*THOMAS v. OCEAN COAL CO., LTD.*, [1933] A. C. 100; 102 L. J. K. B. 142; 148 L. T. 219; 49 T. L. R. 57; 76 Sol. Jo. 849; 25 B. W. C. C. 436, H. L.

*Annotations*:—*Consd. Talbot v. Ackers, Whitley & Abrams Coal Co.* (1934), 150 L. T. 444; *Bullers v. Altus Shoes makers, Ltd.* (1934), 27 B. W. C. C. 132; *Privett v. Darracq Motor Engineering Co.* (1934), 151 L. T. 211. *Tucknott v. East Sussex County Council* (1935), 28 B. W. C. C. 42; *Victoria Spinning Co. (Rochdale), Ltd. v. Matthews*, [1936] 2 All E. R. 1359. *Refd. Collins v. British Timkin, Ltd.* (1934), 27 B. W. C. C. 74; *Knowles v. Southern Ry. Co.*, [1936] 2 All E. R. 682; *Evans v. Powell Duffryn Associated Collieries, Ltd.* (1938), 82 Sol. Jo. 565.

2512a. —.]—By the Coal Mines Act, 1911 (c. 50), s. 43 (11), an official of a mine is permitted to travel on foot on a haulage road while the haulage is in motion, but by sect. 43 (12) of that Act is not permitted in the circumstances of this case to ride on the tubs. An overman, whose duties took him to all parts of the mine, was at some distance from the bottom of the shaft at the time when it was his duty to hand over his duties to another. He got into a moving tub for the purpose of riding to the person to whom he had to hand over his duties, & whilst so riding received injuries which caused his death. On a claim by his widow the county ct. judge found that the workman's act in riding on the tub was done for the purposes of & in connection with his employers' business, but it was an act which was not within the scope of his employment. He therefore made an award in favour of the employers. A shifter, in contravention of Regulation 25 (a), made under Coal Mines Act, 1911 (c. 50), got into an open

train, which was being hauled along the way by a pony, without the permission of the manager. In consequence he received injuries which caused his death. On a claim by his widow, the county ct. judge made a similar award. Both appcts. appealed:—*Held*: the question of whether the workman was acting within the scope of his employment at the time of the accident was one of fact, & there was evidence to support the finding that he was not. This being so, the accident did not arise out of & in the course of the employment, notwithstanding that the act of the workman was one done for the purposes of & in connection with his employers' business. The judge's decision was right & there was no misdirection.—*DAVISON v. HOLMSIDE & SOUTH MOOR COLLIERIES, LTD., NAPPER v. LAMBTON, HETTON & JOICEY COLLIERIES, LTD.* (1929), 140 L. T. 511; 45 T. L. R. 188; 22 B. W. C. C. 51, C. A.

*Annotations*:—*Consd. Hannaby v. Llay Main Collieries, Ltd.*, [1931] 1 K. B. 602. *Refd. Talbot v. Ackers, Whitley & Abrams Coal Co.* (1934), 150 L. T. 444.

2512b. —.]—By Coal Mines Act, 1911 (c. 50), s. 43 (2), no miner may ride on sets or trains of tubs where the haulage is worked by gravity or mechanical power. A workman, when signing on for work at a colliery where he was employed as a salvage man, was supplied with a summarised copy of this provision. Men-riding trolleys were provided for carrying the men up the dips at the end of their shift. The workman, with two other salvage men, was ordered in the middle of a shift to move twenty-six pipes from the bottom to the top of a dip, a distance of about seventy yards. Half the pipes were loaded & hauled up on a timber-trolley. The workman, instead of walking down to assist in loading the remainder, got into an empty tub attached to the descending timber-trolley. In the descent the tub became derailed by an accident in the haulage engine-house & the workman was killed. His widow claimed compensation. The county ct. judge found that the workman rode in the tub for the purposes of & in connection with his employer's business in that he did it to save time, & held that he was still within the scope of his employment, although acting in contravention of the statutory prohibition, inasmuch as the prohibition was only concerned with the mode of carrying out his work. An award having been made in favour of the dependant, the employers appealed:—*Held*: the question was one of degree & therefore one of fact for the county ct. judge. In this case there was evidence to support the finding & no misdirection.—*HANNABY v. LLAY MAIN COLLIERIES, LTD.*, [1931] 1 K. B. 602; 100 L. J. K. B. 353; 144 L. T. 490; 23 B. W. C. C. 403, C. A.

*Annotations*:—*Consd. Thomas v. Ocean Coal Co.*, [1933] A. C. 100. *Refd. Talbot v. Ackers, Whitley & Abrams Coal Co.* (1934), 150 L. T. 444.

2512c. *Riding on journey of trams.*—A miner & his son, working on the same shift, had to return to the pit shaft by the main drift along which journeys of trams were being hauled. While they were returning, the cable of a journey of trams broke & ran back some twenty yards. The son was then found to be pinned underneath the corner of an overturned tram & the father was found lying

across another derailed tram, holding the signal rope & seriously injured. The boy died immediately & the father died two days later. The widow claimed compensation on behalf of herself & her surviving children. The county ct. judge found that the workman had been riding on the journey of trams contrary to the prohibition contained in Coal Mines Act, 1911 (c. 50), s. 43 (2), & consequently was not acting in the course of his employment at the time of the accident. He therefore made an award in favour of the employers. The dependants appealed:—*Held*: there was evidence to support the finding & no misdirection.—*EDWARDS v. OCEAN COAL CO., LTD.* (1929), 22 B. W. C. C. 254, C. A.

**2514. Add. Annotation:—***Refd.* Knowles v. Southern Ry. Co., [1936] 2 All E. R. 682.

**2515a. Workman entering prohibited place by mistake.]—**A series of cubicles for electrical works were in course of being fitted up, some of which had been completed & contained live electrical machinery, & were locked. There was an express order to the workmen not to enter the completed cubicles. The cubicles being worked upon were quite close to those finished, being in the same series. The workman, a very competent man at his job, was very short-sighted, & was found electrocuted in one of the completed cubicles, he having unlocked the others. The county ct. judge drew the inference that the workman had entered a completed cubicle by mistake, & was there for the purposes of his employers' trade or business, & that the accident arose out of & in the course of his employment:—*Held*: there was evidence to support this inference of fact, & although the workman was acting contrary to a prohibition, the accident must be deemed to arise out of & in the course of the employment.—*CARTER v. BRITISH THOMSON-ROUSTON CO., LTD.* (1927), 137 L. T. 329; 20 B. W. C. C. 331, C. A.

**2522a. Usual route to cage barred by accident.]—***EVANS v. POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD.* (1938), 82 Sol. Jo. 565, C. C. A.

**2528. Add. Annotations:—***Consd.* Dixon v. Ayresome S.S. Owners (1930), 99 L. J. K. B. 250. *Folld.* Cartwright v. Shell-Mex & B.P., Ltd. (1932), 25 B. W. C. C. 650.

**2535. Add. Annotations:—***Consd.* Hannaby v. Llay Main Collieries, Ltd., [1931] 1 K. B. 602. *Refd.* Edwards v. Gwauncaegurwen Colliery Co., James v. Same, Jenkins v. Same (1926), 96 L. J. K. B. 337; Knowles v. Southern Ry. Co., [1936] 2 All E. R. 682.

#### PART XIV. SECT. 5, SUB-SECT. 2.—E. (c).

**sl. Recapture of elephant—Workman forbidden to shackle or ride elephants.]—**A workman was employed by appts. as a coolie whose duty it was to assist & attend upon the driver of an elephant belonging to appts. On one occasion the elephant, which was of uncertain temper, was shackled & let loose to graze in the jungle. The driver being ill the workman & two other coolies were sent out to find him. They were expressly ordered not to attempt to catch the animal, much less to unshackle & ride him. They found the elephant but the workman approached him, unshackled & rode upon him.

A few moments later the elephant threw him down, & killed him with his tusks. Resp. as a dependant claimed compensation:—*Held*: not entitled, as the workman met his death by an accident caused through doing an act which he was not employed to do.—*BOMBAY BURMA TRADING CORPN., LTD. v. U PO HLAING* (1936), 1 L. R. 14 Kan. 305.—*IND.*

**sp. Use of defective ladder.]—**A painter, who was engaged in painting the woodwork of some high windows, made use of a ladder not belonging to his employer. The ladder was old, weather-beaten, & unsafe. Other workmen on the job complained to the employer in the hearing of the painter

**2535a. —.]—**A cotton-machine was fitted with a locking device which prevented the bars of the machine being cleaned or adjusted while it was in motion. A workman, while operating the machine, noticed that it was defective, & finding that the locking device was broken, he attempted to clean or adjust the bars when the machine was running, contrary to the orders of his employers. In so doing he slipped & sustained serious & permanent injuries through his left hand coming into contact with the revolving knives. He claimed compensation on the ground that the accident arose out of & in the course of the employment, or should be deemed to have so arisen by virtue of sect. 1 (2) of Workmen's Compensation Act, 1925:—*Held*: (1) as the prohibited act of cleaning the bars while the machine was in motion resulted in serious & permanent disablement of the workman, & was done by him for the purposes of & in connection with his employers' trade or business, the accident must be deemed to arise out of & in the course of the employment, & the employers were therefore liable to pay compensation; (2) the defence of added peril, based on the allegation that the contravention of the employers' regulation by the workman added a peril to his employment, could no longer, since the decision in *Thomas v. Ocean Coal Co., Ltd.*, No. 2511a, deprive the workman of compensation.—*VICTORIA SPINNING CO. (ROCHDALE), LTD. v. MATTHEWS*, [1936] 2 All E. R. 1359; 105 L. J. K. B. 521; 155 L. T. 363; 52 T. L. R. 708; 80 Sol. Jo. 735; *sub nom.* MATTHEWS v. VICTORIA SPINNING CO. (ROCHDALE), LTD., 29 B. W. C. C. 242, H. L.

**2541. Add. Annotation:—***Refd.* Dixon v. Ayresome S.S. Owners (1930), 99 L. J. K. B. 250.

**2544a. Operating machine without guard.]—**An infant workman was in charge of a sausage machine which was perfectly safe to use when fitted with a guard, but unsafe without it. He admitted that he had been repeatedly told not to operate the machine without the guard, but nevertheless did so & in consequence suffered an accident which resulted in the loss of all the fingers of his right hand. The county ct. judge found that the workman was employed to operate the machine with a guard which would have prevented any possibility of injury & was never employed to operate the machine without the guard. He therefore held that the accident did not arise out of & in the course of the employment, but was due to an "added peril." The workman appealed:—*Held*: there was evidence to support the findings & no mis-

about its condition, whereupon the employer forbade it to be used, & directed another ladder to be brought from his premises. Notwithstanding this, the painter again used the unsafe ladder, when it broke & he fell, with the result that he suffered serious & permanent disablement:—*Held*: the accident arose out of & in the course of the employment, in respect that neither the workman's negligence, nor, in view of his serious & permanent disablement, his contravention of the employer's orders, rendered the accident outwith the scope of the Act. Appeal allowed.—*O'NEIL v. M'KENRACHER* (1935), 28 B. W. C. C. Suppt. 58.—*SCOT.*

direction. Appeal dismissed.—**MUTEHAM v. GENTLE (F. W.) & SON** (1931), 24 B. W. C. O. 310, C. A.

Annotation:—**Refd.** Matthews v. Victoria Spinning Co. (Rochdale), Ltd. (1935), 28 B. W. C. O. 246.

**2547. Add. Annotations:—As to (1) Consd.** McCullum v. Northumbrian Shipping Co. (1931), 146 L. T. 124. **Refd.** Bulmer & Byron v. Baluchistan S.S. Owners (1934), 27 B. W. C. C. 399. **As to (2) Refd.** Durie v. Anchor-Donaldson Line (1925), 19 B. W. C. C. 512; Taylor v. Lock (1930), 99 L. J. K. B. 245. **Generally, Refd.** Simpson v. London, Midland & Scottish Ry. Co., [1931] A. C. 351; Todd v. MacCallum (1933), 25 B. W. C. C. Supp. 155.

**2548. Add. Annotations:—Apld.** Morrison v. S.S. Aboukir, Woods v. Same (1928), 21 B. W. C. C. 163. **Refd.** Black v. Hesperides S.S. Owners (1929), 22 B. W. C. C. 295; Simpson v. London, Midland & Scottish Ry. Co., [1931] A. C. 351; Northumbrian Shipping Co. v. McCullum (1932), 48 T. L. R. 568; Todd v. MacCallum (1933), 25 B. W. C. C. Supp. 155.

**2552. Add. Annotation:—Refd.** Dixon v. Ayresome S.S. Owners (1930), 23 B. W. C. C. 29.

**2552a. Drowned when using boat not provided by employer.]—**Five sailors got leave to go on shore. The bo'sun said that they were not bound to be back in the ship until 6.15 a.m. A launch had been provided to take the sailors on leave to the shore & back again, & the captain told the men that the last journey to the ship by the launch would be made at 8 p.m., & that if they came back later than that, they would have to find some other means of returning to the ship. The men desired to enjoy their leave till later than 8 p.m., & tried to arrange with the man who worked the launch to come for them at 10 p.m., offering to pay him 2s. each, but the launch never came for them at 10 p.m., so they got into the first boat handy, a dinghy, & borrowed a scull with which they propelled the dinghy from the stern. The dinghy, though the men were unaware of it, was rotten & sank, the result being that three of the five men were drowned:—**Held:** there was no contractual obligation on the deceased men to return to their ship by the boat they used, which was not provided by the employers, & as no such duty was on the men to use that boat, the accident by which they lost their lives was not in the course of performing some duty arising out of their contract of service, or, in other words, in the course of their employment.—**ROBERTSON v. APPALACHEE (OWNERS), ROVIRA v. SAME** (1926), 136 L. T. 483; 20 B. W. C. C. 57, C. A.

Annotations:—**Consd.** Morrison v. S.S. Aboukir, Woods v.

Same (1928), 21 B. W. C. C. 163; Black v. Hesperides S.S. Owners (1929), 22 B. W. C. C. 295; Todd v. MacCallum (1933), 25 B. W. C. C. Supp. 155.

**2552b. Standing up in boat to take hold of gangway—Boat sinking.]—**M. & W. were members of the crew of a ship lying in a river about twenty-five feet from the wharf. The ship provided no boat for the purpose of going to or from the shore. A game of football was being played on shore, at which the captain & some of the officers were present & in which M. took part. On returning to the wharf after the game M. hailed W., who got into a canoe at the foot of the gangway & fetched M. When M. got up to take hold of the gangway, the canoe filled, & both men were drowned. The county ct. judge held the accident was occasioned by a reasonable attempt to get hold of the gangway, & such attempt involved more than an ordinary risk of navigation to which any passenger would be exposed, & was an act specifically connected with his employment on the ship, & he made an award in favour of the dependants in both cases, on the ground that both men had been drowned in an accident arising out of & in the course of their employment:—**Held:** there was evidence to support the finding.—**MORRISON v. ABOUKIR (OWNERS), WOODS v. SAME** (1928), 21 B. W. C. C. 163, C. A.

Annotation:—**Refd.** Todd v. MacCallum (1933), 25 B. W. C. C. Supp. 155.

**2552c. Seaman crossing barges instead of using boat.]—**A sailor who was on shore on leave from his ship returned to the ship by walking over barges which lay between it & the quay, & while doing so, fell into the water & was drowned. The employers had provided a boat & boatman for the members of the crew to get from & to the ship, but most of the crew used the way over the barges, & that was acquiesced in by the officers:—**Held:** the sailor being under no obligation or duty to his employers to return by this means, was not in the course of his employment in so doing, & therefore the accident did not arise in the course of the employment.—**BLACK v. HESPERIDES S.S. OWNERS** (1929), 22 B. W. C. C. 295, C. A.

Annotation:—**Consd.** Todd v. MacCallum (1933), 25 B. W. C. C. Supp. 155.

**2552d. Fall from ship's bulwark.]—**The deceased workman was a coal trimmer. On the day of the accident, he & the foreman of the trimmers had gone on resps.' steamship A. to place the chute in position, so that the coal could be shot into the hold. Having done that they both left the ship. The foreman stepped on to the ship's bulwark & from there he stepped on to the top of the handrail on the quay, a distance of about

PART XIV. SECT. 5, SUB-SECT. 2.  
—F.

r i. —.]—The chief engineer of a ship lying in harbour went ashore on leave on his own business. On returning to the ship in the evening, which was dark, he fell from the quay, & was drowned. The recorder found that he fell in either by stepping off the quay thinking that he was stepping on to the gangway, or in an attempt to get from the place where he reached the quay edge to the gangway & that appt. was entitled to compensation:—**Held:** there was ample evidence to support the finding.—**TODD v. MAC-**

**CALLUM.** [1932] N. I. 130; 25 B. W. C. O. Supp. 155.—**IR.**

**sv. Fall from ship lying between barge & quay.]—**A canal barge, with a cargo of grain, which was to be transferred to a ship lying alongside the quay, drew up on the river side of this ship & lay alongside it secured in that position by hawsers. The only reasonable way the men on the barge had of going ashore was to cross this ship & then cross the gangway between it & the quay. In the interval before the discharging of the cargo began, the master of the barge went ashore to obtain refreshments, cash a cheque, &

to use a lavatory, there being no lavatory on the barge. On his return, having crossed the ship he was proceeding to get from it to the barge, there being no gangway between the ship & the barge, when he slipped & fell into the river & was drowned. There was some evidence that the crew of the barge could not go ashore without the permission of the master of the barge, but there was no evidence that the master could not go ashore without leave from some superior officer of his employers:—**Held:** the accident arose out of & in the course of the employment.—**LAWLOR v. GRAND CANAL CO.**, [1929] I. R. 633.—**IR.**

two feet, & then hopped on to the quay. The deceased workman followed, but in stepping off the ship's bulwark he slipped, fell, & was killed. After the accident the foreman noticed for the first time that there was a ladder provided to bridge the two-foot space between the ship's bulwark & the handrail on the quay, & it was admitted that stepping across from the ship's bulwark to the quay was not the right way of leaving the ship. The county ct. judge made an award in favour of the employers:—*Held*: the manner in which the deceased workman left the ship was not so far removed from anything contemplated by either party as to preclude the ct. from holding that the accident arose out of & in the course of the employment. The case must be remitted to the county ct. judge to assess compensation.—*DIXON v. AYRESOME S.S. OWNERS* (1930), 99 L. J. K. B. 250; 142 L. T. 455; 18 Asp. M. L. C. 115; 23 B. W. C. C. 29, C. A.

**2557a. No order before accident—Liability to receive order to work on machine from which injury received.]**—A workman employed in a brick factory had to work according to the instructions of a foreman. He might be put to work at any moment on any machine, including a plunger machine. He was instructed by the foreman to work a pressing machine & then to collect broken bricks. After collecting the bricks he was asked by a fellow workman to work a plunger machine. While working on this machine he was injured by an accident which resulted in serious & permanent disablement. The county ct. judge found as a fact that although he was working on the plunger machine without instructions from the foreman, the act was one within the scope of his general employment, & held that as the act was done for the purposes of & in connection with the employers' business, the accident must be deemed to have arisen out of & in the course of his employment. The employers appealed:—*Held*: there was evidence to support the finding & no misdirection. Appeal dismissed.—*THORNTON v. WILLIAM COCHRAN-CARR, LTD.* (1931), 24 B. W. C. C. 411, C. A.

*Annotation*:—*Refd. Privett v. Darracq Motor Engineering Co.* (1934), 151 L. T. 211.

**2557b. Order to take bath—No liability to dismissal for disobedience.]**—Resp. was employed by appts. as a fireman in their mine. In 1929 the welfare society erected baths for the use of the miners on land forming part of appts.' colliery undertaking leased to the society. The workmen in the mine contributed 3d. each weekly towards the expense of the baths & appts. 3d. a week per man employed, & the baths were managed by the welfare committee & representatives of the workmen & the employers. Appts. ordered all their firemen to instruct their men that they must take a bath after a shift & if any workman did not take a bath he must give a reason to the manager. Of 1,100 miners a thousand used the baths, but any man who did not was never dismissed. On Nov. 26, 1931, resp. was having a bath at the welfare society premises after his shift when he slipped & injured his knee. The injury caused resp. to be totally incapacitated from osteo-arthritis & he claimed compensation. The

county ct. judge found that there was an order issued that the men should have baths & that the order was part of the contract of service & that therefore the accident in the bath arose out of & in the course of the employment, & awarded compensation:—*Held*: though there might have been an order that men should take baths that order was never a term of the employment, as the men were not subject to dismissal if they disobeyed it. Therefore when resp. was bathing he was no longer in the course of his employment by appts. & was not entitled to compensation.—*GASKELL v. ST. HELENS COLLIERY Co., LTD.* (1934), 150 L. T. 506; 27 B. W. C. C. 32, C. A.

**2557c. Superior ordering unauthorised act.]**—The workman was employed in the motor works of resps., his orders being that he was to do what S. told him to do. He worked for a few months on drilling & stamping machines as he was told to do by S.; but on Dec. 18, 1933, on which date he was fifteen years old, F., a fellow workman, told him to work his pressing machine. He worked on it for two hours, when he sustained an accident resulting in the tops of two of the fingers of his left hand having to be amputated. There was a notice that "boys under seventeen not allowed on power press":—*Held*: the injury was not sustained by an accident which arose out of & in the course of his employment.—*PRIVETT v. DARRACQ MOTOR ENGINEERING Co., LTD.* (1934), 151 L. T. 211; 78 Sol. Jo. 550; 27 B. W. C. C. 163, C. A.

*Annotations*:—*Refd. Keeley v. English Electric Co.* (1935), 28 B. W. C. C. 118; *Knowles v. Southern Ry. Co.*, [1936] 2 All E. R. 682; *Matthews v. Victoria Spinning Co. (Rochdale), Ltd.* (1935), 28 B. W. C. C. 246; *Tucknott v. East Sussex County Council* (1935), 28 B. W. C. C. 42.

**2559. Add. Annotations:—As to (3) Apld. Howells v. G. W. Ry.** (1928), 97 L. J. K. B. 183. *Consd. Dyson v. Vickers-Armstrong, Ltd.* (1929), 142 L. T. 340. *Refd. Jardine v. Steel Co. of Scotland* (1926), 19 B. W. C. C. 726; *Sparey v. Bath R. D. Co.* (1932), 48 T. L. R. 87; *Goring v. Southern Ry. Co.* (1938), 31 B. W. C. C. 68.

**2560. Add. Annotation:—Consd. Hannaby v. Llay Main Collieries, Ltd.,** [1931] 1 K. B. 602.

**2566a. Handling electric cable before permit given.]**—A linesman of some experience was employed by contractors in their work of laying overhead electric cables. The work was done in three stages, unrolling, gunning, & lifting the wire on to the insulators on the poles. He had been instructed by his foreman that cables were not to be fixed to the insulators on the poles until information had been received that the current had been turned off from the live wires already in position. The first two stages of the work having been completed, the workman without waiting for the necessary permit, proceeded to lift a wire into position on top of the poles. While doing so he struck a live wire & sustained severe burns from which he died. On a claim for compensation by the dependants, the county ct. judge though he found the foregoing facts & also that the workman was a quick workman who was anxious to proceed with the job, & that, provided care was used, there was no danger from the live wires, held that, as the workman was instructed not to work in the area where he met with his

accident until the current had been turned off, the accident did not arise out of the employment within sect. 1 (1), & made his award in favour of the employers. The dependants appealed:—*Held*: on the facts found by the county ct. judge the accident must be deemed to have arisen out of the employment within sect. 1 (2). Appeal allowed. Case remitted for apportionment of compensation.—*DUGDALE v. JOHNSON & PHILLIPS, LTD.* (1931), 24 B. W. C. C. 502, C. A.

*Annotation*:—*Consd.* *Thomas v. Ocean Coal Co., Ltd.* (1931), 146 L. T. 183, C. A.

2569. *Add. Annotation*:—*Refd.* *Gorman v. Barclay Curle* (1925), 19 B. W. C. C. 564.

2571a. *Operating another workman's machine during absence.*—On Mar. 13, 1933, resp., then seventeen years old, whilst employed by appts. in their woodturning business, left the twisting machine he usually worked & worked an automatic machine while its workman was away. He was asked to change the electric bulb over the machine, which he had been asked to do & done before, & got on the table of the machine whilst it was in motion to do so, when the bulb gave him an electric shock, causing him to fall into the machine, with the result that both legs had to be amputated. The county ct. judge awarded him compensation on the ground that the accident arose out of & in the course of his employment. The boy admitted in evidence that he had no right to be working the automatic machine, but the evidence was that from time to time he used for considerable periods to work that machine, & had more than once changed the bulb, & was never told not to do so. The county ct. judge also found that the act was done by the boy for the purposes of & in connection with his employer's trade or business:—*Held*: there was ample evidence for the award made, as what the boy admitted in evidence did not imply that, knowing the full terms of the Act, he confessed he had lost all his rights under the Act against his employer, & changing the bulb was within the scope of his employment & therefore arose out of his employment.—*MANLEY v. OPENSHAW (TRADING AS GREENGATE WOODTURNING CO.)* (1933), 150 L. T. 232; 26 B. W. C. C. 625, C. A.

2572. *Add. Annotations*:—*Expld.* *Edwards v. Gwauncaegurwen Colliery Co., James v. Same, Jenkins v. Same* (1926), 96 L. J. K. B. 337. *Consd.* *Clarke v. Southern Ry.* (1927), 96 L. J. K. B. 572. *Refd.* *James v. Penderyn Limestone Quarries (Hirwain)* (1926), 20 B. W. C. C. 27; *Stokoe v. Mickley Coal Co.* (1928), 138 L. T. 566; *Davison v. Holmside & South Moor Collieries, Napper v. Lambton, Hetton & Joicey Collieries* (1929), 140 L. T. 511; *Hannaby v. Llay Main Collieries, Ltd.*, [1931] 1 K. B. 602; *Knowles v. Southern Ry. Co.*, [1937] A. C. 463.

2573. *Add. Annotations*:—*Consd.* *Dennison v. Keiller* (1926), 19 B. W. C. C. 409. *Apld.* *Stephen v. Cooper* (1928), 21 B. W. C. C. 543; *Davison v. Holmside & South Moor Collieries, Napper v. Lambton, Hetton & Joicey Collieries* (1929), 140 L. T. 511. *Refd.* *James v. Penderyn Limestone Quarries (Hirwain)* (1926), 20 B. W. C. C. 27; *Brotherton v. Jackson* (1928), 98 L. J. K. B. 76; *Stephenson v. British Insulated Cables, Ltd.* (1930), 23 B. W. C. C. 549; *Knowles v. Southern Ry. Co.*, [1936] 2 All E. R. 682.

2574a. —[Deceased was a mosaic worker employed by appts., who had a flooring contract at K., & deceased was carrying out at K. mosaic work for the purposes of the contract. It was the duty of deceased to travel by train from L. to K. daily, & he was paid by appts. for the time occupied in so travelling, & his railway ticket was also paid for by appts. Deceased, having gone to sleep, got out of the train whilst it was in motion leaving K. & slipped on the platform as he landed, fell heavily on his back, his head striking the platform violently, & died of the injuries received:—*Held*: though deceased was in the course of his employment while travelling in the train, he was committing an illegal act in getting out of the train while in motion, & was doing an act which did not arise out of the employment, but under the above sect. it must be deemed to arise out of & in the course of the employment as having been done in pursuance of & for the purposes of the employers' trade or business, & the act done was not so contrary to law as to put the man wholly outside the sphere of the employment, & his widow was entitled to compensation.—*ALTOBELLI v. JOHN ELLIS & SONS, LTD.* (1926), 136 L. T. 602; 20 B. W. C. C. 190, C. A.

2578. *Add. Annotations*:—*Apld.* *Lye v. British & Argentine Meat Co. (1923), Ltd.* (1927), 20 B. W. C. C. 341; *Moule v. Marmite Food Extract Co.* (1927), 20 B. W. C. C. 446. *Refd.* *Pruce v. Davey* (1926), 136 L. T. 601; *Brentnall v. London & North Eastern Ry. Co.* (1932), 25 B. W. C. C. 265.

2579. *Add. Annotations*:—*Consd.* *Moule v. Marmite Food Extract Co.* (1927), 20 B. W. C. C. 446. *Refd.* *Gorman v. Barclay Curle* (1925), 19 B. W. C. C. 564; *Pruce v. Davey* (1926), 136 L. T. 601; *Brentnall v. London & North Eastern Ry. Co.* (1925), 25 B. W. C. C. 265; *Gaskell v. St. Helen's Colliery Co.* (1934), 150 L. T. 506.

2581. *Add. Annotation*:—*Consd.* *Holden v. Premier Waterproof & Rubber Co.* (1930), 144 L. T. 519.

2582. *Add. Annotations*:—*Consd.* *Lawrence v. Matthews* (1924), Ltd. (1928), 97 L. J. K. B. 758; *Holden v. Premier Waterproof & Rubber Co.* (1930), 144 L. T. 519; *Lander v. British United Shoe Machinery Co.* (1933), 102 L. J. K. B. 768. *Refd.* *Brooker v.*

#### PART XIV. SECT. 5, SUB-SECT. 3.—A.

1. *Workman fetching hot water for tea.*—Following a practice or custom known to his employer, a worker left the job upon which he was working to go from one part of his employer's premises to another during his employer's time, in order to procure hot

water for tea for the midday meal of himself & his fellow-workers; he was doing this for the purpose of more conveniently supplying them with the hot water which the employer habitually provided, generally as a matter of statutory obligation, sometimes without that compulsion, but in like case. Whilst on the way to the employer's

boiler containing the hot water, he was injured by a motor car on a road on the employer's premises:—*Held*: the accident arose in the course of his employment, & he was entitled to compensation.—*PEARSON v. FREMANTLE HARBOUR TRUST* (1929), 42 C. L. R. 320.—AUS.



Thomas Borthwick & Sons (Australasia), Ltd., [1933] A. C. 609.

2583. *Add. Annotation*:—*Refd.* Lawrence v. Matthews (1924), Ltd. (1928), 97 L. J. K. B. 758.

2586. *Add. Annotation*:—*Refd.* Holden v. Premier Waterproof & Rubber Co. (1930), 144 L. T. 519.

2589a. —.]—A porter employed by furniture & upholstery makers claimed compensation for injury by accident arising out of an assault committed upon him in the course of his employment. Whilst engaged in loading furniture into a railway van outside resp.'s premises an altercation arose between appt. & the van driver in consequence of a suggestion made to the driver that he should assist in expediting the work. The driver struck appt. in the face, & so injured one of his eyes that it had to be removed. The county ct. judge dismissed the application, finding that though the assault was an accident, it was not one of the risks of appt.'s employment that he should be assaulted, & it was not the result of doing anything of service to his employer, & it was not an accident arising out of the employment:—*Held*: the decision was right, as there was evidence upon which the judge could support his decision, & no misdirection.—*LEE v. BRECKMAN* (S. & I.) & Co. (1928), 138 L. T. 610; 44 T. L. R. 235; 72 Sol. Jo. 154; 21 B. W. C. C. 32, C. A.

2589b. —.]—A ship's fireman who had been on shore was carried back to the ship quite drunk. The ship sailed with the drunken man absent from his duty. An hour after the ship had sailed a fellow-workman was ordered to go & fetch him. The workman found the drunken man in his bunk & gave the message, whereupon the drunken man seized a razor & inflicted severe injuries on the workman. The injured man claimed compensation. The county ct. judge found that the workman was injured by accident arising out of & in the course of his employment & made an award in his favour. The employers appealed:—*Held*: there was evidence to support the finding & no misdirection. Appeal dismissed.—*RENNIE v. DALGLEISH STEAMSHIPPING CO., LTD.* (1930), 23 B. W. C. C. 501, C. A.

2594a. *Attendant of urinal—Assault by drunkard.*]—A workman employed as an underground urinal attendant in the East End of London, was struck in the eyes by a drunken sailor who refused to pay a penny for using a water-closet. As a result, the workman, who already suffered from partial loss of sight, was totally blinded. The county ct. judge heard no evidence as to the *quantum* of com-

pensation, but decided as a point of law that he could not hold that the accident arose out of the employment in the absence of evidence that the employment exposed the workman to some risk of assault. He therefore made an award in favour of the employers. The workman appealed:—*Held*: the workman, by the nature of his employment, was exposed to risks to which ordinary members of the public were not exposed & the accident arose out of the employment.—*SMITH v. STEPENY CORPN.* (1929), 22 B. W. C. C. 451, C. A.

*Annotation*:—*Refd.* Holden v. Premier Waterproof & Rubber Co. (1930), 23 B. W. C. C. 460.

2594b. *Workman murdered by mad fellow-workman.*]—A workman was murdered in a rubber factory by a fellow-workman, who suddenly developed homicidal mania. His father claimed compensation as a dependant. The county ct. judge made an award in his favour, holding that, though there was no special risk attached to the nature of the employment, the workman was bound by his duty to work near the man who ultimately went mad, & was therefore exposed to a risk not equally shared with the rest of the community. The employers appealed, & it was argued on behalf of the dependant on appeal that a risk was attached to the locality in which the workman was murdered by reason of the presence of a madman:—*Held*: the risk of being attacked by a madman did not arise out of the employment either by reason of the duties performed by the workman or by reason of the locality in which they were performed.—*HOLDEN v. PREMIER WATER-PROOF & RUBBER CO., LTD.* (1930), 144 L. T. 519; 47 T. L. R. 169; 23 B. W. C. C. 460, C. A.

2597. *Add. Annotations*:—*Refd.* Holden v. Premier Waterproof & Rubber Co. (1930), 23 B. W. C. C. 460; *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351.

2599. *Add. Annotation*:—*Consd.* Bulmer & Byron v. Baluchistan S.S. Owners (1934), 27 B. W. C. C. 399.

2600. *Add. Annotations*:—*Refd.* Bulmer & Byron v. Baluchistan S.S. Owners (1934), 27 B. W. C. C. 399; *Boanas v. Barrwhin S.S. Owners* (1936), 29 B. W. C. C. 40.

2601. *Add. Annotation*:—*Distd.* Bulmer & Byron v. Baluchistan S.S. Owners (1934), 27 B. W. C. C. 399.

2602. *Add. Annotations*:—*Consd.* Bulmer & Byron v. Baluchistan S.S. Owners (1934), 27 B. W. C. C. 399. *Refd.* McLaughlin v. Caledonia Stevedoring Co., [1938] 3 All E. R. 72.

2602a. —.]—A ship's fireman was found injured at midnight at the bottom of a roped-

PART XIV. SECT. 5, SUB-SECT. 3.—C.

so. — *Buyer at fruit market.*]—A worker employed by a wholesale fruit vendor at a market while recovering some fruit cases from some buyers was assaulted by one of the buyers & as a consequence his right eye had to be enucleated. The buyer who assaulted the worker was one of a very rough class of men. These men thieved from vendors in the markets, became quarrelsome & in a number of cases assaulted persons who recovered stolen goods:—*Held*: there was a special risk of assault attaching to appt.'s employment.—*HARDER v. STEVENS*

(F. J.) & SON, [1930] W. C. R. 137.—AUS.

PART XIV. SECT. 5, SUB-SECT. 3.—D.

sr. *Watchman bitten by dog.*]—Resp. employed appt. as a watchman, & for about two years prior to May 24, 1934, his dog accompanied him on patrolling duty. While waiting to be relieved of duty appt. was stroking his dog, when the dog, without provocation, bit appt.'s hand, causing him incapacity for work. At the time of the happening of the injury, appt. was seventy-three years of age, & had physical

disability unconnected with his employment. As a result of the dog bite he suffered a degree of permanent disablement to his right hand, which caused him a degree of partial incapacity for the limited type of work he could perform before the happening of the injury, thus reducing his pre-injury ability to earn & this disablement was a material contributing factor in restricting his opportunities for employment of the pre-injury kind:—*Held*: the injury arose out of & in the course of the appt.'s employment with resp.—*COLLINS v. METTERS, LTD.*, [1935] W. C. R. 149.—AUS.



in hold, after having been helped on board three hours earlier in a hopelessly drunken condition. The accident happened when he was engaged in carrying food, it being no part of his duty to do so, on that night. The county ct. judge found that the workman must have crawled through the ropes round the hold without having any duty whatsoever to do so, & held the accident arose neither out of nor in the course of his employment:—*Held*: the judge could have come to no other conclusion on the evidence, & there was no misdirection.—*WATSON v. ALEPPO (OWNERS)* (1927), 20 B. W. C. C. 634, C. A.

**2602b.** — *Accident not due solely to intoxication.*—A seaman who had been on shore with leave returned to his ship in a state of intoxication. While climbing from the jetty to the ship by means of a ladder, he slipped from the ladder & was killed. The county ct. judge found that the negotiation of the ladder, although properly placed & secured, involved some risk & that the accident was not solely due to the intoxication. He therefore made his award for the dependants. The employer appealed:—*Held*: there was evidence to support the finding & no misdirection. Appeal dismissed.—*BULMER & BYRON v. S.S. BALUCHISTAN* (1934), 27 B. W. C. C. 399, C. A.

**2604.** *Add. Annotations*:—*As to* (1) *Refd. Brooker v. Thomas Borthwick & Sons (Australasia), Ltd. & Connected Appeals*, [1933] A. C. 669. *As to* (2) *Refd. Lawrence v. Matthews* (1924), *Ltd.* (1928), 97 L. J. K. B. 758.

**2605.** *Add. Annotations*:—*Refd. Lawrence v. Matthews* (1924), *Ltd.* (1928), 97 L. J. K. B. 758; *Brooker v. Thomas Borthwick & Sons (Australasia), Ltd. & Connected Appeals*, [1933] A. C. 669.

**2609.** *Add. Annotation*:—*Refd. Brooker v. Thomas Borthwick & Sons (Australasia), Ltd. & Connected Appeals*, [1933] A. C. 669.

**2610a.** — *Earthquake.*—Buildings at Nelson, New Zealand, having collapsed owing to a severe earthquake, debris therefrom fell upon three men who were "workers" within Workers' Compensation Act, 1922, two of them being at work on the premises where they were employed, & the third being in the public street in the performance of his duty as an hotel porter; a further worker

while working lost his balance owing to the earthquake & fell down a steep incline on the premises where he was employed:—*Held*: in each case the accident to the worker was one "arising . . . out of the employment" within sect. 3 (1) of the Act above mentioned without it being shown that by reason of his employment he was especially exposed to risks incidental to earthquakes.—*BROOKER v. THOMAS BORTHWICK & SONS (AUSTRALASIA), LTD.*, [1933] A. C. 669; 102 L. J. P. C. 170; 149 L. T. 590; 50 T. L. R. 3; 77 Sol. Jo. 556; 28 B. W. C. C. 495, P. C.

**2612.** *Add. Annotation*:—*Refd. Codling v. Ridley* (1933), 26 B. W. C. C. 3.

**2612a.** *Splinter in finger—Workman making packing-cases.*—A workman engaged in making wooden packing-cases complained to a welfare worker in his employers' works that he thought he had a splinter in the little finger of his right hand, but she could find nothing except a small black speck. It was a frequent occurrence for a workman to request the welfare worker to remove a splinter from a finger, & this particular workman had done so on several occasions. The finger became red & swollen, & five days later a doctor found a small bleb on it containing pus. The workman was feverish & was sent to hospital, where he died of septic pneumonia ten days after his complaint to the welfare worker. In his evidence the house-surgeon of the hospital said, "There was no sign of a foreign body. In my view there must have been some injury or crack at place of bleb. Crack might be microscopical or it might be a foreign body entering there. The latter is the most usual." There was no evidence that the workman did any work at home which might cause a similar injury. On a claim by the dependants, the county ct. judge found the following facts: (a) sepsis was due to the entry of a foreign body, the point of entry being indicated by the bleb, (b) deceased had previously got splinters in his hand, such as led to festering, (c) such a splinter would be likely to produce the condition of deceased's finger. From these facts he drew the inference that the deceased was infinitely more likely to get a splinter at work than elsewhere, & that he, therefore, died from an accident arising out of & in the course of his employment. The employers

PART XIV. SECT. 5, SUB-SECT. 3.—F.

*sg. Earthquake.*—An accident caused to a worker in the course of his employment within Workers' Compensation Act, 1922, s. 3, as a result of a severe earthquake, which was a general catastrophe, does not arise "out of" the employment unless the accident is due to a "locality risk" & the worker establishes that he was exposed to some special risk due to the incidents of his employment.—*BORTHWICK (THOS.) & SONS (AUSTRALASIA), LTD. v. RYAN, BORTHWICK (THOS.) & SONS (AUSTRALASIA), LTD. v. BROOKER, NELSONS (N. Z.), LTD. v. PRENDERGAST, BRENNAN & MANNING v. ASHWEILL*, [1932] N. Z. L. R. 225.—N. Z.

*sk.* —.—E. was employed as a barman at the M. Hotel, Napier, & when the earthquake of Feb. 3, 1931, began, he was attending to his work in the bar. He ran from the bar & out of the street door. The whole

front of the building fell on to the pavement, & E. was killed, his body being found on the footpath buried beneath the hotel veranda & the fallen front portion of the building:—*Held*: (1) the death of deceased took place "in the course of" his employment, & his death in the circumstances outlined above arose "out of the employment"; (2) a worker, who in the discharge of his duty to seek safety attempts to leave the building in which he is employed, is within the protection of the Act until he arrives at a place where he is reasonably safe from being injured through the collapse of building; the ambit or scope of his duty impliedly extended to cover the danger area in respect of that building & its curtilages, *Altter*, if a worker, having reached a place of safety, returns to his place of employment out of mere curiosity & is injured by a fall of brickwork resulting from one of the aftershocks of an earthquake.—*EVANS v. NEW MASONIC CO., LTD.*, [1934] N. Z. L. R. 68.—N. Z.

PART XIV. SECT. 5, SUB-SECT. 3.—G.

*sl. Accident in bath—Bathhouse provided by employer in accordance with statute—No order to use bath.*—R., while in the employ of deft., which, pursuant to Coal Mines Act, 1925, s. 150, had provided bathhouses for workers at its mine, & while bathing in accordance with the practice at the mine, slipped & suffered injury which disabled him from working. No order or request, express or implied, was given to the men to use the shower-bath:—*Held*: (1) the taking of a bath in the bathhouses provided by deft. formed no part of pltf.'s duty, & the accident did not accordingly arise out of & in the course of his employment; (2) the deciding factor was not the provision of the baths pursuant to a statutory requirement, but the conditions relating to their use, which was optional.—*REED v. GLEN AFTON COLLIERIES, LTD.*, [1936] N. Z. L. R. 29—N. Z.

appealed:—*Held*: there was evidence to support the findings of fact, & the county ct. judge was entitled to draw from those facts the inference which he did.—*HURST v. WALTER'S PALM TOFFEE CO., LTD.* (1929), 22 B. W. C. C. 215, C. A.

*Annotation*:—*Distd. Davies v. Armstrong-Whitworth* (Sir W. G.) *Aircraft, Ltd.* (1932), 25 B. W. C. C. 227.

**2618a. Scratches—Furniture remover.**—A workman, employed to drive a lorry & move furniture, frequently received scratches in the course of his work, but usually took no notice of them. On returning from his work one evening he showed his wife that his fingers were scratched. He suffered great pain under the arm during the night & died within seven days of septic poisoning. He had no hobby or occupation at home which exposed him to scratches. The county ct. judge found that death was due to an injury arising out of the employment. The employers appealed:—*Held*: there was evidence to support the finding & no misdirection.—*PIPER v. DE'ATH BROS.* (1929), 22 B. W. C. C. 73, C. A.

**2618b. Domestic servant drying hair.**—A domestic servant was accustomed, with the knowledge, assent, & approval of her mistress, to wash her hair once a fortnight. On one occasion having washed her hair she sat near a gas fire in the kitchen, & was engaged in drying her hair by rubbing it with a towel when she fell in a faint against the fire suffering severe burns. It was admitted by the employer that the accident arose in the course of the employment. The county ct. judge found that it was part of the girl's duty to her employer to wash her hair & that the accident resulted from so doing. He, consequently, held that the accident arose out of the employment. The employer appealed:—*Held*: there was evidence to support the findings of fact, & from those facts the county ct. judge had drawn the correct inference in law that the accident arose out of the employment.—*CODLING v. RIDLEY* (1933), 26 B. W. C. C. 3, C. A.

*Annotation*:—*Refd. Gaskell v. St. Helen's Colliery Co.* (1934), 150 L. T. 506.

**2619. Add. Annotations**:—*Apld. Lawrence v. Matthews* (1924), *Ltd.* (1928), 97 L. J. K. B. 758. *Consd. Lee v. Breckman* (1928), 138 L. T. 610; *Holden v. Premier Waterproof & Rubber Co.* (1930), 144 L. T. 519. *Apld. Brooker v. Thomas Borthwick & Sons* (Australasia), *Ltd.* & *Connected Appeals*, [1933] A. C. 669. *Refd. Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351; *Hutchings v. Devon County Council* (1931), 24 B. W. C. C. 320; *Codling v. Ridley* (1933), 26 B. W. C. C. 3; *Lander v. British United Shoe Machinery Co.* (1933), 102 L. J. K. B. 768.

**2619a.** —.]—A commercial traveller was killed by a falling tree while motor-cycling upon his employers' business. The fall of the tree was apparently caused by a gale of unusual force:—*Held*: as deceased was brought into a danger zone by reason of his employment, the accident arose "out of the employment" within Workmen's Compensation Act, 1925 (c. 84), s. 1, & the question as to what caused the fall of the tree was irrelevant.—*LAWRENCE v. GEORGE MATTHEWS* (1924), *LTD.*, [1929] 1

K. B. 1; 97 L. J. K. B. 758; 140 L. T. 25; 44 T. L. R. 812; 21 B. W. C. C. 345, C. A.

*Annotations*:—*Consd. Holden v. Premier Waterproof & Rubber Co.* (1930), 144 L. T. 519; *Brooker v. Thomas Borthwick & Sons* (Australasia), *Ltd.* & *Connected Appeals*, [1933] A. C. 669; *Lander v. British United Shoe Machinery Co.* (1933), 102 L. J. K. B. 768; *Martin v. Finch*, [1937] 2 All E. R. 631. *Refd. Mascal v. Bowlby* (1933), 26 B. W. C. C. 588.

**2619b.** —.]—*SIMPSON v. LONDON, MIDLAND & SCOTTISH RY. CO.*, No. 2693a, *post*.

**2620. Add. Annotations**:—*Distd. Lander v. British United Shoe Machinery Co.* (1933), 102 L. J. K. B. 768. *Consd. Martin v. Finch*, [1937] 2 All E. R. 631; *Ironmonger v. Vinter* (1938), 31 B. W. C. C. 90.

**2620a. Fall in lavatory.**—*Aplts.* had employed resp. for some fourteen years as a clerk, & were aware that he had been liable all the service to seizures of epileptic fits which sometimes he felt coming on & the danger of which he lessened by sitting down. On Aug. 10, 1932, he had occasion in the morning to go to the lavatory which the employers had provided on the working premises, & he fell, in an epileptic fit, on the back of his head, fracturing his skull & dying the same day from it. The floor of the lavatory was tiled & was wet, but the fall was found & admitted to be due to the fit. The widow of the deceased workman claimed compensation from *aplts.* as being dependent on the earnings of deceased. The county ct. judge, sitting as an arbitrator under the Act, having found that the floor of the lavatory was not in itself dangerous except in the sense that to fall upon it, just as upon any hard surface, would probably be productive of injury, but that it was a zone of special danger with relation to an epileptic person, & that resort to the lavatory was not only an incident but an obligation of the employment, held that the accident arose out of the employment as well as in the course of the employment:—*Held*: when once the county ct. judge had found that the floor of the lavatory was not in itself dangerous, he was bound to hold that there was no accident which arose out of the employment, as the origin of the mishap was the idiopathic condition of the workman, & the cause of the fall peculiar to the man himself quite apart from his employment.—*LANDER v. BRITISH UNITED SHOE MACHINERY CO., LTD.* (1933), 102 L. J. K. B. 768; 149 L. T. 395; 26 B. W. C. C. 411, C. A.

*Annotations*:—*Consd. Martin v. Finch*, [1937] 2 All E. R. 631; *Ironmonger v. Vinter* (1938), 31 B. W. C. C. 90.

**2620b. — Fall off bicycle.**—A workman, who to his employer's knowledge suffered from frequent epileptic fits, used a bicycle to go to & from his work. He had been warned by his doctor not to ride a bicycle, but had continued to do so, & his employer had on many occasions told him to use his bicycle for the purpose of carrying his tools if he was required to work at any distance from his usual place of employment. On the day of his death the workman had been told by his employer to leave his work early in order to take his tools to a field where he was to work on the following day. He was found dead on the road; there was no suggestion that the accident was caused by any traffic trouble, & the evidence showed that he had had an epileptic fit & had fallen off his bicycle,

- sustaining injuries from which he died:—*Held*: the accident arose out of the workman's employment.—*MARTIN v. FINCH*, [1937] 2 All E. R. 631; 156 L. T. 447; 81 Sol. Jo. 418; 30 B. W. C. C. 99, C. A.
- Annotation*:—*Refd.* *Ironmonger v. Vinter* (1938), 31 B. W. C. C. 90.
- 2620c.** — *Fall into dyke.*—A workman who was to the knowledge of his employer subject to epileptic fits was employed to clean out a dyke. The dyke was 15 feet wide at the top & 2 feet 6 inches wide at the bottom. To perform his work the workman had to stand on the sloping sides which were uneven & did not afford a firm foothold, & chop upwards with a scythe. He was found drowned in the water at the bottom of the dyke. On a claim for compensation brought by the widow the county ct. judge drew the inference that he had fallen into the water in an epileptic fit. & further found as facts that the place & nature of the work were such that a normal man might fall & that a risk was necessarily attached to the employment by reason of the fact that the workman was an epileptic. He accordingly made an award in favour of the widow. The employer appealed:—*Held*: there was evidence to support the findings of fact & no misdirection.—*IRONMONGER v. VINTER* (1938), 31 B. W. C. C. 90, C. A.
- 2624.** *Add. Annotation*:—*Consd.* *Holden v. Premier Waterproof & Rubber Co.* (1930), 144 L. T. 519.
- 2626.** *Add. Annotation*:—*Consd.* *Foster v. Edwin Penfold & Co.* (1934), 27 B. W. C. C. 240.
- 2626a.** *Ploughman accidentally shot—Rabbit shooting on adjoining land.*—A ploughman was ploughing his employer's land when a man who had shot a rabbit on adjoining land came over to give it to the workman. While talking to the workman the man put on the safety catch, but the gun went off & shot the workman in the leg. The county ct. judge held that there was no case for the employer to answer. The workman appealed:—*Held*: the accident did not arise out of the employment.—*MASCALL v. BOWLBY* (1933), 26 B. W. C. C. 588, C. A.
- 2626b.** *Mosquito-infested area—Death from malaria.*—*CRAIG v. DOVER NAVIGATION CO., LTD.*, [1938] 4 All E. R. 559, C. A.
- 2627.** *Add. Annotations*:—*As to* (1) *Consd.* *Holden v. Premier Waterproof & Rubber Co.* (1930), 144 L. T. 519; *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351; *Sparey v. Bath R. D. C.* (1930), 23 B. W. C. C. 263; *Martin v. Finch*, [1937] 2 All E. R. 631. *Refd.* *Lawrence v. Matthews* (1924), Ltd. (1928), 97 L. J. K. B. 758; *Smith v. Stepney Corp.* (1929), 22 B. W. C. C. 451; *Hutchings v. Devon County Council* (1931), 24 B. W. C. C. 320; *Rosen v. Quercus S.S. Owners* (1932), 146 L. T. 559; *Allen v. Siddons* (1932), 25 B. W. C. C. 350; *Brooker v. Thomas Borthwick & Sons* (Australasia), Ltd. & Connected Appeals, [1933] A. C. 669; *Codling v. Ridley* (1933), 26 B. W. C. C. 3; *Lander v. British United Shoe Machinery Co.* (1933), 102 L. J. K. B. 768; *Towriss v. Marshall, Knott & Barker, Ltd.* (1938), 31 B. W. C. C. 78. *As to* (2) *Refd.* *Lawrence v. Matthews* (1924), Ltd. (1928), 97 L. J. K. B. 768.
- 2628.** *Add. Annotation*:—*Refd.* *Codling v. Ridley* (1933), 26 B. W. C. C. 3.
- 2629.** *Add. Annotation*:—*Consd.* *Holden v. Premier Waterproof & Rubber Co.* (1930), 144 L. T. 519.
- 2635.** *Add. Annotation*:—*Consd.* *Knowles v. Southern Ry. Co.*, [1936] 2 All E. R. 682.
- 2646.** *Add. Annotations*:—*Consd.* *Muscroft v. Stewarts & Lloyds* (1928), 21 B. W. C. C. 274; *Treloar v. Falmouth Docks & Engineering Co.* (1932), 147 L. T. 271; *Whittle v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] 2 All E. R. 1221.
- 2647.** *Add. Annotations*:—*Consd.* *Davis v. London, Midland & Scottish Ry. Co.* (1930), 23 B. W. C. C. 368; *Hannon v. Mowlem & Co.* (1937), 30 B. W. C. C. 139. *Refd.* *Hurst v. Walter's Palm Toffee Co.* (1929), 22 B. W. C. C. 215; *Hutchings v. Devon County Council* (1931), 24 B. W. C. C. 320; *Davies v. Armstrong-Whitworth* (Sir W. G.) *Aircraft, Ltd.* (1933), 149 L. T. 206; *McLarty v. Prince Line, Ltd.* (1933), 26 B. W. C. C. 134; *Collins v. British Timkin, Ltd.* (1934), 27 B. W. C. C. 74; *Leary v. Deptford S.S. Owners* (1935), 28 B. W. C. C. 235; *Whittle v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] 2 All E. R. 1221; *Ellison v. Calvert & Heald*, [1936] 3 All E. R. 467.
- 2647a.** — — —.]—A colliery repairer, fifty-eight years of age & apparently in excellent health, was scooping out a hole in the earth with an iron bar. After kneeling at this work for a minute or two he fell forward without a word & died some hours later without regaining consciousness. There was no *post mortem* or inquest as the medical man called to the deceased was alleged to have said at the time that death was due to "natural causes." At the arbn. brought by the widow the same medical man in his evidence said that he did not understand the meaning of the phrase "natural causes" in its legal significance, & that he now thought that the work was connected with the death. The county ct. judge, sitting with a medical assessor, said that on the evidence he was entitled in law to find either way, but having discussed the medical aspect with the medical assessor he did not feel that appt. had discharged the *onus* of showing that the death had any connection with the work on which deceased was engaged at the time of his collapse, & made his award in favour of the employer. The widow appealed:—*Held*: there was evidence to support the finding & no misdirection. Appeal dismissed.—*HAYMAN v. PENSFORD & BROMLEY COLLIERIES* (1921), LTD. (1932), 25 B. W. C. C. 37, C. A.
- 2647b.** — — —.]—A labourer was employed as a handy-man to clean up & do "anything" he was told. He set a motor truck in motion, but being unable to drive it or to switch off the current he was squeezed by it against another truck, sustaining injuries from which he died. On an application by his widow for compensation the county ct. judge held that the moving of the truck was within the sphere of the workman's employment.

PART XIV. SECT. 5, SUB-SECT. 4.—A.

2642 vill.  
552.—IR.

—.]—*HETHERINGTON v. DUBLIN & BLESSINGTON STREAM TRAMWAY CO.*, [1927] Ir. 75; 20 B. W. C. C.

The employer appealed:—*Held*: there was no evidence on which the county ct. judge could find that deceased moved the truck for the purposes of his work. Such a finding was no more than "surmise, conjecture or guess" & the widow had failed to discharge the onus of proof.—*COLLINS v. BRITISH TIMKIN, LTD.* (1934), 27 B. W. C. C. 74, C. A.

2647c. ———.]—A pipe fitter was employed by oil refiners, & went to & from his work on a bicycle. On the day of his death he complained while at work of a tightness in his chest, & had a fit of vomiting. While on his way home he fell from his bicycle. A passer-by summoned a doctor, who found that the workman was already dead. Suspecting heart disease the doctor performed a *post mortem* examination but could find no signs of heart disease. Certain organs were sent to the borough analyst who diagnosed gas poisoning. The organs were then sent to a distinguished pathologist who definitely reported in favour of heart disease as the cause of death. On a claim for compensation by the widow the county ct. judge held that the widow had failed to prove out her case, & in making his award for the employers accepted the evidence of the expert witnesses called by them. The widow appealed on the ground that the judge was wrong in accepting this evidence:—*Held*: there was no misdirection & ample evidence to support the award. Appeal dismissed.—*DAWSON v. AGWI PETROLEUM CORPN., LTD.* (No. 2) (1934), 27 B. W. C. C. 456, C. A.

2647d. ———.]—An electric fitter who was competent & trustworthy had been employed by the same employer for twenty years. It was part of his duty to carry out tests on switches, & he was employed on this work in a compound containing four powerful switches. Each switch before being tested was made "dead" by disconnection. No. 3 switch having been tested was made "alive" again & work was being done on No. 4, which had been disconnected. An explosion occurred & the workman was seen on No. 3 electrocuted. No reason was known for his return to No. 3 switch. On a claim for compensation by the widow the county ct. judge drew the inference from the facts proved that the workman had gone on to No. 3 in mistake for No. 4, & that he had not gone there for any purpose of his own, & awarded the widow compensation on the ground that death resulted from an injury by accident arising out of & in the course of his employment. The county ct. judge in giving judgment appeared to have overlooked the fact that evidence was given on behalf of the employer. The employer appealed:—*Held*: there was evidence upon which the county ct. judge could draw the inference he did, & even assuming that he had not considered the evidence given on behalf of the employer, such evidence was not sufficient to displace that inference, which was a proper one to draw. Appeal dismissed. Leave to appeal to the House of Lords refused.—*KEELEY v. ENGLISH ELECTRIC CO., LTD.* (1935), 28 B. W. C. C. 118, C. A.

2647e. ———.]—A labourer came home from work & showed his wife a cut on his forearm to which iodine had been applied. As a result of infection in the wound the workman died. The widow claimed compensation.

Notice of an accident to the workman had been entered in a register of accidents kept by the employers. The county ct. judge held that there was not sufficient evidence that the deceased workman had sustained injury by accident arising out of & in the course of his employment, & made his award for the employers. The widow appealed:—*Held*: there was no evidence of any accident arising out of & in the course of the employment & the entry in the register of accidents could not be used as evidence of the occurrence of an accident. Appeal dismissed.—*PITT v. STRETFORD & DISTRICT GAS BOARD* (1936), 29 B. W. C. C. 43, C. A.

2649. *Add. Annotations*:—*Apld.* *Stroud v. Bath Gas Light & Coke Co.* (1927), 137 L. T. 623. *Consd.* *Stokoe v. Mickley Coal Co.* (1928), 138 L. T. 566. *Apld.* *Edwards v. Ocean Coal Co.* (1929), 22 B. W. C. C. 254; *Pattenden v. McIntosh* (No. 1) (1934), 27 B. W. C. C. 434. *Refd.* *Towriss v. Marshall, Knott & Barker, Ltd.* (1938), 31 B. W. C. C. 78.

2650a. ———.]—The deceased workman was employed to drive a dust cart & assist in collecting house refuse. The occupier of a house asked deceased's mate to take away some gas cylinders which he did, placing them in a pail at the rear of the cart. The mate was in another house collecting refuse when he heard a loud report. He went out & found the deceased lying fatally injured on the bank with a gas cylinder lying two feet away on the road without its brass cap. The gas cylinders could not explode unless touched in some way. They were not house refuse & should never have been collected. On an application by the widow for compensation the county ct. judge refused to find either that deceased workman was engaged in his employer's work up to the time of his fatal injury or that his last known acts were consistent with the continuance of that work, on the ground that the only evidence before him was that the explosion could not have occurred automatically, & its occurrence was not therefore consistent with either of the sets of facts which he was asked to find on her behalf & made his award for the employer. The widow appealed:—*Held*: there being no evidence that the workman was otherwise engaged than in his employer's work up to the time of his fatal injury, & the explosion being consistent either with the continuance or discontinuance of that work, the proper presumption to be drawn, in the absence of any evidence to the contrary, was that death resulted from an injury by accident arising out of & in the course of the employment. Appeal allowed.—*PATTENDEN v. MCINTOSH (I.)* (1934), 27 B. W. C. C. 434, C. A.

2651. *Add. Annotations*:—*Consd.* *Simpson v. London, Midland & Scottish Ry. Co.*, (1931) A. C. 351. *Refd.* *Evans v. Raglan Collieries, Ltd.* (1933), 26 B. W. C. C. 609; *Towriss v. Marshall, Knott & Barker, Ltd.* (1938), 31 B. W. C. C. 78.

2651a. ———.]—A miner was returning from his place of work at the face to the pit shaft by a route along which journeys of trams went. He was found crushed & later died from his injuries, but was heard to say, "I slipped." His dependants brought a claim for compensation which the employer

resisted on the ground that the workman had been riding on a journey of trams in contravention of a statutory prohibition. The county ct. judge found as a fact that the workman had been riding on a tram & had fallen off, & made his award for the employer. The dependants appealed:—*Held*: there was no evidence on which the judge could come to the conclusion which he did without surmise, conjecture, or guess, & as the accident was unexplained & occurred in a place where it was the workman's duty to be during the performance of his work the award should have been made for the dependants.—*EVANS v. RAGLAN COLLIERIES, LTD.* (1933), 26 B. W. C. C. 609, C. A.

**2651b.** —.]—A miner was employed to attend to the removal of dirt in steel tubs from a lower to a higher part of a mine through an inclined tunnel 70 yds. long & 6 ft. wide. The height of the tunnel varied from 6 ft. to 3 ft. 6 ins. By the side of the lines on which the tubs ran was a footpath 2 ft. wide, & in the side of the tunnel man-holes were constructed for safety purposes. The tubs were hauled by a chain worked from a stationary engine at the top of the tunnel. The workman was very familiar with the tunnel & used to walk by the side of the tubs as they were hauled up the incline. On this particular occasion he entered the tunnel by the side of a tub & was last seen walking, when he was lost to sight in the darkness. A few seconds later a shout was heard & the engine was stopped. The workman was found lying partly in a manhole with his feet towards the lines & his cap lying further along the way in which the tubs had been moving. His back was broken & he was in great pain. He was alleged to have said, "Yes, I have been riding, but don't tell anyone." He subsequently denied recollection of such a statement. The workman claimed compensation. The employer denied liability on the ground that the workman had been riding on the tubs, contrary to the regulations, & it was admitted on behalf of the workman that, if that were so, the accident did not arise out of & in the course of the employment. The county ct. judge rejected the alleged statement made while the workman was in pain as being of no evidential value & held that on the circumstantial evidence he was justified in drawing the inference that the workman had lurched forward in the dark & had been struck by the tub. He, therefore made his award for the workman. The employer appealed:—*Held*: there was evidence to support the findings & no misdirection. Appeal dismissed. Leave to appeal to the House of Lords refused.—*HESFORD v. MANCHESTER COLLIERIES, LTD.* (1935), 28 B. W. C. C. 137, C. A.

*Annotation*:—*Refd.* *Hayard v. Amalgamated Anthracite Collieries, Ltd.* (1936), 80 Sol. Jo. 875.

**2651c.** —.]—Two workmen were employed in a shed in a timber yard dipping timber into creosote & then stacking it. Shortly after one workman had left the shed the other

workman was seen running from it in flames. He subsequently died from the effects of the burns. The widow of the workman having claimed compensation, evidence to the above effect was given on her behalf at the arbn., but the employers called no evidence. The county ct. judge found that it was a matter of common knowledge that creosote was inflammable & drew the inference from the facts that the workman's clothes had creosote upon them. He held, however, that there was no evidence to show how the clothes could become ignited by any act connected with the work or to establish that the accident was capable of explanation solely by reference to the presence of some risk incident to the work or place, & said that he refused to draw from the evidence the inference that the accident had arisen out of the employment. The widow appealed:—*Held*: the county ct. judge having found that creosote was inflammable & that creosote was on the workman's clothes, must thereby be taken to have found that the workman was subjected by reason of his employment to a special risk & was bound in law to hold that the widow had discharged the burden of proving that the accident had arisen out of the employment, as the facts raised a presumption which it was for the employers to rebut. The employers having called no evidence to rebut this presumption, the widow was entitled to succeed. Appeal allowed.—*TOWRISS v. MARSHALL, KNOTT & BARKER, LTD.* (1938), 31 B. W. C. C. 78, C. A.

**2652.** *Add. Annotation*:—*Refd.* *Stroud v. Bath Gas Light & Coke Co.* (1927), 137 L. T. 623.

**2653a.** — —.]—A workman in charge of a coke-conveyor was found entangled in the machinery, & died shortly after being released. There was no explanation of how he met with the accident, but when last seen shortly before he was acting in the course of his duty. The county ct. judge drew the inference from the facts before him that the workman was acting in the course of his employment:—*Held*: the county ct. judge was entitled to draw the inference he did, & there was no misdirection.—*STROUD v. BATH GAS LIGHT & COKE CO.* (1927), 137 L. T. 623; 20 B. W. C. C. 496, C. A.

*Annotations*:—*Consd.* *Muscroft v. Stewarts & Lloyds* (1928), 21 B. W. C. C. 274. *Refd.* *Pattenden v. McIntosh* (No. 1) (1934), 27 B. W. C. C. 434.

**2656.** *Add. Annotations*:—As to (1) *Consd.* *Jones v. Cory* (1926), 20 B. W. C. C. 251; *Muscroft v. Stewarts & Lloyds* (1928), 21 B. W. C. C. 274. *Distd.* *Whittle v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] 2 All E. R. 1221. *Consd.* *Ormond v. Holmes & Co.*, [1937] 2 All E. R. 795. *Refd.* *Hayman v. Pensford & Bromley Collieries* (1921), Ltd. (1932), 25 B. W. C. C. 37; *James v. Partridge Jones & John Paton, Ltd.* (1932) 25 B. W. C. C. 92; *Walker v. Brown (John) & Co.* (1932), 25 B. W. C. C. 166; *Davis v. McNamara & Co.* (1921), Ltd. (1932), 25 B. W. C. C. 550.

**2658.** *Add. Annotation*:—*Apld.* *Edwards v. Ocean Coal Co.* (1929), 22 B. W. C. C. 254.

PART XIV. SECT. 5, SUB-SECT. 4.—  
B. (a).

2652 ii. — *Workman's finger crushed by mangle—Pain wrongfully*

*attributed by workman to prick from thorn.*—*BRIDSON v. PERTH DIOCESAN TRUSTEES* (1925), W. A. L. R. 96.—AUS.

PART XIV. SECT. 5, SUB-SECT. 4.—  
B. (d).

*sw. Claim unsuccessful—Origin of infection unexplained.*—*OAKES v. HOLLI-DAY*, [1927] N. Z. L. R. 263.—N.Z.

**2660. Add. Annotation:—***Refd.* *Gill v. Perrott* (1928), 21 B. W. C. C. 9.

**2665. Add. Annotations:—***Consd.* *Raeburn v. Lochgelly Iron & Coal Co.* (1926), 20 B. W. C. C. 637; *Bradley v. London & North Eastern Ry. Co.* (1931), 145 L. T. 30; *Leary v. Deptford S.S. Owners* (1935), 28 B. W. C. C. 235; *Collinson v. Manvers Main Collieries, Ltd.* (1937), 30 B. W. C. C. 280. *Refd.* *Ferguson v. Shotts Iron Co.* (1927), 20 B. W. C. C. 741; *Ellison v. Calvert & Heald* (1935), 28 B. W. C. C. 371.

**2666. Add. Annotations:—***Consd.* *Cole v. L. & N. E. Ry.* (1928), 21 B. W. C. C. 87. *Refd.* *Ferguson v. Shotts Iron Co.* (1927), 20 B. W. C. C. 741.

**2668a. Dispenser—Scratch.]—***Appet.* was employed by two doctors in partnership as a dispenser, her duties being to fill medicine bottles & clean instruments. On Nov. 9, 1926, at 10.30 a.m., whilst so employed, she noticed that her right thumb was bleeding, but was not sure how the scratch which caused the bleeding had occurred, & she had not felt pain. She inferred that she must have knocked it at the time on a rough bit of wood at the side of the sink or on the edge of a cork box. She applied iodine, but as the bleeding did not stop she went to the assistant, who bandaged her thumb, & she continued at work until 11.30, when she went to one of the partners, who dressed the wound. On Nov. 16 she felt too unwell to go to work, & subsequently was in the infirmary until Jan. 18, 1927, suffering from septic poisoning:—*Held*: (1) there were sufficient facts proved before the county ct. judge to enable him to draw an inference one way or the other, so that there was no necessity for surmise, conjecture, or guess; (2) the employers had had knowledge of the accident, & notice was not necessary.—*GILL v. PERROTT* (1928), 21 B. W. C. C. 9, C. A.

**2668b. Workman moving gutters with sharp edges.]—**On May 16 a workman was employed as a labourer in moving semi-circular rain gutters with somewhat sharp edges, & returned home with a slight wound in his right shoulder. On the following day he told a fellow-workman that he was "feeling his shoulder," but he continued at work until May 21. A doctor was called in on May 23, but the workman rapidly grew worse & died on May 25 from septicæmia. The widow spoke to the employers' time-keeper of the death & gave formal notice on June 11. The county ct. judge held he was entitled to infer an injury resulting from an accident which arose out of & in the course of the employment, & also held the employers were not prejudiced by any delay in giving notice:—*Held*: there was evidence to support the findings, & no misdirection.—*FLETCHER v. SINCLAIR IRON CO., LTD.* (1928), 21 B. W. C. C. 62, C. A.

**2670. Add. Annotation:—***Consd.* *Ellison v. Calvert & Heald* (1935), 28 B. W. C. C. 371.

**2675a. Cut finger—Sheet metal worker.]—**An engineer's fitter was engaged in cutting, filing, & bending sheet metal for use in aeroplanes. The work was such that small cuts on the fingers with sharp splinters were caused frequently. While at work on July 20,

1931, the workman called his mate's attention to his finger, & the mate said that the finger appeared inflamed to him. He then went to the ambulance room & had his finger dressed. Septicæmia set in & he died on Aug. 20. His parents claimed compensation as dependants. The county ct. judge held that the accident arose out of & in the course of the employment & made an award in favour of the dependants. That award having been set aside by the Ct. of Appeal, the dependants appealed:—*Held*: the more likely cause of the accident was a cut from a splinter of a metal sheet; in other words, the cut was sustained during work hours on July 20 & was therefore an accident which occurred in the course of the workman's employment.—*DAVIES v. ARMSTRONG WHITWORTH (SIR W. G.) AIRCRAFT, LTD.* (1933), 149 L. T. 206; 26 B. W. C. C. 299, II. L.

*Annotations:—**Apld.* *Churchward v. Lancaster's Steam Coal Collieries, Ltd.* (1935), 28 B. W. C. C. 306. *Consd.* *Ellison v. Calvert & Heald* (1935), 28 B. W. C. C. 371.

**2676. Add. Annotation:—***Refd.* *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351.

**2680. Add. Annotations:—***Consd.* *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351. *Refd.* *McCullum v. Northumbrian Shipping Co.* (1931), 146 L. T. 124; *Rosen v. Quercus S.S. Owners* (1932), 146 L. T. 559.

**2681. Add. Annotations:—***Consd.* *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351. *Refd.* *Stroud v. Bath Gas Light & Coke Co.* (1927), 137 L. T. 623.

**2685. Add. Annotation:—***Refd.* *Churchward v. Lancaster's Steam Coal Collieries, Ltd.* (1935), 28 B. W. C. C. 306.

**2686a. Fall—Death from head injury.]—**A plumber while working alone fell from some steps & was, for a time, in a state of stupor, but was able to finish the job. His jaw & face were contused & he was unable to eat owing to the injury to the jaw. His doctor sent him to bed & later to hospital. He had some injury to his back which prevented his turning over, & also a dark hæmorrhage. He died in hospital on the fourth day after his accident. His widow claimed compensation. At the arbn. the panel doctor & a specialist from Harley Street called on behalf of his widow were of opinion that death was due to or accelerated by the injury to the head. The county ct. judge found that the widow had discharged the onus of proving that death was due to an accident which arose out of & in the course of the employment & made his award in her favour. The employer appealed:—*Held*: there was evidence to support the finding & no misdirection.—*EVERETT v. CAMBRIDGE UNIVERSITY & TOWN WATERWORKS CO.* (1934), 27 B. W. C. C. 237, C. A.

**2689a. Concussion—Subsequent stroke.]—**A labourer, aged thirty-eight years, suffered injuries to his head & concussion in Oct. 1930, from an accident arising out of & in the course of his employment. He was in hospital for ten days, when he returned to do light work with his old employers. In Mar. 1931, owing to lack of work, he was discharged. In July, 1931, he had a stroke, as a result of which he was paralysed down the right side & unable to speak. The



medical evidence was conflicting as to whether the stroke was due to kidney & bladder trouble or to the injuries suffered by the accident. The county ct. judge held that the onus upon the workman of proving that his present condition was due to the injuries received in the accident had not been discharged & refused to make an award for him. The workman appealed:—*Held*: there was evidence to support the finding & no misdirection.—*STANDLEY v. CHAPMAN (J.) & SONS, LTD.* (1932), 25 B. W. C. C. 403, C. A.

**2690a.** — *Chronic glaucoma.*—A stoker, who was already blind in his left eye, complained that he had become completely blind. He alleged that a foreign body had entered his right eye, but at the time of the alleged accident he made no complaint of anything having entered his right eye. A doctor, who examined him, diagnosed the case as one of chronic glaucoma. The county ct. judge found that the workman was at all material times suffering from chronic glaucoma, & that there was no injury by accident arising out of or in the course of his employment:—*Held*: there was evidence to support the finding, & no misdirection.—*WARSAWA v. WATNESS (OWNERS)* (1921), 21 B. W. C. C. 85, C. A.

**2690b.** *Cataract.*—A foreman electrician had since the age of seven worn spectacles in order to save a permanent squint. On Apr. 16, 1926, an ignition tube burst, & some particles of dust & carbon struck his right eye. The right side of the face was blackened, but after his eye had been bathed & particles of carbon washed out, he continued at work until Jan. 1928, although from time to time the right eye became inflamed. In Feb. 1928, cataract was diagnosed, & in Oct. 1928, the right eye was excised. After the operation the workman resumed his work with the same employer & earned the same wages. On an application for compensation the county ct. judge said he was not satisfied that the workman had made out a *prima facie* case of incapacity due to the accident in 1926 & did not call on the employers, but dismissed the application with costs. The workman appealed on the ground that the award was against the weight of evidence:—*Held*: the evidence justified the county ct. judge in finding that the incapacity was not due to the accident.—*JONES v. PETTIFER (A. & E.), LTD.* (1929), 22 B. W. C. C. 405, C. A.

**2691.** *Add. Annotations:*—As to (1) *Consd. Johnson v. Warren (F.) & Co.* (1928), 21 B. W. C. C. 411. *Expld. Church v. Dugdale & Adams, Ltd.* (1929), 22 B. W. C. C. 444.

**2691a.** — *Injury to one eye—Subsequent incapacity to other eye not due to accident.*—A plumber injured his right eye when stooping down at his work in Feb. 1924. He returned to work in Mar. 1924, & remained at work until May, 1932. Meanwhile as a result of the accident a cataract developed in his right eye, which became useless in 1931, so that he had to work with the sight of his left eye. The left eye also developed cataract unconnected with the accident. In 1932 he was operated on for cataract in the right eye & recovered partial sight in that eye. On a claim for compensation for total

incapacity the county ct. judge held that the incapacity was not due to the accident in Feb. 1924, & made his award for the employers. The workman appealed:—*Held*: the matter was a question of fact for the county ct. judge.—*BEALL v. BOSTAL BROS., LTD.* (1933), 26 B. W. C. C. 371, C. A.

**2691b.** *Claim successful—Shoe cleaner—Burst bottle of ammonia.*—A woman was employed in a stock-room to clean patent leather shoes. For this purpose ammonia was used & was supplied by the foreman as required. If, however, the supply ran short, the workmen were in the habit of buying ammonia for themselves. The woman bought a bottle of ammonia for the purpose of cleaning shoes, but the cork flew out & the liquid splashed in her face. As a result her eyes were injured. On a claim for compensation the county ct. judge found that the accident arose out of & in the course of the employment & made his award for the woman. The employer appealed:—*Held*: there was evidence to support the finding & no misdirection.—*BULLERS v. ALTUS SHOEMAKERS, LTD.* (1934), 27 B. W. C. C. 132, C. A.

**2692.** *Add. Annotation:*—*Consd. Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351.

**2693.** *Add. Annotations:*—*Apld. Stroud v. Bath Gas Light & Coke Co.* (1927), 137 L. T. 623. *Consd. Stokoe v. Mickley Coal Co.* (1928), 138 L. T. 566. *Apld. Edwards v. Ocean Coal Co.* (1929), 22 B. W. C. C. 254. *Consd. Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351. *Refd. Evans v. Raglan Collieries, Ltd.* (1933), 26 B. W. C. C. 609; *Pattenden v. McIntosh (No. 1)* (1934), 27 B. W. C. C. 434; *Towriss v. Marshall, Knott & Barker, Ltd.* (1938), 31 B. W. C. C. 78.

**2693a.** — *Railway guard travelling as passenger.*—A railway guard, instructed to travel from Glasgow to Gourrock in order to take charge of a train there, got into an empty compartment at Glasgow. On arrival of the train at Gourrock he was missing, but articles belonging to the man were found on the seat of the compartment. He was afterwards found lying unconscious in a tunnel between Glasgow & Gourrock at the left side of the direction of the train, & he died from a fractured skull without recovering consciousness. The compartment at Gourrock had its left door shut but the window open. Upon a claim by his dependants for compensation, the arbitrator negatived violence & suicide, & found that the man met his death by falling accidentally from the window of the compartment, & on these facts he concluded that the accident arose out of & in the course of the deceased's employment & awarded compensation:—*Held*: the arbitrator was entitled on the facts found to draw the inference that the accident to the deceased arose out of as well as in the course of his employment.

The rule to be deduced from the authorities for application to unexplained accident cases is that where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches, & an accident occurs capable of explanation solely by reference to that risk, it is legitimate, not-



withstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk, & to hold that the accident arose out of the employment, but the inference as to the origin of the accident may be displaced by evidence tending to show that the accident was due to some action of the workman outside the scope of his employment (*per CUR.*).—*SIMPSON v. LONDON, MIDLAND & SCOTTISH RY. CO.*, [1931] A. C. 351; 100 L. J. P. C. 98; 144 L. T. 730; 47 T. L. R. 286; 75 Sol. Jo. 155; 24 B. W. C. C. 1, H. L.

*Annotations*:—*Apld.* *Geary v. Mathew Brown & Co.* (1931), 24 B. W. C. C. 210; *McCullum v. Northumbrian Shipping Co.* (1931), 146 L. T. 124. *Expld.* *Rosen v. Quercus S.S. Owners*, [1933] A. C. 494. *Apld.* *McLarty v. Prince Line, Ltd.* (1933), 26 B. W. C. C. 134. *Consd.* *Todd v. MacCallum* (1933), 25 B. W. C. C. Supp. 155. *Refd.* *Hutchings v. Devon County Council* (1931), 24 B. W. C. C. 320; *Evans v. Raglan Collieries, Ltd.* (1933), 26 B. W. C. C. 609; *Towriss v. Marshall, Knott & Barker, Ltd.* (1938), 31 B. W. C. C. 78.

2695. *Add. Annotation*:—*Refd.* *Everett v. Cambridge University & Town Waterworks Co.* (1934), 27 B. W. C. C. 237.

2697. *Add. Annotations*:—*Expld.* *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351. *Consd.* *McLarty v. Prince Line, Ltd.* (1933), 26 B. W. C. C. 134. *Refd.* *Hutchings v. Devon County Council* (1931), 24 B. W. C. C. 320; *McCullum v. Northumbrian Shipping Co.* (1931), 146 L. T. 124; *Rosen v. Quercus S.S. Owners* (1932), 146 L. R. 559.

2702a. —.]—A ship's fireman who, in warm weather & with permission, had gone to sleep on deck when the vessel was in harbour, fell overboard in the night & lost his life. There was no evidence that he was on duty at any time during the night. On a claim by the dependants of the dead man against the owners of the ship for compensation on the ground that the death resulted from an accident arising out of & in the course of the man's employment, the county ct. judge decided against the claimants, his award indicating that he considered that the absence of any evidence that the man was on duty at the time was a critical & determining factor which, on the authorities, bound him to reach this conclusion:—*Held*: this was a mistaken view of the true position as laid down in the authorities, & the judge was free to draw an inference from the facts as they were before him, & since he had not considered himself so free the case should be remitted to him with a direction that he was.—*ROSEN v. QUERCUS S.S. OWNERS*, [1933] A. C. 494; 102 L. J. K. B. 427; 148

L. T. 532; 49 T. L. R. 248; 26 B. W. C. C. 286, H. L.

*Annotations*:—*Consd.* *McLarty v. Prince Line, Ltd.* (1933), 26 B. W. C. C. 134. *Refd.* *Towriss v. Marshall, Knott & Barker, Ltd.* (1938), 31 B. W. C. C. 78.

2702b. —.]—A dishwasher & pantryman was a member of the crew of the *W. P.* The ship left Rio de Janeiro at 5 p.m. one summer evening. At 1 a.m. on the following morning the workman was found asleep on deck by one B., who wakened him & asked him if he was not going to bed. He replied that he would go in five minutes. B. went below & heard some one go past his door five minutes later. The workman did not report for duty at 5 a.m. & was never seen alive after 1 a.m. It was presumed that he had gone overboard, but his body was never recovered. The ship was out at sea between 1 a.m. & 5 a.m., but there was only a slight roll. Two years later his widow filed a request for arbn. on behalf of herself & her children. The county ct. judge held that there was no evidence of any kind from which he could draw any inference that there was an accident which arose out of & in the course of the employment. The widow appealed:—*Held*: the judgment of the county ct. judge should not be disturbed.—*McLARTY v. PRINCE LINE, LTD.* (1933), 26 B. W. C. C. 134, C. A.

2706. *Add. Annotations*:—*Consd.* *Muscroft v. Stewarts & Lloyds* (1928), 21 B. W. C. C. 274. *Expld.* *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351. *Consd.* *Hutchings v. Devon County Council* (1931), 24 B. W. C. C. 320; *Rosen v. Quercus S.S. Owners* (1932), 146 L. T. 559. *Refd.* *Gill v. Perrott* (1928), 21 B. W. C. C. 9; *Todd v. MacCallum* (1933), 25 B. W. C. C. Supp. 155; *Boanas v. Barrwhin S.S. Owners* (1936), 29 B. W. C. C. 40.

2710. *Add. Annotations*:—*Consd.* *Muscroft v. Stewarts & Lloyds* (1928), 21 B. W. C. C. 274. *Whittle v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] 2 All E. R. 1221.

2710a. —.]—A miner, who was known to be suffering from valvular disease of the heart, returned to work against his doctor's advice. His condition was such that he was liable to collapse or sudden death at any moment. He went down the mine at 10.30 p.m., & was alive & well at 3 o'clock. At 4 o'clock he was found dead in his stall, lying back as though asleep. There was no evidence of any fall of roof, & he had no pick in his hand. He was alone at the time of his death, & there was no evidence of what the man was actually doing:—*Held*: there was

later his body was found floating in the Canal Basin. The cause of death was, admittedly, drowning:—*Held*: there was evidence from which the judge could infer that when the workman left the hut he had gone for the purpose of relieving nature; there was also evidence that the death of the workman was caused by an accident; & that accident arose out of & in the course of the employment.—*TRACEY v. KELLY*, [1929] 1 R. 634.—*IR.*

PART XIV. SECT. 5, SUB-SECT. 4.—*B. (j).*

*b i.* —.]—*FERGUSON v. SHOTTS Iron Co., Ltd.*, [1927] S. G. 321; 20 B. W. C. G. 741.—*SCOT.*

PART XIV. SECT. 5, SUB-SECT. 4.—*B. (i).*

*b i.* —.]—*Workman leaving work to relieve nature.*—The premises of a coal importer adjoined the Grand Canal Docks. Although a considerable number of men were employed on these premises, no lavatory accommodation was provided, & it was customary for the employees to go across a piling on to a track about three feet wide which passed along the edge of the docks & to relieve nature either on the track, which was on the employer's premises, or at some little distance outside the premises at steps which led down to the water's

edge. The dinner hour for the men was from 1 to 2 o'clock. One of the workmen was told by the foreman to return to work one day before 2 o'clock to do certain work, & he returned as ordered. But when he returned he found that the work, which it was intended he should do, was not required to be done. As it was then only a short time before the ordinary hour for resuming work, he remained on the employer's premises in a shed in the company of some of his fellow-workmen. He subsequently went out of the hut, making use of a slang expression used by the men when retiring to relieve nature. He was never seen alive again. Several hours

no evidence that the man's death was caused by any strain at work, & no evidence that death resulted from any injury by accident arising out of the employment.—**MUSCROFT v. STEWARTS & LLOYDS, LTD.** (1928), 140 L. T. 64; 21 B. W. C. C. 274, C. A.

*Annotations*.—**Consd. Treloar v. Falmouth Docks & Engineering Co.** (1932), 147 L. T. 271. **Refd. James v. Partridge Jones & John Paton, Ltd.** (No. 2) (1932), 25 B. W. C. C. 328; **Walker v. Brown (John) & Co.** (1932), 25 B. W. C. C. 166; **Whittle v. Ebbw Vale Steel, Iron & Coal Co.**, [1936] 2 All E. R. 1221.

**2710b.** ———.]—A plasterer's labourer was whitewashing while standing on a plank supported by trestles. He suddenly fell dead on to the floor. A *post-mortem* examination showed that he had been suffering from advanced disease of the heart. The widow claimed compensation. The county ct. judge held that there was no evidence of any accident. The dependant appealed:—**Held**: it was purely a question of fact for the county ct. judge & there was no misdirection. Appeal dismissed.—**POGSON v. TUNNACLIFFE** (1931), 24 B. W. C. C. 86, C. A.

**2710c.** ———.]—A miner was engaged in filling a tram, & in the course of his work had to reach over a tram to get a piece of coal with a pick. He reached over the tram, said "Oh!" twice, & died. The *post mortem* examination showed that he had been suffering from a large rupture of the left ventricle of the heart which burst & caused his death. The dependants filed a request for arbn. At the hearing a fellow-workman gave evidence that chipping coal was no heavy work & there was no unusual strain, while one of the medical witnesses said that the workman might just as well have died in his bed so far as physical condition went. The county ct. judge in his award stated that he was unable to find that the work contributed to the death, & made his award in favour of the employer. The dependants appealed:—**Held**: as to whether the workman's death was accelerated by the work he was doing in any material degree was a question of fact. The evidence supported the judge's decision & there was no misdirection.—**DAVIES v. VIPOND (JOHN) & Co., LTD.** (1932), 146 L. T. 498; 25 B. W. C. C. 47, C. A.

*Annotation*.—**Refd. Walker v. Brown (John) & Co.** (1932), 25 B. W. C. C. 166.

**2710d.** ———.]—A motor van driver went out to start up his engine at 7.30 in the morning. Two minutes later he was seen sitting in the driver's seat with the bonnet of the van open. Three minutes after that he was found lying unconscious on the ground almost touching the front of the van. He died in hospital some days later. He was found to have been suffering from an aneurism of the heart which might have burst spontaneously at any time. The county ct. judge found that the workman died not from the

disease alone, but from the disease & employment together, & therefore made his award for the widow. The employer appealed:—**Held**: there was no evidence to justify the finding, & therefore the widow had failed to discharge the onus of proving that there was an accident arising out of & in the course of the employment.—**DAVIS v. McNAMARA & Co.** (1921), **LTD.** (1932), 25 B. W. C. C. 550, C. A.

**2713.** *Add. Annotation*.—**Refd. Ferguson v. Shotts Iron Co.** (1927), 20 B. W. C. C. 741.

**2714.** *Add. Annotation*.—**Consd. Flanagan v. Ackers Whitley** (1926), 19 B. W. C. C. 399.

**2714a.** **Workman falling into water tank.**]—Deceased was a grease boiler, aged 61, & was at the time of the accident suffering from heart disease. His doctor said in evidence that he did not advise him to go back to work, but he insisted upon going. The doctor also gave evidence that he might have died at any moment, & any strain or stooping was prejudicial to him. He was seen about his work at 5.20 a.m., & found dead at 5.40 a.m., lying over a water tank his face being covered with water. The *post mortem* examination showed that he died of heart disease. Upon these facts the county ct. judge held that the work upon which the deceased was engaged contributed to & accelerated his death & applying the principles in **Treloar's Case**, No. 2317c, & in **Partridge Jones & John Paton, Ltd. v. James**, No. 2322a, he made an award in favour of the dependants:—**Held**: the case was distinguishable from **Barnabas v. Bersham Colliery Co.**, No. 2656, & the county ct. judge had applied the right principle, as there was evidence that the employment contributed to the death of the deceased.—**WHITTLE v. EBBW VALE, STEEL, IRON & COAL Co., LTD.**, [1936] 2 All E. R. 1221; 80 Sol. Jo. 671; 29 B.W.C.C. 179, C. A.

*Annotation*.—**Refd. Ormond v. Holmes & Co.**, [1937] 2 All E. R. 795.

**2720a.** — **Hernia strangulated in fresh employment.**]—On Feb. 6, 1930, a blacksmith ruptured himself while at work. A doctor showed him how to reduce the hernia & he was able to continue his work without any outward sign of incapacity until on May 14, 1930, he was discharged owing to slackness of trade. On June 25 he entered the employment of fresh employers as a blacksmith & on the same day, while lifting a steel bar weighing a hundredweight, strangulated the hernia & an immediate operation became necessary. The lift was not an abnormal one, but was in the ordinary course of a blacksmith's work. He was totally incapacitated for seven weeks & claimed compensation for that period from the previous employer. The county ct. judge found that the in-

PART XIV. SECT. 5, SUB-SECT. 4.—  
B. (k).

**2719 iv.** — **Rupture of signalman.**]—Pltf., a railway signal operator, was in the course of his duty operating the levers in the signal tower when he felt a sharp pain in his left side, which continued less sharply throughout the evening & became more intense during the night. The next morning he was too ill to attend to his work & had to be operated on, when it was found that he was suffering from a rupture of the

sigmoid colon accompanied by a general peritonitis:—**Held**: pltf. had suffered a personal injury by an accident arising out of & in the course of his employment & was, therefore, entitled to compensation under the Act.—**REES v. CANADIAN NATIONAL RAILWAYS**, [1935] 1 W. W. R. 17.—CAN.

—, who was operated on for hernia some years previously, suffered a recurrence of the trouble

while at his work:—**Held**: although, if there is an unexpected personal injury arising from some physiological condition set up in the course of the work, that may be described as an accident even when there is nothing unusual or particular which sets it up, yet the onus on pltf. in the present case of establishing that his condition was the result of a recent hernia had not been discharged.—**AYLING v. WELLINGTON CORPN.**, [1930] N. Z. L. R. 337.—N.Z.

capacity caused on June 25 was a direct consequence of the accident on Feb. 6. The employers appealed:—*Held*: it was a question of fact for the county ct. judge, & there was evidence to support the finding & no misdirection. Appeal dismissed.—*BRADSHAW v. RICHARDSONS, WESTGARTH & CO., LTD.* (1931), 24 B. W. C. C. 64, C. A.

*Annotation*:—*Consd.* *Hutchings v. Devon County Council* (1931), 24 B. W. C. C. 320.

2721. *Add. Annotation*:—*Refd.* *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351.

2731a. — *Death from drinking caustic soda in tea.*—A workman was entitled to refresh himself with a cup of tea while he was working. Near to his place of work there was a bucket of caustic soda which was occasionally used to wash the walls. On drinking from his cup he felt a burning sensation & became totally incapacitated from the effects of drinking caustic soda. There was no evidence as to how, or by whom, the caustic soda could have been put into the cup. The county ct. judge held that the accident did not arise out of the employment, & made his award for the employer. The workman appealed:—*Held*: on the evidence no inference could be drawn that the accident arose out of the employment. Appeal dismissed.—*GEARY v. MATHEW BROWN & CO., LTD.* (1931), 24 B. W. C. C. 210.

*Annotation*:—*Consd.* *Rosen v. Quercus S. S. Owners* (1932), 146 L. T. 559.

2731b. *Death from typhoid.*—A workman who had been employed for a year in sewer work returned home feeling ill & died a fortnight later of typhoid fever. Medical evidence was in agreement that the typhoid could have been contracted either by eating or drinking or by work in the sewer, but there was no evidence as to the source of infection in this particular case. The county ct. judge on a claim by the widow for compensation drew the inference that the typhoid fever was contracted by deceased while engaged in the sewer work. The employer appealed:—*Held*: on the evidence the ct. was left in the position of having to surmise, conjecture, or guess as to when & where the disease was contracted, so that there was no ground for comparing & balancing probabilities, & it was not therefore possible for the county ct.

judge to draw an inference in favour of the widow. Appeal allowed.—*HANNON v. MOWLEM & CO., LTD.* (1937), 30 B. W. C. C. 139, C. A.

2733. *Add. Annotation*:—*Refd.* *Codling v. Ridyle* (1933), 26 B. W. C. C. 3.

2734a. — — —. — A miner was about to insert a fuse in a detonator in the course of his duties when the detonator exploded & injured him. The sheriff-substitute held that the cause of the explosion was not proved &, the workman having discharged any onus laid on him by proving that the explosion caused the injury, found that the accident arose out of the employment & made an award in his favour. The employees appealed. The First Division of the Ct. of Session by a majority affirmed the award. The employers appealed to the House of Lords:—*Held*: it followed from the facts of the case that the accident arose out of & in the course of the employment.—*LOCHGELLY IRON & COAL CO., LTD. v. LINDORES* (1929), 22 B. W. C. C. 376, H. L.

2735a. — *Seaman stooping in course of duty—Burst blood-vessel.*—The chief officer of a vessel, fifty-eight years old, while on duty on the bridge, stooped to get some string out of a cupboard in the course of his duty & then stated to the captain that he felt queer, sat down, & later fell unconscious on the bridge. He recovered consciousness in five minutes, but died about eight hours afterwards. There was no inquest or *post mortem*. At the hearing of a claim by the widow the doctors on both sides agreed that he died very probably from cerebral hæmorrhage. His own doctor, who had attended him for twenty-five years, said he was a healthy man, & there was no evidence of anything wrong with his heart. The county ct. judge found that the cause of death was the breaking of some blood-vessel due to the stooping which caused the fall which subsequently led to the death, but held that he would not be justified in making an award for the dependant. The dependant appealed:—*Held*: on the finding that death was due to the stooping, it followed that death resulted from injury by accident arising out of the employment.—*HORE v. GENERAL STEAM NAVIGATION CO.* (1929), 22 B. W. C. C. 100, C. A.

#### PART XIV. SECT. 5, SUB-SECT. 4.— B. (m).

b 1. — *No evidence how accident occurred—Deceased killed by railway wagons at place of work.*—Deceased, who was employed by deft. co. to sweep up the coal dropping on the wharf alongside one of its ships which was discharging, was discovered some short distance away from the scene of his work jammed between two railway wagons & fatally injured, it being impossible to say how he got into the position in which he was found:—*Held*: there being evidence that deceased was seen at his work shortly before the accident, a presumption arose that he continued in the course of his employment.—*ARCHIBALD v. UNION STEAMSHIP CO. OF NEW ZEALAND*, [1930] N. Z. L. R. 179.—N.Z.

b 11. — *Rheumatic fever—Working in damp room.*—Appet. worked for three months in a damp room. She was in good health when she com-

menced to work there, but contracted rheumatic fever as a result of exposure to the damp conditions:—*Held*: she had suffered injury by accident.—*RYAN v. NEWSOME* (1929), W. A. L. R. 69.—AUS.

t 1. — *Heart disease.*—On June 9, 1933, a labourer, who was carrying sleepers, felt the strain in his neck & chest, & had to get help. On June 13 he was employed in breaking up an iron box with a sixteen-pound hammer. On that day he felt so exhausted that he refused to work overtime, & next day represented himself as unfit for work. On June 23 he claimed compensation for total incapacity due to muscular strain of his chest. The employers paid compensation. Later the workman presented an application to the arbitrator to have a memorandum between himself & the employers, of date Oct. 27, 1933, recorded. The employers disputed the genuineness of the memorandum on the ground that any incapacity of the work-

man was not, & had not been, due to injury by accident, but to natural causes. They also asked for review & ending of the compensation on the same ground. The arbitrator, after proof, found that the workman had throughout the relevant period suffered from myocardial disease, that the muscular strain had been for some time completely cured, that the workman's present claim was made in respect of the condition of his heart, that the employers had made no contract with him relative to his present claim, & that he had not, at or about the dates libelled, suffered an accident in the sense of the Act. He therefore refused to award compensation. The workman appealed:—*Held*: the workman being no longer fit for employment owing to the wear & tear of his ordinary work acting on a diseased heart, the incapacity was not due to "injury by accident" in the sense of the statute.—*MILLER v. CARNTYNE STEEL CASTINGS CO., LTD.*, [1935] S. C. 20; 27 B. W. C. C. Supp. 101.—SCOT.

**2737a. — Fumigation of ship with sulphur—Gastritis from fumes.**—At 6 p.m. on July 30, 1930, a ship was fumigated with sulphur, all hatches being battened down. All hatches were opened at 2 a.m. on July 31, & at 8 a.m. a body of workmen came on board to remove gear. Among them was a man in good health & forty-six years old, who worked at a winch about two feet from one of the hatches & nearer to the fumes than any other of the workmen. The fumes from the sulphur were coming up the hatches at that time but were not bad. At midday the workman felt very ill & complained that it was due to the fumes. He vomited during the dinner hour, but worked in the afternoon on another ship. He worked on & off feeling very ill until Aug. 8, when he was sent to hospital suffering from gastritis. None of his fellow-workmen appeared to suffer from the sulphur fumes. At the subsequent arbitration the county ct. judge found, in accordance with medical evidence, that the illness was due to the fumes & also that the occurrence was an accident. He therefore made his award in favour of the workman. The employers appealed:—*Held*: there was evidence on which the judge could find that there had been personal injury by accident within the Act & there was no misdirection. Appeal dismissed.—**BRADLEY v. LONDON & NORTH EASTERN RY. Co.** (1931), 145 L. T. 30; 24 B. W. C. C. 41, C. A.

**2737b. — Farm bailiff hiring employer's horses.]**—A farm bailiff hired horses from his employer for the purpose of moving his furniture to the residence appointed for him. The workman unbridled one of the horses in order to use the straps to tie up his furniture, but the horse took fright, knocked him down, & killed him. The county ct. judge found as a fact that the accident arose out of the employment & made an award in favour of the widow. The employer appealed:—*Held*: the question was one of fact for the county ct. judge. There was evidence to support the finding & no misdirection. Appeal dismissed.—**JACKSON v. FROST** (1930), 23 B. W. C. C. 347, C. A.

**2737c. — Broncho-pneumonia.]**—A workman was employed by resps. as an underground fireman in their colliery. It was part of his employment to clean out a sump in the colliery into which water was collected from the underground workings. In carrying out the work it was usually necessary to stand in cold water about waist-deep. On one occasion, upon coming out of the sump, it was noticed that he was cold & shivering; he contracted a chill which within a short time developed into broncho-pneumonia, from which he died. In an arbn. under the Workmen's Compensation the arbitrator drew the inference that the broncho-pneumonia from which the deceased died was caused by a chill

which he contracted through exposure to cold & water while cleaning the sump, but he found in law that the death of the workman was not caused by accident arising out of & in the course of his employment:—*Held*: having regard to the findings of fact in this case the workman's death was caused by personal injury by accident arising out of & in the course of his employment.—**WALKER v. BAIRDS & DALMELLINGTON, LTD.** (1935), 153 L. T. 322; 28 B. W. C. C. 213, H. L.

*Annotation*:—**Refd.** *Lochgelly Iron & Coal Co. v. Walkenshaw* (1935), 28 B. W. C. C. 230.

**2737d. — Death from typhoid.]**—The workman was a mess-room steward employed on a steamship. On the round voyage the ship put in at midday at Durban for coal, leaving the next morning for New York. While at Durban, the workman & other members of the ship's co. went ashore. During the passage from Durban to New York the workman & two others were taken seriously ill with typhoid & were landed at Ascension Island, where the workman & one other died. The workman's widow claimed compensation on behalf of herself & infant son, as dependants. The county ct. judge found that death was due to typhoid probably contracted from a germ swallowed by the workman while partaking of food or water on board ship when at Durban & held that death resulted from an injury by accident arising out of his employment. The employers appealed on the ground that the finding of the county ct. judge that the infection was caused while the man was on board ship was mere surmise, conjecture, or guess, & not based on the evidence or probabilities of the case:—*Held*: there was evidence to support the finding of fact & no misdirection. Appeal dismissed.—**LEARY v. DEPTFORD S.S. OWNERS** (1935), 28 B. W. C. C. 235, C. A.

**2742. Add. Annotation**:—**Refd.** *Smith v. Wemyss Coal Co.* (1927), 21 B. W. C. C. 483.

**2747. Add. Annotation**:—**Refd.** *Wood v. Garscube Colliery Co.* (1927), 20 B. W. C. C. 837.

**2757. Add. Annotation**:—**Refd.** *Wood v. Garscube Colliery Co.* (1927), 20 B. W. C. C. 837.

**2759. Add. Annotations**:—*As to* (2) **Consd.** *Hutchings v. Devon County Council* (1931), 24 B. W. C. C. 320. **Refd.** *Gilmour v. Garrallan Coal Co.* (1926), 19 B. W. C. C. 683; *Smith v. Cornhill Insurance Co.*, [1938] 3 All E. R. 145.

**2766. Add. Annotation**:—*As to* (2) **Consd.** *Young v. Keeble* (1928), 21 B. W. C. C. 294.

**2767. Add. Annotation**:—**Refd.** *Boyle v. Union Coal Storage Co.* (1935), 28 B. W. C. C. 49.

**2768. Add. Annotation**:—**Apld.** *Thorpe v. Sadler, Sadler v. Thorpe* (1927), 20 B. W. C. C. 488.

**2768a. —.]**—A workman was struck on the elbow while passing through a swing door. He suffered great pain & had to see a doctor.

**PART XIV. SECT. 5, SUB-SECT. 5. —A.**

**2740 III. Onus of proof on workman.**—**WILSON v. W. WINN & Co., LTD.** (1928), 28 S. R. N. S. W. 470; 45 N. S. W. W. N. 145.—**AUS.**

**PART XIV. SECT. 5, SUB-SECT. 5. —B. (b).**

**ex. Workman on railway track.]**—Contributory negligence on the part of the employee does not exonerate

the employer from liability to compensate the employee if the accident could have been avoided by deft. by the exercise of ordinary care & diligence. Where, therefore, the finding of the comr. was that the workman was passing along a railway track contrary to the rules framed by deft. co., & was run over by an engine which was going faster than the prescribed speed:—*Held*: the accident was not

directly attributable to the wilful disobedience of the workman within Workmen's Compensation Act, 1923, s. 3 (1) (b) (ii).—**URMILA DAS v. TATA IRON CO.** (1928), I. L. R. 8 Pat. 24.—**IND.**

**PART XIV. SECT. 6, SUB-SECT. 1. —y. Possibility of future injury—Whether court may consider.]**—**SAMSON v. WILLIAM BAIRD & Co.,** [1929] S. C. (Ct. of Sess.) 21.—**SCOT.**

At the end of a week symptoms of osteomyelitis showed themselves. The arm gradually grew worse & was finally amputated. The county ct. judge held the incapacity was due to the accident:—*Held*: there was evidence to support the finding, & no misdirection.—*VINCE v. ABEL & IMRAY* (1928), 21 B. W. C. C. 151, C. A.

**2768b.** —.]—*BRADSHAW v. RICHARDSONS, WESTGARTH & Co., LTD.*, No. 2720a, *ante*.

**2768c.** —.]—A quarryman, aged thirty-seven & in good health, was working a pneumatic drill on a ledge when the drill jumped causing him to fall six feet off the ledge & then to roll down a slope of twenty feet to the bottom of the quarry. Although bruised on the legs he resumed work, but the foreman gave him a lighter job for the rest of the day. After work he bicycled 2½ miles home & slept well, but it was noticed that he was not his usual self. On his return to work the next morning the foreman took care not to put him to work on too high a spot. After a while he was missed & was found dead in a shallow stream eighty yards from his work to which he had probably gone to relieve nature. The medical witnesses agreed that he had not drowned but had died from shock. The county ct. judge held that there was no break in the chain of causation between the accident & death, & that falling into the stream did not amount to a *novus actus interveniens*. He therefore made his award in favour of the widow of the deceased workman. The employers appealed:—*Held*: it was a question of fact for the county ct. judge, & there was evidence to support the finding & no misdirection.—*HUTCHINGS v. DEVON COUNTY COUNCIL* (1931), 24 B. W. C. C. 320, C. A.

**2768d.** —.]—A steel erector aged sixty-two fell forty feet into soft dirt. He was unconscious for ten minutes, but was able to walk home & returned to work next day. He came to work every day for a fortnight, but did not do his full work. He continued to suffer from shock & it was found that he had commencing cataract in both eyes. After paying compensation for four months, the employer served a notice under sect. 12 & stopped the weekly payments. The workman claimed compensation. At the arbn. it appeared that the condition of his eyesight prevented the workman from doing his old work of a steel erector, but it was doubtful whether this condition had been aggravated by the accident or not. There was further medical evidence in regard to the man's capacity for work. The county ct. judge disregarding the condition of the eyesight found that the workman was totally incapacitated as a result of the accident. The employer appealed:—*Held*: there was evidence to support the finding of fact & no misdirection.—*BLACKWELL v. ARROL (SIR WILLIAM) & Co., LTD.* (1935), 28 B. W. C. C. 151, C. A.

**2776.** *Add. Annotation*:—*As to* (1) *Refd.* *Old v. Furness, Withy & Co.* (1934), 27 B. W. C. C. 266.

**2777a.** —.]—*Heart disease.*—A constructional fitter, aged forty-six, had, prior to 1933, been employed for eight years, with the exception of a period in 1931 when he was admitted to hospital with a cough & was

found to have heart disease. He was then told by his doctor not to lift heavy weights. On May 16, 1933, he started work at 8 a.m. as usual & was employed using a 4-lb. hammer until 9.30, when with the help of his mate he lifted iron "stringers" weighing about 162 lb. for a quarter of an hour. He then continued work involving no strain until 11.45 a.m., when he collapsed & died. His widow filed a request for arbn. At the arbn. the employer called no evidence. On behalf of the widow a fellow workman was called, & a doctor who gave it as his opinion that the lifting of the stringers was the cause of death, though he admitted that the workman might have died at any time without strain. The county ct. judge held that there was no evidence of any strain at work which either accelerated or contributed to the workman's death. The widow appealed:—*Held*: it was a question of degree & therefore of fact for the county ct. judge & there was evidence to support the judge's decision & no misdirection.—*MITCHELL v. PALMER & Co.* (1934), 27 B. W. C. C. 159, C. A.

**2777b.** —.]—A foreman stevedore, aged fifty-two, who supervised the work of a gang & occasionally lent a hand, was on June 28, 1933, struck on the chest by a case weighing 5 cwt. & knocked over. He sat in the hold for about an hour, until work ceased, when he climbed the ladder & went home. He returned to his work as a foreman on the following day, although he complained of feeling "very bad in the breast." He took a ten days' holiday in Aug. & continued his work of supervision, but after the accident did no physical work. On Sept. 5 he became totally unfit to work. He claimed compensation. At the arbn. in Apr. 1934, evidence was given that since Jan. 1933, the workman had been suffering from an aneurism, but that this fact had not been disclosed to him by his medical advisers who allowed him to continue at work. In making his award for the workman, the county ct. judge said, "Finding then that this accident did aggravate appet's condition & cause him to become totally incapacitated before he would otherwise have done, I have further to form a judgment as to when he would have become incapacitated had there been no accident." He came to the conclusion that, but for the accident, the workman would not have been incapacitated for another fourteen weeks & awarded compensation for fourteen weeks. The workman appealed:—*Held*: the judgment of the county ct. judge must be read as meaning that the accident had accelerated the arrival of the date on which the workman would in any event have become incapacitated by the aneurism, but that otherwise the effects of the accident were temporary & at the time of the hearing had completely passed away. There was evidence to support the award & no misdirection.

Where the only effect of the accident is to accelerate the disease so that the man is put into a condition of incapacity at an earlier date than he would have been put had the disease been allowed to run its normal course without acceleration caused by the accident, his incapacity that is due to the accident may not last beyond the date at which, if the disease had run its normal course, he

- would have become incapacitated (ROMER, L.J.).—*OLD v. FURNESS, WITBY & CO., LTD.* (1934), 27 B. W. C. C. 266, C. A.
- Annotation*.—*Consd. London Power Co. v. Lamb*, [1936] 3 All E. R. 392.
- 2783. Add. Annotation**.—*Apld. Gilmour v. Gar-rallan Coal Co.* (1926), 19 B. W. C. C. 683.
- 2787. Add. Annotations**.—*Consd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshay* (1927), 90 L. J. K. B. 664. *Apprvd. Birch Bros., Ltd. v. Brown*, [1931] A. C. 605. *Consd. McCann v. Scottish Co-operative Laundry Asscn., Ltd.*, [1936] 1 All E. R. 475.
- 2788a. ———.**—*By accident arising out of & in course of her employment a female worker sustained permanent injury to her right hand, & for a period received compensation as for total incapacity. Having become fit for special light work, her employers gave her such work at her full pre-accident wage. While so employed she was rendered temporarily unfit for any work through serious illness unconnected with the injury due to the accident. The light work provided by her employers remained open to her during the whole period of her illness. An arbitrator awarded her compensation as for partial incapacity for this period:—Held: the arbitrator rightly awarded compensation for the period in question & the liability of the employers to the worker for compensation was not satisfied by their offer of light work, which her illness prevented the worker from accepting.*—*MCCANN v. SCOTTISH CO-OPERATIVE LAUNDRY ASSCN., LTD.*, [1936] 1 All E. R. 475; 105 L. J. P. C. 58; 154 L. T. 503; 52 T. L. R. 325; 80 Sol. Jo. 184; 29 B. W. C. C. 1, H. L.
- 2790. Add. Annotations**.—*Consd. Evans v. Gilbie* (1926), 96 L. J. K. B. 117; *Wagstaff v. Gutta Percha Co.* (1927), 20 B. W. C. C. 430; *Williams v. Tredegar Iron & Coal Co.* (1927), 96 L. J. K. B. 722; *Stevens v. Birmingham Corpn.* (1929), 22 B. W. C. C. 311; *Wilsons & Clyde Coal Co. v. Burrows* (1929), 141 L. T. 594; *Bitch Bros., Ltd. v. Brown*, [1931] A. C. 605. *Refd. Wilsons & Clyde Coal Co. v. Burrows* (1929), 22 B. W. C. C. 430; *Athey v. United Steel Co.* (1935), 28 B. W. C. C. 435; *Drury v. Appleby Iron Co.* (1935), 28 B. W. C. C. 483; *Moore v. Wallsend & Hepburn Coal Co.* (1935), 28 B. W. C. C. 174.
- 2791a. ———.**—*A trammer in a coal-mine, aged seventeen, lost the tips of two fingers of his right hand in 1917. He was re-employed as a collier in 1920, & worked at the coal face until 1927, earning higher wages than he had done as a trammer. In 1927 he had to give up work owing to bad health, & became unemployed. On an application by the workman for compensation the county ct. judge found that there was no incapacity for work resulting from the injury, that there was no probability that he would have been earning higher wages if he had remained uninjured, & that there was no reasonable probability that any incapacity would ensue from the injury in the future, & dismissed the workman's application. The workman appealed:—Held: there was evidence to support the findings & no mis-direction.*—*REES v. PENTRE MAWR COLLIERY Co., LTD.* (1933), 26 B. W. C. C. 616.
- 2793. Add. Annotations**.—*Refd. Stevens v. Birmingham Corpn.* (1929), 22 B. W. C. C. 311; *Birch Bros., Ltd. v. Brown*, [1931] A. C. 605; *Drury v. Appleby Iron Co.* (1935), 28 B. W. C. C. 483.
- 2795. Add. Annotations**.—*Refd. Gilmour v. Gar-rallan Coal Co.* (1926), 19 B. W. C. C. 683; *Timmins v. Brodsworth Main Colliery Co.* (1934), 50 T. L. R. 458.
- 2796a. Melancholia due to accident—Death from pneumonia—Susceptibility due to melancholia.**—*A farm labourer was, in Sept. 1932, kicked by a horse, & sustained a dislocated shoulder. Adhesions formed & he was totally incapacitated. Towards the end of the year he showed signs of mental trouble & suffered from melancholia. In Jan. 1933, he was certified as insane & entered a mental hospital, where on Feb. 28, he developed broncho-pneumonia from which on Mar. 2, he died. The widow claimed compensation as a dependant. The medical evidence, accepted by the county ct. judge & adopted by him as findings of fact, was to the effect that the melancholia was the result of the accident, & that a person suffering from melancholia was more susceptible to broncho-pneumonia than a healthy person & less likely to recover from it. The county ct. judge held that there was not sufficient evidence for him to find that death was accelerated by the melancholia. He accordingly made his award for the employer on the ground that there was no evidence to justify a finding that death from broncho-pneumonia resulted from the accident:—Held: the county ct. judge, having found that the melancholia was the result of the accident & the melancholia made the workman more susceptible to broncho-pneumonia, was bound to find on that evidence that death resulted from the accident.*—*EWERS v. CURTIS* (1933), 26 B. W. C. C. 553, C. A.
- 2797. Add. Annotations**.—*Expld. Hutchings v. Devon County Council* (1931), 24 B. W. C. C. 320. *Refd. Pedley v. Davison & Son, Ltd.* (1937), 30 B. W. C. C. 323.
- 2799. Add. Annotations**.—*Consd. Werrin v. United National Collieries* (1926), 20 B. W. C. C. 166. *Refd. Bradshaw v. Richardsons, Westgarth & Co.* (1931), 24 B. W. C. C. 64.
- 2799a. ———.**—*An operative baker had suffered for some years from a right inguinal hernia for which he wore a truss. On May 26, 1936, he slipped & fell whilst at his work & sustained a left inguinal hernia. On July 5, 1936, he was operated on for both hernias. He received compensation on the basis of total incapacity until Oct. 1936, when he resumed his old work at his old rate of wages of £3 15s. 6d. a week. Towards the end of Mar. 1937, the employer agreed that the workman was entitled to a declaration of liability & a memorandum of the agreement was drawn up with a view to its being recorded, but it was not in fact recorded. On Mar. 27, 1937, the workman noticed that a lump had appeared in his right groin, after feeling a sudden pain while engaged in his work. This indicated that he was again suffering from a right inguinal hernia, but he continued to work until Apr. 3, 1937, when the hernia became strangulated, while he was not at work, & he underwent a second opera-*



tion. He returned to light work on June 28, 1937, at a weekly wage of £3 7s. 6d. On July 28, 1937, he claimed compensation at the rate of 30s. a week from Apr. 3 to June 28, 1937, & at the reduced rate of 4s. a week from June 28 onwards. He claimed on the basis of two accidents which occurred on May 26, 1936, & Mar. 27, 1937. The employer alleged that what the workman called the second accident was not an accident at all, but the gradual results of a physical weakness. The county ct. judge found that although the coming into existence on Mar. 27, 1937, of a lump might be the culmination of a gradual process, it was a particular event which happened at a particular time, that the lump was caused by his last slip on Mar. 27, & that the formation of the lump was directly connected with the subsequent strangulation which caused total incapacity. He held that the workman was therefore entitled to be paid compensation on the basis of total incapacity from Apr. 3 to June 28, 1937, for an accident which occurred on Mar. 27, 1937, but was not entitled to any compensation thereafter because all the medical witnesses agreed that the workman ought never to have returned to his full work on Oct. 26, 1936, & that the only effect of the second accident was to call the attention of the workman to his natural weakness or tendency to hernia. In fact the workman had recognised this by being content to take lighter work at less wages. The workman appealed:—*Held*: there was evidence to support the findings & no misdirection. Appeal dismissed. Leave to appeal to House of Lords refused.—*ANSELL v. ENFIELD HIGHWAY CO-OPERATIVE ASSOCN., LTD.* (1938), 31 B. W. C. C. 150, C. A.

**2799b.** ———.]—A workman was employed in pottery works as a biscuit placer, work which involved carrying heavy utensils known as saggars & climbing ladders to place the saggars at a proper height in the kiln. In May, 1936, he fell into a hole in the works & fractured his right ankle. After receiving compensation for total incapacity he returned to lighter work on Jan. 14, 1937, receiving reduced compensation in addition to his wages. On the evening of Jan. 25, 1937, he was carrying along a street for his own purposes a wireless accumulator weighing 3 to 4 lb. when, there being no obstruction or irregularity where he was walking, he fell & damaged his spine & once more became totally incapacitated. The workman applied for a review & increase of the weekly payments on the ground that the fall in the street was caused by the original accident. The employers while admitting their liability to pay 10s. 6d. a week for partial incapacity, contended that the fall in the street was a *novus actus interveniens*. The county ct. judge gave as his reasons for dismissing the application for review: "His former employers gave him lighter work at first, as is often done, & admitted a liability of 10s. 6d. a week not on the ground of an fresh injury to the ankle, for there was none, but solely on the footing that he was not after his return to work earning his usual wages. . . . I preferred the opinion of [the employer's doctor] to that of [the workman's doctor] largely on the ground that no one alleged any

injury or weakness of the ankle joint owing to this second accident. I thought on the case of *Noden v. Galloways, Ltd.*, [1912] 1 K. B. 46; 34 Digest 347, 2797, this was a second accident & I was not satisfied that it was a *sequela* of the first. Award for 10s. 6d. a week." The workman appealed:—*Held*: the county ct. judge had failed to direct himself properly to the issue of fact which he had to decide, viz. Was the second accident in any way caused by the first accident? Appeal allowed. Case remitted for new trial by another judge.—*PEDLEY v. DAVISON & SON, LTD.* (1937), 30 B. W. C. C. 323, C. A.

**2801a.** Existing total incapacity from first accident.]—A workman, while totally incapacitated as the result of an accident arising out of & in the course of his employment, was certified by the certifying surgeon to be suffering from miners' nystagmus & disabled from earning full wages, the date of the certificate being under sect. 43 of 1925 Act the date of the disablement. In proceedings brought by the workman for compensation for total incapacity from the miners' nystagmus while in receipt of compensation for the total incapacity resulting from the accident:—*Held*: the workman was not entitled to any compensation in respect of the nystagmus while the total incapacity from the previous accident continued, as the disease did not result in any loss or diminution of earning capacity; but a declaration of liability should be made so as to enable the workman to obtain compensation in respect of the nystagmus as soon as the total incapacity from the previous accident ceased.—*WHEATLEY v. LAMPTON, HETTON & JOICEY COLLIERIES, LTD.*, [1937] 2 K. B. 426; [1937] 2 All E. R. 756; 106 L. J. K. B. 667; 156 L. T. 490; 53 T. L. R. 721; 81 Sol. Jo. 418; 30 B. W. C. C. 171, C. A.

**2803.** *Add. Annotations*:—*Consd.* *Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw* (1927), 96 L. J. K. B. 664. *Distd.* *Ruddy v. L. M. & S. Ry.* (1929), 22 B. W. C. C. 138. *Consd.* *Birch Bros. v. Brown*, [1930] 2 K. B. 225; *McCann v. Scottish Co-operative Laundry Assocn., Ltd.*, [1936] 1 All E. R. 475; *Drury v. Appleby Iron Co.* (1935), 28 B. W. C. C. 483. *Refd.* *Williams v. Cwmaman Coal Co.* (1927), 20 B. W. C. C. 476; *Lyon v. Taylor Bros.* (1928), 21 B. W. C. C. 415; *White v. London & North-Eastern Ry. Co.* (1929), 22 B. W. C. C. 613; *Bacon v. Wills & Sons, Ltd.*, [1933] 2 K. B. 493; *Thompson v. London & North Eastern Ry. Co.*, [1935] 2 K. B. 90; *Old v. Furness, Withy & Co.* (1934), 27 B. W. C. C. 266.

**2809a.** Refusal of offer by medical adviser.]—A workman, who had been injured in two accidents, was advised by his medical adviser to undergo an operation. He refused so to do, & it was held that such refusal amounted to unreasonable conduct. On appeal it was contended that, for a refusal to constitute unreasonable conduct, it must be a refusal of an offer made by an employer:—*Held*: in considering whether such refusal constituted unreasonable conduct, it is irrelevant whether a suggestion of some surgical operation or treatment comes from an employer



or from a workman's own medical adviser.—*PURVIS v. GOOLE STEAM SHIPPING (LONDON, MIDLAND & SCOTTISH RAILWAY)*, [1937] 4 All E. R. 345; 81 Sol. Jo. 1001; 30 B. W. C. C. 330, C. A.

2811. *Add. Annotation*:—*Refd. Fyfe v. Fife Coal Co.* (1926), 20 B. W. C. C. 548.

2811a. ———.]—Where an award was made terminating weekly payments, on the grounds that refusal to undergo certain treatment was unreasonable, & that the *onus* lay on the workman to prove that the proposed operation would not have cured him & that he was reasonable in refusing the operation:—*Held*: the *onus* lay on the employers to show that the workman would have recovered if he had undergone the treatment.—*INDIA RUBBER, GUTTA PERCHA & TELEGRAPH WORKS CO., LTD. v. CHAPMAN* (1926), 20 B. W. C. C. 184, C. A.

*Annotations*:—*Refd. Ramsay v. Gramophone Co.*, [1936] 2 All E. R. 752; *Purvis v. Goole Steam Shipping (London, Midland & Scottish Railway)*, [1937] 4 All E. R. 345.

2815. *Add. Annotations*:—*Refd. Cauldon Potteries v. Johnson* (1926), 20 B. W. C. C. 42; *Wilson v. Summerlee Iron Co.* (1932), 25 B. W. C. C. Supp. 115.

2815a. ———.]—A dock labourer, sixty-two years old, was injured by an accident arising out of & in the course of his employment. Immediately after the accident he underwent an operation for strangulated hernia. As a result of the operation he suffered from an inguinal hernia. The employer alleged that if he underwent an operation for the inguinal hernia he would be cured & fit for work. After serving a notice under sect. 12 the employer reduced the compensation. The workman commenced arbn. proceedings. At the hearing two expert witnesses advised the operation, but the workman's panel doctor, who had never operated for hernia, was against the operation. The county ct. judge found that the workman was fit to undergo the operation which would probably result in a radical cure & therefore there must be strong reasons to justify a refusal. The judge then said that he held that, on the whole, it was not reasonable that the workman should be required to undergo the operation or lose his compensation. He therefore made his award for the workman. The employer appealed:—*Held*: the advice of the panel doctor was not conclusive on reasonableness, & the county ct. judge had not decided the question of fact, whether the workman's conduct was reasonable or unreasonable.—*ZIKKING v. SWIFT (THOMAS & CO., LTD.)* (1933), 26 B. W. C. C. 53, C. A.

*Annotation*:—*Refd. Shelton Iron, Steel & Coal Co. v. Franklin* (1934), 27 B. W. C. C. 140.

2815b. ———.]—A workman in Sept. 1930, was carrying pig iron when he slipped & strained his right groin, with the result that a femoral hernia supervened. He was then forty-two years old & had for several years been treated by his own doctor for chronic bronchitis. This doctor advised him to have an operation, but after the operation had been performed by a surgeon the hernia still remained, & it was thought by the workman's doctor that the coughing due to the bronchitis had

“undone the operation.” He was supplied with a truss by the employer, who also, in Dec. 1930, gave him very light work—white-washing—paying him £2 a week as wages & 15s. 6d. a week as compensation for partial incapacity. The employer in May, 1933, suggested that if a second operation was performed he would be cured. On the advice of his own doctor he refused. The employer applied for a review of the weekly payments on the ground that the workman was bound to submit to reasonable remedial measures. Two medical men gave evidence at the arbitration that there would be no danger in having a second operation & that the result should be successful. The only evidence called by the workman was his own doctor, who said that with his experience of the bronchitis & the result of the first operation he must disagree. The county ct. judge held that the workman was not unreasonable in refusing to undergo the second operation on the advice of his own doctor, bearing in mind that he was a sufferer from chronic bronchitis, & that it was common knowledge that coughing after an operation for hernia was very dangerous. The employer appealed:—*Held*: the reasonableness or otherwise of a workman in refusing to undergo an operation was a question of fact for the county ct. judge. There was evidence to support the finding & no misdirection.—*SHELTON IRON, STEEL & COAL CO., LTD. v. FRANKLIN* (1934), 27 B. W. C. C. 140, C. A.

2817. *Add. Annotation*:—*Refd. Zikking v. Swift (Thomas) & Co.* (1933), 26 B. W. C. C. 53.

2820a. *Inability to do former work even if operation successful.*—A scaffolder sustained a wound in the middle finger of his right hand which became septic, thus necessitating its removal. The operating surgeon at first removed the index finger by mistake: the middle finger was removed subsequently. Eighteen months later the employer succeeded in proceedings for a review in obtaining a reduction of the weekly payments. The county ct. judge, however, found that the man had a tender nerve ending on the stump of the middle finger & “as far as the results of the injury caused by the accident are concerned” his earning capacity was only 25s. a week. The evidence went to show that an operation on that finger would probably cure the sensitive condition. The workman refused to undergo this operation on the ground he could not do the work of a scaffolder without his index finger. The employers applied by way of review to terminate the weekly payments. The county ct. judge held that the workman's refusal was reasonable, because, having lost the first finger, it was useless to have the operation. He consequently refused to terminate the weekly payment. The employer appealed:—*Held*: whereas in the first proceedings the county ct. judge has correctly excluded from consideration the effect of the loss of the index finger, he had failed to do so in the second proceedings, & therefore the case must go back to him to consider whether the refusal to undergo the operation would be reasonable or not, if the workman had not lost his first finger. Appeal allowed.—*MOWLEM (JOHN) & CO. v. MUDGE* (1934), 27 B. W. C. C. 450, C. A.

**Whether refusal unreasonable.]**—The question whether the refusal of a workman to undergo treatment is reasonable or unreasonable, is one of fact.—*FYFE v. FIFE COAL CO., LTD.* (1927), 138 L. T. 65; 20 B. W. C. C. 548, H. L.

*Annotation*:—*Refd.* *Wilson v. Summerlee Iron Co.* (1932), 25 B. W. C. C. Supp. 115.

**2823a.**

—*]*—A workman strained the muscles of his back in the course of his employment & received compensation for five months. He also suffered from septic teeth. Acting on their doctor's certificate his employers stopped compensation & the workman filed a request for arbn. The employers answered that, if the workman was still incapacitated, the incapacity was due to natural causes. The workman's doctor had advised him to have his teeth out, as their condition retarded his recovery, but he had refused to have this done, & at the hearing the county ct. judge was advised by the medical assessor that the condition of the teeth had perpetuated the injury. The county ct. judge found that the workman had acted unreasonably in not having his teeth removed, as by that means he would probably have fully recovered by the time that the employers had stopped compensation. He found "that appt. had failed to prove that his continued incapacity was due solely to the accident." He made an award of a penny a week, allowing the workman the costs of the arbn. The workman appealed from the award of a penny a week, & the employers cross-appealed on the question of costs:—*Held*: the county ct. judge was justified in awarding only a penny a week, because he found that he could not otherwise assess the quantum of incapacity due to the accident so long as the effect of the septic teeth remained, also the award as to costs could not be disturbed because he had found that there was some incapacity due to the accident.

—*RUDDY v. LONDON, MIDLAND & SCOTTISH Ry.* (1929), 22 B. W. C. C. 138, C. A.

*Annotations*:—*Fold.* *Watts, Watts & Co. v. Hole* (1930), 23 B. W. C. C. 119. *Refd.* *Sedgwick v. Leeds Forge Co.* (1930), 23 B. W. C. C. 144.

**2831. Add. Annotations:**—*Consd.* *Church v. Dugdale & Adams, Ltd.* (1929), 22 B. W. C. C. 444; *Dixon v. Sutton Heath & Lea Green Colliery, Ltd.* (1929), 22 B. W. C. C. 521. *Refd.* *Johnson v. Warren (F.) & Co.* (1928), 21 B. W. C. C. 411.

**2831a.** —*]*—A miner received an injury to the spine, which caused paralysis of the lower part of the body. An operation was unsuccessful, & the injury was classed as incurable. The miner was taken to his home & suffered great pain. He committed suicide

by cutting his femoral artery, & left a letter addressed to his wife explaining his act. The county ct. judge held the man was not insane when he committed suicide, & death had not resulted from the injury:—*Held*: it was a question of fact, as to which there was evidence to support the finding, & there was no misdirection.—*BEVAN v. LANCASTERS STEAM COAL COLLIERIES* (1927), 20 B. W. C. C. 241, C. A.

*Annotation*:—*Consd.* *Church v. Dugdale & Adams, Ltd.* (1929), 22 B. W. C. C. 444.

**2833. Add. Annotations:**—*As to (2)* *Refd.* *Bevan v. Lancasters Steam Coal Collieries* (1927), 20 B. W. C. C. 241; *Smith v. Cornhill Insurance Co.*, [1938] 3 All E. R. 145. *Generally, Consd.* *Johnson v. Warren (F.) & Co.* (1928), 21 B. W. C. C. 411; *Church v. Dugdale & Adams, Ltd.* (1929), 22 B. W. C. C. 444; *Dixon v. Sutton Heath & Lea Green Colliery, Ltd.* (1929), 22 B. W. C. C. 521.

**2836. Add. Annotation:**—*Refd.* *Johnson v. Warren (F.) & Co.* (1928), 21 B. W. C. C. 411.

**2836a.** —*]*—A workman while leading a horse was badly injured by the animal falling on him. He did no work for two years, & then committed suicide. He had received medical attention throughout the two years. On a claim made by the widow for compensation, the county ct. judge found that the workman was not insane when he committed suicide, & that death did not result from the injury, & made an award in favour of the employers. The widow appealed:—*Held*: there was evidence to support the finding of fact & no misdirection.—*JOHNSON v. WARREN (F.) & Co.* (1928), 21 B. W. C. C. 411, C. A.

*Annotations*:—*Refd.* *Church v. Dugdale & Adams, Ltd.* (1929), 22 B. W. C. C. 444; *Dixon v. Sutton Heath & Lea Green Colliery, Ltd.* (1929), 22 B. W. C. C. 521.

**2836b.** —*]*—A baker suffered from dermatitis, which was pronounced incurable. He became depressed & it was said, had delusions, one of which was that, by receiving weekly compensation, he was robbing his employers. Six months after being certified as suffering from dermatitis, he committed suicide. On a claim for compensation by his widow, as dependant, the county ct. judge made an award in favour of the employers on the ground that death was not due to causes directly attributable to the accident:—*Held*: the award of the county ct. judge amounted to a finding of fact that there was no insanity. The finding was supported by the evidence, & there was no misdirection.—*CHURCH v. DUGDALE & ADAMS, LTD.* (1929), 22 B. W. C. C. 444, C. A.

*Annotations*:—*Consd.* *Bradshaw v. Bickerstaffe Collieries* (1931), 24 B. W. C. C. 451. *Refd.* *Dixon v. Sutton Heath & Lea Green Colliery, Ltd.* (No. 2) (1930), 23 B. W. C. C. 135.

#### PART XIV. SECT. 6, SUB-SECT. 7.—D.

**2822 ii.** —*]*—A repaiirer in a colliery sustained injury to his back arising out of & in the course of his employment. After a period of compensation for total incapacity he was certified by a medical referee fit for suitable light work. Work of that character having been provided by the employers, the workman worked at it for a few hours, left & did not return. Thereafter a second remit was made to the medical referee who certified the workman unfit for any work owing to the neurasthenia caused partly by the accident & partly by the refusal of the workman to co-operate by continuing

to attempt light work. After the issue of that certificate the workman applied for an award of compensation for total incapacity. He averred & offered to prove that he had done everything reasonably practicable towards assisting his recovery, & that his failure to continue the light work was reasonable & due to no fault of his. The employers pleaded that the workman's petition for compensation for total incapacity was irrelevant, & should be dismissed, but offered 13s. per week as partial compensation. The arbitrator repelled the employer's plea, held that the workman was entitled only to partial compensation, & before further

answer remitted the case back to the medical referee to state to what extent the incapacity was due to the accident. The workman appealed:—*Held*: the arbitrator was wrong in holding that on the medical certificate he was bound to find that the workman was only partially incapacitated by the accident, as the question of the reasonableness of the workman's failure to co-operate by continuing light work was a question of fact for him & not a medical question for the referee. The remit to the medical referee was therefore premature.—*WILSON v. NIDDRIE & BENHAR COAL CO., LTD.*, [1934] S. C. 364; 27 B. W. C. C. Supp. 19.—*SCOT.*

**2836c.** —.]—A miner was certified in Jan. 1926, as suffering from miner's nystagmus. He had been a cheerful man before the onset of the disease, but gradually became depressed & ultimately showed signs of marked nervous & mental derangement. He walked unsteadily & failed to recognise his friends. On the evening of Oct. 12, 1928, he attended on the certifying surgeon & was afterwards put on a tram, his home being not far from the tram terminus. A friend found him at a spot about 400 yards from the tram terminus & about 400 yards from his home, crawling on his hands & knees. The friend led him to a fence which led to his house. His body was subsequently found in a canal 2½ miles from where his friend had left him. The widow claimed compensation on the grounds that her husband committed suicide, that he committed suicide while he was insane, & that the insanity was a direct effect of the nystagmus. The county ct. judge made an award in her favour, in which he said, "I do not say he was insane, but that the suicide was due to mental derangement." The employers appealed:—*Held*: there was evidence to support the findings & no misdirection.—*DIXON v. SUTTON HEATH & LEA GREEN COLLIERY, LTD. (No. 2) (1930), 23 B. W. C. C. 135, C. A.*

*Annotations*:—*Consd. Bradshaw v. Bickerstaffe Collieries (1931), 24 B. W. C. C. 451. Refd. Smith v. Cornhill Insurance Co., [1938] 3 All E. R. 145.*

**2836d.** —.]—A miner was certified on Jan. 12, 1931, to be suffering from nystagmus. He complained of pains in the head & had been depressed for several months. On Feb. 21, 1931, he was found dead, having committed suicide by cutting his throat. His dependants made a claim for compensation. The county ct. judge, who sat with a medical assessor, found that the depression was due to the nystagmus & that the suicide was due to the depression, but held that there was no evidence of insanity which would entitle him to attribute the suicide to the accident. He therefore made his award in favour of the employer. The dependants appealed:—*Held*: the evidence supported the findings, & there was no misdirection.—*BRADSHAW v. BICKERSTAFFE COLLIERIES (1931), 24 B. W. C. C. 451, C. A.*

**2839.** *Add. Annotations*:—*Consd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw (1927), 96 L. J. K. B. 664; North's Navigation Co. (1889), Ltd. v. Batten (1933), 150 L. T. 186. Refd. McCann v. Scottish Co-operative Laundry Assn., Ltd., [1936] 1 All E. R. 475.*

**2839a.** —.]—Applt., on Nov. 29, 1923, met with an accident, which arose out of & in the course of his employment by resps., & thereby his right thigh was fractured & there was a shortening of his leg & stiffness of his right knee; his right arm had also subsequently to be amputated. He received compensation for total incapacity from resps., who accepted responsibility, up to Nov. 18, 1931, when he was convicted of a criminal offence & sentenced to twenty months' imprisonment, whereupon the weekly compensation was stopped. On June 28, 1933, on an application for a review of the weekly payments made by resps. the county ct. judge reduced the compensation to 10s.

a week as from Nov. 18, 1931. Resps., in their application, asked that there should be a diminution or termination of the weekly payments as from Nov. 18, 1931, on the ground that any incapacity to perform work & earn wages as from that date had not been the result of his injury but was due to causes unconnected therewith. The evidence of a doctor at the hearing was that applt. was capable of doing certain work such as stone dusting, & that he had been in that condition for many years. Applt. was released from prison in Apr. 1933:—*Held*: there being no evidence or finding that applt.'s recovery began at the time he was imprisoned, there was not sufficient justification for holding that the incapacity changed on Nov. 18, 1931; & the county ct. judge was not justified in finding that applt. was partially incapacitated. A workman did not become disentitled to compensation because, while incapacitated, he was imprisoned.—*NORTH'S NAVIGATION CO. (1889), LTD. v. BATTEN (1933), 150 L. T. 186; 26 B. W. C. C. 525, C. A.*

**2840.** *Add. Annotations*:—*Refd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw (1927), 96 L. J. K. B. 664; McCann v. Scottish Co-operative Laundry Assn., Ltd., [1936] 1 All E. R. 475.*

**2849a.** — Error in entry—Verbal notice correctly given.]—The workman, a miner, met with an accident arising out of & in the course of his employment with applt. He went into his employers' ambulance room & received treatment. An entry was made in the accident book describing his injury as an injury to the left knee. The injury was in fact to the right knee, & the workman subsequently developed tubercular trouble in his right knee. In answer to a claim for compensation, the employers relied on the entry in the accident book & said that they had had no notice of the injury to the right knee, in accordance with Workmen's Compensation Act, 1925 (c. 84), s. 14. The county ct. judge found on the evidence that the workman's right knee was in fact injured by the accident & that the entry in the accident book was an error. He also held that the entry in the accident book referred to the accident & that notice of the accident was given orally by the workman in the ambulance room, & that that notice complied with sect. 14 (2); that the incorrect entry was no bar to the claim for compensation, & that the employers were not prejudiced, & he made an award in favour of the workman:—*Held*: the employers were not prejudiced by the incorrect entry in the accident book, as notice of the accident had been properly given to them in compliance with sect. 14. Therefore the award of the county ct. judge must be affirmed.—*CROUCH v. APPELBY IRON CO., LTD. (1930), 143 L. T. 264; 23 B. W. C. C. 69, C. A.*

**2849b.** —.]—The workman was employed by resps. as an iron-moulder, & on Oct. 12, 1932, whilst so employed, hit his leg against a cast-iron moulding box. He made an exclamation & held his leg, & left his work for a short time, then finished his shift, & he worked the next two days complaining of pain in his leg & limping. The

works were then closed down for nineteen days, during which his leg became septic, & he went into hospital. When the works opened again, notice of the accident was given, & entered in the accident book kept by resps., & the entry was witnessed by a fellow workman. The workman died as a result of the accident. The widow, as a dependant on the earnings of deceased workman, claimed compensation. The county ct. judge held that the accident arose out of & in the course of the employment, the death being accelerated by the condition of the leg, but refused the claim on the ground that the notice of the accident was not given as soon as practicable. He also held that the register for the entry of accidents kept by the employers referred to in sect. 15 (2) (c) of 1925 Act was synonymous with the book in the prescribed form mentioned in sect. 15 (3) of the Act:—*Held*: (1) there was evidence upon which the county ct. judge could conclude that the notice of the accident was not given as soon as practicable, for the workman had not complied with the requirements of sect. 14 (1), or its proviso, or with sect. 15 (3) of the Act of 1925, & the workman could not rely on sect. 15 (2) (c), as that referred to a register, the purpose of which was for the employers themselves to make a note of any accident; (2) the register kept in the works of an employer for the entry by them of accidents mentioned in sect. 15 (2) (c), was not the same as the book in the prescribed form referred to in sect. 15 (3).—*THOMAS v BAGLAN ENGINEERING CO. (1919), LTD (1934), 151 L. T. 26; 27 B. W. C. C. 81, C. A.*

**2849c. Contents.—All injuries need not be specified.]**

—The mere fact that notice has to be given does not imply that all injuries must be specified.

A workman gave notice of an accident, in which he complained of injury to his ribs, & his employers paid him compensation. He returned to work after two months. He then began to suffer with his hip, & eventually had to cease work on that account. His employers resisted a second claim for compensation, on the ground that no injury to the hip was specified in the notice of the accident. The county ct. judge found that the injury to the hip was due to the original accident, that the employers had not been prejudiced by any failure to mention the hip in the notice of accident, as they had paid compensation to the workman after an examination by their own doctor:—*Held*: there was evidence to support the findings, & no misdirection.—*WILES v. ELLERMAN'S WILSON LINE (1928), 21 B. W. C. C. 194, C. A.*

**2855. Add. Annotations:—***Consd. Evans v. Pen-Maen-Mawr & Welsh Granite Co. (1931), 24 B. W. C. C. 443. Refd. Ince v. Pulling & Wolsey, Ltd. (1935), 28 B. W. C. C. 154.*

**2855a. — — —.]**—A miner, on July 1, 1932, bumped his head on a beam of timber causing a bruise & some bleeding. On his return home his head ached. The mine was shut until July 12, but the workman was unable to resume work. On July 18 he went to hospital & was found to be suffering from

paralysis of the right side. On July 25 his son gave notice of the accident, & on July 30 the workman died. The county ct. judge on a claim by the widow for compensation found that death resulted from an injury by accident arising out of & in the course of the employment, & held that notice of the accident was given as soon as practicable within sect. 14 (1), & made his award for the widow. The employers appealed:—*Held*: there was evidence to support the findings & no misdirection.—*BROOKS v. WEST LEIGH COLLIERY CO., LTD. (1933), 26 B. W. C. C. 130, C. A.*

**2855b. — — —.]**—A miner sustained an injury to his eye from a bit of coal on Wed. Mar. 9, 1932. A mate removed the bit of coal from his eye & he continued at work, the pain stopping in half an hour. On ceasing work he was unable to find a deputy to whom he could give notice of the accident & had no time to give notice at the ambulance station as he had to catch the last bus to his home. He worked on the Thurs. & Fri., & on Sun. pain began to develop in his eye. He saw his panel doctor & had to go to the infirmary on Mar. 17, where he remained for five weeks, undergoing three operations. On Mar. 18 he sent for a friend to ask him to give notice of his injury, but the friend could not come to see him until Mar. 20. Notice was given by his friend on Mar. 21. When he came out of the infirmary the workman was practically a one-eyed man. On an application for compensation the county ct. judge held that the workman had given notice of the accident as soon as practicable, & that in any case the employer was not prejudiced in his defence. He then went on to say that he was satisfied on the evidence & found as facts (a) that but for the accident the workman would still be employed at the mine; (b) that the workman was practically one-eyed; (c) that the disfigurement in the eye was so observable that it must prevent him from obtaining light work in the labour market, & made his award for the workman on the basis of total incapacity. No evidence was called as to what steps, if any, the workman had taken to obtain work in the mine or on the surface or elsewhere. The employer appealed:—*Held*: (1) there was evidence on which the county ct. judge could hold that notice had been given as soon as practicable; (2) there was no evidence on which the county ct. judge could make finding (a) above, & therefore nothing to support an award of total incapacity under sect. 9 (4) (i.), as amended by the 1931 Act. Further, there was no evidence on which the county ct. judge could make finding (c) above, & it was necessary for him to be satisfied by evidence that the workman had taken all reasonable steps to obtain employment & he was not entitled to assume that no work would have been available if he had taken all such reasonable steps.

*Per ROMER, L.J.*: I do not doubt that for the purpose of estimating the value of evidence given before a county ct. judge & for the purpose of drawing inferences from

the evidence brought before him a county ct. judge is entitled to use his local knowledge; but I emphatically dissent from the proposition that he is entitled to substitute that knowledge for evidence when evidence is available.—OWENS v. LLAY MAIN COLLIERIES, LTD. (1932), 25 B. W. C. C. 573, C. A.

*Annotations*:—*Reid. Hughes v. Penmaenmawr & Welsh Granite Co.* (1933), 148 L. T. 485; *Williams v. Penmaenmawr & Welsh Granite Co.* (1933), 148 L. T. 485.

**2855c.** —.]—A bus driver strained himself cranking up the engine of his bus & felt strained & sick that day when driving. At the hearing of a claim by him for compensation he alleged that on the next day he telephoned to his employer's garage & told the manager that the doctor said he had strained his heart & that he would be away six weeks, & that he must have done it winding the bus the night before. The manager gave evidence that the workman told him on the telephone that he would not be able to work that day, that he had been to the doctor & had to go to bed & that he did not know what was the matter. Fourteen days later the workman's daughter wrote to the manager that her father had strained his heart winding the bus on Nov. 2. The county ct. judge held that the workman had given notice of the accident as soon as practicable. The employer appealed:—*Held*: there was evidence upon which the county ct. judge could come to the conclusion that notice was given as soon as practicable.—*BROCKWAY v. EAST KENT ROAD CAR CO., LTD.* (1934), 27 B. W. C. C. 91, C. A.

**2856.** *Add. Annotations*:—*Consd. Evans v. Penmaen-Mawr & Welsh Granite Co.* (1931), 24 B. W. C. C. 443. *Refd. Lomas v. Park Hall Colliery Co.* (1935), 28 B. W. C. C. 313.

**2856a.** —.]—A workman cut his finger slightly. He continued at work for about a month, when his thumb became swollen & he had to go to the infirmary, where a week later he died of blood-poisoning. Notice of the accident was not given to the employers until a month after the workman's death. The county ct. judge found that notice of the accident had not been given as soon as practicable, & that the employers were prejudiced by the want of notice:—*Held*: it was a question of fact, as to which there was evidence to support the finding.—*EVANS v. SIMPSON (JAMES) & SON* (1926), 19 B. W. C. C. 407, C. A.

**2856b.** —.]—On Jan. 31, 1927, a workman suffered an accident to his right thumb. He left work as a result of the accident, & a week later, on Feb. 7, notice of the accident was given to the employers on his behalf. The county ct. judge found that the notice was not given as soon as practicable after the accident, but he also found that the employers were not prejudiced in their defence by such want of notice:—*Held*: there was evidence to support the findings, & no misdirection.—*HINKS v. RISCOE (JAMES) & SONS* (1927), 96 L. J. K. B. 1068; 20 B. W. C. C. 558, C. A.

**2857.** *Add. Annotations*:—*Reid. Evans v. Penmaen-Mawr & Welsh Granite Co.* (1931), 24 B. W. C. C. 443; *Ellison v. Calvert & Heald* (1935), 28 B. W. C. C. 371.

**2865a.**

—.]—A workman was injured by a fall of coal on his right knee in Feb. 1931, while working a compressed air drill. He reported the accident to his overman, whose duty it was to report to the fireman, who in his turn should have entered the accident in the accident book. It was not in fact so entered. The workman stated that he could no longer hold the drill with his knees & was in consequence put on light work at full wages. Except for a short absence he continued at work until June, 1932, when he had to give up work. His own doctor was of the opinion that he was suffering from traumatic arthritis, but he was later certified by a certifying surgeon as suffering from "beat knee," being an industrial disease within the Act. The medical referee allowed an appeal from this certificate & certified that the workman was suffering from arthritis. The workman received National Health benefit until Oct. 1933, when he claimed compensation on the ground that he was incapacitated by reason of the accident in Feb. 1931. The employer resisted the claim on the grounds that no notice had been given of the accident & that the claim was out of time. The county ct. judge held that the notice to the overman was sufficient notice to the employer, & that in his findings on fact there was reasonable cause for delay in making the claim. The employer appealed:—*Held*: there was evidence to support the findings & no misdirection.—*CARTLEDGE v. SHELTON IRON, STEEL & COAL CO., LTD.* (1934), 27 B. W. C. C. 136, C. A.

**2876a.** —.]—A workman alleged that on Mar. 5, 1935, he was loading teak boards when his foot slipped & a board struck him in the abdomen. On Mar. 7 he complained of pain to his wife. On Mar. 8 he ceased work & went to bed. On Mar. 11 he was visited by his doctor. On Mar. 19 a swelling appeared in the neighbourhood of the spleen, & a second doctor was called in. An operation was performed on the swelling by a third doctor on Apr. 5, but a thorough examination was not made. On the same day notice of the accident was for the first time given to the employer. All three doctors thought the swelling to be a hæmatoma or collection of blood caused by the blow. The workman's condition having deteriorated, he was on Sept. 16 examined jointly by his own doctors & a doctor representing the employer. This was the first time that a doctor representing the employer had examined the workman. The employer's doctor took the view that the workman was dying of carcinoma of the descending colon, which had probably begun about six months previously & had eaten through the bowel wall & caused an abscess. He was also of opinion that the blow had not had any effect on the carcinoma or been the cause of the approaching death. Shortly afterwards the workman died, & a post mortem examination was carried out. This examination confirmed the employer's doctor's theory of the cause of death, but did not make it possible to prove whether the swelling had been caused by a hæmatoma due to the blow or by an abscess due to the cancer. After the post-mortem examination, the workman's doctors formed the view that the blow had accelerated the

growth of the cancer. On a claim for compensation by the widow of the deceased workman, the employer's doctor said that he had been prejudiced by delay in examining the workman, & the county ct. judge, while accepting the view of the workman's doctors, found as a fact that the employer had been prejudiced in his defence by the want of notice of the accident, & made his award for the employer. The widow appealed:—*Held*: there was evidence on which the county ct. judge could find that the employer had been prejudiced in his defence by the want of notice & there was no misdirection. Appeal dismissed.—*BLACKWELL v. ASHBE & SONS, LTD.* (1936), 29 B. W. C. 153, C. A.

**2876b.** —.—.]—On Nov. 20, 1936, a milk salesman while handling wire crates sustained bruises on two fingers & an abrasion on one finger of the left hand. His wife washed the wound, treated it with iodine & kept it covered up. He continued at work although in pain. On Nov. 27, he suffered a considerable increase of pain & was heard groaning in the night. His doctor was then called in & advised hot fomentations. On Dec. 8, he complained of a red, inflamed lump in his left armpit, & his wife applied hot fomentations to the lump. He still remained at work until Dec. 10, when he collapsed & was taken to hospital. On Dec. 20 he died of septicæmia resulting from the accident. Notice of the accident was first given to his employer on Dec. 22. His widow claimed compensation. At the arbn. the employer called no evidence. The county ct. judge found that the accident was not a trivial one & that it was practicable to have given notice on the day of the accident. He held on the facts that there was no reasonable cause for want of notice of the accident after Nov. 27, & refused to hold that the employer had not been prejudiced in his defence. The widow appealed:—*Held*: the county ct. judge was right in law in refusing to draw the inference from the evidence before him that the employer had not been prejudiced.—*HOLBOROUGH v. UNITED DAIRIES (LONDON), LTD.* (1937), 30 B. W. C. C. 372, C. A.

**2885a.** —.—.]—*GILL v. PERROTT*, No. 2668a, *ante*.

**2887.** *Add. Annotation*:—*Refd.* *White v. Leicestershire Colliery & Pipe Co.* (1931), 24 B. W. C. C. 128.

**890a.** —.—.]—When notice of an accident has not been given as soon as practicable after the accident, it is a question of fact for the county ct. judge whether the employer is or is not prejudiced in his defence by the want of such notice, & if there was evidence upon which the judge could so decide, the ct. will not interfere.—*DERRY v. GREAT WESTERN RY. Co.* (1926), 19 B. W. C. C. 405, C. A.

**2890b.** —.—.]—*EVANS v. SIMPSON (JAMES) & SON*, No. 2856a, *ante*.

**2890c.** —.—.]—*HINKS v. RISCOE (JAMES) & SONS*, No. 2856b, *ante*.

**2890d.** —.—.]—*FLETCHER v. SINCLAIR IRON Co., LTD.*, No. 2668b, *ante*.

**2900a.** —.—.]—*Opportunity to examine workman lost.*—On Nov. 29, 1929, applt. suffered some hurt to his right arm while in the

employment of resps., but with assistance worked till the end of the shift. He went home & lay on a sofa, which he was unable to leave until he was removed to hospital on Dec. 9, 1929. He remained in hospital until May, 1930, where he was operated on nine times & became totally incapacitated. On July 31, 1930, he filed a request for arbn. proceedings claiming compensation under Workmen's Compensation Act, 1925. The stepfather & mother of applt. said that whilst he lay on the sofa he was not in complete possession of his mental faculties, but the panel doctor gave evidence that his mentality was not affected until the third or fourth day & his temperature was normal. The question was raised whether before the accident the applt. suffered from osteo-myelitis or whether the osteo-myelitis had developed after the injury at the seat of the injury. No notice of the injury was given to the resps. until Mar. 1930:—*Held*: (1) the only conclusion on the evidence was that resps. were prejudiced in their defence by the delay in giving notice of the injury, as they were deprived of the opportunity of obtaining medical evidence as to applt.'s condition during the first three days of his illness upon the issue whether there had been pre-accident osteo-myelitis, & it was irrelevant to consider whether the employers would have been likely to take advantage of the opportunity or not; (2) the failure to give notice earlier was not occasioned by reasonable cause. Applt., therefore, having failed to give notice of the accident as soon as practicable after the happening thereof within sect. 14 (1) of the Act, was not excused from such failure on either of those two grounds, within the meaning of clause (a) of the proviso to that sub-section.—*WHITE v. LEICESTERSHIRE COLLIERY & PIPE Co.* (1932), 101 L. J. K. B. 617; 147 L. T. 303; 25 B. W. C. C. 189, H. L.

*Annotations*:—*Consd.* *Lomas v. Park Hall Colliery Co.* (1935), 28 B. W. C. C. 313. *Refd.* *Owen v. John Baker & Bossemmer, Ltd.* (1932), 25 B. W. C. C. 339; *Blackwell v. Ashbee & Sons, Ltd.* (1936), 29 B. W. C. C. 153.

**2903.** *Add. Annotation*:—*Refd.* *Thomas v. Baglan Engineering Co. (1919), Ltd.* (1934), 151 L. T. 20.

**2912a.** & failure to hear counsel.]—An agreement made between an injured workman & employers was embodied in an award given by a county ct. judge in 1929. By this agreement the employers agreed to pay a certain sum weekly to the workman on the basis of partial incapacity. In 1930 the employers applied for a review of the weekly payments before another county ct. judge, who sat with a medical assessor. At this hearing the judge at an early stage in the case expressed the view that the material question for him to decide was the present condition of the workman, & that he was not concerned with the condition in 1929. Counsel for the workman took no objection to this expression of opinion, & did not attempt to tender evidence as to the workman's previous condition. The judge then suggested that the workman should be examined by the medical assessor, which was done, neither counsel offering any objection. On receiving the report of the assessor the



judge immediately proceeded to make an award ending the compensation on the ground that the workman had entirely recovered, without first calling on counsel to address him. No objection was taken by counsel for the workman, nor did he ask for an opportunity to address the ct. The workman appealed on the grounds (a) that the judge had refused to hear evidence as to the workman's condition in 1929, & (b) that he had given no opportunity for counsel to address him on behalf of the workman before making his award:—*Held*: counsel for the workman, having by his silence allowed the judge to think that he acquiesced in the manner in which the trial was being conducted, could not now raise objections which could, & should, have been raised in the ct. below.—*NAVY, ARMY & AIR FORCE INSTITUTES v. LINDSEY* (1930), 23 B. W. C. C. 172, C. A.

2917. *Add. Annotations*:—As to (1) *Consd.* *Piper v. De'ath Bros.* (1929), 22 B. W. C. C. 73. *Lomas v. Park Hall Colliery Co.* (1935), 28 B. W. C. C. 313. *Apld.* *Holborough v. United Dairies (London), Ltd.* (1937), 30 B. W. C. C. 372. *Refd.* *White v. Leicestershire Colliery & Pipe Co.* (1931), 24 B. W. C. C. 128; *Blackwell v. Ashbee & Sons, Ltd.* (1936), 29 B. W. C. C. 153.

2918. *Add. Annotations*:—*Consd.* *Evans v. Pen-Maen-Mawr & Welsh Granite Co.* (1931), 24 B. W. C. C. 443; *Lomas v. Park Hall Colliery Co.* (1935), 28 B. W. C. C. 313. *Apld.* *Holborough v. United Dairies (London), Ltd.* (1937), 30 B. W. C. C. 372. *Refd.* *Blackwell v. Ashbee & Sons, Ltd.* (1936), 29 B. W. C. C. 153.

2921. *Add. Annotations*:—*Refd.* *Drewitt v. Britannic Assee.* (1927), 137 L. T. 511; *Soyer v. Johnson, Matthey* (1927), 96 L. J. K. B. 1011; *Owen v. John Baker & Bessemer, Ltd.* (1932), 25 B. W. C. C. 339.

2925. *Add. Annotation*:—*Refd.* *Brown v. Aveling & Porter* (1929), 22 B. W. C. C. 165.

2925a. — *Erroneous entry in accident book as to limb injured—Verbal notice correctly given.* —*CROUCH v. APPLEBY IRON CO., LTD.*, No. 2849a, *ante*.

2930. *Add. Annotations*:—*Consd.* *Drewitt v. Britannic Assee.* (1927), 137 L. T. 511; *Soyer v. Johnson, Matthey* (1927), 96 L. J. K. B. 1011. *Apld.* *Brown v. Aveling & Porter* (1929), 22 B. W. C. C. 165. *Consd.* *Halsey v. Erith Oil Works* (1930), 23 B. W. C. C. 1; *Sharrod v. Warwickshire Coal Co.* (1929), 22 B. W. C. C. 599; *Owen v. John Baker & Bessemer, Ltd.* (1932), 25 B. W. C. C. 339. *Fold.* *Bedford v. Bell & Winney, Ltd.* (1933), 26 B. W. C. C. 161. *Refd.* *Shotts Iron Co. v. Fordyce*, [1930] A. C. 503; *Templeton v. Coupe & Sons, Ltd.* (1932), 146 L. T. 518; *Phillips v. Sidebottom & Co.* (1934), 27 B. W. C. C. 382; *Ince v. Pulling & Wolsey, Ltd.* (1935), 28 B. W. C. C. 154.

2930a. — *Unreasonable conclusion as to condition.*—A warehouseman, whilst superintending the loading of lorries in Feb. 1932, was struck on his back by a lorry. After five minutes he continued his work. He went home feeling sick, but on the next day was able to do his work & continued to do it without interruption until Sept. He felt slight pain in his back until Mar., when it

got worse, but even then was only intermittent. In July he was definitely worse & could only get up from a lying position with difficulty, but was still able to do his work & earn full wages. In Sept. a swelling appeared on his back, & on Sept. 16 he first gave notice of the injury. He went to the infirmary where an abscess which had given rise to the swelling was opened. Subsequently tuberculosis supervened & he became totally incapacitated. In his evidence on the hearing of a claim for compensation the workman said that in July he thought the matter "serious & mysterious," but at that time still thought that the trouble would wear off in time. He admitted that his wife had urged him to be examined by a doctor as early as May. The county ct. judge found that it was practicable for the workman to have given notice in Mar., or certainly in May, but that the employer was not prejudiced in his defence by his failure to give notice then. He further found that there was reasonable cause for the failure to make a claim within six months, & that the workman was honest in his belief that the accident would not interfere with his work. He made his award for the workman. The employer appealed:—*Held*: the workman's attention was so drawn to his serious condition, which he knew to result from his accident, that there was no reasonable cause for not making a claim within six months.

It is not "reasonable cause" within the sect. if a man honestly arrives at a conclusion about his own physical condition at which no sensible man could arrive.—*PHILLIPS v. SIDEBOTTOM & CO., LTD.* (1934), 27 B. W. C. C. 382, C. A.

2939. *Add. Annotations*:—*Consd.* *Sharrod v. Warwickshire Coal Co.* (1929), 22 B. W. C. C. 599. *Refd.* *Evans v. Pen-Maen-Mawr & Welsh Granite Co.* (1931), 24 B. W. C. C. 443; *Ellison v. Calvert & Heald* (1935), 28 B. W. C. C. 371; *Ince v. Pulling & Wolsey, Ltd.* (1935), 28 B. W. C. C. 154.

2939a. — *]*—A professional football player was, on Mar. 16, 1935, playing for his club in a match, when, according to his account, he was kicked on the neck. He stated that he did not attach very much importance to it at the time, although he showed the place to others that evening. On Mar. 25 he played again but did not feel well and suffered occasional pain until on Apr. 26, 1935, he collapsed. His doctor was called in on Apr. 29. On May 4 he was sent to hospital suffering considerable pain. An X-ray taken in hospital at the end of May disclosed that the vertebræ of the neck were injured. Notice of the accident was given to his employer on June 1, 1935, & a claim for compensation was made on Aug. 6, 1935. Proceedings were instituted on May 4, 1937:—*Held*: there was no reasonable cause for failure to give notice of the accident between Apr. 26 & June 1. Appeal dismissed.—*HODGE v. WAKEFIELD TRINITY FOOTBALL CLUB* (1937), 30 B. W. C. C. 359, C. A.

2940. *Add. Annotation*:—*Refd.* *Ellison v. Calvert & Heald* (1935), 28 B. W. C. C. 371.

2941a. — *]*—In Jan. 1925, a miner was struck in his right eye by a piece of coal. He never went off work, but from the first



suffered pain in the eye which increased. A year after the accident a white patch appeared on the eye. In Apr. 1928, he was run over by an omnibus & prevented by that accident from working. He then began to go blind in the right eye. In Sept. 1928, he first gave notice to his employers of the accident to his eye in 1925, & subsequently claimed compensation. At the hearing medical evidence was given to the effect that the condition of the eye was consistent with the blow it received in 1925. The county ct. judge said in his award, that he was satisfied that the blindness was caused by the blow received in 1925, but that the workman never thought that the injury was in any way serious. He therefore held that, in those circumstances, there was reasonable cause for giving no notice of the accident until Sept. 1928. The employers appealed:—*Held*: there was misdirection; on the evidence the injury was serious to the man's knowledge from the first, & the workman had shown no reasonable cause for failing to give notice of the accident at the time it occurred.—*SHARROD v. WARWICKSHIRE COAL CO., LTD.* (1929), 22 B. W. C. C. 599, C. A.

2947. *Add. Annotation*:—*Consd. Sharrod v. Warwickshire Coal Co.* (1929), 22 B. W. C. C. 599.

2948a. —.]—A quarryman, while lifting a granite block on Nov. 13, 1930, cracked one of his fingers which bled. He did not visit his employer's doctor who was stationed at the quarry to attend to injuries, but tied up the finger & continued at work. He worked on Nov. 14 although in pain. On Nov. 15, a Saturday, he stayed at home & put a poultice on it. On Monday, Nov. 17, the finger was so swollen that he sent for his panel doctor who diagnosed septic poisoning & treated him accordingly. It was not disputed that the treatment prescribed by the panel doctor from Nov. 17 onwards was correct. The doctor asked the workman on Nov. 17 whether he had reported the accident & the workman replied that he had not. Notice of the accident did not reach the employer until Dec. 1 through the workman's friendly society. The employer contended that notice of the accident had not been given in accordance with the requirements of the Act, but the county ct. judge found as facts that Nov. 17 was the first practicable date on which notice could have been given as that was the first date on which the workman knew his finger was septic & did not until then realise he had received an injury for which he would be entitled to claim compensation. He further found that the employer was not prejudiced by want of notice after that date. He accordingly made his award in favour of the workman. The employer appealed:—*Held*: there was evidence to support the findings & no misdirection. Appeal dismissed.—*EVANS v. PEN-MARN-MAWR & WELSH GRANITE CO., LTD.* (1931), 24 B. W. C. C. 443, C. A.

*Annotation*:—*Reid. Brooks v. West Leigh Colliery Co.* (1933), 26 B. W. C. C. 130.

2948b. —.]—A wood machinist slipped in the course of his employment & hurt his knee. He felt some pain & that was all. He gave no notice of the accident as he did not consider it serious & continued at work. During the next three weeks the knee became in-

creasingly painful & began to swell. He consulted his panel doctor, who advised him to go to hospital for X-ray examination. He then gave notice of the accident. The examination at the hospital revealed a sarcoma on the site of the injury & the leg had to be amputated. On a claim for compensation the employers pleaded that they had been prejudiced in their defence by the want of notice. The county ct. judge held that notice of the accident had not been given as soon as practicable, but that the fact that the workman thought the accident a trivial one was reasonable cause for the delay & the employers had not been prejudiced in their defence. The employers appealed:—*Held*: the employers had been prejudiced in their defence, but on the facts the county ct. judge was right in holding that there was reasonable cause for the delay in giving notice. Appeal dismissed. Leave to appeal to the House of Lords refused.—*INCE v. PULLING & WOLSEY, LTD.* (1935), 28 B. W. C. C. 151, C. A.

2948c. —.]—A miner whilst sweeping up the floor of the colliery on Friday, Jan. 11, 1935, & picking up small pieces of sharp shale said to his mate, "I have cut my hand." He continued working that day. On Sat. the colliery was closed. He worked again on Mon. & Tues. but on Wed., Jan. 16, his thumb was swollen & painful & he was unable to go to work. A doctor was sent for on the 17th & again on the 19th & 20th, when he made incisions. On Thurs., Jan. 24, he was removed to hospital with a septic thumb & whitlow & the infection spreading, he died on Jan. 27. Notice of the accident was not given until Feb. 19. The widow claimed compensation for herself & infant children. The county ct. judge found as facts that notice might have been given on Jan. 16, but that before that date the workman thought that the injury was trivial; & that the employer was not prejudiced in his defence by the delay in giving notice within sect. 14 (1) (a) & made his award for the widow:—*Held*: the questions were ones of fact upon which there was evidence to support the findings & no misdirection.—*LOMAS v. PARK HALL COLLIERY CO., LTD.* (1935), 28 B. W. C. C. 313, C. A.

2948d. —.]—An electrician was employed in the foundations of a building in a cutting, the roof of which was so low that he had often to lie on his back with his head resting on the floor. Men who worked there had to discard their caps because of the heat due to central heating pipes. The place was dark, dusty, & dirty. When he returned home on Nov. 23, 1934, the electrician showed his wife, applt., a sore place on the back of his head, which neither regarded as serious, & he continued to work as usual. On Nov. 26 he felt so ill that his wife tried to dissuade him from going to work. He went to work but came home early & complained of pains in the chest & in the head, & in the evening his condition was serious. On the following day he remained in bed, & his doctor found that he had bronchitis in both lungs but did not connect it with the septic wound on his head. He was admitted to hospital on Dec. 7 suffering from septic meningitis & septic pneumonia, & on Dec. 10 he died from septic

meningitis. The doctor who conducted the post-mortem examination attributed the septic condition to the small wound on the back of the head as the place of entry of the poison. On Dec. 7 applt. notified the employers, resps., verbally that the illness was due to the workman having hurt his head in the cutting, but there was no evidence adduced as to such cause of the illness. Written notice was given to the employers on Jan. 22, 1935. An award of compensation was made to applt. on the ground that the balance of probability was that the small wound on the head was caused at work, & that the want of notice of the accident was occasioned by mistake or other reasonable cause:—*Held*: (1) there was evidence upon which the county ct. judge could reasonably infer that the small wound on the back of the head was caused by an injury arising out of & in the course of the employment; (2) notice of the accident was given as soon as practicable, & the failure to give earlier notice was therefore due to a reasonable cause. The fact, therefore, that the employers may have been prejudiced by want of notice is immaterial.—*ELLISON v. CALVERT & HEALD*, [1936] 3 All E. R. 467; 106 L. J. K. B. 74; 155 L. T. 547; 80 Sol. Jo. 951; 29 B. W. C. C. 323, H. L.

2949a. ———.—*WILES v. ELLERMAN'S WILSON LINE*, No. 2849c, *ante*.

2951a. ———.—*WHITE v. LEICESTERSHIRE COLLIERY & PIPE CO., LTD.*, No. 2900a, *ante*.

2951b. ———.—A smith was severely burned on the back of his neck by a particle of hot metal. His wife dressed it at home, & he continued at work without giving any notice of the accident. The wound got worse, & after two or three weeks a doctor was called in. The doctor at first thought it was a carbuncle, & treated him for that. The workman got steadily worse & died of septicaemia within six weeks of the accident. The widow made a claim for compensation. The county ct. judge found that death was due to a burn, & held that the employers had been prejudiced by the want of notice, & that there was no reasonable cause for failure to give notice. He therefore made his award for the employer. The widow appealed:—*Held*: there was evidence to support the finding & no misdirection.—*OWEN v. JOHN BAKER & BESSEMER, LTD.* (1932), 25 B. W. C. C. 339, C. A.

*Annotation*:—*Reid*, *Phillips v. Sidebottom & Co.* (1934), 27 B. W. C. C. 382.

2951c. ———.—A timber discharger was on Sat., Nov. 7, 1931, hit on the head by a swinging baulk of timber whilst engaged in

unloading in the hold of a ship. He was, according to the evidence, "knocked out" for ten minutes. A ladder was then lowered & he climbed on to the deck, where it was said he rested for half to three-quarters of an hour before resuming his work. One of his employers was in charge of the unloading, but the accident was not brought to his notice. The workman finished his work for the employers on that day, but complained of pain at home & was unwell on the Sun. On the Mon. he applied for work at the labour exchange & worked on & off for various employers until Jan. 27, 1932, when, whilst working for other employers, he collapsed & died. No notice was given of the accident until Feb. 20, though he had continually complained of pain in his head. The widow filed a request for arbn. on behalf of herself & six children on July 19, 1932. At the hearing the medical evidence was to the effect that the deceased workman had an aneurism in his brain which ultimately killed him, but that the blow on the head accelerated the death. There was also medical evidence to the effect that a more valuable opinion could have been given if the workman had been examined at the time of the accident. The county ct. judge found that notice of the accident was not given as soon as practicable, & that the employers were thereby prejudiced in their defence. He further held that there was no reasonable cause for the delay in giving notice, & that the want of notice was therefore a bar to proceedings on the part of the widow. He accordingly made his award for the employers. The widow appealed:—*Held*: there was evidence to support the findings & no misdirection.—*BEDFORD v. BELL & WINNEY, LTD.* (1933), 26 B. W. C. C. 161, C. A.

2954. *Add. Annotations*:—As to (3) *Apld. Dobson Steam Fishing Co. v. Lewis* (1929), 22 B. W. C. C. 419. *Generally, Reid. Hayter v. Southern Railway*, [1931] 2 K. B. 274; *Winfield v. London Midland & Scottish Ry. Co.*, [1931] 2 K. B. 284.

2956. *Add. Annotations*:—*Consd. Telephone Manufacturing Co. v. Abel* (1928), 21 B. W. C. C. 289. *Apld. Dobson Steam Fishing Co. v. Lewis* (1929), 22 B. W. C. C. 419. *Reid. Hayter v. Southern Railway*, [1931] 2 K. B. 274; *Winfield v. London, Midland & Scottish Ry. Co.* (1931), 145 L. T. 242; *North's Navigation Co.* (1889), *Ltd. v. Batten* (1933), 150 L. T. 186.

2958. *Add. Annotation*:—As to (2) *Consd. Telephone Manufacturing Co. v. Abel* (1928), 21 B. W. C. C. 289.

#### PART XIV. SECT. 7, SUB-SECT. 4.

*sb. Application for reference to medical referee—Where justified.*—*Held*: an arbitrator is entitled to refuse to allow a reference only where there is some exceptional difficulty or other sufficient reason referable to the particular case; an arbitrator, who had, on the ground of the diversity of general medical opinion as to the nature & curability of miner's nystagmus, refused to allow the question whether a workman had recovered from miner's nystagmus to be referred to a medical referee & had allowed a proof, had misdirected

himself with regard to the meaning of sect. 19 (2), & his refusal was not justified.—*M'GUICKIN v. ADDIE & SONS' COLLIERIES, LTD.*, [1931] S. C. 620; 24 B. W. C. C. Supp. 82.—*SCOT*.

#### PART XIV. SECT. 7, SUB-SECT. 4.—B.

*h i. — Refusal of X-ray examination.*—An injured workman, who had been receiving weekly payments for over six months, was examined by his employers' surgeon on Oct. 4, 1934. The surgeon made a clinical examination, but reported to the employers that, without a radiographic examination, he could not

form a definite opinion on certain aspects of the workman's condition, & as he was not himself a radiologist, he asked for authority to incur the expense of such an examination. Having obtained this authority, he requested the workman to attend on Oct. 18 to be X-rayed. The workman, founding on the Regulations of 1907, refused to attend until the expiry of two months from Oct. 4. The employers having thereupon stopped the weekly payments as from Oct. 18, the workman brought arbn. proceedings to obtain the continuance of the payments:—*Held*: in the circumstances, the radiographic examination was a necessary part of the surgeon's examination to

2968a.

—[An injured workman was treated in hospital by a consultant of the hospital. She returned to work, but ceased work again owing to the injury. She was then requested by her employers to submit to an examination by the same consultant acting as their medical adviser. She refused, on the ground that he would be a necessary witness on her behalf in any arbn. proceedings. The employers applied for suspension of weekly payments until the examination had taken place. The county ct. judge granted the application, on the ground that the reason given for the refusal was itself unreasonable:—*Held*: to find that the refusal was unreasonable merely because the workman objected to being examined, at the instance of the employer, by a consultant at the hospital at which she had been treated, was not sufficient. The matter must be further inquired into to ascertain (1) whether this consultant was the only medical adviser available to the workman, & (2) whether the woman's case, if it went to arbn., would be imperilled by reference to this particular consultant.—*TELEPHONE MANUFACTURING CO., LTD. v. ABEL* (1928), 21 B. W. C. C. 289, C. A.; *subsequent proceedings* (1929), 22 B. W. C. C. 84, C. A.

2968b. — Reasonableness of refusal.]—An

injured workman was treated in hospital by a consultant of the hospital. She returned to work, but ceased work again owing to the injury. She was then requested by her employers under Workmen's Compensation Act, 1925 (c. 84), s. 18, to submit to an examination by the same consultant acting as their medical adviser. She refused on the ground that he would be a necessary witness on her behalf in any arbn. proceedings. On an appln. by the employers under sect. 18 to suspend the weekly payments, the county ct. judge held that her refusal was unreasonable & granted the appln. On appeal the case was remitted for further inquiry to ascertain (a) whether this consultant was the exclusive adviser of the workman, (b) whether the workman's case, if it went to arbn., would be imperilled in any way by reference to this particular consultant, & (c) whether the employers' request that the workman should be examined by this consultant was reasonable. The county ct. judge found in favour of the employers on all points. The workman appealed:—*Held*: on the evidence the workman was reasonable in refusing to submit to examination by this consultant at the instance of the employer, & the county ct. judge's findings could not be supported.—*TELEPHONE MANUFACTURING CO., LTD. v. ABEL* (No. 2) (1929), 22 B. W. C. C. 84, C. A.

2970a. Voluntary payments under agreement—Employer's right to examination.]—Where a workman & employers come to an agreement

whereby voluntary payments are in future to be made to the workman, in lieu of payments under an order of the ct., the employers are entitled to have the workman examined by their medical adviser under sect. 18.—*DOBSON STEAM FISHING CO., LTD. v. LEWIS* (1929), 22 B. W. C. C. 419, C. A.

2970b. Application for reference to medical referee—When justified.]—A miner lost the sight

of one eye as the result of an accident arising out of & in the course of his employment. He recovered sufficiently to be fit for work on the surface, but was unable to obtain such work. He was paid compensation for partial incapacity, & the matter came from time to time before a joint committee of representatives of employers & workmen in the pit. The workman ultimately applied to the joint committee to be treated as totally incapacitated under sect. 9 (4) as amended. The joint committee referred the matter to arbn. in the county ct. In the meantime the employers served a notice on the workman under sect. 12, ending the compensation on a report of their doctor that he was fit for work underground. The workman served a counter certificate of his own doctor, who reported that the workman was only fit for surface work on account of being one-eyed. The employers applied under sect. 19 (2) to the registrar for the matter to be sent to a medical referee, but he refused on the ground that there was no real medical dispute. The workman filed an application for arbn. to which the employers filed an answer. The employers then appealed to the county ct. judge from the registrar's decision. The county ct. judge held that the matter was of sufficient difficulty to justify refusing to send the matter to the medical referee. The employers appealed to the Ct. of Appeal:—*Held*: there was no exceptional difficulty within sect. 19 (2) to justify a refusal of the reference.—*KILBANE v. WHITEHAVEN COLLIERY CO., LTD.* (1933), 26 B. W. C. C. 76, C. A.

*Annotation*:—*Consd.* *White v. Carlton Main Colliery Co.* (1934), 27 B. W. C. C. 194.

2970c.

—[A workman injured his left knee by accident arising out of & in the course of his employment, as a result of which he was unable to work standing. He was, therefore, fitted with a mechanical knee-cap & attempted light work. Two days after starting light work he slipped & injured his knee a second time. He received compensation for total incapacity for about three years, when the compensation was reduced after notice given under sect. 12. On an application by the workman for arbn. the employer applied to the registrar of the county ct. to refer the matter to a medical referee. The registrar refused the application & the employer appealed to the county ct. judge, who dismissed the appeal on the grounds

enable him to return a true report; accordingly, it could not be said that the workman, in being requested to attend to be X-rayed, was being requested to submit himself to a fresh examination; & therefore, so long as he refused to submit himself to be X-rayed, his right to compensation fell to be suspended. Appeal dismissed.—*MALONE v. CURRIE & Co.* (1935), 28 B. W. C. C. Suppt. 183.—*SCOT.*

*sd. Extent of reference.*]—Employers, who had been paying compensation to a workman in respect of an injury through accident, applied for a reference to a medical referee under 1925 Act, s. 19, averring in their application that that workman had become fit for light work of a general character "as far as the accident is concerned." In the remit made by the sheriff-clerk, the medical referee was asked to certify as to the condition of the workman

& his fitness for work, & also as to whether or to what extent his incapacity was due to the accident:—*Held*: the words "as far as the accident is concerned" in the application warranted the sheriff-clerk in including in the remit the question whether the workman's remaining incapacity was due to the accident.—*MERCHAN v. BAIRD (WILLIAM) & Co.*, [1932] S. C. 468; 25 B. W. C. C. Suppt. 1.—*SCOT.*

that there were sufficient reasons for not referring the matter to a medical referee, namely, that the circumstances of the second accident could be properly investigated only in an arbn. The employer appealed:—*Held*: the matter was one of discretion, & in this case the county ct. judge had exercised his discretion judicially. The words "any other sufficient reason" are not to be construed as being necessarily of the same nature as "exceptional difficulty."—*WHITE v. CARLTON MAIN COLLIERY CO., LTD.* (1934), 27 B. W. C. C. 194, C. A.

**2970d.** — Minute must indicate extent of reference.]—If it is desired by the parties, or one of them, where a joint minute is lodged by them in a workman's compensation claim craving the ct. under sect. 19 of 1925 Act, to order a reference to a medical referee, that both the condition of the workman & the attribution of that condition to the accident should be investigated & finally determined by the medical referee then it must be made clear in the joint minute that the parties are in disagreement on both questions, & that it is desired that both questions be referred & decided. If the minute be ambiguous it should be clarified by amendment before the reference is made.—*ARCHIBALD RUSSELL, LTD. v. MCNEILLY* (1934), 50 T. L. R. 471; 27 B. W. C. C. 362, H. L.

*Annotation*:—*Expld. Addie (Robert) & Sons Collieries, Ltd. v. McAllister*, [1937] 1 All E. R. 676.

**2970e.** — —.]—A workman sustained injury to his back on Oct. 27, 1932, in an accident arising out of & in the course of his employment & thereafter, by agreement, he was paid compensation as for total incapacity. In Jan. 1936 the employers were advised that the workman had wholly recovered from the injury & had become fit for his ordinary work. This was disputed by the workman, & the employers applied for a reference to a medical referee, which was allowed by the sheriff clerk depute. The latter prepared an order of reference, on the prescribed form, from which he deleted the question as to whether, or to what extent, the incapacity was due to the accident. The medical referee found that the workman had wholly recovered from his injury by accident, but was quite unfit for his ordinary work or for any work except the lightest. An arbitrator remitted the matter back to the referee, for the purpose of ascertaining whether the existing unfitness was attributable to the accident. Without further examination, the referee reported that the said unfitness was not attributable to the accident, whereupon the arbitrator terminated the payment of com-

pensation. On appeal by case stated, the first division of the Ct. of Session held that the arbitrator was not entitled to hold that the claimant had wholly recovered from his injury by accident & to end his right to compensation, & was bound to refuse to end compensation, & that the omission to include, in the reference to the medical referee, the question as to whether, or to what extent, the incapacity of the claimant was due to the accident confined the duties of the medical referee to considering the condition of the workman, & his fitness for employment, & excluded any report by him as to whether the incapacity was attributable to the accident. Thereupon this appeal was brought. The same question was raised in both appeals:—*Held*: as the prescribed form of the reference included the question whether the workman had wholly or partially recovered from the injury by accident, & as, in the application for a reference, the question of the workman's recovery was expressly stated to be in dispute, the arbitrator was justified, on the referee's certificate of complete recovery, in terminating the payment of compensation.—*ADDIE (ROBERT) & SONS COLLIERIES, LTD. v. MCALLISTER, BURNS v. GARSCLUE COLLIERY CO., LTD.*, [1937] 1 All E. R. 676; 53 T. L. R. 418; 81 Sol. Jo. 176; 30 B. W. C. C. 1, H. L.

**2970f.** — Evidence.]—*ILAY MAIN COLLIERIES, LTD. v. JONES* (1938), 55 T. L. R. 257, C. A.

**2971.** *Add. Annotations*:—*As to* (3) *Apld. Vickers-Armstrongs, Ltd. v. Regan*, [1933] 1 K. B. 232. *Refd. Kitchen v. Koch & Co.* (1930), 23 B. W. C. C. 349. *As to* (4) *Consd. Pepperill v. Kembal Bishop & Co.* (1932), 25 B. W. C. C. 641.

**2978.** *Add. Annotation*:—*Consd. Vickers-Armstrongs, Ltd. v. Regan*, [1933] 1 K. B. 232.

**2983.** *Add. Annotation*:—*Refd. Drewitt v. Britannic Assee.* (1927), 137 L. T. 511.

**2985a.** — Asking for particulars of weekly earnings.]—A letter written by a workman's solrs. to his employers asking for particulars of his average weekly earnings for the twelve months previous to an accident with a view to a claim, either at common law or under the Workmen's Compensation Act, is a claim sufficient to satisfy the provisions of sect. 14.—*EMMERSON v. GEE, WALKER & SLATER, LTD.* (1934), 27 B. W. C. C. 897, C. A.

**2990a.** — —.]—A woman was employed with her husband as caretaker, & alleged that in May, 1930, she fell & fractured her thigh. After being treated in hospital she returned & continued in employment with her husband receiving wages until Feb. 1934, when both

**PART XIV. SECT. 8, SUB-SECT. 1.**  
*xx. Failure of employer to file prescribed statement—Effect of.*—*BLACKBURN v. MCINTOSH (N. B.)*, [1927] 1 D. L. R. 1084.—CAN.

**PART XIV. SECT. 8, SUB-SECT. 2.**  
*xx. Offer of compensation made but not accepted.*—On Nov. 24, 1931, a bus conductress was injured through the alleged defective condition of the door of her bus. On Dec. 14, 1931, her employers' insurers wrote to her solr. offering to pay compensation under the Act, & the solr. acknowledged the letter & stated that until their inquiries were completed they did not propose to take compensation under the Act. Matters were left in that condition

until on June 17 the workman raised a common law action in the Sheriff Ct. of Lanarkshire against her employers for damages. The action was dismissed as irrelevant. The pursuer having appealed to the Second Division of the Ct. of Session, the ct. adhered to the Sheriff-Substitute's view that the pursuer has failed to state a relevant case, but *in hoc statu* recalled the dismissal of the action in order to enable the pursuer, if so advised, to lodge a claim in the action for workmen's compensation in terms of sect. 29 (2) of the 1925 Act. Pursuer having lodged a minute claiming compensation, defenders lodged answers in which they averred that no claim for compensation had ever been made by or on

behalf of the pursuer, & that her common law action had not been raised within the six months laid down by sects. 14 (1) & 29 (2) as the limit of time for raising proceedings independent of the Act in which, on the failure of the proceedings themselves, compensation under the Act could be assessed. After argument on the minute & answers:—*Held*: (1) an offer of compensation made to but not accepted by the workman did not constitute a claim under the Act, & (2) the workman had shown no reasonable cause for her failure to make a claim in time. Application dismissed.—*WILSON v. CURRIE & THOMSON, LTD.*, [1934] S. C. 98; 26 B. W. C. C. Supp. 106.—SCOT.

were discharged. In July, 1934, she made a claim for compensation. On being asked at the hearing why the claim had not been made before she said "I left all that to my husband; we were paid good wages & did not think we could make a claim," & her husband said "I did not make a claim because I could not get another place as good as that." The county ct. judge held that there had not been shown any reasonable cause why the claim had not been made within six months of the date of the accident. The workman appealed:—*Held*: the county ct. judge had come to a right decision on the evidence & there was no misdirection. Appeal dismissed.—*TAYLOR v. WOOD* (1935), 28 B. W. C. C. 287, C. A.

2999. *Add. Annotations*:—*Consd. Soyer v. Johnson, Matthey* (1927), 96 L. J. K. B. 1011; *Shotts Iron Co., Ltd. v. Fordyce*, [1930] A. C. 503. *Appl. Sharrod v. Warwickshire Coal Co.* (1929), 22 B. W. C. C. 599.

2999a. —.—(1) The question whether the facts found by an arbitrator constitute reasonable cause for the failure of the injured workman to give notice of the accident or to claim compensation within the statutory period is a question of law, & therefore the arbitrator's decision on the question is open to review.

(2) In Apr. 1924, resp., while working as a drawer in applts.' employment, injured the muscles of his back. He immediately reported his injury to the proper officer, who, thinking the injury trivial, did not report it to headquarters. Resp. continued his work as a drawer at full wages, with the exception of a fortnight in Sept. 1927, for nearly four years, when he became totally incapacitated, & he had since been fit for light work only. His injury took the form of muscular rheumatism in the back & attendant sciatica. In Oct. 1928, he made a claim for compensation, & until that date applts. had no knowledge that he intended to make any claim against them. Throughout the whole period he suffered considerable pain, which he associated with the injury. He did not intend to claim compensation so long as he was able to earn full wages in applts.' employment. The arbitrator found in law that resp.'s failure to claim compensation timeously was without reasonable cause & refused compensation:—*Held*: resp. had proved that his failure to make a claim within the statutory period was occasioned by mistake or other reasonable cause.—*SHOTTS IRON CO., LTD. v. FORDYCE*, [1930] A. C. 503; 99 L. J. P. C. 101; 143 L. T. 200; 46 T. L. R. 354; 74 Sol. J. 400; 23 B. W. C. C. 73, H. L.; *affg.*, S. C. *sub nom.* *FORDYCE v. SHOTTS IRON CO., LTD.* (1929), 22 B. W. C. C. 911.

*Annotations*:—*As to* (1) *Consd. White v. Leicestershire Colliery & Pipe Co.* (1931), 24 B. W. C. C. 128. *As to* (2) *Consd. Templeton v. Coupe (E. & J.) & Sons, Ltd.* (1932), 146 L. T. 518; *Owen v. John Baker & Bessemer, Ltd.* (1932), 25 B. W. C. C. 339. *Distd. Bedford v. Bell & Winney, Ltd.* (1933), B. W. C. C. 161. *Appl. Stenning v. Southern Ry. Co.* (1937), 30 B. W. C. C. 430. *Refd. White v. Leicester-*

*shire Colliery & Pipe Co.* (1932), 101 L. J. K. B. 617; *Phillips v. Sidebottom & Co.* (1934), 27 B. W. C. C. 382; *Ellison v. Calvert & Heald* (1935), 28 B. W. C. C. 371; *Fitchett v. Holmes & Co.* (1937), 30 B. W. C. C. 289.

3005. *Add. Annotations*:—*Consd. Soyer v. Johnson, Matthey* (1927), 96 L. J. K. B. 1011.

3006. *Add. Annotations*:—*Consd. Drewitt v. Britannic Assce.* (1927), 137 L. T. 511. *Kitchen v. Koch & Co.* (1930) 23 B. W. C. C. 349. *Refd. Taylor v. Wood* (1935), 28 B. W. C. C. 287.

3008a. *Seaman—Return one month after accident.*—A seaman alleged that on May 16, 1931, he was ordered to haul in a heavy rope & strained his heart in doing so. He reported to the ship's doctor, who treated him, & he was in hospital for eleven days abroad. He returned to Liverpool as a passenger on June 26, 1931. On June 29 he went to his employers' office & asked for a form to gain admission to hospital, but made no claim. He was in hospital during Aug. He first made a claim in Dec. 1931, & in Mar. 1932, filed a request for arbn. The county ct. judge found that his claim was not made within six months of the alleged accident, & held that his failure to make a claim within the required time was not occasioned by absence from the United Kingdom or other reasonable cause, & that the period of six months began to run from the date of the accident & not from the date of the workman's return to the United Kingdom. The workman appealed:—*Held*: there was evidence to support the findings & no misdirection. Appeal dismissed.—*GILL v. BONIFACE, OWNERS* (1932), 25 B. W. C. C. 346, C. A.

3013. *Add. Annotations*:—*Refd. Drewitt v. Britannic Assce.* (1927), 137 L. T. 511; *Soyer v. Johnson, Matthey* (1927), 96 L. J. K. B. 1011.

3016. *Add. Annotations*:—*Consd. Drewitt v. Britannic Assce.* (1927), 137 L. T. 511; *Soyer v. Johnson, Matthey* (1927), 96 L. J. K. B. 1011. *Refd. Phillips v. Sidebottom & Co.* (1934), 27 B. W. C. C. 382.

3019a. —.—A french-polisher left his employment on Apr. 10, 1913, on account of inability to continue at work. A certifying surgeon certified on Oct. 10, 1931, that he was suffering from dermatitis produced by dust or liquids, but gave no date of disablement. Proceedings were begun on Nov. 17, 1931. The county ct. judge found that any delay in making the claim was due to the conduct of the employer, with whom the workman had been in constant touch since he left his employment, & held that there was therefore reasonable cause for such delay. He made his award for the workman. The employers appealed:—*Held*: there was evidence to support the finding & no misdirection. Appeal dismissed.—*MAYNARD v. BERCOVITCH* (1932), 25 B. W. C. C. 71, C. A.

3020. *Add. Annotations*:—*As to* (2) *Consd. Soyer v. Johnson, Matthey* (1927), 96 L. J. K. B. 1011. *Refd. Kitchen v. Koch & Co.* (1930), 23 B. W. C. C. 349.

#### PART XIV. SECT. 8, SUB-SECT. 4.—B.

p. 1. —.—*Held*: following the English authorities, "mistake" in *Workers' Compensation Act, 1922*, s. 27 (4), means a mistake of fact & not of law, & a mistake of law which is

excluded from the category of mistake in the sub-sect. cannot be admitted as a ground of excuse as coming within the category of "any other reasonable cause."—*WILSON v. GANNAWAY & CO., LTD.*, [1932] N. Z. L. R. 843, 844.—N.Z.

#### PART XIV. SECT. 8, SUB-SECT. 4.—E.

3021 iv. —.—In Apr. 1924, a colliery drawer injured his back in assisting to replace a derailed hutch. With the exception of a fortnight in Sept. 1927, when he was off work for

**3025a.** —.]—A workman, who had been employed by the same employers for thirty-nine years, received a jerk while helping to pull a barrow through loose sand on Jan. 5, 1926. He felt pain & reported that he thought he had ruptured himself, but he continued at work until June 17, 1927, when he became very ill after attempting to lift a heavy article & went to bed. On the following day he was found to have a hernia. He made a claim for compensation on Aug. 3, 1927, giving the date of the accident as Jan. 5, 1926. The employers contended that no claim had been made within six months of the alleged accident. The county ct. judge held that there was reasonable cause for failing to make a claim within six months, because the workman believed that the pain was temporary, & that he would soon recover. The employers appealed:—*Held*: there was misdirection, & the workman had shown no reasonable cause for failing to make a claim within six months.—*BROWN v. AVELING & PORTER, LTD.* (1929), 22 B. W. C. C. 165, C. A.

*Annotations*:—*Folld. Halsey v. Erith Oil Works* (1930), 23 B. W. C. C. 1. *Refd. Sharrod v. Warwickshire Coal Co.* (1929), 22 B. W. C. C. 599; *Templeton v. Coupe & Sons, Ltd.* (1932), 146 L. T. 518; *Owen v. John Baker & Bessemer, Ltd.* (1932), 25 B. W. C. C. 339.

**3025b.** —.]—A workman, on Jan. 6, 1927, trod on a piece of pipe, causing him to fall on his right arm. He made no claim until Aug. 1929. At the hearing he said: "I felt sick, but could not find the first-aid man. Fourteen days after I went to a doctor. I carried on with my work; it was difficult & painful. . . . At the time I realised there was an accident. I thought a good deal of the injury, but I thought it would work off. I made no claim because I thought it would work off & there would be no necessity to make a claim. That was why I made no claim. I was able to earn my money." He continued working until Nov. 1928, when he went off work on account of bursitis until Apr. 1929. After Apr. he worked for two months, & then, owing to slackness of trade, was discharged. In Nov. 1929, a medical man reported that from Nov. 1928, to Apr. 1929, his incapacity was due to the bursitis, & in all probability the bursitis dated from the fall in Jan. 1927. The county ct. judge decided that on those facts he was bound to hold that the workman had shown no reasonable cause for not making the claim within six months of Jan. 6, 1927:—*Held*: there was evidence to support the finding & no misdirection.—*HALSEY v. ERITH OIL WORKS* (1930), 23 B. W. C. C. 1, C. A.

*Annotation*:—*Refd. Templeton v. Coupe & Sons, Ltd.* (1932), 146 L. T. 518.

**3025c.** —.]—On Feb. 20, 1931, the left eye of a workman was injured by a chipping from a

flagstone. He gave notice to his employer of the accident on Feb. 23, but neither he nor his employer considered the injury serious as he had frequently got chips in his eye without serious results. Though the eye gave trouble he was able to continue his work until May when he was discharged owing to slackness of work. He had been advised to go to an eye hospital in Apr., but he alleged that it was not until Aug. 20, 1931, that he realised that the condition of his eye was serious. He made a claim for compensation on Aug. 29. The employer denied liability on the ground that the claim had not been made within six months. At the arbn. the workman in cross-examination said, "At the end of June I knew the sight had gone." The county ct. judge stated that the workman was entirely honest in giving his evidence, although it contained flagrant inconsistencies, & he was convinced that the man did not realise his condition was serious until Aug. 20, 1931. He therefore found that there was reasonable cause for failure to make the claim within six months as throughout that period the injury had honestly been treated as a trivial one. The employer appealed:—*Held*: there was evidence to support the finding & no misdirection.—*TEMPLETON v. COUPE (E. & J.) & SONS, LTD.* (1932), 146 L. T. 518; 25 B. W. C. C. 56, C. A.

*Annotations*:—*Refd. Phillips v. Sidebottom & Co.* (1934), 27 B. W. C. C. 382; *Fitchett v. Holmes & Co.* (1937), 30 B. W. C. C. 289.

**3025d.** —.]—The workman, whilst oiling his engine, fell on to the permanent way, bruising his left arm & hip & skinning his left leg. He was fifty-nine years old, & was subject to arthritis in his hips but had not suffered pain or inconvenience. He gave notice of the accident, but continued driving though he suffered pain in his left hip. The accident occurred on Apr. 26, 1931, & it was not until Oct. 30, 1931, that he had to stop work owing to pain in his hip. He saw his doctor after the accident, who thought the trouble was due to rheumatism & told him so. In Dec. 1931, X-ray photographs discovered the presence of arthritis, but it was not until Dec. 1933, that it was diagnosed that the arthritis in the left hip had been aggravated by the accident. The workman had resumed work from Mar. 1932, to Jan. 1934, & again from Mar. to Dec. 1934, but then became permanently incapacitated by the hip joint becoming dislocated by osteo-arthritis. The workman had not connected his condition with the accident, & consequently made no claim for compensation until Dec. 1934. The county ct. judge found as a fact that the incapacity was caused by the accident, & he held that failure to make the claim within six months of the accident as required by

medical treatment, he continued at his usual occupation, earning full wages, until Mar. 1928, when he left his employment to undergo treatment for trouble arising from the injury. In Oct. 1928, while still incapacitated, he made a claim for compensation. In addition to the above facts it was established that the workman was suffering from muscular rheumatism & sciatica, & that these troubles arose from the injury in Apr. 1924; that ever since the date of the accident the

workman had associated his trouble with the accident; but that he had not intended to claim compensation so long as he was able to earn full wages. It was also established that, immediately after the accident, the workman had notified the fireman of the injury, but that the latter, considering the injury trivial, had not reported it to his superiors, & that prior to Oct. 1928, the employers had no knowledge, either actual or imputed, of any intended claim:—*Held*:

although the workman was throughout aware of his injury, the fact that he was able to earn full wages in his ordinary employment for four years after the accident showed that he was not unreasonable in assuming that the injury was not such as would cause him to become incapacitated; & accordingly, that his delay in claiming compensation was due to a "reasonable cause."—*FORDYCE v. SHOTT'S IRON CO., LTD.*, [1929] S. C. 813—*SCOT*.



sect. 14 was occasioned by reasonable cause within proviso (b) to sect. 14:—*Held*: (1) there was evidence upon which the county ct. judge could find that the incapacity was caused by the accident; (2) there was reasonable cause for not making a claim within six months of the accident as during that period the workman both honestly & reasonably believed that the pain which he suffered was owing to rheumatism & was not due to the accident, & it was therefore not necessary to consider whether any further delay in making the claim was excusable on similar grounds.—*BALDWIN v. LONDON & NORTH EASTERN RY.* (1936), 155 L. T. 331; 29 B. W. C. C. 227, C. A.

**3025e.** —.]—On July 25, 1935, a fitter while engaged at work was struck on his knee by a parallel which slipped from his table. He went to the first-aid station & iodine was applied to the spot. The workman said he suffered inconvenience from, but was never incapacitated by, the blow. Every week after receiving it he visited his doctor, who treated him for what he & the workman believed to be a strained cartilage due to the accident. He was, with other men, stood off work in Aug. 1935, but returned in Nov. 1935, & continued at his work until Feb. 4, 1936, when he became ill & it was discovered that he was suffering from a tubercular knee-joint. On Feb. 7, 1936, he made a claim for compensation in respect of the accident of July 25, 1935. The county ct. judge found that his tubercular condition was due to the accident & after finding the other facts as set out above held that the failure to make a claim within six months was occasioned by reasonable cause. The employer appealed:—*Held*: there was evidence to suggest the findings & no misdirection. Appeal dismissed.—*FITCHETT v. HOLMES & Co., LTD.* (1937), 30 B. W. C. C. 289, C. A.

**3025f.** —.]—A signalman sustained a rupture in 1928 while at his work. After consulting his own doctor & after having been seen by his employers' doctor, he continued at his work as a signalman under the impression that the matter was trivial, but wearing a truss. At the end of 1934 he began to realise that the matter was not trivial. In 1936 he was offered work as a crossing keeper, but refused it on grounds unconnected with his injury. His employers then reduced his wages to a lower grade on the ground that he was unable to perform signal-box duty "in consequence of a physical disability." The workman filed a request for arbn. in which he claimed half the difference between the two sets of wages. He had given notice of the accident at the proper time, but had never made a claim. The employers contended that there was no reasonable cause for the failure to make a claim within six months of the accident. The county ct. judge held on these facts that there was reasonable cause for the failure to make a claim within the statutory period. The employers appealed:—*Held*: the county ct. judge had drawn the proper inference of law from the facts. Appeal dismissed.—*STENNING v. SOUTHERN RY. Co.* (1937), 30 B. W. C. C. 430, C. A.

**3025g.** —.]—A collier had his right elbow violently trapped while at work. After

being disabled for three days, he returned to work at full wages, receiving help with the heaviest part of his duties, & suffering severe pain which diminished but did not entirely disappear. He continued at work, with bouts of pain for ten months, when the pain increased & he was absent from work for ten days. He still continued at work, with occasional absences due to pain, until it was discovered that he was suffering from progressive osteo-arthritis in the injured elbow, which was likely to cause incapacity in the future. The workman claimed compensation in respect of the period of ten days' absence, & a declaration of liability. The county ct. judge held that the osteo-arthritis had been latent during the six months following the accident, & that the workman had therefore reasonable cause for not making a claim within that period & that he was not concerned with any subsequent delay. He therefore made his award for the workman granting the relief claimed. The employer appealed:—*Held*: there was evidence to support the findings & no misdirection. Appeal dismissed.—*SIMS v. ROSCOE & SONS, LTD.* (1938), 31 B. W. C. C. 184, C. A.

**3029.** *Add. Annotation*:—*Refd.* *Drewitt v. Britannic Assce.* (1927), 137 L. T. 511.

**3030.** *Add. Annotations*:—*Consd.* *Sharrod v. Warwickshire Coal Co.* (1929), 22 B. W. C. C. 599; *Shotts Iron Co., Ltd. v. Fordyce*, [1930] A. C. 503. *Refd.* *Soyer v. Johnson, Matthey* (1927), 96 L. J. K. B. 1011; *Brown v. Aveling & Porter* (1929), 22 B. W. C. C. 165; *Owen v. John Baker & Bessemer, Ltd.* (1932), 25 B. W. C. C. 339.

**3031.** *Add. Annotation*:—*Apld.* *Drewitt v. Britannic Assce.* (1927), 137 L. T. 511.

**3031a.** —.]—On Apr. 16, 1926, a workman fell & injured his knee. He was paid full wages, although incapacitated, until Sept. 3, when he was summarily dismissed from employment for misconduct. In the hope of being reinstated, he threatened to bring an action for wrongful dismissal, but made no claim under Workmen's Compensation Act, 1925 (c. 84), until two days after the statutory six months had expired. The county ct. judge found that the workman never intended to claim within the necessary period of six months, & there was no reasonable cause for the delay, & he refused to award compensation:—*Held*: the evidence supported the findings, & there was no misdirection.

When the workman knows that the injury he suffers from was occasioned by an accident giving him a right to compensation, & fails to make a claim within six months, if that failure was prompted by his own interests, & was not induced by any action of the employer which would lead him to believe he could get compensation without making a claim, he shows no reasonable cause (*SCRUTTON, L.J.*).—*DREWITT v. BRITANNIC ASSURANCE Co., LTD.* (1927), 137 L. T. 511; 20 B. W. C. C. 434, C. A.

*Annotations*:—*Apld.* *Brown v. Aveling & Porter* (1929), 22 B. W. C. C. 165. *Consd.* *Shotts Iron Co. Ltd. v. Fordyce*, [1930] A. C. 503. *Refd.* *Halsey v. Erith Works* (1930), 23 B. W. C. C. 1.

**3033.** *Add. Annotations*:—*Consd.* *Holt v. Hobson & Sons* (1930), 23 B. W. C. C. 242; *Kitchen v. Koch & Co.*, [1931] A. C. 753; *Easterling v. Peek, Frean & Co.*, [1938] 2 K. B. 300.



**3033a.** Unwillingness to claim compensation.]—*SHOTT'S IRON CO., LTD. v. FORDYCE*, No. 2999a, *ante*.

**3033b.** Expectation of compensation without necessity of making claim.]—In Apr. 1925, a chef severed the ligaments of his right hand in handling a dish which broke, but he continued his work at his full wages. His employers knew of the accident, but were not aware the chef could not do his full work. In July, 1926, he was dismissed, & in that month made a claim for compensation. The county ct. judge found that the workman did not refrain from making a claim because he formed the view that he would receive compensation should incapacity supervene in the future without the necessity of making a claim, & that the employers did nothing to encourage such a view, & there was no reasonable cause for not making the claim within six months of the accident:—*Held*: there was evidence to support the findings, & no misdirection.

There would be reasonable cause for not making a claim within six months, if the workman could prove that there was a tacit understanding that the employers knew all about the possibility of a claim & were prepared to give him compensation, even though his claim might fall outside the six months (*LORD HANWORTH, M.R.*).—*SOYER v. JOHNSON, MATTHEY & CO.* (1927), 96 L. J. K. B. 1011; 20 B. W. C. C. 504, C. A.

**3033c.** Belief that injury trivial.]—An engine planer on July 16, 1930, sustained an injury to his eyes, & was unconscious for an hour & a half. His panel doctor treated the injury as trivial, gave him a lotion, & sent him back to work. No ophthalmic expert was called in. He remained at work until Oct. 1930, when he was discharged in consequence of slackness of trade. On Feb. 15, 1931, he was examined by another doctor, who took a serious view of the case. The workman made a claim for compensation on Feb. 16, 1931. An application for arbn. was filed in Mar. 1932. The county ct. judge on those facts held that the failure to make a claim within six months was occasioned by mistake, the workman having been entitled from the time of the accident until he saw the second doctor to consider the injury a trivial one. He therefore made his award for the workman. The employer appealed:—*Held*: there was evidence on which the county ct. judge was entitled to hold that there was reasonable cause for not making the claim within six months & there was no misdirection.—*FLINDERS v. JONES (A. A.) & SHIPMAN, LTD.* (1932), 25 B. W. C. C. 563, C. A.

**3034a.** —.]—The husband of pltf. had been killed in an accident due to the condition of the floor of a power station. The case in support of an action for damages was so strong that it was not then thought advisable to make a claim under Workmen's Compensation Act, 1925 (c. 84), which there was little likelihood of ever being prosecuted. In the course of the action for damages, great difficulty was encountered in ascertaining who, among a number of contractors & sub-contractors, was responsible for the condition of the floor which was the cause of the accident. At the trial, it was decided that the wrong parties had been sued, & it was

then too late to bring an action under the Fatal Accidents Act against the right party. Upon the action being dismissed, application was made for an assessment of compensation under the Workmen's Compensation Act, 1925 (c. 84). It was contended that the absence of the claim under the Act was due to mistake within the meaning of sect. 14 of that Act:—*Held*: the making of a claim is not a mere formality. The requirements of the Act in that respect must be fulfilled, in the interests of both parties. Upon the facts, the widow deliberately refrained from making a claim under the Act because she deemed it in her interest to take other proceedings. The application for compensation was, therefore, refused.—*HARRIS v. HOWDEN (JAMES) & CO. (LAND), LTD.*, [1938] 4 All E. R. 167; *sub nom. HARRIS v. DORMAN, LONG & CO., LTD.*, 159 L. T. 568.

**3035.** *Add. Annotations*:—As to (1) *Consd. Drewitt v. Britannic Assce.* (1927), 137 L. T. 511. *Folld. Soyer v. Johnson, Matthey* (1927), 96 L. J. K. B. 1011. *Apld. Sharrod v. Warwickshire Coal Co.* (1929), 22 B. W. C. C. 599; *White v. Leicestershire Colliery & Pipe Co.* (1931), 24 B. W. C. C. 128. *Consd. Templeton v. Coupe & Sons, Ltd.* (1932), 146 L. T. 518. *Refd. Brown v. Aveling & Porter* (1929), 22 B. W. C. C. 165; *Shotts Iron Co. v. Fordyce*, (1930), A. C. 503; *Owen v. John Baker & Bessemer, Ltd.* (1932), 25 B. W. C. C. 339; *Phillips v. Sidebottom & Co.* (1934), 27 B. W. C. C. 382; *Easterling v. Peek, Frean & Co.*, [1938] 2 K. B. 300.

**3037.** *Add. Annotation*:—*Apld. Gill v. Boniface, Owners* (1932), 25 B. W. C. C. 346.

**3038a.** Delay of certifying surgeon.]—*KITCHEN v. KOCH (C.) & Co.*, No. 3815a, *post*.

**3038b.** Omission of date of disablement in medical certificate.]—A miner suffered from nystagmus in 1914 & again in 1919, but after each attack resumed his work underground. He again had to cease work owing to the same disease on Dec. 28, 1930. The employer & his insurers both knew by Feb. 5, 1931, that a claim was being contemplated by the workman for compensation as from this date. On Feb. 6 the workman obtained a certificate from a certifying surgeon, but it did not give any date for the commencement of the disablement. The workman filed an application for arbn. based on this certificate, but claiming compensation as from Dec. 28, 1930, for a recurrence of the attack in 1919, but when the arbn. came on in Apr. these proceedings were abandoned. The workman then obtained a fresh certificate in Aug. 1931, which gave the commencement of the disablement as Dec. 28, 1930. From this the employers appealed to the medical referee, who gave a certificate in accordance with that of the certifying surgeon, but stating that the workman was fit for surface work. Proceedings on the basis of these certificates were commenced on Oct. 19, 1931. At the arbn. the employers contended that the claim was out of time as it had not been made within six months from Dec. 28, 1930, & there was no reasonable cause for the delay. The county ct. judge made his award in favour of the workman, & ordered that the partial incapacity should be treated as total under the 1931 Act. The employers appealed:—*Held*: (1) on the evidence the

workman had always intended to claim as from Dec. 28, 1930, to the knowledge of all parties. In view of this & that the certifying surgeon had omitted to fill in the date of disablement in the Feb. certificate, there was reasonable cause for the delay in making the claim; (2) though the medical referee had certified only partial incapacity, the judge was at liberty on the evidence to make his award on the basis of total incapacity under sect. 9 (4) as amended by 1931 Act. Appeal dismissed.—**WILLIAMS v. NEW BRITISH RHONDDA COLLIERY CO., LTD.** (1932), 25 B. W. C. C. 75, C. A.

**3038c. Absence of medical information as to nature of disease.**—*E.*, a married woman, at one time an employee of resps., was certified on June 4, 1937, to be suffering from a disease scheduled under Workmen's Compensation Act, 1925 (c. 84), s. 43, & known as dermatitis, produced by dust or liquids. The certifying surgeon certified that disablement commenced on Sept. 11, 1936, & that she was thereby disabled from earning full wages at the work at which she had been employed. The certificate was thus dated more than six months after the date on which disablement was certified to have commenced. *E.* had been in the employ of resps. for many years before Sept. 11, 1936, when she left their service, & had been under treatment for irritation of the skin on her fingers for some time prior to that date. A claim for compensation must under Workmen's Compensation Act, 1925 (c. 84), s. 14 (1), be made within six months from the occurrence of the accident.

*E.* having claimed compensation in the county ct., it was held by the county ct. judge that she had not discharged the onus incumbent upon her to show that there was a "reasonable cause" for her not making a claim within six months from Sept. 11, 1936, & that she was not entitled to compensation. *E.* appealed:—*Held*: it could not be said that a workman had not shown "reasonable cause" when he did not make a claim within the six months in a case where, during that period, he had not been certified to be suffering from the notional accident which alone could give him the right to make a claim. No such thing as "reasonable cause" could

under sect. 14 be considered in respect of an appct. failing to present himself to the certifying surgeon, since the Act did not anywhere lay down any such duty. For that reason "reasonable cause" must be held to have been shown when during the six months' period in which he could have claimed he could not produce the certificate, which constituted the accident, & which alone could support his claim; also, the county ct. judge was wrong in his conclusion that on the evidence produced applt. had not shown "reasonable cause," & that applt. was entitled to compensation. Appeal allowed.—**EASTERLING v. PEEK, FREAN & CO., LTD.**, [1938] 2 K. B. 300; [1938] 1 All E. R. 674; 107 L. J. K. B. 704; 158 L. T. 289; 54 T. L. R. 495; 82 Sol. Jo. 194; 31 B. W. C. C. 113, C. A.

**3039. Add. Annotation:**—*As to* (3) **Appld.** *R. v. Whitehaven County Court Registrar, Ex p. Wellington Colliery Representative Committee, Re Whitehaven Colliery Co. v. McMaster* (1933), 26 B. W. C. C. 508.

**3044. Add. Annotation:**—**Appld.** *Delahunt v. Moody* (1927), 21 B. W. C. C. 588.

**3045. Add. Annotation:**—**Appld.** *Delahunt v. Moody* (1927), 21 B. W. C. C. 588.

**3047. Add. Annotations:**—**Refd.** *Woodrow v. Trawlers (White Sea) & Grimsby* (1929), 141 L. T. 676; *R. v. Webster, Ex p. Marshall* (1931), 95 J. P. 226.

**3048. Add. Annotation:**—**Refd.** *Codling v. Ridley* (1933), 26 B. W. C. C. 3.

**3052a. Report signed in firm name.**—*Applts.* applied to the registrar under the provisions of 1925 Act, s. 19 (2), for the appointment of a medical referee. The registrar refused the application, & on appeal the county ct. judge upheld his decision. The grounds of the judge's decision were that it was not possible to appoint as referee a doctor who had acted in that capacity in a previous reference between the same parties. This doctor had given up practice, & was no longer a medical referee. There was, therefore, no machinery available for compelling him to give evidence under a reference, or to produce certain X-ray photographs. In the judge's view, these facts made the case one of exceptional difficulty within the words of the sect.

#### PART XIV. SECT. 9, SUB-SECT. 1.

**f i. —.**—The Workmen's Compensation Board has no jurisdiction over rights of action or proceedings in the Exchequer Ct. in Admty.—**DAGELAND v. S.S. CATALA**, [1927] 4 D. L. R. 426; [1927] 3 W. W. R. 97; 38 B. C. R. 440.—**CAN.**

**h i. —.**—Workmen's Compensation Board cannot rehear a case after an order has been made.—**Re GOGUEN**, [1935] 3 D. L. R. 104.—**CAN.**

**ss. Control of Board—By court.**—On construction of Workmen's Compensation Act (Accident Fund), *R. S. A.*, 1922, c. 177, s. 13:—*Held*: the jurisdiction of the ct. to interfere with acts of the board is excluded only with respect to acts within the jurisdiction of the board, & the board's jurisdiction is limited to "matters arising under this Act," & its regulations are to be for the purpose of "carrying out the provisions of this Act." Therefore where a regulation of the board goes beyond the authority which the Act confers on the board, the ct. can declare it, & an assessment

based thereon, unauthorised & invalid.—*R. ex rel. DAVIES v. F. W. McDougall Construction Co., Ltd. (Alta.)*, [1929] 3 W. W. R. 650; [1930] 1 D. L. R. 621; 24 Alta. L. R. 338.—**CAN.**

**ss. Mode of assessment by Board.**—Upon the true construction of Workmen's Compensation Act, of British Columbia, assessments made under the Act for the purpose of raising funds for medical aid are not required to be made so that all employers liable to be so assessed shall be assessed at the same rate upon their pay-rolls irrespective of the hazards of their respective industries; the words "by assessment upon the employers generally" in sect. 33 (2) of the Act do not cut down the power given to the respondent Board by sect. 32 to rate the assessments upon the pay-rolls or in such manner as the board may deem proper.—**MERRILL RING WILSON, LTD. v. WORKMEN'S COMPENSATION BOARD**, [1933], A. C. 727, P. C.—**CAN.**

**st. Jurisdiction of Board—Application of pension.**—The Compensation

Board may not apply compensation pensions in payment of a support order of a magistrate under Deserted Wives & Children's Maintenance Act.—**NADEAN v. WORKMEN'S COMPENSATION BOARD**, [1935] 4 D. L. R. 442; O. R. 472; 5 F. L. J. (Can.) 115.—**CAN.**

**ss. Question of law.**—Workmen's Compensation Board under *R. S. W. S.*, 1923, has power to determine whether a ceremony was a mere form or a valid marriage, this being a question of law.—**Re McDONALD**, [1935] 4 D. L. R. 342; 9 M. P. R. 536.—**CAN.**

**PART XIV. SECT. 9, SUB-SECT. 3.**  
**3044 i. Position of judge—Sits as arbitrator.**—**DELAHUNT v. MOODY**, [1928] 1 R. 208; subsequent proceedings, 28 B. W. C. C. 959, P. C.—**IR.**

**ss. Not persona designata.**—A county ct. judge with reference to a claim for compensation is not a *persona designata*, & another judge may therefore act if he is ill.—**Re CARTER**, [1933] 1 D. L. R. 666; 6 M. P. R. 182.—**CAN.**

Resp. had been examined on behalf of applts. by two doctors, who were working in partnership, & their certificate was signed in the firm name:—*Held*: (1) once a county ct. judge has decided that a matter ought to be settled by arbn., he is bound to refuse to allow a medical reference; (2) on the facts of this case, the judge was justified in regarding the case as one of exceptional difficulty within the meaning of those words in sect. 19 (2), & in refusing to order a reference; (3) the word "report" in sect. 19 (2) & the word "certificate" in sect. 12 (3) should be given the same meaning; (4) a report signed by a firm name is within the requirements of the Act, provided that the injured person has been examined by all the partners. It is, however, desirable that each doctor who has examined him should sign separately.—*CARTWRIGHT v. LILLESHELL CO., LTD.*, [1937] 4 All E. R. 242; 81 Sol. Jo. 902; 30 B. W. C. C. 311, C. A.

3055. *Add. Annotations*:—*Apld.* Pullen v. Enthoven (1927), 20 B. W. C. C. 248. *Consd.*

PART XIV. SECT. 9, SUB-SECT. 5.

3053 xv. —.—*M'CREADIE v. DOULTON & CO.*, [1928] S. C. 29.—*SCOT.*

3053 xvi. —.—*A* minor, who was disabled by nystagmus, & had been paid compensation by his employers, was examined by a medical referee, who certified that "the claimant is not now suffering from nystagmus . . . & his condition is such that he is now fit for his ordinary work." The employers having craved the arbitrator to end the right to compensation, the workman moved for a continuance of the award of compensation at the rate of 30s. weekly. He averred that the certificate was not conclusive, in respect that it did not bear that he had completely recovered in the sense of not being more susceptible than formerly; in fact, he was more susceptible; no employer in the mining industry would engage him in consequence of his being unable to sign a declaration that he had not suffered from nystagmus; the work underground was no longer open to him; & his failure to obtain employment was wholly or mainly due to his having contracted the disease. The arbitrator having, before answer, allowed a proof of these averments:—*Held*: he was not entitled to allow a proof, for the question of recovery was to be decided by the referee.—*HAMILTON v. KINNEIL CANNEL & COKING COAL CO.*, [1933] S. C. 81; 25 B. W. C. C. Supp. 81.—*SCOT.*

3053 xvii. —.—*On* Nov. 14, 1927, a colliery overman injured his back by accident arising out of his employment. Compensation at the rate of 30s. per week was paid from the date of the accident to Dec. 15, 1932. On Aug. 2, 1928, a medical referee certified that the workman was still unfit for any work on account of his injury. On Apr. 13, 1929, the same referee certified the workman as fit for light work on the surface, & reported, *inter alia*: "Such work is essential. . . . He is reluctant to make any exertion. . . ." On Dec. 15, 1932, the employers applied for a third reference, & a remit was made to a different referee (the previous referee having died) in the double form prescribed by Act of Sederunt of Mar. 16, 1926, which follows upon sub-sects. (3) & (4) of sect. 19 of 1925 Act. The referee certified, *inter alia*: "(1) . . . the facts of the case, & his complaints are elicited from the two agents & from claimant's wife. . . . He has recovered

from the accident, but his general condition is such that he is unfit for any work. (2) The incapacity . . . is not due to the accident, but to his neglect to work as recommended by the [previous] medical referee . . . or, in default of obtaining such work, neglect to exercise himself. . . ." The employers moved the arbitrator on this certificate to end compensation, & the workman lodged a minute averring that the certificate was *ultra vires* of the medical referee, in respect that the finding that the incapacity was due not to the accident but to neglect of exercise was (1) not a medical question, & (2) pronounced upon insufficient evidence. The workman averred that he had been taking exercise under the advice & care of his own doctor, & that that fact had not been disclosed to the referee. The arbitrator refused *in hoc statu* to end compensation & allowed the workman a proof of the averments in his minute. The employers appealed:—*Held*: proof was incompetent, & compensation ought to have been ended, in respect the question whether the incapacity was due to the accident or to neglect of work or, failing work, exercise, was *ultra vires compromissi*, & there was no reason to doubt the sufficiency of the data upon which the medical referee decided it. The proper time for the workman to state that he had been taking exercise under his own doctor's orders was when the remit was made, or at latest before the referee. Appeal allowed.—*CAMPBELL v. MOORE & CO., LTD.*, [1933] S. C. 564; 26 B. W. C. C. Supp. 46.—*SCOT.*

3053 xviii. —.—*A* miner injured his left ankle, & received compensation as for total incapacity for a few months. In Jan. 1933, the workman & his employers presented a joint minute to the Sheriff-Clerk asking for a medical reference. The employers averred in the application that the claimant was "fit for light work so far as the accident is concerned," & the workman maintained that he was unfit for any work. On Jan. 28, 1933, the Sheriff-Clerk remitted to the medical referee to "give his certificate as to the condition of [the workman] & his fitness for employment . . . & whether or to what extent the incapacity of [the workman] is due to the accident." On Feb. 4, 1933, the medical referee certified, *inter alia*, as follows: "(1) . . . His condition is such that he is not at present fit for any work. . . . (2) The incapacity . . . is not due to the accident, but to

*Kilbane v. Whitehaven Colliery Co.* (1933), 26 B. W. C. C. 76. *Refd.* *Bodkin v. Manchester Collieries, Ltd.* (1932), 25 B. W. C. C. 262; *White v. Carlton Main Colliery Co.* (1934), 27 B. W. C. C. 194; *Moore v. Wallsend & Hepburn Coal Co.* (1935), 28 B. W. C. C. 174.

3055a. —.—*There* being disagreement between the medical advisers of a workman & his employer, respectively, as to the condition & fitness for employment of an injured workman in receipt of compensation, the matter was by consent referred to a medical referee, who certified that the workman was suffering from an inflammatory condition due to the original accident, & was thereby totally incapacitated from work. A year later a similar disagreement arose, & the matter was again referred to the medical referee, who gave a similar certificate. Three years later, the employer having ceased to pay compensation, the workman applied for resumption of the weekly payments. At the arbn. the medical evidence called on behalf

his persistently retaining the foot in bad position & refusing to put down in normal way. . . ." The employers thereafter moved the ct. to end compensation, & the workman lodged a minute asking for an award in respect of total incapacity. He averred that he had been receiving competent medical treatment, & had followed his doctor's advice. He asked for proof of those averments. The arbitrator having refused *in hoc statu* to end compensation & allowed a proof of the workman's averments, the employers appealed:—*Held*: in view of the averments of the joint application for a reference, the referee's finding that the incapacity was not due to the accident was *ultra vires compromissi*, & the arbitrator was entitled to refuse *in hoc statu* to end compensation, & to allow the workman a proof of his averments as to his reasonable conduct under his own doctor's advice. Appeal dismissed.—*M'NEILLY v. ARCHIBALD RUSSELL, LTD.*, [1933] S. C. 647; 26 B. W. C. C. Supp. 74.—*SCOT.*

3053 xix. —.—*In* the course of arbn. proceedings between a miner & his employers, a colliery co., the medical referee reported that the workman, whose left hand had been rendered permanently useless as the result of an injury by accident in the course of his employment, was capable of acting as a supervisor at the picking tables. The co. accordingly gave the workman employment as a supervisor, paying him at the same time compensation as for partial incapacity; but subsequently dismissed him on the ground of inefficiency through failure to give proper attention to his work. Thereupon the workman, who denied this allegation, claimed compensation as for total incapacity. The arbitrator found that it was not proved that the workman had failed to take reasonable advantage of the employment offered, & awarded compensation as for total incapacity, proceeding on the view that the effect of weather conditions upon the workman's injured hand might make work at the picking tables unsuitable for him:—*Held*: the circumstances in which the specified work fell to be performed must be presumed to have been in the contemplation of the medical referee when he made his report, which was final & conclusive on the matter; & accordingly, the arbitrator was not entitled to award compensation as for total incapacity.—*MOONEY v. WILLIAM BAIRD & CO.*, [1937] S. C. 1.—*SCOT.*

of the employer was to the effect that the workman had been suffering from some considerable time from *osteitis fibrosa* which was the principal cause of the incapacity & in no way due to the accident. On that evidence the county ct. judge made his award for the employer. The workman appealed on the ground that he had all along suffered from the same condition which had been conclusively found by the medical referee to have resulted from the accident, & therefore could not now be said to be due to other causes:—*Held*: the county ct. judge not having given reasons for his judgment, & it being doubtful whether he had applied the principle set out in *Cauldon Potteries, Ltd. v. Johnson*, No. 3821a, *post*, there must be a new trial.—*DUNN v. DORMAN, LONG & Co., LTD.* (1933), 26 B. W. C. C. 593, C. A.

**3056a.** —.]—Appct. was in receipt of a weekly payment on account of injuries received in the course of his employment. The employers gave notice of termination of the weekly payment, on the ground of recovery as certified by their doctor. The workman replied with a counter-certificate of his doctor. The matter was submitted to the medical referee, who certified that the man was fit for most forms of work. The employers ceased making the weekly payments, & the workman appealed to the county ct. judge as to the effect of the certificate. The judge, sitting with the same medical referee as assessor, who explained his certificate as being one of complete recovery, held the man was fit for work on the date when compensation ceased, but awarded compensation from the date of cessation of the weekly payment to the date of his award:—*Held*: (1) compensation was not payable after incapacity had ceased; (2) the certificate of the medical referee was sufficient & conclusive.—*PULLEN v. ENTHOVEN & SON* (1927), 20 B. W. C. C. 248, C. A.

**3056b.** —.]—In a reference to a medical referee made under Workmen's Compensation Act, 1925 (c. 84), s. 19 (2), the medical referee certified that the workman was fit to resume his ordinary occupation, but described it as being something different from what in fact it had previously been. The county ct. judge refused to treat the certificate as conclusive, & received evidence as to the nature of the respective occupations, the parties having objected to the certificate being sent back to the medical referee for explanation or correction:—*Held*: the certificate being ambiguous was not conclusive, & the parties having refused the opportunity of the ambiguity being explained by the medical referee, the judge was entitled to hear the evidence tendered & act upon it.—*AUSTIN v. PARTINGTON STEEL & IRON Co., LTD.* (1928), 21 B. W. C. C. 1, C. A.

*Annotation*:—*Consd. Morgan & Co. v. Thomas*, [1938] 1 All E. R. 696.

**3056c.** —.]—A stoneman in a colliery was certified by a medical referee to be suffering from miners' nystagmus, & unable to do work which involved stooping. The county ct. judge, after hearing evidence, interpreted that certificate as meaning that the workman was unable to do work which involved continuous stooping, such as his old employment

necessitated, & made an award on the basis of partial incapacity:—*Held*: the judge had properly treated the certificate as conclusive, & interpreted it rightly, & was justified in hearing evidence as to the amount of stooping that would incapacitate the man in order to make an award for the proper compensation.—*TAYLDER v. LAMBTON, HETTON & JOICEY COLLIERIES, LTD.* (1928), 21 B. W. C. C. 115, C. A.

**3056d.** — *As to possibility of recurrence.*—A medical referee, to whom a dispute as to the condition of a workman who had sustained injuries by accident arising out of & in the course of his employment had been referred under Workmen's Compensation Act, 1925 (c. 84), s. 19, after giving two certificates of partial recovery, certified that in his opinion the workman had completely recovered from the accident & was fit for his ordinary work:—*Held*: the medical referee must be taken to have directed his mind, not merely to the condition of the workman at the moment, but to the possibility of a recurrence of incapacity, & that his certificate was final & conclusive.

Where, therefore, upon an application by the employer to end the compensation, the workman lodged a minute informing the ct. that skiagrams taken since the last certificate of the medical referee had disclosed conditions not apparent on external examination, & that there was a reasonable probability of a recurrence of incapacity:—*Held*: it was not competent to the arbitrator, or, failing him, to the appellate ct., to direct an inquiry into the facts set forth in the minute, & that the only course open to the arbitrator was to end the compensation.—*WILSONS & CLYDE COAL Co. v. BURROWS*, [1929] A. C. 651; 98 L. J. P. C. 151; 141 L. T. 594; 45 T. L. R. 615; 22 B. W. C. C. 430, H. L.

*Annotations*:—*Consd. Connor v. Cadzow Coal Co.*, [1932] A. C. 1; *Penrhyber Navigation Colliery Co. v. Edwards*, [1933] A. C. 28; *Hamilton v. Kinneil Cannel & Coking Coal Co.* (1932), 25 B. W. C. C. Supp. 81. *Fold. Moore v. Wallsend & Hebburn Coal Co.* (1935), 28 B. W. C. C. 174. *Consd. Richards v. Goskar*, [1937] A. C. 301. *Reff. Meehan v. Baird & Co.* (1932), 25 B. W. C. C. Supp. 1.

**3056e.** —.]—A puller-up at a coal pit lost the index finger of his left hand while at work in Aug. 1933. He received compensation at 30s. a week until Jan. 1934, when a notice was served on him under sect. 12 (3) of his employer's intention to reduce the compensation to 7s. 6d. The workman served a counter-notice & the matter was referred to a medical referee who in Feb. 1934, certified as follows: "(1) The condition of the said Joseph Moore is as follows: He has recovered from the amputation of the left index finger & is fit for his ordinary work as 'puller-up'; (2) the incapacity of the said Joseph Moore has ceased." On this certificate the employer ceased payment. On Mar. 7, 1934, the workman returned to work but left on the same day on the ground that he was unable to do it. In May, 1934, he applied to the county ct. for resumption of compensation. The county ct. judge held that the medical referee's certificate was one of complete recovery & that it was impossible for him to award compensation. No declaration of liability was made or asked for. In Dec.

1934, the workman underwent an operation on his hand & in Jan. 1935, made a fresh application for compensation. The county ct. judge on this occasion held that the certificate of Feb. 1934, did not deal with future probabilities & awarded the workman compensation for partial incapacity. The employer appealed:—*Held*: the county ct. judge having given his decision in May, 1934, on the meaning of the medical referee's certificate, but finally determined the matter & could make no further award. Appeal allowed.—*MOORE v. WALLSEND & HEPBURN COAL CO., LTD.* (1935), 28 B. W. C. C. 174, C. A.

**3057a.** ——— *What amounts to ambiguity.*—*EVANS (RICHARD) & CO., LTD. v. GILBIE*, No. 3541a, *post*.

**3057b.** ——— *—*—*AUSTIN v. PARTINGTON STEEL & IRON CO., LTD.*, No. 3056b, *ante*.

**3057c.** ——— *What amounts to.*—A medical referee certified that a workman was fit for work as a stevedore, or at any other form of unskilled labour, but that occasionally in actions where a particularly strong grip was necessary he would be working at a small disadvantage as compared with his condition before the accident. The county ct. judge, contrary to his own opinion that the man was not fit for work as a stevedore, held that the certificate was conclusive against the workman:—*Held*: the certificate was unambiguous & there was no misdirection.—*MONTGOMERY v. GENERAL STEAM NAVIGATION CO., LTD.* (1929), 22 B. W. C. C. 48, C. A.

**3057d.** *Remit for fresh certificate.*—A workman suffered an accident which caused dislocation of the right shoulder. Compensation was paid by the employer at first for total & then, on the return of the workman to light work, for partial incapacity. Notice to terminate was then given under sect. 12, & the matter proceeded by reference to the medical referee who certified that there was no disability except for a permanent liability to recurrent dislocation. The certificate ended with the words: "The incapacity consists entirely in the liability to recurrence. He is fit for his present employment with the proviso that the dislocation may recur at any time, however light the work." The workman claimed that the effect of this certificate was that he was totally incapacitated: the employer claimed that it entitled the workman to no more than a declaration of liability. The county ct. judge made an award of compensation for partial incapacity. The employer appealed:—*Held*: the certificate was ambiguous, the medical referee having failed to state in precise terms his answer to one of the questions referred to him, namely, the kind of employment for which the workman was fit.

**3057 i. Ambiguous report—Duty of judge to clear.**—Employers, who had been paying compensation to a labourer in respect of an injury to his eye, served upon him a medical certificate to the effect that he had recovered; & no counter-certificate having been received from him, they stopped payment of compensation on Apr. 5, 1927. In a subsequent application by the workman to have a memorandum of

agreement recorded, the arbitrator, on the application of the employers, made a remit to a medical referee. On Feb. 2, 1928, the referee reported that the workman's condition was such that he was not "at present" debarred from doing labouring work. The arbitrator granted warrant to record the memorandum, but suspended compensation as from Apr. 5, 1927, until the further orders of the Ct.:—

Appeal allowed. Matter remitted to medical referee for fresh certificate.—*RILEY v. BICKERSHAW COLLIERIES, LTD.* (1937), 30 B. W. C. C. 155, C. A.

**3057e.** ——— *—*—A driver of a steam truck was on Jan. 12, 1935, totally incapacitated as a result of the bursting of the boiler. Liability was admitted & compensation paid by the employer. On Sept. 27, 1935, a medical referee to whom the matter had been referred under sect. 19 certified that the workman's condition was a purely nervous one, that he should be given light work & would be fit for full work in two months' time. The employer then re-employed the workman at light work, paying him reduced compensation. The matter was again referred to the same medical referee, who on Feb. 20, 1936, certified that the scar had almost disappeared, that the workman could walk seven miles a day, that apart from this he could find no cause for incapacity & that he did not think that slight weakness of the legs would interfere with the workman driving. The certificate concluded, "the incapacity of William James Staff has in my opinion ceased." On this certificate the employer ceased to pay compensation. The workman filed an application for arbn. & in his answer the employer referred to the two certificates of the medical referee & contended that the county ct. judge had no jurisdiction to hear the arbn. On this preliminary point the county ct. judge held that the second certificate was unambiguous & conclusive & refused to hear the arbn. The workman appealed:—*Held*: the medical referee was bound by sect. 19 (3) to certify both as to the condition of the workman & his fitness for employment, & in this case had only certified as to his fitness for employment. The matter must therefore be sent back to the medical referee to certify as to the workman's condition by following the directions on the appropriate form as set out in the sched. to the regulations as to medical referees. Appeal allowed. Matter remitted.—*STAFF v. FREEGUARD BROS.* (1937), 30 B. W. C. C. 384, C. A.

**3057f. Ambiguous certificate—Duty of judge.**—Appcts., who had been paying resp. compensation in respect of an injury, applied for a medical reference. The medical referee granted a certificate which was ambiguous:—*Held*: (1) a judge, although he has power to do so, is under no duty to remit an ambiguous certificate to the medical referee for explanation; (2) if a certificate is ambiguous, it is wholly bad, & even an unambiguous portion cannot be conclusive evidence of matters certified therein. *MORGAN & CO. v. THOMAS*, [1938] 1 All E. R. 696; 82 Sol. Jo. 273; 31 W. C. C. 47, C. A.

**3058a.** ——— *No injustice caused.*—The registrar of a county ct. made an order under

*Held*: the arbitrator was not entitled, on the evidence before him, to suspend compensation as from Apr. 5, 1927, & in view of the circumstances disclosed, the capacity of the workman as between Apr. 5, 1927, & Feb. 2, 1928, should be inquired into by the arbitrator rather than by a further remit to the medical referee.—*MCLELLAN v. THORNBURN & SON*, [1929] S. G. (Ct. of Sess.) 84.—*SCOT*.

1925 Act, s. 19 (2), referring a dispute to a medical referee. The application to the registrar had been made by the employers *ex parte* without notice to the workman contrary to the provisions of Workmen's Compensation Rules, r. 57 (2). On appeal, all parties being then before him, the judge confirmed the order & dismissed the appeal on the grounds that the merits of this case required a reference to the medical referee & no injustice had been caused by the failure to comply with the rules:—*Held*: the judge had power, under County Ct. Rules, Ord. 54, r. 24, to deal with the matter in this way. Appeal dismissed.—*RIXON v. ASHFORD HOSPITAL TRUSTEES* (1931), 24 B. W. C. C. 518, C. A.

**3058b. Reference by consent—Functions of registrar.]**—The functions of a county ct. registrar in connection with a reference to a medical

referee under the Workmen's Compensation Act, 1925 (c. 84), & the Workmen's Compensation Rules, 1926, are purely ministerial. He has no jurisdiction to consider whether the questions put to the medical referee have been properly answered, or to remit the certificate for further answer.—*BURGOYNE v. ROSE BRIDGE COLLIERY CO., LTD.*, [1936] 2 K. B. 1; [1936] 1 All E. R. 743; 105 L. J. K. B. 532; 155 L. T. 7; 52 T. L. R. 435; 80 Sol. Jo. 322; 29 B. W. C. C. 86, C. A.

*Annotation*:—*Refd.* Hill v. Ladyshore Coal Co. (1930), Ltd., [1936] 3 All E. R. 299.

**3059. Add. Annotations:—***Consd.* Somerville v. Barclay Curle (1925), 19 B. W. C. C. 536; *Penman v. Caprington & Auchlochan Collieries* (1926), 19 B. W. C. C. 604. *Refd.* Lafferty v. Darnagavil Coal Co. (1926), 20 B. W. C. C. 671; *Catton v. Ashwell & Nesbit*, [1928] Ch. 484; *Dugdale v. Johnson & Phillips, Ltd.* (1931), 24 B. W. C. C. 502.

**3080 i.** — *How far certificate conclusive.*—A workman sustained an injury by accident necessitating amputation of his left index finger. He was paid compensation, at first for total, & later for partial, incapacity. In the course of a medical reference a remit was made to a medical referee to report (a) whether the workman had wholly or partially recovered from the effects of the accident, & if necessary, the kind of work for which he was fit, & (b) whether, or to what extent, his incapacity was due to the accident. The referee having reported (a) that the workman was fit for any work which did not involve gripping, & that his hand required use, & (b) that his incapacity was due to want of use & effort, the employers moved for termination of compensation. The workman thereupon lodged answers in which he averred that he had, on the advice of his medical practitioner, used his hand in all reasonable ways, & that, in spite of such use, he was still partially incapacitated. The arbitrator having allowed a proof of the workman's averments:—*Held*: the referee's statement in his report that the workman's incapacity was due to want of use & effort did not raise any question as to the reasonableness of the workman's conduct, but involved a purely medical question upon which the referee was final; & the arbitrator had, accordingly, misdirected himself in allowing a proof, & should have terminated the compensation.—*ROSS v. MANOR POWIS COAL CO.*, [1936] S. C. 77.—*SCOT*.

*sg. Duty to consider medical report of workman.*—On Oct. 29, 1931, a workman applied for a medical reference in arbn. proceedings pending between him & his employers. The arbitrator refused the application, but that refusal was reversed on appeal, & in Oct. 1932, the Sheriff-Clerk remitted to the medical referee. The referee refused to consider a medical report obtained by the workman on Sept. 26, 1932, that is, after his application, which had not been included amongst the productions sent to him by the Sheriff-Clerk with the reference. The medical referee having certified the workman fit for his ordinary work, the employers moved the arbitrator to end compensation. The workman lodged objections, on the ground, *inter alia*, of the referee's refusal to consider the report aforementioned. The arbitrator having ended compensation, the workman appealed. In all the circumstances of the case the appeal was dismissed.—*NICOL v. KINCAID & CO., LTD.* (1933), 26 B. W. C. C. Supp. 68.—*SCOT*.

*sk. Irregularities in reference—Effect.*

—On Jan. 19, 1934, employers applied for a medical reference as to the condition of an injured workman. On Jan. 30, the workman not opposing, the matter was referred to the medical referee, who certified on Feb. 9 that the workman had recovered from his injury & was fit for his ordinary work. The employers thereupon lodged a minute moving the arbitrator to end compensation. The workman lodged answers stating that the procedure in the medical reference had been bad, & that the reference was null & void. He averred that on Jan. 25, 1934, at the request of the employer, he had submitted himself for X-ray examination to a doctor named; that the X-ray plate & a report upon it had been furnished to the employers; that they were bound to lodge that plate & report along with their application for a reference; & that they had not done so. It was later agreed that the plate had been sent by the employers to the medical referee on Feb. 6, but that the report had not been sent. The arbitrator having ended compensation, the workman appealed:—*Held*: in respect of the irregularities in the reference the arbitrator was not entitled to end compensation. Further, the X-ray plate had not been lodged, & could not have been lodged, as a production by the employers at their application, in terms of the Act of Sederunt, & could not be classed as a "statement" in terms of the Regulation. Appeal allowed.—*BAIN v. SPRINGBANK QUARRY CO., LTD.*, [1935] S. C. 5; 27 B. W. C. C. Supp. 89.—*SCOT*.

*sm. Right of employer to reference—Notwithstanding common law action by workman.*—On Nov. 16, 1932, a stripper sustained injury during the course of his employment in a colliery, being burned by an explosion which occurred there. On Nov. 24, 1932, he gave his employers "notice & claim" at common law, under the Employers' Liability Act & under the Workmen's Compensation Act. On July 13, 1933, the employers applied to the sheriff-clerk for a medical reference, alleging that they had paid the workman compensation under the Act. On July 28, 1933, the workman raised an action at common law in the Ct. of Session against the employers, & on Aug. 1, 1933, he lodged objections to the employers' application for a medical reference, on the grounds that he had not accepted compensation under the Act & that he had raised a common law action. The sheriff-clerk &, on appeal, the Sheriff-Substitute, as arbitrator, refused the application for a medical reference. The employers ap-

pealed:—*Held*: the raising of an action at common law by the workman did not bar the employers, a claim under the Act having been served upon them, from obtaining a medical reference, the certificate in which might be useful at a future date. Appeal allowed.—*RAE v. DUNLOP & CO., LTD.*, [1934] S. C. 438; 27 B. W. C. C. Supp. 35.—*SCOT*.

*sp.* — *A mine-worker, aged sixteen, was injured on Nov. 3, 1932. Very shortly after the accident he obtained a certificate from an infirmary & gave it to his brother to enable him to obtain money from his employers, which his brother in fact did obtain for some weeks, & the workman himself for a few weeks thereafter. In Jan. 1933, the workman stopped collecting these payments & on Jan. 5, by his solrs., intimated that he intended to claim damages at common law. On Mar. 30 & June 26, 1933, the workman submitted himself to medical examination at the instance of the employers. On June 12, 1933, the workman raised an action at common law in the Ct. of Session concluding for damages against his employers in respect of his injury of Nov. 3, 1932. At no time did he make a claim under the Workmen's Compensation Act. On July 3, 1933, the employers presented an application in the Sheriff Ct. for a medical reference under the Act, the application being accompanied by the two medical reports above mentioned. The workman lodged objection to the application on the grounds (a) that there was no agreement to pay or receive compensation under the Act, & (b) that proceedings at common law were pending in the Ct. of Session. The Sheriff-Clerk repelled the objections & allowed the reference. The workman appealed to the arbitrator. In the appeal, the employers amended their application to the effect of deleting their averment that compensation had been paid under the Act, as that matter was at that time *sub judice* in the Ct. of Session. The arbitrator refused the appeal, & the workman appealed to the Ct. of Session:—*Held*: notice of an accident having been given by the workman by service of the writ in the common law action, the employers were entitled to insist under sect. 17 on a medical examination, & the fact that the common law action was raised after the expiry of the statutory period was not a bar to the employers' application for a medical reference, in respect that the workman still had contingent rights under the statute, the assertion of which the employers were entitled to anticipate. Appeal dismissed.*

*Opinions reserved on the question whether, if notice of the accident had*



**3061. Add. Annotations:—**Consd. Penrikyber Navigation Colliery Co. v. Edwards, [1933] A. C. 28. Refd. Lewis v. Tredegar Iron & Coal Co. (1929), 22 B. W. C. C. 268; Hands v. Great Western Colliery Co. (1930), 23 B. W. C. C. 477; Timmins v. Brodsworth Main Colliery Co., [1934] 2 K. B. 361.

**3061a. ———.]**—A miner was certified in Dec. 1925, as suffering from miner's nystagmus, & was paid compensation. In Aug. 1926, the employers stopped compensation after serving notice under Workmen's Compensation Act, 1925 (c. 84), s. 12, on the ground that the workman no longer suffered from the disease. A counter-notice having been served, the issue was referred by the registrar to the medical referee, who certified that the workman was totally incapacitated, but that such incapacity was due to other causes than nystagmus. On an application by the workman for an arbitration in Jan. 1929, evidence was tendered that nystagmus had once more become active, but the employers raised the preliminary objection that the medical referee's certificate was conclusive against the workman, & destroyed the effect of the certifying surgeon's certificate of Dec. 1925. The county ct. judge upheld the objection & made an order dismissing the application for arbitration. The workman appealed:—*Held*: the certificate of a medical referee being only conclusive as to the matters therein certified, & miner's nystagmus being a recurrent disease, the certificate was not of itself a bar to the claim of the workman for compensation, & it was for the county ct. judge to decide whether there had been in fact any recrudescence of the original disease.—*LEWIS v. TREDEGAR IRON & COAL CO.* (1929), 22 B. W. C. C. 268, C. A.

*Annotations:—*Refd. Hands v. Great Western Colliery Co. (1930), 23 B. W. C. C. 477; Penrikyber Navigation Colliery Co. v. Edwards, [1933] A. C. 28; Holmes v. Kaye, Son & Co. (1934), 151 L. T. 83.

**3061b. ———.]**—A certifying surgeon certified that a workman was suffering from dermatitis produced by dust or liquids & that the disablement commenced on Nov. 28, 1935. The employer appealed to the medical referee who, on Jan. 6, 1936, dismissed the appeal & certified that the workman "is not now suffering from dermatitis produced by dust or liquids." The medical referee made no finding as to probability of recrudescence or as to increased susceptibility. The employer paid compensation for the period from Nov. 28, 1935, to Jan. 6, 1936. In Sept. another certifying surgeon certified that the workman was suffering from dermatitis produced by dust or liquids & that the disablement commenced on Sept. 1, 1936. The employer appealed to the same medical referee who dismissed the appeal & certified that the workman "is still suffering from dermatitis produced by dust or liquids & is thereby disabled from earning full wages at the work at which he was employed & I fix Nov. 28, 1935, as the date on which the disablement from the said disease commenced":—*Held*: the first certificate of the medical referee was not conclusive as to recovery & there was no

inconsistency between the two certificates.—*SCRUTTONS, LTD. v. RADONICICH* (1937), 81 Sol. Jo. 611; 30 B. W. C. C. 303.

**3062a. ——— Copy of medical certificate—Statutory requirements not complied with.]**—A collier was injured while working & a big toe was amputated in consequence. After paying full compensation for a time & then part compensation, the employers proceeded under Workmen's Compensation Act, 1925, s. 12, & gave notice of termination of payments. A copy of the medical adviser's certificate as to workman's condition supplied with the notice contained nothing that was not in the original certificate, but omitted various matters included therein. The medical referee certified the workman as fully recovered & payments were terminated. Renewed trouble appeared at the seat of the amputation, shortly afterwards, & the workman applied for & obtained an award of compensation from the county ct. The employers appealed on the ground that the medical referee's decision was conclusive & binding, & the county ct. had no jurisdiction to inquire into the matter. A preliminary objection against the appeal was taken on the ground that the omissions in the copy medical certificate, served on the workman, were contrary to the express terms of sect. 12 (3), & that it & all subsequent proceedings based on it were a nullity:—*Held*: the omissions in the copy of the certificate of the employers' doctor were contrary to the express provisions of Workmen's Compensation Act, 1925, s. 12 (3), & all subsequent proceedings based upon it were invalid & a nullity. The appeal must therefore be dismissed & the parties left to take such proceedings as they might be advised.—*HILL v. LADYSHORE COAL CO.* (1930), LTD., [1930] 3 All E. R. 299; 155 L. T. 567; 80 Sol. Jo. 874; 29 B. W. C. C. 255, C. A.

**3068. Add. Annotation:—***Distd. Parker v. London Brick Co. & Forders* (1927), 20 B. W. C. C. 573.

**3074. Add. Annotation:—***Folld. Lewis v. Cammell, Laird & Co.* (1929), 22 B. W. C. C. 410.

**3076. Add. Annotation:—***Folld. Lewis v. Cammell, Laird & Co.* (1929), 22 B. W. C. C. 410.

**3076a. ———.]**—A stevedore earning 65s. a week injured his knee on Mar. 14, 1928, & remained totally incapacitated until Mar. 16, 1929. He was then given light work, but left it on Aug. 1, 1929, stating that he was once more totally incapacitated. Correspondence followed between the representatives of the workman & the representatives of the employer; in the course of this correspondence the latter repudiated the suggestion that the workman was totally incapacitated but eventually agreed to pay certain sums to the workman as compensation, partly in the form of a lump sum for arrears & partly in the form of weekly payments for the future. In accordance with this agreement the workman on Jan. 21, 1930, signed a receipt agreeing to accept the sum, "being weekly compensation at the rate of £1 a week from Aug. 1, 1929, to Jan. 23, 1930." The wording of the receipt con-

not *de facto* been given by the workman, the employers' independent knowledge of the accident would have entitled

them to make the application, on the ground that necessity of giving notice under the Act had been dispensed with.

—*O'DONNELL v. BROWNIESIDE COAL CO., LTD.* (No. 2), [1935] S. C. 41; 27 B. W. C. C. Supp. 116.—*SCOT.*



tinued: "This weekly payment is to be continued during my partial disablement resulting from the accident in accordance with the provisions of the (Workmen's Compensation) Act, the amount of any payment due during decreased partial disablement to be settled hereafter." Weekly payments of £1 were paid to the workman under this agreement. On Nov. 5, 1930, the workman filed an original request for arbn. asking for compensation on the basis of total incapacity at 30s. a week from Aug. 1, 1929, & claiming the difference. The county ct. judge found that a binding agreement had been made between the parties as to the amount payable for partial incapacity, but on a finding that the workman was in fact totally incapacitated, he held that, though there had been no change in the workman's physical condition since Aug. 1, 1929, he could make an award for 30s. a week on the basis of total incapacity from that date, as the agreement did not purport to deal with anything but partial incapacity. On appeal by the employer the Ct. of Appeal held that the agreement dealt with the question of the extent of the incapacity as well as with the rate of compensation, & the judge could not disregard the agreement that the man was in fact only partially incapacitated, which was binding. They allowed the appeal & set the award aside with costs. The workman appealed to the House of Lords:—*Held*: the agreement precluded the workman from claiming compensation on the basis of total incapacity between Aug. 1, 1929, & Jan. 23, 1930, but it did not preclude him from applying for a review of the weekly payments paid under the agreement for any period subsequent to Jan. 23, 1930, on proof of "change of circumstances or knowledge" justifying such a review. The proceedings brought by the workman in the county ct. were misconceived & should have been by way of review & not by way of original arbn. Appeal dismissed with costs to applt. Declaration that order of Ct. of Appeal setting aside award to be without prejudice to right of workman to apply for review of weekly payments made after Jan. 23, 1930.—*SMITH v. UNION CASTLE STEAMSHIP CO., LTD.* (1932), 25 B. W. C. C. 176, H. L.

*Annotation*:—*Refd.* North's Navigation Co. (1889), Ltd. v. Batten (1933), 150 L. T. 186.

**3080a.** —.]—A potters' dust grinder was certified as being totally disabled by silicosis on Oct. 16, 1930, & he received compensation. On Nov. 30, 1931, a medical board certified that he was unfit for work, but that silicosis only partially contributed to his incapacity. The Scheme only providing for compensation for total incapacity the employers ceased paying compensation from Dec. 31, 1931. The workman filed an application for arbn., which was heard & dismissed on Feb. 16, 1933. On Jan. 4, 1933, the workman filed another application for arbn., claiming compensation for total incapacity from Feb. 17, 1933. The employers raised the preliminary objection that the matter was *res judicata*. The county ct. judge held that the matter was not *res judicata*. The employers appealed:—*Held*: the cause of action was not the same as that in the proceedings which

ended in the award given on Feb. 16, 1932, & therefore not *res judicata*.—*NEWMAN v. THYNNE (H. & G.), LTD.* (1933), 26 B. W. C. C. 390, C. A.

**3081.** *Add. Annotations*:—As to (1) *Apld.* Dodd v. Oceanic Steam Navigation Co. (1928), 21 B. W. C. C. 118; Tempus Shipping Co. v. Trott (1929), 141 L. T. 19. *Extd.* Hayter v. Southern Ry. Co. (1930), 100 L. J. K. B. 378; Winfield v. London, Midland & Scottish Railway (1931), 24 B. W. C. C. 158. *Consd.* Kilbane v. Whitehaven Colliery Co. (1933), 26 B. W. C. C. 76. *Refd.* Robinson v. Vickers-Armstrong (1929), 22 B. W. C. C. 171; Ruddy v. L. M. & S. Ry. (1929), 22 B. W. C. C. 138; Mockbill v. Homer City S.S. Owners (1929), 22 B. W. C. C. 260; Evans & El Uruguayo S.S. Owners, Barlow v. Pacific Steam Navigation Co. (1930), 23 B. W. C. C. 383; Fairfield Shipbuilding Co. v. Harris (1931), 24 B. W. C. C. 110; White v. Winterton Pottery (Longton), Ltd., [1932] 2 K. B. 265; Higgins v. Cronk & Sons, Ltd. (1932), 25 B. W. C. C. 396; Monaghan v. Elswick Coal Co. (1933), 26 B. W. C. C. 432; White v. Carlton Main Colliery Co. (1934), 27 B. W. C. C. 194; Garnett v. Enoch Rhodes & Son (1935), 28 B. W. C. C. 345; Moore v. Wallend & Hepburn Coal Co. (1935), 28 B. W. C. C. 174; Harding v. Waters, Ltd., [1936] 3 All E. R. 891. As to (2) *Expld.* Francis v. London Public Omnibus Co. (1933), 26 B. W. C. C. 539. *Refd.* Lafferty v. Darngavil Coal Co. (1926), 20 B. W. C. C. 671. *Generally, Refd.* Howarth v. Singleton (1926), 20 B. W. C. C. 136.

**3083a.** *Discretion to allow amendment of proceedings.*—A coal porter who had lost his left middle finger as a result of an accident applied for arbn. The employer offered to take him back & start him at light work at his old wages. On this the county ct. judge made a declaration of liability. After a few months of light work, during which the workman only once attempted to do his old heavy work, the workman was discharged owing to slackness of trade. He then applied again for arbn. under sect. 21. At the hearing of the application the employer contended that the application should have been made by way of review under sect. 11, & the judge upheld the contention. He, however, adjourned the hearing until the afternoon to enable the workman to formulate the necessary amendment & to draft a statement of the change of circumstances which he alleged as justifying a review, & for the employer to apply for a further adjournment if necessary. The change of circumstances alleged was put into writing & was: "That since [the date of his return to work] applt. has attempted to do his pre-accident work but was unable to do so & was put on light work." Upon this the employer consented to the case being heard without further adjournment. The judge found that there had been a change of circumstances in that "the anticipation of the medical witnesses at the first hearing, that after a short period of light work the workman would be able to resume his full work, had not been realised." He therefore made an award for the workman of 12s. 6d. a week on the basis of partial incapacity. The employer ap-

pealed:—*Held*: the county ct. judge had properly exercised his discretion in allowing the amendment, but had misdirected himself in finding a different change of circumstances than that stated in the amendment. Appeal allowed without prejudice to the workman applying for a further review if justified.—*CURTIS v. RICKETT, COCKERELL & Co., LTD.* (1933), 26 B. W. C. C. 16, C. A.

3086. *Add. Annotation*:—*Consd. Parker v. London Brick Co. & Forders* (1927), 20 B. W. C. C. 573.

3090. *Add. Annotation*:—*As to* (1) *Consd. Hayter v. Southern Ry. Co.* (1930), 100 L. J. K. B. 378; *Francis v. London Public Omnibus Co.* (1933), 26 B. W. C. C. 539.

3091. *Add. Annotations*:—*As to* (1) *Folld. Parker v. London Brick Co. & Forders* (1927), 20 B. W. C. C. 573. *Refd. Cockerline (W. H.) & Co. v. I. R. Comrs.* (1930), 16 Tax Cas. 1.

3093a. *Proposed reduction of payment.*—*HOWARD v. KINNELL (CHARLES P.) & Co., LTD.* (1938), 55 T. L. R. 193, C. A.

3095. *Add. Annotation*:—*Consd. North's Navigation Co. (1889), Ltd. v. Batten* (1933), 150 L. T. 186.

3096. *Add. Annotation*:—*Distd. Parker v. London Brick Co. & Forders* (1927), 20 B. W. C. C. 573.

3097. *Add. Annotation*:—*Folld. Parker v. London Brick Co. & Forders* (1927), 20 B. W. C. C. 573.

3098. *Add. Annotation*:—*Folld. Parker v. London Brick Co. & Forders* (1927), 20 B. W. C. C. 573.

3098a. —.—An infant workman lost his left arm below the elbow as a result of an accident. The employers admitted liability, & paid full compensation. On Nov. 5, 1926, the workman signed a receipt for payments in the form of an agreement, by which he agreed that the payments were to be continued only so long as he was totally disabled, but that the amount of payment in respect of any subsequent partial incapacity should be settled if & when the question arose. In Jan. 1927, he applied for registration of an agreement in the terms of Form 24, that the weekly payments should continue during partial or total incapacity or until the same should be ended or diminished in accordance with 1925 Act. The employers objected to that agreement being recorded, on the ground that the terms of the real agreement of Nov. 5, 1926, were not therein correctly stated, & thereupon the workman filed a request for

arbn. on Feb. 23, 1927. The boy obtained work as a messenger boy on Feb. 11, 1927. The county ct. judge ordered the document of Nov. 5 to be recorded as the agreement between the parties, & dismissed the request for arbn.:—*Held*: a totally incapacitated workman in receipt of full compensation under an admission of liability was entitled, either to a recorded memorandum of agreement stating his rights in the terms of Form 24, or, if the employers objected to that, he was entitled, on the question so raised, to apply in arbn. proceedings for the judge to grant an award in such terms; the document of Nov. 5 did not give the workman his full rights as expressed in Form 24, & was not binding on the workman, being an infant, & when the employers objected to the recording of a memorandum in the terms of Form 24 a question was raised fit for arbn., & an award should have been made having regard to the terms of Form 24, & there was no power on the proceedings to order a memorandum of agreement to be recorded, & the case must be remitted for the proper award to be made to suit the circumstances of the workman having actually returned to work.—*PARKER v. LONDON BRICK CO. & FORDERS, LTD.* (1927), 97 L. J. K. B. 42; 20 B. W. C. C. 573, C. A.

3099. *Add. Annotation*:—*Distd. Parker v. London Brick Co. & Forders* (1927), 20 B. W. C. C. 573.

3100. *Add. Annotation*:—*Folld. Parker v. London Brick Co. & Forders* (1927), 20 B. W. C. C. 573.

3110a. *Workman employed by unincorporated association.*—Where a workman suffers an injury by accident while employed by an unincorporated body of persons & desires to bring arbn. proceedings in respect of the injury, he should cite as resps. to the arbn. the persons who are prepared to undertake responsibility to pay compensation out of the funds of the unincorporated body if liability is established. Appeal allowed.—*TAYLOR v. CHURCH UNION (INCORPORATING ENGLISH CHURCH UNION)* (1935), 28 B. W. C. C. 6, C. A.

3116. *Add. Annotations*:—*Consd. Hall v. British Oil & Cake Mills* (1930), 23 B. W. C. C. 529. *Refd. Ford v. Wellerman Bros.* (1930), 99 L. J. K. B. 600.

#### PART XIV. SECT. 11, SUB-SECT. 1.

3101 1. *Jurisdiction of court of district where accident happened*—*Accident in Ireland—Employer resident in England.*—*SCANLON v. HARTLEPOOL SEATONIA S.S. Co., LTD.* (No. 1), [1929] I. R. 96.—IR.

#### PART XIV. SECT. 11, SUB-SECT. 3.

57. *Statement of claim—Action under Workmen's Compensation Act, R. S. S., 1920 (c. 210)—Date of accident.*—*LIEB v. DEACON*, [1927] 3 D. L. R. 332; [1927] 2 W. W. R. 173; 21 Sask. L. R. 485.—CAN.

57. *Case should not be determined on technicality.*—A workman received compensation, at first for total & later for partial incapacity, in respect of injuries accompanied by severe nervous shock. The medical referee having reported that the workman, although still suffering from nervous symptoms, was fit to try his ordinary work, the arbitrator, on July 6, 1934, suspended

compensation, against which decision the workman did not appeal. On July 18, 1934, the workman instituted new proceedings, in which he averred that he was still incapacitated, & that his former employers had refused to let him try his ordinary work. The employers pleaded that these averments were irrelevant, but stated no plea to the competency of the application. At adjustment, the workman added an averment that, subsequently to the date of his application, he had been employed at his ordinary work by another employer, but had been discharged in respect that, owing to his nervous condition, he was unable to do the work. The arbitrator having dismissed the workman's application as irrelevant, in respect that, as at the date of his application, he had not averred that there was any change in his condition:—*Held*: as there was no plea to the competency of the application, the relevancy of the workman's averments must be judged

as at the date when the case came to be considered by the arbitrator; & as adjusted, these averments disclosed a relevant case for inquiry.

Observations upon the undesirability of disposing of arbitrations under the Workmen's Compensation Acts on technical pleas, where there were questions of real substance between the parties.

Appeal allowed.—*M'SWENEY v. CLAN LINE STEAMERS, LTD.* (1935), 28 B. W. C. C. Suppt. 154.—SCOT.

#### PART XIV. SECT. 11, SUB-SECT. 5.

5d. *Joint committee—Consideration of extraneous matters on hearing of application—Effect of.*—*Workmen's Compensation (Broken Hill) Act, Sched., Part II.*, provides that awards of compensation shall be made by the joint committee to a mine-worker, whom the medical authority has certified to be suffering from pneumoniae &/or tuberculosis to such a degree that he

**3129a.** —[—]—Deceased, on leaving off work, remarked to a fireman that he had been hit by a fall of rock. He died the next day. The *post mortem* examination showed he was suffering from heart & other diseases, & might have died at any moment. The county ct. judge rejected the remark as evidence of an accident, &, after hearing all the evidence, found that no accident had occurred:—*Held*: the statement was inadmissible as evidence of an accident, & the finding, being one of fact, & there being no misdirection, could not be disturbed.—*JONES v. CORY BROTHERS & Co., LTD.* (1926), 20 B. W. C. C. 251, C. A.

*Annotation*:—*Refd.* Churchward v. Lancaster's Steam Coal Collieries, Ltd. (1935), 28 B. W. C. C. 306.

**3129b.** —[—]—*WOLSEY v. PETHICK BROTHERS*, No. 3897, *post*.

**3133a. Statement after injury—Effect.**—[—]*HAVARI v. AMALGAMATED ANTHRACITE COLLIERIES, LTD.* (1936), 80 Sol. Jo. 875; 29 B. W. C. C. 341, C. A.

**3140. Add. Annotations**:—*Distd.* Rees v. Imperial Navigation Coal Co. (1926), 20 B. W. C. C. 287. *Refd.* Broome v. Minister of Labour (1926), 136 L. T. 322.

**3140a.** —[—]—An infant workman lost a little finger while handling a machine. He was paid varying amounts of compensation for some months, & when this was stopped asked for an award. The county ct. judge allowed the employers to give evidence as to the scope of the workman's employment, & found as a fact that he was not employed to touch or handle any machinery:—*Held*: the employers were not estopped by previous payments of compensation from putting the true facts of the workman's employment before the judge, & his finding thereon was purely a question of fact.—*NOMERACKSKY v. CANTERBURY DRESSING WORKS* (1928), 21 B. W. C. C. 41, C. A.

should not be re-engaged. Upon an application for compensation by a mine-worker, whom the medical authority had certified to be suffering from pneumoconiosis & tuberculosis to the degree mentioned in the schedule, the joint committee, refused to make an award upon the ground, amongst others, that the mine-worker had received compensation in respect of his disablement through lead poisoning under Workmen's Compensation Act, 1916:—*Held*: the receipt of compensation by a mine-worker under Workmen's Compensation Act, 1916, was a matter outside the ambit of the jurisdiction of the joint committee, &, the action of the joint committee in taking into consideration extraneous matters which were outside its jurisdiction, amounted in law to a failure to hear & determine the application, & a writ of mandamus should issue.—*Re ATKINSON, Ex p. ROWE* (1928), 28 S. R. N. S. W. 601; 45 N. S. W. W. N. 194.—*AUS.*

#### PART XIV. SECT. 11, SUB-SECT. 6.—A.

**g i.** —[—]—A woman claimed compensation in respect of the death of a workman by accident arising out of his employment. She averred that she was the widow of the deceased, having been married to him by declaration *de presenti* but that the marriage had not been registered. She further averred that, in any event, the deceased, & she were husband & wife by habit

& repute. These averments were denied by the employers, & they pleaded that proof of them was incompetent in the Sheriff Ct.:—*Held*: it was competent for the Sheriff, as arbitrator, to allow proof of claimant's marriage in the arbn. process, as being incidental to determining whether she was a dependant of the deceased.—*TURNBULL v. WILSONS & CLYDE COAL Co., LTD.* (1935), 28 B. W. C. C. Suppt. 77.—*SCOT.*

**sa. Power to refuse application "without prejudice."**—[—]Where a circuit ct. judge ordered an application to be "refused without prejudice":—*Held*: the refusal of compensation was final, & as the refusal could not be treated as a nullity, nor as a mere adjournment of the application, the judge had no jurisdiction to entertain a second application.—*DELAHUNT v. MOODY*, [1928] I. R. 208; *subsequent proceedings*, 22 B. W. C. C. 939, P. C.—*IR.*

**sb. Power to grant decree for expenses in name of agent-disburser.**—[—]*Held*: although Workmen's Compensation Act, 1925, did not in terms authorise the sheriff, sitting as arbitrator, to allow decrees for expenses to go out in the name of the agent-disburser, such a power, not being expressly excluded, was to be inferred, there being no reason, on grounds of equity or expediency, for refusing to the sheriff, as a statutory arbitrator, a power which he possessed in his ordinary judicial capacity.—*COAKLEY v. SUM-*

**3145. Add. Annotation**:—*Refd.* Moore v. Cunard S. S. Co. (No. 2) (1935), 28 B. W. C. C. 469.

**3145a.** —[—]—A workman was certified as suffering from dermatitis, & applied for arbn. At the hearing in the county ct. it was agreed between the parties that the dermatitis had come to an end, & the county ct. judge made an award for a lump sum in respect of past liability. A fortnight after the making of this award the workman obtained a fresh certificate which certified that he was again disabled by dermatitis, the fresh disablement being certified as commencing on a date subsequent to the making of the award. The workman applied for a new trial on the ground that the parties were under a mutual mistake of fact when they agreed that the dermatitis had come to an end. The county ct. judge granted the application. The employer appealed:—*Held*: the county ct. judge had power to grant a new trial by virtue of rule 29 of Workmen's Compensation Rules, 1926, & sect. 93 of County Cts. Act, 1888 (c. 43), & the order made was within his discretion. Appeal dismissed. Leave to both parties to raise at new trial all questions arising on both certificates.—*NASH v. NANI* (1932), 25 B. W. C. C. 68, C. A.

**3151. Add. Annotations**:—*Refd.* Delahunt v. Moody (1927), 21 B. W. C. C. 588; Woodrow v. Trawlers (White Sea) & Grimsby (1929), 141 L. T. 676.

**3153a. Power to dismiss claim—On statement by counsel that money taken out of court.**—[—]A county ct. judge has no right to dismiss a workman's claim for arbn. without hearing any evidence on counsel stating in his opening that money paid into ct. by the employer has already been taken out by the workman. Appeal allowed. New trial ordered before a different county ct. judge.—*DESBOROUGH v. PORTSMOUTH* (1934), 27 B. W. C. C. 192, C. A.

*MERLEE IRON Co., LTD.*, [1929] S. C. (Ct. of Sess.) 182.—*SCOT.*

#### PART XIV. SECT. 11, SUB-SECT. 6.—B.

**m. Add. Citation**:—19 B. W. C. C. 584.

**m i.** —[—] *Not where question of reasonableness of refusal to undergo operation.*—[—]A colliery machineman, while in receipt of compensation in respect of total incapacity resulting from an accident to his left hand, was examined four months after the accident by a medical referee, who reported that his condition was still such that he was not fit for work of any kind involving the use of the left hand. Six months later the employers applied for another medical reference on the ground that the workman was retarding recovery by declining to submit to an operation, & they produced a medical report which stated that removal of the left ring finger would improve the flexion of the middle & little fingers. The application was opposed by the workman, who tabled a counter certificate which expressed the view that removal of the finger would not improve the gripping power of the hand, & might result in septic poisoning. The sheriff-clerk having remitted to the medical referee to examine the workman & report on his condition & fitness for work, the arbitrator on appeal refused the reference on the grounds (a) that the

**3155a.** Application for second reference—Discretion to refuse.]—After proceedings for a review of weekly payments had been begun by a workman the matter was referred to a medical referee who was an ophthalmic surgeon. This medical referee reported in favour of the employer, but suggested a further reference to a neurologist. The workman then applied for the matter to be referred a second time but to a medical referee who was versed in neurology. The county ct. judge refused the application & the workman appealed from his order refusing the application:—*Held*: the matter was within the discretion of the county ct. judge & he had rightly exercised his discretion in refusing a second reference. Appeal dismissed.—*BODKIN v. MANCHESTER COLLIERIES, LTD.* (1932), 25 B. W. C. C. 262, C. A.

**3161.** Add. Annotation:—*Consd. Dixon v. Sutton Heath & Lea Green Colliery, Ltd.* (1929), 22 B. W. C. C. 521.

**3162a.** ———.]—Where conflicting medical evidence was given, & the county ct. judge followed the view expressed by the medical assessor, who was sitting with him:—*Held*: the county ct. judge must form his own opinion on the facts as proved & then accept advice given by the medical assessor as to the scientific inference to be drawn from those facts, & having entirely founded his award on the opinion formed by the medical assessor his award could not stand.—*FOX v. PRICE* (1926), 20 B. W. C. C. 160, C. A.

Annotations:—*Consd. Dixon v. Sutton Heath & Lea Green*

*Colliery, Ltd.* (1929), 22 B. W. C. C. 521. *Distd. Colley & Sons, Ltd. v. Moone* (1931), 24 B. W. C. C. 429. *Reid, Davis v. London, Midland & Scottish Ry. Co.* (1930), 23 B. W. C. C. 388.

**3162b.** ———.]—A painter's labourer was injured by a ladder falling on his left foot & was paid compensation for a year. The employers applied for the termination or diminution of the weekly payments on the ground that the incapacity due to the injury had ceased. The county ct. judge sat with a medical assessor. In his award the county ct. judge said: "The medical assessor took the view, which was upheld by the ct., that, although there might still be disability due to resp.'s flat feet, this disability was not due to the accident, any disability due to that having come to an end." The workman appealed on the ground that the decision was that of the assessor & not the judge:—*Held*: the county ct. judge had rightly taken the burden of the decision on himself & had not left it to the medical assessor. Appeal dismissed.—*COLLEY (B.) & SONS, LTD. v. MOONE* (1931), 24 B. W. C. C. 429, C. A.

**3165.** Add. Annotations:—*Appl. Fox v. Price* (1926), 20 B. W. C. C. 160. *Consd. Dixon v. Sutton Heath & Lea Green Colliery, Ltd.* (1929), 22 B. W. C. C. 521.

**3165a.** ——— Duty of judge to deal with questions of fact.]—*Held*: the county ct. judge had not himself dealt with those questions of fact with which it was his duty to deal, but had relied on the findings & opinions of the medical assessor. The case must go back for the judge to find the relevant facts, & give

remit as made by the sheriff-clerk did not raise the real question on which the parties were at issue, namely, the actual cause of the workman's existing incapacity, & (b) that, in the circumstances, that question was not a suitable one for determination by the referee:—*Held*: as the real question upon which the parties were at issue was the reasonableness or unreasonableness of the workman's conduct in refusing to submit to an operation, the arbitrator was entitled to refuse to allow a reference.—*WILSON v. SUMMERLEE IRON CO.*, [1933] S. C. 181; 25 B. W. C. C. Supp. 115.—*SCOT.*

**o i.** ———.]—A workman, who had been injured by accident in 1935, was paid compensation by his employers until he returned to work, Sept. 7, 1936. On Sept. 11 he ceased work, & in Oct., instituted an arbn. in which he claimed compensation for incapacity due to the original accident. On Nov. 17, when the workman was not in fact receiving compensation, the employers, having obtained a medical certificate to the effect that he had wholly recovered from the accident served him with a copy of the certificate along with a notice that on Nov. 27 his compensation would cease. On Nov. 24, i.e. less than ten days after the notice, they applied for a medical reference. The arbitrator having allowed the reference:—*Held*: the arbitrator was entitled to allow the reference, in respect that, while the application for a reference purported to be based on, but was invalid as an application under sects. 18 & 12 (3), as compensation was not being paid, & as ten days' notice had not been given, it was nevertheless valid as an application under sects. 17 & 19 (2). Appeal dismissed.—*MOSS v. HENRY ROBB, LTD.*, [1937] S. C. 611.—*SCOT.*

**so.** Duty to refer.—On application of party.]—*Held*: it was not for the

sheriff to determine whether in his opinion there was, or would be, a conflict in medical testimony, but he was bound to summon a medical referee, if either party applied for a medical referee on the ground that there was, or would be, such a conflict.—*COCHRANE v. BAIRD (WILLIAM) & Co.*, [1930] S. C. 640.—*SCOT.*

**sp.** Reference as to matters on which parties agreed.]—Employers who had been paying compensation to an injured workman as for total incapacity intimated, by notice under sect. 12 (3), their intention to reduce the weekly payments. A dispute having thereafter arisen as to the extent of the workman's recovery, & his fitness for work, the employers presented a minute of application for a medical reference, their material averment being "that the claimant is fit for light labouring work on the level, & that any condition from which he may suffer incapacitating him for such work is not due to the accident, which contentions the claimant denies & maintains that he is only fit for light sedentary work . . . & that his incapacity for any other kind of work is wholly due to the accident." By the remit, which was in the form provided by the Act of Sederunt of Feb. 28, 1933, the medical referee was directed to certify, *inter alia*, "as to the condition of the said claimant & his fitness for employment, stating whether the claimant has wholly or partially recovered from the injury by accident or scheduled disease. The medical referee reported that the claimant had wholly recovered from the injury by accident; that he was not fit for his own work but was fit for light employment; & that his incapacity was not due to the accident. The arbitrator having ended the workman's right to compensation:—*Held*: on a consideration of the minute of application, as the only question upon which the parties were at issue was

as to the kind of light work for which the workman was fitted, the remit made by the Sheriff-Clerk, in so far as including matters, e.g. the question of total recovery, upon which there was not disagreement, was incompetent, & the report of the medical referee thereon without effect, & accordingly, the determination of the arbitrator could not stand. Appeal allowed.—*STURROCK v. JAMES KEILLER & SON*, [1937] S. C. 813.—*SCOT.*

**sr.** Construction of report.]—Following upon an accident, a workman received compensation from his employers for total incapacity until a medical referee certified that his incapacity was due mainly to arthritis which was not due to the accident. The referee expressed the opinion that not more than 20 per cent. of the incapacity should be attributed to the accident, & the arbitrator having reduced the compensation proportionately, the workman appealed to the Ct. of Session. The ct., holding that the referee's certificate did not clearly determine the real question, viz. whether the workman would, but for the accident, have been a disabled man, recalled the arbitrator's award & remitted to him to re-mit to the referee the question "whether the claimant's present total incapacity is due to the accident." The referee having in a supplementary report expressed the opinion that, if the accident had not occurred, the workman might have continued at full work for an indefinite period, the arbitrator awarded compensation as for total incapacity. In an appeal at the instance of the employers:—*Held*: as the referee could not say that the workman would have been a disabled man if there had been no accident, the arbitrator's determination was right.—*HUTTON v. NIDRIE & BENEAR COAL CO.*, [1938] S. C. 30.—*SCOT.*

his decision.—*DIXON v. SUTTON HEATH & LEA GREEN COLLIERY, LTD.* (1929), 22 B. W. C. C. 521, C. A.

**3165b.** —.]—A workman was pushing a hand-cart laden with scaffolding & ladders when he slipped & injured his right knee. He received compensation for six months. The employers then discontinued the weekly payment after serving a notice under 1925 Act, s. 12. The workman's application for resumption of the compensation was resisted on the ground that the incapacity, if any, was due, not to the accident, but to ulceration due to syphilis. The county ct. judge sat with an assessor to whom, after hearing the medical evidence, he addressed three questions which were stated to counsel & were not objected to. On receiving the answers of the assessor the county ct. judge made his award in favour of the workman. The employers appealed:—*Held*: the county ct. judge had exercised his own judgment on the evidence, including the evidence contained in the answers given by the medical assessor.—*HALL v. BRITISH OIL & CAKE MILLS* (1930), 23 B. W. C. C. 529, C. A.

**3169.** *Add. Annotations*:—*Refd.* *Maxwell v. Keun, Lane, Bodley Head & Butler & Tanner, Maxwell v. Keun, Jonathan Cape & Butler & Tanner* (1927), 44 T. L. R. 100; *Kronstein v. Korda*, [1937] 1 All E. R. 357.

**3172a.** Pending arbitration—Application for leave to issue execution for arrears.]—*LEWIS v. DOBSON STEAM FISHING CO., LTD.* (1929), 73 Sol. Jo. 483.

**3175a.** —.]—An office cleaner earning 18s. a week was certified in May, 1935, by a medical referee to be suffering from dermatitis produced by dust or liquids, to be disabled from earning full wages at the work at which she was employed, & to be unfit for any other kind of work. Her employers paid her compensation on the basis of total incapacity from May, 1935, until July, 1936, when a doctor reported that she was no longer suffering from dermatitis. The employers thereupon, after giving notice under sect. 12, stopped the weekly payments. In Apr. 1937, the workman filed an application for an arbn. in which she claimed compensation on the basis of total incapacity due to dermatitis from dust or liquids as from the date when payments were stopped. At the arbn. the judge sat with a medical assessor who was of opinion that the workman was at the date of the arbn. suffering from dermatitis: that the dermatitis prevented her from carrying out her employment, but that she was physically fit to do work if it did not entail the use of dust or liquids. The judge held that he was bound on that opinion to find that the workman was not totally incapacitated. He also found that the disease had been contracted though long-continued exposure to dust or liquids, but he also found that she could earn her pre-accident wages of 18s. a week if she could find the work at which to earn it & dismissed her application. At the arbn. no declaration of liability was asked for on the workman's behalf & no evidence was called in any way directed to the probability of the circumstances changing in the future. The work-

man appealed:—*Held*: the judge was entitled by using his experience & local knowledge to find that the workman was able to earn her pre-accident wage of 18s. a week in some suitable employment, & on that finding the workman was not entitled to any compensation. Nor was she entitled to a declaration of liability, such relief not having been asked for at any stage of the proceedings & no evidence having been called which was directed to that issue. Appeal dismissed.—*BLADES v. WOOL EXCHANGE & GENERAL INVESTMENTS, LTD.* (1937), 30 B. W. C. C. 395, C. A.

**3184a.** —.]—A workman, whose right arm was injured, was for some time paid compensation on the basis of total incapacity. The employers then applied for a review on the ground that he had partially recovered. At the hearing the workman was not called, but the county ct. judge examined his arm. The only evidence given was that of two doctors, one called by each side, who agreed that the workman was suffering from a 40 per cent. incapacity. The judge made an award diminishing the compensation payable, in which he said that he was unable to find on the evidence that the workman was either an "odd lot" or came within Workmen's Compensation Act, 1925 (c. 84), s. 9 (4). The workman appealed on the ground that no sufficient evidence had been given that he had regained sufficient capacity to work to take him out of the category of "odd lot," & that, therefore, the onus was upon the employers of proving that there was in fact work available at which the man could earn wages which onus had not been discharged:—*Held*: taking into consideration the judge's power to use his own knowledge of the local labour conditions, there was evidence to support the finding & no misdirection.—*GLADSTONE SPINNING CO. v. NANGLE* (1928), 98 L. J. K. B. 161; 140 L. T. 171; 21 B. W. C. C. 394, C. A.

**3188.** *Add. Annotation*:—*As to* (1) *Folld. Cauldon Potteries v. Johnson* (1926), 20 B. W. C. C. 42.

**3192a.** — — — —.]—*CAULDON POTTERIES, LTD. v. JOHNSON*, No. 3821a, *post*.

**3197.** *Add. Annotation*:—*Refd.* *Jones v. Blaenavon Co.* (1931), 24 B. W. C. C. 148.

**3199.** *Add. Annotation*:—*As to* (1) *Consd. Gilbert v. Coles* (No. 2) (1931), 24 B. W. C. C. 481.

**3200a.** —.]—A carpenter alleged in his application for compensation that he had fractured his skull nine months earlier by hitting his head against a tie-pole & then tumbling on to a concrete floor. The county ct. judge found that he had failed to establish the occurrence of any such accident, but allowed him to amend his application by alleging in the alternative that the fracture was due to hitting his head against the concrete floor. The county ct. judge again found against the workman, but in the course of his award said: "I adopt LORD SALVESEN'S reasoning in *Wright and Greig v. M'Hendry* (1918), 11 B. W. C. C. 402," & quoted a passage dealing with various possible causes for the falling down of workmen, some being causes arising out of the employ-

ment & some not. He also stated a sum to which the workman would be entitled if in law there had been an accident. The workman appealed:—*Held*: the county ct. judge, by the form in which he had given his reasons, had introduced a doubt into the award, & as it was possible that he might have held that there was some special risk incidental to the employment, the case must go back for re-hearing.—*EVANS v. BIERUM & PARTNERS* (1930), 23 B. W. O. C. 131, C. A.

3206a. **Non-payment of calls.**—A mutual indemnity society, by the terms of its memorandum & articles of association, protected a colliery co. against its liabilities under the Workmen's Compensation Act in respect of all workmen who had not contracted out of the Act. Originally the arrangement was that for the first eighteen months after any accident the co. in effect met all payments due to the injured workman, but upon the expiration of that period the liability in respect of each injured workman was to be actuarially assessed, & a call for such sum was then made upon the co. The eighteen months' indemnity period above referred to was later altered to five years. A receiver of the co. was appointed by debenture holders, & an injured workman thereupon claimed compensation from the indemnity society under Workmen's Compensation Act, 1925 (c. 84), s. 7. The society repudiated this claim, on the ground that the calls from time to time made upon the co. in respect of the injured workman had not been paid at the date of the appointment of the receiver, which was found to be the fact:—*Held*: (1) during the indemnity period there was no contract of insurance; (2) in respect of the later period there was a contract of insurance; (3) the calls not having been paid, there was no subsisting contract of insurance at the date of the appointment of the receiver, & therefore the indemnity co. were under no liability to the injured workman under Workmen's Compensation Act, 1925 (c. 84), s. 7.—**WOODING v. MONMOUTHSHIRE & SOUTH WALES MUTUAL INDEMNITY SOCIETY, LTD., JAMES v. MONMOUTHSHIRE & SOUTH WALES MUTUAL INDEMNITY SOCIETY, LTD., HAWKINS v. MONMOUTHSHIRE & SOUTH WALES MUTUAL INDEMNITY SOCIETY, LTD.**, [1938] 3 All E. R. 625; 54 T. L. R. 1124; 82 Sol. Jo. 644; 31 B. W. C. C. 322. C. A.

**3208. Add. Annotation :—**Dlst. *Parker v. London Brick Co. & Forders* (1927), 20 B. W. C. C. 573.

**3224. Add. Annotations :—***Consd. Evans v. Ebbw Vale Steel Iron & Coal Co.* (1929), 22 B. W. C. C. 274. *Refd. Williams v. Watson* (H. J. & S. A.) (1930), 23 B. W. C. C. 151.

**3226a.** —.]—Where a workman injured his left hand, but the county ct. judge found that there was no incapacity resulting from the accident & no probability of any:—*Held*: the evidence supported the findings, & there was no misdirection.—*WAGSTAFF v. GUTTA PERCHA Co.* (1927). 20 B. W. C. C. 430. C. A.

**3226b.**     **-].**—A workman earned 29 9s. a week as a stone contractor under a contract at a fixed price, upon which he himself worked, & also employed others. While so working he was injured by an accident. The county ct. judge said that he did not accept the evidence which had been given as to the inability of the workman to do the full work of a contractor, & refused compensation:—*Held*: it was a question of fact, as to which there was evidence to support the finding, & no misdirection.—*JONES v. GAREFORTH COLLIERIES, LTD.* (1926), 20 B. W. C. C. 109, C. A.

**Annotation:—***Reid. Dodd v. Oceanic Steam Navigation Co.*  
(1928), 21 B. W. C. C. 118.

**3226c.**     **-]**—In July a seaman caught his left hand in the cogs of a windlass, & in Aug. had the little finger amputated. He was paid compensation until Dec. He claimed compensation as for total incapacity, with a declaration of liability. The county ct. judge made an award in favour of the employers:—**Held**: there was abundant evidence to support the award.—**BARRY v. PORTHLEVEN SHIP OWNERS** (1928), 21 B. W. C. C. 219, C. A.

**3226d.** —.]—A timber-feller was injured while felling trees by reason of a chip flying into his right eye. After six weeks his panel doctor certified that he was fit to resume his ordinary work. He resumed work, but with some assistance. The workman claimed compensation, alleging permanent partial incapacity. At the hearing the panel doctor who had granted the certificate gave evidence to the effect that the workman's right eye had lost 50 per cent. of its visual power. The county ct. judge found that there was a difference of 2s. between the pre-accident & post-accident earnings, & made his award for the workman for 1s. a week. The employer appealed :—*Held* : there was evidence to support the finding & no misdirection. Appeal dismissed.—**ROBERTS v. GREGSON** (1931), 24 B. W. C. C. 155, C. A.

8227a. —.]—A workman suffered an injury to his finger by an accident arising out of & in the course of his employment, with the result that the finger had to be amputated. Compensation was paid, but was determined upon the certificate of the employer's doctor that the workman was no longer incapacitated. In proceedings instituted by the workman medical evidence was given on his behalf that his grip was weakened, that the muscles were still tender, & that he was still partially incapacitated. The doctor called on behalf of the employers agreed that the grip was weak, but stated that the workman was capable of doing some work which would be beneficial. The county ct. judge found that the workman had fully recovered, & made a declaration of liability only:—*Held*: there was no evidence to support the finding, & the case must be remitted for compensation to be assessed.—BUCK v. DENNING (1926), 19 B. W. C. C. 388, C. A.

*Annotations.* — v. Cunard S.S. Co. (1933), 26  
B. W. O. C. 558. Cunard S.S. Co. v. Moore (1935),  
104 L. J. K. B. 467.

**PART XIV. SECT. 12. SUB-SECT. 1.**

**3215 l.** ———.—**MOORE v. NIMMO.** [1929] S. C. (Ot. of Sess.) 607.—800T.



**3228. Add. Annotations:—***As to* (2) *Consd. Williams v. Tredegar Iron & Coal Co.* (1927), 96 L. J. K. B. 722; *Bevan v. Nixon's Navigation Co.* (1928), 139 L. T. 647; *Tannoch v. Brownieside Coal Co.*, [1929] A. C. 642. *Apld. Stevens v. Birmingham Corp.* (1929), 22 B. W. C. C. 311. *Consd. Birch Bros., Ltd. v. Brown*, [1931] A. C. 605; *Byrne v. Evans Lifts, Ltd.* (1932), 25 B. W. C. C. 41; *Bywater v. Sothert & Pitt* (1932), 102 L. J. K. B. 1; *Owens v. Llay Main Collieries, Ltd.* (1932), 25 B. W. C. C. 673; *Smith v. Outler & Sons, Ltd.* (1932), 25 B. W. C. C. 408; *Hughes v. Penmaenmawr & Welsh Granite Co.* (1933), 148 L. T. 485; *Jones v. Penmaenmawr & Welsh Granite Co.* (1933), 148 L. T. 485. *Expld. Williams v. Penmaenmawr & Welsh Granite Co.* (1933), 148 L. T. 485; *Andrews v. Denaby & Cadeby Main Collieries, Ltd.*, [1935] 1 K. B. 484; *McCann v. Scottish Co-operative Laundry Assn., Ltd.*, [1936] 1 All E. R. 475; *Athey v. United Steel Co.* (1935), 28 B. W. C. C. 435. *Refd. Broughton v. London & North Eastern Ry. Co.*, [1930] 1 K. B. 578; *The Croxeth Hall, The Celtic*, [1930] P. 197; *Earl v. Thomas W. Ward, Ltd.* (1930), 143 L. T. 745; *Mothersdale v. Cleveland Bridge & Engineering Co.* (1930), 99 L. J. K. B. 261; *West Leigh Colliery Co. v. McNeil* (1929), 22 B. W. C. C. 541; *Jensen v. Jones (R. E.), Ltd.* (1930), 23 B. W. C. C. 518; *Fox v. Great Western Sawmills*, [1932] 25 B. W. C. C. 621; *Morton v. South Kirkby, Featherstone & Hemsworth Collieries, Ltd.* (1933), 26 B. W. C. C. 180; *Hamilton v. Kinnell Cannel & Coking Coal Co.* (1932), 25 B. W. C. C. Supp. 81; *Delta Mill (1919), Ltd. v. Blakemore* (1935), 104 L. J. K. B. 459; *Drury v. Appleby Iron Co.* (1935), 28 B. W. C. C. 483; *Bryan v. Upland* (1936), 29 B. W. C. C. 221. *As to* (3) *Refd. Bacon v. Wills & Sons, Ltd.*, [1933] 2 K. B. 493; *Wooding v. Monmouthshire & South Wales Mutual Indemnity Society, Ltd.*, [1938] 3 All E. R. 625. *Generally, Refd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshay* (1927), 96 L. J. K. B. 664.

**3230. Add. Annotations:—***Consd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshay* (1927), 96 L. J. K. B. 664; *Birch Bros., Ltd. v. Brown*, [1930] 2 K. B. 255; *Matthews v. Harland & Wolff* (1932), 102 L. J. K. B. 170. *Refd. Bevan v. Nixon's Navigation Co.* (1928), 139 L. T. 647; *White v. London & North-Eastern Ry. Co.*, [1931] A. C. 52; *Blakemore v. Delta Mill* (1919), *Ltd.* (1933), 26 B. W. C. C. 598; *Delta Mill (1919), Ltd. v. Blakemore* (1935), 104 L. J. K. B. 459.

**3231a. —.**—*]*—A miner working at the face had his right hand crushed in June, 1905. As a result, in May, 1912, the middle finger of that hand was amputated & he returned to work on the surface as a trimmer. His earnings as a trimmer exceeded his pre-

accident earnings, & his compensation was therefore reduced to a penny a week. In Jan. 1929, the pit was closed down. The workman was unable to obtain work & applied for compensation. The employers contended that the workman was fully able to work, & that his inability to obtain work was due to labour conditions. The county ct. judge made an award for 2s. 2d. a week. The employers appealed:—*Held*: there was evidence of partial incapacity & no misdirection.—*WOODCOCK v. TYDESLEY COAL Co.* (1929), 22 B. W. C. C. 502, C. A.

**3231b. —.**—*]*—A workman employed as a wheelwright & van driver met with an accident arising out of & in the course of his employment, which necessitated the removal of his left eye. After a period of total incapacity he resumed his work as a wheelwright, but was unable to drive a van, & he was ultimately discharged for business reasons. In respect of his injury he obtained an award of compensation, first, for partial incapacity, & afterwards, on his application for a review in consequence of his inability to get work owing to his obvious disfigurement, for total incapacity. After he had become nearly blind owing to cataract in his right eye, the employers' insurance co. offered him employment as a cleaner in their office at a wage which was double the market rate of wages for that work, but the workman refused this offer by reason of his infirmity. Upon an application by the employers for a review terminating or reducing the compensation, the county ct. judge found that the offer of the insurance co. was a genuine offer & reduced the compensation to half the difference between the workman's pre-accident wages & the wages offered him by the insurance co.:—*Held*: there was no evidence on which the county ct. judge could properly find that the workman's proved inability to earn wages by reason of the loss of his left eye had ceased to exist, inasmuch as the offer of the insurance co., in the circumstances in which it was made, had no evidential value as a test of the man's earning capacity in the open market.—*BIRCH BROS., LTD. v. BROWN*, [1931] A. C. 605; 100 L. J. K. B. 651; 145 L. T. 398; 47 T. L. R. 495; 75 Sol. Jo. 488; 24 B. W. C. C. 255, H. L.

*Annotations:—**Consd. Bryan v. Upland* (1936), 29 B. W. C. C. 221. *Refd. Hills Patent Glazing Co. v. Douglas* (1937), 30 B. W. C. C. 145.

**3231c. —.**—*]*—In Mar. 1924, a workman aged eighteen & earning 19s. 6d. a week was injured by a piece of steel flying into his eye. The sight was not destroyed & he was able to return to his work in the following May, & he continued to work for his old employers at gradually increasing wages, until, in Jan. 1932, when his wages had reached £2 12s. a week, he was discharged owing to lack of trade. Upon a claim for compensation:—*Held*: (1) incapacity might be measured

#### PART XIV. SECT. 12, SUB-SECT. 3.

**3228 ill. —.**—*]*—A workman was awarded compensation in respect of total incapacity in Feb. 1925. On May 13, 1926, he became fit for light work. He made efforts to obtain such work, but, owing to abnormal economic conditions, he was unable to do so. If he had obtained light work the effects of his injury would have worn off, &

he would have recovered full capacity by Sept. 13, 1926. Owing, however, to his failure to obtain light work he was still partially incapacitated at the latter date. Apart from this failure to obtain work, his condition was not due to any failure on his part to take reasonable measures to promote the recovery of capacity. The arbitrator having suspended payment of compensation as from Sept. 13, 1926:—

*Held*: the continuance of incapacity, not being due to any unreasonable conduct on the workman's part or to the intervention of any new cause apart from economic circumstances, was still attributable to the original accident; & accordingly, that the arbitrator was not entitled to suspend payment of compensation.—*KENNEDY v. SHORNS IRON CO.*, [1929] S. C. (Ct. of Sess.) 29.—*SCOT*.



not merely by apparent physical incapacity or incapacity to do work when obtained, but also by incapacity, owing to the injury, to get the work. It was therefore open to the county ct. judge to find on the evidence that incapacity existed, although the facts suggested that if work had been given to the workman he would have been able to do it; (2) the compensation to be awarded in such cases under Workmen's Compensation Act, 1925 (c. 84), s. 9, "a sum not exceeding 50 per cent. of the workman's average weekly earnings during the previous twelve months," refers to the twelve months previous to the accident, not to the twelve months prior to the award, & therefore the compensation should have been assessed on the footing of the wages being 19s. 6d. a week.—*BYWATER v. STOTHERT & PITT* (1932), 102 L. J. K. B. 1; 148 L. T. 12; 25 B. W. C. C. 422, C. A.

**3232. Add. Annotations:—***Consd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw* (1927), 96 L. J. K. B. 664. *Refd. Oushion v. Tredegar Iron & Coal Co.* (1927), 20 B. W. C. C. 454; *Bevan v. Nixon's Navigation Co.* (1928), 139 L. T. 647; *Hills Patent Glazing Co. v. Douglas* (1937), 30 B. W. C. C. 145.

**3233. Add. Annotation:—***Refd. Broughton v. London & North-Eastern Ry. Co.*, [1930] 1 K. B. 578.

**3235a. ———.]**—The amount of the average weekly earnings of a workman before accident was 50s. After the accident he returned to lighter work, but was paid at exactly the same rate as before the accident. He, however, only earned an average weekly amount of 37s. 8d., owing to slackness of trade. He brought a claim for compensation at the rate of 6s. 2d. a week, being one-half the difference between his pre-accident & post-accident earnings. The county ct. judge made a declaration of liability only on the ground that he found no loss of earning capacity due to the accident since the return to work. The workman appealed:—*Held*: the loss of earnings after the accident being entirely due to labour conditions & not to the fact that the workman was injured, the decision of the county ct. judge was right.—*LYON v. TAYLOR BROS.* (1928), 21 B. W. C. C. 415, C. A.

*Annotations:—Distd. White v. London & North-Eastern*

#### PART XIV. SECT. 12, SUB-SECT. 4.

**3235 1. Whether incapacity within the Acts—Slackness of work.**—A workman, employed as a drawer in a mine, who had been injured, was paid compensation first as for total, & later as for partial, incapacity. He then obtained work with the same employers as a pump engineman at wages higher than he had earned as a drawer, & compensation was suspended by agreement. The pit in which he was employed as a pump engineman having been closed, the workman was thrown out of employment. He was unfit, owing to his injury, for his former work as a drawer, but he was fit for various jobs, including that of pump engineman, at which he could earn his former wage. He was unable to find work owing to the state of the coal mining industry & not owing to his injury. The arbitrator having ended compensation in the meantime as at the date when the workman obtained work as a pump engine-

man:—*Held*: as the workman was fit for work at which he could earn as high wages as he had earned as a drawer, he was not entitled to compensation.—*INVERARITY v. EDINBURGH COLLIERIES, LTD.* [1929] S. C. (Ct. of Sess.) 338.—**SCOT.**

**3237 1. Whether incapacity within the Acts—Strikes.**—Appct. was formerly employed by resps. as a roofer. On Dec. 31, 1921, he was partially incapacitated by an accident which admittedly arose out of & in the course of his employment. He received compensation until May 21, 1922, when he was given light work by resps. He received the same wage as he had formerly been paid as a roofer. He was still engaged upon this work when on Jan. 31, 1923, a railway strike began against a reduction in the wages payable to certain classes of workers.

Appct. was not directly affected by the reduction. He gave evidence before the Recorder that during the strike there was no work for him to do; but he admitted on cross-examina-

*Ry. Co.*, [1931] A. C. 52. *Dtd. Matthews v. Harland & Wolff* (1932), 102 L. J. K. B. 170. *Consd. Blakemore v. Delta Mill* (1919), Ltd. (1933), 26 B. W. C. C. 598; *Delta Mill* (1919), Ltd. v. *Blakemore* (1935), 104 L. J. K. B. 459. *Refd. The Croxteth Hall, The Celtic*, [1930] P. 197.

**3236a. ———.]**—A fitter & machine operator, earning 53s. a week, lost the top portion of his right thumb by accident arising out of & in the course of his employment, & received compensation at the full rate for seven months. His panel doctor then certified him fit for work & his compensation was stopped. He obtained work as an attendant at a greyhound racing track at 20s. a week. He filed a request for arbn., claiming compensation for partial incapacity. The employer submitted to a declaration of liability & stated at the hearing that if it were not for trade conditions he would have given the workman his pre-accident work. The county ct. judge inspected the work the man had been doing before his accident & found that the workman was not suffering from any present loss of earning capacity but granted a declaration of liability. The workman appealed:—*Held*: the matter was a question of fact for the county ct. judge.—*NEARY v. ROBERT BOBY, LTD.* (1932), 25 B. W. C. C. 357, C. A.

**3238. Add. Annotations:—***As to* (1) *Refd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw* (1927), 96 L. J. K. B. 664; *McCann v. Scottish Co-operative Laundry Asscn., Ltd.* [1936] 1 All E. R. 475.

**3239. Add. Citations:—**96 L. J. K. B. 295; 136 L. T. 427; 19 B. W. C. C. 475.

*Add. Annotations:—**Refd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw* (1927), 96 L. J. K. B. 664. *McCann v. Scottish Co-operative Laundry Association, Ltd.*, [1936] 1 All E. R. 475.

**3239a. ———.]**—A miner who, in Apr. 1926, had the symptoms of nystagmus, on Apr. 30 went on strike until Dec. 2. On July 13, he obtained a certificate that he was disabled by the disease as from June 14. The county ct. judge held, although totally incapacitated from June 14, the workman would not, in any case, have been at work owing to the strike, & refused compensation:—*Held*: if a workman was totally incapacitated by an accident, it was immaterial that

tion that he had been directed to do other light work. Evidence was given on behalf of the resps. that appct. had been warned that consequence of the strike would be a curtailment in the staff of the co. After the strike appct. applied to the co. for reinstatement which was refused on the ground that as a result of the strike there was no work available for him. He was still partially incapacitated:—*Held*: (1) appct. was not entitled to compensation during the period of his refusal to work, i.e., during the strike & after the strike up to the time of his application for reinstatement; (2) he did not finally lose his right to compensation by his refusal to work during the strike; (3) the fact that the co. could not offer appct. work was due to the strike was immaterial except in so far as it was evidence of a general failure of the labour market for his type of labour. Appeal dismissed.—*BEATTIE v. LONDON MIDLAND & SCOTTISH Ry. Co.* (N. C. C.) (1935), 28 B. W. C. C. Suppl. 124.—**IR.**

he might also have been prevented from earning money by some other cause.—**WILLIAMS v. OWMAMAN COAL CO., LTD.** (1927), 20 B. W. C. C. 476, C. A.

**3240. Add. Annotation:—***Consd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshay* (1927), 96 L. J. K. B. 664.

**3241. Add. Annotation:—***Refd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshay* (1927), 96 L. J. K. B. 664.

**3243a. —** Cesser of work obtained in lieu of compensation.]—When a workman, partially incapacitated by an accident during the course of his employment, obtains work in lieu of compensation, the cesser of that work entitles him to an award, even in cases where the cesser is due to the state of the labour market & would have resulted in his being unemployed in any event.—**LEWIS v. GUEST, KEEN & NETTLEFOLDS, LTD., WATKINS v. SAME, TUCKER v. SAME, INGRAM v. CRAWSHAY BROTHERS**, [1928] 1 K. B. 20; 96 L. J. K. B. 664; 137 L. T. 386; 43 T. L. R. 436; 71 Sol. Jo. 388; 20 B. W. C. C. 359, C. A.

**Annotations:—***Apld. Williams v. Cwmaman Coal Co.* (1927), 20 B. W. C. C. 476; *Lyon v. Taylor Bros.* (1928), 21 B. W. C. C. 415. *Refd. Cushion v. Tredegar Iron & Coal Co.* (1927), 20 B. W. C. C. 454; *Bevan v. Nixon's Navigation Co.* (1928), 139 L. T. 647; *Birch Bros., Ltd. v. Brown*, [1930] 2 K. B. 255; *White v. London & North-Eastern Ry. Co.* (1929), 142 L. T. 435; *Williams v. Watson* (H. J. & S. A.) (1930), 23 B. W. C. C. 151.

**3243b. —**.]—A coal miner, who had worked for many years underground, became, by reason of an attack of nystagmus, only able to do surface work at a lower wage. This work was unavailable, owing to the state of the labour market, though the workman, but for the nystagmus, would probably have been able to obtain employment underground:—**Held**: the effect of Workmen's Compensation Act, 1923 (c. 43), s. 16, which was re-enacted as Workmen's Compensation Act, 1925 (c. 84), s. 9 (4), was necessarily to exclude the idea that the words "able to earn" in Workmen's Compensation Act, 1906 (c. 58), Sched. I., applied to any circumstances not personal to the workman himself. It dealt expressly with the case of the man who could not find work, & it set the criterion whether the failure to find work was due wholly or mainly to the accident, but failure to find work due solely to the state of the labour market was expressly excluded by the sect., & it was impossible to say that *Cardiff Corpn. v. Hall*, No. 3284, *post*, when applied to a case after the passing of 1923 Act, was wrong.—**BEVAN v. NIXON'S NAVIGATION CO., LTD.**, [1929] A. C. 44; 139 L. T. 647; 44 T. L. R. 805; 21 B. W. C. C. 237, H. L.

**Annotations:—***Apld. Lyon v. Taylor Bros.* (1928), 21 B. W. C. C. 415. *Expld. Tannech v. Brownside Coal Co.*, [1929] A. C. 642. *Distd. Evans v. Ebbw Vale Steel, Iron & Coal Co.* (1929), 22 B. W. C. C. 274. *Consd. Statham v. Oxerott Colliery Co.* (1929), 22 B. W. C. C. 330; *Mothersdale v. Cleveland Bridge & Engineering Co.* (1930), 99 L. J. K. B. 261. *Distd. White v. London & North-Eastern Ry. Co.*, [1931] A. C. 52. *Apld. Woodcock v. Tynesley Coal Co.* (1929), 22 B. W. C. C. 502. *Consd. Matthews v. Harland & Wolff, Ltd.* (1932), 102 L. J. K. B.

*Refd. Gladstone Spinning Co. v. Nangle* (1928), 98 L. J. K. B. 161; *Wemyss Coal Co. v. Walker* (1929), 22 B. W. C. C. 366; *Birch Bros., Ltd. v. Brown*, [1930] 2 K. B. 255; *Broughton v. London North-Eastern Ry. Co.*, [1930] 1 K. B. 678; *The Croxteth Hall, The Celtic*, [1930] P. 197; *Williams v. Watson* (H. J. & S. A.) (1930), 23 B. W. C. C. 151; *Blakemore v. Delta Mill* (1919), Ltd. (1933), 26 B. W. C. C. 598; *Delta Mill* (1919), Ltd. v. *Blakemore* (1935), 104 L. J. K. B. 453; *Acton Hall Colliery Co. v. Barker* (1937), 30 B. W. C. C. 89.

**3243c. —**.]—Applt., who was totally incapacitated by an injury by accident arising out of & in the course of his employment by resps. whilst working as a fitter in the erecting department of their works, on becoming fit for light work, was employed by resps. in the gauge department of their works. A claim by him for compensation in respect of the difference between his pre-accident earnings & his present earnings was opposed by resps. on the ground that the full week's work in that department was five & a half days, but that owing to trade conditions the department was only working five days, & that, if applt. had worked a full week, as he was physically capable of doing, his earnings would have exceeded his pre-accident earnings. The arbitrator awarded compensation:—**Held**: on the facts, resps. had failed to prove that a normal week's work in the gauge department was more than five days & that the award was rightly made.

The question whether, where a partially disabled workman is actually earning wages, the compensation to which he is entitled is to be assessed by reference to the normal earnings under normal market conditions in that employment or by reference to his actual earnings in the conditions prevailing at the time was left open by the House.

**Semle**: it does not necessarily follow from *Bevan v. Nixon's Navigation Co.*, No. 3243b, where a man is actually earning wages in a suitable employment & the wages which he is receiving are the wages usually paid at the time in that employment, that the arbitrator is bound to assess his compensation on the basis of what he would have been earning if the conditions of employment in that occupation had been more prosperous.—**WHITE v. LONDON & NORTH EASTERN RY. CO.**, [1931] A. C. 52; 99 L. J. K. B. 633; 144 L. T. 1; 46 T. L. R. 648; 23 B. W. C. C. 330, H. L.

**Annotations:—***Consd. Matthews v. Harland & Wolff, Ltd.* (1932), 102 L. J. K. B. 170. *Refd. Blakemore v. Delta Mill* (1919), Ltd. (1933), 26 B. W. C. C. 598; *Delta Mill* (1919), Ltd. v. *Blakemore* (1935), 104 L. J. K. B. 459.

**3247a. —**.]—A blacksmith was injured while at work by a splinter of iron entering an eye, & impairing its vision by one-half. He returned to work for a short period, but did not do overtime, & threw up the work on the ground that it was unsuitable. He was nervous of losing the sight of the other eye. The employers called medical evidence that he was fully able to do his work. The county ct. judge made an award in favour of the workman on the basis of partial incapacity. The employers appealed:—**Held**: there was evidence to support the finding & no misdirection.—**COLQUITT v. UNITED STEEL CO., LTD.** (1928), 21 B. W. C. C. 409, C. A.

PART XIV. SECT. 12, SUB-SECT. 5.

**3248 II. —**.]—Where it appeared from the medical evidence that subsequent to an injury the workman

developed a mental condition in which he could not bring himself to begin work, & did not carry out medical advice to do light work of any sort as a curative measure:—**Held**: the find-

ing of the arbitrator refusing to award compensation should not be disturbed.—**FORRESTER v. TORRENSFORD SAND & GRAVEL PITS, LTD.**, [1928] S. A. S. R. 427.—AUS.

**3251a.** ——. —.]—A workman lost an eye in the course of his employment. He refused to follow medical advice & wear a glass eye, but brooded over his accident, & got into a nervous state. The county ct. judge held the nervous condition caused incapacity & was directly due to the accident:—*Held*: it was a question of fact, as to which there was evidence to support the finding, & no misdirection.—*HODSON v. STAR PAPER MILLS, LTD.* (1927), 20 B. W. C. C. 265, C. A.

**3261.** *Add. Annotation*:—*Consd.* *Bevan v. Nixon's Navigation Co.* (1928), 139 L. T. 647.

**3264.** *Add. Annotation*:—*Consd.* *Statham v. Oxcroft Colliery Co.* (1929), 22 B. W. C. C. 330.

**3269a.** ——. —.]—A collier suffered a succession of accidents, but was given work with partial compensation until, in 1921, he left the colliery & became a club steward at higher wages. In 1922 he was granted a declaration of liability against the colliery co. In 1928 he was dismissed from his position of club steward & failed at three clubs where there were vacancies to obtain the position of a club steward. He claimed that he was unfit to work as a collier at the coal face, & his old employers refused to employ him otherwise. He therefore made a claim for compensation against his old employers in the form of a review of the declaration of liability. The county ct. judge made an award in his favour of 7s. 6d. a week on the grounds that, although he could do surface work, he was unable to work at the coal face, & that the job of a club steward was not a well-known branch of the labour market, & should therefore be disregarded:—*Held*: there was no evidence on which the county ct. judge could find that the work of a club steward was exceptional; it was a well-known class of employment in which the man was capable of working. The case must be remitted for a rehearing, taking this fact into consideration.—*STATHAM v. OXCROFT COLLIERY CO., LTD.* (No. 2) (1929), 22 B. W. C. C. 330, C. A.

**3269b.** ——. *After retirement.*]—A workman lost the use of an eye by accident & wore a shade over it in consequence. Liability being admitted he received full compensation until he was able to do his ordinary work again. An agreement was recorded whereby the employers undertook to provide the workman with employment, & admitted their liability to pay compensation "as & when their

liability shall arise." The workman continued doing his work without compensation until having reached the age of sixty-six he was compulsorily retired under his employers' superannuation scheme, but at the same time became entitled thereunder to a pension of 10s. per week. After his retirement the workman filed a request for arbitration, claiming to be entitled to be paid full compensation as from the date of his retirement. He gave evidence that he had tried to obtain work since his retirement but had failed. The county ct. judge held that although the workman was physically capable of performing his old work with his old employers, his age & the loss of the eye prevented him getting fresh work in the labour market. He made an award in his favour of 10s. a week. He found the workman's average weekly earnings before the accident to be £3 5s. & his post-accident earnings £2 2s. The first figure included payment for overtime & the second did not. Furthermore there had been a fall in the rate of wages since the accident. The employers appealed on the grounds that the workman was not incapacitated, & that, if he was, compensation had been calculated on the wrong basis, because the judge had not taken into consideration the question of overtime & fall in the rate of wages:—*Held*: there was evidence on which the county ct. judge could find that the workman was partially incapacitated, but, in arriving at the amount of compensation payable he had not taken into account the high rate of pre-accident wages & overtime. Also the question of pension must be considered.—*STEVENS v. BIRMINGHAM CORPN.* (1929), 22 B. W. C. C. 311, C. A.

*Annotation*:—*Reid.* *Birch Bros., Ltd. v. Brown*, [1931] A. C. 605.

**3274a.** ——. —.]—A workman, whose left eye was defective, suffered, in 1919, an injury to his right eye while working as a miner, for which compensation was received until the beginning of 1924, when he was given work underground. This was found to be unsuitable, & he was given surface work on the screens, & was paid compensation for partial incapacity. He left this work at the commencement of the stoppage due to a dispute in the coal trade in 1926, but was not re-employed at the conclusion of the stoppage, in Dec. 1926. In Feb. 1927, the workman applied to have his compensation increased, on the ground that the work on which he had been employed was a special kind of

PART XIV. SECT. 12, SUB-SECT. 7.—  
B.

**3271 II.** ——. *Light work available—At pre-accident wage.*]—On Dec. 11, 1930, a female workman, a presser in a steam laundry, sustained injury by accident arising out of her employment. She lost the index finger of her right hand & damaged the thumb of that hand so that she remained permanently partially incapacitated. The employers paid her compensation for total incapacity to Feb. 23, 1932, when they re-employed her at light work of a special character at her pre-accident wage, & stopped payment of compensation. On Nov. 14, 1932, the workman was totally incapacitated by illness in no way connected with her injury, & remained so till May 31, 1933, when indisposition due to her illness

terminated & she later resumed her light work at her pre-accident wage. This light work had been open to her on the same terms throughout the period of her illness. The workman having claimed compensation for total incapacity from Nov. 14, 1932, to May 31, 1933, the arbitrator awarded compensation for partial incapacity during that period. The employers appealed:—*Held*: the arbitrator was not entitled to award partial compensation in respect: (a) the workman had not been entitled to, & was not in receipt of, partial compensation at the date when she became totally incapacitated by illness in no way connected with the accident; (b) the light work at pre-accident wages remained open for her throughout the period of her illness. Appeal allowed.—*M'CANN v. SCOTTISH CO-OPERATIVE LAUNDRY*

*ASSOON., LTD.*, [1935] S. O. 65; 27 B. W. C. C. Suppl. 167.—*SCOT.*

**3271 III.** ——. —.]—A workman claimed compensation as for total incapacity. He had for some years, by agreement, been paid compensation as for total incapacity. He had recently been elected president of the committee of management of a co-operative society for a term of one year, the appointment carrying a salary of £12 per annum:—*Held*: as from the date of this appointment, he was entitled to compensation as for partial incapacity only, in respect that the salary received by him was earned "in some suitable employment or business," these words not being restricted to employments which fell within the scope of the Act. Appeal dismissed.—*NINHO v. COLTRESS IRON CO., LTD.* (1935), 28 B. W. C. C. Suppl. 39.—*SCOT.*

surface work found for him by his employers. The county ct. judge held resps. were not liable to pay compensation as claimed on the grounds set out in their particulars. The particulars referred to in resps.' answer contained the allegation that the workman was not incapacitated from doing ordinary surface work:—*Held*: the award must be taken to mean that the judge had found as a fact that the workman was capable of doing ordinary surface work, & there was evidence to support such a finding.—*CUSHION v. TREDEGAR IRON & COAL CO., LTD.* (1927), 20 B. W. C. C. 454, C. A.

**3275a.** —[—]—A miner, in 1916, lost his right eye by accident, & received compensation. He subsequently returned to work at the face, but in June, 1924, had another accident through which his left eye was injured, & he was paid compensation. In Mar. 1925, he returned to light work, receiving also a weekly sum by way of compensation. On July 1, 1925, the employers applied for a review & termination of the weekly payments. The workman stated in evidence that he was afraid to work below ground again, & the county ct. judge held work at the coal face was not suitable, & the man's refusal to do it was reasonable:—*Held*: the case must go back for the judge to decide whether the unsuitability of the work resulted from the first accident or the second, or both, & to assess the compensation payable only in regard to incapacity from the second accident.—*ASTON COAL CO., LTD. v. STANCLIL* (1926), 20 B. W. C. C. 198, C. A.

**3282.** *Add. Annotation*:—*Consd. Evans v. Ebbw Vale Steel, Iron & Coal Co.* (1929), 22 B. W. C. C. 274.

**3283.** *Add. Annotations*:—*Refd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw* (1927), 137 L. T. 386; *Birch Bros., Ltd. v. Brown*, [1930] 2 K. B. 255; *Old v. Furness, Withy & Co.* (1934), 27 B. W. C. C. 268.

**3283a.** *Accident to infant—Inability to do work of employer on becoming adult.*—An infant employed by a railway co. lost his left foot in an accident while at work. He was fitted with an artificial foot & given suitable employment until he came of age. His employers, being then unable to find him work in an adult grade, dismissed him. The workman claimed compensation as a totally incapacitated adult worker, but the employers refused to pay except on the basis of partial incapacity. The county ct. judge held that the workman was not entitled to be treated as totally incapacitated either as an "odd lot" or under Workmen's Compensation Act, 1925 (c. 84), s. 9 (4). The workman appealed:—*Held*: there was evidence to support the finding & no misdirection.—*BARNES v. LONDON & NORTH EASTERN RY. CO.* (1929), 22 B. W. C. C. 205, C. A.

*Annotations*:—*Refd. Earl v. Thomas W. Ward, Ltd.* (1930), 143 L. T. 745; *Williams v. Watson (H. J. & S. A.)* (1930), 23 B. W. C. C. 161.

**3283b.** "Reasonable steps to obtain employment"—*Application for unsuitable work.*—Where the expression "all reasonable steps to obtain employment" appears in proviso (i.) to sect. 9 (4), as amended by the 1931 Act, the word "employment" means employ-

ment of a kind for which the workman is fitted, & the workman has not taken "all reasonable steps" if he has applied for work which is not suitable for him. Appeal allowed. New trial ordered.—*INGHAM v. RED LINE GLICO, LTD.* (1932), 25 B. W. C. C. 243, C. A.

*Annotation*:—*Refd. Langslow v. John Lines & Sons, Ltd.* (1935), 28 B. W. C. C. 186.

**3283c.** *Question of fact.*—A painter's improver injured the wrist of his left hand by an accident arising out of & in the course of his employment. An application by him for compensation was adjourned for him to try to do suitable work offered to him by his old employer. He was able to do the work & was paid his old wages, but after sixteen weeks had to be discharged owing to trade depression. He then made a further request for arbn., alleging that his left arm was useless. There was evidence that the workman had applied for many jobs, but there were no vacancies, & that he told one prospective employer that he had met with an accident & could only do light work. The county ct. judge held that the workman was entitled to be treated as totally incapacitated, & that, although he had taken all reasonable steps to obtain employment he had failed to obtain it. He therefore made an order under sect. 9 (4) as amended by the 1931 Act. The employer appealed on the point that the man had not taken all reasonable steps to obtain employment & there was not sufficient evidence to support a finding that he had done so:—*Held*: it was a question of fact for the county ct. judge & there was evidence on which the order could be made.—*HIGGINS v. CRONK (JOHN) & SONS, LTD.* (1932), 25 B. W. C. C. 396, C. A.

*Annotation*:—*Refd. Chapman v. Marshall, Sons & Co.* (1936) 29 B. W. C. C. 14.

**3283d.** —[—]—A painters' labourer was injured by accident arising out of & in the course of his employment, & was in receipt of 15s. a week for partial incapacity. He claimed 30s. a week under sect. 9 (4), as amended, on the ground that he had tried to obtain light work but had failed. He did not register at the labour exchange. The county ct. judge found that he had fulfilled the conditions of sect. 9 (4) except that he had not taken all reasonable steps to obtain employment, particularly having regard to the fact that he had not registered himself at the labour exchange. He made an award for 16s. a week. The workman appealed:—*Held*: there was evidence to support the findings & no misdirection.—*CRAWLEY v. GIBBIN (WILLIAM) & SON* (1933), 26 B. W. C. C. 408, C. A.

**3283e.** —[—]—A moulder injured his left hand by accident while at work & for two years was given light work as a clerk by his employers. He then returned to his old work, receiving assistance, & a declaration of liability was filed in the county ct. by consent. When that work came to an end he registered at the labour exchange as a moulder & made two applications for work, one to a moulder & another to a farmer. In each case work was refused on account of the injury to his hand. He then returned to his employers as a moulder for two short periods, but was finally discharged on account

of slackness of trade. He again registered at the labour exchange but this time as a clerk. Six months after he had registered as a clerk he applied for compensation, basing his proceedings on the declaration of liability. During those six months he had made no applications for work either as a moulder or as a clerk. In his application he claimed that for the periods while he was out of work his partial incapacity should be treated as total under sect. 9 (4) as amended. The county ct. judge found that he had brought himself within the provisions of sect. 9 (4) & in particular that he had taken all reasonable steps to obtain employment. The employers appealed only as to that part of the award which covered the six months' period from the date when the workman had registered as a clerk:—*Held*: the question was one of fact & there was evidence to support the finding that the workman had taken all reasonable steps to obtain employment. Appeal dismissed.—*CHAPMAN v. MARSHALL, SONS & CO., LTD.* (1936), 29 B. W. C. C. 14, C. A.

*Annotation*: *Consd. McLaughlin v. Caledonia Stevedoring Co.*, [1938] 3 All E. R. 72.

**3283f.** — *Condition precedent to treatment of incapacity as total.*—In three of the four cases the injury which the workmen sustained was the loss of visual power in one eye, & in the fourth case it was the loss of three fingers, in each case by an accident arising out of & in the course of their employment in applts.' quarry. In every instance the workman had been totally incapacitated for a period & then been given light work at the quarry, receiving partial compensation. Subsequently the four men, with very many others, were discharged from the quarry, solely by reason of slackness of trade. Neither the damage to the eyes nor that to the fingers had anything to do with the

men's dismissal. There were workmen still employed at the quarry who had lost eyes & fingers. Each of the workmen after discharge filed a request for arbn. in the county ct. under the Act, claiming that they were entitled to be treated as totally incapacitated under the provisions of sect. 9 (4) of 1925 Act, as amended by sect. 1 of 1931 Act. In each case the county ct. judge made an award for the workman on the ground that the position under sub-sect. (4), as amended by 1931 Act, was that the county ct. judge must treat partial incapacity on the footing of total incapacity if it appeared to him that, having regard to all the circumstances, it was probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident, or that his failure to obtain employment was a consequence wholly or mainly of the injury:—*Held*: the county ct. judge had not considered proviso (i.) to sect. 1 (1) of 1931 Act. That proviso was directory to the ct. & a condition precedent to the operation of the sub-sect. The effect of the proviso was that the workman was no longer under the necessity of calling a number of employers to state that they had refused him work on account of his injury. Sub-sect. (4) of sect. 9, as amended by the Act of 1931, did not exclude the opportunity which was given under sub-sect. (3) (i.) of that same sect. for a man to receive compensation for partial incapacity.—*HUGHES v. PENMAENMAWR & WELSH GRANITE CO., LTD.* (1933), 148 L. T. 485; 26 B. W. C. C. 99, C. A.

*Annotations*:—*Consd. McLaughlin v. Caledonia Stevedoring Co.*, [1938] 3 All E. R. 72. *Refd. United Dairies (London), Ltd. v. Stirling*, [1937] 1 K. B. 402.

**3283g.** — *—*—A miner, at that time aged fifty-six, met with an accident to his left eye

#### PART XIV. SECT. 12, SUB-SECT. 8. A.

**3283f i.** — *Condition precedent to treatment of incapacity as total.*—A miner, who had suffered from nystagmus, had recovered so far as to be fit for his ordinary work, but was suffering from chronic nystagmus. In an arbn. it was found by the arbitrator, & admitted by the employers, that they had refused to employ him solely because he declined to sign a statement, always required by them, in common with other mine-owners, before employment of a miner, that he had not previously suffered from nystagmus. The arbitrator further found that the same result would have followed if the workman had applied for such employment at any colliery within an area reasonably accessible to him; & that the workman had taken all reasonable steps to find other employment & had failed to obtain it. The arbitrator awarded compensation as for total incapacity. It appeared from the arbitrator's note that, on a construction of sect. 9 (4) of the 1925 Act as amended by sect. 1 of the 1931 Act, he had based the two latter findings, not upon legal proof, but upon his own opinion of the particular circumstances of the case:—*Held*: (1) the workman's failure to obtain employment as a miner with his former employers was due to the latter's refusal to engage a miner who had had nystagmus, & was not "a consequence, wholly or mainly, of the injury"; (2) the arbitrator's finding, that the workman had taken all

reasonable steps to obtain other employment & had failed to obtain it, was defective in respect (a) that it did not disclose that the failure was due to the injury, & that it did not cover employment other than mining, & (b) that in any event, it appeared from the arbitrator's note that the finding was based, not on evidence before him, but upon his own opinion; & accordingly (3) the arbitrator had misdirected himself & was not entitled to make any award of compensation. Appeal allowed.—*DOCHERTY v. BAIRD (WILLIAM) & CO., LTD.* (1935), 28 B. W. C. C. 89.—*SCOT.*

**3283f ii.** — *Corroboration.*—In an application by an injured workman under sect. 9 (4) as amended to have his partial incapacity treated as total incapacity in respect of his inability to find suitable employment, the only evidence led on either side as to his inability to obtain such employment was that of the workman himself. He deposed that, after being certified by a medical referee as partially recovered & fit for light work on the ground or floor level, he had applied unsuccessfully to various employers, other than his former employers, for light work suitable to his condition; that in the case of one of these he had filled up a printed form of application which they had acknowledged by a post card which he produced; & also that he had registered at the Labour Exchange, but had had no offer of employment. He was not cross-examined on these matters except as to an offer of work by his former employers (which the arbn. held not to be proved as an offer

of suitable employment), & as to the kind of work for which he had indicated to the other employers that he was fit. The arbitrator refused to make the order asked for, upon the ground of law that the evidence of a single witness, namely, the appct. himself, was insufficient to satisfy the requirements of proof under sect. 9 (4). He, however, stated that, if he had considered himself entitled to accept the appct.'s evidence as sufficient & to apply his judicial knowledge of the limited market available to a man with the appct.'s disability, he would have been prepared to hold that the appct. had taken all reasonable steps to obtain employment:—*Held*: the right to compensation as for total incapacity under sect. 9 (4) must be established by such legal evidence as would be necessary to establish any other ground of claim in an ordinary action of law. In the present case, while an arbitrator is not precluded from taking into consideration his own judicial knowledge, the necessary legal corroboration of the appct.'s evidence as to his efforts to obtain suitable employment was not supplied by (a) the arbitrator's judicial knowledge of local conditions, or (b) an implied acceptance of the appct.'s evidence by the employers in view of their abstention from a detailed cross-examination; & accordingly, that the arbitrator had rightly refused to make the order craved. Appeal dismissed.—*MOORE v. HARLAND & WOLFF, LTD., CREANEY v. FAIRFIELD SHIPBUILDING CO.*, [1937] S. C. 707.—*SCOT.*

in Mar. 1928, & in May, 1928, the eye had to be removed & a glass eye fitted. He was given light work with payment of partial compensation until May, 1932, when he & a large number of other miners were paid off. Of four pits belonging to his employers, three had been closed down & one was working on short time. The workman had been employed until he was twenty-four years old on a farm, & applied in June & July, 1932, to three farmers for work, but work was refused on account of his injury. He registered at the Labour Exchange, & on four occasions during the next four months he made unsuccessful applications for work to his former employers. He continued to receive payment of partial compensation. On a claim for compensation on the basis of total incapacity under sect. 9 (4), as amended by the 1931 Act, the county ct. judge found that the workman's failure to obtain employment was mainly due to his injury, & that he had taken all reasonable steps to obtain employment. He therefore made an order that the workman's incapacity should be treated as total for six months only. The employers appealed. Shortly after the hearing in the county ct. the employers gave the workman employment in one of their pits:—*Held*: there was evidence to support the findings & no misdirection. Proviso (i.) to sect. 9 (4) as amended imposes in effect a condition precedent, so that a workman must establish that he has taken all reasonable steps to obtain employment before he can obtain the benefit of the sect. —*DONACHIE v. WHITEHAVEN COLLIERY CO., Ltd.* (1933), 150 L. T. 6; 26 B. W. C. C. 63, C. A.

*Annotations*:—*Overd*, *McLaughlin v. Caledonia Stevedoring Co.*, [1938] 3 All E. R. 72. *Reid*, *Hughes v. Penmaen-mawr & Welsh Granite Co., Ltd.* (1933), 26 B. W. C. C. 99; *Keehane v. Dorman Long & Co. (No. 2)* (1935), 28 B. W. C. C. 186; *United Dairies (London), Ltd. v. Stirling*, [1937] 1 K. B. 402.

**3283h.** ——. ]—A labourer was injured by an accident in Jan. 1931. He was paid full compensation at 30s. a week until May, 1932, when he consented to a reduction to 15s. a week. In July, 1932, the workman applied for a review claiming a return to 30s. a week on the ground that he was entitled in the circumstances to be treated as a totally incapacitated man under sect. 9 (4) of the 1925 Act, as amended by the 1931 Act. The workman gave evidence of attempts to obtain employment, but admitted that he had not applied to his old employer for work nor had he registered at the labour exchange. The county ct. judge made his award for the employer. He based his reasons on sect. 9 (4) of the 1925 Act without considering the effect of the repeal of that sect. by the 1931 Act. He found that the workman had so far recovered as to be fit for employment of a certain kind, but had failed to satisfy him either that he had taken all reasonable steps to obtain such employment or that his failure to obtain such employment was a consequence wholly or mainly of his injury. The workman appealed:—*Held*: although there was misdirection the award being expressly made under the repealed sect. 9 (4) of the 1925 Act, no substantial wrong or miscarriage had been occasioned thereby within R. S. C., Ord. 39, r. 6,

so as to justify a new trial. Though the words "If a workman . . . proves . . . he has taken all reasonable steps" have been altered to "If it appears to the judge that the workman has not taken all reasonable steps," such change in the wording of the sect. has caused no alteration in the onus resting on the workman of proving that he has taken all reasonable steps to obtain employment, & in this case the judge's findings would justify refusing an order either under the 1925 Act or the 1931 Act.—*HANCOX v. BALFOUR, BEATTIE & Co., LTD.* (1932), 25 B. W. C. C. 596, C. A.

*Annotations*:—*Apld.* *Babbidge v. Pirelli General Cable Works, Ltd.* (1933), 26 B. W. C. C. 571. *Overd*, *McLaughlin v. Caledonia Stevedoring Co.*, [1938] 3 All E. R. 72.

**3283j.** ——. ]—OWENS v. LLAY MAIN COLLIERIES, LTD., No. 2855b, ante.

**3283k.** ——. ]—Appeal by workman on the question of fact as to whether he had taken all reasonable steps to obtain employment dismissed.—*BABBIDGE v. PIRELLI GENERAL CABLE WORKS, LTD.* (1933), 26 B. W. C. C. 571, C. A.

**3283l.** ——. ]—A mechanic earning £2 17s. 4d. fell from a scaffold & dislocated both his wrists. For eighteen months he received £1 18s. 8d. a week as compensation for total incapacity. The employer then reduced the weekly payment to 10s. a week. The workman filed a request for arbn., claiming to be treated as totally incapacitated or, alternatively, as entitled to the benefit of sect. 9 (4), as amended. The county ct. judge held that the workman was partially incapacitated for work, but that he was not entitled to the benefit of sect. 9 (4). The county ct. judge also found that the workman might, by accepting a reduced wage, get a job worth about 15s. a week. He, therefore, made an award for the workman of £1 1s. 2d. a week, being half the difference between 15s. & £2 17s. 4d. The workman appealed:—*Held*: there was evidence to support the findings & no misdirection.—*HORNSHAW v. MIDDLETON ESTATE & COLLIERY CO., LTD.* (1933), 26 B. W. C. C. 620, C. A.

**3283m.** ——. ]—A tool & metal turner lost the tip of his right forefinger in a slotting machine. The employer, admitting liability, paid him 30s. a week for two & a half months, when he resumed his old work at the same rate of wages. After four months he was discharged by the employer as inefficient. He then obtained other work for six weeks at a lower rate of wages. After that he was out of employment & filed a request for arbn., claiming compensation on the basis of total incapacity, & asking for an order under sect. 9 (4) as amended. At the arbn. he said that he had applied to all firms having his class of work within forty miles, but had failed to obtain it. The county ct. judge said that the workman impressed him as being a truthful man, & that he had taken all reasonable steps to obtain employment. He made an order under sect. 9 (4) awarding 30s. a week. The employer appealed:—*Held*: the judgment of the county ct. judge did not contain sufficient to comply with the requirements of sect. 9 (4) as amended, & the award must be reduced to one for partial incapacity only.—*WICKS v. KING & Co.* (1934), 27 B. W. C. C. 310, C. A.



**3283n.** —.]—A steel-erector lost his left little finger by accident & was paid compensation. Compensation was stopped under the provisions of sect. 12, & the workman returned to work on the level for a few days. He complained of tenderness in his hand & was discharged. He claimed compensation for total incapacity or alternatively for partial incapacity to be treated as total under sect. 9 (4) as amended. The medical evidence at the hearing was to the effect that he needed a few months' work on the level preparatory to returning to his old work. The workman said he had tried to get light work. The county ct. judge found that he was fit for his old work except for nervousness, & made an award for 5s. a week. He also found that he was not entitled to be treated as totally incapacitated under sect. 9 (4) as he had not taken all reasonable steps to obtain employment. The workman appealed. On appeal it was alleged that the judge had given certain reasons for finding the workman had not taken all reasonable steps to obtain employment which were unsound:—*Held*: if the reasons alleged had been given, the finding under sect. 9 (4) could not be supported. Appeal allowed. Order for matter to be remitted for the judge to reconsider on the evidence already given, the question of making an order under sect. 9 (4). The finding of compensation for partial incapacity at 5s. to stand.—*KEOHANE v. DORMAN, LONG & Co.* (1934), 27 B. W. C. C. 471, C. A.

**3283o.** — Failure consequent on injury.]—A county ct. judge must not treat the requirement in sect. 9 (4) (ii) as amended, viz. that it must appear to him that the failure to obtain employment is a consequence, wholly or mainly, of the injury, as a mere *addendum* to proviso (i) of the sub-sect., viz. whether the workman has taken all reasonable steps to obtain employment. Each provision in the sub-sect. is a separate & important item & there must be evidence to show that each provision has been complied with before an order under the sub-sect. can be properly made. Appeal allowed.—

**3283p i.** *Work in same grade as before accident.*—An injured colliery machineman, who had received compensation from his employers as for total incapacity until certified by a medical referee to be so far recovered as to be fit for light work on the surface, unsuccessfully tried to obtain such employment, & later claimed compensation from his employers as for total incapacity, founding on sect. 9 (4) of Workmen's Compensation Act, 1925, as amended by sect. 1 (1) of 1931 Act. His claim was refused by the arbitrator, who, while finding that he was fit for light work, that he had taken all reasonable steps to obtain employment, & that, if he had not been injured, he would probably have been at his pre-accident job, further found that it was not proved that, being certified as fit for light work, it was probable that, but for the continuing effects of his injury, he would have been able to obtain work in the same grade in the same class of employment as before the accident, & that it was not proved that his failure to obtain employment was a consequence wholly or mainly of the injury:—*Held*: (1) the workman's claim did not fall within the scope of sect. 9 (4) (i), in respect that it had not been found that it was probable that, but for the continuing effects of his injury, he would

have been able to obtain work in the same grade in the same class of employment as before the accident; & a finding that, if he had not been injured, he would probably have been at his pre-accident job was not equivalent thereto; (2) the workman's claim did not fall within sect. 9 (4) (ii), in respect that the arbitrator had expressly found in fact that it was not proved that the failure to obtain employment was a consequence wholly or mainly of the injury.—*WISHNEY v. ARCHIBALD RUSSELL, LTD.*, [1935] S. O. 84.—*SCOT*.

*sp. Occasional periods of total incapacity—Award of partial incapacity.*—An employee in the cleansing department of a corp., as the result of an accident arising out of & in the course of his employment, became infected with rat-bite fever, was totally incapacitated for work, & for a period received compensation for total incapacity. At the end of that period he was re-employed by the corp. at light work, & received compensation for partial incapacity. Thereafter he voluntarily left his employment & became unemployed, & under an award, continued to receive compensation for partial incapacity at the same rate. The nature of the infection was such as to render the workman susceptible to recurring attacks of

*LANGSLOW v. JOHN LINES & SONS, LTD.* (1935), 28 B. W. C. C. 186, C. A.

*Annotation*:—*Reid, Chapman v. Marshall, Sons & Co.* (1936), 29 B. W. C. C. 14.

**3283p.** — Onus of proof.]—In 1926, a dock labourer suffered injuries in the course of his employment resulting in the amputation of the middle & ring fingers of his left hand. He was paid full compensation until Apr. 1927, & thereafter he was paid compensation as for partial incapacity until Apr. 1928. In Nov. 1928, he was refused further compensation, on the ground that he was able to earn & was in fact earning as a hatchmouth man, wages equal to his pre-accident wages, & a suspensory award was made, as there was a likelihood that his hand might become worse in the future. In 1935, the workman claimed compensation as for total incapacity, on the ground that he had failed to obtain employment in consequence of the accident. After hearing evidence, an arbitrator found that the workman's failure to obtain employment was mainly due to his injuries, & he awarded compensation as for total incapacity, holding that there was an onus on the employers to establish that the workman had not taken all reasonable steps to obtain employment, which onus the employers had failed to discharge:—*Held*: although the workman was bound to prove his failure to obtain employment, he could do so by evidence short of proof of taking all reasonable steps to obtain employment, for the effect of the amendment was to remove from the workman the onus of proving that he had taken all such reasonable steps. In the circumstances, therefore, he was entitled to compensation.—*MCLAUGHLIN v. CALEDONIA STEVEDORING CO., LTD.*, [1938] A. C. 642; [1938] 3 All E. R. 72; 107 L. J. P. C. 77; 159 L. T. 217; 54 T. L. R. 910; 82 Sol. Jo. 474; 31 B. W. C. C. 198, H. L.

**3283q.** *Work in same grade as before accident.*—The words "work in the same grade in the same class as before the accident," in 1925 Act, s. 9 (4), as amended by 1931 Act, mean work in the same grade in the same

fever, lasting from four days to three weeks, at intervals of from three to six weeks, during which attacks he was totally incapacitated for work. In an arbn. under Workmen's Compensation Act, 1925, the workman craved a review of the previous award, claiming compensation as for total incapacity, at any rate in respect of the recurring short periods during which the attacks of fever lasted. He proved the onset of only one definite attack, but not its duration, & the arbitrator refused to award compensation as for total incapacity in respect of any period. The arbitrator had, however, in previously fixing the rate of compensation for partial incapacity, taken into account that, owing to the nature of the infection, there were recurring short periods of total incapacity:—*Held*: while the workman, if he had proved the existence of total incapacity during definite periods, would have been entitled to awards of compensation for total incapacity in respect of these periods, the arbitrator, in the absence of such definite evidence, had, in fixing compensation for partial incapacity, rightly taken into account that there were, from the nature of the disease, short recurring periods of total incapacity.—*FITZSIMMONS v. GLASGOW CORPN.*, [1937] S. O. 723.—*SCOT*.



class of employment as the workman was working in immediately before the accident. It is of no avail to show that but for the continuing effects of the injury work in the same grade in the same class of an earlier employment could be obtained.—*PALMER v. WATTS, WATTS & Co., LTD.*, [1937] 2 K. B. 360; [1937] 3 All E. R. 241; 106 L. J. K. B. 829; 157 L. T. 27; 81 Sol. Jo. 476; 30 B. W. C. C. 120, C. A.

*Annotation* :—*Refd.* *Wenn v. Watney, Combe, Reid & Co.* (1938), 31 B. W. C. C. 56.

**3284. Add. Annotations** :—*Consd.* *Hamilton v. Shelton Iron, Steel & Coal Co., Leigh v. Same, Timmis v. Same* (1926), 136 L. T. 427; *Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw* (1927), 96 L. J. K. B. 664; *Rhodes v. Digby Colliery Co.*, [1927] 1 K. B. 152. *Apprvd.* *Bevan v. Nixon's Navigation Co.* (1928), 139 L. T. 647. *Consd.* *Gladstone Spinning Co. v. Nangle* (1928), 98 L. J. K. B. 161; *Barnes v. L. & N. E. Ry. Co.* (1929), 22 B. W. C. C. 205; *Evans v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (1929), 22 B. W. C. C. 274. *Apld.* *Wemyss Coal Co., Ltd. v. Walker* (1929), 22 B. W. C. C. 366. *Consd.* *Earl v. Thomas W. Ward, Ltd.* (1930), 143 L. T. 745. *Distd.* *White v. London & North-Eastern Ry. Co.*, [1931] A. C. 52. *Dtd.* *Williams v. Watson (H. J. & S. A.)*, (1930), B. W. C. C. 151. *Consd.* *Jarvis v. Ashington Coal Co.* (1932), 25 B. W. C. C. 570; *Baveridge v. Stephenson (Robert) & Co.* (1933), 26 B. W. C. C. 316; *Ackton Hall Colliery Co. v. Barker* (1937), 30 B. W. C. C. 89. *Refd.* *Cushion v. Tredegar Iron & Coal Co.* (1927), 20 B. W. C. C. 454; *Tannoch v. Brownieside Coal Co.*, [1929] A. C. 642; *Statham v. Oxcroft Colliery Co.* (1929), 22 B. W. C. C. 330; *The Croxteth Hall, The Celtic*, [1930] P. 197; *Mothersdale v. Cleveland Bridge & Engineering Co.* (1930), 99 L. J. K. B. 261; *Birch Bros., Ltd. v. Brown*, [1931] A. C. 605; *Robinson v. English Steel Corp., Ltd.* (1932), 25 B. W. C. C. 203; *Williams v. Penmaenmawr & Welsh Granite Co.* (1933), 148 L. T. 485; *North's Navigation Co.* (1889), *Ltd. v. Batten* (1933), 150 L. T. 186; *Delta Mill* (1919), *Ltd. v. Blakemore* (1935), 104 L. J. K. B. 459; *Taylor v. Danks (Edwin) & Co. (Oldbury), Ltd.* (1934), 27 B. W. C. C. 486; *Hills Patent Glazing Co. v. Douglas* (1937), 30 B. W. C. C. 145.

**3284a.** —.]—A hewer was injured in 1921 by a runaway truck, & had his right thigh broken. He was paid full compensation at the rate of 35s. a week. In 1924 his employer offered him work in the lamp cabin which he accepted, receiving compensation at 20s. a week with reduced wages. In 1931, by which time he had been discharged owing to trade conditions, he was medically examined, & his compensation reduced to 7s. 6d. a week. The medical question was referred to a medical referee, who certified that he was unfit to do his pre-accident work, but was able to do light work such as lamp-cabin work. In May, 1932, the workman filed an

application for compensation at the rate of 35s. a week, alleging that an agreement had been come to between the parties for the payment of that sum to him. The county ct. judge found that there was an agreement as alleged by the workman, & made an award for 35s. a week. He made no finding as to whether the workman was totally incapacitated or not. The employer appealed on the question of the agreement & on *quantum*, & the workman appealed on the failure to find total incapacity :—*Held* : there was no evidence of the alleged agreement, & the matter must go back for the county ct. judge to find whether the workman was totally incapacitated as an "odd lot," or was only partially incapacitated. Case remitted.—*JARVIS v. ASHINGTON COAL CO., LTD.* (1932), 25 B. W. C. C. 570, C. A.

**3286. Add. Annotation** :—*Refd.* *Bevan v. Nixon's Navigation Co.* (1928), 139 L. T. 647.

**3287. Add. Annotations** :—*Refd.* *Bevan v. Nixon's Navigation Co.* (1928), 139 L. T. 647; *Hughes v. Pwll-Heli Granite Co.* (1929), 22 B. W. C. C. 637; *Willis v. Howie* (1931), 24 B. W. C. C. 352.

**3288.** For cross-reference after this case read "*See, now, Workmen's Compensation Act, 1931 (c. 18).*"

**3288a. Application to industrial disease.**—*Applt.*, who was a miner employed by the resps., was disabled by miners' nystagmus & was paid compensation, but ultimately the medical referee certified under 1925 Act, sect. 19 (3), that *applt.* had recovered & was fit for ordinary work. On an application by resps. to end the compensation the medical referee informed the arbitrator that he did not intend to certify that *applt.* had completely recovered in the sense that he was not more susceptible to the disease than before the attack :—*Held* : sect. 9 (4) of the Act applies not merely to physical incapacity for work but also to cases of industrial disease, & as complete recovery had not been established, the arbitrator was not entitled to end the compensation as from the date of the certificate, & *applt.* must be permitted to go to proof of his averments in opposition to resps.' claim to have the compensation ended.—*CONNOR v. CADZOW COAL CO., LTD.*, [1932] A. C. 1; 101 L. J. P. C. 59; 146 L. T. 97; 48 T. L. R. 10; 75 Sol. Jo. 763; 24 B. W. C. C. 396, H. L.

*Annotations* :—*Consd.* *Penrikyber Navigation Colliery Co. v. Edwards*, [1933] A. C. 28. *Apld.* *Monaghan v. Elswick Coal Co.* (1933), 26 B. W. C. C. 432. *Consd.* *Morton v. South Kirkby, Featherstone & Hunsworth Collieries, Ltd.* (1933), 26 B. W. C. C. 180; *Hamilton v. Kinnell Cannel & Coking Coal Co.* (1932), 25 B. W. C. C. Supp. 81; *Timmins v. Brodsworth Main Colliery Co.*, [1934] 2 K. B. 361; *Weeks v. Powell Dyffryn Steam Coal Co.* (1935), 28 B. W. C. C. 396; *Richards v. Goskar*, [1937] A. C. 304. *Refd.* *McNicholas v. West Leigh Colliery Co.* (1933), 26 B. W. C. C. 29; *French v. Archibald Russell, Ltd.* (1934), 50 T. L. R. 451; *United National Collieries, Ltd., Treorchy v. Jones* (1934), 27 B. W. C. C. 94; *Burgoyne v. Rose Bridge Colliery Co.*, [1936] 1 All E. R. 742.

**3288b.** —.]—A coal miner was certified on Nov. 28, 1923, to be suffering from miner's

#### PART XIV. SECT. 12, SUB-SECT. 8. —B (a).

**3288b 1. Application of Workmen's Compensation Act, 1931 (c. 18), s. 1—No right to compensation during receipt of unemployment benefit.**—A workman

who had been in receipt of compensation as for total incapacity was found by a medical referee to have so far recovered as to be fit for employment of a certain kind. His employers having thereupon reduced the payment

of compensation to 5s. weekly, the workman, who had tried but had been unable to obtain employment, applied for & received unemployment benefit. He thereafter brought an application for an award of compensation as for

nystagmus, & was paid compensation at the rate of 35s. a week until Feb. 17, 1929, when the compensation was reduced to 10s. a week on the ground that he was fit for surface work. On Feb. 5, 1932, the employers stopped the reduced weekly payment on the ground that their doctor had certified that he was free from nystagmus when examined under the severest tests. The workman applied for work from his old employers, but they refused to give it to him on the ground that he might have a recurrence of the nystagmus if he went below. Other collieries refused to employ him because he had had nystagmus. He then made genuine efforts to obtain work at various other places, but without success. He filed a request for arbn., claiming 35s. a week from Feb. 5, 1932, onwards. The medical evidence given in the county ct. was to the effect that the workman had recovered in the sense that the signs & symptoms had disappeared, but that if he went down the pit he would probably have oscillations of the eyes. It was, however, admitted that he was, at the moment, absolutely fit to go & do his old work at the coal face. The county ct. judge found that the attack of nystagmus had made the workman more susceptible to another attack & therefore he had not wholly recovered from the disease. He further found that the man was unable to get work at the coal face at other collieries by reason of the policy of the coal owners in that district in refusing to employ miners who had suffered from nystagmus. He therefore held that as the fact that he had suffered from nystagmus was the cause of his inability to earn wages he was entitled to be paid compensation on the basis of total incapacity. The employers appealed on the ground that the evidence established that the workman had fully recovered & therefore was entitled to no compensation:—*Held*: there was evidence on which the county ct. judge could find that the workman had not completely recovered, but there was no evidence to show why he was unable to obtain employment elsewhere than at collieries, or that his failure to obtain such employment should be attributed to nystagmus.

Appeal allowed in part without costs. Case remitted for a new trial on the question whether the workman's failure to obtain employment at places other than collieries should be attributed to nystagmus & consequent reassessment of compensation.—*MORTON v. SOUTH KIRKBY, FEATHERSTONE & HEMSWORTH COLLIERIES, LTD.* (1933), 26 B. W. C. C. 180, C. A.

*Annotations*:—*Folld. Horsfall v. South Kirkby, Featherstone & Hemsworth Collieries, Ltd.* (1933), 26 B. W. C. C. 195. *Dbtd. Andrews v. Denaby & Cadeby Main Collieries, Ltd.*, [1935] 1 K. B. 484. *Refd. Monaghan v. Elswick Coal Co.* (1933), 26 B. W. C. C. 432.

**3288c.** —.]—*HORSFALL v. SOUTH KIRKBY, FEATHERSTONE & HEMSWORTH COLLIERIES, LTD.* (1933), 26 B. W. C. C. 195, C. A.

**3288d.** —.]—A miner certified as suffering from the industrial disease of miner's nystagmus

recovered so far as to be fit to work at the coal face, though more susceptible to the disease by the attack from which he recovered. He was refused work at the coal face because he was unable to sign a declaration that he had never suffered from nystagmus. His inability to sign the declaration, & not the continuing effects of his injury by the attack of the disease, prevented him from getting work in the same grade in the same class of employment as before the accident by disease:—*Held*: his failure to obtain work was not due to the continuing effects of his injury by the disease, & he could not claim compensation on the basis of total incapacity.—*FRENCH v. ARCHIBALD RUSSELL, LTD.* (1934), 104 L. J. P. C. 17; 152 L. T. 1; 50 T. L. R. 451; 78 Sol. Jo. 446; 27 B. W. C. C. 338, H. L.

*Annotations*:—*Expld. Andrews v. Denaby & Cadeby Main Collieries, Ltd.*, [1936] 1 K. B. 484. *Consd. Richards v. Goskar*, [1937] A. C. 304. *Refd. Lloyd v. Conduit Collieries, Ltd.* (1937), 30 B. W. C. C. 293; *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.*, [1937] 2 K. B. 426.

**3288e.** —.]—A miner who, after being disabled by miner's nystagmus, has become fit for work at the coal face, but is unable to obtain work there by reason of the refusal of mine-owners to employ a man below ground who has suffered from miner's nystagmus, is not entitled to recover compensation under the Workmen's Compensation Act, 1925, even though the attack of nystagmus has rendered him more susceptible to another attack, so that in that sense he has not completely recovered from his injury.

*French v. Archibald Russell, Ltd.*, No. 3288d, must be treated as having overruled *Morton v. South Kirkby, etc., Collieries, Ltd.*, No. 3288b, although the claim for compensation arose in the former case under sect. 9 (4) (i) of the Act, & in the latter case under sect. 9 (1). In a case where the incapacity for work is not to be treated as one of "the continuing effects of the injury" within sect. 9 (4) (i), it cannot be treated as resulting from the injury within sect. 9 (1).—*ANDREWS v. DENABY & CADEBY MAIN COLLIERIES, LTD.*, [1935] 1 K. B. 484; 104 L. J. K. B. 370; 152 L. T. 183; 51 T. L. R. 139; 78 Sol. Jo. 839; 27 B. W. C. C. 419, C. A.

**3288f.** Application of Workmen's Compensation Act, 1931 (c. 18), s. 1—*Finding of partial incapacity by medical referee.*—*WILLIAMS v. NEW BRITISH RHONDDA COLLIERY CO., LTD.*, No. 3038b, *ante*.

— Condition for termination on receipt of unemployment benefit—*Right to compensation for period prior to order.*—(1) The proviso to sect. 1 of 1931 Act applies only to a period after the date of the order made by the county ct. judge, & therefore does not prevent full compensation being awarded from a date antecedent to the order although unemployment benefit may have been paid throughout such antecedent period.

(2) The county ct. judge has a discretion under the section to attach such conditions

total incapacity. The sheriff substitute, having found that the workman's failure to obtain employment was a consequence of his injury, ordered that his incapacity should be treated as total incapacity, & awarded com-

penetration therefor as from the date when the employers reduced the payment, on the workman undertaking to refund the sums paid to him as unemployment benefit:—*Held*: the sheriff substitute was not entitled to

award compensation for any period during which the workman had been in receipt of unemployment benefit.—*MITCHELL v. MACRAE & DICK*, [1932] S. C. 567; 25 B. W. C. C. Supp. 35.—*SCOT*.

to his order as he may think fit with regard to the repayment of unemployment benefit received prior to the date of the order. Appeal dismissed.—*GOODMAN v. RUSTON & HORNSBY, LTD.*, [1932] 2 K. B. 60; 101 L. J. K. B. 353; 146 L. T. 522; 48 T. L. R. 319; 25 B. W. C. C. 98, C. A.; *affd. sub nom.* *RUSTON & HORNSBY, LTD. v. GOODMAN*, [1933] A. C. 150; 102 L. J. P. C. 161; 148 L. T. 145; 49 T. L. R. 55; 76 Sol. Jo. 815; 25 B. W. C. C. 475, H. L.

*Annotations*:—As to (1) *Folld. Foster v. Scunthorpe & District Billposting Co.* (1932), 101 L. J. K. B. 357. *Consd. Robinson v. English Steel Corp., Ltd.* (1932), 25 B. W. C. C. 203. As to (2) *Consd. Marsh v. Robert Parker, Ltd.* (1932), 25 B. W. C. C. 197. *Generally, Refd. Darracq Motor Engineering Co. v. Seaward* (1935), 28 B. W. C. C. 64.

**3288h.** — — — — —.]—A carpenter was seriously injured by an accident for which his employer admitted liability & paid him full compensation. He was subsequently given light work, sitting on a bench making boxes, the materials being brought to him. It was work which had to be done in the normal course of the employer's business, & was done satisfactorily. On an application for compensation he was awarded 4s. a week, & received this in addition to the wages paid to him for the light work. After a year & a half he had to be discharged owing to trade depression. After his discharge he applied for & received unemployment benefit & was still receiving it at the date of the hearing of an application by him for the review of his weekly payment of 4s. by an increase to 30s. At the arbn. the medical evidence was to the effect that the workman was in the same condition as when he was awarded 4s. a week, but he claimed an increase to 30s. a week on the ground of total incapacity. The county ct. judge found that the workman was as capable of doing work as when the award for 4s. a week was made, but that owing to trade conditions he had lost his employment & had since drawn, & was still drawing, unemployment pay on the ground that he could do the work if he could get it. He found he was not an "odd lot," & further held that the 1931 Act had rendered it impossible for the workman to obtain an increase, & made his award for the employer. The workman appealed:—*Held*: the award was unsatisfactory as it might be read as meaning that the receipt of unemployment benefit by the workman before the date of the hearing had disentitled him from claiming full compensation, contrary to the decision in *Goodman v. Ruston & Hornsby, Ltd.*, No. 3288f, *ante*.—*ROBINSON v. ENGLISH STEEL CORPN., LTD.* (1932), 25 B. W. C. C. 203, C. A.

**3288j.** — — — — —.]—The words in proviso (ii) to sect. 1 of 1931 Act are words of futurity only, & should be incorporated in every order made under that Act. Appeal dismissed.—*FOSTER v. SCUNTHORPE & DISTRICT BILLPOSTING CO.* (1932), 101 L. J. K. B. 357; 25 B. W. C. C. 111, C. A.

**3288k.** — — — — —.]—What conditions must be imposed—*General rule.*—Sect. 1 of 1931 Act not being mandatory, there is no obligation on a county ct. judge in making an order under that Act to specify any period for, or to impose any conditions to, such order, but if he does not wish to specify any period or conditions, it is wise for him to record that

the order is to continue until the weekly payment shall be ended, diminished, or redeemed in accordance with the Acts, & that no conditions are imposed save only the condition contained in proviso (ii) to sect. 1. the terms of which should be set out. Appeal dismissed.—*MARSH v. ROBERT PARKER, LTD.* (1932), 25 B. W. C. C. 197, C. A.

**3288l.** — — — — —.]—Condition for termination on receipt of unemployment benefit.]—*GOODMAN v. RUSTON & HORNSBY, LTD.*, No. 3288g, *ante*.

**3288m.** — — — — —.]—*FOSTER v. SCUNTHORPE & DISTRICT BILLPOSTING CO.*, No. 3288j, *ante*.

**3288n.** — — — — —.]—Condition for repayment of unemployment benefit received prior to order—*Discretion of judge.*—*GOODMAN v. RUSTON & HORNSBY, LTD.*, No. 3288g, *ante*.

**3288o.** — — — — —.]—Condition for cesser of compensation on employment.]—On a claim by a partially incapacitated workman that his incapacity should be treated as total, the county ct. judge made an order based on the wording of Form 24B in the Appendix to the Workmen's Compensation Rules, 1926. He first of all ordered that the workman's incapacity should be treated as total incapacity for three months only; then that the employer should pay compensation at the full rate during the total or partial incapacity of the workman or until review proceedings were taken; & finally that in the event of the workman being incapacitated for work or unable to earn full wages as a result of his injury, he should be entitled to compensation in accordance with the Acts. The employer appealed on the grounds that there was no evidence on which the judge could make the order & that he was wrong in doing so:—*Held*: there was evidence on which the order could be made & no misdirection, but the wording of the order, by reason of the wording of Form 24B, was inconsistent & failed to state the intention of the judge or carry out the provisions of the Act, & must be amended generally so that the benefit of the order should only continue during so much of the three months as the workman remained unemployed.

New order drafted by the Ct. of Appeal & observations on inadequacy of wording of Form 24B. Appeal dismissed.

*Semble*: until Form 24B is altered a condition should be added to every order under sect. 9 (4) to the effect that the order for payment of compensation for total incapacity only continues operative while the workman remains unemployed.—*DARRACQ MOTOR ENGINEERING CO., LTD. v. SEAWARD* (1935), 28 B. W. C. C. 64, C. A.

**3288p.** — — — — —.]—A painter's labourer lost half the second finger of his right hand by accident arising out of & in the course of his employment. The employers admitted liability & paid compensation for eight months. They then served a notice to terminate the compensation, together with a doctor's certificate in accordance with sect. 12, on the workman on a Sat. On the same morning the workman applied to his old employer for work, but no suitable work was available. On the following Mon. he filed a request for arbn. claiming compensation on the basis of total

& permanent incapacity. In his answer the employer admitted that the workman was partially incapacitated. The workman did not register at the Labour Exchange. The county ct. judge said that he thought the workman ought to be treated as totally incapacitated having regard to the 1931 Act, & made an award on the basis of total incapacity. The employer appealed:—*Held*: the application had not been framed under sect. 9 (4) of the 1931 Act, & was bad. Further, there was no evidence to support an award on such basis. The compensation should have been assessed on the basis of partial incapacity. Appeal allowed. Case remitted.—*PAULLEY v. AVELING & PORTER, LTD.* (1932), 25 B. W. C. 567, C. A.

**3288q.** —.]—A waggon shunter employed in locomotive works at an average wage of £2 17s. 7d., severely injured his left hand while firing a boiler in May, 1929, as a result of which several fingers were damaged & the grip was very much weakened. After receiving full compensation for some time he did a certain amount of work. On being discharged, in Oct. 1931, he claimed compensation on the basis of total incapacity. The county ct. judge found that the workman's labour was an "odd lot," & that he was entitled to compensation on the basis of total incapacity. He awarded him full compensation from Oct. 1931, & added the words "this order shall cease to be in force if the workman receives unemployment benefit," but there were no findings in accordance with sect. 9 (4) as amended. Between Oct. 1931, & Nov. 1932, the only employment which the workman was able to obtain was one day's work as a painter, & there was no evidence that he was unable to do that work or that he was unable to obtain any other work on account of his injury. The employers appealed:—*Held*: the county ct. judge had failed to keep separate the different considerations involved in "odd lot" labour & partial incapacity treated as total under sect. 9 (4), & had therefore failed to direct himself correctly.—*BAVERIDGE v. STEPHENSON (ROBERT) & Co., LTD.* (1933), 26 B. W. C. C. 316, C. A.

**3288r.** —.]—A workman whose hand had been injured claimed to have his partial incapacity treated as total under sect. 9 (4) as amended. In the arbn. he proved that he had taken all reasonable steps to obtain employment & in giving evidence as to fifty-two unsuccessful applications for work he said that he sometimes did, & sometimes did not, show his injured hand to prospective employers. The county ct. judge in giving judgment, found that it was probable that the workman would, but for the continuing effects of his injury, be able to obtain work in the same grade in the same class of employment as before the accident & in coming to this conclusion he applied his own knowledge of the conditions of local industry. He also stated in his judgment that on the evidence the workman's failure to obtain employment was not a consequence, wholly or mainly, of the injury. In his award, however, he found that the workman had satisfied him both under para. (i) & para. (ii) of sect. 9 (4). The employer appealed:—*Held*: as to para. (i), there was evidence on which the

county ct. judge could find as he did; as to para. (ii) the view expressed in the award was the right one, & not that expressed in the judgment, as the latter view would be inconsistent with the evidence. Appeal dismissed.

Sect. 9 (4) (i) means, in my opinion, that, if the workman shows that, but for his injury, he is competent for work, i.e. a decent workman, & that there is no reason why he should not get work as before, & that the state of trade is comparable with what it was when he was previously in employment, that is enough to constitute *prima facie* evidence within the meaning of the sub-sect. (SCOTT, L.J.).—*GREGSON v. SWIFT* (1936), 29 B. W. C. C. 166, C. A.

*Annotation*:—*Consd.* *Wenn v. Watney, Combe, Reid & Co.* (1938), 31 B. W. C. C. 56.

**3288s.** —.]—A workman lost the tips of the first & second fingers of her left hand, was subsequently re-employed, but owing to labour conditions was discharged after twenty-four days. On a claim for compensation at the full rate the county ct. judge made an order under sect. 9 (4), that her incapacity should be treated as total. The employer appealed:—*Held*: the requirements of sect. 9 (4) had not been satisfied & there must be a new trial. Appeal allowed.—*GILDERS v. DENYAR & HARWAR* (1935), 28 B. W. C. C. 116, C. A.

**3288t.** —.]—Resp. sustained serious injuries in consequence of an accident arising out of & in the course of his employment with the applts., resulting in the amputation of his leg. Being thereby partially incapacitated for work, he made application to an arbitrator to have his partial incapacity treated as total incapacity within the Workmen's Compensation Act, 1925, s. 9 (4), as amended. The arbitrator decided in resp.'s favour, having found that (a) he had so far recovered from the accident as to be fit for light work, (b) he had taken all reasonable steps to obtain employment, (c) he had failed to obtain employment in his former work because of the injury, & (d) it was probable that, but for the continuing effects of the accident, he would have been able to obtain work in the same grade in the same class of employment as before the accident. Applts. contended that, resp. having been found to be incapable of engaging in his former employment & to be fit only for light work, the said sections of the Acts of 1925 & 1931 did not apply to his case:—*Held*: (1) the words in the sub-sect. "has so far recovered from the injury as to be fit for employment of a certain kind," do not mean that the subsect. is applicable only to a workman fit in every respect to engage in his former employment but are to be construed so as to apply to a workman rendered unfit for his former employment but fit for light work; (2) as the findings in fact of the arbitrator were such as to satisfy the provisions & requirements of the Acts, he was entitled to treat resp.'s incapacity as total incapacity.—*ADDIE (ROBERT) & SONS' COLLIERIES, LTD. v. MCCracken*, [1936] 3 All E. R. 1039; 106 L. J. P. C. 49; 156 L. T. 113; 53 T. L. R. 187; 81 Sol. Jo. 33; 29 B. W. C. C. 378, H. L.

*Annotations*:—As to (1) *Consd.* *Wenn v. Watney, Combe, Reid & Co.* (1938), 31 B. W. C. C. 56. *Reid, Palmer v. Watts, Watts & Co.*, [1937] 2 K. B. 360, C. A.

288u. —.]—A workman was employed for fourteen years in a brewery, which was situated in an agricultural district, first as a maltster & later as a foreman barley roaster, work which brought him into contact with heat, dust & steam. Only two foreman barley roasters were employed in the brewery. Having become disabled by dermatitis produced by dust or liquids the workman was paid 30s. a week compensation, which was subsequently reduced to 15s. a week when he had become sufficiently recovered to do work which did not involve contact with heat, dust or steam. The workman commenced arbn. proceedings claiming an increase of the rate of compensation & also an order that his partial incapacity should be treated as total. The county ct. judge granted an increase in the rate of compensation but refused to make the order asked for on the ground that, although the workman had taken all reasonable steps to obtain employment, there was still a large field of work in the same grade in the same class of employment as before the accident open to him & his failure to obtain employment was not a consequence, wholly or mainly, of the injury. The workman appealed:—*Held*: there was misdirection, as the only work in the same grade in the same class of employment as before the accident was that of a foreman barley roaster.

Appeal allowed. Case remitted to another county ct. judge to find whether it was probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident. WENN V. WATNEY, COMBE, REID & CO., LTD. (1938), 31 B. W. C. C. 56, C. A.

**3289a. Unable to find former employment.]**

—A miner who had lost the sight of his right eye in an accident recovered sufficiently to be fit to resume his old work. Although he had taken all reasonable steps to obtain work as a miner or quarryman, he failed to obtain any. The sheriff-substitute found that the workman's failure to obtain employment was mainly a consequence of the injury & treated his incapacity as total under sect. 9 (4). On appeal to the First Division of the Ct. of Session the decision of the sheriff-substitute was reversed on the ground that sect. 9 (4) did not apply to a case where the workman had recovered sufficiently to be fit for his former employment. The workman appealed to the House of Lords:—*Held*: the words "employment of a certain kind," in sect. 9 (4) are applicable although the employment which the workman is fit for & is attempting to obtain is his pre-accident employment.—TANNOCH V. BROWNIESIDE COAL CO., [1929] A. C. 642; 98 L. J. P. C. 156; 141 L. T. 599; 45 T. L. R. 599; 73 Sol. Jo. 499; 22 B. W. C. C. 383, H. L.

*Annotations*:—*Consd.* Hughes v. Pwll-Hell Granite Co. (1929), 22 B. W. C. C. 637; Mothersdale v. Cleveland Bridge & Engineering Co. (1930), 99 L. J. K. B. 261; Ingham v. Red Line Gluco, Ltd. (1932), 25 B. W. C. C. 243; Fox v. Great Western Sawmills (1932), 25 B. W. C. C. 621; Hamilton v. Kinneil Cannel & Coking Coal Co. (1932), 25 B. W. C. C. Supp. 81. *Reid*. Birch Bros., Ltd. v. Brown, [1930] 2 K. B. 255; Charlton v. Union Castle Line, Ltd. (1929), 18 B. W. C. C. 396; Owens v. Llay Main Collieries, Ltd. (1932), 25 B. W. C. C. 573; Jones v. Crumlin Valley

Collieries, Ltd. (1935), 28 B. W. C. C. 260; Addie (Robert) & Sons' Collieries, Ltd. v. McCracken, [1936] 3 All E. R.

**3290. Add. Annotation:—Consd. Birch Bros., Ltd. v. Brown, [1931] A. C. 605.**

3290a. —.]—In May, 1923, a miner suffered a permanent injury by accident to his left foot & was paid compensation. In May, 1924, he was given by his employers light employment as a signalman, together with compensation for partial incapacity, & he continued to do the work satisfactorily until the general stoppage in 1926. His services were then dispensed with, & he was unable to obtain employment elsewhere. At the hearing it was proved that the workman could not do work which involved activity of the feet. The sheriff-substitute found that the workman was fit only for a special & limited class of work which he would have no chance of obtaining in the competitive labour market, & awarded him compensation for total incapacity. On appeal this decision was affirmed by the First Division of the Ct. of Session. The employers again appealed:—*Held*: there was ample evidence to support the finding of the arbitrator.—WEMYSS COAL CO., LTD. v. WALKER (1929), 22 B. W. C. C. 360, H. L.

*Annotations*:—*Reid*. Smith v. Union Castle Steamship Co. (1931), 24 B. W. C. C. 71; Raveridge v. Stephenson (Robert) & Co. (1933), 26 B. W. C. C. 316; Taylor v. Danks (Edwin) & Co. (Oldbury), Ltd. (1934), 27 B. W. C. C. 486.

**3291a. Charitable employment given by employer.]**

—An hotel employee was in 1922 injured by an accident which converted him for all practical purposes into a one-armed man. He received compensation until 1926, when, as a result of an arbn., the county ct. judge made an order that the employers were liable to pay him compensation, & that he was at liberty to apply to the ct. "should he at any time be so advised." No other award was made, as the employers undertook to find him employment at 30s. a week. The employment found for him was to stand in the street holding a sign advertising the hotel. In 1930 he was dismissed for pilfering & applied to the ct. for compensation by way of review. The county ct. judge made an award in his favour on the basis of total incapacity. The employers appealed:—*Held*: (1) the award of the county ct. judge must have been made on findings that the workman was totally incapacitated & that the employment found for him by his employers was only a charitable employment, & there was evidence to support these findings; (2) the workman, being found to be in the category of "odd lot" labour, the fact that he had been dismissed for misconduct was irrelevant in coming to a decision as to whether or not there was incapacity for work. Appeal dismissed.—JENSEN V. JONES (R. E.), LTD. (1930), 23 B. W. C. C. 518, C. A.

**3291b. One hand becoming useless.]**—As a result of an accident a workman lost the third finger of his left hand, the second & fourth fingers were shrunken, & the thumb & first finger became weak, thus making the hand practically useless. The county ct. judge found that the workman was an "odd lot," & also that he should be treated as totally incapacitated under 1925 Act, s. 9 (4).

The employers appealed:—*Held*: there was evidence to support the findings, & no misdirection. Appeal dismissed. — *EVANS v. THOMAS W. WARD, LTD.* (1930), 23 B. W. C. C. 364, C. A.

*Annotations*:—*Consd.* *Earl v. Thomas W. Ward, Ltd.* (1930), 23 B. W. C. C. 229; *Robinson v. English Steel Corp., Ltd.* (1932), 25 B. W. C. C. 203.

**3291c. General discharge of workmen—No notice to injured workman.**—A miner employed on a week's notice lost the ring finger of his right hand in an accident. He received compensation for total incapacity. While he was absent from work owing to his injury his employer discharged 500 men, choosing for purposes of dismissal men from the district in which the injured workman lived. When the workman ceased to be totally incapacitated the employer applied to have the weekly payments diminished. The workman resisted the application on the ground that he was entitled to an order treating his incapacity as total under sect. 9 (4). The county ct. judge found as a fact that the workman, having never received a week's notice as the discharged workmen had done, would probably, but for the continuing effects of the injury, have been able to obtain his old work. On this finding, & being satisfied that the workman had taken all reasonable steps to obtain employment & failed, he refused the employer's application for a review, & made an order under sect. 9 (4) for total incapacity. The employer appealed:—*Held*: there was evidence to support the findings & no misdirection.—*FIRBECK MAIN COLLIERIES, LTD. v. HOPEWELL* (1932), 25 B. W. C. C. 607, C. A.

*Annotations*:—*Refd.* *Barstow v. Ingham's Thornhill Collieries, Ltd.*, [1934] A. C. 304; *Ingham's Thornhill Collieries, Ltd. v. Barstow* (1934), 27 B. W. C. C. 146; *Ebbw Vale Steel Iron & Coal Co. v. Williams*, [1936] 1 All E. R. 835; *Jones v. Crumlin Valley Collieries, Ltd.* (1935), 28 B. W. C. C. 260.

**3291d. Workman dismissed.**—The words "the continuing effects of the injury" in sect. 1 (1) of 1931 Act have reference to the physical condition of the workman & do not include an act of the employers in dismissing a workman because they may think it unlikely that he will be able to return to work within a reasonable time.—*BARSTOW v. INGHAM'S THORNHILL COLLIERIES, LTD.*, [1934] A. C. 304; 103 L. J. K. B. 425; 151 L. T. 66; *sub nom.* *INGHAM'S THORNHILL COLLIERIES, LTD. v. BARSTOW*, 27 B. W. C. C. 146, H. L.

*Annotations*:—*Distd.* *Ebbw Vale Steel Iron & Coal Co. v. Williams*, [1936] 1 All E. R. 835; *Appld.* *Jones v. Crumlin Valley Collieries, Ltd.* (1935), 28 B. W. C. C. 260. *Dist.* *Vranch v. Tredgar (Southern) Collieries* (1935), 28 B. W. C. C. 277. *Refd.* *French v. Archibald Russell, Ltd.* (1934), 104 L. J. P. C. 17; *Andrews v. Denaby & Cadeby Main Collieries, Ltd.*, [1935] 1 K. B. 484.

**3291e.** —.]—A miner, who had been employed by the same employer for twelve years, was certified on Jan. 1, 1934, as being disabled by miner's nystagmus & as being only fit for light work. Liability under sect. 9 (4) was admitted & full compensation paid at the weekly rate of 26s. 4d. Compensation was reduced from Jan. 20, 1934, to May 19, 1934, to 8s. 4d. a week on the ground that the workman was drawing unemployment benefit. On May 19, 1934, when the workman ceased to draw unemployment benefit, the weekly rate of compensation was restored to 26s. 4d. until Sept. 11, 1934, when a notice

to terminate his employment with the employer took effect. It was thereafter continued at the reduced rate of 8s. 4d. a week. The workman applied to have his compensation restored to the full rate during the two periods of reduction on the ground that he was entitled to the benefit of sect. 9 (4) as amended by the 1931 Act. In a short judgment the county ct. judge said: "The facts appeared to me to be indistinguishable from those in the case of *Ingham's Thornhill Collieries, Ltd. v. Barstow*, No. 3291d. . . . I have, of course, taken into consideration the state of the labour market" & refused to make an award increasing the rate of compensation for either period. The workman appealed:—*Held*: the termination of the contract of service on Sept. 11, 1934, marked a difference between the two periods of reduced compensation. The county ct. judge was entitled on the evidence to hold that the workman had failed to satisfy him that he was entitled to the benefit of sect. 9 (4) & *Ingham's Case* applied in regard to the second period, but there was nothing in the judgment to show that he had considered the effect of the continuance of the contract of service during the first period & there must be a new trial on the issue in regard to such period. Appeal allowed in part.

Decision reserved on the question whether, on an application by a workman for an order under sect. 9 (4), the county ct. judge is entitled to take into consideration the fact that unemployment benefit is being drawn.

—*JONES v. CRUMLIN VALLEY COLLIERIES, LTD.* (1935), 28 B. W. C. C. 260, C. A.

*Annotation.*—*Consd.* *Ebbw Vale Steel, Iron & Coal Co. Ltd. v. Williams* (1935) 28 B. W. C. C. 267.

**3291f.** —.]—A disabled miner was in receipt of compensation for total incapacity. The employers gave notice terminating his contract of service, & afterwards brought proceedings to review & diminish the weekly payment. The manager of the colliery said in evidence that if the miner had not had nystagmus he would probably have been working for the employers; that he made a practice of re-engaging old workmen if he needed them; & that he was instructed to give the workman notice in consequence of the House of Lords' decision in *Barstow v. Ingham's Thornhill Collieries, Ltd.*, No. 3291d. The county ct. judge, nevertheless, was not satisfied that the workman would have been employed, or that he was unfit to do the work by reason of nystagmus, or that his failure to obtain employment was consequent either wholly or mainly on his injury. He therefore reduced the amount of the compensation:—*Held*: the evidence that, in spite of the notice terminating employment, the workman would have been re-employed took the case out of the class represented by *Barstow v. Ingham's Thornhill Collieries, Ltd.*, No. 3291d. This evidence established the probability that the workman would, but for the continuing effect of the injury, have been able to obtain the same class of work as before, & the workman must receive his old rate of compensation.—*EBBW VALE STEEL, IRON & COAL CO., LTD. v. WILLIAMS*, [1936] 1 All E. R. 835; 80 Sol. Jo. 385; 29 B. W. C. C. 98, C. A.



**3292. Add. Annotation:—***Refd. Earl v. Thomas W. Ward* (1930), 143 L. T. 745.

**3295. Add. Annotation:—***Consd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw* (1927), 96 L. J. K. B. 604.

**3295a. ———.]—**In 1911, a workman lost his right arm as a result of an accident. From 1913 to 1922 his employers engaged him on light work. In 1922 it was agreed that he should in the future be paid 7s. 6d. a week compensation in respect of the estimated difference between what he could earn at light work & what he would have been earning if he had not been injured. After 1924 he was given the work of record-keeping. On Dec. 24, 1927, he was discharged, the works being closed on account of trade difficulties. On Jan. 9, 1928, after sixteen days, he was re-engaged on light work on the terms of the 1922 agreement. The workman received unemployment benefit for the period he was unemployed & also the weekly compensation of 7s. 6d., & did not try to obtain other employment. On May 13, 1928, he filed an application for arbitration, claiming an increase of compensation during the period he was unemployed on the basis of total incapacity. It was agreed that the amount recoverable in these proceedings, if successful, was 55s., being two sums of 35s. a week less the two payments of 7s. 6d. The arbitration was begun in Aug. 1928, & continued in Oct. In his evidence the workman said that he was "a storekeeper plus messenger," & that he could act as a watchman-gatekeeper. At the hearing in Oct. the county ct. judge intimated that he was prepared to accept the argument put forward on behalf of the workman that he was an "odd lot," but again adjourned the case to Feb. 1929, for further consideration. In Feb., after hearing further argument, the county ct. judge found that the workman was partially incapacitated, that there were classes of employment in which he could earn his pre-accident wages, & that 7s. 6d. was sufficient compensation during the two weeks in question. The workman appealed:—*Held*: the findings of the county ct. judge amounted to a finding of fact that the workman was not an "odd lot," & there was evidence to support such a finding & no misdirection.—*EVANS v. EBBW VALE STEEL, IRON & COAL CO., LTD.* (1929), 22 B. W. C. C. 274, C. A.

**3295b. ———.]—**A partially incapacitated workman in receipt of reduced compensation was unable to obtain work & claimed compensation on the basis of total incapacity on the ground that the injury was responsible for the fact that he was now only fit for light work, which was in fact unobtainable. The county ct. judge found that the workman was neither an "odd lot" nor within 1925 Act, s. 9 (4), but fit for light work. He also found that his failure to obtain employment was due to industrial conditions & not to his physical disability, & that the employers were right in reducing the compensation. The workman appealed:—*Held*: the findings of the county ct. judge were the exact findings in the case of *Cardiff Corpn. v. Hall*, No. 3284, which was approved in *Bevan v.*

*Nixon's Navigation Co., Ltd.*, No. 3243b, & there was no misdirection. Appeal dismissed.—*WILLIAMS v. WATSON* (H. J. & S. A.) (1930), 23 B. W. C. C. 151, C. A.

**3296. Add. Annotation:—***Consd. Owens v. Llay Main Collieries, Ltd.* (1932), 25 B. W. C. C. 573.

**3298a. ———.]—**A wood-working machinist cut his hand on a circular saw. He was paid full compensation for over two months, but when the cut had healed the compensation was stopped & he applied for continuance of the compensation. After filing the application he obtained a job with fresh employers & cut himself again. At the hearing, at which it was alleged that the workman was suffering from traumatic neurasthenia, the county ct. judge found that he was able to do light work on the ground in the open air, but away from machinery, if such work could be found, but that he was quite unfit to go back to his old job. On the ground that there was no evidence that there was any light work available of that particular limited kind, the judge awarded him continuance of compensation at the full rate from the date when it had been stopped. The employers appealed:—*Held*: there was no evidence to justify an award for payment of compensation at the full rate. Appeal allowed. Case remitted.—*ATKINS v. SPRECKLEY (CHARLES) & CO., LTD.* (1931), 24 B. W. C. C. 59, C. A.

**3299a. ———.]—**A workman met with an accident arising out of & in the course of his employment which resulted in the loss of his right arm. He received full compensation based on total incapacity for some time, when it was reduced. Owing to failure to obtain work he again claimed full compensation. Arbn. proceedings having taken place, the county ct. judge made an award based on partial incapacity, holding that the failure to obtain work was not "wholly or mainly" due to the injury, but to the state of the labour market:—*Held*: there was material upon which the county ct. judge could base his decision. The workman having failed to prove that his failure to obtain work was a consequence, wholly or mainly, of the injury, & there being no misdirection, the appeal failed.—*MOTHERSDALE v. CLEVELAND BRIDGE & ENGINEERING CO.* (1930), 99 L. J. K. B. 261; 142 L. T. 541; 23 B. W. C. C. 47, C. A.

*Annotations:—**Consd. Owens v. Llay Main Collieries, Ltd.* (1932), 25 B. W. C. C. 573. *Refd. Jones v. Crumlin Valley Collieries, Ltd.* (1935), 28 B. W. C. C. 260; *Langslow v. John Lines & Sons, Ltd.* (1935), 28 B. W. C. C. 186.

**3299b. ———.]—**A press-worker, aged fifty-seven years, lost the second & third fingers of his right hand in an accident while at work. On a claim for compensation the county ct. judge held that owing to the man's age & to the fact of there being two million unemployed in the labour market, it was quite impossible for him to find work of any description, & therefore his labour was an "odd lot." The employer appealed:—*Held*: there was misdirection. Appeal allowed. New trial.—*TAYLOR v. DANKS (EDWIN) & CO. (OLDBURY), LTD.* (1934), 27 B. W. C. C. 486, C. A.

**3300a. ———.]—**A workman, in Dec. 1924, lost his left eye in an accident, & received



compensation until he was re-employed at full wages at his old work in Mar. 1925. In Aug. 1925, he was discharged owing to slackness of trade & received unemployment benefit for a year. He was unable to give any clear evidence of what he had done subsequently, but from Oct. 1928, to June, 1929, he was employed by the guardians. From June, 1929, he was again in receipt of unemployment benefit. He made a claim for compensation in Aug. 1929. Evidence was given that he had applied three or four times to his old employers for work, but unsuccessfully, & that he had been unsuccessful in his applications for work to two other firms. The employers alleged that the only reason why they had been unable to re-employ him was because he had always applied for work at times when there was no work to be had, but that there had been work available for him in the past, & there was work available for him at the date of the hearing. There was no evidence that the refusal of work by the other two firms was due to the fact that he had lost an eye. The judge found that the workman had failed to obtain employment wholly or mainly in consequence of his injury, & made an award in his favour under sect. 9 (4) on the basis of total incapacity. The employers appealed on the ground that there was no evidence of either partial or total incapacity & no evidence to bring the case within sect. 9 (4):—*Held*: there was misdirection & no evidence to support a finding of incapacity due to the injury.—*HUGHES v. PWLL-HELI GRANITE CO., LTD.* (1929), 22 B. W. C. C. 637, C. A.

*Annotation*:—*Refd.* Langslow v. John Lines & Sons, Ltd., (1935), 23 B. W. C. C. 186.

**3300b.**

—*J*—A case maker sustained an injury to an eye, resulting in the removal of part of the iris. The injury was an obvious one, but did not prevent him doing his old work. He was paid compensation until his employer stopped the weekly payments on the ground that the workman was able to do his ordinary work. The workman claimed full compensation on the ground that he ought to be deemed to be totally incapacitated under sect. 9 (4) as amended by the 1931 Act. He alleged that he had taken all reasonable steps to obtain employment which he was capable of doing. He called two employers as witnesses on the hearing of his application for arbn., who said that they preferred not to employ him as not being a fit man. The county ct. judge found that the workman had sufficiently recovered as to be fit for his former employment, but was not satisfied that he came within either clause (i.) or clause (ii.) of sect. 9 (4) of 1925 Act as amended by the 1931 Act. The workman appealed:—*Held*: the conclusion to which the arbitrator had come was one of fact & there was no jurisdiction.—*Fox v. GREAT WESTERN SAWMILLS* (1932), 25 B. W. C. C. 621, C. A.

**3301a. Ability to do work in ordinary course of employer's business.**—On Jan. 5, 1923, the workman, who was at the time of this appeal fifty-nine years old, while working as a general labourer, was injured by an accident arising out of & in the course of his employment by resps. His left foot & leg thickened & swelled, & ever since he has walked with a

limp with the aid of sticks, & been unable to do any work involving standing up. In Jan. 1924, an award was made in his favour for full compensation on the ground that his injuries left his labour as an "odd lot," but on resp.'s undertaking to give him some work suitable to his impaired powers & to pay him a wage equal to his pre-accident earnings, the only award made was a declaration of liability. He was given the work of cleaning valves to do, for which he could sit at a bench, & he continued so to work till Nov. 1929, when, owing to slackness of trade, he, with many other able-bodied & injured men, was discharged. Since that time he had been unable to obtain any work, employers having told him they were slack & had nothing to suit him. Appls, having refused to pay him compensation, he filed a request for arbn. & the county ct. judge awarded him full compensation on the basis of total incapacity on the ground that he was the class of man for whom employers were called upon to find special jobs of light work, & that consequently his labour was an "odd lot":—*Held*: the workman being able to do, & having done, the job for six years, of cleaning valves, a job necessary to be done in the ordinary course of business of his employers, his labour was not an "odd lot," that was to say, he was not only able to do certain very special jobs depending on finding a very special employer who either from compassion or because he had a special job was able to give him employment, therefore he was not totally incapacitated.—*EARL v. THOMAS W. WARD, LTD.* (1930), 143 L. T. 745; 23 B. W. C. C. 229, C. A.

*Annotation*:—*Consd.* Robinson v. English Steel Corpn., Ltd. (1932), 25 B. W. C. C. 203.

**3301b. Occasional unemployment.**—A workman recovered from an injury by accident sufficiently to return to his old work though he was unable to do all that he could do before the accident. After his return he was occasionally without work, owing to slackness of trade. While still employed he made a claim for compensation. The county ct. judge found that he was fit only for light work but had failed to obtain employment wholly or mainly in consequence of his injury, & held that under the 1931 Act his incapacity must be treated as total. He ordered payment to him by his employer of £1 10s. a week from the date of his return to work, & to continue. The employers appealed:—*Held*: the award could not be supported. Appeal allowed. New trial ordered in another county ct.—*SNAPE v. MELLOWES & CO., LTD.* (1931), 24 B. W. C. C. 497, C. A.

*Annotation*:—*Refd.* Hancox v. Balfour, Beattie & Co. (1932), 25 B. W. C. C. 596.

**3302. Add. Annotation**:—*Refd.* Bevan v. Nixon's Navigation Co. (1928), 139 L. T. 647.

**3303. Add. Annotation**:—*Consd.* Birch Bros., Ltd. v. Brown, [1931] A. C. 605.

**3305. Add. Annotations**:—*Consd.* Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw (1927), 96 L. J. K. B. 664; Barnes v. L. & N. E. Ry. Co. (1929), 22 B. W. C. C. 205; Evans v. Ebbw Vale Steel, Iron & Coal Co. (1929), 22 B. W. C. C. 274. *Refd.* Cushion v. Tredegar Iron & Coal Co. (1927), 20 B. W. C. C. 454; Robin-

son v. English Steel Corpn., Ltd. (1932), 25 B. W. C. C. 203.

**3305a.** —.]—An omnibus conductor suffered injury to an arm by an accident arising out of & in the course of his employment. After he had been in receipt of compensation for two years, the employer applied for a review requesting diminution or termination of the weekly payments. The employer's medical evidence was to the effect that the workman was fit to do his pre-accident work. The workman's medical evidence was to the effect that the workman was only able to do light work of a special kind. The county ct. judge in a short judgment said that the onus was on the employer to prove his case on the issues raised & he had failed to discharge it. He therefore made his award for the workman. The employer appealed:—*Held*: having regard to the evidence given before him, the county ct. judge must have intended to find in his judgment that the workman was so disabled that his earning capacity was only that of an "odd lot" in the labour market. Appeal dismissed.—CROSVILLE MOTOR SERVICES, LTD. v. JONES (1938), 31 B. W. C. C. 179, C. A.

**3307a.** —.]—In Dec. 1927, as a result of an accident arising out of & in the course of his employment, a workman sustained an injury to his left foot. He received compensation at first for total incapacity & then for partial incapacity. In July, 1932, the employers applied for a review of the weekly payments. The workman had for several years been wearing a mechanical contrivance on his leg, but was unable to state at the hearing who had advised him to wear it. There was a conflict of medical opinion as to whether the contrivance was desirable or otherwise. The county ct. judge found as a fact that the workman wore the contrivance in order to maintain his incapacity & made an award terminating the weekly payments. The workman appealed:—*Held*: there was evidence to support the finding & no misdirection.—RICH v. PARTRIDGE JONES & JOHN PATON, LTD. (1932), 25 B. W. C. C. 547, C. A.

**3315a.** —.]—A workman was employed as a seaman on a fishing-boat at £3 a week. On Feb. 11, 1926, his finger was cut by a rope, & he was paid compensation until July 2, when he was certified fit for light work. He then obtained a situation on a trawler, until Sept., payment being on a profit-sharing basis, & his share of the profits being £21. He next worked on another trawler until Feb. 1927, payment being on the same basis, but there were no profits. On Nov. 5, 1926, he filed a request for arbn. claiming half the difference between his pre-accident wages & what he was able to earn on the trawlers

on the profit-sharing basis. The county ct. judge assessed his weekly earning capacity since July 2, 1926, at £2 5s., & awarded him 7s. 6d. a week compensation:—*Held*: (1) there was no evidence that the workman suffered any loss of earnings by reason of his injury, & no evidence to support the award; (2) the workman had not discharged the *onus* of showing a reasonable probability that incapacity would ensue in the future, & was not entitled to a declaration of liability.—MCLEOD v. BLACK (1927), 20 B. W. C. C. 530, C. A.

**3316.** *Add. Annotation*:—*Refd.* Bryan v. Upland (1936), 29 B. W. C. C. 221.

**3317.** *Add. Annotation*:—*Refd.* Byrne v. Evans Lifts, Ltd. (1932), 25 B. W. C. C. 41.

**3321.** *Add. Annotation*:—*Consd.* McCann v. Scottish Co-operative Laundry Asscn., Ltd., [1936] 1 All E. R. 475.

**3324a.** *How calculated—Death after receiving weekly payments—& sum in redemption.*—A workman entitled to compensation after receiving weekly payments amounting to £115 10s., was paid a sum of £750 in redemption of all further payments. He subsequently died as the result of the injuries from the accident for which he had been paid compensation:—*Held*: in calculating the amount payable as compensation under sect. 8 of the Act to his widow & children, under sect. 8 (2) (iii), the amount paid to him weekly must be deducted from the lump sum payable to the widow, which was £300, so as not in any case to reduce that sum to less than £200. Then under sect. 8 (3) (iii), the sum of £200 left must be deducted from the redemption sum of £750 & the remainder of the £750, namely, £550, must be deducted from the amount of the children's allowance, which, calculated in accordance with sect. 8 (3) (i), was £788 2s., & the amount therefore payable on the death of the workman was £238 2s.

*Per* ROMER, L.J.: The literal construction of the words "lump sum payable" in sect. 8 (3) (iii) must be rejected & the words read as meaning the lump sum which would have been payable if there had been no redemption of the weekly payments.—SWAN v. PURE ICE Co., LTD., [1935] 2 K. B. 265; 104 L. J. K. B. 583; 152 L. T. 407; 51 T. L. R. 343; 28 B. W. C. C. 9, C. A.

**3324b.** *Proceedings by children but not by widow.*—AVERY v. LONDON & NORTH EASTERN RY. CO., HARRIS v. LONDON & NORTH EASTERN RY. CO., BONNER v. LONDON & NORTH EASTERN RY. CO., WATSON v. LONDON & NORTH EASTERN RY. CO., No. 2021a, *ante*.

**3325.** *Add. Annotation*:—*As to* (1) *Consd.* Gardner v. Vickers (1928), 44 T. L. R. 563.

PART XIV. SECT. 12, SUB-SECT. 9.  
—A.

*sf. Disfigurement—No evidence of difficulty in obtaining employment.*—The employers of a dock labourer, who had lost his left index finger by accident in their employ & had been receiving compensation, obtained a medical reference as a result of which the referee reported that the workman had again become fit for his ordinary

work. It was, however, not in dispute that the workman was permanently disfigured by the loss of his finger. In arbn. proceedings brought by the employers, the arbitrator refused a motion at their instance that he should end compensation, & pronounced a suspensory award, on the ground that the workman's disfigurement might make it difficult for him to obtain employment. The workman tendered no evidence to show

that his prospects of employment had been prejudiced by the disfigurement:—*Held*: in the absence of evidence showing that the workman's disfigurement would make it difficult or impossible for him to secure employment, the arbitrator was not entitled to make a suspensory award, but was bound to end compensation.—MAVOY v. CALEDONIA STEVEDORING CO., [1932] S. C. 31; 24 B. W. C. C. Supp. 135.—SCOT.

**3329. Add. Annotations:—**As to (1) *Refd.* White v. London & North-Eastern Ry. Co. (1929), 142 L. T. 435. As to (4) *Refd.* Morgan v. Tareni Colliery Co., [1938] 1 K. B. 433. *Generally*, *Refd.* Gardner v. Vickers (1928), 44 T. L. R. 563; Bywater v. Stothert & Pitt, Ltd. (1933), 148 L. T. 12.

**3341. Add. Citations:—**[1927] A. C. 126; 96 L. J. K. B. 284; 136 L. T. 258; 19 B. W. C. C. 416.

*Add Annotation:—Refd.* Curran v. Kays, [1928] 2 K. B. 469.

**3354. Add. Annotation:—**As to (1) *Refd.* Nugent v. Londonderry Collieries (1929), 141 L. T. 619.

**3355. Add. Annotations:—**Consd. Welsh Navigation Steam Coal Co. v. Evans, [1927] A. C. 834; Nugent v. Londonderry Collieries (1929), 141 L. T. 619.

**3357. Add. Annotations:—**Consd. Campbell v. Portland Colliery Co. (1926), 19 B. W. C. C. 594; Shotts Iron Co. v. Curran, [1929] A. C. 409. *Refd.* Ward v. Dorman, Long & Co., [1933] 2 K. B. 658.

**3359a.** —.]—Where a workman who had been killed by an accident arising out of & in the course of his employment left his

mother & several brothers & sisters under the age of fifteen partially dependent on his earnings:—*Held*: the brothers & sisters were entitled to the children's allowance.—*SHOTT'S IRON CO. v. CURRAN*, [1929] A. C. 409; 98 L. J. P. C. 73; 141 L. T. 65; 45 T. L. R. 251; 22 B. W. C. C. 1, H. L.

*Annotation:—*Consd. Ward v. Dorman, Long & Co. (1933), 2 K. B. 658.

**3359b.** — *Brother under fifteen.*—*SHOTT'S IRON CO. v. CURRAN*, No. 3359a, *ante*.

**3359c. How calculated.—Period of calculation.—Posthumous child.**—A workman having been killed by accident arising out of his employment, his widow claimed compensation for herself & her posthumous child born some ten weeks after the workman's death. The employers paid a sum of money into ct. in respect of the child's allowance based on 15 per cent. of £2 a week for 780 weeks or fifteen years:—*Held*: the child was entitled to a sum calculated by taking 15 per cent. of £2 a week over a period from the death of the workman to the date when the child in fact would attain the age of fifteen, which, in this case, was some ten weeks more than fifteen years.—*ATHEY v. PICKERINGS, LTD.* (1926), 96 L. J. K. B. 250; 136 L. T. 535; *sub nom.* *Re ATHEY*,

**PART XIV. SECT. 13, SUB-SECT. 1.—**  
**B. (a).**

**3331 i. What may be taken into account**—*Transitional benefit.*—A workman was killed as the result of an injury by accident arising out of & in the course of his employment. He lived in family with his father & mother, one brother, & three sisters, one of whom was a mental defective. The family was supported for the ordinary necessities of life out of a family fund, the only contributions to which were the father's transitional benefit & the deceased workman's wages. In computing the father's transitional benefit the Unemployment Assistance Board allowed a certain sum weekly for the maintenance of each unemployed member of the family, amounting to 32s. for the father, mother, & three younger children, & 7s. 6d. for the defective, but, owing to the Assistance Regulations which prevented an award of transitional benefit exceeding what could have been awarded as unemployment benefit, the actual weekly benefit received by the father amounted to 32s. only. The arbitrator having held that the defective was totally dependent upon the deceased workman's wages, in respect that, owing to the method of computation by the Board, the allowance for her maintenance out of the father's benefit had never actually been received by him, having been counter-balanced by the surplus of the deceased workman's earnings over the cost of his maintenance:—*Held*: (1) the father's transitional benefit fell to be regarded as belonging to him as his contribution to the fund to be distributed for the maintenance of the family; (2) although the Unemployment Assistance Board, for the purpose of computing the father's benefit, had allocated it among the members of the family, there was no evidence that the family fund had been expended upon the maintenance of the family in accordance with such allocation; (3) the arbitrator had, accordingly, misdirected himself in finding that the defective was not dependent upon her father's benefit; (4) as the presumption that every claimant on a common fund is partially dependent upon each contributor thereto had not been displaced,

the defective should be treated as partially dependent on her father's contribution & partially on the deceased workman's earnings. Appeal allowed.—*FORRESTER'S CURATOR v. NESS & Co.*, [1937] S. C. 441.—*SCOT.*

**PART XIV. SECT. 13, SUB-SECT. 1.—**  
**B. (b).**

**3339 i. From what sum deducted**—*Not from children allowance.*—Workmen's Compensation Act, 1925, enacts that weekly payments of compensation made to the workman before his death shall be deducted from the lump sum, but not from the children's allowance:—*Held*: such payments fell to be deducted from the lump sum prior to its aggregation with the children's allowance, & not from the aggregate of the lump sum & the allowance; & accordingly, such portion of the children's allowance, calculated according to the rules, as was necessary to raise the aggregate to the maximum of £600, fell to be added to the lump sum after deduction from the latter of any payments made to the workman.—*FAHRELL v. MURDOUSTON COLLIERY CO.*, [1931] S. C. 143; 23 B. W. C. C. 639.—*SCOT.*

**PART XIV. SECT. 13, SUB-SECT. 1.—**  
**C. (b).**

**3348 iv. Contributions from unemployment benefit.**—A workman who was fatally injured in his employment was, at the time of his death, living in family with his father, mother, & two sisters. The family was maintained out of a common fund, to which the workman, his father, & other members of the family contributed weekly, the whole fund being expended upon necessities. During the year preceding the workman's death, his father was in employment only for eleven weeks; during the remainder of the year his father's sole contribution to the fund consisted of unemployment benefit. The workmen's own contribution to the fund during the year amounted to rather more than one-third of it; his wages averaged £1 13s. 9d., & he contributed to the fund, on an average, 13s. 9d. more than he received from it. The other members of the family were all

partially dependent on his contribution; & on his death, they claimed compensation:—*Held*: the compensation payable to claimants fell to be measured by the extent to which the workman's death had in fact deprived them of the ordinary necessities of life.

Opinions that, in determining the extent of the claimants' partial dependency on the workman's earnings, the arbitrator was entitled to take into account the father's contributions to the common fund from unemployment benefit.—*POLLOCK v. BAIRD (WILLIAM) & Co., LTD.*, [1931] S. C. 667; 24 B. W. C. C. Supp. 87.—*SCOT.*

**3349 ii.** — *Applts.*—being the father, mother, brothers, & sisters of deceased, claimed compensation under Workers' Compensation Act, 1912–1924, on the ground that they were partially dependent on deceased. *Applts.* & deceased had resided together, & deceased, who was an infant, had been in receipt of a wage of 12s. 6d. per week at the time of his death, which, or most of which, he was in the habit of contributing towards the expenses of the household of which he was a member. The magistrate found that the cost of the keep of deceased came to more than the amount which he paid into the family & that *applts.* were not dependent on him:—*Held*: the magistrate was entitled to find that *applts.* were not dependent on deceased.—*EDMONSTONE v. GREAVES* (1926), 29 W. A. L. R. 83.—*AUS.*

**11. Incapacity of wage-earning father—Result of son's accident.**—A workman who was killed by an accident arising out of his employment, left his mother & sister partially dependent upon his earnings. His father, a wage-earner & not dependent, was totally incapacitated by the news of his son's death. The arbitrator took the loss of the father's earnings into consideration in assessing the lump sum payable to the dependants. The employers appealed:—*Held*: the loss of the father's wage-earning capacity was irrelevant to the assessment of the compensation.—*SWAN v. COLTNESS IRON CO., LTD.* (1928), 21 B. W. C. C. 567.—*SCOT.*

*o. Reversd.*, 19 B. W. C. C. 461.

PICKERINGS, LTD.'s APPLICATION, 20 B. W. O. C. 215, O. A.

**3359d.** — Amount of lump sum.]—A workman died as the result of an accident, having previously received from his employers £65 5s. 5d. in weekly payments as compensation. On his death his employers paid into ct. £534 14s. 7d., made up of £234 14s. 7d., i.e., £300 less £65 5s. 5d., for the lump sum payable to the widow, & £300 for children's allowance. The total amount to which the children would have been entitled, if not limited in any way, was calculated to be £617 14s. The county ct. judge decided that the amount paid in was reasonable &, at the request of the widow, made an order for payment out of part of the amount :—*Held* : (1) the amount paid into ct. by the employers was insufficient, & the dependants were entitled to the full £600, since if the lump sum calculated under Workmen's Compensation Act, 1925 (c. 84), s. 8 (2), was reduced below £300, then, if the figures warranted it, the children's allowance under sect. 8 (3) might exceed £300, provided that the lump sum & the children's allowance together did not exceed £600; (2) the widow was not deprived of her right of appeal by having accepted payment of part of the amount paid in, because, although she might have approbated the order on her own behalf, she had reprobated it in the interests of her children. (3) *Seem* : a request for arbn., & not an appeal, was the proper procedure for the widow.—MALCOLM v. BARBER, WALKER & Co., LTD. (1927), 137 L. T. 470; 20 B. W. O. C. 516, C. A.

*Annotation* :—*Consd.* Swan v. Pure Ice Co., [1935] 2 K. B. 265.

**3359e.** — One child over fifteen partially dependent.]—A workman died as a result of an accident leaving a widow & two children under fifteen all wholly dependent, & also one daughter over fifteen partially dependent. The county ct. judge held the presence of the daughter over fifteen, & only partially dependent, required him to calculate the children's allowance on the basis of partial dependency :—*Held* : the children's allowance must be calculated on the basis of their being wholly dependent, & the existence of another member of the family over fifteen, who happened to be only partially dependent, did not affect the calculation.—GREEN v. PREMIER GLYNRHONWY SLATE Co., LTD., [1928] 1 K. B. 561; 97 L. J. K. B. 32; 138 L. T. 90; 20 B. W. C. C. 563, C. A.

**3362a.** Two accidents—Statutory maximum inapplicable.]—A workman who had been partially incapacitated by an accident & was in receipt of 19s. 6d. a week compensation was, whilst in the employment of the same employers, totally incapacitated for two months by a second accident in respect of which the compensation, calculated according to the Workmen's Compensation Act, 1925, was 22s. 6d. a week :—*Held* : that there

was nothing in the Act of 1925 which restricted the total liability of the employers for compensation in respect of the two accidents to the 30s. mentioned in proviso (c) to sect. 9 (1) of the Act; that proviso was confined to the weekly payment in respect of the particular accident then under consideration; & the workman was therefore entitled to the two sums of 19s. 6d. & 22s. 6d.—THOMPSON v. LONDON & NORTH EASTERN RY. Co., [1935] 2 K. B. 90; 104 L. J. K. B. 515; 152 L. T. 571; 51 T. L. R. 308; 79 Sol. Jo. 195; 28 B. W. C. C. 95, C. A.

*Annotation* :—*Consd.* Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd., [1937] 2 K. B. 426.

**3363a.** During the previous twelve months—Twelve months prior to accident.]—BYWATER v. STOTHERT & PITT, No. 3231c, ante.

**3364.** *Add. Annotation* :—*Consd.* Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw (1927), 96 L. J. K. B. 664.

**3366.** *Add. Annotations* :—*Consd.* Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw (1927), 96 L. J. K. B. 664; Delta Mill (1919), Ltd. v. Blakemore (1935), 104 L. J. K. B. 459. *Refd.* Bevan v. Nixon's Navigation Co. (1928), 139 L. T. 647; Barber, Walker & Co. v. Flint (1928), 98 L. J. K. B. 83.

**3371a.** — — —.]—STEVENS v. BIRMINGHAM CORPN., No. 3269b, ante.

**3373.** *Add. Annotations* :—*Consd.* Hamilton v. Shelton Iron, Steel & Coal Co., Leigh v. Same, Timmins v. Same (1926), 96 L. J. K. B. 295; Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw (1927), 96 L. J. K. B. 664. *Refd.* Bevan v. Nixon's Navigation Co. (1928), 139 L. T. 647.

**3375.** *Add. Annotation* :—*Consd.* Birch Bros., Ltd. v. Brown, [1930] 2 K. B. 255.

**3377a.** Accident occurring before operative date of 1923 Act—Compensation to be calculated by reference to 1906 Act.]—A workman earning £1 18s. 6d. a week was injured by an accident on July 10, 1923. Liability was admitted & compensation paid. The 1923 Act did not come into operation until Jan. 1, 1924. In Sept. 1924, he resumed work at lighter employment, but was in receipt of higher wages. In Dec. 1928, he was discharged. In June, 1929, he filed an application for arbn. The county ct. judge found that he was still partially incapacitated & made an award for a weekly payment of £1. The employers appealed :—*Held* : the accident having occurred before Jan. 1, 1924, compensation for partial incapacity should have been awarded in accordance with the 1906 Act, & the judge, in making the award he did, must have applied the principles of the later Acts.—WILLIAMS v. ENGLEFIELD COLLIERIES, LTD. (1929), 22 B. W. C. C. 532, C. A.

PART XIV. SECT. 13, SUB-SECT. 2.—A.

*sd. Application of Workmen's Compensation Act, R. S. S., 1920, s. 15.]—ORTON v. PANGMAN RURAL TELEPHONE Co., LTD., [1930] 2 W. W. R. 163; 4 D. L. R. 78; 24 S. L. R. 371.—OAN.*

PART XIV. SECT. 13, SUB-SECT. 2.—C. (a).

**3374 i.** — Offer of suitable work—As non-union worker.]—*Held* : as the employers had not discharged the onus of proving that acceptance of the condition in their offer would not have

made the workman's position materially worse than it had been under the old contract, the arbitrator was not entitled to refuse compensation.—M'DONALD v. OUTRAM (GEORGE) & Co., LTD., [1927] S. C. 333.—SCOT.

**3377b. Duty of court to apply 1925 Act, sect. 10.]—**  
—A workman was injured on Feb. 6, 1929. Out of the fifty-two weeks prior to that date he had been in work for twenty-three weeks & out of work for twenty-nine. He had been employed by the same employer since 1914, but owing to bad trade his contract of service had since 1921 become terminable at a day's notice, & it was the practice of the employer to put up notices from time to time announcing that the particular mill in which the workman was engaged would cease work on the following week. Whenever he was thus thrown out of work the workman attempted to get other work, but always failed & had to draw unemployment benefit. He would, if the mill happened to have reopened, apply at the works on the chance of being taken on again. Liability for the accident was admitted by the employer, but a dispute arose as to the amount of the average weekly earnings on which the rate of compensation should be calculated. The county ct. judge held that the total earnings during the fifty-two weeks should be divided by twenty-three, representing the number of weeks of employment. There was no evidence before the judge that the irregular cessation of work was a normal incident of the workman's employment beyond the statement of the workman that employment had been irregular since 1921. The employer appealed:—*Held*: the county ct. judge had not computed the workman's average weekly earnings in the manner best calculated to give the rate per week at which the workman was being remunerated. Appeal allowed. Case remitted for reconsideration on the basis of 1925 Act, s. 10 (i), & the proviso thereto.—*McGEE v. UNITED STEEL COMPANIES, LTD.* (1930), 23 B. W. C. C. 273, C. A.

*Annotation*:—*Folld. Fenton v. Charlton (J. E.), Ltd.* (1931), 24 B. W. C. C. 176.

**3377c. —.]—**At the hearing of an arbn. at which the county ct. judge found partial incapacity only, a dispute arose as to the average weekly earnings of the workman, a stevedore. The workman claimed that they amounted to £5 10s., but the employer contended that they were £3 10s., being the actual weekly amount paid by them to the workman while in their employment. The county ct. judge, without considering the provisions of 1925 Act, s. 10, in calculating the average weekly earnings, took the figure of £5 10s. for the purpose of assessing the amount of compensation. The employer appealed:—*Held*: average weekly earnings must be calculated in accordance with 1925 Act, s. 10. Appeal allowed. Case remitted for reconsideration of compensation on the basis of both sects. 9 & 10.—*FENTON v. CHARLTON (J. E.), LTD.* (1931), 24 B. W. C. C. 176, C. A.

**3383a. —.]—***WHITE v. LONDON & NORTH EASTERN RY. CO.*, No. 3243c, *ante*.

**3383b. —.]—**In calculating the amount of compensation due to a partially disabled workman who has resumed work for his former employers, the arbitrator cannot take into account any changes in the basic rate of wages which may have occurred since the accident.—*MATTHEWS v. HARLAND & WOLFF,*

*LTD.* (1932), 102 L. J. K. B. 170; 25 B. W. C. C. 533, C. A.

*Annotations*:—*Apld. Blakemore v. Delta Mill (1919), Ltd.* (1933), 26 B. W. C. C. 598. *Consd. Delta Mill (1919), Ltd. v. Blakemore* (1935), 104 L. J. K. B. 459.

**3385. Add. Annotation:—***Refd. Broughton v. London & North-Eastern Ry. Co.*, [1930] 1 K. B. 578.

**3389. Add. Annotation:—***Refd. Stevens v. Birmingham Corp.* (1929), 22 B. W. C. C. 311.

**3390. Add. Annotation:—***Refd. Colquitt v. United Steel Co.* (1928), 21 B. W. C. C. 409.

**3390a. —.]—**A miner, in 1913, sustained a fracture of his right leg & was wholly incapacitated, for which he received full compensation at 35s. a week. The employers subsequently claimed to reduce the compensation to 3s. 5d. a week, on the ground that he was then capable of earning wages as a clerk, storekeeper, or lampman. The workman filed an application for arbn. claiming the continuance of compensation for total incapacity. The judge referred certain questions to the medical referee who, in his replies, stated that the workman suffered pain in his right leg which would prevent him standing eight hours as a storekeeper or lampman; but which would not prevent him doing the full work of a clerk. The judge examined letters written by the workman & found that he was sufficiently well educated to earn 30s. a week as a clerk &, on the answers given by the medical referee, made an award for 7s. 8d. a week with costs. The workman appealed:—*Held*: there was evidence to support the finding of fact & no misdirection.—*YEOMAN v. GREAT WESTERN COLLIERY CO., LTD.* (1929), 22 B. W. C. C. 547, C. A.

**3392a. Lack of accommodation for workman's family.]—**A workman employed by a railway co. as a foreman ganger, living in a village in Lincolnshire with his wife, whose lungs were delicate, & his four children, was partially incapacitated as the result of an injury from an accident arising out of & in the course of his employment. His average weekly earnings before the accident amounted to £3 1s. 11d. The co. offered him, first at B. & then at S., work which he was capable of doing & in which he could earn £2 6s. 9d. a week; & they made him weekly payments of 7s. 7d. The workman refused the employment offered as not being "suitable" on the grounds that, as he alleged: (a) in neither of the places mentioned could he find accommodation for his family, & (b) that his wife's health would suffer if she had to live in either of them; & he applied to the county ct. for an award of compensation:—*Held*: the lack of accommodation for the family of the workman & the possible or probable injury to his wife's health were irrelevant to the question whether available employment was "suitable."—*BROUGHTON v. LONDON & NORTH-EASTERN RY. CO.*, [1930] 1 K. B. 578; 99 L. J. K. B. 238; 142 L. T. 475; 46 T. L. R. 202; 74 Sol. Jo. 138; 23 B. W. C. C. 17, C. A.

**3392b. — Injury to wife's health.]—***BROUGHTON v. LONDON & NORTH-EASTERN RY. CO.*, No. 3392a, *ante*.

**3396. Add. Annotation:—***Reid. Yates v. Hemsworth Rural District Council* (1929), 22 B. W. C. C. 649.

**3399. Add. Annotations:—***Distd. Cartwright v. Crossley & Porter Orphan Home & School (Governors)* (1934), 27 B. W. C. C. 476. *Reid. Re Transferred Civil Servants (Ireland) Compensation*, [1929] A. C. 243; *Yates v. Hemsworth Rural District Council* (1929), 22 B. W. C. C. 649; *Nixon v. A.-G.*, [1931] A. C. 184.

**3400. Add. Annotation:—***Distd. Cartwright v. Crossley & Porter Orphan Home & School (Governors)* (1934), 27 B. W. C. C. 476.

**3401a. — Statutory duty to make contribution.]—**A teacher, while teaching a class, met with an accident which resulted in her being permanently incapacitated & having to retire. She was accordingly awarded by the Board of Education an annual superannuation allowance under Teachers (Superannuation) Act, 1925 (c. 59). Under that Act both the teacher & her employers had been compelled to make contributions towards superannuation allowance. These contributions were paid into the Exchequer, but did not represent the whole of the moneys required for the ultimate payment of the superannuation allowance, which was made up out of State funds. The superannuation allowance was paid out of the Exchequer to the Board of Education, which paid it to the workman. The employers claimed to deduct from the weekly payments of compensation a sum equivalent to the proportion of the superannuation allowance contributed by him, as being a payment, allowance or benefit received by the workman from the employers during the period of his incapacity within sect. 9 (1) (b). On a claim by the workman for the sums deducted, the county ct. judge made his award for the employers. The workman appealed:—*Held*: although there was a statutory obligation on the employers to make certain contributions to the Exchequer, the allowance was received by the workman from State funds which had never been in the employer's possession or under his control & must therefore be disregarded in computing the weekly payments. Appeal allowed.—*CARTWRIGHT v. CROSSLEY & PORTER ORPHAN HOME & SCHOOL, GOVERNORS* (1934), 27 B. W. C. C. 476, C. A.

**3401b. — Must be paid in respect of incapacity.]—**By Local Government & other Officers' Superannuation Act, 1922 (c. 59), s. 6 (3), where a servant of a local authority adopting the Act has attained the age of sixty-five, he shall cease to hold his employment, provided that the local authority may, with the consent of the servant, by resolution extend the period of employment for one year or any less period & so from time to time as they may deem expedient. A dustman, aged sixty-seven, employed by a local authority which had adopted the above Act was

injured & became entitled to be paid compensation. He was paid full compensation for a short time & then given a small weekly pension. The workman claimed compensation on the basis of total incapacity. There was no evidence as to whether the employment of the workman had been extended by resolution, or as to whether the pension was paid in respect of the incapacity. The county ct. judge found partial incapacity & held that the pension was being paid by the employers in respect of such incapacity. He, therefore, made an award of compensation for partial incapacity, reducing the weekly payment by the amount of the weekly pension. The workman appealed:—*Held*: there were insufficient materials before the county ct. judge to enable him to come to a proper decision as to whether the pension was in respect of incapacity or not. Appeal allowed. Case remitted for rehearing.—*YATES v. HEMSWORTH RURAL DISTRICT COUNCIL* (1929), 22 B. W. C. C. 649, C. A.

**3411. Add. Annotation:—***Reid. Pickervance v. Evans (Richard) & Co.* (1935), 28 B. W. C. C. 492.

**3420. Add. Annotation:—***Distd. McGee v. Muir Wm. & Co.* (1929), 140 L. T. 546.

**3423a. Payments received under part-time agency agreement.]—**A workman was employed as a fitter by a firm of engineers, & at the same time was acting under an agreement with a benefit society as their part-time agent. Under this agreement he agreed to obey the orders of the society & perform all his duties in accordance with official instructions. He was to be paid a weekly salary calculated on a percentage basis. The workman suffered an accident in the course of his employment as a fitter. The county ct. judge, in order to compute his average weekly earnings, added together the weekly payments received from both sources. The employers appealed on the ground that the relationship between the society & the workman was that of principal & agent, & not master & servant, & that his payments under the agreement should not be taken into account:—*Held*: the judge had rightly construed the agreement as establishing the relationship of master & servant between the society & the workman.—*ROBERTS v. GARDNER (WILLIAM) & SONS* (1928), 21 B. W. C. C. 154, C. A.

*Annotations:—Reid. Hobbs v. Royal Arsenal Co-operative Society* (1930), 144 L. T. 10; *Petrie v. Red Bank Manufacturing Co.* (1935), 28 B. W. C. C. 423.

**3423b. Payments out of public funds—Compensation for loss of wages—Workman sitting on Court of Referees.]—**The earnings which are to be taken as the basis of the compensation payable to an injured workman under Workmen's Compensation Act, 1925 (c. 84), are the earnings in his employment, & do not include other earnings such as payments to the workman from public funds to make up loss of wages for days when instead of

**PART XIV. SECT. 13, SUB-SECT. 3.—**  
A. (a).

**3415 i. Whether incidental advantages included—Value of tuition to apprentice.]—**An apprentice, not in receipt of any wages, was totally incapacitated as a result of an accident arising out of & in the course of his employment:—*Held*: the value of the tuition he re-

ceived could not be taken into account for the purpose of awarding compensation.—*DAVIS v. DELAHUNT*, [1930] I. R. 262; 23 B. W. C. C. 668.—*IR.*

*sa. Amount he is actually earning.]—Held*: as the workman was employed & there was no other employment open to him at which he could earn higher wages, the proper figure to take

in assessing compensation was the amount he was actually earning.—*DYKES v. BATRD*, [1929] S. C. (Ct. of Sess.) 555.—*SCOT.*

*sb. Profit sharing by fisherman—Deemed to earn wages at \$780 a year—Amount fixed conclusively.]—MARITIME FISH CORPN. v. COBORN*, [1930] 1 D. L. R. 800.—*CAN.*



working he sits as workmen's representative on the Ct. of Referees of a local employment committee.—*McGEE v. MUIR W. & Co., LTD.* (1929), 140 L. T. 546; 45 T. L. R. 202; 73 Sol. Jo. 109; 22 B. W. C. C. 193, C. A.

**3427. Add. Annotations:—Consd.** *McGee v. United Steel Companies, Ltd.* (1930), 23 B. W. C. C. 273. **Refd.** *Gregory v. Waddington & Co.* (1933), 26 B. W. C. C. 590.

**3428. Add. Annotation:—Refd.** *Gregory v. Waddington & Co.* (1933), 26 B. W. C. C. 590.

**3429a. Long distance lorry driver—Allowance for meals.]—**A long distance lorry driver was employed at a weekly wage of £2 10s. He was also paid 1s. 3d. a meal in respect of meals obtained by him when engaged at a distance on his employer's business. The county ct. judge found that the allowance for meals was a sum paid to cover a special expense within the meaning of sect. 10 (iv.), & refused to reckon it as part of the workman's average weekly earnings. The workman appealed:—**Held:** the finding was one of fact & there was no misdirection.—*GREGORY v. WADDINGTON & Co.* (1933), 26 B. W. C. C. 590, C. A.

**3431. Add. Annotations:—Consd.** *McGee v. United Steel Companies, Ltd.* (1930), 23 B. W. C. C. 273. **Refd.** *Morgan v. Tareni Colliery Co.*, [1938] 1 K. B. 433.

**3431a. —.]—**A cotton spinner earning £3 19s. 7d. a week was disabled by an industrial disease. In Apr. 1926, he obtained an award for a weekly payment of £1 a week as compensation based on an estimated earning capacity of £1 19s. 7d. a week. He remained in fact unemployed except for a short time in Oct. 1929, when he obtained work as a labourer at £1 18s. a week. In Apr. 1932, he obtained work as a bookmaker's clerk at £1 5s. a week. The work was seasonal, intermittent, & for part of a day only. He applied for a review & an increase of the weekly payments. At the arbn. the workman gave evidence that he had attempted to obtain more lucrative work but had failed. This evidence was not contradicted by the employer. The county ct. judge found that the work of a bookmaker's clerk was part-time work & of such a nature as afforded no criterion as to the amount the workman was able to earn. He therefore dismissed the application on the ground that there had been no change of circumstances sufficient to justify a review of the amount that the workman had already been found able to earn. On appeal by the workman the Ct. of Appeal held, on the uncontradicted evidence of the workman, that there had been a change of circumstances, as the workman had proved by taking proper steps to obtain employment that his earning capacity was in fact less than had been estimated when the original award was made, & an award must be made on the basis that the workman was only able to earn £1 5s. a week. The employer appealed to the House of Lords:—**Held:** the words in sect. 9 (3) (i) "the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident"

are alternative, & the qualifying words "in some suitable employment or business" must be excluded from the first alternative, so that the sect. should read "the average weekly amount which, after the accident, he is earning, or, in some suitable employment or business is able to earn."

In this case 25s. a week was all that the workman was actually earning after making *bond fide* efforts to obtain work suitable to his condition. Those earnings were fixed as a fact & the county ct. judge had no power to increase the amount for the purpose of assessing compensation.

I see no justification for reading into the words 'the average weekly amount which he is earning,' any such phrase as 'for full time employment' or 'for a full week's employment.' These words stand unqualified, as the first alternative. They are not qualified, as in the second alternative, by the words 'in some suitable employment or business.' In my opinion, the Act provides a simple method, though it may not be a logical one, as the actual earnings of the workman are presumably conditioned by the existing economic position of the labour market—an element which falls to be excluded in assessing the amount which he 'is able to earn' (*LORD THANKERTON*).—*DELTA MILL (1919), LTD. v. BLAKEMORE*, 104 L. J. K. B. 459; *sub nom. BLAKEMORE v. DELTA MILL (1919), LTD.* (1935), 28 B. W. C. C. 193, H. L.

**3433. Add. Annotations:—As to (1) Refd.** *Hamilton v. Shelton Iron, Steel & Coal Co.*, *Leigh v. Same*, *Timmins v. Same* (1926), 96 L. J. K. B. 295. **As to (3) Refd.** *Hawkins v. Thames Stevedore Co. & Cold Storage Co.*, [1936] 2 All E. R. 472. **As to (5) Refd.** *Bevan v. Nixon's Navigation Co.* (1928), 139 L. T. 647; *Doncaster v. Sudlow (R.) & Sons* (1929), 22 B. W. C. C. 564. **Generally, Refd.** *Lewis v. Guest*, *Keen & Nettlefolds*, *Watkins v. Same*, *Tucker v. Same*, *Ingram v. Crawshaw* (1927), 96 L. J. K. B. 664; *Birch Bros., Ltd. v. Brown*, [1930] 2 K. B. 255; *Bacon v. Wills & Sons, Ltd.*, [1933] 2 K. B. 493; *Wooding v. Monmouthshire & South Wales Mutual Indemnity Society, Ltd.*, [1938] 3 All E. R. 625.

**3438. Add. Annotation:—Refd.** *Tansey v. Wilcock & Co.* (1936), 29 B. W. C. C. 214.

**3449a. Irregular employment—Workman liable to day's notice.]—***McGEE v. UNITED STEEL COMPANIES, LTD.*, No. 3377b, *ante*.

**3455a. — Overtime.]—***STEVENS v. BIRMINGHAM CORPN.*, No. 3269b, *ante*.

**3455b. Pension.]—***STEVENS v. BIRMINGHAM CORPN.*, No. 3269b, *ante*.

**3455c. Occasional increased wages when working away from home.]—**The workman, a ganger, aged fifty-five years, met with an accident in the course of his employment & two fingers of his right hand were injured. After receiving compensation on the basis of total incapacity for about four months, he resumed work with his old employers. He was afterwards discharged & was out of work for about two months. He then obtained work with a municipal authority, his weekly wages



varying from £2 to £3 1s. 6d. He claimed compensation under the Act, on the basis of partial incapacity, alleging that his average weekly earnings before the accident were £4 & that he was able to earn £2 10s. 8d. after the accident. At the hearing he stated that his average pre-accident weekly earnings as a ganger when at home amounted to £3 15s., & when not at home £5. The county ct. judge made an award in favour of the workman of £1 a week to take effect from the date of the accident. The county ct. judge said that he thought he had arrived at that figure by taking into account the workman's occasional pre-accident earnings of £5 a week:—*Held*: there was no ground for interfering with the award of £1 per week, as the county ct. judge had not considered anything irrelevant. The award must therefore be affirmed.—*FORD v. WELLERMAN Bros.* (1930), 99 L. J. K. B. 600; 143 L. T. 590; 23 B. W. C. C. 183, C. A.

**3455d. Intermittent employment.**—A bosun's mate was employed intermittently, being at sea on voyages in nine months out of the twelve. He earned at this work a total of £93 in the year. The average sometimes exceeded £3 5s. per week while actually working. When on shore he worked & earned varying amounts. In Nov. 1930, his jaw was fractured owing to the breaking of a mooring rope. He was paid compensation at 30s. per week until July, 1931, when he was able to work & earned £2 15s. per week until Oct. 1932, when he was discharged. He filed a request for arbn. The county ct. judge computed his pre-accident earnings at £3 5s. a week. He assessed his earning capacity in the labour market at £2 a week. He therefore awarded the workman 5s. a week from July, 1931, to Oct. 1932, & 12s. 6d. a week thereafter. The employers appealed on the question of the amount of the pre-accident earnings:—*Held*: the question was one of fact & there was evidence to support the findings & no misdirection.—*JACKSON v. UNION CASTLE MAIL S.S. Co.* (1933), 26 B. W. C. C. 364, C. A.

**3466. Add. Annotation.**—*As to* (1) *Consd. Templeton v. Parkin Wm. & Co.* (1929), 140 L. T. 519.

**3469. Add. Annotations.**—*As to* (1) *Refd. Templeton v. Parkin Wm. & Co.* (1929), 140 L. T. 519. *As to* (2) *Refd. Hobbs v. Royal Arsenal Co-operative Society* (1930), 170 L. T. Jo. 159. *As to* (3) *Consd. Roberts v. Gardner* (1928), 21 B. W. C. C. 154. *Refd. Williams v. Larsen* (1928), 21 B. W. C. C. 339. *Generally, Refd. Petrie v. Red Bank Manufacturing Co.* (1935), 28 B. W. C. C. 423.

**3472. Add. Annotations.**—*Folld. McGee v. Muir Wm. & Co.* (1929), 140 L. T. 546. *Consd. Unsworth v. Pease & Partners, Ltd.*, [1937] 2 All E. R. 817.

**3472a. — — —.**—A workman in addition to his employment by a colliery co. as a collier at the coal face acted as a checkweigher at the mine under Coal Mines Regulation Act, 1887

(c. 58). On these occasions he was paid for each day he was so engaged a day's wage out of the checkweigh fund, a fund contributed to by his fellow workmen in the mine. He also was employed as a branch official of his local trade union to collect subscriptions of members, for which he received remuneration. On the days on which he was engaged in one or other of these capacities he was absent from the mine with the consent of the colliery co., but received no payment from them. The workman, having met with an accident arising out of & in the course of his employment, commenced proceedings for compensation, & claimed that the amount received in respect of the foregoing employments ought to be taken into account in estimating the amount of his weekly earnings. The county ct. judge made an award in favour of the workman on the basis of the compensation claimed. On appeal by the employers:—*Held*: the payments were made to the workman in respect of concurrent contracts of service within sect. 10 (ii.) of 1925 Act, & therefore he was entitled to have them taken into account in computing the amount of his average weekly earnings as a collier.—*UNSWORTH v. PEASE & PARTNERS, LTD.*, [1937] 2 K. B. 504; [1937] 2 All E. R. 817; 106 L. J. K. B. 868; 157 L. T. 78; 53 T. L. R. 738; 81 Sol. Jo. 457; 30 B. W. C. C. 241, C. A.

**3473a. Miner acting as sub-checkweighman.**—*UNSWORTH v. PEASE & PARTNERS, LTD.*, No. 3472a, ante.

**3475. Add. Annotations.**—*Apld. Gardner v. Vickers* (1928), 44 T. L. R. 563; *Re Unemployment Insurance Act, 1920, Re Leeds Corp'n. & Chadwick* (1928), 92 J. P. 192. *Consd. Williams v. Tredegar Iron & Coal Co.* (1935), 28 B. W. C. C. 291. *Refd. Scott v. Summerlee Iron Co.* (1930), 99 L. J. P. C. 170.

**3477. Add. Annotations.**—*Consd. Kinneil Cannel & Coking Coal Co. v. Sneddon (or Waddell)*, [1931] A. C. 575; *Avery v. London & North Eastern Ry. Co.*, [1937] 2 All E. R. 777.

**3479a. Due to spread-over arrangement.**—A collier was certified to be partially disabled by the industrial disease of silicosis as from Feb. 14, 1933, & later to be totally incapacitated. During the twelve months preceding the disablement work had been slack at the colliery & during part of the time a spread-over system was instituted with the consent of the senior workmen in the colliery, who otherwise would have been in continuous employment under a seniority rule which gave them a preference in employment. As the result of the spread-over the collier, who was a senior workman, was employed during its continuance at first for one week in three & later for alternate weeks. For the purpose of computing his compensation it was necessary to ascertain his average weekly earnings during the twelve months preceding his disablement:—*Held*: the spread-over system regulated the conditions of the workman's

PART XIV. SECT. 13, SUB-SECT. 3.—  
B. (a) ii.

*sh. Employment during summer months as club servant.*—*Pltf.'s* employment, with a club, lasted only during the summer months, for which

he received a weekly wage of £4 15s., & during the winter months he was engaged as an independent contractor on his own account:—*Held*: compensation should be assessed on the basis of an average weekly wage of £4 15s., & the break in the employ-

ment during the winter months was not to be regarded as so incidental to his employment with the club as to disentitle him to assessment on this basis.—*LEATHAM v. PETONE CENTRAL BOWLING CLUB* [1930] N. Z. L. R. 176.—N.Z.

employment & determined the wages he could earn during its continuance. The weeks of enforced idleness could not be disregarded & the average weekly earnings during the twelve months must be ascertained by dividing his total earnings for the year by fifty-two.—*MORGAN v. TARENI COLLIERY CO., LTD.*, [1938] 1 K. B. 433; [1937] 4 All E. R. 505; 107 L. J. K. B. 233; 158 L. T. 400; 54 T. L. R. 183; 81 Sol. Jo. 1022; 30 B. W. C. C. 448, C. A.

**3482a. Causing temporary unemployment.]—**

Applt., who was employed by resps. as a riveter on piecework, received notice, on Sept. 3, 1926, owing to the coal strike of that year, that there was no more work available for him. He accordingly ceased to work till Dec. 8, when he was re-employed by resps. On Jan. 11, 1927, he met with an accident causing total incapacity. On an application for compensation, the county ct. judge held the interruption was a normal incident & there was no break in the employment, & he awarded compensation on the basis of applt.'s earnings for the twelve months prior to the accident.—*Held*: the interval was not one of the incidents of a discontinuous employment, & there was a break in the employment, & the case must go back to the judge to assess compensation on that basis.—*GARDNER v. VICKERS, LTD.* (1928), 44 T. L. R. 563; 21 B. W. C. C. 129, C. A.

*Annotation*:—*Refd.* *McGee v. United Steel Companies, Ltd.* (1930), 23 B. W. C. C. 273.

**3488a. Workman "stood off."]**—A roofer received, in addition to his wages, a "board allowance" of 28s. a week to cover his expenses when working away from home. This was paid to him whether he was in fact away from home or not. He was "stood off" for two months, & on his return was re-engaged on the terms that he received in addition to his wages 12s. a week travelling allowance when he was living at home & 28s. a week board allowance when he was living away from home. He was injured by accident a few days after his return to work. He was at first paid compensation at 30s. a week, but as he recovered the compensation was reduced by stages. He objected to the basis of average weekly earnings on which the compensation for partial incapacity was being paid, & claimed that his allowances should be reckoned as part of his earnings. The county ct. judge held that there was a break in the employment when the workman returned after being "stood off," & that the allowances paid after the break were special expenses not to be reckoned as part of the earnings. The workman appealed:—*Held*: there was evidence to support the findings & no misdirection.—*WOODHOUSE v. TURNERISING ROOFING CO., LTD.* (1933), 26 B. W. C. C. 326, C. A.

**3491. Add. Annotation**:—*Refd.* *Marchant v. Char Steam Trawling Co.* (1929), 22 B. W. C. C. 247.

**3493a. Promotion due to illness.]**—A workman, who had been employed as a deck-hand, was

promoted boatswain of a steam trawler, owing to the illness of one of the vessel's officers just before she left harbour. Within twenty-four hours of putting to sea, the workman suffered an accident. In the course of subsequent proceedings regarding the payment of compensation, an issue was raised between the parties as to whether the weekly payment should be calculated on the earnings of a boatswain or a deck-hand. The county ct. judge held that at the time of the accident the workman was employed in the grade of a boatswain, & awarded compensation on that basis. The employers appealed:—*Held*: the judge had rightly directed himself as to the grade of the workman at the date of the accident.—*MARCHANT v. CHAR STEAM TRAWLING CO., LTD.* (1929), 22 B. W. C. C. 249, C. A.

**3494. Add. Annotations**:—*Consd.* *McGee v. United Steel Companies, Ltd.* (1930), 23 B. W. C. C. 273; *Summers v. Rhondda Urban District Council*, [1938] 3 All E. R. 585.

**3502a. Employment by local authority under scheme of relief.]**—Applt. council had employed a workman under a scheme for the relief of unemployment. Under this scheme, men who had been unemployed for a considerable time were employed for a period of nine weeks, after which it was unlikely that they would be further employed by appls. for a considerable time. During the ninth week of such employment, the workman met with an accident arising out of & in the course of his employment, & died. It was contended for appls. that this employment was of a casual type, & was of such short duration that it could not afford a basis of assessment of average weekly earnings, so that the case came within the proviso to Workmen's Compensation Act, 1925 (c. 84), s. 10:—*Held*: (1) nine weeks was an ample period of time upon which to base an assessment of average weekly earnings, & the case came within sect. 8 (2) of the Act; (2) the ct. must look at the nature of the employment, & not at the motive actuating an employer when he employs a workman.—*SUMMERS v. RHONDDA URBAN DISTRICT COUNCIL*, [1938] 3 All E. R. 585; 159 L. T. 373; 102 J. P. 459; 54 T. L. R. 1113; 82 Sol. Jo. 681; 31 B. W. C. C. 310, C. A.

**3511. Add. Annotation**:—*Consd.* *Niddrie & Benhar Coal Co. v. Dee*, [1927] A. C. 299.

**3513. Add. Annotations**:—*Refd.* *Leonard v. Redbrook Tinplate Co.*, [1930] 1 K. B. 643; *Willis v. Howie* (1931), 24 B. W. C. C. 352; *Old v. Furness Withy & Co.* (1934), 27 B. W. C. C. 266.

**3521. Add. Annotation**:—*Apld.* *Williams v. Crawshay Bros. (Cyfarthfa)* (1929), 22 B. W. C. C. 223.

**3524. Add. Annotation**:—*Refd.* *Moore v. Wallsend & Hepburn Coal Co.* (1935), 28 B. W. C. C.

**3524a. —.]**—A wood machinist & cabinet-maker lost the index finger of his left hand by an accident arising out of & in the course of his employment. He recovered sufficiently to be able to do his pre-accident work, & the employers applied for termination of the weekly payments. At the arbn. the only

evidence before the county ct. judge was to the effect that the workman would suffer no loss of capacity for his work in the future, & on that evidence the county ct. judge terminated the weekly payments. No declaration of liability had been asked for at the arbn. but the workman appealed on the ground that the evidence was insufficient to justify a finding of complete recovery & that, in view of the fact that the left index finger was missing, a declaration of liability should have been granted:—*Held*: the workman having produced no evidence that by reason of his accident he had either been rendered ineligible for employment with any employer or would probably in the future be incapacitated for work, no grounds existed for granting a declaration of liability. Appeal dismissed.—*BRYAN v. UPLAND* (1936), 29 B. W. C. C. 221, C. A.

**3530a.** —.]—On a finding that a workman has fully recovered & there is no evidence of any probability of future incapacity, the judge has no power to order a declaration of liability to be recorded.—*PORTER v. WHITBYS, LTD.* (1926), 19 B. W. C. C. 414, C. A.

**3530b.** —.]—A miner had his right eye injured by a splinter of coal while working at the coal face & was paid compensation therefor. The employers subsequently applied to terminate the weekly payments. At the hearing the medical evidence was conflicting, & accordingly the judge referred certain questions to the medical referee, who answered that the workman was fit for work at the coal face & that he did not think that there was any greater danger to either eye from such work than there would be if the vision of the right eye were normal. The judge thereupon terminated the weekly payments, but made a declaration of liability. The employers appealed:—*Held*: there was no evidence of any reasonable probability of incapacity arising at a later day, & therefore, no ground for making a declaration of liability.—*WEST LEIGH COLLIERY CO., LTD. v. MCNEIL* (1929), 22 B. W. C. C. 541, C. A.

**3530c.** —.]—A dyer was certified as suffering from dermatitis due to dust or liquids. The employers denied liability on the ground that the disease was not contracted

through long continued exposure to dust or liquids in dyeing & that he was only disabled for employment in the process of dyeing. The county ct. judge awarded compensation to the date of hearing & granted a declaration of liability, but not in the terms set out in *McNicholas v. West Leigh Colliery Co., Ltd.*, No. 3545b, *post*, stating that there was a reasonable probability of future disability. The employer appealed. On the appeal the matter was referred to the county ct. judge for inquiry on this point. The county ct. judge replied that there had not been established either the probability of a fresh attack without repetition of exposure, or that the probability of a fresh attack would be due to the last attack:—*Held*: there was no evidence to support the granting of a declaration of liability.—*PEARSON v. JOHN WALTON OF COLLYHURST, LTD.* (1934), 27 B. W. C. C. 106, C. A.

*Annotation*:—*Reid. Holmes v. Kaye, Son & Co.* (1934), 151 L. T. 83.

**3530d. Admission by employer of partial incapacity.**—On Sept. 26, 1926, a workman was kicked on the knee by a horse & injured. He was paid full compensation until May 5, 1927, when the employers gave notice of their intention to reduce the weekly compensation to 10s., & did in fact so reduce it. The workman applied for 30s. to be continued. The employers in their answer submitted to an award of 10s. a week to continue. The county ct. judge found that the man was able to do his full work on May 5, 1927, but ordered that compensation should be paid at 30s. up to July 4, 1927, & then terminate altogether:—*Held*: the award was inconsequent, & the case must be sent back to the judge for a rehearing.—*SHEAVY v. TITE (B. W.) & SONS* (1927), 20 B. W. C. C. 616, C. A.

**3530e. Continuing incapacity solely due to pre-accident disease.**—A carter fell from his cart & was injured. The employers paid him compensation until they caused him to be examined by a doctor who reported that the effects of his injuries had passed away & that his continuing incapacity was due solely to disseminated sclerosis from which the carter had been suffering before the accident. The employers accordingly ceased paying compensation. On a claim for continued compensation, the county ct. judge held that the

#### PART XIV. SECT. 14, SUB-SECT. 5. —B.

**3527 H.** —.]—A workman who was incapacitated through injuries by an accident sustained in 1931 in the course of his employment, was paid by his employers compensation under Workmen's Compensation Act, 1925, at rates which varied from time to time by agreement. A dispute having arisen as to the workman's fitness for employment, the employers, in 1934, presented an application for a medical reference, which stated that appots. "aver that the claimant is now fit for his ordinary work, which contention the claimant denies & maintains that he is only fit for light work." A reference in the form prescribed by the Act of Sederunt of Feb. 28, 1933, was thereafter made by the Sheriff-clerk to a medical referee, who was directed to "give his certificate as to the condition of the claimant & his fitness for employment, stating whether the claimant has wholly or partially recovered from the injury by accident." The medical

referee certified that the claimant, although still lame, "is wholly recovered from the injuries by accident, & is, in respect of these, fit for his usual work":—*Held*: the nature of the dispute which had arisen between the parties warranted a reference to the medical referee in the form adopted by the sheriff-clerk, & on the facts as stated, the arbitrator was entitled to end the workman's right to compensation. Appeal dismissed.—*OLIVER v. UNITED COLLIERS, LTD.* (1935), 28 B. W. C. C. Suppt. 165.—SCOT.

**sb. Incapacity continuing — Unreasonable conduct of workman.**—A brusher in a colliery, who had sustained injury to his back through an accident in 1928, was paid compensation as for total incapacity until Sept. 1929, when a dispute arose as to his right to further compensation. After sundry remits to the medical referee as to the workman's incapacity, the employers, in July, 1931, obtained a further reference on the questions whether the workman was fit for his ordinary work, &

"whether, & to what extent, claimant's incapacity (if any) was due to the accident. The referee reported that the workman was not fit for work as a brusher, but was fit for light labouring work. He further reported that the workman's incapacity was primarily due to the accident in 1928, from which he had not recovered, but that it remained owing to his failure to do his part in exercising the bruised back muscles. The workman offered to prove that he had carried out his own doctor's instructions as to the exercises to be taken, but the arbitrator refused to allow further inquiry, & ended the workman's right to compensation:—*Held*: as the real question raised was whether in the circumstances the workman's conduct was reasonable or unreasonable, the arbitrator should not have ended compensation without inquiring into the whole facts regarding the alleged failure of the workman to take the necessary steps to effect a cure.—*MORRIS v. MOUNT VERNON COLLIERY CO.*, [1932] S. C. 485; 25 B. W. C. C. Suppt. 9.—SCOT.

effects of the injuries including their aggravation of the disease had passed off & that the continuing incapacity of the workman was not due to the accident, & he accordingly made his award for the employers. The workman appealed:—*Held*: there was evidence to support the finding & no misdirection. Appeal dismissed.—*DILLON v. WELLS* (1934), 27 B. W. C. C. 488, C. A.

**3531a.** — Onus of proof on workman.]—Where the county ct. judge found that employers were not liable to pay compensation, as the workman was not incapacitated from doing his ordinary work at his ordinary wages:—*Held*: the judgment of the county ct. judge involved a finding that the workman was not entitled to a declaration of liability, & the evidence supported the finding, in that the workman had failed to show that there was a reasonable probability of an ensuing incapacity.—*WILLIAMS v. TREDEGAR IRON & COAL CO., LTD.* (1927), 96 L. J. K. B. 722; 137 L. T. 464; 20 B. W. C. C. 480, C. A.

*Annotations*:—*Folld. West Leigh Colliery Co. v. McNeill* (1929), 22 B. W. C. C. 541. *Consd. Birch v. John* (1930), 23 B. W. C. C. 345. *Refd. Athey v. United Steel Co.* (1935), 28 B. W. C. C. 435.

**3531b.** — ——.]—*MCLEOD v. BLACK*, No. 3315a, *ante*.

**3531c.** ——.]—An injured workman in receipt of compensation was told at the hospital in Apr. 1932, that he was fit for light work. In July, 1932, his compensation was stopped. He was unable to obtain light work between Apr. & July, 1932. He filed a request for arbn. which was heard in Feb. 1933. In the course of the arbn. the county ct. judge said that if the workman had done light work in Apr. 1932, he would have been fully recovered by July, 1932. After referring the matter to a medical referee for report, the county ct. judge made an award in which he found that the employers were not liable to pay to the workman any further sum as compensation for the injury sustained. The workman appealed:—*Held*: there was evidence to support the finding & no ground for holding that the observation made by the judge in the course of the hearing was the sole basis of his award.—*MCGRODER v. NEW ZEALAND SHIPPING CO., LTD.* (1933), 26 B. W. C. C. 354, C. A.

**3532.** *Add. Annotations*:—*Consd. Birch v. John* (1930), 23 B. W. C. C. 345. *Appld. Holmes v. Kaye, Son & Co.* (1934), 151 L. T. 83.

**3532a.** ——.]—Applt. was employed by resps. as a ship's scaler, an occupation which might produce the occupational disease of dermatitis due to exposure to dust or liquids. In Nov. 1932, he was incapacitated by dermatitis due, as found by the county ct. judge, to long-continued exposure to dust or liquids, but had recovered in Apr. 1933, & was then out of employment until Sept. 1933. On Sept. 6, 1933, he returned to his old work with resps., but after doing six intermittent days' work broke out in a rash again, & the medical referee, on Oct. 17, 1933, certified that he was suffering from dermatitis produced by dust or liquids, & thereby disabled from earning full wages at the work at which he was employed, & that as a result of previous attacks there was a reasonable probability of a recurrent incapacitation

through recrudescence of attacks of the disease. The workman made a claim under 1925 Act, as extended by orders of the Secretary of State, for compensation for an accident resulting from disablement by dermatitis. The county ct. judge awarded him a certain amount of compensation for the period he was disabled, but found that after that period he was fit for anything but dusty work & refused to grant him a declaration of liability against the employers in the event of any future incapacity from a recrudescence of the disease:—*Held*: a workman had no absolute right to a suspensory award that was to be a declaration of liability, & the county ct. judge had a discretion to grant or refuse such a declaration & had not wrongly exercised that discretion.—*HOLMES v. KAYE, SON & CO., LTD.* (1934), 151 L. T. 83; 27 B. W. C. C. 116, C. A.

*Annotation*:—*Refd. Blades v. Wool Exchange & General Investments, Ltd.* (1937), 30 B. W. C. C. 395.

**3540a.** ——.]—A grocer's assistant lost his left index finger & received compensation for a year. When his compensation was terminated, he claimed a renewal of the weekly payments or a declaration of liability. The county ct. judge found as a fact that the workman could do his ordinary work & refused to grant a declaration of liability. The workman appealed:—*Held*: on that finding of fact a declaration of liability could not be granted. Appeal dismissed.—*BIRCH v. JOHN* (1930), 23 B. W. C. C. 345, C. A.

**3540b.** ——.]—A guillotine cutter on May 2, 1930, by an accident injured his right eye, which subsequently had to be removed. He was paid compensation by his employers until Sept. 22, 1930, when they alleged that he was no longer incapacitated for work by reason of his injury. On a claim for a continuance of compensation the county ct. judge on Dec. 10, 1930, found that by Nov. 3, 1930, the workman had become capable of earning as much as before his accident, though he should not for the present resume work as a guillotine cutter or attend machinery, & awarded him a lump sum representing compensation from Sept. 22 to Nov. 3. The award stated that the lump sum was "in full satisfaction & discharge of all claims for" compensation. No request was made in the county ct. for a declaration of liability. The workman appealed:—*Held*: the award should be varied by deleting the words "in full satisfaction & discharge of all claims for" & adding a declaration of liability in the terms of *King v. Port of London Authority*, No. 3548. Appeal allowed. No costs on either side.—*ARMSTRONG v. VULCO DRY BATTERY CO., LTD.* (1931), 24 B. W. C. C. 38, C. A.

**3540c.** ——.]—A labourer, forty-nine years old, fell & fractured his right femur in Dec. 1930. The employers admitted liability to pay compensation, & paid the workman on the basis of total incapacity until Aug. 1932, when they ended the weekly payments in accordance with notice given by them under sect. 12. The workman did not serve a counter notice, but filed a request for arbn. claiming that he was still totally incapacitated. On the evidence the county ct. judge gave judgment to the effect that he was not

satisfied that the workman's condition was the effect of the original accident, nor was he satisfied that he was incapacitated; but he was satisfied that there had been an accident arising out of & in the course of the employment, the result of which might lessen his earning capacity in the future. He therefore granted a declaration of liability, but made his award in favour of the employers. The workman appealed:—*Held*: there was evidence to support the award & no misdirection. Appeal dismissed.—*SKIDMORE v. BIRMINGHAM CORPN.* (1932), 25 B. W. C. C. 639, C. A.

**3541a. — After termination of compensation.]—**

(1) Where a county ct. judge, upon a certificate of a medical referee that a workman who has been injured has entirely recovered & is fit for his usual employment, not containing any suggestion of the possibility of a recurrence of incapacity due to the injury at a future date, makes an order terminating the compensation, there is no jurisdiction to make a declaration of liability. (2) The fact that the certificate does not refer, one way or the other, to the possibility of future recurrence or complications, does not make it in any way ambiguous. "Recovery" *prima facie* means that there is no liability of a recurrence of illness & consequent incapacity.—*EVANS (RICHARD) & CO., LTD. v. GILBIE* (1926), 96 L. J. K. B. 117; 136 L. T. 93; 19 B. W. C. C. 375, C. A.

*Annotations*:—As to (1) *Consd.* *McLeod v. Black* (1927), 20 B. W. C. C. 530; *Wagstaff v. Gutta Percha Co.* (1927), 20 B. W. C. C. 430; *Williams v. Tredegar Iron & Coal Co., Ltd.* (1927), 96 L. J. K. B. 722.

**3541b. Possibility of future incapacity.]—**

A printers' assistant injured her right index finger, the injury resulting in absence of sensation & a permanent disability to flex the top joint. Liability was admitted & compensation paid until she was able to resume her former employment. After she had resumed her employment for a month she filed a request for arbn., claiming a declaration of liability. The county ct. judge refused the declaration on the ground that there was no evidence "at this stage" to support the application, but stated that he was making an award protecting her in the future should anything unforeseen arise. He thereupon made an award dismissing the application for a declaration of liability, "there being no evidence at this stage to support the application." The workman appealed:—*Held*: by refusing a declaration of liability but inserting in his award the words "at this stage," the county ct. judge had safeguarded the workman by not prejudicing any future application that might be made in different circumstances, & there was evidence on which in this case he could properly do so. Appeal dismissed.—*O'NEILL v. FORD SHAPLAND & CO., LTD.* (1932), 25 B. W. C. C. 660, C. A.

*Annotation*:—*Consd.* *Atthey v. United Steel Co.* (1935), 28 B. W. C. C. 435.

**3541c. Award of one penny a week—When justified.]—**

*RUDDY v. LONDON, MIDLAND & SCOTTISH RY., No. 2823a, ante.*

**3541d. —**

—In Nov. 1926, a seaman was moving planks during heavy weather in the Channel, when, owing to a lurch of the ship,

he was thrown down & at the same time struck by one of the planks. He complained of injuries & was examined by a doctor when the ship called at R. No serious injury was discovered & he proceeded with the ship to B. On the voyage to B. he became so ill that he was only able to take his turn at the wheel by sitting in a chair. At B. he was operated on for hernia & his back was put into a plaster jacket. He returned home in Apr. 1927, & in June, 1927, his employers agreed to pay him full compensation. In Apr. 1928, he underwent a second operation for hernia, which was completely successful. In Dec. 1929, the employers applied for a review of the weekly payments, specifying in their application that they asked only for diminution. The county ct. judge, sitting with a medical assessor, found that he was no longer incapacitated by the hernia, but that he was incapacitated by osteo-arthritis not due to the accident. On those findings he made an award of a penny a week. The workman appealed:—*Held*: there was evidence to support the findings & the judge was justified in diminishing the compensation to a penny a week.—*WATTS, WATTS & CO., LTD. v. HOLE* (1930), 23 B. W. C. C. 119, C. A.

**3541e. Effect—Subsequent incapacity.]—**The workman, aged eighteen, whilst working in a colliery slipped & fell. Immediately afterwards he found that the sight of his left eye had gone & he remained under this disability for four months. He filed a request for arbn., but on Apr. 28, 1936, before the case came on for hearing, he recovered his sight. The county ct. judge made an award of weekly payments to cover the period while the sight was lost, on the ground that the blindness was accelerated by the fall, & also granted a declaration of liability in the form suggested in *King v. Port of London Authority*, & which ran as follows: "It is hereby declared that appct. has received an injury by accident arising out of & in the course of his employment but inasmuch as the evidence has not established that after Apr. 28, 1936, appct. has, as a result of such injury, been incapacitated for work but has on the other hand established that there is reasonable probability that such incapacity may ensue, it is ordered that this arbn. shall stand adjourned reserving to each of the parties hereto liberty to make such further application in the matter of this arbn. as he or they may be advised." After the hearing the workman had another attack of blindness in the same eye & this disability lasted for a month. When he recovered he was unable to obtain employment. Later he suffered a third attack which rendered him blind in the left eye for one day only. Neither of these last two attacks was associated with any fall. He then filed a request for arbn. based on the original declaration of liability & claimed to be treated as totally incapacitated under the provisions of sect. 9 (4) as amended. At the second arbn. evidence was given that the workman was suffering from "spontaneous recurrent hæmorrhage" or Eales' disease to which young men were liable & which was caused either by some weakness of the blood vessels in the eye or by some condition of the blood. The county ct. judge held that the hæmorrhages on the last two occasions were

not causally connected with the original accident & refused to award compensation. The workman appealed: *Held*: the question was one of fact & the county ct. judge was in no way bound by the original declaration of liability to award further compensation. Appeal dismissed.—*TILLINGS v. LANCASTERS STEAM COAL COLLIERIES, LTD.* (1937), 30 B. W. C. C. 114, C. A.

**3543. Add. Annotations:—***As to (1) Consd. Williams v. Tredegar Iron & Coal Co.* (1927), 96 L. J. K. B. 722; *Holmes v. Kaye, Son & Co.* (1934), 151 L. T. 83. *As to (2) Consd. McLeod v. Black* (1927), 20 B. W. C. C. 530; *West Leigh Colliery Co. v. McNeill* (1929), 22 B. W. C. C. 541. *Generally, Reifd. Blades v. Wool Exchange & General Investments, Ltd.* (1937), 30 B. W. C. C. 395.

**3545a. Order giving liberty to apply.]—**Employers having paid a workman full compensation for some months for an accident in their employment, applied for a review of the weekly payment & for termination, but offered to accept a declaration of liability. The county ct. judge held they were not entitled to terminate the weekly payments, as the workman was still partially incapacitated, but such payments should cease, & no such payments should be made so long as they employed & continued to employ the workman at a wage equivalent to his pre-accident wages, with liberty to either party to apply. He also ordered the employers to pay the costs:—*Held*: (1) the order was a right order, as liberty to apply carried out the effect of a declaration of liability; (2) the employers having failed to establish their right to termination of the weekly payments, the judge rightly exercised his discretion in ordering that the employers should pay the costs.—*SIDNEY LEE (EXETER), LTD. v. JAMES* (1928), 21 B. W. C. C. 220, C. A.

**3545b. —.]—**A workman had an eye removed as a result of an accident arising out of & in the course of his employment, but was able to return to his old work without any loss of earning capacity. On a claim for a declaration of liability the county ct. judge found that the workman was perfectly healthy with no fear of sympathetic trouble in the uninjured eye, that he was capable of any work a one-eyed man could do & that there was no evidence of his opportunities of employment being restricted. On these findings he refused to grant a declaration of liability, while expressing in his reserved judgment the view that such refusal did not debar the workman from making an application under sect. 9 (4), as amended by the 1931 Act, if he chose to do so. The formal award read, "I decline to make a declaration of liability in the above-mentioned matter." The workman appealed:—*Held*: the formal award debarred the workman from making any application under sect. 9 (4) &, it being the expressed intention of the county ct. judge that he should not be so debarred, there should be added to the formal award the following words: "without prejudice to the right of the appt. to make further application for compensation, declaration of liability or otherwise."

Where the arbitrator desires a matter to be kept open for the benefit of the workman but there is no evidence before him which would

entitle him to grant a declaration of liability, the above form of words should be used in the award rather than the words "at this stage" which appear in the award made in the case of *O'Neill v. Ford Shapland & Co., Ltd.* No. 3541b. Appeal allowed.—*ATHEY v. UNITED STEEL CO., LTD.* (1935), 28 B. W. C. C. 435, C. A.

**3545c. —.]—**A gas operator was injured by the bursting of a safety valve, as a result of which numerous fragments of glass penetrated his body & he lost the little finger of his right hand. Many fragments of glass were removed & the remainder appeared to be quiescent. Owing to the loss of the little finger, the grip of the right hand was reduced by 15 to 20 per cent. In an award made three years after the accident the county ct. judge found as a fact that the workman was able to do his pre-accident work & refused to grant a declaration of liability. The workman appealed & asked that the award should be amended in the form prescribed in *Athey v. United Steel Co., Ltd.* (1935), 28 B. W. C. C. 435; Digest Supp.:—*Held*: there was evidence to support the findings & no misdirection & no grounds for adding the form of words suggested in *Athey v. United Steel Co., Ltd. supra.* Appeal dismissed.—*WEBB v. NEWPORT & SOUTH WALES TUBE CO., LTD.* (1938), 31 B. W. C. C. 172, C. A.

**3545d. Industrial disease.]—**A miner was on Apr. 13, 1928, certified by a certifying surgeon as being disabled by miner's nystagmus, & was paid compensation for his disablement. On Mar. 3, 1931, he was examined by a medical referee who certified that he was not suffering from nystagmus, that he was fit for his ordinary work, & that no incapacity existed. The employer ceased to pay compensation on Mar. 17, 1931. The workman having been examined on Feb. 1 & May 11, 1932, by medical men who reported that he was suffering from nystagmus, filed an application claiming compensation at 10s. a week to start from Mar. 17, 1931. The arbn. took place on July 15, 1932, when the county ct. judge sat with the medical referee who had given the certificate of Mar. 3, 1931, & who made a personal examination of the workman at the hearing & advised the judge that there was then no nystagmus. The county ct. judge made an award for the workman for 8s. a week from Mar. 17, 1931. The employer appealed. The Ct. of Appeal adjourned the appeal for the medical referee to answer certain questions. The questions with their answers were as follows: "(Q.) What did the medical referee intend to convey by his certificate dated Mar. 3, 1931? In particular, is there in the man himself any constitutional susceptibility to nystagmus? (A.) On my examination on Mar. 3, 1931, I could find no signs of miner's nystagmus, but on previous occasions I had found signs. (Q.) Has the effect of the attack of Apr. 13, 1928, completely passed away? (A.) On my examination on Mar. 3, 1931, I could find no signs of nystagmus, but there may have been something latent, & therefore in my opinion it is impossible for me to say whether the attack of Apr. 1928, had completely passed away. (Q.) If nystagmus supervenes, will that arise as a repetition of the nystagmus certified on Apr. 13, 1928,



or from a fresh onset of the disease? (A.) A repetition of the nystagmus certified in 1928. (Q.) Is there or is there not a probability of a recurrence of nystagmus owing to the fact that the original conditions caused by the first attack have not completely passed away? (A.) Yes":—*Held*: there was no evidence on which the county ct. judge could make an award of weekly compensation either from Mar. 17, 1931, or at all, but in view of the answers given to the ct. by the medical referee, the workman was entitled to a declaration of liability. Appeal allowed. Form of declaration of liability in case of industrial disease settled.—*McNICHOLAS v. WEST LEIGH COLLIERY CO., LTD.* (1933), 26 B. W. C. C. 29, C. A.

*Annotations*:—*Consd.* Timmins v. Brodsworth Main Colliery Co., [1934] 2 K. B. 361; Pearson v. John Walton of Collyhurst, Ltd. (1934), 27 B. W. C. C. 106; Richards v. Goskar, [1937] A. C. 304. *Rees v. Powell Duffryn Associated Collieries, Ltd.*, [1938] 1 All E. R. 743. *Refd.* Holmes v. Kaye, Son & Co. (1934), 151 L. T. 83; Eaton v. Wimpey & Co. [1938] 1 K. B. 353.

**3547. Add. Annotation**:—*Folld. Smith v. Cutler & Sons, Ltd.* (1932), 25 B. W. C. C. 408.

**3548. Add. Annotations**:—*As to* (1) *Consd.* Birch Bros., Ltd. v. Brown, [1930] 2 K. B. 255; Birch v. John (1930), 23 B. W. C. C. 345; Brewer v. Firestone Tyre Rubber Co. (1931), 24 B. W. C. C. 366. *Refd.* Evans v. Gilbie (1926), 96 L. J. K. B. 117; Williams v. Crawshaw Bros. (Cyfarthfa) (1929), 22 B. W. C. C. 223; Wilsons & Clyde Coal Co., Ltd. v. Burrows (1929), 141 L. T. 594; Wilsons & Clyde Coal Co. v. Burrows (1929), 22 B. W. C. C. 430; Pearson v. John Walton of Collyhurst, Ltd. (1934), 27 B. W. C. C. 106. *As to* (2) *Consd.* McLeod v. Black (1927), 20 B. W. C. C. 530; Wagstaff v. Gutta Percha Co. (1927), 20 B. W. C. C. 430. *Apld.* Williams v. Tredegar Iron & Coal Co. (1927), 96 L. J. K. B. 722. *Consd.* Ruddy v. L. M. S. Ry. (1929), 22 B. W. C. C. 138. *Apld.* West Leigh Colliery Co. v. McNeil (1929), 22 B. W. C. C. 541. *Consd.* O'Neill v. Ford Shapland & Co. (1932), 25 B. W. C. C. 666. *Refd.* Watts, Watts & Co. v. Hole (1930), 23 B. W. C. C. 119; Armstrong v. Vulco Dry Battery Co. (1931), 24 B. W. C. C. 38; Hillier v. Ebbw Vale Steel, Iron & Coal Co. (1932), 25 B. W. C. C. 238; Neary v. Robert Bobby, Ltd. (1932), 25 B. W. C. C. 357; Smith v. Cutler & Sons, Ltd. (1932), 25 B. W. C. C. 408; Curtis v. Rickett, Cockerell & Co. (1933), 26 B. W. C. C. 16; McNicholas v. West Leigh Colliery Co. (1933), 26 B. W. C. C. 29; Athey v. United Steel Co. (1935), 28 B. W. C. C. 435; Moore v. Wallsend & Hepburn Coal Co. (1935), 28 B. W. C. C. 174. *As to* (3) *Consd.* Drewitt v. Britannic Assce. (1927), 137 L. T. 511. *Distd.* Soyer v. Johnson, Matthey (1927), 96 L. J. K. B. 1011. *Apld.* Maynard v. Bercovitch (1932), 25 B. W. C. C. 71. *Refd.* Sharrod v. Warwickshire Coal Co. (1929), 22 B. W. C. C. 599; Shotts Iron Co. v. Fordyce, [1930] A. C. 503. *Generally, Refd.* Lee (Exeter) v. James (1928), 21 B. W. C. C. 220; Glassbrook Bros. v. Leyson, [1933] 2 K. B. 91.

**3556. Add. Annotation**:—*As to* (2) *Refd.* McCann v. Scottish Co-operative Laundry Assocn., Ltd., [1936] 1 All E. R. 475.

**3558a.** —.]—A coppersmith was injured by an accident which caused permanent partial

incapacity by loss of the left index finger & was paid full compensation for a short period. He was then re-employed, earning an average weekly amount equal to his pre-accident wages. Help was given him where heavy work was involved, but his capacity was nearly as good as before the accident. From time to time his employers before the accident had to stand men off from work as the amount of work varied, & after the accident the workman was stood off work in the same way for periods of two & six weeks in 1928 & of seven weeks up to the middle of June, 1930. Alleging that he had been stood off more than other men on account of his injury, the workman made a claim for varying amounts of compensation as from the date of his first return to work & for a declaration of liability. The employers submitted a declaration of liability. The county ct. judge found that the workman had not been stood off more than other workmen, that he was receiving his pre-accident rate of pay, & that that rate of pay was really being earned by him. He therefore held that the workman was only entitled to a declaration of liability. The workman appealed:—*Held*: there was evidence to support the findings & no misdirection. Appeal dismissed.—*DOUGHTY v. BRAITHWAITE (H.) & Co., LTD.* (1930), 23 B. W. C. C. 437, C. A.

**3558b.** — *Recurrence of incapacity.*—In 1915 appct. met with an accident & rupture supervened. Resps. paid him compensation. In Dec. 1916, the rupture was operated upon. Appct. returned to work, but shortly afterwards the rupture broke down again & appct. left his work. After a short absence he again returned to work at reduced wages & received compensation on a sliding scale according to the amount he was able to earn. In Dec. 1921, he left resp.'s employment to take up a position as steward of a club for which he received approximately the same wages as he had earned with resps. before the accident. About five months later he claimed a declaration of liability. Resps. contended that application was too late, & as the man was able to earn the same wages as before the accident & there was no evidence that these wages would cease or the appct. would be unable to earn the same wages in the future, there was no evidence upon which a declaration could be granted. The deputy county ct. judge said that the injury being a rupture which had in fact broken down once after operation for so called radical cure, appct. was entitled to a declaration:—*Held*: there was evidence upon which the judge was entitled to grant a declaration of liability.—*STATHAM v. OXCROFT COLLIERY CO., LTD.* (1922), 15 B. W. C. C. 271, C. A.

*Annotation*:—*Consd.* Brewer v. Firestone Tyre Rubber Co. (1931), 24 B. W. C. C. 366.

**3559. Add. Annotations**:—*As to* (1) *Consd.* Barnes v. L. & N. E. Ry. Co. (1929), 22 B. W. C. C. 205; Evans v. Ebbw Vale Steel, Iron & Coal Co. (1929), 22 B. W. C. C. 274. *Apld.* Earl v. Thomas W. Ward, Ltd. (1930), 143 L. T. 745. *Refd.* Williams v. Tredegar Iron & Coal Co. (1927), 96 L. J. K. B. 722; Williams v. Watson (H. J. & S. A.) (1930), 23 B. W. C. C. 151; Robinson v. English Steel Corpn., Ltd. (1932), 25 B. W. C. C. 203; O'Neill v. Ford Shapland & Co. (1932),



25 B. W. C. C. 666; *Baveridge v. Stephenson* (Robert) & Co. (1933), 26 B. W. C. C. 316; *Atthey v. United Steel Co.* (1935), 28 B. W. C. C. 435. *As to* (2) *Refd.* *Evans v. Gilbie* (1926), 96 L. J. K. B. 117.

**3559a.** —[A workman having been injured, the employers entered into an agreement with him, which was duly recorded. This agreement gave the workman 30s. a week for total or partial incapacity "or until same shall be ended, diminished, increased or redeemed." Later the workman returned to work at his old wages, on the express agreement contained in correspondence that his rights under the registered agreement were kept alive, & that if the work was not continued & old wages paid, he should go back to such rights. As he was able to continue at work, the employers applied for a review to diminish or terminate the payments payable under the registered agreement. The workman claimed that he had not been paid his full old rate of wages under the second agreement & was entitled to have them made up to the old rate, & further, that by reason of this agreement the employers had no power to review the payments payable under the registered agreement. The county ct. judge held the employers' application to review was in breach of the agreement in the correspondence, & dismissed the application:—*Held*: the employers had expressly reserved their rights under the registered agreement to have the weekly payment reviewed. The workman's attempt at work having been successful, the employers' application to review was a proper one, & the judge was wrong in dismissing it. The right order on the facts was to discharge the registered agreement & direct a declaration of liability to be recorded.—*HITCHENS & CO., LTD. v. HART* (1927), 20 B. W. C. C. 609, C. A.

**3562a.** — *Dismissal on closing down of works.* —A workman was injured by accident in Oct. 1929, & received 30s. a week until July, 1930, when the compensation was reduced by the employer to 15s. a week. In consequence the workman began arbn. proceedings. The

arbn. was heard in Oct. 1930, when the county ct. judge found that at that time the workman was able to earn his pre-accident wages at work which was offered to him by his old employers. He awarded 30s. a week from July to Oct. The man was re-employed at his old wages & remained at work until Jan. 1931, when he was dismissed with others on the closing down of the factory. In Feb. 1931, he began fresh proceedings, claiming a declaration of liability. In his answer the employer raised the defence of *res judicata*. It was agreed that subject to this defence the workman was entitled to a declaration of liability. The county ct. judge held that the doctrine of *res judicata* did not apply, & made an award in favour of the workman for a declaration of liability. The employer appealed:—*Held*: the county ct. judge had never intended the first arbn. to operate as *res judicata*, & the fact that the workman had obtained employment at his old rate of wages did not prevent a subsequent original application for a declaration of liability. Appeal dismissed.—*BREWER v. FIRESTONE TYRE RUBBER CO.* (1931), 24 B. W. C. C. 366, C. A.

**3562b.** — *Prevented by general fall in wages.* —A workman who was employed sometimes as a casual, sometimes as a general labourer, & sometimes as a bricklayer's labourer, lost his left eye by an accident arising out of & in the course of his employment & received compensation for some years. The employers applied for a review, seeking termination or, alternatively, diminution. In his evidence the workman said, "I can work just as well as I could before, & the only diminution is due to the drop in wages." On this evidence the county ct. judge terminated the weekly payments & refused a declaration of liability. The workman appealed:—*Held*: on the evidence before him the county ct. judge had rightly refused to make a declaration of liability & there was no misdirection. Appeal dismissed.—*UNION COLD STORAGE CO., LTD. v. POOLE* (1932), 25 B. W. C. C. 1, C. A.

**3563.** *Add. Annotation*:—*Distd.* *Union Cold Storage Co., Ltd. v. Poole* (1932), 25 B. W. C. C. 1.

#### PART XIV. SECT. 14, SUB-SECT. 6.— D. (d).

**3564 i.** *Declaration of liability to be made.* —In an application for compensation at the instance of a miner who, in Mar. 1933, had practically lost the sight of one eye as the result of an accident in the course of his employment with a colliery co., the arbitrator found that incapacity had ceased as at Sept. 30, 1933, & he terminated the workman's right to compensation as from that date until the further orders of the ct. It appeared that, since Sept. 30, the workman had been physically fit for his former employment at the coal face, & that the loss of the sight of the eye had not appreciably diminished his efficiency. He was in fact employed by the co. on light work as a repairer at a lower wage. His former work had been suitable work for him since he had become accustomed to one-eyed vision; but, owing to the risk of injury to his remaining eye, he was unwilling to resume his former work, notwithstanding that injuries involving loss of sight were uncommon. Employment at his former work had not been asked for by him, or offered to him by the co. There were no averments, & no evidence was led as to the effect which the loss of the sight of his eye might have upon

his position in the labour market. On an appeal by stated case the employers contended that the arbitrator ought to have made a final award terminating the right to compensation:—*Held*: in the circumstances, there was material before the arbitrator which entitled him to make the award suspensory. Appeal dismissed.—*FERGUSON v. NEW CUMNOCK COLLIERIES, LTD.* (1935), 28 B. W. C. C. Suppt. 1.—*SCOT.*

#### PART XIV. SECT. 15, SUB-SECT. 1.

*eg. Agreement by minor—Necessity for concurrence of curator.* —On Nov. 3, 1932, a mine-worker, aged sixteen, sustained injury by accident by having his right hand caught in the haulage apparatus in the colliery in which he was employed. The employers made weekly payments of what they alleged was compensation under the Act for the first few weeks to the workman's brother, & then for three weeks to the workman himself. Thereafter the workman stopped accepting these weekly payments & raised an action at common law in the Ct. of Session against the employers. The minor workman had a curator, his father, who was in the same employment. In their defence to the workman's action the employers pleaded that the

workman had claimed & accepted compensation under the Act, & was therefore barred from insisting in the action. The workman pleaded that no payments had been made or accepted as compensation under the Act, & that the payments had been made without the consent & concurrence of the pursuer's curator & while the pursuer was in ignorance of his legal rights. After a proof on these preliminary pleas the Lord Ordinary repelled the defenders' plea, holding (a) that no agreement to accept compensation under the Act had been proved, & (b) that the minor workman had no capacity to conclude such an agreement without the consent of his curator, which had not been obtained. The employers reclaimed:—*Held*: (1) in respect an agreement to accept compensation under the Act was not a contract in the ordinary course of the minor's trade, business, or employment, it fell within the general rule of Scots Law that contracts made by minors who have curators without the consent & concurrence of those curators are void; (2) an agreement to accept compensation under the Act had not been proved. Appeal dismissed. *Reclaiming Note refused.*—*O'DONNELL v. BROWNESIDE COAL CO., LTD.* (No. 1), [1934] S. C. 534; 27 B. W. C. C. Supp. 87.—*SCOT.*

**3571a. Consideration for agreement—Sufficiency.]**

—An underground colliery workman left his employment in Mar. 1921, on account of illness. On July 18, 1922, he was certified to be suffering from nystagmus, the disablement, according to the certificate, being deemed to commence on that day. The workman applied for compensation, & the employers paid full compensation for total incapacity for four years, & then ceased payment. In proceedings for an award, instituted by the workman, the case was treated by both parties on the basis of an agreement to pay compensation as for total incapacity having been made, but the county ct. judge held there had been no consideration on the part of the workman for the agreement, & as the workman was not entitled to any compensation since he had not been employed by resps. during twelve months prior to the date of the certificate, the agreement was outside Workmen's Compensation Act, 1925 (c. 84), & could not give jurisdiction within the Act:—*Held*: there had been good consideration, inasmuch as the workman had forborne to take steps, either by applying to the certifying surgeon, or by appeal to the medical referee, to get the date of the certificate of disablement altered, & the agreement was binding upon resps., & the workman was entitled to an award.—*REES v. IMPERIAL NAVIGATION COAL CO., LTD.* (1927), 20 B. W. C. C. 287, C. A.

**3580a.** — — — — —.]—A workman injured by accident in Dec. 1927, was paid compensation at the rate of £1 2s. 3d. a week, this rate being based by the employers on the supposition that the pre-accident wage was £1 18s. 10d. a week. These payments were accepted by the workman until Dec. 1928, when the payments were reduced to 15s. a week. In Jan. 1929, the workman was given light work at a weekly wage of £2 1s. 8d. He then claimed a review of the weekly payments on the ground that his pre-accident wages were £2 10s. 3d., & that he was therefore entitled to £1 5s. 1½d. during the period of his total incapacity instead of the £1 2s. 3d. which he had been paid & had accepted, & 4s. 4½d. a week from the time he was given light work. The county ct. judge held that the payment of the compensation over so long a period implied an agreement between the parties on the terms that the rate of compensation should be £1 2s. 3d. a week based on a pre-accident wage of £1 18s. 10d. & that since there had been no change of circumstances & no question had arisen within the meaning of the Act, the workman was bound by that agreement. The workman appealed:—*Held*: the county ct. judge, having found on the evidence that there was an implied agreement, was right in holding that the parties

were bound by it.—*LEWIS v. CAMMELL, LAIRD & CO., LTD.* (1929), 22 B. W. C. C. 410, C. A.

*Annotations*:—*Apld.* *Emsley v. Haggas (J.) & Co.* (1931), 24 B. W. C. C. 332. *Consd.* *Tello Tinplate Co. v. Griffiths* (1936), 28 B. W. C. C. 127. *Refd.* *Standish v. Newton Chambers & Co.* (1933), 26 B. W. C. C. 142.

**3580b.**

—.]—On May 19, 1931, a workman was injured by the collapse of a crane, his face was severely disfigured & he suffered other injuries. Liability was admitted by his employers, who paid him compensation at the rate of £1 3s. 9d. a week on the supposition that his pre-accident earnings were £2 5s. 6d. It was said that he had taught the violin in his spare time. He accepted compensation at that rate until June 24, 1932, when the employers reduced it to 5s. a week, after serving notice under sect. 12. On Oct. 6, 1932, he filed a request for a review & increase of the weekly payment on the ground that whilst he was able to do suitable light work he had failed to obtain employment, although he had taken all reasonable steps to obtain it. It was then discovered that he had been employed for seven weeks in Nov. & Dec. 1931, playing the violin in a cinema, & had been employed as a salesman at an average weekly wage of £2 7s. 10d. since Aug. 2, 1932. The workman then changed his solr., & a large number of amendments were made in the request for arbn. He also claimed that any compensation payable should be paid on the basis that his pre-accident earnings, including his earnings as a musician, were £3 10s. 2d. At the hearing it was proved that from Feb. to Aug. 1932, the workman had been drawing unemployment benefit. The county ct. judge refused to hold that the payment & receipt of £2 5s. 6d. for total incapacity constituted an agreement between the parties, & found as a fact that the workman's pre-accident earnings were £3 10s. 2d. Adopting that figure he treated the workman as having been totally incapacitated from the date of the accident until June 24, 1932, & partially incapacitated from June 24, 1932, & made his award for the workman accordingly. The employers appealed:—*Held*: the county ct. judge was entitled to find as a fact that there was no agreement to be implied between the parties, but on the evidence the award could not be supported. Appeal allowed. New trial ordered in another county ct.—*STANDISH v. NEWTON CHAMBERS & CO., LTD.* (1933), 26 B. W. C. C. 142, C. A.

**3591a. Voluntary weekly payment made—Bankruptcy of employer—Proof for lump sum.]**

A workman sustained an accident in respect of which his employer voluntarily paid him compensation. The employer was subsequently adjudicated a bkpt., & the trustee in

**PART XIV. SECT. 15, SUB-SECT. 3.—A.**

*eg. Liability of lump sum for sums paid in poor relief.]*—A workman, who was injured by accident in Aug. 1933, received weekly compensation at an agreed rate until May, 1934, when his employers gave notice to diminish the rate of payment. The workman refused to agree to the diminution, & payment of compensation was suspended pending the settlement of this dispute. In Feb. 1936, the dispute was settled by the employers agreeing to

make a lump sum payment of £200 in redemption of the workman's claim. This sum covered both arrears due to the workman & liability for the future, but no allocation was made between past & future liability. From May, 1934, till Feb. 1936, while payment of compensation was suspended, the workman received out-door relief. The relieving authority, in terms of sect. 41, claimed from the employers repayment of the relief paid, amounting to £125, out of the lump sum agreed to be paid to the workman:—*Held*:

(1) the relief had been granted "pending the settlement of the workman's claim," rejecting a contention for the workman that his claim was "settled" when liability to pay compensation was originally admitted by the employers; (2) (*dis.* *LORD MONCHIEFF*) the lump sum payment of £200 was chargeable with repayment of the sums paid as relief, in respect that it was a sum which the employers were "liable to pay as compensation."—*LOTHIAN COAL CO. v. CASSIDY*, [1936] S. C. 138.—*SCOT.*

bkpcy. continued the weekly payments until the workman tendered a proof in the bkpcy. for £1,000, being, as he alleged, the lump sum required to redeem the weekly payments. The trustee rejected the proof on the ground that he was unable to estimate its value until the county ct. had assessed the amount of the liability. The workman moved the ct. for an order directing the trustee to admit the proof:—*Held*: the proper practice was for the motion to stand over in order that the trustee might apply to the county ct., in the name of the bkpt., for an award fixing the amount of the lump sum to which the workman was entitled, & the trustee must then decide whether to admit the proof for that, or some other, & what amount; & if the workman was dissatisfied with the trustee's decision he could then apply to restore the motion.—*Re WISE, Ex p. MOLE v. TRUSTEE* (1934), 27 B. W. C. C. 490.

**3630a.** To set aside award—Previous refusal to set aside—Fresh application on different ground.]—A workman having been certified as disabled in Nov. 1932, by dermatitis, applied for compensation on the basis of the certifying surgeon's certificate. At the arbn. held in Feb. 1933, a witness was called who gave evidence that the workman could not have come into contact with lime which was alleged to be the cause of the dermatitis. The workman's application for compensation was dismissed. In Jan. 1934, the workman applied under Workmen's Compensation Rules, r. 85 (4), for leave to apply to set aside the award. The county ct. judge dismissed the application. The witness who had given evidence in the county ct. was subsequently tried at assizes for perjury & was acquitted, but in the course of the trial made certain admissions which indicated that there was a possibility that the workman might have come into contact with lime. In consequence of these admissions the workman, in Nov. 1934, made a second application for leave to apply to set aside the award. The employers contended that in view of his previous refusal in Jan. 1934, the county ct. judge was *functus officio*. The county ct. judge, however, gave leave & held that there was reasonable cause for not having made an application to set aside the award within six months, as the trial for perjury took place after the expiration of the six months & provided fresh evidence not previously available. The employers appealed:—*Held*: the fact that the county ct. judge under rule 85 (4) had on one occasion refused leave to make an application to set aside the award did not preclude him from granting leave on a later occasion, as the two requests for leave were based on different grounds. If the first application, however, had been for a new trial under rule 85 (1), the county ct. judge's decision would have been final & he would then have been *functus officio*. Appeal dismissed.—*BOYLE v. UNION COLD STORAGE CO., LTD.* (1935), 28 B. W. C. C. 49, C. A.

PART XIV. SECT. 16, SUB-SECT. 1.  
r 1. — *Withdrawal of.*—It is competent to withdraw an application for the recording of a memorandum if it is done timeously.—*M'GINLEY v. FARMER COAL CO.*, [1927] S. C. 149; 20 B. W. C. C. 725.—SCOT.

PART XIV. SECT. 16, SUB-SECT. 3.—  
A.  
3614 II. — — — — —.]—It is the duty of the sheriff- clerk to consider question whether he ought or not to refuse to record the memorandum on the ground of inadequacy of com-

3631a.

—.]—By an accident arising out of & in the course of the employment on Jan. 10, 1928, a workman aged fifteen suffered a cut on the scalp behind & above the ear. He was able to return to work at the beginning of Feb. 1928. On Mar. 14 & 20 he had epileptic fits, & on the latter date gave up work, receiving compensation in respect of the accident. In July, 1929, the employers requested a review of the weekly payment, but in Sept. 1929, an agreement was made between the parties whereby the workman agreed to accept £350 & costs in redemption of all further payments. Both the registrar & the county ct. judge, who had certificates before them of three doctors that the epilepsy was due to the accident, refused to record the agreement on the ground that the sum was inadequate & compensation was therefore continued. On Mar. 13, 1931, the weekly payments were stopped under sect. 12 after a doctor had reported that the epilepsy was not due to the accident. The workman filed a request for arbn. The county ct. judge, sitting with a medical assessor, held that the workman had not proved that there was any connection between the accident & the epileptic condition. The abortive agreement was not mentioned at the arbn. The workman appealed:—*Held*: the county ct. judge was free to decide in favour of the employer on the evidence before him & was in no way fettered by his previous refusal to record the agreement between the parties.—*EMSLEY v. HAGGAS (J.) & Co., LTD.* (1931), 24 B. W. C. C. 332, C. A.

3632a.

Order of county court judge to registrar.]—A coal hewer was employed in a colliery for which there existed a joint committee representative of the employer & his workman. In Dec. 1930, the workman was certified by a certifying surgeon to be disabled by miner's nystagmus. Liability was admitted & compensation paid under the certificate. In Nov. 1931, the employer alleged that the workman had recovered. In Dec. 1931, both parties agreed that the question of recovery should be referred to an ophthalmic surgeon, that the surgeon's report should be laid before the representative committee & that both parties should be bound by the decision of the committee thereon. The surgeon reported that the workman had completely recovered from miner's nystagmus. Before the committee met, the workman once more obtained work in the colliery, but on Feb. 10, 1932, was again certified by a certifying surgeon to be disabled by miner's nystagmus. On Feb. 11, the workman's solr. wrote to the employer enclosing the certifying surgeon's certificate & also a notice of objection by the workman to the jurisdiction of the committee. The notice of objection began with the words: "I hereby give notice that on & after the of Feb. 1932, I contract out of the compensation agreement." The committee met on Feb. 29, 1932, & made an award terminating the liability of the

compensation, & thereafter, according as his decision is in the affirmative or in the negative, to refer the matter to the sheriff or to record the memorandum.—*TONNER v. WILLIAM BAIRD & Co., LTD., GALLACHER v. WILLIAM BAIRD & Co., LTD.*, [1927] S. C. 870.—SCOT.

employer in respect of the certifying surgeon's first certificate of Dec. 1930, as from Dec. 5, 1931. A memorandum of the award authenticated by the signatures of the chairman & joint secretaries of the committee was sent to the local county ct. to be recorded. The registrar refused to record the memorandum on the ground that he had received notice of objection from the workman's solr. In a subsequent letter the registrar stated that in his opinion an objection that the award was *ultra vires* the committee was a notice disputing the genuineness of the award. The employer took proceedings in the county ct. to obtain an order from the judge directing the registrar to record the memorandum, but later withdrew his proceedings. The High Ct. was then moved on behalf of the representative committee & an order *nisi* was obtained directing the registrar to show cause why he should not record the memorandum. On the matter coming on for argument:—*Held*: (1) the proper remedy in this case was not an order in the nature of *mandamus*, but an order of the county ct. judge under W. C. R. 48, directing the registrar to record the memorandum of award; (2) an award is not "genuine" within the meaning of sect. 23 if it is made without jurisdiction.

(3) By AVORY, J., it is open to any party interested to dispute the genuineness of a memorandum of award made by a representative committee, although the memorandum may be authenticated by the proper signature, & in such a case W. C. R. 48 comes thereupon into operation.—*R. v. WHITEHAVEN COUNTY COURT REGISTRAR, Ex p. WELLINGTON COLLIERY REPRESENTATIVE COMMITTEE, Re WHITEHAVEN COLLIERY CO., LTD. v. McMASTER* (1933), 26 B. W. C. C. 508.

**3641a. Award made without jurisdiction.**—*R. v. WHITEHAVEN COUNTY COURT REGISTRAR, Ex p. WELLINGTON COLLIERY REPRESENTATIVE COMMITTEE, Re WHITEHAVEN COLLIERY CO., LTD. v. McMASTER*, No. 3632a, *ante*.

**3641b. Right to dispute genuineness—Award by representative committee.**—*R. v. WHITEHAVEN COUNTY COURT REGISTRAR, Ex p. WELLINGTON COLLIERY REPRESENTATIVE COMMITTEE, Re WHITEHAVEN COLLIERY CO., LTD. v. McMASTER*, No. 3632a, *ante*.

**3649. Add. Annotation.**—*Appld. R. v. Whitehaven County Court Registrar, Ex p. Wellington Colliery Representative Committee, Re Whitehaven Colliery Co. v. McMaster* (1933), 26 B. W. C. C. 508.

**3657. Add. Annotation.**—*Consd. Paterson v. Ardrossan Harbour Co.* (1926), 10 B. W. C. C. 621.

**3659a. Grounds for removal—Allegation by workman that scope of agreement not understood by him.**—Circumstances in which:—*Held*: an order for removal of a memorandum from the record was wrong, & must be discharged.—*QUARRELL v. LAMPORT & HOLT* (1928), 21 B. W. C. C. 112, C. A.

**3659b. Application for removal—Necessity for compliance with statute.**—On Apr. 12, 1932, a memorandum was recorded in a county ct. of an agreement made between a workman & his employer whereby the workman agreed to accept a lump sum in full & final settlement of his claim for compensation. On Aug. 8, 1932, the workman's solr. inti-

mated that an application might be made to have the memorandum removed from the register under sect. 25 (5) on the ground of fraud, undue influence or improper means. On Oct. 12, 1932, the solr. wrote to the employers' insurers enclosing notice of an application which he asked them to accept by post. This notice reached the employers' insurers on Oct. 13, & ran as follows: "Take notice that I intend to apply to the judge . . . on Oct. 26, 1932 . . . for a reconsideration of the memorandum of agreement recorded in this matter on Apr. 12, 1932." The application was heard by the county ct. judge on Oct. 26, & refused. The workman appealed:—*Held*: the application was properly dismissed. If the application was intended to have been made under sect. 25 (5), the workman had used neither the proper form nor the proper procedure for that purpose.—*PEPPERELL v. KEMBALL BISHOP & Co., LTD.* (1932), 25 B. W. C. C. 641, C. A.

**3660. Add. Annotation.**—*Distd. Fowkes v. Leicestershire Colliery & Pipe Co.*, [1931] 2 K. B. 570.

**3662a. Common law action.**—Workmen's Compensation Act, 1925 (c. 84), s. 23, which provides that a recorded agreement under the Act may be enforced as a county ct. judgment does not bar a common law action for damages for breach of a recorded agreement by the employers to employ the injured employee on light work at a weekly wage.—*STUBBS v. IMPERIAL & QUEEN LAUNDRIES, LTD.* (1933), 149 L. T. 426; 49 T. L. R. 445; 77 Sol. Jo. 421; 26 B. W. C. C. 307, D. C.

**3665. Add. Annotation.**—*Consd. Winfield v. London, Midland & Scottish Railway* (1931), 24 B. W. C. C. 158.

**3668. For "No. 3340" read "No. 3090."**

**3668a. ——— Adjournalment of application for leave to issue execution.**—*HAYTER v. SOUTHERN RY. CO.*, No. 3668e, *post*.

**3668b. ——— Award of one penny a week—Execution for arrears.**—In 1903 a workman lost two fingers of his right hand & received compensation until 1906. An agreement was then made between the parties that the employers should employ the workman at his pre-accident average weekly earnings, & that an award should be made for one penny a week to continue during such period as the workman should be so employed or until the same should be ended, diminished, increased or redeemed. The award was duly made by consent on Nov. 9, 1906. The workman remained at work until Sept. 7, 1929, when the employers closed down their works. The workman then claimed his arrears of 1d. a week & applied for leave to levy execution for these arrears. The county ct. judge made the necessary order. The employers appealed:—*Held*: there having been no variation of the award for a penny a week the workman was entitled to issue execution for the accumulated arrears. Appeal dismissed.—*SEDGWICK v. LEEDS FORGE CO., LTD.* (1930), 23 B. W. C. C. 144, C. A.

**3668c. ——— What is sufficient memorandum relating to future payments.**—The workman, having suffered an accident arising out of & in the course of his employment, was

paid by appls., his employers, full compensation for a time. On Mar. 10, 1930, notice to end the compensation was given by the employers under 1925 Act, s. 12, based on a certificate of complete recovery. The workman replied with a counter certificate, & the question was referred to a medical referee. Meanwhile the employers paid four weeks' compensation into ct. An agreement was then come to between the employers & the workman under which the money in ct. was to be paid out to the employers, & the compensation was fixed at 18s. 6d. a week to be paid by the employers as from the date when they stopped the compensation until further review of that amount. This agreement was sent to the registrar & was recorded by him. The registrar then made an order for payment out of the sum in ct. to the employers. Subsequently, again proceeding under sect. 12, the employers reduced the weekly payments, & the workman, not continuing the proceedings under that sect., applied for leave to issue execution under r. 82 of the Workmen's Compensation Rules, 1926. The county ct. judge gave leave to issue execution, & the question arose whether, having regard to the agreement & the order of the registrar, the compensation was owing under a memorandum, award, or certificate within the meaning of r. 82:—*Held*: agreement between the parties on which the registrar made his order was a memorandum within r. 82 relating to the future as well as the past, & therefore execution was properly leviable as to the future weekly payments.—*ALLEN v. DIGBY COLLIERY CO., LTD.* (1931), 145 L. T. 501; 24 B. W. C. C. 214, C. A.

**3668d.** ——— *Appeal lies to Court of Appeal.*—An appeal from a decision of a county ct. judge on an application for leave to issue execution in respect of compensation due to an injured workman does not lie to the Div. Ct., but to the Ct. of Appeal.—*FOWKES v. LEICESTERSHIRE COLLIERY & PIPE CO., LTD.*, [1931] 2 K. B. 570; 100 L. J. K. B. 593; 145 L. T. 421; 24 B. W. C. C. 205.

**3668e.** ——— *After commencement of proceedings to terminate payment under 1925 Act, sect. 12.*—In Aug. 1929, a workman met with an accident, & was paid full compensation by his employers. In Apr. 1930, an agreement was recorded under which he was paid compensation at an agreed rate. In July the employers obtained a certificate from their doctor that the workman had practically recovered from the accident in 1929, & served upon the workman a notice of their intention to terminate the compensation under 1925 Act, s. 12. The workman did not follow the procedure prescribed by that sect., but applied under r. 82 of Workmen's Compensation Rules, 1926, for

leave to issue execution under the recorded agreement. The county ct. judge refused the application:—*Held*: (1) under the recorded agreement a workman was in the position of a judgment creditor, & was entitled under r. 82 to apply for leave to issue execution, notwithstanding the fact that the employers had already commenced proceedings under sect. 12 to terminate or reduce the weekly payments under the recorded agreement; (2) the employers could always apply under r. 82, sub-r. (5), for an adjournment of the application to enable them to proceed under sect. 11 of the Act by way of review; (3) leave to issue execution ought to be allowed, but execution ought to be suspended for one month to enable the employers to apply for a review; (4) the decision of the question whether sect. 12 extended to anything but payments made under agreements that are not recorded was reserved.—*HAYTER v. SOUTHERN RY. CO.*, [1931] 2 K. B. 274; 100 L. J. K. B. 378; 144 L. T. 539; 23 B. W. C. C. 389, C. A.

*Annotations*:—*Fold. Winfield v. London, Midland & Scottish Railway* (1931), 24 B. W. C. C. 158. *Appl. Francis v. London Public Omnibus Co.* (1933), 26 B. W. C. C. 539. *Refd. Allen v. Digby Colliery Co.* (1931), 145 L. T. 501.

**3668f.** ——— *—*—In 1928 a workman having met with an accident his employers paid him full compensation of 30s. a week on the basis of total incapacity. In Aug. 1930, an agreement was recorded under which the payments of 30s. a week were to be continued by the employers. In Jan. 1931, the employers, following the procedure prescribed by sect. 12, served upon the workman a notice, in accordance with a certificate of a medical practitioner which stated that the workman had partially recovered, that they would from & after the expiration of ten days therefrom reduce the weekly payment of 30s. under the recorded agreement to 11s. 1d. The workman did not follow the procedure open to him under the proviso to sect. 12 (3), but applied to the registrar under r. 82 of Workmen's Compensation Rules, 1926, for leave to issue execution under the recorded agreement. The matter was referred by the registrar to the judge, who held that the workman was entitled to leave to issue execution unless the employers applied for a review. On appeal by the employers:—*Held*: leave to issue execution ought to be granted, as the certificate of the employers' doctor, on which they relied as a ground for ending the compensation, was not final & conclusive, & did not establish partial incapacity, & therefore they were in default in making weekly payments under the recorded agreement within the meaning of r. 82, sub-r. (1); but the execution must be suspended in order to give the employers an

**PART XIV. SECT. 18, SUB-SECT. 1.**

3673 i. *Effect of payment in—Money not subject to arrestment.*—*WILLIAM BAIRD & CO. v. CAMPBELL*, [1928] S. C. 314.—*SCOT.*

**PART XIV. SECT. 18, SUB-SECT. 3.—A.**

sm. *When Liability accrues.*—In arbn. proceedings under 1925 Act, brought by a stone mason against a firm of builders, the arbitrator, on

May 1, 1931, found that the workman had been permanently disabled by silicosis, an industrial disease, as at Dec. 8, 1930, & he awarded compensation for total incapacity. On the same day, Dec. 8, 1930, the employers had granted a trust deed for creditors. In an action brought against the employers' trustee in bkpy. by the workman's widow *qua* executrix, for a declarator that she was entitled to a ranking for a lump sum payment in the sequestration in priority to all other creditors, in which it was admitted

that the granting of the trust deed fell to be regarded as a receiving order in the sense of the 1925 Act:—*Held*: (1) under sect. 7 (3) of 1925 Act, liability for compensation had "accrued" at the date of the trust deed, notwithstanding that the precise amount of that liability might not be ascertainable until a later date; (2) "before" the date of the receiving order in sect. 7 (3) fell to be read as equivalent to "not after" that date; (3) under sects. 7 & 13 of 1925 Act, the fact that the weekly payments had not been

opportunity to apply for a review under sect. 11 of the Act.—*WINFIELD v. LONDON, MIDLAND & SCOTTISH RAILWAY*, [1931] 2 K. B. 284; 100 L. J. K. B. 453; 145 L. T. 242; 24 B. W. C. C. 158, C. A.

*Annotation* :—*Cotton v. Lutton* (1931), 24 B. W. C. C. 179.

**3668g.** — — — — —.]—An employer, after serving notice under 1925 Act, s. 12, stopped the weekly payments of compensation paid to an injured workman under a recorded memorandum of agreement. The workman obtained leave under r. 82 to issue execution against the goods of the employer. The employer appealed to the Div. Ct.:—*Held*: the appeal could not succeed in view of the decision of the Ct. of Appeal in *Winfield v. London, Midland & Scottish Railway Co.*, No. 3668f.

*Qu.*: whether an appeal did not properly lay to the Ct. of Appeal instead of to the Div. Ct.—*COTTON v. LUTTON* (1931), 24 B. W. C. C. 179.

**3668h.** — — — — —.]—A workman in receipt of compensation for total incapacity entered into an agreement with his employer whereby the employer agreed to continue to make a weekly payment until the same should be ended, diminished, increased or redeemed in accordance with the provisions of the Act. A memorandum of this agreement was recorded in the county ct. Six months later the employers having purported to carry out the provisions of sect. 12 stopped the weekly payments. The workman applied by way of original application for arbn. to have his compensation restored. The employers objected that the procedure was out of order, but the county ct. judge, having found as a fact that the workman was still totally incapacitated, made an award in the workman's favour. The employers appealed:—*Held*: the procedure laid down in sect. 12 (3) applies only to weekly payments made where there is no award or recorded memorandum of agreement. When a memorandum of agreement to make weekly payments has been recorded, & an employer purports to end or diminish the weekly payment under sect. 12 (3), the proper course for the workman to adopt is to apply for leave to issue execution under rule 82 of the Workmen's Compensation Rules, 1926.—*FRANCIS v. LONDON PUBLIC OMNIBUS CO., LTD.* (1933), 26 B. W. C. C. 539, C. A.

**3668j.** — — — — —.]—*Necessity for.*—Compliance with rule 82 of Workmen's Compensation Rules, 1926, is a condition precedent to execution to enforce an award, & in default of such an application a sale of goods seized in execution for the purpose of satisfying the award is void, & the purchaser has no title thereto.

County Cts. Act, 1888 (c. 43), s. 52, which protects officers of the ct. who may carry out an execution affected with irregularity, does not avail to cure non-compliance with rule 82.—*BUSHELL v. TIMSON*, [1934] 2 K. B. 79; 103 L. J. K. B. 405; 150 L. T. 512; 50

T. L. R. 259; 78 Sol. Jo. 154; 27 B. W. C. C. 15.

**3668k.** — — — — —.]—*Suspension*—*Pending application for review.*—*HATTER v. SOUTHERN RY. CO.*, No. 3668e, *ante*.

**3668l.** — — — — —.]—*WINFIELD v. LONDON, MIDLAND & SCOTTISH RY.*, No. 3668f, *ante*.

**3668m.** — — — — —.]—*For arrears of weekly wages—Execution refused—Common law action.*—A memorandum of agreement to pay a lump sum of £475 to a workman in settlement of his claim, & also to provide light work at a minimum weekly wage of 17s. 6d., was recorded under sect. 23 by the county ct. judge, who attached great importance to the condition of providing employment when approving the adequacy of the lump sum. It was subsequently alleged that the employers had broken their agreement to provide employment & were indebted to the workman to the extent of over £22 in wages. The workman applied under rule 82 for leave to issue execution for this sum. The county ct. judge refused the application on the ground that rule 82 only allowed execution to issue for compensation or costs, & arrears of weekly wages were neither of these. The workman therefore brought an action at common law for damages for breach of the agreement & the county ct. judge gave judgment for plff. for the amount claimed. The employers appealed & contended that such an action was not maintainable as an agreement registered under Workmen's Compensation Act could only be enforced under that Act. At the same time they alleged that as rule 82 did not provide for execution in regard to arrears of wages, the particular term of the memorandum with regard to the provision of light work at a minimum weekly wage was not so enforceable:—*Held*: the two contentions were mutually destructive, & these being the only grounds of appeal, the appeal must be dismissed.—*STUBBS v. IMPERIAL & QUEEN LAUNDRIES, LTD.* (1933), 149 L. T. 426; 49 T. L. R. 445; 77 Sol. Jo. 421; 26 B. W. C. C. 307, D. C.

**3669.** *Add. Annotation* :—*Refd.* *Bundy v. Motor Cab Owner Drivers' Assocn.* (1930), 143 L. T. 334.

**3671.** *Citations* :—*Add sub nom.* *THOMPSON & CO. v. FERRARO*, 6 B. W. C. C. 461.

**3672.** Delete this case.

**3676.** *Add. Annotations* :—*As to* (1) *Folld.* *Suffling v. Malcolm & Co.* (1933), 26 B. W. C. C. 537. *As to* (2) *Consd.* *Vickers v. Miners Thames Steam Tug & Lighterage Co. v. Ingram* (1927), 96 L. J. K. B. 490.

**3676a.** — — — — —.]—A county ct. judge has no discretion under rule 53 of Workmen's Compensation Rules, 1926, to refuse the application of a workman of full age for payment out to him of a lump sum paid into ct. for his benefit during his infancy in redemption of his claim for compensation.—*SUFFLING v. MALCOLM (J.) & CO.* (1933), 26 B. W. C. C. 537, C. A.

continued for a period of six months prior to bkpyr. was not sufficient to deprive pursuer of a preferential ranking to a lump sum payment.—*THORNTON'S EXECUTRIX v. ANGUS & SONS' TRUSTEE*, [1934] S. C. 279;

27 B. W. C. C. Supp. 1.—*SCOT.*

3886 I. *Limit of preferential payment*—*Under Workmen's Compensation Act*, 1906, s. 5 (3)—*Not where liability accrued prior to liquidation.*—*Held*:

the workman was entitled to the whole of the amount due to him for compensation as a preferential debt, without any limitation to £100 as mentioned in s. 5, sub-s. 3, Workmen's Compensation Act, 1906, the liability for such







man admitted that the incapacity had ceased on Sept. 3, but claimed compensation up to the date of the award:—*Held*: the county ct. judge had no jurisdiction under Workmen's Compensation Act, 1923 (c. 42), s. 14, to award any payment after the incapacity had ceased, & he ought to make a retrospective award terminating the weekly payments as from the date of recovery.—*OCEAN COAL CO. v. DAVIES*, [1927] A. C. 271; 96 L. J. K. B. 364; 136 L. T. 449; 43 T. L. R. 108; 70 Sol. Jo. 1219; 19 B. W. C. C. 429, H. L.; *reversé*. (1926), 96 L. J. K. B. 255, C. A.

*Annotations*:—*Conrad, Macaulay v. Baird* (1927), 20 B. W. C. C. 802; *Niddrie & Benhar Coal Co. v. Dee*, [1927] A. C. 299; *Thorpe v. Sadler, Sadler v. Thorpe* (1927), 20 B. W. C. C. 488. *Appl. Lowe v. Essex County Council* (1927), 20 B. W. C. C. 452; *Pullen v. Enthoven* (1927), 20 B. W. C. C. 248. *Conrad, Catton v. Ashwell & Nesbit*, [1928] Ch. 484; *Dodd v. Oceanic Steam Navigation Co.* (1928), 21 B. W. C. C. 118; *Anchor Donaldson v. Crossland*, [1929] A. C. 297; *Mockbill v. Homer City S.S. Owners* (1929), 22 B. W. C. C. 260. *Appl. Lewis v. Dobson Steam Fishing Co.* (1929), 73 Sol. Jo. 483; *Bevan v. Grovesend Steel & Tinplate Co., Ltd.* (1929), 22 B. W. C. C. 572. *Fold, Fairfield Shipbuilding Co. v. Harris* (1931), 24 B. W. C. C. 110. *Reid, Akers v. L. & N. E. Ry.* (1926), 20 B. W. C. C. 195; *Howarth v. Singleton* (1926), 20 B. W. C. C. 136; *Parker v. London Brick Co. & Forders* (1927), 20 B. W. C. C. 573; *Woodrow v. Trawlers (White Sea) & Grimsby* (1929), 141 L. T. 676; *Evans v. El Urugayyo S.S. Owners, Barlow v. Pacific Steam Navigation Co.* (1930), 23 B. W. C. C. 383.

3701a. ———.]—*PULLEN v. ENTHOVEN & SON*, No. 3056a, *ante*.

3701b. ———.]—A workman was injured by an accident & was paid compensation by his employers for total incapacity. On receipt of their doctor's report that the workman was fit for light work, the employers made two offers of light work to the workman at the same rate of wages as before his accident. After the second refusal, the employers ceased to pay compensation. The county ct. judge held the workman was unreasonable in refusing the offers of light work &, applying *Ocean Coal Co. v. Davies*, No. 3701, *ante*, the employers were entitled to stop payment of compensation when they did:—*Held*: the evidence supported the findings, & the judge had correctly applied *Ocean Coal Co. v. Davies*, No. 3701, *ante*.—*LOWE v. ESSEX COUNTY COUNCIL* (1927), 20 B. W. C. C. 452, C. A.

3701c. ———.]—*BEVAN v. GROVESEND STEEL & TINPLATE CO., LTD.*, No. 3954c, *post*.

3701d. ———.]—A boiler-maker's riveter whose compensation for the loss of his right finger had been stopped under 1925 Act, s. 12, filed a request for arbn. The employers in their answer offered to submit to an award on the basis of partial incapacity, but at the same time gave notice that they denied liability. An award was consequently made for an agreed amount until the same should be ended or diminished. Eleven months later the employers applied to review with a view to termination of the weekly payment on the ground that the workman had completely recovered. The county ct. judge found as facts that the workman could do his pre-accident work, but that his physical condition was the same in all material respects as at the time of the previous award & refused to terminate the weekly payments. The employers appealed:—*Held*: the two findings of fact were wholly inconsistent with each other, but once the county ct. judge had found that the workman could do his

pre-accident work, all right to compensation ceased.—*FAIRFIELD SHIPBUILDING CO., LTD. v. HARRIS* (1931), 24 B. W. C. C. 110, C. A.

3701e. ———.]—*Workman malingering*.—A workman, in Jan. 1932, suffered a fracture of his arm by accident arising out of & in the course of his employment. Liability was admitted & compensation paid. In May, 1932, his employer offered him work which he said he was unable to do. In Sept. 1932, the weekly payments were reduced by an award of the county ct. judge. In Oct. 1932, the employer again offered work which was refused. In Sept. 1933, the employer applied for termination of the weekly payments. The county ct. judge repeatedly adjourned the arbn. to enable the workman to try suitable work. The workman was on some occasions medically examined before & after the trials of work, & on one occasion the county ct. judge inspected the work himself. Finally the county ct. judge found as a fact that the workman was malingering & he terminated the weekly payments. The workman appealed:—*Held*: there was evidence to support the finding & no misdirection.—*MALLANDAIN v. HILL* (1934), 27 B. W. C. C. 177, C. A.

3701f. Failure by workman to adopt procedure.—*Application for review—Right to amend*.—Employers, using the machinery provided by Workmen's Compensation Act, 1925 (c. 84), s. 12, stopped weekly payments to a workman on their doctor's certificate. The workman did not avail himself of sect. 12, but began fresh proceedings for an arbn. by way of review, asking for an order that the weekly payments should be continued. At the arbn. the employers, at the close of the workman's case, objected to the method adopted by the workman & submitted that there was no case to answer. The workman applied for leave to amend, to turn the proceedings into an original appln. under sect. 21 of the Act, but the county ct. judge refused to allow this, & upheld the employers' objection, making an award in favour of the employers. The workman appealed:—*Held*: the county ct. judge should have allowed the amendment, so that the case could have been considered on its merits.—*ROBINSON v. VICKERS-ARMSTRONG, LTD.* (1929), 22 B. W. C. C. 171, C. A.

*Annotations*:—*Expld. Francis v. London Public Omnibus Co.* (1933), 26 B. W. C. C. 539. *Reid, Harding v. Waters, Ltd.*, [1936] 3 All E. R. 891.

3701g. ———.]—*No amendment—Right of judge to treat proceedings as arbitration*.—A workman was voluntarily paid compensation at the rate of 25s. a week in respect of an injury by accident. The employers served a notice on the workman under Workmen's Compensation Act, 1925, s. 12 (3), & in due course reduced the weekly payments to 17s. 6d. No counter-notice was served & for 6 months the workman accepted the weekly payments of 17s. 6d. During those 6 months correspondence passed between the solrs. acting for the parties & there were negotiations for a lump sum settlement, but no complaint was made as to the reduction in the weekly payments. The workman then applied for a review & for a restoration of the weekly payments of 25s. The county ct. judge declined to infer an agreement between

the parties that the workman should receive compensation at the reduced rate, & he held that the workman's condition was the same as at the date of service of the employers' notice under sect. 12 (3). He found the measure of the workman's incapacity at that date to be £1 a week, & treating the proceedings as an original application for arbn., he awarded compensation at the rate of £1 a week. No formal amendment of the proceedings was, however, made. The employers appealed:—*Held*: (1) the county ct. judge was entitled to allow the application for review to be treated as an application for arbn.; (2) the fact that the workman did not serve a counter-notice on the employers did not preclude him from bringing arbn. proceedings in opposition to the diminution of the compensation paid; (3) the county ct. judge was entitled to decline to infer an agreement that the workman should receive compensation at the reduced rate.

*Per SLESSER, L.J.*: where a county ct. judge thinks fit to give leave to amend the proceedings particularised, either in whole or in part, the amendment ought to be made then & there, so that if any question subsequently arises, the Ct. of Appeal can see exactly what case was made before the county ct. judge.—*HARDING v. WATERS* (H. & E.), LTD., [1936] 3 All E. R. 891; 156 L. T. 29; 80 Sol. Jo. 914; 29 B. W. C. C. 335, C. A.

**3702a.** — — —.]—A workman met with an accident, which he alleged caused an inguinal swelling. He was paid full compensation until Sept. 20, 1926, when the payments were reduced. The workman filed an application claiming compensation at the old rate, & the employers filed a counter-application for termination of compensation. The county ct. judge found that the workman had entirely recovered on Sept. 20, 1926, & that the swelling from which he suffered at the date of the trial was not a result of the accident, & made an award for the employers on both applications:—*Held*: the employers, by paying compensation, were not estopped from saying that the injury was not caused by the accident, & there was evidence to support the judge's findings, & no misdirection.—*THORPE v. SADLER* (A. L.) & SON, SADLER (A. L.) & SON v. *THORPE* (1927), 20 B. W. O. C. 488, C. A.

*Annotation*:—*Refd.* *Watts, Watts & Co., Ltd. v. Hole* (1930), 23 B. W. C. C. 119.

**3702b.** — — —.]—On May 15, 1927, a trimmer met with an accident on board a liner causing hernia. He received compensation until Nov. 12. On receipt of a medical report that he was fit to resume work, his employers gave notice on Nov. 2, that the weekly payments would be terminated. The workman did not obtain a counter-certificate, but, on Nov. 24, his solrs. wrote suggesting that he had not been examined for hernia, that an operation would be necessary, &

that the notice of Nov. 2 should be cancelled. The employers thereupon requested the workman to present himself for further examinations, & as a result of these examinations again repudiated liability to pay compensation. The county ct. judge found that there was no incapacity on Jan. 7, 1928, but he made an award of compensation for eight weeks from Nov. 12, 1927, on the ground that compensation was not properly terminated on that date, in that the employers by subjecting the workman to further examinations had shown that they did not rely on their first medical report. He estimated the period during which the employers were satisfying themselves after Nov. 12 as to the workman's condition at eight weeks:—*Held*: the workman had not discharged the *onus* of proving incapacity after Nov. 12, 1927. The judge, in awarding compensation to the workman, in fact, for the trouble he had been put to by the employers after notice of termination had been given, had misdirected himself.—*DODD v. OCEANIC STEAM NAVIGATION CO., LTD.* (1928), 21 B. W. C. C. 118, C. A.

**3702c.** Action for declaration—Of breach of statutory duty by employer—Whether maintainable.—*Pltf.*, a workman in the employment of defts., was injured by an accident, & defts. admitted liability & made a weekly payment of compensation. Ultimately a doctor reported that *pltf.* had recovered, & defts. stopped the payments & applied for a review thereof, & paid into ct., with a denial of liability, the amount of the weekly payments up to that date. While the county ct. proceedings were still pending, *pltf.* brought an action, alleging that he had not recovered from his injury, & claiming (1) a declaration that under Workmen's Compensation Act, 1925 (c. 84), s. 12, defts. had committed a breach of their duty by stopping the payments otherwise than in pursuance of an agreement or arbn., & (2) an injunction restraining a continuance of the breach:—*Held*: under sect. 21 the only tribunal to determine the question of incapacity was the county ct., & as that question had not yet been determined by that tribunal, *pltf.* could not show that his incapacity was continuing since the date when defts. stopped the weekly payments, & the action failed.—*CARTON v. ASHWELL & NESBIT, LTD.*, [1928] Ch. 484; 97 L. J. Ch. 199; 139 L. T. 34; 44 T. L. R. 422; 72 Sol. Jo. 317; 21 B. W. C. C. 97, C. A.

*Annotations*:—*Consd.* *Anchor Donaldson v. Crossland*, [1929] A. C. 297. *Refd.* *Robinson v. Vickers-Armstrong* (1929), 22 B. W. C. C. 171; *Woodrow v. Trawlers* (White Sea) & *Grimshy* (1929), 141 L. T. 676.

**3702d.** Power to make interim award—Payment into court.—A workman suffered injuries through an accident arising out of & in the course of his employment, & his employers paid him weekly compensation until a certain date. They then terminated the payment, on the ground that his incapacity had ceased,

**3702d i.** Power to make interim award—Withdrawal by employers of application for medical reference.—*Held*: an interim award fell to be refused, in respect that the employers, having applied for a medical reference, were entitled to the protection of consignation until the settlement of the dispute.—*MACAULAY v. WILLIAM BAIRD*

& Co., [1927] S. C. 788; 20 B. W. C. C. 802.—*SCOT*.

o i. — On return to work.—The employers of a workman, who had been injured by accident, paid compensation, as for total incapacity, without any award having been made or any memorandum of agreement

having been recorded. After a time the workman started work again with the same employers, not at his former work as a machine moulder, but as a labourer. The employers ceased payment of compensation as from the date of the workman's re-employment, without having served any certificate or notice under sect. 12 (3). The

but there was no award or recorded agreement. The workman had not returned to work, & his employers had not served on him a notice under Workmen's Compensation Act, 1925 (c. 84), s. 12 (3). On the termination of the payments the workman, on the ground that his incapacity was still continuing, applied for an award of weekly compensation & for an interim award of weekly compensation until the question of the liability of his employers should be decided. The arbitrator made an interim award of a weekly payment, & authorised the employers to pay the money into ct. instead of paying it to the workman:—*Held*: under sect. 12 the workman was entitled to an interim award, & the arbitrator had no power to authorise the employers to pay the money due thereunder into ct. instead of paying it to the workman. —ANCHOR DONALDSON, LTD. v. CROSSLAND, [1929] A. C. 297; 98 L. J. P. C. 7; 140 L. T. 282; 45 T. L. R. 97; 21 B. W. C. C. 448, H. L.

*Annotations*:—*Distd. Mockbill v. Homer City S.S. Owners* (1929), 22 B. W. C. C. 260. *Fold. Woodrow v. Trawlers (White Sea) & Grimsby* (1929), 141 L. T. 676. *Consd. Bevan v. Grovesend Steel & Tinplate Co.* (1929), 22 B. W. C. C. 572; *Evans v. El Uruguayo S.S. Owners, Barlow v. Pacific Steam Navigation Co.* (1930), 23 B. W. C. C. 383.

**3702e.** —.—.]—Where employers, on receiving a certificate of the workman's doctor that he is fit for work, stop the payment of the weekly sums to him for compensation for an accident arising out of & in the course of his employment, but are informed that the certificate was no admission of recovery having regard to the fact that it was made on a National Health Insurance form, which did not admit of stating a man is fit for light work only, & subsequently the workman's doctor reports that he is only fit for light work, on an application by the workman for an interim award that the employers should continue to pay the compensation until the hearing of the arbitration, the county ct. judge, sitting as an arbitrator, has a power inherent in him under Workmen's Compensation Act, 1925

workman brought an application for an award of compensation as for partial incapacity from the date of the cessation of payments, & moved the arbitrator to make an interim award of compensation. The arbitrator refused the motion:—*Held*: an interim award was incompetent, in respect that, as the workman had "actually returned to work," the employers were entitled, under sect. 12 (1), to end all payments of compensation. —M'DOUGAL v. SINGER MANUFACTURING Co., [1931] S. C. 47; 23 B. W. C. C. 616.—SCOT.

**so.** "Weekly payment"—*What is.*—In order to make a payment a "weekly payment under the principal Act" within Workmen's Compensation Act, 1923 (c. 48), s. 14, it must be shown (a) that there was an admission, express or implied, of liability under the Act, & (b) that the payment was made in respect of that admission.

Where employers paid a sum of money to a workman, who signed a receipt bearing that the payment was made without an admission of liability on their part:—*Held*: as it did not appear that the payment complied with the above requirements, sect. 14 did not apply. —LAFFERTY v. DARGAVIL COAL CO., LTD., [1927] S. C. 60; 20 B. W. C. C. 671.—SCOT.

**nd.** Service of certificate of recovery—*Time for*—Service more than 6 days

(c. 84), s. 12, to make such an interim award in order that the provisions in the section shall be made effective.—WOODROW v. TRAWLERS (WHITE SEA) & GRIMSBY, LTD., [1930] 1 K. B. 176; 99 L. J. K. B. 7; 141 L. T. 676; 22 B. W. C. C. 456, C. A.

*Annotations*:—*Consd. Bevan v. Grovesend Steel & Tinplate Co.* (1929), 22 B. W. C. C. 572; *Evans v. El Uruguayo S.S. Owners, Barlow v. Pacific Steam Navigation Co.* (1930), 23 B. W. C. C. 383.

**3702f.** Time for making application.]—An application for an interim award being an interlocutory application can only be made pending arbn. & cannot be made for the first time at the arbn. itself.—EVANS v. EL URUGUAYO S.S. OWNERS, BARLOW v. PACIFIC STEAM NAVIGATION Co., LTD. (1930), 23 B. W. C. C. 383, C. A.

**3704a.** Under recorded agreement—Effect of supplemental unrecorded agreement.]—HITCHENS & Co., LTD. v. HART, No. 3559a, *ante*.

**3704b.** Application to review subsequent to application to redeem—Ineffective.]—ELLIOTT, LTD. v. HOBBS, No. 3769a, *post*.

**3706a.** —.—.]—BOWLER & MACK v. TURNER (1933), 26 B. W. C. C. 1, C. A.

**3708.** *Add. Annotations*:—*Consd. Willis v. Howie* (1931), 24 B. W. C. C. 352; *Vickers-Armstrongs, Ltd. v. Regan* (1932), 147 L. T. 298. *Refd. Curran v. Kays*, [1928] 2 K. B. 469. *Curtis v. Rickett, Cockerell & Co.* (1933), 26 B. W. C. C. 16.

**3708a.** —.— Payment of money.]—A workman, a minor, was injured by an accident in the course of his employment, & was paid compensation. Subsequently, having obtained other work, he agreed to the compensation being terminated, with the making in his favour of a declaration of liability. On Dec. 3, 1931, his solrs. wrote to the employers' solrs. informing them that the workman had attained his majority on July 6, 1931, & adding: "I shall be glad to know whether your clients are prepared to pay my

*after examination.*—A medical practitioner, instructed by an employer to examine a workman in receipt of weekly payments, reported to the employer on Jan. 16, 1930, that he had examined the workman on Dec. 30, 1929, when he had found him to have wholly recovered, & that, to confirm his diagnosis, he had subsequently had the workman X-rayed & a surgeon's opinion taken. On Jan. 18, two days after receiving the medical certificate, the employer served it upon the workman, along with notice that his weekly payments would be ended. In arbn. proceedings the workman maintained that the employer was not entitled under sect. 12 (3) to end his weekly payments, because he had failed to serve the certificate within six days after the medical examination, & he contended that the six days' time-limit under the provisions of sect. 12 (3):—*Held*: the employer had ended the workman's weekly payments in compliance with sect. 12 (3). —M'GEE v. M'BRAYNE, [1931] S. C. 69; 23 B. W. C. C. 627.—SCOT.

**st.** Power to diminish payments—*From what date.*—A dock labourer, who, in consequence of injuries to both ankles, had been found by an arbitrator to be in a permanent state of partial incapacity, was paid compensation up till June 7, 1930, at a weekly rate of 25s. On May 23 his employers served

upon him a medical certificate to the effect that he was fit for light work, & intimated their intention to diminish his weekly payments to 7s. 6d. per week. The workman served a counter certificate to the effect that he would never be fit for any but sedentary work. On June 2 his employers offered him light cleaning-up work. Thereafter they applied for, & obtained a medical reference; & on Aug. 9, the referee reported that the workman was fit for light cleaning-up work on a level surface. Subsequently the workman accepted the light work offered. The employers having thereafter applied to the arbitrator to diminish the weekly payments to 7s. 6d. per week as from June 7, the workman contended that, as the referee had made no finding upon his condition before Aug. 9, there was no evidence to justify the arbitrator in diminishing the payments prior to that date. The arbitrator having diminished the weekly payments as from June 7:—*Held*: as no change in the workman's condition between June 7 & Aug. 9 had been alleged to the referee or to the arbitrator, the arbitrator was, in the circumstances, entitled to treat the referee's report as conclusive of the workman's condition as from June 7, & to diminish the compensation payable to him as from that date. —DOCHERTY v. ROSS & MARSHALL, LTD., [1931] S. C. 603; 24 B. W. C. C. Supp. 57.—SCOT.

client compensation on the basis of partial incapacity." The workman subsequently, on Jan. 18, 1932, gave notice of his intention to apply to the ct. under sect. 11 (2) of 1925 Act to award him increased weekly payments of compensation, in view of his having attained full age. The employers contended: (a) that whereas by sect. 1 of 1926 Act, the claim under sect. 11 (2) of 1925 Act should have been made by "application for the review . . . before or within six months after the workman attains the age of twenty-one years," it had not been made until Jan. 18, 1932, twelve days after the prescribed period; & (b) that sect. 11 (2) being for the review of "any weekly payment" it was not applicable to a case where no weekly payments were being made:—*Held*: (1) the words "application for the review" in sect. 1 of 1926 Act were not restricted to a formal application to the ct. An application within the section could be made informally to the employer, & this had been done by the solrs.' letter of Dec. 3, 1931; (2) the declaration of liability which had been made, being in lieu of the old order for payment of 1*l.* a week, was a declaration intended to keep open the rights of the parties, & took effect as if there were a weekly payment which was at the moment in abeyance.—*VICKERS-ARMSTRONG, LTD. v. REGAN*, [1933] 1 K. B. 232; 101 L. J. K. B. 657; 147 L. T. 298; 25 B. W. C. C. 211, C. A.

*Annotations*:—As to (1) *Folld. Darby v. Allen* (1932), 25 B. W. C. C. 326. *Consd. Curtis v. Rickett, Cockerell & Co.* (1933), 26 B. W. C. C. 16; *Burton v. Dobson Ship Repairing Co.*, [1938] 3 All E. R. 410. *Refd. Pepperill v. Kemball Bishop & Co.* (1932), 25 B. W. C. C. 641.

**3708b. Reasonable steps to obtain employment.**—A woman who by reason of injury by accident arising out of her employment had suffered the amputation of three fingers of her right hand was paid full compensation until 1934, when the employers were advised that she was then only partially incapacitated. She applied for an award, & the county ct. judge awarded compensation for partial incapacity treated as being total, under the above sub-sect., finding that she had taken all reasonable steps to obtain work, but had failed. In May, 1936, the employers applied to review & diminish the payment, alleging that, though the condition of the hand remained static, she was able to do certain work & had made little or no effort to obtain any work. The county ct. judge held that the employers had failed to show any change of circumstances, that he could not take into consideration the question whether the woman had or had not endeavoured to find work upon an application to review the payments, & dismissed it:—*Held*: as the workwoman had admitted that she had given up making any attempt to obtain suitable employment, this fact was a change of circumstances since the previous hearing which the county ct. judge was entitled to take into consideration on the application for a review for the purpose of deciding whether the conditions mentioned in sect. 9 (4) of Workmen's Compensation Act still obtained, & the case must be remitted to him to be reheard.—*UNITED DAIRIES (LONDON), LTD. v. STIRLING*, [1937] 1 K. B. 402; [1936] 3 All E. R. 272; 106 L. J. K. B. 468; 80 Sol. Jo. 1014; 29 B. W. C. C. 317, C. A.

**3708c. Award for fixed period under 1925 Act, s. 9 (4)—Partial incapacity continuing beyond fixed period.**—A workman was injured in June, 1928, & received full compensation until June, 1929. In July, 1929, he applied for the restoration of compensation on the ground of continuing incapacity. The county ct. judge heard the application in Oct. 1929, & ordered that the workman's partial incapacity should be treated as total incapacity under sect. 9 (4). Under this order he awarded full compensation until Jan. 7, 1930. On Jan. 7, 1930, the employers ceased payment. In Apr. 1930 the workman applied for review but subsequently altered his application to one to restore the proceedings begun in July, 1929, to deal with the amount of compensation payable for his partial incapacity after Jan. 7, 1930. The county ct. judge in Nov. 1930 refused to assent to this application. In consequence the workman once more filed an application for review. On this application the county ct. judge held that he was by virtue of sect. 9 (4) entitled to review the matter, although no liberty to apply was expressly given under the award made in Oct. 1929, & made an award of £1 a week for partial incapacity from Jan. 7, 1930. The employer appealed on the ground that there could be no right of review of a weekly payment that did not exist. The workman cross-appealed on the ground that the judge was wrong in refusing to restore the original proceedings:—*Held*: as the award made in Oct. 1929, dealt solely with matters referable to sect. 9 (4), there still remained the issue of partial incapacity considered apart from sect. 9 (4) &, although the award appealed from was made in review proceedings, it should properly be treated as an award made in the proceedings initiated in July, 1929, which the workman was entitled to have restored, the court having had seisin of the matter throughout. Appeal dismissed. Cross-appeal allowed.—*WILLIS v. HOWIE* (1931), 24 B. W. C. C. 352, C. A.

*Annotations*:—*Held. Marsh v. Robert Parker, Ltd.* (1932), 25 B. W. C. C. 197; *Darracq Motor Engineering Co. v. Seaward* (1935), 28 B. W. C. C. 64.

**3710a.** —A miner was certified on Nov. 22, 1919, as suffering from nystagmus & received compensation. After some years the employers requested a review, on which the county ct. judge terminated the weekly payments as from Aug. 21, 1925, the date of his award, on the ground that the workman had recovered from his disablement & was able to do his ordinary work as a miner. There was no appeal by the workman from this award. Three years later, on June 12, 1928, the workman obtained from a certifying surgeon a certificate to the effect that he was suffering from nystagmus, & thereby disabled from earning full wages at his old employment. The date of the commencement of disablement not appearing on this certificate, the workman went to the medical referee, who issued a certificate confirming the certificate of the certifying surgeon, & fixing Nov. 22, 1919, as the date of the commencement of disablement. The medical referee also certified that the workman was only fit for surface work. On that the workman commenced arbn. proceedings, claiming compensation for partial incapacity as from 1925 & a declaration of liability. The employers

contended that the matter was *res judicata*, & this contention was accepted by the county ct. judge. The workman appealed:—*Held*: the award of Aug. 21, 1925, was final between the parties & could not be affected by the certificate of the medical referee.—*WILLIAMS v. CRAWSHAY BROS. (CYFARTHEFA), LTD.* (1929), 22 B. W. C. C. 223, O. A.

**3711.** *Add. Annotation*:—*Refd.* *Ramsay v. Gramophone Co.*, [1936] 2 All E. R. 752.

**3712.** *Add. Annotation*:—*Refd.* *Ramsay v. Gramophone Co.*, [1936] 2 All E. R. 752.

**3716.** *Add. Annotation*:—*Refd.* *Ramsay v. Gramophone Co.*, [1936] 2 All E. R. 752.

**3716a.** ————.]—*SMITH v. UNION CASTLE STEAMSHIP CO., LTD.*, No. 3076a, *ante*.

**3716b.** ————.]—A workman was injured in Mar. 1933, & underwent an operation for the removal of cartilage from his knee. He was paid compensation as for total incapacity until Nov. 1933, when he returned to light work & was paid compensation as for partial incapacity. In Mar. 1934, payments were stopped, & the workman applied for an arbn. At the hearing in Jan. 1935, the workman's doctor said that the workman was not fit for his old work, the employers' doctor saying that he was fit for such work. The latter in his evidence referred to the probability that there was "some loose body which occasionally gets nipped between the bones of the joint," but he said there was no X-ray evidence of such loose body. The county ct. judge awarded compensation as for partial incapacity up to the date of the hearing & granted a declaration of liability. The workman applied to his foreman for his old work, but this was refused in the absence of a certificate of fitness from the workman's doctor. The doctor refused such a certificate & the workman continued at light work. In June, 1935, trouble developed, due to the nipping of a piece of cartilage which had not been removed. In Aug. 1935, the workman applied for a review. The county ct. judge came to the conclusion that the workman was more disabled than he had thought in Jan. 1935, "due to change of circumstances," & made an award for compensation on the basis of partial incapacity. The employers appealed:—*Held*: the finding that there was a change of circumstances was founded upon additional positive evidence of fact not before him at the first hearing & the matter was not *res judicata*.

*Per SCOTT, L.J.*: the evidence given at the first hearing is not admissible on the second hearing as if it had been taken on commission. If it is necessary to prove the facts at the time of the first hearing the witnesses must be called & examined *de novo*.—*RAMSAY v. GRAMOPHONE CO., LTD.*, [1936] 2 All E. R. 752; 155 L. T. 56; 29 B. W. C. C. 187, C. A.

*Annotation*:—*Refd.* *London Power Co. v. Lamb*, [1936] 3 All E. R. 392.

**3718.** *Add. Annotations*:—*Distd.* *Thorpe v. Sadler*, *Sadler v. Thorpe* (1927), 20 B. W. C. C. 488. *Consd.* *Curran v. Kays*, [1928] 2 K. B. 496.

*Refd.* *North's Navigation Co. (1889), Ltd. v. Batten* (1933), 150 L. T. 186; *Morgan v. Amalgamated Anthracite Collieries, Ltd.*, *Hutchings v. Amalgamated Anthracite Collieries, Ltd.* (1935), 28 B. W. C. C. 358.

**3718a.** ————.]—A riveter lost his right eye as the result of an accident arising out of & in the course of his employment. He was paid full compensation for a year & then went back to his old work. He left work after two days, alleging that he was unable to do the work, & made a claim for compensation based on total incapacity. The county ct. judge found that the injury had left no incapacity & made his award in favour of the employers & refused to grant a declaration of liability. The workman gave notice of appeal from that award but did not proceed any further. Seven months later the workman applied for a review alleging that though he had recovered & was capable of work he had found that he was unable to obtain employment owing to the disfigurement caused by the loss of his eye. The employers took the preliminary points that the matter was *res judicata* & also that there could be no review as there were no weekly payments & no declaration of liability to review. These second proceedings came before another county ct. judge, who refused to allow leave to amend the proceedings & held that the decision of the first county ct. judge was binding on him & final against the workman. He therefore dismissed the application. The workman appealed:—*Held*: the first county ct. judge having made an award in favour of the employers, finally terminating all liability, & there having been no appeal from that award, the second county ct. judge had rightly held in the second case, which raised exactly the same issues, that the matter was *res judicata*. The result must have been the same whether the second proceedings had been by way of original application or review.—*SMITH v. CUTLER (SAMUEL) & SONS, LTD.* (1932), 25 B. W. C. C. 408, C. A.

**3721.** *Add. Annotations*:—*Consd.* *Charlton v. Union Castle Line, Ltd.* (1930), 143 L. T. 66; *Ebbw Vale Steel Iron & Coal Co. v. Williams* (1935), 28 B. W. C. C. 267; *Ramsay v. Gramophone Co.*, [1936] 2 All E. R. 752. *Refd.* *Teilo Tinplate Co. v. Griffiths* (1936), 28 B. W. C. C. 127.

**3725.** *Add. Annotation*:—*Refd.* *Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshay* (1927), 96 L. J. K. B. 664.

**3726.** *Add. Citation*:—136 L. T. 129.

**3726a.** ————.]—A baker's assistant, aged eighteen years, lost his right index finger. The employers consented to an award for a weekly payment & then applied for a review asking for termination. Their application was granted, but the workman obtained a declaration of liability. The workman then applied for a review, asking for an increase, & produced evidence that he had tried other work but was unable to do it. The county ct.

#### PART XIV. SECT. 20, SUB-SECT. 3.

1. *Whether applicable*—To question of calculation of compensation.]  
—*Held*: in view of the arbitrator's

express finding that there had been no agreement between the parties as to the average weekly amount of the workman's pre-accident earnings, the arbitrator was entitled to determine

that amount *de novo* upon the whole evidence before him.—*FOTHERINGHAM v. ALLOA COAL CO., LTD.*, [1931] S. C. 611, 612; 24 B. W. C. C. Supp. 44.—*SCOTT*.

judge refused the workman's application on the ground that the workman had failed to satisfy him that he was unable to do his pre-accident work. The workman appealed:—*Held*: there was evidence to support the finding & no misdirection. Appeal dismissed.—*ALLVEY v. WILSON* (1930), 23 B. W. C. C. 525, C. A.

**3726b.** —.]—A painter fell from a ladder & injured his foot. Compensation was paid to him for some months under an award. His employer applied for a review of the weekly payments on the ground that he was fit for work. The county ct. judge found on the evidence taken as a whole that the workman was no longer suffering from any diminution of wage-earning capacity, & made an award terminating the weekly payments. The workman appealed:—*Held*: there was evidence to justify the award, & no misdirection. Appeal dismissed.—*WRIGHT (R.) & SON v. BURDON* (1932), 25 B. W. C. C. 594, C. A.

**3726c.** —.]—A workman suffered an injury by accident to his back & was thereby incapacitated. A memorandum of agreement was filed. On an application for review of the weekly payments payable under the agreement, the employers sought to prove by calling four medical men that the workman was now suffering from locomotor ataxy & not from any result of the accident. The county ct. judge found that the workman was not suffering from any constitutional disease, but was still incapacitated by the accident & dismissed the application. The employers appealed:—*Held*: the matter was a question of fact for the county ct. judge.—*SMEATON & SONS, LTD. v. TAYLOR* (1933), 26 B. W. C. C. 369, C. A.

**3726d.** —.]—Employers paid a workman who had sustained a fractured skull in July, 1928, full compensation until Nov. 1929, when they reduced the weekly payments in accordance with the provisions of sect. 12 to 11s. 9d. on the basis that he could earn 30s. a week at light work. In Jan. 1933, the workman bought a grocery business with a beer off-licence, & the employers applied for a review by termination or diminution of the 11s. 9d. a week on the ground that he was able to earn in some suitable employment as much or more than his average weekly earnings before the accident, or alternatively that he had such earning capacity as entitled them to relief. The only evidence called at the arbn. was to the effect that the workman's condition had improved, but that he had to lie down with headaches for a few hours. The county ct. judge said that he formed the conclusion that there was no material change in the workman's working capacity since Nov. 1929. He then went on to find that the workman & his wife shared the profits of the grocery business, & that the share of the profits would be about 30s. a week, so that the existing compensation of 11s. 9d. a week would be correct. The employers appealed on the ground that there was no evidence for the various findings:—*Held*: there being evidence on which the county ct. judge could find that the employers had failed to prove any change of circumstances, that alone was sufficient to justify him in dismissing the application to review, & the

other matters did not therefore arise.—*STEEL PEECH & TOZER, LTD. v. LAMBERT* (1933), 26 B. W. C. C. 579, C. A.

**3726e.** —.]—A workman suffered injury by accident in Dec. 1932, & was under treatment until Aug. 1933, when he underwent an operation. Compensation was paid on the basis of total incapacity from Dec. 1932 until Apr. 1934, when payments were discontinued. An application for compensation was then made. The employers denied liability on the ground that since the date of the application the workman had not been incapacitated for work by reason of the jury, but they submitted to a declaration of liability. The judge found in favour of the workman & made an award on the basis of total incapacity. In Feb. 1936, the employers applied for a review. Evidence was given that the workman would have had to undergo the operation even if there had been no accident & the employers contended that at the time of the review it could no longer be shown that the incapacity was due to the accident. The judge allowed the application & terminated the employers' liability. The workman appealed:—*Held*: as the employers, by submitting to a declaration of liability, had made an unqualified admission that the incapacity was due to the accident, it was not open to the judge, without a change of circumstances, to hear new evidence on a matter which had already been decided.—*LONDON POWER CO., LTD. v. LAMB*, [1936] 3 All E. R. 392; 29 B. W. C. C. 281, C. A.

**3726f.** —.]—A workman struck his skull against a scaffold while at work & claimed to be incapacitated by traumatic neurasthenia. At an arbn. in Dec. 1936, medical evidence was called on behalf of the employers to the effect that the incapacity was due to arterio-sclerosis & not to traumatic neurasthenia. The county ct. judge accepted the medical evidence called on behalf of the workman & made an award for partial incapacity. The employers applied for a review, which took place in Nov. 1937. At this arbn. the employers called a doctor who had given evidence at the first arbn. & who now said that the condition of arterio-sclerosis from which the workman had, in his opinion, been suffering had now become definitely worse, as fresh symptoms of the disease had now manifested themselves in the form of parkinsonism. Another doctor was also called by the employers. The county ct. judge having heard this evidence stated that it did not show such change of circumstances as would falsify his previous conclusion, or justify him in retrying the original medical issue, or in finding that the continuing partial incapacity should now be regarded as not being due to the accident but to an aggravated condition of arterio-sclerosis, & dismissed the application to review. The employers appealed:—*Held*: the question was one of fact for the county ct. judge & there was no misdirection. Appeal dismissed.—*HOLLAND & HANNEN & CUBITTS, LTD. v. BRIGHT* (1938), 31 B. W. C. C. 74, C. A.

**3731.** *Add. Annotations*:—*Consd. Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw* (1927), 96 L. J. K. B. 664; *Charlton v. Union Castle*



Line, Ltd. (1930), 143 L. T. 66; Williams v. Penmaenmawr & Welsh Granite Co. (1933), 148 L. T. 485. Refd. Cushion v. Tredegar Iron & Coal Co. (1927), 20 B. W. C. C. 454; Smith v. Union Castle S.S. Co. (1932), 25 B. W. C. C. 176.

**3733.** *Add. Annotations* :—*As to* (1) **Refd.** Ramsay v. Gramophone Co., [1936] 2 All E. R. 752. *As to* (2) **Consd.** Williams v. Penmaenmawr & Welsh Granite Co. (1933), 148 L. T. 485. **Refd.** Lewis v. Guest, Keen & Nettlefolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw (1927), 96 L. J. K. B. 664; Smith v. Union Castle S.S. Co. (1932), 25 B. W. C. C. 176.

3733a. —J—A workman was certified to be disabled by an industrial disease contracted whilst employed as a mule spinner, & in 1926 was awarded compensation of £1 a week on the basis that he was fit for any work not in the spinning trade & should be able to earn £1 19s. 7d. a week, his pre-accident average weekly earnings being £3 19s. 7d. After being unemployed for some two years he obtained work at a wage of £1 18s. a week for a year, when he was again unemployed for nearly two & a half years until Apr. 1932. In Apr. 1932, he obtained employment as a clerk to a commission agent, being employed for each afternoon while racing was proceeding at £1 5s. a week. The work was seasonal from Apr. to Nov. in each year. Whilst so employed, in Oct. 1933, he applied for a review of the weekly payment of £1. The county ct. judge held that there had been no change of circumstances since the award of 1926 which would justify a review of that award, & that he could not regard the £1 5s. earned for part-time work as any criterion. The Ct. of Appeal set aside the award of 1926 & substituted the actual wage of £1 5s. for the estimate of £1 19s. 7d. & made an award for £1 7s. 3½d. a week :—*Held* : the words “ he is earning or is able to earn ” in sect. 9 (3) (i), were strictly alternative, & the first alternative was not qualified by the words “ in some suitable employment or business.” Assuming that the £1 5s. a week was derived otherwise than from “ a suitable employment or business ” it still was an average weekly amount which the workman was earning after the accident within the meaning of the first alternative, & as there was no evidence that that amount was not really what he might earn if he took proper steps to get the most remunerative employment he could find, he must be charged with the 25s. & no more.—*DELTA MILL (1919), LTD. v. BLAKEMORE (1935)*, 104 L. J. K. B. 459; *sub nom. BLAKEMORE v. DELTA MILL (1919), LTD.*, 28 B. W. C. 193, H. L.

**8734a. Workman generally more fit for work.]—**  
A colliery repairer had a series of hernia & operations for hernia commencing in 1922. In 1927, on the workman's appln. for compensation, the county ct. judge found as a fact that he was not fit to do the work of repairer, & awarded compensation. In 1928, the employers applied to terminate the weekly payment, & the matter was referred by the judge to the medical referee, who reported that the workman was fit for his former work as a repairer. The judge said that, on this occasion, he accepted the evidence of the employers' doctors which he had rejected at the

former hearing & made an award terminating the weekly payments. The workman appealed on the ground that the judge had merely reversed his first decision without any change of circumstances. In view of this argument, the judge was written to & asked what change of circumstances he found which justified him in coming to his decision in 1928. In reply the judge said he had found that the workman was generally more fit for work :—*Held*: there was evidence that the man was fitter generally, & there had been, therefore, such a change of circumstances as justified the later award.—*PARTRIDGE, JONES & PATON JOHN, LTD. v. SULWAY* (1928), 21 B. W. C. C. 423, C. A.

3734b. Injury to right eye—Subsequent blindness in left eye unconnected with accident—Inability to work.]—A first helper at a blast furnace was in Aug. 1929, injured by reason of a piece of molten metal entering his right eye which was in consequence removed. He returned to work & though he could not do it properly by reason of his injury, he was able to carry on for three years with help & was paid his full former wages. In Nov. 1933, he had to cease work on account of a cataract unconnected with his injury having developed in his left eye, & subsequently resumed work at reduced wages. In Apr. 1935, he applied for review of a declaration of liability which had previously been recorded. The county ct. judge held that, in spite of some physical disability resulting from the accident, the workman would have been earning his pre-accident rate of wages at the date of the arbn. but for an event not connected with the accident & that he had not proved a change of circumstances since the date of filing the declaration of liability. He therefore made his award for the employers. The workman appealed :—*Held* : the cessation of work in 1933, although due to a reason unconnected with the accident, was a change of circumstances entitling the workman to ask for a review. The workman was entitled to have compensation for his partial incapacity assessed. Appeal allowed. Case remitted for assessment of compensation.—*DRURY v. APPLEBY IRON CO., LTD.* (1935), 28 B. W. C. C. 483, C. A.

**3737. Add. Annotations :—***Consd. Lewis v. Guest, Keen & Nettelfolds, Watkins v. Same, Tucker v. Same, Ingram v. Crawshaw (1927), 96 L. J. K. B. 664; Bevan v. Nixon's Navigation Co. (1928), 139 L. T. 647. Refd. Cushion v. Tredegar Iron & Coal Co. (1927), 20 B. W. C. C. 454; Barber, Walker & Co. v. Flint (1928), 98 L. J. K. B. 83.*

3737a. — [—]—The principles laid down in *Bevan v. Energlyn Colliery Co.*, No. 3366, ante, for computing the weekly payment in cases of partial incapacity, where there has been a fluctuation of wages since the accident, have been incorporated in Workmen's Compensation Act, 1925 (c. 84), to a limited extent by sect. 11 (3). Apart from that sect. the principle does not apply to cases under the Act, the provisions of Workmen's Compensation Act, 1906 (c. 58), Sched. I. (3), with regard to partial incapacity, having been repealed by Workmen's Compensation Act, 1923 (c. 42).—*CALOW v. SHELTON IRON, STEEL & COAL CO., LTD.* (1928), 21 B. W. C. O. 125, C. A.



**3737b.** — *General fall in wages.*—A collier being partially incapacitated by an accident arising out of & in the course of his employment, entered into an agreement with his employers by which, after reciting that the workman's average weekly earnings for twelve months before the accident were £3 19s. 4d., it was agreed that the employers should find him suitable employment & pay him the wages which he could earn therein &, in addition to those wages in each week, half the difference between his said average weekly earnings & the wages he could earn at the said employment by working while the pit was at work, but not in any case exceeding £1. After weekly payments under the agreement had been made for some years, the rate of wages having fallen, the employers applied to have the payments reviewed under Workmen's Compensation Act, 1906 (c. 58), Sched. I., s. 16:—*Held*: a change in the rate of wages, being one of the events contemplated & provided for by the agreement, was not such a change in the circumstances as entitled either party to have the weekly payments reviewed.—*BARBER, WALKER & Co. v. FLINT*, [1929] 1 K. B. 256; 98 L. J. K. B. 83; 140 L. T. 154; 21 B. W. C. C. 428, C. A.

**3745a.** —.]—A workman, who was paid compensation for the loss of three fingers, & who had returned to light work, was discharged owing to the closing down of his employers' works. He registered with the Labour Exchange & for some months received unemployment benefit, together with a proportionate amount of compensation from his late employers. When the unemployment benefit ceased he claimed full compensation, proving that he had made genuine attempts to obtain work but had failed owing to his injury. The county ct. judge awarded a sum, less than the full compensation, to date from the application for review & not from the cessation of the unemployment benefit:—*Held*: the workman was entitled to compensation on the basis of total incapacity as from the date when the unemployment benefit ceased.—*KING v. BRITISH STEEL CORPN., LTD.* (1928), 21 B. W. C. C. 37, C. A.

*Annotation*:—*Refd. Hughes v. Pwll-Heli Granite Co.* (1929), 22 B. W. C. C. 637.

**3748a.** —.]—A workman was injured by accident on July 4, 1926, & was paid compensation for total incapacity until Jan. 1929, when the weekly payments were reduced to 25s. In Mar. 1929, the workman applied for an increase by way of review. The county ct. judge held that there had been no change of circumstances & refused the application. The workman later renewed his application, alleging that a change of circumstances had been created by the combined effect of the state of the labour market & his own injury, & claimed to come within sect. 9 (4). The county ct. judge found that

the workman had not really tried to obtain employment, & again held that there had been no change of circumstances that would justify a review. The workman appealed:—*Held*: there was evidence to support the finding, & no misdirection.—*CHARLTON v. UNION CASTLE LINE, LTD.* (1930), 143 L. T. 66; 23 B. W. C. C. 65, C. A.

**3748b.** *No genuine effort to keep work.*—A builder's labourer lost his right eye as a result of an accident arising out of & in the course of his employment. He was paid full compensation for some two years when he was offered light work which he refused. The employer then applied to terminate the weekly payments but submitted to a declaration of liability. The county ct. judge terminated the weekly payments & a declaration of liability was recorded. The workman within three months applied for a review on the ground that he was entitled to the benefit of the 1931 Act. The county ct. judge found that the workman had in fact obtained two jobs from which he had been dismissed for wilful clumsiness, although he could have done the work. He therefore held that there had been no change of circumstances since the award terminating the weekly payments, & that he had not brought himself within the 1931 Act:—*Held*: there was evidence to support the findings & no misdirection.—*FEW v. GOODCHILD (ARTHUR G.) & SONS, LTD.* (1932), 25 B. W. C. C. 418, C. A.

**3749.** *Add. Annotations*:—*As to* (1) *Apld. Gladstone Spinning Co. v. Nangle* (1928), 98 L. J. K. B. 161. *Refd. Keane v. Mount Vernon Colliery Co.*, [1933] A. C. 309; *Gregson v. Swift* (1936), 29 B. W. C. C. 166.

**3750a.** —.]—A miner was injured in 1922. His average weekly earnings were 42s. 8d. He was paid 20s. a week as compensation with 15s. as war addition. He developed nervous weakness of the heart & neurasthenia. In 1927 an award for 35s. a week was made & filed. In Apr. 1932, an application by the employer to diminish the weekly payment was refused, but the medical witnesses agreed that the workman was fit to do suitable light work. The employer thereupon offered the workman a job as a watchman at a weekly wage of 30s. in a colliery which was in the process of being dismantled, & the offer was accepted. The workman then received 30s. a week as wages & 6s. 4d. as compensation. In July, 1932, the employer again applied to diminish the weekly payment. The workman contended that there had been no change of circumstances since Apr. 1932, entitling the employer to review, the watchman's job being a job specially created by the employer for the purpose of the review. The county ct. judge held that there was no evidence of any change for the better in the workman's physical capacity, & refused the application. The employer appealed:—*Held*: there was

PART XIV. SECT. 20, SUB-SECT. 4.—  
B. (d).

*eg. Limitation to light work not due to accident medical report going beyond reference.*—The employers of a workman, who had been receiving compensation for an injury to his back alleged that he was now "fit for ordinary work" & craved that the

matter should be referred to a medical referee under sect. 19. The medical referee certified that the workman was fit for light work only, but added that his unfitness was not due to the accident, the effects of which had completely passed off, but to rheumatic fibrosis. The arbitrator having refused a motion by the employers to end the compensation:—*Held*: the arbitrator

had acted rightly in refusing to end the compensation, in respect that the only matter referred to the medical referee was the question under sect. 19 (2) & the referee has decided that question in the workman's favour.—*QUINN v. MOUNT VERNON COLLIERY CO.*, [1932] S. C. 23; 24 B. W. C. C. Supp. 113

misdirection, the offer & acceptance of work at 30s. a week being in itself a change of circumstances entitling the employer to review. Appeal allowed. Case remitted for county ct. judge to assess the weekly payment in accordance with Sched. I. (3) of the 1906 Act.—ENGLEFIELD COLLIERIES, LTD. v. ROBERTS (1932), 25 B. W. C. C. 558, C. A.

**3752. Add. Annotation :—***Refd.* *Burton v. Dobson & Ship Repairing Co.*, [1938] 3 All E. R. 410.

**3753a. — Effect of Workmen's Compensation Act, 1926 (c. 42).]**—A workman, being a minor, who met with an accident arising out of & in the course of his employment before the above Act came into force, is, if he was still under twenty-one years of age when the Act came into force, entitled to obtain a review during the extended period permitted by the amending Act.—**EDWARD CURRAN & Co. v. KAYS, [1928] 2 K. B. 469; 97 L. J. K. B. 806; 139 L. T. 294; 21 B. W. C. C. 203, C. A.**

*Annotation* :—**Consd.** Vickers-Armstrongs, Ltd. v. Regan (1932). 147 L. T. 298.

8753b. — Time for making claim.]—An infant sustained an accident on Jan. 14, 1930, & received compensation at the rate of £1 a week. On June 24, 1930, he was given light work, & in addition to his pay for this work received 8s. 3d. a week as compensation. He was discharged on Dec. 3, 1930. He became twenty-one on June 30, 1931. In Nov. 1931 certain correspondence passed between the employers' insurers & the workman's solrs. whereby it was agreed that the sum of 8s. 3d. a week should be paid to the workman as compensation. This letter said, "We think it will be necessary to record an agreement to show the review by consent of the post-infancy basis of compensation. Before doing so, however, we shall be glad to know whether you are prepared to settle this case." The workman never signed this agreement nor was it recorded. He received 8s. 3d. a week for three weeks only, when he was taken back to work at £2 4s. a week. On Jan. 4, 1932, an application was filed by the workman for arbn. by way of review on the ground that, but for the accident, he would have been earning £3 0s. 6d. a week. The county ct. judge held that no agreement capable of being recorded was contained in the letters, & that the application for review was out of time. The workman appealed, & also instituted proceedings to record a memorandum of agreement:—*Held*: without deciding whether any agreement was in fact contained in the letters, & without prejudice to the proceedings to record a memorandum of agreement, the application for review was

out of time. Appeal dismissed—JOHNSON  
v. SHARP BROS. & KNIGHT, LTD. (1932), 25  
B. W. C. C. 86, C. A.

*Annotation:—*Consd. Vickers-Armstrongs, Ltd. v. Regan, (1932), 147 L. T. 298, C. A.

**3753c. — Informal notice to employer within six months after attaining majority.]—VICKERS-ARMSTRONGS, LTD. v. REGAN, No. 3708a, ante.**

8753d. ———.]—An infant suffered an injury by accident arising out of & in the course of his employment on Dec. 16, 1926. Liability was admitted & compensation of £1 a week paid by the employer until May 17, 1927, when a declaration of liability was filed. The workman was given light work which he was able to do, but after six weeks he left of his own accord. The workman came of age on June 12, 1931, & on Aug. 17, 1931, a letter was written by his solr. to the employer, discussing the amount of compensation payable now that the workman had attained the age of twenty-one & requesting payment of an increased amount. A request for arbn. was filed on Mar. 10, 1932, & at the hearing the county ct. judge upheld a preliminary objection of the employer that the application for review was out of time having regard to sect. 11 (2), as amended by sect. 1 of the 1926 Act:—*Held*: the point was already decided in *Vickers-Armstrongs, Ltd. v. Regan*, No. 3753c, *ante*, that an informal application for review if within time is sufficient to comply with the sect. Appeal allowed.—*DARBY v. ALLEN* (1932), 25 B. W. C. C. 328, C. A.

3753e.     -]-A girl aged seventeen lost her left index finger while working as a farm hand & subsequently earned higher wages as a domestic servant. She obtained an award of a declaration of liability. On obtaining the age of twenty-one she applied for a review both on the ground that there had been a change of circumstances in her physical condition & earning capacity & on the ground that she had attained the age of twenty-one. The county ct. judge found that she had shown no change in her physical condition & earning capacity & held that there was nothing in the fact that she had attained the age of twenty-one years which entitled her to a review. The workman appealed :—*Held* : there was evidence to support the findings of the county ct. judge & no misdirection. Appeal dismissed.     LEE v. PINKERTON (1938), 31 B. W. C. C. 168, C. A.

**3754. Add. Annotations :—***Consd. Miller v. Taylor & Son* (1931), 100 L. J. K. B. 641. *Refd.* *Webb v. Southern Ry. Co.* (1932), 25 B. W. C. C. 521.

**PART XIV. SECT. 20, SUB-SECT. 5.**

22. **Recovery of workman.—No jurisdiction to increase payments.**—A farm labourer under twenty-one years of age, who had lost an eye by accident arising out of his employment, & had been awarded compensation, brought proceedings for review: & in the course thereof a medical reference was obtained, as a result of which the referee certified that the workman had again become fit for his ordinary work. At a proof subsequently taken in the review proceedings it was established that, if the workman had remained uninjured, he would probably have

been earning more during the whole period under review than he had been earning at the time of the accident. The employer thereafter moved the arbitrator to end compensation at the date of the referee's certificate, but the arbitrator refused to do so, on the ground that the workman was, in virtue of 1925 Act, s. 11 (2), entitled to compensation in respect of his earning capacity being as a result of the accident less than it would have been had he not been injured; & he awarded a weekly payment as for partial incapacity until further order of the ct. :—*Held*: the workman having fully

recovered capacity, the arbitrator was bound to end compensation as from the date of the referee's certificate, subject to the workman's right to have the award made suspensory; & the arbitrator was not entitled to award further weekly payments in virtue of sect. 11 (2) of 1925 Act, in respect that sect. 11 (2) only warranted the increase of weekly payments to which a workman in minority was already entitled, & had no application in cases where the right to compensation had terminated.—*M'ILWRAITH v. PATON*, [1932] S. C. 690; 25 B. W. C. C. Supp. 44.—**SCOT.**

**3754a.** —.]—An infant workman at fifteen years of age commenced work at 8s. a week. At sixteen years of age when he met with an accident he was receiving 12s. a week, & received compensation based on that figure. When he was twenty years old he applied for a review of the weekly payment, his evidence being that three years earlier he had been offered a post on a liner. The county ct. judge found that the workman was not suitable for a post at sea, & apparently without considering whether the man might have obtained work elsewhere at an increased wage, he further found that at the date of the hearing the workman would probably have been earning, if uninjured, no more than the amount which he was earning when he met with the accident. The workman appealed:—*Held*: the reasons given by the county ct. judge for his award were unsatisfactory & the case must be remitted for further consideration. Appeal allowed. Case remitted.—*MILLER v. TAYLOR & SON* (1931), 100 L. J. K. B. 641; 145 L. T. 539; 24 B. W. C. C. 237, C. A.

**3754b.** — Question of fact.]—An infant workman met with an accident while employed as a motor-lorry driver's mate & received compensation. On attaining twenty-one the workman asked for a review of the weekly payment, alleging that but for the accident he would now have been able to earn wages as a motor-lorry driver. At the hearing of the arbn. the workman called evidence to show that he had learned to drive a motor lorry, but the county ct. judge disbelieved this evidence & made an award in accordance with an offer submitted to by the employers. The workman appealed:—*Held*: the question was purely one of fact & there was no misdirection. Appeal dismissed.—*RUSTON v. RYBURN* (1931), 24 B. W. C. C. 101, C. A.

**3755.** *Add. Annotation*:—As to (2) *Consd. Miller v. Taylor & Son* (1931), 100 L. J. K. B. 641.

**3756a.** — Effect of criminal conviction.]—An infant, aged nineteen & a half, while employed as a railway porter lost his left arm in May, 1913, by an accident arising out of & in the course of his employment. Liability was admitted under the 1906 Act, & a weekly payment of 10s. was made from May to Dec. 1913. In Dec. 1913, he was employed as a signalman at 23s. a week, & was promoted from time to time so that in 1930 he was being paid at the rate of 65s. a week. On Sept. 8, 1930, he committed a criminal offence totally unconnected with his employment, & served a term of imprisonment from Sept. 30, 1930, to July 26, 1931. It being a rule of railway cos. that persons who have been convicted & imprisoned shall not be employed by them the workman was unable to obtain his former employment. In Jan. 1932, he applied for a review of the original payment of 10s. a week. The county ct. judge assessed his earning capacity in the open labour market at 20s. a week, & held that, had he been uninjured, he would probably have been earning not less than 65s. a week at the date of the review. He therefore made an award under Sched. I. (16) of the 1906 Act increasing the compensation to 20s. a week, but ordered that such increase should not commence to operate on Sept. 8, 1930, but be suspended until July 26, 1931. The employers appealed:—*Held*: there was

evidence on which the county ct. judge could exercise the discretion given to him by Sched. I. (16) of the 1906 Act, & he had exercised his discretion judicially. Appeal dismissed.—*WEBB v. SOUTHERN RY. CO.* (1932), 25 B. W. C. C. 521, C. A.

**3761a.** Time for application.]—An infant, who was apprenticed under a seven-year contract to the deft. firm of shipbuilders, was injured in an accident on Aug. 31, 1932. A declaration of liability was made by consent. Upon an application for review, heard on Oct. 8, 1937, it was proved that he was earning 30s. per week working for his mother, & as he had therefore suffered no loss of earning capacity, no order was made. On Dec. 8, 1937, six days before the workman attained the age of twenty-one years & six months, his solr. wrote notifying defts. of his intention to apply for a further review. At that date, appct. would still have been under his contract of apprenticeship, had he not been injured, but by Feb. 24, 1938, he would have qualified as a shipwright, & would have been earning about £3 per week. He was at that time earning 35s. per week. It was contended by the employers that the application for review must be bad on the ground that, at the time it was made, appct. was earning as much as he would have done had he not been injured, & therefore he had lost nothing:—*Held*: (1) the solr.'s letter was an application for review within the meaning of sect. 11 (2); (2) an application for review is not necessarily bad solely because it is one under which the workman, upon the facts proved to have been existing at the date of the application, cannot succeed; (3) the date of a review is the date on which any change made at the review begins to operate, which may be any date prior to the hearing of the application, & therefore a date subsequent to the date of the application itself, so long as it is prior to the hearing; (4) the infant was entitled to compensation as from Feb. 24, 1938, on the footing that he would then probably have been earning £3 per week.—*BURTON v. DOBSON SHIP REPAIRING CO., LTD.* [1938] 3 All E. R. 410; 54 T. L. R. 1006; 82 Sol. Jo. 583; 31 B. W. C. C. 294, C. A.

**3762a.** What court has jurisdiction.]—Where an arbn. is heard in a county ct. in the district of which both workman & employer reside, & an award is made capable of being reviewed, it is competent for either party to apply for a review in another county ct. in the district of which the accident happened, & the judge of the second county ct. has jurisdiction to hear & determine the case, & is under no obligation to transfer the proceedings to the first county ct. Application to stay proceedings pending appeal.—*THOMAS ALLEN, LTD. v. HAGGER* (No. 1) (1931), 24 B. W. C. C. 373, C. A.

**3762b.** —.]—A claim for compensation was heard by the county ct. judge of the district in which both employer & workman resided. An award was given in favour of the workman & recorded in that ct. The employer then applied for a review, in the county ct. of the district in which the accident happened, having first obtained a certified copy of the award & filed it in the second ct. The county ct. judge of the second ct. refused to transfer the proceedings to the first ct. &

found that the workman had recovered & made an award ending the weekly payments. The workman appealed, alleged that the second judge had no jurisdiction to hear the review:—*Held*: the word “shall” in 1925 Act, s. 27, is not mandatory but is qualified by the words “subject to rules of ct.” & by rule 89 of Workmen’s Compensation Rules, 1926, the county ct. judge had jurisdiction to hear the review. He also had jurisdiction by virtue of County Ct. Act, 1919 (c. 73), s. 10 (1). Appeal dismissed.—*THOMAS ALLEN, LTD. v. HAGGER* (No. 3) (1931), 24 B. W. C. C. 513, C. A.

**3763a.** —.—.]—*HARDING v. WATERS* (H. & E.), LTD., No. 3701g, *ante*.

**3766a. Particulars—Contents of.]**—Upon an application by an employer to review a weekly payment & diminish it, or terminate or diminish it, the appropriate form is Form 5, under which certain particulars are to be given. These do not include particulars of the extent to which diminution is asked for, but the county ct. judge has a discretion to order or to refuse such further particulars under r. 29 (2). His decision on the point is not a decision on a question of law, & there is no appeal therefrom. *Semble*: such particulars ought to be sparingly ordered, & not with the object of compelling the county ct. judge to give costs to one side or the other, & there is much greater reason for asking for particulars of the extent of diminution of a weekly payment where termination is not asked for, than where the employer is asking for termination\* or diminution.—*VICKERS, LTD. v. MINERS, THAMES STEAM TUG & LIGHTERAGE CO. v. INGRAM* (1927), 96 L. J. K. B. 490; 137 L. T. 226; 71 Sol. Jo. 350; 20 B. W. C. C. 269, C. A.

*Annotation*:—*Consd.* Callender Cable Construction Co. v. Walsh (1938), 158 L. T. 299.

**3766b.** —.—.]—After employers had made weekly payments under the Workmen’s Compensation Act, as compensation to a workman injured by an accident arising out of & in the course of his employment, they applied under sect. 11 of the Act for a review of the weekly payments by diminution. The workman applied for further & better particulars stating the amount they claimed that the payment should be reduced by. The registrar & county ct. judge dismissed the application for such particulars, relying on the principles laid down in *Vickers, Ltd. v. Miners, Thames Steam Tug & Lighterage Co., Ltd. v. Ingram*, 20 B. W. C. C. 269; Digest Supp.:—*Held*: the ct. were bound by the decision of the Ct. of Appeal in *Vickers, Ltd., supra*, but disagreed with it as the workman was entitled to know to what extent the employers claimed to reduce the weekly payments to enable him to decide whether to contest the claim. Leave to appeal to the House of Lords. Award affirmed.—*CALLENDER CABLE CONSTRUCTION, LTD. v. WATSON* (1938), 158 L. T. 299; 82 Sol. Jo. 174; 31 B. W. C. C. 96, C. A.

**3769. Add. Annotation**:—*Apld.* Elliott, Ltd. v. Hobbs (1929), 22 B. W. C. C. 509.

**3769a.** —.—.]—A workman suffered an

accident to his right eye in Apr. 1923. Liability was admitted & compensation paid. In Dec. 1927, the weekly payments were reviewed & the county ct. judge made an award in respect of partial incapacity at the rate of 17s. 6d. a week, such rate to date from Feb. 1927. Compensation continued to be paid at this rate without any suggestion on the part of the workman that the rate should be altered. In June, 1929, the employers filed an application for redemption of the 17s. 6d. per week under sect. 13 on the basis of permanent partial incapacity. The workman’s solrs. wrote to the employers that the workman objected to the application to redeem, but that they could not object to it as they themselves felt that his medical condition was & would continue to be the same as it had been for the past two years. At the hearing of the application on July 1. medical evidence was called to the effect that the workman’s condition was stabilised & that there was unlikely to be any change in either eye. The county ct. judge, however, dismissed the application to redeem, stating that he was doing so in the exercise of the discretion which, in his opinion, the legislature had given to him. The employers gave notice of appeal, & later the workman filed an application for review on the ground that his incapacity had increased:—*Held*: (1) the employers have an absolute right to redeem, & the judge has no discretion to refuse such application; (2) the application of the workman to review not being in existence at the date of the hearing of the employers’ application to redeem & the right of the employers to redeem having become crystallised by that date, the subsequent application to review could have no effect.—*ELLIOTT, LTD. v. HOBBS* (1929), 22 B. W. C. C. 509, C. A.

**3771a.** —.—.]—An injured workman was paid full compensation at 22s. 10d. per week until Mar. 23, 1933. On Oct. 31, 1933, an agreement was entered into between the parties, whereby the employer agreed to employ the workman on light work at 2s. 6d. per day for eight months during the year & to pay compensation at 14s. 7d. per week. On Jan. 7, 1936, the employer applied to redeem the weekly payments on the basis of a weekly payment of 14s. 7d. per week, & the workman applied for a review of the award on the ground of a change of circumstances:—

employers  
basis of a weekly payment of 14s. 7d.; (2) the employers should have asked for a review of the weekly payment & redemption, & the county ct. judge was not bound on an application for redemption on the footing of a weekly payment of 14s. 7d. to proceed to a review of the weekly sum; (3) the counter-application of the workman for a review did not oblige the county ct. judge to review the payment for the purposes of the employer’s application to redeem.—*PICK v. PALING*, [1936] 2 All E. R. 1291; 155 L. T. 196; 80 Sol. Jo. 704; 29 B. W. C. C. 203, C. A.

PART XIV. SECT. 20, SUB-SECT. 6.

**3763 i. Whether original arbitration or review appropriate**—*Payment of compensation under unrecorded agreement.*—*HARRIS v. MANOR POWIS COAL CO., LTD.*, [1926] S. C. 97

**3775. Add. Annotations:—***As to (1) Consd. Curran v. Kays, [1928] 2 K. B. 469; Pick v. Paling, [1936] 2 All E. R. 1291.*

**3777. Add. Annotation:—***Apld. Elliott, Ltd. v. Hobbs (1929), 22 B. W. C. O. 509.*

**3781. Add. Annotations:—***As to (2) Refd. Curran v. Kays, [1928] 2 K. B. 469. Generally, Refd. Elliott, Ltd. v. Hobbs (1929), 22 B. W. C. O. 509.*

**3799. Add. Annotations:—***As to (1) Apld. Raeburn v. Lochgelly Iron & Coal Co. (1926), 20 B. W. C. O. 637. Consd. Bradley v. London & North Eastern Ry. Co. (1931), 145 L. T. 30; Ormond v. Holmes & Co., [1937] 2 All E. R. 795. Refd. Smith & Son v. Eagle Star & British Dominions Insurance Co. (1934), 27 B. W. C. O. 1; Leary v. Deptford S.S. Owners (1935), 28 B. W. C. O. 235.*

**3801a. — Scheme inapplicable where employment occasional—What is occasional work.]—**By Metal Grinding Industries (Silicosis) Scheme, clause 2, the scheme is made to apply to all workmen employed in the grinding of metal by mechanical power or in glazing, when such glazing is carried on in the same room as the grinding, but by proviso (a) thereof the scheme is not to apply, if such employment is occasional only, & for not more than eight hours in any week. A workman, employed by knife-blade manufacturers, superintended the girls in the glazing shop, & also worked on the processes of glazing known as rebuffing & whitening. In the course of his work he used an abrasive wheel in the whitening shop, whitening involving the raising of silica dust. He became totally disabled from silicosis & was certified accordingly. The county ct. judge found that the work done by the workman in rebuffing & whitening was "occasional only & for not more than eight hours in any week," & was, therefore, within the above proviso, & that he was thereby precluded from the benefit of the scheme. The workman appealed:—*Held*: for the employment to fall within the proviso it must be both "occasional only" & "for not more than

eight hours in any week." In this case the workman was called on, under his ordinary employment, to do the work, & therefore, such work was not "occasional only."—*MAKIN v. NEEDHAM, VELL & TYZACK, LTD. (1929), 22 B. W. C. O. 76, C. A.*

**3801b. — Disablement before Scheme in operation.]—**By Various Industries (Silicosis) Scheme, dated Dec. 11, 1928, workmen engaged in certain processes are brought within the operation of the 1925 Act. By para. 2 the scheme came into operation on Feb. 1, 1929, & is made to apply to all workmen employed at any time on or after Jan. 1, 1929, in the processes therein specified. By para. 11 1925 Act, s. 14, requiring the claim to be made within six months of the happening of the accident, is made to apply, the disablement being treated as the date of the accident. A street mason employed on Jan. 1, 1929, on a process within the scheme was taken ill on Jan. 8, & later went to hospital suffering from silicosis. He did not know until Apr. that he was entitled to compensation. On Apr. 28 he wrote to the certifying surgeon who, however, was away. He took no further steps to get certified until at the end of June he was discharged from hospital in order to see the certifying surgeon, who examined him & certified him on July 2, 1929, to be disabled by silicosis as from Jan. 10, 1929. On July 12 he first gave notice to his employer of the accident & made a claim. The county ct. judge held that the accident having occurred between Jan. 1 and Feb. 1, 1929, was not one to which the scheme applied, & that there was no reasonable cause why the workman should have delayed making his claim until two days after the six months had expired. The workman appealed:—*Held*: although the Scheme did not become operative until Feb. 1, 1929, it nevertheless applied to all workmen employed on or after Jan. 1, 1929, & therefore applied to a workman employed on Jan. 1, 1929, who was certified after that date as being disabled. On the second point the award was upheld on the ground that

**PART XIV. SECT. 22, SUB-SECT. 1.**

**so. Various Industries (Silicosis) Scheme, 1928—Duty to furnish information as to previous employment—Time for furnishing.]—**Various Industries (Silicosis) Scheme, 1928, para. 13, enacts that a claimant for compensation under the Scheme must furnish the employer from whom compensation is claimed with true information as to his previous employment, & that, if the claimant withholds information, he shall forfeit any right to compensation under the Scheme. A workman, who had been certified by the certifying surgeon to be totally disabled by silicosis, claimed compensation from his employer. His claim having been refused, he brought arbn. proceedings, & in the initial writ furnished for the first time the particulars as to his previous employment required by para. 13 of the Scheme:—*Held*: there being in para. 13 no time limit within which the information must be furnished, the workman, having furnished it in the initial writ, was not in breach of para. 13; & accordingly, he had not forfeited his right to compensation.—*HENRY v. GLADSTONE, [1931] S. O. 228; 24 B. W. C. O. Supp. 1.—SCOT.*

**si. Disease result of "long exposure"**

**—Two certificates.]—**Industrial Diseases Order, 1929, para. 2, limits the right of a workman, who is disabled for certain forms of employment by the industrial disease of dermatitis produced by dust or liquids, to recover compensation to cases where the arbitrator is satisfied that the disease is the result of "long exposure" to dust & liquids.

A workman employed by rubber manufacturers as a tyre builder, an employment which exposed him to the fumes of benzene, was certified disabled by dermatitis, due to the nature of his employment, in Sept. 1934, & he received compensation as for total incapacity until Nov. 1935, when he obtained a National Health Insurance certificate of fitness for work, & his employers ceased payment. On Jan. 4, 1936, he was given work by the employers as a labourer to their electricians who were doing general repairs while the works were closed for the holidays & no tyre building was being carried on. Within three days, however, he again developed dermatitis, & was certified to be disabled as from Jan. 7, 1936. In arbn. proceedings the employers maintained that the second certificate of disablement could alone be regarded, & as that disablement was not the result of

"long exposure," the limitation in the Order applied. In awarding compensation as for partial incapacity, the arbitrator found that the workman had never wholly recovered from the original disablement in 1934, which was the result of "long exposure"; that his subsequent condition was one of increased susceptibility to another disabling attack; & that his disablement on Jan. 7, 1936, was due to that susceptibility in addition to the conditions under which he worked between Jan. 4 & Jan. 7.

In a question as to whether, in determining liability for compensation, the effects of the original disablement might be treated as a cause of the injury notwithstanding the second certified disablement:—*Held*: while the second certificate established that, as from Jan. 7, 1936, the workman was disabled from earning full wages through dermatitis, it could not be read as importing that he had recovered from the disease previously certified, & was consistent with the view that the later disablement was simply due to a recrudescence of the original disease, & accordingly, the arbitrator was entitled to make his award on the basis of an original injury by accident in Sept. 1934.—*MACNAMARA v. INDIA TYRE & RUBBER CO., [1937] S. O. 136.—SCOT.*

there was here no reasonable cause for the delay in making a claim. Appeal dismissed.—**HOLT v. HOBSON (ANDREW) & SONS (1930)**, 23 B. W. C. O. 242, C. A.

*Annotation*:—**Consd. Easterling v. Peck, Frean & Co.**, [1938] 2 K. B. 300.

**3801c. Order extending Workmen's Compensation Act, 1906 (c. 58), s. 8, to Ironworkers' cataract—Construction of Order.**]—*Held*: the proviso to Workmen's Compensation (Ironworkers' Cataract) Order, 1925, was not governed by the operative words in par. 2 which contained the absolute limit of six months in all, & where the incapacity was continuing, compensation could be allowed for the continuing incapacity. *Semble*: the absence of a bed in a ward or a vacancy in a place for an operation would be a good medical reason for the non-performance of an operation within the four months.—**DAVIES v. BALDWIN, LTD. (1928)**, 136 L. T. 462; 20 B. W. C. O. 116, C. A.

*Annotation*:—**Consd. Leonard v. Redbrook Tinplate Co.**, [1930] 1 K. B. 643.

**3801d. Right to compensation not limited to skilled workers.**]—*Appl.* was employed by resps., who were varnish manufacturers, as a general labourer. He was twenty-two years of age & his wages were £2 a week. His work was to help with the loading & unloading of vehicles, & clean & fill old varnish drums. In the course of his work he came into contact with rosin, turps, wood-oil, gum, etc., & he had to use turpentine for cleaning his hands as soap would not remove the dirt. In Dec. 1929, the certifying surgeon certified that he was suffering from dermatitis produced by dust & liquids & was thereby disabled for work. On a claim for compensation under the Act the county ct. judge awarded him a weekly sum for compensation from Dec. 7, 1929, until Feb. 1, 1930, when it was to be terminated. He held that *appl.* was not then disabled from earning full wages at the work at which he was employed; that he was employed as a labourer simply & that he had full capacity to perform all kinds of general labouring work; & that the wording of sect. 43 (1) (i) precluded *appl.*, who was a labourer, from recovering compensation as a worker in the varnish-making industry or otherwise than as a general labourer:—*Held*: the view taken by the county ct. judge that the workman did not come within sect. 43 was erroneous. There was nothing in the words of that sect. which limited its application to skilled workers in a process. It applied to any ordinary unskilled labourer who suffered from any industrial disease due to the nature of his employment, & who was thereby disabled from earning full wages at the work at which he was employed.—**GILMORE v. FREDERICK BOEHM, LTD. (1930)**, 99 L. J. K. B. 640; 143 L. T. 307; 46 T. L. R. 484; 74 Sol. Jo. 402; 23 B. W. C. O. 198, C. A.

**3801e. Extension of section to other diseases by Order in Council—Subject to modification—What amounts to modification.**]—1925 Act, s. 43 (3), gives the Secretary of State power to "make Orders for extending the provisions of this section to other diseases & other processes, & to injuries due to the nature of any employment specified in the Order not being injuries by accident, either without modification or subject to such

modifications as may be contained in the Order." Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, para. 1, extends the provisions of sect. 43 "subject to the modifications hereinafter specified," to (*inter alia*) cataract caused by exposure to rays from molten or red-hot metal. Para. 3 provides that "a person suffering from cataract shall not be entitled to compensation under the provisions of the said sect. on account of that disease for more than six months in all," subject to a power of extension at the discretion of the arbitrator acting on the advice of the medical referee:—*Held*: para. 3 was a "modification" within sect. 43 (3), & was therefore not *ultra vires*.—**LEONARD v. REDBROOK TINPLATE CO., LTD.**, [1931] A. C. 205; 100 L. J. K. B. 225; 144 L. T. 346; 47 T. L. R. 187; 23 B. W. C. O. 375, H. L.

**3801f. Metal Grinding Industries (Silicosis) Scheme—Necessity for employment on process when Scheme brought into force.**]—By para. 2 of Metal Grinding Industries (Silicosis) Scheme, which came into force on July 1, 1927, the Scheme is made to apply to any workman employed on or after that date in certain processes connected with the grinding of metals. By para. 7 the certifying surgeon is to certify the date of disablement, & by para. 4 the workman, to qualify for compensation, must have been employed in the specified processes within the three years previous to the certified date. By para. 5, where the workman has been employed in the processes for not less than five years, the onus is on the employer to prove that the disease is not due to employment in the processes instead of on the workman to prove that the disease is so due. A workman had been employed as a nail & tack maker for thirty-five years & as such had for many years to use a sandstone grindstone. On Feb. 7, 1930, the workman ceased work, & on Aug. 19, 1930, he was certified by the certifying surgeon to be suffering from silicosis, the date of disablement being fixed as Feb. 7, 1930. On a claim for compensation the county ct. judge found that, although the workman had not been employed in any process mentioned in para. 2 of the Scheme since the Scheme came into force, yet as he had been employed previously in such a process for not less than five years, he held that the employers had failed to discharge the onus put upon them by para. 5 of the Scheme, & therefore held that the disease must be deemed to be due to the employment. He accordingly made an award in favour of the workman. The employer appealed:—*Held*: by the finding of fact that the workman had not been employed in any process mentioned in the Scheme on or after the date when the Scheme came into force, the workman was not within the Scheme at all, & therefore para. 5 could not be made to apply to him. Appeal allowed.—**HUGHES v. HARRISON & COOK (1931)**, 24 B. W. C. O. 104, C. A.

**3801g. Date of disablement—No date in certificate—Date of accident.**]—Various Industries (Silicosis) Amendment Scheme, 1930, which came into force on Feb. 1, 1931, held applicable to a workman who ceased work by reason of silicosis on Dec. 27, 1930, for the



reason that no date of commencement of the disease was stated in the surgeon's certificate which was given on May 7, 1931.—*BRIDGES v. NEW ROCK COLLIERIES Co.* (1932), 101 L. J. K. B. 557; 25 B. W. C. C. 155, C. A.

**3801h.** — No wages earned within twelve months of date—Calculation of compensation.—Where a workman is certified to be totally disabled from silicosis & the date of disablement is more than two years after the date when he was last employed in a process coming within Metal Grinding Industries (Silicosis) Scheme, 1927, he can, in view of the proviso to para. 4, sub-para. 1, of the Scheme that "no compensation shall be payable if the workman has not been employed at any time in the processes within the three years previous to the date of total disablement," recover compensation from that last employer, notwithstanding that by para. 10 of the Scheme sects. 8 to 13 of Workmen's Compensation Act, 1925, are made applicable for the purpose of fixing the amount of compensation but with the exception that the amount of compensation is to be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable under the Scheme.

The provision in sect. 9 (2) of 1925 Act that the weekly payment of compensation in cases of total incapacity shall be fixed by reference to "the workman's average weekly earnings during the previous twelve months" must for the purpose of the Scheme be moulded so as to apply to the altered circumstances, by treating it as referring to the previous twelve months during which the workman was employed in a process coming within the Scheme.—*BACON v. WILLS (A. W.) & SONS, LTD.*, [1933] 2 K. B. 493; 102 L. J. K. B. 611; 149 L. T. 385; 49 T. L. R. 511; 26 B. W. C. C. 374, C. A.

*Annotation*.—*Apld. Cole v. Amalgamated Anthracite Collieries, Ltd.* (1933), 26 B. W. C. C. 569.

**3801j.** — — — — —.]—By para. 4 of Various Industries (Silicosis) Scheme, 1928, where a workman is certified as totally disabled from silicosis, & the disease is due to the employment in the processes whether under one or more employers, compensation shall be payable during such disablement as if the disease were a personal injury by accident arising out of & in the course of that employment. By para. 11 of the same Scheme the total disablement is to be treated as the happening of the accident. A collier working in a process to which this scheme applied, whose average weekly earnings were 56s. 8d. gave

up work in Nov. 1929, owing to illness which ultimately proved to be silicosis. From June, 1930, to March, 1931, he was re-employed by the same employers as a white-washer, work not within the scheme, at an average weekly wage of 45s. 4d. He was unemployed from Mar. 1931, to Nov. 1931, when he returned to work with them as a whitewasher. He ceased work owing to illness on Dec. 11, 1931. In May, 1932, a Medical Board certified him as totally disabled from silicosis, & fixed the date of disablement as Jan. 1, 1932. The workman claimed to be paid compensation based on his average weekly earnings as a collier, but the county ct. judge held that compensation should be based on the average weekly earnings for the twelve months immediately previous to the certified date of disablement, viz. on the lower rate paid to a whitewasher. The workman appealed:—*Held*: the combined effect of paras. 4 & 11 of the Scheme was to provide that compensation should be based on the average weekly earnings earned in the process which gave rise to the disease, & the words "previous twelve months" in sect. 9 (2) must be construed accordingly. The workman must therefore be paid compensation based on the higher rate of a collier.—*COLE v. AMALGAMATED ANTHRACITE COLLIERIES, LTD.* (1933), 26 B. W. C. C. 560, C. A.

**3802.** *Add. Annotation*.—*Apld. Young v. Keeble* (1928), 21 B. W. C. C. 294.

**3805.** *Add. Annotation*.—*Consd. O'Neil v. Wilsons & Clyde Coal Co.* (1926), 19 B. W. C. C. 656.

**3807.** *Add. Annotations*.—*Consd. Ellerbeck Collieries, Ltd. v. Cornhill Insurance Co.*, [1932] 1 K. B. 401. *Refd. O'Neil v. Wilsons & Clyde Coal Co.* (1926), 19 B. W. C. C. 656.

**3810.** *Add. Citations*.—[1927] A. C. 461; 96 L. J. K. B. 608; 137 L. T. 257; 71 Sol. Jo. 429; 20 B. W. C. C. 391.

*Add Annotations*.—*Consd. Ellerbeck Collieries, Ltd. v. Cornhill Insurance Co.*, [1932] 1 K. B. 401; *Bridges v. New Rock Collieries Co.* (1932), 101 L. J. K. B. 557. *Apld. Kilbride v. William Harrison, Ltd.* (1933), 26 B. W. C. C. 197; *Eaton v. Wimpey & Co.*, [1938] 1 K. B. 353. *Refd. McDougall v. Summerlee Iron Co.* (1927), 20 B. W. C. C. 419; *Smith (R.) & Son v. Eagle Star & British Dominions Insurance Co.* (1933), 150 L. T. 194.

**3811.** *Add. Annotation*.—*Refd. McNicholas v. West Leigh Colliery Co.* (1933), 26 B. W. C. C. 29.

#### PART XIV. SECT. 22, SUB-SECT. 2.

**3811a.** 1. *Silicosis—Construction of Various Industries (Silicosis) Scheme.*—A workman was employed as a "hewer" up to Dec. 1931, in a private quarry, his work within the curtilage of the quarry being to dress, for use as building material, sandstone which had been won from the quarry. The quarrymaster was a member of the Sandstone Industry Compensation Fund, Ltd., & had paid, since 1929, levies in respect of his employees, including the workman in question. In Jan. 1933, the workman was certified as suffering from disablement due to a process specified in para. 2 of Various Industries (Silicosis) Scheme,

1931, & he obtained an award of compensation against a firm of builders, his last employers in these processes. In a question whether the quarrymaster, as a previous employer of the workman, was liable to make contribution to the builders under para. 8 of the Various Industries (Silicosis) Scheme:—*Held*: (1) "manipulation" in the sense of para. 2 of Sandstone Industry (Silicosis) Scheme, was not restricted to any particular process of preparing sandstone, but included fine as well as rough dressing; (2) the work on which the workman had been engaged at the quarry, being that of fine dressing, was a process included in the Sandstone Scheme; (3) as the provisions of Various Industries (Sil-

cosis) Scheme, were, in these circumstances, excluded by the proviso to para. 2 of that Scheme, the quarrymaster was not liable as a contributor. Appeal allowed.—*ALEXANDER MILNE & SON v. MACLEAN & SON* (1935), 28 B. W. C. C. Suppt. 44.—*SCOT.*

*1. Pulmonary fibrosis—Whether caused by silica dust—Onus of proof.*—Sect. 7 (1) of New South Wales Workers' Compensation Act, 1926-29, provides for the payment of compensation by his employer to a workman who has received an injury, & by sect. 8 (1), "injury" means "personal injury arising out of & in the course of the employment & includes a disease so arising whether of sudden onset or of such a nature as to be contracted by



**3811a. Silicosis—Construction of Various Industries (Silicosis) Scheme, 1928.**—By clause 2 (vii) of Various Industries (Silicosis) Scheme, the scheme is made to apply to all workmen employed in the potteries in certain specified processes only. One of such specified processes is "any process in or incidental to the manufacture of china or earthenware, including sanitary earthenware, electrical earthenware, & ware tiles." A workman was employed to put spouts & handles on teapots made of Jet & Rockingham ware, & was certified as being totally disabled from silicosis. Evidence was given before the county ct. judge that Jet & Rockingham ware was a special branch of the pottery trade & did not come within the meaning of the trade term "earthenware"—*Held*: the words used in describing the processes specified in the scheme are to be interpreted in the technical sense in which they would be understood by those engaged in the trades concerned & not in the wide sense in which they might be understood by the general public.—*DONCASTER v. SUDLOW (R.) & SONS (1929)*, 22 B. W. C. C. 564, C. A.

**3811b. ———.**—*J*.—A coal miner was employed for eleven years, during which time he worked in rock known as "clift." He was then certified as being totally disabled from silicosis & claimed compensation under Various Industries (Silicosis) Scheme, 1928, as amended by Silicosis Amendment Scheme, 1930. The 1928 scheme excluded from the definition of silica rock in clause 2 (i.) of the scheme "any rock containing less than 50 per cent. free silica." These words were deleted by the Amendment Scheme, 1930. At the hearing of the arbn. the employers called a geologist who gave evidence that "clift" did not contain 50 per cent. free silica & was not silica rock. The county ct. judge accepted this evidence, & found that the workman had not been employed in work in silica rock, & therefore had not worked in any process covered by the scheme. The workman appealed:—*Held*: there was no evidence that "clift" was silica rock. The question was one of fact for the county

ct. judge.—*DAVIES v. OAKDALE NAVIGATION COLLIERIES, LTD. (1932)*, 25 B. W. C. C. 374, C. A.

*Annotation*:—*Reid, Morgan v. Amalgamated Anthracite Collieries, Ltd., Hutchings v. Amalgamated Anthracite Collieries, Ltd. (No. 2) (1934)*, 27 B. W. C. C. 313.

**3811c. ———.**—*J*.—A miner worked in his employer's collieries from 1910 to Apr. 26, 1929, when he had to cease work. In Dec. 1931, he was certified to be suffering from silicosis, & to have been disabled in Aug. 1931. His employer admitted that the disease was due to employment in the processes of drilling & blasting in silica rock, but alleged that his employment in such processes had ceased before Jan. 1, 1929. The Silicosis Scheme of 1928 only applied to workmen employed in such processes after Jan. 1, 1929. The county ct. judge, after seeing samples of the materials in which the workman had been working between Jan. 1, 1929, & Apr. 26, 1929, found as a fact that the workman had been engaged in drilling & blasting in silica rock after Jan. 1, 1929, & held that he was therefore entitled to the benefit of the Scheme. The employer appealed:—*Held*: there was evidence to support the finding & no misdirection. Whether the *quantum* of silica rock, in regard to which the workman was employed, is sufficient to bring him within the scheme, is a question of fact for the judge. Appeal dismissed.—*PRICE v. AMALGAMATED ANTHRACITE COLLIERIES, LTD. (1932)*, 25 B. W. C. C. 615, C. A.

*Annotations*:—*Reid, Morgan v. Amalgamated Anthracite Collieries, Ltd., Hutchings v. Amalgamated Anthracite Collieries, Ltd. (1933)*, 26 B. W. C. C. 573; *Morgan v. Amalgamated Anthracite Collieries, Ltd., Hutchings v. Amalgamated Anthracite Collieries, Ltd. (No. 2) (1934)*, 27 B. W. C. C. 313.

**3811d. ———.**—*J*.—A miner was employed after Jan. 1, 1929, until June 12, 1929, when he became disabled for work by silicosis as a rider on the trams in which silica rock was conveyed. A great deal of dust was created while the trams were moving. He would often have to handle the silica rock when the trams overturned. The county ct. judge found that the workman was employed in the process of handling or moving silica rock in or incidental to the processes specified in the scheme, & made his award for the

gradual process other than a disease caused by silica dust." Workmen's Compensation (Silicosis) Act, 1920, as amended, provides for the payment of compensation by the employers of workmen in specified industries & processes involving exposure to silica dust who suffer death or total or partial disablement from diseases of the pulmonary or respiratory organs caused by exposure to silica dust. "Coal-mining" is not included in the industries or processes so specified.

*Resp.*, who was employed by appts. as a miner in one of their coal-mines, became partially incapacitated for work owing to pulmonary fibrosis resulting from the inhalation of dust in the coal-mine. The Workers' Compensation Commission before whom his claim for compensation came, & who were not satisfied that the partial incapacity for work resulted from a disease caused by silica dust, awarded him compensation as for partial incapacity. On a case stated at the request of appts.:—*Held*: *resp.* was entitled to compensation. The intention of Workers' Compensation Act was, as appears from sect. 6 (1) to provide for compensation in every

case of injury, including disease, arising out of & in the course of a workman's employment, & to give effect to the Act the words "other than a disease caused by silica dust," must be read as inserted not to limit the Act, but to prevent it being appealed to in particular circumstances where the relief would overlap that provided by a special & narrower scheme. Till such overlapping appears its operation is unaffected. To hold otherwise would have the result that where the medical evidence showed that the disease was due to dust but could not specify the kind of dust, the workman would be left without any compensation at all though undoubtedly suffering from a disease arising out of & in the course of his employment. Coal-mining not being an industry brought within the operation of the Act dealing with silicosis, if disease in a coal-miner was affirmatively proved to be due to silica dust the workman was left unprotected, for in such case he would not come within either Workers' Compensation Act or Workmen's Compensation (Silicosis) Act.—*METROPOLITAN COAL CO., LTD. v. PYE, [1936] A. C. 343; [1936] 1 All E. R. 919; 105*

*L. J. P. C. 69; 154 L. T. 698; 80 Sol. Jo. 445.—AUS.*

*sh. Dupuytren's Contraction.*—A worker who had been employed in the hat-making industry for periods aggregating eighteen years, became incapacitated for work by Dupuytren's Contraction, a disease of gradual progress, & claimed compensation from his last employer in that industry, who denied liability. The Comrs. held that Dupuytren's Contraction is not in the same category as an industrial disease, for instance, lead poisoning, for the reason that the cause of lead poisoning may arise out of the employment, whereas the cause of Dupuytren's Contraction remains unknown; that the real question at issue was one of fact as to whether appt.'s employment in the felt hat industry was such as would aggravate the disease after its onset, accelerate its progress, & be a contributing cause to his incapacity for work. The Commission found that as the evidence did not establish any connection between appt.'s employment & his incapacity for work, his claim for compensation must be disallowed.—*HAMILTON v. R. C. HENDERSON & CO. LTD., [1934] W. C. R. 200.—AUS.*

workman. The employer appealed:—*Held*: there was evidence to support the finding & no misdirection. Appeal dismissed.—**WILLIAMS v. AMALGAMATED ANTHRACITE COLLIERIES, LTD.** (1932), 25 B. W. C. C. 634, C. A.

**3811e.** ———.—**BURGESS v. TREDEGAR IRON & COAL CO., LTD.** (1932), 25 B. W. C. C. 377.

**3811f.** ———.—By para. 2 (vii.) of Various Industries (Silicosis) Scheme, 1928, the scheme applies to all workmen employed on or after Jan. 1, 1929, in "any process in or incidental to the manufacture of china . . . up to & including the preparation for glazing." A workman was employed in the pottery trade as a glost oddman & wad-squeezer. He made wads of clay which were used to close the saggars in which the ware was placed, after having been dipped in the liquid glaze, for heating & hardening in the glost ovens. The workman was disabled by silicosis & applied for compensation. The county ct. judge found that the operation of glazing included the process of placing the ware in saggars & then placing the saggars in the glost ovens, but held that as the wads were actually made before this was done, the workman was employed in a process in or incidental to the manufacture of china up to & including the preparation for glazing. He therefore made his award for the workman. The employer appealed:—*Held*: on the facts found by the county ct. judge as to what processes constituted the operation of glazing, the making of the wads was a process which belonged to the operation of glazing itself & did not come within the words "any process . . . up to & including the preparation for glazing."—**ELLIS v. CARTWRIGHT & EDWARDS, LTD.** (1932), 25 B. W. C. C. 378, C. A.

**3811g.** 'Process involving exposure to silica dust'—*Question of fact.*—A miner was employed first as a ripper & later as a stallman in a coal mine from 1913 to 1930. As a stallman he was only occasionally employed in drilling & blasting. He ceased work in Nov. 1930; a medical board certified that he was suffering from silicosis accompanied by tuberculosis, & that total disablement commenced in Oct. 1931. The county ct. judge found as a fact that the workman had been employed since Jan. 1, 1929 (the date from which the Silicosis Scheme, 1928, applied), in the process of drilling & blasting within the meaning of the scheme, & that the stone in which he worked was silica rock within the meaning of the scheme as amended in 1930. He therefore awarded compensation. The employer appealed:—*Held*: there was evidence to support the findings & no misdirection. It is a question of fact for the judge whether the workman is sufficiently engaged in the operation under consideration to bring him within the scheme as being employed in a process specified therein.—**KILBRIDE v. WILLIAM HARRISON, LTD.** (1933), 26 B. W. C. C. 197, C. A.

**3811h.** ———.—If a workman's employment is such that he is from time to time employed in a process specified in the Various Industries (Silicosis) Scheme, 1931, & by reason of that employment of which the process forms a part he contracts the disease he is entitled to compensation.

Both Morgan & Hutchings did work breaking down shale which, though not silica rock in itself, contained small lenticles of quartz which became broken in the course of work. The county ct. judge found that the men were not employed in any process referred to in the Scheme. This award was affirmed by the Ct. of Appeal. The workmen appealed to the House of Lords:—*Held*: as the lenticles themselves were silica rock & were broken in the course of work, the workmen were within process (v) of Clause 2 referring to the breaking of silica rock. Appeal allowed.—**MORGAN v. AMALGAMATED ANTHRACITE COLLIERIES, LTD., HUTCHINGS v. AMALGAMATED ANTHRACITE COLLIERIES, LTD.** (1935), 28 B. W. C. C. 358, H. L.

*Annotations*:—**Apld.**: **Williams v. Oakdale Navigation Collieries, Ltd.** (1937), 30 B. W. C. C. 158. **Refd.**: **Wragg v. Fox (Samuel) & Co., [1937] A. C. 442.**

**3811j.** ———.—For twenty-two years a miner was employed in blasting & drilling stone. In Sept. 1928, he was employed by fresh employers as a stone ripper breaking friable shale. On July 7, 1933, he was certified to be suffering from silicosis. On a claim by him for compensation under Workmen's Compensation Act, 1925, & the Various Industries (Silicosis) Scheme, 1931, the employers denied that the disease was due to the nature of his employment by them. The workman alleged that he was employed in breaking a dry admixture containing a dry deposit or dry residue of silica, & was therefore brought within the scheme. The county ct. judge, after hearing the evidence of expert analysts accepted the evidence of the employers' expert, who stated that the shale was not a dry admixture containing a dry deposit or dry residue of silica, & held that the workman was not employed in any process within the scheme. The workman appealed:—*Held*: the question was one of fact, & there was evidence to support the finding & no misdirection.—**GLEDHALL v. DALTON MAIN COLLIERIES, LTD.** (1934), 27 B. W. C. C. 181, C. A.

**3811k.** ———.—Certain miners were certified by a medical board to be disabled by silicosis, but their employers refused to pay compensation on the ground that they had not been employed in any of the processes mentioned in Various Industries (Silicosis) Scheme, 1931. The contention of the employers was upheld by the county ct. judge who made his award in favour of the employers. The workmen appealed:—*Held*: the county ct. judge had not sufficiently considered whether the work in which the workmen were engaged might not come within those general "sweeping-up" clauses of the scheme which followed the clauses which specified more particularly the processes in which workmen must be engaged in order to obtain the benefit of the scheme & the cases must be remitted for him to do so.—**MORGAN v. AMALGAMATED ANTHRACITE COLLIERIES, LTD., HUTCHINGS v. AMALGAMATED ANTHRACITE COLLIERIES, LTD.** (No. 1) (1933), 26 B. W. C. C. 573, C. A.

*Wragg v. Fox & Co., [1936] 1 K. B. Ltd.*

**3811l.** ———.—The Various Industries (Silicosis) Scheme, 1931, specified in eight sub

paras. to para. 2 the processes with regard to which the Scheme should apply to all workmen employed in such processes.

The Various Industries (Silicosis) Amendment Scheme, 1934, directed that the Scheme of 1931 should be amended & take effect as if the processes specified in para. 2 of the said Scheme as the processes to employment in which the Scheme should apply, included: "Any operation underground in any coal mine":—*Held*: the amendment must take the form of an additional sub-para. to para. 2 of the Scheme of 1931 & could not be inserted after any particular sub-para. of para. 2; consequently the amendment made in 1934 was not subject to the proviso to sub-para. (iii.) of para. 2, under which the employer was freed from liability where he proved that the workman had not been exposed to the dust of silica rock.—*WRAGG v. FOX (SAMUEL) & Co., LTD., CHARLESWORTH v. FOX (SAMUEL) & Co., LTD.*, [1937] A. C. 442; [1937] 2 All E. R. 157; 106 L. J. K. B. 273; 157 L. T. 74; 53 T. L. R. 503; 81 Sol. Jo. 375; 30 B. W. C. C. 51, H. L.

**3811m.** —[A workman who had been employed in operating a power-driven machine used for drilling, cutting, ripping, or breaking stone in a coal mine, a process specified in the Various Industries (Silicosis) Scheme, 1928, as amended in 1930, was certified to be totally disabled by silicosis & claimed compensation. Under the provisions of the Scheme an employer could escape liability in respect of this process if he could prove that the workman had not, during the employment to which the disease was alleged to be due, been exposed to the dust of silica rock. Silica rock was stated to mean, *inter alia*, quartz. Evidence was given at the arbn. that there were particles of quartz in the stone in which the workman had been working. The county ct. judge found that the workman had been employed in a process within the Scheme & that the employers had failed to prove that the workman had not been exposed to the dust of silica rock & made his award for the workman. The employers appealed:—*Held*: there was evidence to support the findings of the county ct. judge & no misdirection on his part, although he had failed to find in terms that the silicosis was due to employment in the relevant process. Appeal dismissed.—*WILLIAMS v. OAKDALE NAVIGATION COLLIERIES, LTD.* (1937), 30 B. W. C. C. 158, C. A.

**3811n.** — **Employment under different schemes — Right of election.**—[By para. 5 of Various Industries (Silicosis) Scheme, 1931, it is provided that if the workman had been employed in the processes specified in that scheme for a period amounting to not less than five years, the disease shall be deemed to be due to employment in the processes unless the employer proves the contrary. By para. 4 (a) of Sandstone Industry (Silicosis) Scheme, 1931, it is provided that no compensation shall be payable if the medical board certifies that the silicosis could not have been contracted in the industry owing to the shortness of the time during which the workman has been employed therein.

A stonemason was certified under Various Industries Scheme to be totally disabled by silicosis from June 27, 1932. From July

1924, to Jan. 1931, he had been employed by G., & then for three years by S. From Apr. to June, 1931, he was employed by P. From July to Aug. 1931, he was again employed by G., & lastly, from Sept. 1931, to Mar. 1932, he was again employed by S. G. & P. were engaged in business to which Various Industries (Silicosis) Scheme applied, & S. was engaged in business to which Sandstone Industry (Silicosis) Scheme applied, but the work done by the workman for all the employers was of the same class & exposed him in all cases to silica dust. The county ct. judge dismissed a claim for compensation made against G. on the ground that the workman should have proceeded against the employers who last employed him working in silica dust. The workman appealed:—*Held*: the workman was entitled to elect to proceed under any scheme applicable provided he proceeded against the last employer who employed him in a process under that scheme. Therefore he was entitled to proceed against resps. who had employed him for 6½ years under Various Industries (Silicosis) Scheme, rather than against his last employer who had only employed him for short periods under Sandstone Industry (Silicosis) Scheme, & he was particularly justified in doing so in view of para. 5 of Various Industries Scheme, & para. 4 (a) of Sandstone Industry Scheme.—*VALE v. GODWIN (THOMAS) & SONS* (1933), 26 B. W. C. C. 90, C. A.

**3811o.** — **Construction of Metal Grinding Industries (Silicosis) Scheme.**—[By para. 2 of the Metal Grinding Industries (Silicosis) Scheme, 1931, the Scheme applies to the processes of (i.) grinding metals, (ii.) work incidental to grinding metals, & (iii.) racing grindstones for the purpose of grinding metals, provided that the Scheme does not apply to processes (i.) & (ii.) in the case of machine file grinding where the grindstone is enclosed & the metal immersed in water.

A machine file grinder died after being certified by a medical board as being disabled by silicosis. His duty was to grind files by means of an enclosed power-driven grindstone. Each grindstone lasted about a week. Before a fresh grindstone could be used it had to be freely revolved by him to see whether it was perfectly true. During this process the surface was smoothed, if necessary, by means of hacker saws. During the subsequent operation of grinding files the grindstone would require to have fresh inequalities removed from time to time by the same hacker saws. The widow claimed compensation on behalf of herself & her infant child as dependants. At the arbn. evidence was called that the process of revolving the grindstone before work on the files commenced was termed "racing" by the men engaged in the work. The employers' manager said that any use of the hacker saws was "hacking." The county ct. judge found that the preliminary use of the hacker saws was both "hacking" & "racing," & held that the process in which the workman was engaged was not exempted from the scheme. He therefore made his award for the widow. The employers appealed:—*Held*: the county ct. judge having found as a fact on sufficient evidence that

the preliminary use of the hacker saws was "racing" within the meaning of the scheme, it was a process to which the scheme applied & was not within the exemption stated in the proviso to para. 2.—**ROBERTS v. ENGLISH STEEL CORPN., LTD.** (1932), 25 B. W. C. C. 387, C. A.

**3811p.** —Time for making claim.]—By sect. 14 of 1925 Act, claims for compensation must be made within six months from the occurrence of the accident giving rise to the claim, unless the workman is prevented from making a claim within that time by (*inter alia*) a reasonable cause. By the Various Industries (Silicosis) Scheme, 1928, the date certified as the date of total disablement is to be treated as being the date of the occurrence of the accident. A miner contracted silicosis in 1930 & was certified as being partially disabled by that disease in 1931. His condition became worse, & he was unable to work, but, acting on the advice of his doctor, he abstained from applying for a certificate of total disablement until Apr. 1935. In that month a medical board certified that he had been totally disabled through silicosis as from Oct. 24, 1933. On Apr. 25, 1935, he gave notice to his employers of a claim for compensation:—*Held*: the facts justified the county ct. judge in holding that there was reasonable cause for the workman's failure to give notice of his claim within the prescribed period.—**GWILYM v. ABERBEEG COLLIERIES, LTD.** (1936), 155 L. T. 598; 80 Sol. Jo. 873; 29 B. W. C. C. 273, C. A.

*Annotation*:—**Redf.** *Easteling v. Peck, Fearn & Co.*, [1938] 2 K. B. 300.

**3811q.** *Dermatitis.*]—A dock labourer had been employed almost continuously for forty years in dealing with & handling oils, but in June, 1929, was discharged, owing to bad trade, & remained unemployed until July 31, 1930, when he was employed by fresh employers. In Oct., Nov. & Dec. 1930, he was employed in discharging & handling Russian turpentine. On Dec. 24 a certifying surgeon certified that he was suffering from dermatitis, & that the disease commenced on Dec. 8, 1930. He was paid full compensation, which was terminated on Nov. 7, 1931. He applied for a continuance of compensation. The county ct. judge found that he had contracted the disease through the long continued exposure involved in handling oils during the forty years ending in 1929, & therefore held that under para. 2 of Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, he was entitled to compensation although he was disabled only from handling oils, & made an award for the workman for 10s. a week. The employers appealed:—*Held*: the interpretation of the words "long continued exposure" was a question of fact & degree for the county ct. judge, & he had in no way misdirected himself. Appeal dismissed.—**HAGAN v. LONDON OIL STORAGE CO., LTD.** (1932), 25 B. W. C. C. 278, C. A.

**3811r.** —.]—A steel chipper had been employed for seventeen years without having suffered from any skin disease. On Aug. 18, 1933, he had to give up his work owing to skin trouble, & on Oct. 17, 1933, he was certified to be suffering from dermatitis produced by dust or liquids as from Aug. 27, 1933. In Aug. neither he nor his panel doctor connected his

disease with his employment. He gave notice to his employers of the disease in Oct. 1933, but did not make a claim for compensation until Mar. 1934. In his evidence the panel doctor said he thought the skin trouble was due to the employment & added that he saw no other cause. The certifying surgeon was called by the employers & stated that the disease was not due to industrial infection but was a seborrhoeic infection not due to occupation. The county ct. judge said that after carefully considering the evidence he was not satisfied that the dermatitis was caused by the employment, & he thought that the dermatitis was caused by some agency not connected with the employment. He accordingly made his award for the employers. The workman appealed:—*Held*: there was no misdirection on the part of the county ct. judge, & evidence to support his finding.—**HOLFORD v. STEEL, PEECH & TOZER, LTD.** (1934), 27 B. W. C. C. 260, C. A.

**3811s.** —.]—In May, 1933, a workman began work in dye works as mate to a dyer. In October, 1933, eruptions having appeared on his hands, he was certified by a certifying surgeon to be suffering from dermatitis produced by dust or liquids, but the certificate was never served on the employers. At about the same time he was examined by a dermatologist, who formed the opinion that the workman was suffering from seborrhoeic eczema, an idiopathic type of dermatitis, & not from dermatitis due to dust or liquids. In Jan. 1934, the workman went back to work, but the eruptions reappeared, & in Feb. 1934, the certifying surgeon again certified the workman to be suffering from dermatitis produced by dust or liquids, the certificate being this time served on the employers who paid him compensation until Mar. 1934, when they gave him work as a van boy. In Mar. 1935, slight touches of rash appeared on the neck & chin, & he was re-examined by the dermatologist, who was of opinion that "he was suffering again from seborrhoeic eczema." The certifying surgeon refused to give him another certificate, & in May, 1935, the workman got employment with other employers in a canteen. In Dec. 1935, a rash having reappeared on his arms & neck, the workman filed a request for arbn. On the hearing of the arbn. the certifying surgeon & another doctor who were called by the workman, stated that in their opinion the workman was at that time suffering from dermatitis produced by dust or liquids. The dermatologist who was called by the employers gave it as his opinion that the workman had suffered both in Oct. 1933, & in Mar. 1935, & was still suffering, from seborrhoeic eczema & nothing else. His evidence was corroborated by another dermatologist. The county ct. judge found that the workman had fully recovered from the dermatitis produced by dust or liquids which had been certified in Feb. 1934, & that since Mar. 1935, he had only suffered from seborrhoeic eczema & made his award for the employers. The workman appealed:—*Held*: there was evidence to support the findings, & no misdirection. Appeal dismissed.—**STANFORD v. FLINN & SON, LTD.** (1936), 29 B. W. C. C. 126, C. A.

*Annotation*:—**Redf.** *Burgin v. Earl Fitzwilliam's Collieries Co.* (1937), 30 B. W. C. C. 419.

**3813. Add. Annotation :—***Consd. Edwards v. Penrhiceiber Navigation Colliery Co.* (1931), 24 B. W. C. C. 117.

**3814. Add. Citations :—**[1928] 1 K. B. 291; 96 L. J. K. B. 347; 137 L. T. 26; 91 J. P. 43; 21 B. W. C. C. 226.

**3815a. ————.]—**A certificate of disablement granted to a workman under 1925 Act, s. 43, certified as the date of disablement a date more than six months before the date of the certificate. Consequently a claim by the workman for compensation founded upon the certificate was not made within the period prescribed by 1925 Act, s. 14 (1), namely, six months from the occurrence of the accident, the disablement being treated by sect. 43 as the happening of the accident. If the certificate had been granted immediately after the examination of the workman by the certifying surgeon the claim for compensation could have been made in time:—*Held*: on the facts, the failure to make the claim within the prescribed period was due to the delay of the certifying surgeon &, so far as the workman was concerned, was occasioned by reasonable cause, within proviso (b) to sect. 14 (1), & the workman was entitled to compensation.—*KITCHEN v. KOCH (C.) & Co., LTD.*, [1931] A. C. 753; 100 L. J. K. B. 459; 145 L. T. 618; 47 T. L. R. 558; 75 Sol. Jo. 571; 24 B. W. C. C. 294, H. L.

*Annotation :—Consd. Easterling v. Peck, Freen & Co.*, [1938] 2 K. B. 300.

**3815b. Omission of date of disablement.]—***WILLIAMS v. NEW BRITISH RHONDDA COLLIERY CO., LTD.*, No. 3038b, *ante*.

**3816. Add. Annotations :—***As to (2) Consd. Cauldon Potteries v. Johnson* (1926), 20 B. W. C. C. 42. *Apld. Young v. Keeble* (1928), 21 B. W. C. C. 294.

**3816a. Certificate of death—Various Industries (Silicosis) Scheme, 1928—Whether presence of medical referee at post-mortem essential.]—**By clause 14 (1) of Various Industries (Silicosis) Scheme, 1928, it is provided that where an application is made on behalf of dependants of a deceased workman to a medical referee for a certificate that death has been due to silicosis or silicosis & tuberculosis, the medical referee must, after a post-mortem examination, give a certificate in accordance with the facts & such certificate shall be conclusive. It is further provided by the same paragraph that the post-mortem

examination shall, if possible, be made by or under the personal supervision of the medical referee. The last provision is directory & not imperative. Therefore, where, on the death of a workman, a coroner ordered a post-mortem examination, which the medical referee was not invited to attend, & subsequently, after an examination of portions of the lungs, the medical referee gave a certificate that death was due to silicosis & tuberculosis:—*Held*: (1) the provisions of clause 14 (1) of the Scheme were complied with & the certificate was conclusive; (2) *further*, the correct procedure to quash a certificate would be to obtain a rule *nisi* for a writ of *certiorari*.—*HINDMARSH v. JOHNS (EDWARD) & Co., LTD.* (1930), 23 B. W. C. C. 537, C. A.

**3816b. Application for certificate—Notice to employer—Necessity for.]—**A workman employed in the process of cotton-spinning by means of self-acting mules noticed a black pimple on his scrotum. His panel doctor who happened also to be the certifying surgeon for the district, suspected epitheliomatous cancer (being item 13 (a) in the Extension of Sched. III) & sent him to the infirmary where the diagnosis was confirmed. The workman obtained a certificate of disablement by such disease & notice thereof was given to the employer. The employer appealed to the medical referee. The workman then had the pimple removed & sent for microscopic examination, & the report of the examination was sent to the medical referee. As a result the medical referee reported that the workman was not suffering from epitheliomatous cancer but from a keratotic condition. By the Workmen's Compensation (Industrial Diseases) Order, S. R. & O., 1932, No. 314, this condition was placed within Sched. III as an industrial disease, but it was also provided in the Order that compensation should not be payable under the Act for that disease unless at least one week's notice of intention to apply for a certifying surgeon's certificate had been given to the employer. No such notice had been given, & on that ground the employer refused to pay compensation. On the workman's application for compensation the county ct. judge held that the notice was a condition precedent to claiming compensation & made his award for the employers. The workman appealed:—*Held*: under the special provisions of the Order, the requirement as to

PART XIV. SECT. 22, SUB-SECT. 3.—  
A.

*sk. Certificate granted by wrong surgeon—Whether agreement to pay without certificate.]—*A workman was certified by a certifying surgeon to be suffering from dermatitis, & his employers paid him compensation until, as a result of a medical examination, they ceased such payment. In an arbitration at the workman's instance to determine the existence & extent of liability to pay compensation, it appeared at the proof that the certificate had been signed by the certifying surgeon for the district in which the workman lived & not for that in which he was employed. The arbitrator having found (a) that the employers were under agreement to pay compensation without requiring a certificate, as provided for by sect. 44 (2); (b) that the disease was due to the nature of the workman's employment in terms of

para. 2 of the 1929 Order, & having continued the arbn. proceedings:—*Held*: (1) the certificate of the certifying surgeon was invalid in respect that it did not conform with the requirements of sect. 43 (1) of 1925 Act; (2) on a construction of sect. 44 (2) of 1925 Act, the employers had not agreed to pay compensation "without requiring" the workman to produce a certificate, in respect that compensation had been paid on the faith of a certificate subsequently discovered to be invalid; (3) the arbitrator, in the absence either of a valid certificate or of a valid agreement under the Act, was not entitled to find that the disease was due to the nature of the employment; & (4) the arbn. proceedings ought not to have been continued but ought to have been sisted in order that the evidence already obtained might be available to either party in the event of the workman taking further action

by proposing either a valid certificate or a memorandum of agreement.

Opinions, *per* LORD MACKAY & LORD WARK, that an agreement which did not fall within the terms of sect. 44 (2) would not entitle the workman to recover compensation under the Act.

Opinion, *per* the Lord Justice-Clerk, that an employer who paid compensation on the basis of formally invalid certificate might, in certain circumstances, be barred from founding on its invalidity.—Appeal allowed.—*M'QUADE v. INDIA TYRE & RUBBER CO.*, [1937] S. C. 422.—SCOT.

PART XIV. SECT. 22, SUB-SECT. 3.—  
B.

*so. Failure to show disablement due to disease—Omission of word "thereby."—Held*: fatal.—*BROKEN HILL ASSOCIATED SMELTERS PROPRIETARY, LTD. v. VELLA*, [1927] S. A. S. R. 49.—AUS.

notice was a condition precedent to the payment of compensation & could not be excused. The workman must be deemed to know that his application to the certifying surgeon might result in his obtaining a certificate of disablement by this disease. Appeal dismissed. Leave to appeal to the House of Lords refused.—*HASLAM v. SELBY MILL, LTD.* (1935), 28 B. W. C. C. 82, C. A.

**3818a.** ———.]—A french polisher had suffered intermittently from dermatitis since 1925, while working for different employers. The medical referee issued a certificate on Jan. 30, 1928, in which he certified that on Jan. 30, 1928, appct. was no longer disabled by dermatitis. On Mar. 10, 1928, appct. was examined by the certifying surgeon, who on that date certified that she was suffering from dermatitis & had been disabled thereby since Sept. 29, 1927. On a claim by the workman for compensation based on the certifying surgeon's certificate of Mar. 10, 1928, the county ct. judge held the two certificates, being inconsistent, the certificate of the medical referee must prevail to the effect that the workman was not disabled after Jan. 30, 1928:—*Held*: there was no vital inconsistency between the two certificates, bearing in mind the intermittent character of dermatitis, & the certificate of Mar. 10 was consistent with dermatitis having broken out again.—*MACY v. CORK MANUFACTURING CO., LTD.* (1928), 21 B. W. C. C. 306, C. A.

*Annotation*.—*Consd. Williams v. Crawshaw Bros. (Cyfarthfa)* (1929), 22 B. W. C. C. 233.

**3819a. Certificate incomplete—Death of certifying surgeon—Subsequent certificate by successor—Validity.**—On July 12, 1926, eighteen months after the workman had left his employment, Dr. S., the certifying surgeon of the district, certified that the workman was suffering from lead poisoning. The certificate did not comply with the regulations as no date of disablement was filled in, nor were the words "I certify that the disablement commenced on the day of " struck out. Before the workman could see Dr. S. to have the omission put right the doctor died. After Dr. F. had been appointed in his place the workman, on Aug. 12, 1926, obtained a certificate from him in which the date of disablement was filled in as Nov. 23, 1924. In answer to the workmen's request for arbn., based on Dr. F.'s certificate, the employers denied liability to pay compensation on the ground that, as Dr. S.'s certificate did not specify the date of disablement, such date was deemed to be the date of the certificate, & was final & conclusive, & Dr. F.'s certificate was accordingly invalid, & as the workman had not been in their employment for more than twelve months prior to that date of disablement, he could not recover compensation. The county ct. judge upheld that contention:—*Held*: the first certificate was incomplete in that it had not dealt with the date of disablement in either manner provided by the regulations & was invalid, & the workman,

not being able by reason of the death of Dr. S. to have the matter put in order, was entitled to rely on the second certificate.—*POWELL v. CAULDON POTTERIES, LTD.* (1926), 96 L. J. K. B. 245; 136 L. T. 532; 20 B. W. C. C. 16, C. A.

*Annotation* :—*Fold. Hands v. Great Western Colliery Co.* (1930), 23 B. W. C. C. 477.

**3819b. Certificate ineffective—Issue of second certificate.**—A miner was certified by the certifying surgeon as being disabled from Mar. 31, 1924, by miner's nystagmus. From Oct. 1924, to Mar. 1929, he worked on the surface as a partially incapacitated workman. On Mar. 8, 1929, he was served under 1925 Act, s. 12 (3) with a doctor's certificate alleging complete recovery, & the question was ultimately referred to a medical referee, who, in Apr. 1929, certified that the workman was not then suffering from miner's nystagmus & was fit to resume work underground. On Dec. 12, 1929, the workman obtained from the same certifying surgeon a certificate that he was disabled by miner's nystagmus, but the certificate did not certify a date from which disablement commenced, nor were the words "& I certify that the disablement commenced on the day of " struck out in accordance with the instructions contained in Form 3 in the schedule to the regulations as to certifying surgeons, which states "[if the surgeon is unable to certify a date on which the disablement commenced, he should strike out this part of the certificate. In that case the disablement will be deemed to have commenced on the date on which this certificate is given]." On obtaining this certificate the workman made a claim for compensation on his employers, who appealed to a medical referee. The medical referee on Jan. 4, 1930, dismissed the employer's appeal. The certifying surgeon then issued a second certificate which he ante-dated Dec. 12, 1929, & in which he certified that the workman's disablement commenced on Mar. 31, 1924. In Mar. 1930, the workman filed an application for arbn. based on an allegation of recurrence of the industrial disease which originally manifested itself in 1924. The county ct. judge made an award in favour of the employers on the ground that the date of disablement must be taken to be Dec. 12, 1929, & that the certifying surgeon had no power to displace the certificate given on Dec. 12, 1929, by the certificate given in Jan. The workman appealed:—*Held*: the certificate of Dec. 12, 1929, was ineffective, as no date of disablement could be inferred from it, & the certifying surgeon was entitled to issue an effective certificate giving the date of disablement as Mar. 31, 1924. Case remitted for compensation to be awarded.—*HANDS v. GREAT WESTERN COLLIERY CO., LTD.* (1930), 23 B. W. C. C. 477, C. A.

**3820. Add. Annotations** :—*Apld. Cauldon Potteries v. Johnson* (1926), 20 B. W. C. C. 42. *Consd. Davies v. Baldwins* (1926), 136 L. T. 462. *Apld. Young v. Keeble* (1928), 21 B. W. C. C.

certificate was dismissed by the medical referee. In an arbn. the arbitrator, after a proof, held that the disablement had commenced on a date earlier than that certified by the certifying surgeon, & more than twelve months before the workman entered his new employment

PART XIV. SECT. 22, SUB-SECT. 3.—C.

*sf. As to date of commencement of disease.*—A miner, who had previously suffered from miner's nystagmus, obtained work from new employers.

Shortly after entering this employment he obtained from a certifying surgeon a certificate that he was disabled owing to miner's nystagmus, & that disablement had commenced on a date since he entered his new employment. An appeal by the employers against the



294. *Consd. Timmins v. Brodsworth Main Colliery Co.*, [1934] 2 K. B. 361; *Stanford v. Flinn & Son, Ltd.* (1936), 29 B. W. C. C. 126.

3821a. ———.]—A certificate was given by the certifying surgeon that a workman was suffering from lead poisoning. A leading symptom of the disease was stated on the form to be dupuytren's contraction. Full compensation was paid until an application by the employers to review the weekly payments. The workman was still incapacitated by dupuytren's contraction. The county ct. judge refused to treat the certificate as conclusive as to dupuytren's contraction being a symptom of lead poisoning, & on contradictory medical evidence given at the hearing, & also on knowledge he had acquired some years before while sitting on a commission to consider industrial diseases, including dupuytren's contraction, held the symptoms, though still the same as those set out in the certificate, were not due to the certified disease, & reduced the compensation to 1*d.* a week. The case involved a point of law, & early in the hearing, counsel called attention to that fact, but the judge omitted to take any notes of the proceedings:—*Held*: (1) the certificate that the symptoms were due to the certified disease was conclusive, & evidence to the contrary was inadmissible, & there was no evidence of any new factor or new disease to support an award in reduction of compensation. (2) Observations on the judge's duty to take a note.—*CAULDON POTTERIES, LTD. v. JOHNSON* (1926), 20 B. W. C. C. 42, C. A.

*Annotations*:—*As to* (1) *Apld. Young v. Keeble* (1928), 21 B. W. C. C. 294. *Consd. Dunn v. Dorman, Long & Co.* (1933), 26 B. W. C. C. 593.

3821b. *As to cause of death or incapacity.*—A workman, employed as a painter, was from July to Sept. 1927, laid up with an ulcer on his ankle & with heart trouble. From Oct. 19 onwards he became unfit for further work with loss of power in his left arm & leg, he became mentally incapable, his memory failed, & his heart got worse. On Nov. 15 he was admitted to hospital, where the medical superintendent found that he had long-standing disease of the heart caused by kidney trouble. On Nov. 23, the certifying surgeon visited the hospital, & on Nov. 28 certified that the workman was suffering from lead poisoning or its sequelæ & had been disabled as from Oct. 19. The medical superintendent was ignorant both of the visit & of the certificate of the certifying surgeon & when the workman died on Dec. 23 certified that the cause of death was cerebral hæmorrhage caused by valvular disease of the heart. The county ct. judge held he was not bound to find that death was due to the disease certified by the certifying surgeon.

& refused compensation:—*Held*: the date of disablement stated in the certificate of the certifying surgeon was conclusive.—*TENNENT v. MOORE (A.-G.) & Co., LTD.*, (1929) S. C. (Ct. of Sess.) 7.—*SCOT*.

*al. As to recovery.*—In an application by a workman for compensation in respect of certified disablement by an industrial disease, the matter of the claimant's condition & fitness for employment was referred to a medical referee in terms which specially directed the attention of the referee

& refused to make an award in favour of the dependants, on the ground that they had not discharged the *onus* of proving that lead poisoning either caused, contributed to, or accelerated death:—*Held*: there was evidence to support the finding, & no misdirection.—*YOUNG v. KEEBLE, LTD.* (1928), 21 B. W. C. C. 294, C. A.

*Annotations*:—*Refd. Timmins v. Brodsworth Main Colliery Co.*, [1934] 2 K. B. 361; *Britton v. Leveron's Wallsend Collieries* (1934), 27 B. W. C. C. 46.

3821c. ———.]—An odd job man in spinning mills was certified as suffering from epitheliomatous ulceration of the skin due to mineral oil. He died five months later. The county ct. judge held the certificate of the certifying surgeon was conclusive & debarred him from hearing any evidence on behalf of the employers, which tended to show that he had not contracted the disease in their employment & that death did not result from the disease:—*Held*: the judge was not entitled to refuse to hear the evidence, & the case must be remitted for rehearing.—*NEEDHAM v. ACE MILL, LTD.* (1928), 21 B. W. C. C. 189, C. A.

*Annotation*:—*Refd. Timmins v. Brodsworth Main Colliery Co.*, [1934] 2 K. B. 361.

3821d. *As to date of disablement.*—The certificate which a workman must obtain from the certifying surgeon under 1925 Act, s. 43, as a condition precedent to a claim for compensation on the ground of disablement by an industrial disease is conclusive as to the date of disablement, & it is therefore not competent for the arbitrator to determine that the disablement commenced at an earlier date.—*WILSONS & CLYDE COAL CO., LTD. v. FLYNN*, [1930] A. C. 516; 99 L. J. P. C. 139; 143 L. T. 362; 46 T. L. R. 441; 74 Sol. Jo. 437; 23 B. W. C. C. 159, H. L.

*Annotations*:—*Consd. Penrikyber Navigation Colliery Co. v. Edwards*, [1933] A. C. 28; *Timmins v. Brodsworth Main Colliery Co.*, [1934] 2 K. B. 361; *Richards v. Goskar*, [1937] A. C. 304. *Apld. Eaton v. Wimpey & Co.*, [1938] 1 K. B. 353.

3821e. ———.]—Pltfs., who were a colliery co., had in their employment early in 1929 two piece-work miners who, for reasons not here material, were not actually working & received no wages, though their names appeared in the pay sheets, for a period including Mar. 8 to Mar. 19. On Mar. 8 deft. insurance co. issued to pltfs. a cover note which insured pltfs. from Mar. 8 to Mar. 19 against claims for non-fatal accidents. During the currency of the cover note the certifying surgeon certified that the two workmen were suffering from miners' nystagmus & fixed the date of the beginning of the disablement as Mar. 11 in one case & Mar. 12 in the other case. The county ct. judge awarded both workmen compensation, but defts. refused to indemnify pltfs. on the grounds that the workmen suffered no injury

to the question of the claimant's proneness to a recurrence of the disease. The referee certified that the claimant had wholly recovered & was fit for his ordinary work; & he further certified that there was no reasonable probability of a recrudescence of the disease, & no increased susceptibility to a fresh attack. Thereafter the workman lodged a minute, in which he averred that his certified condition was such that it was possible that he might become incapacitated through a recrudescence of the disease, & that a

recrudescence had in fact occurred; & he craved the arbitrator to allow proof of the averments in his minute. The arbitrator having ended compensation:—*Held*: as the reference had displaced the arbn. as regarded inquiry into the workman's condition, & as the referee's certificate provided sufficient & conclusive evidence as to that condition, the only course open to the arbitrator was to end the compensation.—*Appeal dismissed.*—*CARRUTH v. GALBRAITH'S STORES*, [1937] S. C. 382.—*SCOT*.



between Mar. 8 & Mar. 19 & were not engaged in work for plffs. between those dates. In an action for an indemnity:—*Held*: the policy, though not actually issued, was intended to cover plffs.' liability for the results of industrial disease, & as an "accident," namely, disablement by industrial disease, had happened within the period of cover, & as the Act created the statutory fiction that a workman, at the date of the certified disablement, was employed by the last relevant employer before that date, defts. were liable to indemnify plffs.—*ELLERBECK COLLIERIES, LTD. v. CORNHILL INSURANCE CO., LTD.*, [1932] 1 K. B. 401; 101 L. J. K. B. 117; 146 L. T. 153; 48 T. L. R. 78; 24 B. W. C. C. 376, C. A.

*Annotation*:—*Consd. Bridges v. New Rock Collieries Co.* (1932), 101 L. J. K. B. 557.

**3821f. Failure to give notice of disablement.]**

—A workman was employed by resp. as a labourer at breaking up concrete floors & relaying them. After varying periods of employment he ultimately stopped work on July 22, 1929, & on July 30 obtained a certificate from the certifying surgeon that he was disabled from dermatitis contracted during his employment by resp., & fixing the date of disablement as Mar. 14, 1929. Resp. paid the workman compensation till Nov. 19, 1929, when resp.'s doctor reported that the workman had practically recovered & was fit for any work except on cement. Resp. then employed the workman at other work till Dec. 24, 1929, when he was dismissed for want of work. After a period of unemployment the workman obtained work in Apr. 1930, with new employers in unloading lorries containing old iron, rags & bones. By May 2 the dermatitis had become so bad that he had to cease work. On Aug. 28, 1930, he obtained a second certificate from the certifying surgeon that he was suffering from dermatitis, but fixing the date of disablement at the date of the original disablement, Mar. 14, 1929. On this occasion no notice of disablement was given to resp., & he remained unaware of the certificate till the workman commenced the present proceedings against him for compensation on Sept. 19, 1930. The county ct. judge declined in the circumstances to treat the second certificate as conclusive of the date of disablement in accordance with 1925 Act, s. 43 (2), & on the evidence that the workman had recovered from the disablement of Mar. 14, 1929, by Nov. of that year, dismissed the application. On appeal:—*Held*: (1) as no notice of disablement had been given after the second certificate as required by 1925 Act, s. 14 & r. 41, sub-r. 2, of Workmen's Compensation Rules, 1926, so that resp. was never given the opportunity of appealing to the medical referee as provided by reg. 8 of the Regulations as to Certifying Surgeons, the certificate was not conclusive of the date of disablement; (2) as there was evidence to support the county ct. judge's finding that the workman had recovered from the old disablement, the appeal must be dismissed.—*MASON v. FOSTER*, [1931] 2 K. B. 172; 100 L. J. K. B. 395; 145 L. T. 88; 24 B. W. C. C. 88, C. A.

*Annotation*:—*As to (1) Reff. Britton v. Leverson's Wallsend Collieries* (1934), 27 B. W. C. C. 45.

**3821g.** .]—A glass-blower had been employed by S. for thirty years & had become a highly skilled worker. His employment terminated in Apr. 1931, & he was out of work. On Aug. 16, 1932, he was taken on as a glass-blower on trial by W. & C. with a view to being permanently employed if his work should prove satisfactory. The proportion of his spoiled work was so high that he was dismissed on Aug. 17, 1932. In Oct. 1932, he obtained a certificate from a certifying surgeon which stated that he had been disabled by "cataract in glass-workers" since Aug. 12, 1932, & gave the name of his last employer as S. A claim made by him against S. failed for the reason that more than twelve months had elapsed between the end of his employment with S. & the date of his disablement. He then obtained a fresh certificate in Jan. 1933, in which the certifying surgeon altered the date of disablement to Aug. 17, 1932, & the name of his last employer to W. & C. The workman now made a claim against W. & C. for compensation for partial incapacity. The county ct. judge held that there was no loss of earning capacity because he was already suffering from cataract when he entered into employment with W. & C., & the high proportion of rejected work showed him to have become reduced in skill to the level of a glass-blower's labourer. He therefore only awarded him a declaration of liability. The workman appealed:—*Held*: the county ct. judge was wrong in admitting evidence to show that the man was disabled from the disease before the date of disablement which appeared in the second certificate which was conclusive on this point. The matter must be remitted to estimate the compensation to which the man was entitled on this basis.—*KIRKHAM v. WEBB & CORBETT, LTD.* (1933), 26 B. W. C. C. 425, C. A.

**3821h.** —.]—From June, 1935, applt. was working for H. K. & F., Ltd. In Mar. 1936, he developed a rash, but continued in that employment at full wages until May 2, when he began to work for the resp. He worked for resp. until May 9, when he felt too ill to continue. On June 4 he obtained a certificate from the certifying surgeon who certified that he was suffering from dermatitis & gave May 9 as the date of the beginning of the disablement. Resp. appealed to the medical referee who decided that applt. was, when examined by the certifying surgeon, suffering from dermatitis, but fixed Apr. 6, 1936, as the date on which the disease began. At that date applt. was, as stated, working for H. K. & F., Ltd., & receiving full wages. Applt. sought to recover compensation from resp.:—*Held*: the medical referee's certificate was final & conclusive as to the date of the beginning of the disease & applt. was not entitled to endeavour to displace that certificate by showing that on a certified matter it was not in accordance with the facts.—*SAVAGE v. NIGHTINGALE*, [1937] 3 All E. R. 30; 30 B. W. C. C. 299, C. A.

**3821j.** *As to extent of disability.*]—A miner was certified to be suffering from miner's nystagmus & for a short time received full compensation. On a reduction being made in the weekly payment the workman commenced proceedings claiming restoration of full

compensation. The employer then applied for a reference to the medical referee who reported that the workman had partially recovered & was fit for surface work. The hearing of the claim had meanwhile been postponed, but when it came on for hearing medical evidence was given on behalf of the workman to the effect that the workman was totally disabled by the disease. Objection was taken by the employer to this evidence on the ground that the medical referee's certificate was conclusive. The county ct. judge held that miner's nystagmus being a nervous disease & variable in its symptoms, he was entitled to find that there had been a change for the worse since the medical referee had made his report, & he accordingly made his award for the workman on the basis of total incapacity. The employer appealed:—*Held*: there was evidence to support the finding of fact & no misdirection. Appeal dismissed.—*ROBERTS v. DENABY & CADEBY MAIN COLLIERIES, LTD.* (1935), 28 B. W. C. C. 112, C. A.

**3822a. Where possibility of recurrence.]**—*PENRIKYBER NAVIGATION COLLIERY CO., LTD. v. EDWARDS*, No. 3832b, *post*.

**3822b. Where disease gradual.]**—In the case of an industrial disease which is of such a nature as to be contracted by a gradual process, a certifying surgeon's certificate is only conclusive as to the fact that at the certified date of disablement the workman was disabled by the disease as specified therein, & a former employer cannot be held liable to contribute towards the compensation payable by the later employer until it is at least proved by the later employer that the disease was due to the nature of the employment under the former employer.—*LEWIS & TOWERS, LTD. v. SEMBLIZ* (1934), 27 B. W. C. C. 125, C. A.

**3822c. Various Industries (Silicosis) Scheme, 1931—Examination & certification by Medical Board—When certificate conclusive—Re-examination not made “in pursuance of any Compensation Scheme.”]**—A pottery worker to whom Various Industries (Silicosis) Scheme, 1928, applied ceased work on Sept. 25, 1930. On Sept. 30 the certifying surgeon certified that he was totally disabled from silicosis & that the disablement commenced on Sept. 25. An appeal by the employer to the medical referee having been dismissed, compensation on the basis of total incapacity was paid to the workman. On June 1, 1931, there came into force Silicosis & Asbestosis (Medical Arrangements) Scheme, 1931, which instituted a medical board to deal with Silicosis, & Various Industries (Silicosis) Scheme, 1931. By the preamble to Various Industries (Silicosis) Scheme, 1931, the 1928 Scheme was made to continue to apply in the case of workmen who were within that scheme with the exception that the provisions of the new scheme as to the examination & certification by the medical board were substituted for the provisions of the former scheme as to the examination & certification by the certifying surgeon & medical referee. This preamble further stated that the medical board shall have the same powers & duties in cases under the old scheme as under the new scheme. By para. 12 of Various Industries (Silicosis) Scheme, 1928, & para. 11 of Various Indus-

tries (Silicosis) Scheme, 1931, the provisions of the 1925 Act relating to submission to medical examination continued to apply to workmen within the respective schemes. By a proviso to para. 11 of the 1931 Scheme any reference to be made to a medical referee under the provisions of the 1925 Act was to be made to the medical board. By para. 9 of Silicosis & Asbestosis (Medical Arrangements) Scheme, 1931, where, “in pursuance of any compensation scheme” an employer applied to a medical board for re-examination of a workman under that scheme or any compensation scheme, the board should re-examine & give a fresh certificate in the appropriate form. On Sept. 9, 1931, the employer applied to the medical board for re-examination of the workman. The workman having submitted under protest to such re-examination, the medical board, on Oct. 21, certified that he was no longer totally incapacitated. The employer thereupon refused to pay further compensation, & on Oct. 26, 1931, the workman filed a request for arbitration claiming a continuance of the weekly payments. The county ct. judge held that the certificate of the medical board was valid & conclusive against the workman & that therefore he had no jurisdiction to hear the case. The workman appealed:—*Held*: (1) the application to the medical board for re-examination had not been made “in pursuance of any compensation scheme” as there was no scheme applicable which gave such power. The certificate of the medical board was therefore not given in accordance with the provisions of Silicosis & Asbestosis (Medical Arrangements) Scheme, 1931, & was not conclusive evidence within para. 5 of such scheme; (2) the substitution by Various Industries (Silicosis) Scheme, 1931, of a medical board for certifying surgeon & medical referee, as stated in the preamble, related only to the functions performed in conjunction by the certifying surgeon & medical referee in originally bringing a workman within the 1928 Scheme. Appeal allowed. Case remitted to hear arbitration on all points.—*WHITE v. WINTERTON POTTERY (LONGTON), LTD.*, [1932] 2 K. B. 265; 101 L. J. K. B. 546; 147 L. T. 177; 25 B. W. C. C. 129, C. A.

*Annotation*:—As to (1) *Consd. Garnett v. Enoch Rhodes & Son* (1935), 28 B. W. C. C. 345.

**3822d. — When applicable.]**—*WHITE v. WINTERTON POTTERY (LONGTON), LTD.*, No. 3822c, *ante*.

**3822e. Second certificate of disablement—Whether conclusive against former employer.]**—A hewer was certified in Nov. 1925, as totally incapacitated by miner's nystagmus & received compensation on that basis until June, 1928, when he was given work on the surface & was treated as partially incapacitated. In May, 1932, the employers alleged that he had completely recovered, & in June, 1932, the medical referee certified: “I find the man not suffering from nystagmus & fit for work at the face as a hewer.” In Sept. 1932, the workman having signed a declaration that he had not previously suffered from nystagmus, obtained work in another colliery but was discharged sick after eleven days. In Nov. 1932, he was certified by a certifying surgeon as suffering from nystagmus, the

date of disablement being given as Oct. 25, 1932. No notice of this certificate was given to the first employer. The workman could not succeed in a claim against the second employer by reason of sect. 43 (1) (b), nor could he claim against the first employer under the certificate of Nov. 1932, because he had not been employed by them within twelve months from the date of disablement stated in such certificate. He therefore brought a claim against his first employers on the basis of the certificate given in 1925. The county ct. judge held that he was bound by the certificate given in Nov. 1932, to find in favour of the workman. The employers appealed:—*Held*: the certificate obtained by the workman in Nov. 1932, not having been served on them, was not conclusive against the first employers in proceedings based on the certificate of Nov. 1925. The matter must be referred to the medical referee for information whether in June, 1932, the workman was still susceptible to nystagmus & if so, whether such susceptibility was due to the first disablement or was constitutional. If there were susceptibility due to the first disablement, then the question whether the second disablement resulted therefrom was a matter of evidence.—*BRITTON v. LEVERSON'S WALLS-END COLLIERIES, LTD.* (1934), 27 B. W. C. C. 45, C. A.

3822f. —.]—A hewer was certified as disabled by miner's nystagmus in 1925. In 1926 he had recovered & was able to resume work underground. In 1930 he was again certified as being disabled by nystagmus & was paid compensation until 1932, when his employers served a notice & certificate in accordance with sect. 12. A counter-certificate having been served the matter was referred to the medical referee, who gave the following certificate: "He has recovered from this attack of coal-miner's nystagmus & is able to return to his old work of a hewer. There will, however, be an increased susceptibility to the disease as a result of this attack." The workman then filed an application for arbn. After hearing certain evidence in the arbn. the county ct. judge wrote to the medical referee as follows: "In this case you certify that the workman was liable to an increased susceptibility to a fresh attack, see footnote (b) [to Form C. in the Sched. to Rules dated Nov. 9, 1932]. Is the judge entitled to consider that you do not think there was a reasonable probability of the man again becoming incapacitated through the effects of the accident, or through a recrudescence of the attack of the disease (footnote (a))?" The medical referee replied as follows: "I do not think there was a reasonable probability of the man again becoming incapacitated through the effects of the accident, or through a recrudescence of the attack of miner's nystagmus." Having received this reply the county ct. judge held that the certificate of the medical referee was one of complete recovery & made his award for the employers. The workman appealed:—*Held*: the certificate of the medical referee was unambiguous & showed that the workman had not completely recovered from the attack of the disease. It was not therefore necessary to consider the effect of the reply given to the county ct. judge's inquiry.—

*MONAGHAN v. ELSWICK COAL CO.* (1933), 26 B. W. C. C. 432, C. A.

*Annotations*:—*Consd. United National Collieries, Ltd., Treorchy v. Jones* (1934), 37 B. W. C. C. 94; *Lloyd v. Conduitt Collieries, Ltd.* (1937), 30 B. W. C. C. 293.

3822g. —.]—In review proceedings brought by the employers to terminate compensation on the grounds of alleged recovery from miner's nystagmus a medical referee reported to the county ct. judge as follows: "I find that [the workman] has now recovered from miner's nystagmus, but as a result there is increased susceptibility to a recrudescence of an attack of the disease & therefore it is not advisable for him to work underground, as if he did work below he would probably be only able to keep working for a short time, & would then have to give up again." On receipt of this report, the county ct. judge asked further questions of the medical referee, who replied as follows: "[The previous answer] means that this man has recovered from miner's nystagmus (i.e. the disease is not now present). The original susceptibility of the workman to nystagmus is still present, but owing to the workman having actually had an attack of nystagmus, & to the original susceptibility, if the man is put underground he is more likely to develop another attack more easily & more quickly; there is no new susceptibility, it has always been there. I consider any future attack of nystagmus a fresh attack. There is no disability caused by the original attack still existing—it is only a question of the inadvisability of his going underground again because of the danger of another attack." On receipt of this further answer the county ct. judge terminated the weekly payments on the ground that the case was covered by *Edwards v. Penrhiceiber Navigation Colliery Co.* The workman appealed:—*Held*: the two answers of the medical referee must be read together. The second must not be taken to contradict the first, & on a proper interpretation of these answers there continued an increased susceptibility to nystagmus over & above any idiopathic susceptibility & therefore there was no evidence to support the application for review.—*UNITED NATIONAL COLLIERIES, LTD., TREORCHY v. JONES* (1934), 27 B. W. C. C. 94, C. A.

3822h. Evidence of change of condition—*Admissibility*.—A stone-mason was examined by the medical board set up under *Silicosis & Asbestosis* (Medical Arrangements) Scheme, 1931, on Jan. 31, 1935, & on Mar. 2, 1935, they issued a certificate under para. 4 (3) of the *Various Industries* (Silicosis) Scheme, 1931, that he was, though not totally disabled, suffering from silicosis to such a degree as to make it dangerous for him to continue work in the process in which he was employed & that he was suspended from Jan. 11, 1935. On Apr. 12, 1935, the workman filed a request for arbn., claiming that he was totally incapacitated. At the arbn. on May 10, 1935, the workman tendered evidence to show that he was totally incapacitated, but the county ct. judge held that as the certificate of the medical board was conclusive he was bound to refuse to hear evidence showing a change in the workman's condition, & made an award for partial incapacity only. The workman

appealed:—*Held*: (1) the certificate of the medical board was conclusive as to the matters certified at the date when certified. No evidence was therefore admissible in regard to this, but if the judge required more information as to the effect & contents of the certificate, it was his duty to communicate with the medical board; (2) the county ct. judge was wrong in refusing to receive evidence of a change in the workman's physical condition since the date of certification; (3) in view of the decision of *White v. Winterton Pottery (Longton), Ltd.*, No. 3822c, there was no other means of showing that the condition of a workman certified by a medical board to be disabled by silicosis had improved or worsened than by calling such evidence. Appeal allowed. New trial ordered.—*GARNETT v. ENOCH RHODES & SON* (1935), 28 B. W. C. C. 345, C. A.

**3824a. Add. Annotation:—***Refd. Mason v. Foster*, [1931] 2 K. B. 172.

**3825. Add. Annotations:—***Consd. Rees v. Imperial Navigation Coal Co.* (1926), 20 B. W. C. C. 287; *Wemyss Coal Co. v. Haig* (1933), 49 T. L. R. 547. *Refd. Powell v. Cauldon Potteries* (1926), 96 L. J. K. B. 245; *Williams v. Crawshaw Bros. (Cyfarthfa)* (1929), 22 B. W. C. C. 223.

**3828. Add. Annotations:—***Consd. Lowe v. Wilsons & Clyde Coal Co.* (1929), 23 B. W. C. C. 558; *Ellerbeck Collieries, Ltd. v. Cornhill Insurance Co.*, [1932] 1 K. B. 401.

**3828a. ———.**—Where under sect. 43 (1) of 1925 Act, the certifying surgeon certifies that a workman is suffering from a scheduled industrial disease & is thereby disabled from earning full wages at the work at which he was employed, the medical referee has under the sect. power to alter the date specified by the certifying surgeon as the date on which the disablement commenced. The power to review conferred upon the medical referee is not confined to the questions whether the certifying surgeon should or whether he should not give a certificate of disablement under sub-sect. 1 (i.), but covers the whole range of the action of the certifying surgeon in giving or refusing to give a certificate under that sub-sect.—*WEMYSS COAL CO., LTD. v. HAIG*, [1933] A. C. 643; 102 L. J. P. C. 153; 149 L. T. 458; 49 T. L. R. 547; 77 Sol. Jo. 484; 26 B. W. C. C. 444, H. L.

**3828b. ———.**—Subsequent alteration without notice to employer.—A cement worker contracted dermatitis in Nov. 1931. He was discharged from hospital as fit for work in Dec. 1931, but the disease continued to recur. He went in June, 1932, to a certifying surgeon, who refused to give him a certificate. The workman appealed to the medical referee, who gave him a certificate dated July 7, 1932, & fixed the date of disablement as Nov. 16, 1931. No claim was made by the workman on his employer until July 25, 1932, more than six months after the certified date of disablement. The workman then approached the medical referee, who on Sept. 7, 1932, altered the date of disablement to Jan. 4,

1932, without giving notice of his intentions to the employer. Proceedings were begun in Nov. 1932, on the basis of the altered certificate. The county ct. judge held that he must treat the altered certificate as revoking the one dated July 7, 1932, & as being an entirely new certificate dated Sept. 7, 1932. He also held that as the workman had made his claim under the certificate dated July 7, & had never made a claim under the certificate dated Sept. 7, the workman must fail. He accordingly made his award for the employers. The workman appealed:—*Held*: the date of disablement being a material part of the certificate, the medical referee could not alter it without due notice to the employers. The purported alteration was a nullity & the date of disablement remained Nov. 16, 1931. Appeal allowed. Order for new trial to allow the workman opportunity to show reasonable cause for delay in making a claim more than six months after Nov. 16, 1931. The question as to whether a medical referee has power, even on notice to both parties, to alter his certificate except to correct a slip or clerical error was left undecided.—*LAURIE v. UNIT CONSTRUCTION CO., LTD.* (1933), 26 B. W. C. C. 328, C. A.

*Annotations:—Folld. Powell Dyffryn Steam Coal Co. v. Griffiths* (1934), 27 B. W. C. C. 408. *Refd. Davies v. Howe Bridge Spinning Co.* (1934), 27 B. W. C. C. 207; *Weeks v. Powell Dyffryn Steam Coal Co.* (1935), 28 B. W. C. C. 396.

**3828c.**

—.]—A coal miner who had been engaged in a process coming within Various Industries (Silicosis) Scheme, 1931, ceased work on Apr. 2, 1930. On Nov. 17, 1932, as a result of an X-ray examination at hospital, he was given a form of certificate to the effect that he was suffering from silicosis. On Apr. 10, 1933, he was examined by the medical board appointed in pursuance of the Silicosis & Asbestosis (Medical Arrangements) Scheme, 1931, & on Apr. 19, 1933, the board certified him as totally disabled, but gave in the certificate the date of commencement of the total disablement as Apr. 10, 1933. Compensation having been claimed by the workman as from Apr. 10, 1933, the employer disputed the claim on the ground that the workman was, in virtue of proviso (b) to para. 4 of the Various Industries (Silicosis) Scheme, 1931, disentitled to compensation on the ground that he had not been employed in any process under the Scheme within the three years previous to the certified date of disablement. As a result of representations made on behalf of the workman the medical board reconsidered the matter & altered the date of commencement of total disablement in the certificate from Apr. 10, 1933, to Nov. 16, 1932, the date of the X-ray examination in hospital. On this altered certificate the county ct. judge awarded compensation to the workman. The employer appealed:—*Held*: the medical board having once heard the matter was *functus officio*. The date was vital to both parties & could not in the circumstances be altered under the "slip rule" as being a mere clerical mistake or error due to an accidental slip or omission.—

PART XIV. SECT. 23, SUB-SECT. 3.

1. Powers of referee—Fixation

of date of disablement.—Opinion by LORD HUNTER that a medical referee has no power to alter the date certified by the certifying surgeon as the date

of disablement.—*LOWE v. WILSONS & CLYDE COAL CO., LTD.*, [1930] S. C. 32; 23 B. W. C. C. 558.—SCOT.

POWELL DYFFRYN STEAM COAL CO. v. GRIFFITHS (1934), 27 B. W. C. C. 408, C. A.

Annotation:—*Refd. Weeks v. Powell Dyffryn Steam Coal Co.*

3828d.

**Failure to fix when appeal dismissed—Subsequent decision fixing date.]—**

On Feb. 6, 1932, a miner was certified by a certifying surgeon to be suffering from miner's nystagmus & thereby disabled from earning full wages at the work at which he was employed & that his disablement therefrom commenced on Feb. 6, 1932. Compensation was accordingly paid by his employers. On Oct. 16, 1933, a medical referee certified that he was not then suffering from miner's nystagmus & was fit to resume work underground, but that his condition was such that if he worked underground there was reasonable probability of his becoming again incapacitated by reason of a recrudescence of the attack of the disease. He did not return to work with his old employers, but in Jan. 1934, he obtained work with fresh employers after making a declaration that he had not previously suffered from the disease. He only worked with them for nine shifts, when he was compelled to cease work on account of nystagmus. On Feb. 7, 1934, the certifying surgeon certified that he was suffering from miner's nystagmus & that his disablement therefrom commenced on Feb. 6, 1932. On an appeal by the first employers from that certificate the medical referee on Mar. 5, 1934, dismissed the appeal. The registrar then wrote to the medical referee that the employers had called attention to the fact that no date of disablement was given in the decision dismissing the appeal. Thereupon the medical referee issued a second document dated back to Mar. 5, 1934, & to the following effect: 'The workman "is suffering from miner's nystagmus & so is disabled from earning full wages at the work at which he was employed. He is fit for work on the surface. The date of the disablement is from Jan. 1934, after he had been working underground for three weeks." The medical referee issued the second document without giving any notice to the workman. The workman claimed compensation against the first employers, relying on the certificate of Feb. 7, 1934, which gave the date of disablement as Feb. 6, 1932. The employers relied on the statement in the medical referee's second decision that there had been a fresh disablement in Jan. 1934. The county ct. judge held that the medical referee was not *functus officio* when he issued the first document dated Mar. 5, 1934, & could properly complete an otherwise unfinished document by adding the date of disablement. He therefore made his award for the employers. The workman appealed:—*Held*: (1) the effect of the first decision of the medical referee in Mar. 1934, dismissing the appeal from the certifying surgeon was to fix the date of disablement as Feb. 6, 1932, & after dismissing the appeal the medical referee was *functus officio* & could not by a second decision alter that date; in any case he had not given the workman an opportunity of appearing before him before he made this second decision; (2) *Timmins v. Brodsworth Main Colliery Co., Ltd.*, No. 3846a, & *Richards v. Goskar*, No. 3846c, did not decide that in the

case of a workman who had been certified as disabled by an industrial disease any return to his former work for however short a time ended the disablement, but it was a question of fact & therefore of degree in each case. In this case the question did not arise as the decision of the medical referee dismissing the appeal was final; (3) the certificate given by the medical referee on Oct. 16, 1933, was similar in effect to that given in *Connor v. Cadzow Coal Co.*, No. 3288a, & not to that given in *Edwards v. Penrhiceiber Navigation Colliery Co.*, No. 3832b, & therefore was not one of complete recovery. Appeal allowed. Leave to appeal to the House of Lords refused.—*WEEKS v. POWELL DYFFRYN STEAM COAL CO., LTD.* (1935), 28 B. W. C. C. 396, C. A.

3829a. — **Extension of time for appeal.]—**

Appct. had applied unsuccessfully for a certificate that he was suffering from an industrial disease. More than ten days after the certifying surgeon had given his decision, the appct., acting through an approved society, applied for a medical reference. The registrar treated this application as including one for an extension of time, although no such extension of time was applied for nor were there any facts before the registrar relating to that matter:—*Held*: it could not be said that the registrar had been shown any good cause for extending the time for making the application. The conditions of the Medical Referees Regulations, 1932, reg. 25, had, therefore, not been fulfilled, & this was not a mere technical matter, which might be waived, but one going to the root of the jurisdiction of the registrar.—*CONROY v. WILKINSON (THOMAS) & SONS, LTD.*, [1938] 1 All E. R. 668; 82 Sol. Jo. 255; 31 B. W. C. C. 18, C. A.

3829b. **What amounts to decision.]—**

A medical referee, in his certificate, said that it was impossible for him to give a certificate either agreeing with or against that given by the certifying surgeon, as it was outside his province as an ophthalmic surgeon. The county ct. judge having held the certificate of the certifying surgeon was conclusive:—*Held*: there had been no decision by the medical referee, & the case must go back for the appointment of a fresh medical referee.—*JONES v. WILLIAM MUIRHEAD MACDONALD WILSON & CO., LTD.* (1926), 19 B. W. C. C. 412, C. A.

3830. **Add. Annotations:—**

*Refd. Wilsons & Clyde Coal Co. v. Flynn*, [1930] A. C. 516; *Timmins v. Brodsworth Main Colliery Co.*, [1934] 2 K. B. 361.

3831. **Add. Annotations:—**

*Distd. Macy v. Cork Manufacturing Co.* (1928), 21 B. W. C. C. 306. *Consd. Wemyss Coal Co. v. Haig* (1933), 49 T. L. R. 547. *Refd. Wilsons & Clyde Coal Co. v. Flynn*, [1930] A. C. 516.

3832a. — **]**—*WILSONS & CLYDE COAL CO. v. FLYNN*, No. 3821d, *ante*.

3832b. — **]**—

A miner obtained from a certifying surgeon on Oct. 17, 1920, a certificate that he was suffering from miners' nystagmus. He was paid compensation on the basis of total incapacity up to June, 1924, on which date he was given work above ground at a lower wage. In Oct. 1926 a medical referee certified that he was still suffering from

miners' nystagmus. In Jan. 1930 the employers served a notice upon the workman under sect. 12 of the Act together with a certificate from a doctor. This was met by a counter notice on the part of the workman, & the matter was accordingly referred to a medical referee. On Feb. 15, 1930, the same medical referee who had made the report in 1926 certified that the workman was not then suffering from miners' nystagmus, but that his incapacity was due to other defects. On Mar. 27, 1930, the workman obtained a report from the certifying surgeon for the district that he was suffering from miners' nystagmus, & was disabled from earning full wages, & that the disablement commenced on Oct. 17, 1920. Upon this report the workman applied for arbitration. The arbitrator made an award in favour of the employers, but this was set aside by the Ct. of Appeal. On appeal to the House of Lords the medical referee in answer to a further question put by the House, said that his certificate of Feb. 15, 1930, meant that although the workman had now recovered from miners' nystagmus he was likely to develop a second attack sooner or later & in much shorter time than it took to produce the first attack:—*Held*: the mere fact that a second attack would develop quicker than a first was a natural concomitant to susceptibility, & was compatible with complete recovery from the original development having taken place. Disablement from the second attack would be caused thereby & not by the first. The certificate here was one of complete recovery, & that being so, it could not be contradicted by a finding by some one else which was incompatible with complete recovery.—*PENRIKYBER NAVIGATION COLLIERY CO. LTD. v. EDWARDS*, [1933] A. C. 28; 101 L. J. K. B. 744; 147 L. T. 421; *sub nom. EDWARDS v. PENRHICHER NAVIGATION COLLIERY CO., LTD.*, 25 B. W. C. C. 303, H. L.

*Annotations*:—*Apld.* Monaghan v. Elswick Coal Co. (1933). 26 B. W. C. C. 432. *Consd.* Morton v. South Kirkby, Featherstone & Hemsworth Collieries, Ltd. (1933), 26 B. W. C. C. 180; Hamilton v. Kinnell Cannel & Coking Coal Co. (1932), 25 B. W. C. C. Supp. 81; United National Collieries, Ltd. Treorchy v. Jones (1934), 27 B. W. C. C. 94; Weeks v. Powell Duffryn Steam Coal Co. (1935), 28 B. W. C. C. 396; Richards v. Goskar, [1937] A. C. 304. *Refd.* McNicholas v. West Leigh Colliery Co. (1933). 26 B. W. C. C. 29; Timmins v. Brodsworth Main Colliery Co., [1934] 2 K. B. 361; Button v. Leveron's Wallend Collieries (1934), 27 B. W. C. C. 45; Garnett v. Enoch Rhodes & Son (1935), 28 B. W. C. C. 345; Addie (Robert) & Sons Collieries, Ltd. v. McAllister, [1937] 1 All E. R. 676.

**3834. Add. Citations**:—*affd. sub nom.* EVANS (RICHARD) & Co., LTD. v. SCAHILL (1927), 137 L. T. 161; 20 B. W. C. C. 348, H. L.

*Add. Annotations*:—*Apld.* Lewis v. Tredegar Iron & Coal Co. (1929), 22 B. W. C. C. 268. *Consd.* Penrikyber Navigation Colliery Co. v. Edwards, [1933] A. C. 28; Richards v. Goskar, [1937] A. C. 304. *Refd.* Connor v. Caszow Coal Co., [1932] A. C. 1; McNicholas v. West Leigh Colliery Co. (1933), 26 B. W. C. C. 29; Holmes v. Kaye, Son & Co. (1934), 151 L. T. 83; Timmins v. Brodsworth Main Colliery Co., [1934] 2 K. B. 361.

**3834a.** —.]—MACY v. CORK MANUFACTURING CO., LTD., No. 3818a, *ante*.

**3834b. Breach of regulations by referee—Death of workman—Reference to referee to comply**

**with regulations—Validity.**]—A cotton-spinner was certified to be disabled by epitheliomatous cancer, but the certifying surgeon omitted to certify the date of disablement, which thereby under the provisions of sect. 43 (2) became the date of the certificate. As the date of the certificate was more than twelve months after the workman had last been employed in any employment to the nature of which the disease was due, the workman appealed to the medical referee, who, however, failed to carry out the necessary regulations by omitting to give the employer such notice as would entitle him to attend at the time & place of the examination of the workman. The medical referee certified a date of disablement which was within the necessary period of twelve months, but owing to his failure to comply with the regulations, the certificate was invalid. The workman sent the certificate to the employer with notice of claim & filed a request for arbn., but died before the hearing. His widow then filed a request for arbn., but the employer objected to the validity of the medical referee's report on which both claims were necessarily based. The county ct. judge ultimately ordered that the matter should again be referred to the medical referee to enable him to comply with the regulations. The employer appealed from this order on the grounds that the medical referee was *functus officio*, & in any case there was no provision in the Act or the regulations as to medical referees made thereunder which could enable such an order to be made after the workman had died:—*Held*: the medical referee could not be *functus officio*, as he had not yet done his duty by issuing a valid certificate, & the death of the workman did not prevent the completion of the reference which the county ct. judge had properly ordered for the benefit of the workman's dependant.—*DAVIES v. HOWE BRIDGE SPINNING CO., LTD.* (1934), 27 B. W. C. C. 207, C. A.

**3834c. Form of certificate—Necessity for compliance with statutory requirements.**]—A workman obtained a certificate from the certifying surgeon which certified that he was suffering from miner's nystagmus & that he was thereby disabled from earning full wages at the work at which he was employed. The employers appealed to the medical referee, who certified that the workman was suffering from the disease " & was therefore disabled from earning full wages," but that he was fit for light work on the surface, adding that there was an increased susceptibility to a fresh attack should he again work below the ground. This certificate was given on form P (ii), the form prescribed when a medical referee allows an appeal. In an application for compensation the county ct. judge held the certificate was unintelligible on the grounds: (a) that form P (ii) had been used instead of form P (i), the form prescribed when a medical referee dismisses an appeal; (b) the medical referee had used the words "therefore disabled" instead of "thereby disabled" which appeared in the Workmen's Compensation Act, 1925, s. 43 (1), & (c) the medical referee had certified with regard to increased susceptibility, whereas it was clear on the form that he had power to



do so only if he found that the workman was no longer incapacitated by the disease, & he ordered that the matter should be referred to another medical referee. The workman appealed:—*Held*: (1) the medical referee, by stating that the workman was fit for light work on the surface & that there was an increased susceptibility to a fresh attack, had varied the certificate in several respects, & these qualifications amounted to an allowance of the appeal in part. The use of form P (ii) did not therefore vitiate the certificate; (2) the use of the word "therefore" instead of the word "thereby" rendered the certificate a nullity; (3) the county ct. judge had no power to refer the matter to another medical referee.—*HOMER v. DONISTHORPE COLLIERY Co., LTD.*, [1936] 3 All E. R. 534; 155 L. T. 600; 80 Sol. Jo. 895; 29 B. W. C. C. 310, C. A.

#### 3834d. Effect of decision on declaration of liability.]

—A workman obtained from a certifying surgeon a certificate that he was suffering from miner's nystagmus & was thereby disabled from earning full wages at the work at which he was employed, & that the disablement commenced on the date of the giving of the certificate. On appeal the medical

referee gave the following decision: "I decide as follows: John Lloyd was not at the time of his examination by the certifying surgeon suffering from miner's nystagmus. & I hereby certify that the present condition of the workman as ascertained by my examination is as follows: I consider that he has had nystagmus probably brought on by his two accidents & that if he returns to work in the pit he is very liable to a relapse. Also that, owing to his previous attack, there is an increased susceptibility to disease." The workman, having applied for a declaration of liability which was refused, appealed:—*Held*: the decision of the medical referee having destroyed the effect of the certifying surgeon's certificate, there remained no certified date of disablement, & therefore no "happening of the accident" within the meaning of sect. 43 (1) (a) in respect of which a declaration of liability could be granted. Appeal dismissed.—*LLOYD v. CONDUIT COLLIERIES, LTD.* (1937), 30 B. W. C. C. 293, C. A.

#### 3835a. Certificate of death—Under Various Industries (Silicosis) Scheme, 1928.]—*HIND-MARSH v. JOHNS (EDWARD) & Co., LTD.*, No. 3816a, *ante*.

#### PART XIV. SECT. 22, SUB-SECT. 4.

*sg. False representation—Whether made "at time of entering employment."*

—A miner who had previously suffered from miner's nystagmus, an industrial disease, obtained employment at his trade in Apr. 1927. In May, 1927, he wilfully & falsely made a representation in writing that in Apr. 1927, he had not previously suffered from the disease. For a period of three weeks in Aug. 1927, he was unemployed, after which he again obtained employment under the same employers. He continued in their employment until Nov. 1927, on which date he was certified by the certifying surgeon to be incapacitated by nystagmus from earning full wages.—*Held*: he was not barred by the provisions in sect. 43 (1) (b) from recovering compensation, in respect that the written representation was not made "at the time of entering the employment."—*JOHNSTONE v. MOUNT VERNON COLLIERY Co., LTD.*, [1929] S. C. (Ct. of Sess.) 227.—*SCOT*.

*sh. ———.*—*Held*: a false representation, made by a workman on entering any employment to the nature of which the disease is due & in which he has been engaged within the twelve months previous to the date of disablement, is a bar to the recovery of compensation by him, although he has entered the employment & made the representation outwith the twelve months, & although there has been a break in the employment within the twelve months.—*HIGGINS v. CADZOW COAL Co.*, [1931] S. C. 54; 23 B. W. C. C. 621.—*SCOT*.

*sj. ———.*—*Held*: the words "the employment" in modification (b) of 1925 Act, s. 43 (1), mean any employment, to the nature of which the disease was due, in which the workman was employed within the twelve months previous to the date of disablement, & therefore (1) where a miner had on entering the employment of one employer, made a false representation as to previous immunity from miner's nystagmus, & was, within twelve months of so entering but while in the employment of another employer, certified to be suffering from miner's nystagmus, he was not entitled to compensation, & (2) where

a miner had, on entering the employment of one employer, made a false representation as to previous immunity from miner's nystagmus, & was, more than twelve months after leaving that employment, & while in the employment of another employer, certified to be suffering from miner's nystagmus, he was not barred from claiming compensation from the second employer; (3) where a miner had made a false representation of immunity from miner's nystagmus on re-entering the employment of a previous employer after a period of unemployment, that representation had been made on "entering the employment" within the sub-sect., & accordingly, he was barred from recovering compensation on the recurrence of the disease.—*SCOTT v. SUMMERLEE IRON Co., LTD.*, *CONNELLY v. A. G. MOORE & Co., LTD.*, *GILLULEY v. A. G. MOORE & Co., LTD.*, [1929] S. C. 830; *affd.*, [1931] A. C. 37, H. L.—*SCOT*.

*sk. ———.*—A workman entered the employment of a colliery co. in Jan. 1927. The employees of this co. were engaged by persons described as contractors, who were, however, admitted, for the purposes of the case, to be merely the co.'s agents. The particular contractor by whom the workman had been engaged received notice from the co. that he & his squad would not be required after Nov. 7, 1927. Before that date the workman arranged with another contractor for a new job in the colliery, to begin on Nov. 8; & on starting work on Nov. 8, he signed a declaration in which he falsely represented that he had not previously suffered from miner's nystagmus. After being employed under this contract for more than twelve months, he was certified as disabled by miner's nystagmus as from Dec. 22, 1928.—*Held*: the false declaration made on Nov. 8, 1927, was not made by the workman at the "time of entering the employment," within sect. 43 (1) (b), & accordingly, he was not deprived of his right to compensation.—*MOORE v. MANOR POWIS COAL Co.*, [1931] S. C. 1; 23 B. W. C. C. 593.—*SCOT*.

*so. ———.*—A workman entered the employment of a colliery co. on

June 19, 1928, on which occasion he signed a declaration that he had not previously suffered from miner's nystagmus. This declaration was false & wilfully made. He worked until Sept. 12, 1928, when he was discharged, & he thereafter received unemployment benefit until Oct. 26, 1928. On the latter date he was again employed by the co., & he remained continuously in their employment until Jan. 16, 1931, when he was certified to be suffering from miner's nystagmus. He had not signed any declaration subsequent to that dated June 19, 1928.—*Held*: the workman was not deprived of his right to compensation, in respect that the false declaration signed on June 19, 1928, was not made at the time of entering the employment in which he was engaged at any time within twelve months of his disablement, the entry into that employment having taken place on Oct. 26, 1928.—*M'GUGAN v. MOORE (A. G.) & Co.*, [1932] S. C. 12; 24 B. W. C. C. Supp. 97.—*SCOT*.

*sr. ——— Employers' officials' knowledge of falsity.*—A miner, who had been disabled by nystagmus, received compensation from his employers until Dec. 1929. In Jan. 1930, he re-entered the employment of the same employers at a different colliery, & on so doing he knowingly signed a false statement that he had not previously suffered from nystagmus. He did not, however, intend to deceive, & did not in fact deceive, the employers' officials who were responsible for re-engaging him, as these officials were, in his knowledge, aware that the statement was false & they acquiesced in his making it. A statement of previous immunity from nystagmus was required by the employers from all applicants for employment underground. The workman having again become incapacitated by nystagmus.—*Held*: the arbitrator was entitled to make an award of compensation.—*M'KEAN v. BAIRD (WILLIAM) & Co.*, [1932] S. C. 268; 24 B. W. C. C. Supp. 187.—*SCOT*.

*st. ——— Whether absolute disqualification.*—A workman suffered from miner's nystagmus in 1923 under *oyer A.* In July, 1930, he entered *B.* After



**3837a. 'Continuity of employment.]**—The words "the employment" in modification (b) of 1925 Act, s. 43 (1), meant any employment, to the nature of which the disease was due, in which the workman was employed within the twelve months previous to the date of disablement.

Applt., a miner, who had suffered from miners' nystagmus, entered the service of resp. coal co. on Apr. 27, 1927. After two periods of unemployment, during which he received unemployment benefit, he returned to the resps.' colliery on Nov. 7, 1927, & before commencing work wilfully & falsely represented himself in writing as having never suffered from miners' nystagmus. He ceased working for the resps. on Aug. 26, 1928, & was certified as disabled by miners' nystagmus as from that date. Upon a claim by applt. for compensation, the arbitrator stated that applt.'s employment was continuous from Apr. 27, 1927, down to Aug. 26, 1928, except for the periods when he was temporarily out of work owing to slackness of trade, & as no false declaration was made when he first entered resps.' service he awarded him compensation:—*Held*: the employment of applt. was not a continuous employment from Apr. 27, 1927, but that his resumption of work with resps. on Nov. 7, 1927, after a period of unemployment was "entering the employment" within modification (b), & as the false declaration was made by applt. within twelve months of his disablement, no compensation was payable.—*SCOTT v. SUMMERLEE IRON CO.*, [1931] A. C. 87; 99 L. J. P. C. 170; 143 L. T. 726 46 T. L. R. 625 23 B. W. C. C. 312 H. L.

*Annotation.*—*Consd.* *Williams v. Tredegar Iron & Coal Co* (1935), 28 B. W. C. C. 291.

**3838. Add. Annotation.**—*Refd.* *Andrews v. Denaby & Cadeby Main Collieries, Ltd.*, [1935] K. B. 484.

**3839. Add. Annotation.**—*Refd.* *Hillier v. Ebbw Vale Steel, Iron & Coal Co.* (1932), 25 B. W. C. C. 238.

**3842. Add. Annotations.**—*Consd.* *Penrikybe Navigation Colliery Co. v. Edwards*, [1933] A. C. 28; *McNicholas v. West Leigh Colliery*

*Co.* (1933), 26 B. W. C. C. 29; *Rees v. Powell Duffryn Associated Collieries, Ltd.*, [1938] 1 All E. R. 743. *Refd.* *Lewis v. Tredegar Iron & Coal Co.* (1929), 22 B. W. C. C. 268; *Hillier v. Ebbw Vale Steel, Iron & Coal Co.* (1932), 25 B. W. C. C. 238.

**3842a.** ——.]—A certifying surgeon certified that a workman, who had been suffering from miners' nystagmus, had wholly recovered, & was fit for his ordinary work, but he also added that, should the workman do so, he would be very liable to a relapse. In response to questions by the judge, the surgeon stated that the relapse would be a recrudescence of the disease, & might be expected to occur within six months of the man's resuming his work:—*Held*: in view of the liability to a relapse, the man was still partly incapacitated.—*REES v. POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD.*, [1938] 1 All E. R. 743; 82 Sol. Jo. 313; 31 B. W. C. C. 28, C. A.

**3843. Add. Annotation.**—*Consd.* *Mason v. Foster*, [1931] 2 K. B. 172.

**3843a.** ——. *New accident.*]—*MASON v. FOSTER*, No. 3821f, ante.

**3843b.** ——.]—In 1936 a workman was certified by a certifying surgeon to be suffering from the industrial disease of dermatitis & to be disabled from doing his work as from July 15, 1936. An appeal from this certificate was dismissed by the medical referee. For a time his employers paid him compensation, but then desisted, & in answer to the workman's claim for compensation relied on the fact that the workman had been certified to be disabled from dermatitis in 1933, had been paid compensation from 1933 1935, & had never fully recovered from the original attack. The county ct. judge found on the evidence that as a result of the earlier attack the workman was prone to a recurrence of the disease & therefore that he had never fully recovered. But he made an award of compensation in favour of the workman against the last employer, as that employment was of a nature to which the disease might be due. On appeal:—*Held*: the date of disablement fixed by the second certificate must under Workmen's Compensation

a period of absence from work owing to beat elbow from May to August, 1931, he presented himself as again fit for work. There was then put before him a printed declaration, with blanks to be filled in, to the effect that he had not previously suffered from the industrial disease of miner's nystagmus. He filled in his name, address, & age; the manager filled in the date, & the workman signed the declaration before two witnesses, who also signed. The declaration was not read over to the workman, nor did he read it or give any attention to its contents, although he had every opportunity to do so; nor was he asked if he had suffered from miner's nystagmus. The miner restarted work & continued at work with employer B until May, 1932, when he left that employment & entered the employment of employer C, the present applt. On entering this new employment he signed no document relating to miner's nystagmus. In Aug. 1932, the manager of these employers showed the workman a form relating to miner's nystagmus & asked him if he had ever suffered from it. The workman replied that he had suffered from the

disease about ten years previously, & in view of that answer the manager did not ask the workman to sign the form. The employers had not known until then that the workman had ever suffered from miner's nystagmus. In Sept. 1932, the workman was again disabled by miner's nystagmus, & claimed compensation. After negotiation the employers agreed to pay compensation, but in Dec. 1932, stopped payment at their own hand on discovering for the first time that the workman had signed the declaration of Aug. 1931, as above narrated. On these facts the arbitrator found that the workman had not wilfully or falsely represented himself as not having previously suffered from miner's nystagmus within sect. 43 (1) (b), & in respect of the agreement to pay compensation above mentioned awarded a continuation of compensation. The employers appealed:—*Held*: (1) (allowing the appeal on this point), the declaration of Aug. 1931, was a wilful representation on the part of the workman; (2) sect. 43 (1) (b) does not enact an absolute disqualification from receiving compensation, but

merely provides a ground of defence against the claim; accordingly, the employers were not entitled to discontinue payment of compensation, on the ground (*per LORD PRESIDENT & LORD FLEMING*) that the defence should have been proposed before the workman's claim was settled by agreement, & on the ground (*per LORD MOUNSON*) that the defence was not open to employers who had employed the workman in the knowledge that he had suffered from the disease. Appeal dismissed.—*JAMIESON v. ST. FLANAN COAL CO., LTD.*, [1935] S. C. 138; 27 B. W. C. C. Supp. 187.—*SCOT*.

#### PART XIV. SECT. 22, SUB-SECT. 5.

**3843a 1. Recurrence after settlement & return to work.**]—*Held*: when a workman who had suffered from nystagmus was certified as being no longer disabled by the disease, compensation must be ended, & that, on any recurrence of the disease, a fresh application must be made to the certifying surgeon.—*BROWN v. WILLIAM DIXON, LTD.*, [1929] S. C. (Ct. of Sess.) 206.—*SCOT*.

Act, 1925 (c. 84), s. 43 (1) (a), be treated as the happening of a notional accident & the workman could therefore recover compensation against his last employers; under sect. 43 (1) (c), proviso (i) & (ii), those employers had only a right of recourse against any employers who had employed the workman in the twelve months preceding the disablement & whose employment was of a nature to which the disease might be due.—*EATON v. WIMPEY & Co., LTD.*, [1938] 1 K. B. 353; [1937] 4 All E. R. 583; 107 L. J. K. B. 259; 158 L. T. 6; 54 T. L. R. 185; 82 Sol. Jo. 14; 30 B. W. C. C. 408, C. A.

**3843c. Recurrence after settlement & return to work.]**—*M'DOUGALL v. SUMMERLEE IRON CO., LTD.* (1927), 20 B. W. C. C. 419, H. L.

*Annotations*.—*Expld.* *Wilsons & Clyde Coal Co. v. Flynn*, [1930] A. C. 516. *Consd.* *Connor v. Cadzow Coal Co.*, [1932] A. C. 1; *Penrhyber Navigation Colliery Co. v. Edwards*, [1933] A. C. 28; *Hamilton v. Kinnell Cannel & Coking Coal Co.* (1932), 25 B. W. C. C. Supp. 81; *Timmins v. Brodsworth Main Colliery Co.*, [1934] 2 K. B. 361. *Expld.* *Richards v. Goskar*, [1937] A. C. 304. *Refd.* *Mason v. Foster*, [1931] 2 K. B. 172; *Durrant v. British Fibrocement Works, Ltd.* (1934), 104 L. J. K. B. 222.

**3846. Add. Annotations**.—*Consd.* *Britton v. Leverston's Wallend Collieries* (1934), 27 B. W. C. C. 45; *Durrant v. British Fibrocement Works, Ltd.* (1934), 104 L. J. K. B. 222; *Timmins v. Brodsworth Main Colliery Co.*, [1934] 2 K. B. 361.

**3846a.** — — — — —.]—A miner, after obtaining in 1928 the certificate of a certifying surgeon that he was suffering from miner's nystagmus & was thereby disabled, was in 1932 able to return to his old work for nearly a year, but thereafter obtained a second certificate that he was suffering from the same industrial disease & was thereby disabled. Neither certificate expressly fixed a date for the commencement of disablement, so that under sect. 43 (2), the disablement was in each case treated as commencing on the date of the certificate. After he had obtained the second certificate the workman commenced proceedings for compensation on the basis of the first certificate, his claim being that he was suffering from a recrudescence of the old trouble. The county ct. judge held on the evidence that this was so. On appeal:—*Held*: as under sect. 43 the certificate of a certifying surgeon was conclusive of the date of disablement, & the disablement was to be treated as the happening of an accident, the county ct. judge was debarred after the workman had obtained the second certificate from holding on evidence that the disablement was caused by a recrudescence of the old trouble.—*TIMMINS v. BRODSWORTH MAIN COLLIERY CO., LTD.*, [1934] 2 K. B. 361; 103 L. J. K. B. 707; 151 L. T. 231; 50 T. L. R. 458; 78 Sol. Jo. 471; 27 B. W. C. C. 283, C. A.

*Annotations*.—*Distd.* *Durrant v. British Fibrocement Works, Ltd.* (1934), 104 L. J. K. B. 222. *Consd.* *McGrath v. Day & Emery, Ltd.* (1935), 28 B. W. C. C. 474. *Weeks v. Powell Dyffryn Steam Coal Co.* (1935), 28 B. W. C. C. 396; *Richards v. Goskar*, [1937] A. C. 304. *Refd.* *Stanford v. Flynn & Son, Ltd.* (1936), 29 B. W. C. C. 126; *Eaton v. Wimpey & Co.*, [1938] 1 K. B. 353.

**3846b.** — — — — —.]—A workman who had been certified as disabled by dermatitis within Sched. B. to the Workmen's Compensation Act, 1925, returned to his original work, but again became disabled in the same manner & therefore obtained a fresh certificate referring to a date while he was engaged in

that work. Subsequently he obtained work of a different kind, & while doing that he was again disabled in the same manner & obtained two fresh certificates dated after he had left the original work:—*Held*: as to the four certificates, (1) the disablement to which the first certificate referred came to an end when the workman returned to his old work with the same employers; (2) the second certificate was conclusive that at the date of the beginning of this disablement there was a fresh notional accident; (3) there being no evidence that this disablement under the second certificate had ceased, it was not open to a certifying surgeon to certify that the disablement was due to an accident at a later date: the third & fourth certificates were nullities.—*DURRANT v. BRITISH FIBROCEMENT WORKS, LTD.* (1935), 104 L. J. K. B. 222; 152 L. T. 205; 27 B. W. C. C. 460, C. A.

*Annotations*.—*Consd.* *Richards v. Goskar*, [1937] A. C. 304; *Refd.* *Eaton v. Wimpey & Co.*, [1938] 1 K. B. 353.

**3846c.** *Mistaken certificate of recovery.]*—An employee of manufacturing chemists was on Sept. 6, 1934, certified by a certifying surgeon to be suffering from dermatitis produced by dust or liquids & disabled from earning full wages at the work at which he had been employed, the date of disablement being Sept. 1, 1934. Compensation was paid by the employers until Feb. 8, 1935, when the workman's panel doctor issued a certificate in the following terms: "This is to certify that Mr. Robert McGrath is recovered from dermatitis & is fit as from to-day to seek employment." The workman then registered at the labour exchange & received unemployment benefit. By Unemployment Insurance Act, 1920 (c. 30), s. 7 (1), it was made a statutory condition for the receipt of unemployment benefit (*inter alia*), that the insured contributor should be capable of & available for work. He received unemployment benefit until May 16, 1935, when he was seen by his panel doctor who was of opinion that he was suffering from a relapse. He applied to the certifying surgeon for a fresh certificate of disablement which was refused. He then filed an application for resumption of compensation. At the arbn. the panel doctor stated that he had made a mistake on Feb. 8, 1935, & that the workman was then fit only for special work & had not fully recovered. The employers called no evidence. The county ct. judge accepted the evidence of the panel doctor & found that the workman had not on Feb. 8, 1935, completely recovered from the disease. He also, however, found that the workman had nevertheless recovered from the disablement & made an award in favour of the employers. The workman appealed:—*Held*: the county ct. judge having accepted the evidence of the panel doctor that he had made a mistake in certifying recovery on Feb. 8, 1935, there was no evidence on which he could find that disablement had ceased. The fact that the workman might have satisfied the statutory condition for obtaining unemployment benefit was in no way inconsistent with his being disabled from earning full wages at an employment involving working in dust or liquids. Appeal allowed. Case remitted.—*MCGRATH v. DAY & EMERY, LTD.* (1935), 28 B. W. C. C. 474, C. A.

**3846d. Return to work—Recurrence—Necessity for new certificate.**—The disease itself, & not the certificate of disablement, is the equivalent of a personal injury by accident within 1925 Act, s. 43 (1). Therefore a miner who has been certified as suffering from miner's nystagmus, & as being thereby disabled from earning full wages at the work at which he was employed, & who returns to his employment at his former wages although he has not in fact recovered from the disease, & again becomes disabled thereby, can rely upon the original certificate & need not obtain a fresh certificate in order to obtain compensation.—**RICHARDS v. GOSKAR**, [1937] A. C. 304; [1936] 3 All E. R. 839; 106 L. J. K. B. 85; 156 L. T. 52; 53 T. L. R. 149; 80 Sol. Jo. 991; 29 B. W. C. C. 357, H. L.

*Annotations* :—**Consd. McGrath v. Day & Emery, Ltd.** (1935), 28 B. W. C. C. 474; **Weeks v. Powell Dyffryn Steam Coal Co., Ltd.** (1935), 28 B. W. C. C. 396. **Distd. Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.**, [1937] 2 K. B. 426; **Eaton v. Wimpey & Co.**, [1938] 1 K. B. 353. **Consd. Rees v. Powell Dyffryn Associated Collieries, Ltd.**, [1938] 1 All E. R. 743.

**3847. Add. Annotation** :—**Apprvd. Blatchford v. Staddon & Founds**, [1927] A. C. 461.

**3849a. Determination of contributions by arbitration—Liability in dispute—Whether amount of compensation "in dispute."**—The workman had been employed for thirty-one weeks by resps., & then on July 13, 1932, was taken on by appls. but was not examined as the custom was by appls.' doctor, who was then away on holiday. He worked for one week only & then he was certified to be suffering from miner's nystagmus, an industrial disease brought within the ambit of the 1925 Act, for which compensation under the Act became payable. The workman claimed 30s. a week as compensation for total incapacity, but an agreement was arrived at under which he accepted 23s. 9d. a week. Under sect. 43 (1) (c) (iii.) appls. brought proceedings by way of arbn. under the Act against resps. claiming contribution by them to the payment of the 23s. 9d. a week. On the hearing in the county ct. the question arose as to when the compensation was in dispute, & the county ct. judge thought it was in dispute under the sub-clause set out if any of the persons who were to contribute had not agreed the amount. Resps. claimed that they should have been entitled to co-operate in fixing the amount payable to the

workman. The county ct. judge, taking that view, held that appls. ought to have refused compensation & compelled the workman to make a claim against them under the Act, in which case under r. 41 (5) of Workmen's Compensation Rules, 1926, resps. could have been added as third parties to the workman's arbn.:—**Held**: the county ct. judge had wrongly interpreted that part of sub-clause (c) (iii.) "if the amount of compensation is not in dispute," as when the appls. & the workman reached an agreement as to the amount of it, it was not in dispute. That being so, the proper course was adopted of an arbn. under the Act between the employers alone, in which any question as to resps.' disagreement with the amount appls. had agreed to pay the workman could be considered, & the case must be sent back to the county ct. judge for him to determine the issues open to resps. to raise in the proceedings in which it was sought to fix them with liability to pay contributions.—**BOLSOVER COLLIERY CO., LTD. v. OXCROFT COLLIERY CO., LTD.**, [1933] 2 K. B. 429; 102 L. J. K. B. 617; 149 L. T. 391; 26 B. W. C. C. 340, C. A.

*Annotation* :—**Refd. Lewis & Towers, Ltd. v. Semblitz** (1934), 27 B. W. C. C. 125.

**3849b. Various Industries (Silicosis) Scheme, 1928, clause 9—Failure to comply with order for payments—Bankruptcy of employer—No right to contribution.**—By clause 9 of Various Industries (Silicosis) Scheme, 1928, "the compensation shall be claimed & recoverable from the employer who last employed the workman in the processes; but any other employers who employed the workman in the processes . . . shall . . . be liable to make to the employer from whom compensation is recoverable, such contributions as, in default of agreement, may be determined by arbitration under this Scheme":—**Held**: where an award of compensation has been made against the last employer, & where, having subsequently become bkpt., he has paid nothing under the award & no payment under it has been made out of his estate, his trustee in bkpy. is not in a position to make under the Scheme any claim to contribution from the workman's previous employers, but if any payment is thereafter made out of the bkpt.'s estate the trustee's right to claim such contribution will then arise.—**M'GIL-**

#### PART XIV. SECT. 22, SUB-SECT. 6.

**sg. Failure to obtain declaration of immunity—Whether bar to claim for contribution.**—A miner, who was employed by a colliery co. from Sept. 4 to Dec. 5, 1929, at the time of entering the employment signed a true declaration that he had not previously suffered from miner's nystagmus. On Dec. 7 he became disabled by miner's nystagmus, & the co. after paying him weekly compensation finally discharged his claim for a lump sum in Apr. 1930. On May 12, 1930, the workman entered the employment of another colliery co. who, however, took from him no declaration as to previous immunity from nystagmus. He left their employment after two days & was certified as having again become disabled by nystagmus on May 16. His last employers, having duly paid him compensation, claimed a contribution from his previous employers. The latter maintained that pursuers' claim was barred by their having failed to take

from the workman a declaration of his previous immunity from disease:—**Held**: pursuers' claim, under sect. 43, to a contribution was not so barred.—**UNITED COLLIERIES v. ROBERT ADDIE & SONS' COLLIERIES**, [1932] S. C. 45; 24 B. W. C. C. Supp. 125.—**SCOT.**

**sk. Workman employed under Various Industries Scheme—Formerly employed under Sandstone Industry Scheme.**—On May 3, 1932, a quarryman died of silicosis accompanied by tuberculosis, according to a certificate by the Medical Board appointed under the Silicosis & Asbestosis (Medical Arrangements) Scheme, 1931. The workman's last employers were builders & contractors, with whom he worked as a labourer & stone cutter from June to Oct. 1931. As the employers who last employed the workman in one of the processes mentioned in para. 2 of Various Industries (Silicosis) Scheme, 1931, they were liable to pay, & did pay, compensation to the workman's dependants amounting to £542 8s.

Thereafter they sought relief against the workman's former employers, with whom he had worked from Sept. 1919, till Jan. 1931. These employers were quartermasters & engaged in the Sandstone Industry as defined in para. 2 of Sandstone Industry (Silicosis) Scheme, 1931. The Various Industries (Silicosis) Scheme, 1931, provides (para. 8 (2)) for contributions by former employers in relief of compensation paid by the last employer, but it also provides (para. 2) that "nothing in this Scheme shall apply to the employment of a workman included in . . . the Sandstone Industry (Silicosis) Scheme, 1931." The arbitrator having found the former employers liable to contribute these employers appealed:—**Held**: the former employers were not liable to contribute to the compensation paid to the workman's dependants. Appeal allowed.—**ROBINSON & DAVIDSON v. CORNOCKLE QUARRIES**, [1933] S. C. 659; 26 B. W. C. C. Supp. 91.—**SCOT.**

LIVRAY v. HOPE, [1935] A. C. 1; 104 L. J. P. C. 11; 151 L. T. 482; 50 T. L. R. 475; 78 Sol. Jo. 503; 27 B. W. C. C. 848, H. L.; *aff.*, S. C. *sub nom.* HENRY v. GLADSTONE, [1933] S. C. 283; 26 B. W. C. C. Supp. 1.

3852a. — [Application for leave to issue execution.]—*POWERS v. LEICESTERSHIRE COLLIERY & PIPE CO.*, No. 3668d, *ante*.

3855a. — Order giving leave to issue execution.]—*COTTON v. LUTTON*, No. 3668g, *ante*.

3858. *Add. Annotations*:—As to (1) *Consd. Vickers v. Miners, Thames Steam Tug & Lighterage Co. v. Ingram* (1927), 96 L. J. K. B. 490. As to (2) *Refd. Vickers v. Miners, Thames Steam Tug & Lighterage Co. v. Ingram* (1927), 96 L. J. K. B. 490.

3860a. Effect of agreement for compensation—*Facts as to agreement not presented in county court.*—On an application for review & redemption of weekly payments a workman alleged that he had negotiated with persons representing a new co. which had taken over the business of his employers, & the new co. had agreed to pay him £650 in full settlement of his claims. The county ct. judge had previously decided in a similar case that the workman could not rely upon such an agreement with the new co., as such agreement was only with a third party, & not with his employers. The parties treated the case as governed by that decision, & the question of the agreement was not gone into at the hearing. The application was then proceeded with as an application for review & the judge held the workman had recovered, & by his award stopped further weekly payments. The workman appealed, on the ground that the judge could not terminate the payments in view of the agreement:—*Held*: (1) the ct. could not entertain an appeal as to the effect of the agreement, as the facts as to that agreement had not been presented in the county ct., & there were no materials before the ct. on which they could come to a decision; (2) the question whether the workman had recovered was a question of fact, as to which there was evidence to support the finding, & there was no misdirection.—*EAST KENT COLLIERY CO. v. HEATH* (1926), 20 B. W. C. C. 97, C. A.

3872a. — [A dock labourer seriously injured his left arm in an accident & was totally incapacitated for fourteen months, during which period he received compensation. His employers then terminated the weekly payments, using the provisions of sect. 12, & relying on a medical certificate to the effect that although the workman had lost his power of gripping with the left hand a return to work would restore that power.

The workman applied for an arbn. & the county ct. judge on the grounds stated in the certificate found that the workman had completely recovered from the accident & made his award for the employers. On appeal by the workman the Ct. of Appeal applying *Buck v. Denning*, No. 3227a, held that there was no evidence of complete recovery, & ordered the case to be remitted to the county ct. judge for compensation to be assessed.

The county ct. judge in conformity with the order of the Ct. of Appeal accordingly made an award of a weekly sum of 10s. as compensation, the employers being present & consenting to the amount proposed. Payment of compensation had been made under this award for four months when the employers petitioned for appeal to the House of Lords from the decision of the Ct. of Appeal:—*Held*: (1) there was some evidence upon which the county ct. judge could find that incapacity from every relevant point of view had ceased, & it was of the first importance that the finality of an arbitrator's findings of fact in cases under the Workmen's Compensation Act should be jealously maintained; (2) the employers were not, by consenting to the amount of the award, & making payments thereunder, deprived of their then statutory right of appeal. Appeal allowed. Original award restored.—*CUNARD S.S. CO., LTD. v. MOORE* (1935), 104 L. J. K. B. 467; *sub nom.* *MOORE v. CUNARD S.S. CO.*, 153 L. T. 51; 28 B. W. C. C. 162, H. L.

*Annotation*:—*Consd. Jones v. Smith*, [1936] 1 All E. R. 661.

3873a. — [HOBBS v. ROYAL ARSENAL CO-OPERATIVE SOCIETY (1930), 170 L. T. Jo. 159, C. A.

3877a. — [A chef suffered an accident to his eyes from the bursting of a cooker. As a result he suffered from an occasional overflow of tears. On a claim for compensation the county ct. judge found that the accident had not interfered with the workman's capacity for work & dismissed the claim. No declaration of liability was granted. The workman appealed:—*Held*: it was a question of fact for the county ct. judge & there was no misdirection. Appeal dismissed.—*RIVOLI v. DUDLEY, EARL* (No. 2) (1937), 30 B. W. C. C. 73.

3880a. — [HEWORTH COAL CO. v. BARNES (1930), 23 B. W. C. C. 46, C. A.

3880b. — [A girl of eighteen, employed as a screw polisher, lost the sight of an eye on account of the file with which she was working slipping & striking it. The employers stopped paying compensation a year after

#### PART XIV. SECT. 23, SUB-SECT. 2. —A.

sl. *Sufficiency of evidence*—*Case stated.*—*Re PETERS*, [1931] 3 M. P. R. 252.—CAN.

#### PART XIV. SECT. 23, SUB-SECT. 2.—B. (a).

3865 iv. — [On the hearing before the Workers' Compensation Commission of a claim by a workman for compensation it was submitted that there was no evidence to support the claim, but the commission overruled the submission & an award was made in favour of the claimant. Thereafter, at the request of resp., the chair-

man stated a case asking the opinion of the Supreme Ct. whether there was evidence to justify the finding of the commission:—*Held*: after the making of the award the question could not be submitted to the ct. unless the commission had decided to reconsider the matter; the mere fact that the chairman had stated a case did not establish that it had so decided, & therefore it was not competent for the ct. to entertain the matter.—*ROBERTS v. JONES* (1935), 28 S. R. N. S. W. 543; 45 N. S. W. W. N. 156.—AUS.

3865 v. — [BATHURST v. WORKMEN'S COMPENSATION BOARD, [1928] 1 D. L. R. 114.—CAN.

3865 vi. — [An award of compensation having been made in favour of the widow of a deceased workman, the employer obtained a stated case. Thereafter the employer presented a note craving an order for transmission of the process, in order that the notes of evidence might be available to satisfy the ct. that there was no evidence before the arbitrator upon which he could reasonably arrive at certain of his findings in fact:—*Held*: the ct. could not, by a review of the evidence, interfere with the arbitrator's findings in fact, & motion refused.—*SCOTT v. MITCHELL*, [1930] S. G. 105.—SCOT.

the accident. The county ct. judge found that the workman was fit to resume her pre-accident work & that such work was suitable. He awarded her a declaration of liability only. The workman appealed:—*Held*: the question was one of fact & there was no misdirection.—*HILLIER v. TUNGSTEN MANUFACTURING CO., LTD.* (1933), 26 B. W. C. C. 551, C. A.

**3881a.** —.]—Employers applied to review weekly payments being made on the basis of total incapacity. They called a doctor who said he thought the man might do watchman's work or wash motor cars. Two doctors called on behalf of the workman said he was unfit for anything but the lightest form of work sitting down without bending. The judge found the man was only partially incapacitated, & consequently reduced the compensation:—*Held*: it was purely a question of fact, & there was evidence to support the finding.—*MEARS BROS. v. DAVIES* (1929), 22 B. W. C. C. 292, C. A.

**3885a.** —.]—*DAVISON v. HOLMSIDE & SOUTH MOOR COLLIERIES, LTD., NAPPER v. LAMPTON, HETTON & JOICEY COLLIERIES, LTD.*, No. 2512a, *ante*.

**3885b.** —.]—*HANNABY v. LLAY MAIN COLLIERIES, LTD.*, No. 2512b, *ante*.

**3885c.** —.]—A workman was struck in the jaw by a revolving belt &, after being in receipt of compensation for nearly a year, returned to work. Shortly afterwards he ceased work. Two & a half years later he claimed compensation on the ground that he was totally incapacitated as a result of the accident. The county ct. judge found that his incapacity was due to causes unconnected with the accident. The workman appealed:—*Held*: it was a pure question of fact, & there was no misdirection.—*BERRYMAN v. BOAKE, ROBERTS & Co.* (1934), 27 B. W. C. C. 459, C. A.

**3885d.** —.]—A workman employed in a factory alleged that he received an injury on Oct. 28, 1934, by being struck in the back. He continued at work until Oct. 28, when he sent a doctor's certificate that he was suffering from myalgia. Three causes of injury were entered in the accident book: (a) caught cold in the back; (b) some one threw something & hit him in the back; (c) he fell on a pipe & hurt his back. The workman's doctor saw appct. on Nov. 1, 1934, & stated in cross-examination that what he found was absolutely negative. The county ct. judge held at the end of appct.'s case that there was not sufficient evidence for him to find that there had been personal injury by accident arising out of & in the course of the employment. The workman appealed:—*Held*: it was a question of fact for the county ct. judge & there was no misdirection.—Appeal dismissed.—*BALDERSTON v. CENTRAL SUGAR CO. LTD.* (1936), 29 B. W. C. C. 84, C. A.

**3885e.** —.]—A cook employed on a steam-trawler was found lying in the bunk spitting blood. He stated that he had fallen down a ladder. He died seven days later of septic pneumonia. On a claim for compensation by his widow the county ct. judge found that the fall neither caused the death nor had any connection with it & dismissed the claim. The widow appealed:—*Held*: the question was entirely one of fact for the county ct. judge & there was no misdirection. Appeal dismissed.—*PARKER v. NEW DOCKS STEAM TRAWLING CO. (FLEETWOOD), LTD.* (1936), 29 B. W. C. C. 250, C. A.

**3887a.** —.]—The father & sister of a deceased workman claimed compensation. The father was unemployed, but the sister was in receipt of a small weekly wage not sufficient to keep herself. It was alleged in the particulars contained in the application for arbn. that the average weekly earnings of the deceased were £1 19s. 6d. On proof of total dependency on the part of one or other of the dependants, the lump sum payable on these earnings, if calculated in accordance with the rules contained in sect. 8 (2), amounted to £300. The employer filed no answer. At the arbn. no evidence was given as to the average weekly earnings, but the father gave evidence that he was totally dependent. The county ct. judge made an award for £275 only, on the ground that there was no evidence as to the average weekly earnings. The father appealed on the question of amount & the employer cross-appealed on the question of dependency:—*Held*: on the appeal, the employer having failed to file an answer, the amount of the average weekly earnings must be taken to be admitted under rule 18 (3). There must therefore be an award for £300. On the cross-appeal, the question of dependency was purely one of fact for the county ct. judge. Appeal allowed. Cross-appeal dismissed.—*PICKERVANCE v. EVANS (RICHARD) & Co., LTD.* (1935), 28 B. W. C. C. 492, C. A.

**3887b. Duration of exposure—Resulting in dermatitis.**—A woman worked as a washer in a laundry during July & Aug. 1928. She left without any signs of dermatitis. On Sept. 6, 1928, she was employed in a similar capacity by another laundry, & left work on Sept. 19 with symptoms of dermatitis. On Sept. 26, she obtained a certificate from the certifying surgeon under sect. 43. Her second employers admitted liability & paid compensation, but discontinued the payments in Dec. on their doctor's certificate that she had recovered. He further stated that she suffered from a condition of the skin which rendered her particularly susceptible to dermatitis, & that but for this she would not have developed the disease after so short a period of exposure. On a claim for con-

W. W. R. 497.—CAN.

*an. Added peril.*—The question of added peril is one of fact, upon which the determination of the arbitrator was conclusive.—*WALKINGSHAW v. WOODHALL COAL CO., LTD.* [1931] S. C. 508; 24 B. W. C. C. Supp. 32.—SCOT.

*sp. Failure of company to file payroll.*—*WORKMAN'S COMPENSATION BOARD v. ST. JOHN TUGBOAT CO.*, [1931] 4 M. P. R. 9.—CAN.

**PART XIV. SECT. 23, SUB-SECT. 2.—B. (b).**

**3884 II.** —.]—*NAGY v. WORKMAN'S COMPENSATION BOARD*, [1931] 3 M. P. R. 516.—CAN.

**3887 IV.** —.]—The question whether a survivor of a workman is a "dependant" within the Workmen's Compensation Act, R.S.S., 1930, as well as the question whether deceased was a "workman" within the meaning

of the Act, is a mixed question of law & fact, at least in cases such as the present one, &, therefore, the Ct. of Appeal must determine, not only whether there is any evidence to sustain a finding of dependence, but also whether the district ct. judge drew proper inferences from the facts & arrived at a proper conclusion in holding, as he did in this case, that pltf. was a "dependant".—*WOLFE v. CANADIAN NATIONAL RAILWAYS*, [1934] 3

tinuance of the compensation, the county ct. judge made an award in favour of the employers. He found that the exposure of the workman to dust or liquids was of short duration & only resulted in dermatitis owing to an unusual proclivity to such disease on her part. The workman appealed. On appeal it was argued that the employers were estopped from denying that the disease had been contracted through long-continued exposure within Statutory Rules & Orders, 1929, No. 2, by reason of their admission of liability & payment of compensation:—*Held*: the point as to estoppel not having been taken in the county ct. could not be raised on appeal, & on the evidence the county ct. judge was bound to find that exposure was not of long-continued duration. The question was one of fact.—Appeal dismissed.—*LANE v. "PUREWITE" LAUNDRY SERVICE CO., LTD.* (1929), 22 B. W. C. C. 396, C. A.

**3887c. Computation of remuneration.**—A workman had been at work for only four weeks when he met with an injury by accident arising out of & in the course of his employment. While admitting liability, the employers contended that by reason of the shortness of the time it was impracticable at the date of the accident to compute the workman's rate of remuneration, & that regard must be had to the wages earned by other workmen. The county ct. judge refused to do so & calculated the compensation on the basis of the exact average of the wages earned by the workman during the four weeks. The employers appealed:—*Held*: it was a question of fact for the county ct. judge to decide whether or not it was impracticable at the date of the accident to compute the rate of remuneration on only four weeks of employment, & there was no misdirection. Appeal dismissed.—*TANSEY v. WILCOCK & CO.* (1936), 29 B. W. C. C. 214, C. A.

**3891a.** —.—*—*—*MALCOLM v. BARBER, WALKER & CO., LTD.*, No. 3359d, *ante*.

**3892a. Quantum in excess of evidence.**—An electric lift erector's mate was being tried out as an erector & paid accordingly when he injured his left thumb by an accident arising out of & in the course of his employment. The top of the thumb was amputated but not to such an extent as to prevent the thumb-nail from growing. He returned to work at the wage of a mate & was again tried as an erector but on simpler jobs. After about two months he was dismissed as incompetent. He filed an application for arbn. & then entered into an agreement with his employer that he should receive £30 in final settlement of all claims. A memorandum of agreement was drawn up together with a statement of facts, both of which were signed by the workman. From the statement it appeared that the workman's average pre-accident earnings were £3 0s. 2d., & his average post-accident earnings were £3 4s. 3d., & that his employment ceased for reasons unconnected with his injury. The registrar &, on appeal, the county ct. judge refused to record the memorandum on the ground of inadequacy. The parties proceeded to arbn. At the hearing the workman admitted the facts contained in the statement accompany-

ing the memorandum. The medical men called on each side disagreed as to whether the disability caused by the injury amounted to 5 per cent. or 20 per cent. The county ct. judge in his award assessed the loss of earning capacity at 16s. a week & ordered payment of compensation at the rate of 8s. a week. The employer appealed:—*Held*: the county ct. judge in awarding to the workman a sum based on an incapacity equivalent to 25 per cent. of his earnings had gone beyond the evidence called before him. Appeal allowed. New trial ordered before another county ct. judge. Observations on sending cases back to the same county ct. judge for rehearing.—*BYRNE v. EVANS LIFTS, LTD.* (1932), 25 B. W. C. C. 41, C. A.

**3893a. Consent order as to quantum—On remission from Court of Appeal—Right of Appeal to House of Lords.**—*CUNARD S.S. Co. v. MOORE*, No. 3872a, *ante*.

**3896a. Hearing unsatisfactory—Rehearing ordered.**—*HUCKNALL v. MANCHESTER CORPN.* (1928), 21 B. W. C. C. 8, C. A.

**3896b. New trial—When granted.**—*HANCOX v. BALFOUR, BEATTIE & CO., LTD.*, No. 3283h, *ante*.

**3896c. Approbation of award—What amounts to.**—*CUNARD S.S. CO., LTD. v. MOORE*, No. 3872a, *ante*.

**3897. Add. Annotation:—Refd. Jones v. Cory** (1926), 20 B. W. C. C. 251.

**3899a.** —.—*—*—A filler in a colliery was certified by a medical referee in Oct. 1934, to be suffering from dermatitis produced by dust or liquids, but to be fit for light work. He was accordingly given light work and received compensation at the appropriate rate. In July, 1935, he was involved in a motor accident & was off work for a year. In May, 1937, the employers applied for a review & termination of the weekly payments. At the arbn. evidence was given on behalf of the employers by a dermatologist to the effect that the workman's condition when he examined him in Mar. 1937, was not due to his employment as a filler for the reason that, if it had been, the workman should have recovered during the year when he had to stop work on account of the motor accident. The dermatologist was further of opinion that the workman was suffering from some form of constitutional eczema. Under cross-examination he said, "I don't suggest the form of dermatitis has changed since Oct. 1934, though it is not impossible." The workman's panel doctor, who had attended him throughout, said that there had been no change in his condition. The county ct. judge on that evidence found that the workman was no longer suffering from the disease of dermatitis produced by dust or liquids & made an award terminating the weekly payments. The workman appealed:—*Held*: as the dermatologist's evidence involved a contradiction of the medical referee's conclusive certificate & was therefore inadmissible, there was no evidence on which an award for termination of the weekly payments could be made. Appeal allowed.—*BURGIN v. FITZWILLIAM'S (EARL) COLLIERIES CO.* (1937), 30 B. W. C. C. 419, C. A.

**3901a.** —.—*—*—A workman, who had suffered an injury to his knee, was paid compensation



by his employers for a time. He underwent a successful operation & his compensation was stopped. He later suffered another injury to the same knee, & brought proceedings for further compensation. After hearing evidence, the county ct. judge came to the conclusion that he was not satisfied as to any further injury after the cessation of compensation. The county ct. judge then considered the question of a declaration of liability &, while doing so, asked a medical man, who happened to be present in ct., whether there was any probability of further injury to the workman. The opinion of the medical man was not given as evidence on oath nor was he called by consent of the parties. The county ct. judge then made an award to the effect that the workman had recovered from his injury on the date when compensation was stopped, but granted a declaration of liability by consent. The workman appealed:—*Held*: although the procedure followed with regard to the doctor was undesirable & irregular, it had not been detrimental to the workman, because the county ct. judge had already made up his mind on the main question before him. There was ample evidence to support his finding on the question.—*RANSOM v. FULHAM FOOTBALL & ATHLETIC CO., LTD.* (1928), 21 B. W. C. C. 375, C. A.

**3904a.** — — —.]—A workman, whose compensation had been stopped, claimed a continuance of compensation on the basis of total incapacity, & it was argued on his behalf that he was entitled to be paid on this basis under Workmen's Compensation Act, 1925 (c. 84), s. 9 (4). The county ct. judge found as a fact that the workman was partially incapacitated as a result of the accident but had, since the payment ceased, been doing work which he did before the accident. He held that sect. 9 (4) did not apply, but gave no reasons for so holding beyond stating that the workman refused work offered him on the ground that he could not do it when in fact he could have done it. He, therefore, refused to find total incapacity but gave a declaration of liability. On the appeal by the workman it was argued that, the county ct. judge having found partial incapacity, the case should be remitted to him to assess the amount of such incapacity:—*Held*: although the finding of the county ct. judge on the point was not too clear, the case had been argued & dealt with under sect. 9 (4) alone. The issue as to partial incapacity, not having been raised on the claim, in the ct. below, or in the notice of appeal, could not be taken in the Ct. of Appeal.—*PLUMB v. RALEIGH CYCLE CO.* (1928), 21 B. W. C. C. 378, C. A.

*Annotation*:—*Refd.* Hughes v. Reed & Co. (1938), 82 Sol. Jo. 273.

**3915a. Estoppel.]** — *LANE v. "PUREWITE" LAUNDRY SERVICE CO., LTD., No. 3887b, ante.*

**3918a.** — — — Unless costs of adjournment paid.]—A farm labourer received injuries to his ribs by reason of an accident arising out of & in the course of his employment. In his application for an arbn. he stated in the particulars that the nature of his injury was bruised ribs resulting in traumatic neurasthenia. At the arbn. medical evidence was called for the workman to the effect that he

was suffering from angina of effort, a condition differing from traumatic neurasthenia. Counsel for the employer, on the ground that he was taken by surprise, requested an adjournment of the hearing. The county ct. judge said that he would grant an adjournment if the employer paid the costs of the adjournment. Counsel for the employer did not accept the offer & called no evidence. The county ct. judge then made his award in favour of the workman. The employer appealed:—*Held*: as the workman was endeavouring to set up at the arbn. a case different from the one set up in his particulars, the necessary amendment should have been made in the particulars & the request of the employer for an adjournment granted without any onerous condition being imposed. Appeal allowed. New trial ordered before another county ct. judge.—*BURTON v. CHAMBERLAIN* (1938), 31 B. W. C. C. 63, C. A.

**3922a.** — — —.]—A miner, who was a healthy man of forty-seven, was engaged for an hour in pulling down coal with an iron bar. His mate then asked for the bar, & worked with it. The miner appeared to be quite well when he handed over the bar to his mate, but within a few minutes he was lying on the ground dead. An autopsy was made by a surgeon. At the hearing of a claim for compensation by the widow the surgeon was not called but his report was by agreement read to the county ct. judge. He therein stated that the cause of death was syncope following double pneumonia of one or two days' duration, & that in his opinion death was accelerated by the strain put upon an overburdened heart by his work. That was the only medical evidence before the ct., & it was accepted as correct by the judge, who made an award in favour of the employers on the ground that there was "no real evidence within the meaning of the decided cases that any particular piece of work caused death." The widow appealed:—*Held*: it being doubtful from the use in the award of the words "particular piece of work" whether the county ct. judge had not misdirected himself by thinking that he had to find as a fact that some particular or special strain had to be proved in order to connect the death with the work, the case must be remitted to him for reconsideration. Appeal allowed. Order for new trial.—*WALKER v. BROWN (JOHN) & CO., LTD.* (1932), 25 B. W. C. C. 166, C. A.

**3922b.** — — —.]—A county ct. judge found that a miner who had injured his left foot was suffering from partial incapacity, but awarded him compensation on the basis of total incapacity for a period during which he was suffering from appendicitis. The employers appealed. The Ct. of Appeal sent the award back for amendment & reconsideration. The county ct. judge confirmed his award. The employers again appealed:—*Held*: the whole matter was unsatisfactory & must be sent to another county ct. judge for a new trial.—*SCOTT v. PEARSON & DORMAN, LONG & CO., LTD.* (1933), 26 B. W. C. C. 350, C. A.

**3922c.** — — —.]—A haulage hand sustained an injury by accident to his right leg with the result that it was bowed outward & backward, & caused him to walk with a limp & with the right foot somewhat inverted. He could walk quite briskly but felt pain in the



right foot after walking continuously for several miles. He had not obtained any work since the accident nor had he looked for it. After paying compensation for total incapacity for seven months, the employers applied to review the weekly payments. The county ct. judge found that the workman was capable of ordinary light work of an unskilled nature such as gardening work of not too arduous a nature, & of doing such work continuously, & having stated that he was constrained by the authorities to ignore the remoteness of the prospect of obtaining regular light work, he found that a man who obtains a job of unskilled light work on the footing that he suffers from some physical disability which disqualifies him from competing in the labour market on equal terms with men not so disabled might expect to receive about two-thirds of the ordinary wages of an unskilled labourer, & made an award diminishing the weekly payments accordingly. The workman appealed:—*Held*: it being impossible to decide on the judgment whether the county ct. judge had or had not found that the workman was capable of becoming an ordinary workman of average capacity in any well-known branch of the labour market, in other words, whether his labour was or was not an "odd lot" within the definition of *FLETCHER MOULTON, L.J.*, in *Cardiff Corporation v. Hall*, the case must be sent back for him to make the necessary finding. Appeal allowed. Case remitted.—*ACKTON HALL COLLIERY CO., LTD. v. BARKER* (1937), 30 B. W. C. C. 89, C. A.

**3926a.** —.]—A glazier living in Liverpool fell 24 feet from a ladder & received very severe injuries to his spine & sacrum. A year later his doctor made a report to his employers at their request. It was a detailed report & contained the following conclusions: The movements of the spine were much freer, but not much improvement could be expected: the workman's capacity for walking had considerably deteriorated: his mental condition had changed for the worse but elimination of the compensation negotiations might improve the mental condition: he was at that time only fit for sedentary work or semi-sedentary light work. This report was sent on to the employers' insurers who wrote a letter to the workman's solr. saying that the doctor's report showed that the workman had made considerable recovery & that it was advisable that he should be given light work as it would give him occupation & tend to make him fit. The employers then offered the workman employment in their stores near Birmingham consisting of "a certain amount of clerical work & also sorting out small parts & handing them out when he desired" at £2 a week together with the appropriate compensation & travelling expenses. This offer was refused. The employers applied for a review of the weekly payment on the ground that the workman was able to earn £2 a week. The county ct. judge found that the workman had no earning capacity in the open labour market, but that the offer of work was suitable & should have been accepted. He therefore made his award in favour of the employers. The workman appealed:—*Held*: there was misdirection as the county ct. judge had failed to put to him-

self & answer two separate questions, viz., first, whether the offer of employment was in the circumstances under which it was made a genuine offer, & secondly whether, bearing in mind the distance from the workman's home of the employment offered, it was suitable employment. Appeal allowed. Matter sent to another county ct. judge for new trial.—*HILLS PATENT GLAZING CO., LTD. v. DOUGLAS* (1937), 30 B. W. C. C. 145, C. A.

**3927a.** Date of termination of incapacity.]—A fireman had to have his right thumb amputated as the result of an accident in the stokehold of a ship. On Nov. 5, 1928, his employers obtained a certificate to the effect that he was fit to return to his work, & thereupon gave notice to terminate the weekly payments on Nov. 15. The weekly payments were stopped on that day although a certificate had been furnished by the workman which stated that he was not fit to resume his old occupation, but also stated that there was plenty of other work he could do. The workman applied for an arbn. The arbn. took place on Jan. 29, & Feb. 5, 1929. On Mar. 1, the county ct. judge made his award in which he found as a fact that the workman was able to earn his pre-accident wages, & that up to the date of the hearing there was a dispute whether he had recovered. He did not give a finding as to the date on which the workman had become able to earn his pre-accident wages, but ordered the employers to continue to pay the full amount of weekly payments as from Nov. 15, 1928, to Feb. 5, 1929. The employers appealed:—*Held*: the judge should have found in fact the date when incapacity ceased. If by fixing Feb. 5, 1929, as the date down to which compensation must be paid, he intended to hold that incapacity continued to that date, there was no evidence to support such a finding.—*MOCKBILL v. HOMER CITY S.S. OWNERS* (1929), 22 B. W. C. C. 260, C. A.

*Annotations*:—*Conrad. Evans v. El Uruguayo S.S. Owners. Barlow v. Pacific Steam Navigation Co.* (1930), 23 B. W. C. C. 333. *Reid. Bevan v. Grovesend Steel & Tinplate Co.* (1929), 22 B. W. C. C. 572.

**3927b.** Whether workman within Workmen's Compensation Act, 1925 (c. 84), s. 9 (4).]—An employer having reduced a workman's compensation to 12s. 3d. a week, the workman applied for an arbn. on the ground that, although he was only partially incapacitated, he was unable to earn anything. At the hearing the workman said that it was impossible to say what he could earn if he could get light work. On that evidence it was submitted on his behalf that he was brought within sect. 9 (4). The county ct. judge made an award in favour of the employer that the workman was only entitled to 12s. 3d. a week as from the date of reduction. An appln. was subsequently made to the county ct. judge on behalf of the workman for an amendment of his note, or for a new trial, on the ground that sect. 9 (4) had not been properly considered at the hearing. The county ct. judge refused to grant a new trial, but said that he had not considered sect. 9 (4) until the end of the case. The workman appealed from the award & from the refusal to grant a new trial:—*Held*: the appln. was clearly made under sect. 9 (4), & the county ct. judge must be

taken to have realised that fact in making the award which he did.—*STORER v. MORRIS* (1929), 22 B. W. C. C. 177, C. A.

**3927c. Contract of service.]—**A miner in receipt of unemployment benefit died from the effects of fire-damp while working at an outcrop of coal on a farm. The widow filed an application for compensation on behalf of herself & other dependants. No evidence was given at the arbn. to show by whom or on what terms the deceased man was employed to get the coal. The county ct. judge made his award for the widow. Resps. appealed:—*Held*: the hearing was unsatisfactory as the county ct. judge had not found the facts which were necessary to enable him to come to a decision. Appeal allowed. New trial ordered before a different judge.—*MEAKIN v. LOMAS* (1932), 25 B. W. C. C. 73, C. A.

**3927d. Whether accident arising in course of employment.]—**A workman after a few minutes' interval from the time he was working as a dipper in a galvanising department suddenly fell dead. Death was diagnosed as being due to *angina pectoris*. There was some medical evidence pointing to a connection between the arduous nature of the work & the death. The county ct. judge in making his award for the employer said that he was unable to find as a fact that the workman suffered any strain or that the work contributed in any way to his death. The widow appealed:—*Held*: in view of the medical evidence, it was not clear that the judge had rightly directed himself in law & there should be a new trial. Appeal allowed. New trial ordered.—*JAMES v. PARTRIDGE JONES & JOHN PATON, LTD.* (1932), 25 B. W. C. C. 92, C. A.

*Annotations*:—*Apld.* *Lochgelly Iron & Coal Co. v. Walkenshaw* (1935), 28 B. W. C. C. 230. *Consd.* *Walker v. Balrds & Dalmellington, Ltd.* (1935), 153 L. T. 322. *Apld.* *Whittle v. Ebbw Vale Steel, Iron & Coal Co.*, [1936] 2 All E. R. 1221.

**3927e. Whether fresh accident—Unsatisfactory pleadings.]—**A wagon-tippler suffered an inguinal hernia in 1923 while at work. After a few weeks' absence, for which he received compensation, he returned to light work which he continued to perform until 1930. In June, 1930, he had further intestinal trouble & was away from work for two weeks for which he received compensation. After some difficulty with regard to wearing a truss he applied in Nov. 1930, for further compensation, alleging the 1923 accident as the cause of incapacity. It was then discovered that he was suffering from a femoral hernia. The workman then by leave amended his application by adding the femoral hernia, but still alleged that his incapacity was caused by the inguinal hernia. The county ct. judge held that the incapacity was due to the femoral hernia & not to the inguinal hernia, & dismissed the application. The workman appealed:—*Held*: the hearing was unsatisfactory, largely owing to the condition of the pleadings which did not make the issues clear. Appeal allowed. New trial ordered.—*HARDSTAFF v. SHERWOOD COLLIERY CO.* (1931), 24 B. W. C. C. 349, C. A.

**3927f. Whether employment continuous.]—**A miner was certified in 1924 to be suffering from miner's nystagmus & thereby disabled from earning full wages. After a short period he returned to work on the surface.

In 1926 there was a general strike & stoppage of work in all the coalfields which continued till Dec. of that year. Work was re-started in Wales under a general agreement between masters & men which contained a clause that each workman should receive a fortnight's notice of termination of his employment. The workman was re-employed in Dec. with others but when signing on falsely declared in writing that he had not suffered from miner's nystagmus. Certain subsequent agreements had been made between the parties. With the exception of three months' unemployment in 1929 & two weeks in 1933, when he received unemployment pay, he continued at work until Aug. 1933, when he was dismissed on a fortnight's notice. He then obtained a certifying surgeon's certificate that he was suffering from miner's nystagmus & made a claim for compensation accordingly. The employer denied liability on the ground that the workman had made a wilful & false declaration in writing within the meaning of sect. 43 (1) (b) at the time of entering his employment in 1926 & that that employment had continued up to the date of his dismissal in 1933. The county ct. judge without finding whether the agreement which commenced in Dec. 1926, had been put an end to, held that the contentions of the employer were correct & dismissed the workman's application. The workman appealed:—*Held*: the county ct. judge had both misdirected himself in not considering the effect of *Scott v. Summerlee Iron Co., Ltd.*, No. 3837a, & had also failed to determine the essential question of the continuity of employment from 1926 to 1933. There must be a new trial for him to find the essential facts as to this & to apply the law in the light of those facts. For the workman to be deprived of compensation by reason of the false declaration, such declaration must have been made on entering a contract of employment in which he was in fact engaged at some time during the period of twelve months previous to the date of disablement on which his claim is based. Appeal allowed.—*WILLIAMS v. TREDEGAR IRON & COAL CO., LTD.* (1935), 28 B. W. C. C. 291, C. A.

**3927g. Whether agreement between parties as to quantum.]—**A workman having been injured in Oct. 1930, his employer admitted liability & paid him a weekly sum of 30s. as compensation. The employer was at that time under the impression that the average weekly earnings of the workman before the accident were £6 1s. 6d. In June, 1933, the employer learned for the first time that the workman was earning £3 a week in a fresh employment & suggested that the weekly payment of compensation should be adjusted accordingly. The workman refused an adjustment & 30s. continued to be paid weekly. In Dec. 1934, the employer applied for a review & raised the question of the amount of the pre-accident average weekly earnings. For the workman it was argued that there having been an agreement to pay 30s. a week, the employer must be taken also impliedly to have agreed the amount of the pre-accident average weekly earnings. The county ct. judge made no finding as to the existence of any agreement express or implied, but found that the pre-accident average weekly earnings were

£5 7s. 6d. & made an award reducing the weekly payment to 23s. 9d., being half the difference between £3 & £5 7s. 6d. The workman appealed:—*Held*: the county ct. judge should have found whether there was any agreement between the parties &, if so, what were its terms express or implied, & the matter must go back for him to do so.

*Per* ROMER, L.J. If it were proved that the parties were labouring under a mutual mistake of fact as to the amount of the pre-accident average weekly earnings, the county ct. judge would be entitled on these figures to diminish the weekly payment under sect. 21, even if there were no change of circumstances. Appeal allowed.—TEILO TINPLATE CO., LTD. v. GRIFFITHS (1935), 28 B. W. C. C. 127, C. A.

**3927h. Extent of incapacity.**—On the termination of weekly payments by his employer in respect of an accident a workman filed an application for arbn. alleging that he was still totally incapacitated. The employer by his answer pleaded that the workman had been neither partially nor totally incapacitated since the date when the weekly payments were terminated. The county ct. judge found that the workman was able to do "some work" & made his award for the employer, dismissing the workman's application. The workman appealed:—*Held*: the extent of the workman's incapacity was put in issue by the employer's answer. The county ct. judge should have determined that issue &, if he meant to find that the workman was still partially incapacitated, he should have decided the extent of such partial incapacity. Appeal allowed. Case remitted to another county ct. judge.—HUGHES v. REED & Co. (1938), 82 Sol. Jo. 273; 31 B. W. C. C. 11, C. C. A.

**3932a. Reliance on medical assessor—On question of fact.**—An engine-driver while coaling felt sudden pain in his stomach. He continued to drive his engine, but the pain increased & he went home. The next morning his doctor stated that he had a strangulated hernia. The workman claimed compensation. At the hearing the judge sat with a medical assessor. He held that the workman had not discharged the onus of proving that there had been an accident in the sense of an abnormal strain, & stated in his judgment that the medical assessor had advised him that the man never had a strangulated hernia. He made an award in favour of the employers. The workman appealed, asking for a new trial:—*Held*: the hearing was unsatisfactory, the judge having misdirected himself on the points at issue, & having accepted the opinion of the assessor as to what his findings of fact should be. Appeal allowed. New trial ordered in another county ct. with directions to apply the principles laid down in *Clover, Clayton & Co., Ltd. v. Hughes*, No. 2316.—DAVIS v. LONDON, MIDLAND & SCOTTISH RY. Co. (1930), 23 B. W. C. C. 368, C. A.

**3932b. No details in award.**—A domestic servant alleged that while carrying a bottle of her own nail polish she slipped on a mat & the bottle broke in her hand, cutting it. On a claim for compensation the county ct. judge made a short award stating that the workman had not discharged the *onus* that was on her

to satisfy him that the accident arose out of & in the course of her employment. The workman appealed on the ground that the county ct. judge had not stated the facts on which he based his decision & asked for a new trial:—*Held*: it not being a case in which a detailed finding was required, the shortness of the award was no ground for a new trial. Appeal dismissed.—GILBERT v. COLES (No. 2) (1931), 24 B. W. C. C. 481, C. A.

**3932c. Contradictory judgment.**—A miner who had suffered from periodical attacks of miner's nystagmus & was in receipt of weekly payments was examined by a medical referee who certified that the man "is not now suffering from miner's nystagmus, but from nervous debility." On his report the employer stopped the weekly payments. Six months later the workman applied for further compensation. The county ct. judge found as a fact that the workman was not suffering from nystagmus, & looked the picture of health, but said that he thought it possible, & even likely, that he might have a recurrence though he was not satisfied that such would be the case. His award was in the form that the employers were to be liable to pay the workman further compensation if at any time he became incapacitated for work from nystagmus. The workman appealed:—*Held*: as the award made by the county ct. judge was not consistent with his judgment, & the judgment was contradictory in itself, there must be a new trial. Appeal allowed. Order for new trial.—HILLIER v. EBBW VALE STEEL, IRON & COAL Co., LTD. (1932), 25 B. W. C. C. 238, C. A.

**3932d. Excessive award.**—A workman claimed compensation on the basis of partial incapacity. On the matter coming before him, the county ct. judge referred it to a medical referee, who reported as follows: "S. has good general health, but is not fit for his ordinary work." The judge, without considering the effect of sect. 9 (4), made an award of 30s. a week on a finding of total incapacity. The employers appealed:—*Held*: the hearing was unsatisfactory, the judge having made an award in excess of what the workman was claiming & not justified by the evidence. Appeal allowed. New trial ordered.—SINGLETON v. DRAKE (D.) & SONS (1931), 24 B. W. C. C. 369, C. A.

**3932e. Confusion at hearing as to relationship of principal & contractor.**—A workman was injured while screening coal supplied by a colliery co. to be put on board ship. The coal shippers & the colliery co. were under the same control. The workman framed an application for compensation against the colliery co. as his immediate employers, but the colliery co. denied that he had ever been employed by them. At the arbn. the case was opened & argued on the basis that the shippers were contractors within sect. 6, & that the colliery co. were principals. The county ct. judge made an award in favour of the workman against the colliery co. The colliery co. appealed:—*Held*: there having been confusion as to the basis on which the claim was being made against the colliery co. the case must be sent back for re-hearing.—JENKINS v. OCEAN COAL Co., LTD. (1934), 27 B. W. C. C. 111, C. A.

**3932f. Insufficient evidence as to whether reasonable cause for delay in giving notice.]—**On Nov. 14, 1933, a labourer struck his knee while at work. On returning home he showed his wife a black bruise. The bruise was attended to by his wife, & he continued working for a month suffering occasionally from cramp. On Dec. 12, 1933, he suddenly felt severe pain & was sent to the infirmary. On Dec. 14 he underwent two operations but died on Dec. 16. On Dec. 15 his wife gave notice to the employer. The county ct. judge, on a claim by the widow for compensation, found that death resulted from the injury, but held that that being so the deceased workman must have suffered sufficient discomfort to make it obligatory for him to give notice of the accident. He held that there was no reasonable cause for failure to give notice before Dec. 15, & that the employer was prejudiced by the delay. He therefore made his award for the employer. The widow appealed:—*Held*: there was not sufficient evidence as to whether in fact the injury was such as to call for notice being given before Dec. 15, & there must be a new trial to see whether such evidence was forthcoming.—**REDMAN v. SUNDERLAND CORPN.** (1934), 27 B. W. C. C. 376, C. A.

**3932g. Decision unsupported by evidence.]—**An employer applied for a review & diminution to 8s. 6d. of a weekly payment then being paid to an injured workman under a recorded memorandum of agreement, the grounds of the application being that the workman had received a genuine offer of employment at £2 a week. The county ct. judge held that the workman had an earning capacity of a higher amount than £2 a week & reduced the weekly payment to 5s. The workman appealed:—*Held*: there being no evidence on the point before him the county ct. judge was wrong in taking it upon himself to find that the workman's earning capacity was greater than that alleged by the employers, & there must be an award for 8s. 6d. Appeal allowed.—**WIMBUSH v. GARNER** (1936), 28 B. W. C. C. 135, C. A.

**3932h. Misdirection.]—**On Feb. 21, 1936, a cold day, a lorry driver strained himself by having to crank up his lorry at frequent intervals. On returning to his home he complained of pain to his wife. On Feb. 23, he was found to be suffering from influenza. He returned to work on Mar. 16, having recovered from the influenza. He died on Apr. 27. Evidence showed that the strain on Feb. 21 was much more than the ordinary strain of work, & that the lorry driver was continuously ill from the day of the strain to the day of his death. The lorry driver had been suffering from heart disease of long standing & he might have died from the effects of any sudden strain. One doctor said that death was due to the strain, another that excessive strain would have shortened his life, & the lorry driver's own doctor stated that he had "apparently well recovered, but heart irregular—heaving impulse." The county ct. judge was not satisfied on the medical evidence that death had been caused by the strain & he dismissed an application for compensation by the lorry driver's widow:—*Held*: the county ct. judge had misunderstood the evidence of the lorry driver's own

doctor, when he thought that it meant that the lorry driver had recovered from the strain. The evidence meant that he had recovered from the influenza but not from the strain, & there was no evidence of the effect of the influenza on his heart. The judge had misdirected himself & the appeal was allowed & an award made in favour of the widow.—**HILTON v. BILLINGTON & NEWTON, LTD.**, [1936] 3 All E. R. 292; 155 L. T. 530; 80 Sol. Jo. 952; 29 B. W. C. C. 299, C. A.

**3932j. Decision based upon proper reasoning—Addition of unsound reason.]—**A workman stayed away from work & was considered by his doctor to be suffering from influenza & gastric trouble. On the next day the doctor discovered an injury to the scrotum which appeared to be of a few days' standing. On the next two days the workman was visited by a mate & by his foreman to each of whom he gave an account of an accident a week earlier when he fell from a ladder while at work & injured his scrotum. An entry of this was made in the accident book. A few days later the workman died of septicæmia. On a claim for compensation brought by the widow the county ct. judge held that the probabilities were that the injury which caused the death was sustained during work, but went on to say that, apart from that, the information given by the workman when notifying the accident could not be ignored, & made his award in favour of the widow. The employer appealed:—*Held*: there was evidence on which the county ct. judge could find that the injury occurred while at work. As the county ct. judge had come to his decision by proper reasoning, the fact that he might have added another reason which was unsound in law would not be a ground for upsetting that decision.—**CHURCHWARD v. LANCASTER'S STEAM COAL COLLIERIES, LTD.** (1935), 28 B. W. C. C. 306, C. A.

*Annotation*:—**Refd.** *Ellison v. Calvert & Heald* (1935), 28 B. W. C. C. 371.

**3932k. Lump sum award—Incorrect finding of dependency.]—**A family consisted of father, mother & three sons. One son died as the result of an injury arising out of & in the course of his employment. The father & all three sons contributed varying sums to the family purse. At the time of the death, one son was in no way dependent on deceased & the other son was in ill-health & out of work. The father earned £4 17s. 3d. a week, of which he contributed £3 to the family purse & kept a savings bank account of his own. The father & mother claimed compensation on behalf of themselves & the brother in ill-health, as being partially dependent on deceased's earnings. The county ct. judge held that they were all partial dependants & awarded them a lump sum of £150, but reserved the question of apportionment. The employer appealed:—*Held*: there was no evidence on which the county ct. judge could find that the father was a partial dependant within the meaning of sect. 4 (2), & as in view of the nature of the award of an undivided lump sum to all three appcts., it was impossible to say what portion of it the county ct. judge had appropriated to the father, there must be a new trial to consider the amounts to which the mother &

brother were entitled.—*JACKSON v. CANHAM* (1935), 28 B. W. C. C. 30, C. A.

**3932l. Award based on ambiguous medical certificate.**—A miner had worked underground for some years but on Oct. 12, 1934, the mine in which he was working closed down. On Oct. 17, 1934, he obtained work in a quarry, but gave up that work on Feb. 9, 1935, on account of miner's nystagmus. On Feb. 11, 1935, he was certified to be suffering from miner's nystagmus & the date of disablement was fixed by the certifying surgeon as Oct. 12, 1934. The mine owners appealed from that certificate to the medical referee who, on Mar. 12, 1935, found that the workman "was at the time of his examination by the certifying surgeon suffering from miner's nystagmus but was not thereby disabled from earning full wages at the work at which he was employed," & certified that his condition at the date of examination by the medical referee was that "he is suffering from miner's nystagmus with well marked oscillation of the eyes but slight subjective discomfort, so that his earning capacity is not decreased. He is quite fit to do the work in a quarry at which he is at present employed." The county ct. judge held that the certificate of the medical referee was unambiguous, & meant that the workman was fit for his full work as a miner. He therefore made his award for the employer. The workman appealed on the ground that the certificate should have been sent back to the medical referee for explanation as it was not clear whether it intended to certify that the man was fit for his full work as a miner or only for work as a quarryman:—*Held*: the certificate of the medical referee was ambiguous, for if he had meant to say that the workman's earning capacity was not decreased for the purpose of earning full wages at the work of mining, there was no necessity also to state that he was quite fit to do work in a quarry. The certificate must therefore be remitted to the medical referee for further explanation. Appeal adjourned. Certificate remitted to medical referee.—*EVANS v. AMALGAMATED ANTHRACITE COLLIERIES, LTD.* (1935), 28 B. W. C. C. 413, C. A.

**3932m. Formal award inconsistent with written judgment.**—A miner was certified to be disabled by miner's nystagmus. Though fit for light work, he received compensation for total incapacity under sect. 9 (4) for a time & was then given notice to terminate his contract of service. The employer then brought proceedings to review & diminish the weekly payment. The workman contended, & at the arbn. called evidence to show, that he was entitled to the benefit of an order under sect. 9 (4) as amended, both on the ground, under clause (i), that he was in consequence of the injury unable to obtain the same class of work & also, under clause (ii), that his failure to obtain employment was a consequence wholly or mainly of his injury. The county ct. judge gave a written judgment in which he said that the case was indistinguishable from that of *Ingham's Thornhill Collieries, Ltd. v. Barstow*, No. 3291d, & held that, after considering the state of the labour market & the evidence called at the arbn., it was not probable that

the workman would in consequence of the injury be able to obtain the same class of work as before. He therefore reduced compensation. On the same day the county ct. judge signed a printed award (Form 24B) in which the words in square brackets dealing with clause (ii) were not deleted. The printed award diminished the weekly payment. The result of this was to make the award appear as if the judge had refused to make an order under sect. 9 (4) because he was not satisfied that the provisions of either clause (i) or (ii) had been fulfilled. The workman appealed:—*Held*: it was clear from his judgment that the county ct. judge had not intended to deal with clause (ii) & the fact that he had not deleted that part of his printed award which referred to it did not mean that he had necessarily considered it. There must be a new trial to consider the evidence under both clause (i) & clause (ii) of sect. 9 (4) as amended. Appeal allowed.—*EBBW VALE STEEL, IRON & COAL CO., LTD. v. WILLIAMS* (1935), 28 B. W. C. C. 267, C. A.

**3932n.** —.—*V-RANCH v. TREDEGAR (SOUTHERN) COLLIERIES, LTD.* (1935), 28 B. W. C. C. 277, C. A.

**3932o. Fresh evidence—Available at original hearing.**—A workman injured his arm in Dec., 1931. In June, 1933, the county ct. judge found that he had completely recovered & made an award for the employers. In 1935 the workman was examined by specialists & X-ray photographs were taken, with the result that it was then discovered that he had been more seriously injured than had been apparent two years previously, five fresh fractures being disclosed. As the workman was still incapacitated, he applied to the county ct. judge for a new trial. The county ct. judge refused the application on the ground that with reasonable diligence the fresh evidence could have been available at the original hearing & the responsibility for any inadequacy in the presentation of his case then rested on the workman & his advisers. The workman appealed:—*Held*: the county ct. judge had rightly exercised his discretion in refusing to grant a new trial. Appeal dismissed.—*MOORE v. CUNARD S.S. Co.* (No. 2) (1935), 28 B. W. C. C. 469, C. A.

**3932p. Refusal to grant new trial.**—An appeal from a refusal of the county ct. judge to grant a new trial:—*Held*: the judge had acted within his discretion & there were no grounds for ordering a new trial. Appeal dismissed.—*COCHRANE & SONS, LTD. v. HUTCHENS* (1936), 29 B. W. C. C. 219, C. A.

**3932q. Admission of accident—Incapacity not considered.**—A chef on board a yacht suffered an accident. The accident was admitted but incapacity was denied. On a claim for compensation the county ct. judge found as a fact that there had never been an accident & dismissed the claim. The workman appealed:—*Held*: as the accident had been admitted there must be a new trial to consider the issue of incapacity. Appeal allowed. New trial ordered.—*RIVOLI v. DUDLEY, EARL* (1936), 29 B. W. C. C. 249, C. A.

**3932r. Acceptance of facts from medical assessor—Facts in contradiction to sworn evidence.**—A workman, who was in receipt of full compensation for incapacity due to a fractured

skull, was offered light employment of a specified nature by his employer, but refused the offer on the ground that he was unfit for any work. The employer then applied for termination or diminution of the weekly payment on the grounds that the workman was not incapacitated for work as a result of his accident & that he had refused an offer of work which he was capable of doing. The review was heard by the county ct. judge sitting with a medical assessor. The medical evidence given on behalf of the employer was to the effect that the workman had improved & was fit for light work, particularly the light work offered. The doctors called on behalf of the workman were of opinion that he could not do the light work offered. The medical assessor then examined the workman in the judge's room & the judge & the medical assessor conferred on the case. The judge then said: "The medical referee has examined Filer. The appts. succeed & any incapacity is not due to the accident. Award appts., terminating compensation." The workman appealed:—*Held*: the county ct. judge could only have come to the conclusion to which he did come by accepting from the medical assessor facts which were in contradiction to the sworn evidence, & it was not competent for him on the evidence which was called before him to find otherwise than that the workman was still partially incapacitated. —PENSFORD & BROMLEY COLLIERIES (1921), LTD. v. FILER (1938), 31 B. W. C. C. 105, C. A.

**3932s.** Acceptance of sum due to date of award—No appeal.—LISSEDEN v. BOSCH (C. A. V.), LTD. (1938), 82 Sol. Jo. 1031, C. A.

**3940a.** ———.—]—A steel erector lost his left little finger by accident & was paid compensation. Compensation was stopped under the provisions of sect. 12 & the workman returned to work on the ground level for a few days. He complained of tenderness in his hand & was discharged. He claimed compensation for total incapacity or alternatively for partial incapacity to be treated as total under sect. 9 (4) as amended. The county ct. judge found that he was not entitled to be treated as totally incapacitated under sect. 9 (4) as he had not taken all reasonable steps to obtain employment & made an award for 5s. a week. The workman appealed on the ground that the judge had, according to the recollection of counsel, given reasons which were unsound & could not support the award. There was no note of such reasons having been given but they were set out in the notice of appeal. The Ct. of Appeal ordered that the case should be remitted for the judge to reconsider the whole matter on the evidence already given. On the second hearing the county ct. judge said that he had no recollection of giving any of the reasons alleged. He thereupon reconsidered the whole evidence & came to the same conclusion as before & consequently made the same award:—*Held*: the matter had now been made clear & there was abundant evidence to support the finding. Appeal dismissed.—KEOHANE v. DORMAN LONG & Co. (No. 2) (1935), 28 B. W. C. C. 146, C. A.

**3945a.** ———.—Not to be supplemented by note taken by artioled clerk.—Note apparently complete.] —A miner, after helping to put a tram on the rails, died within a few minutes. At the

post-mortem examination it was found that death was due to effusion in the pericardium. At the arbn., on the claim by his dependant for compensation, the employer's doctor gave evidence to the effect that there was no connection between the exertion & the sudden collapse. In making his award for the employer, the county ct. judge said that he preferred the evidence given for the employer to that given for the dependant, & held that death was not caused by accident arising out of & in the course of the employment. The dependant appealed, & on the hearing of the appeal counsel for the dependant asked for permission to read, in addition to the judge's note, a note taken at the hearing in the ct. below by an artioled clerk. Permission was refused:—*Held*: there was evidence to support the finding, which was purely a question of fact for the county ct. judge, & no misdirection. Appeal dismissed.—JONES v. BLAENAVON CO., LTD. (1931), 24 B. W. C. C. 148, C. A.

**3947.** Add. Annotations:—Apld. Jones v. Smith, [1936] 1 All E. R. 661. Refd. Mills v. Duckworth, [1938] 1 All E. R. 318.

**3948.** Add. Annotation:—Refd. Jones v. Smith, [1936] 1 All E. R. 661.

**3949.** Add. Annotation:—Refd. Jones v. Smith, [1936] 1 All E. R. 661.

**3950.** Add. Annotation:—Refd. Jones v. Smith, [1936] 1 All E. R. 661.

**3951.** Add. Annotation:—Refd. Jones v. Smith, [1936] 1 All E. R. 661.

**3952a.** ———.—]—A workman obtained, on Feb. 19, 1937, an award for weekly compensation at the rate of 4s. 6d. from June 9, 1936, up to the date of hearing & to continue. The arrears of compensation amounted to £8 9s. 6d. The formal award was drawn up & signed on Apr. 2, 1937. On Apr. 22, 1937, the workman's solr. gave notice of appeal as to quantum only. Resps. did not know of the intention to appeal until after service of the notice of appeal. A week after the award resps. had sent to the workman a cheque for £8 9s. 6d. for arrears & thereafter continued to send cheques for 4s. 6d. each week. These cheques were endorsed & cashed by the workman. The workman was in need of the money & stated that he treated the payments as merely made on account of the sum to which he considered he was entitled. The workman's solr. was throughout in ignorance of these payments. On the preliminary objection that no appeal lay on the ground that the workman was both approbating & reprobating the award:—*Held*: the rule was well established that any acceptance by a workman of money payable under an award was an approbation of that award & he could not now be heard to appeal from it.—EVANS v. MONMOUTHSHIRE & SOUTH WALES EMPLOYERS' MUTUAL INDemnITY SOCIETY, LTD. (1937), 30 B. W. C. C. 196, C. A.

**3953.** Add. Annotations:—Distd. Bevan v. Grovesend Steel & Tinsplate Co. (1929), 22 B. W. C. C. 572. Refd. Jones v. Smith, [1936] 1 All E. R. 661.

**3954.** Add. Annotations:—Folld. Evans v. Monmouthshire & South Wales Employers' Mutual Indemnity Society, Ltd. (1937), 30 B. W. C. C. 196. Refd. Jones v. Smith, [1936] 1 All E. R. 661.



**3954a. Acceptance of money paid into court—Appeal as to costs.]**—On the hearing of a claim for compensation applt. agreed to accept £10 paid into ct. on Jan. 7, 1927, the date of the answer filed by resps., in full satisfaction of the claim. Under the award, the £10 was to be paid to applt. with a declaration of liability, but resps. were given costs after the date of filing of their answer. Applt. appealed from so much of the order as directed costs to be so paid:—*Held*: applt. could not take the benefit of the award & appeal from a part of it to which she objected, & there was no right of appeal.—*WALDEN v. GRAMOPHONE CO., LTD.* (1927), 20 B. W. C. C. 346, C. A.

**3954b. — By widow—Appeal as to amount of children's allowance.]**—*MALCOLM v. BARBER, WALKER & Co., LTD.*, No. 3359d, *ante*.

**3954c. Appeal against date of termination of compensation—Application for review.]**—An infant workman was in receipt of compensation from the date of his injury to Aug. 10, 1928. On that date the employers, without following the procedure indicated in sect. 12, stopped the compensation on the ground that the workman had fully recovered. The county ct. judge heard the workman's claim for a continuance of the weekly payments on Jan. 8, 1929, when he found as a fact that the workman had fully recovered on Aug. 10, 1928, but granted a declaration of liability. The workman claimed that on this finding he was entitled to a continuance of the weekly payments to Jan. 8, 1929, in accordance with sect. 12. The county ct. judge adjourned the case for further argument on this point, & on Aug. 14, 1929, gave a considered judgment in which he held that, on his previous finding as to the date of recovery, the liability of the employers to make weekly payments ceased on Aug. 10, 1928. In May, 1929, the infant workman had come of age. In Sept. 1929, he entered an appeal against the decision of Aug. 14, 1929, by which the judge had ended payments as from Aug. 10, 1928, & in Oct. 1929, he filed an application in the county ct. for a review of the declaration of liability. On the hearing of the appeal the employers took the preliminary objection that by starting proceedings both by way of appeal & by way of review, the workman was both approbating & reprobating the award:—*Held*: (1) on the preliminary objection, the two sets of proceedings were in respect of independent matters & did not amount to approbation & reprobation; (2) on the merits, the county ct. judge having fixed the date of recovery of the workman, the employers could not then be ordered to continue the weekly payments after that date.—*BEVAN v. GROVESEND STEEL & TINPLATE CO., LTD.* (1929), 22 B. W. C. C. 572, C. A.

**3954d. Acceptance of costs—Appeal as to quantum.]**—An injured workman was awarded a weekly payment by way of compensation, & costs. The costs were duly taxed & paid. The workman then sought to appeal against the *quantum* of the award:—*Held*: the award was indivisible &, having approbated it by accepting costs, the workman could not then reprobate it by appealing against the *quantum*.

*Per GREENE, L.J.*: The workman approbated the award as soon as he proceeded to taxation.—*JONES v. SMITH*, [1936] 1 All E. R. 661; 80 Sol. Jo. 287; 29 B. W. C. C. 75, C. A.

**3961a. — — —.]—Ex parte application on behalf of the workman for extension of time within which to serve notice of appeal granted on the ground that the county ct. judge had not furnished applt. with a copy of his notes within the time given for appealing, though requested to do so.**—*GILBERT v. COLES* (No. 1) (1931), 24 B. W. C. C. 372, C. A.

**3963a. — Mistake.]**—An application for leave to extend the time for service of notice of appeal on the ground of mistake under the rules dismissed.—*BROWN v. BIRCH BROS., LTD.* (1929), 22 B. W. C. C. 404, C. A.

**3963b. Receipt of ex gratia payment.]**—An application for leave to extend the time for appealing against an order made in 1924 ending the weekly payments dismissed, the workman having in the meantime received from the employer a sum expressed to be paid *ex gratia*.—*HOLDEN v. MASSEY* (1929), 22 B. W. C. C. 507, C. A.

**3967. Add. Citations:—**96 L. J. K. B. 254; 20 B. W. C. C. 198.

**3968a. Application to Court of Appeal for leave—Applicant not previously suing as poor person.]**—*PRACTICE NOTE* (1934), 27 B. W. C. C. 418.

**3969a. —.]**—An infant workman having obtained an award, the employer appealed. Pending the appeal the employer agreed to withdraw the appeal, provided a lump sum was accepted by those acting on behalf of the infant:—*Held*: the proper order was to remit the case to the county ct. judge to consider the sufficiency of the amount offered in view of the chances of appeal being successful, & on the approval of the judge being given, the appeal should stand dismissed with liberty to apply.—*MARSHALL v. KIDDLE* (1927), 20 B. W. C. C. 614, C. A.

**3969b. —.]**—In a proper case pending the hearing of an appeal the Ct. of Appeal will approve the terms of a lump sum settlement of a question as to the extent of an employer's liability to an infant workman.—*SEAMAN v. INGRAM (J. G.) & SON, LTD.* (1929), 22 B. W. C. C. 393, C. A.

**3969c. Remission of compromise to registrar for registration.]**—*KNIGHT v. SKINNER* (1928), 21 B. W. C. C. 368.

**3969d. —.]**—*BABER v. FORD* (1938), 31 B. W. C. C. 183, C. A.

**3976a. —.]**—*DAVIS v. LONDON, MIDLAND & SCOTTISH RY. CO.*, No. 3932a, *ante*.

**3976b. —.]**—*BYRNE v. EVANS LIFTS, LTD.*, No. 3892a, *ante*.

**3976c. —.]**—*MEAKIN v. LOMAS*, No. 3927c, *ante*.

#### I. Other Cases.

**3977a. Death of applicant before appeal heard—Judgment given in ignorance of death.]**—A widow of a deceased workman was refused compensation by the county ct. judge. She appealed, but died five days before the hearing of the appeal. The appeal was however heard, the ct. being unaware of her death, & on Oct. 25, 1934, the appeal was allowed.



The case was sent back to the county ct. judge to assess the amount of compensation payable to her & her four children. On a motion by the employers to set aside or strike out the judgment of the Ct. of Appeal:—*Held*: the judgment of the Ct. of Appeal was a nullity & the award of the county ct. judge must stand, & the parties must take such proceedings as they might be advised.—*PATTENDEN v. MCINTOSH* (No. 2) (1934), 27 B. W. C. C. 494, C. A.

**3978a. Remission to medical referee—To explain certificate.]**—A workman had been certified by the medical referee as not suffering from miner's nystagmus, but upon a subsequent recurrence of the disease was certified to be so suffering by a certifying surgeon at a date after the medical referee's report. The House of Lords remitted the case to the medical referee as to the meaning of his report as it was doubtful whether he had considered the possibility of a recrudescence as a result of the original attack.—*PENRIKYBER NAVIGATION COLLIERY CO., LTD. v. EDWARDS*, [1932] W. N. 76; 173 L. T. Jo. 261; 73 L. Jo. 273, H. L.; *subsequent proceedings*, [1933] A. C. 28, H. L.

**3981. Add. Annotations:—***Refd.* Middleton Estate & Colliery Co. v. Finan (1926), 20 B. W. C. C. 207; *Vickers v. Miners, Thames Steam Tug & Lighterage Co. v. Ingram* (1927), 96 L. J. K. B. 490.

**3981a. —**—[Employers applied by way of review that a weekly payment payable to a workman might be ended or diminished. The county ct. judge made an award diminishing the weekly payment but ordering the employers to pay the costs. The employers appealed from so much of the award as related to costs:—*Held*: the judge has an unfettered discretion in the matter of costs, & there was no evidence in this case that the discretion had not been exercised judicially.—*CO-OPERATIVE WHOLESALE SOCIETY, LTD. v. LALLY* (1930), 23 B. W. C. C. 513, C. A.

*Annotation:—Distd.* Williams v. Dorothea Slate Quarry Co. (1936), 29 B. W. C. C. 174.

**3983. Add. Annotation:—***Refd.* Middleton Estate & Colliery Co. v. Finan (1926), 20 B. W. C. C. 207.

**3988a. —**—[*RUDDY v. LONDON, MIDLAND & SCOTTISH RY.*, No. 2823a, *ante*.

**3990. Add. Annotation:—***As to* (1) *Refd.* Vickers v. Miners, Thames Steam Tug & Lighterage Co. v. Ingram (1927), 96 L. J. K. B. 490.

**3993a. —**—*Denial of liability.*—A workman having been injured by accident, his employers applied for a reference to a medical referee under Workmen's Compensation Act, 1925 (c. 84), s. 19, on the ground that there was a dispute as to whether he was fit for his employment & as to whether any incapacity from which he might be suffering was due to the accident. Four days later the workman filed an objection to the reference on the ground that, as the employers were refusing to admit that the accident arose out of & in the course of the employment, the matter should be dealt with by arbn. & not by reference. On the same day he filed his appln. for arbn. The sheriff-clerk allowed

the reference to the medical referee & his decision was not appealed from. The employers filed an answer to the workman's appln. for arbn., in which they objected to the arbn. proceedings on the ground that the matter had already been referred to a medical referee, & further alleged that the workman was not entitled to any compensation because the accident had not arisen out of & in the course of the employment. The medical referee reported that the workman was partially incapacitated, & two days later the parties arrived at an agreement for settlement. On argument as to the costs the sheriff-substitute held that the workman's appln. for arbn. was premature, unwarranted & unnecessary, & while awarding no costs on the reference to the medical referee, gave the costs of the alleged abortive arbn. proceedings to the employers. On appeal it was held by the Second Division of the Ct. of Session that the sheriff-substitute was wrong in depriving the workman of the costs of the arbn. proceedings on the ground stated by him, & remitted the question of costs to him for further argument. The employers appealed:—*Held*: the medical referee having no power to decide whether the accident arose out of or in the course of the employment, it was perfectly proper for the workman to take the earliest opportunity of getting that point determined by arbn., & was entitled to act as he had done.—*BARR & HIGGINS, LTD. v. GREEN* (1928), 98 L. J. P. C. 17; 140 L. T. 441; 21 B. W. C. C. 439, H. L.

**3995a. —**—[A workman alleged that on Jan. 19, 1933, he was injured by accident arising out of & in the course of his employment. He was away from work from Mar. 2 to June 19, 1933. From June 19, 1933, to Dec. 1, 1934, he continued at his old work. He alleged that he had to cease work on Dec. 1, 1934, on account of the injury sustained on Jan. 19, 1933, & claimed compensation from Dec. 1, 1934, only. It was agreed between the parties at the arbn. that the three issues to be tried by the county ct. judge were: (1) Was there an accident? (2) Did it cause an injury at the time? (3) Was the workman's condition at the date of the arbn. due to that accident? The judge found for the workman on the first two issues & for the employer on the third issue, but awarded compensation to the workman for the period from Mar. 2 to June 19, 1933, & ordered each side to pay their own costs. The employers appealed:—*Held*: in so far as the award was given in favour of the workman, it was given on a matter that had never been submitted to arbn. by him & was bad, & the employers having therefore been wholly successful in the arbn., there was no ground for depriving them of their costs. Appeal allowed.—*WILLIAMS v. DOROTHEA SLATE QUARRY CO., LTD.* (1936), 29 B. W. C. C. 174, C. A.

**4009. Add. Annotation:—***Refd.* Campbell v. Pollak, [1927] A. C. 732.

**4012a. —**—*Employer ordered to pay costs.*—*SIDNEY LEE (EXETER), LTD. v. JAMES*, No. 3545a, *ante*.

**4013. Add. Annotation:—***Reid. Middleton Estate & Colliery Co. v. Finan* (1926), 20 B. W. C. C. 207.

**4014a. —**—[On an application to review weekly payments the employers received a letter from the workman's solrs., asking what was the exact amount of diminution they claimed, & replied that they intended to ask for a reduction of the 15s. a week to 2s. 6d. a week or to such other sum as the ct. should hold proper. The county ct. judge reduced the weekly payment to 10s., & ordered the employers to pay the costs:—*Held*: on the correct reading of the letter stating the diminution claimed the employers were successful on the award given, & the order as to costs should be set aside, & by consent of the employers, each party was ordered to pay their own costs.—*MIDDLETON ESTATE & COLLIERY CO., LTD. v. FINAN* (1926), 20 B. W. C. C. 207, C. A.

**4014b. —**—[It is not a judicial exercise of discretion for the county ct. judge to order the employers to pay the costs of proceedings for review in which they have been successful in obtaining a reduction of the weekly payments. On appeal the Ct. of Appeal ordered that the costs of the arbn. should be paid by the workman.—*GREAVES (J. W.) & SONS, LTD. v. ROBERTS* (1929), 22 B. W. C. C. 401, C. A.]

**4014c. — Ambiguous answer by workman—***Workman to pay costs.*—[Employers asked for termination or diminution of a weekly payment to a workman on the ground that he was fit to resume work. The workman put in an answer in which he admitted that he was fit for light work, but alleged that the employers had neglected to provide any light work. He also said that he was prepared to accept such reduced compensation as might be found to be half the difference between his average pre-accident earnings & the average weekly amount he could earn at such light work as might be available for him. The county ct. judge made an award diminishing the weekly payment, & giving the costs to the employers on the ground that they had succeeded on the main issue, the answer being ambiguous, & leaving it open to the workman to argue at the hearing that his labour was an "odd lot" & that he was, therefore, entitled to resist any reduction. The workman appealed on the ground that the county ct. judge had failed to exercise judicially his discretion as to costs:—*Held*: the county ct. judge had not violated any

principle of law in exercising his discretion as to costs. Appeal dismissed.—*MIDLAND EMPLOYERS' MUTUAL ASSURANCE, LTD. v. LEWIS* (1930), 23 B. W. C. C. 192, C. A.]

**4019. Add. Annotation:—***Consd. Campbell v. Pollak*, [1927] A. C. 732.

**4032a. Workman's expenses in getting to medical referee's house.**—[The ct. has no power to make an order that a workman, who is ordered to attend before a medical referee to determine whether he is entitled to continue in the receipt of a weekly payment for compensation, shall be paid a sum for his expenses in getting to the medical referee's house.—*RICHARDS v. UNITED NATIONAL COLLIERIES, LTD.* (1927), 96 L. J. K. B. 716; 137 L. T. 467; 71 Sol. Jo. 490; 20 B. W. C. C. 465, C. A.]

**4034a. Taxing fee—Liability of workman to refund to employers.**—[Notwithstanding Workmen's Compensation Act, 1925 (c. 84), Sched. I. (12), where a workman has brought unsuccessful proceedings against his employers, & has been ordered to pay their costs, he may also be made to refund to them the taxing fee which they have paid for having those costs taxed.—*ELWELL v. CRANE FOUNDRY CO.* [1929] 1 K. B. 88; 97 L. J. K. B. 641; 139 L. T. 300, C. A.]

**4035a. Decision of registrar as to quantum—Appeal to judge—No jurisdiction to review.**—[In the taxation of costs the County Ct. Rules & the Workmen's Compensation Rules give a discretion to the registrar of the county ct. which cannot be interfered with by the county ct. judge on a question of amount when the discretion is otherwise properly exercised. A bill of costs in a case under the Workmen's Compensation Act included fees paid to three medical witnesses, two for £8 8s. each & one for £10 10s. On taxation the registrar reduced the fee to be allowed to each of those witnesses to £3 3s., stating that he did so in the exercise of his discretion & after careful consideration of the relevant circumstances. On the hearing of an application to review, the county ct. judge increased the allowance for each of the three witnesses to £7 7s. On appeal:—*Held*: the county ct. judge had no jurisdiction to interfere with the discretion of the registrar in fixing the quantum of allowance for the medical witnesses.—*WHITE v. ALTRINCHAM URBAN DISTRICT COUNCIL*, [1936] 2 K. B. 138; [1936] 1 All E. R. 923; 105 L. J. K. B. 366; 154 L. T. 656; 52 T. L. R. 441; 80 Sol. Jo. 365; 29 B. W. C. C. 105, C. A.]

**PART XIV. SECT. 24, SUB-SECT. 1.—J.**

*sk. Remit to medical referee—Fee of referee—By whom payable.*—[The person liable for payment of the fee under Workmen's Compensation Act, 1923 (c. 42), s. 25 (1), is the person applying for registration at the time when the remit to the medical referee is made.—*EASTON v. NIDDRIE & BENHAR COAL CO., LTD.* [1927] S. C. 3; 20 B. W. C. C. 652.—*SCOT.*]

**PART XIV. SECT. 24, SUB-SECT. 1.—K.**

*sl. Set-off—Costs of separate decrees.*—[*Held*: as both decrees were steps in the statutory adjustment of liability for compensation in respect of the same accident, & therefore *partes ejusdem negotii*, the employers should not be deprived of their right to set

off the one decree for expenses against the other.—*BYRNE v. BAIRD & CO.* [1929] S. C. (Ct. of Sess.) 624.—*SCOT.*

**PART XIV. SECT. 24, SUB-SECT. 1.—P.**

*sm. Remission to arbitrator on appeal—Power of arbitrator as to costs.*—[An arbitrator, after a proof, decided against the workman, & found the employers entitled to expenses. In a stated case the question of law was whether the arbitrator was entitled, on the facts found proved, to decide against the workman. The ct. answered the question of law in the negative, & remitted the case to the arbitrator. The arbitrator refused a motion by the workman for the expenses of the proof, on the ground that he had already awarded them to the

employers & could not recall his own award:—*Held*: the effect of the answer to the question of law was to recall the interlocutor of the arbitrator on the merits, that the award of expenses being merely ancillary fell with it, & accordingly, it was now open to the arbitrator to reconsider the question of the expenses of the proof.—*MORTON v. DAVID COLVILLE & SONS*, [1931] S. C. 234; 24 B. W. C. C. Supp. 10.—*SCOT.*

*sm. Fee of court for recording memorandum—Payable by employer only—Validity of Act of Sederunt.*—[The fee of 10s. prescribed by the Act of Sederunt of July 18, 1929, for examining & recording a memorandum of agreement is a "fee of ct." within the meaning of sect. 40 of Sheriff Cts. (Scotland) Act, 1907, & the further

4042a. —.]—*KNIGHT v. SKINNER* (1928), 21 B. W. C. C. 344, C. A.; *subsequent proceedings*, 21 B. W. C. C. 368, C. A.

4042b. —.]—*EVANS v. URIGUAYO S.S. OWNERS* (1930), 23 B. W. C. C. 227, C. A.

4042c. —.]—*EMSLEY v. HAGGAS (J.) & Co., LTD.* (1931), 24 B. W. C. C. 243, C. A.

4042d. —.]—*BARLOW v. PACIFIC STEAM NAVIGATION Co.* (1930), 23 B. W. C. C. 228, C. A.

4043a. Stay of order pending application to Poor Persons Committee.]—*THOMAS ALLEN, LTD. v. HAGGER* (No. 2) (1931), 24 B. W. C. C. 375, C. A.

4045a. —.]—*DAWSON v. AGWI PETROLEUM CORPN., LTD.* (1934), 27 B. W. C. C. 375, C. A.

4055a. — Owing to subsequent decision of appellate court.]—Where a county ct. judge's award was according to the law as interpreted at the date of the hearing, but such interpretation, owing to a subsequent decision of the House of Lords, was proved since to have been wrong:—*Held*: his order giving costs to the successful workman must be set aside, & applts. the employers, must have their costs both in the county ct. & in the Ct. of Appeal.—*AKERS v. LONDON & NORTH EASTERN RY. Co.* (1926), 20 B. W. C. C. 195, C. A.

4063. *Add. Annotation*:—*Refd. Lind v. Johnson*, [1937] 4 All E. R. 201.

4068a. —.]—*Pltf.*, a farm bailiff, was injured in a collision between his employer's van, which he was driving, & a motor lorry owned by deft. Deft. admitted the negligence of his driver, but relied upon 1925 Act, s. 30, alleging that pltf. had received compensation under that Act, & was debarred from recovering damages. *Pltf.* was, in fact, paid full wages all the time he was off work, & made no claim for compensation. Some time after his return to work, however, he signed the usual form of receipt in respect of each week he was off work, the receipt stating that he had received compensation at the rate of 30s. per week. The employer in fact never received from the insurance co. any sum in respect of the compensation, & *pltf.* received only his full wages as stated above:—*Held*: *pltf.* had received wages only, & not compensation, & no question arose under sect. 30. *Pltf.* was entitled to recover in this action.—*LIND v. JOHNSON*, [1937] 4 All E. R. 201; 158 L. T. 376; 54 T. L. R. 95; 81 Sol. Jo. 1023; 30 B. W. C. C. 457.

4067. *Add. Annotations*:—*Consd. Kinneil Cannel & Coking Coal Co. v. Sneddon (or Waddell)*,

[1931] A. C. 575; *Avery v. London & North Eastern Ry. Co.*, [1937] 2 All E. R. 777; *Taylor v. Arrol & Co., Ltd.*, [1937] 1 All E. R. 658.

4068. *Add. Citation*:—96 L. J. K. B. 268.

*Add. Annotation*:—*Consd. Kinneil Cannel & Coking Coal Co. v. Sneddon (or Waddell)*, [1913] A. C. 575. *Refd. Rudd v. Elder Dempster & Co.*, [1933] 1 K. B. 566.

4068a. *Adjournment of compensation proceedings*—*Pending action by widow under Fatal Accidents Act.*—A workman met with a fatal accident. A claim under 1925 Act was made by two infant dependants. The widow, acting under advice, stated that she proposed to take proceedings in another ct. to recover damages in respect of her husband's death, but declined to make or give up any claim to compensation under the Act. The county ct. judge, acting under Workmen's Compensation Rules, 1926, r. 4 (2), then made an order joining the widow as resp. to the arbn. proceedings, stating that the order was made without prejudice to her right to proceed under Fatal Accidents Act or to claim compensation under the Act. The employers contended that by reason of the above matters the widow was barred from bringing an action under Fatal Accidents Act, she having elected to proceed under the Workmen's Compensation Act:—*Held*: (1) the widow had not in law or in fact exercised an option to claim compensation under Workmen's Compensation Act; (2) it was open to the widow to bring proceedings under Fatal Accidents Act, & for the children at the same time to proceed under Workmen's Compensation Act; (3) the provisions of 1925 Act, s. 8 (3) (ii), do not make such proceedings impossible, in that, in such a case, it would be impossible to make a proper award of compensation in respect of the children under the sect.—*TAYLOR v. ARROL (SIR WILLIAM) & Co., LTD.*, [1937] 1 All E. R. 658; 156 L. T. 342; 81 Sol. Jo. 139; 30 B. W. C. C. 30.

4068b. *Claim for compensation by stepson*—*Right to widow to common law remedy.*—After an action of damages under the common law of Scotland had been brought against a colliery co. by the widow of a miner who had been killed in the pit, on behalf of herself & children, a stepson of deceased, who had no claim at common law, presented an application for compensation under 1925 Act. In that process the co. paid into ct. the maximum amount payable under the

provision in the Act of Sederunt that the fee is payable by the employer whether the memorandum is presented by him or by the workman does not make it *ultra vires*.—*CARRON Co. v. THOM* (1931), 24 B. W. C. C. 245, H. L.—*SCOT.*

#### PART XIV, SECT. 24, SUB-SECT. 2.—B.

4062 I. *Jurisdiction to vary order as to costs*—*Judgment specifically dealing with costs.*—An award was made by an arbitrator under Workmen's Compensation Act, 1916, in favour of a workman who was allowed a certain weekly payment & the costs of the arbitration. From this award the workman appealed, & that appeal was

dismissed with costs. Subsequently an application was made on behalf of resp. employer for an order that the costs incurred by him in the appeal should be made costs in the arbitration:—*Held*: although the order asked for might have been made on the hearing of the appeal, the Ct. had now no jurisdiction to make it.—*LAURER v. BRIGGS* (1928), 28 S. R. N. S. W. 389; 45 N. S. W. W. N. 110.—*AUS.*

#### PART XIV, SECT. 25, SUB-SECT. 1.—A.

f i. —.]—The fact that *pltf.*, who was suing in Admlty. for damages resulting from a collision which caused the death of her husband, had accepted benefits under Workmen's Compensa-

tion Act:—*Held*: not to bar her, under the principle of election, from proceeding against the ship.—*DAGLAND v. S.S. CATALA*, [1927] 4 D. L. R. 426; [1927] 3 W. W. R. 97; 38 B. C. R. 440; *reversd. sub nom. THE CATALA v. DAGLAND*, [1928] 3 D. L. R. 334; Ex. C. R. 83.—*CAN.*

r i. —.]—A workman who has suffered injury owing to the negligence of his employer is not debarred by Workers' Compensation Act, 1926, s. 63, from bringing an action at common law against his employer to recover damages for the injury so sustained unless he has made a claim under the Act & obtained a decision thereon.—*CONNELL v. UNION STEAMSHIP Co.* (1928), 28 S. R. N. S. W. 242; 45 N. S. W. W. N. 62.—*AUS.*

Act, & the arbitrator awarded the stepson compensation. In their defences to the common law action the co. pleaded that the defenders having paid into ct. the maximum compensation payable under 1925 Act, & not being liable to proceedings independently of said Act, the present action was incompetent:—*Held*: the option of the widow either to claim compensation under the Act or to take proceedings independently of it could not be defeated by the arbn. proceedings taken by the stepson, & the action was competent.—**KINNEIL CANNEL & COKING COAL CO., LTD. v. SNEDDON (OR WADDELL)**, [1931] A. C. 575; 100 L. J. P. C. 113; 145 L. T. 289; 47 T. L. R. 386; 75 Sol. Jo. 295; 24 B. W. C. C. 181, H. L.; *affg.*, S. C. *sub nom.* WADDELL v. KINNEIL CANNEL & COKING COAL CO., LTD. (1930), 23 B. W. C. C. 567.

*Annotations*:—**Consd.** Taylor v. Arrol & Co., [1937] 1 All E. R. 658. **Refd.** Avery v. London & North Eastern Ry. Co., [1938] A. C. 606.

**4070. Add. Annotations**:—**Consd.** Murray v. Schwachman, Ltd., [1937] 2 All E. R. 68. **Refd.** Higgins v. Harrison (1932), 25 B. W. C. C. 113.

**4071. Add. Annotations**:—**Dbtd. & Distd.** M'Cafferty v. MacAndrews & Co., [1930] A. C. 599. **Consd.** Rudd v. Elder Dempster & Co., [1933] 1 K. B. 566. **Refd.** Higgins v. Harrison (1932), 25 B. W. C. C. 113.

**4071a. Action for breach of statutory duty.**—An infant workgirl lost the ring finger of her right hand by accident arising out of & in the course of her employment. She received compensation under the Workmen's Compensation Act for a time, & then accepted £20 in purported settlement on the promise by the employer to re-employ her. No memorandum of this agreement was recorded. She worked at this employment for five years when, by reason of trade conditions, she was discharged. She then commenced an action against the employer for damages for personal injuries resultant from the employer's alleged breach of statutory duty to fence the machine. The action was tried by a judge alone who found that the injury had been caused by the employer's breach of statutory duty to fence, & that there was no contributory negligence on the part of pltf. He, however, also found, having regard to the fact that the infant had received employment for five years after her accident under the agreement, that the agreement to accept compensation, though not registered, was for her benefit & therefore binding, with the result that the action was barred by sect. 29 of the Act. The infant appealed:—*Held*: without deciding whether the agreement was for the infant's benefit or whether further proceedings might be taken under Workmen's Compensation Act, the action for breach of statutory duty failed because, on the evidence, the machine was not a dangerous machine within Factory & Workshop Act, 1901 (c. 22), s. 10, & therefore there was no duty on the employer to fence it. Further, on the evidence, the accident was caused by the negligence of pltf. which was a complete defence to the action even if such negligence had only been of a contributory character.—**HIGGINS v. HARRISON** (1932), 25 B. W. C. C. 113, C. A.

*Annotations*:—**Consd.** Lochgelly Iron & Coal Co. v. M'Mullan, [1934] A. C. 1; Walker v. Bletchley Flettons, Ltd., [1937]

1 All E. R. 170. **Refd.** Rudd v. Elder Dempster & Co., [1933] 1 K. B. 566.

**4071b. — Negligence or wilful act of employer or person for whom employer responsible—Whether necessary.**—In the absence of any personal negligence or wilful act of the employer or of some one for whose act or default the employer is responsible, Workmen's Compensation Act, 1925 (c. 84), s. 29, relieves the employer from liability in an action at common law for injury sustained by a workman in his employment, as the result of an accident arising out of & in the course of the employment through breach of a statutory obligation imposed on the employer for the workman's benefit.—**RUDD v. ELDER DEMPSTER & CO., LTD.**, [1933] 1 K. B. 566; 102 L. J. K. B. 275; 148 L. T. 337; 49 T. L. R. 202; 25 B. W. C. C. 482, C. A.; *on appeal*, [1934] A. C. 244, H. L.

*Annotations*:—**Overd.** Lochgelly Iron & Coal Co. v. M'Mullan, [1934] A. C. 1. **Consd.** Wheeler v. New Merton Board Mills, Ltd., [1933] 2 K. B. 669. **Refd.** Flower v. Ebbw Vale Steel Iron & Coal Co., [1934] 2 K. B. 132; Wilsons & Clyde Coal Co. v. English, [1937] 3 All E. R. 828.

**4071c. — — — — —.**—Sect. 29 (1) of 1925 Act does not preclude an action at common law against employers for breach of a statutory duty on their part or on the part of some person for whose act or default they are responsible.—**LOCHGELLY IRON & COAL CO., LTD. v. M'MULLAN**, [1934] A. C. 1; 102 L. J. P. C. 123; 149 L. T. 526; 49 T. L. R. 566; 77 Sol. Jo. 539; 26 B. W. C. C. 463, H. L.

*Annotations*:—**Consd.** Flower v. Ebbw Vale Steel, Iron & Coal Co., [1936] A. C. 206. **Refd.** Knott v. London County Council, [1934] 1 K. B. 126; Wheeler v. New Merton Board Mills, Ltd., [1933] 2 K. B. 669; Hannaford v. May, [1935] 2 K. B. 385; Bailey v. Goddes, [1937] 3 All E. R. 671; Marshall v. London Passenger Transport Board, [1936] 3 All E. R. 83; Wilsons & Clyde Coal Co. v. English, [1937] 3 All E. R. 828.

**4071d. What amounts to.**—Defts. installed in their factory as part of the plant with the intention that it should be used by their employees a dangerous machine which was not fenced or guarded as required by Factory & Workshop Act, 1901 (c. 22). Owing to the condition of the machine pltf., a workman in the employment of defts., was injured by it in the course of his work. It was found that it was not by the negligence of defts. but of their foreman that the machine had been allowed to be used in the condition in which it was at the time of the accident:—*Held*: the defence of *volenti non fit injuria* had no validity against an action based on breach of statutory duty; & further, pltf.'s injury was caused by the "wilful act" of defts. within sect. 29 (1) of 1925 Act, & defts. were therefore not protected by that sect. from liability to pltf. independent of the Act.

Defts. appealed, & contended that the maxim *volenti non fit injuria* was a defence to the action:—*Held*: the defence of *volenti non fit injuria* was no answer to a claim made by a workman against his employer for injury caused through a breach by the employer of a duty imposed upon him by statute.—**WHEELER v. NEW MERTON BOARD MILLS, LTD.**, [1933] 2 K. B. 669; 103 L. J. K. B. 17; 149 L. T. 587; 49 T. L. R. 574; 26 B. W. C. C. 230, C. A.

*Annotation*:—**Refd.** Flower v. Ebbw Vale Steel, Iron & Coal Co., [1934] 2 K. B. 132.

**4072a. — Appeal from order on question of law.**—*Held*: (1) an appeal lies (in Scotland by

means of a reclaiming note) from an order of the ct. in the action assessing compensation under 1925 Act, s. 29 (2), but on the same principle as if the proceedings had been by arbn., namely, that the determination is final as to fact, but is open to review as to law; (2) upon the construction of 1925 Act, s. 29 (2), in conjunction with 1925 Act, s. 14 (1), the expression "within the time hereinbefore limited for taking proceedings under this Act" does not mean that the action must be brought within six months from the occurrence of the accident, but means that the claim must be made within the six months as a condition of taking proceedings for the recovery of compensation; if the conditions of sect. 14 (1) are complied with the Act imposes no limit of time within which the action must be brought.—*M'CAFFERTY v. MACANDREWS & Co., LTD.*, [1930] A. C. 599; 99 L. J. P. C. 145; 143 L. T. 682; 46 T. L. R. 559; 23 B. W. C. C. 286, H. L.

**4076. Add. Annotations:—***As to* (1) *Distd. Adair v. Colville* (1926), 20 B. W. C. C. 702. *Refd.* *Delahunt v. Moody* (1927), 21 B. W. C. C. 588.

**4081a. —.]—***M'CAFFERTY v. MACANDREWS & Co., LTD.*, No. 4072a, *ante*.

**4090. Add. Annotation:—***Refd.* *Lind v. Johnson*, [1937] 4 All E. R. 201.

**4095a. —.]—**Where the injury for which compensation is payable under the Workmen's Compensation Acts, 1925 to 1934, was caused in circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employer on paying compensation is not disentitled to be indemnified under sect. 30 (2) of the Act of 1925 by the person so liable to

pay damages by reason of the fact that, the injury having been a fatal injury, the compensation has been paid not to the workman but to a dependant of the workman.—*SHIRVELL v. HACKWOOD ESTATES CO., LTD.*, [1938] 2 K. B. 577; [1938] 2 All E. R. 1; 107 L. J. K. B. 713; 159 L. T. 49; 54 T. L. R. 554; 82 Sol. Jo. 271, C. A.

**4096. Add. Annotations:—***Refd.* *Rudd v. Elder Dempster & Co.*, [1933] 1. K. B. 566; *Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1.

**4096a. —.]—***Resps.* were engaged in work upon a vessel in appcts.' yard. As the work was urgent, they borrowed three of appcts.' workmen. One of the latter dropped a hammer & injured an employee of appcts. Appcts. paid the injured man compensation & sought to be indemnified by resps. The latter contended that, by reason of the definition of "employer" in sect. 5 of 1925 Act (whereby, upon the loan of services of a workman, the person with whom he has entered into a contract of service is to be deemed to be, & to continue to be, his employer) appct. co. was the employer within the meaning of sect. 30 of the Act & that therefore the injury was not caused in circumstances creating a legal liability in some person other than the employer as required by that sect.:—*Held*: (1) the "legal liability in some person other than the employer" referred to in sect. 30 was a liability outside the Act, & it was not legitimate to refer to the definition in sect. 5 of the Act in the way contended; (2) the construction of the sect. was the same whether the right to an indemnity was sought to be enforced by an arbn. under the Act or by action.—*DOXFORD & SONS, LTD. v. FURNESS SHIP-*

#### PART XIV. SECT. 25, SUB-SECT. 1.— B.

**4075 iv. —.]—***Whether award open to review.*—*M'CAFFERTY v. MACANDREWS & Co.*, [1929] S. C. (Ct. of Sess.) 529.—*SCOT.*

**4077 i. —.]—***Deduction of costs of unsuccessful action.*—*ADAIR v. COLVILLE & SONS, LTD.*, [1927] S. C. 116; 20 B. W. C. C. 702.—*SCOT.*

**4081 i. —.]—***Unsuccessful proceedings brought more than six months after accident.*—*M'CAFFERTY v. MACANDREWS & Co., LTD.* (1929), 22 B. W. C. C. 807.—*SCOT.*

**h i. —.]—***ADAIR v. COLVILLE & SONS, LTD.*, [1927] S. C. 116; 20 B. W. C. C. 702.—*SCOT.*

**k i. —.]—**A workman, who has brought an action against his employer, founded solely upon the employer's liability at common law, & who has obtained a judgment in his favour, is not entitled, if that judgment be subsequently set aside upon appeal, to have compensation assessed in the action under Workmen's Compensation Act, 1906 (c. 58).—*WARD v. DEVLIN*, [1927] 1. R. 299.—*IR.*

#### PART XIV. SECT. 25, SUB-SECT. 2.— A.

**4083 iii. —.]—**On Jan. 22, 1926, a workman sustained injury by accident arising out of & in the course of his employment. On Feb. 4 his wife received from his employers £3 as compensation for two weeks, & on Feb. 15 she received 30s. as compensation for a further week. She had no authority from the workman to apply for or obtain compensation, & while

he knew that she had received the payment of £3, he did not know that it had been paid as compensation. He knew, however, that the payment of 30s. made to his wife on Feb. 15 was a payment of compensation, & he allowed her to retain & use the money. The workman having subsequently brought an action against a third party to recover damages in respect of his injuries:—*Held*: he was barred from suing for damages, in respect that he had already recovered compensation within sect. 30 (1) of the 1925 Act.—*REID v. STEVENSON*, [1928] S. C. (Ct. of Sess.) 799.—*SCOT.*

**4085 i. —.]—***Payment of compensation—No claim under Act.*—In an action claiming damages for personal injuries caused by deft.'s negligence, deft. specially pleaded in bar that pltf. was precluded from recovering damages from him by Workmen's Compensation Act, s. 38, in that the accident was one in respect of which compensation was payable under the Act by pltf.'s employer, from whom pltf. had in fact claimed & recovered such compensation. It was admitted that, for a period of 6 months from the date of the accident, pltf.'s employer had paid him weekly, upon the day of each week upon which his weekly salary was paid before the accident, an amount equal to half the amount of his previous salary. The ct. found as a fact that pltf. accepted the payments with the knowledge that they were made to him as being due under the Act:—*Held*: pltf. notwithstanding he had made no claim under the Act, had recovered compensation & so was barred under sect. 38.—*DIXON v.*

*SHAVE* (1929), 50 N. L. R. 245.—*S. AF.*

**n i. —.]—***From contractor.*—*GEDDES v. DUNFERMLINE DISTRICT COMMITTEE*, [1927] S. C. 797; 20 B. W. C. C. 815.—*SCOT.*

**sm. "Recover" damages—What amounts to.**—The phrase "to recover" damages in Workmen's Compensation Act, 1925 (c. 84), s. 30 (1), means "to receive payment of" damages, & where a workman has been unable to obtain payment under a common law judgment in his favour against a third party, he is entitled to claim compensation from his employers.—*CUMBERLAND v. LANARKSHIRE TRAMWAYS CO.*, [1927] S. C. 407; 20 B. W. C. C. 780.—*SCOT.*

#### PART XIV. SECT. 25, SUB-SECT. 2.— B. (a).

**4096 i. From whom recoverable—Agent of employer.**—A workman employed by the County Council of the County of Galway obtained an award of compensation under Workmen's Compensation Act, 1906, against the County Council in respect of injuries sustained by being knocked down by a motor ambulance to the County Galway Board of Health & Public Assistance. The County Council sued the Board of Health for indemnity under sect. 6 of that Act:—*Held*: that the Board of Health was merely the statutory agent of the County Council, & that the indemnity given by sect. 6 was not intended to enable an employer to seek an indemnity against his own agent.—*GALWAY CO. COUNCIL v. GALWAY BOARD OF HEALTH*, [1931] 1. R. 858; 24 B. W. C. C. Supp. 215; *affd.*, [1931] 1. R. 547.—*IR.*

BUILDING CO., LTD., [1937] 4 All E. R. 334; 157 L. T. 572; 81 Sol. Jo. 1001; 30 B. W. C. C. 441, C. A.

4113. *Add. Annotation*:—*Consd. Davis v. Lisle*, [1936] 2 All E. R. 213.

SECT. 27.—REPAYMENT OF POOR RELIEF.

*See Workmen's Compensation Act, 1925 (c. 84), s. 41.*

4103a. *Res judicata.*—On June 29, 1936, M., an employee of the Post Office, was injured in the course of his employment by a vehicle driven by R., who was in the service of R., Ltd. The Postmaster-General paid compensation to M. On Jan. 6, 1937, the A.-G. began an action, under sect. 30 (2) of the Workmen's Compensation Act, 1925 (c. 84), against R., Ltd., & R., to recover the compensation paid to M. during the period from June 30, 1936, to Jan. 1, 1937. Defts. paid a sum of money into ct. with a denial of liability, & on or about Feb. 16, 1937, pltf. accepted the sum of money so paid in. On Apr. 9, 1937, pltf. made a further claim against defts. for the sum of £18 13s. 1d., being compensation paid by the Postmaster-General to M. for the period from Jan. 2, 1937, to Mar. 31, 1937. Defts. contended that the matter had already been settled by the previous action, & relied on the plea of *res judicata*. The county ct. judge decided that pltf. was prevented from suing for the said sum of £18 13s. 1d. by reason of what had happened in the earlier proceedings. Pltf. appealed:—*Held*: each time a payment of compensation was made there arose a liability to pay indemnity under Workmen's Compensation Act, 1925 (c. 84), s. 30 (2); & the second action must go back to the county ct. to be tried.—A.-G. v. ARTHUR RYAN AUTOMOBILES, LTD., [1938] 2 K. B. 16; [1938] 1 All E. R. 361; 107 L. J. K. B. 460; 158 L. T. 164; 54 T. L. R. 374; 82 Sol. Jo. 94; 31 B. W. C. C. 1, C. A.

4137a. *When right arises*—Payment by guardians pending settlement of claim—By arbitration or agreement.]—In an action brought by debenture holders against a co. to realise their security receivers were appointed of the assets comprised in the debentures. At the date of their appointment there were a number of workmen in receipt of weekly payments from the co. as compensation for accidents suffered by them causing total or partial incapacity. These payments having ceased on the appointment of the receivers, the workmen were paid outdoor relief by the guardians. On an application by the guardians under Workmen's Compensation Act, 1925 (c. 84), s. 41, for repayment of the money so expended by them:—*Held*: the words "pending the settlement of his claim" in sect. 41 did not refer to the settlement of the workman's claim by the payment of a lump sum, but to the settlement of compensation by an award or by agreement between the workman & the employer; therefore, as the claims of the workmen in the present case had long since been settled by the co. by the weekly sums, the guardians were not entitled to the repayment they claimed.—*Re LEWIS MERTHYR CONSOLIDATED COLLIERIES, LLOYDS BANK v. THE CO.* (No. 2), [1929] 1 Ch. 589; 98 L. J. Ch. 77; 140 L. T. 356; 93 J. P. 105; 45 T. L. R. 159; 73 Sol. Jo. 92; 27 L. G. R. 184; 22 B. W. C. C. 31; [1928] B. & C. R. 149, C. A.

## Part XV.—Apprenticeship.

4183. *Add. Annotation*:—*Refd. Mercantile Union Guarantee Corpn., Ltd. v. Ball*, [1937] 3 All E. R. 1.

4197. *Add. Annotations*:—*Refd. Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181; *Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110.

4200. *Add. Annotation*:—*Refd. Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181.

4201. *Add. Annotation*:—*Refd. Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110.

4230a. *Exemption in case of apprenticeship by public charity*—What amounts to "public charity."—It is not necessary that a public charity should be a permanent charity (*LORD MANSFIELD, C.J.*).—*R. v. ST. MATTHEW'S, BETHNAL GREEN* (1767), *Burr. S. C.* 574.

4230b. ———.]—*R. v. CLIFTON-UPON-DUNSMORE (INHABITANTS)* (1772), *Burr. S. C.* 697.

4230c. ———.]—*R. v. FAKENHAM (INHABITANTS)*, No. 4429, *post*.

———.]—*See, also, REVENUE, Vol. XXXIX., p. 265, No. 485.*

4415. At end of paragraph add:—

"the indenture was invalid, & a service by the apprentice under it conferred on him no settlement."

4421a. *Omission of consideration.*—The premium given by the parish officers upon the binding out of a poor apprentice need not be set out in the indenture in words at length; such an indenture being exempted from any duty by 8 Anne, c. 5, s. 40, & the insertion of the premium being required for no other purpose but to ascertain the amount of the duty.—*R. v. OADBY (INHABITANTS)* (1818), 1 B. & Ald. 477; 106 E. R. 175.

*Annotation*:—*Refd. R. v. Baildon (Inhabitants)* (1832), 3 B. & Ad. 427.

### PART XV. SECT. 1, SUB-SECT. 13.

sd. *Apprenticeship to company*—*Voluntary liquidation.*—Indentures of apprenticeship to a co. are not as a matter of course terminated by the

passing of a resolution for the voluntary winding up of the co. or by the subsequent liquidation of the co. pursuant to such resolution. In the absence of any express provision in such an indenture the question whether the indenture has been terminated by

such voluntary liquidation must depend upon the particular circumstances of the case.—*Re YURONG STREET MOTORS, LTD., Ex p. NEAL & FOUGH* (1932), 32 S. R. N. S. W. 296; 49 N. S. W. W. N. 89.—AUS.

# MAYOR'S AND CITY OF LONDON COURT.

## Part I.—The Court.

**Officers.**—*See, also*, COUNTY COURTS, Vol. XIII., p. 450, No. 18.

## Part II.—Jurisdiction.

- 21a. Specific performance.**—This [specific performance] being an equitable right appearing incidentally in the course of the cause, the recorder was bound to give effect to it (*per* **31.** *Cur.*).—**WILLIAMS v. SNOWDEN**, [1880] W. N. 124.  
**31. Add. Annotation:**—**Dlstd. Lake v. Cronin, Hunt v. Cronin**, [1929] 1 K. B. 31.

## Part III.—Practice and Procedure.

- 58. Add. Annotation:**—**Refd. R<sup>e</sup> Keystone Knitting Mills Trade Mk.** (1928), 97 L. J. Ch. 316.

## Part IV.—Appeals.

- 85. Add. Annotation:**—**Consd. Bowater & Sons, Ltd. v. Davidson's Paper Sales, Ltd.**, [1936] 1 All E. R. 110.  
**91. Add. Annotation:**—**Consd. Bowater & Sons, Ltd. v. Davidson's Paper Sales, Ltd.**, [1936] 1 All E. R. 110.  
**93a. ——— Proceedings within county court jurisdiction.**—(1) An appeal from proceedings in the Mayor's & City of London Ct. within the county Ct. jurisdiction, lies to the Ct. of Appeal; (2) *Seemle*: where the proceedings are not within the county ct. jurisdiction appeal lies to the Ct. of Appeal if the old Ct. of Exchequer Chamber would have had jurisdiction in error, otherwise appeal lies to the Div. Ct. with a further appeal with leave to the Ct. of Appeal.—**BOWATER & SONS, LTD. v. DAVIDSON'S PAPER SALES, LTD.**, [1936] 1 K. B. 465; [1936] 1 All E. R. 110; 105 L. J. K. B. 233; 154 L. T. 395; 80 Sol. Jo. 186, C. A.  
**94. Add. Annotation:**—**Consd. Bowater & Sons, Ltd. v. Davidson's Paper Sales, Ltd.**, [1936] 1 All E. R. 110.

## Part V.—Removal of Actions—Certiorari.

- 99. Add. Annotation:**—*As to* (2) **Refd. Stevens v. Walker**, [1936] 2 K. B. 215.



# MEDICINE AND PHARMACY.

## Part I.—Physicians and Surgeons.

15. *Add. Annotation* :—*Dlstd. Way v. Bishop*, [1928] Ch. 647. 16. *Add. Annotation* :—*Refd. Institution of Civil Engineers v. I. R. Comrs.*, [1932] 1 K. B. 149.

## Part II.—The General Medical Council and Similar Bodies in the Dominions.

21a. *Removal from register—On application—Discretion of Council.*—A medical practitioner whose name was on the medical register applied to have his name removed at his own request under chapter 13 of the Standing Orders. After the application was received by the Council & before it was heard & determined the Council received information that the practitioner had been guilty of conduct *prima facie* constituting infamous conduct in a professional respect. An inquiry was then held & the Council adjudged that the practitioner was guilty of infamous conduct in a professional respect & by their direction his name was erased from the register :—*Held* : the practitioner was not entitled to have his name removed from the medical register on his mere application for that purpose ; until the Council ordered his name to be removed he was still a registered medical practitioner, & in ordering his name to be erased for infamous conduct in a professional respect

the Council had acted within the powers conferred upon them by the Act & by their Standing Orders validly made thereunder.—*R. v. GENERAL MEDICAL COUNCIL*, [1930] 1 K. B. 562 ; 99 L. J. K. B. 217 ; *sub nom. R. v. GENERAL MEDICAL COUNCIL*, *Ex p. KYNASTON*, 142 L. T. 390 ; 94 J. P. 94 ; 46 T. L. R. 197 ; 28 L. G. R. 159, C. A.

24. *Add. Annotations* :—*As to* (1) *Refd. R. v. General Medical Council*, [1930] 1 K. B. 562. *As to* (2) *Consd. Maclean v. Workers' Union*, [1929] 1 Ch. 602.

28. *Add. Annotations* :—*As to* (2) *Consd. Chapman v. Ellesmere* (1932), 48 T. L. R. 309. *Generally, Refd. Hearts of Oak Assurance Co. v. A.-G.*, [1931] 2 Ch. 370.

30. *Add. Annotations* :—*As to* (2) *Appld. Maclean v. Workers' Union*, [1929] 1 Ch. 602. *Refd. R. v. General Medical Council*, [1930] 1 K. B. 562. *As to* (3) *Refd. R. v. General Medical Council*, [1930] 1 K. B. 562.

### PART II. SECT. 2.

n i. ————.]—A registered physician is guilty of "infamous or disgraceful conduct in a professional respect" if he advertises a cure for cancer, no evidence of cures being produced.—*Re HETT*, [1937] 3 D. L. R. 687 ; O. R. 582 ; 69 Can. C. C. 71.—CAN.

o i. ———— *Must be specified in report of discipline committee.*—*CHURCH v. COLLEGE OF PHYSICIANS & SURGEONS*, [1927] 2 D. L. R. 957 ; [1927] 2 W. W. R. 9 ; 47 Can. Crim. Cas. 297 ; 22 Alta. L. R. 560 ; *varying*, [1927] 2 D. L. R. 701.—CAN.

a i. ———— *Jurisdiction of discipline committee.*—*Re McLAUCHLAN & COLLEGE OF PHYSICIANS & SURGEONS*, [1927] 2 D. L. R. 953 ; [1927] 2 W. W. R. 4 ; 47 Can. Crim. Cas. 290 ; 22 Alta. L. R. 553.—CAN.

b i. ————.]—*LATIMER v. COLLEGE OF PHYSICIANS & SURGEONS OF BRITISH COLUMBIA*, [1931] 3 D. L. R. 304 ; 55 Can. C. C. 132.—CAN.

b ii. ———— *Power of appellate court — To set aside order of council made without jurisdiction.*—*Re McLAUCHLAN & COLLEGE OF*

*PHYSICIANS & SURGEONS*, [1927] 2 D. L. R. 953 ; [1927] 2 W. W. R. 4 ; 47 Can. Crim. Cas. 290 ; 22 Alta. L. R. 553.—CAN.

b iii. ———— *To refer matter back to discipline committee for reconsideration.*—*CHURCH v. COLLEGE OF PHYSICIANS & SURGEONS*, [1927] 2 D. L. R. 957 ; [1927] 2 W. W. R. 9 ; 47 Can. Crim. Cas. 297 ; 22 Alta. L. R. 560 ; *varying*, [1927] 2 D. L. R. 701.—CAN.

b iv. ———— *To mitigate punishment.*—Where applt.'s conduct was such as to bring him within the disciplinary powers of the council & it was right in punishing him therefor, but in all the circumstances of the case the punishment imposed was too severe :—*Held* : his name should be restored to the register on Dec. 31, 1927.—*Re McLAUCHLAN & COLLEGE OF PHYSICIANS & SURGEONS (Alta.)*, [1927] 3 D. L. R. 225 ; [1927] 2 W. W. R. 388 ; 48 Can. Crim. Cas. 148.—CAN.

aa i. ————.]—*CRAWFORD v. COLLEGE OF PHYSICIANS & SURGEONS (Alta.)*, [1929] 3 D. L. R. 62.—CAN.

aa ii. ———— *No right to adopt findings of committee.*—The Medical

Act, R. S. B. C., 1924 (c. 157), does not authorise the executive committee of the Council of the College of Physicians & Surgeons to do more than find the facts & report same to the Council. It cannot adjudicate on the facts found by it. The fact that the membership of the executive committee was identical with that of the Council when a certain case was before them does not entitle the Council to merely adopt the adjudication made by the committee in that case. Where on an appeal from the Council the ct. holds that it has not adjudicated on the matter before it, the matter should be remitted to the Council for rehearing & adjudication.—*Re MURPHY*, [1930] 3 W. W. R. 234 ; 4 D. L. R. 1008.—CAN.

aa iii. ———— *Right of member to counsel.*—A member of the College whose conduct is the subject of inquiry is entitled to be represented by counsel not only before the committee but also before the Council.—*Re MURPHY*, [1930] 3 W. W. R. 234 ; 4 D. L. R. 1008.—CAN.

aa iv. ———— *Liability of member to pay costs of proceedings.*—*Re MURPHY* (1931), 55 Can. C. C. 113.—CAN.

## Part III.—Medical Practitioners.

43. *Add. Annotation*.—*Refd.* Jutson v. Barrow, [1936] 1 K. B. 230.
47. *Add. Annotation*.—*Consd.* Andrews v. Director of Public Prosecutions, [1937] A. C. 576.
- 69a. — Needle broken in patient—Duty to inform patient.—*GERBER v. PINES* (1934), 79 Sol. Jo. 13.
- 69b. — *DRYDEN v. SURREY COUNTY COUNCIL & STEWART*, No. 87c, *post*.
72. *Add. Annotation*.—*Refd.* De Freville v. Dill (1927), 96 L. J. K. B. 1056.

## PART III. SECT. 1, SUB-SECT. 2.

sa. *Practice—Whether time spent in study of profession.*—Time put in in the study of a science or profession cannot be considered as time spent in the "practice" of it as that term is commonly understood.—*INNIS v. SATCHEL*, [1928] 3 D. L. R. 624; [1928] 2 W. W. R. 638; 23 Alta. L. R. 495.—*CAN.*

## PART III. SECT. 1, SUB-SECT. 3.

sd. *German qualification—Recognition in South Australia.*—Where, on an application for an order directing the Medical Board of South Australia to register a medical practitioner qualified in Germany as a medical practitioner in the State of South Australia, it was shown that a medical practitioner duly qualified according to the law of South Australia cannot practise in Germany, with very limited exceptions, under a style denoting that he is a medical practitioner approved by the German Govt., & if he does so is subject to fine or imprisonment.—*Held*: it could not be affirmed that a person registered as a medical practitioner under the South Australian Act would be granted rights & advantages equal to those granted in Germany to the holders of the same qualifications. Accordingly, registration was rightly refused by the Medical Board.—*Re BECKER*, [1934] S. A. S. R. 137.—*AUS.*

## PART III. SECT. 3, SUB-SECT. 1.—A.

55 i. *Want of proper skill in assistant—Liability of surgeon—Nurse.*—F., a surgeon, on being consulted by I., advised that she should undergo at the same time two distinct operations, the second of which involved an abdominal incision; he suggested that she should enter a named private hospital for such purpose, & she & her husband made the necessary arrangements with that hospital to do so. In due course she was suitably prepared for the operation before being taken into the operating theatre, where F., his assistant surgeon, & the anaesthetist were present, as well as the theatre sister, & one, & at times two, assistant theatre sisters, all members of the nursing staff of the hospital & engaged, paid & provided by the hospital in the ordinary course. Each was qualified & had sufficient experience properly to undertake the work which fell to her duty to discharge in the theatre. In the course of the first operation iodised phenol (iodine containing carbolic acid) was used for cauterising purposes by F., & after such use it became the duty of one of the assistant sisters to remove the beaker containing it outside the theatre or to a safe place. Instead she returned it to a tray which held a similar beaker containing tincture of iodine & to the spot where the stock iodine was kept. The first operation continued for about forty minutes after the iodised phenol was used. After the first operation, F. & his assistant surgeon proceeded to scrub up & regown, this taking about fifteen minutes. While they were so engaged, the two assistant sisters placed the patient in the position required for the second operation, & upon an indication from the anaesthetist the

assistant sister who had previously handled the iodised phenol proceeded to paint the abdomen of the patient. Instead of painting the patient with plain tincture of iodine, the sister actually used the iodised phenol, with the result that the patient was badly burned. The sister's error was discovered by F. very soon after it had occurred, & prompt measures were taken by him. I. claimed damages against F. After evidence had been given, the case was removed into the Ct. of Appeal for argument. It was explicitly admitted that F. was not personally negligent, & it was taken as a fact that I., through the sister's negligence, was painted with iodised phenol instead of with tincture of iodine. The question for the Ct. of Appeal was whether F. was vicariously liable for the sister's negligence.—*Held*: in the circumstances, the sister, in discharging the duty of painting, was neither the servant of the operating surgeon, nor was she in a position analogous to that of a servant doing work as his servant or agent, & accordingly he was not vicariously liable for her negligence.—*INGRAM v. FITZGERALD*, [1936] N. Z. L. R. 905; G. L. R. 652; 12 N. Z. L. J. 307.—*N. Z.*

## PART III. SECT. 3, SUB-SECT. 1.—B.

57 iv. — *Use of apparatus.*—The test of the efficient use by a physician of an apparatus for ascertaining a diseased condition, e.g. an X-ray machine, is the ordinary standard of skill maintained by its competent manipulators.—*ANTONUK v. SMITH*, [1930] 2 W. W. R. 721; 4 D. L. R. 215; 24 Alta. L. R. 585; *reversg.*, [1930] 3 D. L. R. 500.—*CAN.*

64 i. *Less degree than might have been shown by others.*—Against M., the medical superintendent in charge of the hospital, damages were sought for his alleged negligent treatment. The evidence showed that M. failed to diagnose the ear-trouble from which pltf. suffered as mastoiditis, & although M. was not able to ascertain what the exact trouble was, he did not send for nor advise sending for an ear-specialist.—*Held*: all a medical practitioner is required to bring to the performance of his duty is reasonable care & average skill; & he is not responsible merely because some other practitioner of greater skill & greater knowledge might have prescribed a different treatment. If a physician in charge of a case is unable to diagnose the trouble he is under no legal obligation so to inform the patient & to advise the calling in of a specialist.—*JARVIS v. INTERNATIONAL NICKEL CO.*, [1929] 2 D. L. R. 842; 63 O. L. R. 564.—*CAN.*

sa. *Insurance against malpractice, error or mistake—Neglect to adjust table for examination.*—The reasonable care & skill which a physician must exercise in his treatment of a patient includes such care & skill with respect to everything he requires the patient to do in order to determine what else should be done. When a physician requires a patient to get upon a table in order that he may continue his diagnosis, he is bound to exercise reasonable

care to see that the table is safe & properly adjusted so that the patient will not be injured as a result of getting upon it. The physician's neglect to so adjust the table is "malpractice, error or mistake in the practice of his profession," within the meaning of those words in an insurance policy under which the insurer agreed to indemnify him against liability for damages in consequence thereof.—*BALTZAN v. FIDELITY INSURANCE CO. OF CANADA*, [1932] 3 W. W. R. 140; *affd.*, [1933] 3 W. W. R. 203.—*CAN.*

## PART III. SECT. 3, SUB-SECT. 1.—C.

67 vi. — *When a surgeon minimises the danger of the treatment to induce the patient to proceed, & refrains from explaining the advantages of an alternative course well known to him, he brings himself within the field of liability. If the surgeon assures the patient of results of which he cannot speak with certainty, he must be taken to have spoken recklessly, & is liable. If the patient, in this case had received the advice which it was the duty of the surgeon to impart, she would not have had the operation at all, & for this failure of duty resulting in damage to her hand, she was entitled to recover damages.*—*KINNEY v. LOCKWOOD CLINIC, LTD.*, [1931] 4 D. L. R. 906; O. R. 438.—*CAN.*

67 vii. — *In a case where a joint has been injured & dislocation is suspected the fact that the surgeon who is consulted, & who applies the recognised tests & gives the usual instructions, does not advise the taking of an X-ray examination does not necessarily constitute negligence on his part; even though it is subsequently disclosed as a result of such an examination that his diagnosis was erroneous.*—*MOORE & MOORE v. LARGE*, [1932] 2 W. W. R. 568; 4 D. L. R. 793; 46 B. C. R. 179.—*CAN.*

67 viii. — *ARMSTRONG v. DAWSON*, [1933] 1 W. W. R. 187.—*CAN.*

70 vii. — *The fact that the physician attending a person injured in a motor-car accident omits to recommend an immediate X-ray examination does not necessarily constitute incompetence or negligence. The advisability of an X-ray examination must always depend upon the circumstances, e.g. the condition of the patient, the character of the injuries & the accessibility of the apparatus.*—*SAHAPATHI v. HUNTLEY*, [1938] 1 W. W. R. 817.—*CEYLON.*

so. *Mode of trial.*—*Held*: an action against a doctor for damages for negligence in the use of X-ray apparatus should be tried without jury since it involved expert evidence & scientific investigation.—*ALEXANDER v. KIRKLAND*, [1934] 2 D. L. R. 525.—*CAN.*

## PART III. SECT. 3, SUB-SECT. 1.—D.

ai. — *DAVEY v. MORRISON*, [1931] 4 D. L. R. 619; [1932] O. R. 1.—*CAN.*

## PART III. SECT. 3, SUB-SECT. 1.—G.

84 ii. — *Removal of organ or limb.*—A surgeon is justified in removing an organ during an operation if he con-

**85a. Res ipsa loquitur—Whether doctrine applicable.]**—Deft. agreed to perform a surgical operation upon pltf. & to give the case his personal attention. After the operation, pltf. remained in the hospital, & was attended by nurses & resident medical officers on the hospital staff. During this time he was visited by deft. some three times a week. Pltf.'s treatment involved the insertion into his body of tubes, & the frequent replacement of these tubes. The tubes were inserted in the first place by deft., in the course of the operation, but the replacements were done by resident doctors & nurses. Pltf. was discharged from hospital on Feb. 10, 1934, & subsequently, as a result of his condition, he visited deft. on Mar. 28, 1934. There was a dispute as to whether on that occasion he called deft.'s attention to the pain he was suffering. He paid another visit to deft. on Apr. 11, 1934, when deft.'s attention was drawn to pltf.'s pain. An X-ray photograph was taken, & it was discovered that there was a

portion of a tube in pltf.'s bladder. In an action for breach of contract & negligence, the judge found as facts (i) that pltf. did not inform deft. on Mar. 28, 1934, that he was suffering pain, & (ii) that the tube that was found in pltf.'s bladder had not been inserted in or left there during the course of the operation:—*Held*: (1) deft. could not be held responsible for any negligence on the part of any members of the hospital staff; (2) in the circumstances of this case, the doctrine of *res ipsa loquitur* was inapplicable; (3) the undertaking to give the case his personal attention did not put upon deft. any duty further than that usually owed by a surgeon to his patient.—*MORRIS v. WINSBURY-WHITE*, [1937] 4 All E. R. 494.

**86. Add. Annotations:—***Consd. Lindsey County Council v. Marshall*, [1937] A. C. 97. *Reid. Dryden v. Surrey County Council & Stewart*, [1936] 2 All E. R. 535; *Re Frost*, [1936] 2 All E. R. 182; *Wardell v. Kent County Council*, [1938] 3 All E. R. 473.

siders it necessary for the patient's life or health, notwithstanding that he has not the patient's consent to such removal.—*MARSHALL v. CURRY*, [1933] 3 D. L. R. 260; 6 M. P. R. 267, 60 C. C. C. 136.—*CAN.*

**84 iii.** ———.]—Pltf., a surgeon, was called to a hospital because of an injury to deft.'s hand in a motor-car accident. Deft., a Chinaman, who was unacquainted with pltf., asked him to fix up the hand but not to cut it off as he wished to have it looked after in his home city. Again, when in the operating room, deft. stated that he did not want the hand cut off. Pltf. replied that he would be governed by the conditions found after the anæsthetic had been administered. Deft. said nothing. On examination under the anæsthetic pltf. decided that an immediate operation was necessary to prevent blood poisoning with no possibility of saving the hand & it was amputated. This view was supported by two other attending physicians. Pltf. sued for professional fees & deft. counterclaimed for damages for the cost of an artificial hand, loss of wages, & general damages:—*Held*: the operation was necessary, & it was performed in a highly satisfactory manner. The judge dismissed the action & awarded deft. \$50 damages for trespass to the person. Damages for loss of wages & the cost of the artificial hand were not allowed since they were the results of the accident & not of the unauthorised operation.—*MULLOY v. HOP SANG*, [1935] 1 W. W. R. 714.—*CAN.*

**8d. Tube left in patient.]**—*THOMPSON v. BARRY*, [1932] 1 D. L. R. 805, *reversd.*, 2 D. L. R. 814.—*CAN.*

**8f. Duty as to advice—Extent of duty.]**—The duty of a surgeon is to be honest in fact; he need not disclose fully the nature & possible effects of an operation.—*KENNY v. LOCKWOOD*, [1932] 1 D. L. R. 507; O. R. 141.—*CAN.*

**PART III. SECT. 3, SUB-SECT. 1.—H. 86 iv.** ———.]—Hospital liable for the negligence of nurses after an operation.—*NYBERG v. PROVOST MUNICIPAL HOSPITAL BOARD*, [1927] 1 D. L. R. 969; [1927] S. C. R. 226.—*CAN.*

**86 v.** ———.]—Pltf. entered defts. hospital for the purpose of undergoing an operation, & owing to the fact that the regular nursing staff was not sufficient to give her the care considered necessary by her physician, a special nurse was employed & added temporarily to the regular staff but charged to pltf.:—*Held*: the special

nurse so engaged was the employee of the hospital, & not the mere assistant of pltf.'s physician, & the hospital was responsible in damages for negligence on her part resulting in severe injury to pltf.—*LOGAN v. COLCHESTER COUNTY HOSPITAL*, [1928] 1 D. L. R. 1129; 60 N. S. R. 62.—*CAN.*

**86 vi.** ———.]—*Insufficient staff.]*—Defts., the O. Board of Health, maintained a County Hospital, to which pltf. was admitted, & where she underwent an operation. Pltf. was admitted to the hospital upon the terms that her father would pay defts. 4s. per day for the treatment therein. After the operation pltf. was burnt by a hot-water jar, which, she alleged, had been placed in her bed by another patient, & she sued the defts for damages. The jury found that defts. contracted to care & maintain pltf.; that defts. were guilty of negligence or breach of duty in the care & maintenance of pltf.; & in answer to the question whether the negligence was that of some of defts.' employees, answered: "Through insufficient staff":—*Held*: once defts. went outside the statutes relating to the relief of the poor, & proceeded to contract with paying patients, they were bound by the ordinary law of contract.—*MULRENNAN v. OFFALY BOARD OF HEALTH*, [1930] I. R. 345.—*IR.*

**86 vii.** ———.]—*Negligent operation of apparatus.]*—A boy of three years, a patient in deft. corp'n.'s hospital, was scalded & burnt by steam escaping from an apparatus designed for his treatment by steam inhalation for pneumonia. The nurse in charge was absent from the room at the time, & was recalled by the boy's screams. She found the apparatus in order & was not able to account for the condition of the patient. In an action by the patient & his father to recover damages arising from the former's injuries, it was not shown how the accident happened, but there was evidence to show that the apparatus was safe if proper care was taken:—*Held*: the obligation of deft. corp'n. being not merely to supply properly qualified nurses, but to nurse the patient, the only inference to be drawn from what happened was that there was an absence of proper care on the part of the hospital attendants, & deft. corp'n. was liable for the negligence of its servants. *HARRIES v. LORD DUFFERIN HOSPITAL*, [1931] 2 D. L. R. 440; 66 O. L. R. 572.—*CAN.*

**86 viii.** ———.]—In an action against an infirmary for damages for

personal injuries, pursuer averred that she attended the infirmary for ultra-violet ray treatment; that the nurse in charge, who was in the employment of defenders, allowed her to be exposed to the rays for too long a period; that she thereby sustained injury; & that the injury was due solely to the negligence of the nurse, for whom defenders were responsible. She further averred that she had relied on the knowledge & skill of the nurse in applying the treatment. She did not aver that defenders had acted negligently in the selection of their medical or nursing staffs, or of the apparatus employed. Defenders averred, & pursuer did not deny, that their electrical department was in charge of, & was superintended by, a doctor, & that the treatment received by pursuer was administered by the nurse upon his instructions. The Second Division having dismissed the action as irrelevant the pursuer appealed to the House of Lords. The House, with the assent of the parties, reversed that decision & ordered a proof before answer.—*ANDERSON OR LAVERLE v. GLASGOW ROYAL INFIRMARY*, [1931] S. C. (H. L.) 34.—*SCOT.*

**86 ix.** ———.]—*Applt. collapsed under an operation performed in the Waitaki Hospital, & had to be moved out of the theatre into a ward. The operating surgeon gave instructions to the house surgeon to apply the usual restorative measures, including the application of heat. The house surgeon decided that applt., who was unconscious, should be placed under an electrical radiant-heat cradle, a common device to keep up the heat of the body, & left general instructions noted in the ward-book as "Hot bath on; watch carefully, & see that patient does not get too hot," & later, "Bed temperature to be kept between 90 & 100 degrees; watch the heater very carefully." No one was told off to watch or sit by the patient continuously, & during the night applt. was left for intervals of twenty minutes to half an hour without observation. A burn on the knee resulted, necessitating amputation of applt.'s leg. In an action by applt. against the hospital board:—*Held*: the burn was due to the negligence of the nurse in the care & treatment of the patient while his temperature was being so kept up by means of the heat-cradle, although the evidence did not disclose the precise way in which the burn was caused. The judge assessed the damages at £1,350, but came to the conclusion that the negligence in question was not in a*

87. *Add. Annotations:—Consd. Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364. *Fold. Marshall v. Lindsey County Council*, [1935] 1 K. B. 516. *Consd. Strangeways-Lesmere v. Clayton*, [1936] 1 All E. R. 484; *Dryden v. Surrey County Council & Stewart*, [1936] 2 All E. R. 535. *Distd. Lindsey County Council v. Marshall*, [1936] 2 All E. R. 1076; *Wardell v. Kent County Council*, [1938] 3 All E. R. 473.

87a. — *Maternity home maintained by county council—Patient contracting puerperal fever from previous patient.*—Applts. admitted resp. as a patient to their maternity home at Cleethorpes for the purpose of her confinement, without informing her that there had been a recent case of puerperal fever in the home. While in the home resp. contracted puerperal fever & was for some time seriously ill. In an action by resp. to recover damages from applts. for injury caused by the negligence of their professional staff:—*Held*: applts. or their staff knew or ought to have known that in admitting resp. to the home they were exposing her to the danger of infection, & applts. were consequently negligent in not duly warning her of the existence of that risk.

*Per LORD WRIGHT, M.R.*: To apply

matter of mere ministerial ward duty or in a matter of routine, but was negligence in the discharge of a professional duty for which resp. was not liable. On appeal:—*Held*: the evidence justified a finding of negligence on the part of a nurse.—*LOGAN v. WAITAKI HOSPITAL BOARD*, [1935] N. Z. L. R. 385; G. L. R. 1, 421.—N.Z.

86 x. — — —.]—A hospital is liable for the negligence of a nurse burning a patient by improper administration of diathermic treatment as part of her routine duty, & not under the control or direction of a doctor.—*FLEMING v. SISTERS OF ST. JOSEPH*, [1937] 2 D. L. R. 121; *affd.*, [1938] S. C. R. 172; 2 D. L. R. 417; O. R. 512.—CAN.

86 xi. — — —.]—An infirmary was governed by managers, none of whom took any control over the treatment of the patients. The nurses were engaged, & might be suspended, by the matron, whose duty it was to see that they were attentive to their duties. The electrical department of the infirmary was under the control of a director, who was a qualified medical practitioner, & its staff included several qualified nurses. The director prescribed for a patient treatment by ultra-violet rays. He did not specify the time for which the patient was to be exposed, but the regular period for a first exposure was ten minutes. The first exposure was supervised by a nurse, no doctor being present at the time. The patient was burned by the rays, & she alleged that her injuries were due to the negligence of the nurse in allowing her to be exposed for forty-five minutes. In an action against the infirmary for damages:—*Held*: no negligence on the part of the nurse had been established.—*ANDERSON & LAVELLE v. GLASGOW ROYAL INFIRMARY*, [1932] S. C. 245.—SCOT.

86 xii. — — —.]—In an action against a doctor & hospital authorities for burns alleged to have been incurred by a patient in the hospital through negligence in the operating of an X-ray machine owned by the hospital & operated by its technician, while the doctor was making a fluoroscopic examination:—*Held*: assuming that

the propositions formulated in *Vuchar v. Toronto Gen. Hospital (Trustees)*, [1937] O. R. 71, are sound in law, nevertheless the evidence herein did not establish that the technician in charge of the X-ray machine was in the circumstances of this case in the class of doctors & nurses in the performance of duties calling for professional skill; nor did it establish that any carelessness of hers was in a matter of professional care or skill. The hospital authorities by whom she was employed were, therefore, liable for her negligence in operating the machine, as well as for any injury to the pltf. resulting from the use of a defective machine.—*ABEL v. COOKE & LLOYDMINSTER & DISTRICT HOSPITAL BOARD*, [1938] 1 W. W. R. 49; 1 D. L. R. 170; 7 F. L. J. (Can.) 291.—CAN.

86 xiii. — — —.]—Whilst recovering from an anæsthetic after having been operated upon in applt.'s hospital, resp. was severely burned by a hot-water bottle owing to the negligence of a nurse:—*Held*: the hospital was not liable for her negligence in the performance of what was a professional as distinct from a ministerial or administrative duty.—*LOWER UMFOLOSI DISTRICT WAR MEMORIAL HOSPITAL v. LOWE*, [1937] N. L. R. 31.—S. AF.

86 xiv. — — —.]—A patient brought an action for damages against the governing body of a public hospital. He averred that the doctors in attendance failed to examine him properly, & ordered him to leave the hospital when he was unfit to do so; & that the nurses failed to administer medicine as prescribed by the doctors, & also failed to administer laxatives when required. He made further general averments that the nurses had failed to carry out their duties in regard to attendance & the supply of food:—*Held*: defendants were not responsible for the negligent discharge of their professional duties by competent doctors & nurses engaged by them.—*REIDFORD v. ABERDEEN MAGISTRATES*, [1933] S. C. 276.—SCOT.

86 xv. — — —.]—Hospital found not liable for the negligent burning of a patient by a hot-water bottle properly

*Hillyer's Case*, No. 87, to facts like these would involve a great extension of the rule which the Ct. of Appeal there laid down, & indeed would contravene the limitations which KENNEDY, L.J., placed upon it.—*LINDSEY COUNTY COUNCIL v. MARSHALL*, [1937] A. C. 97; [1936] 2 All E. R. 1076; 105 L. J. K. B. 614; 52 T. L. R. 661; 80 Sol. Jo. 702; *sub nom. MARSHALL v. LINDSEY COUNTY COUNCIL*, 155 L. T. 297; 100 J. P. 411; 34 L. G. R. 469, H. L.

*Annotations:—Generally Consd. Strangeways-Lesmere v. Clayton*, [1936] 1 All E. R. 484; *Wardell v. Kent County Council*, [1938] 3 All E. R. 473. *Reid. Dryden v. Surrey County Council & Stewart*, [1936] 2 All E. R. 535.

87b. — — —.]—Pltf.'s wife, who had been admitted to the W. hospital to undergo an operation, lost her life owing to an overdose of a dangerous drug administered to her just before the operation by two nurses at the hospital. The overdose was due to a mistake on the part of the nurses in reading the amount ordered by the doctor to be administered. Pltf. brought an action for damages under Fatal Accidents Acts, & Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), against (a) the nurses, & (b) the hospital authority:—*Held*: the nurses were guilty of negligence & were liable, but the

left in the bed by a nurse, the burning being due to replacement of the bottle by one of the doctors who brought the patient back from the operating room.—*DAVIS v. COLCHESTER COUNTY HOSPITAL*, [1933] 4 D. L. R. 68; 7 M. P. R. 66.—CAN.

86 xvi. — — —.]—When a hospital, even though the hospital in question is a charitable institution, is sued by a patient for damages caused by the negligence of its employees it is in exactly the same position as other employers & the question whether pltf. can succeed depends upon the facts of the particular case. In the present case it was found that the nurses had been negligent. The hospital contended, with respect to the negligence of one of them in adjusting a tube without informing the patient's doctor, as the patient requested, of the latter's condition, that when she attempted to adjust it she was acting under the orders of the interne, who should be deemed to have been acting temporarily as a substitute for the pltf.'s surgeon & therefore, pltf.'s agent for giving instructions to the nurse:—*Held*: what the interne said to the nurse should not be regarded as instructions but merely advice from one whose advice she was not obliged to accept, & in any event, he was, under the circumstances, the agent of deft. hospital by whom he was employed & the main negligence was that of the nurses in not disclosing the actual facts to him.—*BEATTY v. SISTERS OF MISERICORDIA OF ALBERTA*, [1935] 1 W. W. R. 651; 2 D. L. R. 804.—CAN.

86 xvii. — — —.]—A hospital held not liable for the negligence of nurses in applying excessive heat to a patient by air electric cradle, the treatment having been prescribed by the surgeon.—*VUCHAR v. TORONTO GENERAL HOSPITAL TRUSTEES*, [1937] 1 D. L. R. 298; O. R. 71.—CAN.

86 xviii. — — —.]—When prolapse follows a cataract operation through a patient being fed with too hot soup the hospital is liable.—*WYNDHAM v. TORONTO GENERAL HOSPITAL TRUSTEES*, [1938] 1 D. L. R. 797.—CAN.

hospital authority was not liable as principals for the nurses' negligence, the only duty resting on the hospital being to see that the nurses who were engaged were duly qualified.—**STRANGWAYS-LESMERE v. CLAYTON**, [1936] 2 K. B. 11; [1936] 1 All E. R. 484; 105 L. J. K. B. 385; 154 L. T. 463; 52 T. L. R. 374; 80 Sol. Jo. 306.

**Annotations:—****Consd.** *Dryden v. Surrey County Council & Stewart*, [1936] 2 All E. R. 535; *Wardell v. Kent County Council*, [1938] 3 All E. R. 473.

**87c.** ——.]—**Deft. S.** performed a minor operation on **ptlf.** in **deft. council's** hospital. After she had left the hospital **ptlf.** complained of pains, & upon examination by her doctor she was found to be suffering from pyelitis, & a wad of surgical gauze was found in & removed from her body. **Ptlf.** brought an action against **S.** for breach of duty & neglect to remove the plugging after the operation, & against **deft. council** for breach of duty & negligence arising out of a failure to nurse her properly. The negligence alleged against the council was that the nurses in their hospital had failed to remove the plugging, had failed to observe or report to the doctor in charge certain symptoms in **ptlf.'s** condition, & had failed to take her temperature on the morning on which she had left the hospital. At the hearing counsel for **S.** put leading questions to witnesses for **deft. council**:—**Held**: (1) upon the evidence **S.** had negligently left the gauze in **ptlf.'s** body & was liable in damages; the negligence alleged against the nurses was negligence in carrying out their skilled duties as nurses, for which **deft. council** were not liable; upon the evidence the nurses had no reason to know that the gauze had been left in, & inasmuch as **ptlf.** had not complained of pain there was no duty upon the nurses to discover the presence of the gauze; inasmuch as the temperature had pursued a perfectly normal course & gave no indication that there was anything wrong, the nurses were not negligent in not taking **ptlf.'s** temperature on the morning on which she left the hospital; the causes of action against the two **defts.** were quite distinct & arose to a substantial extent out of different facts, & counsel for the one **deft.** was entitled to cross-examine a witness for the other; there ought not to be an order that **ptlf.** should recover the costs payable by her to **deft. S.**, as the acts of negligence

alleged against two **defts.** were different.—**DRYDEN v. SURREY COUNTY COUNCIL & STEWART**, [1936] 2 All E. R. 535; 80 Sol. Jo. 306.

**Annotation:—****Reid.** *Russell v. Criterion Film Productions, Ltd.*, [1936] 3 All E. R. 627.

**87d. Liability of hospital—Diphtheria patient contracting smallpox.**—**Resp.**, an infant patient in **applt. hospital**, who had suffered from diphtheria, was discharged as cured. Nine days afterwards she developed smallpox. The facts were that smallpox patients had been placed in rooms on the same floor as **resp.**, & that the latter had been attended by the nurses who attended to the smallpox patients. In an action brought by **resp.**, as **ptlf.**, against the hospital, as **defts.**, for negligence, **defts.** pleaded (1) that the technique of which complaint was made by **resp.** was adopted by **applt.**, on competent medical advice, & (2) that it was in accord with approved modern practice:—**Held**: having regard to the favourable opinion expressed by all **applt.'s** medical witnesses regarding the technique followed in the hospital & to the accepted practice in regard to that technique appearing from the same evidence, the charge of negligence brought by **resps.** against **applt.** in this case was not established.—**VANCOUVER GENERAL HOSPITAL v. MCDANIEL** (1934), 152 L. T. 53, P. C.

**Annotation:—****Consd.** *Marshall v. Lindsey County Council*, [1935] 1 K. B. 516.

**103a.** ——. **Work performed before operative date of Medical Act.**—The Medical Act, 1858 (c. 90), has not a retrospective effect, so as to prevent a person who is not registered under it from maintaining an action for medical or surgical advice given, or medicine supplied, before the Act came into operation.—**WRIGHT v. GREENROYD** (1861), 1 B. & S. 758; 31 L. J. Q. B. 4; 5 L. T. 347; 26 J. P. 118; 8 Jur. N. S. 98; 121 E. R. 896.

**105. Add. Annotation:—****Folld.** *Macnaghten v. Douglas*, [1927] 2 K. B. 292.

**106. Add the following para. & citations:—**  
—.—.]—Medical Act, 1858 (c. 90), s. 32, does not apply to an osteopath, so as to prevent him from recovering at law fees charged for treatment as distinct from diagnosis or advice.—**MACNAGHTEN v. DOUGLAS**, [1927] 2 K. B. 292; 96 L. J. K. B. 738; 137 L. T. 518; 91 J. P. 143; 43 T. L. R. 525; 71 Sol. Jo. 409, D. C.

#### PART III. SECT. 4, SUB-SECT. 2.—A.

**m 1.** ——. **Unnecessary visits to dying patient.**—Although the **ct.** will not interfere with the discretion of a physician in the number of visits made to a dying patient, it will not permit charges to run up an account against the estate.—**LIVINGSTONE v. ROBINSON**, [1936] 2 D. L. R. 15; O. R. 168.—**CAN.**

**r 1.** ——. **General rule.**—The law does not raise an implied promise on the part of a person who calls a physician to perform services for another to pay for such services, unless the relation of such person to the person who is ill is such as to put him under obligation to provide medical attention for the patient, or unless the circumstances are such as to show an intention on his part to pay for the services rendered. Such obligation does not arise from the relationship of brother & sister.—**ALLEN v. FROB**, [1932] 1 W. W. R. 593.—**CAN.**

**sg. Services rendered in emergency.**—

**Ptlf.**, a surgeon, sued to recover from an **extrix.** his fees for operating on **testator.** The latter had been found in his home in a very serious condition as the result of a wound from a shot-gun which had, apparently, been discharged by his own hand. **Deft.** was not there, but two friends, who were in the house, called in a doctor immediately after making the discovery. The doctor, considering the case to be a surgical one, brought in **ptlf.** The wounded man said something to **ptlf.**, but the **ct.** found that he was in such a condition that no words of his could be construed as a request for **ptlf.'s** services or as an acquiescence in their being rendered on a contractual basis:—**Held**: **ptlf.** was entitled to recover.—**MATHESON v. SMILEY**, [1932] 1 W. W. R. 758; 2 D. L. R. 787; 40 Man. L. R. 247.—**CAN.**

#### PART III. SECT. 4, SUB-SECT. 3.

**sd. Treatment discontinued by patient**

—**Whether fees recoverable from practitioner.**—**Ptlf.** sued for the return of fees paid a **chiropractor** & for travelling expenses incidental to the treatments. **Chiropractors** are not entitled to be registered in **Manitoba** & in giving the treatments referred to herein, for hire, gain or reward, **deft.** was acting illegally. **Ptlf.** knew that **deft.** was a **chiropractor** & not a regular medical practitioner. She paid in advance for two months' treatment, accepted treatments for two weeks, & then refused to permit their continuance:—**Held**: there being no fraud, misrepresentation or mistake of fact, **ptlf.** could not recover.—**HASLUK v. OSCHANKE**, [1935] 3 W. W. R. 385; [1936] 1 D. L. R. 232; 43 Man. L. R. 470.—**CAN.**

#### PART III. SECT. 7, SUB-SECT. 1.

**sk. Right to sue for libel.**—**Ptlf.** in an action for libel was an unregistered medical practitioner. He had attained professional qualifications in Germany & was entitled to practise in that

**109a. Failure to effect cure—Whether breach of warranty.]—**Pltf., who had been treated for cancer by deft., an unqualified medical practitioner, brought an action against him for (1) fraudulent representations; (2) negligence; & (3) breach of a warranty that he could cure pltf. in three months. The jury could not agree as to the alleged fraudulent representations or as to the alleged negligence, but they found that deft. did not warrant a cure in three months:—*Held*: deft. was entitled to judgment on the cause of action for alleged breach of warranty, although there must be a new trial of the claims on which the jury had disagreed.—**BURRELL v. EVANS** (1930), 46 T. L. R. 578, C. A.

**113. Add. Annotations:—***Expld.* **Jutson v. Barrow**, [1936] 1 K. B. 236. *Refd.* **Whitwell v. Shakesby** (1932), 147 L. T. 157.

**122. Add. Annotation:—***Consd.* **Whitwell v. Shakesby** (1932), 147 L. T. 157.

**130. Add. Annotations:—***Consd.* **Whitwell v. Shakesby** (1932), 147 L. T. 157; **Jutson v. Barrow**, [1936] 1 K. B. 236.

country. These qualifications were not recognised in South Australia & accordingly he was unable to obtain registration. He, however, practised his profession & described himself as "Dr. Becker" & added the letters M.D., M.S., after his name in the belief that his German degrees were equivalent to those degrees in South Australia. By this & other acts he committed breaches of Medical Practitioners Act, 1919:—*Held*: that statute does not render unlawful the act itself of practising medicine or surgery, but merely subject an unregistered practitioner to certain disabilities & a person who is unregistered has the right to bring an action for defamation in respect of medical or surgical qualifications which he in fact possesses.—**SMITH'S NEWS-PAPERS, LTD. v. BECKER** (1932), 6 A. L. J. 195; 47 O. L. R. 279; [1933] *Argus* L. R. 196.—**AUS.**

*sm. Degree of care required.]—*An unqualified practitioner, whose patient is aware of the lack of qualification, is liable only for the lack of diligence & skill belonging to an ordinary unprofessional person of common-sense.—**MILLER v. MILLWARD**, [1935] N. Z. L. R. Supp. 12.—**N.Z.**

### PART III. SECT. 7, SUB-SECT. 2.—A.

**bb i. ———.]—**Appeal from the dismissal of a charge that the accused being a person who had not been registered under Chiropractic Act, 1934, did unlawfully practise chiropractic upon one C. for remuneration:—*Held*: if the testimony of C., a paid investigator, as to the treatment given her by the accused was true, he had been "practising" chiropractic; but, since the accused denied that he gave C. any such treatment & his testimony was not shaken on cross-examination & there was no corroboration of C.'s testimony the appeal should be dismissed.—**R. v. HOLTRUM**, [1937] 1 W. W. R. 199.—**CAN.**

*e (p. 554) i. ——— Treating—What amounts to.]—***R. v. OSHANEK**, [1935] 2 W. W. R. 531; 4 D. L. R. 632; 64 C. C. O. 219; 43 Man. L. R. 234.—**CAN.**

*h (p. 554) i. ———.]—***R. v.**

**MCLEOD**, [1934] 3 W. W. R. 426; 46 B. C. R. 96.—**CAN.**

*q i. ——— Treating—What amounts to —Chiropractor.]—*The administering of chiropractic service to another person for the purpose of removing the cause of a disease is to "treat" a disease within sect. 78 of Medical Act, R. S. M. 1913, & where such treatment is given by a person not registered under said Act & for gain or hope of reward, liability to the penalty provided by said sect. is incurred.—**McDIARMID v. ELLIOTT** (No. 1), [1934] 1 W. W. R. 504; 41 Man. L. R. 660.—**CAN.**

*q ii. ———.]—*Where a chiropractor confirms the presence of a physical ailment, this is a "consultation" & adjustments & manipulations are a "treatment" within Quebec Medical Act, 1925.—**COLLEGE OF PHYSICIANS & SURGEONS v. HEBERT**, [1936] 2 D. L. R. 729; 65 Can. C. C. 285.—**CAN.**

*sv. Drugless practitioner — Practising without licence—What must be proved.]—***R. v. LAUDIE** (1930), 53 Can. C. C. 189.—**CAN.**

*sx. "Holding out" as medical practitioner—What amounts to.]—*On a charge that a person not being registered under Medical Practitioners Act, 1919, held himself out as a medical practitioner, it was proved that deft. had handed "a diagnosing chart" to a constable who had come to consult him containing representations as to his methods of diagnosis & treatment of disease & invited persons to secure his opinion. The representations in this "chart" set out that the diagnosis & treatment were not according to the ordinary method of medical practitioners:—*Held*: by means of the "chart" applt. had held himself out as a medical practitioner. The fact that he had represented the diagnosis & treatment as different from the ordinary methods was immaterial.—**KUGELMAN v. LENTHALL**, [1932] S. A. S. R. 167.—**AUS.**

### PART III. SECT. 7, SUB-SECT. 2.—B. (c).

*t i. ———.]—***HORSEMAN v. NAIRN**, [1926] S. A. S. R. 1.—**AUS.**

**132a. By osteopath.]—**An osteopath, who was not registered under the Medical Act, 1858 (c. 90), & who was not a legally qualified medical practitioner, affixed outside his house a plate bearing his name & following on his name the words "Boncsetter, Osteopathic Physician & Surgeon":—*Held*: in using the words "physician & surgeon" he had committed an offence under Medical Act, 1858 (c. 90), s. 40.—**WHITWELL v. SHAKESBY** (1932), 147 L. T. 157; 96 J. P. 307; 43 T. L. R. 489; 76 Sol. Jo. 360; 30 L. G. R. 327; 29 Cox, C. C. 487.

*Annotation:—***Apld.** **Jutson v. Barrow**, [1936] 1 K. B. 236.

**132b. By unqualified manipulative surgeon.]—**The use, by a person who is not registered under Medical Act, 1858 (c. 90), nor a legally qualified medical practitioner within the meaning of the Act, of the title "manipulative surgeon" on a plate bearing his name affixed outside his house, is an offence under sect. 40 of that Act.—**JUTSON v. BARROW**, [1936] 1 K. B. 236; 105 L. J. K. B. 106; 154 L. T. 185; 100 J. P. 4; 52 T. L. R. 49; 79 Sol. Jo. 965; 33 L. G. R. 503; 30 Cox, C. C. 305, D. C.

*t ii. ———.]—***O'CONNELL v. CULLEY**, [1927] V. L. R. 502; 49 A. L. T. 92; [1927] *Argus* L. R. 423.—**AUS.**

*t iii. ———.]—**Held*: deft., an osteopath, holding the degree of Doctor of Osteopathy, used the word "Doctor" in advertisements, in conjunction with "osteopath," as an occupational designation relating to the treatment of human ailments, & was therefore guilty of an infraction of Ontario Medical Act, s. 49 (1925). The addition of the word "osteopath" after the words "Doctor Pocock" in his advertisements, simply indicated the method which he, professing to be a doctor, in the sense in which that word is ordinarily understood, used in the treatment of human ailments.—**R. v. POCKOCK**, [1928] 2 D. L. R. 937; 50 Can. Crim. Cas. 75; 62 O. L. R. 113.—**CAN.**

*t iv. ———.]—*Chiropractor held liable under Medical Act, R. S. M., 1913, s. 80, for assuming the title of doctor.—**McDIARMID v. ELLIOTT** (No. 2), [1934] 1 W. W. R. 722.—**CAN.**

*t v. ———.]—*A person who calls himself "Doctor of Chiropractic, Graduate of Palmer," commits an offence against Quebec Medical Act, R. S. Q., 1925.—**LESAGE v. COLLEGE OF PHYSICIANS & SURGEONS**, [1936] 3 D. L. R. 71; 65 Can. C. C. 392.—**CAN.**

*t vi. ———.]—*Deft., who was qualified as a medical practitioner in Germany, but unregistered in South Australia, was found to have systematically practised as a general medical practitioner, described himself as an unregistered practitioner, permitted himself to be addressed as "doctor," & did certain other acts susceptible of the inference that he practised as a medical practitioner. He did not exhibit on any sign or use any written or printed matter which suggested that he was a medical practitioner. The evidence showed that the applt. had on 1,500 occasions & over a period of 145 days treated patients:—*Held*: deft., being unregistered, had been guilty of the offence of holding himself out as a medical practitioner.—**BECKER v. MILLER**, [1936] S. A. S. R. 125.—**AUS.**



## Part VI.—Dentists.

## SECT. 1.—IN GENERAL.

**201a. Constitution of Dental Board — Member ceasing to be member of General Medical Council & Branch Council—Vacation of office.**—Under Dentists Act, 1921 (c. 21), a Dental Board is constituted for the regulation & registration of members of the dental profession, & by Sched. 1. the Board is to be composed of seven appointed members & six elected members. Of the appointed members three are to be appointed by the General Medical Council, of whom one shall be a member of the Branch Council for England. By para. 6 of the Sched. provision is made in the event of the place of a member of the Board becoming vacant before the expiration of his term of office by death, resignation or otherwise, for the filling of the vacancy:—*Held*: a member of the Board who had been appointed thereon by the Branch Council for England as being a member of that Branch Council, but who had ceased to be a member of the General Medical Council & of the Branch Council, was no longer qualified to be a member of the Dental Board, & that his office was vacant.—*GENERAL MEDICAL COUNCIL v. WARING*, [1932] 2 Ch. 115; 101 L. J. Ch. 389; 147 L. T. 497.

**201b. Disciplinary powers of General Medical Council—Delegation to executive committee.**—Dentists Act, 1921 (c. 21), s. 16 (4), which lays down that for the purpose of the exercise of their functions under the Act & Dentists Act, 1878 (c. 33), the General Medical Council

can act by an executive committee of the Council, including at least one additional member, does not enable them to delegate to any such committee the disciplinary powers over dental practitioners conferred on the General Medical Council by Dentists Act, 1878 (c. 33), s. 18, as amended by Dentists Act, 1921 (c. 21), s. 8.

The sub-sect. in question confers power on the General Medical Council to act by an executive committee only in respect of those matters in which the General Medical Council is not required to act itself.—*GENERAL MEDICAL COUNCIL v. UNITED KINGDOM DENTAL BOARD*, [1936] Ch. 41; 105 L. J. Ch. 59; 154 L. T. 340.

**205a. ——— Non-payment of annual retention fee.**—Dentists Act, 1921 (c. 21), s. 7 (1), impliedly authorises the Dental Board to provide for non-retention on, or removal from, the register in default of payment of the annual retention fee.—*TATTERSALL v. SLADEN*, [1928] Ch. 318; 97 L. J. Ch. 145; 138 L. T. 577; 44 T. L. R. 237; 26 L. G. R. 217.

**205b. ——— Conviction for misdemeanour.**—The word "misdemeanour" in Dentists Act, 1878 (c. 33), s. 13, is not confined to indictable misdemeanours.—*PICKUP v. UNITED KINGDOM DENTAL BOARD*, [1928] 2 K. B. 459; 97 L. J. K. B. 604; 139 L. T. 607; 92 J. P. 147; 44 T. L. R. 544; 72 Sol. Jo. 369; 28 Cox, C. C. 536; 26 L. G. R. 393, D. C.

## PART V. SECT. 4.

*sz. Pretending to be chemist—Corporation.*—By Pharmacy Act, 1897, s. 17, it is an offence if "any person . . . not being then a registered pharmacist, pretends to be . . . a chemist . . .":—*Held*: a corpn. could be convicted of that offence.—*Re JOSSELYN, Ex p. MICK SIMMONS, LTD.* (1935), 35 S. R. N. S. W. 239; 52 N. S. W. W. N. 66.—AUS.

## PART VI. SECT. 1.

*a i. ———*—The rule as to the skill required of a dentist is the same as that with regard to the skill of a member of any other branch of the therapeutic art. Where he is registered & injury results from his treatment, the presumption is that he is competent & that the treatment was correct, until the contrary is shown.—*MOTAGART v. POWERS*, [1927] 1 D. L. R. 28; 36 Man. L. R. 73; [1926] 3 W. W. R. 513.—CAN.

*a ii. ———*—The doctrine that the question whether treatment by a physician was negligent is to be tested by the principles of the physician's school is not applicable to the mechanical manipulative labour of a dentist involved in the pulling of teeth; such work is governed by the rule applicable to all skilled labourers, i.e. that if the work undertaken by them implies skill it must be used, & when injury is sustained that could not have arisen unless there had been an absence of reasonable skill, or negligence, then there is liability.—*DRINNEN v. DOUGLAS*, [1931] 1 W. W. R. 160; 2 D. L. R. 806; 43 B. C. R. 362.—CAN.

*a iii. ——— Excessive extraction.*—Pltf. went to deft., a dentist, to have a tooth extracted. Deft. by an honest misunderstanding of pltf.'s instructions

extracted, after he had put pltf. under an anæsthetic, twelve teeth, & pltf. brought this action for trespass, assault & battery upon his person:—*Held*: (1) deft. was negligent in that he failed to make sure what he had to do before rendering pltf. unconscious; (2) as the action was not begun within six months from the day of the operation, it was barred by sect. 28 of Dentistry Act, R. S. O. 1927.—*ROASE v. PAUL*, [1931] 1 D. L. R. 562; 66 C. L. R. 237; *affd.*, [1931] 4 D. L. R. 435; O. L. R. 625.—CAN.

*a iv. ——— Injury to patient from hot-water bottle.*—Each pltf. claimed from defts. (a dentist who extracted pltf.'s teeth & the doctor who administered the anæsthetic) damages for injuries, the result of being burnt by a hot-water bag, which, it was alleged, had been improperly or carelessly allowed to come in contact with the patient. On the facts:—*Held*: the dentist was negligent in placing an insufficiently covered hot-water bag against the patient's feet, & was liable for the damage sustained, but as the use of the hot-water bag was not part of the preparation of the patient on behalf of the anæsthetist, the doctor was not liable.—*ARCHER & PALMER v. COLVIN* (1934), 29 M. C. R. 54.—N.Z.

## PART VI. SECT. 2.

**202 ii. ——— Conditions precedent.**—Medical (Dentists) Act, 1927 (Vict.), s. 14 (1) (b), requires that an appt. shall have "entered on a definite course of training":—*Held*: the words were satisfied by appt. entering upon a defined & continuous course of practical instruction in dental surgery & dentistry.—*DENTAL BOARD OF VICTORIA v. DENISON* (1928), 41 C. L. R. 102.—AUS.

**202 iii. ——— Principal means of**

*livelihood derived from dentistry.*—The fact that during part of the five years mentioned in sect. 36 (1) (a) (ii) of Act 13, 1928, an appt. was under apprenticeship as a dental mechanic does not make it impossible for his sole or principal means of livelihood during that period to have been derived from dental work outside his work as an apprenticed dental mechanic.—*HIRST v. SOUTH AFRICAN MEDICAL COUNCIL* (1929), 50 N. L. R. 170.—S. AF.

**202 iv. ——— Operative dental assistant.**—The construction of teeth or other dental articles is not a class of work which can be claimed by a dental assistant as entitling him to registration as a dentist under sect. 32 of Dentists Act, 1931. A person who has earned the main part of his maintenance or sustenance as a dentist's assistant by doing merely construction work is not thereby qualified to be registered as a dentist.—*MCCARTHY v. SOUTH AUSTRALIA DENTAL BOARD*, [1933] S. A. S. R. 424.—AUS.

**202 v. ———**—The essence of dentistry according to the definition contained in sect. 4 of Dentists Act, 1931, is operating in the mouths of patients, & to be an "operative dental assistant" one must be a person practising (as an assistant) dentistry in the form of so operating. To practice as an employed artisan manufacturing dentures & devices is not to practice dentistry.—*SEAMAN v. SOUTH AUSTRALIA DENTAL BOARD*, [1933] S. A. S. R. 421.—AUS.

**207 iv. ———**—*Ex p. KEENE* (1926), 26 S. R. N. S. W. 465; 43 N. S. W. W. N. 136.—AUS.

**207 v. ———**—*ALBERTA DENTAL ASSOCN. v. SHARP*, [1930] 2 W. W. R. 45; 3 D. L. R. 652; 24 Alta. L. R. 580.—CAN.



213. *Add. Annotation*:—*Refd. R. v. Registrar of Joint Stock Companies, Ex p. More*, [1931] 2 K. B. 197.

217. *Add. Annotation*:—*Consd. A.-G. v. Weeks*, [1932] 1 Ch. 211.

218a. —“Dental surgeon”—Registration after practising without qualification.]—By Dentists Act, 1921 (c. 21), s. 4, “A person registered under the principal Act—(a) shall, by virtue of being so registered, be entitled to take & use the description of dentist or dental practitioner; (b) shall not take or use, or affix to or use in connection with his premises, any title or description reasonably calculated to suggest that he possesses any professional status or qualification other than a professional status or qualification which

he in fact possesses & which is indicated by particulars entered in the register in respect of him”:—*Held*: a person who has no qualification, but who has been registered under the provisions of the above Act on the ground of his previous practice of dentistry, is not entitled to describe himself as a “dental surgeon”—*A.-G. v. Weeks*, [1932] 1 Ch. 211; 101 L. J. Ch. 26; 146 L. T. 59.

223. *Add. Annotation*:—*Refd. Albemarle Supply Co. v. Hind*, [1928] 1 K. B. 307.

224. *Add. Annotations*:—*Consd. Robinson v. Graves*, [1935] 1 K. B. 579. *Refd. Dominion Press v. Customs & Excise Minister*, [1928] A. C. 340; *Myers (G. H.) & Co. v. Brent Cross Service Co.*, [1934] 1 K. B. 46.

## Part VII.—Midwives.

226. To cross-refs. before this case add “*See, also, Midwives & Maternity Homes Act, 1926 (c. 32).*”

234a. Duty of midwife to call in doctor—Right of doctor to fees—Validity of Ministry of Health Regulations.]—When under Midwives Act, 1918 (c. 43), s. 14 (1), a registered medical practitioner has been called in by a midwife in a case of emergency it is the duty of the

local supervising authority under that subject. to pay to the medical practitioner “a sufficient fee . . . according to a scale to be fixed by the Local Govt. Board” (now the Ministry of Health). A Circular issued by the Ministry of Health contained a scale of fees, & clause 8 of the Circular provided (*inter alia*), that no fee should be payable where the doctor had agreed to attend the patient under arrangement made by or on

*o i.* — *Finding of Appeal*.]—Under Dentistry Act, R.S.B.C., 1924, as amended a finding by the Council of infamous or unprofessional conduct in respect of the practice of dentistry is subject to review, on appeal, by the Ct.—COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA v. COULTAS, [1935] 1 W. W. R. 471; 2 D. L. R. 609; 63 C. C. C. 162; 49 B. C. R. 459.—CAN.

*so.* Application for registration.—“Entered on a definite course of training”—What amounts to.]—From 1905 to Mar. 1910, appt. pursued a course of practical instruction in the various branches of a dentist’s work under the direction of a qualified & practising dentist. From Mar. 1910, onwards, until the Medical (Dentists) Act, 1927, came into operation, he acted as assistant to different qualified & practising dentists, performing the mechanical & surgical work in the practice of dentistry:—*Held*: the words “entered on a definite course of training,” in s. 14 (1) (b) of the Act were satisfied by the applicant entering on a defined & continuous course of practical instruction in dental surgery & dentistry.—DENTAL BOARD OF VICTORIA v. DENISON, [1928] V. L. R. 371; [1928] Argus L. R. 253.—AUS.

*sd.* Registration—Graduate—Meaning of.]—The word “graduate” in Dentistry Act, R. S. B. C. 1924, c. 66, s. 22 (b), does not import that appt. must have gone through a course of training prior to graduation.—*Re NEFF & COLLEGE OF DENTAL SURGEONS* [1928] 4 D. L. R. 839; [1928] 3 W. W. R. 299.—CAN.

*sf.* Grant of licence as operative dental assistant—Conditions precedent.]—On an application for a licence to practise as an operative dental assistant, appt. must show that the work done by appt. as an operative dental assistant was principally of that character. Appt. must show that there is some continuity of work done, sufficient to establish that the appt. is a person

practising dentistry as an assistant to a dentist. Before a dental assistant can be said to practise dentistry as an assistant, he must have had a sufficient experience in dentistry to come within the words frequently, customarily, or habitually.—*GEORGE v. DENTAL BOARD OF SOUTH AUSTRALIA*, [1932] S. A. S. R. 343.—AUS.

### PART VI. SECT. 3.

*q i.* — — —.]—Appt. a registered dentist had agreed to manage for resp., who was not a dentist, a dental practice which had been carried on by resp.’s former husband. In answer to an action by resp. to restrain appt. from practising in a certain specified locality in terms of a covenant to such effect contained in the agreement, appt. pleaded the illegality of the agreement:—*Held*: a person carries on a business who employs a servant to work for him though he may take no practical part in it; & the agreement in the present case was illegal, as constituting the carrying on of the “practice of dentistry” by a person who was not a registered dentist in contravention of Dentists Amendment Act, 1921–22, ss. 2, 3.—*SCOTT v. WATKINS*, [1928] N. Z. L. R. 628.—N.Z.

*q ii.* — — —.]—A person who for gain takes impressions of patients’ mouths & subsequently fits the plates into their mouths, performs functions specially belonging to the calling of a dentist, within sect. 5 of Act 21, 1899 (Natal).—*R. v. ROBERTSON*, [1929] App. D. 10.—S. AF.

*q iii.* — — —.]—A single act, in this instance the taking of an impression for the purpose of making a plate for false teeth:—*Held*: to constitute, under the circumstances, the practice of dentistry within Dentistry Act, R. S. B. C., 1924.—*J. v. STURcliffe*, [1932] 3 W. W. R. 377; 4 D. L. R. 662; 59 C. C. C. 108.—CAN.

*q iv.* — — —.]—The methods followed by denta. who were not regis-

tered under said Act, in the obtaining of “impressions” & “bites” for the purpose of making artificial teeth, & in guiding patients in fitting themselves with trial & permanent plates, without the direction & control of a person registered under said Act:—*Held*: to constitute the practice of the profession of dentistry.—*A.-G. FOR ALBERTA v. LEES & COURTNEY*, [1932] 3 W. W. R. 533.—CAN.

*q v.* — — —.]—*Assisting corporation*—Meaning of “assist.”—*R. v. SIMMONS*, [1934] 2 W. W. R. 641; 48 B. C. R. 398; 62 C. C. C. 161.—CAN.

*q vi.* — *Liability of company*.]—Appt., a co. incorporated by the province, appealed from a conviction for unlawfully practising dentistry in that it took impressions of the gums or jaws of persons & did fit thereto artificial dentures for gain, contrary to sect. 71 of Dentistry Act, R.S.B.C., 1924. It was proved that appt. had published an advertisement offering low-priced plates made by experts, also offering to repair, burnish & sterilise plates & concluding, “we make & repair plates only”; also its business was conducted in premises connected by a door with the office of a registered dentist who had organised the co., & was for a time one of its directors; & when a customer decided to buy a plate & had selected it he was directed by the co. to that office for the taking of the impression & the fitting:—*Held*: the appeal should be allowed.—*R. v. MECHANICAL DENTISTRY SCHOOL*, [1935] 2 W. W. R. 311; 3 D. L. R. 264; 63 C. C. C. 320; 50 B. C. R. 40.—CAN.

*sk.* Information—What must be given.]—An information under Dental Act, 1929, N. B., must show that informant is one of the persons authorised to lay the charge, & must specify the acts constituting the alleged unlawful practice.—*R. (DESMARAIS) v. DOWEN*, [1937] 1 D. L. R. 232; 67 Can. C. C. 256.—CAN.

behalf of the patient or by the club, medical institute, or other assocn. of which the patient or her husband was a member:—*Held*: (1) clause 8 of the Circular formed no necessary part of the establishment of a scale of fees; it determined matters which did not belong, & ought not to be appended, to such a scale & was therefore (*ultra vires*) the Ministry of Health, which had no power under the Act of 1918 except to fix a scale of fees; (2) "sufficient fee" in sect. 14 (1) of Midwives Act, 1918 (c. 43), was only intended to lay down that the doctors should be properly remunerated for their services, & that it had no relation to another source (the club, medical institute, or other assocn.) from which a payment might be made. The local

supervising authority had no power to determine the question of sufficiency, which was finally fixed by the scale of fees prescribed by the Ministry.—*BROWN v. MONMOUTHSHIRE COUNTY COUNCIL*, *THOM v. MONMOUTHSHIRE COUNTY COUNCIL*, *PARTRIDGE v. MONMOUTHSHIRE COUNTY COUNCIL*, *BUCKLEY v. MONMOUTHSHIRE COUNTY COUNCIL* (1935), 153 L. T. 9; 99 J. P. 227; 51 T. L. R. 348; 79 Sol. Jo. 215; 33 L. G. R. 231, C. A.

234b. — — — What is "sufficient" fee.]—*BROWN v. MONMOUTHSHIRE COUNTY COUNCIL*, *THOM v. MONMOUTHSHIRE COUNTY COUNCIL*, *PARTRIDGE v. MONMOUTHSHIRE COUNTY COUNCIL*, *BUCKLEY v. MONMOUTHSHIRE COUNTY COUNCIL*, No. 234a, *ante*.

## Part IX.—Drugs.

242. *Add. Citation*:—28 Cox, C. C. 303, D. C.

242a. — — — Prosecution under Dangerous Drugs Act, 1925 (c. 74)—Act not in operation.]—Conviction quashed.—*R. v. KYNASTON* (1926), 19 Cr. App. Rep. 180, C. C. A.

242b. — — — "Person authorized" to supply drugs—Manager of shop owned by company.]—Whether or no the qualified manager of a chemist's shop owned by a limited co. carrying on business in pursuance of Poisons & Pharmacy Act, 1908 (c. 55), is himself "keeping open shop" as well as the co. which employs him, he is at all events a "person authorized" to supply the drugs to which the Dangerous Drugs (Consolidation) Regulations, 1928, apply, & is bound to keep the register prescribed by reg. 11 (1) "at all

times available for inspection." Some limitation must be put on the words "at all times," but they must be taken at least to mean "at all times when the premises are open for business," & therefore when the manager on going out to lunch left the register, for safety's sake, locked up in the poison cupboard, so that his assistant was unable to produce it to a police officer who called:—*Held*: the manager was rightly convicted of an offence against the regulations.—*DAVIES v. WINSTANLEY* (1930), 144 L. T. 433; 95 J. P. 21; 47 T. L. R. 104; 29 L. G. R. 94; 29 Cox, C. C. 242.

242c. — — — Register to be "at all times available for inspection"—Meaning of "at all times."—*DAVIES v. WINSTANLEY*, No. 242b, *ante*.

### PART VIII.

a i. — — —.]—Deft. was convicted of having pretended to be a veterinary surgeon contrary to sect. 23 of Veterinary Surgeons Act, 1928, on evidence which showed that he had called on the owner of a horse, stated that the horse was sick, & offered to give it treatment. He did not say he was a veterinary surgeon. He treated the horse on two occasions & received payment therefor:—*Held*: the evidence was not sufficient to support the conviction.—*JOHNSTON v. COLLINS*, [1932] V. L. R. 66; *Argus* L. R. 15.—AUS.

b i. — — —.]—Pltf., whose membership of the Tailwaggers Club entitled him to advice only from W., the Club's "Veterinary Adviser," brought action against W. in respect of an injury to his dog, upon the ground that W. had failed to diagnose & treat such injury & that such failure was due to a lack of that degree of care & skill, which in the circumstances, the law demanded of him; & against the Club upon the ground that W. was its servant or agent, or alternatively, that it had failed to exercise due care in the selection of its "Veterinary Adviser":—*Held*: (1) pltf. was entitled to a verdict against W.; (2) the Club was not, on the ground of employment or agency, liable for lack of care or skill on his part, nor had it been shown that the Club had failed to use due care in selecting its "Veterinary Adviser."—*LEIGHTON v. TAILWAGGERS CLUB OF NEW ZEALAND (INC.)* (1934), 29 M. C. R. 71.—N.Z.

### PART IX. SECT. 1.

242 i. *Dangerous drugs—Procuring drugs for unlicensed or unauthorised person—Doctor supplying wife with orders on chemist.*]—A complaint, which charged a medical practitioner with procuring dangerous drugs for his wife, in contravention of Dangerous Drugs Act, 1920 (c. 46), s. 7, & Dangerous Drugs Regulations, 1921, reg. 4, libelled that accused had delivered to his wife five order forms of different dates, signed by him, in which he pretended that the drugs specified in the orders were required by him for professional use only, "while you well knew that the order forms were granted by you for the purpose of enabling your wife to obtain the drugs for her own use, she not being a person licensed or otherwise authorised to be in possession of the drugs," & that his wife presented the order forms to certain chemists & thereby obtained the drugs:—*Held*: the complaint relevantly charged an offence against the Act & regulation libelled, in respect that (1) the order forms, inasmuch as they bore to be "for professional use only," were not prescriptions; (2) the procedure alleged to have been followed negatived the view that accused was dispensing his own medicine; (3) the wife was not a messenger on behalf of her husband, but a person obtaining drugs on her own behalf & for her own use.—*STRATHERN v. ROSS*, [1927] S. C. (J.) 70.—SCOT.

st. "Distribution" of drugs—What amounts to.]—*MARINO & YIPP v. R.*, [1931] S. C. R. 482; 4 D. L. R. 530; 56 Can. C. C. 186.—CAN.

sg. *Selling drugs—Imposition of maximum penalty—Not varied by Court of Appeal.*]—*R. v. NIP CAR* (1930), 53 Can. C. C. 321; 42 B. C. R. 327.—CAN.

sk. — — — Mail order—Vendor not within jurisdiction.]—*QUEBEC PHARMACEUTICAL ASSOCN. v. T. EATON CO.* (1931), 56 Can. C. C. 172.—CAN.

sl. *Possession of drugs—Liability for—Bailment from trafficker in drugs.*]—*LANMONTAGNE v. R.* (1929), 54 Can. C. C. 338; 48 Que. K. B. 474.—CAN.

so. — — — Demand for trial by jury by Attorney-General—No right to summary trial.]—*ASTROFF v. R.* (1931), 56 Can. C. C. 263.—CAN.

sr. *What are drugs—Hydrogen peroxide.*]—Hydrogen peroxide is not a drug within Quebec Pharmacy Act 1925.—*QUEBEC PHARMACEUTICAL ASSOCIATION v. WOOLWORTH CO.*, [1936] 1 D. L. R. 173; 64 Can. C. C. 281.—CAN.

### PART IX. SECT. 2.

248 i. "Held out or recommended to public"—Necessity for notice or advertisement to be affixed—Tonic food.]—Manufacturers & vendors of a preparation known as "Zomogen," on which the duty had not been paid, were charged with a contravention of the Acts. It was proved that no skill in chemistry was needed or used in the process of manufacture of the preparation. It was composed mainly of ox blood & marrow. Its predominant constituent as a health preserving & restoring commodity was hemoglobin, an article which was frequently recommended by medical men to supply

252. *Add. Annotation* :—*Consd. A.-G. v. Lewis & Burrows, Ltd.* (1931), 146 L. T. 165.
- 252a. — *Article made up by manufacturer at request of retailer.*—*A.-G. v. LEWIS & BURROWS, LTD.*, No. 253a, *post*.
- 253a. *Exemption—Article of which properties “known admitted & approved of”—What amounts to.*—A retail chemist ordered a remedy for chest complaints to be made up by manufacturers in accordance with a formula which was contained in a well-known book of pharmaceutical formulas under the name “Chest Vapour Rub.” He then put it into cartons, & sold it to the public with a label which described it as “Vapour Rub” & bore his trade mark. There was evidence that the words “Vapour Rub” alone described a class of medicines & not

any individual one. In an action brought upon information by the A.-G. for non-payment of medicine stamp duty :—*Held* : “Vapour Rub,” as described above, was not a remedy whose properties were “known, admitted & approved” within the exemption contained in the Sched. to Medicines Stamp Act, 1812 (c. 150).

The “denomination, properties, qualities, virtues & efficacies” of a mixture cannot be “known, admitted & approved” unless the vendor clearly identifies them either by description or by reference to a known & accessible formula.—*A.-G. v. LEWIS & BURROWS, LTD.*, [1932] 1 K. B. 538; 101 L. J. K. B. 327; 146 L. T. 165; 96 J. P. 25; 48 T. L. R. 77; 75 Sol. Jo. 885; 30 L. G. R. 13; 29 Cox, C. C. 418.

## Part X.—Poisons.

*See Pharmacy & Poisons Act, 1933 (c. 25).*

257. *Add. Annotations* :—*Consd. Davies v. Winstanley* (1930), 47 T. L. R. 104. *Appl. Orpen v. Haymarket Capital, Ltd.* (1931), 145 L. T.
614. *Consd. Law Society v. United Services Bureau, Ltd.* (1933), 103 L. J. K. B. 81. *Refd. R. v. Cory*, [1927] 1 K. B. 810; *A.-G. v.*

deficiencies of red blood corpuscles in their patients, & was used especially in cases of anaemia. It was advertised & sold to the public as a tonic food, & the labels on the bottles stated that medical men from every part of the world described it as a marvellous success in the immediate restoration of health :—*Held* : the method in which the preparation was manufactured, used, & sold rendered it liable to duty under the Act.—*ADAM v. ZOMOGON FOOD PRODUCTS, LTD.*, [1929] S. C. (J.) 22.—*SCOT.*

### PART X. SECT. 1.

- h i.* ———.—*R. v. SMITH*, [1924] 4 D. L. R. 427; 55 O. L. R. 549.—*CAN.*
- h ii.* ———.—*Duty to convict.*—*Held* : if a charge of having possession of opium contrary to sect. 4 (d) of Opium & Narcotic Drug Act, R. S. C., 1927, be proved, the ct. should convict under that sect. & not reduce or substitute an offence under other sects. of the Act.—*R. v. WONG SACK JOE* (1929), 41 B. C. R. 254.—*CAN.*
- h iii.* ———.—*R. v. LEE KIM*, [1930] 2 W. W. R. 441; *sub nom.* *Il. v. MAH POY, R. v. HENRY CHAN, Il. v. CHARLIE SAM*, 53 Can. C. C. 252; 42 B. C. R. 360.—*CAN.*
- h iv.* ———.—*Opium was found by the police in the house of accused, but he was absent at the time, & testified before a police magistrate that the opium found was not there with his authority, knowledge, or consent.*—*Held* : accused had discharged the onus cast on him by Opium & Narcotic Drug Act, R. S. C., 1927, s. 15.—*R. v. GUN YING*, [1930] 3 D. L. R. 925; 53 Can. C. C. 378; 65 O. L. R. 369.—*CAN.*
- h v.* ———.—*Sentence.*—*R. v. HENRY CHOW*, [1930] 2 W. W. R. 389; 53 Can. C. C. 247; 42 B. C. R. 365.—*CAN.*
- h vi.* ———.—*The Opium & Narcotic Drug Act, 1929, c. 49 (Dom.), is to be interpreted as a complete code with respect to those matters within its scope. Where on a prosecution on indictment for a violation of sect. 4 (1) (d) of Opium & Narcotic Drug Act, 1929, the sentence of imprisonment imposed is the minimum one of six months, the ct. has no power to direct that the term should*

begin from the date of arrest where that was prior to the date of conviction.—*R. v. JUNG QUON CHONG*, [1938] 1 W. W. R. 45; 1 D. L. R. 55; 69 Can. C. C. 248.—*CAN.*

*h vii.* ———.—*Whether Court of Appeal may revise.*—*R. v. CHOW DUCK YUET* (1929), 43 B. C. R. 152.—*CAN.*

*h viii.* ———.—*Accused was found in an opium den lying on a couch beside another man. Between them on the couch was a pipe. The accused had a packet of opium in his hands & was in the act of opening it up. He was convicted under sect. 4 (d) of Opium & Narcotic Drug Act, 1929, of having opium in his possession.*—*R. v. LEE PO*, [1932] 2 W. W. R. 313; 4 D. L. R. 712; 45 B. C. R. 503; 58 C. C. C. 315.—*CAN.*

*h ix.* ———.—*Distinguished from offence of smoking.*—*R. v. LEE WAH YUEN*, [1932] 3 D. L. R. 234; 57 C. C. C. 372.—*CAN.*

*h x.* ———.—*R. v. WONG YIP LAN & LEE LUNG*, [1936] 1 W. W. R. 478; 2 D. L. R. 403; 65 Can. C. C. 229; 50 B. C. R. 350.—*CAN.*

*h xi.* ———.—*Proof of innocence.*—*Held* : on an appeal by accused from a conviction for unlawfully having opium in her possession, while said sect. throws a heavy onus on the accused of “proving” his innocence, yet it does not exclude the doctrine that he must be given the benefit of a reasonable doubt raised by the evidence as to his guilt; & since, in the present case, the accused had advanced the “proof” of her defence to such a stage that she created such a doubt, she was entitled to the benefit of that doubt & to be declared not guilty.—*R. v. LEE FONG SHEE*, [1933] 3 W. W. R. 204; 60 C. C. C. 73; 47 B. C. R. 205.—*CAN.*

*h xii.* ———.—*Under sect. 4 (1) of Opium & Narcotic Drug Act, 1929, physical possession is sufficient to warrant a conviction, while sect. 17 contemplates constructive possession.*—*MORELLI v. R.* (1932), 58 C. C. C. 120; *affg.* (1932), 57 C. C. C. 398.—*CAN.*

*h xiii.* ———.—*Conviction under amended Act—Amendment not in operation.*—*Held* : the conviction was bad.—*R. v.*

*Soo Gong*, [1927] 2 D. L. R. 269; [1927] 1 W. W. R. 669; 47 Can. Crim. Cas. 275; 38 B. C. R. 321.—*CAN.*

*h xiv.* ———.—*Deft. was convicted in 1928 for “unlawfully having in his possession a drug, to wit, opium, contrary to sect. 4 of the Opium & Narcotic Drug Act, 1923.” Said Act had been amended in 1925 by severing sub-sect. (d) of said sect. 4 into two sub-sects., but no change was made in the nature of the offences, which remained identical in their legal effect; & said Act as amended was repealed & re-enacted in the same words by R. S. C., 1927, the short title of which was The Opium & Narcotic Drug Act :—*Held* : in view of the above & of sect. 8 of the Act Respecting the Revised Statutes of Canada, 1924, there had been no period of time since the Act of 1923 in which the transaction upon which deft. was convicted did not constitute an identical offence against all of the statutes in question; & therefore, the clerical error made in the conviction by adding the date “1923” to the then existing Act was a mere matter of surplusage which could be disregarded.*—*R. v. QUONG WONG*, [1930] 1 W. W. R. 299; 2 D. L. R. 422; 53 Can. C. C. 60; 42 B. C. R. 241.—*CAN.*

*h xv.* ———.—*Trial before police magistrate—No appeal.*—*R. v. LEE SAM* (1931), 55 Can. C. C. 74.—*CAN.*

*h xvi.* ———.—*Opium & Narcotic Drug Act, 1929, ss. 4 (d), 17—Whether construed together.*—*TOM YOUNG v. R.*, [1932] 1 D. L. R. 201; 56 Can. C. C. 286.—*CAN.*

*h xvii.* ———.—*R. v. MORELLI*, [1932] 3 D. L. R. 611; 58 Can. C. C. 120.—*CAN.*

*h xviii.* ———.—*Sale of—Amendment of conviction.*—*Accused was convicted of selling opium & sentenced to imprisonment for one year & a day & fined \$200. On appeal by the Crown that the sentence be amended in order to comply with sect. 14 of Opium & Narcotic Drug Act, the Ct. of Appeal added to the sentence that in default of payment of the fine he be imprisoned until the fine be paid, or for a period of three months, to commence to run at the end of the term awarded :—*Held* : the Ct. of Appeal did not*

Walkergate Press, Ltd., *Same v. Bloomfield*,  
*Same v. Carlton* (1930), 142 L. T. 408.

**257a.** Whether "personal control."—Applts. were charged with unlawfully selling at 2, Piccadilly Circus, strychnine contained in Easton's Syrup, & at 95, Charing Cross Road, strychnine contained in a compound syrup of hypophosphites. They were also charged with unlawfully taking or causing to be taken & used at each of these addresses the title of chemist. It was alleged in each case that they were not authorised sellers of poisons. Applts. employed a registered pharmacist as superintendent in connection with the retailing & dispensing of poisons. Applts. carried on business at sixteen shops in or near London, but the business carried on comprised the sale of drugs & poisons by retail at the above premises & one other shop in Edgware Road only, the other premises being mainly concerned with the sale of proprietary medicines. The superintendent attended at the Edgware Road shop during half the time the shop was open, & at each of the shops at Piccadilly Circus & in Charing Cross Road a registered

pharmacist was employed as manager, & attended there during the whole time the shop was open. The superintendent was a member of applts.' board, & the statement in writing required by the Pharmacy & Poisons Act, 1933 (c. 25), s. 9 (1) (a) (ii), had been duly made & sent to the registrar of the Pharmaceutical Society:—*Held*: applts.' business was not, so far as concerned the sale by retail of drugs & poisons, under the personal control of the superintendent, nor, subject to the directions of the superintendent, under the personal control of a manager who was a registered pharmacist, as required by the Pharmacy & Poisons Act, 1933 (c. 25), s. 9 (1) (b), & applts. were guilty of the offences charged.—*HYGIENIC STORES, LTD. v. COOMBES*, [1938] 1 All E. R. 63; 36 L. G. R. 136.

**257b.** ———.—*DAVIES v. WINSTANLEY*, No. 242b, *ante*.

**258.** *Add. Annotation*:—*Refd. Pharmaceutical Society Council of Great Britain v. Fuller* (1932), 96 J. P. 422.

**259a.** ———.—*Qualified manager of company.*—*DAVIES v. WINSTANLEY*, No. 242b, *ante*.

make a new conviction but only added to it sufficient to bring the sentence within the requirements of the Act.—*Re CHOW DUCK YUET* (1931), 55 Can. C. C. 344; 43 B. C. R. 556.—*CAN.*

**h xix.** ———.—*Right of Crown to proceed by indictment.*—In a prosecution under Opium & Narcotic Drug Act, 1929, the Crown has an option to proceed by summary conviction or by indictment.—*R. v. LAPORTE* (1931), 57 C. C. C. 280.—*CAN.*

**h xx.** ———.—*Right of Crown to trial by jury.*—The A-G. may require trial by jury, notwithstanding election for speedy trial, in the case of offences under Opium & Narcotic Drug Act, 1929 (Can.).—*It. v. VALADE* (1932), 58 C. C. C. 156.—*CAN.*

**h xxi.** ———.—*Defence that accused agent of purchaser.*—On a prosecution for illegally selling opium the defence was that a stool pigeon having obtained the confidence of the accused introduced a mounted police officer to him & the accused, first at the request of the stool pigeon & afterwards at the request of the officer, sought for & got into touch with a Chinaman named by the stool pigeon as a man from whom opium could be bought, & that the accused merely accepted money from the officer, turned it over to the real vendor &, in effect, acted as an agent for the officer in the purchase of the drug. The accused was convicted & appealed:—*Held*: the conviction should be sustained.—*R. v. MAH QUN MON*, [1934] 1 W. W. R. 78; 47 B. C. R. 464.—*CAN.*

**h xxii.** ———.—*What is—"Dross."*—"Dross" which is the refuse or residue of opium after it has been smoked, is opium within Opium & Narcotic Drug Act, 1929.—*R. v. CHAN SAM*, [1933] 1 W. W. R. 296; 59 C. C. C. 325; 46 B. C. R. 341.—*CAN.*

**h xxiii.** ———.—*Principles of punishment.*—*R. v. DAVIS* (1933), 61 C. C. C. 90.—*CAN.*

**h xxiv.** ———.—*For non-medical purposes—Acquittal—Whether bar to charge of selling without permit.*—Acquittal on a charge of selling a narcotic drug for other than medicinal purposes, being a physician, is not a bar to a subsequent charge of selling the drug without a permit, in his personal capacity.—*R. v. LAPORTE*, [1934] 1 D. L. R. 637; 60 C. C. C. 372.—*CAN.*

**h xxv.** ———.—*Ignorance of nature—Whether defence.*—Ignorance of the

nature of a substance found on accused is no defence to proceedings under Opium & Narcotic Drug Act, 1929, s. 4 (d).—*R. v. ARANOVITCH* (1933), 60 C. C. C. 22.—*CAN.*

**h xxvi.** ———.—*Validity of conviction.*—The record of a conviction on a charge under the Opium & Narcotic Drug Act, 1929, held bad on its face on two grounds: (a) it did not show, with respect to accused's election for trial that he did anything more than consent to be tried before ELLIS, C.C.J.; therefore, so far as the record was concerned LENNOX, C.C.J., was without jurisdiction & the proceeding before him & the conviction were null & void; (b) it did not appear therefrom that LENNOX, C.C.J., is a judge, &, if the record alone was to be looked at, the accused would be entitled to his discharge upon that ground. Moreover the record did not show in what county the city of Vancouver, where the record stated the accused was arraigned, is.—*R. v. YONG JONG*, [1936] 2 W. W. R. 147; 3 D. L. R. 60; 66 Can. C. C. 62; 50 B. C. R. 433.—*CAN.*

**h xxvii.** ———.—*When doctor may claim privilege.*—A doctor cannot claim privileges under Opium & Narcotic Drug Act, 1929, s. 7, if he is liable to suspension for not having paid his annual fees to the College of Physicians & Surgeons.—*L. v. R.* (1934), 62 Can. C. C. 308.—*CAN.*

**h xxviii.** ———.—*A physician who has not paid his annual contribution to the College of Physicians is not "in good standing" & cannot invoke the benefit of Opium & Narcotic Drug Act, ss. 6 & 7.*—*LAVALLEE v. R.*, [1936] 3 D. L. R. 570; 66 Can. C. C. 101.—*CAN.*

**sg. Morphine—What amounts to—Question of fact.**—*R. v. BERU*, [1934] 3 W. W. R. 47; 62 C. C. C. 158.—*CAN.*

**sl.** ———.—*Unlawful possession.*—Accused appealed from a conviction for unlawfully having morphine in his possession contrary to Opium & Narcotic Drug Act, 1929. The facts were that the accused was the proprietor of a shop in "Chinatown" & in this shop & in his room where he resided there were found pills in containers labelled cough medicine. At one time these pills were allowed entry into Canada & were used by the Chinese for treating coughs. On analysis they were found to contain morphine. The accused testified that he did not

know they contained morphine. The magistrate held that the accused could not be heard to say that he did not know what was in the pills:—*Held*: the accused's possession of the pills was that possession contemplated by sect. 17 of the Act, & although that sect. shifts the burden of proof to the accused it also opens the door to the defence of ignorance, a defence which is not open to him under sect. 4 standing alone.—*R. v. WONG LOON*, [1938] 1 W. W. R. 333; 1 D. L. R. 313; 69 Can. C. C. 284.—*CAN.*

**sp. Marihuana—Unlawful possession.**—The unlawful possession of marihuana is an offence under Opium & Narcotic Drug Act.—*R. v. FORBES* (1937), 69 Can. C. C. 140.—*CAN.*

## PART X. SECT. 2.

**257 i.** "Person"—*Corporation.*—*Held*: (1) a limited co. is a "person" within sect. 17 of Pharmacy Act (Ir.), 1875, Amendment Act, 1890; (2) a sale of arsenic contained in a sheep dip is a sale of a poison mentioned in Sched. A., Part I, of Sale of Poisons (Ir.) Act, 1870, although it may also be a poison contained in a compound & prepared or sold for the destruction of vermin within Sched. A., Part II; (3) only one offence can be committed under sect. 2 of Sale of Poisons (Ir.) Act, 1870, in respect of one sale.—*WEDICK v. OSMOND & SON*, [1935] 1 R. 820.—*IR.*

**258 iii.** ———.—*Held*: a complaint, which set forth that a duly registered chemist on a specified date did keep an open shop for retailing poisons, contrary to Pharmacy Act, 1868 (c. 121), ss. 1, 15, as amended by Poisons & Pharmacy Act, 1908 (c. 55), s. 3 (1) & stated that accused, "not being personally present & bona fide conducting the sale," did sell to a person named, by the hand of an assistant who was not a duly registered chemist, certain poisons, did not relevantly charge a contravention of the statutes libelled, in respect that the alleged transaction, being merely an isolated sale when the registered chemist did not happen to be present, was not an offence under the statutes, & particularly was not an offence under 1908 Act, s. 3 (1).—*LINSTEAD v. SIMPSON*, [1927] S. C. (J.) 101.—*SCOT.*

**sm. Opium & Narcotic Drugs Act—Jurisdiction of magistrate under.**—*VIAU v. OTIS* (1927), 44 Que. K. B. 406.—*CAN.*

**260a. "Conducted by himself"—Sale of poison from automatic machine.]—**By sect. 3, subsect. (1), of the Poisons and Pharmacy Act, 1908: "Any person who, being a duly registered pharmaceutical chemist or chemist & druggist, carries on the business of pharmaceutical chemist or chemist & druggist shall, unless in every premises where the business is carried on the business is *bona fide* conducted by himself or some other duly registered pharmaceutical chemist or chemist & druggist, as the case may be, . . . be guilty of an offence under sect. 15 of the Pharmacy Act, 1868."

Deft., a duly registered chemist & druggist, sold & offered for sale (*inter alia*) lysol, a poison, from an automatic machine which he had placed just outside the door of his shop:—**Held**: the sale of the lysol by means of the automatic machine was not an offence under Pharmacy Act, 1868 (c. 121), s. 15, & Poisons & Pharmacy Act, 1908 (c. 55), s. 3. The business carried on by means of the automatic machine was *bona fide* conducted by deft. himself within Poisons & Pharmacy Act, 1908 (c. 55), s. 3 (1).—**PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. WATKINSON**, [1931] 2 K. B. 323; 100 L. J. K. B. 577; 145 L. T. 257; 95 J. P. 139; 47 T. L. R. 399; 75 Sol. Jo. 312; 29 L. G. R. 457, D. C.

**Annotation:—Distd.** Pharmaceutical Society Council of Great Britain v. Fuller (1932), 96 J. P. 422.

**260b. — Exercise of control sufficient.]—Held**: the words "*bona fide* conducted" in Poisons & Pharmacy Act, 1908 (c. 55), s. 3 (1), were wider than the words "carries on the business." They meant that the business might be conducted by a person who did not himself perform every act which formed part of the business; it was enough that he controlled & regulated it & had the power, which he exercised, of giving orders as to how it should be carried on. Accordingly, it was not sufficient to make it an offence under the section that one sale was not conducted by the chemist himself or by some other duly registered pharmaceutical chemist. How many sales must be proved was a question of degree & therefore of fact.—**PHARMACEUTICAL SOCIETY COUNCIL OF GREAT BRITAIN v. FULLER** (1932), 96 J. P. 422; 48 T. L. R. 643; 30 L. G. R. 468, C. A.

**272a. — Use need not be confined to agriculture or horticulture.]—Held**: that in order to bring a preparation within the exception in Poisons & Pharmacy Act, 1908 (c. 55), Sched., Part II., it is not necessary to show that the article has been exclusively prepared for some purpose in connection with agriculture or horticulture or that it cannot be used for any other purpose.—**PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. BROWN** (1932), 48 T. L. R. 427.

## Part XI.—Optometry and Chiropody.

*See cases infra.*

**sn. Optum—Furnished by physician to addict—Onus of proof on physician.]—**While under Opium & Narcotic Drug Act, 1923, a physician may furnish a "drug" for self-administration to an addict or habitual user who is suffering from a diseased condition caused otherwise than by the excessive use of any "drug," yet, even in such a case, an accused physician must nevertheless bring himself within the requirements of sect. 6 of the Act by showing that the "drug" was required for medicinal purposes or was prescribed for the medical treatment of a person under professional treatment by such physician. Where a diseased condition is proved, or the medical evidence is such that the physician should be given the benefit of the doubt on the point, the question whether one of the other two conditions which permit of the furnishing of the "drug" existed is not to be decided by accepting the physician's own judgment & evidence as conclusive, but the ct. must determine each case on its own facts as disclosed by all the evidence.—**R. v. GORDON**, [1928] 2 D. L. R. 315; [1928] 1 W. W. R. 678; 49 Can. Crim. Cas. 272.—**CAN.**

### PART XI.

**so. Board of Examiners—Disciplinary powers.]—**Sect. 8 of the Optometry Act does not give the Board of Examiners authority to

conduct a trial in the first instance to ascertain whether a person is guilty of illegal practices, etc., & the words "where the board is satisfied that any person has been found guilty" in s. 8 (1) point to a finding that has already been made by some tribunal other than the Board, & that it is only after a person has "been found guilty," & the Board has become "satisfied of that fact," that notice is to be given under said sect. & the person concerned offered an opportunity of being heard.—**WITHROW v. NOVA SCOTIA BOARD OF OPTOMETRY**, [1929] 1 D. L. R. 766; 60 N. S. R. 318.—**CAN.**

**sq. Breach of Medical Act, R. S. O., 1927.]—**Optometry is a method of treating a human ailment & therefore an optometrist who uses the title "Doctor" or "Dr." in connection with his occupation as optometrist, uses it as an occupational designation contrary to Medical Act, R. S. O., 1927.—**R. v. LOWRIE**, [1932] O. R. 107; 4 D. L. R. 806.—**CAN.**

**sr. Breach of Optometry Act.]—**Conviction for supplying mechanical instrument for self-measurement & subsequent supply of eye-glasses. Offence under Optometry Act, R. S. O., 1927, proved.—**R. v. BROWN** (1933), 60 C. C. C. 241.—**CAN.**

**st. —.]—**Under Optometry Act,

R. S. O., 1927, s. 12 (a), a place of business must have a registered optometrist on the premises, & a co. cannot evade this by employing a duly qualified medical practitioner.—**R. v. RITZOLZ OPTICAL CO. LTD.**, [1935] 1 D. L. R. 681; 63 Can. C. C. 212; 5 F. L. J. (Can.) 5.—**CAN.**

**sv. —.]—**There is an offence of supplying glasses under the Optometry Act when a person who has solicited orders at the door delivers the glasses to the post office to be mailed to the purchaser.—**R. v. PENCHARD**, [1936] 1 D. L. R. 546; 10 M. P. R. 231; 65 Can. C. C. 113.—**CAN.**

**sy. Optometry Board—Whether exercising judicial functions.]—**The Optometry Board established under Optometry Act, R. S. O., 1927 exercises judicial & not administrative functions, & is therefore liable in a proper case to prohibition. The power to establish such a body lies in the Province, since it does not exercise a judicial power of the quality contemplated in B. N. A., Act, s. 96.—**Re ASHBY**, [1934] O. R. 421; 3 D. L. R. 565; 62 C. C. C. 132.—**CAN.**

**sz. Breach of Chiropody Act.]—**The carrying on by a person not registered under Chiropody Act, 1929, & amendments, of the business of massaging feet is not a breach of that Act.—**R. (JONES) v. FRASER**, [1937] 2 W. W. R. 684.—**CAN.**

## METROPOLIS.

## Part II.—Metropolitan Areas and Authorities.

- 6a. **London Passenger Transport Board—What property passes to Board—Property acquired after commencement of Act.**—Under London Passenger Transport Act, 1933 (c. 14), s. 5, no property, acquired after the date of the passing of the Act by an undertaking which is transferred by the Act to the London Passenger Transport Board on the appointed day, passes to the Board unless the acquire-

ment is justified for the maintenance of the undertaking until the appointed day, as previously, in the ordinary course of business in as efficient a condition as usual.—*CHOCOLATE EXPRESS OMNIBUS CO., LTD. v. LONDON PASSENGER TRANSPORT BOARD* (1934), 152 L. T. 63; 50 T. L. R. 490; 78 Sol. Jo. 518, C. A.

## Part III.—The London County Council.

8. *Add. Annotations* :—**Refd.** *Collins v. Whiteway*, [1927] 2 K. B. 378; *Hearts of Oak Assurance Co. A.-G.*, [1931] 2 Ch. 370; *O'Connor v. Waldron*, [1935] A. C. 76.

## Part VII.—Officers of Metropolitan Authorities.

- 29a. ——— **“Emoluments”—Annual allowances in respect of superannuation.**—*KIDDIE v. PORT OF LONDON AUTHORITY*, *DURRANT v. SAME* (1929), 45 T. L. R. 430; 93 J. P. 203; 27 L. G. R. 398.

- 29b. ——— **Fees of town clerk acting as registration officer.**—*Held*: the fees received by the town clerk of a metropolitan borough in respect of his duties as registration officer are “emoluments of his office” as town clerk & properly included in calculating the super-

annuation allowance payable to him under Superannuation (Metropolis) Act, 1866 (c. 3), s. 4.—*STOKE NEWINGTON BOROUGH COUNCIL v. RICHARDS*, [1930] 1 K. B. 222; 99 L. J. K. B. 1; 142 L. T. 257; 45 T. L. R. 650; 27 L. G. R. 660; 94 J. P. 27, D. C.

- 29c. **Transfer of existing officer to borough council—Right to remuneration for additional duties**—London Government Act, 1899 (c. 14), ss. 8 (3), 30 (1).—*GRAY v. HACKNEY BOROUGH COUNCIL* (1904), 2 L. G. R. 429.

## Part XI.—Metropolitan Building Legislation.

**NOTE.**—The London Building Acts as amended to 1928 were consolidated & re-enacted by London Building Act, 1930 (c. clviii.).

- 42a. **Special buildings—General provisions of London Building Act applicable.**—London Building Act, 1930 (c. clviii), s. 227, provides that where a local authority or a co. has statutory powers for the supply of electricity in London, the buildings of that authority or co. “used as a generating station or for works shall be deemed to be special buildings to which the general provisions of Parts V., VI. & VII. of this Act & the First & Second Scheds. thereof do not apply.” A generating station, coming within sect. 227, having been erected according to plans approved by the London County Council, the building being a steelframed building clothed with brickwork & reinforced concrete, to which sects. 58 & 59 in Part VI. of the Act were applicable, the district surveyor claimed from the builders the fees prescribed for a survey under Parts III. & IV. of the Fifth Sched. to the Act :—*Held*: the expression “general provisions” in sect. 227 limited the parts of the Act which were excluded by that sect. to those which applied to all buildings, & sects. 58 & 59, under

which the building was erected, were not general provisions relating to all buildings but were special provisions relating to buildings constructed as therein mentioned, & were therefore not “general provisions of Parts V., VI. & VII.” within sect. 227 which were deemed not to apply to the generating station, & therefore the district surveyor was entitled under sect. 173 (2) to the fees he claimed.—*LANE v. MOWLEM & CO., LTD.*, [1935] 1 K. B. 369; 104 L. J. K. B. 207; 152 L. T. 269; 99 J. P. 117; 51 T. L. R. 209; 79 Sol. Jo. 31; *sub nom.* *MOWLEM (JOHN) & CO., LTD. v. LANE*, 33 L. G. R. 85, C. A.

44. *Add. Annotation* :—**Refd.** *London County Council v. Stilgoe* (1931), 95 J. P. 149.

- 46a. ——— **Building used for purposes of railway—Space enclosed under arch.**—A ry. co., incorporated by & acting under the provisions of statute, constructed their railway by a viaduct formed of arches of brickwork, & used the viaduct & arches for the purposes of the railway. Afterwards, a space was en-

closed under an archway by building walls with gates at each end, & constructing two stories in the enclosed space. The space so enclosed was used by a lessee of the co. as a stable, & not for the purposes of the railway. After the passing of Metropolitan Building Act, 1855 (c. 122), alterations were made in the enclosing walls. The district surveyor having claimed fees in respect of such alterations, under sect. 49:—*Held*: the fees were not claimable, & the structure not liable to the operation of Part I. of the Act, but exempt, under sect. 6, as a building belonging to a ry. co., used for the purposes of such railway, under the provisions of an Act of Parliament; since the archway itself was so used, & the addition did not, of itself, constitute a building: & this was not the case of an alteration of or addition to an old building, within sect. 9, that sect. applying only where the old building is itself within the operation of the Act.—*Re BADGER* (1858), 8 E. & B. 728; 120 E. R. 271.

81. In lieu of the paragraph following the catch-words substitute as follows:—

The comrs. under Metropolitan Building Act, 1855 (c. 122), having incurred expense under sect. 73 of the Act, demanded payment of the owner of the structure, who refused to pay:—*Held*: the six months, within which a complaint was to be made, were to be reckoned from the demand & refusal, not from the incurring of the expense.

*Add. Annotation*:—*Apld.* *Ashby-de-la-Zouch Grdns. v. Summers*, [1928] 2 K. B. 397.

87. *Add. Annotation*:—*Folld.* London County Council v. Stilgoe (1931), 95 J. P. 149.

- 87a. ———.]—M. Co. were the occupiers of a building on which was a bridge certified to be a dangerous structure under the London Building Act, 1894, holding it under a sub-demise for twenty-one years from H., who held it on a ninety-nine years' lease from the owners in fee simple. Neither owner nor occupier having complied with a notice under sect. 5 of 1898 Act to take the bridge down or otherwise secure it, or with an order to the same effect made by a metropolitan police magistrate under sect. 107 of 1894 Act, the London County Council acting under their statutory powers took down the bridge themselves & then forthwith brought a complaint to recover the expenses thereof from the owners in fee simple:—*Held*: the complaint was rightly dismissed, as by sect. 173 (1) of 1894 Act, proceedings to recover their expenses must proceed in the first instance against the owner immediately entitled in possession to the premises or the occupier.—*LONDON COUNTY COUNCIL v. STILGOE*, [1932] 1 K. B. 303; 100 L. J. K. B. 563; 145 L. T. 287; 95 J. P. 149; 47 T. L. R. 435; 29 L. G. R. 470.

92. For "8 L. T. 369" read "89 L. T. 369."

- 98a. Height of wall for purpose of determining thickness—Bressummers between each storey—Whether one wall or series of walls.]—A building in London was constructed as follows: The front & rear exterior walls of the basement storey, & the rear exterior wall of the ground storey were on a different vertical plane from the front & rear exterior walls on the first, second, & third storeys. There was no front exterior wall

on the ground storey, but in lieu thereof a shop front. The front & rear exterior walls were, respectively, in one vertical plane throughout the height of the first, second, & third storeys. Between each storey there was a metal girder or bressummer. These metal girders or bressummers were supported by metal pillars, those at the front standing at the ground floor level on brick pillars, those at the rear going down into foundation under the basement floor level. The wall or piece of wall between the first & second floors stood on one of those metal girders or bressummers. If this wall or piece of wall were taken away, the wall or piece of wall between the second floor & the roof would remain in position. The same facts applied *mutatis mutandis* to the walls or piece of wall between the second & third floors & the third floor & roof. The walls on each floor depended for their strength & support upon the girders or bressummers upon which they were built. The walls from outside appeared to be each one solid wall. The height of the building from the first floor to the top of the topmost storey was 38 feet. The height of the first storey was 14 feet, of the second 13 feet, & of the third 11 feet. On a complaint by the district surveyor for contravening the London Building Act, 1894, the builders contended that for the purpose of determining the thickness of the walls, the exterior wall of each storey at the front & at the back was a separate wall, that of the first storey 14 feet, that of the second 13 feet, & that of the third 11 feet, respectively. The metropolitan magistrate upheld this contention:—*Held*: without considering the question whether the walls began at the ground level, the front & rear walls were each one wall from the first floor to the top of the topmost storey, & consequently their height for the purpose of determining the thickness of the walls was 38 feet.—*BLACK v. PARKER (GEORGE) & SONS, LTD.* (1929), 142 L. T. 130.

100. *Add. Annotation*:—*Refd.* *Harper v. Haden & Sons*, [1933] Ch. 298.

- 116a. ———.]—*LONDON COUNTY COUNCIL v. STILGOE*, No. 87a, *ante*.

- 119a. Compliance with dangerous structure notice by lessor—Right of entry—Duty to give notice to lessee.]—Defts. granted to first pltf. a lease of the second & third floors of certain premises in London with a covenant for quiet enjoyment, & the first pltf. sub-let the third floor to the second pltf. During the currency of the lease the London County Council served on defts. a dangerous structure notice in respect of the whole building, & defts. entered on both the demised floors to carry out the work necessitated by the notice. In an action in which first pltf. claimed damages for breach of the covenant for quiet enjoyment, & in which second pltf. claimed damages for trespass, defts. pleaded that they were under no liability, as they were bound to do the work. Defts. had not served on pltfs., as occupiers, a notice, under 1894 Act, s. 192, of the intention to enter the premises & do the work required:—*Held*: defts. had no right of entry without complying with sect. 192, & both pltfs. were entitled to damages.—*TROTTER v. LOUTH* (1931), 47 T. L. R. 335; 75 Sol. Jo. 259.



## MINES, MINERALS AND QUARRIES.

## Part I.—In General.

12. *Add. Annotations*:—*As to* (1) *Consd.* South Staffordshire Mines Drainage Comrs *v* Elwell (1927), 91 J. P. 113. *Apld.* *Waring v. Foden*, *Waring v. Booth Crushed Gravel Co.* (1931), 101 L. J. Ch. 33. *Refd.* *R. & W. Paul, Ltd. v. Wheat Commission*, [1936] 2 All E. R. 1243.
26. *Add. Annotations*:—*As to* (1) *Consd.* *Waring v. Foden*, *Waring v. Booth Crushed Gravel Co.* (1931), 101 L. J. Ch. 33. *As to* (2) *Refd.* *Re Jenkins, Jenkins v. Davies*, [1931] 2 Ch. 218.
36. *Add. Annotation*:—*Consd.* *Waring v. Foden*, *Waring v. Booth Crushed Gravel Co.* (1931), 101 L. J. Ch. 33. *Refd.* *A.-G. for Isle of Man v. Moore*, [1938] 3 All E. R. 263.
- 39a. *Substances exceptional in use, value, & character.*—*WARING v. FODEN, WARING v. BOOTH CRUSHED GRAVEL CO., No. 651a, post.*
41. *Add. Annotations*:—*Consd.* *Waring v. Foden*, *Waring v. Booth Crushed Gravel Co.* (1931), 101 L. J. Ch. 33. *Refd.* *Warwickshire Coal Co. v. Coventry Corp.*, [1934] Ch. 488; *R. & W. Paul, Ltd. v. Wheat Commission*, [1936] 2 All E. R. 1243; *A.-G. for Isle of Man v. Moore*, [1938] 3 All E. R. 263; *Re Wilson Syndicate Conveyance, Wilson v. Shorrocks*, [1938] 3 All E. R. 599.
43. *Add. Annotations*:—*Apld.* *Waring v. Foden*, *Waring v. Booth Crushed Gravel Co.* (1931), 101 L. J. Ch. 33. *Refd.* *A.-G. for Isle of Man v. Moore*, [1938] 3 All E. R. 263.
- 43a. —.]—*WARING v. FODEN, WARING v. BOOTH CRUSHED GRAVEL CO., LTD., No. 651a, post.*
50. *Add. Annotation*:—*As to* (1) *Consd.* *Waring v. Foden*, *Waring v. Booth Crushed Gravel Co.* (1931), 101 L. J. Ch. 33.
52. *Add. Annotation*:—*Refd.* *A.-G. for Isle of Man v. Moore*, [1938] 3 All E. R. 263.
- 55a. —.]—*WARING v. FODEN, WARING v. BOOTH CRUSHED GRAVEL CO., LTD., No. 651a, post.*
- 59a. *Question of fact.*]—*WARING v. FODEN, WARING v. BOOTH CRUSHED GRAVEL CO., LTD., No. 651a, post.*
- 59b. “Minerals” & “mineral substances”—*Equivalent terms.*]—*WARING v. FODEN, WARING v. BOOTH CRUSHED GRAVEL CO., LTD., No. 651a, post.*
60. *Add. Annotations*:—*As to* (2) *Refd.* *Waring v. Foden*, *Waring v. Booth Crushed Gravel Co.* (1931), 101 L. J. Ch. 33. *Generally, Refd.* *A.-G. for Isle of Man v. Moore*, [1938] 3 All E. R. 263.
62. *Add. Annotations*:—*Refd.* *Shingler v. Williams & Sons* (1933), 148 L. T. 474; *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1933] 1 K. B. 548.
73. *Add. Annotation*:—*Refd.* *Waring v. Foden*, *Waring v. Booth Crushed Gravel Co.* (1931), 101 L. J. Ch. 33.
- 74a. —.]—*WARING v. FODEN, WARING v. BOOTH CRUSHED GRAVEL CO., LTD., No. 651a, post.*
- 77a. —.]—*WARING v. FODEN, WARING v. BOOTH CRUSHED GRAVEL CO., LTD., No. 651a, post.*
79. *Add. Annotation*:—*Refd.* *Waring v. Foden*, *Waring v. Booth Crushed Gravel Co.* (1931), 101 L. J. Ch. 33.
85. *Add. Annotation*:—*Refd.* *Elliott v. Burn*, [1934] 1 K. B. 109.
86. *Add. Annotations*:—*Consd.* *Wath-upon-Dearne Urban District Council v. Brown & Co.*, [1936] Ch. 172. *Refd.* *Hargreaves, Ltd., Executors of v. Burnley Corp.*, [1936] 3 All E. R. 959; *Re Wilson Syndicate Conveyance, Wilson v. Shorrocks*, [1938] 3 All E. R. 599.
92. *Add. Annotation*:—*Refd.* *Hatherton v. I. R. Comrs.*, [1936] 1 All E. R. 608.

## Part II.—Property in Mines.

121. *Add. Annotation*:—*Refd.* *I. R. Comrs. v. New Sharlston Collieries Co.*, [1937] 1 K. B. 583.
- 173a. —.]—*As a general rule, where title is founded on adverse possession the title will be limited to that area of which actual possession has been enjoyed. But the extent of possession enjoyed may be an inference of fact, & in applying the rule to the case of a mineral field regard is to be had to the nature of the subject & the possession to which it is susceptible.*—*NAGESHWAR BUX ROY v. BENGAL COAL CO.* (1931), 58 L. R. Ind. App. 29, P. C.
140. *Add. Annotation*:—*Refd.* *Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63.
142. *Add. Annotation*:—*Refd.* *Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63.
150. *Add. Annotation*:—*Refd.* *Port of London*

## PART I. SECT. 4, SUB-SECT. 2.

aa. *Upper basal.*]—*Re WOODSIDE'S ESTATE*, [1929] N. I. 75.—*IR.*

## PART I. SECT. 5.

aa. *Reef*—*Two reefs in close proximity.*]—*Two ore deposits which ex facie constitute two independent reefs cannot be considered as one reef merely because they are intimately associated*

or because at times they approach so closely that the one cannot be worked without the other.—*RHODESIAN CORPN., LTD. v. GLOBE & PHENIX GOLD MINING CO., LTD.*, [1934] A. D. 313.—*S. AF.*

## Part III.—Amalgamation and Absorption Schemes.

180a. ———.]—Observations on the meaning of the expression "national interest" in sect. 7 (2) (a) of the above Act.—*Re AMALGAMATED ANTHRACITE COLLIERIES, LTD.'S APPLICATION* (1927), 43 T. L. R. 672.

MATED ANTHRACITE COLLIERIES, LTD.'S APPLICATION (1927), 43 T. L. R. 672.

## Part IV.—Right to work Mines and Quarries.

263. *Add. Annotation:—Reid. Glenboig Union Fireclay Co. v. I. R. Comrs.* (1922), 12 Tax Cas. 427.

277a. ——— Damages for unworkable coal & payments for unworked coal.]—*Re CANNER, BURY v. CANNER* (1923), 155 L. T. Jo. 211.

### PART IV. SECT. 1.

cc (p. 620) i. ———.]—Substantial compliance as nearly as circumstances will reasonably permit with the requirements of the Mining Act of Ontario as to staking out of mining claims is sufficient. Every reasonable intentment ought to be made to uphold the validity of a claim where there has been actual discovery & an honest attempt to comply with the directions of the Legislature in staking & describing the location of the discovery.—*Re DUPONT & COLE*, [1931] 1 D. L. R. 320; 65 O. L. R. 526.—CAN.

mmm (p. 620) i. ———.]—*Sufficiency of evidence.*—*BERG v. BOSENCE*, [1931] 2 W. W. R. 469; 3 D. L. R. 611; 44 B. O. R. 71.—CAN.

nnnn (p. 620) i. ———.]—*Not misleading record of claim.*—If the description of a mining claim as recorded is so erroneous as to mislead parties locating other claims in the vicinity, the error is not cured by a certificate of work done by the first locator on land not included in such description & covered by the subsequent claims.—*COLPEN v. CALLAHAN* (1899), 30 S. C. R. 555.—CAN.

o (p. 621) i. ———.]—*Effect of.*—A "free miner's" certificate having expired, he did not immediately take out a new one as authorised by sect. 6 of Mineral Act, R. S. B. C., 1924, but continued to be without one for two weeks, when he then took out a new one & thereafter continued to "possess" the required certificates; but he had not availed himself of the privilege of remedying his default by taking out a special certificate under sect. 8 of said Act. In an adverse action, in which he was ptf. —*Held:* under sect. 13 of the Act, he had absolutely forfeited all his rights & interest in any mining property then held or claimed by him.—*TURNER v. VIDETTE GOLD MINES, LTD.*, [1935] 3 W. W. R. 259; 4 D. L. R. 217; 50 B. C. R. 202.—CAN.

n (p. 621) i. ———.]—*Power to cancel claim.*—*Re COLE & KNOWLES*, [1927] 3 D. L. R. 950; 60 O. L. R. 638.—CAN.

r (p. 621) i. ———.]—*Who may attack recorded claim.*—The title of the holder of a recorded mineral claim, whose interest under Reg. 48 of the "Regulations for the Disposal of Quartz Mining Claims" is equivalent to a lease of the minerals in or under the land, cannot be attacked by any private individual who did not have at the time it was granted any adverse right upon the ground covered thereby.—*MACPHEE & POINTER v. BOX*, [1935] 3 W. W. R. 326; *affd.*, [1936] 2 W. W. R. 129; 8 D. L. R. 286; *affd.*, [1937] S. C. 385; 3 D. L. R. 98; 7 F. L. J. (Can.) 83.—CAN.

bb (p. 621) i. ———.]—*Variance between located ground & plan—Position of location posts binding.*—*MCCALLUM v. CENTRAL MANITOBA MINES, LTD.*

qq (p. 621) i. ———.]—*Who may place posts & lines.*—It is not competent for one to locate one post of a mining claim & then leave assistants to plant the other posts & place the lines.—*MULHOLLAND v. HOLMES*, [1938] 2 D. L. R. 672; O. R. 276; 8 F. L. J. (Can.) 20.—CAN.

tt (p. 621) i. ———.]—*Forfeiture—Necessity for declaration.*—Sects. 110 & 114 of Placer-mining Act, R. S. B. C., 1924, are not irreconcilable & there is no conflict between them. Each one of these sects. has its respective application according to the circumstances of each case. Sect. 110 imparts a statutory declaration of forfeiture in certain well-defined cases of breach therein specified; while sect. 114 covers all cases of non-performance or non-observance. In cases of forfeiture specifically mentioned in sect. 110, the lease is *ipso facto* void: the necessity of a declaration by the Gold Comr. approved by the Minister of Mines is excluded, as absolute forfeiture operates automatically.—*MORRISON v. EAST KOOTENAY RUBY CO., LTD.*, [1934] S. C. R. 5; 1 D. L. R. 468.—CAN.

tt (p. 621) ii. ———.]—*Lay—Whether interest in land.*—The interests of the grantees under the lay in question herein held to be assignable; & the lay conferred an interest in land.—*BEATON v. SCHULZ*, [1934] 3 W. W. R. 179; 4 D. L. R. 488; 49 B. C. R. 1.—CAN.

tt (p. 621) iii. ———.]—*Water rights.*—*BRISCOE v. HIXON CREEK (CARIBOO) GOLD, LTD.* (1937), 51 B. C. R. 554.—CAN.

sd. *Claims recorded through fraud & inadvertence.*—Set aside.—*WEKUSKO MINES, LTD. v. MAY*, [1927] 1 W. W. R. 383; 36 Man. L. R. 351.—CAN.

so. *Adverse claim—Extension of time for action on—Minerals Act.*—*Re "GOOD FRIDAY" ETC., MINERAL CLAIMS* (1896), 4 B. C. R. 496.—CAN.

st. *Prospecting & mining—Right to exclude lands from by proclamation.*—*R. v. NOLTE*, [1928] App. D. 377.—S. AF.

sk. *Sale of ore, mineral, & gold—Onus of proof of ownership.*—Accused was charged with selling ore, mineral, & gold, contrary to Criminal Code, s. 424 (b):—*Held:* the onus was upon him to prove he was the owner or agent for the owner of a mining claim.—*R. v. FRESCO*, [1933] 2 D. L. R. 643; O. R. 424; 59 C. C. C. 391.—CAN.

sl. *Rights of tributer—Meaning of "premium on gold."*—The Mining Act of Western Australia required the owner of a gold treatment plant to account for & pay to the tributer (i.e. the worker of a mine under an agreement with the owner on a percentage basis) not less than 50 per cent. of "any premium received by such owner on the sale of the gold obtained from the ore treated." Appts. contended that gold could not be said accurately to have been at a premium during the period in question herein since its price

or value was not then in excess of par, i.e. the London price in sterling. English currency being then on the gold standard:—*Held:* since in Western Australia gold was during the period in question purchased at a price in terms of Australian currency which was more than its world price at par, i.e. in the then terms of sterling, it was appropriately described in the vernacular of commerce as being at a premium in the Australian market, although the increased payment was due to the depreciation of Australian currency rather than to the appreciation of gold in the world market; also it was the conditions of the Australian market that were contemplated by the statute in question, & therefore, said increased payments were premiums within the statute.—*SCRIVEN v. GREAT BOULDER PROPRIETARY GOLD MINES, LTD.*, [1931] W. A. L. R. 123; [1923] 1 W. W. R. 429.—AUS.

sm. ———.]—*Qu.*: whether the abandonment of the gold standard for English currency did not leave unaffected the basis for estimating the premium for the purposes of Mining Act, s. 152, as including the amount by which the Australian currency obtainable for standard gold exceeds the equivalent in sovereigns of the standard gold content.—*COMINELLI v. LAKE VIEW & STAR, LTD.* (1934), 40 Argus L. R. 390; 8 A. L. J. 237.—AUS.

sp. *When claim extinguished.*—Notwithstanding the existence of a free miner's licence & a record of assessment work, a mineral claim ceases to be a valid claim if the co. owing it forfeit its charter, since a mineral claim cannot exist *in vacuo*.—*ANDERSEN v. OMINECA SILVER KING MINES, LTD.* (1935), 49 B. C. R. 341.—CAN.

sr. *Unlawful possession of ore—If who may prefer charge.*—A charge of unlawful possession of partly melted gold or gold ore cannot be preferred by the secretary of a mines protective assocn.—*R. v. HERMAN*, [1936] 3 D. L. R. 79; O. R. 338; 66 Can. C. C. 129.—CAN.

sw. *Fractional mining claims—Title to.*—No title to fractional mining claims is shown when no "rock in place" is found.—*CARIBOO GOLD QUARTZ MINING CO. v. ISLAND MOUNTAIN MINING CO.*, [1937] 2 D. L. R. 207.—CAN.

sz. *Mining tax—Liability of shareholders.*—Shareholders are deemed co-owners with the co. under the tax provisions of sect. 19 of Mining Tax Act, R. S. O. 1927.—*FLOOD v. MONARGO MINES, LTD.*, [1938] 2 D. L. R. 460; O. R. 282.—CAN.

sb. *Loss of effects by mining prospector—Measure of damages.*—Ptf., a mining prospector, sued for the value of personal effects & chattels, destroyed by fire. Liability was admitted. The articles in respect to which ptf. claimed included records made by him while prospecting in Alberta & British Columbia at various periods between 1907 & 1929. After his records were

315. *Add. Annotation*.—*Re*ld. A.-G. v. Leeds Corp., [1929] 2 Ch. 291.

325a. ————.]—In considering whether it is in the national interest to grant ancillary rights to facilitate the proper & efficient working of minerals under Mines (Working Facilities & Support) Act, 1923 (c. 20), the Railway & Canal Commission is entitled to take into account not only difficulties which physically obstruct the getting & carrying away of minerals, but also economic difficulties which militate against their effective marketing.

The expressions "carrying away" in sect. 1 (2), & "conveyance of minerals" in sect. 3 (2) (b), of the Act are to be construed not in a technical sense, but broadly as entitling the person to whom ancillary rights are granted under the Act to transport the minerals from the land where they have been won for sale elsewhere.

The Railway & Canal Commission made an order granting to a colliery co. the ancillary right under the Act to construct an aerial ropeway over the land of other persons from their colliery to Dover, a distance of seven miles, which would enable them to transport their minerals more cheaply & more conveniently than by other means.—*Held*: the Railway & Canal Commission had jurisdiction to make this order.—*Re* TILMANSTONE (KENT) COLLIERIES, LTD., [1928] 1 K. B. 599; 97 L. J. K. B. 169; 138 L. T. 452; 44 T. L. R. 167; 19 Ry. & Can. Tr. Cas. 26, C. A.

*Annotations*.—*Re*ld. *Re* Hamsterley Ganister Co., Application (1931), 75 Sol. Jo. 602; *Glassbrook Bros. v. Leyson*, [1933] 2 K. B. 91; *Consett Iron Co. v. Claverling*, [1935] 2 K. B. 42.

325b. ———— *Reasonable rent*.—*Re* HAMSTERLEY GANISTER CO., LTD., APPLICATION (1931), 75 Sol. Jo. 602.

325c. ———— *Quarry*.—A co. quarrying granite wished to acquire adjoining fields ultimately for the purpose of quarrying the granite under them & immediately partly for the reason that there was a danger of fine stones from blasting operations doing damage on those fields. The co. upon approaching the apparent owners, were told the real owner was a Mrs. M., to whom they made an offer to purchase the property at £2,650. The offer was refused, Mrs. M. naming a purchase price of £6,750. Subsequently, they discovered that she was a mere nominee for certain persons who had been servants or officers of the co., & these persons were joined as resps. It was stated by resps. that they were about to develop these fields by the building of bungalows. The co. applied under Mines (Working Facilities & Support) Act, 1923

(c. 20), for a compulsory purchase order in respect of these fields, but as this was beyond the provisions of the Act, the application was amended to ask for a right to work the minerals & such subsidiary rights as might be necessary.—*Held*: (1) the application to the owners to purchase the land was, in the circumstances of a quarry, a sufficient compliance with the statutory requirement that application must be made to the owner for the right to work the minerals, as the working of the quarry would so destroy the surface that it would be useless for any other purpose; (2) the offer had been unreasonably refused; (3) there was a danger of the minerals being left permanently unworked, because, (a) the co. were the only people likely to work them, & (b) the owners were minded to build bungalows on the fields; (4) the employment by the co. of a considerable number of men made the working of these minerals a matter of national interest; (5) although the minerals under the fields would not be worked in the immediate future, it was reasonable for the quarry owners to look some years ahead & acquire mineral rights in adjoining fields.—*Re* WEST OF ENGLAND ROAD METAL CO., LTD., [1936] 2 All E. R. 1607; 155 L. T. 478; 80 Sol. Jo. 817.

326a. *Damage to railway by subsidence—Liability of mineowner—Construction of Mines (Working Facilities & Support) Act, 1923 (c. 20), s. 85B (2)*.—In 1893, 1895 & 1897 a ry. co. acquired the surface of three areas. In 1889, 1873 & 1889 a mining co. was granted leases of the same three areas with a right to let down the surface. In 1916 & 1920 the co. surrendered their leases for the purpose of & as part of the consideration for the granting of new leases on the same terms. The owners of the land were the same in all cases. The mining co. worked certain minerals under an area protected by Railways Clauses Consolidation Act, 1845 (c. 20), s. 79A (1), contained in Mines (Working Facilities & Support) Act, 1923 (c. 20), s. 15, & as the result of such working the ry. co. suffered damage.—*Held*: the mining co.'s right to let down the surface was not derived from a title antecedent to the acquisition by the ry. co. of their interest in the surface, within Railways Clauses Consolidation Act, 1845 (c. 20), s. 85B (2), contained in Mines (Working Facilities & Support) Act, 1923 (c. 20), s. 15, & they were not protected by that sect., & therefore, they were liable to contribute, under sect. 79A (1), towards the expenses incurred in making good the damage caused by such working.—LONDON

compiled both the provincial & the federal departments of mines had made reports of the areas in question which are available to everyone. Pltf. did not say that his records contained to his knowledge any mineral discovery of value. His records had no present market value in the ordinary sense.—*Held*: the records had a residue of value not too remote in the legal sense of \$500.—*READE & GEORGE v. NORTH-WESTERN UTILITIES, LTD.*, [1938] 1 W. W. R. 647.—CAN.

*sd. Failure of co-owner to contribute proportion—Notice*.—Sect. 28 of Mineral Act, R. S. B. C. 1936, which

provides that, on failure of a co-owner to contribute his proportion of the expenditure required by sect. 49, his co-owner or co-owners may give him notice by publication in a newspaper to pay said proportion, & that upon his failure to comply therewith his interest in the claim shall become vested in his co-owners who have made the required expenditure, is a forfeiture provision, & therefore, is to be strictly construed. A notice addressed to a deceased person is not a notice in conformity with the requirements of said sect. 28, & is a nullity.—*BECK v. ARMSTRONG*, [1938] 1 W. W. R. 295; 1 D. L. R. 792.—CAN.

PART IV. SECT. 2, SUB-SECT. 2.—C. (a).

*sh. Partnership as distinguished from co-owners*.—*DAVIES v. SCHULLI*, [1928] 4 D. L. R. 132; [1928] 3 W. W. R. 158.—CAN.

PART IV. SECT. 4.

*sm. Right of creditor to take ore—Under security agreement*.—A right to mine ore held by a creditor under a collateral security agreement is a *profit à prendre* & exists as a right of property unconnected with any other estate the owner may have in the land.—*Re* SUDBURY RAND MINES & GORDON, [1936] 4 D. L. R. 783.—CAN.

& NORTH EASTERN RY. CO. v. HARDWICK COLLIERY CO., [1935] Ch. 203; 104 L. J. Ch. 81; 152 L. T. 387; 51 T. L. R. 33; 78 Sol. Jo. 767.

327. For existing para. & citation substitute "*Re TILMANSTONE (KENT) COLLIERIES, LTD., No. 325a, ante.*"

327a. ————.]—*Re HAMSTERLEY GANISTER CO., LTD., APPLICATION (1931), 75 Sol. Jo. 602.*

327b. Jurisdiction of Railway & Canal Commission—Ancillary right—Diversion of highway.]—The Railway & Canal Commission has no jurisdiction to make an order extinguishing or diverting a footpath as an ancillary right under Mines (Working Facilities & Support) Act, 1923 (c. 20), s. 3. The procedure to be followed in extinguishing or diverting public footpaths is laid down in Highway Act, 1935 (c. 50), ss. 84, 85, & there is no concurrent or alternative procedure under the Act of 1923.—*HODDESDON URBAN DISTRICT COUNCIL v. BROXBORNE SAND & BALLAST PITS, LTD., HERTFORDSHIRE COUNTY COUNCIL v. BROXBORNE SAND & BALLAST PITS, LTD., [1936] 2 K. B. 19; [1936] 1 All E. R. 798; 105 L. J. K. B. 524; 154 L. T. 568; 100 J. P. 204; 52 T. L. R. 384; 80 Sol. Jo. 366; 34 L. G. R. 240.*

327c. ———— Repair of highway.]—Appct. co. was extending the works in connection with a limestone quarry & had agreed with neighbouring owners to construct a road leading to a public road. The latter road had recently been greatly improved by another quarry co. at its own expense, & the liability of repairs to the road had never been settled. Upon this further addition to the traffic on the road being suggested, the county council asked appct. co. to come to some arrangement with it as to the repair of the road. Upon an application for the grant of certain ancillary rights, appct. co. also asked for a declaration that the public road in question was a carriage road repairable by the inhabitants at large, & in the events which had happened, by the Derbyshire County Council:—*Held*: the Railway & Canal Commission Ct. had no jurisdiction to make the declaration asked.—*Re SOMERVILLE (T. RYAN) & CO.'S APPLICATION, [1937] 1 All E. R. 507.*

327d. Right of way—Formerly enjoyed under lease—Compensation.]—Collieries required for their proper working a right of way along a strip of land for the removal of

coal. They had enjoyed such a right under a lease upon terms which had been found in a previous action to be unreasonable. This lease was determined on Dec. 31, 1936. Any renewal of the grant was offered only on terms which were held to be unreasonable. It was contended that, as appcts. had put an end to their existing rights, any inability to obtain these rights was self-induced, & not within the provisions of sect. 3 of the 1923 Act:—*Held*: (1) appcts. were entitled to determine, & justified in determining, the lease, & were entitled to a grant of the right of way; (2) the compensation payable for the grant could not be based on the rent previously paid, for that had been held to be unreasonable, & was rightly based upon the agricultural value of the land.—*Re CONSETT IRON CO., LTD.'S APPLICATION, [1938] 1 All E. R. 439; sub nom. CONSETT IRON CO., LTD. v. CLAVERING ESTATES (DURHAM), LTD., 54 T. L. R. 348; 82 Sol. Jo. 275.*

#### SECT. 9.—COAL MINES.

327e. Mining Industry Act, 1926 (c. 28), s. 13—What must be shown—National interest in grant.]—*Held*: it is not necessary for an appct., in order to support his application under Mining Industry Act, 1926 (c. 28), s. 13, to assert that, in the words of Mines (Working Facilities & Support) Act, 1923 (c. 20), s. 1, there is a danger of the minerals being left permanently unworked, but it is sufficient to establish that it is in the national interest that the application should be granted.—*Re HENRY LOWSON, LTD., APPLICATION OF (1930), 144 L. T. 128; 46 T. L. R. 595.*

327f. ———— Unreasonable refusal to grant lease—Question of law.]—Appcts., who were colliery proprietors owning mines which adjoined those of resps., were desirous of acquiring rights to work resp.'s mines, which were then unworked. Appcts. were willing to pay certain rents & royalties & a dead rent, but refused to give a covenant to work the mines diligently. Resp. declined to grant a mining lease not containing a covenant to work diligently. Appcts. thereupon applied to the Railway & Canal Comrs. for the grant of a right to work the minerals in accordance with the provisions of 1923 Act & sect. 13 of 1926 Act, & for the grant of certain ancillary rights in accordance with sect. 13 of 1926 Act. In their application they alleged (*inter alia*) that resp., being the person with

#### PART IV. SECT. 9.

327d i. Mining Industry Act, 1926—What must be shown—National interest.]—In an application for leave to work minerals under the provision of the Acts of 1923 & 1926, appcts. averred that it was not reasonably practicable to obtain the right by private arrangement, in respect (a) of the unreasonable refusal of the proprietors of the larger portion of the land involved, & (b) of the number of the proprietors of the remaining lands. The application was opposed by these proprietors & by other parties interested on the ground that it was expedient in the national interest that the land in question should be reserved for housing purposes rather than developed as a coalfield. The Commission, after inquiry, dismissed the application on the ground of want

of jurisdiction, in respect that appcts. had failed to establish, in terms of the Act of 1923 that, as at the date when permission to work was refused by the proprietors, their refusal was unreasonable, & that the question of national interest did not affect the reasonableness or unreasonableness of that refusal. In an appeal raising the question as to the elements to be considered in determining what was unreasonable refusal within sect. 4 (1) (d) of 1923 Act:—*Held*: upon an examination of the terms of the Acts of 1923 & 1926, the Commission were not entitled, in dealing with the question of reasonableness, to limit their consideration to the situation when the refusal by the proprietors was made, but were bound first to consider, upon the facts ascertained at the inquiry, with which of the com-

peting proposals the balance of national interest lay, & thereafter to dispose of the question in the light of the view thus reached; & case remitted back to the Commission to proceed as accords.—*ARCHIBALD RUSSELL, LTD. v. NETHER POLLOK, LTD., [1938] S. C. 1.—SCOT.*

ad. Licence—Conditions precedent.]—The agreement which under reg. 13 of Coal Mining Industry Act, 1935, is a condition precedent to the obtaining of an operator's licence remains in force only during the period that the licence in respect of which it is entered into remains in force; & a breach thereof after the licence has expired is not a ground for injunction.—*R. (MINISTER OF NATURAL RESOURCES) v. PARKINSON, [1937] 2 W. W. R. 30.—CAN.*

power to grant the right to work, had unreasonably refused to grant it & had demanded terms which having regard to the circumstances were unreasonable. The Comrs. found that the conduct of resp. had been unreasonable & in substance made the order asked for. On appeal:—*Held*: (1) it was a condition precedent to the exercise by the Comrs. of their jurisdiction under the Acts that they should first find on the facts that resp. was unreasonable in his refusal or unreasonable in his demands; (2) the question of unreasonableness was a question of law for the decision of the Comrs.; (3) an appeal from their decision therefore lay to the Ct. of Appeal, notwithstanding Railway & Canal Traffic Act, 1888 (c. 25), s. 17, which provided that “no appeal shall lie from the Comrs. upon a question of fact”; (4) resp. was not unreasonable in requiring as a condition of granting a lease that appcts. should enter into a covenant to work the minerals diligently.—GLASSBROOK BROS., LTD. v. LEYSON, [1933] 2 K. B. 91; 102 L. J. K. B. 598; 148 L. T. 439, C. A.

*Annotation*:—As to (4) *Refd.* Consett Iron Co. v. Clavering, [1935] 2 K. B. 42.

327g. — Appeal from Commissioners.]—GLASSBROOK BROS., LTD. v. LEYSON, No. 327f, *ante*.

327h. — What amounts to.]—GLASSBROOK BROS., LTD. v. LEYSON, No. 327f, *ante*.

327j. — Meaning of “impeded”—Obligation to pay wayleave rent.]—The word “impeded” in Mining Industry Act, 1926 (c. 28), s. 13 (2), relates exclusively to something which impedes or obstructs the actual winning or carrying away of coal, & does not apply to financial obligations imposed by his lease upon the lessee of the coal. The words “terms” & “conditions” are similarly restricted in meaning. The Railway & Canal Commission has, therefore, no jurisdiction to relieve the lessee from an obligation to pay a wayleave rent imposed by his lease in connection with the transport of his coal.—CONSETT IRON CO., LTD. v. CLAVERING TRUSTEES, [1935] 2 K. B. 42; 104 L. J. K. B. 489; 153 L. T. 199; 51 T. L. R. 379; 79 Sol. Jo. 251, C. A.

327k. — Amalgamation—Validity of scheme.]—A scheme for the partial amalgamation of coal mines, submitted for confirmation to the Railway & Canal Commission Ct., provided for the election by the colliery proprietors concerned of a committee which should have power to make & carry into effect plans for the closing of coal mines or undertakings, the purchase of mines or undertakings, the distribution of quota tonnage, the central purchasing of stores & the co-ordination of marketing. From the decision of the committee on any of these matters an appeal lay to arbitrators. The scheme did not provide for the fusion of two or more undertakings:—*Held*: the scheme ought not to be confirmed because (1) the scheme did not comply with the requirements of Part I. of Mining Industry Act, 1926 (c. 28), since it did not provide for the amalgamation into one unit of two or more existing units; (2) it did not comply with the requirements of Part II. of Coal Mines Act, 1930 (c. 34), since the ct. was not satisfied (a) that the scheme was in the national interest, (b) that it would result

in lowering the cost of production or disposal of coal, (c) that it would not be financially injurious to undertakings to be amalgamated in respect of which there was no provision for compulsory purchase, or (d) that the terms of the scheme were fair & equitable to all persons affected thereby.—*Re* WEST YORKSHIRE PARTIAL AMALGAMATION (COAL MINES) SCHEME (1935), 153 L. T. 167; 51 T. L. R. 462; 79 Sol. Jo. 435, D. C.

327l. Coal Mines Act, 1930 (c. 34)—Quota exceeded—Standard tonnage wrongly assessed.]—A district scheme made in pursuance of Coal Mines Act, 1930 (c. 34), provided for the payment of penalties by the owners of coal mines who produced from their mines in any month a quantity of coal in excess of the standard tonnage allotted to them. The scheme further provided that the standard tonnage was to be ascertained by taking the average annual output for all the mines in the district for the years 1923, 1924, 1925, & 1927, & by subdividing that output amongst the several mines in the district by reference to the output of each mine in the year 1928. The year 1928 had been selected for this purpose in order to comply with the reference in sect. 3 (2) (c), of the Act to “some recent period during which no arrangements made by a voluntary assocn. or otherwise were in force regulating the output of any substantial number of coal mines in the district.” In the district in question the year 1928 was the last year in which no such arrangements were in force. Pltfs. were a statutory body appointed to carry into effect in their district the provisions of the Act, & in this action they claimed penalties from defts., who were owners of a coal mine in the district, for having raised from their mine in the month of Mar. 1931, a quantity of coal in excess of the standard tonnage allotted to them. It was proved that the tonnage allotted to defts. had been calculated by reference to the output of the mines in the district during the year 1929, in which year a voluntary restriction was in force in the district:—*Held*: inasmuch as pltfs. had acted *ultra vires* their statutory powers, the ct. was entitled to question their decision so arrived at, because it had not been made in accordance with the scheme. The claim for penalties therefore failed & the appeal must be allowed.—MIDLAND (AMALGAMATED) DISTRICT (COAL MINES) SCHEME, 1930, EXECUTIVE BOARD v. SHIPLEY COLLIERIES, LTD. (1933), 149 L. T. 290, C. A.

327m. — “Solely occasioned by the performance of contracts.”]—Appls., who were colliery owners, made in 1928 a contract with a coal distillation co. to supply them with 750 tons of small coal a day for fifteen years. The contract contained a *force majeure* clause that appls. should be under no liability if they failed to deliver the agreed quantity by reason (*inter alia*) of the operation of any scheme for the restriction of output. During one period of three days appls. withheld delivery at the request of the distillation co. & sold to other customers the small coal, 1,890 tons, produced during that period. The quarterly allowance of coal which, during the material period, appls. were allowed to produce under a scheme made under Coal Mines Act, 1930 (c. 34), was 92,787 tons.

They produced an excess of 11,608 tons, in respect of which the Executive Board imposed a penalty. The matter went before an arbitrator sitting in pursuance of the Act & he held that no part of the excess output of 11,608 tons was solely occasioned by or reasonably necessary for the performance of the contract. A motion by applts. to set aside his award was also dismissed. On appeal:—*Held*: the arbitrator came to a correct determination in law on the construction of Coal Mines Act, 1930 (c. 34), s. 4 (2); as to 4,108 tons, the total output representing the 1,890 tons of small coal, the arbitrator found facts which made it impossible for applts. to resist the penalty; as applts. were excused in law by the *force majeure* clause from delivery of the balance of the excess, such delivery was not, under sect. 4 (2) (b), reasonably necessary for the performance of the contract; & the penalty was rightly imposed in respect of the full excess produced.—*BEDWAS NAVIGATION COLLIERY CO. (1921), LTD. v. SOUTH WALES COAL MINES SCHEME EXECUTIVE BOARD (1935)*, 153 L. T. 386; 51 T. L. R. 566, H. L.

**327n.** — Discretion of Quota Committee as to procedure.—*LOCKWOOD & ELLIOTT v. MIDLAND (COAL MINES) QUOTA COMMITTEE (1934)*, 50 T. L. R. 337.

**327o.** — Whether monthly proportions & output fixed.—*LOCKWOOD & ELLIOTT v. MIDLAND (COAL MINES) QUOTA COMMITTEE (1934)*, 50 T. L. R. 337.

**327p.** — Whether permissible.—If export & inland supply quotas not exceeded.—Under Coal Mines Act, 1930 (c. 34), & the South Wales District (Coal Mines) Scheme, 1930, the collieries in South Wales were assigned certain quotas in respect of coal production. Defts. were assigned separate quotas for export supply, inland supply & the supply of coal for consumption in the working of the colliery or the supply of the workmen. The whole was called the output quota. One particular colliery was not limited to its own quota, if it could acquire the whole or part of the quota of another colliery. The contention of defts. was that it could exceed its output quota so long as it did not exceed its export & inland supply quotas, they having, in fact, exceeded their output quota by some 4,000 tons by reason of the fact that they had been able to acquire from other collieries more additional export & inland quotas than output quotas:—*Held*: there had been a breach of the scheme by defts., & they were liable to penalties under sect. 50 thereof in respect of the excess of output.—*WILLIAMS, EVANS & LLEWELLYN v. CRUMLIN VALLEY COLLIERIES, LTD.*, [1936] 3 All E. R. 387; 80 Sol. Jo. 1035.

**327q.** — Increase in sectional tonnage—Right to increase in standard tonnage.—The average annual sectional standard tonnage of the Derbyshire & Nottinghamshire Section of the Midland (Amalgamated) District (Coal Mines) Scheme, 1930, a scheme formulated in accordance with the provisions of the Coal Mines Act, 1930, was increased by the Standard Tonnage Committee of the section by a net addition of 1,282,507 tons, which was made up of three items of 335,007 tons, 697,500 tons, & 200,000 tons. The 335,007

tons had been added to provide for increases of annual standard tonnage to non-associated non-special mines, that was, to non-special mines which had not been members of the C. C. C. A. Scheme, the voluntary scheme which had preceded the Statutory Scheme:—*Held*: (1) on the construction of the material clause of the Midland Amalgamated scheme, that increase of 335,007 tons was to be divided so that associated non-special coal mines were entitled to a share thereof; (2) the Standard Tonnage Committee of the section was not entitled to subject the annual standard tonnage of an associated non-special coal mine to a general reduction of annual standard tonnage without having any regard to the special circumstances of that coal mine, or any other non-special coal mine in the section; (3) an award of an arbitrator, fixing the annual standard tonnage of a coal mine as being a certain percentage of the aggregate annual sectional standard tonnage, is final & binding in the sense that it is a finding that until circumstances change or warrant a change the mine is to have the standard tonnage on the award.—*NEW HUCKNALL COLLIERY CO., LTD. v. STANDARD TONNAGE COMMITTEE & EXECUTIVE BOARD OF MIDLAND (AMALGAMATED) DISTRICT (COAL MINES) SCHEME, 1930 (1933)*, 148 L. T. 565; 49 T. L. R. 463.

*Annotations*:—As to (2) *Consd. Dormau, Long & Co. v. Durham District (Coal Mines) Scheme Executive Board (1934)*, 50 T. L. R. 340. *Generally, Rejd. Oakes (James) & Co. (Riddings Collieries), Ltd. v. Executive Board & Standard Tonnage Committee of Midland (Amalgamated) Scheme, 1930 (1935)*, 153 L. T. 47.

**327r.** — Decrease of standard tonnage—What must be considered.—*NEW HUCKNALL COLLIERY CO., LTD. v. STANDARD TONNAGE COMMITTEE & EXECUTIVE BOARD OF MIDLAND (AMALGAMATED) DISTRICT (COAL MINES) SCHEME, 1930, No. 327q, ante.*

**327s.** — Award fixing standard tonnage—Effect.—*NEW HUCKNALL COLLIERY CO., LTD. v. STANDARD TONNAGE COMMITTEE & EXECUTIVE BOARD OF MIDLAND (AMALGAMATED) DISTRICT (COAL MINES) SCHEME, 1930, No. 327q, ante.*

**327t.** — On power of Executive Board to recast scheme.—*R. v. MIDLAND (AMALGAMATED) DISTRICT (COAL MINES) SCHEME, 1930 (TRUSTEES OF EXECUTIVE BOARD), Ex p. MANVERS MAIN COLLIERIES, LTD. (1935)*, 79 Sol. Jo. 162; *affd.*, 79 Sol. Jo. 251, C. A.

**327u.** — Increase of standard tonnage—Grounds for.—*Re WOLSTANTON, LTD. (1934)*, 50 T. L. R. 413.

**327v.** — By the Forest of Dean District (Coal Mines) Scheme, 1930, the annual basic tonnage of a mine was to be the mean of the tonnages of coal supplied during 1934 & 1935 from that mine, provided that in any case where the board considered that the basic tonnage so calculated did not fairly represent the trade of the mine they might make such special addition or deduction as is fair & equitable:—*Held*: the words in the proviso "fairly represent the trade of the mine" referred to the trade in the years 1934 & 1935 & not to the trade of the mine at the time of the determination of the annual basic tonnage.—*Re FOREST OF DEAN DISTRICT (COAL MINES) SCHEME, 1930, CANNOP COLLIERY CO., LTD. v. EXECUTIVE BOARD, [1937]*

1 All E. R. 82 ; 53 T. L. R. 219 ; 81 Sol. Jo. 58.

**327w. Powers of arbitrator.**—An arbitrator appointed under clause 15 (11) of the Midland (Amalgamated) District (Coal Mines) Scheme, 1930, as amended by the Order of the Board of Trade of Nov. 6, 1934, has jurisdiction to award an increase in the annual output standard tonnage of any non-special mine in a sect. coming under the Scheme without considering the special circumstances of any other non-special mines in that sect. & without awarding a corresponding decrease in the annual output standard tonnage of any one or more of them. It is the duty of the Executive Board & Standard Tonnage Committee constituted under the Scheme to make that corresponding decrease so soon as the arbitrator has awarded the increase.—*OAKES (JAMES) & Co. (RIDDINGS COLLIERIES), LTD. v. EXECUTIVE BOARD & STANDARD TONNAGE COMMITTEE OF MIDLAND (AMALGAMATED) SCHEME, 1930 (1935), 153 L. T. 47 ; 51 T. L. R. 296 ; sub nom. Re MIDLAND (AMALGAMATED) DISTRICT (COAL MINES) SCHEME, 1930, OAKES (JAMES) & Co. (RIDDINGS COLLIERY), LTD. v. EXECUTIVE BOARD, 79 Sol. Jo. 215.*

**327x. — Ascertainment of standard tonnage.**—Consideration of the proper method of ascertaining the annual standard tonnage of a coal mine or undertaking under the Durham District (Coal Mines) Scheme, 1930.—*DORMAN, LONG & Co., LTD. v. DURHAM DISTRICT (COAL MINES) SCHEME EXECUTIVE BOARD (1934), 50 T. L. R. 340.*

**327y. — “Coal mine.”**—In arbn. proceedings arising out of a fixation by the Executive Board under the scheme of a colliery co.’s annual standard tonnage, the arbitrator found (*inter alia*) that the co. proposed to work the S. Seam in one of its collieries from a shaft in an adjacent colliery, that the S. Seam was to be approached by the deepening of that shaft & also by a shaft in the P. Seam, & that both shafts were to be used for ventilation & working. He found also that the coal from the S. Seam could be sold by the co. at a higher average price in the com-

petitive market & could be worked at a lower working cost than the coal from the other seams worked at the two collieries:—*Held*: (1) the definitions of a coal mine in Coal Mines Act, 1930 (c. 34), s. 18 (1), clause 2 (d) of the scheme are not restricted & the words “coal mine” as used in clause 15 of the scheme (dealing with the Standard Tonnage Committee under the scheme) ought not to be narrowly construed; (2) the S. Seam, under the conditions & circumstances of its proposed development, was a “coal mine” within the scheme.—*Re MIDLAND (AMALGAMATED) DISTRICT (COAL MINES) SCHEME, 1930, MITCHELL MAIN COLLIERY Co., LTD. v. EXECUTIVE BOARD, [1934] Ch. 712 ; 103 L. J. Ch. 314 ; 151 L. T. 394 ; 78 Sol. Jo. 803.*

**327z. — “Output.”**—In arbn. proceedings under the Midland (Amalgamated) District (Coal Mines) Scheme, 1930, between the owners of a coal mine in the Midland (Amalgamated) District & the Executive Board constituted under the scheme the arbitrator stated his award in the form of a special case for the opinion of the ct. The question raised was whether, according to the true construction of “output” in Coal Mines Act, 1930 (c. 34), s. 18 (1), the expression “tonnage in coal” means tonnage in coal before it is picked, screened & washed, or whether it means tonnage in coal excluding the dirt picked, screened, washed or otherwise taken out of the coal:—*Held*: according to the true construction of the definition of “output” in sect. 18 (1) the expression “tonnage in coal” means tonnage in coal as it comes out of the pit in the tubs before any dirt is picked, screened, washed or otherwise taken out of the coal.—*Re MIDLAND (AMALGAMATED) DISTRICT (COAL MINES) SCHEME, 1930, HOLLIDAY (ROBERT) & SONS, LTD. v. EXECUTIVE BOARD (1934), 152 L. T. 212 ; sub nom. HOLLIDAY (ROBERT) & SONS, LTD. v. MIDLAND (AMALGAMATED) DISTRICT (COAL MINES) SCHEME EXECUTIVE BOARD, 51 T. L. R. 81.*

**327aa. — Amalgamation—Validity of scheme.**—*Re WEST YORKSHIRE PARTIAL AMALGAMATION (COAL MINES) SCHEME, No. 327k, ante.*

## Part V.—Powers Incidental to Ownership.

**335a. —.**—*Re MERCHANTS’ TRUST & NEW BRITISH IRON Co. (1894), 38 Sol. Jo. 253.*

**335b. —.**—*Re THOMAS’S TRUSTS (1895), 40 Sol. Jo. 98.*

**335c. —.**—*Re STAMFORD & WARRINGTON EARL TRUSTS (1896), 40 Sol. Jo. 771.*

**373. Add. Annotation:—***Refd. Hatherton v. I. R. Comrs., [1936] 1 All E. R. 608.*

**396a. — Power to vary lease.**—The tenant for life under a resettlement executed in 1884

granted two mining leases, in 1924 & 1928, respectively, each for the period of 60 years. On a summons asking for the determination of the question, among others, whether he had power, under Settled Land Act, 1925 (c. 18), s. 59, or otherwise, to vary the leases by substituting in each of them a term of 100 years in lieu of the term of 60 years:—*Held*: he had power to vary by deed the terms of the leases, provided that their length after variation should not be more than 100 years from the respective dates of

### PART V. SECT. 2, SUB-SECT. 2.— B. (a).

*sk. Covenant for renewal—Whether court may sanction.*—Where it is proposed to grant a mining lease

pursuant to the provisions of Settled Land Act, 1908, & its amendments, the ct. has no power to approve of the insertion in such lease of a covenant for renewal, even although it is agreed

in such covenant that the rental payable under the renewed lease shall be fixed by arbn.—*McKINNON v. GLEN AFON COLLIERIES, LTD., [1929] N. Z. L. R. 202.—N.Z.*



execution.—*Re SAVILE SETTLED ESTATES, SAVILE v. SAVILE*, [1931] 2 Ch. 210; 100 L. J. Ch. 274; 145 L. T. 17.

*Annotation*:—*Consd. Re Bruce, Brudenell v. Brudenell*, [1932] 1 Ch. 316.

**417a. Effect of surrender & regrant after commencement of Settled Land Act, 1925 (c. 18).]**—A deed executed on Mar. 25, 1931, purported, under the provisions of Settled Land Act, 1925 (c. 18), s. 59, to vary a mining lease, the term of which was forty years, expiring on Mar. 25, 1947, by extending the term of forty years to one of ninety-nine years, expiring on Mar. 25, 2006:—*Held*: (1) as the 1931 deed merely varied the lease, & did not put an end to it, the provisions of Settled Land Act, 1925 (c. 18), s. 47, applied to the lease as varied, & not to a new lease; but in accordance with the expressed intention of the settlement the whole of the rents or royalties should go to the tenant for life throughout the whole of the original term;

(2) as there was no contrary intention expressed in the settlement with reference to the extended portion of the term, & as the tenant for life was unimpeachable for waste, there would be capitalisation of one-fourth of the rents from the beginning of the extended portion of the term in 1947; (3) although it might be that, as between all persons interested in the settlement on the one hand, & the lessees on the other, the principle of estoppel would prevent any allegation that the deed of 1931 operated otherwise than as a surrender of the old lease, with the result that a new lease would have been deemed to have been created from 1931, there was no authority for extending such principle of estoppel as between the tenant for life & remaindermen so as to nullify the effect of sect. 59, which expressly gives power to vary leases without destroying them.—*Re BRUCE, BRUDENELL v. BRUDENELL*, [1932] 1 Ch. 316; 101 L. J. Ch. 204; 146 L. T. 363.

## Part VI.—Rights Incidental to Ownership.

**540a. Cost of erecting barrier—Although damage not yet occurred.]**—The owners of a coal mine sued the lessees of an adjacent mine for damages in consequence of an encroachment upon, & removal of coal from, their mine:—*Held*: as part of the damages plffs. could recover the cost of erecting an artificial barrier to protect their mine from the risk of fire, water, or foul gases coming through the encroaching galleries worked by defts.; they were not bound to wait until that risk actually emerged, & an artificial barrier was necessary, as plffs. were entitled to work out the pillars of coal left by defts. in the en-

croaching galleries.—*ADJAI COAL Co. v. PANNA LAL GHOSH* (1930), 57 L. R. Ind. App. 144, P. C.

**546a. ———.]**—*TOWNEND v. ASKERN COAL & IRON CO., LTD.*, No. 922a, *post*.

**549. Add. Annotation:—As to (1) Dlst. Townend v. Askern Coal & Iron Co.**, [1934] Ch. 463.

**551. Add. Annotations:—Refd. Legh v. Legh** (1930), 143 L. T. 151; *Lynn v. Bamber*, [1930] 2 K. B. 72.

**556. Add. Annotations:—Consd. Townend v. Askern Coal & Iron Co.**, [1931] Ch. 463. *Refd. Ash v. Dickie*, [1936] 2 All E. R. 71.

## Part VII.—Contracts.

**576. Add. Annotation:—Refd. Arseculeratne v. Perera**, [1928] A. C. 173.

**584. Add. Annotation:—As to (1) Refd. Re Sandwell Park Colliery Co., Field v. Sandwell Park Colliery Co.**, [1929] 1 Ch. 277.

**623. Add. Annotation:—Consd. Re Wait**, [1927] 1 Ch. 606.

**623a. Regulation of prices of coal—By Executive Board & Central Sale Committee—Extent of powers.]—Held: the Executive Board & the**

### PART VI. SECT. 2, SUB-SECT. 5.—A. (d).

**552 i. Value of minerals at pit's mouth—Less costs of severance & bringing to bank.]—BARTLETT v. NOVA SCOTIA STEEL CO.** (1906), 1 E. L. R. 226.—CAN.

### PART VI. SECT. 2, SUB-SECT. 5.—A. (h).

**d i. — Deduction of costs of bringing to bank.]—By an agreement in writing deft. was licensed by a mining co. to prospect, mine for & sell ore from a shaft, the property of the co. After the expiry of the licence, deft. continued to mine until restrained by interlocutory injunction:—Held: on the construction of the document, deft. had not an exclusive licence to work the mine; he had committed trespass, & on the facts, the damages should be assessed according to the rule in *Martin v. Porter*, No. 567.—*MOONTA PROSPECTING SYNDICATE,***

**LTD. v. NEILL** (1929), S. A. S. R. 335.—AUS.

**so. Damage to future working of claim.]—HILDITCH v. YOTT** (1908), 90 W. L. R. 53.—CAN.

### PART VII. SECT. 1.

**m i. —.]—LARSEN v. MONTGOMERY**, [1930] 2 W. W. R. 796; 3 D. L. R. 966; 43 B. C. R. 89.—CAN.

**sp. Agreement to provide funds—In consideration of services on claim—Failure to provide funds—Effect.]—TURNBULL v. EDEN** (B. C.), [1929] 4 D. L. R. 261.—CAN.

**sa. Application of Mineral Act, R. S. B. C., 1924.]—An agreement with respect merely to a division of the proceeds of a sale of mineral claims & to a declaration of trusteeship as to such proceeds is not one to which sect. 19 of Mineral Act, R. S. B. C., 1924, applies.—*Re SIEMAN* (No. 3), [1930] 2 W. W. R. 411.—CAN.**

**sb. —.]—An agreement with**

respect merely to a division of the proceeds of a sale of mineral claims & to a declaration of trusteeship as to such proceeds is not one to which sect. 19 of Mineral Act, R. S. B. C., 1924 (c. 167), applies.—*HARRIS v. LINDBERG*, [1931] S. C. R. 235; 1 D. L. R. 945; *varying*, [1930] 1 W. W. R. 411; 2 D. L. R. 117; 42 B. C. R. 276; *revg. in part*, [1929] 4 D. L. R. 178; 41 B. C. R. 262.—CAN.

**sx. Sale of natural gas—Purchaser's knowledge of defective title.]—Deft. M. co. made an agreement with plff. co. under which the latter was given the right to drill oil wells on said deft.'s leasehold with the view of benefiting both cos. The agreement provided, *inter alia*, for the sale to plff. of the natural gas. Later deft. agreed to sell the "tail gas" to its co-deft. :—*Held*: since on the evidence it was clear that co-deft. entered into said contract with full knowledge of the contract between the M. co. & plff. & contemplated the possibility & proceeded upon the basis**

Central Sale Committee appointed under the Midland (Amalgamated) District (Coal Mines) Scheme under the Coal Mines Act, 1930, had power to fix minimum prices for bunker coal on a f.o.b. basis, but, assuming the trade,

industry, or other category of the consumer to be the same, there could only be one such f.o.b. price for the same type of bunker coal for every port in Great Britain.—A.G. v. WRIGHT (1932), 49 T. L. R. 6.

## Part VIII.—Absolute Dispositions.

631. *Add. Annotation* :—*Reffd. I. R. Comrs. v. Raphael, I. R. Comrs. v. Ezra*, [1935] A. C. 96.

651a. — **Reservation of "mines, minerals, & mineral substances"**—**Whether sand & gravel included.**—(1) *Primâ facie* the meaning of the word "minerals" both in private deeds & in statutory provisions will yield to the expressed or implied intention of the parties.

(2) In arriving at the construction of a reservation of mines & minerals in a private deed, regard must be had to cases relating to the construction of the words "mines & minerals" in statutory provisions.

(3) The two main principles to be gathered from the authorities are: that the word "minerals" when found in a reservation out of a grant of land means substances, exceptional in use, in value & in character, & does not mean the ordinary soil of the district which, if reserved, would practically swallow up the grant, & (4) in deciding whether or not in a particular case exceptional substances are "minerals" the true test is what the word means in the vernacular of the mining world, the commercial world & land-owners at the time of the grant & whether the particular substance came within that meaning. (5) The question whether a given substance is or is not a "mineral" within the meaning of the instrument in which it is mentioned is a question of fact to be decided according to the circumstances of the particular case. (6) For all practical purposes "minerals" & "mineral substances" are synonymous terms, & the latter yields to the expressed or implied intention of the parties as much as the former, & accordingly what is said in the authorities as to the meaning of

the word "minerals" applies with equal force to the words "mineral substances." (7) A conveyance of land made in 1925 contained a reservation of "all mines, minerals, & mineral substances":—*Held*: that the words must be construed according to their meaning in the vernacular of the mining world, the commercial world & land-owners at the time of the execution of the conveyance, & that, upon the evidence, the words did not include sand or gravel.—*WARING v. FODEN, WARING v. BOOTH CRUSHED GRAVEL CO., LTD.*, [1932] 1 Ch. 276; 101 L. J. Ch. 33; 146 L. T. 107; 75 Sol. Jo. 852, C. A.

654a. **Conveyance & payment concurrent acts.**—To a declaration on an agreement, setting out that "pltf. had agreed to sell, & that defts. had agreed to purchase of pltf. one-fourth share in a mining sett for £250; & that pltf. & defts. agreed forthwith to form a co., to be registered with limited liability, for working the mining sett; & that, so soon as the co. should be registered with limited liability, defts. would pay to pltf. the sum of £250 as thereinbefore stated": assigning as a breach non-payment of £250; defts. pleaded; first, that pltf. had not at the time of making the agreement, nor hath he now, any title to the said one-fourth part or share in the said mining sett, nor any right or title to convey the same. Secondly, that pltf. never has been at any time ready & willing to convey the said one-fourth share to defts. according to the agreement:—*Held*: the pleas were good.—*MARSDEN v. MOORE & DAY* (1859), 4 H. & N. 500; 28 L. J. Ex. 288; 157 E. R. 936.

that the M. co. might not have title to what it agreed to sell it could not recover damages from the M. co. because of the latter's inability to make title.—*NORTHWEST CO., LTD. v. MERLAND OIL CO. OF CANADA, LTD. & GAS & OIL PRODUCTS, LTD.*, [1936] 2 W. W. R. 577; 4 D. L. R. 248.—CAN.

### PART VII. SECT. 2, SUB-SECT. 1.

sq. **Sale of land subject to gas lease—Where gas treated as chattel.**—*TILBURY TOWN GAS CO. v. MAPLE CITY OIL & GAS CO., MAPLE CITY OIL & GAS CO. v. TILBURY TOWN GAS CO.* (1915), 7 O. W. N. 786; 9 O. W. N. 301; 35 O. L. R. 186.—CAN.

### PART VII. SECT. 3, SUB-SECT. 1.

o 1. — **For sale of option to purchase mining claims.**—*GORDON v. EARLE* (Man.) [1927] 3 W. W. R. 242.—CAN.

s 1. — **Sale of assets of company—**

**Whether mining rights included.**—*MAJESTIC MINES, LTD. v. ROYAL TRUST CO. (Alta.)*, [1929] 4 D. L. R. 568.—CAN.

sr. **Contract to pay for mineral claim on sale thereof—Claim allowed to lapse—Measure of damages.**—*MC GEE v. CLARKE*, [1927] 1 W. W. R. 593; 38 B. C. R. 156.—CAN.

### PART VII. SECT. 3, SUB-SECT. 5.

sv. **Application of Security Frauds Prevention Act, 1930, s. 3 (h).**—*DEVINE v. SOMERVILLE & SOMERVILLE*, [1931] 3 W. W. R. 264; 44 B. C. R. 502.—CAN.

### PART VIII. SECT. 1, SUB-SECT. 1.

624 iii. — **MAJESTIC MINES, LTD. v. ROYAL TRUST CO., LTD. (No. 2)**, [1930] 2 W. W. R. 488; 3 D. L. R. 1010.—CAN.

### PART VIII. SECT. 1, SUB-SECT. 2.

650 iii. — **STUART v. CALGARY & EDMONTON RY. CO. (Alta.)**, [1928] 1 D. L. R. 24; [1927] 3 W. W. R. 678; *varying*, [1927] 2 D. L. R. 271; [1927] 1 W. W. R. 639.—CAN.

650 iv. — **The words "other minerals" in a reservation or exception from a transfer of land are susceptible of limitation or expansion according to the intention with which they are used. The exception expressed in a transfer of land of "all coal & other minerals" held to cover all minerals, including petroleum & natural gas, which at the date of the transfer were owned by the transferor.**—*KNIGHT SUGAR CO., LTD. v. ALBERTA RY. & IRRIGATION CO.*, [1935] 3 W. W. R. 86; *affd.*, [1936] 1 W. W. R. 416; 2 D. L. R. 125; 5 F. L. J. (Can.) 307; *affd.*, [1938] 1 W. W. R. 234, P. C.—CAN.

## Part XI.—Leases.

673. *Add. Annotation*:—As to (2) *Refd.* Glenboig Union Fireclay Co. v. I. R. Comrs. (1922), 12 Tax Cas. 427.
678. *Add. Annotation*:—*Expld.* Flexman v. Corbett, [1930] 1 Ch. 672.
679. *Add. Annotation*:—*Generally*, *Refd.* Glassbrook Bros. v. Leyson, [1933] 2 K. B. 91.
799. *Add. Citation*:—*Affg.*, S. C. *sub nom.* FORSTER v. ELVET COLLIERY Co., [1908] 1 K. B. 629, C. A.
- Add. Annotation*:—*Appld.* Grant v. Edmondson, [1931] 1 Ch. 1.
827. *Add. Annotation*:—*Appld.* Simons v. Associated Furnishers, Ltd. (1930), 47 T. L. R. 118.

## Part XII.—Licences.

869. *Add. Annotation*:—As to (3) *Refd.* Grant v. Edmondson, [1931] 1 Ch. 1.

## PART X.

a i. — *For sublease of petroleum rights—Obligations of parties under agreement.*—OHLSON v. WEISS (Alta.), [1927] 3 D. L. R. 24; [1927] 2 W. W. R.

## PART XI. SECT. 3, SUB-SECT. 1.

st. *Chattels appurtenant to lease—What are.*—*Pltf.* obtained an option on several mining leases. The ground had previously been worked by one H., who constructed a water system for washing the gravel, but after operating for a time abandoned the property, leaving certain chattels used in connection with the water system on the ground. Upon *pltf.* commencing operations it purchased the chattels from H.'s estate & used them until it in turn abandoned the properties. The owners took possession & refused to give up the chattels, claiming that the water licences authorising *pltf.* to use water were together with all works constructed appurtenant to the lease, & could not be separated from the property:—*Held*: *defts.* had not satisfied the burden of proof which was upon them to show that these chattels were in fact to be regarded as part of the works which are appurtenant to the leases. They were in fact parts of the mining machinery & appliances for recovering the gold, not of the water system, & were quite separate & distinct from those works, & not attached in any way to them or to the soil.—ENNIS GOLD MINING Co. v. HENDERSON (1927), 39 B. C. R. 76.—CAN.

sv. *Lease of right to win oil—Discovery of natural gas—Rights of parties.*—*Applt.*, the owner of oil sites & grantee from Govt. of the right to win oil therefrom, leased the sites & the right to win oil for twenty-five years to *resps.*, who agreed to pay royalties on oil won by them. In sinking wells, which did not produce oil in commercial quantities, *resps.* found natural gas. They tapped the gas by pipes & for six years used it for their own purposes:—*Held*: *applt.* was not entitled to compensation for the gas so taken since (a) that right was not included in the right to royalties upon the oil won; & (b) the lease on its true construction was not merely a lease for the purpose of winning oil, & *applt.* having no property in the gas, *resps.* were entitled to reduce into possession & use it, provided they did so without injury to the leased property.—U PO NAING v. BURMA OIL Co., LTD. (1929), L. R. 56 Ind. App. 140.—IND.

sz. *Whether lessee may sue for encroachments before demise.*—A demise of three plots of land which were

being worked as a coal mine & "all those coal-mining rights or other rights of & in the said plots of coal land together with . . . all privileges, advantages, appurtenances appertaining or belonging thereto or usually enjoyed with same," does not enable the lessee to sue in respect of encroachments upon the mine which occurred before the date of the demise.—SRISCHANDRA NANDY v. BAIJNATH JUGAL KISHORE (1934), 62 I. L. R. Ind. App. 40, P. C.—IND.

## PART XI. SECT. 3, SUB-SECT. 3—B.

## (a) i.

r i. — *Tributers' agreement—Validity.*—*Appls.* were the lessees of a gold mine in Western Australia. *Resps.* were tributers of the mine under tribute agreements made with *appls.* on May 15, 1930, & approved & registered by the warden. *Resps.* instituted proceedings in the warden's ct. in 1933, claiming in substance an account of all sums due to them from *appls.* under the tribute agreement. *Appls.*, in their defence, contended that by an agreement of Mar. 18, 1932, the parties had agreed that *appls.* should pay to *resps.* for the gold delivered by them to *appls.* certain sums other than those stipulated for by the tribute agreements, & on making such payments should be released & discharged from their liability to make the payments agreed to be made in the tribute agreements, that they had made such payments & that the sums were received in full settlement of all claims. *Resps.* in reply maintained that the agreement of Mar. 18, 1932, was illegal & void as being contrary to the Mining Acts, 1904–23, s. 152:—*Held*: the Mining Act was intended to protect tributers in respect of their own contracts, & to interfere with their liberty of contract in their own interests, & its terms were plainly obligatory. The agreement was invalid, both as to past & future payments.—LAKE VIEW & STAR, LTD. v. COMINELLI, [1937] A. C. 653; [1937] 2 All E. R. 285; 106 L. J. P. C. 87; 157 L. T. 123; 53 T. L. R. 466; 81 Sol. Jo. 293, P. C.—AUS.

## PART XI. SECT. 4, SUB-SECT. 2.—A.

k i. — *—*.—A covenant by the "lessee" in an assignment of a lease of petroleum & natural gas rights that he would "commence actional drilling operations" not later than a certain date:—*Held*: to have been complied with where before that date the "lessee" had obtained a lease of the surface rights, dug a cellar & cribbed & completed it with a runaway, made contracts for the erection of a derrick, placed some of the equipment on the

ground & let the drilling contract, & had from that date on shown a *bona fide* intention to proceed with diligence towards the completion of a well. The word "actional" was held not to add anything material to the words "drilling operations," although, in the absence of evidence as to its presence in the agreement, the ct. had no right to find that it was a clerical mistake or typographical error.—RISVOLD & MALORY v. SCOTT & GRANVILLE OILS, LTD., [1938] 1 W. W. R. 682; 2 D. L. R. 238.—CAN.

## PART XI. SECT. 6, SUB-SECT. 2.

d i. *Fine in lieu of forfeiture.*—A warden of mines having recommended the forfeiture of a mineral lease on account of default, without reasonable cause, in compliance with the covenant with regard to the expenditure of money, the Mining Board imposed a fine of £200 in lieu of forfeiture.—HILL v. THE TASMANIAN METALS EXTRACTION Co., LTD. (1925), Tas. L. R. 38.—AUS.

## PART XI. SECT. 7.

t i. — *—*.—*Re* MCGREGOR, [1927] 2 D. L. R. 588; 59 N. S. R. 231.—CAN.

sm. *By impossibility of performance—What amounts to.*—FIRTH v. HAL-LORAN (1926), 38 C. L. R. 261.—AUS.

## PART XII. SECT. 1, SUB-SECT. 2.

d i. — *Assignment.*—SHAW v. ROBINSON (1910), 8 E. L. R. 557.—CAN.

## PART XII. SECT. 2, SUB-SECT. 3.

sa. *Licence to bore for oil—Royalties payable under—Whether recoverable.*—*Pltf.* sought to recover from *defts.* under a certain deed granting oil-boring rights a sum reserved by the deed by way of rental in the following terms: "Provided further that if after the expiration of the said first five years as aforesaid the co., the predecessor in title of present *defts.*, shall commence & regularly & punctually continue to pay to the grantors, the predecessors in title of *pltf.*, for & in respect of the said lands mentioned in the said schedule by equal monthly payments at the rate of . . . then this grant or licence shall remain in full force & effect".—*Held*: the deed amounted merely to a qualified grant of the rights conferred, depending for its continuance on *defts.* regularly paying the rentals or royalties therein specified, & implied no covenant by *defts.* to keep up such payments, which were accordingly not recoverable.—BLOOMFIELD v. LYSNAR, [1928] N. Z. L. R. 285.—N.Z.

## Part XIII.—Easements and Rights affecting Mines.

907. *Add. Annotations*:—*Apld. Re Beckermert Mining Co., Ltd.'s Application*, [1938] 1 All E. R. 389. *Refd. Elliott v. Burn*, [1934] 1 K. B. 109.

913. *Add. Annotation*:—*Refd. West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt* (1932), 96 J. P. 159.

922a. *Order of Railway & Canal Commission*.—(1) A mining co., for the proper working of its mines, obtained an order from the Railway & Canal Commission under Mines (Working Facilities & Support) Act, 1923 (c. 20), & the Mining Industry Act, 1926 (c. 28), granting it facilities to work the coal under land adjoining its mines upon the terms & conditions therein stated. One of the paragraphs in the order was in these terms: "Every dispute concerning any matter or thing whatsoever arising out of this Order shall be referred to the Commission." The owners of the land brought an action for injury done to their property by a subsidence which took place subsequent to the date of the order. The co. took the preliminary objection that the action was not maintainable, & that the questions in dispute were wholly questions to be determined by the Commission, & not by the High Ct.:—*Held*: the Railway & Canal Commission had no jurisdiction enabling it to oust the jurisdiction of the High Ct., but the effect of an order made by that Commission, under the above-mentioned Acts, may be to make not actionable an act or acts which apart from the order would have been tortious &, in this way, to deprive a plff. of a cause of action which he would otherwise have had, or it may affect the relief to which plff. would otherwise have been entitled.

(2) A mining co., for the proper working of its mines & having made an application to the Railway & Canal Commission for an order, under the above-mentioned Acts, giving it facilities to work minerals under adjoining land together with ancillary rights

of working including that of letting down the surface on payment of compensation, committed a trespass by working under adjoining property before the order was granted but after the application was filed. An action was brought by the owners of the adjoining land for damages for trespass for working the coal without an order of the Commission so to do:—*Held*: in the circumstances, the trespass was not wilful & plffs. were entitled only to reasonable damages & not to penal damages, the co. being allowed all expenses of hewing & raising.—*TOWNEND v. ASKERN COAL & IRON CO.*, [1934] Ch. 463; 103 L. J. Ch. 201; 151 L. T. 196; 50 T. L. R. 200; 78 Sol. Jo. 103.

933. *Add. Annotation*:—*Refd. I. R. Comrs. v. New Sharlston Collieries Co.*, [1937] 1 K. B. 583.

934. *Add. Annotations*:—*Consd. Warwickshire Coal Co. v. Coventry Corp.*, [1934] Ch. 488; *Wath-upon-Dearne Urban District Council v. Brown & Co.*, [1936] Ch. 172.

940. *Add. Annotations*:—*Consd. Warwickshire Coal Co. v. Coventry Corp.*, [1934] Ch. 488. *Refd. Wath-upon-Dearne Urban District Council v. Brown & Co.*, [1936] Ch. 172.

942. *Add. Annotation*:—*As to (2) Overd. Warwickshire Coal Co. v. Coventry Corp.*, [1934] Ch. 488.

943. *Add. Annotation*:—*Consd. Warwickshire Coal Co. v. Coventry Corp.*, [1934] Ch. 488.

944a. — *Reservation of mines & minerals on sale of land under Land Tax Redemption Act, 1802 (c. 116)*—"Proper & necessary powers of working."—In 1804 land in the city of Coventry was sold by a bishop in exercise of the power conferred by this Act, & in 1903 a lease of the mines & minerals under the land for the term of ninety-nine years was granted by his successors in title. The question arose whether the lessees of the mines & minerals were entitled to work & get them in such a manner as to damage &

### PART XIII. SECT. 1, SUB-SECT. 2.—A.

*sb. Right of tenant against landlord—Landlord proprietor of underground workings causing subsidence.*—In an action of damages for personal injuries brought by a woman against a colliery co., the pursuer averred that, while residing in a house belonging to defenders of which her son was tenant, she was injured by the fall of a ceiling, due to the fact that, unknown to the pursuer & the other residents in the house, defenders were working their coal seams beneath the house. She further averred that it was the duty of defenders, in working these seams, to avoid any operation which might render the house unsafe for any of its occupants, & that, in breach of this duty, they had proceeded with their operations, although aware that she was living in the house & that its stability was being imperilled:—*Held*: although defenders were under no obligations to pursuer *qua* landlords of the house, her averments set forth a relevant case of negligence towards her on their part *qua* proprietors of the underground workings, which, if established, would entitle her to damages.—*McCORMICK v. FIFE COAL CO.*, [1931] S. C. 19.—*SCOT.*

### PART XIII. SECT. 1, SUB-SECT. 3.—C. (a).

930 i. *When right to let down surface implied.*—A mining lease purported to confer upon the Colliery Co. a right to mine, excavate & remove all coal that lay under the surface of the land, & made reference to the removal of the whole of the coal, including the ultimate removal of the pillars, walls, & ranges, which in the earlier stages of the operation are to support the surface. In addition the following clause was included in the lease: "5. The lessor shall have the full & absolute right subject as aforesaid to the use of the surface of all land hereby demised & the lessee co. shall not interfere with or damage the surface of any of the said land except so far as such interference or damage may be unavoidably occasioned by the working of the demised mines in accordance with the provisions of these presents." In answer to a question of law argued before trial:—*Held*: the mining lease carried with it & conferred upon the Colliery Co. the right to let down the surface of the land in so far as such letting down may be unavoidably occasioned by the working of the demised mines in accordance with the

provisions of the mining lease; & the Colliery Co. was not bound to abstain from removing any part of the coal in order to avoid or reduce such letting down; to this extent the rights of the Colliery Co. under the mining lease were inconsistent with the full continuance of the natural right of support.—*WARD v. PUKEMIRO LAND CO., LTD., & PUKEMIRO COLLIERIES, LTD.*, [1936] N. Z. L. R. s. 9; G. L. R. 94; 12 N. Z. L. J. 5.—*N. Z.*

### PART XIII. SECT. 3, SUB-SECT. 2.—A.

*sg. Right of entry—Grant of rights of lessee.*—On an application under the regulations of the Department of Lands & Mines for an order giving appt. a right of entry on the surface of a certain parcel of land for the purpose of drilling an oil well, & a right of way thereto, appt. having acquired title to the gas & petroleum rights under said land:—*Held*: under all the circumstances, appt. should not be given an absolute title to the land required but merely the rights of a lessee, the compensation being payable in the form of an annual rent.—*Re OKALTA OILS, LTD.*, [1937] 2 W. W. R. 489.—*CAN.*

let down the surface of the land & the erections thereon:—*Held*: the reservation of the mines & minerals together with all proper & necessary powers for opening & working the same, did not reserve either expressly or by necessary implication the right to work the mines & minerals so as to let down the surface. As it was not known at the date of the Act & the conveyance, as it was at the present time, that the mines & minerals could not be worked safely & with commercial efficiency without letting down the surface of the land, there was, in the absence of express words, nothing to affect the ordinary presumption that the land when conveyed was conveyed with the common right to support.—**WARWICKSHIRE COAL CO., LTD. v. COVENTRY CORPN.**, [1934] Ch. 488; 103 L. J. Ch. 269; 151 L. T. 181; 78 Sol. Jo. 330, C. A.

**Annotation :—****Refd.** Wath-upon-Dearne Urban District  
Council v. Brown & Co. [1936] Ch. 172.

**946. Add. Annotation :—***As to (1) Consd. Warwickshire Coal Co. v. Coventry Corpn.*, [1934] Ch. 488.

**947. Add. Annotation :—**Consd. Warwickshire Coal Co. v. Coventry Corpn., [1934] Ch. 488.

**954. Add. Annotation :—**Consd. Warwickshire Coal Co. v. Coventry Corpn., [1934] Ch. 488.

967a. ———.]—Appcts. applied for an order that they might search for & get iron ore over a large area, which was very little proved, & under some parts of which there might be no ore. The surface owners asked that they might receive compensation, not as & when damage was done by letting down the surface, but in respect of the apprehension that the surface might be so let down:—*Held*: compensation could not be awarded until the surface was actually let down, & the principle applied to damages in *Backhouse v. Bonomi* (1861), 9 H. L. Cas. 503; 17 Digest 90, 78, applies to a grant of compensation.—*Re BECKERMET MINING CO., LTD.'S APPLICATION*, [1938] 1 All E. R. 389; 54 T. L. R. 377; 82 Sol. Jo. 317.

**978a. — Plaintiff formerly tenant—Whether damages for subsidence while tenant recoverable.]—**S., a yearly tenant of a certain farm, subsequently purchased the fee simple of the surface of the land. The underlying minerals had been reserved to the original owners by a previous conveyance, together with the right to work the same, but there was a proviso in that conveyance granting reasonable compensation to the surface owner for damage caused to the surface by the working of the minerals. This proviso constituted a covenant between the parties running with the land. The conveyance to S. was subject to this reservation of the underlying minerals, & S. accordingly obtained the benefit of the covenant. The minerals had been worked for some time both before & after the sale to S., & damage had been caused to the surface thereby. In an action by S. claiming compensation for damage caused to the surface by the working of the underlying minerals both before & after the conveyance to him, it was admitted that compensation for damage caused after the date of the conveyance was recoverable by him:—*Held*: he was not entitled in the absence of an ex-

press assignment to recover under the covenant any compensation for damage which had accrued before the conveyance to him of the surface.—*Snowdon v. Ecclesiastical Comrs. for England*, [1935] Ch. 181; 104 L. J. Ch. 153; 152 L. T. 417; 78 Sol. Jo. 820.

**982.** *Add. Annotation* :—**Refd.** *I. R. Comrs. v. New Sharlston Collieries Co.*, [1937] 1 K. B. 583.

**992. Add. Annotation :—***Consd. Re Wilson Syndicate Conveyance, Wilson v. Shorrocks*, [1938] 3 All E. R. 599.

1002a. **Express reservation of underground working.**—In a conveyance of 1923, there was a reservation to the vendors & their assigns of “all clay, lignite, umber, mines & minerals of every description . . . together with all necessary powers, rights & easements for searching for, winning, working & carrying away the same by underground working,” with a provision for compensation for subsidence & damage to the surface or buildings. Pltf. was an assignee of the vendors, & claimed the right to make borings & sink shafts & otherwise to use the surface for the purpose of winning & carrying away the minerals:—*Held*: (1) upon the construction of the conveyance of 1923, the right to work the minerals was restricted to underground working; (2) the express power being restrictive of the implied common law power, the intention of the parties must have been that the vendors were restricted to the rights of working expressly reserved.—*Re WILSON SYNDICATE CONVEYANCE, WILSON v. SHORROCK*, [1938] 3 All E. R. 599; 82 Sol. Jo. 644.

**1007. Add. Annotation:—***As to (1) Consd. Warwickshire Coal Co. v. Coventry Corpn., [1934] Ch. 488.*

**1021.** *Add. Annotation :—As to (1) Refd. Williams-Ellis v. Cobb, [1935] 1 K. B. 310.*

**1023.** *Add. Annotation :—***Refd.** Williams-Ellis v. Cobb, [1935] 1 K. B. 310.

**1054. Add. Annotation :—***Reid. Bartlett v. Tottenham*, [1932] 1 Ch. 114.

**1065. Add. Annotation :—***Reid. Bartlett v. Tottenham*, [1932] 1 Ch. 114.

**1067. Add. Annotation :—***Reid. Pontardawe Rural Council v. Moore-Gwyn*, [1929] 1 Ch. 656.

**1071. Add. Annotations:—***As* to (2) *Consd. St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L. T. 1. *As* to (3) *Refd. Bartlett v. Tottenham*, [1932] 1 Ch. 114; *Wilkins v. Leighton*, [1932] W. N. 68.

**1077. Add. Annotation :—***Reid. Conquer v. Boot*,  
[1928] 2 K. B. 336.

**1086. Add. Annotation :—***Reid. Bartlett v. Tottenham*, [1932] 1 Ch. 114.

**1089. Add. Annotations :—**Dists. St. Anne's Well Brewery Co. v. Roberts (1928), 140 L. T. 1. **Consd.** Pontardawe Rural District Council v. Moore-Gwyn, [1929] 1 Ch. 656. **Dists.** Fardon v. Harcourt-Rivington (1932), 48 T. L. R. 215; Wilkins v. Leighton (1932), 76 Sol. Jo. 232. **Apld.** A.-G. v. Corke (1932), 48 T. L. R. 650. **Refd.** Glanville v. Sutton (1927), 44 T. L. R. 98; G. W. Ry. v. S.S. Mostyn, [1928] A. C. 57; Bartlett v. Tottenham, [1932] 1 Ch. 114.

## Part XIV.—Statutory Regulation of Mines.

- 1104. Add. Annotation :—***As to (2) Rejd. Catton v. Ashwell & Nesbit, [1928] Ch. 484.*
- 1106a. Wages agreement—Decision of chairman of conciliation board—Whether award.]—**By a Conciliation Board agreement provision was made for the payment of a subsistence allowance to low-paid colliery workers in South Wales, & the parties having failed to agree as to the amount & conditions of payment, the matter came before the independent chairman of the board, & he gave a decision. The parties failed to agree as to the interpretation of the decision, & representative workmen then brought an action against representative employers for declarations, (a) that on the true construction of the decision the subsistence allowance ought to be calculated for each shift separately, & (b) as to the method of reckoning overtime for the purpose of calculating subsistence allowance. The judge in chambers, on the grounds that the wages agreement incorporating the conciliation agreement amounted to a submission to arbitration, & that the chairman's decisions were awards, made an order that the action be adjourned & that the awards be remitted to the chairman to deal with the two questions raised by the pleadings. The Ct. of Appeal set aside the order of the judge & granted the declarations claimed :—*Held* : the chairman had decided both questions in favour of pltf. & they were entitled to the declarations claimed.—**CARDIFF COLLIERIES, LTD. v. MEREDITH (1929), 45 T. L. R. 321, H. L. ; affg. S. C. sub nom. CHARLES v. CARDIFF COLLIERIES, LTD. (1928), 44 T. L. R. 448, C. A.**
- 1107. Add. Annotation :—***As to (1) Consd. Matthews v. Amalgamated Anthracite Collieries, Ltd. (1935), 52 T. L. R. 23.*
- 1108. Add. Annotation :—***As to (1) Consd. Matthews v. Amalgamated Anthracite Collieries, Ltd. (1935), 52 T. L. R. 23.*
- 1110. Add. Annotation :—***Rejd. Re Midland (Amalgamated) District (Coal Mines) Scheme, 1930, Holliday (Robert) & Sons, Ltd. v. Executive Board (1934), 152 L. T. 212.*
- 1116a. Agreement for payment on large coal gotten—Small coal necessarily produced.]—**Appl., a collier, was employed on terms embodied in a Conciliation Board Agreement dated Feb. 9, 1931, which provided that "the mineral to be gotten is clean large coal only as hereinafter described," & that his wages were to be paid on the weight of the large coal gotten by him. The rate of wages payable to him was contained in a price list. In the process of mining coal the collier had of necessity to produce a certain amount of small coal in the course of mining large coal. He contended that the agreement was illegal as being in contravention of Coal Mines Regulation Act, 1887 (c. 58), s. 12, which stated that "where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them," & he claimed to be paid on a contract basis which included payment for small coal :—*Held* : his wages were to be calculated on a *quantum meruit* basis on the weight of both the large & small coal gotten by him.—**MATTHEWS v. AMALGAMATED ANTHRACITE COLLIERIES, LTD. (1935), 52 T. L. R. 23 ; 79 Sol. Jo. 795, 41 L.**
- 1117. Add. Annotation :—***Rejd. Re Midland (Amalgamated) District (Coal Mines) Scheme, 1930, Mitchell Main Colliery Co. v. Executive Board, [1934] Ch. 712.*
- 1117a. — Validity—Failure to give notice to all persons entitled to appoint.]—**(1) A checkweigher in a mine appointed by a majority, ascertained by ballot, of the persons employed in the mine, & paid according to the mineral gotten, & acting as such checkweigher, is entitled to payment of a proportionate part of his wages from all persons so employed & paid, & it is no defence to such claim against any one of these persons that another checkweigher has been appointed, during the material period, by ballot, but not by a majority as aforesaid, to act as checkweigher on his behalf.
- (2) A notice convening a meeting to appoint a checkweigher addressed to a part of those entitled to appoint is bad, & the appointment of a person chosen by the subsequent meeting is invalid.—**BELL v. BENNETT, [1928] 2 K. B. 206 ; 97 L. J. K. B. 713 ; 139 L. T. 70 ; 92 J. P. 106 ; 44 T. L. R. 424 ; 72 Sol. Jo. 284 ; 26 L. G. R. 249, D. C.**
- 1119a. Dismissal—Whether available for re-election.]—**Pltf., a checkweigher duly appointed under Coal Mines Regulation Act, 1872 (c. 76), s. 18, received a fortnight's notice to quit his employment from the men employed in the mine. Before the notice expired, the men held a fresh election, at which pltf. (with others) presented himself as a candidate, & was again appointed :—*Held* : the true construction of sect. 18 was to limit the class of persons from whom the men might appoint a checkweigher to persons employed in the mine by the mine-owner ; pltf. ceased to have any employment under the mine-owner when he was first appointed checkweigher by the men ; & therefore his second appointment was invalid.—**HOPKINSON v. CAUNT (1885), 14 Q. B. D. 592 ; 54 L. J. Q. B. 284 ; 49 J. P. 550 ; 33 W. R. 522 ; 1 T. L. R. 345.**
- Annotation :—***Consd. Unsworth v. Pease & Partners, Ltd., [1937] 2 All E. R. 817.**
- 1120a. Who entitled to recover—Co-existence of majority & minority checkweighers.]—****BELL v. BENNETT, No. 1117a, ante.**
- 1123. Add. Annotation :—***Rejd. Hampton v. West Cannock Colliery Co. (1932), 96 J. P. 197.*
- 1124. Add. Annotation :—***Consd. Hampton v. West Cannock Colliery Co. (1932), 96 J. P. 197.*
- 1126. Add. Annotation :—***Rejd. Hampton v. West Cannock Colliery Co. (1932), 96 J. P. 197.*

### PART XIV. SECT. 1, SUB-SECT. 2.—B.

- r 1. — Deduction for indebtedness on account of purchased goods—Invalid.]—****R. v. DOMINION COAL CO. (1907), 41 N. S. R. 137.—CAN.**

**1126a.** — — — **Act need not be unlawful.]—**A checkweigher at a certain pit was also secretary of the local branch of the miners' union of which the men employed at that pit were members. It had been the custom of the district to work a short shift on a Saturday. The colliery gave notice that a full shift would in future be worked at that pit on a Saturday instead of a short shift. The checkweigher tried to persuade the managers of the colliery to work only a short shift on Saturdays. On the Friday he chalked on the pavements in the neighbourhood of the colliery words to the effect that the workmen at that pit had decided at a mass meeting not to work on Saturday unless a short shift should be worked. On Saturday a number of miners assembled at the pit in their pit clothes with their water bottles filled & day's food. After the checkweigher had been told by the manager that the mine would work a full shift instead of a short shift, he went to the men & said: "It's a full shift. Come on, lads," & walked away, & the men did the same & did not work that day:—*Held*: there was evidence upon which the justices were entitled to come to the conclusion that the checkweigher had interfered with the management of the mine contrary to Coal Mines Regulation Act, 1887 (c. 58), s. 13, & to make an order removing him from his office of checkweigher.

*Per* AVORY, J. It was sufficient that the act of the checkweigher did in fact interfere with the management of the mine. It was not necessary that the act should be unlawful either as being in breach of some statute or unlawful according to the common law.—*HAMPTON v. WEST CANNOCK COLLIERY CO., LTD.*, [1932] 2 K. B. 293; 101 L. J. K. B. 366; 147 L. T. 76; 96 J. P. 197; 48 T. L. R. 387; 30 L. G. R. 257; 29 Cox, C. C. 458.

**1129a.** **Rate applicable.]—**Lord St. Aldwyn's Award, made under Coal Mines (Minimum Wage) Act, 1912 (c. 2), provides that the following questions shall be referred to the trade tribunal: (a) as to whether a workman is one to whom the minimum rate applies; (b) whether the workman has complied with the rules of the award; & (c) whether such non-compliance has worked a forfeiture of his right to the minimum rate. A workman brought an action in the county ct. to decide the rate of minimum wage applicable to his particular case, & the county ct. judge stayed the action as being a matter

to be submitted to the trade tribunal:—*Held*: the only question in dispute being the particular rate to which the workman was entitled, this was a proper matter for trial in the cts. & ought not to be referred to the trade tribunal.—*MCCARTHY v. PENRIKYBER NAVIGATION COLLIERY CO., LTD.*, [1937] 4 All E. R. 597; 107 L. J. K. B. 249; 158 L. T. 137; 54 T. L. R. 187; 81 Sol. Jo. 1040, C. A.

**1132. Add. Annotation:—***Consd. Pockney v. Atkinson*, [1930] 1 K. B. 197.

**1133. Add. Annotation:—***Generally, Refd. Pockney v. Atkinson* (1929), 45 T. L. R. 639.

**1137. Add. Annotation:—***Generally, Consd. McCarthy v. Penrikyber Navigation Colliery Co.*, [1937] 4 All E. R. 597.

**1148a.** — — — **Failure to provide safe system of working.]—**The provision of a safe system of working in a mine is an obligation of the owner, who, if he appoints an agent to perform it, remains vicariously responsible for the agent's negligence. An agent in performing the owner's duty of providing a safe system of working in the mine is not engaged in common employment with an ordinary workman in the mine; he is performing the duty of the owner, not the duty of an employee, & consequently the defence of common employment is not available to the mine owner, where injury has been caused to a workman through the negligence of the agent.—*WILSONS & CLYDE COAL CO., LTD. v. ENGLISH*, [1938] A. C. 57; [1937] 3 All E. R. 628; 106 L. J. P. C. 117; 157 L. T. 406; 53 T. L. R. 944; 81 Sol. Jo. 700, H. L.

**1166. Add. Annotations:—***Refd. Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1; *Wilson & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.

**1168. Add. Annotations:—***Consd. Rudd v. Elder Dempster & Co.*, [1933] 1 K. B. 566; *Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1.

**1170. Add. Annotations:—***As to (2) Consd. Rudd v. Elder Dempster & Co.*, [1933] 1 K. B. 566. *As to (3) Consd. Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1.

**1173. Add. Annotations:—***Consd. Rudd v. Elder Dempster & Co.*, [1933] 1 K. B. 566; *Wheeler v. New Merton Board Mills, Ltd.* (1933), 148 L. T. 549; *Lochgelly Iron & Coal Co. v. M'Mullan*, [1934] A. C. 1. *Refd. Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K. B. 669.

**1173a. Liability of manager—Provision of refuge holes—Proceedings without consent.]—**A

#### PART XIV. SECT. 1, SUB-SECT. 9.—A.

**1153 i. Owner or agent.]—***Held*: (1) the provision of a safe system of working in a coal mine was a duty incumbent on the owners, & they could not escape liability for an accident to a miner due to an unsafe system of working on the ground that they had entrusted the management of the mine, including the provision of the system of safe working, to a capable agent; (2) the doctrine of common employment was inapplicable to a case where the person in fault was acting, not as a fellow servant, but as the agent of the owners in carrying out a duty incumbent on them; (3) the owners were not exempted from liability by Coal Mines Act, 1911, s. 2 (4), which prohibits a mine owner, unless he is qualified to be a manager, from taking any part in its technical management.—*ENGLISH v. WILSONS & CLYDE COAL*

*CO.*, [1937] S. C. (H. L.) 46.—*SCOT.*

**sp. Statutory defence—Nature of.]—**Observations on the nature of the statutory defence competent to mine-owners under Coal Mines Act, 1911 (c. 50), s. 102 (8).—*PARK v. WILSONS & CLYDE COAL CO.*, *HAGGERTY v. WILSONS & CLYDE COAL CO.*, [1928] S. C. 121.—*SCOT.*

**sr. Safety of apparatus—Onus of proof—Liability for acts of servant.]—***Held*: (1) pursuer's injury having been caused by the defective condition of apparatus provided by defenders, it was for them to show that all reasonable steps had been taken to maintain the apparatus in a safe condition; they had failed to discharge this onus; & accordingly, a failure to comply with Reg. 124 (a) of the General Regs. had been established; (2) even if the duty to comply with Reg. 124 lay, not upon the defenders themselves as

owners, but only on their responsible servants, defenders were nevertheless liable for their servants' failure, unless they could bring themselves within the protection of sect. 102 (8) of Coal Mines Act, 1911, by showing that it was not reasonably practicable to prevent the breach of regulation.—*CRANE v. BAIRD (WILLIAM) & CO.*, [1935] S. C. 715.—*SCOT.*

**st. Liability of owner—Provision of adequate working space.]—**Reg. 123 (c) of the General Regs. for Coal Mines, 1911, which requires that adequate working space, free from danger, shall be provided for all apparatus worked by any person, imposes an absolute statutory duty on mine owners to see that the working space provided is adequate & safe, & this duty cannot be delegated.—*BAIN v. FIFE COAL CO.*, [1935] S. C. 681.—*SCOT.*



manager was charged with omitting to provide refuge holes of the character required by Coal Mines Act, 1911 (c. 50), s. 44. The actual duty of providing them fell on others, but under sect. 75 the manager also was personally liable. By the same sect. he escaped responsibility if he proved that he had taken all reasonable means of enforcing (*inter alia*) the provisions of sect. 44. This applt. failed to prove:—*Held*: the omission to provide such holes was not an offence committed personally by the manager within sect. 102 (5) of the Act, & consequently the justices had no jurisdiction to entertain a prosecution by the resp., who was not an inspector nor acting with the consent in writing of the Secretary of State.—*DAVIES v. MAY*, [1937] 2 K. B. 260; [1937] 2 All E. R. 582; 106 L. J. K. B. 526; 157 L. T. 143; 101 J. P. 250; 53 T. L. R. 656; 81 Sol. Jo. 529; 35 L. G. R. 237.

**1173b. Avoidance of breach of duty not practicable.**

—In applts. coal mine was a machine which when in motion should by virtue of Coal Mines Act, 1911 (c. 50), s. 55, be kept securely fenced. The machine was not working properly & the engineer made certain adjustments, & having done so he set the machine in motion, & in order to test its running he removed the guard, as, without doing this, he could not observe its working. While the guard was off, resp., a workman in the mine, in passing it, slipped, & his hand was caught in the unprotected gearing & was injured. To an action claiming damages in respect of this injury applts. pleaded that they were exempted from liability by virtue of Coal Mines Act, 1911 (c. 50), s. 102 (8), inasmuch as it "was not reasonably practicable to avoid or prevent the breach" of the statutory obligation to keep the machine securely fenced, inasmuch as it was essential at the material time to have the guard off the machine:—*Held*: as it was not reasonably practicable to keep the gearing securely fenced when it had to be observed while being tested, & as it would have been impossible to have observed its working if it had been

protected by the guard, applts. were entitled to the protection from liability given by sect. 102 (8) of the Act.—*COLTNESS IRON CO., LTD. v. SHARP*, [1938] A. C. 90; [1937] 3 All E. R. 593; 106 L. J. P. O. 142; 157 L. T. 394; 53 T. L. R. 978, H. L.

**1180. Add. Annotation:—***Refd. Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.

(d) Fencing (p. 743).

**1184a. Fencing machinery—Machinery exposed & dangerous—Coal Mines Act, 1911 (c. 50), s. 55.**—*WING v. SOAR* (1926), [1938] 1 K. B. 379, n.; 107 L. J. K. B. 351, n.; 157 L. T. 520, n.; 54 T. L. R. 44, n.; 35 L. G. R. 660, D. C.

**1184b.**

—*Among the machinery used in a coal mine to which the Coal Mines Act, 1911 (c. 50), applied was a mechanical belt conveyor. The rollers at the end were contained in a cage which purported to shield them at the sides, but there was no fencing in the front. A temporary stoppage occurred & a workman got on to the lower level of the belt & crawled along to the rollers, presumably for the purpose of freeing them, or ascertaining the cause of the stoppage. The machine began to move, & the workman was killed. The justices dismissed informations against the proprietors, agent & manager of the mine for failing to keep exposed & dangerous machinery securely fenced. They were of opinion that the workman, when he met with the accident, "was acting in a wrong & extraordinary manner," & that, if he wished to get at the rollers, he could & should have got at them through the apertures in the sides of the cage, & that the machinery was undoubtedly dangerous, but, on the evidence before them, it was not exposed:—*Held*: (1) it is quite irrelevant in a prosecution under Coal Mines Act, 1911 (c. 50), s. 55, or Factory & Workshop Act, 1901 (c. 22), s. 10, that the workman is acting improperly, since the Acts are designed to protect the careless workman against himself as much as the careful workman; (2) "exposed" means "at all exposed," &*

**PART XIV. SECT. 1, SUB-SECT. 9.—B. (d).**

**sv. Coal Mines Act, 1911, s. 55—Meaning of dangerous machinery.**—*Held*: the question whether a part of the machinery in a mine was "dangerous" within Coal Mines Act, 1911, was always one of degree, & sect. 55 did not apply to machinery which, in normal conditions & circumstances, was not a source of danger, & which became dangerous only in the extraordinary & exceptional circumstances of a general breakdown.—*TODRICK v. HALLIDAY*, [1928] S. C. (J.) 61.—*SCOT*.

**aw. —.**—*A brushing contractor was seriously injured through coming in contact with an electrically driven motor pump in the seam of a mine where he was working. He had started the pump to drain off water, & immediately after operating the switch which set the pump in motion, he had tripped on some loose flooring cloth & had been caught in the wheels of the pump.*

In an action of damages brought by the contractor against the mine owners on the ground of their breach of their statutory obligation under sect. 55 of Coal Mines Act, 1911, to fence dangerous machinery, defenders pleaded that pursuer, not being an "authorised person," was in breach of the General

Regulations when operating the pump, & therefore not entitled to recover.

The case was tried by a jury, who, in answer to questions put by the presiding judge, found that the accident to the pursuer was due to his coming into contact with the wheels of the pump, which had not been properly fenced; that the failure to fence was due to the fault of the mine officials; that a notice at the pump prohibited any person other than an authorised person from handling or interfering with electrical apparatus; that pursuer had failed to prove that he had been given a certificate authorising him to operate electrical apparatus; but that he had, to the knowledge of the under manager, been treated by the fireman, whose duties included the working of the pump, as an authorised person & allowed to operate the pump. The presiding judge applied the verdict in favour of the pursuer:—*Held*: pursuer was not an authorised person within Reg. 118; his use of the pump was in these circumstances a breach of the statutory prohibition contained in Reg. 121; his actions were the effective cause of his injuries; & accordingly, he was not entitled to recover, notwithstanding the failure of defenders to perform their statutory duty of fencing the pump.—*M'GOVERN*

*v. JAMES NIMMO & Co.*, [1937] S. C. 473.—*SCOT*.

**sz. —.**—*An engineer, after making repairs on the sprocket gearing which connected an electric motor in a mine to the loading plant for which purpose he had removed the safety cover of the gearing, started the machine to enable him to test the efficiency of the repairs, an operation which could be performed in a few minutes, & left the cover off as otherwise he could not observe the running of the mechanism. While this was happening, an employee of the mine-owners, who was employed in connection with the loading plant, stumbled in the neighbourhood of the machine & was injured by one of the unfenced sprocket wheels. In an action of damages at the instance of the employee against the mine-owners based on the breach of their statutory duty to fence:—*Held*: in the circumstances, it was not "reasonably practicable" to avoid a breach of sect. 55, & mineowners assailed.*

Question, whether fencing off of the place where dangerous machinery, itself unfenced, is situated can be compliance with the provisions of sect. 55 that the machinery must be fenced.—*SHARP v. COLTNESS IRON CO.*, [1937] S. C. (H. L.) 68.—*SCOT*.

it was no answer to say that the machinery was exposed only to the man who had to work or repair it, & who was the person most in need of protection; (3) machinery can hardly be "dangerous" without being "exposed"; (4) the duty imposed by Coal Mines Act, 1911 (c. 50), s. 55, is even higher than that imposed by Factory & Workshop Act, 1901 (c. 22), s. 10, since sect. 55 does not contain the alternative in sect. 10 (1) (c), or the exception in sect. 10 (1) (d) (which, in any case, is available only to a person who has discharged the primary duty to fence).—*CAREY v. OCEAN COAL CO., LTD., CAREY v. RICHARDS, CAREY v. REES*, [1938] 1 K. B. 365; [1937] 4 All E. R. 219; 107 L. J. K. B. 344; 157 L. T. 516; 101 J. P. 571; 54 T. L. R. 40; 82 Sol. Jo. 154; 35 L. G. R. 640, D. C.

*Annotation*.—*Refd.* Caswell v. Powell Duffryn Associated Collieries, Ltd., [1938] 3 All E. R. 21, C. A.

**1184c.** ———.—Defts. were the proprietors of a coal mine in which there was a conveyer belt. This was originally totally enclosed, but, in order that some rollers might be cleaned, it was found necessary to make a portion of the fencing removable. The correct method of cleaning was to have the engine stopped & to scrape one half of each roller with a scraper, & then, having moved the belt slightly by restarting the machinery, to scrape the remainder. A workman was found dead with his head inside the machinery. On the day in question, the machinery had been stopped only in order to allow full trucks to be removed from under the end of the conveyer & empty ones substituted:—*Held*: (1) the accident could not have happened without some wrongful act on the part of the workman, who had therefore been guilty of contributory negligence; (2) if there had been a temporary breach of the statutory duty to fence dangerous machinery, it was a breach which it was impracticable to prevent. Defts. had therefore a second defence under Coal Mines Act, 1911 (c. 50), s. 102 (8).—*CASWELL v. POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD.*, [1938] 3 All E. R. 21; 82 Sol. Jo. 520, C. A.

**1188.** *Add. Annotation*.—*Refd.* Edwards v. Gwauncaegurwen Colliery Co., James v. Same, Jenkins v. Same (1926), 96 L. J. K. B. 337.

**1189a.** *Failure to support roof—Amounts to negligence within Workmen's Compensation Act, 1925 (c. 84), s. 29.*—The pursuer in an action under the common law of Scotland claimed damages for the death of his son, a miner lately in the employment of the appls. The pursuer averred that, in breach of Coal

Mines Act, 1911 (c. 50), s. 49, which provides that the roof of every working place shall be made secure & that a person shall not (with an immaterial exception) work in any working place which is not so made secure, his son was ordered or permitted to work in a working place where the roof had not been made secure, & that, while he was there at work, part of the roof fell & killed him:—*Held*: these averments disclosed a case of "personal negligence of the employers" within Workmen's Compensation Act, 1925 (c. 84), s. 29 (1), & the action was competent.—*LOCHGELLY IRON & COAL CO., LTD. v. M'MULLAN*, [1934] A. C. 1; 102 L. J. P. C. 123; 149 L. T. 526; 49 T. L. R. 566; 77 Sol. Jo. 539; 26 B. W. C. C. 463, H. L.

*Annotations*.—*Refd.* Knott v. London County Council, [1934] 1 K. B. 126; Wheeler v. New Merton Board Mills, Ltd., [1933] 2 K. B. 669; Hannaford v. May, [1935] 2 K. B. 385; Flower v. Ebbw Vale Steel, Iron & Coal Co., [1936] A. C. 206; Wilsons & Clyde Coal Co. v. English, [1937] 3 All E. R. 628.

**1190.** *Add. Annotation*.—*As to* (1) *Refd.* R. v. Minister of Health, *Ex p.* Yaffe, [1930] 2 K. B. 98.

**1192.** For "—— ———."—read "Prohibiting order by Secretary of State—Application of order."

**1199.** *Add. Annotation*.—*Consd.* Hampton v. West Cannock Colliery Co. (1932), 96 J. P. 197.

**1212a.** *Failure to keep register—Who may prosecute.*—The manager of a mine caused a register to be kept there purporting to be the register to be kept under Coal Mines Regulation Act, 1908 (c. 57), s. 2 (1), & by the custom of the mine an official of the mine known as "the banksman" was appointed to keep the register & to make the necessary entries therein. In the register there were in respect of a certain date no entries giving particulars of the cause or causes of certain workmen being below ground on that date for more than the time fixed; & an offence was thus committed against that sub-sect. which could be prosecuted before a ct. of summary jurisdiction:—*Held*: that offence was an offence "committed personally" by the manager of the mine within Coal Mines Act, 1911 (c. 50), s. 102 (5); & consequently that sub-sect. did not prevent a prosecution from being instituted against the manager for that offence by a miner's agent who was neither an inspector nor acting with the consent of the Secretary of State.—*HANNAFORD v. MAY*, [1935] 2 K. B. 385; 104 L. J. K. B. 606; 153 L. T. 380; 99 J. P. 267; 51 T. L. R. 483; 33 L. G. R. 297, D. C.

*Annotation*.—*Distd.* Davies v. May, [1937] 2 K. B. 260.

## Part XV.—Quarries.

**1228.** *Add. Annotation*.—*Refd.* Coleshill v. Manchester Corpn., [1928] 1 K. B. 776.

### PART XIV. SECT. 1, SUB-SECT. 9.— B. (j).

*sy. Duty to inspect every part of mine in which work is carried on.*—*Held*: a disused out through was part of a mine, in respect of which inspection was necessary.—*Ex p.* DELLACA (1927), 27 S. R. N. S. W. 64; 44 N. S. W. W. N. 39.—*AUS.*

### PART XIV. SECT. 1, SUB-SECT. 10. sz. Penal Act—Where no penalty

*imposed—Construction.*—*Held*: a contravention of the amendment to sect. 4 of Coal Mines Regulations Act, prohibiting the employment of Chinamen, was not made an offence under the Act for which any penalty is imposed, & the penal Act should not be extended beyond the reasonable construction which the words used would bear.—*R. v. LITTLE* (1898), 6 B. C. R. 78, 1 M. M. Cas. 220.—*CAN.*

### PART XIV. SECT. 2, SUB-SECT. 4.

*i. Mining Act of Ontario, R. S. O., 1914 (c. 32), s. 164.*—*DOYLE v. FOLEY-O'BRIEN, LTD.* (1915), 7 O. W. N. 780; 8 O. W. N. 362; 84 O. L. R. 42.—*CAN.*

*ii. ———.*—*HULL v. SENECA SUPERIOR SILVER MINES, LTD.* (1915), 8 O. W. N. 301; 33 O. L. R. 557; 24 D. L. R. 254.—*CAN.*





tion for terminating their services ; B. & S. agreed to accept these sums, & they were duly paid. The jury, in answer to a further specific question, found that the L. Co. if they had been aware of the breaches of duty by B. & S. would have terminated their agreements, & B. & S. would have been dismissed from their offices without any compensation. The action in which the jury so found was brought in the first instance by the L. Co. alone, the N. Co. being joined in the course of the proceedings as co-pltfs. against B. & S., claiming rescission of the compensation agreements & repayment of the sums paid thereunder on the ground of fraudulent misrepresentation, & alternatively, as the House construed the points of claim, on the ground of unilateral mistake induced by fraud, but not on any ground of mutual mistake innocently made by the defts. so far as

they were concerned. There was a specific alternative claim that the agreements of settlement & the payments under them were made under a mistake of fact. The jury negated the charges of fraud, & found that at the time of negotiating the compensation agreements B. & S. had not in mind their breaches of duty:—*Held*: the action failed as to unilateral mistake, on the ground that defts. under their contracts of service with the L. Co. owed no duty to them to disclose the impugned transactions.—*BELL v. LEVER Bros., LTD.*, [1932] A. C. 161; 101 L. J. K. B. 129; 146 L. T. 258; 48 T. L. R. 133; 76 Sol. Jo. 50; 37 Com. Cas. 98, H. L.; *reversg.* S. C. *sub nom.* *LEVER Bros., LTD. v. BELL*, [1931] 1 K. B. 557, C. A.

**Annotations :—***Reid. Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.*, [1934] A. C. 455; *Swain v. West (Butchers), Ltd.*, [1936] 1 All E. R. 224.

## Part IV.—Fraudulent and Innocent Misrepresentation.

185. *Add. Annotations* :—*As to* (1) *Refd.* Clark v. Urquhart, Stracey v. Urquhart, [1930] A. C. 28; Lancashire Loans, Ltd. v. Black, [1934] 1 K. B. 380; United Motor Finance Co. v. Addison & Co., [1937] 1 All E. R. 425. *As to* (2) *Refd.* Greer v. Downs Supply Co., [1927] 2 K. B. 28.
187. *Add. Annotation* :—*Generally*, *Refd.* McAlister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119.
214. *Add. Annotation* :—*As to* (2) *Refd.* Steedman v. Frigidaire Corp., [1932] W. N. 248.
219. *Add. Annotation* :—*Refd.* Torbay Hotel v. Jenkins, [1927] 2 Ch. 225.
228. *Add. Annotation* :—*Apid.* With v. O'Flanagan, [1936] Ch. 575.
- 229a. ———.]—In Jan., 1934, negotiations were entered into for the sale of a medical practice, & the vendor then represented to the purchasers that the takings of the practice were at the rate of £2,000 *per annum*. The contract was signed on May 1, 1934, but by that date the circumstances had changed, as the practice had fallen off owing to the illness of the vendor & the employment of several *locum tenentes*. The change of circumstances was not disclosed to the purchasers, & when they took possession on that date they found that the practice was almost non-existent. They thereupon commenced an action for rescission of the contract :—*Held* : the representation was made with a view to induce the purchasers to enter into the contract & must be treated as continuing until the contract was signed, & it was the duty of the vendor to

communicate the change of circumstances to the purchasers.—*WITH v. O'FLANAGAN*, [1936] Ch. 575; [1936] 1 All E. R. 727; 105 L. J. Ch. 247; 154 L. T. 634; 80 Sol. Jo. 285, C. A.

234. *Add. Annotation:—Consd. With v. O'Flanagan*, [1936] Ch. 575.
- 293a. —.]—Pltf. firm financed for debts. the hire-purchase of motor cars, the purchaser of the car paying one-third of the price, & pltf. firm the other two-thirds, less an agreed commission. The hire-purchase agreement was then entered into between pltf. firm & the purchaser. It was a stipulation of the agreement between pltf. firm & debts. that the purchaser should pay not less than one-third of the purchase price as a deposit, & in the present action fraud was alleged against debts. by reason of the fact that they (a) in some cases had allowed a discount to the purchaser which was set off against the initial deposit, (b) in other cases had effected the same result by buying from the purchaser a used car at a price greater than its value, & (c) in other cases had caused pltf. firm to enter into such hire-purchase agreements purporting to be in respect of new cars, when they had in fact allowed the purchaser to use the car for such a period that its value was so depreciated that it was not a proper security for the balance of the purchase-price:—*Held*: the intention to deceive is not necessarily an intention to injure or to cheat, & if debts. made to pltf. firm a statement as to price & deposit which they knew to be untrue,

**PART IV. SECT. 1, SUB-SECT. 2.—**  
**B. (a).**

- 178 il. —.]—MACFARLANE v.  
DAVIS (Sask.) (1911), 18 W. L. R. 498.  
—CAN.

**sd.—Pleading.]**—Where a declaration alleged that representations were made by deft. falsely & fraudulently, to induce plft. to act upon them, but did not contain any allegation that deft. knew the representations so made by him to be false :—**Held :** the declaration was sufficient. —**McKAY v. CAMPBELL** (1871), 8 N. S. R. (2 G. & O.) 475.—**CAN.**

so. —. —.]—The declaration alleged that deft. before the committing of the grievance, etc., was a carrier & express agent; that pltf. delivered to one W. a sum of money to be handed to deft., to be carried & delivered to S., & that deft. falsely & fraudulently represented to pltf. that W. had delivered said money to him, whereby pltf. was satisfied of the fact, whereas in truth it had not been so delivered, but appropriated by W. to his own use; & by reason of such false & fraudulent representation W. obtained time to & did abscond, & pltf. lost said money, which he would otherwise have re-

covered from W.:—*Held*: it was unnecessary to allege that deft. knew the representations to be false, the words falsely & fraudulently being equivalent to knowingly.—*YOUNG v. VICKERS* (1872), 32 U. C. R. 385.—*CAN.*

**PART IV. SECT. 1, SUB-SECT. 5.—**  
**B. (a).**

249 *l. Effect of mere negligence.*—A negligent statement does not give any cause of action. It must be a fraudulent misrepresentation. — *OLARK v. BANK OF NOVA SCOTIA*, [1983] 3 D. L. R. 287; 5 M. P. R. 415.—CAN.

& did so with a view to pltf. firm entering into a purchase, there was a sufficient basis for an action of deceit, provided always that pltf. firm relied upon the statement. The damages could not be modified upon any assumption that pltf., had they known the facts, would have entered into some modified contract with the purchasers, & so have lost money in any event. In all of the three

classes of misrepresentation pltf. was entitled to succeed.—UNITED MOTOR FINANCE CO. v. ADDISON & Co., LTD., [1937] 1 All E. R. 425, P. C.

325. *Add. Annotation*:—*Refd. Trading Co. L. & J. Hoff v. De Rougemont* (1928), 34 Com. Cas. 291.

328. *Add. Annotation*:—*Refd. Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380.

## Part V.—Inducement, Materiality, and Alteration of Position.

396. *Add. Annotation*:—*As to* (2) *Apld. Clark v. Urquhart, Stracey v. Urquhart* (1929), 141 L. T. 641.

417. *Add. Annotation*:—*As to* (2) *Consd. Bellotti v. Chequers Developments, Ltd.*, [1936] 1 All E. R. 89.

432. *Add. Annotation*:—*Refd. Collins v. Associated Greyhound Racecourses, Ltd.*, [1930] 1 Ch. 1.

434a. —.]—*HUTCHINSON v. MORLEY* (1839), 2 Arn. 2; 7 Scott, 341; 3 Jur. 288.

439. *Add. Annotation*:—*Refd. Lake v. Simmons*, [1927] A. C. 487.

445a. —.]—Pltf. desired to be present at the first performance of a play at a theatre. He knew that, in consequence of his having made certain serious & unfounded charges against some members of the theatre staff, an application for a ticket in his own name would be refused. He therefore obtained a ticket through the agency of a friend, who bought the ticket at the theatre without disclosing that it was for pltf. By order of deft., the managing director of the theatre,

pltf. was refused admission to the theatre on the night in question. Pltf. claimed damages from deft. for maliciously procuring the proprietors of the theatre to break a contract for the admission of pltf. to the theatre, alleged to have been made by them with pltf. by the sale of the ticket:—*Held*: the non-disclosure of the fact that the ticket was bought for pltf. prevented the sale of the ticket from constituting a contract as alleged, the identity of pltf. being in the circumstances a material element in the formation of the contract, & the action failed.—*SAID v. BUTT*, [1920] 3 K. B. 497; 90 L. J. K. B. 239; 124 L. T. 413; 36 T. L. R. 762.

*Annotations*:—*Consd. Dyster v. Randall*, [1926] Ch. 932. *Apld. Scammell v. Hurley*, [1929] 1 K. B. 419. *Refd. A.G. v. Walkergate Press, Ltd. Same v. Bloomfield, Same v. Carlton* (1930), 142 L. T. 408.

454. *Add. Annotation*:—*Refd. South London Greyhound Racecourses, Ltd. v. Wake*, [1931] 1 Ch. 496.

455. *Add. Annotations*:—*Consd. Haseldine v. Hosken*, [1933] 1 K. B. 822. *Refd. James v. British General Insee.*, [1927] 2 K. B. 311.

### PART IV. SECT. 1, SUB-SECT. 8.—A.

300 III. —.]—*ELLIOTT v. DALGETY & Co., LTD.*, [1929] Argus L. R. 201; [1929] S. R. (Q). 253.—AUS.

### PART IV. SECT. 1, SUB-SECT. 8.—C.

d I. —.]—*Conversation with third party.*—*FITZPATRICK v. MICHEL* (1928), 28 S. R. N. S. W. 285; 45 N. S. W. W. N. 69.—AUS.

### PART V. SECT. 1, SUB-SECT. 1.

337 v. —.]—*CANADIAN BANK OF COMMERCE v. DISTRICT REGISTRAR OF WINNIPEG*, [1929] 4 D. L. R. 318; 2 W. W. R. 487; 38 Man. L. R. 275; *aff.*, [1928] 3 W. W. R. 630.—CAN.

337 vi. —.]—Since in an action for deceit pltf. cannot succeed without proof of deft.'s fraudulent intent, deft.'s state of mind is of the essence of the case; & the inference as to what his state of mind was is one which the jury must make for itself from the facts given in evidence.—*MCLEOD v. HUGHES*, [1930] 1 W. W. R. 835; 2 D. L. R. 937; 24 Alta. L. R. 427.—CAN.

337 vii. —.]—A claim for damages for misrepresentation inducing the making of a contract cannot be sustained in the absence of proof of a fraudulent intent.—*WHITNEY v. MACLEAN*, [1932] 1 W. W. R. 417; 26 Alta. L. R. 209.—CAN.

337 viii. —.]—Misrepresentation by a husband to his wife as to the effect of an assignment of her property does not affect the assignee who was not party to the misrepresentation, although this resulted in a loan to the husband by the assignee on the security of the wife's property.—*DAVISON v. DOUGLAS*, [1935] 1 D. L. R. 176; *on appeal*, [1935] 3 D. L. R. 456; 9 M. P. R. 485.—CAN.

sg. *Inducement to perform binding contract.*—For one party to a binding contract to induce another to perform it by representations of fact false to his knowledge is not actionable as deceit.—*AUSTRALASIAN BROKERAGE, LTD. v. AUSTRALIAN & NEW ZEALAND BANKING CORPN., LTD.* (1935), 52 C. L. R. 430.—AUS.

### PART V. SECT. 1, SUB-SECT. 6.—C. (a).

428 i. *Admission that inducement not relied on.*—S. purchased certain farming land from the C. Co. S. brought an action against the co. & H. its managing director jointly, claiming damages incurred by him as a result of being induced to purchase the land by reason of the fraudulent representations made to him by the co. & H. The jury returned a verdict in favour of S. In cross-examination S. admitted that he had had experience as

a dairy farmer in other parts of the State, & that he went over the land in question before purchasing it & had used his own judgment in what he saw:—*Held*: the jury were not bound to interpret the admission made by S. as being that he had relied exclusively on his own judgment, but might accept it as meaning that he applied his own judgment to the facts presented to him by his own observations & by the information he derived from defts.—*SAGAR v. CLOSER SETTLEMENT, LTD.* (1929), 29 S. R. N. S. W. 199; 46 N. S. W. W. N. 79.—AUS.

### PART V. SECT. 3.

af. *Representation relating to restrictive covenant.*—Where a person entitled to the benefit of a restrictive covenant has made a positive representation to another person, that the covenant will not be enforced as against him, & has thereby induced the other person to alter his position for the worse, so that it would be unjust to ask a ct. of equity to compel the performance of the covenant by injunction, the representation raises an equity which debars a claim for equitable relief in respect of the covenant.—*GREATER SYDNEY DEVELOPMENT ASSOCN., LTD. v. RIVETT* (1929), 29 S. R. N. S. W. 356; 46 N. S. W. W. N. 99.—AUS.

## Part VI.—Who are deemed Parties to the Representation.

464. *Add. Annotations* :—*Consd. McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. *Refd. Konskier v. Goodman*, [1928] 1

K. B. 421; *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.

## Part VII.—Remedies for Misrepresentation.

SUB-SECT. 3.—INJUNCTION (Vol. XXXV., p. 52).

For "Passing off action."]—*See TRADE & TRADE UNIONS* "read "Passing off action."]—*See TRADE MARKS*, Vol. XLIII., pp. 264 *et seq.*"

474. *Add. Annotations* :—*Consd. Bottomley v. Bannister*, [1932] 1 K. B. 458; *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. *Refd. Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.

479. *Add. Annotation* :—*Refd. Otto v. Bolton & Norris*, [1936] 1 All E. R. 960.

486. *Add. Annotations* :—*Consd. Sullivan v. Constable* (1932), 48 T. L. R. 287. *Refd. Cruse v. Mount* (1932), 102 L. J. Ch. 74; *Otto v. Bolton & Norris*, [1936] 1 All E. R. 960; *Terrene, Ltd. v. Nelson*, [1937] 3 All E. R. 739.

493. *Add. Annotations* :—*Refd. Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258; *Terrene, Ltd. v. Nelson*, [1937] 3 All E. R. 739.

509. *Add. Annotations* :—*Refd. Houghton v. Nott, Lowe & Wills* (1927), 44 T. L. R. 76; *Ariff v. Rai Jadunath Majumdar Bahadur* (1931), 47 T. L. R. 238.

510a. —. —.]—A testator by his will & codicil appointed W., B. & H. trustees & directed the income of his residuary estate to be paid to his son H. S. for life & after the death of H. S. his wife was to receive an annuity out of residue during widowhood & thereafter a similar annuity was to be paid to the daughter of H. S. Upon the death of the daughter the residue was to go to her children as she should appoint, & in default of children there was a gift over to a named charity. The trustees had power to retain investments existing at the date of the testator's death; & the number of the trustees was not to fall below three. At the death of testator there were living H. S., the wife of H. S., & their daughter who was married & had two children living. Testator's residuary estate consisted of shares in two brick-making cos., both of which were well managed & paid an extremely high rate of dividend, but which held their brickfields upon leases expiring in 1950, &

the shares were therefore wasting securities. After H. S. had enjoyed the income of the two cos. for 10 years, it occurred to the trustees that something should be done to protect the interests of the remaindermen; & they accordingly proposed to H. S. that they should either sell the shares in the cos. & invest the proceeds in trustee securities, or that they should create a sinking fund out of the income of H. S. In reply to this, H. S. offered to settle £40,000 (his wife consenting) on his daughter & her children, the interests of the daughter & the grandchildren not to take effect until his death. This offer was accepted by the trustees. The settlement, however, was not made. H. (one of the trustees) then died, & H. S. wanted to be appointed in his place. Shortly afterwards W., another trustee, died. H. S. wrote to the sole remaining trustee, B., saying that the draft deed to settle the £40,000 had been prepared & was only awaiting the appointment of two new trustees. Relying on this letter B. appointed H. S. & the latter's friend Q. as trustees. H. S. then died, & it appeared that no settlement had been made or even prepared. H. S. had a private fortune of £120,000, which he left by his will wholly to his mistress & their two illegitimate children. The trustee B. then brought this action against the exors. of H. S., claiming specific performance of the promise to make a settlement. It was contended that (a) this action could not be brought by B., but only by the trustees of the will as a body; (b) there was no consideration moving from the daughter & her children to H. S.; (c) the contract could not be enforced, as the appointment of H. S. as a trustee of the will was a breach of trust:—*Held*: (1) B. & W. had been contracting for a benefit to the daughter & her children, not in the capacity as beneficiaries under the will, but for a benefit for them entirely outside the will; (2) the consideration was the withdrawal of a valid objection to H. S. as trustee; (3) the appointment of a tenant for life as trustee was not a breach of trust. If it were, specific performance should be decreed, because a contract involving an innocent breach of trust is enforceable; (4) H. S. by his conduct

### PART VI. SECT. 2, SUB-SECT. 3.

457 II. —. —.]—If A. causes B. to get C., a stranger, to transfer his property to A., which both A. & B. believe to be for their own advantage, & B. induces C. to do so by fraudulent misrepresentation, A. is not in equity a holder in good faith & is in no better position than B.—*ORCHARDSON v. DOMINION BANK*, [1923] 2 W. W. R. 958.—CAN.

### PART VII. SECT. 1.

468 I. *Damages & rescission alternative*—*Except as to damages due to partial execution of contract.*—A party to a contract entitled to have it declared rescinded on the ground of fraudulent misrepresentations may, in addition to rescission, obtain judgment for damages for any loss incurred by him owing to his partial execution of it. The rule that a party who has been led into a contract by fraud cannot

both repudiate the contract & recover damages contemplates those damages which are given for breach of contract & which, therefore, are incompatible with repudiation.—*HILL v. STEPHEN MOTOR & AERO CO., LTD.*, [1929] 3 D. L. R. 676; 2 W. W. R. 97; 23 S. L. R. 552; *revers.*, [1929] 2 D. L. R. 556.—CAN.

468 II. —. —.]—*MORGAN v. HUDSON BAY MINING & SMELTING CO.*, [1930] 2 D. L. R. 587.—CAN.



had made himself trustee of £40,000 for the benefit of his daughter & her children & there should be a declaration that his exors. held £40,000 with interest at 4 per cent. from

the date of the death of H. S. for the benefit of his daughter & her children.—*BRIGGS v. PARSLOE*, [1937] 3 All E. R. 831; 81 Sol. Jo. 702.

## Part IX.—Proceedings for Rescission.

634. *Add. Annotation*:—*Refd. Lynn v. Bamber*, [1930] 2 K. B. 72.

645. *Add. Annotation*:—*As to* (3) *Refd. Lynn v. Bamber*, [1930] 2 K. B. 72.

649. *Add. Annotation*:—*Refd. Public Trustee v. Lancaster Duchy*, [1927] 1 K. B. 516.

673. *Add. Annotation*:—*Consd. Delavenne v. Broadhurst* (1930), 70 L. Jo. 355.

682. *Add. Annotation*:—*Refd. Blay v. Pollard & Morris*, [1930] 1 K. B. 628.

686. *Add. Annotation*:—*Refd. Blay v. Pollard & Morris*, [1930] 1 K. B. 628.

**PART VIII. SECT. 1, SUB-SECT. 2.—A.**  
531 *iv.* ———.—*IRVING v. MERYGOLD* (1847), 5 U. C. R. 272.—**CAN.**

531 *v.* ———.—*ADAIR v. TILTON*, [1928] 4 D. L. R. 183; [1928] 3 W. W. R. 92.—**CAN.**

**PART VIII. SECT. 1, SUB-SECT. 2.—B.**

543 *i.* *General rule*.—*Proof of damage necessary*.—In order to establish a cause of action for deceit *pltf.* must not only allege but also prove that he suffered actual damage in consequence of *deft.*'s false representation.—*CALGARY HERALD, LTD. v. BARNES CORPN.*, [1929] 1 D. L. R. 992; 1 W. W. R. 428; 24 Alta. L. R. 120; *revers.*, [1929] 1 D. L. R. 114; [1928] 3 W. W. R. 543.—**CAN.**

**PART VIII. SECT. 1, SUB-SECT. 2.—C.**

549 *v.* ———.—In an action of deceit:—*Held*: the co. whose bonds *pltf.* had been induced by *deft.* *applt.* to buy was not, as represented by *applt.*, "an established industry making money," & since *applt.* knew it was not & *pltf.* was induced by said representation into making the purchase, he was entitled to damages.—*FERGUSON v. NORTHWEST BRICK & SUPPLY CO., LTD.*, [1931] 1 W. W. R. 543; [1931] 2 D. L. R. 275; 25 Alta. L. R. 198.—**CAN.**

**PART VIII. SECT. 1, SUB-SECT. 3.**

559 *ii.* ———.—*To prove prima facie case*.—*CHURCH v. JONES* (1935), 5 F. L. J. (Can.) 180.—**CAN.**

**PART VIII. SECT. 1, SUB-SECT. 5.—A.**

55. *Misrepresentation as to number of sheep*.—*Date of ascertaining number for assessment of damages*.—On a claim for damages for fraudulent misrepresentation, it was found that in order to induce *pltf.* to enter into an agreement on Aug. 15, 1928, *deft.* fraudulently represented that, in his opinion, there were 7,000 ewes of the value of 25s. each depasturing on a certain property. A muster made on Sept. 18, 1928, showed that there were 4,050 ewes then on the property:—*Held*: in assessing the amount of damages, Aug. 15 & not Sept. 18 was the date on which the number & value of the ewes should be ascertained.—*GERAGHTY v. RIDGE*, [1929] S. R. (Q.) 205.—**AUS.**

**PART VIII. SECT. 1, SUB-SECT. 5.—B.**

572 *i.* *Damage must be natural result of representation*.—*GOSSE-MILLERD, LTD. v. DEVINE*, [1928] 2 D. L. R. 869; [1928] S. C. R. 101.—**CAN.**

**PART VIII. SECT. 1, SUB-SECT. 5.—C.**

583 *iii.* ———.—*BLOIS v. CITY OF HALIFAX* (1921), 54 N. S. R. 207; 56 D. L. R. 239.—**CAN.**

583 *iv.* ———.—*JENSEN v. LEACH*, [1931] 2 W. W. R. 815.—**CAN.**

**PART VIII. SECT. 1, SUB-SECT. 5.—D.**

588 *viii.* ———.—In an action for damages for deceit, *pltf.* alleged false representations by *deft.* in regard to land in B. C. which *deft.* had conveyed to *pltf.* in exchange for land in A.:—*Held*: *deft.* made no knowingly false representations as to the situation of the western boundary of the land, or as to the amount of timber upon the land; but *deft.* did represent to *pltf.* that there were two springs upon the land, which was not the truth, as he knew, & that this misrepresentation was material, was relied upon by *pltf.*, & constituted fraud & deceit which rendered *deft.* liable in damages. The true measure of damages was the difference between the value of the land, without the springs & its value assuming the springs to be on it as represented.—*PERRY v. DOWNS* (1913), 24 W. L. R. 407; 11 D. L. R. 670.—**CAN.**

593 *i.* *Date of ascertainment of value*.—*Date of purchase*.—*HARDMAN v. MCLEOD* (1926), 26 S. R. N. S. W. 578; 43 N. S. W. W. N. 194.—**AUS.**

**PART IX. SECT. 1, SUB-SECT. 1.**

616 *viii.* ———.—An action for the rescission of an executory contract for the sale of land will lie on the ground of a material innocent misrepresentation inducing the contract, & in such action it is not necessary for *pltf.* to establish that the misrepresentation is such as to go to the root of the consideration, the test of materiality being the same as that applicable where it is sought to set aside a contract on the ground of fraud.—*WILSON v. BRISBANE CITY COUNCIL*, [1931] S. R. (Q.) 360.—**AUS.**

616 *ix.* ———.—*Rescission* will be granted on sale of a business based on a representation that the monthly turnover is twice as large as it really is.—*CARTER v. GOLLAND*, [1937] 4 D. L. R. 513; O. R. 881.—**CAN.**

616 *x.* ———.—*Pltf.* was the administratrix of the estate of her deceased husband. The only asset of the estate was a quarter section of land which had been sold under an agreement for sale to P. *Deft.*, who had seen the newspaper notice to creditors to file their claims, prepared but did not complete the declaration as to his claim, but instead drafted an assignment or order by *pltf.* on P. & took it to the home of *pltf.* where he told her that her husband owed him \$200 & that they would both save legal expenses if she signed it. She declined to sign until he told her she had to sign it, when she did so. He took the order to P. who accepted it. *Pltf.* sued to have the order set aside on the ground of fraud.

*Pltf.*, who was illiterate, swore that her only reason for signing was that *deft.* told her she had to do so. *TAYLOR, J.*, handed down a short fiat which stated, "I find on the facts for *pltf.*" *Deft.* appealed:—*Held*: the ct. must, under the circumstances, assume that every fact necessary to support the judgment had been found in favour of *pltf.*; there was, therefore, ample evidence to support the trial judge's conclusion, & the appeal must be dismissed.—*ZAJACHOWSKI v. WOREBETZ*, [1938] 2 W. W. R. 575.—**CAN.**

**PART IX. SECT. 1, SUB-SECT. 2.—B.**

639 *ii.* ———.—Where a party to a contract seeks to vitiate it for fraud he is under the burden of pleading & establishing facts sufficient for that purpose. The burden of proof cannot be shifted until he has established a *prima facie* case.—*LABBY v. JOHNSON & SIGMETH*, [1928] 4 D. L. R. 556; [1928] 3 W. W. R. 447.—**CAN.**

**PART IX. SECT. 1, SUB-SECT. 2.—C.**

642 *iv.* ———.—*WHEELER v. ATKINSON* (1926), 28 W. A. L. R. 12.—**AUS.**

**PART IX. SECT. 1, SUB-SECT. 2.—D.**

648 *i.* *Whether ground for dismissing entire action*.—Where a statement of claim which alleges fraud also alleges other facts sufficient, if proved, to entitle *pltf.* to judgment although no fraud is proved, the failure to prove fraud does not prevent *pltf.* from recovering.—*MACLEAN v. REIDRUG, LTD.*, [1932] 1 W. W. R. 223.—**CAN.**

**PART IX. SECT. 1, SUB-SECT. 3.—A.**

5d. *Sale of assets & goodwill*.—*Misrepresentation that trade mark registered*.—*Deft.*, managing director & chief owner in *deft.* co. entered into an agreement for sale of the assets & goodwill of the co. to *pltf.*, including a secret formula & trade mark which *deft.* represented as duly registered:—*Held*: the statement that a trade mark was registered when it was not is a material misrepresentation upon which rescission of a contract will be ordered.—*SCAETS & MURRAY v. YOUNG* (1930), 43 B. C. R. 321.—**CAN.**

**PART IX. SECT. 1, SUB-SECT. 3.—E.**

687 *vi.* ———.—A party to a contract, as soon as he has knowledge of any fraud or false representations, must decide at once either to continue to carry out the contract or take immediate steps to repudiate it. If he continues to carry out the contract, he cannot later, on the ground of such fraud or false representations, ask for payment on a basis different from that provided for in the contract or on *quantum meruit* or as damages arising from the fraud or misrepresentations.—*NOVA SCOTIA CONSTRUCTION CO.*,

695. *Add. Annotations* :—*Refd. Hyman v. Hyman, Hughes v. Hughes* (1928), 139 L. T. 416; *May v. May* (1929), 98 L. J. K. B. 770.
725. *Add. Annotation* :—*Refd. Re City Equitable Fire Insurance Co. (2)*, [1930] 2 Ch. 293.
748. *Add. Annotations* :—*Refd. Weld v. Petre* (1928), 97 L. J. Ch. 399; *Lever Bros., Ltd. v. Bell*, [1931] 1 K. B. 557.
751. *Add. Annotation* :—*Refd. Steedman v. Frigidaire Corp., [1932] W. N. 248.*
- 751a. ———.]—A party to a contract is not entitled to rescind it on the ground of bribery when he is not in a position to offer *restitutio in integrum*, but he can recover damages in respect of the giving of the secret commission.—*STEEDMAN v. FRIGIDAIRE CORPN.*, [1932] W. N. 248; 74 L. Jo. 405, P. C.
755. *Add. Annotation* :—*Refd. Lever Bros., Ltd. v. Bell*, [1931] 1 K. B. 557.

## Part X.—Misrepresentation as a Defence.

773. *Add. Annotation* :—*Consd. Alexander v. Rayson*, [1936] 1 K. B. 169.
774. *Add. Annotation* :—*Refd. Re Wait*, [1927] 1 Ch. 606.

## Part XI.—Effect of Fraud on Innocent Parties.

782. *Add. Annotations* :—*Refd. Re Lloyds Bank, Ltd., Bomze v. Bomze* (1930), 47 T. L. R. 38; *Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380.
794. *Add. Annotation* :—*Refd. Slingsby v. District Bank, Ltd.* (1931), 48 T. L. R. 114.

LTD. v. QUEBEC STREAMS COMMISSION & ROYAL BANK OF CANADA, [1933] S. C. R. 220; 2 D. L. R. 593.—CAN.

### PART IX. SECT. 2, SUB-SECT. 1.

703 v. ———.]—CANADIAN CREDIT MEN'S TRUST ASS'N. v. BUNGALOW CONSTRUCTION CO., [1928] 2 D. L. R. 84.—CAN.

703 vi. ———.]—Right to rescission for unilateral misrepresentation depends on being in position to offer *restitutio in integrum*.—DOMINION ROYALTY CORPN., LTD. v. GOFFATT, [1935] 1 D. L. R. 780; O. R. 189; *affd.*, [1935] S. C. R. 565; 4 D. L. R. 736; 5 F. L. J. (Can.) 179.—CAN.

### PART IX. SECT. 2, SUB-SECT. 4.—A.

708 i. *When ordered.*—HESS v. ROSS (Sask.) (1912), 22 W. L. R. 742; 3 W. W. R. 251; 8 D. L. R. 798.—CAN.

### PART IX. SECT. 2, SUB-SECT. 5.—C.

722 i. *General rule.*—KLEYNHAUS BROTHERS v. WESSELS' TRUSTEE, [1927] App. D. 271.—S. AF.

### PART IX. SECT. 3, SUB-SECT. 6.

742 ii. ———.]—CARRIQUE v. CATTS (1914), 7 O. W. N. 500; 32 O. L. R. 548.—CAN.

742 iii. ———.]—MORIN v. ANGER, [1931] 1 D. L. R. 827; 66 O. L. R. 327.—CAN.

742 iv. ———.]—WEYERMAN v. FAGEOL MOTOR SALES CO., [1931] 2 D. L. R. 817.—CAN.

### PART IX. SECT. 3, SUB-SECT. 9.

757 vii. ———.]—In proceedings for curial rescission of a contract to take shares, the shareholder's claim for rescission may be barred by laches or delay on the ground that equity will not lend its aid to those who sleep on their rights.—*Re LUCKS, LTD. (SERPELL'S CASE)*, [1928] V. L. R. 466; [1928] ARGUS L. R. 288.—AUS.

757 viii. ———.]—CAHILL v. NICHOLLS, [1929] 1 D. L. R. 239.—CAN.

### PART X. SECT. 1.

*sp. Although no claim for rescission.*

—TRUSTS & GUARANTEE CO. v. SCHOOLEY, [1932] 3 D. L. R. 789.—CAN.

### PART X. SECT. 3, SUB-SECT. 1.

773 ii. ———.]—A doctor sold his practice for £500. The purchaser paid two instalments of the price, but, when sued for the balance of the price, he stated in defence that he had been induced to enter into the contract by the false & fraudulent misrepresentations of the seller:—*Held*: the purchaser's claim of damages, being illiquid, & based not upon the contract of sale but upon delict, could not constitute a relevant defence to the action, & could not be dealt with as a counterclaim in that action.—*SMART v. WILKINSON*, [1928] S. C. 383.—SCOT.

### PART XI.

*fi. S. P. RUTLEDGE v. ANDERSON* (1914), 27 W. L. R. 75; *affd.* (1915), 28 W. L. R. 393; 20 D. L. R. 97; 24 Man. L. R. 403.—CAN.

## MISTAKE.

## Part I.—Nature of Mistake.

5. *Add. Annotation* :—*Refd.* Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding Urban District Council, [1937] 3 All E. R. 335.

## Part II.—Mistake of Law.

17. *Add. Annotation* :—*Folld.* Jervis v. Howle, [1936] 3 All E. R. 193.
- 17a. —. —.]—Pltf. & the first deft. verbally agreed that the first deft. should take a lease of pltf.'s coal mine & pay pltf. a royalty of threepence per ton free of tax on all coal sold. The terms of this agreement were set out in a memorandum signed by pltf. containing the words "free of tax" in pltf.'s writing. The lease provided that the first deft. should pay the rent therein mentioned & the royalty free of tax. He carried out both provisions until he assigned the lease to deft. co., & he did not pay the income tax on the royalty. The co. continued to pay the royalty free of tax, & also not to pay the income tax thereon, until the Inland Revenue authorities demanded it. It was then paid to date, & the co. deducted the whole of it from the current instalment of royalty, & claimed to be entitled to deduct it rateably from future instalments, on the ground that the provision in the lease for the payment of royalty free of tax was in contravention of the Income Tax Acts. On a claim by pltf. for rectification of the lease by substituting for the provision for the payment of the royalty of threepence free of tax a provision for the payment of a royalty of such an amount as after the deduction of income tax of the standard rate from time to time should leave threepence :—*Held* : that there was "strong irrefragable evidence" of the parties' intention on executing the lease, & it must be rectified in accordance with pltf.'s claim.—*JERVIS v. HOWLE & TALKE COLLIERY CO., LTD.*, [1937] Ch. 67; [1936] 3 All E. R. 193; 106 L. J. Ch. 34; 155 L. T. 572; 80 Sol. Jo. 875.
- Annotation* :—*Refd.* Noel v. Trust & Agency Co. of Australasia, Ltd., [1937] Ch. 438.
27. *Add. Annotations* :—*As to* (1) *Refd.* Bell v. Lever Bros., Ltd. (1931), 146 L. T. 258. *As to* (2) *Consd.* Robert A. Munro & Co. v. Meyer, [1930] 2 K. B. 312; Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding Urban District Council, [1937] 3 All E. R. 335. *Refd.* Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd., [1934] A. C. 455.
31. *Add. Annotation* :—*Refd.* Blay v. Pollard & Morris, [1930] 1 K. B. 628.
34. *Add. Citation* :—*previous proceedings, sub nom.* AINSWORTH v. WILDING, [1896] 1 Ch. 673.
- Add. Annotation* :—*Generally*, *Refd.* Kinch v. Walcott, [1929] A. C. 482.
- 34a. —. —.]—There is no authority for the proposition that if two parties enter into what is on the face of it a binding contract, in ignorance of their legal rights, each believing the other to be legally bound to enter into such a contract when he is in fact not so bound, the contract so entered into is not enforceable. To hold otherwise would be to decide that a common mistake of law vitiated a contract.
- On Feb. 1, 1935, pltf. co. by a formal contract in writing agreed with deft. K. that pltf. co. should have the exclusive right to the services of K. & his band for the purposes of making gramophone records for twelve months. The terms & conditions were set out in the contract. Clause 1 of the contract was in the same terms as those of clause 1 of the contract of Mar. 15, 1934, except that the inapt word "hereinafter" was omitted. When making the contract both K. & the representative of pltf. co. thought that they were legally bound to do so by the terms of clause 1 of the contract of Mar. 15, 1934 :—*Held* : the contract was enforceable.—*BRITISH HOMOPHONE, LTD. v. KUNZ & CRYSTALLATE GRAMOPHONE RECORD MANUFACTURING CO., LTD.* (1935), 152 L. T. 589.
- 36a. —. —.]—*Payment of tax.*—The suppliant co. paid betting duty under Finance Act, 1926 (c. 22), s. 15, in respect of a totalisator, & afterwards the House of Lords, in a precisely similar case, held that betting duty was not payable. The suppliant co. then presented a petition of right claiming the return of the amount of the duty on the ground that it had been paid under a mistake of fact :—*Held* : the suppliants' mistake as to their liability to the duty was a mistake of law & not of fact, & therefore they could not recover.—*NATIONAL PARI-MUTUEL ASSOCN., LTD. v. R.* (1930), 47 T. L. R. 110, C. A.

## PART II. SECT. 2, SUB-SECT. 1.

11 v. —.]—*Held* : even if the money had been paid under a mistake of law, it could not be recovered back.—*CAULFIELD v. ARNOLD* (No. 3), [1925] 1 D. L. R. 298; 34 B. C. R. 398.—*CAN.*

11 vi. —.]—Where a licence fee is demanded by a municipality under a claim of right, without fraud or imposition, & the person of whom it is demanded knows that it is demanded

only by reason of a certain bye-law, & chooses to yield to the demand rather than contest it, the payment is regarded as a voluntary one & the money cannot be recovered back even if the bye-law was *ultra vires*.—*COLWOOD PARK ASSOCN., LTD. v. OAK BAY CORPN.*, [1928] 3 D. L. R. 812; [1928] 2 W. W. R. 593.—*CAN.*

## PART II. SECT. 2, SUB-SECT. 2.

a i. —. —.]—*Payment of tax.*—Money

paid voluntarily to a municipal corporation under a claim of right, without fraud or imposition, for a tax or licence cannot, without statutory aid, be recovered back, even though such tax or licence could not have been legally demanded or enforced.—*FOWLER & ANDREWS v. SPALLUMCHEN TOWNSHIP*, [1930] 3 W. W. R. 12; 53 B. C. R. 47.—*CAN.*

## Part III.—Mistake of Fact.

**58a.** —.]—The L. Co., who held more than 99 per cent. of the share capital of N. Co., agreed with one B. that he should be in the service of L. Co. for a term of years, during which he should act as chairman of the board of directors of N. Co. at a salary of £8,000 a year. They made a similar agreement with one S. that he should be vice-chairman of the board at a salary of £6,000 a year. While acting as chairman & vice-chairman respectively, B. & S. entered on their own account into secret speculations in cocoa, a commodity in which N. Co. dealt, of such a character as, on the finding of the jury in answer to a specific question, would have justified the L. Co. in terminating their agreements of service & N. Co. in dismissing them from their offices of chairman & vice-chairman. Subsequently N. Co. became amalgamated with another co., & it became necessary to cancel the appointments of B. & S. as chairman & vice-chairman. Being unaware of the aforesaid breaches of duty by B. & S., L. Co. agreed to pay to B. £30,000 & to S. £20,000 as compensation for terminating their services; B. & S. agreed to accept these sums, & they were duly paid. The jury, in answer to a further specific question, found that the L. Co. if they had been aware of the breaches of duty by B. & S. would have terminated their agreements, & B. & S. would have been dismissed from their offices without any compensation. The action in which the jury so found was brought in the first instance by the L. Co. alone, N. Co. being joined in the course of the proceedings as co-pltfs., against B. & S., claiming rescission of the compensation agreements & repayment of sums paid thereunder on the ground of fraudulent misrepresentation, & alternatively, as the House

construed the points of claim, on the ground of unilateral mistake induced by fraud, but not on any ground of mutual mistake innocently made by the defts. so far as they were concerned. There was a specific alternative claim that the agreements of settlement & the payments under them were made under a mistake of fact. The jury negated the charges of fraud, & found that at the time of negotiating the compensation agreements B. & S. had not in mind their breaches of duty:—*Held*: the action failed; as to mutual mistake, on the ground that the mutual mistake related not to the subject-matter, but to the quality of the service contracts.—*BELL v. LEVER BROS., LTD.*, [1932] A. C. 161; 101 L. J. K. B. 129; 146 L. T. 258; 48 T. L. R. 133; 76 Sol. Jo. 50; 37 Com. Cas. 98, H. L.; *reversing* S. C. *sub nom.* *LEVER BROS., LTD. v. BELL*, [1931] 1 K. B. 557, C. A.

*Annotation*:—*Refd.* *Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.*, [1934] A. C. 455.

**64.** *Add. Citations*:—96 L. J. K. B. 621; 137 L. T. 233; 43 T. L. R. 417; 33 Com. Cas. 16, H. L.

**65.** *Add. Annotation*:—*Refd.* *Greer v. Downs Supply Co.*, [1927] 2 K. B. 28.

**66.** *Add. Annotation*:—*Consd.* *Greer v. Downs Supply Co.*, [1927] 2 K. B. 28.

**71.** *Add. Annotation*:—*Refd.* *Lake v. Simmons*, [1927] A. C. 487.

**72.** *Add. Annotations*:—*Consd.* *London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd.*, [1934] 2 K. B. 206. *Refd.* *Greer v. Downs Supply Co.*, [1927] 2 K. B. 28.

**75.** After this case add "*See, also, MISREPRESENTATION & FRAUD, No. 445a.*"

## PART III. SECT. 2, SUB-SECT. 2.

**53 II.** —.]—Deft. as purchaser signed a contract of sale & purchase of a piece of land, which, in her ignorance, she believed was a contract for the purchase of an option to purchase the land. Deft., however, pleaded that she informed pltf.'s agent that she desired an option only, & that later the agent saw her & said that he had seen pltf. & "fixed it up." She alleged that the contract which was signed was put forward & signed in the belief that it gave effect to an agreement for an option only. The jury found that such belief was not induced by the representations of pltf.'s agent:—*Held*: as deft. had herself misconstrued the document she was bound by the contract, & as she had charged fraud & failed, she should not succeed on another ground.—*BURROWS v. WINTER* (1931), 24 Tas. L. R. 45.—*AUS.*

**54 II.** —.]—*Status of individual*.—Pltf. a sharemilker under agreement with deft. D., met with an accident of which due notice was given & deft. co., D.'s insurer, admitted liability. Some nineteen months after the accident a doctor was able to pronounce that pltf. had suffered a 50 per cent. permanent disability. The co. was then advised that pltf. was not a "worker" within *Workers' Compensation Act, 1922*. Pltf. claimed compensation in the *Arbn. Ct.* on the grounds (1) that pltf. was a "worker" within the Act, & (2) that deft. D., through his insurers, had agreed to

admit liability & to pay compensation. The judgment of that ct. was that pltf. was not a "worker" within the Act & that being so, the ct. had no jurisdiction to enforce the alleged agreement. Pltf. then brought this action for specific performance of the alleged agreement, or, alternatively, for £1,000 damages for breach of contract. On the evidence set out in the judgment:—*Held*: giving judgment for defts. there was no consideration in the ordinary sense for the admission & nothing in the nature of a compromise & the admission was made through a mutual mistake of fundamental fact.—*DAVIDSON v. ATLAS ASSURANCE CO., LTD. & DAYSH*, [1932] N. Z. L. R. 1163; G. L. R. 426.—*N.Z.*

*sa. Ignorance of rights dependent on mixed questions of law & fact*.—*Mistake of title*.—"Belief".—In *K. B. R. 603*, which provides for the relief of a person who makes lasting improvements on the land of another under the belief that it is his own, the words "under the belief that the land is his own" imply a mistake regarding sufficiency of title & not a mistake regarding the boundaries of his own land; & even if the rule covers mistakes as to boundaries, the "belief" must be real, *bond fide* & reasonable, that is, it must be founded on information or assurances such as would guide an ordinarily careful & competent man, & not predicted merely on the absence of information or inquiry, especially where inquiry is suggested by the nature

of the circumstances.—*AUMANN v. MCKENZIE*, [1928] 3 W. W. R. 233.—*CAN.*

## PART III. SECT. 2, SUB-SECT. 3.

*o i.* —.]—*Mistake as to identity of payee—Intention of payor—Question for jury*.—*BUNGE (AUSTRALIA) PTY., LTD. v. YING SING* (1928), 28 S. R. N. S. W. 265; 45 N. S. W. W. N. 60.—*AUS.*

## PART III. SECT. 2, SUB-SECT.

**84 i.** *Unilateral mistake*.—Deft. was offered a house described as "No. 6"; he carelessly went & inspected No. 16 in the same street, & then signed an offer for No. 6 believing it to be the house he had inspected. The mistake was deft.'s & was in no way attributable to pltf. or her agent, neither of whom was made aware of the fact that deft. had made the inspection. Deft. knew he had inspected No. 16, & afterwards signed the offer for No. 6 after reading it. In an action by pltf. for specific performance, or, alternatively, for damages:—*Held*: the case was one of mistake as to the identity of the subject-matter of the contract, but such mistake was purely unilateral, as pltf. was guiltless of such mistake & was unaware until the contract was complete that deft. believed he was buying No. 16. Deft. was accordingly bound by the contract.—*WALLACE v. MCGIRRE*, [1936] N. Z. L. R. 483; G. L. R. 388; 12 N. Z. L. J. 187.—*N. Z.*

85. *Add. Annotation*:—*As to* (2) *Refd.* *Blay v. Pollard & Morris*, [1930] 1 K. B. 628.
86. *Add. Annotation*:—*Refd.* *Chaney v. MacIow*, [1929] 1 Ch. 461.
87. *Add. Citations*:—96 L. J. Ch. 38; 136 L. T. 235.  
*Add. Annotation*:—*Refd.* *Shipley Urban District Council v. Bradford Corpn.*, [1936] Ch. 375.
94. *Add. Annotations*:—*Apld.* *Kennedy v. Thomassen*, [1929] 1 Ch. 426. *Consd.* *Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258.  
*After this case add "See, also, CONTRACT, No. 3081a."*
95. *Add. Annotations*:—*Consd.* *Lever Bros., Ltd. v. Bell* (1931), 146 L. T. 258. *Refd.* *Robert A. Munro & Co. v. Meyer*, [1930] 2 K. B. 312.
100. *Add. Annotations*:—*Consd.* *Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258. *Refd.* *Robert A. Munro & Co. v. Meyer*, [1930] 2 K. B. 312.
101. *Add. Annotations*:—*Refd.* *Lever Bros., Ltd. v. Bell* (1930), 47 T. L. R. 47; *British Homophone, Ltd. v. Kunz & Crystallate Gramophone Record Manufacturing Co.* (1935), 152 L. T. 589.
125. *Add. Annotations*:—*As to* (1) *Consd.* *Blay v. Pollard & Morris*, [1930] 1 K. B. 628. *As to* (3) *Apld.* *London Holeproof Hosiery Co. v. Padmore* (1928), 44 T. L. R. 499. *Consd.* *Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258; *Sullivan v. Constable* (1932), 48 T. L. R. 369.
135. *Add. Annotation*:—*Consd.* *Lever Bros., Ltd. v. Bell* (1930), 47 T. L. R. 47.
137. *Add. Annotation*:—*Refd.* *Clark's Appeal* (1937), 26 Ry. & Can. Tr. Cas. 61.
157. *Add. Annotation*:—*Refd.* *Lawrence v. Cassel*, [1930] 2 K. B. 83.
173. *Add. Annotation*:—*Generally, Refd.* *Home & Colonial Insee. v. London Guarantee & Accident Co.* (1928), 45 T. L. R. 134.
176. *Add. Annotation*:—*Refd.* *Cashin v. Cashin*, [1938] 1 All E. R. 536.

## Part IV.—Mistake in Expression of Intention and Relief Therefor.

203a. —.—.]—P. & M., who had been partners as garage proprietors, agreed to dissolve the partnership as from Mar. 4, 1929, on the terms, as was found, that M. should take over all liabilities of the firm incurred after Mar. 4. P. informed his father, who was a solr., of the dissolution of the partnership, & the father prepared a written agreement to carry it out. By this document M. was made liable to indemnify P. in respect of all rent due before Mar. 4. This agreement was handed to M., who was asked to read it, & he looked through it & signed it, although he said he could not understand it. On a claim by P. to be indemnified in accordance with the written agreement in respect of rent accrued due before Mar. 4, M. pleaded that he signed the agreement under the belief that it embodied the oral agreement of Mar. 4, that it was drawn up under a mutual mistake of fact, & that the only agreement arrived at was that M. should indemnify P.

to the extent agreed upon orally. Fraud was not pleaded, nor was rectification claimed in the pleadings. At the trial the judge found that M. signed the agreement handed to him with practically no consideration of its terms, & that as a stipulation had been inserted therein which he had not orally agreed to, that term could not be relied upon, & accordingly, that the written agreement must be rectified to make it conform to the oral agreement. P. appealed:—*Held*: (1) as M. knew that the agreement which he signed was an agreement for the dissolution of the partnership between him & P., it was not open to him, in the absence of fraud or misrepresentation by P. as to the legal effect of the document, to rely on the plea of *non est factum* merely because if he had carefully read & understood the document he would have objected to one of its terms as not in accordance with the oral agreement; (2) in the absence of any allegation of fraud or

### PART III. SECT. 2, SUB-SECT. 6.—A.

115 II. —.—.]—Where a sale, which was not by order or description, but of a specific chattel known to the buyer, was made on the understanding & in the honest belief that it was inherently a better article than it really was, *e.g.* that it was a new motor car of recent make, whereas it was in fact a used & damaged car of an earlier make, but there was no representation or warranty, & title passed before the parties discovered their mistake, the purchaser was held not to be entitled to rescission or other relief.—*Brook v. Cripps*, [1930] 1 W. W. R. 595; 2 D. L. R. 818.—CAN.

### PART III. SECT. 2, SUB-SECT. 7.

11. —.—.]—*BURKE v. RITCHIE* (1906), *Cont.* 365.—CAN.

### PART III. SECT. 2, SUB-SECT. 8.—A.

1. —.—.]—*ARMSTRONG v. WRIGHT* (1930), 2 M. P. R. 309.—CAN.

11. —.—.]—*TATTIE v. DYKINS* (1930), 2 M. P. R. 118.—CAN.

t i. —.—.]—*Mortgage—Mortgagor insolvent to knowledge of mortgagee.*—A party taking a mtge. from a mtgor. to his knowledge insolvent cannot, on the ground of mutual mistake, rectify his mtge. by including additional land, as against a subsequent mtgee. or trustee in bkpy.—*Re MONKLEY, BANK OF NOVA SCOTIA v. WRIGHT*, [1933] 3 D. L. R. 384; 5 M. P. R. 523.—CAN.

### PART III. SECT. 2, SUB-SECT. 8.—C.

sb. *Assignment of judgment.*—The assignor specifically mentioned two judgments, & the judgment in question was a third judgment owned by the assignor:—*Held*: since at the time of the assignment the assignee did not have said third judgment in mind at all & it was not mentioned, there was no *consensus ad idem* with respect to it, & therefore, the assignment did not

cover it, although the assignor was willing to assign it, & believed he was assigning it.—*RYGUS v. ZAWITKOWSKI & ROSS*, [1928] 1 D. L. R. 521; [1928] 1 W. W. R. 332; 22 Sask. L. R. 305.—CAN.

### PART III. SECT. 2, SUB-SECT. 9.—C.

d i. —.—.]—*STINSON v. MOORE* (1863), 10 Gr. 94.—CAN.

### PART IV. SECT. 1, SUB-SECT. 1.—A.

192 II. —.—.]—*MASTER v. PHIPPS* (1855), 5 Gr. 253.—CAN.

### PART IV. SECT. 1, SUB-SECT. 1.—

e i. —.—.]—Where the parties have made an agreement & one party records it erroneously, the other party, if he knows at the time that there is an error, acts fraudulently if he seeks to take advantage of that error, & cannot be allowed to enforce it.—*BINNS (W. C.) v. AVERY (W. & A.) LTD.* (1934), 1 L. R. 61 Calc. 548.—IND.

conduct amounting to fraud, & in the absence of any claim for rectification, it was not open to the judge to rectify the written agreement: (3) there was no evidence of mutual

mistake.—*BLAY v. POLLARD & MORRIS*, [1930] 1 K. B. 628; 99 L. J. K. B. 421; 143 L. T. 92; 74 Sol. Jo. 284, C. A.

## Part V.—Relief in Cases of Mistake.

216. *Add. Annotation*:—*Consd.* *Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258.
229. *Add. Annotation*:—*Refd.* *Steedman v. Frigidaire Corp.*, [1932] W. N. 248.
236. *Add. Annotation*:—*Refd.* *Dixon (J. J.) v. Taylor & Cowells (trading as Pine-exx Liquid & Disinfectant Soap Co.)* (1933), 50 R. P. C. 405.
244. *Add. Annotations*:—*Refd.* *Robert A. Munro & Co. v. Meyer*, [1930] 2 K. B. 312; *Lever Bros., Ltd. v. Bell*, [1931] 1 K. B. 557.
248. *Add. Annotations*:—*Refd.* *Re Russ & Brown's Contract* (1933), 49 T. L. R. 443; *Re Russ & Brown's Contract*, [1934] Ch. 34.
249. *Add. Annotation*:—*As to* (1) *Refd.* *Public Trustee v. Lancaster Duchy*, [1927] 1 K. B. 516.
254. *Add. Annotation*:—*Refd.* *Lever Bros., Ltd. v. Bell*, [1931] 1 K. B. 557.
263. *Add. Annotation*:—*Refd.* *Shipley Urban District Council v. Bradford Corp.*, [1936] Ch. 375.
281. *Add. Annotation*:—*Refd.* *Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380.
283. *Add. Annotation*:—*Refd.* *Shipley Urban District Council v. Bradford Corp.*, [1936] Ch. 375.
293. *Add. Annotation*:—*Refd.* *Eagle Star & British Dominions Insee. v. Reiner* (1927), 43 T. L. R. 259.
298. *Add. Annotation*:—*Refd.* *Shipley Urban District Council v. Bradford Corp.*, [1936] Ch. 375.
- 300a. —.—.]—*BLAY v. POLLARD & MORRIS*, No. 203a, *ante*.
308. *Add. Annotation*:—*As to* (2) *Refd.* *Blay v. Pollard & Morris*, [1930] 1 K. B. 628.
310. *Add. Annotation*:—*Consd.* *Shipley Urban District Council v. Bradford Corp.*, [1936] Ch. 375.
- 312a. —.—.]—In an action for a declaration that, upon the true construction of an agreement

under the seals of a district council & a city corp., for an additional supply of water to the council by the corp., therein expressed to be "at a *pro rata* charge as £540 is to 450,000 gallons subject to measurement," the council were entitled to such additional supply at a *pro rata* charge of £540 "*per annum*" for 450,000 gallons "*per diem*" or in the alternative, for rectification of the agreement on the ground of mutual mistake, by the insertion therein of the words "*per annum*" & "*per diem*":—*Held*: the agreement bore the construction which the council claimed to have placed upon it. If that construction were wrong the ct. would, notwithstanding the absence of any antecedent binding contract, rectify the instrument of agreement, so as to give effect to what was proved to have been the concurrent intention of the parties at the moment of executing the same—namely, to contract on the basis of a payment of £540 "*per annum*" for a supply of 450,000 gallons "*per diem*" subject to measurement.

The statement in the judgment of JAMES, V.-C. in *Mackenzie v. Coulson* (1869), L. R. 8 Eq. 368, at p. 375: "It is always necessary for a pltf. to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; & that such contract is inaccurately represented in the instrument" does not warrant the suggestion that the jurisdiction of the ct. cannot be exercised, even in cases of clear mutual mistake in the attempt to embody in the instrument the concurrent intention of the parties existing at the moment of the execution of the instrument, unless a previously existing contract can be proved.—*SHIPLEY URBAN DISTRICT COUNCIL v. BRADFORD CORPN.*, [1936] Ch. 375; 105 L. J. Ch. 225; *on appeal*, [1936] Ch. 399; 154 L. T. 444, C. A.

336. *Add. Annotation*:—*Refd.* *Shipley Urban District Council v. Bradford Corp.*, [1936] Ch. 375.

PART V. SECT. 2, SUB-SECT. 1.  
216 ii. —.—.]—*Mistaken belief that money due—Onus of proof on plaintiff.*—*ROSEY v. REICHE*, [1927] App. D. 554.—S. AF.

PART V. SECT. 3, SUB-SECT. 1.—  
C. (b).  
r i. —.—.]—*MAHON v. McLEAN* (1867), 13 Gr. 361.—CAN.

PART V. SECT. 3, SUB-SECT. 2.—

282 ix. —.—.]—*SAMSON v. BUTT*, [1927] N. Z. L. R. 119.—N.Z.  
282 x. —.—.]—An agreement

for the sale of mineral claims held to have been entered into under a mistake common to both parties, they thinking that they were contracting with respect to claims of a reasonable size, whereas the claims in question were in fact substantially encroached upon by a previously Crown granted claim. The purchasers were, therefore, held entitled to an abatement of the purchase-price.—*BARRON v. MORGAN & SILVER LEAF MINES, LTD.*, [1930] 3 W. W. R. 65; 4 D. L. R. 985; 43 B. C. R. 84.—CAN.

282 xi. —.—.]—*CORSON v. MORGAN*, [1932] S. C. R. 722; 4 D. L. R. 799.—CAN.

282 xii. —.—.]—*EVANS v. NYLAND*, [1933] 1 W. W. R. 139; 46 B. C. R. 441.—CAN.

282 xiii. —.—.]—*Refusal to reform mtge., as evidence not sufficient to establish mutual mistake.*—*STEEVES v. LAYTON* (1935), 9 M. P. R. 156.—CAN.

st. *Reasonableness of mistake.*—*Held*: not a question in issue.—*TSHOBA COLLIERY (NATAL), LTD. v. TSHOBA COAL SYNDICATE, LTD.* (1926), 47 N. L. R. 526.—S. AF.

PART V. SECT. 3, SUB-SECT. 2.—  
A. (b).

300 ii. —.—.]—*COTTINGHAM v. BOULTON* (1857), 6 Gr. 186.—CAN.

300 iii. —.—.]—*Unless induced by other party.*—*Re GOLD MEDAL FURN. MFG. CO., Ex p. SCOTCHES & CO. (Ont.)*, [1927] 2 D. L. R. 323; 8 C. B. R. 169.—CAN.

340. *Add. Annotation*:—*Refd.* Shipley Urban District Council v. Bradford Corpn., [1936] Ch. 375.
343. *Add. Annotation*:—*Refd.* Shipley Urban District Council v. Bradford Corpn., [1936] Ch. 375.
345. *Add. Annotation*:—*Generally, Refd.* Shipley Urban District Council v. Bradford Corpn., [1936] Ch. 375.
355. *Add. Annotation*:—*Refd.* Shipley Urban District Council v. Bradford Corpn., [1936] Ch. 375.
356. *Add. Annotation*:—*Refd.* Shipley Urban District Council v. Bradford Corpn., [1936] Ch. 375.
376. *Add. Annotation*:—*Refd.* Shipley Urban Dis-

- trict Council v. Bradford Corpn., [1936] Ch. 375.
389. *Add. Annotation*:—*Refd.* Shipley Urban District Council v. Bradford Corpn., [1936] Ch. 375.
401. *Add. Annotation*:—*Refd.* Shipley Urban District Council v. Bradford Corpn., [1936] Ch. 375.
403. *Add. Annotation*:—*Refd. Re* Lloyds Bank, Ltd., Bomze & Lederman v. Bomze, [1931] 1 Ch. 289.
- 414a. ———.]—SMITH v. PAWSON (1855), 25 L. T. O. S. 40, C. A.
420. *Add. Annotations*:—*Expld. Re* Mason (1928), 97 L. J. Ch. 321. *Refd. Re* Blake, *Re* Minahan's Petition of Right (1931), 100 L. J. Ch. 251.

## Part VI.—Recovery of Money Paid under Mistake.

457. *Add. Annotation*:—*Consd.* Morgan v. Ashcroft, [1937] 3 All E. R. 92.
458. *Add. Annotations*:—*Apld.* Home & Colonial Insee. v. London Guarantee & Accident Co. (1928), 45 T. L. R. 134. *Consd.* Morgan v. Ashcroft, [1937] 3 All E. R. 92.
461. *Add. Annotation*:—*Consd.* Morgan v. Ashcroft, [1937] 3 All E. R. 92.
462. *Add. Annotation*:—*Consd.* Morgan v. Ashcroft, [1937] 3 All E. R. 92.
463. *Add. Annotations*:—*Refd.* *Re* Regent Finance & Guarantee Corpn., Ltd. (1930), 69 L. Jo. 283; *Re* Gozzett, *Ex p.* Messenger & Co. v. Trustee, [1936] 1 All E. R. 79.
- 463a. ———.]—*Deft.* was in the habit of making bets with *pltf.*, a bookmaker. *Pltf.* claimed that through a mistake on the part of his clerk in making out the account *deft.* was overpaid to the extent of £24 2s. 1d. & he sued *deft.* to recover that amount. *Deft.* counterclaimed for a balance of £9 13s. 4d. alleged to be due to him. The county ct. judge found that £24 2s. 1d. had been over-

paid under a mistake of fact & he entered judgment for *pltf.* On appeal:—*Held*: (1) the dispute between the parties was a dispute between a backer & a bookmaker as to the nature of the account between them; & in order to ascertain whether or not an overpayment had been made it would be necessary for the ct. to examine the state of the account between the parties. But the ct. was not entitled to do that by reason of the Gaming Act, 1845, as by merely taking the account the ct. would be recognising wagering transactions as producing legal obligations. *Pltf.*'s claim therefore failed; (2) *pltf.*'s claim was for money had & received based upon a mistake of fact, but in order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fundamental fact. In making the payment *pltf.* was under a mistake as to the nature of the transaction; he thought that a wagering debt was due from himself to *deft.*, whereas, on the facts as found by the county ct. judge, it was not. But if the supposed fact had been true *pltf.* would have been under no

### PART V. SECT. 3, SUB-SECT. 2.—A. (f).

326 i. *Whether granted.*—Where an instrument purporting to evidence an agreement for the sale of land does not accurately represent the true agreement, the ct. will entertain an action to have it rectified & for the specific performance of the real agreement, even though only oral evidence is adduced in support of the claim for rectification. —LINGS v. ZERYSKI, [1930] 3 W. W. R. 415; 4 D. L. R. 1040.—CAN.

### PART V. SECT. 3, SUB-SECT. 2.—C. (a).

323 xi. ———.]—Where a parcel of land is omitted by mistake, a mtge. may be rectified although there is no memorandum to satisfy the Stat. of Frauds.—ELKINGTON v. WILLET (1934), 49 B. C. R. 316.—CAN.

### PART V. SECT. 4, SUB-SECT. 1.—B. (a).

363 iii. ———.]—Even in a common-law action on a written contract, the defence of mutual mistake may be raised, & parol evidence admitted to support it, although *deft.* does not claim rectification or rescis-

sion of the contract.—CLARK v. APPLEBY, [1928] 2 D. L. R. 95; [1928] 1 W. W. R. 784.—CAN.

363 iv. ———.]—Extrinsic evidence allowed in case of mutual mistake as to the consideration for a mtge.—CYR v. DIONNE (1936), 11 M. P. R. 107.—CAN.

### PART VI. SECT. 2, SUB-SECT. 1.

456 v. ———.]—MAXWELL E. J., LTD. v. BANK OF NOVA SCOTIA, [1929] 1 D. J. R. 616; 63 O. L. R. 323; *rearg.* [1928] 4 D. L. R. 490; 62 O. L. R. 600.—CAN.

456 vi. ———.]—A lessee of a hotel covenanted with the lessor to pay the rates on the land occupied by the hotel. The hotel formed part of a building standing on land in the city of Sydney, the property of the lessor. The hotel occupied part of the ground floor & the whole of the first floor of the building, the other part of the ground floor being occupied by a shop leased to another lessee. The council rated the land as an undivided lot & forwarded the rate notices in each of several years to the owner, who in turn sent them to the lessee of the hotel.

The lessee paid the rates under the impression that the notices only referred to the land occupied by the hotel. In an action against the council to recover that portion of the rates which he had not covenanted to pay:—*Held*: the lessee could not recover that part of the rates from the council as it paid the rates voluntarily to the council instead of to the owner of the land, who alone was in legal relationship with the rating authority.—TOOHEY'S, LTD. v. SYDNEY MUNICIPAL COUNCIL (1936), 13 L. G. R. 52.—AUS.

§. *Extent of onus of proof.*—In order to succeed in an action to recover back money paid under a mistake of fact *pltf.* must prove, not only the mistake of fact which induced him to part with the money, but also that under the particular circumstances the law is able to impute to *deft.* the action of a promise to repay it. The conditions under which the law will impute such a promise cannot, it seems, be reduced to a common formula.—GARDEN RIVER RURAL MUNICIPALITY v. MONTREUIL, [1928] 3 W. W. R. 22; *affd.*, [1929] 2 D. L. R. 396; 1 W. W. R. 486; 23 S. L. R. 439.



liability to make the payment which was only in law a voluntary payment, & on this ground also pltf.'s claim failed.—**MORGAN v. ASHCROFT**, [1938] 1 K. B. 49; [1937] 3 All E. R. 92; 106 L. J. K. B. 544; 157 L. T. 87; 53 T. L. R. 786; 81 Sol. Jo. 477, C. A.

**464a. Mistake must have been cause of payment.]—**

Where an action was brought for money paid under a mistake of fact, & pltf.'s evidence showed that if he had known of the fact, his ignorance of the law would still have led him to pay:—**Held**: as knowledge of the fact would not have affected his conduct the action failed.—**HOME & COLONIAL INSURANCE CO., LTD. v. LONDON GUARANTEE & ACCIDENT CO., LTD.** (1928), 45 T. L. R. 134; 73 Sol. Jo. 60; 34 Com. Cas. 163.

**465. Add. Annotation:—Consd. Morgan v. Ashcroft**, [1937] 3 All E. R. 92.

**470. Add. Annotations:—Consd. Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.**, [1934] A. C. 455; **Morgan v. Ashcroft**, [1937] 3 All E. R. 92.

**471. Add. Annotation:—Refd. Calico Printers' Asscn., Ltd. v. Barclays Bank** (1931), 145 L. T. 51.

**484. Add. Annotation:—Consd. Anglo-Scottish Beet Sugar Corp., Ltd. v. Spalding Urban District Council**, [1937] 3 All E. R. 335.

**484a. — Mistake of agent.]—Pltf. co.**, which had its head office at G. & had a district office at N., contracted with defts. for the supply of water to their branch factory at S. The original contract, in 1925, provided for a minimum quarterly payment of £375 by pltf.s. In 1927 a new contract was made, under which the quarterly payment was reduced to £100. This contract was negotiated by pltf.s.' managing director at G., & by mistake the factory manager at S. was not notified of the new contract, nor was the commercial manager at N. Defts., also by mistake, continued to send out demands at the old rate of £375, which were passed for payment by pltf.s.' branch manager at S. & forwarded to the commercial manager at N., who drew cheques which were signed as a mere matter of routine without further inquiry by the managing director on his next visit to N. The error was not discovered until 1936, when pltf. co. sought to recover the amounts overpaid:—**Held**: (1) the mistake was a mutual mistake of fact, not of law, & pltf.s. were *prima facie* entitled to recover; (2) even if the principles on which

a co. is held liable for the fraud of an agent apply equally to cases of innocent mistake, the mistake of the factory manager & the commercial manager was the mistake of pltf. co., which could rely on it, & it was immaterial that the managing director of the co. knew of the existence of the second contract, he not being aware that it was not being acted on.—**ANGLO-SCOTTISH BEET SUGAR CORPN., LTD. v. SPALDING URBAN DISTRICT COUNCIL**, [1937] 2 K. B. 607; [1937] 3 All E. R. 335; 106 L. J. K. B. 885; 157 L. T. 450; 53 T. L. R. 822; 81 Sol. Jo. 734.

**484b. —.]—Deft. made a bet on the totalisator & won £42 10s.** Intending to pay him forty one-pound notes, a clerk, employed by the pltf.s., paid him forty five-pound notes. When this was discovered, deft. offered to pay back any sum pltf.s. could prove he had been overpaid. Seventeen of the five-pound notes in his possession were proved by the serial numbers to have been paid to him by the pltf.s., & this £85 was returned to them. Rule 4 of the Totalisator Rules made by pltf.s. under the provisions of the Racecourse Betting Act, 1928 (c. 41), s. 2 (8), contains the following provision: "Dividends should be examined before leaving these windows, as mistakes cannot be rectified later." Upon an action being brought to recover the balance of the amount by which deft. had been overpaid, deft. counterclaimed for the sum of £85 he had repaid, & it was contended on his behalf that rule 4 was bilateral, & applied equally whether pltf.s. had paid a backer too much or too little:—**Held**: the rules were not any part of the contract between the parties, & did not affect pltf.s.' common law rights to recover money paid under a mistake of fact.—**RACECOURSE BETTING CONTROL BOARD v. MOUNT**, [1938] 3 All E. R. 547; 159 L. T. 379; 54 T. L. R. 1072; 82 Sol. Jo. 605, C. A.

**487. Add. Annotations:—As to (2) Apld. Home & Colonial Insee. v. London Guarantee & Accident Co.** (1928), 45 T. L. R. 134. **As to (2) Consd. Anglo-Scottish Beet Sugar Corp., Ltd. v. Spalding Urban District Council**, [1937] 3 All E. R. 335; **Morgan v. Ashcroft**, [1937] 3 All E. R. 92. **Refd. Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.**, [1934] A. C. 455.

**494. Add. Annotation:—Refd. Anglo-Scottish Beet Sugar Corp., Ltd. v. Spalding Urban District Council**, [1937] 3 All E. R. 335.

**PART VI. SECT. 2, SUB-SECT. 2.**

**486 i. General rule.]—In a proper case money paid under a mistake of fact may be recovered back.** The four conditions of a proper case are: (a) the mistake was an honest one, i.e. there was a genuine *bona fide* belief on the part of the payer of the money that certain facts existed which did not exist; laches or negligence do not of themselves affect the *bona fides* of his belief, & means of knowledge will not impute knowledge unless he wilfully abstained from inquiry; (b) the mistake must have been between the payer & the receiver of the money, i.e. the receiver must have been in some way a party to the mistake, either as inducing it or as responsible for it or connected with it; (c) the facts as they were believed to be must have imposed an obligation, legal, equitable or moral, to make the payment; (d) the receiver of the money had no

legal, equitable or moral right to retain the money as against the payer.—**ROYAL BANK OF CANADA v. R.**, [1931] 1 W. W. R. 709; 2 D. L. R. 685.—**CAN.**

**PART VI. SECT. 2, SUB-SECT. 3.**

**475 xix. —.]—CANADIAN MORTGAGE ASSCN. v. R.**, [1917] 1 W. W. R. 1130; 10 Sask. L. R. 30; 33 D. L. R. 43.—**CAN.**

**475 xx. —.]—The rule that where money is paid upon the supposition that a specific fact, which if true would entitle the payee to the money, is true, but it is in reality untrue, the money may, generally speaking, be recovered back, was applied herein in favour of pltf., a co. engaged in financing the sale of motor cars, where it advanced money to deft., a wholesale dealer in cars, thinking that it was dealing with respect to & obtaining title to a car**

then being sold by deft., whereas in truth the car in question had, without the knowledge of deft., & through the fraud of a retail dealer, been sold by the latter & title thereto had passed to the purchaser from him.—**PACIFIC FINANCE CO., LTD. v. FREEMAN CO., LTD.**, [1931] 2 W. W. R. 493; 3 D. L. R. 755; 25 Alta. L. R. 395.—**CAN.**

**PART VI. SECT. 2, SUB-SECT. 5.**

**488 iv. —.]—Money honestly paid under a mistake of fact can be recovered back even though the person paying it did not avail himself of the means of knowledge which he possessed.—ST. ROSE RURAL MUNICIPALITY v. ROYAL BANK OF CANADA**, [1928] 1 W. W. R. 663.—**CAN.**

**PART VI. SECT. 2, SUB-SECT. 7.**

**508 v. —.]—Rent wrongfully collected & paid under a mistake is re-**

511. *Add. Annotations*:—**Consd.** *Re Mason* (1928), 97 L. J. Ch. 321. **Refd.** *Marconi's Wireless Telegraph Co. v. Newman*, [1930] 2 K. B. 292; *Re Simms, Ex p. Trustee*, [1934] Ch. 1; *Morgan v. Ashcroft*, [1937] 3 All E. R. 92.
515. *Add. Annotation*:—**Generally**, **Refd.** *Anglo-Scottish Beet Sugar Corp., Ltd. v. Spalding Urban District Council*, [1937] 3 All E. R. 335.
520. *Add. Annotation*:—**Refd.** *Anglo-Scottish Beet Sugar Corp., Ltd. v. Spalding Urban District Council*, [1937] 3 All E. R. 335.
522. *Add. Annotation*:—**As to (2) Consd.** *Anglo-Scottish Beet Sugar Corp., Ltd. v. Spalding Urban District Council*, [1937] 3 All E. R. 335.
526. *Add. Annotation*:—**Refd.** *Morgan v. Ashcroft*, [1937] 3 All E. R. 92.
530. *Add. Annotation*:—**Refd.** *Gowers v. Lloyds & National Provincial Foreign Bank, Ltd.*, [1937] 3 All E. R. 55.
533. *Add. Annotations*:—**As to (1) Refd.** *Marconi's Wireless Telegraph Co. v. Newman* [1930] 2 K. B. 292. **As to (2) Dstd.** *Reckitt v. Barnett, Pembroke & Slater* (1927), 44 T. L. R. 63. **Refd.** *Lever Bros., Ltd. v. Bell*, [1931] 1 K. B. 557; *Morgan v. Ashcroft*, [1937] 3 All E. R. 92. **Generally**, **Refd.** *Home & Colonial Insce. v. London Guarantee & Accident Co.* (1928), 45 T. L. R. 134.
536. *Add. Annotations*:—**Consd.** *Re Mason* (1928), 97 L. J. Ch. 321; *Anglo-Scottish Beet Sugar Corp., Ltd. v. Spalding Urban District Council*, [1937] 3 All E. R. 335. **Refd.** *Re Blake, Re Minahan's Petition of Right*, [1932] 1 Ch. 54.
537. *Add. Annotations*:—**Refd.** *British & North European Bank v. Zalzein*, [1927] 2 K. B. 92; *Anglo-Scottish Beet Sugar Corp., Ltd. v. Spalding Urban District Council*, [1937] 3 All E. R. 335.
540. *Add. Citations*:—[1927] 2 K. B. 92; 96 L. J. K. B. 539; 137 L. T. 127; 43 T. L. R. 299.
562. *Add. Citations*:—137 L. T. 533; 17 Asp. M. L. C. 305.  
*Add. Annotation*:—**Expld.** *Smith Hogg v. Bamberger* (1928), 97 L. J. K. B. 458.
577. *Add. Annotations*:—**Consd.** *Re Gozzett, Ex p. Messenger & Co. v. Trustee*, [1936] 1 All E. R. 79. **Refd.** *Re Regent Finance & Guarantee Corp., Ltd.* (1930), 69 L. Jo. 283.
- 583a. **Deduction of tax on sum regarded as interest—Sum dealt with by Inland Revenue as capital.**—Certain claims arose to be settled in connection with the increased burden falling upon pltf. council consequent upon the alteration of the boundaries of the city of Oxford under Oxford Extension Act, 1928. Terms of settlement were recommended to the parties by accountants appointed to negotiate a settlement, & by letter pltf. stated that they accepted the following settlement: capital sum, £4,100; one year's burden in respect of highways, £1,925; plus interest at the rate of 5 per cent. *per annum* from Oct. 1, 1929 [the amount being left blank]. Defts. in reply sent a cheque for £6,759 5s. & a receipt for execution under pltf. council's seal. This receipt stated that the sum of £6,759 5s. was received "in full satisfaction & discharge of all claims of pltf. upon defts. in connection with or arising out of the alteration of the boundaries of the city of Oxford under Oxford Extension Act, 1928, as follows: capital sum, £6,025 [the total of the two capital sums above-mentioned]; interest at 5 per cent. *per annum* from Oct. 1, 1929, to Dec. 31, 1932, £979, less income tax at 5s. in the £, £244 15s." The income tax authorities regarded the payments, including the so-called interest portion, as capital sums, & intimated that they would not look to defts. to account for tax in respect of the deductions made. Pltf. claimed from defts. £244 15s., the sum stated in the receipt to have been deducted in respect of income tax:—**Held**: as the settlement was expressed to be in full satisfaction & discharge of all claims upon defts., & the contract was not entered into under a mistake as to the present existence of an essential fact recognised by law as the foundation of the contract, the settlement could not be re-opened & pltf. could not recover the sum claimed.—**BULLINGTON RURAL DISTRICT COUNCIL v. OXFORD CORPN.**, [1936] 3 All E. R. 875; 80 Sol. Jo. 1037.

coverable by action for money had & received.—**SCOTT v. SPEARIN** (1936), 50 B. C. R. 466.—**CAN.**

**PART VI. SECT. 3, SUB-SECT. 1.**

i. —.—**FISHER v. LUKE**, [1926] V. L. R. 190; 47 A. L. T. 165.—**AUS.**  
ii. —.—**A wrong interpretation of an agreement is a mistake of law, & money paid in consequence of such misinterpretation cannot be recovered.**—**OTTAWA ELECTRIC RY. CO. v. OTTAWA**, [1934] 4 D. L. R. 731.—**CAN.**

562 l. **Effect of change in understanding of law—Subsequent declaration of law by court.**—Money voluntarily paid at a time when the law is in favour of the payee cannot be recovered, if a subsequent judicial decision reverses the former understanding of the law.—**JULIAN v. AUCKLAND (MAYOR, ETC.)**,

[1927] N. Z. L. R. 453.—**N.Z.**

**PART VI. SECT. 3, SUB-SECT. 2.**

**sk. Money paid to municipality—For licence to instal petrol pump—No power to grant licence.**—In 1926 pltf. applied to deft. for permission to instal two petrol pumps on footpaths in the municipality, & deft. granted such permission on the condition that pltf. should pay an annual fee of £5 5s. in respect of each pump. Pltf. paid £10 10s. in pursuance of that arrangement & installed the two pumps. When it was subsequently discovered that deft. had no power to authorise the erection of petrol pumps pltf. sued to recover the money he had paid, & obtained judgment in the local ct.:—**Held**: allowing the appeal, there had been no failure of consideration, as pltf. had the full enjoyment of that

for which he bargained; further, if the money had been paid under a mistake it was a mistake of law, & the money could not be recovered.—**MIDLAND JUNCTION MUNICIPALITY v. KENT**, [1932] W. A. L. R. 99.—**AUS.**

**PART VI. SECT. 3, SUB-SECT. 4.**

**so. Payment under ultra vires statute.**—**Held**: pltf.'s contention, that although money paid voluntarily under a mistake of law with full knowledge of the facts is not as a general rule recoverable, yet this rule does not apply where the receiving person was *ab initio* without authority to receive it, is not sustained by the decisions.—**INDEPENDENT MILK PRODUCERS' CO-OPERATIVE ASSOC. v. BRITISH COLUMBIA LOWER MAINLAND DAIRY PRODUCTS BOARD**, [1937] 1 W. W. R. 679; 51 B. C. R. 423.—**CAN.**

## MONEY AND MONEY-LENDING.

## Part I.—Money.

8. *Add. Annotations*:—*Re*ld. Anchor Donaldson v. Crossland, [1929] A. C. 297; Marconi's Wireless Telegraph Co. v. Newman, [1930] 2 K. B. 292; *Re* Simms, *Ex p.* Trustee, [1934] Ch. 1.
10. *Add. Annotations*:—*Re*ld. *Re* Wait, [1927] 1 Ch. 606; *Madras Official Assignee v. Krishnaji Bhat* (1933), 49 T. L. R. 432.

## Part II.—Currency and Rate of Exchange.

12. *Add. Annotations*:—*As to* (1) *Re*ld. Buerger v. New York Life Assce. (1927), 96 L. J. K. B. 930; *Broken Hill Proprietary Co. v. Latham*, [1933] Ch. 373; *Ottoman Bank of Nicosia v. Chakarian*, [1938] A. C. 260.
- 15a. *Salary in Turkish pounds—Employment in Cyprus*.—In 1905 resp. became a member of the pensionable staff of a Turkish banking corp'n. of which appts. were the Cyprus branch. By the contract then made he was entitled on retiring to a pension based upon his salary in the previous year. His salary was a sum in Turkish pounds. Before the war the Turkish pound was a coin of specified gold content, but in 1915 paper money was issued by the Turkish Govt. & made legal tender in Turkey. Resp., who previously had served in Turkey, was transferred to Cyprus in 1923, & was employed there by the appts. until the end of 1931, when he retired. In Cyprus his salary was paid at the rate of 100 Cyprus pounds per 110 Turkish pounds. That rate was adopted when both England & Turkey were on the gold standard, & was based upon the gold content of the English sovereign, which was interchangeable with the Cyprus pound, & of the Turkish pound. The Cyprus currency had since depreciated in terms of gold:—*Held*: resp.'s pension was payable in Turkish gold pounds converted into Cyprus currency at the rate of exchange on the day of each payment.—*OTTOMAN BANK OF NICOSIA v. DASCALOPOULOS*, [1934] A. C. 354; 103 L. J. P. C. 73; 151 L. T. 151, P. C.
- Annotation*:—*Dbtd.* *Ottoman Bank of Nicosia v. Chakarian*, [1938] A. C. 260.

## PART I. SECT. 1.

aa. *Purchase & sale of gold coins without license*.—On appeal from a conviction of applt. of the offence of unlawfully carrying on the business of a gold-coin dealer without being the holder of a license, contrary to clause 2 of the regulations under the Board of Trade Act, 1929:—*Held*: the first ground of appeal—namely, that as sovereigns are still legal tender in New Zealand & are therefore part of the currency, they cannot be purchased or sold, but can only be exchanged for currency in a different form—failed, as the giving of a higher value in cash for a sovereign is a purchase of that sovereign, & it is taken by the purchaser not as a current coin of the realm, but as a piece of gold of standard fineness, & is bought as gold for the purpose of making a profit on the gold.—*MORRIS v. RITCHIE*, [1934] N. Z. L. R. Supp. 196; G. L. R. 734.—N.Z.

## PART II. SECT. 1.

sd. *Australian notes—In New Guinea*.—*Held*: Australian notes issued pursuant to Part VIA., Division 4 of Commonwealth Bank Acts, 1911–1931, are legal tender throughout the Territory of New Guinea, by virtue of sect. 60B (1) (b) of that Act, which sect. was made applicable by sect. 13 of the New Guinea Acts, 1920–1926; further, the Commonwealth Parliament had legislative power to pass the New Guinea Acts, 1920–1926.—*JOLLEY v. MAINKA*, [1933] Argus L. R. 506; 7 A. L. J. 214.—AUS.

## PART II. SECT. 2, SUB-SECT. 1.

16 i. *Mortgage debt*.—Where a contract provides that the money payable thereunder shall be paid in a foreign country the question as to what cur-

rency it is payable in is determined by the intention of the parties as expressed by the terms of the contract. Where by a contract money payable in a foreign currency is made payable at a fixed & definite time, the time so fixed for payment is the date as to which the rate of exchange is to be calculated. Under a mtg. made in Winnipeg on Winnipeg property the mtgor. covenanted to pay the principal on Nov. 1, 1932, "in gold or its equivalent at the office of the mtgee. in the City of Detroit"; & covenanted to pay interest at 7 per cent. *per annum* by half-yearly payments at the same place "in gold or lawful money of Canada." The mtge. also provided that all interest in arrears should become principal & bear interest at the rate aforesaid:—*Held*: the mtgee. was entitled to payment of the principal in an amount in Canadian dollars which on Nov. 1, 1932, would have bought the principal amount in United States dollars, but that the clause specifically providing that interest might be payable in lawful money of Canada governed the payment of interest. Moreover the clause which provided that all interest should become principal made the interest principal only for the purpose of bearing interest.—*JOHNSON v. PRATT*, [1934] 1 W. W. R. 321; 2 D. L. R. 802; 42 Man. L. R. 93.—CAN.

e i. —.—*Provisional sentence was claimed upon a mtge. bond in which deft. acknowledged her indebtedness to plifs. in the sum of "two hundred & fifty pounds (£250) sterling, arising from & being the balance of purchase-price & agreed costs in connection with the purchase" of a certain motor car bought by deft. from pliffs. A condition of the bond pro-*

vided that all payments of interest & principal should be made in "British sterling money" at a particular place in Natal:—*Held*: as the parties could not have intended, in a transaction which was between South Africans in South Africa concerning such an ordinary article of commerce as a motor vehicle, that the amount to be paid in discharge of such a purely domestic debt should vary with the exchange between South Africa & Great Britain, the word "sterling" in the acknowledgment of debt meant nothing more than standard money, & if deft. could discharge her obligation by a payment in British sterling money, it would have to be equivalent to £250 in South African money, & provisional sentence must therefore be granted, for £250 as prayed.—*FISHER, SIMMONS & RODWAY (PTY.) LTD. v. MUNESARI*, [1932] N. L. R. 77.—S. Af

e ii. —.—*Pltf. was the holder of debentures issued by deft. municipal corp'n. in which it promised to pay "to the holder of this Debenture the sum of Five Hundred Dollars (\$500.00) of lawful money of the Dominion of Canada, or £102 14s. 10d., its sterling equivalent, at the rate of \$4.86 2/3 to the one pound sterling, on the 18th day of Nov. 1933, at any branch of the Bank of British North America, either at Victoria, B.C., Toronto, Montreal, the City of New York, U.S.A., or London, England, at the holder's option."* On the due date English money was at a premium over Canadian money. On said date pltf. duly presented the debentures for payment at the Bank of Montreal, Victoria, B.C. (the successor to the Bank of British North America) & demanded payment in English money of £102 14s. 8d., or its equivalent in Canadian money at

17a. — Agreement to pay in sterling in gold coin—Payment in bank notes.]—One F. was the holder of a bond for £100, one of a series of bonds issued in 1928 by a Belgian co. Each bond provided for payment of £100 on Sept. 1, 1933, or at an earlier date in accordance with indorsed conditions, & of interest during the continuance of the security at the rate of 5½ per cent. *per annum*, "in sterling gold coin of the United Kingdom of or equal to the standard of weight & fineness existing on the first day of Sept. 1928," by equal half-yearly payments on every Mar. 1 & Sept. 1 in accordance with coupons attached thereto. One of the indorsed conditions provided that the bond should be construed & the rights of the parties regulated according to the law of England as a contract made & according to the terms thereof to be performed in England. A half-yearly instalment of interest on the bond having fallen due, the co. claimed to pay the nominal sum specified in the coupon in whatever might be legal tender in England at the day of payment in full discharge of their obligation under the bond. Upon an originating summons, F., as *pltf.*, claimed such a sum in sterling as would purchase in the market on the day of payment gold of the weight & fineness contained in the gold coin of the United Kingdom sufficient to discharge the payment if falling due on

Sept. 1, 1928 :—*Held* : *pltf.* was entitled to a declaration that upon the true construction of the bond he was entitled as the holder thereof to receive from the co. from time to time by way of principal & interest thereunder & on the due dates of payment therefor such a sum in sterling as should represent the gold value of the nominal amount of each respective payment, such gold value to be ascertained in accordance with the standard of weight & fineness existing on Sept. 1, 1928, & where the nominal amount comprised a fraction of a pound, a sum in sterling representing a corresponding fraction of the gold value, ascertained as aforesaid, of a pound, part of the nominal amount aforesaid.—*FEIST v. SOCIÉTÉ INTERCOMMUNALE BELGE D'ÉLECTRICITÉ*, [1934] A. C. 161; 103 L. J. Ch. 41; 50 T. L. R. 143; 78 Sol. Jo. 64; 39 Com. Cas. 145; *sub nom.* *Re SOCIÉTÉ INTERCOMMUNALE BELGE D'ÉLECTRICITÉ*, *FEIST v. SOCIÉTÉ INTERCOMMUNALE BELGE D'ÉLECTRICITÉ*, 150 L. T. 41, H. L.

*Annotations*.—*Distd. British & French Trust Corp., Ltd. v. New Brunswick Ry. Co.*, [1936] 1 All E. R. 13. *Consd.* R. v. International Trustee for Protection of Bondholders Akt., [1937] A. C. 600; British & French Trust Corp. v. New Brunswick Ry. Co., [1937] 4 All E. R. 516. *Refd.* St. Pierre v. South American Stores (Gath & Chaves), Ltd., & Chilean Stores, [1937] 3 All E. R. 349; Ottoman Bank of Nicosia v. Chakarian, [1938] A. C. 260.

17b. — Payment in gold illegal.]—In 1917 the British Govt. made an offer in New

the rate of exchange on the due date, which demand was refused by the bank, but at the same time the bank offered to pay *pltf.* £500 in Canadian money in respect of each debenture which in turn *pltf.* refused. *Pltf.* thereupon brought an action claiming the said sum in English money or its equivalent at the rate of exchange at the date the writ was issued, but at the trial *pltf.*'s counsel conceded that, if *pltf.*'s contentions were upheld, it would be entitled to payment at only the rate of exchange at the due date of the debentures :—*Held* : *pltf.* was entitled to only the face value of the debentures in Canadian dollars, *i.e.*, £500 per each debenture. The words "its sterling equivalent" indicate that the amount of English money was to be of the same value as the amount in Canadian dollars & the addition of the words & figures "at the rate of \$4.86 2/3" makes it clearer that the intention was that the English money should be the equivalent of 500 Canadian dollars. The purpose of inserting the latter words was to fix the rate of exchange. No matter in what foreign currency an obligation is payable in Canada, any judgment obtained in our cts. must be for an amount in the currency of this country.—*ROYAL TRUST CO. v. OAK BAY CORPN.*, [1934] 3 W. W. R. 210; 4 D. L. R. 697; 48 B. C. R. 514.—*CAN.*

f i. — Municipal debentures payable in Canadian currency or sterling.]—A provincial statute empowering cities to pass bye-laws for the issue of debentures stated that "The bye-law may provide that the debentures & coupons shall be payable in lawful money of Canada or in sterling money of Great Britain or as to part thereof in one & part thereof in the other of the said moneys of equivalent value, & may be made payable at any place or places in Canada, Great Britain or the United States of America; the equivalent value of the said moneys shall be the value provided in the Currency Act of Canada; . . . :—*Held* : the power of the cities thereunder was limited to the issue of debentures payable either in lawful money of

Canada or sterling money; & therefore, payment of certain debentures issued by *pltf.* city expressed to be payable both as to principal & interest in dollars either in New York or in London could be lawfully made by payment of the specified amount in Canadian currency, converted, when necessary, into the lawful money of the place of payment, notwithstanding that the currency of the place of payment was at a premium over Canadian currency.—*SASKATOON CITY v. LONDON & WESTERN TRUSTS CO., LTD.*, [1933] 2 W. W. R. 296; [1934] 1 D. L. R. 103.—*CAN.*

sa. "Gold" bond issue by Toronto company—Holder of interest coupons resident in Belgium—Currency of payment.]—*DERWA v. RIO DE JANEIRO TRAMWAY, LIGHT & POWER CO.*, [1928] 4 D. L. R. 542; 62 O. L. R. 669.—*CAN.*

st. Interest on railway bond—Payable in England.]—Interest on railway bond payable in England held payable in English currency.—*BROWN v. ALBERTA & GT. WATERWAYS RY. CO.* (1921), 59 D. L. R. 520.—*CAN.*

sg. Insurance policy.]—A Canadian living in Ontario insured his life by a policy of insurance payable in dollars at the co.'s office in Indiana :—*Held* : he was entitled to payment in Canadian money at the face value of the policy.—*WEISS v. STATE LIFE INSURANCE CO.*, [1934] 4 D. L. R. 469; O. R. 677; *affd.*, [1935] S. C. R. 461; 5 F. L. J. (Can.) 99.—*CAN.*

sk. Mortgage of land in New Guinea.]—In pursuance of an agreement for the sale & purchase of land situate in the mandated territory of New Guinea, *mtges.* executed in 1926 at Rabaul by *applt.* in favour of *resp.*, provided that all payments thereunder "shall be made in gold or in currency equivalent thereto at the market or exchange rate current at the time when every such payment is actually made." The principal sums secured by the *mtges.* were expressed in pounds. On May 1, 1931, *applt.* paid to the credit of *resp.*'s account with a bank at Rabaul

nine hundred Australian one pound notes in full payment of £900 interest falling due under the *mtges.* on June 30, 1931. At all material times the equivalent of £900 in gold in Rabaul was eleven hundred & seventy-two Australian pound notes :—*Held* : the provisions of sect. 60H (1) (b) of Commonwealth Bank Act, 1911-1931, applied to the territory of New Guinea & therefore, the payment of nine hundred Australian one pound notes satisfied the debt of £900 due under the *mtges.*—*JOLLEY v. MAINKA* (1934), 49 C. L. R. 242.—*AUS.*

sh. Identity of English & Australian pound—Materiality.]—The identity of the English & Australian pound in measuring obligations is of no significance where it becomes necessary to ascertain the relative value of the two currencies in which those obligations are discharged.—*PAYNE v. FEDERAL COMR. OF TAXATION* (1935), 51 C. L. R. 197.—*AUS.*

sv. Contract with Crown—"Current War Office cost."—[Clause 3 of a contract for the manufacture & supply of ammunition by *applt.* to *resp.* provided that the Crown on purchasing ammunition from the supplier should pay a "price equal to the current War Office cost, meaning thereby the current price for the time being paid by His Majesty's War Office to contractors for similar ammunition in England," plus certain increases (expressed in pounds, shillings & pence). The agreement, after providing for an annual meeting of the representatives of both parties to the contract to ascertain the War Office cost, continued : "the current War Office cost so ascertained (increased in the manner hereinbefore provided) shall be & be taken to be the price to be paid . . . :—*Held* : upon the construction of the whole agreement, the current War Office cost, stated in pounds sterling, should be converted into New Zealand currency in order to serve as the basis for ascertaining the price payable by the Govt.—*COLONIAL AMMUNITION CO., LTD. v. R.*, [1938] N. Z. L. R. 354; 13 N. Z. L. J. 319.—*N.Z.*

York of 5½ per cent. secured loan convertible gold Notes, the principal & interest of which & of the bonds into which they might be converted were to be payable, without deduction for British taxes, in New York in United States gold coin, or, at the option of the holder, in London, in sterling at the fixed rate of 4.86½ dollars to the pound. The offer was made "subject to the approval by our counsel of necessary formalities." Resps. were the holders of a bond, in exchange for a Note, by which the British Govt. promised to pay one thousand dollars on Feb. 1, 1937, either in New York, at the office or agency to be maintained there by them, in gold coin of the United States of the standard of weight & fineness existing in Feb. 1917, or in London in sterling money at the fixed rate of 4.86½ dollars to the pound. The payment was to be made without deduction for any British taxes. In 1933 by a Joint Resolution of the Congress of the United States, which it was admitted had the force of law, it was provided that every provision contained in any obligation which purported to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, was against public policy, & that any such obligation should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public or private debts. On a petition of right by resps. claiming that they were entitled to be paid such a sum in dollars as would equal in value the number of dollars of the standard specified in the bond—namely, of the weight & fineness which was prescribed by the law of the United States existing in Feb. 1917:—*Held*: (1) a consideration of all the circumstances relating to the offer of the loan—the fact that the Notes were issued in the first instance in the United States, were expressed to be in terms of United States currency, & were to be paid on one option in New York on a value estimated by reference to United States coins—pointed to the law of the United States being the proper law of the contract; (2) the Joint Resolution of Congress had the statutory effect of requiring the bond to be discharged upon payment of dollar for dollar of the nominal amount.—*R. v. INTERNATIONAL TRUSTEE FOR PROTECTION OF BONDHOLDERS AKTIENGESSELLSCHAFT*, [1937] A. C. 500; [1937] 2 All E. R. 164; 106 L. J. K. B. 236; 156 L. T. 352; 53 T. L. R. 507; 81 Sol. Jo. 316; 42 Com. Cas. 246, H. L.

*Annotations*:—*Consd. St. Pierre v. South American Stores (Gath & Chaves), Ltd., & Chilean Stores (Gath & Chaves), Ltd.*, [1937] 3 All E. R. 349; *British & French Trust Corp., Ltd. v. New Brunswick Ry. Co.*, [1936] 1 All E. R. 13; *British & French Trust Corp. v. New Brunswick Ry. Co.*, [1937] 4 All E. R. 516. *Reid. Ottoman Bank of Nicosia v. Chakarian*, [1938] A. C. 260.

17c. — — —.]—Defts., a Canadian corpn., registered under the laws of New Brunswick issued on Aug. 1, 1884, 6,000 first mtge. gold bonds of like amount, tenor, & date. The bonds were secured by a mtge. trust deed, & all became due on Aug. 1, 1934. The bonds stated that on that date defts. for value received promised "to pay to bearer or registered holder thereof £100 sterling gold coin of Great Britain of the present standard

• of weight & fineness at its agency in London, England, with interest thereon" at 5 per cent. *per annum*, payable in London, or, at the holder's option, at defts. office in New Brunswick. The interest coupon stated that the co. would pay the bearer £2 10s. sterling at its agency in London, England, or at its office in New Brunswick, on Aug. 1, 1934. Pltfs., holders of 992 such bonds, claimed in respect of each bond the sum in sterling calculated on Aug. 1, 1934, then representing the gold value of £100 on Aug. 1, 1884. The defts. contended that they were bound to pay only £100 sterling upon each bond, & interest upon the same basis. In an action between the same parties upon another of the said bonds, pltfs. obtained judgment on Nov. 7, 1934, upon the gold basis now claimed, defts. not having put in any defence to that action. The statement of claim in that action did not allege that all the bonds were identical in their terms. On Jan. 16, 1936, judgment was given in the present action in favour of defts. Pltfs. appealed, but, before the appeal could be heard, the legislature of New Brunswick, on Apr. 2, 1937, & that of Canada, on Apr. 10, 1937, passed legislation affecting gold-clause obligations:—*Held*: (1) defts. were estopped from raising any argument about the construction of the bonds, as a contract in identical terms & between the same parties had already been construed by the ct. in the earlier action; (2) defts. were not estopped from raising as a defence the Dominion or Provincial legislation, as that had been passed after delivery of judgment in the ct. below, & had not, therefore, been available to defts. as a defence at the first hearing; (3) (*per* SCOTT, L.J.): by virtue of the British North America Act, 1867 (c. 3), s. 92, & 44 Vict. (Can.), c. 42, s. 1, the Parliament of Canada was entitled to legislate in respect of debt. co., although such parts of debt. co.'s undertaking as were within Canada were situate wholly within New Brunswick. The Federal Gold Clauses Obligations Act, 1937, was therefore *intra vires* the Canadian Parliament; (4) although the contract was as a whole governed by Canadian law, questions as to mode of payment & as to measure of the amount of payment were to be settled by the *lex loci solutionis*, which in this case was English law; (5) the clause in the bonds was a gold clause, & both principal & interest must be calculated on a gold basis.—*BRITISH & FRENCH TRUST CORPN. v. NEW BRUNSWICK RY. CO.*, [1937] 4 All E. R. 516; 54 T. L. R. 172; 81 Sol. Jo. 1038; 43 Com. Cas. 110, C. A. *varied* [1938] 4 All E. R. 747 H. L.

17d. — — — *Debenture payable in London or New Zealand.*—Resps. were the holders of a number of debenture bonds in denominations of £100, dated 1920, & the interest coupons outstanding under them, which were issued by the Auckland, New Zealand, Corpn. under the Local Bodies Loans Act, 1913, & sect. 26 of Appropriation Act, 1915, in payment for the purchase by the Corpn. from a private undertaking of the City's tramway system. The debentures & the interest thereon, at the rate of 5½ per cent. *per annum*, were payable at the holder's option either in Auckland, New Zealand, or in London. The currency of New Zealand

having become depreciated resps. exercised their option to be paid in London, & having been there offered payment of the equivalent in sterling of the nominal amount in New Zealand currency, they claimed a declaration that they were entitled to be paid in sterling—in the currency of England—both as to principal & interest, without any deduction for exchange:—*Held*: that there being a common unit of account, the pound, in England & New Zealand, the mode of performance of the contract must be governed by the law of the place of performance, & accordingly the debt must be discharged by payment in the currency of the place of payment. Provided, therefore, that the bearer exercised his option to be paid in London, the interest coupons were payable in English currency without any allowance for exchange, as also were the debentures when they fell due. The Local Bodies Loans Act, 1913, which contained a code regulating the conditions & the procedure under which a local authority in New Zealand were entitled to borrow money for public purposes, did not take the present case out of the ruling in the *Adelaide* case, No. 17i, *post*. The word “pound” contemplated & authorised by that Act meant the common unit of account current in Great Britain & in various parts of the British Empire, & the currency which it connoted in the case of any particular loan would be determined by the place, whether within or outside New Zealand, stipulated as the place of payment in the debenture.—*AUCKLAND CORPN. v. ALLIANCE ASSURANCE CO., LTD.*, [1937] A. C. 587; [1937] 1 All E. R. 645; 106 L. J. P. C. 40; 156 L. T. 367; 53 T. L. R. 347; 81 Sol. Jo. 96, P. C.

*Annotations*:—*Reid*, *De Bueger v. Ballantyne & Co.*, [1938] A. C. 152; *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society, Ltd.*, [1938] A. C. 221; *Ottoman Bank of Nicosia v. Chakarian*, [1938] A. C. 260.

**Money payable abroad on demand in foreign currency—Refusal to pay—Whether remedy in debt or damages.**—See **BANKERS & BANKING**, No. 276a, *ante*.

- 17e. **Bill payable abroad—Sum in sterling—Of “value cheque on London.”**—*Resp.*, a British subject residing in Manchester, was in the habit of consigning Manchester goods to customers in Beyrout. The course of business was for him to draw a bill at sight on the customers for the amount in sterling, representing the cost of the goods & commission, & to hand it, with the bills of lading & invoices, to the Manchester branch of appts., a bank incorporated in Turkey. The Manchester branch then made an advance to him on the bill, & sent the documents to their Beyrout branch, who collected the price from the customer in exchange for the goods. On the Manchester branch being advised by the Beyrout branch that the price had been paid, a cheque for the sterling value of the goods, less any advance made, was handed to *resp.* In accordance with this practice *resp.* consigned to Beyrout goods which arrived there shortly before the outbreak of war, on Nov. 5, 1914, between this country & Turkey, on which date appts. held the bills & the documents representing the goods. The bills were in the following form: “Please pay to our order value cheque on London the sum of

£ sterling. Shipping documents attached to be given up on payment.” After the outbreak of war the Beyrout branch of appts. delivered the goods to the customers, taking payment in piastres of a sum fixed by the Beyrout branch as the price of sterling in London, & on the conclusion of the war, the piastres having fallen in value, the appts. claimed that they were only liable to pay the *resp.* an amount in sterling which at the then current rate of exchange represented the value of the piastres they had received for the goods. *Resps.* sued appts. to recover the sterling amount of the bills, or, alternatively, damages for the conversion of the goods:—*Held*: the words “value cheque on London” meant that the payment, which would ordinarily be in Turkish currency, must be so calculated on the exchange of the day as to represent the price of a cheque on London for the amount of the bill.—*OTTOMAN BANK v. JEBARA*, [1928] A. C. 269; 97 L. J. K. B. 502; 139 L. T. 194; 44 T. L. R. 525; 72 Sol. Jo. 516; 33 Com. Cas. 260, H. L.

- 17f. **Charterparty—Commission on freight.**—*KING LINE, LTD. v. WESTRALIAN FARMERS, LTD.* (1932), 48 T. L. R. 598, H. L.; *reversg. S. C. sub nom. WESTRALIAN FARMERS, LTD. v. KING LINE, LTD.* (1931), 47 T. L. R. 586.

*Annotations*:—*Consd. Auckland Corpn. v. Alliance Assurance Co.*, [1937] A. C. 587; *De Bueger v. Ballantyne & Co.*, [1938] A. C. 152. *Reid*, *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1931] A. C. 122.

- 17g. **Repayment of bank deposit—Application of foreign law.**—In 1913 *pltf.*, who was a Turkish subject & was then resident in Smyrna, deposited with the Smyrna branch of the Ottoman Bank 12,500 piastres in Turkish pounds. In 1930 he demanded repayment of the balance of his account in gold, but the bank refused to pay otherwise than in the paper piastres which were then the currency at Smyrna. In an action against the bank to recover the value of the balance on a gold basis with compound interest evidence was given that by decisions of the Turkish Cts., even if the original contract was to repay in gold, the debt could, in consequence of certain decrees, be satisfied by payment in paper:—*Held*: that in these circumstances *pltf.*'s claim failed.—*KRICORIAN v. OTTOMAN BANK* (1932), 48 T. L. R. 247; 76 Sol. Jo. 147.

- 17h. **Insurance policy—Application of Treaty of Lausanne.**—In 1909 an insurance co., whose principal place of business at all times material was at Trieste, issued a policy to a man & his wife, Ottoman subjects domiciled in Palestine, agreeing that upon the death of either the co. would pay 10,000 gold francs to the survivor. Trieste was Austrian territory in 1909, but in 1920 it became Italian territory under the Treaty of St. Germain. The Treaty of Lausanne made between the allied powers, including Italy, & the Ottoman Empire was signed on July 24, 1923, & became part of the municipal law of Palestine in 1924. The Treaty, as translated, provided that “life assurance policies contracted in currencies other than Turkish pounds, entered into before Oct. 29, 1914, between cos. possessing at this date [*actuellement*] the nationality of an allied power & Turkish nationals” should be settled, if the amount



was stipulated in gold francs, by paying French francs for the period before Nov. 18, 1915, & Turkish paper pounds for the period after that date. The wife having died in 1925, the husband claimed 10,000 gold francs under the policy. The co. was willing to pay 10,000 francs at the then rate of exchange in Paris; that was more favourable to the assured than payment in Turkish pounds:—*Held*: the provision of the Treaty of Lausanne applied, as the co. was of Italian nationality at the date of the Treaty, & consequently the assured was not entitled to payment in gold francs.—*ASSICURAZIONE GENERALI v. SELIM COTRAN*, [1932] A. C. 268; 101 L. J. P. C. 81; 146 L. T. 233; 76 Sol. Jo. 50, P. C.

- 17l. **Dividends of Australian company payable in England.**—The A. E. Co. was an English co. incorporated under Cos. Acts, 1869 to 1909, as a co. limited by shares & having its registered office in London & a branch office in Adelaide, South Australia, where it carried on its business of supplying electric light. The capital of the co. included certain 5 per cent. A cumulative preference shares (A shares) & certain 6½ per cent. C cumulative preference shares (C shares). On June 1, 1925, & thenceforward the P. Co. was & remained registered in England as the holder of A shares which had been issued in England in 1919. In 1924 & 1928 the same co. was registered as the holder of C shares which had been offered for subscription concurrently in England & Australia.

In 1921 by special resolutions duly passed & confirmed the whole conduct & control of the A. E. Co.'s business, except formalities required by statute to be observed in England, were transferred to Australia, & it was provided that all dividends should be declared at general meetings to be held in Australasia & should be paid in & from Adelaide or elsewhere in Australasia, & that all preference dividends declared by the board of directors should be declared at meetings to be held in Australasia & should be paid in & from Adelaide or elsewhere in Australasia, & that no part of the profits of the co. should be transmitted to the United Kingdom except in payment of dividend to members ordinarily resident there. In 1929 the A & C shares were converted respectively into A stock & C stock. On & since Mar. 1, 1931, the A. E. Co. paid dividends on its stock by delivering to the stockholders warrants payable at the Bank of Adelaide, South Australia. The P. Co. claimed a declaration that they & all other holders of A stock & C stock registered in the A. E. Co.'s register in England were entitled to be paid their dividends in sterling in England in English legal tender for the full nominal amount thereof & not subject to deduction for Australian exchange, & to an order for payment accordingly less the amount already

received in respect of the dividends:—*Held*: inasmuch as the dividends were by agreement between the parties to be paid in Australia, the A. E. Co. had discharged its obligation by paying in Australian currency that which was in Australia legal tender for the nominal amount of the dividend warrants.—*ADELAIDE ELECTRIC SUPPLY CO., LTD. v. PRUDENTIAL ASSURANCE CO., LTD.*, [1934] A. C. 122; 103 L. J. Ch. 85; 150 L. T. 281; 50 T. L. R. 147; 77 Sol. Jo. 913; 39 Com. Cas. 119, H. L.

*Annotations*:—*Appl.* Auckland Corpn. v. Alliance Assurance Co., [1937] A. C. 587. *Consd.* British & French Trust Corpn. v. New Brunswick Ry. Co., [1937] 4 All E. R. 516; De Bueger v. Ballantyne & Co., [1938] A. C. 452. *Expld.* Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society, Ltd., [1938] A. C. 224. *Consd.* Ottoman Bank of Nicosia v. Chakarian, [1938] A. C. 260. *Refd.* Payne v. Deputy Federal Comr. of Taxation, [1936] 2 All E. R. 793.

- 17j. **Option for payment in Australia or London—Payment in London.**—*BROKEN HILL PROPRIETARY CO., LTD. v. LATHAM*, No. 61a, *post*.

- 17k. **Damages for collision with foreign ship—Payment by order of foreign court in foreign currency.**—*THE BAARN*, No. 55a, *post*.

- 17l. **Contract made in England—For performance in New Zealand—Payment in sterling.**—By an agreement, made in England in 1932, between resps., a co. incorporated in New Zealand, & applt., then resident in England, applt. agreed to proceed to New Zealand to be there employed by resps. as a tailor cutter for a period of three years at a salary of "seven hundred pounds sterling" a year. At the date of the agreement the value of the New Zealand pound was at about 10 per cent. discount as compared with the English pound, & later during applt.'s period of service the discrepancy rose to 24 or 25 per cent. Applt. having claimed to be entitled to be paid the agreed salary in such amounts of New Zealand currency as would be the equivalent of sterling according to the rate of exchange current at the time of each payment, resps. refused to pay the £700 a year otherwise than in New Zealand currency:—*Held*: "sterling" meant British sterling. "Sterling" was added in the agreement to define what means of discharge—what currency—was being stipulated, & was an express term excluding the *prima facie* rule according to which New Zealand pounds would be meant, as being the currency of the place of payment. Having regard to the place where, & the parties between whom, the agreement was made, applt. was entitled under it to be paid his salary of £700 a year in English currency or its equivalent in New Zealand currency at the relevant rates of exchange. If "sterling" had not been inserted, the salary would have been payable in New Zealand currency, being that of the place of payment, in accordance with the principles laid down in *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934]

PART II. SECT. 2, SUB-SECT. 2.  
so. *Mortgage of land in New Guinea.*  
—In pursuance of an agreement for the sale & purchase of land situate in the mandated territory of New Guinea, mtges. executed in 1926 at Rabaul by applt. in favour of resp., provided that all payments thereunder "shall be made in gold or in currency equivalent thereto at the market or exchange rate

current at the time when every such payment is actually made." The principal sums secured by the mtges. were expressed in pounds. On May 1, 1931, applt. paid to the credit of resp.'s account with a bank at Rabaul nine hundred Australian one pound notes in full payment of £900 interest falling due under the mtges. on June 30, 1931. At all material times the equivalent of £900 in gold in Rabaul

was eleven hundred & seventy-two Australian pound notes:—*Held*: the provisions of sect. 60H (1) (b) of Commonwealth Bank Act, 1911–1931, applied to the territory of New Guinea & therefore, the payment of nine hundred Australian one pound notes satisfied the debt of £900 due under the mtges.—*JOLLEY v. MAINKA* (1934), 49 C. L. R. 242.—*AUS.*



A. C. 122; Digest Supp.—*DE BUEGER v. BALLANTYNE (J.) & Co., LTD.*, [1938] A. C. 452; [1938] 1 All E. R. 701; 107 L. J. P. C. 61; 158 L. T. 398; 54 T. L. R. 450; 82 Sol. Jo. 311, P. C.

17m. **Loan in Gibraltar in pesetas—Restriction on export of currency.**—*PYRMONT, LTD. v. SCHOTT* (1938), 55 T. L. R. 178, P. C.

28. **Add. Annotation:—Consd. Adelaide Electric Supply Co. v. Prudential Assurance Co.**, [1934] A. C. 122.

30a. **Voluntary undertaking to pay money—Legacy of sum payable under undertaking.**—In 1911, S., a German subject living in England, executed in Germany, together with his brothers & sisters, a document which recorded their intention to make gifts to certain members of the next generation of the family. S. undertook *inter alia* to give to E. B. S. on attaining the age of twenty-five, or marrying under that age, 100,000 marks. In June, 1922, being then a naturalised British subject domiciled in England, S. made his will & directed his trustees to fulfil his obligations under the document of 1911. S. died in Oct. 1922, & E. B. S. attained the age of twenty-five in 1934. Upon a summons taken out to determine the validity of the document of 1911 & what, if any, sum should be paid to E. B. S., either under that document or under the will of S.:—*Held*: the document of 1911 was merely a record of intention & not a deed of family arrangement & was not enforceable in a German ct.; the legacy under the will was one not of 100,000 marks, but of such sum as would give to E. B. S. a sum which S. would have had to give her if there had been an enforceable obligation under the document of 1911; the German ct., acting according to German law, if it had to value the obligation treated as a binding obligation, would have put the figure at approximately £5,000, & E. B. S. was entitled to that sum with interest from Oct. 31, 1934.—*Re SCHNAPPER, WESTMINSTER BANK, LTD. v. SCHNAPPER*, [1936] 1 All E. R. 322.

*Annotation:—Consd. Kornatzki v. Oppenheimer*, [1937] 4 All E. R. 133.

30b. **Annuity subject of compromise in foreign court.**—Under their father's will, the female pltf. was given an annuity & certain other rights & debt. was the residuary legatee. The rights of the parties were subsequently, in 1905, the subject of a compromise approved by the German ct., under which, so far as is material to this case, the female pltf. was to receive an annuity of 8,000 marks. In 1926 the trustees, in pursuance of a decision of the Ct. of Appeal in England, appropriated £8,489 14s. 11d. 5 per cent. War Loan

in respect of this annuity. Deft. contended that the female pltf. was entitled to only the produce of this War Loan—which had been converted into 3½ per cent. stock—and the female pltf. contended that she was entitled at the present time to receive 8,000 reichsmarks:—*Held*: (1) the female pltf. was not restricted to the actual sum produced by the appropriated investment; (2) she was not entitled to 8,000 reichsmarks, but to such a sum as a German ct. would award having regard to the original liability & to all the circumstances of the case, in this case found to be £500 *per annum*, payable in reichsmarks at the rate of exchange on the dates of payment; (3) the assessment of such a sum was not an exercise of the discretion of the ct. which could be made by a German ct. only, but a question of fact, which could be determined by the ct. in England.—*KORNATZKI v. OPPENHEIMER*, [1937] 4 All E. R. 133.

34a. — **Date of ascertainment of rate.**—A testatrix who died domiciled in England, leaving property in both England & the United States, by her will gave a legacy of 10,000 dollars or the equivalent thereof in sterling at current rates of exchange to the rector & churchwardens or other the governing body of Chiswick Church for the purpose of keeping the burial ground & monument therein to her late husband & herself in good & sufficient repair & for the maintenance of the church & the decorations thereof. Testatrix, who died in 1925, was buried in Chiswick cemetery immediately adjoining the churchyard, which had long been closed for burials, in the same grave as her husband:—*Held*: a valid charitable bequest, to be divided equally between the vicar & churchwardens of Chiswick Parish Church as the controllers of the church & churchyard & the Borough Council as managers & owners of the cemetery. Further, the value of the legacy, & therefore the rate of exchange from dollars into sterling, must be ascertained on the first anniversary of the death of testatrix.—*Re EIGHMIE, COLBOURNE v. WILKS*, [1935] Ch. 524; 104 L. J. Ch. 254; 153 L. T. 295; 51 T. L. R. 404.

35. **Add. Annotation:—Refd. Adelaide Electric Supply Co. v. Prudential Assurance Co.**, [1934] A. C. 122.

36. **Add. Annotation:—Refd. The Baarn (No. 2)**, [1934] P. 171.

39. **Add. Annotations:—Consd. Banco de Portugal v. Waterlow & Sons, Ltd.** (1931), 100 L. J. K. B. 465. **Expld. The Baarn** (1933), 49 T. L. R. 554. **Refd. Rhokana Corp'n., Ltd. v. I. R. Comrs.**, [1936] 2 All E. R. 678.

## PART II. SECT. 3, SUB-SECT. 1.

sb. **Winding-up of partnership—Payment to assignee of partner—Rate at date of realisation of assets.**—As regards the rate of conversion of dollars into British Indian currency, to which the assignee was entitled, the rate prevailing at the date on which the winding-up of the partnership was completed & the assets were realised is the proper rate to be allowed to the assignee.—*VEERAPPA CHETTY v. MUTHIAH CHETTY* (1929), 1 L. R. 52 Mad. 509.—IND.

sd. **Income received abroad in foreign currency—Assessment to income tax.**—Applt., resident in Australia, included in his Federal income tax return a sum of £5,671, interest on British funded

stock, which had been received by him by credits to his account with a bank in London & retained in England. The assessing officer added to applt.'s net income return a sum of £1,097, representing the difference between the £5,671 & the sum which would have been produced in Australia at the then existing rate of exchange by telegraphic transfer upon the respective dates of credit of the sums constituting the £5,671. On a claim by the applt. that the sum of £5,671 should not be included in his return at any other figure than £5,671:—*Held*: the Australian Income Tax Acts, which provide that the amount of income tax payable is to be ascertained by reference to a rate based on a calculation of pence per pound of taxable income,

in referring to pounds & pence are referring only to those units of Australian currency known as pounds & pence. To calculate Australian income tax at a rate of so many pence per pound of taxable income the assessable income of the taxpayer must, whatever be the currency in which he derives it, all be expressed in terms of Australian currency. Applt.'s derived income had, therefore, for the purposes of income tax, to be stated & dealt with in terms of Australian currency, & the £1,097 was rightly included in his assessment.—*PAYNE v. DEPUTY FEDERAL COMR. OF TAXATION*, [1936] A. C. 497; [1936] 2 All E. R. 793; 105 L. J. P. C. 98; 155 L. T. 309; 52 T. L. R. 627; 80 Sol. Jo. 508, P. C.—AUS.

43. *Add. Annotation* :—*Consd. Banco de Portugal v. Waterlow & Sons, Ltd.* (1931), 100 L. J. K. B. 465.

44. *Add. Annotation* :—*Refd. Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A. C. 122.

45a. —.].—Deft., an English subject, incurred a debt of Frs.18,035 to pltfs. in France. The debt fell due on Dec. 31, 1914, & its value at that date in sterling was £715. In an action for recovery of this debt deft. admitted the debt, but pleaded that her liability in sterling should be reckoned at the date of the judgment. Between the issue of the writ & the day of hearing deft. paid Frs.18,035 to pltfs. in France, & a receipt was given her as for money deposited :—*Held* : in arriving at the proper equivalent in English currency, the rate of exchange prevailing between the two countries on Dec. 13, 1914, when the debt became due, & not that prevailing at the date of the judgment, should be adopted.—*SOCIETE DES HOTELS DU TOUQUET-PARIS-PLAGE v. CUMMING*, [1921] 3 K. B. 459; 91 L. J. K. B. 17; *revid. on other grounds*, [1922] 1 K. B. 451, C. A.

46. *Add. Annotations* :—*Refd. The Baarn* (1933), 102 L. J. P. 120; *Rhokana Corp., Ltd. v. I. R. Comrs.*, [1936] 2 All E. R. 678.

52. *Add. Annotations* :—*Consd. Banco de Portugal v. Waterlow & Sons, Ltd.* (1931), 100 L. J. K. B. 465. *Refd. Richardson v. Richardson*, [1927] P. 228.

52a. —.].—Resp., an Armenian & a Turkish subject, was in the permanent employment of applt. bank. In 1922, while employed at their Smyrna branch, he was sent on business of the bank to the head office at Constantinople, & was given temporary employment there. He informed applts. that his life was in danger in Constantinople from the Turkish authorities, & asked to be transferred to a branch outside Turkey. That being refused he fled from Constantinople. He was dismissed without notice, & brought an action for wrongful dismissal :—*Held* : conversion into sterling of the damages in Turkish currency in respect of resp.'s pension under the contract should be at the rate of exchange at the date of his dismissal, not at the date of the judgment.—*OTTOMAN BANK v. CHAKARIAN*, [1930] A. C. 277; 99 L. J. P. C. 97.

*Annotations* :—*Expld. & Distd. Ottoman Bank of Nicosia v. Dascalopoulos*, [1934] A. C. 354. *Consd. Ottoman Bank of Nicosia v. Chakarian*, [1938] A. C. 260.

52b. —.].—Resp., who became an employee of applt. bank in 1910, had no written contract of employment, but had signed a declaration to the effect that he would adhere strictly to the regulations governing the pension & superannuation fund adopted by the bank as forming an integral part of the conditions of his agreement. The contract

of employment was governed by Turkish law, & his salary was in Turkish pounds, which, at the date of the contract, were paid in gold coins, though later, as the result of currency changes effected by statute consequent upon the war, he was paid in paper currency notes, which were then legal tender. He served in Turkey for many years, & in 1923 was transferred to Cyprus, where he remained in the service of applts. until 1931, when he retired on the terms that he was entitled to a pension in accordance with the pension regulations at the rate of 48 per cent. of the fixed salary received by him on Dec. 31, 1930. On a claim by him that there was an original contractual obligation, which still subsisted, to pay him his salary in gold, & that he was therefore entitled to be paid his pension in Turkish gold pounds, by which was meant the current value of the bullion content of the Turkish gold coin (or its equivalent in the currency of Cyprus) at the appropriate rates of exchange prevailing on the date of payment of each monthly instalment of the pension :—*Held* : (1) resp.'s contention amounted to construing the contract exactly as if there were a gold clause expressed in it, whereas no contractual conditions which could be described as "a gold clause" were anywhere expressly to be found in the transactions between the parties.

The principle that a contract to pay so many pounds is not a contract to pay in gold, but is *prima facie* a contract to pay money according to the currency of the country where payment has to be made, was equally applicable to the present case, where there had been a change in the currency of the country concerned—Turkey, & the original contract to pay resp. in Turkish pounds was not, therefore, either on the above-mentioned principle or according to Turkish law, a contract to pay him in gold coins, even though gold was the then normal form of legal tender, but was a contract to pay him in whatever might be legal tender in Turkey at the material time. He was accordingly not entitled to be paid his pension in Turkish gold pounds or their equivalent in Cyprus currency :—*Held* : (2) the practice of applt. bank in paying their employees, & in particular the course which they adopted in Turkey after Turkish currency went off gold, could not be treated as showing that the original contract with resp. was one to pay in gold coins.—*OTTOMAN BANK OF NICOSIA v. CHAKARIAN*, [1938] A. C. 260; [1937] 4 All E. R. 570; 107 L. J. P. C. 15; 158 L. T. 1; 54 T. L. R. 122, P. C.

*Annotation* :—*Consd. Sforza v. Ottoman Bank of Nicosia*, [1938] A. C. 282, P. C.

52c. —.].—*SFORZA v. OTTOMAN BANK OF NICOSIA*, [1938] A. C. 282; 107 L. J. P. C. 33; 54 T. L. R. 127, P. C.

53. *Add. Annotation* :—*Refd. Re Parent Trust & Finance Co.*, [1936] 1 All E. R. 641.

#### PART II. SECT. 3, SUB-SECT. 2.—B.

43 ii. —.].—A Victorian co. which was in voluntary liquidation was indebted to a creditor in England under a contract made in England which expressed the indebtedness in pounds, shillings & pence, & provided for payment in England :—*Held* : proof should be admitted by the liquidator for such a sum in Australian currency

as would have been of equal value to the sum due in England at the date when it became due, according to the then current rate of exchange.—*RE TILLAM BOEHME & TICKLE PTY., LTD.*, [1932] V. L. R. 146.—AUS.

49 iii. —.].—The rule that, in

is the date of the breach of contract, which was laid down in *In re British American Continental Bank, Ltd., Goldsteiner & Fensholt's Claim* ([1922] 3 Ch. 578, at p. 587), is applicable to the case of currencies between the Dominions although expressed in sterling.—*McDONALD (A. H.) & CO. PROPRIETARY, LTD. v. WELLS* (1932), 46 C. L. R. 506.—AUS.

54. *Add. Annotation*:—*Refd.* Rhokana Corpn., Ltd. v. I. R. Comrs., [1936] 2 All E. R. 678.
- 55a. —.]—A Chilean vessel owned by plffs. received damage while at anchor in the territorial waters of Ecuador through being run into by a Dutch vessel owned by defts. The Dutch vessel was arrested in this country, & her owners put in bail, admitted liability, & consented to a reference to assess the damage. The admission & consent were filed in the registry & became an order of ct. The Chilean vessel was repaired in Chile, & plffs. filed their claim & vouchers comprising some 70,000 Chilean pesos & some small sums in Ecuador sucres, U.S. dollars, & sterling, the whole amount quantified into sterling being claimed at £2,533 19s. 1d.

Under Chilean law a debtor can make a valid payment, even against the will of the creditor, by depositing the amount owed in a Chilean bank in the name of the creditor, & the exchange value of the peso having fallen heavily, defts. deposited in a bank at Valparaiso 80,000 pesos in plffs.' name, an amount which defts. alleged was more than sufficient to cover the whole claim with interest at 6 per cent. On plffs.' application for a day to be fixed for the hearing of the reference, defts., on the ground that the claim had been paid in full, moved to have the action dismissed & the bail discharged. LANGTON, J., held that so far as the payment related to the claim in pesos it was a good discharge, but having regard to the fall in the exchange it was not necessarily a good discharge for the items of the claim in other currencies, & that so far as they were concerned there must be a reference to the registrar to report whether the amount deposited in pesos was in fact sufficient to cover these items with interest. Both parties filed notice of appeal. Before the appeal was heard, however, plffs. accepted a sum tendered in respect of the small items in currencies other than the Chilean pesos, & the appeal was confined to the question whether the payment in Chile of the 80,000 pesos in respect of repairs & demurrage was a good discharge:—*Held*: on the evidence there was no final decision by the Chilean cts. that the payment in depreciated pesos was sufficient, while proceedings were still pending in the English ct.; accordingly the reference must proceed, & the registrar must treat the payment in Chile as a payment on account of the sums expended & lost in pesos in respect of the repairs & demurrage, & ascertain, in accordance with the decision in *The Volturno*, No. 55, the amount due to plffs. by converting the sums so expended &

lost into sterling at the rate of exchange prevailing at the time the pesos were paid or lost.—*THE BAARN*, [1933] P. 251; 102 L. J. P. 120; 150 L. T. 50; 49 T. L. R. 554; 18 Asp. M. L. C. 434, C. A.

- 61a. *Debentures of Australian company—Option for payment in Australia or London—Payment in London.*—In Oct. 1920, an Australian co. incorporated in Victoria, & having also a registered office in London, England, issued mtge. debentures secured by a trust deed. By each of the debentures the co. covenanted to pay the principal moneys on Oct. 1, 1940, or such earlier date as they should become payable in accordance with the conditions indorsed thereon, & in the meantime to pay interest thereon at 7 per cent. *per annum* in accordance with the coupons annexed thereto. Under the conditions both principal & interest were payable in either Australia or London, at the holder's option. In accordance with a supplemental trust deed dated Sept. 1, 1921, an additional register of debentures was established in London, & the co. had power to make provision for (*inter alia*) transfer of registration from one register to the other. At the date of the last drawing of debentures for redemption before this summons—namely, Oct. 7, 1931, over 6,000 debentures were outstanding, of which 137 were on the London register:—*Held*: on the true construction of the debentures & of the annexed coupons there was no implied stipulation that, in the event of a debenture holder exercising his option to be paid in London, the co. could be required to pay the principal moneys & interest thereby secured in sterling & not in Australian currency. Therefore, the appeal must be allowed, & there must be a declaration that the sums payable by the co. in London in redemption of, & for interest on, the debentures in question ought in all cases to be paid in Australian currency converted into sterling at the rate of exchange current in London on the due date for payment thereof.—*BROKEN HILL PROPRIETARY CO., LTD. v. LATHAM*, [1933] Ch. 373; 102 L. J. Ch. 163; 148 L. T. 412; 49 T. L. R. 137; 77 Sol. Jo. 29, C. A.

*Annotations*:—*Apld.* Prudential Assurance Co. v. Adelaide Electric Supply Co. (1933), 49 T. L. R. 224. *Overd.* Adelaide Electric Supply Co. v. Prudential Assurance Co., [1934] A. C. 122. *Refd.* Ottoman Bank of Nicosia v. Chakarian, [1938] A. C. 260.

63. *Add. Citations*:—96 L. J. K. B. 930; 137 L. T. 431.

*Add. Annotation*:—*Refd.* De Béeche v. South American Stores, Ltd. & Chilian Stores, Ltd., [1935] A. C. 148.

## Part III.—Interest.

- 101a. —.]—*SWEETLAND v. SMITH* (1833), 1 Cr. & M. 585; 3 Tyr. 491; 2 L. J. Ex. 190; 149 E. R. 532.

### PART III. SECT. 2, SUB-SECT. 1.—A.

*so. General rule.*—A successful plff. in an action for debt may recover interest if he can show that deft. agreed expressly or impliedly to pay interest or, in the absence of such agreement,

if he can convince the ct. that he is entitled to interest as damages. It is only, however, in the case of a contract express or implied to pay interest at a fixed rate that the claim can be said to constitute a liquidated demand.—*VALADE v. McEWEN*, [1930] 2 W. W. R.

490; 4 D. L. R. 123; 24 S. L. R. 527. —*CAN.*  
n. *Revd.*, 64 S. C. R. 396.

PART III. SECT. 2, SUB-SECT. 1.—B.  
95 vi. —.]—*DUNN v. R.* (1901), 1 Cout. Dig. 728.—*CAN.*

SUB-SECT. 2.—BY STATUTE (p. 182).

See, now, Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 3.

119. *Add. Annotation*:—*Refd.* Graigola Merthyr Co. v. Swansea Corp., [1928] Ch. 31.
123. *Add. Annotations*:—*Refd.* Maine & New Brunswick Electrical Power Co. v. Hart, [1929] A. C. 631; *Simpson v. Maurice's Exors.* (1929), 45 T. L. R. 581.
125. *Add. Annotations*:—*Apprvd.* Maine & New Brunswick Electrical Power Co. v. Hart, [1929] A. C. 631. *Refd.* Shell Mex, Ltd. v. Elton Cop Dyeing Co., Ltd. (1928), 34 Com. Cas. 39.

C. Under Other Statutes (p. 185).

- 142a. Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 3 (1)—*Whether retrospective.*—Sect. 3 (1) of Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), is not restricted to proceedings begun after the Act had come into force. The sect. gives the ct. a discretion to award interest in any proceeding, whenever begun, whether before or after the

Act.—*BANK OF ATHENS SOCIÉTÉ ANONYME v. ROYAL EXCHANGE ASSURANCE*, [1938] 1 K. B. 771; [1938] 1 All E. R. 514; 107 L. J. K. B. 302; 158 L. T. 244; 54 T. L. R. 427; 82 Sol. Jo. 114.

219. *Add. Annotation*:—*Refd.* Weld v. Petre (1928), 97 L. J. Ch. 399.
224. *Add. Citation*:—136 L. T. 114.
243. *Add. Annotation*:—*Consd.* Weld v. Petre (1928), 97 L. J. Ch. 399.
255. *Add. Annotation*:—*Refd.* *Re* Mansel, Smith v. Mansel, [1930] 1 Ch. 352.
257. *Add. Annotation*:—*Refd.* *Re* Mansel, Smith v. Mansel, [1930] 21 Ch. 352.
260. *Add. Annotation*:—*Refd.* *Re* Mansel, Smith v. Mansel, [1930] 1 Ch. 352.
262. *Add. Annotation*:—*As to* (1) *Refd.* I. R. Comrs. v. Holder, [1931] 2 K. B. 81.
270. *Add. Annotations*:—*Refd.* I. R. Comrs. v. Holder, [1931] 2 K. B. 81; I. R. Comrs. v. Lawrence, Graham & Co., [1937] 2 K. B. 179; Paton v. I. R. Comrs., [1938] A. C. 341.

## Part IV.—Money-Lending.

286. *Add. Annotation*:—*Generally*, *Refd.* Glaskie v. Watkins, [1927] 2 K. B. 181.

- 290a. — *Company financing hire-purchase transactions.*—*OLDS DISCOUNT CO., LTD. v. COHEN* (1937), [1938] 3 All E. R. 281, n.; 159 L. T. 335, n.

*Annotation*:—*Consd.* Olds Discount Co., Ltd. v. John Playfair, Ltd., [1938] 3 All E. R. 275.

### PART III. SECT. 2, SUB-SECT. 1.—

*sk. Intention that no interest payable.*—One brother lent £100 to another, & the debtor granted a written acknowledgment of the receipt of "£100 on loan to be repaid later." The creditor lived for eighteen years after the date of the loan, & during his lifetime no interest was demanded or paid. After his death his executrix claimed repayment of the loan with interest from its date:—*Held*: although as a general rule interest is due on a loan, the proper inference from the whole circumstances of the case, & in particular from the facts that the parties were brothers, that the creditor had made no demand for interest during his lifetime, & that the acknowledgment bore that the money was "to be repaid later" was that the intention of the parties was that no interest should be paid.—*SMELLIE'S EXECUTRIX v. SMELLIE*, [1933] S. C. 725.—SCOT.

### PART III. SECT. 2, SUB-SECT. 2.—

117 v. —.—]—When an instrument provides for future payments, but the time for payment, & the amount, if any, payable, both depend upon contingent events, there is not "a sum certain payable by a written instrument at a certain time" so as to enable interest to be allowed under sect. 24, sub-sect. 1, of the New Brunswick Jud. Act, 1909, the language of which is not distinguishable from that in the English Civil Procedure Act, 1833, s. 28.—*MAINE & NEW BRUNSWICK ELECTRICAL POWER CO. v. HART*, [1929] A. C. 631.—CAN.

137 i. *Demand in writing—Sufficiency of—Claim on writ.*—The inclusion of a claim for interest in a statement of

claim is not a demand therefor within 3 & 4 Will. 4, c. 42, s. 28.—*PEARSON-BURLEIGH, LTD. v. PIONEER GRAIN CO., LTD.*, [1933] 1 W. W. R. 179; 1 D. L. R. 714; 41 Man. L. R. 65.—CAN.

### PART III. SECT. 2, SUB-SECT. 2.—C.

i. —.—]—*THE CUSTODIAN v. BLUCHER*, [1927] 3 D. L. R. 40; [1927] S. C. R. 420.—CAN.

*sd. Under Crown Suits Act, 1898* (62 Vict. No. 9, W. A.)—*Whether payable by Crown.*—*R. v. McNEIL*, [1927] A. C. 380; 96 L. J. P. C. 41; 136 L. T. 646.—AUS.

*ss. Under Interest Act.*—The proviso to the Interest Act, s. 1, only enables the ct. to award interest in all cases where it was payable in law before the Act, & the cts. in India, following the practice of the English cts., did not, prior to the Indian Act, award interest in the case of ordinary debts, but did so only in certain special cases.—*NANOCHAPPA GOUNDAN v. ITTICHATHARA MANNADIAR* (1929), 1 L. R. 53 Mad. 549.—IND.

### PART III. SECT. 2, SUB-SECT. 3.—A.

*sk. Money obtained by threat.*—*FURPHY v. NIXON* (1925), 37 C. L. R. 161; 26 S. R. N. S. W. 380.—AUS.

*si. Rescission of contract & return of purchase-money.*—Where the ct. gives a purely equitable relief as in the case of rescission of a contract & repayment of the money paid by the purchaser, the moneys will carry interest from the date of the payment until the date of repayment, whenever repayment takes place, but will not carry interest as a judgment.—*SKINNER v. JAMES SYPHONIC VISIBLE*

290b. —.—]—Defts. were credit drapers, selling goods upon terms that the price should be paid by instalments. Pltfs. were a hire-purchase finance co. Defts. in consideration of the payment of a sum of money assigned to pltfs. certain debts, being the above instalments to become due. Defts. undertook to

*MEASURES, LTD.* (1927), 28 S. R. N. S. W. 20.—AUS.

### PART III. SECT. 6, SUB-SECT. 1.

261 v. —.—]—*CLYDE NAVIGATION TRUSTEES v. KELVIN SHIPPING CO., LTD.*, [1927] S. C. 622.—SCOT.

*sm. Rule in India.*—In India compound interest is common, & often may be necessary & proper upon a borrowing for necessity.—*SUNDER MULL v. SATYA KINKER SAHANA* (1927), L. R. 55 Ind. App. 85.—IND.

### PART IV. SECT. 1, SUB-SECT. 1.—A.

282 i. *Question of fact.*—In each case it is a question of fact whether a person is carrying on the business of money-lending.—*KERR v. LOUISSON*, [1928] N. Z. L. R. 154.—N.Z.

282 ii. —.—]—A pltf., who alleges that deft. is carrying on business as a money-lender, discharges the *prima facie onus* resting on him upon proof merely of a series of loan transactions by deft. of a volume & frequency sufficient to indicate the existence of a money-lending business; but if further evidence is adduced which explains the real nature of those transactions & the circumstances surrounding their creation, it then becomes a question of fact upon a consideration of the whole of the evidence whether the existence of a business of money-lending has been affirmatively established.—*LAPIN v. HEAVENER* (1929), 29 S. R. N. S. W. 514; 46 N. S. W. W. N. 104.—AUS.

### PART IV. SECT. 1, SUB-SECT. 1.—B.

*sn. Cash order business.*—Resp. co. carried on the business of providing its customers with written orders on shop-

collect these debts at their own expense as agents of pltf's., & to remit to pltf's. all money so collected. Def'ts. also gave a series of monthly bills of further securing these book debts. It was then provided that, when all the instalments & other moneys payable in respect of such book debts should have been paid, then pltf's. should pay a further sum in respect of the purchase price of the book debts. It was contended that this transaction was in effect a moneylending transaction, & was unenforceable, as pltf's. were not registered moneylenders, & the provisions of Moneylenders Act, 1927 (c. 21), had not been complied with:—*Held*: the transaction was a sale of book debts, & not a moneylending transaction, & it was therefore enforceable.—*OLDS DISCOUNT CO., LTD. v. JOHN PLAYFAIR, LTD.*, [1938] 3 All E. R. 275; 159 L. T. 332; 82 Sol. Jo. 648.

302. *Add. Annotation*:—*Re*fd. *Glaskie v. Watkins*, [1927] 2 K. B. 181.

303. *Add. Annotation*:—*Consd. Re Mason* (1928), 97 L. J. Ch. 321.

304. *Add. Annotation*:—*Consd. Pirie v. Richardson*, [1927] 1 K. B. 448.

316. *Add. Annotation*:—*Re*fd. *Merz v. South Wales Equitable Money Soc.*, [1927] 2 K. B. 366.

343. *Add. Annotation*:—*Re*fd. *Merz v. South Wales Equitable Money Soc.*, [1927] 2 K. B. 366.

345. *Add. Annotation*:—*Re*fd. *Merz v. South Wales Equitable Money Soc.*, [1927] 2 K. B. 366.

346. *Add. Annotation*:—*As to* (1) *Re*fd. *Merz v. South Wales Equitable Money Soc.*, [1927] 2 K. B. 366.

346a. — *Company registered as money-lender—Security payable to secretary.*—Def't. society became incorporated as a limited co. & began to carry on business as money-lenders & were registered as such, & they made an advance to pltf's., who signed a promissory note agreeing to pay the amount to the secretary of def't. society, which was mentioned by name in the note as the society of which he was secretary. In an action for a declaration that the transaction was void, on the ground that def'ts. had taken a security in a name other than their registered name, contrary to Moneylenders Act, 1900 (c. 51), s. 2 (1) (c):—*Held*: as no one could sue on the note except the secretary, the security had been taken in a name other than def'ts.

registered name, & pltf's. were entitled to the declaration claimed.—*MERZ v. SOUTH WALES EQUITABLE MONEY SOCIETY, LTD.*, [1927] 2 K. B. 366; 96 L. J. K. B. 1020; 137 L. T. 626; 43 T. L. R. 456, C. A.

#### SUB-SECT. 5.—RESTRICTIONS ON CONTRACTS.

*See* Money-lenders Act, 1927 (c. 21), ss. 6, 8.

353a. *Note or memorandum signed by borrower—Contract contemplating security—Whether contract must set out terms of security.*—Money-lenders brought an action against a borrower to recover sums of £200, £100, & £100 lent by them to the borrower & alleged to be due upon three promissory notes payable at a specified address, the first in fourteen monthly instalments with interest at 60 per cent. *per annum*, & the others in three months after their respective dates with interest at 80 per cent. *per annum* until payment. If default were made the whole unpaid principal & interest thereon became due & was to carry interest in the case of the first sum at 60 per cent. *per annum* & in the case of the other two sums at 80 per cent. *per annum* from the date of default until payment. In intended compliance with Money-lenders Act, 1927 (c. 21), s. 6, in each case before the money was lent there was made & signed by the borrower a note or memorandum of the contract stating that the sum referred to therein was advanced on the security of a promissory note, but not stating where repayment of the sum was to be made. Copies of the notes or memoranda were duly delivered to the borrower:—*Held*: (1) the note or memorandum in each case was sufficient. The ct., without deciding the point, inclined to the view that the terms of a security given for repayment of a loan need not be set out in the note or memorandum of the contract, at any rate where the security does not impose terms more onerous than those stated in the note or memorandum.

(2) Where the interest charged exceeds the rate mentioned, Money-lenders Act, 1927 (c. 21), s. 10 (1), imposes on the money-lender the burden of showing that the interest is not excessive & that the transaction of loan is not harsh or unconscionable; & in the circumstances pltf's. had in each case discharged themselves of this burden.—*READING TRUST, LTD. v. SPERO, SPERO v. READING TRUST, LTD.*, [1930] 1 K. B. 492; 99 L. J.

keepers requesting them to supply goods to a certain amount to the customer. The customer signed a memorandum stating that in consideration of the co. making a certain advance at his request he undertook to pay to the co. a sum larger than the price of goods supplied by a deposit & instalments:—*Held*: the business so carried on was not that of money-lending, & resp. co. was not under an obligation to register under the Money-lenders Act, 1924.—*ALLCHURCH v. POPULAR CASH ORDER CO., LTD.*, [1928] S. A. S. R. 189.—*AUS.*

#### PART IV. SECT. 2, SUB-SECT. 1.—A.

301 ii. — *Where a person whose business is that of money-lending, or who advertises or announces*

himself or holds himself out in any way as carrying on that business, & does any of those acts within the Irish Free State, he must, in order to make his contracts legal & enforceable within the Irish Free State, comply in the Irish Free State with the provisions as to registration contained in Money-lenders Act 1900, s. 2 (1) (a).—*LONDON FINANCE & DISCOUNT CO., LTD. v. BUTLER*, [1929] 1 R. 90.—*IR.*

#### PART IV. SECT. 2, SUB-SECT. 3.

324 i. *What amounts to—Question of fact.*—*GOLDSTEIN v. CRAFT* (1928), 26 S. R. N. S. W. 354; 43 N. S. W. W. N. 13.—*AUS.*

#### PART IV. SECT. 2, SUB-SECT. 5.

*st. Moneylenders Act, 1933, s. 11.*—

A contract by a moneylender to lend money was secured by a promissory note, which was not signed by either the principal or the surety, nor was any note or memorandum of the contract made, until after the major portion of the sum of money contracted to be lent had been lent:—*Held*: by reason of the provisions of Moneylenders Act, 1933, s. 11 (1), the moneylender's claim for the repayment of the money was unenforceable; also, Moneylenders Act, 1933, only applies to the transactions of a moneylender made in the course of his business, & a moneylender is not precluded by the Act from lending small sums to his friends without complying with all the formalities of the Act.—*HANDELMAN v. DAVIES*, [1937] 1 R. 419.—*IR.*

K. B. 186; 142 L. T. 361; 74 Sol. Jo. 12; 46 T. L. R. 117, C. A.

*Annotations* :—As to (1) *Consd. Collings v. Charles Bradbury, Ltd.*, [1936] 3 All E. R. 369. *Refd. Bennett & Co. v. Smith* (1931), 47 T. L. R. 592; *Temperance Loan Fund, Ltd. v. Rose*, [1932] 2 K. B. 522; *Dunn Trust, Ltd. v. Feetham*, [1936] 1 K. B. 22; *Mitchener v. Equitable Investment Co.*, [1938] 1 All E. R. 303. As to (2) *Refd. Parkfield Trust v. Dent*, [1931] 2 K. B. 579.

**353b.** ——— **Substituted contract in settlement of action to recover loan.**—The male deft. borrowed, by promissory note, money from pltf., a firm of money-lenders, & agreed to repay the same by monthly instalments. In this transaction the requirements of Money-lenders Act, 1927 (c. 21), s. 6, were duly complied with. The borrower made default in paying the instalments, whereupon pltf. issued a writ to recover the amount. Negotiations then took place, & in the result an arrangement was made by which the male deft. & the second deft., his wife, gave pltf. a joint & several promissory note in respect of the amount unpaid on the first promissory note, an amount for interest, & certain agreed costs. A memorandum of this contract was signed by both defts., but no copy was sent to them within seven days, as required by sect. 6. The amount of the promissory note not having been repaid on the due date, pltf. sued defts. to recover the same :—*Held* : (1) although the contract sued on was a substituted agreement for, or a variation of, the original contract entered into by the male deft., it was nevertheless a contract "for the repayment by a borrower of money lent to him" within sect. 6; (2) as a copy of the contract had not been sent as required by that sect., the contract was unenforceable against the male deft.; (3) it was likewise unenforceable against the female deft., inasmuch as it appeared that she signed the promissory note solely as a surety, & the male deft. not being liable she also was discharged from liability.—*ELDRIDGE & MORRIS v. TAYLOR*, [1931] 2 K. B. 416; 100 L. J. K. B. 689; 145 L. T. 499; 47 T. L. R. 516.

*Annotations* :—As to (1) *Appl. Temperance Loan Fund, Ltd. v. Rose*, [1932] 2 K. B. 522. As to (2) *Refd. Bennett & Co., Ltd. v. Smith* (1931), 47 T. L. R. 592.

**353c.** ——— **What amounts to security—Guarantee.**—*TEMPERANCE LOAN FUND, LTD. v. ROSE*, No. 353v, *post*.

**353d.** ——— **Post-dated cheques.**—A lady of no business experience borrowed money from money-lenders, & in respect of the loan gave them a promissory note payable by instalments & post-dated cheques in respect of the instalments. The cheques were handed over with the note before the transaction was completed. The interest secured by the notes was 81.23 per cent., & the money-lender knew the borrower was a lady of some means but made no further inquiry on the matter :—*Held* : (1) the handing over of the cheques formed a term of the contract & must be mentioned in the memorandum of the contract of loan given in accordance with the provisions of the Money-lenders Act, 1927 (c. 21), s. 6. As they were not referred to therein, the loan was unenforceable by the money-lender; (2) the transaction was harsh & unconscionable within sect. 10 of the Act & the interest must be reduced to 25 per cent.—*COLLINGS v. CHARLES BRADBURY, LTD.*, [1936] 3 All E. R. 369.

**353e.** ——— **Duty to send copy to borrower.**—*ELDRIDGE & MORRIS v. TAYLOR*, No. 353b, *ante*.

**353f.** ——— **Discharge of surety—On failure to send copy.**—*ELDRIDGE & MORRIS v. TAYLOR*, No. 353b, *ante*.

**353g.** ——— **Omission of date.**—*TEMPERANCE LOAN FUND, LTD. v. ROSE*, No. 353v, *post*.

**353h.** ——— **Date of loan inaccurately stated.**—If the memorandum required by Money-lenders Act, 1927 (c. 21), s. 6, states the date of the loan incorrectly, the contract is unenforceable, even although the inaccuracy has caused no deception & is due merely to a clerical error.—*GASKELL, LTD. v. ASKWITH* (1929), 45 T. L. R. 566; 73 Sol. Jo. 465, C. A.

*Annotations* :—*Consd. Reading Trust, Ltd. v. Spero, Spero v. Reading Trust, Ltd.*, [1930] 1 K. B. 492. *Expld. Temperance Loan Fund, Ltd. v. Rose*, [1932] 2 K. B. 522.

**353i.** ——— **The copy of the memorandum required by sect. 6 of the Money-lenders Act, 1927 (c. 21), s. 6, to be delivered to the borrower is not vitiated by the absence of a copy of the signature of the borrower, & the memorandum itself is not vitiated by an accidental slip in the date of the loan.**—*SHERWOOD v. DEELEY* (1931), 47 T. L. R. 419; 75 Sol. Jo. 345.

*Annotation* :—*Consd. Bennett & Co., Ltd. v. Smith* (1931), 47 T. L. R. 592.

**353j.** ——— **The copy of the memorandum required by Money-lenders Act, 1927 (c. 21), s. 6, to be delivered to the borrower must be an exact copy, & therefore, when the memorandum correctly states the date of the loan, the copy is vitiated by an imperfect statement of the date.**—*BENNETT (T. W.) & CO., LTD. v. SMITH* (1931), 47 T. L. R. 592; 75 Sol. Jo. 645.

**353k.** ——— **Rate of interest incorrectly stated.**—Pltf., who were registered money-lenders, agreed to lend a borrower the sum of £500 in consideration of the additional sum of £150, the whole sum of £650 to be repaid by two instalments of £325 each paid at the end of the first & second months. In the memorandum of the contract dated May 25, 1933, the loan was stated to be payable with interest at the rate of £240 per cent. *per annum* & to be made upon the terms of a promissory note of the same date, a copy of which was attached. The promissory note contained a promise to pay £500 together with interest at the rate of £240 per cent. *per annum* "such sum of £500 to be paid together with interest then due by consecutive monthly instalments of £325 each" on June 25 & July 25, 1933 :—*Held* : the rate of interest was incorrectly stated in the memorandum & therefore the contract was unenforceable. Having regard to the form of the memorandum the rate of interest could not be treated as having been calculated in accordance with the provisions in Sched. I. to Money-lenders Act, 1927 (c. 21), & in order that the instalments should include interest at £240 per cent. *per annum* the second instalment must have been £330 & not £325.

*Per SLESSER and ROMER, L.JJ.* : In a case where the rate of interest stated in the memorandum has been calculated in accordance with the provisions of Sched. I. to the

Act, this fact must be stated in the memorandum in order to comply with sect. 6 of the Act.—**PARKFIELD TRUST, LTD. v. CURTIS**, [1934] 1 K. B. 685; 103 L. J. K. B. 609; 150 L. T. 436, C. A.

*Annotation*:—**Extd. & Apld. Mason & Wood, Ltd. v. Greene**, [1936] 2 All E. R. 509.

353l.

—[.]—A borrower, who had had several loan transactions with a firm of registered money-lenders, was adjudicated bkpt. in July, 1933, & the money-lenders proved in that bkpcy. for £257 in respect of principal & interest but received no dividend in respect thereof. In May, 1934, the borrower applied to the money-lenders for a loan of £100, & on the money-lenders refusing to make the loan, offered that £50 out of the £100 advance should be retained by the money-lenders to compensate them in part for the loss they sustained in his bkpcy. The money-lenders thereupon made the loan, two cheques for £50 each being made out by the money-lenders, one of which was endorsed by the borrower & returned to the money-lenders. The memorandum & promissory note, which were signed by the borrower, stated that an advance of £100 had been made with interest at the rate of £64 per cent. *per annum* to be repaid by fourteen consecutive monthly instalments of £10 each. In the default clause in the memorandum the principal sum was stated to be £140, but the typist who typed the document said in an affidavit that she typed £140 by mistake & that the sum ought to have been £100. The money-lenders brought an action on the promissory note on a failure by the borrower to pay more than one monthly instalment:—*Held*: the memorandum did not contain all the terms of the contract, inasmuch as the amount actually lent was only £50, & therefore the amount of the principal of the loan was not correctly stated according to the definition of “principal” in Money-lenders Act, 1927 (c. 21), s. 15; the sum of £50, given by the borrower or retained by the money-lenders, was an amount in excess of the principal, paid to the money-lender in consideration of the loan, & was therefore “interest” within the definition of “interest” in sect. 15, & accordingly that the interest charged on the loan was not truly stated in the memorandum, & therefore the contract for the repayment of the money lent to the borrower by the money-lenders was, under sect. 6 (1) of the Act of 1927, unenforceable.

*Per SLESSER & ROCHE, L.JJ.*, the insertion in the default clause of the memorandum of £140 instead of £100 was a material error which would invalidate the transaction.—**DUNN TRUST, LTD. v. FEETHAM**, [1936] 1 K. B. 22; 105 L. J. K. B. 52; 154 L. T. 53, C. A.

*Annotation*:—**Distd. Re British Games, Ltd.**, [1938] Ch. 240.

353m.

—[.]—In each of two money-lending transactions secured by a promissory note for payment of £70 by fourteen monthly instalments the memorandum of the contract stated that “the amount of principal being advanced in respect of the said promissory note for £70 is £50, & the interest charged of £20 is equivalent to interest at the rate of £64 per cent. *per annum*.” The rate of interest was in fact calculated in accordance

with the provisions of Sched. I. to Money-lenders Act, 1927 (c. 21). After default had been made in payment of instalments the assignees for value of the promissory notes, who were also money-lenders, brought proceedings to recover the balance of principal & interest:—*Held*: the contracts & promissory notes were unenforceable having regard to sect. 6 (2) of the Act, because the memorandum failed to state that the rate of interest was calculated in accordance with the provisions of Sched. I. to the Act.—**MASON & WOOD, LTD. v. GREENE**, [1936] 2 K. B. 370; [1936] 2 All E. R. 509; 105 L. J. K. B. 774; 155 L. T. 11; 52 T. L. R. 636; 80 Sol. Jo. 510, C. A.

353n. — **Principal incorrectly stated.**—**DUNN TRUST, LTD. v. FEETHAM**, No. 353l, *ante*.

353o. — **Effect of clerical error.**—**TEMPERANCE LOAN FUND, LTD. v. ROSE**, No. 353v, *post*.

353p. — **Omission of copy of borrower's signature.**—**SHERWOOD v. DEELEY**, No. 353i, *ante*.

353q. — **Power of court to go behind.**—(1) A memorandum under Money-lenders Act, 1927 (c. 21), s. 6, must be stamped before it can be received in evidence.

(2) If such a memorandum is not a true representation of the transaction, the ct. will go behind it, & if there is no memorandum of the real transaction there is no enforceable contract.—**B. S. LYLE, LTD. v. CHAPPELL** (1931), 47 T. L. R. 562; 75 Sol. Jo. 511; *reversd. on other grounds*, [1932] 1 K. B. 691, C. A.

*Annotations*:—*Generally*, **Refd. Temperance Loan Fund, Ltd. v. Rose**, [1932] 2 K. B. 522; **Lancashire Loans, Ltd. v. Black**, [1934] 1 K. B. 380; **Dunn Trust, Ltd. v. Feetham**, [1936] 1 K. B. 22.

353r. — **Necessity for stamp.**—**B. S. LYLE, LTD. v. CHAPPELL**, No. 353q, *ante*.

353s. — —[.]—(1) By virtue of Money-lenders Act, 1927 (c. 21), s. 10, where a money-lender seeks to recover judgment against a borrower for more than a sum equal to the money lent & 48 per cent. *per annum* interest, he must satisfy the ct. that, in all the circumstances of the case, the rate of interest which he claims to recover is not excessive & that the transaction is not harsh & unconscionable. Although the borrower does not appear to the writ, or does not further defend the action, the onus is still on pltf. money-lender to satisfy the ct. on these two points. He must therefore prove a transaction which comes within Money-lenders Act, 1927 (c. 21), s. 6, & consequently he must prove a note or memorandum of the contract made in accordance with that sect.

(2) Such a note or memorandum is a memorandum of a contract within Stamp Act, 1891 (c. 39), s. 1 & Sched. I. to that Act, & therefore must be stamped with a 6d. stamp.

—**PARKFIELD TRUST, LTD. v. DENT**, [1931] 2 K. B. 579; 101 L. J. K. B. 6; 146 L. T. 90.

*Annotation*:—*As to* (1) **Consd. Collings v. Charles Bradbury, Ltd.**, [1936] 3 All E. R. 369.

353t. — **Onus of proof.**—**PARKFIELD TRUST, LTD. v. DENT**, No. 353s, *ante*.

353u. — **Renewal—Must appear on second memorandum.**—When the time for payment of an original loan granted by a money-lender has expired without complete repayment, there is no objection to extending the time for repayment on altered terms by treating the old loan as paid off by means of a



new loan on the altered terms, provided that the fact that this is being done is shown on the face of the second memorandum signed by the borrower before the new security is given. Such a memorandum is signed by the borrower before the money is lent within the meaning of sect. 6 (1) of the Money-lenders Act, 1927 (c. 21), s. 6 (1).

At the time when the second memorandum is signed neither a cheque nor cash need be handed over by the money-lender to the borrower & then returned. The money is lent within Money-lenders Act, 1927 (c. 21), s. 6, if it is appropriated by the money-lender to the purposes of the borrower, in any way which the borrower authorises (GREER, L.J.). —*B. S. LYLE, LTD. v. CHAPPEL*, [1932] 1 K. B. 691; 101 L. J. K. B. 185; 48 T. L. R. 119, C. A.

*Annotations*.—*Consol. Temperance Loan Fund, Ltd. v. Rose*, [1932] 2 K. B. 522; *Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380. *Distd. Dunn Trust, Ltd. v. Feetham*, [1936] 1 K. B. 22. *Appl. Re British Games, Ltd.*, [1938] Ch. 240. *Reid. Egan v. Langham Investments, Ltd.*, [1938] 1 K. B. 667.

## 353v.

—*]*—(1) Every contract between a money-lender & a borrower for the repayment by the latter of money lent to him, & that includes a promise by the borrower to pay the balance of money previously lent to him, is brought within the purview of Money-lenders Act, 1927 (c. 21), s. 6. Where a transaction is the renewal of an old loan, the fact that it is such ought to be set out in the memorandum in order to comply with sect. 6.

(2) If the transaction between a money-lender & a borrower is unenforceable against the borrower by reason of non-compliance by the money-lender with the requirements of sect. 6, for example, by the omission from the memorandum of the date on which the loan was made, it is equally unenforceable against a person who has guaranteed the payment of the debt.

(3) A security "given by the borrower" within sect. 6 of the Act of 1927 may take the form of a guarantee given by a third party.

(4) *Gaskell, Ltd. v. Askwith*, No. 353h, *ante*, did not decide that a mere clerical error in the memorandum required by sect. 6 will invalidate the memorandum; & it must not be taken that a mere clerical error will have that effect (SCRUTTON, L.J.).

The Money-lenders Acts are not to be construed strictly in favour of lenders; they are to be construed on the same canons as any other Act (SLESSER, L.J.).—*TEMPERANCE LOAN FUND, LTD. v. ROSE*, [1932] 2 K. B. 522; 101 L. J. K. B. 609; 147 L. T. 330, C. A.

*Annotation*.—*As to* (1) *Reid. Dunn Trust, Ltd. v. Feetham*, [1936] 1 K. B. 22.

## 353w. — Real transaction must be stated.]—

*Per SCRUTTON, L.J.*: The memorandum of the transaction of Aug. 5, 1931, was void because it did not state the real transaction. It contained an admission by the mother that £575 was then due & owing by her, whereas at that date nothing was due, & if it were assumed that the principal & *pro rata* interest were then to be paid, the amount payable would only be £535, & there would be a bonus to the money-lenders of about £40 for accepting payment before it was due, which ought to have been stated on the face of the memorandum, but was not. In

effect the money-lender was obtaining interest on interest, which was prohibited under Money-lenders Act, 1927 (c. 21), s. 7.—*LANCASHIRE LOANS, LTD. v. BLACK*, [1934] 1 K. B. 380; 103 L. J. K. B. 129; 150 L. T. 304, C. A.

## 353x.

**Loan on security of bill of sale**  
**Number of instalments payable not stated in memorandum.]**—A loan was made by registered money-lenders on the security of a bill of sale given by the borrower on his furniture. The transaction was a money-lending transaction within the meaning of the Money-lenders Act, 1927 (c. 21). The memorandum of the transaction stated the date of the loan, the amount of the principal advanced & the rate of interest charged. The bill of sale, which was in the form required by Sched. to Bills of Sale Act (1878) Amendment Act, 1882 (c. 43), was also set out verbatim in the memorandum. Under the bill of sale the borrower agreed to pay to the lenders the principal sum advanced together with the interest then due by equal monthly payments of £3 to be paid on a specified date of each month until the whole amount including principal & interest was repaid. Neither the bill of sale nor the memorandum stated the number of instalments that had to be paid. Objection was taken that the contract was unenforceable, as the memorandum did not contain all the terms of the contract because the number of instalments payable had not been stated therein:—*Held*: the contract was enforceable, as the memorandum set out the particulars specifically required by Money-lenders Act, 1927 (c. 21), s. 6 (2), & also set out verbatim the bill of sale, which was in the statutory form, & accordingly contained all the terms of the contract. What had not been set out was the effect of those terms according to the decisions of the cts. in various cases, but the statute did not require that to be set out in the memorandum.—*SIMMONS v. RUSSELL FINANCIERS, LTD.*, [1934] 2 K. B. 487; 103 L. J. K. B. 724; 151 L. T. 472, C. A.

## 353y.

— **Omission to state power of seizure & sale.]**—Pltf. borrowed money from defts., moneylenders. The memorandum merely set out that the loan was secured by a bill of sale on pltf.'s furniture. The statutory form of such a bill of sale sets out that personal chattels thereby assigned shall not be liable to seizure for any other than five specified causes:—*Held*: the memorandum did not contain all the terms of the contract in that it did not specify upon which of the above grounds the goods could be seized, & therefore the contract was unenforceable.—*MITCHENER v. EQUITABLE INVESTMENT CO., LTD.*, [1938] 2 K. B. 559; [1938] 1 All E. R. 303; 107 L. J. K. B. 316; 158 L. T. 176; 54 T. L. R. 334; 82 Sol. Jo. 257.

## 353z.

— **—**—*]*—A loan by registered moneylenders was secured by a bill of sale. It appeared both from the memorandum & from the evidence that the borrower had received a copy of the bill of sale. It was contended that the memorandum was insufficient, since it did not state the power of seizure & sale contained in the bill of sale. It was further contended that, although in the bill of sale the consideration was not truly

stated, *pltf.* was estopped from raising that point, because he knew the true facts at the time of execution:—*Held*: (1) it is not necessary that the power of seizure & sale under the bill of sale should be specifically set out in the memorandum of loan where the borrower receives a copy of the bill of sale; (2) *pltf.* was not estopped from alleging that the consideration was not truly stated in the bill of sale; (3) similarly, a borrower would not be estopped from asserting the inaccuracy of statements in the memorandum of loan under Moneylenders Act, 1927 (c. 21), s. 6, although he knew the true facts.—*HOARE v. ADAM SMITH (LONDON), LTD.*, [1938] 4 All E. R. 283.

**353aa. — Loan to company—Signature.**—A co. which had from time to time borrowed large sums from moneylenders, on Dec. 1, 1936, entered into a contract with the lenders by which the lenders agreed to advance £4,950, the sum then owed for principal & arrears of interest, on the security of a promissory note for £4,950 with interest at the rate of 27½ per cent. *per annum*, repayable as to £1,970 by specified instalments, the balance of £2,980 with accrued interest to be paid off on Feb. 1, 1937. In default of the payment of any instalment the whole amount was to become due & payable. The memorandum of the contract & the accompanying promissory note were both signed by a director & the secretary of the co. "for & on behalf of the co.," & the co.'s seal was not affixed to the contract. The new loan in fact consolidated previous loans & the interest thereon, & the memorandum authorised & requested the lenders to retain the sum of £4,950 in repayment of outstanding balances of accounts owing. The co. defaulted in payment of the instalments, & the lenders, having sued them, obtained leave to sign judgment for £4,695 10s., but did not actually sign it. The co. having passed a resolution for voluntary winding-up, the lenders lodged with the liquidators a proof for £4,804 19s. 8d., balance of principal & interest then due. The liquidator rejected the proof as not being in accordance with the provisions of Moneylenders Act, 1927 (c. 21), s. 6 (1), (2), & sect. 9 (2):—*Held*: (1) the contract having been duly executed in accordance with Cos. Act, 1929 (c. 23), s. 29, the memorandum was "signed personally by the borrower" in accordance with Moneylenders Act, 1927 (c. 21), s. 6 (1), there being nothing in Moneylenders Act, 1927 (c. 21), prescribing that a moneylending transaction with a co. must be perfected by a memorandum under seal; (2) the document showed on its face that the loan of £4,950 was a consolidating loan, & therefore the memorandum contained all the particulars required to satisfy Moneylenders Act, 1927 (c. 21), s. 6 (2), notwithstanding that part of the loan might have been or was attributable to interest accrued due on previous loans; (3) the statement accompanying the affidavit verifying *appts.* proof contained all the particulars necessary to satisfy sect. 9 (2) of the same Act.—*Re BRITISH GAMES, LTD.*, [1938] Ch. 240; [1938] 1 All E. R. 230; 107 L. J. Ch. 81; 158 L. T. 239; 54 T. L. R. 137; 81 Sol. Jo. 1001; [1936-7] B. & C. R. 233.

**353bb. — Part of loan payable in discharge of**

previous loan—*Necessity for disclosure.*—Where a borrower obtains a loan from a registered moneylender, & it is a term or condition of the contract between him & the moneylender that the outstanding balance of a former loan shall be repaid by the borrower out of the new loan, failure to include that term or condition in the note or memorandum required by Moneylenders Act, 1927 (c. 21), s. 6, renders the contract & the security (in this case a bill of sale) unenforceable.—*EGAN v. LANGHAM INVESTMENTS, LTD.*, [1938] 1 K. B. 667; [1938] 1 All E. R. 193; 107 L. J. K. B. 337; 159 L. T. 118; 54 T. L. R. 268; 82 Sol. Jo. 196.

**353cc. — Statement of one promissory note—Loan secured by two notes.**—A moneylender lent to a borrower £100 as one loan, taking as security two promissory notes for £50 each, exactly alike in date & wording. The memorandum of the transaction signed by the borrower described the security as "a promissory note." The moneylender obtained judgment against the borrower, on whose non-compliance with a *bkpcy.* notice he presented a petition in the county ct. The registrar made a receiving order, against which the borrower appealed:—*Held*: by the Div. Ct. in *Bkpcy.*, allowing the appeal, the misdescription of the security as "a promissory note" instead of "two promissory notes" was an error which prevented the memorandum from complying with Moneylenders Act, 1927 (c. 21).—*Re DEBTOR* (No. 18 of 1937), [1938] Ch. 645; [1938] 2 All E. R. 759; 107 L. J. Ch. 403; 159 L. T. 284; 54 T. L. R. 844; 82 Sol. Jo. 453.

**353dd. — Estoppel.**—*HOARE v. ADAM SMITH (LONDON), LTD.*, No. 353z, *ante*.

**353ee. Duty of money-lender to supply information—Application to proceedings on judgment summons.**—*PRACTICE NOTE* (1929), 45 T. L. R. 476; [1929] 1 B. & C. R. 54.

**353ff. Proof in liquidation of debtor—Affidavit—Sufficiency.**—*Re BRITISH GAMES, LTD.*, No. 353aa, *ante*.

**353gg. Interest—Rate of—How calculated.**—*MUTUAL LOAN FUND ASSOCN., LTD. v. SANDERSON*, No. 353hh, *post*.

**353hh. — Appropriation of payments to—After default—Whether compound interest.**—A borrower was in debt to a money-lender in the sum of £301 19s. 10d. On June 14, 1935, he received a further sum that made his total indebtedness £500. The memorandum stated that the principal sum was to be applied in discharge of the previous advance. It also stated that the interest upon the sum of £500 was to be £200, & was at the rate of 34.65 per cent. *per annum*. The repayment was to be made in equal instalments, which were appropriated to principal & interest in proportions other than that of the principal to the total interest. If an instalment was more than seven days overdue, the whole balance of the principal was then to become due with interest to date. The memorandum then stated: "the principal sum outstanding in the schedule of repayments shall become immediately repayable, together with the instalment of interest due as shown in the schedule aforesaid, together with simple interest at the rate per cent. *per annum* aforesaid on the sum payable (whether for

principal or interest) until payment, & such interest shall not be reckoned as part of the interest charged in respect of the loan." In accordance with this clause pltf. took the amount of principal & interest due at the date of default, namely £451 2s. 10d., & charged interest thereon until the date of the first payment on account. Such interest amounted to £173 0s. 5d. The payment then made of £169 9s. 7d. was appropriated to interest, leaving the principal sum of £451 2s. 10d. still due & a balance of £3 10s. 10d. of interest still due. Further interest was afterwards charged on the principal sum of £451 2s. 10d.:—*Held*: (1) the loan was one at an actual rate of interest, & the provisions of Money-lenders Act, 1927 (c. 21), s. 15 (2), which required instalments to be allocated to principal & interest in the proportion of the principal to the total interest, did not apply; (2) the memorandum sufficiently showed that nature of the transaction in respect of the past loan; (3) the appropriation of payments after default to interest did not amount to a charge of interest upon interest contrary to the Money-lenders Act, 1927 (c. 21), s. 7.—*MUTUAL LOAN FUND ASSOCN., LTD. v. SANDERSON*, [1937] 1 All E. R. 380.

**353jj. Insufficient memorandum—Right of plaintiff to return of security—Without being put on terms.**—Upon a loan by moneylenders, the borrower deposited with the lenders jewellery alleged to be worth £200. It was admitted that the memorandum of the contract did not comply with the terms of the Money-lenders Act, 1927 (c. 21), s. 6, & that the contract was therefore unenforceable. The claim was therefore restricted to a claim for the return of the jewellery, & it was contended that pltf. was not entitled to such return without paying all sums due under the contract of loan, as he was asking for the exercise of the equitable jurisdiction of the ct.:—*Held*: pltf. was entitled to the return of the jewellery without being put upon terms, as in seeking to enforce such terms deft. was seeking to enforce the loan contract, which, by reason of the statute, was unenforceable.—*COHEN v. LESTER (J.), LTD.*, [1938] 4 All E. R. 188; 159 L. T. 570.

**366. Add. Annotation:—***Refd. Humphery v. Wilson* (1929), 141 L. T. 409.

**376. Add. Annotation:—***Consd. Reading Trust, Ltd. v. Spero, Spero v. Reading Trust, Ltd.*, [1930] 1 K. B. 492.

**377. Add. Annotations:—***As to* (1) *Refd. Crossingham v. Park* (1927), 96 L. J. K. B. 1036.

*Generally, Refd. Reading Trust, Ltd. v. Spero, Spero v. Reading Trust, Ltd.*, [1930] 1 K. B. 492; *Collings v. Charles Bradbury, Ltd.*, [1936] 3 All E. R. 369.

**377a. Before proceedings taken by money-lender for recovery of money lent.**—(1) A county ct. has jurisdiction under Money-lenders Act, 1900 (c. 51), s. 1 (2), to entertain an application by a borrower from a registered money-lender to reopen a money-lending transaction, only when the amount of the money lent, whether repayable by instalments or otherwise, without the addition of any claims arising under any agreement to pay interest or an amount charged for "expenses, inquiries, fines, bonus, premium, renewals, or any other charges," is within the jurisdiction of the county ct.

(2) If this condition is fulfilled, the ct. may entertain the application, although the money-lender has not taken any proceedings to recover the money lent, & although the time has not come for taking such proceedings.—*CROSSINGHAM v. PARK*, [1928] 1 K. B. 330; 96 L. J. K. B. 1036; 137 L. T. 651; 43 T. L. R. 647, D. C.

**378. Add. Annotation:—***Consd. Nihalchand Navalchand v. McMullan*, [1934] 1 K. B. 171.

**379a. Jurisdiction of county court—Amount of money lent over £100.**—*CROSSINGHAM v. PARK*, No. 377a, *ante*.

**380a. Construction of Moneylenders Acts—Whether in favour of lender.**—*TEMPERANCE LOAN FUND, LTD. v. ROSE*, No. 353v, *ante*.

**381a. — — —.**—(1) *Held*: in Money-lenders Act, 1927 (c. 21), s. 5 (3), the words "no person shall act as such agent or canvasser" must be construed as meaning "no person shall act as an agent or canvasser employed by a money-lender or any person on his behalf for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender." The Act does not, therefore, prohibit canvassing or touting for this purpose, where the canvasser acts without the authority or mandate of the money-lender to whom he is introducing a customer.

(2) Although a rate of interest on a loan not exceeding 48 per cent. does not carry the legal presumption introduced by sect. 10 of the Act that the transaction is harsh & unconscionable; yet, where in addition to his contract for repayment of the loan the borrower gives a bill of sale over his furniture of ample security for such repayment, a rate of 48 per cent. is, in such circumstances,

**PART IV. SECT. 3, SUB-SECT. 1.—B.**  
**so. Onus of proof.**—*NELSON v. CAMPBELL*, [1928] V. L. R. 364; [1928] Argus L. R. 221.—*AUS.*

**PART IV. SECT. 7, SUB-SECT. 1.—A.**  
**sl. Although security unenforceable.**—By a mtge. bond resp. mtged. certain property therein specified as security for the repayment of sums of money lent to him by applts. upon certain promissory notes. The promissory notes admittedly did not comply with the provisions of sect. 10 (1) of the Ceylon Money-lending Ordinance, 1918, inasmuch as they did not state the "interest, premium, or charges" deducted or paid in ad-

vance, & they were consequently unenforceable under sub-sect. (2) of sect. 10 of the Ordinance. It was further admitted that the default was not due to inadvertence, & that the promissory notes must be taken to be fictitious to the knowledge of the lender within the meaning of sect. 14 of the Ordinance. On a claim by applts. to recover the sums lent on the security of the bond & upon the promissory notes:—*Held*: although the promissory notes were notes in which the amounts stated as due were to the knowledge of the lender fictitious within the meaning of sect. 14 of the Ordinance, & could not be enforced by reason of the provisions of sect. 10, the trial judge had jurisdiction under

sect. 2 of the Ordinance to re-open the transactions & to take an account between the lender & the person sued. The provisions of sect. 13 of the Ordinance, which make the taker of a fictitious promissory note liable to a penalty, do not prevent the ct. from re-opening the transaction & taking the account under the provisions of sect. 2. Where, however, the trial judge exercises his discretion & re-opens the transaction & takes the account, the unenforceable promissory notes must not be admitted in evidence to prove the loans.—*SOCKALINGHAM CHETTIAR v. RAMANAYAKE*, [1937] A. C. 230; [1937] 1 All E. R. 196; 106 L. J. P. C. 23; 156 L. T. 227; 81 Sol. Jo. 136, P. C.—*IND.*

so excessive as to render the transaction harsh & unconscionable for the purposes of Money-lenders Act, 1900 (c. 51), s. 1.—*VERNER-JEFFREYS v. PINTO*, [1929] 1 Ch. 401; 98 L. J. Ch. 337; 140 L. T. 360; 45 T. L. R. 163, C. A.

389a. ———.]—*PARKFIELD TRUST (1935), LTD. v. PORTMAN (1937)*, 81 Sol. Jo. 687.

409. *Add. Annotations*:—*Apprvd. Reading Trust v. Spero (1929)*, 46 T. L. R. 117. *Refd. Parkfield Trust, Ltd. v. Dent*, [1931] 2 K. B. 579.

410a. ———.]—*VERNER-JEFFREYS v. PINTO*, No. 381a, *ante*.

410b. ———.]—*READING TRUST, LTD. v. SPERO, SPERO v. READING TRUST, LTD.*, No. 353a, *ante*.

410c. ———.]—*PARKFIELD TRUST, LTD. v. DENT*, No. 353s, *ante*.

410d. ——— *Effect of consent to judgment.*—*Held*: in a case where the interest charged exceeded 48 per cent. *per annum* & debt. consented to judgment, such consent did not relieve the ct. of the duty of enforcing the presumption arising under Money-lenders Act, 1927 (c. 21), s. 10, in the absence of proof to the contrary thereof, & the ct. was not entitled by reason merely of such consent to enter judgment in accordance therewith.—*MILLS CONDUIT INVESTMENTS, LTD. v. LESLIE*, [1932] 1 K. B. 233; 100 L. J. K. B. 685; 145 L. T. 585; 47 T. L. R. 514, C. A.

*Annotations*:—*Consd. Parkfield Trust, Ltd. v. Dent*, [1931] 2 K. B. 579; *Nihalchand Navalehand v. McMullan* [1934] 1 K. B. 171. *Refd. B. S. Lyle, Ltd. v. Chappel*, [1931] 146 L. T. 236; *Re Debtor (No. 591 of 1934)*, *Ex p. Debtor*, [1935] Ch. 353.

410e. ———.]—*COLLINGS v. CHARLES BRADBURY, LTD.*, No. 353d, *ante*.

430a. *Charges for expenses—Solicitor's costs.*—*DUNN TRUST, LTD. v. ASPREY (1934)*, 78 Sol. Jo. 767.

434. *Add. Annotation*:—*As to (2) Refd. Glaskie v. Watkins*, [1927] 2 K. B. 181.

434a. *Remitting action to county court—Whether claim founded on contract—County Courts Act, 1919 (c. 73), s. 1.*—*Pltf.*, a borrower from a money-lender, issued a writ claiming to have re-opened a money-lending transaction between *pltf.* & *deft.*, a declaration that the interest charged therein was excessive

& the transaction harsh & unconscionable, accounts & inquiries, payment of the sum found due to *pltf.* & other & necessary relief under Money-lenders Acts. *Pltf.* having applied to have the action remitted to the county ct. for trial, the claim being restricted to £100:—*Held*: *pltf.*'s claim was founded on contract within County Cts. Act, 1919 (c. 73), s. 1, & could be remitted to the county ct. under that sect. for hearing.—*WHITE v. SMITH (1927)*, 96 L. J. K. B. 397; 137 L. T. 48; 43 T. L. R. 288; 71 Sol. Jo. 191, C. A.

438a. ——— *Onus of proof.*—*READING TRUST, LTD. v. SPERO, SPERO v. READING TRUST, LTD.*, No. 353a, *ante*.

438b. ———.]—*PARKFIELD TRUST, LTD. v. DENT*, No. 353s, *ante*.

438c. ——— *Effect of consent to judgment.*—*MILLS CONDUIT INVESTMENTS, LTD. v. LESLIE*, No. 410d, *ante*.

442. *For "Party seeking relief—Ordered to pay costs" read "Costs—Party seeking relief—Ordered to pay costs."*

442a. ——— *Action by money-lender—Judgment for reduced amount—Discretion to deprive plaintiff of costs.*—In an action by money-lenders in the county ct. for money lent & interest, where the judge is satisfied that the transaction was harsh & unconscionable & the interest excessive, & where, after reopening the transaction, he gives judgment for *pltf.*s for a reduced amount, he has a discretion to deprive *pltf.*s of costs.—*TEMPERANCE LOAN FUND v. ERWOOD (1927)*, 137 L. T. 449; 43 T. L. R. 530, D. C.

445. *Add. Annotation*:—*Consd. Glaskie v. Watkins*, [1927] 2 K. B. 181.

446. *Add. Annotation*:—*Refd. Glaskie v. Watkins*, [1927] 2 K. B. 181.

447. *Add. Annotations*:—*Consd. (Crossingham v. Park (1927)*, 96 L. J. K. B. 1036. *Refd. Glaskie v. Watkins*, [1927] 2 K. B. 181.

448. *Add. Annotation*:—*N.F. Glaskie v. Watkins*, [1927] 2 K. B. 181.

449. *Add. Citations*:—[1927] 2 K. B. 181; 96 L. J. K. B. 469; 137 L. T. 132; 71 Sol. Jo. 192, C. A.

456a. *Employment of agent or canvasser—Money-lenders Act, 1927 (c. 21), s. 5 (3).*—*VERNER-JEFFREYS v. PINTO*, No. 381a, *ante*.

#### PART IV. SECT. 7, SUB-SECT. 1.—C. (d).

*sp. Money borrowed for illegal transaction—Excessive interest paid cannot be recovered.*—*SIGEL v. O'BRIEN*, [1931] 2 D. L. R. 882.—CAN.

#### PART IV. SECT. 7, SUB-SECT. 1.—F. (a).

*sq. Bill in favour of money-lender—"Summary diligence"—Money-lenders*

*Act, 1927, s. 18 (h).*—*Held*: "summary diligence" in sect. 18 (h) means the execution of diligence & not the obtaining of the summary warrant on which it proceeded; & accordingly, an arrestment executed after Jan. 1, 1928, on a bill in favour of a money lender was incompetent, although the warrant on which the arrestment proceeded was obtained before that date.—*MURRAY v. M'GUIRE*, [1928] S. C. (Ct. of Sess.) 647.—SCOT.

#### PART IV. SECT. 8.

*sw. Excessive charges—Not referable to interest.*—A charge on a loan of an amount, which if interest would sustain a conviction under Money-lenders Act, R. S. C. 1927, will not sustain a conviction if it is referable to services in connection with the loan.—*R. v. CLIMANS & ELLENBURG (1938)*, 69 Can. C. C. 336.—CAN.

## MORTGAGE.

## Part I.—Nature of Mortgage.

4. *Add. Annotations*:—*Refd.* *Weld v. Petre* (1928), 97 L. J. Ch. 399; *Dennerley v. Prestwich* U. D. C. (1929), 141 L. T. 602.
17. *Add. Annotation*:—*Refd.* *I. R. Comrs. v. Lawrence, Graham & Co.*, [1937] 2 K. B. 179.
20. *Add. Annotation*:—*Consd.* *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1938] 2 All E. R. 444.
- 20a. *Distinguishes mortgage for sale.*—In a transaction of sale the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them. In the case of a mtge. or charge, the mtgor. is entitled, until he has been foreclosed, to get back the subject-matter of the mtge. or charge by returning to the mtgee. the money that has passed between them. The second essential difference is that if the mtgee. realises the subject-matter of the mtge. for a sum more than sufficient to repay him, with interest & the costs, the money that has passed between him & the mtgor. he has to account to the mtgor. for the surplus. If the purchaser sells the subject-matter of the purchase, & realises a profit, of course he has not got to account to the vendor for the profit. Thirdly, if the mtgee. realises the mtge. property for a sum that is insufficient to repay him the money that he has paid to the mtgor., together with interest & costs, then the mtgee. is entitled to recover from the mtgor. the balance of the money, either because there is a covenant by the mtgor. to repay the money advanced by the mtgee., or because of the existence of the simple contract debt which is created by the mere fact of the advance having been made. If the purchaser were to resell the purchased property at a price which was insufficient to recoup him the money that he paid to the vendor, of course he would not be entitled to recover the balance from the vendor (*ROMER, L.J.*).—*Re GEORGE INGLEFIELD, LTD.*, [1933] Ch. 1, 27; 101 L. J. Ch. 360; 147 L. T. 411; 48 T. L. R. 536; [1931] B. & C. R. 220, C. A.
- Annotation*:—*Refd.* *Ashby, Warner & Co. v. Simmons* [1936] 2 All E. R. 697.
35. *Add. Annotation*:—*Refd.* *Tsang Chuen v. Li Po Kwai*, [1932] A. C. 715.
36. *Add. Annotation*:—*Refd.* *Tsang Chuen v. Li Po Kwai*, [1932] A. C. 715.
- 70a. —.]—The mtgor. of an estate released the equity of redemption to the mtgee. for a valuable consideration; the mtgee., at the same time, gave mtgor. a note, that if he should, within a year, pay a certain sum, being the original mtge. money, & the consideration for the release of the equity, he, the mtgee., would sell & convey to him the premises.—*Held*: this was an original agreement between the parties, & did not operate as a defeasance of the release, or raise any new equity to the mtgor.; & the money not being paid, the party was not entitled to any relief.
- A distinction has been made, by the Ct. of Chancery, between contracts originally founded upon lending & borrowing money, with an agreement for a purchase in a certain event; & cases, where after a mtge. a new agreement hath been entered into & executed by the parties for an absolute purchase; although there be a subsequent declaration, that the mtgor. may have his estate upon payment of interest, principal, & costs; or where a release of the equity of redemption is given, with a collateral agreement to re-convey upon re-payment of the purchase-money; & in the latter cases it hath been determined that no re-purchase shall be allowed, unless upon strict performance of the conditions stipulated.—*ENSWORTH v. GRIFFITHS* (1706), 5 Bro. Parl. Cas. 184; 2 E. R. 615, H. L.
- 72a. *S. P. RATCLIFF v. DAVIS* (1610), 1 Bulst. 29; Cro. Jac. 244; *Yelv.* 178; *Noy*, 137; 80 E. R. 733.
- Annotations*:—*Consd.* *Ryall v. Rolle* (1749), 1 Atk. 165. *Refd.* *Kinsey v. Heyward* (1699), 1 Ld. Raym. 432; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585.
- 78a. —.]—Ordinarily by the common law, although a mtge. may be given without delivering possession, yet a mere pledge cannot be given without the delivery of the possession of the goods (*MELLISH, L.J.*).—*AYERS v. SOUTH AUSTRALIAN BANKING CO.* (1871), L. R. 3 P. C. 548; 7 Moo. P. C. C. 432; 19 W. R. 860; 17 E. R. 163; *sub nom.* *AYRES v. SOUTH AUSTRALIAN BANKING CO.*, 40 L. J. P. C. 22, P. O.
- Annotation*:—*Refd.* *Burdiok v. Sewell* (1883), 10 Q. B. D. 363.
- 387; L. R. 17 Ind. App. 98.—*IND.*

## PART I. SECT. 1.

88. *Agreement to deliver mortgage*—*Meaning of mortgage*—*Registrable mortgage*.—*BASANT SINGH & JAGAT SINGH v. KEHAR SINGH GILL* (B. C.), [1929] 4 D. L. R. 396; 2 W. W. R. 431.—*CAN.*

89. *Mortgage of fruit-bearing trees*—*Whether mortgage of immovable property*.—Whether or not a mtge. of fruit-bearing trees is a mtge. of immovable property is a question dependent in each case upon the intention of the contracting parties & cannot be settled by an inflexible rule.—*SHIR DAYAL v. PUTTU LAL* (1931), 1 L. R. 54 All. 437.—*IND.*

## PART I. SECT. 4, SUB-SECT. 2.

37 v. —.]—Where a registered instrument clearly shows a transaction between the parties to be a sale, oral evidence to show that it was intended to be a mtge. is inadmissible in evidence.—*MAUNG SHWE PHOO v. MAUNG TUN SHIN* (1927), 1 L. R. 5 Ran. 644.—*IND.*

## PART I. SECT. 6, SUB-SECT. 1.

51 xvii. —.]—*HERRON v. MAYLAND* (Alta.), [1927] 4 D. L. R. 171; [1927] 2 W. W. R. 788; *affd.*, [1928] 2 D. L. R. 858; [1928] S. C. R. 225.—*CAN.*

51 xviii. —.]—*BHAGWAN SAHAI v. BHAGWAN DIN* (1890), 1 L. R. 12 All.

51 xix. —.]—Where the instrument professes fully & clearly to give the reasons & considerations on which it proceeds, collateral evidence is admissible to show that the transaction is not thereby truly stated, although, in such cases, only the most cogent evidence avails to rebut the presumption to the contrary.—*WILSON v. WARD*, [1930] S. C. R. 212; 2 D. L. R. 433; *reversd.*, [1929] 2 W. W. R. 122; 3 D. L. R. 209; 24 Alta. L. R. 48.—*CAN.*

65 l. — *Sufficiency of agreement for repurchase*.—*Re WEBBER, Ex p. VALINSKY*, [1931] 4 D. L. R. 583.—*CAN.*

## Part II.—Classification of Mortgages.

**196a. Further advances—What are.]**—By two memoranda of charge the testator charged in favour of his two sisters his share in an estate in Dominica to secure certain stated sums & such further sums as should be advanced to him by them or either of them. The two sisters at various times deposited securities belonging to them respectively with the testator's bank by way of collateral security for the testator's loan account. After testator's death the bank realised these securities & applied the moneys in discharge of testator's loan account:—*Held*: the moneys so applied by the bank were in the nature of further sums advanced to testator by his two sisters within the meaning of the two memoranda of charge.—*Re SMITH, LAWRENCE*

### PART II. SECT. 1.

**sq. Form of—Whether statutory form essential.]**—*IMPERIAL ELEVATOR & LUMBER CO. v. OLIVE* (1914), 99 W. L. R. 339; 6 W. W. R. 1562; 19 D. L. R. 248.—*CAN.*

### PART II. SECT. 2, SUB-SECT. 1.

**91 v. —.]**—*Pltf., as administrator, sued upon def.'s alleged promise to execute a mtge. to testator on certain land, in consideration that testator would discharge a mtge. which he then held thereon, so as to enable def. to give a first mtge. on the land to one L.:—Held*: the alleged promise required to be in writing, as relating to an interest in land.—*STODDART v. STODDART* (1876), 39 U. C. R. 203.—*CAN.*

### PART II. SECT. 2, SUB-SECT. 2.—A.

**e i. —.]**—*Leys v. HOLLINGHEAD* (1878), 29 C. P. 66.—*CAN.*

### PART II. SECT. 2, SUB-SECT. 2.—B.

**109 i. Specific performance.]**—*JEWAN LAL DAGA v. NILMANI CHAUDHUR.* (1927), L. R. 55 Ind. App. 107.—*IND.*

### PART II. SECT. 2, SUB-SECT. 5.—A.

**sr. Necessity for good faith—Effect of laches.]**—*Re AYLWARD, Ex p. McMILLAN* (P. E. I.), [1927] 4 D. L. R. 305; 8 C. B. R. 352.—*CAN.*

**sv. Law in Ontario.]**—The law in regard to the creation of equitable mtge. by delivery or deposit is the same in Ontario as in England.—*ZIMMERMAN v. SPROAT* (1912), 26 O. L. R. 448.—*CAN.*

### PART II. SECT. 2, SUB-SECT. 5.—B.

**sd. Transfer in blank—& certificate of title.]**—*Re HANS C. CHRISTENSEN, LTD., THOMAS EVERETT*; [1928] 4 D. L. R. 688; [1928] 3 W. W. R. 314.—*CAN.*

### PART II. SECT. 2, SUB-SECT. 5.—I.

**so. Property as it stands at date of sale or foreclosure.]**—For the purpose of creating an equitable mtge. of a share in an indigo concern it is quite sufficient to deposit the title deeds under which that share was acquired. Where such a share is mortgaged the parties must be taken to intend that when foreclosure or sale takes place, at some subsequent date, the share shall pass to the purchaser as it stands at the date of the foreclosure or sale, & not merely as it existed at the date of the various title deeds when it was acquired.—*TOOMEY v. BHUPENDRA NATH BOSE* (1928), 1 L. R. 7 Pat. 520.—*IND.*

### PART II. SECT. 2, SUB-SECT. 6.

**st. Agreement giving rights over building to creditor.]**—*CLUTTERBUCK v. IMPERIAL LUMBER CO.*, [1928] 3 W. W. R. 123.—*CAN.*

### PART II. SECT. 2, SUB-SECT. 7.—A.

**sg. Charge on debt—Order to debtor to pay third party out of specific fund.]**—An agreement between a debtor & a creditor that the debt owing shall be paid out of a specific fund coming to the debtor will create a valid equitable charge upon such fund.—*PRABODH-CHANDRA MITRA v. ROAD OILS (INDIA), LTD.* (1930), 1 L. R. 57 Cal. 1101.—*IND.*

**sk. What amounts to.]**—A document without a defeasance clause, but containing a covenant to repay the consideration with interest, in default of which the grantee might re-enter, creates an equitable charge against the lands.—*GENERAL TRUST & EXECUTOR CORPN. v. BISHOP* (1933), 7 M. P. R. 79.—*CAN.*

### PART II. SECT. 3, SUB-SECT. 1.—A.

**n i. —.]**—An instrument of transfer lodged for registration under Transfer of Land Act, 1915, expressed the consideration for the transfer to be "the sum of £200, this day lent to me by M., which sum is to be repaid within two years from the date hereof, together with interest at the rate of 48 per cent. per annum in the meantime." The transaction between the parties to the transfer was, to the knowledge of the registrar of titles, a mtge. transaction. The registrar refused to register the transfer:—*Held*: the registrar was justified in refusing to register the transfer.—*PUTZ v. REGISTRAR OF TITLES*, [1928] V. L. R. 348; [1928] Argus L. R. 224.—*AUS.*

**a ii. —.]**—In order to be registrable under Land Titles Act a document given to secure a debt or loan must be in the form prescribed for a mtge.—*DEVENISH v. CONNAOHER*, [1930] 1 W. W. R. 958; 2 D. L. R. 973; *on appeal*, [1930] 2 W. W. R. 254; 3 D. L. R. 977; 24 Alta. L. R. 535.—*CAN.*

**b i. Certificate of registry—Requisites of.]**—*Re BRADSHAW & SIMCOE COUNTY REGISTRAR* (1867), 26 U. C. R. 464.—*CAN.*

**bb i. — How ascertained.]**—*Re LAND TITLES ACT* (1921), 65 D. L. R. 770.—*CAN.*

**hh i. — Proceedings for foreclosure—Who has jurisdiction.]**—A mtge. of land, under a new system, operates as a security only, & not as a transfer of the land or of any estate or interest therein, Real Property Act, s. 100; & proceedings for foreclosure can be taken only before the district registrar, as provided for in sects. 113, 114 of the Act; & the ct. of K. B. has no jurisdiction to make a final or other order of foreclosure in respect of such a mtge., in the absence at all events of a special agreement between the parties raising equities as to title or for a conveyance of an estate in the land.—

*v. KITSON*, [1918] 2 Ch. 405; 88 L. J. Ch. 131; 120 L. T. 25.

**224. Add. Annotation:—***Reid. Parker v. Jackson*, [1936] 2 All E. R. 281.

**225. Add. Annotation:—***As to (3) Dists. Parker v. Jackson*, [1936] 2 All E. R. 281.

**260. Add. Annotations:—***Reid. Re Wait*, [1927] 1 Ch. 606; *Re Gillott's Settlement, Chattock v. Reid*, [1934] Ch. 97.

**268. Add. Annotation:—***Reid. Chowood, Ltd. v. Lyall* (2), [1930] 2 Ch. 156.

**272. Add. Annotation:—***Reid. Tsang Chuen v. Li Po Kwai*, [1932] A. C. 715.

**305. Add. Annotation:—***As to (1) Consd. Weld v. Petre* (1928), 97 L. J. Ch. 399.

*Re ALAIRE & FRECHETTE* (1913), 25 W. L. R. 648.—*CAN.*

**sl. Necessity for affidavit in Form E—Land Titles Act, 1917, s. 100.]**—*Re LAND TITLES ACT* (Sask.), [1919] 1 W. W. R. 713.—*CAN.*

**sm. —.]**—*Re LAND TITLES ACT, CANADA'S LIFE ASSURANCE CO.'S CASE* (Sask.), [1919] 2 W. W. R. 47.—*CAN.*

**sn. Registration fees—By whom payable.]**—A purchaser who, to secure a balance of purchase-money, has given a mtge. to the ct., must pay the fees for registration of his mtge.—*SWEETNAM v. SWEETNAM* (1873), 6 P. R. 83.—*CAN.*

**sp. Reference under Land Titles Act, R.S.A., 1922, s. 159—Duty of judge.]**—G., a second mtgee., obtained, on Apr. 25, 1923, a vesting order directing the registrar to issue title in his name clear of all encumbrances except the first mtge. The order was not registered until Oct. 8, 1923, & meanwhile, on May 23, 1923, a mechanics' lien was registered. When the title issued, in pursuance of the vesting order, in G.'s name, the mechanics' lien was left off. On Oct. 12, 1923, a bank registered a mtge. dated July 26, 1923, which was given & taken to replace a previous security by way of assignment by G. to the bank of the moneys owing under his mtge. & as a condition of the bank extending time to G. for payment of his then existing debt. The bank had no notice of the lien as a registered interest or of the error made with respect to it:—*Held*: on a reference under sect. 159 of Land Titles Act, R.S.A., 1922, as to priority between the bank's mtge. & the mechanics' lien (no question as to priority under the Mechanics' Lien Act being raised) the mtge. had priority, sect. 175 of Land Titles Act concluding the matter, in the absence of fraud or express notice.—*Re RICHIE CO., LTD.*, [1935] 1 W. W. R. 345.—*CAN.*

### PART II. SECT. 3, SUB-SECT. 1.—B. (g).

**o i. — Action to redeem & set aside sale under power in mortgage—No allegation of fraud—Subsequent action to redeem & set aside on ground of fraud.]**—*RUDGE v. HADDINGTON ISLAND QUARRY CO., LTD.* (1929), 41 B. C. R. 502.—*CAN.*

### PART II. SECT. 6, SUB-SECT. 3.

**293 i. Validity—Omission of penal sum in obligatory clause.]**—*Held*: the omission did not render the bond uncertain & ineffectual.—*GREAT WEST LIFE ASSURANCE CO. v. CAMPBELL (Man.)*, [1928] 1 D. L. R. 263; 37 Man. L. R. 184; [1927] 3 W. W. R. 645.—*CAN.*

## Part III.—Parties to Mortgages.

- 368a. Cost of purchasing adjoining land—Maintenance of value of trust property.]—***Re HAIG* (1912), cited in *Underhill's Law of Trusts & Trustees*, 8th ed., p. 231.
- 371. Add. Annotation:—Generally, Refd. Pirie v. Richardson**, [1927] 1 K. B. 448.
- 383a. ———.]—**As a general rule long terms of years do not answer the description of "real securities," within the meaning of a power for trustees to lend on mortgage of "real securities."—*Re BOYD'S SETTLED ESTATES* (1880), 14 Ch. D. 626; 49 L. J. Ch. 808; 43 L. T. 348.
- 385a. ——— Fourteen years.]—**Trustees being empowered under a settlement to invest trust moneys upon mtge. of freehold, copyhold, or leasehold estate, invested upon mtge. of leaseholds, with only fourteen years to run, the ct. directed the mtge. to be called in, without prejudicing any question as to the liability of the trustees in the event of a loss.—*PINCE v. BEATTIE* (1863), 2 New Rep. 546; 32 L. J. Ch. 734; 9 L. T. 315; 27 J. P. 804; 9 Jur. N. S. 1119; 11 W. R. 979.
- 385b. ———.]—***BOURNE v. MOLE* (1843), 1 L. T. O. S. 12; *subsequent proceedings* (1845), 8 Beav. 177; 50 E. R. 70.
- 389a. Real security in Scotland—Power forbidding investment on real security in Ireland.]—**Trustees of the will of a testator, who died in 1845, had power to invest on "real securities in England or Wales, but not in Ireland." The ct. declined advising the trustee to invest, under the powers contained in the 22 & 23 Vict. c. 35, s. 32, on a mtge. of Scottish estate.—*Re MILES' WILL* (1859), 27 Beav. 579; 29 L. J. Ch. 47; 1 L. T. 122; 23 J. P. 805; 5 Jur. N. S. 1236; 8 W. R. 54; 54 E. R. 229.
- 389b. House property—Value dependent on covenants.]—**An investment by trustees of £2,183, trust funds, which they were empowered to lend on real security, in a mtge. of house property in a town, occupied for commercial purposes & valued at £2,800, a value also in some measure dependent on the performance of covenants, held not to be justified.—*PHILLIPSON v. GATTY, GATTY v. PHILLIPSON* (1848), 7 Hare, 516; 12 L. T. O. S. 445; 13 Jur. 318; 68 E. R. 213.
- Annotations:—***Apld. Norris v. Wright* (1851), 14 Beav. 291. **Refd. Re Massingberd's Settlement, Clark v. Trelawny** (1890), 63 L. T. 296.
- 415a. Investment improvident owing to nature of property.]—***Re SALMON, PRIEST v. UPPELBY* (1889), 42 Ch. D. 359; 62 L. T. 270; 38 W. R. 150; 5 T. L. R. 583, C. A.
- Annotations:—***Consd. Exploring Land & Minerals Co. v. Kolckmann* (1905), 94 L. T. 234. **Refd. Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337; *Re Turner, Barker v. Ivimey*, [1897] 1 Ch. 536; *Head v. Gould*, [1898] 2 Ch. 250; *Re Lake, Ex p. Howe, Trustees*, [1903] 1 K. B. 439.**
- 438. Add. Annotation:—As to (1) Refd. Re Vickery, Vickery v. Stephens, [1931] 1 Ch. 572.**

## Part IV.—Form and Contents of Mortgage.

- 488. Add. Annotation:—***Distd. Sowerby v. Lindsay* (1928), 44 T. L. R. 501.
- 490. Add. Annotation:—As to (1) Consd. Sowerby v. Lindsay (1928), 44 T. L. R. 501.**
- 501. In the catchwords for "charged" read "changed."**

### PART III. SECT. 1, SUB-SECT. 1.

**o i. ———.]—**Under Act Respecting Homesteads, s. 2, the registrar cannot register a mtge. of homestead land if the same is not signed by mtgor.'s wife, although in a paper attached to the mtge. she purports to have relinquished her homestead rights in favour of mtgee.—*Re LAND TITLES ACT*, [1919] 1 W. W. R. 711.—CAN.

**o ii. ——— & acknowledgment.]—**A mtge. by a husband of his homestead was in fact consented to by his wife of her own free will & knowing what it was. To it was attached her written consent & a certificate by a comr. of her acknowledgment of execution of it of her own free will, etc. Being on its face in compliance with the Dower Act, 1917, it was registered. The facts, however, were that the wife had not made before the comr. the acknowledgment to which he certified. The husband had participated in this breach of the statute in order, apparently, to save his wife, who was in ill-health, the inconvenience of going from the farm to the comr.'s office:—**Held:** since the wife's consent was not evidenced in the manner prescribed by the statute, the mtge. was, in this

sense, not made with her consent & was null & void as against her dower right; there were no grounds for holding her estopped. But since the husband by his conduct had induced the mtgee. to believe that his wife's consent had been properly & regularly given & the mtgee. had on the strength of this belief parted with the property for the payment of which the mtge. was security, the husband was estopped from setting up her lack of effective consent as a defence to an action on the mtge. Moreover, he was, in any event, personally liable on the covenant.—*PARSLOW v. MOORE*, [1930] 2 W. W. R. 340; 4 D. L. R. 750.—CAN.

**sp. Mortgage by alleged absolute owner—Third party in possession.]—***GREY v. COUCHER* (1868), 15 Gr. 419.—CAN.

### PART III. SECT. 2, SUB-SECT. 10.

**—A. sq. Payment of rates.]—**Where land is sold by a mtgee. the proceeds must be applied firstly in payment of the rates shown in the rate book, as there is a lien as soon as the rate book is approved.—*ANTIGNISH TOWN v.*

*CHISHOLM*, [1933] 1 D. L. R. 571; 6 M. P. R. 173.—CAN.

### PART III. SECT. 3, SUB-SECT. 1.

**341 ii. ——— What estate passes.]—***BANQUE PROVINCIALE DU CANADA v. CAPITAL TRUST CORPN.*, [1928] 4 D. L. R. 390; 62 O. L. R. 458.—CAN.

### PART III. SECT. 3, SUB-SECT. 2.—A. (a) i.

**343 i. Whether mortgagee concerned with application of money.]—***PLACE v. SPAWN* (1859), 7 Gr. 406.—CAN.

**sr. Power given by testator to mortgage "my estate"—Property subject to life interest of wife.]—***PURDUM v. NORTHERN LIFE ASS'CE CO. OF CANADA*, [1928] 4 D. L. R. 679; 63 O. L. R. 12; *affd.*, [1930] S. C. R. 119; 1 D. L. R. 1003.—CAN.

### PART IV. SECT. 1, SUB-SECT. 1.

**483 iv. ———.]—**There is an implied covenant on the part of a mtgor. to repay the mtge. money, even though the bond contains no express promise to repay it.—*CHHATHI LALSAH KALWAH v. BINDESHWARI PRANAD SAHU* (1928), 1 L. R. 8 Pat. 16.—IND.



- v. Davies (1878), 8 Ch. D. 205. *Refd.* Reeve v. Hicks (1825), 2 Sim. & St. 403; Hipkin v. Wilson (1850), 15 L. T. O. S. 559; Plowden v. Hyde (1852), 2 De G. M. & G. 684; Eddleston v. Collins (1853), 3 De G. M. & G. 1; Walker v. Armstrong (1856), 21 Beav. 284; Heather v. O'Neill (1858), 27 L. J. Ch. 512; Plomley v. Fleton (1888), 14 App. Cas. 61.
- 505a. ———.]—A mtge. of property does not alter the existing limitations affecting it, except for the purpose of the mtge., unless an express intention be shown to resettle it.—*HASTINGS (LORD) v. ASTLEY* (1861), 30 Beav. 260; 8 Jur. N. S. 225; 10 W. R. 73; 54 E. R. 888.
508. *Add. Annotation*:—*Refd.* *Re Park, Public Trustee v. Armstrong*, [1932] 1 Ch. 580.
509. *Add. Annotations*:—*Consd.* *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1938] 2 All E. R. 444. *Refd.* *Davis v. Symons*, [1934] Ch. 442.
510. *Add. Annotations*:—*Consd.* *Davis v. Symons*, [1934] Ch. 442; *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1938] 2 All E. R. 444.
525. *Add. Annotation*:—*Refd.* *Bottomley v. Banister* (1931), 101 L. J. K. B. 46.
538. *Add. Annotations*:—*Refd.* *Spyer v. Phillipson*, [1931] 2 Ch. 183; *Golden Horseshoes (New) Ltd. v. Thurgood* (1934), 150 L. T. 427.
- 583a. ———.]—On a mtge. of a public house the goodwill is not included unless expressly mentioned.—*Re BENNETT, CLARKE v. WHITE*, [1899] 1 Ch. 316; 68 L. J. Ch. 104; 47 W. R. 406.
587. *Add. Annotations*:—*Refd.* *Houghton v. Nothard, Lowe & Wills*, [1927] 1 K. B. 246; *Liggett (Liverpool) v. Barclays Bank* (1927), 137 L. T. 443.
590. *Add. Annotation*:—*As to* (2) *Consd.* *Halifax Building Society v. Keighley*, [1931] 2 K. B. 248.

590a. ———.]—*HALIFAX BUILDING SOCIETY v. KEIGHLEY*, No. 1357a, *post*.

623a. ———.]—Covenant for payment of yearly premium & other costs & charges of insurance.—*Held*: a mtge. for £1,500, with covenants for payment of the yearly premium & other costs & charges of an insurance of £1,000 upon a particular life for seven years, required a £25 stamp.—*HALSE v. PETERS* (1831), 2 B. & Ad. 807; 1 L. J. K. B. 2; 109 E. R. 1342.

*Annotations*:—*N.F.* *Doe d. Mercer v. Bragg* (1838), 8 Ad. & El. 620. *Consd.* *Richards v. Macclesfield, Cocks v. Edwards* (1841), 10 L. J. Ch. 329. *Distd.* *Wroughton v. Turtle* (1843), 1 Dow. & L. 473. *Dbtd.* *Lawrance v. Boston* (1851), 21 L. J. Ex. 49. *Refd.* *Lloyd v. Heathcote* (1833), 3 Tyr. 309.

625a. ———.]—Second mortgage—Covenant to pay sum secured by first mortgage—First mortgage duly stamped.]—A second mtge. of freehold property subject to an existing first mtge. contained a covenant by the borrower to pay by instalments (a) a sum equivalent to the amount of the loan, the subject of the first mtge., (b) a sum equivalent to the amount of the loan, the subject of the second mtge., & (c) a sum equivalent to the interest on the amounts remaining unpaid under both mtges. There was a proviso for redemption on payment of the amount of the second mtge. & interest thereon. The first mtge. had been duly stamped with the appropriate duty on the amount thereby secured:—*Held*: the second mtge. was liable to stamp duty in the aggregate of the two sums secured by the two mtges., the covenant contained in the second mtge. to pay the amount secured by the first mtge. being an additional covenant made with a different covenantor.—*MUTUAL PROPERTY INSURANCE CO., LTD. v. INLAND REVENUE COMRS.* (1926), 136 L. T. 354.

PART IV. SECT. 5, SUB-SECT. 3.—  
A. (a).

517 iv. ———.]—*DOMINION TRUST CO. v. MUTUAL LIFE ASSURANCE CO., BRITISH CANADIAN SECURITIES v. MUTUAL LIFE ASSURANCE CO.*, [1917] 3 W. W. R. 941.—*CAN.*

*sg.* *Mortgage including "buildings"* —*Movable granaries.*—In a mtge. the words charging the land were followed by the clause: "together with all buildings now or hereafter erected or placed on the said lands & which the mtgor. hereby declares to form part of the freehold of the said lands & of this security whether annexed to the said freehold or not." The mtgor., after the date of the mtge., moved on to the land two wooden granaries which were built on skids & were moved about the land as the farming operations required. The mtgor. defaulted & gave the mtgee. a quit-claim deed & the latter sold the land to deflt., who took possession of the granaries & moved them on to other lands. The mtgor. sued for their value, & his action was dismissed. On appeal:—*Held*: even if the granaries retained their character of chattels, they had become part of the mtge. security by virtue of the word "buildings" in the clause above quoted, & since it was the intention of the quit-claim deed that the mtgee. should

have all its security the deed divested the mtgor. of any interest he had in the granaries.—*HERRIOTT v. CRONIN*, [1935] 1 W. W. R. 571; 2 D. L. R. 637; 43 Man. L. R. 71.—*CAN.*

PART IV. SECT. 5, SUB-SECT. 3.—  
B. (a).

k i. ———.]—Recess beds screwed to the wall of an apartment house are not fixtures & may therefore be claimed by a conditional vendor against a mtgee. of the building.—*CALIFORNIA WALL BED CO. OF CANADA, LTD. v. PRUDENTIAL INSURANCE CO. OF AMERICA*, [1935] 1 D. L. R. 279; O. R. 59; *varied*, [1935] 2 D. L. R. 434; O. R. 227.—*CAN.*

PART IV. SECT. 5, SUB-SECT. 8.

*sm.* *License—Mortgage of hotel* Where a mtgor. mortgages land upon which he is carrying on an hotel business, then *prima facie* the license, though not mentioned in the mtgo., forms part of the security given to the mtgee.—*GAY v. JOHNSTON* (1937), 37 S. R. N. S. W. 454; 54 N. S. W. N. 171.—*AUS.*

PART IV. SECT. 7, SUB-SECT. 1.

620 ii. ———.]—*Security for future advances—Construction of Stamp Act*, 1891 (c. 39), ss. 15 (1), 88 (1) (2).—

*O'SULLIVAN v. LOUGHNAN*, [1927] I. R. 493.—*IR.*

620 iii. ———.]—A trust deed to secure debentures recited that the C. Co. had determined to issue a series of debentures for a sum not exceeding £100,000, & the first of the conditions indorsed on each debenture stated: "This debenture is one of a series of debentures all in the like form for securing principal sums not exceeding at any one time in the aggregate £100,000." The trust deed also contained a capitalisation clause, the effect of which was that if any interest should be in arrear for a period of six months, it should be added to the principal sum due under the debenture, & treated as principal money for all purposes. The debentures were expressed to become payable on Jan. 11, 1938. The mtgor. claimed that stamp duty was payable not on a limited sum, but as on an amount "uncertain or without limit":—*Held*: the amount which the trust deed was intended to secure was a sum readily ascertainable by arithmetical calculation, & therefore, was not "without any limit" within Sched. 1 of Stamp Duties Act, 1882, & that duty should be paid in respect of £100,000.—*CASCADE BREWERY CO., LTD. v. A COLLECTOR OF STAMP DUTIES* (1929), 23 Tas. L. R. 18.—*AUS.*

## Part VI.—Rights and Liabilities of the Mortgagor.

633. *Add. Annotation*:—*Refd.* Purnell v. Roche, [1927] 2 Ch. 142.

725. *Add. Annotation*:—*Distd.* Woolwich Equitable Building Society v. Preston, [1938] Ch. 129.

732a. *Service of notice to quit—Whether Small Tenements Recovery Act, 1838 (c. 74), applicable.*—A mtge. deed contained a clause by which the mtgor. attorned tenant from year to year to the mtgees. at a nominal rent. It was also provided that, if the mtgor. made default in payments under the deed, the mtgees. might give to the mtgor. seven days' notice in writing to determine the tenancy created by the deed. The mtgor. defaulted & the mtgees. served on him a notice to quit. The mtgor. refused to give up possession:—*Held*: the term or interest of the mtgor. in the mortgaged property had been "duly determined by a legal notice to quit or otherwise" within sect. 1 of above Act, & therefore, justices had power to issue a warrant to give possession of the property to the mtgees.—*DUDLEY & DISTRICT BENEFIT BUILDING SOCIETY v. GORDON*, [1929] 2 K. B. 105; 98 L. J. K. B. 486; 141 L. T. 583; 93 J. P. 186; 45 T. L. R. 424; 27 L. G. R. 448, D. C.

737. *Add. Annotation*:—*Appld.* Dudley & District Benefit Building Society v. Gordon, [1929] 2 K. B. 105.

739. *Add. Annotation*:—*Refd.* *Re* Wait, [1927] 1 Ch. 606.

768a. *Restriction of statutory power—Effect on common law power.*—By a legal charge dated Oct. 1, 1935, defts. charged by way of legal mtge. certain freehold properties to pltfs., & they covenanted with pltfs. that they would not, except with the previous written consent of pltfs., exercise the power of leasing or agreeing to lease or of accepting surrenders of leases conferred by the Law of Property Act, 1925 (c. 20), on a mtgor. while in possession. By a tenancy agreement dated Oct. 8, 1935, defts. granted a lease of part of certain premises included in the legal

charge, from Sept. 29, 1935, upon a yearly tenancy. Pltfs. were not asked for & did not give their consent to the execution by defts. of the tenancy agreement & no counterpart thereof had at any time been delivered to pltfs. in accordance with the requirements of sect. 99 (11) of Law of Property Act, 1925 (c. 20):—*Held*: defts., in granting the lease of Oct. 8, were not exercising their statutory power, & consequently they did not commit any breach of the covenant contained in the legal charge of Oct. 1.—*IRON TRADES EMPLOYERS INSURANCE ASSOCN., LTD. v. UNION LAND & HOUSE INVESTORS, LTD.*, [1937] Ch. 313; [1937] 1 All E. R. 481; 106 L. J. Ch. 206; 156 L. T. 322; 53 T. L. R. 341; 81 Sol. Jo. 159.

772a. ————]—*KING v. BIRD*, No. 774, *post*.

775a. ————]—*Lease at best rent—Covenant by mortgagor to pay rates—Subsequent improvements by mortgagor increasing rateable value.*—A mtgor. granted a lease of the mtgd. property to his son-in-law without any independent bargaining, & in the lease covenanted to pay the rates. The mtgor. effected great improvements on the mtgd. premises which might increase the rateable value of the premises. The mtgee. claimed that the improvements & the covenant had rendered the rent under the lease not the best rent reasonably obtainable in the circumstances, & the lease was void under Law of Property Act, 1925 (c. 20), s. 99:—*Held*: in the absence of any covenant by the landlord to effect improvements which might increase the rateable value of the property or of any actual increase of the rateable value the covenant to pay the rates, though unusual in the case of a lease for a long term, was not sufficient to render the rent reserved not the best rent reasonably obtainable, & upon the evidence the rent reserved was, having regard to the condition of the property at the time when the lease was granted, the best rent reasonably obtainable, & the action by the mtgee. failed.—*COUTTS & CO. v. SOMERVILLE*, [1935] Ch. 438; 104 L. J. Ch. 243; 153 L. T. 216.

PART VI. SECT. 3, SUB-SECT. 5.  
sa. *No right to growing crops.*—*JACKSON v. PENFOLD*, [1931] 1 D. L. R. 808; 66 O. L. R. 440.—CAN.

PART VI. SECT. 3, SUB-SECT. 7.  
665 iv. ————]—A mtgor. in possession is entitled to cut timber on the land & to give third persons a licence to do so, unless it is shown that the security is thereby impaired. The *onus* is on the party seeking to establish impairment to plead & offer proof of it.—*REID v. GALBRAITH*, [1927] 2 D. L. R. 857; [1927] 1 W. W. R. 780; 38 B. C. R. 287; *varying*, [1926] 4 D. L. R. 814; [1926] 3 W. W. R. 500; 38 B. C. R. 36.—CAN.

PART VI. SECT. 4, SUB-SECT. 2.—D.  
§ 1. ————]—*Position of mortgagor.*—Where a mtgee. leases the land to the mtgor., the latter does not take the lease in his character as mtgor., but in his individual capacity only, & as such he stands in the same position as a stranger to the mtge.—*MASSEY-HARRIS CO. v. MANLEY*, [1927] 1 D. L. R. 484; [1927] 1 W. W. R. 35; 21 Sask. L. R. 256.—CAN.

PART VI. SECT. 4, SUB-SECT. 3.—A.  
h. *Revsd.*, [1924] 1 W. W. R. 1233; 18 Sask. L. R. 269.

sk. *Effect of Landlord & Tenant Act, R. S. O., 1914 (c. 155), s. 3.*—*KENNEDY v. AGRICULTURAL DEVELOPMENT BOARD*, [1926] 4 D. L. R. 717; 59 O. L. R. 374.—CAN.

sl *Effect of Land Titles Act, s. 117.*—*MATTHEWSON BROTHERS & MATHER v. GOOD*, [1927] 3 D. L. R. 422; [1927] 1 W. W. R. 728; 21 Sask. L. R. 403.—CAN.

PART VI. SECT. 4, SUB-SECT. 3.—B.  
k 1. ————]—The summary jurisdiction under Landlord & Tenant Act, R. S. O. 1927, for recovery of possession is not applicable to the case of a mtge. where the mtgor. attorns tenant to the mtgees.—*PREMIER TRUST CO. v. HAXWELL*, [1937] 3 D. L. R. 499; *sub nom. Re PREMIER TRUST CO. & HAXWELL*, [1937] O. R. 497.—CAN.

PART VI. SECT. 5, SUB-SECT. 5.  
772 i. *What leases within powers—Lease with no condition of re-entry—Void.*—A mtgor. in possession made an agreement in writing whereby he let to a tenant a public-house & dwelling

together with certain lands "as a yearly tenancy at a yearly rent of £35 payable quarterly in advance." The agreement provided that the tenancy should commence from a certain date, & that the tenant should pay the first quarter's rent on that date, & that he would "punctually pay the rent thereafter according to the terms of this agreement." The agreement also provided that the tenancy might be determined by either party giving to the other three months' notice in writing. There was no condition of re-entry on the rent not being paid:—*Held*: although the undertaking to pay the rent contained in the agreement might be a sufficient compliance with Conveyancing Act, 1881 (c. 41), s. 13 (7), as to payment of the rent, since the agreement, not being under seal, there could be no covenant therein, yet the omission of a condition of re-entry on the rent not being paid invalidated the agreement as against an incumbrancer, the provision in the agreement entitling the landlord to determine the tenancy by a three months' notice to quit not being sufficient to satisfy the condition.—*MURPHY & CO. v. MAREN*, [1933] 1 I. R. 393.—IR.

836. *Add. Annotation*:—*Expld. & Distd. Schalet v. Nadler, Ltd.*, [1933] 2 K. B. 79.
845. *Add. Annotation*:—*Refd. The W. H. Randall*, [1928] P. 41.
846. *Add. Annotations*:—*Consd. Re Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter*, [1933] Ch. 611. *Refd. Torbay Hotel v. Jenkins*, [1927] 2 Ch. 225; *Re Sunnyfield*, [1932] 1 Ch. 79.

## Part VII.—Equity of Redemption.

853. *Add. Annotation*:—*As to (2) Refd. Re Wells, Swinburne-Hanham v. Howard* (1932), 48 T. L. R. 617.
854. *Add. Annotation*:—*Refd. Re Wells, Swinburne-Hanham v. Howard*, [1933] Ch. 29.
864. *Add. Annotation*:—*Refd. Re Wells, Swinburne-Hanham v. Howard*, [1933] Ch. 29.
- 866a. *Whether mortgagee trustee of equity of redemption.*—*Re WELLS, SWINBURNE-HANHAM v. HOWARD*, No. 1017a, *post*.
904. *Add. Annotation*:—*Refd. Re Wells, Swinburne-Hanham v. Howard*, [1933] Ch. 29.
909. *Add. Annotation*:—*Refd. Hodgson v. Salt*, [1936] 1 All E. R. 95.
958. *Add. Annotation*:—*Consd. Knightsbridge Estates Trust, Ltd. v. Byrne*, [1938] 2 All E. R. 444.
- 971a. *Clause giving mortgagee interest in property on redemption.*—[Provisions in a mtg. deed conferring on the mtgee. upon redemption an interest in the mortgaged premises are a clog or fetter on the equity of redemption, & being so are void not only against the mtgor., but also against the purchaser of his interest, since they are inconsistent with the very nature & essence of a mtg.—*MEHRBAN KHAN v. MAKHNA* (1930), 57 L. R. Ind. App. 168, P. C.]
984. *Add. Annotation*:—*Consd. Weld v. Petre* (1928), 97 L. J. Ch. 399.
990. *Add. Annotation*:—*Consd. Davis v. Symons*, [1934] Ch. 442.
993. *Add. Annotation*:—*Consd. Knightsbridge Estates Trust, Ltd. v. Byrne*. [1938] 2 All E. R. 444.

### PART VI. SECT. 5, SUB-SECT. 6.—B. (a).

784 vii. ———.]—Where a lease made by a mtgor. is subsequent to the mtg., the mtgee. has not the right at common law to require the tenant to pay the rent to him & to sue for its recovery unless the relationship of the landlord & tenant has been created between them by mutual agreement; & the mere fact of the tenant remaining in possession after notice from the mtgee. to pay the rent to him is not evidence of such an agreement. The provision in Real Property Act, R. S. M., 1913, s. 114, that a mtgee. upon default by the mtgor. "may enter into possession of the mortgaged or encumbered land by receiving the rents & profits thereof," does not give the mtgee. a right of action for rent against a tenant holding under a lease made by the mtgor. after the mtg.—*AIKENHEAD v. SPIVAK*, [1931] 2 W. W. R. 721; 4 D. L. R. 721; 39 Man. L. R. 541.—CAN.

### PART VI. SECT. 7.

c i. ———. *Mortgage overdue*—*Right of possession in mortgagee.*—Ejectment cannot be sustained by a mtgor. against a stranger where the mtg. is overdue & unsatisfied, & the fee & right of possession in the mtgee.—*DOE d. McBERNIE v. LUNDY* (1844), 1 U. C. R. 186.—CAN.

sl. *Payment into court of amount due on mortgage—Application for order under Mortgages Act, R. S. O., 1914 (c. 113)—Mode of application.*—*Re APPLETON & ROSS*, [1927] 4 D. L. R. 1125; 61 O. L. R. 338.—CAN.

### PART VII. SECT. 3, SUB-SECT. 3.

sm. *Under decree for sale—What is incident to land—Manure in heaps on land.*—Manure in heaps on land, not the produce thereof, does not pass to the purchaser of the equity of redemption under a decree of sale, as an incident to the land; & if he uses it, it is a conversion, for which the mtgor. may recover in trover without a demand.—*THOMSON v. WALSH* (1852), 2 All. 369.—CAN.

### PART VII. SECT. 4, SUB-SECT. 1.

946 iv. ———.]—Roman-Dutch law as applied in Ceylon recognises a principle which bears a close resemblance to the principle of English law embodied in the maxim "once a mtg. always a mtg."

A syndicate purchased forest land in Ceylon & conveyed it by deed to resp., who had provided the greater part of the purchase-price. A second deed of the same date recited the facts, & provided that resp. should hold as absolute owner with power to manage & to sell the lands for the best available price, approval to be obtained if the price was less than Rs. 100 per acre, & to apply all moneys realised in payment of sums due to him for purchase-price or management expenses, & that he should pay over the balance *pro rata*, according to their interests, among the syndicate. A year later, before the lands had been sold, members of the syndicate sued claiming to redeem. Resp. had settled with all plifs. except two, who were represented by applt.:—*Held*: upon the true construction of the two deeds they created a security for money advanced, there being imposed upon resp. duties & obligations of the nature of trusts, & that applt. was entitled to redeem the shares of the two plifs. on payment of their rateable proportion of the amount due, which was to be ascertained on taking accounts as directed.—*SAMINATHAN CHETTY v. POORTEN*, [1933] A. C. 178; 102 L. J. P. C. 54; 148 L. T. 360, P. C.—CEYLON.

948 v. ———.]—M., the registered proprietor & licensee of hotel property, obtained a loan from a brewery co., & as security gave a mtg. of the freehold & a lease for a term of fifteen years. The co. then gave M. a sub-lease for the same term less one day & M. mtgd. the sub-lease to the co. The sub-lease contained a brewer's tie that the sub-lessee would deal exclusively with the sub-lessor for all liquors & would not during the term of the lease purchase or obtain any liquors from any other person. B. subsequently purchased from M. the unencumbered fee simple & the un-

expired term of the sub-lease. B. obtained an advance from a bank & repayment was guaranteed by the brewery co. The mtges. over the freehold & sub-lease were released & M. transferred to B. the sub-lease & the freehold free of mtg. B. then gave a mtg. over the sub-lease to the brewery co. to secure the moneys owing to the bank. B. paid off the loan from the bank & asserted that he held the property free of the brewer's tie. In an action by the brewery co. claiming that the lease & sub-lease were binding on B.:—*Held*: the lease & sub-lease were not binding on B.—*QUEENSLAND BREWERY, LTD. v. BAKER*, [1936] Q. S. R. 98.—AUS.

sk. *Whether English decisions applicable in India.*—In India there is a codified law of mtg., & it would be improper for the cts. in India to ignore that law & to look to English cases as their guide in determining what amounts to a clog on the equity of redemption. Where the statutory law will not help them, it may then be open to them to look to English cases for rules of justice, equity & good conscience.—*SHUBRATAN v. DHANPAT GADARIYA* (1932), 1 L. R. 54 All. 1041.—IND.

### PART VII. SECT. 4, SUB-SECT. 2.—A.

968 iv. ———.]—*TOOHEY v. GUNTHER* (1927), 28 S. R. N. S. W. 229; 45 N. S. W. N. 11.—AUS.

### PART VII. SECT. 4, SUB-SECT. 2.—B. (c).

sn. *Agreement for future advances.*—Where a mtg. is for a definite amount & also covers future advance but the amount outstanding & secured by the mtg. may be ascertained at any time, & on payment thereof there is nothing to prevent the mtgor. from getting back the mortgaged property & enjoying it just as he did before making the mtg., it cannot be said that the mtg. constitutes a clog on the equity of redemption.—*STEPHEN & STEPHEN v. TRANS-CANADA FINANCE CORPN., LTD.*, [1931] 2 W. W. R. 448; 4 D. L. R. 783.—CAN.

**995a. Mortgage including policies—Redemption postponed to date later than maturity of policies.**—A mtge. of land together with an endowment policy on the life of the mtgor., made in 1926, contained mutual covenants between mtgor. & mtgee. that the principal sum should be allowed to remain on the security for a period of twenty years, or until the earlier death of the mtgor., & so long as interest was punctually paid, & there was no breach of covenant, should not be called in by the mtgee. during the same period. The covenants in the mtge. were made applicable to a further charge given in 1926, by which another endowment policy was mortgaged. This policy would mature in 1942, & the further charge provided that if the mtgor. survived the date of maturity, the policy moneys with profits should be paid to the mtgee. in reduction of the mtge. debt. The other policy also would mature before the date for redemption:—*Held*: the postponement of redemption for twenty years, together with the other provisions which made the policies in effect irredeemable, was a clog on the equity, & the mtgor. was entitled to judgment in an action for redemption.—**DAVIS v. SYMONS**, [1934] Ch. 442; 103 L. J. Ch. 311; 151 L. T. 96; 78 Sol. Jo. 297.

*Annotation*:—**Consd.** *Knightsbridge Estates Trust, Ltd. v. Byrne*, [1938] 2 All E. R. 414.

**995b. Forty years.**—A co. owning a considerable area of freehold land in the county of London mortgaged it by deed in 1931 to a friendly society to secure a loan of £310,000. By the deed the co. (plffs. in the action) by clause 1 covenanted (*inter alia*) with the friendly society (defts.) to repay to them the principal moneys so borrowed with interest by eighty half-yearly instalments of principal & interest combined on the two half-yearly days therein mentioned. There was the usual proviso in case of default. By clause 2 plffs. demised the mortgaged land to defts. for a long term of years with the usual proviso for cesser. There was a further covenant by pltf. co. with defts. that if pltf. co. should (*inter alia*) pay defts. the sum so borrowed with the appropriate interest by the instalments & on the half-yearly days mentioned in the deed, & should not have committed any breach of any covenant in the deed or any breach of any obligation, statutory or otherwise, binding on plffs., then defts. would accept payment of the sum so lent on mtge.

by the instalments & in the manner specified in the deed & would not require payment of such principal moneys otherwise than by such instalments. Plffs. being desirous of redeeming the property so mortgaged by the repayment of the principal moneys borrowed, notwithstanding the stipulation contained in the deed as to the repayment by eighty half-yearly instalments, sought by action a declaration that they were so entitled to redeem at any time on giving the usual notice. Several questions arose for the decision of the ct.—namely: (1) whether, on the true construction of the deed, plffs. were entitled to redeem the property mortgaged on giving the usual six months' notice; (2) if the answer should be in the negative, whether the provision in the mtge. deed postponing the right of redemption for a period of forty years was void as infringing the rule against perpetuities; (3) if the answer to this question should be in the negative, were the provisions of the mtge. deed so unreasonable as to constitute a clog on the equity of redemption, & (4) whether the mtge. deed was a debenture within Cos. Act, 1929 (c. 23), s. 380, & therefore whether sect. 74 of that Act applied:—*Held*: (1) on the true construction of the mtge. deed pltf. co. was not entitled to pay off the mtge. money on giving the usual six months' notice; (2) the condition in defeasance of the term of years created by the mtge. deed did not infringe the perpetuity rule, the rule against perpetuities not being applicable to mtges.; (3) having regard to the unusual provisions of the mtge. deed, they were, from the point of view of the mtgor., onerous & unreasonable & constituted a clog on the equity; (4) sect. 74 of Cos. Act, 1929 (c. 23), does not apply to an ordinary mtge., & the sect. therefore did not prevent the application of the equitable doctrine regarding unreasonable postponement of the period for redemption to the mtge. deed of 1931. Pltf. co. was therefore entitled to the declaration sought.—**KNIGHTSBRIDGE ESTATES TRUST, LTD. v. BYRNE**, [1938] Ch. 741; [1938] 2 All E. R. 414; 159 L. T. 55; 54 T. L. R. 749; 82 Sol. Jo. 375; *reversd.* [1938] 4 All E. R. 618, C. A.

**1017a. Mortgage by company—Dissolution of company—Whether bona vacantia.**—In 1899 a limited co. mortgaged to trustees of a will certain leasehold properties by way of absolute assignment subject to the equity of redemption. In 1910 the co. went into liquidation,

**PART VII. SECT. 4, SUB-SECT. 2.—E.**

**996 iv.** — — — — —.]—Attached to & expressed as forming part of a mtge. of land was an agreement stating that in further consideration for the loan the mtgor. granted to the mtgee. an option to purchase the land for a specified amount; the option to be open for acceptance until the due date of the amount secured, & in the event of payment not being then made, until the amount secured was fully paid & the mtge. discharged. The mtgee. sued for specific performance of the option agreement:—*Held*: the option was a clog on the equity of redemption & therefore void.—**HOAR v. MILLS** (No. 2), [1935] 1 W. W. R. 433.—CAN.

**PART VII. SECT. 4, SUB-SECT. 2.—F.**

**q i.** — — — — —.]—*Permanent lease.*—Permanent leases executed by the mtgor. in favour of the mtgee. subsequent to the mtge. constitute a clog

on the equity of redemption & are null & void.—**PARSHARAM YESHWANTHET v. LAXMIBAI** (1928), 1 L. R. 53 Bom. 360.—IND.

*sp. Covenant creating right of pre-emption in favour of mortgagee—Limited to life of parties.*—A covenant in a mtge. deed creating a right of pre-emption in favour of the mtgee., the operation of which is not meant to extend beyond the lifetime of the parties, is neither a clog on the equity of redemption nor obnoxious to the rule against perpetuities.—**MATURA SUBBA RAO v. SURENDRANATH SARU** (1928), 1 L. R. 8 Pat. 243.—IND.

**PART VII. SECT. 5.**

**1013 i.** *Amount appearing in receipt clause—How far conclusive.*—A bill alleged that a mtge. was executed by W. to deft. in consideration of \$450; that deft. advanced only \$150 thereon, & W. being entitled to receive the balance assigned such right & con-

voyed his equity of redemption to pltf.; that deft. refused to pay the balance & claimed to hold the mtge. as security for \$450. The prayer was for specific performance or, in the alternative, a declaration of the above facts, & for general relief:—*Held*: upon the facts alleged in the bill, namely, that the mtge. was being held for more than had been advanced thereon, & therefore, to that extent had formed a cloud on the title, pltf. would be entitled to a declaration to that effect, & appropriate relief.—**CALVERT v. BURNHAM** (1881), 6 A. R. 620.—CAN.

**a i.** — — — — —.]—**FREDERIKSEN v. WESTERN CAN. INV. CO.** (Sask.), [1927] 1 D. L. R. 804.—CAN.

**PART VII. SECT. 6, SUB-SECT. 1.**

*sq. Statute for Sale of Equities of Redemption—When applicable.*—**FITZ-GIBBON v. DUGGAN** (1865), 11 Gr. 188.—CAN.

& in 1913, the trustees having called in the mtge., the co. made default & the trustees appointed a receiver. In 1916 the co. was dissolved, the income of the property being at that time insufficient to meet the mtge. interest, & nothing was done in respect of the equity of redemption as the liquidator considered it to be of no value. The value of the property having since largely increased, the surviving trustee claimed to be entitled to the property absolutely, & the Crown claimed the equity of redemption as *bona vacantia*.—*Held*: (1) Cos. Act, 1929 (c. 23), s. 296, did not apply, as that section was not retrospective; (2) after the disappearance of the legal entity which had had the right of redemption the Crown was entitled to the property as *bona vacantia*.

(3) The equity of redemption, then, was a right of property which could be disposed of by the mtgor. In a general sense the mtgee. was not a trustee for the mtgor.; their interests were antagonistic, though the mtgee. might be trustee in a limited sense—that was, in respect of surplus purchase-moneys after his own claims had been satisfied (LORD HANWORTH, M.R.).—*Re WELLS, SWINBURNE-HANHAM v. HOWARD*, [1933] Ch. 29; 101 L. J. Ch. 346; 148 L. T. 5; 48 T. L. R. 617, O. A.

1018. *Add. Annotation*:—*Consd. Re Mainwaring, Mainwaring v. Verden*, [1936] 3 All E. R. 540.

1024. *Add. Annotation*:—*Refd. Ideal Films v. Richards*, [1927] 1 K. B. 374.

1025. *Add. Annotation*:—*Refd. Ideal Films v. Richards*, [1927] 1 K. B. 374.

1036. *Add. Annotation*:—*Refd. Cromwell Property Investment Co. v. Western & Toovey*, [1934] Ch. 322.

1041. *Add. Annotation*:—*Refd. Cromwell Property Investment Co. v. Western & Toovey*, [1934] Ch. 322.

1041a. ——— *Length*.—A co. in consideration of £25,000, executed on Oct. 5, 1931, in favour of two lenders, a mtge. containing a clause providing that if the co. paid interest at the rate of 5½ per cent. *per annum* within fourteen days after the several days on which it should fall due & performed & observed all the covenants & stipulations in the mtge. to be performed & observed by it, save that for repayment of the principal sum, the lenders would not enforce repayment before Oct. 15, 1936, the principal sum being deemed to be due for the purposes of the exercise of the statutory powers on Mar. 25, 1932. On Aug. 11, 1932, the co., in consideration of £24,000 executed in favour of the same lenders & in respect of different property, a mtge. containing a like clause, in which the lenders

agreed not to enforce repayment before Sept. 29, 1937, the principal sum being deemed to be due for the purposes of the exercise of the statutory powers on Dec. 25, 1932. In the course of correspondence the lenders, in answer to the co., wrote that they would be prepared to accept repayment of both sums "on reasonable notice." On Jan. 23, 1933, they wrote that they would be prepared to accept three months' notice, & on Jan. 24 the co. wrote giving notice of intention to pay off the mtges. on Apr. 25. On Apr. 20, during a telephone conversation between clerks of the co.'s solrs. & the lenders' solrs., it was made clear that completion would not take place on Apr. 25, & the lenders' solrs.' clerk acquiesced & asked to be informed when it would take place as soon as the co.'s solrs. knew. It did not take place on Apr. 25, & on that date the lenders' solrs. wrote informing the co.'s solrs. that as the mtges. had not been redeemed in accordance with the notice interest in lieu of notice would have to be paid on completion; & on Apr. 27 they wrote that the lenders would accept interest up to the actual date of repayment, plus three months' interest in lieu of notice, if redemption took place "not later than Thursday of next week." On May 10 the lenders' solrs. refused the co.'s solrs.' tender of a sum representing principal & interest to date on both mtges.:—*Held*: (1) nothing in the mtges. freed the co. from the rule of equity that six months' notice must be given of intention to pay off a mtge., or six months' interest in lieu thereof be paid; (2) when failure to pay off on the date fixed in the notice is unexplained, a new notice must be given or interest in lieu thereof be paid, but the new notice need not in every case be six months' notice; (3) in the present case only a "reasonable notice" was required after Apr. 25, 1933, & three months was a "reasonable notice."—*CROMWELL PROPERTY INVESTMENT CO., LTD. v. WESTERN & TOOVEY*, [1934] Ch. 322; 103 L. J. Ch. 168; 150 L. T. 335.

1049. For the existing catchwords read " .

1085. *Add. Annotation*:—*Refd. Smith v. Wood* (1928), 139 L. T. 250.

1091a. ——— *Claim for repayment of excess received by mortgagee over amount due under mortgage*.—Where shares in a co. were mortgaged to secure a loan with interest, & the value of the shares increased enormously so that the mtgee. received dividends sufficient to pay off the loan & interest, & a summons was subsequently taken out claiming redemption, & also repayment of the excess of the amount of dividends received by the mtgee. over

#### PART VII. SECT. 6, SUB-SECT. 2.

1018 x. ——— *Limitation of action—When time begins to run*.—*LEWINGTON v. RAYCHOFF*, [1935] 4 D. L. R. 378; O. R. 474.—*CAN.*

1018 xi. ——— *—*.—The personal liability of the purchaser of an equity of redemption to pay the mtge. debt, or to indemnify the vendor against it, is implied by law.—*HOLMES v. FAGAN*, [1935] 4 D. L. R. 49.—*CAN.*

1018 xii. ——— *—*.—Although the implied equitable obligation of the purchaser of an equity of redemption to indemnify the vendor against lia-

bility on the mtge. debt arises in every case where it can reasonably be implied that it was the intention of the parties that such an indemnity should be given:—*Held*: under all the circumstances of the present case, including the absence of an express covenant of indemnity, said obligation did not exist.—*BRITISH COLUMBIA LAND & INVESTMENT AGENCY, LTD. v. MONTREAL TRUST CO.*, [1935] 3 W. W. R. 566.—*CAN.*

o 1. ——— *Assignee not barred by twenty years' possession of assignor claiming under mortgagor*.—*COLLINS*

*v. REID* (1866), 6 N. S. R. (2 Old.) 252.—*CAN.*

sg. *Covenant by purchaser to pay—Agent of all mortgagors*.—The purchaser of the equity of redemption who covenants to pay the mtge. is the agent of all the mtgors.—*COLEMAN v. YARMOLINSKY*, [1935] 3 D. L. R. 314; O. R. 264.—*CAN.*

#### PART VII. SECT. 8, SUB-SECT. 4.—B.

sr. *By motion for judgment—Proceedings by action—Limitation of costs recoverable*.—*MALKOWICH v. GENIK*, [1928] 3 W. W. R. 65.—*CAN.*

& above the amount due under the mtge. :—*Held*: an order for payment of the excess claimed against the mtgee. could, by R. S. O., Ord. 55, r. 5A, be obtained upon originating summons.—*WELD v. PETRE*, [1929] 1 Ch. 33;

97 L. J. Ch. 399; 139 L. T. 596; 44 T. L. R. 739; 72 Sol. Jo. 569, C. A.

1092. *Add. Annotation*:—*Refd.* *Ruislip-Northwood Urban District Council v. Lee* (1931), 145 L. T. 208.

## Part VIII.—Assignment and Devolution of Mortgage.

1171. *Add. Annotation*:—*Refd.* *Re Turner, Tenant v. Turner*, [1938] Ch. 593.

1177. *Add. Annotation*:—*Refd.* *Bonham v. Maycock* (1928), 138 L. T. 736.

1234. *Add. Annotation*:—*Generally, Refd.* *Parker v. Jackson*, [1936] 2 All E. R. 281.

1242a. A firm of solrs. held about £2,000 belonging to the estate of one of their clients. The client had before his death mtged. certain property to secure a sum of £700. This mtge. was transferred to the then surviving partner in the firm of solrs. The trustees of the client's estate—the persons entitled to the equity of redemption—gave no directions for the appropriation of part of the £2,000 in discharge of the mtge. The surviving partner then parted with the title deeds, in return for £700, to another client, who thus became an equitable transferee of the mtge. No notice of this transfer was given to the trustees until some time later, when the firm of solrs. was found to be insolvent & the surviving partner was made a bkpt. The trustees thereupon claimed to recover from the assignee the title deeds free & discharged from any claim in respect of the mtge. debt :—*Held*: as the trustees had not joined in, & had no notice of, the transfer of the mtge., the transferee took subject to the right of set-off which the trustees had against the transferor, the surviving partner, & were entitled to redeem the mtged. property without further payment.—*PARKER v. JACKSON*, [1936] 2 All E. R. 281; 155 L. T. 104; 80 Sol. Jo. 365.

1245. *Add. Annotation*:—*Refd.* *Tsang Chuen v. Li Po Kwai*, [1932] A. C. 715.

### PART VIII. SECT. 1, SUB-SECT. 1.

b 1. — *Mortgage paid off by mortgagor*.—Sect. 99 of Land Titles Act, which provides that a mtgee. on receiving payment of a mtge. which the mtgor. is entitled to pay off is bound to transfer the mtge. to a third party if the mtgor. so directs, does not have the effect of continuing the life of a mtge. so transferred if it has been paid off in full by the mtgor. himself. In such a case there is nothing to assign or transfer.—*DEVENISH & DEVENISH v. CONNACHER (Alta.)*, [1929] 4 D. L. R. 1004; 3 W. W. R. 355.—CAN.

ss. *Executor—Necessity for proof of probate*.—An assignment of a mtge. by an exor. is not admissible in evidence without proof of the probate.—*DOE v. HANSON* (1857), 8 N. B. R. (3 All.) 427.—CAN.

### PART VIII. SECT. 1, SUB-SECT. 2.

b 1. —.]—Since by virtue of the covenant implied by sect. 54 of Land Titles Act, R. S. A., 1922 (c. 133), there is a direct personal liability of the transferee of mortgaged land to the mtgee., the original mtgor. becomes a surety for the transferee to the mtgee. & therefore, is entitled to pay off the mtge. money as soon as there is default,

without waiting till he is sued or pressed for payment, & on paying it off is entitled, under sect. 99 of the Act & under sect. 5 of Mercantile Law Amendment Act (Imp.) (19 & 20 Vict. c. 97), to require the mtgee. to transfer the mtge. to a third party as a valid security.—*DEVENISH v. CONNACHER*, [1930] 2 W. W. R. 254; 3 D. L. R. 977; 24 Alta. L. R. 535; *revg.*, [1930] 2 D. L. R. 973; 1 W. W. R. 958.—CAN.

### PART VIII. SECT. 1, SUB-SECT. 3.

1172 vi. —.]—The covenant which is implied by Real Property Act, R. S. M., 1913, s. 97, on the part of the transferee of mortgaged land with the transferor is one which can be rebutted by evidence of circumstances which make it inequitable that it should be enforced. The sect., therefore, leaves the law for all practical purposes the same as it was before the section was enacted.—*SOKOLOV v. KACHMARK*, [1929] 2 D. L. R. 305; 1 W. W. R. 353; 38 Man. L. R. 99.—CAN.

1172 vii. —.]—In an action based on the covenant implied by sect. 97 of Real Property Act, R. S. M. 1913, on the part of the transferee of mortgaged land with the transferor, the transferee is under the onus of rebut-

1256. *Add. Annotation*:—*Refd.* *Parker v. Jackson*, [1936] 2 All E. R. 281.

1260. *Add. Annotation*:—*Refd.* *Parker v. Jackson*, [1936] 2 All E. R. 281.

1269. *Add. Annotation*:—*Refd.* *Parker v. Jackson*, [1936] 2 All E. R. 281.

1278a. *Voluntary transfer—Amount of duty*.—*ANDERSON v. INLAND REVENUE COMRS.*, [1938] 4 All E. R. 491.

1279a. *Sale on bankruptcy of mortgagor of mortgage of settled premises—Effect of—Right of purchaser to hold mortgage as first charge on estate*.—*SIMPSON v. O'SULLIVAN* (1840), 7 Cl. & Fin. 550; West, 332; 7 E. R. 1179.

1324a. —.]—The legal estate in property vested in a testator by way of mtge. does not pass under the description of "securities for money," or "money invested on any security."—*Re GORFETT'S TRUST, Ex p. PRICE* (1850), 19 L. J. Ch. 173; 14 Jur. 53.

1326a. —.]—Testator, who was a mtgee., devising all the rest & residue of his freehold, leasehold, & copyhold estates in possession or reversion, together with all his goods, chattels, etc. mtges. & debts to a legatee, subject to the payment of his debts, etc., & also appointing the legatee exor. of his will :—*Held*: not to have thereby devised the legal estate in the mortgaged premises to such legatee.—*SILVESTER v. JARMAN* (1822), 10 Price, 78; 147 E. R. 248, Ex. Ch.

*Annotations*:—*Refd.* *Galliers v. Moss* (1829), 9 B. & C. 267; *Doe d. Guest v. Bennett* (1851), 6 Exch. 892; *Re Field's Mortgage* (1851), 15 Jur. 1004.

ting the presumption which the Act raises in favour of the transferor.—*POLLOCK v. SHAPERA*, [1938] 1 W. W. R. 311.—CAN.

### PART VIII. SECT. 1, SUB-SECT. 4.—F. 1. *Revd.*, 19 Gr. 59.

### PART VIII. SECT. 1, SUB-SECT. 15.

ss. *Application of Land Titles Act (Alta.)*, sects. 101, 102, 103.]—These sects., relative to transfer of mtges., have no application where the mtgor.'s interest in the land has disappeared before transfer & there remains nothing but the personal responsibility of the mtgor. arising under covenant or otherwise.—*STANDARD TRUSTS CO. v. LA VALLÉE*, [1931] S. C. R. 595.—CAN.

ss. *Effect of transfer on lease by mortgagee in possession*.—*Semble*: an assignment of a mtge. is not by itself effective to transfer a lease given by the mtgee. in possession.—*KONEIN v. CANADIAN BANK OF COMMERCE (Sask.)*, [1927] 3 W. W. R. 123.—CAN.

### PART VIII. SECT. 3, SUB-SECT. 1.

b 1. —.]—*GARRETT v. SAUNDERS* (1876), 23 Gr. 566.—CAN.

## Part IX.—Rights and Liabilities of the Mortgagee.

1352. To the existing paragraph, after the last words "toll gates," add as follows:—  
; (3) he was entitled to have a receiver appointed.

1357. *Add. Annotation*:—*Fold. Halifax Building Society v. Keighley*, [1931] 2 K. B. 248.

1357a. *Effect of Law of Property Act, 1925 (c. 20), s. 108—On Conveyancing Act, 1881 (c. 41), s. 23.*—A mtge. deed made in 1919 provided that the mtgees. might insure the premises against fire, & that the mtgors. should pay the premiums to them. Before 1925 the mtgees. effected insurances of the premises under the deed. Before that year the mtgors. also effected with other insurers an insurance of the premises apart from statute or the deed in their own names. In 1930, while the deed & insurances were all in force, the premises were damaged by fire. The respective insurers paid to the mtgors. & mtgees. the proportions of the loss for which they were responsible. The mtgees. brought an action against the mtgors. for payment over of the money paid to the latter by their insurers:—*Held*: plffs. were not entitled to succeed in the action, either (1) under Conveyancing Act, 1881 (c. 41), s. 23 (4), inasmuch as that sub-sect. had been repealed by Law of Property Act, 1925 (c. 20), s. 207, subject to a proviso that the repeal should not affect any right acquired before the latter Act, & no right to the money which plffs. claimed had accrued to them before that Act; or (2) under Law of Property Act, 1925 (c. 20), s. 108 (4), inasmuch as the insurance effected by defts. was not an insurance effected under that Act or any enactment replaced thereby, or an insurance for the maintenance of which defts. were liable under the mortgage deed; or (3) on the footing that defts. were trustees of the money for plffs. or otherwise liable to them therefor.

Conveyancing Act, 1881 (c. 41), s. 23 (4), in so far as it may remain unrepealed by Law of Property Act, 1925 (c. 20), is not subject to the limitation which restricts sub-sect. (3) of that sect. to money received

on an insurance effected under the mtge. deed or under the Act; but is subject to the limitation that it applies only to money received on an insurance in which the mtgor. & the mtgee. are one or other or both interested.—*HALIFAX BUILDING SOCIETY v. KEIGHLEY*, [1931] 2 K. B. 248; 100 L. J. K. B. 390; 145 L. T. 142.

1361. *Add. Annotations*:—*Fold. Re Smith's Mortgage, Harrison v. Edwards*, [1931] 2 Ch. 168. *Refd. Re Leighton's Conveyance*, [1937] Ch. 149.

1362a. —.]—Trespass will not lie against the occupier of land at the suit of the mtgee., who has never been in actual possession or been seised of the land, & has not obtained a judgment in ejectment, either by default or by verdict; & therefore he cannot, in such case, waive the tort, & maintain an action of use & occupation.—*TURNER v. CAMERON'S COALBROOK STEAM COAL CO.* (1850), 5 Exch. 932; 20 L. J. Ex. 71; 16 L. T. O. S. 285; 155 E. R. 407.

1408a. *Right to possession as against subsequent lessee.*—*SPENCER v. MASON* (1931), 75 Sol. Jo. 295.

1445. *Add. Annotation*:—*Refd. Lazard Bros. & Co. v. Banque Industrielle de Moscou, Lazard Bros. & Co. v. Midland Bank, Ltd.* (1931), 101 L. J. K. B. 65.

1499a. *Application for judgment under R. S. C., Ord. 14—Leave to defend—When granted.*—Pltf., a legal mtgee., brought an action to recover possession of the mtged. land, & applied for judgment under R. S. C., Ord. 14. Deft. alleged that the terms of the mtge. deed had been varied by a parol agreement to the effect that the mtgee. should not exercise his right of re-entry before the end of 1936. To this pltf. objected that the mtge. being required to be in writing under Stat. Frauds the alleged variation must be in writing. Deft. then alleged that he had entered upon the land & spent money upon the property, in effect, setting up a plea of part performance:—*Held*: it could not be said that the defence

### PART IX. SECT. 1, SUB-SECT. 1.—C.

n 1. —.]—Plffs. were mtgees. under a mtge. from B. An insurance policy covering the property mortgaged was issued by the defts. in favour of plffs. "as mtgees., B. as owner." This was afterwards altered to read in favour of plffs. "as mtgees. of B." The premises insured by the policy were burnt down. After the fire B. repaid to plffs. the amount due under the mtge., the plffs. agreeing at the time of such repayment to prosecute on behalf of B. plffs.' claim against defts. under the policy. After such repayment plffs. instituted an action against defts. on the policy:—*Held*: the existence of a personal loss or damage in plffs. at the time the action was begun was not essential to their right to maintain the action, if in fact other interests intended to be covered by the policy subsisted & loss had occurred in respect of them, & plffs. were therefore entitled to recover.—*HORDERN v. FEDERAL MUTUAL IN-*

*SURANCE CO. OF AUSTRALIA* (1924), 24 S. R. 267; 41 W. N. 54. —AUS.

### PART IX. SECT. 1, SUB-SECT. 2.—D.

a. *Varied.*, [1927] 2 D. L. R. 857; [1927] 1 W. W. R. 780; 38 B. C. R. 287.

### PART IX. SECT. 1, SUB-SECT. 2.—E.

so. *Seizure & sale of mortgaged goods.*—A mtgee. may maintain an action against a person seizing & selling the property mtged., the right of possession of the goods at the time of such sale being rightfully in the mtgor., & the reversionary estate in pltf. as mtgee.—*MCLEOD v. MERCER* (1856), 6 C. P. 197.—CAN.

### PART IX. SECT. 2, SUB-SECT. 1.

sd. *Whether possession by lessee of mortgagor—Under lease made after mortgage.*—*Re SHANTZ & HALLMAN*, [1927] 3 D. L. R. 658; 60 O. L. R. 543; *affd. sub nom. MODERN REALTY CO. v. SHANTZ*, [1928] 2 D. L. R. 705; [1928] S. C. R. 213.—CAN.

### PART IX. SECT. 2, SUB-SECT. 2.—A.

ol. — *Against lessee—Under Land Acts.*—*MUNGALL v. MANN, Ex p. MANN* (1928), 22 Q. J. P. R. 66.—AUS.

### PART IX. SECT. 4, SUB-SECT. 1.

so. *No liability to pay taxes.*—A mtgee. who has never been in possession of the land or in receipt of any income therefrom is not, in the absence of an agreement therefor, under any obligation to the mtgor. to pay the taxes; & the fact that he has paid part of them does not bind him to pay them all.—*BATTRUM v. NOAKES*, [1931] 2 W. W. R. 74; 3 D. L. R. 91; *affd.*, [1931] 1 W. W. R. 213; 25 S. L. R. 253.—CAN.

### PART IX. SECT. 7, SUB-SECT. 1.—A.

st. *Validity of lease—Non-compliance with Land Titles Act, R. S. S., 1920 (c. 87), s. 108.*—*MASSEY-HARRIS CO. v. MANLEY*, [1927] 1 D. L. R. 464; [1927] 1 W. W. R. 35; 21 Sask. L. R. 256.—CAN.



was unarguable & deft. ought to be given leave to defend, & the action should be transferred to the Ch. Div.—*KNAPP-FISHER v. CRISP*, [1936] 3 All E. R. 560, C. A.

1502. *Add. Annotation*:—*Consd.* Clayton v. Clayton, [1930] 2 Ch. 12.  
1506. *Add. Annotation*:—*Consd.* Clayton v. Clayton, [1930] 2 Ch. 12.

## Part X.—Consolidation.

1592. *Add. Annotation*:—*Refd.* Hayes Bridge Estate v. Portman Building Society, [1936] 2 All E. R. 1400.

1629. *Add. Annotation*:—*Appld.* Westminster Bank, Ltd. v. Residential Properties Improvement Co., [1938] Ch. 639.

## Part XII.—Priority of Mortgagees.

1830. *Add. Annotation*:—*Generally, Refd.* Abigail v. Lapin, [1934] A. C. 491.

1916a. ———.]—The provisions of sect. 113 of Law of Property Act, 1925 (c. 20), are merely concerned with relieving persons who are investigating title to land from being affected by notice of & from making inquiries into equitable interests, of which they may have actual or constructive notice, relating to the money secured by mtges. on the land. There

is nothing in the sect. giving to a person who acquires an equitable interest in the mtge. debt last in point of time a better equity than that of a person whose equitable interest is earlier in point of time.—*BEDDOES v. SHAW*, [1937] Ch. 81; [1936] 2 All E. R. 1108; 106 L. J. Ch. 4; 155 L. T. 348; 80 Sol. Jo. 594.

1977. *Add. Annotation*:—*Refd.* Abigail v. Lapin, [1934] A. C. 491.

### PART IX. SECT. 14.

sh. *Right to indemnity—Mortgage of shares.*—*MASTERS v. MCLELLAN* (1889), (1825-97), N. B. Dig. 316.—*CAN.*

### PART X. SECT. 2, SUB-SECT. 2.

1603 i. *One mortgage by sole mortgagor—Other jointly with partner.*—*J. & T., who were partners, made a mtge. to pltf. upon partnership land, parcel B., & J. alone, at a later date, made a mtge. to pltf., upon a different parcel of land, A. J. became bkpt., & deft. was the authorised trustee of his estate. T. afterwards conveyed his undivided half interest in parcel B. to deft. as authorised trustee of the estate of J.:—Held: pltf. was not entitled to consolidation, & either mtge. might be redeemed without redeeming the other.*—*WATKINS v. ADAMSON*, [1929] 1 D. L. R. 572; 63 O. L. R. 315.—*CAN.*

### PART XII. SECT. 1, SUB-SECT. 2.—A.

1838 iv. ———.]—A person who pays off a first mtge. on property & accepts a new mtge. on the property & a discharge of the old first mtge. is entitled to rank as first mtgee. upon the property, although there is a mtge. subsequent to the original mtge. but prior to his mtge. registered upon the property.—*GORDON v. SNEEGROVE*, [1932] O. R. 253; 2 D. L. R. 300.—*CAN.*

### PART XII. SECT. 1, SUB-SECT. 3.—A.

1903 iv. ———.]—By a memorandum of agreement, made in 1915, between C. & his aunt, M., C. agreed to give M. "during her life the exclusive use of the drawing-room & bedroom over same, with fuel & suitable support & maintenance," in a certain dwelling-house, "free of charge, the consideration for same being natural love & affection & services rendered" by M. to C.; & C. thereby agreed with M. "to execute a deed whenever called upon to carry out & give effect to the foregoing contract." No deed was ever executed pursuant to the said agreement. The agreement was not registered in the Registry of Deeds. M. went into exclusive occupation of

the two rooms, & so continued, & was supplied with fuel & maintenance. The rest of the house was in the occupation of C., who held the premises under a fee-farm grant. In 1921 C. deposited the title deeds of the premises with a bank by way of equitable mtge. to secure the payment of present & future advances. In 1927, C. being indebted to the bank for a large sum, the bank issued a summary summons to enforce the mtge. against C. M. claimed to be entitled under the agreement to an equitable life interest in the two rooms, & also to a charge on the whole of the premises in her favour for fuel & suitable support & maintenance during her life, & that the bank's equitable mtge. was pious to her life interest & charge. She stated in an affidavit that on the faith of the agreement, & on the security of the rights thereby conferred on her, she had from time to time made advances to C. of sums amounting to £252. The manager of the bank stated in an affidavit that at the date of the deposit the bank had no knowledge of any claim by M. against the premises:—*Held: M. was entitled to an equitable life estate in the two rooms, which interest was not subject to the bank's equitable mtge. M. was not entitled to a charge upon the premises for fuel & support & maintenance.*—*NATIONAL BANK v. KEEGAN*, [1931] I. R. 344.—*IR.*

m i. *Charge on land—Whether priority given over registered assignment—Dealing only with estate which assignor then had.*—*CANADIAN PORT HUBON Co. v. BURNETT* (1907), 17 Man. L. R. 55.—*CAN.*

### PART XII. SECT. 1, SUB-SECT. 4.—C.

f (p. 458) i. ———.]—*THOMSON v. HARRISON*, [1927] 3 D. L. R. 526; 60 O. L. R. 484.—*CAN.*

f (p. 458) ii. ———.]—*CARROLL v. ROGERS* (1900), 2 N. B. Eq. Rep. 159; 21 C. L. T. 96.—*CAN.*

f (p. 458) iii. ———.]—The Registry Act cannot be used to perpetrate a fraud, & therefore registration cannot be relied upon as notice when the person registering knows the mtgor. to be a

fictitious person.—*McLAUGHLIN v. CLIFF* (1932), 5 M. P. R. 72.—*CAN.*

o (p. 458) i. ———.]—*SCHAUZ v. STEINHAEVER*, [1930] 2 D. L. R. 998.—*CAN.*

o (p. 458) ii. ———.]—*What amounts to caveating interest.*—By an agreement one C., the owner of certain land, agreed to "allow" resp. an equal third share of the "net profits" which C. might make on the resale of this land. The land was sold at a considerable profit. On the completion of the purchase, a mtge. was given by the purchasers to applt. for £1,800, which purported to be a loan by applt., but, in fact, part of this amount was the balance of the purchase-money which applt. was to hold in trust for C., subject to a charge for money advanced. Resp. entered a caveat against dealings with the mtge.:—*Held: applt. had, at most, a claim against C. under his contract to an account, & for payment of any moneys found due thereon, & accordingly, had no caveating interest.*—*SHEPHERD v. HOUSTON*, [1927] S. A. S. R. 144.—*AUS.*

o (p. 458) iii. ———.]—*Failure to lodge—Loss of priority.*—*Reeps., who were registered under Real Property Act, 1900, of New South Wales, as proprietors of lands, transferred them to the nominee of a creditor by transfers expressed to be made in consideration of money payments, & handed the certificates of title to the transferee, who caused the transfers to be registered & indorsed upon the certificates. The transfers, though absolute in form, were made merely as security for the debt, but reeps. lodged no caveat. Subsequently the transferee mtged. the land to applt. to secure a loan then made. Applt. had no notice that the reeps. had any equitable interest, but had not searched the register. The mtge. to him was not registered:—*Held: reeps.' equity should be postponed to that of applt., because reeps. had armed their transferee with power to deal with the lands as owner; applt.' failure to search the register did not affect the case, because his priority did not arise from any representation to him by reeps., & because they had lodged no caveat.**

1989. *Add. Annotations*:—*Refd. Re Murphy's Estate, Morton v. Marchanton* (1930), 74 Sol. Jo. 321; *Parker v. Judkin*, [1931] 1 Ch. 475.
2013. *Add. Annotation*:—*Consd. Clayton v. Clayton*, [1930] 2 Ch. 12.
2017. *Add. Annotation*:—*Refd. Abigail v. Lapin*, [1934] A. C. 491.
- 2019a. —.—.—*MANCHESTER & COUNTY BANK, LTD. v. MONK* (1929), 73 Sol. Jo. 465.
2036. *Add. Annotation*:—*Generally, Refd. Blay v. Pollard & Morris*, [1930] 1 K. B. 628.
2038. *Add. Annotation*:—*Consd. Republica de Guatemala v. Nunez*, [1927] 1 K. B. 669.
2041. *Add. Annotation*:—*As to (1) Refd. Re Leighton's Conveyance, Re Land Registration Act, 1925*, [1936] 1 All E. R. 667.
2044. *Add. Annotation*:—*Appld. Manchester & County Bank v. Monk* (1929), 73 Sol. Jo. 465.
2131. *Add. Annotation*:—*Distd. Tsang Chuen v. Li Po Kwai*, [1932] A. C. 715.
2136. *Add. Annotation*:—*Refd. Parker v. Judkin*, [1931] 1 Ch. 475.
2145. *Add. Annotation*:—*Refd. Abigail v. Lapin*, [1934] A. C. 491.
2149. *Add. Annotation*:—*Refd. Abigail v. Lapin*, [1934] A. C. 491.
2150. *Add. Annotations*:—*Consd. Tsang Chuen v. Li Po Kwai*, [1932] A. C. 715; *Abigail v. Lapin*, [1934] A. C. 491.
2168. *Add. Annotation*:—*Consd. Abigail v. Lapin*, [1934] A. C. 491.
2173. *Add. Annotations*:—*Refd. Re King's Settlement, King v. King*, [1931] 2 Ch. 294; *Tsang Chuen v. Li Po Kwai*, [1932] A. C. 715; *Abigail v. Lapin*, [1934] A. C. 491.
2175. *Add. Annotation*:—*Refd. Abigail v. Lapin*, [1934] A. C. 491.
2178. *Add. Annotation*:—*Distd. Tsang Chuen v. Li Po Kwai*, [1932] A. C. 715.

## Part XIII.—Remedies of Mortgagee.

2229. *Add. Annotation*:—*Generally, Refd. Hunter v. Hunter*, [1936] A. C. 222.
2258. *Add. Annotation*:—*Consd. Weld v. Petre* (1928), 97 L. J. Ch. 399.

Further, it was to be inferred that resps. had authorised their transferee to raise money upon the lands, & accordingly the case was one of an agent exceeding his authority but acting within its apparent *indicia*.—*ABIGAIL v. LAPIN*, [1934] A. C. 491; 103 L. J. P. C. 195; 151 L. T. 429, P. C.—*AUS*.

*ss. Effect of omission from memorial of addition of witness.*—*Held*: under 9 Vict. c. 34, registry in accordance with the Act was imperative; & a deed registered upon a memorial in which the addition of the witness to the deed was omitted was, therefore, fraudulent & void as against a subsequent mtgee.—*ROBSON v. WADDELL* (1865), 24 U. C. R. 574.—*CAN*.

*ss. Postponement of mortgage—Power of registrar to register.*—*Re WINDOVER & GREAT WEST LIFE ASSURANCE CO. (Alta.)*, [1927] 3 D. L. R. 829; [1927] 2 W. W. R. 414.—*CAN*.

*ss. Right to registration—Duplicate certificate in hands of mortgagor.*—*Re TOTH & CASE J.I. THRESHING MACHINE CO. (1910)*, 14 W. L. R. 704; 3 Sask. L. R. 270.—*CAN*.

*ss. Notice to solicitor.*—A client is not a "person claiming . . . without notice" within Nova Scotia Registry Act, R. S. N. S., 1923, s. 18, if his solr. has express notice of an outstanding mtgee.—*CROSS v. DARES*, [1933] 2 D. L. R. 97; 6 M. P. R. 215.—*CAN*.

*ss. Failure to register—Priority of execution creditor.*—*MCDONALD v. ROYAL BANK OF CANADA*, [1933] 1 D. L. R. 796; *reversd.*, [1933] 2 D. L. R. 680; O. R. 418.—*CAN*.

### PART XII. SECT. 13, SUB-SECT. 1.—A. (a).

1995 iii. —.—.—.—*KIRK v. HARVEY* (1913), 26 W. L. R. 747; 5 W. W. R. 980; 15 D. L. R. 488; 18 B. C. R. 645.—*CAN*.

1995 iv. —.—.—.—*COLFITTS v. SHERWOOD (Alta.)*, [1927] 3 D. L. R. 7.—*CAN*.

### PART XII. SECT. 13, SUB-SECT. 3.—B. (b).

2170 i. *Mortgagee parting with deeds*

*to mortgagor—Failure to return—Laches of mortgagee.*—G., a customer, deposited the title deeds of immovable property with deft. bank to secure an overdraft. Subsequently G. obtained possession of the title deeds on a misrepresentation to deft. bank that he wanted them for inspection by an intending purchaser, & deposited the deeds with pltf. bank to secure a loan:—*Held*: by the conduct of deft. bank pltf. bank had priority of charge over the mortgaged property.—*LLOYDS BANK v. GUZDAR & CO* (1929), 1 L. R. 56 Calc. 868.—*IND*.

### PART XII. SECT. 13, SUB-SECT. 4.

*ss. Priority of mortgage over lien of lender—Of advance in reduction of mortgage.*—*Held*: the lender could not claim priority for his advance.—*IMPERIAL LOAN & INVESTMENT CO. v. O'SULLIVAN* (1879), 8 P. R. 162.—*CAN*.

*ss. Of advance in payment of purchase money.*—*Held*: the lender could not claim priority in respect of his lien for unpaid purchase money.—*WATSON v. DOWSER* (1881), 28 Gr. 478.—*CAN*.

*ss. Prior mortgagee purchasing rights of puisne mortgagee.*—*FATEH ALI v. GEHNA* (1927), 1 L. R. 9 Lah. 88.—*IND*.

### PART XIII. SECT. 1, SUB-SECT. 1.

2190 i. *Application of rule—Foreclosure—Proceedings on bond.*—*Re CHANDLER'S ESTATE* (1883), 17 N. S. R. (5 R. & G.) 78.—*CAN*.

*k i. — Action on covenant—Entry into possession.*—*GREAT WEST LIFE ASSURANCE CO. v. POLLOCK (Alta.)*, [1929] 2 D. L. R. 468; 1 W. W. R. 742.—*CAN*.

### PART XIII. SECT. 1, SUB-SECT. 2.

2210 i. *Sale of collateral securities—Foreclosure for balance.*—Pltf., a first mtgee., sued McD., as mtgor., & deft. bank, as second mtgee., for an account of the amount due for principal & interest under pltf.'s mtgee. & in default of payment, for foreclosure. It held, as collateral to the mtgee. debt, certain co. shares owned by McD. & duly

assigned. Having obtained leave under the Mtgor.'s & Purchasers' Relief Act, 1932, to proceed with the action, & no appearance being entered by either deft., it obtained a default judgment against McD. & an order to take accounts of what was due to it under the mtgee., & also an order that on payment of the amount so found it should reconvey the mtged. property & deliver up the share certificates or in default (the event which happened) there should be foreclosure. After the order nisi but before the final order for foreclosure was obtained the bank was permitted by pltf. to enter an appearance. Thereupon the bank called upon pltf. to realise in its collateral & thus reduce the debt. This being refused, the bank moved to have the writ of summons & all subsequent proceedings set aside on the ground of misjoinder in that an action for recovery of land was without leave joined with another cause of action, viz., a claim for foreclosure of securities; also that the order nisi be set aside & the bank be allowed to defend the action, since the order nisi gave pltf. relief to which it was not entitled:—*Held*: the order nisi & personal judgment be set aside.—*OKANAGAN LOAN & INVESTMENT TRUST CO. v. MCDONALD & ROYAL BANK OF CANADA*, [1935] 1 W. W. R. 481; 2 D. L. R. 278; 49 B. C. R. 468.—*CAN*.

### PART XIII. SECT. 2, SUB-SECT. 1.—B. (b) i.

*ss. Length of.*—*Held*: (1) in enacting Property Law Amendment Act, 1927, the Legislature must be presumed to have intended the repeal of Mortgages Final Extension Act, 1924, s. 70; (2) until the mtgor. took some active step towards availing himself of the protection granted him he acquired no right which survived the repeal of the protecting Act, & the mtgee. was, therefore, entitled to exercise his power of sale without giving three months' notice of his intention to do so.—*MATHESON v. HALL*, [1929] N. Z. L. R. 333.—*N.Z.*

*ss. Power of sale with notice on default—Notice to some persons entitled only—*

*Add. Annotation* :—*Refd.* *Hunter v. Hunter*, [1936] A. C. 222.

**2291a.** Part of mortgage debt due.]—There is nothing in Law of Property Act, 1925 (c. 20), s. 101, to prevent a mtgee. from exercising his power of sale when part only of the mtge. debt has become due, & where a mtge. debt is payable in instalments the right to enforce payment arises as each instalment becomes due.—*PAYNE v. CARDIFF RURAL DISTRICT COUNCIL*, [1932] 1 K. B. 241; 100 L. J. K. B. 626; 145 L. T. 575; 95 J. P. 173; 47 T. L. R. 532; 29 L. G. R. 507.

**2291b.** Debt payable in instalments.]—*PAYNE v. CARDIFF RURAL DISTRICT COUNCIL*, No. 2291a, *ante*.

**2299a.** Personal representative of transferee of mortgagee.]—*SALOWAY v. STRAWBRIDGE* (1855), 7 De G. M. & G. 594; 25 L. J. Ch. 121; 1 Jur. N. S. 1194; 4 W. R. 34; 44 E. R. 232, L. J.J.

*Annotations* :—*Consd.* *Ashton v. Wood* (1857), 30 L. T. O. S. 85. *Refd.* *Re Rumney & Smith*, (1897) 2 Ch. 351.

**2312a.** —.]—Property comprised in a mtge. was sold by the mtgee. by public auction, & at

the sale the mtgee.'s solr. became the purchaser :—*Held* : the purchase by the solr. was invalid, & must be set aside.—*LAWRANCE v. GALSORTHY* (1857), 30 L. T. O. S. 112; 3 Jur. N. S. 1049.

*Annotation* :—*Refd.* *Nutt v. Easton* (1899), 80 L. T. 353.

**2333.** *Add. Annotation* :—*Refd.* *Payne v. Cardiff R. D. C.*, [1932] 1 K. B. 241.

**2378a.** — Sale at undervalue.]—*WARING v. LONDON & MANCHESTER ASSURANCE CO., LTD.*, No. 2479a, *post*.

**2381.** *Add. Annotation* :—*As to* (1) *Apld.* *Waring v. London & Manchester Assurance Co.*, [1935] Ch. 310.

**2425.** *Add. Annotation* :—*Consd.* *Refuge Assurance Co. v. Pearlberg*, [1938] 3 All E. R. 231.

**2479a.** — By contract of sale.]—The ct. will not grant to a mtgor. tendering the moneys due under the mtge. an injunction restraining the mtgee. from completing by conveyance a contract to sell the mtged. property in exercise of his power of sale unless it is proved that the mtgee. entered into the contract in bad faith.

*Effect on power of sale after three months without notice.*—The right of a mtgee. of land to sell under power of sale contained in the mtge. on three months' default without notice is not lost merely because the mtgee. under a power of sale with notice on immediate default contained in the mtge., gives notice of sale to some only of the persons entitled to redeem.—*O'BRIEN v. MIDLAND LOAN & SAVINGS CO.*, [1934] O. R. 433; 3 D. L. R. 358; *affd.*, [1934] 4 D. L. R. 803.—*CAN.*

#### PART XIII. SECT. 2, SUB-SECT. 1.—D.

*so. Sale of two properties subject to mortgages—Sale by mortgagee of one property on default by purchaser—Rights of purchaser of other property against mtgoror & defaulting purchaser.*—*NORRIS v. MEADOWS* (1882), 7 A. R. 237.—*CAN.*

#### PART XIII. SECT. 2, SUB-SECT. 3.—D.

*sf. Sale under Land Titles Act—Jurisdiction to stay proceedings.*—*Re LAND TITLES ACT, Re FIELDING & NORTH OF SCOTLAND MTGE. CO.*, [1927] 3 D. L. R. 690; [1927] 2 W. W. R. 423; 22 Alta. L. R. 575.—*CAN.*

#### PART XIII. SECT. 2, SUB-SECT. 5.—A.

*k i. Order permitting purchase at price fixed by court—With leave to recover deficiency—Whether foreclosure.*—*SECURITY TRUST CO., LTD. v. SAYRE & GILFOY*, [1920] 3 W. W. R. 469.—*CAN.*

*k ii.* — — — — —.]—*CANADA LIFE INSURANCE CO. v. MCHARDY*, [1922] 3 W. W. R. 855; 69 D. L. R. 712.—*CAN.*

#### PART XIII. SECT. 2, SUB-SECT. 5.—D.

*so. Servant of mortgagee.*—Under a power of sale enabling a bank as mtgee. to sell certain land by private sale or public tender, it sold the land by private sale to a servant in its employ for the amount owing to the bank on the mtge. for principal & interest, after unsuccessfully attempting to sell by tender or otherwise. The sale to the servant was made in good faith & not at an undervalue. It was the servant's duty to help generally in the administration of the bank's business in the district where the land was situate, but he had no power to sell land, & all he could do was to submit offers to the head office

of the bank, which had a separate sales department. The servant was the person who would have received tenders if any had been made, but he would have transmitted them to the head office with such advice as he thought fit. In fact, no tender & no offer had been received, & the servant had taken no active step in relation to the exercise of the bank's power of sale :—*Held* : the sale to the servant was not wrongful.—*SEWELL v. AGRICULTURAL BANK OF WESTERN AUSTRALIA* (1931), 44 C. L. R. 104.—*AUS.*

#### PART XIII. SECT. 2, SUB-SECT. 6.—A.

*2331 i. Position of mortgagee—Whether a trustee.*—A mtgee., in exercising his power of sale, must exercise it in good faith. He has a right to look after himself first, but he is not at liberty to look after his own interests alone. He must not wilfully & recklessly deal with the property in such a manner that the interests of the mtgor. are sacrificed. Therefore, he is bound to take reasonable precautions in exercising the power of sale to see that the advertisements of the sale are adequate, & that the property is not sold at such a manifest undervalue as in itself to indicate disregard of the mtgor.'s interest.—*HARTLEY v. HUMPHRIES*, [1928] S. R. Q. 83; *affd.*, 2 A. L. J. 106.—*AUS.*

#### PART XIII. SECT. 2, SUB-SECT. 6.—C.

*sg. Duty to credit mtgoror with whole purchase-price.*—Where a mtgee., selling under a general power of sale (without special power to sell on terms), agrees with the purchaser to leave part of the purchase-money on mtge., conveys the property & takes a mtge. back, he must credit the mtgor. both with the amount received & the amount secured by mtge., & the mtgor.'s personal covenant is discharged to the extent of the amount received by the mtgee. in cash & of the amount for which the mtgee. is secured by mtge.—*WRIGHT v. NEW ZEALAND FARMERS' CO-OPERATIVE ASSOCN. OF CANTERBURY, LTD.*, [1934] N. Z. L. R. 1037.—*N.Z.*

#### PART XIII. SECT. 2, SUB-SECT. 8.—A.

*sg. Sale under second mortgage.*—*FLEMING v. McDUGALL* (1880), 8 P. R. 200.—*CAN.*

*sh. Right of purchaser of part of mortgaged property to marshal—Against*

*purchaser of other part subject to entire mortgage debt.*—*KAMTA SINGH v. CHATURBHUI SINGH* (1929), 1 L. R. 8 Pat. 585.—*IND.*

*sj. Whether fee passes.*—Where mtgees. in fee in possession executed a deed purporting to "convey, assign, release & quit claim" to the grantees, "their heirs & assigns for ever," all & singular the mortgaged land, *habendum* "as & for all the estate & interest" of the grantors "in & to the same" :—*Held* : sufficient to pass the fee to the grantees.—*BRIGHT v. MCMURRAY* (1882), 1 O. R. 172.—*CAN.*

#### PART XIII. SECT. 2, SUB-SECT. 8.—B. (a).

*q. Revad.*, 7 A. R. 10.

#### PART XIII. SECT. 2, SUB-SECT. 9

*sk. Sale under second mortgage—Purchaser's right to possession—Lease from first mortgagee to mtgoror.*—Land having been sold under a power of sale in a second mtge. :—*Held* : the mtgor. was estopped from setting up a lease from the first mtgee. as against a claim for possession by a transferee from the purchaser, even though at the time of securing the lease the equity of redemption was no longer in the mtgor.—*SEWELL v. HNATIW & HNATIW (Man.)*, [1927] 3 W. W. R. 577; *revad.*, [1928] 1 D. L. R. 570; [1928] 1 W. W. R. 274; 37 Man. L. R. 247.—*CAN.*

*sl. Right of second mortgagee of part of mortgaged property—Where other portion already sold by mtgoror—To compel first mortgagee to proceed against that portion & have purchaser joined as party.*—*THANMUL SOWCAR v. NATTU RAMADOSS REDDIAR* (1927), 1 L. R. 51 Mad. 648.—*IND.*

#### PART XIII. SECT. 2, SUB-SECT. 10.—A.

*sm. No liability for wages of persons working mortgaged lands.*—*MACPHERSON v. LONDON LOAN ASSETS, LTD.*, [1931] 2 D. L. R. 630; O. R. 109; 12 C. B. R. 302.—*CAN.*

*sp. Title of mtgoror subject to covenant to maintain mother—Lump sum payment on sale.*—*P. E. I. AGRICULTURAL MUTUAL FIRE INSURANCE CO. v. CAIRNS* (1933), 5 M. P. R. 577.—*CAN.*

#### PART XIII. SECT. 2, SUB-SECT. 10.—D.

*sa. Subrogation—Contribution.*—*BOUCHER v. SMITH* (1862), 9 Gr. 347.—*CAN.*

A co. entered as mtgee. into a contract for the sale of the mtged. property. The mtgor. had been given many opportunities to find the money due under the mtge. &, at his request & upon his undertaking to put the property up for sale by auction, the co. had refused a good offer to purchase. When the mtgor. did put the property up for sale by auction, when the period within which he had undertaken to do so was past, no acceptable bid was received, &, after a long period during which he was to the co.'s knowledge negotiating with a third party for a fresh loan on the security of the mtged. property, & during which the co., in order to help him as much as possible, had postponed selling, the co. ultimately contracted to sell the property for an amount less than that which it had refused at his request & upon his undertaking. On a motion by the mtgor. for an injunction to restrain completion on the grounds that there was no sale until conveyance & that the contract had been entered into in bad faith at a gross undervalue, & for leave to redeem the property upon paying into ct., as he claimed to be able to do, the moneys due under the mtge.:—*Held*: (1) a mtgee.'s exercise of his power under Law of Property Act, 1925 (c. 20), s. 101 (1) (i), to sell the mtged. property by public auction or private contract is binding on the mtgor. before completion unless it is proved that he exercised it in bad faith; (2) the fact that a contract for sale was entered into at an undervalue is not by itself enough to prove bad faith.—*WARING v. LONDON & MANCHESTER ASSURANCE CO., LTD.*, [1935] Ch. 310; 104 L. J. Ch. 201; 152 L. T. 390; 78 Sol. Jo. 860.

**2504. Add. Annotation:—***Refd. Ideal Films v. Richards*, [1927] 1 K. B. 374.

**2506. Add. Annotation:—***Consd. Refuge Assurance Co. v. Pearlberg*, [1938] 3 All E. R. 231.

**2508. Add. Annotation:—***As to (2) Refd. Refuge Assurance Co. v. Pearlberg*, [1938] Ch. 572.

**2535. Add. Annotations:—***As to (2) Refd. Re Wait*, [1927] 1 Ch. 606; *Re Gillott's Settlement*, [1927] 1 Ch. 606; *Re Gillott's Settlement*, [1927] 1 Ch. 606; *Re Gillott's Settlement*, [1927] 1 Ch. 606.

**2578a. —**—*MASTERS v. CROUCH* (1927), 63 L. Jo. 557.

**2587a. Whether liable for rates.**—An action by a

local authority to recover unpaid arrears of rates will not lie. The proper method of procedure in such a case is by an application for a distress warrant followed by distress. A local authority commenced proceedings in the county ct. for certain unpaid arrears of rates which they alleged to be due. The county ct. judge having held that on such a claim an action would lie, resp. appealed:—*Held*: (1) a rate not being a common law liability but the creature of statute, this method of procedure was wrong, & the only remedy available was that laid down by statute, namely distress; (2) the non-payment of rates by a receiver appointed by a mtgee. is not a breach of statutory duty under Law of Property Act, 1925 (c. 20), s. 109 (8) (i), for which the local authority is entitled to sue.—*LIVERPOOL CORPN. v. HOPE*, [1938] 1 K. B. 751; [1938] 1 All E. R. 492; 107 L. J. K. B. 694; 158 L. T. 215; 102 J. P. 205; 54 T. L. R. 425; 82 Sol. Jo. 194; 36 L. G. R. 183, C. A.

**2605. Add. Annotation:—***As to (1) Apld. Manchester & County Bank v. Monk* (1929), 73 Sol. Jo. 465.

**2611a. Appointment by mortgagee in possession.**—The power conferred on a mtgee. by Law of Property Act, 1925 (c. 20), s. 101 (1) (iii), when the mtge. money has become due, to appoint a receiver of the income of the mortgaged property or any part thereof, may be exercised after the mtgee. has gone into possession.—*REFUGES ASSURANCE CO., LTD. v. PEARLBERG*, [1938] Ch. 687; [1938] 3 All E. R. 231; 107 L. J. Ch. 393; 159 L. T. 453; 54 T. L. R. 950; 82 Sol. Jo. 544, C. A.

**2631. Add. Annotations:—***Refd. Houghton v. Nothard, Lowe & Wills*, [1927] 1 K. B. 246; *Liggett (Liverpool) v. Barclays Bank* (1927), 137 L. T. 443.

**2645a. Sum not repayable until interest overdue—Subsequent repayment of interest.**—A bank lent money on mtge. to two joint borrowers, one, pltf., being surety for the other, deft., for the full amount lent. The borrowers, & pltf. as surety, covenanted jointly & severally to repay the loan on demand & interest meantime half-yearly. The mtge. gave to the bank power to sell & to appoint a receiver

#### PART XIII. SECT. 3, SUB-SECT. 1.—D. (a).

**so. Duty of owner of estate to account.**—*From what date.*—The owner of an estate which is subject to an equitable mtge. or charge is not bound to account as a trustee from the date of the institution of proceedings by the owner of the incumbrance to raise the amount thereby secured, or from the date of the order for sale; but from the date of the appointment of a receiver.

*Deft.*, owner of an estate which was subject to certain charges, consented to an order being made *ex parte* by the judge referring to Chambers the account of receipts & outgoings which he had furnished to pltf. the chargeants, they having taken proceedings to raise the amount of the charges:—*Held*: *deft.* had not estopped himself from disputing his liability to account.—*BUTLER v. BUTLER*, [1925] 1 I. R. 185.—IR.

#### PART XIII. SECT. 3, SUB-SECT. 1.—E. (d).

**2565 I. Receiver appointed.**—*BRANT-*

*FORD CORPN. v. GRAND RIVER NAVIGATION CO.* (1860), 8 Gr. 246.—CAN.

#### PART XIII. SECT. 3, SUB-SECT. 1.—F. (a).

**sd. Service of order for attornment.**—*Whether relationship of landlord & tenant created.*—*MANUFACTURERS LIFE INSURANCE CO. v. DAVID SPENCER, LTD.*, [1933] 1 W. W. R. 319; 46 B. C. R. 451.—CAN.

#### PART XIII. SECT. 3, SUB-SECT. 1.—F. (b).

**sf. Variation by receiver in mode of payment.**—*Effect on mortgagee.*—Interference by a receiver in the mode of payment of rent by a tenant to the mtgor. held not to create a liability against the mtgee.—*WESTMINSTER MORTGAGE CORPN. v. ADAIR* (1932), 47 B. C. R. 1.—CAN.

**sk. Failure to pay.**—*Right of receiver to possession.*—A receiver in an undetermined foreclosure action has not the same rights as a landlord under the Landlord & Tenant Act, R. S. B. C., 1924, to obtain possession on account of the tenant's non-payment of occupa-

tion rent fixed in the foreclosure action.—*COULSON v. GUNN* (1936), 50 B. C. R. 330.—CAN.

#### PART XIII. SECT. 3, SUB-SECT. 1.—H. (a).

**2589 I. Interlocutory application.**—*EASTERN TRUST CO. v. NOVA SCOTIA STEEL & COAL CO.*, [1927] 1 D. L. R. 421; 59 N. S. R. 123.—CAN.

#### PART XIII. SECT. 4, SUB-SECT. 5.

**sk. Conditional sale contract.**—A receiver of the rents of a large business block appointed under an order *mist* in a mtge. foreclosure action & authorised thereby to manage the heating & janitor services & make incidental repairs, installed, without leave, a mechanical stoker & a modern system of hot-water heating, in order to reduce heating expenses, & entered into a conditional-sale agreement to pay therefor. The mtgee. applied to have the receiver's actions approved:—*Held*: the approval asked for should be given.—*GEORGIA INVESTMENT CO., LTD. v. STRATFORD REALTY CO., LTD. & NELSON*, [1937] 1 W. W. R. 699.—CAN.

immediately at any time after demand for repayment, without notice to the borrowers; & it provided that, as between the borrowers & their property & the surety & his, the former should be primarily liable under the mtge. without affecting the bank's rights & remedies, & that the surety, although surety for the borrowers only as between himself & them, should, as between himself & the bank, be liable to the bank as a principal debtor under the mtge. The borrowers later agreed between themselves that the money should be deemed to have been lent in the proportion of one-half to each of them, & that each should be liable to repay his half & to pay the interest on it meanwhile, should be able, under the mtge., to recover any payments made by him in respect of the other's half & interest, & should be entitled, despite anything in the mtge., to the same security for payments made by him in respect of the other's half as the bank would have if that half were not paid; & the agreement provided that neither borrower should be able to compel the other to repay his half for ten years from the date

of the agreement so long as the interest owing thereon should be paid within thirty days of the same becoming due. Deft. failed to pay certain interest due from him within thirty days of its becoming due. The bank did not at any time demand repayment of the loan:—*Held*: on pltf.'s repaying his half of the loan, the ct. would order deft. to repay his half.—*TATE v. CREWDSON*, [1938] Ch. 869; [1938] 3 All E. R. 43; 107 L. J. Ch. 328; 159 L. T. 512; 54 T. L. R. 857; 82 Sol. Jo. 454.

2665. Delete "No. 2189, ante" & add the following:—

A mtgee. concurred with the transferee of the equity of redemption in selling the property, & he allowed such transferee to receive the purchase-money:—*Held*: the mtgee. could not afterwards sue the mtgor. for the debt, & he was perpetually restrained from doing so, & ordered to pay the costs of the suit.—*PALMER v. HENDRIE* (No. 2) (1860), 28 Beav. 341; 54 E. R. 397.

2688. Add. Annotation:—*Refd. Humphery v. Wilson* (1929), 141 L. T. 469.

**PART XIII. SECT. 5, SUB-SECT. 2.**

d i. — *Mortgage for purchase-money.*—*TULLY v. BRADBURY* (1861), 8 Gr. 561.—CAN.

d ii. —.]—Assignee may sue on covenant for repayment, on joining mtgee. as co-pltf., debtor having no notice of assignment.—*PRINGLE v. HUTSON* (1909), 19 O. L. R. 682.—CAN.

**PART XIII. SECT. 5, SUB-SECT. 3.—A.**

2647 i. *General rule—Assignee not liable.*—*POWER v. NOVA SCOTIA TRUST CO.*, [1928] 4 D. L. R. 570.—CAN.

i i. —.]—The implied covenant under Land Titles Act, R. S. A., 1922 (c. 133), s. 54, does not arise in the case of the transfer of only part of the mortgaged land.—*ITE MACDONALD*, [1925] 2 D. L. R. 748; [1925] 1 W. W. R. 1031; 21 Alta. L. R. 66.—CAN.

**PART XIII. SECT. 5, SUB-SECT. 4.**

sm. *Effect of consent to variation of principal sum.*—*MORTLEMAN v. PUBLIC TRUSTEE*, [1927] N. Z. L. R. 642.—N.Z.

sn. *Mortgage for purchase-money—Vendor accepting from purchaser transfer of other land subject to incumbrances—Right of vendor to add amount of incumbrances to claim under mortgage.*—*MAULSON v. MOORE* (1860), 8 Gr. 448.—CAN.

so. *Mortgage to managing director of company assigned to company—Right of mortgagee to set off against amount due—claim against managing director for services rendered.*—*NORTHARD & LOWE Co. v. DURNO*, [1927] 2 D. L. R. 892; 59 N. S. R. 310.—CAN.

**PART XIII. SECT. 5, SUB-SECT. 5.—B. (a).**

2664 v. —.]—*McCuaig v. Barber* (1898), 29 S. C. R. 126.—CAN.

2664 vi. —.]—Where after a final order of foreclosure the mtgee. sues the mtgor. on his covenant, the mtgee. must be in the position, if redemption is sought, to restore the mortgaged property intact.—*COLONIAL INVESTMENT & LOAN Co. v. MARTIN* (Man.), [1927] 3 D. L. R. 360; [1927] 2 W. W. R. 94; *affd.*, [1928] 3 D. L. R. 784; [1928] S. C. R. 440.—CAN.

2664 vii. —.]—Pltf., mtgee., being the transferee of the title under a tax-sale, was held entitled to recover in an action upon the covenant in the mtge. deed, notwithstanding he had put it out of his power to transfer the

land to defts. in case they paid the mtge. moneys.—*SERVAIS v. SHEAR*, [1929] 2 D. L. R. 633; 63 O. L. R. 381; *revg.*, [1928] 1 D. L. R. 549; 61 O. L. R. 490.—CAN.

sd. *Deterioration of property—No defence to action on covenant.*—A covenant between a mtgor. & mtgee. which relates chiefly to articles, matters & things (which words indicate movable chattels) & provides that such things shall (in addition to other fixtures on the land) become a part of the realty is not a covenant running with the land.—*SASKATCHEWAN FARM LOAN BOARD v. MORGAN*, [1932] 2 W. W. R. 676.—CAN.

**PART XIII. SECT. 5, SUB-SECT. 5.—C'**

ti. *Right of mortgagee to repay debt & redeem.*—Even after foreclosure under Land Titles Act, the mtgee. may sue upon the covenant for the payment of the mtge. moneys, though, if he does the mtgor., on payment of the debt is entitled to redeem his property.—*DOUGLAS v. THE MUTUAL LIFE ASSURANCE CO.*, [1918] 3 W. W. R. 529; *sub nom.* *MUTUAL LIFE v. DOUGLAS*, 44 D. L. R. 115.—CAN.

si. —.]—With respect to the argument that *Royal Bank of Canada v. McLeod*, [1919] 3 W. W. R. 544, decides that where a mtgee. after acquiring the equity of redemption, by foreclosure or otherwise, so deals with the mortgaged property as to put it beyond his power to restore it the debt is extinguished:—*Held*: it so decides that such is the case only where the uniting of the two estates in the mtgee.'s person makes him the absolute owner. If a mtgor. gives a quitclaim deed to the mtgee., not in settlement of the mtge. debt nor in order to place the mtgee. in the same position as if he had obtained a final decree of foreclosure, but in order to make it easier for the mtgee. to exercise the power of sale contained in the mtge., said case has no application.—*CATES CO., LTD. v. BANK OF MONTREAL*, [1937] 3 W. W. R. 87; 7 F. L. J. (Can.) 100; *affd.*, [1938] 1 W. W. R. 449; 2 D. L. R. 65.—CAN.

**PART XIII. SECT. 5, SUB-SECT. 5.—E.**

mi. — *To purchaser from mortgagee.*—In an action by a mtgee. against a mtgor. on his covenant to pay, the mtgor. pleaded that he had been released by an extension of time given without his consent to a pur-

chaser of the land from him:—*Held*: judgment must be given for pltf. —*ALLOWAY & CHAMPION, LTD. v. STEPHENSON* [1927] 3 D. L. R. 220; [1927] 2 W. W. R. 337; 36 Man. L. R. 636.—CAN.

so. *Mortgage containing receipt clause but no covenant for repayment.*—A mtge., which contains an acknowledgment of receipt of the money, but no covenant for repayment, does not of itself afford conclusive evidence of a debt, so that the mtgee., or his assigns, can maintain an action for its recovery.—*LONDON LOAN CO. v. SMYTH* (1882), 32 C. P. 530.—CAN.

sp. *Money advanced for illegal purpose.*—*WILKINSON v. HARWOOD & COOPER*, [1931] S. C. R. 141; [1931] 2 D. L. R. 479.—CAN.

sq. *Variation of mortgage—By assignee of mortgagee—Mortgagee consenting provided liability not increased.*—*PUBLIC TRUSTEE v. MORTLEMAN*, [1928] N. Z. L. R. 337.—N.Z.

st. *Grant of option to purchase to tenant.*—The fact that for some time between the obtaining of a final order for foreclosure of a mtge. & an action to recover the amount of the mtge. debt the mtgee. might have been bound to convey the premises to a tenant to whom he had given an option to purchase, had the conditions of the option agreement been fulfilled, does not prevent him recovering said debt where said agreement has fallen through.—*SASKATCHEWAN GENERAL TRUSTS CORPN., LTD. v. MCCARTHY*, [1932] 3 W. W. R. 592.—CAN.

**PART XIII. SECT. 5, SUB-SECT. 6.**

sv. *Action against sureties—Parties.*—The action herein was on a bond by which deft. became a surety for the repayment of the amount due under a mtge. given by the Y.M.C.A. of Calgary on its leasehold interest in land owned by the C.P.R. Co. The C.P.R. Co. had joined in the mtge. "for the purpose of securing the repayment of the said loan" but upon the expressed condition that it should incur no personal liability with respect to the repayment:—*Held*: deft. had the right to compel pltf. to add both the said Y.M.C.A. & the C.P.R. Co. as defts.—*HOLLAND-CANADA MORTGAGE CO., LTD. v. HUTCHINGS*, [1934] 2 W. W. R. 137.—CAN.

**PART XIII. SECT. 6.**

2687 i. *Varied*, 39 U. G. R. 280.

2757. After this case add "See, also, LIMITATION OF ACTIONS, No. 1369a, ante."

2777a. —.]—After decree in a suit by a second mtgee., to redeem the first & foreclose the subsequent mtgees. one of the subsequent mtgees. assigned his interest in the premises to A. A. then filed a bill against all the parties to the former suit, praying to be entitled to the benefit of that suit, & to redeem the mtgees. who were prior to himself, & to foreclose the others. The bill was dismissed as against all defts, except the assignor: & A. was declared to be entitled to stand in his place, & to use his name in the further prosecution of the first suit.—BOOTH v. CRESWICKE (1837), 8 Sim. 352; 59 E. R. 139.

2779. Add. Annotation:—Distd. Parker v. Jackson, [1936] 2 All E. R. 281.

2876. Add. Annotation:—Consd. Weld v. Petre (1928), 97 L. J. Ch. 399.

2890. Add. Annotation:—Refd. Purnell v. Roche, [1927] 2 Ch. 142.

2897a. —.]—As a general rule, all persons beneficially interested in an equity of redemption ought to be made parties to a foreclosure suit.—CROPPER v. MELLERSH (1855), 3 Eq. Rep. 492; 24 L. J. Ch. 430; 24 L. T. O. S. 267; 1 Jur. N. S. 299; 3 W. R. 202.

Annotation:—N.F. Wilkins v. Reeves (1855), 3 Eq. Rep. 494.

2897b.

—.]—A suit was instituted by a mtgee. against the trustee for sale of the property & exor. of the mtgor. for a foreclosure:—Held: the persons beneficially interested in the equity of redemption were not necessary parties to the suit.—WILKINS v. REEVES (1855), 3 Eq. Rep. 494; 24 L. T. O. S. 337; 3 W. R. 305.

2928a.

—.]—A surviving trustee & extrix., who was also tenant for life of mortgaged property, was made sole deft. to a bill for foreclosure or sale:—Held: the parties interested in remainder were sufficiently represented.—MARRIOTT v. KIRKHAM (1862), 3 Giff. 536; 31 L. J. Ch. 312; 6 L. T. 17; 8 Jur. N. S. 379; 10 W. R. 340; 66 E. R. 521.

2940. Add. Annotation:—Refd. Hodgson v. Salt, [1936] 1 All E. R. 95.

2943a.

—.]—Where a foreclosure suit was instituted before 15 & 16 Vict. c. 86, & stood over, in order that the *cestuis que trust* under the mtgor.'s will might be made parties:—Held: after the Act came into operation, the suit might proceed in their absence, the trustees & exors. of the mtgor. representing them sufficiently.—SALE v. KITSON (1853), 3 De. G. M. & G. 119; 22 L. J. Ch. 344; 20 L. T. O. S. 320; 17 Jur. 170; 43 E. R. 47.

### PART XIII. SECT. 7, SUB-SECT. 2.—

A. (a).

sx. Application for sale after order nisi.—Mortgage to secure barrister's fees.—Objection that fees not taxed.—Where the period fixed by an order nisi for the redemption of a mtge. given to a barrister & solr. to cover his fees has expired & an application is made in pursuance of the order for the sale of the mortgaged property, it is then too late to raise the objection that the agreement fixing the amount for which the mtge. was given had not been examined & allowed by a taxing officer as required by r. 748.—MACKIE v. IVANCHUK, [1930] 2 W. W. R. 43; 4 D. L. R. 76; 24 Alta. L. R. 635.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 2.—

A. (d).

sr. Duty of mortgagor.—To see to parcelling out of land directed to be sold.—BEATTY v. RADENHURST (1871), 3 Ch. Ch. 344.—CAN.

st. Postponement of sale.—Fresh advertisement unnecessary.—Note of postponement at foot of old advertisement sufficient.—THOMPSON v. MILLIKEN (1868), 15 Gr. 197.—CAN.

su. Conveyance.—Parties.—Wife joining in execution of incumbrance.—MOORE v. SHINNERS (1858), 1 Ch. Ch. 59.—CAN.

### PART XIII SECT. 7, SUB-SECT. 2.—

B. (a).

i i. —.]—DE COTEAU v. PHILLIPS (No. 2), [1930] 3 W. W. R. 615.—CAN.

sv. Mortgagee executor de son tort.—Sufficient assets of deceased mortgagor.—No right to foreclose.—KENNY v. KENNY (1826–1897), N. B. Dig. 311.—CAN.

sw. Breach of covenant to pay taxes.—Defence.—In an action for foreclosure of a mtge. on the ground that the mtgor. had defaulted in performing his covenant to pay taxes, it was shown that deft. was paying the arrears of taxes by instalments under an arrangement satisfactory to the city to which the taxes were payable, & it was held that he was, therefore, entitled to relief from the consequences of his

default, & that the action should be dismissed, subject to the right of the pltf. to apply forthwith for judgment should deft. default in the performance of the order made herein for the payment of costs & for the continuance of the instalments on the taxes.—TILLET v. CARLSON & BRITTON, [1932] 1 W. W. R. 463; 45 B. O. R. 52.—CAN.

sx. —.]—The right of pltf., a mtgee., to bring an action for foreclosure because of default under the covenant to pay taxes held to arise forthwith on the default whether or not he had paid the taxes himself, his right of action & to judgment being subject, of course, to Mtgor.' & Purchasers' Relief Act & to the ct.'s power to relieve against forfeiture.—TATROFF v. RAY, [1934] 3 W. W. R. 493; 49 B. C. R. 24; on appeal, [1935] 3 W. W. R. 41.—CAN.

sz. —.]—A mtgor. having defaulted with respect to the payment of taxes, the mtgee. paid the taxes & brought suit for foreclosure. The taxes so paid were for three years, & it appeared that a receiver, if appointed, would not be able to pay out of the rents & profits anything on account of said taxes until there was some substantial increase in the net receipts from the premises:—Held: a foreclosure order should be granted; but the redemption period should be twelve months, instead of the usual six months.—CANADA LIFE ASSURANCE CO. v. COUGHLAN, [1935] 3 W. W. R. 38; 50 B. C. R. 194.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 2.—E.

2869 i. —.]—Mortgages by deposit.—Deposit of debentures.—Debentures secured by a trust deed were issued by deft. co. under an arrangement with pltf. that the proceeds expected therefrom should be used in paying off the debt owing from the co. to him & in continuing deft.'s business. The trust deed provided that the debentures, after execution thereof by the directors, should be delivered to the trustee & certified to by him from time to time as required by resolution of the directors, & should be returned to them or delivered to their order. It

being found impossible to sell any of the debentures, deft.'s managing director, at the request of pltf., instructed the trustee to deposit the debentures with pltf. as collateral security for said indebtedness & to secure further advances. Thereafter advances were made by pltf. & the business continued for a year:—Held: pltf. was entitled to enforce his security by requiring the trustee to enforce the trust deed in the usual manner.—ANDERSON v. MCNAIR LUMBER & SHINGLE CO., LTD., [1929] 2 D. L. R. 209; 1 W. W. R. 480; 40 B. C. R. 466.—CAN.

sy. Claim of judgment creditor to be added.—After order nisi.—RADERMACHER v. RADERMACHER, [1934] 1 W. W. R. 795.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 4.—

D. (b).

sw. Widow of intestate mortgagor.—Application for widow to represent estate.—Held: an application under K. B. Rule 205 should be refused, since Surrogate Cts. Act made ample provision for the requirements of the mtgee.—Re GREAT WEST LIFE ASSURANCE CO., Re CHRISTIE ESTATE (Man.), [1927] 3 W. W. R. 302.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 4.—E.

m i. —.]—Death after commencement of action.—NETHERLANDS INVESTMENT CO. v. TRUSTS & GUARANTEE CO., [1929] 1 D. L. R. 463; 1 W. W. R. 62; 25 Alta. L. R. 631.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 4.—H.

2945 iv. —.]—KAULBACH v. TAYLOR (1880), R. E. D. 400.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 4.—

J. (f).

m i. —.]—T. M. BALL LUMBER CO., LTD. v. BUNTING, [1933] 1 W. W. R. 57; revid., [1933] 3 W. W. R. 214.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 5.—

D.

sk. Transfer of proceedings.—Sect 36 (3) of King's Bench Act, R. S. S.



2991. *Add. Annotation*:—*Refd. Friern Barnet U. C. v. Adams*, [1927] 2 Ch. 25.

2997a. *Application for foreclosure of registered charge—Should not ask for rectification of register.*—PRACTICE NOTE, [1932] W. N. 6; 173 L. T. Jo. 40.

3081a. *As to loss of title deeds.*—The title deeds being stolen from a mtgee., the account directed with an inquiry.—*Stokoe v. Robson* (1814), 3 Ves. & B. 51; 35 E. R. 398.

3104a. ———.—*Re Heginbotham; Peirce v. Harrison* (1935), 180 L. T. Jo. 455.

3122. *Add. Annotation*:—*Refd. Re Wells, Swinburne-Hanham v. Howard* (1932), 48 T. L. R. 617.

3140a. ———.—*A District Council having advanced the sum of £200,000 upon the security of freehold houses, the mtgor. became bkpt. The council put in a proof for their debts, valuing their security at £160,000, without obtaining a professional valuation. The council also issued a foreclosure summons against the mtgor., again valuing their security at £160,000, & a foreclosure order nisi was made according to the form in Seton's Judgments & Orders, 7th ed., vol. iii., p. 1892, which has been in use in such cases for many years. The order contained a declaration that plfts. were entitled to hold the mtged. property as security for £160,000 & interest thereon. The council subsequently*

*obtained a professional valuation of the mtged. property at £200,000, & they moved in bkpcy. to amend the valuation in their proof. The judge in bkpcy. held that he could not consider the application as long as the valuation of £160,000 in the foreclosure order stood. The council then moved in the Ch. Div. for leave to amend the foreclosure order by increasing the valuation to £200,000:—Held: the foreclosure order as it stood prevented the council from exercising the right they had in bkpcy. to apply to amend their proof, & notwithstanding the long period between the date of that order & the date of the application & the long period during which the form of order had been used, it was right to discharge the order & make a fresh order with a declaration that plfts. were entitled to hold the mtged. properties for the respective amounts of principal & interest due to them upon the security of the mtges.—HAYES & HARLINGTON URBAN DISTRICT COUNCIL v. WILLIAMS TRUSTEE, [1936] Ch. 315; 105 L. J. Ch. 312; 154 L. T. 695; 80 Sol. Jo. 91; [1936] B. & C. R. 87.*

3155a. ———.—*Property vested in mortgage.*—By a foreclosure decree on an equitable mtge., the mtgor. was declared a trustee, & an order was made vesting the estate in the mtgee.—*LECHMERE v. CLAMP* (No. 2) (1861), 30 Beav. 218; 30 L. J. Ch. 651; 9 W. R. 860; 54 E. R. 872.

1930, does not prevent the making of an order for the transfer of a mtge. foreclosure action from the judicial district wherein the land is situated & wherein the action was begun to another judicial district, when deft. has given his solr. his written instructions to consent to such an order & his solr. has so consented.—*CANADA LIFE ASSURANCE CO. v. MACMURCHY*, [1936] 2 W. W. R. 421.—CAN.

PART XIII. SECT. 7, SUB-SECT. 5.—*F. (c).*

1 i. ———.—*The clause added to sect. 113 of Land Titles Act, R. S. S., 1930, by 1933, c. 19, s. 8, which provides that in a foreclosure action the ct. "may authorise the mtgee. to enter into possession of the lands . . ." does not entitle plft. as a matter of course to an order for possession prior to the final foreclosure order, but in view of the law prior to 1933, should be read as leaving it to the ct. to refuse such an order at that stage of the action, even where the mtge. contains a covenant that on default the mtgee. shall have quiet possession.—DEVLIN v. WILSON, [1936] 1 W. W. R. 705.—CAN.*

PART XIII. SECT. 7, SUB-SECT. 5.—*L.*

p 1. ———.—*After order nisi—Time for redemption.*—*RADERMACHER v. RADERMACHER* (No. 2), [1935] 1 W. W. R. 29.—CAN.

so. *Decree nisi by default—Setting aside—Amount excessive.*—In an action to foreclose a mtge. defts. did not enter an appearance & on an *ex parte* application a decree nisi was made & entered for an amount which was strictly in accordance with the amount claimed in the statement of claim; there was nothing in the pleadings to indicate that said amount was too large, & there was no irregularity in the proceedings. Defts., who alleged that it had since been discovered that the judgment had been entered for too much interest, contended that it should be set aside *ex debito justitiae*.—*Held*: the decree should not be set aside *ex justitiae* as the questions raised

were matters of defence; & the order of the local Master, set aside by a Judge in Chambers, that defts. be allowed to enter an appearance & file a defence on paying within ten days of taxation the costs of the order nisi & of the motion to set it aside, should be restored.—*CANADA WEST GRAIN CO., LTD. v. MELFORT MILLS, LTD.*, [1937] 3 W. W. R. 522; 7 F. L. J. (Can.) 228.—CAN.

PART XIII. SECT. 7, SUB-SECT. 5.—*A.*

c 1. ———.—*Action upon mortgage—What is.*—By an agreement extending the time for payment of a mtge. the mtgors. "guaranteed" payment of the interest & agreed that the mtgee. "shall have the right to recover same as for a debt owing without first applying for foreclosure & sale of the said lands; it being understood that this clause shall operate as a collateral guarantee by the parties of the second part for the payment of the said interest & that any default in payment of such shall entitle the party of the first part to personal judgment for the amount so in default, reserving at all times to the party of the first part the additional right to foreclosure & sale".—*Held*: an action by the mtgee., in so far as it was based upon the so-called guarantee, was an "action brought upon a mtge. of land," within sect. 37 (o) (4) of Judicature Act, R. S. A., 1922.—*ORANG v. RUTHERFORD*, [1937] W. W. R. 205; 6 F. L. J. (Can.) CAN.

PART XIII. SECT. 7, SUB-SECT. 6.—*B. (a).*

sa. *Questions of mixed law & fact involved—Defendant though not appearing filing notice disputing amount claimed.*—*RAFFELMAN v. KIPROFF*, [1928] 4 D. L. R. 310; 62 O. L. R. 629.—CAN.

sb. *Misdating of master's report.*—Where accounts were taken in a foreclosure action & the master's report was dated a day earlier than it should have been.—*Held*: the report was good.—*NORWICH UNION LIFE INSUR-*

*ANCE SOCIETY v. OKE*, [1933] 2 D. L. R. 749; O. R. 679.—CAN.

PART XIII. SECT. 7, SUB-SECT. 6.—*B. (c).*

m ———.—*Power of master to compute.*—*TORONTO GENERAL TRUST CORPN. v. TURTON*, [1929] 4 D. L. R. 1072; 1 W. W. R. 916; 23 S. L. R. 625.—CAN.

PART XIII. SECT. 7, SUB-SECT. 6.—*C. (b) 1.*

so. *Inclusion of injunction against waste by mortgagor in possession.*—*CAWTHRA v. MCGUIRE* (1859), C. L. J. O. S. 142.—CAN.

PART XIII. SECT. 7, SUB-SECT. 6.—*C. (b) 11.*

3105 v. ———.—*REDMOND v. CANADIAN CREDIT MEN'S TRUST ASSOCN., LTD.*, [1931] 1 W. W. R. 197.—CAN.

d 1. ———.—*WALLACE v. MCMASTER*, [1931] 1 W. W. R. 79; 1 D. L. R. 1016; 25 S. L. R. 219.—CAN.

sy. *Effect of payment—Action at an end.*—*DE COTEAU v. PHILLIPS*, [1930] 1 W. W. R. 844; 2 D. L. R. 1004; 24 S. L. R. 397.—CAN.

PART XIII. SECT. 7, SUB-SECT. 6.—*C. (c).*

sz. *Crown judgment creditor for income tax & sales tax—Foreclosure as subsequent encumbrancer.*—In a mtge. action, the King & the A.G. for Canada were added as parties in a local master's office, as subsequent encumbrancers in respect of executions against the mtgor. upon judgments recovered for income & sales tax.—*Held*: the Crown was not in any sense the owner of the equity of redemption, & having submitted itself to the ordinary rules of procedure in an action, by recovering judgment & issuing execution for Crown debts, could be foreclosed in another action as an ordinary execution creditor of the mtgor.—*BARTLETT v. OSTERBOUT*, [1931] 3 D. L. R. 609; O. R. 358.—CAN.



**3378. Add. Citations:**—*sub nom. Re CLAYTON & BARCLAY'S CONTRACT*, [1895] 2 Ch. 212; 64 L. J. Ch. 615; *sub nom. CLAYTON v. BARCLAY*, 72 L. T. 764; 59 J. P. 489; 43 W. R. 549; 11 T. L. R. 415; 89 Sol. Jo. 503; 13 R. 556.

**Add. Annotations:**—*Refd. London & County Contract v. Tallack* (1903), 51 W. R. 408; *Official Receiver v. Cooke*, [1906] 2 Ch. 661; *Re Kent County Gas Light & Coke Co.*, [1909] 2 Ch. 195.

## Part XIV.—Discharge of Mortgages.

**3384a. — Assignment of one property subject to mortgage.]**—M. was entitled to a life interest & a contingent reversionary interest under a settlement. He mtged. these interests together with a life policy & subsequently was adjudicated bkpt. The trustee in bkpcy. sold the interests under the settlement & assigned them subject to the mtge. but retained the life policy. The purchasers of the interests under the settlement paid the mtge. interest & the premiums on the policy as they fell due. M. then died & the mtge. was satisfied out of the policy moneys. The question raised was whether the discharge of the mtge. debt fell (i) wholly upon the proceeds of the policy, or (ii) wholly upon the settlement interests, or (iii) must be apportioned between the proceeds of the policy & the settlement interests in the proportion of their respective values:—*Held*: the mtge. debt must be rateably apportioned between the policy moneys & the settlement interests. The assignment was subject to the mtge., & there was nothing in the assignment or in the relevant surrounding circumstances to

displace the *prima facie* rule that contribution takes place. It was true that the trustee in bkpcy. stood in no better position than the bkpt., but the latter, though he retained one of the properties mtged., was not compelled to bear the whole debt when he had expressly assigned the other subject to the mtge.—*Re MAINWARING, MAINWARING v. VERDEN*, [1937] Ch. 96; [1936] 3 All E. R. 540; 106 L. J. Ch. 49; 156 L. T. 11; 53 T. L. R. 103; 80 Sol. Jo. 931, C. A.

**3385. Add. Annotation:**—*Refd. Shipley Urban District Council v. Bradford Corpn.*, [1936] Ch. 375.

**3399. Add. Annotation:**—*Consd. Re Mainwaring, Mainwaring v. Verden*, [1936] 3 All E. R. 540.

**3400. Add. Annotation:**—*Consd. Re Mainwaring, Mainwaring v. Verden*, [1936] 3 All E. R. 540.

**3404. Add. Annotation:**—*Refd. Parker v. Judkin*, [1931] 1 Ch. 475.

**3423. Add. Annotation:**—*Refd. Re Fenton, Ex p. Fenton Textile Assocn.* (1930), 99 L. J. Ch. 358.

### PART XIII. SECT. 7, SUB-SECT. 6.— D. (b) i.

**sd. Sale of mortgagor's interest.—Not land itself.]**—It is the proper practice in Nova Scotia, in an action by a mtgee. for foreclosure & sale, that the order provide for the advertisement & sale, not of the lands & premises in question *simpliciter*, but only of the interest of deft., mtgor., & of persons claiming under or through him. The ct. has full power & control over the advertising & the form of the deed which the sheriff is to execute.—*MORTGAGE CORPN. OF NOVA SCOTIA v. ALLEN*, [1930] S. C. R. 16; *aff.*, [1929] 4 D. L. R. 529.—CAN.

**sd. Provision that sale be subject to reserve bid.]**—In Saskatchewan an order for sale in a mtge. action should not provide that the sale be subject to a reserve bid.—*Bk. TORONTO v. MATHESON & MCCASKILL*, [1928] 2 D. L. R. 991; [1928] 1 W. W. R. 846; 22 Sask. L. R. 467.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 6.— D. (b) ii.

**q i. — To postpone sale.]**—*MURDOCK v. LAWSON* (1874), 9 N. S. R. 454.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 6.— E. (a).

**3166 i. When made in first instance.]**—On motion for judgment in default of defence, immediate foreclosure will be ordered if it appears that the allowance of a period for redemption would be detrimental to the mtgee. & no benefit to mtgor.—*ELKINGTON v. WILLETT* (No. 2), 49 B. C. R. 325.—CAN.

**3169 i. — On default of defence.]**—*ANGLICAN SYNOD v. RUSSELL & MAY* (1927), 38 B. C. R. 400.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 6.— E. (a) i.

**g i. — —.]**—W., having a

"charge" on lands duly recorded in the land titles office, alleging that the charge was in arrear, began foreclosure proceedings in the Supreme Ct. of Ontario, which resulted in a decree & final order for foreclosure:—*Held*: the master should record W. as owner of the land if he found that all persons having claims subsequent to the charge were foreclosed by the decree & order. It is not the duty of the master of titles to review the proceedings in the ct.; he must give the orders of the ct. their full effect without going behind them in any way. He is entitled to ask for proof that there has been no appeal or application to open the foreclosure; but not for proof that the proceedings leading up to the decree & final order were regular & sufficient.—*Re WEST*, [1928] 1 D. L. R. 937; 61 O. L. R. 540.—CAN.

**sw. Ex parte application.—No right to apply for immediate possession.]**—Rule 542 (f) does not warrant the making on an *ex parte* application for a final decree of foreclosure in a mtge. action a special application for immediate possession. The application which may be made *ex parte* under rule 542 (f) is for the decree provided in the rules. If pltf. is seeking greater or different relief, or setting up facts not impliedly admitted on default of defence, deft. is entitled to notice thereof & must be given an opportunity to contest the new issue thus raised. On an *ex parte* application the applicant is under the duty of disclosing all pertinent facts.—*SANFABON v. ALTICE*, [1931] 1 W. W. R. 118.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 8.— A. (a).

**3229 viii. — —.]**—*HURON & ERIE CORPN. v. WILLIAMS*, [1934] 2 W. W. R. 479.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 8.— —A. (b).

**d i. — By mortgagee.—Mortgage obtained by fraud.]**—*BRABAZON v. PETERSON*, [1932] 3 W. W. R. 666.—CAN.

### PART XIII. SECT. 7, SUB-SECT. 8.— H. (a).

**g i. — Agreement in mortgage to extend time.]**—*MACKENZIE v. MACKENZIE ESTATE*, [1932] 3 W. W. R. 159.—CAN.

### PART XIV. SECT. 1, SUB-SECT. 2.— C. (b).

**3389 i. Creditors of testator.]**—*Re HOLLAND, Ex p. HOLLAND* (1928), 28 S. R. N. S. W. 369; 45 N. S. W. W. N. 88.—AUS.

### PART XIV. SECT. 2, SUB-SECT. 1.—A.

**d (p. 603) i. — —.]**—*CAMPBELL v. RAYNOR*, [1926] 4 D. L. R. 686; 59 O. L. R. 466.—CAN.

**ex. Payments on account.—Whether mortgage discharged.]**—*Held*: the transactions which had taken place discharged the mtge. debt.—*BUCHANAN v. KERBY* (1855), 5 Gr. 332.—CAN.

**sy. — —.]**—*Held*: the circumstances were sufficient to show that the mtge. was intended to cover a floating balance, & was not satisfied.—*RUSSELL v. DAVEY* (1858), 7 Gr. 13.—CAN.

**3423 i. Set-off.]**—*DICK v. SCHWARTZ* (Man.), [1926] 3 D. L. R. 894.—CAN.

**3423 ii. — —.]**—*Pltfs.* sought a declaration that a mtge. of which deft. was the assignee had been wholly paid & satisfied by the exercise of the right of set-off in an action in which pltf. K. had sued deft.'s assignor on a mtge. which the assignor had assumed & which had become payable in consequence of the assignor's default in paying taxes. It was found that express notice in writing of the assign-

3427. *Add. Annotation*:—*Refd.* Bonham v. Maycock (1928), 138 L. T. 736.

3433. *Add. Annotation*:—*Apld.* Bonham v. Maycock (1928), 138 L. T. 736.

3434. *Add. Annotation*:—*Apld.* Bonham v. Maycock (1928), 138 L. T. 736.

3436a. ———.]—In the absence of express authority or holding out, the mere receiving of interest on a mtge. by the mtgee.'s solr. does not imply authority to receive the principal. The solr. is, for this purpose, agent of the mtgor. & not of the mtgee.—*BONHAM v. MAYCOCK* (1928), 138 L. T. 736; 44 T. L. R. 387; 72 Sol. Jo. 254.

3447. *Add. Annotation*:—*Refd.* *Re* Conley, *Ex p.* Trustee v. Barclays Bank, Ltd., [1938] 2 All E. R. 127.

3451. *Add. Annotation*:—*Refd.* *Re* Simms, [1930] 2 Ch. 22.

3453a. ———.]—By a mtge. made in 1922 the widow of J., who was tenant for life under his will, mtged. a farm to W., a brother of J., to secure £1,000 & interest at 5 per cent. The widow died in 1923, having appointed her two daughters, E. & A., exors. of her will. The mtge. contained no personal covenant for payment of the principal, & the mtgee. accepted interest at 3½ per cent., reduced in 1924 to 3 per cent. In 1924 W., who was on very friendly terms with his brother's family, gave the deeds relating to the farm, other than the mtge. deed, to E. & A. to retain in their custody. On Dec. 11, 1927, W., who had since 1922 been suffering from an incurable disease & knew that he could not possibly live long, called upon his nieces, who were aware of his state of health, & gave them an envelope indorsed in his own handwriting: "Deeds relating to X. farm to be given up at death. W.," saying: "I have brought this down for you; put it away." After he had left the house the envelope was opened, & was found to contain the mtge., which the nieces placed in their

safe. On Jan. 23, 1928, W. died of pneumonia following a chill. In an action by his exors. for a declaration that the mtge. was a subsisting security & to enforce it:—*Held*: there was a valid *donatio mortis causâ* by W., & a release of the mtge. to the two daughters of J. for the benefit of his estate.—*WILKES v. ALLINGTON*, [1931] 2 Ch. 104; 100 L. J. Ch. 262; 144 L. T. 745; 47 T. L. R. 307; 75 Sol. Jo. 221.

3453b. ———.]—*RICHARDS v. SYMS* (1740), Barn. Ch. 90; 2 Eq. Cas. Abr. 617; 27 E. R. 567, L. C.

*Annotations*:—*Consd.* *Hassell v. Tynte* (1756), Amb. 318; *Cross v. Sprigg* (1849), 6 Hare, 552. *Refd.* *Duffield v. Elwes* (1827), 1 Bl. N. S. 497.

3477a. *Title of mortgage extinguished by Statute of Limitations.*]—Where the owner of a legal estate in fee simple in land executes a mtge. & hands over the mtge. & other title deeds to the mtgee., but fails to pay any interest on the mtge. or give any acknowledgment of the mtge. debt for more than twelve years, the mtgee. loses all title to the land & the mtgor. can recover possession of the mtge. & other title deeds.—*LEWIS v. PLUNKET*, [1937] Ch. 306; [1937] 1 All E. R. 530; 106 L. J. Ch. 125; 156 L. T. 211; 53 T. L. R. 299; 81 Sol. Jo. 179.

3495a. *Jurisdiction to stay—Terms.*]—In an ejectment on a forfeiture in not paying mtge. money, debt. is entitled to have proceedings stayed under Mortgage Act, 1733 (c. 20), upon payment of the principal & interest due on the mtge. deed, with the costs incurred, without paying any bygone interest not included in the mtge. or the expense of preparing the mtge. deed or any assignment of it.—*DOE d. BLAGG v. STEEL* (1832), 1 Dowl. 359.

3514a. *Endorsed receipt—No statement that payer not entitled to immediate equity of redemption—Validity.*]—*SIMPSON v. GEOGHEGAN* (1934), 78 Sol. Jo. 930.

ment had been given ptfs. after said default:—*Held*: the claims of the parties under, respectively, the mtge. assigned by debt. & the assignor's said breach of covenant had a common origin & the obligations which gave rise to them were interwoven in the one & the same contract, & there was a legal set-off available to ptfs. against debt. assignee unless ptfs. were estopped & there was no evidence to support the plea of estoppel.—*MACDONALD APARTMENTS, LTD. v. FALSE CREEK LUMBER CO., LTD.*, [1936] 1 W. W. R. 543.—*CAN.*

b (p. 604) i. ———. *Defects in.*]—The absence of the residence & occupation of the subscribing witness to a certificate of discharge of mtge., on the face of the certificate, though stated in the affidavit:—*Held*: clearly no objection, being cured by 36 Vict. c. 17, s. 8 (O.).—*STODDART v. STODDART* (1876), 39 U. C. R. 203.—*CAN.*

d (p. 604) i. ———.]—*EWART v. DRYDEN* (1867), 13 Gr. 50.—*CAN.*

sz. *Payment to mortgagee's nominee—Nominee absconding—Mortgage liable.*—*CORSINI v. PALM* (1925), 35 B. C. R. 417.—*CAN.*

PART XIV. SECT. 2, SUB-SECT. 1.—B.

3433 ii. ———.]—Payment to solr. for mtgee. operates as a discharge when the solr. has implied authority to receive payment, as by negotiating

the mtge.—*McDONALD v. STEWART*, [1937] 3 D. L. R. 66.—*CAN.*

pi. ———.]—*ROWE v. JOHNSON*, [1928] V. L. R. 515; 49 A. L. T. 311.—*AUS.*

sa. *Payment by assignee of second mortgage—To solicitor of first mortgage—Misappropriation by solicitor—Position of assignee.*—*LIVINGSTONE v. TORONTO WINE MANUFACTURING CO., LTD.*, [1932] S. C. R. 175; 1 D. L. R. 529.—*CAN.*

PART XIV. SECT. 2, SUB-SECT. 1.—D.

sk. *On rights of subsequent encumbrancer.*—*KERSCHNER v. CONVENTION OF BAPTIST CHURCHES*, [1930] 2 W. W. R. 280; 4 D. L. R. 135; 43 B. C. R. 4.—*CAN.*

PART XIV. SECT. 2, SUB-SECT. 2

sm. *Discharge of mortgage on execution & performance of agreement.*—*WEST v. ACCIDENTAL FIRE INSURANCE CO. (Sask.)*, [1927] 3 D. L. R. 260.—*CAN.*

PART XIV. SECT. 3, SUB-SECT. 1.

ni. ———.]—Ptff. was the assignee of a mtge., & debts, the purchasers of the equity of redemption from R., the mtgor., covenanted to assume the incumbrances on the land, & ptff., in consideration of the assignment to him of that covenant of indemnity, released R. from all liability upon his personal covenant contained in the

mtge.:—*Held* the mtge. debt was not wiped out by the release, & ptff. was entitled to enforce the covenant of indemnity.—*ESSER v. PRITZKER*, [1926] 2 D. L. R. 645; 58 O. L. R. 537.—*CAN.*

ti. *Statutory discharge executed by one of two executors of deceased mortgagee.*—*Held*: effective, when registered, as a reconveyance of the land.—*Re A. & B.*, [1927] 3 D. L. R. 1070; 60 O. L. R. 647.—*CAN.*

sb. *Right of mortgagee to release portion of mortgaged property—To purchaser of that portion—Bond given by purchaser to mortgor. for payment of proportion of debt.*—*BANK OF MONTREAL v. HOPKINS* (1864), 2 E. & A. 458.—*CAN.*

PART XIV. SECT. 3, SUB-SECT. 2.—A.

ti. ———. *Effect of Land Registry Act.*]—Notwithstanding Land Registry Act, R. S. B. C., 1924, s. 183, a mtgor. is entitled to a reconveyance on paying the amount due on the mtge.—*RICHARDSON v. ROYAL TRUST CO.* (1932), 45 B. C. R. 512.—*CAN.*

PART XIV. SECT. 3, SUB-SECT. 5.—E.

st. *Memorandum of discharge—"Duly executed"—What amounts to.*]—A memorandum of discharge of a mtge. is "duly executed" within Real Property Act, R. S. M., 1913, s. 112,

**3574. Add. Annotation:—***Refd. Re Warwick's Settlement Trusts, Greville Trust Co. v. Grey*, [1938] Ch. 530.

**3587a. Tenant for life in remainder.]—**When a tenant for life in remainder pays off a mtge. on the property, the mtge. is, in the absence of evidence of a contrary intention, kept alive for his benefit.—*Re CHESTERS, WHITTINGHAM v. CHESTERS*, [1935] Ch. 77; 104 L. J. Ch. 65. 152 L. T. 210; 78 Sol. Jo. 634.

**3592. Add. Annotation:—***Consd. Re Warwick's Settlement Trusts, Greville Trust Co. v. Grey*, [1938] Ch. 530.

**3596. Add. Annotation:—***Appld. Re Chesters, Whittingham v. Chesters*, [1935] Ch. 77.

**3612. Add. Annotation:—***Consd. Re Warwick's Settlement Trusts, Greville Trust Co. v. Grey*, [1938] Ch. 530.

**3626. Add. Annotation:—***Consd. Re Warwick's Settlement Trusts, Greville Trust Co. v. Grey*, [1938] Ch. 530.

## Part XV.—Avoidance of Mortgages.

**3643. Add. Annotation:—***Refd. Blay v. Pollard & Morris*, [1930] 1 K. B. 628.

## Part XVI.—Accounts.

**3663. Add. Annotation:—***As to (1) Refd. Parker v. Jackson*, [1936] 2 All E. R. 281.

**3694. Add. Annotation:—***Distd. Schlesinger & Joseph v. Mostyn*, [1932] 1 K. B. 349.

**3698. Add. Annotations:—***Refd. Royal Exchange*

*Assce. v. Hope*, [1928] Ch. 179; *Smith v. Wood* (1928), 139 L. T. 250.

**3765. Add. Annotation:—***Refd. Barratt v. Richardson & Cresswell*, [1930] 1 K. B. 686.

**3777. Add. Annotation:—***Folld. Re Smith's Mortgage, Harrison v. Edwards*, [1931] 2 Ch. 168.

## Part XVII.—Interest on Mortgages.

**3950. Add. Annotation:—***As to (1) Consd. Sowerby v. Lindsay* (1928), 44 T. L. R. 501.

**3974. Add. Annotations:—***Refd. I. R. Comrs. v. Holder*, [1931] 2 K. B. 81; *I. R. Comrs. v.*

*Lawrence, Graham & Co.*, [1937] 2 K. B. 179.

**3990. Add. Annotation:—***Consd. Weld v. Petre* (1928), 97 L. J. Ch. 399.

when it is executed by the person appearing on the register as the owner of the mtge.—*DALLAS v. TORONTO GENERAL TRUSTS CORPN.*, [1936] 3 W. W. R. 219; 4 D. L. R. 233; 6 F. L. J. (Can.) 116, *sub nom.*—*TORONTO GENERAL TRUSTS CORPN. v. DALLAS* (1936), 44 Man. L. R. 320.—CAN.

**PART XIV. SECT. 4, SUB-SECT. 2.—C.**

**3556 iv. —.**—The principle, enunciated in *Smith v. Phillips*, No. 3578, which is based on *Toulmin v. Steere*, No. 3555, is not applicable to India.—*MANGTULAL BAGARIA v. UPENDRA MOHAN PAL CHAUDHURI* (1929), 1 L. R. 57 Calc. 82.—IND.

**PART XIV. SECT. 4, SUB-SECT. 2.—D.**

**3565 ii. —.**—If a third person at the request of mtgor. pays off a first mtge. such third person, in default of evidence to the contrary, is entitled in equity to be subrogated to the rights & position of the first mtgee. who has been paid off. Under Registry Act, R. S. O., 1927 & Mtges. Act, R. S. O., 1927, s. 11, the third party's right of subrogation is not void as against subsequent purchasers or assignees who have actual notice of the circumstances giving rise to the third person's right of subrogation.—*FERGUSON v. ZINN*, [1933] O. R. 9; 1 D. L. R. 300.—CAN.

**PART XIV. SECT. 4, SUB-SECT. 2.—E.**

**n i. —.**—*CLARY v. BOULAY*, [1928] 2 D. L. R. 144.—CAN.

**3573 xv. —.**—In order that a subsequent mtgee., who has paid off

a prior mtge., should have priority over the rest, it is sufficient to show that the parties intended that the mtgee. should have the first & only charge, & it is immaterial whether there was any intention to keep alive the prior mtge.—*PANDIT DURGA MISHR v. BALJNATH SARAN* (1928), 1 L. R. 8 Pat. 360.—IND.

**PART XIV. SECT. 4, SUB-SECT. 2.—G. (b) i.**

**3605 xi. —.**—An owner of land who has paid off a mtge. thereon is deemed to have extinguished the mtge., unless it appears from the circumstances of the transaction that he intended to keep it alive for his own benefit.—*HOPPS v. BOROWSKI*, [1928] 2 D. L. R. 72; [1928] 1 W. W. R. 545; 22 Sask. L. R. 434.—CAN.

**PART XIV. SECT. 4, SUB-SECT. 2.—G. (b) iv.**

**3624 i. Devise to mortgagee.]—***Re PARSHALLE ESTATE, SHAW v. COX*, [1930] 2 W. W. R. 802; 3 D. L. R. 1004; *sub nom. Re PARSHALLE, KUNHARDT v. COX*, 43 B. C. R. 68.—CAN.

**PART XV.**

**so. Lien granted over unpatented land—Transfer to third party—Patent issued to third party on payment of arrears.]—***NORTHWEST THRESHER CO. v. BOURDIN* (1910), 15 W. L. R. 181.—CAN.

**PART XVI. SECT. 1, SUB-SECT. 2.**

**sd. Subsequent encumbrancers—In absence of fraud or collusion.]—**In the case of a common-law mtge. an account whether taken in or out of ct. between

a mtgee. & mtgor., or person standing in his place, binds subsequent encumbrancers, though they were not privy to the taking of it, unless there is fraud or collusion; & there is nothing in Land Titles Act, R. S. A., 1922, which renders this rule inapplicable with respect to a mtge. under that Act.—*CANADIAN BANK OF COMMERCE v. POSTMAN & POSTMAN*, [1931] 3 W. W. R. 737.—CAN.

**PART XVI. SECT. 2, SUB-SECT. 3.—B.**

**3770 i. Improvements by mortgagee—Occupation rent not increased—Unless improvements allowed.]—***DONOVAN v. HANNA*, [1926] N. Z. L. R. 883.—N.Z.

**PART XVI. SECT. 2, SUB-SECT. 4.—A.**

**st. Mortgagees carrying on business with mortgagor in their employ—Payment of wages—Value of goodwill.]—***VAN VOLKENBERG v. WESTERN CANADA RANCHING CO.* (1898), 6 B. C. R. 284.—CAN.

**PART XVI. SECT. 2, SUB-SECT. 4.—C.**

**n i. —.**—*FOSTER v. MORDEN* (1881), 29 G. R. 25.—CAN.

**PART XVII. SECT. 1.**

**3907 i. A charge on mortgaged property.]—***MANGHT v. DIAL CHAND* (1926), 1 L. R. 7 Lah. 559.—IND.

**e i. —.**—*Appld. agreed to loan to T. Co., on mtge. of real estate, \$30,000, at 7½ per cent. interest, but stipulated that, in consideration of making the loan, it should receive a bonus of \$3,000, to which T. Co. agreed. The mtge. on its face was one*

## Part XVIII.—Costs, Charges, and Expenses.

4054. *Add. Annotations*:—*Re*fd. *Campbell v. Pollak*, [1927] A. C. 732; *Thomas v. Jones*, [1928] P. 162.

4061a. —.]—In 1897 the trustees of the will of J. & Mrs. J. executed a consolidating mtge. to B. upon certain securities to secure a certain amount. In 1924 & 1926 B. made further advances to Mrs. J., who was the owner in fee, upon the same securities. Mrs. J. died in 1926. In Jan. 1927 her trustees applied for & were granted a further advance on the same securities by B., whose solrs. had attended to the previous transactions. The deed secured an immediate advance, & it also secured all the previous existing securities, although the old securities had been kept on foot for the purpose of preserving priorities, & there was a new proviso for redemption. B.'s solrs. carried in a bill for taxation, the charges being according to the scale in Sched. I., Part I., of the General Order under Solrs.' Remuneration Act, 1881 (c. 44), for "investigating title & preparing & completing deed of security." The taxing master took the view that Sched. I. did not apply, & taxed the bill accordingly:—*Held*: there had been an "investigation of title" within Sched. I., & the matter must be referred back to the taxing master.—*Re* COWARD, CHANCE & Co., [1928] Ch. 379; 97 L. J. Ch. 234; 139 L. T. 113; 72 Sol. Jo. 225.

4070. *Add. Annotations*:—*As to* (2) *Consd. Re Hill's Trusts*, *Claremont v. Hill*, [1934] Ch. 623. *Re*fd. *Re Gates*, *Arnold v. Gates*, [1933] Ch. 913.

4127a. *Action by devisee of mortgagee—Against heir & executor of mortgagor—Heir of mortgagee also party.*—The devisee of a mtgee. filed his bill against the heir & exor. of the mtgor. for a foreclosure, & also made the heir of the mtgee. a party in order to establish the will against him. This latter party can-

not have his costs out of the estate.—*SKIPP v. WYATT* (1787), 1 Cox, Eq. Cas. 353; 29 E. R. 1200.

4246a. —.]—In [actions for redemption of mtges.] where redemption is opposed altogether, the mtgees. may either be deprived of costs up to trial or may be—more frequently is—ordered to pay them; but never, so far as I am aware, is the mtgor. who succeeds, in spite of opposition, in obtaining a judgment for redemption ordered to pay any of the mtgee.'s costs up to judgment (*WARRINGTON, L.J.*).—*CARLTON MAIN COLLIERY CO., LTD. v. CLAWLEY*, [1917] 2 K. B. 691; 86 L. J. K. B. 1294; 117 L. T. 324; 33 T. L. R. 448; 61 Sol. Jo. 629; 10 B. W. C. 384. C. A.; *re*vsd. on other grounds, *sub nom.* *CLAWLEY v. CARLTON MAIN COLLIERY CO., LTD.*, [1918] A. C. 744, H. L.

4324. *Add. Annotation*:—*Folld. Re Smith's Mortgage*, *Harrison v. Edwards*, [1931] 2 Ch. 168.

4326a. — *Sale by mortgagee under power—Bid by mortgagor—Registration of estate contract—Costs of action for specific performance & of removal of estate contract from register.*—The first mtgees. of property subject to a second mtge. put it up for sale by auction in exercise of their statutory power. The mtgor. attended the sale & bid for the property, but her bid was not accepted; & the highest genuine bidder was declared the purchaser. The mtgor. claiming that she had purchased the property, registered an estate contract in respect of it & sued the vendors for specific performance. The action was dismissed with costs. Upon a summons taken out by the first mtgees. against the second mtgees.:—*Held*: the costs of the action & of taking the estate contract off the register were not "costs, charges or expenses, properly incurred incident to the sale" within Law of Property Act, 1925

for \$30,000, bearing interest half-yearly at 7½ per cent. *per annum*, & containing no reference to the bonus. Applt. issued its cheque to T. Co. for \$28,505.55, being the \$30,000 less deductions for taxes, insurance premiums & solrs.' costs, & took a cheque from T. Co. for the \$3,000 bonus. Some payments were made, but T. Co. became insolvent, & the mtge. being in arrear, applt. advertised the property for sale, & the liquidator paid off the amount owing, on the basis of the full face amount of the mtge., without knowledge of the bonus. He sued to recover the \$3,000, with interest paid thereon, invoking sects. 6 to 9 of Interest Act, R. S. C., 1927 (c. 102):—*Held*: he could not recover. The agreement for the bonus was legal & enforceable. The Act did not apply; in view of the effect of the legislation in question, its application should be confined to mtges. coming clearly within its description; & taking the precise language of sect. 6, it applies only to mtges. which on their face come within the description in that sect.—*LONDON LOAN & SAVINGS CO. OF CANADA v. MRAGHER*, [1930] S. C. R. 378; 2 D. L. R. 849; *re*sp., [1930] 1 D. L. R. 701; 64 O. L. R. 600; *affo.*, [1929] 4 D. L. R. 566; 64 O. L. R. 221.—*CAN.*

• *ii.* —.]—Where a mtge. does not comply with Interest Act, 1927, s. 6,

the mtgor. is relieved from all liability for interest.—*ROGERS v. LABOW*, [1929] 3 D. L. R. 845; 64 O. L. R. 309.—*CAN.*

• *iii.* —.]—*LAURIER v. VALLEE*, [1931] 1 D. L. R. 465.—*CAN.*

• *iv.* —.]—Where there was nothing upon the face of the mtge. which brought it within Interest Act, R. S. C., 1927, s. 6, & where the mtge. had on its face a statement showing the amount of the principal money & the rate of interest chargeable, the mtge. was held not to come within sect. 6, & therefore sect. 9 did not apply.—*BOWMAN v. DENISON*, [1930] 4 D. L. R. 671; 65 O. L. R. 613.—*CAN.*

• *v.* —.]—*LEVY v. BOOKSPAN*, [1931] 2 D. L. R. 1007.—*CAN.*

• *g* (p. 657) *i.* — *When granted.*—The ct. cannot reduce the rate of interest or interfere with the stipulation for compound interest merely on the ground that the interest stipulated is considered to be excessive or that the interest has amounted to a large sum owing to debt, not paying it at the stipulated periods of the rests agreed upon in the bond.—*RAM KRISHNA KULASI v. HERAMBA CHANDRA RAY* (1929), 1 L. R. 56 Calc. 980.—*IND.*

PART XVII. SECT. 4, SUB-SECT. 2.

8964 x. —.]—*Re BROWN*, [1928] 1 D. L. R. 1125; 61 O. L. R. 602.—*CAN.*

### PART XVII. SECT. 16.

*sm. Effect of consent to variation of rate of interest.*—*MORTLEMAN v. PUBLIC TRUSTEE*, [1927] N. Z. L. R. 642.—*N.Z.*

### PART XVIII. SECT. 3, SUB-SECT. 2

q 1. — *Not limited to sum paid into court.*—*LEMIEUX v. McDONALD* (Sask.), [1929] 3 D. L. R. 644.—*CAN.*

*sp. Appropriate scale.*—*CANADA LIFE ASSURANCE CO. v. MCCLELLAN*, [1933] 3 W. W. R. 557; 47 B. C. R. 438.—*CAN.*

### PART XVIII. SECT. 3, SUB-SECT. 4.

—*B.*  
4240 *i.* *Overstatement of amount due.*—The mere fact that a mtgee. suing for foreclosure claims a larger amount than that found due to him is not such misconduct as justifies depriving him of his costs.—*MATHEW v. DAVIS*, [1931] 1 D. L. R. 611; [1930] 3 W. W. R. 359; 25 S. L. R. 204.—*CAN.*

### PART XVIII. SECT. 3, SUB-SECT. 4. —*G.*

*so. Right of mortgagee to set off amount of taxes paid against liability for costs—Parties entitled to costs not liable for taxes.*—*FRIESEN v. SASKATCHEWAN MORTGAGE & TRUST CORPN.*, [1924] 2 D. L. R. 1246; [1924] 2 W. W. R. 608.—*CAN.*

(c. 20), s. 105, & the first mtgees. were not entitled to deduct them from the net proceeds of the sale.—*Re SMITH'S MORTGAGE, HARRISON v. EDWARDS*, [1931] 2 Ch. 168; 100 L. J. Ch. 276; 145 L. T. 441.

#### 4326b. Proceedings for rectification of register

—*Action by poor person.*—The general rule that a mtgee. is entitled to add the costs, charges & expenses of defending his title to his security applies notwithstanding that the mtgor. has obtained leave to sue as a poor person. *R. S. C.*, Ord. 16, r. 28, which provides that "a poor person shall not be ordered to pay any costs" is dealing with costs of litigation & not with such a matter as a mtgee.'s right to add his costs, charges & expenses to his security, which is treated as an incidental or implied term of the mtge. contract.—*Re LEIGHTON'S CONVEYANCE*, [1937] Ch. 149; [1936] 3 All R. R. 1033; 106 L. J. Ch. 161; 156 L. T. 93; 53 T. L. R. 273; 81 Sol. Jo. 56, C. A.

4391. *Add. Annotation*:—*Refd.* Campbell v. Pollak, [1927] A. C. 732.

4392. *Add. Annotation*:—*Refd.* Campbell v. Pollak, [1927] A. C. 732.

4393. *Add. Annotation*:—*Refd.* Campbell v. Pollak, [1927] A. C. 732.

#### PART XVIII. SECT. 13.

4398 1. *Costs of appeal—How borne—Right to payment forthwith.*—A mtgor. & putene mtgee. having appealed unsuccessfully from an order setting aside the registrar's certificate & directing a new account to be taken:—*Held*: the mtgee. was entitled to have the usual rule, that the cost of an unsuccessful appeal are payable forthwith, adhered to.—*CANADA PERMANENT MORTGAGE CORP. v. DALGLEISH*, [1928] 3 D. L. R. 59; [1928] 1 W. W. R. 922.—*CAN.*

#### PART XIX.

30. *Debt Adjustment Acts—Application for cancellation of certificate—Matters for consideration.*—A certificate under Debt Adjustment Act, 1931, should not be withheld or withdrawn if, without real injustice & hardship to any creditor, it offers a reasonable possibility that "the resident" will be able to recover himself financially when conditions become normal again.—*Re PETRICH & ERICKSON & DEBT ADJUSTMENT COMM.*, [1932] 1 W. W. R. 459.—*CAN.*

31. ————*ANDERSON v. DEBT ADJUSTMENT COMM.*, [1932] 2 W. W. R. 120.—*CAN.*

32. ————*Restraint of sale of home-stead.*—*REIDER v. NATIONAL TRUST CO., LTD.*, [1932] 3 W. W. R. 428; 40 Man. L. R. 657.—*CAN.*

33. ————*Mortgage after Apr. 1, 1931 for prior indebtedness.*—*Held*: where an unsecured debt existed prior to Apr. 1, 1931, the amount being in dispute, & after that date a settlement was arrived at by which the amount was agreed upon & the debtor gave a mtge. as security therefor, & the mtgee. sought to exercise his power of sale under the mtge. the case was not one in which "the whole of the original consideration" within Debt Adjustment Act, 1932, s. 7, arose after Apr. 1, 1931. Therefore, the Act applied to the sale proceedings.

The covenant referred to in sect. 7 of said Act is the covenant to pay contained in the mtge. & not the right given by Landlord & Tenant Act to appropriate the rents. Where the mtgor. is not a farmer or home owner said right & the similar right under sect. 8 of Real Property Act, *R. S. M.*, 1913, are not interfered with.—*McDIARMID v. McDIARMID (J.) CO., LTD.*, [1933] 1 W. W. R. 554; 3 D. L. R. 187; 41 Man. L. R. 81.—*CAN.*

34. ————*Default in payment of taxes.*—*HOUGHTON v. TRUST & LOAN CO. OF CANADA*, [1933] 2 W. W. R. 125; 3 D. L. R. 493; 41 Man. L. R. 299.—*CAN.*

35. ————*Appeal—Jurisdiction.*—The Ct. of Appeal of Manitoba has jurisdiction to entertain an appeal from an order of a County Ct. made upon an appeal to it from an order of the Debt Adjustment Comm.—*Re HETHERINGTON ESTATE, FAULKNER & OLIVER v. MARTENS & DELICHT*, [1934] 3 W. W. R. 29; 4 D. L. R. 243; 42 Man. L. R. 393.—*CAN.*

36. ————*Commissioner cannot reopen agreement between mortgagor & mortgagee.*—A mutually acceptable agreement between mtgor. & mtgee. cannot be reopened or varied by the Comr. under Debt Adjustment Act, 1932, Man.—*Re HETHERINGTON ESTATE, FAULKNER & OLIVER v. MARTENS & DELICHT*, [1934] 3 W. W. R. 29; 4 D. L. R. 243; 42 Man. L. R. 393.—*CAN.*

37. ————*Jurisdiction of county court.*—Under Debt Adjustment Act, 1932, the county ct., which is the "ct." within said Act, has no jurisdiction to entertain an application under sect. 22c as enacted by 1934, c. 9, s. 14, for a stay of proceedings where the appct. is an assignee of an agreement for sale from a purchaser who was the mtgor. under the mtge. under which the sale or foreclosure proceedings have been taken, since such appct. is neither the owner subject to a mtge. given by himself nor the purchaser under an agreement for sale executed by himself.—*TAYLOR v. LONDON LIFE INSURANCE CO.*, [1935] 1 W. W. R. 69; 43 Man. L. R. 97.—*CAN.*

38. ————*Action by mortgagee—Leave to proceed against second mortgagee—Necessity for.*—*GREAT WEST LIFE ASSURANCE CO. v. STOUTENBURG & McDONALD*, [1935] 1 W. W. R. 721.—*CAN.*

39. ————*Sale of land on crop payment plan.*—*Re RICHMOND v. DYCK*, [1934] 3 W. W. R. 735.—*CAN.*

40. ————*Retired farmer resident—Who included.*—A "retired farmer resident" within Debt Adjustment Act, 1932, includes the personal representative, child, widow or widower of a deceased retired farmer resident.—*Re BLANKS*, [1935] 1 W. W. R. 379.—*CAN.*

41. ————*Action begun before Act in force—Whether leave for execution necessary.*—*FREEDMAN v. HOWARD*, [1935] 2 W. W. R. 267; 2 D. L. R. 285; 49 B. C. R. 417.—*CAN.*

42. ————*Order for transfer to mortgagee—Leave to mortgagor with option to repurchase—Effect of.*—Mtgees. under a plan, in default applied to the Comr. under Debt Adjustment Act, 1932, for leave to proceed on the mtge. Leave was refused, but the Comr. ordered the mtgor. to give the mtgee. a quit-claim deed or transfer, & the mtgees. to give the mtgor. a lease of the land at a one-third crop rental, the lease to contain an option for the repurchase of the land, at any time during the term of the lease, at an amount not exceeding the amount of the claim under the mtge., provided that in order to exercise said option, the mtgor. should pay \$500 on account of the mtge., the proceeds of the sale of one-third of the crop to be applied on this \$500. The transfer of the land was executed & registered, & the mtgees. gave a lease containing said option:—*Held*: notwithstanding the transfer & lease, the relationship continued to be that of mtgor. & mtgee., the transaction being intended merely to facilitate & ensure collection; &

even if a new relationship was established, it should be found that the mtgor. or her personal representatives were able to pay the \$500 at the expiration of the lease & the consummation of the transaction was frustrated by the mtgees.—*FAULKNER v. MARTENS (No. 2)*, [1935] 3 W. W. R. 212.—*CAN.*

43. ————*Refusal of permit to foreclose—Notice of intention to continue action under 1934 Act—Right to give.*—*Held*: flat & letter under the Act of 1933 amounted to nothing more than the refusal of a permit; therefore, the saving clause in sect. 16 (1) of the Act of 1934 did not apply; & ptlf. had the right to give the notice of intention under the Act of 1934, & also the notice under rule 657, there being nothing in the Act of 1934 to prevent the giving of that notice, although after giving it the right under the Act to continue the action must be obtained.—*GEORGIA INVESTMENT CO., LTD. v. LONDON BUILDING & INVESTMENT CO., LTD.*, [1935] 3 W. W. R. 460; 5 F. L. J. (Can.) 164.—*CAN.*

44. ————*Application by mortgagee—Necessity for "substantial interest" in land.*—A mtgor. applied under sect. 22c of Debt Adjustment Act, 1932, for a stay of an action which had been brought on the mtge. covenant, foreclosure or sale not being asked, & for a stay of sale proceedings in the land titles office on the mtge. The application was dismissed on the ground that on the evidence the mtgor. did not have, as required by said sect., a "substantial interest" in the land. On appeal:—*Held*: said finding was justified by the evidence & was a sufficient answer to both stays asked for.—*McIVOR v. PATERSON*, [1937] 2 W. W. R. 201; 3 D. L. R. 210; 45 Man. L. R. 194.—*CAN.*

45. ————*Proceedings by Canadian Farm Loan Board.*—The restrictive provisions of Debt Adjustment Act, 1932 (Man.), apply to proceedings by the Canadian Farm Loan Board established under the Canadian Farm Loan Act, *R. S. C.*, 1927, to foreclose mtges. held by the Board, & therefore the production by the Board of the certificate called for by sect. 6 of said Manitoba statute is a necessary prerequisite to the prosecution of such proceedings.—*Re REID & CANADIAN FARM LOAN BOARD*, [1937] 3 W. W. R. 1; *sub nom.* *REID v. CANADIAN FARM LOAN BOARD*, [1937] 4 D. L. R. 248; 45 Man. L. R. 367; 7 F. L. J. (Can.) 84.—*CAN.*

46. ————*Lease with option to purchase made in 1935.*—In Dec. 1935, ptlf. leased a section of land to defts. for a term ending Dec. 31, 1936. The lease gave defts. an option to purchase the land. Defts. exercised their option & an agreement for sale of the land was entered into between them & ptlf. in June, 1937. Defts. made the cash payment provided for by the agreement but defaulted with respect to the crop payment due on the crop

of 1937. Pltf. sued for specific performance or, in the alternative, sale or foreclosure. Defts. contended that they were entitled to the benefit of sect. 8 of Debt Adjustment Act, 1937, & that as pltf. had not secured the permit required thereby before beginning this action, it could not succeed:—*Held*: there was no prior or antecedent consideration for the agreement sued on before it was executed in June, 1937, but "the whole of the original consideration therefor arose," within sub-sect. (3) of sect. 8, at that time, & therefore, no permit was required & the defence failed.—*NETHERLANDS INVESTMENT CO. OF CANADA, LTD. v. LASHER*, [1938] 2 W. W. R. 493.—**CAN.**

*sz. Mortgagors' & Purchasers' Relief Acts—Effect of leave.*—Only one order granting leave to commence or continue proceedings is contemplated by *Mtgors.' & Purchasers' Relief Act*, 1932, & an order thereunder to commence or continue proceedings includes all such steps as may be neces-

sary to be taken, either before or after judgment.—*Re BRITISH COLUMBIA REALTY DEVELOPMENT CORPN., LTD.*, [1934] 3 W. W. R. 136.—**CAN.**

*sb. — Order of master—Appeal.*—There is a right of appeal from the order of a master on applications under *Mtgors. & Purchasers Relief Act*, 1933 (Ont.).—*Re WATERMAN*, [1936] 1 D. L. R. 117; O. R. 47.—**CAN.**

*sd. — British Columbia Act of 1934—Whether repealed.*—*Mtgors.' & Purchasers' Relief Act*, 1934, is still in force although it has not been printed in *extenso* in the R. S. B. C., 1936.—*Re INTENDED ACTION OF KNOX v. VENNING*, [1937] 3 W. W. R. 112.—**CAN.**

*sf. — Form of appointment.*—An appointment for the holding of an inquiry pursuant to sect. 5 of *Mtgors.' & Purchasers' Relief Act*, 1934, read that the purpose of the inquiry was to determine whether the intended pltf. should be granted leave "to foreclose a certain agreement for sale." The report of the registrar on the inquiry

recommended that leave be granted the intended pltf. "to take proceedings by way of foreclosure or sale or otherwise" for the recovery of the principal moneys, interest, etc., payable under said agreement & indenture of assignment dated Sept. 6, 1928. The order made prior to the issuance of the writ gave the intended pltf. leave "to take proceedings by way of foreclosure or sale or otherwise" for the recovery of the principal moneys, interest, etc., payable under said agreement & also under said assignment:—*Held*: after considering the wording of the appointment & report as well as that of the order, the interpretation to be put on the words "take proceedings by way of foreclosure or sale or otherwise" in the order should be the same as that which would be put on those words as used in sect. 4 (1) (a) of said Act, & said words used in sect. 4 (1) (a) cannot be read as if the words contained in sect. 4 (1) (d) were omitted altogether.—*YORKSHIRE & PACIFIC SECURITIES, LTD. v. FIORENZA*, [1938] 1 W. W. R. 390; 1 D. L. R. 785.—**CAN.**

# NAME AND ARMS.

## Part I.—Name.

- 62a. **Costs of compliance.**—The tenant for life under a will must pay the expenses of taking testator's name & arms as directed by the will.—*Re MERCER, DREWE-MERCER v. DREWE-MERCER* (1889), 6 T. L. R. 95.
64. *Add. Citations* :—96 L. J. Ch. 9 ; 136 L. T. 23.; *subsequent proceedings*, [1927] 1 Ch. 593.
- 64a. —.]—*SEMPLE v. HOLLAND* (1863), 33 Beav. 94 ; 55 E. R. 302.
66. After this case add :—  
— **Land held in undivided shares.**—*See Re HIND, BERNSTONE v. MONTGOMERY, SETTLEMENTS*, No. 3143g.

### PART I. SECT. 7, SUB-SECT. 1.

sa. *Whether infant may change.*—*Semble* : it is impossible for an infant to accomplish the act of taking or assuming a surname by any voluntary action on his part.—*Re TALBOT*, [1932] 1. R. 714.—IR.





# NEGLIGENCE.

## Part I.—General Principles.

1. *Add. Annotations* :—*As to* (1), (2) & (3) *Consd. Markland v. Manchester Corpn.*, [1934] 1 K. B. 566. *As to* (4) *Refd. Cunard v. Antifyre, Ltd.*, [1933] 1 K. B. 551; *Markland v. Manchester Corpn.*, [1934] 1 K. B. 566.
2. *Add. Annotation* :—*Consd. McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119.
3. *Add. Annotation* :—*Refd. Markland v. Manchester Corpn.*, [1934] 1 K. B. 566.
4. *Add. Annotations* :—*Generally, Refd. Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool)* (1929), 143 L. T. 296; *Jones v. Great Western Ry. Co.* (1930), 47 T. L. R. 39; *McGowan v. Stott* (1923), 99 L. J. K. B. 357, n.; *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351; *McCullum v. Northumbrian Shipping Co.* (1931), 146 L. T. 124.
- 4a. ————] — HARGROVE *v. BURN* (1929), 46 T. L. R. 59.
7. *Add. Annotations* :—*Refd. Manchester Corpn. v. Farnmouth* (1929), 46 T. L. R. 85; *Cunard v. Antifyre, Ltd.*, [1933] 1 K. B. 551.
9. *Add. Annotations* :—*Consd. McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119; *Parker v. Oloxo, Ltd. & Senior*, [1937] 3 All E. R. 524. *Refd. Oliver v. Sadler & Co.*, [1929] A. C. 584; *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46; *Cunard v. Antifyre, Ltd.*, [1933] 1 K. B. 551; *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606; *Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C. 85; *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781; *Otto v. Bolton & Norris*, [1936] 1 All E. R. 960; *Barnes v. Irwell Valley Water Board*, [1938] 2 All E. R. 650.
10. *Add. Annotations* :—*Refd. Fanton v. Denville*, [1932] 2 K. B. 309; *Haynes v. Harwood & Son*, [1934] 2 K. B. 240.
12. *Add. Annotations* :—*Consd. Re Munton, Munton v. West*, [1927] 1 Ch. 262. *Apld. Re Vickery, Vickery v. Stephens*, [1931] 1 Ch. 572. *Refd. Re Windsor Steam Coal Co. (1901), Ltd.*, [1929] 1 Ch. 151.
15. *Add. Annotations* :—*As to* (1) *Consd. Bromily v. Collins*, [1938] 2 All E. R. 1061. *Generally, Refd. Cunard v. Antifyre, Ltd.*, [1933] 1 K. B. 551.
26. *Add. Annotations* :—*As to* (1) *Consd. McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. *Refd. Cunard v. Antifyre, Ltd.*, [1933] 1 K. B. 551; *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606; *Barnes v. Irwell Valley Water Board*, [1938] 2 All E. R. 650.
27. *Add. Annotation* :—*Refd. Bryce v. Hornby* (1938), 82 Sol. Jo. 216.

### PART I. SECT. 1, SUB-SECT. 1.

5 iv. ————]—Negligence is not the absence of care which will prevent an accident, but rather the absence of that care which a reasonably prudent person would exercise.—*MACGREGOR v. CANADIAN NATIONAL RY. & EDMONTON CITY*, [1930] 3 W. W. R. 392; [1931] 1 D. L. R. 87; 25 Alta. L. R. 104; *varq.*, [1930] 3 W. W. R. 237.—CAN.

sa. *Failure to take ordinary care.*—Negligence is a failure to take ordinary care, not a failure to take extraordinary care. In the circumstances of the present case it was open to the jury, on the evidence before them, to suppose that the infant *pltf.* committed a mere error of judgment, & to find that, at the most, she only failed to take extraordinary care. As it was open to the jury to think that, in relation to the acts or omission which contributed to the cause of the collision, *def.* was negligent in that he failed to take ordinary care while *pltf.* was not negligent in that, at the most, it had been proved that she failed to take extraordinary care, the jury were bound to find for *pltf.*, & their verdict could not be disturbed.—*WRIGHT v. ANDERSON* (No. 2), [1936] N. Z. L. R. 724; G. L. R. 524; 12 N. Z. L. J. 232.—N. Z.

### PART I. SECT. 1, SUB-SECT. 2.

sd. *Meaning of.*—“Gross negligence” within a statute providing that a gratuitous guest in a motor vehicle shall not have a cause of action for damages against the owner or driver for injuries sustained in an accident unless the accident was caused by the “gross negligence or wilful & wanton misconduct” of the owner or driver:—*Held*: to mean such recklessness or deliberate act as shows a disregard or indifference to the rights or safety of

others as distinguished from a mere temporary lapse or involuntary & momentary neglect. The absence of even a slight degree of care to avoid obvious dangers is, undoubtedly, gross negligence.—*NIX v. GODFREY*, [1936] 1 W. W. R. 680; 2 D. L. R. 326; 5 F. L. J. (Can.) 308; *affd.*, [1936] 2 W. W. R. 497; 4 D. L. R. 365; 44 Man. L. R. 201.—CAN.

st. ————]—“Gross negligence” in the phrase “gross negligence or wilful & wanton misconduct” in sect. 8 of 1936, c. 106, amending sect. 85 of *Vehicles Act, 1935*, connotes criminal negligence, which differs from civil negligence because, objectively, it implies a want of care which may endanger human life while, subjectively, it implies a state of mind indifferent to consequences. By reserving to a passenger a cause of action against the owner & operator of a private motor vehicle for injuries sustained by him by reason of gross negligence on the part of the driver, besides those arising from wilful & wanton misconduct, the Legislature meant to make sure that he would have the right to recover for conduct of a certain tortious quality in regard to matters of omission as well as in regard to those of commission. While, therefore, there is thus obviously a distinction between the ideas involved in these terms so stated alternatively, yet the fact of their association as if affording equal grounds for liability is a reasonable basis for the assumption that the legal gravity of the fault to be predicated of the one is on a parity with that included in the other. Since “gross negligence” in said sect. does not imply so much an intention to do wrong but rather the absence of an intention to do right, the trial judge’s charge to the jury herein was erroneous in so far as it instructed them in effect that the conduct constituting “gross negli-

gence” must be intentional; but this defect was cured by the fact that he also told them that the driver would be guilty of “gross negligence” if his conduct had shown a reckless disregard for, i.e. a complete indifference to, the safety & rights of others; & by the supplemental instruction, in which in answer to the jury’s question as to what kind of indifference could constitute gross negligence, he told them in the circumstances it would mean that indifference which showed that the driver was careless of the consequences & “took a chance.”—*SHORTT v. RUSH & BRITISH AMERICAN OIL CO., LTD.*, [1937] 2 W. W. R. 191; 4 D. L. R. 62; 7 F. L. J. (Can.) 53.—CAN.

sg. ————]—*Pltf.*, a gratuitous passenger in a motor car driven by *def.* M. & owned by *def.* D., sued for damages for injuries sustained as a result of the car leaving the road & running into a ditch:—*Held*: *pltf.* had established “gross negligence” on the part of M.—*LLOYD v. MILTON & DEREON* (No. 2), [1937] 3 W. W. R. 504; 7 F. L. J. (Can.) 213.—CAN.

sl. ————]—The negligence of the driver of a motor car in driving from a private road on to a highway in front of a truck approaching from his right, he turning to his left:—*Held*: not to have been “gross negligence or wilful & wanton misconduct” within sect. 60A of *Highway Traffic Act, 1930*.—*LAWRENCE v. GOURLAY & DEVRIES*, [1938] 1 W. W. R. 409; 1 D. L. R. 783; 45 Man. L. R. 560.—CAN.

sp. ————]—The meaning of the words “gross negligence” in sect. 85 (2) of *Vehicles Act, 1934-35*, is coloured by their association with the words, “or wilful & wanton misconduct,” which follow them & with which they are collocated.

The negligence of *def.* B.

38. *Add. Annotations* :—*Refd.* *Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776; *Lee v. Luper*, [1936] 3 All E. R. 817.
47. *Add. Annotation* :—*Refd.* *Deen v. Davies*, [1935] 2 K. B. 282.
52. *Add. Annotation* :—*Refd.* *Vaile Bros. v. Hobson, Ltd.* (1933), 149 L. T. 283.
53. *Add. Annotations* :—*Distd.* *Oliver v. Sadler & Co.*, [1929] A. C. 584. *Apld.* *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606. *Consd.* *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. *Refd.* *Bottomley v. Bannister*, [1932] 1 K. B. 458; *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781; *Otto v. Bolton & Norris*, [1936] 1 All E. R. 960.
55. *Add. Annotations* :—*Distd.* *Cunard v. Antiflyre, Ltd.*, [1933] 1 K. B. 551. *Refd.* *Otto v. Bolton & Norris*, [1936] 1 All E. R. 960.
58. *Add. Annotation* :—*Refd.* *Jones v. Great Western Ry. Co.* (1930), 47 T. L. R. 39.
59. *Add. Annotations* :—*Consd.* *Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776; *Gilmour v. Belfast Harbour Comrs.* (1933), 150 L. T. 63.
- 59a. —.]—In Mar. 1926, defts. carried out demolition work on premises adjoining other premises, called X., under a limited licence given by the owners of premises X. One of the conditions of the licence was that defts. should make good all damage done to premises X. by reason of the demolition operations. In the course of the operations defts. allowed debris to drop on an inaccessible part of the roof of premises X. & did not remove all the debris therefrom when the demolition work was completed. In July pltf. became the occupier of premises X. under a lease. In Sept. a heavy storm of rain washed the debris which had been left
- by defts. on the roof of premises X. into the gutters on the roof, & a gully was choked & the basement of premises X. was flooded, & goods which pltf. kept there were damaged. In an action by pltf. claiming damages for defts.' negligence :—*Held* : there could be no negligence, as there was no duty on the part of defts. towards pltf.—*KONSKIER v. GOODMAN (B.) LTD.*, [1928] 1 K. B. 421; 97 L. J. K. B. 263; 138 L. T. 481; 44 T. L. R. 91, C. A.
- 59b. —.]—*HARGROVE v. BURN* (1929), 46 T. L. R. 59.
- 59c. —.]—Pltf. was riding on the pillion of the third party's motor cycle. Deft., who was also riding a motor cycle, had agreed to lead them, as he was familiar with the road. At a left-hand bend, deft. drove straight ahead off the road on to a piece of waste land. He then applied his brakes, whereupon the third party, who had followed him off the road, slightly collided with him, & pltf. was injured. It was contended that pltf. could not recover against deft., as the latter owed him no special duty, & his injuries were due to the negligence of the third party in driving off the road :—*Held* : in the circumstances of this case, deft., having undertaken to lead the third party & pltf., was under a duty to both of them not to put them in a position of danger.—*SHARP v. AVERY & KERWOOD*, [1938] 4 All E. R. 85; 82 Sol. Jo. 908, C. A.
61. *Add. Annotation* :—*Refd.* *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K. B. 399.
64. *Add. Annotation* :—*Refd.* *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K. B. 399.
66. *Add. Annotation* :—*Refd.* *Winkworth v. Raven*, [1931] 1 K. B. 652.

to keep a proper look-out on approaching an intersection & in therefore failing to yield the right-of-way to a vehicle on his right, said negligence being in this case nothing more than inadvertence :—*Held* : not to amount to "gross negligence or wilful & wanton misconduct" within said sect. 85 (2) of Vehicles Act, 1935.—*HECK v. BRAUN & MARCHUK*, [1938] 2 W. W. R. 1.—*CAN.*

#### PART I. SECT. 2, SUB-SECT. 1.

33 xxv. —.]—An action of damages was brought against a firm of ginger beer manufacturers on behalf of two children who had been injured through drinking a bottle of ginger beer, manufactured by defenders, which contained the decayed body of a mouse. The bottle was bought from a retailer, but the mouse, unknown to the manufacturers, was in the bottle when it left their factory. It was possible for mice to enter empty bottles at a factory, but the manufacturers' system of cleansing & inspecting the bottles before filling was the best system known in the trade. There was no affirmative proof of carelessness by any of the manufacturers' servants in carrying out the system :—*Held* : defenders fell to be absolved; on the ground that, as defenders neither knew that the contents of the bottle were dangerous, nor were dealers in articles *per se* dangerous, they owed no duty to the consumers, who had not contracted with them.—*MULLEN v. BARR & Co., LTD., M'GOWAN v. BARR & Co., LTD.*, [1929] S. C. (Ct. of Sess.) 461.—*SCOT.*

33 xxvi. —.]—Pltf., who was employed by deft. in his store, observed deft. handling a loaded revolver & later overheard deft. in his office inform one of her fellow-employees that he was going out to shoot himself or some one. Deft. was drunk. Shortly afterwards deft.'s statement was repeated to pltf. by the employee to whom it was made & pltf. became nervous. Deft. left his office & pltf. heard a shot fired, but shortly afterwards deft. returned unharmed. Later still, deft. continuing his erratic behaviour, tore up banknotes in pltf.'s presence, saying that he would not be there in the morning to mend them & that a death would be heard of. Pltf. alleging that deft.'s conduct shocked her & caused her to become ill, sued deft. for damages for negligence, breach of contract, assault, & for wilfully causing her harm. At the trial of the action a verdict was entered by direction of the trial judge for deft. Upon appeal :—*Held* : there was no evidence of any breach of any duty, contractual or other, towards pltf., no assault, & no intention to injure pltf. & therefore, that the trial judge was right in directing a verdict for deft. & the appeal should be dismissed.—*BUNYAN v. JORDAN* (1936), 36 S. R. N. S. W. 350; 53 N. S. W. W. N. 130; *affd.* (1937), 57 C. L. R. 1; 37 S. R. N. S. W. 119; 54 N. S. W. W. N. 61; 10 A. L. J. 463; 43 Argus L. R. 204.—*AUS.*

60 i. *Application to recreation as well as work—Accident at game of golf.*—Pltf. while playing golf lost her eye as the result of being struck by a golf ball played by deft. :—*Held* : deft. in

playing the ball as he did, under the circumstances in question, was guilty of negligence, & therefore, could not escape liability on the ground that pltf. had accepted the risks incidental to the game.—*RATCLIFFE v. WHITEHEAD*, [1933] 3 W. W. R. 447; 41 Man. L. R. 570.—*CAN.*

60 ii. —.]—Pltf., while playing golf on a certain course, was struck on the eye by a ball played by deft. The eye was so injured that in a few days it had to be removed. He now brought action claiming £500 by way of damages, the parties having agreed that this ct. should have jurisdiction to hear the action. On the facts stated in the judgment :—*Held* : no lack of reasonable care on deft.'s part in having failed to notice pltf. prior to making her shot had been established, nor had pltf. established that, even on the basis that deft. had or should have seen him before playing her shot, she was guilty of negligence in failing to warn him before she played.—*EDWARDS v. MEHAFFEY* (1936), 31 M. C. R. 45.—*N. Z.*

#### PART I. SECT. 2, SUB-SECT. 3.—A.

68 iii. —.]—While deft. was driving a motor car along a well-used trail on the grounds of an agricultural fair assocn. he noticed three men standing talking a few feet from the left edge of the trail. His speed was not more than four miles per hour, & when three or four rods from the men he sounded his horn. One of the three, pltf., whose back was towards the car, stepped backwards just as the front of the car was opposite him. He was

78. *Add. Annotation:—Refd. Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.

79. *Add. Annotation:—Refd. Banco de Portugal v. Waterlow & Sons, Ltd.* (1931), 100 L. J. K. B. 465.

83. *Add. Annotations:—Consd. Howard v. Farmer & Son, Ltd.*, [1938] 2 All E. R. 290. *Refd. Stein v. Gates* (1935), 79 Sol. Jo. 252; *Burnham v. Boyer & Brown*, [1936] 2 All E. R. 1165.

83a. **Liability to blind person.]**

*STEIN v. GATES* (1935), 79 Sol. Jo. 252.

— — — — —.]—A crowd artiste in a film production was injured by the intensity of the lighting in a ballroom scene. The lighting was not abnormal for a scene of this kind, but its effect was increased by the high polish of the floor. The film co. pleaded that they themselves were not responsible for the lighting & pltf. joined the second deft. who, pltf. alleged, was in charge of the lighting. Defts. then added a defence of common employment:—*Held*: (1) lighting of the intensity used was not frequently used in the production of films & there was a duty upon the film co. to warn the artistes or to take precautions against injury to them; (2) it was the system of lighting that was at fault & there was no question of common employment; (3) the second deft. took no responsibility for the effect of the lighting upon the performers. He was there to provide the lighting the co. required, & the likelihood of damage to the performers was known to the film co., & was a risk which

struck & fell, & the car went over & fractured his ankle. Deft. stopped the car while pltf. was between the front & rear wheels:—*Held*: the appeal should be dismissed, deft.'s conduct being that of a reasonably prudent man under the circumstances.—*MONNINGTON v. WHITE*, [1936] 2 W. W. R. 362; 3 D. L. R. 745; 44 Man. L. R. 237.—*CAN.*

73 iv. — — —.]—*PACIFIC STAGES, LTD. v. JONES*, [1928] 2 D. L. R. 897; [1928] S. C. R. 92.—*CAN.*

**PART I. SECT. 2, SUB-SECT. 3.—C.**

77 ii. — — —.]—*ARMAND v. CARR & CARR & WILCOX*, [1926] 3 D. L. R. 592; [1926] S. C. R. 675.—*CAN.*

**PART I. SECT. 2, SUB-SECT. 3.—D. (a).**

80 xxii. — — —.]—*ZEIDEL v. WINNIPEG ELEC. CO.*, [1928] 3 D. L. R. 570; [1928] 2 W. W. R. 801; 34 Can. Ry. Cas. 267; 37 Man. L. R. 412; *reversd., sub nom. WINNIPEG ELEC. CO. v. ZEIDEL*, [1929] 3 D. L. R. 610; S. C. R. 538.—*CAN.*

80 xxiii. — — —.]—Even though a motor car is travelling on the right-hand side of the road, the driver is not justified in holding to his course regardless of the consequences, but is bound to exercise reasonable care to avoid injuring others, & owes this duty to the driver of an approaching car even if the latter has not yet complied with the statutory provision requiring him to turn out to the right of the centre of the highway.—*AUDET v. WETSCH*, [1928] 3 W. W. R. 655.—*CAN.*

80 xxiv. — — —.]—*MANN v. SHARP* (P. E. I.), [1929] 4 D. L. R. 949.—*CAN.*

80 xxv. — — —.]—A motorist making a turn into the path of vehicles coming in the opposite direction is responsible for a collision with an oncoming motor

cyclist.—*BEAZLEY v. MILLS BROS., LTD., PLUNKETT v. MILLS BROS., LTD.*, [1937] 1 D. L. R. 205; 51 B. C. R. 197.—*CAN.*

82 vii. — — — — —.]—Persons lawfully doing a work which interferes with a public right, e.g. contractors working on a highway, must use reasonable care not to injure persons lawfully exercising that right, & therefore, must take reasonable precautions to warn such persons of dangers created by the doing of the work which the latter could not with reasonable care discover.—*McCULLOCH v. STAR CONSTRUCTION CO.*, [1928] 1 D. L. R. 970; [1928] 1 W. W. R. 211; 22 Sask. L. R. 231.—*CAN.*

82 viii. — — — — —.]—*HARVIE v. CANADIAN PACIFIC RY. CO. & HURST ENGINEERING & CONSTRUCTION CO., LTD.*, [1929] 2 D. L. R. 422; 1 W. W. R. 72; 35 Crim. Ry. Cas. 274; 23 S. L. R. 257.—*CAN.*

82 ix. — — — — —.]—Where a person driving a motor car on a narrow country road sees men & teams engaged on construction work on the road ahead of him he should at once slow down & look for a signal to proceed unless upon a careful survey it is clear that the road is open to traffic.—*PHILLIPS v. MCKAY*, [1932] 1 W. W. R. 730; 2 D. L. R. 614; 40 Man. L. R. 235.—*CAN.*

**PART I. SECT. 2, SUB-SECT. 3.—E. (b).**

89a i. *Barber—Burn during permanent waving.*—Whilst having her hair permanently waved in resp.'s hair-dressing establishment, applt.'s head was burnt, with the result that she incurred a small permanent bald patch. Applt. claimed damages:—*Held*: applt. had been burnt by steam generated in a cylinder passing through

they took upon themselves. His employment afforded them no protection against their negligence in using such brilliant lights without proper precautions.—*RUSSELL v. CRITERION FILM PRODUCTIONS, LTD.*, [1936] 3 All E. R. 627; 53 T. L. R. 117; 80 Sol. Jo. 1036.

85. *Add. Annotations:—Refd. Silverman v. Imperial London Hotels* (1927), 137 L. T. 57; *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159; *Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546.

89a. — **Permanent waving.**—Pltf., who was in the habit of bleaching & dyeing her hair herself, was, upon her own instructions, given a permanent wave by a servant of defts. Bleached hair becomes brittle & devitalised. No warning was given to pltf. of the risk attached to a permanent wave of bleached hair, & without testing one or two curls first, defts.' servant put 20 curls into the heaters at the same time. Five heaters were removed & put on to other curls & the 15 curls which had already been heated were heated again. Upon removal of the heaters pltf.'s hair fell off for the most part, leaving short strands. In the instructions issued by the manufacturers with regard to the process of permanent waving were the words "do not attempt to permanent wave over-bleached hair without testing for heat a few curls in the most difficult part":—*Held*: the work was done in a negligent & unskilful manner & defts. were liable to pltf. in damages.—*DOBBS v. WALDORF TOILET SALOONS, LTD.*, [1937] 1 All E. R. 331.

the aperture of a clip to the scalp, & not by a heated clip coming into contact with the scalp; in the case of a steam burn the duty was on resp. through his assistants, first to adjust the apparatus properly, secondly to warn applt. to co-operate, & thirdly, upon a complaint by applt., to take immediate steps to relieve her; on the evidence, resp. had discharged those duties; resp.'s assistant stopped what burning was going on as soon as a complaint was made; applt. was burnt before she complained & she did not make the complaint in sufficient time to enable the assistant to prevent the mischief, & applt. was not entitled to succeed.

*Semble*: if applt. has suffered from a metal burn the inference would probably be that it was caused by the negligence of resp.—*JOLIFFE v. TURNER* (1936), N. L. R. 358.—*S. AF.*

89a ii. — — —.]—The fact that the fees charged a customer at a hair-dressing school are less than those charged in an ordinary beauty parlour does not constitute a waiver of her right to have the work performed with such reasonable skill as to avoid the burning of her scalp.—*TAYLOR v. KINNON*, [1937] 3 W. W. R. 94; 7 F. L. J. (Can.) 100.—*CAN.*

89a iii. — — —.]—On appeal from a judgment for pltf. for injuries alleged to have been sustained while she was having her hair curled in deft.'s beauty parlour:—*Held*: there was evidence to warrant the trial judge's finding that pltf.'s scalp was burned in the course of said treatment; although there was no direct evidence of any witness to that effect, the evidence as a whole pointed to the conclusion that pltf.'s injury was so caused, & it (the evidence) was such that any other conclusion was extremely improbable.

—*BURNICK v. SOFFER & SOFFER*,

- 90a. Negligent repair of car—Negligent driving—Effect on liability of repairer.]—*VAILE BROS. v. HOBSON, LTD.* (1933), 149 L. T. 283.
- 90b. Jeweller piercing ear.]—Pltf., requiring her ears to be pierced so that she could wear ear-rings, approached defts., who arranged with C., who was a jeweller, to do this for them at their premises. C., before he set out for defts.' establishment, placed his instrument in a flame & washed his hands, & upon arrival there, dipped both the instrument & his fingers into a glass of lysol before he pierced the ear. On the following day, pltf. entered a nursing-home for the purpose of undergoing a severe operation, & some thirteen days later, after she had experienced some pain in the neck, an abscess formed there, owing to the entry of infection into the hole that had been pierced in the ear:—*Held*: (1) a jeweller is not bound to take the same precautions as a surgeon would take, & upon the facts, C. had taken all reasonable precautions; (2) it was not proved that the infection entered the ear at the time when C. pierced it.—*PHILIPS v. WILLIAM WHITELEY, LTD.*, [1938] 1 All E. R. 566; 54 T. L. R. 379; 82 Sol. Jo. 196.
92. *Add. Annotation*:—*Consd. Purkis v. Walthamstow Borough Council* (1934), 151 L. T. 30.
95. *Add. Annotation*:—*Consd. Cunard v. Antifire, Ltd.*, [1933] 1 K. B. 551.
101. *Add. Annotation*:—*Distd. Wells v. Metropolitan Water Board*, [1937] 4 All E. R. 639.
112. *Add. Annotation*:—*Refd. Halliwell v. Venables* (1930), 99 L. J. K. B. 353.
118. *Add. Annotations*:—*As to* (1) *Distd. Donovan v. Union Cartage Co.* (1932), 148 L. T. 333. *As to* (2) *Consd. Haynes v. Harwood*, [1935] 1 K. B. 146. *As to* (4) *Consd. Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.
121. *Add. Annotation*:—*Consd. Haynes v. Harwood*, [1935] 1 K. B. 146.
124. *Add. Annotation*:—*Refd. The Kate*, [1935] P. 100.
128. *Add. Annotation*:—*Refd. De Freville v. Dill* (1927), 96 L. J. K. B. 1056.
- 131a. —.]—*HARGROVE v. BURN* (1929), 46 T. L. R. 59.
134. *Add. Annotations*:—*As to* (1) *Consd. Purkis v. Walthamstow Borough Council* (1934), 151 L. T. 30. *Refd. Jones v. Great Western Ry. Co.* (1930), 47 T. L. R. 39.
135. *Add. Annotations*:—*Refd. The Edison*, [1932] P. 52; *The Arpad*, [1934] P. 189.
139. *Add. Annotation*:—*Refd. The Edison* (1932), 147 L. T. 141.
142. *Add. Annotations*:—*Consd. Bottomley v. Banister* (1931), 101 L. J. K. B. 46; *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. *Refd. Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C. 85; *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A. C. 108; *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.
143. *Add. Annotations*:—*As to* (2) *Refd. Pontardawe Rural District Council v. Moore-Gwyn*, [1929] 1 Ch. 656; *Bartlett v. Tottenham*, [1932] 1 Ch. 114. *Generally, Refd. Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., Ltd.*, [1936] A. C. 108; *Western Engraving Co. v. Film Laboratories, Ltd.*, [1936] 1 All E. R. 106; *Marchant Manufacturing Co. v. Leonard D. Ford & Teller, Ltd.* (1936), 154 L. T. 430; *Collingwood v. Home & Colonial Stores, Ltd.*, [1936] 3 All E. R. 200; *Hale v. Jennings Bros.*, [1938] 1 All E. R. 579.
151. *Add. Annotations*:—*Refd. Compania Mexicana De Petroleo El Aguila v. Essex Transport & Trading Co.* (1929), 141 L. T. 106; *The Edison*, [1932] P. 52; *Liesbosch S.S. Owners v. Edison S.S. Owners*, [1933] A. C. 449; *Haynes v. Harwood & Son*, [1934] 2 K. B. 240; *Domine v. Grimsdall*, [1937] 2 All E. R. 119.
156. *Add. Annotation*:—*Refd. S.S. Singleton Abbey v. S.S. Paludina*, [1927] A. C. 16.
161. *Add. Annotation*:—*Refd. H. v. H.*, [1928] P. 206.
162. *Add. Annotation*:—*Consd. Canadian Pacific Ry. v. Kelvin Shipping Co.* (1927), 138 L. T. 369.
181. *Add. Annotation*:—*Refd. Blay v. Pollard & Morris*, [1930] 1 K. B. 628.
188. *Add. Annotation*:—*Refd. Haynes v. Harwood*, [1935] 1 K. B. 146.

[1938] 1 W. W. R. 761; 2 D. L. R. 409.—CAN.

89a iv. —.]—Liability for burns negligently inflicted by a permanent wave machine held established by doctrine of *res ipsa loquitur*.—*FIELD v. DAVID SPENCER, LTD.*, [1938] 2 D. L. R. 245; 2 W. W. R. 385.—CAN.

#### PART I. SECT. 2, SUB-SECT. 3.—F.

93 i. *Carriers*.—A motor vehicle owned by two defts. was being driven by one of them, L., & pltf. was injured in a collision which followed:—*Held*: pltf., though not a passenger for hire, could maintain an action for damages for his injuries, want of ordinary & reasonable care on the part of L. being shown.—*PARLOV v. LOZINA & RAOLOVICH* (1920), 47 O. L. R. 376; 18 O. W. N. 139.—CAN.

PART I. SECT. 4, SUB-SECT. 2.—A.  
125 xiii. —.]—*MONTREAL TRAMWAYS Co. v. DUPERE*, [1934] 1 D. L. R. 807.—CAN.

132 iv. *Revsd.*, [1919] 1 W. W. R. 806.

132 ix. —.]—Following a collision

at night between deft.'s motor car & pltf.'s motor truck, the truck which was disabled, stood at an angle across the road, & the female pltf. went back along the road to try to "flag" or warn, by means of lighted matches, oncoming cars. While doing so she was struck by such a car. She had already sustained injury in the first accident. About ten minutes elapsed between it & the second accident. Deft. having been found liable for the first accident, the question arose whether he was liable also for the additional injuries suffered by the female pltf. in the second accident:—*Held*: deft. could not be held so liable. The circumstances did not bring the female pltf.'s case within those in which a "rescuer" or "intervener," attempting on a sudden impulse & without time for deliberation to save another from immediate danger, has been held entitled to recover from the person whose negligence created the danger. Moreover, deft.'s negligence was not the proximate cause of the female pltf.'s second injury.—*BRINE & BRINE v. DUBBIN*, [1933] 2 W. W. R. 25.—CAN.

132 x. —.]—*CROSBIE v. WILSON & LANGLOIS* (1933), 47 B. C. R. 384.—CAN.

132 xi. —.]—*HOLLUM v. ROBERTSON* (1936), 50 B. C. R. 551.—CAN.

138 xix. —.]—*GRUNNELL Co. v. WARREN*, [1937] S. C. R. 353; 1 D. L. R. 705.—CAN.

150 i. *Injury not capable of being foreseen or anticipated—Liability only where negligence established*.—*HARDING v. EDWARDS & TATISCH, EDWARDS v. TATISCH, GALL v. EDWARDS & TATISCH*, [1929] 4 D. L. R. 598; 64 O. L. R. 98.—CAN.

#### PART I. SECT. 4, SUB-SECT. 3.—B.

171 iv. —.]—*STEPHEN v. McNEILL*, [1929] 1 D. L. R. 1003; S. C. R. 537; *affg.*, [1928] 4 D. L. R. 172; [1928] 3 W. W. R. 182.—CAN.

#### PART I. SECT. 4, SUB-SECT. 3.—C.

188 ii. —.]—Negligence of a third party is no excuse for a driver colliding at an intersection with a parked car.—*PELLE v. BERSEA*, [1936] 4 D. L. R. 517; 50 B. C. R. 546.—CAN.

195. *Add. Annotation*:—*Refd. Knott v. London County Council*, [1934] 1 K. B. 126.
- 196a. —.—Pltf. was the widow of a man employed by deft. co. as a derrickier. Deceased had left the barge on which he was employed & volunteered to act temporarily as tipper on a second barge in order to relieve a fellow workman. The fellow workman was in fact a director of the co., but at the time he was acting merely as a foreman over the job, & was not there as representing the board of directors. While engaged as a tipper in these circumstances he stumbled & fell into the hold, sustaining minor injuries. He was removed to hospital & given an anæsthetic under which he collapsed & died. The *post mortem* examination showed that he had a diseased heart, but neither the history of the man's activities nor the use of a stethoscope did or would have disclosed the man's condition. At the trial it was held

that the death was due to the negligence of defts., who were ordered to pay to pltf. £785, of which sum £300 was not to be recoverable in any event. On appeal:—*Held*: on the facts there was no negligence on the part of defts.; the fact that the fellow worker was a member of the board of directors did not in a case where he was in fact acting as a foreman bar the defence of common employment; on the work upon which deceased was engaged at the time he was merely a volunteer & the defence of *volenti non fit injuria* applied; the administration of the anæsthetic was not a wrongful act intervening between the accident & the death, & could not be relied on as a case of *novus actus interveniens*.—*BLOOR v. LIVERPOOL DERRICKING & CARRYING CO., LTD.*, [1936] 3 All E. R. 399, C. A.

202. *Add. Annotation*:—*Refd. Newsome v. Darton Urban District Council*, [1938] 3 All E. R. 93.

## Part II.—Negligence in regard to Property.

208. *Add. Annotations*:—*Consd. Forbes, Abbott & Lennard v. G. W. Ry.* (1927), 138 L. T. 286. *Apld. Compania Mexicana De Petroleo El Aguila v. Essex Transport & Trading Co.* (1929), 141 L. T. 106. *Consd. Hillen v. I. C. I. (Alkali), Ltd.*, [1934] 1 K. B. 455; *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781; *Simons v. Winslade*, [1938] 3 All E. R. 774. *Refd. Silverman v. Imperial London Hotels* (1927), 137 L. T. 57; *Coleshill v. Manchester Corp.*, [1928] 1 K. B. 776; *The Hayle*, [1929] P. 275; *Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546; *Knott v. London County Council*, [1934] 1 K. B. 126; *Marshall v. Lindsey County Council*, [1935] 1 K. B. 516; *Weigall v. Westminster Hospital*, [1936] 1 All E. R. 232; *Ellis v. Fulham Corp.*, [1937] 2 All E. R. 454; *Woodman v. Richardson & Concrete, Ltd.*, [1937] 3 All E. R. 866.
209. *Add. Annotation*:—*Refd. Coleshill v. Manchester Corp.*, [1928] 1 K. B. 776.
213. *Add. Annotation*:—*Refd. Coleshill v. Manchester Corp.*, [1928] 1 K. B. 776.
216. *Add. Annotation*:—*Refd. Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.
217. *Add. Annotations*:—*Refd. Silverman v. Imperial London Hotels* (1927), 137 L. T. 57; *Coleshill v. Manchester Corp.*, [1928] 1 K. B. 776; *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101; *Purkis v. Walthamstow Borough Council*, [1934], 151 L. T. 30; *Weigall v. Westminster Hospital*, [1936] 1 All E. R. 232; *Bromley v. Collins*, [1936] 2 All E. R. 1061.
219. *Add. Annotations*:—*Refd. Coleshill v. Manchester Corp.*, [1928] 1 K. B. 776; *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.
223. *Add. Annotations*:—*As to (1) Consd. Coleshill v. Manchester Corp.*, [1928] 1 K. B. 776; *Addie (Rt.) & Sons (Collieries) v. Dumbreck*, [1929] A. C. 358. *Apld. Donovan v. Union Cartage Co.* (1932), 148 L. T. 333. *Refd. Sycamore v. Ley* (1932), 147 L. T. 342; *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101; *Purkis v. Walthamstow Borough Council* (1934), 151 L. T. 30; *Coates v. Rawtenstall Borough Council*, [1937] 3 All E. R. 602; *Ellis v. Fulham Corp.*, [1937] 3 All E. R. 454. *As to (2) Consd. Compania Mexicana De Petroleo El Aguila v. Essex Transport & Trading Co.* (1929), 141 L. T. 106. *Generally, Refd. De Freville v. Dill* (1927), 96 L. J. K. B. 1056.

### PART II. SECT. 1, SUB-SECT. 1.

206 iv. —.—Pltf. was hired with his teams by L., who had a contract with deft. co. to get out logs for use in co.'s lumber business. Pltf. took a team over a private way leading to the co.'s limits, & in crossing a culvert one of the horses met with an accident by stepping upon a board which broke under its weight. Pltf. charged negligence in respect of the rotten condition of the board. There was no evidence that deft. co. placed the board there, or knew or should have known of its presence there:—*Held*: pltf. had failed to prove any negligence of deft. co.—*GUERTIN v. FASSETT LUMBER CO.*, [1931] 4 D. L. R. 916; O. R. 589.—CAN.

### PART II. SECT. 1, SUB-SECT. 2.

—A. (a).  
sp. *Independent contractor*.]—C.,

while engaged in cleaning out a septic tank connected with deft.'s hospital, was killed by poisonous gas that had accumulated in the tank. The widow brought an action under Fatal Accidents Act. The judge instructed the jury that its first duty was to determine whether the relationship of O. to deft. was that of a servant or that of an independent contractor. He then told the jury that in answering the question, "Was deft. negligent," it should apply a higher standard of care if it had found that C. was a servant than it should apply if it found that O. was a contractor; in the former case deft. was negligent if it had let C. do the work knowing that it was dangerous or if it should have made inquiries to ascertain if the work was dangerous, but that, if he was a contractor, then deft. was required merely not to

him into a trap. The jury found that the relationship was that of principal & independent contractor & there was no negligence on the part of deft. —*Held*: the charge to the jury was objectionable because deft.'s duty to C. was the same whether he was an independent contractor or a servant & therefore the jury should not have been asked to find in which capacity he was employed, & also because it told the jury that the duty of deft. towards an independent contractor was merely not to lead him into a trap. The proper questions for the jury were, first, whether deft. knew of the danger, & second, if it did not know, could it by the exercise of reasonable care & diligence have become aware of the existence of the danger.—*COTE v. LAMPMAN UNION HOSPITAL BOARD*, [1933] 2 W. W. R. 81.—CAN.

239. *Add. Annotation*:—*Expld. Davis v. Lisle*, [1936] 2 All E. R. 213.

242. *Add. Annotation*:—*Consd. Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546.

243a. —.]—*Resps.* were the proprietors of a space of land known as "Dreamland," which was a place for the entertainment of the public. On part of this land the "Atlantic Flyer" was erected by S., under the terms of an agreement with *resps.*, by which a part of

the land at "Dreamland" was taken over by S. for the purpose of erecting & running the "Atlantic Flyer." *Resps.* under the agreement were to be paid 33½ per cent. of S.'s gross receipts, but all moneys were in the first instance to be paid to the *resps.*, who had the right to appoint the cashiers. Under rules & regulations attached to the agreement, a right was reserved to *resps.* to refuse admission to any person & to charge for admission to the ground. S. was bound to

PART II. SECT. 1, SUB-SECT. 2.—  
A. (b).

228 i. *Customer in shop*.—*Pltf.*, a customer in *deft.*'s store, slipped when approaching the steps leading to the ground floor, fell down a few steps & was injured. There was no question of structural defect or lack of lighting or handrails or guards. No one saw exactly how she came to fall, & she did not know; but alleged that it was due to a pool of water caused by drippings from an umbrella.—*Held*: *pltf.* had not proved any negligence on the part of *deft.*. Even if there was a pool of water as alleged, & it was found that there was not, it was not a danger such as *deft.* ought to have known of; & it would be unreasonable to expect the *deft.* to employ people throughout the shop to mop up any dampness or moisture or drippings from umbrellas.—*WITT v. DAVID SPENCER, LTD.*, [1935] 2 W. W. R. 644; 50 B. C. R. 35.—CAN.

242 i. *Spectator at public exhibition*.—At a motor cycle race meeting conducted by a co., a spectator was injured through a motor cycle getting out of control, & after colliding with another motor cycle, jumping over the fence. The racing took place at high speeds on a flat track surrounded by a wire mesh safety fence, a foot outside which was a picket fence of the same height. In addition, in places, there was another fence erected on top of the picket fence. Outside the picket fence there were seats, & the heads of persons sitting thereon would be below the level of the picket & safety fences. The spectator, who had not been to motor cycle races before, attended in consequence of an advertisement, paid for admission, & took a seat at a place where there was no fence above the picket fence. He saw a notice: "Danger. Do not lean on fence." He assumed that the fence gave him sufficient protection. Unknown to the spectator, a motor cycle had on a previous occasion similarly gone over the fence:—*Held*: *deft.* was liable.—*CHATWOOD v. NATIONAL SPEEDWAYS, LTD.*, [1929] S. R. (Q.) 29.—AUS.

242 ii. —.]—In an action for damages for injuries sustained by *pltf.* by the sudden stopping of an amusement device known as a "whoop wheel" upon which they were seated as paying passengers:—*Held*: the negligence of *deft.* in not providing an emergency brake was the cause of the breaking of the shaft & the consequent injuries.—*BALNE v. SUNNYSIDE AMUSEMENT CO., LTD.*, [1931] 4 D. L. R. 487; 6 O. R. 549.—CAN.

242 iii. —.]—The infant *pltf.* while watching a hockey game at *deft.*'s rink was hit by a puck & seriously injured. He had paid for his ticket & had selected a seat in a front box on a level with the ice. He had played hockey for a number of years. The negligence of which he complained particularly was the absence of wire or other netting for the protection of spectators. The evidence was that such protection was not provided at other rinks in Winnipeg or other cities:—*Held*: the action failed; *deft.* was not an insurer against dangers incident to the game which any reasonable

spectator could see, & *pltf.* must be held to have had a thorough knowledge of the risks assumed by the spectators of hockey & of the protection customarily afforded them.—*ELLIOTT v. AMPHITHEATRE, LTD.*, [1934] 3 W. W. R. 225.—CAN.

242 iv. —.]—It is negligence to provide torn matting upon which persons attending a concert on the premises may trip.—*SANGSTER v. DURBAN CORPN.*, [1934] N. L. R. 347.—S. AF.

242 v. —.]—*DENT v. CENTRAL CANADA EX. ASSOCN.* (1935), 5 F. L. J. (Can.) 85.—CAN.

242 vi. —.]—The W. Racing Club was the owner of a racecourse at T., where the saddling-paddock was an area of about an acre & a half, & the conditions surrounding it were of the usual kind on racecourses. *Pltf.* was walking on a footpath bordering the saddling-paddock when he was kicked by one of two horses owned by the other *defts.*, but as he was unable to identify the horse that kicked him he was non-suited in respect of those *defts.* *Pltf.* had full opportunity of avoiding the negligence complained of as against the club, as he observed that one of the horses was fractious & pulling away from the stable-boy in charge, & yet continued to walk in close proximity to it whilst there was ample room to keep clear, as there was the full width of the footpath (8 ft. to 9 ft.), & there was grass on the farther side. There was no evidence that a saddling-paddock is ever fenced on racecourses; or that the particular horse was more fractious than ordinary racehorses; that it was a kicker; or that it required more strength to restrain it than in the case of any other horses; or that the boy in charge was less capable of controlling it than a full-grown man. No such accident had happened before, or at least during the previous thirteen years. In an action by the injured spectator, who was a paying visitor to the course, the question for the ct. was whether or not he was entitled to recover damages in respect of the injuries sustained by him, from the Racing Club itself:—*Held*: it was the duty of the club to see that its premises were as free from danger as reasonable care & skill could make them; but it was not an insurer against accidents which no reasonable diligence could foresee, or against perils which the ordinary spectator might be expected to appreciate & take precautions against, or against perils incidental to the ordinary conduct of a racecourse which a reasonable spectator can foresee & of which he takes the risk. As the conditions surrounding the position & conduct of the saddling-paddock were similar to those in racecourses generally & for at least thirteen years there had been no accident on the course in the nature of the present one, which was an unlikely & improbable accident against which it would be unreasonable to expect the club to provide & which would not have occurred if *pltf.* had taken ordinary reasonable care, there was no breach of duty on the part of the club, or failure to comply with any terms or implications arising from the

contract.—*MOLOUGHNEY v. WELLINGTON RACING CLUB*, [1935] N. Z. L. R. 800; 11 N. Z. L. J. 255.—N.Z.

242 vii. —.]—Two ladies, proceeding along the passage-way towards the auditorium of *deft.*'s picture theatre, fell & injured themselves in tripping over the end of a strip of linoleum forming part of the floor covering. The accident happened where two strips met. The ends were not secured but one partly overlapped the other so that the upper end faced the street. On a claim for damages:—*Held*: the omission of *deft.* to make the junction of the two ends as little dangerous as could reasonably be, was a breach of its duty to *pltf.*, & as they were not negligent they were entitled to recover damages for the injuries received.—*DODDS v. KEMBALL THEATRES, LTD.* (1936), 31 M. C. R. 65.—N. Z.

242 viii. *Child in corporation playground*.—*Deft.* city corpn. established & conducted "supervised playgrounds" throughout the city & employed supervisors to take charge of them:—*Held*: the corpn. assumed, or held itself as having assumed the obligation of taking reasonable care of such children as should resort to the playgrounds, & was bound to make some reasonable effort to protect them from dangers known or reasonably to be apprehended.—*MCSTRAVICK v. OTTAWA*, [1929] 4 D. L. R. 492; 64 O. L. R. 275; *aff.*, [1929] 3 D. L. R. 317; 63 O. L. R. 628.—CAN.

242 ix. *Person sharing offices with friend*.—*Pltf.* had for a number of years shared with a friend an office in *deft.*'s building which the friend leased from *deft.* *Pltf.* paid the friend half of the rent, & they gave one another mutual assistance in their business. When *pltf.* was entering a passenger elevator in the building it began to slide downwards, with the result that *pltf.* fell forward & was injured. A jury returned a verdict for damages on which judgment was given for *pltf.*, & *deft.* appealed:—*Held*: *pltf.* was an invitee, & therefore, *deft.* was under the duty towards him of taking reasonable care that the premises were safe.—*GORDON v. CANADIAN BANK OF COMMERCE*, [1931] 3 W. W. R. 185, 373; 4 D. L. R. 635; 44 B. C. R. 213.—CAN.

242 x. *Contractor using ladder*.—*Pltf.* was employed to paint the smoke stack of *deft.*'s tannery. He was thrown to the ground from a defective ladder:—*Held*: *deft.* owed *pltf.* a duty to *pltf.* to use reasonable care to see that their property & appliances were fit for the purpose for which they were used, & *deft.* were therefore liable to *pltf.*—*MCGRATH v. LECKIE (J.) & Co.* (1932), 45 B. C. R. 534.—CAN.

242 xi. *Swimmer—Submerged wall in municipal swimming pool*.—A submerged partition wall in a municipal swimming pool, dividing deep from shallow water, is not a dangerous construction so as to render the municipality liable for injuries to a swimmer who knew of the wall, & dived into the pool & struck it.—*KESTER v. HAMILTON*, [1937] 2 D. L. R. 330; O. R. 420; 6 F. L. J. (Can.) 262.—CAN.



provide at his own expense a ticket-taker. Resps. advertised inviting persons to "Dreamland." W. was killed while on one of the boats of the "Flyer" in consequence of a bolt giving way & the occupants being flung out. Applt., as his mother & partial dependant, claimed damages under Fatal Accidents Act, 1846 (c. 93), against resps.:—*Held*: on the terms & rules of the agreement, there was no contractual relation between resps. & deceased, & as the advertisements of resps. did no more than invite people to the area of land owned by them, there was no invitation to deceased to enter upon property on which there was a hidden danger under the control of the inviter.—**HUMPHREYS v. DREAMLAND (MARGATE), LTD. (1930), 100 L. J. K. B. 137; 144 L. T. 529; 74 Sol. Jo. 862, H. L.**

**243b.** —. — Action for injuries received while watching a polo match, through a polo pony leaving the ground & passing through a hedge:—*Held*: there was no negligence.—*PIDINGTON v. HASTINGS* (1932), *The "Times"* Mar. 12.

*Annotation* :—**Consd.** Hall v. Brooklands Auto-Racing Club (1932), 48 T. L. R. 546.

243c. -.]—Pltf. had paid for admission to witness motor car races on a course occupied & managed by defts. As the result of a collision between two motor cars near the railing behind which pltf. was standing one of the cars leapt into the air & went right through the railing, with the result that pltf. & several other spectators sustained serious personal injuries. It was not disputed that this accident was the first time when any spectator had been injured by a car leaving the track. In an action claiming damages for personal injuries the jury found (*inter alia*) that defts. had omitted to take reasonable precautions for the safety of spectators, & awarded damages to pltf. On appeal:—*Held*: there was no evidence that defts. had failed to take proper care to make their premises reasonably safe for spectators. Defts. were not under any obligation to insure safety under all circumstances, but only to provide against damage to spectators which any reasonable person in their position would have anticipated as likely to happen. The spectator himself took the risk of remoter damage when he elected to attend the races.—*HALL v. BROOKLANDS AUTO-RACING CLUB* [1933] 1 K. B. 205; 101 L. J. K. B. 679 147 L. T. 404; 48 T. L. R. 546, C. A.

**nnotations :—***Reid. Weigall v. Westminster Hospital*, [1936  
1 All E. R. 232; *Fryer v. Salford Corpn.*, [1937] 1 All E. R  
617; *Woodman v. Richardson & Concrete, Ltd.*, [1937  
3 All E. R. 866.

**246. Add. Annotation :—***Refd. Howard v. Furness Houlder Argentine Lines, Ltd. & Brown Ltd., [1936] 2 All E. R. 781.*

**246a. Relation visiting paying patient in hospital.**  
—Pltf., the mother of a patient occupying

for payment, a private ward in a hospital desired to consult one of its honorary surgeons, with whom she had made a personal contract for the treatment of her son. He invited her into a small room often used, to the knowledge of the hospital authorities, for such consultations between the honorary medical staff & relatives of patients. The floor was highly polished for antiseptic reasons. She trod on a mat, which slid along the floor beneath her foot, so that she fell & suffered personal injury:—*Held*: in these circumstances pltf. was an invitee of deft. hospital, because she was in the room in pursuance of an interest common to her, the surgeon, & the hospital, & therefore, the hospital authorities owed her the duty of taking reasonable steps to make the room safe, which duty they had not discharged. The mat was an unusual danger, of which they ought to have known, & pltf. was entitled to recover.—*WEIGALL v. WESTMINSTER HOSPITAL*, [1936] 1 All E. R. 232; 52 T. L. R. 301; 80 Sol. Jo. 140, C. A.

246b. **Bather at bathing pool.**—Pltf. was the father & administrator of a schoolboy, aged 15 years, who was killed by breaking his neck when diving from a diving board maintained by a borough council in a swimming pool under the control of the council. The accident was due to the insufficient depth of the water, of which no warning was given either by attendants or by the exhibition of a notice:—*Held*: the placing of the diving board at a point where there was an insufficient depth of water, accompanied by the failure to give any warning, amounted to a trap.—*SIMMONS v. HUNTINGDON CORPN.*, [1936] 1 All E. R. 596.

**254. Add. Annotations :—***As to (2) Consd. Hillen v. I. C. I. (Alkali). Ltd., [1934] 1 K. B. 455; Refd. Schlarb v. London & North Eastern Ry. Co., [1936] 1 All E. R. 71.*

256. *Add. Annotations* :—As to (1) *Consd. Addie R. & Sons (Collieries) v. Dumbreck*, [1929] A. C. 358. *Refd.* *Oldham v. Sheffield Corpn.* (1927), 136 L. T. 681. *Generally, Refd.* *Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776.

**260. Add. Annotation :—**Consd. Hall v. Brooklands Auto-Racing Club (1932), 48 T. L. R. 546.

260a. ———.]—At 9 p.m. on Aug. 2, 1937, pltf., who was a customer at a public-house kept by deft., was crossing a yard attached to the public-house in order to get to a convenience situated at the far end of the yard, when he slipped on some vomit & sustained injuries. It was dusk at the time, & the yard was unlighted. It was proved in evidence that the landlord had inspected the yard at 6 p.m. & cleaned it out then. It was further proved that during the two previous years only one other customer had vomited in the yard :—*Held* : (1) pltf., while in the

**PART II. SECT. 1, SUB-SECT. 2.—**  
**B. (a).**

247 xl. — — —.]—GUILFOIL <sup>v.</sup>  
MCAVITY (T.) & SONS, LTD. (N. B.),  
[1927] 3 D. L. R. 672.—CAN.

252 1. ———— *Danger unknown to invitee.*—GORDON & GORDON v. BLAKELY, [1931] 2 W. W. R. 902.—CAN.

**PART II. SECT. 1, SUB-SECT. 2.—**  
**B. (b).**

259 v. — [Continued].—On a day of falling snow the female pltf., after making some purchases in def't.'s shop, was picking up her parcels as she was leaving, or about to pick them up, when she slipped & was injured. It was found on conflicting evidence that the floor was covered by a mixture of water, mud & oil (sawdust & oil were used every two weeks to keep dust

down, the last time having been two weeks before the accident), & that it was owing to this condition of the floor that plft. fell; the fact that none of the 300 other customers who had been in the shop that day had fallen was held not to be an answer to what the evidence demonstrated to have been the cause of the mishap.—*Held*: deft. was liable.—REITH v. SAFEWAY STORES, LTD., [1935] 1 W. W. R. 36; [1935] 1 W. W. R. 481.—CAN.

yard, was still an invitee; (2) this was a danger which the landlord could not reasonably be expected to guard against, & he had not failed in any duty owed to an invitee.—*SIMONS v. WINSLADE*, [1938] 3 All E. R. 774; 159 L. T. 408; 82 Sol. Jo. 711, C. A.

261. *Add. Annotations*:—*Consd. Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546. *Refd. Silverman v. Imperial London Hotels* (1927), 137 L. T. 57; *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.

267a. *Proprietor of Turkish baths—Dangerous insects.*—*Circumstances (see CONTRACT, No. 5168a, ante)*, in which:—*Held*: apart from contract, debts. were under an obligation to a person using their premises to abstain from negligence, & if they, knowing of the danger, did not take sufficient precautions & such person were injured, he could recover.—*SILVERMAN v. IMPERIAL LONDON HOTELS, LTD.* (1927), 137 L. T. 57; 43 T. L. R. 260.

275. *Add. Annotations*:—*Consd. McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. *Refd. Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781.

276. *Add. Annotations*:—*Consd. The Kate*, [1935] P. 100. *Refd. Cammell, Laird & Co. v. Mangnese Bronze & Brass Co.*, [1933] 2 K. B. 141.

277. *Add. Annotation*:—*Consd. The Kate*, [1935] P. 100.

277a. ———.]—R. had contracted to erect a building, & to do so he had to erect a scaffolding for the use of his own workmen & of the sub-contractors' workmen. Pltf., a workman employed by the sub-contractors, was working on the scaffolding when he saw a ladder, by which he had ascended, being

removed by two men employed by R. These two men informed pltf. that there was another ladder at the other end of the scaffolding. Pltf. found this other ladder & was descending by it, when, as two rungs were missing, he slipped & sustained injuries. The evidence showed that the defective ladder had been put on a dump with discarded plant, a place from which no employee of R. had any right to remove it & again put it in use. There was no evidence as to how, or by whom, the defective ladder had been placed against the scaffolding. In an action for negligence against R.:—*Held*: pltf. could not succeed in his action as he had failed to prove negligence on the part of R. *Per GREER, L.J.*: Inasmuch as pltf. had failed to give evidence to show that the scaffolders put the defective ladder into position, or to show that some of the foremen on the job had seen, or ought to have seen, the defective ladder, & had failed to get it removed, his case necessarily failed for want of evidence. *Per SLESSER, L.J.*: The risk that the defective ladder would be taken back into service in its defective state was not a risk the knowledge of the danger of which could be imputed to R., the fact that the ladder belonged to R. did not seem to alter the position, & in the absence of any evidence or finding that it was replaced by his servants or with his knowledge, he could not be held liable.—*WOODMAN v. RICHARDSON & CONCRETE, LTD.*, [1937] 3 All E. R. 866; 81 Sol. Jo. 700, C. A.

280. *Add. Annotation*:—*Consd. McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119.

287a. *Building owner.*—*NABARRO v. COPE & Co., LTD.*, [1938] 4 All E. R. 565.

261 ii. ———.]—Pltf. went to deft.'s butcher shop to buy meat; he asked the employee who served him about peas, & the employee motioned with his head to a shelf where there were peas; pltf. walked across the shop to the shelf, but stepped into a hole in the floor near the shelf, fell into the cellar & was injured. The employee knew the trap door which guarded the hole was up, & did not warn pltf. The shelf was in a part of the shop to which customers occasionally went:—*Held*: pltf., an invitee, was not in a part of the shop to which he was not invited, & it could not be said that he was not exercising ordinary care because, going across a shop to look at goods upon a particular shelf, he did not cast his eyes on the floor to see that no trap had been laid for him.—*RUDLEN v. BRIDGEMAN*, [1930] 3 D. L. R. 224; 65 O. L. R. 224.—CAN.

261 iii. ———.]—Pltf., a customer of deft.'s department store, slipped on an orange peel on the stairs in the store & was injured. There was no evidence that he did not use reasonable care:—*Held*: deft. was negligent in allowing pieces of orange peel to remain on the stairs for a long time without being removed & in answer to the contention that pltf. had not proved that the particular piece of peel on which he slipped had been allowed to remain on the stairs any length of time, it was *held* that since pltf. had proved that the cleaning system established by deft. for the removal of orange peel & other refuse from the stairs was not properly carried out & had not been properly functioning for more than an hour prior to the accident & that pieces of orange peel had been allowed to be during the whole of that time on the stairs on which he slipped & fell upon

an orange peel, he had proved enough to shift the onus to deft. of proving that the particular piece of orange peel upon which he slipped was not there by its negligence & that it was blameless in respect of the cause of the accident; & since deft. did not satisfy this onus, it was liable.—*EDGIE v. WOODWARD STORES, LTD.*, [1936] 1 W. W. R. 502; 50 B. C. R. 403.—CAN.

#### PART II. SECT. 1, SUB-SECT. 2.—B. (i).

sb. *Public Library Board.*—*Held*: liable for injury sustained by pltf., by a fall upon an icy step of the public library building, which she was leaving after exchanging books in the library.—*NICKELL v. CITY OF WINDBOR*, [1927] 1 D. L. R. 379; 59 O. L. R. 618.—CAN.

#### PART II. SECT. 1, SUB-SECT. 2.—C.

268 iv. ———.]—Pltf., looking for employment, came by permission of defts. foreman upon their premises during the erection thereon of a building, & spoke to the foreman at the foot of a stair. The foreman told him to wait there, or wait where he was & he would see about him. Pltf. was injured by a piece of wood, part of an open hoist, which some time afterwards fell upon him when he was in another part of the premises:—*Held*: although pltf. was an invitee, the invitation to remain was limited, & did not justify him in leaving the place indicated & going to another part of the premises where there was danger; he had no right to be where he was when struck & defts. in the circumstances owed him no duty.—*AZZOLE v. YATES CONSTRUCTION Co.*, [1928] 1 D. L. R. 233; 61 O. L. R. 416.—CAN.

268 v. ———.]—It would be imposing too great a liability on a landowner who permits his premises to be used as a picnic ground, in the hope of profit, to hold him liable for a disaster to a child whose parents permit him, not merely to bathe upon the safe beach in front of the picnic grounds, but to stray away to a danger in front of adjacent premises where he could not be supposed to be invited to disport himself.—*DRINKWALTER v. MORAND*, [1929] 4 D. L. R. 421; 64 O. L. R. 124.—CAN.

#### PART II. SECT. 1, SUB-SECT. 3.—A.

285 ii. ——— *Children walking along track.*—*ACADIA COAL CO. v. MCNEIL*, [1927] 3 D. L. R. 871; [1927] S. C. R. 497; 33 Can. Ry. Cas. 49.—CAN.

287 i. *Guests.*—Pltf.s, who were gratuitous passengers in deft.'s motor car, were injured in a collision between it & another motor car. The trial judge found negligence on the part of deft. & awarded both pltf.s. damages. Deft. appealed:—*Held*: the appeals should be dismissed.—*LECHTZIER v. LECHTZIER, LEVY v. LECHTZIER*, [1931] 1 W. W. R. 425; 1 D. L. R. 1004; 43 B. C. R. 423.—CAN.

287 ii. ———.]—A guest in a car accepts all risks & cannot hold the driver responsible for accidents occurring without any negligence.—*MACKENZIE v. MEYERS*, [1933] 1 D. L. R. 418; *affd.*, [1934] 4 D. L. R. 803.—CAN.

st. *Person driving car in another's drive.*—*Held*: per the Lord Justice Clerk, if it were the law that a person driving a car in another person's avenue was, as a mere licensee, entitled to no higher right than that of protection against hidden dangers or traps, a

291. *Add. Annotations*:—*Consd. Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776. *Refd. Oldham v. Sheffield Corpn.* (1927), 136 L. T. 681.

304. *Add. Annotations*:—*As to* (1) *Consd. Oldham v. Sheffield Corpn.* (1927), 136 L. T. 681; *Refd. Burnham v. Boyer & Brown*, [1936] 2 All E. R. 1165.

307a. —.]—Applts. were members of a stevedores' gang employed to load a steamship from resps. barge *H*. The cargo in the hold of the barge consisted of bicarbonate of soda in bags & soda in kegs on top of the bags. The foreman required the bags to be loaded before the kegs. The kegs were therefore laid along the deck of the barge to enable the bags to be slung on board the steamer by the ship's derricks. After this had been done the crew of the barge replaced the hatch covers on the after portion of the hatch, unsupported by the fore & aft beam. The engineer threw

a sling on one of the hatch covers & applts. placed seven kegs in the sling. When they were moving the eighth keg, the hatch covers gave way & the applts. fell into the hold & were injured. The men knew that it was dangerous & improper to load cargo off the hatch covers:—*Held*: applts. had no cause of action against resps. because: the crew of the *H*. had no authority to invite applts. to use the hatch covers for the purpose for which, or in the way in which, they were used; consequently, applts. in so using the hatch covers were trespassers, & not invitees of resps; even if they were invitees they were guilty of contributory negligence.—*HILLEN & PETTIGREW v. I. C. I. (ALKALI), LTD.*, [1936] A. C. 85; 104 L. J. K. B. 473; 153 L. T. 403; 51 T. L. R. 532; 41 Com. Cas. 29, II. L.

*Annotations*:—*Consd. Honaghan v. Rederiet Forangirene*, [1936] 2 All E. R. 1426. *Refd. Marshall v. Lindsey County Council*, [1935] 1 K. B. 516; *Hanlon v. Port of Liverpool Stevedoring Co.*, [1937] 4 All E. R. 39.

car negligently driven by the owner of the avenue or his servant might, & in the present case did, constitute such a hidden danger or trap.—*BOWIE v. SHENKIN*, [1934] S. C. 459.—*SCOT*.

*sw. Premises rented for musical recital—Person assisting pianist.*—*Deft.* rented its auditorium to *H*. for a musical recital which *H*. was giving, & permitted *H*., without charge, to use it for a rehearsal previous to the recital. *Ptlf.*, *H*'s brother, was, for a fee, which also covered his preparatory work, to assist *H*. as a pianist in the recital. During the rehearsal, while *ptlf.* was playing a piano on the stage of the auditorium, the lens of a spotlight suspended above the piano burst & a piece of broken glass cut his hand. He sued *deft.* for damages:—*Held*: *ptlf.* was a mere licensee of *deft.*, without an interest, *ptlf.* not having entered the auditorium upon business which concerned *deft.* upon *deft.*'s invitation, express or implied. Upon the evidence, the spotlight in question was not a trap or hidden peril within the meaning of the cases.—*HAMBOURG v. T. EATON CO., LTD.*, [1935] S. C. R. 430; 3 D. L. R. 305.—*CAN.*

#### PART II. SECT. 1, SUB-SECT. 3.— B. (a).

288 xiii. —.]—*ACADIA COAL CO. v. McNEIL*, [1927] 3 D. L. R. 871; [1927] S. C. R. 497; 33 Can. Ry. Cas. 49.—*CAN.*

288 xiv. —.]—The driver of a motor car is liable for injuries caused a gratuitous passenger by his negligence in driving the car.—*LIMB & LIMB v. STEWART (B. C.)*, [1929] 2 D. L. R. 349; *revers.*, [1926] 3 D. L. R. 550; 3 W. W. R. 205.—*CAN.*

288 xv. —.]—The driver of a motor car which is travelling behind another car is under the duty to a passenger in his car to anticipate & take reasonable care to avoid the risk which may arise from the driver of the car ahead doing what he should not do, e.g. making a sudden left-hand turn at an intersection without giving any signal of his intention to turn.—*McLEOD v. BOULTER & ATKINS*, [1931] 2 W. W. R. 805; 4 D. L. R. 912; 44 B. C. R. 375.—*CAN.*

288 xvi. —.]—In an action for damages for personal injuries, brought against the magistrates of a burgh as the owners & occupiers of a esplanade, pursuer averred that the esplanade included a granolithic footway; that adjacent to the footway were a number of seats on platforms clear of the footway; that the public were permitted by defenders to have

esplanade was not lighted at night; & that he, while walking on the footway at night, had fallen over a seat placed on the footway, & had been injured. He further averred that he had believed that the footway was free from obstructions, & that all the seats were on the platforms & not on the footway; that he was entitled to expect that the footway would be kept safe for foot traffic, or guarded & lighted if not so; the defenders ought to have known that the seat was in a dangerous position, & in leaving it unlit after dark they were guilty of negligence:—*Held*: as pursuer was merely a licensee, defenders' only duty was not to subject him to a trap & there were no relevant averments of a trap.—*BOLTON v. GOURCOCK MAGISTRATES*, [1932] S. C. 239.—*SCOT*.

#### PART II. SECT. 1, SUB-SECT. 3.— B. (b.)

305 iii. —.]—*HAUSER v. MCGUINNNESS*, [1934] 3 W. W. R. 321; 34 B. C. R. 289.—*CAN.*

306 v. —.]—An occupier of premises is under no duty to a bare licensee to insure that the premises are safe; but he is bound not to create a trap or to permit a concealed danger to exist on the premises which is known to him but is not apparent to the licensee.—*DYMOND v. WILSON*, [1936] 2 W. W. R. 193; *revers.*, [1937] 1 W. W. R. 419; 1 D. L. R. 730.—*CAN.*

306 vi. —.]—A member of the public lawfully using a public park is a licensee with respect at least to portions of the park, & the occupier is liable to such licensee for injury caused by a concealed trap, of which the occupier was aware, situated upon any portion of the park so lawfully used. *Ptlf.* claimed damages from *deft.*, the occupier of a public park, for injury caused to her by her foot slipping into a hole covered by a piece of paper. The hole was in a water table adjacent to a retaining wall, & *ptlf.* after entering the park was proceeding along the water table, which lay between the retaining wall & a garden plot, for the purpose of viewing a procession. At the trial *ptlf.* was non-suited on the ground that no invitation express or implied, was extended to her to use the particular part of the park where she was injured. Upon appeal:—*Held*: the case should have been left to the jury to determine on the evidence whether the right or licensee of *ptlf.* to use the park did in fact extend to the place where the injury was sustained &, if so, whether the injury was caused by a concealed trap of which *deft.* was aware.—

*PETTIET v. SYDNEY MUNICIPAL COUNCIL* (1936), 36 S. R. N. S. W. 125; 53 N. S. W. W. N. 52; 12 L. G. R. 155.—*AUS.*

306 vii. —.]—In an action against the Municipal Council of Sydney evidence was given that *ptlf.* was injured by stepping into a hole in a narrow space between a raised wall & a light iron fence erected round some flower beds in Hyde Park, which is vested in the council under the Public Parks Act, 1912. The hole was in a drainage gutter & would have been plainly visible to any one walking in the vicinity, but for the fact that it had become covered with rubbish & papers, which were wet. A number of other people were sitting near the hole & newspapers were scattered about:—*Held*: there was no evidence upon which the jury were entitled to find that *deft.* was aware that the hole had become covered & a verdict should be entered for *deft.* The *ptlf.*'s counsel asked the trial judge to direct the jury that the council was bound not to expose persons visiting the park to a hidden peril & that if it knew of a danger in the park it must warn them & owed a duty to them not to lay a trap:—*Held*: he had not asked for a direction that *deft.* was liable, if by the exercise of reasonable care it ought to have known of the extent of the danger, & the ct. could not consider the question whether a finding by the jury, that the council had failed to exercise such reasonable care, would have rendered *deft.* liable for the injury sustained.—*PETTIET v. SYDNEY MUNICIPAL COUNCIL (No. 2)* (1936), 13 L. G. R. 24.—*AUS.*

#### PART II. SECT. 1, SUB-SECT. 4.

307 xiv. —.]—The adult *ptlf.*, having business with *defts.*, drove his motor truck into their enclosed premises & left it standing therein. His daughter, the infant *ptlf.*, who had accompanied him, remained seated in the truck. It was struck by a car of *deft.*'s which was pushed over the end of a railway siding. The truck was damaged & the infant *ptlf.* injured:—*Held*: the infant *ptlf.* was a mere trespasser & could not recover.—*BETTTLES v. CANADIAN NATIONAL RYS.*, [1929] 4 D. L. R. 175; 35 Can. Ry. Cas. 309; 64 O. L. R. 211; *revers.*, [1929] 2 D. L. R. 782; 35 Can. Ry. Cas. 305; 63 O. L. R. 537.—*CAN.*

308 iv. —.]—*To whom defence available.*—The defence that the party complaining of negligence was a trespasser at the time he suffered his injury is available only to the owner or occupier of the premises trespassed

309. *Add. Annotation* :—*Consd. Addie R. & Sons (Collieries) v. Dumbreck*, [1929] A. C. 358.

309a. ———.]—A piece of waste land, whose owner was laying it out as a building estate, adjoined the highway & was unfenced, & the children of the neighbourhood, without any licence to do so, used it as a playground. On the land there was a large elm tree, & by a contract between the owner & deft., who was a nurseryman, the latter undertook to fell the tree. On the day on which the tree was expected to fall there were many children on the land, & deft. or his assistant more than once drove them back from the tree. At 5.15 p.m. the tree was held up by one root only, & deft., knowing that when that root was cut the tree would fall within two minutes & without giving any further warning to the children, cut that last root, whereupon the tree fell & in its fall hurt pltf., a boy ten years of age. In an action in the county ct. by pltf. against deft. for personal injuries the judge found that deft. had been guilty of negligence in not warning the children that the tree was about to fall, & that pltf.'s injuries were due to that negligence; but he further found that pltf. was a trespasser on the land, & on that ground he gave judgment for deft. On appeal :—*Held* : deft. owed a duty even to a trespasser not to do any act, which would alter the condition of the land & might injure him,

without giving him warning; the judge in finding that deft. had been negligent had found that he had committed a breach of that duty towards pltf., though a trespasser; & pltf. was entitled to judgment.—*MOURTON v. POULTER*, [1930] 2 K. B. 183; 99 L. J. K. B. 289; 143 L. T. 20; 35 Com. Cas. 308; *sub nom. MOULTON v. POULTER*, 94 J. P. 190; 46 T. L. R. 256; 74 Sol. Jo. 170.

*Annotations* :—*Distd. Hillen v. I. C. I. (Alkali), Ltd.*, [1934] 1 K. B. 455. *Refd. Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.

310a. ——— *Felling tree.*]—*MOURTON v. POULTER*, No. 309a, *ante*.

312. *Add. Annotations* :—*Consd. Daniel v. Rickett Cockerell & Co.*, [1938] 2 K. B. 322. *Refd. Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.

315. *Add. Annotation* :—*Refd. Cunard v. Anti-fyre, Ltd.*, [1933] 1 K. B. 551.

321. *Add. Annotation* :—*Refd. Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776.

322. *Add. Citations* :—136 L. T. 681; 91 J. P. 69; 25 L. G. R. 94.

*Add. Annotation* :—*Distd. Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776.

334. *Add. Annotation* :—*Refd. Collingwood v. Home & Colonial Stores, Ltd.*, [1930] 3 All R. 200.

upon.—*COBURN v. SASKATOON CITY*, [1935] 1 W. W. R. 392; 2 D. L. R. 810.—CAN.

## PART II. SECT. 1, SUB-SECT. 6.

d i. ——— *Window broken by negligence of servants.*]—Defta. were the occupiers of a building abutting on the street. Two servants of defts. were engaged on the third floor of the building in moving a large table by means of an electric hoist. Overlooking the street on this floor was a window, half of which was projecting over the street, having been opened to give the table more play. One servant was holding the table top, & the other servant was working the hoist. At a time when the table was suspended in the air, the foot of the servant holding the table slipped, & in consequence the table struck that half of the window projecting over the street. The window was broken & the glass fell on pltf. passing in the street below & injured him. The other windows on this floor of the building had been broken on previous occasions by rolls of linoleum whilst being moved by the electric hoist.—*Held* : pltf.'s injuries were caused by the negligent use & management of defts.' property by their servants, & that such negligence was the effective cause of pltf.'s injuries.—*MORE v. EDWARDS & LAMB*, [1929] S. R. (Q.) 171.—AUS.

d ii. ——— *Dead tree falling on highway.*]—The occupier of land on which there is standing a dead tree which had grown there naturally & which is not overhanging his boundary is not liable to a person who while on the adjoining highway is injured by the falling of the tree across the highway.—*PATTERSON v. BOARD OF SCHOOL TRUSTEES OF NORTH VANCOUVER*, *PATTERSON v. CANADIAN ROBERT DOLLAR CO.*, [1929] 3 D. L. R. 33; 2 W. W. R. 181; 41 B. C. R. 123.—CAN.

d iii. ——— *Snow falling off roof.*]—Pltf., while walking on the street in front of a building owned by deft. was struck on the head by snow which slid off the roof. Deft. knew that snow had

accumulated on the roof & that if it was not removed it would slide on to the street; & it gave orders to its caretaker with respect thereto which, apparently, were not carried out.—*Held* : these was a duty on deft.; it was negligent in discharging that duty; & that negligence caused the accident.—*ZIEMER v. COLUMBUS HALL ASSOCN., LTD.*, [1935] 3 W. W. R. 33.—CAN.

sx. *Unguarded excavation on property—Property unfenced from sidewalk.*]—Deft. owned a property at the corner of F. Street & First Avenue. There was a fence along F. Street but no fence on First Avenue. There was an unguarded excavation on the property intended for the basement of a house, about two feet from the line of F. Street & about twenty feet from the line of First Avenue. On a dark & foggy night pltf., who was a stranger in the town, was walking to his home. He missed his way on First Avenue where there was no sidewalk, fell into the excavation & was injured.—*Held* : as there was no fence, pltf. in straying upon deft.'s land was not a trespasser, & there was a duty upon deft. not to maintain a trap such as this excavation. Pltf. was therefore entitled to recover.—*BLANCHARD v. VAUGHAN* (1930), 42 B. C. R. 446.—CAN.

sz. *Structure erected over highway.*]—There is no absolute liability on a builder who erects a structure over a public highway to compensate any member of the public who is injured by some part of the structure falling upon & injuring him.

Where pltf. had been injured on a Sunday by the falling of a pole used as a prop by a builder to support a framework into which concrete had been poured to form a verandah projecting from a building & the evidence showed that when work was discontinued by the builder's servants on the Saturday the props were all in order, but that the pole in question had thereafter become loosened through some outside agency prior to the accident :—*Held* : the builder had not been negligent in the erection of the

props; further, inasmuch as the props were not *per se* dangerous to the public it was not the duty of the builder to adopt the unusual course of having a watchman on the works during the week-end to look after the props.—*COLMAN v. DUNBAR*, [1933] App. D. 141.—S. AF.

so. *Defective stonework on building—Natural disintegration.*]—Pltf. was in possession of a car under a hire-purchase agreement. The car was standing on a public road at a conveyance stand when an ornamental stone structure of the building near by broke off & fell on the car damaging it. In a suit to recover damages for negligence against the owner of the building :—*Held* : deft. was not liable, as the fall was due to an internal flaw which led to a gradual disintegration of the inside material of the stone, & this was not capable of being easily detected.—*D'SOUZA v. CASSAMILLY* (1933), 1 L. R. 58 Bom. 189.—IND.

sd. *Car in park.*]—A municipality owes no duty to a member of the public in a park to prevent a car parked on high ground from running down into the park.—*RICHARDSON v. TORONTO CITY*, [1938] 1 D. L. R. 795.—CAN.

## PART II. SECT. 2.

st. *Failure to prevent freezing.*]—Where deft., tenant of pltf.'s house, knew that damage from frost was likely to happen if precaution were not taken to prevent the water which he had brought into the house by pipes from freezing, & failed to take reasonable precaution to that end, but, on the contrary, did that which increased the danger & led to the freezing of the water & consequent damage to the demised premises :—*Held* : tenant was liable to the landlord for such injury.—*CONKLEN v. DICKSON* (1917), 40 O. L. R. 460.—CAN.

## PART II. SECT. 3, SUB-SECT. 1.

327 vi. ——— *Application of R. S. O.*, 1927, c. 146.]—An "accidental fire" within above Act does not include a fire which had its origin in negligence,

339. *Add. Annotation:—Generally, Consd. Col-lingwood v. Home & Colonial Stores, Ltd., [1936] 3 All E. R. 200.*

353. *Add. Annotations:—Consd. Bottomley v Bannister (1931), 101 L. J. K. B. 46; McAlister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119; Parker v. Oloxo, Ltd. & Senior, [1937] 3 All E. R. 524. Refd. Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd., [1936] 2 All E. R. 781.*

353a. — Hot water boiler—Heated by gas burner without flue.—Defts., who were builders, sold a house to a purchaser, the contract providing that before conveyance the house was to be completed with a design similar to that of other houses on defts.' building estate & to be fit for habitation. In these houses the hot water for the bath was provided by a kitchen boiler heated by a gas burner with no flue to carry off waste products & with a linen shoot between the kitchen & the bathroom. A similar apparatus was installed by defts. in the house in question, & after the installation the gas co., on behalf of the purchaser, who was already in occupation as a tenant-at-will pending completion, set the regulator at 45 feet an hour, & the apparatus, when so regulated, was perfectly safe. The purchaser or his wife, in all probability, afterwards altered the regulator to 75 feet an hour, which was dangerous, & they were found dead in the bathroom, death being due to the inhalation of carbon monoxide. On behalf of their infant daughter their administrators brought against defts. an action for damages, (a) for breach of a contract to render the house fit for habitation, & (b) for negligently installing the apparatus so that noxious gases or products of combustion would be emitted into the

house. The evidence established that such an installation, properly regulated, was not dangerous, & that defts. had nothing to do with the regulation:—*Held*: (1) since, apart from statutory exceptions which did not apply, a landlord or a vendor of real estate was not, in the absence of express contract, liable to his tenant or purchaser for dangerous defects, & since there was no evidence of the house being unfit for habitation with the apparatus properly regulated, pl'tfs. could not succeed on the ground of contract; (2) since the apparatus as installed by defts. was not dangerous, pl'tfs. could not recover on the ground of tort.—*BOTTOMLEY v. BANNISTER*, [1932] 1 K. B. 458; 101 L. J. K. B. 46; 146 L. T. 68; 48 T. L. R. 39, C. A.

*Annotations:—Consd. McAlister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119; Otto v. Bolton & Norris, [1936] 1 All E. R. 960; Perry v. Sharon Development Co., [1937] 4 All E. R. 390.*

354. *Add. Annotations:—Consd. Bottomley v. Bannister (1931), 101 L. J. K. B. 46; McAlister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119. Refd. Wray v. Essex County Council, [1936] 3 All E. R. 97.*

355. *Add. Annotation:—Refd. Bromiley v. Collins, [1936] 2 All E. R. 1061.*

356. *Add. Annotations:—Refd. Bottomley v. Bannister (1931), 101 L. J. K. B. 46; Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd., [1936] 2 All E. R. 781.*

359. *Add. Annotations:—Consd. Langham v. Wellingborough School Governors & Fryer (1932), 147 L. T. 91. Refd. Wray v. Essex County Council, [1936] 3 All E. R. 97.*

361a. —.—The law seems to be (1) if a barge which has carried petrol is an article dangerous in itself, it is the duty of the owners to take proper & reasonable precautions to prevent its doing damage to people likely to come in

but is confined to the case of a fire produced by mere chance, or incapable of being traced to any cause.—*MCMAULIFFE v. HUBBELL*, [1931] 1 D. L. R. 835; 66 O. L. R. 349.—*CAN.*

#### PART II. SECT. 3, SUB-SECT. 2.—A.

342 xvi. —.—Deft. who set fire to orchard prunings & brush which he had piled up on his land, held to have been negligent in failing to take proper precautions to see that the fire did not get beyond his control to the injury of pl'tf.'s adjoining property.—*MARSHALL v. HUTTON*, [1928] 2 W. W. R. 33.—*CAN.*

342 xvii. —.—*McRURY v. DOMINION COAL CO., LTD.* (1896), 40 N. S. R. 89.—*CAN.*

342 xviii. —.—When a fire is caused by negligence on uncleared arable and damages are to be assessed on the ordinary principle that pl'tf. is entitled to have the difference in value to him of the property before & after the fire. Damages allowed should take into account the extra cost of clearing, loss of productivity, & loss of feed, & against these should be offset any advantages arising, such as the sale of timber partially burnt & any deductions such as the restoration of the land to its original condition by natural growth before there is a likelihood of its being used for farming purposes.—*GENDERS v. SOUTH AUSTRALIAN RYS. COMR.*, [1928] S. A. S. R. 273.—*AUS.*

342 xix. —.—Destruction of a barn from fire caused by the escape of a spark from burning refuse on deft.'s

land held to be caused by deft.'s negligence.—*DICKIE v. BRIDGES*, [1935] 2 D. L. R. 809; 8 M. P. R. 352.—*CAN.*

#### PART II. SECT. 5, SUB-SECT. 2.—A.

353a 1. *Whether article dangerous.—Hot water boiler—Heated by gas.*—Pl'tfs. sued P. Co. & O. Co. for damages for injury to one of them (wife of the other) alleged to have been caused by escape of gas from P. Co.'s premises (which were in the building as pl'tfs.' premises). O. Co. had, five years before the alleged injury, installed gas before the alleged injury, installed gas appliances in P. Co.'s premises, & it supplied gas to P. Co. At the trial the jury found that pl'tf. was injured by gas; that it escaped from gas appliances on P. Co.'s premises; that P. Co. had not satisfied the jury that it was not guilty of negligence causing or contributing to the escape; that O. Co. did not take the precautions it ought to have taken in installing & maintaining the gas appliances; that its failure to take such precautions caused or contributed to the causes of the injury; that O. Co. was guilty of negligence in the installation or maintenance, causing in whole or in part the injury, "in failing to install fume pipe on boiler when said boiler was installed"; that there was a verbal agreement between P. Co. & O. Co. "to install the aforementioned boiler & maintain same in good order"; that the coa. failed to observe the terms of such agreement "by not insisting on the installation of fume pipe on boiler at the time said boiler was installed"; that O. Co.'s failure to observe its agreement caused or con-

tributed to the causes of the injury; & assessed damages. Judgment was given against both defts.:—*Held*: there should be a new trial.—*DOZOIS v. PURE SPRING CO., LTD. & OTTAWA GAS CO.*, [1935] S. C. R. 319; 3 D. L. R. 384.—*CAN.*

d 1. —.—Action by a landlord against the tenant of a dwelling-house for damage to the house caused by explosion & fire. No certain evidence as to the cause of the explosion or fire was given, but deft. admitted that, in his opinion, the explosion was caused by contact between gasoline & an electric heater in the basement, & nowhere in the pleadings or in the evidence was any alternative cause for the explosion or fire alleged or suggested. Deft. had brought five gallons of gasoline on to the premises for the use of his wife in drycleaning curtains owned by her & used in a store occupied by her for her separate business. He knew that the use of gasoline for drycleaning was dangerous but he did not take any precautions to minimise the risk. The bringing of such a quantity of gasoline into the house was a violation of a city bye-law:—*Held*: independently of the covenants in the lease & of any negligence by his wife, deft. had violated his general duty to his landlord to guard against damage to the house from its use for purposes beyond those incident to its natural & ordinary use as a dwelling. Moreover, his duty to the landlord was, under all the circumstances, an absolute one.—*CHAMBERLIN v. SPERRY*, [1933] 3 W. W. R. 74; [1934] 1 D. L. R. 189.

contact with it. These precautions may be fulfilled by entrusting it to a competent person with reasonable warning of its dangerous character, if that danger is not obvious. If such precautions are not taken, the owner will be liable to third persons with whom he has no contract for damage done by the barge, which they could not have avoided with reasonable care; (2) If the barge which has carried petrol is not dangerous in itself, but becomes dangerous because it has been insufficiently cleaned, & the owner is ignorant of the danger, the owner is not liable for damage caused by it to persons with whom he has no contract; (3) In the case of a thing dangerous in itself, where either the danger is obvious or the owner has given proper warning to the person entrusted with it, not being his servant, the owner is not liable for negligence of such person causing injury to a third party; such negligence is *nova causa interveniens* (SCRUTTON, L.J.).—HODGE & SONS v. ANGLO-AMERICAN OIL CO. (1922), 12 Ll. L. Rep. 183.

**Annotations:**—*Consd.* Bottomley v. Bannister, [1932] 1 K. B. 458; McAllister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119. *Refd.* Howard v. Furness Houder Argentine Lines, Ltd. & Brown, Ltd., [1936] 2 All E. R. 781.

**361b.** —.]—TAYLOR (J.) & SONS, LTD. v. UNION-CASTLE MAIL S.S. CO., LTD. (1932), 48 T. L. R. 249; 76 Sol. Jo. 148.

**361c.** —.]—Pltf.'s husband, who was a dust collector employed by a local authority, was asked by deft.'s wife to take away with the refuse from deft.'s house a metal cylinder which in fact contained gas but which deft. did not know to be dangerous. The cylinder was put in a pail at the back of the dust-cart & soon afterwards it exploded & caused fatal injuries to pltf.'s husband. In an action for negligence the jury found that the death of pltf.'s husband was caused by the handling of the cylinder, & the judge held that in view of the small quantity of gas in the cylinder it was not dangerous in the condition in which it was handed over to the dustman, & he gave judgment for the deft.:—*Held:* as there was evidence to support the judge's decision it must be affirmed.—PATTENDON v. BENEY (1934), 50 T. L. R. 204; 78 Sol. Jo. 121, C. A.

**364.** *Add. Annotations:*—*Consd.* Bottomley v. Bannister, [1932] 1 K. B. 458; McAllister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119. *Apld.* Pattendon v. Beney (1933), 50 T. L. R. 10.

**364a.** —.]—By Scots & English law alike the manufacturer of an article of

food, medicine, or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.—M'ALISTER (OR DONOGHUE) v. STEVENSON, [1932] A. C. 562; 101 L. J. P. C. 119; 147 L. T. 281; 48 T. L. R. 494; 76 Sol. Jo. 396; 37 Com. Cas. 350, H. L.

**Annotations:**—*Distd.* Farr v. Butters Bros. & Co., [1932] 2 K. B. 606. *Consd.* Pattendon v. Beney (1933), 50 T. L. R. 10. *Apld.* Malfroot v. Noxal, Ltd. (1935), 51 T. L. R. 551. *Distd.* Evans v. Triplex Safety Glass Co., [1936] 1 All E. R. 283; *Apld.* Grant v. Australian Knitting Mills, Ltd., [1936] A. C. 85. *Consd.* Otto v. Bolton & Norris, [1936] 1 All E. R. 960; Kubach v. Hollands, [1937] 3 All E. R. 907; Barnes v. Irwell Valley Water Board, [1938] 2 All E. R. 650; Dransfield v. British Insulated Cables, Ltd., [1937] 4 All E. R. 382; Square v. Model Farm Dairies (Bournemouth), Ltd., [1938] 2 All E. R. 740. *Refd.* Cunard v. Antifire, Ltd., [1933] 1 K. B. 551; Bishop v. Consolidated London Properties, Ltd. (1933), 102 L. J. K. B. 257; Brown v. Cotterill (1934), 51 T. L. R. 21; Haynes v. Harwood, [1935] 1 K. B. 146; Howard v. Furness Houder Argentine Lines, Ltd. & Brown, Ltd., [1936] 2 All E. R. 781; London, Midland & Scottish Ry. Co. v. Ribbles Hat Works, Ltd. (1936), 80 Sol. Jo. 1038.

**364b.** —.]—**Defect discoverable on examination—and discovered by injured party.**—Crane manufacturers sold a crane in parts to a firm of builders, the arrangement being that the parts were to be assembled by the builders' men. The builders had in their employment an experienced crane erector, who in assembling the parts found that certain cog-wheels worked stiffly, did not fit accurately, & required to be remedied; he accordingly marked in chalk the places where there was inaccurate fitting, saying at the same time that he would have to report the matter to his employers. Before the defects so discovered had been remedied the erector began working the crane, & while he was so engaged a part of it fell & killed him, the fall being due to the defects above mentioned. In an action by his widow under Fatal Accidents Act, 1846 (c. 93), against the manufacturers of the crane:—*Held:* the defects being discoverable on reasonable inspection, & having in fact been discovered by the deceased man, the manufacturers owed him no duty & were not liable for the accident.—FARR v. BUTTERS BROS. & CO., [1932] 2 K. B. 606; 101 L. J. K. B. 768; 147 L. T. 427, C. A.

**Annotations:**—*Consd.* Otto v. Bolton & Norris, [1936] 1 All E. R. 960; Dransfield v. British Insulated Cables, Ltd., [1937] 4 All E. R. 382.

**364c.** —.]—Defts. were the manufacturers of a bull-ring, a ring through

**362 i. Liability of manufacturer of dangerous article.**—To warn purchaser of dangerous character—Liability to third party—Article dangerous in itself.]—Where the vendor of a chattel, in this case a firework, which belongs to the dangerous class delivers it with a proper warning to recipient, he owes no further duty to the person who receives it from the recipient, nor, where the danger is apparent on the face of the thing, does he owe a greater duty with regard to the manufacture of the article than if it was not a dangerous thing in itself.—BROWNLEE v. HAND FIREWORK CO., [1931] 1 D. L. R. 127; 65 O. L. R. 646.—CAN.

**364 i.** —.]—Article dangerous owing to unknown defect.]—Pltf. alleging that his health had been in-

jured as the result of his drinking part of the contents of a bottle of coca cola which contained a deleterious substance, brought an action for damages against the manufacturer. The bottle had been purchased from a retailer who had obtained it from the manufacturer, & it was capped in a way that showed the manufacturer intended it to reach the consumer unaltered; it had not been tampered with & there were no means of inspection which could disclose the alleged danger from the time it was distributed by the deft. to the retailer until it reached pltf. Caustic soda in solution was used by deft. in cleaning the bottles before filling them, & pltf. alleged that through deft.'s negligence the soda was intermingled with the beverage & thus rendered it poisonous. Pltf. contended that upon proof

that the bottle contained caustic soda, that the beverage was manufactured & bottled by deft. & distributed by him for consumption, & that injury to pltf. had ensued upon drinking of its contents, the principle of *res ipsa loquitur* applied. Verdict for deft. Appeal dismissed.—WILLIS v. COCA COLA CO. OF CANADA, LTD., [1934] 1 W. W. R. 145; 2 D. L. R. 173; 47 B. C. R. 481.—CAN.

**364 ii.** —.]—A dairy co. is liable to a consumer for chips of glass contained in a bottle of milk purchased from a dealer, & the dealer is liable for breach of implied warranty under Sale of Goods Act.—SHANDLOFF v. OTTY DAIRY, [1936] 4 D. L. R. 719; O. R. 579; 6 F. L. J. (Can.) 166.—CAN.



which an overhead trolley-wire passed, & which had been supplied to a local authority to be used in their overhead system of wires. An employee of the local authority, while working on the wires, was knocked from a wagon & killed by the breaking of the ring. The ring had not at any time been subjected to any test, either by defts. or by the corpn. Pltf., the widow of the employee, sued defts., alleging that the breaking of the ring was due to the negligence of defts. She also sued as administratrix of her husband, & as such, claimed damages for his loss of expectation of life:—*Held*: (1) although defts. were negligent in the manufacture of the ring, & such negligence was the cause of the accident, there was an opportunity for intermediate examination of the ring by the local authority, which examination would have disclosed the defect. Defts. as manufacturers of the ring were not, therefore, liable in damages to pltf.; (2) if defts. had been liable, the damages for the loss of expectation of life would have been £500, & this sum, under the Administration of Estates Act, 1925 (c. 23), s. 46, would be the absolute property of the widow.—*DRANSFIELD v. BRITISH INSULATED CABLES, LTD.*, [1937] 4 All E. R. 382; 54 T. L. R. 11; 82 Sol. Jo. 95.

**364d.** ———.—[Applt., who contracted dermatitis of an external origin as the result of wearing a woollen garment which, when purchased from the retailers, was in a defective condition owing to the presence of excess sulphites which, it was found, had been negligently left in it in the process of manufacture, claimed damages against both retailers & manufacturers. The presence of the deleterious chemical in the garment was a hidden & latent defect, & could not be detected by any examination that could reasonably be made; nothing happened between the making of the garment & its being worn to change its condition; & the garment was made by the manufacturers for the purpose of being worn exactly as it was worn in fact by applt.:—*Held*: those facts established a duty to take care as between the manufacturers & applt. for the breach of which the manufacturers were liable in tort. The principle of *M'Alister v. Stevenson*, No. 364a, can be applied only where the defect is hidden & unknown to the customer or consumer. The liability in tort was independent of any question of contract.—*GRANT v. AUSTRALIAN KNITTING MILLS, LTD.*, [1936] A. C. 85; 105 L. J. P. C. 6; 154 L. T. 18; 52 T. L. R. 38; 79 Sol. Jo. 815, P. C.

*Annotations*:—*Distd. Evans v. Triplex Safety Glass Co.*, [1936] 1 All E. R. 283; *Howard v. Furness Houder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781; *Kubach v. Hollands*, [1937] 3 All E. R. 907. *Consd. Dransfield v. British Insulated Cables, Ltd.*, [1937] 4 All E. R. 382.

**364e.** ———.—*Onus of proof.*—[Pltf. bought a motor car fitted with a "Triplex Toughened Safety Glass" windscreen of defts.' manufacture. When the car was being used, about a year after the date of purchase, the windscreen suddenly & for no apparent reason broke into many fragments & injured the occupants of the car:—*Held*: in these circumstances the manufacturers were not liable in damages, for the following

reasons: the lapse of time between the purchase of the car & the occurrence of the accident; the possibility that the glass might have been strained when screwed into its frame; the opportunity for examination by the intermediate seller; & the breaking of the glass might have been caused by something other than a defect in manufacture.—*EVANS v. TRIPLEX SAFETY GLASS CO., LTD.*, [1936] 1 All E. R. 283.

**364f.** ———.—*Goods not tested by retailer.*]

—A schoolgirl was carrying out a chemical experiment with chemicals supplied by the teacher of the chemistry class, when an explosion occurred whereby she was severely injured. The experiment was one for the making of oxygen by heating a mixture of potassium chlorate & manganese dioxide, a perfectly harmless experiment. The teacher had purchased the chemicals from the second defts., receiving as manganese dioxide a black powder so labelled in a packet. In fact the black powder was a mixture of antimony sulphide & manganese dioxide, indistinguishable from manganese dioxide to the eye, but dangerous when heated with potassium chlorate. The second defts. had purchased this powder as manganese dioxide from the third party, whose invoice stated: "The above goods are accurate as described on leaving our works but they must be examined & tested by user before use. The above goods are not invoiced as suitable for any purpose but they are of the nature & quality described." The second defts. had carried out no test on the powder & had not advised the teacher that an examination or test would be advisable. The second defts. knew that the powder would be used for the purpose of school experiments, but they had not told the third party that the powder might be so used. The schoolgirl recovered damages, in an action for negligence, from the second defts., who sought an indemnity or contribution from the third party:—*Held*: (1) as the third party had no notice of the intended user of the powder, which might have been resold for a variety of purposes or in innocuous compounds or mixtures, & as the second defts. had not carried out a test, as the invoice prescribed, & which the second defts. had ample opportunity for doing, the third party was not liable to indemnify the second defts.; (2) as the third party could not have been successfully sued by the schoolgirl, the third party was not liable to contribute as a joint tortfeasor.—*KUBACH v. HOLLANDS*, [1937] 3 All E. R. 907; 53 T. L. R. 1024; 81 Sol. Jo. 766.

*Annotation*:—*As to (1) Consd. Dransfield v. British Insulated Cables, Ltd.*, [1937] 4 All E. R. 382.

—[Pltf. had been in the habit of having her hair dyed with henna at the second deft.'s shop. The second deft. suggested that pltf.'s hair should be dyed with Oloxo, a dye which she described as harmless, & which was prepared by & bought by the second deft. from the first deft. Pltf. raised objections to the use of such a dye but was assured it was safe to use. Pltf. as the result of the use of the dye had an acute attack of dermatitis & nervous trouble. The first deft. by its agent had warranted the dye as safe, but for trade reasons it had supplied the second deft.



through a wholesale hairdressers' sundriesman. A booklet was issued with the dye which stated it was dangerous if used without a skin test; but no warning was given to the second deft. as to the danger. A certain quantity of the dye being purchased by the second deft., she was entitled to & did attend certain lectures & demonstrations given on behalf of the first deft. & the lecturer upon behalf of the co. stated that the co. would indemnify hairdressers using this dye against claims arising out of its use:—*Held*: (1) pltf. was entitled to recover against the second deft. in contract; (2) pltf. was entitled to recover against the first deft. in tort; (3) the second deft. was entitled to recover from the first deft. damages for breach of contract & those damages were the damages the second deft. had to pay to pltf. in this action & her costs of the action; (4) the indemnity given at the lectures was not made at such a time that it could be considered a part of the contract with the second deft.—*PARKER v. OLOXO, LTD. & SENIOR*, [1937] 3 All E. R. 524.

**364h.** —.]—A husband & wife sued the manufacturers & the retailer of a bottle of lemonade for damages for injuries received by reason of the fact that the bottle contained thirty-eight grains of carbolic acid in addition to the lemonade. Both pltf.s., in suing the manufacturers, relied upon the doctrine enunciated in *M'Alister (or Donoghue) v. Stevenson*. The husband, who in fact purchased the bottle of lemonade, in suing the retailer alleged that the implied conditions as to quality & fitness in the Sale of Goods Act, 1893 (c. 71), s. 14, had not been fulfilled. It was found as a fact that the manufacturers, by adopting a fool-proof process & by carrying out that process under proper supervision, had taken reasonable care to see that there was in the lemonade no defect which would injure the pltf.s. It was also found as a fact that the husband asked for & received a bottle of the manufacturers' lemonade, mentioning the manufacturers by name:—*Held*: (1) the duty owed by the manufacturers to the consumer was not to ensure that their goods were perfect, but merely to take reasonable care to see that no injury was done to the consumer or ultimate purchaser, & this duty they had completely fulfilled; (2) the husband did not, in the circumstances, rely upon the skill or judgment of the retailer, & could not recover under the Sale of Goods Act, 1893 (c. 71), s. 14 (1), but there was a sale by description, & therefore, a breach of the implied condition that the goods should be of merchantable quality, & he could recover under the Sale of Goods Act, 1893 (c. 71), s. 14 (2).—*DANIELS & DANIELS v. WHITE & SONS, LTD., & TARBARD*, [1938] 4 All E. R. 258; 82 Sol. Jo. 912.

**364j.** — To retailer—Sale through sundriesman.]—*PARKER v. OLOXO, LTD. & SENIOR*, No. 364g, *ante*.

**364k.** — — Lectures on use—Indemnity.

*PARKER v. OLOXO, LTD. & SENIOR*, No. 364g, *ante*.

**364l.** Liability of repairer of dangerous article.]—While the male pltf., the owner of a motor cycle to which a few days previously defts. had fitted a sidecar, was driving the combination along a public road the sidecar became detached from the motor cycle. Both the male pltf., & the female pltf. who was a passenger in the sidecar, sustained personal injuries. In an action for damages:—*Held*: defts. were guilty of negligence in fitting the sidecar to the motor cycle, that they were liable to the male pltf. in contract & in tort, & to the female pltf. in tort.—*MALFROOT v. NOXAL, LTD.* (1935), 51 T. L. R. 551; 79 Sol. Jo. 610.

*Annotation*:—*Consd. Dransfield v. British Insulated Cables, Ltd.*, [1937] 4 All E. R. 382.

**364m.** —.]—Pltf. was working as an electric welder in a boiler of a steamship when an explosion occurred & steam came in through the furnace door. After one vain attempt he succeeded in making his way through the door. He was badly scalded but suffered far more from shock & was rendered neurasthenic. The escape of steam was due to the fact that in a valve chest a bridge, in which a brass bush fitted, had been put in upside down. The valve had been assembled & fitted by the second defts. Pltf. alleged that both defts. were negligent in that the valve chest was made of cast iron. Against the first defts. he alleged negligence in not taking sufficient precautions against water hammer by securing effective drainage of the steam pipes, & that having brought the steam upon the ship they were liable under the principle of *Rylands v. Fletcher* for not keeping it under control. Against the second defts. he alleged negligence in wrongly assembling & fitting the valve chest, contending that though there was no privity of contract they were liable in tort for supplying a dangerous article:—*Held*: there was no negligence in using a valve chest made of cast iron; there was no negligence in the shipowners in not having an improved system of drainage of the steam pipes to exclude the possibility of water hammer; the doctrine of *Rylands v. Fletcher* was not applicable because there was no escape of the steam off the premises & the steamship owners were not making an unnatural user of their premises; the defective bridge was not a source of danger which the first defts. knew or ought to have known, & they were not liable to pltf. as invitee or licensee; in reassembling the valve with the bridge upside down the second defts. by negligent repair converted an article not dangerous in itself into a dangerous article & they knew of the danger which they were so creating. This imposed upon them a liability for injuries caused to pltf., altogether apart from their liability arising out of their contract with the first defts.—*HOWARD v. FURNES HOULDER ARGENTINE LINES, LTD., & BROWN, LTD.*, [1936] 2 All E. R. 781; 80 Sol. Jo. 554; 41 Com. Cas. 290.

## Part III.—Negligence in relation to Highways.

**382a. Motor-car mounting pavement.]**—Where a motor-van gets on to a pavement intended for foot-passengers & injures persons standing there, these facts, in the absence of explanation, constitute evidence of negligence.—*ELLOR v. SELFRIDGE & Co., LTD.* (1930), 46 T. L. R. 236; 74 Sol. Jo. 140.

*Annotations:—*Consd. *Hunter v. Wright*, [1938] 2 All E. R. 621. *Refd.* *Halliwell v. Venables* (1930), 99 L. J. K. B. 353, C. A.

**382b.** —.]—A skid is a sufficient explanation to negative the suggestion of want of care in the case of a car mounting the pavement.—*HINTON v. GILCHRIST* (1930), *The Times*, March 8, 1930, D. C.

**382c.** —.]—Deft. was driving a motor car when it skidded, & subsequently mounted the pavement & injured pltf., who was walking thereon. It was found that the skid was not due to any negligence on the part of deft., but it was contended that she had been negligent (i) in steering the wrong way to correct the skid, & (ii) in accelerating after the skid. Shortly before the accident, she had practically stopped at a pedestrian crossing, & was accelerating when the skid occurred. The speed of the car was estimated at 16 to 20 miles per hour, & the car travelled 13 ft. to 20 ft. between the skid & the pavement:—*Held*: the time & space at the dis-

posal of deft. in which to remedy the skid were so short that, it being proved that the skid was not due to any fault of hers, she had discharged the onus of showing how her car came to be on the pavement, & could not be said to have been in any way to blame for the accident.—*HUNTER v. WRIGHT*, [1938] 2 All E. R. 621, C. A.

**385. Add. Annotation:—***Refd.* *Square v. Model Farm Dairies* (Bournemouth), Ltd., [1938] 2 All E. R. 740.

**389a. Inability to pull up within limits of vision.]**—It seems to me that when a man drives a motor car along the road he is bound to anticipate that there may be things & people or animals in the way at any moment, & he is bound to go not faster than will permit of his stopping, or deflecting his course, at any time to avoid anything he sees, after he has seen it. If there is any difficulty in the way of his seeing, like a fog for instance, he must go slower in consequence. In a case like this, where a man is struck without the driver seeing him, the driver, the deft., is in this dilemma; either he was not keeping a sufficient look out, or, if he was keeping the best look out possible, then he was going too fast for the look out that could be kept. I really do not see how it can be said that

### PART III. SECT. 9, SUB-SECT. 1.—B.

**g (p. 59) i. — Driving in fog.]**—The driver of a tramcar when driving in a fog should keep his car under such control that he may stop it within the limits of his vision.—*VANCOUVER ICE & STORAGE Co. v. BRITISH COLUMBIA ELECTRIC Ry. Co.*, [1927] 1 W. W. R. 631; 38 B. C. R. 234.—CAN.

**h (p. 60) i. —**—The driver of a motor vehicle upon city streets may be grossly negligent if his car is travelling at the permitted speed of 20 miles per hour, or even at a much lower rate of speed: what is an excessive rate must depend upon the circumstances of each case. In this case, where there was a collision of motor vehicles at the intersection of two city highways:—*Held*: the driver of the vehicle on the right had not such a clear view of approaching traffic as made it safe to approach the intersection at the rate at which his vehicle was travelling—15 miles an hour or more.—*MARTIN v. POWELL*, *POWELL v. MARTIN*, [1928] 4 D. L. R. 149; 62 O. L. R. 436.—CAN.

**h (p. 60) ii. —**—In ordinary circumstances, if a driver turns out of & across the line of traffic, after giving the usual warning by putting out his hand (although his duty may not be so great as to make sure), he acts negligently unless he has at least reasonable ground, beside the mere fact of his warning, for believing that he can cut across without endangering approaching traffic.—*GREEN v. HARDY*, [1929] S. A. S. R. 58.—AUS.

**h (p. 60) iii. —**—*CAMERON v. McDONALD*, [1931] 1 W. W. R. 731; 2 D. L. R. 978.—CAN.

**u (p. 61) i. —**—*COLLINS v. GENERAL SERVICE TRANSPORT Co.* (B. C.), [1927] 2 D. L. R. 353.—CAN.

**u (p. 61) ii. —**—*SCHONBERNER v. BARRON* (Alta.), [1927] 3 D. L. R. 708; [1927] 2 W. W. R. 417.—CAN.

**u (p. 61) iii. —**—Even though a motor car is travelling on the right-

hand side of the road, the driver is not justified in holding to his course regardless of the consequences, but is bound to exercise reasonable care to avoid injuring others, & owes this duty to the driver of an approaching car even if the latter has not yet complied with the statutory provision requiring him to turn out to the right of the centre of the highway.—*AUDET v. WETSCH*, [1929] 2 D. L. R. 186; 23 S. L. R. 165; [1928] 3 W. W. R. 655.—CAN.

**u (p. 61) iv. —**—A driver of a motor vehicle must expect the presence of other persons & animals on the highway, & his failure to see them in time to avoid running into them may amount to negligence.—*KEATLEY v. SPEARING*, [1931] 2 W. W. R. 309.—CAN.

**u (p. 61) v. —**—Pltf., a pedestrian, was proceeding over a footpath to a gate into a place on a racecourse where motor vehicles parked. A motor car proceeding over the footpath, which at this point was asphalted as a track for motor cars, & into the parking place, ran down pltf. from behind. Pltf. did not see or hear deft.'s car, but before approaching the asphalted track he looked into the motor park & also on to the roadway, but along the direction opposite to which pltf. was approaching. On approaching the gate, he stopped momentarily facing the motor park. The driver of the car gave no sufficient warning, & came from such a direction that the pltf. was entitled to expect a warning. The car was accelerated just before it struck pltf.:—*Held*: deft. was guilty of negligence in driving at an excessive speed, & had disabled himself from avoiding the consequences of pltf.'s default in not keeping a more careful look out.—*RANKIN v. RICHARDS* (1929), S. A. S. R. 100.—AUS.

**384 i. Breach of regulations under Motor Car Acts.]**—The breach of a statutory regulation under Motor Vehicles Act, 1921, which results in damage will usually afford *prima facie* evidence of negligence. *Phillips v.*

*Britannia Hygienic Laundry Co., Ltd.*, [1923] 1 K. B. 539, applied. This rule indisputably applies when the nature of the regulation is such that the breach is calculated to deceive other users of the highway, & so as to create the situation of danger that results in the damage sustained.—*FORBY v. LAUCKE*, [1933] S. A. S. R. 60.—AUS.

**386 x. —**—*SOLOMON v. MUSETT & BRIGHT, LTD.*, [1926] App. D. 427.—S. AF.

**386 xi. —**—A motor truck proceeding westerly upon a highway was about 5 feet from the south kerb, when, as it approached an intersecting highway, it struck a boy riding a bicycle & injured him. In an action to recover damages for the injury from the owner of the truck alleging negligence of the driver, the trial judge directed the jury as a matter of law that they were entitled to find the driver negligent, from the one circumstance that he was on the wrong side of the highway:—*Held*: misdirection, & a new trial was ordered.—*ALLEN v. LORD*, [1928] 4 D. L. R. 62; 62 O. L. R. 433.—CAN.

**386 xii. —**—The driver of a motor vehicle is guilty of negligence in travelling on the left side of the road, without any just excuse for doing so, if he knows or ought to know that by so proceeding he is likely to collide with another vehicle coming from the opposite direction, & under such conditions he is under the duty to use more care & keep a better look out to avoid a collision than would be required of him if he were on his proper side of the road.—*ERICKSON v. KLATT*, [1929] 3 D. L. R. 295; 2 W. W. R. 5; 23 S. L. R. 567.—CAN.

**389 i. Insufficient lighting.]**—In an action for damages resulting from a collision between automobiles the judge found that the real cause of the accident was that deft.'s car was being driven at night with only one lighted headlight. Deft. appealed:—*Held*: said finding was justified & the appeal

there was no negligence in running into the back of a man. If he had had better lights or had kept a better look out, the probability is that the accident would never have happened (ROWLATT, J.).—PAGE v. RICHARDS & DRAPER (1920), cited in 149 L. T. p. 263, D. C.

*Annotation*:—Folld. *Tart v. Chitty & Co.*, [1933] 2 K. B. 453, 389b. —.]—On the road from Basingstoke to Winchester there is a "draw-up" opposite a refreshment hut. A stationary lorry of defts. was drawn up in the roadway opposite the draw-up, & there was a conflict of evidence whether this lorry was showing a rear light. It was a moonlight night, but the

stationary lorry was in shadow. Pltf.'s lorry when driving from Basingstoke to Winchester ran into defts.' stationary lorry. The driver of pltf.'s lorry said that he was unable to see defts.' lorry owing to a beam of light thrown by a third lorry, which was in the draw-up across the road. The jury found a verdict for pltf. & judgment was entered for him. On appeal SCRUTTON, L.J., said that he thought that there was just enough evidence to support the verdict of the jury, namely, that as to the beam of light thrown by the third lorry. The Ct. of Appeal had stated in three cases, as indeed had the Div. Ct., though unfortunately these cases had

should be dismissed.—NEBITT v. CARNEY, [1930] 3 W. W. R. 504; [1931] D. L. R. 106; 25 S. L. R. 129.—CAN.

389 H. —.]—RUBERNUS v. DOW-NARD, [1930] 2 D. L. R. 767.—CAN.

389 III. *Infringement of lighting regulation—No tail light.*—Liability for negligence does not arise solely from the failure to have a red tail light burning.—FALSETTO v. BROWN, [1933] 3 D. L. R. 545; O. R. 645.—CAN.

389a I. *Inability to pull up within limits of vision.*—(1) In an action resulting from a collision at night between a motor car driven by pltf. & a car which, owing to its lights having gone out, had been stopped on the side of the highway without having its rear light burning.—*Held*: the contention of deft. could not be sustained that the mere occurrence of the collision was in itself conclusive evidence that pltf. must have been driving at an excessive speed or not keeping a proper lookout, & that his ultimate negligence in one or other of said respects was the real cause of the accident.

(2) Too much weight should not be placed upon an admission of fault made by a motorist immediately after a collision in which he was injured.—BROCKIE v. MCKAY, [1934] 1 W. W. R. 725; 2 D. L. R. 690; 42 Man. L. R. 39.—CAN.

389a II. —.]—Some time after dark the electric lights of a motor car failed & the driver, while in search of a mechanic to remedy the defect, left the car near the unlighted side of a suburban road. The night had been wet, & the road & a tarpaulin partially covering the road were so similar in colour as to be almost indistinguishable. A motor car proceeding at a speed of twenty to twenty-five miles an hour along the road, with its headlights on but "dipped," collided with the car.—*Held*: the evidence led for pursuer as to the invisibility of the car was credible, & accordingly it was not a necessary inference that pursuer was in fault in not avoiding the accident; also, the accident was due solely to the fault of the driver of the car in leaving his vehicle unlighted so as to be a dangerous obstruction on the road.—SCOTT v. MINTOSH, [1935] S. C. 199.—SCOT.

389a III. —.]—In an action for damages resulting from a collision, about six a.m. on Sept. 25, between deft.'s motor truck & pltf.'s wagon which was stationary on the right hand side of a paved one-way highway.—*Held*: deft., on his own testimony, was either not keeping a proper lookout or had not kept his truck under such control that he could stop within the limits of his vision; &, furthermore, deft., whether or not the wagon was unlawfully on the highway, was negligent in not using the skill & standard of care required of him in controlling the direction his truck was taking. It should be kept

in mind that many of the older automobile collision cases which deal especially with "agony periods & spaces" dealt with brakes & controlling mechanisms for automobiles which were much less efficient than those of the present day.—SHUST v. HARRIS, [1936] 2 W. W. R. 54; 44 Man. L. R. 121.—CAN.

389a IV. —.]—The contention that in *Ristow v. Weinstein*, [1934] S. C. R. 128, the law of Canada, in cases where the driver runs into a stationary object, was settled in accordance with the rule supposed to be laid down in *Tart v. Chitty & Co.*, [1933] 2 K. B. 453; & *Baker v. Longhurst*, [1933] 2 K. B. 461, is disposed of by the judgment of MARTIN, J.A., in *Hall v. West Coast Charcoal & Wood Products Co., Ltd.*, [1935] 2 W. W. R. 134; 50 B. C. R. 18.

In an action by a gratuitous passenger in a motor car for injuries sustained when late on a wet night the car ran into a pile of excavated earth, which was not so lighted or guarded, as it was held it should have been, so that the danger would be plainly obvious under any possible conditions.—*Held*: after referring to the rule that the presence of the trap did not excuse the driver if when he became aware of it, or ought to have become aware of it, he was able by the exercise of ordinary care to avoid it, that he had not been shown to have been negligent.—THOMPSON v. WOOD, [1937] 2 W. W. R. 511; 3 D. L. R. 728; 45 Man. L. R. 307.—CAN.

389a V. —.]—Where a motor driver or rider claims damages for having run into an unlighted obstruction on the road, a verdict in his favour may be upheld where he can prove facts which the ct. thinks might be considered by the jury to offer a reasonable excuse for his failure to see the obstruction in time to avoid it, except where there are circumstances which a jury might reasonably consider to be something in the nature of a trap; &, in New Zealand, in view of the statutory regulations as to lights on motor-vehicles, a pltf. motorist must prove some peculiar or unusual circumstance which would justify a jury in excusing him for such failure.—HANCOCK v. STEWART, [1937] N. Z. L. R. 321; 13 N. Z. L. J. 109.—N.Z.

389a VI. *Failure to give signal—Of intention to turn.*—It is incumbent upon the driver of a vehicle, who desires to change his course & to turn into another street, to give a warning to that effect, & to turn the corner at a pace which will give him complete control over his vehicle.—UYS v. UYS, [1927] App. D. 394.—S. AF.

389a VII. —.]—When deft.'s car was making a right turn at a speed of about 10 or 12 miles an hour through an opening in the ranks of pedestrians crossing an intersection it struck the infant pltf., a girl nine years old, who had run out from the curb without noticing that deft. had made the turn. Deft. had not sounded his horn or

given any other warning.—*Held*: deft. was negligent in going at too high a speed under the circumstances & in not making it known to the infant pltf. that he was turning through the pedestrian traffic. The infant pltf. was also negligent, & the degrees of their respective faults contributing to the accident were equal.—DOBROSKI v. MACKAY, [1938] 2 W. W. R. 47.—CAN.

389a VIII. *Lack of sufficient control.*—The driver of an automobile should have his car under such control that he is able to come to a stop in the space which he sees clear ahead.—MAGILL v. HOLMES (1927), 39 B. C. R. 65.—CAN.

389a IX. *Failure to give notice of intention to cross street.*—BLOW v. MAYLAND (Alta.), [1929] 4 D. L. R. 561.—CAN.

389a X. *Absence of "clear view"—Insufficient headlight.*—RUTTAN v. O'CONNOR-FENTON, [1929] 4 D. L. R. 62; 64 O. L. R. 208.—CAN.

389a XI. *Failure to slow down.*—When a person driving a motor car at night knows that another car is on the road a short distance ahead, & his vision is so interfered with by the lights of an approaching car that he cannot see the location of the car ahead, he is under the duty of slowing down & proceeding with his car under such control as will prevent it from crashing into the car ahead.—FLETCHER v. MULLEN, [1930] 2 W. W. R. 529; 3 D. L. R. 919; 24 S. L. R. 520.—CAN.

389a XII. —.]—No general rule can be laid down as to the duty of a driver of a motor car to stop when the lights of an approaching car interfere with his vision. The circumstances of each case must be carefully examined before concluding that a driver should stop, or almost stop, when his vision for any reason is impaired.—NORTHERN ELECTRIC CO., LTD. v. KELLY, [1931] 3 W. W. R. 527.—CAN.

389a XIII. *Restarting taxi in fog—Passengers not told to alight.*—While a taxicab was being driven in a dense fog astride a street-car rail its engine stalled, & before the driver could start it again the cab was run into by a street car which, despite the warnings of the taxi driver, approached from behind & the passengers in the cab were injured.—*Held*: the fact that the driver did not first get his passengers out of the cab before attempting to get it under way again did not constitute negligence; nor did the driver by driving astride the rail or because of the position of the car after it stalled violate the traffic bye-law relied on by pltf.—NOWELL v. YELLOW CAB CO. LTD., [1930] 1 D. L. R. 491; [1929] 3 W. W. R. 816; 41 B. C. R. 494; *revers.*, [1929] 4 D. L. R. 280; 1 W. W. R. 822.—CAN.

389a XIV. *Failure to keep distance from cars ahead.*—There is no authority for propounding a rule that the failure of the driver of a motor car to keep at a greater distance than six to eight feet from cars ahead of him always

not been reported, that if a driver at night proceeded at such a speed that he could not pull up within the limits of his vision, he was in the wrong. As Lord BRAMWELL had once observed: "If you cannot see where you are going, you must not go." The decision in that case did not weaken the force of these observations.—*EVANS v. DOWNER & Co., LTD.* (1933), 149 L. T. p. 264 n., C. A.

*Annotation*:—*Consd.* Tidy v. Battman (1933), 103 L. J. K. B. 158.

**389c.** —.]—On a dark evening, when it was raining & blowing hard, a Foden steam wagon pulled up, 9 in. from the kerb in a 14 ft. street, that the driver's mate might attend to the rear lamp, which had gone out. The place where the wagon pulled up was very dark. A motor cyclist whose light threw a beam of 15 yds. crashed into the back of the wagon & he was injured. On these facts,

in an action brought by the motor cyclist against the owners of the wagon, the county ct. judge found that defts.' servants were negligent, but that defts. had not shown that pltf. was negligent:—*Held*: there was no evidence upon which a judgment could be founded that pltf. was not guilty of contributory negligence. Either pltf. was not keeping a proper look out or he was travelling at such a speed that he was unable to stop his motor cycle or to swerve so as to avoid the collision.—*TART v. CHITTY (G. W.) & Co., LTD.*, [1933] 2 K. B. 453; 102 L. J. K. B. 568; 149 L. T. 261, D. C.

*Annotations*:—*Consd.* Baker v. Longhurst & Sons, Ltd. (1933), 102 L. J. K. B. 573; Tidy v. Battman, [1934] 1 K. B. 319.

**389d.** —.]—A person driving a motor vehicle at night must drive at such a pace that he can pull up within his limits of vision;

constitutes negligence.—*STANLEY v. NATIONAL FRUIT CO.*, [1929] 3 W. W. R. 522; *revid.*, [1931] 1 D. L. R. 306; S. C. R. 60.—*CAN.*

**so. Car parked for reasonable time.**—The driver of a vehicle has a right to stop temporarily upon a highway to load or unload his vehicle, but this right is limited by the correlative right of others to pass along the highway. The right of the driver so to stop must be exercised reasonably; & whether the length of time or extent of stoppage is reasonable is a question of fact to be determined by the circumstances of each case.—*BRAIN v. CRINNAN*, [1931] 1 D. L. R. 546; 66 O. L. R. 223.—*CAN.*

**sp. No liability to pedestrian appearing suddenly from behind parked cars.**—Def't. driving car had a right to expect that pedestrians would act reasonably; & she had no reason to anticipate that any one would be so foolish as to come out suddenly from between two lines of parked cars without looking to see if there were any moving cars too near, as pltf. did.—*TAYLOR v. AINSIE*, [1931] 3 D. L. R. 26; O. R. 188.—*CAN.*

**sq. Intersection controlled by light signals.**—No liability when pedestrian suddenly disobeys signals.—When the driver of a motor vehicle has the signal lights with him, he knows that they are against pedestrians crossing his path, & he has a right to expect that the signals will be obeyed by them. He must use every precaution to avoid an accident, but he is not in all cases to be regarded as negligent because he fails to observe negligent conduct of a pedestrian.—*HULME v. CREELMAN*, [1931] 1 D. L. R. 682; 66 O. L. R. 360.—*CAN.*

**sr. Driver of one car negligent—Damage caused by driver of second car swerving to avoid accident.**—Liability of first driver.—*TATISICH v. EDWARDS*, [1931] S. C. R. 671; 2 D. L. R. 521.—*CAN.*

**st. Approaching intersection at excessive speed.**—*Held*: pltf. was also negligent in approaching the intersection at an unlawful & excessive rate of speed, namely, about forty miles an hour.—*ANDERSON v. PARNEY*, [1930] 4 D. L. R. 833; 66 O. L. R. 112.—*CAN.*

**su. Crossing arterial road at slow speed.**—When G.'s car was making a left-hand turn into a service station near the top of a hill on an arterial highway a collision occurred with B.'s car which had come over the brow of the hill, which was on G.'s right as he was making the turn. MANSON, J., held that, although G. was negligent in crossing the highway too slowly & in not using his horn, yet the sole cause of the accident was B.'s negligence in coming over the brow of the hill at an excessive speed & in not keeping a proper lookout. On appeal:—*Held*:

the accident was caused by the fault of both drivers & therefore the Contributory Negligence Act, R. S. B. C., 1936, applied, & the apportionment of liability, in the view of the majority of the ct., was G. 70 per cent., & B. 30 per cent.—*BAILEY v. GROGAN & BAILEY, GHOGAN v. BAILEY*, [1938] 1 W. W. R. 520; 2 D. L. R. 313.—*CAN.*

**sv. Glaring headlights.**—*TINKLER v. GOEBEL*, [1931] 2 W. W. R. 413.—*CAN.*

**sb. —.**—(1) No absolute rule can be formulated as to the duty of the driver of a motor car to stop when his eyes are dazzled by the lights of an approaching vehicle; the facts of the particular case must determine the necessity for his doing so. (2) In the absence of an apparent danger of a grazing collision, it is not negligence for the driver of a motor car to drive with his left elbow projecting over the window sill.—*BEARDSLEY v. CLARK*, [1932] 2 W. W. R. 481; 4 D. L. R. 237; 40 Man. L. R. 449.—*CAN.*

**sd. —.**—Resp.'s servants left a roller on the side of a road at night without any light or other warning. The driver of pltf.'s truck, seeing a car coming towards him, pulled further over to the left of the road, but being dazzled by the lights of the car he did not see the roller & collided with it, damaging the truck:—*Held*: there was no negligence on the part of the driver of the truck, & the negligence of def't. was the real cause of the accident.—*TAYLOR v. MAIN ROADS BOARD*, [1931] W. A. L. R. 48.—*AUS.*

**sf. —.**—It is negligence to drive a car when the driver is so blinded by the headlights of an approaching car that he cannot see anything in front of him.—*McGIBBON v. MOORE* (1931), 4 M. P. R. 209.—*CAN.*

**sw. Putting chains on car after dark—No rear light.**—It is negligence for the driver of a motor car to kneel in the roadway after dark for such a purpose as the putting on of chains without having the red light on the rear end of his car which is called for by Motor Vehicle Act.—*STEFURA v. RIDGE*, [1931] 1 D. L. R. 694; [1930] 3 W. W. R. 465; 39 Man. L. R. 256.—*CAN.*

**sx. Backing car into lane without warning.**—*EVA v. JOHNSON*, [1932] 3 W. W. R. 502; 40 Man. L. R. 628.—*CAN.*

**sy. Breach of lighting regulation as contributory negligence.**—*MORRISON v. FERGUSON*, [1930] 1 D. L. R. 913; 1 M. P. R. 81.—*CAN.*

**sa. Failure to look out before turning.**—The driver of a car before making a turn looked in the mirror of his car, but did not look out of & behind his car:—*Held*: negligence.—*HILBORN v. JOHNSON* (1932), 4 M. P. R. 262.—*CAN.*

**so. Breach of Regulations.**—The

driver of a motor car at an intersection failed to give way, as required by the Regulations, to a tram-car, alongside which a motor-cyclist was riding at a reasonable speed, the tram-car preventing the latter from seeing the motor car coming from the right. The motor-car driver just missed the tram-car & collided with & injured the motor cyclist, neither seeing the other until at or immediately before impact:—*Held*: under the circumstances the bare fact that pltf., the motor cyclist, did not give way to a vehicle approaching from his right was not evidence of negligence; the question of negligence was one for the jury, which was entitled to find that pltf. was not negligent.—*ALGIE v. BROWN (D. H.) & SON, LTD.*, [1932] N. Z. L. R. 779.—*N.Z.*

**sh. Negligent approach to narrow bridge in fog.**—*BALDWIN v. BELL*, [1933] S. C. R. 1; 1 D. L. R. 232.—*CAN.*

**sk. Leaving truck without lights.**—While a motor truck was being driven on a highway about an hour & a half before sunset a tyre blew out & the owner-driver, def't., after drawing it somewhat to the side of the road, left it in the way of traffic approaching from its rear & without putting any one in charge or turning on the lights. Shortly after dark it was run into by pltf.'s car coming from behind. The evidence as to the time of the accident was too uncertain to justify a finding that the def't. violated the statutory provision requiring motor-car lights to be turned on within one hour after sundown:—*Held*: in so leaving the truck def't. was guilty of negligence for which he was liable to pltf.'s; the pltf. driver being found not guilty of any contributory negligence.—*ELLIS v. ZIMMERMAN, MORGAN v. ZIMMERMAN*, [1933] 1 W. W. R. 550.—*CAN.*

**sl. —.**—*HALL v. WEST COAST CHARCOAL & WOOD PRODUCTS CO., LTD.*, [1935] 2 W. W. R. 134; 3 D. L. R. 53; 50 B. C. R. 18.—*CAN.*

**sm. —.**—In an action for injuries to a passenger on a motor truck which collided about six o'clock of an Oct. morning with an oil tank truck which, owing to a broken axle, had been left on the highway over night:—*Held*: the negligence of both defts. or their servants contributed jointly to the accident & could not be so separated that it could be said that the negligence of either was the sole cause thereof; therefore, both were liable to pltf. Under all the circumstances, it was negligence to leave the oil truck on the highway for such a length of time without taking reasonable precautions to prevent such an accident, even if the statutory duty as to reflectors was complied with. The negligence of the driver of the other truck was in not keeping a proper lookout, in driving

accordingly, if he collides with something, either he was riding unduly fast or he was not keeping a good look out; that is, in the absence of some other factor causative of the collision.

**Pltf., motor cycling at night, ran into a horse tip-cart proceeding in the same direction in front of him on its near side of the road. The cart was without a light. Pltf. in his evidence said that his speed was 15-20 m.p.h., & he could stop easily within 10 yds. The beam of his lamp showed 30 yds. ahead. He said that he never actually saw it was a cart. He saw a dark object loom up & swerved to avoid it:—Held: as on pltf.'s evidence, when proving the negligence of defts., contributory negligence was established, there was no contest of fact & judgment must be entered for defts.**—**BAKER v. LONGHURST (E.) & SONS, LTD.,** [1933] 2 K. B. 461; 102 L. J. K. R. 573; 149 L. T. 264, C. A.

**Annotation:—Distd. Tidy v. Battman, [1934] 1 K. B. 319.**

**389e. —.**—**Deft.'s motor lorry was drawn across the road running from Chichester to Arundel at 7.45 p.m. on Feb. 23, 1932, in such a position as to be an unlighted obstruction. A motor car had stopped behind the lorry about ten yards away on the near side, when pltf.'s son, who had been following the car on his motor cycle, drew out from behind,**

too fast under the circumstances, in not having his car under sufficient control, & in the fact that his headlights did not comply with sect. 36a of said Act.—**WANDELEER v. DAWSON,** [1936] 3 W. W. R. 282; *affd.*, [1936] 3 W. W. R. 478; 6 F. L. J. (Can.) 195.—**CAN.**

**so. Both vehicles without lights.**—**Appl't., a pillion-rider on an unlighted motor cycle driven by his brother, was injured in a collision on a dark night with an unlighted motor car coming the opposite way. There was a continuing act of negligence on the part of the two drivers up to the point of impact, & neither had the opportunity of avoiding the other:—Held: although the unlighted condition of the vehicles was the causa sine qua non of the collision, in order to ascertain the causa proxima it was necessary to ascertain where the vehicles were & on what side of the road the collision took place, for, even as between the drivers of the two vehicles, a collision could have been avoided, despite the want of lights, if each had kept to his own side of the road, & therefore the driver of the cycle would be entitled to succeed if the real cause of the collision was that the car, owing to the negligence of its driver, was on the wrong side of the road.**—**BOURKE v. JESSOP,** [1933] N. Z. L. R. 1418.—**N.Z.**

**sp. Insufficiency of gasoline.**—**Failure to have sufficient gasoline, which caused deft.'s car to stall, whereby pltf.'s car ran into it, is negligence.**—**IRVINE v. METROPOLITAN TRANSPORT CO.,** [1933] 4 D. L. R. 682; O. R. 823.—**CAN.**

**sr. Driving with worn tyre.**—**Where a tyre on a motor car was, to the knowledge of the driver & owner, so worn & damaged as to be unsafe for use at a speed of 35 miles per hour:—Held: the driver was negligent in driving the car with the tyre in that condition & the owner was negligent in that it did not take reasonable care in maintaining the tyres.**—**FRASER v. CHILDREN'S AID SOCIETY,** [1935] 1 W. W. R. 667; 43 Man. L. R. 102.—**CAN.**

**st. Absence of mirror.**—**GEMMILL v.**

**GRAIN,** [1935] 2 W. W. R. 447; 43 Man. L. R. 155.—**CAN.**

**sw. Reliance on having given signal.**—**It is negligence for a motorist about to make a left turn who has given a signal with his left arm to rely solely on that signal & to turn without taking precautions to see that the turn can be made without the risk of collision with a car coming behind him.**—**LEONARD McLAUGHLIN MOTORS, LTD. v. BARNES,** [1935] 1 W. W. R. 598.—**CAN.**

**sz. Pushing car from side road into highway.**—**Pushing a car from private property on to a highway, & into the path of a truck so that the latter cannot avoid a collision, is negligence.**—**PINEO v. HARRIS,** [1937] 2 D. L. R. 62.—**CAN.**

**sc. Cutting-in.**—**A. was driving a car containing passengers in such a way as to prevent B., who was driving another car, from passing him. In consequence, B. had to cut in sharply to avoid the sudden slowing up of a car in front, & A. was forced into the ditch:—Held: A. was not liable to his passengers, as the proximate cause of the accident was B.'s cutting in.**—**KNOCK v. MAXNER,** [1938] 1 D. L. R. 713; 12 M. P. R. 375.—**CAN.**

**sd. Driving while sleepy.**—**A motorist who knows or should realise that he is tending to fall asleep is negligent in continuing to drive while in that condition.**—**LAJMODIERE v. PRITCHARD & DUFF,** [1938] 1 W. W. R. 305; 1 D. L. R. 781.—**CAN.**

**sk. Pushing car across road.**—**It is negligent to push an unpowered car from one side of the highway to the other without keeping a proper look-out.**—**PINEO v. HARRIS** (1937), 11 M. P. R. 431.—**CAN.**

**sm. Driving car upon railway crossing.**—**It is negligence to drive a car upon a railway crossing which was under repair without ascertaining whether the place is safe to cross.**—**STALEY v. BRITISH COLUMBIA ELECTRIC RY. CO.,** [1937] 3 D. L. R. 578; 51 B. C. R. 499.—**CAN.**

**sn. Driver entitled to expect proper driving from others.**—**A driver on his**

dashed into the lorry, & was killed. Pltfs. brought an action in the county ct. under Lord Campbell's Act for compensation for loss as a result of the negligence of deft. or his servant. The defence was that the accident was caused by the contributory negligence of deceased. The county ct. judge left the case to the jury, who found that deft. was negligent, & that deceased could not by the exercise of ordinary care have avoided the consequences of that negligence. On appeal by deft.:—**Held: on the above facts, the questions of negligence & contributory negligence were rightly left to the jury.**—**TIDY v. BATTMAN,** [1934] 1 K. B. 319; 103 L. J. K. B. 158; 150 L. T. 90, C. A.

**389f. —.**—**WARING v. KENYON & Co. (1927), LTD. (1935), 79 Sol. Jo. 306.**

**396. Add. Annotation:—Apld. Brooke v. Bool,** [1928] 2 K. B. 578.

**400a. Presumption that car driven by owner or agent.**—**Where a pltf. in an action for negligence proves that damage has been caused by deft.'s motor car, the fact of ownership of the motor car is *prima facie* evidence that the motor car, at the material time, was being driven by the owner, or by his servant or agent.**—**BARNARD v. SULLY** (1931), 47 T. L. R. 557, D. C.

**Annotation: Refd. Daniels v. Vaux, [1938] 2 K. B. 203.**

proper side of the road is entitled to assume that a driver approaching him from the opposite direction will continue his course & will not cut across his path without a warning given in a reasonable & timely manner.—**VAN STADEN v. STOCKS,** [1936] A. D. 18.—**S. AF.**

### PART III. SECT. 9, SUB-SECT. 1.—C.

**400a 1. Presumption that car driven by owner or agent.**—**Proof that deft. is the owner of the car is not of itself sufficient to establish a *prima facie* case of liability on his part for damage caused by the negligence of the driver of his private motor car.**—**McKENZIE v. McEWIN,** [1933] V. L. R. 309.—**AUS.**

**Vehicle driven by third party.—With owner's permission.**—**See AGENCY, Part IX., Sect. 4, sub-sect. 1 O.; STREET TRAFFIC, Part V., Sect. 3, sub-sect. 5.**

### PART III. SECT. 9, SUB-SECT. 1.—D.

**401 1. Duty of driver to give place to pedestrian.**—**ELLIOTT v. JOHNSON,** [1929] 1 D. L. R. 208; [1928] S. C. R. 408.—**CAN.**

**401 ii. —.**—**A pedestrian who is boarding a street car has a right to expect that a car driver will see him & slacken his speed.**—**JAMES v. PREGG** (1932), 46 B. C. R. 285.—**CAN.**

**402 1. Injury must be attributable to negligence of driver.—Effect of contributory negligence of pedestrians.—Effect of bye-law against "jay-walking."**—**CHESTER v. KINNEAR (Alta.),** [1927] 1 D. L. R. 47; [1926] 3 W. W. R. 601.—**CAN.**

**402 ii. —.**—**Duty of tramcar drivers.**—**SYMONS v. WINNIPEG ELECTRIC CO. (Man.),** [1928] 1 D. L. R. 159; [1927] 3 W. W. R. 650; *affd. sub nom.* WINNIPEG ELECTRIC CO. v. SYMONS, [1929] 2 D. L. R. 197; [1928] S. C. R. 637.—**CAN.**

**402 iii. —.**—**HOARE v. INVERARITY** (1926), 29 W. A. L. R. 67.—**AUS.**

**402 iv. —.**—**Pedestrian in sight for three seconds.**—**If it is proved in a running down case that the period of**

407. *Add. Annotations*:—*Consd.* Bottomley v. Bannister, [1932] 1 K. B. 458; McAlister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119. *Refd.* Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd., [1936] 2 All E. R. 781.

408. *Add. Annotations*:—*Consd.* McAlister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119. *Refd.* Bottomley v. Bannister (1931), 101 L. J. K. B. 46; Grant v. Australian Knitting Mills, Ltd., [1936] A. C. 85; Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd., [1936] 2 All E. R. 781; Dransfield v. British Insulated Cables, Ltd., [1937] 4 All E. R. 382.

414. *Add. Annotation*:—*Consd.* Deen v. Davis, [1935] 2 K. B. 282.

415. *Add. Annotation*:—*Refd.* Daniels v. Vaux, [1938] 2 K. B. 203.

420a. *Unhorsed van.*]—Where an action for damages was brought for injuries sustained by a child of seven years of age who, while playing with other children in a public street, had climbed on to & fallen from an unhorsed van belonging to defts. & left standing unattended in the street outside their premises:—*Held*: such an object as a sound, stationary & unhorsed van possessed no inherent attribute which rendered it dangerous in itself, & had about it nothing which was in the nature of a trap or concealed peril, so as to

render the owner thereof liable in damages. Further, in the present case there was no relation of cause & effect between an obstruction of the use of the highway & the occurrence of the accident.—*DONOVAN v. UNION CARTAGE CO., LTD.*, [1933] 2 K. B. 71; 102 L. J. K. B. 270; 148 L. T. 333; 49 T. L. R. 125; 77 Sol. Jo. 30.

*Annotation*:—*Consd.* Liddle v. North Riding of Yorkshire County Council, [1934] 2 K. B. 101.

421a. *Parties—Defendant insured—Institution of third party proceedings against insurer.*]—

(1) As a general rule, in the absence of special circumstances, the insurance co. which has issued a motorist's insurance policy should not be brought in as a third party at the hearing of an action for damages by the injured party against the motorist.

(2) It is a well established rule of practice at the Bar, enforced by the judges, that in an action against a motorist the jury should not be informed that deft. is insured.—*GOWAR v. HALES*, [1928] 1 K. B. 191; 96 L. J. K. B. 1088; 137 L. T. 580, C. A.

*Annotations*:—*As to* (1) *Consd.* Jones v. Birch Bros., Ltd. (1933), 49 T. L. R. 586. *Refd.* Grinham v. Davies (1928), 139 L. T. 379. *As to* (2) *Apld.* Grinham v. Davies (1928), 139 L. T. 379. *Consd.* Jones v. Birch Bros., Ltd. (1933), 49 T. L. R. 586.

421b. ————]—*LOTHIAN v. EPWORTH PRESS* (1926), [1928] 1 K. B. 199, n.; 96 L. J. K. B. 1092, n.; 137 L. T. 582, n., C. A.

*Annotation*:—*Distd.* Gowar v. Hales, [1928] 1 K. B. 191.

## Part VII.—Children.

437a. ————]—A boy just over the age of twelve years entered a recreation ground provided by deft. local authority "for the use of children under twelve years only." He fell off a swing & was injured by the swing in

motion hitting him twice before he could get away. In an action against defts. he was awarded damages for these personal injuries on the ground that there being approximately two hundred children in the recreation ground

vision of the pedestrian by the driver of the motor car was as much as three seconds, the conclusion properly follows that the driver exercising due care could & should have avoided the collision.—*FALLON'S ESTATE v. CLARET*, [1932] App. D. 177.—S. AF.

*sk. Failure of driver to give warning.*]—Where a danger of collision arose only at the time when a child started to run across the road & it was too late for a warning to be effective, there is no duty to give warning of the approach of a motor car.—*JOLLY v. WALLMAN*, [1936] S. A. S. R. 121.—AUS.

### PART III. SECT. 9, SUB-SECT. 2.

413 I. *Defective steering gear of motor car—Knowledge of defect.*]—*MOIR v. HILL* (1927), 30 W. A. L. R. 56.—AUS.

413 II. *Defective steering gear of motor car.*]—Deft. was driving a motor car with defective steering gear when the car swerved owing to such defect & ran over pltf.'s dog:—*Held*: that driving a motor car in a defective condition if the injury may reasonably be discovered or is known renders a person liable for the injuries of which the defect is the effective cause.—*MOIR v. HILL*, [1928] W. A. L. R. 56.—AUS.

413 III. ————]—In an action by gratuitous passengers for damages for injuries sustained while riding in deft.'s motor car it was found that the car was in an unfit condition for driving owing to a defective steering gear:—

*Held*: deft., who had bought the car secondhand, was negligent in driving it when he knew or ought to have known that it was in that unfit condition.—*DE LANOIS & JOHNSON v. FLESH*, [1937] 1 W. W. R. 122; *revid.* [1937] 3 W. W. R. 104; 4 D. L. R. 209; 7 F. L. J. (Can.) 115.—CAN.

### PART III. SECT. 9, SUB-SECT. 7.

n i. ————*Absence of licence & lights.*]—The failure to take out a licence to operate a motor car does not bar the recovery of damages resulting from the negligence of the driver of another car; & a breach of the statutory duty as to carrying lights is a bar only if it can be shown that such breach was a proximate cause of the accident.—*CASSELL v. THOMPSON*, [1930] 1 W. W. R. 1000; 3 D. L. R. 65.—CAN.

### PART IV. SECT. 2, SUB-SECT. 4.

sg. *Breach of scaffolding regulations—Contributory negligence.*]—Contributory negligence prevents a workman from recovering damages for injuries received, notwithstanding a continuing breach, on the part of the employer, of statutory regulations up to the time of the accident.

Pltf. was a carpenter employed by deft. He was working on a scaffold fixing boxing for ferro-concrete supports when the plank on which he was standing broke & pltf. fell to the floor & was seriously injured. He alleged breaches of the provisions of Regs. 8 & 14 made under Scaffolding &

Excavation Act, 1922; inadequate supervision of the erection of the scaffold; & that the scaffold was erected without sufficient support & with unsuitable material:—*Held*: (1) the building operations were carried out under a definite & well-planned system, & whatever departures from that system were made in particular instances were either inseparable from the carrying on of the work or from the wrongful or improper conduct of those engaged in the work; (2) assuming, but not deciding, that the alleged breach of the regulations had been established, pltf.'s conduct in forcing struts or props from the plank on which he was standing to the bottom of the boxing, & persisting in this against the definite warning & orders of his supervisor, amounted to wilful misconduct & negligence which substantially contributed to the breaking of the plank, & pltf. was therefore not entitled to recover damages.—*DUNNE v. NEW ZEALAND REFRIGERATING CO., LTD.*, [1932] N. Z. L. R. 1040.—N.Z.

### PART VII. SECT. 1a

433 I. *Liability dependent on breach of duty—Public park close to railway.*]—*Held*: there was no obligation on the corpn. owning the park to build a fence to separate it from the railway.—*RICHARDSON v. CANADIAN NATIONAL RY. CO.*, [1927] 2 D. L. R. 801; 32 Can. Ry. Cas. 411; 60 O. L. R. 296.—CAN.



& but one attendant provided by defts., pltf.'s injuries were the result of lack of adequate supervision on the part of defts., & judgment was entered for him. Defts. did not contend that pltf. was a trespasser in the recreation ground. On appeal, judgment was entered for defts. on the ground that pltf.'s fall from the swing, as appeared from the evidence, was due to his sickness & fainting & that there was no evidence on which the jury could find that pltf.'s injuries were due to lack of supervision on the part of defts.—*PURKIS v. WALTHAMSTOW BOROUGH COUNCIL* (1934), 151 L. T. 30; 98 J. P. 244; 78 Sol. Jo. 207, C. A.

*Annotations*.—*Consd.* *Coates v. Rawtenstall Borough Council*, [1937] 3 All E. R. 602; *Ellis v. Fulham Corp.*, [1937] 3 All E. R. 454.

440a. — *Unhorsed van.*—*DONOVAN v. UNION CARTAGE CO., LTD.*, No. 420a, *ante*.

443. *Add. Annotations*.—*Consd.* *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101. *Refd.* *Donovan v. Union Cartage Co.* (1932), 148 L. T. 333.

449a. —.]—Defts., at the request of the police, erected a casualty tent in a public place where it was anticipated large crowds would gather. Nearby they erected a flag pole which was supported only by four guy ropes. A man was left in charge of the tent, & it was his duty to prevent interference with the flag pole. Children who came to play round the pole & to swing on the rope, were repeatedly warned by the attendant to keep away. While the attendant was assisting a casualty inside the tent, the pole fell & injured pltf. No warning had been given to pltf. & to other people near the pole :—*Held* : the accident was due to defts.' negligence in the erection of the pole & the insufficient means taken to protect it from interference by children, having regard to the fact that it was an allurement to them.

*Semble* : the flag pole came within the doctrine of *Rylands v. Fletcher*.—*SHIFFMAN v. VENERABLE ORDER OF THE HOSPITAL OF ST. JOHN OF JERUSALEM*, [1936] 1 All E. R. 557; 80 Sol. Jo. 346.

449b. —.]—A tip-up lorry in the charge of a single driver had delivered coke in a school playground, & was driving away when a number of boys jumped on to the rear of the lorry causing the tipping part to tip up. Another boy, pltf., had jumped on to the lorry immediately behind the driver's cab, & when the tipping part of the lorry was suddenly released it came down on pltf. &

crushed his leg. The headmaster of the school had left the boys to play in the playground & had returned into the school premises before the arrival of the lorry. He did not know of the arrival of the lorry. In an action for damages against the managers of the school, the headmaster & the owners of the lorry :—*Held* : (1) the headmaster was not negligent in leaving the boys in the playground without supervision, nor ought he to have taken steps to stop the lorry from coming during playtime. The headmaster & the managers were accordingly not liable; (2) the owners of the lorry had sent the lorry in the charge of a reasonable adult, & ought not reasonably to have anticipated interference; (3) the driver was not negligent in not looking to see if the boys had jumped on to the lorry, & he could not have anticipated sufficient weight to tip the lorry. The owners of the lorry were, therefore, not liable; (4) a lorry as such is not an allurement to children.—*RAWSTHORNE v. OTLEY*, [1937] 3 All E. R. 902.

450. *Add. Annotations*.—*Expld.* *Addie R. & Sons (Collieries) v. Dumbreck*, [1929] A. C. 358. *Consd.* *Donovan v. Union Cartage Co.* (1932), 148 L. T. 333; *Haynes v. Harwood & Son*, [1934] 2 K. B. 240; *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101; *Ellis v. Fulham Corp.*, [1937] 3 All E. R. 454. *Refd.* *Cunard v. Antifyre*, [1933] 1 K. B. 551.

451a. —.]—A co. having works near a railway, under a licence from an adjoining landowner, constructed a siding on his land & erected thereon a post to which a pulley block was attached called a sheave. To move a truck along the siding, a wire rope passed through the sheave & round a winch worked by a dynamo, & one end of the rope was fastened to the front of the truck & the other to the back. The siding adjoined some fields which were let to the local authority as a playground. A boundary fence between the siding & the fields had disappeared, & to the knowledge of the co., children frequented the siding & played round the sheave without interruption except when the haulage machinery was about to be put in motion, which occurred about three times a week. On one occasion when a truck had to be moved two of the co.'s employees, in accordance with their usual practice, walked to the sheave for the purpose of seeing that the rope was properly adjusted & of driving children away. After the men went back to start

# PART VII. SECT. 2, SUB-SECT. 2.—B.

445 i. *Duty to guard against—Trap or lure—Moving freight train.*—*PINKAS & PINKAS v. CANADIAN PACIFIC RY. CO.*, [1928] 1 W. W. R. 321.—*CAN.*

446 xi. —.]—Resp., as father & tutor of his minor son, brought an action in damages against applt. for injuries sustained by his son, then seven years of age, resulting from a serious accident due to the alleged fault of applt. Resp.'s son was playing with a small tricycle in a lane behind his father's house; in that lane, facing the house, applt. had placed a cement mixer at a short distance from a garage which he was constructing. Resp.'s son, on his tricycle, approached the mixer & put his hand on the machine while in motion, with the result that

his hand was caught & drawn into the machine, where it remained until he was extricated. The evidence shows that the machine had been left unattended & unguarded at the moment of the accident :—*Held* : applt. was liable.—*BOUVIER v. FEE*, [1932] S. C. R. 118; 2 D. L. R. 424.—*CAN.*

*sp. What amounts to.*—An abandoned power house level with a pathway down a hill is not an allurement, & a boy climbing thereon is a trespasser who cannot recover damages for injury by contact with an exposed wire.—*DESJARDINS v. GATINEAU POWER CO.*, [1936] 3 D. L. R. 338.—*CAN.*

# PART VII. SECT. 2, SUB-SECT. 2.—C.

450 vii. —.]—*HAYMAN v. CITY PROPERTY INVESTMENT TRUST CORP.*, [1929] S. C. (H. L.) 65.—*SCOT.*

*LTD.*, [1929] S. C. (H. L.) 65.—*SCOT.*

450 vii. —.]—The responsibility of a person who endangers the safety of small children who have not reached the age of discretion is a very heavy one. Defts. were held liable for the kicking of a young boy by a colt which the infant deft. riding a saddle pony, was leading on a grass strip or boulevard which was between the middle of a street & a cinder path on which the boy & a companion had been standing, it being held that the infant deft. was negligent in not paying attention to the boys after he had passed them.—*RAMSAY & RAMSAY v. RICKARD & RICKARD* (No. 1), [1936] 1 D. L. R. 308; [1936] 3 W. W. R. 554; 5 F. L. J. (Can.) 227; *affd.* [1936] S. C. R. 302; 3 D. L. R. 321; 5 F. L. J. (Can.) 115.—*CAN.*



the machine a little girl, aged five, was seen swinging on the rope, & the movement of the rope caused her hands to be caught in the pulley & crushed, & her brother, aged nine, was similarly injured in coming to her rescue. The father, for himself & as next friend of the children, claimed damages against the co. for the injuries sustained by the children:—*Held*: it being well known to the co. that when the machine was going to start it was extremely likely that children would be near the sheave, the duty owed by the co. when they set the machine in motion was to see that no child was in such a position as to be exposed to danger by the occasional use to which the machine was put, & that they had failed in that duty. The immediate danger being apparent, it was not material whether the children were or were not trespassers.—*EXCELSIOR WIRE ROPE CO., LTD. v. CALLAN*, [1930] A. C. 404; 99 L. J. K. B. 380; 142 L. T. 531; 94 J. P. 174; 35 Com. Cas. 300; 28 L. G. R. 543, H. L.

*Annotations*:—*Folld. Mouton v. Poulter*, [1930] 2 K. B. 183; *Consd. Sycamore v. Ley* (1932), 147 L. T. 342. *Refd. Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.

451b. —. —.]—Deft. council maintained a children's recreation ground, upon which were devices for the amusement of children, & *inter alia*, a chute or children's slide. The infant pltf., aged 3½, & a boy aged 14, while sliding on the chute, collided with a chain, which had improperly been fixed across the chute by another child, pltf. receiving serious injuries. The chain was used, with others, to prevent the use of the chute on Sundays, & was kept padlocked to a pole at the recreation ground. It was found that the recreation ground attendant had negligently failed to secure the chain to the pole, whereby a child had been able to remove it. In an action for damages, deft. council contended that the recreation ground was provided for children of school age only, & that pltf. was a trespasser:—*Held*: (1) pltf. was accompanied by a competent guardian, & was, therefore, a licensee; (2) the injuries were caused by a danger

which was known to deft. council; (3) the damages in the present case ought to be increased from £1,300 to £3,000.—*COATES v. RAWTENSTALL BOROUGH COUNCIL*, [1937] 3 All E. R. 602; 157 L. T. 415; 101 J. P. 483; 81 Sol. Jo. 627; 35 L. G. R. 614, C. A.

453. *Add. Annotations*:—*Consd. Ellis v. Fulham Corp.*, [1937] 3 All E. R. 454. *Refd. Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101; *Purkis v. Walthamstow Borough Council* (1934), 151 L. T. 30.

457. *Add. Annotations*:—*Apprvd. Addie R. & Sons (Collieries) v. Dumbreck*, [1929] A. C. 358. *Refd. Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.

457a. —. —.]—A boy four years of age was killed by being crushed in the terminal wheel of a haulage system belonging to a colliery co. The system, which was used for depositing ashes on a bing situated in a field adjoining the colliery, consisted of an endless wire cable operated from time to time, as might be necessary, from the pithead by an electric motor, while at the other end of the system, which was not visible from the pithead, there was a heavy horizontal iron wheel round which the cable passed & returned. The field was surrounded by a hedge, which was quite inadequate to keep out the public, & it was, to the knowledge of the colliery co., used as a playground by young children. The colliery officials at times warned children out of the field, but their warnings were disregarded. The wheel was dangerous & attractive to children, & at the time of the accident it was insufficiently protected. The accident occurred owing to the wheel being set in motion by the colliery servants without taking any precaution to avoid accident to persons frequenting the field. The boy had been warned by his father not to go near the field or the wheel. In an action for damages by the father against the co.:—*Held*: the boy was a trespasser & went on the colliery premises at his own risk, & the co. owed him no duty to protect him from injury.—

#### PART VII. SECT. 2, SUB-SECT. 3.

454 x. —. —.]—*PINKAS & PINKAS v. CANADIAN PACIFIC RY. CO.*, [1928] 1 W. W. R. 321.—CAN.

454 xi. —. —.]—In an action for injuries sustained by a child through letting her fingers get caught in a bread-mixing machine in deft.'s bake shop:—*Held*: the child was a trespasser & therefore, even if the omission to provide a guard for the revolving gears of the machine might in some circumstances be negligence with respect to an invitee or licensee, there was no duty to take such a precaution with respect to the child.—*HUMENY v. CHAIKOWSKI*, [1931] 3 W. W. R. 398.—CAN.

454 xii. —. —.]—There is no liability to infant trespassers when the children know that they are forbidden to go upon deft.'s land, & no act has been done deliberately to injure them, or in reckless disregard of their safety.—*CRAIG v. CANADIAN NORTHERN PACIFIC RY. CO.*, [1934] 1 D. L. R. 484; 47 B. C. R. 453.—CAN.

454 xiii. —. —.]—A railway porter, in the course of his duties, was burning rubbish in the goods yard of a small railway station when a boy of eleven years of age entered the yard attracted by the fire. Very shortly afterwards a

detonator, accidentally concealed in the burning rubbish, exploded & severely injured one of the boy's eyes:—

*Held*: the boy was a trespasser & not a licensee in respect that (a) he was knowingly trespassing, & (b) the porter had no authority to grant permission for the boy to remain in the yard in breach of the railway regulations, the granting of such permission being without the scope of his duties; further, there was no duty upon a proprietor of land summarily to exclude trespassers, & in the present case, the porter's failure immediately to exclude the boy did not amount to permission to him to remain in the yard.—*BRESLIN v. LONDON & NORTH EASTERN RY. CO.*, [1936] S. C. 816.—SCOT.

454 xiv. —. —.]—In respect to the liability of an occupier of land for injuries sustained by persons coming thereon there is no one rule for trespassing children & another for trespassing adults, i.e. once a child is found to have been a trespasser the position as to the liability of the occupier is the same as in the case of an adult trespasser.—*HAINES v. BREWSTER*, [1938] 2 W. W. R. 285.—CAN.

454 xv. —. —.]—The infant pltf., a little over two years old, was struck by a railway train when he was seated

between the rails at the intersection of the railway & a highway in a farming district. The place where he was seated was on the railway's exclusive right of way, & not on the highway. There was nothing to obstruct the forward view of the engineer & there was no building at or near the intersection. The train consisted of a flat car in the front & a coach, in the right-hand corner of which the engineer was stationed. It did not appear that the intersection was at any time frequented by children or that there was anything in the vicinity thereof which would tend to bring them there. Pltf.'s case was based on the contention that (a) a proper lookout from the advancing train was not kept; (b) there was inefficient & therefore negligent handling of the braking appliances after the child was first seen; & (c) the braking equipment on the train was insufficient & defective as the sanding equipment was not in use, & the flat car which was being pushed ahead of the motive car was not equipped with brakes:—*Held*: the action failed. The child was a trespasser & therefore its infancy could not of itself be an additional basis of claim or an offset to defences otherwise available.—*HONKE v. MANITOBA EASTERN RY. CO.*, [1938] 2 W. W. R. 520.—CAN.

ADDIE, R. & SONS (COLLIERIES) v. DUMBRECK, [1929] A. C. 358; 98 L. J. P. C. 119; 140 L. T. 650; 45 T. L. R. 287; 34 Com. Cas. 214, H. L.

*Annotations*.—*Expld.* Mourton v. Poulter, [1930] 2 K. B. 183. *Consd.* Coates v. Rawtenstall Borough Council, [1937] 3 All E. R. 602; Ellis v. Fulham Corp., [1937] 3 All E. R. 454. *Refd.* Excelsior Wire Rope Co. v. Callan, [1930] A. C. 404; Donovan v. Union Cartage Co. (1932), 148 L. T. 333; Little v. North Riding of Yorkshire County Council, [1934] 2 K. B. 101; Purkis v. Walthamstow Borough Council (1934), 151 L. T. 30; Morgan v. Incorporated Central Council of the Girl's Friendly Society, [1936] 1 All E. R. 404; Weigall v. Westminster Hospital, [1936] 1 All E. R. 232; Hawkins v. Thames Stevedore Co. & Cold Storage Co., [1936] 2 All E. R. 472.

457b. —.]—EXCELSIOR WIRE ROPE CO., LTD. v. CALLAN, No. 451a, *ante*.

457c. —.]—MOURTON v. POULTER, No. 309a, *ante*.

457d. —.]—In the course of carrying out a road improvement in their district deft. council's workmen had to excavate a large quantity of soil which, till it could be cleared away, was placed on the new verge of the road against a new retaining wall which the council had built. This heap of soil formed a slope giving easy access to the top of the wall. There was evidence that the children of the neighbourhood played about the works, but were always warned off when workmen were there. On a Saturday afternoon, after the workmen had left, two boys were sitting on the new wall, & seeing them there the pltf., a boy of seven years of age, who also had been previously warned off, climbed up the heap & sat on the wall between the other two, & in trying to show them how bees flew he waved his arms &, losing his balance, fell backwards & sustained injuries in respect of which he sued deft. council:—*Held*: (1) in climbing up the heap of soil & in sitting on the wall pltf. was a trespasser to whom defts. owed no duty, not having constructed or placed the heap where it was with a view of causing him an injury, or, indeed, in contemplation of him at all; (2) the temporary heap of soil placed as it was on undedicated land did not constitute a nuisance.

*Per SCRUTTON, L.J.*: To make a landowner liable for injury to children on his land, it must be proved that he expressly or impliedly invited them on to his land, & either did an act which caused damage with knowledge that it might injure them, or knowingly permitted the existence on his land of a hidden danger or trap. An invitation may be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, the landowner is not liable.

458 i. *Licensee*.]—ACADIA COAL CO. v. McNEIL, [1927] 3 D. L. R. 871; [1927] S. C. R. 497; 33 Can. Ry. Cas. 49.—CAN.

458 ii. —.]—EDWARDS v. LONDON MIDLAND & SCOTTISH RY. CO., [1928] S. C. (Ct. of Sess.) 471.—SCOT.

#### PART VII. SECT. 4, SUB-SECT. 1.

469 iii. —.]—A woman went with her child two & a half years old to the deft.'s shop to buy clothing for both. While there a mirror fixed in the wall, & in front of which the child was, fell & injured him:—*Held*: it was a question for the jury whether the mirror fell without any active interference on the child's part; if so,

that in itself was evidence of negligence; but if not, the question for the jury would be whether defts. were negligent in having the mirror so insecurely placed that it could be overturned by a child; & if that question was answered in the affirmative, the child, having come upon defts.'s premises by their invitation & for their benefit, would not be debarred from recovering by reason of his having directly brought the injury upon himself.—SANGSTER v. EATON (T.) & CO., LTD. (1894), 25 O. R. 78; *affd.* (1894), 21 A. R. 624; *affd.* (1895), 24 S. C. R. 708.—CAN.

469 iv. —.]—Deft. sold cartridges to the infant pltf., a boy about twelve years old. The sale was a violation

The decision in *Cooke v. Midland Great Western Railway of Ireland*, No. 450, must be treated as dealing with a child who was impliedly licensed to use the turntable which for a child constituted a trap.—LITTLE v. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL, [1934] 2 K. B. 101; 103 L. J. K. B. 527; 151 L. T. 202; 98 J. P. 319; 50 T. L. R. 377; 78 Sol. Jo. 349; 32 L. G. R. 241, C. A.

*Annotation*.—*Refd.* Coates v. Rawtenstall Borough Council, [1937] 1 All E. R. 333.

457e. —.]—HOWARD v. PICKFORDS, LTD. (1934), 79 Sol. Jo. 69.

457f. —.]—PROCTOR v. BRITISH NORTHROP CO., LTD. (1937), 81 Sol. Jo. 611, C. A.

460a. —.]—COATES v. RAWTENSTALL BOROUGH COUNCIL, No. 451b, *ante*.

462a. —.]—A local authority provided a public park for the use of the inhabitants of the district. In this park was constructed a paddling pool for children to paddle in, & loads of sand were put at the side of the pool to give the appearance of the seaside. The local authority affixed a notice to a board near the pool stating that "Owing to the risk of cut feet, persons must not take into the paddling pool any bottles, tins or other sharp materials." They also provided park-keepers, who, under instructions, raked the pool every morning; but the rake used would not go into the sand but only over the surface, so that anything embedded in the sand would not be disclosed by the rake. The pltf., a little boy who paddled in the pool, had his foot cut with a piece of glass embedded in the sand. A short time previously another little boy had his foot also cut in the same pond to the knowledge of the park-keeper. In an action for personal injuries GREAVES-LORD, J., held that pltf. was an invitee & that the local authority were liable to him for the injuries. On appeal:—*Held*: on the assumption that pltf. was only a licensee, nevertheless the local authority were liable, as they knew that there was a possible danger to children paddling in the pool through articles in the pool & took measures to remove such articles, but such measures were inadequate.

*Per SLESSER & MACKINNON, L.JJ.*: persons who entered a public park provided by a local authority were only licensees & not invitees.—ELLIS v. FULHAM BOROUGH COUNCIL, [1938] 1 K. B. 212; [1937] 3 All E. R. 454; 107 L. J. K. B. 84; 157 L. T. 380; 101 J. P. 469; 53 T. L. R. 884; 81 Sol. Jo. 550; 35 L. G. R. 507, C. A.

of the prohibition in s. 119 of Criminal Code. When a rifle with which said boy & a friend were shooting was loaded with one of the cartridges so obtained something went wrong with the foresight & he, standing in front of the rifle, attempted to put it right while the friend was holding it. The rifle went off & injured the infant pltf. He sued for damages for the injuries so sustained & his mother sued for hospital & medical expenses:—*Held*: the boy's negligence prevented him from recovering.—WASNEY v. JURASKY, [1933] 1 W. W. R. 155; 1 D. L. R. 616; 41 Man. L. R. 46.—CAN.

q i. —.]—In children's cases the question of contributory negligence resolves itself into whether, having

471. *Add. Annotation*:—*N.F. Oliver v. Birmingham & Midland Motor Omnibus Co.* (1932), 48 T. L. R. 540.

471a. —.—]—An infant four years old was crossing a road in charge of his grandfather. He was struck by a motor omnibus & received permanent injuries to his left hand. The jury found that the accident occurred through the negligence of the driver of the motor omnibus, & the contributory negligence of the grandparent. The county ct. judge held that

the doctrine of identification no longer applied & gave judgment for plffs. Defts. appealed:—*Held*: the county ct. judge was right. Since the decision of the House of Lords in *Mills v. Armstrong*; *The Bernina*, No. 807, the doctrine of identification was no longer part of the law of England. The appeal must be dismissed.—*OLIVER v. BIRMINGHAM & MIDLAND MOTOR OMNIBUS CO., LTD.*, [1933] 1 K. B. 35; 102 L. J. K. B. 65; 147 L. T. 317; 48 T. L. R. 540.

## Part VIII.—Liability of Persons Jointly Interested.

473a. *Liability of party in control of proceedings.*—Circumstances (*see* AGENCY, No. 2318b, *ante*) in which:—*Held*: the landlord was liable for the damage, on the grounds (*inter alia*) of (a) control of the proceedings, & (b) a joint tortious enterprise, & (c) that, having undertaken the examination, he was under a duty to take reasonable care to avoid damage resulting from it, & could not escape

liability by getting some one else to make the examination or part of it for him.—*BROOKE v. BOOL*, [1928] 2 K. B. 578; 97 L. J. K. B. 511; 139 L. T. 376; 44 T. L. R. 531; 72 Sol. Jo. 354, D. C.

*Annotation*:—*Consd.* *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.

## Part IX.—Proof of Negligence.

482. *Add. Annotation*:—*Generally*, *Refd.* *Baker v. Longhurst & Sons, Ltd.*, [1933] 2 K. B. 461.

484. *Add. Annotation*:—*Apld.* *Desborough v. Portsmouth* (1934), 27 B. W. C. C. 192.

507. *Add. Annotations*:—*As to* (1) *Distd. Jones v. Great Western Ry. Co.* (1930), 47 T. L. R.

39. *Consd.* *McGowan v. Stott* (1923), 99 L. J. K. B. 357, n. *As to* (2) *Consd.* *The Kite* (1933), 49 T. L. R. 525. *Refd.* *Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool)* (1929), 143 L. T. 296. *Generally*, *Refd.* *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C.

regard to pltf.'s age & appreciation of the risk, his conduct was culpable negligence or not. If he showed as much care as a person of his age & appreciation may reasonably be expected to show he cannot be said to have been culpable. Deft. held liable for injuries suffered by the infant pltf. as the result of the tipping of doors which deft. had piled on top of a cupboard which he had put in a public lane & which the infant pltf., while at play, climbed upon.—*TURNER & TURNER v. KOREN*, [1931] 3 W. W. R. 684; *affd.*, [1932] 1 W. W. R. 480; 26 Alta. L. R. 129.—CAN.

t 1. —.—]—While passing a group of small boys the driver of defts.' motor truck invited them, or at least permitted a number of them, to get on the truck. Before one of the group, pltf.' son aged six & a half years, could secure a place on the running board it became filled & he grabbed a rod that extended along the truck in front of the rear wheels & was keeping up in this way with the truck when, its speed being increased, he fell & was killed by being run over by a rear wheel. The driver testified that he had told the boys for whom there was no room to stand back & that then pltf.' boy had gone as far from the truck as to the side ditch. The testimony adduced by pltf. contradicted that of the driver. The trial judge excluded the question of contributory negligence from the consideration of the jury, & it returned a general verdict for pltf.'s.—*Held*: the direction of the trial judge to the jury on the questions of law was correct, & the verdict of the jury was justified by the evidence.—*LESLIE & LESLIE v. CLARKE & BUZZA, LTD. & BUZZA*, [1930] 1 W. W. R. 513; 3

D. L. R. 369; 42 B. C. R. 391.—CAN.

### PART VIII.

474 i. *Joint liability*—*Co-owners of vehicle*—*Negligent driving*.—*McEWEN v. ARMOUR*, [1928] 2 D. L. R. 958.—CAN.

477 i. *What defendants may be joined*—*Separate torts*.—*ENDERBY v. SCOTT & WANGANUI CITY*, [1928] N. Z. L. R. 407.—N.Z.

477 ii. —.—]—*Employer of driver & of owner of car*.—Where the driver & owner of a car are sued, an order may be made under Negligence Acts, 1930 (Ont.) & 1931 (Ont.) joining as party deft. the employer of both driver & owner where owner was paid for use of car & driver was alleged to be on employer's business.—*LANG v. HOOKY*, [1932] O. R. 363; 2 D. L. R. 778.—CAN.

st. *Costs awarded to successful defendant*—*Recovery from unsuccessful defendant*.—Where a passenger injured in a collision between two motor cars, in one of which he was travelling, brought an action for negligence against both drivers, he was held entitled to recover as against the unsuccessful deft. the costs awarded against him in respect of the successful deft.—*KIRKLAND v. MERRETT & McLUCAS*, [1930] N. Z. L. R. 223.—N.Z.

### PART IX. SECT. 1, SUB-SECT. 1.

sg. *Wilful neglect*—*A question of law*.—The term "wilful neglect" has a special significance in law, as established by judicial decisions, & the question whether facts established in the case amounted to "wilful neglect" is a question of law & not of fact.—*SECRETARY OF STATE v. GHANATA*

*LAL-SRI KISHAN* (1928), 1 L. L. R. 10 Lah. 329.—IND.

sh. *Contradictory evidence*—*Decision of trial judge binding on court of appeal*.—*ABBOTT v. DAVIS (Man.)*, [1929] 4 D. L. R. 993.—CAN.

### PART IX. SECT. 1, SUB-SECT. 2.—A.

sk. *Non-suit*—*Based upon answers to interrogatories*—*Effect of defendants tendering no further evidence*.—*KIRBY v. PALMER*, [1928] 1 W. W. R. 968; 37 Man. L. R. 277.—CAN.

### PART IX. SECT. 1, SUB-SECT. 2.—B.

485 i. *General rule*.—While the general rule of law is that a judge may withdraw an action for negligence from the jury & non-suit pltf., where, on the undisputed facts of the case, it appears that the accident was directly caused by pltf.'s own negligence, although there may have been, on the facts, some negligence on the part of defts., yet this power should not be exercised unless the evidence is so strong that it would be wholly unreasonable for the jury to find that pltf. had not caused the accident by his own negligence.—*ERICKSON v. CANADIAN PACIFIC RY.*, [1928] 3 W. W. R. 694; *affd.*, 22 Sask. L. R. 299.—CAN.

### PART IX. SECT. 1, SUB-SECT. 2.—C.

502 xi. —.—]—Pltf. cannot recover for negligence when the evidence is equally consistent with the cause of the accident being the negligence of pltf. or deft. or when the accident is equally attributable to some cause other than deft.'s negligence.—*HAYWARD v. MITTON* (1932), 4 M. P. R. 530.—CAN.

351; *McCullum v. Northumbrian Shipping Co.* (1931), 146 L. T. 124.

510a. —.]—Pltfs. were the widow & children of a workman who was killed by being crushed between the buffers of two trucks during shunting operations on a siding of the Great Western Railway. No one saw the accident happen, & there was no evidence to show how the deceased came to be at the place where he was killed. Pltfs. sued under Lord Campbell's Act, & obtained judgment, but the judgment was reversed on appeal & pltfs. now appealed to the House of Lords:—*Held*: although there was no direct evidence relating to the accident, it was a reasonable inference from all the circumstances that it had been caused by the negligence of the railway co., & pltfs. were therefore entitled to recover.—*JONES v. GREAT WESTERN RY. CO.* (1930), 144 L. T. 194; 47 T. L. R. 39; 36 Com. Cas. 136, H. L.

512. *Add. Annotation*:—*As to* (2) *Refd. Fanton v. Denville*, [1932] 2 K. B. 309.

518. *Add. Annotation*:—*Refd. Jones v. Great Western Ry. Co.* (1930), 47 T. L. R. 39.

519. *Add. Annotation*:—*Refd. Schlarb v. London & North Eastern Ry. Co.*, [1936] 1 All E. R. 71.

519a. —.]—A widow, whose husband had been killed in a motor accident, brought an action for damages against the driver of the motor car in which her husband was riding when he was killed. At the close of pltf.'s case,

the trial judge, partly at the invitation of deft.'s counsel, held that there was no case to go to the jury & gave judgment for deft. On appeal by pltf., the Ct. of Appeal held that the facts proved required explanation by the driver of the motor car, as they constituted an accident of a kind which would not usually happen with proper driving, & therefore the case ought not to have been withdrawn from the jury. There must therefore be a new trial. There must be a special order with regard to the costs. Pltf. must have the costs of the appeal, but with regard to the costs of the first trial, if pltf. succeeded in the new trial, she would have the costs of the first trial, but deft. was not to have the costs of the first trial in any event.—*HALLIWELL v. VENABLES* (1930), 99 L. J. K. B. 353; 143 L. T. 215; 74 Sol. Jo. 264, C. A.

*Annotation*:—*Refd. Hunter v. Wright*, [1938] 2 All E. R. 621.

548. *Add. Annotation*:—*Refd. Cutler v. United Dairies (London), Ltd.*, [1933] 2 K. B. 297.

565. *Add. Annotations*:—*Refd. Broome v. Agar* (1928), 138 L. T. 698; *Powell v. Streatham Manor Nursing Home*, [1935] A. C. 243; *Mechanical & General Inventions Co. v. Austin & Austin Motor Co.*, [1935] A. C. 346.

578. *Add. Annotation*:—*Refd. Manchester Corpn. v. Farnworth* (1929), 46 T. L. R. 85.

580a. —.]—*HARGROVE v. BURN* (1929), 46 T. L. R. 59.

#### PART IX. SECT. 1, SUB-SECT. 3.

544 xxii. —.]—*Held*: there being a dispute as to the facts from which the inference of contributory negligence was to be drawn, the question was properly left to the jury by the trial judge for the jury to decide.—*ANSON v. BLACK & WHITE CABS, LTD.*, [1928] N. Z. L. R. 321.—N.Z.

c i. —.]—The jury need not answer specific questions put to it by the ct. in an action for negligence, but can return a general verdict.—*EVANS v. HUDSON'S BAY CO.*, [1930] 2 W. W. R. 718; 3 D. L. R. 951; 43 B. C. R. 81.—CAN.

al. *Speed of car.*—*BRANCH v. ELLIS*, [1930] 2 D. L. R. 756.—CAN.

#### PART IX. SECT. 1, SUB-SECT. 4.—A.

554 iii. —.]—*HOYT'S PROPRIETARY, LTD. v. O'CONNOR*, [1928] V. L. R. 222; [1928] Argus L. R. 117; 40 C. L. R. 566.—AUS.

554 iv. —.]—Non-direction is a ground for granting a new trial only when it produces a verdict against the evidence.—*MOUNTAIN v. EDMONTON CITY*, [1928] 4 D. L. R. 697; [1928] 3 W. W. R. 270.—CAN.

sn. *On plea of contributory negligence.*—New trial, there being no direction to the jury on the plea of contributory negligence.—*MCDONALD v. MCNEIL*, [1933] 1 D. L. R. 330; 5 M. P. R. 514.—CAN.

#### PART IX. SECT. 1, SUB-SECT. 4.—B.

561 ii. —.]—*HARRIS v. HEALING A. G. & CO. PTY., LTD.*, [1927] S. A. S. R. 131.—AUS.

so. *Reference to documents improperly admitted.*—On appeal from the dismissal of an action for damages for injuries sustained by a child on deft.'s escalator:—*Held*: there had been a mistrial, because, *inter alia*, of the admission in evidence of the affidavit of the secretary of the bureau of labour

with a report attached of an inspector, & the admission of certain Govt. permits & certificates with respect to the escalator based on governmental inspection, without evidence by the inspector of his qualifications or of the nature & extent of the alleged inspection. Also, the charge to the jury based on these documents was a misdirection.—*WYRZYKOWSKI v. HUDSON'S BAY CO.*, [1936] 2 W. W. R. 650; 4 D. L. R. 208; 44 Man. L. R. 256.—CAN.

#### PART IX. SECT. 1, SUB-SECT. 4.—C.

565 xiv. —.]—*DAVISON v. CONRAD* (1924), 58 N. S. R. 218.—CAN.

565 xvi. —.]—*ANSON v. BLACK & WHITE CABS, LTD.*, [1928] N. Z. L. R. 321.—N.Z.

565 xvii. —.]—*DALGETTY v. HAMILTON RADIAL ELECTRIC RY. CO.* (1928), 62 O. L. R. 813.—CAN.

565 xviii. —.]—*GOLDEN v. CANADIAN CONSOLIDATED GRAIN CO., LTD. & BEATON*, [1936] 3 W. W. R. 153; 3 D. L. R. 550.—CAN.

sp. *Judgment entered for defendant—Power of Court of Appeal.*—After the third trial of an action for damages resulting from a collision, motions for judgment on the jury's answers to questions were made by both parties & referred by the judge to the Ct. of Appeal. In their view the findings for pltf. were against the weight of evidence, & therefore, judgment for pltf. was out of the question. It appeared from their opinions that, but for the fact that the action had been tried already before three juries, they would have ordered a new trial only; but deeming it impossible to conclude, on the then undisputed facts of the case, that any verdict for pltf. by any subsequent jury could be other than perverse, the ct. directed judgment to be entered at once for deft. Pltf. appealed:—*Held*: after reviewing the facts & the findings of the jury, the Ct. of Appeal had in so directing judgment

usurped the functions of the jury; & pltf.-applt. was in accordance with the verdict of the jury entitled to judgment as a matter of right.—*BENSON v. KWONG CHONG*, [1932] 3 W. W. R. 61.—N.Z.

#### PART IX. SECT. 1, SUB-SECT. 4.—D.

h i. —.]—*Inconclusive.*—*MARSHMAN v. McDOWELL*, [1928] S. R. Q. 308.—AUS.

k i. —.]—*KEETH v. JOHNSON* (N. B.), [1929] 1 D. L. R. 503.—CAN.

n i. —.]—In an action for personal injuries the jury found that both pltf. & deft. were negligent, that notwithstanding pltf.'s negligence, deft. could have avoided the accident & that the degree of fault attributable to each was 50 per cent.:—*Held*: these findings were inconsistent & there should be a new trial.—*DE YOUNG v. FRASER* (1932), 4 M. P. R. 450.—CAN.

n ii. —.]—New trial owing to conflicting answers by jury & failure to decide the proximate cause of the accident.—*MCARTHUR v. GOOD* (1932), 4 M. P. R. 535.—CAN.

r i. —.]—*PEDLOW v. CANADIAN NATIONAL RY. CO.*, [1928] 4 D. L. R. 776; 62 O. L. R. 481.—CAN.

s j. *Damages assessed on wrong principle.*—Where damages have been assessed on a wrong principle a new trial will be ordered.—*DRYDEN v. ORR* (1928), 28 S. R. N. S. W. 216; 45 N. S. W. W. N. 44.—AUS.

#### PART IX. SECT. 2, SUB-SECT. 1.—A.

573 xxvi. —.]—*CHIPPENDALE v. WINNIPEG ELECTRIC CO.*, [1928] 1 D. L. R. 920; [1928] 1 W. W. R. 238; 37 Man. L. R. 207.—CAN.

573 xxvii. —.]—*LEWIS v. MOSES* (1932), 5 M. P. R. 358.—CAN.

573 xxviii. —.]—*KAPOOR LUMBER CO., LTD. v. CANADIAN NORTHERN PACIFIC RY. CO.* (No. 9), [1933] 3 W. W. R. 513.

590. *Add. Annotations* :—*Consd. Ellor v. Selfridge & Co.* (1930), 46 T. L. R. 236; *McGowan v. Stott* (1923), 99 L. J. K. B. 357, n. *Refd.* *Hunter v. Wright*, [1938] 2 All E. R. 621.

594. *Add. Annotations* :—*Distd. McGowan v.*

*Stott* (1923), 99 L. J. K. B. 357, n. *Refd.* *Ryan v. Youngs*, [1938] 1 All E. R. 522.

595. *Add. Annotation* :—*Expld. Langham v. Wel-  
lingborough School Governors & Fryer* (1932),  
147 L. T. 91.

#### PART IX. SECT. 2, SUB-SECT. 1.—B.

581 xxi. —.—.—]—*BLACKER v. WATERS* (1928), 28 S. R. N. S. W. 406; 45 N. S. W. W. N. 111.—*AUS.*

581 xxii. —.—.—]—*HOCKING v. BRITISH COLUMBIA MOTOR TRANSPORTATION, LTD.* (1932), 46 B. C. R. 307.—*CAN.*

#### PART IX. SECT. 2, SUB-SECT. 2.

583 viii. —.—.—]—In an action for damages for negligence, once initial negligence on the part of deft. is established the burden of proof is upon deft. to establish contributory negligence in pltf., & that that contributory negligence was a proximate cause of the accident. A verdict for pltf. cannot be set aside on the ground that contributory negligence has been conclusively proved unless on the facts in evidence there is no explanation of his conduct consistent with proper care on his part.—*WILLIAMS v. ROAD TRANSPORT & TRAMWAYS COMR. (NEW SOUTH WALES)* (1934), 50 C. L. R. 258.—*AUS.*

#### PART IX. SECT. 4, SUB-SECT. 1.

589 xiii. —.—.—]—*Tooth in patient's lung after extraction of teeth.*—*Held*: the maxim *res ipsa loquitur* did not apply.—*McTAGGART v. POWERS*, [1927] 1 D. L. R. 28; 36 Man. L. R. 73; [1926] 3 W. W. R. 513.—*CAN.*

589 xiv. —.—.—]—*Fault possibly due to action of third party.*—Observations upon the applicability of the maxim *res ipsa loquitur* in cases where there is a possibility that the fault may be due to the action of a third party.—*CARRUTHERS v. MacGREGOR*, [1927] S. C. 816.—*SCOT.*

589 xv. —.—.—]—*HENDERSON v. MAIR*, [1928] S. C. 1.—*SCOT.*

589 xvi. —.—.—]—*Dangerous article thrown from train.*—*HOFFMAN v. NIELSEN*, [1928] S. R. Q. 364; 22 Q. J. P. R. 147.—*AUS.*

589 xvii. —.—.—]—*SEREDIUK v. POSENER*, [1928] 1 D. L. R. 648; [1928] 1 W. W. R. 258; 37 Man. L. R. 230.—*CAN.*

589 xviii. —.—.—]—While proceeding at a moderate speed deft.'s car struck pltf., a pedestrian, who was crossing the street at a slow pace. The accident took place near the centre of the street; there were no other vehicles or pedestrians in the vicinity, & there was nothing to obstruct deft.'s view of pltf.:—*Held*: the onus was on deft. to show, if he was to escape the imputation of negligence, that the accident happened without fault on his part.—*KATZENSTEIN v. DUVENHAGE* (1929), 50 N. L. R. 294.—*S. AF.*

589 xix. —.—.—]—*Pltf.s. agreed with defts. to clean the brick & stone front of a block of stores. During the cleaning, water mixed with acid entered a display window of one of the stores & damaged the goods in the window, stained the varnished floor, etc.*:—*Held*: the onus was upon pltf.s. to account for the entry of the water & acid.—*CAPITAL BUILDING CLEANERS v. SLATER-SHERWOOD*, [1930] 3 D. L. R. 596; 65 O. L. R. 364.—*CAN.*

589 xx. —.—.—]—*Manhole blown off waterworks system—Accumulation of gas.*—The infant pltf., five years old, was playing upon a city street when an explosion took place in a subterranean chamber erected by the city corpn. under the street pavement as part of its waterworks system. The explosion

blew a heavy iron lid into the air, & the boy was injured seriously by burns from flames which came from the opened manhole & by bruises received as he fell upon the pavement:—*Held*: the maxim *res ipsa loquitur* should be applied & the city corpn. found guilty of negligence.—*CORSINI v. HAMILTON*, [1931] 4 D. L. R. 313; O. R. 598.—*CAN.*

589 xxi. —.—.—]—Generally speaking, when one car runs into another from behind the fault is in the driving of the rear car, & the driver of the rear car must satisfy the ct. that the collision did not occur as a result of his negligence.—*BEAUMONT v. RUDDY*, [1932] O. R. 441; 3 D. L. R. 75.—*CAN.*

589 xxii. —.—.—]—*Deft.'s servant's having sole control of certain boom sticks, made them fast to the shore of K. Island in the F. River, in an improper & insecure manner, & then left them unattended. The sticks escaped & caused damage to pltf.'s property.*:—*Held*: deft. not having rebutted the presumption of negligence raised against it by the pleadings, the evidence & the admissions made at the trial, by showing the cause of the accident & that it was inevitable, the doctrine of *res ipsa loquitur* was applicable & deft. must be held liable in damages to pltf.—*R. v. CANADIAN TUG BOAT CO., LTD.*, [1933] Ex. C. R. 104.—*CAN.*

589 xxiii. —.—.—]—Where a passenger of a common carrier is injured in an accident of a kind which does not as a rule occur except through default in the performance of the carrier's obligation to see that proper care & skill are used, the maxim *res ipsa loquitur* applies, & in the absence of explanation by the carrier, proof of the accident itself affords some evidence that what happened did in fact arise through the failure to discharge said obligation.—*SEVICH v. CANADIAN NATIONAL RAILWAYS*, [1933] 2 W. W. R. 109; 4 D. L. R. 668; 41 Man. L. R. 276.—*CAN.*

589 xxiv. —.—.—]—Where a motor vehicle is so driven that it mounts on the footpath & injures a foot passenger thereon, the case falls within the principle *res ipsa loquitur* & the onus is on the owner of the vehicle of explaining the occurrence & showing that it took place without any negligence on his part.—*CONCORAN v. WEST*, [1933] 1 R. 210.—*IR.*

589 xxv. —.—.—]—*Pltf. seeing no traffic coming from either direction, proceeded on a bright, clear day to cross a street at a place where, under a city bye-law, she was prohibited from doing so; & before she looked again for traffic she was run down by a taxicab. There were no other vehicles in motion at the scene of the accident.*:—*Held*: in the absence of an explanation by the driver of the happening of the accident, the ct. was bound to infer that he was not keeping that careful lookout which a motorist is obliged to keep & that his negligence in that respect was the proximate cause of the accident.—*HACKING v. BRITISH COLUMBIA MOTOR TRANSPORTATION, LTD.*, [1933] 1 W. W. R. 14.—*CAN.*

589 xxvi. —.—.—]—The doctrine of *res ipsa loquitur* does not necessarily apply to an accident so as to throw the burden of disproving negligence upon deft.—*BECK v. DEXTER*, [1935] 2 D. L. R. 335; 8 M. P. R. 468.—*CAN.*

589 xxvii. —.—.—]—*Falling upon a*

slippery floor is not an occurrence such that a reasonable man might be justified in inferring negligence from the fact that the accident happened; it is one thing for a person to suffer injury from an instrument or object which he has not touched, & it is quite another thing when the injury occurs from an object which such person is himself using.—*PHILPOTT v. DAIRY SUPPLY & COLD STORAGE CO.*, [1934] N. L. R. 331.—*S. AF.*

589 xxviii. —.—.—]—Speed alone is not negligence, & a skid causing injury is not evidence of negligence.—*FILLION v. O'NEILL*, [1934] 4 D. L. R. 598; O. R. 716.—*CAN.*

589 xxix. —.—.—]—*Pltf., while she was on a footpath, was struck & injured by a riderless motor bicycle. Deft. had started the bicycle by pushing it with its engine in gear, but, before he could mount, a part of the machine struck his knee so that he fell & lost his hold of the bicycle, which ran on & hit pltf.*:—*Held*: the facts afforded evidence of negligence.—*MERCOVICH v. MULLANEY*, [1934] V. L. R. 285; 40 Argus L. R. 311.—*AUS.*

589 xxx. —.—.—]—A motor service co. used large quantities of gasoline poured on a cement floor to clean grease thereon, with the result that the gasoline reached a heating tank & caused an explosion:—*Held*: a dangerous operation & the maxim *res ipsa loquitur* applied.—*UNITED MOTORS SERVICE INC. v. HURSON*, [1937] S. C. R. 294; 1 D. L. R. 737; 7 F. L. J. (Can.) 115.—*CAN.*

589 xxxi. —.—.—]—The fact that deft. had just started on his honeymoon after leaving the wedding ceremony cannot be considered as a factor in determining his negligence. The natural inference in such a case is that greater care was exercised.—*HEANS v. MITCHELL*, [1936] 2 D. L. R. 260; 10 M. P. R. 375; 5 F. L. J. (Can.) 245.—*CAN.*

589 xxxii. —.—.—]—Where there is a duty of care on the part of deft., & the injurious agency is entirely within his control, negligence will be inferred under the rule *res ipsa loquitur* & the burden is on deft. to disprove it.—*MITCHELL v. CAMPBELL*, [1937] 1 W. W. R. 212; 1 D. L. R. 603; *affd.*, [1937] 2 W. W. R. 497; 3 D. L. R. 512; 45 Man. L. R. 281.—*CAN.*

589 xxxiii. —.—.—]—There is no general rule that when an overtaking vehicle collides with an overtaken vehicle, *prima facie*, the driver of the former is guilty of negligence. Where pltf. was riding a bicycle & a motor car was following, & without warning, pltf. swerved to the right & so came into collision with a motor car which was just passing or about to pass him at a reasonable speed in the day-time:—*Held*: the driver of the motor car had not been guilty of any negligence.—*JACKSON v. THOMPSON*, [1935] S. A. S. R. 391.—*AUS.*

589 xxxiv. —.—.—]—The fact that a foot-passenger crossing a highway is knocked down by a passing motor car raises no presumption of negligence against the driver of that car.—*GUNTREIF v. CAWOOD*, [1937] N. Z. L. R. 76; 13 N. Z. L. J. 30.—*N.Z.*

589 xxxv. —.—.—]—The presence of forceps in pltf.'s abdomen after an operation held negligence upon the principle of *res ipsa loquitur*.—*TAYLOR v. GRAY*, [1934] 4 D. L. R. 123; 11 M. P. R. 588.—*CAN.*

595a. —.]—MCGOWAN v. STOTT (1920), 99 L. J. K. B. 357, n.; 143 L. T. 217, C. A.

Annotation:—Folld. Halliwell v. Venables (1930), 99 L. J. K. B. 353.

595b. —.]—ELLOR v. SELFRIDGE & Co., LTD., No. 382a, ante.

601. Add. Annotations:—Consd. Ellor v. Selfridge & Co. (1930), 46 T. L. R. 236; Halliwell v. Venables (1930), 99 L. J. K. B. 353. Apld. McGowan v. Stott (1923), 99 L. J. K. B. 357, n. Dlstd. Langham v. Wellingborough

School Governors & Fryer (1932), 147 L. T. 91. Consd. The Kite (1933), 49 T. L. R. 525. Refd. Gosse Millard v. Canadian Government Merchant Marine, American Can. Co. v. Same, [1927] 2 K. B. 432; Cunard v. Antifyre, Ltd., [1933] 1 K. B. 551; Williams (Samuel) & Sons, Ltd. v. Port of London Authority (1933), 39 Com. Cas. 77; Hunter v. Wright, [1938] 2 All E. R. 621.

607. Add. Annotation:—Consd. Jones v. Great Western Ry. Co. (1930), 47 T. L. R. 39.

## Part X.—Defences.

615. Add. Annotations:—Refd. Western Engraving Co. v. Film Laboratories, Ltd., [1936] 1 All E. R. 106; Collingwood v. Home & Colonial Stores, Ltd., [1936] 3 All E. R. 200.

620. Add. Annotation:—Generally, Refd. Griffiths v. St. Clement's School, Liverpool, [1938] 3 All E. R. 537.

620a. —.]—A horse belonging to defts. & attached to one of their vans was seen by pltf. running past his house without the driver. It entered a field immediately adjoining, & separated by a hedge from, pltf.'s garden, & the driver, who had followed it, was trying to pacify it, but as it continued very restive, the driver, who was excited, shouted "Help, help," whereupon pltf. went over the hedge & attempted to hold the horse, but it suddenly reared & threw him to the ground causing him serious injuries, in respect of which he sued defts. There was evidence that the horse had bolted once, if not twice, before. The jury found (a) that

pltf. did not freely & voluntarily, with full knowledge of the nature of the risk he ran, impliedly agree to incur it; (b) that the defts. were guilty of negligence in employing the horse to draw the van; & (c) that that negligence was the cause of the accident:—Held: the negligence (if any) of defts. in employing the horse could not be said to be the cause of the accident, inasmuch as there was a *novus actus interveniens*—namely, pltf.'s attempt to hold the horse, which he must have known was attended with risk, & therefore that the principle of *volenti non fit injuria* applied & precluded pltf. from recovering.

Per SCRUTTON, L.J.: If a horse bolts in a highway & a bystander tries to stop it & is injured, the owner of the horse is under no legal liability to the injured person.

Per SLESSER, L.J.: If a man sees his child in great peril in the street from a runaway horse, &, moved by paternal affection, dashes out & is injured in attempting to stop the

596 i. Sparks from engine.]—Held: there being evidence which would justify the jury in drawing the inference that the fire was occasioned by a spark from the engine, it was not necessary for pltf. to show negligence in the operation of the engine.—MORWICK v. PROVINCIAL CONTRACTING CO., LTD. (1923), 55 O. L. R. 71.—CAN.

g l. —.]—BURNIDE v. REID, [1928] 2 D. L. R. 303.—CAN.

sk. Rebuttal of presumption.]—Held: assuming the maxim *res ipsa loquitur* applied, defender would still be entitled to succeed in respect (1) that he had offered several reasonable explanations of the accident, & so had discharged the *onus* laid upon him by the application of that maxim, & (2) that, in any event, he had definitely disproved negligence on his part.—HENDERSON v. MAIR, [1928] S. C. 1.—SCOT.

sp. Plea of specific acts or omissions.—Whether presumption waived.]—The doctrine of *res ipsa loquitur* is not waived by pleading specific acts or omissions which are alleged to constitute negligence.—NEAL v. T. EATON CO., LTD., [1933] 3 D. L. R. 306; O. R. 645.—CAN.

sr. Storage of meat.—Deterioration.]—In an action there was evidence that A., a butcher, in pursuance of a previous arrangement with B., the owner of freezing rooms, placed some meat in a portion of a room assigned to him for that purpose. The meat, when placed in the room, was in good condition, but shortly after it was taken out it was unfit for consumption. The plaintiff, after alleging the agreement between pltf. & deft., alleged that deft. did not keep the meat with sufficient care, but allowed the temperature of

the room in which it was stored to rise so that the meat afterwards became unfit for human consumption. No evidence was given that in fact the temperature of the room had risen, & deft. called no evidence, contending that pltf.'s evidence did not establish any cause of action. For the pltf. it was contended that the evidence established a breach of contract & that the doctrine of "*res ipsa loquitur*" applied:—Held: without deciding the question of bailment or "*res ipsa loquitur*" the evidence was sufficient to establish a breach of contract.—GAYLARD v. MILNE (1934), 28 Q. J. P. R. 1.—AUS.

sw. Accident on highway.]—ANDANOFF v. SMITH (1935), 5 Can. L. Jo. 85.—CAN.

### PART IX. SECT. 4, SUB-SECT. 2.

sl. Application of maxim.]—There being no evidence showing how an accident happened:—Held: the maxim *res ipsa loquitur* did not apply.—RICHARDSON v. CANADIAN NATIONAL RY. CO., [1927] 2 D. L. R. 801; 32 Can. Ry. Cas. 411; 60 O. L. R. 296.—CAN.

sm. —.]—The distinction between cases in which the maxim *res ipsa loquitur* applies & those in which the cause of the accident is unknown, referred to.—MCCLINTOCK v. WINNIPEG ELECTRIC CO., [1927] 3 D. L. R. 519; [1927] 2 W. W. R. 226; 33 Can. Ry. Cas. 39; 36 Man. L. R. 497.—CAN.

### PART X. SECT. 1, SUB-SECT. 1.

608 ii. —.]—GENERAL TRUST OF CANADA v. ST. JACQUES, [1931] 3 D. L. R. 654.—CAN.

608 iii. —.]—Pltf. was travelling

with a friend along a street in Durban in a ricksha hired by the latter when she was injured by a motor vehicle driven by deft.'s servant. The street had been proclaimed a "one-way" street by notice boards affixed at each end. The ricksha was travelling in the prohibited direction when it collided with the motor vehicle which was travelling in the opposite direction:—Held: the maxim *volenti non fit injuria* did not apply in the absence of evidence to show that pltf. knew that the ricksha was travelling in a prohibited direction, or that she appreciated the danger of its so travelling.—COOMBS v. MASON (1931), 52 N. L. R. 105.—S. AF.

608 iv. —.]—CRAIG v. DALTON, ELFDON v. DALTON, [1934] 3 D. L. R. 797.—CAN.

608 v. —.]—An inspector employed as overseer by a corpn. is not entitled to eject a workman from a position of danger. If he persists in staying after warning there is no liability on the part of the corpn. if an accident occurs.—LATOUR v. STE. ANNE DES PLAINES, [1935] 3 D. L. R. 609.—CAN.

608 vi. —.]—Where a person is engaged to perform a dangerous occupation—e.g. quarrying with explosives—& undertakes to do work that is intrinsically dangerous, & care has been taken to render it as little dangerous as possible, he voluntarily subjects himself to the risk; & those claiming through him cannot be permitted to complain that a wrong had been done when he was killed as the result of engaging in such occupation.—GRICE v. R., [1937] N. Z. L. R. 574; 13 N. Z. L. J. 223.—N.Z.



horse, it may in those circumstances well be said that there is in law no *novus actus interveniens*.—*CUTLER v. UNITED DAIRIES (LONDON), LTD.*, [1933] 2 K. B. 297; 102 L. J. K. B. 663; 149 L. T. 436, C. A.

*Annotation*.—*Expld. & Distd. Haynes v. Harwood*, [1935] 1 K. B. 146.

**620b.** *Duty to take risk.*—*Pltf.*, a police constable, was on duty inside a police station in a street in which, at the material time, were a large number of people, including children. Seeing defts.' runaway horses with a van attached coming down the street he rushed out & eventually stopped them, sustaining injuries in consequence, in respect of which he claimed damages:—*Held*: (1) on the evidence defts.' servant was guilty of negligence in leaving the horses unattended in a busy street; (2) as defts. must or ought to have contemplated that some one might attempt to stop the horses in an endeavour to prevent injury to life & limb, & as the police were under a general duty to intervene to protect life & property, the act of, & injuries to, *pltf.* were the natural & probable consequences of defts.' negligence; (3) the maxim "*volenti non fit injuria*" did not apply to prevent *pltf.* recovering.—*HAYNES v. HARWOOD*, [1935] 1 K. B. 146; 104 L. J. K. B. 63; 152 L. T. 121; 51 T. L. R. 100; 78 Sol. Jo. 801, C. A.

*Annotation*.—As to (3) *Distd. Sylvester v. Chapman, Ltd.* (1935), 79 Sol. Jo. 777.

**620c.** —.]—*SYLVESTER v. CHAPMAN, LTD.* (1935), 79 Sol. Jo. 777.

**623.** *Add. Annotation*.—*Refd. Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.

**628.** *Add. Annotation*.—*Refd. Cleghorn v. Oldham* (1927), 43 T. L. R. 465.

**629.** *Add. Annotation*.—*Refd. Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.

**633.** *Add. Annotations*.—*Consd. Fanton v. Den-ville*, [1932] 2 K. B. 309. *Refd. Dew v. United British S.S. Co.* (1928), 139 L. T. 628; *Chapman v. Ellesmere* (1932), 101 L. J. K. B. 376; *Rudd v. Elder Dempster & Co.*, [1933] 1 K. B. 566; *Wheeler v. New Merton Board*

*Mills, Ltd.*, [1933] 2 K. B. 669; *Haynes v. Harwood & Son*, [1934] 2 K. B. 240; *Olsen v. Corry & Gravesend Aviation, Ltd.*, [1936] 3 All E. R. 241; *Russell v. Criterion Film Productions, Ltd.*, [1936] 3 All E. R. 627; *Wilson & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.

**636a.** —.]—*Pltfs.*, stevedores at the port of Tampico, in Mexico, undertook to load a steamship of defts.' the *Essex Isles*, with kerosine & gasoline. The cargo being of a dangerous character, *pltf.*s, who had had much experience in handling such cargoes, stipulated that they should have entire control of the loading. While the loading was in progress an explosion occurred, which killed & injured many of the workmen engaged & destroyed the ship. There was no direct evidence as to the cause of the explosion. *Pltfs.* brought an action against defts. for damages, & it was found as a fact that the explosion was caused by a spark made by a beam which fell into the hold, the fall of the beam being caused by a blow from a tray which was being hoisted by *pltf.*s' men from the hold. *Pltfs.* contended that if the beam had been properly secured by bolts it would not have fallen, & they said that defts. had been negligent in leaving the beam unbolted. Defts. contended that the proximate cause of the explosion was the negligence of *pltf.*s in not hoisting the tray with proper care, & they counter-claimed for the loss of their ship:—*Held*: on the facts the ship-owners had not been guilty of negligence in leaving the beam unbolted, or that if they had been guilty of negligence in so leaving it *pltf.* stevedores knew, or ought to have known, that the beam was unbolted, & took the risk; & the stevedores themselves had been negligent in failing to use proper care in hoisting the tray.—*COMPANIA MEXICANA DE PETROLEO EL AGUILA v. ESSEX TRANSPORT & TRADING CO., LTD.* (1929), 141 L. T. 106; 34 Com. Cas. 198; 17 Asp. M. L. C. 590, C. A.

**641.** *Add. Annotation*.—*Refd. Cutler v. United Dairies (London), Ltd.*, [1933] 2 K. B. 297.

**621** 1. *Application to recreation—Accident at game.*—Four farm labourers were engaged in building a stack of straw, three on tramping down & one in actually building. The three, besides doing their work, were engaged in knocking one another over in the straw. The fourth took no part in the play but took no objection to it. Suddenly he was knocked off the stack by one of the others who had intentionally or unintentionally pushed against him, & falling on his head was severely injured. He brought an action against his companion who had knocked him over:—*Held*: as the pursuer had not been engaged in the play, he had been injured through the fault of the defender & was entitled to damages.

A person who is injured in the course of a game in which he takes part by any cause ordinarily occurring in such a game is not entitled to damages therefor, but takes the risks of the game in which he joins (LORD YOUNG).—*REID v. MITCHELL* (1885), 12 R. (Ct. of Sess.) 1129; 22 So. L. R. 748.—SCOT.

*nr. Failure of master to provide protection.*—An employer must take something more than a passive concern for his servant's safety so far as

machinery is concerned in order to protect himself from liability on the ground of negligence for injuries sustained by the servant in the course of his employment. With respect to the defence of *volenti non fit injuria* to an action for personal injuries brought by a servant against his employer the distinction must be observed between the case where a servant undertakes to do work which is inherently dangerous & the case where the work is rendered dangerous by the employer's neglect to provide the servant with an appliance which would protect him against a preventable danger.

Once the employer's neglect of said duty has been established in a case where the defence of *volenti non fit injuria* has been raised, then the burden falls upon him of proving to the satisfaction of the tribunal trying the case that the servant had voluntarily undertaken & contracted to accept the risk for himself: this is a question of fact.—*HILL v. BAADÉ*, [1933] 3 W. W. R. 592.—CAN.

PART X. SECT. 1, SUB-SECT. 2.—A.

**622 ix.** —.]—*REID v. MIMICO* (1927) 1 D. L. R. 235; 59 O. L. R. 579.—CAN.

**622 x.** —.]—*Held*: *pltf.* was debarred from the recovery of damages by the findings of the jury in reference to his state of knowledge of the dangers to be anticipated in the area through which he chose voluntarily to walk in the dark, although another safe & well-lighted route, which was only forty yards longer, was provided for him. In these circumstances, if he chose to walk in the dark, he walked at his peril.—*GILMOUR v. BELFAST HARBOUR COMRS.*, [1933] N. I. 114.—IR.

**622 xi.** —.]—A gratuitous passenger in a motor car who is shown to have clearly appreciated the risk which he was incurring because of the speed with which the car was being driven on a dangerous road but who made no protest, although he had time before an accident resulted to warn the driver, must be deemed to have voluntarily incurred the risk.—*JENNINGS v. DAVIES & CAMPBELL, WILSON & HORNE, LTD.*, [1934] 1 W. W. R. 686; *affd.*, [1934] 2 W. W. R. 587.—CAN.

PART X. SECT. 1, SUB-SECT. 2.—B

**638 v.** —.]—*McLEAN v. BOURCET (B. C.)*, [1929] 4 D. L. R. 359; 3 W. W. R. 44.—CAN.



- eg. *Window cleaner falling upon pedestrian.*—STROMME v. WOODWARD STORES, LTD., [1938] 2 W. W. R. 251.—CAN.

- Anne's Well Brewery Co. v. Roberts** (1928), 140 L. T. 1.
- 701. Add. Annotation:—***Consd. Markland v. Manchester Corpn.*, [1934] 1 K. B. 566.
- 703. Add. Annotation:—***Dbtd. G. W. Ry. v. S.S. Mostyn, The Mostyn*, [1928] A. C. 57.
- 704. Add. Annotation:—***Dbtd. G. W. Ry. v. S.S. Mostyn, The Mostyn*, [1928] A. C. 57.
- 705. Add. Annotations:—***Consd. G. W. Ry. v. S.S. Mostyn, The Mostyn*, [1928] A. C. 57. **Refd.** *Witham Outfall Board v. Boston Corpn.* (1926), 136 L. T. 756; *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.
- 706. Add. Citations:—***Revsd. sub nom. GREAT WESTERN RY. CO. v. MOSTYN (OWNERS), THE MOSTYN*, [1928] A. C. 57; 97 L. J. P. 8; 138 L. T. 403; 92 J. P. 18; 44 T. L. R. 179; 72 Sol. Jo. 16; 26 L. G. R. 91; 17 Asp. M. L. C. 367, H. L.  
*Add. Annotations:—***Refd.** *Witham Outfall Board v. Boston Corpn.* (1926), 136 L. T. 756; *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.
- 718. Add. Annotations:—***Consd. Lindsey County Council v. Marshall*, [1936] 2 All E. R. 1076. **Refd.** *Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364; *Strangeways-Lesmere v. Clayton*, [1936] 1 All E. R. 484; *Wardell v. Kent County Council*, [1938] 3 All E. R. 473.
- 719. Add. Annotations:—****Refd.** *Dryden v. Surrey County Council & Stewart*, [1936] 2 All E. R. 535; *Lindsey County Council v. Marshall*, [1937] A. C. 97; *Wardell v. Kent County Council*, [1938] 3 All E. R. 473.
- 720. Add. Annotations:—***Consd. Strangeways-Lesmere v. Clayton*, [1936] 1 All E. R. 484; *Lindsey County Council v. Marshall*, [1936] 2 All E. R. 1076. **Refd.** *Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364; *Dryden v. Surrey County Council & Stewart*, [1936] 2 All E. R. 535; *Wardell v. Kent County Council*, [1938] 3 All E. R. 473.
- 722. Add. Annotations:—***Consd. Forbes, Abbot & Lennard v. G. W. Ry.* (1927), 138 L. T. 286; *G. W. Ry. v. Durnford* (1928), 139 L. T. 145. **Refd.** *Marbe v. George Edwardes (Daly's Theatre)* (1927), 138 L. T. 51; *Silverman v. Imperial London Hotels* (1927), 137 L. T. 57; *Livock v. Pearson* (1928), 33 Com. Cas. 188; *Great Western Railway v. Monmouthshire County Council* (1929), 94 J. P. 6; *Lensen Shipping Co. v. Anglo-Soviet Shipping Co.* (1935), 40 Com. Cas. 320.

## Part XI.—Contributory Negligence.

- 726.** *Add. Annotations* :—**Apld.** *Service v. Sundell* (1929), 45 T. L. R. 569. **Consd.** *The Eury-medon*, [1938] P. 41. **Refd.** *Tidy v. Batt-man*, [1934] 1 K. B. 319.
- 729.** *Add. Annotations* :—**Apld.** *Service v. Sundell* (1929), 45 T. L. R. 569. **Consd.** *Cooper v. Swadling* (1929), 46 T. L. R. 73. **Refd.** *M'Lean v. Bell* (1932), 48 T. L. R. 467; *The Eurymedon*, [1938] P. 41.
- 731.** *Add. Annotation* :—**Refd.** *The Vectis*, [1929] P. 204.
- 731a.** —.]—In an action for damages under Lord Campbell's Act brought by pltf. in respect of the death of her husband, who had been killed in a collision between his motor-bicycle & deft.'s motor car, the judge directed the jury that, if they found that the accident was due to the negligence of both parties substantially, there would be contributory negligence on the part of the deceased man & both would be to blame, & the jury would have to find for deft. The jury found for deft. The Ct. of Appeal directed a new trial, holding that the jury should have been directed that if the deceased man was guilty of negligence, but deft. could by exercising reasonable care have avoided the collision, they were still entitled to find for pltf. :—*Held* : since, on the facts of the case, from the moment when the parties became aware of their respective positions there could have been no time for deft. to do anything to avoid the impact, & therefore the negligence of each party contributed to the collision, the judge's directions to the jury were sufficient, & there must be judgment for deft.—**SWADLING v. COOPER**, [1931] A. C. 1; 100 L. J. K. B. 97; 46 T. L. R. 597; 74 Sol. Jo. 536; *sub nom.* **COOPER v. SWADLING**, 143 L. T. 732, H. L.
- Annotations* :—**Consd.** *M'Lean v. Bell* (1932), 48 T. L. R. 467; *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1934] 2 K. B. 132. **Refd.** *The Eurymedon*, [1938] P. 41.

**PART X. SECT. 8.**

719 I. — *Professional assistance called in—Local authority providing medical attention.*—Hospital liable for the negligence of nurses after an operation.—*NYBERG v. PROVOST MUNICIPAL HOSPITAL BOARD*, [1927] 1 D. L. R. 969; [1927] S. C. R. 226.—CAN.

**PART XI. SECT. 1, SUB-SECT. 1.**

726 ix. —.]—KENZIE v. HART  
(Sask.), [1927] 3 D. L. R. 839.—CAN.

726 x. —.]—JOHNSTON v. McMOR-  
RAN (B. C.), [1927] 4 D. L. R. 335 ;  
[1927] 3 W. W. R. 37.—CAN.

726 xl. —. ]—PEACOCK v. STEPHENS  
(Sask.), [1927] 4 D. L. R. 1057; [1927]  
3 W. W. R. 570.—CAN.

726 xli. —.]—**NASON v. HODNE**  
(B. C.), [1929] 4 D. L. R. 490.—**CAN.**

726 xiii. —.J—ATWOOD v. LUBO-  
TINA (1928), 40 B. C. R. 446.—CAN.

726xiv. —. ]—McNALLY v. SENTNER  
(1934), 7 M. P. R. 346.—CAN.

726 xv. —.]—Pltf., a member of deft. assocn., while scuffling with another member on the verandah of deft.'s building was thrust against the railing of the verandah with such force that it gave way & pltf. fell to the pavement & was injured. It was found that the railing was reasonably safe for all purposes for which it was intended to be used:—*Held*: pltf. was not using reasonable care for his own safety & his conduct amounted to negligence which was the cause of his injury, there being no negligence on the part of deft.—*MCCOLL v. CALGARY YOUNG MEN'S CHRISTIAN ASSOCN.*, [1936] 1 W. W. R. 81; 5 F. L. J. (Can.) 243.—*CAN.*

726 xvi. —.]—In an action resulting from the running down of p'ts. by a motor car:—*Held*: the fact that p'ts. were walking at night on the

LY V. SENTNER  
CAN.  
A member of  
ruffling with  
verandah of  
rust against  
lath with such  
plf. fell th  
red. It was  
was reasonably  
bright day

732 lxviii —.]—McLAUGHLIN v. LONG, [1927] 2 D. L. R. 186; [1927] S. C. R. 303; *varying*, [1926] 3 D. L. R. 918.—CAN.

732 lxx. —.]—The statutory *onus* on the driver of a motor car of showing that loss or damage resulting from its use did not arise from his negligence does not operate to compel the st. to hold to be negligence that which would not otherwise be negligence or to refuse to give effect to the defence of contributory negligence where the

**735. Add. Annotations:—***Apld. Dew v. United British S.S. Co.* (1928), 139 L. T. 628. *Consd. Lochgelly Iron & Coal Co. v. M'Mullan* (1933), 49 T. L. R. 566. *Refd. Flower v. Ebbw Vale Steel Iron & Coal Co.*, [1936] A. C. 206.

**736a. Jury unable to decide liability.]—**In an action for damages for personal injuries alleged to have been caused by deft.'s negligent driving of a motor car, the jury found that there was negligence on both sides, but they were unable to agree on the question whose negligence was really responsible for the accident:—*Held*: on this verdict judgment could not be given for either party.—*SERVICE v. SUNDELL* (1929), 99 L. J. K. B. 55; 46 T. L. R. 12; 73 Sol. Jo. 729, C. A.

*Annotation:—Expld. Cooper v. Swadling* (1929), 46 T. L. R. 73.

evidence supports it, but merely goes to the burden of proof.—*PRUDEN v. FOXON*, [1928] 3 W. W. R. 245.—*CAN.*

**732 lxx.** —.]—*DENT v. USHER*, [1929] 4 D. L. R. 716; 64 O. L. R. 323; *affd.*, [1930] 2 D. L. R. 736; 65 O. L. R. 117.—*CAN.*

**732 lxxi.** —.]—*SCHMULAND v. LUCAS* (Alta.), [1929] 3 D. L. R. 848.—*CAN.*

**732 lxxii.** —.]—*ROOT v. McKINNEY*, [1930] S. C. R. 337; 2 D. L. R. 984; [1929] 4 D. L. R. 138; 2 W. W. R. 340; 24 Alta. L. R. 181; *affd.*, [1929] 2 D. L. R. 604; 1 W. W. R. 884.—*CAN.*

**732 lxxiii.** —.]—In an action against the comrs. of a development district for damages because of the freezing of the water pipes in pltf.'s house after he had closed the house up & had asked the man in charge of defts.' waterworks system to cut off the water from the branch service pipe: *Held*: pltf. must fall on the ground that his own failure to take the reasonable precautions which he should have taken under the circumstances was the cause of his loss, & also on the ground that said loss was not shown to have been the natural & probable consequence of defts.' negligence. The alternative claim under Contributory Negligence Act was also disposed of by the above findings, since this Act applies only to a case where the fault of two or more persons causes damage to one of them, & the failure of deft. to shut off the water at the main did not "contribute" to cause the pltf.'s loss.—*LEARY v. NAKUSP DEVELOPMENT DISTRICT COMRS.*, [1930] 1 W. W. R. 97.—*CAN.*

**732 lxxiv.** —.]—Pltf. alighted from a motor omnibus & ran behind into deft.'s automobile:—*Held*: deft. was not bound to anticipate that the girl would run into the road in front of her so as not to give deft. a chance to stop; deft. could not be expected to know the actual intention of every one on the road, but only the intention manifested by outward acts or to be expected from the ordinary course of events; the sole negligence causing the accident was that of the girl herself.—*WILSON v. REMOTOY*, [1930] 1 D. L. R. 273; 64 O. L. R. 458.—*CAN.*

**732 lxxv.** —.]—*PRICE v. BRITISH COLUMBIA MOTOR TRANSPORT, LTD. & LEDBURY*, [1932] S. C. R. 310; 2 D. L. R. 161.—*CAN.*

**732 lxxvi.** —.]—*WATT v. REID*, *BURCH v. REID*, [1930] 2 D. L. R. 215; 42 B. C. R. 90.—*CAN.*

**732 lxxvii.** —.]—*NASON v. BICKFORD* (1932), 5 M. P. R. 434.—*CAN.*

**732 lxxviii.** —.]—A patrolman on a racing track was struck by a car while crossing the track to chase boys

away. He sued for damages for negligence alleging an insufficiency of patrolmen:—*Held*: the damage was not the natural & probable cause of his negligence, but was due solely to the voluntary act of pltf.—*CLAGUE v. WINNIPEG JOCKEY CLUB* (1933), 41 Man. L. R. 421.—*CAN.*

**732 lxxix.** —.]—*HAYNES v. THOMPSON* (1933), 41 Man. L. R. 513.—*CAN.*

**732 lxxx.** —.]—Pltf., a passenger on a steamer operated by deft., was injured when landing therefrom. She jumped from the deck to the wharf or float when the steamer was about a foot away from it & gradually drifting out. Her evidence was that she had jumped because the captain had said to her: "You will have to jump quick because the wind is carrying me out." The jury found deft. negligent in "lack of proper care & warning in preventing pltf. from disembarking in the proper manner" & found that pltf. was contributorily negligent in "over anxiety to disembark." The proportion of fault of pltf. & deft. were fixed at one-quarter & three-quarters respectively & on these answers judgment went for pltf. for three-quarters of the damages found. On appeal, the ct. being equally divided, the appeal was dismissed.—*BONIFACE v. HARBOUR NAVIGATION CO., LTD.*, [1934] 1 W. W. R. 612; 2 D. L. R. 714; 48 B. C. R. 136.—*CAN.*

**732 lxxxi.** —.]—Pltf., a pedestrian, was struck at a street intersection by deft.'s motor car. He had seen the motor car approaching but thought that he had time to cross. Deft. saw pltf. crossing & blew his horn when about 15 or 20 feet from pltf., after pltf. had passed the line of the course of his car. Pltf. upon hearing the horn stepped back into the path of deft.'s car & was injured:—*Held*: the real blame of the accident must fall on pltf. since he failed to watch deft.'s car which he had seen approaching.—*ROBERTSON v. ANTONIUK*, [1934] 2 W. W. R. 293; 4 D. L. R. 46.—*CAN.*

**732 lxxxii.** —.]—In an action arising out of a collision on the highway between pltf.'s motor car & deft.'s horse, alleged to have been negligently left unattended on the highway, the jury in answer to questions submitted to them, found that deft. was negligent in not having full control of the horse, & that pltf.'s driver was guilty of contributory negligence in driving too fast & not keeping a sharp look-out. In addition the following question was submitted to & answered by the jury as follows: "(5) If there was negligence on the part of deft., could pltf.'s driver, notwithstanding deft.'s negligence, have prevented the accident by the exercise of reasonable care, & if so, how could he have prevented it?"

**736b. Breach of statutory duty by defendant.]—**Contributory negligence of pltf. is a valid defence to an action founded on breach of a statutory duty by deft.—*FLOWER v. EBBW VALE STEEL, IRON & COAL CO., LTD.*, [1934] 2 K. B. 132; 103 L. J. K. B. 465; 151 L. T. 87; 78 Sol. Jo. 154, C. A.; *revid. on other grounds*, [1936] A. C. 206, H. L.

*Annotations:—Consd. Bailey v. Geddes*, [1937] 3 All E. R. 671; *Craze v. Meyer-Dumore Bottlers' Equipment Co.*, [1936] 2 All E. R. 1150; *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1938] 3 All E. R. 21.

**743. Add. Annotations:—***Dbtd. Service v. Sundell* (1929), 45 T. L. R. 569. *Refd. Dew v. United British S.S. Co.* (1928), 139 L. T. 628; *The Eurymedon*, [1938] P. 41.

**745. Add. Annotations:—***Distd. Swadling v. Cooper* (1930), 46 T. L. R. 597. *Folld. Tart v. Chitty & Co.*, [1933] 2 K. B. 453. *Consd. The*

*Answer: Yes, by keeping a sharp look-out & driving at a slower rate of speed*:—*Held*: the trial judge properly gave judgment for deft.—*CLONEY v. TRERRICE* (1933), 6 M. P. R. 500.—*CAN.*

**732 lxxxiii.** —.]—*PERDUE v. EPSTEIN* (1933), 48 B. C. R. 116.—*CAN.*

**732 lxxxiv.** —.]—*TILLEY v. WILSON*, [1936] 1 W. W. R. 72; 50 B. C. R. 276; 5 F. L. J. (Can.) 163.—*CAN.*

**732 lxxxv.** —.]—*BARNES v. BRADSHAW*, [1937] 2 D. L. R. 203; 51 B. C. R. 338.—*CAN.*

**732 lxxxvi.** —.]—*BILLINGS v. MOORE & MCGUIRE*, [1937] 4 D. L. R. 518; 11 M. P. R. 553.—*CAN.*

**732 lxxxvii.** —.]—*CASSELLS v. T. T. C.*, [1938] 1 D. L. R. 746.—*CAN.*

**732 lxxxviii.** —.]—*ILASIEWICZ v. GHAPENTINE*, [1938] 1 D. L. R. 626.—*CAN.*

*sn. Breach of statutory regulation by plaintiff.]—*If a breach by the pltf. of a statutory regulation against pillion-riding occurs, then, provided that the circumstances are such that the management of pltf.'s motor vehicle was a determining factor of the collision, it is to be assumed, without further evidence, that the pillion-riding did in fact make the management of the motor vehicle more difficult, & was negligence contributing to the accident.—*MORTESS v. FRY*, [1928] S. A. S. R. 60.—*AUS.*

*sp. Presumption with modern traffic.]—*When a ct. has to deal with modern quick-moving traffic, though it is sometimes possible where the parties are successively negligent to determine which negligence was by the result the cause of the accident, in most such cases the last acts follow one another so closely in time, & are so closely interconnected as to justify the view that the resulting damage was due to the negligence of both parties.—*SOUTH AFRICAN RAILWAYS v. STEGMANN*, [1932] App. D. 318.—*S. AF.*

*sr. Defence available in civil proceedings only.]—*Defence of contributory negligence is not available in criminal prosecutions involving criminal negligence.—*R. v. SUTHERLAND* (1933), 7 M. P. R. 172.—*CAN.*

#### PART XI. SECT. 1, SUB-SECT. 2.—A.

**744 xxxi.** —.]—*DAVIDGE v. JOHNSTON & McDONALD, LTD.* (1926), 59 N. S. R. 76.—*CAN.*

**744 xxxii.** —.]—*BALLANTINE v. INTERNATIONAL RY. CO.*, [1927] 4 D. L. R. 951; 61 O. L. R. 278.—*CAN.*

**744 xxxiv.** —.]—Where in an action for damages arising out of the collision of two motor cars at the

Eurymedon, [1938] P. 41. **Refd.** Hargrove v. Burn (1929), 46 T. L. R. 59; Tidy v. Battman, [1934] 1 K. B. 319; Flower v. Ebbw Vale Steel, Iron & Coal Co., [1934] 2 K. B. 132.

**751. Add. Annotations :—***Apld.* Hargrove v. Burn (1929), 46 T. L. R. 59.; *Swadling* v. Cooper (1930), 46 T. L. R. 597. *Consd.* M'Lean v. Bell (1932), 48 T. L. R. 467. *Dlstd.* The Eurymedon, [1938] P. 41. *Refd.* The Vectis, [1929] P. 204; The Chatwood, [1930] P. 272; *Flower* v. Ebbw Vale Steel, Iron & Coal Co., [1934] 2 K. B. 132.

765a. —.]—The fact that a man was killed while endeavouring to cross in front of an electric tramcar at the intersection of two streets in a town, at a place where the rules of the tramway co. laid down that "the speed must be reduced & the car kept carefully under control" is not evidence of recklessness on

his part amounting to contributory negligence sufficient to free the co. from liability for the accident, the jury having found that the driver of the tramcar was in fault.—TORONTO RY. CO. v. KING, [1908] A. C. 260 ; 77 L. J. P. 272.

*Annotation* :—**Reid. Flower v. Ebbw Vale Steel, Iron & Coal Co., [1934] 2 K. B. 132.**

770a. .]—HARGROVE v. BURN (1929), 46  
T. L. R. 59.

**770b.**     ~~—.]—~~In a running-down case, if it is established that although ptlf. was negligent, deft. could have avoided the collision by the exercise of reasonable care, then it is deft.'s failure to take that reasonable care to which the resulting damage is due, & ptlf. is entitled to recover.—*McLEAN v. BELL* (1932), 147 L. T. 262; 48 T. L. R. 467; 76 Sol. Jo. 414, H. L.

*Annotation :—***Consd.** The Eurymedon, [1938] P. 11.

crossing of two roads it was proved that deft. had been negligent in not keeping a proper look out, but it was also proved that the driver of pltf.'s car had seen deft.'s car at a considerable distance from the crossing, but had ignored it, considering as he was on the main road & had the right of way he could continue his course:—**Held:** the driver of pltf.'s car had not acted reasonably in ignoring the approaching car on the assumption that deft. would respect his right of way, & he had been guilty of contributory negligence which disentitled pltf. from succeeding.—**ROBINSON BROS. v. HENDERSON, (1928) App. D.138.—S. A.F.**

744 xxxv. —.]—TREVOR-SMITH v. WALTERS(1928), 49 N. L. R. 351.—S.AF.

744 xxxvi. —. —.]—The fact that the gates at a railway crossing have been left open does not excuse a person approaching the track from taking reasonable precautions before crossing it in order to discover whether a train is coming. —MICHALINSKI v. CANADIAN PACIFIC RAILWAY Co., [1928] 3 W. W. R. 238.—CAN.

744 xxxvii. —.]—JOHNSON v.  
HILBORN, [1932] 1 D. L. R. 683.—CAN.

744 xxxviii. —.]—MACDONALD v. THOMAS (1933), 41 Man. L.R. 657.—CAN.

744 xxxix. —.]—KOEPEL v.  
COLONIAL COACH LINES, LTD., [1933]  
3 D. L. R. 469; S. C. R. 529.—CAN.

744 xl. —.]—Possession of the right of way does not absolve any motor-car driver from the duty of taking reasonable care. In an action arising from a collision of motor cars at an intersection:—*Held*: the fact that the female *pltf.* was a passenger in the male *pltf.*'s car & sitting on the front seat had her back towards the door & was reading a newspaper & continued to read it, without warning the driver of danger although she had seen the def't.'s car when it was some distance from the intersection, did not, under the circumstances, constitute contributory negligence.—*FOSTER v. REDGRAVE*, [1935] 1 W. W. R. 33.—**CAN.**

744 xli.—.]—Def't. driver was found to have been negligent in so turning on to the left side of the road without attempting to see that the road was clear but it was contended that, nevertheless, pl'tf., the driver of the oncoming car, had time to, & could have avoided a collision by merely swinging his car out a few feet: —Held: while it seemed that some drivers more skilled than pl'tf. & more accustomed to quick & instinctive judgment in an emergency could have so avoided the collision, yet to hold —Held: guilty of contributory negligence cause he did not do so would be to

demand the taking of an extraordinary precaution in the agony of a situation entirely attributable at that stage to the negligence of the deft. driver; & that is untenable.—**DAVIDNER v. SCHUSTER, RIESENBERG v. SCHUSTER** (No. 2), [1936] 1 W. W. R. 120.—**CAN.**

744 xlii. —.]—A pedestrian who steps suddenly from between standing cars & is knocked down is guilty of contributory negligence barring recovery.—**ARMSTRONG v. HOUSTON**, [1936] 2 D. L. R. 65; 5 F. L. J. (Can.) 293.—**CAN.**

744 xliii. -- J. In a motor car collision case wherein the trial judge found that deft. was negligent in suddenly cutting-in in front of pltf.'s car & that it was this negligence which caused the accident, it was contended that nevertheless pltf. had been ultimately negligent since he could have prevented the accident by putting on his brakes :-*Held*: the contention could not be sustained. The applying of pltf.'s brakes was not a step which a reasonably careful man would be expected to take in the circumstances. --PUTNAM v. MACNEILL, [1938] 1 W. W. R. 780. --CAN.

**PART XI. SECT. 1, SUB-SECT. 2.—B.**

771 xxxix. *Subsequent proceedings*,  
[1923] 4 D. L. R. 727; [1923] S. C. R.  
730; [1923] 3 W. W. R. 938.

771 lv. —.]—HEALING (A. G.) & CO. PROPRIETARY, LTD. v. HARRIS (1927), 39 Cl. L. R. 560; [1927] Argus L. R. 386.—AUS.

771 lvi. —.]—PENROSE v. BARR  
(B. C.), [1927] 4 D. L. R. 407; [1927]  
3 W. W. R. 104.—CAN.

771 (vii. —.)—HAMILTON v. PAL-  
LISER. HOTEL AUTO & TAXI Co., LTD.,  
[1928] 4 D. L. R. 962; [1928] 3  
W. W. R. 497.—CAN.

771 lviii. —.]—NELSON v. DENNIS  
(Man.), [1929] 4 D. L. R. 282; 2  
W. W. R. 513; *revsd.*, [1930] 1  
W. W. R. 656; 3 D. L. R. 215; 38  
Man. L. R. 553.—CAN.

771 lix. —.—.]—JEREMY & JEREMY  
v. FONTAINE, [1931] 1 W. W. R. 671;  
*affd.*, [1931] 3 W. W. R. 203; 4 D. L. R.  
556; 26 Alta. L. R. 499.—CAN.

771 lx. —j— Where in an action for negligence the jury finds on sufficient evidence that, notwithstanding the negligence which it found *pltf.* guilty of, *def't.* could by the exercise of reasonable care have avoided the accident *pltf.* is entitled to recover; & the Contributory Negligence Act, 1925, has no application.—*KEY v. BRITISH COLUMBIA ELECTRIC RY. Co.*, [1931] 1 D. L. R. 532; [1930] 3 W. W. R. 569; *aff'd.*, [1931] 3 D. L. R. 587.—*CAN.*

771 lxi. ----- v. DUFF  
FLINT & Co., [1930] 2 D. L. R. 142.-  
CAN.

771 lxii. —.]—BRITISH COLUMBIA  
ELECTRIC RY. CO. v. KEY, [1931] 3 D. L.  
R. 587 ; [1932] S. C. R. 106.—CAN.

771 lxiii. —.]—CHISHOLM v. AIRD  
(1930), 43 B. C. R. 354.—CAN.

771 livi. —] Pliff., a boy twelve years old, alighted from a hayrack, on which he had been riding while it was being driven westward in the outskirts of a city, & went around the back of the rack with the intention of crossing the road. As he emerged from behind the rack he ran into the side of def.'s motor car, driven by his son, which was travelling eastwards at thirty miles per hour. The judge, who found the driver of the car negligent in not sounding his horn before coming to the hayrack & in driving at an excessive speed under the circumstances, gave judgment for pliffs. On appeal: *Held*: the appeal should be dismissed but the damages should be reduced. — *VENOT v. BLACK*, [1933] 2 W. W. R. 198; 3 D. L. 517; 41 Man. L. R. 217; *reversed*, [1934] 1 D. L. 803. — *CAN.*

771 kv. ....) In an action resulting from a collision at dusk at a well-lighted intersection between a bicycle ridden by the infant plff. & deff.'s motor car:—**Held**: although the infant plff. was negligent in not having a headlight on his bicycle, yet the direct cause of the accident was the negligence of deff. in failing to keep a proper lookout & in making a turn to the left too soon & too short & on the wrong side of the intersection. —**DAVIS V. HALL & DAVID HALL SIGN CO., LTD.**, (1936) 1 W. W. R. 419. —**CAN.**

771 lxxi. —.]—Where in a collision between a motor cycle & a motor car a pillion rider sustained injury, it was not shown that the negligence of the motor cyclist was alone the effective cause of the injury, & it was shown that the negligence of deft. motor driver was a contributory factor in the effective cause, deft. is liable.—DRED v. LIDDLE, [1935] S. A. S. R. 188.—AUS.

771 lxvii. -- J. - Plff.'s son was killed as a result of a collision between his bicycle, which he had been riding on the left side of the road, & a motor car which approached him from the rear. The jury, in answer to questions, found that the driver of the motor car was negligent & that deceased was contributorily negligent. In opposing the motion for the dismissal of the action, plff.'s counsel contended that, in view of the jury's findings, it should be asked whether, notwithstanding deceased's negligence, deft. driver could have avoided the accident.

- 791 l. —.}—A man who, by another's want of care, finds himself in a position of imminent danger can-

792. *Add. Annotation*:—*Refd.* *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.
793. *Add. Annotations*:—*Consd.* *Haynes v. Harwood & Son*, [1935] 1 K. B. 146. *Refd.* *Banco de Portugal v. Waterlow & Sons, Ltd.* (1931), 100 L. J. K. B. 465.
793. *Add. Citation*:—17 Asp. M. L. C. 117.
- Add. Annotation*:—*Refd.* *Canadian Pacific Ry. v. Kelvin Shipping Co.* (1927), 138 L. T. 369.
803. *Add. Annotations*:—*Refd.* *Hargrove v. Burn* (1929), 46 T. L. R. 597; *Swadling v. Cooper* (1930), 46 T. L. R. 597.
804. *Add. Annotation*:—*N.F.* *Oliver v. Birmingham & Midland Motor Omnibus Co.* (1932), 48 T. L. R. 540.
807. *Add. Annotations*:—*As to* (1) *Consd.* *Oliver v. Birmingham & Midland Motor Omnibus Co.* (1932), 48 T. L. R. 540. *Generally, Refd.* *The Vectis*, [1929] P. 204.

not be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger.—*THORNTON v. FISHER*, [1928] App. D. 398.—S. AF.

t i. —.]—*PATTERSON v. GOODERHAM*, [1928] 1 D. L. R. 131.—CAN.

t ii. —.]—*CARTER v. VAN CAMP & ANDERSON, VAN CAMP v. CARTER & ANDERSON*, [1930] S. C. R. 156; *affd.*, [1929] 4 D. L. R. 625; *varg.*, [1929] 1 D. L. R. 429; 63 O. L. R. 257.—CAN.

t iii. —.]—*WILKINS v. DODDS* (Sask.), [1929] 4 D. L. R. 119.—CAN.

t iv. —.]—The negligence of the driver of deft. co.'s automobile, at the intersection of two streets, forced pltf. who was driving his own automobile, in the face of imminent collision with deft. co.'s automobile, to choose between collision & the chance of avoiding it by turning his automobile up the intersecting street, which in attempting to do he ran into the curbing & damaged his automobile:—*Held*: the negligence of deft. co.'s driver in effect caused the damage sustained by pltf.—*HARDMAN v. YELLOW CAB, LTD.*, [1929] 1 D. L. R. 947; 60 N. S. R. 352.—CAN.

t v. —.]—Deft., the driver of an automobile trying to overtake & pass another automobile on a curve at an excessive rate of speed, collided with the automobile of pltf. approaching the curve from the opposite direction on his proper side of the road. The former contended that the latter might have passed between the overtaking & overtaken automobiles:—*Held*: there was no duty on the driver of the approaching automobile to do so.—*MCDONALD v. BEZANSON*, [1929] 1 D. L. R. 272; 60 N. S. R. 337.—CAN.

t vi. —.]—Applt. H., driving a car belonging to applt. co., proceeding along the road on his correct side, finding himself suddenly confronted by resp.'s approaching car, which had cut a blind corner leading into the road, in order to avoid what appeared to be an imminent collision, swerved to the opposite side of the road, & there collided with resp.'s car, which had simultaneously swerved on to its correct side:—*Held*: applt.'s action in swerving to his wrong side of the road was reasonable & unattended by negligence.—*HINDMARSH v. GUTHRIE, SHELL CO. OF NEW ZEALAND v. GUTHRIE*, [1930] N. Z. L. R. 15.—N.Z.

sz. *Act on impulse of personal peril.*—When deft.'s motor car cut in sharply in front of pltf.'s car the male pltf., who was driving, attempted to use the foot brake but, in his agitation, stepped on the accelerator with the result that his car swerved over the sidewalk & collided with an electric light pole:—*Held*: notwithstanding what pltf. driver so did, deft. was solely liable.—*FUJIWARA v. OSAWA*, [1937] 1 W. W. R. 364; 2 D. L. R. 133; 51 B. C. R. 388; *affd.*, [1937] 3 W. W. R. 670; [1938] 1 W. W. R. 377; *affd.*, [1938] S. C. R. 170.—CAN.

#### PART XI. SECT. 5.

803 iv. —.]—The contributory negligence of the driver of a vehicle who is not the servant or agent of a passenger therein is no defence to an action by the latter for

damages for personal injuries caused by the negligence of another person.—*McCULLOCH v. STAR CONSTRUCTION Co.*, [1928] 1 D. L. R. 970; [1928] 1 W. W. R. 211; 22 Sask. L. R. 231.—CAN.

803 v. —.]—The more fact of a passenger being a passenger does not so identify him with his driver as to make him responsible for the driver's negligence.—*MARA v. HARTLEY*, [1931] 2 D. L. R. 734; O. R. 69.—CAN.

803 vi. —.]—In an automobile collision case in which pltf. was a passenger in one of the cars & deft. was the driver of the other car:—*Held*: since the negligence of the driver of the car in which pltf. was riding was not a defence open to deft. as against pltf., & since deft. had been guilty of negligence without which the accident would not have occurred, pltf. was entitled to recover.—*MATTHEWS v. MCKINNON*, [1934] 3 W. W. R. 590; 1 D. L. R. 255.—CAN.

803 vii. —.]—A boy was injured by a collision between a car & a bicycle, on the handlebars of which he was riding. The lamp on the bicycle was unlighted. Since he did not know that the lamp was unlighted & therefore had no knowledge of the danger, he was held not guilty of contributory negligence.—*MACKENNEY v. HORNE* (1934), 7 M. P. R. 470.—CAN.

803 viii. —.]—Pltf., while a member of a family party on a motor car outing, was injured as the result of her brother's negligence in driving the car, which was owned by her step-father, & sued her brother for damages. Pltf. did not drive a car at all & trusted solely to her brother to do the driving:—*Held*: it could not be said that pltf. was in any way in control of the car & therefore, identified with her brother's negligence.—*KERR v. STEPHEN*, [1930] 1 W. W. R. 896; 2 D. L. R. 978; 42 B. C. R. 518.—CAN.

803 ix. —.]—Pltf. M. sued as administrator of the estate of his son who was a passenger, on a "joy jaunt," in pltf. H.'s car & was killed in the collision:—*Held*: although he was not identified with the negligence of his driver, yet, since he must have known the condition of the car in which he was travelling, he was identified with it, & was an accomplice in the offence of operating the car without legal lighting: the result being that both he & H. were in the same legal position with respect to deft.—*McMARTIN v. ELLIOTT & BURNS & CO., LTD., HADLEY & HADLEY v. ELLIOTT & BURNS & CO., LTD.*, [1932] 2 W. W. R. 664; *on appeal*, [1933] 1 W. W. R. 85.—CAN.

803 x. —.] *Pillion passenger.*—Where a motor cycle with a pillion passenger was being driven along a public road without lights on a dark night, the passenger taking a share in the direction & control of the motor cycle, & both driver & passenger being equally aware of the foolhardy & dangerous nature of their undertaking, they were engaged in a common purpose or joint enterprise, i.e., "concerted action towards a common end." The negligence of the driver must, therefore, be attributed to the passenger.—*BOURKE v. JESSOP* (No. 2),

1934] N. Z. L. R. Supp. 81; G. L. R. 495.—N.Z.

803 xi. —.]—In sect. 71b of *Vehicles & Highway Traffic Act, 1924*, which provides that, except in the case of motor vehicles ordinarily used for carrying passengers for hire, "a person" who is a gratuitous passenger shall have no right of action against an owner or driver of a motor vehicle for injuries sustained by reason of its "negligent operation," the words "negligent operation" include only such negligence as is due to forgetfulness, inadvertence or carelessness, but not such an operating of a vehicle as can be classed as reckless, wilful or illegal, or is due to improper conduct or is contrary to the various provisions of the Act.—*FRASER v. FRASER*, [1936] 2 W. W. R. 225; 6 F. L. J. (Can.) 36; *reversd.*, [1936] 3 W. W. R. 616; [1937] 1 D. L. R. 67; 6 F. L. J. (Can.) 243.—CAN.

803 xii. —.]—Deft., a market gardener, was driving a number of his employees in a motor truck to their work when the truck hit a telephone pole & two of the employees were injured:—*Held*: said employees were not "guests" of deft. within sect. 60A of *Highway Traffic Act, 1930*.—*TYCHOLITZ v. CROP, KOWPAK v. CROP*, [1936] 2 W. W. R. 222, 272; *affd.*, [1936] 2 W. W. R. 416; 44 Man. L. R. 146.—CAN.

803 xiii. —.]—Pltf.'s car was owned by B. & was being driven by his son. B. & his wife & the two other pltfs. were passengers therein. Defts.' car, driven by M., was owned by his wife, his co-deft. It was admitted that each car was being operated with the knowledge & consent of its owner. Three actions, tried together, were brought: one by B. & his wife, one by one of the passengers, & the third by the widow of the other passenger, who was killed:—*Held*: deft. M.'s wife was identified with his negligence & was equally liable with him; but neither B.'s wife nor the other passengers could be identified with the negligence of their driver, B.'s son. B. as the owner consenting to the driving of the car by his son was identified with the latter's negligence & therefore, the action by him & his wife was, so far as his claims were concerned, dismissed.—*BARR v. MILLER, CANADA v. MILLER, SICHEWSKY v. MILLER*, [1938] 2 W. W. R. 563.—CAN.

o i. —.]—If an injury is done by the wrongful act of one to the property of another, the wrongdoer is liable to the owner quite apart from the existence of any contract of bailment. The *Contributory Negligence Act, R. S. O., 1927*, does not affect the rights of a bailor who is not guilty of any negligence.—*FLETCHER v. THOMAS*, [1931] 3 D. L. R. 142; O. R. 195.—CAN.

sw. *Failure of lights of omnibus—Passengers continuing with knowledge.*—*HORNING v. SYCAMORE & FLEXMAN* (1935), 11 N. Z. L. J. 201.—N. Z.

sz. *Contributory negligence of guest—What amounts to.*—A guest in a car is not guilty of contributory negligence in failing to keep a look out, or to warn the driver, when approaching a railway crossing.—*BOOTH v. GRIEVE*, [1936] 1 D. L. R. 682; O. R. 111; 5 F. L. J. (Can.) 228.—CAN.



## Part XII.—Damages.

810. *Add. Annotations*:—*Reid. Rose v. Ford*, [1937] 3 All E. R. 359; *Workington Harbour & Dock Board v. Trade Indemnity Co. (No. 2)*, [1937] 3 All E. R. 139.

817. *Add. Annotation*:—*Reid. Hall v. Brooklands Auto-Racing Club (1932)*, 48 T. L. R. 546.

828. *Add. Annotations*:—*Consd. Roach v. Yates*, [1937] 3 All E. R. 442. *Reid. Heaps v. Perrite, Ltd.*, [1937] 2 All E. R. 60; *Rose v. Ford*, [1937] 3 All E. R. 359; *Shepherd v. Hunter & Co.*, [1938] 2 All E. R. 587.

835a. — *Shortened expectation of life.*—A pltf. met with an accident through the negligence of deft. & sustained serious personal injuries whereby the expectation of his life was materially shortened. Pltf. brought an action to recover damages for the injuries he had sustained:—*Held*: in assessing the damages

the judge was entitled to take into consideration as one of the elements of damage the fact that pltf.'s normal expectation of life had been materially shortened.—*FLINT v. LOVELL*, [1935] 1 K. B. 354; 104 L. J. K. B. 199; 152 L. T. 231; 51 T. L. R. 127; 78 Sol. Jo. 860, C. A.

*Annotations*:—*Consd. Slater v. Spreag*, [1936] 1 K. B. 83. *Appl. Roach v. Yates*, [1937] 3 All E. R. 442. *Apprvd. Rose v. Ford*, [1937] 3 All E. R. 359. *Consd. Shepherd v. Hunter & Co.*, [1938] 2 All E. R. 587. *Reid. The Alzkarai Mendi*, [1938] 3 All E. R. 483; *Feay v. Barnwell*, [1938] 1 All E. R. 31.

835b. — — — — —]—In a collision between a pedal bicycle ridden by pltf., a bricklayer thirty-three years of age, & a car driven by deft., occasioned by the negligence of the latter, pltf. sustained serious injury to the brain rendering him permanently, not only unfit for work, but incapable of looking after him-

## PART XII. SECT. 2, SUB-SECT. 1.

814 xvii. — — — — —]—Where an invitee is injured by explosion of a cylinder of gas, the owner of the gas is liable for all the consequences, including fire on the premises.—*BROWN v. CANADIAN NATIONAL RYS.*, [1938] 1 D. L. R. 802.—CAN.

## PART XII. SECT. 2, SUB-SECT. 2.

818 i. *Fear of personal injury—Impending collision.*—*WALKER v. PITLOCHRY MOTOR CO.*, [1930] S. C. 565.—SCOT.

## PART XII. SECT. 3, SUB-SECT. 1

a i. — *Destruction of orchard by fire.*—Pltf.'s apple orchard consisting of trees of a kind which did not bear fruit until thirteen years after planting & which had been planted for sixteen years, was destroyed by fire caused through the negligence of deft.'s servants.—*Held*: pltf. was entitled to damages in a sum which would place her in as good a position financially as she would have been if no fire had occurred, & where the evidence showed that pltf. could derive from trees which would take only six years to bear fruit an income not less than that obtained from the destroyed trees, she was entitled to judgment for a sum representing the actual cost to her of restoration of the orchard with such more quickly bearing trees, including the cost of re-planting, fertilising, cultivating, pruning, etc., to which must be added a sum representing the loss of income pltf. would suffer pending such restoration, that is to say, for a period of six years.—*OATES v. UNION GOVERNMENT*, [1932] N. L. R. 198.—S. AF.

a ii. *Sum sufficient to give annuity equal to annual earnings—Whether awarded on wrong principle.*—*BLOUDDOFF v. CANADIAN NATIONAL RAILWAY (Sask.)*, [1928] 4 D. L. R. 29; [1928] 2 W. W. R. 619.—CAN.

832 i. — *Not cost of re-instatement.*—*ROUSSEAU v. LYNCH & FOURNIER*, [1931] 4 D. L. R. 595; 3 M. P. R. 355.—CAN.

835 iv. — — — — —]—In an action for damages for personal injuries a claim for loss of wages or earnings to the date of the commencement of the action or of the trial is not recoverable as special damages; such a loss is one to be taken into consideration by the jury in assessing general damages.—*TRACHE v. CANADIAN NORTHERN RY. CO.*, [1929] 2 D. L. R. 321; 1 W. W. R. 100; 35 C. R. C. 258; 23 S. L. R. 576.—CAN.

835 v. — — — — —]—In an action for

damages for personal injuries a claim for wages lost by reason of the injury is an element of damage to be considered in assessing general damages; it cannot be recovered as special damages because, by reason of the uncertainties connected with employment & with human life, it is incapable of exact assessment.—*TAYLOR v. ADDEMS & ADDEMS*, [1932] 1 W. W. R. 505.—CAN.

835 vi. — — — — —]—In an action for damages for personal injuries caused by negligence the fact that the pltf. is entitled under his contract with his employer to a cumulated credit for sick leave for a period exceeding that during which he was absent from work as the result of his injuries, & therefore, has not actually lost any salary because of such absence, is not a ground for depriving him of damages for loss of time. Time lost from work as a result of injuries caused by negligence is an element to be considered in assessing general damages; it cannot be recovered as special damages.—*TUBB v. LIEF & GORDON*, [1932] 3 W. W. R. 245.—CAN.

c i. — — — — —]—An impairment of a young woman's prospects of marriage because of injuries or disfigurement may be taken into consideration in assessing damages for personal injuries.—*TAYLOR v. ADDEMS & ADDEMS*, [1932] 1 W. W. R. 505.—CAN.

c ii. — — — — —]—In an action for damages for negligent driving by which pltf. was crippled:—*Held*: the possibility that pltf. might be inconvenienced in motherhood, & also that her condition might lessen her chances of marrying at all were proper matters to consider in assessing damages.—*WELDON v. STEEVES* (1934), 8 M. P. R. 53.—CAN.

d i. — *Unreasonable refusal to submit to operation.*—Where the continuance or increase of an injured person's incapacity is due to his unreasonableness in refusing to allow himself to be operated on, the quantum of damages allowable to him must be limited to what would be reasonable compensation if he had acted as a reasonable man.—*MASNY v. CARTER-HALLS-ALDINGER CO., LTD. (Sask.)*, [1929] 3 W. W. R. 741.—CAN.

d ii. — *Inability to follow trade.*—A dairy-farmer, who had suffered injury through accident, prayed & was awarded special damages for, *inter alia*, loss of goodwill of milk customers & loss of crops through inability to sow because of the injuries he had received, & he also prayed & was awarded general damages on account of being

unable to follow his occupation as a dairy-farmer & for permanent disability as the result of the accident. The special damages relating to the items mentioned were disallowed, the jury having been directed to take into consideration, when assessing general damages the incapacity of supplant to carry on his business, as those items could not be separated from the business & treated as distinct & separate matters of special damage.—*DUFFY v. R.*, [1935] N. Z. L. R. 745.—N.Z.

d iii. — *Possibility of further injury.*—In an action for damages for a broken leg, the abnormal delay of the healing processes, & the possibility of a further easy break within six months of the jury's verdict, with its attendant economic loss & physical pain, make it not unreasonable for the jury to award damages which in a normal case might seem to be excessive.—*KASSLER v. BYRNE*, [1935] N. Z. L. R. s. 121.—N.Z.

st. *Loss of limb.*—Damages to be allowed to pltf., who has sustained the loss of part of his leg through the negligence of deft., discussed.—*CLARK v. WILSON*, [1926] S. A. S. R. 342.—AUS.

st. *Action by husband for injury to wife—Effect of contributory negligence of wife.*—Damages having been assessed by the jury to both husband & wife:—*Held*: the finding of negligence on the part of the wife cut down the award of damages to the husband.—*DONITY v. OTTAWA ROMAN CATHOLIC SEPARATE SCHOOLS TRUSTEES*, [1930] 3 D. L. R. 633; 65 O. L. R. 369.—CAN.

sv. — *No loss of consortium.*—Where a husband sued a surgeon in respect of an operation performed by him on pltf.'s wife, on the grounds that the surgeon should not have operated at all:—*Held*: the action failed, as there was no evidence that pltf. lost more of the consortium than if there had been no operation.—*DAVEY v. MORRISON*, [1931] 4 D. L. R. 619; [1932] O. R. 1.—CAN.

st. — — — — —]—*CORKILL v. VANCOUVER RECREATION PARKS, LTD.*, [1933] 1 W. W. R. 413; 46 B. C. R. 532.—CAN.

sz. *Action by father for injury to child—Effect of contributory negligence of child.*—Where in an action for injuries to an infant through negligence, the infant's father suing both as next friend & in his personal capacity, it was found that the infant & deft. were equally to blame:—*Held*: the father was entitled to recover only one-half of the special damages incurred by him.—*BOWEN v. HAWKE*, [1938] 1 W. W. R.



self & dependent both day & night upon the care of a nurse, & shortening his expectation of life from thirty to sixteen years. At the time of the accident pltf. was earning an average wage of £3 10s. a week. Pltf. having brought an action against deft. for damages for personal injury, it was agreed between the parties that pltf.'s pecuniary losses & expenses by reason of the accident down to the date of the action amounted to £542, & in respect thereof & of all his other damages past & prospective the trial judge awarded him the sum of £2,742 in all. Pltf., being dissatisfied with that sum, appealed:—*Held*: by the Ct. of Appeal, in assessing the amount due to pltf. a proper, though not necessarily the only, method to adopt was to allow him (i) in respect of his pecuniary losses & expenses down to the date of the action the said agreed sum of £542; (ii) in respect of his prospective loss of wages the sum which he would have earned during what, but for the accident, would have been his normal life according to actuarial tables, subject to deductions for all contingencies, that sum to be not less than £2,000; (iii) in respect of nursing attendance, a sum sufficient to cover a reasonable weekly payment for that purpose during the period of his life as shortened by the accident, that sum being estimated at upwards of £2,000; & (iv) in respect of his past & future physical & mental pain & suffering, & the shortening of his life, a sum, in estimating which the following considerations should be kept in view, namely, that no amount of money, however large, could fully compensate pltf. for these injuries, & that the most that could be done was to award him such compensation as was reasonable in all the circumstances of the case, & further, that no deduction should be

made from that compensation because of the fact that in consequence of the accident his condition was such that he might be either incapable of appreciating that his life had been shortened, or even glad that it had been shortened & that his sufferings would the sooner come to an end; & in respect of all these matters pltf. was entitled to a sum of £6,542.—*ROACH v. YATES*, [1938] 1 K. B. 256; [1937] 3 All E. R. 442; 107 L. J. K. B. 170; 81 Sol. Jo. 610, C. A.

*Annotations*:—*Refd.* *Shepherd v. Hunter & Co.*, [1938] 2 All E. R. 587; *Trubyfield v. Great Western Ry. Co.*, [1937] 4 All E. R. 611.

— — — — —]—*Compare* Nos. 953b, 953c, *post*.

**835c.** — — — — —]—The successful pltf. in an action for damages for personal injuries had been awarded £10,000 for the loss of both hands. Defts. appealed against the judgment on the ground that this amount was excessive:—*Held*: the judge was entitled to consider other matters besides the mere loss of earning power. The amount awarded, though large, was not unreasonable in the unusual circumstances of this case.—*HEAPS v. PERRITE, LTD.*, [1937] 2 All E. R. 60; 81 Sol. Jo. 236, C. A.

**837. Add. Annotations**:—*Apld.* *Bradstreets British, Ltd. v. Mitchell* (1932), 48 T. L. R. 670. *Refd.* *The Edison* (1932), 147 L. T. 141; *Re Simms, Ex p. Trustee*, [1934] Ch. 1.

**838a. Loss of wages.**—*ROACH v. YATES*, No. 835b, *ante*.

**838b. Nursing expenses.**—*ROACH v. YATES*, No. 835b, *ante*.

**842. Add. Annotations**:—*Consd.* *Grinham v. Davies* (1928), 139 L. T. 379; *Jones v. Birch Bros., Ltd.* (1933), 49 T. L. R. 586.

**842a.** — — — — —]—*GOWAR v. HALES*, No. 421a, *ante*.

191; 1 D. L. R. 791; 7 F. L. J. (Can.) 211.—CAN.

**sf. Damage to car.**—In an action for injuries to a motor car where the cost of putting the car back into the same condition it was in before the injury would have cost more than the sum for which the car as repaired could be sold for:—*Held*: the proper measure of damages was the fair value of the car just before it was injured, i.e. the price for which a similar car in like condition could have been bought, less what the injured car was worth as scrap.—*DEWEES v. MORROW*, [1932] 2 W. W. R. 228; 2 D. L. R. 800; 45 B. C. R. 154.—CAN.

**sh. Duty of jury.**—It is the duty of the jury in an action for negligence to pass upon general damages as well as the special damages claimed, & then failure to do so will be ground for ordering a new trial.—*JAMIESON v. BRITISH COLUMBIA AMUSEMENTS CO.* (1930), 43 B. C. R. 317.—CAN.

**sk. Money stolen from pocket while unconscious.**—*PATTEN v. SILBERSCHNIG*, [1936] 3 W. W. R. 169; 51 B. C. R. 133.—CAN.

**sm. Damage to car.**—It is not the law that the amount of damages recoverable in the case of a damaged motor car is always the costs of repairing it plus depreciation.—*STEWART v. SMITH*, [1936] 3 W. W. R. 1.—CAN.

**sp. Duty of plaintiff to minimise damages.**—*Whether bound to undergo operation.*—On the question whether pltf. should submit to an operation to minimise the damages flowing from personal injuries due to deft.'s negligence:—*Held*: the onus was on the defence to prove that pltf. could

minimise such damages, & that it was reasonable for him to undergo one or other of the operations suggested.—*BUTLER v. DURBAN CORPN.* (1936), N. L. R. 139.—S. AF.

**sr. Injury to three year old child.**—In assessing the damages recoverable by the parents of a child for injuries caused by negligence:—*Held*: since the parents' ordinary duties were increased for some months following the accident, the mother being unable to give her usual attention to her household duties & the father being obliged to relieve her at times at the hospital & at home & to hire a maid, he was entitled, in addition to the hospital & medical expenses, to recover for the wages of the maid & for the nursing services & special attendances of his wife & himself in caring for the child.—*THOMAS v. WINNIEG CRY.*, [1937] 3 W. W. R. 141; *affd.*, [1937] 3 W. W. R. 393; 45 Man. L. R. 422.—CAN.

#### PART XII. SECT. 4.

**sv. Mitigation.**—*Whether contributory negligence of plaintiff may go in.*—In an action for negligence if pltf. is held entitled to succeed he cannot be deprived of part of the damages which he has proved or of his costs, on the ground that he was guilty of contributory negligence.—*BARRY v. WINNIEG ELECTRIC CO.*, [1926] 2 W. W. R. 791; 36 Man. L. R. 27.—CAN.

**sw.** — — — — —]—*Payment under insurance policy.*—In an action by pltf. to recover damages for the destruction of his dwelling-house & a quantity of chattel property caused by sparks emitted from deft.'s steam tug through deft.'s negligence:—*Held*: deft. was

not entitled to deduct from the amount of damages found to have been sustained by pltf. an amount paid to pltf. by an insurance co. under an insurance on the property.—*BROWN v. MCRAE* (1889), 17 O. R. 712.—CAN.

**sx.** — — — — —]—*FARMER v. GRAND TRUNK RY. CO.* (1891), 21 O. R. 299.—CAN.

#### PART XII. SECT. 6.

**842 i. Defendant insured against liability.**—*Whether court informed thereof.*—*WALSH v. PEAT* (N. B.), [1927] 2 D. L. R. 1120.—CAN.

**842 ii.** — — — — —]—Although it is, as a general rule, improper for counsel for pltf. when cross-examining deft., to ask whether deft. is entitled to an indemnity from an insurance co., yet special circumstances may justify the judge in not withdrawing the case from the jury.—*WILSON v. KENT (GEORGE) & SONS, LTD.*, [1928] N. Z. L. R. 166.—N.Z.

**sl. Action by infant.**—*Injury while en ventre sa mere.*—*Resp.'s* wife, being seven months pregnant, was descending from a tram car belonging to applt. co. when, by reason of the negligence of the motorman, she fell, or was thrown, from the car & was injured. Two months later she gave birth to a female child who was born with club feet. *Resp.*, as tutor to his child, brought an action against applt. co. claiming that the deformity of the child was the direct consequence of the negligence of applt. co. by which the mother was injured. The action was tried with a jury who found in favour of *resp.* & judgment was rendered accordingly. which was affirmed by a majority of

842b. ———.]—It is an established rule of practice that, in an accident case, it should not be intimated to a jury that deft. is insured &, where this rule has been violated, it is within the discretion of the judge to discharge the jury, at the expense of the party whose advocate has violated the rule.—GRINHAM v.

DAVIES, [1929] 2 K. B. 249; 98 L. J. K. B. 703; 139 L. T. 379; 44 T. L. R. 523; 72 Sol. Jo. 303, D. C.

842c. ———.]—ELLIS v. MAYHEW (M.), LTD. (1926), cited in [1929] 2 K. B. at p. 252; 98 L. J. K. B. at p. 705.

Annotation:—Consd. Grinham v. Davies, [1929] 2 K. B.

## Part XIII.—Negligence causing Death.

### SECT. 1.—LIABILITY AT COMMON LAW.

See, now, Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1, & sect. 3, *post*.

843. *Add. Annotations:—As to (2) Consd. Flint v. Lovell*, [1935] 1 K. B. 354; *Rose v. Ford*, [1937] 3 All E. R. 359. *Refd. Grein v. Imperial Airways, Ltd.*, [1937] 1 K. B. 50.

846. *Add. Annotations:—Consd. Flint v. Lovell*, [1935] 1 K. B. 354; *Rose v. Ford*, [1937] 3 All E. R. 359; *The Aizkarai Mendi*, [1938] 3 All E. R. 483. *Refd. The Edison*, [1932] P. 52; *Grein v. Imperial Airways, Ltd.*, [1937] 1 K. B. 50.

851. *Add. Annotation:—Consd. Rose v. Ford*, [1937] 3 All E. R. 359.

859. *Add. Annotation:—As to (2) Refd. Avery v. London & North Eastern Ry. Co.*, [1938] A. C. 606.

864. *Add. Annotation:—Refd. Wilsons & Clyde Coal Co. v. English*, [1937] 3 All E. R. 628.

865. After this case add:—

———.]—See, now, Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 2 (1).

———.]—*Adopted child.*—See Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 2 (1), (2).

867. *Add. Annotation:—Refd. Donovan v. Union Cartage Co.* (1932), 148 L. T. 333.

the appellate ct.:—*Held*: the judgment appealed from should be affirmed & the appeal dismissed. There was sufficient evidence adduced at the trial to produce in the jury's minds a conviction that it was reasonably probable that the deformity of the child resulted as a consequence of the mother's injury, &, consequently, their verdict should not be disturbed. The fact that applt.'s fault caused the deformity of the child cannot, from the nature of things, be established by direct evidence. It may, however, be established by a presumption or inference drawn from facts proved to the satisfaction of the jury.

Under the civil law, a child, who suffers injury while in its mother's womb as the result of a wrongful act or default of another has the right after birth to maintain an action for damages for the injury received by it in its pre-natal state.—*MONTREAL TRAMWAYS CO. v. LEVEILLE*, [1933] S. C. R. 456; 4 D. L. R. 337.—CAN.

87. *Particulars — When ordered.*—Where an action for negligence is one in which the onus of disproving negligence is placed by statute upon deft., pltf. will not be required to give particulars of the negligence alleged.—*WHITE v. HENTON*, [1930] 1 W. W. R. 685; 2 D. L. R. 959; 24 Alta. L. R. 423.—CAN.

8d. *New trial.*—*WINSTON v. NELLES*, [1932] S. C. R. 341; 3 D. L. R. 527.—CAN.

### PART XIII. SECT. 2, SUB-SECT. 2.

860 i. *Personal representative—Foreign administrator.*—*BYRN v. PATERSON S.S., LTD.*, [1936] 3 D. L. R. 111; O. R. 311; 6 F. L. J. (Can.) 20.—

865 i. *Child—Adopted child—Fatal Accidents Act, R. S. O., 1914 (c. 151), s. 2 (a).*—*HOWIE v. LAWRENCE*, [1927] 1 D. L. R. 477; 59 O. L. R. 641.—CAN.

g 1. ———.]—Sisters of deceased are not entitled, as such, to the benefits of Fatal Accidents Act, 1920 (c. 29); & the mere allegation that they were dependent on him does not bring them within the Act.—*SEITZ v. CANADIAN NATIONAL RY. CO.*, [1927] 1 D. L. R. 951; [1927] 1 W. W. R. 193; 21 Sask. L. R. 345.—CAN.

### PART XIII. SECT. 2, SUB-SECT. 3.

o 1. ———.]—W. was injured by falling into a gullet, which was in a street under the care of an urban district council. W. brought no action in his lifetime, & died within six months after the accident, & in consequence thereof. An action was instituted by the widow under Lord Campbell's Act, 1846 (c. 93), more than six months after the death of, & more than eight months from the death of W.:—*Held*: pltf. was entitled to maintain the action.—*WALSH v. BALLINA URBAN DISTRICT COUNCIL* (1921), 55 L. T. 140.—IR.

st. *Action within six months by widow—Subsequent action as administratrix.*—Within six months of the death of a railway passenger, who was killed as the result of being thrown from the train owing, it was alleged, to a sudden stop, his widow & infant child brought an action for damages against the railway co. The widow afterwards obtained letters of administration of his estate, &, having discontinued said action, brought, as administratrix, another action based on the same allegations of facts as those set up in the first action. The second action was begun within a year from the death of the husband:—*Held*: the second action was not barred by sect. 4 or sect. 5 of Act Respecting Compensation to Families of Persons Killed by Accident, R.S.M., 1913.—*SEVICH v. CANADIAN NATIONAL RY.*, [1933] 1 W. W. R. 244; *on appeal*, [1933] 2 W. W. R. 109; 4 D. L. R. 668; 41 Man. L. R. 276.—CAN.

### PART XIII. SECT. 2, SUB-SECT. 5.—B. (a).

883 xiv. ———.]—In order to succeed in an action under Lord Campbell's Act it is necessary for pltf. to show that he has lost a reasonable probability of pecuniary advantage.—*SANFORD v. CROSSLEY*, [1931] 44 B. C. R. 481.—CAN.

883 xv. ———.]—An action under Lord Campbell's Act was brought by an executrix for the benefit of the father & stepmother of the deceased. At the time of his death deceased was thirty-six years old, he had not acquired any property, he was engaged to be married within a few months to

pltf. & for six years his father had not heard from or of him:—*Held*: under the circumstances the father or stepmother had no reasonable expectation of some pecuniary benefit if the death of deceased had not occurred. Also, *semble*: pltf. was not entitled in her action to maintain a claim for damages to the estate of the deceased, even if there were, as there was not, evidence of the amount of damage sustained by the estate.—*CLARKE v. OGILVIE FLOUR MILLS CO., LTD.*, [1933] 1 W. W. R. 417.—CAN.

883 xvi. ———.]—In an action under Fatal Accidents Act, R. S. S., for the death of a girl, two years & four months old, who was killed by a motor car, it was held that the accident was caused by deft.'s negligence in taking his eyes off the road ahead of him when driving the car, but that since pltf. had not shown any reasonable expectation of pecuniary benefit from the continued life of the child, he could not recover.—*KLEISINGER v. DIMIN-YATZ*, [1937] 1 W. W. R. 600; *affd.*, [1937] 3 W. W. R. 481; 7 F. L. J. (Can.) 199.—CAN.

883 xvii. ———.]—*BAUR v. CANADIAN PACIFIC RAILWAY*, [1937] 3 D. L. R. 258.—CAN.

887 ii. *Add. Citation:—affd.* (1903), 34 S. C. R. 215.

### PART XIII. SECT. 2, SUB-SECT. 5.—B. (b).

sg. *Gratuitous services by wife.*—A husband suing on behalf of himself under Families' Compensation Act for the death of his wife shows a pecuniary loss when he shows that services were rendered him gratuitously by the deceased & that there had been a reasonable prospect that they would have continued to be rendered gratuitously for a time at least, had not her death been caused by the accident in question.—*HAINES & HAINES v. WILLIAMS, WILLIAMS & WILLIAMS v. HAINES*, [1933] 1 W. W. R. 644; 47 B. C. R. 69.—CAN.

sk. *Son of divorced parents.*—The father of a nine-year-old son who was divorced from the son's mother & who had been paying for the son's maintenance in the custody of the mother, held to have no right to expect

894. *Add. Annotation*:—**Refd.** Grein v. Imperial Airways, Ltd., [1936] 2 All E. R. 1258.
895. *Add. Annotation*:—**Refd.** Grein v. Imperial Airways, Ltd., [1936] 2 All E. R. 1258.
896. *Add. Annotations*:—**Consd.** Grein v. Imperial Airways, Ltd., [1937] 1 K. B. 50. **Refd.** Fosbroke-Hobbes v. Airwork, Ltd. & British American Air Services, Ltd., [1937] 1 All E. R. 108.
- After this case add:—  
— **Carriage by air.**—*See* STREET TRAFFIC, No. 260d, *post*.
899. *Add. Annotations*:—**Consd.** Fanton v. Den-ville, [1932] 2 K. B. 309. **Refd.** Knott v. London County Council, [1934] 1 K. B. 126; Wilsons & Clyde Coal Co. v. English, [1937] 3 All E. R. 628.
900. *Add. Annotations*:—**Refd.** Bottomley v. Ban-nister (1931), 101 L. J. K. B. 46; Nicholson v. Southern Ry. Co. & Sutton & Cheam Urban District Council, [1935] 1 K. B. 588; Otto v. Bolton & Norris, [1936] 1 All E. R. 960; Shirvell v. Hackwood Estates Co., [1938] 2 All E. R. 1.
903. *Add. Annotation*:—**As to** (1) **Refd.** Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.
905. *Add. Annotations*:—**Consd.** Fanton v. Den-ville, [1932] 2 K. B. 309. **Refd.** Holloway v. Donaldson Line, Ltd. (1935), 41 Com. Cas. 47.
906. *Add. Annotation*:—**Refd.** Kinneil Cannel & Coking Coal Co. v. Sneddon (or Waddell), [1931] A. C. 575.
909. *Add. Annotation*:—**Consd.** Fanton v. Den-ville, [1932] 2 K. B. 309.
910. *Add. Annotations*:—**Appld.** Dew v. United British S.S. Co. (1928), 139 L. T. 628. **Refd.** Flower v. Ebbw Vale Steel, Iron & Coal Co., [1936] A. C. 206.
929. After this case add:—  
—.]—*See, now*, Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 2 (3).
930. *Add. Annotation*:—**Generally**, **Refd.** Rose v. Ford, [1937] 3 All E. R. 359.
932. *Add. Annotation*:—**Consd.** Feay v. Barnwell, [1938] 1 All E. R. 31.
941. *Add. Annotations*:—**As to** (1) **Refd.** Owen v. Sykes, [1936] 1 K. B. 192; Rose v. Ford, [1936] 1 K. B. 90.
942. *Add. Annotations*:—**As to** (3) **Refd.** Owen v. Sykes, [1936] 1 K. B. 192; Rose v. Ford, [1936] 1 K. B. 90; Roach v. Yates, [1937] 3 All E. R. 442.
943. *Add. Annotation*:—**Refd.** Carling v. Lebbon, [1927] 2 K. B. 108.
944. *Add. Citations*:—[1927] 2 K. B. 108; 96 L. J. K. B. 515; 137 L. T. 255; 43 T. L. R. 454.
- After this case add:—  
“ — — — — — . ]—*See, now*, Widows', Orphans' & Old Age Contributory Pensions Act, 1929 (c. 10), s. 22.”
- 953a. **Payment into court with denial of liability—Death of plaintiff—Application by executor for payment out—What order made.**—A pltf. who had issued a writ for damages for personal

that the son's continued life would have been of any pecuniary advantage to him. The son's mother, however, was held to have suffered a pecuniary loss in the death of the child.—**MARTEL v. CHARTER**, [1934] 3 W. W. R. 244; *on appeal*, [1935] 1 W. W. R. 305; 43 Man. L. R. 54.—**CAN.**

sl. **Husband working “on relief.”**—The widow & child of an automobile mechanic, who was working “on relief” when he was killed, are entitled to claim under the Fatal Accidents Act.—**HUMPHREYS v. CITY OF LONDON**, [1935] 1 D. L. R. 300; O. R. 91; *affd.*, [1935] 3 D. L. R. 39; O. R. 295.—**CAN.**

#### PART XIII. SECT. 2, SUB-SECT. 7.—A.

sp. **Action against Canadian National Railways—Any defence open to Crown.**—**SEVICH v. CANADIAN NATIONAL RYS.**, [1933] 1 W. W. R. 244, *on appeal*, [1933] 2 W. W. R. 109.—**CAN.**

sr. **Release.**—**HOWELL v. STAGG**, [1937] 2 W. W. R. 331.—**CAN.**

#### PART XIII. SECT. 2, SUB-SECT. 7.—B.

907 ix. —.]—A claim for damages by a widow or the minor children of a person, whose death is alleged to have been caused by the negligence of deft., is not barred by the fact that the death was caused by the combined negligence of the latter & deceased.—**UNION GOVERNMENT (MINISTER OF RAILWAYS) v. LEE**, [1927] App. D. 202.—**S. AF.**

907 x. —.]—**MORAWITSKI v. KOSTUCHENKO (Man.)**, [1929] 2 W. W. R. 384; 38 Man. L. R. 228; *affd.*, [1929] 1 W. W. R. 585.—**CAN.**

907 xi. —.]—In an action under Fatal Accidents Act, R. S. O. 1927, where deceased has been guilty of contributory negligence, & though his degree of fault has much exceeded that of deft., Contributory Negligence Act, R. S. O. 1927, is applicable to enable the action to be maintained; & it is

also applicable for the purpose of providing for apportionment of the liability for damages.—**LITTLE v. BROOKS & CANADIAN NATIONAL RY. CO.**, [1932] S. C. R. 462; 2 D. L. R. 386.—**CAN.**

907 xii. —.]—Contributory Negligence Act, 1925, applies to an action brought under Families' Compensation Act, R. S. B. C., 1924.—**HUNTER v. CLARKE**, [1932] 1 W. W. R. 466; 44 B. C. R. 554.—**CAN.**

907 xiii. —.]—**IRVINE v. MUSSALLEM** (1935), 50 B. C. R. 72.—**CAN.**

#### PART XIII. SECT. 2, SUB-SECT. 8.—A.

st. **How calculated.**—Damages under Lord Campbell's Act should be such a sum as would, if put out at interest, yield at the end of ten years a sum equal to the pecuniary loss of those for whose benefit the action is brought.—**NOBLE v. BATH, BRITISH & FLORENCEVILLE HYDRO ELECTRIC DISTRICT COMRS.**, [1935] 2 D. L. R. 615; 9 M. P. R. 257; 5 F. L. J. (Can.) 35.—**CAN.**

#### PART XIII. SECT. 2, SUB-SECT. 8.—D.

930 v. —.]—**LEIGH v. LUTZ**, [1937] 3 W. W. R. 190; 4 D. L. R. 222.—**CAN.**

#### PART XIII. SECT. 2, SUB-SECT. 8.—E.

937 v. —.]—In an action under Lord Campbell's Act brought by a husband for the death of his wife:—**Held**: although he could not recover hospital, nursing, doctor's or funeral expenses or anything by way of a solatium, but only such pecuniary damages as he had suffered, yet the word “pecuniary” should not be narrowly interpreted as to limit it to an immediate loss of money or property.—**AGNEW v. ELLEN**, [1936] 3 W. W. R. 337.—**CAN.**

h i. —.]—The dependants of a person who has lost his life through the negligence of deft. are entitled to compensation only for the material loss

caused to them by the accident, & not for mental suffering or distress, or to improve their material prospects.—**SMART v. S. AFRICAN RYS. & HARBOURS** (1928), 49 N. L. R. 361.—**S. AF.**

m i. —.]—**Consideration of insurance.**—**BURNS v. MACDONALD CONSOLIDATED**, [1931] 3 W. W. R. 54.—**CAN.**

sa. **Fine imposed under Penal Code in respect of accident—Taken into account.**—**NATHU RAM v. CHAND KUAR** (1927), 1 L. R. 50 All 408.—**IND.**

so. **Jury may consider savings.**—In assessing damages under Lord Campbell's Act the jury may consider savings, less expenditure.—**NOBLE v. BATH, BRISTOL & FLORENCEVILLE HYDRO ELECTRIC COMRS. (No. 2)**, [1935] 4 D. L. R. 271; *on appeal*, [1936] 2 D. L. R. 192.—**CAN.**

#### PART XIII. SECT. 2, SUB-SECT. 8.—F.

o i. —.]—**YOUNG v. CANADIAN PACIFIC RY. CO. (No. 2)** (Sask.), [1927] 3 W. W. R. 175.—**CAN.**

#### PART XIII. SECT. 2, SUB-SECT. 9.

953 i. **Verdict not set aside—If evidence in support.**—**FLYNN v. IRISH SUGAR MANUFACTURING CO.**, [1928] 1 R. 525.—**IR.**

f i. —.]—**FITZPATRICK v. SCHRAM**, [1928] 1 W. W. R. 751.—**CAN.**

g i. —.]—**Sufficiency.**—**SUTTITZ v. CANADIAN NATIONAL RY. CO.**, [1927] 1 D. L. R. 951; [1927] 1 W. W. R. 193; 21 Sask. L. R. 345.—**CAN.**

g ii. —.]—**Description of plaintiff—Executor.**—It is not of the essence of the cause of action of an exor. under Fatal Accidents Act, R. S. A., 1922, that pltf. therein be described in the statement of claim as an exor. The Act does not make the pleading of his appointment as exor. one of the constituent elements of his right of action nor prescribe that such a plea shall be made; it does no more than

injuries died from a cause not due to the accident. Her exor. was substituted as pltf. & he applied by summons for payment out to him of money paid into ct. by deft. with a denial of liability. Deft. was held entitled to an adjudication of the questions whether there was liability &, if so, what were the damages, the amount of which might be affected by the death of the original pltf., & no order was made on the summons except that the money should remain in ct. to await the trial.—*DAWSON v. SPAUL* (1935), 152 L. T. 444; 51 T. L. R. 247; 79 Sol. Jo. 162.

**SECT. 3.—SURVIVAL OF CAUSE OF ACTION.**

*See, now, Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1.*

**953b. Measure of damages—Death without recovering consciousness—Pain & suffering.]—**A motor car negligently driven by deft., struck a man who was at once rendered unconscious & died two days later without having recovered consciousness. The administratrix of deceased brought an action against deft. under (*inter alia*) Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1, alleging that causes of action against deft. had vested in deceased & survived for the benefit of his estate for damages in respect of pain & suffering caused to him by his physical injuries & by apprehension of shortening of his life, & claiming damages

make it a condition precedent to the action being maintainable within the first six months after the death of the injured person that it shall be brought by his executor, if there be an executor. MILLER v. CANADIAN PACIFIC RY. CO., [1933] 1 W. W. R. 233; 1 D. L. R. 761.—CAN.

sk. *Death after commencement of action—Survivorship.*—An Action for negligence resulting in personal injuries was commenced by the injured party. Pitts filed the action and having been brought to trial, *Held*, the action was properly revived in the name of the administratrix, she being entitled, under Trustee Act, R. S. O. 1927, s. 87, to maintain an action for all torts or injuries to the person of deceased. —*BOWLER v. BLAKE*, [1930] 1 D. L. R. 683; 64 O. L. R. 499.—**CAN.**

al. ——.]—Where after an action had been brought by an employee against his employer for damages for injuries sustained in the course of his employment pltf. died before trial, & an action was then brought by his widow, in her capacity as executrix, claiming damages under Fatal Accidents Act, R. S. A., 1922 :—*Held* : the executrix was entitled to proceed with both actions.—*BRADY v. CANADIAN PACIFIC RY. CO.*, [1933] 1 W. W. R. 83.—*CAN.*

Act, R. S. A., 1922, which provides that exors. or administrators of a deceased may maintain an action for torts or injuries to his person, except for libel & slander, as he would if living have been entitled to do, is not limited to cases where the deceased died from causes other than a tort which gives a right of action under Fatal Accidents Act, R. S. A., 1922. The fact that a dependant shares in the estate of the deceased has no bearing on the question except in so far as it may affect the amount of damages recoverable under Fatal

**Accidents Act.—BRADY v. CANADIAN PACIFIC RY. CO., [1933] 1 W. W. R. 250; 1 D. L. R. 643.—CAN.**

an. **PLIFF.** — **J.**—The infant son of **PLIFF** was injured by a motor car driven by one of **defts.** & owned by the other **def.** **Pltf.** incurred expenses for medical & hospital charges & nursing & the child suffered considerable pain. Shortly after its recovery from said accident the child was struck by another motor vehicle & killed. **Pltf.** suing as the personal representative of the deceased child, brought an action for the damages caused by the first of said accidents:—**Held:** by virtue of sect. 48 of Trustee Act, 1931, the action was maintainable; & **defts.** not having satisfied the statutory onus of disproving negligence **pltf.** was entitled to recover said damages the said expenses & also damages for the pain & suffering of the child.—**CREEMER v. ENGLUND, (1933) 3 W. W. R. 277; *reversed*, (1934) 2 W. W. R. 339; 42 Man. L. R. 139.—CAN.**

sp. ———.—The concluding part of sect. 48 (1) of Trustee Act, 1931, is a bar to a claim by exors. to recover from a tortfeasor the medical, nursing & hospital expenses incurred by the deceased in consequence of the tort which caused his death.—FRASER v. CHILDREN'S AID SOCIETY, [1936] 1 W. W. R. 667; 43 Man. L. R. 102.—CAN.

sq. ----,]—After an action under Fatal Accidents Act, 1935, had been brought by the widow & some of the children of the deceased the widow died & letters of administration of her husband's estate were issued to the present plff. On application the referee ordered that the statement of claim be amended by substituting the administrator as plff. in the place of the widow & children. After the statement of claim had been so amended deft. filed an amended statement of defence & the action was entered for trial. No appeal was

for his estate in respect of these causes of action:—*Held*: deceased having been unconscious & incapable of experiencing physical or mental pain from the time of the accident until his death, no cause of action in respect thereof had vested in him or survived for the benefit of his estate; but *semble*: if after the accident deceased had for a time been conscious & endured such pain & suffering, *pltf.* could have recovered damages in respect thereof in so far as it arose from his physical injuries, & possibly also in so far as it arose from his anticipation of a shortening of his life.—*SLATER v. SPREAG*, [1936] 1 K. B. 83; 105 L. J. K. B. 17; 153 L. T. 297; 51 T. L. R. 577; 79 Sol. Jo. 657.

**Annotation :—***Reid. Rose v. Ford*, [1937] 3 All E. R. 359.

953c. ———— .]—A young woman was injured in a motor accident due to the negligence of deft. Her injuries were serious, including a combined fracture of her right leg & thigh. Two days later gangrene set in, & it became necessary to amputate the leg; but the infection had already spread above the point of severance, & two days later she died as the result of the injuries, having been unconscious the greater part of the four days she survived the accident. Her father, as her administrator, brought an action claiming damages (*inter alia*) under Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), for the shortening of her expectation of life:—*Held*: there was vested in the deceased before she died a cause of action

taken from said order, but deff. then moved that the statement of claim be struck out or that the action be stayed, and gave notice that the question of law whether the original action must proceed to trial should be decided on a special case or in such other manner as directed by the ct. :—*Held*: the referee's order was justified. Moreover, deff. by not appealing from it & by taking the steps he did had acquiesced in it.—WESTERN TRUST CO. (MILNITZKY ESTATE) v. STUART, [1937] 3 W. W. R. 225.—CAN.

a (p. 142) i. ———.]—**LESLIE v. BUZZA**,  
[1929] 1 D. L. R. 903; 40 B. C. R. 441.  
—CAN.

c (p. 142) i. —.]—Actions under the Act respecting compensation to families of persons killed by accident must be *prima facie* tried without a jury.—SEVICH v. CANADIAN NATIONAL RAILWAYS (1934), 42 Man. L. R. 254.—CAN.

**sb. Fatal Accidents Act, 1920, s. 7—Neglect to file affidavit under.]—An order dispensing with the filing of the affidavit required under above sect. should not be made when the result of making it would be to prejudice a right of deft. which has accrued since the commencement of the action.—**  
**SWINDELL v. NORTHERN ELEVATOR Co., Ltd., [1928] 4 D. L. R. 982; [1928] 3 W. W. R. 433.—CAN.**

**ad. Particulars.**—In an action under Fatal Accidents Act, 1846, in respect of the alleged negligence of deft. in the driving of a car, the particulars of negligence furnished by pltf. included the following para.: "Pltf. will rely also upon any other acts or omissions of deft. constituting negligence or breach of duty as may be given in evidence or otherwise appear at the trial of this action." Upon a motion by deft. for an order striking out this particular it was ordered that the following should be substituted: "Pltf. will also rely on such facts in proof of the negligence alleged in the

which entitled her to sue for loss of expectation of life, & under the Act of 1934 that cause of action survived, & so surviving, was enforceable by applt. as her personal representative; (2) also the principle laid down in *Flint v. Lovell* is not confined to the case where the injured person is alive at the date of the action.—*ROSE v. FORD*, [1937] A. C. 826; [1937] 3 All E. R. 359; 106 L. J. K. B. 576; 157 L. T. 174; 53 T. L. R. 873; 81 Sol. Jo. 683, H. L.

*Annotations*:—*Consd.* The Aizkarai Mendi, [1938] 3 All E. R. 483; *Dransfield v. British Insulated Cables, Ltd.*, [1937] 4 All E. R. 382; *Feay v. Barnwell*, [1938] 1 All E. R. 31; *May v. McAlpine (Sir Robert) & Sons (London), Ltd.*, [1938] 2 All E. R. 25; *Morgan v. Scoulding*, [1938] 1 K. B. 786; 158 L. T. 230; 54 T. L. R. 253; 81 Sol. Jo. 1041; *Trubyfield v. Great Western Ry. Co.*, [1937] 4 All E. R. 614; *Walton v. Jacob* (1938), 82 Sol. Jo. 586. *Refd.* *Roach v. Yates*, [1937] 3 All E. R. 442; *Berridge v. Everard*, [1938] 1 All E. R. 717; *Radclyffe v. Ribble Motor Services, Ltd.*, [1938] 2 K. B. 346.

**953d.** Shortened expectation of life.]—*SLATER v. SPREAG*, No. 953b, *ante*.

**953c.** ———.]—*ROSE v. FORD*, No. 953c, *ante*.

**953f.** ———.]—*DRANSFIELD v. BRITISH INSULATED CABLES, LTD.*, No. 364c, *ante*.

**953g.** ———.]—A young girl of 8 years of age was killed in a street accident, & damages were claimed in respect of her loss of expectation of life:—*Held*: though, in the case of a very young child, some reduction of damages must be made, having regard to children's ailments, yet, in the case of one who has outlived such dangers, there should be no such reduction on account of the infancy. The question of the inability of the child to appreciate the loss of expectation of life is wholly immaterial. The damages were assessed at £1,500.—*TRUBYFIELD v. GREAT WESTERN RY. CO.*, [1937] 4 All E. R. 614; *sub nom.* *TURRYFIELD v. GREAT WESTERN RY. CO.*, 158 L. T. 135; 54 T. L. R. 221; 81 Sol. Jo. 1002.

*Annotation*:—*Refd.* *Feay v. Barnwell*, [1938] 1 All E. R. 31.

**953h.** ———.]—As a result of the negligent driving of a motor car by deft., deceased, riding a motor cycle, was killed, practically instantaneously. Pltf., his administrator, by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), brought an action claiming damages (*inter alia*) for the

shortening of the expectation of life of deceased. It was contended for deft. that no cause of action had vested in deceased, by reason of the instantaneous character of his death, & consequently, that no such cause survived to pltf.:—*Held*: that the cause of action was the negligence of deft., which happened before the death, & which caused damage (*inter alia*), loss of expectation of life, to deceased, which cause of action vested in deceased before his death, & consequently, by virtue of the Act, survived to pltf.—*MORGAN v. SCOULDING*, [1938] 1 K. B. 786; [1938] 1 All E. R. 28; 107 L. J. K. B. 299; 158 L. T. 230; 54 T. L. R. 253; 81 Sol. Jo. 1041.

*Annotation*:—*Refd.* *Feay v. Barnwell*, [1938] 1 All E. R. 31.

**953j.** ———.]—**Question for High Court.**—

An order had been made remitting to the county ct. an action in which the administrator of an infant, who had been killed in a motor accident, was claiming damages in respect of loss of expectation of life:—*Held*: the case would involve considering whether a child was entitled to greater damages in respect of loss of expectation of life larger than an adult, & also whether loss of enjoyment of life ought to be taken into account. These were difficult questions of law, which have not yet been decided, & therefore it was desirable that the case should be tried in the High Ct.—*BERRIDGE v. EVERARD*, [1938] 1 All E. R. 717; 54 T. L. R. 462; 82 Sol. Jo. 173.

**953k.** Claim also under Lord

**Campbell's Act.**—In a street accident, a blind man, seventy-three years old, was injured, & his wife, seventy-one years old, was killed. Deft.'s negligence was admitted, & damages therefor, in so far as it resulted in the death of the wife, were assessed by the judge at £600 under Law Reform (Miscellaneous Provisions) Act, 1934 (c. 21), & if they had been recoverable in full, at £625 under the Fatal Accidents Acts. It was agreed that the death duties & testamentary expenses in respect of the wife's estate would be £25:—*Held*: in order to prevent overlapping of damages the £600 ought to be deducted from the £625, but, having regard to the administration expenses, the £600 should

statement of claim as are in the knowledge of deft. but not of pltf. & appear in the evidence of deft. & her witnesses at the hearing of the action." The order further provided that pltf. should have liberty to rely also upon such other particulars of negligence as pltf. might, not later than ten days before the commencement of the trial of the action, give notice of, in writing, to deft.—*MCWATTERS v. MAXWELL*, [1932] 1 R. 176.—*IR.*

*sf.* ———.]—Pltf. was held to be obliged, a demand for particulars having been made, to give the best particulars in her possession or reasonably available to her of the negligence complained of & of the acts or omissions constituting it, whether or not she was right in her contention that the maxim *res ipsa loquitur* applied to the case.—*SEVICH v. CANADIAN NATIONAL RYS.*, [1933] 1 W. W. R. 244; *on appeal*, [1933] 2 W. W. R. 109; 4 D. L. R. 668; 41 Man. L. R. 276.—*CAN.*

*sk.* Change of name of plaintiff.—*Administrators substituted for widow & children.*—*BROCKEST v. RADIO OIL CO., LTD.*, [1935] 2 W. W. R. 285.—*CAN.*

*sl.* ———.]—*WESTERN TRUST CO. v. STUART*, [1937] 3 W. W. R. 225; 4 D. L. R. 510.—*CAN.*

### PART XIII. SECT. 3.

*sp.* Administration Act Amendment Act, 1934—"Action pending"—*Appeal.*—After giving notice of appeal from the dismissal of her action for damages pltf. died before the appeal was heard. Her exor. moved before the Ct. of Appeal for an order that the proceedings be continued between himself as exor. & deft., & that he be substituted as applt. under sect. 2 (4) of Administration Act Amendment Act, 1934:—*Held*: the words in said sect. 2 (4) "action pending" include an appeal & therefore, the motion should be allowed.—*LYMOND v. WILSON* (No. 2), [1937] 1 W. W. R. 417; 1 D. L. R. 286; 51 B. C. R. 206.—*CAN.*

*st.* ———.]—*Action under Families' Compensation Act, R. S. B. C., 1924.*—Administration Act Amendment Act, 1934, applies to actions based upon the death of a person wrongfully or negligently caused by another & brought under Families' Compensation Act,

R. S. B. C., 1924, as well as to those brought under the Administration Act & amendments thereto.

Families' Compensation Act does not in itself give a right of action against the exor. of the estate of a person who has wrongfully or negligently caused the death of another but said Act & Administration Act Amendment Act, 1934, combined do give such a right of action for the benefit of the relatives mentioned in the first-named Act.

Administration Act Amendment Act, 1934, does not alter the law in respect to damages for nervous shock.

In the present action wherein pltf. was held to have sued as administratrix for the benefit of herself as wife of deceased & for the benefit of his children but not to have claimed damages also for the benefit of his estate:—*Held*: on the pleadings as they stand, she could not recover for nursing & hospital expenses or for burial expenses.

Pltf. had brought a previous action as wife of deceased against the alleged tortfeasor himself. This action was discontinued pursuant to an order

*Annotation* :—**Refd.** *May v. McAlpine & Sons (London), Ltd.*,  
[1938] 3 All E. R. 85.

*Annotation :—***Reid.** The Aizkaral Mendi, [1938] 3 All E. R. 483.

Defts. moved in objection to the report on the ground that the damages awarded under the Fatal Accidents Acts were excessive. Pltfs., by a cross-motion, alleged that the registrar was wrong in law in awarding the

**§2. —.**—[A person having a cause of action in tort for personal injuries can claim damages for loss of expectation of life &, under sect. 48 of Trustee Act, 1931, this right passes to his personal representative. Such damages are for being deprived of the right of living life out to its normal length, i.e. for the privilege of living, every life being *prima facie* of temporal value. The opportunity which life gives of providing for & assisting dependants is not, however, an element to be

sf. —.]—In a motor collision, husband & wife were both injured. In actions in which they were respectively plaintiffs, heard by a judge alone, it was admitted that the collision was due to deft.'s negligence & the only question in dispute in such case was the quantum

**9580.**                                 -.]—BAILEY v. HOWARD,  
[1938] 4 All E. R. 827, C. A.

of damages. By consent, the indemnifier under a comprehensive insurance policy was jointly and severally liable. Before the accident the wife had led a full & active life & was reduced by the accident to the position of a helpless cripple, was for life confined to bed & blind, & was in a mental condition described as "severe dementia caused by injury to the brain." It was claimed upon the evidence that she was entitled to damages (*inter alia*) for (a) pain & suffering, (b) loss of enjoyment of life, & (c) shortening of her normal expectation of life.—*Held*: (1) a shortened expectation of life is a factor that must be taken into account in the assessment of damages, but that compensation must not be given more than once under different heads; (2) in awarding damages in the circumstances set out in the judgment, there must be taken into consideration *pltf.'s* wife's pain & suffering, the depriva-

953p. — — —.]—A healthy child aged three, was killed in a road accident. The representative brought an action in which, after a perfectly proper summing up, the jury awarded £90 in respect of the child's loss

of expectation of life :—*Held* : this verdict was clearly erroneous, & there should be a new trial.—*SHEPHERD v. HUNTER*, [1938] 2 All E. R. 587 ; 82 Sol. Jo. 375, C. A.

—.]—*Compare* No. 835a, *ante*.

tion of the enjoyment of so much of her life as still remained, & the shortening of her life. Each head did not require to be separately valued & added together to make the total compensation awarded.

In respect of these matters solely a sum of £2,000 was awarded as general

damages.—*PETHERICK & PETHERICK v. WATERS & N. I. M. U. INSURANCE Co.* (No. 1), [1937] N. Z. L. R. 294 ; 13 N. Z. L. J. 43.—**N.Z.**

*sl. — & pain & suffering.*]—In an action for personal injuries which on the death of *pltf.* is continued by

his administrator, damages for pain & suffering of deceased as well as for shortened expectation of life are recoverable, although deceased was seventy years old.—*MAJOR v. BRUER*, *HANRAHAN v. BRUER*, [1937] 4 D. L. R. 760 ; [1938] O. R. 1 ; 7 F. L. J. (Can.) 117.—**CAN.**



## NOTARIES.

**PART II. SECT. 1, SUB-SECT. 1.**

b 1. — *Number of notaries practising in district.*—*Re* STEWART (B. C.), [1929] 4 D. L. R. 528.—CAN.

**PART II. SECT. 2, SUB-SECT. 1.**

sa. *Who may appoint—Whether local judge.*—BRITISH COLUMBIA LAW SOC.

*v.* STEWART, [1928] 4 D. L. R. 572.—CAN.

**PART III.**

g 1. —.]—There is impropriety, to say the least, for a notary to insert in a will passed before him a clause by which the testator directs that the exors. & the heirs shall employ him for

the execution of the will. It is consonant to sound legal principle, & even to public order, that a deed passed before a notary do not contain any stipulation in his favour.—*St. DENIS v. THIBODEAU*, [1929] 3 D. L. R. 749; S. C. R. 346; *affo.*, 44 Que. K. B. 207.—CAN.

# NUISANCE.

## Part I.—Definition, Nature and Characteristics.

1. *Add. Annotations*:—**Refd.** *Vanderpant v. Mayfair Hotel Co.* (1929), 27 L. G. R. 752; *Chesham (Lord) v. Chesham Urban District Council* (1935), 79 Sol. Jo. 453.
8. *Add. Annotation*:—**Consd.** *Pontardawe Rural District Council v. Moore-Gwyn*, [1929] 1 Ch. 656.
- 9a. **Nuisance distinguished from negligence.**—We think that "nuisance" (we are speaking of private nuisance only) is correctly confined to injuries to property, whether to easements, such as the obstruction of light or of rights of way, or the diversion of water-courses, or the withdrawal of support from a house; or to other kinds of property, as by noise, noxious vapours, smoke, or the like. In all such cases the pltf. in order to maintain an action must show some title to the thing to which the nuisance is alleged to be. No doubt a nuisance may be caused by negligence, & there may be cases in which the same act or omission would support an action of either kind, but, generally speaking, these two classes of actions on the case are distinct, & the evidence necessary to support them is different (*per CUR.*).—**CUNARD v. ANTIFYRE, LTD.**, [1933] 1 K. B. 551; 103 L. J. K. B. 321; 148 L. T. 287; 49 T. L. R. 184, D. C.
18. *Add. Annotation*:—**As to (3) Refd.** *The Carl-garth, The Otarama*, [1927] P. 93.
22. *Add. Annotation*:—**Refd.** *London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd.*, [1936] Ch. 78.
31. *Add. Annotations*:—**Consd.** *Vanderpant v. Mayfair Hotel Co.* (1929), 27 L. G. R. 752. **Refd.** *Harper v. Haden & Sons, Ltd.*, [1933] Ch. 298.
44. *Add. Annotations*:—**Consd.** *Matania v. National Provincial Bank, Ltd. & Elevenist Syndicate, Ltd.*, [1936] 2 All E. R. 633. **Refd.** *Harper v. Haden & Sons*, [1933] Ch. 298; *Andrew v. Selfridge & Co.*, [1936] 2 All E. R. 1413.
48. *Add. Annotation*:—**As to (1) Consd.** *Harper v. Haden & Sons, Ltd.*, [1933] Ch. 298.
56. *Add. Annotation*:—**Refd.** *Nicholls v. Ely Beet Sugar Factory, Ltd.*, [1936] Ch. 343.
58. *Add. Annotation*:—**Refd.** *A.-G. v. Sharp* (1930), 99 L. J. Ch. 441.
65. *Add. Annotations*:—**Refd.** *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606; *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 1 All E. R. 825.
66. *Add. Annotation*:—**As to (2) Refd.** *Vanderpant v. Mayfair Hotel Co.* (1929), 27 L. G. R. 752.
73. *Add. Annotation*:—**As to (2) Refd.** *Fishenden v. Higgs & Hill, Ltd.* (1935), 153 L. T. 128.

## Part II.—Nuisances in respect of Particular Matters.

76. *Add. Annotation*:—**Consd.** *Great Western Railway v. Monmouthshire County Council* (1929), 94 J. P. 6.
77. *Add. Annotation*:—**Consd.** *Farnworth v. Manchester City Corpn.*, [1929] 1 K. B. 533.
83. *Add. Annotations*:—**Consd.** *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 1 All E. R. 825. **Refd.** *Harper v. Haden & Sons, Ltd.*, [1933] Ch. 298.
- 94a. — **Demolition & rebuilding.**—Pltf. was the occupier of a pice of land which formed part of an island site & on this piece of land she carried on the business of an hotel proprietor. The remainder of the site had been acquired by deft. co., which was proceeding to demolish the various properties which then occupied the site & to rebuild. Pltf. complained that deft. co. in carrying out its building operations had conducted them in such a way as by noise & dust to interfere with the reasonable & comfortable enjoyment by her of her premises, & brought the

present action for damages. **BENNETT, J.**, before whom the action was tried, found that the damages alleged had been proved, & assessed them at £4,500. On appeal:—**Held**: (1) no cause of action arises in respect of operations, such as demolition & building, if they are reasonably carried on & all reasonable & proper steps are taken to ensure that no undue inconvenience is caused to neighbours. In determining what is reasonable, methods of building & demolition must not be taken as stabilised, but new inventions & new methods may be reasonable in the altered circumstances & developments of the day; (2) the evidence showed that pltf. was inconvenienced by the dust & noise, but in estimating the damages the ct. must be careful not to penalise the deft. co. by throwing into the scales against it losses caused by operations which deft. co. was legitimately entitled to carry out; deft. co. could be made liable only in respect of matters in which it crossed the permissible line.

### PART I. SECT. 1.

10 1. *Nuisance definable by local authority—By bye-law.*—Where a thing is of such a character that it can be a nuisance it rests with the local authority to say whether it shall be considered a nuisance in the particular

locality for which it has power to make bye-laws.—**RAMATHULA v. R.**, [1933] N. L. R. 11.—**S. AF.**

### PART II. SECT. 9, SUB-SECT. 1.

911. *Building operations—Mechanical drills.*—**DAILY TELEGRAPH CO., LTD. v. STUART** (1928), 28 S. R. N. S. W.

291; 45 N. S. W. W. N. 48.—**AUS.**

93 1. *Building operations—Pile driving.*—Vibration from pile driving is within the rule in *Rylands v. Fletcher*.—**BOWER v. RICHARDSON CONSTRUCTION CO.**, [1938] 2 D. L. R. 309; O. R. 180.—**CAN.**

The order of BENNETT, J., would be varied by reducing the damages to £1,000.—ANDREAE v. SELFRIDGE & Co., LTD., [1938] Ch. 1; [1937] 3 All E. R. 255; 107 L. J. Ch. 126; 157 L. T. 317; 81 Sol. Jo. 525, C. A.

98a. ———.]—Pltf. purchased a house in a partly rural, but largely residential district. Adjoining this house was a poultry farm, & about 100 yards from pltf.'s house was an orchard in which the poultry farmer kept large numbers of cockerels. Ptf. complained of the noise made by the cockerels in the early mornings, & threatened proceedings unless they were removed. The cockerels were removed, but after some months numbers of cockerels reappeared & the farmer made no attempt to rearrange his farm so as to keep the cockerels further from pltf.'s property. Pltf. brought an action for an injunction:—*Held*: a nuisance had been proved & an injunction should be granted.—LEEMAN v. MONTAGU, [1936] 2 All E. R. 1677; 80 Sol. Jo. 691.

98b. Hotel kitchen.]—The making or causing of such a noise on premises as materially interferes with the ordinary physical comfort of a neighbour constitutes an actionable nuisance; & it is no answer to say that the best known means have been taken to reduce or prevent the noise complained of or that the cause of the nuisance is the exercise of a business or trade in a reasonable & proper manner. In accordance with these principles an injunction was granted in an action by the occupier of a house abutting on a highway to restrain the owners of a neighbouring hotel from causing a nuisance to pltf. by noise arising from the hotel kitchen.—VANDERPANT v. MAYFAIR HOTEL CO., LTD., [1930] 1 Ch. 138; 99 L. J. Ch. 84; 142 L. T. 198; 94 J. P. 23; 27 L. G. R. 752.

95 i. Dairy—Noisy churns.]—MCKELVEY v. INVERCARGILL MILK SUPPLY CO., LTD., [1928] N. Z. L. R. 223.—N. Z.

95 ii. ———.]—DUCHMAN v. OAKLAND DAIRY CO., [1929] 1 D. L. R. 9; 63 O. L. R. 111.—CAN.

96. Milk vendor—Noise of horses.]—In an action for nuisance, where it was shown that deft. had taken much trouble to make the carrying on of his business as unobjectionable as possible, & had carried on his business in a fair & reasonable way & at a site proper for such a business:—*Held*: on the evidence that noises caused in the early mornings by the movements & stamping of horses which disturbed the sleep of pltf. constituted an actionable nuisance & should be restrained by injunction.—PAINTER v. REED, [1930] S. A. S. R. 295.—AUS.

97. Biscuit factory.]—Noise from a biscuit factory at night held not to be a nuisance.—HOURSTON v. BROWN-HOLDER BISCUITS, LTD., [1937] 2 D. L. R. 53; 11 M. P. R. 550.—CAN.

98. Electrical plant.]—Pltf., who owned & had resided since 1918 in the house in question herein in the village of Manor, sued to restrain the operation of an electrical plant on adjoining lots as a nuisance. The plant, built some years after pltf. took up her said residence, had been shut down for some time but had been operated continuously since Mar. 1937. Vibration, noise, smoke & fumes were complained of. The trial judge found that

the nuisance had been proved & that pltf.'s house was not, as alleged, poorly built & unsubstantial:—*Held*: deft. should be restrained from operating the plant so as to cause pltf.'s land & house to vibrate or so that smoke would be carried over pltf.'s land below the level of the highest point of any dwelling thereon or so that noise from the exhaust would disturb pltf. & any occupant of said dwellings in the ordinary enjoyment thereof at any time. Pltf. was also awarded \$100 damages.—CUBBON v. WHITE, [1938] 2 W. W. R. 257.—CAN.

#### PART II. SECT. 9, SUB-SECT. 2.

91. ———.]—Every person has a right, independent of custom, to worship in his own method, & according to his own rites; the right, however, is not absolute, but is limited by the rights of others.—JANKI PRASAD v. KARAMAT HUSAIN (1931), 1 L. L. R. 53 All. 836.—IND.

92. Crowing cocks.]—An injunction had been granted, after a trial by affidavit, restraining deft. from keeping roosters, or allowing roosters to be kept, on his premises, in a residential area, in such manner & under such conditions as to cause a nuisance to pltf.s:—*Held*: on the evidence it was impossible to determine the real degree of noise caused by deft.'s birds during the relevant period, & consequently pltf.s had not established a nuisance.—RUTHING v. FERGUSON (1930), S. R. (Q.) 325.—AUS.

#### PART II. SECT. 11, SUB-SECT. 7.

93. Fox farm.]—A fox farm 20 feet

98c. Greyhound racing.]—TARRY v. CHANDLER (1934), 79 Sol. Jo. 11.

98d. Motor-cycle racing.]—TARRY v. CHANDLER (1934), 79 Sol. Jo. 11.

98e. Loud-speakers at Stadium.]—TARRY v. CHANDLER (1934), 79 Sol. Jo. 11.

111. Add. Annotations:—Consd. Andrew v. Selfridge & Co., [1936] 2 All E. R. 1413. Refd. Matania v. National Provincial Bank, Ltd. (1935), 154 L. T. 103.

121a. ———.]—VANDERPANT v. MAYFAIR HOTEL CO., LTD., No. 98b, ante.

134a. Manure manufacture.]—CARDELL v. NEW QUAY LOCAL BOARD (1875), 39 J. P. Jo. 742.

134b. Rag & bone business.]—P. set up a business of a rag & bone merchant without leave. The bones were stored in bags & removed weekly. The justices having found as a fact that the business was noxious & *ejusdem generis* with those specified, convicted P.:—*Held*: the conviction was right.—PASSEY v. OXFORD LOCAL BOARD (1879), 43 J. P. 622, D. C.

152. Add. Annotation:—Refd. Manchester Corp'n. v. Farnworth (1929), 46 T. L. R. 85.

206. Add. Annotation:—Refd. Newsome v. Darton Urban District Council, [1938] 1 All E. R. 79.

212. After this case add:—

“———.]—See, also, PUBLIC HEALTH, Vol. XXXVIII, p. 198, Nos. 337, 341.”

221. Add. Annotation:—Refd. Nicholson v. Southern Ry. Co. & Sutton & Cheam Urban District Council, [1935] 1 K. B. 588.

223a. ———.]—WALLIS v. UNITED FRENCH-POLISHERS' LONDON SOCIETY (1905), Times, Nov. 28th.

232a. Meaning of premises—Overhanging rock.]—PONTARDAWE RURAL COUNCIL v. MOORE-GWYN, No. 364a, post.

from pltf.'s house held not a nuisance *per se*; but, in view of evidence of a certain slackness in conducting the farm for some time prior to the time when the present action became imminent, an order was granted that defts. should so carry on the business of the farm as not to occasion a nuisance to the pltf.—MILLER v. KRAWITZ, [1931] 1 W. W. R. 577; 2 D. L. R. 784.—CAN.

99. Tobacco factory.]—Smoke & fumes from a tobacco factory held to constitute a nuisance, but injunction refused on the ground that the effect of throwing a large number of persons out of work would be against public policy.—BOTTOM v. ONTARIO LEAF TOBACCO CO., [1935] 2 D. L. R. 699; O. R. 205.—CAN.

#### PART II. SECT. 13, SUB-SECT. 4.

94. Hospital.]—SHUTTLEWORTH v. VANCOUVER GENERAL HOSPITAL, No. 673 iv, post.—CAN.

#### PART II. SECT. 14, SUB-SECT. 2.—B.

95. “Unfit for human habitation”—Absence of plumbing.]—Although under sect. 85 of Public Health Act, 1924, the determination of the question whether a particular building or part of a building is unfit for human habitation depends upon the opinion of the medical health officer or other official mentioned therein, nevertheless, it was not intended that such opinion should be made arbitrarily but only upon reasonable grounds. Where it is based upon “absence of plumbing,” a proper opinion would seem to predicate at least a personal examination

235. *Add. Annotation* :—*Refd.* *Ager v. Gates* (1934), 151 L. T. 98.

300a. *Exhibition of coloured light in proximity to*

railway.]—LONDON, MIDLAND & SCOTTISH RY. CO. v. RIBBLE HAT WORKS, LTD. (1936), 80 Sol. Jo. 1038.

## Part III.—Neighbouring Owners.

302. *Add. Annotations* :—*Apld.* *Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56. *Refd.* *Bull v. West African Shipping, etc. Co.*, [1927] A. C. 686.

309. *Add. Annotations* :—*Consd.* *China Navigation Co. v. A.-G.* (1932), 48 T. L. R. 375. *Apld.* *Symes & Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board*, [1937] 1 K. B. 548.

310. *Add. Annotation* :—*As to* (2) *Overd.* *Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63.

311. *Add. Annotations* :—*Distd.* *St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L. T. 1. *Consd.* *Pontardawe Rural District Council v. Moore-Gwyn*, [1929] 1 Ch. 656. *Distd.* *Fardon v. Harcourt-Rivington* (1932), 48 T. L. R. 215; *Wilkins v. Leighton* (1932), 76 Sol. Jo. 232. *Apld.* *A.-G. v. Corke* (1932), 48 T. L. R. 650. *Distd.* *Collingwood v. Home & Colonial Stores, Ltd.*, [1936] 1 All E. R. 74. *Consd.* *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A. C. 108. *Apld.* *Western Engraving Co. v. Film Laboratories, Ltd.*, [1936] 1 All E. R. 106. *Distd.* *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1936] 2 All E. R. 781. *Consd.* *Marchant Manufacturing Co. v. Leonard D. Ford & Teller, Ltd.* (1936), 154 L. T. 430. *Apld.* *Shiffman v. Venerable Order of Hospital of St. John of Jerusalem*, [1936] 1 All E. R. 557. *Distd.* *Collingwood v. Home & Colonial Stores, Ltd.*, [1936] 3 All E. R. 200. *Apld.* *Hale v. Jennings Bros.*, [1938] 1 All E. R. 579. *Consd.* *Sedleigh-Densfield v. St. Joseph's Society for Foreign Missions & Hillman*, [1938] 3 All E. R. 321. *Refd.* *Glanville v. Sutton* (1927), 44 T. L. R. 98; *G. W. Ry. & S.S. Mostyn, The Mostyn*, [1928] A. C. 57; *Bartlett v. Tottenham*, [1932] 1 Ch. 114; *Bishop v. Consolidated London Properties, Ltd.* (1933), 102 L. J. K. B. 257; *Knott v. London County Council*, [1934] 1 K. B. 126; *Markland v. Manchester Corpn.*, [1934] 1 K. B. 566; *Deen v. Davies*, [1935] 2 K. B. 282; *Greenwood Tileries, Ltd. v. Clapson*, [1937] 1 All E. R. 765; *Ryan v. Youngs*, [1938] 1 All E. R. 522; *Westripp v. Baldock*, [1938] 2 All E. R. 779.

313. *Add. Annotations* :—*Refd.* *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 1 All E. R. 825; *London, Midland & Scottish Ry. Co. v. Ribble Hat Works, Ltd.*, [1936] 80 Sol. Jo. 1038.

314. *Add. Annotations* :—*Consd.* *Western Engraving Co. v. Film Laboratories, Ltd.*, [1936] 1 All E. R. 106.

315. *Add. Annotations* :—*Refd.* *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A. C. 108; *Shiffman v. Venerable Order of Hospital of St. John of Jerusalem*, [1936] 1 All E. R. 557; *Collingwood v. Home & Colonial Stores, Ltd.*, [1936] 3 All E. R. 200.

315a. —. [Pltf. was working as an electric welder in a boiler of a steamship when an explosion occurred & steam came in through the furnace door. After one vain attempt he succeeded in making his way through the door. He was badly scalded but suffered far more from shock & was rendered neurasthenic. The escape of steam was due to the fact that in a valve chest a bridge, in which a brass bush fitted, had been put in upside down. The valve had been assembled & fitted by the second defts. Pltf. alleged that both defts. were negligent in that the valve chest was made of cast iron. Against the first defts. he alleged negligence in not taking sufficient precautions against water hammer by securing effective drainage of the steam pipes, & that having brought the steam upon the ship they were liable under the principle of *Rylands v. Fletcher* for not keeping it under control. Against the second defts. he alleged negligence in wrongly assembling & fitting the valve chest, contending that though there was no privity of contract they were liable in tort for supplying a dangerous article:—*Held*: the doctrine of *Rylands v. Fletcher* was not applicable because there was no escape of the steam off the premises & the steamship owners were not making an unnatural user of their premises.—*HOWARD v. FURNESS HOULDER ARGENTINE LINES, LTD. & BROWN, LTD.*, [1936] 2 All E. R. 781; 80 Sol. Jo. 554; 41 Com. Cas. 290.

316a. — *Confined to owners in possession.*—*ST. ANNE'S WELL BREWERY Co. v. ROBERTS No. 349a, post.*

316b. — *In case of water gas & electricity—Not applicable to domestic uses.*—In premises adjoining those of pltf. a fire originated, due to some unknown defect in the electrical wiring. Pltf.'s premises were damaged by the water used for extinguishing the fire:—*Held*: in the absence of any proof of negligence by defts. in the installation or the maintenance of the electrical wiring, they were not liable in damages to pltf. The doctrine of *Rylands v. Fletcher* does not apply to the use of water, gas or electricity for ordinary domestic purposes, which must be distinguished from the handling of them

of the building by the officer, & an exposition of conditions arising from the absence of plumbing which would justify a reasonable conclusion that they rendered it unfit for human occupation because they created a situation which "was or might become injurious or dangerous to health or

which prevented or hindered in any manner the suppression of disease." The absence of plumbing does not in itself render a house "unfit for human habitation."—*R. (WILSON) v. HOLMES*, [1931] 2 W. W. R. 41; 3 D. L. R. 218.—*CAN.*

### PART III. SECT. 2, SUB-SECT. 2.—A.

314 i. *Extent of principle.*—The rule in *Rylands v. Fletcher* is not applicable to the ordinary domestic use of gas, electricity or water in a private residence.—*BLOOM v. CREED & CONSUMERS' GAS Co.*, [1937] 3 D. L. R. 709; O. R. 626.—*CAN.*

in bulk in mains or reservoirs.—*COLLINGWOOD v. HOME & COLONIAL STORES, LTD.*, [1936] 3 All E. R. 200; 155 L. T. 550; 53 T. L. R. 53; 80 Sol. Jo. 853, C. A.

323. *Add. Annotation* :—*Refd. Bartlett v. Tottenham*, [1932] 1 Ch. 114.

325. *Add. Annotation* :—*Distd. Bartlett v. Tottenham*, [1932] 1 Ch. 114.

328a. *Adjoining premises in warehouses.*—*STERLING WHARFAGE CO., LTD. v. PEEK BROS. & WINCH, LTD.* (1935), 79, Sol. Jo. 363.

330a. *Tapping springs.*—Before the year 1919 the land of pltf. & of deft. was in the same ownership. On Mar. 25, 1919, the common owners conveyed a cottage & garden to C., & on Aug. 25, 1919, part of the land. On July 19, 1921, C. conveyed the whole of the land to pltf. On Dec. 20, 1929, the common owners conveyed other part of their land to deft. In about 1888 a tank Y. had been constructed by the common owners, mainly on what became the land of pltf., but which projected partly on to the land which became the land of deft. The water from that tank was led by a pipe to another tank Z. wholly situate on deft.'s land. The tank Z. was tilted so that the water overflowed on to land which became pltf.'s. The overflow was diminished by the cattle using the tank as a drinking trough; what overflowed was conveyed by a stone drain to a point where it discharged into an open watercourse which was also fed by an underground spring on pltf.'s land. The open watercourse became a natural stream along the southern boundary of pltf.'s land, where there were two dipping places used by pltf. for watering his cattle & by some cottagers. Pltf.'s land was always boggy in places, & was now overgrown with rank vegetation. In Feb. 1930, deft. replaced tank Z. by another, which had two outlet holes, one only of which acted as an overflow outlet on to pltf.'s land. The overflow from the other outlet, which was on the west side, was led to a ram on deft.'s land. These alterations diminished the overflow on to pltf.'s land, who alleged that it affected the supply at the dipping places. He also alleged deft., in the alternative, had tapped springs the water from which escaped on to pltf.'s land, rendering part of it waterlogged. Pltf. claimed the right to a continuance of the overflow by grant as successor in title to C. or by prescription :—*Held* : the fact that owing to the natural & proper user by deft. of her own land some of the water in the water-bearing stratum below the surface had, to a

small extent, been diverted, did not entitle pltf. to damages for any alleged injury arising from such diversion, & deft. not having diverted any defined watercourse nor altered the level of her land nor erected any structure upon it so as to cause rain water which would ordinarily soak into her ground to pass on to pltf.'s land, pltf. was not entitled to the relief claimed in paras. 3 & 4 of the prayer of the statement of claim.—*BARTLETT v. TOTTENHAM*, [1932] 1 Ch. 114; 101 L. J. Ch. 160; 145 L. T. 686.

330b. *Escape from factory premises.*—Defts., the occupiers of factory premises on the second floor of a building, on several occasions allowed water to escape into the factory premises of pltf. on the floor below, whereby damage was caused to pltf.'s property. Defts.' business included the washing of cinematograph film, for which purpose an extraordinarily large quantity of circulating water was necessary, also a boiler, & carboys for storing water :—*Held* : as the water was brought by defts. on to their premises for their own special purposes, & not for the common benefit of defts. & pltf.'s, & defts.' user was not a normal user for the purposes for which both pltf. & defts. were occupying the premises, the principle of the decision in *Rylands v. Fletcher*, applied, & defts. were liable to pltf. in damages & need not prove specific acts of negligence by pltf. on each occasion.—*WESTERN ENGRAVING CO. v. FILM LABORATORIES, LTD.*, [1936] 1 All E. R. 106; 80 Sol. Jo. 165, C. A.

331a. *Overflow from boiler used for manufacturing purposes.*—Pltf. were tenants, & in occupation of the ground floor of commercial premises. Defts. were tenants & occupiers of the first & second floors of the premises. For the purpose of their business defts. had installed a boiler on the second floor connected with the main water supply of the building; an overflow of water occurred from the boiler, & flowing down to the ground floor, damaged pltf.'s stock of paper goods. At the time of the overflow defts., although carrying on their business elsewhere, were still tenants of the premises, & it was their custom to send employees over to the premises. The boiler apparatus was fitted with two stop-cocks or safety wheel-valves, but not with a trough or overflow waste pipe. Pltf. claimed damages for breach of a duty of absolute care, or for negligence, or for nuisance :—*Held* : (1) the introduction of a boiler into the upper floor of a building of this kind was an ordinary & proper use of the building, & that, therefore, the defts. were under no

PART III. SECT. 2, SUB-SECT. 2.—  
B. (e).

326 II. — *Measure of damages.*—Where by digging a ditch beneath the natural surface of the soil an occupant of land causes surface water, not moving in any defined watercourse, to be discharged upon the land of another, he is liable in damages. The damages in the present case were held to include the net value to pltf. of the crop which he would have put in on the flooded part of his land but for the flooding.—*QUALLEY v. DAY*, [1929] 2 D. L. R. 928; 1 W. W. R. 200; 23 S. L. R. 425; *revg.*, [1928] 3 D. L. R. 56; 1 W. W. R. 961; 22 S. L. R. 442.—*CAN.*

m 1. — *Alteration of land.*—Where deft. co. carried out alterations to its land with the result that, when rain fell, rain water poured from deft.'s land on to pltf.'s council's streets in a more concentrated form & carried with it more sand & silt than would be the case in the ordinary course of nature :—*Held* : pltf. was entitled to an injunction restraining deft. from permitting its land to remain in such a condition that these results ensued, & an inquiry as to what damage had accrued to pltf.'s streets arose from the operations of deft.—*NEWCASTLE COUNCIL v. AUSTRALIAN AGRICULTURAL CO., LTD.* (1928), 29 S. R. 212; 9 L. G. R. 71.—*AUS.*

sg. *Melted snow.*—In an action for

damage to property which was alleged to have been caused by deft. city bringing on to its own land large quantities of snow which on melting caused a flow of water to pltf.'s land & injured her building :—*Held* : the water from the one scrapful of snow which had been shown to have been hauled on to the city's land by the city was so negligible that the damage must have been caused by what fell naturally or was brought on to the land by parties other than the city; & also the fact that the city after constructing a drain to remove the water lying on the land had, some years later, obstructed the drain when building a concrete sidewalk did not render it liable.—*GRAHAM v. ST. BONIFACE CITY*, [1935] 1 W. W. R. 282; 2 D. L. R. 488.—*CAN.*

absolute duty of care in respect of water used for the boiler, the principles laid down in *Rylands v. Fletcher* not applying; (2) there was no negligence on the part of defts. in the construction of the boiler or in the condition in which it was left. Accordingly, pl'tfs. were not entitled to claim damages.—*MARCHANT MANUFACTURING CO., LTD. v. LEONARD D. FORD & TELLER, LTD.* (1936), 154 L. T. 430.

**332. Add. Annotations:—***As to (1) Refd. Shiffman v. Venerable Order of Hospital of St. John of Jerusalem*, [1936] 1 All E. R. 557. *Generally, Refd. Scammell v. Hurley*, [1929] 1 K. B. 419.

**343. Add. Annotation:—***Consd. Collingwood v. Home & Colonial Stores, Ltd.*, [1936] 3 All E. R. 200.

**344a. Collapse of wall.—***ST. ANNE'S WELL BREWERY CO. v. ROBERTS*, No. 349a, *post*.

**344b. —.**—*WILKINS v. LEIGHTON*, No. 349b, *post*.

**344c. Permitting occupation of land by caravan dwellers—Misconduct by occupants.**—*Deft.*, in return for payment, allowed persons to place caravans on a disused brickfield & to live in them, & some of these persons committed in the vicinity, but not in the brickfield, acts which interfered with the comfort of people in the neighbourhood. In an action by the A.-G. at the suit of the local district council for an injunction to restrain *deft.* from permitting the brickfield to be occupied in such a way as to be a nuisance:—*Held*: as *deft.* was putting his land to an abnormal use he was responsible for the nuisance which existed in the vicinity, & he must be restrained from permitting the occupiers of the land to do the acts constituting the nuisance.—*A.-G. v. CORKE*, [1933] Ch. 89; 148 L. T. 95; 48 T. L. R. 650; 76 Sol. Jo. 593; 31 L. G. R. 35; *sub nom. A.-G. & BROMLEY RURAL COUNCIL v. CORKE*, 102 L. J. Ch. 30.

**344d. Roundabout—Dangerous if improperly used.**—*Pltf.* was tenant of a stand on a fair-ground belonging to defts. While she was on her stand, a chair, with its occupant, became detached from a chair-o-plane, the property of & operated by defts., & severely injured *pltf.* It was found as a fact that the action was due to the recklessness of the occupant of the chair:—*Held*: defts. were liable without proof of negligence on their part, as the principle of *Rylands v. Fletcher* applied.—*HALE v. JENNINGS BROS.*, [1938] 1 All E. R. 579; 82 Sol. Jo. 193, C. A.

**349a. —. —. No knowledge of danger or defect.**—*Pl'tfs.* were the owners of an ancient inn,

one side of which was bounded by the ancient city wall of Exeter, part of which was the property of defts. On either side of the fireplace in the kitchen of the inn recesses had at some time unknown been formed by means of excavations made in the wall. In 1927 a considerable portion of the wall belonging to defts. collapsed & completely demolished *pl'tfs.' inn*:—*Held*: (1) inasmuch as the damage caused to *pl'tfs.' premises* did not arise from an abnormal or unnatural user of defts.' property, & defts. were not occupiers of the wall at the time the damage took place, the doctrine of *Rylands v. Fletcher* did not apply, & (2) it had not been proved that defts. had knowledge of the defect which ultimately resulted in the fall of the wall or that there had been a failure on their part by due diligence to ascertain that knowledge.—*ST. ANNE'S WELL BREWERY CO. v. ROBERTS* (1928), 140 L. T. 1; 92 J. P. 180; 44 T. L. R. 703; 26 L. G. R. 638, C. A.

*Annotations:—As to (2) Follid. Wilkins v. Leighton*, [1932] 2 Ch. 106. *Refd. Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56. *Generally, Refd. Cunard v. Antliff*, [1933] 1 K. B. 551.

**349b. —. —. —.**—*The owner of land situate on a steep natural slope built in 1888 a house called "A. Hall." The ground was then excavated on the upper side to a depth of thirteen feet, forming a vertical bank on the boundary. In order to protect this from weathering & crumbling the owner erected a retaining wall some seventy feet long & thirteen feet high. The adjoining land beyond & above the wall was left unbuilt on until 1925, when a house was erected & was afterwards purchased by *deft. A. L.* Early in 1930 the retaining wall collapsed almost entirely, causing pressure against & damage to an outside wall of a room which had been on to "A. Hall." *Pltf.* alleged & the ct. found as a fact that the collapse of the wall was due to the additional pressure upon it caused by the weight of the new house built in 1925, & he claimed a mandatory order to restore the wall & to take such further steps as might be necessary to prevent any further damage to his property, & an injunction & damages:—*Held*: (1) *deft. A. L.* as the owner of the house was under no liability to *pltf.* based on the doctrine of *Rylands v. Fletcher*, as her predecessor in title had only used the land for the natural & normal purpose of building a house on it; (2) the claim as based on nuisance failed, as there was no evidence that *deft.* knew or could have known that her house constituted a nuisance or hidden danger to *pltf.'s property*, or that any such nuisance in fact existed.—*WILKINS v.**

#### PART III. SECT. 2, SUB-SECT. 2.—B. (i).

**d 1. —.**—*MCCARTNEY v. MILLER* (1905), 7 Terr. L. R. 367; 2 W. L. R. 87.—CAN.

**d 11. —.**—*BETTCHEER v. TURNER* (Sask.) (1918), 25 W. L. R. 136.—CAN.

*sg. Overloading floor of warehouse.*—*Pltf.*, an automobile dealer, was the tenant of part of the ground floor of a warehouse. *Deft.*, a dealer in seed grain, was the tenant of part of the third floor directly above *pltf.'s premises*. About three months after *deft.* had stored a large quantity of oats on his floor it collapsed, the oats fell through & brought the second floor down upon *pltf.'s cars*. In an

action for the resulting damage, the immediate cause for the collapse could not be definitely assigned, but it was shown that the floors of a building constructed for general warehousing purposes should have a carrying capacity far in excess of the load under which *deft.'s floor* collapsed. There was no evidence that the building in question was ever held out to the public, or prospective tenants, as a general warehouse, although parts of it had been leased from time to time to various tenants for miscellaneous storage purposes:—*Held*: *deft.* was guilty of negligence, not only in overloading, but in disregarding the duty which, under the circumstances including the general flimsiness of the

building, was upon him to inquire & inspect; & also his liability could be based on the principle of *Rylands v. Fletcher*.—*MADDER v. MCKENZIE* (A. E.) & CO., LTD., [1931] 1 W. W. R. 344; 2 D. L. R. 522; *affd.*, [1931] 3 W. W. R. 540; [1932] 1 D. L. R. 129; 40 Man. L. R. 24.—CAN.

**sl. Flood lighting.**—*Flood lighting does not come within Rylands v. Fletcher*, as light is not noxious or dangerous.—*NOYES v. HURON & ERTE MORTGAGE CORPN.*, [1932] O. R. 426; 3 D. L. R. 143.—CAN.

**sp. Rotary mud from oil well.**—*MOWILLIAMS v. CARLETON ROYALTIES, LTD.*, [1938] 2 W. W. R. 351.—CAN.

- LEIGHTON, [1932] 2 Ch. 106; 101 L. J. Ch. 385; 147 L. T. 495; 76 Sol. Jo. 232.
350. *Add. Annotation*:—*Refd.* Western Engraving Co. v. Film Laboratories, Ltd., [1936] 1 All E. R. 106; *Marchant Manufacturing Co. v. Leonard D. Ford & Teller, Ltd.* (1936), 154 L. T. 430.
353. *Add. Annotations*:—*Distd.* Western Engraving Co. v. Film Laboratories, Ltd., [1936] 1 All E. R. 106. *Refd.* Pontardawe Rural District Council v. Moore-Gwyn, [1929] 1 Ch. 656; *Bartlett v. Tottenham*, [1932] 1 Ch. 114; *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A. C. 108; *Marchant Manufacturing Co. v. Leonard D. Ford & Teller, Ltd.* (1936), 154 L. T. 430; *Collingwood v. Home & Colonial Stores, Ltd.*, [1936] 3 All E. R. 200; *Hale v. Jennings Bros.*, [1938] 1 All E. R. 579.
356. *Add. Annotation*:—*Refd.* St. Anne's Well Brewery Co. v. Roberts (1928), 140 L. T. 1.
357. *Add. Annotations*:—*Consd.* Hollywood Silver Fox Farm, Ltd. v. Emmett, [1936] 1 All E. R. 825. *Refd.* O'Cedar v. Slough Trading Co., [1927] 2 K. B. 123; *Matania v. National Provincial Bank, Ltd.* (1935), 154 L. T. 103.
359. *Add. Annotation*:—*Consd.* Pontardawe Rural District Council v. Moore-Gwyn, [1929] 1 Ch. 656.
360. *Add. Annotation*:—*Consd.* Hollywood Silver Fox Farm, Ltd. v. Emmett, [1936] 1 All E. R. 825.
363. *Add. Annotations*:—*Refd.* Aldridge v. Wright, [1929] 2 K. B. 117; *Vanderpant v. Mayfair Hotel Co.* (1929), 27 L. G. R. 752.
364. *Add. Annotations*:—*Consd.* St. Anne's Well Brewery Co. v. Roberts (1928), 140 L. T. 1; *Refd.* Wilkins v. Leighton (1932), 76 Sol. Jo. 232.
- 364a. *Maintaining overhanging rock.*—The owner of land on which there is an outcrop of rock overhanging a steep slope is not liable for damage caused by reason of portions of that rock breaking away & falling down the slope if the break is due to natural causes, such as weathering, & the owner has used his land in an ordinary way, without any mining or quarrying operations. Rocks in such a position, though they may become dangerous
- are not "premises in such a state as to be a nuisance" within Public Health Act, 1875 (c. 55), s. 91.—*PONTARDAWE RURAL COUNCIL v. MOORE-GWYN*, [1929] 1 Ch. 656; 98 L. J. Ch. 242; 141 L. T. 23; 93 J. P. 141; 45 T. L. R. 276; 27 L. G. R. 493.
366. *Add. Annotation*:—*Refd.* Bishop v. Consolidated London Properties, Ltd. (1933), 102 L. J. K. B. 257.
369. *Add. Annotations*:—*Refd.* Western Engraving Co. v. Film Laboratories, Ltd., [1936] 1 All E. R. 106; *Collingwood v. Home & Colonial Stores, Ltd.*, [1936] 3 All E. R. 200.
372. *Add. Annotation*:—*As to (1)* *Refd.* Manchester Corp'n. v. Farnworth (1929), 46 T. L. R. 85.
374. *Add. Annotations*:—*Consd.* St. Anne's Well Brewery Co. v. Roberts (1928), 140 L. T. 1. *Appl.* Wilkins v. Leighton, [1932] 2 Ch. 106. *Refd.* Liddle v. North Riding of Yorkshire County Council, [1934] 2 K. B. 101; *Hale v. Jennings Bros.*, [1938] 1 All E. R. 579; *Sedleigh-Dentfield v. St. Joseph's Society for Foreign Missions & Hillman*, [1938] 3 All E. R. 321.
376. *Add. Annotations*:—*Refd.* G. W. Ry. v. S.S. Mostyn, The Mostyn, [1928] A. C. 57; *St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L. T. 1.
379. *Add. Annotations*:—*Refd.* Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., [1936] A. C. 108; *Shiffman v. Venerable Order of Hospital of St. John of Jerusalem*, [1936] 1 All E. R. 557; *Hale v. Jennings Bros.*, [1938] 1 All E. R. 579.
386. *Add. Annotations*:—*Consd.* Vanderpant v. Mayfair Hotel Co. (1929), 27 L. G. R. 752. *Refd.* Aldridge v. Wright, [1929] 2 K. B. 117; *Keewatin Power Co., Ltd. v. Lake of the Woods Milling Co.*, [1930] A. C. 640; *Liddiard v. Waldron*, [1933] 2 K. B. 319.
389. *Add. Annotation*:—*Refd.* St. Anne's Well Brewery Co. v. Roberts (1928), 140 L. T. 1.
414. *Add. Annotation*:—*Refd.* Matania v. National Provincial Bank, Ltd. & Elevenist Syndicate, Ltd. (1936), 155 L. T. 74.
416. *Add. Annotation*:—*Consd.* Hollywood Silver Fox Farm, Ltd. v. Emmett, [1936] 1 All E. R. 825.
430. *Add. Annotation*:—*Consd.* Andreae v. Selfridge & Co., [1936] 2 All E. R. 1413.

### PART III. SECT. 2, SUB-SECT. 2.— C. (a) ii.

n i. —.]—*Deft.* lit a fire on his land on Feb. 15, 1933, for the purpose of burning off approximately 100 acres of stubble. The stubble was burnt off as an ordinary farming operation & in the way in which the majority of farmers in the district burnt their stubble. During the operation a tree stump became ignited & smouldered until Feb. 20, when a high wind caused the fire from the stump to spread to & damage ptff.'s land:—*Held*: the lighting of such a large area of stubble was not a natural or ordinary user of the land & *deft.* was liable for the damage thus caused.—*WEBBER v. HAZELWOOD* (1934), 34 S. R. N. S. W. 155; 51 N. S. W. W. N. 53.—*AUS.*

### PART III. SECT. 2, SUB-SECT. 2.— C. (f).

378 i. *General rule*—*Owner not liable.*—The true view of the law as to the act of a stranger, both as relieving from initial or original negligence & by way of exception to or as a limitation

of the rule in *Rylands v. Fletcher*, is that where the escape of the dangerous article or agency is caused by the act of a stranger over whom the owner or keeper thereof has no control, the happening or the injurious effect of whose act he could not reasonably be expected to anticipate, such owner or keeper is not liable for the escape & its results.—*LONDON GUARANTEE & ACCIDENT CO., LTD. v. NORTHWESTERN UTILITIES, LTD.*, [1934] 1 W. W. R. 675; *reversd. on the facts* (1934), 3 W. W. R. 641; 1 D. L. R. 135; [1935] 4 D. L. R. 737; 3 W. W. R. 446, P. C.—*CAN.*

so. *Sparks from machine used by defendant on another's land causing fire on plaintiff's land.*—*PETT v. SIMS PAVING & ROAD CONSTRUCTION CO. PTY., LTD.*, [1928] V. L. R. 247; [1928] *Argus* L. R. 215.—*AUS.*

### PART III. SECT. 2, SUB-SECT. 3.

389 i. *Duty of neighbouring owner.*—During a windstorm, one of the brick walls of *deft.*'s garage was drawn outwards, & the falling wall injured the

infant ptff. who was playing in her father's yard on the adjoining property. The judge found that both in design & construction the wall was sufficient for the purpose for which it was intended, & that its fall was due to the storm, which he found to be one of such extraordinary violence that it could not reasonably have been anticipated; he found also that the wall was not a nuisance; & that the breach of a building bye-law, in not employing an architect, could not be said to have caused the accident; moreover the bye-law in question gave no right of action to ptff.:—*Held*: *deft.* was not liable.—*MARCHESYN v. FANE AUTO WORKS, LTD.*, [1932] 1 W. W. R. 689; 4 D. L. R. 618; *affd.*, [1933] 3 W. W. R. 281.—*CAN.*

### PART III. SECT. 4.

c i. — *Ammonia plant causing loss of patronage to theatre*—*Loss due to change in character of district.*—*AVENUE THEATRE, LTD. v. VANCOUVER GAS CO.* (1928), 40 B. C. R. 275.—*CAN.*



432a. — Silver fox breeding—Firing gun on adjoining property.]—Pltf. co. carried on the business of breeding silver foxes on their land. During the breeding season the vixens are very nervous, & liable if disturbed either to refuse to breed, to miscarry, or to kill their young. Deft., an adjoining landowner, maliciously caused his son to discharge guns on his own land as near as possible to the breeding pens for the purpose of injuring

plfts. by interfering with the breeding of the foxes :—*Held* : plfts. were entitled to an injunction & damages, although the firing took place on deft.'s own land, over which he was entitled to shoot.—*HOLLYWOOD SILVER FOX FARM, LTD. v. EMMETT*, [1936] 2 K. B. 468 ; [1936] 1 All E. R. 825 ; 105 L. J. K. B. 829 ; 155 L. T. 288 ; 52 T. L. R. 611 ; 80 Sol. Jo. 488.

## Part IV.—Remedies.

438. *Add. Annotations* :—*Refd.* Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226 ; *Seaton v. Slama* (1932), 77 Sol. Jo. 11.

439. *Add. Annotation* :—*As to* (1) *Refd.* Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226.

444. *Add. Annotations* :—*As to* (1) *Refd.* Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226. *Generally*, *Refd.* The Carlgarth, The Otarama, [1927] P. 93.

445. *Add. Annotations* :—*Consd.* Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226. *Refd.* *Seaton v. Slama* (1932), 77 Sol. Jo. 11.

447. *Add. Annotation* :—*As to* (1) *Refd.* Salisbury & Fordingbridge District Drainage Board v. Southern Tanning Co. (1920), Ltd., [1927] 2 K. B. 566.

465. *Add. Annotation* :—*Consd.* Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co., [1927] A. C. 226.

517. *Add. Annotation* :—*Consd.* Cunard v. Antifire, Ltd., [1933] 1 K. B. 551.

527. *Add. Annotations* :—*Consd.* Cunard v. Antifire, Ltd., [1933] 1 K. B. 551. *Refd.* Otto v. Bolton & Norris, [1936] 1 All E. R. 960.

528. *Add. Annotation* :—*Consd.* Cunard v. Antifire, Ltd., [1933] 1 K. B. 551.

542. *Add. Annotations* :—*Refd.* Blundy, Clark & Co. v. London & North Eastern Railway

(1931), 100 L. J. K. B. 401 ; *Harper v. Haden & Sons*, [1933] Ch. 298.

545. *Add. Annotation* :—*Refd.* Vanderpant v. Mayfair Hotel Co., [1930] 1 Ch. 138.

549. *Add. Annotation* :—*Refd.* Colleshill v. Manchester Corpn., [1928] 1 K. B. 776.

550. *Add. Annotations* :—*Refd.* Vanderpant v. Mayfair Hotel Co. (1929), 27 L. G. R. 752 ; *Harper v. Haden & Sons, Ltd.*, [1933] Ch. 298.

552. *Add. Annotation* :—*Refd.* Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401.

553. *Add. Annotations* :—*Refd.* Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401 ; *Harper v. Haden & Sons*, [1933] Ch. 298.

566. *Add. Annotation* :—*Consd.* Cornford v. Havant & Waterloo Urban District Council (1932), 97 J. P. 137.

566a. — — —.]—Certain sewage disposal works were vested in P., a local authority. As these disposal works served an area within the jurisdiction of H., another local authority, H., by arrangement with P., had operated the sewage disposal works. Plfts. brought an action against both P. & H., claiming an injunction to restrain them from causing a nuisance by smell arising from the sewage disposal works :—*Held* : an injunction must be granted against H., which operated the sewage disposal works, but P., the authority

### PART IV. SECT. 1, SUB-SECT. 2.— B. (a).

442 ii. — — —.]—*McLOUGHLAN v. MARTIN* (1864), 5 Nfld. L. R. 44.—*NFLD.*

### PART IV. SECT. 1, SUB-SECT. 2.— C. (a).

eg. *No right to abate—Nuisance by building—Rule in India.*—There is no statutory provision in India justifying a private person or a member of the public in demolishing a building & causing loss to another person by way of abating a nuisance. Such an act is contrary to sect. 23 of the Indian Penal Code & is governed by Indian statute law & not English common law.—*NARASIMHULU v. NAGUR SAHIB* (1933), 1 L. R. 57 Mad. 351.—*IND.*

### PART IV. SECT. 2, SUB-SECT. 1.— A. (a) i.

483 i. — — —.]—*Of permanent character.*—An owner who is not in occupation of a house can file a suit for damages for nuisance without joining the occupier if the nuisance complained of is "permanent" & of such a character as to injuriously affect the reversion. Where the nuisance is caused by

machinery installed in certain premises for the purposes of supplying electricity to a city in pursuance of a licence granted by Government for the said purpose, the nuisance is practically a "permanent" one, i.e. one "which will continue indefinitely unless something is done to remove it."—*ALWAR CHETTY v. MADRAS ELECTRIC SUPPLY CORPN., LTD.* (1933), 1 L. R. 56 Mad. 289.—*IND.*

483 ii. — — —.]—To give a reversioner a right of action for nuisance, the injury must be of a permanent character.—*LANDZICK v. ROBINSON* (1935), 43 Man. L. R. 30.—*CAN.*

### PART IV. SECT. 2, SUB-SECT. 1.— A. (b).

st. *Tenant.*—A tenant is entitled to recover damages for a nuisance which affects his use & enjoyment of he leased premises, even though the nuisance existed to his knowledge when he entered into the lease.

An injury to the pltf.'s business caused by a nuisance is a ground for damages.—*BILLINGSBATE FISH, LTD. v. BRITISH COLUMBIA SUGAR REFINING CO., LTD.*, [1933] 1 W. W. R. 530 ; 46 B. C. R. 543.—*CAN.*

### PART IV. SECT. 2, SUB-SECT. 1.— B. (c) i.

540 xii. — — —.]—In an action by a landowner against a golf club wherein he sought an injunction on the ground of nuisance :—*Held* : pltf. was entitled to show that the acts of deft. in maintaining & operating the golf course constituted a public nuisance & that, because thereof, he suffered particular, direct, & substantial special damage, above that sustained by the public at large.—*CHISWELL v. CHARLESWOOD RURAL MUNICIPALITY, & ALCREST GOLF CLUB, LTD.*, [1935] 3 W. W. R. 217.—*CAN.*

### PART IV. SECT. 2, SUB-SECT. 2.—A.

566 i. *Person permitting nuisance—Nuisance created by licensee.*—Where a person uses land merely as a licensee the owner or licensor may be liable for any nuisance the licensee commits & which the licensor or owner does not prevent him from carrying on. There is a great difference between the position of responsibility with relation to a licensee with exclusive rights pending the term & a mere transitory licensee. There may also be a difference between a landlord & a lessor.—*GRIERSON v.*

owning the works, having had no notice of the nuisance until action brought, no injunction could be granted against them.—**CORN-FORD v. HAVANT & WATERLOO URBAN DISTRICT COUNCIL** (1933), 97 J. P. 137; 31 L. G. R. 142.

567a. —.]—**SHORT v. TAYLOR** (1709), 2 Eq. Cas. Abr. 522; 22 E. R.

*Annotation* :—**Apld. Williams v. Jersey** (1841), Cr. & Ph. 91.

575. *Add. Annotation* :—**Refd. Sedleigh-Denfield v. St. Joseph's Society for Foreign Missions & Hillman**, [1938] 3 All E. R. 321.

575a. **No notice of nuisance.**—The college, the first deft., was the owner of property adjoining pltf.'s premises. The boundary of its property on that side had originally been a ditch & a hedge, their relative positions changing along the boundary. Where pltf.'s garden adjoined the college property, the ditch abutted on pltf.'s garden, the hedge being on the side of the ditch nearer to the college property. It was admitted that, applying the usual presumption, the ditch at this point belonged to the college. About 1934, when a block of flats was erected upon the western side of pltf.'s premises, the ditch had been piped by the county council. No permission was obtained from the college, & the fact of these pipes having been put in was not at any material time brought to the notice of the college authorities. No proper guard was put at the entrance to the pipe to prevent its being blocked by *débris*. The pipe becoming blocked, pltf.'s garden was flooded, & he claimed damages from the college, on the ground that the pipe was a nuisance. He also claimed damages from the second deft., the lessee of the block of flats above referred to, upon the ground that she had covenanted in the lease of her property to repair, maintain & cleanse all sewers, drains, water-courses, culverts & pipes :—**Held** : (1) it was equally open to pltf. & to the college to put this pipe right, & pltf. could not complain of the failure of the college to abate a nuisance of which they had no notice, being a nuisance which pltf. could have abated himself; (2) as the second deft. could not abate this nuisance without committing a trespass, there was no claim against her.—**SEDLIGH-DENFIELD v. ST. JOSEPH'S SOCIETY FOR FOREIGN MISSIONS & HILLMAN**, [1938] 3 All E. R. 321; 159 L. T. 253; 82 Sol. Jo. 606.

582. *Add. Annotation* :—**Generally, Refd. Wilchick v. Marks & Silverstone**, [1934] 2 K. B. 56.

584. *Add. Annotations* :—**As to** (1) **Consd. Cornford**

**v. Havant & Waterloo Urban District Council** (1932), 97 J. P. 137. **Generally, Refd. Wilchick v. Marks & Silverstone**, [1934] 2 K. B. 56.

589. *Add. Annotation* :—**Refd. Cornford v. Havant & Waterloo Urban District Council** (1932), 97 J. P. 137.

598a. **Jus tertii.**—In an action of trespass a deft. cannot set up a *jus tertii* against a possessory title. The same rule applies to an action for polluting a several fishery & damaging the fish.

Now does the *jus tertii* rule apply to such an action? I must confine my remarks most strictly to actions of the kind before me. There are many kinds of nuisance actions, e.g. an action for infringement of ancient lights, & so on, & I am very far from saying that the *jus tertii* rule applies to every kind of nuisance action. But in this case I am dealing with a nuisance action of a kind peculiar to itself & to other pollution actions. It is not trespass, but it is very analogous to trespass. In my judgment where defts. are doing acts *per se* illegal, & therefore not justifiable under any outside authority, they cannot set up a *jus tertii* as a defence in an action of this kind (FARWELL, J.).—**NICHOLLS v. ELY BEET SUGAR FACTORY**, [1931] 2 Ch. 84, 87; 100 L. J. Ch. 259; 145 L. T. 113.

598b. **Clause in lease permitting rebuilding of adjacent property.**—**ANDREÆ v. SELFRIDGE & Co., LTD.**, No. 94a, *ante*.

599. *Add. Annotation* :—**Consd. Hollywood Silver Fox Farm, Ltd. v. Emmett**, [1936] 1 All E. R. 825.

601. *Add. Annotation* :—**Refd. Harper v. Haden & Sons**, [1933] Ch. 298.

608. *Add. Annotation* :—**Refd. Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co.**, [1927] A. C. 226.

609. *Add. Annotation* :—**Refd. Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co.**, [1927] A. C. 226.

612. *Add. Annotation* :—**Refd. Lagan Navigation Co. v. Lambeg Bleaching, Dyeing & Finishing Co.**, [1927] A. C. 226.

613. *Add. Citation* :—25 L. G. R. 1.

626. *Add. Annotation* :—**Refd. Manchester Corp'n. v. Farnworth** (1929), 46 T. L. R. 85.

640. *Add. Annotation* :—**Refd. Mayhead v. Hydraulic Hoist Co.** (1931), 100 L. J. K. B. 369.

660. *Add. Annotation* :—**Refd. Farnworth v. Manchester City Corp'n.**, [1929] 1 K. B. 533.

669. *Add. Annotation* :—**Refd. Matania v. National Provincial Bank, Ltd. & Elevenist Syndicate, Ltd.**, [1936] 2 All E. R. 633.

**OSBORNE STADIUM, LTD.**, [1933] 1 W. W. R. 634; 3 D. L. R. 598; 41 Man. L. R. 163.—CAN.

#### PART IV. SECT. 2, SUB-SECT. 2.—B.

**sg. Liability of joint contributors.**—Where two or more persons contribute in part only to the creation of a nuisance, each is severally liable. Each may be restrained from doing the act which contributes to that which becomes, in the aggregate, a nuisance.—**L'ESTRANGE v. THE BRISBANE GAS CO.**, [1928] S. R. Q. 180.—AUS.

#### PART IV. SECT. 2, SUB-SECT. 3.—A.

**sk. Delay—Action by Attorney General—Laches of relator.**—**Proceed-**

ings were brought by the A.-G. at the relation of the County Council of Down, & by county council for a declaration that defts. had wrongfully obstructed the public highway by erecting a public lavatory, & for a mandatory injunction to compel defts. to pull down the structure & restore the highway :—**Held** : the delay on the part of the county council had disentitled them to an injunction, but the laches of a relator is not necessarily to be attributed to the A.-G., & while delay on his part with knowledge of the alleged violation of his rights cannot be ignored, there was no sufficient evidence of the A.-G.'s knowledge of the infringements of the rights of the public to justify a refusal of the

mandatory injunction.—**A.-G. & DOWN COUNTY COUNCIL v. NEWRY NO. 1 RURAL DISTRICT COUNCIL**, [1933] N. I. 50.—IR.

#### PART IV. SECT. 2, SUB-SECT. 4.

**sl. Nominal damages.**—**MURPHY v. BACON**, [1931] 1 D. L. R. 1001; 1 M. P. R. 586.—CAN.

#### PART IV. SECT. 2, SUB-SECT. 6.—A. (e).

678 iv. —.]—In a *quia timet* action for an injunction restraining the establishment of a hospital, on the ground that it will constitute a nuisance to pltf., he must prove a strong probability almost amounting to moral certainty that the hospital will be an

681. *Add. Annotation* :—*Refd.* Graigola Merthyr Co. v. Swansea Corpn., [1928] Ch. 235.

730. *Add. Annotation* :—*Refd.* Hill v. Aldershot Borough Council, [1933] 1 K. B. 259.

774a. *Appeal to quarter sessions—Objection to original notice & order—Jurisdiction of quarter sessions.*—On failure by an owner of premises to abate a nuisance thereon when required by notice to do so, the sanitary inspector caused a complaint to be preferred to a ct. of summary jurisdiction. The ct. made an order requiring the owner to abate the nuisance, & the owner did not appeal against that order. On the failure of the owner to comply with the order the sanitary inspector caused a further complaint to be preferred to the same ct., which ultimately made an order imposing penalties on the owner. Against that order the owner appealed to quarter sessions, & on the hearing

of the appeal for the first time took objection to the original notice & order. The ct. of quarter sessions allowed the appeal on the ground that the original notice & order were bad :—*Held* : the ct. of quarter sessions on appeal against the order imposing penalties had no jurisdiction to inquire into the validity of the original notice & order, inasmuch as no objection had been made to the original complaint & no appeal brought against the original order.—*AGER v. GATES* (1934), 151 L. T. 98 ; 98 J. P. 223 ; 32 L. G. R. 167 ; 30 Cox, C. C. 105, D. C.

793. *Add. Annotation* :—*Consd.* Pointon v. Cox (1926), 136 L. T. 506.

794. *Add. Annotation* :—*Apld.* R. v. Surrey Justices, *Ex p.* Witherick, [1932] 1 K. B. 450.

799. *Add. Annotation* :—*Refd.* Manchester Corpn. v. Farnworth (1929), 46 T. L. R. 85.

actual nuisance.—*SHUTTLEWORTH v. VANCOUVER GENERAL HOSPITAL*, [1927] 2 D. L. R. 573 ; [1927] 1 W. W. R. 476 ; 38 B. C. R. 300.—*CAN.*

673 v. —.—.]—*Pitfs.* moved for an

*injunction to prevent a nuisance, which they feared would arise from noise & vibration caused by the establishment of a factory then in course of erection* :—*Held* : as it had not been established

that the damage apprehended was imminent & of a substantial character, the claim was premature.—*ROBERTSON v. DUTHIE STEEL CASEMENT CO., LTD.*, [1927] N. Z. L. R. 826.—*N.Z.*

# OPEN SPACES AND RECREATION GROUNDS.

## Part I.—General Rights of Public.

1. *Add. Annotation* :—*Refd.* Hue v. Whiteley, [1929] 1 Ch. 440.
10. After this case add :—  
Open space within London Open Spaces Act, 1893, c. lxxi—Whether liable to expropriation under Housing Act.]—*See* COMPULSORY PURCHASE, No. 2225f, *ante*.

## Part II.—Exemption from Rates, Charges, etc.

2. *Add. Annotations* :—*Consd.* Consett Iron Co. v. Durham County Assessment Committee for No. 5 or North-West Area (1930), 99 L. J. K. B. 277. *Distd.* London Playing Fields Society v. Essex (S. W. Area) Assessment Committee (1930), 94 J. P. 241. *Consd.* Mitcham Golf Course Trustees v. Ereaud, [1937] 3 All E. R. 450.
13. *Add. Annotation* :—*Dbtd.* London Playing Fields Society v. Essex (S. W. Area) Assessment Committee (1930), 94 J. P. 241.
- 14a. ———.]—Applts. were a body incorporated by Royal Charter for the purpose of providing playing fields for the use of clubs & persons who could not afford to pay full economic rents. Land was conveyed to applts. by a deed containing a restrictive covenant that the land should be used for the purposes of Recreation Grounds Act, 1859 (c. 27), as though it had been conveyed under that Act, but subject to the power of applts. to sell the whole or any part of the land. Applts. successfully appealed to Quarter Sessions against a poor rate in which they were rated & assessed in respect of the land. On resps.' appeal by case stated :—*Held* : since the land was not "struck with sterility" as a matter of law, there being no statutory & irrevocable dedication to the public, applts. were in rateable occupation.—LONDON PLAYING FIELDS SOCIETY v. ESSEX (S. W. AREA) ASSESSMENT COMMITTEE (1930), 144 L. T. 233 ; 94 J. P. 241 ; 46 T. L. R. 631 ; 74 Sol. Jo. 662 ; 28 L. G. R. 591 ; (1926-31), 1 B. R. A. 367, D. C.

## Part III.—Powers of Regulation and Management.

- 24a. *Garden committee—Membership—Eligibility of women.*]—Sex Disqualification (Removal) Act, 1919 (c. 71), s. 1, removes the bar imposed by Kensington Improvement Act, 1851, s. xliii., by which "... the male inhabitant householders ... shall be & are hereby constituted & appointed a committee for the care & management" of the respective gardens referred to, & entitles women householders to be appointed to the committees.—*Re* EDWARDS SQUARE GARDEN COMMITTEE, SMITH v. MITCHELL (1934), 51 T. L. R. 35 ; 78 Sol. Jo. 767.

## Part IV.—User of Open Spaces.

33. *Add. Annotation* :—*Refd.* A.-G. v. Poole Corp., [1936] 3 All E. R. 852.
  35. *Add. Annotations* :—*Distd.* A.-G. v. Sunderland Corp. (1929), 46 T. L. R. 10. *Refd.* A.-G. v. Manchester Corp., [1931] 1 Ch. 254.
  38. *Add. Annotations* :—*Folld.* *Re* Cranstoun, National Provincial Bank, Ltd. v. Royal Society for Encouragement of Arts, Manufactures & Commerce, [1932] 1 Ch. 537. *Refd.* I. R. Comrs. v. Yorkshire Agricultural Soc. (1927), 44 T. L. R. 59.
  39. *Add. Annotation* :—*Consd.* A.-G. v. Sunderland Corp., [1929] 2 Ch. 436.
  40. *Add. Annotation* :—*Refd.* A.-G. v. Poole Corp., [1938] Ch. 23.
- .]—By a conveyance dated Apr. 28, 1905. the Comrs. of Poole Harbour conveyed to the Poole Corp. in consideration of certain covenants a part of certain land known as Sandbanks. The land was expressed to be conveyed to the Council to hold "in fee simple to the intent that the same may for ever hereafter be preserved & used as a pleasure or recreation ground for the public use." Among the covenants by the Council it was covenanted "That the Council will at all times hereafter subject as aforesaid preserve the land hereby conveyed as an open space or as a pleasure ground or recreation ground for the use of the public & will take all necessary steps to maintain the land as such." There

was also a covenant to reserve a portion of the land for a bathing station. In 1934, the Council having laid out the land as a recreation or sports ground, with a bathing establishment & so forth, proposed to build a residence for a caretaker on the land. In an action brought by the A.-G. at the relation of persons owning or interested in adjoining land to restrain the erection of the caretaker's residence on the open space :—*Held* : (1) the conveyance of Apr. 28, 1905, was a document *inter partes* in respect of which the covenantees would be the proper parties to sue & not the A.-G. at the instance of parties interested. It was plain therefore that, if pltf. was to succeed in the action, it could only

be because he could show that what the Council were doing was in breach of the statutory obligations imposed on them by Open Spaces Act, 1906 (c. 25), s. 10 ; (2) the evidence showed that the erection of a caretaker's residence was reasonably necessary to enable the Council to comply with the requirement of sect. 10 (b) to "maintain & keep the open space . . . in a good & decent state" & the Council had therefore power within the last words of the sect. to erect a caretaker's residence.—A.-G. v. POOLE CORPN., [1938] Ch. 23 ; [1937] 3 All E. R. 608 ; 106 L. J. Ch. 319 ; 157 L. T. 209 ; 101 J. P. 498 ; 53 T. L. R. 924 ; 81 Sol. Jo. 627 ; 35 L. G. R. 472, C. A.

## PARLIAMENT.

## Part I.—Nature and Powers.

- 2a. ———.]—It is not the practice in Acts of Parliament to attempt to restrain future Parliaments in their enactments; & the Legislature could not have intended to suggest such an object without expressing it in very distinct terms (WILDE, C.J.).—*BODEN v. SMITH* (1849), 18 L. J. C. P. 121; 12 L. T. O. S. 377; 13 J. P. 153; 13 Jur. 428.
- Annotations* :—*Refd.* *R. v. Smith* (1873), L. R. 8 Q. B. 146; *Jenkins v. Great Central Ry. Co.*, [1921] 1 K. B. 1.
- 2b. ———.]—The exemption is in general terms. It may have been intended to include all taxes & assessments whatsoever, present or future, then imposed or to be imposed by any future Act of Parliament. But even if the exemption had been enacted in those very terms, it is plain that such an enactment could not have bound future Parliaments (CHANNELL, J.).—*ASSOCIATED NEWSPAPERS, LTD. v. LONDON CITY CORPN.*, [1913] 2 K. B. 281; 82 L. J. K. B. 928; 108 L. T. 789; 77 J. P. 273; 11 L. G. R. 554; *on appeal*, [1914] 2 K. B. 603, C. A.; *sub nom.* *LONDON CITY CORPN. v. ASSOCIATED NEWSPAPERS, LTD.*, [1915] A. C. 674, H. L.
- 2c. ———.]—Parliament cannot bind itself as to the form of subsequent legislation & cannot effectively enact that a provision in one statute shall not be altered by a subsequent Act save by express words.—*ELLEN STREET ESTATES, LTD. v. MINISTER OF HEALTH*, [1934] 1 K. B. 590; 103 L. J. K. B. 364; 150 L. T. 468; 98 J. P. 157; 32 L. G. R. 233, C. A.

## Part II.—The House of Lords.

4. *Add. Annotation* :—*Refd.* *Edwards v. A.-G. for Canada* (1929), 46 T. L. R. 4.
22. *Annotation* :—Delete *Wycombe Grdns. v. Barton-upon-Irwell Grdns.* (1926), 43 T. L. R. 89.
37. *Add. Annotation* :—*Consd.* *Campbell v. Pollak*, [1927] A. C. 732.
38. *Add. Citations* :—[1927] A. C. 732; 96 L. J. K. B. 1093; 137 L. T. 656.  
*Add. Annotations* :—*Consd.* *Co-operative Wholesale Society, Ltd. v. Lally* (1930), 23 B. W. C. C. 513. *Refd.* *The Young Sid*, [1929] P. 190; *Clark v. Urquhart, Stracey v. Urquhart*, [1930] A. C. 28; *London Welsh Estates, Ltd. v. Philip* (1931), 144 L. T. 643; *Midland Employers' Mutual Assurance, Ltd. v. Lewis* (1930), 23 B. W. C. C. 192; *Mabro v. Eagle Star & British Dominions Insurance Co.*, [1932] 1 K. B. 485; *Hamilton v. Branch*, [1933] W. N. 11; *British Russian Gazette & Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, *Talbot v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616; *Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380; *Brown v. New Empress Saloons, Ltd.*, [1937] 2 All E. R. 133; *Cecil-Wright v. McCulloch*, [1936] 3 All E. R. 518; *Culver v. Beard*, [1937] 1 All E. R. 301; *Evans v. Bartlam*, [1937] A. C. 473; *Re Margolin's Registered Design*, [1936] 3 All E. R. 347; *Williams v. Dorothea Slate Quarry Co.* (1936), 29 B. W. C. C. 174.
39. *Add. Annotation* :—*Consd.* *Campbell v. Pollak*, [1927] A. C. 732.
41. *Annotation* :—For "*As to* (1) *Mentd.*" read "*As to* (1) *Refd.*"  
*Add. Annotation* :—*As to* (3) *Refd.* *Campbell v. Pollak*, [1927] A. C. 732.
- 54a. ——— *Citations of cases referred to by Judge.*—In a properly prepared case, where, in the course of the judgments printed in the appendix, a judge mentions a reported case, without giving the reference, the reference should be added in the margin.—*PRACTICE NOTE*, [1932] W. N. 61; 173 L. T. Jo. 243; 73 L. Jo. 273, H. L.
- 77a. *Duty not to burden House with unnecessary authorities.*—*BLACKIE v. BLACKIE*, [1935] W. N. 105; *sub nom.* *PRACTICE NOTE*, 80 L. Jo. 148, H. L.
99. *Add. Annotation* :—*As to* (1) *Refd.* *Campbell v. Pollak*, [1927] A. C. 732.
113. *Add. Annotation* :—*Refd.* *Woolmington v. Public Prosecutions Director* (1935), 104 L. J. K. B. 433.
- 135a. ———.]—In an action by an agent for a claim for commission from the purchaser on the sale of a business, the trial judge found on the facts that the agent had earned his commission, & his decision was affirmed by the appellate ct. :—*Held* : the concurrent findings of the cts. below ought not to be disturbed.—*Bow's EMPORIUM, LTD. v. BRETT (A. R.) & Co., LTD.* (1927), 44 T. L. R. 194, H. L.
- 155a. *In Admiralty actions—Collision cases—Both vessels to blame.*—*CANTON (OWNERS) v. RHESUS (OWNERS)*, [1928] W. N. 214; *sub nom.* *THE CANTON, 31 Lloyd, L. R. 289, H. L.*  
*Annotation* :—*Refd.* *The Young Sid*, [1929] P. 190.
162. *Add. Annotation* :—*Consd.* *Campbell v. Pollak*, [1927] A. C. 732.
190. *Add. Annotation* :—*Consd.* *Re Transferred Civil Servants (Ireland) Compensation*, [1929] A. C. 243.

## PART II. SECT. 2, SUB-SECT. 1.

161. *Appeals from Scottish courts—From Lords of Session—From interlocutory order.*—*Ross v. Ross*, [1927] S. O. (H. L.) 4.—SCOT.

## PART II. SECT. 2, SUB-SECT. 7.—C.

85 1. *Not admitted.*—*PORTLAND (DUKE) v. WOOD'S TRUSTEES*, [1927] S. O. (H. L.) 1.—SCOT.

## PART II. SECT. 2, SUB-SECT. 12.—A.

168 1. *Lords may vary own order—Order inconsistent with judgment.*—An order pronounced by the House of Lords disposing of an appeal, which

## Part III.—The House of Commons.

229. After this case add "See House of Commons Disqualification (Declaration of Law) Act, 1931 (c. 13), s. 1.

## Part V.—The Legislative Work of Parliament.

- 256a. — **Metropolis Gas Act, 1860 (c. 125).]**—Sect. 56 of above Act enacts that "the costs, charges, expenses of & incident to the passing of this Act, & preliminary thereto, shall be paid by the Metropolitan Board of Works" out of certain funds:—*Held*: the persons to whom such payment is to be made by the board are the promoters of the Act, & not the solr. or parliamentary agent retained & employed by them for hire & reward to do the necessary work.—*WYATT v. METROPOLITAN BOARD OF WORKS* (1862), 11 C. B. N. S. 744; 31 L. J. C. P. 217; 142 E. R. 988.
- Annotations*:—*Apld. Re Skegness & St. Leonard's Tram. Co.*, [1891] 1 K. B. 594.
- See, also, COMPANIES, Vol. X., p. 1113, No. 7830.
261. *Add. Citations*:—*sub nom. Re PETERSON*, [1909] 2 Ch. 398; 79 L. J. Ch. 53; 101 L. T. 480; 73 J. P. 461.
- 263a. — **Metropolis Gas Act, 1860 (c. 125).]**—*WYATT v. METROPOLITAN BOARD OF WORKS*, No. 256a, *ante*.
286. This is the same case as No. 287, *post*. The order made was subsequently reconsidered & reversed, *see* [1876] W. N. 80.
- 288a. **Failure to invest—Liability of Paymaster-General.]—***Re WILDBORE* (1903), Y. S. C. P.
- 291a. — **Leave for claimant to attend to examine other claims.]—***Re PECKHAM & EAST DULWICH TRAMWAYS Co.*, [1911] W. N. 15.

## Part VII.—Privileges of Parliament.

365. *Add. Annotation*:—**Refd. Re Transferred Civil Servants (Ireland) Compensation**, [1929] A. C. 243.
377. *Add. Annotation*:—**Refd. R. v. Graham-Campbell (Sir), Ex p. Herbert**, [1935] 1 K. B. 594.
396. *Add. Annotation*:—**As to (3) Refd. R. v. Graham-Campbell (Sir), Ex p. Herbert**, [1935] 1 K. B. 594.
436. *Add. Annotation*:—**Refd. R. v. Graham-Campbell (Sir), Ex p. Herbert**, [1935] 1 K. B. 594.
437. *Add. Annotation*:—**Refd. Re Transferred Civil Servants (Ireland) Compensation**, [1929] A. C. 243.
- 466a. **Internal affairs of House—Sale of intoxicating liquor.]—**The House of Commons has the privilege of regulating its own internal affairs & procedure, including the sale, within the precincts of the House, of intoxicating liquor without a licence, through its employees in the Refreshment Department of the House.
- Appet.* applied in the police ct. for summonses against certain members of the Kitchen Committee of the House of Commons & the manager of the Refreshment Department of the House on the ground that they had on two occasions unlawfully sold by retail intoxicating liquor for the sale of which they did not hold a justices' licence as required by Licensing (Consolidation) Act, 1910 (c. 24), s. 65. The magistrate held that, assuming that there had been a sale of liquor without a licence, his jurisdiction was excluded by the privileges of the House & he declined jurisdiction. Rules *nisi* having been obtained by *appet.* for orders in the nature of *mandamus* calling on the magistrate, the members of the Kitchen Committee affected & the manager of the Refreshment Department to show cause why the magistrate should not proceed to hear & determine the application for the summonses:—*Held*: in the sale of liquor in the precincts of the House without a licence, the House was acting, through its Kitchen Committee & its employee, the manager of the Refreshment Department, in a matter which fell within the scope of the internal affairs of the House & therefore, within the privileges of the House so that no ct. of law had jurisdiction to interfere.—*R. v. GRAHAM-CAMPBELL, Ex p. HERBERT*, [1935] 1 K. B. 594; 104 L. J. K. B. 244; 152 L. T. 556; 51 T. L. R. 198; 79 Sol. Jo. 12; 33 L. G. R. 136; 30 Cox, C. C. 209, D. C.

had been submitted to both parties prior to its pronouncement & had not been objected to by them, was subsequently discovered to contain an error which prevented it from giving effect to the judgment of the House. In a petition presented by *appmts.*, the

House altered the order so as to make it conform to the judgment of the House.—*COATS v. UNION BANK OF SCOTLAND*, [1930] S. C. (H. L.) 63.—SCOT.

### PART VIII.

m (p. 295) l. — *Canadian senate*—

*of women.]—*The words "qualified persons" in British North America Act, 1867, s. 24, include women, & therefore, women are eligible for membership of the Senate of Canada.—*EDWARDS v. A.-G. FOR CANADA* (1929), 46 T. L. R. 4.—CAN.



## PARTITION.

## Part III.—Partition by Agreement.

33. After this case add:—

—Application of Law of Property Act,  
1925 (c. 20), s. 28 (3).—See TRUSTS & TRUS-  
TEES, No. 3639a, *post*.

35a. ———.—ANON. (1820), 4 Bro. C. C.  
(Belt's edn.), 284 n.; 29 E. R. 894, L. C.

Annotation:—Consd. Bradshaw v. Fane (1856), 4 W. R. 422.

## PART I.

h (p. 300) i. ———.—It is essential for the maintainability of a suit for partition that pltf. should be in actual or constructive possession of the properties.—SARJAN BIBI v. ASHANULLA BEPARI (1926), 1. L. R. 54 Cal. 524.—IND.

h (p. 300) ii. ———.—Pltf. & def. were entitled, after their mother's life estate in certain land, to the remainder as tenants in common. The mother refused to consent to a partition:—*Held*: pltf. was not entitled as against def. to an order for partition of the lands. Only those entitled to possession of their shares in land are entitled to partition.—BUNTING v. SERVOS, [1931] 4 D. L. R. 167; O. R. 409.—CAN.

ii (p. 300) i. ———.—*In case of absentee*.—Sect. 4 of Partition Act, R. S. O., 1927, is intended to operate so as to convey the estate & interest of an absentee in lands sought to be partitioned; &, if he is dead leaving a

widow, she should be regarded as one entitled to claim under or through him. The lands being sold under the partition order, her claim for dower would be upon the money which would stand in the place of the lands.—*Re STROUD & MANDELL*, [1930] 2 D. L. R. 135; 65 O. L. R. 4.—CAN.

aaa (p. 300) i. ———.—Apart from such discretion as is given by Partition Act, 1868, as to sale in lieu of partition, a decree or judgment of partition is a matter of right & not dependent upon the discretion of the ct., except where certain acts may be required to be performed as a condition precedent by the doctrine that he who seeks equity must do equity. For example, a party seeking partition may be required to reimburse his co-tenants for his share of money expended for the benefit of the property. The right to partition may, however, be limited, modified or waived by agreement express or implied. Where there is no specific agreement as to the duration of the joint ownership, the

purpose or idea which the owners may have had in acquiring property does not preclude either of them from determining it by an action for partition; but if the implication of an agreement to postpone partition is to be gathered from the circumstances & purpose of such acquisition it may be given effect to, but only by way of contract.—*WIKSTRAND & MANNIX v. CAVANAUGH & DILLON*, [1936] 1 W. W. R. 113; 5 F. L. J. (Can.) 275; *affd.*, [1936] 2 W. W. R. 69.—CAN.

e (p. 301) i. ———.—*HUESTIS v. HUESTIS* (1928) 54 N. B. R. 1.—CAN.

## PART III. SECT. 4, SUB-SECT. 2.

h i. ———.—*With part performance*.—*STEVENS v. STEVENS*, [1930] 3 D. L. R. 762.—CAN.

## PART III. SECT. 9.

aa. *Agreement to pay amount in equalisation—Evidence*.—*PHERRILL v. PHERRILL* (1867), 13 Gr. 476.—CAN.

# PARTNERSHIP.

## Part I.—Partnership Generally.

8. *Add. Annotation*:—**Refd.** *Dominion Iron & Steel Co. v. Invernairn*, [1927] W. N. 277.

## Part II.—Tests of Partnership.

43. *Add. Annotation*:—**Refd.** *Arseculeratne v. Perera*, [1928] A. C. 173.

44. *Add. Annotation*:—**Refd.** *Arseculeratne v. Perera*, [1928] A. C. 173.

77. *Add. Annotation*:—**Refd.** *English Insee. Co. v. National Benefit Assee. Co. (Official Receiver)*, [1929] A. C. 114.

89. *Add. Annotation*:—**Consd.** *Stanley & Co. v. Solomon, Ltd.*, [1932] 2 K. B. 287.

91. *Add. Annotation*:—*As to* (1) **Refd.** *Marconi's Wireless Telegraph Co. v. Newman*, [1930] 2 K. B. 292.

107. *Add. Annotation*:—*As to* (2) **Refd.** *Watson v. Haggitt* (1927), 44 T. L. R. 90.

129. *Add. Annotation*:—**Folld.** *Pratt v. Strick* (1932), 17 Tax Cas. 459.

- 129a. —.]—Applt. having agreed to purchase a medical practice, a deed of assignment was executed on July 15, 1929, whereby the vendor, on payment at the date of execution of a specified part of the purchase price, assigned the practice & goodwill thereof to applt. The vendor covenanted (*inter alia*) to continue, from July 15, 1929, until Sept. 30, 1929, to reside at the house from which the practice was being carried on &, during that period, to introduce applt. to his patients, with a view to maintaining the connections of the practice, including National Health Insurance works, & generally to aid & assist him in the practice. It was

also agreed that the earnings & expenses of the practice from the commencement of the period of introduction until Sept. 30, 1929, should belong to & be borne by the vendor & purchaser in equal shares. On July 15, 1929, applt. took up residence with the vendor &, until Sept. 30, 1929, they carried on the practice in conjunction, the earnings & expenses of the practice being divided equally between them. On appeal against an assessment to income tax under Sched. D. made upon him for the year 1930–31 in respect of his professional profits, applt. contended that the practice was sold outright to him on July 15, 1929, & that his income tax liability should be computed on the footing that the practice was commenced anew by him on that date. The General Comrs. decided that the deed of July 15 constituted articles of partnership between applt. & the retiring doctor, & that, in the absence of notices under the proviso to r. 11 (1) of the Rules applicable to Cases I. & II. of Sched. D., the practice must be treated as a continuing one throughout:—**Held**: there was an out-and-out sale of the practice on July 15, 1929, & there had been no partnership.—**PRATT v. STRICK** (1932), 17 Tax Cas. 459.

171. *Add. Annotation*:—**Refd.** *Re Debtor* (No. 229 of 1927), [1927] 2 Ch. 367.

198. *Add. Annotation*:—**Refd.** *Illustrated Newspapers, Ltd. v. Publicity Services (London), Ltd.*, [1938] Ch. 414.

### PART I. SECT. 2.

d I. S. P. BROJO LAL SAHA BANIKYA v. BUDH NATH PYARILAL (1927), I. L. R. 55 Calc. 551.—**IND.**

sd. *Whether firm "resides" at partnership premises.*—The office of a partnership is not the residence of the firm, since a partnership is not a legal entity.—**ODEGARDE v. LYNN**, [1935] 2 D. L. R. 493, 9 M. P. R. 127.—**CAN.**

### PART II. SECT. 1.

ss. *Statutory partnership under Registration of Partnerships Act, R. S. N. S.*, 1923—*What amounts to.*—**HOBRECKER v. JAMES**, [1930] 2 D. L. R. 415; 1 M. P. R. 177.—**CAN.**

### PART II. SECT. 3, SUB-SECT. 2.

43 III. —. *Co-owners of coal leases.*—**DAVIES v. SCHULLI**, [1928] 4 D. L. R. 132; [1928] 3 W. W. R. 158.—**CAN.**

### PART II. SECT. 3, SUB-SECT. 3.

ss. *Contract for dismantling vessel.*—The relationship between the parties herein created by a contract for the dismantling by them of the bulk of a vessel:—**Held**: not to constitute a partnership.—**GILCHRIST MANUFACTURING Co., LTD. v. INTERNATIONAL**

**JUNK Co., LTD.**, [1931] 1 W. W. R. 101; 1 D. L. R. 595; 43 B. C. R. 258.—**CAN.**

s c. *Unit holders in mining syndicate.*—Under the "trust agreement" in question herein which provided for the divisions into "units" of the assets of a mining syndicate & authorised the trustees to sell a certain number of the "units":—**Held**: the "unit holders" must be taken to be parties thereto & it constituted them, not partners *inter se*, but co-adventurers in a mining venture; but they did not, through becoming signatories of the agreement, confer, either individually or collectively, any authority on deft. which would make them in any way legally concerned with a fraud committed by him in the sale of further units.—**WEARMOUTH v. MACPHERSON**, [1936] 1 W. W. R. 623.—**CAN.**

### PART II. SECT. 5, SUB-SECT. 1.

78 I. *Builder & building owner.*—A building contractor & the owner of a lot agreed that the former should build a house on the lot for a certain sum in cash plus what the contractor could obtain on a mtge. by the owner; & the agreement further provided that the house when completed should be

sold by the owner & the profit thereon, i.e. the surplus over said contract price, should be divided equally between them. Pltfs., lumber merchants, sued for the balance due on lumber supplied to the contractor & used in building the house:—**Held**: the relationship between the owner & contractor was not that of partners, or such as to entitle plts. to say that the contractor was the agent of the owner to pledge his credit for the materials used in the house.—**SHUCKETT v. LOCKHART & KYLE**, [1932] 2 W. W. R. 330; 3 D. L. R. 466; 40 Mar. L. R. 344.—**CAN.**

### PART II. SECT. 5, SUB-SECT. 2.

91 xxi. —. —.]—**LOTBINIERE LBR. Co. v. FORTIN**, [1927] 4 D. L. R. 167.—**CAN.**

### PART II. SECT. 5, SUB-SECT. 4.

110 iv. —. —.]—**RAGHUNANDAN NANU KOTHARE v. HORNASJEE BEZONJEE BAJJEE** (1926), I. L. R. 51 Bom. 342.—**IND.**

### PART II. SECT. 6, SUB-SECT. 1.

152 xvii. —. —.]—**IDEAL COAL Co. v. GEDDES (Sask.)**, [1929] 2 D. L. R. 588.—**CAN.**

## Part III.—Creation and Duration of Partnership.

210. *Add. Annotation* :—*Refd.* *Foster v. Driscoll*, *Lindsay v. Attfield*, *Lindsay v. Driscoll*, [1929] 1 K. B. 470.
213. *Add. Annotation* :—*Refd.* *Humphery v. Wil-*

son (1929), 141 L. T. 469.

*Add. Annotation* :—*As to* (2) *Refd.* *Bentall, Horsley & Baldry v. Vicary* (1930), 47 T. L. R. 99.

## Part IV.—Relations between Partners and Third Parties.

- 313a. ——— *After attempted dissolution by other partner.*]—*LAND v. BURTON* (1935), 79 Sol. Jo. 180.

- 345a. ———.]—*A. & B. partners as woollen drapers, A. receives money in the shop, & gives his note for it. Though no proof that this money was brought into stock, or used in trade; yet this note being given in the shop by one of the partners, it shall bind both; & though this note at law binds only the exor. of the surviving partner, yet in equity the creditor may follow the estate of the other.*—*LANE v. WILLIAMS* (1692), 2 Vern. 277, 292; 23 E. R. 779, 780.

*Annotations* :—*Consd.* *Devaynes v. Noble* (1816), 1 Mer. 539. *Refd.* *Bank of Australasia v. Breillat* (1847), 6 Moo. P. C. C. 152.

403. *Add. Annotation* :—*Refd.* *Harmer v. Armstrong*, [1934] Ch. 65.

449. *Add. Annotation* :—*Refd.* *British Russian Gazette & Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, *Talbot v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616.

520. *Add. Annotation* :—*Refd.* *Smith v. Wood* (1928), 139 L. T. 250.

- 556a. ——— *Contract for work & labour.*]—*Pltf.* was directed by the captain of a vessel to repair it, & also to repair the fitting-up of the cabins for passengers; afterwards there was an agreement come to between the parties to the effect that deft. & the captain should become partners in the ultimate profits; deft. did not hold himself out that he would be liable for these repairs :—*Held* : deft. was not liable for the repairs to the vessel or to the cabin fittings.—*ELLIS v. STEELE* (1855), 25 L. T. O. S. 183.

- 572a. ——— *Liability of retired partner—After proof by holder in bankruptcy of firm.*]—*In* 1927

*pltf.* became a partner in a firm carrying on business under the title of Samuel Dobree & Sons. While he was a partner the firm accepted a number of bills payable at various dates, & those bills eventually passed into the possession of defts. as holders for value. In Dec. 1928, before the majority of the bills had become due, *pltf.* retired from the partnership & a new partner was admitted in his place, the new firm so constituted taking over all the liabilities of the old firm. Before the outstanding bills had been paid the new firm became bkpt. Defts. as holders of the bills proved in the bkpcy. & received a small dividend, & they then brought an action against *pltf.* to recover from him the balance owing on the bills after credit had been given for the amount recovered in the bkpcy. proceedings. As *pltf.* was residing in France the action was begun in a French Ct., & judgment was obtained against him on the first of the outstanding bills, with the right to claim payment on the later bills when considered appropriate. *Pltf.* then brought this action in England, alleging that he had been induced to enter into the partnership by fraud, & claiming a declaration (a) that he had never become liable to defts. on the bills, or (b) that, if he ever was liable, he had been discharged from liability owing to the fact that defts. had elected to treat the new firm as their debtors in respect of the bills. An order was made that a preliminary issue should be tried to dispose of certain points raised in the pleadings, the issue in effect being whether the fact that defts. had proved in the bkpcy. of the new firm prevented them from now claiming against *pltf.* as a retired partner. The preliminary issue was tried by *MACKINNON, J.*, who gave judgment for defts. :—*Held* : as there had not been an

### PART III. SECT. 1, SUB-SECT. 1.

*sa.* *Firm as partner in another firm.*]—A firm cannot legally be a partner in another firm.—*Re JAI DAYAL MADAN GOPAL* (1932), 1 L. R. 54 All. 846.—*IND.*

### PART III. SECT. 3, SUB-SECT. 2.—B.

237 *iii.* *S. P. ARCHIBALD v. MCNERHANIE* (1899), 29 S. C. R. 564.—*CAN.*

### PART III. SECT. 6, SUB-SECT. 2.—A.

*sb.* *What amounts to continuation.*]—The acts of a surviving partner in a firm of farmers in threshing & marketing grain grown before the death of the deceased partner are not a continuing of the firm's business within sect. 45 of Partnership Act, R. S. M., 1913, but the planting & harvesting of a new crop is such a continuing.—*Re HEAD ESTATE* (1932), 40 Man. L. R. 570.—*CAN.*

### PART IV. SECT. 1, SUB-SECT. 1.—D.

*sd.* *Disclaimer—Whether alternative plea permissible.*]—*CHIHATTOO LAI MISER v. NARAIN DAS BAIJNATH PRASAD* (1928), 1 L. R. 56 Cal. 704.—*IND.*

### PART IV. SECT. 1, SUB-SECT. 2.—F.

*e i.* ———.]—*Defts.*, A. & B., were registered as partners carrying on the business of money-lending. A., the active par her, had from time to time borrowed money from M., giving as security promissory notes in the name of the partnership. M. sued A. & B. jointly on the promissory notes. A. did not appear. B. appeared & defended the action. The partnership between A. & B. did not contain any express authority to borrow money. A verdict was found for *pltf.* :—*Held* : as the partnership agreement did not give express authority to borrow money, & as the business of money-lending did

not necessarily involve the borrowing of money so as to give an implied authority, the verdict should be set aside & a non-suit entered.—*MANDELBERG v. ADAMS* (1931), 31 S. R. N. S. W. 50; 48 N. S. W. W. N. 23.—*AUS.*

### PART IV. SECT. 1, SUB-SECT. 2.—G.

401 *i.* *Contract for tenancy—For partnership purposes—Possession not taken.*]—*H.* entered into a partnership with N. Desiring an office, N. signed on behalf of the partnership & in the partnership name a lease of property owned by *pltf.* N. told nothing of this to H. The firm never took possession of *pltf.*'s premises :—*Held* : there having been no occupation of the premises by the firm, & N. having had no authority to bind his partner, H. & the firm were not liable for the rent.—*SECURITIES DEVELOPMENT CO., LTD. v. NOBLE & HODGINS*, [1931] 4 D. L. R. 161; O. R. 749.—*CAN.*

agreement between pltf. as retiring partner, the new firm, & debts. as holders of the bills, whereby debts. released pltf. from liability & agreed to treat the new firm as solely responsible on the bills, the mere fact that debts. had first proved in the bkpy. of the new firm did not prevent them from subsequently recovering from pltf. the amount remaining due on the bills.—*DE BEARN (PRINCE) v. LA COMPAGNIE D'ASSURANCES LA FEDERALE DE ZURICH* (1937), 42 Com. Cas. 189.

590. *Add. Annotation*:—*Generally*, *Refd.* *De Bearn (Prince) v. La Compagnie D'Assurances La Federale De Zurich* (1937), 42 Com. Cas. 189.

609. *Add. Annotation*:—*Refd.* *Re Blake, Re Minahan's Petition of Right*, [1932] 1 Ch. 54.

631a. —.]—*CAMPBELL v. BAILLIE* (1823), *Coop. Pr. Cas.* 503; 47 E. R. 622.

653. *Add. Annotation*:—*Consd.* *Graves v. Cohen* (1929), 46 T. L. R. 121.

656a. —. —. —. —.]—C., M., & N. carried on business under the name of J. K. & Sons; & being indebted to A., C. retired from the partnership, & M. & N. agreed to liquidate all the concerns of the partnership. M. afterwards retired, & advertisements of the dissolutions of both partnerships were at the same time inserted in the *Gazette*. N. then took in a new partner, & the business was carried on in the original name of J. K. & Sons. A.'s account was transferred to the new firm, & he received accounts & payments from them; but it did not appear that he ever saw the *Gazette*, or that either he or the new partner ever agreed to the substitution of the responsibility of the new firm for that of the old:—*Held*: the three original partners were not released from their responsi-

bility, but were liable at the suit of A.—*KIRWAN v. KIRWAN* (1834), 2 Cr. & M. 617; 4 Tyr. 491; 3 L. J. Ex. 187; 149 E. R. 907.

*Annotations*:—*Consd.* *Re Waldon, Ex p. Bradbury* (1839), 4 Deac. 202; *Mills v. Boyd* (1842), 6 Jur. 943; *Harris v. Farwell* (1851), 15 Beav. 31. *Refd.* *Thompson v. Percival* (1834), 3 L. J. K. B. 98; *Oakeley v. Pasheller* (1836), 4 Cl. & Fin. 207; *Hart v. Alexander* (1837), 2 M. & W. 484; *Longmore v. Calvert* (1859), 32 L. T. O. S. 310.

662. *Add. Annotations*:—*Refd.* *Albemarle Supply Co. v. Hind*, [1928] 1 K. B. 307; *Near East Relief v. King, Chasseur & Co.*, [1930] 2 K. B. 40.

680. *Add. Annotation*:—*Consd.* *Re Fuller's Contract*, [1933] Ch. 652.

718a. *Action by partnership*—In respect of goods supplied to partner before creation of partnership.]—Debts. contracted in writing with first pltf. to supply him with all the brass ashes produced at their mill at a certain fixed price, the ashes being agreed to be equal to a certain sample. Some ashes were delivered, & then pltf. took co-pltfs. into partnership, & ashes were delivered by debts. to the firm without any new or special contract. Neither the ashes supplied before the formation of the partnership nor those supplied afterwards were equal to sample, & pltfs. commenced an action to recover damages in respect of the breach of agreement:—*Held*: pltfs. could not recover in respect of the deliveries of ashes which took place prior to the formation of the partnership, but they could do so in respect of those which took place afterwards.—*BOUNTY v. HEATON* (1865), 13 L. T. 238.

782. *Add. Annotation*:—*Refd.* *Harmer v. Armstrong*, [1934] Ch. 65.

794. *Add. Annotation*:—*Consd.* *Re Debtor* (No. 24 of 1935), [1936] Ch. 292.

#### PART IV. SECT. 2, SUB-SECT. 3.—B. (b).

581 ii. —. —. —. —.]—*Liability of retired partner*.]—When after a dissolution of partnership the business is continued in the same firm name, a partner who has retired at the dissolution is liable upon a contract made by the new firm with a person who has previously dealt with the old firm, unless that person has received notice of the dissolution, even though public notice by advertisement has been given.—*JWALADUTT R. PILLAI v. BANSILAL MOTILAL* (1929), L. R. 56 Ind. App. 174.—*IND.*

#### PART IV. SECT. 2, SUB-SECT. 3.—B. (c).

582 xi. —. —. —. —.]—Creditors of a partnership who had received notice that it had been dissolved & that the business was being continued by one of the dissolved firm & a new partner:—*Held*: by their course of dealing with the new firm to have adopted it as their debtors with respect to debts incurred both before & after the dissolution & thereby to have discharged the retiring partners from liability. Other creditors who were found neither to have received notice of the change nor to have so acted after it were held entitled to recover against the former partners.—*BURNS & CO., LTD. v. DIMOR, MARCUS & DIMOR, PALMER & CO. v. DIMOR, MARCUS & DIMOR*, [1931] 1 W. W. R. 169; 2 D. L. R. 1004; 43 B. C. R. 517.—*CAN.*

582 xii. —. —. —. —.]—The agreement required by sect. 18 (3) of the Partnership Act in order to release a retiring partner must be an agreement between the creditor & each of the two partners;

an agreement between any two of them would not be enough.—*McWHIRTER v. CREBER*, [1931] 1 D. L. R. 642; 66 O. L. R. 372; *affd.*, [1930] 3 D. L. R. 804; 65 O. L. R. 386 & 387; 45 C. B. R. 457.—*CAN.*

#### PART IV. SECT. 2, SUB-SECT. 3.—C. (a).

593 ii. —. —. —. —.]—Where a partner dies before the institution of a suit against the partnership, & a decree is obtained against the firm alone in the firm name, the private estate of the deceased partner is not liable to be proceeded against in execution of such decree.—*MAHOMED YUSUF v. BADSHA SAHIB* (1929), L. L. R. 52 Mad. 885.—*IND.*

#### PART IV. SECT. 3, SUB-SECT. 1.

a. *Insurances effected by firm*—*Firm turned into limited company*.]—*Held*: there was such a change of interest as to invalidate the insurances, in the absence of notification of the change to, & assent by, the insurance co.—*PHUCHEN CO. v. CITY MUTUAL FIRE INSURANCE CO.* (1891), 18 A. R. 446.—*CAN.*

so. *Death of partner*—*Third party must have express notice of dissolution*.]—Persons dealing with a firm, which is alleged to be dissolved by the death of a partner, are entitled to continue to deal with it on the same footing as before the death of that partner, unless they had express notice that the firm was so dissolved.—*BABU v. DATAMBAL* (1935), L. L. R. 60 Bom. 5.—*IND.*

#### PART IV. SECT. 6, SUB-SECT. 1.—B.

737 ii. —. —. —. —.]—*Held*: a partner with whom a contract has been personally made is entitled to sue upon that con-

tract in his own name, without joining the co-partners as pltfs., although the benefit of the contract will result to the partnerships firm.—*KAPURJI MAGNIRAM v. PANAJI DERICHAND* (1928), L. L. R. 53 Bom. 110.—*IND.*

#### PART IV. SECT. 6, SUB-SECT. 1.—C.

sm. *Medical partnership*.]—A partnership consisting of members of the College of Physicians & Surgeons of the Province of Alberta is entitled to sue in the firm name for professional services rendered by one of the members of the firm at deft.'s request.—*CALGARY ASSOCIATE CLINIC v. JOHNSTON*, [1931] 2 W. W. R. 717; 4 D. L. R. 247; 25 Alta. L. R. 470.—*CAN.*

#### PART IV. SECT. 6, SUB-SECT. 2.—A.

d i. —. —. —. —.]—Debts. as named in the writ of summons herein were "L. P. & J. G., carrying on business as the W. L. Co. & the said W. L. Co." G. moved to have his name struck out of the style of cause or alternatively, that pltf. be compelled to elect to proceed against debts. L. P. & J. G. or against deft. W. L. Co.; the ground of the motion being that it was improper to sue debts. thus in their own names & also in their alleged partnership name:—*Held*: the action was properly constituted & the motion was, therefore, dismissed.—*DOMINION BANK OF CANADA v. CALITTI*, [1931] 3 W. W. R. 377; 45 B. C. R. 89.—*CAN.*

#### PART IV. SECT. 6, SUB-SECT. 2.—D.

799 ii. *Action in firm name*—*Whether representatives of deceased partner necessary parties*.]—In a suit against a firm in the firm name, the firm having been dissolved to pltf.'s know-

814. *Add. Annotation*:—*As to (1) & (2) Expld.* Hobbs v. Australian Press Assocn. (1932), 48 T. L. R. 586.
816. *Add. Annotation*:—*Consd.* Hobbs v. Australian Press Assocn. (1932), 48 T. L. R. 586.
817. *Add. Annotation*:—*Consd.* Hobbs v. Australian Press Assocn. (1932), 48 T. L. R. 586.
821. *Add. Annotation*:—*Refd.* Lazard Bros. & Co. v. Banque Industrielle de Moscou, Lazard Bros. & Co. v. Midland Bank, Ltd. (1931), 101 L. J. K. B. 65.
822. *Add. Annotation*:—*Refd.* Hobbs v. Australian Press Assocn. (1932), 48 T. L. R. 586.
824. *Add. Annotation*:—*Consd.* Hobbs v. Australian Press Assocn. (1932), 48 T. L. R. 586.
826. *Add. Annotation*:—*Consd.* Hobbs v. Australian Press Assocn. (1932), 48 T. L. R. 586.
- 830a. ———.]—Pltf. brought an action for libel in respect of a statement published in the Melbourne *Argus*, a newspaper published in Melbourne & in London. Defts. were the Australian Press Assocn., who carried on business in London, & the firm of W. & M., proprietors of the *Argus*, who, as stated in the paper itself, were a Melbourne firm, but who had a branch office in London & carried on business there. W. & M., who were British subjects, were sued in the firm name. Pltf., in ignorance that W. & M. had a London branch, applied under R. S. C., Ord. 11, for leave to serve the writ on the firm of W. & M. out of the jurisdiction, which HUMPHREYS, J., granted, & the writ was served in Melbourne. W. & M. applied to CHARLES, J., to discharge the order, on the grounds that they had a place of business in this country, & further, that the right allowed by R. S. C., Ord. 48a, r. 1, of suing two or more partners in the firm's name, did not apply to cases of service of a writ outside the jurisdiction under R. S. C., Ord. 11. CHARLES, J., made the order as prayed:—*Held*: there being an inter-relation between the various Orders of the Supreme Ct., & so between R. S. C., Ord. 11 & Ord. 48a, the right conferred by the former Order was not inapplicable to the case of a pltf. availing himself of the latter one. The order made by HUMPHREYS, J., was therefore right, & the service effected under it was good service.—HOBBS v. AUSTRALIAN PRESS ASSOCN., [1933] 1 K. B. 1; 101 L. J. K. B. 713; 147 L. T. 225; 48 T. L. R. 586; 76 Sol. Jo. 494, C. A.
858. *Add. Annotations*:—*Refd.* Cumberland v. Lanarkshire Tram. Co. (1927), 20 B. W. C. O. 780; Jenkins v. Jenkins, [1928] 2 K. B. 501.
859. *Add. Annotation*:—*Refd.* Pirie v. Richardson, [1927] 1 K. B. 448.

## Part V.—Relations of Partners inter se.

926. *Add. Annotation*:—*Consd.* Hole v. Garnsey, [1930] A. C. 472.
- 945a. ———. *Of interest in partnership effects & profits.*]—WARTNABY v. SHUTTLEWORTH & TAYLOR (1837), 1 Jur. 469, L. O.
- 952a. ———.]—A deed of partnership provided that each original partner could, by will or codicil, nominate a qualified person as a new general partner; that the admission to the partnership was to be subject to the consent, not to be unreasonably withheld, of the general partners; & that a general partner or the qualified nominee, if of opinion that the consent to admission had been unreasonably withheld, could require the matter to be referred to arbn. An original partner nominated by will F., a qualified person, as a new general partner. After the death of the nominator the general partners refused to admit F. into the partnership. F. made an application under Arbn. Act, 1889 (c. 49), s. 5, asking that some fit & proper person might be appointed to act as arbitrator:—*Held*: only a party to the submission could make an application under sect. 5, & F. was not such a party.—*Re* FRANKLIN & SWATHLING'S ARBITRATION, [1929] 1 Ch. 238; 98 L. J. Ch. 101; 140 L. T. 403.
955. *Add. Annotation*:—*Distd.* *Re* Franklin & Swathling's Arbitration, [1929] 1 Ch. 238.
997. After this case add:—  
Application of Law of Property Act, 1925 (c. 20), Sched. I., Part IV.]—*See* *Re* FULLER'S CONTRACT, SETTLEMENTS, No. 3143f.

ledge before the institution of the suit by reason of the death of a partner, the suit as so framed does not include the legal representatives of the deceased partner, & it is necessary to add them as parties in order to obtain judgment against the private estate of the deceased partner, as opposed to mere judgment against the partnership assets.—MATHURAS CANJI MATANI v. EBRAHIM FAZALHOY (1927), 1 L. R. 51 Bom. 986.—IND.

PART V. SECT. 2, SUB-SECT. 2.—A.  
r i. ———.]—COLE v. REED (1914), 29 W. L. R. 786.—CAN.

r ii. ———. *Assignment of obligation.*]—A partner is under obligation to account to his co-partners. This obligation cannot be assigned.—GHISHULAL & GANESHILAL v. GAMBHIRMAL PANDYA (1934), 1 L. R. 62 Calo. 510.—IND.

r iii. ———. *Construction of agreement.*]—DAVIS v. LOWRY (1912), 20 W. L. R. 839; 3 D. L. R. 157.—CAN.

b i. ———. *Partner confidential agent of other partners.*]—GROSCH v. LOVERIDGE, SMITH v. LOVERIDGE, [1930] 1 D. L. R. 309; 64 O. L. R. 465; *affd.*, [1931] S. C. R. 142; 2 D. L. R. 502.—CAN.

### PART V. SECT. 2, SUB-SECT. 3.

917 ii. ———.]—Where a partner during the partnership, which was about to expire, received an offer for himself to negotiate for the renewal of a lease enjoyed by the partnership:—*Held*: he was under no obligation to accept the offer for the benefit of the partnership.—WELZEL v. KAIN (1926), 27 S. R. N. S. W. 140; 44 N. S. W. W. N. 17.—AUS.

### PART V. SECT. 7, SUB-SECT. 1.

a i. ———. *Does not belong to individual partners.*]—SAWYER-MASSEY v. SOHLEY (1914), 29 W. L. R. 454.—CAN.

e i. ———. *Delivery to Pool—One partner only member of Pool.*]—Pltf. & one B. were equal partners in a fishing business. B. was a member of the "Fish Pool," under Manitoba Co-operative Associations Act, 1925, & had entered into the "Uniform Pool Contract" with it. Pltf. delivered fish to the Pool, & a receipt therefor was issued to him & B.:—*Held*: the fish in question was partnership property, which was delivered to the pool as such, i.e. as the property of pltf. & B., & its delivery must be held to have been governed by the Pool rules as stated in said pool contract.—KRIST-JANSON v. MANITOBA CO-OPERATIVE FISHERIES, LTD., [1931] 3 W. W. R. 743.—CAN.

1127. *Add. Annotation*:—*Consd. Naval Colliery Co. v. I. R. Comrs.* (1928), 138 L. T. 593.

1159. *Add. Annotation*:—*Refd. Re Lynch-White, Smith v. Lynch-White*, [1937] 3 All E. R. 551.

1160. *Add. Annotation*:—*Refd. Re Lynch-White, Smith v. Lynch-White*, [1937] 3 All E. R. 551.

1162a. *Profits from underwriting syndicate—Clause negating apportionment.*—By his will a testator declared that “all income arising from any part of my estate shall at all times be used & applied as income & no part thereof shall be added to capital & in particular all income received immediately subsequent to my death shall be treated wholly as income & shall not be apportioned.” Testator was a member of three Lloyd’s underwriting syndicates. It was not possible to ascertain what profits were made or what loss was suffered by a syndicate in any particular year until two further years had passed. A question arose as to how testator’s interests in the syndicates were to be treated as between capital & income, testator having given the income of his residuary estate to his widow during her widowhood:—*Held*: (1) the profits from the syndicates were “income arising from any part of my estate” within the meaning of the will; (2) the profits of the syndicates accrued at the end of each year, although they could not be ascertained until after two further years had passed. The profits so accruing up to the death of testator were to be treated as capital, & the profits so accruing subsequent to the death of testator were to be treated as income.—*Re LYNCH-WHITE*,

*SMITH v. LYNCH-WHITE*, [1937] 3 All E. R. 551; 81 Sol. Jo. 628.

1189. *Add. Annotation*:—*Consd. Naamlooze Ven-nootschap Handels-en-Transport Maatschappij Vulcaan v. Ludwig Mowinckels Rederi A/S* (1937), 42 Com. Cas. 200.

1192a. *Interest on overdrawings.*—*SULEMAN v. ABDUL LATIF*, No. 1199a, *post*.

1199a. *From date of final decree.*—The decree in a suit for dissolution of partnership & accounts should provide for payment of interest upon the amount due only from the date of the final decree by which the amount (if any) is found due, not from the date of the plaint.

A partner is not charged with interest in respect of overdrawings in the absence of special circumstances.—*SULEMAN v. ABDUL LATIF* (1930), 57 L. R. Ind. App. 245, P. C.

1201. *Add. Annotation*:—*Refd. Re Lynch-White, Smith v. Lynch-White*, [1937] 3 All E. R. 551.

1211. *Add. Annotation*:—*Refd. Gilford Motor Co. v. Horne*, [1933] Ch. 935.

1219. *Add. Annotation*:—*Refd. Robinson v. South Australia State* (No. 2), [1931] A. C. 704.

1242. *Add. Annotation*:—*Consd. Manley v. Sartori*, [1927] 1 Ch. 157.

1370. *Add. Annotation*:—*Refd. Foster v. Driscoll, Lindsay v. Attfield, Lindsay v. Driscoll* (1928), 98 L. J. K. B. 282.

1397. *Add. Annotation*:—*As to* (1) *Refd. Green v. Weatherill*, [1929] 2 Ch. 213.

1407a. *Balance found to be due.*—*DUNN v. CAMPBELL* (1879), 27 Ch. D. 254 n.

*Annotations*:—*Apld. Hampden v. Wallis* (1884), 27 Ch. D. 251; *Wanklyn v. Wilson* (1887), 35 Ch. D. 180.

PART V. SECT. 7, SUB-SECT. 2.—A.  
*sb. Membership in livestock exchange.*—*Re HENDERSON & RUDD ESTATE*, [1931] 3 W. W. R. 142.—CAN.

PART V. SECT. 8, SUB-SECT. 3.  
 —C. (a).

*sc. Consent of other partners—Effect of assignment without consent.*—Where a partnership agreement provides for the consent of the other partners to a transfer of his share by one partner, the transfer without such consent is a nullity.—*HARNAM SINGH v. KAPOOR SINGH* (1932), 46 B. C. R. 195.—CAN.

PART V. SECT. 8, SUB-SECT. 3.—  
 C. (c).

*sd. Whether bound by settlement of accounts—After date of assignment.*—The assignee of the interest of a partner is not bound by a settlement of accounts of the partnership, made behind his back after the date of the assignment.—*VEERAPPA CHETTY v. MUTHIAH CHETTY* (1929), 1 L. R. 52 Mad. 509.—IND.

PART V. SECT. 9, SUB-SECT. 1.  
 1091 i. *Right of contribution.*—*WALKER v. CORNELL*, Cass. Dig. (2nd edn.) 595.—CAN.

*se. Advances due to defendant partner's default in contributing capital.*—A. agreed with B. & C. to join them in contributing in equal shares the money required for a venture which B. & C. had agreed with D. to carry on & in which D. was to get one-third of the profits & stand one-third of the losses. In entering into the first-mentioned agreement neither the possibility of losses nor the amount of capital required was discussed. As money was required from time to time

to carry on the business, A. failed to pay his share & B. advanced amounts in excess of B.’s one-third share. The venture resulted in a loss. D., on the termination of the business, did not, & admittedly was unable to, pay any part of the loss. A.’s exors. sued B. with respect to another claim, & B. counterclaimed for payment or a set-off of said excess amounts expended by him:—*Held*: A.’s liability to B. arose from time to time as B. made the advances & was not dependent either on the ultimate condition of the business or on D.’s fulfilling or failing to fulfil his agreement to pay part of the loss.—*MCGOUGAN v. MACDONALD & MACAW* (Man.), [1929] 3 W. W. R. 337.—CAN.

*sx. Effect of obtaining declaration of indemnity.*—*LUKIS, STEWART & Co. v. HUMPHREY*, [1930] 4 D. L. R. 330.—CAN.

PART V. SECT. 10, SUB-SECT. 1.

*sz. Division of assets.*—On the dissolution of a firm of three members carrying on a hotel & restaurant business they executed a quit claim deed under which two of them transferred to the third J. D. all their interest in the goods & chattels pertaining to the restaurant business, subject to the payment by him of the outstanding liabilities incurred with respect to said part of the partnership business, & he covenanted to assume & pay said liabilities:—*Held*: a proper construction of the deed did not show that it was intended that the two transferring partners should have a lien on the chattels as security for the payment by J. D. of the outstanding liabilities.—*Re DIMOR*, [1932] 1 W. W. R. 53; 45 B. C. R. 22.—CAN.

PART V. SECT. 11, SUB-SECT. 1.—  
 B. (a).

*st. Profits on sale of portion of individual share.*—*MITCHELL v. GORMLEY* (1885), 9 O. R. 139; *affd.* (1886), 14 A. R. 55.—CAN.

PART V. SECT. 12, SUB-SECT. 3.—C.  
 1213 i. *Production of partnership documents—Grounds for refusal—Denial of partnership.*—*HARNAM SINGH v. KAPOOR SINGH* (1927), 39 B. C. R. 485.—CAN.

PART V. SECT. 13, SUB-SECT. 5.—B.

1296 i. *Whether necessary.*—An action for accounts cannot be brought in the firm name. Whether any account is taken during the subsistence of the partnership is a matter for the discretion of the ct.—*SANDHAM v. SANDHAM BROS.*, [1933] 3 D. L. R. 292; O. R. 590.—CAN.

PART V. SECT. 13, SUB-SECT. 5.—  
 C. (b).

*e i.* —.]—The rule of English law that a mtgee. or an assignee of a partner cannot sue the other partners for accounts represents the law in India where there is no statutory provision to that effect.—*MISTRY GOA PETHA v. N. H. MOOS* (1931), 1 L. R. 10 Pat. 792.—IND.

PART V. SECT. 13, SUB-SECT. 5.—  
 H. (b).

1366 ii. —.]—*MOMPLE v. MOMPLE* (1927), 48 N. L. R. 374.—S. AF.

PART V. SECT. 13, SUB-SECT. 5.—  
 H. (d).

1378 i. *Denial of partnership—Onus* [.]—*WONG v. HOU*, [1923] 1 480; 39 B. C. R. 425.—CAN.

1436. *Add. Annotation* :—**Consd.** Naamlouze Vennootschap Handels-en-Transport Maatschappij *Vulcaan v. Ludwig Mowinckels Rederi A/S* (1937), 42 Com. Cas. 200.

1459a. *Foreign firm—Branch office in England.*—Partnership Act, 1890 (c. 39), s. 23, applies to a foreign firm having a branch house of business in England.—**BROWN, JANSON & CO. v. HUTCHINSON & CO.**, [1895] 1 Q. B. 737; 64 L. J. Q. B. 359; 73 L. T. 437; 43 W. R. 533; 11 T. L. R. 291; 14 R. 354, C. A.; *subsequent proceedings*, [1895] 2 Q. B. 126.

1480a. —.]—(1) Where it is not the object of a suit to obtain the dissolution of a partnership, but, on the contrary, to continue the partnership, it is not according to the practice of the ct. in the course of that suit to grant a receiver & manager. (2) Cases, however, may arise in which the conduct of deft. being such as to endanger the existence of the partnership concern, the ct. will appoint an interim receiver & manager.—**HALL v. HALL** (1850), 3 Mac. & G. 79; 20 L. J. Ch. 585; 17 L. T. O. S. 11; 15 Jur. 363; 42 E. R. 191, L. C.

*Annotation* :—*As to* (1) **Refd.** *Medwin v. Ditcham* (1882), 47 L. T. 250.

1496a. —.]—**HALL v. HALL**, No. 1480a, *ante*.

1540. *Add. Annotation* :—**Consd.** *Newport v. Pougher*, [1937] Ch. 214.

1544a. — — —.]—In an action for dissolution of partnership a receiver was appointed, who collected the assets & paid them into ct. In the course of the action deft. partner was adjudicated bkpt. & his trustee in bkpcy. added as a deft. The assets proved insufficient to pay the creditors in full. Judgment creditors then obtained a charging order on the fund in ct. & any moneys in the hands of the receiver in the form made in

*Kewney v. Attrill* (1886), 34 Ch. D. 345. This order ended with the statement: "The intention of this ct. being to preserve to appcts. such legal rights as they would have had if the sheriff had seized under the execution & sold on this day." At a subsequent date both pltf.'s solr. & the solrs. of deft.'s trustee in bkpcy. obtained charging orders for their bills of costs under Solrs. Act, 1932 (c. 37), s. 69, on the fund in ct.:—**Held**: by **EVE, J.**, (1) the solrs.' charging orders were properly made, as the assets had been recovered or preserved through their exertions, & these orders ranked before all other claims on the fund in ct.; by the Ct. of Appeal, (2) the charging order in the form made in *Kewney v. Attrill* gave the judgment creditors priority over the general body of creditors; (3) the passage declaring the intention of the order should be omitted from the form of order.—**NEWPORT v. POUGHER**, [1937] Ch. 214; [1937] 1 All E. R. 276; 106 L. J. Ch. 166; 156 L. T. 181; 53 T. L. R. 291; 81 Sol. Jo. 78, C. A.

1544b. — **Whether giving priority over general creditors.**—**NEWPORT v. POUGHER**, No. 1544a, *ante*.

1545. *Add. Annotation* :—**Refd.** *Newport v. Pougher*, [1937] Ch. 214.

1580. *Add. Annotations* :—**Generally**, **Refd.** *Reid & Sigrist, Ltd. v. Moss & Mechanism, Ltd.* (1932), 49 R. P. C. 461; *Mitchell v. Alexander* (1935), 79 Sol. Jo. 381.

1604. *Add. Annotation* :—**Consd.** *Farey v. Cooper* [1927] 2 K. B. 384.

1610. *Add. Citation* :—*sub nom.* **CARL BROS., LTD. v. WEBSTER**, 52 W. R. 413.

1614. *Add. Citations* :—96 L. J. Ch. 361; 137 L. T. 409.

*Add. Annotation* :—**Refd.** *Re Thomson, Thomson v. Allen*, [1930] 13 Ch. 20.

## Part VI.—Dissolution.

1645a. **Notice by one partner—Effect of.]**

By a deed of partnership between a father & his five sons it was provided, *inter alia*: "2. The partnership shall commence as from Oct. 11, 1923. The death or retirement of any partner shall not terminate the

partnership. . . 10. If any partner shall . . . do or suffer any act which would be a ground for the dissolution of the partnership by the ct. then he shall be considered as having retired." One of the sons, claiming that as no term had been fixed for the dura-

PART V. SECT. 13, SUB-SECT. 8.—**C. (a).**

*eg. Where existence of partnership disputed.*—There is no rule of practice that, where in a suit for dissolution of a partnership the existence of the alleged partnership is denied, the ct. will not appoint an interim receiver unless the assets are in danger.—**TATE v. BARRY** (1928), 28 S. R. N. S. W. 380; 45 N. S. W. W. N. 83.—**AUS.**

PART V. SECT. 13, SUB-SECT. 9.—**B. (c) II.**

*r i.* —.]—A dispute having arisen between pltf. & deft. as to whether a partnership existed between them, pltf. brought an action to have the matter determined. Subsequently the

parties agreed to refer the matter to arbn., & the arbitrator found that a partnership had existed between them, but that it had been dissolved. By his award the arbitrator directed that the goodwill, stock in trade, & all other assets of the business should belong to the pltf. absolutely, & that deft. was entitled to a certain sum of money for his share of the goodwill, stock in trade, & other assets of the business. The trade that had been carried on during the partnership was that of wholesale dealers supplying the retail trade with sweets, confectionery, etc. Deft. used to travel through the country soliciting orders from retail dealers for these goods. After the arbitrator had made his award deft. continued to travel through the country soliciting orders from retailers who had been customers of the firm

before it was dissolved. Pltf. applied for an interlocutory injunction to restrain deft. from so doing:—**Held**: pltf. was entitled to an interlocutory injunction to restrain deft. from applying personally or by a traveller to any person who was at the date of the dissolution of the partnership a customer of the firm asking such customer to continue after the dissolution to deal with him, deft., or not to deal with pltf.; but the restraint on deft. from applying as aforesaid by a traveller was to be in force only so long as deft. should carry on the business, either under his own name or any name introducing it, of a wholesale dealer in goods of the general class of those for

**I. R. 152.—IR.**



tion of the partnership it was a partnership at will, gave notice of dissolution & brought an action for a declaration that the partnership had been dissolved, for an account & for an order that the partnership be wound up by the ct. :—*Held*: (1) upon a proper construction of the deed, the partnership could not be determined by a single partner, although he could determine the partnership as between himself & the other partners; (2) the partnership was not a partnership at will, but one to continue, unless dissolved by the ct. or some other event, so long as two of the partners were still living & had not retired.—*ABBOTT v. ABBOTT*, [1936] 3 All E. R. 823; 81 Sol. Jo. 58.

1648. *Add. Annotation*:—*Refd. Abbott v. Abbott*, [1936] 3 All E. R. 823.

1654a. *Death of partner sending notice before notice received*—*Date of dissolution of partnership*.]—Where a partner sends by post a notice to the other partner to determine the partnership as from the date of the notice, & dies before the other partner receives the notice, the partnership is dissolved, not by the notice, but by the death of the partner sending it, inasmuch as the statutory dissolution by notice is not brought about until receipt of the notice. In such a case the surviving partner has the rights which by the terms of the partnership he is to have on the death of a partner during the partnership.—*MCLEOD v. DOWLING* (1927), 43 T. L. R. 655.

1670a. *Partner sending notice of intention to dissolve partnership*—*Death before notice received by other partner*.]—*MCLEOD v. DOWLING*, No. 1654a, *ante*.

#### SUB-SECT. 1.—COURTS HAVING JURISDICTION.

(Vol. XXXVI., p. 503.)

**County court—Action for declaration & account—Denial of partnership.**]—*See* COUNTY COURTS, No. 244a.

1744. *Add. Annotation*:—*Refd. Re Davis & Collett, Ltd.*, [1935] Ch. 693.

#### PART VI. SECT. 1, SUB-SECT. 3.

*sl. Death of partner intestate—Disposal of interest in partnership assets.*]—*Ex p. SESSIONS* (1869), 2 Ch. Ch. 360.—CAN.

#### PART VI. SECT. 1, SUB-SECT. 3.

*m i. — Construction of agreement.*]—*ARMSTRONG v. WHITTEN*, [1932] 1 W. W. R. 818; 40 Man. L. R. 284; 3 D. L. R. 38.—CAN.

*sm. Transfer of partnership assets—Subject to payment of existing liabilities.*]—*KERR v. BRADFORD* (1876), 26 O. P. 318.—CAN.

#### PART VI. SECT. 2, SUB-SECT. 2.—A.

*t i. —*]—A partnership is dissolved from the time of service of the writ in an action for dissolution brought by one of the partners.—*HARRIS v. BURGESS & THORNE*, [1937] 4 D. L. R. 219; 12 M. P. R. 216.—CAN.

*sg. Proceedings in county court—Practice.*]—Proceedings for the dissolution of a partnership within the competence of the county ct. by virtue of Partnership Act, R. S. O., 1927, ss. 1, 35, cannot be initiated in that ct. by an originating notice of motion.—*BENDJY v. MUNTON*, [1932] 1 D. L. R. 634; O. R. 123.—CAN.

#### PART VI. SECT. 2, SUB-SECT. 3.—C. (b) ii.

1731 *i. Violation of articles—Promotion of companies by chartered accountant.*]—The financing & promotion of cos. does not fall within the scope of a chartered accountant's business as such, & the doing of such work by one partner does not constitute, by itself, a breach of the partnership agreement entitling the other partner to a dissolution of the partnership.—*PETTIT v. COX* (1928), 54 N. B. R. 246.—CAN.

1835. *Add. Citations*:—96 L. J. Ch. 65; 136 L. T. 238.

1841a. — *For share of "net profits"—Dissolution by death.*]—*Applt. & H.* entered into partnership, the arts. providing that each partner was entitled to a salary & half the "net profits" during the term of the partnership, & that if either partner died the surviving partner was for five years to pay to the exors. a third of the "net annual profits." *H.* died, & the partnership was thereby dissolved:—*Held*: the expression "net profits" was not necessarily to be interpreted as having the same meaning in every part of the arts., & *applt.*, in calculating the share of the net profits payable to the exors., was not entitled to deduct any salary for himself.—*WATSON v. HAGGITT*, [1928] A. C. 127; 97 L. J. P. C. 33; 138 L. T. 306; 44 T. L. R. 90; 71 Sol. Jo. 963, P. C.

1845. *Add. Annotation*:—*Consd. Manley v. Sartori*, [1927] 1 Ch. 157.

1899a. — — —.]—The rule that in the bkpcy. of a firm the exors. of a deceased partner may not prove in competition with the creditors of his surviving partners may be inapplicable when the share of the deceased partner has been ascertained before the adjudication in bkpcy., & no joint liability can be shown to exist. On the death of a partner in a London firm a sum was found due to his estate from the surviving partners in respect of his share in the business, & certain claims & accounts between the deceased partner & another firm in Dundee, of which during his life he was also a partner, & which firm was after the death of the deceased partner a creditor of the London firm, were also compromised & settled by his exors. before the bkpcy. of the London firm:—*Held*: the proof of a debt put in by the deceased partner's exors. in the bkpcy. of the London firm ought to be admitted.—*Re DOUGLAS, Ex p. DOUGLAS* (JAMES) EXECUTORS, [1930] 1 Ch. 342; 142 L. T. 379; [1929] B. & C. R. 76; *sub nom. Re DOUGLAS, DOUGLAS & HILL v. MYERS* (J. E.), 99 L. J. Ch. 97.

*sn. Refusal to accept business—Reasonable refusal.*]—Where on partner is in charge of a business, his refusal to accept certain business on the ground that it would not be profitable, will not afford a ground upon which dissolution should be granted, if he has honestly exercised his best judgment, even if he were wrong in the conclusion he arrived at.—*PETTIT v. COX* (1928), 54 N. B. R. 246.—CAN.

#### PART VI. SECT. 4.

*sp. Registration of memorandum of dissolution—Under Partnership Registration Act, R. S. O., 1914 (c. 139)—Effect of.*]—*DOMINION SUGAR CO. v. WARRELL*, [1927] 2 D. L. R. 198; 60 O. L. R. 169.—CAN.

#### PART VI. SECT. 6, SUB-SECT. 5.

*r i. — Rights in respect of asset received after dissolution.*]—*RIOUX v. COTE* (1933), 6 M. P. R. 421.—CAN.

## Part VII.—Limited Partnership.

**1909a. Bankruptcy of sole general partner—What debts provable.]**—Where an individual who is the sole general partner in one or more limited partnerships is adjudged bkpt., all the debts & liabilities owing by such limited partnerships at the date of the receiving order are provable in bkpcy., whether the firms are mentioned in the proceedings or not. Accordingly, if the bkpt. be the sole general partner in two limited partnerships, namely, the “A” firm & the “B” firm, it makes no difference if there are successive bkpcies.,

in one of which only the A firm & in the other of which only the B. firm are mentioned in the proceedings. Creditors will be entitled to prove in the same way as they are entitled to prove against an individual in successive bkpcies. *Qu.*: whether, for purposes of administration, the trustee ought not to distinguish between the assets of the respective firms & the bkpt.’s own separate estate.—*Re BARNARD, MARTIN’S BANK, LTD. v. TRUSTEE*, [1932] 1 Ch. 269; 101 L. J. Ch. 43; 146 L. T. 191; [1931] B. & C. R. 73.

## PATENTS AND INVENTIONS.

## Part I.—Definitions.

1. Before this case add:—

**Statutory definition**—Includes patents of addition.]—*See Re Maschinenfabrik Augsburg-Nürnberg A C. Patents* (1929), 47 R. P. C. 193.

8. *Add. Annotation*:—*As to* (2) *Distd. Walsh v. Albert Baker & Co.* (1898), *Ltd.* (1930), 47 R. P. C. 283.

## Part "True and First Inventor."

14. *Add. Annotation*:—*As to* (1) *Consd. No-Fume, Ltd. v. Frank Pitchford & Co.* (1935), 52 R. P. C. 231.

25. *Add. Annotation*:—*As to* (1) *Consd. Mullard Radio Valve Co. v. Philco Radio & Television Corpn. of Great Britain, Ltd.* (1935), 52 R. P. C. 261.

39. *Add. Citations*:—41 T. L. R. 545; *affd.* (1927), 96 L. J. Ch. 470; 137 L. T. 794; 43 T. L. R. 717; 44 R. P. C. 453, C. A.

*Add. Annotation*:—*Refd. Mackenzie-Kennedy v. Air Council* 1927), 138 L. T. 8.

45. *Add. Annotation*:—*Consd. Reid & Sigrist, Ltd. v. Moss & Mechanism, Ltd.* (1932), 49 R. P. C. 461.

48. For "86 L. J. Ch. 468" read "86 L. J. Ch. 486."

*Add. Annotation*:—*Refd. Adamson v. Kenworthy* (1931), 49 R. P. C. 57.

- 49a. ———.]—Deft. was a leading draughtsman in the employ of pltf's. In 1924 deft. was instructed by pltf's. to design an unlubricated crane brake, a branch of work upon which deft. had not been directly engaged. The design he produced was tested but was unsatisfactory. In 1926 deft. was again instructed to design such a brake, & did in fact design a brake incorporating a resilient disc which proved to be satisfactory. This design was patented in deft.'s name. Pltf's. claimed that deft. was a trustee for them of his interest in the patent & claimed a declaration to this effect. Deft. alleged that the successful feature of the resilient disc had been evolved solely by him in 1918 outside the scope of his duties, & claimed to be entitled to the beneficial interest in the patent:—*Held*: it is the duty of a draughtsman when instructed by his employer to prepare a design to use such skill & inventive faculty as he may possess in order to produce the best possible design within his ability, & in this case deft. evolved the invention which was the subject of the patent as a result of instructions given to him by pltf's. & in the discharge of his duty. The declarations & injunction asked for were granted, & an order upon deft. to assign the patent to pltf's. was made with costs.—*ADAMSON v. KENWORTHY* (1931), 49 R. P. C. 57.

*Annotation*:—*Consd. Reid & Sigrist, Ltd. v. Moss & Mechanism, Ltd.* (1932), 49 R. P. C. 461.

- 49b. ———.]—Deft., M., was employed by pltf. co. as chief draughtsman for the purpose (*inter alia*) of developing a gyroscopic turn indicator for use on aeroplanes. The terms of his employment contained a specific covenant, namely, "that all work done whilst in the service of said co. was to be secret & confidential & the property of said co." In the course of developing the instrument certain problems arose & discussions took place as to proposed solutions of them, in which deft., M., took part. Before an instrument embodying features of design & construction, made possible as a result of the solution of the various problems, was put into production by pltf. co. deft., M., left the service of said co. Deft., M., together with one Pierce, an ex-employee of pltf. co., promoted deft. co., which began to incorporate the said features of design & construction in a gyroscopic turn indicator which was offered for sale & sold in competition with the instruments made & sold by pltf. co. Deft., M., also applied for letters patent, & he filed provisional specifications describing said features of design & construction. Deft., M., alleged that the features of design were not novel, that they had not been evolved by pltf. co., & that knowledge of them had not been acquired by him in the course of his employment by pltf. co. Deft., M., also stated that he had not disclosed or made any wrongful use of any confidential information acquired by him in the course of his employment by pltf. co.:—*Held*: letters patent granted in accordance with the first provisional specification filed by deft., M., would, if valid, enable M. to prevent pltf. co. from making gyroscopic turn indicators in accordance with their present design; the second provisional specification filed by deft., M., included matters discussed with him while he was in pltf. co.'s employ, & letters patent granted in accordance with this provisional specification would, if valid, enable M. to prevent pltf. co. from making use of one at least of the matters discussed with him while he was in their employ; deft., M., must be assumed to know what he was claiming as his invention, & that he could only claim what he sought to protect on the ground that it was secret & confidential; it was not unfair to treat deft. M.'s provisional specifications as an admission by him of such

## PART III. SECT. 1.

- 13 III. *S. P. DAVIS LOG & RAFT PATENTS CO. v. GATHELS* (B. C.), [1927] 4 D. L. R. 95; [1927] 2 W. W. R. 753.—CAN.

fact; further, the gyroscopic turn indicators made by deft. co. were made substantially in accordance with information & knowledge acquired by deft., M., while he was in pltf. co.'s employ; the designing of a gyroscopic turn indicator by deft., M., with assistance, suggestions, & advice from pltf. co., was, from the start of M.'s employment by pltf. co., a confidential matter; deft., M. was not at liberty, while he remained in the employ of pltf. co., to disclose to any one difficulties which had arisen in the manufacture of gyroscopic turn indicators nor the methods discussed, used, or proposed to be used for overcoming such difficulties; deft., M., was not at liberty to make drawings embracing matters discussed with him while he was in pltf. co.'s employ, & while still in their employ to disclose such drawings to any third party; & deft., M., could not better his position by terminating his employment with pltf. co. An injunction was granted; & delivery up of all turn indicators which would constitute a breach of the injunction was ordered. A declaration was made that pltf. were entitled to the benefit of the applications for grant of letters patent covered by the provisional specifications filed by deft., M., subject to certain limitations, together with costs.—*REID & SIGRIST, LTD. v. MOSS & MECHANISM, LTD.* (1932), 49 R. P. C. 431.

49c. ———.]—Pltf. co. employed deft. as technical adviser. The service agreement & a deed assigning Letters Patent No. 437,973 together provided (*inter alia*) (i) for the assignment during the service agreement of all inventions relating to improvements upon Letters Patent No. 437,973 or application No. 34,809 of 1935 or relating to the same art as either of these or to the art to which any of the products of the co. related, & (ii) that deft. would communicate all such inventions & apply for or join with the co. in applying for Letters Patent or other similar protection in respect of the same.

Pltf. co. issued a writ against deft. claiming (i) a declaration that deft. held an invention the subject of application No. 31,470 of 1936 & No. 26,959 of 1937 & any other invention made by him during the currency of the service agreement in trust for pltf. co.; & (ii) a mandatory injunction that deft. do communicate all such inventions or do all acts necessary to obtain & vest Letters Patent or other protection for the same either in this or any other country in pltf. co.; & (iii) an inquiry as to what inventions covered

by the declaration had been made or discovered by deft. during the continuance of the service agreement; (iv) damages, & (v) costs & further relief.

Deft. alleged (*inter alia*) (a) that the service agreement had been terminated prior to filing the complete specification upon application No. 31,470 of 1936 by reason of pltf. co.'s failure to pay the full wages stipulated in the service agreement, & that no special terms as to patent rights were to be inferred from any continuance of service after the date of this breach, & (b) that the application No. 26,959 of 1937 did not deal with an invention the subject-matter of the service agreement or the deed. Deft. counterclaimed for a declaration that the service agreement & deed were void & for an order that they be cancelled:—*Held*: the service agreement was subsisting until deft. terminated it by notice in Oct. 1937, it not having been previously avoided consequent upon any breach by pltf. Accordingly a declaration was made that Letters Patent to be obtained upon application No. 31,470 of 1936 & any other invention made or discovered by him during the period of his engagement being an improvement upon two specified inventions or being a further invention relating to the art concerned were held in trust for pltf. co. Deft. was ordered to do all acts which pltf. might reasonably require to obtain & to vest such Letters Patent or other protection in this or any other country in respect of the invention protected by application No. 31,470 of 1936. An inquiry as to the subject-matter of application No. 26,959 of 1937 was refused for want of evidence. Judgment was given for pltf. with costs, & the counterclaim was dismissed with costs; also the phrase "Letters Patent or other similar protection" should, in the absence of any contrary indication, be construed as including protection, similar to the protection given by Letters Patent in this country, which is given under the laws of other countries.—*AMPLAUDIO, LTD. v. SNELL* (1938), 55 R. P. C. 237.

62. *Add. Annotation*:—*Reid. Re Von Krogh's Patent* (1929), 49 R. P. C. 417.

63. *Add. Annotation*:—*Reid. Boyce v. Morris Motors* (1927), 44 R. P. C. 105.

65. *Add. Annotation*:—*Reid. Re Von Krogh's Patent* (1929), 49 R. P. C. 417.

67. *Add. Annotation*:—*As to* (1) *Reid. Re Von Krogh's Patent* (1929), 49 R. P. C. 417.

## Part IV.—Subject-Matter of Patent.

97. *Add. Annotation*:—*As to* (1) *Reid. Re Farbenindustrie (I. G.) A. G.'s Patents* (1930), 47 R. P. C. 289.

109. *Add. Annotations*:—*Reid. Re Simon-Carves & Robinson's Patent* (1928), 45 R. P. C. 407; *Re Farbenindustrie Akt.'s Application* (1928), 46 R. P. C. 271.

115. *Add. Annotation*:—*Reid. Re Battig's Patent* (1929), 49 R. P. C. 415.

116. *Add. Annotation*:—*Reid. Re Farbenindustrie Akt.'s Application* (1928), 46 R. P. C. 271.

116a. ——— *Selective cultivation of oil-seed.*]—*Re RAU G.m.b.H. PATENT* (1935), 52 R. P. C. 362.

- 116b. — **Stabilising electric arc.**—*Held*: there was no evidence to support a finding that the stabilisation of the arc which resulted from the combination must necessarily have been foreseen by any person skilled in the art without the necessity for practical experiment & observation.—*Re JOHNSON'S APPLICATION FOR A PATENT* (1934), 52 R. P. C. 61.
117. *Add. Annotations*:—*As to* (2) *Consd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153; *Re* Simon-Carves & Robinson's Patent (1928), 45 R. P. C. 707; British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd. (1932), 49 R. P. C. 495. *Refd.* Boyce v. Morris Motors (1927), 44 R. P. C. 105. *Generally*, *Refd.* Drysdale, Sidney Smith & Blyth, Ltd. v. Davey Paxman & Co. (Colchester), Ltd., *Re* Letters Patent No. 274,162 (1937), 55 R. P. C. 95.
121. *Add. Citation*:—*on appeal, sub nom.* HENNEBIQUE v. COWLIN (WILLIAM) & SONS (1909), 26 R. P. C. 280, H. L.
- 128a. **Subjection of known material to known process.**—Subjection, for the first time, of a known material to a known process may support an application.—*Re* I. G. FARBENINDUSTRIE AKTIENGESSELLSCHAFT, APPLICATION FOR A PATENT (1928), 46 R. P. C. 271.
134. *Add. Annotation*:—*Refd.* Adelman & Ham Boiler Corp'n. v. Llanrwst Foundry Co. (1928), 45 R. P. C. 413.
138. *Add. Annotations*:—*Refd.* Boyce v. Morris Motors (1927), 44 R. P. C. 105; Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153; *Re* Farbenindustrie (I. G.) A. G.'s Patents (1930), 47 R. P. C. 289.
142. *Add. Annotation*:—*Refd.* British United Shoe Machinery Co. v. Gimson Shoe Machinery Co. (1928), 45 R. P. C. 290.
147. *Add. Annotation*:—*Refd.* Parkes Samuel & Co., Ltd. v. Cocker Bros. (1929), 46 R. P. C. 241.
148. *Add. Citation*:—*affd.* (1912), 29 R. P. C. 656, C. A.
149. *Add. Annotation*:—*As to* (3) *Refd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153.
162. *Add. Annotations*:—*As to* (3) *Consd.* British Thomson-Houston Co. v. Metropolitan Vickers Electrical Co. (1928), 45 R. P. C. 1. *Refd.* Pope Appliance Corp'n. v. Spanish River Pulp & Paper Mills, [1929] A. C. 269; British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd. (1932), 49 R. P. C. 495. *Generally*, *Consd.* No-Fume, Ltd. v. Frank Pitchford & Co. (1935), 52 R. P. C. 231.
163. *Add. Annotation*:—*Refd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153.
172. *Add. Annotation*:—*As to* (2) *Refd.* No-Fume, Ltd. v. Frank Pitchford & Co. (1935), 52 R. P. C. 231.
187. *Add. Annotation*:—*As to* (2) *Refd.* Rondo Co., Ltd. v. Gramophone Co. (1929), 46 R. P. C. 378.
192. *Add. Annotations*:—*Refd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C.

#### PART IV. SECT. 1, SUB-SECT. 3.—C. (a).

k l. —.—.—[A patented process to be valid must denote ingenuity of invention. It is not enough, in order to constitute invention, to disclose something which has been but dimly seen before.—ELECTROLYTIC ZINC PROCESS CO. v. FRENCH'S COMPLEX ORE REDUCING CO. OF CANADA, LTD., [1927] Exch. C. R. 94; *affd.*, [1930] S. C. R. 462; 4 D. L. R. 902.—CAN.

m l. —.—.—[There is no invention in a mere adaptation of an idea in a well-known manner for a well-known, or clear purpose without ingenuity, though the adaptation may effect an improvement which may supplant an article already on the market.—VAN HEUSEN, PRODUCTS INC. v. TOOKE BROS., LTD., [1929] Ex. C. R. 89.—CAN.

sa. **Not mere mechanical skill.**—*Held*: the lantern in question was new & useful, & the changes made in the ventilation in the lantern to control the quantity & direction of the air currents was not the result of mere mechanical skill, but required thought, study & an inventive mind, & constituted invention.—ADAMS & WESTLAKE CO. v. E. T. WRIGHT, LTD., [1928] Exch. C. R. 112; *affd. sub nom.* E. T. WRIGHT, LTD. v. ADAMS & WESTLAKE CO., [1929] 4 D. L. R. 1061; S. C. R. 81.—CAN.

sc. **Change of form.**—The invention claimed is for a radiator for heating purposes. The ct. found that, at best, if pltf. had added to the prior art it was merely the product of that mechanical skill which normally results from habitual & intelligent practice, & was not invention.—*Held*: it is not enough that a thing should be new in the sense that in the shape or form in which it is produced it shall not have been known before, & that it shall be useful, but it must, under the Patent Act, amount to an invention or dis-

covery. A change of form within the domain of mere construction is not invention.—MAUCK v. DOMINION CHAIN CO., LTD., [1933] Ex. C. R. 120.—CAN.

sf. **Simplicity.**—Narrowness & simplicity of invention will not invalidate a patent.—R. v. SMITH INCUBATOR CO. & BUCKEYE INCUBATOR CO., [1936] Ex. C. R. 105; *reversd.* [1937] S. C. R. 238; 2 D. L. R. 689.—CAN.

sh. **General commercial adoption.**—Evidence of general commercial adoption of a certain device is not conclusive of invention.—CANADIAN GENERAL ELECTRIC CO., LTD. v. CROSLY RADIO CORPN., [1935] Ex. C. R. 190; [1936] 1 D. L. R. 508; *affd.*, [1936] S. C. R. 551; 3 D. L. R. 737; 6 F. L. J. (Can.) 163.—CAN.

sl. **Application of principle.**—The patents in suit, infringement of which was claimed by pltf., were for methods of severing package wrappers. The ct. found that there was no subject-matter in the patents & dismissed the action:—*Held*: when a principle is not new, a patent for a method of applying it only secures to the patentee protection in respect of the particular method specified, & the use of different methods of carrying the same principle into effect cannot be restrained.—IMPERIAL TOBACCO CO. OF CANADA, LTD. & WRIGLEY JR. CO., LTD. v. ROCK CITY TOBACCO CO., LTD., [1936] Ex. C. R. 229; [1937] 2 D. L. R. 11; *affd.*, [1937] S. C. R. 399; 3 D. L. R. 145.—CAN.

so. **Mere adoption of method not invention.**—It is not invention to adopt a method to accomplish a result when that method is simply a case of engineering judgment or skill.—PORTER & MACGLASHEN v. TORONTO CORPN., FOUNDATION CO. OF ONTARIO, LTD. & TORONTO IRON WORKS, LTD., [1936] Ex. C. R. 217; [1937] 1 D. L. R. 745.—CAN.

sq. **Formulation of description of**

*discovery.*—*Held*: by the date of discovery of the invention is meant the date at which the inventor can prove that he has first formulated, either in writing or verbally, a description which affords the means of making that which he has invented.—BOHN ALUMINIUM & BRASS CORPN. v. BERRY, [1937] Ex. C. R. 114; [1938] 1 D. L. R. 79.—CAN.

#### PART IV. SECT. 1, SUB-SECT. 3.—C. (b).

133 iii. —.—.—[GUETTLER v. CANADIAN INTERNATIONAL PAPER CO., [1928] 2 D. L. R. 801; [1928] S. C. R. 438; *affd.*, [1927] 4 D. L. R. 517; [1928] Ex. C. R. 21.—CAN.

#### PART IV. SECT. 1, SUB-SECT. 4.—A.

153 l. —.—.—[**Unless coupled with discovery of mode of putting principle into practice.**—A principle cannot be the subject of a patent, & a claim to every mode or means of carrying a principle into effect amounts to a claim for the principle itself. A patent may be granted for a principle coupled with a mode of carrying the principle into effect, but such principle may be carried into effect under several patents operating in different ways & by different means.—GRISINGER v. VICTOR TALKING MACHINE CO. OF CANADA, LTD., [1929] Ex. C. R. 24; *affd.*, [1931] S. C. R. 144; [1930] 4 D. L. R. 617.—CAN.

#### PART IV. SECT. 1, SUB-SECT. 4.—B. (b).

176 iii. —.—.—[PRENTICE MANUFACTURING CO. v. KENNY, [1931] 2 D. L. R. 463; Ex. C. R. 24.—CAN.

#### PART IV. SECT. 1, SUB-SECT. 4.—B. (c).

185 ii. —.—.—[MATHAN v. GILLETTE SAFETY RAZOR CO. OF CANADA, [1932] S. C. R. 724.—CAN.

- 153; *Heap Samuel & Son v. Bradford Dyers' Asscn.* (1929), 46 R. P. C. 254.
207. *Add. Annotations:—As to (2) Refd. Marconi's Wireless Telegraph Co. v. Philips Lamps, Ltd.* (1933), 50 R. P. C. 287; *N. V. "Splendor" Gloeilampen Fabrieken v. Omega Lamp-works, Ltd.* (1933), 50 R. P. C. 393.
- 210a. —.—*Held*: the patentee had obtained a result superior to any other at the date of the patent, & there was good subject-matter & the patent was valid.—*RONDO Co., LTD. v. GRAMOPHONE Co., LTD.* (1929), 46 R. P. C. 378.
- 222a. —.—The claim was as follows: "In a coin-controlling vending machine of the kind set forth, means for arresting the legend displaying wheels independently of the automatic stop mechanism, wherein the usual, automatically operated, locking pawl is divided intermediately of the length of its normally upright end position, the two parts being pivoted together about a transverse axis, stops being provided on the pawl lever so as to limit the pivotal movement of the outer portion, & wherein said outer portion is connected by lever, or link & lever, mechanism with a key or other handle outside the mechanism so as to be adapted when said key is depressed, to engage with the teeth of the star wheel." In an action for infringement of the patent it was contended on behalf of plffs. that the patented invention, when incorporated in a known type of machine, changed a game of chance into a game of skill, & that defts. had used a modified form of plffs.' invention:—*Held*: the patentees' idea was not new, & no problem had had to be solved in carrying it into effect, & that all that the patentees had done was to effect a perfectly natural & ordinary workshop alteration in a known machine, & that the patent was bad for want of subject-matter.—*LENNARDS PERFECT SKILL CONTROL Co., LTD. v. HOLLOWAY & SAMPSON NOVELTY Co., LTD.* (1929), 46 R. P. C. 353.
231. *Add. Annotation:—Refd. Mellor v. Beardmore* (1927), 44 R. P. C. 175.
246. *Add. Annotation:—Refd. Parkes Samuel & Co. v. Cocker Bros.* (1929), 46 R. P. C. 241.
248. *Add. Annotation:—Refd. Re De Havilland's Patent* (1931), 49 R. P. C. 438.
- 249a. —.—Letters patent were granted for "Improvements in or relating to boot or shoe end stiffeners." Claim 1 of the specification was as follows: "As an article of manufacture, a thermoplastic impregnated-fabric toe puff which prior to its incorporation in a shoe upper has had flexibility imparted to its back margin by hot pressure in a die having a bevelled marginal portion, so as to expel impregnant from said margin by graduated pressure thereon & to leave the surface of the puff substantially free from local excess of impregnant." Claim 5 was as follows: "In the manufacture of a toe puff of the kind claimed in Claims 1, 2, 3, or 4 the use of a die & an advancing pressure which causes a pinch to travel over the margin or margins to be treated":—*Held*: there was a problem to be solved, namely, to produce a thermoplastic puff with a flexible back margin which was produced gradually in the sense that there was a gradual & practically imperceptible descent from the thick portion of the puff to the outer margin & prior to the patent the nearest to which any one had got was a double operation process, & there was an inventive step & the patent possessed subject-matter.—*BRITISH UNITED SHOE MACHINERY Co., LTD. v. PEMBERTON (ALBERT) & Co.* (1930), 47 R. P. C. 134.
281. *Add. Annotation:—As to (1) Refd. British Celanese, Ltd. v. Courtaulds, Ltd.* (1933), 50 R. P. C. 259.
284. *Add. Annotation:—Generally, Refd. Sharp & Dohme Inc. v. Boots Pure Drug Co.* (1928), 45 R. P. C. 153.
285. *Add. Annotation:—Consd. Mullard Radio Valve Co. v. Philco Radio & Television Corpn. of Great Britain, Ltd.*, [1936] 2 All E. R. 920.

## PART IV. SECT. 1, SUB-SECT. 5.—A.

193 vii. —.—*GUETTLER v. CAN. INTERNAT'L PAPER Co.*, [1927] 4 D. L. R. 517.—CAN.

193 viii. —.—Where a specific machine already exists producing certain effects, & additions have been made to such machine to produce the same effect in a better manner:—*Semble*: a patent cannot be taken for the whole machine, but for the improvement only.—*SHEERBROOKE MACHINERY Co., LTD. v. HYDRAULIC Co., LTD.*, [1927] Exch. C. R. 114.—CAN.

193 ix. —.—Every trifling improvement is not invention, & the industrial public should not be embarrassed by patents for every small improvement. A slightly more efficient way of doing a thing, small changes in size, shape, degree, or quality in a manufacture or machine, even assuming novelty, is not invention. More is necessary to justify a monopoly.—*LIGHTNING FASTENER Co., LTD. v. COLONIAL FASTENER Co., LTD. & PRENTICE (G. E.) MANUFACTURING Co.* (No. 13633), [1932] Ex. C. R. 101.—CAN.

193 x. —.—*Held*: factory improvements, the little improvements & betterments in technique that skilled workmen devise, because they are

skilled, should not be the subject of monopoly & do not constitute subject-matter for a patent.—*GILLETTE SAFETY RAZOR Co. of CANADA, LTD. v. PAL BLADE CORPN., LTD. & METROPOLITAN STORES, LTD.*, [1932] Ex. C. R. 132; *affo.*, [1933] S. C. R. 142; 2 D. L. R. 29.—CAN.

*sa. Extent of protection—Means used.*—The invention in question is for an improvement in locking devices, for use on separable slider fasteners:—*Held*: as the essence of the invention was the production of an old result, even though there is invention, the patentee is only protected in respect of the particular means he sets forth in his specification, & in such circumstances it may not be infringement to achieve the same result by using other means, by a different device.—*LIGHTNING FASTENER Co., LTD. v. COLONIAL FASTENER Co., LTD. & G. E. PRENTICE MANUFACTURING Co.*, [1932] Ex. C. R. 127; *affd.*, [1933] S. C. R. 377.—CAN.

## PART IV. SECT. 1, SUB-SECT. 5.—B.

250 iv. *affd.*, [1928] 2 D. L. R. 448; [1928] S. C. R. 8.—CAN.

## PART IV. SECT. 1, SUB-SECT. 7.—A.

270 xx. —.—CANADIAN

*GENERAL ELECTRIC Co., LTD. v. FADA RADIO, LTD.*, [1927] 2 D. L. R. 911; [1927] Exch. C. R. 134.—CAN.

270 xxi. —.—*Though the action & properties of each constituent of a chemical composition or mixture was known, where a new formula has been made known & the constituents have been so combined as to overcome difficulties or disadvantages in known herbicides, such combination is patentable. A chemical compound intended for the accomplishment of a specific purpose, which has never before been known, used, or published within the meaning of the Patent law, may be patented, provided one may assume some degree of skill & ingenuity, or the exercise of intelligent research & experiment successfully directed to a particular purpose or end.*—*CHIPMAN CHEMICALS, LTD. v. FAIRVIEW CHEMICAL Co., LTD.*, [1932] Ex. C. R. 107.—CAN.

287 i. *Ambit of protection.*—Where each element in a combination functions with all the other elements for the purpose of attaining a result, & when one of the elements is removed from the combination the usefulness of all disappears, then such a combination is a true combination within the meaning of patent law, whereas in a mere aggregation, if any one element is

299. *Add. Annotation*:—*Refd.* Boyce v. Morris Motors (1927), 44 R. P. C. 105.

302. *Citation*:—For “14 L. R. 487, H. L.,” read “14 T. L. R. 487, H. L.”

308a. —.]—*Held*: the applying to a ham boiler of a rack & catch was the addition of something which in itself had no novelty, & the patent was invalid for want of subject-matter.—ADELMANN & HAM BOILER CORPN. v. LLANRWST FOUNDRY CO. (1928), 45 R. P. C. 413.

308b. —.]—*Held*: (1) the first claim as to an apparatus was so vague as to be bad; (2) a combination claimed in the second claim did not produce a new result, & was merely the use successively of two pieces of apparatus, neither of which was patentable, & did not constitute a patentable combination, but was mere juxtaposition.—HANKS v. COOMBES (1928), 45 R. P. C. 237, C. A.

308c. —.]—JOHN WRIGHT & EAGLE RANGE, LTD. v. GENERAL GAS APPLIANCES, LTD. (1928), 46 R. P. C. 169, C. A.

308d. —.]—In 1930 letters patent were granted in respect of “improvement in or connected with hinged flaps for furniture, walls or supports.” The claim was as follows: “A combined hinge & stay for use with fold down flaps of articles of furniture in combination with means on which the stay slides for holding the flap in the horizontal or nearly horizontal position, comprising a butt hinge having one member longer than the other & securable to the flap, & to which longer member or a projecting piece thereon is pivotally connected a slotted stay bar which slidably engages a headed pin projection or a screw, the smaller member of the hinge being secured to a shelf or some horizontal part of the article to which the combined hinge & stay is to be applied, the headed pin or the screw being secured to some vertical part of the structure, as set forth.” In 1933 pltf.s commenced an action for infringement of the patent, claiming the usual relief, the alleged infringement being a similar device but in which the stay bar was solid instead of slotted. Defts. denied infringement & counterclaimed for the revocation of the

patent:—*Held*: the device was a mere combination of well-known integers & accordingly the patent was invalid; & further, it was held that it was an essential part of pltf.’s invention that the stay should be slotted & that deft.’s device did not infringe the patent. The action was dismissed with costs & an order for revocation of the patent was made.—DOCTORS (SOLOMON) v. WARSHAWER & SON, LTD. (1934), 51 R. P. C. 385.

311a. —.]—In 1925 Letters Patent were granted in respect of “Improvements in Garden Shears.” Claim 1 was as follows: “A garden shears with a straight knife edged blade & an abutment blade against which the cutting blade beds when the shears are closed, the serial blades being pivoted together on an axis offset in relation to the line of the knife edge so that a drawing cut is obtained in operating the shears.” In 1935 pltf.s commenced an action for infringement of the patent, claiming the usual relief. Defts. denied infringement & alleged that the patent was invalid by reason of anticipation & lack of subject-matter & counterclaimed for revocation of the patent:—*Held*: though none of elements of the invention taken singly was new, there was no anticipation of the combination, & the evidence of the inventor himself as to how he evolved the invention, & the evidence of commercial utility established the fact that the invention was not obvious, & the patent was accordingly valid & infringed. There was judgment for pltf. with costs, & a certificate of validity was granted.—HOWALDT, LTD. v. CONDRUP, LTD. (1936), 54 R. P. C. 121.

315. *Add. Annotations*:—*Refd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153; *Re* Farbenindustrie (I. G.) A. G.’s Patents (1930), 47 R. P. C. 289.

317. *Add. Annotation*:—*Consd.* R. C. A. Telephone, Ltd. v. Gaumont-British Picture Corp., Ltd. & British Acoustic Films, Ltd. (1935), 53 R. P. C. 167.

325. *Add. Annotation*:—*Refd.* Hanks v. Coombes (1928), 45 R. P. C. 237.

327. *Add. Annotation*:—*Refd.* Hanks v. Coombes (1928), 45 R. P. C. 237.

removed, the remaining elements would continue to function.—J. O. ROSS ENGINEERING CORPN. & ROSS ENGINEERING OF CANADA, LTD. v. PAPER MACHINERY, LTD. & HELLSTROM, [1932] Ex. C. 11. 238; *affd.*, [1933] 3 D. L. R. 241.—CAN.

287 ii. *Ambit of protection*.—The two patents in suit related to electric signalling & particularly to signalling over ocean cables. The ct. found that there was no infringement &:—*Held*: on a true construction of the patents, the monopoly claimed must be limited to the precise combination described, & if the claims purport to go beyond this, then such claims, if not the patents themselves, would be void. These were not cases where the doctrine of equivalency applies.—WESTERN ELECTRIC CO. INCORPORATED & NORTHERN ELECTRIC CO., LTD. v. BALDWIN INTERNATIONAL RADIO OF CANADA, LTD., [1934] Ex. C. R. 132; *affd.*, [1934] S. C. R. 570; 4 D. L. R. 129.—CAN.

#### PART IV. SECT. 1, SUB-SECT. 7.

—B. (a).

292 iv. —.]—Patent for a loud speaker. Previous to this patent the

best loud speakers had a frequency range of somewhere from 300 cycles to about 2,500 cycles, which meant that the overtones were not reproduced & the tones of high & low pitch were distorted or not faithfully reproduced. By certain structural changes in the sound box, the present invention overcomes these defects. With it a frequency response as low as 60 cycles & good response as high as 4,000 cycles can be obtained. Between 4,000 & 6,000 cycles there is slightly reduced response, & a useful response as high as 8,000 cycles, thus permitting the overtones to be reproduced, giving a faithful reproduction of the tones of high pitch and a more uniform amplitude:—*Held*: the invention in question being for a new & valuable loud speaker, structurally & operatively different from anything which preceded it, & giving much more satisfactory results, such invention disclosed ingenuity & was patentable. Even if all elements in a combination are old, where the combination produces an old result or object in a more convenient, cheaper, or more useful way, it is proper subject matter for a patent assuming there is evidence of ingenuity or skill in the

production of such combination.—BALDWIN INTERNATIONAL RADIO CO. OF CANADA, LTD. v. WESTERN ELECTRIC CO. INC. & NORTHERN ELECTRIC CO., LTD., [1934] S. C. R. 94; 1 D. L. R. 369.—CAN.

292 v. —.]—A combination of known articles does not give rise to subject-matter for letters patent.—HORTON v. CENTRAL SHEET METAL WORKS, [1935] 2 D. L. R. 760; 49 B. C. R. 303.—CAN.

#### PART IV. SECT. 1, SUB-SECT. 7.

—B. (c).

323 vii. —.]—A new combination of old elements is not a patentable invention simply because it is useful & possesses advantages not produced before. The patent in question was held invalid because the improvement for which it was granted did not, having regard to the prior state of knowledge, require such exercise of the inventive faculty as would justify the granting of a monopoly.—LIGHTNING FASTENER CO., LTD. v. COLONIAL FASTENER CO., LTD. & G. E. PRENTICE MANUFACTURING CO., [1933] S. C. R. 371; 3 D. L. R. 342.—CAN.



329. *Add. Annotation*:—*Refd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153.
335. *Add. Annotation*:—*Refd.* British Celanese, Ltd. v. Courtaulds, Ltd. (1933), 50 R. P. C. 259.
336. *Add. Annotations*:—*Refd.* Jones & Attwood v. National Radiator Co. (1928), 45 R. P. C. 71; British Celanese, Ltd. v. Courtaulds, Ltd. (1933), 50 R. P. C. 259.
337. *Add. Citation*:—*affd.*, 41 R. P. C. 604, C. A.
339. *Add. Annotation*:—*Refd.* Re Higginson & Arundel's Patent (1927), 44 R. P. C. 430.
346. *Add. Annotations*:—*Refd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153; *Re* Farbenindustrie (I. G.) A. G.'s Patents (1930), 47 R. P. C. 289; British Celanese, Ltd. v. Courtaulds, Ltd. (1933), 50 R. P. C. 259.
349. *Add. Annotations*:—*Refd.* Saffveans Akt. v. Ford Motor Co. (England) (1926), 44 R. P. C. 49; *Re* Farbenindustrie (I. G.) A. G.'s Patents (1930), 47 R. P. C. 289.
351. *Add. Annotation*:—*Refd.* Re Carpmael's Application (1928), 46 R. P. C. 321.
- 351a. — If giving substantial advantage to all selected members.]—(1) Selection patents do not differ in their nature from other patents, but they must be based on some substantial advantage to be gained by the use of the selected members, the whole of the selected members must possess this advantage & this advantage must be of a special character peculiar to the selected group.
- (2) Amendments which sought to exclude certain groups of bodies altered the basis of the selection & the patents would then claim an invention substantially different from that originally claimed, & the amendments were therefore inadmissible.—*Re* I. G. FAR-BENINDUSTRIE PATENTS (1930), 47 R. P. C. 289.
- Annotation*:—*As to* (1) *Consd.* Re Compagnie Centrale des Emeris et Produits a Polir for Letters Patent No. 343,970 (1933), 52 R. P. C. 167.
- 351b. *Conditions necessary for grant.*]—The considerations laid down by MAUGHAM, J., in *Re* I. G. Farbenindustrie A.-G.'s Patents, 47 R. P. C. 289, at p. 322, line 45, as being those on which a selection patent must depend for its validity apply with equal force when the question under consideration is whether a patent shall be granted or not.—*Re* COMPAGNIE CENTRALE DES EMERIS ET PRODUITS A POLIR FOR LETTERS PATENT NO. 343,970 (1933), 52 R. P. C. 167.
361. *Add. Annotations*:—*Consd.* Pope Appliance Corp'n. v. Spanish River Pulp & Paper Mills, [1929] A. C. 269. *Refd.* Boyce v. Morris Motors (1927), 44 R. P. C. 105; Mellor v. Beardmore (1927), 44 R. P. C. 175; Wright (John) & Eagle Range v. General Gas Appliances (1928), 46 R. P. C. 169; British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd. (1932), 49 R. P. C. 495; British Celanese, Ltd. v. Courtaulds, Ltd. (1933), 50 R. P. C. 259.
365. *Add. Annotation*:—*Refd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153.
372. *Add. Annotation*:—*Generally*, *Refd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153.
383. *Add. Annotation*:—*Refd.* Re Farbenindustrie Akt.'s Application (1928), 46 R. P. C. 271.
390. *Add. Annotations*:—*As to* (1) *Consd.* Pope Appliance Corp'n. v. Spanish River Pulp & Paper Mills, [1929] A. C. 269. *Refd.* British Celanese, Ltd. v. Courtaulds, Ltd. (1933), 50 R. P. C. 259. *Generally*, *Refd.* Mellor v. Beardmore (1927), 44 R. P. C. 175.
- 391a. — — — — —]—*Held*: the specification claimed the process of mercerising the cotton in a mixed fabric of cotton & cellulose acetate silk by applying for that purpose the old familiar process of mercerisation; that it was only discovery for the patentee to find that an application of the old process to the particular mixed fabric did not occasion deleterious effect to the cellulose acetate artificial silk, & the patent was invalid for want of subject-matter.—*HEAP (SAMUEL) & SON, LTD. v. BRADFORD DYERS' ASSOCN., LTD.* (1929), 46 R. P. C. 254.
402. *Add. Annotation*:—*Generally*, *Refd.* Mellor v. Beardmore (1927), 44 R. P. C. 175.
409. *Add. Annotation*:—*Consd.* Wright & Eagle Range v. General Gas Appliances (1928), 45 R. P. C. 346.
412. *Add. Annotation*:—*Refd.* Wright John & Eagle Range v. General Gas Appliances, Ltd. (1928), 46 R. P. C. 169.
- 412a. — — — — —]—Where a known apparatus is first used for a particular purpose, a presumption of patentable subject-matter is raised by novelty in the mode of use, as distinguished from novelty of purpose. New mode of use may be based on advantage in treatment of particular materials.—*Re* SIMON-CARVES, LTD. & ROBINSON'S PATENT (1928), 45 R. P. C. 407.
423. *Add. Annotation*:—*Generally*, *Refd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153.
434. *Citations*:—For "44 R. P. C. 69," read "44 R. P. C. 367; *affd.* 45 R. P. C. 153, C. A."
- Add. Annotation*:—*Refd.* British Celanese, Ltd. v. Courtaulds, Ltd. (1933), 50 R. P. C. 259.
435. *Add. Annotation*:—*Consd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153.

PART IV. SECT. 1, SUB-SECT. 9.—A. 352 viii. *affd.*, [1928] 2 D. L. R. 448; [1928] S. C. R. 8.—CAN.

352 x. — — — — —]—BERGEON V. DE KERMOR ELECTRIC HEATING CO., LTD., [1927] 3 D. L. R. 99; [1927] Exch. C. R. 181.—CAN.

352 xi. — — — — —]—DETROIT RUBBER PRODUCTS INC. v. REPUBLIC RUBBER CO., [1927] 4 D. L. R. 724; *affd.*, [1928] 3 D. L. R. 81.—CAN.

352 xii. — — — — —]—NIBBLE MANUFACTURING CO. v. STANDARD CO.,

[1927] 4 D. L. R. 785; ( *fd.*, [1929] 2 D. L. R. 186; [1928] S. C. R. 1579.—CAN.

PART IV. SECT. 2, SUB-SECT. 1.

436 xii. — — — — —]—ELECTROLYTIC ZINC PROCESS CO. v. FRENCH'S COMPLEX ORE REDUCING CO. OF CANADA, LTD., [1927] Exch. C. R. 94; *affd.*, [1930] S. C. R. 462; 4 D. L. R. 902.—CAN.

436 xiii. — — — — —]—There must be a substantial exercise of the inventive power, though it may in some cases be very slight, to sustain a grant for

a patent for invention. Slight alterations may produce important results & may disclose great ingenuity.—CANADIAN GENERAL ELECTRIC CO., LTD. v. FADA RADIO, LTD., [1927] 2 D. L. R. 911; [1927] Exch. C. R. 134.—CAN.

436 xiv. — — — — —]—LOWE-MARTIN CO., LTD. v. OFFICE SPECIALTY MANUFACTURING CO., LTD., [1930] Ex. C. R. 181; 4 D. L. R. 918.—CAN.

436 xv. — — — — —]—*Held*: where all deft. has done was to adopt pltd.'s

457. *Add. Annotation*:—*Consd. Sharpe & Dohme Inc. v. Boots Pure Drug Co.* (1928), 45 R. P. C. 153.

459a. ———.]—*WHITE v. TODD OIL BURNERS, LTD.* (1929), 46 R. P. C. 275.

459b. ———.]—Letters patent were granted for "combined Bag & Cushion." Claim 1 of the specification was as follows: "A combined bag & cushion consisting of a bag made of waterproof material lined at one or both sides with padding covered by ordinary fabric, & adapted to be turned inside out." In an action for infringement of the letters patent *plffs.* alleged infringement of claims 1, 2, & 3. *Defts.* denied infringement & alleged that the patent was invalid by reason of want of novelty & subject-matter, prior public user, & prior publication:—*Held*: the patent was invalid for want of subject-matter. The action was dismissed with costs.—*BERTON (ARTHUR), LTD. v. JARRETT RAINSFORD & LAUGHTON, LTD.* (1930), 47 R. P. C. 444.

459c. ———.] — *FRANC-STROHMENGER & COWAN (INC.) v. PETER ROBINSON, LTD.* (1930), 46 T. L. R. 579 47 R. P. C. 493.

459d. ———.]—Letters patent were granted for "improvements in electric combs for the hair." Claim 1 of the specification was as follows: "As a new article of manufacture, a self-contained electric hair comb in which a comb complete in itself has insulated comb members in a simple circuit with a removable battery which is attached to the comb." In an action for infringement of the patent *plffs.* alleged infringement of claims 1, 2, 3, 7, 13, 14, & 15. *Defts.* denied infringement & alleged that the patent was invalid by reason of want of novelty & subject-matter. Further allegations of prior user, & inutility, & an allegation that the patentee was not the true & first inventor, were not relied on by *defts.* at the trial:—*Held*: all the claims which were alleged to have been infringed were invalid for want of subject-matter. The action was dismissed, & *defts.* were given the general costs of the action save in so far as they had been increased by the inclusion of the allegations upon which *defts.* did not rely at the trial. *Plffs.* were given their costs so far as they had been increased by the inclusion of the said allegations, with a set-

off.—*WILDEY & WHITES MANUFACTURING CO., LTD. v. FREEMAN (H.) & LETRIK, LTD.* (1931), 48 R. P. C. 405.

459e. ———.]—In 1924 letters patent were granted in respect of "improvements in record strips for autographic registers," Claim 1 being as follows: "A record strip for autographic registers adapted to be fed by said register, said strip being provided with filing or folding apertures arranged in series therein & adapted to co-operate with strip folding mechanism to fold the strip into a zig-zag pad, all of the said filing apertures being so disposed as to assume positions at the same end of the said zig-zag pad." It was stated in the specification that the invention related to improvements in record strips employed in autographic registers & more especially to an improved zig-zag supply pad for autographic registers as described in specification No. 229,616, which was a specification of the same patentees & of the same date. *Plffs.* commenced an action for infringement of this patent & of two other patents in respect of which they discontinued the action at the trial. *Defts.* denied infringement & alleged that the patents were invalid by reason of want of novelty, subject-matter & utility:—*Held*: although the strip was novel, the patent was invalid for want of subject-matter, since any invention that may have been exercised was in the machine which was the subject of Patent No. 229,616, & not in the strip. The action was dismissed with costs. A certificate for the particulars of objections was granted in respect of the patent proceeded upon, the costs in connection with the other two patents being left to the absolute discretion of the taxing master.—*LAMSON PARAGON SUPPLY CO., LTD. v. CARTER-DAVIS, LTD.* (1930), 48 R. P. C. 133.

*Annotation*:—*Reidf. Hardaker v. Boon* (1934), 52 R. P. C. 89.

459f. ———.]—Letters patent were granted to A. for "improvements in or relating to means or apparatus for use in combined cinematograph & phonograph productions." The specification claimed a method of inserting into a cinematograph film blank pieces of film marked with letters or numbers which, when flashed upon the screen, indicated to the operator when he was to start or stop a

combination of materials & device, functioning similarly, producing similar results obtained in a similar manner, with slight mechanical changes, there is no ingenuity of invention; & where in view of the disclosures in *plffs.* patent no ingenuity of invention was required to construct *defts.* device, then such latter device is an infringement of the said patent.—*INTERNATIONAL FIRE EQUIPMENT CORPN. v. FIREGAS SERVICE, LTD.*, [1930] Ex. C. R. 168; 4 D. L. R. 708.—*CAN.*

436 xvi. ———.]—*Held*: utility is not an infallible test of originality, & to support a patent there must be something more than a new & useful manufacture, the invention must have required for its evolution some amount of ingenuity to constitute subject-matter or invention.—*CANADIAN GYPSUM CO., LTD. v. GYPSUM, LIMESTONE & ALABASTINE, CANADA, LTD.*, [1931] Ex. C. R. 180.—*CAN.*

436 xvii. ———.]—Novelty & utility, without something more requiring the exercise of inventive in-

genuity, is not sufficient to make an article a good subject-matter of a patent. The patentee must show an inventive step. Commercial success is nothing more than a question of fact depending upon several factors; & although it may assist in determining whether there is invention, it cannot afford a basis for controverting the conclusion that the alleged improvements of a known article are not of such a character as to show invention in a pertinent sense. The making or the selling, without more, of an element of a patented combination does not of itself constitute an infringement of the combination.—*BURT BUSINESS FORMS, LTD. v. AUTOGRAPHIC REGISTER SYSTEMS, LTD.*, [1933] S. C. R. 230; 2 D. L. R. 449.—*CAN.*

436 xviii. ———.]—In determining whether an alleged new use of a known device will support a patent the distinction is to be observed between novelty in the mode of using a known thing & novelty in the object or purpose of using it. In the former

case there is invention, in the latter merely discovery.—*BALDRY v. McBAIN*, [1935] 2 W. W. R. 593; 4 D. L. R. 160; 43 Man. L. R. 245; *affd.*, [1936] S. C. R. 120; 1 D. L. R. 673.—*CAN.*

436 xix. ———.]—If any variation of an existing process could be made the subject of a monopoly, merely because it had not been done before, patents would exist & be supported for innumerable trivial details & industrial effort would be hampered.—*UNIVERSAL BUTTON FASTENING & BUTTON CO. OF CANADA, LTD. v. CHRISTENSEN*, [1936] Ex. C. R. 185.—*CAN.*

436 xx. ———.]—*VANITY FAIR SILK MILLS v. PATENTS COMM.*, [1938] Ex. C. R. 1; 1 D. L. R. 148.—*CAN.*

436 xxi. ———.]—The method of knitting full-fashioned silk stockings by multiple yarn feeding is not the subject-matter for patent, being a mere new use of a known contrivance.—*BELDING-CORTICELLI, LTD. v. KAUFMAN*, [1938] Ex. C. R. 152; 2 D. L. R. 343.—*CAN.*

mechanical sound-producing apparatus. Defts. showed a "talking picture" in which the operator was provided with a "cue sheet" which told him at what points in showing the film, indicated by sub-titles appearing upon the screen which were part of the film, he was to operate or change over the sound-producing apparatus. Pltf. claimed that this was an infringement of his patent:—*Held*: there could be no novelty in using an incident, such as a sub-title, in the film as a cue for the operator, what defts. were doing was no infringement, & the invention as disclosed in pltf.'s specification was not novel.—*JOHNSON v. WARNER BROS. PICTURES LTD.* (1930), 48 R. P. C. 343.

459g. ——.]—In 1914 Letters Patent were granted in respect of "An improved process & apparatus for sterilising water & making it aseptic." Claim 1 was as follows:—"A process for sterilising flowing water which consists in a minor body of running water being brought as a film or in a state of fine distribution into contact with chlorine gas which is thus quantitatively absorbed, this minor body of water being led continuously to the main body of flowing water through which it becomes immediately & uniformly distributed." In 1929 ptfs. commenced an action for infringement of the patent, claiming a declaration that defts. had infringed the patent, & other relief. Defts. denied infringement, & alleged that the patent was invalid by reason of novelty, subject-matter & utility. At the trial it was held that there was no subject-matter to support the patent, & the action was dismissed with costs. Ptfs. appealed:—*Held*: the invention provided for the continuous introduction into the water to be sterilised of chlorinated water of the desired strength immediately after its chlorination & that it was novel & possessed subject-matter. It was further held, after argument, that defts. at the trial had unreservedly admitted infringement. The appeal was allowed, with costs, an order for a declaration that defts. had infringed the patent & for an inquiry as to damages was made & a certificate that the validity of the patent came in question was granted.—*PATERSON ENGINEERING CO., LTD. v. CANDY FILTER CO., LTD.* (1932), 50 R. P. C. 1, C. A.

*Annotation*:—*Consd. Schuster v. Hine Parker & Co.* (1935), 52 R. P. C. 345.

459h. ——.]—A patent (hereinafter referred to as the first patent) was granted in 1920, the first claim whereof was: "Process of manufacturing artificial silk & like threads or filaments from solutions of cellulose acetate, nitrocellulose or other cellulose derivatives containing volatile liquids such as acetone, alcohol-benzene, ether-alcohol & the like, characterised in that the artificial silk of filaments are spun downwards in an enclosing casing, & the travelling threads or filaments, solidified by the evaporation of the volatile solvent by an atmosphere of warm air, are led out continuously & wound up mechanically on apparatus located outside the casing." The second claim related to apparatus & concluded: "devices located outside the casing, for winding up the threads or filaments & means serving to feed or convey the threads or filaments to the winding-

up devices with or without the interposition of twisting or other devices . . .":—*Held*: (1) there was no inter-related working between the integers, but each performed an independent part, & therefore there was no subject-matter in the combination: the evidence of commercial success resulting from the invention was insufficient: the adoption of the various integers was obvious in the light of common general knowledge: the patent was invalid for want of subject-matter & was also anticipated by certain publications, which disclosed the combination as a whole. (2) The second patent was granted in 1922 & related to the twisting & winding up of the filaments by means of a known device, the cap spinning apparatus:—*Held*: this was an analogous, if not an identical, user of the device. (3) The function of expert witnesses & the nature of the questions that might be put was considered, &:—*Held*: such a witness is entitled to give evidence as to the state of the art, the meaning of technical terms, to give an opinion whether, on a hypothetical construction of a specification, a skilled worker could carry it into effect, to say what such construction or a given piece of apparatus would have taught or suggested, & generally to explain scientific facts. But he may not be asked (even as engineer or chemist) what a specification means, nor whether any step is obvious. Numerous examples of inadmissible questions & answers were given.

The appeal was dismissed with costs.—*BRITISH CELANESE, LTD. v. COURTAULDS, LTD.* (1935), 152 L. T. 537; 79 Sol. Jo. 126; 52 R. P. C. 171, H. L.

459j. ——.]—Letters patent were granted for "improvements in frames & covers for manholes & the like." The claim of the specification (as amended) was as follows: "A frame & cover with the cover made in substantially rectilinear triangular sections, & the frame made with suitable bearing blocks or seatings to support the sections of the cover at their corners, substantially as set forth." In an action for infringement of the patent it was held that the patent was invalid on the ground that the principle of three point support, applied to covers, was known having been so applied to a cover substantially triangular in form & used before the date of the patent & known as the Seamac cover, & that there was no subject-matter in splitting a cover into triangular sections in order to apply the principle. Pltf. appealed:—*Held*: the claim was too wide, & would include modifications in which there was no inventive step, namely, dividing the Seamac cover into two triangular sections & laying triangular sections together to form a cover; &, in view of the Seamac cover being known & used before the date of the patent, there was no subject-matter. The appeal was dismissed with costs.

*Semble, per ROMER, L.J.*, the patent might have been valid, if limited to rectangular covers.—*WOODROW v. LONG, HUMPHREYS & CO., LTD.* (1933), 51 R. P. C. 25.

459k. ——.]—In 1927 letters patent were granted for "improvements in & relating to fish cookers." Claim 1 was for "a fish cooker of the coke or like fired type provided

with an escape flue for the fumes, such flue leading downwards with a delivery outlet some distance above the base of the flue in which a fan is situated & the delivery outlet leading to beneath the fire grate to deliver the fumes or the like thereto, substantially as described." In 1932 pltf. commenced an action for infringement of the patent, claiming the usual relief. Defts. denied infringement & alleged that the patent was invalid for want of novelty, subject-matter & utility. Defts., who had been licensees under the patent, counter-claimed for the return of moneys paid by them to pltf. & also for damages for breach of warranty of validity of the patent. At the trial defts. abandoned their counterclaim:—*Held*: the patent was invalid for want of subject-matter; & had the patent been valid, there was no infringement. The action was dismissed with costs. The counterclaim was also dismissed with costs. A set-off was ordered & a certificate was granted in respect of certain of the particulars of objections.—*TOMLIN v. ACME ENGINEERING CO., LTD.* (1933), 51 R. P. C. 117.

- 459l. ———.]—Letters patent were granted for "Improvements in or relating to circuit arrangements & discharge tubes for amplifying electric oscillations." Claim 1 of the patent was for "a circuit arrangement for amplifying electric oscillations by means of one or more thermionic discharge tubes connected in series or cascade, etc." Claim 2 was for "a discharge tube having at least three auxiliary electrodes between the cathode & the anode, characterised in that the auxiliary electrode nearest to the anode is directly connected to the cathode so as to be maintained continuously at the cathode potential." Claim 5 was for "the discharge tube substantially as described." The present appls., in an action for infringement of the patent, alleged infringement of claims 2 & 5 in respect of the sale of certain wireless valves. No infringement of claim 1 was alleged. The present resps. at first denied, but subsequently did not dispute infringement, & claimed that the letters patent were invalid for want of novelty or patentable subject-matter, & by reason of prior grant & prior publication:—*Held*: claim 1 was valid as an invention possessing novelty, utility & subject-matter; claim 2 was invalid, as the monopoly claimed was wider than the subject-matter of the invention; & claim 5 was consequently also invalid as it related to subject-matter within claim 2 & was also ambiguous.—*MULLARD RADIO VALVE CO., LTD. v. PHILCO RADIO & TELEVISION CORPN. OF GREAT BRITAIN, LTD.*, [1936] 2 All E. R. 920; 53 R. P. C. 323, H. L.

*Annotations*:—*Consd.* Mullard Radio Valve Co. v. British Belmont Radio, Ltd. & Juviler, *Re* Mullard Radio Valve Co. Ltd.'s Patent No. 287,958 (1938), 55 R. P. C. 197. *Reid*, Molins & Molins Machine Co., Ltd. v. Industrial Machinery Co., Ltd., [1930] 3 All E. R. 709.

- 459m. ———.]—Letters patent were granted for an "Improved construction of metal aeroplane spars." Claim 1 of the specification was as follows: "A thin metal member of girder form comprising two oppositely disposed flanges or booms & one or more connecting webs in which the thin metal both of the booms or flanges & of the webs is stiffened to withstand shear & longitudinal

compression stresses by being bent about longitudinal axes so that its cross-section is an arc or a sinuous curve substantially as & according to the principles described." In an action for the infringement of the patent defts. denied infringement & alleged the patent was invalid by reason of prior publication, want of subject matter & ambiguity:—*Held*: there was insufficient subject-matter for letters patent in corrugating longitudinally the webs & flanges of a thin metal aeroplane spar in view of the common knowledge of corrugating for the purposes of adding resistance to buckling & the patent was invalid. Action was dismissed with costs.—*A. T. S., LTD. v. HANDLEY PAGE, LTD.* (1936), 53 R. P. C. 99.

- 459n. ———.]—Letters Patent No. 377,330 were granted for "Improvements in packing of invert sugar & like substances for transport." Claim 1 was as follows: "1. An improved method of packing a predetermined quantity (for example, one hundred weight) of invert sugar & like crystallisable substances, comprising the step of pouring the sugar when liquid into a paper bag or like pre-formed & pre-shaped container positioned in a mould of a shape requisite to the form of a package suitable for man-handling & transport, the said sugar container being thereby pressed against the surface of the mould by the weight of the liquid sugar so that it constitutes a closely fitting detachable lining of the mould, a crystallising vessel in which the sugar gradually sets to a compact & shaped crystallised sugar block & thereafter serves as a container or wrapper for transport for said sugar block which by reason of it having set by crystallisation, serves as the rigid or firm member of the package." In an action for infringement of the patent defts. denied infringement & validity & counterclaimed for revocation of the patent. It was held at the trial that the patent was valid, but not infringed as defts.' carton was more or less rigid. By agreement between the parties the appeal was limited to the issue of infringement & defts. did not oppose the appeal:—*Held*: the patent had been infringed by defts., & a declaration to this effect was granted with liberty to apply for an inquiry as to damages. No order was made as to costs as these, both in the High Ct. & the Ct. of Appeal, had been provided for by the agreement between the parties.—*MANBRÉ & GARTON, LTD. v. ALBION SUGAR CO., LTD.* (1937), 54 R. P. C. 243, C. A.
- 459o. ———.]—*Re* KODAK, LTD.'s APPLICATION FOR A PATENT (1936), 53 R. P. C. 276.

- 459p. ———.]—*Re* CELLULOSE ACETATE SILK Co.'s LTD., APPLICATION FOR A PATENT (1935), 53 R. P. C. 128.

471. *Add. Annotation*:—*Consd.* Kestos, Ltd. v. Kempat, Ltd. & Vivian Fitch Kemp, *Re* Kestos, Ltd. Registered Design (No. 725,716) (1935), 53 R. P. C. 139.

- 472a. ———.]—It is not enough to show that an apparatus described in an earlier specification alleged as an anticipation could have been used to produce a certain result; it must also be shown that the specification contains clear & unmistakable directions so to use it.—*BRITISH THOMSON-HOUSTON CO., LTD. v. METROPOLITAN-VICKERS ELECTRICAL CO.,*

LTD. (1928), 45 R. P. C. 1, H. L.; *affg.* S. C. *sub nom.* METROPOLITAN-VICKERS ELECTRICAL CO., LTD. v. BRITISH THOMSON-HOUSTON CO., LTD. (1925), 43 R. P. C. 76, O. A.

*Annotations*:—*Consd.* Pope Appliance Corp. v. Spanish River Pulp & Paper Mills, [1929] A. C. 269; *Molins v. Industrial Machinery Co.*, [1937] 4 All E. R. 295. *Refd.* British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd. (1932), 49 R. P. C. 495; *British Celanese, Ltd. v. Courtaulds, Ltd.* (1933), 50 R. P. C. 259.

475. *Add. Annotation*:—*Consd.* No-Fume, Ltd. v. Frank Pitchford & Co. (1935), 52 R. P. C. 231.

479. *Add. Annotation*:—*Refd.* *Re De Havilland's Patent* (1931), 49 R. P. C. 438.

502a. —. ]—*BIRTWHISTLE v. SUMNER ENGINEERING Co., LTD.* (1928), 46 R. P. C. 59.

502b. —. ]—*HOROWITZ v. WALD (H.) & Co.* (1930), 47 R. P. C. 183.

502c. —. ]—In 1926 letters patent were granted for "Improvements in & relating to the spinning of metal hollow-ware." Claim 1 was as follows: "An improved method of spinning metal hollow-ware consisting in hammer-marking or otherwise embossing or ornamenting the face or faces of a chuck or mandrel upon which a blank is spun, so that similar ornamenting is produced in the metal of the blank which is forced into close contact with the mandrel by the pressure of the spinning tool or tools." *Pltfs.* brought an action for infringement & *defts.* alleged that the patent was invalid by reason of prior publication in certain specifications & by reason of a prior public user. *Defts.* also alleged that there was no subject-matter & that the invention was not useful; they also denied infringement:—*Held*: the patent was invalid for want of novelty by reason of public prior user, & the action was dismissed with costs.—*JOSEPH v. JENKINS (B. J.), LTD.* (1929), 47 R. P. C. 61.

502d. *Subject-matter—Avoidance by prior user.* ]—*LUSRY (W.) & SONS v. SCOTT (G. W.) & SONS, LTD.* (1932), 49 R. P. C. 620.

517. *Add. Annotation*:—*Refd.* *Wright John & Eagle Range v. General Gas Appliances, Ltd.* (1928), 46 R. P. C. 169.

518. *Add. Annotations*:—*Consd.* *British Thomson-Houston Co. v. Metropolitan-Vickers Electrical Co.* (1928), 45 R. P. C. 1. *Refd.* *Pope Appliance Corp. v. Spanish River Pulp & Paper Mills*, [1929] A. C. 269; *Wright John & Eagle Range v. General Gas Appliances, Ltd.* (1928), 46 R. P. C. 169; *British Hart-*

*ford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd.* (1932), 49 R. P. C. 495; *No-Fume, Ltd. v. Frank Pitchford & Co.* (1935), 52 R. P. C. 231.

518a. *Prior specification.*]—Letters patent were granted for "an improved ash receptacle for smokers' use." Claim 1 of the specification was as follows: "An ash receptacle which without the use of movable parts retains the smoke rising from objects thrown into it, characterised by the fact that it consists of a closed container (1, 2) into which extends a shaft (3) of substantially constant cross-section, the sides of which with the sides of the receptacle form a trapped space closed above whilst wholly beneath the shaft is provided a deflecting member (4) which deflects objects thrown in wholly to one side of the lower mouth of the shaft, the dimensions of the shaft & of the deflecting member being so chosen relatively to one another & to the sides of the closed container that the smoke rising from objects thrown into the container is collected entirely in the trapped space, & after cooling is thrown down again without being able during this movement to pass the lower mouth of the shaft." *Pltfs.* commenced an action for infringement of this patent & *defts.* counterclaimed for its revocation:—*Held*: (1) the patent was valid but not infringed. The appeal was allowed on the issue of validity & the order for revocation was rescinded. A special order was made as to costs in the Ct. of Appeal & below. A monopoly may be defined by reference to the result & the proportions need not be exactly laid down, if there is a field in which the proportions may vary & yet within which success may be ensured, & if the dimensions are sufficiently described as to be ascertainable by tests not involving the exercise of any inventive faculty; (2) a prior specification, not being a use at all, cannot be adduced by way of an analogous user.

*Semle*: *per MAUGHAM, L.J.*, a paper offer for sale unaccompanied by exposure for sale of any infringing article does not constitute infringement, but might be a threat to infringe.—*NO-FUME, LTD. v. FRANK PITCHFORD & Co., LTD.* (1935), 52 R. P. C. 231, O. A.

518b. *User outside three mile limit.*]—*V. D., LTD. v. BOSTON DEEP SEA FISHING & ICE Co., LTD.*, No. 613d, *post*.

PART IV. SECT. 2, SUB-SECT. 2.—  
B. (a).

480 iv. —. ]—Evidence of prior user in support of a plea of anticipation, depending upon the recollection of witnesses over a number of years, & implying fine distinctions or close diversities between two things, should be considered with great caution & should be disregarded unless established beyond a reasonable doubt, before it is accepted to defeat a patent under which a patented article is made, & particularly when it has gone into substantial use by the public.—*CORDS & CORDS PISTON RING CO. OF CANADA, LTD. v. STEELCRAFT PISTON RING CO. OF CANADA*, [1935] Ex. C. R. 38; 3 D. L. R. 18; *affd.*, [1935] 4 D. L. R. 507.—CAN.

PART IV. SECT. 2, SUB-SECT. 2.—  
B. (b) i.

*sb.* Known thing transferred from one

*user to another.*]—Where a known thing is merely transferred from one user to another there is prior user & the new use cannot be the subject of patent.—*GALT ART METAL Co. v. THE PEDLAR PEOPLE, LTD.*, [1935] 2 D. L. R. 353; O. R. 126.—CAN.

PART IV. SECT. 2, SUB-SECT. 2.—  
B. (b) ii.

523 iii. —. ]—*GEORGESEN v. URWIN & Co.*, [1928] N. Z. L. R. 207.—N.Z.

i. —. —. ]—*POPE APPLIANCE CORPN. v. SPANISH RIVER PULP & PAPER MILLS*, [1929] A. C. 269.—CAN.

ii. —. —. ]—"Not known or used by any other person."—*Held*: though, as decided in *Pope Appliance Corp. v. Spanish River Pulp & Paper Mills, Ltd.*, the public use or sale for more than a year previously to the application must be public use or sale in Canada, yet the words "which was not known or used by any other person

before his [appot.'s] invention thereof," are not qualified by the words "in Canada," & accordingly, if it can be shown that the invention was known or used by any other person in any part of the world before the invention in Canada, that fact alone would render the patent invalid.—*CANADIAN GENERAL ELECTRIC Co., LTD. v. FADA RADIO, LTD.* (1929), 46 T. L. R. 18.—CAN.

PART IV. SECT. 2, SUB-SECT. 2.—  
B. (b) iii.

540 i. *User followed by abandonment.*]—An experiment which never becomes completed, but up to the last remains an experiment & nothing more does not as a rule anticipate a novel machine, device or process, but if the experimental stage is over & the machine or device operates effectively for the purpose for which it was designed, & it is used by persons capable of understanding its use there

549a. ———.]—*Re LEO AXIEN'S APPLICATION FOR A PATENT* (1935), 53 R. P. C. 127.

550. *Add. Annotations*:—*Refd.* Sharpe & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153; Pope Appliance Corp. v. Spanish River Pulp & Paper Mills (1929), 98 L. J. P. C. 50.

559. *Add. Annotations*:—*Refd.* Mellor v. Beardmore (1927), 44 R. P. C. 175; Pope Appliance Corp. v. Spanish River Pulp & Paper Mills, [1929] A. C. 269; British Celanese, Ltd. v. Courtaulds, Ltd. (1933), 50 R. P. C. 259.

560. *Add. Annotations*:—*Refd.* Mellor v. Beardmore (1927), 44 R. P. C. 175; Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153; *Re* Simon-Carves & Robinson's Patent (1928), 45 R. P. C. 407.

561. *Add. Annotations*:—*Refd.* Boyce v. Morris Motors (1927), 44 R. P. C. 105; British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd. (1932), 49 R. P. C. 495.

574. *Add. Annotation*:—*Refd.* Boyce v. Morris Motors (1927), 44 R. P. C. 105.

583. *Add. Annotation*:—*Refd.* Drysdale, Sidney Smith & Blyth, Ltd. v. Davey Paxman & Co. (Colchester), Ltd., *Re* Letters Patent No. 274,162 (1937), 55 R. P. C. 95.

585. *Add. Annotations*:—*Consd.* Wright John & Eagle Range v. General Gas Appliances

(1928), 46 R. P. C. 169. *Refd.* Boyce v. Morris Motors (1927), 44 R. P. C. 105.

589a. ———.]—Letters patent were granted in 1917 for "improvements in electric heating apparatus." Claim 1 was as follows: "improvement in & relating to electric heating apparatus characterised by the insulating supporting blocks, through which the conductor passes, being suspended in such a manner as to be capable of movement with the conductor under the influence of heat." Pltfs. brought an action for infringement of the patent. Defts. denied infringement & alleged that the patent was invalid by reason of anticipation by prior publication, & for want of subject-matter & utility:—*Held*: the patent was invalid by reason of anticipation by prior publication & for want of subject-matter, & it was not infringed. The action was dismissed with costs.—*NAAM-LOOZE VENNOOTSCHAP FABRIEK VAN INSTRUMENTEN EN ELECTRISCHE APPARATEN "INVENTUM" v. SCHNEIDER* (1931), 48 R. P. C. 87.

593. *Add. Annotations*:—*As to* (3) *Refd.* British Thomson-Houston Co. v. Metropolitan-Vickers Electrical Co. (1928), 45 R. P. C. 1; Pope Appliance Corp. v. Spanish River Pulp & Paper Mills, [1929] A. C. 269. *Generally.* *Refd.* Société Anonyme Servo-Frein Dewandre v. Citroen Cars, Ltd. (1929), 47 R. P. C. 221.

is a completed invention & a completed publication even though for some other reason work with it is subsequently discontinued.—*VEASEY v. DENVER ROCK DRILL & MACHINERY CO., LTD.*, [1930] App. D. 243.—S. AF.

#### PART IV. SECT. 2, SUB-SECT. 2.— B. (b) v.

a). "On sale"—*Within Patent Act—What amounts to.*—*SEMET-SOLVAY CO. v. COMR. OF PATENTS*, [1927] 3 D. L. R. 385; [1927] Exch. C. R. 218; *affd.*, [1929] 4 D. L. R. 1081; S. C. R. 172.—CAN.

#### PART IV. SECT. 2, SUB-SECT. 2.— C. (a).

594 ii. ———.]—*CANADIAN GENERAL ELECTRIC CO. v. LTD. v. FADA RADIO, LTD.*, [1927] 2 D. L. R. 911; [1927] Exch. C. R. 134.—CAN.

594 iii. ———.]—*MAUNDER v. WANGANI SASH & DOOR FACTORY & TIMBER CO., LTD.*, [1928] N. Z. L. R. 566.—N.Z.

594 iv. ———.]—By sect. 7 (1) of Patent Act, 1923, of Canada, any person who has invented any (*inter alia*) new & useful art, process, machine or manufacture "not known or used by others before his invention thereof," & as to which other specified circumstances do not exist, may obtain a patent granting him an exclusive property in the invention:—*Held*: the knowledge or user by others contemplated by the words quoted above is not confined to knowledge or user within Canada, nor to knowledge or user of a public or open character excluding that which is secret or confidential. In construing the provision the natural & ordinary meaning of the words should not be departed from in order to reconcile it with any theory of patent law evolved otherwise than from the language of the Act itself.—*RICE v. CHRISTIAN*, [1931] A. C. 770; 100 L. J. P. C. 202; 145 L. T. 624; 47 T. L. R. 537; 75 Sol. Jo. 525, P. C.—CAN.

594 v. ———.]—*Held*: by the date

of discovery of the invention is meant the date at which the inventor can prove he first formulated, either in writing or verbally, a description which affords the means of making that which is invented. There is no necessity of a disclosure to the public. He who first communicates an invention to "others" would be the true & first inventor in the eyes of the patent law of Canada, as it stood previous to Sept. 1932.—*J. O. ROSS ENGINEERING CORPN. & ROSS ENGINEERING OF CANADA, LTD. v. PAPER MACHINERY, LTD. & HELLSTROM*, [1933] Ex. C. R. 238; *affd.*, [1933] 3 D. L. R. 241.—CAN.

594 vi. ———.]—In order to establish that a patent has been anticipated, any information as to the alleged invention given by any prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defence of anticipation. Where the question is solely one of prior publication it is not enough to prove that an apparatus described in an earlier specification, could have been used to produce this or that result. It must also be shown that the specifications contain clear & unmistakable directions so to use it. It must be shown that the public have been so presented with the invention, that it is out of the power of any subsequent person to claim the invention as his own.—*CORDS & CORDS PISTON RING CO. OF CANADA, LTD. v. STEELCRAFT PISTON RING CO. OF CANADA*, [1935] Ex. C. R. 38; 3 D. L. R. 18; *affd.*, [1935] 4 D. L. R. 507.—CAN.

594 vii. ———.]—In order to establish that a patent has been anticipated, any information as to the alleged invention given by any prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it in order to sustain the defence of anticipation.—

NORTHERN ELECTRIC CO., LTD. & WESTERN ELECTRIC CO. INC. v. BURKHOLDER, KELLEY & BURKHOLDER & KELLEY, LTD., [1935] Ex. C. R. 127; 4 D. L. R. 598.—CAN.

594 viii. ———.]—Sect. 61 (1) (a) of the Patent Act require that before a patent shall be declared void on the ground of anticipation it must be established that before the date of the application for such patent another inventor had disclosed or used the invention in such manner that it had become available to the public.—*B. V. D. CO., LTD. v. CANADIAN CELANESE, LTD.*, [1936] Ex. C. R. 139; *reversd.* [1937] S. C. R. 221; 2 D. L. R. 481.—CAN.

594 ix. ———.]—In order to set up anticipation by prior publication it is not sufficient that the patent relied on as an anticipation should suggest the idea to the inventor, or some line of inquiry which may lead him to his invention, or that the apparatus described in the earlier specification could be made to produce the same result; it is necessary that the specification relied on should contain a clear & unmistakable direction so to use the apparatus as to produce the result; nor is it enough that the document relied on as an anticipation should, when read along with other documents, preshadow or indicate the invention. The patentee may select & collate from any sources that are accessible to him, & his invention is not invalid by anticipation by reason merely of the fact that some of, or even all, the elements in his device have been anticipated in prior publications.—*CLUETT, PEABODY & CO. INC. v. DOMINION TEXTILE CO., LTD.*, [1938] Ex. C. R. 47; 1 D. L. R. 465.—CAN.

xv. *Private exhibition.*—*Australian letters patent No. 21808/25* were granted in 1925 in respect of an invention of "improvements in paper bags." Claim 1 was as follows:—"1. A paper bag of the kind hereinbefore referred to having its walls composed of a plurality of piles of paper which are relatively movable at the places subjected to bending &



598. *Add. Annotations*.—*Re*ld. Jones & Attwood v. National Radiator Co. (1928), 45 R. P. C. 71; *British Celanese, Ltd. v. Courtaulds, Ltd.* (1933), 50 R. P. C. 259.

604. *Add. Annotation*.—*As to* (2) *Fold. V. D., Ltd. v. Boston Deep Sea Fishing & Ice Co.* (1935), 52 R. P. C. 303.

604a. — — —.]—An action was commenced by V. D., Ltd., for infringement of five patents relating to deep sea fishing gear. Claim 1 of letters patent No. 175,824 was as follows: "1. A trawling gear of the type set forth in which the width of opening of the net is maintained by two separating panels or other boards which are connected on the one side by towing lines or cables to a single boat & on the other side to the net by means of cables of relatively great length which converge towards the net so that the width of opening of the net is directly controlled by the inclination of the cables to each other, substantially as described." Defts., former licensees, denied infringement. E. P. & B. A. P. applied by petition for the revocation of these five patents. An application for leave to amend the first patent (No. 175,824) was made by pl'tfs. upon which def't. & petitioners & several others appeared as resps. —*Held*: (1) all the claims of letters patent No. 175,824 were invalid for want of novelty or subject-matter, & that patent would be invalid even if the specification were amended as asked, & amendment was refused; & patent 209,032 was invalid for want of subject-matter, & patent 211,105 was invalid for want of subject-matter as well as prior publication; & all these three patents & patent 232,914, which was admitted to be invalid, were ordered to be revoked, subject to suspension of the order in the case of an appeal; (2) letters patent No. 210,396 (patent of addition to No. 209,032) fell with the parent patent but of itself had subject-matter & should become an independent patent, but that it had not been infringed. No certificate of validity as to it was given. The infringement action & the application to amend were dismissed with costs; (3) the deposit of a document on the shelves in the library of the Ministry of Agriculture & Fisheries in London held to be publication; (4) a patent does not run at sea outside the three-mile limit & user outside such limit could not constitute either a prior user or an infringement; (5) pl'tfs.' conduct in knowingly allowing an invalid claim in a specification of letters patent to remain unamended might be a bar to relief by way of amendment; (6) the question

discussed whether the ct. can treat an agreement not to dispute validity as having any legal validity; (7) *semble*: licensees in respect of specified vessels were not by reason of that fact estopped from setting up invalidity where other vessels were concerned.—V. D., LTD. v. BOSTON DEEP SEA FISHING & ICE CO., LTD., *Re* VIGNERON DAHL ET CIE PETITION FOR REVOCATION OF LETTERS PATENT, *Re* VIGNERON'S APPLICATION FOR LETTERS PATENT (No. 175,824) (1935), 52 R. P. C. 303.

613a. *Publication in drawings*.—*Re* CROWTHER'S APPLICATION FOR A PATENT No. 373,942 (1933), 51 R. P. C. 72.

613b. *Publication in scientific paper*.—I. G. FARBENINDUSTRIE AKTIENGESSELLSCHAFT'S APPLICATION FOR REVOCATION OF LETTERS PATENT No. 376,746 GRANTED TO O. F. BLOCH & ILFORD, LTD. (1935), 53 R. P. C. 92.

613c. —.]—BRITISH ACOUSTIC FILMS, LTD., POULSEN & PETERSEN v. NETTLEFOLD PRODUCTIONS No. 1213b, *post*.

613d. *Publication in document deposited in library of Ministry of Agriculture*.—(1) The deposit of a document on the shelves in the library of the Ministry of Agriculture & Fisheries in London held to be publication. (2) A patent does not run at sea outside the three mile limit & user outside such limit could not constitute either a prior user or an infringement.—V. D., LTD. v. BOSTON DEEP SEA FISHING & ICE CO., LTD. (1935), 52 R. P. C. 303.

616. *Add. Annotation*.—*Re*ld. British Celanese, Ltd. v. Courtaulds, Ltd. (1933), 50 R. P. C. 259.

625. *Add. Annotation*.—*Re*ld. Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153.

633. *Add. Annotations*.—*Consd. Re* L'Air Liquide Société Anonyme pour l'Etude et l'Exploitation des Procédés George Claude's Patent (1930), 49 R. P. C. 428; Mullard Radio Valve Co. v. Philco Radio & Television Corp'n. of Great Britain, Ltd., [1936] 2 All E. R. 920.

636. *Add. Annotation*.—*Re*ld. *Re* Higginson & Arundel's Patent (1927), 44 R. P. C. 430.

640. *Add. Annotation*.—*Re*ld. Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153.

642a. —.]—*Re* I. G. FARBENINDUSTRIE AKTIENGESSELLSCHAFT'S APPLICATION FOR REVOCATION OF LETTERS PATENT No. 361,917 GRANTED TO IMPERIAL CHEMICAL INDUSTRIES, LTD. (1933), 51 R. P. C. 53.

*Annotation*.—*Apld. Re*, Dreyfus' Application for a Patent (No. 285,968) (1935), 52 R. P. C. 299.

having one or both of its ends closed by means of sewing, stapling or the like." A petition for revocation of the patent was presented to the High Ct. of Australia on the grounds of anticipation, want of subject-matter, ambiguity, & want of novelty by reason of an exhibition by the patentee's agent prior to the date of the patent of a bag made in accordance with the specification. The High Ct. & the Full Ct. dismissed the petition & upheld the validity of the patent, holding that the exhibition was private & the patentee was protected by sect. 124 of Australian Patents Act, 1903-1921. Petitioners appealed by leave to the Privy Council:—*Held*: the appeal should be allowed with costs & the

patent be revoked, on the ground that (a) the patent was invalid in that the demonstration of the bags was such as to be outside the protection of sect. 124 of the Australian Patents Act, 1903-1921, & (b) the patent was also invalid for want of subject-matter, commercial success induced by commercial acumen & in the absence of any demand for a substitute for jute bags forming no criterion of the inventive step. The point of law whether sect. 124 forms any defence to revocation proceedings or only operates to take away a ground or grounds upon which a grant of letters patent could be refused was not decided, a decision not being necessary in the circumstances.—PAPER SACKS PROPRIETARY, LTD. v.

COWPER (1935), 53 R. P. C. 31, P. C.—AUS.

#### PART IV. SECT. 2, SUB-SECT. 2.—C.(c).

615 iii. —.]—CANADIAN GENERAL ELECTRIC CO., LTD. v. FADA RADIO, LTD., [1927] 2 D. L. R. 911; [1927] Exch. C. R. 134.—CAN.

615 iv. —.]—*Held*: the proper principle to be applied in testing anticipation is that the specification which is relied upon as an anticipation must give the same knowledge as the specification of the invention itself.—LIGHTNING FASTENER CO., LTD. v. COLONIAL FASTENER CO., LTD., [1934] 3 D. L. R. 737; 51 R. P. C. 349, P. C.—CAN.



**642b.** —.].—Pltfs. were the owners of letters patent relating to a cigarette-making machine, the feature of which was that it had slanting vanes which ensured that the shower of tobacco falling upon the paper should not have a vertical movement, but should have a component of motion in the direction in which the paper was moving. The advantage of the machine was that it avoided an uneven distribution of the tobacco in the cigarettes, & by its use the speed of production was markedly increased. There was, however, a German patent of 1880, in the specification of which there was a drawing of a similar arrangement of vanes, & the arrangement was described, but its purpose was not described, nor was it claimed that such an arrangement had the effect of increasing the speed of production of a perfect cigarette. The machine shown in the 1880 specification worked at a much lower speed than did that of pltfs. An application was made, in an infringement action, to amend the specification by limiting the invention claimed to machines capable of moving at a high speed, thereby excluding the earlier invention:—*Held*: (1) without the proposed amendment, the patent in suit was invalid by reason of anticipation by the earlier patent; (2) the amendments sought were such as would distinguish the invention from the earlier one without enlarging its scope, & were such as might be allowed within Patents & Designs Acts, 1907–1932, s. 22; (3) the patent as amended was valid; (4) the claim as originally framed had been framed in good faith & with reasonable skill & knowledge. Therefore, although the patent was invalid at the time when it was infringed, damages could be awarded in respect of such infringements.—*MOLINS v. INDUSTRIAL MACHINERY CO., LTD.*, [1937] 4 All E. R. 295; 81 Sol. Jo. 980; 55 R. P. C. 31, C. A.

**655a.** — Question of construction—Evidence of intention inadmissible.].—Whether a specification is an anticipation of a later patent, apart from statutory provisions, depends upon the construction of the specification, verbal evidence as to the intention of the person whose specification it is being inadmissible.—*CANADIAN GENERAL ELECTRIC CO., LTD. v. FADA RADIO, LTD.*, [1930] A. C. 97; 99 L. J. P. C. 58; 142 L. T. 106; 47 R. P. C. 69, P. C.

*Annotation*:—*Refd.* *Rice v. Christiani* (1931), 47 T. L. R. 537.

**659.** *Add. Citation*:—*Affd. sub nom.* *BRITISH THOMSON-HOUSTON CO., LTD. v. METROPOLITAN-VICKERS ELECTRICAL CO., LTD.* (1928), 45 R. P. C. 1, H. L.

*Add. Annotations*:—*Consd.* *Pope Appliance Corp. v. Spanish River Pulp & Paper Mills*, [1929] A. C. 269. *Refd.* *British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd.* (1932), 49 R. P. C. 495.

**659a.** —.].—In 1927, a patent was granted in respect of "improvements in or relating to actuating devices for the control of the carburetters of internal combustion engines, but applicable for other purposes." The first claim was as follows: "Actuating provision suitable for use in connection with the

control of the carburetters of internal combustion engines but applicable for other purposes having a rotary hand grip or operating member adapted to displace a longitudinally movable member incorporated within or substantially within the overall transverse dimension of said grip or operating member & a front collar for said grip or operating member said front collar being adapted to embrace the handle bar or other supporting member upon which the said actuating member is adapted to be mounted & in which the said grip or operating member is of a character such that power transmission mechanism which it may be adapted to actuate can be disconnected from it at a time at which it is mounted or located upon said handle bar or supporting member with said front collar in its normal position."

Pltfs. commenced an action for infringement of the patent. Defts. denied infringement & alleged that the patent was invalid by reason of anticipation by prior specifications & prior users, for want of subject-matter & utility & for insufficiency, & counterclaimed for the revocation of the patent. Pltfs. alleged that the object of the invention was to be able to expose the point of attachment of the power transmission mechanism, for ease of replacement, while keeping all the parts in operative engagement upon the handle bar. One of the prior specifications of A.M.A.C. relied on by defts. described such a device in the letter-press, but showed in the drawings a mechanism which could not be operated so as to fulfil the objects of pltfs.' patent:—*Held*: assuming that the specification was not ambiguous, & that its object was as alleged by pltfs., the specification of A.M.A.C. disclosed in its drawings a device that could be modified by a skilled mechanic so as to fulfil pltfs.' objects & that accordingly the patent was invalid either by reason of anticipation or want of subject-matter. The action was dismissed with costs & an order was made for the revocation of the patent, such order to lie in the office for six weeks, or if notice of appeal be given, until judgment in the appeal.—*AMALGAMATED CARBURETTERS, LTD. v. BOWDEN WIRE, LTD.* (1930), 48 R. P. C. 105.

**680a.** —.].—In an action for infringement defts. denied infringement, & alleged that the patent was invalid by reason of (*inter alia*) want of utility. Pltfs. proved the utility of their invention:—*Held*: the patent was valid, & had been infringed.—*BRITISH UNITED SHOE MACHINERY CO., LTD. v. LAMBERT HOWARTH & SONS, LTD. & GIMSON SHOE MACHINERY CO., LTD.* (1927), 44 R. P. C. 511; *subsequent proceedings* (1929), 46 R. P. C. 315.

**680b.** *S. P. BRITISH UNITED SHOE MACHINERY CO., LTD. v. GIMSON SHOE MACHINERY CO., LTD.* (1928), 45 R. P. C. 290, C. A.

**680c.** *S. P. PARKES S. & CO., LTD. v. COCKER BROS., LTD.* (1929), 46 R. P. C. 241, C. A.

**680d.** —.].—N. & G., Ltd. & others brought an action against J. in respect of alleged infringements of three patents. At the trial it was

held that infringement had not been proved, & that all three patents were invalid, & an order was made for their revocation. Pltfs. appealed against so much of the judgment as affected the validity of one patent, being No. 294,972:—*Held*: the claims, when construed according to their natural meaning, included substances which were undesirable & ineffective for producing the result sought by the patentee, & the patent was bad for want of utility; also, an essential requirement of the patented process had not been disclosed in the specification, though known to the patentee, & the patent was also invalid under sect. 25 (2) (j). The appeal was dismissed.

*Per Cur.*: It is illegitimate, when construing a claim, to whittle away its plain & ordinary meaning, either by borrowing glosses & limitations extracted from the body of the specification, or by excluding from its ambit such embodiments as a person skilled in the art would know to be unsuitable. To do this is not to construe a claim, but to amend it.—*NORTON & GREGORY, LTD. v. JACOBS* (1937), 54 R. P. C. 271, C. A.

688a. —.—.]—*ROSE STREET FOUNDRY & ENGINEERING CO., LTD. v. INDIA RUBBER GUTTA PERCHA & TELEGRAPH WORKS CO., LTD.* (1929), 46 R. P. C. 294, C. A.

*Annotation*:—*Refd. Cincinnati Grinders (Inc.) v. B. S. A. Tools, Ltd.* (1930), 48 R. P. C. 33.

## Part V.—Application for Patent.

695. *Add. Annotation*:—*Refd. Re Von Krogh's Patent* (1929), 49 R. P. C. 417.

700a. —.—.]—*Re I. G. FARBENINDUSTRIE AKTIENGESellschaft APPLICATION FOR A PATENT* (1934), 51 R. P. C. 196.

700b. *Effect of*.]—Samples & indorsements thereon, deposited under Patents & Designs Act, 1907 (c. 29), s. 2 (5), can be relied on in aid of the interpretation of the specification, & as effective prior publication against a subsequent claim.—*NOTES OF OFFICIAL RULINGS* 1928 (B) (1928), 45 R. P. C. App. iv.

704. *Add. Annotation*:—*Refd. Re Farbenindustrie Akt.'s Application* (1928), 46 R. P. C. 271.

709a. *Power to modify forms*.]—The Comptroller may only modify patents forms so as to adapt them for some purpose akin to the purpose for which they are primarily intended.—*Re SALLIES' APPLICATION* (1927), 45 R. P. C. 61.

709b. *Power to divide or antedate application on second application*.]—*Re WINGATE'S PATENT*, No. 724a, *post*.

717. *Add. Annotations*:—*As to* (1) *Consd. Re Farbenindustrie Aktiengesellschaft, Application for a Patent* (No. 307,758) (1933), 50 R. P. C. 249; *Re Kodak, Ltd.'s Application for a Patent* (1936), 53 R. P. C. 276. *Refd. Re Farbenindustrie Akt.'s Application* (1928), 46 R. P. C. 271. *As to* (2) *Refd. Re Wingate's Patent* (1931), 47 T. L. R. 541. *Generally, Refd. Re Johnson & Johnson (Great Britain), Ltd.'s Patent*, [1938] Ch. 283.

724a. *Whether prohibition lies*.]—On Oct. 26, 1928, W. lodged an application & provisional specification for a patent for improvements in folding spectacles. The complete specification was lodged in July, & accepted in Dec. 1929, as No. 322,297. In Feb. 1930, notice of opposition was given by E. & the T.

Optical Co. In Apr. 1930, W. lodged another application with a complete specification, differing only from No. 322,297 in the claims, which were fewer in number, but widened by the omission of certain limiting words. This specification was accepted on Apr. 28, 1930, as No. 328,584. W. then made an application for a division of the patent under r. 13 of the Patents Rules, & the Comptroller allowed it, holding that No. 328,584 should be treated as an application for a patent for an invention excluded by amendment from specification No. 322,297, & should bear date Oct. 26, 1928. The opponents, contending that the Comptroller could not divide or antedate the application, & that his decision, in the circumstances, was *ultra vires* the Patents & Designs Act & the rules thereunder, moved for a writ of prohibition to restrain the Comptroller & W. from proceeding with application No. 328,584:—*Held*: (1) the decision of the Comptroller being in a matter of the administration of the Patent Office & the procedure in granting a patent, was final, subject to an appeal to the Law Officer under the Act, & to directions which might be given by the officer under sect. 74, & prohibition would not lie against the Comptroller or the Law Officer in respect of any act or decision so done or made; (2) the division or antedating of an application for a patent provisionally decided by the Comptroller before opponents have been heard is a matter which can be reopened & the decisions thereon reviewed in opposition proceedings, according to long established practice in the Patent Office, notwithstanding that such questions are not specifically included in the grounds of opposition enumerated in sect. 11 of the Act.—*Re WINGATE'S PATENT*, [1931] 2 Ch. 272; 100 L. J. Ch. 370; 145 L. T. 572; 47 T. L. R. 541; 48 R. P. C. 416.

683 i. *Degree of utility necessary to support patent*.]—*Held*: a definite amount of utility is not required by law to sustain an invention; a slight amount of utility being sufficient. Commercial utility is the very essence of a patent, & a favourable reception by the purchasing public is strong evidence of that degree of utility required by law.—*FRENTICE v. DOMINION RUBBER CO., LTD.*, [1928]

Exch. C. R. 196.—CAN.

### PART IV. SECT. 3, SUB-SECT. 2.

690 i. *Effect of non-user*.]—*ELECTROLYTIC ZINC PROCESS CO. v. FRENCH'S COMPLEX ORE REDUCING CO. OF CANADA, LTD.*, [1927] Exch. C. R. 94; *affd.*, [1930] S. C. R. 462; 4 D. L. R. 902.—CAN.

### PART V. SECT. 5, SUB-SECT. 1.

1 i. —.— *Statement of date*.]—*No power to amend*.]—*Held*: after disclosure made between the parties in conformity with r. 32, an order in chambers should not be made allowing one of the parties to amend its statement of the date of the invention relied on in the action.—*LARKIN-WARREN REFRIGERATING CORPN. v. FRIGIDAIRE CORPN.*, [1932] Ex. C. R. 67.—CAN.

727. For the existing paragraph substitute the following paragraph:—

**Injunction to restrain acceptance—Lawful ground of objection—“Secret processes.”**—Where an injunction had been granted to restrain appct. for a patent from disclosing processes derived from pltf. co., or from doing any act which might cause same to become public or commonly known, & the Comptroller-General refused to undertake when he should receive an application for the acceptance of a complete specification to consider such injunction a “lawful ground of objection” to the acceptance of the complete specification within Patents & Designs Act, 1907 (c. 29), s. 7 (3), objecting to his duty prescribed by the Patent Acts being in any way interfered with by the ct., the ct. granted an injunction restraining the Comptroller-General from accepting the complete specification, as under sect. 9, on such acceptance, the matter would be thrown open to public inspection, the specification being concerned with some of the processes

which, as between pltf. co. & appct., appct. had been restrained from disclosing, & because the Comptroller-General might accept the complete specification on the footing that the injunction against appct. would not constitute a lawful ground of objection within sect. 7 (3). On appeal the S.-G. on behalf of the Comptroller-General undertook that the injunction granted against appct. would be properly considered in deciding whether the specification should be accepted as being something which might constitute “a lawful ground of objection” to such acceptance, & by consent the order against the Comptroller-General was discharged, notice of discontinuance to be served upon him. Appct. was also further restrained from proceeding with his application in addition to the injunction granted against him in the ct. below.—*REX CO. & REX RESEARCH CORPN. v. MUIRHEAD & COMPTROLLER-GENERAL OF PATENTS* (1926), 96 L. J. Ch. 121; 136 L. T. 568; 44 R. P. C. 38, C. A.

*Annotation*:—*Refd.* *Re Manassch Giragos Sevag's Application* (1938), 55 R. P. C. 193.

## Part VI.—Specifications.

736. *Add. Annotation*:—*Refd.* *Kraft, Kraft Cheese Co. (Incorporated) & Kraft Walker Cheese Co. Proprietary, Ltd. v. McAnulty* (1931), 48 R. P. C. 536.
757. *Add. Annotation*:—*Refd.* *Re Bramwell's Patent* (1930), 49 R. P. C. 431.
763. *Add. Annotation*:—*Refd.* *Re Hull's Patent* (1930), 49 R. P. C. 433.
773. *Add. Annotation*:—*Refd.* *Re Dreyfus' Applns.* (1927), 44 R. P. C. 291.
789. *Add. Annotation*:—*Consd.* *Kraft, Kraft Cheese Co. (Incorporated) & Kraft Walker Cheese Co. Proprietary, Ltd. v. McAnulty* (1931), 48 R. P. C. 536.
- 789a. ———.]—*Held*: assuming applts.' contention that a process for the production of a permanently keeping cheese was the main object of the specification was right, the patentee had not fulfilled his promise & shown the way to secure a permanently keeping cheese, even allowing that the patentee used the expression in a commercial sense intelligible to those concerned in the trade; & there was insufficiency in the description of the process to be followed; the patent was invalid.—*KRAFT, KRAFT CHEESE CO. (INCORPORATED) & KRAFT WALKER CHEESE CO. PROPRIETARY, LTD. v. MCANULTY* (1931), 48 R. P. C. 536, P. C.
795. *Add. Annotations*:—*Refd.* *Pope Appliance Corp. v. Spanish River Pulp & Paper Mills*, [1929] A. C. 269; *Re Farbenindustrie (I. G.) A. G.'s Patents* (1930), 47 R. P. C. 289; *British Celanese, Ltd. v. Courtaulds, Ltd.* (1933), 50 R. P. C. 259; *Compagnie Centrale*

*des Emeris et Produits a Polir for Letters Patent No. 343,970* (1933), 52 R. P. C. 167.

- 796a. ———.]—*ROSE STREET FOUNDRY & ENGINEERING CO., LTD. v. INDIA RUBBER GUTTA PERCHA & TELEGRAPH WORKS CO., LTD.* (1929), 46 R. P. C. 294, C. A.

*Annotation*:—*Refd.* *Cincinnati Grinders (Inc.) v. B. S. A. Tools, Ltd.* (1930), 48 R. P. C. 33.

- 796b. ———.]—Pltfs. were owners of letters patent for “improvements in & relating to apparatus for grinding cylindrical bodies.” The machine, the subject of the patent, was known as a centreless grinding machine, since the work to be ground was not supported between centres, but was caused to rotate between the grinding wheel & two other points of support. In pltfs.' embodiment of the invention & in the machine illustrated in the specification, the work rotated between a peripherally acting grinding wheel & a peripherally acting regulating wheel & rested upon a work rest placed between the two wheels. The specification described a theory according to which the machine was said to work. Claim 1 of the specification was for “a method of grinding cylindrical bodies, which consists in supporting a substantially cylindrical body in operative relation to a grinding surface having portions progressively more distant from the surface supporting the cylindrical body, rotating said body by means of a driving member, & in moving said rotating body into contact with more distant portions of said grinding surface as said driving member moves said body relative thereto when said member engages projecting

### PART VI. SECT. 4, SUB-SECT. 1.

*sa. General rules.*—*DE FOREST PHOTOFILM OF CANADA, LTD. v. FAMOUS PLAYERS CANADIAN CORPN., LTD.*, [1931] Ex. C. R. 27; 3 D. L. R. 803.—

### CAN.

*so. Reference in claim to previous claim in same specification.*—*Held*: the inclusion by reference in one claim, of one or more preceding claims, in the specification accompanying an applica-

tion for letters patent for an invention, is permissible under Patent Act.—*A. C. COSSOR, LTD. v. PATENTS COMR.*, [1935] Ex. C. R. 22; 2 D. L. R. 769.—CAN.

held that infringement had not been proved, & that all three patents were invalid, & an order was made for their revocation. Pltfs. appealed against so much of the judgment as affected the validity of one patent, being No. 291,972:—*Held*: the claims, when construed according to their natural meaning, included substances which were undesirable & ineffective for producing the result sought by the patentee, & the patent was bad for want of utility; also, an essential requirement of the patented process had not been disclosed in the specification, though known to the patentee, & the patent was also invalid under sect. 25 (2) (j). The appeal was dismissed.

*Per CUR.*: It is illegitimate, when construing a claim, to whittle away its plain & ordinary meaning, either by borrowing glosses & limitations extracted from the body of the specification, or by excluding from its ambit such embodiments as a person skilled in the art would know to be unsuitable. To do this is not to construe a claim, but to amend it.—*NORTON & GREGORY, LTD. v. JACOBS* (1937), 54 R. P. C. 271, C. A.

**688a.** —[—]*ROSE STREET FOUNDRY & ENGINEERING CO., LTD. v. INDIA RUBBER GUTTA PERCHA & TELEGRAPH WORKS CO., LTD.* (1929), 46 R. P. C. 294, C. A.

*Annotation*:—*Refd. Cincinnati Grinders (Inc.) v. B. S. A. Tools, Ltd.* (1930), 48 R. P. C. 33.

## Part V.—Application for Patent.

**695.** *Add. Annotation*:—*Refd. Re Von Krogh's Patent* (1929), 49 R. P. C. 417.

**700a.** —[—]*Re I. G. FARBENINDUSTRIE AKTIENGESELLSCHAFT APPLICATION FOR A PATENT* (1934), 51 R. P. C. 196.

**700b.** *Effect of.*—Samples & indorsements thereon, deposited under Patents & Designs Act, 1907 (c. 29), s. 2 (5), can be relied on in aid of the interpretation of the specification, & as effective prior publication against a subsequent claim.—*NOTES OF OFFICIAL RULINGS* 1928 (B) (1928), 45 R. P. C. App. iv.

**704.** *Add. Annotation*:—*Refd. Re Farbenindustrie Akt.'s Application* (1928), 46 R. P. C. 271.

**709a.** *Power to modify forms.*—The Comptroller may only modify patents forms so as to adapt them for some purpose akin to the purpose for which they are primarily intended.—*Re SALLES' APPLICATION* (1927), 45 R. P. C. 61.

**709b.** *Power to divide or antedate application on second application.*—*Re WINGATE'S PATENT*, No. 724a, *post*.

**717.** *Add. Annotations*:—*As to* (1) *Consd. Re Farbenindustrie Aktiengesellschaft, Application for a Patent* (No. 307,758) (1933), 50 R. P. C. 249; *Re Kodak, Ltd.'s Application for a Patent* (1936), 53 R. P. C. 276. *Refd. Re Farbenindustrie Akt.'s Application* (1928), 46 R. P. C. 271. *As to* (2) *Refd. Re Wingate's Patent* (1931), 47 T. L. R. 541. *Generally, Refd. Re Johnson & Johnson (Great Britain), Ltd.'s Patent*, [1938] Ch. 283.

**724a.** *Whether prohibition lies.*—On Oct. 26, 1928, W. lodged an application & provisional specification for a patent for improvements in folding spectacles. The complete specification was lodged in July, & accepted in Dec. 1929, as No. 322,297. In Feb. 1930, notice of opposition was given by E. & the T.

Optical Co. In Apr. 1930, W. lodged another application with a complete specification, differing only from No. 322,297 in the claims, which were fewer in number, but widened by the omission of certain limiting words. This specification was accepted on Apr. 28, 1930, as No. 328,584. W. then made an application for a division of the patent under r. 13 of the Patents Rules, & the Comptroller allowed it, holding that No. 328,584 should be treated as an application for a patent for an invention excluded by amendment from specification No. 322,297, & should bear date Oct. 26, 1928. The opponents, contending that the Comptroller could not divide or antedate the application, & that his decision, in the circumstances, was *ultra vires* the Patents & Designs Act & the rules thereunder, moved for a writ of prohibition to restrain the Comptroller & W. from proceeding with application No. 328,584:—*Held*: (1) the decision of the Comptroller being in a matter of the administration of the Patent Office & the procedure in granting a patent, was final, subject to an appeal to the Law Officer under the Act, & to directions which might be given by the officer under sect. 74, & prohibition would not lie against the Comptroller or the Law Officer in respect of any act or decision so done or made; (2) the division or antedating of an application for a patent provisionally decided by the Comptroller before opponents have been heard is a matter which can be reopened & the decisions thereon reviewed in opposition proceedings, according to long established practice in the Patent Office, notwithstanding that such questions are not specifically included in the grounds of opposition enumerated in sect. 11 of the Act.—*Re WINGATE'S PATENT*, [1931] 2 Ch. 272; 100 L. J. Ch. 370; 145 L. T. 572; 47 T. L. R. 541; 48 R. P. C. 416.

**683 i.** *Degree of utility necessary to support patent.*—*Held*: a definite amount of utility is not required by law to sustain an invention; a slight amount of utility being sufficient. Commercial utility is the very essence of a patent, & a favourable reception by the purchasing public is strong evidence of that degree of utility required by law.—*PRENTICE v. DOMINION RUBBER CO., LTD.*, [1928]

Exch. C. R. 196.—*CAN.*

### PART IV. SECT. 3, SUB-SECT. 2.

**690 i.** *Effect of non-user.*—*ELECTROLYTIC ZINC PROCESS CO. v. FRENCH'S COMPLEX ORE REDUCING CO. OF CANADA, LTD.*, [1927] Exch. C. R., 94; *affd.*, [1930] S. C. R. 462; 4 D. L. R. 902.—*CAN.*

### PART V. SECT. 5, SUB-SECT. 1.

**1 i.** —*Statement of date—No power to amend.*—*Held*: after disclosure made between the parties in conformity with r. 32, an order in chambers should not be made allowing one of the parties to amend its statement of the date of the invention relied on in the action.—*LARKIN-WARREN REFRIGERATING CORPN. v. FRIGIDAIRE CORPN.*, [1932] Ex. C. R. 67.—*CAN.*

727. For the existing paragraph substitute the following paragraph:—

**Injunction to restrain acceptance—Lawful ground of objection**—"Secret processes."—Where an injunction had been granted to restrain appct. for a patent from disclosing processes derived from pltf. co., or from doing any act which might cause same to become public or commonly known, & the Comptroller-General refused to undertake when he should receive an application for the acceptance of a complete specification to consider such injunction a "lawful ground of objection" to the acceptance of the complete specification within Patents & Designs Act, 1907 (c. 29), s. 7 (3), objecting to his duty prescribed by the Patent Acts being in any way interfered with by the ct., the ct. granted an injunction restraining the Comptroller-General from accepting the complete specification, as under sect. 9, on such acceptance, the matter would be thrown open to public inspection, the specification being concerned with some of the processes

which, as between pltf. co. & appct., appct. had been restrained from disclosing, & because the Comptroller-General might accept the complete specification on the footing that the injunction against appct. would not constitute a lawful ground of objection within sect. 7 (3). On appeal the S.-G. on behalf of the Comptroller-General undertook that the injunction granted against appct. would be properly considered in deciding whether the specification should be accepted as being something which might constitute "a lawful ground of objection" to such acceptance, & by consent the order against the Comptroller-General was discharged, notice of discontinuance to be served upon him. Appct. was also further restrained from proceeding with his application in addition to the injunction granted against him in the ct. below.—*REX CO. & REX RESEARCH CORPN. v. MUIRHEAD & COMPTROLLER-GENERAL OF PATENTS* (1926), 96 L. J. Ch. 121; 136 L. T. 568; 41 R. P. C. 38, C. A.

*Annotation*:—*Refd.* *Re Manasseh Giragos Sevag's Application* (1938), 55 R. P. C. 193.

## Part VI.—Specifications.

736. *Add. Annotation*:—*Refd.* *Kraft, Kraft Cheese Co. (Incorporated) & Kraft Walker Cheese Co. Proprietary, Ltd. v. McNulty* (1931), 48 R. P. C. 536.
757. *Add. Annotation*:—*Refd.* *Re Bramwell's Patent* (1930), 49 R. P. C. 431.
763. *Add. Annotation*:—*Refd.* *Re Hull's Patent* (1930), 49 R. P. C. 433.
773. *Add. Annotation*:—*Refd.* *Re Dreyfus' Applns.* (1927), 44 R. P. C. 291.
789. *Add. Annotation*:—*Consd.* *Kraft, Kraft Cheese Co. (Incorporated) & Kraft Walker Cheese Co. Proprietary, Ltd. v. McNulty* (1931), 48 R. P. C. 536.
- 789a. —.—.—*Held*: assuming applts.' contention that a process for the production of a permanently keeping cheese was the main object of the specification was right, the patentee had not fulfilled his promise & shown the way to secure a permanently keeping cheese, even allowing that the patentee used the expression in a commercial sense intelligible to those concerned in the trade; & there was insufficiency in the description of the process to be followed; the patent was invalid.—*KRAFT, KRAFT CHEESE CO. (INCORPORATED) & KRAFT WALKER CHEESE CO. PROPRIETARY, LTD. v. MCANULTY* (1931), 48 R. P. C. 536, P. C.
795. *Add. Annotations*:—*Refd.* *Pope Appliance Corp. v. Spanish River Pulp & Paper Mills*, [1929] A. C. 269; *Re Farbenindustrie (I. G.) A. G.'s Patents* (1930), 47 R. P. C. 289; *British Celanese, Ltd. v. Courtaulds, Ltd.* (1933), 50 R. P. C. 259; *Compagnie Centrale*

*des Emeris et Produits a Polir for Letters Patent No. 343,970* (1933), 52 R. P. C. 167.

- 796a. —.—.—*ROSE STREET FOUNDRY & ENGINEERING CO., LTD. v. INDIA RUBBER GUTTA PERCHA & TELEGRAPH WORKS CO., LTD.* (1929), 46 R. P. C. 294, C. A.

*Annotation*:—*Refd.* *Cincinnati Grinders (Inc) v. B. S. A. Tools, Ltd.* (1930), 48 R. P. C. 33

- 796b. —.—.—*Pltfs.* were owners of letters patent for "improvements in & relating to apparatus for grinding cylindrical bodies." The machine, the subject of the patent, was known as a centreless grinding machine, since the work to be ground was not supported between centres, but was caused to rotate between the grinding wheel & two other points of support. In pltfs.' embodiment of the invention & in the machine illustrated in the specification, the work rotated between a peripherally acting grinding wheel & a peripherally acting regulating wheel & rested upon a work rest placed between the two wheels. The specification described a theory according to which the machine was said to work. Claim 1 of the specification was for "a method of grinding cylindrical bodies, which consists in supporting a substantially cylindrical body in operative relation to a grinding surface having portions progressively more distant from the surface supporting the cylindrical body, rotating said body by means of a driving member, & in moving said rotating body into contact with more distant portions of said grinding surface as said driving member moves said body relative thereto when said member engages projecting

### PART VI. SECT. 4, SUB-SECT. 1.

**§4. General rules.**—*DE FOREST PHOTOFILM OF CANADA, LTD. v. FAMOUS PLAYERS CANADIAN CORPN., LTD.*, [1931] Ex. C. R. 27; 3 D. L. R. 803.—

### CAN.

*so. Reference in claim to previous claim in same specification.*—*Held*: the inclusion by reference in one claim, of one or more preceding claims, in the specification accompanying an applica-

tion for letters patent for an invention, is permissible under Patent Act.—*A. C. COSSOR, LTD. v. PATENTS COMR.*, [1935] Ex. C. R. 22; 2 D. L. R. 769. —**CAN.**

irregularities in said body." Centreless grinders using non-peripherally acting wheels either for regulating or grinding were old. Pltfs. brought an action for infringement against defts. who had built a machine with peripherally acting wheels, similar to pltfs.' machine. Defts. disputed the validity of the patent, & also submitted that, as their machine had been sold & supplied in parts & assembled at the works of the purchasers, this did not constitute infringement by them. Defts. counterclaimed for revocation of the patent:—*Held*: it had not been proved that pltfs.' machine worked according to the theory given in the specification; the claims were not limited to peripheral grinding or regulating wheels, but included machines whose grinding or regulating wheels were discs; the "driving member" claimed was a mechanical equivalent of a fixed back rest which was therefore included in the claim; & therefore the claims were anticipated & were invalid for lack of novelty; also that, on a construction of the specification put forward by pltfs., the invention had not been distinctly stated & that it merely consisted in certain, not novel, adjustments of well-known parts of a well-known machine, & if the patent had been valid, the infringement would have been committed by the user who operated the machine in the infringing configuration & not by defts., the sellers of the machine alleged to infringe. The action was therefore dismissed & an order was made for revocation under the counterclaim. Pltfs. appealed:—*Held*: the patent was not limited to the use of peripherally acting wheels & was therefore bad for want of subject-matter & novelty; it was also bad for ambiguity & want of utility; & the specification as drawn was calculated to prevent a workman from using the tools of his trade. The appeal was therefore dismissed.—*CINCINNATI GRINDERS (INC.) v. B. S. A. TOOLS, LTD.* (1930), 48 R. P. C. 33.

*Annotation*:—*Reid*. Lamson Paragon Supply Co., Ltd. v. Carter-Davis, Ltd. (1930), 48 R. P. C. 133.

**796c.** —. ]—In 1919 letters patent were granted in respect of "improvements in the cylinders of internal combustion chambers." Claim 1 was as follows: "In an internal combustion engine in which both the inlet & exhaust valves are disposed in one & the same side space or pocket, the combination with a cylinder whose head is flat & arranged so as to permit only the minimum clearance between it & the piston which is necessary for mechanical reasons, of a valve pocket constituting the combustion chamber or space which is situated at the side of the cylinder & formed with a part which overlaps the cylinder head or bore where is a port whose area is substantially the same as that of the inlet valve port." In 1931 pltfs. commenced an action for infringement of the patent. Defts. denied infringement & alleged that the patent was invalid by reason of lack of novelty, subject-matter, & utility, & by reason of ambiguity & insufficiency of definition:—*Held*: the invention solved a problem which had existed in 1919 by a means new in 1919; the invention did not relate only to the form of the combustion chamber, but had another feature; the patent was novel & had subject-matter; & there was not

sufficient ambiguity in the words "minimum clearance," "port or passage," "substantially the same area," to invalidate the patent; construing the specification as a whole & considering the purpose of the invention the words "area of a port or passage" were sufficiently definite & meant "the minimum cross-sectional area of a passage"; defts.' engine had minimum clearance & the minimum area of its cylinder head port or passage was, though not equal, substantially equal to the area of the inlet valve port; & the patent was valid & had been infringed.—*RICARDO & RICARDO & CO., ENGINEERS (1927), LTD. v. ROOTES, LTD. & HILLMAN MOTOR CAR CO., LTD.* (1933), 51 R. P. C. 35, 92.

**796d.** —. ]—Pltfs. brought an action for infringement of their patent for "Improvements in or relating to apparatus for printing late news in newspaper printing machines." Defts. denied infringement & alleged that the patent was invalid. The words "substantially as hereinbefore described" appeared in the usual way at the end of the claims. The following words also appeared in the specification: "It will be understood that the invention is not limited to the actual construction or to the combination of the features of the construction hereinbefore described as the operations described may be carried out in constructions considerably different without departing from the invention." *BENNETT, J.*, held that the patent was void for ambiguity. Pltfs. appealed:—*Held*: any ambiguity must be resolved in the favour of pltfs. & the restriction of the invention to a particular type of mechanism; the words "substantially as hereinbefore described" merely refer back to the body of the specification & their scope & meaning vary in each particular case; in this case they referred to the whole specification & to each element in the combination but they had not the effect of making the claim one for a principle; the words set out above beginning "it will be understood . . ." though now common in specifications, are obscure in their meaning, are not a description of anything, cannot be imported into the claim by the words "substantially as hereinbefore described," & are not a proper way of claiming a principle. The use of such words is to be avoided.—*CRABTREE & SONS, LTD. v. HOE & CO., LTD.*, [1936] 2 All E. R. 1639; 53 R. P. C. 443, C. A.

**796e.** —. ]—Letters Patent No. 274,162 were granted for "Improvements in Mills for Grinding Paints & other Materials." Claim 1 (as proposed to be amended) was as follows: "1. A grinding mill for paint & like materials having a reciprocating roller & an adjustable grinding block wherein the hopper, feed throat & grinding block are hingedly mounted as a unit to enable the roller & housing surfaces to be cleaned." Pltfs. commenced an action for infringement of the patent. Defts. denied infringement & counterclaimed for the revocation of the patent. Pltfs. applied by notice of motion to amend the specification & a third party opposed the proposed amendments:—*Held*: the amendments were *prima facie* allowable as being by way of disclaimer & explanation

& no conditions other than those imposed by sect. 23 on the ground of delay in applying to amend should be imposed; but that the patent, even if the specification were so amended, would be invalid for want of subject-matter in Claim 1, for want of utility & ambiguity as regards Claim 2, for ambiguity as regards Claim 3, for ambiguity, for want of utility & ambiguity as regards Claim 6, & for want of subject-matter & as being tied to Claims 1, 2 & 3 as regards Claim 9. The patent was ordered to be revoked, the costs of the action & the counterclaim to be paid by plffs. & the motion to amend was also dismissed with costs. A plea of inutility, in the absence of particulars as to which claims it related, applied to each claim & a failure to obtain the result promised by one claim held to constitute inutility invalidating it.—*DRYSDALE & SIDNEY SMITH & BLYTH, LTD. v. DAVEY PAXMAN & Co. (COLCHESTER), LTD. & Re LETTERS PATENT No. 274,162 (1937)*, 55 R. P. C. 95.

**796f.** —[.]—In 1926 Letters Patent No. 287,958 for “Improvements in or relating to circuit arrangements & discharge tubes for amplifying electric oscillations” were granted to H. Wade. Claim 2 was as follows: “A discharge tube having at least three auxiliary electrodes between the cathode & the anode characterised in that auxiliary electrode nearest to the anode is directly connected to the cathode so as to be maintained continuously at the cathode potential.” In accordance with the terms of the settlement of an action for infringement between *Mullard Radio Valve Co., Ltd. v. British Belmont Radio, Ltd.*, the plffs. applied to the High Ct. to amend the specification No. 287,958, *inter alia*, by striking out Claim 2 as above & substituting: “A discharge tube for amplifying electric oscillations comprising a screening grid between the control grid & the anode characterised in that an auxiliary electrode is placed between the screening grid & the anode & next to the latter & is directly connected to the cathode so as to be maintained continuously at the cathode potential whereby the increase of the screening grid current at the expense of the anode current will be substantially avoided.” Four opponents brought in by advertisement of the proposed amendments appeared & opposed the amendments on the grounds (a) that appcts. had abused their monopoly, & (b) that the claims as amended were ambiguous:—*Held*: the amendments were all allowable & the proposed Claim 2 properly defined the monopoly in accordance with the judgments in *Mullard Radio Valve Co., Ltd. v. Philco Radio & Television Corpn. of Great Britain*, 53 R. P. C. 323, & was not ambiguous; but, in the circumstances of the delay in amending to the present form, there should be no right of action in respect of any valve made prior

to the present amendment. The appcts. were ordered to pay the costs of all the opponents. —*MULLARD RADIO VALVE CO., LTD. v. BRITISH BELMONT RADIO, LTD. & JUVILER. Re MULLARD RADIO VALVE CO., LTD.'S PATENT No. 287,958 (1938)*, 55 R. P. C. 197.

**799.** *Add. Annotation*:—*Refd.* No-Fumo, Ltd. v. Frank Pitchford & Co. (1935), 52 R. P. C. 231.

**804.** *Add. Annotations*:—*Consd.* *Hanks v. Coombes* (1928), 45 R. P. C. 237; *Rose Street Foundry & Engineering Co. v. India Rubber Gutta Percha & Telegraph Works Co.* (1929), 46 R. P. C. 294; *Crabtree & Sons, Ltd. v. Hoe & Co.* (1935), 52 R. P. C. 367. *Refd.* *Submarine Signal Co. v. Henry Hughes & Son, Ltd.* (1931), 49 R. P. C. 119; *British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd.* (1932), 40 R. P. C. 495; *British Celanese, Ltd. v. Courtaulds, Ltd.* (1933), 50 R. P. C. 259; *Marconi's Wireless Telegraph Co. v. Philips Lamps, Ltd.* (1933), 50 R. P. C. 287; *Mullard Radio Valve Co. v. Philco Radio & Television Corpn. of Great Britain, Ltd.*, [1936] 2 All E. R. 920.

**804a.** *As to apparatus*.]—*HANKS v. COOMBES*, No. 308b, *ante*.

**810a.** —[.]—*Re CHEMISCHE FABRIK AUF ACTIEN (VORM E. SCHERING) PATENT* (1928), 45 R. P. C. 403.

**810b** —[.]—The employment in claims of such terms as “known methods” & “general methods” leads to ambiguity & doubt.—*Re BRITISH CELANESE, LTD., ELLIS & BROWN. APPLICATION FOR A PATENT* (1934), 51 R. P. C. 192.

**814.** *Add. Annotation*:—*Refd.* *Sharp & Dohme Inc. v. Boots Pure Drug Co.* (1928), 45 R. P. C. 153.

**833.** *Add. Annotation*:—*As to* (1) *Refd.* *Norton & Gregory, Ltd. v. Jacobs* (1936), 54 R. P. C. 58.

**837a.** —[.]—Letters Patent were granted for an invention of “Improvements in thermionic valve amplifying systems.” Plffs. commenced an action for infringement of this patent & claimed the usual relief. Defts. denied infringement & alleged that the patent was invalid by reason of prior publication & want of subject-matter & they counterclaimed for the revocation of the patent. Claim 1 of the complete specification of the patent was as follows: “For a sound-reproducing device having operating & field windings, an amplifying system including a thermionic valve, the plate circuit of which is supplied from a source of alternating current & a rectifier, in which the field winding of the sound-reproducing device is employed to smooth out fluctuation in the rectified current”:—*Held*: claim 1 was limited to the result to be obtained, such

#### PART VI. SECT. 4, SUB-SECT. 2.—A. (b).

**q1.** —[*Quantities of ingredients*.]—*MICO PRODUCTS, LTD. v. ACETOL PRODUCTS, INC.*, [1930] Ex. C. R. 64; 3 D. L. R. 190.—CAN.

**sm.** *As to process*.]—The specification of a patent for a process must point out clearly the method by which the process is to be performed so as to

accomplish the object in view.—*ELECTROLYTIC ZINC PROCESS CO. v. FRENCH'S COMPLEX ORE REDUCING CO. OF CANADA, LTD.*, [1927] Ex. C. R. 94.—CAN.

#### PART VI. SECT. 4, SUB-SECT. 2.—B. (a).

**sq.** *Matters outside limits at time of invention*.]—No patent is “defective or inoperative” within the meaning of

the Act, by reason of its failure to describe & claim subject-matter outside the limits of that invention, as conceived or perceived by the inventor, at the time of his invention.—*NORTHERN ELECTRIC CO., LTD. & WESTERN ELECTRIC CO. v. PHOTO SOUND CORPN. & PERKINS*, [1936] Ex. C. R. 75; 2 D. L. R. 711; *affd.* [1936] S. O. R. 649; 4 D. L. R. 657.—CAN.



limitation being implicit in the specification itself, the claim so construed was valid being neither too wide nor too vague, the invention was not obvious & the patent was therefore valid & it had been infringed. The counterclaim was dismissed with costs. A certificate of validity was granted. No order for delivery up or destruction was made. An injunction was granted, but the order was stayed pending an appeal on an undertaking being given by defts. to keep an account.—*BRITISH THOMSON-HOUSTON CO., LTD., MARCONI'S WIRELESS TELEGRAPH CO., LTD., & ELECTRIC & MUSICAL INDUSTRIES, LTD. v. GUILDFORD RADIO STORES & E. K. COLE, LTD.* (1937), 55 R. P. C. 71.

- 842a.** —.—.]—The practice of the Comptroller-General in opposition proceedings under sect. 11 of Patents & Designs Acts, 1907 to 1932, & proceedings for revocation under sect. 26 of taking into consideration want of subject-matter should cease. The matter is only proper for consideration in proceedings for revocation under sect. 25.

The power of the Comptroller under sect. 26 to require amendment of a specification by "disclaimer, correction or explanation" is subject to the limitation imposed by sect. 21 (6) that "No amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by the specification as it stood before the amendment."

A co. applied to the Comptroller, under sect. 26, for revocation of a patent granted to patentees for "Improvements in or relating to waterproof fabrics & the production thereof" on the ground (amongst others) that the nature of the invention or the manner in which it was to be performed had not been fairly or sufficiently described. The patentees sought, if necessary, to amend the specification in two particulars. The Comptroller made an order revoking the patent & *LUXMOORE, J.*, dismissed an appeal from this decision:—*Held*: by the Ct. of Appeal, the specification was bad from insufficiency as there were two mutually contradictory indications as to the nature of the waterproofing material which would not be remedied by the suggested amendment. *Re JOHNSON & JOHNSON (GREAT BRITAIN), LTD.'S LETTERS PATENT* No. 387,125, [1938] Ch. 283; [1937] 4 All E. R. 561; 107 L. J. Ch. 113; 158 L. T. 151; 54 T. L. R. 203; 82 Sol. Jo. 13; 55 R. P. C. 4, C. A.

- 843.** *Add. Annotation*:—*Refd. Re Chemische Fabrik auf Actien (Vorm E. Schering) Patent* (1928), 45 R. P. C. 403.
- 868.** *Add. Annotation*:—*Generally, Consd. No-Fume, Ltd. v. Frank Pitchford & Co.* (1935), 52 R. P. C. 231.
- 886.** *Add. Annotation*:—*Consd. No-Fume, Ltd. v. Frank Pitchford & Co.* (1935), 52 R. P. C. 231.
- 894a.** *Suitable drawings—What are.*—*Re STANDARD TELEPHONES & CABLES, LTD.'S APPLICATION* (1928), 46 R. P. C. 183.

**896a.** —.—.]—In 1930 letters patent were granted in respect of "an improved hair curler." Claim 1 was as follows:—"An improved hair curler of the kind referred to provided with a pressure balancing elastic cord on the opposite side of the body to the gripping cord, substantially as herein described." In 1932 plffs. commenced an action for infringement of the patent. Defts. denied infringement & alleged that the patent was invalid by reason of lack of novelty, subject-matter & utility & by reason of false suggestion of effects & advantages contained in the specification:—*Held*: the patent was invalid by reason of false suggestion & want of subject-matter, but had the patent been valid it would have been infringed. The action was dismissed with costs, save so far as they had been increased by the issue of infringement & a certificate was granted as to the particulars of objections.—*AKERROYD v. STRANGE* (1932), 50 R. P. C. 23.

**897a.** *Invalid claim knowingly included—Bar to right to amend.*—*V. D., LTD. v. BOSTON DEEP SEA FISHING & ICE CO., LTD., Re VIGNERON DAHL ET CIE PETITION FOR REVOCATION OF LETTERS PATENT, Re VIGNERON'S APPLICATION FOR LETTERS PATENT* (No. 175,824), No. 604a, *ante*.

**910.** *Add. Annotations*:—*As to* (3) *Refd. Boyce v. Morris Motors* (1927), 44 R. P. C. 105; *Laurence Scott & Electromotors, Ltd. v. General Electric Co., Ltd.* (1938), 55 R. P. C. 233. *Generally, Refd. Parkes Samuel & Co. v. Cocker Bros.* (1929), 46 R. P. C. 241.

**918.** *Add. Annotation*:—*Refd. Mellor v. Beardmore* (1927), 44 R. P. C. 175.

**921.** *Add. Annotations*:—*As to* (1) *Consd. British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd.* (1932), 49 R. P. C. 495; *British Celanese, Ltd. v. Courtaulds, Ltd.* (1933), 50 R. P. C. 259. *Refd. Mellor v. Beardmore* (1927), 44 R. P. C. 175; *Sharp & Dohme Inc. v. Boots Pure Drug Co.* (1928), 45 R. P. C. 153; *Re Simon-Carves & Robinson's Patent* (1928), 45 R. P. C. 407.

**953.** *Add. Annotation*:—*Refd. Re Adamson (Daniel) & Co. & Kerfoot Patent* 353,087 (1932), 50 R. P. C. 171.

**954a.** *Opponents' specification.*—*Re BRITISH CELANESE, LTD., HENRY DREYFUS, & CLIFFORD IVAN HANEY'S APPLICATION* (1933), 50 R. P. C. 247.

**954b.** *Reference with disclaimer—Form of.*—If a specific reference is inserted in a specification followed by a disclaimer, the disclaimer should state as clearly as possible the precise matter disclaimed.—*Re SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC PATENT* (No. 340,445) (1933), 50 R. P. C. 230.

**954c.** *Proceedings under section 11—Statutory reference—No power to insert.*—*Re DREYFUS APPLICATION FOR A PATENT* (No. 285,968) (1935), 52 R. P. C. 299.

**969.** *Add. Annotation*:—*Generally, Refd. British Celanese, Ltd. v. Courtaulds, Ltd.* (1933), 50 R. P. C. 259.

#### PART VI. SECT. 4, SUB-SECT. 4.

**955 i.** *Whether necessary to distinguish novelty or improvement—General rule.*—A patentee, in a patent for an

improvement on a known device, must not throw his net so wide as to omit to disclose honestly what belongs to the prior art as distinct from his new

claim.—*BERGON v. DE KERMOR ELECTRIC HEATING CO., LTD.*, [1927] 3 D. L. R. 99; [1927] Exch. C. R. 181.—*CAN.*

- 973. Add. Annotations :—***Generally, Refd. Re Dewrance Patent* (1930), 49 R. P. C. 424; *Marconi's Wireless Telegraph Co. v. Philips Lamps, Ltd.* (1933), 50 R. P. C. 287.
- 981a. Effect of disconformity with convention document.]—***Re MANASSEH GIRAGOS SEVAG'S APPLICATION* (1938), 55 R. P. C. 193.
- 996. Add. Annotations :—***Apld. Hanks v. Coombes* (1928), 45 R. P. C. 237. *Consd. Rose Street Foundry & Engineering Co. v. India Rubber Gutta Percha & Telegraph Works Co.* (1929), 46 R. P. C. 294; *British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd.* (1932), 49 R. P. C. 495; *British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd.* (1934), 51 R. P. C. 254; *Re Application for Compagnie Centrale des Emeris et Produits a Polir for Letters Patent No. 313,970* (1933), 52 R. P. C. 167; *Crabtree & Sons, Ltd. v. Hoe & Co.* (1935), 52 R. P. C. 367; *Mullard Radio Valve Co. v. Philco Radio & Television Corp'n. of Great Britain, Ltd.*, [1936] 2 All E. R. 920. *Apld. Electrical & Musical Industries, Ltd. & Boonton Research Corp'n., Ltd. v. Lissen, Ltd.* (1937), 54 R. P. C. 307. *Refd. Re Farbenindustrie (I. G.) A. G.'s Patents* (1930), 47 R. P. C. 289; *British Celanese, Ltd. v. Courtaulds, Ltd.* (1933), 50 R. P. C. 259; *Marconi's Wireless Telegraph Co. v. Philips Lamps, Ltd.* (1933), 50 R. P. C. 287.
- 1000. Add. Annotations :—***Refd. R. C. A. Telephone, Ltd. v. Gaumont-British Picture Corp'n., Ltd. & British Acoustic Films, Ltd.* (1935), 52 R. P. C. 206; *Crabtree & Sons, Ltd. v. Hoe & Co.*, [1936] 2 All E. R. 1639.
- 1002. Add. Annotations :—***Consd. R. C. A. Telephone, Ltd. v. Gaumont-British Picture Corp'n., Ltd. & British Acoustic Films, Ltd.* (1935), 53 R. P. C. 167. *Refd. R. C. A. Telephone, Ltd. v. Gaumont-British Picture Corp'n., Ltd. & British Acoustic Films, Ltd.* (1935), 52 R. P. C. 206.
- 1013a. —.**—*Re GILL'S APPLICATION* (1935), 54 R. P. C. 119.
- 1022. Add. Annotation :—***As to* (1) *Refd. Mullard Radio Valve Co., Ltd. v. Philco Radio & Television Corp'n. of Great Britain, Ltd.* (1935), 52 R. P. C. 261.
- 1028. Add. Annotation :—***Consd. No-Fume, Ltd. v. Frank Pitchford & Co.* (1935), 52 R. P. C. 231.
- 1040. Add. Annotations :—***Consd. Rose Street Foundry & Engineering Co. v. India Rubber Gutta Percha & Telegraph Works Co.* (1929), 46 R. P. C. 294; *Mullard Radio Valve Co., Ltd. v. Philco Radio & Television Corp'n. of Great Britain, Ltd.* (1935), 52 R. P. C. 261. *Refd. British Hartford-Fairmont Syndicate, Ltd. v. Jackson Bros. (Knottingley), Ltd.* (1932), 49 R. P. C. 495; *Marconi's Wireless Telegraph Co. v. Philips Lamps, Ltd.* (1933), 50 R. P. C. 287.
- 1055. Add. Citation :—***affd.*, 24 R. P. C. 33, C. A.
- 1081. Add. Annotation :—***Refd. Fuel Economy Co. v. Murray*, [1930] 2 Ch. 93.
- 1093. Add. Annotation :—***Consd. British Celanese, Ltd. v. Courtaulds, Ltd.* (1933), 50 R. P. C. 63.
- 1111a. —.**—*Claim 1 of a patent was as follows : "In an amplifier circuit including an electric discharge tube wherein alternating current*

**PART VI. SECT. 5, SUB-SECT. 1.**

989 i. *Necessity for claim.*].—(1) A patentee must define & limit with precision what he claims to have invented, & everything not clearly claimed becomes *publici juris*.

(2) A patentee must clearly set forth the various steps in a process claimed, & if designedly or unskillfully he makes it ambiguous, vague or indefinite, the patent is bad.—ELECTROLYTIC ZINC PROCESS CO. v. FRENCH'S COMPLEX ORE REDUCING CO. OF CANADA, LTD., [1927] Exch. C. R. 94; *aff'd*, [1930] S.C. R. 462; 4 D. L. R. 902.—CAN.

989 ii. —.]—Anything disclosed in the specifications of a patent, & for which no claim is made, becomes *publici juris*.—BERGEON V. DE KERMOR ELECTRIC HEATING CO., LTD., [1927] 3 D. L. R. 99; [1927] Exch. C. R. 181.—CAN.

992 I. *Necessity for clear statement.*—ELECTROLYTIC ZINC PROCESS CO. v. FRENCH'S COMPLEX ORE REDUCING CO. OF CANADA, LTD., No. 9891 *ante*.—CAN.

1. *Failure to claim advisable addition as necessary element of invention.*—Where in the specification in a patent for an oven the patentee states that a certain device or addition is advisable or preferable, but does not claim it as a necessary element of the invention, any oven so constructed as to represent the invention patented, but without such additional device, will be an infringement of the patent. —*SIMET-SOLVAY CO. v. COMR. OF PATENTS*, [1927] 3 D. L. R. 385; [1927] Exch. C. R. 218; *affd.*, [1929] 4 D. L. R. 1081; S. C. R. 172.—**CAN.**

**PART VI. SECT. 5, SUB-SECT. 2.**

**sp.** *Substance intended for food or medicine.*—Applt., applied for a patent.

for medical or therapeutic substances prepared by chemical processes described in the specification. The Com. of Patents rejected the claims made by appt. on the ground that it is necessary that the process be disclosed clearly & completely in the claims & that the product claims be restricted to the product when prepared or produced by such process: *Held*: there cannot be a reference in a claim to the specification in the case of inventions relating to substances prepared or produced by chemical processes & intended for food or medicine. - WINTHROP CHEMICAL CO. INCORPORATED v. COMR. OF PATENTS, [1937] Ex. C. R. 137; [1938] 1 D. L. R. 120. -- CAN.

**PART VI. SECT. 6, SUB-SECT. 1.—A.**

**1057 1. General rule—Question for judge.**—In an action for infringement of a patent, not only is the construction of the specification exclusively within the province of the ct., & not within that of the jury or expert witnesses, but it is also for the ct. a question of law.—WESTERN ELECTRIC CO., INCORPORATED v. NORTHERN ELECTRIC CO. v. BALDWIN INTERNATIONAL RADIO OF CANADA, [1934] S. C. R. 570; 4 D. L. R. 129.—CAN.

1059 I. — — *Identity of two inventions.*—*Held*: the construction of the language of the specification of a patent is a question of law for the ct., & pltf. co.'s specification covered not merely the precise mechanism described, but the attainment of a novel result at which, according to the arbitrator's findings, deft.'s machine was designed to arrive by means of a process substantially equivalent to that disclosed in pltf. co.'s specification, such findings in consequence establish-

ing what is in law an infringement of  
 pltf. co.'s patent.—**FARMERS' MILKING  
 MACHINE CO., LTD. v. KNAPP**, [1928]  
 N. Z. L. R. 501.—**N.Z.**

**PART VI. SECT. 6, SUB-SECT. 2.—B**

**1090 I. General rule.** 1.—The claims at the end of the specification in a patent must be regarded as definitely determining the scope of the patent monopoly, having regard to the due & proper construction of the expressions they contain. They must be construed in the light of the rest of the specification; that is to say, the specification must be considered in order to assist in comprehending & construing the meaning—and possibly the special meaning—in which the words or the expressions contained in the claims are used; but, on the issue either of validity or of infringement, the criterion must be determined according to the scope of the monopoly as expressed in the claims (though it is not necessary, to justify a holding of infringement, that the infringing article be found identically, or in every respect, the same as the patented article; it is sufficient if the infringer has borrowed the substance or spirit of the invention as it can be ascertained from the claims, except in details which could be varied without detriment to the successful working of it).—SMITH INCUBATOR CO. v. SEILING, [1937] S. C. R. 251; 2 D. L. R. 701.—CAN.

**PART VI. SECT. 6, SUB-SECT. 2.—C.**

1105 1. *General rule.*—The language in a patent should be liberally construed with a view to maintaining its validity.—*DAVIS LOG & RAFT PATENTS Co. v. GATHELS* (B. C.), [1927] 4 D. L. R. 96; [1927] 2 W. W. R. 753.—**CAN.**

energy is relayed through the control action of a grid electrode upon an electron current in the vacuous space of the tube, the method of adjusting the transmission through said amplifier which comprises the steps of controlling by different amounts the portions of said electron stream flowing through different regions of said vacuous space by a special design of the tube electrodes, impressing upon said control grid a steady polarising voltage & adjusting said polarising voltage to a value substantially different from that at which the total electron current falls to zero." Claim 2 & succeeding claims covered other aspects of the invention described in claim 1. The question was whether this claim was a claim in respect of the use of the valve for amplification or a claim for a method of using the valve according to the strength of the signals to be received. If the former was the proper construction, a similar valve had been previously published in prior specifications, though it was intended to be used for quite a different purpose & the claim was therefore lacking in subject-matter. The original patent in the present case had been granted in the United States of America, & it was alleged that there was disconformity between the English & American claims:—*Held*: (LORD ATKIN and LORD PORTER dissenting): (1) the claim, upon its true construction, was merely a claim for the use of the valve for amplification, & was invalid for anticipation; (2) upon the facts, there was disconformity between the English & American claims; (3) (*per* LORD ATKIN, LORD RUSSELL of KILLOWEN dissenting) the words in the grant of the patent "shall be construed in the most beneficial sense for the advantage of the said patentee" are not a mere conventional form of royal graciousness, but enforce a liberal construction in favour of the patentee; (4) (*per* LORD WRIGHT) upon a question of disconformity, the doctrine of legitimate development cannot be invoked, & the grant must be confined to the claim for which protection was applied for in a foreign application; (5) (*per* LORD RUSSELL of KILLOWEN & LORD WRIGHT) the monopoly claimed must be stated clearly & precisely in the claims. It is not permissible to change a claim which by its own language is a claim for one subject-matter into a claim for another subject-matter by means of a reference to some language used in the body of the specification.—*ELECTRIC & MUSICAL INDUSTRIES, LTD. v. JASSEN, LTD.*, [1938] 4 All E. R. 221, H. L.

1127. *Add. Annotation*:—*Refd.* Gibson v. Cossor, Ltd. (1934), 51 R. P. C. 375.

1134. *Add. Annotation*:—*Refd.* No-Fume, Ltd. v. Frank Pitchford & Co. (1935), 52 R. P. C. 231.

1168a. — Jurisdiction of Appeal Tribunal to

strike out.]—In one application, where a reference previously inserted in the specification under sect. 8 (2) of the Acts was left in by the Assistant-Comptroller, his order was varied by the Appeal Tribunal, which directed such reference to be struck out.—*Re RUTH-ALDO CO. (INCORPORATED) APPLICATIONS FOR PATENTS* (Nos. 282,788, 303,135 & 305,096) (1933), 50 R. P. C. 253.

1178. *Add. Annotations*:—*Consd.* *Re* Farbenindustrie (I. G.) A. G.'s Patents (1930), 47 R. P. C. 289. *Refd.* Mullard Radio Valve Co. v. British Belmont Radio, Ltd. & Juviler (1938), 55 R. P. C. 197.

1182a. — As to time & mode of hearing.]—*Held*: by the Ct. of Appeal, the appeal must be dismissed with costs as the matter was within the discretion of the judge.—*BRITISH CELANESE, LTD. v. COURTAULDS, LTD.* (1932), 49 R. P. C. 345, C. A.

1199. *Add. Annotation*:—*Refd.* *Re* Kirk's Specification (1929), 49 R. P. C. 412.

1199a. Two applications—Practice.]—Where, in an action, there were two separate motions for leave to amend the specification, all the proposed amendments were directed to be included in the second notice of motion, & an order was made allowing plffs. to proceed with the application for leave to amend, & that the application should come on with the trial of the action & counterclaim. But, *semble*, the hearing of such motions with the trial may not usually be convenient.—*BRITISH ACOUSTIC FILMS, LTD. v. NETTLEFOLD PRODUCTIONS* (1935), 52 R. P. C. 296.

1205a. — — — Order of Court of Appeal in action for infringement.]—*DOUGLAS PACKING CO. (INCORPORATED), DOUGLAS PECTIN CORPN. & POSTUM CO. (INCORPORATED) v. EVANS & CO. (HEREFORD & DEVON), LTD.* (1929), 46 R. P. C. 493, C. A.

1205b. Before fiat of Attorney-General obtained or petition presented—After notice of intended proceedings & receipt of draft petition & particulars of objection.]—*Re* WESTERN ELECTRIC CO., LTD. LETTERS PATENT NO. 195,589 (1932), 50 R. P. C. 59.

1208a. — — —.]—In 1927 a patent was granted in respect of "improvements in or connected with galvanic batteries," & in 1928 a patent was granted in respect of improvements in or relating to boxes or containers for electrical accumulators." Plffs. brought an action for infringement of the patents, & defts. counterclaimed for the patents to be revoked. Plffs. applied under sect. 22 of Patents & Designs Acts, 1907–1932, for leave to amend the specification of the second patent by way of disclaimer, correction or explanation. Leave was given to proceed, the form of the order being similar, with one addition, to that made in *N. V. Hollandsche Glas-en-Metaalbank v. Rockware Glass Syndicate, Ltd.* (1931), 48

# PART VI. SECT. 7, SUB-SECT. 2.—B.

sa. To sanction amendment notwithstanding action for infringement or revocation.]—When an application has been made under sect. 71 of Patents Act, 1903–1921, of Australia, to amend a complete specification, & afterwards an action for infringement, or for revocation, is commenced, sects. 80 & 81 of the Act do not preclude the ct. which has seisin of the application

from permitting a modification of the amendments proposed & from sanctioning the modified amendments. After the High Ct. of Australia had affirmed an order by which a patentee's application under sect. 71 had been dismissed upon the ground that the amendments, contrary to sect. 78, would make the invention substantially different from that originally claimed, proceedings were commenced for revocation of the patent. Upon appeal to the Privy

Council the patentee was allowed to modify the amendments proposed, but the Board, not being satisfied that the amendments even as modified were permissible under sect. 78 except as to certain untested items, affirmed the judgment of the High Ct. subject to allowing the untested amendments.—*COWPER (N. L.) v. PAPER SACKS PROPRIETARY, LTD.*, [1932] A. C. 709; 101 L. J. P. C. 165; 148 L. T. 27.—AUS.

R. P. C. 181.—*ROWLAND EDWARDS & Co., LTD. v. THREE STAR ACCUMULATORS, LTD.* (1933), 51 R. P. C. 23.

1209. *Add. Annotation:—Refd. Re Keystone Knitting Mills Trade Mk.* (1928), 97 L. J. Ch. 316.

1212. *Add. Annotation:—Refd. Sharpe & Dohme Inc. v. Boots Pure Drug Co.* (1927), 44 R. P. C. 367.

1213a. ———.—[—]—Letters patent were granted in 1916 for a "method & apparatus for separating quantities of molten glass or like material from mass." Claim 1 was as follows: "The method of delivering charges of viscous glass from a viscous mass thereof which consists in producing by pre-forming a charge of glass of such form & dimensions & so related to the condition under which it is to be deposited that it will not fold, lap or coil when so deposited, & depositing it in such a manner that it will not fold, lap or coil." After commencing an action for infringement, *ptf's.* moved for leave to amend the specification pursuant to sect. 22 of Patents & Designs Acts, 1907–28, but deleting some of the claims & certain optional alternatives, & by incorporating other consequential amendments. *Defts.* contended that the amended form of one claim, which was appendant upon a claim which the amendment sought to delete, was inadmissible:—*Held:* leave be granted to amend the specification by deleting the claims desired, appendant claim to have the whole of the claim to which it was appendant incorporated in it, & by deleting the optional alternatives as asked for; the costs of the motion & the costs of & occasioned by such amendments of the pleadings as were necessitated by the amendment of the specification to be *defts.* in any event.—*HOLLANDSCHE (N. V.) GLAS-EN METAALBANK v. ROCKWARE GLASS SYNDICATE, LTD.* (1931), 48 R. P. C. 425.

1213b. ———.—[—]—In 1931 letters patent were granted in respect of "Improvements in & relating to the recording of sound on films." The first claim was as follows (amendments allowed in the present proceedings being included): "A method of producing a photographic sound record of the varying width constant density type, in which a beam of light is passed through a triangular & rectangular slit in that order on to a moving film to form thereon a transversely disposed narrow strip of light & in which the beam of light is caused to vibrate in the direction of movement of the film relatively to the said slit in a manner depending upon both the variations in the form of the sound waves & upon the intensity of the sound so that the mean width of the exposed area of the sound track is reduced as the intensity of the sound decreases." In 1933 *ptf's.* commenced an action for infringement. Subsequently as a result of amendments of the defence, *ptf's.* twice gave notice of motion to amend the patent & it was ordered that the amendments proposed in the first motion should be incorporated in the second motion, & that that motion should be heard at the trial of the action. *Defts.* in their pleadings denied infringement, but at the trial admitted it, if the patent was valid, but alleged that the patent was invalid by reason of

want of novelty, want of subject matter & of ambiguity:—*Held:* (1) the amendments proposed (with certain consequential amendments not advertised) should be allowed, so as to exclude certain alternatives that were not useful. The amendments included certain alterations to the claims which were held to be by way of explanation, & not to alter the scope of the invention on the true construction of the original specification. An objection of want of skill & knowledge not sustained. But observed that, in the majority of cases, it is more convenient to deal with an application to amend *ptf's.* specification before the trial of an action for infringement; (2) the amended patent was valid as a combination of items of public knowledge, & (infringement being admitted) an injunction & order for delivery up were granted, but no damages prior to the date of judgment (without prejudice however to the date from which damages might accrue in another pending action); (3) publication in a Journal, even of wide circulation in the art, did not constitute common general knowledge, in the absence of evidence, not merely of reading, but of acceptance generally by those engaged in the art, & such knowledge is difficult to attribute when there has been no user. *Defts.* were ordered to pay the costs of the action & the counterclaim, *ptf's.* to pay the costs of the motion to amend with a set off. A certificate of validity of the patent was granted.

A stay of the order for the injunction & delivery up was allowed, pending appeal, in the special commercial circumstances of the case & *ptf's.* not objecting & *defts.* undertaking to keep on account.—*BRITISH ACOUSTIC FILMS, LTD., POULSEN & PETERSEN v. NETTLEFOLD PRODUCTIONS* (1935), 53 R. P. C. 221; *on appeal* (1937), 54 R. P. C. 267, C. A.

1213c. ———.—[—]—*Effect of delay.*—Letters patent No. 303,690 were granted in 1928 in respect of "improvements in or relating to boxes or containers for electrical accumulators." Claim 1 was as follows: "An electric cell having a liquid electrolyte & a gas-venting device adapted to prevent the escape of electrolyte, wherein a space sufficient to receive all the electrolyte is provided between the plates & one of the outer walls of the cell, the arrangement being such that the internal opening to the venting device is above the level of the electrolyte when in the space when said outer wall is lowermost, & wherein the plates can be entirely covered with electrolyte when said outer wall is either uppermost or on one side of the cell." *Ptf's.* were the proprietors of the patent, & also of patent No. 295,516, of earlier date & being a concurrent grant, in respect of "improvements in or connected with galvanic "batteries." After commencing an action for infringement of the patents, *ptf's.*, moved for leave to amend the specification of patent No. 303,690 under sect. 22 of Patents & Designs Acts, 1907–1932, by deleting Claim 1 & inserting a disclaimer of the construction the subject of the earlier patent, & making other consequential amendments. *Defts.* contended that Claim 2 was substantially the same as Claim 1 & ought, therefore, to be deleted if Claim 1 were dropped, & that the proposed

amendments would result in ambiguity:—*Held*: leave be granted to amend the specification in the manner proposed, with some modification of the form of the disclaimer, but that having regard to the delay of pl'tfs. in making the application they should be precluded from claiming damages from defts. in respect of infringements committed prior to the date of the order; the costs of the motion & the costs of all necessary amendments of the pleadings & the costs thrown away to be paid by pl'tfs. in any event.—*ROWLAND EDWARDS & Co., LTD. v. THREE STAR ACCUMULATORS, LTD.* (1934), 51 R. P. C. 370.

**1219a. Extension of time—Appeal to wrong court.**—An application was made to the Comptroller-General of Patents under sect. 21 to amend a patent specification. That application was opposed & the opponents applied to the Comptroller-General for an order for discovery of certain documents. The Comptroller-General by his decision dismissed that application & made no order. Thereupon the opponents gave notice of appeal from that decision to the Patents Appeal Tribunal. It was held that the Patents Appeal Tribunal had no jurisdiction to hear the appeal. The opponents then filed a petition to the High Ct. under R. S. C., Ord. 53A, r. 5 (a), & they sought leave to present the petition out of time:—*Held*: time for presenting such a petition could only be extended in "special circumstances," that the circumstances were not "special" & the leave sought was refused.—*Re WESTERN ELECTRIC CO., LTD. PATENT NO. 259,664* (1935), 52 R. P. C. 364.

**1219b. Whether tried as preliminary issue—Proceedings for revocation pending.**—Letters Patent dated May 7, 1932, were granted to N. & others in respect of "Improvements in or relating to Hurricane Lanterns."

On Feb. 20, 1936, a petition for revocation of the patent was presented. The patentees applied by notice of motion to amend the specification of the patent. *EVE, J.*, directed the motion to be tried as a preliminary issue upon affidavit evidence; & on Mar. 4, 1937, it was heard by *CLAUSON, J.*, who refused the application except that certain mistakes & clerical errors in the specification were allowed to be corrected. App'cts. appealed:—*Held*: as a general rule it was not convenient to have amendment proceedings tried as a preliminary issue where a petition for revocation is pending, & in the circumstances of a dispute having arisen as to the facts of the prior art, the order of *EVE, J.*, directing the motion for amendment to be tried as a preliminary issue would be reversed & the order of *CLAUSON, J.*, should be discharged, save in so far as the latter allowed amendment of certain clerical errors, & the costs would be costs in the motion.—*Re NIER'S PATENT* (1937), 55 R. P. C. 1, C. A.

**1233. Add. Annotation:—***Refd. Re Kirk's Specification* (1929), 49 R. P. C. 412.

**1236. Add. Annotation:—***Refd. Re Kirk's Specification* (1929), 49 R. P. C. 412.

**1242. Add. Annotation:—***Refd. Re Eveno's Patent*, [1932] 2 Ch. 167.

**1242a. —**—[In 1927, letters patent were granted in respect of "Improvements in radio

receiving systems." Claim 1 was as follows: "A high frequency signal receiving system, including an amplifying valve & a detector, in which the direct current passing through the detector controls the mean potential between two of the electrodes of the amplifying valve, so as to regulate the sensitivity of the amplifier in accordance with the strength of the high frequency input oscillations." In 1934, *M. W. T. Co., Ltd. & E. M. I., Ltd.* applied for leave to amend the specifications by (*inter alia*) correcting a misdirection concerning the substitution of an electrical circuit shown in Figure 3 for a part of the electrical circuit shown in Figure 1. The application was opposed by *M. R. V. Co., Ltd.* The Superintending Examiner, acting for the Comptroller, disallowed the principal amendments sought & *M. W. T. Co., Ltd. & E. M. I., Ltd.* petitioned the ct. by way of appeal:—*Held*: the mistake sought to be corrected by amendment was a clear misdescription; the correction of a misdescription was not necessarily unallowable, but each case must depend upon its own facts; the specification must be read as addressed to persons reasonably skilled in the art; here the proposed amendments would not make the invention substantially different from that originally claimed & described & they were not objectionable. Further evidence having been admitted it was held, that the origin of the mistake had been properly explained & that the delay in discovering it had been properly accounted for. The amendments sought were allowed, but in the circumstances petitioners were ordered to pay the costs.—*Re BRITISH THOMSON-HOUSTON CO., LTD.'S PATENT* (No. 283,120) (1935), 53 R. P. C. 255.

*Annotation: Refd. Mullard Radio Valve Co. v. British Belmont Radio, Ltd. & Juyiler, Re Mullard Radio Valve Co. Ltd.'s Patent No. 287,958* (1938), 55 R. P. C. 197.

**1248. Add. Annotation:—***Refd. Boyce v. Morris Motors* (1927), 44 R. P. C. 105.

**1257a. —**—[Letters patent were granted in 1927 for "an improved reflector & advertising sign for window, shop, & general display purposes." Claim 1 was as follows: "A combined lighting unit & advertising sign of the kind hereinbefore referred to wherein the means for carrying the lamp or lamps is formed integral with the portion of the body of the sign which acts wholly as a reflector." After commencing an action for infringement, pl'tf. moved for leave to amend the specification pursuant to sect. 22 of the Patents & Designs Acts, 1907–1928, by limiting the construction covered by the claims to one embodying a particular means of suspension:—*Held*: the desired amendment limited the claim, but would result in a claim for protection for an invention which had not been foreshadowed in the original specification & was a different invention from that claimed by the original specification. The motion was dismissed with costs.—*WALSH v. ALBERT BAKER & Co.* (1898), *LTD.* (1930), 47 R. P. C. 283; 47 R. P. C. 458, C. A.

**1261a. Amendments altering basis of selection patent.**—*Re I. G. FARBENINDUSTRIE PATENTS*, No. 351a, *ante*.

**1261b. Addition of feature of later claim.**—[In 1927, letters patent were granted in respect

of "improvements in & relating to frictional gearing & the like mechanism." Claim 1 was as follows: "A friction gear of the type indicated, in which the transmission of power through the gear is divided between friction members interconnected as regards power transmission & arranged co-axial with, & on opposite sides of, another friction member having friction surfaces on its opposite sides, while intermediate members are interposed between each of such interconnected friction members & said other friction member for transmitting the power there between, said interconnected friction members acting as driving members & said other friction member as a driven member, or *vice versa*, substantially as described." In 1932, G. M. C. applied for leave to amend the specification by (*inter alia*), limiting Claim 1 by introducing one feature the subject of a later claim & another feature, that of connecting by a casing or its equivalent the central friction member of the gear to a shaft aligned with the shaft carrying the outer friction members. This feature of coaxiality of the driving & driven members was not described in the specification but was illustrated in the drawings of the preferred embodiment. The Superintending Examiner, acting for the Comptroller-General, disallowed these amendments, & G. M. C. petitioned the ct. by way of appeal:—*Held*: if it can be shown that in the invention as disclosed in the specification there is a proper ground for differentiating it from the prior art, then although that ground has not been emphasised in the original specification, an amendment directed to the insertion in the description of that ground ought to be allowed; in this case the feature sought to be emphasised by the amendments was in fact to be found in the drawings, & the amendments were directed, not to claiming a different invention, but to embodying a proper description of the difference distinguishing the invention from the prior art, & should be allowed. Liberty was given to petitioners to amend the specification.—*Re THOMSON'S PATENT* (1934), 51 R. P. C. 241.

**1261c. Disclaimer & explanation.**—In 1924, Letters Patent were granted in respect of "Improvements in or relating to dust collectors or separators & the like." Claim 1 was as follows: "Improved apparatus for the separation & removal of dust & grit from dust laden air or from the gaseous products of combustion of furnaces of the kind referred to comprising in combination a vortex or

separating chamber, an admission opening therein for the current of dust laden air or gases, means for setting up the necessary whirling motion of the said current in the vortex chamber, an exhaust passage for the purified air or gas connected to the side of the vortex chamber, a draught inducing device connected so as to draw or force the said current into the vortex chamber & the purified air or gas from thence through the said exhaust passage, a tangential dust outlet arranged at any desired point of the periphery of the vortex chamber, & a connection from the said outlet to a suitable dust receptacle, or to a settling chamber." In 1935, D. & Co., Ltd., applied for leave to amend the specification by (*inter alia*) limiting the invention to separators in which the air stream was induced by a suction fan as opposed to those in which such stream was induced by a pusher fan. D. & Co., Ltd., also sought to limit the invention to apparatus in which there were two separators. The amendments sought were opposed by the G. E. Co., Ltd., & by J. H. & Co. (L.), Ltd. The Comptroller-General allowed the first set of amendments sought, namely, those limiting the invention to separators in which the air stream was induced by a suction fan, but he disallowed the second set of amendments sought & so far as that part of his decision was concerned D. & Co., Ltd., petitioned the ct. by way of appeal:—*Held*: the amendments sought were by way of disclaimer & of explanation that they came within the provisions of sect. 21 of Patents & Designs Acts, 1907-1932, & they ought to be allowed with certain variations. Liberty was given to petitioners to amend the specification & resps. were directed to pay one-half of the costs of the petitioners.—*Re DAVIDSON'S PATENT* (1936), 53 R. P. C. 153.

**1281. Add. Annotations:—***Consd.* Drysdale, Sidney Smith & Blyth, Ltd. v. Davey Paxman & Co. (Colchester), Ltd., *Re* Letters Patent (No. 274,162) (1937), 55 R. P. C. 95. *Refd.* Mullard Radio Valve Co. v. British Belmont Radio, Ltd. & Juviler (1938), 55 R. P. C. 197.

**1290. Add. Annotation:—***Refd.* Drysdale, Sidney Smith & Blyth, Ltd. v. Davey Paxman & Co. (Colchester), Ltd., *Re* Letters Patent No. 274,162 (1937), 55 R. P. C. 95.

**1337a. Costs occasioned by amendment during action for infringement.**—*HOLLANDSCHE (N. V.) GLAS-EN METAALBANK v. ROCKWARE GLASS SYNDICATE, LTD.*, No. 1213a, *ante*.

## Part VII.—Grant of Patent.

**1342a. ———. When granted.]** Two applications by L. for inventions having been made, & a complete specification in respect of them having been filed, an application was made by W. requesting that in the case of the earlier application a patent should be granted to him & L. jointly, W. claiming under an agreement with L. that L. would on certain conditions assign to him one-half share of the patent when granted. L. did not consent,

& he applied to the Comptroller to settle a dispute between him & W. It was held by the Comptroller that sect. 12 (1) (b) & sect. 12 (2) were not applicable & that he had no jurisdiction to deal with the matters in issue. W. appealed to the Patents Appeal Tribunal. The appeal was dismissed with costs.

Proviso (b) to sect. 12 (1) of the Acts does not cover the case of an agreement in writing

by a sole appct. to assign merely a part interest in the patent when granted. Sect. 12 (2), which relates to disputes arising between joint appcts. or their assigns as to proceeding with an application, cannot be invoked in connection with an application for a patent made by one person alone.—*Re LANFRANCONI'S (FRÉDÉRIC ALEXANDRE) APPLICATIONS FOR LETTERS PATENT* (1936), 53 R. P. C. 317.

1352a. ———.—]—*Re A. B.'s APPLICATION* (1902), 19 R. P. C. 403.

1352b. Jurisdiction to refuse grant—Prerogative right—Patent for contraceptive.—*Re RUFUS RIDDLESBARGER'S PATENT* (1935), 53 R. P. C. 57.

1353. *Add. Annotation*:—*As to* (2) *Refd. Re Wingate's Patent* (1931), 47 T. L. R. 541.

1363a. ———.—]—The manufacturer of a particular article may be regarded as interested in commercial processes for making such article marketable; but an opposition is not necessarily admissible, merely because it is not frivolous, vexatious or blackmailing.—*Re CLAVEL'S APPLICATION* (1928), 45 R. P. C. 222.

1364. *Add. Annotation*:—*Refd. Re Clavel's Appln.* (1928), 45 R. P. C. 222.

1369. *Add. Annotation*:—*Consd. Re Clavel's Appln.* (1928), 45 R. P. C. 222.

1375a. ———.—]—*Re SIEMENS-SCHUCKERTWERKE AKT'S APPLICATION* (1937), 55 R. P. C. 153.

1408. *Add. Annotation*:—*As to* (2) *Dbtd. Re Hull's Patent* (1930), 49 R. P. C. 433.

1413. *Add. Annotation*:—*Apld. Re Carpmael's Application* (1928), 46 R. P. C. 321.

1419. *Add. Annotation*:—*Folld. Re Carpmael's Application* (1928), 46 R. P. C. 321.

1424a. ———.—]—Letters patent were granted for "Improvements in apparatus for breaking up, untwisting, & teasing the fibres in the form of ropes & the like." Claim 1 of the specification was as follows: "In a rope untwisting, breaking up, & teasing machine, the combination with a rotary right-angled nozzle having a guide passage adapted to receive a rope through its axial arm & discharge it through the radial one, of stationary teasing spikes fixed in the plane of rotation of the rope end, & a hood or casing so shaped as to form a guide for the end of the rope whirled round by the said radial arm so as to direct it against the spikes." In an action for infringement of the patent plffs. alleged infringement of Claims 1 & 2. Defts. denied infringement & alleged that the patent was invalid by reason of want of novelty & subject-matter, inutilty, insufficiency & ambiguity:—*Held*: the patent was confined to, or at any rate included, lateral guidance by the casing; on a proper construction of the specification the passages in the rotating fan in defts.' machine could not be described as a rotating right-angled nozzle & there was no infringement of Claims 1 or 2; the patent was, on this construction, admittedly not anticipated by any of the prior specifications, but there was no inventive step between certain of the latter & plffs.' patent, & the patent was also invalid on the grounds of insufficiency &

ambiguity. The action was dismissed with costs.—*BORE & BORE v. GREAVES & THOMAS* (1932), 49 R. P. C. 571.

1430. *Add. Annotations*:—*Consd. Re Dreyfus' Application for a Patent* (No. 285,968) (1935), 52 R. P. C. 299. *Refd. Re Ehrenreich's Patent* (1931), 49 R. P. C. 437.

1437. *Add. Annotations*:—*Refd. Re Mooney's Application* (1927), 44 R. P. C. 294; *Re Clifford Haigh Crowther, Application for a Patent No. 373,942* (1933), 51 R. P. C. 72.

1440. *Add. Annotation*:—*Refd. Re Clifford Haigh Crowther, Application for a Patent No. 373,942* (1933), 51 R. P. C. 72.

1457. *Add. Annotations*:—*Refd. Re Adamson (Daniel) & Co. & Kerfoot Patent* 353,087 (1932), 50 R. P. C. 171; *Re British Celanese, Ltd., Henry Dreyfus & Clifford Ivan Haney, Application for a Patent* (No. 298,667) (1933), 50 R. P. C. 247; *Re Société Des Usines Chimiques Rhone-Poulenc Patent* (No. 340,445) (1933), 50 R. P. C. 230.

1468. *Add. Annotation*:—*Consd. Re Adamson (Daniel) & Co. & Kerfoot Patent* 353,087 (1932), 50 R. P. C. 171.

1468a. ———.—]—*Re ADAMSON (DANIEL) & CO., LTD. & KERFOOT, APPLICATION FOR A PATENT No. 353,087* (1932), 50 R. P. C. 171.

1468b. *Invention constituting new departure in art.*—Where a particular prior invention not available to the public is described in the public interest, this description should contain a reference by number to the prior specification, but such description is only necessary when it refers to an invention which constitutes a new departure in the art.—*Re BAKER, APPLICATION FOR LETTERS PATENT, No. 373,702* (1933), 51 R. P. C. 145.

1474. *Add. Annotation*:—*Refd. Re Bramwell's Patent* (1930), 49 R. P. C. 431.

1474a. *Statement derogatory to prior patent of opponent.*—*Re HANS EHRLIG & ULRICH KEILHAUER, APPLICATION FOR A PATENT* (No. 361,787) (1933), 50 R. P. C. 176.

1474b. *No new method disclosed.*—*Held*: that it is open to an opponent under sect. 11 (1) (c) to oppose the grant of a patent on the ground that the specification discloses no new method of manufacture; where there were but three methods by which liquid could be circulated in an industrial process, the selection of two of these methods, either singly or together, did not constitute any new method of manufacture.—*Re I. G. FARBENINDUSTRIE AKTIENGESELLSCHAFT APPLICATION FOR A PATENT* (No. 307,758) (1933), 50 R. P. C. 249.

*Annotation*:—*Refd. Re Kodak Ltd.'s Application for a Patent* (1936), 53 R. P. C. 276.

1474c. *Opposition amounting to objection under sect. 38A (1).*—*Held*: an objection based upon sect. 38A (1) cannot be brought under sect. 11, & an opponent cannot be heard in this connection; but the Comptroller has full power at any time before the grant of a patent is made to take any objection to the grant which is open, no matter when the objection is brought to his notice. Application remitted to Patent Office for reconsideration under sect. 38A (1) as amended by the Act of 1932. Application held to be free from objection under that sub-sect. & patent sealed with amendments of the specification



to meet ground (b) of the opposition.—*Re H. A. METZ LABORATORIES INC. APPLICATION FOR A PATENT* (No. 311,382) (1933), 50 R. P. C. 355.

1485a. ———.—*Re* LINO TYPE & MACHINERY, LTD.'S APPLICATION (1937), 51 R. P. C. 228.

1495a. ———.—*Re* CARPMAEL'S APPLICATION (1928), 45 R. P. C. 411

1496a. ———.—**Interlocutory orders—Order for discovery.**—A. having applied for the grant to him of letters patent, the application was opposed by B., who claimed that he was the first & true inventor. In the course of the proceedings before the Comptroller an order for the discovery & production of documents was made against A. A. thereupon applied by originating summons by way of appeal asking that the order be set aside. At the hearing B. took a preliminary objection to the ct.'s jurisdiction:—*Held*: the jurisdiction of the ct. to entertain the appeal was excluded by sect. 11 (3) of the Patents & Designs Acts, 1907 to 1928. The provision for appeal to the law officer thereby made includes not only final decisions but interlocutory matters; & this is not affected by sect. 77 (2) of the Consolidated Patent Acts. The words which put the Comptroller in the same position in all respects as an official referee do not imply any other right of appeal.—*Re* ROBERTSON'S APPLICATION FOR

LETTERS PATENT, [1930] 1 Ch. 186; 99 L. J. Ch. 145; 142 L. T. 307; 46 T. L. R. 17; 47 R. P. C. 215.

*Annotation*:—*Reid*. Dennis v. Malcolm, [1934] Ch. 244.

1503a. ———.—**Essentials.**—Practice of the Comptroller-General under rr. 42 & 43 of the Patents Rules, 1920, in relation to the filing of statements & counter-statements in proceedings by way of opposition to the grant of a patent or of application for the revocation of a patent. The statement filed under r. 42 must fully set out the facts upon the opponent bases his case, & the counter-statement filed under r. 43 must fully set out the grounds upon which the opposition is contested. The issue between the parties should be clearly defined in the statement & counter-statement, & should not be left to be defined later in declarations filed under rr. 44 & 45.—NOTES OF OFFICIAL RULINGS, 1932 (A) (1932), 49 R. P. C., App. i.

1505a. ———.—**Essentials.**—NOTES OF OFFICIAL RULINGS, No. 1503a, *ante*.

1505b. **Disclosure of vital documents—Time for—Not limited to five days provided by rule 48.**—NOTES OF OFFICIAL RULINGS (1929) B. (1929), 46 R. P. C. App. iii.

1508a. ———.—**Opposition overloaded with documents.**—*Re* METALLGESELLSCHAFT AKTIENGESELLSCHAFT APPLICATION FOR A PATENT (No. 359,868) (1931), 51 R. P. C. 368.

## Part VIII.—Register of Patents.

1522a. ———.—**Agreement as to ownership.**—*Re* SMITH'S (H. E.) PATENT (1929), 46 R. P. C. 400.

## Part IX.—Maintenance of Patent.

1526. *Add. Annotation*:—**Folld.** *Re* RUTH-ALDO CO. (INC.), Application for Patent (Nos. 282,791 & 303,099) (1933), 50 R. P. C. 409.

1526a. ———.—*Patent* No. 303,099 was a patent of addition to Patent 282,791. When renewal fees became due upon the original patent, the patentees decided to allow that patent to lapse, not appreciating

that this would also make the patent of addition void. The patentees applied to restore both patents, so that the original could then be surrendered & the patent of addition be made an independent patent:—*Held*: restoration could not be granted.—*Re* RUTH-ALDO CO. (INC.), APPLICATION FOR PATENT (Nos. 282,791 & 303,099) (1933), 50 R. P. C. 409.

## Part X.—Assignment and Devolution of Patents.

1534a. **Assignment dependent on happening of future event.**—A. by indenture (reciting that a suit was depending between him & B.

respecting certain patents & that the same could not be assigned without hazard of defeating the suit) granted absolutely the

### PART VIII.

**sg. Abandonment.**—*Held*: (1) the abandonment of his invention by an inventor can only be inferred from such conduct as clearly denotes the voluntary surrender to the public of his rights in some form or other; (2) non-user of a patented invention is not fatal to a patent; (3) the Comr. of Patents in the exercise of his discretion, having granted a patent under Patent Act of 1923, the ct. will not now hold that the

filing date given to appct. should be changed to another date & thus render the application subject to certain provisions of the Patent Act of 1906; (4) the Patent Act of 1923 does not affect the operation of the Act of 1906 in respect of applications for patents made under that Act or to affect any right or privilege acquired by an appct. for a patent under that Act; (5) sect. 50 of the Patent Act means, that if a person has acquired in some way or other, something which

was the subject of an application for a patent by another who is presumably the first inventor, but for which a patent had not yet issued, he, the former, should have a continuing right to use & vend the same notwithstanding the issue of the patent to the other person.—*SCHWEYER ELECTRIC & MANUFACTURING CO. v. NEW YORK CENTRAL RAILROAD CO.*, [1934] Ex. C. R. 31; *affd.*, [1935] S. C. R. 665; 4 D. L. R. 273.—CAN.

- said patents together with some others to C., excepting however until the determination of the above-mentioned suit, such patents as should be necessary to support A.'s legal title. Then followed a covenant that A. upon the determination of the suit, should assign the excepted patents to C. & that until such assignment, A. should stand legally possessed of the same:—*Held*: the legal interest in the excepted patents vested in C. upon the determination of the suit, without assignment.—*CARTWRIGHT v. AMATT* (1799), 2 Bos. & P. 43.
- 1534b. Agreement for assignment—Whether representation that grantee was "original inventor" material misrepresentation.]—***Held*: it had not been proved that a material misrepresentation had been made.—*THOMPSON v. JEFFERSON* (1928), 45 R. P. C. 309, P. C.
- **Construction.]—***See* Nos. 1555–1557a, *post*.
- 1546. Add. Annotations :—***Refd.* *Palmolive Co. (of England) v. Freedman* (1927), 44 T. L. R. 86; *Gilford Motor Co. v. Horne*, [1933] Ch. 935.
- 1553. Add. Annotation :—***Refd.* *Suhr v. Crofts (Engineers), Ltd.* (1932), 49 R. P. C. 359.
- 1557a. — Of all patents in relation to preparation & application of gutta percha—What patents within agreement.]—***BEWLEY v. HANCOCK* (1856), 6 De G. M. & G. 391; 26 L. T. O. S. 264; 2 Jur. N. S. 289; 4 W. R. 334; 43 E. R. 1285, L. C.
- **By joint owners of patents—Assignments to "contain covenants by vendors" that patents valid—" & such other covenants as may be reasonably required."—***See* *CONTRACT*, Vol. XII., pp. 29, 30, No. 73.
- 1557b. Assignment of all assignor's interest in patent—Passes right to apply for extension of term.]—***Re* *BEARD & SCOTT'S PATENT, Re SCOTT & BEARD'S PATENT* (1927), 45 R. P. C. 31.
- 1562. Add. Annotation :—***As to* (3) *Apld.* *The W. H. Randall*, [1928] P. 41.
- 1577. Add. Annotations :—***Overd.* *English Scottish & Australian Bank, Ltd. v. I. R. Comrs.* (1931), 48 T. L. R. 170. *Refd.* *Curtis Brown, Ltd. v. Jarvis, Jarvis v. Curtis Brown, Ltd.* (1929), 14 Tax Cas. 744.

## Part XI.—Licences.

- 1584. Add. Annotation :—***As to* (2) *Consd.* *Trico Products Corp. & Trico-Folberth, Ltd. v. Romac Motor Accessories, Ltd.* (1933), 51 R. P. C. 90.
- 1585a. Assignment of benefits from licence.]—**A patentee granted a licence, one term of which was that the licensee should communicate further improvements. A further improvement was made & patented. The patentee assigned his patents to pltf's. who commenced an action against defts., assignees of the licensee, & claimed a declaration that defts. should communicate the improvements to them. The judge found in favour of defts. Pltf's. appealed to the Ct. of Appeal:—*Held*: the patentee was entitled to assign the benefits due to him under the licence agreement.—*NATIONAL CARBONISING CO., LTD. v. BRITISH COAL DISTILLATION, LTD.*, [1936] 2 All E. R. 1012; 80 Sol. Jo. 652; 54 R. P. C. 41, C. A.
- 1587a. Agreement by parties to use each other's invention—Whether royalties payable on use of own invention.]—**Pltf. & defts., who were the respective owners of patents for conveying apparatus, entered into an agreement whereby each was granted a licence to use the invention of the other. The agreement contained a clause whereby defts. undertook to pay a royalty upon conveyors made by them which were made in accordance with pltf.'s letters patent. Pltf. alleged that defts. had made such conveyors & had refused to pay the royalties due thereon.
- Defts. denied that such conveyors were an infringement of pltf.'s letters patent & stated alternatively that, even if they were, no royalties were due since the conveyors were in fact made in accordance with defts.' own letters patent & it was an implied term of the agreement that neither party was to pay royalties upon conveyors made in accordance with his own letters patent:—*Held*: (1) the agreement covered all conveyors made wholly or in part in accordance with either of the patents; if it was intended to qualify the obligation to pay royalty by excluding conveyors made in accordance with the particular invention of the manufacturer notwithstanding that they were made wholly or in part in accordance with the invention of the other patentee, the intention ought to have been expressed in clear & unambiguous language; also defts.' conveyors complained of were made in part in accordance with pltf.'s invention. Defts. appealed:—*Held*: the agreement must be looked at as a whole, & bearing in mind that it had been entered into with a view to terminating the dispute between the parties, it should not be read as imposing a liability on applts. to pay a royalty on conveyors manufactured in accordance with their own patent. The appeal was allowed with costs in the Ct. of Appeal & below.
- (2) During the cross-examination of a witness for pltf. a prior specification was sought to be put to him to show the state of the art at the date of the patent in suit:

### PART X. SECT. 3.

**1545 i. Covenant for payment of royalties by assignees—Covenant to "warrant & defend" by assignor.]—***GREEN v. WATSON* (1884), 10 A. R. 113.—CAN.

### PART XI. SECT. 1, SUB-SECT. 1.

**sp. Nature of.]—**A personal, non-exclusive, non-assignable licence to use & exercise inventions which are the subject of letters patent, which neither transfers to nor confers upon the licensee any interest in the inventions or in the letters patent, is distinguish-

able from a licence of the kind referred to in sect. 122 (2) of Patents, Designs, & Trade-marks Act, 1921–22, & from the grant of a *profit à prendre*.—*COLLIER & BEALE, LTD. v. STAMP DUTIES COMR.*, [1936] N. Z. L. R. 264; G. L. R. 161; 12 N. Z. L. J. 43.—N.Z.

—*Held*: the only object of such evidence was really to impugn validity &, since this could not be disputed, the evidence was disallowed.—**CAMBELL v. HOPKINS (G.) & SONS (CLERKENWELL), LTD.** (1933), 50 R. P. C. 213.

**1590. Add. Citation**:—28 R. P. C. 229.

*Add. Annotation*:—**Refd.** *Lacteosote v. Alberman*, [1927] 2 Ch. 117.

**1602a. Condition limiting price—Notice—Expiration of patent.**—In Sept. 1917, letters patent were granted in respect of “improvements in tobacco-pipes, cigar-holders & the like.” In Mar. 1933, plffs. commenced an action against defts. to restrain them from selling bruyère pipes manufactured by plffs. in accordance with the patent at a price less than that authorised by plffs. in breach of the terms of a limited licence under which alone the pipes might be sold. Defts. denied (*inter alia*) that the limited licence had been brought to their notice. The restrictive conditions were on a wrapper & the pipe, the sale of which was complained of, passed through several hands & defts. suggested that the outer cover had never been removed whilst the article was in their possession. In Sept. 1933, before the hearing of the action, the patent expired:—*Held*: the suggested defence had not been proved & defts. must be taken to have knowledge of the limited licence, & the patent in respect of which the action had been brought having expired, the ct. did not think fit to make any order, except that plff.’s costs should be taxed & paid by defts.—**ALFRED DUNHILL, LTD. v. GRIFFITHS BROS.** (1933), 51 R. P. C. 93.

**1603. Add. Annotation**:—*As to* (1) **Appld.** *Huntoon Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528.

**1603a.** —.]—(1) A licence to “make use, exercise, & vend” a patented invention for a particular form of collapsible tube contained a condition that the licencees should purchase from the inventor all such wires for connecting the caps with the tubes as they should use with the tubes, the cap being not within the protection of the patent:—*Held*: the condition was null & void under Patents & Designs Act, 1907 (c. 29), s. 38.

(2) Another condition in the licence provided that the patentee should at his own cost, at the request of the licencees, commence & prosecute all legal proceedings in respect of infringement or suspected infringement of the patent:—*Held*: in the circumstances of the case a refusal to take proceedings when requested to do so by the licencees was not such a breach of the contract as would disentitle the assignees of the licensors to sue upon another stipulation contained in it.—**HUNTOON CO. v. KOLYNOS (INCORPORATED)**, [1930] 1 Ch. 528; 99 L. J. Ch. 321; 143 L. T. 165; 46 T. L. R. 253; 47 R. P. C. 403; *subsequent proceedings*, 48 R. P. C. 98, C. A.

**1603b. Interdependent conditions—What are.**—

**HUNTOON CO. v. KOLYNOS (INCORPORATED)**, No. 1603a, *ante*.

**1603c. Sale below price fixed by patentee—Form of order.**—The owners of letters patent relating to gramophone records brought an action against defts., who carried on a retail business, complaining of sales by defts. of plffs.’ records at prices below those fixed by the limited licence which regulated the terms of such sales. Defts. failed to deliver a defence, & at the trial the ct. made an order (*inter alia*) restraining defts. from selling records made in accordance with the letters patent in suit & sold by plffs. subject to a limited licence governing the retail price at prices lower than those fixed by plffs. in force at the date of such retail sale.—**COLUMBIA GRAPHOPHONE CO., LTD. v. OXFORD CAMERA & TRADING CO., LTD.** (1933), 50 R. P. C. 413.

**1608. Add. Annotation**:—**Refd.** *Fuel Economy Co. v. Murray*, [1930] 2 Ch. 93.

**1609. Add. Annotations**:—*As to* (1) **Dbtd.** *Fuel Economy Co. v. Murray*, [1930] 2 Ch. 93. **Refd.** *Suhr v. Crofts (Engineers), Ltd.* (1932), 49 R. P. C. 359.

**1614. Add. Annotation**:—**Refd.** *Suhr v. Crofts (Engineers), Ltd.* (1932), 49 R. P. C. 359.

**1616. Add. Annotation**:—**Refd.** *Suhr v. Crofts (Engineers), Ltd.* (1932), 49 R. P. C. 359.

**1619a. After expiration of licence.**—A patentee brought an action for damages for infringement against a certain firm who gave judgment by consent before declaration filed, & immediately took a licence to use the patent for a term. On a bill being filed by the patentee, after the expiration of the licence, to restrain an alleged further infringement of his patent, by defts. in the action & certain other persons who had joined the firm after the date of the judgment at law:—*Held*: upon motion for decree, defts. in the suit were not estopped either by the licence or by the judgment at law from denying the validity of plff.’s patent.—**GOUCHER v. CLAYTON** (1865), 5 New Rep. 360; 34 L. J. Ch. 239; 11 L. T. 732; 11 Jur. N. S. 107; 13 W. R. 336.

**1619b. Executed agreements.**—Plff., who exploited patents, in 1930 acquired from one S. the sole rights of exploitation of letters patent No. 267,795 for a three-wheel motor delivery carrier. On Oct. 29, 1930, he entered into an agreement with defts. that they should take over the sole manufacturing rights for Great Britain & export to any part of the world except Germany, in which it was (*inter alia*) agreed that the manufacture of the vehicle was to commence forthwith on the understanding that the patent rights were sound & that defts. were kept safeguarded & indemnified against infringement. Defts. were to provide the necessary facilities to enable the manufacture to be accomplished & to make an original payment, part of which was payable on signing the agreement & to pay certain royalties. In Sept. 1931, plff. commenced an action against defts., claiming a certain sum under the agreement.

#### PART XI. SECT. 1, SUB-SECT. 5.—B.

**1604 v. —.**—In an action for royalties against the licensee of a patent:—*Held*: No covenant that

the patent was valid was to be implied in the agreement, the licensee is a purchaser of personal property & the rule of *caveat emptor* applies. A judg-

ment declaring the patent void would be no defence to an action for royalties.—**ANDERSON v. SHEPARD, LTD.**, [1971] 1 D. L. R. 204; 66 O. L. R. 105. —CAN.

Defts. by their defence denied that the agreement was binding on them, alleging (*inter alia*) fraud & misrepresentation, & that the agreement was entered into upon the understanding that the patent rights were sound, & that they were not sound, & that the patent was on various grounds invalid; they also denied the title of pltf. to grant the rights granted under the agreement. Defts. counter-claimed for money paid to pltf. & for expenses incurred by them:—*Held*: the defences of fraud & misrepresentation failed & the agreement did not contain any guarantee of the validity of the patent by pltf., but it meant that both parties had agreed that manufacture should begin forthwith on the assumption that the patent was valid & that they should co-operate to prevent infringement; the agreement had been executed & therefore, even if there had been a guarantee of validity by pltf., defts. could not set up a plea of invalidity whilst continuing to manufacture under the agreement; the doctrine of estoppel applied & defts. were not entitled to deny pltf.'s title. Judgment was given for pltf. with costs & the counter-claim was dismissed with costs.—*SHIR (R. F. H.) v. CROFTS (ENGINEERS), LTD.* (1932), 49 R. P. C. 359.

1638. *Add. Annotation*:—*Re*fd. *Huntoon Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528.

1638a. **Failure of patentee to stop infringement after notice.**—Letters patent were granted in 1926, for "improvements in incandescent electric lamps, & like sealed envelopes." Claim 1 was as follows: "An envelope of the kind set forth in which the exhaust tube is provided with a bulbous closed end before insertion into the stem tube." Pltfs., the registered proprietors of the patent, granted defts. a licence to make & sell electric lamps & bulbs in accordance with patent, on payment of a royalty by defts. The licence further provided that defts. were to notify pltfs. of any infringement of the patent whereupon the pltfs. were within six weeks to take steps to prevent such infringement. Pltfs. brought an action for royalties. An infringement had been reported by defts. to pltfs., & defts. alleged that pltfs. had not taken proper steps as required by the licence. Pltfs. contended that the patent had not been infringed:—*Held*: the patent had been infringed; under the clause in the licence pltfs. were bound to take such steps as a reasonable energetic patentee would take to protect what he thought was a valuable patent, & pltfs. had not taken the necessary steps to prevent the infringement. The action was dismissed with costs, except on one issue.—*N. V. "SPLENDOR" GLOEILAMPEN FABRIEKEN v. OMEGA LAMPWORKS, LTD.* (1933), 50 R. P. C. 393.

1641. After this case add:—

— — — — —.]—*See, now*, 1907 Act, s. 38 (2).

1642a. **Article made by licensee not within ambit of monopoly.**—*DOBSON v. ADIE BROS., LTD.* (1935), 52 R. P. C. 358.

1650. *Add. Annotations*:—*Apld.* *I. R. Comrs. v. British Salmson Aero Engines, Ltd.*, [1938] 2 K. B. 482. *Re*fd. *Curtis Brown, Ltd. v. Jarvis, Jarvis v. Curtis Brown, Ltd.* (1929), 14 Tax Cas. 744.

1651a. — — — — —.]—*Held*: the phrase "the public interest" was to be construed in its widest meaning, & not simply with regard to the purchasing public.—*Re BROWNIE WIRELESS CO. OF GREAT BRITAIN, LTD.* (1929), 45 T. L. R. 584; 46 R. P. C. 457.

*Annotation*:—*Re*fd. *Re Loewe Radio Co.'s Application* (1929), 46 R. P. C. 479.

1652. *Add. Annotation*:—*Generally, Consd. Re Brownie Wireless Co. of Great Britain* (1929), 45 T. L. R. 584.

1655a. — — — — —.]—*Re BROWNIE WIRELESS CO. OF GREAT BRITAIN, LTD.* (1929), 45 T. L. R. 584; 46 R. P. C. 457.

*Annotation*:—*Re*fd. *Re Loewe Radio Co.'s Application* (1929), 46 R. P. C. 479.

1656a. **Question of degree.**—*Re LOEWE RADIO CO., LTD.'S APPLICATIONS FOR THE GRANT OF COMPULSORY LICENCES* (1929), 46 R. P. C. 479.

*Annotation*:—*Re*fd. *Re Cathro's Applications* (1934), 51 R. P. C. 461.

1658a. **Abuse of monopoly rights—What amounts to.**—Letters patent No. 225,523 were granted to a German Co. in respect of improvements in the manufacture of lithopone. The I. G. Farbenindustrie Aktiengesellschaft, the assignees of the patent, & their licensees Orr's Zinc White, Ltd., appealed by way of a joint petition against the decision of the Comptroller allowing McKechnies' application for a compulsory licence on the grounds of abuse of monopoly under all three heads of sect. 27 (2) (a), (b), (d) of Patents & Designs Acts, 1907–1932, & ordering the grant of a non-exclusive licence to appcts., the form of which the Comptroller settled, owing to the parties not agreeing as to the form:—*Held*: on a true construction sect. 27 (2) (a) provides that the actual facts at the date of hearing as well as those at the date of application may be considered in determining whether the invention is being worked on a commercial scale & the scale must by the definition in sect. 93 be adequate to meet the demand for the patented article in the United Kingdom; there was an abuse of monopoly under sect. 27 (2) (a) in that there was not at the date of hearing working on a commercial scale, the licence to Orr's not having been shown to have been granted *bonâ fide*; & accordingly it was unnecessary to consider whether a case had been made out under para. (b) or para. (d), & a licence ought to be granted to appcts.: although the licence to Orr's was not *bonâ fide* from the point of view of securing working in the United Kingdom, the royalty reserved must be taken to have been fixed on a fair commercial basis; but amendments were ordered to be made in the form of compulsory licence. The petition was dismissed with costs.—*Re MCKECHNIE BROS., LTD., FOR COMPULSORY*

PART XI. SECT. 1, SUB-SECT. 6.  
sp. *Sub-assignment—Position of parties.*—*HILL v. MOISAN*, [1927] 2 D. L. R. 1089.—CAN.

PART XI. SECT. 1, SUB-SECT. 8.  
h i. — *Invalidity of patent.*—*CHANNELL v. O'CEDAR CORPN.* (1927), 60 O. L. R. 525; *varied*, [1928] 3 D. L. R. 843; [1928] S. C. R. 542.—CAN.

PART XI. SECT. 2, SUB-SECT. 1.  
sq. *Non-manufacture in Canada—Cost when imported unreasonably large.*—*MITCHELL CO. v. ATLAS SYSTEMS*, [1929] 1 D. L. R. 538.—CAN.

LICENCE IN RESPECT OF CERTAIN LETTERS PATENT (1934), 51 R. P. C. 461.

1658b. ———.]—*Re* CATHRO'S APPLICATION (1934), 51 R. P. C. 475.

1665. *Add. Annotation* :—*Re* Brownie Wireless Co. of Great Britain (1929), 45 T. L. R. 584.

1665a. ——— *Undertakings to Comptroller-General—Should not be required.*]—*Re* LOEWE RADIO CO., LTD.'S APPLICATIONS FOR THE GRANT OF COMPULSORY LICENCES (1929), 46 R. P. C. 479.

*Annotation* :—*Re* Cathro's Applications (1934), 51 R. P. C. 461.

1666a. *Cancellation of endorsement—Procedure.*]—(1) Where a patentee applies, under sect. 24 (5), of Patents & Designs Acts, 1907 & 1919, for the cancellation of the indorsement, "licences of right," on a patent, the Comptroller-General of Patents may advertise the application, indicating the procedure to be followed by any person wishing to oppose it, may require the filing of statements & evidence by the patentee & an opponent, & may hear the parties before deciding the application.

(2) Rules 73, 74, & 75 of Patents Rules, 1920, are *intra vires* & valid.—*R. v. COMPTROLLER-GENERAL OF PATENTS, Ex p. ENGL.* [1930] 1 K. B. 517; 99 L. J. K. B. 271; 142 L. T. 600; 47 R. P. C. 118.

1669. *Add. Annotations* :—*As to* (1) *Re* *Constantinesco v. R.* (1927), 11 Tax Cas. 730. *As to* (2) *Re* *Buckland v. R.* (1933), 102 L. J. K. B. 404.

1673a. ———.]—(1) No action for a declaration of the validity of a patent, or for compensation for user of the invention by the Crown, against the Govt. department concerned is competent or open to the patentee under Patents & Designs Act, 1919 (c. 80), s. 8, if the Crown do not consent to its being dealt with in proceedings under sect. 8, but the remedy is by petition of right or by originating notice of motion addressed to the department. The true effect of sect. 8 is to give merely a right of compensation to the patentee against the Crown for the use by its officers of his invention for the purposes of the Crown, & it does not give any right in itself to sue the department concerned.

(2) A claim for a declaration of the validity of the patent is not a claim in tort because the Crown has the right to use the patent on the statutory terms set out in sect. 8.

An action in which such a declaration was claimed against the Air Council, dismissed on the above grounds.—*ROWLAND & MACKENZIE-KENNEDY v. AIR COUNCIL* (1927), 96 L. J. Ch. 470; 137 L. T. 794; 43 T. L. R. 717; 44 R. P. C. 453, C. A.

*Annotations* :—*Generally, Re* *Mackenzie-Kennedy v. Air Council* (1927), 138 L. T. 8; *Gilleggan v. Minister of Health* (1931), 47 T. L. R. 439.

## Part XII.—Term of Patent.

1681a. ——— *Being beneficial owner.*]—*Re* WHITE & GRAY'S PATENT (1927), 45 R. P. C. 119.

1684a. ——— *Interests of foreign shareholders acquired by Public Trustee—Patents & Designs Acts, 1907–1919, s. 18 (6).*]—*Re* STIRLING'S PATENT, *Re* STIRLING & SCHMIDT'S SUPER-HEATING CO. (1910), LTD.'S PATENT (1928), 46 R. P. C. 133.

1687a. *Joinder of grantee—Application by assignee.*]—Where a grantee declines to join in an application for the extension of the term of a patent & lodges notice of opposition, it is unnecessary to join such grantee as a party to the summons.—*Re* BEARD & SCOTT'S PATENT, *Re* SCOTT & BEARD'S PATENT (1927), 45 R. P. C. 31.

1687b. ——— *Discretion of court to dispense with.*]—*Re* DRESSLER'S PATENTS (No. 2) (1928), 46 R. P. C. 165.

1687c. ———.]—*Re* SMITH'S (E. J.) PATENTS (1928), 46 R. P. C. 166.

1687d. ———.]—*Re* ALLEN & BENNETT BROS. LTD. PATENTS (1929), 46 R. P. C. 397.

1687e. *Assignor.*]—*Re* OWEN'S PATENT (1928), 46 R. P. C. 333.

1687f. *Person entitled to apply for Convention patent.*]—A co. became entitled in 1914 to apply for a patent in this country for an

invention protected by letters patent in America dated May 18, 1914, & was therefore in a position to apply under sect. 91 of Consolidated Patents & Designs Acts, 1907 & 1919, for a Convention patent, the date of which when granted would be the same as that of the American letters patent. Owing to the war the co. made no application for any grant of letters patent until Mar. 1920, when by virtue of powers of extension vested in the Comptroller under temporary rules made by the Board of Trade & having statutory force, a grant was made to the co. of letters patent in respect of the invention. Shortly before the expiration of this grant the co. in 1929 applied by originating summons for an extension of the term of the letters patent on the ground of losses which they alleged they had suffered by reason of the war :—*Held* : the patentees having been entitled to apply for a Convention patent were within the description of "patentee as such" in sect. 18 (6) of Consolidated Patents & Designs Acts, 1907 & 1919, the application for a grant had been properly postponed, & they had suffered loss or damage owing to the war. They were therefore entitled to the extension they sought. As the term of the letters patent had expired at the date of the hearing a re-grant was necessary.—*Re* WESTERN

### PART XI. SECT. 2, SUB-SECT. 2.

1662i. *Grant of licence—On what terms granted—Licence fee—How calculated.*]—*CONSOLIDATED WAFER CO., LTD. v.*

*INTERNATIONAL CONE CO., LTD.*, [1927] 1 D. L. R. 402; [1927] S. C. R. 300.—*CAN.*

*st. Appeal—From Exchequer Court—Proceedings under Patent Act, 1923*

(c. 23), s. 40—*Jurisdiction of Supreme Court of Canada.*]—*CONSOLIDATED WAFER CO., LTD. v. INTERNATIONAL CONE CO., LTD.*, [1927] 1 D. L. R. 402. [1927] S. C. R. 300.—*CAN.*

ELECTRIC CO., LTD.'S PATENT, [1931] 1 Ch. 68; 100 L. J. Ch. 82; 144 L. T. 299; 40 T. L. R. 549; 48 R. P. C. 155.

*Annotation*.—*Refd.* *Re* British Thomson-Houston Co., Letters Patent Nos. 15,448 of 1915 & 148,129 (1931), 49 R. P. C. 218.

**1690a.** —[*Re* Government Departments—Represented by Comptroller.]—Western Electric Co., Ltd., applied by originating summons for the extension of the term of two patents granted in respect of "improvements in Cores for Pulp Loading Coils, electromagnets, & the like." One of the patents expired prior to the hearing of the summons. The application was opposed by the Postmaster-General, who alleged that there had been a postponed demand owing to the War & arising out of the non-installation of older types of apparatus:—*Held*: (1) in the preliminary proceedings Govt. Depts. were sufficiently represented by the Comptroller, & should not be otherwise represented; (2) at the hearing there had been loss of opportunity owing to the war, but this had been counterbalanced in part by a postponed demand. An extension of eighteen months was granted.—*Re* WESTERN ELECTRIC CO., LTD., LETTERS PATENT NO. 103,188 & 107,007 (1932), 49 R. P. C. 342.

**1695a.** —[*Re* BRITISH THOMSON-HOUSTON CO., LTD., LETTERS PATENT NOS. 15,448 of 1915 & 148,129 (1931), 49 R. P. C. 218.

**1695b.** —[*In* 1921 & 1922 Letters Patent No. 193,451 & No. 208,235, a patent of addition, were granted to S. for improvements in & relating to the manufacture of rubber, concerning an invention relating to a process for the vulcanisation of natural rubber latex. The merit of the invention *per se* was never questioned, but the evidence relating to its merit & utility from the point of view of the public was insufficient. On the hearing of the petition it further appeared that certain material documents had not been disclosed & that the accounts were not completely satisfactory:—*Held*: the required standard of disclosure of material information had not been reached & insufficient care had been taken in the presentation of the accounts. The petition was dismissed with costs.—*Re* SCHIDROWITZ'S PATENT (1937), 55 R. P. C. 46.

**1706a.** —[*Re* BEARD & SCOTT'S PATENT, *Re* SCOTT & BEARD'S PATENT (1927), 45 R. P. C. 31.

**1711.** *Add. Annotation*:—*Refd.* *Re* Maschinenfabrik Augsburg-Nürnberg A. G. Patents (1929), 47 R. P. C. 193.

**1724a.** —[*T.* was the grantee of a patent for an invention for an improved pipe joint. A co. which had bought the patent applied by petition for an extension of the term of the patent. On the "return day" of the petition the Comptroller raised a question regarding disclosure of documents to be disclosed by petitioners:—*Held*: (1) petitioners must make an affidavit of documents & must give discovery of any document in such affidavit, the said affidavit to be filed within three weeks from the "return day" & discovery to take place within ten days from such date of filing; (2) after further hearing, "patentee" included the original inventor, those associated

with him, & successive owners of the patent during its life; the remuneration of all such persons must be considered; where the original inventor & his associates had been adequately remunerated & were not parties to the petition brought by an assignee, it was no part of the duty of the ct. to grant an extension of the term of the patent to enable such assignee to remedy what had proved to be an unremunerative commercial speculation; the invention was undoubtedly meritorious, but the accounts were unsatisfactory, & the costs of maintaining subsidiary patents & trade marks ought not to be included in the accounts of loss under the patent. The application was dismissed with costs. Petitioners were ordered to pay the costs of the Comptroller, including costs incurred by him in obtaining expert examination of the accounts.—*Re* TRIBE'S PATENT (1936), 53 R. P. C. 131.

**1743.** *Add. Annotation*:—*Refd.* *Re* Maschinenfabrik Augsburg-Nürnberg A. G. Patents (1929), 47 R. P. C. 193.

**1750a.** —[*Re* NEUFELD & KUHNKE G.m.b.H. PATENTS (1930), 47 R. P. C. 553.

**1750b.** —[*P. & B.* were the grantees of two patents. The first patent was granted in respect of an invention for "improvements in or relating to gyro-compasses." The second patent was granted for another invention for "improvements in or relating to gyro-compasses." *P.* died on Aug. 4, 1920, & under his will the patents became vested in *B.* On June 17, 1930, leave was granted to present the petition out of time:—*Held*: the inventions were of exceptional merit & utility; the patentees had made a substantial loss & in the circumstances no objection should be taken to the accounts; & each patent should be extended for ten years from the date of expiry in each case.—*Re* PERRY & BROWN'S PATENTS (1930), 48 R. P. C. 200.

**1750c.** —[*A. H., Ltd., T. & G.,* were the grantees of a patent granted in respect of improvements in finishing prisms or lenses or combinations of the same & in apparatus therefor; *A. H., Ltd., & T.* were the grantees of a later patent granted in respect of improved process & apparatus for finishing lenses. The patentees applied for extensions of the terms of the patents:—*Held*: the inventions were of very exceptional merit & utility; the patentees had been inadequately remunerated; possible purchasers of the patented apparatus were few & commercial development of the patents must necessarily be slow; taking all these matters into consideration the first patent must be extended for ten years, & the second patent extended for such a term as to expire contemporaneously with the first patent.—*Re* ADAM HILGER, LTD., TWYMAN & GREEN PATENTS (1931), 49 R. P. C. 245.

**1750d.** —[*W.* was the grantee of a patent for an invention for an "improved construction of metal aeroplane spars." Assignees of the patentee applied for an extension of the term of the patent:—*Held*: the invention was an exceptional one meriting five years' extension of the patent, but that it was not an "extra-exceptional" one; also petitioner must pay the costs of the Comptroller-

General of Patents.—*Re WYLIE'S LETTERS PATENT* (1934), 51 R. P. C. 377.

**1765. Add. Annotations:—***Consd. Re Maschinenfabrik Augsburg-Nürnberg A. G. Patents* (1929), 47 R. P. C. 193. *Reid. Re Neufeldt & Kuhnke Patents* (1930), 47 R. P. C. 553.

**1777. Add. Annotation:—***As to (4) Consd. Re Neufeldt & Kuhnke Patents* (1930), 47 R. P. C. 553.

**1783. Add. Annotations:—***As to (2) Consd. Re Neufeldt & Kuhnke Patents* (1930), 47 R. P. C. 553. *As to (3) Consd. Re Evans' Patent* (1937), 54 R. P. C. 259.

**1795. Add. Annotation:—***Consd. Re Neufeldt & Kuhnke Patents* (1930), 47 R. P. C. 553.

**1807. Add. Annotation:—***Consd. Re Fairey's Patent* (1937), 54 R. P. C. 297.

**1808a. ———. ]—**In 1921 Letters Patent No. 190,774 were granted to the Fairey Aviation Co., Ltd. & Charles Richard Fairey entitled "Improvements in or relating to Controlling Devices for Aeroplanes" for an invention relating to the construction of aeroplane wings wherein the rear portion of the wing is made in the form of two flaps to be depressed at will in order to vary the lifting power or control the lateral stabilisation of the machine. There had been no user of the machine & consequently no remuneration. This non-user was sought to be explained on the basis that the invention was in advance of its time & that its benefits would be felt in the future as the general design of aircraft had reached a stage of development where the invention would be of real utility. It appeared during the hearing of the petition that petitioners had failed to disclose all the results of certain tests made upon models constructed in accordance with the invention:—*Held*: in view of the non-user of the patent during its lifetime, the evidence was insufficient to establish any merit from the point of view of the public; also, in the event of petitioners failing to disclose any material information, it is the duty of the ct. to refuse extension. The petition was dismissed with costs. An application that the Comptroller-General should be allowed to take a copy of a document disclosed at the hearing allowed.—*Re FAIREY'S PATENT* (1937), 54 R. P. C. 297.

**1810. Add. Annotation:—***Reid. Re Murray's Patent* (1932), 49 R. P. C. 445.

**1825a. Effect of later improvements.]—**M. was the grantee of a patent in respect of an invention by which new & improved fabrics were made by applying an adhesive to yarn, then untwisting the yarn, & using the twistless yarn for weaving. M. & a co. applied by petition for an extension of the terms of the patent. On the "appointed day" when application was made to fix a day, the Comptroller objected that patents for certain later improvements were not disclosed. Leave was given to amend the petition. The petition was opposed by one D. & the Comptroller, on the grounds (*inter alia*) that there was insufficient invention or benefit to the public, that any success achieved was due to later improvements, that the accounts were incomplete, & that insufficient efforts had been made by the patentee to exploit the invention. At the hearing it appeared that there was a quantity of undisclosed correspondence relevant to the latter ground:—*Held*: there had been no *mala fides*, & the hearing was adjourned for further discovery; the opponent D. was allowed to withdraw & received his costs; there was sufficient merit to justify extension, the fact that later improvements contributed to success did not destroy that merit, & the insufficiency of accounts could be excused where there were not profits; also Claim 1 should not be extended, but any amendments made should be purely consequential. As the patent had expired, a new grant limited to the remaining claims was necessary & this was ordered to be for five years subject to an undertaking to register licences, & to submission of the amendments to the Comptroller.—*Re MEYER'S PATENT* (1933), 50 R. P. C. 341.

**1832a. ———. ]—***Re LETTERS PATENT* (No. 120,911) GRANTED TO JACOB OCHSNER (1933), 51 R. P. C. 4.

**1836. Add. Annotations:—***Consd. Re Maschinenfabrik Augsburg-Nürnberg A. G. Patents* (1929), 47 R. P. C. 193. *Reid. Re Neufeldt & Kuhnke Patents* (1930), 47 R. P. C. 553.

**1842a. ———. ]—**In 1920 Letters Patent No. 119,233 were granted to E. entitled "Improved method & means for storing, transporting & delivering for use gas under pressure from liquefied gas" on a communication from abroad by the Heylandt Gesellschaft für Apparatebau m.b.H. for an invention relating to the construction of insulated tanks or vessels for the transport of liquefied gases

## PART XII. SECT. 2, SUB-SECT. 5. —G. (a).

**1839 ii. ———. ]—**The method related to the fixing of uprights consisting of single steel pillars comprising two channel irons connected together at the base & at short intervals throughout their height. The channel irons were provided with slots through which movable though self-locking thwarts were passed. The invention was proved to be of considerable utility. The remuneration received by the patentee in respect of his invention amounted to £2,147 drawn from royalties of £1 payable for each upright. The patentee had been prevented from receiving further remuneration because of the prolonged period of depression in the ship-building industry. The patentee petitioned for an extension of the term

of the patent. The ct. refused an extension of the term, holding that the remuneration of petitioner had not been inadequate.—*Re MACILWAIN'S PATENT* (1934), 51 R. P. C. 415.—**SCOT.**

**1839 iii. ———. ]—**In 1919 a patent was granted to W. for "an improved method of & apparatus for use in making faced concrete building blocks or slabs & the like." The method related to (a) the forming of a concrete block face upwards in a mould, & coating the face while still moist with a layer of cement & depositing pebbles on the wet surface & allowing the whole mass to set in the mould, & (b) a machine for depositing the pebbles evenly on to the face of a block in the mould. The invention was proved to be of considerable merit & utility. The remuneration received by the patentee & afterwards by his widow as the person succeeding him in

right of the patent amounted to £8,653. In addition the patentee had received payment as managing director of a limited co. which worked the patent under licence from him & also dividends on capital invested by him in the limited co. The widow of the patentee & the limited co. petitioned for an extension of the term of the patent. The ct. refused an extension of the term, holding that the remuneration of the patentee & petitioner had not been inadequate. The ct. held further that in reckoning the amount of profits made by the patentee as such, sums received by a patentee for services as managing director of a limited co. working the patent under licence, & dividends on capital invested by him in such limited co. were not to be taken into consideration.—*Re WILSON'S PATENT* (1935), 53 R. P. C. 1.—**SCOT.**



& mechanism, consisting of valves & the like, for delivery of the gas. In the exploitation of the patent various cos. had at various times acquired an interest therein. These cos. & the inventor Christian Wilhelm Paul Heylandt joined in a petition for extension. The grounds of the application were difficulties in the way of the development of the patent & inadequacy of remuneration. The opposition was based chiefly on the grounds that petitioners had failed to show that the remuneration received was inadequate:—*Held*: though it was impossible to ascertain the precise remuneration obtained by the various interested parties, some considerable remuneration had in fact been received, & where a patent is purchased as a commercial transaction in the last years of its life, special considerations must apply; where a patentee is also a manufacturer, the profits which he makes as manufacturer must also be taken into consideration; further, the accounts kept were inadequate.—*Re EVANS' PATENT* (1937), 54 R. P. C. 259.

1863. *Add. Annotation*:—As to (1) *Consd. Re Neufeldt & Kuhnke Patents* (1930), 47 R. P. C. 553.

1883a. —.]—*Re LAKE'S PATENTS* (1928), 46 R. P. C. 135.

1904. *Add. Annotation*:—*Refd. Re Maschinenfabrik Augsburg-Nürnberg A. G. Patents* (1929), 47 R. P. C. 193.

1914. *Add. Annotation*:—*Consd. Re Neufeldt & Kuhnke Patents* (1930), 47 R. P. C. 553.

1925a. *Patent endorsed "licences of right"—Form of order for extension.*—*Re SANDERS' (THOMAS) PATENT* (1931), 48 R. P. C. 342.

1944. *Add. Annotation*:—*Refd. Re Neufeldt & Kuhnke Patents* (1930), 47 R. P. C. 553.

1945. *Add. Annotations*:—*Refd. Re Maschinenfabrik Augsburg-Nürnberg A. G. Patents* (1929), 47 R. P. C. 193; *Re Von Krogh's Patent* (1929), 49 R. P. C. 417.

1947a. *Insufficiency excused where no profits.*—*Re MEYER'S PATENT* (1933), 50 R. P. C. 341.

1955. *Add. Annotation*:—As to (2) *Consd. Re Maschinenfabrik Augsburg-Nürnberg A. G. Patents* (1929), 47 R. P. C. 193.

1956a. —.]—*Re MASCHINENFABRIK AUGSBURG-NÜRNBERG A. G. PATENTS* (1929), 47 R. P. C. 193.

1959a. *Not confined to profits of petitioner assignee—Includes profits of original inventor & all subsequent holder.*—*Re MASCHINENFABRIK AUGSBURG-NÜRNBERG A. G. PATENTS* (1929), 47 R. P. C. 193.

1977a. —. *Irregularity in service of advertisements—Excused.*—*Re PANICALI & BRENNI'S PATENT* (1927), 44 R. P. C. 509.

2004a. *Discovery—Affidavit of documents.*—*Re TRIBE'S PATENT*, No. 1724a, *ante*.

2005a. —. *All material documents.*—On the petition for extension of the first-mentioned patents coming into the list upon an application to fix the appointed day, when a petition for extension of the secondly mentioned patent also came before the ct., the question of the appropriate order for discovery by the respective petitioners was discussed, as well as the effect of amendments to the first-mentioned petition & the matter of delivery of particulars of objections by the Comptroller-General. Ordered that the petitioners should deliver to the Comptroller-General a list of all documents material to the issues to be considered under sect. 18 of the Patents & Designs Acts, 1907–1932. It is the duty of petitioner, whilst disclosing all material documents, not to overload the case with documents that are not material.—*Re HELESHAW'S PATENTS, Re CHAPMAN'S PATENT* (1938), 55 R. P. C. 120.

2005b. *Withdrawal of opposition—Terms on which permitted.*—*Re MASCHINENFABRIK AUGSBURG-NÜRNBERG A. G. (1929)*, 47 R. P. C. 193.

2005c. *Necessity for accurate statements in affidavits.*—*Re BROWN & BOSTOCK PATENT* (1931), 48 R. P. C. 215.

2012. *Add. Annotation*:—*Refd. Re Maschinenfabrik Augsburg-Nürnberg A. G. Patents* (1929), 47 R. P. C. 193.

2019a. —. *Over eight months prior to expiry—Hearing over five months prior to expiry.*—*Re MILLS & MORRIS, LETTERS PATENT NO. 105,857* (1932), 49 R. P. C. 326.

2021. *Add. Annotation*:—*Refd. Re Chambers' Patent* (1927), 44 R. P. C. 332.

2021a. —.]—*Re BOUYER'S PATENT* (1928), 45 R. P. C. 268.

2023a. —. *Six months after expiry.*—*Re HORSTMANN, HORSTMANN & EDGAR'S PATENT* (1928), 46 R. P. C. 1.

2027a. —. *Notice of opposition.*—*Re MASCHINENFABRIK AUGSBURG-NÜRNBERG A. G. PATENTS* (1929), 47 R. P. C. 193.

2027b. *Form of petition.*—*Re RUTH'S PATENT* (1931), 48 R. P. C. 553.

2027c. *Amendment of summons by addition of parties after expiry—Restoration of original summons.*—*Held*: in view of the amendment in sect. 18 (1) of the Patents & Designs Acts, 1907–32, which removed the power of the ct. to allow an application after a patent had expired, the original summons should be restored & the necessary parties added as resps.—*Re MOSSAY, JACOB & ENCLOSED MOTOR CO., LTD. PATENTS* (1933), 50 R. P. C. 256.

2029a. —.]—*Re MORF'S PATENT* (1929), 46 R. P. C. 335.

## PART XII. SECT. 2, SUB-SECT. 8.

*sc. Form of application—In Scotland—Petition.*—*Held*: the fact that procedure by originating summons was unknown in Scotland did not preclude a patentee in Scotland from obtaining from the ct. in Scotland an extension of his patent under Patents & Designs Act, 1907 (c. 29), s. 18 (6), as amended by Patents & Designs Act, 1919 (c. 80), s. 7 (3); & such an extension was granted in the course of an ordinary application by petition for the extension

of a patent.—*MURRAY v. COMPTROLLER-GENERAL OF PATENTS*, [1932] S. C. 726.—*SCOT.*

## PART XII. SECT. 2, SUB-SECT. 8.—F.

2029 i. *Form of application—Petition.*—In 1916 a patent was granted to M. for "A piece of furniture convertible for use as a bed, a couch, a bath chair or the like." The patentee expended a considerable sum in connection with the patent, but very few of the articles were sold. Manu-

facture of the article had been impeded by the war. The patentee petitioned for an extension of the term of the patent.—*Held*: the patent did not possess sufficient merit & utility to justify an extension of its term from war loss; but, on the ground that the patentee had sustained loss by reason of the war, the patent was extended for two years, notwithstanding that the application for extension was made by way of petition & not by originating summons.—*Re MURRAY'S PATENT* (1932), 49 R. P. C. 445.—*SCOT.*

- 2031. Add. Annotation:—***Refd. Re Higginson & Arundel's Patent* (1927), 44 R. P. C. 430.
- 2036a. —**.]—*Re BRITISH THOMSON-HOUSTON CO., LTD.'S PATENT* (1929), 46 R. P. C. 367.
- Annotation:—Mentd. Re Western Electric Company's Patent* (1930), 46 T. L. R. 549.
- 2038a. —**.]—*Re I. G. FARBENINDUSTRIE AKTIENGESELLSCHAFT LETTERS PATENT* (1937), 54 R. P. C. 250.
- 2044a. —** — — —.]—*Re WADE'S PATENT, Re DOUGLAS' PATENT* (1929), 46 R. P. C. 518.
- 2055a. —** Application of R. S. C. (No. 2), 1933, r. 8.].—*Re DRAKE'S PATENT* (1933), 51 R. P. C. 323.
- 2056. Add. Annotation:—***Consd. Re Neufeldt & Kuhnke Patents* (1930), 47 R. P. C. 553.
- 2060a. —**.]—*Re CLYDE & DOBBIE MCINNES, LTD. PATENTS* (1929), 46 R. P. C. 429.
- 2062a. —** — — —.]—*Re GILBERT'S PATENTS* (1927), 44 R. P. C. 527.
- 2062b. —**.]—*Re WESTERN ELECTRIC CO., LTD.'S PATENTS* (1927), 45 R. P. C. 117.
- 2062c. Manufacture in Irish Free State—Before Treaty.**—*Held:* as the patentee was working within the area of the British patent before the Irish Treaty, the considerations as to manufacture abroad were subject to modification & did not debar extension; also in the case of war losses the merits scarcely came into consideration.—*Re HILTON (JOHN) PATENT* (1932), 49 R. P. C. 398.
- 2064a. —** Loss partly made good by subsequent profits.].—An application for an extension of the term of a patent was opposed on the ground (*inter alia*) that sales lost during the war had been balanced by accumulated deferred sales after the war:—*Held:* there had been a loss which had been in part, but not wholly, made good by a subsequent gain, & an extension of two & a half years should be granted.—*Re HIGGINSON & ARUNDEL'S PATENT* (1927), 44 R. P. C. 430.
- 2064b. —** — — —.]—*Held:* in order to show that a loss had been counterbalanced by subsequent gains, it should be established that, as the result of the cessation of hostilities, those who had been holding up their demands had loosed them, so that, in the post-war years, the arrears of orders had been executed in addition to the work which would normally have been done in the normal development of the patent.—*Re BATES & UNITED SHOE MACHINERY CO., LTD.'S PATENT, Re BATES RICHARDS & UNITED SHOE MACHINERY CO., LTD.'S PATENT* (1928), 45 R. P. C. 270.
- 2064c. —**.]—*Re BOUYER'S PATENT* (1928), 45 R. P. C. 268.
- 2077a. Illness of patentee owing to war.**].—*Re EVANOVITCH'S PATENT* (1928), 46 R. P. C. 168.
- 2090a. —**.]—*Re ENFIELD CYCLE CO., LTD. & SMITH'S PATENT* (1927), 44 R. P. C. 526.
- 2094. Add. Annotation:—***Refd. Re Chambers' Patent* (1927), 44 R. P. C. 332.
- 2105a. —**.]—*Re SPENGLER'S PATENT* (1929), 46 R. P. C. 331.
- 2112. Add. Annotation:—***Refd. Re Chambers' Patent* (1927), 44 R. P. C. 332.
- 2113a. —**.]—*Electrical Research Products, Inc., & Standard Telephones & Cables, Ltd., applied by originating summons for the extension of the term of a patent granted in respect of "improvements in electric wave amplifying apparatus." The patent expired prior to the hearing of the summons. The application was opposed by Radio Manufacturers Assocn., Columbia Graphophone Co., Ltd., Mullard Radio Valve Co., Ltd., Mitcham Works, Ltd., & Philips Lamps, Ltd. The opponents denied that any loss was suffered by reason of the war, & alleged that by the earlier development by reason of the war of various uses to which the patent could be applied, the use of the patent had been accelerated & not retarded by the war. They further contended that the ct. must not consider the mere length of time lost, but its relative value compared with a similar period of time at the end of the life of the patent:—Held:* the opponents failed to show that appts. had been compensated by reason of the war for loss of opportunity for the period during which they were prevented by the war from dealing with the patent, & that the patent should be extended for four years.—*Re WESTERN ELECTRIC CO., LTD.'S PATENT* (No. 275 OF 1915) (1931), 48 R. P. C. 218.
- 2123a. —** Postponed demand.].—*Re WESTERN ELECTRIC CO., LTD., LETTERS PATENT NO. 103,188 & 107,007, No. 1690a, ante.*
- 2124. Add. Annotation:—***As to (2) Consd. Re Western Electric Co.'s Patent* (1930), 46 T. L. R. 549.
- 2127a. —**.]—*Re MELLINGER'S PATENT, Re AUTOMATIC TELEPHONE MANUFACTURING CO., LTD.* (1928), 46 R. P. C. 4.
- 2130a. —** — — —.]—*Re HOGG & CARR'S PATENTS* (1927), 45 R. P. C. 120.
- 2130b. Three years' difference in grant—Adjournment.**].—*Re EDUCATIONAL SUPPLY ASSOCN., LTD.'S PATENTS* (1928), 46 R. P. C. 330.
- 2136a. Within statutory definition of patent.**].—*Re MASCHINENFABRIK AUGSBURG-NÜRNBERG A. G. PATENTS* (1929), 47 R. P. C. 193.
- 2136b. Right to extension—Limited to period of extension of main patent.**].—*Re MASCHINENFABRIK AUGSBURG-NÜRNBERG A. G. PATENTS* (1929), 47 R. P. C. 193.
- 2136c. —** What must be considered.].—*Re MASCHINENFABRIK AUGSBURG-NÜRNBERG A. G. PATENTS* (1929), 47 R. P. C. 193.
- Annotation:—Consd. Re Letters Patent* (No. 120,941) granted to Jacob Ochsenr (1933), 51 R. P. C. 4.
- 2136d. Conversion of application for patent into application for patent of addition—To patent applied for at later date.**].—*Re IMPERIAL CHEMICAL INDUSTRIES, LTD., ERIC WILLIAM FAWCETT & ERIC EVERARD WALKER, APPLICATION FOR A PATENT* (1935), 53 R. P. C. 157.

## Part XIII.—Revocation.

**2144. Add. Annotation:—***As to (3) Refd. Re Ivor Gwynne Perrett's Patent (1928), 49 R. P. C. 406.*

**2171a. — Razor blades.]—**In 1925 letters patent were granted for "Improvements in Safety Razors." The patentee claimed to have discovered that each time a razor is used for shaving, the cutting edge is upturned or bent back by reason of the resistance offered by the hair of the face; that honing the blade returned the bent back portions of the blade to their original position in the line of the cutting edge, & that, if the upturning or bending back always takes place in the same direction, greatly increased life is obtained from the cutting edge. In order to ensure that the upturning always takes place in the same direction, the patentee provided that the blade should be non-reversible in the holder. This was done by means of cut out portions in the blade asymmetrically disposed relatively to the longitudinal & transverse axes of symmetry of the blade & positioning studs similarly mounted on the holder adapted to engage the cut out parts of the blade. Claim 1 was as follows: "In a safety razor, the combination of a thin cutting blade, a holder for said blade, cut out parts provided in said blade asymmetrically disposed relatively to the longitudinal & transverse axes of the said blade & positioning studs similarly mounted on said holder & adapted to engage said cut out parts in the blade." Claim 5 was as follows: "Safety razor blades substantially as described & illustrated in the accompanying drawing." The Valet Auto Strop Co., Ltd., petitioned to revoke the patent on the ground that it was invalid by reason of prior publication, that it lacked subject-matter & utility, & that the patent had been obtained by false suggestion:—*Held*: the theory upon which the patent was founded was erroneous; there was no subject-matter or utility in the invention, & the patent was anticipated by at least one of the prior specifications cited & was invalid. An order for the revocation of the patent was made, with costs.—*Re LE RASOIR APOLLO, LETTERS PATENT No. 239,112 (1931), 49 R. P. C. 1.*

**2174a. Prior publication.]—**In the case of an application for the revocation of a patent already granted, appct. must establish his case in the clearest possible manner, & where prior publication is relied on, it is necessary to point to a clear & specific disclosure of something which can fairly be stated to be

the patentee's invention.—*Re LOWNDES' PATENT (1927), 45 R. P. C. 48.*

**2174b. Insufficient description.] —***Re GAS CHAMBERS & COKE OVENS, LTD., APPLICATION FOR REVOCATION OF LETTERS PATENT No. 366,656 (1934), 52 R. P. C. 81.*

**2175a. Insufficiency—Characteristics defined by reference to result.]—***NO-FUME, LTD. v. FRANK PITCHFORD & CO., LTD., No. 518a, ante.*

**2186. After this case add:—**

**Application for directions.]—***See R. S. C., Ord. 53A, r. 21A, & Nos. 2944a—2944l, post.*

**2189a. — Counter-statement out of time.]**—S. applied to the Comptroller-General of Patents under sect. 26 of the Patents & Designs Acts, 1907–1932, for the revocation of Letters Patent No. 450,457 granted to E. The patentee having failed to put in a counter-statement within the appointed time, appct. had no opportunity of putting in evidence under Patent Rule 45. A hearing having been appointed under rule 49 the patentee put in a counter-statement two days before the date appointed for the hearing. When the matter came before the superintending examiner, leave was given to admit the counter-statement out of time under rule 41, but an adjournment to allow appct. to put in evidence under rule 45 was refused. The hearing proceeded without further evidence & an order was made. Appct. appealed by petition:—*Held*: in view of the irregularities of procedure the order of the superintending examiner should be discharged & the matter returned for rehearing after an opportunity for the admission of evidence under the Patent Rules had been afforded, & the costs of the petition to the ct. should be paid by the patentee, the costs of the hearing before the superintending examiner to be dealt with at the rehearing. A statutory declaration is not "a publication other than a specification or publication already mentioned in the proceedings" within Patents Rule 49.—*Re SHEPHERD'S APPLICATION FOR REVOCATION OF LETTERS PATENT No. 450,457 (1938), 55 R. P. C. 265.*

**2196. Add. Annotation:—***Refd. Drysdale, Sidney Smith & Blyth, Ltd. v. Davey Paxman & Co. (Colchester), Ltd., Re Letters Patent No. 274,162 (1937), 55 R. P. C. 95.*

**2222a. Power to order amendment of specification —Extent of power.]—***Re EVENO'S PATENT, No. 2261b, post.*

### PART XIII. SECT. 1, SUB-SECT. 1.—A.

**so. Person interested—Who is.]—**Pltf. is licensee in Canada of a patent issued to G. Co., relating to improvements in cooling containers, & deft. W. S. Incorporated is the owner of a patent for improvements in a method of refrigeration, & the other deft. is licensee under the same patent:—*Held*: where an individual is using an invention in respect of which another person claims to have a patent, which the unlicensed user believes to be invalid; or where a person is desirous of using anything described in a patent, but which patent he has reason to

believe is void, then he has such an interest as to qualify him to initiate proceedings to annul such letters patent; & is a person "interested" within the rules of this ct.—*REFRIGERATING EQUIPMENT, LTD. v. DRUMMOND & QUILHAM SYSTEM, INCORPORATED, [1930] Ex. C. R. 154; 4 D. L. R. 926.—CAN.*

### PART XIII. SECT. 1, SUB-SECT. 1.—B.

**sp. Proceedings by information—Validity.]—***Held*: the present action to impeach & annul certain patents of invention instituted in this ct. by information in the name of the A.-G.

of Canada was properly instituted under rule 16, notwithstanding the provisions of sect. 37 of Patent Act providing for procedure by *scire facias*; (2) the Exchequer Ct. Act authorises the Crown to institute proceedings upon the information of the A.-G. of Canada to impeach a patent of invention, without showing that it is otherwise a party interested.—*R. v. MYERS CANADIAN AIRCRAFT CO., LTD., [1931] Ex. C. R. 146.—CAN.*

**PART XIII. SECT. 1, SUB-SECT. 2.—F. m i. —.]—***WRIGHT v. BELL TELEPHONE CO. (1887), 2 Exch. C. R. 552.—CAN.*

**2251a.** ———.]—*Re* KOERNER'S PATENT (1928), 45 R. P. C. 442.

**2254a.** Application to make order rule of court—By Side Bar Motion.]—PRACTICE NOTE (1930), 69 L. Jo. 80; 189 L. T. Jo. 54; [1930] W. N. 9.

**2257.** Add. Annotation:—As to (2) *Consd. Re* Adamson (Daniel) & Co. & Kerfoot Patent 353,087 (1932), 50 R. P. C. 171.

**2260a.** Ambiguity.]—I. B. E., Ltd., applied to the Comptroller-General of Patents under sect. 26 of Patents & Designs Acts, 1907–1928, for the revocation of letters patent No. 321,721 granted to D. The Assistant-Comptroller ordered the specification to be amended. I. B. E., Ltd., appealed to the ct. It was contended (*inter alia*) for applts. that the letters patent ought to be revoked on the ground of (1) insufficient description, & (2) ambiguity. It was contended (*inter alia*) for resps. that the ct., on an appeal under sect. 26, had no power to order an amendment:—*Held*: by virtue of sect. 92 (2) of Patents & Designs Acts, 1907–1928, & of R. S. C., Ord. 53a, r. 6, the ct. has jurisdiction to order an amendment; & the ground of ambiguity, unless it be identical with the ground of insufficiency of description covered by sect. 11 (1) (c), is not open to a petitioner under sect. 26. The order of the Assistant-Comptroller was varied, & further amendments ordered.—*Re* INTER-

NATIONAL BITUMEN EMULSIONS, LTD., PETITION FOR THE REVOCATION OF DEHN'S PATENT (1932), 49 R. P. C. 368.

**2261a.** Power of court—To order amendment of specification.]—*Re* INTERNATIONAL BITUMEN EMULSIONS, LTD., PETITION FOR THE REVOCATION OF DEHN'S PATENT (1932), 49 R. P. C. 368.

**2261b.** ——— Extent of power.]—In proceedings for the revocation of a patent under sect. 26 of Patents & Designs Acts, 1907 & 1919, the power of the Comptroller to require the specification to be amended by disclaimer, correction, or explanation does not enable him to accept an amendment put forward by the patentee covering a wider claim or a different claim from that made in the unamended specification. Sect. 26 does not widen or enlarge the powers of amendment conferred on the Comptroller under sect. 21 or on the ct. under sect. 22.

The procedure of amendment by way of disclaimer cannot be used so as to extract from the specification some feature or features not claimed or suggested as constituting the original invention, & to claim them as being the invention.—*Re* EVENO'S PATENT, [1932] 2 Ch. 167; 101 L. J. Ch. 395; 147 L. T. 478; 49 R. P. C. 385.

Annotation. *Re*ld. *Re* Johnson & Johnson (Great Britain), Ltd.'s Patent, [1938] Ch. 283.

## Part XIV.—Infringement.

**2268a.** ———.]—Letters patent were granted for "improvements in or relating to bag corner sewing & like operations." Claim 1 of the specification was as follows: "A machine as hereinbefore characterised in which a work-engaging portion of the internal work-support has movement of accommodation to either side of the sewing point in a direction substantially parallel to the stitching line." In an action for infringement of the patent, defts. denied infringement & alleged that the patent was invalid by reason of prior publication, prior user, want of subject-matter, & inutility, & they counterclaimed for the revocation of the patent:—*Held*: the first feature of the invention described & claimed in the specification was for the work-engaging member or tablet at the tip of the horn & consisted in its shape & method of attachment, the tablet used in defts.' machine differed wholly in form & method of attachment from the tablet described in the specification of the patent, defts.' machine did not embody any invention described in & claimed by the specification, & therefore there was no infringement; further, on that interpretation of the specification there had been no prior publication or user of the invention described, which possessed utility, & defts. had failed to establish any ground of revocation. The action & counterclaim were dismissed with costs, with the usual set-off, & a certificate with respect to certain of the particulars of objections & a certificate of validity were granted.—*BRITISH UNITED SHOE MACHINERY Co., LTD. v. ISAACSON &*

*RALPHS (NORWICH), LTD.* (1934), 51 R. P. C. 289.

**2268b.** ———.]—Letters Patent No. 403,952 were granted for "improvements in or relating to reflecting signs for roads & streets." Pltfs. commenced an action for infringement. Defts. denied infringement & alleged that the patent was invalid & counterclaimed for its revocation. Claim 1 of the patent was as follows: "A reflector sign illuminated by an external source of light, comprising in combination with the matter to be displayed a light-condensing plate of clear glass or other transparent material, one face of which is provided with a plurality of small lenses of convex external surface, the foci of which are at the plane face of the plate, & a dispersively reflecting surface at said plane face." It was held at the trial that the patent had not been infringed & was invalid for want of subject-matter & the patent was ordered to be revoked. Pltfs. appealed. The parties settled the appeal, after argument, upon terms that the appeal in the action should be allowed subject to pltfs. (applts.) abandoning their claim that defts. had infringed. Resps. thereupon took no part in the appeal against revocation of the patent:—*Held*: the patent was not wanting in subject-matter & was valid; & that the appeal against the order for revocation should be allowed & that order be discharged; & a certificate of validity was granted; also that the method of dissecting a combination into its constituent elements, & then examining each element

to see whether it was obvious or not, is to be applied with great caution as tending to obscure the fact that the selection of the elements presupposes the conception of the combination & the result to be obtained.—**ALBERT WOOD & AMCOLITE, LTD. v. GOWSHALL, LTD.** (1936), 54 R. P. C. 37, C. A.

*Annotation*:—**Refd.** British Thomson-Houston Co., Marconi's Wireless Telegraph Co. & Electric & Musical Industries Ltd., v. Guildford Radio Stores & Co., Ltd. (1937), 55 R. P. C. 71.

**2270a. Ownership without user.**—In 1934 plff. commenced an action for infringement of three patents, the date of acceptance of the earliest of which was Nov. 1932. By his particulars of breaches, plff. alleged infringement by reason of the ownership of a machine purchased from plff. in 1930 & subsequent to Jan. 1932, & prior to the issue of the writ modified so as to be in accordance with the specifications of the patents & in infringement of each of the claims of the same. Defts. moved to strike out the statement of claim on the grounds that it disclosed no cause of action & that it was embarrassing:—**Held**: the statement of claim did not necessarily disclose any cause of action, as the particulars of breaches merely stated that defts. owned a machine which they had modified, possibly at a time when they were entitled to do so. The statement of claim was struck out. Plff. appealed to the Ct. of Appeal:—**Held**: on appeal, the statement of claim did not allege infringement of the patents after the date of acceptance of the complete specifications, & therefore it did not disclose a good cause of action; mere ownership without possession was not sufficient to raise a presumption of an intention to use & the commission of an act which did not give rise to a cause of action was no evidence of an intention to commit an act that was unlawful. The appeal was dismissed with costs.—**SCHUSTER v. HINE PARKER & CO., LTD.** (1935), 52 R. P. C. 345, C. A.

**2273. Add. Annotation**:—As to (4) **Folld.** Pittevil & Co. v. Brackelsberg Melting Processes, Ltd., [1932] 1 Ch. 189.

**2274a.** — — — — —.]—**PITTEVIL & CO. v. BRACKELSBURG MELTING PROCESSES, LTD.**, No. 3317a, *post*.

**2281a.** — — — — —.]—**STELOS RE-KNIT, LTD. v. LADDA-MEND CO., LTD.** (1931), 48 R. P. C. 435.

**2298. Add. Annotation**:—**Refd.** No-Fume, Ltd. v. Frank Pitchford & Co. (1935), 52 R. P. C. 231.

**2302. Add. Annotation**:—**Refd.** V. D., Ltd. v. Boston Deep Sea Fishing & Ice Co., Ltd. (1935), 52 R. P. C. 303.

**2302a.** — — — — — **User at sea outside three-mile limit.**—V. D., LTD. v. BOSTON DEEP SEA FISHING & ICE CO., LTD., *Re VIGNERON DAHL ET CIE PETITION FOR REVOCATION OF LETTERS PATENT, Re VIGNERON'S APPLICATION FOR LETTERS PATENT* (No. 175,824), No. 604a, *ante*.

**2307. Add. Annotation**:—As to (1) **Consd.** Schuster v. Hine Parker & Co. (1935), 52 R. P. C. 345.

**2312. Add. Annotations**:—**Refd.** Sharpe & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153; Pope Appliance Corp. v. Spanish River Pulp & Paper Mills (1929), 98 L. J. P. C. 50.

**2332. Add. Annotation**:—**Consd.** *Re L'Air Liquide Société Anonyme pour L'Etude et L'Exploitation des Procédés George Claude's Patent* (1930), 49 R. P. C. 428.

**2337a.** — — — — — **Form of patented article modified.**—The patentee of a collapsible tube & cap for holding tooth paste licensed defts. to make & sell the tube & cap, but with the condition that each tube should be stamped with certain words. Defts. sold a modified form of tube & cap unstamped:—**Held**: the modified form was not within the patent, & there was consequently no infringement.—**HUNTOON CO. v. KOLYNOS (INCORPORATED)** (1930), 47 T. L. R. 57; 47 R. P. C. 430; *affd.*, 48 R. P. C. 98, C. A.

**2342. Add. Annotation**:—**Folld.** Chloride Electrical Storage Co. v. Silvia Wireless Stores (1931), 48 R. P. C. 468.

**2344a.** — — — — — **Attached to article.**—The owners of letters patent relating to electrical batteries brought an action for infringement against defts. claiming damages & an injunction restraining them from infringing by selling certain batteries of the D. T. G. type manufactured by plffs. below authorised prices. It was alleged by plffs. that each of the said batteries had a label pasted upon it that it must not be sold below the catalogue price fixed by the patentee, & was enclosed in a carton on which was printed a notice in the same terms. P. J. S., trading as deft. firm which carried on business at a shop in L., admitted in evidence & in his answers to interrogations that he had knowledge of the restrictions, but denied (a) that all of the batteries sold by plffs. bore the alleged label; (b) that all of such batteries were enclosed in the alleged cartons; (c) that deft. firm had ever sold any of such batteries below the price fixed by plffs. as alleged:—**Held**: defts. having had knowledge of the restrictions upon the evidence sold batteries at prices lower than that fixed by plffs. as patentees. Judgment was given for plffs. & an injunction was granted with costs.—**CHLORIDE ELECTRICAL STORAGE CO., LTD. v. SILVIA WIRELESS STORES** (1931), 48 R. P. C. 468.

**2358a.** — — — — —.]—Letters patent were granted in 1916 for "Improvements in ironing machines & apparatus." One of the claims was as follows: "In an ironing machine of the type specified, mounting the device employed to control the movements of the iron on the mechanism by which reciprocating motion is imparted to the iron in such a manner that said device partakes of both the horizontal & the vertical movements of the element which carries the iron." Plffs. alleged that defts. had infringed the patent. Defts. denied infringement, & alleged that the patent was invalid for want of novelty, by reason of prior publication & prior public

PART XIV. SECT. 1, SUB-SECT. 6.—A.

2337 i. Sale in breach of limited licence—Necessity for knowledge of limitation.]—In a suit by a patentee of articles

against a vendor of them for infringement of plff.'s patent by selling them contrary to conditions imposed by the patentee, it is necessary to allege in the statement of claim that deft.

acquired the patented articles with knowledge of those conditions.—**COLUMBIA GRAMOPHONE CO., LTD. v. FOSSEY** (1927), 27 S. R. N. S. W. 246; 44 N. S. W. W. N. 87.—**AUS.**

general knowledge, & for want of subject-matter :—*Held* : there was novelty & subject-matter & the patent was valid, but that the claims were limited to machines "of the type in which a flat iron of such a weight as will give the necessary pressure is employed," & defts.' machine was not of this type & consequently there was no infringement. The action was dismissed. *Pltfs. & defts.* were directed to tax their respective costs of the action, *pltfs.* to have one-fifth & *defts.* four-fifths of such costs.—*LISTER BROS. v. THORP, MEDLEY & Co.* (1930), 47 R. P. C. 99 ; *affd.*, 47 R. P. C. 526, C. A.

**2358b.** —.]-In 1924 letters patent were granted for "Improvements in electric couplings, terminals, & the like." Claim 14 was as follows : "An electric coupling substantially as described with reference to figs. 11 & 12 of the accompanying drawing." *Pltfs.* brought an action for infringement of this claim. *Defts.* denied infringement & alleged that the patent was invalid by reason of prior publication & for want of utility :—*Held* : Claim 14 was for a combination of a plug & socket & that, as *defts.* sold a plug that was not combined with a socket, they did not infringe.—*CHAPMAN & COOK & LECTRO LINX, LTD. v. DELTAVIS, LTD.* (1930), 47 R. P. C. 163.

**2358c.** —.]-Letters patent dated Aug. 13, 1923, were granted to *pltf.* entitled "improvements in or relating to apparatus for tipping & discharging railway wagons." Claim 1 was as follows : "Apparatus of the type herein referred to, for tipping & discharging railway wagons, wherein the carrier is pivoted to & carried by the lower short arms of a pair of levers carried by stationary standards or supports arranged at the opposite ends of the carrier, the longer & upwardly extending arms of the levers being connected together by a sustaining beam that serves to hold a wagon on the carrier during the tipping operation but which is normally in an inoperative position clear of the wagon, the pivotal connections between the levers & the carrier & between the levers & the standard being so arranged that the centre of gravity of the carrier & a wagon thereon will in all working positions of the carrier be to that side of the vertical plane passing through the pivotal connections between the levers & stationary standards or supports that is opposite to that side to which the carrier & wagon are moved for tipping the wagon substantially as described." In 1931 *pltf.* commenced an action for infringement of the patent claiming the usual relief. *Defts.* denied infringement & alleged that the patent was invalid :—*Held* : the letters patent were valid ; the words "short" & "longer" in relation to the arms of levers referred to in the specification were words limiting the monopoly claimed & not describing the best way known to the patentee of working his invention, & upon this construction there was no infringement. The action was dismissed with costs.—*MITCHELL v. WEST'S GAS IMPROVEMENT CO., LTD.* (1934), 51 R. P. C. 177.

**2358d.** —.]-Letters patent were granted for "improvements in & relating to sound recording apparatus." The invention related to the reduction of background noise, by

reducing the transparent area of the photographic sound track during periods of low sound intensity, but utilising a rectified component of the microphone current. Claims 1, 2 & 6 were as follows : "1. In the method of making a photographic sound record consisting in varying the amount of light falling upon an elementary transverse strip of a moving film in accordance with the wave form of the sound to be recorded, producing automatically in accordance with the volume of the sound to be recorded a superimposed variation either of the mean intensity of the recording light beam (in variable density recording) or of the mean position of the light beam with reference to the sound track (in variable width recording).

2. The method of making a photographic sound record in which the clear area varies with the volume of the sound being recorded which comprises exposing a sensitive film to a light beam, vibrating the beam laterally of the film in accordance with the wave form of the sound being recorded, & producing an additional lateral displacement of the beam in accordance with the volume of the sound. . . . 6. Apparatus for photographically recording sound on a moving sensitive film comprising a light source, an oscillograph galvanometer arranged to reflect a light beam therefrom on to the film & adapted to be vibrated by an alternating current corresponding to the wave form of the sound to be recorded thereby forming a variable width sound record, & means for superimposing on the alternating current a rectified component thereof which varies in accordance with the volume of the sound being recorded" :—*Held* : on the true construction of the specification the patentee had limited his claims to a lateral displacement of the light beam, whereas *defts.* had obtained their result by a longitudinal displacement of a triangular beam intersecting a slot ; also the patentee had limited his claims to the use of a component of the microphone current, whereas *defts.* used that component to control another current in inverse phase to the first ; *defts.* had not infringed the patent.—*R. C. A. PHOTOPHONE, LTD. v. GAUMONT-BRITISH PICTURE CORPN., LTD., & BRITISH ACOUSTIC FILMS, LTD.* (1935), 52 R. P. C. 206 ; *affd.* (1935), 53 R. P. C. 167 C. A.

**2386.** *Add. Annotation* :—*As to* (1) *Refd.* Norton & Gregory, Ltd. v. Jacobs (1936), 54 R. P. C. 58.

**2389.** *Add. Annotation* :—*Refd.* *Re* Higginson & Arundel's Patent (1927), 44 R. P. C. 430.

**2389a.** —.]-Letters patent were granted in 1931 for "A new or improved rowing machine or rowing exercise apparatus." The first claim was as follows : "A rowing machine or rowing exercise apparatus, of the type herein referred to, which comprises an open rectangular or like frame or base of metallic tubular construction, a tubular footrest raised integrally from said frame or base, a stool or seat slidably supported on rollers or runners upon the side tubes of said frame or base & having spiral tension spring attachments to the forward part thereof, & a pair of handles or hand grips mounted on the forward part of said frame or base & having spiral tension spring attachments to the rearward part thereof." *Pltfs.* alleged

infringement by the sale of a "Spenby Sculling Machine." Defts. alleged that the patent was invalid on the grounds of want of novelty, by reason of prior publication in a number of prior specifications, & common general knowledge, want of subject-matter, insufficiency of description & lack of utility:—*Held*: defts.' machine did not infringe pltf's. claim, since the machine did not contain all the integers of that claim. In the circumstances it was unnecessary for the issue of validity to be decided. The action was dismissed. Pltfs. were ordered to pay defts.' costs, except in so far as they had been increased by the issue of validity.—*TERRY & ROWLEY v. SPENCER & BEATTIE* (1935), 52 R. P. C. 154.

**2389b.** —. —. —. In 1928 letters patent were granted in respect of "Improvements in rams & like devices." Claim 1 was as follows: "A ram of the type set forth in which the supporting rod engages with the piston in other than a rigid manner to allow of relative displacement, the distance between both elements when at their limiting positions in the internal combustion engine cylinder away from the ram proper being equal to the suction stroke of the piston." In 1935 pltf's. commenced an action for infringement of the patent. In the alleged infringement the working piston was rigidly attached to the supporting rod, but there was a second piston which was not attached thereto. Defts. denied infringement & alleged that the patent was invalid by reason of lack of novelty & subject-matter & insufficiency:—*Held*: the patent was valid, but the claims were limited to cases in which the working piston was not rigidly attached to the supporting rod, in this case the doctrine of "pith & marrow" or mechanical equivalents had no application & there was no infringement. The action was dismissed & pltf's. were ordered to pay nine-tenths of defts.' costs. A certificate of validity was granted.—*HAAGE v. PEGSON, LTD.* (1935), 53 R. P. C. 58.

**2417a.** —. —. —. F. & F., Ltd., the registered legal owners of Letters Patent No. 200,163 for "Means for Pleating & Suspending Curtains & the like" brought an action for infringement against C., Ltd. At the trial defts. contended that on a proper construction of the claims there was no infringement, & that the patent was invalid for lack of subject-matter & for ambiguity. The first claim was "A heading tape for pleating & suspending curtains & the like woven with

'hook tubes' constructed to hold suspension hooks firmly to the tape, & provided with draw cords adapted to pleat the tape, the arrangement of the 'hook tubes' & draw cords being such that, on the tape being pleated, the 'hook tubes' lie in & across the channels of the pleats & the front portion of each 'hook tube' projects forwardly from the tape &/or the tape proper projects rearwardly from the said front portion of the 'hook tube' substantially as herein set forth." Pltf's. contended that defts. had taken the "pith & marrow" of pltf's. invention:—*Held*: the hook tubes in defts.' tape did not "lie in & across the channels of the pleats" & on the proper construction of the claims defts. had not infringed, & the "pith & marrow" of the invention was expressly contained in claim 1; in the circumstances it was unnecessary to consider the question of validity, since if the Ct. of Appeal were to hold that the construction of the specification was wrong, it would not be assisted by observations of the question of validity. The action was dismissed with costs. A certificate was granted in respect of certain of the particulars of objections.—*FRENCH & THOMAS FRENCH & SONS, LTD. v. CHALCO, LTD.* (1938), 55 R. P. C. 157.

**2441.** *Add. Annotation*:—*Refd. N. V. "Splendor" Gloeilampen Fabrieken v. Omega Lamp-works, Ltd.* (1933), 50 R. P. C. 393.

**2456a.** *What amounts to patent of principle.*—In 1913 letters patent were granted in respect of "improvements in receivers for use in wireless telegraphy & telephony." Claim 1 was as follows: "A receiving system for electrical oscillations which contains a valve for magnifying the oscillations & which is so arranged that the circuit in which are set up the magnified oscillations reacts on the circuit in which occur the oscillations to be magnified substantially as described." In 1930 pltf's. commenced an action against defts. for infringement of the patent. Defts. denied infringement & alleged that the patent was invalid by reason of lack of novelty, subject-matter & utility, & because the specification was ambiguous:—*Held*: the patent was valid, but it did not claim a principle of construction but an apparatus of particular construction & method of working, & defts. had not infringed. The action was dismissed, defts. being given four-fifths of their costs, & pltf's. one-fifth of their costs, a direction being given to the taxing master to include in defts.' costs the reasonable costs

#### PART XIV. SECT. 1, SUB-SECT. 9.

**2419 i.** *Not conclusive of infringement—Difference in method.*—*Held*: the essence of the alleged invention rested on what the patentee describes as a process of destructive distillation of waste liquors, the evaporation of all water & combustion of nearly all the consumable products in the liquor, i.e. woody or ligneous matter, in its downward flight in the upper zone of the furnace, leaving nothing but a carbon residue & non-volatile salts reaching the floor of the furnace, & the method employed by defts., where recovery takes place on the hearth & not by distillation in the upper zone, was radically different, was based on an altogether different idea & principle & could not be said to be an infringement of pltf's. patent.—*ROSS* (J. O.)

ENGINEERING CORPN. & C. L. W. PATENTS CORPN. v. CANADA PAPER CO. & HOWARD SMITH PAPER MILLS, LTD., [1932] Ex. C. R. 141; *reversd.*, [1934] 1 D. L. R. 786.—*CAN.*

**2423 i.** *Not conclusive of infringement—Substantial identity.*—Infringement of a patent for frost shields on cans is not avoided by changing the means or adhesive properties which hold it to the glass.—*DURKEE ATTWOOD CO. v. AUGER*, [1938] 2 D. L. R. 255.—*CAN.*

*sm. Difference in method.*—Pltf. alleged infringement of a patent relating to handles for use on caskets & other receptacles. The Ct. found that there was invention in pltf.'s idea of the mode of construction of the two members of the handle which permitted

the locking of the handle to be effected by merely lifting the grip after it was placed in the base; that there was no anticipation in the prior art; that deft.'s handle differed from that of pltf. only in the practice of locking the members by a machine operation, a means which produced the same handle & the same result:—*Held*: infringement cannot be evaded because one chooses to adopt a slower & more expensive method of doing what a patent clearly states may be done in another & better way. Invention should not be denied upon the ground of the mere simplicity of the thing invented & patented.—*DOMINION MANUFACTURERS, LTD. v. ELECTROLIER MANUFACTURING CO., LTD.*, [1933] Ex. C. R. 141; *affd.*, [1934] S. C. R. 436; 3 D. L. R. 657.—*CAN.*



of putting in evidence certain matters referred to in the particulars of objections. No order was made on an application by defts. for costs on the higher scale & for three counsel.—*MARCONI'S WIRELESS TELEGRAPH CO., LTD. v. PHILIPS LAMPS, LTD.* (1933), 50 R. P. C. 287.

**2461. Add. Annotation:—Generally, Refd.** Marconi's Wireless Telegraph Co. v. Philips Lamps, Ltd. (1933), 50 R. P. C. 287.

**2469. Add. Annotation:—Refd.** Marconi's Wireless Telegraph Co. v. Philips Lamps, Ltd. (1933), 50 R. P. C. 287.

**2474. Add. Annotations:—Refd.** Marconi's Wireless Telegraph Co. v. Philips Lamps, Ltd. (1933), 50 R. P. C. 287; R. C. A. Photophone, Ltd. v. Gaumont-British Picture Corp., Ltd. & British Acoustic Films, Ltd. (1935), 53 R. P. C. 167.

**2479. Add. Annotation:—As to (1) Refd.** Rondo Co., Ltd. v. Gramophone Co. (1929), 46 R. P. C. 378.

**2528. Add. Annotation:—Refd.** Harmer v. Armstrong, [1934] Ch. 65.

**2537a. ———.]—Held: Heap v. Hartley,** No. 1584, did not decide that a licensee could not properly be joined with the patentee in an action for infringement, & he should not be struck out on this application, which was dismissed.—*TRICO PRODUCTS CORPN. & TRICOPOLBERTH, LTD. v. ROMAC MOTOR ACCESSORIES, LTD.* (1933), 51 R. P. C. 90.

**2538a. Prior grantee.]—NORTON & GREGORY, LTD. v. JACOBS** (1933), 50 R. P. C. 257.

**2556. Add. Annotation:—Refd.** The Jupiter (No. 3) (1927), 137 L. T. 333.

**2560. Citations:—For "47 Sol. Jo. 365" read "67 Sol. Jo. 365."**

**Add. Annotation:—Refd.** Mackenzie-Kennedy v. Air Council (1927), 138 L. T. 8.

**2563. Add. Annotation:—Refd.** British Oxygen Co. v. Gesellschaft für Industriegasverwertung M. B. H. (1930), 48 R. P. C. 130.

**2570a. Motion to strike out—Action for declaration.]—Pltf.,** who was the grantee & registered legal owner of four letters patent, commenced an action against deft. claiming a declaration that he was the first & true inventor of the subject-matter of the patents

& an injunction restraining deft. from representing that he had any claim or interest in the patents. By his statement of claim pltf. alleged (*inter alia*) that he was the first & true inventor of the subject-matter of the patents & that deft. had falsely represented that he was the co-inventor, together with pltf., of the inventions & that he had a claim to or interest in the patents. Deft. moved to strike out the statement of claim on the grounds that it disclosed no cause of action & tended to prejudice, embarrass or delay the trial of the action:—**Held:** the discretion of the ct. was one to be exercised at the trial, having regard to the facts which might then be established, & the motion must be dismissed with costs.—*KILLEN v. MACMILLAN* (1931), 48 R. P. C. 380.

**2595. Add. Annotation:—Consd.** Schuster v. Hine Parker & Co. (1935), 52 R. P. C. 315.

**2596. After this case add:—**

———.]—*See, also, INJUNCTION, No. 839a.*

**2601a. Application stood over—Where unreasonable & oppressive.]—Pltfs.** commenced an action for the infringement of four patents granted in respect of improved manufacture of cathodes for electric discharge valves. By their particulars of breaches pltfs. alleged that defts. had infringed the patents by importing into this country certain wireless valves which had certain specified characteristics, or some of them, & which had been manufactured by a process comprising certain specified steps, or some of them. Defts. issued a summons for further particulars of the aforesaid characteristics & steps:—**Held:** defts. had full knowledge of the patented processes & of those used for the production of the alleged infringing valves, & their application for particulars was unreasonable & oppressive. The application was stood over generally with liberty to restore.—*MULLARD RADIO VALVE CO., LTD. v. TUNGSRAM ELECTRIC LAMP WORKS (GREAT BRITAIN), LTD.* (1932), 49 R. P. C. 279.

**2606a. ———.]—LEKTOPHONE CORPN. v. BROWN (S. G.), LTD.** (1929), 46 R. P. C. 203; *affd.*, 46 R. P. C. 439, C. A.

**Annotation:—Refd.** Marconi's Wireless Telegraph Co. v. Philips Lamps, Ltd. (1933), 50 R. P. C. 287.

#### PART XIV. SECT. 1, SUB-SECT. 14.

**n i. ———.]—PARIS v. LEDINGHAM,** [1931] 44 B. C. R. 289.—**CAN**

**n ii. ——— Obvious equivalent.]—**When an invention consists in the production of a new result, the patentee is not tied down to the particular means, or the identical parts mentioned in his specification. In other words one cannot make use of the novel principle of an invention, the carrying of which into effect is the real substance of the patentee's invention, by substituting obvious equivalents for some of the parts mentioned in the patentee's specifications, & thus escape infringement.—*CANADIAN RADIO PATENTS, LTD. v. HOBBS HARDWARE CO., LTD.*, [1929] 4 D. L. R. 82; Ex. C. R. 238.—**CAN.**

#### PART XIV. SECT. 1, SUB-SECT. 15.

**2519 ii. ———.]—Pltf.,** owner of a patent of invention, known as the H. patent, for a radio receiving circuit, alleged that the circuit used in the set manufactured & sold by deft. was an infringement of the said H. patent & asked that it be so declared & that deft. be restrained from further manu-

facturing & using the said circuit:—**Held:** even assuming that deft.'s circuit contained component parts & arrangements distinguishing it from the specific circuit disclosed by H., & were patentable improvements, nevertheless, the H. invention being new & useful, the fact that it was more useful with the subsequent improvements, afforded no ground for infringing the original invention by using it with the subsequent improvement.—*WESTERN ELECTRIC CO., LTD. v. BELL*, [1929] 4 D. L. R. 943; Ex. C. R. 213.—**CAN.**

#### PART XIV. SECT. 2, SUB-SECT. 1.—A.

**2536 iii. ———.]—CHANNELL v. O'CEDAR CORPN.** (1927), 60 O. L. R. 525; *varied* [1928] 3 D. L. R. 843; [1928] S. C. R. 542.—**CAN.**

**st. Subsidiary company.]—**A New Jersey co. owning a patent sold its goods through a subsidiary Canadian co.:—**Held:** the New Jersey co. could recover damages for infringement in Canada, but the Canadian co. had no cause of action & was not entitled to be joined as pltf.—*ELECTRIC CHAIN CO. v. ART METAL WORKS, INC.*, [1933] 4 D. L. R. 240; S. C. R. 581.—**CAN.**

#### PART XIV. SECT. 2, SUB-SECT. 3.—A.

**sv. Service of.]—Held:** service of the statement of claim at the place of business of deft., a registered firm doing business in the Province of Quebec & owned by one G. who was not served with the statement of claim personally, constituted good service & was regular, valid & legal.—*CANADIAN GENERAL ELECTRIC CO., LTD. v. NATIONAL ILLUMINATION CO.*, [1935] Ex. C. R. 242; [1936] 2 D. L. R. 10.—**CAN.**

#### PART XIV. SECT. 2, SUB-SECT. 3.—B. (b).

**sz. Inapplicability of English practice.]—**Under r. 28 of the General Rules & Orders of this ct., the ct. or a judge thereof may order such further & better particulars as such ct. or judge may see fit. The practice laid down in Order 53A of the High Ct. of Justice in England has not so far been adopted in this ct.—*CANADIAN RADIO PATENTS, LTD. v. HIGEL RADIO, LTD.* [1929] Ex. C. R. 107.—**CAN.**

**2614. Add. Annotations :—***Apld. Heap Samuel & Son v. Bradford Dyers' Assocn.* (1929), 46 R. P. C. 254. *Refd. British United Shoe Machinery Co. v. Gimson Shoe Machinery Co.* (1928), 45 R. P. C. 85; *Cincinnati Grinders (Inc.) v. B. S. A. Tools, Ltd.* (1930), 48 R. P. C. 33; *Woodrow v. Long, Humphreys & Co.* (1933), 51 R. P. C. 25; *Hardaker v. Boucher & Co.* (1934), 51 R. P. C. 278.

**2627a. —.**—In 1917, letters patent were granted in respect of "improvements relating to electrodes for electric arc soldering." Claim 1 was as follows:—"In a method of coating electrodes for electric arc soldering by an extrusion process, winding the wire with asbestos yarn or other suitable non-conducting material (*i.e.* a second class conductor) in open spirals, substantially as & for the purposes set forth." In 1932, *ptf.s.* commenced an action for infringement of the patent, claiming the usual relief. *Defts.* denied infringement & alleged that the patent was invalid. They also pleaded that by reason of an order made in 1924, embodying an undertaking by *ptf.s.* in an action against *defts.* not to bring any further action in respect of the infringements of the patent complained of in that action, *ptf.s.* were estopped from bringing this action. This plea was ordered to be tried as a separate issue under R. S. C., Ord. 53A, r. 21a:—*Held:* upon the preliminary issue, *ptf.s.* were not estopped from bringing this action, & *defts.* must pay the costs of this issue in any event. Upon the trial of the action, the patent was invalid by reason of anticipation & want of subject-matter, & *defts.* had not infringed. The action was dismissed with costs.—*MUREX WELDING PROCESSES, LTD. v. WELDRICS* (1922), *LTD.* (1933), 50 R. P. C. 178.

**2629a. Agreements by plaintiff containing illegal condition—Defendant unable to give particulars until after discovery—Printed form issued by plaintiffs.**—In an action for infringement of a patent relating to foam baths, *defts.* alleged that *ptf.s.* had entered into agreements, in relation to a licence to use or work the process protected by the patent, on a printed form requiring the persons with whom the agreements were made to acquire from *ptf.s.* or their nominees an extract not protected by the patent, & *defts.* relied on sect. 38 (4) of Patents & Designs Acts, 1907–1932. *Defts.* were unable until after discovery to give particulars of the persons with whom such agreements had been entered into. *Ptfs.* issued a summons for further & better particulars, which was adjourned into *ct.* as a procedure summons:—*Held:* although the rule was clearly intended to prevent any general fishing allegation having no apparent foundation on any particulars which *defts.* could give, *defts.* ought not at the present stage, having regard to the printed form, to be prevented from setting up the defence. Accordingly, the application was ordered to stand over until after discovery, the costs to be costs in the action.—*SOAPLESS FOAM,*

*LTD. v. PHYSICAL TREATMENT INSTITUTES, LTD.* (1935), 52 R. P. C. 256.

**2633a. Insertion by patentee of void condition in contracts—R. S. C., Ord. 53A, r. 8—Particulars of contracts—Time for.**—In 1931 *ptf.s.* commenced an action for infringement of two patents. By their defence, *defts.* alleged (*inter alia*) that *ptf.s.* had entered into certain contracts containing conditions which offended sect. 38 (4) of Patents & Designs Acts, 1907–32, particulars of certain of which contracts appeared in the particulars of objections, & by their particulars of objections they alleged that among the contracts relied on were a number of specified contracts. An order for discovery was made containing a proviso that discovery should be limited to a specimen copy of each type of contract & a disclosure of the total number of each type. Before discovery was made, *ptf.s.* issued a summons for an order for particulars sufficient to identify each of the contracts relied on in defence other than those set out in the particulars of objections:—*Held:* the particulars given complied with R. S. C., Ord. 53A, r. 8, & the application must stand over till after discovery. *Ptfs.* appealed to the Ct. of Appeal:—*Held:* though there was some obscurity in the exact meaning of the defence, it was not embarrassing to *ptf.s.*, & the appeal was dismissed with costs.—*GERARD INDUSTRIES, LTD. v. BOX WIRING CO., LTD.* (1933), 50 R. P. C. 125.

**2633b. Embarrassing defence.**—*Defts.* to an action for infringement of letters patent being estopped from denying validity pleaded (a) that the alleged infringement was old, & (b) by an amendment made in the course of the motion to strike out they denied infringement, giving particulars of the prior art relied upon for construing the specifications in suit. *Ptfs.* applied by motion to strike out the defence as showing no cause of action:—*Held:* the defence was embarrassing & should be struck out save only the plea denying infringement.—*V. D., LTD. v. BOSTON DEEP SEA FISHING & ICE CO., LTD.* (1934), 52 R. P. C. 1, C. A.

**2636a. Defence to counterclaim for revocation—Knowledge of defendants.**—In an action for infringement of a patent relating to "Improvements in cooling tubes for dynamo electric machines & methods of manufacturing the same," & counterclaim for revocation, in which the usual issues of infringement & validity were raised, *ptf.s.* by their reply & defence to counterclaim alleged in support of the validity of the patent that *defts.* at all material times knew of the contents of the specification of the patent & of the design of motors & dynamos made by *ptf.s.* in accordance therewith, & used such knowledge to design the apparatus pleaded in the particulars of breaches & also certain apparatus supplied to the Victoria Falls & Power Co. of South Africa. *Ptfs.* further alleged that *defts.* would have been unable without such knowledge to design either of the said apparatus. *Defts.* issued a

PART XIV. SECT. 2, SUB-SECT. 3.—C. (a).

**2621 i. Patent irregularly obtained—Untruth in affidavit verifying petition**

for patent.]—*FADA RADIO, LTD. v. CANADIAN GENERAL ELECTRIC CO., LTD.*, [1927] 3 D. L. R. 922; [1927] S. C. R. 520.—CAN.

**2621 ii. — Absence of affidavit in**

support of petition for re-issued patent.]—*FADA RADIO, LTD. v. CANADIAN GENERAL ELECTRIC CO., LTD.*, [1927] 3 D. L. R. 922; [1927] S. C. R. 520.—CAN.

summons, pursuant to R. S. C. Ord. 19, r. 27, for an order that the whole of such allegations might be struck out on the ground that they were unnecessary & embarrassing. The summons was adjourned into et. as a procedure summons:—*Held*: plffs. would be entitled to give in evidence the matters sought to be struck out, & they were therefore entitled to plead them & the et. had no jurisdiction to strike them out. The summons was dismissed with costs.—*LAURENCE SCOTT & ELECTROMOTORS, LTD. v. GENERAL ELECTRIC CO., LTD.* (1938), 55 R. P. C. 233.

**2641a. Plea by licensee—Sued as stranger.]**—The rule that the licensee of a patent is estopped from denying the validity of the novelty of his licensor's patent is limited to proceedings in which the licensee is sued as such, & does not apply in an action for infringement of patent by making & selling the patented article in a manner & to an extent in & to which the licence would be no defence.

Def't. was a licensee of a patent for the making & fitting of boiler joints, the licence being limited to the counties of Northumberland, Durham, Lincoln, & part of Yorkshire, & entitled under the terms of the licence to trade under a certain registered business name within that limited area. He traded in the patented articles & in the said business name outside that area, whereupon plffs., who were the owners of the patent, brought an action against him for infringement & passing-off. The licence was referred to in the pleadings for the purpose of defining the limited area within which it was available to def't. Def't. by his defence pleaded that the patent was invalid by reason of objections, particulars of which were given, & also for want of novelty. Plffs. moved to strike out the paragraphs setting up the invalidity of the patent & the particulars of objections, on the ground that def't. as a licensee was estopped from denying the validity of the patent:—*Held*: the objection failed, as def't. was not sued as licensee, but as a stranger for infringement outside the area for which the licence was available.—*FUEL ECONOMY CO., LTD. v. MURRAY*, [1930] 2 Ch. 93; 99 L. J. Ch. 456; 143 L. T. 242; 47 R. P. C. 346, C. A.

*Annotation*:—*Reid, V. D., Ltd. v. Boston Deep Sea Fishing & Ice Co., Ltd.* (1935), 52 R. P. C. 303.

**2641b. —.**—*V. D., LTD. v. BOSTON DEEP SEA FISHING & ICE CO., LTD., Re VIGNERON DAHL ET CIE PETITION FOR REVOCATION OF LETTERS PATENT, Re VIGNERON'S APPLICATION FOR LETTERS PATENT* (No. 175,824), No. 604a, *ante*.

**2648a. Mutual licence agreement—Covenant not to dispute validity.]**—Pltf. & def'ts., who were respective owners of patents for conveying apparatus, entered into an agreement whereby each was granted a licence to use the invention of the other. The agreement recited the acknowledgment by the parties of the validity of the respective patents of the other, & contained a covenant by def'ts. not at any time hereafter to dispute the validity of pltf.'s patent. The agreement also con-

tained a clause referring to arbn. any dispute between the parties other than the question of infringement or the recovery of royalties. In an action for royalties under the agreement & damage for infringements committed prior to it def'ts. pleaded that pltf.'s patent was invalid, & that there was an implied term in the agreement that pltf. should accept the same in satisfaction of all claims in respect of infringements then outstanding. The questions as to whether in view of the covenant in the agreement def'ts. could put the validity of pltf.'s patent in issue, & whether such a term as pleaded in the defence could be implied, were set down for hearing as preliminary questions of law:—*Held*: in view of the covenant in the agreement def'ts. were not entitled to dispute the validity of pltf.'s patent, & such a term as pleaded in the defence must be implied in the agreement in order to give business efficacy to the contract.—*CAMPBELL v. HOPKINS (G.) & SONS (CLERKENWELL), LTD.* (1931), 49 R. P. C. 38.

**2648b. — Infringement prior to agreement—Implied term precluding denial of validity.]**—*CAMPBELL v. HOPKINS (G.) & SONS (CLERKENWELL), LTD., No. 2648a, ante*.

**2664a. Objection of want of conformity between provisional & complete specifications.]**—Where def't. in a patent action objects to the validity of pltf.'s patent on the ground that there is a want of conformity between the provisional & complete specifications, it is not sufficient for him to state in his particulars of objection that the invention described in the complete specification is not the same as the invention described in the provisional specification: he must state in what the difference consists.—*ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPN. v. CROMPTON* (1886), 31 Ch. D. 152; 56 L. J. Ch. 167; 55 L. T. 722; 35 W. R. 125; 3 T. L. R. 136; (1884–1886), *Griffin's Patent Cases* 34, C. A.

**2667. Add. Annotation:—***Reid, Drysdale Sidney Smith & Blyth, Ltd. v. Davey Paxman & Co. (Colchester), Ltd., Re Letters Patent No. 274,162* (1937), 55 R. P. C. 95.

**2668a. Ambiguity.]**—Plffs. commenced an action against def'ts. for infringement of letters patent. Def'ts. denied infringement & alleged that the patent was invalid by reason of want of novelty, subject-matter, & utility, & because the specification & claims of the patent were ambiguous. Plffs. issued a summons asking for particulars of what parts & in what respects def'ts. alleged the specification was ambiguous:—*Held*: no useful purpose would be served by the particulars, & they might be embarrassing to def'ts. The application for particulars was refused.—*MARCONI'S WIRELESS TELEGRAPH CO., LTD. v. CRAMER (J. B.) & CO., LTD.* (1932), 49 R. P. C. 400.

**2676a. —.**—*HARDAKER v. BOUCHER & CO., LTD.* (1934), 51 R. P. C. 278.

**2676b. — Allegation of long period of "regular manufacture"—No dates specified.]**—*BRITISH*

- THOMSON-HOUSTON CO., LTD. v. CROMPTON PARKINSON, LTD. (1935), 52 R. P. C. 409.
- 2879.** *Add. Annotation:—***Refd.** Gottschalk & Co. v. Velez & Co. (1936), 53 R. P. C. 403.
- 2897a.** ———.]—**BIRTHWISTLE v. SUMNER ENGINEERING CO., LTD.** (1928), 46 R. P. C. 59.
- 2703a.** ———.]—**Earliest & latest dates of prior user.**—In a petition for the revocation of two patents petitioner alleged that the patents were invalid by reason (*inter alia*) of prior public user, & that neither appct. was the true & first inventor. In the particulars of objections sundry instances of prior public user were given:—**Held:** resps. are entitled under R. S. C., Ord. 53A, r. 16, to particulars giving the earliest & latest dates of each alleged prior public user, distinguishing between manufacture, sale, demonstration & use.—**Re MARTIN'S PATENTS**, [1936] 1 All E. R. 711.
- 2709.** *Add. Annotation:—***Refd.** Gottschalk & Co. v. Velez & Co. (1936), 53 R. P. C. 403.
- 2723a.** **Defendant relying on manufacture out of United Kingdom.**—In an action for infringement of three patents, defts. revised (*inter alia*) the defence that the patents were liable to the revoked under sects. 25, 27 of Patents & Designs Act, 1907 (c. 29), on the ground that the patented articles & processes were manufactured & carried on exclusively as mainly outside the United Kingdom. Pltfs. obtained an order in chambers directing certain particulars to be given (*inter alia*) of whom & by whom such articles have been manufactured as aforesaid, where & by whom the processes had been carried on, & by whom & from whom the impartial commodity had been obtained. The order was appealed against by way of motion to discharge, but this motion was refused with costs. Defts. gave particulars under the order. These particulars alleged (*inter alia*) manufacture on the continent of Europe by pltfs. as other persons who manufactured for or sold to pltfs. & by named persons, & "by persons who are the manufacturers of the Saccharin referred to" in an official annual statement, the names of such persons & their places of manufacture being unknown to defts. Pltfs. then obtained an order for certain further particulars to be given within fourteen days after service of notice of trial, & defts. moved to discharge this order:—**Held:** the particulars given amounted to a mere general statement that all the Saccharin imported into the United Kingdom was Saccharin manufactured exclusively on the continent, & was manufactured for & sold to pltfs. The motion was dismissed & the costs to be pltfs.' in any event.—**SACCHARIN CORPN. v. NATIONAL SACCHARIN CO., LTD.** (1910), 27 R. P. C. 354, C. A.
- 2736a.** ———.]—**LUSTY (W.) & SONS v. SCOTT (G. W.) & SONS, LTD.** (1931), 48 R. P. C. 475.
- 2761.** *Add. Annotation:—***Generally, Refd.** Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153.
- 2781a.** ———.]—**BRITISH THOMSON-HOUSTON CO., LTD. v. HENRY (P.) & CO., LTD.** (1928), 45 R. P. C. 218, C. A.
- 2819a.** ———.]—**Plaintiffs' contract unreasonable & oppressive.**—Pltfs. were the registered legal owners of letters patent granted in respect of loud speakers, & sold units made in accordance therewith subject to the limited licence that they were not to be resold at a price less than 25s. Deft. sold such a unit for 17s. 6d. Pltfs. demanded that deft. should sign an undertaking not to sell pltfs.' loud speaker units below the authorised price, to pay pltfs.' costs & to pay for the publication of a full page apology in two trade papers, of which the cost would be £29 15s. Defts. signed the undertaking & paid the sum demanded by pltfs. in respect of their costs, but refused to pay the costs of advertising the apology, & stated that, if proceedings were commenced against them, they would submit to a consent order. Pltfs. thereon moved for an interlocutory injunction:—**Held:** pltfs.' demands were unreasonable & oppressive, & defts. were not threatening or intending to continue to sell pltfs.' loud speaker units below the authorised price. The motion was dismissed, the costs to be deft.'s costs in any event. Pltfs. subsequently obtained judgment with costs upon motion for judgment in default of defence.—**BRITISH BLUE SPOT CO., LTD. v. KEENE** (1931), 48 R. P. C. 375.
- 2829a.** ———.]—Where an injunction is asked to restrain the infringement of a patent, the ct. has occasion to consider, first, the validity of the patent; & secondly, the fact of the infringement. Where those two facts are established, it is within the power, as it is the duty of the ct., to grant the injunction.
- There are many cases in which it is not clear either that the patent is legally valid, or that it has been infringed. It depends on the degree of doubt which exists on these questions, whether the ct. will grant the interim injunction. In such cases it will cautiously consider the degree of convenience & inconvenience to the parties by granting or not granting the injunction (**LORD LANGDALE, M.R.**).—**BRIDSON v. MCALPINE** (1845), 8 Beav. 229, 230; 50 E. R. 90.
- 2848a.** ———.]—**MARSHALL & THE LACE WEB SPRING CO., LTD. v. THE CROWN BEDDING CO., LTD.** (1929), 46 R. P. C. 267.
- 2864a.** ———.]—In an action for infringement of a patent relating to boot & shoe machinery, & counterclaim for revocation, the validity of the patent was attacked on the grounds (*inter alia*) of prior publication, prior public user, prior common general knowledge, want of subject-matter, & inutility. An order for discovery was made by the judge in chambers, which pltfs. moved to discharge. An affidavit was filed on behalf of pltfs., stating that by reason of the extensive nature of their business a general order would be oppressive. Pltfs. contended that, until the summons under R. S. C., Ord. 53A, r. 21A, had been dealt with, the order was premature, & ought in any event to be limited by exclusion of the issues relating to common general knowledge & utility:—**Held:** a deft. who desires discovery ought not to be made to wait until pltf. is ready to give notice of trial, & the order for discovery was not premature; further the size of pltfs.' business organisation afforded no ground for limiting the order. The motion was dismissed with costs. Pltfs. appealed to the Ct. of Appeal. The

appeal was dismissed with costs.—BRITISH UNITED SHOE MACHINERY CO., LTD. & UNITED SHOE MACHINERY CORPN. v. HOLD-FAST BOOTS, LTD., A. T. RALPHS (NORWICH), LTD. & MASCHINENFABRIK MOENUS (1934), 51 R. P. C. 489.

**2868a. Size of business organisation.]**—BRITISH UNITED SHOE MACHINERY CO., LTD. & UNITED SHOE MACHINERY CORPN. v. HOLD-FAST BOOTS, LTD., A. T. RALPHS (NORWICH), LTD. & MASCHINENFABRIK MOENUS, No. 2864a, *ante*.

**2873. After this case add :—**

—.]—*See* R. S. C., Ord. 53A, r. 21A, & No. 2944a, *post*.

**2906. Add. Annotation :—***Refd. Jonesco v. Beard*, [1930] A. C. 298.

**2933a. — — —.]**—In 1919 pltf. was granted letters patent in respect of "Improvements in resilient surfaces for seats, cushions & upholstery." In 1931 pltf. commenced an action for infringement. Defts. denied infringement & alleged that the patent was invalid, but were not represented at the trial. Pltf. submitted at the trial that it was unnecessary to call evidence of the validity of the patent:—*Held*: it was doubtful whether evidence of validity was necessary, but it was better to follow the usual practice of calling such evidence. An injunction & inquiry as to damages were granted, with costs.—WEBER v. XETAL PRODUCTS, LTD. (1933), 50 R. P. C. 211.

**2944. Add. Annotation :—***Generally, Refd. Sharp & Dohme Inc. v. Boots Pure Drug Co.* (1928), 45 R. P. C. 153.

After this case add :—

**Application for directions.]**—*See* R. S. C., Ord. 53A, r. 21A.

**2944a. — Order for inspection.]**—Letters patent were granted in 1918 in respect of "improvements in axles for motor-driven road vehicles." Pltfs. commenced an action for infringement of the patent & defts. denied infringement & alleged that the patent was invalid. Pltfs. issued a summons under R. S. C., Ord. 53A, r. 21A, for further directions & that they might have inspection of defts.' process, & asked that the time for setting down the action for trial should not run until after the date of inspection, in order that costs of preparing for trial should not be incurred unnecessarily. Defts. were willing to give inspection & also to undertake not to do anything to increase the costs of the action until three weeks after the date of the inspection:—*Held*: an order for inspection be made to take place before the expert witnesses of both sides at a date to be mutually agreed & upon defts. giving an undertaking as above, the action should be set down in the usual way within six weeks of the close of pleadings.—BUTLER v. ENGLISH STEEL CORPN., LTD. (1931), 48 R. P. C. 551.

**2944b. — — Secret process.]**—Pltfs. sued defts. for infringement of two patents No. 212,106 & No. 212,188 relating to the manufacture of asphaltic mastic. Application for directions under R. S. C., Ord. 53A, r. 21a, was made, including (*inter alia*), an order that pltfs. agree with defts. the analysis, or should disclose their own state-

ment of analysis, of the red mastic complained of & particularised in the particulars of breaches. Defts. objected on the ground that their product was the subject of a secret process. Pltfs. filed evidence for the purpose of making out a *prima facie* case for inspection:—*Held*: a *prima facie* case of infringement had been established as regards the Patent No. 212,106 sufficiently to justify an order for inspection. Inspection was ordered of defts.' mastic & process for making same, limited to solr., counsel & an expert, on behalf of pltfs., none of whom should disclose anything appearing at the inspection which was claimed by defts. to be a secret process except by leave of the ct., but should be entitled to report to pltfs., without giving any details, whether or not in the opinion of any of them the mastic infringed the patent. A case for inspection as regards the other patent not having been made out, pltfs. elected to discontinue as regards that patent.—COLOURED ASPHALTE CO., LTD. v. BRITISH ASPHALT & BITUMEN, LTD. (1935), 53 R. P. C. 89.

**2944c. — — —.]**—In an action for damages for the infringement of letters patent, pltfs. applied for leave to inspect the machines of defts. which made the alleged infringing article. The expert evidence before the ct. was conflicting, but showed that the article could be made with or without infringement. It was contended by pltfs. that the new R. S. C., Ord. 53A, r. 21A, gave the ct. power to order inspection even in cases where no *prima facie* case of infringement had been made out. Pltfs. further asked that defts. should give particulars of prior common general knowledge, lack of invention, lack of utility, & insufficiency. It had been agreed between the parties that no written statements of contentions should be made:—*Held*: an order for inspection should not be made in such a case. The new rule was not intended to facilitate a fishing inspection of a deft.'s machinery; these desired particulars would not have been allowed under the old rule, & to obtain them under the new rule, a pltf. must show that there is some special reason for allowing them. The present pltfs. had failed so to do, & the order asked for could not be made. AMERICAN CHAIN & CABLE CO., INC. v. HALL'S BARTON ROPE CO., LTD. [1938] 4 All E. R. 129; 82 Sol. Jo. 890; 55 R. P. C. 287.

**2944d. — — Whether order for particulars of prior common general knowledge granted.]**—SOLAFLEX SIGNS AMALGAMATED, LTD. v. ALLAN MANUFACTURING CO., LTD. (1931), 48 R. P. C. 577.

**2944e. — — —.]**—In 1924, letters patent were granted to M. in respect of "improvements in or relating to electrically operated indicating apparatus for vehicles." In 1931, M. commenced an action for infringement of the patent against S. & B. S. denied infringement & B. denied infringement & alleged that the patent was invalid for want of novelty by reason of prior publication & prior common general knowledge, & for want of subject-matter & utility. S. issued a summons for an order that the issue of infringement might be tried before the issue of validity. M. issued a summons for an order that B. should (*inter alia*) give parti-

culars of the matters referred to in the patent which he alleged were prior common general knowledge:—*Held*: upon S. undertaking to be bound by the decision against B., all further proceedings should be stayed against S. until after the action against B. was determined. The order that B. should give particulars of prior common general knowledge was refused.—*McCREATH v. SOUTH SHIELDS CORPN. & BAKER* (1932), 49 R. P. C. 349.

**2944f. — Jurisdiction in regard to summons.]—**

It has been decided that, though the master has jurisdiction to deal with a summons under R. S. C., Ord. 53A, r. 21A, for the present it must be adjourned to the Judge in Chambers, who, if he is of opinion that the matter is of sufficient importance, may adjourn it into ct.—*PRACTICE NOTE*, [1932] W. N. 22; 173 L. T. Jo. 76.

**2944g. — —.]—*Held*: (1) extra time might**

be allowed for deposit in view of exchange difficulties, but that the action must be set down at once; (2) under the above rule that interrogatories should normally be dealt with by the master. The form of order concerning experiments & models was settled.—*JUNKERS v. FORD MOTOR CO., LTD., & COOPER* (1932), 49 R. P. C. 347.

**2944h. — Failure to apply—Dismissal for want of prosecution.]—*Held*: eight months was**

undue delay, the ct. had an inherent jurisdiction in this matter apart from the rules, & defts. were entitled to make an application to dismiss the action in lieu of giving notice under the rule. It was ordered that, unless plffs. proceeded under the rule before a certain date, the action should be dismissed.—*BAIRD TELEVISION, LTD. v. GRAMOPHONE CO., LTD.* (1932), 49 R. P. C. 227.

**2944j. — Defence of non-infringement—Order**

for trial as separate issue.]—*GIBSON v. A. C. COSSOR, LTD.* (1934), 51 R. P. C. 375; *on appeal* (1935), 52 R. P. C. 201, C. A.

**2944k. — Petition for revocation—Form of**

order.]—*Re VIGNERON & VIGNERON, DAHL ET CIE PETITION FOR REVOCATION OF FIVE LETTERS PATENT* (1934), 52 R. P. C. 5.

**2944l. — Statements to be delivered by parties.]**

—In 1932, Letters Patent were granted to pltf. in respect of "Improvements in & relating to cutting implements." In 1936 pltf. commenced an action for infringement of the patent against defts. Pltf. issued a summons under R. S. C., Ord. LIIIA., rule 21A for directions & in particular as to whether & in what manner statements should be delivered by the parties:—*Held*: while the ct. must not be treated as stating that it thought that the best procedure was being adopted, an order should be made that statements as to construction & other matters should be delivered successively by the parties, pltf. being entitled to deliver a further statement by way of rebuttal.—*FRASER v. SIMPSON (PICCADILLY), LTD. & PLATINUM PRODUCTS, LTD.* (1937), 54 R. P. C. 199.

**2944m. — —.]—In an action for damages for the infringement of letters patent plffs. made**

an application that, instead of directions under R. S. C., Ord. 53A, r. 21A (2) (d), being given in the customary form, they should either deliver to defts. a list of experiments on which they intended to rely upon the issue of infringement or else give notice that they did not intend to rely upon any such experiments; & that similarly defts. should either deliver to plffs. a list of experiments on which they intended to rely upon the issue of validity or else give notice that they did not intend to rely on such experiments. It was also contended that the statement of the contentions of fact & of law should be curtailed:—*Held*: this was a form of order which might well lead to the saving of expense, & one that might properly be made; having regard to the wide character of the claim, the form of order settled in *Fraser v. Simpson (Piccadilly), Ltd. & Platinum Products, Ltd.* (1937), 54 R. P. C. 199; Digest Supp., should not be departed from.—*BRITISH THOMSON-HOUSTON CO., LTD. v. TUNGSTALITE, LTD.*, [1938] 4 All E. R. 177; 82 Sol. Jo. 909; 55 R. P. C. 280.

**2944n. — —.]—In 1927, letters patent were**

granted to plffs. in respect of "Improvements in manhole covers & grids applied in road construction." In 1936 plffs. commenced an action for infringement of the patent against defts. Plffs. issued a summons under R. S. C., Ord. 53A, r. 21A, for directions, including directions for the delivery of statements of the contentions of the parties. The summons was adjourned into ct. as a procedure summons:—*Held*: while no general principle could be laid down, & the desirability of ordering the delivery of statements signed by counsel was a matter for the ct. in each case, the present case was simple enough for elaborate statements to be dispensed with, but that expense & trouble might be saved if plffs. were given certain further particulars. Defts. were ordered to deliver to plffs. a statement signed by counsel, specifying (*inter alia*) certain matters in the nature of further particulars, the form of the order to be agreed between counsel. *EYRES (J. & S.), LTD. & JOHN EYRES v. JOHN GRUNDY, LTD.* (1938), 55 R. P. C. 149.

**2944o. — —.]—*WHATMOUGH v. MORRIS***

*MOTORS, LTD.*, [1938] 4 All E. R. 584.

**2944p. — — Statements as to construction—Further**

& better statement ordered.]—*ULTRA ELECTRIC, LTD. v. JOHN BARNES & CO., LTD.* (1937), 54 R. P. C. 269.

**2963. Add. Annotation:—*Refd. Sharp & Dohme***

*Inc. v. Boots Pure Drug Co.* (1928), 45 R. P. C. 153.

**2967. Add. Annotation:—*Refd. Re Chemische***

*Fabrik auf Actien (Vorm E. Schering) Patent* (1928), 45 R. P. C. 403.

**2967a. — —.]—*BRITISH CELANESE, LTD. v.***

*COURTAULDS, LTD.*, No. 459h, *ante*.

**2976. Add. Annotations:—*Consd. Fuel Economy***

*Co. v. Murray*, [1930] 2 Ch. 93. *Refd. Greer v. Kettle*, [1938] A. C. 156.

After this case add:—

—.]—*Compare FUEL ECONOMY Co. v. MURRAY*, No. 2641a, *ante*.

PART XIV. SECT. 2, SUB-SECT. 9.—C.

2986 ii. — —.]—*DAVIS LOG & RAFT PATENTS Co. v. GATHELS (B. C.)*, [1927] 4 D. L. R. 95; [1927] 2 W. W. R. 753.—CAN.

**2996a. Motion for leave for further cross-examination.]**—Letters patent were granted in 1919 in respect of "improvements in methods of & apparatus for feeding molten glass." Claim 1 was as follows: "Method of feeding molten glass wherein successive masses or gathers are suspended beneath an outlet & mold charges are separated therefrom while suspended, whilst the shape of the masses or gathers is controlled by variation of the movement of a movable controlling member adapted to act as a piston in the outlet, or by the means for separating the mold charges, or by the variation of the location of the controlling member or of the said separating means relatively to the outlet." Pltfs. commenced an action for infringement. Defts. denied infringement & counter-claimed for the revocation of the patent on the grounds that it lacked novelty, subject-matter, & utility, & that the specification was ambiguous & insufficient. It was held that the patent was invalid on the grounds that it had been anticipated & lacked subject-matter in that it merely used an old method for controlling the weight of gathers for the new purpose of controlling their shape; but defences of prior grant, inutility, & insufficiency failed; & that if the patent had been valid, defts. would have infringed it. The action was dismissed & an order for revocation of the patent was made, the order to lie in the office for one month &, if the pltfs. appealed & prosecuted the appeal with due diligence, until after the appeal. Pltfs. were ordered to pay the costs of the action & counterclaim, a certificate for certain of the particulars of objections being granted. Pltfs. appealed to the Ct. of Appeal & moved for an order that the expert witness called on behalf of defts. at the trial might be called before the Ct. of Appeal for further cross-examination, or alternatively that the witness' evidence given in another case might be read as part of the evidence in the case:—*Held*: the patent was invalid on the grounds that it had been anticipated & lacked subject-matter, & for ambiguity & uncertainty. The appeal was dismissed with costs & a stay of the order for revocation pending an appeal to the House of Lords was refused. The motion for leave to further cross-examine defts.' expert witness was dismissed with costs.—**BRITISH HARTFORD-FAIRMONT SYNDICATE, LTD. v. JACKSON BROS. (KNOTTINGLEY), LTD.** (1932), 49 R. P. C. 495, C. A.; *affd.* (1934), 51 R. P. C. 254, H. L.

#### PART XIV. SECT. 2, SUB-SECT. 9.—D.

**sb. Evidence discoverable at time of trial.]**—*Held*: the evidence which it was sought to adduce having been discoverable for the hearing before the Supreme Ct., & no special grounds having been advanced for the granting of the application, the motion should be dismissed, notwithstanding any injury which applt. might suffer from the evidence not having been adduced at the hearing.—**KNAPP v. FARMERS' MILKING MACHINE CO., LTD.**, [1928] N. Z. L. R. 308.—N.Z.

#### PART XIV. SECT. 2, SUB-SECT. 10.—D. (a).

**so. Expiration of patent.]**—An action for damages for infringement of a patent will lie, although the patent has expired.—**JENYNS v. JENYNS**, [1927] S. R. Q. 313.—AUS.

#### PART XIV. SECT. 2, SUB-SECT. 10.—D. (b.) i.

**3054 ii. —**—*Held*: (1) in the assessment of damages in patent matters pltf. should be compensated for the loss caused him by the infringer's acts; he should be restored by monetary compensation to the position which he would have occupied but for the wrongful acts of deft.; (2) deft.'s acts being tortious the burden of proof on pltf. is lightened by the presumption that invasion of a patentee's monopoly will cause him damage; (3) in the assessment of damages every article that is manufactured or sold which infringes the rights of the patentee, is a wrong to him, & the patentee is entitled to recover in respect of each one of those wrongs; (4) where a patentee uses his monopoly by manufacturing the object

**2997a. Declaration that plaintiff true & first inventor.]**—**KILLEN v. MACMILLAN**, No. 2570a, *ante*.

**2997b. Patents & Designs Act, 1907 (c. 29), s. 32A.—Application of.]**—**SUBMARINE SIGNAL CO. v. HUGHES (HENRY) & SON, LTD.** (1931), 49 R. P. C. 149.

*Annotation: Refd. R. C. A. Photophone, Ltd. v. Gaumont British Picture Corp., Ltd. & British Acoustic Films, Ltd.* (1935), 53 R. P. C. 167

**2999a. Action against first defendant settled—Judgment against second defendant.]**—**FRASER v. SIMPSON (PICCADILLY), LTD. & PLATINUM PRODUCTS, LTD.** (1937), 55 R. P. C. 118.

**3003a. — After expiration of patent—Infringing articles manufactured during patent.]**—Injunction granted generally to restrain the sale, both before & after the term limited by the patent, of machines piratically manufactured while the patent was in force.—**CROSSLEY v. BEVERLEY, CROSSLEY v. DERBY GAS LIGHT CO.** (1829), 1 Russ. & M. 166, n.

**3032a. — — — —.]**—Letters patent dated Jan 13, 1930, were granted for "improvements in or relating to electric lampholders." On June 21, 1933, pltf. commenced an action against deft. for an injunction to restrain him from infringing pltf.'s patent & by the particulars of breaches alleged that deft. had by a letter threatened to infringe. Deft. denied that the lampholder which he proposed to make would be an infringement of pltf.'s patent & alleged that that patent was invalid:—*Held*: letters patent No. 341,265 were valid & the letter was a clear statement of intention to make a cap & lampholder in accordance with specification of letters patent No. 389,664, & such a construction would be an infringement of pltf.'s letters patent No. 341,265. An injunction to restrain infringement & a certificate that the validity of the patent came in question were granted, & deft. was ordered to pay pltf.'s costs of the action.—**BLOOM v. SHULMAN** (1934), 51 R. P. C. 308.

**3050. Add. Annotation: Refd.** **British Thomson-Houston Co., Marconi's Wireless Telegraph Co. & Electric & Musical Industries, Ltd. v. Guildford Radio Stores & Cole, Ltd.** (1937), 55 R. P. C. 71.

**3054. Add. Annotation:—As to (1) Consd. No-Fume, Ltd. v. Frank Pitchford & Co.** (1935), 52 R. P. C. 231.

covered by his patent in order to get the increased profits, his loss, generally speaking, is to be calculated on the basis of the loss of profits to him on the sales of the object made & sold by deft., which the patentee would have sold; (5) in case of sales by deft. which would not have been made by pltf., the basis for damage is a fair royalty; (6) the basis for assessing damages in this case should be the profit that pltf. would have obtained had it sold the completed fastener, & not the stringer alone, since the stringer is not only an integral part of the article but is the main part, & what pltf. lost by means of defts.' breach of its monopoly is the sale of the article as a whole; (7) where the infringement is a part only of the article manufactured & sold by deft. pltf. is only entitled to recover damages in respect of that part alone, if the



3081. *Add. Annotation*.—*Refd.* British Celanese, Ltd. v. Courtaulds, Ltd. (1933), 50 R. P. C. 259.

3081a. — To date of amendment of specification.]—BRITISH UNITED SHOE MACHINERY CO., LTD. v. GIMSON SHOE MACHINERY CO., LTD. (No. 2) (1928), 46 R. P. C. 137.

3081b. — On proof of valid claim—Validity of other claims not proved.]—BENJAMIN ELECTRIC, LTD. v. GARNET, WHITELEY & CO. (1930), 47 R. P. C. 44; 169 L. T. Jo. 7; [1929] W. N. 293.

3093. *Add. Annotation*.—*Consd.* Mellor v. Beardmore (1927), 44 R. P. C. 175.

3107. *Add. Annotation*.—*Refd.* Gibson v. Cossor (A. C.), Ltd. (1934), 51 R. P. C. 375.

3108a. Refusal to grant certificate that validity in question—Whether appeal lies to Court of Appeal.]—No appeal lies to the Ct. of Appeal under Jud. Act, 1873 (c. 66), s. 19, against the decision of a ct. or a judge in an action for infringement of a patent granting a certificate under Patents, Designs & Trade Marks Act, 1883 (c. 57), s. 31, that the validity of the patent came in question.—HASLAM FOUNDRY & ENGINEERING CO., LTD. v. HALL (1888), 20 Q. B. D. 491; 57 L. J. Q. B. 352; 59 L. T. 102; 36 W. R. 407; 4 T. L. R. 350; 5 R. P. C. 144, C. A.

*Annotation*.—*Refd.* Acetylene Illuminating Co. v. United Alkali Co., [1902] 1 Ch. 494.

3112a. —.]—BLOOM v. IMPERIAL LIGHTING CO. (IMPLITICO, LTD.) (1935), 52 R. P. C. 162.

3120a. —.]—In an action for infringement, the ct. held defts. had not infringed, & the action was dismissed with costs. A certificate, that the validity of the patent had come into question, was granted.—TECALEMIT, LTD. v. WAKEFIELD (C. C.) & Co., LTD. (1927), 44 R. P. C. 471.

3120b. —.]—In an action for infringement, the ct. held defts. had not infringed, & the action failed. A certificate of particulars of objections was granted to defts., & a certificate of validity to pltf's.—TECALEMIT, LTD. v. EWARTS, LTD. (1927), 44 R. P. C. 488.

*Annotation*.—*Refd.* Kostos, Ltd. v. Kempat, Ltd. & Vivian Fitch Kemp, *Re* Kostos, Ltd. Registered Design (No. 725, 716) (1935), 53 R. P. C. 139.

3130a. —.]—DESCOMBES & ARONDEL v. LESTOR & PARTON (1931), 48 R. P. C. 473.

3137a. —.]—ENTICKNAP E. G. & ENTICKNAP CONCRETE MACHINES, LTD. v. HUMBY, LTD. (1929), 46 R. P. C. 351.

3137b. —.]—TRICO PRODUCTS CORPN. & TRICO FOLBERTH, LTD. v. ROMAC MOTOR ACCESSORIES, LTD. (1935), 52 R. P. C. 292.

3150. *Add. Annotation*.—*Refd.* Sharp & Dohme Inc. v. Boots Pure Drug Co. (1928), 45 R. P. C. 153.

3151a. —.]—BRITISH HARTFORD - FAIRMONT SYNDICATE, LTD. v. JACKSON BROS. (KNOTTINGLEY), LTD., No. 2996a, *ante*.

3152a. — Sale of patented articles below price fixed by licence—Plaintiff awarded costs.]—COLUMBIA PHONOGRAPH CO., GENERAL v. REGENT FITTINGS CO. (1913), 30 R. P. C. 484.

3158a. — Application to amend particulars.]—In an action for infringement of a patent, deft. counterclaimed for the revocation of the patent. After delivery of the usual pleadings, deft. applied to amend his defence, counterclaim & particulars of objections by citing further alleged anticipations:—*Held*: pltf. should within three weeks elect whether to discontinue or to proceed with his action; if he should discontinue, the letters patent should be revoked & the taxing master should tax the costs of deft. of the action up to & including the date of delivery of the original particulars of objections & of the counterclaim except in so far as they had been increased by the failure to deliver the full particulars on the said date, & the taxing master should tax the costs of pltf. of the action subsequent to the said date to the date of this order, & of the counterclaim in so far as they had been increased by deft.'s failure aforesaid, & there should be a set-off of the costs so taxed: if pltf. did not elect to discontinue, deft. should be at liberty to amend his pleadings & pltf. should be at liberty to deliver an amended reply & defence to counterclaim.—*SEE* v. SCOTT-PAINE (1932), 50 R. P. C. 56.

3161a. Defendant successful—General costs of action—Except as to allegations dropped at trial.]—WILDEY & WHITE'S MANUFACTURING CO., LTD. v. FREEMAN (II.) & LETRIK, LTD., No. 459d, *ante*.

3161b. Costs left to discretion of taxing master.]—LAMSON PARAGON SUPPLY CO., LTD. v. CARTER-DAVIS, LTD., No. 459e, *ante*.

3161c. —.]—Letters patent were granted in respect of "Improvements appertaining to the Harness Cords of Jacquard Machines used in Looms for Weaving." Claim 1 was as follows: "In the production of the harness cords of jacquard machines for the purpose described, the interlacing or interweaving of cross binding cords with the extending looped ends of the harness cords by arranging the cross binding cords to return & be interwoven so as to present loops which will resist the pull of the side harness cords, substantially as herein specified." The patentee commenced an action for infringement of this patent & also one other, but any claim in respect of the latter was abandoned at the trial. Defts. denied infringement & alleged

infringing part is clearly separable & does not co-operate with the rest to produce the new effect which is the feature of the patented invention in question; (8) pltf. cannot claim to have suffered a loss of profit on sales it refused to make or for any other reason it would not have made; (9) since pltf. had not a monopoly of the Canadian market, it cannot obtain damages from defts. on the ground that it was forced to reduce the price of its articles to meet price reduction by defts.; (10) loss by pltf. due to the establishment of an office in the City of Montreal, Quebec, allegedly to meet free delivery in that city by defts., is

not a natural & direct consequence of defts.' act, & therefore a claim for such loss must be refused.—LIGHTNING FASTENER CO., LTD. v. COLONIAL FASTENER CO., LTD. & PRENTICE MANUFACTURING CO., [1936] Ex. C. R. 1; 2 D. L. R. 194; *on appeal*, [1937] S. C. R. 36; 1 D. L. R. 21.—CAN.

#### PART XIV. SECT. 2, SUB-SECT. 10. G. (a).

sb. *By whom granted*—Court of Session.]—Pursuers, who were the registered owners of a patent relating to thermostats, brought an action in Scotland for infringement in which

they sought interdict against a co. which engaged in the manufacture & sale of thermostats which they alleged contained improvements described in the specification of pursuers' patent. Defenders denied infringement & alleged that the pursuers' patent was invalid for want of novelty & subject-matter, & also that the complete specification of the letters patent was vague, ambiguous & misleading:—*Held*: the patent was valid & had been infringed. A certificate of validity was given.—RHEOSTATIC CO., LTD. v. ROBERT MACLAREN & CO., LTD. (1934), 52 R. P. C. 42; *on appeal* (1935), 53 R. P. C. 109.—SCOT.

that the patent proceeded with was invalid by reason of prior user, want of novelty & subject-matter:—*Held*: patent was invalid both for want of novelty & by reason of prior user, & even if valid, it has not been infringed. The action was dismissed with costs. A certificate with respect to certain of the particulars of objections was granted in respect of the patent proceeded upon, the costs in connection with the other patent, including any question as to the reasonableness or otherwise of the particulars cited against it, were left to the unfettered discretion of the taxing master.—*HARDAKER v. BOON* (1934), 52 R. P. C. 89.

**3185a.** —.]—*LISTER BROS. v. THORP, MEDLEY & Co.*, No. 2358a, *ante*.

**3185b.** —.]—*Held*: both patents were valid, but since on the construction argued by plffs. the patents would have been invalid, the action was dismissed with costs except so far as those costs had been increased by the defence of invalidity & the counterclaim was dismissed without costs.—*HOLLANDSCHE (N. V.) GLAS EN METAALBANK v. ROCKWARE GLASS SYNDICATE, LTD.* (1932), 49 R. P. C. 288.

**3174. Add. Annotations:—***Refd.* *British Thomson-Houston Co. v. Metropolitan-Vickers Electrical Co.* (1928), 45 R. P. C. 1; *Pope Appliance Corp. v. Spanish River Pulp & Paper Mills*, [1929] A. C. 269.

**3177. Add. Annotation:—***Generally, Refd.* *Sharp & Dohme Inc. v. Boots Pure Drug Co.* (1928), 45 R. P. C. 153.

**3185. Add. Annotation:—***Refd.* *Mellor v. Beardmore* (1927), 44 R. P. C. 175.

**3198. Add. Annotation:—***Refd.* *The Edison* (No. 2), [1934] P. 115.

**3200. Add. Annotations:—***Refd.* *White v. Todd Oil Burners* (1929), 46 R. P. C. 275; *British Celanese, Ltd. v. Courtaulds, Ltd.* (1933), 50 R. P. C. 63.

**3207a.** —.]—Letters patent were granted in 1930 in respect of "improvements in electric switches, of the push & pull type." Claim 1 was as follows: "An electric switch, of the type referred to comprising a base, a sliding actuating rod or stem passing through the base, fixed contacts on the base, a transversely disposed contact bar or bridge extending from opposite sides of the said rod or stem so as to engage & connect the said fixed contact contacts by an outward pull of the rod or stem, & laterally spaced outstanding guard parts or walls on the base between which the contact bar or bridge moves throughout its range of travel & which thus prevent turning or rotating of the actuating rod or stem in both the 'on' & 'off' positions of the switch." Plffs. commenced an action for infringement of the patent. Defts. denied infringement & alleged that the patent was invalid by reason of want of novelty, subject-matter, & utility:—*Held*: in the alleged infringement the contact bar or bridge did not move throughout its range of travel between the outstanding guard parts or walls, & consequently defts. had not infringed the patent; & under the circumstances it was unnecessary to consider or express any opinion upon the validity of the claims of the

patent. The action was dismissed with costs, & after argument, a certificate was granted that the particulars of objections were reasonable.—*BUSBY & Co., LTD., & TWINE v. TELSEN ELECTRIC Co., LTD.* (1932), 49 R. P. C. 587.

**3212a.** —.]—*Plaintiff failing on issue of infringement.*—*TECALEMIT, LTD. v. EWARTS, LTD.*, No. 3120b, *ante*.

**3215a. Action dismissed for want of appearance—Restoration of action.**—Leave was granted to a plff. to restore the action upon terms, & the action came on for hearing:—*Held*: on the construction of the specification submitted by plff., the patent had not been infringed by defts. & the action was dismissed with costs, including the costs of the first hearing & of the application to restore. A certificate was granted for the particulars of objections.—*MCCREATH v. SOUTH SHIELDS CORPN. & BAKER* (1933), 50 R. P. C. 119.

**3243a.** —.]—*Plaintiff not appearing at trial.*—In 1924, letters patent were granted to J. M. in respect of "Improvements in or relating to electrically operated indicating apparatus for vehicles." In 1931, J. M. commenced an action for infringement of the patent against the Mayor of South Shields & J. A. B. J. A. B. denied infringement & alleged that the patent was invalid for want of novelty, subject-matter & utility. Proceedings against the Mayor of South Shields were stayed to abide the result of the action as against B. When the action was called on against J. A. B., J. M. did not appear:—*Held*: the action must be dismissed with costs, but, the ct. being of the opinion that the action had not proceeded to trial within R. S. C., Ord. 53A, r. 20, a certificate for the particulars of objections would not be granted.—*MCCREATH v. SOUTH SHIELDS CORPN. & BAKER* (1933), 50 R. P. C. 119.

**3243b.** —.]—Defts. had obtained injunctions against two firms to restrain them from infringing their letters patent. They issued a leaflet to this effect to their travellers, & it was stated that the latter had used this leaflet to suggest to customers that there was an action going on & had told them that they would find a difficulty in obtaining supplies:—*Held*: this did not amount to a threat.—*SURRIDGE'S PATENTS, LTD. v. TRICO-FOLBERTH, LTD.*, [1936] 3 All E. R. 26; 53 R. P. C. 420.

**3243c.** —.]—*Patents revoked before trial.*—An action was brought by plff. co. against defts. for infringement of five patents, of which one only (No. 300,998) is material for the present purpose. The patent was held to be invalid by CLAUON, J., on the grounds of prior user, prior publication & want of subject-matter, & was ordered to be revoked, & the action on that patent was dismissed. Plffs. appealed. The patent was for "Improvements in or relating to processes & apparatus for the production of artificial filaments or threads," the first claim of the specification being "A process of spinning artificial silk or like filaments or threads from solutions of cellulose acetate or other cellulose derivative, comprising spinning the solutions into closed or substantially closed chambers or cells through which passes an evaporative medium,

the chambers or cells being provided with collector devices so that substantially the whole of the evaporative medium is constrained to pass through the immediate vicinity of the spinning orifice or orifices." Claim 4 was for a modification of the process in which only a proportion of the evaporative medium was constrained to pass through the immediate vicinity of the orifices:—*Held*: the idea of rapid removal of solvent was not new & the invention, if any, must lie in the mechanism; that was anticipated by prior user & by prior publication, also the patent was invalid for lack of subject-matter. The appeal was dismissed with costs. Leave to appeal to the House of Lords was refused on the grounds that the case was not difficult, & four judges had been unanimous.—BRITISH CELANESE, LTD. v. BRITISH ACETATE SILK CORPN., LTD., MALONEY & HILLIER, PARKER, MAY & ROWDEN (1936), 53 R. P. C. 478, C.A.

**3246. Add. Annotations:—***Re*fd. *McCreath v. South Shields Corpn. & Baker* (1933), 50 R. P. C. 119; *British Celanese, Ltd. v. British Acetate*

*Silk Corpn., Ltd., Maloney & Hillier, Parker, May & Rowden* (1935), 53 R. P. C. 11.

**3283. Add. Annotations:—***Re*fd. *Mellor v. Beardmore* (1927), 44 R. P. C. 175; *Sharp & Dohme Inc. v. Boots Pure Drug Co.* (1928), 45 R. P. C. 153; *Re Simon-Carves & Robinson's Patent* (1928), 45 R. P. C. 407.

**3289. Add. Annotation:—***Consd. Re Mundy v. Butterley Co.*, [1932] 2 Ch. 227.

**3292a. Extension of time for—Grounds for—Exchange difficulties.]—***JUNKERS v. FORD MOTOR CO., LTD., & COOPER*, No. 2944g, *ante*.

**3301. Add. Annotation:—***Folld. Société Anonyme Servo-Frein Dewandre v. Citroen Cars, Ltd.* (1929), 47 R. P. C. 221.

**3301a. ———.]—**An application on behalf of the resps. for an order that the expenses of the attendance of two experts during the hearing of the appeal should be allowed on taxation refused.—*SOCIÉTÉ ANONYME SERVO-FREIN DEWANDRE v. CITROEN CARS, LTD.* (1929), 47 R. P. C. 221, C.A.

## Part XV.—Legal Proceedings.

**3312a. Stay of proceedings—Pending determination of action between other parties.]—***MULTIPLE UTILITIES CO., LTD. v. SOUCH* (1929), 46 R. P. C. 402, C.A.

**3314a. Action for declaration that plaintiff first & true inventor—Whether Attorney-General necessary party—Effect of admission by defendant.]—***Pltf.*, who was the grantee of four letters patent, commenced an action against *def.*, alleging that *def.* had falsely represented to be co-inventor & entitled to an interest in the patents, & claiming a declaration that *pltf.* was the sole first & true inventor & an injunction to restrain *def.* from representing that he had any interest in the patents. *Def.* denied that *pltf.* was the sole first or true inventor. At the trial *pltf.* withdrew his claim to an injunction, & *def.* admitted that *pltf.* was the sole first and true inventor:—*Held*: although it was doubtful whether a declaration could be made that a certain person was a first & true inventor in the absence of the A.G., upon *def.*'s admission at the trial *pltf.* was to be treated as the successful party so far as the claim was for a declaration. An order was made that, upon *def.* admitting that *pltf.* was the sole first & true inventor, *def.* should pay the costs of the action, except so far as they had been increased by the claim for an injunction, & that *pltf.* should pay *def.*'s costs of the action so far as they had been increased by the claim for an injunction, with a set-off.—*KILLEN v. MACMILLAN* (1932), 49 R. P. C. 258.

*Costs.]—KILLEN v. MACMILLAN*, No. 3314a, *ante*.

**3315. Add. Annotation:—***Re*fd. *Re Keifer's Patent* (1931), 49 R. P. C. 440.

**3317a. ———.]—**(1) The amendment of Patents & Designs Act, 1907 (c. 29), s. 36, by Patents & Designs Act, 1919 (c. 80), was not intended to abrogate the rule which had prevailed ever since *Challender v. Royle*, No. 2273, was decided, that a *pltf.* in a threats action might, if he so desired, raise the question of the validity of the patent. The obvious reason for the amendment was to widen the scope of the section so as to enable a threats action to be brought not merely against the patentee, but against any person claiming to have an interest in the patent. The alterations in the subsequent part of the section were consequential upon the main alteration & were not intended to, & did not in fact, abrogate the rule which was laid down in *Challender v. Royle*, No. 2273.

(2) I do not understand how a patent that is invalid can be infringed. The truth of the matter is, that when one talks of the infringement of a patent one does not mean an infringement of the document, but the letters patent itself. You cannot infringe a document. One means infringement of the monopoly rights conferred by the letters patent (*ROMER, L.J.*).—*PITTEVIL & CO. v. BRACKELSBURG MELTING PROCESSES, LTD.*, [1932] 1 Ch. 189; 101 L. J. Ch. 8; 146 L. T. 53; 75 Sol. Jo. 797; 49 R. P. C. 23, C.A.

**3322a. ———.]—**An English co., having brought an action against a German co. to restrain threats in respect of certain letters patent, applied for & obtained leave to serve notice in lieu of service of the writ out of the

### PART XV. SECT. 1.

**q i. ———.]—***To order rehearing.]—*B.V.D. CO., LTD. v. CANADIAN CELANESE, LTD., [1937] S. C. R. 411; 3 D. L. R. 119. CAN.

**sd. Conflict action—Abandonment by**

*defendant.]—Held*: *def.* in a conflict action having abandoned his application for a patent at trial & consequently there then being no conflict in the claims of rival applicants, to consider the proper disposition of the matter is to declare that *pltf.* is entitled to a

patent or refer the matter back to be disposed of by the Comr. of Patents.—*AKTIENGESELLSCHAFT FUER STICKSTOFFDUENGEN v. SHAWINIGAN CHEMICALS, LTD.*, [1936] Ex. C. R. 56; 2 D. L. R. 746.—CAN.

jurisdiction upon defts. Defts., having entered a conditional appearance, applied by motion to discharge the order giving such leave on the ground that the evidence on that application did not fully & fairly disclose the facts or the true nature of the action to enable the ct. properly to exercise its discretion, & evidence was filed on that motion:—*Held*: the motion must be dismissed, the ct. not being judicially satisfied that the facts, if proved, would not support the action, & it seeming to the ct. that there was a substantial question between plffs. & defts. as to whether plffs. were entitled to have the trial.—*BRITISH OXYGEN Co., LTD. v. GESELLSCHAFT FÜR INDUSTRIEGASVERWERTUNG M. B. H.* (1930), 48 R. P. C. 130.

**3322b. Evidence for defendant—Affidavit of plaintiff read on interlocutory motion.]**—Plffs. commenced an action against deft. claiming an injunction to restrain deft. from threatening plffs. or their customers with an action for infringement of patent. Dft. denied having threatened. At the hearing of the action deft. sought to put in as evidence an affidavit filed by plffs. upon an interlocutory motion & sworn by a deponent who was not called as a witness at the hearing:—*Held*: deft. was entitled to put in as evidence & comment upon any affidavits actually read by plffs. upon the interlocutory motion; further, deft. had issued threats, & an injunction & inquiry as to damages were granted, with costs.—*EARLES UTILITIES, LTD. v. JACOBS* (1934), 51 T. L. R. 43; 52 R. P. C. 72; *sub nom.* PRACTICE NOTE, [1934] W. N. 198.

**3326. Add. Annotation:—Generally, Refd. Farr v. Weatherhead & Harding** (1932), 49 R. P. C. 262.

**3343a. — Question of fact—Threat may be implied from words used.]**—*LUNA ADVERTISING Co., LTD. v. BURNHAM & Co.* (1928), 45 R. P. C. 258.

**3348a. —**—Plffs. were the marketers & distributors of a particular type of kettle. Dft. was a solr. Dft. wrote in Oct. 1933, to plffs. & to the firm who were manufacturing the kettles for plffs. in the following terms: "I understand you are manufacturing a certain kettle which is an infringement of Patent No. 165,299 vested in a client of mine. Unless I receive forthwith your assurance that you will at once cease manufacturing such kettles I shall have no alternative but to advise my clients to apply for an injunction. Will you also please let me have an account of the number of those kettles made to date & the names of the people to whom they have been supplied." Dft. also caused to be inserted in a trade paper an advertisement in his name in which it was stated that anyone manufacturing or selling a kettle constructed in accordance with the patent was liable to an action for infringement:—*Held*: a letter written by a solr. in which he stated that in certain circumstances he would advise his client to bring an action did not amount to a threat within sect. 36 of Patents & Designs Acts, 1907–1932, & the advertisement in the trade paper was gratuitous advice by a solr. & not a threat. The action was dismissed with costs.—*EARLES UTILITIES, LTD. v. HARRISON* (1934), 52 R. P. C. 77.

**3351a. — In respect of registered design.]**—*FINKELSTEIN v. BILLIG* (1930), 47 R. P. C. 516.

**3353a. — —.]**—*TIBO PRODUCTS Co., LTD. v. SALT* (1929), 46 R. P. C. 451.

**3353b. —.]**—On a motion for an interim injunction in an action, under sect. 36 of Patents & Designs Acts, 1907–1932, to restrain the issue of threats under certain patents, in respect of radio sets marketed by plffs., defts. alleged that plffs.' sets in fact infringed the patents, & plffs. put in no evidence in reply to this allegation:—*Held*: the evidence did not show a *prima facie* case under the sect., & an injunction was refused.—*CABARET ELECTRIC Co., LTD. (TRADING AS MOTOROLA DISTRIBUTING Co.) v. MARCONI'S WIRELESS TELEGRAPH Co., LTD.* (1934), 52 R. P. C. 104.

**3353c. *Prima facie* case of invalidity of patent.]**—On a motion for an interlocutory injunction in an action to restrain defts. from threatening plffs. or their customers with an action for infringement of patent or registered design or other like proceedings, in respect of the sale by plffs. of ladies' vanity cases, defts. alleged that plffs.' vanity cases were imitations of their registered design No. 790,245. Plffs. alleged that the registration was invalid by reason of the prior sale by defts. of vanity cases identical with the registered design:—*Held*: there was a strong *prima facie* case that the registration was invalid, & an injunction was granted.—*INTERNATIONAL SALES, LTD. v. TRANS-CONTINENTAL TRADING Co., LTD. & BENNO MAISEL* (1934), 52 R. P. C. 107.

**3353d. Counterclaim for infringement—Plaintiffs not represented.]**—*CABARET ELECTRIC Co., LTD. v. MARCONI WIRELESS TELEGRAPH Co., LTD.* (1936), 53 R. P. C. 254.

**3355a. — Motion for interim injunction treated as trial of action.]**—This was an action to restrain threats commenced under sect. 36 of Patents & Designs Acts, 1907–1932. Pltf. moved for an interlocutory injunction to restrain threats issued by defts., in respect of an alleged infringement by pltf. of certain letters patent. Defts. consenting to treat the motion as the trial of the action, a final order was made in the form set out. A declaration that the threats were unjustifiable was included in the order.—*DESIDERIO v. CURRUS, LTD.* (1934), 52 R. P. C. 201.

**3384a. Interim injunction.]**—In 1931, letters patent were granted for "improvements in & relating to end pieces or terminal ends for necklets." In 1932 pltf. commenced an action against defts. to restrain them from threatening under patent & moved for an interim injunction. Defts. did not deny that they had issued threats, but alleged that the patent was valid & that it had been infringed by pltf.:—*Held*: it was not a case for an interim injunction, & the motion was dismissed, the costs to be costs in the action.—*STRINGER v. PLATNAUER (R.), LTD.* (1932), 50 R. P. C. 61.

**3413a. —.]**—Plffs., who were the exclusive licencees in this country for the sale of a furnace known as a "Sesci" furnace, in Apr. 1931, brought an action to restrain threats made by defts., who claimed to have

a beneficial interest in two patents Nos. 283,381 & 306,141 granted to B. Deft. co.'s legal title to the patents was not completed till Dec. 2, 1931, & the writ issued by them in an action for infringement was not issued until Dec. 3, 1931. Defts. admitted that threats had been made, & at the trial stated that they did not intend to contest the case with regard to the second patent. They submitted to an injunction in terms of the writ as regards that patent. Pltfs. alleged that the first patent was neither valid nor infringed & they relied on prior publication, prior common general knowledge, & lack of utility. Defts. affirmed that the patent was valid & that it had been infringed; & they proposed to rely also on the proviso to sect. 36 of Patents & Designs Acts, 1907-1928:—*Held*: the proviso had on application to the present case, as the action for infringement had not been commenced & prosecuted with due diligence; the patent was valid but that there was no infringement. An injunction was granted & defts. were ordered to pay the costs of the action except in so far as the costs had been increased by the issue of validity of the first patent, & defts. were given the costs as far as related to the validity of that patent with a set-off; & an inquiry as to damages was ordered.—*PITTEVIL & Co. v. BRACKELSBERG MELTING*

PROCESSES, LTD. (1931), 49 R. P. C. 73; *affd.* (1932), 49 R. P. C. 327, C. A.

**3414a.** — *No mala fides or special damage.*—In Apr. 1929, letters patent were granted to W. & H. In Oct. 1930, W. & H. commenced an action against F. for infringement of the patent; F. denied infringement & counter-claimed for revocation of the patent. In Mar. 1931, the patent was revoked by order of the ct. In June, 1931, F. commenced an action against W. & H., alleging that between Aug. & Dec. 1930, W. & H. had falsely & maliciously published statements that machines manufactured by F. were infringements of the patent, whereby he had been injured in his business & lost profits that he otherwise would have made:—*Held*: the statements published by W. & H. amounted to threats & they were not justifiable, but there was no evidence of *mala fides* or of special damage. The action was dismissed with costs.—*FARR v. WEATHERHEAD & HARDING* (1932), 49 R. P. C. 262.

**3415.** *Add. Annotation*:—*Consd. Solanite Signs, Ltd. v. Wood* (1933), 50 R. P. C. 315.

**3419.** *Add. Annotation*:—*Folld. Solanite Signs Ltd. v. Wood* (1933), 50 R. P. C. 315.

**3422a.** — *Break down of negotiations caused by threats.*—*SOLANITE SIGNS, LTD. v. WOOD* (1933), 50 R. P. C. 315.

## Part XVI.—International and Colonial Arrangements.

**3423.** *Add. Annotation*:—*Refd. Re Von Krogh's Patent* (1929), 49 R. P. C. 417.

**3424.** *Add. Annotation*:—*Refd. Re Von Krogh's Patent* (1929), 49 R. P. C. 417.

**3430.** *Add. Annotation*:—*Refd. Re Von Krogh's Patent* (1929), 49 R. P. C. 417.

**3432.** *Add. Annotation*:—*Generally, Refd. Sharpe & Dohme Inc. v. Boots Pure Drug Co.* (1928), 45 R. P. C. 153.

**3433a.** *Opposition to English grant—Disconformity between English & foreign application.*—The introduction of the ground 1 (e) into sect. 11 by 1919 Act does not alter the construction to be placed on sect. 91 (1).—*Re ARNO ANDREAS APPLICATION FOR LETTERS PATENT NO. 360,547* (1934), 51 R. P. C. 188.

**3433b.** *Several foreign applications—Whether constituting single invention—Decision of Comptroller—Finality of.*—*Held*: the Comptroller having expressed his opinion that the whole of the inventions in respect of which the foreign applications were made were not such as to constitute a single invention, the Tribunal had no jurisdiction to entertain the appeal, which was dismissed.—*Re BRUNO CLAUS APPLICATION FOR A PATENT* (1934), 51 R. P. C. 383.

**3433c.** *"Any foreign state"—Meaning of.*—The words "any foreign state" in sect. 91 (2) mean "any one foreign state" & not "any foreign state or states."—*Re N. V. PHILIPS' GLOEILAMPENFABRIEKEN APPLICATIONS FOR A PATENT* (1934), 52 R. P. C. 111.

## Part XVII.—Patent Agents.

**3434.** *Add. Annotations*:—*As to* (1) *Distd. Minister of Health v. R., Ex p. Yaffe*, [1931] A. C. 494. *As to* (2) *Refd. Musical Performers' Protection Assn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485; *A.-G. v. Premier Line, Ltd.* (1931), 48 T. L. R. 104. *Generally, Refd. Tattersall v. Sladen*,

[1928] Ch. 318; *A.-G. v. Sharp* (1930), 99 L. J. Ch. 441.

**3442a.** — *Inference from correspondence.*—*THOMPSON v. BETTINGER* (No. 2) (1928), 46 R. P. C. 189.

**3443.** *Add. Annotation*:—*Refd. Maclean v. Workers' Union*, [1929] 1 Ch. 602.

### PART XVI.

**3426 I.** *To whom patent granted under International Convention—Assignee of foreign inventor.*—The right of a foreign inventor, who had applied for protection in his own country, to apply under Patents Act, 1903-1909, s. 121, for a patent for his invention in priority to other applicants, is purely personal, & could not have been exercised by his assignees in their own names prior to Patents Act, 1921.—*MARCONI'S*

*WIRELESS TELEGRAPH CO., LTD. v. DAVID JONES, LTD.* (1928), 28 S. R. N. S. W. 355; 45 N. S. W. W. N. 96.—*AUS.*

*p. Revsg.*, [1924] 4 D. L. R. 484.  
*se. Application in several countries—Priorities.*—Under the International Convention, where inventors have filed applications for patents for invention in the United States, & subsequently apply for patents in Canada for the same thing, they are entitled to have

the priority of invention determined by the date of the filing of their applications in the United States.—*GOODYEAR TIRE & RUBBER CO. v. RUBBER SERVICE LABORATORIES CO.*, [1929] Ex. C. R. 63.—*CAN.*

### PART XVII.

*st. Registration of patent agents—Solicitor in Irish Free State.*—*O'NEILL v. BRADLEY*, [1929] I. R. 422.—*IR.*

## PAWNS AND PLEDGES.

## Part II.—Pawns at Common Law.

7. *Add. Annotation*:—*As to* (2) *Refd.* *Best v. Butler & Fitzgibbon*, [1932] 2 K. B. 108.
30. *Add. Annotations*:—*Refd.* *Albemarle Supply Co. v. Hind* (1927), 43 T. L. R. 652; *Republica de Guatemala v. Nunez*, [1927] 1 K. B. 669; *Madras Official Assignee v. Mercantile Bank of India, Ltd.*, [1935] A. C. 53.
31. *Add. Annotations*:—*Refd.* *Madras Official Assignee v. Mercantile Bank of India, Ltd.*, [1935] A. C. 53; *Lloyds Bank, Ltd. v. Bank of America National Trust & Savings Assn.*, [1938] 2 K. B. 117; *Mercantile Bank of India, Ltd. v. Chartered Bank of India, Australia & China & Strauss & Co. (No. 2)*, [1937] 4 All E. R. 651.
67. *Add. Annotation*:—*Refd.* *London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd.*, [1934] 2 K. B. 206.
138. *Add. Annotation*:—*Consd.* *Weld v. Petre* (1928), 97 L. J. Ch. 399.
146. *Add. Annotation*:—*Refd.* *Lowther v. Harris*, [1927] 1 K. B. 393.
168. *Add. Annotations*:—*Consd.* *Lake v. Simmons*, [1927] A. C. 487. *Refd.* *London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd.*, [1931] 2 K. B. 206.
169. *Add. Annotation*:—*Consd.* *London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd.*, [1934] 2 K. B. 206.
171. *Add. Annotation*:—*Refd.* *Lowther v. Harris*, [1927] 1 K. B. 393.
- 172a. *Goods delivered "on appro" by false representation.*—Where the owner of goods is induced, by a false representation made by another with fraudulent intent that he can sell them, to deliver the goods to that other on "appro," for the purpose of his endeavouring to sell them, the case is one not of larceny by a trick but of obtaining by false pretences. If, therefore, the fraudulent person pledges the goods before the contract between him & the true owner is avoided, the pledgee who takes *bond fide* obtains a good title as pledgee.—*LONDON JEWELLERS, LTD. v. ATTENBOROUGH, LONDON JEWELLERS, LTD. v. ROBERTSONS (LONDON), LTD.*, [1934] 2 K. B. 206; 103 L. J. K. B. 429; 151 L. T. 124; 50 T. L. R. 436; 78 Sol. Jo. 413; 39 Com. Cas. 290, C. A.; *revsg.* S. C. *sub nom.* *LONDON JEWELLERS, LTD. v. SUTTON, LONDON JEWELLERS, LTD. v. ROBERTSONS (LONDON), LTD.*, 50 T. L. R. 193; 78 Sol. Jo. 82.
- 173a. *Revesting of property in stolen goods—Sale of Goods Act, 1893 (c. 71), s. 24—Who may sue—Owner from whom goods actually stolen.*—*Pitfs.* were wholesale dealers. They had as clients the S. S. Co., who introduced a customer, a Captain Le M. Captain Le M. was accompanied by a friend, M. Captain Le M. purchased a ring, which he was allowed to take away, & which was immediately pawned by M. with defts. A few days later M., purporting to act on behalf of Captain Le M., took away a diamond bracelet, which he disposed of in the same way to defts. Both the ring & bracelet were invoiced to the S. S. Co. M. was convicted & sentenced for larceny by a trick, but the ct. refused restitution of the property. *Pitfs.* had been paid the price of the ring by the S. S. Co. as invoiced to them, & now sought to recover the bracelet from defts. :—*Held*: *pitfs.* had no title in law to maintain the action. A fundamental point fatal to *pitfs.*' claim was that the words "owner of the goods" in Sale of Goods Act, 1893 (c. 71), s. 24 (1), meant the owner of the goods from whom they were actually stolen, & not some previous owner from whom the title had been derived. In the present case the sale was to the S. S. Co., & the property in the goods had passed to them & from them to Captain Le M., by whose authority it had been pledged.—*BULLER & Co., LTD. v. BROOKS, T. J., LTD.* (1930). 142 L. T. 576; 46 T. L. R. 233; 74 Sol. Jo. 139; 35 Com. Cas. 205.

## Part III.—Pawns under Pawnbrokers Acts.

178. *Add. Annotation*:—*Refd.* *Foster v. Driscoll, Lindsay v. Attfield, Lindsay v. Driscoll*, [1929] 1 K. B. 470.

## PART II. SECT. 1, SUB-SECT. 2.—A.

e i. —.—[In the case of the pledge of an instrument creating or evidencing a right the thing pledged must be taken to be both the instrument & the right, not the bare instrument without the right nor the mere right without the

instrument.—*ROYAL BK. OF CANADA v. TALBOT*, [1928] 3 D. L. R. 157; [1928] 2 W. W. R. 190; 34 Alta. L. R. 395.—*CAN.*

## PART III. SECT. 1.

sb. *Meaning of pawnbroker.*—A

pawnbroker is a person who lends money upon the security of pawns with sufficient frequency or system to constitute the business of a pawnbroker. There must be a series or repetition of acts of pawning.—*V. A. S. M. CHETTYAR FIRM v. KING EMPEROR* (1934), 1 L. R. 13 Ran. 32.—*IND.*

## PEERAGES AND DIGNITIES.

## Part I.—Peerage.

68. *Add. Annotation* :—*Refd.* Edwards v. A.-G. for Canada (1929), 46 T. L. R. 4.
69. *Add. Annotation* :—*Refd.* Edwards v. A.-G. for Canada (1929), 46 T. L. R. 4.
- 89a. ——— ———.]—Deft. having voted at the election of Scotch peers :—*Held* : as a Scotch peer, entitled to be discharged from arrest, although his vote had been protested against, his claim to the title disputed, & never recognised by the House of Lords or at ct.—*DIGBY v. STIRLING (LORD)* (1831). 8 Bing. 55 ; 1 Dowl. 248 ; 1 Moo. & S. 116 ; 131 E. R. 321 ; *sub nom.* *DIGBY v. ALEXANDER*, 1 L. J. C. P. 42.
- Annotation* :—*Refd.* Smart v. Johnstone (1837), Murp. & H. 351.
262. *Add. Annotation* :—*Generally, Refd. Re Davy*, [1935] P. 1.



## PERPETUITIES.

## Part I.—The Rule Against Perpetuities.

2. *Add. Annotation*:—**Refd.** *Re Villar*, Public Trustee v. Villar, [1928] Ch. 471.
- 19a. ———.]—**CLEMENTI v. FIELDING** (1848), 12 L. T. O. S. 309.
28. *Add. Annotation*:—**Refd.** *Re Talbot*, Jubb v. Sheard (1933), 49 T. L. R. 462.
29. *Add. Annotation*:—**Refd.** *I. R. Comrs. v. Bone* (1927), 13 Tax Cas. 20.
35. *Add. Annotation*:—**Refd.** *Re Talbot*, Jubb v. Sheard (1933), 49 T. L. R. 462.
53. *Add. Citation*:—*sub nom.* **ALFORD'S CASE**, O. Bridg. 584, L. C.  
*Add. Annotations*:—**Refd.** *Howard v. Norfolk (Duke)* (1681), 3 Cas. in Ch. 14; *Goodtitle d. Gurnall v. Wood* (1740), Willes, 211; *Thellusson v. Woodford* (1798), 4 Ves. 227.
54. *Add. Annotation*:—**Refd.** *Re Villar*, Public Trustee v. Villar, [1928] Ch. 471.
56. *Add. Annotation*:—*As to* (2) **Refd.** *Re Villar*, Public Trustee v. Villar, [1928] Ch. 471.
58. *Add. Citations*:—*subsequent proceedings* (1788), 2 Term Rep. 241; 2 Bro. C. C. 344, L. C.  
*Add. Annotation*:—**Refd.** *Re Villar*, Public Trustee v. Villar, [1928] Ch. 471.
60. *Add. Annotation*:—**Consd.** *Re Legh's Resettlement Trusts*, Public Trustee v. Legh, [1937] 3 All E. R. 823.
64. *Add. Annotation*:—**Refd.** *Re Lanyon*, Lanyon v. Lanyon, [1927] 2 Ch. 264.
65. *Add. Annotation*:—**Refd.** *Re Vaux*, Nicholson v. Vaux, [1938] 2 All E. R. 177.
66. *Add. Annotation*:—**Apprvd.** *Re Villar*, Public Trustee v. Villar, [1929] 1 Ch. 243.
- 66a. ———. ———. **Survivor of Queen Victoria's descendants living.**]—By his will dated June 14, 1921, & confirmed by a codicil of Feb. 2, 1926, testator, who died on Sept. 6, 1926, gave his property to his trustees upon certain trusts as to income & capital for his participating issue as therein defined, using a well known common form so as to tie it up in such a way that the capital was not to vest until the expiration of "the period ending at the expiration of twenty years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death":—**Held**: though the existing lives selected were very numerous & it would be extremely difficult & expensive in the future to ascertain the date of the survivor's death, it could not be said to be so impracticable or beyond the scope of the ordinary legal testimony probably then available as to avoid the trust *ab initio* for uncertainty or perpetuity, & the trust was valid.—**Re VILLAR, PUBLIC TRUSTEE v. VILLAR**, [1929] 1 Ch. 243; 98 L. J. Ch. 223; 140 L. T. 90; 45 T. L. R. 13; 72 Sol. Jo. 761, C. A.
67. *Add. Annotations*:—*As to* (4) **Apld.** *Re Villar*, Public Trustee v. Villar, [1928] Ch. 471.  
*As to* (5) **Consd.** *Elliot v. Joicey*, [1935] A. C. 209. *Generally*, **Refd.** *Re Villar*, Public Trustee v. Villar (1928), 45 T. L. R. 13.
70. *Add. Annotations*:—*As to* (1) **Consd.** *Athey v. Pickering* (1926), 96 L. J. K. B. 250. **Folld.** *Elliot v. Joicey*, [1935] A. C. 209.
80. *Add. Annotation*:—**Refd.** *Elliot v. Joicey*, [1935] A. C. 209, H. L.
98. *Add. Annotations*:—*As to* (1) **Refd.** *Re Talbot*, Jubb v. Sheard, [1933] Ch. 895. *Generally*, **Refd.** *Re Legh's Resettlement Trusts*, Public Trustee v. Legh, [1937] 3 All E. R. 823.
103. *Add. Annotation*:—*As to* (1) **Consd.** *Re Legh's Resettlement Trusts*, Public Trustee v. Legh, [1937] 3 All E. R. 823.
108. *Add. Annotation*:—**Refd.** *Re Coleman*, Public Trustee v. Coleman, [1936] Ch. 528.
- 115a. "Within the limits prescribed by law." — The testator by his will gave the income of his residuary estate unto his widow until death or remarriage, & after her remarriage he gave her an annuity of £500 *per annum*. Subject thereto, the trustees were to set aside £20,000 for each of his daughters living at his death or born in due time thereafter, & these sums were settled in the usual way. The trustees were then given full discretion to deal with the capital & income of the residue in favour of the children & issue of deceased children. The will continued: " & I declare that my trustees may from time to time within the period of twenty-one years from my decease accumulate the surplus of any income of my residuary trust fund not paid or applied under the preceding clause of this my will by investing the same & the resulting income thereof to the intent that the accumulations shall be added to the residuary trust fund & follow the determination thereof with liberty nevertheless for the trustees at any time or times to resort to the accumulations of any preceding year or years & apply the same as part of my residuary trust fund." This clause was admittedly void for perpetuity, but it was contended that that result was prevented by the following clause, which, it was contended, must be read with the preceding clause. The following clause was in these terms: " Having the fullest confidence in my trustees I hereby authorise & empower them to deal with the capital & income of my residuary trust fund & pay away & deal with the same in all respects for the benefit & provisions of my children or grandchildren as they may think best or most expedient & to act in all respects as I could have done if living save only that all such dealings with the residuary trust fund & the income & accumulations thereof shall be within the limitations prescribed by law " :— **Held**: as the second clause, which must be construed as a separate disposition from the preceding clause, did not extend to issue more remote than a grandchild, the possible interests, having regard to the saving words,

must necessarily vest within the period allowed by the rule against perpetuities. The saving words were equivalent to a proviso that the trustees should not create by the exercise of the power any interest which, if given by the testator in his will, would have been obnoxious to the rule against perpetuities.—*Re VAUX, NICHOLSON v. VAUX*, [1938] 4 All E. R. 297; 55 T. L. R. 92, C. A.

133. *Add. Annotation*:—As to (2) *Refd.* Knightsbridge Estates Trust, Ltd. v. Byrne, [1938] 2 All E. R. 444.

135. *Add. Annotation*: *Refd.* Knightsbridge Estates Trust, Ltd. v. Byrne, [1938] 2 All E. R. 444.

138. *Add. Annotation*:—*Refd.* *Re* Cockerill, Macanness v. Percival, [1929] 2 Ch. 131.

166a. —.—.]—*OAKES v. CHALFONT* (1674), Poll. 38; 86 E. R. 504; *sub nom.* CHALFONT v. OAKES, 1 Cas. in Ch. 239.

*Annotation*:—*Refd.* Smith v. Clever (1688), 2 Vern. 59.

175. *Add. Annotation*:—*Refd.* *Re* Villar, Public Trustee v. Villar, [1929] 1 Ch. 243.

181. *Add. Annotation*:—*Refd.* *Re* Villar, Public Trustee v. Villar, [1929] 1 Ch. 243.

192. *Add. Annotation*:—*Folld.* *Re* Coleman, Public Trustee v. Coleman, [1936] Ch. 528.

195. *Add. Annotation*:—As to (1) *Refd.* *Re* Rutherford's Conveyance, Goadby v. Bartlett, [1938] Ch. 396.

210. *Add. Annotation*:—As to (1) *Refd.* British Homophone, Ltd. v. Kunz & Crystallate Gramophone Record Manufacturing Co. (1935), 152 L. T. 589.

272. *Add. Annotation*:—*Apld.* *Re* Brandon, Samuels v. Brandon (1932), 49 T. L. R. 48.

277. *Add. Annotation*:—*Refd.* *Re* Gwyon, Public Trustee v. A.-G. (1929), 46 T. L. R. 96.

285. *Add. Annotation*:—*Refd.* Berry v. Geen, [1938] A. C. 575.

289. *Add. Annotation*:—*Refd.* *Re* Prevost, Lloyds Bank, Ltd. v. Barclays Bank, Ltd., [1930] 2 Ch. 383.

293. *Add. Annotation*:—*Refd.* *Re* Chardon, Johnston v. Davies, [1928] Ch. 404.

295. *Add. Annotation*:—*Refd.* I. R. Comrs. v. Bone (1927), 13 Tax Cas. 20.

324. *Add. Annotation*:—*Consd.* *Re* Legh's Resettlement Trusts, Public Trustee v. Legh, [1937] 3 All E. R. 823.

334. *Add. Annotation*:—*Generally, Refd.* *Re* Legh's Resettlement Trusts, Public Trustee v. Legh, [1937] 3 All E. R. 823.

334a. —.—.]—When in exercise of a special power of appointment a testator makes an appoint-

ment of a share of personalty to two objects of the power for their joint lives & after the death of either of them to the survivor for life & they were not lives in being at the date of the creation of the power of appointment, the reversionary life interest of the survivor is a contingent interest & therefore void as contravening the rule against perpetuities.—*Re* LEGH'S SETTLEMENT TRUSTS, PUBLIC TRUSTEE v. LEGH, [1938] Ch. 39; [1937] 3 All E. R. 823; 107 L. J. Ch. 6; 157 L. T. 270; 53 T. L. R. 1036; 81 Sol. Jo. 701, C. A.

335. *Add. Annotation*:—*Refd.* *Re* Coleman, Public Trustee v. Coleman, [1936] Ch. 528.

336. *Add. Annotations*:—As to (1) *Refd.* Knightsbridge Estates Trust, Ltd. v. Byrne, [1938] 2 All E. R. 444. *Generally, Refd.* *Re* Coleman, Public Trustee v. Coleman, [1936] Ch. 528; *Re* Legh's Resettlement Trusts, Public Trustee v. Legh, [1937] 3 All E. R. 823.

346. *Add. Annotations*:—As to (1) *Consd.* *Re* Payne, Taylor v. Paine, [1927] 2 Ch. 1. *Apld.* A.-G. v. Lloyd's Bank, Ltd., [1935] A. C. 382. *Distd.* *Re* Cohen's Will Trusts, Cullen v. Westminster Bank, Ltd., [1936] 1 All E. R. 103. *Consd.* *Re* Coleman, Public Trustee v. Coleman, [1936] Ch. 528. *Apld.* *Re* Gatti's Voluntary Settlement Trusts, De Ville v. Gatti, [1936] 2 All E. R. 1489. *Refd.* *Re* Monk, Giffen v. Wedd, [1927] 2 Ch. 197; *Re* Marshall, Graham v. Marshall, [1928] Ch. 661; *Re* Hodson's Settlement, Brookes v. A.-G., [1938] 3 All E. R. 341.

369a. —.—.]—A testator gave his residuary estate on trust to invest & accumulate the same during the minority of the youngest of his grandchildren living at his decease; & he directed that, so soon as "such grandchildren" should attain twenty-one, the trust fund should remain & be "for all & every" the testator's "grandchildren then living, who, being a son or sons, shall attain twenty-one, . . . & to be divided between them (if more than one) equally." Then followed this proviso: "Provided always that, if any grandchild shall die leaving a child or children who, being a son or sons, shall attain twenty-one . . . then & in every such case the last-mentioned child or children shall take (& if more than one, equally between them) the share which is . . . or their parent would have taken if living"—*Held*: the gift was not void for remoteness.—*Re* WATKINS, JAMES v. CORDEY (1889), 37 W. R. 609, C. A.

372. *Add. Annotation*:—As to (1) *Refd.* *Re* Lanyon, Lanyon v. Lanyon, [1927] 2 Ch. 264.

385. *Add. Annotation*:—*Refd.* *Re* Coleman, Public Trustee v. Coleman, [1936] Ch. 528.

#### PART I. SECT. 2, SUB-SECT. 3.—B.

191 I. *Discretionary trust*—*For maintenance*.—*Re* ANTROBUS, HENDERSON v. SHAW & MORTON, [1928] N. Z. L. R. 364.—N.Z.

#### PART I. SECT. 2, SUB-SECT. 4.—A.

197 I. *Contract giving equitable interest—Land*.—Where an agreement for the sale to a co. of the oil & gas rights under a parcel of land in consideration of a certain number of shares in the co. provided that, if the co. should cease to do business for a specified period, said rights should revert to the vendor, & the shares were allotted & the co. failed to go ahead for said period, the reverting of said rights to the vendor was held not to be

subject to her returning the shares to the co. Pltf. co., which had purchased the assets of the co. above referred to & was the assignee of its interests under said agreement sued the vendor for specific performance & contended that the condition that if the co. failed to go ahead the oil rights should revert to the vendor was void under the rule against perpetuities as applied in *London & S. W. Ry. Co. v. Gomm*, No. 197.—*Held*: the rule did not apply under the circumstances.—*NEW FEDERAL OILS, LTD. v. ROWLAND*, [1929] 1 D. L. R. 472; 1 W. W. R. 263; 24 Alta. L. R. 19.—CAN.

#### PART I. SECT. 2, SUB-SECT. 4.—D.

206 II. —.—.]—KALACHAND

MUKHERJI v. JATINDRA MOHAN BANERJI (1928), I. L. R. 56 Calo. 487.—IND.

#### PART I. SECT. 3, SUB-SECT. 1.

290 I. *General rule—No remoteness after vesting*.—*Re* CRICHTON ESTATE (1913), 25 W. L. R. 18; 4 W. W. R. 1188; 13 D. L. R. 169; 23 Man. L. R. 594.—CAN.

#### PART I. SECT. 3, SUB-SECT. 5.—A.

342 VI. —.—.]—*Application to Hindus*.—*Held*: the principle in *Leake v. Robinson* applies to Hindus.—*SEWDAYAL RAMJEEDEAS v. OFFICIAL TRUSTEE OF BENGAL* (1930), I. L. R. 58 Calo. 768.—IND.

387. *Add. Annotation*:—*Generally*, *Refd. Re Curryer's Will Trusts*, Wyly v. Curryer, [1938] 3 All E. R. 574.
393. *Add. Annotation*:—*Refd. Re Canning's Will Trusts*, Skues v. Lyon, [1936] Ch. 309.
395. *Add. Annotation*:—*Consd. Re Curryer's Will Trusts*, Wyly v. Curryer, [1938] 3 All E. R. 574.
397. *Add. Annotations*:—*Appld. Re Marshall, Graham v. Marshall*, [1928] Ch. 661. *Consd. A.-G. v. Lloyd's Bank, Ltd.*, [1935] A. C. 382. *Appld. Re Gatti's Voluntary Settlement Trusts*, De Ville v. Gatti, [1936] 2 All E. R. 1489. *Consd. Re Curryer's Will Trusts*, Wyly v. Curryer, [1938] 3 All E. R. 574; *Re Hodson's Settlement*, Brookes v. A.-G., [1938] 3 All E. R. 341. *Refd. Re Monk, Giffen v. Wedd*, [1927] 2 Ch. 197; *Re Payne, Taylor v. Payne*, [1927] 2 Ch. 1.
- 397a. —.]—By his will a testator provided: "... on the decease of my last surviving child or on the death of the last surviving widow or widower of my children as the case may be whichever shall last happen I direct my trustees to stand possessed of the trust fund (that being the testator's residuary estate) ... in trust for my grandchild or grandchildren living at the period of distribution & the issue then living of my grandchild or grandchildren dying before that period ...":—*Held*: the words "on the decease of my last surviving child or on the death of the last surviving widow or widower of my children" adequately expressed alternative events, & the words "as the case may be whichever shall last happen" did not cause the gift of residue to offend the rule against perpetuities.—*Re CURRYER'S WILL TRUSTS*, WYLY v. CURRYER, [1938] Ch. 952; [1938] 3 All E. R. 574; 107 L. J. Ch. 417; 159 L. T. 599; 51 T. L. R. 1055; 82 Sol. Jo. 625.
- 402a. *First person becoming adult tenant in tail in possession.*]—Testator gave his real & personal estate to trustees as to the personal estate upon trusts for conversion & investment & upon trust to pay the income thereof to the person, if any, who under the trusts or limitations thereafter contained should for the time being be tenant for life of or otherwise entitled to the possession or receipt of the rents & profits of his real estate until such real estate should become vested in some person who should become adult tenant in tail thereof in possession, & from & after the happening of such last-mentioned event then as to both capital & income upon trust for such last-mentioned person absolutely; & as to his real estate upon trust for his brother during his life, & from & after his death upon trust for the first & every other son of his said brother successively in remainder one after another according to their respective seniorities in tail general:—*Held*: the trust of the personal estate in favour of the person who should become adult tenant in tail in possession could not be construed as applying to a tenant in tail by purchase only, & was therefore void for remoteness.—*Re ATKINSON, ATKINSON v. ATKINSON*, [1916] 1 Ch. 91; 85 L. J. Ch. 159; 114 L. T. 44; 60 Sol. Jo. 190.
- 408a. *Interest in personalty analogous to determinable fee*—Gift to cemetery so long as graves maintained.]—Testator gave £200 to his trustees on trust to invest it, & to pay the income thereof to a cemetery co. "during such period as they shall continue to maintain & keep" two specified graves "in the cemetery in good order & condition with flowers & plants thereon, as same have hitherto been kept by me," & he declared that, if the graves should not be kept in such order & condition, his trustees should pay & apply the income in manner therein mentioned:—*Held*: the gift did not infringe the rule against perpetuities.—*Re CHARDON, JOHNSTON v. DAVIES*, [1928] Ch. 464; 97 L. J. Ch. 289; 139 L. T. 261.
- 412a. *Power given to trustees—Appointment of Public Trustee.*]—By his will a testator, who died in 1887, appointed four named persons as the exors. & trustees of his will & gave his real & personal estate to them upon trust that they & the survivors & survivor of them & the heirs, exors. or administrators of such survivor their or his assigns, each & all of whom were intended to be included in the term "my trustees" thereafter used, should distribute the net residue of his estate to & among such of the descendants of his brothers & sisters in such shares, proportions or amounts & at such proper times as the trustees, in whom he "placed full confidence," in their absolute & uncontrolled discretion should determine. Two of the trustees died in 1902, one retired in 1907, when another was appointed who retired in 1923 in favour of yet another. In 1934 the two remaining trustees retired & the Public Trustee was appointed in their place. In a summons to determine the effect of the will, it was argued by testator's next of kin that: (i) the gift of the residuary estate was void, because there was no longer anybody who, in accordance with the terms of the will, was entitled to exercise the power of selecting the descendants of testator's brothers & sisters who were to take, & (ii) the gift was void as infringing the rule against perpetuities, because the descendants of testator's brothers & sisters might be selected by persons ascertained outside the limit fixed by the rule against perpetuities, & might themselves be persons who took outside that time:—*Held*: (1) the Public Trustee, as an assign, came within the definition of "my trustees" in the will & was entitled to exercise the power of selection; (2) the gift was void as infringing the rule against perpetuities.—*Re SYMM'S WILL TRUSTS, PUBLIC TRUSTEE v. SHAW*, [1936] 3 All E. R. 236; 80 Sol. Jo. 994.
414. *Add. Annotations*:—*As to (3) Refd. Re Symm's Will Trusts, Public Trustee v. Shaw*, [1936] 3 All E. R. 236. *Generally, Refd. Re Rooke, Jeans v. Gatehouse*, [1933] Ch. 970.
415. *Add. Annotations*:—*Consd. Re Canning's Will Trusts*, Skues v. Lyon, [1936] Ch. 309. *Expld. & Distd. Re Coleman, Public Trustee v. Coleman*, [1936] Ch. 528.
424. *Affd. by LORD LYNCHURST*, see *per LORD COTTENHAM* in 3 My. & Cr. at p. 151.
428. *Add. Annotation*:—*Refd. A.-G. v. Farrell* (1930), 99 L. J. K. B. 605.
433. *Add. Annotation*:—*Refd. Re Beresford's Will Trusts*, Sturges v. Beresford, [1938] 3 All E. R. 566.

453. *Add. Annotation*:—**Refd. Re Villar, Public Trustee v. Villar**, [1928] Ch. 471.
466. *Add. Annotation*:—**Expld. Re Silva, Silva v. Silva**, [1929] 2 Ch. 198.
492. *Add. Annotation*:—**Refd. Re Coleman, Public Trustee v. Coleman**, [1936] Ch. 528.
- 493a. *Subsequent independent limitations valid.*—Limitations, in themselves valid, which follow, but are not dependent upon, limitations offending the rule against perpetuities, are not affected by the invalidity of the prior limitations.—**Re CANNING'S WILL TRUSTS, SKUES v. LYON**, [1936] Ch. 309; 105 L. J. Ch. 211; 154 L. T. 693.
- Annotation*:—**Follid. Re Coleman, Public Trustee v. Coleman**, [1936] Ch. 528.
- 493b. ———.—Under the will of a testator a share of residue given to one of his sons, W. was settled upon discretionary trusts for W. during his life, & after his death upon similar discretionary trusts for any widow W. might leave & for all or any of the children of W., & after the death of such widow, upon trust for the children of W. at twenty-one or marriage, in equal shares:—**Held**: though the discretionary trust in favour of W.'s widow was void for remoteness, as W. might marry a woman who was not born at the death of testator, the ultimate trust in favour of W.'s children being vested, & not contingent or dependent on the void trust, was valid.—**Re COLEMAN, PUBLIC TRUSTEE v. COLEMAN**, [1936] Ch. 528; [1936] 2 All E. R. 225; 105 L. J. Ch. 244; 155 L. T. 402.
511. *Add. Annotation*:—**Refd. Re Coleman, Public Trustee v. Coleman**, [1936] Ch. 528.
542. *Add. Annotation*:—**Refd. Re Beresford's Will Trusts, Sturges v. Beresford**, [1938] 3 All E. R. 566.
545. *Add. Annotation*:—**Consd. Re Payne, Taylor v. Payne**, [1927] 2 Ch. 1.

## Part II.—The Rule Prohibiting Limitations to Issue of Unborn Persons.

548. *Add. Annotation*:—**As to (8) Refd. Re Curver's Will Trusts, Wyly v. Curver**, [1938] 3 All E. R. 571.
576. *Add. Annotation*:—**Refd. Re Villar, Public Trustee v. Villar**, [1928] Ch. 471.

## Part III.—Restriction of Accumulation.

610. *Add. Annotation*:—**As to (3) Apld. Re Villar, Public Trustee v. Villar**, [1929] 1 Ch. 243.
614. *Add. Annotation*:—**Refd. Berry v. Geen** [1938] A. C. 575.
615. *Add. Annotation*:—**Refd. Re Watt's Will Trusts, Watt v. Watt**, [1936] 2 All E. R. 1555.
646. *Add. Annotations*:—**As to (1) Consd. Elliot v. Joicey**, [1935] A. C. 209. **Refd. Athey v. Pickering** (1926), 96 L. J. K. B. 250.
648. *Add. Annotation*:—**Refd. Re Watt's Will Trusts, Watt v. Watt**, [1936] 2 All E. R. 1555.
- 648a. ———.—A testator by his will directed that the share of his son G. in testator's trust estate (called the G. fund), should be held by special trustees upon trust that, subject to certain provisions for the maintenance of G. & his children & the payment of annuities to G. & his wife, "the special trustees shall during the minority of the children or child of G. accumulate the surplus (if any) of the income of the G. fund . . . for the benefit of the persons who shall eventually become entitled to the capital of such fund." The will further provided: "Subject as aforesaid the special trustees shall stand possessed of the capital & income of the G. fund & of the said accumulations in trust for all or any

PART I. SECT. 4, SUB-SECT. 5.—B. 466 I. *Power changing nature of interests—Outside limit of rule.*—**DAVIS v. SAMUEL** (1926), 28 S. R. N. S. W. 1.—AUS.

PART I. SECT. 6, SUB-SECT. 1. *sp. Subsequent limitation in default of appointment.*—The principle that a limitation depending or expectant upon a prior limitation, which is void for remoteness, is invalid, does not necessarily apply to limitations in default of appointment.—**Re HAY**, [1932] N. I. 215.—IR.

### PART III. SECT. 2, SUB-SECT. 1.

612 II. ———.—When a direction to accumulate contained in an *inter vivos* deed comes into operation in the lifetime of the grantor, the only period during which the accumulation can, under above Act, be lawfully continued is the lifetime of the grantor.—**UNION BANK OF SCOTLAND, LTD. v.**

**CAMPBELL**, [1929] S. C. (Ct. of Sess.) 143.—SCOT.

a i. — *Applicable in Scotland—Notwithstanding repeal in England.*—**Held**: the operation of above Act in Scotland has not been affected by the repeal of that Act by Law of Property Act, 1925 (c. 20), in respect that sect. 209 (3) of the latter Act has expressly limited its application to England & Wales.—**SMITH'S TRUSTEES v. GAYDON**, [1931] E. C. 533.—SCOT.

a ii. — *Effect of.*—**Held**: the effect of Accumulations Act, 1892 (c. 58), was not to annul the whole provisions relative to the purchase of lands, but only to prohibit the accumulation of income.—**ROBERTSON'S TRUSTEES v. ROBERTSON'S TRUSTEES**, [1933] S. C. 639, S. C.—SCOT.

### PART III. SECT. 2, SUB-SECT. 3.—B.

sk. *Accumulations resulting from operation of forfeiture clause.*—Testator

directed that the residue of his estate should be divided into three equal parts, one of which was destined to his widow in life, & upon her death or remarriage to her daughter in life, & to the daughter's issue in fee. The other two parts of residue were destined to testator's two daughters by his first marriage in life, & to their issue in fee. The will further directed that beneficiaries claiming their legal rights were to forfeit all benefit under the will, the forfeited interest to accresce to the other beneficiaries "in the same manner, for the same interests of life, fee or otherwise & upon the same conditions as the other provisions in their favour":—**Held**: after the lapse of 21 years from testator's death, further accumulations of income under the scheme for behoof of the heirs were struck at by *Thellusson Act*, in respect that they resulted from the directions of testator contained in the forfeiture clause.—**MOSS'S TRUSTEES v. BRANWELL**, [1935] S. C. 123.—SCOT.

of the children or child of G., who being male, attain the age of twenty-one years, or being female attain that age or marry, & if more than one in equal shares." Testator died in Oct. 1928, & was survived by G., G.'s wife & three children of G., who were born respectively in 1914, 1917 & Jan. 1928. When G.'s eldest child attained the age of twenty-one a summons was taken out to determine: (i) whether the direction for accumulation was valid; (ii) whether G.'s eldest son became indefeasibly entitled in possession upon attaining the age of twenty-one to one equal third part of the G. fund & the accumulations of the income of such fund, subject to & after the appropriation of a sufficient sum to provide for the annuities to & maintenance of G. & his wife & children, or whether any child of G., who may hereafter be born & attain the age of twenty-one would be entitled to participate in the distribution of the G. fund & the accumulations, & (iii) if G.'s eldest child did not upon attaining the age of twenty-one become indefeasibly entitled in possession to one equal third part of the G. fund, subject as aforesaid, whether under Trustee Act, 1925 (c. 19), s. 31 (1) (ii), G.'s eldest child on attaining the age of twenty-one became entitled to be paid the income of his expectant share of the G. fund & the accumulations of the income thereof, & if so during what period:—*Held*: (1) the direction for accumulation was valid & effectual so long as any child of G. living at the date of testator's death was under the age of twenty-one; (2) G.'s eldest child did not become indefeasibly entitled in possession to one equal part of the G. fund & any child of G. born whilst any child of G. living at the death of testator was alive & under the age of twenty-one would if he or she attained the age of twenty-one, be entitled to participate in the distribution of the G. fund & the accumulations; (3) G.'s eldest child did not on attaining twenty-one become entitled to be paid the income of his expectant share of the G. fund & the accumulations.—*Re WATT'S WILL TRUSTS, WATT v. WATT*, [1936] 2 All E. R. 1555.

**652a.** — **Commencement during twenty-one years from testator's death.**—Testator, who died in 1893, gave his net residue, subject to certain life annuities which did not exhaust the income, in trust for a bachelor's children who should attain twenty-one with a gift over in default. On Mar. 11, 1896, the surplus income was ordered to be accumulated for twenty-one years from testator's death, i.e., until Nov. 6, 1914, or until the bachelor's previous death without leaving issue. During this twenty-one years' period the bachelor married & died leaving three children, two of whom were still living. Temporary orders for maintenance were made. On Nov. 12, 1914, it was declared that as from Nov. 6, 1914, the two children then living were entitled to maintenance under Conveyancing Act, 1881 (c. 41), s. 43 (1), but that notwithstanding sect. 43 (2) any income not so applied passed as on an intestacy. On July 20, 1927, the elder child attained twenty-one, & her contingent moiety vested in possession. The question having arisen whether, having regard to Law of Property Act, 1925 (c. 20), s. 165, the order of Nov. 12, 1914, ought still to be

acted on with regard to the younger child's contingent moiety:—*Held*: (1) the effect of sect. 165 was that the years of minority accumulation, which commenced during the twenty-one years' period, were not to be reckoned in ascertaining that period, & the income of the younger child's contingent moiety must in the first place be applied for her maintenance under Conveyancing Act, 1881 (c. 41), s. 43 (1), & the balance could be validly accumulated under sect. 43 (2); (2) quite apart from sect. 165, the moment the elder child attained a vested interest as a member of the contingent class, there could be no question of intestacy as to any part of the capital or income.—*Re MABER, WARD v. MABER*, [1928] Ch. 88; 97 L. J. Ch. 101; 138 L. T. 318.

**679.** *Add. Annotations*:—As to (2) *Consd. Re Chartres, Farman v. Barrett*, [1927] 1 Ch. 466. As to (3) *Refd. Re Watt's Will Trusts, Watt v. Watt*, [1936] 2 All E. R. 1555.

**681.** *Add. Annotation*:—As to (1) *Folld. Re Walpole, Public Trustee v. Canterbury*, [1933] Ch. 431.

**721.** *Add. Annotations*:—*Appld. Re Knapp, Spreckley v. A.-G.*, [1929] 1 Ch. 311. *Distd. Berry v. Geen*, [1938] A. C. 575. *Refd. Re Jeffries, Finch v. Martin*, [1936] 2 All E. R. 626; *Re Blake, Berry v. Geen*, [1937] Ch. 325.

**724.** *Add. Annotations*:—As to (1) *Consd. Re O'Hagan, O'Hagan v. Lloyds Bank, Ltd.*, [1932] W. N. 188. *Refd. Re Tong, Hilton v. Bradbury*, [1920] 2 Ch. 400.

**725.** *Add. Annotation*:—As to (1) *Refd. Re Tong, Hilton v. Bradbury*, [1930] 2 Ch. 400.

**726a.** —.—Where certain funds were settled upon trust to accumulate the surplus income until the death or remarriage of the settlor's wife, it was held that the accumulations made after the death of the settlor were invalid, & there was a resulting of them to his estate. The right to receive the surplus income was in the nature of a terminable annuity, & until sold by the exors. the surplus income as it accrued ought to be applied as income of the estate of the settlor.—*Re O'HAGAN, O'HAGAN v. LLOYDS BANK, LTD.*, [1932] W. N. 188; 174 L. T. Jo. 122; 74 L. Jo. 196.

**728.** *Add. Annotation*: *Refd. Berry v. Geen*, [1938] A. C. 575.

**740a.** —.—A testator by his will gave to his trustees his real & personal estate, not otherwise disposed of, in trust out of the income thereof to pay to M. during his life a certain annual sum, & he declared that his trustees should stand possessed of his real & personal estate from & after the death of M. "upon trust to sell the same & to stand possessed of the net proceeds thereof & the balance of the income accumulated during the lifetime of [M.] & the interest thereof in trust to divide the same amongst such of the London hospitals situate within the administrative County of London as my trustees for the time being shall in their absolute discretion select & to be paid to or for such hospitals in such proportions as my trustees for the time being may think proper." Upon a summons to determine the effect of the gift of residue, it was sought to show that upon testator's death there was an immediate

vested gift to charity, postponed as to time of payment, & that the A.-G. could stop the accumulations :—*Held* : there was no interest vested in anybody, the gift being to a class of institutions to be ascertained in the future, & the direction in the will for accumulation of the income in excess of that required for meeting the annuity to M. became void twenty-one years after testator's death. There was an intestacy as regards excess income accruing after the expiration of the period of twenty-one years from testator's death until the death of M.—*Re JEFFERIES*, *FINCH v. MARTIN*, [1936] 2 All E. R. 626.

740b. —.].—A testator, who died on Jan. 1, 1925, by his will gave & devised all his property both real & personal to his trustees upon trust to pay out of the income thereof a large number of annuities, some being to certain religious institutions, & he directed that these last annuities should determine on the death of the last of the personal annuitants. He also gave certain legacies. He further directed that so long as any of the annuitants were alive the balance of the income of the residuary estate & the income resulting therefrom should be accumulated & invested, & subject as aforesaid he gave the whole of his property after the death of the

last personal annuitant to the Congregational Union of England & Wales to be invested as capital. The secretary of that charity asked for an order that the trust for accumulation should be determined, & that either the surplus income in each year should be paid to the charity or that proper provision should be made for the payment of the legacies & annuities, & that subject thereto the residuary estate should be transferred to the charity :—*Held* : if any of the annuitants survived the period of twenty-one years from the testator's death, when the accumulations would cease by virtue of Law of Property Act, 1925 (c. 20), s. 164, the surplus income down to the death of the last surviving annuitant would be undisposed of & would pass as on an intestacy ; & the ct. ought not to make the order asked for by the residuary legatees, as the effect of such an order would be to prejudice & possibly defeat altogether the possible interests of the persons taking under an intestacy.—*BERRY v. GEEN*, [1938] A. C. 575 ; 159 L. T. 122 ; *sub nom. Re BLAKE*, *BERRY v. GEEN*, [1938] 2 All E. R. 362 ; 107 L. J. Ch. 173 ; 54 T. L. R. 703 ; 82 Sol. Jo. 491, H. L.

752. *Add. Annotation* :—*Dbtd. Berry Geen*, [1938] A. C. 575.

## PERSONAL PROPERTY.

### Part I.—Definitions and Enumeration.

9. *Add. Annotation* :—*Refd. Re Mason* (1928), 97 L. J. Ch. 321.

### Part II.—Possession.

52. *Add. Annotation* :—*Refd. Elias v. Pasmore*, [1934] 2 K. B. 164.

### Part III.—Ownership.

72. *Add. Annotation* :—*As to* (2) *Refd. Fleetwood Hesketh v. I. R. Comrs.* (1935), 180 L. T. Jo. 99.

78. *Add. Annotations* :—*As to* (1) *Refd. Ellis v. Stenning & Son, Ltd.* (1932), 76 Sol. Jo. 232; *Freshwater v. Bulmer Rayon Co.*, [1933] Ch. 162; *South Bedfordshire Electrical Finance, Ltd. v. Bryant*, [1938] 3 All E. R. 580.

94. For “—*Mutual wills by husband & wife—Agreement not to revoke*” read “—*Mutual wills—By husband & wife—Agreement not to revoke.*”

94a. ———.]—Leasehold property was given to two sisters as joint tenants, & they mutually agreed to bequeath it in trust for each other for life, & for their nieces after the death of the survivor :—*Held* : the agreement between the sisters, carried out by the making of mutual wills, severed the joint tenancy.—*Re WILFORD'S ESTATE, TAYLOR v. TAYLOR* (1879), 11 Ch. D. 267; 48 L. J. Ch. 243; 27 W. R. 455.

*Annotation* :—*Refd. In the Estate of Heys, Walker v. Gaskill*, [1914] P. 192.

### Part IV.—Alienation.

114. *Add. Annotation* :—*Refd. Republica de Guatemala v. Nunez*, [1927] 1 K. B. 669.

121a. *Contract for exchange by infant—Void.*]—A contract for the exchange of chattels entered into by an infant is a contract for goods supplied, &, if not for necessities, is absolutely void under Infants Relief Act, 1874 (c. 62),

s. 1.—*PEARCE v. BRAIN*, [1929] 2 K. B. 310; 98 L. J. K. B. 559; 141 L. T. 264; 45 T. L. R. 501; 73 Sol. Jo. 402; 93 J. P. Jo. 380, D. C.

130. *Add. Annotation* :—*Consd. Re Gillott's Settlement, Chattock v. Reid*, [1931] Ch. 97.

#### PART II. SECT. 4.

42 v. ———.]—Possession of a movable raises a presumption of ownership.—*TERRY v. SHAM'S GARAGE*, [1934] N. L. R. 407.—S. AF.

#### PART III. SECT. 2, SUB-SECT. 4.

sv. *Tyres on car.*]—The doctrine of title by accession does not apply to tyres on a car sold under a registered conditional sale contract.—*GOODRICH SILVERTOWN STORES v. MCGUIRE MOTORS, LTD.*, [1936] 1 D. L. R. 519. CAN.

#### PART III. SECT. 3.

74 ii. ——— *Extent of right.*]—The cts. cannot suffer a man to take for himself that which he cannot obtain by way of an action. The right of recaption does not exist unless there is a right to the possession of the property, & a right to possession means, for this purpose, one that is specifically enforceable by judicial proceedings. If, therefore, the claimant cannot by way of judicial proceedings obtain specific restitution of the property, he cannot recover it by recaption either. Even when the retention of another's property is unjustifiable, the owner is not entitled to seriously injure the wrongdoer in

attempting to recover it.—*PHILLIPS v. MURRAY* (Sask.), [1929] 3 D. L. R. 770; 2 W. W. R. 314.—CAN.

#### PART III. SECT. 4, SUB-SECT. 1.—B.

r i. ——— *Murder of one joint tenant by the other—Whether right of survivorship operates.*]—*Re BARROWCLIFF, ELDER'S TRUSTEE & EXECUTOR CO., LTD. v. KENNY*, [1927] S. A. S. R. 147.—AUS.

#### PART III. SECT. 4, SUB-SECT. 2.

96 i. *How arising—Settlement agreement as to shares.*]—Settlement agreement as to shares : shares to belong property in their own right :

f to create tenancy in common or joint tenancy. *LUMBERS v. LUMBERS*, [1938] 1 D. L. R. 1.—CAN.

sd. *How arising—Joint purchase of shares.*]—*Held* : even if the shares were purchased out of money contributed in equal amounts, & though transferred into the joint names of the purchasers, the shares were held by them in equity as tenants in common.—*O'CONNELL v. HARRISON*, [1927] I. R. 330.—IR.

#### PART IV. SECT. 1.

se. *Document giving right to seize &*

*sell.*]—A document may give authority to seize & sell chattels without being a bill of sale, chattel mtge., or conditional sale agreement.—*SAMSON v. CHAMPION*, [1933] 2 D. L. R. 138.—CAN.

#### PART IV. SECT. 2, SUB-SECT. 1.—A. (a) ii.

st. *Dependent on nature of property.*]—There is no such thing as “actual” or “symbolical” delivery of possession irrespective of the nature of the property to be delivered. The difference is due to the nature of the property & not on account of the difference in the nature of possession.—*RAM PRASAD OJHA v. BAKSHI BINDESHWARI PRASAD SINHA* (1932), 1 L. R. 11 Pat. 165.—IND.

#### PART IV. SECT. 2, SUB-SECT. 1.—A. (c).

sg. *Exchange of cars—Action for breach of contract.*]—*SWEENEY v. STARRAT*, [1931] 2 D. L. R. 473; 2 M. P. R. 544.—CAN.

sk. *Warranty of title on exchange.*]—A warranty of title is implied in the case of an exchange of chattels.—*GAVIN v. MOKLER*, [1934] 1 D. L. 286.—CAN.

## PLEADING.

See PLEADING & PRACTICE at end of Volume after WORK & LABOUR.



## POLICE.

## Part II.—Police Forces.

4. *Add. Citation* :—1 B. R. A. 500.

*Add. Annotation* :—**Refd.** *Lodge v. Lancashire County Council* (1934), 152 L. T. 167.

24. *Add. Annotations* :—**Expld. & Distsd.** *Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364. **Consd.** *Cooper v. Wilson*, [1937] 2 K. B. 309.25a. **Dismissal—Power of watch committee—Resignation before meeting of committee—Appeal.**—Applt., a sergeant in the Liverpool police force, on July 27, 1933, handed in the statutory month's notice of resignation. On Aug. 8 charges were preferred against him of offences against discipline. On Aug. 11 the Chief Constable, after an inquiry, purported to dismiss him; & on Aug. 29 the Watch Committee at a meeting, at which the Chief Constable was present during the deliberations, purported to dismiss applt.'s appeal from the Chief Constable's sentence of dismissal. The Watch Committee thereupon refused to repay to applt. the accumulated rateable deductions from his pay to which he claimed to be entitled under sect. 20 (1) of Police Pensions Act, 1921 (c. 31). Applt. then sued the Chief Constable & the Watch Committee claiming declarations that he had duly resigned, & was therefore entitled to be repaid the rateable deductions that had been made from his

pay :—**Held** : (1) in a borough the right to dismiss a police constable is vested solely in the Watch Committee, but in this case that Committee had no power to dismiss applt., who had already terminated his service by due notice of resignation, & it had no power *ex post facto* to treat him as dismissed as from a date prior to the hearing by them of an application to confirm the purported dismissal by the Chief Constable; (2) it could not be said that by appearing before the Watch Committee applt. must be taken to have abandoned his notice of resignation; (3) applt. was not limited to the right of appeal to the Secretary of State given by Police (Appeals) Act, 1927 (c. 19); (4) he was entitled to the declarations claimed.

**Semble** : the proceedings before the Watch Committee were contrary to natural justice owing to the presence of the Chief Constable during the Committee's deliberations on applt.'s appeal.—*COOPER v. WILSON*, [1937] 2 K. B. 309; [1937] 2 All E. R. 726; 106 L. J. K. B. 728; 157 L. T. 290; 101 J. P. 319; 53 T. L. R. 623; 81 Sol. Jo. 357; 35 L. G. R. 436, C. A.

75. *Add. Annotation* :—**Consd.** *Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364.76. *Add. Annotation* :—**Distsd.** *Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364.

## Part IV.—Duties, Powers, and Privileges of Constables.

82. *Add. Annotations* :—**Consd.** *China Navigation Co. v. A.-G.* (1932), 48 T. L. R. 375. **Refd.** *Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364.92. *Add. Annotation* :—**Refd.** *Vanderpant v. Mayfair Hotel Co.* (1929), 27 L. G. R. 752.

## Part V.—Legal Proceedings by and against Police.

97. *Add. Annotation* :—**Consd.** *Sheffield Corpn. v. Kitson*, [1929] 2 K. B. 322.100. *Add. Annotation* :—**Refd.** *R. v. Ely JJ., Ex p. Mann* (1928), 45 T. L. R. 92.SECT. 2.—PROCEEDINGS AGAINST POLICE  
(Vol. XXXVII., p. 189).

**Civil proceedings—Acceptance of bribes.**—*See AGENCY*, No. 1608b.

## PART I.

a i. — *Power of Commissioner of Police.*—**POWER v. R.**, [1929] N. Z. L. R. 267.—**N.Z.**

b i. — *What amounts to "hearing" by Police Commission.*—**TAYLOR v. RITCHIE**, [1932] 4 D. L. R. 418; 5 M. P. R. 15.—**CAN.**

b ii. — *Power of Commissioner of Public Safety.*—The Comr. of Public Safety has no power to dismiss members of the police force.—**R. v. WALSH**, [1936] 3 D. L. R. 59; 66 Can. C. C. 118; 10 M. P. R. 383; 5 F. L. J. (Can.) 292.—**CAN.**

b iii. — *Whether action lies.*—A police constable is liable, in New South Wales, to dismissal at the pleasure of the Crown: **Held** : therefore, an action by a police constable for wrongful dismissal did not lie against a nominal deft. appointed on behalf of the Govt. of New South Wales. **FLETCHER v. NOTT** (1937), 37 S. R. N. S. W. 130; 54 N. S. W. W. N. 138.—**AUS.**

sa. *Policeman—Meaning of—Railway Act (Dom.).*, s. 351.—**R. v. CANADIAN PACIFIC RY. CO. & CANADIAN NATIONAL RY.**, [1928] 2 D. L. R. 386; [1928] 1 W. W. R. 785; 34 C. R. C. 292; 23 Alta. L. R. 401.—**CAN.**

sd. *Responsibility of city—For conversion by constable.*—A city is not liable to refund funds collected & illegally converted by a police constable.—**PHINNEY v. HALIFAX**, [1935] 3 D. L. R. 627; 64 Can. C. C. 236.—**CAN.**

## PART II. SECT. 6, SUB-SECT. 1.

sk. *Liability.*—A special constable is not liable to be indicted for general inattention to his duties. For an indictment to lie it must be shown that there has been a wilful refusal or neglect to perform some specific duty.—**GRAY v. CHILMAN** (No. 2), [1935] S. A. S. R. 359.—**AUS.**

## Part VII.—Superannuation and Other Allowances.

136. *Add Annotation:—Apld.* Piper v. St. Mary-lebone Licensing JJ., [1928] 2 K. B. 221.

*Effect of bankruptcy.]—See* BANKRUPTCY, No. 6296a.

142. After this case add:—

*Compensation for loss of office.]—See* PUBLIC AUTHORITIES, No. 1048a.

### PART VII.

132 l. *Computation of pension—Based on annual pay—What included therein—Allowance for special duties.]—*MARTIN v. R. (1928), 40 C. L. R. 162; [1928] V. L. R. 38; [1928] Argus L. R. 17.—AUS.

a i. — *Temporary employees of police department.]—*The Superannuation Act, R. S. B. C., 1924, applies to temporary employees of the city police department. — KNOX v. BAKER (1936), 51 B. C. R. 62.—CAN.

sm. *Necessity for claim.]* On the proper construction of Police Pensions

Act, 1921 (c. 31), s. 2 (1) (b), a member of a police force who desires to retire & claim a pension must intimate his claim & tender a medical certificate at the time when he intimates his intention to resign. — DUDMOND v. PLEBLES COUNTY COUNCIL, [1937] S. C. 36. — SCOT.

# POOR LAW.

NOTE 1.—The Act now in force is the Poor Law Act, 1930 (c. 17). References to sections of the 1927 Act should therefore be checked with the Comparative Table appended below. Omitted sections of the 1927 Act were either repealed or replaced by the Local Government Act, 1929 (c. 17).

1927.	1930.	1927.	1930.	1927.	1930.	1927.	1930.	1927.	1930.	1927.	1930.
1	1 (1)	48	23	77	47	107	75	157 (4),	156	221	9 (1-3)
2 (1)	2	49	21	78	52	108	93, 94	(5)		222	9 (2)
29 (1-3)	10	50	22	79	26	109	84	158	120	223	160 (1-6)
29 (4)	12	51	28	80	83	110	85	162	111	224	155
30	11 (1),	52	33	81	53 (1-3)	111	86	165	121	225 (1)	158
	(2)	53	34	82	53 (4), (5)	112	87	170	123	226 (1),	144
31	13	54	27	84	54	113	88	171	124	(2)	
32	116	55	112	85	55	114	89	172	125	227	145
34	15	56	24	86	58	115	90	174	126	228	146
35 (1)	16 (1),	57	25	87	56	116	91, 108	183	133	229	147
	17 (1)	58	82	88	57	117	92	184	127	230	148
	(2)	59	29	89	71	118	104	186	128	231	149
	(3)	60	30	90	72	119	105	187	129	232	151
	(4)	61	31	91	73	120	102	188	130	233	153
	79	62	32	92	74	121	95	189	131	234	154
	(5)	63	35	93	59	122	96	190	132	235	159
36 (1)	80	64	36	94	61	123	98	192	134	236	157
	(2)	65	37	95	62	124	99 (1-7)	209	135	241	140
37	81	66	38	96	63	125	99 (8)	210	11 (3)	242	162
38	67	67	39	97	64	126	100	211	136 (1),	244	163
39	70	68	40	98	60	127	97	(2)		245	164,
40	150	69	41	99	65	128	103	212 (1)	1 (2)		165 (4)
41	14	70	42	100	66	129	106	213	161	Sch. V.	Sch. II.
42	18	71	44	101	69	130	107	214	136 (3-5)	Sch. VI.	Schs.
43	19	72	43	102	68	131	101	215	137	I. & III.	
44	20	73	45	103	75	132	109	216	138		
45	49	74	46	104	77	145	114	217	141		
46	50	75	152	105	78	147	113	218	139		
47	51	76	48	106	76	148 (1)	115	219	142		

NOTE 2.—By Local Government Act, 1929 (c. 17), Sched. X., para. 1, references in any enactment to the terms mentioned in the first column, *infra*, must be constructed as references to the terms mentioned in the second column. These adaptations, so far as affecting Poor Law Act, 1927 (c. 14), have since been embodied in Poor Law Act, 1930 (c. 17).

Reference.	Adaptation.
Board of guardians	County Council or County Borough Council.
Board of management or managers of a school district	County Council or County Borough Council.
Chargeability for any poor law purpose to any parish, township or place, or to a parish or union, or to a union or parish, or to the common fund of a union.	Chargeability to a County or County Borough.
Clerk to the guardians	Clerk of County Council or town clerk of County Borough or such other officer as may be appointed or designated by the council.
Common fund of the union or fund of board of guardians for a single parish.	County fund or general rate fund of County Borough.
District school or district poor law school	Separate school.
Guardian—as an individual	Member of County Council or County Borough.
Guardians—as a corporate body	County Council or County Borough.
Medical officer of board of guardians or of a union	Poor law medical officer of a County or County Borough.
Officer of a board of guardians, or guardians, or officer of a union or other area for which a board are constituted.	Officer concerned with the relief of the poor.
Parish—as the area for which a board of guardians are constituted.	County or County Borough.
Parish—as the area in which a settlement is acquired or derived.	County or County Borough.
Parochial relief	Poor relief.
Poor law union	County or County Borough.
Treasurer of poor law union	County treasurer or treasurer of County Borough.
Union or other area for which a board of guardians are constituted.	County or County Borough.
Union or parochial relief	Poor relief.

## Part I.—Poor Law Authorities.

SECT. 4.—OVERSEERS (Vol. XXXVII., p. 204).

**24a. Overseer becoming transferred officer—Removal—Powers of rating authority.**—By Local Government Act, 1894 (c. 73), s. 5 (1), the power of appointing & revoking the appointment of an assistant overseer for any rural parish having a parish council is transferred to & vested in the parish council.—An assistant overseer so appointed by a parish council which was subsequently transformed into an urban district council, became a “transferred officer” under the Rating & Valuation Act, 1925 (c. 90). He was summarily dismissed by the urban district council as the rating authority:—*Held*: the council could dismiss the officer without notice or cause, & without affording him a hearing, provided that in so dismissing him they did not act dishonestly, corruptly, or in bad faith—*BROWN v. DAGENHAM URBAN COUNCIL*, [1929] 1 K. B. 737; 98 L. J. K. B. 565; 140 L. T. 615; 93 J. P. 147; 45 T. L. R. 284; 73 Sol. Jo. 144; 27 L. G. R. 225.

*Annotation*.—*Distd. Field v. Poplar Corpn.*, [1929] 1 K. B. 750. *Consd. McManus v. Bowes*, [1938] 1 K. B. 98.

*See, now*, Local Government Act, 1933 (c. 51), s. 121.

**31. Add. Citations**:—96 L. J. K. B. 741; 137 L. T. 558; 25 L. G. R. 207.

**34a. Abolition—Local Government Act, 1929 (c. 17), s. 1—Transfer of “parish property”—What included.**—*Pltfs.*, the City of London Corp., claimed a declaration that a certain capital fund invested in 5 per cent. War Loan Stock in the hands of the City of London Guardians, being the balance of the proceeds of the sale by *defts.* of a poor law institution as the H. Institution, was “parish property” within Local Government Act, 1929 (c. 17), s. 115, & that it was “property with respect to which special provision is made” within sect. 113 of the 1929 Act, & would on Apr. 1, 1930, by virtue of sect. 115 of the 1929 Act, be transferred to & vest in *pltfs.* & not in the London County Council. By sect. 1 of 1929 Act, the functions of the City of London Guardians were transferred to the London County Council on Apr. 1, 1930, on which date the Guardians were abolished. Sect. 113 of the 1929 Act transferred to the London County Council all property & liabilities of the City of London Guardians, except those for which special provision was made in the Act. The only special provision which was suggested to apply was that contained in sect. 115. By sect. 115, sub-sect. 1, of all parish property on the appointed day, namely, Apr. 1, 1930, vested in a board of guardians was to be transferred to the appropriate council, in this case the Common Council of the City of London. The H. Institution & Infirmary was acquired by the City of London Guardians in 1871 for the purposes of their functions in the relief of the poor. By an order dated Apr. 6, 1921, the Minister of Health, the successor of the Local Government Board, sanctioned the sale by the City of London Guardians by the H. Institution, &, by a further order, directed that the net proceeds of the sale should be

invested in 5 per cent. War Loan Stock, & that the Guardians should stand possessed of the securities so purchased on trust to receive & pay into the common fund of the Union the interest accruing therefrom:—*Held*: (1) the property in the capital fund in question & the interest thereon was not “parish property” within 1929 Act, s. 115; (2) it was not transferred by that Act to the representative of the City of London; (3) the property in the fund was transferred to & vested in the London County Council for the benefit of the whole area administered by the London County Council; & (4) it was not subject to any condition that the income of the fund should be credited to the City Corp. in computing the amount of the contributions due from the City Corp. to the County fund.—*LONDON (CITY) CORPN. v. LONDON COUNTY COUNCIL*, [1931] 1 K. B. 25; 99 L. J. K. B. 577; 143 L. T. 372; 94 J. P. 219; 46 T. L. R. 533; 74 Sol. Jo. 421; 28 L. G. R. 451, C. A.

**38a. Loans to strikers’ families—Resolution cancelling repayment—Void.**—*Defts.*, a board of guardians, upon the outbreak of the coal dispute of 1926 resolved to give outdoor relief to the wives & families of miners & other workmen who were unemployed because of the dispute, & that such relief should be given by loan, subject to an undertaking to be given by the head of each household to repay the loan by weekly instalments, or, by arrangement with the employers, deductions from wages to commence five weeks after the resumption of work. In pursuance of this resolution *defts.* granted relief to miners’ families during the continuance of the dispute to the amount of £195,957. Repayment commenced in Jan. 1927, the terms being modified from time to time. On July 11, 1929, the total balance due on the loans was £145,924, & it was then being repaid by about 5,000 miners at the rate of nearly £400 a week, some having already repaid their loans in full, & others having been entirely released from payment. On that day *defts.* passed a resolution that the whole balance of the loans owing in respect of relief received by miners’ wives & families should be excused & cancelled. In an action by *pltf.* at the relation of the *corp.* of a borough situate & owning rateable property within *defts.*’ area:—*Held*: (1) the resolution to cancel the loans was *ultra vires* & void & must not be acted upon; (2) even if there was any general discretionary power in *defts.* to release the debtors, it was not properly or reasonably exercised, as they had considered solely the interest of the debtors, without any inquiry into the ability of all or any of them to continue paying off their loans, there being no evidence of any general inability to repay, or request for the cancellation of the debts.—*A.-G. v. TYNE-MOUTH UNION*, [1930] 1 Ch. 616; 99 L. J. Ch. 307; 143 L. T. 70; 94 J. P. 191; 46 T. L. R. 272; 74 Sol. Jo. 169; 28 L. G. R. 179.

**41. Add. Annotation**:—*Consd. McManus v. Bowes*, [1938] 1 K. B. 98.

**63a. Guardians acting in loco parentis—Right to grant of administration.]—**By Poor Law Act, 1927 (c. 14), a board of guardians may act in certain circumstances as *in loco parentis* in respect of an orphan child, & in that capacity is entitled to take out letters of administration of the estate of the child's deceased parent for the benefit of the child.—*Re PETERS* (1929), 142 L. T. 328; 46 T. L. R. 119; 74 Sol. Jo. 13.

**75a. — To dismiss—Transferred officer.]—**The effect of Local Government Act, 1929 (c. 17), s. 121 (1), is that an officer of a poor law authority who has been transferred to the appropriate county council or county borough council under sect. 119 of the Act retains all the incidents of his service & there is no change in the terms of his employment. If, therefore, the poor law authority was entitled to terminate his service by giving him proper notice & to re-engage him on different terms, the council are also entitled to do so.—*MOUNTFORD v. LONDON COUNTY COUNCIL*, [1935] 2 K. B. 243; 104 L. J. K. B. 477; 153 L. T. 236; 99 J. P. 351; 51 T. L. R. 486; 79 Sol. Jo. 503; 33 L. G. R. 323.

**87. Add. Annotation :—***Re* *Ed. Brown v. Dagenham Urban Council*, [1929] 1 K. B. 737.

**88a. Officer placed on half-pay—Validity.]—**Pltf. before Apr. 1, 1930, the appointed day, was a poor law relieving officer in the service of the Stepney Guardians. On the appointed day in 1930 he was automatically transferred to the service of the London County Council. By letter dated Dec. 7, 1932, the London County Council offered pltf. a new contract of service with a substantially increased scale of remuneration. The letter stated that the revised scales & conditions of service, if accepted, must be taken as a whole. With the letter was enclosed a printed document containing the conditions of transfer & a summary of the Council's Orders, etc. Under that heading appeared a clause headed "Sick Pay." "Full pay for a reasonable period at the discretion of the appropriate sub-committee of the Public Assistance Committee." Pltf. accepted the offer on the following day. The consent of the Minister had not been obtained to the rule as to sick pay. From Dec. 8, 1933, until Sept. 30, 1934, when pltf. left the Council's service on superannuation, he was continuously & wholly incapacitated by illness of the eyes from performing any of the duties of his contract of service. He received full salary to the end of July, 1934, a period of nearly eight months, & half-pay during Aug. & Sept. He claimed to recover the balance of salary in respect of a period when his pay was reduced for sickness, alleging that under arts. 157 & 162 of the Public Assistance Order, 1930, he continued in his office on full pay until he retired on superannuation on Sept. 30, 1934. The county ct. judge dismissed the claim, holding that a reasonable time had elapsed during which full pay was

paid to pltf. On appeal :—*Held* : under the contract of Dec. 7, 1932, pltf. obtained a new scale of remuneration, substantially more advantageous than he had before, consisting partly of normal pay & partly of sick pay; by obtaining sick pay rights which he did not have before he got a new advantage which was part of his remuneration; & the clause as to sick pay conferred upon the appropriate sub-committee a contractual right to do anything that was in fact done. The application of the sick pay rule on the lines of the present case, namely of allowing an officer wholly incapacitated for duty eight months on full pay & an additional two months on half-pay, was not a reduction of pltf.'s remuneration within the meaning of art. 162 of the Public Assistance Order, 1930. *LITTLEJOHN v. LONDON COUNTY COUNCIL*, [1938] 1 K. B. 78; [1937] 3 All E. R. 13; 106 L. J. K. B. 488; 157 L. T. 128; 53 T. L. R. 774; 81 Sol. Jo. 477; 35 L. G. R. 197, C. A.

**91a. — Certificate as to guardians' liabilities—Finality of.]—**On the transfer of the functions of poor law boards of guardians to county councils, the certificate to those councils of his valuation of the non-institutional liabilities of the guardians by the district auditor under Local Government Act, 1929 (c. 17), Sched. VI., clause 2 (1), is final & conclusive within the meaning of clause 2 (2) of the Sched., both as to the determination of what are the non-institutional liabilities & as to their value.—*R. v. AYTON, Ex p. CARDIFF CORPN.*, [1935] 1 K. B. 225; 104 L. J. K. B. 9; 152 L. T. 238; 99 J. P. 1; 51 T. L. R. 57; 32 L. G. R. 453, D. C.

**100a. "Regularly employed"—Employment as deputy.]—**Pltf. was in the service of depts.' predecessors in their capacity of poor law guardians for fifteen years before his retirement, but during five of those years he was only employed as gate porter to a poor law institution in substitution for its regular gate porter who was away on war service :—*Held* : in computing the amount of his superannuation allowance under Poor Law Officers' Superannuation Act, 1896 (c. 50), pltf., though only a temporary substitute for the regular gate porter, was entitled to reckon his actual five years' deputy service as regular employment in the capacity of a poor law officer or servant.—*HAMMOND v. LONDON COUNTY COUNCIL*, [1931] 1 Ch. 540; 100 L. J. Ch. 125; 144 L. T. 720; 95 J. P. 97; 29 L. G. R. 350; *sub nom.* *HAMMOND v. WESTMINSTER GUARDIANS*, 47 T. L. R. 249.

**105. Add. Annotations :—***Consd.* *Gissing v. Liverpool Corpn.*, [1935] Ch. 1. *Expld.* *Tees Conservancy Comrs. v. James*, [1935] Ch. 544. *Consd.* *Jones v. London County Council*, [1936] Ch. 50. *Re* *Ed. R. v. Grain, Ex p. Wandsworth Grdns.*, [1927] 1 K. B. 540; *Powell v. Sheffield Corpn.*, [1936] 1 K. B. 680; *Tibbals v. Port of London Authority*, [1936] 2 All E. R. 819.

#### PART I. SECT. 4.

*sm. Conditions precedent to liability.]*  
—Necessity for request to overseers before they can be liable.—*McKENZIE v. CAPT. BRETON COUNTY POOR DISTRICT*, No. 13 (1932), 8 M. P. R.

#### 1.—CAN.

*sn. —.*—*]*—A brother, claiming from overseers expenses incurred for the relief of a pauper must prove (1) that there is another person liable before him, or (2) that he had not sufficient

means.—*McGILLIVRAY v. ARISAIG POOR DISTRICT No. 1*, [1933] 2 D. L. R. 134; 6 M. P. R. 35.—CAN.

**PART I. SECT. 5, SUB-SECT. 7.—C.**  
q. For "585" read "258."

**105a. Transferred officer—Construction of Local Government Act, 1929 (c. 17), s. 124 (1).—**Sect. 124 (1) of Local Government Act, 1929 (c. 17), enacts that if an officer who has made contributions required by Poor Law Officers' Superannuation Act, 1896 (c. 50), is by the Act of 1929 transferred to the service of any council, then, if the council to whose service he is so transferred has no superannuation scheme, the Act of 1896 shall apply to him, " & shall continue so to apply to him so long as he is in the service of the council of any county . . .":—*Held*: the words "so long as he is in the service of the council of any county" were not to be read with some such implied addition as "to whose service he shall have been so transferred," but included the case of an officer who after transfer resigned his employment & obtained service with another county council.—*POUNDER v. LONDON COUNTY COUNCIL*, [1934] 1 K. B. 26; 103 L. J. K. B. 79; 150 L. T. 169; 97 J. P. 306; 50 T. L. R. 26; 31 L. G. R. 414, C. A.

**105b. — — —.]—**Pltf. was employed as a cleaner by a board of guardians from 1897 until Apr. 1, 1930, but until Oct. 1929, no deductions in respect of superannuation contributions under Poor Law Officers' Superannuation Act, 1896 (c. 50), ss. 12, 13, were made from the pltf.'s wages. From Oct. 1929, the guardians deducted 6d. a week in respect thereof, & on Mar. 27, 1930, an arrangement was made that they should deduct a further 1s. 6d. a week in part payment of arrears of contributions, & this further deduction was made on Mar. 29, 1930. On Apr. 1, 1930, by the Local Govt. Act, 1929 (c. 17), the guardians were abolished & pltf. was transferred to the service of deft. corpn. Until Feb. 1932, deft. corpn. continued to deduct the 6d. & the 1s. 6d. a week, but then ceased to do so & returned the contributions on the ground that pltf. was not within the superannuation scheme provided by 1896 Act. In an action claiming that pltf. was entitled, under sect. 124 (1) of 1929 Act to the benefit of that scheme & that the arrangement of Mar. 27, 1930, was binding on defts.:—*Held*: although pltf.'s contributions had not been made exactly as & when they ought to have been made there was no impediment to her receiving her pension.—*GISSING v. LIVERPOOL CORPN.*, [1935] Ch. 1; 104 L. J. Ch. 68; 151 L. T. 513; 98 J. P. 359; 50 T. L. R. 525; 78 Sol. Jo. 601; 32 L. G. R. 499, C. A.

*Annotations:—*Expld. *Tees Conservancy Comrs v. James*, [1935] Ch. 544. *Refd. Jones v. London County Council*, [1936] Ch. 50.

**105c. — Amount of pension.]—**Under the Poor Law Officers' Superannuation Act, 1896, poor law officers became entitled to superannuation allowance, certain deductions to provide therefor being made from their salaries, the amount of superannuation being a defined proportion of the average of the last five years' salary preceding the day when they ceased to hold office.

Pltf. became a clerk under an assessment committee of a union & held the office for twenty-four years, his salary for the last five years averaging £30 *per annum*. In 1927, under the provisions of the Rating & Valuation Act, 1925 (c. 90), the union ceased to exist, & pltf. was transferred to the new rating

authority created by the Act, & held the office for a further seven years, his average salary for the last five years of this service being £165:—*Held*: Rating & Valuation Act, 1925 (c. 90), s. 51 (1), applied Poor Law Officers' Superannuation Act, 1896 (c. 50), to pltf. after his transfer, & not only down to the time in 1927 when he ceased to be an officer of the dissolved union. He was therefore entitled to superannuation allowance based on £165 & not on £30.—*NEWELL v. CLUN ASSESSMENT COMMITTEE* (1935), 79 Sol. Jo. 839; 34 L. G. R. 8.

**105d. Election to contract out—Cancellation.]—**Pltf. entered the service of a board of guardians in 1904 as a probationer nurse & certain annual deductions were made from her salary for superannuation purposes. In 1907 she obtained employment as a charge nurse under the Metropolitan Asylums Board, & gave notice that, as a female nurse within Poor Law Officers' Superannuation Act Amendment Act, 1897 (c. 28), she wished to contract out of superannuation benefits, *i.e.*, did not wish to avail herself of the provisions of the Poor Law Officers' Superannuation Act, 1896 (c. 50). No deductions were therefore made from her salary by way of contribution to superannuation benefit, & the same procedure continued when after leaving the Asylums Board in 1908 she was employed from Feb. 1909 to 1923, as a superintendent nurse by another board of guardians. In that year she obtained employment under a different board of guardians as a charge nurse, but shortly after her appointment requested to be allowed to contribute to the poor law officers' superannuation fund. This request was granted by the board on her paying to them the deductions which would have been made from her salary for superannuation benefit while in the service of her two previous employers if she had not contracted out. This was duly paid by pltf., & the necessary deductions made from her salary down to 1927, when she was appointed by the board to be an assistant matron at an orphanage, & therefore (having ceased to be a female nurse within the 1897 Act) could not contract out of the 1896 Act. The proper deductions were therefore made by the board from her salary down to 1930, when by virtue of Local Govt. Act, 1929 (c. 17), the duties & functions of the board of guardians were transferred to deft. council whose servant pltf. consequently became. Down to 1933 deft. council made deductions from pltf.'s salary at the rate of 3½ per cent., but in 1933 they informed her that her rate of contribution under the superannuation scheme would be reduced to 2½ per cent. as from Apr. 1, 1930, being the rate in respect of employees whose period of service did not on Apr. 1, 1930, exceed ten years. They accordingly repaid her a sum which included (*inter alia*) the amount paid back by pltf. in 1923 while employed as a charge nurse, & the consequent deductions made from her salary down to 1927. These sums pltf. accepted under protest. She accordingly commenced an action against deft. council for a declaration (*inter alia*) that her contributions ought to be calculated at 3½ per cent. on the total amount of her salary on the footing that the period of her service

to be considered in fixing the amount of these contributions to the superannuation scheme was on Apr. 1, 1930, more than twenty years. This deft. council denied, on the ground that as pltf. had in 1907 contracted out of the 1896 Act, her service with poor law authorities down to 1927 when she became an assistant matron could not be aggregated for superannuation purposes; that the deductions made from her salary when she became a charge nurse in 1923 & down to 1927 were illegal; & that the board of guardians in accepting from pltf. the payment of the deductions from her salary above mentioned had acted *ultra vires*. They further contended that a contracting-out notice once given could never be withdrawn & that it applied to the whole of her future service as a female nurse.—*Held*: the board of guardians had not acted illegally in 1923 in permitting the withdrawal of the contracting-

out notice & requiring pltf. as a condition of that withdrawal to repay the sums which would in the past years have been deducted from her salary if she had not contracted out of superannuation benefits; pltf. was an officer by whom, on her transfer to deft. council, the annual contributions required by the 1896 Act had been made; & on Apr. 1, 1930, pltf.'s employment extended over the aggregate period covered by her combined periods of service & exceeded twenty years. The deductions to be made by deft. council out of pltf.'s salary should therefore be at the rate of 3½ per cent.—*JONES v. LONDON COUNTY COUNCIL*, [1936] Ch. 50; 105 L. J. Ch. 53; 154 L. T. 211; 99 J. P. 370; 79 Sol. Jo. 642; 33 L. G. R. 404.

120. *Add. Annotation*:—*Refd. R. v. London County Council, Ex p. Entertainments Protection Assocn., Ltd.*, [1931] 2 K. B. 215.

## Part II.—Poor Law Areas.

157. *Add. Annotation*:—*Consd. Stoke Newington Borough Council v. Richards* (1929), 45 T. L. R. 650. 164. *Add. Annotation*:—*Refd. R. v. Minister of Health, Ex p. Yaffe*, [1930] 2 K. B. 98.

## Part III. Workhouses.

174. *Add. Annotation*:—*Refd. London (City) Corpn. v. London County Council* (1930), 99 L. J. K. B. 577.

## Part IV.—Relief of the Poor.

188. *Add. Annotations*:—*As to (1) Refd. Reeve v. Walker*, [1932] 1 K. B. 454. *As to (3) Consd. R. v. Grain, Ex p. Wandsworth Grdns.*, [1927] 2 K. B. 205.

### 197a. Whether disability pension disregarded.]

—An ex-service man, whose sole income for the maintenance of himself, his wife & five children was a 100 per cent. disability pension of £2 per week, applied for poor relief from the local authority because he was unable adequately to maintain himself & his family. The local authority decided that appet. was not entitled to relief on the ground that his income of £2 per week was sufficient for maintenance, & contended that, as the above

sect. of the Act applied only for the purposes of regulating the amount of relief to be afforded to persons who have first of all been found entitled to relief, they were not bound to disregard the first one pound of appet.'s pension when determining whether appet. was entitled to relief:—*Held*: resps. were bound by the above sect. to disregard the first pound of applt.'s disability pension when considering whether or not he was entitled to relief as well as when calculating the amount of relief payable.—*DUNCAN v. ABERDEEN COUNTY COUNCIL*, [1936] 2 All E. R. 911; 106 L. J. P. C. 1; 156 L. T. 145; 80 Sol. Jo. 702, II. L.

### PART IV. SECT. 1.

*r i.* —[—]—*BUTTS v. SYDNEY MINES*, [1927] 1 D. L. R. 546; 59 N. S. R. 90.—CAN.

### PART IV. SECT. 2, SUB-SECT. 2.

201 i. *Right to recover costs of relief*—*From parish to which pauper belongs—Condition precedent.*—No claim for the support of a pauper can be made against his district of settlement unless a request to the district to provide relief has been made.—*MCKENZIE v. BIG POND OVERSEERS*, [1933] 1 D. L. R. 232.—CAN.

### PART IV. SECT. 2, SUB-SECT. 3.

*sa.* —[—]—*Capricious finding of age of child in order to give jurisdiction.*—*Re KELLY* (N. B.), [1929] 1 D. L. R. 716; 51 Can. Crim. Cas. 113.—CAN.

*sb. Deserted child—Order for maintenance—Jurisdiction.*—Under an order of the police magistrate for the county of F. made in Jan. 1927, under Children Protection Act, R. S. O., 1914, & amendments, two infants were delivered into the custody of pltf. society & became its wards. The order directed that the corpn. of the

united counties of L. & G. should pay a weekly sum to the society for the maintenance of the infants. It was afterwards discovered that the town of X., of which the infants were residents, was a separate municipality, so constituted by Act of Ontario legislature in 1922; & on May 19, 1927, the magistrate amended his order by directing that the maintenance money should be paid by the town corpn. instead of the counties corpn. The town corpn. repudiated its liability & this action was brought to enforce payment:—*Held*: the magistrate had jurisdiction to make the first order, but



206. *Add. Annotation*:—*Refd. Re Carroll*, [1931] 1 K. B. 317.

225a. *Within what time proceedings must be taken.*—*Appls.*, a board of guardians, in 1926 gave relief, by way of loan, to resp. under Poor Law Amendment Act, 1834 (c. 76), s. 58. In Feb. 1927 *appls.* made a written application to resp. for repayment, & in Aug. 1927 summonses were issued against resp. & against his employers to recover the amount due. The justices held, as more than six months had elapsed since the date when the last instalment of the loan was advanced, they had no jurisdiction by reason of Summary Jurisdiction Act, 1848 (c. 43), s. 11, & they dismissed the summons:—*Held*: the matter of complaint did not arise until the application for repayment was made.—*ASHBY-DE-LA-ZOUCH GUARDIANS v. SUMMERS*, [1928] 2 K. B. 397; 97 L. J. K. B. 397; 139 L. T. 46; 92 J. P. 72; 44 T. L. R. 406; 72 Sol. Jo. 241; 26 L. G. R. 245; 28 Cox, C. C. 494, D. C.

225b. *In what court proceedings must be taken.*—A ct. of summary jurisdiction is not a "county ct. or other ct. for the recovery of small debts" within Poor Law Act, 1927 (c. 14), s. 46 (1), & under that sub-sect. relief granted by way of loan by the guardians to a

poor person cannot be recovered therein.—*EVANS v. MORGAN*, [1928] 2 K. B. 527; 97 L. J. K. B. 703; 139 L. T. 612; 92 J. P. 146; 44 T. L. R. 544; 26 L. G. R. 386, D. C.

248. *Add. Annotation*:—*Apld. Hogton v. Hogton* (1933), 103 L. J. P. 17.

254. *Add. Annotations*:—*Refd. Grubb v. Grubb* (1934), 98 J. P. 99; *Markovitch v. Markovitch* (1934), 151 L. T. 139.

289a. *Under Summary Jurisdiction Act, 1879 (c. 49).*—Where an order has been made in petty sessions upon a husband to pay a sum weekly or otherwise towards the cost of poor relief given to his wife, & the payments thereunder fall into arrear, complaint may be made to a ct. of summary jurisdiction, & the ct. has power under the Summary Jurisdiction Act, 1879 (c. 49), to enforce the payments due under the order as a civil debt, although no mode of recovery is prescribed by Poor Law Act, 1930 (c. 17), s. 19 (1), re-enacting Poor Law Act, 1927 (c. 14), s. 43 (1).—*LONDON COUNTY COUNCIL v. BETTS, LONDON COUNTY COUNCIL v. DOWNES*, [1936] 1 K. B. 430; [1936] 1 All E. R. 144; 105 L. J. K. B. 289; 154 L. T. 267; 100 J. P. 183; 52 T. L. R. 257; 80 Sol. Jo. 187; 34 L. G. R. 169; 30 Cox, C. C. 345, D. C.

## Part V.—Settlement.

304. *Add. Annotation*:—*Consd. Newport Borough Council v. Leicester County Council*, [1937] 1 All E. R. 439.

315a. *Construction of private Act—Meaning of "immediately before" appointed day.*—A poor person had resided in the county of Monmouth for such a period & in such circumstances, before Feb. 23, 1935, as to acquire a settlement in that county. On Feb. 23, 1935, the poor person went to live in the county of Leicester. On Apr. 1, 1935, by the Newport Extension Act, 1934, the boundary of the borough of Newport was altered to include, *inter alia*, that part of the county of Monmouth in which the poor person had formerly lived. The poor person subsequently became chargeable to the county of Leicester. The Newport Ex-

tension Act, 1934, s. 26, provides: "Every person resident in the added areas immediately before the appointed day [Apr. 1, 1935] who has acquired a settlement in the county . . . shall be deemed to have acquired . . . a settlement in . . . the borough"—*Held*: the poor person was not resident in the county of Monmouth "immediately before" Apr. 1, 1935, within the Newport Extension Act, 1934, s. 26, & his settlement remained in the county of Monmouth.—*NEWPORT BOROUGH COUNCIL v. LEICESTER COUNTY COUNCIL*, [1937] 1 All E. R. 439; 106 L. J. K. B. 157; 156 L. T. 110; 101 J. P. 103; 53 T. L. R. 229; 81 Sol. Jo. 80; 35 L. G. R. 42, D. C.

327. *Add. Citations*:—[1927] 2 K. B. 511; 96 L. J. K. B. 793; 137 L. T. 524.

the magistrate not having, on or before May 19, 1927, been designated a "judge" within Children's Protection Act, 1927, had no jurisdiction to make the amending order.—*FRONTENAC CHILDREN'S AID SOC. v. GANANOQUE*, [1929] 3 D. L. R. 104; 63 O. L. R. 560.—CAN.

80. *Extent of liability of municipality—Child Welfare Act, C. A., 1924.*—*DIRECTOR OF CHILD WELFARE v. RURAL MUNICIPALITY OF CARTIER*, [1931] 2 W. W. R. 7; 2 D. L. R. 845.—CAN.

8m. *Meaning of municipality.*—A village municipality is not a "municipality" within the meaning of that word as used in Infants Act, R. S. B. C., 1924, unless under the powers given the Lieutenant-Governor in Council by sect. 7 (c) of Village Municipalities Act, R. S. B. C., 1924, it has been declared to be a municipality under the Infants Act.—*RILEY & CHILDREN'S AID SOCIETY v. MISSION VILLAGE*, [1933] 1 W. W. R. 20; 46 B. C. R.

330.—CAN.

### PART IV. SECT. 3, SUB-SECT. 2.—A. (a).

sp. *Parents' Maintenance Act, 1923*—*What amounts to dependence.*—If a father has a sufficient income of his own to provide him with food, clothing, & other necessities, his age, disease, or other infirmities will not enable him to claim any money from his children as their "dependent" within Parents' Maintenance Act, 1923.—*STE. MARIE v. STE. MARIE (Sask.)*, [1929] 4 D. L. R. 1076; 1 W. W. R. 890.—CAN.

st. — *Joint & several liability of children.*—*R. v. SKILLING*, [1935] 1 W. W. R. 183.—CAN.

sb. *Settlement by judgment.*—*BOTS-FORD OVERSEERS v. WELLINGTON OVERSEERS*, [1932] 1 D. L. R. 400.—CAN.

### PART IV. SECT. 3, SUB-SECT. 2.—D.

sg. *Liability of city.*—Counties are

not liable for the institutional care of an illegitimate child where the child has been in the custody of a city for more than one year.—*Re LEVETT*, [1936] 1 D. L. R. 731; O. R. 139; 65 Can. C. C. 251.—CAN.

### PART V. SECT. 1.

st. *New settlement—Burden of proof.*—The burden of showing a new settlement is upon the county of original settlement of an infant's father.—*Re LEWIS*, [1935] 3 D. L. R. 188; 9 M. P. R. 415.—CAN.

sh. *Loss—Receipt of poor relief—What amounts to.*—A person does not receive aid from the overseers of the poor, so as to deprive him of settlement, by asking the overseers to make a payment to a nurse attending the woman with whom he is living.—*Re SCHNARE*, [1935] 3 D. L. R. 116; 9 M. P. R. 378.—CAN.

335. *Add. Citations*:—96 L. J. K. B. 511; 137 L. T. 98; 91 J. P. 41; 25 L. G. R. 21, H. L.

351. *Add. Annotation*:—*Consd. Glamorgan County Council v. Birmingham Corpn.* (1932), 48 T. L. R. 664.

415. *Add. Annotation*:—*Refd. Norwich Union v. Henstead Union*, [1927] 2 K. B. 511.

436. *Add. Annotation*:—*As to (2) Consd. Norwich Union v. Henstead Union*, [1927] 2 K. B. 511.

473. *Add. Annotations*:—*Apld. Birkenhead Borough Council v. Lancashire County Council* (1934), 150 L. T. 414. *Folld. Lancashire County Council v. Birkenhead County Borough Council*, [1934] 2 K. B. 226.

473a. ————*J*.—A married woman, deserted by her husband, may acquire a settlement for herself, but by residence only, under Poor Law Act, 1930 (c. 17), ss. 84 (2) (b) (i.), 86 (2), & not by any of the other ways enumerated in sect. 84 (2) (b).—*LANCASHIRE COUNTY COUNCIL v. BIRKENHEAD BOROUGH COUNCIL*, [1934] 2 K. B. 226; 103 L. J. K. B. 407; 32 L. G. R. 38; *sub nom. BIRKENHEAD BOROUGH COUNCIL v. LANCASHIRE COUNTY COUNCIL*, 150 L. T. 414; 98 J. P. 68, D. C.

482a. *Nurse—Sent to training establishment.*

—On July 20, 1920, A. signed an agreement at C. in the parish of F., by which she was to undergo a year's free training in nursing under the C. Nursing Assocn. & thereafter to remain in their employment for three years. She was sent to D. on the same day for her training & returned to C. on July 9, 1921. She remained at C. under her contract till July 2, 1924, on which day she was allowed to go on holiday, & had no intention of returning, as her three years expired during her holiday. She subsequently became chargeable as a pauper lunatic:—*Held*: since she had not resided physically in the parish of F. for three complete years when she left on July 2, 1924, & had then no *animus revertendi*, she had not acquired a settlement there, there being no evidence that she resided there between

July 20, 1920, & July 9, 1921.—*FARNHAM UNION v. CAMBRIDGE UNION*, [1929] 1 K. B. 307; 98 L. J. K. B. 177; 140 L. T. 377; 93 J. P. 21; 45 T. L. R. 73, D. C.

486a. ————*Territorial in camp.*—*Held*: a poor person who had enlisted as a man of the Territorial Force, was not, while attending the annual training camp of that Force, serving in the military service of the Crown as a soldier within proviso (a) of sect. 93 (1) of Poor Law Act, 1930 (c. 17). The period of his attendance at the camp was not to be excluded in computing his period of residence, so as to prevent him from acquiring a settlement in a county borough by residence in that county borough for a term of three years within sect. 86 (1) of the Act.—*DERBYSHIRE COUNTY COUNCIL v. MIDDLESEX COUNTY COUNCIL*, [1936] 1 K. B. 533; 105 L. J. K. B. 101; 154 L. T. 125; 99 J. P. 391; 52 T. L. R. 15; 79 Sol. Jo. 777; 33 L. G. R. 449, D. C.

*Annotation*:—*Dist. Re, Cousins* [1938] 1 K. B. 499.

494. *Add Annotations*:—*Refd. Coventry Corpn. v. Surrey County Council*, [1935] A. C. 199; *London County Council v. Berkshire County Council* (1935), 153 L. T. 463.

495. *Citation*:—For "[1912]" read "[1913]."

498. *Add. Annotation*:—*Apld. Farnham Union v. Cambridge Union*, [1929] 1 K. B. 307.

503. *Add. Annotations*:—*Refd. Morris v. Britannic Assurance Co.*, [1931] 2 K. B. 125; *Coventry Corpn. v. Surrey County Council*, [1935] A. C. 199.

#### C. Adopted Children.

504a. *Effect of adoption order.*—W. was born an illegitimate child in the county of Leicester & lived with a foster-mother in the county borough of Leicester until he was eleven years of age. He was then, by an order under sect. 1 of the Adoption of Children Act, 1926 (c. 29), s. 1, adopted by one C., & his wife, with whom he lived continuously for four years in the county borough of Leicester, from which place the adopters

#### PART V. SECT. 3, SUB-SECT. 3.—A.

339 i. ————*Derivative settlement.*—*OLD KILPATRICK PARISH COUNCIL v. KILMARNOCK PARISH COUNCIL*, [1929] S. C. (Cl. of Sess.) 651.—*SCOT.*

#### PART V. SECT. 3, SUB-SECT. 4.—A. (a).

sm. *Municipality where mother born—Child & mother not resident.*—A municipality in which a mother was born, but in which neither the mother nor the child reside is not liable for the maintenance of a child under Children's Protection Act, R. S. O., 1927.—*Re FORMAN*, [1937] 2 D. L. R. 263; O. R. 436; 68 Can. C. C. 93.—*CAN.*

sp. *County where mother lived & employed over one year.*—Under Ontario Children's Protection Act, s. 10, where a child is less than one year old the county where the mother has resided & been continuously employed for more than one year is liable for its maintenance.—*Re AMEY*, [1936] 4 D. L. R. 129.—*CAN.*

#### PART V. SECT. 3, SUB-SECT. 4.—B.

402 i. *Follow mother's settlement.*—An illegitimate child takes the settlement of the mother acquired through marriage subsequent to the birth of the child.—*Re MAIN'S SETTLEMENT*,

[1936] 2 D. L. R. 64; 10 M. P. R. 263; 65 Can. C. C. 262; 6 F. L. J. (Can.) 38.—*CAN.*

402 ii. ————*J*.—The county where the mother of an illegitimate child has her home is liable for its maintenance, not the county in which she is working, or is delivered.—*Re BAKER*, [1937] 3 D. L. R. 122; O. R. 176; 68 Can. C. C. 302.—*CAN.*

402 iii. ————*J*.—Under Ontario Children's Protection Act the municipality where the mother of an illegitimate child resided for five years before its birth is liable for its maintenance.—*Re WRIGHT*, [1938] 2 D. L. R. 52; O. R. 117; 69 Can. C. C. 397.—*CAN.*

#### PART V. SECT. 4, SUB-SECT. 2.—B. (a).

433 i. *Whether relegated to birth settlement where mother's settlement derivative—Settlement derived from subsequent marriage.*—*ROTHES PARISH COUNCIL v. ELGIN PARISH COUNCIL*, [1928] S. C. (Cl. of Sess.) 918.—*SCOT.*

#### PART V. SECT. 5, SUB-SECT. 2.—B.

ae. *Before settlement acquired—Liability of former district.*—Where a person resident in one municipal district who has not previously received relief as an indigent moves into another

district, & such relief is furnished to him by the latter district before he has become a "resident" therein within Municipal District Act, 1926, s. 150 (3) (c), & continued after the date when he becomes a "resident," it is only for the relief furnished before said date that the relieving district can obtain reimbursement from the district of which he was previously a resident.—*WHEATLAND MUNICIPAL DISTRICT v. IRON CREEK MUNICIPAL DISTRICT*, [1929] 2 D. L. R. 15; 1 W. W. R. 531; 24 Alta. L. R. 141.—*CAN.*

#### PART V. SECT. 5, SUB-SECT. 3.—A.

493 i. *Capacity of child to acquire independent settlement.*—Where, while a child is living with its own parents as a member of the family under a foster agreement made with them by the Comr. of Child Protection, they change their residence to another municipality, & the child continues to so live with them therein for six months, it then, if one year of age or older, "belongs" to said municipality within Child Welfare Act, 1927, c. 60, s. 28 (2).—*Re BALASANOVICH (OR BAILEY), FOAM LAKE TOWN v. RURAL MUNICIPALITY OF INSMINGER*, [1928] 4 D. L. R. 127; [1928] 2 W. W. R. 448.—*CAN.*

493 ii. ————*J*.—*Re KLYNE*, [1932] 3 W. W. R. 615.—*CAN.*

were irremovable & in which they were settled at the date of the order. A few days after he had reached the age of sixteen years the child became chargeable to the county of Surrey. The justices of Surrey ordered his removal to Coventry, where his mother was then last settled:—*Held*: the order for removal must be quashed, for the removability & settlement of a poor person are matters relating to his custody, maintenance & education; therefore the rights, duties, obligations & liabilities of the mother in relation thereto were extinguished & vested in the adopter as though the child was a child born to the adopter in lawful wedlock, in which case the child could not be removed to the place of settlement of his mother.—*COVENTRY CORPN. v. SURREY COUNTY COUNCIL*, [1935] A. C. 199; 103 L. J. K. B. 590; 152 L. T. 49; 98 J. P. 401;

50 T. L. R. 529; 78 Sol. Jo. 567; 32 L. G. R. 373, H. L.

720. *Citations*:—For “(1733), Cun. 76; 2 Sess. Cas. K. B. 245,” read “(1734), Cun. 76; 1 Sess. Cas. K. B. 251.”

778a. — **Weekly tenancy—Effect of Poor Law Act, 1930 (c. 17), s. 89.**—In order to satisfy the terms of Poor Law Act, 1930 (c. 17), s. 89, the tenancy must be a yearly tenancy, & therefore a person who rents or occupies a house for a period longer than a year upon a weekly tenancy does not acquire a settlement under the sect. In this respect the sect. has made no alteration in the law as it was before 1930.—*NORTHINGHAM COUNTY COUNCIL v. MIDDLESEX COUNTY COUNCIL*, [1936] 1 K. B. 141; 105 L. J. K. B. 91; 151 L. T. 131; 100 J. P. 1; 52 T. L. R. 76; 79 Sol. Jo. 922; 33 L. G. R. 499, D. C.

## Part VI.—Removal.

1079a. **Effect of Local Government Act, 1929 (c. 17), Sched. IX.**—A poor person who was born at C. in the county of L. on Aug. 25, 1878, was a domestic servant from 1891 to 1896, residing in the parish of L. in the said county. From 1896 to May 25, 1900, she resided in the parish of O. in the said county. From May 25, 1900, to Aug. 27, 1900, she was an inmate of O. Union poor law institution. From Aug. 27, 1900, to Oct. 3, 1907, & from Nov. 7, 1907, to Jan. 25, 1911, she resided at various addresses in the parish of O. without receiving relief. From Jan. 25, 1911, to Mar. 12, 1913, she was again an inmate of O. poor law institution. From Mar. 12, 1913, to Mar. 16, 1913, she resided in the county borough of S. without receiving relief. On Mar. 16, 1913, she was admitted into the casual wards at the county borough of S., & on Mar. 17, 1913, she was transferred to O. Union poor law institution, where she remained until Mar. 14, 1931. Before Apr. 1, 1930, the “appointed day” under Local Government Act, 1929 (c. 17), the parish of O. & the area comprised in the county borough of S. were within the O. poor law union. After the “appointed day” the area comprising the county borough of S. became a separate poor law area, & that comprising the parish of O. became part of the poor law area of the county of L. From Mar. 14, 1931, to Nov. 17, 1931, & again from Nov. 17, 1931, to Mar. 3, 1933, the poor person resided in the county borough of S., & was in receipt of outdoor relief. On Oct. 12, 1932, the Minister of Health made an order under Poor Law Act, 1930 (c. 17), s. 161, that the poor person was chargeable to the county borough of S. On Mar. 3, 1933, S. justices made an order that she should be removed to the county of L., but L. Quarter Sessions reversed this order, holding that the poor person was resident in the county borough of S. immediately before the appointed day, & that she had acquired there a status of irremovability by virtue of the Local Government Act, 1929 (c. 17), Sched. IX., Part I., para. 3, sub-para. 2 & 3. On appeal by the

county borough of S. the Divisional Ct. reversed the order of quarter sessions, holding that the poor person had not acquired a status of irremovability in S. On appeal by the L. County Council:—*Held*: Poor Law Act, 1930 (c. 17), is a complete code dealing with settlement & removability, & it alone applied, unaffected by Local Government Act, 1929 (c. 17), Sched. IX., Part I.; therefore the removal order was rightly made.—*LANCASHIRE COUNTY COUNCIL v. SOUTHPORT BOROUGH COUNCIL*, [1935] 1 K. B. 216; 104 L. J. K. B. 177; 152 L. T. 242; 99 J. P. 69; 51 T. L. R. 122; 79 Sol. Jo. 11; *sub nom.* *SOUTHPORT BOROUGH COUNCIL v. LANCASHIRE COUNTY COUNCIL*, 33 L. G. R. 61, C. A.

1123a. — **Effect of Mental Treatment Act, 1930 (c. 23), s. 18 (1) (b).**—A married woman, normally residing with her husband, had been during the greater part of the three years next preceding Oct. 4, 1935, in receipt of relief as a rate-aided patient in a mental hospital. No other relief had been granted to her or to her husband. The husband, who was previously settled in the County of L., had resided during those three years in the County Borough of R.; but there had been no period of residence sufficient to give him a settlement or status of irremovability there if the period of his wife's receipt of relief was to be excluded. The wife having become chargeable to the County of L. an order was made by justices for her removal to R.:—*Held*: the effect of the second proviso to sect. 18 (1) of Mental Treatment Act, 1930 (c. 23), was that the husband's settlement must be determined by the antecedent law, as though that sect. had not been passed, & consequently that by sect. 93 (1) of Poor Law Act, 1930 (c. 17), the time of his wife's confinement as a rate-aided patient must be excluded from the computation, & that he was not & therefore his wife was not, last settled in R., & the order of removal was bad.—*ROCHDALE CORPN. v. LANCASHIRE COUNTY COUNCIL*, [1937] 1 K. B. 632; [1937] 1 All

- E. R. 559; 106 L. J. K. B. 523; 156 L. T. 259; 101 J. P. 174; 53 T. L. R. 421; 81 Sol. Jo. 257; 35 L. G. R. 142, D. C.
1138. *Add. Annotation:—Consd.* Derbyshire County Council v. Middlesex County Council, [1936] 1 K. B. 533.
1146. *Add. Annotation:—Consd.* Glamorgan County Council v. Birmingham Corpn. (1932), 48 T. L. R. 664.
1148. *Add. Annotation:—Consd.* Glamorgan County Council v. Birmingham Corpn. (1932), 48 T. L. R. 664.
- 1148a. *Poor Law Act, 1930 (c. 17).—*Quarter sessions made an order for the removal from the city of B. to her county of settlement of a pauper & her child who were not entitled to any of the exceptions from removability contained in Poor Law Act, 1930 (c. 17), s. 93. At the date of the order the husband of the pauper was serving a sentence of six months' imprisonment at B. after conviction of forgery, & by the prison regulations the pauper was permitted to visit her husband in prison at intervals of several weeks. Neither the pauper nor her husband consented to the order:—*Held*: (1) the order was rightly made, since the common law principle that an order could not be made without consent for the removal of a wife so as to separate her from the husband with whom she was actually or constructively residing had ceased to be of effect since the passing of Poor Law Act, 1930 (c. 17), ss. 93, 94, & 104 of which exclusively governed the matter, & rendered the pauper removable as being a person in receipt of relief within sect. 94 & not rendered irremovable by sect. 93; (2) the order was also right on the ground that in the circumstances the pauper & her husband could not be said to be constructively living together.—*GLAMORGAN COUNTY COUNCIL v. BIRMINGHAM CORPN.*, [1933] 1 K. B. 198; 102 L. J. K. B. 6; 148 L. T. 16; 96 J. P. 409; 48 T. L. R. 664; 30 L. G. R. 426, D. C.
1177. *Add. Annotation:—Apld.* London County Council v. Berkshire County Council (1935), 99 J. P. 300.
- 1215a. ———.—[The last legal settlement of a rate-aided mental patient, & that of her father & mother, was in the county borough of Reading. Her mother had obtained a status of irremovability from the county of London, under the proviso to Poor Law Act, 1930 (c. 17), s. 93 (2), as a wife deserted by her husband:—*Held*: the patient, during a period when she was residing in the county of London apart from her mother, had taken & was following the settlement of her father in Reading & the mother's status of irremovability from London did not, under the above sub-sect., confer a similar status on her daughter, so as to enable the above period to count towards the three years requisite to secure for the patient a settlement by residence in the county of London.—*LONDON COUNTY COUNCIL v. BERKSHIRE COUNTY COUNCIL* (1935), 153 L. T. 463; 99 J. P. 300; 79 Sol. Jo. 504; 33 L. G. R. 345, D. C.

## Part VII.—Vagrancy.

- 1607a. *Making false statement to obtain relief—Poor Law Act, 1930 (c. 17), s. 150—Meaning of "relief"—Work coupled with payment.*—Applt. was convicted, under Poor Law Act, 1930 (c. 17), s. 150, of making a false statement to a relieving officer for the purpose of obtaining relief for himself & his wife. The false statement in question was made to induce the relieving officer to give to applt. a card entitling him to work on the roads maintainable by the local authority & to be paid for his work a sum of 23s. No benefit other than the employment to be provided & the payment to be made was sought or received by applt.:—*Held*: the provision of work & wages constituted relief within sect. 150 & applt. was rightly convicted.—*REEVE v. WALKER*, [1932] 1 K. B. 454; 101 L. J. K. B. 324; 146 L. T. 137; 96 J. P. 3; 48 T. L. R. 102; 30 L. G. R. 17; 29 Cox, C. C. 410, D. C.
1616. *Add. Annotations:—Refd.* *R. v. Grain, Ex p.* Wandsworth Grdns., [1927] 2 K. B. 205; *Reeve v. Walker*, [1932] 1 K. B. 454.

### PART VII. SECT. 1, SUB-SECT. 1.

p i. ———. *Restaurant.*—*R. v. BENSON*, [1928] 3 W. W. R. 605; 50 Can. Crim. Cas. 426.—*CAN.*

g i. ———. *Impeding passengers—What must be proved.*—The mere holding of a meeting in the street does not necessarily imply the impeding or incommoding of passengers, & proof of actual impeding is essential to justify a conviction.—*R. v. BUHAY*, [1930] 1 D. L. R. 540; 52 Can. C. C. 263; 64 O. L. R. 531.—*CAN.*

g ii. ———. *Whether single disturbance sufficient to support conviction.*—The commission of a single disturbance of the kind, & at a place, referred to in sub-sect. (f) of sect. 238 of Criminal Code is sufficient to justify a conviction thereunder for being a disorderly person or vagrant. The other sub-sections of said section seem, however, to require that the conduct complained

of be something more than a single act, & at least a manner of behaviour of some duration.—*R. v. OISEBERG*, [1931] 3 W. W. R. 507; [1932] 1 D. L. R. 348; 40 Man. L. R. 5.—*CAN.*

g iii. ———. *Refusal to work.*—An unemployed person receiving relief who refuses work does not thereby necessarily become a vagrant.—*R. v. FLEURY* (1933), 60 C. C. C. 32.—*CAN.*

g iv. ———. *Ability to work.*—Proof of physical ability to work & mere lack of proof of financial ability are not sufficient to support a conviction for vagrancy.—*L. v. KELLY* (1933), 60 C. C. C. 116.—*CAN.*

st. *Neglect to maintain wife & family—Miner on hunger march.*—A miner, in receipt of unemployment benefit amounting to 31s. 3d. weekly, left his wife & children & joined other unemployed on a "hunger march" to London to make representations to the Govt. He went with his wife's con-

sent, & in addition to informing her of his route, wrote to her during the march. Before leaving, he applied at the Employment Exchange for a travelling card to enable him to draw unemployment benefit while away, but this was refused. During the march he earned nothing & received no benefit, although, had he remained at home, he would have continued to receive the weekly payment of 31s. 3d. His wife, being left destitute, applied to the Public Assistance Authority for relief, which she obtained. In a complaint charging him with neglecting to maintain his wife & children, contrary to Poor Law (Scotland) Act, 1845 (c. 83), s. 80:—*Held*: as at the time of the alleged offence the accused was unable to maintain his wife & children, & as his inability was due to no failure in legal duty on his part, it could not be said that he had neglected to maintain them within the sect.—*WILSON v. MANNARN*, [1934] S. O. 92.—*SCOT.*

**1623a. Existing maintenance order—Whether defence.**—Resp. was charged under Vagrancy Act, 1824, with having unlawfully run away from a certain parish & left his wife & child, then under sixteen years of age, whereby they became chargeable to the local public assistance committee. At the hearing of the charge, it was admitted that there was then in existence a maintenance order against resp. made by another ct. of summary jurisdiction, at the instance of the wife of resp., under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5. Resp. contended that the mere existence of the maintenance order constituted a complete defence to the charge. The justice upheld the contention, declined to hear evidence tendered by applt., & dismissed the charge. Thereupon this appeal was brought:—*Held*: as the order made under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5, did not free the husband from his legal obligation to maintain his wife & child, it was the duty of the ct. to hear & consider the evidence.—*BATTY v. LEE*, [1938] 4 All E. R. 207; 159 L. T. 575; 102 J. P. 485; 82 Sol. Jo. 871, D. C.

**1628. Add. Annotation:—Expld. & Distd.** Prothero v. Watson (1931), 47 T. L. R. 627.

**1629. Add. Annotation:—Expld. & Distd.** Prothero v. Watson (1931), 47 T. L. R. 627.

**1653. Add. Annotation:—Reffd.** Ledwith v. Roberts, [1937] 1 K. B. 232.

**1659. Add. Annotations:—Consd.** Ledwith v. Roberts, [1937] 1 K. B. 232. **Folld.** Rawlings v. Smith, [1938] 1 K. B. 675.

**1659a. —**—*Applt.* was charged with being a suspected person loitering with intent to commit a felony within Vagrancy Act, 1824

(c. 83), s. 4, as amended by Penal Servitude Act, 1891 (c. 69), s. 7. The evidence showed that applt. was seen on various occasions over a period of about one hour & forty minutes on the same day to look into unattended motor cars, try the doors, & on one occasion to open a door of a car. On the last of such occasions he was arrested:—*Held*: as there was a clear distinction between the antecedent acts which occasioned the suspicion & brought applt. within the category of suspected persons & the act which was the culminating point of a series of acts, which caused him to be arrested on the charge of loitering with intent, applt. could be convicted. It was not a case where one & the same act was relied on as giving rise to suspicion & as occasioning the arrest. *RAWLINGS v. SMITH*, [1938] 1 K. B. 675; [1938] 1 All E. R. 11; 107 L. J. K. B. 151; 158 L. T. 274; 102 J. P. 181; 51 T. L. R. 255; 81 Sol. Jo. 1021; 36 L. G. R. 99, D. C.

**1664a. Sentence — Imprisonment — Duration.**—

Where an incorrigible rogue has been committed to quarter sessions for sentence, it is the duty of the ct., before passing sentence, to examine into the circumstances of the conviction at petty sessions &, after affording the prisoner an opportunity of cross-examining any witnesses called for the Crown & of addressing the ct., to pass such sentence as is appropriate in the circumstances of the particular case.—*R. v. HOLDING, R. v. LONG* (1934), 104 L. J. K. B. 28; 152 L. T. 216; 98 J. P. 459; 78 Sol. Jo. 841; 25 Cr. App. Rep. 28; 32 L. G. R. 512; 30 Cox, C. C. 201, C. C. A.

*Annotation:—Consd.* *R. v. Riordan*, [1937] 2 All E. R. 62.

**667 a. Hearing of appeal—Circumstances of conviction to be considered.**—*R. v. HOLDING, R. v. LONG*, No. 1661a, *ante*.

## Part VIII.—Old Age Pensions.

**1672a. Statutory conditions—Widow's pension—Husband's "entry into insurance."**—The expression "entry into insurance" in Widows', Orphans', & Old Age Contributory Pensions Act, 1925 (c. 70), s. 5, means "last entry into insurance."—*WADSWORTH v. MINISTER OF HEALTH* (1927), 138 L. T. 519;

44 T. L. R. 159, D. C.

**1672b. — Contributions—Payments made after appointed day—Widows', Orphans', & Old Age Contributory Pensions Act, 1925 (c. 70), s. 8.**—*TAYLOR v. MINISTER OF HEALTH*, [1928] W. N. 244, D. C.

### PART VII. SECT. 2, SUB-SECT. 1.

*so. Application of Marriage Act, 1915.*—*Marriage Act, 1915*, s. 97 (1), refers to a person who, being in Victoria, or resident in Victoria, deserts his wife or children. After the accused had left Victoria & had been for some months resident in New Zealand, he deserted his wife, & children, who had remained in Victoria, & left them without adequate means of support:—*Held*: no offence under the sect. was disclosed.—*R. v. FRANKS*, [1929] V. L. R. 285; *Argus* L. R. 230.—*AUS.*

### PART VII. SECT. 2, SUB-SECT. 7.

*sk. Place adjacent to street—Railway hotel.*—The entrance hall & staircase of the Central Station Hotel in Glasgow, which opened directly on to a public street, is a place adjacent to a street or highway in the sense of Vagrancy Act, 1824, s. 4, as amended & applied to Scotland by Prevention of Crimes Act, 1871, s. 15.—*McINTYRE v. MORTON*, [1912] S. C. (J.) 58.—*SCOT.*

### PART VII. SECT. 4.

*sa. Vagrancy—Allegation of—Criminal Code, s. 238.*—*R. v. ROSENFELD*,

[1928] 3 W. W. R. 67; 50 Can. Crim. Cas. 305.—*CAN.*

*sb. —*—*Re R. v. KNOWLES* (Ont.), (1929), 52 Can. Crim. Cas. 377.—*CAN.*

*sd. Swearing—Form of information.*—An information reciting that "J. B. Washington . . . did unlawfully cause a disturbance in a public place by swearing contrary to sect. 238 (f) of the Criminal Code" discloses an offence which on proof is punishable by sect. 239 of the Code.—*R. v. WASHINGTON* (1935), 50 B. C. R. 238; 65 Can. C. C. 106.—*CAN.*

## POST OFFICE.

## Part II.—Constitution.

1. *Add. Annotation*:—**Refd.** Mackenzie-Kennedy v. Air Council, [1927] 2 K. B. 517.

## Part III.—Conveyance of Mails.

43. *Add. Annotation*:—**Refd.** A.-G. v. Cornwall County Council (1933), 97 J. P. 281.

## Part V.—Offences.

52a. ———.]—Deft. was charged before a ct. of summary jurisdiction with stealing a postal packet in course of transmission by post. A test letter containing stamps & notes, & bearing a Saffron Walden postmark, was placed by an official of the Post Office in a post office letter-box at Edgware, but there was no evidence that the letter ever had gone to Saffron Walden. Another official of the Post Office specially collected the letter on the same day, kept it in his possession overnight, & on the following morning placed it with letters to be delivered by deft. The letter was not proper to deft.'s delivery, & should have been thrown out by him as a mis-sort. Deft., as he subsequently admitted, stole the stamps & notes from the letter & burned the cover & letter. The justices held that the letter was not in the ordinary course of transmission by post & dismissed the information:—*Held*: the letter never ceased to be a postal packet in course of transmission by post from the time when it was put in the post office down to the time when it was stolen by deft.; & *per* AVORY, J., if there were any room for doubt on that point, it became in the course of transmission by post when delivered to deft. on the morning following the posting, because by Post Office Act, 1908 (c. 48), s. 90 (b), such delivery was deemed to be delivery to a post office.

The case must be remitted to the justices with a direction to find the offence charged proved.—HOOD v. SMITH (1933), 150 L. T. 477; 98 J. P. 73; 32 L. G. R. 30; 30 Cox, C. C. 82, D. C.

## SECT. 5.—OTHER OFFENCES (p. 377).

75a. **Accommodation address—False information by user.**—Resp. was summoned for giving false information to the keeper of an accommodation address registered for the receipt of letters, contrary to Official Secrets Act, 1920 (c. 75), s. 5 (4). The magistrate dismissed the summons on the ground that sect. 5 applied only to offences committed by keepers of accommodation addresses as distinct from persons using them, & that resp. could not be convicted under that sect.:—*Held*: the words of sect. 5 (4) were wide enough, & precise enough, to include also offences committed by users of accommodation addresses, & resp. ought to have been convicted.—STEVENSON v. FULTON, [1936] 1 K. B. 320; 105 L. J. K. B. 167; 154 L. T. 162; 99 J. P. 423; 52 T. L. R. 89; 80 Sol. Jo. 75; 34 L. G. R. 26; 30 Cox, C. C. 293, D. C.

## PART I.

**sd.** *Right of public to use postal service.*—All members of the public in Canada have the right to make use of the public postal service provided the Post Office Act is complied with, & an illegal denial by the Postmaster-General of that right would be actionable.—*LITERARY RECREATIONS, LTD. v. SAUVE*, [1932] 3 W. W. R. 123; 4 D. L. R. 553; 58 C. C. C. 385; 46 B. C. R. 116.—CAN.

## PART II. SECT. 1.

**a i.** ———.]—The power of the Postmaster-General under sect. 7 of Post Office Act, R. S. C., 1927, & reg. 219 made in pursuance thereof, to determine what is & what is not "mailable matter" & to prohibit the use of the mails for what he has declared not to be "mailable matter," is absolute & not open to review by a ct.—*LITERARY RECREATIONS, LTD. v. SAUVE*, [1932]

3 W. W. R. 123; 4 D. L. R. 553; 58 C. C. C. 385; 46 B. C. R. 116.—CAN.

## PART V. SECT. I.

**a i.** ———.]—From parliamentary post office.]—Appl. was charged, under sect. 361 of Criminal Code, with having stolen *une lettre dans le bureau de poste du Parlement* in the city of Quebec. He was found guilty & the conviction was affirmed by a majority of the appellate ct. The appeal in this ct. was as to the proper construction of sect. 361 of Criminal Code:—*Held*: the appeal should be allowed & the conviction quashed. The parliamentary post office (*bureau de poste du Parlement*) was not a *bureau de poste* within the meaning of sect. 361 of Criminal Code; & also, the stolen letter was not a *lettre confiée à la poste* at the time of the theft in the sense of that expression as given in sect. 2 of Post Office Act.—ROY v. R., [1938]

S. C. R. 32; 1 D. L. R. 129; 69 Can. C. C. 177. CAN.

## PART VI. SECT. 5.

**sf.** *Wilfully delaying postal packet.*—Where a postman through forgetfulness failed to deliver a letter & having discovered that failure before he had finished his round, did not return & deliver the letter, but took it back to the post-office intending to deliver it in the ordinary course next day:—*Held*: he was not guilty under Post & Telegraph Act, 1901-1923, s. 109, of the offence of wilfully delaying the letter.—TAYLOR v. THORN, [1932] Argus L. R. 377; 6 A. L. J. 237; 47 C. L. R. 148.—AUS.

## PART VII.

**sa.** *Grant of licence to sell stamps by automatic machine—Whether revocable.*—The Postmaster-General granted to resp. a general licence to sell postage stamps, etc., by means of automatic

## Part IX.—Post Office Property.

**81a.** —.—.]—Premises approved by the Postmaster-General for use as a sub-post office & occupied as such by a scale payment sub-postmistress are not premises occupied "on behalf of the Crown" within Rating &

Valuation Act, 1925 (c. 90), s. 64 (3), so as to be exempt from rateability.—*WILLIAMS v. NEATH ASSESSMENT COMMITTEE* (1935), 154 L. T. 261; 100 J. P. 71; 52 T. L. R. 152; 80 Sol. Jo. 77; 34 L. G. R. 80, D. C.

machines, "such licence to be for a period of ten years . . . & if this contract has been properly fulfilled then for a further period of ten years without further agreement & upon the termination of the said periods above the licence shall be renewed for further periods of ten years each successively

unless & until" either party terminated by notice. The Postmaster-General terminated the agreement at the end of 10 years:—*Held*: the licence was revocable at the Postmaster-General's discretion. He had no authority to grant it so as to bind his successor or the country at a future time. The

question was one of statutory administration of the public service; the Minister could depute the performance of his duties only so far as authorised by Parliament.—*R. v. DOMINION OF CANADA POSTAGE STAMP VENDING CO., LTD.*, [1930] S. C. R. 500; 4 D. L. R. 241.—*CAN.*



## POWERS.

## Part I.—Definition and Classification.

9. *Add. Annotation* :—*Refd. Re Mills, Mills v. Lawrence*, [1930] 1 Ch. 654.

## Part II.—Creation of Powers.

17. *Add. Annotation* :—*As to* (1) *Apld. Re Graham, Graham v. Graham*, [1929] 2 Ch. 127.

## Part III.—Construction of Powers.

28. *Add. Annotation* :—*Refd. Re Mathieson*, [1927] 1 Ch. 283.

81. *Add. Annotation* :—*Consd. Re Shuker's Estate, Bromley v. Reed*, [1937] 3 All E. R. 25.

85. *Add. Annotation* :—*Consd. Re Lawry, Andrew v. Coad*, [1938] Ch. 318.

86. *Add. Annotation* :—*Consd. Re Shuker's Estate, Bromley v. Reed*, [1937] 3 All E. R. 25.

87. *Add. Annotation* :—*Consd. Re Shuker's Estate, Bromley v. Reed*, [1937] 3 All E. R. 25.

87a. —.—.]—A testator gave his residue equally between his two sisters "for their respective lives with full power to deal therewith as if it were their own & on the death of either of them or in the event of either or both of them predeceasing me then I give & bequeath her or their share or shares" to X. One of the sisters of testator died in his lifetime :—*Held* : the power of appointment, conferred on the other sister, who survived him, was an absolute power of disposing of one moiety of the residue & was exercisable not only *inter vivos* but also by will.—*Re LAWRY, ANDREW v. COAD*, [1938] Ch. 318 ; [1937] 4 All E. R. 1 ; 107 L. J. Ch. 170 ; 158 L. T. 493.

87b. —.—.]—A testator appointed his wife to be his sole executrix & trustee, & after her death his two nephews to be the exors. & trustees of his will. He gave all his property, both real & personal, to his wife, her heirs, exors., administrators & assigns respectively, upon trust to deal with the same by way of conversion, realisation, investment or otherwise

as she in her absolute discretion might think proper, & without regard to any restriction or limitation of law or otherwise imposed upon trustees or exors., & to retain the income thereof for her own use & benefit absolutely with power to convert to her own use from time to time such part or parts as she might think fit of the capital of testator's real & personal estate, & after her death testator gave all his said property, or so much thereof as should not have been converted by his wife to her own use, to his trustees upon trust for sale & conversion for the benefit of themselves & other nephews & nieces. Upon the death of testator, his widow caused a statement to be drawn up in which she set out the property & the terms of its administration, stated that the debts & funeral expenses had been paid & declared that she had converted the whole of the property to her own use :—*Held* : the will gave the widow a life interest in & a general power of appointment over testator's estate. The declaration was a sufficient exercise of this power, & the whole had become vested in the widow absolutely.—*Re SHUKER'S ESTATE, BROMLEY v. REED*, [1937] 3 All E. R. 25 ; 81 Sol. Jo. 498.

91. *Add. Annotation* :—*Refd. Re Lawry, Andrew v. Coad*, [1938] Ch. 318.

133a. **Power to appoint part of share—Whether including accrued shares.**—*Re HUTCHINSON'S SETTLEMENT, Ex p. DUNN* (1852), 5 De G. & Sm. 681 ; 17 Jur. 59 ; 64 E. R. 1297.

145. *Add. Annotation* :—*As to* (1) *Refd. Re Gooch, Gooch v. Gooch*, [1929] 1 Ch. 740.

PART III. SECT. 3, SUB-SECT. 1.—  
B. (a).

46 i. *Whether life estate enlarged.*—A will next directed trustees : "To divide the residue of my estate into two equal shares each of which shares shall be held in trust by my said exor. & trustee & net income therefrom paid to my nephew, the aforesaid P. T., & my niece, the aforesaid J. T., during their respective lives. On the death of either the said P. T. or the said J. T., the share of my estate from which they receive the net income shall be distributed as they shall by deed or will

appoint & in default of such appointment or insofar as such appointment shall not extend, to their respective next of kin"—*Held* : the donees of the power could separately exercise the power in his or her own favour so as to entitle them to have the half of the residue transferred to him or her immediately.—*Re TEMPLETON ESTATE, TEMPLETON v. ROYAL TRUST CO.*, [1936] 2 W. W. R. 347 ; 3 D. L. R. 782 ; 44 Man. L. R. 154.—*CAN.*

46 ii. —.—.]—The rule that where there is an unlimited & unrestricted gift by will of rents & income of real or personal property the gift carries the

corpus as well as the rents & income, can have no application to a bequest of income where the will clearly shows, either expressly or impliedly, that the testator intended that the income producing corpus or capital should not absolutely vest in the beneficiary to whom the income is directed to be paid.—*ROBINSON v. ROYAL TRUST CO.*, [1938] 2 W. W. R. 433.—*CAN.*

## PART III. SECT. 8.

sd. **Power to donee to pass corpus as well as income.**—*SHAW v. SHAW* (1927), 59 N. S. R. 349.—*CAN.*

## Part IV.—Exercise of Powers.

170. *Add. Annotation*:—**Refd.** *Re Symm's Will Trusts, Public Trustee v. Shaw*, [1936] 3 All E. R. 236.
- 171a. **Appointment “absolutely”**—**Passes fee simple.**—In exercise of a special power of appointment among her children given by the will of testator to Mrs. C., a married daughter of testator, Mrs. C. appointed that one-third share of certain freehold hereditaments & of the investments for the time being representing the same should be held in trust for her daughter E. N., her heirs, exors., administrators & assigns absolutely. Later, in 1901, in exercise of the same power, Mrs. C. by a deed made supplemental to the former deed of appointment, appointed that the trustees of testator's will should stand possessed of the residue then remaining unappointed of the said hereditaments in trust, as to one-fourth share thereof for the said E. N. & as to three-fourth shares thereof for her son C. absolutely:—**Held**: applying the principle stated above, that the appointment made in 1901 in favour of E. N. & C. upon its true construction carried the fee simple to those appointees according to their respective appointed shares.—*Re ARDEN, SHORT v. CAMM*, [1935] Ch. 326; 101 L. J. Ch. 141; 152 L. T. 453; 79 Sol. Jo. 68.
185. *Add. Annotation*:—**Distd.** *Re Mewburn's Settlement, Perks v. Wood*, [1934] Ch. 112.
186. *Add. Annotation*:—**Distd.** *Re Mewburn's Settlement, Perks v. Wood*, [1934] Ch. 112.
187. *Add. Annotation*:—**Consd.** *Re Mewburn's Settlement, Perks v. Wood*, [1934] Ch. 112.
- 187a. ———.]—A settlement executed before 1926 declared trusts in favour of the children or remoter issue of the donee of a power of appointment under the settlement “with such gifts over & generally in such manner for the benefit of such issue” as the donee should by will or codicil appoint, but so that under any appointment a child should not take a vested interest unless being a son he attained the age of twenty-one years or being a daughter she attained that age or married. By his will, also executed before 1926, the donee exercised the power, in accordance with its terms, in favour of his sons, daughters, & remoter issue, & further declared & appointed that the trustees for the time being of the settlement might at any time, but, with regard to any estate, funds or moneys in which any person or persons might have a prior life or other interest, with the written consent of that person or those persons while having that interest, raise up to one-half of the then expectant, presumptive or vested share of any grandchild or remoter issue of his under the appointments made by the will & pay or apply the amounts raised for their benefit as the trustees should think fit:—**Held**: the power of appointment was validly exercised by the will, & the trustees could properly exercise the power of advancement.—*Re MEWBURN'S SETTLEMENT, PERKS v. WOOD*, [1934] Ch. 112; 103 L. J. Ch. 37; 150 L. T. 76; 77 Sol. Jo. 467.
- 187b. **Appointment on “protective trusts.”**—Testator, in exercise of a power of appointment among children & issue contained in his marriage settlement, bequeathed specific property to his son W., & directed his trustees to hold the income of the remainder of the trust property upon protective trusts for the benefit of his son O., & subject thereto to hold the remainder of such property in trust for his granddaughter M.:—**Held**: as the appointment upon “protective trusts,” as defined by Trustee Act, 1925 (c. 19), s. 33, gave a discretion to the trustees to apply the income in the event of a forfeiture for the benefit either of O. or of his wife or children, it was to that extent void, both as being (1) a delegation of the power & (2) in excess of it, & the clause contained in sect. 33 (1) (ii) must be struck out of the will for all purposes; (3) there was no interval of time during which the income of the appointed fund was undisposed of, but there was a valid appointment to O. for life or until an event should happen depriving him of the right to receive the income, & subject thereto for the granddaughter M. absolutely.—*Re BOULTON'S SETTLEMENT TRUST, STEWART v. BOULTON*, [1928] Ch. 703; 97 L. J. Ch. 243; 139 L. T. 288.
208. *Add. Annotations*:—**Refd.** *Salveson (or von Lorang) v. Austrian Property Administrator*, [1927] A. C. 641; H. & H., [1928] P. 206.
256. *Add. Annotations*:—**Folld.** *Re Phillips, Lawrence v. Huxtable*, [1931] 1 Ch. 347. **Distd.** *Re Watts, Coffey v. Watts*, [1931] 2 Ch. 302. **Apld.** *Re Joicey, Thompson v. Duncan* (1932), 173 L. T. Jo. 453.
- 256a. ———.]—Under a settlement a fund was given to such persons, after the death of A., as he should, with the consent of the trustees, appoint by deed:—**Held**: the power was a general power, & the power having been exercised, the fund was equitable assets for the payment of A.'s debts, notwithstanding that the consent of the trustees to the exercise of the power was necessary.—*Re PHILLIPS, LAWRENCE v. HUXTABLE*, [1931] 1 Ch. 347; 100 L. J. Ch. 65; 144 L. T. 178.
- Annotations*:—**Distd.** *Re Watts, Coffey v. Watts*, [1931] 2 Ch. 302. **Apld.** *Re Joicey, Thompson v. Duncan* (1932), 173 L. T. Jo. 453.
- 256b. ———.]—*Re JOICEY, THOMPSON v. DUNCAN* (1932), 76 Sol. Jo. 459.
- 256c. ——— **Consent of settlor's mother.**—A marriage settlement, dated in 1904, contained a clause empowering the settlor, the wife, at any time during the life of her mother by deed to revoke, with the consent of her mother, the trusts declared by the settlement, & to appoint & declare, with the consent of her mother, any new or other trusts powers & provisions concerning the premises to which such revocation should extend. By a deed, dated in 1913, the settlor, with the consent of her mother, exercised the power of revocation & new appointment in such a manner that after her death in 1928 the question arose whether certain trusts declared by the deed of 1913 were valid, their validity depending upon

the decision by the ct. of the question whether the power of revocation & new appointment was a general power or a special power:—*Held*: it would not be right to hold that, upon the terms of the powers contained in the marriage settlement, the settlor was in substance the owner of the property, & consequently free to deal with it in any way she pleased, & the power was a special power.—*Re WATTS, COFFEY v. WATTS*, [1931] 2 Ch. 302; 100 L. J. Ch. 353; 145 L. T. 520.

**269a.** — *Exercise by joint will.*—Testator devised & bequeathed the residue of his real & personal estate to his wife for life & after her death to his son & daughter for their sole & separate use during the term of their natural lives & after their decease to such persons & to such ends & purposes as the son & daughter should by will appoint & in default of appointment to his right heirs for ever. The brother & sister executed a joint will. The brother died in Nov. 1917, having by his separate will confirmed the joint will, & the joint will, the separate will, & a codicil thereto were admitted to probate as being his last testamentary disposition. The mother died on Aug. 8, 1931. The question then arose whether the appointment by the joint will was a good exercise of the power of appointment by the brother & sister:—*Held*: a joint appointment by will could be made by two persons; if the sister did not revoke the joint will, then upon her death & the joint will being admitted to probate as part of her testamentary dispositions it would be an effective exercise of the power of appointment, & would comply with the requirements in the will of the father.—*Re DUDDELL, ROUNDWAY v. ROUNDWAY*, [1932] 1 Ch. 585; 101 L. J. Ch. 248; 146 L. T. 565.

**299a.** — *—*—*ELLIS v. ATKINSON* (1792), 3 Bro. C. C. 565; 2 Dick. 759; 29 E. R. 701, L. C. *Annotations*:—*Refd.* *Socket v. Wray* (1793), 4 Bro. C. C. 483; *Guise v. Small* (1794), 1 Aust. 277; *Whistler v. Newman* (1798), 4 Ves. 129; *Sperling v. Itchfort* (1803), 8 Ves. 161; *Parker v. White* (1805), 11 Ves. 209; *Richards v. Chambers* (1805), 10 Ves. 580; *Francis v. Wigzell* (1816), 1 Madd. 258.

**303.** *Add. Annotation*:—*Consd. Re Shuker's Estate, Bromley v. Reed*, [1937] 3 All E. R. 25.

**311.** *Add. Annotations*:—*Refd. A.-G. v. Glyn, Mills & Co.*, [1938] 3 All E. R. 605; *Re Drake's Settlement Trusts, Wilson v. Drake*, [1938] Ch. 133.

**351a.** *Limitation to more restricted class in default of appointment.*—Testator gave his widow E. full & complete control in the disposal of the principal moneys of his estate, at such times & in such proportions as she might see fit, whether by will or otherwise, for the benefit of his children or grandchildren; but in the event of E.'s marriage or death, the trustees of the will were to divide the estate ratably amongst testator's children share & share alike. E. executed a deed poll appointing a portion to a child, a portion to a grandchild, & a further portion to trustees in trust for the child:—*Held*: all these appointments were valid executions of the power.—*JOB v. JOB* (1853), 2 W. R. 25.

**352.** *Add. Annotation*:—*Consd. Re Turner, Hudson v. Turner*, [1932] 1 Ch. 31.

**360.** *Add. Annotation*:—*Refd. Re Turner, Hudson v. Turner*, [1932] 1 Ch. 31.

**360a.** — *—*—*—*—Testator empowered his wife to appoint his estate, subject to her own life interest therein, to his two children, a son & a daughter, in such proportions as she should think fit, & directed that in default of appointment it should be divided equally between them. The son predeceased him, leaving one child. Testator's widow by her will appointed the estate to the daughter. Upon a summons to determine whether the power was valid at the date of testator's death, & whether the appointment was valid in regard to one-half of the estate:—*Held*: (1) by reason of the death of the son before testator the widow had power to appoint only one-half of the estate; (2) the appointment, though excessive, was not wholly void, but was valid up to one-half of the estate.—*Re TURNER, HUDSON v. TURNER*, [1932] 1 Ch. 31; 101 L. J. Ch. 49; 146 L. T. 209.

**362.** *Add. Annotation*:—*Consd. Re Turner, Hudson v. Turner*, [1932] 1 Ch. 31.

**425.** *Add. Annotation*:—*Refd. Re Baker, Steadman v. Dickson* (1934), 78 Sol. Jo. 336.

**429.** *Add. Annotations*:—*As to* (3) *Refd. Re Phillips, Lawrence v. Huxtable*, [1931] 1 Ch. 347. *Generally, Refd. Re Park, Public Trustee v. Armstrong*, [1932] 1 Ch. 580.

**452.** *Add. Annotation*:—*Consd. Re Vander Byl, Fladgate v. Gore* (1930), 74 Sol. Jo. 770.

**453.** *Add. Annotation*:—*Refd. Re Vander Byl, Fladgate v. Gore*, [1931] 1 Ch. 216.

**484.** *Add. Annotation*:—*Refd. Re Phillips, Lawrence v. Huxtable*, [1931] 1 Ch. 347.

**486.** *Add. Annotation*:—*Refd. Re Phillips, Lawrence v. Huxtable*, [1931] 1 Ch. 347.

**487.** *Add. Annotation*:—*Refd. Re Phillips, Lawrence v. Huxtable*, [1931] 1 Ch. 347.

**505a.** — *—*—*—*—Under the will of a testator who died in 1890, A. had a general testamentary power of appointment over a share of his residuary trust estate. There was a provision that in default of appointment the unappointed share should be held in trust for the persons who at the death of A. would be entitled under Statutes of Distribution. A. by her will appointed her sister I. her executrix & directed that all her debts & funeral expenses should be paid, & after giving certain pecuniary legacies she gave "all the remainder of my property to my sister, I., to be disposed of as she thinks fit at her death." A. died a spinster in Feb. 1929, but, as the husband of I. had witnessed the will, the residuary gift could not take effect. Doubts having arisen whether A. had effectually exercised the general power of appointment given her by the will of testator:—*Held*: testatrix had shown an intention of taking the property subject to the power of appointment out of the instrument creating the power by treating it as forming one mass with her own property. It passed, therefore, as if she had died intestate in respect of it & went to the persons entitled according to the Administration of Estates Act, 1925 (c. 23).—*Re VANDER BYL, FLADGATE v. GORE*, [1931] 1 Ch. 216; 100 L. J. Ch. 108; 144 L. T. 401; 74 Sol. Jo. 770.

**521a.** — *Subsequent confirmation by codicil.*—(1) Testatrix in her will expressed an intention to exercise a power to appoint a life interest in certain trust funds or other

property to her husband, but at the date of the will no such power had been created. Subsequently, a power was created whereby she was given a power to appoint a life interest in certain trust funds to her husband, & subsequently to the creation of such power the testatrix made a codicil confirming her will in respect *inter alia* to the exercise of such power:—*Held*: there was a valid exercise of the power of appointment of such life interest in favour of her husband.

(2) Subsequently to the date of the codicil another power was created, whereby the testatrix was given a power to appoint a life interest in other trust funds to her husband but before her death she made no other will or codicil nor executed any other instrument whereby she exercised such other power:—*Held*: there had been no valid appointment of such life interest in such other trust funds in favour of her husband.—*Re BOWER, BOWER v. MERCER*, [1930] 2 Ch. 82; 99 L. J. Ch. 17; 141 L. T. 639; 143 L. T. 674.

521b. — No subsequent exercise of power.]—*Re BOWER, BOWER v. MERCER*, No. 521a, *ante*.

538. *Add. Annotation*:—*Generally, Refd. Re Beresford's Will Trusts, Sturges v. Beresford* [1938] 3 All E. R. 566.

539. *Add. Annotation*:—*Refd. Re Beresford's Will Trusts, Sturges v. Beresford*, [1938] 3 All E. R. 566.

540. *Add. Annotation*:—*Refd. Re Beresford's Will Trusts, Sturges v. Beresford*, [1938] 3 All E. R. 566.

550. *Add. Annotation*:—*Refd. Re Beresford's Will Trusts, Sturges v. Beresford*, [1938] 3 All E. R. 566.

551. *Add. Annotation*:—*Refd. Re Beresford's Will Trusts, Sturges v. Beresford*, [1938] 3 All E. R. 566.

555. *Add. Annotation*:—*As to (1) Refd. Re Nicholson's Settlement, Molony v. Nicholson*, [1938] 3 All E. R. 532.

562. *Add. Annotation*:—*Refd. Re Beresford's Will Trusts, Sturges v. Beresford*, [1938] 3 All E. R. 566.

585. *Add. Annotation*:—*Refd. Re Beresford's Will Trusts, Sturges v. Beresford*, [1938] 3 All E. R. 566.

587a. Residue of "estate & effects of which I shall have power to dispose."—The testator had a special power of appointment among his children over the residue of his sister's estate exercisable by will. In two clauses of his will, one making a specific legacy & the other giving certain chattels to a trustee to hold upon certain trusts, he used the words "I give & appoint." In these clauses the word "appoint" was clearly surplusage. The clause dealing with his residuary estate was, so far as material, as follows: "I give

devise bequeath & appoint" the residue of the estate "to which I shall be entitled or of which I shall have any power to dispose at my decease" to the trustee upon trust for sale & conversion to apply the proceeds to the payment of debts, testamentary expenses & duties on legacies given free of duty, with directions on investment, followed by a life interest to his widow, who was not an object of the power, & subject thereto, for his children, who were objects of the power:—*Held*: testator had not by his will exercised the special power of appointment.—*Re BERESFORD'S WILL TRUSTS, STURGES v. BERESFORD*, [1938] 3 All E. R. 566; 82 Sol. Jo. 664.

627. *Add. Annotation*:—*Consd. Elliot v. Joicey*, [1935] A. C. 209.

637a. —.]—*GUINAND v. NAISH* (1845), 6 L. T. O. S. 18; 9 Jur. 703.

652. *Add. Annotation*:—*Refd. Re Vander Byl, Fladgate v. Gore*, [1931] 1 Ch. 216.

671a. Appointment to husband by will—Husband predeceasing testatrix—No intention to benefit husband's estate.]—A wife, who was of illegitimate birth, having under the trusts of her marriage settlement, made in 1892, a general testamentary power of appointment in default of issue, by her will in express exercise of that power & "to the intent that this my will shall take effect, whether I survive or predecease my husband," appointed the residue of the settled funds, after payment thereof of her debts & some legacies, to her husband for his own use & benefit absolutely. Her will contained no other disposition than the appointment. Her husband having predeceased her & she having died on Mar. 11, 1932, childless:—*Held*: even assuming testatrix knew that, if she died childless & her husband predeceased her, the settlement funds would in consequence of her illegitimacy pass to the Crown, the prefatory words were ineffectual to appoint the residue of those funds to the exors. of the husband, so as to make it part of his estate, & the appointment failed by lapse.—*Re LADD, HENDERSON v. PORTER*, [1932] 2 Ch. 219; 101 L. J. Ch. 392; 147 L. T. 433.

723. *Add. Annotation*:—*Refd. Re Phillips, Lawrence v. Huxtable*, [1931] 1 Ch. 347.

726. *Add. Annotation*:—*Consd. Re Phillips, Lawrence v. Huxtable*, [1931] 1 Ch. 347.

730. *Add. Annotation*:—*Refd. I. R. Comrs. v. Clarkson-Webb*, [1933] 1 K. B. 507.

748. *Add. Annotation*:—*Consd. Re Chartres, Farman v. Barrett*, [1927] 1 Ch. 466.

751. *Add. Annotation*:—*Refd. Chamberlain v. Haig Thomas* (1933), 17 Tax Cas. 595.

768. *Add. Annotation*:—*Refd. Re Mathieson*, [1927] 1 Ch. 283.

#### PART IV. SECT. 10, SUB-SECT. 2.— B. (a).

683 ii. —.]—In execution of the powers reserved by a marriage settlement, a revocable appointment was made by deed whereby the appointors, husband & wife, directed the trustees to hold the net purchase-money already received & to be received in respect of a certain contract of sale upon trust, on the death of the survivor of the

appointors, as to three several sums of £15,000 for each of three of their daughters, & as to £12,500 for their fourth daughter, & as to the "remainder" one moiety to each of their two sons. The contract of sale referred to was for a sum of £100,000, of which £20,000 had already been paid. The contract of sale was subsequently rescinded on the purchaser paying a further sum of £20,000:—*Held*: in the events which had happened, the

principle that, where a person disposing of a sum among different persons acts on the assumption that he is dealing with a fund of specific amount, & gives part of the fund to one or more persons & the residue to another, if the fund falls short, all the gifts abate proportionately, would not apply, & the sons would get nothing under the gift of the "remainder."—*A'BECKETT v. TRUSTEES, EXECUTORS & AGENCY CO.* (1908), 5 C. L. R. 512.—*AUS.*

771. *Add. Annotation* :—*Generally, Rejd. Re Beresford's Will Trusts, Sturges v. Beresford*, [1938] 3 All E. R. 506.

783. *Add. Annotation* :—*Rejd. Re Bower Williams, Ex p. Trustee*, [1927] 1 Ch. 441.

## Part V.—Appointment Not in accordance with Terms of Power.

830a. — *Appointment to trustees of child's marriage settlement—Share settled.*—A daughter being entitled under the marriage settlement of her father & mother to such share & interest in land & money as the surviving mother should appoint, provided by her own marriage settlement that all such share & interest to which she should become entitled, under her mother's settlement, should be vested in trustees to the use of her intended husband for life, remainder to herself for life, remainder to the children of the

marriage. Four years after the marriage the mother appointed a sum to be paid to the trustees of the daughter's settlement, upon the uses therein expressed, in satisfaction of the daughter's share & interest under the marriage settlement of the father & mother :—*Held* : this was substantially an appointment to the daughter, & valid.—*LIMBERT v. GROTE* (1832), 1 My. & K. 1 ; 39 E. R. 581 ; *sub nom. LAMBARD v. GROTE*, 2 L. J. Ch. 10.

## Part VI.—Excessive, Defective, and Fraudulent Appointments.

857a. — — —.—[A testator, in exercise of a special power of appointment, conferred on him, as the survivor of his wife, by a marriage settlement, dated Apr. 29, 1878, & a further settlement, dated Dec. 26, 1890, appointed that the trustees of both settlements should, after his death, stand possessed of the property subject to the trusts, in trust as to three fourth parts for a named son & as to the remaining fourth part for another named son : "Provided always & I declare that each of my sons shall under the equitable doctrine of election be bound within such time as my trustees shall appoint to settle at the cost of my estate & to the satisfaction of my trustees his appointed share under each of the said settlements upon the trusts hereinafter declared concerning his share in my residuary estate & so as to form one fund therewith for all purposes & my trustees may at their absolute discretion decide any question as to the amount & manner in which in case of default compensation is to be made." The testator settled his residuary estate upon trusts in favour of the same two sons & their issue in the same proportions :—*Held* : the conditions sought to be imposed by the proviso were ineffective & invalid, & the sons took under the appointment free from any such conditions.—*Re NEAVE, NEAVE v. NEAVE*, [1938] Ch. 793 ; [1938] 3 All E. R.

220 ; 107 L. J. Ch. 395 ; 159 L. T. 210 ; 54 T. L. R. 921 ; 82 Sol. Jo. 546.

872a. — *Appointment on "protective trusts."*—*Re BOULTON'S SETTLEMENT TRUST, STEWART v. BOULTON*, No. 187b, *ante*.

887. *Add. Annotation* :—*Consd. Re Payne, Taylor v. Payne*, [1927] 2 Ch. 1.

891. *Add. Citation* :—*subsequent proceedings*, 2 Bro. C. C. 344, L. C.

910a. — — —.—[*Re TURNER, HUDSON v. TURNER*, No. 360a, *ante*.

965. *Add. Annotation* :—*Rejd. Re Nicholson's Settlement, Molony v. Nicholson*, [1938] 3 All E. R. 532.

971. *Add. Annotation* :—*As to (1) Rejd. Re Mills, Mills v. Lawrence*, [1930] 1 Ch. 440.

986. *Add. Annotation* :—*Consd. Re Phillips, Lawrence v. Huxtable*, [1931] 1 Ch. 347.

1004. *Add. Annotation* :—*Fold. Re Penrose, Penrose v. Penrose* (1933), 49 T. L. R. 285.

1005. *Add. Annotation* :—*Rejd. Re Penrose, Penrose v. Penrose* (1933), 49 T. L. R. 285.

1005a. — — —.—[By her will E. J. P., a married woman, gave devised & bequeathed all her residuary real & personal estate to her trustees upon trust to pay the income thereof to her husband J. D. P. for his life & from

### PART V. SECT. 3.

sa. *Appointment to issue of child—Where not among objects of power.*—*MOUBRAY'S TRUSTEES v. MOUBRAY*, [1929] S. C. (Ct. of Sess.) 254.—SCOT.

sb. *Power to appoint among children—Appointment to child—With power to appoint to child's children—Void.*—*Re MCLAN, PERPETUAL EXORS. & TRUSTEES ASSOCN. OF AUSTRALIA, LTD. v. LAWRENCE*, [1929] Argus L. R. 216.—AUS.

### PART VI. SECT. 1, SUB-SECT. 2.—A.

1 i. — — —.—[Where the exercise of a power, in so far as it purported to

reduce the right of fee conferred on the objects of the power to a life rent, was *ultra vires* & invalid :—*Held* : as it was impossible to separate the valid from the invalid portions of the appointment without dislocating the whole scheme of division contemplated by the trust, the whole exercise of the power fell to be disregarded.—*MACKENZIE'S TRUSTEES v. MACKENZIE*, [1927] S. C. 424.—SCOT.

### PART VI. SECT. 2, SUB-SECT. 1.

e i. — — —.—[Testator by his will directed trustees to stand possessed of his trust estate upon trust for any one or more of his children & in such manner as his wife should by deed or

by will appoint. After his death, the trustees, one of whom was the wife, transferred all the trust estate except one parcel of land to certain of the children, purporting to do so in pursuance of the power of appointment contained in the will. The wife by her will devised, bequeathed, & appointed all her real & personal estate over which she had a general power of appointment to one particular child :—*Held* : the power of appointment created by testator in his will was a special power, & it was not executed by the exercise of the general power of appointment by the wife in her will.—*Re HOGARTH*, [1935] Q. S. R. 211.—AUS.

& after his death upon trust for (*inter alia*) such of the following persons as her said husband should by deed or will appoint—namely, any issue (immediate or remote) of her husband's late father subject to the rule against perpetuities. In default of the exercise of the power & subject to any partial exercise thereof testatrix declared that her residuary estate should be held in trust for her four named sons as therein mentioned. Testatrix having died was survived by her husband, who by a deed poll executed shortly afterwards purported to appoint a certain sum of testatrix's residuary estate to himself. He subsequently died, & on his death the question arose what estate duty became payable in respect of the residuary estate of testatrix. The point having arisen whether under the circumstances & having regard to the power of appointment given to the husband by the will of testatrix he was a person "competent to dispose" under Finance Act, 1894 (c. 30), s. 5 (2), of the said residuary real & personal estate; & whether, therefore, this residuary estate & the moneys which he purported to appoint under the deed poll were liable for any & if so what estate duty, an originating summons was taken out by his trustees for the purpose (*inter alia*) of determining this question:—*Held*: the husband was himself an object of the power & could, after the death of testatrix, appoint to himself the whole of the fund by deed. Further, he was a person "competent to dispose" within Finance Act, 1894 (c. 30), s. 5 (2), & therefore estate duty became payable on his death in respect of such part of testatrix's residuary estate as then remained subject to the trusts of her will.—*Re* PENROSE, *PENROSE v. PENROSE*, [1933] Ch. 793; 102 L. J. Ch. 321; 149 L. T. 325; 49 T. L. R. 285.

1024. *Add. Annotation*:—*Refd. Re Nicholson's Settlement, Molony v. Nicholson*, [1938] Ch. 308.

1036a. —. —. —. In 1933, a lady over eighty years of age, & then unmarried, who had a power

of appointment of the income derived from settled funds in favour of any husband who should survive her, but no other property of which she could dispose by will, was anxious to benefit some friends who had been kind to her. She got into touch with the solrs. acting for the trustees of the settlement, & through them tried to induce the other beneficiaries under the settlement to come to some family arrangement whereby some part of the capital of the settled funds might be made disposable by her upon her releasing her power of appointment. The beneficiaries being unwilling to come to any such arrangement, she suggested that she might marry & appoint the income of the settlement to a husband, but this did not alter the decision of the beneficiaries not to come to any arrangement. In 1931, she married a gentleman not quite fifty years of age, & though they saw each other frequently, the lady continued to live with her friends until her death in 1936. Before her death, she exercised the power of appointment in favour of her husband. There was no evidence that the husband was under any legal or moral obligation to use the money otherwise than as he should think fit. It was contended that this was a fraudulent exercise of the power:—*Held*: as there was no evidence of any arrangement or bargain between the appointor & the appointee, & as the power was a power to appoint in favour of one object only, & not a power to select from a class of persons, the power was validly exercised, & no fraudulent exercise of the power was established.—*Re* NICHOLSON'S SETTLEMENT, *MOLONY v. NICHOLSON*, [1938] 3 All E. R. 532; 107 L. J. Ch. 338; 159 L. T. 314; 54 T. L. R. 1060; 82 Sol. Jo. 603, C. A.

1048. *Add. Annotation*:—*Refd. Re Nicholson's Settlement, Molony v. Nicholson*, [1938] 3 All E. R. 532.

1051. *Add. Annotation*:—*As to* (1) *Refd. Re Lanyon, Lanyon v. Lanyon*, [1927] 2 Ch. 264.

## Part VIII.—Extinguishment and Suspension of Powers.

1093. *Add. Annotation*:—*Consd. Re Mills, Mills v. Lawrence*, [1930] 1 Ch. 654.

1101a. —. —. —. *Power appendant or appurtenant*.—A testator by his will directed the income of his *net* residuary estate to be accumulated for a period of twenty-one years from his death, & subject to certain trusts in favour of an infant grandson, & his issue which failed owing to the death of the grandson unmarried, declared that the trust fund & all statutory accumulations of income were to

be held upon such trusts for the benefit of all or any one of the children & remoter issue of testator's father, who in the opinion of testator's brother, one of the two trustees of the will, should evidence an ability & desire to maintain the family fortune by replacing the sums of which it had been depleted by death duties & other taxation, as testator's brother should by any deed revocable or irrevocable appoint, & in default of such appointment in trust for such brother

### PART VII.

1085 i. *Not aided by equity*.—Under a settlement made in respect of a previous marriage a person reserved power to appoint in favour of any after-taken wife a specified interest in certain property. The power was exercisable by deed executed prior to remarriage or by will. The first marriage was dissolved. A proposal of marriage made by him to another lady was accepted

subject to her father's consent. The father required information as to his financial position & what provision he proposed to make for his prospective wife. In a document written by him, but unsigned, he gave a short account of the estate from which his property was derived, & how he had settled his interests therein, & continued: "The effect of the estate on D. In the event of my death before D.—D. will be paid a third of the estate during her life-

time." The marriage was duly celebrated, but four months later he died intestate:—*Held*: the document did not evidence an intention to execute the power: therefore, as it was a case of non-execution of a power, & not defective execution, it could not be aided by the ct.—*ALISON v. ALISON* (1934), 51 C. L. R. 653; 34 S. L. N. S. W. 488; 51 N. S. W. W. N. 172; 8 A. L. J. 194.—*AUS.*

absolutely :—*Held* : the power was a power appendant or appurtenant & not a power coupled with a trust or a duty in the nature of a trust, & accordingly that it could be validly released by the donee.—*Re MILLS, MILLS v. LAWRENCE*, [1930] 1 Ch. 654; 99 L. J. Ch. 396; 143 L. T. 409; 46 T. L. R. 328; 74 Sol. Jo. 437, C. A.

1102. *Add. Annotation* :—*Distd. Re Mills, Mills v. Lawrence*, [1930] 1 Ch. 654.

1103. *Add. Annotation* :—*Distd. Re Mills, Mills v. Lawrence*, [1930] 1 Ch. 440.

1104. *Add. Annotation* :—*Distd. Re Mills, Mills v. Lawrence*, [1930] 1 Ch. 654.

1105a. *Mutual wills—Wife expressly refraining from exercising power.*—Where by her will

the wife expressly refrained from exercising a power of appointment, which she had, but abstained from extinguishing it, & confined the operation of her will to her own property, & there was nothing in the husband's will, which either put the wife to her election or put her in the position of seeking at the same time to approbate & to reprobate its provisions :—*Held* : she was in no way precluded from exercising her power of appointment by a subsequent will.—*GRAY v. PERPETUAL TRUSTEE CO.*, [1928] A. C. 391; 97 L. J. P. C. 85; 139 L. T. 469; 44 T. L. R. 654, P. C.

1111. *Add. Annotation* :—*Refd. Re Mills, Mills v. Lawrence*, [1930] 1 Ch. 654.

1115. *Add. Annotation* :—*Refd. Re Mills, Mills v. Lawrence*, [1930] 1 Ch. 440.

## Part IX.—Powers in the Nature of Trusts.

1135. *Add. Citation* :—*on appeal, sub nom. WALTER v. MAUNDE* (1815), 19 Ves. 424, L. C.

*Add. Annotations* :—*Refd. Re Sinclair's Settlement, Crump v. Leicester* (1886), 56 L. T. 83. *Mentd. Christian v. Foster* (1846), 2 Ph. 161.

1151a. *Validity—Power to donee to appoint to any one "other than herself."*—A power to a donee to appoint the income of a fund to any person, "other than herself," or persons or charitable institution or institutions, is valid.

Testator gave his residuary estate to his trustee in trust to pay the income thereof to any person, "other than herself," or persons or charitable institution or institutions, & in such shares & proportions as his sister, J., should from time to time during her lifetime

direct in writing, & from & after her decease in trust as to both capital & income for the Imperial Merchant Service Guild for the benefit of their stress fund absolutely :—*Held* : the trust was a valid & effectual trust, & the power conferred thereby on J. was a valid power, exercisable by her.—*Re PARK, PUBLIC TRUSTEE v. ARMSTRONG*, [1932] 1 Ch. 580; 101 L. J. Ch. 295; 147 L. T. 118.

1213. *Add. Annotation* :—*Refd. Re Blackwell, Blackwell v. Blackwell*, [1929] A. C. 318.

1233a. ———.—*DAVIE v. HOOPER* (1711), 6 Bro. Parl. Cas. 51; 2 E. R. 926; *sub nom. DAVY v. HOOPER*, 2 Vern. 665; 1 Eq. Cas. Abr. 336, pl. 6, H. L.

*Annotations* :—*Refd. Bellasis v. Uthwatt* (1737), *West temp. Hard.* 273; *Cholmondeley v. Meyrick* (1758), 1 Eden, 77.

## PRACTICE.

See PLEADING & PRACTICE at end of Volume after WORK & LABOUR.



## PRESS AND PRINTING.

## Part II.—Printers and Publishers.

13. After this case add :—  
Printers of bank-notes — Standard of care required.]—See BANKERS, No. 456a.
16. *Add. Annotation* :—Consd. Bradstreets British, Ltd. v. Mitchell (1932), 48 T. L. R. 670.

## Part III.—Editors, Authors, and Journalists.

36. *Add. Annotation* :—Refd. Tolley v. Fry J. S. & Sons (1929), 46 T. L. R. 108.
40. *Add. Annotation* :—Refd. Messenger v. British Broadcasting Co. (1928), 97 L. J. K. B. 251.
44. *Add. Annotation* :—Refd. Messenger v. British Broadcasting Co., [1927] 2 K. B. 543.

## Part IV.—Newspapers.

79. *Add. Annotation* :—As to (2) Refd. Re Nicholson & Sons, Ltd., Application, Re Bass, Ratcliff & Gretton's Trade Mark, [1931] 2 Ch. 1.
83. *Add. Annotation* :—Refd. Cope v. Evans (1875), 30 L. T. 292.
90. *Add. Annotation* :—Refd. Sinanide v. La Maison Kosmeo (1928), 139 L. T. 365.
- 102a. Plumber & Decorator, Gas & Sanitary Engineering Journal—Plumbing & Decorating, Sanitary, Water, & Gas Engineering Chronicle.]—*Held* : there was no such close resemblance of title between these titles as would justify the ct. in granting an injunction restraining the publication of the latter journal.—DALE, REYNOLDS & CO. v. GENERAL NEWSPAPER CO. (1884), 1 T. L. R. 177, D. C.

## Part V. Publications Other than Newspapers.

114. *Add. Annotations* :—Refd. United Indigo Chemical Co. v. Robinson (1931), 49 R. P. C. 178; Reid & Sigrist, Ltd. v. Moss Mechanism, Ltd. (1932), 49 R. P. C. 461.

## PART I. SECT. 2.

sa. *Meaning of printing—Reproduction by Roneo process.*—An accused was charged under sect. 3 (2) of Printing Act, 1899, with having dispersed a pamphlet, upon which the name and place of abode of the printer was not printed. He had distributed papers containing a notification of a lecture to be delivered at a hall. The writing on the papers so distributed was produced by a process known as the "Roneo" process, & the papers did not contain the name and address of the person responsible for their production :—*Held* : the production of writing by the "Roneo" process was not printing within Printing Act, 1899, & accused was not guilty of the offence charged.—R. v. BANKS (1932). 32 S. R. N. S. W. 516; 49 N. S. W. N. 193.—AUS.

sd. *Printer also publisher.*—Where the same person or body is both the printer & publisher of a newspaper the printing thereon of the statement that it is "published by" said person or body is a substantial & sufficient compliance with sect. 10 of Newspapers Act, R. S. M., 1913, which provides that in some part of every newspaper there shall be printed the real name "of every printer & publisher thereof."—SEDIK v. POLISH WORKERS' ASSOC., [1937] 2 W. W. R. 67.—CAN.

## PART II. SECT. 1.

sa. *Liability—In general.*—HAR SWARUP v. MUHAMMAD SIRAJ (1928), I. L. R. 50 All. 806.—IND

sb. *Right of action for work done*—

*Preparation of layout & cover—No order for printing given.*—MORTIMER CO., LTD. v. FRONTENAC BREWERIES, LTD., [1930] 1 D. L. R. 182.—CAN.

## PART III. SECT. 3.

sc. *Duty to become acquainted with his duties & liabilities.*—K. E. v. MAUNG TU SAW (1927), I. L. R. 6 Ban. 39.—IND.

st. *Contract in restraint of trade—What amounts to.*—A contract to serve as a journalist for two years contained a provision that the journalist would not, without the previous consent in writing of the co. contribute any articles or supply any information to any newspaper published or printed in Australasia with one named exception. During her contract she was bound to supply a weekly page to the newspaper of her employer. During the time of her contract the journalist ceased to supply this weekly page; she was offered employment by another newspaper, which published an announcement that the journalist was exclusively engaged by that newspaper. The journalist also informed her previous employer that she would not supply any more matter for its newspaper. An interlocutory injunction was granted prohibiting the journalist from contributing to any newspaper published & printed in Australasia (with the exception mentioned above), & a corresponding injunction was granted against the other newspaper :—*Held* : it did not clearly appear on the evidence that the clause restricting contributions to other newspapers was void or an injunction was an

inappropriate remedy.—GORDON v. SMITH'S NEWSPAPERS, LTD., [1931] S. A. S. R. 307.—AUS.

## PART IV. SECT. 1.

sd. *What are.*—The "Social & Industrial Review," a publication printed & published by the Dept. of Labour appearing once a month & containing some items of news of a special character, but principally articles upon industrial & economic subjects :—*Held* : not to be a newspaper within sect. 7 (2) of Act 27 of 1925.—R. v. LEWIN, [1930] App. D. 344.—S. AF.

st. *Local newspaper—What is.*—"Local newspaper" in sect. 55 (2) of Railways Act means a newspaper which is issued from the locality & not one which, issued from elsewhere, may be read in the locality.—SECRETARY OF STATE FOR INDIA IN COUNCIL v. HARNARAIN BENGALCHAND (1931), I. L. R. 53 All.—IND.

## PART IV. SECT. 2, SUB-SECT. 2.—A.

sm. *Use of disused name—Action for passing off.*—The mere fact of a newspaper having ceased to use a name that had become associated with the goodwill of its business was held to be in itself no absolute bar to a right of action for "passing-off" by use of the disused name.—"INDEPENDENT" NEWSPAPERS v. "IRISH PRESS," [1932] I. R. 615.—IR.

## PART V.

sl. *What amounts to printing—In Press Act.*—The operation of multiplying copies by means of a cyclostyle

115a. Title of publication—Infringement of right of property—What amounts to.]—This action was brought to restrain defts., Sir Isaac Pitman & Sons, Ltd., from selling or offering for sale two books which they had recently put on the market entitled: "How to appeal against your rates within the Metropolis" & "How to appeal against your rates without the Metropolis" as being books offered for sale under titles likely to be confused with two books published by pltf. entitled: "How to appeal against your rates in the Metropolis," & "How to appeal against your rates outside the Metropolis." Pltf.'s books were first published in the year 1887 & went through several editions. The books had been extensively advertised

& the last editions of the books were published in Nov. 1929. Defts.' books were first published in Jan. 1930. Notwithstanding the fact that it was proved defts.' books had on one occasion been confused with pltf.'s books it was held not to be established by the evidence that defts. had been passing off their books as the books of pltf. :—*Held*: the words "How to Appeal against your Rates" which were fairly descriptive of the contents of defts.' book as well as of pltf.'s, had not acquired a secondary or special meaning as meaning pltf.'s books only. The action was dismissed with costs.—*MATHIESON v. PITMAN (SIR ISAAC) & SONS, LTD. (1930), 47 R. P. C. 541.*

## Part VI.—Advertisements.

119. *Add. Annotation*:—*Consd. R. v. London County Council, Ex p. Entertainments Protection Assocn., Ltd., [1931] 2 K.B. 215; Kitchener v. Evening Standard Co., [1936] 1 All E. R. 48.*

After this case add :—

—.]—*See CRIMINAL LAW, Nos. 8178a, 8178b, ante.*

## Part IX.—Stationery Office.

140. After this case add :—

—.]—*See, also, COPYRIGHT, Vol. XIII., pp. 198, 199, Nos. 333-343.*

machine is a printing operation within Press & Registration of Books Act, 1867.—*RAMESHWAR PRASAD VERMA v. KING-EMPEROR (1932), 1. L. R. 10 Pat. 492.—IND.*

### PART VI. SECT. 4.

*st. Action for refusal to insert ]—*

Pltf. published the programmes for all the motor cycle race meetings conducted by W. A. Speedways, Ltd. Pltf.'s canvasser interviewed deft., & obtained from him a written order to insert a full page advertisement in each issue of the programme at the rate of £2 per issue. After the advertisement

had appeared several times, deft refused to go on with the arrangement :—*Held*: on the facts there was a valid contract for the insertion of the advertisement in the whole issue of programmes for the season.—*CUNEEN v. VAN HEURCK & THOMAS, LTD. (1930), W. A. L. R. 13.—AUS.*

## PRISONS.

## Part II.—Prison Officers.

8a. — Detention after receipt of remission marks.]—*MORRISS v. WINTER*, No. 34b, *post*.

## Part III.—Prisoners.

32a. Right of prisoner's solicitor to see witness in prisoner's presence.]—A. was to be tried for felony at the assizes for the county of W. & B., a material witness for A., was committed to the W. city prison for further examination, on a charge of felony:—*Held*: before the trial of A., the governor of the W. city prison ought to allow A.'s attorney to see B. in his presence.—*R. v. SIMMONDS* (1835), 7 C. & P. 170.

34a. Receipt of remission marks.]—*MORRISS v. WINTER*, No. 34b, *post*.

SUB-SECT. 2.—ON EARNING REMISSION (Vol. XXXVII., p. 561).

34b. No legal right to discharge.]—M. was convicted in Dec. 1925, of certain misdemeanours & sentenced to two years' imprisonment with hard labour & twelve months' imprisonment, the sentences to run consecutively. An order was made by the ct. directing that he should be detained in prison in conformity with the sentences passed. He was first detained in Portsmouth Prison & afterwards in Pentonville Prison. In Dec. 1927, after M. had been removed to Pentonville Prison, the Governor of Portsmouth Prison indorsed on M.'s stage card the forfeiture of five remission marks, to make it agree with M.'s record. There was a dispute whether or not the Governor

of Portsmouth Prison had ordered the forfeiture of those marks on May 10, 1926, & the jury differed with regard to it. As a result of the forfeiture of those five marks M. was released by the Governor of Pentonville Prison on July 21, 1928, instead of on July 20. On Aug. 2, 1928, M. brought an action against the Governors of both prisons to recover damages for his detention in prison during that one day. The jury found that the Governor of Portsmouth Prison had not acted maliciously nor with intention to injure M., & that he had not made a false statement:—*Held*: the Prison Rules did not confer upon M. any legal right to an earlier discharge by the obtaining of remission marks, & that therefore the action could not succeed against either of the Governors; having regard to the findings of the jury the action could not succeed against the Governor of Portsmouth Prison; that debt. was protected by Public Authorities Protection Act, 1893 (c. 61), as the action was not brought within six months of the act that caused the damage, there being no continuance of the injury or damage, as there was no continuance of the act by that debt. which caused the damage; lastly, the Governor of Pentonville Prison was protected, as he had merely acted in pursuance of the order of the ct.—*MORRISS v. WINTER*, [1930] 1 K. B. 243; 99 L. J. K. B. 101; 142 L. T. 67; 45 T. L. R. 643; 28 Cox, C. C. 687.

## PART III. SECT. 1, SUB-SECT. 1.

aa. Irregular removal of prisoner.—Under Police & Prisons Regulation Act—Release by habeas corpus.]—Police & Prisons Regulation Act, R. S. B. C. 1924, c. 91, s. 33, cannot be invoked to support the A.-G.'s removal from one gaol to another of a prisoner who has been committed for an offence under the Criminal Code. Where a prisoner convicted under the Code was so removed under said section after serving part of his sentence an order for his release was made under habeas corpus.—*R. v. TARCHUK*, [1928] 3 W. W. R. 577; 50 Can. Crim. Cas. 423.—CAN.

ad. Right to free hospital treatment.]—At common law & by statute a municipality must provide any necessary

hospital treatment for a prisoner & the cost cannot be recovered from the prisoner. *LUXENBURG v. BOHNER*, [1937] 2 D. L. R. 69; 11 M. P. R. 412; 68 Can. C. C. 24.—CAN.

## PART III. SECT. 1, SUB-SECT. 3.

ji. Right to take finger prints.]—By regulations dated Aug. 20, 1904, made under Penal Servitude Act, 1891 (c. 69), s. 3, it is enacted that untried criminal prisoners shall not be measured while in prison save by order of the Secretary for Scotland or upon a sheriff's or magistrate's warrant:—*Held*: at common law the police were entitled, without a warrant, to take the finger prints of a person apprehended on a criminal charge but not yet committed to prison, & their right

to do so was unaffected by the statute & regulations referred to.—*ADAIR v. M'GARRY*; *BYRNE v. H.M. ADVOCATE*, [1933] S. C. (J.) 72.—SCOT.

## PART III. SECT. 2, SUB-SECT. 4.

sb. Breach of parole.—Prisoner unlawfully at large.]—A prisoner is unlawfully at large under sect. 185 if he breaks his parole.—*R. v. CLARKE* (1931), 63 Can. C. C. 296.—CAN.

## PART III. SECT. 4, SUB-SECT. 2.

sd. Injury to prisoner.—Non-repair of prisons.—Whether action lies against municipality.]—A municipality is not liable for injury to a prisoner caused by failure to repair a gaol.—*GAUTREAN v. WESTMORELAND*, [1934] 3 D. L. R. 572; 8 M. P. R. 45.—CAN.

## PRIZE LAW AND JURISDICTION.

## Part II.—Rights in Prize.

29a. **Power unaffected by Civil List Acts.**—The power of bounty which the Crown was accustomed to exercise by way of redress of hardship to subjects or neutrals from decrees of the Prize Ct. exists unimpaired by the Civil

List Acts.—*THE ODESSA*, *THE WOOLSTON*, [1916] 1 A. C. 145; 85 L. J. P. C. 49; 114 L. T. 10; 32 T. L. R. 103; 60 Sol. Jo. 292; 13 Asp. M. L. C. 215, P. C.

*Annotation* :—*Consd.* *The Zamora*, [1916] 2 A. C. 77.

## Part III.—Enemy Character.

176. *Add. Annotation* :—*Refd.* *Sassoon v. International Banking Corp.*, [1927] A. C. 711.

192. *Add. Annotation* :—*Refd.* *Allgemeine Versicherungs-Gesellschaft Helvetia v. German Property Administrator*, [1931] 1 K. B. 672.

220. *Add. Annotation* :—*Distd.* *Allgemeine Versicherungs-Gesellschaft Helvetia v. German*

*Property Administrator*, [1931] 1 K. B. 672.

220. After this case add :—

**Abandonment to neutral underwriter by enemy—After seizure in prize—Detention under Order in Council—Application of Trading with the Enemy Amendment Act, 1914 (c. 12), s. 6.]—See ALIENS, No. 389a.**

## Part IV.—Capture.

327. *Add. Annotation* :—*As to* (1) *Refd.* *Allgemeine Versicherungs-Gesellschaft Helvetia v.*

*German Property Administrator*, [1931] 1 K. B. 672.

## Part V.—Rights, Duties and Liabilities of Captors.

497. *Add. Annotation* :—*Refd.* *Croft v. Dunphy* (1932), 48 T. L. R. 652.

720. *Add. Annotation* :—*Consd.* *The Bathori* [1933] P. 22.

## Part VII.—Contraband.

780. *Add. Annotation* :—*Refd.* *Foster v. Driscoll*, *Lindsay v. Attfield*, *Lindsay v. Driscoll*, [1929] 1 K. B. 470.

866. *Add. Annotation* :—*Generally*, *Refd.* *Sassoon v. International Banking Corp.*, [1927] A. C. 711.

## Part IX.—Jurisdiction of Prize Courts.

1066. *Add. Annotation* :—*Refd.* *The Bathori*, [1933] P. 22.

*v. German Property Administrator*, [1931] 1 K. B. 672.

1071. *Add. Annotation* :—*Generally*, *Consd.* *Allgemeine Versicherungs-Gesellschaft Helvetia*

1080. *Add. Annotation* :—*Refd.* *Allgemeine Versicherungs-Gesellschaft Helvetia v. German Property Administrator*, [1931] 1 K. B. 672.

PART V. SECT. 4, SUB-SECT. 3.—A.

571 i. *Liability for wrongful capture.*  
—*THE ZODIACK* (1812), *Stewart*, 333.—  
CAN,

PART VI. SECT. 4, SUB-SECT. 6.

1. *Revsd.*, *Stewart*, 38, n.

PART VI. SECT. 7.

n. *Revsd.*, *Stewart*, 38, n.

PART VII. SECT. 6, SUB-SECT. 4.

r. *Revsd.*, *Stewart*, 122, n.

## Part X.—Claims.

**1103a.** ——— **Enemy country annexed to Allied country by treaty—"Property rights & interests" of nationals transferred to Allied Powers.]**—In 1930 applts., then & since an Italian corpn., brought an action in the Prize Ct. claiming damages against the Crown on the ground that in Sept. 1914, a British cruiser had sunk their steamship while she was proceeding from Havre to Vigo under a safe conduct issued by the French authorities & confirmed by the British. The ship flew the Austro-Hungarian mercantile flag, & throughout the war applts. were nationals of Hungary. They contended, however, that the treaty of peace with Hungary (the Treaty of Trianon) was not binding upon them, because before it came into effect they had ceased to be nationals of Hungary, as Fiume, where they were domiciled, had been recognised as an independent state; further, that the treaty, upon its true construction, did not adversely affect their claim. The Treaty of Trianon provided by sect. IV., art. 232: "the question of private property, rights & interests in an enemy country shall be settled according to the principles laid down in this sect. & to the provisions of the annex hereto"; & by the annex: "No claim or action shall be made or brought against any Allied or Associated Power . . . by any Hungarian national, or by or on behalf of any national of the former Kingdom of Hungary, wherever resident, in respect of any act or omission with regard to his property, rights or interests during the war. . . ." An Order

in Council declared that the above provisions of the treaty should have full force & effect as law. The Order was made under the Treaty of Peace (Hungary) Act, 1921 (c. 11), & by sect. 1 (2) of that Act was to have "effect as if enacted in this Act":—*Held*: applts.' right, if any, to claim before an English Prize Ct. would be property in England, & the above provision of the annex defeated it. That provision was clearly intended to cover applts., & having regard to the terms of the 1921 Act any English Ct., whether in prize or not, was precluded from considering whether in international law the treaty bound those who at its effective date were no longer Hungarian nationals.—*THE BATHORI*, [1934] A. C. 91; 103 L. J. P. 25; 150 L. T. 221; 50 T. L. R. 102; 18 Asp. M. L. C. 458, P. C.

**1104.** *Add. Annotation*:—*Refd.* *The Bathori*, [1933] P. 22.

**1110.** *Add. Annotation*:—*Refd.* *Buckland v. R.* (1933), 102 L. J. K. B. 404.

**1121.** *Add. Annotation*:—*Refd.* *Allgemeine Versicherungs-Gesellschaft Helvetia v. German Property Administrator*, [1931] 1 K. B. 672.

**1131.** *Add. Annotation*:—*Consd.* *Allgemeine Versicherungs-Gesellschaft Helvetia v. German Property Administrator*, [1931] 1 K. B. 672.

**1177a.** ———.]—*THE ANNA CHRISTIANA* (1778), *Hay & Marr*. 161; 165 E. R. 37.

**1189a.** ———.]—*THE VROU HENRIETTA* (1803), 5 Ch. Rob. 75, n.; 165 E. R. 702.

*Annotation*:—*Apld.* *The Roland* (1915) 84 L. J. P. 127.

## Part XI.—Procedure.

**1302a.** ——— **Ship formerly enemy property—Transfer of ownership.]**—*THE KANKAKEE*,

*THE HOCKING*, *THE GENESEE* (1917), 8 Lloyd, Pr. Cas. 74, P. C.

## Part XII.—Prize Salvage.

**1419.** *Add. Annotation*:—*Consd.* *Admiralty Comrs. v. Valverde Owners*, [1937] 1 K. B. 715.

## Part XVI.—Requisition by Admiralty.

**1563.** *Add. Annotation*:—*Consd.* *The Bathori*, [1933] P. 22.



## PUBLIC AUTHORITIES, BODIES AND OFFICERS.

## Part I.—Acts of State.

4. *Add. Annotation*:—**Consd.** *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantam S.S. Co.* (No. 2), [1938] 3 All E. R. 80.
10. *Add. Annotation*:—**Refd.** *Compania Naviera Vascongada v. Cristina S.S.*, [1938] A. C. 485.
11. *Add. Annotations*:—**Consd.** *Musmann v. Engelke*, [1928] 1 K. B. 90. **Refd.** *The Arantzazu Mendi*, [1938] 3 All E. R. 333; *Compania Naviera Vascongada v. Cristina S.S.*, [1938] A. C. 485.
12. *Add. Annotation*:—**Refd.** *Compania Naviera Vascongada v. Cristina S.S.*, [1937] 4 All E. R. 313.
13. *Add. Annotations*:—**Consd.** *Bank of Ethiopia v. National Bank of Egypt & Liguori*, [1937] 3 All E. R. 8. **Refd.** *Lazard Bros. & Co. v. Midland Bank, Ltd.* (1932), 148 L. T. 242; *Re Russian Bank for Foreign Trade*, [1933] Ch. 745; *The Arantzazu Mendi*, [1938] 3 All E. R. 333; *Banco de Bilbao v. Rey*, [1938] 2 All E. R. 253; *Compania Naviera Vascongada v. Cristina S.S.*, [1937] 4 All E. R. 313; *Haile Selassie v. Cable & Wireless, Ltd.*, [1938] 3 All E. R. 384.
14. *Add. Annotations*:—**Apld.** *Engelke v. Musman*, [1928] A. C. 433. **Refd.** *Compania Naviera Vascongada v. Cristina S.S.*, [1938] A. C. 485.
16. After the cross-reference following this case add "**Status of person claiming diplomatic privilege.**"]—*See* CONSTITUTIONAL LAW, No. 418a."
47. *Add. Annotations*:—**Folld.** *Civilian War Claimants Assocn., Ltd. v. R.*, [1932] A. C. 14. **Consd.** *Hungarian Property Administrator v. Finegold* (1931), 100 L. J. K. B. 383. **Apld.** *German Property Administrator v. Knoop* (1932), 49 T. L. R. 109. **Refd.** *Re Mason* (1928), 97 L. J. Ch. 321.
- 48a. —.—]—By Treaty of Versailles (Art. 232), Germany undertook to make compensation for all damage done to the civilian population of the Allied & Associated Powers & to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by the aggression of Germany & her allies, & moneys were received by the Crown under this Article. By a petition of right the suppliants, as assignees of civilian claimants who had suffered loss or damage by German aggression during the War, claimed on their behalf payment of compensation out of the moneys paid or payable as reparations under the above Article. The case made by the petition was that the claimants had sent particulars of their claims, first, to Foreign Claims Office &, afterwards, to Reparation

Claims Department in accordance with the instructions of His Majesty's Govt., that these claims had been duly verified by the Govt., & were included in the agreed total of claims for reparations which Germany was required to pay under the treaty, & that the Crown in inviting the claimants to submit their claims had constituted itself an agent or a trustee for claimants in respect of any money received by it from Germany on account of reparations, & that any such money was money had & received by the Crown to the use of claimants:—*Held*: on demurrer by the Crown, the petition afforded no ground for the contention that the money received under the treaty was received by the Crown as an agent or a trustee for claimants, or as money had & received to their use, & was bad as disclosing no ground of claim cognizable by the ct.—**CIVILIAN WAR CLAIMANTS ASSOCN., LTD. v. R.**, [1932] A. C. 14; 101 L. J. K. B. 105; 146 L. T. 169; 48 T. L. R. 83; 78 Sol. Jo. 813, H. L.

*Annotation*:—**Apld.** *German Property Administrator v. Knoop* (1932), 49 T. L. R. 109.

57. *Add. Annotation*:—**Refd.** *Croft v. Dunphy* (1932), 48 T. L. R. 652.

58a. **Dominion statute—Municipal courts will not inquire as to validity.**—On an application by defts., the Grand Trunk Ry. Co. of Canada & the Canadian National Ry. Co. claiming a declaration that two Acts of the Canadian Legislature were *ultra vires*, the judge held that the statement of claim in an action brought by a shareholder, on behalf of himself & all other holders on Jan. 18, 1932, of First Preference stock of the Grand Trunk Ry. Co. of Canada did not disclose any cause of action maintainable in an English Ct.; he had no jurisdiction to deal with it; the matter could not be put right by amendment, & the action must be dismissed.—**BOARDMAN v. GRAND TRUNK RY. CO. OF CANADA** (1933), 49 T. L. R. 218.

66. To the cross-references following this case add "**Decrees of Russian Soviet Government—Effect of.**"]—*See* No. 13, *ante*; COMPANIES, Nos. 8523, 8524, 8527a—8527c; CONSTITUTIONAL LAW, No. 387a; INSURANCE, 712a."

- 66a. —.—]—The English cts. will not inquire into the validity of acts done by a recognised foreign Govt. against its own subjects in respect of property situate in its own territory.

In 1918 a section of Russian revolutionaries took & retained possession of movables in Russia belonging to pltf. against her will. The act of those revolutionaries was subsequently adopted by the Soviet Republic, which was recognised in 1924 by the British

PART I. SECT. 3, SUB-SECT. 1.—**B.**

46 I. *Sovereign power not compellable to account.*—The Crown can only be constituted a trustee by express statutory provisions or a contract to

which the Crown is a party.—**CHURMAN v. R.**, [1934] Ex. C. R. 152.—**CAN.**

## PART I. SECT. 3, SUB-SECT. 3.

59 I. *Municipal courts will not inquire as to validity.*—A British

Indian ct. will not inquire into the legality of acts done by a foreign government against its own subjects in respect of property situate in its own territory.—**CHUNILAL v. CHATURBHUI PIRAMAL** (1931), 1 L. R. 56 Bom. 49.—**IND.**



Government as the *de jure* Govt. of Russia. In 1928 the movables in question were sold in Russia by the Soviet Republic to defts., who brought them to England. In an action by pltf. to recover those movables or damages for their detention or conversion:—*Held*: the action failed, as the ct. could not inquire into the validity of the acts of a foreign sovereign Power which had been

recognised by the Govt. of this country.—*PALEY OLGA PRINCESS v. WEISZ*, [1929] 1 K. B. 718; 98 L. J. K. B. 465; 141 L. T. 207; 45 T. L. R. 365; 73 Sol. Jo. 283, C. A.

*Annotation*:—*Refd. Re Russian Bank for Foreign Trade*, [1933] Ch. 745.

72. *Add. Annotation*:—*Refd. Haile Selassie v. Cable & Wireless, Ltd.*, [1938] 3 All E. R. 677.

## Part III.—Exercise of Statutory Powers, Duties, etc.

84a. *Acquiescence in wrongful exercise*—What amounts to.]—Pltf. does not acquiesce in the wrong-doing of a local authority by simply standing by & assuming that the local authority is acting within its statutory powers.—*PIGGOTT v. MIDDLESEX COUNTY COUNCIL*, [1909] 1 Ch. 134; 77 L. J. Ch. 813; 99 L. T. 662; 72 J. P. 461; 52 Sol. Jo. 698; 6 L. G. R. 1177.

86. *Add. Annotation*:—*Consd. Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401.

88. *Add. Annotation*:—*Refd. Polkinghorn v. Lambeth Borough Council*, [1938] 1 All E. R. 339.

90. *Add. Annotations*:—*Consd. Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159; *Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401. *Refd. Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546.

103. *Add. Annotation*:—*As to* (2) *Refd. Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401.

105. *Add. Annotation*:—*Refd. Edwards v. A.-G. for Canada* (1929), 46 T. L. R. 4.

109. *Add. Annotations*:—*Consd. Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 336. *Refd. A.-G. & Taylor & Son, Ltd. v. Todmorden Borough Council*, [1937] 4 All E. R. 588.

114. *Add. Annotation*:—*Refd. Farnworth v. Manchester Corp.*, [1929] 1 K. B. 533.

114a. —.]—Pltfs. were the freeholder & leaseholders of two houses & a piece of vacant land between the two houses. Both the houses & the land abutted on the public highway, & immediately in front of the piece of vacant land the Swindon Corp. had erected a shelter for the use of persons intending to travel by buses owned by the corp. & by omnibus cos. The shelter had been erected in pursuance of statutory powers, which were general powers to erect such shelters on the public streets. The private Act giving these powers included an express prohibition of the erection of such shelters in places where there would be interference with the access to the property of the Great Western Ry. Co. without the consent of that co. Upon the facts, it was held that the erection of the shelter was an interference with the rights of pltfs., but that the corp. had acted reasonably:—*Held*: although the corp. was not bound by the Act to erect the shelter in a specific place, it was authorised by the Act to do something which the legislature must have contemplated would be an interference with private rights, & as it had acted reasonably in choosing the site of the shelter, pltfs. were not entitled to damages for interference.—*EDGINGTON, BISHOP & WITBY v. SWINDON BOROUGH*

### PART II.

8a. *Remuneration.*—(1) The fact that a statute which creates a public office provides that the remuneration of the officer as fixed by order in council shall be paid out of the consolidated revenue fund does not imply a condition that there must be a special vote of supply by the Legislature for such remuneration in order to render the officer entitled to payment thereof; & the fact that the Legislature does make such special votes from year to year does not establish that such practice is legally necessary.

(2) Where such a statute provided that the officer was to be appointed by order in council & should hold office during good behaviour but be removable by the Lieutenant-Governor in Council for cause & an order in council had appointed, & fixed the remuneration of, an officer, who gave no cause for removal, & an amendment to the statute transferred his duties & repealed the provision as to his tenure of office & removal for cause, but did not abolish the office:—*Held*: even if such amendment placed the officer in a position where his remuneration might be terminated by the Lieutenant-Governor in Council, yet an order in council was necessary to terminate it, & until such order was passed the officer, having continued

ready to perform his duties, was entitled to receive said remuneration.—*MACDONALD v. R.*, [1930] 1 W. W. R. 700; 3 D. L. R. 465.—*CAN.*

### PART III. SECT. 1.

8x. *Exercise of discretion*—No interference by courts.]—The rule that the ct. will not interfere with the exercise of the discretion of Ministers of the Crown provided no statutory provision is infringed applied herein in holding that the payment by the Department of Education of the secondary school grant to the S. school district was legal & authorised under Public Schools Act.—*RUSSELL SCHOOL DISTRICT v. SHELLMOUTH RURAL MUNICIPALITY*, [1931] 2 W. W. R. 629; 4 D. L. R. 309; 39 Man. L. R. 528.—*CAN.*

### PART III. SECT. 4, SUB-SECT. 1.

8a. Delete this case.

e (p. 28) i. —.]—Appl. municipality in the exercise of powers conferred by Municipal Corporations Act, 1906, s. 235, constructed certain roads, & there was evidence that in consequence thereof storm waters which formerly soaked away now flowed down on to the resp.'s lands, which were low-lying, to a greater extent than formerly

& flooded them. It was within the powers of applt. municipality to carry out at considerable cost such a system of drainage as might have obviated the injury to resps., but it did not do so:—*Held*: resps. were without remedy since applt. municipality constructed the roads without negligence in a proper manner & in the *bond fide* exercise of its statutory powers.—*CLAREMONT MUNICIPALITY v. FERGUSON*, *CLAREMONT MUNICIPALITY v. L. M. FERGUSON*, *CLAREMONT MUNICIPALITY v. A. E. N. FERGUSON*, [1928] W. A. L. R. 117.—*AUS.*

e (p. 28) ii. —.]—Owing to the bursting of a water pipe which was part of deft. city's waterworks system pltf.'s lands were flooded & damaged. The system was installed by the city under statutory authority, & it was found that the city in doing so had not been guilty of any negligence & had not acted in any unreasonable or oppressive way:—*Held*: the city was not liable.—*KEENAHAN v. VANCOUVER CITY*, [1930] 3 W. W. R. 166; 4 D. L. R. 1018; 43 B. C. R. 147.—*CAN.*

e (p. 28) iii. —.]—Municipality held not liable for damage to pltf.'s gas mains whilst constructing a sewer without negligence, under statutory authority.—*OTTAWA GAS CO. v. CITY OF OTTAWA*, [1937] 1 D. L. R. 579; O. R. 13.—*CAN.*

- COUNCIL, [1938] 4 All E. R. 57; 102 J. P. 473; 55 T. L. R. 12; 82 Sol. Jo. 931.
123. *Add. Annotation* :—**Consd.** Markland v. Manchester Corpn., [1934] 1 K. B. 566.
124. *Add. Annotation* :—**Refd.** Markland v. Manchester Corpn., [1934] 1 K. B. 566.
125. *Add. Annotations* :—**Refd.** Markland v. Manchester Corpn., [1934] 1 K. B. 566; North-western Utilities, Ltd. v. London Guarantee & Accident Co., [1936] A. C. 108; Hale v. Jennings Bros., [1938] 1 All E. R. 579.
127. *Add. Annotation* :—**Consd.** Manchester Corpn. v. Farnworth (1929), 40 T. L. R. 85.
132. *Add. Annotation* :—**Refd.** Manchester Corpn. v. Farnworth (1929), 46 T. L. R. 85.
135. *Add. Annotations* :—**Consd.** Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401. **Refd.** North-western Utilities, Ltd. v. London Guarantee & Accident Co., [1936] A. C. 108.
137. *Add. Annotations* :—*As to* (3) **Consd.** Manchester Corpn. v. Farnworth (1929), 46 T. L. R. 85; Blundy, Clark & Co. v. London & North Eastern Ry. Co., [1931] 2 K. B. 334.
140. *Add. Annotations* :—*As to* (1) **Refd.** North-western Utilities, Ltd. v. London Guarantee & Accident Co., [1936] A. C. 108. *As to* (2) **Refd.** Blundy, Clark & Co. v. London & North Eastern Ry. Co., [1931] 2 K. B. 334.
141. *Add. Annotation* :—**Refd.** Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401.
142. *Add. Annotation* :—**Refd.** Pronck v. Winnipeg, Selkirk & Lake Winnipeg Ry. Co., [1933] A. C. 61.
145. *Add. Annotation* :—**Refd.** The Neptun, [1938] P. 21.
147. *Add. Annotation* :—**Refd.** St. Anne's Well Brewery Co. v. Roberts (1928), 92 J. P. 180.
148. *Add. Annotation* :—**Refd.** Skilton v. Epsom & Ewell Urban District Council, [1936] 2 All E. R. 50.
160. *Add. Annotation* :—*As to* (1) **Refd.** Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401.
177. *Add. Annotations* :—**Refd.** Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1930] A. C. 549; West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt (1932), 96 J. P. 159.
178. *Add. Annotations* :—**Refd.** Graigola Merthyr Co. v. Swansea Corpn., [1928] Ch. 235; Symes & Jaywick Assocn. Properties, Ltd. v. Essex Rivers Catchment Board, [1936] 2 All E. R. 551.
193. *Add. Annotation* :—**Refd.** Blundy, Clark & Co. v. London & North Eastern Ry. Co., [1931] 2 K. B. 334.
207. *Add. Annotation* :—**Refd.** The Neptun, [1938] P. 21.
- 207a. — **Non-repair of drainage works.**—Pltf.'s lands were in 1937 severely damaged by reason of floods. It was alleged that the damage was due to the failure of defts. to keep in good repair the drainage works within their area. The main & substantial cause of the flooding was that a bank was too low. It was found that the dykes were kept reasonably clean & that the pumping system was as efficient as defts. could make it, having regard to the funds at their disposal. The statutes from which defts. derived their powers, while they gave them power to do work for the draining of the fens, did not direct or require them to do such work :—*Held* : the action failed *in limine*, because defts. were not under a statutory duty to execute the repairs which, it was alleged, they had failed to execute.—**SMITH v. CAWPLE FEN, ELY (CAMBRIDGE) COMRS.**, [1938] 1 All E. R. 61; 82 Sol. Jo. 890.
209. *Add. Annotations* :—*As to* (1) **Refd.** Hall v. Brooklands Auto-Racing Club (1932), 48 T. L. R. 546. *As to* (3) **Consd.** Guilfoyle v. Port of London Authority, [1932] 1 K. B. 336. *As to* (5) **Consd.** Dec Conservancy Board v. McConnell, [1928] 2 K. B. 159;

**PART III. SECT. 4, SUB-SECT. 2.**

151 ii. —.].—No remedy can be obtained for injury which inevitably results from the doing by a public body of an act authorised by statute unless that statute provides for compensation; but there is a duty on the part of the public body to take due care to prevent any avoidable injury, & a person injured through failure to take such care may maintain an action for negligence. Where a statute imposes upon a public body the duty of providing a drainage or sewerage system, it does not follow that the duty is owed to individual members of the public so that damages can be obtained by them for mere nonfeasance.—**CAMPISI v. WATER CONSERVATION & IRRIGATION COMMISSION** (1936), 36 S. R. N. S. W. 631; 13 L. G. R. 56; 53 N. S. W. W. N. 198.—**AUS.**

**PART III. SECT. 4, SUB-SECT. 3.**  
**n. *Revsd.***, [1923] S. C. R. 397.

**PART III. SECT. 5, SUB-SECT. 1.**  
**192 xiv. *Revsd.***, 31 S. C. R. 61.

192 xxxiii. —.].—In an action for negligence on the part of a municipality in failing to take proper measures to put out a fire :—*Held* : the firemen did not act negligently in failing to cut high voltage wires & this activity

amounted to non-feasance for which the city was not liable.—**STEVENS-WILSON v. CHATHAM CITY & CHATHAM PUBLIC UTILITIES COMMISSION**, [1933] 2 D. L. R. 407; O. R. 305; *affd.*, [1934] 3 D. L. R. 1; S. C. R. 353.—**CAN.**

192 xxxiv. —.].—Where a city establishes a fire department, even though it is not under a legal obligation to do so, it is obliged to see that no damage is caused to anybody by the negligence doing of the thing undertaken. It is misfeasance, not non-feasance, which gives rise to a cause of action.—**ARIAL v. EDMONTON CITY**, [1935] 2 W. W. R. 536.—**CAN.**

192 xxxv. —.].—Deflt. was in control of a drain, taken over from a predecessor, which collected & conveyed water in such a manner & position as to be a source of danger if such water were not removed from the vicinity of pltf.'s land. Deflt. neglected to prevent the drain from becoming choked, & interfered with it by reducing its capacity at least one point. Pltf.'s land, consequently, became flooded, & pltf. thereby sustained injury for which he obtained a verdict for damages. On appeal :—*Held* : the verdict should not be disturbed.—**CAMPISI v. WATER CONSERVATION & IRRIGATION COMMISSION** (1936), 36 S. R. N. S. W. 631; 53 N. S. W. W. N. 198; 13 L. G. R. 56.—**AUS.**

**sa. Liability of municipality to councillor—Contributory negligence.**—What an officer of a corpn. does in his corporate capacity cannot hurt him in his individual capacity. Thus the mere fact that a pltf. who has sustained personal injury as the result of the negligence of a village council is a member of the council does not preclude him from recovering damages from the village. Pltf., a member of the council of the deflt. village, was injured by the explosion of a chemical fire extinguisher while he was proceeding to use it in helping, together with others, to put out a fire in the village. The jury found that deflt. village was negligent in not having the fire extinguisher properly inspected & kept in perfect working order, & also found pltf. guilty of contributory negligence, but only because of the fact that he was a councillor & not because of his operation of the extinguisher. The village had appointed a fire chief & instructed him, at a council meeting, to see that the fire extinguishers were kept in proper working order :—*Held* : judgment should be entered for pltf.—**SMITH v. KELLHUR VILLAGE**, [1931] S. C. R. 672; 4 D. L. R. 102; *affg.*, [1930] 2 W. W. R. 638; 4 D. L. R. 938; 25 S. L. R. 65; *reversd.*, [1930] 1 D. L. R. 878; 24 S. L. R. 198; [1929] 3 W. W. R. 655.—**CAN.**

Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401; The Neptune, [1938] P. 21. *Generally*, *Refd.* Skilton v. Epsom & Ewell Urban District Council, [1936] 2 All E. R. 50.

221. *Add. Annotations*:—*As to* (3) *Consd.* Rawlins v. Gillingham Corpn. (1932), 146 L. T. 486. *Generally*, *Refd.* Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401.
226. *Add. Annotation*:—*Generally*, *Consd.* Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401.
244. *Add. Annotation*:—*Generally*, *Refd.* Farnworth v. Manchester Corpn., [1929] 1 K. B. 533.
249. *Add. Annotation*:—*Generally*, *Refd.* Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401.
256. *Add. Annotation*:—*Consd.* Manchester Corpn. v. Farnworth (1929), 46 T. L. R. 85.
- 263a. — *Fumes from power station.*—*Pltf.*, who was a farmer, was the occupier of property in the neighbourhood of an electricity power station which had been erected by deft. corpn. under Parliamentary powers, & which emitted fumes heavily charged with sulphur & sulphur compounds so as to damage the property occupied by *pltf.* In an action for a nuisance:—*Held*: the Electric Lighting (Clauses) Act, 1899 (c. 19), did not expressly make defts. liable for a nuisance, but as defts. had not proved the nuisance to be the inevitable result of the exercise of their statutory powers *pltf.* was entitled

to an injunction & damages.—*MANCHESTER CORPN. v. FARNWORTH*, [1930] A. C. 171; 99 L. J. K. B. 83; 94 J. P. 62; 46 T. L. R. 85; 73 Sol. Jo. 818; 27 L. G. R. 709; *sub nom.* FARNWORTH v. MANCHESTER CORPN., 142 L. T. 145, H. L.

- Annotation*:—*Refd.* Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., [1936] A. C. 108.
268. *Add. Annotation*:—*Consd.* Farnworth v. Manchester Corpn., [1929] 1 K. B. 533.
273. *Add. Annotation*:—*Refd.* Manchester Corpn. v. Farnworth (1929), 46 T. L. R. 85.
275. *Add. Annotation*:—*Refd.* Manchester Corpn. v. Farnworth, [1930] A. C. 171.
280. *Add. Annotation*:—*Generally*, *Refd.* Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401.
282. *Add. Annotations*:—*As to* (1) *Consd.* Farnworth v. Manchester Corpn., [1929] 1 K. B. 533. *Refd.* Manchester Corpn. v. Farnworth (1929), 46 T. L. R. 85.
283. *Add. Annotation*:—*Refd.* Withington v. Bolton Borough Council, [1937] 3 All E. R. 108.
284. *Add. Annotations*:—*As to* (1) *Refd.* Harper v. Haden & Sons, [1933] Ch. 298. *Generally*, *Refd.* Andrew v. Selfridge & Co., [1936] 2 All E. R. 1413; *Matania v. National Provincial Bank, Ltd.* (1935), 154 L. T. 103; *Matania v. National Provincial Bank, Ltd. & Elevenist Syndicate, Ltd.*, [1936] 2 All E. R. 633.
286. *Add. Annotation*:—*Refd.* Hollywood Silver Fox Farm, Ltd. v. Emmett, [1936] 1 All E. R. 825.

### PART III. SECT. 6, SUB-SECT. 1.—A.

225 vii. —.]—*Deft.* city having constructed & maintained a common sewerage system under the powers given it by its charter is compelled by Public Health Act, R. S. A., 1922, s. 12 (2), (3), to maintain a sewage disposal plant in connection therewith & to obtain a certificate, which it did obtain, from the provincial Board of Health stating that the proposed plant could be operated without injury or danger to the public health. *Deft.*, therefore, is not liable for any nuisance resulting from the mere fact that it has erected & operated the plant in question:—*Held*: however, the sewage disposal plant was being operated negligently & such negligence caused a nuisance, for which *deft.* was liable in damages.—*CLARKE v. EDMONTON CITY*, [1933] 1 W. W. R. 113.—*CAN.*

228 i. — *Flooding.*—*SECRETARY OF STATE FOR INDIA IN COUNCIL v. ALADIN* (1928), 1 L. R. 51 All. 291.—*IND.*

228 ii. —.]—*BIFROST RURAL MUNICIPALITY v. STADNICK*, [1928] 3 D. L. R. 103; [1928] S. C. R. 304.—*CAN.*

228 iii. —.]—*STEWART v. SPRINGFIELD & TACHE RURAL MUNICIPALITIES*, [1928] 4 D. L. R. 593; [1928] 3 W. W. R. 198; 37 Man. L. R. 453.—*CAN.*

228 iv. —.]—*CALCUTTA COMRS., PORT OF v. CALCUTTA CORPN.* (1937), 81 Sol. Jo. 763, P. C.—*IND.*

228 v. — *In handling of wheat—Right of indorse of certificates.*—When an owner of wheat has delivered it to the Govt. of South Australia under Wheat Harvest Acts, 1915–17, indorses & delivers the certificate for supplementary advances issued to him, there passes to the transferee, not only the right to receive the advances, but

also the right of the owner to sue the Govt. for damages for negligence in the care & handling of the wheat so delivered for the year whereby the amount payable under the certificates is diminished.—*ROBINSON v. STATE OF SOUTH AUSTRALIA*, [1929] A. C. 469.—*AUS.*

*sm. Action against municipality—Effect of change of boundaries.*—*OBIREK v. BIFROST RURAL MUNICIPALITY*, [1930] 1 W. W. R. 919; 3 D. L. R. 507.—*CAN.*

### PART III. SECT. 6, SUB-SECT. 2.—A.

255 i. *No implied authority to commit nuisance—Sewer causing nuisance.*—*RIDEAU LAWN TENNIS CLUB v. OTTAWA*, [1936] 3 D. L. R. 535; 6 F. L. J. (Can.) 38.—*CAN.*

261 i. — *Vibration from blasting operations.*—In the course of its operations in constructing a weir, *deft. co.*, by blasting with dynamite, caused injury to some of *pltf.*'s buildings:—*Held*: liable for damages. While Department of Railways & Canals Act, R. S. B. C., 1927, gives general authority to direct the construction of all railways & canals & all works appertaining thereto, Parliament did not sanction the use of a particular means, namely, dynamite.—*PILLITTERI v. NORTHERN CONSTRUCTION CO.*, [1930] 4 D. L. R. 731; 66 O. L. R. 128.—*CAN.*

263 i. — *Sewage escape.*—A municipality is not liable for overflow from sewers where they are not defective, & there is no negligence in raising the street level.—*SOLOMON v. DARTMOUTH*, [1935] 4 D. L. R. 653.—*CAN.*

### PART III. SECT. 6, SUB-SECT. 2.—B.

268 i. *General rule.*—*SURATEE, BARA BAZAAR CO., LTD. v. MUNICIPAL CORPN. OF RANGOON* (1937), 1 L. R. 5 Ran. 722.—*IND.*

275 xxi. —.]—The provisions of Public Health Act, R. S. A., 1922, read together with those of the Edmonton Charter with respect to sewerage systems & the expropriation of land required thereof held to give the city more than mere permissive authority for their construction. Therefore, the maintenance by the city of a sewage disposal plant, in accordance with said provisions, gives no cause of action for nuisance, in the absence of negligence in its construction or operation.—*TOPHAM v. EDMONTON CITY*, [1932] 1 W. W. R. 636.—*CAN.*

275 xxii. —.]—A house was damaged by blasting operations in the vicinity. In an action against the contractor for nuisance he was held liable in damages, having failed to satisfy the onus of proof upon him to establish that the explosion was necessary in the performance of work which he had undertaken with statutory authority.—*ATKMAN v. MILLS & CO., LTD.*, [1934] O. R. 597; 4 D. L. R. 264.—*CAN.*

283 i. *Exemption from liability—Obstruction in highway.*—The Legislature of Ontario has not given the municipalities of the Province authority to permit telephone cos. to occupy the streets & highways with their poles & wires for a longer period, at one time, than five years. An agreement by a municipality to permit, by irrevocable licence, a telephone co. to occupy the streets with poles & wires is *ultra vires*.—*CORALT CORPN. v. TEMISKAMING TELEPHONE CO. (Ont.)* (1919), 50 S. C. R. 62; 47 D. L. R. 301.—*CAN.*

30. *Interference with level of water—Private corporation in charge of dam—Subject to control of Government—Commission—Exemption from liability.*—*STIRRETT & SONS, LTD. v. KAMINTSIQUITA POWER CO., LTD.*, [1930] 1 D. L. R. 445.—*CAN.*

**288. Add. Annotations :—***Apld.* *Farnworth v. Manchester Corp.*, [1929] 1 K. B. 533. *Refd.* *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.*, [1936] A. C. 108.

**289. Add. Annotations :—***Refd.* *West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt* (1932), 96 J. P. 159; *Markland v. Manchester Corp.*, [1934] 1 K. B. 566.

**291a. Construction of dam — Flooding — Contributory negligence.**—A power co. constructed a dam across the St. Francis River. Upon the occasion of exceptional floods in the spring of 1928, a railway embankment was severely damaged & a serious accident occurred to a passenger train. The dam was constructed under statutory authority which provided that the owner or lessee of the work should be liable for all damages resulting therefrom whether from excessive elevation or otherwise. The railway was the property of the Dominion of Canada, & the ownership had never been conveyed to the Canadian National Railways Co., although the co. had been entrusted with its management & operation by statute, & also by statute given a right to bring an action of this kind. It was proved at the trial that the flood was being watched by the inhabitants generally for some time before the accident, but it was not until a short time before the accident that the disintegration of the embankment was apparent. The power co. contended that the action should have been brought by the railway co. & not by the Crown, & that the railway co. was guilty of contributory negligence :—*Held* : (1) the Crown was the proper party to bring the action; (2) the statute imposed an absolute duty on the power co., & contributory negligence could not be pleaded except as to foolish & irrational

acts of the claimants; (3) upon the facts the railway co. had no opportunity of warning & stopping the train, & damages for injury & loss of the locomotive & carriages were recoverable.—*R. v. SOUTHERN CANADA POWER CO., LTD., SOUTHERN CANADA POWER CO., LTD. v. R.*, [1937] 3 All E. R. 923; 81 Sol. Jo. 785, P. C.

**298. Add. Annotation :—***Folld.* *Fisher v. Oldham Corp.*, [1930] 2 K. B. 364.

**298a. —.**—The police appointed by the watch committee of a borough corp., if they arrest & detain a person unlawfully, do not act as the servants or agents of the corp. so as to render that body liable to an action for false imprisonment.—*FISHER v. OLDHAM CORPN.*, [1930] 2 K. B. 364; 99 L. J. K. B. 569; 143 L. T. 281; 94 J. P. 132; 46 T. L. R. 390; 74 Sol. Jo. 299; 28 L. G. R. 293; 29 Cox, C. C. 154.

**317. Add. Annotations :—***Apld.* *Stevens v. Aldershot Gas, Water & District Lighting Co.* (now Mid-Southern District Utility Co.) (1932), 102 L. J. K. B. 12. *Refd.* *Scammell v. Hurley*, [1929] 1 K. B. 419.

**318. Add. Annotation :—***Refd.* *Clark v. Epsom R. D. C.*, [1929] 1 Ch. 287.

**330. Add. Annotations :—***Refd.* *Scammell v. Hurley*, [1929] 1 K. B. 419; *Lochgelly Iron & Coal Co. v. M'Mullan*, [1931] A. C. 1; *Monk v. Warbey*, [1935] 1 K. B. 75; *Square v. Model Farm Dairies (Bournemouth), Ltd.*, [1938] 2 All E. R. 740.

**333. Add. Annotation :—***Consd.* *Withington v. Bolton Borough Council*, [1937] 3 All E. R. 108.

**334. Add. Annotation :—***Apld.* *Holt Bros. & Whitford v. Axbridge Rural District Council* (1931), 95 J. P. 87.

### PART III. SECT. 7.

**296 xxiii. —.**—*McSORLEY v. ST. JOHN CORPN.* (1882), 6 S. C. R. 531.—CAN.

**296 xxiv. —.**—Where a municipality, in obedience to an Act of the Legislature, appoints an officer to perform a public service in which the corp. has no special interest, & from which it derives no special benefit in its corporate capacity, such officer is not the servant or agent of the municipality, & therefore, it is not liable for his negligence in the performance of his duties.—*MEAD v. MARQUIS RURAL MUNICIPALITY*, [1928] 2 D. L. R. 524; [1928] 1 W. W. R. 756.—CAN.

### PART III. SECT. 9, SUB-SECT. 1.

**aa. Injunction.—Claim to take more land than necessary.**—*Deft. corp.* issued to *pltf.* notice of its intention to take the whole of her land for a certain public work, although it admitted that the area was larger than that actually required for the contemplated work. It also refused *pltf.*'s application for a permit to build on the land, on the ground of its intention to take same for the work :—*Held* : granting an injunction restraining the corp. from taking the whole of the land, it had no power under Public Works Act, 1908, to take a larger area than it actually required for the public work; & further it was not legally justified in refusing the appln. for a permit to

build on the ground of its intention to take the land, & a writ of *mandamus* should issue compelling it to hear & determine the appln.—*QUINLAN v. WELLINGTON CORPN.*, [1929] N. Z. L. R. 491.—N.Z.

### PART III. SECT. 9, SUB-SECT. 2.

**316 i. Whether general jurisdiction of courts ousted.**—*Deft. corp.* erected a power-house, & *pltf.* claimed damages against the corp. for the escape of grit & smoke from the power-house, & asked for an injunction to restrain the corp. from using the power-house as it was being used :—*Held* : *pltf.* must be nonsuited, as his only remedy must be determined in the manner provided by Public Works Act, 1908.—*O'BRIEN v. WELLINGTON CITY CORPN.*, [1928] N. Z. L. R. 215.—N.Z.

**o i. —.**—*Pltf.*, by her statement of claim, alleged that *deft. village corp.* in 1927 lowered the grade of a street in the village in front of her lands, thereby cutting off her access to her property from the street :—*Held* : there being no allegation in the statement of claim that the corp. was guilty of negligence in the construction of the work, & no ground alleged which would entitle *pltf.* to damages at common law, & so far as appeared from the statement of claim, the corp. having acted within its powers in constructing the work, the only right of *pltf.* was to claim compensation for

the injurious affection of her lands, under sect. 342 of Municipal Act, & she was restricted to that right & had no right to bring an action.—*HOWE v. PR. DAIRYHOUSE*, [1929] 1 D. L. R. 585; 63 O. L. R. 305.—CAN.

**ab. Order of Public Utility Board.—Right of appeal.**—*NORTHWESTERN UTILITIES, LTD. v. EDMONTON CITY*, [1929] S. C. R. 186.—CAN.

**so. —.**—The Public Utilities Act, 1923, Amendment Act, 1927, provides for an appeal from an order of the Board upon a question of jurisdiction or upon a question of law, but upon no other ground. In fixing a base for rates to be charged by *aplt.* co. the Board took into account the act that the co. had earned undistributed profits beyond the return rate fixed for the preceding period & the Board, as a consequence of treating such earnings as excessive profits & available for the amortisation fund, had reduced the base on which the rates for the ensuing period were fixed. The co., which contended that this method of calculation was unfair & unreasonable & involved questions of jurisdiction or questions of law, applied for leave to appeal :—*Held* : no point of jurisdiction or of law was involved & the appeal could not be entertained.—*WAINWRIGHT GAS CO., LTD. v. WAINWRIGHT TOWN OF, & BOARD OF PUBLIC UTILITY COMRS. OF ALBERTA*, [1930] 3 W. W. R. 337; 4 D. L. R. 1000.—CAN.

## Part IV.—Exemptions from Liability.

- 343. Add. Annotation:—Refd.** Gilleghan v. Minister of Health (1931), 47 T. L. R. 439.
- 343a. — Ministry of Health.]—**Ministry of Health Act, 1919 (c. 21), s. 7 (1), does not enable an action to be brought against the Minister for alleged breach of a contract made by the Minister as a servant of the Crown, & the proper remedy is against the Crown by petition of right.—GILLEGHAN v. MINISTER OF HEALTH, [1932] 1 Ch. 86; 101 L. J. Ch. 81; 146 L. T. 231; 47 T. L. R. 439.
- 349. Add. Annotation:—Refd.** North Charterland Exploration Co. (1910), Ltd. v. R. (1930), 99 L. J. Ch. 483.
- 355. Add. Annotation:—Refd.** A.-G. v. Goddard (1929), 98 L. J. K. B. 743.
- 362. Add. Annotation:—Consd.** China Navigation Co. v. A.-G. (1932), 48 T. L. R. 375.
- 363. Add. Annotation:—Refd.** Gilleghan v. Minister of Health (1931), 47 T. L. R. 439.
- 364. Add. Annotation:—Refd.** Gilleghan v. Minister of Health (1931), 47 T. L. R. 439.
- 365a. Ministry of Health.]—**GILLEGHAN v. MINISTER OF HEALTH, No. 343a, ante.
- 375. Add. Annotation:—Refd.** Williams v. Williams & Nathan, [1937] 2 All E. R. 559.
- 376. Add. Annotation:—Refd.** R. v. Graham-Campbell (Sir), *Ex p.* Herbert, [1935] 1 K. B. 594.
- 378. Add. Annotation:—Consd.** China Navigation Co. v. A.-G. (1932), 48 T. L. R. 375.
- 387. Add. Citation:—**138 L. T. 8.
- 391. Add. Annotations:—Refd.** Constantinesco v. R. (1927), 11 Tax Cas. 730; Buckland v. R. (1933), 102 L. J. K. B. 404.
- 401. Add. Annotation:—Folld.** Morriss v. Winter (1929), 45 T. L. R. 643.
- 402a. — Detention after receipt of remission marks.]—**MORRIS v. WINTER, No. 940a, post.

## PART IV. SECT. 3, SUB-SECT. 1.—A.

**b i. — Agreement made for ulterior purpose.]—**QUEENSLAND INSURANCE CO., LTD. v. SUBIACO MUNICIPALITY (1927), 30 W. A. L. R. 32.—AUS.

**c i. — Secretary of State for India in Council.]—**In order that a contract may be binding upon the Secretary of State for India in Council, it must be made in strict conformity with the provisions laid down in the statutes governing the matter.—KESORAM, PODDAR & CO. v. SECRETARY OF STATE FOR INDIA (1926), 1 L. R. 54 Calc. 969.—IND.

**c ii. — Minister of Agriculture.]—**On the proper construction of Dried Fruits Act, 1921, in acquiring under that Act dried fruits on behalf of His Majesty, the Minister of Agriculture acts merely as the instrument of the Crown. The obligation to pay for the fruits is upon the Crown & not upon the Minister as such, & therefore, is not subject to attachment by garnishee proceedings.—MILDERA CO-OPERATIVE FRUIT CO., LTD. v. NOYCE, *Re* NOYCE, *Ex p.* MINISTER OF AGRICULTURE, [1925] V. L. R. 390; (1928), Argus L. R. 234.—AUS.

**344 i. Personal liability—Question of fact.]—**Bocz v. HUGONNARD (1899), 4 Terr. L. R. 69.—CAN.

**sb. Indemnity Act, 1920 (c. 48)—Effect of.]—**Indemnity Act, 1920, s. 1 (1), does not apply to actions to enforce the implement by Govt. Departments of their wartime contracts. The saving of actions in respect of "rights under, or alleged breaches of, contract" contained in sect. 1 (1) (b) applies to cases in which rights under a contract have been interfered with, or a contract has been directly breached, by the exercise of some prerogative power.—GREENOCK CORPN. v. THE ADMIRALTY, [1925] S. C. 227.—SCOT.

**sd. British Columbia Magistrates Act—Meaning of "officer."]**—The term "officer" in sect. 9 of the British Columbia Magistrates Act should not be limited in such a way as to exclude all officers who are not judicial officers from its denotation: such interpretation would involve the contention that an act or thing done by any person, in order to fall within the ambit of the section, must be an act or thing in its nature judicial. Any public officer,

not belonging to any of the specific classes of officers enumerated, is, when performing executive duties, within the descriptive words of the section, & subject to the conditions prescribed, entitled to claim the benefit of it.—JOHNSTON v. CANADIAN CREDIT MEN'S TRUST ASSOC., [1932] S. C. R. 219; 2 D. L. R. 462; 58 C. C. C. 1.—CAN.

## PART IV. SECT. 3, SUB-SECT. 1.—B.

**gi. — Against Union Government—Money received by magistrate as workman's compensation.]—**A magistrate who receives from an employer a sum of money as compensation in respect of the death of a workman in terms of sect. 27 (1) of the Workmen's Compensation Act 25 of 1914 is not in regard to the disposal of such money a servant of the Crown, & an action against the Union Govt. for payment of this sum will not therefore lie.—SMITH v. UNION GOVERNMENT, [1933] A. D. 363.—S. AF.

## PART IV. SECT. 3, SUB-SECT. 1.—C.

**sg. Who are Crown servants—Vancouver Harbour Commission.]—**The Vancouver Harbour Commission is a servant or agent of the Crown.—MCLEAN v. VANCOUVER HARBOUR COMRS., [1936] 3 W. W. R. 657; 51 B. C. R. 169.—CAN.

## PART IV. SECT. 3, SUB-SECT. 2.—A.

**366 ii. —.]—**A servant of the Crown is liable for his own wrongful acts.—MORTON v. BARTLETT (1874), 15 N. B. R. (2 Pug.) 215.—CAN.

**373 xii. — Trespass by pathmaster.]—**In trespass against a municipal corp., for the act of their pathmaster, in causing statute labour to be performed on certain land of ptfr., alleged by defts. to be an original allowance for road, it appeared that the pathmaster acted under an order written by the clerk, by the direction of the council while in session:—*Held*: sufficient to render the corp. liable, & a bye-law was not necessary.—NEVILLE v. ROSS TOWNSHIP CORPN. (1872), 22 C. P. 487.—CAN.

**sf. Liability in private capacity—Pleadings.]—**The action for negligence in question herein held to be an action brought against defts. B. & P. in their official capacity as minister & deputy minister of public works. On a motion on their behalf an order striking out

the statement of claim as against them on the ground that as they were sued in said capacity it disclosed no reasonable cause of action against them as such:—*Held*: ptfr. should be allowed to amend so as to make it clear that she was suing defts. in their private capacity.—GRAY v. PATERSON, [1933] 2 W. W. R. 558; 48 B. C. R. 70.—CAN.

## PART IV. SECT. 3, SUB-SECT. 2.—B. (a).

**378 xviii. —.]—**The Land Settlement Board, created by Land Settlement & Development Act, R. S. B. C. 1924, c. 128, is a department of the Govt., & there being nothing in said Act or other statutes which gives it a right to sue or be sued, no action lies against it for acts done in its official capacity.—RATTENBURY v. LAND SETTLEMENT BOARD, [1928] 3 D. L. R. 382; [1928] 2 W. W. R. 475; 39 B. C. R. 523; *affd.*, [1929] 1 D. L. R. 242.—CAN.

**378 xix. —.]—**Where an act is done by an officer of Govt. in the course of exercise of powers, which cannot be lawfully exercised save by the sovereign power, no action in tort lies against the Secretary of State for India in Council upon the principle of *respondet superior*.

A suit may lie against the Secretary of State for India in Council for torts committed by the Govt. in connection with a private undertaking or an undertaking not in exercise of sovereign power.—SECRETARY OF STATE FOR INDIA IN COUNCIL v. SHREEGOBINDA CHAUDHURI (1932), 1 L. R. 59 Cal-1289.—IND.

**378 xx. — Federal District Commission.]—**Federal District Commission is an incorporated Govt. department & cannot be sued in tort unless it actually committed the tortious act, or was privy to it, or gave orders for it to be done.—MOORE v. FEDERAL DISTRICT COMMISSION & OTTAWA CITY, [1937] 1 D. L. R. 461; O. R. 200.—CAN.

**378 xxi. — Forests Commission.]—**The Forests Commission is in substance a body incorporated by statute to administer a department of Govt. & being an instrumentality of the Crown, is not liable in tort for the negligence of its employees in the course of their employment.—MARKS v. FORESTS COMMISSION, [1936] V. L. R. 344; 42 Argus L. R. 476.—AUS.

411. *Add. Annotation*:—**Refd.** *Buckland v. R.* (1933), 102 L. J. K. B. 404.
420. *Add. Annotation*:—**Refd.** *Leitch (William) & Co. v. Leydon, Barr (A. G.) & Co. v. Macgeoghagan* (1930), 47 T. L. R. 81.
- 436a. ——— **Failure to record appearance—Officer of court.**—**FINCH v. RISLEY** (1593), cited *Poph.* 25; 79 E. R. 1145.
- 482a. ———.—**Pltf.** having left his wife & two children, his wife obtained a maintenance order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), for the payment by him of a weekly sum. **Pltf.** having failed to comply with the order, his wife made complaint to a magistrate at D., which was within the county of Chester, that £19 12s. 6d. was then in arrear under the order, & thereupon the magistrate issued a warrant, addressed to each & all of the constables of the county of Chester, commanding them to apprehend **pltf.** & convey him before a ct. of summary jurisdiction at D. to be dealt with according to law. The warrant showed on its face that £19 17s. was payable by **pltf.** & was in the form prescribed by the Bastardy (Forms) Order, 1915, but it did not contain the words “unless said sum & all costs & charges be sooner paid” which were directed to be inserted in such warrants by Bastardy (Forms) Amendment Order, 1921. The warrant was delivered to **deft.**, the superintendent of police at D., & some time later **pltf.** was arrested by a constable acting under **deft.**'s orders. **Pltf.** was taken in custody through the streets & placed in a cell by **deft.**'s order. At the time the arrest was effected the warrant was in **deft.**'s possession at the police station, & was not in the possession of the constable who made the arrest. **Pltf.**'s father immediately after the arrest tendered £19 17s. to **deft.** & asked for his son's release, but **deft.** refused to accept the money. **Pltf.**'s solr. then sent a letter to **deft.** enclosing £19 17s. & demanding **pltf.**'s release, but **deft.** did not open the letter & **pltf.** was kept overnight in the cell. **Pltf.** was brought on the following morning before a ct. of summary jurisdiction at D., when the solr.'s letter was produced & found to contain £19 17s., where-

upon the magistrates ordered **pltf.**'s immediate release. **Pltf.** brought an action against **deft.** for false imprisonment, & the jury returned a verdict in **pltf.**'s favour & awarded £175 as damages for arrest, & £175 as damages for unlawful detention at the police station after the tender of the money:—**Held**: **deft.** was not protected by Constables Protection Act, 1750 (c. 44), s. 6, in respect of the arrest, but he was protected by that Act in respect of the unlawful detention at the police station after the tender of the money, inasmuch as **deft.** in detaining **pltf.** was merely acting in obedience to the warrant.—**HORSFIELD v. BROWN**, [1932] 1 K. B. 355; 101 L. J. K. B. 177; 140 L. T. 280; 96 J. P. 123; 30 L. G. R. 153; 29 Cox, C. C. 422.

483. *Add. Annotation*:—**Refd.** *L. C. C. v. Hackney B. C.*, [1928] 2 K. B. 588.
486. *Add. Annotation*:—**Refd.** *Horsfield v. Brown*, [1932] 1 K. B. 355.
494. *Add. Annotation*:—**Consd.** *Horsfield v. Brown*, [1932] 1 K. B. 355.
511. *Add. Annotation*:—**Consd.** *Horsfield v. Brown*, [1932] 1 K. B. 355.
512. *Add. Annotation*:—**Consd.** *Elias v. Pasmore*, [1931] 2 K. B. 161.
513. *Add. Annotation*:—**Refd.** *Fisher v. Oldham Corpn.*, [1930] 2 K. B. 364.
541. *Add. Annotations*:—**Consd.** *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159. **Refd.** *Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401; *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 336; *Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 516.
550. *Add. Annotation*:—**Refd.** *Ledwith v. Roberts*, [1937] 1 K. B. 232.
553. *Add. Annotations*:—**As to (2) Refd.** *Hearts of Oak Assurance Co. v. A.-G.* (1931), 47 T. L. R. 579; *O'Connor v. Waldron*, [1935] A. C. 76.
555. *Add. Annotation*:—**Refd.** *R. v. Divine, Ex p. Walton*, [1930] 2 K. B. 29.
601. *Add. Annotation*:—**Consd.** *More v. Weaver*, [1928] 2 K. B. 520.

PART IV. SECT. 3, SUB-SECT. 2.—  
C. (d) ii.

516 i. *Compliance with demand.*—**Held**: production, perusal, & a copy of a search-warrant having been demanded by **pltf.** & furnished to them, their remedy, if aggrieved, was against those issuing the warrant, & an action against the constables was stayed by an order made upon summary application under Public Authorities Protection Act, 18. S. O., 1927, ss. 8, 10.—**SOLLOWAY MILLS & Co. v. WILLIAMS**, [1930] 3 D. L. R. 953; 53 Can. C. C. 403; 65 O. L. R. 243.—**CAN.**

PART IV. SECT. 3, SUB-SECT. 4.—  
A. (a).

so. *Secretary of State for India.*—No suit lies against the Secretary of State for damages for wrongful arrest & detention of a person by a police officer.—**M. A. KADIR ZAILANY v. SECRETARY OF STATE IN COUNCIL** (1931), 1 L. R. 9 Ran. 375.—**IND.**

PART IV. SECT. 3, SUB-SECT. 4.—  
A. (b).

sf. *Commissioners of Public Works.*—By a private Act, St. Stephen Green, Dublin, which previously had been

vested in comrs. as a private square, was vested in the Comrs. of Public Works, who were, by the Act, charged with the duty of maintaining the same, to be used as a public park, with power to accept private subscriptions from persons willing to contribute towards carrying into execution the purposes of the Act, but with no power to levy rates or tolls, though authorised to defray such of the expenses incurred in carrying the Act into execution as could not be defrayed out of moneys received by them under the Act out of moneys to be provided by Parliament. **Pltf.** in this action sought damages for injuries received by him while lawfully using the square, by coming in contact with an iron railing, which the statement of claim alleged was erected therein by the Comrs. of Public Works in a negligent & dangerous manner.—**Held**: the Comrs. of Public Works in Ireland were not, by virtue of the Act, constituted servants of the Crown.—**WHEELER v. COMRS. OF PUBLIC WORKS**, [1903] 2 I. R. 202.—**IR.**

PART IV. SECT. 3, SUB-SECT. 4.—B.  
1. *Driver of fire-engine.*—**MORASH**

**v. DARTMOUTH**, [1931] 1 D. L. R. 413.—**CAN.**

h. Add the following paragraph:—**Held**: the treasurer, though appointed by **deft. corpn.**, was not, in discharging or omitting to discharge a duty imposed on him by Assessment Act, the servant or agent of the **corpn.**, who were therefore not liable for his omission to give the notice required by sect. 171 of Assessment Act.

t. *Revd.*, [1927] 1 D. L. R. 969; [1927] S. C. R. 226.

sg. *Inspectors appointed under Noxious Weeds Act.*—Inspectors appointed by a municipality under Noxious Weeds Act, 1924, c. 20, are not employees or agents of the municipality, but are public officers performing public services for the benefit, not of the municipality in its corporate capacity, but of its inhabitants & those of the Province generally.—**MEAN v. MARQUIS RURAL MUNICIPALITY**, [1928] 2 D. L. R. 324; [1928] 1 W. W. L. 756.—**CAN.**

PART IV. SECT. 4, SUB-SECT. 1.  
543 ii. ———.—**Re O'CONNOR v. LEMIEUX**, [1927] 3 D. L. R. 831; 60 O. L. R. at p. 374.—**CAN.**

604. *Add. Annotations* :—**Consd.** *More v. Weaver*, [1928] 2 K. B. 520. **Refd.** *Hearts of Oak Assurance Co. v. A.-G.*, [1931] 2 Ch. 370.
636. In the third line of the existing paragraph read "1813" for "1913."
669. *Add. Annotation* :—**Refd.** *Elias v. Pasmore*, [1934] 2 K. B. 164.
694. *Add. Annotation* :—**Refd.** *Glassbrook Bros. v. Leyson*, [1933] 2 K. B. 91.
698. *Add. Annotation* :—**Consd.** *Wisbech R. D. C. v. Ward* (1928), 138 L. T. 308.
701. *Add. Citations* :—[1928] 2 K. B. 1; 97 L. J. K. B. at p. 59; 138 L. T. 308; 26 L. G. R. 10.
707. *Add. Annotation* :—**Refd.** *Chapman v. Ellesmere* (1932), 48 T. L. R. 309.
708. *Add. Annotations* :—*As to* (2) **Consd.** *Denby & Sons, Ltd. v. Minister of Health*, [1936] 1 K. B. 337; *Marriott v. Minister of Health* (1935), 105 L. J. K. B. 125. **Refd.** *Brown v. Dagenham U. D. C.*, [1929] 1 K. B. 737. *As to* (3) **Consd.** *Errington v. Minister of Health*, [1935] 1 K. B. 249; *Offer v. Minister of Health*, [1936] 1 K. B. 40. **Refd.** *Frost v. Minister of Health*, [1935] 1 K. B. 286. *Generally*, **Refd.** *Leslie v. L. N. E. R. & L. M. S.* (1936), 24 Ry. & Can. Tr. Cas. 182; *Cooper v. Wilson*, [1937] 2 K. B. 309; *Ex-Army Transport, Ltd. v. Diamond & Co.* (1936), 24 Ry. & Can. Tr. Cas. 303.

## Part V.—Interest or Bias of Judicial and Quasi-Judicial Bodies.

715. *Add. Annotation* :—**Consd.** *Cooper v. Wilson*, [1937] 2 K. B. 309.
719. *Add. Annotation* :—*Generally*, **Refd.** *Maclean v. Workers' Union*, [1929] 1 Ch. 602.
721. *Add. Annotations* :—**Refd.** *Maclean v. Workers' Union*, [1929] 1 Ch. 602; *R. v. Huntingdon Confirming Authority, Ex p. George & Stamford Hotels, Ltd.*, [1929] 1 K. B. 698.

## Part VI.—Statutory Protection—Public Authorities Protection Act.

731. *Add. Annotation* :—**Refd.** *Admiralty Comrs. v. Valverde Owners*, [1937] 1 K. B. 745.
732. *Add. Annotation* :—*As to* (1) **Refd.** *Swain v. Southern Ry. Co.*, [1938] 3 All E. R. 705.
733. *Add. Annotation* :—*As to* (1) **Consd.** *Scammell v. Hurley*, [1929] 1 K. B. 419.
736. *Add. Annotation* :—**Refd.** *Graigola Merthyr Co. v. Swansea Corpn.* (1928), 138 L. T. 465.
739. *Add. Annotation* :—*As to* (1) **Consd.** *Greenwood v. Atherton*, [1938] 2 All E. R. 475.
- 739a. *S. P. Moss v. SALFORD CORPN.* (1908), 72 J. P. Jo. 341.
741. *Add. Annotation* :—**Consd.** *Jacobs v. London County Council*, *Shaw v. London County Council*, [1935] 1 K. B. 67.
- 741a. — **Railway company.**—Pltf., a steam-crane driver, in proceeding to his work on his bicycle, had to cross a bridge belonging to deft. co. The road over it, & the approach thereto, were alleged to be in a bad state of repair, there being several potholes & a rut, about 2 feet from the near side, several inches deep in some places, extending a

number of yards from the crown of the bridge down the incline, & said to have been caused in the course of time by rainwater. Pltf.'s machine got into the rut & he was thrown to the ground & suffered severe injuries to his head. It was found as a fact that the accident was caused by the want of repair of the road over the bridge. The claim was based on negligence, nuisance, & breach of the statutory duty of defts. to maintain the road on the bridge & the approach thereto. The bridge had been constructed by defts.' predecessors under the South Western Exeter Extension Act, 1856, incorporating the Railway Clauses Consolidation Act, 1845. It was contended on behalf of defts. (i) that defts. were in a position similar to that of a highway authority, & were not liable for non-feasance; (ii) that they were entitled to the benefit of the Public Authorities Protection Act, 1893; (iii) that they were only liable, if at all, to maintain the road over the bridge for the purposes of the traffic using the road in the year in which it was constructed :—**Held** :

### PART IV. SECT. 4, SUB-SECT. 6.— B. (b).

sh. *Failure to return conviction—Form of action.*—**DRAKE v. PRESTON** (1873), 34 U. C. R. 257.—**CAN.**

### PART IV. SECT. 5, SUB-SECT. 2.— B. (c).

g 1. — *Board of Public Utility Commissioners—Public Utilities Act*, 1923 (c. 53), s. 137 (2).—**Re STANTON & GORDON**, [1927] 1 D. L. R. 273;

[1926] 3 W. W. R. 769; 22 Alta. L. R. 387.—**CAN.**

### PART VI. SECT. 2.

739 iii. — *Harbour trustees.*—The mere fact that bodies such as harbour trustees administer their undertakings under Acts of Parliament is not sufficient to entitle them, as successful defenders, to expenses as between agent & client under Public Authorities Protection Act, 1893 (c. 61), s. 1 (b). They must base their motion

upon such of the enactments regulating their constitution & functions as are relevant to the question whether the action was "for an act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority."—**LIVINGSTONIA S.S. Co., LTD. v. CLYDE NAVIGATION TRUSTEES**, [1928] S. C. 270.—**SCOT.**



(1) by the Railway Clauses Consolidation Act, 1945 (c. 20), s. 46, the co. were liable for non-feasance as well as misfeasance; (2) a railway co. is not a public authority within the meaning of that term as used in Public Authorities Protection Act, 1893 (c. 61), s. 1; (3) the road was in fact in a condition which would have been dangerous to traffic as it was at the date at which the bridge was constructed; but the duty of a railway co. under the Railway Clauses Consolidation Act, 1845 (c. 20), s. 46, is to maintain the bridge & its approaches in the state they are when constructed in accordance with that sect., & that necessarily implies an absence of dangerous ruts.—*SWAIN v. SOUTHERN RY. CO.*, [1938] 3 All E. R. 705; 159 L. T. 462; 54 T. L. R. 1119; 82 Sol. Jo. 713; 36 L. G. R. 569.

**751.** *Add. Annotation:—Refd.* *Greenwood v. Atherton*, [1938] 2 All E. R. 475.

**760.** After this case add:—

**Wheat Commission.**—*See* AGRICULTURE, No. 979f, *ante*.

**760a. School managers.**—Pltf., an infant, was injured at school during an authorised recreation period by the swinging to of a pair of iron gates, which crushed his hand. The accident happened on Apr. 8, 1937, & on Nov. 10, 1937, more than six months later, a writ was issued against defts., who were respectively head teacher & managers of the school, claiming damages for breach of duty. Defts. pleaded the Public Authorities Protection Act, 1893 (c. 61). The school was a non-provided voluntary school, which under Education Act, 1921 (c. 51), received a grant towards the cost of education. The school & its body of managers were in existence before the passing of Education Act, 1921 (c. 51). For the purposes of carrying out the provisions of the Act, supervision & instruction, including recreation, were among the duties which the managers with the assistance of the head teacher had to perform. Pltf. contended that the duty of supervision was not a public duty, but was owed to a particular class of children:—*Held*: (1) the managers were a statutory body acting in the execution of the Education Acts; (2) the duty of supervision was a duty owed to all the children who attended the school, & was a public duty protected by the Public Authorities Protection Act, 1893 (c. 61); (3) the head teacher was acting as the servant of the managers; (4) the action was therefore barred as being out of time.—*GREENWOOD v. ATHERTON*, [1938] 2 All E. R. 475; *affd.*, [1938] 1 All E. R. 686 C. A.

*Annotation:—Refd.* *Griffiths v. St. Clement's School, Liverpool, Managers, & Church of England Schools Society, Trustees*, [1938] 3 All E. R. 537.

**760b.** —.—Pltf.'s son was at the material time a pupil of a non-provided school. Pltf. was invited to attend an exhibition of the pupils' work. The invitation was signed by the head master, & was issued with the authority of the managers of the school. Pltf. attended, & was injured through the collapse of a floor due to want of repair. It was alleged that

the managers of the school were in occupation only as the servants or agents of the general committee of the Church of England Schools Society. Defts. also relied upon Public Authorities Protection Act, it being admitted that the action was not commenced within six months of the act complained of:—*Held*: (1) pltf. was an invitee, & not a mere licensee; (2) the managers of the school were in occupation thereof, & not the general committee of the Church of England Schools Society; (3) the duty to repair was imposed upon them by the Education Act, 1902, s. 7; (4) the managers were a public authority within the meaning of the Public Authorities Protection Act, & the action was therefore barred.—*GRIFFITHS v. ST. CLEMENT'S SCHOOL, LIVERPOOL, & CHURCH OF ENGLAND SCHOOL SOCIETY TRUSTEES*, [1938] 3 All E. R. 537.

**766.** *Add. Annotation:—Refd.* *Graigola Merthyr Co. v. Swansea Corpn.*, [1929] A. C. 344.

**775.** *Add. Annotation:—Refd.* *London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd.*, [1936] Ch. 78.

**777a. Duty to prosecute.**—*Held*: the duty to prosecute for an offence is not a "public duty" within Public Authorities Protection Act, 1893 (c. 61), s. 1.—*HARTIN v. LONDON COUNTY COUNCIL* (1929), 141 L. T. 120; 93 J. P. 160; 45 T. L. R. 318; 27 L. G. R. 497; 28 Cox, C. C. 618.

*Annotation:—Refd.* *Betts v. Metropolitan Police District Receiver* (1932), 96 J. P. 327.

**777b. Stolen goods handed over to alleged owner by Receiver for Metropolitan Police.**—In the end of 1924 the Metropolitan Police found at the house of pltf. & took into their possession a quantity of goods including certain cloth. Pltf. was brought before the police ct. on charges of receiving, & some of the evidence there given tended to show, but did not prove, the identity of the cloth with cloth which had been stolen from a firm of carriers. Pltf. was committed for trial at the London sessions on indictments charging him with having received certain of the goods other than the cloth knowing them to have been stolen, & on an indictment charging him with a similar offence in respect of the cloth, & in Feb. 1925, he was convicted on the first-mentioned indictments & sentenced to five years' penal servitude. He was never tried on the indictment relating to the cloth, but it was allowed to remain upon the record. On Apr. 2, 1925, pltf. not having as yet made any credible claim to the cloth, the Receiver for the Metropolitan Police District handed it over to the firm of carriers, who claimed it, taking from them a written indemnity. On Jan. 16, 1931, pltf. having less than six months before made an unsuccessful demand for the cloth as his property, brought an action against the Receiver & the firm of carriers claiming damages for detainee & conversion of the cloth. The first-named deft. relied, among other defences, upon Public Authorities Protection Act, 1893 (c. 61). The jury, having heard the evidence, found that it did not establish the identity of the cloth with that stolen from the carriers,

#### PART VI. SECT. 3, SUB-SECT. 2.

11.  
—IR.

—*Negligence—Claim under Fatal Accidents Act.*—*APPELBE v. WEST CORK BOARD OF HEALTH*, [1929] I. R. 107.

& they returned a verdict for pltf. against both defts. :—*Held* : (1) the first deft. in handing over the cloth to the second defts. in Apr. 1925, had acted in "intended execution" of a "public duty" within Public Authorities Protection Act, 1893 (c. 61), s. 1, & as the action in respect of the act of conversion so effected had not been commenced within six months after that act, it was not maintainable in respect thereof; (2) pltf. could not elect to rely only on his claim in detainee, so as to make the time run from his demand & to bring the date of the action within six months after the cause of action. Therefore, judgment should be entered for the first deft. against pltf., & for pltf. against the second deft. —*BETTS v. METROPOLITAN POLICE DISTRICT RECEIVER & CARTER PATERSON & CO., LTD.*, [1932] 2 K. B. 595; 101 L. J. K. B. 588; 147 L. T. 336; 96 J. P. 327; 48 T. L. R. 517; 76 Sol. Jo. 474; 30 L. G. R. 349.

**777c. Provision of entertainment pavilion.**—By virtue of the powers contained in the Torquay Harbour Order, 1910, as confirmed by the Pier & Harbour Order Confirmation Act (No. 2), 1910, deft. corp'n. had erected & were carrying on an entertainment pavilion. While pltf. was attempting to buy a ticket at the booking-office of this pavilion, a poster-frame fell on her & injured her. In an action for damages for personal injuries, defts. contended that, as they were a public authority, the action should have been commenced within the period of six months prescribed by Public Authorities Protection Act, 1893 (c. 61), s. 1.

Pltf.'s daughter, who before the accident had had a whole-time job, which enabled her to pay pltf. 17s. 6d. per week towards her keep, had to give up her work for a time in order to look after her mother, who thereby lost this weekly contribution. It was contended that this source of damage was too remote :—*Held* : (1) the Pier & Harbour Order Confirmation Act (No. 2), 1910, merely enabled the corp'n. to build this pavilion, & did not compel them either to build it, or, having built it, to carry it on. Their conduct in so doing was entirely voluntary, & they were, therefore, not protected by the Public Authorities Protection Act; (2) the loss of the daughter's contribution to the home was a source of damage that was properly included, & for which pltf. was entitled to recover.—*HAWKES v. TORQUAY CORPN.*, [1938] 4 All E. R. 16.

**783. Add. Annotation :—Consd.** *McManus v. Bowes*, [1937] 3 All E. R. 227.

**784. Add. Annotations :—Consd.** *Paul, Ltd. v. Wheat Commission* (1935), 152 L. T. 352; *McManus v. Bowes*, [1937] 3 All E. R. 227; *Greenwood v. Atherton*, [1938] 2 All E. R. 475; *Swain v. Southern Ry. Co.*, [1938] 3 All E. R. 705. *Refd.* *Scammell v. Hurley*, [1929] 1 K. B. 419; *Graigola Merthyr Co. v. Swansea Corp'n.*, [1920] A. C. 344; *Betts v. Metropolitan Police District Receiver* (1932), 96 J. P. 327.

**795. Add. Annotation :—Refd.** *Scammell v. Hurley*, [1929] 1 K. B. 419.

**800. Add. Annotation :—Refd.** *Scammell v. Hurley*, [1929] 1 K. B. 419.

**803. Add. Annotation :—Apld.** *Graigola Merthyr Co. v. Swansea Corp'n.*, [1928] Ch. 235.

**804. Substitute Citations.**—[1929] A. C. 344; 98 L. J. Ch. 233; 140 L. T. 505; 93 J. P. 121; 45 T. L. R. 219; 73 Sol. Jo. 109; 27 L. G. R. 243, H. L.

**808a.** —. —.]—If a party *bonâ fide*, & not absurdly believes that he is acting in pursuance of a statute, he is entitled to the special protection which the legislature intended for him, although he has done an illegal act.—*SPOONER v. JUDDOW* (1850), 4 Moo. Ind. App. 353; 6 Moo. P. C. C. 257; 18 E. R. 734, P. C.

**827. Add. Annotation :—Consd.** *R. v. Minister of Health, Ex p. Yaffe*, [1930] 2 K. B. 98.

**834a.** —. —.]—The time limited for bringing actions against justices of a Metropolitan police district in respect of a conviction under 2 & 3 Vict. c. 47, s. 18, made in exercise of the jurisdiction given them by 3 & 4 Vict. c. 84, s. 6, is three calendar months, the period prescribed by 2 & 3 Vict. c. 71, s. 53, & not six calendar months, the period given by 10 Geo. 4, c. 41, s. 41.—*BARNETT v. COX* (1817), 9 Q. B. 617; 115 E. R. 1410.

**839. Add. Annotation :—Consd.** *Scammell v. Hurley*, [1929] 1 K. B. 419.

**854. Add. Annotation :—As to (1) Refd.** *Scammell v. Hurley*, [1929] 1 K. B. 419.

**854a.** —. —.]—Where deft. appears to be acting as a member of a public body under statutory authority & pleads the six months' limitation imposed by Public Authorities Protection Act, 1893 (c. 61), as the period within which an action must be brought in respect of his acts, pltf. can defeat that claim by proving, on sufficient evidence, that deft. was not really intending to act in pursuance of his statutory authority, but was using his pretended authority from some improper motive, such as spite or for a purpose entirely outside statutory justification.

Where defts. are found purporting to execute a statute, the burden of proof is on pltf. to prove the existence of such a dishonest motive & the absence of any honest desire to execute the statute, & such existence & absence should be found only on strong & cogent evidence.—*SCAMMELL G. & NEPHEW, LTD. v. HURLEY*, [1929] 1 K. B. 419; 98 L. J. K. B. 98; 110 L. T. 236; 93 J. P. 99; 27 L. G. R. 53; *sub nom.* *SCAMMELL G. & NEPHEW, LTD. v. ATTLEE*, 45 T. L. R. 75; 73 Sol. Jo. 12, C. A.

*Annotation :—Refd.* *R. v. Minister of Health, Ex p. Yaffe*, [1930] 2 K. B. 98.

**857. Add. Annotation :—Consd.** *China Navigation Co. v. A.-G.* (1932), 48 T. L. R. 375.

**859a. Proceedings by Infant.**—Public Authorities Protection Act, 1893 (c. 61), s. 1, applies to claims by infants against a public authority.—*JACOBS v. LONDON COUNTY COUNCIL, SHAW v. LONDON COUNTY COUNCIL*, [1935] 1 K. B. 67;

- 104 L. J. K. B. 84; 152 L. T. 78; 99 J. P. 10; 51 T. L. R. 16; 78 Sol. Jo. 731; 32 L. G. R. 409, C. A.
860. *Add. Annotations*:—**Folld.** Runcorn Guardians v. Worrall (1930), 94 J. P. Jo. 205. **Refd.** Allen v. Waters & Co., [1935] 1 K. B. 200.
- 860a. — **Recovery of loan by guardians.**—**RUNCORN GUARDIANS v. WORRALL** (1930), 94 J. P. Jo. 205, D. C.
861. *Add. Annotation*:—**Refd.** R. v. L. C. C., *Ex p.* Swan & Edgar (1927) (1929), 141 L. T. 590.
863. *Add. Annotation*:—**Apld.** Graigola Merthyr Co. v. Swansea Corp., [1929] A. C. 344.
864. *Add. Annotation*:—**Consd.** Graigola Merthyr Co. v. Swansea Corp., [1928] Ch. 235.
869. *Add. Annotation*:—**Refd.** Graigola Merthyr Co. v. Swansea Corp., [1929] A. C. 344.
870. *Add. Annotation*:—**Consd.** Graigola Merthyr Co. v. Swansea Corp., [1928] Ch. 235.
876. *Add. Annotation*:—**Refd.** Scammell v. Hurley, [1929] 1 K. B. 419.
- 882a. — **—**—**Certiorari** is not a "proceeding" within Public Authorities Protection Act, 1893 (c. 61), s. 1.—**R. v. LONDON COUNTY COUNCIL**, *Ex p.* SWAN & EDGAR (1927), LTD. (1929), 141 L. T. 590; 45 T. L. R. 512, D. C.
884. *Add. Annotation*:—**Refd.** R. v. L. C. C., *Ex p.* Swan & Edgar (1927) (1929), 141 L. T. 590.
885. *Add. Annotation*:—**Refd.** R. v. L. C. C., *Ex p.* Swan & Edgar (1927) (1929), 141 L. T. 590.
886. *Add. Annotation*:—**Refd.** R. v. L. C. C., *Ex p.* Swan & Edgar (1927) (1929), 141 L. T. 590.
887. *Add. Annotation*:—**Refd.** R. v. L. C. C., *Ex p.* Swan & Edgar (1927) (1929), 141 L. T. 590.
888. *Add. Annotations*:—**Refd.** R. v. L. C. C., *Ex p.* Swan & Edgar (1927) (1929), 141 L. T. 590. **Mentd.** Pickford v. Quirke, Pickford v. I. R. Courts. (1927), 138 L. T. 500; R. v. St. Marylebone Income Tax Comrs., *Ex p.* Schlesinger (1928), 13 Tax Cas. 746.
- 920a. — **—**—**BETTS v. METROPOLITAN POLICE DISTRICT RECEIVER**, No. 777b.
931. *Add. Annotations*:—**Consd.** Morriss v. Winter (1929), 45 T. L. R. 643. **Refd.** Copper Export Assocn. Inc. v. Mersey Docks & Harbour Board (1932), 48 T. L. R. 542.
- 940a. **Detention after receipt of remission marks—Continuance by successive prison Governors.**—**M.** was convicted in Dec. 1925, of certain misdemeanours & sentenced to two years' imprisonment with hard labour & twelve months' imprisonment, the sentences to run consecutively. An order was made by the ct. directing that he should be detained in prison in conformity with the sentences passed. He was first detained in Portsmouth Prison & afterwards in Pentonville Prison. In Dec. 1927, after M. had been removed to Pentonville Prison, the Governor of Portsmouth Prison indorsed on M.'s stage card the forfeiture of five remission marks, to make it agree with M.'s record. There was a dispute whether or not the Governor of Portsmouth Prison had ordered the forfeiture of those marks on May 10, 1926, & the jury differed with regard to it. As a result of the forfeiture of those five marks M. was released by the Governor of Pentonville Prison on July 21, 1928, instead of on July 20. On Aug. 2, 1928, M. brought an action against the Governors of both prisons to recover damages for his detention in prison during that one day. The jury found that the Governor of Portsmouth Prison had not acted maliciously nor with intention to injure M., & that he had not made a false statement:—**Held**: the Prison Rules did not confer upon M. any legal right to an earlier discharge by the obtaining of remission marks, & that therefore the action could not succeed against either of the Governors; having regard to the findings of the jury the action could not succeed against the Governor of Portsmouth Prison; & that debt. was protected by the Public Authorities Protection Act, 1893 (c. 61), as the action was not brought within six months of the act that caused the damage, there being no continuance of the injury or damage, as there was no continuance of the act by that debt. which caused the damage, & the Governor of Pentonville Prison was protected, as he had merely acted in pursuance of the order of the ct.—**MORRIS v. WINTER**, [1930] 1 K. B. 243; 99 L. J. K. B. 101; 142 L. T. 67; 28 Cox, C. C. 687.
942. *Add. Annotation*:—**Consd.** Rawlins v. Gillingham Corp., (1932), 146 L. T. 486.
947. *Add. Annotation*:—**Consd.** Rawlins v. Gillingham Corp., (1932), 146 L. T. 485.
948. *Add. Annotation*:—**Refd.** Newsome v. Darton Urban District Council, [1938] 1 All E. R. 79.
949. *Add. Annotation*:—**As to** (1) **Refd.** Copper Export Assocn. Inc. v. Mersey Docks & Harbour Board (1932), 48 T. L. R. 542.
- 949a. **Negligence of dock company—Improper repair of ship.**—A dock co. were empowered by a private Act of Parliament to raise, destroy, & remove wrecks in their docks, to sell the wreck & cargo, & after paying expenses, to pay over the balance to the owners. A ship caught fire & partially sank in their dock. In Feb. 1930 the dock co. repaired the ship, but on taking her out of the

## PART VI. SECT. 5, SUB-SECT. 2.

861 L. "Action" — Against "person" — Wrongful tax sale.] — **Held**: Public Authorities Protection Act not applicable.—**KOWNATZKI v. BEAR LAKE MUNICIPAL DISTRICT**, [1931] 1 D. L. R. 334; [1930] 3 W. W. R. 353; *reversd. on other grounds*, [1931] 1 W. W. R. 357; 2 D. L. R. 318; 25 Alta. L. R. 751.—**CAN.**

so. "Judgment."—"Judgment" in Public Authorities Protection Act includes a decision of the Inner House pronounced upon a reclaiming note; also, *semble*, a decision of the House of Lords in an appeal against a decision

of the Inner House.—**SMITH v. GLASGOW EDUCATION AUTHORITY**, [1933] S. C. (H. L.) 51.—**SCOT.**

## PART VI. SECT. 5, SUB-SECT. 3.

sp. **Continuing trespass—Action not barred by Towns Incorporation Act, 1895 (c. 4).**—**ARCHIBALD v. TRURO CORPN.** (1900), 33 N. S. R. 401.—**CAN.**

## PART VI. SECT. 6, SUB-SECT. 1.—A.

hi. — **Release of insurance company by corporation from liability for accident.** — On an appln. under The Town Act, 1927, s. 666, for leave to bring an action against a town for injuries sustained,

more than three months previously, owing to alleged defective wiring belonging to the town:—**Held**: the fact that the town had released an insurance co. from further liability with respect to the accident did not prejudice it in such a manner as to lead the ct. to refuse to exercise its discretion under said section to allow the action to be brought.—**Re RURN & ESTEVAN TOWN**, [1928] 4 D. L. R. 509; [1928] 2 W. W. R. 686.—**CAN.**

## PART VI. SECT. 6, SUB-SECT. 1.—B.

h. **Citations**:—For "[1923] S. C. R. 586," read "63 S. C. R. 586."

dockyard it was found that the repairs were useless, & in June, 1931, she was sold to ship-breakers, & a statement was then prepared & issued by the dock co. showing the amount available for division amongst the cargo owners. In July, 1931, the cargo owners issued a writ claiming damages from the dock co. by reason of their having acted negligently in having tried to repair the ship, whereby the sum available for division amongst the owners was diminished. The dock co. relied on the Public Authorities Protection Act, 1893 (c. 61), s. 1 (a), but the cargo owners contended that the action was in time, as their rights were not ascertainable until the preparation of the adjustment statement, & as part of their complaint was the rendering to them of a statement showing too small a balance:—*Held*: the act or default complained of was in substance the alleged negligence of the dock co. in repairing the ship, this had taken place more than six months before action brought, & therefore the action was barred by the operation of the Public Authorities Protection Act, 1893 (c. 61), s. 1 (a).—*COPPER EXPORT ASSOCN. INCORPORATED v. MERSEY DOCKS & HARBOUR BOARD* (1932), 147 L. T. 320; 48 T. L. R. 542.

#### PART VI. SECT. 6, SUB-SECT. 6.

n (p. 133) i. ———.—Under the Medicine Hat Charter:—*Held*: notice of the claim & injury was not a condition precedent to the right to maintain an action against the city for the recovery of damages to property caused by an explosion of natural gas from a leak resulting from disrepair of a gas main owned & maintained by the city.—*FREEDMAN & LESK v. MEDICINE HAT CITY*, [1936] 1 W. W. R. 602.—*CAN.*

n (p. 133) ii. ———.—Where action in respect of want of repair caused by misfeasance.—*PRENTICE v. SAULT STE. MARIE*, [1927] 4 D. L. R. 800; 61 O. L. R. 246; *reversed*, [1928] 3 D. L. R. 564; [1928] S. C. R. 309.—*CAN.*

c (p. 134) i. ———.—*McGREGOR v. R.*, [1929] 1 D. L. R. 181.—*CAN.*

c (p. 134) ii. ———.—As to injuries.—*MILLS v. CITY OF LETHBRIDGE* (Alta.), [1927] 4 D. L. R. 1019; [1927] 3 W. W. R. 421.—*CAN.*

oo (p. 135) i. ———.—Pltf. was injured by his car striking an obstruction in deft.'s highway. During the ten days following the accident he was incapacitated by reason of his physical & mental condition from giving the notice required by Municipal Act, sect. 469 (4):—*Held*: there being no evidence that deft. corp. was prejudiced by the failure to give notice within the statutory time, the ct. should be astute in finding reasonable excuse.—*WEIR v. TURNBERRY*, [1931] 3 D. L. R. 255; O. R. 309.—*CAN.*

oo (p. 135) ii. ———.—To constitute reasonable excuse there must be such incapacity, either mental or physical, on the part of the injured person, as to render him incapable of discussing business affairs or giving

instructions for the notice.—*BISSELL v. ROCHESTER*, [1930] 3 D. L. R. 825; 65 O. L. R. 310.—*CAN.*

oo (p. 135) iii. ———.—*Infancy*.—An adult is not excused by ignorance of the law from giving the notice of claim & injury required by the Municipal Act, but an infant of ten years of age cannot be presumed to know the law, & ignorance of the law is a good excuse for him.—*FERGUS v. TORONTO CITY*, [1932] O. R. 257; 2 D. L. R. 807.—*CAN.*

oo (p. 135) iv. ———.—In an action against a city for damages for negligence the finding by the trial judge that there was a reasonable excuse for pltf.'s delay in giving the notice of the accident required by statute to be given to the city & that the city had not been prejudiced in its defence by the delay is subject to review on appeal.—*CARMICHAEL & CARMICHAEL v. EDMONTON CITY*, [1933] 1 W. W. R. 533; 2 D. L. T. 702; *affd.*, [1933] S. C. R. 650; 1 D. L. R. 197.—*CAN.*

oo (p. 135) v. ———.—Pltf.'s expectation & hope that her knee, which had been injured by her falling on a sidewalk & was causing her much pain & inconvenience, would soon get better so that a claim against the town would not be necessary, *held* not to constitute a "reasonable excuse" within sect. 568 of Town Act, R. S. S., 1930, for not giving the town notice of her claim & injury within the time prescribed by sect. 567.—*NICHOLS v. KAMSAK TOWN*, [1935] 3 W. W. R. 355.—*CAN.*

oo (p. 135) vi. ———.—Pain, suffering & worry held not sufficient excuse for omission of notice of damage against city.—*SCHUMAN v. VANCOUVER CITY* (1934), 48 B. C. R. 191.—*CAN.*

953. *Add. Annotations*:—*Consd.* Rawlins v. Gillingham Corp. (1932), 146 L. T. 486. *Refd.* Morris v. Winter (1929), 45 T. L. R. 643; Copper Export Assocn. Inc. v. Mersey Docks & Harbour Board (1932), 48 T. L. R. 542.

955. *Add. Annotations*:—*Consd.* Graigola Merthyr Co. v. Swansea Corp., [1928] Ch. 235. *Refd.* Morris v. Winter (1929), 45 T. L. R. 643; Copper Export Assocn. Inc. v. Mersey Docks & Harbour Board (1932), 48 T. L. R. 542.

955a. ———.—Pltf., who had sustained injuries in an accident on Jan. 3, 1930, which he alleged was due to the negligence of defts., commenced an action for damages on July 4, 1930. There was no suggestion that any act done by defts. after Jan. 3 had caused any repetition of damage to pltf.:—*Held*: the action was not maintainable, as it had not been commenced within the time limited by Public Authorities Protection Act, 1893 (c. 61), s. 1.—*RAWLINS v. GILLINGHAM CORPN.* (1932), 146 L. T. 486; 96 J. P. 153.

956. *Add. Annotations*:—*Refd.* Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401; Harper v. Haden & Sons, [1933] Ch. 298.

966. *Add. Annotation*:—*Consd.* Graigola Merthyr Co. v. Swansea Corp., [1929] A. C. 344.

oo (p. 135) vii. ———.—Failure to serve notice of action in time on a municipal corp. is a complete bar to action, whatever the reason for the omission.—*TRUSSLER v. KITCHENER*, [1936] 1 D. L. R. 98; O. R. 53; 5 F. L. J. (Can.) 180.—*CAN.*

sq. *Fishery inspector*.—In an action by an Indian living on an Indian reserve against a fishery inspector & a game & fishery overseer in trover, to recover the value of a seine fishing net, the property of pltf. seized by defts. upon the reserve, defts. justified under Dominion Fisheries Act, 1914, & Ontario Game & Fisheries Act, 1914, no license to fish having been taken out by pltf. or those who used the seine for fishing:—*Held*: no notice of action was necessary.—*SERO v. GAULT* (1921), 50 O. L. R. 27; 64 D. L. R. 327.—*CAN.*

st. *Effect of negotiations by city claims agent*.—After notice given—*Limitation period suspended*.—*CAMILLO v. EDMONTON*, [1930] 3 D. L. R. 670.—*CAN.*

#### PART VI. SECT. 7.

st. *Pleading*.—In an action against deft. in his capacity as sheriff & his servants & agents for wrongful trespass & wrongful seizure of grain the sheriff set up (*inter alia*) sect. 2 of Public Authorities Protection Act, R. S. A., 1922, & relying thereon, moved under rule 255 to have the statement of claim struck out as disclosing no cause of action against said sheriff, or, alternatively, under rule 114, to have the questions of law raised by said defence set down for hearing before trial:—*Held*: the better course would be to set down for hearing before trial the question whether sect. 2 of said Act was a complete answer to the statement of claim.—*BARRY v. RAE*, [1934] 1 W. W. R. 74.—*CAN.*

## Part VIII.—Tenure and Compensation for Abolition of Office.

**1015a.** — — —.]—To prove continuance in office as First Lord of the Admiralty :—*Held* : sufficient to prove appointment, the onus being on the other party to prove determination.—*R. v. BUDD* (1805), 5 Esp. 230 ; 170 E. R. 795, N. P.

**1037.** *Add. Annotation* :—*Apld.* *Stoke Newington Borough Council v. Richards* (1929), 45 T. L. R. 650.

**1039a.** *Children of deceased constable—Constabulary (Ireland) Act, 1922 (c. 55), Sched. Part I, r. 4.*—*EGAN v. A.-G.*, No. 1048a, *post*.

**1042.** *Add. Annotation* :—*Distd.* *Mountford v. London County Council*, [1935] 2 K. B. 243.

**1046.** *Add. Annotation* :—*Consd.* *Stoke Newington Borough Council v. Richards* (1929), 45 T. L. R. 650.

**1047.** *Add. Annotation* :—*Consd.* *Kiddie v. Port of London Authority* (1929), 93 J. P. 203.

**1048a.** *For loss of salary—Meaning of salary—Constabulary (Ireland) Act, 1922 (c. 55).*—(1) In *Constabulary (Ireland) Act, 1922 (c. 55)*, by which compensation on the basis of salary is payable to the members of the disbanded Royal Constabulary, the word “salary” means wages or pay & does not include allowances, such as allowances for lodging, house-rent, & servant. (2) Under Part I, r. 4 of the *Sched.* to the Act the children of a constable who has received compensation on his compulsory retirement are not, on his death, entitled to any pension or gratuity unless his death has taken place within 12 months from the date of his receipt of such compensation, inasmuch, as, by clause 6 of *Royal Irish Constabulary Pensions Order, 1922*, the children of a pensioned constable are not, by the mere fact of his death, entitled to any allowances unless he has died within 12 months from the grant of

his pension.—*EGAN v. A.-G.*, [1931] A. C. 113 ; 100 L. J. Ch. 18 ; 144 L. T. 227 ; 47 T. L. R. 91 ; 74 Sol. Jo. 849, H. L.

**1049a.** *London Passenger Transport Act, 1933—Lump sum or annuity.*—In assessing compensation for loss of office under *London Passenger Transport Act, 1933*, s. 73 (6), the Standing Arbitrator may award compensation either in the form of a lump sum or an annuity. The recipient of the compensation has no option & cannot insist upon the award in either form. If a lump sum is awarded, the arbitrator may apply any actuarial tables that he thinks fit, provided that the total sum awarded does not exceed the sum which could have been awarded to a civil servant under the provisions of the Acts & regulations in force on Aug. 13, 1888, *i.e.*, the regulations made by the Treasury on July 27, 1871.—*Rich v. London Passenger Transport Board*, [1936] 1 All E. R. 912 ; 80 Sol. Jo. 384, C. A.

*Annotation* :—*Consd.* *Allen v. London Passenger Transport Board*, [1936] 2 All E. R. 122.

**1049b.** — — *Managing director of company taken over.*—A joint managing director of each of two omnibus cos. taken over by the *London Passenger Transport Board* was not offered any office or employment, & his services were dispensed with on the ground that they were no longer required. The question arose whether he was entitled to have his compensation assessed under *London Passenger Transport Act, 1933*, s. 73 (4) or (6) :—*Held* : compensation ought to be assessed under sub-sect. (6). *Allen v. London Passenger Transport Board*, [1936] 2 All E. R. 122, D. C.

**1057.** *Add. Annotation* :—*Consd.* *Stoke Newington Borough Council v. Richards* (1929), 45 T. L. R. 650.

### PART VIII. SECT. 1, SUB-SECT. 2.

**h i.** — — — *Notwithstanding contract for term certain—Contract ultra vires.*—*LARKINS v. SUMMERSIDE*, [1928] 4 D. L. R. 841.—**CAN.**

**k i.** *Appointment until successor appointed—Appointment of successor—Right to salary in lieu of notice.*—*BLAKELEY v. CHARLEWOOD RURAL MUNICIPALITY*, [1928] 2 D. L. R. 657 ; [1928] 1 W. W. R. 828 ; 37 Man. L. R. 331.—**CAN.**

**l i.** — — — *Of weights & measures.*—*Held* : (1) the office of inspector was a freehold public office tenable during life or good behaviour ; (2) an inspector was not liable to dismissal at the pleasure of the Governor in Council as the holder of a public office under the Govt., but could only be removed from office by the justices in petty

sessions for good cause, & after being called upon to show cause against his removal ; (3) the acceptance of a salary did not affect the tenure of his office, or render him liable to dismissal by the Govt. as a public servant.—*Ex p. EVANS* (1909), 10 S. R. N. S. W. 1 ; 26 N. S. W. W. N. 189 ; 9 C. L. R. 140.—**AUS.**

**st.** *Delegation of authority to departmental heads.*—The municipal council of Sydney passed a resolution providing that the discharge or disrating or suspension of any employee should be left in the hands of the heads of the respective departments subject to appeal to the town clerk, whose decision was to be final. An employee who was subsequently dismissed by a departmental head brought an action against the council for wrongful dismissal :—*Held* : the council had power to

delegate its authority to discharge employee.—*BAILY v. SAUNDY MUNICIPAL COUNCIL* (1927), 28 S. R. N. S. W. 149 ; 45 N. S. W. W. N. 40.—**AUS.**

### PART VIII. SECT. 2, SUB-SECT. 2.

**n.** For “ *Wigg v. COCHRANE v. A.-G.*, [1927] L. R. 285 ” read “ *Wigg v. A.-G. OF IRISH FREE STATE*, [1927] A. C. 674 ; 96 L. J. P. C. 88 ; 137 L. T. 460 ; 43 T. L. R. 457.”

*See, further*, *DEPENDENCIES*, No. 714b, 714c.

### PART VIII. SECT. 2, SUB-SECT. 3.

**sw.** *Calculated on years of actual service—Addition of years under county scheme.*—*O’SULLIVAN v. LIMERICK C. C. NAUGHTON v. LIMERICK C. C.*, [1928] I. R. 493.—**IR.**

## PUBLIC HEALTH AND LOCAL ADMINISTRATION.

## Part III.—Control by Ministry of Health.

9. *Add. Annotation*:—*Refd. A.-G. v. Sunderland Corpn.* (1929), 46 T. L. R. 10.
- 10a. — *Confirmation of unauthorised improvement scheme—Effect of Housing Act, 1925 (c. 14), s. 40 (5).*—*MINISTER OF HEALTH v. R., Ex p. YAFFE*, No. 506c, *post*.
14. *Add. Annotation*:—*Dbtd. R. v. Minister of Health, Ex p. Yaffe*, [1930] 2 K. B. 98.
20. *Add. Annotation*:—*As to (1) Consd. Crediton Gas Co. v. Crediton U. C.*, [1928] Ch. 447.
23. *Add. Annotation*:—*Refd. Clark v. Epsom R. D. C.*, [1929] 1 Ch. 287.
29. *Add. Annotation*:—*Generally, Refd. Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401.
- 29a. — — — — — *J*—The duty of a local authority under 1875 Act, s. 15, to keep sewers in repair cannot be enforced by an action by a private person for a mandatory injunction. The proper remedy is a complaint to the Minister of Health under sect. 299 of the Act.—*CLARK v. EPSOM RURAL DISTRICT COUNCIL*, [1929] 1 Ch. 287; 98 L. J. Ch. 88; 140 L. T. 246; 93 J. P. 67; 45 T. L. R. 106; 27 L. G. R. 328.
38. *Add. Annotations*:—*Apld. Clark v. Epsom R. D. C.*, [1929] 1 Ch. 287. *Refd. Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485.

## Part V.—Bye-Laws.

49. *Add. Annotation*:—*Refd. R. v. Minister of Health, Ex p. Yaffe*, [1930] 2 K. B. 98.
70. *Add. Annotations*:—*Refd. R. v. Minister of Health, Ex p. Yaffe*, [1930] 2 K. B. 98;

## PART I.

a. *Power to acquire land—For offices.*—*MAYVILLE LOCAL ADMINISTRATION & HEALTH BOARD v. GIELINK* (1928), 49 N. L. R. 148.—S. AF.

## PART II. SECT. 3.

c i. — *Order for abatement of nuisance made on report of—Effect of report of Department of Health.*—*LEATHER v. DOOLITTLE CO., LTD.*, [1928] 2 D. L. R. 805; 62 O. L. R. 162.—CAN.

## PART III. SECT. 1.

sb. *Meaning of "public show" in bye-law—Dog racing.*—*Held*: dog racing handicaps, conducted in a ground specially adapted for dog racing, to which the public were admitted as spectators on payment, were not a "public show" within *Burgh Police* (Scotland) Act, 1892, s. 397.—*BREMNER v. MORRISON*, [1930] S. C. (J.) 42.—SCOT.

## PART III. SECT. 2, SUB-SECT. 1.

sd. *Whether jurisdiction must be shown—Order under Housing Acts.*—An order of a local authority under the Housing Acts, if it follow the prescribed form, need not show jurisdiction on its face like the order of an inferior ct.—*McCoy v. CORK CORPN.*, [1934] 1 R. 779.—IR.

## PART V. SECT. 1.

a (p. 156) i. — *By Railway & Municipal Board—Does not validate invalid bye-law.*—*Re CASA LOMA*, [1927] 4 D. L. R. 645; 61 O. L. R. 187.—CAN.

a (p. 156) ii. — *Leave to appeal from Board—Grounds for granting.*—*Re CASA LOMA*, [1927] 4 D. L. R. 645; 61 O. L. R. 187.—CAN.

a (p. 156) iii. — *Necessity for—Bye-law amending bye-law.*—Approval of municipal board held necessary to a bye-law amounting in effect to an amendment of another bye-law.—*WORTHINGTON v. FOREST HILL VILLAGE*, [1934] 1 D. L. R. 608; O. R. 17.—CAN.

h (p. 156) i. — — — — — *J*—*Held*: the statutory duty to publish a bye-law in the newspaper of a village under Municipal Act, R. S. O., 1914, was imperative.—*Re POULIN & L'ORIGINAL VILLAGE* (1918), 42 O. L. R. 483.—CAN.

cc (p. 156) i. — — — — — *J*—Where pending the return of a summons to show cause why a certain bye-law of the city of Winnipeg should not be quashed as *ultra vires* the council repealed the bye-law & enacted a new bye-law which overcame appct.'s ground of complaint & the motion made on the return was, therefore, dismissed.—*Held*: on appeal from the refusal of costs to appct. he was entitled to costs since the sect. of the Charter under which the motion was made provides that the judge may "according to the result of the application award costs for or against the corpn." & in the circumstances the word "result" should not be read so literally as to be confined to the fact of the dismissal of the application.—*Re TURNER & WINNIPEG CITY*, [1933] 1 W. W. R. 651; 3 D. L. R. 486; 41 Man. L. R. 372.—CAN.

ee (p. 156) i. — — — — — *J*—*Re McCUTCHEON & TORONTO CORPN.* (1863), 22 U. C. R. 613.—CAN.

ii. (p. 156) i. — — — — — *J*—Pursuant to the power given it by the city charter to pass bye-laws regulating its proceedings the Winnipeg city council passed a bye-law reading: "Notice at a previous regular meeting shall be given of all motions for introducing new matter other than matters of privilege & bringing up petitions, reports & communications, & no motion shall be discussed unless such notice has been given . . .".—*Held*: the bye-laws in question herein which provided for the compulsory closing of shops on Saturday or on Wednesday afternoons introduced "new matter" within the bye-law quoted above & since no notice of the motion to introduce them had been given at any previous meeting of the council, said bye-laws were invalid, although no member of the council had objected to their introduction; & they must be

quashed. Costs given appct.—*RAN-NARD v. WINNIPEG CITY*, [1935] 3 W. W. R. 35; 43 Man. L. R. 385; *revid.* [1937] 1 W. W. R. 539; 45 Man. L. R. 111; 68 Can. C. C. 275.—CAN.

jj (p. 156) i. — — — — — *Non-compliance with condition precedent.*—When in passing a bye-law a municipal council exceeds its limited jurisdiction or ignores a condition precedent to the exercise of the powers conferred on it by statute the duty of the ct. is to quash the bye-law for illegality or, in the case of a prosecution under it, to dismiss the charge; & therefore, evidence is admissible to show that the condition precedent had not been complied with.—*Re ex rel. DONALD v. THOMPSON* (No. 1) (Sask.), [1929] 4 D. L. R. 958; 2 W. W. R. 563; 52 Can. Crim. Cas. 47.—CAN.

mm (p. 156) i. — — — — — *J*—Where the illegality of a bye-law appears upon its face there is no discretion in the ct. to refrain from quashing it. A rating bye-law provided "that the rate for public school purposes be as requested by public school trustees"—*Held*: it was invalid, because it attempted to delegate the power which by the Municipal Act is vested solely in the township council to the public school trustees of the several school sections, & the illegality appeared on the face of the bye-law.—*Re MIDDLETON & GODERICH*, [1931] 4 D. L. R. 75; O. R. 392.—CAN.

## PART V. SECT. 2, SUB-SECT. 1.

52 v. — — — — — *J*—*R. v. PENNER*, [1930] 1 D. L. R. 834 53 Can. C. C. 242.—CAN.

ooo (p. 157) i. — *Bye-law prohibiting keeping of animals—Except with consent of council—Conditions under which consent given not set out.*—*MILLER v. BRIGHTON CITY*, [1928] V. L. R. 375; [1928] Argus L. R. 209.—AUS.

dddd (p. 157) i. — — — — — *J*—*Re FOX-CROFT & LONDON*, [1927] 4 D. L. R. 684; 61 O. L. R. 209; *revid.* [1928] 1 D. L. R. 849; 61 O. L. R. 553.—CAN.

British Trawlers' Federation, Ltd. v. London & North-Eastern Ry. Co. (1932), 147 L. T. 313.

89. *Add. Annotation:—Consd. Ireland v. Wilson*, [1936] 3 All E. R. 358.

r (p. 158) i. — *Scrutiny—Powers of county court judge.*—A county ct. judge holding a scrutiny of the ballot papers deposited in a vote on a municipal bye-law may go behind the voters' list & inquire if a tenant whose name is placed thereon has the residential qualification entitling him to vote. The judge has no power to inquire whether rejected ballots were cast for or against the bye-law. Ballots rejected on a scrutiny must be deducted from the total number of votes cast in favour of the bye-law. — *McPHERSON v. MEHRING*, [1913] 47 S. C. R. 451. — **CAN.**

aa (p. 158) i. — *Re HOWARD & TORONTO CORPN., Re SWEET & TORONTO CORPN.*, [1928] 1 D. L. R. 952; 61 O. L. R. 563. — **CAN.**

aa (p. 158) ii. — *Question for municipal council.*—A bye-law expropriating a public park land passed by a township council was attacked upon the ground that it was not enacted in the public interest, but in the interest of a land co. — *Held*: the matter was one to be determined by the council. — *HURST v. MURRAY*, [1931] 3 D. L. R. 355; O. R. 290. — **CAN.**

bb (p. 158) i. — *Test.*—In determining whether a municipal bye-law was passed in the public or a private interest the primary moving force behind the bye-law must be looked at, & if that force emanates from a private source & is to save harmless or to reimburse the corpn. with respect to all costs & is to reap the primary direct benefit from the bye-law, it may safely be concluded that the bye-law was in a private & not in the public interest. — *WALLACE v. DAUPHIN TOWN*, [1932] 2 W. W. R. 495. — **CAN.**

so. *Right to question validity.—In summary proceedings.*—*Held*: it is competent in a summary proceeding to challenge the validity of a bye-law made by a local authority, even though it has obtained the approval of the Sheriff & of the Secretary of State. — *DAVID LAWSON, LTD. v. TOURNAINE*, [1929] S. C. 119 (J.). — **SCOT.**

sd. *Bye-law in the "interests of the city."*—In determining whether a city bye-law was "passed *bona fide* in the interests of the city" within the city's charter, allegations of unreasonableness, oppressiveness & unequal operation are of importance only so far as they have a bearing upon the questions of "*bona fides*" & "public interests." The question of what are the interests of the city is certainly, at least *prima facie*, one for the city council to pass upon without undue interference from the cts. The mere fact that a bye-law benefits one individual or class at the expense of another does not necessarily indicate that it is not in the "interests of the city." The burden of showing that a bye-law, otherwise valid, was not passed in good faith in the interests of the city is on the person attacking it. — *KEELY v. EDMONTON CITY*, [1931] 1 W. W. R. 365; 2 D. L. R. 705. — **CAN.**

se. *Bye-law in future tense.—Valid.*—*ST. GERVAIS v. GOULET*, [1931] 3 D. L. R. 604. — **CAN.**

sf. *Petition for bye-law relating to local improvement.—Sufficiency of petition.*—The ct. cannot quash a bye-law of a council for undertaking a work on petition, if the clerk certified to the sufficiency of the petition, even though the clerk in giving his certificate made a mistake of law by misinterpreting the requirements of Local Improvement Act, R. S. O., 1927, s. 11. — *Re*

*BRITTON & TORONTO CITY*, [1934] 1 D. L. R. 368. — **CAN.**

sk. *Jurisdiction of court.*—The ct. cannot question the validity of a bye-law which has been approved by the Ontario Railway & Municipal Board. — *Re HARPER & EAST FLAMBOROUGH TOWNSHIP* (1914), 32 O. L. R. 490. — **CAN.**

sl. *Bye-law in excess of powers.—Whether corporation liable in damages.*—A corpn. is not liable for damages caused by a bye-law passed under a misconstruction of its powers unless such liability is imposed by statute. — *POCOCK v. TORONTO CITY CORPN.* (1896), 27 O. R. 635. — **CAN.**

so. *Non-observance of statutory requirements.*—*FLEMING v. SANDWICH TOWN* (1918), 44 O. L. R. 511. — **CAN.**

sr. *Closure of shops.*—The ct. will not interfere with the judgment of a city council in passing bye-laws requiring shops to close in the summer months on Wednesday or Saturday afternoons. — *WINNIE v. RANNAID VALE SHOE, LTD.*, [1937] 2 D. L. R. 683. — **CAN.**

st. *Closure of beverage rooms.*—A corpn. has no power to enact a bye-law submitting to municipal electors the question of closing beverage rooms at certain hours throughout the whole Province. — *Re THOMAS & HAMILTON CITY*, [1938] 1 D. L. R. 371; 69 Can. C. C. 299; 7 F. L. J. (Can.) 181. — **CAN.**

sw. *Bye-law licensing matters forbidden by Criminal Code.*—A bye-law to licence cranes, slot machines & other devices is bad as an attempt to licence for the benefit of the municipality things forbidden by the Criminal Code. — *MORRISON v. KINGSTON*, [1937] 1 D. L. R. 710; 69 Can. C. C. 251, *sub nom. Re MORRISON & KINGSTON CITY*, [1938] O. R. 21. — **CAN.**

sz. *Amending bye-law.*—An amending bye-law excepted a certain 10 acres from the area covered by the original bye-law (prohibiting fox-farms within that area). Notice of motion to amend the bye-law was given at a regular meeting. Its adoption being objected to by the present appct., the motion was not acted upon but was apparently put over, without being formally postponed or adjourned. At a later special meeting the amending bye-law was passed, without any further notice of motion having been given. — *Held*: sect. 319 of Municipal Act, 1933, had not been complied with & the bye-law must be quashed. — *MILLER v. CHARLESWOOD RURAL MUNICIPALITY*, [1937] 3 W. W. R. 686. — **CAN.**

sb. *Carrying on business.*—C., who resided in Vancouver, was employed by an extra-provincial co. as its representative there. The co. rented desk room in a Vancouver office & C.'s duty was to see that orders for the purchase of lumber made by the co. from its head office were filled & the lumber shipped from British Columbia; he did not obtain orders for the sale or purchase of any goods. He was convicted under bye-law 1954 for that being a person carrying on business within said city he did fail to obtain a licence in respect thereof & pay the specified fee. On a stated case: — *Held*: C. was not a person within the meaning of said bye-law & that said facts did not constitute the carrying on a business or maintaining a business by him within the bye-law. — *R. v. COY*, [1938] 1 W. W. R. 784. — **CAN.**

## PART V. SECT. 2, SUB-SECT. 2.

54 iii. — *Re DUNLOP & TOWNSHIP OF DOUBRO* (1859), 18 U. C. R. 227. — **CAN.**

54 iv. — *In relation to the subject-matter of a bye-law, the powers of the corpn. must be exercised strictly within the limits & in the manner prescribed by the statute.* — *Re HOMERAY & KAMLOOPS BUILDING INSPECTOR* (1933), 46 B. C. R. 475. — **CAN.**

k (p. 160) i. — *Creation of monopoly.*—*TORONTO v. MANDLBAUM*, [1932] 3 D. L. R. 604. — **CAN.**

ee (p. 160) i. — *Bye-law creating lien.—For unpaid water rates.—Ultra vires.*—*BURCHELL v. SYDNEY CORPN.*, [1927] 1 D. L. R. 486; 59 N. S. R. 94. — **CAN.**

h (p. 161) i. — *Re BOVIAN & TORONTO CORPN.* (1887), 15 O. R. 13. — **CAN.**

m (p. 161) i. — *New Year's Day.*—A county licensing ct. issued a bye-law that all licensed premises within the district including inns & hotels, except as regarded travellers & lodgers therein, should be closed wholly on New Year's Day, & when New Year's Day fell on a Sunday, then on Monday, Jan. 2. — *Held*: under this bye-law a Monday falling on Jan. 2 must be treated as a Sunday, & accordingly, that an hotel-keeper who had supplied a customer on such a Monday outwith the permitted week-day hours had not infringed his certificate where the customer was a *bona fide* traveller, who could lawfully have been supplied on Sunday. — *HENDERSON v. ROSS*, [1928] S. C. (J.) 74. — **SCOT.**

t (p. 161) i. — *Rate likely to produce less money than required.*—*Held*: the ct. would not interfere. — *Re GILCHRIST & SULLIVAN CORPN.* (1879), 41 U. C. R. 588. — **CAN.**

e (p. 161) i. — *Street not yet opened.*—A bye-law provided for the construction of side walks on a street to be opened. — *Held*: as the street shown on the plan was not yet & might never be a public street, the council exceeded its authority in passing the bye-law, which should therefore be quashed; the discretion of the ct. should not be exercised in favour of the bye-law. — *Re CHAPPUIS & LA SALLE TOWN*, [1928] 2 D. L. R. 950; 62 O. L. R. 140. — **CAN.**

e (p. 161) ii. — *Bye-law authorising improvement of street.—Passed before land acquired.*—*Re CHAPPUIS & LA SALLE TOWN*, [1928] 2 D. L. R. 950; 62 O. L. R. 140. — **CAN.**

e (p. 161) iii. — *Bye-law regulating width of streets on laying-out building sites.—Whether applicable to roads giving access to building estate.*—*ROSE v. SYDENHAM LOCAL ADMINISTRATION & HEALTH BOARD* (1928), 49 N. L. R. 203. — **S. AF.**

dd (p. 161) i. — *Fee imposed on every truck delivering merchandise.—Whether applicable to trucks belonging to owner outside municipality.*—*Municipal Act, R. S. B. C. 1924, c. 179, s. 290 (34), as enacted by 1925, c. 35, s. 28, which empowers a municipality to impose a licence fee on "the owner or driver of every truck plying for hire or used for the delivery of wood, coal, merchandise or other commodity," authorises it to demand the fee from every owner of a truck used for the delivery of merchandise within the municipality, even though the owner is an outsider.* — **NORTH VANCOUVER**



regulating the conduct of the drivers thereof reasonably. A bye-law was accordingly made which provided: "Every driver of a hackney carriage shall when working or plying for hire . . . conduct himself in a proper civil & decorous manner at all times." In a prosecution under the bye-law it was contended that the bye-law was uncertain as to the standard required & unreasonable, & that it was therefore void & unenforceable:—*Held*: the bye-law was neither uncertain nor unreasonable & was therefore valid & enforceable.—IRELAND v. WILSON, [1936] 3 All E. R. 358.

**97a. Bye-law regulating conduct.]—IRELAND v. WILSON, No. 91a, *ante*.**

v. F. R. STEWART & CO., [1928] 1 W. W. R. 586; 49 Can. Crim. Cas. 216; 39 B. C. R. 401.—CAN.

dd (p. 161) ii. ——— Bye-law requiring vehicles licensed by town council to obtain additional county licence.]—SCOTTISH MOTOR TRACTION CO., LTD. v. LANARKSHIRE COUNTY COUNCIL, [1928] S. C. (Ct. of Sess.) 909; *reversd*. [1929] 14 L. T. 170 H. L.—SCOT.

dd (p. 161) iii. ——— Bye-law prohibiting use of vehicle in filthy bus service without licence.—*Illegit licence no longer issued.*—R. v. SHAWRA, [1929] 1 D. L. R. 321; 50 Can. Crim. Cas. 267; 63 O. L. R. 158.—CAN.

dd (p. 161) iv. ——— Bye-law prescribing parking areas for vehicles.—*Whether bye-law regulating traffic—Right to charge for use of parking areas.*—SCHILLING v. MELBOURNE CITY, [1928] V. L. R. 302; [1928] Argus L. R. 203.—AUS.

h (p. 162) i. ——— Bye-law restricting the carrying-on of restaurants.]—*Re BYE-LAW No. 304 of MINNEDOSA TOWN, WONG SING v. MINNEDOSA*, [1918] 3 W. W. R. 181.—CAN.

o (p. 162) i. ——— Power to sweep chimneys confined to chimney inspectors.]—*R. v. JOHNSTON* (1876), 38 U. C. R. 549.—CAN.

se. ——— Regulation of botanic park—Bye-law prohibiting meetings without consent of governors—*Valid.*—FOX v. ALLCHURCH, [1926] S. A. S. R. 384; *affd.*, 40 C. L. R. 135.—AUS.

sl. ——— Licensing taverns.]—*Re BRODIE & BOWMANVILLE CORPN.* (1876), 38 U. C. R. 580.—CAN.

sg. ——— Bye-law increasing service tax.—*Invalid.*—HARDY v. EDMONTON CORPN. (Alta.), [1925] 1 D. L. R. 256; [1924] 3 W. W. R. 936.—CAN.

sh. ——— Bye-law regulating the housing of motor trucks & apparatus used in truck cartage business. (*Construction.*)—*Re STRONACH*, [1928] 3 D. L. R. 216; 49 Can. Crim. Cas. 336; 61 O. L. R. 636.—CAN.

sl. ——— Tax on non-resident building contractors.—*Amounts to indirect taxation—Ultra vires.*—*Appl.*, city was by statute empowered "to pass bye-laws imposing a tax on contractors resident outside this province doing business within" the city. It passed a bye-law enacting that all contractors non-residents of the province who should engage in the business of a contractor for the performance of any work within the city, under a contract or agreement, should pay to the city "on every such contract or agreement a direct tax," the tax to be a percentage of the contract price, graduated on a sliding scale according to the amount of the contract. The city claimed from resp. payment of a tax, in accordance with the bye-law, of a percentage on the amount of resp.'s contract for the building of an hotel:—*Held*: the tax was "indirect taxation," & the

bye-law imposing it was *ultra vires*.—*CHARLOTTETOWN CITY v. FOUNDATION MARITIME, LTD.*, [1932] S. C. R. 589.—CAN.

so. *Discrimination between skilled & unskilled labour.*—A bye-law which requires a licence for carrying on an occupation, & discriminates between skilled & unskilled labour is *ultra vires*.—*It v. McDONALD*, [1935] 2 D. L. R. 605; 8 M. P. R. 558.—CAN.

**PART V. SECT. 2, SUB-SECT. 4.**

ii. ——— Bye-law regulating dance halls.]—A bye-law passed in purported exercise of the power given by Winnipeg Charter to regulate & license dance halls defined "dance hall" as *inter alia* "any building or portion thereof . . . the use of which is permitted to any person or group of persons for dancing":—*Held*: this part of the definition was void because its generality rendered it uncertain & unreasonable; & since if the bye-law applied to deft.'s premises it could be only because of said clause, his conviction for a violation of the bye-law was quashed.—*R. (McCORQUODALE) v. WONG* [1937] 1 W. W. R. 552; 1 D. L. R. 347; 67 Can. C. C. 288.—CAN.

**PART V. SECT. 2, SUB-SECT. 5.**

a (p. 165) i. ——— Excessive fee for licence.]—*CROOKSTON v. MILLER*, [1912] 7 D. L. R. 771.—CAN.

i (p. 165). *Add. Citation*:—*affd.*, 22 O. L. R. 312.

**PART V. SECT. 3.**

sb. *Bye-law for licensing palmists—Meaning of "carrying on calling of palmist."*—The definition of the word "palmist" in Winnipeg bye-law No. 10,634, which provides that the term shall include "any person who gives free palm readings in connection with the sale of books . . . or of the performance of any service for which a charge is made" & imposes a licence fee "to carry on the calling of a palmist" does not add anything to the significance of the word as used in the sect. of the Winnipeg Charter authorising the city to pass bye-laws for the preventing, regulating, limiting, *inter alia*, "palmists" & for defining "palmists." The giving of free instructions in art held to be carrying on of the calling of a palmist.—*R. v. BEST*, [1934] 3 W. W. R. 635; [1935] 1 D. L. R. 158; 62 C. C. C. 340.—CAN.

sd. *Bye-law fixing prices for dry cleaning.*—A city bye-law fixing prices for dry cleaning does not apply to an agency within the city, although the cleaning is done elsewhere.—*R. v. MARVO SYSTEM OF DRY CLEANING, LTD.*, [1935] 3 D. L. R. 480; 64 Can. C. C. 46.—CAN.

sl. *Dance hall—What is.*—A restaurant permitting dancing without extra charge is a "dance hall" requiring to be licensed by a bye-law relating

**120. Add. Annotation:—***Reid. Bean v. Flaxton* R. D. C. (1928), 139 L. T. 320.

**121a. ———.]—***Pltfs.*, a firm of builders who had, as a private enterprise of their own, built a number of houses upon land situate within the jurisdiction of defts., had not complied with defts.' bye-laws as to the drainage, with the result that differences arose between the parties. Subsequently, by agreement, defts. appointed a sub-committee to settle all outstanding matters, & an agreement was arrived at between pltfs. & the sub-committee. One of the terms of that agreement was that pltfs.' drainage scheme should remain, although it was contrary to defts.' bye-laws. Defts. having

to dance halls.—*R. (McCORQUODALE) v. WONG*, [1937] 1 W. W. R. 552; 1 D. L. R. 317; 67 Can. C. C. 288; *reversd.*, [1937] 2 D. L. R. 802; 45 Man. L. R. 137.—CAN.

sk. *Bye-law relating to signs.* A statutory power to prohibit the erection of signs & the posting of notices does not authorise a bye-law prohibiting signs but saying nothing of notices.—*R. R. v. CULLIAN*, [1937] 4 D. L. R. 670; O. R. 922.—CAN.

sp. *Detached private residence—It has (s.)* Premises used as a home for paying guests in addition to the lessee cannot be said to be a "detached private residence" within the meaning of a bye-law. *R. (WORKMAN) v. ROTHFEL*, [1937] 4 D. L. R. 19; *sub nom. R. R. v. ROTHFEL*, [1937] O. R. 912.—CAN.

**PART V. SECT. 4.**

i. ——— *Attorney-General.*—Where the law resulting from the exercise of a statutory power to make a bye-law operates for the general advantage of the public at large, none but the A.-G. may sue in respect of its breach.—*A.-G. & LUMLEY v. T. S. GILL & SON PRY., LTD.*, [1927] V. L. R. 22; [1927] Argus L. R. 223.—AUS.

sj. *Action to restrain enforcement of illegal bye-law—Effect of Rural Municipality Act, s. 335.*—The provision of sect. 335 of Rural Municipality Act, R. S. S., 1920 (c. 89), that no action can be commenced in respect of anything done under an illegal bye-law or resolution until a month after the quashing or repealing of the bye-law or resolution & until a month after written notice of the intention to bring the action does not apply to an action to prevent the municipality from enforcing rights claimed by it under an illegal bye-law.—*VILLENEUVE v. RURAL MUNICIPAL OF KELVINGTON*, [1929] 2 D. L. R. 919; 1 W. W. R. 186; 23 S. L. R. 406.—CAN.

sl. *When enforceable by injunction.*—A bye-law which is aimed at the conduct of a business rather than at the use of the land for the purpose of the business cannot be enforced by injunction.—*TORONTO CITY v. MANDELBAUM*, [1932] O. R. 552.—CAN.

so. *Discretion of council of corporation.*—The ct. cannot interfere with the discretion of the council of the corpn. in the administration or carrying out of a bye-law.—*Re JOY OIL CO., LTD. & TORONTO*, [1937] 1 D. L. R. 541; O. R. 213; 67 Can. C. C. 325; *on appeal*, [1937] 2 D. L. R. 559.—CAN.

**PART V. SECT. 5.**

sf. *Bye-law relating to licensing of chimney-sweeps—Municipality not entitled to fix charges for cleaning.*—*SCANEY v. JOHNSTON*, [1930] 4 D. L. R. 290.—CAN.

repudiated the agreement to which their sub-committee was a party, pl'tfs. brought an action claiming specific performance:—*Held*: as it had not been established that the building of the houses by pl'tfs. was, or formed part of, a housing scheme to which Housing Act, 1925 (c. 14), s. 99, applied, the verbal contract made by the sub-committee was not binding on defts., for the reason that defts.

could not confer upon the sub-committee a power of entering into any such contract. Neither had the Minister power under sect. 99 to relax the bye-laws in a private building scheme.—*WILLIAM BEAN & SONS, LTD. v. FLAXTON RURAL DISTRICT COUNCIL*, [1929] 1 K. B. 450; 98 L. J. K. B. 20; 139 L. T. 320; 92 J. P. 121; 26 L. G. R. 335, C. A.

## Part VI.—Legal Proceedings.

- 137a. ——— **Town Police Clauses Act, 1847 (c. 89).**—A corpn. was convicted upon an information preferred on behalf of a limited co. under sect. 47 of above Act, by one of its directors, for permitting a motor omnibus to be used as a hackney carriage within the prescribed area, without having obtained the necessary licence under the Act:—*Held*: that P. H. Act, 1875, s. 253, takes the place of Town Police Clauses Act, 1847 (c. 89), s. 73, which enabled "any person" to recover penalties for offences against that Act, & therefore except in the case of information by a party aggrieved or the local authority for the district, the consent of the A.-G. is now a condition precedent to pro-

ceedings for the recovery of penalties under the Town Police Clauses Act, 1847 (c. 89).—*SHEFFIELD CORPN. v. KITSON*, [1929] 2 K. B. 322; 98 L. J. K. B. 561; 142 L. T. 20; 93 J. P. 135; 45 T. L. R. 515; 73 Sol. Jo. 318; 27 L. G. R. 533; 28 Cox, C. C. 674, D. C.

139. *Add. Annotation*:—**N.F. Sheffield Corpn. v. Kitson**, [1929] 2 K. B. 322.  
158. *Add. Annotation*:—**Consd. R. v. South-Eastern Essex Assessment Committee, Ex p. Patterson** (1935), 153 L. T. 152.  
168. *Add. Annotation*:—**Appl. Holt Bros. & Whitford v. Axbridge Rural District Council** (1931), 95 J. P. 87.

## Part VII.—Particular Provisions.

198. *Add. Annotation*:—**Refd. London County Council v. Stilgoe** (1931), 95 J. P. 149.  
199. *Add. Annotation*:—**Refd. Re Whitaker, Rooke v. Whitaker**, [1929] 1 Ch. 662.  
200. *Add. Annotation*:—**Refd. Re Whitaker, Rooke v. Whitaker**, [1929] 1 Ch. 662.  
203. *Add. Annotation*:—**Consd. China Navigation Co. v. A.-G.** (1932), 48 T. L. R. 375.  
203a. ——— **Under local Act—Terms—Whether fee included.**—Under the provisions of a local Act, defts. were granted licences for the erection of advertisements on houses, & in respect of each licence the corpn. asked for a fee, in some cases of 10s. 6d. & in others of £1 1s. It was contended that they were entitled to do so because the Act provided that the licences might be granted under & subject to such terms & conditions as the corpn. might deem proper:—*Held*: upon the construction of the Act, the terms & conditions could not include the payment of a fee in respect of the granting of the licence.—*LIVERPOOL CORPN. v. ARTHUR MAIDEN, LTD.*, [1938] 1 All E. R. 200.  
204a. ——— **Validity.**—By the proviso to Advertisements Regulation Act, 1907 (c. 27), s. 2, any

bye-laws made under that section must provide for the exemption from the operation of such bye-laws of any hoardings or similar structures in use for advertising purposes at the time of the making of the bye-laws & of any advertisements exhibited at that time for a period not less than five years. In 1911 a county council made bye-laws under the section containing such an exemption as is there specified. In 1927 the council made further bye-laws under Advertisements Regulation Acts, 1907 (c. 27) & 1925 (c. 52), containing a similar exemption, which, however, was qualified by the words "but this exemption shall not extend to any hoarding or similar structure or any advertisement to which the bye-law (of 1911) applied":—*Held*: (1) the bye-law in this form was valid & *intra vires*, since hoarding, etc., to which the earlier bye-law applied had already enjoyed the statutory period of exemption, & were not entitled to a second period: while others were in no way prejudiced by the exception; (2) a gable end of a building 25 feet high was not a "hoarding or similar structure."—*GLOUCESTER BILLPOSTING CO., LTD. v. HOPKINS* (1932), 96 J. P. 462; 30 L. G. R. 488.

### PART VI. SECT. 2.

59. *Keeping marine store without licence—In whose name action lies.*—*HALIFAX CITY v. O'CONNOR* (1882), 15 N. S. R. (3 R. & G.) 190.—CAN.

### PART VI. SECT. 5, SUB-SECT. 1.

52. *Powers of arbitrator—Assessment of compensation—Where corporation had no power to appropriate claimant's land.*—*Re St. Michael's*

*COLLEGE & TORONTO CORPN.*, [1928] 3 D. L. R. 710; 62 O. L. R. 410.—CAN.

### PART VI. SECT. 6, SUB-SECT. 1.—B.

h. *Citations*:—For "[1923] S. C. R. 586," read "63 S. C. R. 586."

### PART VII. SECT. 2, SUB-SECT. 1.

k i. ——— *Requiring licence—Valid.*—*WROBLEWSKI v. MCLAREN* (1927) 29 W. A. L. R. 24.—AUS.

sa. *Meaning of "hoarding."*—A regulation made under Control of Advertisements Act, 1916, provided that no person should erect or exhibit any sign, placard, poster or hoarding or any device designed to be an advertisement in certain specified situations:—*Held*: "hoarding" meant a hoarding designed to be an advertisement or to contain an advertisement posted on it.—*MILLER v. PENFOLDS WINES, LTD.*, [1937] S. A. S. R. 11. AUS.

**204b. Construction—"12 feet in height."**—Deft. was summoned for erecting & maintaining for advertising purposes a hoarding or similar structure in contravention of a bye-law made under Advertisements Regulation Act, 1907 (c. 27), s. 2, prohibiting the erection or maintenance for advertising purposes of any hoarding or similar structure exceeding 12 feet in height. The alleged hoarding or structure consisted of rectangular panels or advertisement boards measuring approximately 20 feet in length horizontally & 10 feet in height vertically & attached to the wall of a building. On these panels picture posters were pasted. Although the panels did not themselves exceed 12 feet in height, they were fixed in such a position on the wall as to be more than 12 feet above ground level:—*Held*: (1) the words 12 feet in height meant the measurement of the hoarding itself & not the height at which it was above ground level; (2) *per* AVORY, J., neither the wall nor the panels were hoardings or similar structures within the meaning of the bye-law, which was intended to apply to some independent structure erected on the ground & not to panels fixed to a wall.—*ROYLE v. ORME* (1932), 96 J. P. 468; 30 L. G. R. 494.

**204c. "Hoarding or similar structure"—What amounts to.**—*GLOUCESTER BILLPOSTING CO., LTD. v. HOPKINS*, No. 204a, *ante*.

**204d. ———.**—*ROYLE v. ORME*, No. 204b, *ante*.

**204e. ——— View of rural scenery affected.**—*SCRIMGEOUR v. STOKE-ON-TRENT & NORTH STAFFORDSHIRE BILLPOSTING CO., LTD.* (1936), 80 Sol. Jo. 324, D. C.

**214a. Advertisement hoarding.**—Appls. erected on their land at the side of a main road in the county of Surrey an advertisement hoarding without the consent of the county council. The Surrey County Council Act, 1931, s. 67, enacted that any person constructing, forming or laying out any street or means of access, or erecting any building in contravention of the provisions of that sect., should be liable to a penalty:—*Held*: the advertisement hoarding was a building within the sect.—*SUPER SITES, LTD. v. KEEN*, [1938] 2 All E. R. 471; 36 L. G. R. 331, D. C.

**259a. Dwelling-house—Means of communication with street—Validity of notice.**—By sect. 129 (1) of the Essex County Council Act, 1933, it is provided that "on the deposit with a local authority of the plans of any new building intended or adapted for use as a dwelling-house . . . the local authority may by notice in writing require the provision before the building is erected sold let or occupied (as the local authority shall specify) of sufficient means of communication between the build-

ing & a street. . . ." A local authority, purporting to act under this sub-sect., served a notice upon a building owner requiring the provision of means of communication before the buildings were "erected sold let or occupied":—*Held*: the notice was bad, inasmuch as it did not specify whether the work was to be done before the erection of the buildings, or before their sale, or letting, or occupation.—*HORNCHURCH URBAN DISTRICT COUNCIL v. STANDEN* (1934), 33 L. G. R. 1, D. C.

**259b. Permitting user of land by vans—Exemption—To whom applicable.**—Appl. was the owner of certain land within the jurisdiction of the corpn. of Birmingham. Without having obtained the approval of the corpn., she allowed certain showman to occupy this land with the vans in which they lived:—*Held*: whereas the exemption contained in the Birmingham Corpn. Act, 1935, s. 43 (3) (b), operated in favour of the showmen, it did not operate in favour of the owner of the land, who had therefore been guilty of an offence under this Act.—*DRAKELEY v. MANZONI*, [1938] 1 All E. R. 67; 82 Sol. Jo. 156; 36 L. G. R. 110.

**265a. ——— Caravan-bungalows.**—*RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL v. LEE* (1931), 145 L. T. 208; 95 J. P. 164; 29 L. G. R. 335, C. A.

*Annotations*:—*Apld.* *Mitcham Urban District Council v. Seale* (1933), 97 J. P. 295. *Consd.* *Gumbrell v. Swale Rural District Council*, [1936] 3 All E. R. 935.

**265b. ——— Caravans.**—An owner of land allowed certain movable structures, such as caravans, converted omnibuses & tramway cars which had been erected in a yard upon her land without the permission of the local authority to be used as dwelling-places with all the ordinary conveniences of life except sanitary conveniences:—*Held*: (1) these structures were temporary buildings within the Public Health Acts Amendment Act, 1907 (c. 53), s. 27; (2) a declaration that the local authority are entitled to pull down or remove such buildings may be made against a person affected by such pulling down or removal even though that person is not the owner of the buildings. The owners of the buildings should, however, be made defts. where they are known.

(3) Under Public Health Acts Amendment Act, 1907 (c. 53), s. 27 (4), the local authority may pull down unauthorised buildings without having first obtained an order from the ct.—*MITCHAM URBAN DISTRICT COUNCIL v. SEALE* (1933), 97 J. P. 295; 49 T. L. R. 490; 31 L. G. R. 344.

**265c. ——— Converted omnibuses & tramcars.**—*MITCHAM URBAN DISTRICT COUNCIL v. SEALE*, No. 265b, *ante*.

**PART VII. SECT. 5, SUB-SECT. 1.—A. sd. "Store."**—*Held*: a gasoline service station is a "store."—*Re DOMESTIC STORAGE & FORWARDING CO. & FOREST HILL*, [1932] O. R. 350; 3 D. L. R. 175.—*CAN.*

*se. "Dwelling-house"* — *Self-contained flats under one roof.*—A municipal bye-law prescribed the minimum areas of land upon which a dwelling-house or attached houses might be built, & provided that not more than two houses should be attached together. Deft. proposed to erect, upon

land having an area less than the minimum prescribed for attached houses, but more than that prescribed for a single dwelling-house, a building which would comprise, under the one roof, five self-contained flats:—*Held*: the erection of the building would not be in contravention of the bye-law.—*A.-G. (JACKMAN) v. GRIFFITH*, [1934] V. L. R. 338; 40 Argus L. R. 436.—*AUS.*

**PART VII. SECT. 5, SUB-SECT. 2.—C. sn. "Addition" to building—What amounts to—Not new gambrel roof in**

*lieu of old pitch roof.*—*DANBY v. VILLAGE OF WAKAW & KRAUS* (Sask.), [1927] 3 W. W. R. 107.—*CAN.*

**PART VII. SECT. 5, SUB-SECT. 4.—A. so. What is public building—Club premises used for dances—Liability of club secretary.**—*LISTER v. HUMPHRIES*, [1928] V. L. R. 106; [1928] Argus L. R. 27.—*AUS.*

**PART VII. SECT. 5, SUB-SECT. 4.—B. sp. Who are owners—County court house.**—*R. v. TYBONE COUNTY JJ.*, [1928] N. L. 103.—*IR.*

**265d. — Converted omnibus & lorry.**—Pltf. was the owner of land on which were two caravans on wheels, one an obsolete omnibus, & the other a motor-lorry; both were adapted for use for human habitation & pltf. had used them from time to time as living accommodation. The bus was found to have been brought to the place where it stood for the purpose of a cheap & handy dwelling. It stood apparently on firm ground on a plateau on top of a hill, but owing to the state of the soil down the side of the hill it was found to be nearly if not quite impossible to remove it. The motor lorry, although adapted for use as a bedroom & used as such, was found to have been brought there in the first instance for agricultural purposes. Pltf. did not apply for permission under Public Health Acts Amendment Act, 1907 (c. 53), s. 27, to erect the caravans as temporary buildings. The local authority purporting to act under their powers under the same sect. pulled down the caravans. In an action for damages for trespass:—*Held*: the bus was & the motor lorry was not a temporary building within 1907 Act, s. 27, & pltf. was entitled to damages in respect of the motor lorry.—*GUMBRELL v. SWALE RURAL DISTRICT COUNCIL*, [1936] 3 All E. R. 935; 80 Sol. Jo. 976.

**266a. Removal—Whether order necessary.**—MITCHAM URBAN DISTRICT COUNCIL *v.* SEALE, No. 265b, *ante*.

**266b. — Declaration of right to pull down—Against whom made.**—MITCHAM URBAN DISTRICT COUNCIL *v.* SEALE, No. 265b, *ante*.

**272. Add. Annotation:—As to (1) Distd.** London County Council *v.* Harling Street Owners, [1935] 2 K. B. 322.

**272a. — Jurisdiction of magistrate.**—On an application by the London County Council to a petty sessional ct. under London Building Act, 1930 (c. clviii), s. 141 (1), for an order for the payment of the expenses of demolishing dangerous structures on the

default of the owners, after due notice, to demolish them, the magistrate has jurisdiction to inquire into the reasonableness of such expenses & to determine their amount.—*LONDON COUNTY COUNCIL v. HARLING STREET*, [1935] 2 K. B. 322; 104 L. J. K. B. 377; 152 L. T. 591; 99 J. P. 213; 51 T. L. R. 373; 33 L. G. R. 196, D. C.

**286. Add. Annotation:—As to (3) Apld.** Bean *v.* Flaxton R. D. C. (1928), 139 L. T. 320.

**308. Add. Annotation:—Apld.** Bean *v.* Flaxton R. D. C. (1928), 139 L. T. 320.

**313. Add. Annotation:—Refd.** R. *v.* Minister of Health, *Ex p.* Yaffe, [1930] 2 K. B. 98.

**329a. —**—By Public Health Act, 1875 (c. 55), s. 158, where the execution of any work is an offence, in respect whereof the offender is liable in respect of any bye-law to a penalty, the existence of the work during its continuance in such a form & state as to be in contravention of the bye-law shall be deemed to be a continuing offence.

A builder was convicted for building a house without sufficient air space, contrary to a bye-law. The builder was not the owner, & had not been in possession, nor had any right to go on the premises after the conviction. Afterwards the builder was prosecuted for a continuing offence in respect of the continuance of the work in the same state, in contravention of the bye-law, & convicted. On a case stated:—*Held*: the builder, having no power to remedy the breach complained of, was not guilty of a continuing offence, & the conviction was wrong.—*WELSH & SON v. WEST HAM CORPN.*, [1900] 1 Q. B. 321; 69 L. J. Q. B. 111; 82 L. T. 262; 16 T. L. R. 114; 19 Cox, C. C. 480.

**333a. Relaxation of bye-law—Under Housing Act, 1925 (c. 14), s. 99.**—WILLIAM BEAN & SONS, LTD. *v.* FLAXTON RURAL DISTRICT COUNCIL, No. 121a, *ante*.

#### PART VII. SECT. 5, SUB-SECT. 6.—B. (a).

*sq.* Bye-law providing for formation of residential area—Permitting erection of shops in specified streets.—*BARNES v. COBURN CITY*, [1928] V. L. R. 334; [1928] Argus L. R. 197.—*AUS.*

#### PART VII. SECT. 5, SUB-SECT. 9.—A.

**312 i. For "Not retrospective" read "Retrospective."**

**312 ii. —**—*Held*: the mere deposit of plans & the making of an application for a permit under the then existing building bye-law, while constituting a *prima facie* right to have the plans approved, was not enough to prevent the council from exercising its statutory power to pass a bye-law to prevent the erection of buildings of the character proposed, within a defined area.—*Re UPPER CANADA ESTATES & MACNICOL*, [1931] 4 D. L. R. 459; O. R. 465; *affd.*, [1932] 2 D. L. R. 528.—*CAN.*

*sr.* "Store or manufactory"—*Restaurant*.—Pltf., owner of a hospital & swimming baths in the city of T., proposed to add to his group of buildings a new building & to use part of it as a restaurant in connection with the hospital & baths.—*Held*: a restaurant is not a "store or manufactory" within a bye-law of the city

forbidding the erection or use in a certain area of a building for *inter alia*, "stores" or "manufactories."—*Mc CORMICK v. TORONTO* (1923), 54 O. L. R. 603.—*CAN.*

*sw. Amendment—What court will consider.*—The ct. will consider the interests of owners who bought property because of the restrictions where it is considering the grant of an amendment of building restrictions.—*Re BEARDMORE*, [1935] 4 D. L. R. 562; O. R. 526.—*CAN.*

*sz. Must be certain.*—*SPRINGBANK MUNICIPAL DISTRICT v. RENDER*, [1936] 2 W. W. R. 430; 4 D. L. R. 193.—*CAN.*

*sd. Building to be used for business.*—*In residential area (Flats).*—The owners of land were desirous of building thereon an eleven-storey building comprising 228 residential flats. It was the intention of the owners to provide for the tenants of the flats certain common services, including lifts & attendants, a telephone & message room & attendant, a hot water service, & the supervision & cleaning of a common lounge room & conservatory & the common entrances, stairways & corridors. The council of the municipality in which the land was situated had, pursuant to sect. 19b of Local Govt. Act, 1928, made a bye-law regulating the construction of buildings, & the owners of the land had

complied with the requirements of this bye-law. The council, having come to the conclusion that the proposed building was one which would be erected & used for the purpose of a business, contrary to another of its bye-laws which related to residential areas, directed its surveyor not to issue a permit to build.—*Held*: the council was entitled to take into consideration the question as to whether the residential area bye-law would be infringed; having regard to the nature & size of the building & the services to be rendered by the owners, there was evidence before the council that the building was to be erected & used for the purposes of a business; & the council having come to its conclusion in good faith & upon reasonable grounds, a writ of *mandamus* directing the issue of a permit for the erection of the building, should not be granted.—*R. v. ST. KILDA CITY, Ex p. ROBB*, [1937] V. L. R. 48; 43 Argus L. R. 119.—*AUS.*

#### PART VII. SECT. 5, SUB-SECT. 9.—C.

**329 i. Continuing offence—Erection of building without approval of plans—No notice of disapproval served by council.**—*Held*: the contravention of the bye-laws was a continuing offence.—*PORTSTEWART URBAN DISTRICT COUNCIL v. HAMILL*, [1927] N. I. 181.—*IR.*

**335a. Fees—How recoverable.]**—A weekly tenant brought an action against his landlord for special damages in respect of injury to his wife caused by the breach of the landlord's duty to keep the premises in repair, & the county ct. judge awarded a sum for damages which included an amount claimed by the London County Council for the wife's expenses at a hospital provided by them. On appeal:—*Held*: (1) whether or not the hospital expenses were recoverable by the council from the tenant, more than six months having elapsed since the discharge of the patient from hospital, the county ct. judge was entitled in assessing the special damages to take these expenses into account & to award their amount for payment over to the council; (2) the hospital expenses were still recoverable by the council & therefore on this ground also their amount had been properly included in the special damages. The provision in Local Govt. Act, 1929 (c. 17), s. 14, giving the council the like power to provide hospitals as was conferred on local authorities by Public Health Act, 1875 (c. 55), s. 131, did not operate to incorporate sect. 132 of the 1875 Act, which gives power to recover hospital expenses at any time within six months of the patient's discharge from hospital, & the duty imposed by 1929 Act, s. 16 (1), on the council to recover these expenses impliedly carried with it the power to recover these expenses in any ct. of competent jurisdiction, a power additional to the power to recover these expenses summarily conferred by 1929 Act, s. 16 (2), & not subject to the six months' limitation applicable to summary proceedings.—*ALLEN v. WATERS & Co.*, [1935] 1 K. B. 200; 104 L. J. Ch. 249;

152 L. T. 179; 99 J. P. 41; 51 T. L. R. 50; 78 Sol. Jo. 784; 32 L. G. R. 428, C. A.

*Annotation*:—As to (2) *Refd.* *Middlesex County Council v. Nathan*, [1937] 2 K. B. 272.

**335b. — Recovery from person liable to maintain —Pleading.]**—By Poor Law Act, 1930 (c. 17), s. 14 (1), & s. 19 (2), a county council may obtain a maintenance order upon relations liable under the Act to maintain any person whose relief would be chargeable "if possessed of sufficient means." By Local Govt. Act, 1929 (c. 17), s. 5, the county council have powers to provide assistance otherwise than by poor relief, including (sect. 14) the power to provide hospitals conferred on local authorities by Public Health Act, 1875 (c. 55), s. 131; & (sect. 16) it is the duty of the council to recover from any person maintained in any institution or "from any person legally liable" to maintain that person such part, if any, of the expenses "having regard to their financial circumstances" as they are in the opinion of the council able to pay:—*Held*: the words "legally liable" in Local Govt. Act, 1929 (c. 17), s. 16, include persons rendered liable for the cost of maintenance by statute, & not only those liable at common law; but, before an order for payment can be made upon any person under that sect., it is incumbent upon the council to show that deft. is possessed of sufficient means to pay the amount claimed.—*MIDDLESEX COUNTY COUNCIL v. NATHAN*, [1937] 2 K. B. 272; [1937] 3 All E. R. 283; 106 L. J. K. B. 818; 157 L. T. 24; 101 J. P. 111; 81 Sol. Jo. 553; 35 L. G. R. 341.

**339. Add. Annotation**:—*Generally*, *Refd.* *Graigola Merthyr Co. v. Swansea Corpn.*, [1928] Ch. 325.

#### PART VII. SECT. 6, SUB-SECT. 1.—B.

**352 ii. — Employer—Evidence of contract for medical & surgical care of employees.]**—*QUEEN VICTORIA MEMORIAL HOSPITAL v. BOOTH, LTD.*, [1927] 4 D. L. R. 1016; 61 O. L. R. 293.—*CAN.*

**352 iii. — Patient admitted as resident of city—But having legal settlement elsewhere.]**—On the certificate of her physician that she was a resident of the City of Sydney, G. was admitted to the Sydney hospital as a patient for treatment. It was discovered some time later that G. had a legal settlement at Glace Bay, & she was removed there & accepted. In the meantime there was due to the Sydney hospital the sum of \$194.5 for hospital services, including drugs & medicines. The amount due was admitted:—*Held*: the City of Sydney, paying the claim of the hospital, was entitled to indemnity against deft., & judgment should be entered in favour of pltf. for the amount claimed with costs.—*SYDNEY CITY v. GLACE BAY TOWN*, [1928] 1 D. L. R. 729; 59 N. S. R. 448.—*CAN.*

**352 iv. — Injured prisoner.]**—An injured prisoner is not liable to a hospital for medical treatment received against his will while under arrest.—*SOLDIERS MEMORIAL HOSPITAL v. SANFORD*, [1934] 2 D. L. R. 334; 7 M. P. R. 334.—*CAN.*

**352 v. — Charge on patient's land —Gives no charge on land of husband for treatment of wife.]**—*Re LAND TITLES ACT, Re McCRAEY RURAL MUNICIPALITY CAVEAT*, [1922] 2 W. W. R. 898; 66 D. L. R. 819.—*CAN.*

**352 vi. — No precedence over prior mortgage.]**—*MANUFACTURERS*

*LIFE INSURANCE CO. v. FLOWERY PLAINS* (No. 33), [1924] 1 D. L. R. 66; 20 Alta. L. R. 100; [1923] 3 W. W. R. 1361.—*CAN.*

**352 vii. — Action to recover—Condition precedent.]**—Proof of the written order required by Town Act, 1927, s. 153 (4), is essential to the maintenance of an action under s. 153 (9) for the recovery by a municipality of the value of the treatment & care furnished in a municipal hospital to an indigent sick person.—*SISTERS OF CHARITY OF THE PROVIDENCE GENERAL HOSPITAL OF DAYSLAND v. MARTY, EDMONTON CITY v. MARTY* (Alta.), [1929] 4 D. L. R. 797; 3 W. W. R. 265.—*CAN.*

**352 viii. — Implied contract.]**—*VERNON JUBILEE HOSPITAL v. POUND*, [1932] 2 D. L. R. 813.—*CAN.*

**k i. — For treatment of indigents—Emergency.]**—Where an indigent resident of a rural municipality was admitted to a hospital, as an emergency case, & the matron of the hospital called in a doctor on the rota to treat the case, held that, under Rural Municipality Act, R. S. S., 1920, c. 89, he was entitled to recover from the rural municipality his reasonable charges for necessary services rendered the patient.—*COLES v. WAWKEN RURAL MUNICIPALITY*, [1928] 3 W. W. R. 532; *affd.*, [1929] 4 D. L. R. 1071; 1 W. W. R. 663.—*CAN.*

**k ii. — —.]**—The phrase "in case of emergency" in sect. 208 (1) of Rural Municipality Act, R. S. S., 1930, which imposes a liability on rural municipalities for hospital services rendered their indigent residents at the municipality's request or "in case of emergency," refers to some urgent

need, some condition of the patient requiring his immediate admission to a hospital.—*PRINCE ALBERT CITY v. CRAWWOOD RURAL MUNICIPALITY*, [1931] 2 W. W. R. 36; 2 D. L. R. 955.—*CAN.*

**k iii. — Contract—Fulfillment of statutory conditions.]**—The council of deft. municipality passed a resolution authorising the reeve & secretary to "handle the case" of a boy who had been admitted to pltf.'s hospital, & following a report from the secretary as to his interview with pltf., the council passed another resolution authorising the payment of a certain sum per week while the boy continued in the hospital. Pltf. sued for the balance of an amount alleged to be due to him under said arrangement:—*Held*: pltf. was entitled to assume in entering into the contract that the conditions necessary to enable the council to act had been fulfilled & was not obliged to prove at the trial that the patient came within them.—*BURD v. CAMBRIA RURAL MUNICIPALITY*, [1931] 1 W. W. R. 177; 2 D. L. R. 258.—*CAN.*

**k iv. — Tubercular patients.]**—Sect. 15 (2) of Sanatoria for Consumptives Act, R. S. O., 1927, is not impliedly repealed by sect. 21 of Hospitals & Charitable Institutions Act, R. S. O., 1927. Pltf. assoc., therefore, held entitled to recover from deft. municipality for treatment of an indigent patient resident in the municipality.—*NATIONAL SANATORIUM ASSOCN. v. BRACEBRIDGE*, [1930] 4 D. L. R. 417; 65 O. L. R. 623; *rengs.*, 65 O. L. R. 395.—*CAN.*

**k v. — —.]**—Prior to the patient in question being admitted to a hospital in Fort William, she had not become a resident in Fort William,

357. After "D" following this case add:—

See Nursing Homes Registration A

**Servant in—Liability for unemployment insurance.]—**See WORK & LABOUR, Vol. XLIV., p. 1306, No. 122.

- Patient contracting puerperal fever from previous patient—Liability of council for

having ascertained whether any of the staff were carrying infection, & without informing appets. for admission, or their medical advisers, of the case of Mrs. F., & of the steps taken in consequence thereof to rid the staff of infection. They awarded damages £750 :—*Held* : pltf. was entitled to recover, on the ground that there was evidence on which the jury might find that defts. ought to have known that the home was dangerous & had failed to take reasonable steps to prevent damage to pltf. from the danger.—**LINDSEY COUNTY COUNCIL v. MARSHALL**, [1937] A. C. 97 ; [1936] 2 All E. R. 1076 ; 105 L. J. K. B. 611 ; 52 T. L. R. 661 ; 80 Sol. Jo. 702, *sub nom.* **MARSHALL v. LINDSEY COUNTY COUNCIL**, 155 L. T. 297 ; 100 J. P. 411 ; 34 L. G. R. 469, H. L.

**386. Add. Citation :—**[1928] 1 K. B. 65, D. C.

- Applts. were charged with having kept a common lodging-house at certain premises without being registered as the keepers thereof, contrary to the provisions of Public Health Act, 1936 (c. 49), s. 236. The premises, which had for fifty-nine years been registered with the local authority as a common lodging-house, provided accommodation by night for 201 poor persons. Until the end of 1937 each person using the premises paid 10*d.* a night, & on Jan. 21, 1938, the charge was altered to 5*s.* 6*d.* per week. Applts. contended that the change to the system of minimum weekly contracts,

—TORONTO HOSPITAL FOR CONSUMPTIVES v. FORT WILLIAM CITY & O'CONNOR TOWNSHIP, [1933] O. R. 183; 1 D. L. R. 770.—CAN.

**k vii.** ———. ———. j]—Where a city owns a hospital & the hospital board is not a body corporate, but merely a managing body which the city may appoint to conduct the hospital, the right of action to recover for the treatment of indigents which arises under Rural Municipality Act, ss. 198, 199, is vested in the city, not in the hospital board. In such an action the fact that deft. municipality did not answer the notice which the hospital board, as required by sect. 199 (1) (a), sent to it, does not preclude it from disputing the alleged residence & indigence of the patients in question.  
—MOOSE JAW, CITY OF v. RURAL MUNICIPALITY OF TERRELL (Sask.). [1930] 2 D. L. R. 81; [1929] 3 W. W. R. 573; 24 S. L. R. 170.—**CAN.**

necessity; but even in the latter case the practitioner who voluntarily renders such services cannot hold the district liable therefor unless they have been sanctioned by the district. - WAGNER v. PINE LAKE MUNICIPAL DISTRICT, [1931] 2 W. W. R. 481; 4 D. L. R. 481; 25 Alta. L. R. 473.- CAN.

**k x.** ————].—Under Hospitals Act, R. S. A., 1922, a municipal hospital is not liable to a hospital for hospital services rendered an indigent resident of the district unless they have been authorised by the written order of the municipal authority or, where the case was one of urgent & sudden necessity, by a verbal order.—EDMONTON HOSPITAL BOARD *v.* MUNICIPAL DISTRICT OF LIBERTY. [1932] 1 W. W. R. 599; 2 D. L. R. 374; 26 Alta. L. R. 166.—**CAN.**

kxii. - - - .]—Where an indigent patient in pltf.'s hospital had her leg amputated therein, & the hospital notified, in accordance with sect. 18 of Hospital Aid Act, 1933, deft. town.

k xiii. — *Municipality of settlement* — *Necessity for compliance with Local Hospitals Act (N. B.).* — Municipality of settlement is not liable for hospital treatment of a pauper patient unless the requirements of the Local Hospitals Acts (N. S.) are complied with. — SYDNEY v. NORTH SYDNEY, [1934] 3 D. L. R. 325; 8 M. P. R. 178. — **CAN.**

k xv. — *Injury to infant--Sum paid into court--Right of municipality to recover out of sum.*] - An action for damages for injuries to an infant was settled by the payment into ct. of \$1,000 which was accepted on behalf of the infant. The infant had been taken to a hospital forthwith after incurring said injuries & the hospital's account for its services having been

paid by the city of Winnipeg, as sect. 12 of Hospital Aid Act, 1933, required it to do, it applied under sect. 108 (2) of Child Welfare Act, 1936, for payment thereof out of said fund. The infant's father was unable to pay for the medical services, & there was no other fund from which to pay the account.—*Held*: the city's application should be allowed.—*Re* OBERG & HOSPITAL AID ACT, [1936] 3 W. W. R. 747 : 44 Man. L. R. 357.—*CAN.*

with payment in advance, took the premises outside the definition of a common lodging-house in the Act of 1936. Resp. contended that the period of letting was unimportant, as there was no mention of any period of letting in the definition of a "common lodging-house" in sect. 235 of the Act of 1936, & that it was sufficient to have proved that the premises were used & provided for the purpose of accommodating by night poor persons who resorted thereto & were allowed to occupy one common room for the purpose of sleeping or eating. The justices convicted appts., & thereupon this appeal was brought:—*Held*: as the definitions of a common lodging-house & of the character which it must exhibit were now to be found only in the definition in sect. 235 of the Act of 1936, the justices were right in convicting upon the facts before them.—*PEOPLE'S HOSTELS, LTD. v. TURLEY*, [1938] 4 All E. R. 72; 159 L. T. 557; 102 J. P. 509; 55 T. L. R. 27; 82 Sol. Jo. 870, D. C.

#### SUB-SECT. 4.—HOUSING OF WORKING CLASSES.

(Vol. XXXVIII., p. 212.)

See Housing Act, 1930 (c. 39).

- 470 *Add. Annotations*:—As to (1) *Distd. Cohen v. West Ham Corp.*, [1933] Ch. 814. *Refd. Estate & Trust Agencies (1927), Ltd. v. Singapore Improvement Trust*, [1937] 3 All E. R. 321.

#### PART VII. SECT. 6, SUB-SECT. 2.—C.

*sr. Liability of municipality to pay nurses & those furnishing necessities at request of health officer.*—*CAMERON v. DAUPHIN* (1904), 14 Man. L. R. 573; 24 C. L. T. 99.—*CAN.*

#### PART VII. SECT. 10.

*st. Dangerous slope adjoining street—Liability of owner to pay cost of fencing—Erected by local authority.*—*BUCKIE MAGISTRATES v. SEAFIELD'S DOWAGER COUNTERS TRUSTEES*, [1928] S. C. (Ct. of Sess.) 525.—*SCOT.*

#### PART VII. SECT. 11, SUB-SECT. 4.—B. (a).

476 1. *Disobedience of order—Letting by husband of proprietrix.*—The proprietrix of two houses, with regard to which a closing order was then operative, was charged with a contravention of Housing (Scotland) Act, 1925 (c. 15), s. 9, in respect that she, "being the owner within the meaning of the Act," had let the houses as dwelling-houses, or alternatively had permitted them to be so occupied. It appeared that the houses, which had been closed in 1928 under a closing order, remained unoccupied until 1930, when, by permission of the husband of the accused, they were occupied by tenants, from whom he collected rents. It further appeared that, for the period involved in the case, the husband was generally known to act as factor for his wife in the management of her properties, including the houses in question. On these facts the Sheriff-substitute found the charge not proven.—*Held*: in the absence of an express finding that the husband was in fact his wife's factor, & that, in that capacity, he had let the subjects with his wife's knowledge & approval, it could not be said that she had been proved to have let them, or permitted them to be occupied, within the meaning of the statute.—*HARR v. THOMPSON*, [1931] S. C. (J.) 29.—*SCOT.*

*sp. Whether owner may be heard.*—An owner of a building has no right to

be heard by a local authority before it issues a closing order under sect. 53 of Public Health Act, 1902, declaring the building to be unfit for human habitation or occupation. *Semble*: where, subsequently to the issuing by it of a closing order, a local authority refuses an application by an owner to be heard as to whether the building is unfit for human occupation, &, if so, whether the repairs specified in the order are necessary, a *mandamus* will lie.—*Re CENTRAL ILLAWARRA SHIRE COUNCIL, Ex p. BALLANTINE* (1936), 12 L. G. R. 137.—*AUS.*

#### PART VII. SECT. 11, SUB-SECT. 4.—B. (b).

*sk. House declared insanitary—Validity of declaration—Prohibition.*—*Resps.*, a corporate body constituted by the Singapore Improvement Ordinance, 1927, & entrusted with the duty of carrying out the provisions of the Ordinance, made a declaration that a dwelling-house belonging to appts. was insanitary within sect. 57 of the Ordinance. Having heard objections by appts. to the declaration, *resps.* in due course submitted it for consideration by the Governor in Council in accordance with the provisions of sect. 59 of the Ordinance. Appts. thereupon applied for a writ of prohibition to prohibit *resps.* from proceeding further in respect of the declaration, on the ground (*inter alia*) that they had acted *ultra vires* in making it.—*Held*: (1) the grounds on which *resps.* made the declaration did not justify it, & they were therefore acting beyond their powers & the declaration was not enforceable; (2) in deciding whether, after considering the objections raised by appts. against the declaration, it should be revoked or submitted to the Governor in Council under sect. 59 (1) of the Ordinance, *resps.* were exercising quasi-judicial functions; (3) a writ of prohibition should issue. Although the declaration had been submitted to the Governor in Council by *resps.* they

471. *Add. Annotation*:—*Distd. Re Bowman, South Shields (Thames Street) Clearance Order*, 1931 (1932), 96 J. P. 207.

481a. *Power to make order when satisfied that house unfit for habitation—Meaning of "satisfied."*—By Housing Act, 1930 (c. 39), s. 19 (1), a local authority, if, upon consideration of an official representation or a report from their officers or other information in their possession, they are "satisfied" that a dwelling-house is unfit for human habitation & is not capable at a reasonable expense of being rendered so fit, may make a demolition order:—*Held*: (1) "satisfied" must mean *prima facie* satisfied. It was the duty of the local authority to treat that satisfaction merely as a temporary satisfaction on the information then before them & open to be modified or changed should the owner of the house give them further information or make a further offer to do certain works; (2) an appeal lay to a county ct. judge against a demolition order made by a local authority both on questions of fact & on questions of law.—*FLETCHER v. ILKESTON CORPN.* (1931), 96 J. P. 7; 48 T. L. R. 44; 30 L. G. R. 6, C. A.

#### 485a. Acceptance of undertaking to convert.]—

Two back-to-back dwelling-houses, belonging to one owner, & of a type suitable for occupation by persons of the working classes, were found to be unfit for human habitation & that neither could, by itself, be rendered so fit.

were not *functus officio* because in the exercise of their quasi-judicial functions they had still (*inter alia*) the discretionary power under sect. 61 (1) of the Ordinance, if the Governor in Council approved the declaration, of requiring the appts. to demolish the building. There was, therefore, something upon which prohibition could still operate, & the application for the writ was not made too late; (4) when a house is stated to be unfit for human habitation, it is the whole house that is being so described.—*ESTATE & TRUST AGENCIES (1927), LTD. v. SINGAPORE IMPROVEMENT TRUST*, [1937] A. C. 898; [1937] 3 All E. R. 324; 106 L. J. P. C. 152; 157 L. T. 358; 53 T. L. R. 829; 81 Sol. Jo. 783, P. C.—*STRAITS SETTLEMENTS.*

*am. Validity of demolition order—Effect of delay.*—On June 10, 1931, a local authority served upon the owner of dwelling-houses a notice stating that the houses were unfit for habitation, & that a meeting of the authority would be held on July 13, when the owner would be entitled to be heard upon the matter. The owner did not attend the meeting, & no undertaking regarding the houses was given. At the time when the notice was served there were tenants in the houses for whom accommodation had to be provided. Owing to difficulties which occurred in obtaining a site for, & in building, new houses for the tenants, no demolition order was served upon the owner until March 14, 1934. The owner maintained that the order, in view of the delay in issuing it, did not comply with the provisions of Housing (Scotland) Act, 1930 (c. 40), s. 16, & was invalid.—*Held*: the demolition order was validly made, in respect that sect. 16 did not impose upon the authority a duty of making the order within a specified time, & that the delay was not unreasonable in the circumstances, & had occasioned no prejudice to the owner of the houses.—*BROWN v. BONNYRIGG & LASSWADE MAGISTRATES*, [1936] S. C. 258.—*SCOT.*



The local authority rejected a proposal by the owner to turn the two houses into one, & made a demolition order. On appeal to the county ct. the judge found that the two houses could be combined into one at a reasonable expense & that the combined house would be suitable for occupation by persons of the working classes, & he accepted an oral offer of the owner to carry out the work:—*Held*: there was nothing in Housing Act, 1930 (c. 39), s. 19, to prevent the local authority accepting the undertaking of the owner to turn the two houses into one; the county ct. judge was entitled to accept the undertaking, which should, however, have been in writing, & further, should have specified the period within which the work should be carried out. —*JOHNSON v. LEICESTER CORPN.*, [1934] 1 K. B. 638; 103 L. J. K. B. 541; 151 L. T. 8; 98 J. P. 165; 50 T. L. R. 214; 78 Sol. Jo. 122; 32 L. G. R. 147, C. A.

485b. “House”—What included.]—A cottage & ten acres of adjoining grass land belonging to the same owners were for a number of years let together, formerly to a dairy farmer & now to a poultry farmer. The local authority, regarding the cottage as a house of a type suitable for occupation by persons of the working classes, but being satisfied that it was unfit for human habitation & not capable at a reasonable expense of being rendered so fit, made a demolition order under Housing Act, 1936 (c. 51), s. 11, in respect of it. On an appeal by the owners against the demolition order, the county ct. judge, being of opinion that the cottage & the ten acres of land together constituted the “house” within the statutory definition, & that such a house was not suitable for occupation by persons of the working classes, made an order quashing the demolition order. On appeal by the local authority against the order of the county ct. judge:—*Held*: by the Ct. of Appeal: (1) it was not the cottage together with the whole of the ten acres of land, but only the cottage with its outhouses, yards, curtilage & gardens, that constituted the “house” within the definition, inasmuch as the term “appurtenances” was there used in its well-established legal sense as including only such matters as outhouses, yards & gardens, & not land as meaning a corporeal hereditament; (2) the question exactly how much of the ten acres ought to be included in the appurtenances of the cottage & therefore in the “house” was one for the decision of the county ct. judge, his decision to be confined, however, to considerably less than the whole of the ten acres; (3) the question whether the house as thus defined was suitable for the occupation of the working classes was also one for the county ct. judge; (4) when the county ct. judge had decided these questions, it would then be for him to decide whether or not a demolition order should be made in respect of the house; (5) the case should be remitted to the county ct. judge with a direction to consider & decide these questions in the manner indicated.—*TRIM v. STURMINSTER RURAL DISTRICT COUNCIL*, [1938] 2 K. B. 508; [1938] 2 All E. R. 168; 107 L. J. K. B. 687; 159 L. T. 7; 102 J. P. 249; 54 T. L. R. 597; 82 Sol. Jo. 313; 36 L. G. R. 319, C. A.

peal.]—On Apr. 1, 1932, the council's medical officer of health, acting under Housing Act, 1930 (c. 39), s. 17, reported to their Housing Committee that seven houses were unfit for human habitation & capable at a reasonable expense of being rendered fit: the committee reported that, having considered that representation, it recommended service upon the landlords of notices under the section requiring the execution of works upon the houses; on Apr. 26 the council adopted the committee's report, & on Apr. 28 seven notices were served on the owner's agents (the persons “having control” within sect. 17 (2)) requiring them within fifty-six days to execute the works therein specified. Pltfs. who knew that the notices had been served, bought, on or about Sept. 8, 1932, four of the seven houses, on which none of the work, specified in the notices served in respect of them had yet been done. A requirement in one notice was “to take down & re-build the front, back main & back addition walls where necessary; . . . rake out & re-point the walls of the water-closet, . . .”; another, in two notices, was to “take down & re-build the front & back addition walls where necessary & re-point the remainder of walls (*sic*) where necessary”; & another, in the fourth notice, was to “take down & re-build the front, back addition & water-closet walls where necessary; . . . re-point around reveals of front door; . . .” Pltff. did work on all the houses but rebuilt no walls (though he repointed all or most of them), & all the work that he did was finished by Oct. 14. He contended that he had complied with the notices, which the council denied: & there was evidence that the council's senior sanitary inspector stated that the council would enter upon the houses, rebuild the walls, & take off the roofs. Pltff. did not appeal to the county ct. against the notices, as he could have done under sect. 22 of the Act, with the result that they became, under that sect., operative on the expiration of twenty-one days after service & final & conclusive as to any matters which could have been raised on such an appeal. He alleged that they were invalid, on the ground that there was no sufficient proof that the council had properly considered what it was necessary for them to consider under sect. 17 of the Act before serving them. He accordingly commenced the present action, claiming declarations that the notices were invalid, & that the council were not entitled to enter upon the houses, to pull down their walls or to take off their roofs, & an injunction to give effect to the declarations. Evidence was given for pltff. that the use of the words “where necessary” in notices of the kind before the ct., though not unusual, was not common:—*Held*: (1) by the Ct. of Appeal, in the absence of any evidence one way or another, the ct. would not assume that the council had not properly discharged the duties imposed upon them by sect. 17 of the Act, the proper course for pltff. to adopt if he challenged the validity of the notices was to appeal to the county ct. under sect. 22 of the Act within the twenty-one days thereby limited, & as he had not done so the notices must be regarded as valid notices under sect. 17.

By MAUGHAM, J., (2) local authorities

must exercise discretion as to the nature of works to be specified in notices served under sect. 17 (1) of the Act, which they can do through their appropriate committees or persons chosen thereby; (3) the notices required ptlf. to take down & rebuild only those parts of the walls which needed rebuilding; (4) local authorities have no power, under sect. 18 of the Act relating to the enforcement of notices served under sect. 17 (1), to enter upon & do work in dwelling-houses, or give notice in writing of intention to do so, unless non-compliance with notices given under sect. 17 (1) can be shown, & ptlf. was therefore free to prove, if he could, that he had complied with the notices, & thus prevent the council from proceeding under sect. 18.—*COHEN v. WEST HAM CORPN.*, [1933] Ch. 814; 102 L. J. Ch. 305; 149 L. T. 271; 97 J. P. 155; 31 L. G. R. 205. C. A.

491b. ——— Contents.]—COHEN v. WEST HAM  
CORPN., No. 491a, *ante*.

**491c. — Enforcement—Execution of works by local authority—Conditions precedent.]—**  
**COHEN v. WEST HAM CORPN., No. 491a, ante.**

502a. ——— From owner—Who is owner.]—

A solr., acting for the administratrix of a deceased person's estate, employed a builder to collect the rents of three working-class houses, & to pay the proceeds over to him. The local authority having executed works under Housing, Town Planning, etc. Act, 1919 (c. 35), s. 38 (*see, now*, Housing Act, 1925 (c. 14), s. 3), sought to recover the expenses from the solr. as "owner" within sect. 38:—*Held*: he was the owner, though he was not the person who received the rent directly from the tenants, as there might be more than one owner, & every one receiving the rent, as rent, in succession became the "owner." —*WATTS v. BATTERSEA CORPN.*, [1929] 2 K. B. 63; 98 L. J. K. B. 273; 140 L. T. 594; 93 J. P. 137; 45 T. L. R. 224; 73 Sol. Jo. 143; 27 L. G. R. 307. C. A.

**502b. Statutory charge—Incidence of charge.**—The charge created by Housing Act, 1925 (c. 14), s. 3, is not a charge on the interests of the rack-rent owner only, but is a charge upon the entirety of the interests in the premises.—*PADDINGTON BOROUGH COUNCIL v. FINUCANE*, [1928] Ch. 567; 97 L. J. Ch. 219; 139 L. T. 368; 92 J. P. 68; 26 L. G. R. 283.

*Annotations:* — **Fold.** *Bristol Corp. v. Virgin*, [1928] 2 K. B. 622. **Appl.** *Bromley Rural District Council v. Brooker*, *Orpington Urban District Council v. Brooker*, [1931] W. N. 237.

502c. ----- -.]--The charge given to a local authority in respect of repairs by Housing Act, 1925 (c. 14), s. 3, is a charge on the whole of the proprietary interests in the premises, & ranks in priority to a fee farm rent already issuing out of the premises. - BRISTOL CORPN. v. VIRGIN, [1928] 2 K. B. 622; 97 L. J. K. B. 522; 139 L. T. 375; 92 J. P. 145; 41 T. L. R. 546; 26 L. G. R. 443, D. C.

**502d. ——— Demand for payment—Necessity for signature by town clerk.]—**On the default of defts. to render fit for human habitation two blocks of houses, numbering twenty-three houses altogether, which were under their control, after proper notices served on them, the pltf. corpn., under Housing Act,

1930 (c. 39), s. 18 (1), did the work themselves, & served a demand for payment on defts. under Housing Act, 1930 (c. 39), s. 18 (3). The claim was signed by one of plffs.' officials, not the town clerk. It claimed two sums, one in respect of each block of houses, giving the totals of the different items of expenditure, labour & materials, but there was no demand for the expenditure on each or any house separately. On these demands being made defts. did not appeal to the county ct. under sect. 22 (1) (b) of 1930 Act :—*Held* : (1) the demands were bad, firstly, in that they were not signed by the town clerk as directed by Housing Act, 1925 (c. 14), s. 120 (2), which by sect. 65 (1) of 1930 Act is to be construed as one with the latter Act ; (2) because they did not specify the sums spent on each separate house ; (3) further, the fact that defts. did not appeal to the county ct. did not make the demands good demands, & " demand " in sect. 22 (1) (b) of 1930 Act means a valid demand. Defts., therefore, were not bound to appeal to the county ct.—*WEST HAM CORPN. v. BENABO (CHARLES) & SONS*, [1931] 2 K. B. 253 ; 103 L. J. K. B. 452 ; 151 L. T. 119 ; 98 J. P. 287 ; 50 T. L. R. 392 ; 78 Sol. Jo. 298 ; 32 L. G. R. 202.

502e. ———— Must specify sum spent on  
each house.]—WEST HAM CORPN. v.  
BENABO (CHARLES) & SONS, No. 502d. *ante*.

502f. ——— Failure to appeal to county court—Effect on invalid demand.]—WEST HAM CORPN. v. BENABO (CHARLES) & SONS, No. 502d, *ante*.

(e) *Clearance Areas.*

*See Housing Act, 1930 (c. 39), s. 1 (1).*

**502g. What is "dwelling-house"—Common lodging-house.]—**A common lodging-house is a "dwelling-house" within Housing Act, 1930 (c. 39), s. 1 (1), so as to come within the scope of the section. The fact that the people who dwell in it are of such a character & live under such conditions as to make it a common lodging-house does not cause it to cease to be a dwelling-house.—*Re ROSS & LEICESTER CORPN.* (1932), 96 J. P. 459; 30 L. G. R. 382.

**502h. Validity of clearance order—Mistake in number of days allowed for vacation—Confirmation with modification by Minister of Health.]—**A clearance order made by a local authority under Housing Act, 1930 (c. 39), purported to require that certain of the buildings to which it related should be vacated in a less number of days from the date on which it would become operative than the period of twenty-eight days from that date as required by the Act. The Minister of Health confirmed the order with the modification that the less number of days was altered to twenty-eight days. The order did not include a "starred" note to the form of clearance order prescribed by Provisional Regulations, 1930, made under the Act setting forth the substance of sect. 11 of the Act. On an application to the High Ct. under sect. 11 (3) by the owner of these buildings as a person aggrieved by the order to question its validity in regard to them :—*Held* : (1) the mistake as to the number of days in the order as originally made did not render it an order which was not within the

powers of the Act, or prevent it from applying to these buildings; the order having been confirmed by the Minister with the above-mentioned modification, it could not be said that the requirement of the Act as to the number of days was not complied with by the order; &, therefore, that mistake in the order as originally made was not a ground on which the High Ct. should quash the order in so far as it affected these buildings; (2) the omission of the starred note did not render the order an order which was not within the powers of the Act; assuming that it was a requirement of the Act that that note should be included in the order, there was no evidence in the case before the Ct. to show that the interests of appet. had been substantially prejudiced by that requirement not having been complied with; &, therefore, the omission of the note was not a ground on which the High Ct. ought to quash the order. *Semle*: that it was not a requirement of the Act that the starred note should be included in the order.

(3) The High Ct. will entertain an application under Housing Act, 1930 (c. 39), s. 11 (3), by a person aggrieved by a clearance order, who desires to question its validity only on the grounds mentioned in that sub-section or either of them, namely, that the order is not within the powers of the Act, or that any requirement of the Act has not been complied with, or possibly on the further ground that there is no evidence to support the order; & not on the ground that the evidence is insufficient to support the order.—*Re Bowman, South Shields (Thames Street) Clearance Order, 1931*, [1932] 2 K. B. 621; 101 L. J. K. B. 798; 147 L. T. 150; 96 J. P. 207; 48 T. L. R. 351; 76 Sol. Jo. 273; 30 L. G. R. 245.

*Innotations*.—As to (4) *Refd. Stocker v. Minister of Health* [1938] 1 K. B. 600. As to (3) *Consd. Latham (Well Lane Sedmonds Court & Smithwick Holly Clearance Order, 1936, Halse's Application, [1937] 3 All E. R. 308; Halse v. Minister of Health (1937), 35 L. G. R. 121. Generalib. Refd. Re Mason (1931), 50 T. L. R. 392.*

**502j.** — **Omission of starred note relating to Housing Act, 1930 (c. 39), s. 11.]—***Re Bowman, South Shields (Thames Street) Clearance Order, 1931*, No. 502h, *ante*.

**502k.** — **Alternative accommodation—For residential & not business purposes.]—**On an application by a person who was the owner of business premises affected by a clearance order, & who complained that the authority had not satisfied themselves with regard to the provision of business accommodation for the persons to be displaced:—*Held*: Housing Act, 1930 (c. 39), s. 1 (1), proviso (a), applies only to residential accommodation & there is no duty on the authority to satisfy themselves that suitable business accommodation exists or can be provided.—*Re Gateshead County Borough (Barn Close) Clearance Order, 1931*, [1933] 1 K. B. 429; 102 L. J. K. B. 82; 148 L. T. 264; 97 J. P. 1; 49 T. L. R. 101; 77 Sol. Jo. 12; 31 L. G. R. 52.

**502l.** — **Confirmation of clearance order—Powers of Minister of Health.]—**Where a local authority has made a clearance order under Housing Act, 1930 (c. 39), s. 1, & has submitted the order to the Minister of Health for confirmation, & objections are made thereto by the owners, the Minister must comply with the provisions of 1930 Act,

Sched. I., para. 4, & cause a public local inquiry to be held, & consider any objections not withdrawn & the report of the person who held the inquiry. In deciding whether or not he shall confirm the clearance order the Minister occupies a quasi-judicial function & must not take into consideration any matters other than those mentioned in para. 4 of Sched. I. If the Minister holds a private inquiry to which the owners are not invited or takes into consideration *ex parte* statements with which the owners have had no opportunity of dealing he is not acting in accordance with correct principle of justice, & his confirmation of the clearance order would not be within the powers conferred upon him by the Act, & the owners would be entitled as being persons aggrieved to have the confirmation order quashed.—*ERRINGTON v. MINISTER OF HEALTH*, [1935] 1 K. B. 249; 104 L. J. K. B. 49; 152 L. T. 154; 99 J. P. 15; 51 T. L. R. 41; 78 Sol. Jo. 754; *sub nom. Re Jarrold North Ward (No. 1) Clearance Order, 1933, Ex p. Errington*, 32 L. G. R. 481, C. A.

*Annotations*.—*Apld. Frost v. Minister of Health*, [1935] 1 K. B. 286. *Distd. Offer v. Minister of Health*, [1936] 1 K. B. 40; *Horn v. Minister of Health*, [1936] 2 All E. R. 1299. *Refd. Denby & Sons, Ltd. v. Minister of Health*, [1936] 1 K. B. 337; *Marriott v. Minister of Health*, [1936] 2 All E. R. 865; *Estate & Trust Agencies (1927), Ltd. v. Singapore Improvement Trust*, [1937] 3 All E. R. 321; *Re Brighton (Everton Place Area) Housing Order, 1937, Robins & Son, Ltd.'s Application*, [1938] 2 All E. R. 116.

**502m.** — — — — —.]—*Frost v. Minister of Health*, No. 502v, *post*.

**502n.** — — — — —.]—The Minister of Health has, under Housing Acts of 1925 & 1930, the right to give advice to local authorities & to make inquiries in order to determine whether any powers under the Acts should be put in operation in any area, notwithstanding that under Housing Act, 1930 (c. 39), s. 2, the duty is imposed upon the Minister of deciding in a semi-judicial capacity whether or not a clearance order made by a local authority should be confirmed. The representatives of a local authority applied to the Ministry of Health for advice with regard to the preparation of their 1933 five-year slum clearance programme & saw C., one of the Minister's chief housing & town planning inspectors. C. declined to give any advice as he was not sufficiently acquainted with the conditions in the borough. He subsequently visited the borough & inspected the exteriors of properties in various parts of the borough in co. with the chief sanitary inspector of the borough, & C. told the sanitary inspector that the properties which he had seen appeared *prima facie* to be the class of property which other local authorities were including in clearance orders, but that he could not express any definite opinion nor was he in a position in any way to bind the Minister. The local authority subsequently made a clearance order in respect of certain properties the owners of which objected to the confirmation of the order. At the public local inquiry the above facts were disclosed. The clearance order was confirmed by the Minister, but C. took no part in deciding whether or not the order should be confirmed. The owners appealed under sect. 11 of 1930 Act on the ground that the Minister in confirming the order had failed to act judicially:—*Held*: upon the

facts, the statement of opinion by C., which did not bind the inspector who held the inquiry, nor the Minister of Health, was in no way inconsistent with the exercise of the duty imposed upon the Minister of deciding in a semi-judicial capacity, after a consideration of the objections & the report of the inspector who held the public local inquiry, whether or not the clearance order made by the local authority should be confirmed, & the objectors had no cause of complaint against the confirmation of the order.—*OFFER v. MINISTER OF HEALTH*, [1936] 1 K. B. 40; 105 L. J. K. B. 6; 153 L. T. 270; 51 T. L. R. 516; 79 Sol. Jo. 609; 33 L. G. R. 369, C. A.

*Annotation*:—*Consd.* Horn v. Minister of Health, [1936] 2 All E. R. 1299, C. A.

**502o.**      —.]—A local authority in pursuance of their powers under Part III. of Housing Act, 1925 (c. 40), made an Order for the compulsory purchase of certain land. The owner of the land objected to the confirmation of the Order by the Minister of Health. A public local inquiry was held by an inspector of the Ministry of Health at which it was stated that the land was required by the local authority partly for slum clearance & partly for the erection of new houses required under Housing Act, 1935 (c. 40), on account of overcrowding. The local authority, before the inquiry was held, asked the Minister to receive a deputation with a view to expediting the provision of new houses under Housing Act, 1935 (c. 40), & securing the payment of a subsidy as large as possible. This deputation was received at the Ministry after the public local inquiry was held, but before the confirmation by the Minister of the Compulsory Purchase Order. It was suggested by the owner of the land that representations with regard to the purchase of his land must have been made at that interview in his absence. But the representatives of the local authority & of the Minister deposed that no reference was made at that interview to the purchase of the land in question. The Minister subsequently to the interview confirmed the Compulsory Purchase Order. In proceedings to quash the Confirmation Order:—*Held*: inasmuch as the interview between the representatives of the Minister & the local authority was held for the sole purpose of carrying out the duties imposed upon the Minister & the local authority by Housing Act, 1935 (c. 40), s. 1, of consulting together for the purpose of carrying that Act into effect, & there was no evidence that the order for the compulsory purchase of the land in question was discussed at the interview, there was no such identity between the subject-matter of the deputation & the subject-matter of the Confirmation Order as to amount to an interference with the exercise by the Minister of his semi-judicial functions in confirming the Compulsory Purchase Order, & that consequently there was no ground for quashing the Compulsory Purchase Confirmation Order.

*Per* SLESSER, L.J.: Where the Minister has the right under one Act of giving advice to a local authority, & under another Act the duty of confirming Orders made by local authorities, his duty is to carry out both those powers, & they cannot be said to be contrary

to one another, inasmuch as the Legislature has imposed upon him the duty of doing both.

*Per* SCOTT, L.J.: Where public departments are given quasi-judicial duties to perform as well as administrative duties, the obligation to carry out their quasi-judicial duties in strict accordance with natural justice must always be considered in the light of their administrative duties.—*HORN v. MINISTER OF HEALTH*, [1937] 1 K. B. 164; [1936] 2 All E. R. 1299; 105 L. J. K. B. 649; 155 L. T. 335; 100 J. P. 463; 80 Sol. Jo. 688; 34 L. G. R. 495, C. A.

**502p.**      —.]—A clearance order was made which related to an area including a house owned by applt., & applt. was in due course served with notice of the making of the order. He lodged an objection to the order, in accordance with the provisions of the Housing Acts, & was duly served with notice of the principal grounds on which the local authority was satisfied that the premises were unfit for human habitation. The Minister of Health caused a public local inquiry to be held, at which applt. was represented & his objections to the making of the order were stated. The inspector looked at the houses in question & made a report to the Minister, who decided to confirm the clearance order. Applt. appealed on the ground that there was no evidence upon which the Minister could confirm the order:—*Held*: as applt. had shown neither that the order was not within the powers of the Act, nor that any requirement of the Act had not been complied with, the ct. could not interfere with the Minister's decision.—*Re FALMOUTH (WELL LANE, SEDGEMOND'S COURT & SMITH-WICK HILL) CLEARANCE ORDER, 1936, HALSE'S APPLICATION*, [1937] 3 All E. R. 308; 157 L. T. 140; 101 J. P. 490; 53 T. L. R. 853; 81 Sol. Jo. 590; *sub nom.* HALSE v. MINISTER OF HEALTH, 35 L. G. R. 421.

*Annotation*:—*Refd.* *Re* Hammersmith (Berghem Mews) Clearance Order, 1936, Wilmot's Application, [1937] 3 All E. R. 539; *Stocker v. Minister of Health*, [1938] 1 K. B. 655.

**502q.**      —.]—**Postponement pending inquiry into scheme of county council.**—A borough council gave notice to the London County Council that they were about to take into consideration the question of declaring certain land to be a clearance area, & the London County Council did not notify the borough council within the prescribed period that they themselves intended to deal with the area. Thereafter the borough council made an order declaring the area to be a clearance area, & requested the Minister of Health to confirm such order. Before the Minister had taken any steps the London County Council notified the Minister of their intention to deal with the same area by means of a different scheme, & the Minister ordered a local inquiry into the county council's scheme, suggesting that the borough council should be represented thereat, & refused to consider the question of confirming the order of the borough council until after such inquiry had taken place:—*Held*: there had been no refusal by the Minister to perform his statutory duty, but merely a postponement of his decision until after the inquiry. Therefore the issue of a writ of *mandamus* would not be justified.—*R. v. MINISTER OF HEALTH, Ex p. FINSBURY BOROUGH COUNCIL* (1934), 32 L. G. R. 349.

**502r. — Houses demolished before confirmation.]**—Nottingham Corp'n. on June 4, 1934, resolved that a certain area should be a clearance area, & on the same day made a compulsory purchase order in respect of part thereof. Upon that part of the area there were 39 houses of which 27 were the property of app't. On July 21 app't. instructed a builder to demolish all the 27 houses, & the demolition work began on July 26 & was completed before Oct. 2. Notice of the order was served on app't. on July 30, & he lodged his objection on Aug. 15. On Oct. 2 the public local inquiry began at which the fact of the demolition was proved. On Jan. 16, 1935, the Minister confirmed the order. App't. questioned the validity of the order & applied under Housing Act, 1930 (c. 39), s. 11 (3), to have it quashed:—*Held*: before confirming an order the Minister ought to consider matters as they are at the time of the local inquiry, & as there was at that time no subject-matter on which the Act could operate, the Minister ought not to have confirmed the order either with or without modification.—*MARRIOTT v. MINISTER OF HEALTH*, [1937] 1 K. B. 128; [1936] 2 All E. R. 865; 106 L. J. K. B. 149; 155 L. T. 94; 100 J. P. 132; 52 T. L. R. 643; 80 Sol. Jo. 533; 31 L. G. R. 401, C. A.

*Annotation*:—*Reid*. Denby (William) & Sons, Ltd. v. Minister of Health, [1936] 1 K. B. 337.

**502s. — Whether owner entitled to see report of Inspector.]**—A person whose property is affected by a clearance order made by a local authority under Housing Act, 1930 (c. 39), is not entitled to see the report made to the Minister of Health by the person whom the Minister has caused to hold a public local inquiry as required by Sched. I. of the Act.—*DENBY (WILLIAM) & SONS, LTD. v. MINISTER OF HEALTH*, [1936] 1 K. B. 337; 105 L. J. K. B. 134; 151 L. T. 180; 100 J. P. 107; 80 Sol. Jo. 33; 34 L. G. R. 61, D. C.; *sub nom.* BAILDON URBAN (PARK LANE AREAS) CONFIRMATION ORDER, 1935, BAILDON URBAN TONG PARK NO. 1 HOUSING CONFIRMATION ORDER, 1935, 52 T. L. R. 173.

**502t. — Local Inquiry—Procedure.]**—At a public local inquiry by the Minister of Health to consider the question of the confirmation of a compulsory purchase order in respect of a part of the White City, counsel for the owners of the land sought to state the intentions of his clients as to the future use of the property. He had already stated that he did not intend to call any evidence. The inspector refused to allow the statement to be made:—*Held*: the inspector was right in refusing to hear such a statement unsupported by evidence, & the complaint made afforded no ground for quashing the order.—*Re LONDON (HAMMERSMITH) HOUSING ORDER, LAND DEVELOPMENT, LTD.'S APPLICATION*, [1936] 2 All E. R. 1063; 80 Sol. Jo. 690.

**502u. — Area in map accompanying advertisement differing from area at time of resolution.]**—By a resolution passed on Oct. 4, 1933, a local authority declared an area within their district to be a clearance area under Housing Act, 1930 (c. 39), s. 1 (1). The map defining the area included within it certain houses belonging to the local authority. In Dec. certain communications passed between the

local authority & the Minister of Health regarding the terms of the clearance order, & on the advice of the Minister the houses belonging to the local authority were excluded from the area. Accordingly, when the clearance order was advertised in Mar. 1934, it was accompanied by a new map which did not include within the area the houses in question. Objections to the order having been made, an inquiry under Sched. I., para. 4, to the Act was held on May 29, & on Sept. 29 the order was confirmed without modification by the Minister of Health:—*Held*: (1) the fact that the area covered by the order confirmed by the Minister was different from that defined on the map made at the time of the resolution of the local authority did not render the order one which was not within the powers of the Act, although it might be one with regard to which a requirement of the Act had not been complied with; (2) up to the time of objections to the order being made, the Minister of Health acted in an administrative, & not in a judicial, capacity, & he was, therefore, entitled through the officials of his department, to advise the local authority on what the terms of the clearance order should be.—*FROST v. MINISTER OF HEALTH*, [1935] 1 K. B. 286; 104 L. J. K. B. 218; 51 T. L. R. 171; *sub nom.* *Re BURKENHEAD, CAMBRIDGE PLACE, CLEARANCE ORDER*, 1934, *Ex p.* *FROST*, 152 L. T. 330; 99 J. P. 87; 33 L. G. R. 20.

*Annotation*:—*Reid*. *Oller v. Minister of Health* [1936], 1 K. B. 40.

**502v. — Failure to hear objections before resolution passed.]**—A local authority passed a resolution under Housing Act, 1930 (c. 39), s. 1, declaring an area in their district to be a clearance area. An owner of property in that area contended that the clearance order based on the resolution was bad, because he had not been given an opportunity of being heard in opposition to it before the resolution was passed:—*Held*: there was no rule of law obliging the local authority to hear objections by owners of the property affected before passing the resolution, & the resolution & subsequent order were valid.—*FREDMAN v. MINISTER OF HEALTH* (1935), 151 L. T. 210; 100 J. P. 101; 80 Sol. Jo. 56; 34 L. G. R. 153.

**502w. — Part of premises not dwellings.]**—A clearance order was made in respect of certain premises consisting of garages & workshops with dwelling rooms over, the dwellings not being let, occupied or used in connection with the garages & not being in communication therewith. The owner of the premises contended that it was not within the powers of the local authority under the Housing Acts to order the demolition of the whole of the premises, as the garages & workshops were not dwellings or parts of dwellings. It was also contended that, if that part of the building which was a dwelling were taken away & certain repairs were effected to that part which remained, it might become a desirable garage & could not be a danger to any one living in the neighbourhood:—*Held*: the structure was all one building, & the local authority had acted within its powers in ordering the demolition of the whole.—*Re*

HAMMERSMITH (BERGHEM MEWS) CLEARANCE ORDER, 1936, WILMOT'S APPLICATION, [1937] 3 All E. R. 539; 157 L. T. 112; 81 Sol. Jo. 751; *sub nom.* WILMOT v. MINISTER OF HEALTH, 35 L. G. R. 182.

*Annotation:—Reid.* Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936, Butler's Application, [1938] 2 All E. R. 279.

**502y. "Other buildings"—What may be included.**—A local authority having resolved to declare a certain area a clearance area on the ground that the dwelling-houses were by reason of disrepair or sanitary defects unfit for human habitation . . . & that the other buildings (if any) in the area were for a like reason dangerous or injurious to the health of the inhabitants, subsequently made a clearance order in respect of the area. The area consisted of two-storey buildings forming three sides of a cul-de-sac. The lower floor was used as garages, stables & workshops. The upper floor was divided into dwellings, though the divisions did not in all cases correspond with the divisions of the lower floor. There was a separate entrance in each case to the upper floor. The Minister having confirmed the clearance order, appct., who was the mtgee. of the premises, appealed:—*Held*: (1) the proper way to regard the premises was not to treat each composite structure consisting of garage or workshop with dwelling above as being either a "house" or an "other building" within Housing Act, 1936 (c. 51), but to regard the dwellings as "houses" & the garages & shops as "other buildings"; (2) the effect of para. 2 of Sched. III. of Housing Act, 1936 (c. 51), with the proviso, is that buildings included in a clearance area only as being dangerous or injurious to health by reason of bad arrangement, etc., are to be excluded from the clearance order unless the effect of such exclusion would be also to preserve from demolition a building "constructed or adapted as or for the purposes of a dwelling, or partly for those purposes & partly for other purposes, if any part (not being a part used for other purposes) is by reason of disrepair or sanitary defects unfit for human habitation"; (3) applying that test to the present case the ground floor premises would *prima facie* have been excluded from the order, but if they were so excluded, the provisions of the first part of para. 2 would be applied to a building (namely, the composite structure made up of workshop & dwelling) which fell within the proviso. The intention of the Legislature would be defeated if the word "building" in the proviso were limited to the "other building" considered as a unit without reference to any larger structure of which it might form a part; (4) the resolution was not invalidated either by the reference to "other buildings (if any)," since the buildings were clearly identified in the schedule to the clearance order, or by a suspensive condition, there being evidence that that condition had been complied with.—*Re* BUTLER, CAMBERWELL (WINGFIELD MEWS) NO. 2 CLEARANCE ORDER, 1936, [1938] 2 K. B. 210; [1938] 2 All E. R. 279; 107 L. J. K. B. 419; 102 J. P. 213; 51 T. L. R. 655; 82 Sol. Jo. 317; *sub nom.* BUTLER v. MINISTER OF HEALTH, 159 L. T. 47; 36 L. G. R. 335.

**502z. Power to purchase adjacent land.**—A local authority made, & the Minister of Health confirmed, an order for the compulsory purchase of certain land adjacent to a clearance area. The acquisition of that land was reasonably necessary for the carrying out of a scheme for the development of that clearance area in conjunction with other clearance areas in the neighbourhood, but would not have been necessary had it been proposed to develop the area as a separate unit:—*Held*: Housing Act, 1930 (c. 39), s. 3, conferred power on the local authority to make, & on the Minister to confirm, the above-mentioned compulsory purchase order.—*SHEFFIELD BURGESSES v. MINISTER OF HEALTH* (1935), 154 L. T. 183; 100 J. P. 99; 52 T. L. R. 171; 80 Sol. Jo. 16; 34 L. G. R. 92.

**502aa. Discretion of local authority as to method of clearance.**—The owner of certain property included in a compulsory purchase order contended that the onus was upon the local authority to satisfy the Minister of Health that, by making a compulsory purchase order rather than a clearance order, it had chosen the most appropriate method for securing the clearance of the area:—*Held*: Housing Act, 1930 (c. 39), s. 1 (3), gave the local authority an absolute right to secure the clearance of the area in either of the two ways as it should decide, or partly in one and partly in the other. At the local inquiry the local authority was not required by the Act to call evidence to show why it thought one way more appropriate than another to the particular case, but it was open to the Minister not to confirm the order if he thought the local authority had adopted a wrong method.—*Re* GREENWICH (PRINCE OF ORANGE LANE) HOUSING ORDER, 1936, WILLEY'S APPLICATION, [1937] 3 All E. R. 305; 157 L. T. 67; 101 J. P. 495; 53 T. L. R. 839; 81 Sol. Jo. 501; *sub nom.* WILLEY v. MINISTER OF HEALTH, 35 L. G. R. 116.

*Annotation:—Reid.* *Re* Brighton (Everton Place Area) Housing Order, 1937, Robins & Son, Ltd.'s Application, [1938] 2 All E. R. 116.

**502bb. —.**—The appct. were the owners of a site, which admittedly could properly be declared to be a clearance area. They had for some time been in communication with the local authority upon the question of the demolition of the property & the redevelopment of the site. The local authority without further notice to the appct. declared the area to be a clearance area, & on the same day made a compulsory purchase order in respect of the property:—*Held*: Housing Act, 1936 (c. 51), imposes no obligation upon a local authority to give reasons why it prefers to make a compulsory purchase order rather than a demolition order, & there had been no failure on the part of the local authority to do all that the Act required it to do.—*Re* BRIGHTON (EVERTON PLACE AREA) HOUSING ORDER, 1937, ROBINS & SON, LTD.'S APPLICATION, [1938] 2 All E. R. 146; 102 J. P. 253; 54 T. L. R. 637; 82 Sol. Jo. 335; *sub nom.* ROBINS & SONS, LTD. v. MINISTER OF HEALTH, 158 L. T. 496; 36 L. G. R. 274; *affd.*, [1938] 4 All E. R. 446.

**502cc. Compulsory purchase order—Objection—Sufficiency of notice—Satisfaction of Minister.**—Appct., the owner of certain properties in a clearance area, gave notice to the Minister

of Health of objection to a compulsory purchase order. The local authority served notices upon *appet.* under Housing Act, 1935 (c. 40), s. 63 (1), alleging that the properties were unfit for human habitation, & stating the facts which the local authority alleged to be its principal grounds for being satisfied as to the unfitness. *Appet.* objected to the notices on the ground that they did not give him sufficient particulars of the facts in support of the local authority's allegation of unfitness, & he contended that the Minister had no power to hold a public local inquiry into the local authority's application for confirmation of the compulsory purchase order:—*Held*: by Housing Act, 1935 (c. 40), s. 63 (1), it is the Minister, & not the objector, who is to be satisfied that the local authority has served appropriate notices under that sect., & as the Minister was satisfied, in the present case, that a sufficient notice had been served upon *appet.*, *appet.* could not object to the holding of the public inquiry after the expiration of the period required by sect. 63 (1).—*R. v. MINISTER OF HEALTH, Ex p. HACK*, [1937] 3 All E. R. 176; 157 L. T. 118; 101 J. P. 430; 81 Sol. Jo. 461; 35 L. G. R. 349.

**502dd. Powers of London County Council.**—The London County Council, notwithstanding the fact that they have not submitted a scheme for the approval of the Minister of Health under Housing Act, 1925 (c. 11), s. 80 (2) (b) (ii), have power under Housing Act, 1935 (c. 40), s. 71 (1), to purchase land within the area of a metropolitan borough for the purpose of providing housing accommodation for persons of the working classes rendered necessary by action taken by the County Council in the displacement of such persons in areas outside that borough, or for the purpose of providing accommodation required to abate overcrowding in metropolitan boroughs outside that borough.—*STOCKER v. MINISTER OF HEALTH*, [1938] 1 K. B. 655; 107 L. J. K. B. 146; 158 L. T. 29; 36 L. G. R. 92; *sub nom. Re LONDON COUNTY (STOKE NEWINGTON) HOUSING ORDER, 1936, STOCKER'S APPEAL*, [1937] 4 All E. R. 678; 102 J. P. 67; 51 T. L. R. 233; 82 Sol. Jo. 96.

#### C. Town Planning Schemes (p. 215).

*See, now, Town & Country Planning Act, 1932 (c. 48).*

**503a. — Claim for compensation—When scheme "made."**—By Town Planning Act, 1925 (c. 16), s. 10, it is provided that any person

whose property is injuriously affected by the making of a town planning scheme shall, if he makes a claim within the time limited by the scheme, be entitled to obtain compensation in respect thereof from the responsible authority. & by sect. 2 of the Act it is provided that a town planning scheme shall not have effect, unless it is approved by an order of the Minister of Health, who may refuse his approval except with such modifications as he thinks fit, & a scheme when so approved shall have effect as if it were enacted in the Act:—*Held*: upon the true construction of the Act, the person entitled to obtain compensation under sect. 10 is the person whose property, at the date of "the making" of the scheme, that is, when an order has been made by the Minister approving the scheme, & not before, is injuriously affected thereby.—*MARKHAM v. DERRY CORPN.*, [1935] Ch. 320; 104 L. J. Ch. 108; 152 L. T. 416; 99 J. P. 35; 33 L. G. R. 69.

*Annotation*:—*Reid*, A. G. v. Barnes Borough Council & Ranelagh Club, Ltd. [1938] 3 All E. R. 711.

**506a. Improvement scheme—Validity—Particulars of proposed development must be shown.**—

An improvement scheme purporting to be made under the provisions of Housing Act, 1925 (c. 14), after providing for the acquisition & clearing of an unhealthy area, proceeded to empower the local authority to sell, lease or otherwise dispose of, as they thought fit, the cleared area or to appropriate or use it for any purpose approved by the Minister of Health. The scheme further provided that if the Minister so required, the local authority should provide a number of dwellings, not exceeding 72, suitable for accommodation of persons of the working classes, on a site either within or without the area, according to a scheme to be approved by the Minister. The scheme had been presented to the Minister with a petition for its confirmation:—*Held*: in order to be a valid improvement scheme within Part II. of the Act, a scheme must, besides providing for the acquisition & clearance of an area, contain particulars of the proposed development of the area, & not confer on the local authority an unrestricted power to sell or lease the cleared area.—*R. v. MINISTER OF HEALTH, Ex p. DAVIS*, [1929] 1 K. B. 619; 98 L. J. K. B. 636; 141 L. T. 6; 93 J. P. 49; 45 T. L. R. 345; 27 L. G. R. 677, C. A.

*Annotations*:—*Distd.* Minister of Health v. R., *Ex p. Yaffe*, [1931] A. C. 494. *Consd.* R. v. Webster, *Ex p. Marshall* (1931), 95 J. P. 226. *Reid*. R. v. London County Council, *Ex p. Entertainments Protection Assocn., Ltd.*, [1931] 2 K. B. 215; *Marriott v. Minister of Health*, [1936] 2 All E. R. 865.

#### PART VII. SECT. 11, SUB-SECT. 4.—C.

*sv. Town Planning & Development Act, 1920—Whether applicable to subdivision into farming areas—Private roads marked on plan.*—A piece of land, comprising about 14,000 acres, situated in a farming district, & within the boundaries of a district council area, was subdivided by the owner into twelve lots. A plan was deposited in the Lands Titles Registration Office, & showed certain private roads which were marked "private roads to be vested in" the owner:—*Held*: the fee-simple of these roads did not vest, by virtue of Town Planning & Development Act, 1920, in the district council.—*LOXTON DISTRICT COUNCIL v. BRUCE*, [1927] S. A. S. R. 463.—*AUS.*

#### PART VII. SECT. 11, SUB-SECT. 4. E.

*sz. Housing of rural workers. Calculation of rent.*—A town council made a grant in respect of a dwelling-house in their burgh, under powers contained in the Housing (Rural Workers) Act, 1926. The house, accordingly, became subject to the provisions of sect. 3 (1) (b) as regarded the maximum rent payable by the occupier. There were only a few agricultural workers in the burgh, & they paid rents similar to the rents paid by artisans. In order to fix the maximum rent, the town council took the pre-war rent of the house, added thereto the 10 per cent. increase permitted under the Rent Restriction Acts, & the percentage of the cost of improvements

specified in sect. 3 (1) (b) of the 1926 Act, & fixed the maximum rent at the sum of these figures. The town council did not attempt to ascertain the actual "average rent" paid by agricultural workers in the district. *Held*: a resolution of the town council fixing the maximum rent in this manner was invalid, in respect that the council's duty, under sect. 3 (1) (b) (i) of the 1926 Act, was to ascertain the average rent paid by agricultural workers in their district; & this figure constituted the "normal agricultural rent" which, together with the specified percentage of the cost of improvements in each case, was the maximum rent payable by the occupier of any house in respect of which a grant had been given.—*JACK v. DALBATHIE MAGISTRATE*, [1937] S. C. 730.—*SCOT.*



506b. ——— Power of local authority to sell or lease cleared area.]—*R. v. MINISTER OF HEALTH, Ex p. DAVIS*, No. 506a, *ante*.

506c. ——— Confirmation of unauthorised scheme—Effect of Housing Act, 1925 (c. 14), s. 40 (5).]—Housing Act, 1925 (c. 14), s. 40, which empowers the Minister of Health to make an order confirming, with or without modifications, an improvement scheme made under the Act, & provides that "the order of the Minister when made shall have effect as if enacted in this Act," does not preclude the ct. from calling in question the order of the Minister where the scheme presented to him for confirmation is inconsistent with the provisions of the Act.

The Corpn. of Liverpool submitted to the Minister of Health for confirmation a document under the common seal purporting to be an improvement scheme under Housing Act, 1925 (c. 14), s. 35, in respect of an unhealthy area within the city. The first part of this document, after defining the area proposed to be dealt with, by clause 5, empowered the corpn. in general terms to make & widen & stop up or deviate any street in the area, directed them to appropriate other parts of the land to the erection of dwelling-houses for the working classes, & provided that any lands not required for these purposes might be disposed of as the corpn. might think fit. The second part contained estimates of the cost of acquiring the land & of the lay-out, & stated that there were no surplus lands. The Minister, after holding a public local inquiry, made an order modifying the scheme by providing (*inter alia*), in lieu of clause 5, that the whole of the lands in the area should, subject to the provision of any necessary streets & approaches, be used for the purposes of rehousing, & confirming the scheme as so modified. The owner of two houses which it was proposed to acquire compulsorily under the scheme on account of their sanitary condition obtained a rule *nisi* for a writ of *certiorari* to quash the order of the Minister as being made without jurisdiction, inasmuch as the scheme which the order purported to confirm was not an improvement scheme within the meaning of the Act in respect that (a) it was not accompanied by a lay-out plan & (b) it provided that land within the area might be disposed of as the corpn. might think fit:—*Held*: the scheme, whatever its defects, was an improvement scheme within the meaning of the Act, & any defects in the scheme had been cured by the order of the Minister.—*MINISTER OF HEALTH v. R., Ex p. YAFFE*, [1931] A. C. 494; 100 L. J. K. B. 306; 47 T. L. R. 337; 75 Sol. Jo. 232; *sub nom. R. v. MINISTER OF HEALTH, Ex p. YAFFE*, 145 L. T. 98; 95 J. P. 125; 29 L. G. R. 305, H. L.

*Annotations*:—*Consd. R. v. Webster, Ex p. Marshall* (1931), 95 J. P. 226. *Refd. R. v. London County Council, Ex p. Entertainments Protection Assn. Ltd.* (1931), 144 L. T. 464; *Re Bowman, South Shields (Thames Street) Clearance Order*, 1931 (1932), 96 J. P. 207; *R. v. Minister of Health, Ex p. Purfleet Urban District Council* (1934), 104 L. J. K. B. 18; *R. v. West Midland Traffic Area Licensing Authority Ex p. Great Western Ry. Co.*, [1935] 1 K. B. 419.

506d. ——— Lapse of powers of authority—Power to make new scheme.]—In 1922 an improvement scheme under the Housing Acts was made by a local authority & confirmed by the

Minister of Health, but before it was attempted to be enforced the local authority's powers of compulsory purchase had lapsed:—*Held*: the local authority were not thereby precluded from making a new scheme under the Housing Act, 1930 (c. 39), or the Minister from confirming it.—*ELLEN STREET ESTATES, LTD. v. MINISTER OF HEALTH*, [1934] 1 K. B. 590; 103 L. J. K. B. 364; 150 L. T. 468; 98 J. P. 157; 32 L. G. R. 233.

508a. Rent—Discrimination—Validity.]—Where a local authority erect houses for the working classes with the aid of additional contributions provided by the Govt. under Housing (Financial Provisions) Act, 1924 (c. 35), it is competent to them in fixing the amount of the rents to be paid for houses of the same type in the same area to discriminate according to the means of the particular tenants, provided that in so doing they observe the provision in sect. 3 (1) (e) of the Act, that "the rents charged in respect of the houses shall not in the aggregate exceed the total amount of the rents that would be payable if the houses were let at the appropriate normal rents charged in respect of working-class houses erected prior to the third day of Aug. 1914."—*LEEDS CORPN. v. JENKINSON*, [1935] 1 K. B. 168; 104 L. J. K. B. 182; 152 L. T. 126; 98 J. P. 447; 51 T. L. R. 19; 78 Sol. Jo. 734; 32 L. G. R. 416, C. A.

509a. Subsidy—Amount—Houses completed after passing of Housing Financial Provisions Act, 1924 (c. 35).]—*SEIN (JOHN G.) & CO., LTD. v. STIRLING COUNTY COUNCIL* (1927), 91 J. P. 205; 26 L. G. R. 51, H. L.

509b. ——— Agreement waiving compliance with bye-law—Whether authorised under Housing Act, 1925 (c. 14), s. 99.]—*WILLIAM BEAN & SONS, LTD. v. FLAXTON RURAL DISTRICT COUNCIL*, No. 121a, *ante*.

509c. ——— Condition as to maximum "selling price"—Validity.]—*Pltfs.*, a local authority, were empowered, under Housing, etc., Act, 1923 (c. 24), & Housing (Financial Provisions) Act, 1924 (c. 35), to assist builders by making grants in respect of working-class houses of a specified character. The grants might be subjected by the local authority to terms & conditions having the approval of the Minister of Health, who would reimburse *pltfs.* in respect of such grants out of the public funds. *Defts.*, a firm of builders, applied to *pltfs.* for such assistance in respect of certain houses then under construction, which *pltfs.* granted, subject to a condition that the selling price or value of each house should not exceed £550. The houses were completed & the subsidies duly paid to *defts.* *Defts.* subsequently sold three of the houses for sums exceeding £550. *Pltfs.* brought an action for repayment of the three sums of £75 paid in respect of such houses. *Defts.* contending: (1) that the term "selling price" referred to the price at which a house might reasonably be expected to be sold, & that a house having qualified for subsidy on that footing should not subsequently become disqualified by any actual sale at a higher figure; (2) that the condition limiting selling price was void, (a) as being *ultra vires* *pltfs.* to impose or the Minister of Health

to approve, or (b) for repugnance:—*Held*: (1) the "selling price" of a house meant the price at which such house was actually sold, as distinct from any previously estimated value; (2) a condition imposed by a local authority limiting the selling price of houses in respect of which assistance is being granted under the Housing, etc., Act, 1923 (c. 24), is one which the local authority has power to impose & the Minister of Health to approve, & is *prima facie* valid. The facts having established a contract between the parties, defts. were liable, upon the breach of such condition, to repay moneys received subject thereto.—**BURNHAM-ON-SEA URBAN DISTRICT COUNCIL v. CHANNING & OSMOND**, [1933] Ch. 583; 102 L. J. Ch. 196; 148 L. T. 547; 97 J. P. 115; 49 T. L. R. 246; 77 Sol. Jo. 177; 31 L. G. R. 192.

**509d.** ——— **Meaning of "selling price."**—**BURNHAM-ON-SEA URBAN DISTRICT COUNCIL v. CHANNING & OSMOND**, No. 509c, *ante*.

**513a.** ——— **Appeal to county court—Not limited to question of law.**—**FLETCHER v. ILKESTON CORPN.**, No. 481a, *ante*.

**518.** *Add. Annotations* :- -1s to (2) **Consd. Denby & Sons, Ltd. v. Minister of Health**, [1936] 1 K. B. 337; **Marriott v. Minister of Health** (1935), 105 L. J. K. B. 125. *Reid. Brown v. Dagenham U.D.C.*, [1929] 1 K. B. 737; **Cooper v. Wilson**, [1937] 2 K. B. 309; **Ex-Army Transport, Ltd. v. Diamond & Co.** (1936), 21 Ry. & Can. Tr. Cas. 303. *Generally, Reid. Offer v. Minister of Health*, [1936] 1 K. B. 40; **Leslie v. London & North Eastern & London, Midland & Scottish Ry. Co.'s** (1936), 21 Ry. & Can. Tr. Cas. 182.

(c) *Town Planning Schemes* (p. 218).

*See, now, Town & Country Planning Act, 1932* (c. 48), ss. 18–24.

**524.** After "(d)" following this case add:—

(e) *Clearance Orders*.

*See Housing Act, 1930* (c. 39), s. 11; **R. S. C. (No. 2)**, 1932, S. R. & O., 1932, No. 514, and **PRACTICE**, Part LXIII., *post*.

**524a.** **Application to High Court—Grounds for.**—**Re BOWMAN, SOUTH SHIELDS (THAMES STREET) CLEARANCE ORDER, 1931, No. 502h** *ante*.

**524b.** ———.—**Re FALMOUTH (WELL LANE, SEDGEMOND'S COURT & SMITHWICK HILL) CLEARANCE ORDER, 1936, HALSE'S APPLICATION, No. 502p.** *ante*.

**524c.** ——— **Costs.**—**Re MASON** (1934), 50 T. L. R. 392; 78 Sol. Jo. 411.

#### PART VII. SECT. 12, SUB-SECT. 1.

**11.** ——— **Injury to employee—Whether negligence must be proved.**—**Pltf.** while working for deft. in clearing brush from the latter's farm was injured by an explosive which deft. had brought on to the land for use in the clearing of it, & which pltf. by pure chance struck with an axe.—*Held*: pltf. must prove negligence.—**PIETRZAK v. ROCHELEAU**, [1928] 2 D. L. R. 46; [1928] 1 W. W. R. 428; 23 Alta. L. R. 337.—**CAN.**

**sw. Explosives Act, R. S. C., 1927—Not binding on Crown.**—**R. v. LEBLANC** (1930), 1 M. F. R. 21.—**CAN.**

#### PART VII. SECT. 12, SUB-SECT. 2.—A.

**sz. Oil in Navigable Waters Act, 1922** (c. 39) s. 1 (1)—"*Vessel*"—

*Ship being broken up.*—A ship in process of being broken up, & no longer capable of being navigated, may be a "vessel" within Oil in Navigable Waters Act, 1922 (c. 39), s. 1 (1).—**THOMAS W. WARD, LTD. v. WAUGH**, [1934] S. C. (J.) 13.—**SCOT.**

**sz. Gasoline pump in street—Failure to remove—Conviction.**—Appeal from the dismissal of a charge of non-compliance with an order made by an assistant fire marshal, under Fire Marshal Act, R. S. B. C., 1921, for the removal of a gasoline pump from a public street, allowed, & accused fined, without costs. The fact that accused had been previously convicted & fined, for violating, with respect to the same pump, a regulation under said Act prohibiting the installing of such a pump on a public street, held not to

**524d. Interim development order—Grant of permission to build by council—Certiorari.**—A *certiorari* will lie to bring up a decision of a local authority to permit development pending the final approval by the Minister of Health of a town-planning scheme. Resolutions had been passed by a rural district council for the preparation of a town-planning scheme, & the scheme was awaiting the approval of the Minister of Health, who had made, under Town Planning Act, 1925 (c. 16), s. 4, an Interim Development Order, under which persons could apply to the council for permission to build, pending the approval of the scheme by the Minister. This permission, if granted, would safeguard the appct's right to compensation under sect. 10 of the Town Planning Act, 1925 (c. 16), s. 10, in the event of their property being injuriously affected by the making of the town-planning scheme. An application was made to the council for permission to develop certain premises in the area covered by the proposed town-planning scheme. Objections were invited & considered by the council, who unanimously decided to permit the proposed development, pending the final approval by the Minister of Health of the town-planning scheme:—*Held*: as the decision of the council to permit the development in question conferred a legal right to compensation in certain events & affected the rights of subjects, it was sufficiently near a judicial decision to be the subject of a writ of *certiorari*. Where, therefore, one of the councillors voting in favour of the resolution to grant permission to develop, had such an interest in the matter as to disqualify him from taking part or voting, on account of bias, an order *nisi* for a writ of *certiorari* to quash the decision of the council was made absolute.—**R. v. HENDON RURAL COUNCIL, Ex p. CHORLEY** [1933] 2 K. B. 696; 102 L. J. K. B. 658; 149 L. T. 535; 97 J. P. 210; 49 T. L. R. 482; 31 L. G. R. 332, D. C.

**530a. Filling station—Preservation of amenities—Validity of bye-law.**—Purporting to act upon the powers conferred upon them by Petroleum (Consolidation) Act, 1928 (c. 32), s. 11 (1), which, with certain modifications, applies to Scotland, the Corp'n. of Glasgow applied to certain areas in the city a set of model bye-laws which had been confirmed by the Scottish Office & approved by the Secretary of State. The areas affected by the bye-laws formed a belt round the centre of the city & covered a surface of 35 square miles. Certain motor traders & suppliers

sustain the plea of *autrefois convict*.—**KERR & LLOYD**, [1936] 1 W. W. R. 16; 65 Can. C. C. 359.—**CAN.**

**sk. Licence for pump Grounds for revoking.**—The Board of Public Utilities is not justified in revoking a licence for a gasoline pump merely because the noise & smell of the pumps is likely to interfere with guests in a hotel.—**Re HAMILTON**, [1937] 1 D. L. R. 807; 12 M. P. R. 69; 65 Can. C. C. 265.—**CAN.**

#### PART VII SECT. 12, SUB-SECT. 2.—B.

**529 1. Petroleum for light vehicles—Locomotives on Highways Act, 1896, c. 36, s. 5—Application to Scotland of regulations made by Home Secretary.**—**GALLOWAY v. ANDERSON**, [1928] S. C. (J.) 70.—**SCOT.**

of petroleum, feeling themselves aggrieved by the extent of the area & the restrictions in relation to the filling stations, claimed a decree reducing the bye-laws on the ground that they were *ultra vires*, unreasonable, & uncertain:—*Held*: the Act left to the Corpn. the power of determining to what part of their area bye-laws should be made to apply in order to preserve the amenity of the places mentioned in sect. 11; they were the judges of the beauty or picturesque character of the places; & the bye-laws were not *ultra vires* or unreasonable or uncertain.—**ROBERT BAIRD, LTD. v. GLASGOW CORPN.**, [1936] A. C. 32; 105 L. J. P. C. 33; 154 L. T. 65, 11. L.

533. *Add. Citations*:—*sub nom.* R. v. WARBLINGTON OVERSEERS, 22 L. T. O. S. 304; 18 J. P. 647; *sub nom.* *Ex p.* WARBLINGTON OVERSEERS, 18 Jur. 494.

534. *Add. Citation*:—*sub nom.* R. v. DEVERELL, 23 L. J. M. C. 121.

*Add. Annotations*:—*Refd.* R. v. Kingswinford Overseers (1854), 2 E. & B. 688; Backhouse v. Bishopwearmouth (1861), 7 Jur. N. S. 338.

#### A. Slaughter-Houses, Knackers' Yards and Knackers (p. 222).

See Slaughter of Animals Act, 1933 (c. 39).

549. *Add. Annotation*:—**Consd.** Woolliscroft v. Stoke-on-Trent Corpn. (1928), 92 J. P. 150.

556a. **Registration—Removal from register—Grounds for.**—Pltfs. were the owners of premises which had been used for a long period prior to Mar. 1924, as a slaughter-house in connection with their business as meat salesmen, & were a registered slaughter-house within Towns Improvement Clauses Act, 1847 (c. 34), s. 126. By a resolution passed by the City Council on July 22, 1926, pltfs.' slaughter-house was removed from the register upon the ground that no slaughtering had been done on the premises between Mar. 1924, & July, 1926:—*Held*: upon the evidence, these premises had throughout the period in question been continuously occupied by pltfs. as a slaughter-house & used as such. The local authority were therefore not entitled under sect. 126 to remove the name from the register, even although there had been a breach of the regulations on the part of pltfs.—**WOOLLISCROFT v. STOKE-ON-TRENT CORPN.** (1928), 92 J. P. 150; 26 L. G. R. 522, C. A.

573a. **Liability of fire brigade for disobeying traffic lights.**—A fire engine proceeding to a fire came to a light-controlled crossing when the lights were against it. The driver, who had been sounding his gong in the usual way, seeing no vehicle upon the crossing, proceeded to cross in disobedience to the red

light. Pltf. in his car, coming along the road at right angles, with the lights in his favour, passed on to the crossing & collided with the fire engine. It was contended that, as a driver is bound by the regulations, even when the lights are in his favour, to have due regard to the safety of other users of the road, pltf. should have given way to the fire engine:—*Held*: the accident was caused solely by the negligence of the driver of the fire engine.—**WARD v. LONDON COUNTY COUNCIL**, [1938] 2 All E. R. 341; 82 Sol. Jo. 274; 36 L. G. R. 340.

584a. — **Who are "professional firemen."**—*"Fire brigade duties"* in Fire Brigade Pensions Act, 1925 (c. 47), s. 23, para. 2, comprise only the work done by firemen as such: they do not include other duties which firemen may be called upon to do in accordance with the terms of their employment by local authorities. Firemen who may so be called upon to do other duties, are not "wholly & permanently" employed on fire brigade duties, & therefore are not "professional firemen" within the meaning of the section.—**WHELAN v. BILLINGHAM URBAN DISTRICT COUNCIL**, [1937] Ch. 662; [1937] 3 All E. R. 387; 106 L. J. Ch. 350; 158 L. T. 61; 101 J. P. 511; 53 T. L. R. 883; 81 Sol. Jo. 552; 35 L. G. R. 551.

#### SUB-SECT. 1.—IN GENERAL.

(Vol. XXXVIII., p. 227.)

584b. **Adoption of Acts—Right to poll.**—A meeting of ratepayers was summoned for the purpose of determining whether the provisions of the Public Libraries Acts should be adopted in defts.' district. A chairman having been chosen, the resolution to adopt the Acts was carried upon a show of hands; a poll was demanded, but the chairman refused to grant it. Defts. declined to put in force the Acts:—*Held*: the right to demand a poll existed by the common law, & had not been taken away by any of the provisions contained in the Public Libraries Acts, & defts. could not be compelled by mandamus to carry out the Acts.

The question is whether it is not an attribute at common law of all public meetings, that any qualified person may demand a poll, & the meeting may be enlarged so that all persons duly qualified may come in & take part in the decision. Cannot a meeting be adjourned at common law? Both reason & authority show that where a large class of persons exists who are qualified to take part in a meeting, an opportunity ought to be given of summoning them & of allowing them to record their votes (**BRETT, L.J.**).—**R. v. WIMBLEDON LOCAL BOARD** (1882), 8

#### PART VII. SECT. 14, SUB-SECT. 4.

*h i.* ——— *Negligence.*—**FORREST v. METROPOLITAN MEAT INDUSTRY BD.** (1928), 28 S. R. N. S. W. 621; 45 N. S. W. W. N. 193.—**AUS.**

*h ii.* ——— *By-law depriving owners of animals slaughtered of portion of offal—Whether reasonable.*—A by-law, made by a controlling authority of an abattoir, in pursuance of Slaughtering & Inspection Act, 1908, s. 18, & sect. 3 of the Amendment Act, 1910, is *ultra vires* & reasonable notwithstanding that its operation deprives the owners of animals slaughtered of a proportion of the offal & effects a

confiscation of same.—**SMITH v. BLENHEIM BOROUGH COUNCIL**, [1928] N. Z. L. R. 536.—**N.Z.**

#### PART VII. SECT. 20, SUB-SECT. 1.—A.

*ex.* *Depositing refuse so as to be nuisance.*—Health Act, 1919, s. 32 (2), makes it unlawful for a private citizen, as well as for a municipal council, to deposit refuse or rubbish in any place where it may be a nuisance. A deposit contributing to a continuing nuisance held sufficient to support a conviction under the section.—**FAINTER v. O'CONNELL**, [1928] V. L. R. 259; [1928] Argus L. R. 159.—**AUS.**

#### PART VII. SECT. 20, SUB-SECT. 1.—B.

*sy.* *Right of disposal of owner of garbage.*—A statute giving a municipality power to "establish, maintain, equip, own, & operate garbage collection & garbage disposal & reduction works" does not support a by-law which purports to take away from an owner of garbage his right to dispose of it to whomsoever he pleases provided he does not thereby create a nuisance or violate some valid health or other regulation.—**R. v. BELL (Alta.)**, [1929] 2 W. W. R. 337; 51 Can. Crim. Cas. 414.—**CAN.**

Q. B. D. 459; 51 L. J. Q. B. 219; 46 L. T. 47; 46 J. P. 292; 30 W. R. 400, C. A.

607. *Add. Annotations* :—*Refd. Grant v. Derwent*, [1929] 1 Ch. 390; Port of London Authority v. Canvey Island Comrs. (1931), 101 L. J. Ch. 63.

## SECT. 22.—TOWN PLANNING.

See Town & Country Planning Act, 1932 (c. 48).

- 670a. *Claim for betterment.*—Where by the construction of a street within the area of a town planning scheme, which includes among its purposes the execution of street works, any property is increased in value, the responsible authority are entitled, under Town Planning Act, 1925 (c. 16), s. 10 (3), to recover from the owner of the property one-half of the amount of the increase in value, as the authority's claim arises by the coming into operation of a provision contained in the scheme, & therefore "by the making of [a] town planning scheme" within above sub-sect. An authority's claim for betterment under above sub-sect. is not restricted by the fact that the property in respect of which the claim arises is not itself within the area of the scheme, but only contiguous thereto. —*R. v. WEBSTER, Ex p. YOUNG* (1931), 152 L. T. 535; 99 J. P. 51; 51 T. L. R. 201; 33 L. G. R. 5, D. C.

- 670b. *Assessment of compensation.*—An owner of building land, which was scheduled as an open space under the Town & Country Planning Act, 1932, claimed compensation under Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), which, he contended, should include, in addition to the ordinary market value of the land, the loss he had sustained by being deprived of the profit he expected to make by the erection of houses on the land :—*Held* : compensation could be paid only in respect of the ordinary market value of the land being "the amount which the land if sold in the open market by a willing seller might be expected to realise," as provided by sect. 2 (2) of the Act of 1919, & that would not include any compensation for the loss of profit expected to be made by its development as building land. Interest on the amount of compensation was payable as from the date of the arbitrator's award only, & not from any earlier date.—*COLLINS v. FELTHAM URBAN DISTRICT COUNCIL*, [1937] 1 All E. R. 189; 36 L. G. R. 34, D. C.

*Innovation* : *Consd.* All Souls College, Oxford v. Middlesex County Council, [1938] 2 All E. R. 586.

See, further, Nos. 503-506, ante.

- 670c. ——. *Land, which had been partly developed as a building estate, was acquired by the local authority for the purpose of an open space. Adjoining land belonging to the*

same owners was damaged by the loss of access to an arterial road, but would, it was alleged, be bettered by the provision of the open space :—*Held* : (1) the amount of the compensation in respect of the land acquired was its value in the open market, the expenditure thrown away in part development, the amount of damage by severance, & the increase of overhead charges, but no allowance could be made in respect of the loss of builders' profits; (2) in assessing the compensation in respect of the adjoining land, its increase in value, due to the provision of the open space, was to be taken into account. —*WIMPEY & CO., LTD. v. MIDDLESEX COUNTY COUNCIL*, [1938] 3 All E. R. 781.

- 670d. *Validity of agreement.*—In 1935 & 1936, a local authority for the purposes of Town & Country Planning Act, 1932 (c. 48), entered into two agreements with a club with regard to the development of its property situate in its area. In 1938, a ratepayer of the borough instituted these proceedings claiming that each of the two agreements was *ultra vires* the borough council on the grounds (i) that the agreements resulted from the delegation by the council of powers conferred on it by Town & Country Planning Act, 1932 (c. 48), to a joint committee which, it was alleged, was constituted by the council under the power conferred on it by sect. 18 of the Act of 1932, but without regard to, & in contravention of, the provision of that sect.; (ii) that the agreements, which purported to have been entered into by the council in exercise of the powers conferred on it by sect. 34 of the Act of 1932, were not in fact authorised by that sect., because neither agreement restricted the planning, development or use of the land in question in the manner contemplated according to a true construction of the sect., but were in fact permissive, because the club, by reason of the agreements, was in a position to plan, develop & use its land in a manner more favourable to the club than was provided in the draft planning scheme proposed to be adopted by the council, & without making application for an interim development order, as required by the Act, if the club should desire to plan, develop or use its land before any planning scheme should come into operation; (iii) that the agreement of 1935 contained provisions which could not have been incorporated in a planning scheme under the Act of 1932, & was therefore unauthorised under the provisions of sect. 34. There was no dispute of fact, & counsel for the parties agreed that the agreement of 1936 must stand or fall with the agreement of 1935 :—*Held* : (1) the council had not appointed a committee either under sect. 18 of the Act or at all, as alleged, nor had it delegated any of its powers under the Act of 1932. The agreement of 1935 was submitted to, & approved

## PART VII. SECT. 22.

*Sz. Zoning bye-law — Relaxation — Powers of Board.*—On appeal to the Board of Review under sect. 16 (1) (c) of Town Planning Act, 1925, the owners of a property on which there was a small gasoline service station, which was in operation before the passing of zoning bye-law 1930 of the city of Kamloops, & therefore not affected

thereby, alleged that they wished to arrange with purchasers of the property to erect a modern public garage & gasoline service station thereon, & asked to have the property excluded from the "restricted area" within which under said bye-law such a business shall not be conducted :—*Held* : in view of the powers of the Board under sect. 16 (3) of said Act to "make such relaxations as special cases call

for" & its duty to "endeavour to see that substantial justice is done," the Board had jurisdiction to entertain the appeal, & taking into consideration the preamble to the Act & all the circumstances, the appeal should be allowed & the permission which the owners sought should be granted by the municipal council.—*Re KAMLOOPS CITY*, [1935] 3 W. W. R. 206.—*CAN.*

by, the council, & sealed by the mayor on the authority of a resolution of the council. It was by virtue of this resolution alone that the agreement was entered into, & its execution was not in any sense the act of any committee. The council had delegated to the town-planning scheme clauses sub-committee the final settlement of three subsidiary matters referred to in the resolution, & they were authorised to make such a delegation by the Local Govt. Act, 1933 (c. 51), s. 85; (2) upon a true construction of sect. 34 of the Act of 1932, the council, as an authority under the Act, had at all material times power to enter into an agreement with the club restricting the future

planning, development or use of its land, provided that such restrictions were such as might be dealt with by or under a scheme under the Act of 1932; (3) the provisions in the agreement of 1935 restricting the planning, development & use of the club's land were real restrictions on the future planning & development of the land the subject-matter of the agreement. All the provisions of the agreement of which complaint was made were such as could be properly included in a planning scheme.—*A.-G. v. BARNES BOROUGH COUNCIL & RANELAGH CLUB, LTD.*, [1938] 3 All E. R. 711; 159 L. T. 305; 102 J. P. 448; 54 T. L. R. 1102; 82 Sol. Jo. 646.

## RAILWAYS AND CANALS.

## Part I.—Railway Companies Generally.

**5a. Purchase of Indian railway—Deductions for sinking fund—Construction of Act.]—***Held*: on a summons taken out by the annuity trustees under the Great Indian Peninsular Railway Purchase Act, 1900 (63 & 64 Vict. c. cxxxviii), that, for the purpose of providing the sinking fund to replace capital at the end of a fixed period, the sum to be deducted under sect. 21 of the Act from each

half-yearly payment of Class B annuities was 5s. 8d. in the pound, being the amount fixed by resolution in Dec. 1900; & the trustees had no power to vary the rate of deduction.—*ARMSTRONG v. MEAD* (1930), 46 T. L. R. 216.

.]—*EDINBURGH, PERTH & DUNDEE RY. CO. v. PHILIP*, No. 855, *post*.

## PART I. SECT. 1.

**g i. — Failure to complete within agreed time.]—***QUEBEC CENTRAL RY. CO. v. R.*, [1938] Ex. C. R. 82.—*CAN.*

**k i. —**—[Under an agreement, confirmed by statute, between resp. comrs. & the predecessors in title of applt. co. with respect to a franchise for an electric railway which had now terminated, it was provided that on its determination the co. should be duly compensated for its railway, equipment, machinery & other works, the compensation to be determined by arbn. On the termination of the franchise, the railway, with its equipment, machinery & other works, passed to resp. comrs. as an organic railway capable of operation *in situ*. The railway had not been, & could not be made to be, a financial success, but the agreement expressly stipulated that the co. was not to be compensated "in respect of any franchises for holding or operating" the railway:—*Held*: on the proper construction of the agreement & statute, the compensation should not be fixed (as decided below) at the break-up value of the railway to the comrs. but on the basis of reconstruction cost less depreciation. The effect of the words quoted was to exclude any allowance for past or future profits.—*Re INTERNATIONAL RY. CO. & NIAGARA PARKS COMMISSION*, [1937] 2 W. W. R. 641, P. C.—*CAN.*

**k ii. —**—[In connection with the transfer of the Grand Trunk Railway to the Govt. of Canada as a going concern, the Govt. & the applt. railway co. entered into an agreement, confirmed by a Dominion statute, whereby a Board of three arbitrators was to determine "the value, if any, to the holders thereof, of the preference & common stock" of the co.; an appeal to the Privy Council was provided for upon any question of law if the arbitrators were not unanimous. The arbitrators unanimously came to a preliminary decision that the value of the stock should be determined on the basis of the net earning capacity of the railway, & that principle was accepted by all parties concerned. By a majority the arbitrators held that evidence of the value of the physical assets, whether the selling value or the cost of replacement, was not admissible, & a majority award was made after the exclusion of evidence of that description. It was contended that the cost of replacing the assets was material, among other reasons, because under legislation in the United States, in which about a third of the length of the railway lines was situate, regard was to be had to the aggregate value of railway property in certain groups in fixing maximum rates of freight:—*Held*: having regard to the principle upon which the value was being ascertained, the excluded evidence was not material or admissible; it was not

established that the United States legislation above referred to resulted in there being a relation between the cost of replacement & net earning capacity.—*GRAND TRUNK RY. CO. v. CANADA v. R.*, [1923] A. C. 150, P. C.—*CAN.*

**sg. Action by Canadian National Railways—Whether in name of King.]—***Held*: as the Canadian National Railways Act, R. S. C., 1927, does not vest ownership of the Govt. railways in the Canadian National Ry. Co., it being entrusted only with the management & operation of the railways as an agent or mandatory for the gov't., they remaining the property of the Crown, an action for damages to the Canadian National Railways, brought in the name of H.M. the King, is properly instituted.—*It v. SOUTHERN CANADA POWER CO., LTD.*, [1934] Ex. C. R. 142; *on appeal*, [1936] S. C. R. 1, 1 D. L. R. 331; *affd.* [1937] 3 All. E. R. 923, P. C.—*CAN.*

**sk. Grant by Province—Whether reservation of highway.]—**The title acquired by a railway co. under a grant by the Province of Quebec held not to be subject to any reservation of highway.—*St. EUGENE DE GUERLES v. C. P. R.*, [1937] 3 D. L. R. 532.—*CAN.*

## PART I. SECT. 2.

**sl. "Working expenses"—Interest on bonds.]—**The interest on bonds issued under the authority of sect. 63 of Saskatchewan Railway Act, R. S. S., 1930, is not a "working expenditure," within sects. 64 (1), 65 (1) of said Act; & therefore, does not rank *pro rata* with the claims of wage-earners.—*Re MOOSE JAW ELECTRIC RY. CO.*, [1936] 1 D. L. R. 226; [1935] 3 W. W. R. 419.—*CAN.*

## PART I. SECT. 4, SUB-SECT. 1.

**sa. Power of federal railway to sell its assets—Necessity for sanction of Governor-General in Council.]—***OTTAWA VALLEY RY. CO. v. CENTRAL RY. CO., LTD.* (1926), Q. R. 42 K. B. 281.—*CAN.*

**sb. Power to carry on business reasonably incidental to operation of railway—Sale of souvenirs, photographs & refreshments.]—***QUEEN VICTORIA NIAGARA FALLS PARK COMMISSION v. INTERNATIONAL RY. CO.*, [1928] 4 D. L. R. 755; 63 O. L. R. 49.—*CAN.*

## PART I. SECT. 4, SUB-SECT. 3.

**n (p. 252) i. — Powers of Minister.]—**The Crown expropriated a certain area for use in the building of the terminal of the Hudson Bay Railway at Churchill & for a port on Hudson Bay. At the date of the taking there were no permanent habitations anywhere in the vicinity save a Hudson Bay Post & Mounted Police Post. The future of Churchill was altogether dependent upon the completion of the work for which the land was taken:—*Held*: under the

Expropriation Act a Minister of the Crown may take any land for the use of His Majesty as he thinks advisable to take, & his decision or judgment that the lands so taken are necessary for a public work is not open to review by the cts. This power or authority does not interfere with the security in the enjoyment of private property, as the Crown must compensate the owner of any lands so taken for the value thereof & all damages resulting from the expropriation. Speculative prices paid by purchasers of real estate in the vicinity, some fifteen years before the expropriation in question, are not a fair criterion of the market value of similar property at the date of the expropriation thereof. The advantages due to the carrying out of the scheme for which the lands were taken cannot be considered in fixing the compensation to be paid for the said lands.—*It v. BEECH*, [1939] Ex. C. R. 133.—*CAN.*

**n (p. 253) ii. — None to Supreme Court of Canada.]—***CEDAR RAPIDS MFG. & POWER CO. v. LACOSTE*, [1927] 2 D. L. R. 83.—*CAN.*

**pp (p. 253) i. — Site value for factory.]—**Notice of expropriation under Railway Act, 1919 (Dom.), was given to the owner & to the tenant of land used with the buildings thereon by the tenant in its business as a dealer in coal & coke. By an arrangement between the owner & the tenant, to which the ry. co. was not a party, the arbitrator was asked to treat their claims for compensation as one claim, *i.e.*, as if there were only one person interested therein. The arbitrator accepted as the basis of the valuation of the land its value on the footing that it had been cleared of its business & buildings & was a vacant site available for a factory or some other industry; but nevertheless, in addition to the sum which he awarded the owner, he awarded over \$100,000 to the tenant as compensation for the disturbance of its business & for the value of the buildings, equipment, etc.:—*Held*: the value of the buildings, etc., & compensation for business disturbance could no longer properly enter into the matter, not because the value of the land had been increased by any specific figure representing actually either the value of the buildings or damages for business disturbance; but because an increased value had been attributed to the land upon a hypothesis which is inconsistent with the existence of a claim either for the value of buildings or for damages for business disturbance.—*TORONTO TERMINALS RY. CO. v. STANDARD FUEL CO. OF TORONTO, LTD.*, [1935] 2 W. W. R. 667, P. C.—*CAN.*

**ddd i. —**—[Applt. R., as owner, & applt. P. Coals, Ltd., as lessee from her, of a certain quarter section situated in Alberta, presented an application to the Board of Railway Comrs. under sect. 197 of Railway

- **Abolition of duty.]—**See Finance Act, 1929 (c. 21), s. 3.

69. *Add. Annotation* :—**Refd.** *A.-G. v. Smethwick Corpn.*, [1932] 1 Ch. 562.
118. *Add. Annotation* :—**Refd.** *Farnworth v. Manchester Corpn.* (1929), 98 L. J. K. B. 224.
121. *Add. Annotation* :—**Consd.** *London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E. R. 692.
126. *Add. Annotation* :—**Consd.** *London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E. R. 692.
136. *Add. Annotations* :—**Consd.** *Manchester Corpn. v. Audenshaw U. C. & Denton U. C.*, [1928] Ch. 703; *London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E. R. 692. **Refd.** *Swain v. Southern Ry. Co.*, [1938] 3 All E. R. 705.
171. *Add. Annotation* :—**Refd.** *Vanderpant v. Mayfair Hotel Co.*, [1930] 1 Ch. 138.
- 197a. ————,]—A railway co. agreed with a landowner, through whose estate the railway would pass, to construct & maintain a siding connected with their railway at B., together

with all necessary approaches thereto for public use, & for the reception & delivery of goods :—*Held*: (1) specific performance could be decreed of the agreement to construct the siding & approaches, without decreeing the co. to maintain them when made; (2) the agreement did not bind the co. to erect sheds, or to keep one of their servants in attendance at the siding, but it obliged them to construct a proper siding, with approaches & a wharf or raised platform for the loading & unloading of goods; (3) "necessary approaches" meant "proper approaches."—*LYTTON v. GREAT NORTHERN RY. Co.* (1856), 2 K. & J. 394; 27 L. T. O. S. 42; 2 Jur. N. S. 436; 4 W. R. 441; 69 E. R. 836.

221. *Add. Annotation* :—**Refd.** Symons v. Southern Ry. Co. (1935), 153 L. T. 98.
222. *Add. Annotation* :—**Refd.** Symons v. Southern Ry. Co. (1935), 153 L. T. 98.
225. *Add. Annotation* :—**Refd.** Symons v. Southern Ry. Co. (1935), 153 L. T. 98.

Act, asking the Board to fix the amount of compensation payable to applicants in respect of coal bring under the right of way of the railway. The latter alleged that in 1914 it purchased the right of way from the then owner, predecessor in title of applicants, paid him in full for all the coal required to be left for the support of the right of way & that by virtue of the transfer itself, it was entitled to such support—*Held*: the judgment of the Board dismissing applicants' application should be affirmed.—**BERG & PENN COALS, LTD. v. NORTHERN ALBERTA RYS. CO.** [1935] S. C. R. 120.—**CAN.**

see (p. 253) i. — *Jurisdiction of Exchequer Court—Effect on proceedings commenced in Provincial Court.*—*Held:* (1) the Exchequer Ct. of Canada has no jurisdiction to hear and determine an action by the Canadian National Railway, for fixing the compensation to be paid for lands expropriated by it, before the 1929, date when the C. N. R. Act came into force, conferring jurisdiction on this Ct.; (2) the legal proceedings already instituted before the Provincial Cts., under the Railway Act, should be continued & even enforced, debts, having a vested right to do so under the law existing at the date of expropriation. When the effect of a repeal is to take away a right, *prima facie*, it is not retroactive; but when it deals exclusively with procedure it is retroactive.—CANADIAN NATIONAL RY. CO. v. LEWIS, [1930] Ex. C. R. 145; 4 D. L. R. 537.—CAN.

**SC.** *Right to alienate lands taken.*—**PRATT v. GRAND TRUNK RY. CO.** (1884), 8 O. R. 499.—**CAN.**

ad. Acquisition from tenant for life.]—  
MIDLAND RY. OF CANADA v. YOUNG  
(1893), 22 S. C. R. 190.—CAN.

18. For what purpose land may be taken.—Hotel purposes.—Minerals not included.)—The Canadian National Rys. Co. has the right to expropriate land for the purposes of a hotel; but has no right to expropriate the minerals that may be in or under that land.—*Re CANADIAN NATIONAL RYS. CO. &*

TERWINDT, [1930] 3 W. W. R. 52;  
4 D. L. R. 1004.—CAN.

**sm. Costs.**—Costs of an arbn. to fix the compensation to be paid in an expropriation by a railway are to be taxed as between party & party on a rather more liberal scale than party & party costs, but not as between solr. & client.—*Re* EWART & TORONTO TERMINALS Ry. Co., [1932] 1 D. L. R. 582 O. R. 170.—**CAN.**

**sp. Construction of subway**—*Injurious affection of land*—*Proceedings for compensation*.]—Where lands are injuriously affected by the construction of a subway by order of the Railway Board the only remedy is by way of arbn. proceedings under the Railway Act.—*BOLAND v. CANADIAN NATIONAL RY.*, [1934] 4 D. L. R. 613; O. R. 709.—**CAN.**

**PART I. SECT. 4, SUB-SECT. 5.**

**st. Lien of Government for subsidies—Priority of bondholders.]—**MINISTER OF RAILWAYS & CANALS v. HEREFORD RY. CO., *Re* BOND & MACKINNON & MINISTER OF RAILWAYS & CANALS. [1928] Ex. C. R. 223; *affd.*, [1930] S. C. R. 37; 1 D. L. R. 187; 36 C. R. C. 149.—**CAN.**

**PART I. SECT. 4, SUB-SECT. 6.**

p (p. 254) i. — *When demurrage chargeable.*—J. BROWNLEE & Co. v. CANADIAN NATIONAL RYS. (1926), 32 Can. Ry. Cas. 291.—CAN.

p (p. 254) ii. ———.—]—CON-  
SOLIDATED RENDERING CO. v. CAN-  
ADIAN NATIONAL RYS. (1926), 32 Can.  
Ry. Cas. 294.—CAN.

uu i. — Application of stop-of charge.]—DOMINION MILLERS' ASSOCN. v. CANADIAN NATIONAL & CANADIAN PACIFIC RY. COS. (1925), 33 Can. Ry Cas. 6.—CAN.

uu ii. *Dressing in transit—Application of stop-off.*—NEILSON MAGANN LUMBER CO. v. CANADIAN PACIFIC RY. CO (1926), 32 Can. Ry. Cas. 286.—CAN.

oo (p. 256) 1. —.]—CANADIAN LUMBERMEN'S ASSOON. v. CANADIAN NATIONAL & CANADIAN PACIFIC RY. Cos. (1927). 33 Can. Ry. Cas. 1.—CAN

**PART II. SECT. 1.**

**sg. Rails** — *Whether fixtures.*—The rails of a railway which had been built to permit the hauling of coal from a coal mine, and the main line of the C. P. R. but which, at the time of the issue of the certificate of title to the quarter section of land in question to def't., had been abandoned & allowed to become destroyed as a railway: *Held*: to have become part of said land & to be the property of def't. — **WEST CANADIAN COLLIERIES, LTD. v. RINALDI**, [1936] 1 W. W. R. 635; 2 D. L. R. 601.—**CAN.**

**PART II. SECT. 3, SUB-SECT. 1.—C.**

1 i. —.—]—WINDSOR CORPN. v. CANADIAN PACIFIC RY. CO. (WYANDOTTE STREET BRIDGE CASE) (1926), 32 Can. Ry. Cas. 26.—CAN.

sl. Liability to reconstruct private bridge as highway bridge.]-LEDUC v. CANADIAN PACIFIC RY. CO. (1927), 33 Can. Ry. Cas. 24.-CAN.

**PART II. SECT. 3. SUB-SECT. 2.**

**eg. Claim for damage—Three months' notice of claim.]—**Re ST. ANDREW'S CHURCH TRUSTEES & GREAT WESTERN RY. Co. (1862), 12 C. P. 399.—CAN.

**PART II. SECT. 6. SUB-SECT. 4.—**

aa. *Revsd.*, 31 S. C. R. 155.

**PART II. SECT. 6, SUB-SECT. 4.—**  
C. (a).

215 xiv. ————.]—JAMES v.  
GRAND TRUNK RY. Co. (1900), 31  
D. R. 672.—CAN.

PART II. SECT. 6, SUB-SECT. 4.  
C. (b).

**¶ (p. 289) i.** —.] — The obligation to erect & maintain fences upon the railway ceases when the land ceases to be used for railway purposes.—**CAIRNS BROS. v. CANADIAN NATIONAL RAILWAY.** [1937] 2 D. L. R. 537.—**CAN.**

**h** (p. 290) **i**. —.]—In an action for damages for the loss of cattle killed



231. *Add. Annotation*:—**Consd.** *Symons v. Southern Ry. Co.* (1935), 153 L. T. 98.
- 231a. — **Occupier becoming owner.**—In 1885 the owners of a farm conveyed a small part of it to a ry. co. & in the conveyance it was agreed that the consideration paid should be taken to be not only the purchase money but also compensation for the accommodation work, including fences, which the ry. co. was otherwise required to make & maintain by Railways Clauses Consolidation Act, 1845 (c. 20), s. 68. No similar agreement was entered into with pltf.'s father, who at that time was occupier as tenant from year to year, & the ry. co. proceeded to erect fences on either side of the railway & to maintain them. In 1911 pltf.'s father bought the fee simple of the farm. On the father's death in 1932 pltf., who had been occupying the farm with his father, became the sole occupier & soon after had the fee simple conveyed to him by the father's personal representatives. Two sheep belonging to pltf. strayed on to the

railway through a gap in a fence & were killed. Pltf. claimed damages & the county ct. judge made an order for £5 damages. On appeal:—**Held**: there had been no merger of the occupiers' interest with the fee simple on the purchase of the farm & pltf. was, therefore, entitled to damages for the loss of the sheep by reason of the ry. co.'s failure to maintain the fence pursuant to the Railways Clauses Consolidation Act, 1845 (c. 20), s. 68. —**SYMONS v. SOUTHERN RY. CO.** (1935), 153 L. T. 98; 51 T. L. R. 491; 79 Sol. Jo. 431, C. A.

263. *Add. Annotations*:—**Consd.** *British Trawlers' Federation, Ltd. v. London & North Eastern Ry. Co.*, [1933] 2 K. B. 14; *Winsford Urban District Council v. Cheshire Lines Committee* (1931), 21 Ry. & Can. Tr. Cas. 10. **Refd.** *Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons*, [1930] A. C. 549.
265. *Add. Annotation*:—**Refd.** *Manchester Corpn. v. Audenshaw U. C. & Denton U. C.*, [1925] Ch. 763.

## Part III.—Equipment and Working of Railways.

312. *Add. Annotations*:—**Apld.** *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606. **Consd.** *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. **Refd.** *Bottomley v. Bannister*, [1932] 1 K. B. 458.
- 314a. **Signals**—Interference with safe working—Exhibition of coloured lights on adjoining

property—**Negligence.**—**LONDON, MIDLAND & SCOTTISH RY. CO. v. RIBBLE HAT WORKS, LTD.** (1936), 80 Sol. Jo. 1038.

316. *Add. Annotation*:—**Generally, Refd.** *Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons*, [1930] A. C. 549.

## Part IV.—Level Crossings.

322. *Add. Annotation*:—**Generally, Refd.** *Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401.

325. *Add. Annotation*:—**Consd.** *London & North Eastern Ry. Co. v. North Riding of Yorkshire County Council*, [1936] 1 All E. R. 692.

on deft. railway's right of way:—**Held**: deft. had been relieved of the duty to fence the right of way by an order of the Board of Railway Comrs. made in pursuance of sect. 251 (1) of Railway Act, R. S. C., 1906, as amended. *JAREMKO v. NELSON & PORT SHEPPARD RY. CO. & GREAT NORTHERN RY. CO.*, [1937] 3 W. W. R. 696.—**CAN.**

### PART II. SECT. 6, SUB-SECT. 4.—C. (c) ii.

229 x. —.—]—Pltf. had some sheep which grazed, with the sheep of other persons, upon a mountain side bordering a public road. On the other side of the public road a ry. co. had its line, & beyond the line was arable land owned by pltf. The soil of the public road was pltf.'s property. Pltf.'s sheep & other sheep crossed from the mountain side to the public road, thence on to the ry. line & thence on to the arable lands of pltf., owing to the fences of the ry. co. & of pltf. being defective. The sheep having caused damage to these arable lands, pltf. issued a civil bill against the ry. co. for damages:—**Held**: as the ry. co. was bound under sect. 68 of Railways Clauses Consolidation Act, 1845, to fence against trespass on both sides of the ry. line, liability was imposed on them to prevent, by fencing, the cattle of owners or occupiers of lands adjoining the ry. line from straying upon the line & therefrom into other adjoining lands, & accordingly the co. were liable in damages to pltf.—

*MOYNIHAN v. GREAT SOUTHERN RAILWAYS CO.*, [1935] 1 R. 132.—**IR.**

### PART II. SECT. 8.

p i. —.—]—**R. v. SMITH** (1878), 43 U. C. R. 369.—**CAN.**

sh. *Laying down of railway in public street—Necessity for consent—Who proper authority.*—**PORT ADELAIDE CITY CORPN. v. SOUTH AUSTRALIAN RYS. COMRS.**, [1927] S. A. S. R. 197.—**AUS.**

### PART III. SECT. 9

sk. *"Policemen travelling on His Majesty's service"—Whether Provincial policemen included.*—**R. v. CANADIAN PACIFIC RY. CO. & CANADIAN NATIONAL RY.**, [1928] 2 D. L. R. 386; [1928] 1 W. W. R. 785; 34 C. Ry. Cas. 292; 23 Alta. L. R. 401.—**CAN.**

### PART IV. SECT. 1.

sj. *Extent of duty—Effect of Railway Act, 1919 (c. 68).*—**COLEBOURNE v. HARROP (Ont.)**, [1927] 1 D. L. R. 116; 32 Can. Ry. Cas. 208.—**CAN.**

324 i. —.—]—**SCOTT v. WINNIPEG ELECTRIC CO.**, [1927] 2 D. L. R. 686; [1927] 1 W. W. R. 739; 32 Can. Ry. Cas. 397; 36 Man. L. R. 357; *affd.*, [1928] 2 D. L. R. 420; [1928] S. C. R. 52; 31 C. Ry. Cas. 260.—**CAN.**

324 ii. —.—]—*Power to remove planks—From farm crossing.*—**MACDONALD v. CANADIAN PACIFIC RY. CO. (Que.)** (1927), 33 Can. Ry. Cas. 60.—**CAN.**

324 iii. —.—]—Although a road allowance had never been graded, or had work done on it by the municipality, & had not been regularly travelled, it was held to be a highway within sect. 265 of Railway Act (Dom.); & its intersection by deft. co.'s railway was held not to be a "farm crossing" within general order 47 of Feb. 10, 1909, of the Board of Railway Comrs.; & therefore the co. was held liable for injuries sustained by pltf. owing to the absence of planking between the rails, which projected about five inches above the level of the ground.—**BRIEF v. CANADIAN PACIFIC RY. CO.**, [1929] 1 D. L. R. 344; 1 W. W. R. 56; 35 C. R. C. 115; 23 Alta. L. R. 595.—**CAN.**

324 iv. —.—]—*Railway Act, ss. 264 & 266—Not applicable.* Pltf.'s tractor & threshing outfit, moving along a highway, became stalled upon a level crossing of defts.' railways & were struck by a train & destroyed:—**Held**: sects. 264, 265 & 266 of the Railway Act, 1927, impose no liability in respect of a level crossing.—**OSTRANDER v. MICHIGAN CENTRAL RY. CO. & PERE MARQUETTE RY. CO.**, [1930] 1 D. L. R. 34; 36 C. R. C. 60; 64 O. L. R. 408.—**CAN.**

324 v. —.—]—Rails of a railway track projecting four or more inches above the highway at a level crossing held to constitute an obstruction which, not being authorised by statute or other lawful authority, constituted a nuisance for the maintenance of which the ry. co. was liable to a person

355. *Add. Annotations* :—*Distd. Jones v. Great Western Ry. Co.* (1930), 47 T. L. R. 39. *Consd. McGowan v. Stott* (1923), 99 L. J. K. B. 357, n.; *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A. C. 351. *Refd.*

*Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd.* (Liverpool) (1929), 143 L. T. 296; *McCullum v. Northumbrian Shipping Co.* (1931), 146 L. T. 124; *The Kite* (1933), 49 T. L. R. 525.

Injured thereby.—*MACGREGOR v. CANADIAN NATIONAL RYS. & EDMONTON CITY*, [1930] 3 W. W. R. 392; [1931] 1 D. L. R. 87; 23 Alta. L. R. 104; *varq.*, [1930] 3 W. W. R. 237.—**CAN.**

324 vi. —.] A railway co. is liable for the non-maintenance of a *de facto* public crossing although it is not an authorised highway crossing.—*BOOLEY v. CANADIAN NATIONAL RAILWAY*, [1937] 3 D. L. R. 773.—**CAN.**

m i. —.] *Effect of accident causing death or injury—Application of "slow order."*—*RE RAILWAY ASSOC. OF CANADA & SLOW ORDERS* (1926), 32 Can. Ry. Cas. 238.—**CAN.**

m ii. —.]—*CANADIAN NATIONAL RYS. v. HYDRO ELECTRIC POWER COMMISSION & DEPARTMENT OF HIGHWAYS FOR ONTARIO (WESTHILL CROSSING CASE)* (1926), 32 Can. Ry. Cas. 297.—**CAN.**

m iii. —.] Where there is a level crossing in the neighbourhood of a place where a considerable population assembles from time to time, the duty to guard that level crossing by means of gates, & the duty of closing gates in sufficient time before the approach of a train is cast on the railway co., & if the railway co. leave the gates open, it is an invitation on their part for passengers & traffic to approach the line.—*BENGAL & NORTH-WESTERN Ry. Co., Ltd. v. MATUKDHAR SINGH* (1937), 1 L. L. R. 16 Pat. 672.—**IND.**

f (p. 309) i. —. —. —. —.]—*MONTREAL CORPN. v. CANADIAN PACIFIC Ry. Co. (GOUIN BOULEVARD CROSSING CASE)* (1926), 32 Can. Ry. Cas. 245.—**CAN.**

f (p. 309) ii. —. —. —. —.]—*SPRINGFIELD (VILLAGE) v. MICHIGAN CENTRAL Ry. Co.* (1926), 32 Can. Ry. Cas. 254.—**CAN.**

f (p. 309) iii. —. —. —. —.]—*MONTREAL CORPN. v. CANADIAN NATIONAL RYS.* (1927), 33 Can. Ry. Cas. 29.—**CAN.**

f (p. 309) iv. —. —. —. —.]—*CANADIAN NATIONAL RYS. v. MONTREAL TRAMWAYS (GUY ST. CROSSING CASE)* (1927), 33 Can. Ry. Cas. 32.—**CAN.**

f (p. 309) v. —. —. —. —.]—*SHERBROOKE CORPN. v. CANADIAN PACIFIC Ry. Co.* (1927), 33 Can. Ry. Cas. 35.—**CAN.**

f (p. 309) vi. —. —. —. —.]—*RE ANGLIERS RAILWAY CROSSING REFERENCE*, [1937] S. C. R. 151.—**CAN.**

sk. *Railway Act*, 1927, ss. 264, 265, 266—*Not applicable to level crossings.*—*OSTRANDER v. MICHIGAN CENTRAL RAILROAD CO. & PIERRE MARQUETTE Ry. Co.*, [1930] 1 D. L. R. 34; 64 O. L. R. 408.—**CAN.**

#### PART IV. SECT. 2, SUB-SECT. 1.

sm. *Gate left open—Obligation on person crossing track to take reasonable precautions.*—The fact that the gates at a railway crossing have been left open does not excuse a person approaching the track from taking reasonable precautions before crossing it in order to discover whether a train is coming.—*MICHALINSKI v. CANADIAN PACIFIC Ry. Co.*, [1928] 3 W. W. R. 238.—**CAN.**

sp. —. —. —. —.]—A person who found the gates of a railway level crossing open, & was thereby misled into thinking the line safe for crossing, was held not bound to minute circumspection, & the co. was liable to him in damages, his car having been broken by a passing engine.—*DAYA SHANKAR v. BOMBAY, BARODA & CENTRAL INDIA Ry. Co.* (1931), 1 L. L. R. 53 All. 943.—**IND.**

#### PART IV. SECT. 2, SUB-SECT. 2.

a (p. 311) i. —. —. —. —.]—*Whether gate willfully left open—Gate willfully opened by stranger.*—*BROWN v. GREAT NORTHERN Ry. Co.*, [1927] 2 D. L. R. 316; [1927] 1 W. W. R. 516; 33 Can. Ry. Cas. 326; 38 B. C. R. 115.—**CAN.**

#### PART IV. SECT. 3.

aa (p. 314) i. —. —. —. —.]—*SMART v. SOUTH AFRICAN RYS. & HARBOURS* (1928), 49 N. L. R. 129.—**S. AF.**

aa (p. 314) ii. —. —. —. —.]—In an action for damages resulting from a collision at an unguarded level crossing, between a motor car & a freight train which had been standing on a siding.—*Held*: even if the evidence favourable to deft., as to the time when the peril arose was correct, it was negligence on the part of the train crew not to have seen the motor car in time to give an effective warning before backing up the train, & such negligence was the cause of the accident.—*DOWSER v. CANADIAN NATIONAL Ry. (Alta.)*, [1929] 4 D. L. R. 233; 2 W. W. R. 654.—**CAN.**

aa (p. 314) iii. —. —. —. —.]—A farm-crossing is not a highway-crossing, & sect. 308 of *Railway Act*, 1927, which requires, in the case of a train approaching a highway-crossing at rail level, that the engine-whistle shall be sounded at least 80 rods before reaching the crossing, has no application to a farm-crossing.—*HIGHLEY v. CANADIAN PACIFIC Ry.*, [1930] 1 D. L. R. 630; 36 C. R. C. 217; 64 O. L. R. 615.—**CAN.**

aa (p. 314) iv. —. —. —. —.]—*GOODWIN v. GOODWIN & C. P. R.*, [1933] O. R. 225; 1 D. L. R. 753.—**CAN.**

aa (p. 314) v. —. —. —. —.]—In an action for injuries to a person at a highway crossing.—*Held*: although there was no statutory duty to sound the whistle at 550 feet, failure to do so might well be negligence.—*GRAY v. WARASHI Ry. Co.* (1916), 35 O. L. R. 510.—**CAN.**

aa (p. 314) vi. —. —. —. —.]—*LITOWITZ v. CANADIAN NATIONAL RAILWAYS*, [1931] 3 W. W. R. 520; [1935] 1 D. L. R. 216; 42 Man. L. R. 504.—**CAN.**

aa (p. 314) vii. —. —. —. —.]—The duty of a driver approaching a level crossing discussed.—*SOUTH AFRICAN RAILWAYS v. SYMINGTON*, [1935] App. D. 37.—**S. AF.**

e (p. 315) i. —. —. —. —.]—*CANADIAN NATIONAL Ry. v. POMERLEAU*, [1931] S. C. R. 287; 1 D. L. R. 209; *affn.*, [1930] 3 D. L. R. 841; 37 C. R. C. 76; 48 Que. K. B. 97.—**CAN.**

e (p. 315) ii. —. —. —. —.]—The duty of the driver & the fireman of an engine approaching a level crossing discussed.—*SOUTH AFRICAN RAILWAYS v. VAN DER MEIWE*, [1934] A. D. 129.—**S. AF.**

e (p. 315) iii. —. —. —. —.]—A fireman is not required to neglect his other duties in order to keep a look-out when approaching a crossing.—*GAVEL v. CANADIAN NATIONAL RAILWAYS*, [1935] 2 D. L. R. 627; 9 M. P. R. 501.—**CAN.**

e (p. 315) iv. —. —. —. —.]—*Plff.'s husband was killed by a train at a level crossing. Deft. railway co. alleged that the crossing was a private crossing for the use of those having business with the railway & that deceased was a trespasser. The evidence was that for many years the crossing had been used, without any objection from deft., by every one who wished to cross the railway, although deft. in building & maintaining it may have intended that it should primarily be used by those having business with deft. The jury found that deceased was a licensee:—Held*: in view of the long-established

user of the crossing by the public, deft. was bound to use reasonable care to avoid, if possible, injuring any one on the crossing. The rule that a licensee must accept the premises as he finds them with their "concomitant conditions" & it may be, perils "does not free the licensor from liability for injuries to the licensee caused by negligent acts committed by the licensor or his servants when the licensee is on the premises.—*GREEN v. CANADIAN PACIFIC Ry. Co.*, [1937] 2 W. W. R. 145.—**CAN.**

p (p. 315). *Revsd.*, [1927] 3 D. L. R. 888; [1927] S. C. R. 505; 33 Can. Ry. Cas. 55.

p (p. 315) i. —. —. —. —.]—*TREMBLAY v. CANADIAN PACIFIC Ry. Co.* (1927), Q. R. 65 S. C. 406.—**CAN.**

r (p. 315) i. —. —. —. —.]—Where the Railway Administration has used a particular warning to announce the approach of a train at a level crossing, thereafter, upon an occasion when such warning is not given, a collision occurs between an engine & a vehicle crossing the line, the ct. in deciding whether the driver of the vehicle took reasonable care in approaching the crossing will take into account the fact that the driver may have been thrown off his guard by the absence of the usual form of warning.—*MANCHO v. SOUTH AFRICAN RYS. & HARBOURS*, [1928] App. D. 89.—**S. AF.**

r (p. 315) ii. —. —. —. —.]—*MAYGARD v. CANADIAN PACIFIC Ry. (Alta.)*, [1929] 4 D. L. R. 1064; 2 W. W. R. 652.—**CAN.**

r (p. 315) iii. —. —. —. —.]—Two actions were brought against defts. by the driver & passenger of a car to recover damages for injuries sustained by the car being struck by a train at a level crossing. It was found that the train was travelling more than 10 miles an hour in breach of sect. 309 (c) of the *Railway Act*, but the actual & proximate cause of the collision was the negligence of the driver of the car in attempting to cross the tracks when the train was so near. Defts. therefore held not liable.—*GAULEY v. CANADIAN PACIFIC Ry., BIRKETT v. CANADIAN PACIFIC Ry.*, [1930] 4 D. L. R. 354; 36 C. R. C. 365; 65 O. L. R. 477; *reversd.*, [1930] 1 D. L. R. 225; 36 C. R. C. 215; 64 O. L. R. 527.—**CAN.**

r (p. 315) iv. —. —. —. —.]—In an action for damages for personal injuries resulting from a collision between an automobile & a railway train at a level crossing the trial judge, who misdirected himself in treating the whistling of the mile post as one of the warnings required by sect. 308 of the *Railway Act*, R. S. C. 1927, said that he accepted the testimony of the engineer "corroborated in some particulars by the evidence of other witnesses." The engineer's testimony was corroborated as to one only of the statutory signals & by only one of the three witnesses referred to. The testimony of the other two witnesses was that the train whistled at the mile post. On appeal:—*Held*: it being impossible for the ct. to say whether the trial judge would have concluded that the statutory signals had been given if he had properly appreciated the requirements of the statute & the limited amount of the corroborative testimony with respect to them, his finding could not stand & there must be a new trial.—*NAGEL & NAGEL v. CANADIAN NORTHERN Ry. Co.*, [1930] 2 W. W. R. 431; 4 D. L. R. 366; 24 S. L. R. 502;

357. *Add. Annotation* :—*Refd. Jones v. Great Western Ry. Co. (1930), 47 T. L. R. 39.*
361. *Add. Annotations* :—*Dlstd. Compania Mexicana De Petroleo "El Aguila" v. Essex Transport & Trading Co. (1929), 141 L. T. 106. Consd. Hargrove v. Burn (1929), 46*

T. L. R. 59; *Service v. Sundell* (1920), 99 L. J. K. B. 55; *McLean v. Bell* (1932), 48 T. L. R. 467. **Refd.** *Service v. Sundell* (1929), 45 T. L. R. 569; *Cooper v. Swadling* (1929), 46 T. L. R. 73; *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1934] 2 K. B. 132.

## Part V.—Arrangements between Railway Companies.

- 371.** *Add. Annotation:—As to (1) Distd. Crediton Gas Co. v. Crediton U. D. C., [1928] Ch. 447.*

475. *Add. Annotations* :—As to (1) *Consd. A.-G. v. Leeds Corpn.*, [1929] 2 Ch. 291. *Generally, Rejd. A.-G. v. Smethwick Corpn.* (1932), 96 J. P. 105.

- 503a. Claim for compensation—"Determination" by company—What amounts to.]—Pltfs. were transferred to the co.'s employment when it became an amalgamated co. under Railways Act, 1921 (c. 55). In accordance with Sched. 3 to that Act they put forward**

claims to compensation for loss suffered by reason of the amalgamation. Sched. 3, para. 4, provides that any question whether the provisions of para. 3, dealing with the transfer of existing officers or servants, has been complied with, should be referred to a Standing Arbitrator or board of arbitrators appointed by the Lord Chancellor, & para. 5 provides that claims shall be determined in accordance with Local Government Act, 1888 (c. 41), s. 120, with the necessary modifications. By sub-sect. 4 of that sect., the time for appeal to a Standing Arbitrator

*setting aside*, [1930] 1 D. L. R. 1004.—  
CAN.

r. (p. 315) v. -.]—It is negligence to attempt to pass over a level railway crossing without looking both ways for trains as carefully as a reasonably prudent man would, unless there is some reasonable excuse for not doing so.—GREEN v. CANADIAN NATIONAL RAILWAYS Co., [1931] 3 W. W. R. 448; [1932] 1 D. L. R. 253; *revid.*, [1932] S. C. R. 689; 4 D. L. R. 593.—CAN.

**r. p. (315) vi.** — *Question for jury.* — Pltf., while standing on a railway track at a level crossing, was struck by a train. There was a snowstorm at the time, & he was assisting in getting clear of the track a motor car driven by another person which had stuck in a drift on the track. The jury found that the engine whistle was not blown nor was the bell rung, as required by statute; that the absence of these signals caused the accident; & that there was no contributory negligence on the part of pltf. At the close of pltf.'s case deft.'s counsel had moved to have the case withdrawn from the jury on the ground that it was manifest that there had been contributory negligence. — *Held:* the case should have been taken from the jury on the ground that it was evident from pltf.'s own case that, even if the facts were that deft. had not given the proper warnings, the accident could not have happened but for pltf.'s negligence in remaining on the track. — *CONVERSE v. CANADIAN PACIFIC RY. CO.*, [1932] 2 W. W. R. 1. — **CAN.**

r (p. 315) vii. —.—.—.] A guest passenger in a motor car held to have been under no duty, under the circumstances, to keep a look out when approaching a level railway crossing, &, therefore, the fact that he did not do so was held, in an action resulting from a collision of the motor car with a train, not to have been contributory negligence on his part.—TOLLPAH v. CANADIAN NATIONAL RY., [1932] 1 W. W. R. 846.—CAN.

r (p. 315) vill. ————] Resp.'s automobile was struck by applt.'s train at a railway crossing. The statutory signals (ringing bell & blowing whistle) were not given. Owing to bluffs & shrubbery intercepting his view, resp. was unable to see down the railway in the direction of the approaching train until he had reached the right-of-way. Resp. had listened for the whistle & looked for

smoke. When he reached the right-  
of way, he took a hurried glance along  
the track, which did not disclose any  
danger. He then gave his attention  
to his automobile as it went up a grade  
towards the track & did not again look  
along the track until too late to avoid  
the accident. In an action for  
damages, the jury negatived contrib-  
utory negligence on the part of resp.  
& he recovered damages.—*Hill*:  
resp.'s failure under the existing cir-  
cumstances to make a more careful &  
complete observation, which would  
have disclosed the approaching train,  
did not so incontrovertibly amount to  
contributory negligence that no jury  
could reasonably find otherwise.—  
CANADIAN NATIONAL RYS. v. CLARK,  
[1923] S. C. R. 730.—CAN.

b. (p. 315) ix. — [Plff. —] Plff. on behalf of herself & her husband, sued deft. under Compensation to Relatives Act, 1897, for damages for the death of her son who was killed by a train whilst crossing a level crossing controlled by deft. At the crossing there were two sets of gates, traffic gates & wicket gates for pedestrians. At the trial, one of defts. regulations, which instructed gatekeepers at this class of gate to warn pedestrians of risk & prevent them crossing during operations, was admitted in evidence. The negligence charged against deft. was failure to have a gatekeeper on duty at the gates & failure on the part of the train driver to keep a proper look out & give warning:—*Held*:—although defts. regulation relating to the duty of gatekeepers was admissible in evidence, there was no evidence of negligence in the management & control of the level crossing, but there was evidence upon which the jury were entitled to hold that the accident, despite plff.'s contributory negligence, was due to the failure of the train driver to keep a sufficient look out.—*ALCHIN v. RAILWAYS COMR.* (1935), 35 S. R. N. W. 498; 52 N. S. W. W. N. 156.—*AUS.*

r (p. 315) x. ——— *Admissibility of order made by provincial railway—Before becoming federal railway.*—LITTLE V. BROOKS & CANADIAN NATIONAL RY. CO., [1930] S. C. R. 416; 4 D. L. R. 1; 37 C. R. C. 13; *revers.*, 36 C. R. C. 357.—CAN.

q (p. 316). *Revsd.*, [1923] S. C. R. 397.  
o (p. 316) i. *Defective approach to crossing.*—RASPBERRY v. CANADIAN NATIONAL RY. CO., [1928] 3 D. L. R. 831; 62 O. L. R. 406.—CAN.

**b** (p. 317) i. —.—.] CANADIAN NATIONAL RAILWAYS v. POMERLEAU, [1931] S. C. R. 287; [1931] 1 D. L. R. 209. — **CAN.**

o (p. 317). *Revsd.*, 48 S. C. R. 561.

d (p. 317) I. *Duty to trespasser*.] — In an action for damages for personal injuries sustained by a pedestrian at a level railway crossing the jury found deft. negligent & that plff. had been contributorily negligent, & apportioned the damages under Contributory Negligence Act. Deft. appealed. — *Held*: plff., who when he was struck by the train was on a pathway at the side of the plank roadway, was a trespasser, & deft. had not been guilty of any breach of duty towards him. — *JURE* v. VANCOUVER HARBOR COMES., [1931] 3 W. W. R. 157; 4 D. L. R. 916; 44 B. C. R. 271. — *CAN.*

PART V. SECT. 2, SUB-SECT. 4.—A.

*freight.*—Upon an agreement made between C. P. R. & the C. N. R., dated Jan. 29, 1929, being Sched. "C" to Northern Alberta Railways Act, & upon the facts & circumstances existing with regard to traffic, rates & carriage grain shipped from stations on the Northern Alberta Railways to Prince Rupert (reached by the C. N. R. alone) or to Victoria (reached by the C. N. R. by transporting loaded cars of grain on barges, but not so reached by the C. P. R.) for export, & exported from either of those ports (to, say, the United Kingdom), is "outbound freight traffic destined to competitive points on or beyond the lines of the parties" within art. 7 of said agreement, & is not to be excluded from the comparison of freight traffic for the purpose of the equal division to be made under art. 7. In the light of the objects of the agreement as ascertained from it as a whole, & the conditions the parties must necessarily have had in view, the words "competitive points on or beyond the lines of the parties" should not be construed as limited to points on the lines of the parties or their connecting rail carriers to which the parties are prepared to handle traffic offered at equal rates.—CANADIAN PACIFIC RY. CO. v. CANADIAN NATIONAL RY. CO., [1934] 3 S. C. R. 305; 3 D. L. R. 385; *affd.*, [1935] 4 D. L. R. 145; 3 W. W. R. 121; 5 F. L. R. (Can.) 67.—CAN.

**PART V. SECT. 4, SUB-SECT. 2.**

t. *Revsd.*, 1 O. L. R. 575, 594.

is fixed at three months from the date of the determination. The claims were discussed at a meeting held on Apr. 26, 1928, at the co.'s registered office. L., the co.'s assistant general manager, concluded by asserting that the cases of all plffs. were governed by a decision of the Standing Arbitrator refusing the claim of one B., but no formal letter refusing the claims was sent to plffs. or their solr. It was subsequently contended on behalf of the railway co. that the co. had given its "determination" of the claims, within Railways Act, 1921 (c. 55), at the meeting of Apr. 26, & that the proposed appeals were out of time. In an action by plffs. for a declaration that their claims were

not determined by the co. on Apr. 26, 1928, within Railways Act, 1921 (c. 55), Sched. 3, para. 5, or at all:—*Held*: decisions on claims for compensation must be formulated in a definite manner in the name & on behalf of the co. & communicated forthwith to the claimants; & on the facts there had been no such determination.—*MACDONALD v. GREAT WESTERN RY. Co.*, [1930] 1 Ch. 364; 99 L. J. Ch. 164; 142 L. T. 460; 28 L. G. R. 171.

503b. — *Loss of employment must be due to amalgamation.*—*Re DAWSON & LONDON, MIDLAND & SCOTTISH RY.* (1929), 73 Sol. Jo. 748.

## Part VI.—Relations between Railway Companies and the Public.

528. *Add. Annotation*:—*Consd. British Trawlers' Federation, Ltd. v. London & North Eastern Ry. Co.*, [1933] 2 K. B. 14.

535. *Add. Annotation*:—*Consd. British Trawlers' Federation, Ltd. v. London & North Eastern Ry. Co.*, [1933] 2 K. B. 14.

543. *Add. Annotation*:—*Distd. Bartlett v. Tottenham*, [1932] 1 Ch. 114.

545. *Add. Annotation*:—*Refd. Manchester Corp'n. v. Farnworth*, [1930] A. C. 171.

554. *Add. Annotation*:—*Refd. Manchester Corp'n. v. Farnworth* (1929), 46 T. L. R. 85.

### PART VI. SECT. 1.

f i. — *Passenger standing on platform of car—Contrary to statutory notice duly posted.*—*DORIE v. CANADIAN PACIFIC RAILWAY (B. C.)*, [1931] S. C. R. 277; 3 D. L. R. 856; *reversq.*, [1930] 1 D. L. R. 790; [1930] 1 W. W. R. 6; 36 C. R. C. 200; 42 B. C. R. 30; *affg.*, [1929] 2 D. L. R. 901; 35 Can. Ry. Cas. 302.—*CAN.*

### PART VI. SECT. 4.

k i. — *In sect. 406 (d) of Railway Act, R. S. C., 1927, the word "suffers" in the phrase "wilfully suffers any such horse or animal to enter upon the railway," puts a greater responsibility upon a person to whom said sect. applies than if the words "allow" or "let" or "permit" had been used; & means "refraining from preventing."* If such person disregarded, whether carelessly or not, his duty to so refrain or to be on guard, he is liable under the sub-sect. In the present case:—*Held*: the evidence was not sufficient to render the accused liable.—*R. v. WINBERG*, [1938] 1 W. W. R. 161; 1 D. L. R. 773.—*CAN.*

so. *Trespass by unlicensed porter.*—A person used to work as a licensed porter at the Allahabad railway station, but was dismissed for absenting himself without permission. Subsequently he entered the platform for the purpose of carrying passengers' luggage, & was prosecuted for unlawfully entering railway premises. It was not alleged that there was any barrier leading to the platform, or that entry to the platform was permitted only to ticket-holders:—*Held*: the entry was with the implied permission of the railway authority, & was not therefore unlawful within sect. 122 of the Railways Act; nor did it become so by reason of the fact that his intention was to work as a porter although unlicensed, which he knew was prohibited by the railway authority.—*EMPEROR v. CHANDAI* (1933), 1 L. R. 56 All. 254.—*IND.*

sr. *No liability to trespasser.*—While wandering on a wintry night in search of lodgings plff. had her leg

cut off by a freight train which was being pushed on a spur track. TAYLOR, J., dismissed the action on the ground that plff. was a trespasser at the point where the accident occurred & that there was no "active" negligence on the part of the railway's employees. Plff.'s grounds of appeal as set out in the notice of appeal were based on the case set up by her statement of claim, viz. that she was injured on Paul Avenue, a public crossing, & the trial judge erred in finding that the accident occurred on the right of way. On the argument on the appeal plff.'s counsel contended, moreover, that, regardless of the judge's finding, plff. had a cause of action on the ground that the public had been permitted to make use of the right of way & therefore plff. was a licensee:—*Held*: the appeal must be dismissed.

*Per DENNISTOUN, TRUEMAN & RICHARDS, J.J.A.*: Even if the plff. had been run down on Paul Avenue there is no negligence on the part of the deft. An alternative cause of action on the basis that the plff. was a licensee was not raised by the statement of claim nor put forward at the trial & no evidence was given thereon; therefore it could not be set up in the Appeal Ct.; & if an amendment to the statement of claim had been asked for at the conclusion of the trial it should not have been allowed, particularly in view of what had taken place at the trial, & should not be permitted now.

*PRENDERGAST, C.J.M.*, concurred in dismissing the appeal.

*Per ROBSON, J.A.*, dissenting: The trial judge erred in finding that the plff. was a trespasser. The public had been permitted by the deft. to use the right of way. Plff. was, therefore, a licensee. From that angle the opinion of the trial judge on the conduct of the rear brakeman becomes a direct & unequivocal finding of negligence causing the accident. Plff.'s cause of action as a licensee was made out by the evidence for the defence. Since the trial was conducted with everyone's consent as if the issue was solely one of negligence at the point where the accident did in fact occur, it was

immaterial that the statement of claim alleged that it took place at another point. Nor is any change material to the action involved in treating the plff. as a licensee. The facts all came out without objection as though the plff. was free to place herself on that higher basis. The pleadings can be adapted to the matter proved.—*GLOBOFF v. CANADIAN NATIONAL RAILWAYS*, [1938] 1 W. W. R. 219; 1 D. L. R. 439. *CAN.*

### PART VI. SECT. 5, SUB-SECT. 1.

m (p. 347) i. — *—*—A railway co. dug pits upon their land & allowed water to escape, to the injury of their neighbour. In an action for damages:—*Held*: the limitation sect. of the Railway Act was not applicable, the right sought to be enforced not arising from the statute, but the action was upon the case & must be brought within 6 years after the cause of action arose.—*TORONTO GENERAL TRUSTS CORPN. v. CANADIAN NATIONAL RY.*, [1930] 2 D. L. R. 286; 36 C. R. C. 187; 64 O. L. R. 622; *reversq.*, [1929] 1 D. L. R. 600; 35 C. R. C. 119; 63 O. L. R. 320.—*CAN.*

m (p. 347) ii. — *—*—An action for damages against a railway must be commenced within two years, Govt. Railways Act, R. S. C., 1927, having inferentially repealed Railway Act, R. S. C., 1927.—*SHEA v. McDONALD*, [1935] 3 D. L. R. 569; 9 M. P. R. 150; 5 F. L. J. (Can.) 69.—*CAN.*

sn. *Liability of Government railway for negligence—Application of Provincial Contributory Negligence Act.*—*CANADIAN NATIONAL RY. Co. v. ST. JOHN MOTOR LINE, LTD.*, [1930] S. C. R. 482; 3 D. L. R. 732; 37 C. R. C. 29.—*CAN.*

sg. *Injury to land by subway—Jurisdiction of Dominion Railway Board.*—The Dominion Railway Board, & not the Supreme Ct. of Ontario, has jurisdiction to entertain an action by a landowner against a railway co. for injury to his land by the absence of a retaining wall & under-drainage in connection with a subway erected by the railway co.—

557. *Add. Annotation* :—*Refd. Manchester Corpn. v. Farnworth* (1929), 46 T. L. R. 85.
558. *Add. Annotation* :—*Consd. Manchester Corpn. v. Farnworth* (1929), 46 T. L. R. 85.
561. *Add. Annotation* :—*Refd. Pronck v. Winnipeg, Selkirk & Lake Winnipeg Ry. Co.*, [1933] A. C. 61.
564. *Add. Annotation* :—*Refd. Manchester Corpn. v. Farnworth* (1929), 46 T. L. R. 85.
580. *Add. Annotations* :—*Refd. Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546; *Hillen v. I. C. I. (Alkali), Ltd.*, [1934] 1 K. B. 455; *Schlarb v. London & North Eastern Ry. Co.*, [1936] 1 All E. R. 71.
584. *Add. Annotation* :—*As to* (2) *Refd. Symons v. Southern Ry. Co.* (1935), 153 L. T. 98.

## Part VII.—Railway Companies and their Servants.

598a. *Injury to ganger—Duty to provide look-out man—Prevention of Accidents Rules, 1902, r. 9.*—The foreman of a gang in the employ of a railway co. was employed to repair some signalling apparatus on the permanent way, & took with him a member of his gang to assist him. Whilst engaged in working on the down line he with his fellow workman stepped off the line on the up line to avoid a down train & both men were killed by an up train. In an action by the widow of the foreman for damages against the co. for breach of statutory duty, the judge directed the jury that a regulation of the co. under which the foreman of a gang was entrusted with the duty of seeing that a look-out man

was provided whenever he or any of his gang were at work upon the line was a compliance with r. 9. The jury found that the co. had not omitted to perform their statutory duty of providing a look-out man, & that the foreman's death was caused by the negligence of one or the other or both of the men, & judgment was entered for the co. :—*Held* : (1) a motion for a new trial, on the grounds of misdirection & that the verdict was against the weight of evidence, must be refused; (2) the rule does not require the look-out man provided to be some one who is not a member of the gang itself, but is appointed additionally. (3) *Seem* : the duty of the railway co. under the rule in any case of

BOLAND v. CANADIAN NATIONAL RYS., [1934] O. R. 126.—CAN.

### PART VI. SECT. 5, SUB-SECT. 3.—A.

558 *iii.* ———.—When in pursuance of the authority or obligation conferred on it by sect. 281 (a) of Railway Act, R. S. C., 1927, & the regulations of the Board of Railway Comrs. issued thereunder, a railway co. proceeds to burn a fireguard it is not liable for damage caused by the spread of the fire therefrom unless it is shown that the escape of the fire was due to the co.'s negligence.—*YOUNG & YOUNG v. CANADIAN PACIFIC RY. CO.*, [1931] 2 W. W. R. 14; 2 D. L. R. 968.—CAN.

80. *Damage to timber—Failure to patrol right of way—Defects in locomotive.*—*MID-LAKES TIMBER CO. v. CANADIAN PACIFIC RY. CO.*, [1928] 4 D. L. R. 922; [1928] 3 W. W. R. 745.—CAN.

89. *Death due to fire caused by sparks from engine—Claim by dependants—Where enforceable—Meaning of "losses."*—*VICTORIAN RYS. COMRS. v. SPEED*, [1928] V. L. R. 150; [1928] Angus L. R. 77; 40 C. L. R. 434.—AUS.

### PART VII. SECT. 1.

k. *Revsd.*, 47 S. C. R. 634.

1 l. ———.—The provision in sect. 308 of Railway Act, R. S. C., 1927, for the blowing of the whistle & the ringing of the bell at the approach to a highway crossing is intended only for the benefit of persons coming upon the crossing; others (e.g., a section foreman as the present *pltf.* was) lawfully on the track in the proximity of the crossing are not entitled to the protection afforded by the statute.

In an action for damages for injuries resulting from being struck by a train, it is necessary, in order for the *pltf.* to recover on the ground of alleged negligence in not having the headlight lighted, that there should be evidence upon which the jury can reasonably find, not merely that the presence of

the headlight might have prevented the accident, but that it would have prevented it.—*HESSLER v. CANADIAN PACIFIC RY. CO.*, [1934] 2 W. W. R. 21; *revsd.*, [1935] S. C. R. 585; [1936] 1 D. L. R. 9.—CAN.

sq. *Injury while on duty—Salary during incapacity—Rate.*—*Pltf.*, who was a temporary cleaner employed by *deft.*, but who was qualified to act as a fireman, was injured, & temporarily incapacitated, while acting, for one day, in the latter capacity :—*Held* : under sect. 100B of Govt. Rys. Act, 1912, as inserted by sect. 22 of Govt. Rys. (Amendment) Act, 1916, the rate at which *pltf.* was entitled to be paid, during the period of his incapacity, was that prescribed for a temporary cleaner, & not that prescribed for a fireman.—*LINDFIELD v. NEW SOUTH WALES RY. COMRS.* (1929), 30 S. R. N. S. W. 346; 47 N. S. W. W. N. 115.—AUS.

st. *Injury through failure to apply emergency brake.*—*Pltf.*, a workman employed by *deft.*, was injured while laying new track on *deft.*'s right-of-way. His foot was caught between a rail & a tie & a wheel of the "pioneer" of the work train which was proceeding behind the workmen struck & crushed his leg. The jury found *deft.* responsible for the injury because of the fault of the brakeman on the "pioneer" in not responding quickly enough in applying the emergency air-brake when sensing the danger. The jury negatived any negligence on *pltf.*'s part. The evidence as to whether the brakeman applied the emergency brake at all was contradictory :—*Held* : the jury's finding must be taken to mean that, if the brakeman did apply the brake, he did not do so as quickly as he might & ought to have applied it; & on the evidence it was open to the jury to so find.—*KLAPISCHUK v. CANADIAN PACIFIC RY. CO.*, [1932] 1 W. W. R. 528.—CAN.

sv. *Injury through defective brake.*—An employee of *deft.* was killed while engaged in switching operations in *deft.*'s yard. The accident was not

seen, but he was found dead on the ground after "riding" down a "hump" a car which, as later found, had a defective brake.—*Held* : *deft.*'s appeal to this ct. should be dismissed.—*CANADIAN PACIFIC RY. CO. v. MITCHELL*, [1932] S. C. R. 112; 2 D. L. R. 806.—CAN.

sx. *Contributory negligence.*—*Pltf.*, while engaged in operating a steam shovel in *deft.*'s railway yards, was drawn into the coils of a steel cable about a revolving drum. In an action for damages the jury, in answer to questions, found that *deft.* was guilty of negligence "that caused the accident," which negligence it described as lack of protection at the niggerhead, & absence of proper signalling when about to start operation of the shovel; the jury also found that *pltf.* was guilty of negligence that caused the accident in that he approached too close to the niggerhead when the latter was in motion :—*Held* : the judge was right in interpreting the verdict as a dismissal of *pltf.*'s claim.—*CHERBON v. CANADIAN PACIFIC RY. CO.*, [1932] 1 W. W. R. 513.—CAN.

sy. *Injury to switchman.*—On appeal by *deft.* railway co. in an action wherein a trainman was awarded damages for injuries sustained by being run down by a train while he was opening switches :—*Held* : notwithstanding the strong *prima facie* case of negligence against *pltf.* there was evidence on which the jury could reasonably find, as it did, that he was not guilty of contributory negligence.—*EMERY v. CANADIAN PACIFIC RY. CO.*, [1933] 2 W. W. R. 369.—CAN.

sz. *Injury by fellow servant of Crown.*—In an action by an employee of the Canadian National Railways who was injured by a collision between two of the co.'s trains :—*Held* : he could not recover because (1) he was injured by a fellow servant; (2) the action did not lie against the Crown; (3) a statutory right of compensation existed.—*SHEA v. CANADIAN NATIONAL RYS.*, [1933] 4 D. L. R. 605; 6 M. P. R. 337.—CAN.

danger is an absolute duty to provide a look-out man & to see that he is instructed to act. The co. does not comply with the rule by merely making regulations under which the foreman of a gang is entrusted with the duty of appointing a look-out man; & if the foreman fails in that duty, the co.

may be made liable for injury happening to a member of the gang other than the foreman himself.—*VINCENT v. SOUTHERN RY. CO.*, [1927] A. C. 430; 96 L. J. K. B. 597; 136 L. T. 513; 71 Sol. Jo. 34, H. L.

*Annotation*:—*Reid*. *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K. B. 669.

## Part IX.—Controlling Powers of Ministry of Transport.

602. *Add. Annotation*:—*As to* (2) *Reid*. *A.-G. v. Sharp* (1930), 99 L. J. Ch. 441.

## Part X.—Railway Tribunals.

612. *Add. Annotation*:—*Reid*. *Master Lightermen & Barge Owners Association v. Southern Ry. Co. (No. 2)* (1934), 21 Ry. & Can. Tr. Cas. 126.

618. *Add. Annotation*:—*As to* (1) *Reid*. *Winsford Urban District Council v. Cheshire Lines Committee* (1931), 21 Ry. & Can. Tr. Cas. 10.

631. *Add. Annotations*:—*Consd.* *British Trawlers' Federation, Ltd. v. London & North Eastern Ry. Co.*, [1933] 2 K. B. 14; *London & North Eastern Ry. Co. v. British Trawlers Federation, Ltd.*, [1934] A. C. 279.

631a. *Facilities must arise out of railway traffic.*—The jurisdiction of the Railway & Canal Traffic Commission is limited to questions arising directly or indirectly out of traffic upon a railway. Therefore the Commission refused to entertain an application for improved facilities by the owner of an occupation road which was crossed by a line of railway & interrupted by gates which were said to be kept shut; & on a summons taken out by resps. the application was dismissed, no evidence being heard, on the ground that it disclosed no matter with which the Commission was competent to deal.—*SANDILANDS v. LONDON, MIDLAND & SCOTTISH RY. CO.* (1927), 20 Ry. & Can. Tr. Cas. 136.

684. *Add. Annotation*:—*Reid*. *Tate & Lyle, Ltd. v. London & North Eastern Ry. Co. & London, Midland & Scottish Ry. Co.* (1926), 20 Ry. & Can. Tr. Cas. 166.

685a. ———.]—*Railway & Canal Traffic Act, 1888* (c. 25), s. 18, gives the Railway & Canal Commission power to review, rescind or vary any order which it has made. Under this provision orders may be varied owing to change of circumstances & may be varied at any time upon proper evidence of such change. Under the Rules of Procedure, r. 69, an order may be varied upon an applica-

tion made within 28 days of the decision for the purpose of correcting any accidental slip or miscalculation in it. The two applications are, however, distinct, & an application to correct a miscalculation, especially in a case of great magnitude & complexity, must be made promptly & an application for "re-argument" is not within the rule.—*Re RAILWAY ASSESSMENT AUTHORITY'S APPLICATION*, [1936] 2 All E. R. 316; 80 Sol. Jo. 388; *sub nom.* *Re SOUTHERN RY. CO.'S APPEAL*, 155 L. T. 63; 100 J. P. 313; 34 L. G. R. 270; *sub nom.* *RAILWAY ASSESSMENT AUTHORITY v. SOUTHERN RY. CO.*, 21 Ry. & Can. Tr. Cas. 168.

691a. *Effect of death of judge during hearing.*—*Held*: if the judge assigned to the Commission dies during the hearing of an application, but after the evidence has been completed, it is a proper course (the parties consenting) for his successor to read the shorthand notes of the evidence & of the arguments, & to continue the hearing from the point reached at the last adjournment.—*BRITISH REINFORCED CONCRETE ENGINEERING CO., LTD. v. LONDON & NORTH EASTERN RY. CO.* (1928), 45 T. L. R. 186; 20 Ry. & Can. Tr. Cas. 78.

691b. *Dismissal of application irrelevant on face.*—*SANDILANDS v. LONDON, MIDLAND & SCOTTISH RY. CO.*, No. 631a, *ante*.

702a. ———.]—*Held*: the decision of the Comrs. was on a question of fact; in coming to their decision they had not considered any matters which under the Acts they ought not to have considered; & consequently no appeal from their decision could be entertained.—*MASTER LIGHTERMEN & BARGE OWNERS ASSOCN. v. SOUTHERN RY. CO. (No. 2)* (1934), 21 Ry. & Can. Cas. 126.

### PART VII. SECT. 3.

*sr. Superannuation allowance*.—*Who entitled to.*—F. entered the employment of the Railway Comrs. in 1919, & remained in their employ for upwards of ten years. He was employed on the temporary staff until 1927, when he joined the permanent staff. He remained a member of the permanent staff until his retirement in 1929. He was then over the age of 60 years:—*Held*: F. was entitled to a super-

annuation allowance under Govt. Rys. Act, 1912, s. 113 (a).—*Re CLEARY, Ex p. FULLER* (1929), 30 S. R. N. S. W. 407; 47 N. S. W. W. N. 189.—*AUS.*

### PART VIII.

*st. Arrest without warrant*.—*When justifiable.*—Under Railways Act, s. 122, to justify an arrest without a warrant, much more than trespass on railway premises or travelling without a ticket is necessary. In the case of

trespass, it will have to be shown that there was reason to believe that the person to be arrested would abscond, or that his name & address were unknown & he refused to give his name & address, or that the name & address given by him was incorrect. In the case of travelling without a ticket, it will, further, have to be shown that there was a refusal to pay the sum charged.—*HAMID v. SUDHIRMOHAN GHOSH* (1929), I. L. R. 57 Calc. 102.—*IND.*

- 703. Add. Annotations :—***Apld. R. v. St. Marylebone Income Tax Comrs., Ex p. Schlesinger* (1928), 13 Tax Cas. 746. *Refd. R. v. Electricity Comrs., Ex p. Yorkshire Electric Power Co.* (1927), 138 L. T. 230.
- 705. Add. Annotations :—***Refd. Re Railways Act, 1921, Re Great Western Ry. Co.'s Application*, [1933] 2 K. B. 391; *Master Lightermen & Barge Owners Association v. Southern Ry. Co.* (No. 2) (1934), 21 Ry. & Can. Tr. Cas. 126.
- 727a. — — —.]—Held :** *appet.'s claim was frivolous & vexatious & must be dismissed with costs.—Stokes v. London, Midland & Scottish Ry. Co.* (1932), 21 Ry. & Can. Tr. Cas. 30.
- 736. Add. Annotations :—***Consd. Lloyd del Pacifico v. Board of Trade* (1930), 46 T. L. R. 476. *Refd. London Welsh Estates, Ltd. v. Phillip* (1931), 144 L. T. 643.
- 752. Add. Annotation :—***Refd. Sandilands v. London, Midland & Scottish Ry. Co.* (1927), 20 Ry. & Can. Tr. Cas. 136.
- 755. Add. Annotation :—***Refd. Rowson, Drew & Clydesdale v. G. W. Ry., L. M. & S. Ry., L. & N. E. Ry. & Southern Ry.* (1928), 19 Ry. & Can. Tr. Cas. 235.
- 756a. Adjustment of charges to revenue—Railway carrying on subsidiary business—Railways Act, 1921 (c. 55), s. 58.]—**In dealing with the subject of dock undertakings belonging to railway cos. the Railway Rates Tribunal accepted the division between "railway" & "dock" set out in the railway cos.' estimates, by which all receipts & expenses in respect of railways, sidings & warehouses, whether they were within the area of a dock or not, were treated as "railway" receipts & expenses, & all receipts & expenses in respect of "docks" other than those entered as "railway" receipts & expenses, were treated as "dock" receipts & expenses:—*Held :* (1) this division of receipts & expenditure between railways & docks could not be supported, as it involved the exclusion from consideration of charges at dock warehouses or storage spaces where none of the goods stored therein used railways, & all charges in respect of the conveyance on railways in docks in whatever circumstances the rails were laid or charges were made for their use; (2) (BANKES, L.J.) under sect. 58 (4) of the above Act the Tribunal has to take into consideration the different operations which go to make up the business of a dock undertaking, for which operations separate & distinct charges are made; (3) *Semle* (SCRUTTON, L.J.): warehousing on a dock undertaking goods exported or imported, storing such goods in the open on dock lands, the use of transit sheds, & services such as cooping, are dock & not railway charges.—*MANCHESTER SHIP CANAL CO.'s & DOCK & HARBOUR AUTHORITIES ASSOCN.'s APPLICATIONS*, [1927] 2 K. B. 154; 96 L. J. K. B. 421; 137 L. T. 39; 43 T. L. R. 301; *sub nom. STANDARD CHARGES (DOCKS HARBOURS & PIERS)*, 19 Ry. & Can. Tr. Cas. 75, C. A.
- Annotation :—As to (1) Refd. Standard Charges Ninth Annual Review* (1927), 26 Ry. & Can. Tr. Cas. 1.
- 756b. — — —.]—STANDARD CHARGES (COLLECTION & DELIVERY-WAREHOUSING)** (1925), 19 Ry. & Can. Tr. Cas. 53.
- 756c. — — —.]—Consideration of ancillary business—Modification condition precedent.]—Held :** *Railways Act, 1921 (c. 55), s. 58 (2), (4), does not become applicable until the Tribunal, having reviewed the charges, has decided to modify them.—STANDARD & EXCEPTIONAL CHARGES (FIRST REVIEW)* (1929), 20 Ry. & Can. Tr. Cas. 87.
- 756d. — — —.]—Held :** (1) if on review the Rates Tribunal does not modify charges it has no discretion to consider the financial results obtained from ancillary businesses; (2) the Tribunal will not exercise any discretion it may have, under *Railways Act, 1921 (c. 55), s. 59 (4)*, to limit the allowance in respect of additional capital, where such capital has been invested under statutory powers, & the investment has not been shown to be unwise or imprudent.—*STANDARD & EXCEPTIONAL CHARGES (SECOND REVIEW)* (1930), 20 Ry. & Can. Tr. Cas. 90.
- 756e. — — —.]—What must be considered.]—By Railways Act, 1921 (c. 55), s. 59 (4), if on review it is found that the net revenue is less than the standard revenue the Tribunal are required "to make such modifications in all or any of the standard charges & such a corresponding general modification of the exceptional charges of the co. as they may think necessary to enable the co. to earn the standard revenue":—Held :** (1) in such a case, if the Tribunal are of opinion that neither a general increase nor a general reduction in charges will enable the co. to earn the standard revenue, they are not at liberty to make any modification at all; (2) until the Tribunal have reached the conclusion that a general modification will enable the co. to earn the standard revenue, they are precluded from entertaining any of the considerations prescribed by sect. 59 (6), such as the effect of the existing charges on the traffic of a particular industry.—*STANDARD & EXCEPTIONAL CHARGES (FOURTH REVIEW)* (1932), 21 Ry. & Can. Tr. Cas. 97.
- 756f. — — —.]—Upon an annual review under 1921 Act, s. 59:—**
- (1) The Rates Tribunal are not empowered to take the different commodities in the twenty-one numbered classes & make different modifications of the standard charges applicable to a class according to the commodity in respect of which it is chargeable.
  - (2) Whatever percentage modification is made of the standard charges applicable to a particular class the same percentage modification is to be made of all the exceptional rates in operation for the various commodities specified in that class.
  - (3) The objective of whatever modifications are made is to be the earning by the co. of its standard revenue in the year following the coming into operation of modified charges.
  - (4) The Rates Tribunal are empowered to make a modification which will enable the co. to increase its net revenue but not to as much as its standard revenue.
  - (5) The Rates Tribunal are not precluded from modifying charges by way of increase if it appears that though the co. would by the modification be enabled to earn the standard revenue, less traffic would pass by



(6) The Rates Tribunal are not required to have regard to the interest of the public, except in so far as it may be relevant—though it is difficult to imagine circumstances in which it would be relevant—in connection with the question of the nature & extent of the modification necessary to enable the standard revenue to be earned & except to the extent to which they are directed to have regard to it by Railways Act, 1921 (c. 55), s. 58 (2).—*Re STANDARD CHARGES—NINTH ANNUAL REVIEW* (1937), 26 Ry. & Can. Tr. Cas. 1.

758a. ———.—When a railway co. seeks the consent of the Railway Rates Tribunal under

**761d. Who may oppose.]**—By Railways Act, 1921 (c. 55), s. 37, a railway co. may grant new exceptional rates, “so, however, that a new

(17 (p. 375) i. ———— *To contribute to cost of works.*)]—The Board of Railway Comrs. for Canada when making an order for contribution to the costs of works is entitled to have regard to the state of matters existing when the order for contribution is made. If

0000 i. ——— Prevention of alteration in routing of traffic.]—BOARD OF TRADE OF HALIFAX, ST. JOHN & SACKVILLE, N.B., CANADIAN LUMBERMEN'S ASSOC. v. CANADIAN NATIONAL

exceptional rate so granted shall not, without the consent of the rates tribunal, be less than 5 per cent. or more than 40 per cent. below the standard rate chargeable." By sect. 78 (3) of the same Act, any authority or body having the privileges conferred by the Act on a representative body of traders, "may appear in opposition to any application,

representation or submission in any case where such authority, or the persons represented by them, appear to the Board of Trade to be likely to be affected by the decision on any such application, representation or submission":—*Held*: (1) on an application for the consent of the Rates Tribunal to the granting of a new exceptional rate more than

RYS. (1926), 32 Can. Ry. Cas. 37.—CAN.

t (p. 376) i. ——— *Transit rate—With stop-over privileges—Refusal to order.*—ROSS LEAF TOBACCO CO., LTD. v. CANADIAN FREIGHT ASSOCN. (1927), 32 Can. Ry. Cas. 320.—CAN.

bb (p. 376) i. ———.—Applts. made an application to the Board of Railway Comrs. for Canada for an order requiring resp. railway co. to reduce the freight rates on potatoes in carloads from shipping points within "select territory" in the Maritime Provinces to points within certain areas of Ontario & Quebec in which resp. had published reduced rates for the express purpose of meeting motor-truck competition. The Board found that applts. had failed to establish that the competitive tariffs complained of had resulted in the destruction of, or to the prejudice of, the advantages given by Maritime Freight Rates Act to shippers in the "select territory" in favour of persons or industries located elsewhere & dismissed the application:—*Held*: the judgment of the Board should be affirmed. NOVA SCOTIA PROVINCE v. CANADIAN NATIONAL RYS., [1937] S. C. R. 271; 3 D. L. R. 126.—CAN.

oo (p. 376) i. ———.—STANDARD HARDWOOD LUMBER CO. v. CANADIAN PACIFIC RY. CO. & CANADIAN NATIONAL RYS. (COAL & COKE RATES CASE) (1926), 32 Can. Ry. Cas. 282.—CAN.

pp (p. 376) i. ———.—The Board of Railway Comrs. for Canada, by its General Order No. 448, dated Aug. 26, 1927, ordered (*inter alia*) "that the rates on grain & flour from all points on Canadian Pacific branch lines west of Fort William to Fort William . . . be equalised to the present Canadian Pacific main line basis of rates of equivalent mileage groupings (the rates governed by the Crow's Nest Pass agreement not to be exceeded)"; & "that all other railway companies adjust their rates" on grain & flour to the Canadian Pacific rates:—*Held*: (1) what was required of the Canadian National Rys. under Order 448 was to adjust its rates in such a way that in territory competitive as between it & the Canadian Pacific Ry. Co. grain shippers in such territory would be placed on as equal a rate basis as possible, all things considered; & the Canadian National Rys., in adopting the mileage grouping in effect from the nearest point, parallel or contiguous, main or branch line station, on the Canadian Pacific, had complied with the order; (2) the Board's order (construed as above) & the Board's allowance of the rates in question (fixed on above basis) were within its powers.—ALBERTA GOVERNMENT v. CANADIAN NATIONAL RYS. & CANADIAN PACIFIC RY. CO., [1931] S. C. R. 656; [1932] 1 D. L. R. 335.—CAN.

qq (p. 376) i. ———.—CANADIAN SHIPPERS' TRAFFIC BUREAU v. CANADIAN NATIONAL RYS. (1926), 32 Can. Ry. Cas. 3.—CAN.

yy (p. 376) i. ———.—*Goods of same description.*—HARDY'S, LTD. v. NEW SOUTH WALES RAILWAY COMRS. (1928), 28 S. L. N. S. W. 318; 45 N. S. W. W. N. 82.—AUS.

yy (p. 376) ii. ———.—*Compulsory reduction—Application of Maritime Freight Rates Act, 1927.*—CANADIAN NATIONAL RY. CO. v. NOVA SCOTIA PROVINCE, [1928] 1 D. L. R. 369; [1928] S. C. R. 106; 34 Can. Ry. Cas. 223.—CAN.

yy (p. 376) iii. ———.—*Wharfage rates.*—The Board of Railway Comrs. for Canada has no power, under Railway Act, R. S. C., 1927, to regulate, no question as to discrimination being involved, as to absorption by a railway co. of wharfage charges in respect of transpacific freight, at the point where the goods are transferred from rail to ship for ocean carriage to the transpacific country. The function of the Board as to tolls & charges is, excepting as to powers conferred by sect. 358 of the Act, limited to regulating charges for carriage & for those other services which are incidental to carriage, as railway services, within the meaning of the Act. The wharfage service in question is not such a service. This would appear to be so independently of, but is put beyond doubt by, sect. 358. The definition of "toll" cannot properly be construed as declaring that any wharfage service is a railway service in the above sense.—*Re POWERS TO WHARFAGE CHARGES*, [1931] S. C. R. 431.—CAN.

yy (p. 376) iv. ———.—*Consideration of other statutes & agreements.*—Sub-sect. (5) of sect. 325 of the Railway Act declares the powers of the Board under the Act to fix & determine just & reasonable rates shall not be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, save & except as to rates on grain & flour from points west of Fort William to Fort William and Port Arthur. The wording of this sub-sect. should not be construed as a restriction upon the powers of the Board to fix the rates set out in the Order now in question. On the contrary, it seems from the language used that Parliament contemplated that the Board would look at & consider the statutes & agreements relating to rates which had been in force or agreed upon, & desired to make it clear that, with the exception of the Crow's Nest Agreement, the Board was not to be bound by any such statute & agreement. What weight these statutes & agreements shall have is left to the discretion of the Board; & subject to certain conditions, the obligation rests upon the Board of fixing rates which are "fair & reasonable." In this case, the own conduct of the Canadian National Railways since the Order in question was made has been such as to justify the inference that, in their judgment, the rates were not unfair or unreasonable.—*Re BOARD OF RY. COMRS. ORDER NO. 448 REGARDING RY. FREIGHT RATES IN CANADA*, [1930] S. C. R. 288.—CAN.

yy (p. 376) v. ———.—*Maritime Freight Rates Act.*—It is within the jurisdiction of the Board of Railway Comrs. for Canada (a) to approve from time to time, under s. 9 of Maritime Freight Rates Act (R. S. C., 1927, c. 79), tariffs filed by "other companies" therein referred to (companies other than the Canadian National Railways), specifying tolls lower than those specified in the tariffs

originally filed and approved (which provided for reductions in rates of approximately 20 per cent.) under s. 9; (b) to certify from time to time (as distinct from the provision in s. 9 (4) for certifying in every third year, etc., as to revision of the normal tolls & subsequent use of revised normal tolls) normal tolls in respect of particular freight movements differing from those originally certified at the time of approving the tariffs originally filed & approved under said s. 9; & (c) to certify as the amount of reimbursement to the company the difference between the lower tolls referred to in (a) *supra* & the modified normal tolls referred to in (b) *supra*.—*Re MARITIME FREIGHT RATES ACT, 1927*, [1933] S. C. R. 425; 4 D. L. R. 764.—CAN.

yy (p. 376) vi. ———.—*International freight traffic.*—*Re INTERNATIONAL FREIGHT SHIPMENT CHARGES*, [1935] 2 D. L. R. 148.—CAN.

ccc (p. 376) i. ———.—*Refusal of facility involving variation of established principle.*—PARISH OF LANCASTER, ST. JOHN, N.B. v. DOMINION EXPRESS CO. & CANADIAN NATIONAL EXPRESS CO. (1926), 32 Can. Ry. Cas. 33.—CAN.

mmm (p. 376) i. ———.—MULDOON v. CANADIAN PACIFIC RY. CO. (1927), 33 Can. Ry. Cas. 13.—CAN.

rrr (p. 376) i. ———.—*Re CANADIAN PACIFIC RY. CO., GRAND PILES, P.Q.* (1926), 32 Can. Ry. Cas. 1.—CAN.

hh (p. 377) i. ———.—*Restoration of train services—Refusal to order.*—ANNAPOLIS MUNICIPALITY N.S. v. CANADIAN NATIONAL RYS. (1926), 32 Can. Ry. Cas. 257.—CAN.

pp (p. 377) i. ———.—*Refusal to fix responsibility for future accidents.*—CANADIAN NATIONAL RYS. v. TOWNSHIP OF STAMFORD (1926), 32 Can. Ry. Cas. 252.—CAN.

qq (p. 377) i. ———.—*Power to order substitution of private crossing.*—CALHOUN v. CANADIAN NATIONAL RYS. (1926), 32 Can. Ry. Cas. 236.—CAN.

vv. *Revsd.*, [1912] A. C. 224.

vv i. ———.—*Use of railway bridge for vehicular traffic.*—SASKATCHEWAN DEPARTMENT OF HIGHWAYS v. CANADIAN NATIONAL RYS. (1926), 32 Can. Ry. Cas. 23.—CAN.

aaa (p. 377) i. ———.—*Removal of utilities on construction of subway.*—The Canadian National Railways applied to the Board of Railway Comrs. for the approval of plans & profiles for carrying its tracks across certain highways. The Board, in final Orders granting the applications, authorised the construction of subways or other structures in connection with the highway crossings & at the same time, directed the present applts., amongst others, to move such of their utilities as may be affected by the construction or changes so authorised. Applts. urged that the Board was without jurisdiction to make the Orders in so far as it directed applts. to move their utilities; that, in any event, the Orders were made irregularly & not in accordance with the rules binding upon the Board; that sects. 255, 256 & 257 of the Railway Act were not applicable

40 per cent. below the standard rate chargeable, such a body so certified by the Board of Trade has a right to appear & be heard, whether in support of or in opposition to the proposed new rate; (2) where a party is heard to object to the proposed new rate the only grounds of objection that can be entertained are the fiscal effects of the proposed new rate upon the standard revenue of the company proposing it. *Semble*: a trader interested in the proposed new rate has no right to be heard in opposition thereto.—

GREAT WESTERN RY. CO. & LONDON, MIDLAND & SCOTTISH RY. CO. v. BRISTOL CORPN. (1928), 20 Ry. & Can. Tr. Cas. 22.

*Annotation*.—*Reid*. Great Western Ry. Co. v. United Kingdom Chamber of Shipping, [1937] 2 K. B. 30.

#### SECT. 2A.—ROAD AND RAIL TRAFFIC APPEAL TRIBUNAL.

*Jurisdiction & procedure.*—*See* CARRIERS, Nos. 1539–1562, *ante*.

to the Canadian National Railways, & that the Board had not the power to compel public utilities cos. to remove their facilities without previous compensation.—*Held*: these Orders were made within the exercise of the powers vested in the Board by the Railway Act, & more particularly by the provisions of sects. 39, 255, 256 & 257 of that Act.—*BELL TELEPHONE CO. OF CANADA v. CANADIAN NATIONAL RYS., MONTREAL LIGHT, HEAT & POWER CONSOLIDATED v. CANADIAN NATIONAL RYS., MONTREAL TRAMWAYS CO. & MONTREAL TRAMWAYS COMMISSION v. CANADIAN NATIONAL RYS., BELL TELEPHONE CO. OF CANADA v. TORONTO, HAMILTON & BUFFALO RY. CO. & HAMILTON CORPN.*, [1932] S. C. R. 224; 2 D. L. R. 753; *affd.*, [1933] A. C. 563, P. C.—CAN.

*aaa* (p. 377) ii. — *Electric lines across railways.*—The Board of Railway Comrs. issued a General Order in respect of the conditions & specifications applicable to the erection, placing & maintaining of electric lines, wires or cables along or across all railways, subject to the jurisdiction of the Board; & sect. 2 of the Order stipulated that "the appt. shall, at all times, wholly indemnify the co. owning, operating or using the railway, from & against all loss, damage, injury & expense to which the railway co. may be put by reason of any damage or injury to persons or property, caused by any of appt.'s wires or cables, or any works herein provided for by the terms & provisions of this order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the appt., unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere":—*Held*: the Order was within the jurisdiction of the Board.—*CANADIAN ELECTRICAL ASSOCIATION & HYDRO ELECTRIC POWER COMMISSION OF ONTARIO v. CANADIAN NATIONAL RAILWAYS*, [1932] S. C. R. 451; 3 D. L. R. 118.—CAN.

*aaa* (p. 377) iii. — *Repair of bridge over railway.*—A street ran east & west through (& continuing beyond) the northern part of the city of Toronto & of the adjoining village of Forest Hill. At a point in Forest Hill it was carried over a ravine by a bridge under which a railway (under Dominion jurisdiction) crossed the street. The bridge was 500 feet beyond the nearest point of the Toronto city limits. The Board of Railway Comrs. for Canada, on application of the village of Forest Hill, authorised reconstruction of the bridge, & directed that the city of Toronto contribute to the cost. The city appealed.—*Held*: The board had not jurisdiction under the Railway Act to direct that the city contribute to the cost of the work. There were no cir-

cumstances to warrant a holding that the city was "interested or affected" by the board's order, within the Act.—*TORONTO CORPN. v. FOREST HILL VILLAGE, YORK TOWNSHIP & CANADIAN NATIONAL RAILWAYS*, [1932] S. C. R. 602; 4 D. L. R. 401.—CAN.

*aaa* (p. 377) iv. — *Construction of subway.*—The matter of where traffic through a subway under a railway originates and the volume of it from various districts is not a factor in deciding whether or not a particular municipality is "interested or affected" by the work of constructing the subway, within sect. 39 of Railway Act, R. S. C. 1927. In the present case:—*Held*: Board of Railway Comrs. for Canada had no jurisdiction to order appt. city to pay a portion of the cost of a subway wholly situate within the limits of resp. town & at some distance from the limits of appt. city, notwithstanding that access to & from appt. city (having a large population) from & to other municipalities might be largely through said subway.—*WINDSOR CORPN. v. WALKERVILLE CORPN.*, [1933] S. C. R. 341; (1932), 2 D. L. R. 657.—CAN.

*aaa* (p. 377) v. — *Grants from "Crossing Fund"*—The Board of Railway Comrs. for Canada has jurisdiction to order that a grant will be made from the "Railway Grade Crossing Fund" to help construction work, only when the crossing is eliminated or such protection is provided by the work that the danger is lessened and the safety & convenience of the public increased. The Board has no power to grant an application for a contribution from that fund towards the costs of highway diversions whereby rail level crossings are not eliminated, although they would relieve the crossings from a substantial volume of highway traffic.—*Re RAILWAY GRADE CROSSING FUND (S. 262 of RAILWAY ACT)*, [1933] S. C. R. 81; 1 D. L. R. 660.—CAN.

*ccc* (p. 377) i. — *Construction of branch line.*—*CANADIAN NATIONAL RYS. v. CANADIAN PACIFIC RY. CO.*, [1929] 4 D. L. R. 1076; R. S. C. 135.—CAN.

*ccc* (p. 377) ii. — *To order Provincial undertaking to contribute to cost of work.*—Under sect. 39 of the Railway Act of Canada, R. S. Can., 1927, c. 170, the Railway Board has jurisdiction to impose a proportion of the cost of work, which in the exercise of its powers it has ordered to be carried out, only upon a co., municipality, or person interested in or affected by the order. But in determining whether a particular co., municipality or person is so interested or affected the Railway Board can have regard to the circumstances existing not only when the work was ordered but also when it makes its order allocating the cost, or

reviews that order under sect. 51; further, absence of benefit from the work executed does not necessarily show absence of interest in or affection by the order to carry out the work. In cases in which the Railway Board has jurisdiction the amount of the contribution is within the discretion of the Board. The sect. is not invalid to the extent to which it enables the Railway Board to order a Provincial undertaking to contribute.—*CANADIAN PACIFIC RY. CO. v. TORONTO TRANSPORTATION COMMISSION, TORONTO TRANSPORTATION COMMISSION v. CANADIAN NATIONAL RYS.*, [1930] A. C. 686; 99 L. J. P. C. 219, P. C.—CAN.

*ccc* (p. 377) iii. — *To grant leave for construction of works—On conditions.*—By sect. 372 of the Railway Act of Canada the Board of Railway Comrs., when granting the leave thereby required to construct or maintain telegraph or telephone wires or appliances, or electric power cables, along or across a railway, may order on what "terms & conditions" the work may be executed; & leave is not to be necessary when works have been, or are to be, constructed or maintained by consent, & in accordance with general orders approved by the Board for that purpose.—*CANADIAN ELECTRICAL ASSOCN. v. CANADIAN NATIONAL RYS.*, [1934] A. C. 551; 103 L. J. P. C. 127; 151 L. T. 453; 51 T. L. R. 25, P. C.—CAN.

*ccc* (p. 377) iv. — *Consideration of provincial drainage works.*—Where drainage works are undertaken under a provincial Act the functions of the Railway Board are confined to seeing that the works so far as they affect the railway are sufficient & safe.—*MELANCTHON TOWNSHIP v. CANADIAN PACIFIC RY. CO.*, [1935] 3 D. L. R. 379.—CAN.

*ccc* (p. 377) v. *Action against commissioners—When triable in Supreme Court.*—*M. B. RAIL ANCHOR, LTD. v. VICTORIAN RYS. COMRS.*, [1928] V. L. R. 339; [1928] Argus L. R. 114.—AUS.

*nnn* (p. 377) i. — *Question of law or jurisdiction.*—On an appeal from the Railway Board:—*Held*: the established practice of leaving questions of law or jurisdiction to the Supreme Ct. of Canada should be followed.—*MICHIGAN CENTRAL RY. CO. (EMPLOYEES) v. MICHIGAN CENTRAL RY. CO.*, [1933] 3 D. L. R. 71.—CAN.

*g* (p. 378) i. — *—*—*Re CASA LOMA*, [1927] 4 D. L. R. 645; 61 O. L. R. 187.—CAN.

*sg. Order of Board not interfered with—Unless manifestly wrong.*—An order of the Board of Railway Comrs. will not be interfered with by the Governor in Council unless the board have manifestly been subject to error.—*Re RAILWAY FREIGHTS IN CANADA*, [1933] 2 D. L. R. 209.—CAN.

## Part XII.—Abandonment and Dissolution.

850. *Add. Annotation* :—**Refd.** *Goodwin Foster Brown, Ltd. v. Derby Corpn.*, [1934] 2 K. B. 23.

## Part XIII.—Canals.

888. *Add. Annotation* :—**Refd.** *Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons*, [1929] 1 Ch. 686.

925. *Add. Annotation* :—**Refd.** *Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776.

931a. — **Extent of duty.**—(1) The duty of a railway co. under Regulation of Railways Act, 1873 (c. 48), s. 17, to keep its canals in repair & open for navigation is not an absolute duty, nor, on the other hand, is it limited, as in the case of highway authorities, to acts of misfeasance. It is a duty to take reasonable care.

(2) A railway co. acquired a canal 150 years after it had been constructed. One of the locks collapsed. It was found that the baulks of timber on which the walls rested were laid transversely on the soil which formed the bed of the lock. The proper method would have been to lay the baulks upon vertical piles driven into the ground :—**Held** : no evidence of negligence on the part of the railway co. that on the appearance of cracks in the walls & subsidence of the soil at the side of the walls they failed to investigate the foundations of the lock, an operation which might have involved the closing of the canal for some months.

(3) In order to found a claim for damages for the closing of a canal, *pltf.* must show that there has been caused to him thereby peculiar damage greater than that caused to the general public.

(4) An agreement by traders with a railway co., that they would establish a gravel business near a canal of the railway co., & would pay a reduced rate to be afterwards agreed for the transport of gravel by the canal, & would erect machinery at their own expense, in consideration whereof the railway co. would permit the traders to erect machinery & other plant for carrying gravel over the canal & railway, & would repair the canal :—**Held** : to be void for uncertainty.

(5) A district engineer of the railway co. has no general authority to enter into such an agreement.—**BLUNDY, CLARK & CO., LTD. v. LONDON & NORTH EASTERN RY. CO.**, [1931] 2 K. B. 334; 100 L. J. K. B. 401, C. A.; *sub nom.* **LONDON & NORTH EASTERN RY. CO. v. BLUNDY, CLARK & CO., LTD.**, 145 L. T. 269; 20 Ry. & Can. Tr. Cas. 92, C. A.

*Annotations* :—As to (1) **Consd.** *Gullfoyle v. Port of London Authority*, [1932] 1 K. B. 336. As to (3) **Consd.** *Harper v. Haden & Sons, Ltd.*, [1933] Ch. 298.

934a. — **Damages—Right of individual to sue.**—**BLUNDY, CLARK & CO., LTD. v. LONDON & NORTH EASTERN RY., No. 931a, ante.**

936a. — **What amounts to negligence.**—**BLUNDY, CLARK & CO., LTD. v. LONDON & NORTH EASTERN RY. CO.**, No. 931a, *ante*.

943a. **Power to supply to “works”**—Supply to railway company.]—**A.-G. v. ROCHDALE CANAL CO.** (1938), 55 T. L. R. 153; 82 Sol. Jo. 971.

948a. — **Pumping from one level to another.**—**ELLWELL v. BIRMINGHAM CANAL NAVIGATION PROPRIETORS**, (1852), 3 H. L. Cas. 812; 10 E. R. 323, H. L.

970. *Add. Annotations* :—**Refd.** *Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401; *Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546.

978. *Add. Annotation* :—**Expld. & Distsd.** *Great Western Railway v. Monmouthshire County Council* (1929), 94 J. P. 6.

978a. — — — **Liability of county council on covenant—Tow-path raised to avoid flooding.**—The construction of a canal involved the interception of a certain public road; & the canal co., in accordance with its statutory obligations, carried the road over the canal by means of a bridge. The canal subsequently became vested in a railway co., who were required under s. 17 of the Regulation of Railways Act, 1873 (c. 48), s. 17, to keep the canal open & navigable. At a later date the railway co. entered into an agreement with the county council having jurisdiction in the locality under which the council agreed to remove the bridge & to construct a new bridge in substitution therefor; & the council covenanted that they would “from time to time & at all times thereafter well & sufficiently maintain & repair the new bridge & the roadway & footpaths upon the same & the approaches thereto.” The agreement provided for a headway of six feet between the arch of the new bridge & the towing-path passing under it. The bridge & the neighbouring part of the canal for considerable distances on both sides of the bridge were in a mining area which had been subsiding for a long time prior to the agreement; & within sixteen years thereafter, owing to further subsidences, there was a general sinking of the bridge, & the towing-path. As, however, the water level remained the same, the railway co. found it necessary, in order to avoid flooding, to raise the towing-path—the resulting effect being that the headway between the bridge & the towing-path was

**Cases 978a.—1043b. ENGLISH AND EMPIRE DIGEST SUPPLEMENT.**

reduced to four feet six inches, which was insufficient for the convenient working of the canal:—*Held*: the covenant on the part of defts. to “maintain” the bridge did not impose upon them an obligation to raise the bridge so as to obtain the six feet of clearance for the use of the waterway, even although plffs. had found it necessary to raise the towing-path.—*GREAT WESTERN RY. v. MONMOUTHSHIRE COUNTY COUNCIL* (1929), 91 J. P. 6; 27 L. G. R. 569, C. A.

**980. Add the following paragraph:—**

The right to navigate the dredged channel is confined to vessels paying dues to enter or

leave the canal, & the right of navigation does not include a right to ground on the bank (*per CUR.*).—

**1032. Add. Annotation:—*Refd.* *Coleshill v. Manchester Corpn.*, [1928] 1 K. B. 776.**

**1043a. Agreement void for uncertainty.]—*BLUNDY, CLARK & CO., LTD. v. LONDON & NORTH EASTERN RY. CO.*, No. 931a, *ante*.**

**1043b. Authority of district engineer.]—*BLUNDY, CLARK & CO., LTD. v. LONDON & NORTH EASTERN RY. CO.*, No. 931a, *ante*.**

# RATES AND RATING.

## Part I.—Liability to be Rated.

5. *Add. Annotations*:—**Consd.** *L. C. C. v. Hackney B. C.*, [1938] 2 K. B. 588. **Refd.** *Bertram v. Wightman*, [1936] 2 All E. R. 487.
7. *Add. Annotations*:—*As to* (1) **Consd.** *Re Southern Ry. Co.* (1935), 153 L. T. 105. **Refd.** *Bertram v. Wightman*, [1936] 2 All E. R. 487. *As to* (4) **Consd.** *Westminster Corpn. v. Southern Ry. Co.*, [1936] 2 All E. R. 322.

### PART I. SECT. 1.

8 iii. ———.—[Sect. 476 of the Halifax City Charter applies to cases when the interest of the occupier of real estate is assessed as well as to cases, when the owner of the real estate is assessed, & a retroactive assessment may be made under s. 476 for the business tax authorised by the legislation of 1918.—*HALIFAX v. DILL*, [1929] 1 D. L. R. 613; 60 N. S. R. 219. **CAN.**

y i. ———.—[*Re* **COLEMAN TOWNSHIP & NORTHERN ONTARIO LIGHT & POWER CO., LTD.** (1927), 60 O. L. R. 405.—**CAN.**

y ii. ———.—*Mercantile business.*—[On the question whether the business of manufacturing lumber is a "mercantile business" within Rural Municipality Act, R. S. S., 1920, s. 232, which provided for the assessment of every person who was engaged in mercantile business & owner of a stock in trade liable to assessment:—*Held*: it is a mercantile business.

Under a statute authorising the assessment of "land, buildings, & business," a stock in trade is not assessable.—*PEARSE & EDWORTHY BROS. v. RURAL MUNICIPALITY OF BJORKDALE, B. F. HARRIS CO., LTD. v. RURAL MUNICIPALITY OF BJORKDALE*, [1929] 2 D. L. R. 507, 537; 1 W. W. R. 682; 23 S. L. R. 386.—**CAN.**

y iii. ———.—*Licence fee in lieu.*—[*ATLAS CONSTRUCTION CO., LTD. v. ST. JOHN CITY*, [1931] 4 M. P. R. 100.—**CAN.**

y iv. ———.—[A business having ceased prior to the year of levy of business tax, the fact of its appearance on the assessment roll upon which such levy was made did not make the tax enforceable, as the property had ceased to be rateable.—*Re LYMAN BROS.*, [1932] O. R. 419; 3 D. L. R. 343; *reversd.*, [1933] 1 D. L. R. 738; O. R. 159.—**CAN.**

y v. ———.—[A practising dentist incorporated a co. with power *inter alia* to buy, hold & sell real estate & to carry on the business of real estate agents. He held all but two shares & he contended that his purpose was that the co. manage his own property & control real estate for the investment of his own money, not for speculation. He conveyed his real estate property to the co. in exchange for shares. These lands increased considerably in value & were sold at a profit. He contended that such profits were accretions to capital & not income made in the business of buying & selling real estate & therefore, not subject to assessment as such:—*Held*: these profits were profits acquired in a scheme for profit making, which applt. co. was putting into effect as part of its business, & therefore, were liable to assessment under the provincial Income Tax Act.—*MERRITT REALTY CO., LTD. v. BROWN*, [1932] S. C. R. 187; 2 D. L. R. 465; *affgm.*, [1932] 1 W. W. R. 234; 1 D. L. R. 795; 44 B. C. R. 438.—**CAN.**

y vi. ———.—*Club.*—[Ontario Assessment Act, R. S. O., 1927, s. 9 (2) does not apply to a horse-racing club

which serves meals for only two weeks each year during race meets.—*ONTARIO JOCKEY CLUB v. TORONTO*, [1932] 4 D. L. R. 423; O. R. 637; *on appeal*, [1934] S. C. R. 223; 2 D. L. R. 254.—**CAN.**

y vii. ———.—[One of the premises in question herein was leased from the owner by Falcon Oils, Ltd., which sublet it to S. & S., who operated a filling station thereon as their own business. S. & S. hired the help, regulated their hours, paid the taxes & took the profits or paid the losses. They also carried on other businesses there, such as repairs, the sale of tyres, greasing, etc. Under their lease they were obliged to sell the products their lessor, said oil co., & keep certain stocks & their signs were controlled:—*Held*: the station was an "independent filling station" under Winnipeg Charter, 1918, s. 282.—*FALCON OILS, LTD. v. WINNIPEG CITY, IMPERIAL OIL, LTD. v. WINNIPEG CITY*, [1936] 1 W. W. R. 305; 1 D. L. R. 790; 43 Man. L. R. 557.—**CAN.**

y viii. ———.—[—*TORONTO CORPN. v. FAMOUS PLAYERS' CANADIAN CORPN., LTD.*, [1936] S. C. R. 141; 2 D. L. R. 129.—**CAN.**

y ix. ———.—[In fixing the "annual rental value" of business premises for the purpose of levying the business tax under Winnipeg Charter, 1918, the test must be the market value of the use of the premises for the year in question. Where the premises are occupied by their owner that test is how much rent possible tenants would probably pay, & in considering possible tenants, the owner must be included. The solution cannot be based on actual facts, a certain amount of speculation & assumption must come into play, but all the elements ought to be grouped & fairly considered.—*NATIONAL TRUST CO. v. WINNIPEG CITY*, [1937] 2 W. W. R. 90; 3 D. L. R. 496; 45 Man. L. R. 261.—**CAN.**

y x. ———.—[The business tax assessed under the City Act, 1934, is not a tax on land.—*MOOSE JAW CITY v. BRITISH AMERICAN OIL CO., LTD.*, [1937] 2 W. W. R. 35; *affd.* 2 W. W. R. 309.—**CAN.**

y xi. ———.—[Sect. 282 of Winnipeg Charter, 1918, as amended, provides for "a business tax based on the annual rental value of the premises occupied"—*Held*: the "rental value" must be confined to the particular year for which the assessment is made. Neither the past nor the future value can have any direct influence on such value.—*CITY DAIRY, LTD. v. WINNIPEG CITY*, [1937] 2 W. W. R. 44; 2 D. L. R. 259; 45 Man. L. R. 130.—**CAN.**

y xii. ———.—[A tenant of business premises who intended to move to smaller & less expensive quarters was persuaded by the owner to remain at a lower rent. The owner knew that many other premises suitable for the tenant were then available at a low rent & he wished to keep his premises occupied at almost any price. The tenant wished to avoid the trouble &

expense of moving:—*Held*: the actual lower rent agreed upon under said circumstances was not, as a matter of principle, "the annual rental value" of the premises for that year within Winnipeg Charter, but, in the absence of any evidence of their rental value other than that upon which the assessment was based & the rent actually paid by the tenant, that actual rent must be taken to be the nearest approach by evidence to the rental value for the year in question.—*NEWTON (W. S.) & CO. v. WINNIPEG CITY*, [1937] 2 W. W. R. 351.—**CAN.**

y xiii. ———.—[In assessing for business tax the "actual rent received" is the annual rental value in the absence of evidence to the contrary.—*NEWTON & CO. v. WINNIPEG*, [1937] 3 D. L. R. 416; 45 Man. L. R. 258.—**CAN.**

hh i. ———.—[*Held*: under City of St. John Assessment Act, 1918, two classes of person are liable to assessment: those who are actual inhabitants & residents, & those who are constructively so by sect. 6(3).—*TENNANT v. ST. JOHN CITY* (1932), 5 M. P. R. 107.—**CAN.**

hh (p. 425) i. ———.—[*LOBLAW GROCERIES CO., LTD. v. TORONTO CORPN.*, [1936] S. C. R. 249; 3 D. L. R. 316.—**CAN.**

fff i. ———.—[*Re STOUT & TORONTO*, [1927] 2 D. L. R. 1100; 60 O. L. R. 313.—**CAN.**

fff ii. ———.—[*Re DONALD MASON & Co. (Ont.)*, [1927] 4 D. L. R. 1061; 61 O. L. R. 350.—**CAN.**

fff iii. ———.—[Money received by manufacturers under fire policies insuring them in respect of loss of net profits that would have accrued had there been no interruption of business caused by fire is income from a business within the meaning of sect. 2 of British Columbia Taxation Act, R. S. B. C., 1921, & accordingly is to be brought into account in computing the net income chargeable to tax under that Act.—*R. v. BRITISH COLUMBIA FIR & CEDAR LUMBER CO., LTD.*, [1932] A. C. 441; 101 L. J. P. C. 113; 147 L. T. 1; 48 T. L. R. 281, P. C.—**CAN.**

fff iv. ———.—[Resp. co. was incorporated to (*inter alia*) "purchase . . . lands & to sell" the same & although it had wide powers, it was apparently formed to acquire & resell at a profit, if possible, the property in question herein. Of its authorised capital of 50,000 shares of \$1 each five shares only were issued. It purchased a certain lot in V. for \$40,000 in 1926, & sold it for \$70,000 in 1928; & the Minister of Finance sought to recover income tax on said difference of \$30,000, which, he contended, was profit made by the co. It had not had, of course, sufficient subscribed capital to make the purchase in the ordinary way & had consummated the deal by obtaining proportionate parts of the purchase-price from its shareholders, in consideration of its undertaking to distribute the anticipated profits among them, & it did so dis-

22. *Holding certificate of free grant entry under Soldier Settlement Act.*—**POPLAR VALLEY RURAL MUNICIPALITY v. MOYER**, [1929] 3 D. L. R. 365; 2 W. W. R. 88; 23 S. L. R. 628.—**CAN.**



furniture. The removal was completed in Apr. 1926, except that a caretaker was left in possession with a few articles of furniture for his use. In Mar. 1927 pltfs. decided to use the premises partly as an elementary school & partly for other purposes. Defts. rated pltfs. in respect of the building for the two periods ending Sept. 30, 1926, & Mar. 31, 1927, & it was admitted that the rate was duly made & confirmed. Pltfs. objected that the rate was invalid, as there was no beneficial occupation by them. Upon their refusing to pay, defts. complained to the justices, who issued a distress warrant, & defts. seized a tramcar belonging to pltfs. Pltfs. did not appeal to quarter sessions, but took proceedings in replevin:—*Held*: (1) pltfs. were not in beneficial occupation during the relevant period, & were not ratable; (2) the jurisdiction of the justices to grant a distress warrant depended on the question of actual occupation within the parish & not on that of beneficial occupation, & as pltfs. had failed to show that the distress was unlawful, the action of replevin failed.—**LONDON COUNTY COUNCIL v. HACKNEY BOROUGH COUNCIL**, [1928] 2 K. B. 588; 97 L. J. K. B. 694; 139 L. T. 407; 92 J. P. 138; 44 T. L. R. 592; 26 L. G. R. 366; (1926–31), 1 B. R. A. 249.

*Annotation*:—*As to* (1) **Consd. Townley Mill Co. (1919). Ltd. v. Oldham Assessment Committee**, [1936] 1 K. B. 585.

42. *Add. Annotations*:—*As to* (1) **Refd. Consett Iron Co. v. Durham County Assessment Committee for No. 5 or North-West Area (1930)**, 99 L. J. K. B. 277; **London Playing Fields Society v. Essex (S. W. Area) Assessment Committee (1930)**, 144 L. T. 233; **St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee (1932)**, 147 L. T. 396; *Re Southern Railway Co. Appeals (1935)*, 152 L. T. 299; **Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee**, [1937] 2 All E. R. 298. *As to* (2) **Consd. Westminster Corpn. v. Southern Ry. Co.**, [1936] 2 All E. R. 322. **Refd. Railway Assessment Authority v. Southern Ry. Co.**, **London County Council v. Southern Ry. Co.**, [1936] 1 All E. R. 26. *As to* (4) **Consd. Townley Mill Co. (1919). Ltd. v. Oldham Assessment Committee**, [1936] 1 K. B. 585. **Refd. Mitcham Golf Course Trustees v. Ereaut**, [1937] 3 All E. R. 450.

62. *Add. Annotation*:—**Refd. Bottomley v. West Derby Assessment Committee, etc., etc. (1931)**, 47 T. L. R. 468.

65. *Add. Annotation*:—**Consd. L. C. C. v. Hackney B. C.**, [1928] 2 K. B. 588.

66. *Add. Annotation*:—**Consd. L. C. C. v. Hackney B. C.**, [1928] 2 K. B. 588.

69. *Add. Annotation*:—**Consd. L. C. C. v. Hackney B. C.**, [1928] 2 K. B. 588.

73. *Add. Annotation*:—**Refd. Re Southern Ry. Co. (1935)**, 153 L. T. 105.

86. *Add. Annotation*:—**Consd. L. C. C. v. Hackney B. C.**, [1928] 2 K. B. 588.

87. *Add. Annotation*:—**Consd. L. C. C. v. Hackney B. C.**, [1928] 2 K. B. 588.

112. *Add. Annotation*:—**Consd. Westminster Corpn. v. Southern Ry. Co.**, [1936] 2 All E. R. 322.

115a. — **Levy of rates in stipendiary district by county council.**—9 & 10 Vict. c. lxx. created a stipendiary justice's district. Under the Act the quarter sessions of the county could levy rates on the district in the same manner as was then authorised for making county rates. There were now two county boroughs under the Local Govt. Act, 1888 (c. 41), in the district:—*Held*: on a question submitted summarily to the ct. under Local Govt. Act, 1888 (c. 4), s. 29, the county council had the power to levy the rates on such part of the stipendiary district as was not included within either of the county boroughs, & the liability of the county boroughs could be redeemed by an adjustment under Local Govt. Act, 1888 (c. 41), s. 32.—*Ex p. STAFFORDSHIRE QUARTER SESSIONS (CHAIRMAN) (1889)*, 54 J. P. 72; 6 T. L. R. 45.

122. *Annotations*:—Delete "**Consd. Jones v. I. R. Comrs., Sweetmeat Automatic Delivery Co. v. I. R. Comrs.**, [1895] 1 Q. B. 484."

*Add. Annotation*:—**Refd. Gee v. Hazleton**, [1932] 1 K. B. 179.

135. *Add. Annotation*:—**Consd. Westminster Corpn. v. Southern Ry. Co.**, [1936] 2 All E. R. 322.

139. *Add. Citation*:—(1926–31), 1 B. R. A. 183.

*Add. Annotations*:—**Apld. Towler v. Thetford Rural Council (1929)**, 99 L. J. K. B. 258. **Refd. Cleobury Mortimer Rural District Council v. Childe**, [1933] 2 K. B. 368.

139a. **Shooting rights.**—**Towler v. Thetford Rural Council**, N<sup>o</sup>. 552b, *post*.

149. *Add. Annotation*:—**Refd. Re Southern Ry. Co. (1935)**, 153 L. T. 105.

150. *Add. Annotation*:—**Consd. Westminster Corpn. v. Southern Ry. Co.**, [1936] 2 All E. R. 322.

154. *Add. Annotations*:—**Consd. Salisbury House Estate v. Fry**, [1930] 1 K. B. 304. **Apld. Towle v. Improved Industrial Dwellings Co.**, 17 Tax Cas. 231. **Refd. Re Southern Ry. Co. (1935)**, 153 L. T. 105.

155. *Add. Annotation*:—**Consd. Westminster Corpn. v. Southern Ry. Co.**, [1936] 2 All E. R. 322.

#### PART I. SECT. 2, SUB-SECT. 3.—B. (f).

f 1. — *Station agent.*—*Held*: not occupying the land in an official capacity under the Crown.—**Re COCHRANE TOWN & KING**, [1925] 2 D. L. R. 550; 56 O. L. R. 477.—**CAN.**

#### PART I. SECT. 2, SUB-SECT. 4.—A.

113 i. *Necessity for.*—**CHRISTCHURCH (MAYOR, ETC.) v. PYNNE, GOULD, GUINNESS**, [1928] N. Z. L. R. 318.—**N.Z.**

#### PART I. SECT. 2, SUB-SECT. 4.—B. (c).

sb. *Licence to cut timber.*—The holder of a permit to cut timber on Dominion lands is not the "occupant" within Rural Municipality Act, R. S. S. 1920, c. 89, of the land included in the berth; & since, in assessing him as such, the assessor acts without jurisdiction, the confirmation of the assessment by the Saskatchewan Assessment Commission does not, under the effect given it by sect. 270 of said Act, prevent him from defending an action to collect the taxes.—**BUCKLAND RURAL MUNICIPALITY v. DONALDSON & HORTON**, [1928] 1

D. L. R. 436; [1928] 1 W. W. R. 40; 22 Sask. L. R. 326.—**CAN.**

sc. *Lessee of right of way.*—A lessee of a portion of the right of way of the Canadian Pacific Railway who is in physical possession thereof is subject to assessment as an "occupant" within the City Act, 1926, s. 433 (3), although the land itself is specially exempted by law from taxation.—**MAPLE LEAF MILLING CO., LTD. v. WEYBURN, CITY OF (Sask.)**, [1929] 4 D. L. R. 1063; 2 W. W. R. 452.—**CAN.**

156. *Add. Annotation:—Consd.* Westminster Corpn. v. Southern Ry. Co., [1936] 2 All E. R. 322.
157. *Add. Annotation:—Consd.* Westminster Corpn. v. Southern Ry. Co., [1936] 2 All E. R. 322.
160. *Add. Annotations:—Consd.* Westminster Corpn. v. Southern Ry. Co., [1936] 2 All E. R. 322. *Refd.* L. C. C. v. Hackney B. C., [1928] 2 K. B. 588.
162. *Add. Annotation:—Consd.* Westminster Corpn. v. Southern Ry. Co., [1936] 2 All E. R. 322.
163. *Add. Annotation:—Consd. Re* Southern Ry. Co. (1935), 153 L. T. 105.
- 163a. ———. ———. *Re* SOUTHERN RY. CO., No. 226qq, *post*.
171. *Add. Annotations:—Consd.* Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1937] 2 All E. R. 298. *Refd.* Manchester Corpn. v. Bolton Assessment Committee & West-houghton Urban District Council (1930), 144 L. T. 618; Railway Assessment Authority v. Southern Ry. Co., London County Council v. Southern Ry. Co., [1936] 1 All E. R. 26.
178. *Add. Annotations:—As to (1) Apld.* Gooding v. Benfleet Urban District Council (1933), 49 T. L. R. 298. *As to (2) Consd.* Westminster Corpn. v. Southern Ry. Co., [1936] 2 All E. R. 322. *Generally, Refd.* New Liverpool Eastham Ferry & Hotel Co., Ltd. v. Ocean Accident & Guarantee Corpn., Ltd. (1929), 112 L. T. 319.
185. *Add. Annotation:—Refd.* Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1936] 1 K. B. 585.
189. *Add. Annotations:—Refd.* Ilford Corpn. v.

Mallinson (1932), 96 J. P. 185; Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1936] 1 K. B. 585; Bertram v. Wightman, [1936] 2 All E. R. 487.

193. *Add. Annotation:—As to (1) Refd.* *Re* Southern Ry. Co. (1935), 153 L. T. 105.

202. *Add. Annotation:—Refd.* Towle v. Improved Industrial Dwellings Co., 17 Tax Cas. 231.

218. *Add. Annotation:—As to (3) Consd.* L. C. C. v. Hackney B. C., [1928] 2 K. B. 588.

#### SUB-SECT. 4.—UNDER RATING AND VALUATION (APPORTIONMENT) ACT, 1928 (C. 44).

**Agricultural hereditaments.]—See** Local Government Act, 1929 (c. 17), s. 67, & Nos. 345a, 552a, 955a, *post*.

- 226a. **Industrial hereditaments—Whether used as factory or workshop—Test to be applied.]—**In determining whether a hereditament occupied & used as a factory is primarily occupied & used for purposes which are not those of a factory it is the actual use to which the hereditament itself is put that has to be considered, & not the use to be made of the products of the hereditament or of the work there carried on.—MOON (LAMBETH REVENUE OFFICER) v. LONDON COUNTY COUNCIL, POTTERIES ELECTRIC TRACTION CO., LTD. v. BAILEY (STOKE-ON-TRENT REVENUE OFFICER), [1931] A. C. 151; 100 L. J. K. B. 153; 144 L. T. 410; 95 J. P. 64; 47 T. L. R. 154; 29 L. G. R. 131; (1926-31), 2 B. R. A. 573, H. L.

*Annotations:—Consd.* Toogood & Sons, Ltd. v. Green (1932), 96 J. P. 219. *Refd.* Bottomley v. West Derby Assessment Committee, etc., etc. [1931], 47 T. L. R. 468; Carmarthen Revenue Officer v. United Dairies (Wholesale), Ltd. (1931), 95 J. P. Jo. 88; Sedgwick v. Watney, Combe, Reid & Co., [1931] A. C. 447.

#### PART I. SECT. 2, SUB-SECT. 5.—C.

*sd.* **Owner rated for whole property.—**Notice that parcels of land sold to specified persons—Whether sufficient notice of change of ownership.—CLEARVIEW, LTD. v. YATALA SOUTH DISTRICT COUNCIL, [1927] S. A. S. R. 558.—AUS.

#### PART I. SECT. 2, SUB-SECT. 6.

202 i. **What amounts to separate occupation.—Flats.]—**Dwelling-houses, each hitherto occupied as the residence of one family, were divided by structural alterations into separate residences, each consisting either of a flat or of a single apartment. This work was done in some cases by the proprietors of the houses, in other cases by lessees. The flats were then let on yearly leases, & the apartments by the month, the rents covering the exclusive use of the flats or apartments, & the use of hall & staircase, central heating & supply of hot water, occupier's rates, & the services of a caretaker who performed a number of duties in connection with the building:—*Held:* as the tenants of the flats & apartments were not merely inmates of the houses under the landlords, but were exclusive occupiers of distinct & separate tenements, each flat & each apartment fell to be separately entered in the Roll at a yearly rent or value representing the proportion of the rent paid to the landlord which could fairly be attributed to the occupation of the heritable subjects.—WRIGHT v. GLASGOW ASSESSOR, [1936] S. C. 344.—SCOT.

#### PART I. SECT. 2, SUB-SECT. 7.

203 i. *Revsd.*, 32 S. O. R. 505.

#### PART I. SECT. 3, SUB-SECT. 2.

b. Delete.

c. For citation read "CANADIAN NIAGARA POWER CO. v. STAMFORD; ELECTRICAL DEVELOPMENT CO. v. STAMFORD; ONTARIO POWER CO. v. STAMFORD.

e i. — **Stock assessed for business tax.]—**Income from stock in a co. assessed for business tax is not exempt from municipal income tax by Assessment Act, R. S. O., 1927, s. 4 (20).—BRADBURN v. PETERBOROUGH, [1934] 3 D. L. R. 684; O. R. 555.—CAN.

#### PART I. SECT. 3, SUB-SECT. 4.

sa. **Agricultural lands & heritages.—Piggery.]—Held:** entitled to benefit of Act.—INLAND REVENUE v. RENFREWSHIRE ASSESSOR, [1930] S. C. 345.—SCOT.

sb. — **Golf course—Additional rent paid for grazing rights.]—Held:** not entitled to benefit of Act.—INLAND REVENUE v. ROSS & CROMARTY, [1930] S. C. 404.—SCOT.

sc. — **House & garden adjoining nursery garden.]—Held:** not entitled to benefit of Act.—LANARKSHIRE ASSESSOR v. FINDLAY BROS., [1930] S. C. 407.—SCOT.

sd. — ——. *—Held:* entitled to benefit of Act.—DOUGLAS v. EDINBURGH ASSESSOR, [1931] S. C. 407.—SCOT.

se. — **House & poultry farm.]—Held:** they did not fall to be assessed as a *unum quid*.—CARTER v. LANARKSHIRE ASSESSOR, [1932] S. C. 424.—SCOT.

sf. — **Farm for breeding silver foxes.]—Held:** not entitled to benefit of Act.—INLAND REVENUE v. AUDROSS ESTATES CO., [1930] S. C. 487.—SCOT.

sg. — **House occupied by chief constable with grazing ground attached.]—Held:** not entitled to benefit of Act.—INLAND REVENUE v. BANFF ASSESSOR, [1930] S. C. 552.—SCOT.

sh. — **Farmhouse sublet as dwelling-house.]—Held:** not entitled to benefit of Act.—FIFE ASSESSOR v. WEMYSS'S TRUSTEES, [1931] S. C. 412.—SCOT.

sk. — **Plot rented for future building—Ploughed for crop.]—Held:** entitled to benefit of Act.—ABERDEEN ESTATES CO. v. EDINBURGH ASSESSOR, [1935] S. C. 868.—SCOT.

st. — **Dwelling-houses erected by small landholders for own use.]—**Dwelling-houses erected or acquired by small landholders for their own occupation & use on holdings of which they are tenants, & which are not larger than is reasonably necessary for their accommodation, are agricultural heritages & entitled to derating.—INVERNESSSHIRE ASSESSOR v. MACKAY, [1936] S. C. 300.—SCOT.

si. **Industrial lands & heritages.—Factory or workshop—Meaning of "used."]—**In determining the question whether "silent works," i.e., works standing idle were or were not industrial lands & heritages:—*Held:* the word "used" did not mean "fit & ready for immediate use," but meant "actually in use," subject to the qualification that works in which for the moment no work was being done owing to some temporary cause, as

**226b. ——— Potential user insufficient.]**

—The words "occupied & used" as a factory in the definition of "industrial hereditament" in Rating & Valuation (Apportionment) Act, 1928 (c. 44), s. 3 (1), imply actual, & not merely potential user. Therefore where a cotton-mill, though fully equipped & ready to restart work at any time, had, at the material date been closed for fourteen months owing to trade depression:—*Held*: it was not an industrial hereditament.—*YATES (REVENUE OFFICER FOR BURNLEY ASSESSMENT AREA) v. BURNLEY RATING AUTHORITY* (1933), 97 J. P. 226; 31 L. G. R. 322. D. C.

**226c. ——— Particular instances—Printing**

**works of tramway undertaking.]**—The owners of a tramway undertaking occupied certain printing offices & works used exclusively for the printing of tramway tickets & other matter required for the purposes of their undertaking. The hereditament in question was a factory within the Factory & Workshop Act, 1901 (c. 22):—*Held*: the hereditament was not primarily occupied & used for purposes which were not those of a factory or workshop & was therefore an industrial hereditament.—*MOON (LAMBETH REVENUE OFFICER) v. LONDON COUNTY COUNCIL*, [1931] A. C. 151; 100 L. J. K. B. 153; 144 L. T. 410; 95 J. P. 64; 47 T. L. R. 154;

contrasted with works for which there was no reasonable prospect of a resumption of business in the near future, might be regarded as "actually in use" for the purposes of the sect.—*MITCHELL BROS. v. INLAND REVENUE*, *INLAND REVENUE v. STEPHENS, SONS & Co.*, [1930] S. C. 531.—*SCOT*.

**sk. ——— Rooms in decorators' premises where paints mixed.]**—*Held*: not entitled to benefit of Act.—*INLAND REVENUE v. EDINBURGH ASSESSOR (SINCLAIR'S CASE)*, [1930] S. C. 342.—*SCOT*.

**sl. ——— Editorial department of newspaper premises.]**—*Held*: having regard to Sects. 4 (2) & 9 (6) of the Act, & Factories Act, 1901, s. 149 (4), the part of the premises in question was used for a purpose other than the manufacturing process carried on in the other part of the premises, & there must be apportionment of the valuation.—*OUTRAM & Co. v. INLAND REVENUE*, [1930] S. C. 351.—*SCOT*.

**sm. ——— Fish hatchery & fish-breeding ponds.]**—*Held*: not entitled to benefit of Act.—*INLAND REVENUE v. HOWIETOUN & NORTHERN FISHERIES Co.*, [1930] S. C. 355.—*SCOT*.

**sn. ——— Saddler's workshop & smithy forming part of contractor's stables.]**—*Held*: not entitled to benefit of Act, as being merely ancillary to contractor's business.—*WORDIE & Co. v. INLAND REVENUE*, [1930] S. C. 365.—*SCOT*.

**so. ——— Repair shop & garage of contractor.]**—*Held*: not entitled to benefit of Act.—*WORDIE v. INLAND REVENUE* (No. 2), [1930] S. C. 370.—*SCOT*.

**sp. ——— Estate sawmill.]**—*Held*: not entitled to benefit of Act. The subject was not a factory or workshop, in respect that the sawmill was not carried on "by way of trade or for purposes of gain."—*INLAND REVENUE v. PERTSHIRE ASSESSOR*, [1930] S. C. 379.—*SCOT*.

**sq. ——— Recreation grounds for employees of industrial company.]**—*Held*: not entitled to benefit of Act, as not being *unum quid* with factory.—

29 L. G. R. 131; (1926–31), 2 B. R. A. 573, H. L.; *affg.*, [1931] 1 K. B. 385, C. A.

**226d. ——— Omnibus repair shop.]**

An omnibus co. operating a fleet of motor omnibuses occupied & used a hereditament, so far as material to the present appeal, for the manufacture of spare parts for the fleet & for other manufacturing & repair processes distinct from ordinary maintenance in connection with the fleet. The hereditament was registered as a factory:—*Held*: the hereditament was not occupied & used for purposes which were not those of a factory or workshop; (2) the manufacture of an article needed to maintain differed from "maintenance" as used in 1928 Act, s. 3 (2), & the hereditament, except as to one part thereof used as a paint shop, was a factory within the sub-sect. & was an industrial hereditament.—*POTTERIES ELECTRIC TRACTION Co., LTD. v. BAILEY (STOKE-ON-TRENT REVENUE OFFICER)*, [1931] A. C. 151; 100 L. J. K. B. 153; 144 L. T. 410; 95 J. P. 64; 47 T. L. R. 154; 29 L. G. R. 131, H. L.; (1926–31), 2 B. R. A. 573; *reversg.* S. C. *sub nom.* *BAILEY (STOKE-ON-TRENT REVENUE OFFICER) v. POTTERIES ELECTRIC TRACTION Co., LTD.*, [1931] 1 K. B. 385, C. A.

*Annotations*:—*Consd.* Bottomley v. West Derby Assessment Committee, etc., etc. (1931), 47 T. L. R. 468; Cardiff Revenue Officer v. Cardiff Assessment Committee, etc., etc. [1931] 1 K. B. 47.

*INLAND REVENUE v. FALKIRK ASSESSOR*, [1930] S. C. 402.—*SCOT*.

**sr. ——— Corporation slaughterhouses.]**—*Held*: entitled to benefit of the Act.—*INLAND REVENUE v. EDINBURGH ASSESSOR (SLAUGHTERHOUSES CASE)*, [1930] S. C. 429.—*SCOT*.

**st. ——— Plasterers' premises.]**—*Held*: not entitled to benefit of Act.—*INLAND REVENUE v. M'INTYRE & Co.*, [1930] S. C. 465.—*SCOT*.

**sv. ——— Metal merchants' premises where scrap metal cut & bundled for blast furnaces.]**—*Held*: the metals were "adapted for sale" within Factory & Workshop Act, 1901, s. 149, & so the premises were entitled to benefit of the Act.—*BROWN, MACFARLANE & Co. v. INLAND REVENUE*, *INLAND REVENUE v. EDINBURGH ASSESSOR (WAUGH'S CASE)*, [1930] S. C. 468.—*SCOT*.

**sw. ——— Rag merchants' & sack restorers' premises.]**—*Held*: not entitled to benefit of Act, since the articles were not altered or "adapted for sale."—*INLAND REVENUE v. EASON BROS.*, [1930] S. C. 480.—*SCOT*.

**sx. ——— Joiner's workshop belonging to co-operative society & doing work for society's property.]**—*Held*: not entitled to benefit of Act, in respect that work carried on was not "by way of trade or for purposes of gain" with Factory & Workshop Act, 1901.—*INLAND REVENUE v. PAISLEY PROVIDENT CO-OPERATIVE SOCIETY*, [1930] S. C. 497.—*SCOT*.

**sy. ——— Premises for demolishing & reconditioning motor cars & selling parts & scrap.]**—*Held*: entitled to benefit of Act, in respect that articles were altered & adapted for sale.—*INLAND REVENUE v. CAPLAN* [1930] S. C. 507.—*SCOT*.

**sz. ——— Premises of asphalt work contractors.]**—*Held*: not entitled to benefit of Act.—*INLAND REVENUE v. CURRIE & Co.*, [1930] S. C. 513.—*SCOT*.

**sa. ——— Plumbers' premises.]**—*INLAND REVENUE v. COLIN TURNER, LTD.*, [1930] S. C. 520.—*SCOT*.

**sb. ——— Warehouse, excise office, railway siding, & pond of distillery.]**—*Held*: not entitled to benefit of Act.—*DISTILLERS Co. v. EDINBURGH ASSESSOR*, *DISTILLERS Co. v. GLASGOW ASSESSOR*, [1931] S. C. 393.—*SCOT*.

**sg. ——— Peat moss.]**—*Held*: not entitled to benefit of Act.—*ABERDEENSHIRE ASSESSOR v. MARK'S TRUSTEES*, [1934] S. C. 204.—*SCOT*.

**sh. ——— ———.]**—*Held*: not entitled to benefit of Act.—*LANARKSHIRE ASSESSOR v. JEFFRAY'S TRUSTEES*, [1935] S. C. 381.—*SCOT*.

**sl. ——— Blacksmith's house & shop.]**—*Held*: entitled to benefit of Act.—*INLAND REVENUE v. WIGTOWNSHIRE ASSESSOR* (1930), S. L. T. 381.—*SCOT*.

**sd. ——— ———. Bakehouse, shop & house.]**—*Held*: entitled to benefit of Act.—*INLAND REVENUE v. WIGTOWNSHIRE ASSESSOR* (1930), S. L. T. 381.—*SCOT*.

**se. ——— ———. Joiner's house & shed.]**—*Held*: not entitled to benefit of Act.—*INLAND REVENUE v. WIGTOWNSHIRE ASSESSOR* (1930), S. L. T. 381.—*SCOT*.

**sf. ——— ———. Exceptions—Dwelling-house—Country bakehouse.]**—*Held*: entitled to benefit of Act.—*INLAND REVENUE v. WIGTOWNSHIRE ASSESSOR*, [1930] S. C. 543.—*SCOT*.

**sf. ——— ———. Country smithy.]**—*Held*: entitled to benefit of Act.—*INLAND REVENUE v. WIGTOWNSHIRE ASSESSOR*, [1930] S. C. 543.—*SCOT*.

**so. ——— ———. Country joiner's shop.]**—*Held*: not entitled to benefit of Act.—*INLAND REVENUE v. WIGTOWNSHIRE ASSESSOR*, [1930] S. C. 543.—*SCOT*.

**st. ——— ———. Retail shop—Workshop of garage.]**—*Held*: not entitled to benefit of Act.—*INLAND REVENUE v. EDINBURGH ASSESSOR (HUNTER'S CASE)*, [1930] S. C. 362.—*SCOT*.

**sg. ——— ———.]**—*Held*: not entitled to benefit of Act.—*SCOTTISH MOTOR TRACTION Co. v. EDINBURGH ASSESSOR*, *WYLLIES, LTD. v. GLASGOW ASSESSOR*, [1931] S. C. 416.—*SCOT*.

**226e.** ———— **Barge building & repairing yard.]—Held:** entitled to benefit of Act.—**BARTON (POPLAR REVENUE OFFICER) v. UNION LIGHTERAGE CO., LTD.,** [1931] 1 K. B. 385; 100 L. J. K. B. 1; 143 L. T. 650; 94 J. P. 177; 46 T. L. R. 601; 74 Sol. Jo. 581; 28 L. G. R. 550; (1926–31), 2 B. R. A. 742, C. A.

**226f.** ———— **Coffee blending warehouse.]—Held:** entitled to benefit of Act.—**BARTON (STEPNEY REVENUE OFFICER) v. TWINING (R.) & CO., LTD.,** [1931] 1 K. B. 385; 100 L. J. K. B. 1; 143 L. T. 650; 94 J. P. 177; 46 T. L. R. 601; 74 Sol. Jo. 688; 28 L. G. R. 550; (1926–31), 2 B. R. A. 730, C. A.

*Annotation:—Folld. Toogood & Sons, Ltd. v. Green, Lipton, Ltd. v. Barton* (1931), 47 T. L. R. 565.

**226g.** ———— **Tea blending premises.]—**Resps. occupied & used premises which were registered under the Factory & Workshops Acts. They imported teas from Ceylon, Java, India, China, & other foreign countries. The teas were brought to the premises in question for blending, sifting, cutting, milling, & packing for export abroad for sale wholesale to the public as tea. No tea went out of the premises until after blending, & no blended teas from the premises were supplied or distributed to any part of the United Kingdom, & no blended teas came into the premises. Apart from the basement, which was used & occupied solely as a tin-box factory, the premises were used (a) as premises for blending, sifting, cutting, milling, & packing teas imported from abroad so as to make the teas suitable for export abroad for sale wholesale to the public as tea; & (b) as premises for exporting abroad for sale to the public as blended tea the tea leaves so blended. There was no finding that wholesale business was carried on on the premises:—**Held:** the primary purpose of the occupation & use of the premises was a factory purpose, & therefore the premises must be derated.—**LIPTON, LTD. v. BURTON,**

[1932] 1 K. B. 204; 100 L. J. K. B. 529; 145 L. T. 476; 95 J. P. 211; 47 T. L. R. 565; 29 L. G. R. 642; (1926–31), 2 B. R. A. 940, C. A.

**226h.** ———— **Cold storage.]—A** hereditament was occupied & used for the refrigeration & the refrigerated storage of food & other produce. The hereditament was a factory, & the refrigeration was effected by means of an elaborate process involving the use of machinery. Seventy-five per cent. of the produce received was already refrigerated & was kept by the occupiers in that state:—**Held:** the hereditament was primarily occupied for the purposes of storage within exception (d) in 1928 Act, s. 3 (1).—**UNION COLD STORAGE CO., LTD. v. BANCROFT (MANCHESTER REVENUE OFFICER),** [1931] A. C. 459; 100 L. J. K. B. 271; 145 L. T. 73; 95 J. P. 115; 47 T. L. R. 308; 29 L. G. R. 279; (1926–31), 2 B. R. A. 886, H. L.; *affg.*, [1931] 1 K. B. 385, C. A.

*Annotations:—Distd. Carmarthen Revenue Officer v. United Dairies (Wholesale), Ltd.* (1931), 95 J. P. Jo. 88. *Refd.* *Union Cold Storage Co. v. Moon*, [1932] 2 K. B. 648.

*Compare No. 226ss, post.*

**226j.** ———— **Premises where seeds cleaned for sale.]—A** seed merchant's warehouse was used for the cleansing & preparation for sale of seeds by the use of machinery. The revenue officer objected to the inclusion of this hereditament in the special list as an industrial hereditament on the ground that it was primarily occupied & used for the purposes of wholesale distributive business:—**Held:** it was an industrial hereditament.—**HINES (IPSWICH REVENUE OFFICER) v. EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCN., LTD.,** [1931] A. C. 456; 100 L. J. K. B. 271; 145 L. T. 73; 95 J. P. 115; 47 T. L. R. 308; 29 L. G. R. 279; (1926–31), 2 B. R. A. 886, H. L.; *affg.*, [1931] 1 K. B. 385, C. A.

*Annotation:—Consd. Toogood & Sons, Ltd. v. Green* (1932), 96 J. P. 219.

**sh.** ———— **Bespoke tailor's premises.]—Held:** as to certain premises, entitled to benefit of Act; as to other premises, not so entitled.—**INLAND REVENUE v. GUNN, COLLIE & TOPPING,** [1930] S. C. 389.—**SCOT.**

**sk.** ———— **—.]—Held:** not entitled to benefit of Act.—**ABERDEEN ASSESSOR v. COLLIE,** [1932] S. C. 304.—**SCOT.**

**sl.** ———— **—.]—Held:** entitled to benefit of Act.—**BRODIE & SONS v. GLASGOW ASSESSOR,** [1932] S. C. 373.—**SCOT.**

**sm.** ———— **Bootmaker's premises.]—INLAND REVENUE v. MORFAT,** [1930] S. C. 412.—**SCOT.**

**sn.** ———— **Boot repairing premises.]—Held:** not entitled to benefit of Act.—**GLASGOW ASSESSOR v. MATHIESON,** [1931] S. C. 718.—**SCOT.**

**so.** ———— **Photographer's shop & studio.]—Held:** not entitled to benefit of Act.—**INLAND REVENUE v. HAMPTON,** [1930] S. C. 419.—**SCOT.**

**sp.** ———— **Bakery & baker's shop.]—Held:** entitled to benefit of the Act.—**INLAND REVENUE v. MALCOLM,** [1930] S. C. 437.—**SCOT.**

**sq.** ———— **—.]—Held:** not entitled to benefit of Act.—**BROWN (M. & A.) v. GLASGOW ASSESSOR,** [1932] S. C. 354.—**SCOT.**

**sr.** ———— **Saddler's shop & workshop.]—Held:** not entitled to benefit of Act.—**INLAND REVENUE v. EDINBURGH ASSESSOR (GIBSON'S & ALLEN'S CASES),** [1930] S. C. 443.—**SCOT.**

**st.** ———— **Jeweller's shop & workshop.]—Held:** not entitled to benefit of Act.—**INLAND REVENUE v. EDINBURGH ASSESSOR (GIBSON'S & ALLEN'S CASES),** [1930] S. C. 443.—**SCOT.**

**sv.** ———— **Shop for the repair of weighing-machines.]—Held:** not entitled to benefit of Act.—**INLAND REVENUE v. AVERY (W. & T.),** [1930] S. C. 490.—**SCOT.**

**sw.** ———— **—.]—Held:** not entitled to benefit of Act.—**AVERY (W. & T.) v. GLASGOW ASSESSOR,** [1932] S. C. 421.—**SCOT.**

**sx.** ———— **Creamery where milk pasteurised, chilled, & bottled, prior to distribution.]—Held:** entitled to benefit of Act.—**INLAND REVENUE v. TRARENT CO-OPERATIVE SOCIETY,** [1930] S. C. 503.—**SCOT.**

**sy.** ———— **Plumbers' premises.]—INLAND REVENUE v. COLIN TURNER, LTD.,** [1930] S. C. 520.—**SCOT.**

**sz.** ———— **Premises where machinery reconditioned & sold.]—Held:** not entitled to benefit of Act.—**THOS. W. WARD, LTD. v. GLASGOW ASSESSOR,** [1931] S. C. 438.—**SCOT.**

**sa.** ———— **Workshops of electrical engineers.]—Held:** not entitled to benefit of Act.—**M'WHIRTER & SONS v. GLASGOW ASSESSOR,** [1932] S. C. 407.—**SCOT.**

**sb.** ———— **Sawmakers.]—Held:** not entitled to benefit of Act.—**GLASGOW ASSESSOR v. WRIGHT, BINDLEY & GELL,** [1932] S. C. 393.—**SCOT.**

**sc.** ———— **Premises of lorry & marine engine builders.]—Held:** entitled to benefit of Act.—**GLASGOW ASSESSOR v. THORNYCROFT (JOHN I.) & CO.,** [1932] S. C. 387.—**SCOT.**

**sd.** ———— **Engraver's shop.]—Held:** entitled to benefit of Act.—**ABERDEEN ASSESSOR v. LUMSDEN'S HEIRS,** [1932] S. C. 379.—**SCOT.**

**se.** ———— **Horse-shoers' premises.]—Held:** not entitled to benefit of Act.—**WEIR & SON v. GLASGOW ASSESSOR,** [1932] S. C. 368.—**SCOT.**

**sf.** ———— **Workshops of co-operative society.]—Held:** entitled to benefit of Act.—**ST. CUTHBERT'S CO-OPERATIVE ASSOCN. v. EDINBURGH ASSESSOR,** [1931] S. C. 386.—**SCOT.**

**sg.** ———— **—.]—Held:** not entitled to benefit of Act.—**ST. CUTHBERT'S CO-OPERATIVE ASSOCN. v. EDINBURGH ASSESSOR,** [1932] S. C. 340.—**SCOT.**

**sh.** ———— **—.]—Held:** not entitled to benefit of Act.—

**226k.** ————.]—*Held*: entitled to benefit of Act.—**PRITCHARD (CARDIFF REVENUE OFFICER) v. LEWIS (WILLIAM) & SONS**, [1931] 1 K. B. 386; 100 L. J. K. B. 1; 143 L. T. 650; 94 J. P. 177; 46 T. L. R. 601; 74 Sol. Jo. 661; 28 L. G. R. 550; (1926–31), 2 B. R. A. 742, C. A.

*Annotation*:—**Reld**. **Toogood & Sons, Ltd. v. Green** (1932), 101 L. J. K. B. 453.

**226l.** ————.]—*Applts.*, a firm of seed merchants, owned & occupied a hereditament consisting of a large warehouse, used for cleaning & testing seeds of their own growth for the purposes of sale, & certain subsidiary buildings, including offices, which were admittedly not used for industrial purposes. The hereditament was registered as a factory. A claim that the hereditament was an industrial hereditament was opposed by the Crown on the ground that the premises were primarily occupied & used for the purposes of a retail shop. By a special case stated it was found that all the seeds were sold to customers other than the trade, that orders for the same were received by applts. at their offices, & that the seeds were despatched from the warehouse in fulfilment of such orders. At the hearing in the House of Lords, in answer to a request by the House for further information as to the exact nature

of the uses to which the hereditament was put, it was agreed that the seeds were sold in approximately equal quantities to trade customers & to customers other than the trade, that the retail sales were effected either by travellers or by letters addressed to the hereditament or by telephone; that the offices had, none of the physical features of a shop, & that the applts. had no accommodation adapted for the purpose of the physical resort of customers:—*Held*: the hereditament was not primarily occupied & used for the purposes of a retail shop & it was an industrial hereditament.—**TOOGOOD & SONS, LTD. v. GREEN**, [1932] A. C. 663; 101 L. J. K. B. 453; 147 L. T. 201; 96 J. P. 249; 48 T. L. R. 463; 76 Sol. Jo. 458; 30 L. G. R. 301, H. L.

*Annotations*:—**Consd.** **McGowan v. Osgoldcross Assessment Committee**, West Riding of Yorkshire, [1936] 2 All E. R. 170; **Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee**, [1937] 2 All E. R. 368.

**226m.** ————.]—*Wool sorters.*]—*Held*: entitled to benefit of Act.—**WEATHERHEAD (BRADFORD REVENUE OFFICER) v. BRADFORD ASSESSMENT COMMITTEE & LAYCOCK, SON & CO., LTD.**, [1931] 1 K. B. 386; 100 L. J. K. B. 1; 143 L. T. 650; 94 J. P. 177; 46 T. L. R. 601; 74 Sol. Jo. 628; 28 L. G. R. 550; (1926–31), 2 B. R. A. 632, C. A.

**DALZIEL CO-OPERATIVE SOCIETY v. MOTHERWELL & WISHAW ASSESSOR**, **CARLUKE CO-OPERATIVE SOCIETY v. LANARKSHIRE ASSESSOR**, [1932] S. C. 413.—**SCOT.**

**sj.** ————.]—*Motor repair shop.*]—*Held*: entitled to benefit of Act.—**GLASGOW ASSESSOR v. HENDERSON & Co.**, [1932] S. C. 337.—**SCOT.**

**sk.** ————.]—*Monumental sculptor's yards & workshops.*]—*Held*: entitled to benefit of Act.—**MUIR & GRAY v. GLASGOW ASSESSOR**, [1932] S. C. 313.—**SCOT.**

**sl.** ————.]—*Electrical repair shop acting for insurance company.*]—A co., whose principal business was the repair of electrical machines, occupied premises consisting of a large engineering shop & the ordinary adjuncts. The premises bore no resemblance, either internally or externally, to a retail shop. No provision was made for the reception of customers, & the bulk of the co.'s business was done to the orders of an insurance co., one of the conditions of whose policies was that, in the event of the breakdown of machinery insured, the insurance co. could either repair the machinery or pay for its repair at their option:—*Held*: the insurance co. occupied a position analogous to that of a middleman, & that, in the whole circumstances, the subjects did not fall within the exception of a "retail shop" but fell to be entered as "industrial lands & heritages."—**BRITISH ELECTRICAL REPAIRS, LTD. v. GLASGOW ASSESSOR**, [1933] S. C. 322.—**SCOT.**

**sn.** ————.]—*Distributive wholesale business—Wholesale seed merchants' premises where seeds cleaned, stored, & sold.*]—*Held*: not entitled to benefit of Act.—**INLAND REVENUE v. DONALDSON & Co.**, [1930] S. C. 348.—**SCOT.**

**so.** ————.]—*Premises of wholesale manufacturing chemists also dealing in proprietary medicines.*]—*Held*: the premises were industrial, but were subject to apportionment.—**INLAND REVENUE v. HATHKICK & Co.**, [1930] S. C. 359.—**SCOT.**

**sp.** ————.]—*Premises where proprietary whisky blended, bottled,*

*boxed, & dispatched.*]—*Held*: not entitled to benefit of Act.—**INLAND REVENUE v. JOHNNIE WALKER & SONS**, [1930] S. C. 372.—**SCOT.**

**sq.** ————.]—*Held*: entitled to benefit of Act.—**BUCHANAN (JAMES) & Co. v. GLASGOW ASSESSOR**, [1932] S. C. 358.—**SCOT.**

**sr.** ————.]—*Factory for treating brewers' draff, grain, & yeast.*]—*Held*: entitled to benefit of Act.—**INLAND REVENUE v. BREWERS FOOD SUPPLY Co. (No. 2)**, [1930] S. C. 383.—**SCOT.**

**st.** ————.]—*Warehouse of glass manufacturers where glass cut to suit customers.*]—*Held*: not entitled to benefit of Act.—**PILKINGTON BROS. v. INLAND REVENUE**, [1930] S. C. 387.—**SCOT.**

**sv.** ————.]—*Held*: entitled to benefit of Act.—**PILKINGTON BROS. v. GLASGOW ASSESSOR**, [1932] S. C. 330.—**SCOT.**

**sw.** ————.]—*Premises for the repair of packing cases & washing of bottles of whisky blenders.*]—*Held*: not entitled to benefit of Act.—**WHITE HORSE DISTILLERS v. INLAND REVENUE**, [1930] S. C. 426.—**SCOT.**

**svv.** ————.]—*Wool brokers' & Wool merchants' premises.*]—*Held*: not entitled to benefit of Act.—**M'LEOD & SONS v. INLAND REVENUE**, [1930] S. C. 434.—**SCOT.**

**swv.** ————.]—*Brewers' premises where beer chilled, carbonised, bottled, packed, & dispatched.*]—*Held*: not entitled to benefit of Act.—**INLAND REVENUE v. MACLACHLAN, LTD.**, [1930] S. C. 449.—**SCOT.**

**sxx.** ————.]—*Held*: not entitled to benefit of Act.—**INLAND REVENUE v. WILLIAM YOUNGER & Co.**, [1930] S. C. 548.—**SCOT.**

**sy.** ————.]—*Premises for oil-blending.*]—*Held*: not entitled to benefit of Act.—**INLAND REVENUE v. SHARP & Co.**, [1930] S. C. 463.—**SCOT.**

**sz.** ————.]—*Printing machine manufacturers' distributing depot—Old machines taken in part payment, reconditioned & sold.*]—*Held*: not entitled

to benefit of Act.—**INLAND REVENUE v. DAWSON, PAYNE & ELLIOTT**, [1930] S. C. 493.—**SCOT.**

**saa.** ————.]—*Creamery where milk pasteurised, chilled, & bottled, prior to distribution.*]—*Held*: entitled to benefit of Act.—**INLAND REVENUE v. TRANENT CO-OPERATIVE SOCIETY**, [1930] S. C. 503.—**SCOT.**

**sbb.** ————.]—*Premises where coffee essence bottled & pasteurised.*]—*Held*: entitled to benefit of Act.—**PATERSON & SONS v. GLASGOW ASSESSOR**, [1931] S. C. 432.—**SCOT.**

**scc.** ————.]—*Warehouse in Scotland of English brewery used for quieting, fining, bottling, & maturing beer.*]—*Held*: not entitled to benefit of Act.—**INLAND REVENUE v. WHITBREAD & Co.**, [1930] S. C. 516.—**SCOT.**

**sdd.** ————.]—*Premises where grain cleaned & dressed to make it fit for sale.*]—*Held*: entitled to benefit of Act.—**INLAND REVENUE v. ABERDEEN COMMERCIAL CO., INLAND REVENUE v. HUTCHESON**, [1930] S. C. 555.—**SCOT.**

**see.** ————.]—*Wholesale produce dealers & ham curers.*]—*Held*: not entitled to benefit of Act.—**LAIRD & Co. v. GLASGOW ASSESSOR**, [1931] S. C. 442.—**SCOT.**

**sff.** ————.]—*Purposes of storage—Duty-free warehouse of distillery.*]—*Held*: not entitled to benefit of Act.—**DISTILLERS Co. v. INLAND REVENUE**, [1930] S. C. 329.—**SCOT.**

**sgg.** ————.]—*Held*: not entitled to benefit of Act.—**SCOTTISH MALT DISTILLERS, LTD. v. INLAND REVENUE**, [1930] S. C. 335.—**SCOT.**

**shh.** ————.]—*Premises of cold storage company.*]—*Held*: not entitled to benefit of Act.—**UNION COLD STORAGE Co. v. INLAND REVENUE**, [1930] S. C. 337.—**SCOT.**

**sjj.** ————.]—*Wholesale seed merchants' premises where seeds cleaned, stored, & sold.*]—*Held*: not entitled to benefit of Act.—**INLAND REVENUE v. DONALDSON & Co.**, [1930] S. C. 348.—**SCOT.**

**skk.** ————.]—*Contractor's building where fodder cut, crushed, & mixed by machinery.*]—*Held*: not entitled to benefit of Act.—**WORDIE & Co. v.**

**226n.** ——— **Scrap metal works.**—*Held*: entitled to benefit of Act.—**PICKIN (LANGBAURGH REVENUE OFFICER) v. LANGBAURGH ASSESSMENT COMMITTEE & ROBERT CHEYNE & Co., LTD.,** [1931] 1 K. B. 386; 100 L. J. K. B. 1; 143 L. T. 650; 46 T. L. R. 601; 74 Sol. Jo. 629; (1926–31), 2 B. R. A. 742, C. A.

**226o.** ——— **—.**—*Held*: entitled to benefit of Act.—**LOFTHOUSE (LANGBAURGH REVENUE OFFICER) v. LANGBAURGH ASSESSMENT COMMITTEE & A. BAINBRIDGE, LTD.,** [1931] 1 K. B. 386; 100 L. J. K. B. 1; 143 L. T. 650; 46 T. L. R. 601; 74 Sol. Jo. 629; (1926–31), 2 B. R. A. 742, C. A.

**226p.** ——— **Rag sorters.**—A rag merchant's warehouse was occupied & used, as to one-third of its area, for the grading, blending & sorting of rags, & as to two-thirds, for the storage of rags (a) awaiting these processes; (b) in the course of preparation; & (c) fully dealt with & ready for despatch to the rag merchant's customers. The rags, after being subjected to the above processes, were sold wholesale to heavy woollen cloth manufacturers for use in the heavy woollen cloth industry, & until so treated were useless for that purpose. The revenue officer objected to the inclusion of these premises in the special list as an industrial hereditament, on the ground that the premises were primarily occupied & used for the purposes of wholesale distributive business or for the purposes of storage:—*Held*: (1) the hereditament was primarily occupied & used not for the purposes of wholesale distributive business, but for the conversion of the articles which entered the hereditaments into finished & saleable articles by means of the processes to which they were there subjected, & that this was an adaptation for sale; (2) the storage was merely incidental to those processes. Therefore the hereditament was an industrial

hereditament.—**KAYE (DEWSBURY REVENUE OFFICER) v. BURROWS & DEWSBURY ASSESSMENT COMMITTEE,** [1931] A. C. 454; 100 L. J. K. B. 271; 145 L. T. 73; 95 J. P. 115; 47 T. L. R. 308; 29 L. G. R. 279; (1926–31), 2 B. R. A. 886, H. L.; *affg.*, [1931] 1 K. B. 385, C. A.

**226q.** ——— **Bakehouse & baker's shop.**—*Resp.* carried on a retail business in bread & confectionery in a hereditament comprising a shop with living rooms over & a bakehouse in the rear:—*Held*: the bakehouse, which made goods for the business, although a factory, was an ordinary part of a baker's shop, & the whole hereditament was primarily occupied & used for the purposes of a retail shop, & was therefore not an industrial hereditament.—**FINN (WIMBLEDON REVENUE OFFICER) v. KERSLAKE,** [1931] A. C. 457; 100 L. J. K. B. 271; 145 L. T. 73; 95 J. P. 115; 47 T. L. R. 308; 29 L. G. R. 279; (1926–31), 2 B. R. A. 886, H. L.; *reversg.*, [1931] 1 K. B. 385, C. A.

*Annotations*:—**Distd. Toogood & Sons, Ltd. v. Green** (1932), 96 J. P. 249. **Follad. Wilkinson v. Sibley**, [1932] 1 K. B. 194. **Consd. McGowan v. Osgoldcross Assessment Committee, West Riding of Yorkshire**, [1936] 2 All E. R. 170; **Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee**, [1937] 2 All E. R. 368.

**226r.** ——— **—.**—*Held*: entitled to benefit of Act.—**LUTON REVENUE OFFICER v. DEELEY,** [1931] 1 K. B. 386; 100 L. J. K. B. 1; 143 L. T. 650; 94 J. P. 177; 46 T. L. R. 601; 74 Sol. Jo. 596; 28 L. G. R. 550; (1926–31), 2 B. R. A. 742, C. A.

**226s.** ——— **Motor repair shop & garage.**—A garage & motor repair depot was occupied & used for repairing motor cars, motor boats & agricultural tractors brought or sent to the premises by the owners, for garaging cars, & for the sale of petrol & small motor accessories, but the greater part of the business there carried on consisted in the repair of motor cars:—*Held*: the hereditament was primarily occupied & used for the

INLAND REVENUE, [1930] S. C. 365.—**SCOT.**

**sil.** ——— **Factory for treating brewers' draff, grain, & yeast.**—*Held*: entitled to benefit of Act.—**INLAND REVENUE v. BREWERS FOOD SUPPLY CO. (No. 2),** [1930] S. C. 383.—**SCOT.**

**smm.** ——— **Premises of public works contractor.**—*Held*: not entitled to benefit of Act.—**INLAND REVENUE v. MELVILLE, DUNDAS & WHITSON,** [1930] S. C. 477.—**SCOT.**

**snn.** ——— **Warehouse in Scotland of English brewery used for quieting, fining, bottling, & maturing beer.**—*Held*: not entitled to benefit of Act.—**INLAND REVENUE v. WHITBREAD & Co.,** [1930] S. C. 516.—**SCOT.**

**soo.** ——— **Wholesale produce dealers & ham curers.**—*Held*: not entitled to benefit of Act.—**JAIRD & Co. v. GLASGOW ASSESSOR,** [1931] S. C. 442.—**SCOT.**

**spp.** ——— **Premises where machinery reconditioned & sold.**—*Held*: not entitled to benefit of Act.—**THOS. W. WARD, LTD. v. GLASGOW ASSESSOR,** [1931] S. C. 438.—**SCOT.**

**srr.** ——— **Primary purpose other than that of factory or workshop—Refuse destructor of town council.**—*Held*: not entitled to benefit of Act.—**PAISLEY ASSESSOR v. INLAND REVENUE,** [1930] S. C. 339.—**SCOT.**

**stt.** ——— **Photographer's shop & studio.**—*Held*: not entitled to

benefit of Act.—**INLAND REVENUE v. HAMPTON,** [1930] S. C. 419.—**SCOT.**

**soo.** ——— **Corporation slaughterhouses.**—*Held*: entitled to benefit of Act, as the premises were primarily occupied & used for the purpose of a factory or workshop, & not for providing the necessary statutory facilities for the slaughter of animals, a purpose which would have brought the premises within exception (f).—**INLAND REVENUE v. EDINBURGH ASSESSOR (SLAUGHTER-HOUSES CASE),** [1930] S. C. 429.—**SCOT.**

**spp.** ——— **Manufacturing & repairing shops of steamship owners.**—*Held*: entitled to benefit of Act. The premises were occupied for the purposes of manufacture & repair, which were factory purposes, & as they were expressly included among factories by the Factory & Workshop Act, 1901, Sched. VI, they were within the 1928 Act.—**INLAND REVENUE v. CLAN LINE STEAMERS,** [1930] S. C. 445.—**SCOT.**

**sqq.** ——— **Creamery where milk pasteurised, chilled, & bottled, prior to distribution.**—*Held*: entitled to benefit of Act.—**INLAND REVENUE v. TRANENT CO-OPERATIVE SOCIETY,** [1930] S. C. 503.—**SCOT.**

**srr.** **Freight-transport lands & heritages—Dock purposes—Ground, warehouses, custom-house, & cattle sheds at docks.**—As regarded the buildings belonging to the dock authority & the

ground within the dock precincts leased to shipowners, the Inland Revenue Officer, in view of an undertaking given in Parliament, conceded that, with the exception of the custom-house, they were freight-transport lands & heritages.

As regarded the custom-house, the buildings erected & owned by the occupiers, the ground out-with the dock precincts leased to the occupiers, & the cattle sheds:—*Held*: they were not freight transport subjects, in respect that they were not occupied & used for dock purposes as part of a dock undertaking, but for the special purposes of the occupiers.—**CLYDE NAVIGATION TRUSTEES v. INLAND REVENUE, INLAND REVENUE v. KIRK-WALL ASSESSOR,** [1930] S. C. 454.—**SCOT.**

**stt.** ——— **Dock purposes—Offices let to stevedores by dock company.**—*Held*: entitled to benefit of Act.—**CLYDE NAVIGATION TRUSTEES v. GLASGOW ASSESSOR,** [1931] S. C. 400.—**SCOT.**

**szs.** ——— **Cattle sheds adjacent to pier or dock.**—*Held*: not entitled to benefit of Act.—**INLAND REVENUE v. ORKNEY STEAM NAVIGATION** (1930), S. L. T. 284.—**SCOT.**

**saa.** **Who may appeal as to classification—Officer of Inland Revenue—Sect. 9 (10).**—*Held*: an appeal at his instance was competent.—**INLAND REVENUE v. BREWERS FOOD SUPPLY Co.,** [1930] S. C. 323.—**SCOT.**

purpose of a retail shop, as defined by 1928 Act, within exception (b) in sect. 3 (1), & was not an industrial hereditament.—**TURPIN v. MIDDLESBROUGH ASSESSMENT COMMITTEE & BAILEY**, [1931] A. C. 451; 100 L. J. K. B. 271; 145 L. T. 73; 95 J. P. 115; 47 T. L. R. 308; 29 L. G. R. 279; (1926-31), 2 B. R. A. 886, H. L.; *revsq.*, [1931] 1 K. B. 385, C. A.

*Annotations*:—**Folld. Wilkinson v. Sibley**, [1932] 1 K. B. 191. **Distd. Toogood & Sons, Ltd. v. Green** (1932), 96 J. P. 249. **Consd. McGowan v. Osgoldcross Assessment Committee**, West Riding of Yorkshire, [1936] 2 All E. R. 170; **Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee**, [1937] 2 All E. R. 368.

**226l.** ————**—A hereditament was occupied & used for the repair of motor cars & the storage of motor cars undergoing repair, & for the storage of spare parts & accessories needed for repairs, & petrol was sold there as incidental to such repairs only. The occupiers owned other premises in the borough, where they sold cars & motor accessories:—Held: the hereditament was primarily occupied & used for the purpose of a retail shop, as defined by 1928 Act, within exception (b) in sect. 3 (1), & was not an industrial hereditament.—KAYE (BARNSELY REVENUE OFFICER) v. EYRE BROS., LTD.**, [1931] A. C. 451; 100 L. J. K. B. 1; 145 L. T. 73; 95 J. P. 115; 47 T. L. R. 308; 29 L. G. R. 279; (1926-31), 2 B. R. A. 886, H. L.; *revsq.*, [1931] 1 K. B. 385, C. A.

*Annotation*:—**Distd. Toogood & Sons, Ltd. v. Green** (1932), 96 J. P. 249.

**226u.** ————**Beer bottling premises.]—**Brewers occupied a bottling store in which beer brewed by them elsewhere was matured, carbonated, filtered & bottled, & from which, after the bottles had been corked & labelled, it was distributed to the trade. The beer when it entered the premises was unmarketable, & was converted by processes carried on therein into the commodity known as bottled beer. The hereditament was a factory within Factory & Workshop Acts. The revenue officer objected to the inclusion of the hereditament in the special list as an industrial hereditament under 1928 Act, s. 3, on the ground that it was primarily occupied & used for the purposes of distributive wholesale business within exception (c) in sect. 3 (1):—**Held: the treatment to which the beer was subjected in the hereditament was not a mere prelude to distribution, but changed the liquid from an unfinished article to a finished one, namely, bottled beer, which was not ready for distribution until the bottles had been corked & labelled, & the hereditament did not fall within the exception & was therefore an industrial hereditament.—SEDGWICK (CAMBERWELL REVENUE OFFICER) v. CAMBERWELL ASSESSMENT COMMITTEE & WATNEY, COMBE, REID & Co.**, [1931] A. C. 447; 100 L. J. K. B. 271; 145 L. T. 73; 95 J. P. 115; 47 T. L. R. 308; 29 L. G. R. 279; (1926-31), 2 B. R. A. 886, H. L.; *affg.*, [1931] 1 K. B. 385, C. A.

*Annotation*:—**Folld. Toogood & Sons, Ltd. v. Green, Lipton, Ltd. v. Barton** (1931), 47 T. L. R. 565.

**226v.** ————**Chain cable testing establishment.]—Resps. occupied & used a testing establishment for the purpose of carrying on**

the business of testing & finishing cables & anchors under a licence from the Board of Trade, pursuant to the Anchors & Chain Cables Act, 1899, & they gave certificates in respect of the cables & anchors which had passed the tests. The Act of 1899 prohibited the sale in this country of anchors & cables which had not been proved according to its provisions. The hereditament was admitted to be a factory within Factory & Workshop Acts. The processes employed involved the manufacture & replacement of faulty links in cables or faulty parts in anchors, & the scaling, tarring & finishing of cables & anchors before delivery to the ultimate consignees. The revenue officer objected to the inclusion of the hereditament in the special list as an industrial hereditament on the ground that it was primarily occupied & used for purposes which were not those of a factory or workshop within exception (f) in 1928 Act, s. 3 (1):—**Held: the hereditament was primarily occupied & used for the purpose of testing operations, which were not factory purposes, & fell within the exception.—GROVE (DUDLEY REVENUE OFFICER) v. LLOYD'S BRITISH TESTING CO., LTD.**, [1931] A. C. 450; 100 L. J. K. B. 271; 145 L. T. 73; 95 J. P. 115; 47 T. L. R. 308; 29 L. G. R. 279; (1926-31), 2 B. R. A. 886, H. L.; *revsq.*, [1931] 1 K. B. 385, C. A.

**226w.** ————**Oil-blending factory.]—Held: entitled to benefit of Act.—POPULAR REVENUE OFFICER v. POPULAR ASSESSMENT COMMITTEE** (1930), 99 L. J. K. B. 510; 113 L. T. 490; 94 J. P. 112; 46 T. L. R. 428; 74 Sol. Jo. 320; 28 L. G. R. 327; (1926-31), 2 B. R. A. 502, D. C.

**226x.** ————**Bespoke tailor's workshop.]—Held: not entitled to benefit of Act.—STAINCROSS REVENUE OFFICER v. STAINCROSS ASSESSMENT COMMITTEE & WHITEHEAD** (1930), 113 L. T. 525; 94 J. P. 161; 46 T. L. R. 516; 28 L. G. R. 414; (1926-31), 2 B. R. A. 698, D. C.

**226y.** ————**Retail shop on same premises.]—Resps. were the occupiers of a hereditament entered by the assessment committee in the special list & therein apportioned as to £59 industrial user & as to £146 non-industrial user. The revenue officer appealed against the inclusion of the hereditament in the special list on the ground (*inter alia*) that it was primarily occupied & used for the purposes of a retail shop. The hereditament consisted of a three-storied building which was in the sole occupation of resps., who were bespoke tailors & outfitters. They also owned a retail shop for the sale of shirts, collars, socks, hats & ties on the same premises in which the manufacture of clothes was carried on. The hereditament was registered as a workshop:—**Held: as a matter of law the hereditament could not be dissected as being occupied & used partly as a retail shop but mainly as a workshop. The business conducted on the hereditament was a unified business & the workshop must be treated as ancillary to the trade or business of a retail shop.—WILKINSON (TAUNTON REVENUE OFFICER) v. SIBLEY & DONOVAN** [1932] 1 K. B. 194; 101 L. J. K. B.**



26; 146 L. T. 1; 95 J. P. 208; 29 L. G. R. 633; (1926-31), 2 B. R. A. 926, C. A.

*Annotations*.—**Consd.** Toogood & Sons, Ltd. v. Green, [1932] 1 K. B. 204; McGowan v. Osgoldcross Assessment Committee, West Riding of Yorkshire, [1936] 2 All E. R. 170.

**226z.** ——— **Receiving office of dyers & cleaners.**—*Held*: not entitled to benefit of Act.—**IDEAL CLEANERS & DYERS, LTD. v. WEST MIDDLESEX ASSESSMENT COMMITTEE & REVENUE OFFICER FOR WEST MIDDLESEX** (1930), 143 L. T. 483; 94 J. P. 139; 46 T. L. R. 371; 74 Sol. Jo. 319; 28 L. G. R. 341; (1926-31), 2 B. R. A. 536, D. C.

**226aa.** ——— **Processes carried out on premises.**—A firm of cleaners & dyers were in occupation under a lease for years of a hereditament situated in a busy shopping street in a London suburb. The hereditament, which had the external appearance of a shop, consisted of three floors, there being five rooms on the ground floor, two on the first floor, & two on the second floor. One of the rooms on the ground floor was entered from the street & had a counter for receiving & despatching goods; another room on that floor which faced the street & had a plate-glass window contained a plant for cleaning & drying articles; all the other rooms on the ground & first floors were used for purposes connected with the work of cleaning & dyeing, & the rooms on the second floor were unused. The firm dealt direct with members of the public & did not work for any other firm. Articles received for cleaning were brought to the hereditament by customers & by the firm's vanmen, who collected from two receiving offices maintained by the firm, & from an agency, & from customers' houses in response to orders received by post or telephone. Not more than one-third of the articles received at the hereditament was brought there by the customers themselves. Most of the articles brought by the customers to the hereditament were, after cleaning, delivered to the customers by the firm's vanmen:—*Held*: the proper legal inference from these facts was that the hereditament as a whole was primarily occupied & used for the purposes of a "retail shop"; &, accordingly, it was a retail shop & therefore not an industrial hereditament, & was not derateable. The question whether or not upon the ascertained facts the purposes for which a hereditament is used & occupied are those of a "retail shop," as defined for the purposes of Rating & Valuation (Apportionment) Act, 1928 (c. 44); by sect. 3 (4), thereof, is a question of law & not of fact.—**RITZ CLEANERS, LTD. v. WEST MIDDLESEX ASSESSMENT COMMITTEE**, [1937] 2 K. B. 642; [1937] 2 All E. R. 368; 106 L. J. K. B. 398; 157 L. T. 423; 101 J. P. 307; 53 T. L. R. 588; 81 Sol. Jo. 337; 35 L. G. R. 309, C. A.

**226bb.** ——— **Newspaper offices & printing works.**—**Apportionment of editorial & advertising rooms.**—Printing offices & works in which a newspaper was composed, printed, & published, were included in the special list under 1928 Act as an industrial hereditament, & an apportionment was made of the net annual value of the hereditament according as its various parts were used for industrial or non-industrial purposes:—*Held*: (1) the hereditament was properly included in the

special list as an industrial hereditament, as the composing, printing, & publishing of a newspaper was the making of an article & the adapting for sale of an article within Factory & Workshop Act, 1901 (c. 22), s. 149, & therefore the hereditament came within the definition of a non-textile factory, the primary purpose for which the hereditament was occupied & used being an industrial purpose; (2) the annual value of the hereditament must be apportioned according to the occupation & use thereof for industrial purposes, & the occupation & use for other purposes; those portions of the premises which were occupied & used for printing, composing, engraving, publishing & circulating were used for industrial purposes & entitled to be derated, but that those portions of the premises which were occupied & used for the editorial department, general administrative offices & clerical staff, advertising department, stationery counter, & returns store were used for non-industrial purposes & not entitled to be derated.—**CARDIFF REVENUE OFFICER v. CARDIFF ASSESSMENT COMMITTEE & WESTERN MAIL, LTD., CARDIFF REVENUE OFFICER v. CARDIFF ASSESSMENT COMMITTEE & DAVID DUNCAN & SONS, LTD., WESTMINSTER REVENUE OFFICER v. DAILY MIRROR NEWSPAPERS, LTD.**, [1931] 1 K. B. 47; 99 L. J. K. B. 672; 143 L. T. 500; 94 J. P. 146; 46 T. L. R. 499; 74 Sol. Jo. 466; 28 L. G. R. 372; (1926-31), 2 B. R. A. 542, D. C.

**226cc.** ——— **Printing works with shop.**—Appl't. occupied an hereditament consisting of a printer's works & shop, which did not form a large part of the business, but in which some orders for printing work were received. All the printing work was done in fulfilment & not in expectation of orders. A newspaper was printed on the premises. The premises had until Jan. 1934, been rated largely as an industrial hereditament, but the assessment committee then altered the rating to general. Quarter sessions held on appeal that this was an industrial hereditament. The assessment committee appealed:—*Held*: the hereditament was industrial, for it was primarily occupied & used as a factory, for the purpose of doing work & labour in accordance with orders given by customers, & the handing over of & receiving payment for the work did not make the premises a retail shop.—**McGOWAN v. OSGOLD-CROSS ASSESSMENT COMMITTEE, WEST RIDING OF YORKSHIRE**, [1936] 2 All E. R. 170; 80 Sol. Jo. 614, D. C.

**226dd.** ——— **Wholesale dairy.**—**Resps.**, who were wholesale dairymen, occupied & used certain premises for carrying out the processes of cleaning & pasteurising milk & of cheesemaking. The milk, after cleaning & pasteurisation, & the cheese after ripening, were sent to the respondents' selling centres. The assessment committee found that the premises were an industrial hereditament & were entitled to be derated:—*Held*: as the question was one of fact, & as there was no evidence on which the conclusion of the assessment committee could be varied, their decision must be affirmed.—**CARMARTHEN REVENUE OFFICER v. UNITED DAIRIES (WHOLESALE), LTD.** (1931), 47 T. L. R. 233; 75 Sol. Jo. 138.

**226ee.** ——— **Meaning of "contiguous."**—The only

point decided in this case which was then remitted to sessions for further consideration of other points was that a hereditament in the occupation of the resps. was not "contiguous" to another 235 yards away, & that Quarter Sessions was wrong in law in holding that it was contiguous so as to be treated as forming one hereditament with the other premises for purposes of de-rating.—*SOUTHWARK REVENUE OFFICER v. HOE (R.) & Co., LTD.* (1930), 143 L. T. 544; 94 J. P. 170; 46 T. L. R. 528; 28 L. G. R. 446; (1926-31), 2 B. R. A. 723.

**226ff.** ———.—The word "contiguous" must be construed in its ordinary & proper sense as meaning "touching," & not in its loose sense as meaning "neighbouring."

In five cases properties in the same occupation as the main industrial hereditaments were alleged to be part of the main industrial hereditament as being contiguous thereto. The distance in a direct line between the two properties sought to be treated as part of a single hereditament varied from 20 yards to 60 yards. In one case the properties were only separated by a public thoroughfare, but in that case the property sought to be added was used as a stable. In the other four cases the properties were separated by other properties in different ownership:—*Held*: the two properties in four of the cases were not contiguous to each other & therefore could not be treated as parts of a single hereditament within sect. 3 (3), & in the fifth case, inasmuch as the property sought to be added was used as a stable, & therefore, under sect. 3 (2), was to be deemed not to form part of the factory or workshop, it could not therefore be one of the properties which "are used as parts of a single . . . factory" within sect. 3 (3).—*SPILLERS, LTD. v. CARDIFF ASSESSMENT COMMITTEE & PRITCHARD (CARDIFF REVENUE OFFICER), PIERCE (WIRRAL REVENUE OFFICER) v. WIRRAL ASSESSMENT COMMITTEE & SPILLERS, LTD., PINSENT (PLYMOUTH REVENUE OFFICER) v. PLYMOUTH ASSESSMENT COMMITTEE & OCTAGON BREWERY CO., BLUNT (WEST DERBY REVENUE OFFICER) v. WEST DERBY ASSESSMENT COMMITTEE & TATE & LYLE, LTD.*, [1931] 2 K. B. 21; 100 L. J. K. B. 233; 144 L. T. 503; 95 J. P. 49; 47 T. L. R. 231; 75 Sol. Jo. 173; 29 L. G. R. 411; (1926-31), 2 B. R. A. 818.

*Annotation*:—*Re*ld. *New Plymouth Borough Council v. Taranaki Electric Power Board*, [1933] A. C. 680.

**226gg.** ———.—**Allowance of difference in rates to sub-lessee—Whether "outgoing" as between head-lessor & lessee.**—*Held*: the meaning of the word "landlord" in Local Government Act, 1929 (c. 17), s. 73 (1), is not confined to a head landlord, but extends to a lessee who has sub-let the hereditament, so that the lessee is liable to his sub-lessee, the occupying tenant, for the amount of the difference in rates; (2) where a lessor covenanted to indemnify his lessee against "all rates, taxes & outgoings whatsoever," & the lessee was compelled to pay his sub-lessee the amount referred to in the above section, the payment was not an "outgoing" for which the lessor was liable to indemnify his lessee under the covenant.—*DEPENDABLE UPHOLSTERY, LTD. v. BRASTED*, [1932] 1 K. B. 291; 100 L. J. K. B. 631; 145 L. T.

588; 47 T. L. R. 521; (1926-31), 2 B. R. A. 485, C. A.

**226hh.** ———.—**Meaning of "landlord."**—*DEPENDABLE UPHOLSTERY, LTD. v. BRASTED*, No. 226gg, *ante*.

**226jj.** **Freight-transport hereditament—Particular instances.**—(1) Certain bonded warehouses near the port of Liverpool were used for the storage of tobacco, wine & sugar passing through the port, & the bulk of these goods was stored for a very substantial time:—*Held*: on the facts the warehouses were primarily used for warehousing merchandise not in the course of transport & were not subjects for derating.

(2) A wool warehouse not actually connected with any particular dock & not a bonded warehouse was used as a storage place for wool conveyed thereto by the Dock Authority at the charge of the consignee to be sold at the regular wool sales:—*Held*: the warehouse was not used for transport purposes, but as a place for preparing goods for sale, & was not entitled to be derated.

(3) Three grain warehouses had as their special feature an elevator by which grain was discharged from ships, barges or carts into the warehouse, & when sold, moved out again into sea or land vehicles. The bulk of the grain remained in the warehouses for a short time only, & the revenue derived from shipping & unshipping exceeded that derived from storage & warehousing:—*Held*: the warehouses were used to a substantial extent for purposes of shipping & unshipping & were entitled to be derated as freight-transport hereditaments.

(4) By Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 45), s. 225, an action is defined as a civil proceeding begun by writ "or in such other manner as may be prescribed by rules of ct." By R. S. C., Ord. 58, r. 15, no appeal to the Ct. of Appeal from any order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days from the time at which the order is signed, entered or otherwise perfected:—*Held*: an appeal from the Div. Ct. to the Ct. of Appeal on a special case stated by Quarter Sessions on an appeal from a draft rating assessment made by an Assessment Committee was an appeal in a proceeding which was not an action as defined, & the time for appeal was therefore fourteen days.—*MERSEY DOCKS & HARBOUR BOARD v. WEST DERBY ASSESSMENT COMMITTEE & BOTTOMLEY; BOTTOMLEY v. WEST DERBY ASSESSMENT COMMITTEE & MERSEY DOCKS & HARBOUR BOARD; BOTTOMLEY v. WEST DERBY ASSESSMENT COMMITTEE & LIVERPOOL GRAIN STORAGE & TRANSIT CO., LTD.*, [1932] 1 K. B. 40; 95 J. P. 186; 47 T. L. R. 468; (1926-31), 2 B. R. A. 816, C. A.

*Annotations*:—*As to* (3) *Re*ld. *Union Cold Storage Co. v. Moon*, [1932] 2 K. B. 648. *As to* (4) *Fold*. *Wilkinson v. Sibley & Donovan* (1931), 101 L. J. K. B. 26.

**226kk.** ———.—**Railway—Transfer of benefit to public—Who entitled—General engineering works.**—The mischief which the Railway Freight Rebate Scheme is designed to cure is a mischief in respect of iron & steel works, not a mischief in respect of general engineering works. Therefore, when a general engineer-

ing works consists of four departments, one of which falls within the definition of "iron & steel works" in Local Government Act, 1929 (c. 17), Sched. XI., Part I., para. 17, it cannot for the purpose of the above scheme be considered as four separate works, but must be regarded as a whole, & a general engineering works is not an iron & steel works.—CENTRAL MARINE ENGINE WORKS v. AMALGAMATED RY. COS. (1930), 20 Ry. & Can. Tr. Cas. 141.

**226ll. ——— Railway Freight Rebate**

**Fund—Form of accounts.]**—The Railway Clearing House is not entitled to enter on the credit side of the accounts kept by them in pursuance of para. 13 of Sched. XI. of Local Government Act, 1929 (c. 17), sums paid into the Railway Freight Rebates Fund by the railway cos. in respect of the excess of actual rate relief received by them over estimated rate relief.—MINISTER OF TRANSPORT v. RAILWAY CLEARING HOUSE (1933), 149 L. T. 305.

**226mm. ——— Jurisdiction of Rates**

**Tribunal.]**—(1) Bunker coal shipped on a cable vessel proceeding to the high seas & returning to the British Islands without touching at any foreign port is exported within Local Govt. Act, 1929 (c. 17), Sched. XI., Part I., para. 17, which defines "exported" as meaning (*inter alia*) shipped as bunkers for ships proceeding to places outside the British Islands. (2) The Rates Tribunal have jurisdiction to determine whether a rebate under the Railway Freight Rebates Scheme is allowable not whether one ought to be allowable.—MONMOUTHSHIRE & SOUTH WALES COAL OWNERS' ASSOCN. v. AMALGAMATED RY. CO.'S (1932), 21 Ry. & Can. Tr. Cas. 90.

**226nn. ——— "Exported" coal.]**—MON-

MOUTHSHIRE & SOUTH WALES COAL OWNERS' ASSOCN. v. AMALGAMATED RY. CO.'S, No. 226mm, *ante*.

**226oo. ——— Calculation of rebate on**

**mixed consignment.]**—Where a charge is made on a mixed consignment, calculated at more than its actual weight, in order to give the benefit of a minimum tonnage rate, the carriage charge on each portion of the consignment is the same proportion of the total charge as the weight of that portion bears to the actual weight. Rebate for the Railway Freight Rebates Scheme must be calculated accordingly.—SPILLERS & CO., LTD. v. AMALGAMATED RY. CO.'S (1933), 21 Ry. & Can. Tr. Cas. 70.

**226pp. ——— "Treacle delivered direct**

**to farmers."]**—The words "treacle delivered direct to farmers" in Sched. XI., Part II., mean treacle on an uninterrupted journey to a farmer; they do not mean treacle intended to be delivered in the same state to a farmer, & do not therefore apply to imported treacle on its journey to a retailer who intends to deliver it in an unaltered state to a farmer.—UNITED MOLASSES CO., LTD. v. AMALGAMATED RY. CO.'S (1932), 21 Ry. & Can. Tr. Cas. 26.

**226qq. ——— What included.]**—(1) Certain

offices of the ry. co. at London Bridge, Waterloo, & Southampton, & occupied by various officials of the co., were used in connection with the "general direction & management of the ry. co." within the meaning of sect. 5 (1) (a) (i) & the proviso

thereto, & sect. 5 (2) (a) of Rating & Valuation (Apportionment) Act, 1928 (c. 44), & were therefore hereditaments other than freight transport hereditaments & must be separately assessed, those offices being distinct from any purpose of the station as a railway station.

(2) High-tension electric cables & electrical sub-stations, which were essential to the operation of the railway, were "hereditaments consisting of land used only as a railway," & rateable accordingly.—*Re* SOUTHERN RY. CO. (1935), 153 L. T. 105; 99 J. P. 283; 51 T. L. R. 415; 79 Sol. Jo. 322; 33 L. G. R. 242; *sub nom.* SOUTHERN RY. CO. v. RAILWAY ASSESSMENT AUTHORITY, 22 Ry. & Can. Tr. Cas. 269.

**226rr. ——— Canal—Building occupied by canal company's employees.]**—*Held*: not entitled to benefit.—LEE CONSERVANCY BOARD v. R.

(1931), 39 Ll. L. R. 47, D. C.

**226ss. ——— Cold storage—Apportionment.]**—Appl't.

co. occupied two hereditaments abutting on the Thames which were used as cold stores, being equipped with refrigerating machinery & insulation necessary for dealing with shipments of refrigerated goods arriving in the port of London from colonial & foreign markets. The goods were brought to the hereditaments from the ocean-going steamers in insulated barges, on delivery into which the liability of the shipowners ceased. The goods were sorted to marks in the hereditaments. In one of these 17½ per cent. of the goods were delivered out immediately after sorting, while of the balance of 82½ per cent. part did not remain in the hereditament longer than twenty-eight days, & part remained for a longer period. In the other hereditament 12 per cent. were delivered out immediately after sorting, the balance remaining for a period up to twenty-eight days or longer. Each hereditament had, besides its refrigerating chambers & machinery, a crane for the unshipping of goods, a non-insulated reception front & a non-insulated delivery front. On a claim by appl't. co. for the derating of the hereditaments:—*Held*: (1) the hereditaments, so far as regarded the refrigerating machinery & chambers, were "primarily occupied & used for warehousing merchandise not in the course of being transported," & therefore were not entitled to be derated; (2) the crane, non-insulated reception front & non-insulated delivery front were primarily used for dock purposes, & were entitled to be derated; & therefore (3) the value of the hereditaments for derating purposes must be apportioned, the apportionment being between the value of the refrigerating chambers, etc., which were not the subject of derating, on the one hand, & the value of the crane, non-insulated reception & delivery fronts, which were the subject of derating, on the other hand.

*Per* SCRUTTON, L.J.: The primary use of refrigerating chambers is to store goods not being transported, rather than, like barges, to serve as a means of transport.—UNION COLD STORAGE CO. v. MOON, [1932] 2 K. B. 648; 101 L. J. K. B. 791; 147 L. T. 487; 96 J. P. 432; 30 L. G. R. 433, C. A.

**226tt. ——— Premises forming part of industrial undertaking.]**—Resps. were the occupiers of a

hereditament, consisting of storage bins, offices & premises, which adjoined premises occupied by manufacturers of fertilisers & artificial manures. By a lease of resps.' premises granted to them by the manufacturers, resps. were given rights of way between their premises & the highway to Barking. Resps.' premises were separated from the water front by the manufacturers' premises, which consisted (*inter alia*) of a wharf, in addition to their factory & plant for the manufacture of fertilisers. In terms of an agreement between resps. & the manufacturers, the latter erected upon their premises & up to the distribution centre of resps., a conveyor, from which loading of materials held by the storage bins could be carried out into road transport vehicles. The goods landed at the wharf for transfer to resps.' premises during one year constituted a considerable part of the total goods landed at such wharf. Resps. maintained that their premises were part of a dock undertaking, & were used wholly for docking purposes, whereof a substantial portion of the volume of business related to shipping & unshipping of merchandise not belonging to, or intended for the use of, the undertakers, the manufacturers, & that the hereditament ought to be entered & distinguished in the valuation list as a freight transport hereditament:—*Held*: as the undertaking carried on by the manufacturers was an industrial undertaking, & not a dock undertaking, there was no dock undertaking of which resps.' undertaking could form part, & therefore, resps.' premises ought not to be entered or distinguished in the valuation list as a freight transport hereditament.—SOUTHERN ESSEX ASSESSMENT COMMITTEE v. BETTY & TOM, LTD., [1937] 1 All E. R. 461; *affd. sub nom.* BETTY & TOM, LTD. v. SOUTHERN ESSEX

ASSESSMENT COMMITTEE, [1937] 3 All E. R. 441, C. A.

Compare No. 226h, *ante*.

229a. Land used for exhibition of advertisements—Show-cases.]—WESTMINSTER CORPN. v. SOUTHERN RY. CO., RAILWAY ASSESSMENT AUTHORITY & SMITH & SON, LTD., WESTMINSTER CORPN. & KENT VALUATION COMMITTEE v. SOUTHERN RY. CO., RAILWAY ASSESSMENT AUTHORITY & PULLMAN CAR CO., LTD., No. 800g, *post*.

230. Before this case add “*See, now*, Local Government Act, 1929 (c. 17), s. 67.”

233. *Add. Annotation*:—*Consd.* Monro & Cobley v. Bailey (1932), 148 L. T. 50.

234a. Land partly used for training racehorses.]—About 12 acres of land which were owned by the second applt., & which had formerly been part of an arable farm, had some ten years ago been laid down to grass & used by the first applt. as a training ground for racehorses from about Christmas until about the beginning of Mar. The second applt. during the remainder of the year had used the ground for grazing & hay. It was contended that the ground was “kept or preserved mainly or exclusively for purposes of sport or recreation,” & was not, therefore, an agricultural hereditament within Rating & Valuation (Apportionment) Act, 1928 (c. 44), s. 2:—*Held*: the hereditament was an agricultural hereditament.—JARVIS v. CAMBRIDGESHIRE RURAL ASSESSMENT AREA ASSESSMENT COMMITTEE, DAWSON v. CAMBRIDGESHIRE RURAL ASSESSMENT AREA ASSESSMENT COMMITTEE, [1938] 4 All E. R. 186; 82 Sol. Jo. 990, D. C.

235. *Add. Annotation*:—*Refd.* Engelke v. Musmann, [1928] A. C. 433.

#### PART I. SECT. 4, SUB-SECT. 1.

8a. Station on railway premises.]—A railway co., on an application by an advertiser for the reservation of certain space on the railway premises, granted to applt. the use of a board, situated at the main entrance of one of their stations, in return for a yearly payment. The agreement was for a period of three years & thereafter until terminated by three months' notice given by either party, with a right to the co., in certain circumstances, to end the “licence” on giving fourteen days' notice. The board was suspended from the main iron girder supporting the end of the roof of the station by clamps which gripped the front & rear flanges of the girder, the bottom of the board being attached to the name board of the station by wooden stays which were screwed into both boards. The name board itself was bolted to uprights which were embedded in the ground:—*Held*: in view of the manner & the purpose of its attachment to the heritage of the station, the board fell to be regarded as heritable; by the agreement between the co. & the advertisers, it had been so let out as to be capable of separate assessment, & must be entered in the local Valuation Roll.

*Doubted, per LORD FLEMING*, whether the Advertising Stations (Rating) Act, 1889, applied to Scotland.—LONDON & NORTH EASTERN RY. CO. v. GLASGOW ASSESSOR, [1937] S. C. 309.—SCOT.

#### PART I. SECT. 4, SUB-SECT. 2.

8d. Land improved for grain-growing—What amounts to.]—A parcel of land

improved for grain-growing cannot be otherwise than land which is cleared & broken & made ready for grain-growing, as well as land actually in crop.—LUTHEY v. ST. VITAL RURAL MUNICIPALITY, [1935] 1 W. W. R. 478. 43 Man. L. R. 126.—CAN.

#### PART I. SECT. 4, SUB-SECT. 6.—A.

g i. —Education of poor—Religious vow of poverty.]—On an application for exemption from rates on the ground that premises were used for charitable purposes:—*Held*: the words “for the education of the poor” in Poor Relief (Ir.) Act, 1838 (c. 56), s. 63, do not refer to persons who have become poor by the adoption of a religious vow of poverty.—MCGAHAN & RYAN v. COMR. OF VALUATION, [1931] Ir. 736.—IR.

n i. —Whether buildings used solely for educational purposes exempted.]—*Held*: in Hobart Corp'n. Act, 1893 (Tas.), s. 116, as amended by Hobart Corp'n. Act, 1921 (Tas.), s. 18, & in Hobart Water Act, 1893 (Tas.), s. 60, the words “charitable purposes” should be construed *ejusdem generis* with hospital & benevolent asylum & not in their technical sense, therefore, buildings used solely for educational purposes were not exempted from rates by those sections, even if such purposes were charitable in the technical sense.—CHRIST COLLEGE TRUST v. HOBART CORPN. (1928), 40 C. L. R. 308.—AUS.

t i. —Y. W. C. A.]—City Act, R. S. S., 1930, s. 447 (6), provides that the buildings & grounds not exceeding four acres, of the “Y. W. C. A.” shall be exempt from taxation, & a like pro-

vision for exemption is made for “any assocn. or organisation doing work for young women similar to the work done by the Y. W. C. A.”.—*Held*: the word “work” in said provision means the goal or objective of an assocn. & not its activities, & since the objective of pltf. assocn. was “similar” to that of the Y. W. C. A., it was entitled to the benefits of the provision.—SISTERS OF SION (SOCIETY) v. SASKATOON (CITY), [1931] 2 W. W. R. 553.—CAN.

t ii. —.—Premises of the Young Women's Christian Association, not being used exclusively for the purposes of the assocn.:—*Held*: not exempt from taxation.—YOUNG WOMEN'S CHRISTIAN ASSOCN. v. HALIFAX, [1933] 2 D. L. R. 713.—CAN.

t iii. —Work similar to Y. W. C. A.]—Sect. 453 (6) of City Act, 1931, provides that “The building & grounds . . . used in connection with & for the purposes of . . . any assocn. or organisation doing work for young women similar to the work done by the Young Women's Christian Assocn.” shall be exempt from taxation. Pltf. corp'n., in addition to other activities, operated a girls' home for the purpose of giving girls permanently resident in the home & any girls not in the home but who come there “good moral & religious training which will lead them to pure womanhood”:—*Held*: pltf. was entitled to the exemption.—RUTHENIAN SISTERS OF THE IMMACULATE CONCEPTION v. SASKATOON CITY, [1937] 2 W. W. R. 625.—CAN.

b i. —.—On the hearing of valuation appeals in the Circuit ct., it was held that a convent, in which

248. *Add. Annotations*:—*Refd.* Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1936] 1 K. B. 585; *Bertram v. Wightman*, [1936] 2 All E. R. 487.

267a. — *Roman Catholic Church divided into "blessed" & "unblessed" parts.*—A Roman Catholic Church was divisible by a movable partition into two parts, a "blessed" part in which the altar stood, & an "unblessed" part. The whole building was used for public religious worship, but on certain nights in the week the partition was drawn across & the "unblessed" part was used for dances, the proceeds of which were devoted exclusively to church purposes:—*Held*: the "unblessed" part was not exempt from rates under the Poor Rates Exemption Act, 1833 (c. 30), & was properly included in the valuation list.—CARDIFF ARCHDIOCESE TRUS-

TEES v. PONTYPRIDD AREA ASSESSMENT COMMITTEE & MOUNTAIN ASH RATING AUTHORITY (1930), 144 L. T. 207; 94 J. P. 246; 46 T. L. R. 633; 28 L. G. R. 535; (1926-31), 1 B. R. A. 389, D. C.

*Annotation*:—*Consd.* Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Area Assessment Committee (1932), 96 J. P. 336.

281. *Add. Annotations*:—*Consd.* Metropolitan Meat Industry Board v. Sheedy (1927), 97 L. J. P. C. 1. *Apld.* Fisher v. Oldham Corpn., [1930] 2 K. B. 364.

286. *Add. Annotations*:—*As to* (3) *Consd.* L. O. C. v. Hackney B. C., [1928] 2 K. B. 588. *Generally*, *Refd.* Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1936] 1 K. B. 585; *Williams v. Neath Assessment Committee* (1935), 34 L. G. R. 82.

resided 43 nuns, was not exempt; & that a laundry, managed by some of the nuns & worked by the inmates of a Magdalen Asylum, & which returned a profit of £1,300 a year, was not exempt. The nuns appealed in respect of the convent. Of the 43 nuns residing in the convent, 14 were allocated to manage an Industrial School; the remaining 29 attended to the management of the Asylum & the laundry. There was no evidence as to the number of nuns exclusively engaged in working the laundry. The produce of the land went to the support of the nuns & the penitents in the Magdalen Asylum.—*Held*: the convent was not used exclusively for charitable purposes, since it accommodated not only those nuns who were engaged exclusively in charitable work, but also those who were engaged in working the laundry, & therefore it was not exempt from rateability.—*GOOD SHEPHERD NUNS v. COMR. OF VALUATION*, [1930] 1 R. 646.—IR.

b ii. — [.] A convent was erected by the Roman Catholic inhabitants of the parish of C., & from Nov. 6, 1890, the members of the Religious Order known as the Sisters of Mercy had been in occupation & had been performing their duties for the benefit of the poor of the parish. The buildings had always been exempt from rating, as also was the public elementary school attached to the convent. The community numbered sixteen; of these thirteen was engaged in working for the poor, teaching the Catechism & instructing girls over school age, & teaching in the public elementary school. The remaining three were engaged in domestic work. The members of the community also superintended the work of the sacristan in the Roman Catholic Church. The chapel in the convent was normally used only by the members of the community, but was not restricted solely for their use as members of the public occasionally attended. The work done by the members of the community was mainly outside the convent. The premises were valued by the Comr. of Valuation at £12 10s.

Appnts. appealed to the acting county ct. judge of T. They asked in their notice of appeal that the convent should be distinguished in the valuation list as being used for charitable purposes & should be exempt. The county ct. judge confirmed the valuation but held that the premises being used exclusively for charitable purposes should be distinguished by the Comr. of Valuation in pursuance of sect. 2 of Valuation (Ireland) Act, 1854, & should be exempt. He, however, stated a case for the opinion of the King's Bench Div.:—*Held*: the premises were not used exclusively for

charitable purposes, & were therefore not exempt.—*McLAUGHLIN & CO. GROVE v. NORTHERN IRELAND VALUATION COMR.*, [1937] N. 1. 174.—IR.

c i. — *Seamen's Friendly Society—Work given up by society & continued by Navy League of Canada.*—*Held*: the latter body was not exempt.—*Re NAVY LEAGUE OF CANADA (ASSESSMENT OF HALIFAX BRANCH OF)*, [1927] 2 D. L. R. 184; 59 N. S. R. 212.—CAN.

g (p. 460) i. — *Reserve for show ground.*—*CONNOR v. ROCKHAMPTON CITY COUNCIL* (1928), 22 Q. J. P. R. 91.—AUS.

g (p. 460) ii. — *Salvation Army Home.*—Certain land in the City of Sydney was vested in deft. upon trust for social work of the Salvation Army. Upon the land was a building known as the Salvation Army Men's Home, & used exclusively to supply needy persons with accommodation in the way of beds and meals which otherwise they could not obtain. The charge made for beds was generally less than that made elsewhere, & in some cases no charge was made. In the majority of cases meals were supplied free of charge.—*Held*: the land was used solely for a charitable purpose & therefore was not rateable.—*SYDNEY MUNICIPAL COUNCIL v. SALVATION ARMY (N. S. W. PROPERTY TRUST)* (1931), 31 S. R. N. S. W. 585; 48 N. S. W. W. N. 219; 10 L. G. R. 113.—AUS.

#### PART I. SECT. 4, SUB-SECT. 6.—B.

h i. — [.]—Buildings used to house the domestic staff of a public hospital constitute hospital buildings & also buildings used solely for charitable purposes within sect. 110 (5) of Sydney Corpn. Act, 1902, & are, therefore, not liable to be rated.—*SYDNEY MUNICIPAL COUNCIL v. PRINCE ALFRED HOSPITAL* (1934), 51 N. S. W. W. N. 145; 12 L. G. R. 32.—AUS.

sk. *Hospital carried on by religious community.*—The A. Community, a society of women who devoted themselves to the religious life & to the relief of the suffering of the sick & infirm, consisted of thirty-two sisters all engaged in the work of a hospital carried on by the community. In addition other women, who were not members of the community, were engaged as nurses. Patients paid fees, except a negligible number who paid nothing. Normally profits were made every year & these had been used in developing the property. No funds had been accumulated & none had been distributed amongst the sisters, who were not permitted to own property individually.—*Held*: the property was not exempt from rates, not used exclusively for charitable

purposes.—*AUGUSTINIAN COMMUNITY TRUSTEES v. PIETERMARITZBURG CORPN.*, [1933] N. L. R. 309.—S.A.F.

#### PART I. SECT. 4, SUB-SECT. 7.

i. — *Seminary for education of missionary priests.*—*Held*: the building could not be deemed to be one "used for church purposes" within School Assessment Act, R. S. A., 1922 (c. 32), s. 24 (4), & was not exempt.—*RUTHENIAN CATHOLIC MISSION OF THE ORDER OF ST. BASIL THE GREAT IN CANADA v. MUNDARE SCHOOL DISTRICT*, No. 1603, [1924] 2 D. L. R. 1143; [1924] 2 W. W. R. 481; 20 Alta. L. R. 338.—CAN.

m i. — *Building also used for receipt of rent.*—*Held*: a building which is used or occupied for religious teaching is "solely" used or occupied for that purpose within Metropolitan Water, Sewerage & Drainage Act, s. 88 (1) (h), notwithstanding that rent for land of the owner, other than the land which is occupied by & used in connection with the building, is payable & is paid in the building.—*ROMAN CATHOLIC ARCHBISHOP OF SYDNEY v. METROPOLITAN WATER, SEWERAGE & DRAINAGE BOARD* (1928), 40 C. L. R. 472; [1928] Argus L. R. 162.—AUS.

m ii. — [.]—Although in order for a building to be exempt from taxation as a "place of public worship," within sect. 453 of City Act, 1934, it is not necessary that it should be used exclusively for such purpose, yet the main or principal or dominant use thereof be as a place of public worship. The Act has not provided any method of exempting part of a building where only that part is used for said purpose.—*SASKATOON EPISCOPAL CORPN. v. SASKATOON CITY*, [1935] 3 W. W. R. 330.—CAN.

e i. — *Place of public worship.*—A building in question herein was built & maintained by pltf. corpn. Part of it was consecrated for & used regularly for religious services to which the public was admitted. Another part was equipped & used as a religious library for the instruction of Roman Catholic students attending the nearby University of Saskatchewan. Another part was used by a students' religious society known as the Newman Club:—*Held*: the building was a "place of public worship" within the sub-sect.; pltf., whose name was that under which the Roman Catholic Bishop of the Diocese of Saskatchewan & each of his successors was constituted by statute a body corporate, with power to acquire & hold property, was a "religious organisation" within the sub-sect.—*SASKATOON EPISCOPAL CORPN. v. SASKATOON CITY*, [1936] 2 W. W. R. 91.—CAN.

**327. Add. Annotation :—***Refd.* Metropolitan Meat Industry Board v. Sheedy (1927), 97 L. J. P. C. 1.

#### SUB-SECT. 14A.—INDUSTRIAL HEREDITAMENTS.

See Sect. 3, sub-sect. 4, *ante*.

**345a. — Bed of river running through farm—Fishing rights let.**—A river which flowed through a farm was used for watering stock & for providing gravel for repairing farm buildings & roads. By oral agreement the farmer had let the right to fish the river to another person :—*Held* : the rating appeals committee were justified in holding that the bed of the river was "agricultural land," as defined by sect. 2 (2) of Rating & Valuation (Apportionment) Act, 1928 (c. 44), & was therefore exempt from rateability by reason of sect. 87 (1) of Local Govt. Act, 1929 (c. 17), & accordingly that the farmer was not assessable to rates in respect of his receipts from letting the fishing.—*WATKINS v. HEREFORDSHIRE ASSESSMENT COMMITTEE* (1935), 154 L. T. 262; 100 J. P. 79; 52 T. L. R. 148; 34 L. G. R. 84, D. C.; *sub nom.* HEREFORDSHIRE ASSESSMENT COMMITTEE v. WATKINS, 80 Sol. Jo. 127. D. C.

**349. Add. Annotation :—***Refd.* Lodge v. Lancashire County Council (1934), 152 L. T. 167.

#### PART I. SECT. 4, SUB-SECT. 10.—B.

**297 vi. —** *Halifax Harbour Commissioners.*—Halifax Harbour Comrs. are exempt from business tax as agents & servants of the Crown.—*HALIFAX v. HALIFAX HARBOUR COMRS.* (1934) 3 D. L. R. 614; *sub nom.* *Re HALIFAX HARBOUR COMRS.' ASSESSMENT*, 8 M. P. R. 263; *affd.*, [1935] S. C. R. 215.—CAN.

#### PART I. SECT. 4, SUB-SECT. 10.—C.

**sf. Liability before issue of patent.**—*RUDDELL v. GEORGESON* (1873), 9 Man. L. R. 407.—CAN.

**sg. —** *O'GRADY v. McCaffray* (1882), 2 O. R. 309.—CAN.

**sh. —** *Half-breed lands.*—*Re MATHERS* (1891), 7 Man. L. R. 434.—CAN.

**sj. Whether lessee of Commonwealth land liable.**—The lessee of land leased by a private individual from the Commonwealth of Australia, the owner of the land, is not liable to be rated by a local authority, the land itself not being rateable land.—*COALDRAKE v. BRISBANE CITY COUNCIL* (1928), 22 Q. J. P. R. 34.—AUS.

#### PART I. SECT. 4, SUB-SECT. 12.—A. (a).

**sk. Agreement with municipality exempting taxpayer from taxes—School taxes collected separately by school trustees—Whether exemption applies to school taxes.**—*Ex p. BATHURST CO.*, [1928] 4 D. L. R. 65.—CAN.

**sl. Professors' residences.**—Sect. 320 (5) of the Edmonton Charter, 1913, exempts from taxation, except for local improvements, "the land not exceeding four acres of and attached to or otherwise bona fide used in connection with & for the purposes of any university, college . . . so long as such land is actually used and occupied by such institution, but not if otherwise occupied." Deft. owned certain lots at some distance from its college buildings on which lots the residences of its professors were situated :—*Held* : the fact that the

land on which said residences were situated was used & occupied by professors employed by deft. institution did not constitute occupation by the institution within the meaning of the section & since these lots were assessed from other land on which the college was situated the assessment of these lots was good.—*EDMONTON CITY v. EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, & OTHER STATES*, [1933] 2 W. W. R. 310; 4 D. L. R. 196; *affd.*, [1931] 2 D. L. R. 513; S. C. R. 280.—CAN.

**sp. Training school for clergy.**—A collegiate institution, where the education given is a preparation for Holy Orders & nothing more, is not exempt from rating as "lands & buildings used for a school not carried on exclusively for pecuniary gain or profit" within the meaning of para. (g) of the exceptions to the definitions of rateable property contained in Rating Act, 1925, s. 2, as the institution does not give a sufficiently general education to constitute it such a school.—*AUCKLAND CITY CORPN. v. ST. JOHN'S COLLEGE TRUST BOARD*, [1935] N. Z. L. R. 934.—N.Z.

#### PART I. SECT. 4, SUB-SECT. 12.—B.

**so. University of Manitoba.**—All lands owned by the University of Manitoba are exempt from taxation, including lands acquired by foreclosure, & not in actual use for University purposes.—*UNIVERSITY OF MANITOBA v. CITY OF WINNIPEG* (1934), 42 Man. L. R. 566.—CAN.

**sq. —**—Land of which the university was & still is the registered owner was sold by it in 1917 under an agreement for sale. From 1928 to 1932 inclusive it was assessed in the name of the purchaser. From 1933 to 1935 it was assessed in his name & in that of the university. In 1935, the purchaser being in default under the agreement the university cancelled it under its provisions. The taxes from 1928 to 1935 inclusive were not paid, & the university sued for a declaration that the land was exempt from taxa-

**350. Add. Annotation :—***Consd.* Lodge v. Lancashire County Council (1934), 152 L. T. 167.

**384. Add. Annotation :—***Refd.* New Liverpool Eastham Ferry & Hotel Co. v. Ocean Accident & Guarantee Corp., Ltd. (1929), 142 L. T. 349.

**385a. Houseboat.**—A person who has the exclusive occupation of the moorings of a houseboat to the bank of a river under licence from the tenant of the bank is rateable in respect of them.—*GOODING v. BENFLEET URBAN DISTRICT COUNCIL* (1933), 49 T. L. R. 298; 77 Sol. Jo. 177.

#### 403a. Liability for "parochial taxes"—What are.]

—34 Geo. 3, c. 24, enacted that a canal co. should be rated to all parliamentary & parochial taxes & assessments for its lands & buildings, in the same proportion as other lands & buildings lying near should be rated, & as the lands & buildings of the co. would be rateable if they were the property of individuals in their natural capacity :—*Held* : A., a parish in Buckinghamshire, was to be assessed to the county rate on an estimate in which the co.'s lands & buildings were assessed as directed by the statute. For, under 12 Geo. 2, c. 29, the county rate was to be paid out of the poor rate of the several parishes, & was therefore a parochial tax.—*R. v. AYLESBURY WITH WALTON INHABITANTS* (1846), 9 Q. B. 261; 4 Ry. & Can. Cas. 314; 1 New Mag. Cas. 560; 7 L. T. O. S. 226; 10 J. P. Jo. 371; 115 E. R. 1273.

tion & to restrain the sale thereof for the unpaid taxes :—*Held* : the land was exempt & the appeal must, therefore, be dismissed.—*MANITOBA UNIVERSITY v. PORTAGE LA PRAIRIE RURAL MUNICIPALITY*, [1937] 1 W. W. R. 583; 2 D. L. R. 384; 10 Man. L. R. 12.—CAN.

#### PART I. SECT. 4, SUB-SECT. 16.

**st. Land flooded by power company.**—Land which had been flooded by a power co. in order to raise the level of a river to a certain elevation for the purpose of establishing a power house is assessable & must be given some actual or real value.—*MONTREAL ISLAND POWER CO. v. LAVAL DES RAPIDES TOWN*, [1936] 1 D. L. R. 621; [1935] S. C. R. 301.—CAN.

#### PART I. SECT. 4, SUB-SECT. 20.—A.

**ti. —**—Construction of Assessment Act, R. S. O., 1927.—The question of what are "mineral lands" within Assessment Act, R. S. O., 1927, is one of fact.—*TISDALE TOWNSHIP v. HOLLINGER CONSOLIDATED GOLD MINES, LTD.*, [1933] 3 D. L. R. 13; 5 S. C. R. 321.—CAN.

**tii. —**—Loading pier & equipment for shipment of coal.—*Re ACADIA COAL CO.'s ASSESSMENT*, [1925] 1 D. L. R. 1179; 58 N. S. R. 17.—CAN.

**sa. Coal land—What amounts to.**—"Coal land" within sect. 2 of Taxation Act, R. S. B. C., 1924, includes coal reserved to the vendor on a sale of land in fee simple.—*Re JONES ESTATE, RUDD v. AIPKEN*, [1933] 3 W. W. R. 453; 4 D. L. R. 399; 47 B. C. R. 439.—CAN.

#### PART I. SECT. 4, SUB-SECT. 24.—C. (a).

**li. —**—Land used for quarrying stone for harbour works.—Land used for quarrying stone for the purposes of harbour works is not exempt from rating.—*NAPIER BOROUGH COUNCIL v. NAPIER HARBOUR BOARD*, [1930] N. Z. L. R. 239.—N.Z.



**444. Add. Annotation:—***Consd. R. v. London County Council, Ex p. Swan & Edgar* (1927) (1929), 45 T. L. R. 512.

**448a. —.**—A drill hall erected by a county Territorial Army Assocn. for the use of a local coy. of that army was regularly used for the ordinary military purposes for which it was provided. The hall was, however, also used each Saturday night during the winter for dances organised by the officer commanding the co., to which members of the coy. with their wives & fiancées were admitted free & the public on payment of 6d. each, & the profit after payment of expenses was distributed for the benefit of the members of the co. or their dependants, the purpose of the dances being to keep the men of the co. together during the winter & to stimulate recruiting. It was contended by the rating authority that the above statutory provision should be construed as if, in accordance with the previous state of the law, the word "exclusively" was inserted therein immediately before the word "occupied," or at least as if the word "where" at the beginning of the provision meant "in so far as" or "to the extent to which," & that in view of the user of the hall for the dances it came, consistently with one or other of these respective constructions, either not at all or not entirely within that provision & was therefore either wholly or partially rateable:—*Held*: the provision must be construed according to the natural meaning of its words without regard to the previous state of the

law, none of the constructions contended for could be supported, & the hall came wholly within the provision; even if one or other of the proposed constructions was the true construction, the hall was in the circumstances exclusively occupied on behalf of the Crown for public purposes & would come within the provision; & consequently the hall was entirely exempt from rates.—*DERBY (TERRITORIAL ARMY ASSOCIATION) v. DERBY (SOUTH EASTERN AREA) ASSESSMENT COMMITTEE*, [1935] 2 K. B. 373; 104 L. J. K. B. 611; 153 L. T. 340; 99 J. P. 260; 51 T. L. R. 456; 79 Sol. Jo. 403; 33 L. G. R. 285, D. C.

**453. Add. Annotation:—***Consd. Re Southern Ry. Co.* (1935), 153 L. T. 105.

**494. Add. Annotation:—***Refd. Westminster City Council v. Royal United Service Institution*, [1938] 2 All E. R. 545.

**495. Add. Annotation:—***As to* (1) *Consd. Westminster City Council v. Royal United Service Institution*, [1938] 2 All E. R. 545.

**495a. —.**—Scientific Societies Act, 1843 (c. 36), s. 1, provides for the exemption from rates of "any society instituted for purposes of science, literature, or the fine arts exclusively," if "supported wholly or in part by annual voluntary contributions." An institution, established in 1931 & incorporated by Royal Charter in 1860 for the purposes of "the promotion & advancement of naval & military science & literature," was rated as occupier of a hereditament used for carrying

# **PART I. SECT. 4, SUB-SECT. 24.—K.**

**432 II. —.**—*ESTCOURT CORPN. v. UNION GOVERNMENT* (1929), 50 N. L. R. 21.—**S. AF.**

# **PART I. SECT. 4, SUB-SECT. 24.—L.**

**sn. Land leased to commissariat officer & occupied by troops.**—*Held*: exempt.—*PRINCIPAL SECRETARY OF STATE FOR WAR v. TORONTO CORPN.* (1863), 22 U. C. R. 551.—**CAN.**

# **PART I. SECT. 4, SUB-SECT. 24.—Q.**

**a i. —.**—*Re HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO & THOROLD & PELLHAM TOWNSHIPS* (1924), 55 O. L. R. 431.—**CAN.**

**sl. Land used for public reserve—Zoological gardens.**—*Held*: the land was used for a public reserve within s. 132 (c) of the Local Government Act, 1919, s. 132 (c), & was exempt from rates.—*MUNICIPAL COUNCIL OF MOSMAN v. SPAIN* (1929), 29 S. R. N. S. W. 492; 46 N. S. W. W. N. 174; 9 L. G. R. 81.—**AUS.**

**st. Bookstalls & shops at station.**—In making up his roll for the year ending Whitsunday, 1937, the Assessor of Public Undertakings included in his valuation of the undertakings of two railway cos. the bookstalls & other stalls & shops at certain stations in Glasgow. These subjects had been included every year since the first quinquennial valuation made in the year 1933-1934. In May, 1936, the House of Lords, in a case relating to an English railway, decided that similar subjects did not form part of the undertakings:—*Held*: the subjects in question, in so far as covered by the decision of the House of Lords, fell to be excluded from the roll of the Assessor of Public Undertakings.—*GLASGOW CORPN. v. ASSESSOR OF PUBLIC UNDERTAKINGS*, [1936] S. C. 754.—**SCOT.**

**sv. Property of Toronto Transportation Commission.**—*Toronto Transportation Commission held liable to pay local improvement rates on land controlled & managed by the Commission.*—*TORONTO v. TORONTO TRANSPORTATION COMMISSION*, [1937] 1 D. L. R. 522; O. R. 42.—**CAN.**

**sy. Women's Institute.**—A hall used & occupied by the Women's Institute of Garvagh was held by resp. as trustee for the said Institute. The Institute was an assocn. of women, formed with the object of improving the conditions & amenities of rural life. The membership of the Institute was confined to women & girls over fifteen years of age, who had to be proposed & seconded by members of the Institute before being elected. Each member paid a subscription of two shillings *per annum*. The hall was provided primarily for the women of Garvagh district, but there were members who resided in other districts. Dances & dramatic entertainments were held to which the public were admitted on payment of an entrance fee. Badminton was played two nights a week & the badminton club was open to the public on the payment of a separate subscription. The hall was not used by the members for any private purpose:—*Held*: the hall was not a hereditament of a public nature & used for public purposes so as to be exempt from poor rate.—*VALUATION COMR. v. MACAUSLAND*, [1937] N. I. 132.—**IR.**

**sz. Sheep-dipping station.**—*Held*: a sheep-dipping station was not a hereditament of a public nature & used for public purposes so as to be exempt from poor rate.—*VALUATION COMR. v. LONDONDERRY COUNTY COUNCIL*, [1937] N. I. 141.—**IR.**

**sc. Property used in connection with upkeep of roads.**—Exemption from rating was claimed for property which was used solely in connection with the upkeep of public roads, such as

quarries, stores, etc. The county council claimed that these premises being used solely in connection with the public roads in the county ought to be completely exempted from rating on the ground that they were all "used for public purposes":—*Held*: there was such a private use of the premises by the county council on behalf of the ratepayers as to render the county council liable to be rated as occupiers, & that the claim for exemption therefore failed.—*TYRONE COUNTY COUNCIL v. NORTHERN IRELAND VALUATION COMR.*, [1937] N. I. 181.—**IR.**

**sd. Amusement park.**—*Deft.* city was the owner of land in *pltf.* municipality which the city used for an amusement park & as approaches thereto. It also owned within *pltf.* municipality a street railway line & equipment & electric light transmission wires located partly on lands owned by the city, partly on private land & partly on *pltf.*'s streets. Another lot of land owned by the city was used for obtaining gravel for use in connection with the street railway line. Persons other than those travelling by street car were charged an admission to the park. The charges for the use of some of the amusement devices in the park were collected by the city from the patrons thereof, the right to operate other amusements was rented by the city to concessionaries. The park was closed during the winter, but the street railway service & the distribution of electricity for light were continued for the benefit of persons living in *pltf.* district:—*Held*: said lands were not held "for the public use of such municipality" & the street railway lines & transmission lines were an interest in land in respect to which the city was subject to taxation.—*SPRINGBANK MUNICIPAL DISTRICT v. CALGARY CITY*, [1937] 3 W. W. R. 639; 4 D. L. R. 767; 7 F. I. J. (Can.) 259.—**CAN.**



into effect its purposes. The institution was supported by an annual Govt. grant & by members' subscriptions. The activities of the institution were carried out by having a library, a reading-room & lectures, by publishing a journal & by possessing & maintaining a museum. Exemption from rates was claimed under sect. 1 of the Act of 1843, but the rating authority contended that the said hereditament was not used for the purposes of science or literature exclusively, that the reading-room, lecture theatre & museum were not used exclusively for the said purposes, that the said hereditament was mainly used for the purposes of naval & military professional art, which were not purposes of science or literature, & that the institution was not supported by voluntary annual contributions:—*Held*: (1) the words "science & literature" within Scientific Societies Act, 1843 (c. 36), s. 1, included naval & military science & literature; (2) the modes in which the institution carried out its activities were only modes in which the exclusive purposes of science & literature were carried out; (3) the annual Govt. grant was a voluntary contribution within sect. 1 of the Act of 1843.—*WESTMINSTER CITY COUNCIL v. ROYAL UNITED SERVICE INSTITUTION*, [1938] 2 All E. R. 515; 82 Sol. Jo. 547; 36 L. G. R. 150.

**501a. Royal Academy of Dramatic Art.**—*Ex p. ROYAL ACADEMY OF DRAMATIC ART* (1930), 74 Sol. Jo. 106, D. C.

**503. Add. Annotations:—***Consd.* General Medical Council *v. I. R. Comrs.*, English Branch Council of General Medical Council *v. I. R. Comrs.* (1928), 97 L. J. K. B. 578; *Midland Counties Institution of Engineers v. Inland Revenue Comrs.* (1928), 14 Tax Cas. 285. *Appl.* Institution of Civil Engineers *v. I. R. Comrs.* (1931), 47 T. L. R. 466. *Refd.* Master Mariners, Honourable Co. *v. I. R. Comrs.* (1932), 17 Tax Cas. 298.

**508. Add. Annotation:—***Consd.* Institution of Civil Engineers *v. I. R. Comrs.* (1931), 47 T. L. R. 466.

**509. Add. Annotation:—***Refd.* Westminster City Council *v. Royal United Service Institution*, [1938] 2 All E. R. 515.

**524. Add. Annotation:—***Consd.* Westminster City Council *v. Royal United Service Institution*, [1938] 2 All E. R. 515.

**525. Add. Annotation:—***Refd.* Institution of Civil Engineers *v. I. R. Comrs.* (1931), 47 T. L. R. 466.

**540. Add. Annotation:—***Consd.* Institution of Civil Engineers *v. I. R. Comrs.* (1931), 47 T. L. R. 466.

**549. Add. Annotations:—***Consd.* Towler *v. Thetford Rural Council* (1929), 99 L. J. K. B. 258. *Refd.* Cleobury Mortimer Rural District Council *v. Childe*, [1933] 2 K. B. 368.

**551. Add. Annotation:—***Appl.* Hastings, Lord *v. Walsingham Revenue Officer*, [1930] 2 K. B. 278.

**552a. — Not let—Whether within Rating & Valuation (Apportionment) Act, 1928 (c. 44).]**—Where sporting rights over agricultural land are severed but not let the person exercising those rights is not entitled to the exemption from rates conferred on the occupiers of agricultural land by the Agricultural Rates Act,

1929 (c. 26).—*HASTINGS (LORD) v. WALSHINGHAM (REVENUE OFFICER)*, [1930] 2 K. B. 278; 99 L. J. K. B. 385; 143 L. T. 474; 94 J. P. 136; 46 T. L. R. 425; 74 Sol. Jo. 298; 28 L. G. R. 304; (1926–31), 1 B. R. A. 402, D. C.

*Annotation:—**Fold. Cleobury Mortimer Rural District Council v. Childe* (1933), 97 J. P. 217.

**552b. — Necessity for severance.]**—*Appl.* owned 3,000 acres of land. Two thousand acres he let to tenant farmers reserving to himself the sporting rights; 700 acres of the remainder was waste land & he farmed 300 acres himself. He let the sporting rights over the whole 3,000 acres to B., under an agreement contained in correspondence between them. There was no grant by deed. *Appl.* was rated separately on the sporting rights so let & appealed from an order of the justices directing the issue of a distress warrant in respect of those rates:—*Held*: *applt.* was not rateable in respect of the sporting rights as there was no legal severance of the right from the occupation of the land.—*TOWLER v. THETFORD RURAL COUNCIL* (1929), 99 L. J. K. B. 258; 143 L. T. 45; 94 J. P. 77; 28 L. G. R. 108; (1926–31), 1 B. R. A. 298.

**552c. — Sporting rights reserved.]**—A farm was let to a tenant under an agreement in writing, not under seal. The agreement contained a clause reserving to the owner the sporting rights over the agricultural land. The owner refused to pay the rates in respect of the sporting rights so reserved. An application for a distress warrant was refused by the justices on the ground that there had been no severance of the sporting rights from the occupation of the land within Rating Act, 1871 (c. 51):—*Held*: a grant of sporting rights over land could be validly made only by a deed under seal, but where the owner of the land, by an agreement in writing, not under seal, let the land, & by the same document, reserved to himself the sporting rights, there was in fact a severance of the sporting rights from the occupation of the land within Rating Act, 1871 (c. 51), s. 6, & the owner was rateable in respect of those rights under sect. 6 (3).—*CLEOBURY MORTIMER RURAL DISTRICT COUNCIL v. CHILDE*, [1933] 2 K. B. 368; 102 L. J. K. B. 580; 149 L. T. 495; 97 J. P. 217; 49 T. L. R. 485; 31 L. G. R. 268, D. C.

**556. Add. Annotation:—***Refd.* Townley Mill Co. (1919), Ltd. *v. Oldham Assessment Committee*, [1936] 1 K. B. 585.

**580. Add. Annotation:—***Refd.* Busby *v. Avghetino*, [1928] A. C. 290.

**630a. — — —.]**—In an ancient market, of which S. was lessee of tolls, the frequenters of the market brought corn & potatoes in carts which stood within the limits of the market, & one sack was taken out & pitched in the street for buyers to examine. A toll was payable to S. in kind for the whole quantity brought in bulk, including the sample sack:—*Held*: S. was rateable to the poor-rate in respect of these tolls.—*R. v. BARNARD CASTLE INHABITANTS* (1863), 27 J. P. 534.

**632a. — — —.]**—*Appl.* was rated as the occupier of tolls, lands, & buildings situated in the Ashford cattle market; & among the gross receipts upon which the valuation was



the six occupiers was separately rated:—*Held*: the owner of the house, & not the several occupiers, was rateable: for that the house came within the exception in sect. 7.—*STAMPER v. SUNDERLAND OVERSEERS* (1868), L. R. 3 C. P. 388; 37 L. J. M. C. 137; 18 L. T. 682; 32 J. P. 439; 16 W. R. 1063.

*Annotations*:—*Consd.* *Thompson v. Ward* (1871), L. R. 6 C. P. 327; *Boon v. Howard* (1874), L. R. 9 C. P. 277; *Bradley v. Baylis* (1881), 8 Q. B. D. 195; *White & Hales v. Islington Corp'n.*, [1909] 1 K. B. 133. *Folld.* *Griggs v. Stevens* (1909), 101 L. T. 950. *Consd.* *R. v. Roberts, Ex p. Stepney Borough Council* (1915), 84 L. J. K. B. 1577. *Refd.* *Mason v. Bennett* (1868), L. R. 4 C. P. 502; *Barnes v. Peters* (1869), L. R. 4 C. P. 539; *Cull v. Austin*, *Austin v. Cull* (1872), L. R. 7 C. P. 227.

**675b.** ———.]—*Resp.* was rated & assessed to a general rate in respect of a house which was situate in the parish of H., which was, at the date of the passing of Representation of the People Act, 1867 (c. 102), & had ever since been, situate in a parliamentary borough. *Resp.* did not occupy or reside in or exercise any supervision or control over the house, which was a private dwelling-house consisting of a basement, a ground floor & two other floors, & was let by *resp.* to, & was occupied by, three tenants. The rateable value of each of the tenements was under £20. Each tenant had a separate letting & a separate key, & had the exclusive use & occupation of the rooms let to him or her. On an appln. for a distress warrant against *resp.*, it was contended on behalf of applt. that the borough council were entitled to rate *resp.* under Representation of the People Act, 1867 (c. 102), s. 7, inasmuch as the house was wholly let out in apartments or lodgings not separately rated. It was contended on behalf of *resp.* that the house was not wholly let out in apartments or lodgings not separately rated within the meaning of that section, & that the demand was bad, as no allowance, abatement or deduction had been made to *resp.* under Poor Rate Assessment & Collection Act, 1869 (c. 41). The justices were of opinion that the house was not in point of law a dwelling-house wholly let out in apartments or lodgings within the meaning of sect. 7, & they dismissed the summons:—*Held*: on the authority of *Stamper v. Sunderland Overseers*, No. 675a, *ante*, the council were entitled to rate *resp.* under sect. 7 of the Act of 1867, & the appeal must be allowed.—*GRIGGS v. STEVENS* (1909), 101 L. T. 950; 74 J. P. 67; *Konst. & W. Rat. App.* 154; 8 L. G. R. 63, D. C.

**675c.** ———.]—*Effect of Poor Rate Assessment & Collection Act, 1869 (c. 41).*—*Resp.* was the owner of a tenement situate in a borough which in the year 1867 was, & ever since had been, a parliamentary borough. The tenement was wholly let out in apartments or lodgings not separately rated within Representation of the People Act, 1867 (c. 102), s. 7. Purporting to act under that sect., the rating authority rated *resp.* as owner, instead of the occupiers of the tenement, without allowing him any commission, abatement or deduction:—*Held*: the Act under which *resp.* was rateable as owner instead of the occupiers was not Representation of the People Act, 1867 (c. 102), but was Poor Rate Assessment & Collection Act, 1869 (c. 41), & he was entitled to the commission, abatement or deduction specified

in sect. 3 or sect. 4 of the later Act.—*DAVIS v. WALLIS*, [1908] 2 K. B. 134; 77 L. J. K. B. 432; 98 L. T. 411; 72 J. P. 165; 24 T. L. R. 350; 6 L. G. R. 493, D. C.

*Annotations*:—*Consd.* *Griggs v. Stevens* (1909), 101 L. T. 950. *Overd.* *White & Hales v. Islington Corp'n.*, [1909] 1 K. B. 133. *Refd.* *Nokes v. Strong*, [1909] 2 K. B. 625.

**675d.** ———.]—*Applts.* were the owners of tenements situate in a borough which in the year 1867 was, & ever since had been, a parliamentary borough. The tenements were wholly let out in apartments or lodgings not separately rated within Representation of the People Act, 1867 (c. 102), s. 7. Purporting to act under that sect., the rating authority rated applts. as owners, instead of the occupiers of the tenements, without allowing them any commission, abatement or reduction:—*Held*: applts. were properly rated as owners, instead of the occupiers, under Representation of the People Act, 1867 (c. 102), s. 7, & were, therefore, not entitled to any commission, abatement or reduction from the amount of the rate. That portion of Representation of the People Act, 1867 (c. 102), s. 7, which provides for the rating of owners of houses wholly let out in apartments or lodgings not separately rated has not been repealed by implication by Poor Rate Assessment & Collection Act, 1869 (c. 41), or otherwise.—*WHITE & HALES v. ISLINGTON CORPN.*, [1909] 1 K. B. 133; 78 L. J. K. B. 168; 73 J. P. 44; 25 T. L. R. 121; 2 *Konst. Rat. App.* 798; 7 L. G. R. 133; 53 Sol. Jo. 97; *sub nom.* *HALES v. ISLINGTON BOROUGH COUNCIL*, 100 L. T. 22, C. A.

*Annotations*:—*Consd.* *Griggs v. Stevens* (1909), 101 L. T. 950. *Folld.* *Nokes v. Strong*, [1909] 2 K. B. 625. *Consd.* *R. v. Roberts*, [1914] 1 K. B. 369; *R. v. Carson Roberts, Ex p. Stepney Corp'n.*, [1915] 3 K. B. 313. *Refd.* *Kent v. Pittall*, [1911] 2 K. B. 1102.

**675e.** ———.]—*Who may be liable—Agent.*—An agent who is employed by the owner of a dwelling-house, situate in a parliamentary borough, & wholly let out in apartments, to collect the rents on his behalf is not liable to be rated as owner under above Act.—*NOKES v. STRONG*, [1909] 2 K. B. 625; 78 L. J. K. B. 1041; 101 L. T. 318; 73 J. P. 417; 7 L. G. R. 870, D. C.

*Annotation*:—*Consd.* *Metropolitan Water Board v. Brooks* (1910), 79 L. J. K. B. 705.

**675f.** ———.]—*To what boroughs applicable.*—The council of a metropolitan borough, which became a parliamentary borough some years after the passing of Representation of the People Act, 1867 (c. 102), rated the owners of two dwelling-houses which were wholly let out in apartments or lodgings not separately rated, & allowed them the commissions or abatements authorised by Poor Rate Assessment & Collection Act, 1869 (c. 41). The local govt. auditor at his audit made a surcharge on the rate collector in respect of the amount of these abatements:—*Held*: the words "all boroughs" in Representation of the People Act, 1867 (c. 102), s. 7, extended to all boroughs which had since the passing of that Act become parliamentary boroughs, & were not limited to boroughs which were in existence as parliamentary boroughs at the date of its passing; the owners ought to have been rated under that sect. & were therefore not entitled to any commission, abatement or deduction from the

amount of the rate; & the surcharge was, therefore, rightly made by the auditor.—*R. v. ROBERTS*, [1914] 1 K. B. 369; *sub nom. R. v. ROBERTS, Ex p. BATTERSEA BOROUGH COUNCIL*, 83 L. J. K. B. 146; 109 L. T. 466; 77 J. P. 403; 57 Sol. Jo. 644; 1 B. R. A. 121; 11 L. G. R. 913, C. A.; *revisg.* (1912), 108 L. T. 64, D. C.; *subsequent proceedings, sub nom. ROBERTS v. BATTERSEA METROPOLITAN BOROUGH* (1914), 110 L. T. 560, C. A.

*Annotation*:—*Refd. Crow v. Hilleary* (1912), 11 L. G. R. 226.

**675g. Premises occupied by owner.**—The provisions of sect. 211 (1) (a) of Public Health Act, 1875 (c. 55), as to assessing an owner

on a reduced annual value, where the owner is rated instead of the occupier, do not apply to a case where the owner is himself the occupier of the premises to be rated.—*R. v. PROBERT*, [1911] 1 K. B. 83; *sub nom. R. v. PROBERT, Ex p. JONES* (1910), 80 L. J. K. B. 98; 103 L. T. 844; 71 J. P. 474; 9 L. G. R. 38.

**676.** After this case add "*See, also, LANDLORD & TENANT*, Nos. 4353, 4354."

**689.** *Add. Annotation*:—*Refd. Oxfordshire County Council v. Oxford City Council*, [1938] 2 K. B. 415.

## Part II.—Basis of Assessment.

**695.** *Add. Annotation*:—*As to* (1) *Refd. Railway Assessment Authority v. Southern Ry. Co., London County Council v. Southern Ry. Co.*, [1936] 1 All E. R. 26.

**698.** *Add. Annotations*:—*Generally, Consd. St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee* (1932), 97 J. P. 48; *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1936] 1 K. B. 585. *Refd. Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Area Assessment Committee* (1932), 96 J. P. 336; *Simpson v. Harrington & Co.*, [1934] 1 K. B. 64; *Re Southern Railway Co. Appeals* (1935), 152 L. T. 299.

**703.** *Add. Annotations*:—*Consd. Consett Iron Co. v. Durham County Assessment Committee for No. 5 or North-West Area* (1930), 99 L. J. K. B. 277; *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1936] 1 K. B. 585.

**705.** *Add. Annotations*:—*Appld. Consett Iron Co. v. Durham County Assessment Committee for No. 5 or North Western Assessment Area*, [1931] A. C. 396. *Refd. Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee*, [1937] 2 All E. R. 298.

**711.** *Add. Annotation*:—*Refd. Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1936] 1 K. B. 585.

**713.** *Add. Annotations*:—*Refd. St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee* (1932), 147 L. T. 396; *Railway Assessment Authority v. Southern Ry. Co., London County Council v. Southern Ry. Co.*, [1936] 1 All E. R. 26; *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1936] 1 K. B. 585; *Mitcham Golf Course Trustees v. Ercaut*, [1937] 3 All E. R. 450; *Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee*, [1937] 2 All E. R. 298.

**725.** *Add. Annotations*:—*Distd. Consett Iron Co. v. Durham County Assessment Committee for No. 5 or North Western Assessment Area*, [1931] A. C. 396. *Consd. Yates v. Burnley Rating Authority* (1933), 97 J. P. 226; *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1937] A. C. 419.

**726.** *Add. Annotations*:—*Consd. Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1937] A. C. 419. *Refd. Consett Iron Co. v. Durham County Assessment Committee for No. 5 or North Western Assessment Area*, [1931] A. C. 396.

### PART II. SECT. 1, SUB-SECT. 1.

*y i.* —.—.—*Re HUDSON'S BAY CO. & CITY OF EDMONTON*, [1932] 1 W. W. R. 796; 2 D. L. R. 815.—CAN.

*y ii.* —.—.—*Possible use of property restricted.*—*GRAMPIAN REALITIES CO. v. MONTREAL EAST*, [1932] 1 D. L. R. 705.—CAN.

*yy.* *Agreement for fixed assessment value—Basis of valuation—Construction of agreement.*—*CITY OF OTTAWA v. CANADIAN NATIONAL RYS.*, [1925] 3 D. L. R. 762; [1925] S. C. R. 494.—CAN.

*sz.* *Valuation for unearned increment (L.R.).*—*Re WALLBRIDGE & REGISTRAR OF LAND TITLES*, [1930] 2 W. W. R. 361; 3 D. L. R. 752; 4 D. L. R. 768; 3 W. W. R. 259.—CAN.

*sa.* *Equalisation of assessment.*—*Sect. 96a of Assessment Act was intended to govern the future method of equalising the assessment. The curtailment of the power to levy in future was to be in respect of an equalisation arrived at by the altered method but effected according to the orderly procedure already established by the Assessment Act & not otherwise.*—*Re ROCKCLIFFE PARK VILLAGE & CARLE-*

*TON COUNTY*, [1931] 4 D. L. R. 737; O. R. 737.—CAN.

*sc.* *Benefit from local improvements—Burden to be considered.*—*Where under City Act, R. S. S., 1930, the cost of local improvements is charged in whole or in part against the abutting or other property specially benefited thereby, the general assessment of such property should not be increased because of its additional value due to the local improvements, without, at least, taking into consideration the burden of the special assessments therefor.*—*HILLIER v. REGINA CITY*, [1932] 2 W. W. R. 561.—CAN.

*sf.* *Cash value at public auction.*—*The governing rule for the valuation of property is the actual cash value realisable at public auction.*—*Re WILLISTON & CLARKE ASSESSMENT & DARTMOUTH*, [1935] 4 D. L. R. 250.—CAN.

### PART II. SECT. 1, SUB-SECT. 2.—A.

*dd i.* —.—.—*EDINBURGH ASSESSOR v. CAIRA & CROLLA*, [1928], S. C. 398.—SCOT.

*dd ii.* —.—.—*HERITABLE SECURITIES & MTGE. INVESTMENT ASSOCN.,*

*LTD. v. GLASGOW ASSESSOR*, [1928] S. C. 401.—SCOT.

*sv.* *Farm let by father to son—Whether rent conditioned as fair annual value.*—*MARSHALL v. WYNTOWNSHIRE ASSESSOR*, [1929] S. C. (Ct. of Sess.) 333.—SCOT.

*sz.* *"Consideration other than rent"—What is.*—*Held*: a special clause in a lease binding the tenant, in the event of the subject losing the benefit of derating, to indemnify the landlord for the loss he would suffer by his having to pay increased rates, was not a "consideration other than rent," & accordingly, had no effect upon the valuation of the subjects so long as they remained derated & the obligation to indemnify remained contingent only. —*LIVERPOOL VICTORIA FRIENDLY SOCIETY v. GLASGOW ASSESSOR*, [1934] S. C. 193.—SCOT.

### PART II. SECT. 1, SUB-SECT. 2.—B.

*fi.* —.—.—*RANGOON CITY CORPN. v. DAWOODJEE* (1928), 1 L. R. 6 Rad. 669.—IND.

*gi.* —.—.—*RANGOON TURF CLUB v. RANGOON CORPN.* (1927), 1 L. R. 6 Rad. 75.—IND.

727. *Add. Annotation*:—*Generally*, *Refd.* Consett Iron Co. v. Durham County Assessment Committee for No. 5 or North-West Area, [1931] A. C. 396.

735. *Add. Annotations*:—*Consd.* Railway Assessment Authority v. Southern Ry. Co., London County Council v. Southern Ry. Co., [1936] 1 All E. R. 26. *Refd.* Consett Iron Co., Ltd. v. Durham County Assessment Committee for the North-Western Area, [1931] A. C. 396; Salisbury House Estate v. Fry, [1930] 1 K. B. 304; Leney & Co. v. Whelan, [1934] 2 K. B. 511; Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1937] 2 All E. R. 298.

741. *Add. Annotation*:—*As to* (4) *Refd.* Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1937] 2 All E. R. 298.

742. *Add. Annotation*:—*Generally*, *Refd.* Appenrodt v. Central Middlesex Assessment Committee, [1937] 2 K. B. 48.

752. *Add. Annotation*:—*Consd.* St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee (1932), 97 J. P. 48.

754. *Add. Annotations*:—*Consd.* Consett Iron Co. v. Durham County Assessment Committee for No. 5 or North-West Area (1930), 99 L. J. K. B. 277. *Refd.* St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee (1932), 147 L. T. 396; Railway Assessment Authority v. Southern Ry. Co., [1936] 1 All E. R. 26; Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1936] 1 K. B. 585; Mitcham Golf Course Trustees v. Ercaut, [1937] 3 All E. R. 450; Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1937] 2 All E. R. 298.

769. *Add. Annotations*:—*Refd.* L. C. C. v. Hackney B. C., [1928] 2 K. B. 588; Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1936] 1 K. B. 585.

781. *Add. Annotation*:—*Consd.* Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1936] 1 K. B. 585.

785. *Add. Annotation*:—*Consd.* Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1937] A. C. 419.

792. *Add. Annotation*:—*Consd.* Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee, [1936] 1 K. B. 585.

794a. *Mill closed down—Machinery left in position.*—A co. which owned & occupied a cotton spinning mill, stopped working; they sold the stores & let the basement, & left the remainder of the structure & its contents in charge of a caretaker with a view to selling or letting them if occasion occurred. At the material time there remained in the mill machinery & plant of the classes mentioned in sect. 21 (1) (a) of 1925 Act (which for convenience was described as "motive machinery & plant"). There were also certain fixed machines & loose chattels falling within sect. 24 (1) (b) (called for convenience "process machinery & plant") :—*Held*: the co. were not rateable as the occupiers of premises used as a warehouse for the process machinery, on the grounds (a) that by sect. 24 (1) (b), no account is to be taken of the value of such plant or machinery; (2) the Act applies to hereditaments whether in active operation or out of work.

*Qu.*: whether the practice of treating the owner of an empty house as not rateable is an exception to the general law of rating.—TOWNLEY MILL CO. (1919), LTD. v. OLDHAM ASSESSMENT COMMITTEE, [1937] A. C. 419; [1937] 1 All E. R. 11; 106 L. J. K. B. 140; 156 L. T. 81; 101 J. P. 125; 53 T. L. R. 205; 81 Sol. Jo. 13; 35 L. G. R. 69, H. L.

*Annotation*:—*Refd.* Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1937] 2 All E. R. 298, C. A.

#### SUB-SECT. 1.—RAILWAYS.

(Vol. XXXVIII., p. 534.)

*See, now*, Railways (Valuation for Rating) Act, 1930 (c. 24).

800. After this case add :—

*Derating of railways.*—*See* Rating & Valuation (Apportionment) Act, 1928 (c. 44), ss. 1, 5; Local Government Act, 1929 (c. 17), ss. 68, 136; Sched. XI.; & Nos. 226kk-226qq, ante.

800a. Railways (Valuation for Rating) Act, 1930 (c. 24)—*Meaning of revenue—Compensation for use during war.*—The sums distributed by the Govt. among the railway cos. of Great Britain in satisfaction of all claims which they might otherwise have had for compensation under the Regulation of the Forces Act, 1871 (c. 86), the Ministry of Transport Act, 1919 (c. 50), or otherwise, are not "revenue" within Railways (Valuation for Rating) Act,

#### PART II. SECT. 2, SUB-SECT. 1.—A.

800a i. Railways (Valuation for Rating) Act, 1930 (c. 24)—*Exclusion of ferry.*—L. & N. E. Ry. Co. in which, as successor of the North British Ry. Co., the rights of ferry across the Forth at Queensferry were vested by statute, entered into an agreement with a firm of shipbuilders, under which the latter obtained the sole & exclusive right to work the ferry, & also to use certain piers in connection therewith, for a period of ten years. Under the agreement the shipbuilders provided the vessels & the staff at the piers, & fixed, collected, & retained the tolls & charges, except that they were bound, in the event of the revenue from the ferry exceeding a certain sum, to pay a proportion of the excess to the ry. co.; & they relieved the ry. co.

of all obligations & liability in connection with the working of the ferry. They were, further, entitled to assign their rights under the agreement or to sublet:—*Held*: the agreement constituted a lease of the ferry & was not a mere grant of a right to work the ferry, & accordingly, the ferry was excluded from the undertaking of the ry. co., under Railways (Valuation for Rating) Act, 1930 (c. 24), s. 22 (9).—LONDON & NORTH EASTERN Ry. Co. v. FIFE ASSASSOR, [1935] S. C. 352.—SCOT.

800a ii. — *Error—Appal.*—Finality for the quinquennial period under Railways (Valuation for Rating) Act, 1930, s. 22, applies only where the value of the undertaking has been fixed in accordance with the provisions of the Act, & accordingly, where herit-

ages which do not legally form "part of its undertaking" are included in the valuation, the provision as to finality does not render incompetent an appeal for the correction of the error during the quinquennium.—GLASGOW CORPN. v. ASSESSOR OF PUBLIC UNDERTAKINGS, [1936] S. C. 754.—SCOT.

800a iii. — *Method of assessment.*—The Assessor of Railways & Canals in valuing for the first time under sect. 22 of Railways (Valuation for Rating) Act, 1930, the heritable subjects in Scotland belonging to the L.M.S. & L.N.E.R., adopted the following method. Taking in each case the average Scottish net receipts as certified by the Anglo-Scottish Railways Assessment Authority, he deducted for interest on tenant's capital a sum of 5 per cent. of such

1930 (c. 24), s. 4 (3) (ii.) (d), & were never intended to come into the computation of rateable value. They are sums part of which may be properly regarded as paid in restoration of losses on capital account, & the fact that they may also be applied for revenue purposes is not enough to justify the conclusion that the entire funds are in their nature revenue. The words "set aside out of revenue" in Railways (Valuation for Rating) Act, 1930, s. 4 (3), mean placed to a revenue account in the accounts kept under Railway Accounts Act, 1911.—LONDON, MIDLAND & SCOTTISH RY. CO. v. ANGLO-SCOTTISH RAILWAYS ASSESSMENT AUTHORITY, LONDON & NORTH-EASTERN RY. CO. v. ANGLO-SCOTTISH RAILWAYS ASSESSMENT AUTHORITY (1933), 150 L. T. 361; 98 J. P. 134; 50 T. L. R. 130; 77 Sol. Jo. 899; 32

L. G. R. 41; 23 Ry. & Can. Tr. Cas. 38, H. L.

*Annotation*.—*Reff.* Central London Railway v. I. R. Comrs., London Electric Railway v. I. R. Comrs., Metropolitan Railway v. I. R. Comrs. (1934), 151 L. T. 333.

**800b.** ——— **Bridge maintained by bridge company—Cost of upkeep.**—The building of the Forth Bridge by the Forth Bridge Ry. Co. was authorised by the Forth Bridge Acts, 1878–1882. By sect. 16 of the 1882 Act, the works authorised are for all purposes whatsoever the undertaking of the Forth Bridge Co., & by sect. 38 the London & North Eastern Ry. Co. are forever to maintain & work the railway (*i.e.* carried by the bridge) with the same powers & obligations as if it formed part of the London & North Eastern Railway system, while the Forth Bridge Co. are to maintain & repair the

capital, & of the balance he assigned 40 per cent. to the tenants for tenant's profits & risks, & 60 per cent. to the landlord. He fixed the valuation at the latter figure, bringing out a valuation for the L.M.S. of £940,005 as against the preceding year's valuation of £717,243, & for the L.N.E.R. a valuation of £628,898 as against one of £436,979. The method of valuation adopted by the Assessor was the method he had applied in the case of a number of public utility cos., except that, instead of the ordinary deduction of 20 per cent. for tenant's profits & risks, he deducted, in the case of the railway cos., 4 per cent. having regard to their financial position at the time. The *et. approb.* in principle of the Assessor's method of valuation, but, in view of the falling receipts of the cos., they substituted a deduction of 55 per cent. for the Assessor's deduction of 40 per cent.—LONDON, MIDLAND & SCOTTISH RY. CO. v. ASSESSOR OF RAILWAYS & CANALS FOR SCOTLAND, [1933] S. C. 590.—**SCOT.**

**800a iv.** ————**—A railway co., in return for merely nominal payments, granted to the proprietors of lands adjoining the railway embankments the right to kill rabbits & preserve game on the embankments, the railway co.'s object being to prevent damage to the embankments & to protect the co. against claims for damages from adjoining tenants.**—*Held*: the grants were not leases of heritable subjects within Railways (Valuation for Rating) Act, 1930, s. 22 (9), & accordingly, the Assessor of Public Undertakings, in valuing the railway undertaking, must include in the *cumulo* receipts of the co. the payments made by the adjoining proprietors, & no entry having reference to the grants could be made in the local Roll.—LONDON, MIDLAND & SCOTTISH RY. CO. v. ASSESSOR OF PUBLIC UNDERTAKINGS, [1937] S. C. 773.—**SCOT.**

**800a v.** ——— **Railway hereditaments—Advertising stations.**—A railway co., in return for a pecuniary payment, granted to a firm of advertising contractors the exclusive right to exhibit advertisements on the property of the co. With the co.'s approval, the contractors affixed to the walls of stations & other railway structures advertisement boards, known as "solus" boards, each capable of displaying one advertisement only, & they let out these boards to advertisers for short periods varying from eight to twenty-six weeks, the contractors themselves pasting on the advertisements.—*Held*: the sites of the boards had been "so let out as to be capable of separate assessment" within sect. 22 (9) of Railways (Valuation for Rating) Act, 1930, & fell to be entered in the local Roll, with the railway co.

as proprietors & the firm of advertising contractors as tenants & occupiers.—LONDON, MIDLAND & SCOTTISH RY. CO. v. ASSESSOR OF PUBLIC UNDERTAKINGS, [1937] S. C. 773.—**SCOT.**

**800a vi.** ————**—Shops belonging to a railway co., which were let at the commencement of the quinquennial period & which accordingly were entered in the local Roll, became unlet during the currency of the period.**—*Held*: the Assessor of Public Undertakings, in valuing the undertaking of the railway co. for a year subsequent to the date at which the shops became unlet, was wrong in increasing the *cumulo* receipts of the co., which formed the basis of his valuation, by any sum in respect of these shops, seeing that they added nothing to the co.'s receipts, but, as they formed part of the railway undertaking, he was right in entering them, & putting a valuation on them, in his Roll, within Railways (Valuation for Rating) Act, 1930, s. 22 (3).—LONDON & NORTH-EASTERN RY. CO. v. ASSESSOR OF PUBLIC UNDERTAKINGS, [1937] S. C. 792.—**SCOT.**

**800a vii.** ——— **Showcase.**—A firm of advertising contractors obtained, under an agreement with a railway co., the exclusive right for a period of twenty years of exhibiting advertisements of the property of the railway co., with a right to sublet such sites as might be approved by the railway co. The agreement contained a number of conditions & restrictions made in the interest of the railway co., among them being the right to require the contractors to remove advertisements if objectionable to the co., or if their site was required by the co. for its own use. The agreement did not give the contractors the exclusive use of any particular part of the railway co.'s premises. In return the contractors paid to the co. annually a percentage of their annual receipts from the advertisements. In response to a request by a firm of outfitters for a particular site in the booking hall of Central Station, Glasgow, for the exhibition of a showcase, the contractors, with the approval of the co., entered into a contract with the outfitters for the exhibition of a showcase for a period of five years at an annual specified rent.—*Held*: the site was so let out as to be capable of separate assessment within sect. 22 (9) of Railways (Valuation for Rating) Act, 1930, & fell to be entered in the local Roll, with the railway co. as proprietors & the firm of outfitters as tenants, the position of the contractors in effecting the lease being that of agents for the railway co.; the yearly value of the site to be entered in the Roll was the whole yearly sum payable to the contractors, & not merely

the percentage thereof payable by the contractors to the railway co.—AUSTIN REED, LTD. v. ASSESSOR FOR GLASGOW, [1938] S. C. 317.—**SCOT.**

**800a viii.** ——— **Bookstall.**—By an agreement between a railway co., called therein the landlords, & a firm of newsagents, called therein the tenants, the landlords granted to the tenants the exclusive right to sell books & newspapers at the railway stations on their system for a period of ten years. There was no reference in the agreement to any specific bookstalls. In return the landlords were entitled to payment of a fixed annual sum, or, in their option, to a percentage on the gross drawings from sales.—*Held*: in a case relating to the bookstall at the Central Station, Glasgow, owned by the railway co. & occupied by a firm of newsagents, (a) the bookstall was "so let out as to be capable of separate assessment" within sect. 22 (9) of the Railways (Valuation for Rating) Act, 1930, & must be entered in the local Roll; (b) in determining its yearly rent or value, the Assessor must deduct from the payment made to the railway co. such part of the payment as represented the value of the exclusive right of sale at the bookstall & the sales made on the station platforms.—MENZIES (JOHN) & CO. v. ASSESSOR FOR GLASGOW, [1937] S. C. 288.—**SCOT.**

**800a ix.** ——— **Right to bring taxis into station.**—A railway co., described as the "lessors," "let" to a firm of motor-cab hirers, described as the "lessees," the exclusive right of bringing taxicabs into one of their stations. The right admittedly included the exclusive right to use & occupy a hut in the station. The hut was not, however, mentioned in the lease.—*Held*: the hut was "so let out as to be capable of separate assessment" within Railways (Valuation for Rating) Act, 1930, s. 22 (9), notwithstanding the fact that the right to the hut was incidental to the right of bringing taxicabs into the station; & the Assessor of Public Undertakings had rightly excluded the value of the hut from the *cumulo* yearly rent or value of the lands & heritages in Scotland belonging to or leased by the railway co., & the subjects would fall to be entered in the local Roll.—LONDON & NORTH-EASTERN RY. CO. v. ASSESSOR OF PUBLIC UNDERTAKINGS, [1937] S. C. 792.—**SCOT.**

**x. Profits basis.**—The correct method of assessing the annual value of a railway is on the profits basis; the "contractor's test" is unsuitable & incorrect, as are also the "train mileage" & the "route mileage" system.—**SECRETARY OF STATE FOR INDIA v. RANGOON MUNICIPAL CORPN.** (1932), 1 L. R. 10 Ran. 540.—**IND.**

structure of the bridge carrying the railway. In pursuance of these Acts the London & North Eastern Ry. Co. take all the traffic receipts of the Forth Bridge, but hand over to the Forth Bridge Co. the interest on the capital subscribed for building the bridge & the cost of maintaining the structure. Nevertheless, for the purpose of the Railways (Valuation for Rating) Act, 1930 (c. 24), the Forth Bridge is part of the London & North Eastern Railway undertaking, & the expense of maintaining the structure, though not in fact included in the Statutory Account No. 10, on which the valuation is required to be based, ought to have been so included, & was properly included by the Joint Assessment Authority in their ascertainment of the net railway revenue of the London & North Eastern Co.—*FIFE & WEST LOTHIAN COUNTY COUNCILS v. LONDON & NORTH EASTERN RY. CO. & ANGLO-SCOTTISH RAILWAYS ASSESSMENT AUTHORITY* (1933), 21 Ry. & Can. Tr. Cas. 76.

**800c. — Railway hereditaments.]—Held:**

(1) notwithstanding the provisions of Railways (Valuation for Rating) Act, 1930 (c. 24), s. 4 (2), the method known as the profits basis was still to be applied in assessing the rateable value of railway hereditaments. That method consists of ascertaining three factors, namely, (a) the estimated capital value of the plant & implements required by the tenant; (b) the percentage to be allowed to the tenant on his capital as remuneration; & (c) the net receipts from the undertaking. By dividing the first factor by the second, & subtracting the result from the third, a figure is obtained which is to be deemed to be the net annual value of the ry. co.'s undertaking; (2) in estimating for the purposes of the above calculation the value of the ry. co.'s rolling stock, a deduction must be made for depreciation of each item since its last reconditioning & a further deduction for depreciation due to obsolescence of the type, but no addition may be made for the profit which a manufacturer would have charged the hypothetical tenant for manufacturing each item of plant. Each such item must be taken into account at its actual cost to the ry. co., since the only conceivable tenant is the ry. co. itself.—*Re SOUTHERN RY. CO. APPEALS* (1935), 152 L. T. 299; 51 T. L. R. 233; 79 Sol. Jo. 127; 33 L. G. R. 101; *affd. sub nom. RAILWAY ASSESSMENT AUTHORITY v. SOUTHERN RY. CO., LONDON COUNTY COUNCIL v. SOUTHERN RY. CO.*, [1936] A. C. 266.

**800d. — —.]—(1)** Railways (Valuation for Rating) Act, 1930 (c. 24), s. 4, has not put an end to the system of assessing the hypothetical rent by deducting from the net receipts a percentage of the amount of the capital required by the tenant for the working of the undertaking, & allowing the balance only as rent, though there may be circumstances in which it is inapplicable; (2) there are three elements in assessing the percentage to be allowed on the tenant's capital, (a) the interest on capital, (b) profit on the adventure, (c) fair return on his capital having regard to the risks which he undertook; (3) the alteration in the economic position of railways since 1921 by virtue of legislation then & subsequently passed is not a relevant

fact to affect the construction of the language of Railways (Valuation for Rating) Act, 1930 (c. 24), though it may be relevant in estimating the rent at which the railway premises would let as a whole; (4) in the case of a railway within Railways (Valuation for Rating) Act, 1930 (c. 24), the hypothetical landlord is not entitled to a higher rent in respect of the large capital expended in creating the immovable parts of the undertaking; (5) the "fair & just division" in Railways (Valuation for Rating) Act, 1930 (c. 24), s. 4, is not an aliquot division on an unspecified basis, but involves the ascertainment of the landlord's share in the form of rent; (6) the landlord must be contemplated as a possible tenant, & the difficulties of finding a tenant must not influence the valuation; (7) the Railway Assessment Authority are not limited by Railways (Valuation for Rating) Act, 1930 (c. 24), s. 4 (1) (a) to considering only the actual results for the years 1928 & 1929, but may take into account the tendencies shown by the results of years preceding or following those years; (8) the tenant is not a mere investor to be compensated by the ordinary rate of interest on his investment. The rate must be such as to afford a profit commensurate with the risk involved & to induce him to embark on the undertaking. The actual figure is a question of fact for the Railway Assessment Authority.—*RAILWAY ASSESSMENT AUTHORITY v. SOUTHERN RY. CO., LONDON COUNTY COUNCIL v. SOUTHERN RY. CO.*, [1936] A. C. 266; [1936] 1 All E. R. 26; 105 L. J. K. B. 115; 151 L. T. 314; 100 J. P. 123; 52 T. L. R. 237; 80 Sol. Jo. 223; 34 L. G. R. 103; 24 Ry. & Can. Tr. Cas. 86, H. L.; *affg. S. C. sub nom. Re SOUTHERN RY. CO. APPEALS* (1935), 152 L. T. 299.

**800e. — — What are.]—A** railway co. in pursuance of a statute, constructed over a river a bridge consisting of an upper deck carrying a railway & a lower deck carrying a roadway for use by the public for vehicular & pedestrian traffic on payment of tolls. The construction of the roadway was a condition imposed on the co. by the statute empowering the co. to construct the bridge. The question raised was whether the roadway formed a "railway hereditament" or part of a "railway hereditament" within Railways (Valuation for Rating) Act, 1930 (c. 24), s. 1 (3):—*Held:* as the railway co. was given statutory authority to construct the bridge only on condition that the co. also constructed & maintained the toll-bearing road deck, it followed that the maintenance & the carrying on of the road deck was either an incidental & necessary part of the co.'s principal undertaking, or was an undertaking subsidiary or ancillary to its principal undertaking; on either view, therefore, the road deck was a hereditament occupied for the purpose of the co.'s undertaking & was thus a railway hereditament within sect. 1 (3) of the Act of 1930.—*NEWCASTLE-UPON-TYNE & GATESHEAD CORPN. v. RAILWAY ASSESSMENT AUTHORITY & LONDON & NORTH EASTERN RY. CO.*, [1937] A. C. 275; [1936] 3 All E. R. 616; 106 L. J. K. B. 1; 53 T. L. R. 114; 80 Sol. Jo. 931; 35 L. G. R. 61; *sub nom. Re LONDON & NORTH EASTERN RY. CO. VALUATION ROLL*,



*Re* NEWCASTLE-UPON-TYNE & GATESHEAD CORPN., 156 L. T. 1, H. L.

- 800f. ————]—A railway co. was in occupation under statutory authority of a pier which, owing to the sea having receded, could no longer be used for purposes of transport, & of a neighbouring ornamental garden. The co. used the pier & garden, which were situated not far from one of its stations, only as a place of recreation & amusement for members of the public, whom it admitted thereto on payment of a small fee:—*Held*: the pier & garden were a “railway hereditament” as defined for the purposes of Railways (Valuation for Rating) Act, 1930 (c. 24), by sect. 1 (3) thereof, & they had been properly entered in the railway valuation roll as such a hereditament.—*CLEETHORPES URBAN DISTRICT COUNCIL v. LONDON & NORTH EASTERN RY. CO.*, [1936] 1 K. B. 264; 105 L. J. K. B. 68; 33 L. G. R. 445; 23 Ry. & Can. Tr. Cas. 222; *sub nom. Re LONDON & NORTH-EASTERN RY. CO. VALUATION ROLL, Re CLEETHORPES URBAN DISTRICT COUNCIL*, 154 L. T. 17; 52 T. L. R. 20; 80 Sol. Jo. 34.

- 800g. ————(1) Bookstalls, chemist’s shop, kiosks, hairdressing saloons & other tenements within the area of a railway station:—*Held*: to have been “so let out as to be capable of separate assessment” within the proviso to sect. 1 (3) of Railways (Valuation for Rating) Act, 1930 (c. 24), & therefore not to be “railway hereditaments” within sect. 1 (3), but to be rateable under the general law of rating.

(2) Show-cases *held* by LORD MACMILLAN & LORD WRIGHT (LORD RUSSELL OF KILLOWEN *contra*) not to be “used for the exhibition of advertisements” within Advertising Stations (Rating) Act, 1889 (c. 27), s. 3, & accordingly to be rateable under the general law & not under the sect.—*WESTMINSTER CORPN. v. SOUTHERN RY. CO., RAILWAY ASSESSMENT AUTHORITY & SMITH & SON, LTD., WESTMINSTER CORPN. & KENT VALUATION COMMITTEE v. SOUTHERN RY. CO., RAILWAY ASSESSMENT AUTHORITY & PULLMAN CAR CO., LTD.*, [1936] A. C. 511; [1936] 2 All E. R. 322; 105 L. J. K. B. 537; 52 T. L. R. 541; 80 Sol. Jo. 671; 34 L. G. R. 313; 24 Ry. & Can. Tr. Cas. 189; *sub nom. Re SOUTHERN RY. CO.’S APPEALS*, 155 L. T. 33; 100 J. P. 327, H. L.

*Annotation*:—*Generally, Refd.* Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1938] 2 All E. R. 79.

- 800h. ———— **Rolling stock.**—*Re SOUTHERN RY. CO. APPEALS*, No. 800c, *ante*.

- 800k. ———— **Adjustment after appeal—Jurisdiction of Railway Assessment Authority.**—In terms of the Railways (Valuation for Rating) Act, 1930 (c. 24), the Railway Assessment Authority in July, 1933, settled the draft valuation roll as affecting the Southern Railway Co., & the total rateable value of the whole undertaking was shown to be £2,225,000, part of which, relating to Southampton Dock, was assessed at £101,520. After the draft roll had been settled, notice thereof was given to various persons, including the rating authority of Southampton. Thereupon the Southampton rating authority, in terms of the Act of 1930, made a repre-

sentation objecting to the apportionment relating to Southampton Dock, on the ground that it was insufficient, as full regard had not been paid to all material considerations, including the net receipts derived from the hereditament, & the relative value of the land & buildings then occupied, & that it was therefore less than a fair apportionment. After considering the representation, the Railway Assessment Authority decided that effect ought not to be given to it. Meanwhile, as a result of an appeal to the Railway & Canal Commission, followed by an appeal to the House of Lords, the rateable value of the whole undertaking, being the *cumulo* in the draft valuation roll, had been reduced to £2,180,000, with consequential reductions in the various parts of the whole undertaking, including a reduction, as regards the Southampton Dock, from £101,520 to £100,000. On Apr. 27, 1934, the draft valuation roll was completed by the Railway Assessment Authority, in pursuance of the provisions of the third schedule of the statute, notice whereof was given by the Authority on May 1, 1934, to all interested parties, including the Southampton rating authority, & at the same time, attention was particularly directed to the right of appeal, under sect. 9 of the Act of 1930, within two months after completion of the railway valuation roll, to the Railway & Canal Comrs. against an incorrect determination of the net annual or rateable value of any railway hereditament. The Southampton rating authority did not appeal. Later, the rateable value of the whole undertaking was reduced by the Railway & Canal Commission to £1,077,131 & the Comrs. made an order under the Act, directing the Railway Assessment Authority to make the necessary adjustment, which was, on appeal, confirmed by the House of Lords, & became operative within the time limited by sect. 10 of the Act. Thereupon the Railway Assessment Authority inserted the new aggregate sum in the roll, & made proportionate deductions in the case of each constituent undertaking, & by that time, the period for making representations under the Act had elapsed. A revision was now sought of the apportionment in respect of Southampton Dock:—*Held*: the duty of the Railway Assessment Authority was properly performed, without any excess of jurisdiction, & the Act did not provide, in the circumstances, for a reiteration of the objections made by the local rating authority without success in 1933.—*R. v. RAILWAY ASSESSMENT AUTHORITY, Ex p. SOUTHAMPTON CORPN.*, [1937] 1 All E. R. 431; 106 L. J. K. B. 393; 156 L. T. 236; 101 J. P. 163; 53 T. L. R. 317; 81 Sol. Jo. 277; 35 L. G. R. 136.

803. *Add. Annotation*:—*Refd.* Railway Assessment Authority v. Southern Ry. Co., London County Council v. Southern Ry. Co., [1936] 1 All E. R. 26.

832. *Add. Annotation*:—*Generally, Refd.* *Re* Southern Railway Co. Appeals (1935), 125 L. T. 299.

839. *Add. Annotations*:—*As to* (1) *Refd.* *Re* Southern Railway Co. Appeals (1935), 152 L. T. 299. *As to* (3) *Consd.* Townley Mill Co. (1919), Ltd. v. Oldham Assessment Com-

mittee, [1936] 1 K. B. 585. *Generally, Refd.* Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1937] 2 All E. R. 298.

848. *Add. Annotations:—As to (1) Refd. Re* Southern Railway Co. Appeals (1935), 152 L. T. 299. *Generally, Refd.* Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1937] 2 All E. R. 298.

853. *Add. Annotation:—Refd. Re* Southern Ry. Co. (1935), 153 L. T. 105.

875. *Add. Annotations:—As to (1) Consd. Re* Southern Railway Co. Appeals (1935), 152 L. T. 299. *Refd.* Manchester Corpn. v. Bolton Assessment Committee & Westhoughton Urban District Council (1930), 144 L. T. 618.

878. *Add. Annotation:—Refd.* Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1938] 2 All E. R. 79.

896. *Add. Annotation:—As to (1) Refd.* British Homophone, Ltd. v. Kunz & Crystallate Gramophone Record Manufacturing Co. (1935), 152 L. T. 589.

901. *Add. Citation:—(1926–31), 1 B. R. A. 111. Add. Annotations:—Consd.* Manchester Corpn. v. Bolton Area Assessment Committee & Little Hulton Urban District Council (1930), 144 L. T. 570; Manchester Corpn. v. Bolton Assessment Committee & Westhoughton Urban District Council (1930), 144 L. T. 618; St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee, [1931] A. C. 33. *Refd.* Railway Assessment Authority v. Southern Ry. Co., London County Council v. Southern Ry. Co., [1936] 1 All E. R. 26.

903. *Add. Annotations:—Folld.* Manchester Corpn. v. Bolton Area Assessment Committee & Little Hulton Urban District Council (1930), 144 L. T. 570. *Consd.* St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee (1932), 97 J. P. 48.

903a. ———.]—By sect. 111 of the Manchester Corpn. Waterworks Act, 1847, the corpn. were authorised to levy a domestic water rate on occupiers of property in the city & a public water rate on owners of such property. A poor rate was made in respect of a hereditament consisting of part of the aqueduct from T. to M. in the township of L. The method of assessment adopted by the corpn. & the assessment committee was that approved by the House of Lords in *Kingsion Union v. Metropolitan Water Board*, No. 901, the profits basis system. For the relevant year the revenue of the corpn. in respect of their water undertaking was £755,043 5s. 8d., including £79,099 13s. 11d., the amount collected in respect of the public water rate. After deducting the expenditure of carrying on the undertaking there remained

a balance of £462,335 4s. 2d., & out of this, provision was made (i) for payment of interest & dividends; (ii) for sinking fund in respect of the moneys borrowed by the corpn. under the statutory powers for their water undertaking, including sums to meet expenditure on the construction of works, none of which were completed or occupied or brought into use until after the period for which this rate was made; & (iii) for the promotion of the Bill for the Manchester Corpn. Act, 1919, by which the corpn. were empowered to make & maintain further reservoirs at H. & other works, the construction of no part of which had been commenced. The sum which had to be provided in the following year for debt charges in respect of moneys borrowed for the last-mentioned purposes amounted to £114,674, but there was no earmarking of the proceeds of the public water rate against this sum. The assessment committee, for the purposes of their valuation of this hereditament, included the whole of the sum of £79,099 13s. 11d., the proceeds of the public water rate, in the gross revenue of the corpn.'s water undertaking & made no deduction in respect of debt charges:—*Held*: this sum should be excluded. But for the fact that the landlords' charges were included in the account there would have been no need for the hypothetical tenant to raise this public water rate or any part of it. The sum raised by the public water rate was part of a larger sum provided to meet debt charges in respect of money borrowed by the corpn. for the construction of additional works uncompleted & not in occupation at the date of the rate.—*MANCHESTER CORPN. v. BOLTON AREA ASSESSMENT COMMITTEE & LITTLE HULTON URBAN DISTRICT COUNCIL* (1931), 144 L. T. 571; (1926–31), 1 B. R. A. 463.

*Annotation:—Refd.* St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee (1932), 97 J. P. 48.

904. *Add. Annotations:—Consd.* St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee (1932), 97 J. P. 48. *Refd.* Manchester Corpn. v. Bolton Area Assessment Committee & Little Hulton Urban District Council (1930), 144 L. T. 570.

908. *Add. Annotations:—Consd.* Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1937] 2 All E. R. 298. *Refd.* Railway Assessment Authority v. Southern Ry. Co., London County Council v. Southern Ry. Co., [1936] 1 All E. R. 26.

920. *Add. Annotations:—As to (3) Refd.* Railway Assessment Authority v. Southern Ry. Co., London County Council v. Southern Ry. Co., [1936] 1 All E. R. 26. *Generally, Refd.* Consett Iron Co., Ltd. v. Durham County Assessment Committee for the North-Western Area (1930), 99 L. J. K. B. 277; Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1937] 2 All E. R. 298.

## PART II. SECT. 2, SUB-SECT. 3.— A. (a).

t i. ———. *Extraordinary cost of constructing reservoir during war.*—*FIFE ASSESSOR v. DUNFERMLINE DISTRICT COMMITTEE*, [1929] S. C. (Cl. of Sess.) 304.—*SCOT.*

t ii. ———.]—Local Govt. (Scotland) Act, 1929, provided for the payment of an annual Exchequer grant to local authorities to make good the loss to rates due to derating & to the discontinuance of certain Govt. grants:—*Held*: in valuing the water undertaking of a burgh on the revenue principle,

the Exchequer grant was a surrogatum for rates, & the proportion thereof applicable to the water undertaking fell to be included in the revenue of the undertaking.—*DENNY & DUMFRIES MAGISTRATES v. STIRLINGSHIRE ASSESSOR*, [1933] S. C. 338.—*SCOT.*

- 928a.** — **Hereditament must be assessed as productive or unproductive.**—In the rating of a water undertaking extending over several parishes, ascertained on the profits basis as approved by the House of Lords in *Kingston Union & Metropolitan Water Board*, No. 901, a hereditament, part of the undertaking, in a parish which has been assessed on the contractor's basis as "indirectly productive" in that parish, cannot be at the same time further assessed at an additional sum as "directly productive." To do so would be to produce that very injustice which the profits formula was designed to prevent.—*MANCHESTER CORPN. v. BOLTON AREA ASSESSMENT COMMITTEE & WESTHOUGHTON URBAN DISTRICT COUNCIL* (1930), 144 L. T. 618; 95 J. P. 60; 47 T. L. R. 210; 29 L. G. R. 185; (1926-31), 1 B. R. A. 445, D. C.
- 932.** *Add. Annotation*:—**Refd.** *Re Southern Railway Co. Appeals* (1935), 152 L. T. 299.
- 934.** *Add. Annotation*:—**Consd.** *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*, [1936] 1 K. B. 585.
- 955a.** — **Adjoining land agricultural—Whether lands of canal company derated.**—Under Grand Junction Canal Act, 1794, applts. were liable to be rated in respect of their land & buildings in the same proportions as any other lands, grounds or buildings lying near the same. The adjoining lands & buildings were in fact or in law either agricultural land or buildings & were accordingly derated:—**Held**: the hereditaments of applt. were also to be deemed to have no rateable value.—*GRAND UNION CANAL CO. v. DACORUM ASSESSMENT COMMITTEE & DACORUM REVENUE OFFICER* (1933), 102 L. J. K. B. 622; 49 T. L. R. 491; 31 L. G. R. 311, D. C.
- 971.** *Add. Annotation*:—**Generally, Refd.** *St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee* (1932), 97 J. P. 48.
- 978.** *Add. Annotation*:—**Refd.** *Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee*, [1937] 2 All E. R. 298.
- 1016.** *Add. Annotations*:—**Consd.** *Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee*, [1937] 2 All E. R. 298. **Refd.** *St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee* (1932), 97 J. P. 48.
- 1017.** *Add. Annotation*:—**Consd.** *London Playing Fields Society v. Essex (S. W. Area) Assessment Committee* (1930), 94 J. P. 241; *St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee* (1932), 97 J. P. 48. **Refd.** *Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Area Assessment Committee* (1932), 96 J. P. 336.
- 1025.** *Add. Annotations*:—**Consd.** *Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee*, [1937] 2 All E. R. 298. **Refd.** *Appenrodt v. Central Middlesex Assessment Committee*, [1937] 2 K. B. 48.
- 1028.** *Add. Annotations*:—**Refd.** *Leney & Co. v. Whelan*, [1934] 2 K. B. 511; *Appenrodt v. Central Middlesex Assessment Committee*, [1937] 2 K. B. 48.
- 1031.** *Add. Annotation*:—**Consd.** *Appenrodt v. Central Middlesex Assessment Committee*, [1937] 2 K. B. 48.
- 1031a.** **Monopoly value.**—In Apr. 1932, the owner & occupier of an hotel obtained the grant of a new on-licence for five & a quarter years subject to the payment of £3,000 monopoly value made payable by five annual instalments of £600 each. The question arose whether in fixing the value of the premises for the purposes of the valuation list the instalments ought to be taken into consideration by way of diminishing the estimated rent that a hypothetical tenant would pay & therefore the gross value:—**Held**: the liability for these instalments ought not to be taken into account in fixing the estimated rent; by *LORD WRIGHT, M.R. & ROMER, L.J. (SCOTT, L.J. dissenting)* on the ground that the annual instalments being payments necessary to maintain the premises as licensed premises, they came within the words "other expenses" to be borne by the landlord under the definition of gross value in sect. 68; by *LORD WRIGHT, M.R. & SCOTT, L.J.* on the ground that the rent to be paid by the hypothetical tenant under sect. 68 was in respect of the premises when licensed & therefore when embodying the monopoly value, so that the monopoly value must be borne by the landlord in order to secure the licence.—*APPENRODT v. CENTRAL MIDDLESEX ASSESSMENT COMMITTEE*, [1937] 2 K. B. 48; [1937] 2 All E. R. 325; 106 L. J. K. B. 690; 157 L. T. 201; 101 J. P. 283; 53 T. L. R. 601; 81 Sol. Jo. 356; 35 L. G. R. 383, C. A.
- 1041.** *Add. Annotation*:—**Refd.** *Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee*, [1937] 2 All E. R. 298.
- 1044.** *Add. Annotation*:—**Refd.** *Appenrodt v. Central Middlesex Assessment Committee*, [1937] 2 K. B. 48.
- 1048.** *Add. Annotation*:—**Consd.** *Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee*, [1937] 2 All E. R. 298.
- 1052.** *Add. Annotations*:—**Overd.** *Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee*, [1938] 2 All E. R. 79. **Refd.** *Leney & Co. v. Whelan*, [1934] 2 K. B. 511; *Marston's Dolphin*

## PART II. SECT. 2, SUB-SECT. 3.—B.

**e1.** — *Houses occupied by employees—Showroom for sale of gas appliances.*—*CHIEFF GAS LIGHT CO., LTD. v. PERTSHIRE ASSESSOR, KELTY GAS CO. v. FIRE ASSESSOR*, [1928] S. C. (Ct. of Sess.) 455.—**SCOT.**

**1.** — *—*—The County Council of Lanarkshire, the accounts of whose gas undertaking showed a very large deficit for a period of years which could not be wiped out by any increase in

the prices charged to consumers decided to levy, under statutory powers, for a period of 4 to 5 years a "gas contingent guarantee rate" to be applied to the liquidation of this debt:—**Held**: in valuing the undertaking upon the revenue principle, the sum produced by this rate in any year did not fall to be included in the revenue of the undertaking of that year, in respect that it was revenue of an exceptional character & could not be regarded as part of the ordinary

revenues of the undertaking.—*LANARKSHIRE ASSESSOR v. LANARKSHIRE COUNTY COUNCIL*, [1933] S. C. 355.—**SCOT.**

**sb.** *Gas mains—Tenable where situated.*—*MONTREAL LIGHT, HEAT & POWER CONSOLIDATED v. OUTREMONT*, [1932] 2 D. L. R. 305.—**CAN.**

## PART II. SECT. 2, SUB-SECT. 6.—A.

**d 1.** — *—*—*COUSIN v. EDINBURGH ASSESSOR*, [1928] S. C. 392.—**SCOT.**

Brewery, Ltd. v. Loughnan (1934), 151 L. T. 532; *Re Paulin, Re Crossman*, [1935] 1 K. B. 26.

**1054a.** ———.—]—In assessing a licensed public-house to rates there is no justification for including brewers among the competitors but excluding the rent they would be prepared to pay. The evidence of the rent they would be prepared to pay for its tenancy, whether they proposed to sublet it to a tied tenant or to occupy it themselves by a manager, is both competent & relevant in estimating the rent which a hypothetical tenant might reasonably be expected to pay, although it does not follow that the rent which could be obtained from a brewer is necessarily to be taken as the gross annual value. It is for the valuing authority to arrive at their valuation on the whole evidence, including evidence as to the extent of the demand for public-houses in the district, the parties likely to compete for them, whether brewers or others, the rents which those competitors would be likely to offer, & all other relevant considerations. Furthermore, it is well settled that in valuing a hereditament it is legitimate to have in view its importance as an adjunct of another hereditament.—*ROBINSON BROS. (BREWERS), LTD. v. DURHAM COUNTY ASSESSMENT COMMITTEE* (AREA No. 7), [1938] A. C. 321; 158 L. T. 498; 102 J. P. 313; 82 Sol. Jo. 452; 36 L. G. R. 357; *sub nom.* *ROBINSON BROS. (BREWERS), LTD. v. HOUGHTON & CHESTER-LE-STREET ASSESSMENT COMMITTEE*, [1938] 2 All E. R. 79; 107 L. J. K. B. 369; 54 T. L. R. 568, H. L.

**1057a.** ———.—]—On an appeal to quarter sessions against a rate for the half-year ended Mar. 31, 1928, in respect of certain coal mines of which applts. were occupiers, applts. contended that, inasmuch as the mines had been worked at a loss since 1925, the rateable values thereof should be reduced to nil, or, alternatively, to nominal amounts. On May 10, 1928, applts. entered into a new lease for a term of twenty years of part of their properties. Quarter sessions found that under the trade conditions prevailing at the time when the rate was made, none of applts.' properties could be worked except at a loss, & that there was no indication that conditions of trade were likely to improve within a year; & further, that the only basis on which any one could have been found who might have entered into a tenancy of the properties at that time would have been on the assumption that his tenancy would continue for a term of years & in the hope that conditions of trade would improve during that period. Upon these findings they rejected applts.' contention:—*Held*:

(1) the expression "term of years," as used by quarter sessions, meant a tenancy from year to year, which might be put an end to on notice; where a colliery was actually being worked by the occupier as a going concern the expectation of better trade subsequent to the year of assessment was a consideration which might be taken into account in arriving at the true assessment; (2) inasmuch as quarter sessions had not included any matter of law which they ought to have excluded, or excluded any matter of law which they ought to have included, the *quantum* of the rateable values of the mines was a pure question of fact for that ct.—*CONSETT IRON CO., LTD. v. DURHAM COUNTY ASSESSMENT COMMITTEE FOR NO. 5 OR NORTH-WESTERN AREA*, [1931] A. C. 396; 100 L. J. K. B. 242; 144 L. T. 649; 95 J. P. 98; 47 T. L. R. 301; 29 L. G. R. 231; (1926-31), 1 B. R. A. 308, H. L.

*Annotations:—Generally.* *Reid. Townley Mill Co.* (1919), Ltd. v. *Oldham Assessment Committee*, [1936] 1 K. B. 585; *Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee*, [1937] 2 All E. R. 298.

**1089.** *Add. Annotation:—Apld.* *Cleobury Mortimer Rural District Council v. Childe* (1933), 97 J. P. 217.

**1097a.** *Effect of redemption.*]—Under an order of the Ministry of Agriculture & Fisheries, under Tithe Acts, the tithe rentcharges issuing out of certain lands in a parish were redeemed in consideration of an annuity payable by the landowner for the term of forty years. Thereupon the overseers of the parish made a supplemental valuation list increasing the gross estimated rental & rateable value of the lands, & reducing the assessments of the tithe rentcharges affected by the redemption by amounts equal to the amount by which the gross estimated rental of the lands was increased:—*Held*: the lands could not be revalued by this simple process & the rule laid down by *Parochial Assessments Act*, 1936, s. 1, for ascertaining the rateable value must again be applied.—*Twitchin v. ALTON UNION* (1921), 22 L. G. R. 482.

**1121a.** *Hospital.*]—A newly opened hospital was assessed for rates at a rateable value of £4,733. On objection by the occupiers, the assessment committee reduced the assessment to £4,000. On appeal to the county rating appeals committee, the assessment committee contended that the hospital ought to be assessed on a "contractor's" basis; the occupiers of the hospital contended that the assessment should be on a "per bed" basis. The appeals committee refused to accept either contention, but in the circumstances reduced the assessment to £3,000:—*Held*: the appeals committee were right &

**PART II. SECT. 2, SUB-SECT. 7.—A.**

n (p. 574) i. ———.—]—*Whether houses let to miners entitled to deduction as being used for purposes of working mine.*—*CADZOW COLLIERY CO., LTD. v. LANARKSHIRE ASSESSOR*, [1928] S. C. (Cl. of Sess.) 444.—*SCOT.*

**PART II. SECT. 2, SUB-SECT. 13.**

n (p. 574) i. ———.—]—*QUEENSLAND DEPOSIT BANK, LTD. v. RUSSEANE CITY COUNCIL*, [1928] S. R. Q. 13.—*AUS.*

n (p. 574) ii. ———.—]—*Pltf. sued for a declaration that the assessments of taxes made by doft. city against three parcels of land owned by him for the years 1932, 1933 & 1934 were invalid & that no taxes are legally due & payable in respect of said property for said years, & he, also, prayed for an injunction restraining doft. from proceeding, as it had threatened, to enforce by sale or otherwise the collection of taxes based upon said assessments:—Held*: each of said parcels was a "rateable parcel of land" within the Act & their assessment

together as one property & the taxes based thereon were invalid & illegal, although the assessments could not be treated as nullities in the sense that they were so wholly void & unauthorised by reason of the very foundation of the assessment being wanting that they could not have been corrected by a Ct. of Revision if it had full power to review the action of the assessor.—*VANCOUVER WATERFRONT, LTD. v. VANCOUVER CITY*, [1936] 1 W. W. R. 248; 50 B. C. R. 294.—*CAN.*

h (p. 574) i. ———.—]—*Assessment made in one year adopted as assessment for*

in determining the rateable value of a hospital the sole question was what the hypothetical tenant might reasonably be expected to pay by the year, after making all suitable deductions & taking all proper considerations into account. There was no difference

between a voluntary & a non-voluntary hospital in this respect.—KING EDWARD VII. WELSH NATIONAL MEMORIAL ASSOCN. v. SOUTH-EAST GLAMORGAN ASSESSMENT COMMITTEE (1937), 158 L. T. 311; 102 J. P. 105; 82 Sol. Jo. 17; 36 L. G. R. 258, D. C.

*following year—Removal of person from municipality.*—Pltf. removed from the City of T. to the Township of Y. on Dec. 14, 1923. He paid an income tax to the City of T. in 1923 & to the Township of Y. in 1924. An assessment roll for the City of T. was prepared & settled in 1923, pursuant to bye-law under Assessment Act, R. S. O., 1914, s. 57, & pltf., then resident in T., was entered on this roll for income. This assessment of 1923 was, pursuant to sub-sect. 5 of said sect. 57, adopted by the City Council of 1924, by bye-law passed Feb. 28, 1924, & the City levied on pltf. an income tax in 1924, which he paid under protest. He now sought repayment.—*Held:* pltf. should succeed.—SIFTON v. TORONTO CITY, [1929] 3 D. L. R. 852; S. C. R. 484; *rearg.*, [1929] 1 D. L. R. 933; 63 O. L. R. 937.—CAN.

*h* (p. 574) *ii.* ———.—Pltf. corp'n. sued deft. for income tax levied on her in 1930, based on an assessment roll prepared in 1929 & completed & returned by the assessor on Sept. 20, 1929, at which time deft. was residing in Ottawa. On Nov. 8, 1929, she removed from Ottawa & did not reside there again.—*Held:* from Nov. 8, 1929, to Apr. 3, 1930, deft. had a vested right to freedom from municipal taxation in Ottawa for 1930, & the Assessment Amendment Act of 1930, which came into force on Apr. 3, 1930, was not retroactive so as effectively to cancel & destroy deft.'s vested right.—OTTAWA v. KEMP, [1931] 4 D. L. R. 412; O. R. 753.—CAN.

*aa* (p. 574) *i.* *Effect of change of conditions in locality.*—HUDSON'S BAY CO. v. PRINCE ALBERT, [1930] 3 W. W. R. 81.—CAN.

*dd* (p. 574) *i.* *Bridge over international river—Whether doctrine of "ad medium flum" applies.*—*Re* FORT ERIE VILLAGE & BUFFALO & FORT ERIE PUBLIC BRIDGE CO., [1928] 1 D. L. R. 723; 61 O. L. R. 502.—CAN.

*n* (p. 575) *i.* *Land converted from "dry" to "wet."*—SECRETARY OF STATE FOR INDIA v. RAMANUJACHARIAR (1928), L. R. 55 Ind. App. 289.—IND.

*r* (p. 575) *i.* *Proper deductions from gross income.*—(1) A joint stock trading co. being assessed for income by a city corp'n. was held to have no right to deduct from its gross receipts a sum received from a building co. for dividends upon shares of the building co. owned by the trading co. The profit from which the dividends were paid by the building co., though derived from rentals of real property, & therefore not subject to assessment as income of the building co., were not received by the trading co. as rentals. (2) The amount of the allowance for "overhead expenses" should be fixed & determinable in the proportion which the amount of non-taxable income bears to total gross income.

(3) The trading co., having power under its charter to acquire, hold, & sell the bonds & shares of other incorporated cos. purchased shares & bonds of the A. Co., & to finance the purchase, borrowed money from a bank.—*Held:* in the circumstances, interest paid by the trading co. to the bank upon the money borrowed should not, in fixing the amount of the trading co.'s assessable income, be deducted, as being expenses or carrying charges, from the gross receipts.—*Re* WALLACE REALTY CO. & OTTAWA, [1929] 4 D. L. R. 784; 64 O. L. R. 265; *affd.*

as to (1) & (2); *revid.* as to (3), [1930] S. C. R. 387; 3 D. L. R. 417.—CAN.

*aw.* *Deduction in respect of—Works used for manufacture of steel—What are—Not works preparing scrap metal for sale to steel manufacturers.*—JOHN JACKSON & CO. (IRON MERCHANTS), LTD. v. GLASGOW ASSESSOR, [1928] S. C. 416.—SCOT.

*ax.* *Works for refining crude oil—What are—Works for refining tar.*—JAMES ROSS & CO. (LIME WHARF), LTD. v. STIRLINGSHIRE ASSESSOR, [1928] S. C. 420.—SCOT.

*ay.* *Manufactory—What is—Not cellars & warehouse used for "quieting," "fining," bottling & maturing beer.*—WHITBREAD & CO., LTD. v. EDINBURGH ASSESSOR, [1928] S. C. 425.—SCOT.

*az.* *Not warehouse stores & workshops of whisky blender.*—JOHN WALKER & SONS, LTD. v. KILMARNOCK ASSESSOR, [1928] S. C. 430.—SCOT.

*ab.* *Distillery—Bonded warehouses apart from distillery—Whether whole entitled to deduction as manufactory.*—DISTILLERS CO., LTD. v. EDINBURGH ASSESSOR, [1928] S. C. (Ct. of Sess.) 435.—SCOT.

*ac.* *Bonded warehouse forming integral part of distillery—Whether whole entitled to deduction as manufactory.*—LANARKSHIRE ASSESSOR v. DISTILLERS CO., LTD., [1928] S. C. (Ct. of Sess.) 439.—SCOT.

*ad.* *Erected on ground rented by manufacturer—Whether works & ground entitled to deductions.*—LONDON & NORTH-EASTERN RY. CO. v. GLASGOW ASSESSOR, [1929] S. C. (Ct. of Sess.) 325.—SCOT.

*af.* *Grandstand & buildings erected for greyhound racing track.*—SCOTTISH GREYHOUND RACING CO., LTD. v. GLASGOW ASSESSOR, [1929] S. C. (Ct. of Sess.) 285.—SCOT.

*ah.* *Manufactory—Part of process carried on at separate works—Whether whole entitled to deduction.*—GLASGOW ASSESSOR v. SCOTTISH TUBE CO., LTD., [1928] S. C. (Ct. of Sess.) 466.—SCOT.

*ak.* *Stores, warehouses or other subjects associated with but not forming integral part of manufactory—Whether whole entitled to deduction.*—JOHN LING & CO., LTD. v. DUNDEE ASSESSOR, DUNDEE ASSESSOR v. DON BROS. HUIST & CO., LTD., DUNDEE ASSESSOR v. CAIRD (DUNDEE), LTD., BELL & SIMIE v. DUNDEE ASSESSOR, DISTILLERS CO., LTD. v. GLASGOW ASSESSOR, [1929] S. C. (Ct. of Sess.) 315.—SCOT.

*al.* *Premises used for cold storage & manufacture of ice—Whether premises entitled to deduction.*—MILNE, WILLIAM, LTD. v. GLASGOW ASSESSOR, UNION COLD STORAGE CO., LTD. v. GLASGOW ASSESSOR, [1929] S. C. (Ct. of Sess.) 296.—SCOT.

*am.* *Combined iron & steel works—Whether to be treated as unum quid for purposes of deductions.*—COLVILLE DAVID & SONS, LTD. v. AYRSHIRE ASSESSOR, [1928] S. C. (Ct. of Sess.) 460.—SCOT.

*ao.* *Carling contractor's premises—Comprising stables, workshops, etc.—Capable of being let for separate occupation—Whether whole to be treated as unum quid.*—COWAN & CO. v. EDINBURGH ASSESSOR, COWAN & CO. v. GLASGOW ASSESSOR, [1928] S. C. (Ct. of Sess.) 450.—SCOT.

*ap.* *Real property—Exemption of fixed machinery—What is.*—*Held:* certain

structures, known as "racks," for storage of barrels of whisky during the maturing & aging process, were, along with the erections enclosing them, assessable under Assessment Act, R. S. O., 1927, as being real property, & the racks not being "machinery" within the exemption in sect. 4 (19) of "fixed machinery used for manufacturing purposes"; but the maturing & aging of the whisky was a part of the process of manufacture, & an elevator (for hoisting the barrels, etc.) & a fan (for the circulation of heated air), being used in connection with such process, came within said exemption; the sprinkling system & electric wiring were not machines, therefore not exempt, & were assessable.—HIRAM WALKER & SONS, LTD. v. WALKERVILLE CORPN., [1933] S. C. R. 247; 3 D. L. R. 433.—CAN.

*aq.* *Actual value—College building.*—In determining for assessment purposes the "actual value" within sect. 212 (1) of Municipal Act, R. S. B. C., 1924, of an improvement such as a building constructed for permanent & continuous use as a college & in use as, but practically unsalable at present as, a college, the words "actual value" should not be construed to mean the sum which would be realised for the building at a forced sale, nor by taking as the dominant consideration the structural cost of the building or the cost of replacement. The measure of valuation which should be applied is the value in exchange, properly understood. The test of such value is, what would a prudent investor be likely to pay or agree to pay for the building by way of investment?—the assessor keeping in mind the likelihood that the reversible currents which affect land, causing it sometimes to depreciate and at others to appreciate in value, will not at least to the same degree, affect a building of said character. Moreover, the building must be valued for assessment purposes *qua* college as long as it remains such; it is improper to convert it mentally into a revenue-producing commercial structure, e.g., an apartment house, & value it accordingly.—VICTORIA (BISHOP) v. VICTORIA (CITY), [1933] 3 W. W. R. 332; 4 D. L. R. 524; 47 B. C. R. 264.—CAN.

*am.* *Consideration of special adaptability.*—In assessing land it is proper to take into consideration its special adaptability to such a use as the land in question in this case was being put to, viz. its use in developing a valuable water power which without it could not have been developed.—*Re* ONTARIO & MINNESOTA POWER CO. v. FORT FRANCES (1916), 35 O. L. R. 459.—CAN.

*sp.* *Land & buildings—Meaning of "value."*—Under the Winnipeg Charter where land has buildings thereon the land & buildings must be valued for assessment purposes as a unit. The "value at the time of the assessment" which under sect. 294 of said Charter the assessor is required to ascertain, is that amount which a prudent investor, taking into account all the factors creating value, might reasonably be expected to pay for the property. In determining such value, every factor past, present, future or potential, which enables its owner to exchange property for money must be taken into account. There is nothing in said Charter which authorises "uniformity" or equalisation of assessments. The assessor is not entitled

## Part III.—Special Rate.

1123. *Add. Citation* :—[1928] Ch. 340.

## Part IV.—The Assessment.

1145. *Add. Annotations* :—*Distd. Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Area Assessment Committee* (1932), 96 J. P. 336; *R. v. Cornwall County Valuation Committee, Ex p. Falmouth Rating Authority*, [1937] 2 K. B. 222.

1146. *Add. Citations* :—97 L. J. K. B. 10; (1926–31), 1 B. R. A. 231.

1146a. **Rating & Valuation Act, 1925** (c. 90), Sched. I, provisions 11, 12.]—By provision 12 of Sched. I. to the Rating & Valuation Act, 1925: "No person who is a member of any committee to which the duties of the rating authority with respect to the preparation of the valuation list are delegated shall be qualified for appointment as a member of the assessment committee."

A rating authority had appointed a sub-committee to fix the values of properties in the district for the purpose of the preparation of the valuation list. They appointed P. & G. members thereof, & subsequently appointed the same two persons as their representatives on the resp. assessment committee. The applicant had given notice of objections to his assessment to the resp. committee, & on learning the above facts, obtained a rule *nisi* for a prohibition to that committee from hearing & determining his objection :—*Held* : (1) a writ of prohibition would lie to an assessment committee;

(2) within provision 12, the duties of the rating authority with respect to the preparation of the valuation list had been delegated to the sub-committee of which P. & G. were members, & consequently, they were disqualified from sitting on the assessment committee under provision 12, although at the time of their appointment thereto they were not disqualified; (3) P. & G. were not interested "otherwise" within provision 11, which refers to an interest *ejusdem generis* as that of an owner or occupier.—*R. v. NORTH WORCESTERSHIRE ASSESSMENT COMMITTEE, Ex p. HADLEY*, [1929] 2 K. B. 397; 98 L. J. K. B. 605; 141 L. T. 557; 93 J. P. 199; 45 T. L. R. 525; 27 L. G. R. 458; (1926–31), 1 B. R. A. 279, D. C.

*Annotation* :—As to (1) *Reid, R. v. Salford Assessment Committee*, [1937] 2 K. B. 1.

1146b. — **Jurisdiction of High Court—Prohibition.**—*R. v. NORTH WORCESTERSHIRE ASSESSMENT COMMITTEE, Ex p. HADLEY*, No. 1146a, *ante*.

1146c. — **Right of officer of valuation committee to be present.**—The county valuation committee under sect. 18 (2) of the Act of 1925 is entitled to send its valuation officer or duly authorised representative to meetings of an assessment committee during the hearing by them of any objections to draft valuation lists or of any proposals to amend

to consider the assessments of other properties. In determining value the facts as to the sales of other properties are admissible as evidence of value. But this evidence must be of sales of property in the neighbourhood at the time the assessment was made. The amount which might be obtained at a forced sale is no test of value but the price asked in a *bond fide* offer to sell is weighty evidence of value. The net revenue of the property & the replacement cost are also factors to be considered in conjunction with all the others.—*Re PHILLIPS ESTATE*, [1934] 1 W. W. R. 449; 41 Man. L. R. 582.—CAN.

st. "All purposes of civic taxation"—*School taxes.*—School taxes are within the expression "all purposes of civic taxation in the said city levied by or with the authority of the city council" in *Moncton Tramways, Electricity & Gas Co., Ltd.*, given a fixed valuation for these purposes.—*R. v. ANDERSON, Ex p. MONCTON TRAMWAYS, ELECTRICITY & GAS CO., LTD.* (1933), 6 M. P. R. 319.—CAN.

sv. *Fair value.*—Where it is provided by statute that land in a municipality shall be assessed at its fair value & buildings & improvements at a percentage of their fair value, & that in case of an assessment of any specified land being more or less than its fair value, the assessment shall not be varied on appeal, if such assessed value bears a fair & just proportion to the value at which other lands in the

municipality are assessed; the fair value is the dominant factor in determining the assessment & the provision as to proportionate assessment is subservient to it. A further provision that "the dominant factor in the assessment of subjects of taxation shall be equity" does not alter the situation, as the latter provision is directed towards ensuring equality & uniformity as between various "subjects of taxation," e.g. lands, businesses, & special franchises, & not as between specific lands, etc. Where it is provided that local improvement rates shall not, unless the municipality determines otherwise, be taken into consideration as a factor in the reduction of the general assessment of land to the extent of the local improvement rate levied, or at all, & the municipality has made no determination, the burden of the local improvement tax, being its capitalised value, does not lower the value of the land for assessment purposes.—*ROSBOROUGH v. REGINA CITY*, [1934] 2 W. W. R. 636.—CAN.

sx. *Buildings—Exemption where income from land chief source of income—Meaning of "income."*—"Income" in the phrase "occupant's chief source of income" in the fifth line of sect. 25 (1) of Assessment Act, 1934, does not mean "livelihood."—*AGAR v. EAST ST. PAUL RURAL MUNICIPALITY*, [1935] 1 W. W. R. 381; 2 D. L. R. 811; 43 Man. L. R. 114.—CAN.

st. *Apartment block.*—*Re BELGO-CANADIAN REAL ESTATE CO., LTD. & WINNIPEG CITY*, [1937] 2 W. W. R.

57; 2 D. L. R. 324; 45 Man. L. R. 37.—CAN.

sv. *Undeveloped property—Net revenue.*—The owner of property has the right to develop it or not as he sees fit, within the means at his command; & a municipality has not the right to penalise him in taxes because he does not develop it in the way someone else may think advisable so as to secure from it the largest possible annual return. Under Winnipeg Charter the city has the right to tax the property only at its value as it is, & not at a value which might be the result of further improvements. The future or present possibilities of the property is something which can be considered only in connection with every other feature. The fact, however, that the property is far from being fully developed is almost a complete answer to the contention that the assessment should be based upon the net revenue obtained.—*Re CHRISTIE & CLARK'S APPEAL*, [1937] 1 W. W. R. 81; 44 Man. L. R. 405.—CAN.

### PART IV. SECT. 1.

sd. *Duty to assess & collect rate.*—A municipal corpn. without special authority granted by the legislature, cannot renounce directly or indirectly its right, nor fall in its duty, to collect from assessable property the funds needed for general administration & for the performance of public works.—*TELLIER v. LA CITE DE ST.-HYACINTHE*, [1935] S. C. R. 578; [1936] 1 D. L. R. 275.—CAN.

current valuation lists, & the assessment committee have no right to exclude him from such meetings.

*Per ROMER, L.J.*: Power to attend such meetings is one of the powers conferred upon county valuation committees by sect. 18 (2) of the Act, & that being so, it is not possible for an assessment committee to exclude an officer properly appointed for the purpose of the valuation committee from one of those meetings on the plea of exercising the power conferred upon them by Sched. I. to the Act of regulating their proceedings. The powers so given to the assessment committees of regulating their proceedings are in terms conferred subject to the provisions of the Act.—*MIDDLESEX COUNTY VALUATION COMMITTEE v. WEST MIDDLESEX ASSESSMENT COMMITTEE*, [1937] Ch. 361; [1937] 1 All E. R. 403; 106 L. J. K. 215; 156 L. T. 252; 101 J. P. 203; 53 T. L. R. 365; 81 Sol. Jo. 157; 35 L. G. R. 211, C. A.

*Annotation*:—*Consd. R. v. Salford Assessment Committee*, [1937] 2 K. B. 1.

**1146d.** — **Who may be clerk of.**—An officer of a rating authority, whose duty was to attend the meetings of the rating committee for the purpose of taking minutes of their proceedings, & so would obtain knowledge of all the transactions of the rating authority, was appointed by the assessment committee for that area acting clerk to that committee, & would have to advise the assessment committee upon matters of procedure. The assessment committee would have to consider an objection by the rating authority to a proposal to amend the valuation list. An application was made to prohibit the assessment committee from acting on the resolution appointing the officer acting clerk to the assessment committee & also from acting upon a resolution directing him to remain in attendance on the committee during the hearing of the objection to the applt.'s proposal to amend the valuation list & the deliberations of the committee thereon on an allegation of liability to suspicion of bias. The Div. Ct. held that the appointment was valid:—*Held*: the assessment committee should be prohibited from allowing the officer to remain in attendance on that committee during the hearing of applt.'s objections & proposal & during the subsequent deliberations thereon, on the ground that the assessment committee in hearing objections to the draft valuation list under sect. 27 of 1925 Act, was a body performing judicial or quasi-judicial functions, & if the officer were present at the meeting of the assessment committee when this objection & proposal were being heard, & advised that committee on procedure, it would be impossible to hold that it was a case where justice appeared manifestly & undoubtedly to be done.—*R. v. SALFORD ASSESSMENT*

*COMMITTEE, Ex p. OGDEN*, [1937] 2 K. B. 1; [1937] 2 All E. R. 98; 106 L. J. K. B. 344; 156 L. T. 474; 101 J. P. 225; 53 T. L. R. 471; 81 Sol. Jo. 198; 35 L. G. R. 219, C. A.

**1147a.** — **Revaluation—Right to revalue by instalments—One part of county revalued before another.**—*Held*: on the true construction of 1925 Act, ss. 18, 37 (1), the county valuation committee, in carrying out the duty imposed upon it by sect. 18 (2) of promoting uniformity of valuation in the county, were not bound to make proposals for the correct valuation of all the hereditaments in the county at the same time, but might in the exercise of their discretion proceed by instalments & make proposals for the correct valuation of the hereditaments or some of them in parts of the county in succession. Consequently, where in several areas of a county the prevailing valuations were too low, & the county valuation committee made proposals for the correct valuation of a large number of hereditaments in one of the areas only, & the assessment committee determined many of these proposals & in particular made an order increasing the gross & rateable value of one hereditament, the rating authority for that area was not entitled to obtain either a writ of *certiorari* to quash the order of the assessment committee, or a writ of prohibition to prevent the county valuation committee from making or the assessment committee from determining & enforcing any other such proposal, on the ground that any such proposal made by the county valuation committee in regard to part only of the county must be made in disregard of its statutory duty to promote uniformity of valuation in the county.—*R. v. CORNWALL COUNTY VALUATION COMMITTEE, Ex p. FALMOUTH RATING AUTHORITY*, [1937] 2 K. B. 222; [1937] 2 All E. R. 266; 106 L. J. K. B. 703; 157 L. T. 157; 101 J. P. 271; 53 T. L. R. 550; 81 Sol. Jo. 295; 35 L. G. R. 321, C. A.

**1157.** *Add. Annotations*:—*Consd. Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Area Assessment Committee* (1932), 96 J. P. 336; *R. v. Cornwall County Valuation Committee, Ex p. Falmouth Rating Authority*, [1937] 2 K. B. 222.

**1158a.** — **No injustice—Similar properties incorrectly assessed.**—Applts., who were assessed in respect of their premises at £325 gross & £267 rateable value, objected that they had been incorrectly & unfairly assessed in that seven other hereditaments of the same class in the same valuation list had been assessed at lower figures. Applts. called no evidence to prove that their assessment was higher than the rent which might be expected to be obtained for their premises, & their only witness agreed that the rent would be at least £325; nor did applts. seek

**PART IV. SECT. 2, SUB-SECT. 1.**

*n* (p. 580) 1. ———.—*VARSON v. TOWN OF VEGREVILLE* (1916), 34 W. L. R. 504.—*CAN.*

*ff* (p. 580) 1. — *Error as to ownership.*—*KRUMM v. SHEPARD* (Alta.), [1927] 3 D. L. R. 354; [1927] 2 W. W. R. 330; *affd.*, [1928] 3 D. L. R. 887; [1928] S. C. R. 487.—*CAN.*

1 (p. 581) 1. ———.—*Re GERMAN-*

*TOWN LAKE DISTRICT SEWERS COMRS. Ex p. CALHOUN* (1863), 10 N. B. R. (5 All.) 454.—*CAN.*

*q* (p. 582) 1. ———.—“*Parcel*”—*What is.*—*Re MCBRIDE* (1927), 38 B. C. R. 431.—*CAN.*

*ss.* — *Licence fee—Violation of tax exemption Act.*—A bye-law imposing an annual licence fee on insurance com. doing business through an agent within the municipality:—*Held*: *ultra vires* as being in violation of

*Municipal Tax Exemption Act, R. S. Q., 1925.*—*LA MODERNE CO. OF MUTUAL FIRE ASSCE. v. BLACK LAKE*, [1933] 1 D. L. R. 18.—*CAN.*

*sd.* *Change of ownership after return of roll.*—There is no error in the roll giving jurisdiction to the Ct. of Revision when a change of ownership of property takes place after the roll is returned.—*Re WILLIAMS & REICIMBAL*, [1935] 2 D. L. R. 283; O. R. 199.—*CAN.*



to alter the assessments of the seven other hereditaments, but they sought to use these as evidence that their own assessment was excessive & unfair:—*Held*: as applts.' hereditament had been entered in the valuation list at the proper figure, evidence that the seven other hereditaments had been assessed at a lower figure was irrelevant & could not be used to justify a reduction of applts.' assessment. That evidence was of no weight unless for the purpose, on proper notice, of correcting the inaccuracy of the other hereditaments.—*LADIES' HOSIERY & UNDERWEAR, LTD. v. WEST MIDDLESEX ASSESSMENT COMMITTEE*, [1932] 2 K. B. 679; 101 L. J. K. B. 632; 147 L. T. 390; 96 J. P. 336; 30 L. G. R. 369, C. A.

*Annotations*:—*Apld.* *Lilley & Skinner, Ltd. v. Essex County Valuation Committee* (1935), 153 L. T. 61. *Consd.* *R. v. Cornwall County Valuation Committee, Ex p. Falmouth Rating Authority*, [1937] 2 K. B. 222.

1158b.

—*]*—The occupiers of a shop, the assessment of which had been increased together with the assessments of most of the shop properties in the borough, contended that their assessment ought to be reduced, on the ground that there had been no corresponding increase in the assessments of dwelling-house properties within the borough. The gross & rateable value of the shop arrived at as the result of the above increase were admittedly not higher than the gross & rateable value as defined by Rating & Valuation Act, 1925 (c. 90):—*Held*: the Act did not require that revaluations of shops & dwelling-houses must be made at one & the same time, & as the hereditament in question was admittedly not over-assessed, the ct. could not, merely for the sake of uniformity, substitute a lower figure which admittedly would be inaccurate.—*LILLEY & SKINNER, LTD. v. ESSEX COUNTY VALUATION COMMITTEE* (1935), 153 L. T. 64; 99 J. P. 254; 51 T. L. R. 432; 79 Sol. Jo. 321; 33 L. G. R. 272, D. C.

*Annotation*:—*Consd.* *R. v. Cornwall County Valuation Committee, Ex p. Falmouth Rating Authority*, [1937] 2 K. B. 222.

1158c. Return required by rating authority—

*Form—Validity.*—Defts. for the purpose of making a new valuation list under Rating & Valuation Act, 1925 (c. 90), s. 40, having served a notice on pltf. requiring him to make a return of certain particulars, including "gross takings & outgoings" of his licensed premises & other particulars not contained in Rating & Valuation Act (Returns) Rules, 1926, Sched., pltf. commenced an action for a declaration that the form of returns required was illegal, unauthorised & *ultra vires*, & called evidence to prove that the offending requisitions were not "reasonably required for the purpose of carrying out this Act" within the above sect.:—*Held*: pltf. had proved his case & was entitled to the declaration claimed.—*GRANT v. KNARESBOROUGH URBAN COUNCIL*, [1928] Ch. 310; 97 L. J. Ch. 106; 138 L. T. 488; 92 J. P. 30; 44 T. L. R. 224; 26 L. G. R. 165; (1926-31), 1 B. R. A. 238.

1158d. Revaluation during quinquennial period—

*Validity.*—A county valuation committee notified a borough rating authority in the county that in the opinion of the committee the quinquennial valuation list for the

borough, which had recently come into force, was not in accordance with 1925 Act, in the matter of gross values. After a conference with the county valuation committee, the rating authority were satisfied that a very large number of assessments of shops, houses & flats in the borough were incorrect, & ought to be increased. They accordingly made many thousands of proposals for the amendment of the valuation list, & a large number of objections fell to be decided by the assessment committee. It was sought to quash the assessment committee's decision on one such objection on the grounds (a) that no such proposal for the amendment of a valuation list could lawfully be made under sect. 37 of 1925 Act; (b) that sect. 37 of that Act did not empower the rating authority to make a general revaluation of their district to take effect during the currency of a quinquennial valuation list; & (c) that the rating authority could not be "aggrieved" within the meaning of that sect.:—*Held*: since the rating authority were merely correcting existing inaccuracies in the valuation list, & were not making a new valuation on the ground of any alleged general increase in values, they were not, in truth any more than in form, making a new valuation list, & were acting within sect. 37, though on a large scale, & the rating authority might well be aggrieved both as a local authority & as a ratepayer by the acceptance of incorrect values by the assessment committee in the quinquennial valuation list.—*R. v. HORSHAM & WORTHING ASSESSMENT COMMITTEE, Ex p. BURGESS*, [1937] 2 K. B. 408; 157 L. T. 41; 101 J. P. 411; *sub nom.* *R. v. WORTHING BOROUGH COUNCIL & HORSHAM & WORTHING ASSESSMENT COMMITTEE, Ex p. BURGESS*, [1937] 2 All E. R. 681; 106 L. J. K. B. 810; 53 T. L. R. 755; 81 Sol. Jo. 572; 35 L. G. R. 285, D. C.

1159. *Add. Annotation*:—As to (2) *Refd.* *R. v. West Norfolk Assessment Committee, Ex p. Ward (F. B.)* (1930), 94 J. P. 201.

1161a. ——— County valuation committee.]—

A county valuation committee, as an aggrieved person is entitled to make a proposal for the amendment of a valuation list during the quinquennium within which the list is in force, although they have not objected to the draft list & the time for making such objection has passed.—*R. v. SOUTH-EASTERN ESSEX ASSESSMENT COMMITTEE, Ex p. PATTERSON* (1935), 153 L. T. 152; 99 J. P. 238; 33 L. G. R. 222, D. C.

*Annotation*:—*Refd.* *R. v. Worthing Borough Council & Horsham & Worthing Assessment Committee, Ex p. Burgess*, [1937] 2 All E. R. 681.

1162. *Add. Annotation*:—As to (2) *Refd.* *Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Area Assessment Committee* (1932), 96 J. P. 336.

1162a. Local Government Act, 1929 (c. 17), s. 70 (4)—Time for making claim.]—(1) A claim under Local Govt. Act, 1929 (c. 17), s. 70 (4), by the occupier of a hereditament to the rating authority that it should be treated as an industrial hereditament for the purposes of a valuation list, though made after the rating authority has deposited the list & at the time when notice of objection to the list is given by the occupier to the

assessment committee, is not invalid as having been made too late.

(2) An objection by the occupier of a hereditament in a Metropolitan borough to its non-inclusion in a special valuation list as an industrial hereditament assessable as such at a quarter only of its net annual value, was disallowed by the assessment committee, & their decision was affirmed by quarter sessions, subject to an appeal to the High Ct. by case stated. In these circumstances a quinquennial list for the borough came into force in which the hereditament was entered as a non-industrial hereditament assessable at its full net annual value. In the course of the twelve months preceding the making of a subsequent supplemental list the High Ct. determined on the case stated that the hereditament was an industrial hereditament, & quarter sessions accordingly made an order that it should be inserted as such in the special list; & the decision of the High Ct. was affirmed by the Ct. of Appeal. In the supplemental list when deposited the hereditament was not included or referred to:—*Held*: the decisions of the High Ct. & the Ct. of Appeal & the order of quarter sessions effected, within Valuation (Metropolis) Act, 1869 (c. 67), s. 46, "alterations" in matters stated in the quinquennial list, namely, alterations in the statements therein that the hereditament was a non-industrial hereditament & rateable as such; & the hereditament should be inserted in the supplemental list as an industrial hereditament & its rateable value reduced accordingly.—*LIPTON, LTD. v. SHOREDITCH ASSESSMENT COMMITTEE*, [1934] 2 K. B. 470; 103 L. J. K. B. 700; 151 L. T. 329; 98 J. P. 310; 50 T. L. R. 432; 30 Cox, C. C. 128; *sub nom.* SHOREDITCH ASSESSMENT COMMITTEE v. LIPTON, LTD., 32 L. G. R. 295, D. C.

1164. *Add. Citation*:—(1926–31), 1 B. R. A. 70.

*Add. Annotation*:—*Consd.* Kingston Mill, Stockport v. Owen (1928), 141 L. T. 161.

1168a. — *Valuation officer present—Proceedings invalid.*—Where a proposal made under Rating & Valuation Act, 1925 (c. 90), by the occupier of premises in an assessment area of a county to amend the valuation list in respect of the premises, comes before the Assessment Committee for the area, the county valuation officer, as having a possible interest, is disqualified from being present with the committee while they are hearing the proposal or considering their decision, & if he has been so present a writ of *certiorari* will be granted to bring up & quash the decision.—*R. v. SURREY ASSESSMENT COMMITTEE, NORTH-EASTERN ASSESSMENT AREA, Ex p. WOOLWORTH (F. W.) & Co., LTD.*, [1933] 1 K. B. 776; 102 L. J. K. B. 763; 148 L. T. 428; 97 J. P. 46; 31 L. G. R. 119, D. C.

*Annotations*:—*Consd.* Middlesex County Valuation Committee v. West Middlesex Assessment Committee, [1937] Ch. 361; *R. v. Salford Assessment Committee*, [1937] 2 K. B. 1.

1169. *Add. Annotation*:—*Refd.* *Re* Airedale Garage Co., Anglo-South American Bank, Ltd. v. Airedale Garage Co. (1932), 101 L. J. Ch. 289.

1169a. *Proposal for amendment—Service of notice on occupier—Who is "occupier."*—A rating authority proposed to amend the current

valuation list for the purpose of separately assessing let-out property which formed part of the existing *cumulo* assessment of the undivided hereditament. No notice of the proposal was given to the existing occupier of the undivided property, on the ground that notice had been given to the occupier of the notional hereditament which it was proposed to carve out of the undivided whole, & that there was no statutory obligation to give notice to more than one occupier. Appct. contended that the assessment committee had no jurisdiction to hear or determine the proposed amendment unless notice had been previously given to appct. so that the matter should not be dealt with in the absence of appct.:—*Held*: as appct. was an "occupier" within Rating & Valuation Act, 1925 (c. 90), s. 37 (3), whose rights & property might be vitally affected by decisions of the assessment committee in his absence, the assessment committee had no jurisdiction to hear & determine the proposed amendment unless due notice was previously given to appct.—*R. v. WEST DERBY ASSESSMENT COMMITTEE, Ex p. MERSEY DOCKS & HARBOUR BOARD & LIVERPOOL RATING AUTHORITY*, [1938] 4 All E. R. 110; 159 L. T. 553; 102 J. P. 479; 55 T. L. R. 25; 82 Sol. Jo. 971.

1170a. *County panel of valuers for special properties—Validity.*—In the course of preparing a new valuation list under Rating & Valuation Act, 1925 (c. 90), a conference was held between the county valuation committee (a committee of the Surrey County Council) & representatives of the rating authorities in that county, including pltf. council, at which it was resolved that uniformity in the assessment of properties of a special character would be best secured if one valuer were appointed to value each class of property throughout the county, & that the best means of attaining that end would be by co-operation between the county valuation committee & the rating authorities in the exercise of their respective powers under the Act & the appointment by the county valuation committee of a county panel of valuers to value special properties on behalf of the rating authorities & themselves, the valuers appointed, if possible, to be valuers who had previously acted for rating authorities in the county, & further, that, having regard to the interest of each rating authority in the attainment of uniformity not only in its own area but also as between its own area & all other areas in the county, the payment of the valuers employed on the panel should be met by the county valuation committee as a county charge. Accordingly, defts., in professed exercise of their powers under the said Act, appointed a panel of valuers to value the special properties throughout the county with the view to advising the county valuation committee & any rating authorities desirous of availing themselves of their advice & assistance in connection with such valuation, & in due course delivered a precept to pltf. for their share of the county rate, which included the fees & expenses connected with the panel of valuers. In consequence of such action pltf. challenged the power of defts. to appoint a panel of valuers to value special properties on behalf of pltf., a mode of procedure which they alleged had the

effect of throwing upon the county rate the whole of those fees & expenses & to spread the burden over the whole county, including pltfs.' area, which contained relatively few of the special properties, to the relief of areas which contained a larger number of special properties; & by this action they claimed a declaration that defts. had no power under the said Act or otherwise to appoint or maintain a county panel of valuers to value special properties on behalf of rating authorities or to charge fees or other payments to such valuers or the expenses of establishing & maintaining the panel against the county rate:—*Held*: the appointments by defts. of valuers to value special properties throughout the county were not in fact made by defts.

on behalf of pltfs., & further, that the action of defts. in making the appointments & charging the fees & expenses in connection therewith against the county rate was no usurpation by defts. of pltfs.' functions under the Act, but was within the scope of defts.' duties & powers within the meaning & intent of sect. 18 & other provisions contained in the said Act.

*Qu.*: whether, had there been evidence to prove that the action of defts. was *ultra vires*, the ct. would, in the absence of the A.-G., have jurisdiction to grant any relief to pltfs.—*COULSDON & PURLEY URBAN DISTRICT COUNCIL v. SURREY COUNTY COUNCIL*, [1934] Ch. 694; 103 L. J. Ch. 342; 151 L. T. 522; 98 J. P. 437; 78 Sol. Jo. 535; 32 L. G. R. 447.

## Part V.—Making of the Rate.

### SECT. 2.—AMENDMENT OF RATE (Vol. XXXVIII., p. 585).

Add the following case:—

**1184a. Duty of rating authority to alter "then current rate"**—On alteration of valuation list by assessment committee.]—*Applts.*, in Jan. 1927, gave notice of objection to the valuation list, & relief was refused by the assessment committee. In Nov. 1927 the new assessment committee which came into being on Apr. 1, 1927, reconsidered *applts.*' objection & granted relief, as from Apr. 1, 1926. They altered the valuation list accordingly, but the rating authority refused to alter the rate book, on the ground that the assessment committee could not make their reconsidered decision relate back to the earlier rating period in which the objection had been originally taken & decided:—*Held*: it was the duty of the rating authority to alter their "then current rate" on receipt of notice from the assessment committee, & "then current rate" meant the rate current at the date of the objection.—*KINGSTON MILL, STOCKPORT, LTD. v. OWEN* (1928), 141 L. T. 161; 93 J. P. 58; 45 T. L. R. 107; 27 L. G. R. 12; (1926–31), 1 B. R. A. 273, D. C.

**1188a. Change in amount—Disallowance of relief.**—The duty cast by Companies Act, 1929 (c. 23), ss. 78, 264, upon a receiver appointed

by debenture holders of a co. to pay rates then due from the co. & "having become due & payable within twelve months next before" his appointment in priority to any claim for principal & interest in respect of the debentures, applies to a subsequent increase in those rates resulting from an appeal being allowed against the derating of part of the co.'s premises under Local Government Act, 1929 (c. 17). This is so, because, by Rating & Valuation Act, 1925 (c. 90), s. 37 (10) (which is made applicable to such a case by Sched. IX., Pt. II., para. 1, sub-para. 4, of Local Government Act, 1929 (c. 17)), the resulting amendment of the valuation list is to be deemed to have had effect as from the commencement of the period in respect of which the rate was made & to be recoverable, under the combined effect of that sub-sect. & sect. 36 (2), "as if it were arrears of the rate."—*Re AIREDALE GARAGE CO., LTD., ANGLO-SOUTH AMERICAN BANK, LTD. v. AIREDALE GARAGE CO., LTD.*, [1933] Ch. 64; 101 L. J. Ch. 289; 147 L. T. 372; 96 J. P. 312; 48 T. L. R. 477; 30 L. G. R. 286, C. A.

**1193. Add. Annotation:—***Re*fd. A.-G. v. Leeds Corp., [1929] 2 Ch. 291.

**1225. Add. Annotation:—***Ap*ld. A.-G. v. London & Home Counties Joint Electricity Authority, [1929] 1 Ch. 513.

### PART V. SECT. 1, SUB-SECT. 7.

*i. i.* ——.]—*Pltf.*, a purchaser under an agreement for the sale of land (his interest in the land being in reality that of a *mtgee.*), brought action against *deft.* city to recover an amount which he paid as taxes in excess, it was alleged, of that for which the property could be legally assessed. *Pltf.* besides setting up the alleged illegality of the assessment alleged that the amount which he paid was paid in consequence of the false & fraudulent representations of the *deft.* that said amount was then owing the city:—*Held*: the dismissal of the action should be affirmed.—*ERAUT v. DRUMHELLER CITY*, [1935] 2 W. W. R. 129; 2 D. L. R. 756.—*CAN.*

### PART V. SECT. 3.

*sd.* *Time of commencement.*]—A municipal tax is formally created at the date the bye-law imposing it is adopted & not at the time of the entry into force of the collection roll.—*CANADIAN ALLIS-CHALMERS, LTD. v. LACHINE CITY*, [1934] S. C. R. 445; 4 D. L. R. 479. *CAN.*

### PART V. SECT. 4, SUB-SECT. 1.

*sb.* *Expense of aqueduct.*]—*ST. HYACINTHE (ŒUVRE DU PATRONAGE DE) v. ST. HYACINTHE CITY* (1926), Q. R. 41 K. B. 496.—*CAN.*

### PART V. SECT. 4, SUB-SECT. 2.—C.

*so.* *Government annuity.*]—*Held*: the annuity paid to a person by virtue of a

Dominion Government annuity contract, issued under the provisions of 7 & 8 Edw. 7, c. 5, is "income" within Income War Tax Act, 1917, & is not issued free of taxation.—*KENNEDY v. MINISTER OF NATIONAL REVENUE*, [1929] Ex. C. R. 36.—*CAN.*

### PART V. SECT. 9, SUB-SECT. 3.

*p* (p. 599) *i.* ——.]—If an assessment is not based on the principle outlined in sect. 59 (1) of Assessment Act, S. M., 1934, the Manitoba Tax Commission has the power, & it is its duty, to vary the assessment on an appeal to the said Commission.—*SUN LIFE ASSURANCE CO. OF CANADA v. TUXEDO TOWN*, [1936] 2 W. W. R. 367; 44 Man. L. R. 60.—*CAN.*

## Part VI.—Appeals.

**1297a. No appeal from sessions on question of fact**—What is question of fact—Quantum of rateable value of mine.]-CONSETT IRON CO., LTD. v. DURHAM COUNTY ASSESSMENT COMMITTEE FOR NO. 5 OR NORTH-WESTERN AREA, No. 1057a, ante.

**1297b. Appeal from Divisional Court to Court of Appeal—Time for.]**—MERSEY DOCKS & HARBOUR BOARD v. WEST DERBY ASSESSMENT COMMITTEE & BOTTOMLEY; BOTTOMLEY v. WEST DERBY ASSESSMENT COMMITTEE & MERSEY DOCKS & HARBOUR BOARD; BOTTOMLEY v. WEST DERBY ASSESSMENT COMMITTEE & LIVERPOOL GRAIN STORAGE & TRANSIT CO., LTD., No. 226jj, ante.

**1309. For "affg." read "revsg."**

Add. Annotation:—As to (1) *Consd. R. v. West Norfolk Assessment Committee, Ex p. Ward* (F. B.) (1930), 94 J. P. 201.

### PART VI. SECT. 1, SUB-SECT. 1.

b (p. 600) i. —.]-Observations upon the impropriety of members of a valuation committee taking part in the decision of a case, in which they have a personal interest.—LANARKSHIRE ASSESSOR v. O'HARA, [1928] S. C. 391.—SCOT.

b (p. 600) ii. —.]-To report to municipal council.]-COLQUHOUN v. DRISCOLL (1894), 10 Man. L. R. 254.—CAN.

b (p. 600) iii. —.]-Appeal against equalised assessment.—Under Public Schools Act.]-On an appeal against the equalised assessments made under Public Schools Act, s. 133, as amended by 1928, c. 48, s. 13, the only question for the judge to decide is whether the equaliser has done what the statute as amended requires him to do, i.e. made his equalisation on the basis of the equalisation made by the Manitoba Tax Commission.]-Re BEAUSIEUR SCHOOL DISTRICT, [1928] 3 W. W. R. 310.—CAN.

b (p. 600) iv. —.]-Board of Revision & Valuation.—To state case.—Question of law.]-Re WINNIPEG CHARTER, [1928] 1 W. W. R. 613.—CAN.

b (p. 600) v. —.]-Re VANCOUVER INCORPORATION ACT & CANADIAN PACIFIC RY., [1930] 4 D. L. R. 80.—CAN.

ii (p. 600) i. —.]-On appeal against assessment, a county ct. judge has no power to state a case for the opinion of the Ct. of Appeal.]-Re NIAGARA TOWN & KIRBY [1933] O. R. 174; 2 D. L. R. 60.—CAN.

i (p. 601) i. —.]-B. was a tenant of property in a city when an assessor was making his rounds, & she was correctly entered on his roll as a separate school supporter. Some time later, before the roll was finally revised, B. vacated the premises & they were occupied by another resident who was a public school supporter.—Held: although the entry of B.'s name was not an error at the time it was made, it became an error before the roll was finally returned, & the absence from the roll of the new tenant was an omission; & the error as to one tenant & the omission as to the other were, upon a proper appeal, open to correction by the ct. of revision or by the county ct. judge upon appeal from the ct. of revision.]-Re BAYACK, [1929] 3 D. L. R. 480; 64 O. L. R. 14.—CAN.

i (p. 601) ii. —.]-The Ct. of Revision under s. 56 of Assessment Act, R. S. O., 1927, has no higher

power than to make such corrections as the assessor might, & if he had been aware of them, ought to have made.—CAYEN v. OTTAWA, [1932] O. R. 369; 3 D. L. R. 42.—CAN.

i (p. 601) iii. —.]-Validity of bye-law.]-A bye-law relating to appeals to the Ct. of Revision is bad if it provides that the ct. must reject an application for reduction or cancellation.]-Re McLAUGHLIN & TORONTO CITY, [1933] 3 D. L. R. 430; O. R. 642.—CAN.

i (p. 601) iv. —.]-The Board of valuation & revision for the City of Winnipeg cannot increase the valuation of a building on an appeal from the assessment comr.—Re GRANTHAM & TUPPER (FRASER ESTATE) (1934), 42 Man. L. R. 575.—CAN.

bb (p. 601) i. —.]-Lands Valuation Appeal Court.—Appeal not involving question of value.]-GLASGOW ASSESSOR v. GLASGOW CORPN., [1929] S. C. (Ct. of Sess.) 291.—SCOT.

bb (p. 601) ii. —.]-Whether to Court of Appeal.]-No appeal lies to the Ct. of Appeal from the opinion of a judge of the King's Bench delivered on a case stated by Manitoba Tax Commission under Assessment Act, C. A., 1921.—Re WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO. & WEST KILDONAN RURAL MUNICIPALITY, [1934] 1 W. W. R. 744; 3 D. L. R. 153.—CAN.

bb (p. 601) iii. —.]-Appeal on a question of fact from a county ct. judge affirming an assessment lies to the Ontario Railway & Municipal Board, & not to the Ct. of Appeal.]-Re GUARDIAN REALTY CO. OF CANADA, LTD. & TORONTO CITY, [1934] 2 D. L. R. 721; O. R. 266.—CAN.

tt (p. 601) i. —.]-Re FRASER'S APPEAL, Re WINNIPEG CHARTER, [1927] 4 D. L. R. 213; [1927] 2 W. W. R. 600; 36 Man. L. R. 507.—CAN.

tt (p. 601) —.]-QUINN v. SALMON ARM, [1929] 4 D. L. R. 1085; 40 B. C. R. 111.—CAN.

tt (p. 601) iii. —.]-A complaint having been made to a ct. of revision against an assessment it merely dismissed the complaint & ordered a new assessment. Two days later it adopted the assessor's report of the new assessment which reduced the former assessment.—Held: the taxpayer could not be deprived by said procedure of his right of appeal to the judge of the county ct.—BAIRD v. WEST KILDONAN, [1929] 4 D. L. R. 306; 2 W. W. R. 455; 38 Man. L. R. 232.—CAN.

**1321a. —.]-Appeal by county valuation committee**—Against several assessments—One notice sufficient.]-Where a county valuation committee appointed under Rating & Valuation Act, 1925 (c. 90), s. 18, appeals to quarter sessions in respect of the assessments of a number of hereditaments in the same assessment area, it may serve one notice of appeal, & set out the particulars of the assessments in a schedule. Separate appeals are not necessary, provided that copies of the notice are served upon all persons who would be entitled to be served if separate appeals were lodged.—GLAMORGAN COUNTY VALUATION COMMITTEE v. BARRY AREA ASSESSMENT COMMITTEE, [1931] 1 K. B. 157; 99 L. J. K. B. 516; 144 L. T. 203; 94 J. P. 238; 46 T. L. R. 635; 28 L. G. R. 523; (1926-31), 1 B. R. A. 433, D. C.

tt (p. 601) iv. —.]-By Municipal Act, R. S. B. C., 1924, s. 223a, a person appealing from the decision of a Ct. of Revision has one week from the day on which he receives notice of the ct.'s decision, to give notice of appeal.]-Re GRICE & MUNICIPAL ACT ASSESSMENT APPEAL, [1933] 2 D. L. R. 206.—CAN.

xx (p. 601) i. —.]-Method of appeal laid down by taxing statute.]-CHARLOTTETOWN v. TANTON, [1930] 4 D. L. R. 61.—CAN.

so. Whether barred where appellant has furnished statement of value.]-Held: when a person has, under Lands Valuation (Scotland) Act, 1854, s. 7, furnished the assessor with a written statement of value, he is not thereby barred from appealing, under sect. 9 of the Act, against that value as excessive.—COWDENBEATH PUBLIC-HOUSE SOCIETY, LTD. v. FIFE ASSESSOR, [1929] S. C. (Ct. of Sess.) 280.—SCOT.

st. Failure to appeal.—Claim of exemption not barred.]-Failure to appeal against an assessment does not estop plff., in an action to recover taxes, that the lands are exempt.—BECKER v. TORONTO CITY, [1933] 4 D. L. R. 736; O. R. 843.—CAN.

sk. Premises destroyed by fire after assessment.]-The Ct. of Tax Appeals cannot reduce an assessment on premises destroyed by fire after assessment but before expiration of time to appeal.—Re MUTUAL LIFE ASSCE. CO. v. HALIFAX, [1935] 2 D. L. R. 267; 8 M. P. R. 473.—CAN.

sm. Reduction.—When possible.]-A tax can only be reduced under Assessment Act as long as it remains a tax, i.e. is unpaid.—ONTARIO JOCKEY CLUB v. TORONTO, [1935] 3 D. L. R. 461; O. R. 333.—CAN.

sp. Whether mandamus lies.]-Where an assessment has been fixed by the Alberta Assessment Commission on an appeal to it, mandamus does not lie to compel it to make a re-assessment in accordance with the principles laid down by Alberta Municipal Assessment Commission Act, 1935, which it is alleged have been departed from.—Re WILLSON & ALBERTA ASSESSMENT COMMISSION, [1937] 1 W. W. R. 712; affd., [1937] 2 W. W. R. 396; 2 D. L. R. 718.—CAN.

**PART VI. SECT. 1, SUB-SECT. 7.**  
a i. —.]-Time for bringing action.]-BARISH & CO. v. GAF NO. 3 RURAL MUNICIPALITY & BISS, [1925] 3 D. L. R. 738; [1925] 2 W. W. R. 518; 19 Sask. L. T. 560.—CAN.

**1328a.** — Where one notice of appeal against several assessments.]—GLAMORGAN COUNTY VALUATION COMMITTEE *v.* BARRY AREA ASSESSMENT COMMITTEE, No. 1321a, *ante*.

**1332.** *Add. Annotation:—Consd.* Embleton *v.* Norwich Union Life Insce. Soc., Norwich Union Life Insce. Soc. *v.* Embleton (1927), 11 Tax Cas. 681.

**1355.** *Add. Annotation:—Refd.* Ladies' Hosiery & Underwear, Ltd. *v.* West Middlesex Assessment Area Assessment Committee (1932), 96 J. P. 336.

**1381.** *Add. Annotation:—As to (2) Consd.* Glamorgan County Valuation Committee *v.* Barry Area Assessment Committee (1930), 99 L. J. K. B. 615.

**1392a.** Next sessions after date of rate—Not date of realisation of grievance—County Rate Act, 1852 (c. 81), s. 22.]—The appeal given by above sect., to a parish which is "aggrieved by any rate or assessment" made upon the county rate basis to "the next quarter sessions of the peace after such cause of appeal shall have arisen" must be brought to the next practicable quarter sessions after the parish is in fact aggrieved by the rate; the appeal is not to the next practicable quarter sessions to be held after the parish finds out that it is aggrieved.

A county rate which affected the parish of M. was made in Oct. 1904. In Jan. 1905, as the result of an appeal by a railway co. against their assessment to the poor rate in the parish of M., the rateable value of the parish for the purpose of the county rate basis or standard was reduced by a considerable sum. On Apr. 17, 1905, the parish council of M. gave notice of appeal to the next quarter sessions against such part of the basis or standard as affected that parish, & also against the rate existing upon that basis or standard, they alleging that they only knew of the result of the appeal by the railway co. & its effect on the county rate basis on Mar. 28:—*Held:* the parish council had not appealed against the county rate to the next quarter sessions after the "cause of appeal" had arisen within above sect., & therefore the quarter sessions had no jurisdiction to entertain the appeal against the rate.—WEST RIDING OF YORKSHIRE COUNTY COUNCIL *v.* MIDDLETON PARISH COUNCIL, [1906] 2 K. B. 157; 75 L. J. K. B. 485; 94 L. T. 785; 70 J. P. 326; 22 T. L. R. 493; 4 L. G. R. 624, D. C.

*Annotations:—Consd.* Glamorgan County Council *v.* Barry Overseers, [1912] 2 K. B. 603; *R. v. Carnarvonshire JJ., Ex p. Carnarvon County Council*, [1918] 1 K. B. 280.

**1392b.** — Time for giving notice of appeal.]—On Mar. 17, 1910, a county council fixed the county rate assessment basis for a parish, & on the same day made a rate on the basis so fixed. The county council forwarded their warrant for the first instalment to the guardians of the union in which the parish was included, making the instalment payable by two equal payments. The guardians of the union in due course issued their precept to the overseers of the poor for the amount of the warrant, making it payable in two equal portions, one portion being made payable on Aug. 20, 1910. The county council subsequently forwarded their warrant for the

second instalment to the guardians of the parish, making it payable by two equal payments, & the guardians duly issued their precept to the overseers for the amount of the warrant, making it payable in two equal portions, one portion being made payable on Feb. 18, 1911. The parish overseers made the payments in Aug. 1910, & Feb. 1911, as required by the precepts. On Sept. 2, 1910, a railway co. gave notice to the assessment committee of the union in which the parish was included of objection to their assessment in respect of a portion of their line within the parish on the ground of over assessment, & similar notices were during 1910 given by other ratepayers within the parish. For the purposes of the present case the poor rate valuation was taken to be the same as the county rate assessment basis. On Sept. 27, 1910, the parish overseers gave notice to the county council that they felt aggrieved by & objected to the county rate of Mar. 17, 1910, & that they intended to appeal against the rate at the next quarter sessions for the county. On Apr. 13, 1911, the union assessment committee reduced the assessment of the railway co., & from time to time the assessment of the other objectors. The parish overseers subsequently repaid to the railway co. & other objectors £121 6s. in respect of over assessment to the county rate as regarded the instalment payable on Aug. 20, 1910, & £107 5s. as regarded the instalment payable on Feb. 18, 1911. The hearing of the appeal of the parish overseers to quarter sessions was by consent respite from time to time & ultimately took place on June 27, 1911, when the ct. of quarter sessions ordered the county council to refund to the parish overseers the two sums of £121 6s. & £107 5s. as being the amounts overpaid by them in Aug. 1910, & Feb. 1911, respectively:—*Held:* it was not competent for the ct. of quarter sessions to hear the appeal or to order repayment by the county council to the parish overseers of either of the two sums inasmuch as, assuming that the parish overseers were aggrieved, the grievance arose either on Mar. 17, 1910, when the county rate was made, in which case the notice of appeal of Sept. 27, 1910, was too late, or on Apr. 13, 1911, when the reduction in the assessment of the railway co. & the other objectors was made by the union assessment committee, in which case the notice of appeal was premature; further, even if the notice of appeal had been given at the proper time, the ct. of sessions would have had no power to order repayment to the overseers of the sum of £121 6s. inasmuch as the payment of that sum was made by them in Aug. 1910, before their notice of appeal to quarter-sessions of Sept. 27, 1910, was given, & under County Rates Act, 1852 (c. 81), ss. 22, 23, power is only conferred on a ct. of quarter sessions to which the overseers appeal against a county rate to order repayment to the overseers of any sums overpaid by them after their notice of appeal against the county rate is given by them.—GLAMORGAN COUNTY COUNCIL *v.* BARRY OVERSEERS, [1912] 2 K. B. 603; 81 L. J. K. B. 836; 108 L. T. 118; 76 J. P. 307; 10 L. G. R. 477.

## Part VII.—Collection of Rate.

**1426a. Transfer—Remuneration.]—**In 1927 the Egremont U.D.C. appointed pltf. rent collector at a commission of 2 per cent. on all moneys collected. In 1928 it was resolved that pltf. should be paid at the rate of 3 per cent. on all rents collected by him. Although described as a rent collector, pltf. in fact collected rates as well as rent. In 1934 Egremont was transferred to deft. council, pltf. becoming an officer of that council. By the order which effected the transfer pltf. was, while performing similar duties, to receive not less remuneration than he would have been entitled to if the order had not been made. Defts. appointed pltf. a rate

collector. In an action for remuneration at the rate of 3 per cent. *defts.* contended that *pltf.* was entitled to no remuneration in respect of rates. This contention was abandoned at the hearing, *defts.* then arguing that remuneration should be at the rate of 2 per cent. & not 3 per cent. :—*Held* : upon the evidence *pltf.* was entitled to remuneration at the rate of 3 per cent. from the Egremont U.D.C. for collecting both rent & rates & he was therefore entitled to 3 per cent. in respect of the rates collected on behalf of *defts.*—*COWAN v. ENNERDALE RURAL DISTRICT COUNCIL*, [1936] 3 All E. R. 684.

## Part VIII.—Recovery of Rate.

**1448a. Whether action lies.]**—An action by a local authority to recover unpaid arrears of rates will not lie. The proper method of procedure in such a case is by an application for a distress warrant followed by distress. A local authority commenced proceedings in the county ct. for certain unpaid arrears of rates which they alleged to be due. The county ct. judge having held that on such a claim an action would lie, resp. appealed:—*Held* :

(1) a rate not being a common law liability but the creature of statute, this method of procedure was wrong, & the only remedy available was that laid down by statute, namely distress; (2) the non-payment of rates by a receiver appointed by a mtgee. is not a breach of statutory duty under Law of Property Act, 1925 (c. 20), s. 109 (8) (i), for which the local authority is entitled to sue.—**LIVERPOOL CORPN. v. HOPE, [1938] 1 K. B.**

**PART VIII. SECT. 1.**

• (p. 621) i. — *What defences available.*—VILLAGE OF HAGERSVILLE v. HAMBLETON, [1927] 4 D. L. R. 1044; 61 O. L. R. 327.—CAN.

e (p. 621) ii. — *Effect of distraint on right to sue.*— When a rural municipality Act, distrains under Rural Municipality Act, R. S. S., 1920, for overdue taxes, its right to recover judgment for the taxes as a debt is suspended while the distress exists and until the sale thereunder, since although the Act provides that overdue taxes may be recovered by distress and also by action as a debt it does not provide that these remedies may be pursued concurrently. — *GISLSON v. RURAL MUNICIPALITY OF FOAM LAKE & WARD*, [1929] 2 D. L. R. 386; 1 W. W. R. 233; 23 S. L. R. 359. — **CAN.**

e (p. 621) iii. — *Against purchaser of land—Effect of War Revenue Amendment Act, 1926, s. 6.*—*Held*: the expression “the personal covenant to pay” in above sect. means “any personal covenant to pay,” & thereby protects a purchaser from actions to recover on a covenant to pay interest or taxes as well as on one to pay the purchase-money, even though the taxes agreed to be paid by the purchaser have been paid by the vendor.—*ROBSON v. GRAHAM, [1929] 4 D. L. R. 902; 3 W. W. R. 149; 38 Man. L. R. 336.*—*CAN.*

§ (p. 621) iv. — *Lands in name of non-existent syndicate.*—Where lands are entered upon the assessment roll in the name of a non-existent syndicate the city cannot recover personal judgment for arrears of taxes against the individual members of the alleged syndicate.—*NORTH BAY CITY v. GORDON*, 1934] O. R. 376; 3 D. L. R. 328.—CAN.

—Assessment Act, C.A.M., 1924, s. 228, bars the recovery of taxes levied under Towns' & Villages' Business Tax Act,

R.S.M., 1913, unless proceedings are commenced within six months of payment.—CANADIAN HOTEL CO. v. NREPAWA, [1934] 4 D. L. R. 316.—CAN.

¶ (p. 621) vi. —After abortive sale of *forfeiture of land*.—Although the filing of a caveat under Tax Recovery Act of 1922 had not been implemented by the steps required to be taken under that Act to give title to plaintiff town it proceeded, after the coming into force of Tax Recovery Act of 1929, to hold a public sale in accordance with that Act of 1929. No bid was offered at the sale, & no further steps taken by the town, until it sued defendants as owner, for arrears of taxes:—*Held*: sect. 36 of the Act of 1929 continued the effect of the caveat; an abortive sale was an offering for sale within sect. 9 of the Act of 1929, & since sect. 19 thereof vests in the town the legal & beneficial ownership of the land on the expiry of one year "from the date of sale," & that year had expired, the town's action failed.—*VULCAN TOWN v. ELVES*, [1935] 2 W. W. R. 587; *affd.*, [1936] 1 W. W. R. 560.—*CAN.*

e (p. 621) vii. — *Failure to distrain*  
—*Effect.*]—GLANFORD v. FERRIS (1935),  
5 F. L. J. (Can.) 37.—CAN.

e (p. 621) viii. — *Right of municipality to settle.*]—A municipality may settle an action for taxes before it is tried, as this is not a breach of the prohibition against giving a reduction or exemption from taxation.—*DESCHENES v. LOVEYS*, [1936] 3 D. L. R. 210.—**CAN.**

• (p. 621) ix. *In summary way—Impost sanctioned under Water Act, 1912.*—The impost sanctioned in Water Act, 1912, s. 88 (1), is a rate & may be recovered in a summary way in accordance with the procedure prescribed by sect. 89 (3) of that Act.—*Re JAMIESON, Ex p. CHRISTIAN* (1928), 28 S. R. N. S. W. 275.—**AUS.**

CLARY v. BOULAY (Ont.), [1928] 2  
D. L. R. 144.—CAN.

n (p. 621) ii. — — — — —.]--  
A mtgee. who purchases at a tax sale & obtains a tax title is in the same position as if he had obtained a foreclosure absolute.—*Re ARREARS OF TAXES ACT, Re LAND TITLES ACT, [1937] 1 W. W. R. 696.*—**CAN.**

n (p. 621) ill. ——— *Lessee.*]—  
HEYDEN v. CASTLE (1888), 15 O. R.  
257.—CAN.

p (p. 621) i. ——— Mayor.]—  
GREENSTREET v. PARIS HYDRAULIC  
Co. (1874), 21 Gr. 229.—CAN.

q (p. 621) i. — — — *Reeve.*]—  
TOTTEN v. TRUAX (1889), 16 O. R. 490.  
—CAN.

bb (p. 621) i. ———.]—  
TETRAULT v. VAUGHAN (1899), 12  
Man. L. R. 457.—CAN.

bb (p. 621) il. ———.]—  
BANNATYNE v. PRITCHARD (1906). 16  
Man. L. R. 407; 5 W. L. R. 478.—  
CAN.

bb (p. 621) iii. — — — *Agricultural co-operative association.*]—MEASNER v. BENGERT, [1927] 3 D. L. R. 938; [1927] 2 W. W. R. 713; 21 Sask. L. R. 572; *varying*, [1927] 3 D. L. R. 205.—**CAN.**

bb (p. 621) iv. ——— *Life tenant*  
—*Whether rights of remainderman*  
—*defeated.*]—A life tenant cannot by  
defaulting in the payment of taxes &  
then acquiring the tax-sale title, instead  
of redeeming, defeat the remainder-  
man's rights.—MAYO v. LEITOVSKI,  
1928] 1 W. W. R. 700.—CAN.

dd (p. 621) i. ———.]—CONNOR  
v. McPHERSON (1871), 18 Gr. 607.—  
CAN.

ff (p. 621) l. ———.]—  
GEMMEL v. SINCLAIR (1885), 1 Man.  
L. R. 85.—CAN.

kk (p. 621) l. ——— Lots on plan  
in registry not duly certified by sur-  
veyor.]—ASTON v. INNIS (1878), 20  
Gr. 42.—CAN.

kk (p. 621) ll. — — — *Fixtures—Buildings & machinery.*—Buildings

751; [1938] 1 All E. R. 492; 107 L. J. K. B. 694; 158 L. T. 215; 102 J. P. 205; 54 T. L. R. 425; 82 Sol. Jo. 194; 36 L. G. R. 183, C. A.

**1460a. Time for.]**—A complaint was preferred against applts. for that they, being persons duly rated & assessed in respect of certain premises, had not paid the sum of £17 17s. 6d., the balance of rates & water rents. The total amount due was £48 5s., but applts. were entitled by statute to an abatement which would reduce the total due to £30 7s. 6d., payable in two instalments, provided the second instalment was paid on or before the expiration of seven months from Apr. 7, 1937—that is, Nov. 7, 1937. Nov. 7, 1937, was a Sunday, & resps. in their demand note stated the date of payment of the second instalment as Nov. 8, 1937. On Nov. 8,

1937, applts. posted a cheque for the amount of the second instalment, & this was delivered to resps. on Nov. 9, 1937. Resps. on Nov. 15, 1937, thereupon demanded from applts. the sum of £17 17s. 6d., being the difference between the full amount of the rates & water rents & the reduced amount as abated, on the ground that they were liable to pay the full amount owing to their failure to pay the second instalment on or before the expiration of seven months from Apr. 7, 1937. The stipendiary magistrate held that payment had not been received until Nov. 9, 1937, the Post Office authorities not being resps.' agents to receive such payment, & issued a warrant of distress for £17 19s. 6d., being the sum demanded & 2s. costs. Thereupon, this appeal was brought, & applts.

erected by the owner of land for use in the making of bricks held to form part of the realty, although some of them were attached to the land by nothing but their own weight. They therefore became the property of deft., who became registered owner of the land in pursuance of the purchase thereof at a tax sale under Assessment Act. Certain machinery in said buildings was also held part of the realty.—*McCutcheon v. Lightfoot*, [1928] 2 W. W. R. 240.—CAN.

ii (p. 621) i. ———.—*Re HEN PERSON* (1891), 7 Man. L. R. 481.—CAN.

ii (p. 621) ii. ———.—*Re CAREY & LOT 65, SUB-DIVISION OF LOT 39 E., ST. JOHN* (1893), 9 Man. L. R. 483.—CAN.

ii (p. 621) iii. ———.—*RUSH v. PEMBINA* (Alta.), [1927] 1 D. L. R. 394; [1927] 1 W. W. R. 215.—CAN.

qq (p. 621) i. ———.—*How far deed conclusive.*—*ARCHIBALD v. YOVILLE* (1891), 7 Man. L. R. 473.—CAN.

qq (p. 621) ii. ———.—*SCHULTZ v. ALLOWAY* (1894), 10 Man. L. R. 221.—CAN.

tt (p. 621) i. ———.—*WERGAN v. McDIARMID* (1862), 12 C. P. 499.—CAN.

vv i. ———.—*LOUNT v. WALKINGTON* (1868), 15 Gr. 332.—CAN.

e (p. 622) i. ———.—*Whether seal valid.*—*McRAE v. CORBETT* (1890), 6 Man. L. R. 426.—CAN.

e (p. 622) ii. ———.—*NANTON v. VILLENEUVE* (1894), 10 Man. L. R. 213.—CAN.

e (p. 622) iii. ———.—*Deed not in duplicate.*—*NANTON v. VILLENEUVE* (1894), 10 Man. L. R. 213.—CAN.

e (p. 622) iv. ———.—*Injunction to restrain issue of deed—No by-law passed.*—*JAMES v. BELL*, 11 C. L. T. Occ. N. 57.—CAN.

e (p. 622) v. ———.—*Amendment of Tax Recovery Act, 1919 (c. 20), s. 44a.*—*THACKER v. SMOKY LAKE MUNICIPAL DISTRICT, SHEARER v. SMOKY LAKE MUNICIPAL DISTRICT, A.-G. OF ALBERTA v. SMOKY LAKE MUNICIPAL DISTRICT, PELLETIER v. OPAL MUNICIPAL DISTRICT* (Alta.), [1924] 3 W. W. R. 929.—CAN.

g (p. 622) i. ———.—*If when land has been sold by a municipality for taxes the notice provided for by sect. 42 of Tax Recovery Act, or in lieu thereof that provided for by sect. 9 of Tax Sale Relief Act, 1922, has not been sent to the owner the sale is invalid. If in an action by the owner to recover damages for the wrongful sale he testifies that he never*

received said notice & the ct. sees no reason to disbelieve him, the onus is on the municipality to prove that it was sent.

—*KOWNATZKI v. BEAR LAKE, MUNICIPAL DISTRICT*, [1930] 3 W. W. R. 353; [1931] 1 D. L. R. 334; *revid. on other grounds*, [1931] 1 W. W. R. 757; 2 D. L. R. 318; 25 Alta. L. R. 351.—CAN.

n (p. 622) i. ———.—*DOE d. UPPER v. EDWARDS* (1849), 5 U. C. R. 394.—CAN.

n (p. 622) ii. ———.—*DONOVAN v. HOGAN* (1888), 15 A. R. 432.—CAN.

bb (p. 622) i. ———.—*WHITE v. MUNICIPAL DISTRICT OF INGA & PIDGEON*, [1929] 1 D. L. R. 360; 1 W. W. R. 172; 23 Alta. L. R. 585; *revis.*, [1928] 3 D. L. R. 829; 3 W. W. R. 251.—CAN.

dd (p. 622) i. ———.—*Notice to mortgage of application for title sent to wrong address & not delivered.*—*HOWE v. KIPP*, [1927] 3 D. L. R. 1048; [1927] 2 W. W. R. 522; 21 Sask. L. R. 637.—CAN.

ff (p. 622). *Revis.*, [1927] 1 D. L. R. 1063; [1927] S. C. R. 50.—CAN.

gg (p. 622) i. ———.—*RUSH v. PEMBINA* (Alta.), [1927] 1 D. L. R. 394; [1927] 1 W. W. R. 215.—CAN.

kk (p. 622) i. ———.—*DONOVAN v. HOGAN* (1888), 15 A. R. 432.—CAN.

eee (p. 622) i. ———.—*SUMMERLAND DEVELOPMENT CO., LTD. v. SUMMERLAND*, [1928] 4 D. L. R. 258; [1928] 3 W. W. R. 145.—CAN.

mmm (p. 622) i. ———.—*HILL v. MACAULAY* (1884), 6 O. R. 251.—CAN.

mmm (p. 622) ii. ———.—*REED v. SMITH* (1884), 1 Man. L. R. 341.—CAN.

mmm (p. 622) iii. ———.—*TETRAULT v. VAUGHAN* (1890), 12 Man. L. R. 457.—CAN.

rrr (p. 622) i. ———.—*GREENSTREET v. PARIS HYDRAULIC CO.* (1874), 21 Gr. 229.—CAN.

ttt (p. 622) i. ———.—*WOOD v. BIRTLE* (1887), 4 Man. L. R. 415.—CAN.

k (p. 623) i. ———.—*MCDONALD v. ROBILLARD* (1863), 23 U. C. R. 105.—CAN.

r (p. 623) i. ———.—*Whether sale conducted in fair, open & proper manner.*—*DONOVAN v. HOGAN* (1888), 15 A. R. 432.—CAN.

r (p. 623) ii. ———.—*McRAE v. CORBETT* (1890), 6 Man. L. R. 426.—CAN.

r (p. 623) iii. ———.—*SCOTT v. IMPERIAL LOAN CO.* (1896), 11 Man. L. R. 190.—CAN.

dd (p. 623) i. ———.—*Right to recover damages against municipality—Assessment Act, R. S. M. (c. 101), s. 192.*—*CLEMONS v. ST. ANDREWS* (1896), 11 Man. L. R. 111.—CAN.

oo (p. 623) i. ———.—*Property not sufficiently defined or described.*—*TOWNSEND v. ELLIOTT* (1861), 11 C. P. 217.—CAN.

oo (p. 623) ii. ———.—*DOMANISKY v. FITZGERALD* (1921), 62 D. L. R. 524; 55 N. S. R. 1.—CAN.

pp (p. 623) i. ———.—*Issued under repealed statute.*—*NANTON v. VILLENEUVE* (1894), 10 Man. L. R. 213.—CAN.

hhh (p. 623) i. ———.—*To mortgage.*—*The mailing to a registered mtgee. of the tax-sale notice is a condition precedent to the exercise of any jurisdiction to hold a tax sale of the mtged. land; & since the notice in question herein sent to pltf. mtgee. was not such a notice as is so prescribed:—Held: any sale or proceedings to sell the land covered by her registered charge would be illegal.*—*LOWE v. CAWSTON IRRIGATION DISTRICT*, [1933] 3 W. W. R. 151; 4 D. L. R. 385; *affd.*, [1934] 1 W. W. R. 508; 2 D. L. R. 461; 48 B. C. R. 83.—CAN.

nnn (p. 623) i. ———.—*Burden of proof—Of invalidity.*—*McRAE v. CORBETT* (1890), 6 Man. L. R. 426.—CAN.

nnn (p. 623) ii. ———.—*Of validity.*—*ALLOWAY v. CAMPBELL* (1891), 7 Man. L. R. 506.—CAN.

nnn (p. 623) iii. ———.—*Irregularities in assessment.*—*Complete failure to observe the requirements of Assessment Act, R. S. M., 1913, & its amendments, with respect to assessing one of the two owners of undivided halves of a quarter section & notifying him of the assessment & the tax-sale proceedings:—Held: to render the tax sale of his interest ineffective against him.*—*SZEWCZYK v. GILBERT PLAINS RURAL MUNICIPALITY*, [1933] 2 W. W. R. 326.—CAN.

nnn (p. 623) iv. ———.—*Sale before expiration of redemption period.*—*HYLAND v. HALIFAX CITY*, [1932] 3 D. L. R. 760; 5 M. P. R. 174; *revis.*, [1933] 2 D. L. R. 115; S. C. R. 317.—CAN.

ooo (p. 623) i. ———.—*Bidding more than amount due for taxes & costs—Effect of.*—*Re DUNN & EXPROPRIATION ACT* (1898), 12 Man. L. R. 78.—CAN.

ooo (p. 623) ii. ———.—*Mortgagee—Taking assignment of tax sale certificate & obtaining title—Extinguishment of mortgagor's rights.*—*FARROW v. MARSEY-HARRIS CO., LTD.*, [1927] 3 D. L. R. 997; [1927] 2 W. W. R. 539; 21 Sask. L. R. 610.—CAN.

ooo (p. 623) iii. ———.—*McNABB v. LANDED BANKING & LOAN CO.*, [1935] 2 W. W. R. 630;



contended that they had paid the second instalment "on expiration of seven months" from Apr. 7, 1937, as the words "on the expiration of seven months" must be construed as meaning after, or at a reasonable time after, the expiration of seven months, & that, the Post Office having become the agents of resps. to receive payment, the second instalment was received by resps. on Nov. 8, 1937, when the cheque was posted:—*Held*: (1) the Post Office were not the agents of the corpn., & therefore the date of payment was not the date on which the cheque was posted; (2) as the second instalment had not been paid within the time prescribed, resps. were

justified in demanding the full amount of the rate; (3) where the statutory period ended on a Sunday, the corpn., were entitled in their demand note to state the following day as the day of payment, & the demand note was not invalid by reason of that statement.—*JOYNSON'S EXORS. v. LIVERPOOL CORPN.*, [1938] 4 All E. R. 183.

1464. After this case in cross-reference

"Poverty of ratepayer."—See Rating & Valuation Act, 1925 (c. 90), s. 4" read "s. 2 (3), (4)" for "s. 4."

1477a. — Depends on actual occupation.]—*LONDON COUNTY COUNCIL v. HACKNEY BOROUGH COUNCIL*, No. 37a, *ante*.

43 Man. L. R. 265; 5 F. L. J. (Can.) 68.—CAN.

ooo (p. 623) iv. — Statement in certificate of title that title subject to existing leases.—Effect of.]—*SHRECHUK v. SEAFRED*, [1927] 3 D. L. R. 280; [1927] 2 W. W. R. 207; 36 Man. L. R. 469.—CAN.

ooo (p. 623) v. — Issue of certificate of title Effect of.—On judgment for alimony filed against land.]—*Re SMITH, Re LAND TITLES ACT*, [1925] 2 D. L. R. 556; [1925] 1 W. W. R. 1057; 19 Sask. L. R. 577.—CAN.

ooo (p. 623) vi. — No liability to mortgage for rentals received.]—Deft. purchased at a tax sale land of which pltf. co. was mtgee. & let the land to a tenant. Pltf. co. redeemed the land & then sued deft. for the rental he had received in the interval:—*Held*: deft. had the right to lease the land as an owner could, & to receive the rents. The mtgee., not being in possession, could not claim an accounting merely because it had paid the arrears of taxes.—*NATIONAL TRUST CO. v. BAIKER*, [1931] 3 D. L. R. 583; O. R. 388.—CAN.

ooo (p. 623) vii. — Whether liable for arrears.—Statutory provision for liability of owner until redemption.]—*MARCELIN VILLAGE v. DEFERETURE CO. OF CANADA, LTD.*, [1931] 3 W. W. R. 356.—CAN.

ooo (p. 623) viii. — Application for title.—Debt Adjustment Act, 1932, s. 6.]—A tax-sale purchaser of a homestead registered in the name of the wife applied for notices of its application for title to be served upon those interested in the land. The district registrar refused to do so unless he was furnished with a certificate under Debt Adjustment Act, 1932, authorising proceedings against the husband. On appeal:—*Held*: that sect. 6 of said Act applied & the registrar was right in refusing to issue the notice in the absence of said certificate.—*Re NOWA-SAD*, [1935] 1 W. W. R. 665; 43 Man. L. R. 108.—CAN.

uuu (p. 623) i. — Treasurer.]—The treasurer is a necessary party to an action to set aside a tax sale.—*CRUISE v. RIVERSIDE*, [1935] 2 D. L. R. 171; O. R. 151.—CAN.

k (p. 624) i. — Time for bringing.]—*GREENSTREET v. PARIS HYDRAULIC CO.* (1874), 21 Gr. 229.—CAN.

k (p. 624) ii. — Costs.—Liability of purchaser.]—*BLANCHARD v. SCANLAN* (1885), 3 Man. L. R. 13.—CAN.

k (p. 624) iii. — Misdescription.]—Title to mining property having been granted by the Crown in 1906 to one K., the latter appeared in the books of applt. municipality as owner until 1926, when the property & the buildings erected thereon were sold for unpaid taxes which were alleged to be due by K. Resp. co. bought the

property in 1922. According to the books of applt. municipality in 1926 & previously, the land & the buildings were not described on the valuation roll under consecutive numbers nor on the same pages of the book. Accounts for municipal & school taxes were sent & paid by resp. co. It was not disputed that the taxes on the buildings were paid; but the municipality claimed taxes were due on the land. Applt. municipality, in the public notice of sale for unpaid taxes, described the whole lot as being to be sold without indicating that the buildings were excluded. In 1928, title to the property was delivered to the purchaser at the tax sale by applt. Resp. co. had no knowledge of the sale until 1929 when notified by the purchaser & then took an action to annul the sale:—*Held*: the tax sale was null & void *ab initio*, & the title of the purchaser should be set aside.—*ST. JOSEPH DE COLEMAINE (LA CORPN. DE LA PAROISSE DE) v. COLONIAL CHROME CO., LTD.*, [1933] S. C. R. 13.—CAN.

d (p. 624) i. — — — — —.]—*Re LEWIS & PHALEN (N. W. T.)* (1905), 1 W. L. R. 36.—CAN.

e (p. 621) i. — — — — — Meaning of "sale."—There is a "sale" within the meaning of "sale" in Tax Recovery Act, R. S. A., 1922, s. 21 (1), as amended by 1923, s. 28, when a *bona fide* agreement has been made to sell to a purchaser at the auction sale authorised by said Act.—*STANDARD TRUST CO. v. MUNICIPALITY OF STEWART*, [1929] 2 D. L. R. 271; 1 W. W. R. 660; 24 Alta. L. R. 56; *revers.*, [1928] 4 D. L. R. 802; 3 W. W. R. 409.—CAN.

f (p. 624) i. — — — — — Purchaser of land sold under decree.]—*TURRILL v. TURRILL* (1877), 7 P. R. 142.—CAN.

ff (p. 624) i. — — — — —.]—*FONSECA v. SCHULTZ* (1891), 7 Man. L. R. 458.—CAN.

kk (p. 624) i. — — — — — Whether adequate remedy.]—*SCHULTZ v. ALLO WAY* (1894), 10 Man. L. R. 221.—CAN.

kk (p. 624) ii. — — — — — Sale by purchaser.—Whether waiver of right to tender.]—*NEW BRUNSWICK LAND & INVESTMENT CO. v. SIME*, [1928] 4 D. L. R. 214; *affd.*, [1929] 3 D. L. R. 197.—CAN.

kk (p. 624) iii. — — — — — Sale by treasurer.]—A treasurer selling land in exercise of a statutory power is still the agent or officer of the municipality & if he fails to give the statutory notice to redeem the right of the former owner to set aside the deed is barred if he has not paid the taxes within 3 years or redeemed within 1 year.—*LANGDON v. HOLTREX GOLD MINES, LTD.*, [1937] S. C. R. 334; 2 D. L. R. 364.—CAN.

oo (p. 624) i. — — — — — Rates owing to local authority.—Incorporated with municipality before payment.]—*BRISBANE*

CITY COUNCIL v. HODGE, [1928] S. R. Q. 102; 22 Q. J. P. R. 63.—AUS.

oo (p. 624) ii. — — — — —.]—On appeal from the decision of the Debt Adjustment Comr. granting a certificate permitting a municipality to continue proceedings to obtain title under a tax-sale certificate held by it, *Cory, C.C.J.*, directed that on payment of a certain sum by deft., proceedings be stayed until a certain date. Two subsequent similar orders were made by him on like terms. From the last order the municipality appealed:—*Held*: since no evidence was taken from or submitted by deft. on the last application & the order thereon was made arbitrarily or on the evidence submitted on the previous applications, & the uncontradicted affidavit of the secretary-treasurer showing the amount due for taxes made it clear that deft. had no longer any equity or real interest in the land, the judge did not exercise his discretion having regard to the purposes & objects of the Act, & the appeal should be allowed.—*ST. JAMES RURAL MUNICIPALITY v. BOURKE*, [1938] 1 W. W. R. 863.—CAN.

hhh (p. 624) i. — — — — —.]—A co. was granted a fixed tax in a municipality, on condition that its pay roll did not fall below a specified amount. If it did so fall, assessed taxes for past years became payable. It did so fall, & the co. being insolvent, the town claimed payment in priority to mtgees. & holders of receiver's certificates:—*Held*: there was a lien for taxes in priority to all other claims except the Crown.—*NOVA SCOTIA TRUST CO. v. STARR MANUFACTURING CO.*, [1934] 4 D. L. R. 571.—CAN.

ooo (p. 621) i. — — — — — When proceedings taken to collect tax.]—*Re MCKENZIE H. D. CO.*, [1928] 1 D. L. R. 336; 8 C. B. R. 509.—CAN.

ppp (p. 624) i. — — — — —.]—A person who, although he has not yet any estate in possession, is entitled to an estate in remainder for life, is a "person who has some interest in the land," within the meaning of sect. 229 of Assessment Act, 1924.—*ROGERS v. CICHNYK*, [1931] 3 W. W. R. 20; 40 Man. L. R. 233.—CAN.

ppp (p. 624) ii. — — — — — Crop payment lease.—Whether lessor assignee of lessee.]—Where there is a crop-payment lease the lessor's title to his share of the undelivered crop cannot be said to be derived by "assignment from a taxable person" within sect. 357 (c) (ii) of Municipal District Act, 1926, but is vested in the lessor directly by virtue of Crop Payments Act, 1922: & therefore, is not property which is "liable to seizure for taxes" within sect. 361 of said Municipal District Act.—*GREAT WEST LIFE ASSURANCE CO. v. STERLING MUNICIPAL DISTRICT*, [1931] 3 W. W. R. 730; [1932] 1 D. L. R. 688; 26 Alta. L. R. 199.—CAN.

1488. *Add. Annotation* :—**Refd.** *L. C. C. v. Hackney B. C.*, [1928] 2 K. B. 588.
1519. *Add. Annotation* :—**Consd.** *R. v. Stepney Corpn., Ex p. Walker & Sons, Ltd.* (1932), 102 L. J. K. B. 113.
- 1525a. **Effect of compounding allowance—On proceedings for recovery under Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 2.**—Where owners are rated instead of the occupiers, the fact that the owners are entitled to an allowance if the rate is paid

by a certain date does not preclude the rating authority from enforcing at an earlier date payment of so much of the rate as is recoverable at one time under Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 2.—**LOWERY v. KINGSTON-UPON-HULL CORPN.**, [1930] 1 K. B. 368; 73 Sol. Jo. 819; *sub nom.* **LOWERY v. HULL CORPN.**, 99 L. J. K. B. 127; 142 L. T. 286; 94 J. P. 50; 28 L. G. R. 27; 46 T. L. R. 57; (1926-31), 1 B. R. A. 359, D. C.

## Part IX.—Rates and Rating in the Metropolis.

- 1530a. — **Service of—Whether necessary.**—By Metropolis Management Act, 1855 (c. 120), s. 158, every vestry & district board shall from time to time “by order under their seal require” the overseers of their parish to levy the sums which such vestry or board may require for defraying the expenses of the execution of the Act. By sect. 161 the overseers “to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof”:—**Held**: such an order became effective when sealed, & service of it on the overseers was not necessary to authorise them to levy rates, but rates made by overseers in pursuance of such order, after notice of it having been sealed, were valid.—**GLEN v. FULHAM OVERSEERS** (1884), 11 Q. B. D. 328; 54 L. J. M. C. 9; 54 L. J. Q. B. 176; 51 L. T. 856; 49 J. P. 519; 1 T. L. R. 135; 33 W. R. 165.
1531. *Add. Annotation* :—**Refd.** *Stepney Borough Council v. Walker (John) & Sons, Ltd.*, [1934] A. C. 365.
1536. *Add. Annotations* :—**Refd.** *Consett Iron Co. v. Durham County Assessment Committee for No. 5 or North-West Area* (1930), 99 L. J. K. B. 277; *St. James' & Pall Mall Electric Light Co. v. Westminster (City) Assessment Committee* (1932), 147 L. T. 396; *Railway Assessment Authority v. Southern Ry. Co., London County Council v. Southern*

*Ry. Co.*, [1936] 1 All E. R. 26; *Townley Mill Co.* (1919), *Ltd. v. Oldham Assessment Committee*, [1936] 1 K. B. 585; *Mitcham Golf Course Trustees v. Ereaud*, [1937] 3 All E. R. 450; *Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee*, [1937] 2 All E. R. 298.

1545. *Add. Annotation* :—**Refd.** *Towle v. Improved Industrial Dwellings Co.*, [1931] 1 K. B. 263.
1546. *Add. Annotation* :—**Refd.** *Towle v. Improved Industrial Dwellings Co.*, 17 Tax Cas. 231.
1550. *Add. Annotation* :—**Consd.** *Liptons, Ltd. v. Shoreditch Assessment Committee* (1934), 50 T. L. R. 432.
1561. *Add. Annotation* :—**Apprvd.** *Stepney Borough Council v. Walker (John) & Sons, Ltd.*, [1934] A. C. 365.
- 1564a. **Failure to object in time—Whether mandamus to alter lies.**—*W. & Sons* occupied premises which they claimed were entitled to be derated, as being industrial hereditaments. The claim was rejected by the local authority & by quarter sessions, but was finally upheld by the Divisional Ct. Pending the appeal to that ct., the new quinquennial valuation list had been prepared, in which the premises had been entered as fully rateable, & *W. & Sons* had not appealed against it as provided for by Valuation of Property (Metropolis) Act, 1869 (c. 67), in the belief that if their appeal to the Divisional Ct. were

ppp (p. 624) fil. — *Sale of land—Inquiry by purchaser—Estoppel of city.*—Property was sold for arrears of taxes & the owner remained in possession with power to redeem within two years. Before the expiration of this time the owner sold to a purchaser who obtained a statement from the city collector of “all the city charges” against the property, the lien for taxes being omitted.—**Held**: the city was estopped from asserting a claim for these taxes against the purchaser.—**MELYNK v. SYDNEY**, [1934] 2 D. L. R. 74; 7 M. P. L. R. 428.—**CAN.**

ppp (p. 624) iv. *Recovery by taxpayer—Limitation of action.*—Sect. 228 of Assessment Act, 1924, applies to taxes levied under Towns' & Villages' Business Tax Act, R. S. M., 1913.—**CANADIAN HOTEL CO., LTD. v. NEEPAWA TOWN**, [1934] 2 W. W. R. 591; 4 D. L. R. 316.—**CAN.**

so. *Percentage on arrears.*—**Held**: the 10 per cent. charged upon arrears of taxes due upon land was to be added to the whole amount due upon the lot & not upon the amount of each year's

taxes separately, thereby making it a compound computation of 10 per cent. each year.—**GILLESPIE v. HAMILTON** (1862), 12 U. C. C. P. 426.—**CAN.**

sg. *Recovery of taxes paid under protest.*—**AYLEWORTH v. TORONTO** (1936), 4 D. L. R. 229, 6 F. L. J. 4.—**CAN.**

### PART VIII. SECT. 2.

sr. *Demand upon tenant—What amounts to.*—A demand for taxes in the joint names of owner & tenant is not a demand upon the tenant within Assessment Act, R.S.O., 1927.—**RE CAMPBELL'S HARDWARE**, [1935] 2 D. L. R. 349; O. R. 228.—**CAN.**

### PART VIII. SECT. 6, SUB-SECT. 2.

—A.

sy. *Expenses of distress.*—The tariff set out in Distress Act, R. S. M., 1913, is not exclusive & expenditures not provided for but necessarily incurred by, for instance, a mitgee, are to be allowed him. The bailiff or party making a distress cannot make for himself any sums other than the

charges described in Sched. A to Distress Act.—**SALTER & ARNOLD, LTD. v. NEEPAWA TOWN**, [1933] 2 W. W. R. 105; 4 D. L. R. 371; 41 Man. L. R. 258.—**CAN.**

sz. *Seizure of crop—Failure to sell—Liability to lessor.*—Where a crop on the land of a tenant under a crop-sharing lease was seized under Rural Municipality Act, R. S. S., 1930, for taxes due a rural municipality.—**Held**: the municipality was liable to the lessor for the value of the crop lost through its negligence in not selling the crop & in permitting it to be diverted to meet other claims.—**HAGEL v. CANA RURAL MUNICIPALITY**, [1935] 3 W. W. R. 190; *affd.*, [1935] 3 W. W. R. 192.—**CAN.**

### PART VIII. SECT. 6, SUB-SECT. 2.—D.

sd. *Liability for wrongful arrest.*—Liability of municipality for false arrest for non-payment of poll-tax, pltf.'s name not being on assessment roll.—**ELMS v. MULGRAVE**, [1933] 4 D. L. R. 820.—**CAN.**

successful their premises would, *ipso facto*, be transferred to the industrial hereditaments list. The local authority, however, refused to transfer, & W. & Sons obtained a rule *nisi* for *mandamus* ordering them to do so, which ultimately was made absolute by the Ct. of Appeal:—*Held*: the relevant statutory provisions for the preparation & deposit of valuation lists showed that the Legislature had provided fully for any person affected to make objection & appeal, & it was of the first importance that the list once settled should be conclusive. The writ of *mandamus* was founded to prevent the failure of the performance of some public duty, & applts. had failed in no duty. Resps. had neglected their right under the Valuation (Metropolis) Act, 1869 (c. 67), to object & appeal against the list, & it was not necessary to add new safeguards, such as proceeding by writ of *mandamus*, to those already provided by statute. *Mandamus* was not granted where there was another sufficient & convenient remedy.—STEPNEY BOROUGH COUNCIL *v.* WALKER (JOHN) & SONS, LTD., [1934] A. C. 365; 103 L. J. K. B. 380; 50 T. L. R. 287; 78 Sol. Jo. 238; *sub nom.* R. *v.* STEPNEY CORPN., *Ex p.* WALKER (JOHN) & SONS, LTD., 151 L. T. 42; 98 J. P. 191; 32 L. G. R. 181, H. L.

*Annotation*:—*Refd.* R. *v.* Railway Assessment Authority, *Ex p.* Southampton Corpn., [1937] 1 All E. R. 431.

**1588a. Classification of hereditament as industrial.]**—LIPTON, LTD. *v.* SHOREDITCH ASSESSMENT COMMITTEE, No. 1162a, *ante*.

**1601. Add. Annotations:—***Consd.* R. *v.* Worthing Borough Council & Horsham & Worthing Assessment Committee, *Ex p.* Burgess, [1937] 2 All E. R. 681. *Refd.* Lipton, Ltd. *v.* Shoreditch Assessment Committee (1931), 50 T. L. R. 132.

**1603. Add. Annotation:—***Consd.* Lewis *v.* Elgy (1927), 11 Tax Cas. 723.

**1608. Add. Annotations:—***Refd.* Lency (Alfred) & Co. *v.* Whelan, [1934] 2 K. B. 511; Appenrodt *v.* Central Middlesex Assessment Committee, [1937] 2 K. B. 48.

**1609. Add. Annotation:—***As to* (1) *Refd.* R. *v.* Westminster Assessment Committee, *Ex p.* Black (1933), 102 L. J. K. B. 541.

**1611. Add. Annotations:—***Distd.* R. *v.* Westminster Assessment Committee, *Ex p.* Black, [1934] 1 K. B. 159. *Refd.* R. *v.* Minister of Transport, *Ex p.* Upminster Services, Ltd., [1934] 1 K. B. 277.

**1611a. Power to transpose entries—Although no objection as to one.]**—In May, 1932, a double flat which had formerly been occupied as a single flat was divided by the owner into two flats & let to separate tenants & was known as Nos. 3 & 4, Duke Street Mansions. In Oct. 1932, a provisional valuation list was

made which included the two flats. That list showed No. 3 to be rated at £169 gross & £137 rateable value & No. 4 at £146 & £118 rateable value. The owner pursuant to Valuation (Metropolis) Act, 1869 (c. 67), s. 47 (4), gave notice of objection to the provisional list so far as it related to No. 3, but he gave no notice of objection in respect of No. 4. The owner's representative attended & objected that the figures entered opposite Nos. 3 & 4 had by accident been transposed. The assessment committee amended the provisional valuation list with the result that the valuation of the two flats was increased by £58. The owner objected that no notice had been given him that the valuation of No. 4 would be considered by the assessment committee. The Div. Ct. held that under sect. 47 (7) of 1869 Act the assessment committee had power to alter entries in the provisional list even where no objection had been made to those entries. On Appeal:—*Held*: on the facts, the two flats, Nos. 3 & 4, must be regarded as one hereditament, & that being so, all the requirements of sect. 47 of 1869 Act had been duly complied with.—R. *v.* WESTMINSTER ASSESSMENT COMMITTEE, *Ex p.* BLACK, [1934] 1 K. B. 159; 103 L. J. K. B. 62; 150 L. T. 86; 97 J. P. 323; 31 L. G. R. 405, C. A.

**1616a. Time for hearing appeal.]**—When it is impossible for justices to dispose of their list by Mar. 31, they have jurisdiction after that date to hear an appeal of which notice was given at the proper time, & if the parties are not ready for trial as soon as the justices are able to hear the appeal, the justices have a discretion to postpone the hearing, so that they may have proper materials before them.—R. *v.* LONDON COUNTY J.J., *Ex p.* LOCKE LANCASTER & JOHNSON (W. W. & R.) & SONS, LTD., [1929] 1 K. B. 81; 98 L. J. K. B. 44; 139 L. T. 609; 92 J. P. 183; 44 T. L. R. 728; 72 Sol. Jo. 584; 26 L. G. R. 549; (1926-31), 1 B. R. A. 267, D. C.

*Annotation*:—*Consd.* R. *v.* London Justices, *Ex p.* Shoreditch Assessment Committee (1932), 96 J. P. 323.

**1617a. — Power to extend time.]**—The time fixed by Valuation (Metropolis) Act, 1869 (c. 67), s. 42 (13), for the hearing of appeals is imperative & not merely directory. Therefore the jurisdiction conferred on justices by sect. 34 of that Act to order notice of appeal to be given after the date, Jan. 14, specified in s. 42 (12) in an appropriate year only enables that to be done where the notice can be given in time for the hearing of the appeal before the ensuing Mar. 31, as provided by s. 42 (13).—R. *v.* LONDON JUSTICES, *Ex p.* SHOREDITCH ASSESSMENT COMMITTEE, [1932] 2 K. B. 697; 101 L. J. K. B. 599; 147 L. T. 357; 96 J. P. 323; 48 T. L. R. 531; 30 L. G. R. 357, D. C.

# REAL PROPERTY AND CHATTELS REAL.

## Part I.—In General.

5. *Add. Annotation:—*Refd. *Liddiard v. Waldron*, [1933] 2 K. B. 319.

## Part II.—Estates and Interests in Real Estate.

- 185. Add. Annotation :—***Refd.* I. R. Comrs. v. Raphael, I. R. Comrs. v. Ezra, [1935] A. C. 96.
- 159a. —**—A leasehold for lives being settled on A. for life, with remainder to B., as *quasi* tenant in tail, with remainders over :—*Held* : the *quasi* tenant in tail could not, by fine or otherwise, during the life of A., bar the subsequent remainders without the concurrence of A.—*SLADE v. PATTISON* (1835), 5 L. J. Ch. 51.
- Annotations :—**Refd.* *Edwards v. Champion* (1853), 3 De G. M. & G. 202 ; *Pickersgill v. Grey* (1862), 30 Beav. 352.
- 183a. Cestui que vie dead—& death concealed.]—***Re* *JOBHEIMS, Ex p. FLETCHER* (1835), 4 L. J. Ch. 219.
- 220. Add. Annotation :—***Refd.* *Re Wells, Swinburne-Hanham v. Howard* (1932), 48 T. L. R. 617.

**PART I. SECT. 1.**

3 H. — — — — — HUNTER v.  
FARRELL (N. B.) (1913,) 13 E. L. R.  
354: 14 D. L. R. 556.—CAN.

**PART I. SECT. 3. SUB-SECT. 1.**

§ 1. — *Right to build.*—The right to build a house on another man's land is not an incorporeal hereditament. Such a right is a mark of title & of exclusive enjoyment, & is not an exemption or *profit à prendre*.—PITMAN v. NICKERSON (1891), 40 N. S. R. 20.—CAN.

PART I. SECT. 6.

**o1. — — — Erections by purchaser under instalment agreement.] —** What may be only a chattel if erected by a tenant for years may well become part of the soil if erected by a purchaser of the land under an agreement for sale.

the land under an agreement to give the Wire fencing & a fence post erected or completed by the deft. while he occupied the land, previously rented to him, the purchaser under an installment agreement made with the Crown held to have become part of the soil, & therefore, to have passed to the Crown when deft. gave up the agreement & surrendered all his interest in the land to the Crown, & to have become subsequently the property of pltf. when he purchased the land from the Crown. — LAROCHELLE v. MARCHAND, [1828] 3 W. W. R. 731. — CAN.

to II. — [1929] 2 W. R. 240. — On the question whether articles affixed to land have become part of the realty, the intention of the person who affixed them is material only in so far as it can be presumed from the degree & object of the annexation. Buildings erected by the owner of land for use in the making of bricks held to form part of the realty, although some of them were attached to the land by nothing but their own weight. They, therefore, became the property of debt., who became registered owner of the land in pursuance of the purchase thereof at a tax sale under Assessment Act. Certain machinery in said buildings was also held part of the realty. — McCUTCHEON v. LIGHTFOOT, [1928] 2 W. R. 240. — CAN.

11. *Printing presses.*—RICHARDSON v. HARDIE, [1928] 2 W. W. R. 246.—CAN.

m. (p. 663) 1. *How far English law of fixtures applicable in Canada—As between original vendor & subsequent vendee.*—**TRAVIS-BARKER v. REED** (1922). 86 D. L. R. 426; 17 Alta.

L. R. 319; [1921] 3 W. W. R. 770; *reversd.* on the facts, [1923] 3 D. L. R. 927; [1923] 3 W. W. R. 451.—CAN.

**PART I. SECT. 7.**

o. — When presumed—After long possession.]—DOE d. MCKAY v. ALLEN (1851), 7 N. B. R. (2 All.) 191.—CAN.

**PART II. SECT. 1, SUB-SECT. 1.**

sm. "Use forever" — Effect.)—An Act provided that the county of L. should pay a sum towards the cost of a building owned by the town of L. for the "use forever" of certain rooms in the building:—*Held*: an interest in land unknown to the common law may be created by statute. The words "use forever" did not give a fee simple or a joint tenancy, but gave a right in perpetuity, the fee simple remaining in the town.—LUNENBERG (TOWN) v. LUNENBERG (MUNICIPALITY), [1932] 1 D. L. R. 386; 4 M. P. R. 181.—CAN.

**PART II. SECT. 3, SUB-SECT. 1.—**  
**A. (a).**

**52. Estate of widow of locatee—Public Lands Act (Ont.), 1914, s. 47.]—RE COURT, [1930] 1 D. L. R. 113; [1929] S. C. R. 50.—CAN.**

**PART II. SECT. 3, SUB-SECT. 1.—**  
**A. (b).**

a i. — *To grantee "for ever."*—  
TRUST & LOAN CO. v. CLARKE (1878),  
3 A. R. 429.—CAN.

a li. — “ & the heirs of his body for twenty-one years or the term of his life fully to be completed.” — Deft. on Oct. 13, 1852, granted the land in question to one S. to hold “ to the said S. & the heirs of his body for twenty-one years, or the term of his natural life, from Apr. 1, 1853, fully to be completed & ended ”:—Held: by the lease S. took a life estate, in which the term merged, & he, therefore, had no interest which the sheriff could sell under the *fi. fa.* against goods.—  
DALYE v. ROBERTSON (1860), 19 U. C. R. 411.—CAN.

**PART II. SECT. 4, SUB-SECT. 1.**

m 1. — *Homestead.*—Pltf. transferred to his wife a city house which was their homestead within Dower Act, O. A., 1924. The transfer was registered subject to a mtge. Later he & his wife moved from the house to

a farm where he built a new house in which they resided until his wife left him. She never returned, & in 1934 died. Her will devised the city house to deft. —*Held*: in view of sect. 4 of said Act, pltf. was entitled to his "dower" rights in the city house; he was not obliged to reimburse his wife's estate for the amount of the mtge., which she had paid off; & he was entitled to the rents & profits of the house from the death of his wife less the cost of taxes, insurance & ordinary repairs. —*BEATTY v. COLMAN*, [1936] 1 W. W. R. 714; 2 D. L. R. 591; 44 Man. L. R. 28. — **CAN.**

sa. *Effect of Married Women's Property Act.*—*Re BROWN* (1936), 5 F. L. J. (Can.) 293.—**CAN.**

**PART II. SECT. 4, SUB-SECT. 6.**

sg. *Claims of creditors & mortgagee.*]—Claims of creditors & mtgee. held to have priority over husband's claim to curtesy.—*Re COYLE*, [1934] 3 D. L. R. 792.—CAN.

## PART II. SECT. 5.

pp (p. 679) i. ———.]—  
CAMPBELL v. ROYAL CANADIAN BANK  
(1872). 19 Gr. 334.—CAN.

o (p. 680) i. ———.]—*Re*  
LESPERANCE, [1927] 4 D. L. R. 391;  
61 O. L. R. 94.—CAN.

o (p. 680) H. ————.]—*Re*  
WILLIAMS (1903), 24 C. L. T. 91; 7  
O. L. R. 156; 3 O. W. R. 251.—  
CAN.

t (p. 680) i. ———.]—*Re* TIERNEY,  
[1927] 3 D. L. R. 943; 60 O. L. R.  
652.—CAN.

qq (p. 680) 1. — *Lands passing to husband under intestacy of father—Husband dying intestate.*—*Re ARCHIBALD* (1908), 5 E. L. R. 510.—**CAN.**

aaa (p. 680) i. ——— *What is.*—  
IRONSIDES v. GREEN (Man.), [1927]  
3 D. L. R. 168; [1927] 2 W. W. R.  
59.—CAN.

aaa (p. 680) ii. ————.]—  
Re RIPSTEIN ESTATE (Man.), [1927] 3  
W. W. R. 791.—CAN.

aaa (p. 680) iii. — — — — —.]—A claim of homestead under the Dower Act, C. A., 1924, c. 54, rests upon a dwelling-house being not merely occupied by the owner but "as his home." The words "his home" import something more than a mere temporary or occasional lodging place. Though not every home is a homestead, yet, subject to certain qualifications as to the

**285a. Father & daughter living together—  
Daughter maintained out of mixed fund.]—**  
A daughter was entitled to one-fifth of some

property, & her father to the remainder. She resided with, & was maintained by him, & he received the whole of the rents. After

need of a written consent to a change of homestead, the homestead (if any) can only be where the home is. There cannot be more than one homestead at any one time.—*NATIONAL TRUST CO., LTD. v. GREENGARD (Man.)*, [1930] 1 D. L. R. 58; [1929] 3 W. W. R. 363.—**CAN.**

**aaa (p. 680) iv.** ———.—**]**—An upstairs suite in an apartment block cannot be a "homestead" within Dower Act, C. A., 1924, c. 53; nor can the fact that the owner of such a block resides in one of the suites therein render the whole block his "homestead."—*Re RUPSTEIN ESTATE*, [1929] 2 D. L. R. 933; 1 W. W. R. 788; 38 Man. L. R. 184; *affg.*, [1927] 3 W. W. R. 791.—**CAN.**

**aaa (p. 680) v.** ———.—**]**—Dower Act, R.S.A., 1922, does not give a widow a dower interest in the unexpired portion of a lease of land, unless *semble* where the lease was one which created in the husband an estate of a duration greater than the possible duration of a widow's life. Even assuming that dower attaches to the interest of the husband in land rented to him on a crop-sharing basis, Dower Act does not transfer to the widow the ownership of his share of a crop growing thereon at his death. Dower Act Amendment Act, 1926, does not affect either sect. 2 of Dower Act, *supra*, which contains a definition of homestead, or sect. 3 thereof, which declares every disposition by act *inter vivos* of the homestead of any married man null & void unless made with the written consent of the wife; but it applies only to sect. 4 of the Dower Act & thus operates only to make any disposition by will, or devolution following death intestate of a married man, of such exempted chattels subject to & postponed to an estate for the life of the married man's wife, but does not interfere with or require the consent of the wife to a disposition by him *inter vivos* of such chattels; & does not affect chattels owned by him in excess of those exempt from execution; they continue as before the amendment to be disposable by him by disposition *inter vivos* & by will & devolve ordinarily if he dies intestate.—*Re SCOTT ESTATE*, [1933] 1 W. W. R. 325; 5 F. L. J. (Can), 3.—**CAN.**

**aaa (p. 680) vi.** ———.—**]**—A one-storey building in the front of which was a small grocery shop, & the remainder of which consisted of four rooms wherein the proprietor & his wife lived, the two sections being connected by a door:—*Held*: to be a "dwelling-house" within the definition of "homestead" in sect. 2 (a) (i) of Dower Act, C. A., 1924.—*Re OSTROWICZ ESTATE*, [1938] 1 W. W. R. 609; 2 D. L. R. 466; 46 Man. L. R. 65; 7 F. L. J. (Can.) 291.—**CAN.**

**aaa (p. 680) vii.** ———.—**]**—*FROSTAD v. LIBEK*, [1927] 3 D. L. R. 916; [1927] 2 W. W. R. 550; 21 Sask. L. R. 603.—**CAN.**

**aaa (p. 680) viii.** ———.—**]**—*Effect of adultery.*—Neither at common law nor under Dower Act does adultery disentitle a wife to dower, although it is a circumstance to be taken into account by the judge in deciding whether it is fair & reasonable to order that her consent to the disposition of the homestead be dispensed with under sect. 8. Except, however, by her consent or under such an order her right to dower in the homestead cannot be denied her.—*Re MILLER*, [1929] 1 D. L. R. 147; [1928] 3 W. W. R. 643.—**CAN.**

**aaa (p. 680) ix.** ———.—**]**—*Change of homestead without wife's consent.*—

A husband & wife lived together on property owned by him in the town of V. She left him & they lived separately thereafter. After the separation he changed his residence to a farm where he resided until his death. Her consent to the change was not given & apparently, never asked for; although while they were living together in the town she consented to a mtge. placed on the farm:—*Held*: on his death, she was entitled to select either property as the homestead in which to take her life estate.—*Re McLEOD ESTATE, McLEOD v. McLEOD (Alta.)*, [1929] 4 D. L. R. 659; 3 W. W. R. 241; *affg.*, [1929] 3 D. L. R. 640; 2 W. W. R. 252.—**CAN.**

**ooo (p. 680) i.** ———.—**]**—*Land purchased subject to mortgage.—Registration of conveyance before discharge of mortgage by vendor.*—*Re KUNTZ & HODGINS*, [1927] 4 D. L. R. 1009; 61 O. L. R. 298.—**CAN.**

**ddd (p. 680) i.** ———.—**]**—*Lands in which testator had any estate of freehold by virtue of any mortgage.*—*Low v. SPARKS* (1863), 14 C. P. 25.—**CAN.**

**ddd (p. 680) ii.** ———.—**]**—*Lands assigned by husband for benefit of creditors—& released by wife from dower.—Subsequent reassignment to husband.*—*Re IRVINE*, [1928] 3 D. L. R. 268; 62 O. L. R. 319.—**CAN.**

**ddd (p. 680) iii.** ———.—**]**—*Land granted by Crown subject to mineral rights.—Whether land granted as mining land.*—*Re IRVINE*, [1928] 3 D. L. R. 268; 62 O. L. R. 319.—**CAN.**

**ddd (p. 680) iv.** ———.—**]**—*Land comprised in offer to purchase.—Accepted by husband.—Acceptance not posted till after husband's death.*—*Re IRVINE*, [1928] 3 D. L. R. 268; 62 O. L. R. 319.—**CAN.**

**g (p. 681) i.** ———.—**]**—*Effect of election to take under will.*—In order for a widow to be entitled to take under her husband's will & have also in addition to the bequest thereunder, or any part thereof, the special rights & priorities granted by Dower Act, C.A., 1924, she must establish clearly by the terms of the will that her husband so intended. A will gave to testator's wife "one-third share or interest in my whole estate & a life interest in my homestead as provided for by Dower Act." & then, after leaving specific legacies, gave all the residue of the estate in equal shares to the wife & testator's four children. The widow elected to take under the will, instead of under Dower Act, but contended, nevertheless, that with respect to her total share she was entitled to the priority provided for by sect. 20 of Dower Act:—*Held*: no such intention appeared from the will & therefore, the widow when she elected to take under the will had forfeited the special privileges & rights which would have been hers had she elected to take under Dower Act.—*Re JACKSON ESTATE, JACKSON v. JACKSON*, [1935] 1 W. W. R. 62; 42 Man. L. R. 472.—**CAN.**

**ttt (p. 681) i.** ———.—**]**—*McLENNAN v. GRANT* (1868), 15 Gr. 65.—**CAN.**

**ttt (p. 681) ii.** ———.—**]**—*LEYS v. TORONTO GENERAL TRUSTS CO.* (1892), 22 O. R. 603.—**CAN.**

**ttt (p. 681) iii.** ———.—**]**—*SABINE v. WOOD* (1910), 9 E. L. R. 169.—**CAN.**

**ttt (p. 681) iv.** ———.—**]**—*Testator, after bequeathing certain legacies, devised his lands to his sons, charging them, however, with the legacies & also with an annuity of \$100 to his widow, to whom he also*

bequeathed his furniture, apartments in his dwelling-house, & sundry other things. The estate was sufficient to answer all legacies, & also the widow's dower:—*Held*: the widow was not put to her election as between the will & her dower.—*WILSON v. WILSON* (1883), 7 O. R. 177.—**CAN.**

**ttt (p. 681) v.** ———.—**]**—*A will bequeathing to a wife the dwelling-house for her natural life, the household goods, & an annuity of \$300 secured to her out of the estate:—Held*: not to put the widow to her election.—*Re BIGGAR, BIGGAR v. STINSON* (1884), 8 O. R. 372.—**CAN.**

**ttt (p. 681) vi.** ———.—**]**—*A will bequeathing to a wife one-third of the net income from the whole blended fund of his realty & personality for her life or during widowhood:—Held*: she was put to her election.—*Re HENDRY*, [1931] 4 D. L. R. 908; O. R. 448.—**CAN.**

**f (p. 682) i.** ———.—**]**—*PULKER v. EVANS* (1856), 13 U. C. R. 456.—**CAN.**

**f (p. 682) ii.** ———.—**]**—*Where a will in express terms makes provision for the testator's wife in lieu of dower, thus bringing directly to her mind that she cannot have dower & the benefits of the will as well, a much slighter dealing with the property left to her will evidence an election on her part to take under the will, than would be sufficient in the absence of such express provision:—Held*: there being such provision, the evidence set out in the report of the case was sufficient to establish an election to take under the will, though, otherwise, it would not have been.—*NIXON v. ASHENHURST* (1884), 7 O. R. 664.—**CAN.**

**f (p. 682) iii.** ———.—**]**—*Right to elect.—Question for Surrogate Court.*—*Re JACKSON ESTATE*, [1934] 3 W. W. R. 562.—**CAN.**

**ooo (p. 682) i.** ———.—**]**—*HILL v. GREENWOOD* (1864), 23 U. C. R. 404.—**CAN.**

**ooo (p. 682) ii.** ———.—**]**—*CHUDYR v. CANADA PERMANENT MORTGAGE CORPN.*, [1937] 2 W. W. R. 225; 3 D. L. R. 261; 45 Man. L. R. 161; 7 F. L. J. (Can.) 36.—**CAN.**

**e (p. 683) i.** ———.—**]**—*Consent judgment in alimony action.*—In an action for alimony, a judgment was pronounced by consent whereby it was adjudged that *pltf.* should debt to *def.* all her interest in properties owned by *pltf.* & *def.* jointly, & *pltf.* should stand debarred of any interest in any property, real or personal, hereafter acquired by *def.* The wife executed in favour of the husband a deed in fee simple of land of which they were joint tenants, wherein she released to him all her claims upon the land:—*Held*: *pltf.* was, by the consent judgment, barred of any right to dower, inchoate or otherwise, which she might have had in this land, which was acquired by him after the judgment.—*LUBOVICH v. CUCKOVICH*, [1930] 4 D. L. R. 339; 65 O. L. R. 451; *revg.*, 37 O. W. N. 49.—**CAN.**

**k (p. 683) i.** ———.—**]**—*Where a wife of her own consent leaves the society of her husband & then commits adultery, she is barred of her action for dower.*—*WHIMBEY v. HYDE*, [1927] 3 D. L. R. 237; 60 O. L. R. 399.—**CAN.**

**m (p. 683) i.** ———.—**]**—*Determination of issue.—Jurisdiction.*—The issue which arises under sect. 21 of the Dower Act, 1924, i.e. whether the wife was at the time of the death of the husband living separate & apart

his death, she, for the first time, claimed against his estate an account of one-fifth of the rents for twenty years. The ct. concluded that the common establishment had been maintained out of the mixed fund, & rejected the claim.—*SMITH v. SMITH, TRINDER v. SMITH* (1857), 23 Beav. 554; 29 L. T. O. S. 215; 53 E. R. 218.

**297a. Whether court will supply word "of."**—By a voluntary settlement A. & his cousin limited certain gavelkind lands to a relative, C., for life, with remainder to her issue, & for default of such issue "to the use of the right heirs of E., deceased, & J.," who was then living, "the two sisters of the said A., their heirs & assigns, as tenants in common

for ever":—*Held*: the ct. declining to read the limitation as a limitation to "the right heirs of E., deceased, & of J.," J. herself took a vested remainder in fee simple in a moiety of the property expectant on the death of C., without issue; & accordingly on the death of C., who survived J., & died without issue, the moiety passed to J.'s co-heirs in gavelkind.—*HAWES v. HAWES* (1880), 14 Ch. D. 614; 43 L. T. 280.

*Annotations*:—*Folld. Re Featherstone's Trusts* (1882), 22 Ch. D. 111. *Consd. Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357.

**341a. Sale required by one tenant.**—*Re BUCHANAN-WOLLASTON'S CONVEYANCE, CURTIS v. BUCHANAN-WOLLASTON* (1938), 159 L. T. 601; 55 T. L. R. 165; 82 Sol. Jo. 950.

from him, is one which must be disposed of, in the summary method provided by the Act, by the Surrogate Ct. Judge. The Ct. of K. B. has no jurisdiction to entertain an action to determine it.—*WEAVER v. BAIRD*, [1930] 1 W. W. R. 918; 3 D. L. R. 875.—*CAN.*

**m** (p. 683) ii. ———.—*Where a husband & wife live apart under an agreement between them neither can be said to have "left the other, within Dower Act, C. A., 1924, s. 20, & therefore, to have forfeited his or her rights under the Act."*—*Re MATCHETT ESTATE*, [1931] 2 W. W. R. 512.—*CAN.*

**oo** (p. 683) i. ———.—*Lapse of time.*—*PYATT v. McKEE* (1883), 3 O. R. 151.—*CAN.*

**oo** (p. 683) ii. ———.—*Bankruptcy of husband.*—The bkcy. of a husband does not deprive the wife of her inchoate right to dower.—*Re CANADIAN CREDIT MEN'S ASSOCIATION, LTD. & WATERS*, [1938] O. R. 218.—*CAN.*

**i** (p. 684) i. ———.—*Res judicata.*—Issues adjudicated in proceedings in the Surrogate Ct. with respect to an executorship & not in any way with respect to a claim for dower under Dower Act, C. A., 1924, or incidental thereto, held not to be *res judicata* in an action brought by the widow in the King's Bench in which she claimed dower rights.—*JERRY v. CANADIAN GUARANTEE & TRUST CO.*, [1931] 1 D. L. R. 1013; [1930] 3 W. W. R. 498; 39 Man. L. R. 251.—*CAN.*

**oo** (p. 684) i. ———.—*Competency of wife as witness—Action by husband & wife.*—In an action for dower by husband & wife, the wife is a competent witness.—*CADMAN v. STRONG* (1843), 10 U. C. R. 591.—*CAN.*

**kkk** (p. 684) i. ———.—*Claim admitted—Award by commissioners—Right of court to disturb.*—*ROBINET v. PICKERING* (1879), 44 U. C. R. 337.—*CAN.*

**i** (p. 685) i. *Application for order under Dower Act, R. S. O., 1897 (c. 164), s. 12—Duty of court.*—*Re KING* (1899), 18 P. R. 385.—*CAN.*

**ss. Priority in administration—Devise of portion to which widow entitled under Dower Act.—Testator devised his estate to his exors. in trust to pay & convey to his widow "that portion of my estate which she shall be entitled to under the provisions of the Manitoba Dower Act" & the remaining estate in his residence; & upon further trusts with respect to the balance of his estate.—*Held*: the portion of the estate given to the widow was that which without the will she would have been entitled to under said Act, & also, that what was given & what incidents would attach to it were to be determined by applying the provisions of the Act, including sect. 20 thereof.—*Re COWAN ESTATE*, [1932] 1 W. W. R. 79; 1 D. L. R. 771; 40 Man. L. R. 221.—*CAN.***

**sd. Conflict of laws.**—Although a testator died resident & domiciled

outside of Manitoba & his widow was then resident, & has continued to reside, outside of Manitoba, she is entitled to the benefits of Dower Act, C. A., 1924, but her rights thereunder are restricted to testator's real property in Manitoba, i.e., the total estate of which she is entitled to one-third is said real property.—*Re ELDER ESTATE*, [1936] 2 W. W. R. 70; 3 D. L. R. 422; 44 Man. L. R. 84.—*CAN.*

**PART II. SECT. 6, SUB-SECT. 1.**  
—C. (b).

**q** i. ———.—*Conveyance by a husband to himself & his wife in fee simple creates a right of survivorship by which the husband can convey alone after the wife's decease.*—*Re SHERRETT & GREY*, [1933] 3 D. L. R. 723; O. R. 690.—*CAN.*

**PART II. SECT. 6, SUB-SECT. 1.**  
—C. (d).

**sg. Purchase of house by husband & wife as joint tenants—Death of husband—Wife not liable for husband's share of purchase-price.**—H. & C., husband & wife, who had been separated, came together under a written agreement providing for the formation of a fund to be held in trust to pay for the purchase of a house & premises to be a home for the re-united spouses, & to be vested in them as joint tenants. A property was selected, paid for out of the fund, & conveyed to them as joint tenants. A mtge. of the property was made by the two.—*Held*: the presumption was that the husband & wife were as between themselves equally liable, & neither could call on the other to pay more than his proper share.—*McMILLAN v. NATIONAL TRUST CO.*, [1931] 2 D. L. R. 369; 66 O. L. R. 601.—*CAN.*

**PART II. SECT. 6, SUB-SECT. 1.**  
—D. (a).

**sb. By execution.**—Lands were conveyed to a man & his wife as joint tenants, & not as tenants in common:—*Held*: estates by entireties having been abolished, the joint estate was severable; & the interest of one joint tenant could be sold under execution.—*Re CRAIG*, [1929] 1 D. L. R. 142; 63 O. L. R. 192.—*CAN.*

**sd.** ———.—*A joint tenancy is severed by (inter alia), execution of a writ of fi. fa. But mere delivery of a writ of fi. fa. to the sheriff is not part of execution. Therefore death of one joint tenant after delivery to but before execution by the sheriff of a writ of fi. fa. vests the property in the survivor free from the claim of the execution creditor.*—*POWER v. GRACE*, [1932] 2 D. L. R. 793; O. R. 357; *affg.*, [1932] 1 D. L. R. 801.—*CAN.*

**PART II. SECT. 6, SUB-SECT. 1.**  
—D. (b).

**r** i. ———.—*Admission of parol evidence.*—*TAN CHEW HOE NEO v. CHEE SWEI CHENG* (1928), L. R. 56 Ind. App. 112.—*IND.*

**PART II. SECT. 6, SUB-SECT. 1.**  
—D. (c).

**o** i. ———.—*Re WHITE*, [1928] 1 D. L. R. 846.—*CAN.*

**375 ii.** ———.—*Deposit paid into account of one tenant—Balance paid to his executors.*—A husband & wife joined in an open contract for the sale of land of which they were registered as joint proprietors. The whole of the deposit was paid by the husband into his own bank account. The husband died, & the balance of the purchase-money was paid to his exors.—*Held*: there had been no severance of the joint tenancy, & therefore no part of the proceeds of the sale formed part of the husband's estate.—*Re ALLINGHAM, ALLINGHAM v. ALLINGHAM*, [1932] V. L. R. 469; *Argus L. R.* 393.—*AUS.*

**PART II. SECT. 6, SUB-SECT. 1.**  
—D. (d).

**sc. Intention to sever—Sufficiency of evidence.**—A husband & wife, under a certain deed executed in 1884, prior to their marriage, became equitable joint tenants of a farm at C., held under a tenancy from year to year, & also of another farm at R. In 1900 the wife purchased the farm at R., & was registered as owner in fee simple, subject to equities. In 1911 the husband purchased the farm at C., & was registered as owner in fee simple, subject to equities. The husband died in 1921, & by his will, left the farm at C. to one of his sons. The wife claimed the farm by survivorship.—*Held*: a severance of the joint tenancy in the farm did not, as a matter of law, result from the purchase of the fee simple by the husband. Also, on the evidence, the ct. could not infer that the husband & wife had agreed to sever the joint tenancy in both farms.—*FLYNN v. FLYNN*, [1930] 1 R. 337.—*IR.*

**PART II. SECT. 6, SUB-SECT. 1.**  
—E. (a).

**sd. General rule.**—*CHANDRA KISHORE CHAKRAVARTY v. BHESWAR PAL* (1927), 1 L. L. R. 55 Calc. 396.—*IND.*

**PART II. SECT. 6, SUB-SECT. 1.**  
—E. (b) i.

**394 ii.** ———.—*Method of accounting.*—*SPOURLE v. CLEMENTS* (B. C.), [1927] 3 D. L. R. 955; [1927] 2 W. W. R. 825.—*CAN.*

**PART II. SECT. 6, SUB-SECT. 1.**  
—E. (c).

**o** i. ———.—*A co-sharer, by himself, can maintain an action of trespass against a wrongdoer.*—*CURRIMBOY & CO., LTD. v. CRICK* (1929), 1 L. R. 57 Calc. 170.—*IND.*

**PART II. SECT. 6, SUB-SECT. 2.**

**g** i. ———.—*HARKESH SINGH v. HARDEVI* (1927), 1 L. R. 49 All. 763.—*IND.*

443. *Add. Annotation*:—**Consd.** *Hanson v. Newman*, [1934] Ch. 298.

497. *Add. Annotation*:—*As to* (3) **Refd.** *Re Orlebar, Orlebar v. Orlebar*, [1936] Ch. 147.

509a. ———.]—**WILLIAMS v. WATERS** (1845), 14 M. & W. 166; 5 L. T. O. S. 130; 153 E. R. 434.

*Annotation*:—**Folld.** *Re Watson & Morrison's Contract, Watson v. Kerr* (1900), 44 Sol. Jo. 529.

520a. ———.]—**Cain v. Teare** (1843), 4 Moo. P. C. C. 249; 7 Jur. 567; 13 E. R. 297, P. C.

527. *Add. Annotation*:—**Refd.** *Re Bowden, Hulbert v. Bowden*, [1936] Ch. 71.

535. *Add. Annotation*:—**Refd.** *Clayton v. Clayton*, [1930] 2 Ch. 12.

536a. ———.]—**Barclay v. Collett** (1838), 4 Bing. N. C. 658; 1 Arn. 287; 6 Scott, 408; 7 L. J. C. P. 235; 132 E. R. 942.

537a. ———.]—He who has occasion to use a deed is legally entitled to the custody of it; & where several are equally interested in it, either having possession may retain it against the others.—**FOSTER v. CRABB** (1852), 12 C. B. 136; 21 L. J. C. P. 189; 16 Jur. 835; 138 E. R. 853; *subsequent proceedings*, 12 C. B. 379.

*Annotations*:—**Refd.** *Taylor v. Sparrow* (1863), 4 Giff. 703; *Leathes v. Leathes* (1877), 36 L. T. 646; *Wright v. Robotham* (1886), 33 Ch. D. 106.

537b. ——— **Common law rule confined to assurances.**—Testator died, having by his will bequeathed settled legacies & having thereby also by legal limitations settled freeholds which in the events which happened became vested free from incumbrances & charges in pltf. From time to time there had been appointments of new trustees of testator's will for the purposes of the Settled Land Acts & other purposes, including three by deeds of 1902, 1904, & 1915. In 1924 pltf. had been appointed Settled Land Act trustee of testator's will, jointly with the then trustees thereof, the appointment being limited to the freeholds. At the date when the freeholds became vested absolutely in pltf., the trusts of some of the settled legacies were still on foot. In an action by pltf. claiming the custody of the appointments of 1902, 1904, & 1915, as forming part of his title to the freeholds:—**Held**: absolute ownership of land does not necessarily carry with it the right to title deeds; *semble*: the phrase "title deeds" in the old authorities includes only deeds assuring or dealing with land or legal interests therein.—**CLAYTON v. CLAYTON**, [1930] 2 Ch. 12; 99 L. J. Ch. 498; 143 L. T. 696.

*Annotation*:—**Consd.** *Lewis v. Plunket*, [1937] Ch. 306.

PART II. SECT. 10, SUB-SECT. 1.

**aa.** *Real Chattle Act, 1834—Effect of.*—**DOE d. EVANS v. DOYLE** (1860), 4 Nfld. L. R. 432.—**NFLD.**

PART II. SECT. 10, SUB-SECT. 4.—**E.**

**p i.** ———.]—It is, at least, doubtful whether a mtge. in fee by a tenant in tail in possession bars the entail; & whether, upon a discharge being executed, the mtgr. does not take back his original estate.—*Re Dolson* (1872), 4 Ch. Ch. 36.—**CAN.**

PART II. SECT. 13, SUB-SECT. 2.—**B.**

**ii.** ———.]—**BABBITT v. CLARKE**, [1925] 3 D. L. R. 55; 57 O. L. R. 60.—**CAN.**

**i ii.** ———.]—The statement that possession is evidence of seisin in fee means that there is some evidence that the title to the land has come to the person claiming possession in one of the following ways, namely: by Crown grant, sixty years' possession adverse to the Crown, conveyance from a prior owner, devolution or by twenty years' adverse possession.—**NOLAN v. THOMPSON** (1928), 28 S. R. N. S. W. 479; 45 N. S. W. W. N. 141.—**AUS.**

**so.** *How far possession extends—*

584a. ———.]—**WARMAN v. SEAMAN** (1677), *Cas. temp. Finch*, 279; 23 E. R. 153.

*Annotations*:—**Refd.** *Ex p. Wynoh* (1854), 5 De G. M. & G. 188; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823.

592a. ——— **Addition of " & if more children than one."**—By a marriage settlement estates were limited to the wife & the husband for their lives, with remainder to the heirs of the body of the husband on the body of the wife, & their heirs, & if more children than one, equally to be divided among them as tenants in common, & for default of such issue to the wife & her heirs:—**Held**: the husband did not take an estate in tail special, but for life only, & the children took by purchase as tenants in common in fee in remainder.—**NORTH v. MARTIN** (1833), 6 Sim. 266; 58 E. R. 593.

*Annotations*:—**Consd.** *Jordan v. Adams* (1861), 9 C. B. N. S. 483. **Refd.** *Gummo v. Howes* (1857), 23 Beav. 184.

628a. **Limitation to particular persons.**—**WAKER v. SNOWE** (1622), *Palm.* 359; 81 E. R. 1123.

*Annotations*:—**Refd.** *Sayer v. Masterman* (1757), *Amb.* 344; *Doe d. Long v. Laming* (1760), 2 Burr. 1100; *Winter v. Perratt* (1843), 9 Cl. & Fin. 606; *Tarleton v. Liddell* (1851), 17 Q. B. 390.

663a. **Death of protectors.**—The trustees of the real estate under a will were appointed also protectors of the estates tail created by the will. They all died, & new trustees of the real estate were appointed by the ct.:—**Held**: the tenant for life had become protector of the settlement, & he & the first tenant in tail could convey.—**CLARKE v. CHAMBERLIN** (1880), 16 Ch. D. 176; 29 W. R. 415.

669. *Add. Annotation*:—**Refd.** *Re Gower's Settlement*, [1934] Ch. 365.

670. *Add. Annotation*:—**Refd.** *Re Gower's Settlement*, [1934] Ch. 365.

671. *Add. Annotation*:—**Refd.** *Re Gower's Settlement*, [1934] Ch. 365.

672. *Add. Annotation*:—**Refd.** *Re Gower's Settlement*, [1934] Ch. 365.

677. For "(1841)" read "(1839)."

696. *Add. Annotation*:—**Refd.** *Re Hind, Bernstone v. Montgomery*, [1933] Ch. 208.

697. *Add. Annotations*:—**Consd.** *Re Duncombe's Will Trusts, Wrixon-Becher v. Faversham (Earl)* (1932), 146 L. T. 412. **Apld.** *A.-G. v. De Trafford*, [1934] 1 K. B. 1.

705. *Add. Annotation*:—**Refd.** *Re Gower's Settlement*, [1934] Ch. 365.

761a. ———.]—**SMITH v. RISLEY** (1639), *Cro. Car.* 529; 79 E. R. 1058; *sub nom.* **GERMAN v. RISLEY**, *W. Jo.* 418.

*Annotation*:—**Refd.** *Barker v. Keete* (1678), *F'reem.* K. B. 249.

*Occupation of small portion of wild land.*—When a referee finds in favour of a title acquired by adverse possession against the legal paper title, his certificate must show of what portion of the lot the claimant has been in possession, for by the occupation of one or more acres of a wild lot of land a party will not acquire title to the whole lot.—**LOW v. MORRISON** (1868), 14 Gr. 192.—**CAN.**

**sd.** *Possession under agreement—Subject to performance of condition—Possession for ten years after time fixed for performance.*—**BISHOP v. COX**, [1928] 2 D. L. R. 990.—**CAN.**



### Part III.—Transfer of Land inter vivos.

- 889.** *Add. Annotation* :—*Consd. Tsang Chuen v. Li Po Kwai*, [1932] A. C. 715.
- 885a.** *Effect of memorial*—*Evidence of contents of deed.*]—The registered memorial of a deed conveying lands in Middlesex is secondary evidence of the contents of such deed against the personal representatives of the party by whom such deed is registered.—*WOLLASTON v. HAKEWILL* (1841), 3 Man. & G. 297; 3 Scott, N. R. 593; 10 L. J. C. P. 303; 133 E. R. 1157.
- 891.** In the last line of the existing paragraph substitute the word “register” for the words “sale without registration.”
- 898a.** ————.]—On June 12, 1886, the owners of a freehold estate in London entered into a contract to sell it to builders & com-

**PART III. SECT. 1.**

834 1. *Grant must not commence in futuro.*—*Re* SMITH & DALE (1920), 46 O. T. R. 403.—CAN.

**b1.** — *Assigned by husband alone— Subsequent abandonment of homestead— Right of wife to oppose validity of assignment.*—After a homestead under Homesteads Act has ceased to be such owing to its permanent abandonment as a place of residence, the wife has no status under said Act to oppose the validity of an assignment of the land executed by her husband prior to said date, although the assignment was not executed, as the Act requires it to be, by her; & her husband is in no better position in this respect than she is.—**DOUGLAS v. ADDIE**, [1928] 4 D. L. R. 167; [1928] 3 W. W. R. 37; *aff'd*, [1929] 2 D. L. R. 401; 1 W. W. R. 610; 23 S. L. R. 463.—**CAN.**

**b il.** ——— *Effect.*—The fact that the transfer by a husband of an interest in a homestead under the Homesteads Act is not executed in compliance with said Act does not render it absolutely void; it is merely unenforceable so long as the property remains the homestead & the Act is not complied with.—DOUGLAS v. ADDIE (Nos. 1 & 2), [1929] 2 D. L. R. 401; 1 W. W. L. 610; 23 S. L. R. 463 aff., [1928] 4 D. L. R. 167; 3 W. W. R. 37.—**CAN.**

**b** iii. — Order dispensing with consent of wife—Under Dover Act, 1922—Husband's conduct conducing to adultery of wife.]—*Re MILLER*, [1929] 1 D. L. R. 147; [1928] 3 W. W. R. 643.—**CAN.**

b iv. — *Without wife's consent—Void.*—*Re MILLER*, [1929] 1 D. L. R. 147; [1928] 3 W. W. R. 643.—CAN.

**b v. — Mortgage — Examination of wife — Conclusiveness of certificate.]** — The certificate in the required form that the wife of a mtgor. of a homestead was examined in the manner called for by Homestead Act, is, in the absence of fraud, conclusive. The statute seems to contemplate an examination nearly contemporaneous with, if not preceding, the signing of the mtge. or other instrument, but the antedating of the certificate in the present case so as to make it appear that the signing & examination were on the same day was held innocuous. — **FREY v. HERDE (Saak),** [1929] 3 W. W. R. 700; [1930] 1 D. L. R. 997 *affd.*, [1930] 2 W. W. R. 152; 4 D. L. R. 314; 24 S. L. R. 426. — **CAN.**

**PART III, SECT. 2, SUB-SECT. 7.**

n (p. 570) i. ———.]—Sect. 72 (2)  
of Land Registry Act Amendment Act.

1914, means that once the registrar has accepted what he considers satisfactory proof that a parcel of land against which a judgment has been registered has been released by the act of the judgment creditor from such judgment, & has acted thereon by cancelling the registration of the judgment as against that parcel, & has caused the proper entries to be made to effect such cancellation, then so far as Land Registry Act is concerned said judgment can never again be registered against said parcel if no appeal against the registrar's action has been taken.—HANSEN v. TAYLOR, [1933] 2 W. W. R. 16; 46 B. C. R. 556.—CAN.

**PART III. SECT. 3, SUB-SECT. 1.**

**se. Abandonment.**—Real estate or an interest therein cannot pass from one person to another by "abandonment."—*JONES v. McCLEAN*, [1931] 1 W. W. R. 315; 2 D. L. R. 244; 39 Man. L. R. 321; 12 C. B. R. 238.—**CAN.**

**PART III, SECT. 3, SUB-SECT. 2.**

e 1. — *Effect of 26 Geo. 3, c. 3.* —  
DOE d. WILT v. JARDINE (1836), 2  
N. B. R. (Ber.) 245. — CAN.

**PART III. SECT. 3. SUB-SECT. 4.**

sl. Crown leaseholds—Duty of transferor to obtain consent.]—MAY v. DALY, [1927] S. A. S. R. 428.—AUS.

**PART III. SECT. 4.**

865 i. *What words operate as grant—“Demise.”*—*SPEARS v. MILLER* (1882), 32 C. P. 661.—**CAN.**

**PART III. SECT. 6. SUB-SECT. 1.**

**sk. Powers of Registrar—Collection of Unearned Increment tax.]—NORTH ALBERTA LAND REGISTRATION DISTRICT, REGISTRAR OF v. NORTHERN AGENCY, LTD., [1938] 1 W. W. R. 561; 2 D. L. R. 435; 8 F. L. J. (Can.) 3.—CAN.**

**PART III. SECT. 6. SUB-SECT. 2.**

r (p. 746) I. ———. *Portion of land acquired for improvement of road—Not sub-division.* The L. County Council acquired, in order to lay out, maintain & keep a new road or an improvement of an existing road, the use of a portion of a holding subject to a land purchase annuity, without the consent of the Ministry of Finance.—*Held:* the county council were entitled to have registered under the Act as a burden the use of portion of the holding, as no "sub-division" of the holding within Northern Ireland Land Act, 1925, s. 30 (1), had been effected.—*Re LENNON, [1928] N. I. 95.—IR.*

pletion was fixed for June 24, 1890. The builders were given power to let on building lease or sell any part of the estate, any lease or conveyance to contain a covenant to use the land & any buildings erected thereon as & for a private residence only. Part of the property was conveyed in 1886 by the owners & builders to a purchaser F., who covenanted to build a house thereon & to use it only as a private residence, subject to certain stipulations. The builders entered into covenants with F. that every building lease or other assurance of the rest of the estate should contain covenants on the part of the purchaser or lessee with the builders (*inter alia*) to use the land for the purpose of a private dwelling-house only. Pltf. derived title under the conveyance to F. & a similar deed

k (p. 747) i. *S.P.* WATERLOO v. BARNARD (Man.) (1915), 33 W. L. R. 223; 9 W. W. R. 870.—CAN.

k (p. 747) ii. — *What is.*—  
BOURQUE v. CHAPPELL (1900), 21  
C. L. T. 132; 2 N. B. Eq. Rep. 187.—  
CAN.

n (p. 747) i. —.]—SPEPPARD v. KENNEDY (1884), 10 P. R. 242.—CAN.

n (p. 747) ii. — *Subsequent discontinuance of action—Whether filing of lis pendens constitutes cause of action.* —COWAN v. MACAULAY (1897), 5 B. C. R. 495.—CAN.

n (p. 747) iii. ——— *Discharge of.* —  
GRAHAM v. CHALMERS (1866), 2 Ch. Ch.  
53. — CAN.

n (p. 747) iv. — *By plaintiff in creditors' action.* — BEVILOCKWAY v. SCHNEIDER (1893), 3 B. C. R. 90. — CAN.

*Id.* (p. 747) *l. Subdivision.*]—There is implied in Transfer of Land Act, 1914, s. 241, a right in a registered proprietor to submit to the office of title a plan of a proposed subdivision of his land, & a corresponding duty on the part of the Registrar to receive the plan & take into consideration the proposed subdivision. The Registrar may then exercise such of the powers given to him in relation to the plan as he thinks proper.—*It. v. THE REGISTRAR OF TITLES, Exp. p. FORESTRY PULP & PAPER CO. OF AUSTRALIA, LTD.,* [1929] V. L. R. 178; [1929] *Argus* L. R. 152.—AUS.

sk. *Final order for cancellation of agreement for sale.*—*Re LAND TITLES ACT, AVELSGAARD'S CASE (Sask.)* [1918] 2 W. W. R. 946.—CAN.

3). *Judgment—Registration of as mortgage—Sufficiency of affidavit.*]—*Re MURPHY*. [1928] 1, R. 179.—IR.

**sm. Conveyance by mortgage under power of sale**—Where judgment rendered subsequently to mortgage—d. quit claim deed taken from mortgagor.]-*Re* LOT 5, SECTION 13, SPRING RIDGE, VICTORIA CITY. *Re* LAND REGISTRY ACT & AMENDING ACTS (B. C.), [1929] 3 D. L. R. 123; 1 W. W. R. 739; 41 B. C. R. 74.—**CAN.**

**an.** *Not notice of trust—What amounts to—Description of owner as "executor."*  
—A trust corp'n. claimed the right to be registered under Land Titles Act, 1927, as owner of a charge, & to be described, not as a trustee, but as exor. of C., deceased:—*Held*: the description of app't, as exor. of C. was not notice of any trust, express, implied or constructive, & the entry therefore would not contravene sect. 95 (1) of the Act.—*Re CASBIDY* (1931), 3 D. L. R. 392; O. R. 259.—CAN.

executed in 1887. In 1890 the same vendors conveyed the adjoining land to a purchaser N., who entered into covenants with the owners & the builders & their assigns similar to those contained in the conveyance of 1887, to build a house thereon to be used as a private residence only. This land & the house built upon it became vested in P. in fee, & P. was duly registered at the Land Registry with an absolute title subject to the last-mentioned covenant, which was entered upon the charges register. P. granted a lease of the premises for a term of twenty-eight years to lessees, who afterwards assigned it to defts. The lease contained a covenant by the lessees not to use the premises for any purpose other than a private dwelling-house or private suites or flats. Pltf. brought the action to restrain defts. from committing a breach of the covenant on the register by converting the house into a set of private suites:—*Held*: by the Ct. of Appeal,

(1) neither the covenant by the builders in the conveyance to F. nor the stipulation in the agreement of June 12, 1886, could be taken to constitute regulations enforceable by purchasers of various parts of the estate *inter se*; (2) as the conveyance to F. preceded that to N., F. was not an assign of the owners within the meaning of the covenant entered into by N. with the owners in the conveyance to him so as to entitle pltf. by virtue of Law of Property Act, 1925 (c. 20), s. 56 (1), to the benefit of the covenant. —*WHITE v. BIJOU MANSIONS, LTD.*, [1938] Ch. 351; [1938] 1 All E. R. 546; 107 L. J. Ch. 212; 158 L. T. 338; 54 T. L. R. 458; 82 Sol. Jo. 135, C. A.

*Annotations*:—*Refd.* *Re* Sinclair's Life Policy, [1938] 3 All E. R. 124; *Re* Foster, *Hudson v. Foster*, [1938] 3 All E. R. 357.

**902. Add. Citations**:—*sub nom. Re* REGISTERED TITLE, No. 213,437; 63 L. Jo. 82; 163 L. T. Jo. 52.

### PART III. SECT. 6, SUB-SECT. 4.

**aa** (p. 747) i. — Upon registration of transfer—Whether certificate should be clear of subsequent executions.]—*QUEBEC BANK v. ROYAL BANK* (1916), 34 W. L. R. 137; 10 W. W. R. 218.—*CAN.*

**q** (p. 748) i. — Executor of estate entitled to lands as devisee—Whether execution to be registered as against executor personally.]—*Re GALLOWAY* (1898), 3 Terr. L. R. 88.—*CAN.*

**bb** (p. 748) i. — As against claimant by adverse possession.]—*WASHINGTON & G. N. TOWNSHIP CO. v. HOLBROOK*, [1924] 1 D. L. R. 818; [1924] 1 W. W. R. 511; 33 B. C. R. 388.—*CAN.*

**bb** (p. 748) ii. — On sale by owner of two adjoining lots to separate purchasers—Allged arrangement between vendor & purchaser of one lot.]—*CANADIAN BIRKBECK INVESTMENT & SAVING CO. v. RYDER* (1905), 12 B. C. R. 92; 2 W. L. R. 158.—*CAN.*

**bb** (p. 748) iii. — Transfer by administrators to one of themselves entitled only as life tenant—Claim by remainderman.]—*BREMNER v. TRUSTS & GUARANTEE CO.*, [1928] 4 D. L. R. 913; [1928] 3 W. W. R. 415.—*CAN.*

**bb** (p. 748) iv. — Issued to municipality—Failure to offer land for sale—Rights of former owner.]—*SHAW v. YOUNGSTOWN*, [1928] 3 D. L. R. 404; [1928] 2 W. W. R. 310.—*CAN.*

**bb** (p. 748) v. — Duty of registrar when issuing.]—*Re CANADIAN PACIFIC RY. CO.* (1899), 4 Terr. L. R. 227.—*CAN.*

**bb** (p. 748) vi. — Under Quietting Titles Act—Title acquired by adverse possession—Costs.]—*Low v. MORRISON* (1868), 14 Gr. 192.—*CAN.*

**bb** (p. 748) vii. — Certificate of sheriff—Form of.]—Where the petitioner's title was acquired within two years before the filing of the petition, the sheriff's certificate was required as to executions against the prior owner, as any such executions, if duly renewed, might bind the land.—*Ex p. LYONS* (1869), 2 Ch. Ch. 357.—*CAN.*

**bb** (p. 748) viii. — — — — —.]—*Re HARDING* (1871), 3 Ch. Ch. 232.—*CAN.*

**bb** (p. 748) ix. — Necessity for production.]—A certificate from the sheriff of no executions against petitioner must be produced.—*Re RUNDEL* (1872), 4 Ch. Ch. 71.—*CAN.*

**bb** (p. 748) x. — Certificate from county treasurer—Form of.]—*Re HARDING* (1871), 3 Ch. Ch. 232.—*CAN.*

**bb** (p. 748) xi. — Title derived through hands of trustee to pay creditors—Notices & advertisements necessary.]—*Re RUNDEL* (1872), 4 Ch. Ch. 71.—*CAN.*

**bb** (p. 748) xii. — Affidavit in proof—By whom made.]—*Re RUNDEL* (1872), 4 Ch. Ch. 71.—*CAN.*

**bb** (p. 748) xiii. — Endorsement of restrictive covenant.]—When a conveyance purporting to contain a restrictive covenant is put in for registration, the Registrar must, under sect. 148 of Land Registry Act, R. S. B. C., 1924, determine whether or not the covenant is restrictive & if he finds it is he must endorse it on the certificate, for the sect. is mandatory. The sect. does not suggest he should decide whether or not the covenant is an interest in land or is enforceable. It gives him no discretion.—*HOME OIL DISTRIBUTORS v. BENNETT*, [1936] 1 W. W. R. 385; 50 B. C. R. 382.—*CAN.*

**n** (p. 748) i. — Not executor of administratrix.]—*PUBLICO TRUSTEE v. REGISTRAR-GENERAL OF LAND*, [1927] N. Z. L. R. 839.—*N.Z.*

**hh** (p. 748) i. — Under Quietting Titles Act—Not purchaser selling before completion of contract.]—*Re BROWN* (1871), 3 Ch. Ch. 158.—*CAN.*

**hh** (p. 748) ii. — Purchaser under sale by order of court—In foreclosure action.]—*CANADIAN PACIFIC RY. CO. v. MANG* (1908), 8 W. L. R. 774; 1 Sask. L. R. 219.—*CAN.*

**hh** (p. 748) iii. — Executrix of Scottish will—Resealed in British Columbia.]—*Re CLAZY*, [1928] 2 D. L. R. 971; [1928] 1 W. W. R. 974.—*CAN.*

**hh** (p. 748) iv. — Purchaser from trustee in bankruptcy—Selling with permission of inspectors.]—The proper conclusion from the provisions of Land Titles Act, R. S. O. 1927, c. 158, ss. 66, 69 (5), having regard to Bankruptcy Act, R. S. C. 1927, c. 11, s. 27, is that when land, vested in a trustee in bkpy., has been transferred by the trustee with the permission in writing of the inspectors, the transferee, upon proper proof of the fact, is entitled to have himself registered as owner.—*Re PACEY*, [1928] 4 D. L. R. 425; 62 O. L. R. 616.—*CAN.*

**mm** (p. 748) i. — Filed by registrar—Form of—Necessity for affidavit.]—*HAMILTON & WRAGGE v. STOKES*, [1921] 2 W. W. R. 921; 62 D. L. R. 282; 30 B. C. R. 65.—*CAN.*

**q** (p. 749) i. — Minister of Agriculture—In respect of claim under Live Stock Encouragement Act, R. S. A., 1922 (c. 65).]—*Re v. RUMSEY &*

*MORTHEM NO. 551 MUNICIPAL DISTRICT (Alta.)*, [1926] 2 D. L. R. 792; [1926] 2 W. W. R. 34.—*CAN.*

**d** (p. 749) i. — Person claiming partnership interest in land—Claim not founded on written document.]—*Re MACCULLOUGH & GRAHAM (Alta.)* (1912), 21 W. L. R. 349; 5 D. L. R. 834.—*CAN.*

**d** (p. 749) ii. — Execution creditor.]—The vendor & purchaser under an agreement for the sale of land executed a deed by which the purchaser gave up to the vendor all of whatever interest he, the purchaser, had in the land as such & took in lieu of such interest the vendor's covenant to do all she could to effect a resale of the land & to pay to said purchaser a certain amount out of the purchase-price received on the resale. There was nothing in the deed to give the purchaser any equitable int'ce. or equitable charge on the land. The vendor resold the land:—*Held*: purchaser had no longer any interest in the land & therefore, sect. 120 of Land Titles Act did not entitle an execution creditor of his to maintain a caveat.—*HAY v. MCCULLOUGH & LTD.*, [1930] 1 W. W. R. 434; 2 D. L. R. 93.—*CAN.*

**e** (p. 749) i. — Husband having interest under *Dower Act*, C. A., 1924 (c. 53).]—*SHINBANE v. MINUK*, [1927] 3 D. L. R. 550; [1927] 2 W. W. R. 121; 36 Man. L. R. 530.—*CAN.*

**e** (p. 749) ii. — Rural municipality—Against Crown lands for money advanced for seed grain.]—*Re LAND TITLES ACT*, [1918] 3 W. W. R. 13.—*CAN.*

**e** (p. 749) iii. — Claimant to part proceeds of sale of land.]—*SHERBURN v. HOUSTON*, [1927] S. A. S. R. 144.—*AUS.*

**e** (p. 749) iv. — Person entitled to benefit of restrictive covenant.]—*WANER v. THOLS*, [1928] 2 D. L. R. 793; [1928] 1 W. W. R. 903.—*CAN.*

**e** (p. 749) v. — Assignee of purchaser.]—The assignee of the purchaser of land under an agreement containing a clause providing that no assignment by the purchaser shall be valid unless for his entire interest & approved in a writing signed by the vendor:—*Held*: to have no status to file a caveat where such approval was refused.—*McAVOY v. INTERIOR TRUST CO.*, [1933] 2 W. W. R. 591.—*CAN.*

**o** (p. 749) i. — On failure to file evidence of commencement of proceedings—Whether applicable to caveat filed by registrar.]—*HAMILTON & WRAGGE v. STOKES*, [1921] 2 W. W. R.

906. *Add. Annotation:—Re* *Chowood, Ltd. v. Vesting order — Contents.*—Originating summonses asking for an order vesting Lyall (2), [1930] 2 Ch. 156.

921; 62 D. L. R. 282; 30 B. C. R. 65.—CAN.

dd (p. 749) i. ——— *Lis pendens on file.*—Land Registry Act, s. 49 (8), does not require that the *lis pendens*, or other evidence, of a caveat shall be filed during the currency of the caveat; the words "have filed" are to be construed as meaning "have on file."—*CROFT v. WHITING* (1910), 14 W. L. R. 634.—CAN.

ff (p. 749) i. ——— *Appeal from order for discharge—Registration of order pending appeal.*—*Re MCINNIS*, [1927] 1 D. L. R. 481; [1927] 1 W. W. R. 209; 21 Sask. L. R. 309.—CAN.

ff (p. 749) ii. ——— *Claim under agreement for sale—No proof of agreement.*—*BABITT v. BOILEAU* (1907), 7 Terr. L. R. 481; 6 W. L. R. 260.—CAN.

ff (p. 749) iii. ——— *Where caveat does not assert rights actively—How made.*—*Re MACDONALD*, [1924] 2 D. L. R. 802.—CAN.

ff (p. 749) iv. ——— *Motion to vacate—Caveator must show cause for continuance.*—*ZWICK v. PARKDALE RURAL MUNICIPALITY*, [1934] 1 W. W. R. 17.—CAN.

rr (p. 749) i. ——— *—*—*WILKINSON v. SHACKLETON*, [1930] 1 W. W. R. 721; 3 D. L. R. 304; 24 Alta. L. R. 377.—CAN.

o (p. 750) i. ——— *—*—*LENG R. SMITH* (1902), 14 Man. L. R. 258.—CAN.

oo (p. 750) i. ——— *—*—*McKAY v. McDUGALL*, [1921] 3 W. W. R. 833; 63 D. L. R. 247; 15 Sask. L. R. 24; *affd.* (1921), 68 D. L. R. 245.—CAN.

oo (p. 750) ii. ——— *—*—*BISHOP v. WESTERN TRUST CO. (Sask.)*, [1922] 3 W. W. R. 818; 70 D. L. R. 451.—CAN.

oo (p. 750) iii. ——— *—*—*The effect of a caveat is to prevent the registration of any instrument the registration of which would have the effect of adversely affecting the claim of the caveator, without giving him the opportunity of invoking the assistance of the ct. in order to have effect given to his claim if he can establish it. Meanwhile, the caveat protects whatever interest the caveator has & the registrar cannot enter any transfer in the register or encumber or deal with or affect the land except subject to the claim of the caveator.*—*NICHOLAS v. ROOF*, [1936] 3 W. W. R. 647.—CAN.

gg (p. 750) i. ——— *When made.*—*In proceedings to sustain a caveat filed by pltf. to protect his interest under the agreement in question herein:—Held: (1) said agreement was an agreement for the sale of land between pltf. as purchaser & deft. as vendor, & was not, as contended by deft., a mere option to purchase; (2) the letters sent by deft. & his solr. to pltf. did not amount to an effective notice of the cancellation or determination of said agreement; (3) pltf. was entitled to an order continuing his caveat.*—*BEZBORODKA v. SEBENTHALI*, [1938] 2 W. W. R. 83.—CAN.

ll (p. 750) i. ——— *When maintainable.*—*PENDLETON v. PENDLETON*, [1927] 2 W. W. R. 720; 21 Sask. L. R. 579.—CAN.

pp (p. 750) i. ——— *—*—*In an action under sect. 126 of Land Titles Act, R. S. A., 1922, to maintain a caveat by which the caveators claimed an interest in the land under an assignment from the purchaser thereof of all his right, title & interest therein & in the agreement for its purchase &*

*sale:—Held: the inference to be drawn from the complicated series of transactions between the parties was that when subsequently to said assignment of the vendor, with the consent of the caveators, conveyed the land to the purchaser & took a mtge. back, this arrangement was substituted for the original agreement for sale which then came to an end; & since at the time the caveat was filed the agreement was spent & discharged neither the agreement nor the purchaser's assignment of it could be made the basis of a caveat, & therefore, the caveat failed because the caveators had not substantiated the title, estate or interest claimed by the caveat; in other words, the caveat did not state truly the nature of the actual interest which the caveators had at the time the caveat was filed.*—*HAMILYN v. KAPLAN*, [1936] 2 W. W. R. 293; 3 D. L. R. 56; 6 F. L. J. (Can.) 115.—CAN.

qq (p. 750) i. ——— *Filed before registration of transfer—Interest of caveator purchased by transferor—Right of transferee.*—*BENNETT v. GILMOUR* (1906), 4 W. L. R. 196; 16 Man. L. R. 304.—CAN.

m (p. 751) i. ——— *Sub-division of parcel into lots under unregistered plan.*—*Re RYAN & VANCOUVER DISTRICT REGISTRAR OF TITLES (B. C.)* (1914), 26 W. L. R. 982.—CAN.

gg (p. 751) i. ——— *To accept caveat based on mortgage before registration of grant from Crown.*—*Re LAND TITLES ACT, CANADA LIFE ASSURANCE CO.'S CASE*, (Sask.), [1919] 2 W. W. R. 47.—CAN.

gg (p. 751) ii. ——— *Transfer for executory consideration—Right to mandamus on refusal to register.*—*Re REGISTRAR OF TITLES, Ex p. MOSS*, [1928] V. L. R. 411; [1928] Argus L. R. 293.—AUS.

gg (p. 751) iii. ——— *After foreclosure decreed.*—*Re WEST*, [1928] 1 D. L. R. 937; 61 O. L. R. 540.—CAN.

nn (p. 751) i. ——— *—*—*HALL v. YORKTON LAND REGISTRATION DISTRICT (REGISTRAR)* (1911), 16 W. L. R. 568.—CAN.

ooo (p. 751) i. ——— *To decide as to status of person applying to amend plan.*—*Re CHISHOLM & OAKVILLE TOWN CORPN.* (1885), 12 A. R. 225.—CAN.

ooo (p. 751) ii. ——— *To pay over proportion of fees to treasurer—After deducting disbursements—Whether court can review inspector's decision as to disbursements.*—*SIMCOE COUNTY v. SANDERSON*, [1923] 1 D. L. R. 1185; 51 O. L. R. 239.—CAN.

ooo (p. 751) iii. ——— *Registration under Real Property Act, 1913—Effect of.*—*CANADIAN BANK OF COMMERCE v. WINNIPEG DISTRICT REGISTRAR*, [1928] 3 W. W. R. 630; *affd.*, [1929] 4 D. L. R. 318; 2 W. W. R. 467; 38 Man. L. R. 275.—CAN.

a (p. 752) i. ——— *Land not described in assignment—Effect of affidavit made for purposes of registration.*—*Re ASTON & WHITE* (1920), 48 O. L. R. 168; 18 O. W. N. 5.—CAN.

ee (p. 752) i. ——— *—*—*PUTZ v. TITLES REGISTRAR*, [1928] V. L. R. 348; [1928] Argus L. R. 224.—AUS.

gg (p. 752) i. ——— *Under Land Registry Act, R. S. B. C., 1936, a conveyance passes no estate or interest at law or in equity until it is registered, but merely the statutory right, subject to certain exceptions, to acquire by registration an estate or interest in the land; a right which will be valueless if, prior to the application to register, a subsequent innocent grantee for value has become registered. The phrase, beginning sect. 34, "except as against*

*the person making the same," amounts to no more than a statutory estoppel as against the grantor.*—*Re COMMERCIAL SECURITY CORPN., LTD.*, [1937] 3 W. W. R. 711.—CAN.

sn. *Application under Quieting Titles Act—Jurisdiction of court—To grant certificate.*—*Ex p. CHAMBERLAIN* (1869), 2 Ch. Ch. 752.—CAN.

so. ——— *To waive irregularity—In advertisement.*—*Re HARRIS* (1888), 12 P. R. 430.—CAN.

sp. *Liability of county council—To pay for books supplied to registrar.*—*READ v. KENT COUNTY MUNICIPAL COUNCIL* (1857), 13 U. C. R. 572.—CAN.

sq. ——— *To furnish offices, vaults, etc.*—*Re v. NORTHUMBERLAND & DURHAM COUNTIES CORPN.* (1861), 10 C. P. 526.—CAN.

sr. *Liability of city council—To pay for statement of titles—Furnished by registrar of county—To registrar of city separated from county.*—*DURAND v. KINGSTON CITY* (1864), 14 C. P. 439.—CAN.

### PART III. SECT. 6, SUB-SECT. 5.

q (p. 753) i. ——— *—*—*"Fraud" under Land Titles Act, 1917, ss. 59, 174 & 194, means actual fraud.*—*DOMINION FIRE-BRICK & CLAY PRODUCTS, LTD. v. POLLOCK* (Sask.), [1919] 2 W. W. R. 215.—CAN.

q (p. 753) ii. ——— *—*—*The fact that a person who obtains a transfer of land & registers it, knowing that there is an outstanding unregistered transfer to the same land, may, in addition to his wish to acquire the land, have been actuated by the wish to get rid of an undesirable neighbour who is in occupation of the land, cannot amount to "fraud" within sect. 216 of Land Titles Act, R. S. S., 1930, which provides that a person taking a transfer from the registered owner shall not, except in the case of his own fraud, be affected by any notice, direct, implied or constructive, of any trust or unregistered interest in the land. "any rule of law or equity to the contrary notwithstanding"; & that his knowledge of such trust or unregistered interest "shall not by itself be imputed as fraud."*—*HACKWORTH v. BAKER*, [1936] 1 W. W. R. 321; 5 F. L. J. (Can.) 309.—CAN.

g (p. 753) i. ——— *Certificate given by Commissioner under ch. 126, Acts, A. S. 1908.*—*Re TRINITY CHURCH, LIVERPOOL* (1930), 3 M. P. R. 209.—CAN.

r (p. 753) i. ——— *—*—*ANNABLE v. COVENTRY* (1912), 22 W. L. R. 254; 5 D. L. R. 661; 2 W. W. R. 816.—CAN.

aa (p. 753) i. ——— *—*—*PARAMOUNT THEATRES, LTD. v. BRANDENBERGER*, [1928] 4 D. L. R. 573; 62 O. L. R. 379.—CAN.

kk (p. 753) i. ——— *—*—*CANADIAN PROVINCIAL POWER CO., LTD. v. NOVA SCOTIA POWER COMMISSION*, [1927] 2 D. L. R. 475; 59 N. S. R. 234.—CAN.

r (p. 754) i. ——— *—*—*HALL v. PELMADULLA VALLEY TEA & RUBBER CO.* (1929), 98 L. J. P. C. 174.—CEYLON.

aaa (p. 754) i. ——— *Conveyance by registered owner—Judgment registered against registered owner after date of conveyance.*—*Re MURPHY*, [1928] 1 K. 479.—IR.

h (p. 755) i. ——— *—*—*THOMAS v. GUAY*, [1927] 2 D. L. R. 1146.—CAN.

n (p. 755) i. ——— *Of charge.*—*The statute amending the Registry Act (N. S.) & providing that "no equitable lien, charge or interest affecting land shall be valid as against a registered*

registered land should not ask for rectification of the Register. They should not be entitled in the matter of the Land Registration Act. The order should contain a direction to the trustees to produce the order to the Land Registrar.—PRACTICE NOTE, [1932] W. N. 6; 173 L. T. Jo. 40.

**907b. Merger of agreement for sale in transfer.**—Land in Alberta, held under Crown grants which contained a reservation of all coal mines, coal pit seams, & veins of coal, & the right to work the same, was contracted to be sold, subject to the conditions & reservations expressed in the original Crown grant. The transfers executed for the purpose of the registration of the purchaser as the owner of the land contained an exception of all coal & other minerals & the right to use so much of the land as might be considered necessary for working & removing the coal & minerals. The certificate of title subsequently issued to the purchaser contained the words "excepting thereout all coal & other minerals." It was contended that the rule that the agreement for sale was merged in the conveyance did not apply to a transaction restricting registered land & that the word "minerals" as here used must be construed to mean minerals of the same genus as coal, & did not include petroleum & natural gas:—*Held*: (1) the agreement for sale was merged in the transfer, which must be taken, in the case of registered lands, to represent the conveyance in the case of unregistered land; (2) the words "coal & minerals" could not be restricted as suggested, & meant all minerals. —KNIGHT SUGAR CO., LTD. v. ALBERTA

RAILWAY & IRRIGATION CO., [1938] 1 All E. R. 266; 82 Sol. Jo. 132.

**908a. Unregistered sub-demise—By mortgagor—In breach of covenant.**—BRITISH MARITIME TRUST v. UPSONS, LTD., [1931] W. N. 7; 71 L. Jo. 135; 171 L. T. Jo. 77.

**910a. — With absolute title—Claim that land subject to collateral agreement—Failure to prove agreement.**—Pltfs. were the registered owners in fee simple of a plot of land forming part of a building estate upon which plot they had erected a house. The property comprised in this title was originally the freehold property of defts., S. J. & E. I., who were carrying on business in partnership & who were the registered owners with an absolute title of the whole estate. Before the purchase of the plot by pltfs., a plan was produced of the proposed lay out of the estate. This plan showed, amongst other things, a small strip of land adjoining pltfs.' plot: that strip bore upon it the words "Tennis Courts." Pltfs. stated that in addition it was orally represented to them by defts. that this strip would be used only as tennis courts; & that they were therefore induced to purchase the plot. After the purchase defts. S. J. & E. I. transferred their business & the whole of the unsold portion of the building estate to deft. co., H. C. J. & Co., Ltd., who were duly registered as owners in fee simple with an absolute title. Defts. having erected three garages on the strip of land in question pltfs. sought a mandatory injunction to remove them, alleging that when they purchased the plot there was a collateral agreement that this strip was only to be used as

instrument executed by the same person" is not retrospective.—MORTGAGE CORP. OF NOVA SCOTIA v. MUIR, [1937] 4 D. L. R. 231.—CAN.

**cc (p. 755) i. — Rights of purchaser from ostensible owner.**—P. L. T. A. R. CHETTYAR FIRM v. MAUNG KYANG (1929), 1 L. R. 7 Ran. 276.—IND.

**mm (p. 755) i. — Right of owner of land sold for taxes to sue under Land Titles Act, s. 110—Delay in bringing action.**—BLACKSTOCK v. NORTH ALBERTA LAND REGISTRATION DISTRICT REGISTRAR (Alta.), [1917] 2 W. W. R. 938.—CAN.

**rr (p. 755) i. — Conveyance of Crown land by squatter.**—ROBIN, COLLAS & CO., LTD. v. NERIAULT (1904), 25 C. L. T. 68; 3 N. B. Eq. Rep. 14.—CAN.

**ooo (p. 755) i. — Right of purchaser of one lot on building estate—As to roads.**—Re MCILMURRAY & JENKINS (1895), 22 A. R. 398.—CAN.

**ggg (p. 755) i. — Restrictive covenants.**—Re HOWAN & EATON, [1927] 2 D. L. R. 722; 60 O. L. R. 245.—CAN.

**xx. Real nature of transaction immaterial to stranger.**—MORRIS v. MORRIS, [1931] 3 D. L. R. 325; 3 W. W. R. 427; 44 B. C. R. 166.—CAN.

**sz. Deletion of plan from register—Variation.**—Land having been purchased by a municipality on condition that the registered plan is deleted by order of ct., such plan cannot be varied for the benefit of abutting owners who had no notice.—HARRISON v. HAMILTON, [1936] 1 D. L. R. 293; O. R. 70.—CAN.

**sa. Transfer by administrator to child of intestate—Whether transferee pur-**

chaser for value.]—One who succeeds to an interest in the estate of an intestate & who by a mutual arrangement with the other beneficiaries & the administrator accepts in satisfaction of such interest a transfer of land of the estate & becomes the registered owner thereof is not a purchaser for value, & must be presumed to have known that the property of the estate is subject to such equities as the intestate may have created.—PAULSON v. BAKKEN, [1937] 2 W. W. R. 398.—CAN.

**sd. On acquisition of title by adverse possession.**—The mere fact that deft. was in possession at the time pltf.'s land was brought under Real Property Act, R. S. M., 1913, does not prevent the application of sect. 83 thereof, which provides that no title adverse or in derogation to the title of the registered owner shall be acquired by any length of possession merely.—NUGENT v. MOORE, [1938] 2 W. W. R. 561.—CAN.

#### PART III. SECT. 6, SUB-SECT. 6.

**h i. — Equitable interest subsequently acquired by transferor.**—A transfer of land, in the form provided in Real Property Act, made by the registered owner, & without any special covenants or recitals, does not operate as an estoppel & does not vest in the transferee an equitable interest subsequently acquired by the transferor in the absence of any fraud or misrepresentation by the latter.—BENNETT v. GILMOUR (1906), 16 Man. L. R. 304.—CAN.

**h ii. — On registration of transfer—Previous transfer without consideration—Transferor subsequently becoming of unsound mind.**—RATTIGAN v. REGAN, [1929] 1 R. 342.—IR.

**st. Owner giving agent authority to sell—Agreement between agent & purchaser—Purchaser taking transfer from owner—Whether entitled to registration.**—JOHNSON v. SENFT (Sask.), [1929] 4 D. L. R. 519.—CAN.

**sw. Transfer of homestead by husband to wife—Existing judgment registered against land—Right of wife to certificate free from judgment.**—BEJCO v. ROBSON, [1934] 2 W. W. R. 366; 4 D. L. R. 561; 42 Man. L. R. 214.—CAN.

**sz. Mortgaged land.**—SUPERIOR BUILDERS, LTD. v. SCOTT & SHORE, [1937] 2 W. W. R. 274; 3 D. L. R. 359; 45 Man. L. R. 145.—CAN.

#### PART III. SECT. 6, SUB-SECT. 8.—A.

**bb i. —**—Pltf., to whom deft. was indebted, knowing that deft. was the real owner of certain land & held an unregistered transfer thereof, went behind his back & obtained a transfer to itself from the registered owner, which it registered, & attempted to deprive deft. of possession:—*Held*: the case was one of actual fraud, & deft. was entitled to have the registration of the transfer to pltf. cancelled & to have the duplicate certificate of title in the name of pltf. delivered up for cancellation. In the event of pltf. not so delivering up the duplicate certificate, there should be an order vesting the land in the name of deft., subject to a mtge. which, with deft.'s consent, the registered owner had given pltf. as security for deft.'s debt to pltf.—BEAVER LUMBER CO., LTD. v. PRITCHARD, [1933] 3 W. W. R. 35.—CAN.

**sw. Lis pendens—Dismissal of bill—Order discharging lis pendens unnecessary.**—DEXTER v. COSFORD (1858), 1 Ch. On. 22; 5 C. L. J. O. S. 67.—CAN.

tennis courts, & that on the faith of this agreement they agreed to the purchase. This was denied by defts. During the action the statement of claim was amended to enable pl'ts. to claim rectification of deft. co.'s registered title by inserting therein a notice that the strip of land was affected by the restrictive agreement prohibiting the user thereof otherwise than as tennis courts:—*Held*: (1) pl'ts. had not succeeded in establishing the collateral agreement they alleged; (2) in all the circumstances of the case there was nothing which could be considered to make it unjust not to rectify under Land Registration Act, 1925 (c. 21), s. 82 (3). The action therefore failed.—*HODGES v. JONES*, [1935] Ch. 657; 104 L. J. Ch. 329; 153 L. T. 373; 79 Sol. Jo. 522.

**911a. First registration under Land Transfer Acts, 1875 & 1897—Effect of Land Registration Act, 1925 (c. 21), s. 147.**—The purchasers of freehold land caused themselves to be registered as first proprietors with an absolute title under Land Transfer Acts, 1875 & 1897, of the land purporting to be conveyed to them, which included two narrow strips of woodland of which, as the ct. decided in this action, an adjoining owner was in possession, having acquired a good title by possession to the fee simple at the time of the registration:—*Held*: that notwithstanding Land Registration Act, 1925 (c. 21), s. 147, the power to rectify the register conferred by sect. 82 (1) of that Act enabled the ct. to order rectification of entries made in the register under Land Transfer Acts, 1875 & 1897, & accordingly that the order for rectification of the register by excluding from pl'ts.' registered title the land erroneously included in it had been properly made.—*CHOWOOD, LTD. v. LYALL* (2), [1930] 2 Ch. 156; 99 L. J. Ch. 405; 143 L. T. 546, C. A.

*Annotation*:—*Reid. Re Chowood, Ltd.* (1933), 149 L. T. 70.

**911b. Entry procured by fraud.**—A daughter without her mother's knowledge arranged for the sale of certain registered land from the mother to herself. Without explaining the true nature of the document, the daughter secured the execution of the necessary transfer by her mother & her own registration as owner with an absolute title. The daughter subsequently created charges upon the property, the chargees being ignorant of the fraud upon the mother, & giving full consideration for their charges:—*Held*: the mother was entitled, under Land Registration Act, 1925 (c. 21), s. 82, to rectification of the register by striking out the daughter's name & inserting the mother's name as owner with an absolute title. There was, however, no ground for any rectification of the charges register.—*Re LEIGHTON'S CONVEYANCE*, [1936] 1 All E. R. 667. *On appeal*, [1936] 3 All E. R. 1033, C. A.

**913a. — No loss suffered by rectification.**—On Apr. 22, 1925, Chowood, Ltd. (hereinafter called "Chowood"), were registered as proprietors, with an absolute title, of certain freehold lands which they had purchased from & had had conveyed to them by the vendor. The lands so registered included strips of woodland to which, without the knowledge of Chowood, a title by possession under Real Property Limitation Acts had, before the date of Chowood's registration, been acquired by one Lyall, an adjoining owner. In an action by Chowood against Lyall for trespass on the strips of woodland, Lyall established her title under the Limitation Acts & counterclaimed rectification of the register. LUXMOORE, J., ordered rectification of the register by removing therefrom Chowood's title to the strips, & the register was rectified accordingly. Upon an application by Chowood against the A.-G. (on behalf of the official trustees of the Insur-

### PART III. SECT. 6, SUB-SECT. 8.—B.

kk (p. 757) i. — *Mandamus to Minister of Finance.*—The prosecutors herein had been given judgment in an action in which they alleged that defts. therein had fraudulently obtained a deed of conveyance which had been placed in escrow, & had fraudulently registered it & imposed a mtge. thereon. By said judgment the charge of fraud was sustained, & the land was vested in the prosecutors subject to the mtge., & the judgment further provided for a reference to the district registrar to ascertain the amount received by the wrongdoers under the mtge. & also rents & profits, & that the prosecutors recover "the sum found due on the taking of such account." This amount having been so fixed, the district registrar, without making any further application to the ct. entered judgment therefor. Writs of execution having been issued on such judgment & returns of *nulla bona* made thereto, a demand was made upon the Minister of Finance pursuant to sect. 213 of Land Registry Act, R.S.B.C., 1924, for payment of the amount of the judgment out of the assurance fund provided for by said Act. This demand being refused, the prosecutors obtained an order for a writ of *mandamus* commanding him to pay. From that order the Minister appealed:—*Held*: the order was properly made.—*R. (ANDLER) v. MINISTER OF FINANCE OF B. C.*, [1935] 1 W. W. R. 113; 49 B. C. R. 223; *reversed*, [1935] S. C. R. 278; 3 D. L. R. 316.—CAN.

kk (p. 757) ii. — *Action by transferee from forger.*—Pl'ts. had agreed to buy a mtge. A solr. purporting to act for the mtgee. handed to pl'ts. solr. the mtge., a transfer thereof, a certificate of charge certifying that the mtge. had been transferred to pl'ts. & that the transfer had been registered, & an acknowledgment by the mtgee. of the amount owing thereon. Pl'ts. solrs. then paid the purchase-price of the mtge. to said solr. It was afterwards discovered that the mtgee.'s signature to the transfer had been forged, & in an action brought by the mtgee., the ct. so declared & pl'ts. herein lost all their rights to mtge. Pl'ts. then brought this action for recovery of their loss out of the assurance fund provided for by Real Property Act:—*Held*: applying the principle laid down in *Gibbs v. Messer*, [1891] A. C. 218, the protection given by the Act to persons transacting on the faith of the register does not cover the case of persons who have dealt, not with the registered owner, but with a forger, pl'ts.' action failed.—*SHOREY v. L. & WINNIPEG DISTRICT REGISTRAR*, [1938] 2 W. W. R. 316.—CAN.

l (p. 758) i. — *Time for.*—Where owing to the mistake of the registrar of land titles a certificate of title is issued free from a registered mechanics' lien the lienholder is a person "deprived of land" within the meaning of sect. 153 of Land Titles Act, R. S. A., 1922, & his action thereunder

for damage is barred under sect. 153 of the Act unless brought within six years from the date of such deprivation.—*RIGHTER CO., LTD. v. REGISTRAR OF LAND TITLES FOR SOUTH ALBERTA LAND REGISTRATION DISTRICT*, [1937] 3 W. W. R. 612. CAN.

o i. — *Forged transfer.*—A transfer of title to land owned by pl'tf. was forged, the forger being made the transferee, & a mtge. was given by the forger to an innocent mtgee. & registered. Pl'tf. first received notice of the registration of the mtge. when she was served with notice of sale proceedings under the mtge. She forthwith engaged a solr.; & she was required to attend before the district registrar for examination. Pl'tf.'s insurance policy had also been stolen & a forged assignment thereof made in favour of the mtgee.:—*Held*: the district registrar should pay such amount as would enable pl'tf. to clear the title to her land as from the date of such payment, including the mtgee.'s costs in respect of the mtge. sale proceedings as between solr. & client.—*BONNEAU v. WINNIPEG DISTRICT REGISTRAR*, [1935] 3 W. W. R. 181; 43 Man. L. R. 371.—CAN.

sg. *Payment from assurance fund*—*Mandamus.*—*Mandamus* lies to Minister of Finance ordering him to pay out of the assurance fund provided by Land Registry Act, R.S.B.C., 1924.—*R. v. MINISTER OF FINANCE OF BRITISH COLUMBIA*, [1935] 1 D. L. R. 333; 48 B. C. R. 412.—CAN.

ance Fund established under Land Transfer Act, 1897 (c. 65)), that their claim to be indemnified under Land Registration Act, 1925 (c. 21), s. 83, in respect of loss alleged to have been suffered by reason of the rectification might be determined by the ct. :—*Held* : as appcts.' registered land was subject to the overriding rights of Lyall to the strips of woodland which she had then already acquired under Real Property Limitation Acts, the rectification of the register for the

purpose of giving effect to those overriding rights had put appcts. in no worse position than they were in before such rectification ; with the result that appcts. having suffered no loss by reason of the rectification were not entitled to be indemnified under Land Registration Act, 1925 (c. 21), s. 83.—*Re CHOWOOD'S REGISTERED LAND*, [1933] Ch. 574 ; 102 L. J. Ch. 289 ; 149 L. T. 70 ; 49 T. L. R. 320.

## Part IV.—Extinguishment of Title.

915. *Add. Annotation* :—*Consd. Re Wells, Swinburne-Hanham v. Howard*, [1933] Ch. 29.
918. *Add. Annotation* :—*Refd. Symons v. Southern Ry. Co.* (1935), 153 L. T. 98.
921. *Add. Annotation* :—*Apld. Re Silva, Silva v. Silva*, [1929] 2 Ch. 198.

## Part V.—Action for Recovery of Land.

956. *Add. Annotation* :—*Refd. Ladies Hosiery & Underwear, Ltd. v. Parker*, [1930] 1 Ch. 304.
- 1040a. ———. ]—*SPEAR'S GLASS WORKS (LTD.) v. SPEAR* (1902), 37 L. Jo. 578.
- 1042a. *Suit for redemption.*]—*PHILLIPS v. PHILLIPS* (1900), 44 Sol. Jo. 551.
1064. *Add. Annotation* :—*Distd. Dudley & District Benefit Building Soc. v. Gordon*, [1929] 2 K. B. 105.
1198. *Add. Annotation* :—*Refd. The Edison (No. 2)*, [1934] P. 115.

### PART IV. SECT. 3, SUB-SECT. 1.

e. *Revsd.*, [1927] 3 D. L. R. 1 ; [1927] S. C. R. 493.

### PART V. SECT. 1.

sa. *Duty of court—To decide upon legal rights of parties*]—A judge sitting at nisi prius & hearing an action of ejectment has only to decide upon the legal rights of the parties, & if plff. makes out a legal title to the property he is entitled to recover, even though deft. may be entitled to relief in equity. —*DOE d. MOFFATT v. THOMPSON* (1877), 1 P. & B. 516.—CAN.

### PART V. SECT. 3, SUB-SECT. 1.—B. (a) i.

1057 vi. ———. ]—*STEVENS v. SKIDMORE*, [1931] 2 D. L. R. 467 ; *affd.*, [1931] 3 D. L. R. 455 ; O. R. 649.—CAN.

### PART V. SECT. 3, SUB-SECT. 2.

i (p. 766) i. *Claimant by adverse possession—Against Crown grantee.*]—*DOBEK v. JENNINGS*, [1928] 1 D. L. R. 736 ; [1928] 1 W. W. R. 318 ; 23 Alta. L. R. 306.—CAN.

so. *Lessor—Suit to obtain possession for lessee.*]—A landlord, though he has given a lease to a third person, is entitled, for the purpose of putting his lessee in possession, to maintain a suit to eject a trespasser.—*DAMODAR PRASAD TEWARI v. LACHMI PRASAD SINGH* (1928), 1 L. R. 7 Pat. 496.—IND.

st. *Trustees of church—Unincorporated body.*]—*DOE d. GALT PRESBYTERIAN CHURCH TRUSTEES v. BAIN* (1847), 3 U. C. R. 198.—CAN.

### PART V. SECT. 3, SUB-SECT. 3.—A.

t i. ———. ]—*LOUNT v. SMITH* (1848), 5 U. C. R. 302.—CAN.

i i. ———. ]—*Wife living apart from husband—Circumstances precluding presumption of being husband's agent.*]

Where a wife, living apart from her husband, is in possession of land, under such circumstances as precludes the presumption of her being agent of her husband, she must be made a deft. in ejectment for the land.—*WOODWARD v. CUMMINGS* (1873), 6 P. R. 110.—CAN.

sg. *Tenants in one house—Occupying separate tenements.*]—Where several tenants occupied different apartments in one house, as several tenements :—*Held* : a single action might be brought for the premises, serving each tenant with a copy & notice.—*DOE d. BELL v. ROE* (1834), 3 O. S. 64.—CAN.

sh. *Whether sub-tenants necessary parties.*]—In an action by a landlord for possession of the premises, it is not necessary to make sub-tenants in actual possession parties deft., & a judgment for possession may be given against the tenant under which the sub-tenants must go out.—*INCORPORATED SYNOD OF TORONTO v. FISKEN* (1898), 29 O. R. 738.—CAN.

### PART V. SECT. 4.

b i. ———. ]—*Tenancy terminable by either party.*]—*ECKHARDT v. RABY* (1861), 20 U. C. R. 458.—CAN.

b ii. ———. ]—*Defendant put into possession by lessor of plaintiff—Denial of lessor's title.*]—*DOE d. BOUTER v. FRAZER* (1835), 4 O. S. 80.—CAN.

b iii. ———. ]—*Defendant put into possession by devisee for life—Right of remainderman.*]—*DOE d. FIELDS v. MCKAY* (1844), 4 N. B. R. (2 Kerr) 435.—CAN.

o (p. 770) i. ———. ]—*Action dismissed for failure to give—Right to bring second action after making demand.*]—Where an appln. for a writ of possession was dismissed because no notice of determination of the lease had been given :—*Held* : the landlord was not thereby barred from making another appln. after giving such notice.—*Re ERNEWEIN & WEIGER*, [1928] 4 L. R. 498 ; [1928] 2 W. W. R. 628.—CAN.

### PART V. SECT. 7, SUB-SECT. 2.—B.

1076 iii. ———. ]—*Affidavit of service—Contents of.*]—Affidavit of service of declaration by fixing a copy to the door of house should state the name of the tenant from whom the rent is due.—*DOE d. WHITE v. ROE* (1841), 4 N. B. R. (2 Kerr) 360.—CAN.

### PART V. SECT. 8.

sm. *Claim under paper title—Defendant setting up right under lease from plaintiff—Right of defendant to rely upon forfeiture of lease—Though not pleaded.*]—*LETTIGREW v. DOYLE* (1867), 17 C. P. 459.—CAN.

### PART V. SECT. 10.

1125 i. ———. ]—*Title of plaintiff defective.*]—*DOE d. MUNRO v. HANSON* (1831), (1825-1897) N. B. Dig. 293.—CAN.

r (p. 777) i. ———. ]—*TOWNSHIP OF COLCHESTER SOUTH v. HACKETT*, [1927] 4 D. L. R. 317 ; 61 O. L. R. 77 ; *affd. sub nom. HACKETT v. COLCHESTER SOUTH MUNICIPAL CORPN.*, [1928] 3 D. L. R. 107.—CAN.

r (p. 777) ii. ———. ]—*Act of Limitations—Effect of possession by tenant in common.*]—*DOE d. WILLIAMS v. LEAVITT* (1843), 4 N. B. R. (2 Kerr) 83.—CAN.

r (p. 777) iii. ———. ]—*Against plaintiff taking forcible possession.*]—Possession short of twenty years is a sufficient title in ejectment against a party, who, without any show of title, comes & takes forcible possession of land.—*DOE d. FRENCH v. DUNN* (1859), 4 Nfld. L. R. 404.—NFLD.

r (p. 777) iv. ———. ]—*SOHAN LAL v. MOHAN LAL* (1928), 1 L. R. 90 All. 986.—IND.

sa (p. 777) i. ———. ]—*Title acquired through person who entered by permission of plaintiff.*]—In an action to recover possession of land, defts. limited their defence to a portion of the land claimed, & as to that portion depended upon title acquired from H.,

who entered by permission of pltf. — *Held*: both defts. & H. were estopped from denying pltf.'s title. — *LAKEVIEW MINING Co. v. MOORE* (1903), 36 N. S. R. 333. — **CAN.**

o (p. 778) i. — — — — — *MILNER v. LINGWOOD* (circa 1875), R. E. D. 123. — **CAN.**

o (p. 778) ii. — — — — — *Possession obtained by exchange from plaintiff's father.* — *HELL v. CARRUTHERS* (1869), 2 N. S. D. 1. — **CAN.**

o (p. 778) iii. — — — — — *Agreement by plaintiff to grant perpetual lease—Performance of acts referable to agreement.* — *ARIFF v. JADU NATH MAJUMDAR* (1928), 1 L. R. 55 Cal. 1090. — **IND.**

t (p. 778) i. — — — — — *Purchase at sale under writ of execution—Judgment irregular to purchaser's knowledge.* — *Held*: the sheriff's deed could not defeat pltf.'s right to recover. — *HAMILTON v. LIGHTBODY* (1870), 21 C. P. 126. — **CAN.**

t (p. 778) ii. — — — — — *Colour of title.* — *BOYD v. MILLETT* (1873), 9 N. S. R. 292. — **CAN.**

t (p. 778) iii. — — — — — *McDONALD v. McISAAC* (1905), 38 N. S. R. 163; *affd. sub nom. McISAAC v. McDONALD*, 39 S. C. R. 157. — **CAN.**

t (p. 778) iv. — — — — — *Defendant in possession as tenant of plaintiff.* — *FISHER v. JOHNSTON* (1866), 25 U. C. R. 616. — **CAN.**

t (p. 778) v. — — — — — *Transfer to plaintiff made by party not in possession.* — *GAMMON v. JODREY* (1877), 11 N. S. R. (2 R. & C.) 314. — **CAN.**

t (p. 778) vi. — — — — — *Tenant of mortgagee—Title of mortgagee—Against holder of equity of redemption.* — *SMITH v. SNARE* (1877), 17 N. B. R. (1 P. & B.) 56. — **CAN.**

t (p. 778) vii. — — — — — *Defendant tenant from year to year—No notice to terminate tenancy.* — *LAPORTE v. WILSON* (1913), 24 O. W. R. 543. — **CAN.**

t (p. 778) viii. — — — — — *Defendant in possession under conveyance from plaintiff—Error in conveyance—Boundaries agreed between vendor & vendee.* — *McDONALD v. KNUDSEN*, [1928] 3 D. L. R. 242; [1928] 2 W. W. R. 577. — **CAN.**

#### PART V. SECT. 11, SUB-SECT. 1.

d i. — — — — — *Sufficiency of evidence.* — *ALLISON v. SMITH* (1877), 1 P. & B. 199. — **CAN.**

aa (p. 779) i. — — — — — *In a suit for ejectment, although pltf. may not be able to establish any title in himself, he is entitled to succeed if he can prove that he was in possession of the property in dispute until he was forcibly ousted by deft., provided deft. does not establish a better title in himself.* — *RANJIT SINGH PRINCE v. JHORI SINGH* (1928), 1 L. R. 8 Pat. 351. — **IND.**

ad. *Ejectment for non-payment of rent—Motion for judgment against casual ejector—Tenant in possession not lessee—Whether necessary to show how tenant holds.* — *DOE d. ST. JOHN CORPN. v. ROE* (1885), 25 N. B. R. 149. — **CAN.**

ae. *Unregistered lease—Prior in date to Crown grant—Whether admissible to prove right of tenant.* — *NORTH PACIFIC LUMBER Co. v. BRITISH AMERICAN TRUST Co.* (1917), 23 B. C. R. 332. — **CAN.**

#### PART V. SECT. 11, SUB-SECT. 2.—A.

1134 i. *Plaintiff recovers on own title.* — *CLARKE v. HANEY & DUNLOP* (1899), 8 B. C. R. 130; 1 M. M. Cas. 281. — **CAN.**

1140 i. *Plaintiff claiming as purchaser under writ of execution—Proof of judgment & writ.* — *FERRY v. PIQUOTT* (1855), 12 U. C. R. 372. — **CAN.**

o (p. 780) i. — — — — — *PENNINGTON v. BROWNLEE* (1868), 28 U. C. R. 189. — **CAN.**

aa (p. 780) i. — — — — — *Proof of judgment unnecessary.* — *RAISTON v. HUGHSON* (1867), 17 C. P. 361. — **CAN.**

aa (p. 780) ii. — — — — — *JEX v. HICKS* (1876), 39 U. C. R. 606. — **CAN.**

n (p. 781) i. — — — — — *Loan to be paid off by instalments—Date of expiration of mortgage uncertain—Release of mortgagee by mortgagee after action brought.* — *ASHFORD v. McNAUGHTON* (1854), 11 U. C. R. 171. — **CAN.**

q (p. 781) i. — — — — — *Not registered—Admissible where no registered instrument.* — *An unregistered Crown grant is admissible in evidence where it is not sought to set it up against a registered instrument.* — *DORRELL v. CAMPBELL* (No. 2), [1917] 1 W. W. R. 500; 23 B. C. R. 500. — **CAN.**

c (p. 781) i. — — — — — *Purchaser for value without notice—Defendant in possession—Claim by adverse possession.* — *CANADA PERMANENT LOAN & SAVINGS Co. v. McKAY* (1881), 32 C. P. 51. — **CAN.**

ff (p. 781) i. *Title acquired pendente lite.* — *Held*: Insufficient. — *ADAMSON v. ADAMSON* (1878), 25 Gr. 550. — **CAN.**

hh (p. 781) i. — — — — — *Question for jury.* — *EDEB v. MAXWELL* (1859), 17 U. C. R. 173. — **CAN.**

sm. *Claim by executrix under mortgage from defendant—Right to show mortgage to testator.* — *SKEAHON v. WHELAN* (1861), 21 U. C. R. 174. — **CAN.**

sn. *Evidence that ancestor of plaintiff's lessors had cut wood off land.* — *McDONALD v. CHISHOLM* (1858), 3 N. S. R. (2 Thom.) 404. — **CAN.**

so. *Claim by devisee—Land mortgaged by testator—Foreclosure—Land sold under decree of court.* — *Kearney v. CREELMAN* (1886), 14 S. C. R. 33. — **CAN.**

sp. *Title derived from foreclosure in equity suit—Property mortgaged by remainderman—Defendant in possession as tenant for life.* — *COLONIAL INVESTMENT & LOAN Co. v. DEMERCHANT* (1908), 38 N. B. R. 431; 4 E. L. R. 546. — **CAN.**

sr. *Prima facie title.* — *In ejectment pltf. is only required to prove a prima facie case on title, unless he alleges an illegal title in deft., when he must prove it.* — *GARDINER v. CHARLOTTE-TOWN CITY*, [1933] 4 D. L. R. 809; 5 M. P. R. 571. — **CAN.**

#### PART V. SECT. 13.

sy. *Nature of action.* — *An action for mesne profits is in origin an action of trespass, & is regulated by the broad principles applicable to actions for damages against wrongdoers.* — *KAMALA PROSAD SUKUL v. KISHORI MOHAN PRAMANIK* (1927), 1 L. R. 55 Cal. 666. — **IND.**

p i. — — — — — *HERR v. WESTON* (1872), 32 U. C. R. 402. — **CAN.**

q i. — — — — — *Right to costs of ejectment—Before taxation.* — *In an action for*

mesne profits, after judgment by default in ejectment, it is not necessary that the costs of the ejectment should be taxed before they can be recovered. — *BANK of UPPER CANADA v. ARMSTRONG* (1813), (1823-1900), 1 Ont. Dig. 2158. — **CAN.**

q ii. — — — — — *Necessity for proof of payment.* — *DOE v. CARRILL* (1853), 2 All. 650. — **CAN.**

1175 v. — — — — — *Under the definition of "mesne profits" in Code of Civil Procedure, 1908, s. 2 (12), the sum to be awarded is not what pltf. has lost by his exclusion from the land, but what deft. has made, or might with reasonable diligence have made, by his wrongful possession. In the case of agricultural land that depends upon what an ordinary prudent agriculturist would have grown, & if deft. for his own purposes has grown a less profitable crop the mesne profits are not thereby limited. If deft. has let the land the rent received is ordinarily the measure of the profits in the absence of evidence that a higher rent could have been obtained by reasonable diligence; but if he has cultivated the land himself the cultivation profits are the primary consideration.* — *GRAY v. BHAGU MIYA* (1929), 57 L. R. Ind. App. 105, P. C. — **IND.**

#### PART V. SECT. 14.

e i. *Decision of master in chambers—On originating notice—Whether valid.* — *A master in chambers has no power to make an order, upon originating notice, for the delivery up of possession of land by an overholding tenant.* — *MACDONALD v. GEORGIADIS* (1916), 34 W. L. R. 964. — **CAN.**

sq. *Motion for Plaintiff's case not conclusively made out.* — *COOK v. LEMIEUX* (1885), 10 P. R. 577. — **CAN.**

sr. *Verdict entered for plaintiff by consent—Enforcement conditional on certain payments—Judgment entered on verdict before payments made—Right of defendant to damages.* — *WATSON v. KETCHUM* (1882), 2 O. R. 237. — **CAN.**

#### PART V. SECT. 15.

p i. — — — — — *Notice to quit as to part given too late.* — *Ejectment for a house & small lot of land adjoining. It appeared that, as to the house, notice to quit had been given too late, but that pltf. was entitled to the land. It was ordered that unless pltf. would confine his judgment to the land, deft. should have a new trial.* — *CONLEY v. LEE* (1855), 12 U. C. R. 456. — **CAN.**

st. *Rebuttal of plaintiff's evidence—Defendant in actual adverse occupation for twenty years.* — *DOE d. McMACKIN v. DEWINE* (1811), 3 N. B. R. (1 Kerr) 111. — **CAN.**

#### PART V. SECT. 16.

sv. *Undeclared suit.* — *In entering judgment in an undefended suit for the recovery of land, pltf. is not entitled to enter judgment for costs incurred in the proceeding.* — *STATT ADVANCE SUPREMACY v. HARWOOD*, [1934] N. Z. L. R. 828; 4 L. R. 591. — **N.Z.**

#### PART V. SECT. 17.

aw. *Death of lessor of plaintiff before trial—Whether scire facias necessary.* — *In ejectment under the old form, where the lessor of the pltf. died before the trial:—Held: no sc. fa. was necessary, but that judgment might be entered, & a writ of possession obtained.* — *DOE d. HAY v. HUNT* (1855), 12 U. C. R. 625. — **CAN.**





# RECEIVERS.

## Part II.—Appointment by Court.

20. *Add. Annotation* :—**Consd.** *Refuge Assurance Co. v. Pearlberg*, [1938] 3 All E. R. 231.
- 106a. ———.]—An *interim* appointment of a receiver of property in the possession of, & claimed by, deft. in the suit should be made only if there is a well-founded fear that, in the absence of protection, the property will be dissipated or irreparably injured.—**BEVOY KRISHNA MUKHERJEE v. SATISH CHANDRA GIRI** (1927), 55 L. R. Ind. App. 131.
- 233a. ———.]—A receiver appointed to collect in assets, & to bring actions in the name of an extrix., must give security to indemnify the extrix. on account of such actions.—**TAYLOR v. ALLEN** (1741), 2 Atk. 213; 28 E. R. 532, L. C.
- Annotations* :—**Refd.** *Anon.* (1806), 12 Ves. 4; *Pemberton v. Chapman* (1857), 7 E. & B. 210.
- 233b. ———.]—**SNARE v. BAKER, BEASLEY v. SNARE** (1849), 13 Jur. 203.
390. *Add. Annotation* :—**Refd.** *Re Gillott's Settlement, Chattock v. Reid*, [1934] Ch. 97.
403. *Add. Annotation* :—**Generally, Refd.** *Re Pinto Leite & Nephews, Ex p. Visconde Des Oliveira*, [1929] 1 Ch. 221.
- 451a. ———.]—**HALL v. JENKINSON** (1813), 2 Ves. & B. 125; 35 E. R. 266, L. C.
555. *Add. Annotation* :—**Refd.** *Townshend v. Child* (1932), 48 T. L. R. 575.
556. *Add. Annotation* :—**Refd.** *Townshend v. Child* (1932), 48 T. L. R. 575.
557. *Add. Annotation* :—**Refd.** *Townshend v. Child* (1932), 48 T. L. R. 575.
571. *Add. Annotation* :—**Apld.** *A.-G. v. Glen Line, Ltd. & Liverpool & London War Risks Insee. Assocn., Ltd.* (1929), 34 Com. Cas. 309.

## Part III.—Effect of Appointment.

657. *Add. Annotation* :—**Refd.** *Consolidated Entertainments, Ltd. v. Taylor*, [1937] 1 All E. R. 432.
659. *Add. Annotation* :—**Refd.** *Re Winterbottom (Leeds), Ltd.*, [1937] 2 All E. R. 232.
660. *Add. Annotation* :—**Consd.** *Woolwich Equitable Building Society v. Preston*, [1938] Ch. 129.
682. *Add. Annotation* :—**Refd.** *Re A Debtor*, [1929] 1 Ch. 170.

## Part IV.—Rights, Powers and Duties.

755. *Add. Annotation* :—**Apld.** *Re Debtor No. 76 of 1929*, [1929] 2 Ch. 146.

## Part VI.—Interference with Receiver.

- 895a ———.]—A libel on the business carried on by a receiver & manager appointed by the ct. is a contempt of ct., & may be punished by committal of the offender.—**HELMORE v. SMITH** (No. 2) (1886), 35 Ch. D. 449; 56 L. J. Ch. 145; 56 L. T. 72; *sub nom.* **HELMORE v. SMITH, Ex p. SMITH**, 35 W. R. 157; 3 T. L. R. 139, C. A.
- Annotations* :—**Consd.** *Re Gent, Gent-Davis v. Harris* (1892), 40 W. R. 267. **Apld.** *King v. Dopson* (1911), 56 Sol. Jo. 51. **Refd.** *Re Evelyn, Ex p. General Public Works & Assets Co.*, [1894] 2 Q. B. 302; *Robb v. Green* (1895), 64 L. J. Q. B. 593; *R. v. Davies*, [1906] 1 K. B. 32; *R. v. Daily Mail Editor, Ex p. Farnsworth* (1921), 90 L. J. K. B. 871.

### PART II. SECT. 1, SUB-SECT. 2.—A.

**h i. Master.**—The master of the High Ct. has no jurisdiction to make an order appointing a receiver by way of equitable execution.—**DAIRD v. MURPHY**, [1928] 1 R. 125.—**IR.**

### PART II. SECT. 6, SUB-SECT. 2.—N.

**n i. ———.**—In an action by a vendor of land for specific performance an order may be made, before the land is sold, for the appointment of a receiver of the rents & profits of the land.—**KNOWLES v. JENKINS (Alta.)**, [1923] 1 W. W. R. 1279.—**CAN.**

### PART III. SECT. 1.

**n i. ———.**—*Possession of receiver is possession of court—For benefit of person entitled thereto.*—**BISHESHWAR PRATAP NARAYAN SAHI v. CHANDRESHWAR PRASAD NARAYAN SINGH** (1928), 1 L. R. 7 Pat. 319.—**IND.**

### PART III. SECT. 2.

**587 iv. ———.**—**BOTTOMS v. PACIFIC NORTHWEST LBR. CO. (B. C.)**, [1929]

4 D. L. R. 415.—**CAN.**

### PART III. SECT. 5, SUB-SECT. 5.—B.

**685 viii. ———.**—**NATIONAL TRUST CO. v. DOM. IRON & STEEL CO. (N. S.)**, [1927] 3 D. L. R. 1063.—**CAN.**

### PART IV. SECT. 4.

**p (p. 66) i. ———.**—*Against receiver—Effect of order.*—An order of the ct. giving leave to a party to sue its receiver does not amount to a relinquishment of possession of the properties by that ct., & an order of decree against the receiver cannot be enforced in execution as against him without leave of the ct. appointing him.—**SRIMATI JUGAL KISHORE DEBI v. DEVA PRASANNA MUKHERJI** (1928), 1 L. R. 7 Pat. 684.—**IND.**

**p (p. 66) ii. ———.**—*In British court—Receiver appointed by Baroda.*—A receiver appointed by a ct. of the Baroda State can be recognised as a proper party for the purpose of filing suits in a British ct.—**CHANDULAL MADHAVLAL v. MANEKLAL LALLURAM** (1930), 1 L. R. 55 Bom. 309.—**IND.**

### PART IV. SECT. 5.

**776 i. Purchase by receiver—Without leave of court—Purchasing receiver a trustee.**—The rule in *Nugent v. Nugent*, No. 776, *supra*, that a person in a fiduciary position, having special means of knowledge, ought not to be allowed to buy or bid for property without the leave of the ct., is a sound & salutary rule & should be followed in British India. In the case of receivers it is well recognised in England & the United States of America.—**JITESHWARI DAS v. SUDHAKRISHNA MUKHERJI** (1931), 1 L. R. 59 Calc. 956.—**IND.**

### PART X. SECT. 5.

**88. Stipulation that receiver to sign bond—Failure to sign.**—Where a surety on a receiver's bond executes the bond on the distinct understanding that it is also to be executed by the receiver himself, the failure to secure the signature of the receiver thereto discharges said surety.—**LARBONNE v. SHORE**, [1928] 2 D. L. R. 977; [1928] 2 W. W. R. 8; 39 B. C. R. 508.—**CAN.**

# REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

## Part I.—Central and Local Registration Authorities.

### SECT. 2.—REGISTRATION DISTRICTS.

(Vol. 39, p. 99.)

*See, now, Local Government Act, 1929 (c. 17), ss. 21–28.*

## Part II.—The Registers.

16. *Add. Annotation :—As to (1) Consd. China Navigation Co. v. A.-G. (1932), 48 T. L. R. 375.*

### PART III.

sh. “Indians in province of Natal”  
—Includes only Indian immigrants—  
Act 17, 1923, ss. 6, 42 (1).—*Ex p.*  
LADAT (1927), 48 N. L. R. 435.—S. AF.

sj. Registration under Vital Statistics  
Act. Whether enforceable by man-  
damus.—Registration under Vital  
Statistics Act cannot be enforced by

mandamus.—*Re MILLAR*, [1938] 2  
D. L. R. 164; O. R. 188.—CAN.

### PART IV.

sm. Amendment of register.—When  
order granted.—Appet., whose first  
name was, according to his birth  
certificate, S., but who had always  
believed it to be C., was married in  
Natal in 1928, the latter name being

recorded in the marriage register. He  
applied for an order authorising the  
registrar to amend the marriage register  
so as to show his first name as S.,  
alleging that it was only when he  
obtained a copy of his birth certificate  
that he discovered his name was S.—  
*Held*: order should be granted.—*Ex p.*  
KYRIAKIDES (1929), 50 N. L. R. 305.—  
S. AF.

# RENTCHARGES AND ANNUITIES.

## Part I.—Nature.

24. To cross-refs. before this case add :—  
Law of Property (Entailed Interests) Act, 1932 (c. 27), s. 2.
52. *Add. Annotation* :—**Refd.** *Bristol Corp'n. v. Virgin*, [1928] 2 K. B. 622.
54. *Add. Annotation* :—**Consa.** *Re Alington & L. C. C. Contract* (1927), 138 L. T. 131.
57. *Add. Annotation* :—**Consd.** *Hennell v. I. R. Comrs.*, [1933] 1 K. B. 415.
58. *Add. Annotation* :—**Consd.** *Hennell v. I. R. Comrs.*, [1933] 1 K. B. 415.
61. *Add. Annotation* :—**Folld.** *Re Ellis, Nettleton v. Crimmins*, [1935] Ch. 193.
- 62a. —.—(1) A testator by his will bequeathed various pecuniary legacies, & he directed that a fund, the market value of which at the time of appropriation should amount to £40,000, should be held on trust to pay the income thereof to certain named persons & in the proportions therein directed for their respective lives, & he further directed that a sum of £5,000 should be so set aside & the income thereof paid to L. for his life & after his death to his wife, G., during the remainder of her life, subject to a restraint on anticipation during coverture, & that on the determination of the life or other interests in any part or parts of those funds, such part or parts should fall into & form part of his

residuary estate. The estate of testator proved insufficient to meet the pecuniary legacies & to provide for the two funds :—  
*Held* : the legatees entitled to life interests in the two funds ought to be treated as annuitants.

(2) Testator declared that the two funds should carry interest at the rate of 5 per cent. from the date of his death until the date of appropriation :—*Held* : the annuities should be calculated as from the date of the order, & 4 per cent. should be allowed for the purpose of calculating the value of the respective annuities.

(3) A legatee, entitled to a share in the £40,000 fund, who survived testator two years, died before the date of the order :—*Held* : the estate of the deceased legatee was entitled to 5 per cent. on the capital value of his interest under the will up to the date of his death, & no more.

(1) With regard to the £5,000 fund :—*Held* : the husband & wife must be treated as being entitled to two separate annuities, the husband to an annuity during his life & the wife to a reversionary annuity expectant upon his death & contingent upon her surviving him. —**Re ELLIS, NETTLETON v. CRIMMINS**, [1935] Ch. 193 ; 101 L. J. Ch. 53 ; 152 L. T. 370.

*Annotation* :—*As to* (3) **Refd.** *Re Cox, Public Trustee v. Eve*, [1938] 1 All E. R. 661.

## Part II.—Creation of Rentcharges and Annuities.

- 85a. —.— **No words of inheritance—Limitations exhausting fee simple.**—**GRANT v. EDMONDSON**, No. 912a, *post*.
188. *Add. Annotation* :—**Dlstd.** *Nicholson's Will Trusts, Ortmans v. Burke*, [1936] 3 All E. R. 832.
195. *Add. Annotations* :—*As to* (1) **Consd.** *Re Cox, Public Trustee v. Eve*, [1938] Ch. 556. **Refd.** *Re Vardon, Brown v. Vardon* (1938), 82 Sol. Jo. 697. *Generally, Refd.* *Re Ellis, Nettleton v. Crimmins*, [1935] Ch. 193.
- 196a. —.—A testator by his will bequeathed a number of pecuniary legacies, & subject thereto a number of annuities, & subject thereto gave various legacies to persons & institutions out of the residue & directed any balance that might be left to be held for the persons who would be entitled to his

estate under the Administration of Estates Act, 1925 (c. 23). The pecuniary legacies had priority over the annuities, & the annuities over the residuary legacies, the annuities being charged upon capital as well as income. The estate was insufficient, after payment thereof of the pecuniary legacies and duties, to provide by its income alone for the payment of the annuities in full, but it was estimated that, after the sale of the real estate, there would be sufficient capital to purchase the annuities, valued on an actuarial basis, & leave a balance available for payment of the residuary legacies, subject to abatement :—*Held* : the proper course was to value the annuities, & to pay the value so ascertained to the annuitants. The rule of *In re Cottrell*, [1910] 1 Ch. 402 ; 39 Digest 126, 195, in which this course was followed, is

### PART I. SECT. 1.

11 i. —.— *Devise of land subject to annuity.*—Testator devised a half interest in land to his son & two daughters "subject to the payment" of an annuity :—*Held* : the annuity was charged upon the half interest.—**PEARCE v. WRIGHT** (1926), 39 G. L. R. 16.—**AUS.**

### PART II. SECT. 2, SUB-SECT. 2.—A.

k 1. —.— *Mode of ascertaining capital*

*sum.*—Testator directed that on the happening of a certain event, & at a certain time, his trustees should give to certain persons such capital sum as should fairly represent the capital value of a perpetual annuity of £400. The event had happened, & the date at which the gift should take effect had arrived & was found to be May 7, 1929. The only irredeemable Govt. stock in the State of New South Wales is the 4 per cent. Intermittent Stock of N. S. W., which is free of Federal

& State income tax. Testator had not directed that the beneficiaries should receive the capital value of a perpetual annuity of £400 free of those taxes :—*Held* : as the basis for ascertaining the amount of the capital money bequeathed by the will that Government security in this State, which is the most permanent & the least likely to be redeemed, must be selected.—**GILMOUR v. GILMOUR** (1931), 31 S. R. N. S. W. 83 ; 48 N. S. W. W. N. 15.—**AUS.**

applicable not only as between pecuniary legatees & annuitants, but also as between annuitants *inter se* & residuary legatees.—*Re Cox, Public Trustee v. Eve*, [1938] Ch. 556; [1938] 1 All E. R. 661; 159 L. T. 13; 54 T. L. R. 527; 82 Sol. Jo. 233.

196b. —.—.]—A testator by his will made the following gifts: a specific devise, a pecuniary legacy, certain specific bequests of chattels, an annuity to his widow, & certain dispositions which were held to be inoperative. The result was that the exors. were left with approximately £9,000 out of which to provide the annuity, the residue going as on an intestacy. The income of that sum was clearly insufficient to provide the annuity. The question was asked how the exors. should deal with the estate:—*Held*: the exors. should have the annuity valued & pay the capital value so ascertained to the annuitant. The widow was not entitled to any part of the income of the estate, but would be entitled on her death to the sum of £1,000, with interest at 5 per cent. from the date of the death of the testator. By agreement the widow was to receive this £1,000 at once in order to save the estate bearing the interest payable thereon. The income of the estate during the life of the widow must be applied in recouping to capital as far as possible the value of the annuity paid to the widow.—*Re Vardon, Brown v. Vardon*, [1938] 4 All E. R. 306; 159 L. T. 455; 82 Sol. Jo. 697.

212. *Add. Annotations*:—*Refd. Brown v. Brown*, [1936] 2 All E. R. 1616.

221a. —.—.]—*Bankruptcy of covenantor*.—A marriage having been dissolved by a decree absolute in 1925, the wife remarried shortly afterwards. Immediately before the remarriage the former husband executed a settlement on his

former wife in consideration of her release of any claim to alimony or maintenance from him. By the settlement the husband covenanted with his former wife & as a separate covenant with the trustees to pay her, during their joint lives, an annuity of such an amount as after deduction of income tax would yield the clear sum of £3,000 a year for her separate use without power of anticipation whilst under coverture. In 1929 the former husband was adjudicated bkpt. Pltfs., as trustees of the settlement, & defts., the former wife, jointly proved in the bkpcy. for a large sum made up of several items, of which £41,723 represented the capital value of the annuity of £3,000. The proof was admitted, & in Dec. 1931 a dividend of 6d. in the pound was paid to pltfs. This amounted to £2,322, of which £1,043 1s. 6d. was the proportion attributable to the annuity. On a summons taken out by pltfs. to determine the question whether they ought to pay to deft. the dividend so far as it was attributable to the annuity, notwithstanding the restraint upon anticipation, or whether they ought to invest the same, as being capital, in purchasing an annuity for the life of deft.:—*Held*: the trustees could properly pay the whole dividend to deft.—*Re Horne's Settlement, Courts & Co. v. Dusmet de Smours (Duchessa)*, [1932] 2 Ch. 180; 101 L. J. Ch. 359; 147 L. T. 492.

229 *Add. Annotations*:—*Consd. Re Beecham's Settlement, Johnson v. Beecham*, [1934] Ch. 183. *Refd. Re Ellis, Nettleton v. Crimmins*, [1935] Ch. 193; *Re Cox, Public Trustee v. Eve*, [1938] 1 All E. R. 661.

231. *Add. Annotation*:—*Refd. Wimbledon & Putney Commons Conservators v. Tuely*, [1931] 1 Ch. 190.

### Part III.—Alienation of Rentcharges and Annuities and Estates Charged Therewith.

246. *Add. Annotations*:—*Refd. Re Reeves, Reeves v. Pawson*, [1928] Ch. 351; *Re Tilden, Coubrough v. Royal Society of London* (1938), 82 Sol. Jo. 334.

247. *Add. Annotations*:—*Apld. Kennedy v. Thomassen*, [1929] 1 Ch. 426. *Refd. Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258.

247a. —.—.]—Under the will of her then husband made in 1902 & a separation deed & settlement made in 1903 V. was entitled to two annuities of £200 each. Testator, who was also the settlor, died in 1913, & V. afterwards married a Dutch subject, & for the remainder of her life resided in Holland. In 1927 the trustees of the will offered to redeem both annuities, & after some negotiations were informed by V.'s solrs. that they would advise her to accept £6,000 for redemption, the annuities to be paid in full up to the date of redemption. The trustees sent the solrs. a draft release for their approval. V. having informed her solrs. that she would accept the offer of £6,000, they sent her the release engrossed for her execution, & she executed it on Jan. 12, 1928.

On Jan. 17 she died, but no notification of her death was received by her solrs. in London until Jan. 31. In the meantime the trustees having been informed by V.'s solrs. on Jan. 24 that she had accepted the £6,000, on Jan. 30 paid the money to them, being in ignorance of V.'s death:—*Held*: there was no concluded contract for the sale & purchase of the annuities, as the purchasers could not have intended their offer to be accepted by the vendor merely executing a document. But even assuming there was a concluded contract, there was a total failure of consideration, owing to the death of the annuitant before completion, & the trustees were entitled to recover back the £6,000.—*Kennedy v. Thomassen*, [1929] 1 Ch. 426; 98 L. J. Ch. 98; 140 L. T. 215; 45 T. L. R. 122.

254a. —.—.]—*Sale to raise charge paramount to annuities—Annuitants necessary parties to conveyance*.—*Sullivan v. Sullivan* (1860), 28 Beav. 102; 54 E. R. 304.

*Annotation*:—*Refd. Thompson v. Raine* (1873), 28 L. T. 362.

**254b.** ——— **Annuity charged on premises & business—Sale of business to company—Undertaking of company to pay annuity.**—By his will made in 1913 P. appointed his two sons exors. & devised & bequeathed to them the freeholds upon which his business was carried on & the businesses subject to the payment of an annuity of £300 to his wife. Testator died in 1914. In Feb. 1923 the two sons agreed to sell to a trustee for an intended co. the undertaking & assets of the business in consideration of cash & shares in the co. & an undertaking by the co. to pay all the liabilities of the vendors in relation to the business, including the annuity & a charge to secure the bank overdraft of the vendors' firm. That agreement was carried out by two deeds dated June 1, 1923, one an assignment of the goodwill & the other a conveyance of the freehold premises of the vendors in connection with the business, including freehold premises at L. The conveyance recited the charge to the bank effected by deposit of the deeds, but made no reference to the annuity, & the will was also shortly recited. The conveyance was made by the vendors as beneficial owners, & the *habendum* was expressed to be subject to a

charge by way of collateral security to the bank to secure £774 8s. 4d., the amount of the firm's overdraft. On Nov. 19, 1929, the co. sold the freehold premises at L. to deft. J. by a conveyance of the fee simple free from incumbrances in the usual form. The co. having paid off the £774 8s. 4d. were able to hand over the title deeds to J. The widow was paid her annuity to Dec. 1929, when the co., owing to bad trade, were unable to pay it. The widow then brought this action claiming that J. had taken the property with notice which ought to have put him on inquiry whether the premises were freed from the annuity:—*Held*: the conveyance to the co. being made subject to the bank charge prevented any inference by J. that the vendors had ceased to act as exors., & the vendors to the co. were shown on the conveyance to be sole beneficiaries under their father's will as well as exors., & the fact that the vendors to the co. conveyed as beneficial owners did not put J. on inquiry, as he was entitled to assume that they were selling as exors.—*PARKER v. JUDKIN*, [1931] 1 Ch. 475; 100 L. J. Ch. 159; 144 L. T. 662, C. A.

## Part IV.—Rights as Affected by Various Forms of Limitation.

**292a.** ———.]—A. devises to his nephew £5 *per annum*, without saying to his exors. or administrators, to be paid him during his, the testator's, wife's life, whom he made executrix, on condition that he demeaned himself civilly to her. By his death the £5 *per annum* is determined.—*NEAL v. HANBURY* (1701), Prec. Ch. 173; 24 E. R. 83; *sub nom.* ANON., 2 Eq. Cas. Abr. 362.

*Annotation*:—*Refd.* *Savery v. Dyer* (1752), Amb. 139.

**296.** *Add. Annotation*:—*Refd.* *Re Fitch's Will Trusts, Public Trustee v. Nives* (1928), 139 L. T. 556.

**335a.** ——— **Grant by Crown—Effect of Law of Property (Entailed Interests) Act, 1932 (c. 27).**—*Re CHARLES II., KINGS GRANT, GIFFARD v. PENDEREL-BRODHURST* (1936), 80 Sol. Jo. 92.

**336a.** **Bequest to several—No words of survivorship.**—A bequest of an annuity to several persons during their lives, without words of survivorship, is a bequest to each of them of a separate annuity for an aliquot share of the whole, & upon the death of each his separate annuity ceases.—*Re EVANS, THOMAS v. THOMAS* (1908), 77 L. J. Ch. 583; 99 L. T. 271.

**336b.** **During continuance of fund.**—Testator having bequeathed annuities issuing out of a leasehold estate, to some annuitants for life, to some during the continuance of the fund, & to others indefinitely, with a general provision for an increase or diminution of the annuities, in proportion to the increased or

diminished income of the estate; & a particular provision that, on the death of some of the annuitants for life, their portions should be paid to the survivors; the annuities given indefinitely are payable during the continuance of the fund.—*HACK v. TUCK* (1818), 3 Swan. 270; 36 E. R. 858.

**353.** *Add. Annotations*:—*Refd.* *Re Nelson, Norris v. Nelson* (1918), 140 L. T. 371, n.; *Re Smith, Public Trustee v. Aspinall* (1928), 140 L. T. 369.

**392.** *Add. Annotations*:—*Refd.* *Re Blake, Berry v. Geen*, [1937] Ch. 325; *Re Coller's Deed Trusts, Coller v. Coller*, [1937] 3 All E. R. 292; *Berry v. Geen*, [1938] A. C. 575.

**424.** *Add. Annotation*:—*Refd.* *Re Cox, Public Trustee v. Eve*, [1938] Ch. 556.

**436.** *Add. Annotation*:—*Refd.* *Bowen v. I. R. Comrs.*, [1937] 1 All E. R. 607.

**456.** *Add. Annotation*:—*Refd.* *Re Coller's Deed Trusts, Coller v. Coller*, [1937] 3 All E. R. 292.

**457.** *Add. Annotation*:—*Refd.* *Re Coller's Deed Trusts, Coller v. Coller*, [1937] 3 All E. R. 292.

**457a.** ———.]—By a deed of family arrangement, certain assets representing the residuary estate of a testator were directed to be held by the trustees of his will (a) upon trust to pay out of the income thereof the sum of £10 a week to testator's widow during her widowhood, (b) upon trust to pay out

### PART IV. SECT. 2, SUB-SECT. 2.—A.

**398 v.** ———.]—*Re GILROY ESTATE* (No. 3), [1937] 3 W. W. R. 228; 4 D. L. R. 500; 46 Man. L. R. 34; 7 F. L. J. (Can.) 116; *reversd.*, [1938] 1 W. W. R. 657.—CAN.

of the income thereof the sum of £3 a week to testator's widowed daughter during her widowhood, (c) upon trust to pay out of the income thereof the sum of £1 a week to testator's mother during her life, (d) during the widowhood of testator's widow to pay or apply the whole or any part of the balance of the income for the maintenance, support or otherwise for the benefit of testator's widow & his four sons as the trustees in their absolute discretion should think fit & subject as aforesaid to apply the said balance in payment off of the existing mtges. on testator's estate, (e) upon trust as to capital & income for testator's four sons in equal shares. The weekly sums fell into arrear &

the widow asked for a declaration that the three weekly sums were a charge on the capital of the trust fund, or, alternatively, were a continuing charge on the income of such fund:—*Held*: the weekly sums were neither a charge on the capital nor a continuing charge on the income of the trust fund. The direction in the deed as to surplus income arising during the widowhood of testator's widow showed that the parties to the deed intended that the weekly sums in any year should be paid out of the income of that year, & of that year alone.—*Re COLLIER'S DEED TRUSTS*, COLLIER v. COLLIER, [1937] 3 All E. R. 292; 106 L. J. Ch. 326; 157 L. T. 84; 53 T. L. R. 859; 81 Sol. Jo. 550, C. A.

## Part V.—Rights as Affected by Insufficiency of Grantor's Estate.

493. *Add. Annotation*:—*Distd. Re Beecham's Settlement*, Johnson v. Beecham, [1934] Ch. 183.

498. *Add. Annotation*:—*Refd. Parker v. Judkin*, [1931] 1 Ch. 475.

510. *Add. Annotation*:—*Refd. Re Cockell*, Jackson v. A.-G., [1931] 1 Ch. 389.

511a. ——. —A. gave by will an annuity of £1,000 to his widow, & directed that in case of his estate being insufficient to make up her income from all sources to that amount, a sufficient part of the *corpus* to make up the deficiency should from time to time be sold. B. subsequently by will gave her an annuity of £200, & directed that it should not be taken into account in regard to any other income, it being his express will & desire that it should be a clear beneficial addition to her income:—*Held*: the widow was not bound to include the £200 annuity in her computation of income, & was entitled to have a sufficient amount of the *corpus* sold to make up her income, independently of that annuity to £1,000.—*Re HEDGES' TRUST ESTATE* (1874), L. R. 18 Eq. 419; 44 L. J. Ch. 116; 31 L. T. 160; 22 W. R. 819.

516. *Add. Annotation*:—*Refd. Bowen v. I. R. Comrs.*, [1937] 1 All E. R. 607.

525a. ——. —A testator directed his trustees, of whom his wife was one, to permit his wife to receive the rents & profits of his real estates, & thereout in the first place to retain to herself an annuity of £400 a year, & to pay annuities of £100 a year to each of his daughters:—*Held*: these words did not give a priority to the wife in respect of her annuity over the daughters.—*JENKINS v. BRIANT* (1834), 6 Sim. 603; 3 L. J. Ch. 169; 58 E. R. 719; *subsequent proceedings* (1836), 5 L. J. Ch. 348.

526. *Add. Annotation*:—*Refd. Re Cox*, Public Trustee v. Eve, [1938] Ch. 556.

527. *Add. Annotation*:—*Refd. Re Cox*, Public Trustee v. Eve, [1938] Ch. 556.

528. *Add. Annotation*:—*Refd. Re Cox*, Public Trustee v. Eve, [1938] Ch. 556.

532. *Add. Annotation*:—*Refd. Re Ellis*, Nettleton v. Crimmins, [1935] Ch. 193.

548. *Add. Annotation*:—*As to* (2) *Refd. Bristol Corp'n. v. Virgin*, [1928] 2 K. B. 622.

## Part VI.—Payment of Rentcharges and Annuities.

571. *Add. Annotations*:—*N.F. Re Riddell*, Public Trustee v. Riddell, [1936] Ch. 747. *Refd. Re Hulton*, Midland Bank Executor & Trustee Co. v. Thompson, [1936] 2 All E. R. 207.

571a. ——. *Not payable out of annuities.*—Testator gave his wife an annuity of £8,000 *per annum* during her life & certain other annuities to a large number of persons, & he appointed the Public Trustee to be one of the trustees of his will:—*Held*: the income fee of the Public Trustee is one of the expenses of

administration & is not to be paid out of the portions of the estate which have been given before the residue is disposed of, & therefore, not to be paid out of the annuities.—*Re RIDDELL, PUBLIC TRUSTEE v. RIDDELL*, [1936] Ch. 747; [1936] 2 All E. R. 1600; 105 L. J. Ch. 378; 155 L. T. 247; 52 T. L. R. 675; 80 Sol. Jo. 595.

*Annotations*:—*Distd. Re Roberts' Will Trusts*, Younger v. Lewins, [1937] Ch. 274. *Refd. Re Godwin*, Coutts & Co. v. Godwin, [1938] Ch. 341.

571b. *Income fee.*—A testator, having by his will appointed a bank to be his exors. & trustees,



declaring that they should be entitled to remuneration in accordance with their scale of fees, directed (a) that they should "set aside . . . a sum sufficient to produce" an annuity of £100, which they were to "pay out of the income thereof" to A. F. G. for life, & that after her death the sum set aside should fall into his residuary estate; (b) that they should "set aside . . . a sum sufficient . . . to produce after deduction of income tax . . . the clear yearly sum of £500 upon trust to pay such sum" to M. C. P. during her life & after her death to stand possessed of the investments representing the sum set aside in trust for such of her children as being male should attain the age of twenty-one years, or being female should attain that age or marry, & that if no child attained a vested interest, the fund should sink into his residuary estate; (c) that they should set apart so much of his residuary estate "as by means of the income thereof will . . . produce the clear annual sum of £100 & . . . pay the income thereof" to M. G. during her life, & that subject thereto the fund should sink into his residuary estate. The bank charged (i) an income fee of 2 per cent. on the actual income received, reducible to 1 per cent. if the beneficiary kept his banking account with them, & (ii) a withdrawal fee on the withdrawal of any property from the estate:—*Held*: (1) the withdrawal fees in respect of the funds producing the annuities of A. F. G. & M. G. & also the fund producing that of M. C. P., in the event of her leaving no child who attained a vested interest, should be borne by the residuary estate into which they fell; (2) if M. C. P. left a child or children who attained a vested interest, the withdrawal fee in respect of the fund producing her annuity should be borne by that child or those children, since the fund could then never return to the residuary estate; (3) the respective income fees payable on all the annuities should be borne by the income of the funds set aside to produce those annuities; (4) the sums so set aside should be sufficient to produce the amount payable in respect of the income fees at the rate of 2 per cent. in addition to the full amount of the annuities named; (5) the full amount of the fund so set aside to produce the annuity of M. C. P. & the income fees in respect thereof should after her death be held in trust for her child or children who attained a vested interest under the will.—*Re GODWIN, COUTTS & Co. v. GODWIN*, [1938] Ch. 341; [1938] 1 All E. R. 287; 107 L. J. Ch. 166; 158 L. T. 166; 54 T. L. R. 339; 82 Sol. Jo. 113.

**571c. Withdrawal fee.**—*Re GODWIN, COUTTS & Co. v. GODWIN*, No. 571b, *ante*.

**586. Add. Annotations.**—*Refd. Shrewsbury & Talbot v. I. R. Comrs.*, [1936] 2 All E. R. 101.

**586a.** — *Direction to set aside fund—To produce stated income "without deduction of tax."*—By his will a testator directed his trustees to set aside out of his residuary estate such proportion thereof as should be sufficient to produce a specified income "without deduction of income tax" & to pay that income to his wife during her life:—*Held*: the words "without deduction of income tax" had the same meaning as "free

of income tax" & therefore the sum to be set aside was such a sum as would produce the specified income after income tax at the current rate had been paid.—*Re WILLIAMS, WILLIAMS v. TEMPLETON*, [1936] Ch. 509; [1936] 1 All E. R. 175; 105 L. J. Ch. 362; 151 L. T. 640; 80 Sol. Jo. 223, C. A.

**587. Add. Annotations.**—*Distd. Re Jones, Jones v. Jones* (1933), 49 T. L. R. 516. *Consd. Re Kingcome's Will Trusts, Hickley v. Kingcome*, [1936] 1 All E. R. 173.

**587a.** — — —.]—*Testatrix by her will directed her trustees to pay to or apply for the benefit of her daughter M. L. J. such an annuity as after deducting income tax therefrom at the current rate for the time being would amount to the clear yearly sum of £350. In Dec. 1932, the I. R. Comrs. paid to a receiver appointed by the ct. of the income of M. L. J. the sum of £131 12s. 7d., being allowances & reliefs in respect of income tax upon the annuitant's income for the three preceding financial years:—Held*: (1) so much of that sum as was attributable to tax upon the annuity in question belonged to the annuitant & not to the residuary estate of testatrix; (2) income tax "at the current rate" means tax at the standard rate, irrespective of reliefs & abatements.—*Re JONES, JONES v. JONES*, [1933] Ch. 842; 102 L. J. Ch. 303; 149 L. T. 417; 49 T. L. R. 516; 77 Sol. Jo. 467.

**587b.** — — —.]—Where the trustees of a will requested an annuitant, to whom the annuity was payable free of income tax, to sign an application form claiming relief from income tax (the sum so recoverable being for the benefit of testator's estate) & she refused to do so:—*Held*: she was a trustee of her statutory right to recover for the benefit of testator's estate the tax overpaid in respect of her annuity & was bound at the request of the trustees to sign a proper application form for that purpose.—*Re KINGCOME, HICKLEY v. KINGCOME*, [1936] Ch. 566; [1936] 1 All E. R. 173; 105 L. J. Ch. 209; 154 L. T. 462; 52 T. L. R. 268; 80 Sol. Jo. 112.

**587c.** — *Income tax "at the current rate"*—*Meaning of.*—*Re JONES, JONES v. JONES*, No. 587a, *ante*.

**589. Add. Annotations.**—*Consd. Re Reckitt, Reckitt v. Reckitt* (1932), 173 L. T. Jo. 452. *Refd. Re Hulton, Hulton v. Midland Bank Exor. & Trustee, Ltd.* (1930), 99 L. J. Ch. 316.

**590. Add. Annotations.**—*Consd. Re Reckitt, Reckitt v. Reckitt* (1932), 173 L. T. Jo. 452. *Refd. Re Armaghdale, Craig v. Armaghdale* (1928), 44 T. L. R. 239.

**591. Add. Annotations.**—*Consd. Re Reckitt, Reckitt v. Reckitt* (1932), 173 L. T. Jo. 452. *Distd. Re Veale's Will & Codicils, Malone v. James* (1931), 75 Sol. Jo. 780.

**592a.** — — —.]—By his will dated Nov. 21, 1924, testator, after appointing exors. & trustees, & giving certain specific & pecuniary bequests, bequeathed to his trustees the sum of £200,000 upon trust to invest the same in any of the investments thereafter authorised, & to hold the said investments upon trust thereout to pay his wife during her life the annual sum of £5,000 "free of income tax":—*Held*: the wife was entitled to the annual sum free of sur-tax as well as of

ordinary income tax.—*Re RECKITT, RECKITT v. RECKITT*, [1932] 2 Ch. 144; 101 L. J. Ch. 333; 147 L. T. 275, C. A.

592b.

—*J.*—By a settlement made in consequence of a divorce, the settlor covenanted that he or his personal representatives would pay to trustees in trust to pay to his divorced wife annually “such sum as after deduction of income tax at the standard rate for the time being in force & of every other tax on income for the time being in force shall leave a clear sum of £4,000.” The lady had subsequently remarried, & the settlor died:—*Held*: the exors. of the settlor were bound to provide a sum sufficient to discharge the income tax in respect of the annuity & such proportion of the total sur-tax payable by the annuitant as the sums upon which she is from time to time assessed to sur-tax in respect of the said annuity bear to the total amount of the assessment of the joint income of the annuitant & her husband for the purpose of sur-tax.—*Re HORLICK'S SETTLEMENT TRUSTS, COLLEDGE v. HORLICK*, [1938] 2 All E. R. 553; *affd.*, [1938] 4 All E. R. 602, C. A.

592c. — Devise “free & clear of all taxes & incumbrances whatsoever.”—*Re VEALF'S WILL & CODICILS, MALONE v. JAMES* (1931), 75 Sol. Jo. 780, C. A.

593. *Add. Annotations*:—*Consd. Re Armaghdale, Craig v. Armaghdale* (1928), 44 T. L. R. 239;

*Fleetwood-Hesketh v. Fleetwood-Hesketh*, [1929] 2 K. B. 55. *Folld. Re Hulton, Hulton v. Midland Bank Executor & Trustee, Ltd.* (1930), 99 L. J. Ch 316.

593a. *Application to sur-tax—Devise free of super-tax.*—Where a testator who died before 1927 has directed under his will that his trustees shall pay to an annuitant out of the income of the trust estate “a clear yearly sum after paying or deducting income tax & super-tax,” the proportion of the sur-tax payable in respect of the annuity under the provisions of Finance Act, 1927 (c. 10), s. 38, & Finance Act, 1928 (c. 17), s. 15, is payable out of the income of the trust estate. In every essential feature super-tax & sur-tax are the same tax.—*HULTON, Re, HULTON v. MIDLAND BANK EXECUTOR & TRUSTEE CO., LTD.*, [1931] 1 Ch. 77; 99 L. J. Ch. 316; 144 L. T. 343; 46 T. L. R. 348; 74 Sol. Jo. 233.

*Annotation*:—*Refd. Re Reckitt, Reckitt v. Reckitt*, [1932] 2 Ch. 144.

625. *Add. Annotation*:—*Refd. Re Shee, Taylor v. Stoger*, [1934] Ch. 345.

632. *Add. Annotation*:—*Refd. Re McKee, Public Trustee v. McKee*, [1931] 2 Ch. 145.

633. *Add. Annotation*: *Refd. Re Cox, Public Trustee v. Eve*, [1938] Ch. 556.

654. *Add. Annotation*:—*Folld. Re Thompson, Public Trustee v. Husband*, [1936] Ch. 676.

#### PART VI. SECT. 3, SUB-SECT. 2.

593 i. *Application to sur-tax—Liability of residue of estate—Method of calculation.*—Testator directed his trustees to pay to each of his two daughters an annuity of £5,000, & to hold the residue of his estate for his son in life & his son's children in fee; & further provided: “I hereby specially provide & declare that the income tax payable from time to time upon the said annuities . . . shall be payable out of . . . the income of the residue.” It had previously been decided that, under this provision, super-tax as well as income tax on the annuities was payable out of the income of the residue. Both daughters had income from other sources:—*Held*: the intention of testator with regard to sur-tax was that the income of the residue should be burdened only with the amount of tax which would have been payable if the annuities had been the only income of the annuitants.—*BAIRD'S TRUSTEES v. BAIRD*, [1933] S. C. 553.—*SCOT*.

n i. —*J.*—By his trust disposition & settlement testator directed his trustees to dispose of “the free annual income of the residue” of his means & estate between the date of his death, which was May, 1925, & Martinmas, 1931 (*inter alia*), as follows: (1) By paying to an adopted daughter “an annual allowance of £600,” which he declared to be alimentary; (2) by paying in certain events, to each of her daughters “an annual allowance of £100”; & (3) by paying, in certain events, to each of her sons “such an annual allowance as my trustees in their sole discretion . . . shall think right & proper, but not exceeding £100.” Testator also directed “My trustees shall accumulate whatever balance may remain of said annual income, all accumulations of income to be added to the capital of my estate & dealt with as residue.”—*Held*: the annual allowances fell to be paid under deduction of income tax.—*HUNTER'S TRUSTEES v. MITCHELL*, [1930] S. C. 978.—*SCOT*.

n ii. —*Bequest free of income tax & super tax.*—Testator bequeathed to his wife an annuity of “five thousand pounds to be paid free of income tax & super tax which shall be borne by my trust estate to the relief of my wife.” Testator's wife was possessed of income, apart from the annuity, amounting to £1,600 a year. She received from the Inland Revenue Authorities repayment of the personal allowances provided in the Income Tax Acts:—*Held*: (1) the testator's trustees were bound to pay a proportion of the total sur tax assessed upon his widow equivalent to the proportion which the amount of the annuity, with income tax & sur-tax thereon, bore to her total income; (2) in ascertaining the amount of the income tax & sur tax of which they were bound to relieve the widow, the trustees were not entitled to take into account, by way of deduction, the amount of the personal allowances repaid to her.—*RICHMOND'S TRUSTEES v. RICHMOND*, [1935] S. C. 585.—*SCOT*.

n iii. —“Free of all duties & taxes.”—An annuity given “to be paid clear & free from all deductions whatsoever & free of all duties & taxes” is to be paid free of both income-tax & unemployment-relief tax.—*Re RICHARDS, RICHARDS v. RICHARDS* [1935] N. Z. L. R. 909.—*N.Z.*

n iv. —*Excessive tax repaid—Whether annuitant entitled.*—A testator, who died in 1919, by his trust disposition & settlement directed his trustees to pay to his wife, who survived him, an alimentary annuity of “Three hundred pounds per annum free of all deductions including income tax.” From 1919 until 1927, when the widow intimated to the trustees that she elected to claim her rights of *jus relicte* & *terce*, & thereafter until 1931, when her claim was settled, the trustees paid to her the full amount of her annuity. Throughout the whole period they accounted to the Inland Revenue for income tax on the £300 at the current rate or rates, & in each

year they got the widow to reclaim a proportion of the tax paid by them, representing the personal allowances to which she was entitled. These claims over the period amounted to £630 17s. 6d., & as & when paid to the trustees by the Inland Revenue, they were credited to the trust. A question having arisen as to whether these sums fell to be repaid to the widow, or remained part of the general trust estate, a petition for directions was presented to the ct. by the sole trustee then acting:—*Held*: the widow was not entitled to the sums in question, the only obligation of the trustees being to keep her *indemnitas* *quoad* income tax, to the effect that, if more tax was paid than ought to have been paid, the excess, when recovered, belonged to the trust estate.—*THE MILNE'S TRUSTEES*, [1936] S. C. 706.—*SCOT*.

so. *Jurisdiction of court—Inland Revenue not represented.*—Under an agreement contained in missive letters, the proprietor of a business agreed to sell his interest in it for a sum payable in cash & an annuity “payable quarterly during his lifetime, but for a minimum of five years.” On his subsequent refusal to enter into a formal agreement embodying the terms of the missives, the purchaser brought an action for implement, & (*inter alia*) for declarator that the annuity fell to be paid under deduction of income tax. The Inland Revenue were not called as parties to the cause. Defender pleaded that the declaratory conclusion was incompetent in the absence of the Inland Revenue:—*Held*: the question whether the annuity was or was not payable under deduction of income tax could competently be determined although the representatives of the Inland Revenue had not been convened; & plea repelled.—*ALLEN (DAVID) & SONS, BILLPOSTING, LTD. v. INLAND REVENUE COMRS.*, [1933] S. C. 253.—*SCOT*.

st. *Intention of testator.*—*Re ROGERS* (1936), 5 F. L. J. (Can.) 213.—*CAN.*

662. *Add. Annotation* :—**Consd.** *Re Webster, Goss v. Webster*, [1937] 1 All E. R. 602.
708. *Add. Annotation* :—**Refd.** *Re Webster, Goss v. Webster*, [1937] 1 All E. R. 602.
777. *Add. Annotation* :—**Refd.** *British Russian Gazette & Trade Outlook, Ltd. v. Associated Newspapers, Ltd., Talbot v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616.

## Part VII.—Forfeiture and Extinguishment of Rentcharges and Annuities.

810. After this case add “**Money paid in ignorance of death of annuitant—Recovery of.**”—*See CONTRACT, No. 3081a.*”
814. *Add. Citation* :—138 L. T. 131.  
*Add. Annotations* :—**Refd.** *Re Draycott S. E.*, [1928] Ch. 371; *Armstrong v. Estate Duty Comr.*, [1937] 3 All E. R. 484.
821. *Add. Annotation* :—**Refd.** *Hyman v. Hyman, Hughes v. Hughes*, [1929] P. 1.

## Part VIII. — Recovery of Rentcharges and Annuities.

906. *Add. Annotation* :—*As to* (2) **Expld.** *Grant v. Edmondson*, [1931] 1 Ch. 1.
907. *Add. Annotation* :—**Consd.** *Grant v. Edmondson*, [1931] 1 Ch. 1.
908. *Add. Annotation* :—**Consd.** *Grant v. Edmondson*, [1931] 1 Ch. 1.
911. *Add. Annotation* :—**Folld.** *Grant v. Edmondson*, [1931] 1 Ch. 1.

912a. ———.—]—The benefit of a covenant to pay a rentcharge does not run with the rentcharge at law, but the covenant is only in gross.

By deed dated Apr. 26, 1867, the Earl of W., the tenant for life of the W. estates, in exercise of certain powers under a private Act, conveyed part of the settled lands to E. in fee simple; & E. granted thereout to the Earl & the person or persons who would for the time being have been entitled to the receipt of the rents & profits thereof if the conveyance had not been made yearly & for every year for ever thereafter the rent of £142 7s. 3d. There were the usual powers of distress & entry & a covenant by the grantee for himself, his heirs, exors., administrators & assigns with the Earl his heirs & assigns & other the person or persons who would for the time being have been entitled as aforesaid that he, the grantee, his heirs & assigns, would pay the yearly rent thereby reserved to the person or persons entitled thereto under the reservation thereinbefore contained. The Earl died in 1882, & under & by virtue of various deaths & two successive disentailing deeds & resettlements the W. estates passed ultimately to the present

infant tenant in tail & became vested in the plffs. as statutory owners thereof. In none of those title deeds was there an express assignment of the benefit of the covenant to pay the rentcharge. E. died in 1887, leaving a will of which the first deft. was exor., he & the other defts. being the present trustees thereof. In 1920 the trustees sold & conveyed the land conveyed to their testator in 1867 to W. in fee simple, subject to the rentcharge & to the covenants on the part of the grantee contained in the conveyance of 1867. In 1927 W. became bkpt., & by an order of Aug. 8, 1929, the bkpt.'s interest in the land was vested in plffs. in fee simple. Payments of the rentcharge having ceased to be made since Dec. 25, 1927, plffs. brought this action for payment by defts. of £231, the arrears which accrued down to the date when the land was vested in them :—**Held** : (1) notwithstanding the absence of express words of limitation a perpetual rentcharge had been effectually created; (2) the benefit of a covenant to pay the rentcharge did not run with the rentcharge; (3) Real Property Act, 1845 (c. 106), s. 5, now Law of Property Act, 1925 (c. 20), s. 56, did not affect the second question, as the sect. only applied to covenants which ran with the land or property.—**GRANT v. EDMONDSON**, [1931] 1 Ch. 1; 100 L. J. Ch. 1; 143 L. T. 749, C. A.

948. *Add. Annotation* :—**Consd.** *Grant v. Edmondson* (1931), 100 L. J. Ch. 1.
953. *Add. Annotation* :—**Refd.** *St. Pierre v. South American Stores (Gath & Chaves), Ltd.*, [1936] 1 K. B. 382.

## REVENUE.

## Part I.—Authorities Controlling the Revenue.

2. *Add. Annotation*:—*Re*fd. North Charterland Exploration Co. (1910), Ltd. v. R. (1930), 99 L. J. Ch. 483.
- 3a. *Appropriations in aid—Payment for armed guards for British ships.*—There is no legally enforceable duty on the Crown to protect British subjects from danger in foreign parts & to provide armed guards for British ships. Shipowners who require those services must

pay for them if the Crown requires them to pay. The payment, when made, is sanctioned & controlled by Parliament in the Appropriation Act under the system of appropriations in aid under the Public Accounts & Charges Act, 1891 (c. 24).—CHINA NAVIGATION CO., LTD. v. A.-G., [1932] 2 K. B. 197; 101 L. J. K. B. 478; 147 L. T. 22; 48 T. L. R. 375; 18 Asp. M. L. C. 288, C. A.

## Part IV.—Duties on Land Values.

53. *Add. Annotation*:—*Generally*, *Re*fd. Miller (Lady) v. I. R. Comrs. (1930), 15 Tax Cas. 25.
- 55a. — *What amounts to.*—*Re* WINDSOR STEAM COAL CO. (1901), LTD. (1928), 165 L. T. Jo. 32.
- 55b. — *Whether rent includes supply of free coal.*—Under a mining lease the rent included an obligation to deliver a certain quantity of coal to the lessor or other such persons as they appoint & to their agents & to such person or persons as such agents shall appoint. The value of the supply of such coal was excluded from the assessment of rent for the purposes of Mineral Rights Duty & Royalties Welfare Levy under Finance (1909-10) Act, 1910 (c. 8), s. 20:—*Held*:

the value of such supply of coal was wrongly excluded. "Rent" & "rental value" in the above sect. are not confined to rent as known at common law, but apply to every part of the consideration for the right to mine the minerals.—HATHERTON v. INLAND REVENUE COMRS., [1936] 1 All E. R. 608; 80 Sol. Jo. 386; *sub nom.* INLAND REVENUE COMRS. v. HATHERTON (LORD), [1936] 2 K. B. 316; 105 L. J. K. B. 285; 155 L. T. 415; 52 T. L. R. 368.

61. For "[1914] 2 K. B. 192" read "[1914] 3 K. B. 192."

*Add. Annotation*:—*Re*fd. Simbro Trading Co. v. Posograph Parent Corp'n. [1929] 2 K. B. 266.

## Part V.—Customs Duties.

- 70a. "Baggage of passengers"—*What amounts to—Parcels of cinematograph films.*—Suppliant, who was a producer of cinematograph films, was informed towards the end of June,

1925, that such duties would probably be imposed. He went to Berlin, where he had six films, which he packed in cardboard boxes. He took them to the railway station

## PART II. SECT. 1, SUB-SECT. 1.

sa. *Power to reward informer—Validity of agreement before receiving information.*—*Held*: Inland Revenue Regulation Act, 1890, s. 32, does not warrant the Comrs. of Inland Revenue, or the Treasury, before receiving information from an informer, in entering into an agreement with him as to the payment of a reward.—RITCH v. LORD ADVOCATE, [1932] S. C. 138; 18 Tax Cas. 18.—SCOT.

sc. *Tariff Board—Extent of jurisdiction.*—The Tariff Board, as constituted under c. 55 of the statutes of 1931, has no authority to determine questions of law as distinct from questions of fact. The Tariff Board has no authority under that Act to determine that the orders of the Minister of National Revenue, fixing the values for duty of goods, under the authority of sect. 3 of the Customs Act prior to the enactment of c. 7 of 1932-33, were annulled & ceased to be effective from the date of the last-mentioned enactment in respect of goods entitled to entry under the British Preferential Tariff. The decisions of the Tariff Board when acting under the provisions of Part II. of its constitutory Act, as to the value of goods for duty purposes, are

subject to the approval of the Minister of National Revenue.—*Re* TARIFF BOARD OF CANADA JURISDICTION REFERENCE, [1934] S. C. R. 538; 4 D. L. R. 193.—CAN.

## PART II. SECT. 2, SUB-SECT. 2.—A.

13 i. *Obstruction of officer—What amounts to.*—A person driving a car who refuses to stop when ordered to by a Customs officer is guilty of wilfully obstructing a public officer.—R. v. GRIFFIN, [1935] 2 D. L. R. 503; 9 M. P. R. 84; 63 C. C. C. 286.—CAN.

sf. *Improper refusal of importation—Injunction.*—Injunction granted against member of customs department for preventing the importation of the Pacific Daily Racing Form as being in contravention of sect. 235 (g) of the Criminal Code.—HARDY v. HOFGOOD (1936), 65 Can. C. C. 400; 50 B. C. R. 392.—CAN.

## PART II. SECT. 2, SUB-SECT. 2.—D. (b) ii.

39 ii. — *Seizure outside three mile limit.*—MASON v. COFFIN, [1928] 2 D. L. R. 263; 49 Can. Crim. Cas. 276.—CAN.

sg. *Petition of right.*—The Crown is liable on a petition of right for the

wrongful seizure of goods by customs officer, & such petition may be brought by a friendly alien.—MASSEIN v. R., [1934] Ex. C. R. 223; [1935] 1 D. L. R. 701.—CAN.

## PART V. SECT. 1, SUB-SECT. 1.

bb i. — *Meaning of.*—"Value for duty" wherever used in the Customs Act & amendments has reference to the basis on which the true amount of duty *ad valorem* is payable, & to nothing else.—R. v. CORNET, [1928] 2 D. L. R. 767; 49 Can. Crim. Cas. 200; 61 O. L. R. 583.—CAN.

so. *Goods transferred within territorial waters.*—Where goods are transferred within the territorial waters of Canada, without the intention of fraudulently relanding or bringing the same back into Canada, no offence is committed under Customs Act.—COOK v. R., [1928] Exch. C. R. 49.—CAN.

st. *Offence of smuggling—Not complete until opportunity of reporting to Customs House.*—R. v. LANGILLE, [1932] 2 D. L. R. 226; 57 C. C. C. 151; 4 M. P. R. 473.—CAN.

sg. — *Vessel stranded to avoid capture.*—Sect. 203, para. 4, of Customs Act, which applies only to vessels arriving within three miles of the coast of Canada, & sect. 11 of the

on June 29, 1925, & registered them through to Victoria Station, London. Suppliant & his wife travelled by the same trains & boat in which the films were conveyed. At Folkestone, in answer to the inquiry by the Customs officer whether he had anything to declare, suppliant produced the registration receipt & pointed out the boxes of films, but the Customs officer said he had no authority to deal with them there & then. At Victoria Station, which was reached at 9.30 p.m. on June 30, after the latest hour for entry of goods, the films were detained on the ground that they were liable to forfeiture for non-entry. Later, the Customs authorities offered to waive the forfeiture on payment of the duty under the new Act to which they

were liable if entered after June 30, but suppliant declined to pay the duty. After correspondence & negotiations extending over several years, the suppliant claimed by petition of right the return of the films & damages for their detention:—*Held*: the films were not "baggage of passengers" within Customs Consolidation Act, 1876 (c. 36), s. 66, but were merchandise, & not having been duly entered with the Customs on June 30, 1925, they were liable to the duty imposed by the Finance Act, 1925 (c. 36).—*BUCKLAND v. R.*, [1933] 1 K. B. 767; 102 L. J. K. B. 404; 148 L. T. 557; 49 T. L. R. 244, C. A.

*Annotation*:—*Reid*. Piddington v. Co-operative Insurance Society, Ltd., [1934] 2 K. B. 236.

same Act, which impliedly allows the master of a vessel opportunity of complying with its conditions before being deemed to have committed the offence of smuggling, have no application under the following circumstances of this case: a vessel, on board of which were both appts., having cleared from Lévis, opposite Quebec, for Gaspé, stopped somewhere below Rimouski to take over from a schooner a cargo of liquor & then turned back to try & land these smuggled goods at some point on the shores of the St. Lawrence, & then, to avoid capture by the Govt. patrol, the vessel was deliberately stranded & abandoned by its crew on the shores of Beaumont, within the limits of the harbour of Quebec, several hundred miles inland.—*CHESNEL v. R.*, *DAIGLE v. R.*, [1934] S. C. R. 519; 4 D. L. R. 530; 62 C. C. C. 81.—*CAN.*

*sh. Validity of coasting regulations.*—Regs. 4 & 12 of those brought into force by Order in Council of Apr. 17, 1883, which regs. 4 & 12 were made under sects. 13 & 125 (3) of Customs Act, 1877, & provided (*inter alia*) that an officer of customs might go on board a coasting vessel & if any goods had been unlaid therefrom before the master had reported to a customs officer, the goods & vessel should be forfeited, etc., & that no goods should be put out of any coasting vessel while on her voyage by river, lake or sea, were legally operative, notwithstanding that the procedure described by sect. 4 (1) of Merchant Shipping (Colonial) Act, 1869, requiring that an Act or Ordinance of the legislature of a British possession regulating its coasting trade should contain a suspending clause providing that the Act or Ordinance should not come into operation until Her Majesty's pleasure thereon had been publicly signified in the British possession, was not observed. The matters dealt with in said sects. 13 & 125 (3) of the Customs Act, 1877, & said regs. 4 & 12 were not "regulation of the coasting trade" within sect. 4 (1) of the Imperial Act of 1869.—*R. v. SHEARWATER CO., LTD.*, [1934] S. C. R. 197; 3 D. L. R. 544.—*CAN.*

*sl. Concealment—No manifest.*—Where there is no manifest there can be no concealment, & therefore no offence under Customs Act, 1927, s. 4.—*R. v. BOUDREAU*, [1935] 1 D. L. R. 725; 8 M. P. R. 405; 63 Can. C. C. 181.—*CAN.*

#### PART V. SECT. 1, SUB-SECT. 2.

*e i.* —.—.—*MORIN v. R.* (1927), 49 Can. Crim. Cas. 231; 43 Que. K. B. 192.—*CAN.*

*so. Necessity for duty to comply with Act.*—*R. v. BORKOWSKI* (1934), 63 Can. C. O. 65.—*CAN.*

#### PART V. SECT. 1, SUB-SECT. 4.

*r i.* —.—.—*What amounts to.*—A

ship is seized & forfeiture takes place when a "hovering" ship fails to stop on being so ordered by the customs officer.—*R. v. MASON*, [1935] 2 D. L. R. 161; 9 M. P. R. 97; 63 Can. C. C. 97; *affd.*, [1935] S. C. R. 513.—*CAN.*

*t (p. 229) i.* —.—.—.—*Held*: Inasmuch as by the first part of sect. 181 of Customs Act, which deals with the penalty for having liquor in one's possession illegally, it is provided that the offence exists "whether (the party is) the owner thereof or not," & in the second part, where provision is made for the forfeiture of the liquor or vehicle in which it is being transported, the words "whether the owner thereof or not" are omitted, if it is proved that the vehicle used is the property of an innocent party who claims it, the Crown has no power to forfeit the same.—*R. v. KRAKOWER, DAHLBERG & EKLUND & CONTINENTAL GUARANTY CORP. OF CANADA, LTD.*, [1931] Ex. C. R. 137; 56 Can. C. C. 150; *revid.*, 57 Can. C. C. 96, [1932] 1 D. L. R. 316.—*CAN.*

*t (p. 229) ii.* —.—.—.—*Held*: there is no material dissimilarity in the essential provisions of Excise Act & Customs Act pertaining to seizure & forfeiture; claimant having failed to prove that his boat had been illegally seized & forfeited, the forfeiture was held good & valid, Customs Act attaching to the vehicle unlawfully used the penalty of forfeiture, independently of the guilt or innocence of the owner.—*SANDNESS v. R.*, [1933] Ex. C. R. 78; 4 D. L. R. 662; 60 C. C. C. 220.—*CAN.*

*so. For failure to answer questions—By master of vessel.*—*Held*: the delivery of the report required by Customs Act, s. 96 (1), to the Customs officer by the master was not the "answer of questions demanded of him" referred to in Customs Act, s. 216.—*PARKER v. R.*, [1928] Exch. C. R. 36.—*CAN.*

*sl. Power of election as to penalty—Whether power exercisable by Revenue Commissioners or by Attorney-General.*—*Held*: by the High Ct., on a case stated, the power of election which is conferred upon the Revenue Comrs., as the successors of the Comrs. of Customs, as to which of the two penalties prescribed by Customs Consolidation Act, 1876, s. 186, shall be imposed for any offence under that section, must be exercised by them, & not by the A.-G.—*A.-G. v. PERCY*, [1929] 1 R. 514.—*IR.*

*sg. Illegal unshipment—Forfeiture of bonds—Forged landing certificates.*—The Exchequer Ct. has jurisdiction in an action by the Crown upon a bond entered into pursuant to the Inland Revenue Act of Canada upon the withdrawal of goods from a bonded warehouse for the purpose of export. Upon the true construction of the printed departmental form of bond used in

those circumstances the bond becomes void if the obligor accounts for the goods to the satisfaction of the collector of inland revenue. That condition is performed where the collector, acting upon apparently genuine official documents certifying the landing of the goods at the foreign port, has cancelled the bond by making an entry in his book of record, even if, without the knowledge of the collector or obligor, the documents have been fabricated.—*CONSOLIDATED DISTILLERIES, LTD. v. R.*, [1933] A. C. 508; 102 L. J. P. C. 66; 149 L. T. 318; 49 T. L. R. 506, P. C.—*CAN.*

*sk. Damages—Measure of.*—On assessment of damages for run-running, damages held to be the value of the rum where purchased, together with cost of containers, local tax & freight, but profit on cargo was not included as there was no evidence of an available market at the port of seizure.—*CROSS v. MCCARTHY*, [1931] 3 M. P. R. 414.—*CAN.*

*so. Proceedings for treble value—Bar to summary proceedings.*—When the Revenue Comrs. have elected, under sect. 186 of Customs Consolidation Act, 1876 (c. 36), to proceed for a penalty of treble the value, including the duty, of smuggled goods, & have directed a prosecution under that sect. a District Justice has no jurisdiction to apply the provisions of sect. 233 of the same Act & proceed summarily, notwithstanding such election & direction, to impose a penalty amounting to the single value, including the duty, of such goods. Only in the absence of such direction & election can the District Justice proceed summarily.—*A.-G. v. TRAYNOR*, [1935] 1 R. 155.—*IR.*

*sp. Harboursing uncustomed goods—Whether proof of mens rea necessary.*—*Def.* in a customs prosecution was charged with having knowingly harboured uncustomed goods, viz., five bullocks & two heifers, imported from the Irish Free State into Northern Ireland, with intent to defraud His Majesty the King of the duties thereon, contrary to sect. 186 of Customs Consolidation Act, 1876. It was also charged against him that he did not, when required, furnish proof as provided under sect. 16 of Finance Act, 1934, to the satisfaction of the Comrs. of Customs & Excise, that the cattle had not been imported from the Irish Free State, & that under sect. 186 of Customs Consolidation Act, 1876, he had incurred a penalty of £225, being treble the duty paid value of the cattle, for which the Comrs. of Customs had elected to sue. A statement had been given by *def.* to the police in which he professed to account for the history of the cattle. No evidence was given at the hearing of the complaint at petty sessions contradicting *def.*'s statement. At the conclusion of complainant's case before the justices,

80. *Add. Annotation* :—**Refd.** British Trawlers Federation, Ltd. v. London & North Eastern Ry. Co. (1932), 48 T. L. R. 491.

80a. — To take reasonable precautions.]—Defts. were a firm of furriers who had imported from Russia a consignment of squirrel skins in Aug. 1934. Out of the consignment ten packages were stored by defts. in the bonded warehouse of plffs. Whilst in the warehouse they were stolen on the night of Sept. 7-8, 1934. Plffs. as bonded warehousemen were compelled by law at the demand of the Customs to pay the duties on those packages out of their own moneys. Defts. had refused to supply plffs. with the necessary funds for that purpose. Plffs. claimed from defts. the amount of the duties, £823 17s. 10d., which they had thus been called upon to pay to the Customs, on the ground that, as between themselves & defts., defts. were primarily liable for the duties. Defts. counterclaimed for £4,119 9s. 3d. as being the value of the furs, on the ground that the furs were stolen by reason of the negligence of plffs. & of their failure to exercise due care in the safe keeping of the goods :—**Held** : (1) the duty of plffs. with regard to the care of the goods could not be put higher than that they must do what was reasonable. They were not insurers & they had established their defence by satis-

factory evidence that the precautions they took were such as reasonable & prudent care demanded. The counterclaim accordingly failed, as did the defence to the claim so far as it was based on the allegation that the loss was due to want of care in the custody of the goods ; (2) the Customs duties on the goods became due from the importers at the date of importation & remained so due until the goods were discharged from the custody of the Customs ; (3) plffs. having been compelled under sect. 85 of Customs Consolidation Act, 1876 (c. 36), to pay the duties on defts.' goods were entitled to be reimbursed the amount of the duties they had so paid.—**BROOK'S WHARF & BULL WHARF, LTD. v. GOODMAN BROS.**, [1937] 1 K. B. 534 ; [1936] 3 All E. R. 696 ; 106 L. J. K. B. 437 ; 156 L. T. 4 ; 53 T. L. R. 126 ; 80 Sol. Jo. 991 ; 42 Com. Cas. 99, C. A.

*Annotation* :—**Refd.** The Stranna, [1937] P. 130.

85. *Add. Annotation* :—**As to** (1) **Appld.** Brook's Wharf & Bull Wharf, Ltd. v. Goodman Bros., [1937] 1 K. B. 534.

85a. — — — Goods stolen—Duty paid by warehousemen.]—**BROOK'S WHARF & BULL WHARF, LTD. v. GOODMAN BROS.**, No. 80a, *ante*.

85b. — Duty due on first entry.]—**BROOK'S WHARF & BULL WHARF, LTD. v. GOODMAN BROS.**, No. 80a, *ante*.

## Part VI.—Excise Duties.

SUB-SECT. 1.—**BETTING DUTY** (Vol. XXXIX., p. 232).

**NOTE.**—*This Duty was abolished by Finance Act, 1930 (c. 28), s. 4.*

Add the following case :—

93a. Who liable to duty — Club — Managing

totalisator.]—A limited co. was the proprietor of a club formed for social intercourse. Upon the club premises betting on horse races was transacted through the instrumentality of two machines, called totalisators, owned by the co. & worked by the co.'s servants. Any member desiring to

it was submitted on behalf of deft. that as no evidence of *mens rea* on the part of deft. had been given, deft. was entitled to a direction. On behalf of complainant it was submitted that by reason of the provisions of sect. 16 (2) of Finance Act, 1934, it was not necessary in proceedings under sect. 186 of Customs Consolidation Act, 1876, claiming penalties for harbouring uncustomed goods to establish *mens rea* on the part of deft. The justices refused the application for a direction made on behalf of deft. & convicted deft. of the offence charged but stated a case for the opinion of the King's Bench Division :—**Held** : the justices were wrong in law in holding that it was not now necessary for the complainant by reason of the provisions of sect. 16 (2) of Finance Act, 1934, to establish *mens rea* on the part of deft., & the onus of proving guilty knowledge still lay upon the prosecution.—**R. (KING) v. GASS**, [1936] N. L. 144.—**IR.**

**sq. Evasion of duty—Onus of proof.**]—Deft. was charged at petty sessions on Sept. 26, 1934, with being knowingly concerned in an attempted evasion of customs duty by dealing with two cattle imported from the Irish Free State into Northern Ireland with intent to defraud, contrary to sect. 186 of Customs Consolidation Act, 1876. The principal evidence against deft. was a certificate signed by order of the Comrs. of Customs & Excise to the

effect that some of the cattle in respect of which he was charged were found in the possession or control of C. O'D., on July 13, & that on July 15 some of the same cattle were found in possession of A. M. & that C. O'D. & A. M. being required to furnish proof that the goods had not been imported from the Irish Free State or that customs duty had been paid on them, did not furnish proof to the satisfaction of the Comrs. of Customs & Excise as provided by sect. 16 of Finance Act, 1934. The justices convicted deft. of the offence with which he was charged, but stated a case for the opinion of the King's Bench Division as to whether they were right in law in convicting deft. of the charge, & whether the certificate related only to the goods & was valid & admissible in evidence against any person dealing with the goods, whether such person is or is not named in the certificate, & whether if admissible the certificate casts the onus of proof upon deft. though not named in the certificate :—**Held** : the certificate was wrongly admitted in evidence against deft. & his conviction should not stand ; also, as deft. was never required to explain his possession of the cattle & was afforded no opportunity of making an explanation, sect. 16 of Finance Act, 1934, never applied to his case, & the onus of proof rested on the prosecution & not on deft.—**R. (EMERSON) v. HAUGHEY**, [1936] N. L. 186.—**IR.**

### PART V. SECT. 2.

**sm. Destruction of Government warehouse—No liability for warehouse charges.**]—Rum, stored in resp.'s name in a Govt. public warehouse in Port of Spain from & after Aug. 30, 1930, was destroyed with the warehouse by fire on June 25, 1932. In a suit by the A.-G. of Trinidad & Tobago against resp. for warehousing charges at the monthly rental rate provided for in the rules made under the Ordinance :—**Held** : that the Ordinance provided a complete scheme for the recovery of warehousing charges from the owner of spirits warehoused on his withdrawal or re-warehousing of the spirits ; a right to recover charges by suit was not contemplated & could not be extracted from the terms of the Ordinance a contingency such as the present was not provided for & the Govt. had no right to suit resp.

Judgment of the Supreme Ct. affirmed for a different reason : there was not a frustrated agreement but no agreement at all, the rights of the parties being wholly prescribed by the Ordinance.—**A.-G. OF TRINIDAD & TOBAGO v. GORDON GRANT & CO., LTD.**, [1935] A. C. 532 ; 104 L. J. P. C. 82 ; 153 L. T. 441, P. C.—**WEST INDIES.**

### PART VI. SECT. 4, SUB-SECT. 1.

**sh. On what bets exigible—Ready-money office-betting.**]—**SMITH v. ADAM**, [1929] S. C. (J.) 33.—**SCOT.**

**sj. — Any bet by bookmaker—**

use these machines for the purpose of backing horses applied to join the club pool, &, if elected as a pool member, he became entitled on payment of a small subscription to operate, & for this purpose he was supplied with credit vouchers of varying amounts. Under the rules of the pool 10 per cent. of the gross amount of the stakes on each race was retained by the co. in respect of the facilities provided & the expenses of management, & the balance was divided among the backers, called in the rules "investors," of the winning horse in the proportion of their stakes. The winnings for each week were paid by the co. from its own funds irrespective of any possible loss owing to dishonour of the vouchers. The rules provided that the club acted simply as a distributing agent. Upon an information preferred by the A.-G. against the co. alleging that the co. was liable to pay betting duty in respect of wagers on horse races made by members of the club by means of these machines it was admitted that the co. was a bookmaker & that the transactions in question were bets within Finance Act, 1926 (c. 22), s. 15:—*Held*: the bets were not made with the co., but by the members *inter se*, & the claim of the Crown failed.—*A.-G. v. LUNCHEON & SPORTS CLUB, LTD.*, [1929] A. C. 400; 98 L. J. K. B. 359; 141 L. T. 153; 45 T. L. R. 294, II. L.

*Annotations*:—*Consd.* National Parl Mutuel Assocn., Ltd. v. R. (1930), 47 T. L. R. 110; Everett v. Shand (1931), 145 T. L. R. 216; Shuttleworth v. Leeds Greyhound Assocn., [1933] 1 K. B. 400; Streatham Cinema, Ltd. v. John McLauchlan, Ltd. (1933), 31 L. G. R. 219. *Apld.* Elderton v. United Kingdom Totalisator Co., [1935] Ch. 373. *Refd.* Baker v. Sillitoe (1931), 47 T. L. R. 632; Daniels v. Pinks (1930), 100 L. J. K. B. 337; Samuel v. Adelaide Club, Ltd., [1931] 2 K. B. 69.

**93b. — Employee of bookmaker.**—A bookmaker, who held a bookmaker's certificate & also an entry certificate in respect of certain premises, had in his service at the premises an employee, who received a weekly salary

& was the only person employed there. The employee had sole charge of the premises in the absence of the bookmaker, who attended race meetings in other towns during the flat racing season, & had on one occasion been absent from the premises for ten days consecutively. Although the employee had no authority to open new accounts in the absence of his employer, he could accept personal bets & bets over the telephone, & he had said that he had no responsibility, but answered the telephone & recorded messages. On a certain date the employee when in sole charge of the premises was seen to take two or three bets on the telephone & enter them upon a slip, he himself not holding a bookmaker's certificate. On proof of these facts:—*Held*: the employee carried on business as a "bookmaker" within Finance Act, 1926 (c. 22), s. 18 (1).—*LAKE v. CRONIN, HUNT v. CRONIN*, [1929] 1 K. B. 31; 98 L. J. K. B. 47; 140 L. T. 118; 92 J. P. 191; 44 T. L. R. 819; 72 Sol. Jo. 546; 28 Cox, C. C. 554; 26 L. G. R. 568, D. C. **Payment under mistake of fact.**—*See* MISTAKE, No. 90a, *ante*.

SUB-SECT. 6.—OTHER CASES (Vol. XXXIX., p. 232).

**93c. Safeguarding Acts—Construction—Duty of court to consider intention of Legislature—Duty on "packing or wrapping paper."**—*POWELL LANE MANUFACTURING CO., LTD. v. PUTNAM* (1928), [1931] 2 K. B. 305, n.; 100 L. J. K. B. 347, n.

*Annotation*:—*Folld.* Newman Manufacturing Co. v. Marrable (1930), 100 L. J. K. B. 315.

**93d. — — — — — Duty on "buttons."**—By Finance Act, 1928 (c. 17), s. 9 (1), a customs duty is imposed on buttons imported into the United Kingdom. By sect. 9 (3) the expression "buttons" means buttons made of

*Street bet.*—A licensed bookmaker who made a bet in the public street under circumstances which might possibly have made him liable to prosecution under Street Betting Act, 1906, held liable to pay the betting duty imposed by Finance Act, 1926, s. 21, in respect of said bet. The section is not limited to bets either upon a horse race or upon a greyhound coursing contest, but the words "&, in every other case, 5 per cent. of the amount of the bet" cover every other case of a bet made by a bookmaker.—*A.-G. v. MEETAN*, [1932] 1 R. 61.—*IR.*

*sk. Statutory power to issue "tax-paid betting pads"—Authorised issue of "betting sheets"—Valid.*—*Held*: regulations made by the Revenue Comrs. under Finance Act, 1926, s. 25, by which provision was made for the issue of "official betting sheets" were *intra vires*.—*A.-G. v. M'LOUGHLIN*, [1931] 1 R. 430.—*IR.*

#### PART VI. SECT. 4, SUB-SECT. 6.

*e. Affd. sub nom. DOMINION PRESS, LTD. v. CUSTOMS & EXCISE MINISTER*, [1928] A. C. 340; 97 L. J. P. C. 91; 139 L. T. 338.

**i.** ——— *Equitable mortgage on pledgee realising security.*—The sales tax was not intended to be imposed upon the person realising, by means of sale, property pledged to him to secure a debt; a going concern was in contemplation.—*R. v. DOMINION BANK*, [1930] 1 D. L. R. 664; 11 C. B. R. 152; 64 O. L. R. 448.—*CAN.*

**ii.** ——— *Retail florist.*—A co. which carried on business as a retail

florist went into voluntary liquidation. In the course of its business, both prior to & during the liquidation, the co. (*inter alia*), made up & sold wreaths, bouquets, posies, floral baskets & sheaves of flowers. Neither the co. nor the liquidator were registered as a manufacturer or as a wholesale merchant under Sales Tax Assessment Acts, 1930–31. During the course of the liquidation the liquidator sold the office furniture of the co., which had been acquired prior to Aug. 1, 1930. The co. was assessed for sales tax both on the sales of the floral articles & on the sale of the office furniture:—*Held*: the co. was a manufacturer within Sales Tax Assessment Acts, 1930–31, & therefore sales tax would have to be paid on the sales of the floral articles. Also, as the co. was a manufacturer, the co. was liable to pay sales tax on the sale of the office furniture, such articles, even though not manufactured by the company, being manufactured goods within the Acts.—*Re SEARIS, LTD.* (1932), 49 N. S. W. N. 195; 2 A. T. D. 129.—*AUS.*

**iii.** ——— *Shorthand writers & typists.*—Defts. were professional shorthand writers licensed under the Evidence Act, 1928 (Vict.), & typists. Their business consisted chiefly of reporting judicial proceedings pursuant to the provisions of Evidence Act. They were remunerated for this work by fees prescribed under the Act, which consisted of fees specified for attendance at the proceedings, including the taking of notes, & fees calculated by the folio for transcripts supplied to the parties.

Sometimes, with the consent of the parties, they supplied transcripts to other persons. They also reported conferences & meetings of various bodies. Occasionally they were instructed to take shorthand notes & not to supply a transcript, & sometimes to make copies of documents. Defts. usually supplied the paper & other materials required for the preparation of transcripts. For work done otherwise than under Evidence Act their fees were fixed by private arrangement, & in general approximated to those chargeable under the Act:—*Held*: defts. were not engaged in the manufacture or production of goods or commodities within Sales Tax Assessment Act (No. 1), 1930, & were, therefore, not obliged to register or give security thereunder.—*ADAMS v. RAY*, [1932] Argus L. R. 87; 46 C. L. R. 572.—*AUS.*

**iv.** ——— *Distributing agent—Goods imported in parts & assembled.*—Deft. co. is the distributing agent in New South Wales & Queensland of a well-known English make of motor cycles. The motor cycles are imported by deft. co. from England in cases, each case containing all the parts necessary to complete a motor cycle, with the exception of tyres & tubes. Before exportation the parts of each cycle are assembled &, with old tyres & tubes retained for the purpose, the motor cycle is submitted to a practical test on a road. Upon arrival at deft. co.'s works in Sydney the parts are removed from the particular case & re-assembled, usually by a lad with the aid of a spanner,



any material, & whether finished or unfinished, of a description commonly used for the fastening or decorating of wearing apparel or household linen, not being buttons forming part of any other article. Beads or button blanks, nearly spherical in shape, made of trocas shell & perforated by one hole were imported into the United Kingdom. After grading them the importers made or completed the making of them into shoe-

buttons in the United Kingdom, by the insertion of shanks by means of a machine into & through the holes, & then sorting, cleaning, dyeing, repolishing & resorting them for shade. The cost of the shanking was one-seventh of the total cost of the completed article; material, labour & a proportion of overheads:—*Held*: in deciding what is the meaning of the expression "unfinished" button in sect. 9 (3), the ct. should

& tyres & tubes locally purchased having been fitted thereto, the motor cycle is then ready for sale:—*Held*: deft. co. is not a manufacturer within Sales Tax Assessment Act (No. 1), 1930, & is not obliged to register as such.—*IRVING v. MUNRO & SONS, LTD.* [1932], 46 C. L. R. 279.—*AUS.*

**n i.** — *Imported goods*—*Change in form on coming out of bond.*—*Held*: where goods imported are so changed before taking them out of the bonded warehouse for consumption that they take on a form altogether different from that in which they were imported, the sales tax, under the Special War Revenue Act, 1915, should be calculated on the sale price of the goods after such change, & not upon the duty-paid value thereof as imported in bulk.—*R. v. DOMINION DISTILLERY PRODUCTS CO.*, [1928] Exch. C. R. 170.—*CAN.*

**n ii.** — *Exempting regulation of Minister of Customs & Excise*—*Necessity for strict compliance.*—*A.-G. FOR CANADA v. GOLDBERG (Ont.)*, [1929] 1 D. L. R. 711.—*CAN.*

**n iii.** — *Sale by manufacturer to sales agency—Tax computed on price charged by sales agency to trade.*—*R. v. CAPUANO & PASQUALE CO. (Que.)*, [1929] 1 D. L. R. 1004.—*CAN.*

**n iv.** — *—*—*A.-G. FOR CANADA v. COLEMAN PRODUCTS CO. (Ont.)*, [1929] 1 D. L. R. 658.—*CAN.*

**n v.** — *On beverages.*—*The word "beverages" in Sched. II. of Special War Revenue Act, 1915, controls the whole classification of the products referred to in that portion of the sched. which is introduced by said word. The product in question herein which was sold by deft. to "bottlers" & after certain ingredients were added to it by the latter, was sold by them to the consuming public:—Held: not to be a "beverage" in the condition in which it was when sold by deft.*—*R. v. WHISTLE CO. (OF CANADA), LTD.*, [1929] 3 W. W. R. 30; 38 Man. L. R. 347; *affd.*, [1930] 1 W. W. R. 92; 1 D. L. R. 1000; 38 Man. L. R. 420.—*CAN.*

**n vi.** — *Market price.*—*The shares of both deft. cos. outside of qualifying shares, were owned & held by P. Co. of Delaware, U.S.A. Previous to 1924, C. Co., Ltd., manufactured & sold soap & toilet articles at Toronto & in that year P. M. Co. (Ontario), Ltd., was organised to take over the manufacturing and of the business. The business of both cos. was carried on in the same premises & the officers of both were the same. The manufacturing co. sold the major portion of its products to the selling co. on the basis of costs plus 15 per cent. profit. The Crown claimed that the manufacturing, or alternatively both cos. were liable for the sales tax upon the basis of the sales price to the public by the selling co., namely, the market price.—Held: the selling price arranged between the two deft. cos. was not the sale price within the statute. In a taxing statute where the tax is based on the selling price of goods, sale price can only mean the market price unless there are express words saying it is some other kind of price.*—*R. v. COLGATE-PALMOLIVE-PEET CO., LTD.*

& PALMOLIVE MANUFACTURING CO. (ONTARIO), LTD., [1932] Ex. C. R. 120; varied *sub nom.* PALMOLIVE MANUFACTURING CO. (ONTARIO), LTD. v. R. & SOLGATE-PALMOLIVE-PEET CO., LTD., R. v. COLGATE-PALMOLIVE-PEET CO., LTD. & PALMOLIVE MANUFACTURING CO. (ONTARIO), LTD., [1933] S. C. R. 131; 2 D. L. R. 81.—*CAN.*

**n vii.** — *Selling price.*—*Resp. co. was engaged in the business of wholesale dealers in, & dyers & dressers of, raw furs: it purchased raw furs or skins, dressed & dyed them & then sold them to other furriers or to retailers. Resp. paid the tax computed on the actual selling price; but, claiming that it should have been computed on the current market value of the dressed furs, under the regulation quoted below, resp. sued to recover the amount alleged to have been overpaid, i.e. it urged that it should have only paid the tax imposed on dyers & dressers who were performing that work for others:—Held: the sales made by resp. were sales within the scope of sect. 86 of Special War Revenue Act; & the tax payable by resp. should be computed on the actual selling price of the dressed furs & not on its current market value.*—*R. v. VANDEWEGHE, LTD.*, [1934] S. C. R. 244; 3 D. L. R. 57.—*CAN.*

**n viii.** — *Inclusion of excise tax.*—*Resp., a licensed manufacturer under Part XIII. of Special War Revenue Act, manufactured & sold playing cards. It paid the sales tax on all cards sold, said tax being computed on the sale price of the cards exclusive of the excise tax imposed by sect. 82 of the Act. The Crown contended that the sales tax should have been computed on the sale price including the excise tax:—Held: the excise tax should have been included in the sale price of such cards for the purpose of calculating the sales tax. The definition of "sale price" in the Act is very comprehensive: "sale price" is inclusive of every item entering into the price just before the consumption or sales tax is added & must therefore include the excise tax.*—*R. v. CONSOLIDATED LITHOGRAPHING MANUFACTURING CO., LTD.*, [1934] S. C. R. 298; 2 D. L. R. 161.—*CAN.*

**o. affd. sub nom.** BRADSHAW v. MINISTER OF CUSTOMS & EXCISE, [1928] 2 D. L. R. 352; [1928] S. C. R. 54.—*CAN.*

**o i.** — *Exemption of goods exported—Onus of proof.*—*Held: the Act being a taxing statute, must be construed strictly, & the onus was upon the Crown to show that defts. came within the taxing provisions, but the exemption of goods "exported" being in the nature of a proviso, it was incumbent upon defts. to plead it, & the onus was upon them to show that they came within it.*—*R. v. GOODERHAM & WORTS, LTD.*, [1928] 3 D. L. R. 109; 62 O. L. R. 218.—*CAN.*

**o ii.** — *Meaning of export.*—*The words "sale" & "export" as used in the Act, mean a sale & export by the manufacturer or producer, the exportation being an act consummating a transaction to which the tax does not apply. The language of the proviso relates only to exportation by the manufacturer, &*

cannot be extended to a case where the manufacturer loses control of the goods by selling & disposing of the same to a purchaser in Canada.—*R. v. FROWDE, LTD.*, [1929] 2 D. L. R. 721; *Ex. C. R.* 119; *affd.*, [1930] S. C. R. 375; 2 D. L. R. 725.—*CAN.*

**o iii.** — *—*—*Special War Revenue Act, 1915, of Canada, as amended by later statutes, imposes galloneage tax and the sales tax upon specified goods, including beer, manufactured in Canada. It is provided, however, that galloneage tax shall not be payable "when such goods are manufactured for export under regulations prescribed by the Minister of Customs & Excise," & that sales tax shall not be payable on "goods exported," with a provision for a refund on "domestic goods exported under regulations" similarly prescribed:—Held: the exemption from galloneage tax, like that from sales tax, applied only to goods actually exported, & it operated although no regulations had been prescribed; & an export of beer to the U.S.A. was within the exempting provisions although the import was contrary to the law of that country. Further, beer sold to a purchaser in the U.S.A. was within the exemptions where it had been consigned to him at a Canadian port, & was proved to have been shipped from there into the U.S.A. in smaller consignments, mostly to sub-purchasers.*—*CARLING EXPORT BREWING & MALTING CO., LTD. v. R.*, [1931] A. C. 435; 100 L. J. P. C. 140; 145 L. T. 26; 47 T. L. R. 319, P. C.—*CAN.*

**o iv.** — *Exemption of magazine—What is.*—*Held: the pamphlet in question, printed by deft. monthly for the Canadian Kodak Co., Ltd., & called "Kodakery," was a "magazine," & as such exempt from sales tax. The word "magazine" in the exempting provision is used in its ordinary sense & must be construed & applied in that sense. Its meaning in ordinary usage discussed, with regard to its application to the pamphlet in question.*—*MILN-BINGHAM PRINTING CO., LTD. v. R.*, [1930] S. C. R. 282; 2 D. L. R. 263; *rearg.*, *R. v. MILN-BINGHAM PRINTING CO., LTD.*, [1929] Ex. C. R. 133.—*CAN.*

**o v.** — *Government charge on assets of person indebted for sales taxes—Meaning of assets.*—*In 12 & 13 Geo. V., c. 47, s. 17, which sect. gave the Crown a first charge on the assets of a person indebted for sales taxes, the word "assets" was not intended to include any other assets than such as were the property of the debtor at the time his assets were sought to be administered or distributed.*—*R. v. HYDE*, [1928] 2 W. W. R. 253.—*CAN.*

**o vi.** — *—*—*GOODMAN & A.-G. FOR CANADA v. BANK OF TORONTO* (1924), 56 O. L. R. 318.—*CAN.*

**o vii.** — *Effect of section—Priority of Crown on insolvency—Not lien.*—*R. v. DOMINION BANK*, [1930] 1 D. L. R. 664; 11 C. B. R. 152; 64 O. L. R. 448.—*CAN.*

**o viii.** — *Liability of purchaser of goods not subject to tax.*—*R. v. JACK PINE LUMBER CO. & CANADIAN BANK OF COMMERCE*, [1928] 4 D. L. R. 976; [1928] 3 W. W. R. 410.—*CAN.*

**o ix.** ——— *Liability of purchaser without notice.*—A bank advanced money to a manufacturer, took an assignment of a chattel mtge. on his assets & seized & sold thereunder without knowing that he was indebted to the Crown for sales taxes & without inquiring into the question. The Crown issued an information claiming damages for conversion, the seizure being alleged to constitute the conversion, & a declaration that the bank was indebted to the Crown for the taxes collected by the manufacturer & paid to the credit of his account with the bank. The mortgaged goods were still intact on the manufacturer's premises:—*Held*: no liability had been established against the bank.—*R. v. BANQUE CANADIENNE NATIONALE (Man.)*, [1929] 2 W. W. R. 668; *affd.*, [1930] 2 W. W. R. 586; 4 D. L. R. 441; 39 Man. L. R. 108.—**CAN.**

**o x.** ——— *By one company for another—Joint control.*—Deft. co. manufactured bricks & sold its entire output to the V. Co., paying the sales tax on the sale price of such bricks. The V. Co. sold these bricks by retail together with other builders' supplies, & bricks purchased from other manufacturers. For all practical purposes the control of both cos. was in one J. A. W. & his wife. The Crown contended that the Victoria Co. was merely the agent of deft. co. in the sale of its bricks & that deft. co. was therefore taxable on the sales price of the V. Co.:—*Held*: the two cos. are separate entities even though controlled by the same persons, & though the officers & shareholders of the two cos. are much the same & the cos. have business relations with each other those facts alone do not constitute the one co. the agent of the other.—*R. v. B. C. BRICK & TILE CO., LTD.*, [1936] Ex. C. R. 71; 3 D. L. R. 23.—**CAN.**

**o xi.** ——— *Effect of repeal—On lien of Crown for taxes.*—*Re WILNER*, [1928] 2 D. L. R. 396.—**CAN.**

**o xii.** ——— *On liability incurred before repeal.*—In view of Interpretation Act, s. 10, a liability for sales taxes under special War Revenue Act, 1915, & amendments thereto, which was incurred prior to enactment of 1925 Act, c. 26, s. 9, remains in force.—*R. v. BANQUE CANADIENNE NATIONALE (Man.)*, [1929] 2 W. W. R. 668.—**CAN.**

**o xiii.** ——— *Goods manufactured—By contractor for company.*—*R. v. DOMINION PRESS CO.*, [1928] Exch. C. R. 122.—**CAN.**

**o xiv.** ——— *For person's own use.*—When goods are manufactured & produced in Canada, not for sale, but for the use of the manufacturer or producer, such transactions are for the purposes of the Act to be regarded as sales.—*R. v. BANK OF NOVA SCOTIA*, [1929] Ex. C. R. 155; [1930] 1 D. L. R. 721; 3 C. R. 174.—**CAN.**

**o xv.** ——— *Used for purpose for which made.*—Resp. was a manufacturer of lumber for sale, & consumed a portion in construction & building operations, carried on over a period of years, the lumber so consumed having been taken from stock in its yards, produced & manufactured in the ordinary course of its business of manufacturing for sale, & not produced or manufactured especially for the purpose for which it was used:—*Held*: resp. was liable, under Special War Revenue Act, R. S. C., 1927, ss. 86, 87, for sales tax on the lumber so consumed. The intention of the Act was to levy the tax on the sale price of all goods produced or manufactured in Canada, whether they be sold by the manufacturer or consumed by himself for his own purposes.—*R. v. FRASER COMPANIES, LTD.*, [1931] S. C. R. 490; 3 D. L. R. 145.—**CAN.**

**o xvi.** ——— *Samples.*—Deft., in the course of its business as a

manufacturer of pharmaceutical preparations, put up in special small packages & distributed free amongst physicians & druggists samples of its products, to acquaint them with their character & quality. The question in issue was whether or not deft. was liable for the consumption or sales tax in respect of the samples, under sects. 86 (a) & 87 (d) of Special War Revenue Act, R. S. C., 1927, c. 179. Clause 4 of the special case agreed on stated that "the cost of producing such samples was paid by [def't.] as a necessary expense of business, & [def't.] in its books treated such expense as a necessary cost of production of articles manufactured & sold, in respect of which last-mentioned articles [def't.] has paid sales tax":—*Held*: the "use" by the manufacturer or producer of goods not sold, dealt with in sect. 87 (d), includes any use what *ver* that he may make of such goods, & is wide enough to cover their "use" for advertising purposes by their distribution as free samples, & would have covered their use in the present case, & the samples would have been subject to the tax, but for said clause 4 of the special case, which must be taken as an admission that the sales tax had already been paid upon the cost of producing the samples for free distribution, in which case to hold them now subject to the tax would involve double taxation, which the legislature should not be taken to have intended.—*R. v. HENRY K. WAMPOLE & CO., LTD.*, [1931] S. C. R. 494; 3 D. L. R. 754.—**CAN.**

**o xvii.** ——— *"Leads."*—Deft. carried on both the business of a saw mill & the business of coal mining, & manufactured at its mills "leads" for use in its mining operations. In some isolated cases it would purchase such "leads" in the market for the same purpose. These "leads" are logs put through the mill, sawn in half longitudinally & again into the required lengths for the use aforesaid:—*Held*: such "leads" were manufactured at def't.'s mill & used by them not in the course of manufacturing the same, but were used in a different & distinct undertaking or operation quite apart from manufacturing of the same at their mill, & they were manufactured articles bought & sold on the market, & clearly within the Act.—*R. v. MIRAMICHI LUMBER CO., LTD.*, [1929] Ex. C. R. 172.—**CAN.**

**o xviii.** ——— *Who is "manufacturer"—Not merchant tailor.*—MINISTER OF NATIONAL REVENUE v. OGULNIK & CO., LTD., [1932] 4 D. L. R. 412.—**CAN.**

**o xix.** ——— *—*—A merchant tailor who sells by retail, but also makes uniforms for the employees of cos. is not within the definition of merchant tailor in Special War Revenue Act, R. S. C., 1927, so as to be exempt from sales tax payable by a manufacturer.—MINISTER OF NATIONAL REVENUE v. OGULNIK & CO., [1935] 1 D. L. R. 30.—**CAN.**

**o xx.** ——— *—*—Special War Revenue, R. S. C., 1927, does not impose any consumption or sales tax upon a person who, not being a manufacturer by trade, manufactures or produces, for his own use & with no intent of disposing of it by sale or otherwise, an object or article, which is not used in connection with any trade or business.—*R. v. SHELLEY*, [1935] Ex. C. P. 179; [1936] 1 D. L. R. 415.—**CAN.**

**o xxi.** ——— *—*—Deft. purchased in bulk lots, by the pound, old motor vehicle tyres which could no longer be used as such, paying for them at so much per ton. These worn-out tyres were treated & re-treaded by def't., the number & name of the manufacturer of the original tyre remaining apparent on the side

walls along with the serial number marked thereon by def't. These rebuilt tyres were sold under the name Bilrite Tyres to casual purchasers or wholesale dealers; def't. also carried on a mail order business in such tyres:—*Held*: def't. was a manufacturer within the scope of Special War Revenue Act, R. S. C., 1927, c. 179, & amendments thereto, & liable to pay the sales & excise taxes & licence fees provided in such Act.—*R. v. BILRITE TYRE CO.*, [1937] Ex. C. R. 1; *affd.*, [1937] S. C. R. 361; 2 D. L. R. 417.—**CAN.**

**o xxii.** ——— *To what sales applicable.*—Sales tax imposed by Sales Tax Acts (No. 1), 1930, is chargeable on goods manufactured in Australia, & treated by the manufacturer as stock for sale by him by retail prior to Aug. 1, 1930, where such goods were on that date or afterwards sold, either to persons not registered under Sales Tax Assessment Acts (Nos. 1-9), 1930, or to persons who had not under those Acts quoted their certificate of registration.—*TAXATION COMR. v. BEARD, WATSON & CO., LTD.*, [1931] Argus L. R. 278.—**AUS.**

**o xxiii.** ——— *Priority of Crown in winding up.*—In the winding-up of a co. under Cos. Act, 1899, the Commonwealth Govt. is entitled to priority over unsecured creditors for the amount due from the co. in respect of unpaid sales tax.—*Re KERR, McPHERSON, LTD.* (1931), 48 N. S. W. W. N. 180.—**AUS.**

**o xxiv.** ——— *When tax exigible.*—Deft. co., a manufacturer of chocolate products subject to the tax, sought to avoid payment of the increased tax by accepting orders for future delivery of goods which were set apart in its warehouse & marked "Reserved stock sold." There was no identification of the particular goods representing the order of any individual purchaser. When a customer wished delivery of a portion of the goods ordered they would be taken from the reserved stock & payment made when shipped. Deft. notified the Department of National Revenue each month of the quantity of goods thus sold & later remitted the tax thereon calculated at the rate of 1 per cent. The action was brought to recover the amount of the tax calculated at the rate of 4 per cent. upon the sale price of goods sold after Mar. 2, 1931, & delivered after June 2, 1931:—*Held*: the tax was exigible by the manufacturer when the transaction was finally consummated by delivery of the goods to the purchaser, regardless of the precise date of sale, or where or when the title to the goods passed to him.—*R. v. WILLIAM NEILSON, LTD.*, [1934] Ex. C. R. 121.—**CAN.**

**o xxv.** ——— *Exemption of newspapers.* *What are.*—The daily stock exchange sheets, issued in respect of transactions on the Montreal Stock Exchange & the Montreal Curb Exchange, & the weekly comparative reviews of transactions on the two exchanges fall within the meaning of the word "newspapers" as used in Sched. III. of Special War Revenue Act & therefore exempt from taxation under the provisions of that Act.—*R. v. MONTREAL STOCK EXCHANGE, R. v. EXCHANGE PRINTING CO.*, [1935] S. C. R. 614; 4 D. L. R. 630.—**CAN.**

**o xxvi.** ——— *Exemptions under Sales Tax Assessment Act, No. 1—"Cakes"*—*Sponge.*—Sales Assessment Act (No. 1), 1930, expressed an exemption from sales tax of "pastry but not including cakes or biscuits":—*Held*: "sponge" came within the description of "cakes" in the Sched., & accordingly that applt. was liable to pay sales tax.—*HERBERT ADAMS PROPRIETARY, LTD. v. FEDERAL COMRS. OF TAXATION* (1933), 47 C. L. R. 222.—**AUS.**

**o xxvii.** ——— *"Boxes, cases or crates"*—*Beer casks.*—A kildorkin cask is a cask or barrel made to hold about

consider the object of the sect., which is to protect the English button trade. The statute was directed against those who imported goods, which were not quite buttons, but upon which the bulk of the work had been done abroad, very little remaining to be done by the manufacturers in the United Kingdom. The bead or button blank

was an "unfinished" button within sect. 9 (3).—*NEWMAN MANUFACTURING CO. v. MARRABLE*, [1931] 2 K. B. 297; 100 L. J. K. B. 345; 145 L. T. 117.

**93e. Duty on buttons—"Unfinished" buttons—What are.**—*NEWMAN MANUFACTURING CO. v. MARRABLE*, No. 93d, *ante*.

## Part VII.—Excise Licences.

**104. Add. Citation** :—97 L. J. K. B. 36.

**112. Add. Annotations** :—*Generally*, *Refd.* Appenrodt v. Central Middlesex Assessment Committee, [1937] 2 K. B. 48; Leney (Alfred) & Co. v. Whelan (1936), 20 Tax Cas. 321; Robinson Bros. (Brewers), Ltd. v. Houghton & Chester-Le-Street Assessment Committee, [1937] 2 All E. R. 298.

**114a. Sale of tobacco without licence—Offence depends upon place of appropriation—Supply of cigarettes to automatic cabinets in private houses.**—Two informations were preferred alleging the unlawful sale of tobacco without licence contrary to Tobacco Act, 1842

(c. 93), s. 13, as modified by Revenue Act 1867, (c. 90), ss. 8, 9. In each case the respective suppliers, who had a licence entitling them to sell tobacco at their business premises, agreed to supply customers with automatic cigarette cabinets in their private houses. In each case the contract contained a condition: "The place of delivery of the packets of cigarettes shall be place of business of the [suppliers]." In each case a cabinet was delivered to the customer, & the suppliers' representative visited at regular intervals the customer's house, unlocked the cabinet with a key, which at all material times was in the suppliers' control, removed

seventeen gallons of beer when filled :—*Held* : the definition in Sched. I. was not wide enough to exempt these particular articles from sales tax.—*FEDERAL COMR. OF TAXATION v. FISHER'S COOPERAGE PTY., LTD.* (1933), 2 A. T. D. 377; 7 A. L. J. 282.—*AUS.*

o xxviii. — "Flour"—*Self-raising flour*.—"Self-raising" flour is not "flour" within Sched. I. of Sales Tax Assessment Acts (No. 1), 1930–31.—*JACKETT v. DEPUTY FEDERAL COMR. OF TAXATION*, [1932] S. A. S. R. 405; 2 A. T. D. 203.—*AUS.*

o xxix. — *Intention of Act—Tax on goods—Not on individuals.*—Suppliant was engaged in the business of dressing & dyeing furs for others & not for its own account. It paid to resp. certain sums of money as sales tax imposed by Special War Revenue Act, 1915, & amendments thereto. Suppliant was prepaid or repaid by the customer, the tax so paid, being out of pocket only such amounts as certain customers failed to repay it. Suppliant brought suit to recover all money paid by it as sales tax, alleging such payments to have been made by mistake of law & of fact :—*Held* : under sect. 87 (c) it is the goods of the owner, manufactured by the labour of another, that are to be taxed as a sale; it is not intended the person performing the labour should be taxed for the goods so manufactured or produced. The suppliant, not having paid the tax itself, but rather as an intermediary for & on account of its customers, has no right of action against the Crown to recover the same.—*HOLLANDER & SON, LTD. v. R.*, [1935] Ex. C. R. 90; 4 D. L. R. 171.—*CAN.*

o xxx. — "Produced or manufactured goods"—*Fish & chips.*—The Federal Comr. of Taxation brought an action against deft. to recover money alleged to be payable as sales tax upon sales by deft. of cooked fish & "chips" :—*Held* : by preparing & cooking the fish & "chips" deft. had neither produced nor manufactured goods within Sales Tax Assessment Acts & accordingly no tax was payable by deft.—*FEDERAL TAXATION COMR. v. ROCHESTER* (1934), 50 C. L. R. 225; 2 A. T. D. 466; 8 A. L. J. 65.—*AUS.*

o xxxi. — *Sale of second-hand*

*goods.*—In both these cases defts. carried on business of purchasing second-hand motor vehicles, wrecking them & selling the parts so obtained. The sales were made to (a) persons who used them in reconditioning second-hand vehicles to be sold; (b) persons who used them in repairing vehicles for customers; & (c) to persons who purchased the parts for resale. The A. Co. also carried on business in new parts & accessories. The sales of these goods were made to the same classes of persons as were the sales of the second-hand parts. The goods were never resold in bulk quantities :—*Held* : the sales of goods in question were not subject to sales tax.—*DEPUTY FEDERAL TAXATION COMR. v. ADELAIDE MOTOR WRECKING CO., LTD. & O'DONNELL* (1934), 3 A. T. D. 108.—*AUS.*

o xxxii. — —.—*Deft. co. was registered as a wholesale merchant & as a manufacturer. Its business was in electrical goods & it sold them retail as well as wholesale. Part of its business was in second-hand goods which were in some cases repaired prior to re-sale. During the period from Feb. 1931 to Nov. 1932 sales of second-hand goods amounted to 2970 18s. 3d. in value. These sales were to unregistered persons or to registered persons who did not quote their certificates. The Comr. contended that the sales tax was payable because the goods were either manufactured or imported goods & were sold by a registered person to persons of the classes mentioned :—Held* : the general words of the Acts should not be treated as applying to goods which have already been retailed in Australia & gone into use.—*DEPUTY FEDERAL TAXATION COMR. v. ELLIS & CLARK, LTD.* (1934), 3 A. T. D. 98.—*AUS.*

o xxxiii. — *Granite & freestone from quarries.*—Granite & freestone which, in Australia, are cut out of quarries & moved in large blocks & then sawn into sizes suitable for use in the construction of buildings are goods manufactured in Australia within Sales Tax Assessment Act (No. 1), & are not exempted by sect. 20 (1) (g) of the Act as "being primary products which are derived directly from operations carried on in Australia in

mining . . . & which have not been subject to any process or treatment resulting in an alteration of the form, nature or condition of the goods."—*DEPUTY FEDERATION COMR. OF TAXATION (QUEENSLAND) v. STROMACH* (1926), 55 C. L. R. 305; 42 Argus L. R. 345; 10 A. L. J. 111; 3 A. T. D. 365.—*AUS.*

o xxxiv. — *Exemption of municipal purchasers—To whom applicable.*—Municipal purchases exempt from Quebec sales tax do not include individual purchases by municipal employees, or purchases made by a city tax inspector for the purpose of obtaining evidence.—*FERLAND v. PHILIE*, [1935] 4 D. L. R. 618.—*CAN.*

o xxxv. — *Application for refund—Time for.*—*Held* : sect. 24, c. 50, 23 & 24 Geo. 5, is retroactive & suppliant not having applied for a refund of the sales taxes paid by it, within the period of limitation set by the statute, the present action failed.—*DOMINION DISTILLERY PRODUCTS CO., LTD. v. R.*, [1937] Ex. C. R. 145; [1938] 1 D. L. R. 597.—*CAN.*

sk. *Tax on railway accommodation.*—*Held* : railway employees travelling in Pullman or parlour cars while on the business of the railway are not liable for the tax imposed by the Special War Revenue Act, R. S. C., 1927.—*R. v. C. N. R. & C. P. R.*, [1938] Ex. C. R. 147.—*CAN.*

### PART VII. SECT. 3, SUB-SECT. 5.

sl. *Finance Act, 1926—Whether applicable to street bookmaker.*—*Held* : the provision of the Finance Act, 1926, which imposes a penalty on any one carrying on business as a bookmaker without having in force the certificate required by the Act, applies not only to a bookmaker carrying on his business legally, but also to a street bookmaker carrying on his business in contravention of Street Betting Act, 1906.—*M'COLL v. HYNDMAN, COOKSON v. MACKIE, HERLIHY v. KELLY*, [1928] S. C. (J.) 17.—*SCOT.*

sm. *Registration—Continuation of certificate of suitability—Conditions of.*—*SCOTT v. M'CARNEY*, [1928] I. R. 611.—*IR.*

the coins inserted in the cabinet, & any remaining packets of cigarettes, for which the customer was not asked to pay, & restocked the cabinet. In the first case, on each occasion when the packets of cigarettes were brought to the customer's house they were done up in cartons with his name & address thereon, & the cigarettes returned were placed in the cartons & taken away by the suppliers' representative. In the second case, the packets of cigarettes were brought to the house by the suppliers' traveller loose in an attaché case, & were not in any special cartons or done up in bundles. In each case the information was dismissed:—*Held*: the test in each case was where the appropriation of the goods to the contract had taken place. In the first case, there was sufficient evidence that the appropriation had taken place at the suppliers' licensed premises to justify the magistrates in dismissing the information. In the second case, however, all the evidence went to show that the appropriation took place at the customer's premises, & the magistrates should have found that the offence was proved.—*FITZPATRICK v. HATE, MITCHELL v. PAGE* (1934), 151 L. T. 17; 98 J. P. 215; 50 T. L. R. 309; 78 Sol. Jo. 256, 277; 32 L. G. R. 136; 30 Cox, C. C. 95, D. C.

116. *Add. Annotation*:—*Distd.* Westminster Coaching Services, Ltd. v. Piddlesden, Hackney Wick Stadium, Ltd. v. Piddlesden (1933), 97 J. P. 185.

128. *Add. Annotation*:—*Appld.* Dennis v. Leonard (1929), 141 L. T. 94.

140a. *Petrol-electric vehicle*—Whether “electrically-propelled.”—A vehicle commonly known as a “petrol-electric” motor derived its primary motive power from an ordinary internal combustion engine; that engine was connected with an electric dynamo, & the electricity generated in the dynamo was transmitted to an electric motor, which drove the rear wheels of the car through a

cardan shaft & differential gear:—*Held*: the vehicle was an “electrically propelled” vehicle within Finance Act, 1926 (c. 22), Sched. I., para. 5.—*TILLING-STEVENS MOTORS v. KENT COUNTY COUNCIL*, [1929] A. C. 354; 98 L. J. Ch. 198; 140 L. T. 624; 93 J. P. 146; 45 T. L. R. 249; 27 L. G. R. 261, H. L.

, *now*, Finance Act, 1930 (c. 28), s. 6 (1); Finance Act, 1934 (c. 32), s. 18 (2).

140b. *Private car used for conveyance of goods.*—In 1931 applt., who carried on business as a greengrocer at Neath in Glamorganshire, held a licence for a private motor-car, duty being paid thereon at the “horse-power” rate under Finance Act, 1920 (c. 18), Sched. II., para. 6. The car was neither “constructed” nor “adapted” for use for the conveyance of goods, but applt. while the licence was in force, used it occasionally for the conveyance of goods in the course of his trade. An information was preferred against him at Cardiff under Finance Act, 1922 (c. 17), s. 14, on the ground that this user was for a purpose which brought the car within a class to which the higher rate of duty under Sched. II., para. 5, of 1920 Act, became chargeable. Upon this applt. was convicted & fined:—*Held*: the user was “for a purpose” which brought the car within Finance Act, 1920 (c. 18), Sched. II., para. 5, & applt. was rightly convicted.—*PAYNE v. ALCOCK*, [1932] 2 K. B. 413; 101 L. J. K. B. 775; 147 L. T. 96; 96 J. P. 283; 48 T. L. R. 396; 76 Sol. Jo. 308; 30 L. G. R. 294; 29 Cox, C. C. 475, D. C.

143. *Add. Annotation*:—*Distd.* Gough v. Rees (1929), 46 T. L. R. 103.

144. *Add. Annotation*:—*Consd.* Abercromby v. Morris (1932), 48 T. L. R. 635.

145a. *Use of car without licence*—*Car loaned subject to condition of renewing licence*—*Owner not liable.*—The owner of a motor

#### PART VII. SECT. 4, SUB-SECT. 1.

so. *Invalid condition*—*What is.*—Where a municipal corpn. is empowered to collect a licence fee “from any retail trader, not exceeding twenty dollars, for every six months,” the licence to be granted “so as to terminate on the 15th day of July or the 15th day of Jan.,” the corpn. may not stipulate that applt. shall confine his trading to week days only of the period of the licence, & may not withhold the licence if he refuses to subscribe to such a condition.—*VASILATOR v. VICTORIA CORPN.* (1910), 15 B. C. R. 153.—*CAN.*

sp. *Licence for delivery trucks*—*Delivery within municipality—Owner outsider.*—*NORTH VANCOUVER v. STEWART F. R. & Co.*, [1928] 1 W. W. R. 586; 49 Can. Crim. Cas. 216; 39 B. C. R. 401.—*CAN.*

#### PART VII. SECT. 4, SUB-SECT. 3.—C.

sr. *Person using vehicle.*—*COOKBURN v. GORDON*, [1928] S. C. (J.) 87.—*SCOT.*

#### PART VII. SECT. 4, SUB-SECT. 3.—D.

so. *“Weight unladen”*—*How ascertained*—*Loose equipment.*—Movable shelving, fitted to slide on brackets in a baker's van, & used to facilitate the delivery of goods to customers, is loose equipment within Roads Act, 1920 (C. 72), s. 7 (6), & does not fall

to be included in the weight unladen of the vehicle.—*DARLING v. BURTON*, [1928] S. C. (J.) 11.—*SCOT.*

sg. *Additional duty for “trailer”*—*What is.*—A contractor, in the course of road-repairing operations, used a roadman's hut, furnished with desk, chair, & coal stove, as an office for his foreman. The hut was mounted on four cast-iron wheels of fifteen inches diameter, & fitted with a drawbar. Although normally kept stationary, it was drawn from place to place by the contractor's motor lorry. The additional excise duty chargeable in the case of a vehicle used for drawing a trailer had not been paid in respect of the motor lorry. The contractor having been charged with the offence of having made use of the motor lorry without having paid the additional duty:—*Held*: the roadman's hut was a “trailer” within Finance Act, 1920 (c. 18), Sched. II., para. 5, & the contractor had committed the offence charged.—*HORN v. DOBSON*, [1933] S. C. (J.) 1.—*SCOT.*

sk. *Change in user.*—A motor lorry belonging to a carting contractor, when used at infrequent intervals for the transport of sheep & cattle, had superimposed upon it a float as the container of the load. The float was a large box, having a floor & four sides & open at the top, & it was secured to the lorry by ropes. In a question

whether, for the purpose of Finance Act, 1922 (c. 17), s. 14, the float formed part of the lorry or part of the load:—*Held*: in calculating unladen weight under Road Traffic Act, 1930 (c. 43), s. 26, the float was an alternative body which formed part of the lorry.—*STEWART v. MCOWAN*, [1935] S. C. (J.) 33.—*SCOT.*

sm. —.—A motor lorry belonging to a carting contractor, when used at infrequent intervals for the transport of sheep & cattle, had superimposed upon it a float as the container of the load. The float was a large box, having a floor & four sides & open at the top, & it was secured to the lorry with ropes. It was not adapted for use on the lorry alone as a separate body, but only for use in conjunction with the fixed body of the lorry. In a question whether, when the lorry was being used with the float, the weight of the float fell to be taken into account in calculating the unladen weight of the lorry for purposes of duty under Finance Act, 1922, s. 14:—*Held*: the float was neither an alternative body nor a part necessary to, or ordinarily used with, the lorry, within Road Traffic Act, 1930, s. 26; & accordingly, the use of the float in conjunction with the lorry did not subject the lorry to a higher rate of duty.—*MCOWAN v. STEWART*, [1930] S. C. (J.) 36.—*SCOT.*

car, before going abroad, gave permission to one P., who was not his servant or agent, to use the car during his absence abroad on condition that P. renewed the excise licence. P. used the car after the expiration of the licence, while the owner was still abroad:—*Held*: the owner was not the person responsible for the use of the vehicle within Roads Act, 1920 (c. 72), s. 13, & could not be convicted of an offence under that sect.—*ABERCROMBY v. MORRIS* (1932), 147 L. T. 529; 96 J. P. 392; 48 T. L. R. 635; 76 Sol. Jo. 560; 30 L. G. R. 407; 29 Cox, C. C. 553, D. C.

224. *Add. Annotation*:—*Consd. Abercromby v. Morris* (1932), 48 T. L. R. 635.

#### SUB-SECT. 6.—GUN LICENCES.

For "Pistols Act, 1903 (c. 18), ss. 3, 8" read "Firearms Act, 1920 (c. 43)."

302a. *Firearms Act, 1920 (c. 43), s. 12 (1)*—What is "firearm"—*Air pistol*.—An air pistol is not *per se* a firearm within the definition of "firearm" in above sect., but it is an "air gun or air rifle" within the proviso, which empowers a Secretary of State to make rules declaring certain types of air guns & air rifles to be specially dangerous, & if it is so declared, it is to be deemed to be a firearm.—*SAINT v. HOCKLEY* (1925), 41 T. L. R. 555; 69 Sol. Jo. 575.

302b. — What is "air gun or air rifle"—*Air pistol*.—*SAINT v. HOCKLEY*, No. 302a, *ante*.

## Part VIII.—Drawbacks and Excise Allowances.

360. *Add. Annotation*:—*Refd. Fenton Textile Asscn. v. Lodge*, [1928] 1 K. B. 1.

## Part IX.—Stamp Duties.

372. *Add. Annotation*:—*Apprvd. Hennell v. I. R. Comrs.*, [1933] 1 K. B. 415.

378. *Add. Annotation*:—*As to (1) Refd. Eastern National Omnibus Co. v. I. R. Comrs.*, [1938] 3 All E. R. 526.

390. *Add. Annotation*:—*Refd. Hennell v. I. R. Comrs.*, [1933] 1 K. B. 415.

396. *Add. Annotation*:—*Consd. Conybear v. British Briquettes, Ltd.*, [1937] 4 All E. R. 191.

433. *Add. Annotation*:—*As to (1) Refd. Eastern National Omnibus Co., Ltd. v. I. R. Comrs.*, [1938] 3 All E. R. 526.

435. *Add. Annotation*:—*Refd. A.-G. v. Cohen*, [1936] 2 K. B. 246.

436. *Add. Annotation*:—*Refd. A.-G. v. Cohen*, [1936] 2 K. B. 246.

437a. — Separate contract for each lot—Whether "series of transactions" within Finance (1909-10) Act, 1910 (c. 8), s. 73.—At a public sale by auction of dwelling-houses offered in twelve lots, resps. bought from the same vendor six lots at prices in two cases exceeding £500 & in four cases not exceeding £500 in respect of each lot, but in the aggregate exceeding £500. Six contracts of sale were signed by resps., each separately stamped. Six deposits were paid & six separate abstracts of title were supplied in respect of the six lots so purchased:—*Held*: each sale did not form part of a larger trans-

#### PART VII. SECT. 4, SUB-SECT. 3.—G. (b) i.

*sk. Validity of bye-law*.—The tax sought to be imposed by the city of Winnipeg under bye-law No. 14,415 on all motor vehicles owned by residents of Winnipeg & used in that city is a "fee or charge" within the meaning of sect. 107 (2) of Highway Traffic Act, 1930, as amended, & therefore one which falls within the prohibitions of said sect. 107 (2).—*WINNIPEG CITY v. CRESCENT CREAMERY CO.*, [1934] 1 W. W. R. 228; 41 Man. L. R. 564.—*CAN.*

#### PART VII. SECT. 4, SUB-SECT. 4.—A.

*h. i.* — *Amendment of charge—Validity*.—On a prosecution under Summary Convictions Act, R. S. B. C., 1924, accused was convicted on an information charging him with having in his possession an unlicensed dog, "contrary to sect. 3 of Sheep Protection Act Amendment Act, 1929." Said Act has no sect. 3, but comprises only two sects. On appeal by the accused, the Crown moved for leave to amend the charge. The accused contended that the proceedings were a nullity & could not be amended. The Crown contended that the accused was not & could not have been misled, & that the error was an irregularity only. Clause (d) of sect. 62 of Summary

Convictions Act corresponds to sect. 723 (d) of the Criminal Code:—*Held*: since accused could not have been misled, the amendment should be allowed.—*R. v. MEUGITT*, [1937] 1 W. W. R. 193. *CAN.*

#### PART VII. SECT. 4, SUB-SECT. 4.—B. (b) ii.

*sk. Retrospective operation*.—A farmer had two dogs at his farm on July 12, 1932, in respect of which neither licences nor a certificate of exemption had at that date been issued. On Aug. 8 he obtained a certificate of exemption in respect of these dogs. He was subsequently charged with having, on July 12, been in breach of Dog Licences Act, 1867 (c. 5), s. 8:—*Held*: the justices were entitled to acquit, in respect that the certificate of exemption applied to the year terminating on Dec. 31, 1932, & exempted the holder from payment of duty for that year.—*BORRELL v. MACDONALD*, [1933] S. C. (J.) 19.—*SCOT.*

#### PART IX. SECT. 1.

*sk. Reference to court on abstract question—Incompetent*.—A reference by the Chief Controlling Revenue Authority for opinion of ct. on an abstract question is incompetent & is not within the purview of Indian

Stamp Act, 1899, s. 57.—*Re MARINE INSURANCE POLICIES* (1929), 1 L. R. 57 Calc. 669.—*IND.*

#### PART IX. SECT. 3, SUB-SECT. 1.

*sk. Application for refund—When time begins to run*.—A local poor law authority purchased property for poor law purposes, the deed of conveyance being dated Jan. 30 1932. The conveyance was executed by the vendors but retained by them as an escrow pending payment of the purchase money. The purchase money was paid on May 19, 1932, & the deed was then delivered to the purchasers. The deed, which was exempt from stamp duty under sect. 96 of Poor Relief (Ireland) Act, 1838, was inadvertently stamped by pltf., as solr. for the purchasers, £90 being paid for duty. Pltf. claimed a refund of the £90 on Apr. 25, 1934, which was refused by the Revenue Comrs. dofts., on the ground that it was not made within the prescribed period of two years from the date of the conveyance. In an action by pltf. claiming a declaration that his application to dofts. for a refund had been made within the statutory period of two years:—*Held*: the date of the instrument was the date appearing upon its face & accordingly pltf.'s application had been out of time.—*BYRNE v. REVENUE COMRS.*, [1935] 1 R. 664.—*IR.*

action or of a series of transactions in respect of which the aggregate amount or value of the consideration exceeded £500, within sect. 73 of Finance (1909-10) Act, 1910 (c. 8), &, therefore, in the four cases where the consideration did not exceed £500, the double tax thereby imposed was not payable.—*A.-G. v. COHEN*, [1937] 1 K. B. 478; [1937] 1 All E. R. 27; 106 L. J. K. B. 262; 156 L. T. 130; 53 T. L. R. 214; 81 Sol. Jo. 57, C. A.

**440a. Voluntary disposition inter vivos—Property disposed of including stock exempt from stamp duty.**—A deed of settlement, which operated as a voluntary disposition *inter vivos*, was made of certain stocks, shares, marketable securities & policies of life insurance, including certain Govt. stocks. The settlement operated as a transfer of the policies of life insurance, but the stocks, shares & marketable securities were subsequently transferred to the trustees of the settlement by separate transfers. *Ad valorem* "voluntary disposition" duty under Finance (1909-10) Act, 1910 (c. 8), s. 74, was subsequently paid or assessed, without dispute, in respect of the stocks, shares & marketable securities & policies of life insurance, with the exception of the Govt. stocks, which were exempt from duty on transfer by the General Exemptions from all Stamp Duties in the First Schedule to Stamp Act, 1891 (c. 39). The Comrs. held that the settlement was also chargeable with *ad valorem* "settlement" duty on the value of the Govt. stocks included in it. The settlor, however, contended that no duty was payable in respect of those stocks, as they were included in the settlement with other stocks in respect of which *ad valorem* transfer duty & not settlement duty was payable under Finance (1909-10) Act, 1910 (c. 8), s. 74 (4).—*Held*: the Govt. stocks were distinct matters, within Stamp Act, 1891 (c. 39), s. 4 (a), from the other property dealt with by the settlement, &, therefore, the settlement could be separately charged as if it were a separate instrument, with settlement duty in respect of the Govt. stock.—*ANSELL v. INLAND REVENUE COMRS.*, [1929] 1 K. B. 608; 98 L. J. K. B. 384; 143 L. T. 437.

**473a. Allotment of shares—In consideration of annuity—Valuation of shares.**—By a deed of covenant executed in Canada applt., in consideration of the allotment to him of certain shares in a Canadian co., agreed to pay to the co. for such period as he should continue to carry on his profession an annual sum "equal to nine-tenths of the total income derived from" his profession which was carried on in England. The Comrs. decided that *ad valorem* duty was chargeable on the deed & they valued the consideration at four

times one year's gross income derived from applt.'s profession.—*Held*: the deed of covenant related to a matter or thing done or to be done in the United Kingdom within Stamp Act, 1891 (c. 39), s. 14 (4); the allotment of shares was good consideration for the sale of an annuity; the deed of covenant was properly chargeable with *ad valorem* duty under Stamp Act, 1891 (c. 39), s. 60; in the circumstances of the case the valuation of the shares was a proper one.—*FABER v. INLAND REVENUE COMRS.*, [1936] 1 All E. R. 617; 155 L. T. 228; 80 Sol. Jo. 407.

**478. Add. Annotation:—***Refd. Bottomley v. West Derby Assessment Committee, etc., etc.* (1931), 47 T. L. R. 468.

**482. Add the following paragraph:—***Semble*: such a charterparty must be stamped with an impressed & not an adhesive stamp. After this case add:—  
— — — — —]—*See, now*, Stamp Act, 1891 (c. 39), ss. 49-51.

**548a. Memorandum within Money-lenders Act, 1927 (c. 21), s. 6.**—A note or memorandum in writing within Money-lenders Act, 1927 (c. 21), s. 6, is a memorandum of a contract within Stamp Act, 1891 (c. 39), s. 1 & Sched. I, & therefore must be stamped with a 6d. stamp.—*PARKFIELD TRUST, LTD. v. DENT*, [1931] 2 K. B. 579; 101 L. J. K. B. 6; 146 L. T. 90.

*Annotation:—Refd. Collings v. Charles Bradbury, Ltd.*, [1936] 3 All E. R. 369.

**548b. ————]**—A memorandum under Money-lenders Act, 1927 (c. 21), s. 6, must be stamped before it can be received in evidence.—*B. S. LYLE, LTD. v. CHAPPELL* (1931), 47 T. L. R. 562; 75 Sol. Jo. 511; *reversd. on other grounds*, [1932] 1 K. B. 691, C. A.

**588. Add. Annotation:—***Refd. Fleetwood-Hesketh v. I. R. Comrs.*, [1936] 1 K. B. 351.

**591. Add. Annotation:—***Refd. Hennell v. I. R. Comrs.*, [1933] 1 K. B. 415.

**611. Add. Annotation:—***Consd. Hennell v. I. R. Comrs.*, [1933] 1 K. B. 415.

**614. Add. Annotation:—***Consd. Hennell v. I. R. Comrs.*, [1933] 1 K. B. 415.

**619. Add. Annotation:—***Consd. Hennell v. I. R. Comrs.*, [1933] 1 K. B. 415.

**619a. Covenant to pay during joint lives of covenantor & covenantee.**—A covenant to pay during the joint lives of the covenantor & the covenantee "the sum of £21 13s. 4d., hereinafter referred to as 'the monthly sum,' on the first day of every calendar month" is not a "security for an annuity" within the first clause of the heading "Bond, Covenant, or Instrument of any kind whatsoever" in Stamp Act, 1891 (c. 39), Sched. I, but is a covenant for a "sum periodically

#### PART IX. SECT. 6, SUB-SECT. 3.—B.

**sl. Assignment.**—There is no necessity for an assignment to be stamped, unless it is in the special form of an order, & possibly also unless it is directed to the persons having control of the money in question in such circumstances as to lead to the conclusion that they hold to the order of the person assigning it.—*LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD. v. HARTLEY & FORD*, [1927]

V. L. R. 523; 49 A. L. T. 70; [1927] Argus L. R. 417.—*AUS.*

**sm. Bank guarantee.**—By instrument of guarantee addressed to a bank, the grantor guaranteed to the bank payment to the extent of £3,000 of all sums for which a third party was, or might become, liable to the bank. It had been the practice of the Inland Revenue authorities to treat such instruments for the purposes of stamp duty as "agreements," &, as such,

liable to a duty of 6d. under Stamp Act, 1891, Sched. I.; but they now maintained that the instrument was a "bond" for the payment of £3,000, &, as such, liable to an *ad valorem* duty under that Sched.—*Held*: the instrument of guarantee was an "agreement" within the meaning of the Sched., &, accordingly, was liable to a duty of 6d. only.—*NORTH & SCOTLAND BANK v. INLAND REVENUE COMRS.*, [1931] S. C. 149.—*SCOT.*

payable" within the same clause.—**HENNELL v. INLAND REVENUE COMRS.**, [1933] 1 K. B. 415; 102 L. J. K. B. 69; 148 L. T. 150; 49 T. L. R. 31; 70 Sol. Jo. 849, C. A.

*Annotation*.—**Consd.** Commercial Union Assurance Co. v. I. R. Comrs., [1937] 4 All E. R. 159.

**619b. Insurance policy—Sum payable over period of years.**—An instrument was issued by an insurance co. to E. P. whereby, the sum of £1,000 having been paid by E. P. to the insurance co., there was secured to E. P. the sum of £52 5s. payable half-yearly during a period of eleven years. The sum of the half-yearly payments was calculated to return to E. P. over that period the said £1,000 with interest thereon at 2½ per cent. *per annum*, & aggregated £1,149 10s.:—*Held*: this was an annuity, as it had reference to a fraction of a year; but it was not an annuity by way of sale within Stamp Act, 1891 (c. 39), s. 60, but an annuity by way of repayment within sect. 87 (2) of the Act, & was a "bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale . . .)" in Sched. I.—**COMMERCIAL UNION ASSURANCE CO., LTD. v. INLAND REVENUE COMRS.**, [1938] 2 K. B. 551; [1937] 1 All E. R. 159; 107 L. J. K. B. 81; 158 L. T. 419; 54 T. L. R. 31; 81 Sol. Jo. 584.

**620.** After this case add:—

**Reconstruction & amalgamation—Exemption from duty on issue of shares in transferee company to holders of shares in existing company.**—*See* **BROTEX CELLULOSE FIBRES, LTD. v. INLAND REVENUE COMRS.**; **MUREX, LTD. v. INLAND REVENUE COMRS.**, COMPANIES, Nos. 7155a, 7155b.

**627. Add. Annotations**:—As to (2) **Expld. English, Scottish & Australian Bank, Ltd. v. I. R. Comrs.** (1931), 48 T. L. R. 170. *Refd. Re* John Sinclair, Ltd.'s Trade Mark 437,870 (1932), 116 L. T. 417; *Simpson v. Charrington & Co.*, [1934] 1 K. B. 64.

**636. Add. Annotation**:—*Refd.* **Fleetwood-Hesketh v. I. R. Comrs.**, [1936] 1 K. B. 351.

**640. Add. Annotation**:—*Overd.* **English, Scottish & Australian Bank, Ltd. v. I. R. Comrs.** (1931), 48 T. L. R. 170.

**641. Add. Annotations**:—**Apld.** **Cohen & Moore v. I. R. Comrs.**, [1933] 2 K. B. 126. *Refd.* **Fleetwood-Hesketh v. I. R. Comrs.**, [1936] 1 K. B. 351.

**643a.** —.—[In 1932 a father was tenant for life under the will of a testatrix who died in 1898 of the settled estates (which then consisted mainly of investments) & his son was tenant in tail in remainder. An arrangement was made between the father & the son by which the son was to disentail & the father to purchase from him for £160,000 his absolute reversion in certain of the investments, the son taking over from the father his liability to pay an annual sum to his wife during her life. This sum of £160,000 was then applied in purchasing some of the investments which had thus become the father's property. The only document relating to the sale of the son's reversion for £160,000 was an acknowledgment signed by the son & dated Dec. 14, 1932, by which the son acknowledged the receipt from the father of the sum of £160,000, "being the purchase price agreed as part of a family arrangement for my absolute reversion under the will . . . & a disentailing deed . . . expectant on the life interest" of the father under the will in the investments mentioned in the Sched. thereto:—*Held*: the acknowledgment was chargeable with *ad valorem* duty as an agreement for sale within Stamp Act, 1891 (c. 39), s. 59.

*Qu.*: whether the acknowledgment was chargeable as a conveyance on sale within sect. 54 of the Act.—**FLEETWOOD-HESKETH v. INLAND REVENUE COMRS.**, [1936] 1 K. B. 351; 105 L. J. K. B. 676; 153 L. T. 409, C. A.

**646a. Business conditional upon grants of licence.**—Upon the taking over of a business of operating stage carriage public vehicles, an agreement was entered into in the following terms. Clause 1 provided for the new co. applying for the necessary licences, & the backing thereof, in which they were to receive all proper assistance from the old co. Clause 2 provided that, as consideration for the covenants by the old co. therein contained, the new co. would pay £17,250 within seven days of their commencing to operate the services. Clause 3 contained

**PART IX. SECT. 6, SUB-SECT. 18.—A. (a).**

**631 i. Partnership property—Transfer of share by partner's executors.**—**DUCKETT v. COLLECTOR OF IMPOSTS**, [1927] V. L. R. 457; 49 A. L. T. 82; [1927] *Argus* L. R. 379.—**AUS.**

*so. Land—Undivided share.*—A transfer of an undivided share of land is, for the purposes of Stamp Act, 1915, a transfer of land. A transfer of land may be dutiable as a transfer of land on a sale thereof, though the sale includes both land & personal property.—**DUCKETT v. COLLECTOR OF IMPOSTS**, [1927] V. L. R. 457; 49 A. L. T. 82; [1927] *Argus* L. R. 379.—**AUS.**

*sp. Licence to use property.*—An agreement between a racing club & S. conferred on the latter, for valuable consideration, the sole right of supplying, at prices fixed by the club, all the refreshments, eatables & drinkables to be sold or disposed of within two reserves during race meetings to be held on the club's course for a period of three years. All plant, etc., was to be

supplied by S., & it was implied that he should have the use of the club's refreshment rooms. It was a term of assignment of interest would under any circumstances be allowed unless written permission be granted for same the agreement that no sub-letting or by the chairman of the club. The right was reserved by the club to enter & view the refreshment rooms at any time & to take such steps as appeared necessary from time to time to secure the proper management & control of the business. Y., with two other persons, entered into a joint & several bond with the club to secure the due performance by S. of the contract. S. died, & by an agreement between Y. & the club it was arranged that Y. should carry out the terms of the original agreement in the place of S., the currency thereof being extended for a further three years.—*Held*: the agreement was not within sect. 41 (1) or sect. 85 of Stamp Duties Act, 1920–24 (N.S.W.) because it was an executory contract giving rise to a mere personal right of selling refreshments with ancillary stipulations.

Such a right was not "property" within the meaning of the Act, & therefore the agreement was not liable to *ad valorem* duty appropriate to a conveyance. Nor was the agreement within sect. 71, as there was neither a sale nor a right within that sect.—**COMR. OF STAMP DUTIES (NEW SOUTH WALES) v. YEEND** (1929), 43 C. L. R. 235; 3 A. L. J. 319.—**AUS.**

**PART IX. SECT. 6, SUB-SECT. 18.—A. (b).**

*st. Entries in buyer's account book.*—A buyer of bullion & ornaments used to get each seller to make an entry in the buyer's account books giving the seller's name & a description of the goods purchased & the price paid, together with the signature of the seller thereon. These entries were all unstamped.—*Held*: the transactions of sale were completed by delivery & payment of price, & so the entries did not transfer any property & were not conveyances within Stamp Act, 1899, s. 2 (10).—**EMPEROR v. RAGHUBAR DATAL** (1933), 1 L. R. 56 All. 680.—**IND.**



restrictions upon the old co. & the directors thereof preventing them from operating in competition with the new co. The period of the restrictions was to be calculated from the payment of the said sum of £17,250. Clause 4 provided for payment in respect of certificates of fitness & road fund licences. Clause 5 provided for the transfer of vehicles & stocks used in the business, & clause 6 provided for the sale of certain freehold land & buildings for the sum of £1,750. By clause 7 the whole agreement was made conditional upon the grant of the necessary licences by the Comrs., & if these were not obtained, the new co. was given an option to cancel the agreement. The Inland Revenue Comrs. assessed the document to stamp duty as an agreement for the sale of goodwill or other property not falling within the exceptions in Stamp Act, 1891 (c. 39), s. 59 (1), & therefore liable to *ad valorem* duty, & in addition, to a deed stamp of 10s.:—**Held**: (1) although the continuation of the business was subject to the grant of the necessary licences by the Traffic Comrs., the business had goodwill, & by virtue of the above document, the new co. possessed that goodwill; (2) the document attracted stamp duty upon the value of the goodwill. This was not necessarily the sum of £17,250 less the specific items in respect of the land & stock, but there had also to be deducted the value of the covenant restraining competition. — **EASTERN NATIONAL OMNIBUS CO., LTD. v. INLAND REVENUE COMRS.**, [1938] 3 All E. R. 526; 82 Sol. Jo. 713.

651. **Add. Annotation**:—**Refd.** *Faber v. I. R. Comrs.*, [1936] 1 All E. R. 617.

658a. **Contract for sale of land & building contract.**—A contract for the sale of land for £500 was entered into, to be completed in three weeks. On the same date a contract between the same parties, expressed as conditional on the completion of the contract of sale, was entered into, whereby the vendor of the land contracted to build a house thereon for the purchaser for £1,350. It was contended by the revenue authorities that this was one transaction & that the amount of stamp duty on the conveyance should be on the real consideration therefor—namely, the aggregate of the above sums, £1,850:—**Held**: this was not a contract for the sale of a house & the land on which it stood, but constituted separate transactions, a contract of sale of land & a contract to build a house thereon, & duty on £500 only was payable.—**KIMBERS & CO. v. INLAND REVENUE COMRS.**, [1936] 1 K. B. 132; 105

L. J. K. B. 97; 154 L. T. 305; 51 T. L. R. 421; 79 Sol. Jo. 402.

**Annotation**:—**Consd.** *A.-G. v. Cohen*, [1936] 2 K. B. 246.

661. **Add. Annotation**:—**Overd.** *English, Scottish & Australian Bank, Ltd. v. I. R. Comrs.* (1931), 48 T. L. R. 170.

661a. ———.—**An agreement for sale of, amongst other things, simple contract debts owed by debtors resident out of the United Kingdom is exempt from *ad valorem* stamp duty in respect of such debts upon the ground that they are "property locally situate out of the United Kingdom" within the exception in Stamp Act, 1891 (c. 39), s. 59 (1).**—**ENGLISH, SCOTTISH & AUSTRALIAN BANK, LTD. v. INLAND REVENUE COMRS.**, [1932] A. C. 238; 101 L. J. K. B. 193, 146 L. T. 330; 48 T. L. R. 170, II. L.

**Annotation**:—**Refd.** *Re Russian Bank for Foreign Trade*, [1933] Ch. 745.

663. **Add. Annotation**: **Refd.** *Faber v. I. R. Comrs.*, [1936] 1 All E. R. 617.

667. **Add. Citations**:—[1928] 1 K. B. 703; 97 L. J. K. B. 116; 138 L. T. 171.

**Add. Annotation**:—**Overd.** *Stanyforth v. I. R. Comrs.*, [1930] A. C. 339.

669a. — **Whether overriding powers of revocation & reappointment to be considered.**—By a deed poll dated in 1911 a partial resettlement was effected of the Portman family estates. The deed poll was executed under a joint power of revocation & new appointment contained in previous dispositions of the estates & the appointment thereby made was expressly subject to a further exercise of such power; & the deed poll itself also contained a fresh power of revocation & new appointment. In arriving at the value of the property transferred by the deed poll for the purpose of assessing the *ad valorem* stamp duty payable thereon under Finance (1909–10) Act, 1910 (c. 8), s. 74, the I. R. Comrs. disregarded the powers of revocation & new appointment:—**Held**: these overriding powers ought to have been regarded as affecting the value.—**STANYFORTH v. INLAND REVENUE COMRS.**, [1930] A. C. 339; 99 L. J. K. B. 327; 142 L. T. 641; 46 T. L. R. 288, II. L.

670. **Add. Annotations**:—**Apld.** *Westmorland v. I. R. Comrs.*, [1928] 1 K. B. 703. **Refd.** *Stanyforth v. Inland Revenue Comrs.* (1929), 98 L. J. K. B. 764.

674. **After this case add**:—

— **Exemption of copies of probate & letters of administration.**—**Sec** Finance Act, 1930 (c. 28), s. 43.

#### PART IX. SECT. 6, SUB-SECT. 22.

**sr. Deed of gift.**—C. proposed to his two sons A. & B. that on condition that A. should convey his interest in property "W. P." to B., C. would convey his property "R." to A. A. & B. agreed to the proposal. The conveyance of "R." by C. to A. was stamped as a "deed of gift"; it was now claimed that the conveyance by A. of his interest in "W. P." to B. should be stamped with a denoting stamp:—**Held**: the transaction was not a sale, i.e. a transfer of land in consideration of a sum of money paid as the price therefor & therefore the provisions as to denoting stamps did not apply; but the transaction in substance was a conveyance by A. of his interest in

"W. P." to B. in consideration of the conveyance by C. to A. of "R." & although such conveyance was not a gift properly so called it was an instrument transferring property which was made upon a valuable consideration other than a *bond fide* pecuniary consideration, which was a "deed of gift" within the meaning of the Sched. to Stamp Duties Amendment Act, 1904.—**CAMPRELL v. STAMP DUTIES COLLECTOR** (1932), 25 Tas. L. R. 121.—**AUS.**

#### PART IX. SECT. 6, SUB-SECT. 27.

**sv. Duty assessed on value of feu-duty.**—K. offered to feu to M. a plot of ground for the erection of a house at a feu-duty of £4 4s. On the

date K., Ltd., a building co. under K.'s control, offered to build for M. a house on the plot of ground at a price of £630. These offers were accepted by M. After the house was built K. granted a feu of the ground to M. by a feu contract at the stipulated feu-duty:—**Held**: the stamp duty on the feu contract was assessable on the value of the feu-duty, capitalised in terms of sect. 56 (2), together with the price of the house, & not on the value of the feu-duty alone, in respect that the agreements regarding the land & the house constituted one transaction by which the property in both was transferred.—**M'INNES v. INLAND REVENUE**, [1934] S. C. 424.—**SCOT.**

**sx. — — —.**—Following upon **M'INNES**

734. To cross-references before this case add "See, also, Finance Act, 1930 (c. 28), s. 44."

762a. Verbal declaration of trust—Followed by deed of settlement.]—A deed of settlement executed on June 24, 1931, after reciting, as was the fact, that on May 20, 1931, for the same consideration as was mentioned in the deed, which then existed in draft form, the settlors had verbally declared that they would thenceforth, until trustees were appointed in their place, hold the securities mentioned in the first & second scheds. thereto, being of the value of £55,344, as trustees upon the same trusts as would be set forth in respect of the securities mentioned in the third & fourth scheds. thereto, being of the value of only £1,512, when the same were formally transferred, went on to

witness that in consideration of matters therein mentioned the settlors thereby assigned & transferred to the trustees the securities mentioned in the third & fourth scheds., that the trustees should stand possessed of all the property & securities vested in them upon certain specified trusts, & that the settlors thereby appointed the trustees of the settlement to be the trustees of the securities mentioned in the first & second scheds. thereto. A question having arisen as to the stamp duty with which the deed was chargeable:—*Held*: although the verbal declaration of trust had been made before the deed, the two nevertheless formed one single transaction & the deed was chargeable under the head "Settlement" in Stamp Act, 1891 (c. 39), Sched. I., with *ad valorem* stamp duty on the total value of the property

offers to feu plots of land, but before the feu charters were granted, two prospective feuars entered into contracts with builders for the erection of houses on the land to be feued. In one case no part of the house had been built at the date of the feu charter; in the other case it had been partly built. The superiors & the builders were independent parties. In a third case a house was built upon the land of a landowner with his consent, on an oral agreement with him that a feu of the site would be granted. A feu charter was granted after the house had been built:—*Held*: in each case the stamp duty was assessable on the value of the feu duty only, capitalised in terms of Stamp Act, 1891 (c. 39), s. 56 (2), & not on the feu duty together with the value of the house, in respect that the consideration for the feu charter was the feu duty only, the house in each case being the subject of a separate contract with an independent party.—*PAUL v. INLAND REVENUE, SPAN v. INLAND REVENUE, BLAIR v. INLAND REVENUE*, [1936] S. C. 413.—*SCOT.*

PART IX. SECT. 6, SUB-SECT. 30.

sp. Mortgage stamped in Irish Free State—Double Taxation Relief Act.]—The vendor of an estate situate in County Antrim, which was in process of sale through the Land Purchase Commission under the Northern Ireland Land Act, 1925, executed a mtge. to the Bank of Ireland of the bonus payable in respect of the sale. This instrument, which was dated Apr. 24, 1926, contained a covenant on the part of mtgees. to re-assign the premises on re-payment of the principal & interest thereby secured. It was executed by the mtgor. at his residence in County Antrim & by the mtgees. in Dublin, where it was stamped with an Irish Free State Stamp in respect of the duty chargeable thereon. Upon the ruling of the final schedule of Incumbrances the Judicial Comr. declined to accept the mtge. in evidence on the ground that it was not properly stamped in accordance with the provisions of the Stamp Act, 1891:—*Held*: by the Ct. of Appeal the mtge. was chargeable with stamp duty in the Irish Free State within Double Taxation Relief Act (Northern Ireland), 1923 (c. 14), Part III., para. (a), & it was accordingly properly stamped & admissible in evidence in Northern Ireland.—*Re Estate of MACARTNEY*, [1933] N. I. 1.—*IR.*

PART IX. SECT. 6, SUB-SECT. 34.

734 xl. — Receipt granted to heritor on account of stipend.]—In the case of a parish where a minister was in right of the whole standardised stipend, a question arose whether a receipt

granted by the General Trustees to a heritor on account of stipend paid by him was exempt from stamp duty in virtue of Finance Act, 1924, s. 36:—*Held*: in virtue of the nature of standardised stipend as determined by Church of Scotland (Property & Endowments) Act, 1923, s. 36, the receipt granted by the General Trustees to the heritor on account of standardised stipend could not be described as given on account of any salary or other like payment within Finance Act, 1924, s. 36, even though the minister of the parish was in right of the whole standardised stipend thereof; & accordingly, the receipt was not entitled to the exemption from stamp duty conferred by that section.—*CHURCH OF SCOTLAND GENERAL TRUSTEES v. INLAND REVENUE COMRS.* [1932] S. C. 97.—*SCOT.*

734 xii. — Acknowledgment of loan.]—In an action brought in 1932 by testamentary trustees for recovery of a loan alleged to have been made by testator to defender, pursuers produced a document consisting of a letter, dated 1920, from defender's father to testator, & a docquet holograph of & signed by defender. In the letter defender's father undertook, if testator advanced £1,000 to defender, to arrange for payment of interest. The docquet, which was undated, but must have been executed before July, 1931, bore "I acknowledge receipt of the sum of One Thousand Pounds." The document was not stamped, & defender maintained that it could not be received in evidence, in respect that, being a receipt, it could not be stamped more than one month after its date:—*Held*: when the letter & docquet were read together, it was clear that the £1,000 was received as a loan, & accordingly, the docquet was not a receipt within Stamp Act, 1891 (c. 39), & might be stamped more than one month after its date.—*SIMPSON'S TRUSTEES v. SIMPSON*, [1933] S. C. 128.—*SCOT.*

sh. Failure to give stamped receipt—Money received against voucher.]—Applt., a commercial traveller employed by a joint stock co., received from the co.'s cashier a sum of £10 to be expended in travelling expenses & in return signed a petty-cash voucher, which he handed to the cashier in acknowledgment of his having received the said money. Subsequently he accounted to the cashier for it, producing receipts where receipts had been given to him. He was convicted of a breach of sect. 71 (2) of Stamp Acts, 1894 to 1930, which makes it an offence, in any case where a receipt would be liable to duty, not to give or issue forthwith a receipt duly stamped. For the purposes of those Acts "the expression 'receipt' includes any note, memorandum, or writing whereby any money amounting

to two pounds or upwards . . . is acknowledged or expressed to have been received, or deposited, or paid. . . ." On appeal:—*Held*: the voucher did not merely evidence the passing of money from one servant of the co. to another; that the payment of the amount of £10 must be assumed to have been made to applt. in pursuance of an antecedent liability; & the conviction was right.—*GOLLESON v. S. WARD, Ex p. WARD*, [1936] Q. S. R. 190; 30 Q. J. P. R. 103.—*AUS.*

PART IX. SECT. 6, SUB-SECT. 35.

h. i. — — —.]—NEW SOUTH WALES STAMP DUTIES COMRS. v. THOMSON (1928), 40 C. L. R. 394; [1928] Argus L. R. 30.—*AUS.*

sp. Exemption—Transfer of stock—Equitable interest.]—A deed of settlement otherwise dutiable under Stamp Act, 1928 (Vict.) purported to transfer Australian consolidated inscribed stock to a trustee upon the terms of the settlement. The transfer was not in the form prescribed by Commonwealth Inscribed Stock Act, & consequently did not operate to vest in the trustee the legal property in the inscribed stock:—*Held*: as the deed of settlement transferred only the equitable interest in the stock, it was not a "document relating to the . . . transfer . . . of any stock" within sect. 52A of Commonwealth Inscribed Stock Act, 1911-1933, as that provision applied only to transfers of legal interests, & the deed of settlement was consequently not exempted from stamp duty under Victorian Stamp Act, 1928 by sect. 52A of the Commonwealth Inscribed Stock Act.—*FAIRBAIN v. COMPTROLLER OF STAMPS FOR VICTORIA* (1935), 53 C. L. R. 463; 41 Argus L. R. 377; 9 A. L. J. 205.—*AUS.*

sr. Revocable mandate.]—The instruments referred to in Part IX. of Third Sched. to Stamp Act, 1928, include instruments not under seal. A beneficiary entitled under a will to the residuary estate of testator, delivered to the exor. named in the will a letter, by which he requested the exor. upon the issue of probate to pay out of his interest, in shares or in money at the exor.'s discretion, various amounts to a number of persons & institutions. The exor. transferred shares & made cash payments in compliance with these directions:—*Held*: the letter was not dutiable under Stamp Act, 1928, as a deed of settlement or of gift within Part IX. of Sched. III. since it was not an instrument whereby property was settled or given, but was a mere revocable mandate.—*HOWARD-SMITH v. COMPTROLLER OF STAMPS*, [1935] V. R. 387; 41 Argus L. R. 467; *affd.*, 54 C. L. R. 614; 10 A. L. J. 39; 42 Argus L. R. 198.—*AUS.*

mentioned in all its four scheds.—namely, £56,856.—*COHEN & MOORE v. INLAND REVENUE COMRS.*, [1933] 2 K. B. 126; 102 L. J. K. B. 696; 149 L. T. 252.

- 767a. Unqualified person drawing instrument relating to real property.**—Under Stamp Act, 1891 (c. 39), s. 44, it is an offence for a person

not so qualified as provided therein to draw or prepare, in expectation of a fee, an instrument which purports to be a lease, but which is invalid, being unsealed. Such a document is not an "agreement under hand only" within the meaning of the proviso.—*HARTE v. WILLIAMS*, [1931] 1 K. B. 201; 103 L. J. K. B. 108; 150 L. T. 238; 30 Cox, C. C. 57, D. C.

## Part X.—Corporation Duty.

- 780. Add. Annotations:—***Dlstd. General Medical Council v. I. R. Comrs.*, English Branch Council of General Medical Council *v. I. R. Comrs.* (1928), 97 L. J. K. B. 578. *Consd. Midland Counties Institution of Engineers*

*v. I. R. Comrs.* (1928), 14 Tax Cas. 285. *Apld. Institution of Civil Engineers v. I. R. Comrs.* (1931), 47 T. L. R. 466. *Refd. Master Mariners, Honourable Co. of v. I. R. Comrs.* (1932), 17 Tax Cas. 298.

## Part XII.—Entertainments Duty.

- 784. Add. Annotations:—***Consd. A.-G. v. Arts Theatre of London, Ltd.*, [1933] 1 K. B. 439; *A.-G. v. Southport Corpn.*, [1934] 1 K. B. 226; *A.-G. v. London Casino, Ltd.*, [1937] 3 All E. R. 858.

- 785. Add. Annotations:—***Consd. A.-G. v. Arts Theatre of London, Ltd.*, [1933] 1 K. B. 439; *A.-G. v. London Casino, Ltd.*, [1937] 3 All E. R. 858.

- 786. Add. Annotations:—***Consd. A.-G. v. Arts Theatre of London, Ltd.*, [1933] 1 K. B. 439; *A.-G. v. Southport Corpn.*, [1934] 1 K. B. 226; *A.-G. v. London Casino, Ltd.*, [1937] 3 All E. R. 858.

- 786a. Theatre club.**—A club was formed with the object of creating a social rendezvous & providing its members with the amenities of a London club, including the provision of meals & refreshments. In addition it provided its own theatre on the club premises & produced regularly at the theatre with professional casts new plays & revivals for short runs, & also provided therein concerts, lectures, etc. There were two classes of members—namely, full members, who paid annual subscriptions at full rates, & enjoyed all the privileges & amenities of the club, & associate members, who paid annual subscriptions at much lower rates than the full members, & were entitled only to a few of the privileges of the full members. Both full members & associate members were entitled to enter the theatre & attend the theatrical performances given there upon

payment of the prices charged for admission, which were the same for both full members & associate members, & varied according to the cost of production of each play, & were calculated so as to cover the cost of production throughout each year. There was no admission for the public at large. The Comrs. of Customs & Excise determined that a portion of the subscriptions paid by both full members & associate members was in respect of the right of admission to entertainments & that entertainments duty was payable thereon:—*Held*: by FINLAY, J., on the facts, a portion of the annual subscriptions paid both by the full members & the associate members was paid in order to entitle them to join the privileged class of persons who alone had the right, upon making a further payment, to be admitted to the entertainments in the theatre, & that portion of the annual subscriptions was chargeable with entertainments duty.

On appeal it was contended on behalf of appts. that the duty could not attach, because Finance (New Duties) Act, 1916 (c. 11), s. 1 (4), referred to a payment for admission & not to a part payment for admission to an entertainment:—*Held*: by the Ct. of Appeal, that under s. 1 (4) of the 1916 Act, the Comrs. were charged with the duty of breaking up the lump sum paid in respect of the subscription paid to the club to see whether there was contained in it a sum which represented any payment for admission to the theatre, & that if it did,

### PART IX. SECT. 7.

**765 i. —** *Liability of master for penalty incurred by servant.*—A servant authorised to give receipts, gave a receipt liable to duty & not duly stamped. The receipt was in form an acknowledgment by the principal through the servant that the principal had received the money:—*Held*: the principal was liable to a penalty under Stamps Act, 1928, s. 55.—*FRASER v. BRENNAN*, [1935] V. L. R. 371; 41 Argus L. R. 508.—AUS.

### PART XII.

**aa. Club picnic—Sea trip & shore amusements.**—A club conducted an excursion to a seaside resort & a picnic

there & sold tickets in connection with the excursion & picnic. The holders of tickets were conveyed to the resort by a boat chartered by the club, where for a few hours ashore they might take part in games, pastimes & amusements in a park, of which the club had the use for the day. They afterwards returned by the same boat. The whole outing extended over some eleven or twelve hours. No ticket or special payment was needed for participation in the amusements in the park, in which persons other than ticket-holders were at liberty to join:—*Held*: there was no payment for admission to an entertainment.—*TAXATION COMR. v. VICTORIAN HARDWARE CLUB*, [1931] Argus L. R. 145.—AUS.

**sd. Boating pool.**—The proprietor of a water pool allowed persons to hire boats provided by him on the pool on payment of a fee. The public were admitted free of charge to all parts of the premises. The Comr. of Taxation claimed that under Entertainment Tax Assessment Act, 1925, the moneys paid by the hirers of the boats were subject to entertainment tax as being payments for admission to an entertainment:—*Held*: the amusement carried on upon the pool was an entertainment as defined in the Act, but no payment was made for admission to the entertainment, & therefore the Comr.'s claim failed.—*BLACK v. SPEEDCRAFT, LTD.*, [1937] W. A. L. R. 21.—AUS.

the tax attached; & even though, subsequently or successively, there might have been a direct payment for the ticket of admission which was used by the member, nevertheless the totality of the two sums which had been paid represented a payment made for admission to an entertainment of which he had paid the first portion in his subscription to the club & the second portion directly in the purchase of his ticket, & the duty was payable on the totality of the two sums paid for admission:—*Held*: therefore, the tax attached.—*A.-G. v. ARTS THEATRE OF LONDON, LTD.*, [1933] 1 K. B. 439; 102 L. J. K. B. 105; 148 L. T. 266; 49 T. L. R. 38; 76 Sol. Jo. 831, C. A.

*Annotation*:—*Consd. A.-G. v. London Casino, Ltd.*, [1937] 3 All E. R. 858.

**787. Add. Annotations**:—*Distd. A.-G. v. London Casino, Ltd.*, [1938] 1 K. B. 279. *Refd. A.-G. v. Southport Corp.*, [1934] 1 K. B. 226.

**787a. Revue during meals at restaurant.**—The London Casino, Ltd., owned & carried on a restaurant, at which a minimum charge of 15s. 6d. was made for dinner. Dinner was served on the premises, which had previously been used as a theatre, & the theatre stage was so adapted that persons paying for the dinner & occupying the tables could see an elaborate revue which was in two parts & was produced on the stage from 8.15 to 9 p.m. & from 9.15 to 10 p.m. No charge was made for the show other than the payment for the dinner, which was served either at a fixed price or *à la carte*, & for which a bill was rendered to the customer at the end of the meal:—*Held*: there was “an entertainment,” for admission to which payment was made within the Act, & it was for the Comrs. to allocate the exact proportion of the lump sum paid for the dinner upon which entertainments duty was chargeable.—*A.-G. v. LONDON CASINO, LTD.*, [1938] 1 K. B.

279; [1937] 3 All E. R. 858; 107 L. J. K. B. 66; 158 L. T. 379; 53 T. L. R. 1017; 81 Sol. Jo. 718.

**788. Add. Annotations**:—*Consd. A.-G. v. London Casino, Ltd.*, [1937] 3 All E. R. 858. *Refd. A.-G. v. Southport Corp.*, [1934] 1 K. B. 226.

**791a. Bathing pool—Admission of non-bathers.**—The corp. of a borough were the proprietors of an enclosure which adjoined the sea-shore & included a sea-bathing lake; two areas reserved for sun-bathing; dressing accommodation for about a thousand bathers; terraces with seating accommodation for several thousands of non-bathers sheltered from the wind, & an upper terrace promenade, that accommodation giving the non-bathers a view of the bathing lake, adjacent parks, recreation ground & sea-shore; & a café. The bathing was not organised. The lake & grounds were widely used by visitors & residents as a meeting-place & resort for sheltered sitting & resting in the sun. The sheltered seats, terraces & café were open & used at the same prices whether or not there was bathing. The enclosure was open from Apr. 30 to Oct. 1 from 7 a.m. to 8 p.m. on week-days, & for shorter hours on Sundays. The charges for non-bathers were between 2 p.m. & 5 p.m. 4d., & at any other time 3d., these charges being somewhat less than those for bathers. Admission was by ticket obtained at a turnstile:—*Held*: the bathing, not being organised, was not an “entertainment” within the meaning of that term as defined by Finance (New Duties) Act, 1916 (c. 11), s. 1, & consequently that entertainments duty under the Act could not be charged on the payments made by non-bathers for admission to the enclosure.—*A.-G. v. SOUTHPORT CORPN.*, [1934] 1 K. B. 226; 103 L. J. K. B. 117; 150 L. T. 273; 98 J. P. 51; 50 T. L. R. 122; 77 Sol. Jo. 899; 32 L. G. R. 71, C. A.

## Part XIII.—Recovery of Revenue Duties and Penalties.

**799. Add. Annotation**:—*Appld. Chowood, Ltd. v. Lyall*, [1929] 2 Ch. 406. **811a. Order of Inland Revenue Commissioners—When necessary—Prosecution under Railway**

**PART XIII. SECT. 1, SUB-SECT. 1.**  
p i. — *Action against broker—For value of revenue stamps.*—Under Special War Revenue Act, R. S. C., 1927, the omission to affix the revenue stamps required by sect. 58 of Part VII. to be affixed on stocks or bonds on a sale or transfer thereof does not, when a sale is made by a broker as an agent, render him liable to pay the money value of such stamps as a debt due to the Dominion of Canada.—*R. v. CRABBS*, [1934] S. C. R. 523; 4 D. L. R. 324; 47 B. C. R. 293.—*CAN.*

st. *Trial of issue—To determine fact essential to defence—Amendment of defence.*—*R. v. MUTUAL FIRE ASSOCN. OF CANADA, LTD.* (1926), 58 N. S. R. 120.—*CAN.*

sv. *Statutory presumption from possession.*—*R. v. LEAGE*, [1929] 1 D. L. R. 808; 51 Can. Crim. Cas. 11; 60 N. S. R. 226.—*CAN.*

sw. — — — *On a charge under Customs Act, R. S. C., 1927, s. 217 (2), of unlawfully importing liquor the onus is on the accused to prove lawful importation, without proof by the*

Crown of importation.—*R. v. CHEVERIE* (1933), 7 M. P. R. 147; 62 C. C. C. 283.—*CAN.*

sx. — — — *R. v. DEMPSEY* (1933), 7 M. P. R. 189.—*CAN.*

sa. *Unlawful removal from distillery.*—*Held*: (1) where an inspection of the stock of spirits in a distillery, made according to the directions of the statute, shows that on a given date a substantive quantity of spirits had in some way been removed from the distillery, & that the distillery stock books, required to be kept under the Act, did not show said deficiency to have been lawfully removed, such evidence, unless rebutted by proper & legal evidence, will be proof that said shortage was unlawfully removed; (2) it results from the proper reading of sects. 53, 149, 151 & 152 of the Excise Act, that, upon it being shown that any distilled spirits have been unlawfully removed from a distillery, the excise duties thereon become payable forthwith; (3) it is no defence in the present action to show that the spirits had been unlawfully removed

by its sales manager, who was also a director, without the knowledge of the other directors.—*R. v. ATLANTIC DISTILLING CO., LTD.*, [1931] Ex. C. R. 117.—*CAN.*

**PART XIII. SECT. 1, SUB-SECT. 2.—A.**

806 iv. — — — *R. v. CHENG TONG SENG*, [1928] 1 W. W. R. 33; 49 Can. Crim. Cas. 79; 39 B. C. R. 157.—*CAN.*

806 v. — — — *R. v. BOUTILLER*, [1928] 2 D. L. R. 555; 49 Can. Crim. Cas. 312.—*CAN.*

806 vi. — — — *R. v. MANUEL*, [1928] 2 D. L. R. 755; 50 Can. Crim. Cas. 32.—*CAN.*

806 vii. — — — *Railway Passenger Duty Act, 1842.*—*Held*: under Burgh Police Act, sect. 454, the burgh magistrate had no jurisdiction to entertain the complaint, in respect that, while the duties imposed by the Act of 1842 had been repealed, & other duties substituted therefor, a contravention of sect. 13 was still an offence against an Inland Revenue or Customs Act, within the meaning of Burgh

**Passenger Duty Act, 1842 (c. 79), s. 13.]**—An information was preferred by a police officer against the conductor of a motor omnibus, alleging that he had allowed the omnibus to carry at one time a greater number of passengers than it had been constructed to carry, contrary to Railway Passenger Duty Act, 1842 (c. 79), s. 13:—*Held*: the prosecution was not a proceeding for the recovery of a fine or penalty under an Act relating

to inland revenue within Inland Revenue Regulation Act, 1890 (c. 21), s. 21 (1), & it could, therefore, lawfully be commenced without an order of the Inland Revenue Comrs.—*KIRKBY v. MINTY*, [1929] 2 K. B. 165; 98 L. J. K. B. 733; 141 L. T. 515; 93 J. P. 176; 45 T. L. R. 427; 27 L. G. R. 438; 28 Cox, C. C. 640, D. C.

**816. Add. Annotation:—***Refd. Roche v. Willes* (1934), 151 L. T. 154.

Police Act, s. 454.—*CAMERON v. SWEENEY*, [1928] S. C. (J.) 34.—**SCOT.**

**sd. Election as to penalty.—When made.]**—A summons charged deft. "that he . . . was concerned in carrying, to evade the payment of duty thereon, certain uncooked eggs . . . contrary to sect. 186 of Customs (Consolidation) Act, 1876 (c. 36), whereby the said deft. has forfeited the penalty of £100 for which the Comrs. have elected to sue." Deft. was convicted & the justices ordered him "to pay the sum of £10 11s. 0d. being three times the value including the duty thereon of sixty dozen of eggs which we adjudge deft. to be carrying to evade payment of the duties thereon . . . & for costs the sum of £1 14s. 6d. within one month & if said sums be not paid within one month, we adjudge P. M. to be imprisoned in Londonderry Gaol for fourteen days with hard labour unless said sums be sooner paid." On a motion to make absolute a conditional order of *certiorari* which brought up the order of the justices for the purpose of being quashed:—*Held*: (1) it was open to the Comrs. at any time prior to conviction to say for what penalty they intended to sue; (2) the addition of the punishment of something not warranted in law was not a "defect" within sect. 223 of 1876 Act, but made the order wholly bad; (3) the order could not be sent back to the justices to be amended after *certiorari* proceedings had been taken; (4) if it was not competent for the justices to amend the order the ct. had no power, either to refuse or request them to do so.—*R. (MEEHAN) v. COUNTY TYRONE, CHAIRMAN & JUSTICES*, [1934] N. I. 67.—**IR.**

**811a i. Order of Inland Revenue Commissioners.—When necessary.—Prosecution under Railway Passenger Duty Act, 1842 (c. 79), s. 13.]**—*HORN v. DUCKETT*, [1929] S. C. (J.) 63.—**SCOT.**

**f i. — Effect of Criminal Justice Administration Act, 1914 (c. 58), s. 16.]**—*Held*: sect. 12 of the Customs & Inland Revenue Act, 1879 (c. 21), which provides that any person convicted of an offence against the Customs Acts, & who had been adjudged to pay a penalty of £100 or upwards may for a first offence be imprisoned for not less than six months nor more than nine months, & for a subsequent offence may in lieu of payment of the penalty be imprisoned with or without hard labour, for not less than six months nor more than twelve months, was repealed by sect. 16 of Criminal Justice Administration Act, 1914 (c. 58).—*R. (McCONVILLE) v. ARMAUGH COUNTY JUSTICES*, [1934] N. I. 222.—**IR.**

**l i. — Notice of seizure.]**—The giving of the notice of seizure which is required by Excise Act, 1927, s. 77, is not a condition precedent to the prosecution of a charge laid under sect. 176 (e) of said Act.—*R. v. KORYK*, [1929] 2 D. L. R. 636; 1 W. W. R. 766; 51 Can. Crim. Cas. 372; 38 Man. L. R. 166.—**CAN.**

**sw. Improper adjournment.—Effect of.]**—A justice of the peace having intervened in a prosecution under the Excise Act by assuming to adjourn the trial on the non-appearance of the police magistrate before whom the information

was laid, & who had issued a summons to deft. to appear before him, a conviction made on the adjourned date of trial by another police magistrate, before whom deft. refused to plead & to whose jurisdiction he objected, was quashed.—*R. v. PYKE*, [1928] 1 W. W. R. 590; 49 Can. Crim. Cas. 186; 23 Alta. L. R. 341.—**CAN.**

**xx. Information in writing.—By whom laid.]**—Since only inland revenue officers can lay an information for an offence under Excise Act, such an information must state that the person laying the information is an inland revenue officer.—*R. v. WITSIEWICZ*, [1928] 2 W. W. R. 19; 49 Can. Crim. Cas. 330.—**CAN.**

**xy. — Whether necessary.]—Held**: an information in writing required by Customs & Inland Revenue Act, 1879, is no longer a necessary preliminary to the issue of a summons charging an offence under the Customs Acts.—*A.-G. v. HEALY*, [1928] 1 R. 60.—**IR.**

**sz. Information.—Description of informant.—Sufficiency.]**—An information for an offence against the Excise Act which describes the informant as a Customs & Excise officer "on behalf of His Majesty the King" shows sufficiently that he belonged to the class of persons by whom such an information may be laid & gives the magistrate the right to proceed thereunder.—*R. v. HENDERSON* (B. C.), [1929] 4 D. L. R. 984; 2 W. W. R. 209; 52 Can. Crim. Cas. 82.—**CAN.**

**sb. — Must be laid before two justices.]**—*R. v. O'HALLORAN* (1928), 54 Can. C. C. 227.—**CAN.**

**sc. — Must state value of goods illegally imported.]**—*R. v. BENT* (1930), 54 Can. C. C. 169.—**CAN.**

**sd. — Necessity for averment that goods unlawfully imported.]**—*R. v. REID*, [1932] 2 D. L. R. 303; 4 M. P. R. 328; 57 C. C. C. 396.—**CAN.**

**se. — Description of offence.—Sufficiency.—Whether "without lawful excuse" necessary.]**—*JACOBS v. R.* (1931), 56 Can. C. C. 200.—**CAN.**

**sf. — — — — —.]**—An information under Customs Act, 1927, is valid when it uses the word "keep," which is identical with "have in one's possession."—*R. v. McLEOD*, [1935] 2 D. L. R. 510; 9 M. P. R. 145; 63 Can. C. C. 155.—**CAN.**

**sg. Penalty should be proportionate to extent of illegal operations.]**—*R. v. PETTIT*, [1931] 4 D. L. R. 548; 57 C. C. C. 108.—**CAN.**

**sk. Harbouring goods.—Implication of ownership.]**—In a prosecution under Customs Act, R. S. C., 1927, "harbouring" implies ownership.—*R. v. FORAN* (1932), 59 C. C. C. 268.—**CAN.**

**sl. — Meaning of "value for duty."]—**In a charge of harbouring goods of the "value for duty" of over \$200, "value for duty" means the value to be stated in the bill of entry even though there is no *ad valorem* duty.—*R. v. BALLARD*, [1933] 2 D. L. R. 67; 59 C. C. C. 220; 6 M. P. R. 193.—**CAN.**

**sm. No power to suspend sentence.]**—Customs Act, R. S. C., 1927, s. 282, deprives the ct., in respect of offences under the Customs Act, of its usual

power to suspend the sentence of persons convicted.—*R. v. LOWERY*, [1933] O. R. 19; 59 C. C. C. 112.—**CAN.**

**sp. Form of order.]**—The prosecutor was charged at petty sessions on a summons with being (*inter alia*) knowingly concerned in a fraudulent evasion of duties of customs in respect to ten head of cattle. He was convicted & was ordered to pay the sum of £300 or in default to be imprisoned until that sum be paid or discharged according to law.

On an application to make absolute a conditional order for a writ of *habeas corpus* notwithstanding cause shown:—*Held*: it was necessary for the justices to state the limit of the term of imprisonment imposed, & as no term was fixed, the order of the justices was bad.—*R. (McCAUGHEY) v. TYRONE COUNTY JJ.*, [1936] N. I. 10.—**IR.**

**sr. Fines Property of Crown.]**—Fines imposed in a prosecution for a conspiracy to violate the revenue laws of Canada belong to the Crown & not to the Provincial Treasurer.—*Re PROVINCIAL TREASURER'S CLAIM*, [1937] 1 D. L. R. 531; 11 M. P. R. 335; 67 Can. C. C. 317; *affd. sub nom. A.-G. FOR NOVA SCOTIA v. A.-G. FOR CANADA*, [1937] S. C. R. 103; 3 D. L. R. 225; 68 Can. C. C. 177.—**CAN.**

## PART XIII. SECT. 1, SUB-SECT. 2.—C.

**ni. — — — — —.]—Held**: where goods alleged to have been smuggled are found & seized in the possession of any person, the *onus*, under Customs Act, s. 264, is upon such person to explain how the goods had come into his possession or how they had been imported into Canada, & if so, to prove that the duty upon them was paid.—*WEISS v. R.*, [1928] Exch. C. R. 106.—**CAN.**

**r i. — — — — —.]—R. v. ROZINSKI**, [1930] 2 W. W. R. 636; 54 Can. C. C. 158; 39 Man. L. R. 152.—**CAN.**

**rii. — — — — —.]**—The present action was one to recover a penalty to the amount of the duty paid value of goods harboured by D. unlawfully imported, & incurred under the provisions of Customs Act. Pltf. proved the finding of the goods in the premises of D. & the duty paid value thereof. D. offered no evidence at all:—*Held*: by sect. 217 of Customs Act, the burden of proving that the goods harboured were lawfully imported is upon the person in whose possession the goods are found, & sect. 262 provides that in case of any question relating to identity, origin, importation or payment of duty, the burden is on the owner or possessor of the goods, & D. having failed to discharge the burden put upon him by law, pltf. was entitled to judgment for the duty paid value of the goods so found on his premises.—*R. v. DOULL*, [1931] Ex. C. R. 159.—**CAN.**

**t i. — — — — —.]—R. v. MOYLE (1928), 49 Can. Crim. Cas. 375.—**CAN.****

## PART XIII. SECT. 1, SUB-SECT. 2.—D.

**sa. Sentence of imprisonment in default of payment of costs.—Invalid.]**—*Ex p. MONAHAN* (N. B.), [1929] 1 D. L. R. 804; 51 Can. Crim. Cas. 1.—**CAN.**

**826a. Jurisdiction of justices—Order for condemnation.**—A motor tank wagon was seized by officers of the Customs & Excise on the ground that it was being used in the conveyance of goods liable to forfeiture under the Customs Acts. The owners claimed the vehicle under Customs Consolidation Act, 1876 (c. 36), s. 207, & an information was exhibited before justices on behalf of the Comrs. of Customs & Excise for the forfeiture & condemnation of the vehicle under sect. 226 of the Act:—*Held*: it having been admitted that the vehicle had been used in the conveyance of goods liable to forfeiture (in

which case sect. 202 of the Act provides that the vehicle itself shall be forfeited), the justices were bound to condemn the vehicle, sect. 226 giving them no discretion to refuse to do so on the ground, for example, of hardship on an innocent owner.—*DE KEYSER v. BRITISH RAILWAY TRAFFIC & ELECTRIC CO., LTD.*, [1936] 1 K. B. 224; 154 L. T. 158; 52 T. L. R. 73; 79 Sol. Jo. 904; *sub nom.* *DE KEYSER v. HARRIS*, *DE KEYSER v. BRITISH RAILWAY TRAFFIC & ELECTRIC CO., LTD.*, 105 L. J. K. B. 74; 99 J. P. 403; 33 L. G. R. 463.

# **PART XIII. SECT. 1, SUB-SECT. 2.—E.**

**e i. — Court not named—Validity.**—Notice of appeal from conviction under Customs Act is good, although the ct. is not named.—*R. v. McLEOD* (1933), 61 C. C. C. 319.—**CAN.**

**d i. —**—Although the only appeal expressly granted by Customs Act, R. S. C., 1927, is one from a conviction, an appeal lies from the dismissal of a charge thereunder, both impliedly under sect. 279 (1) of said Act & by virtue of sect. 749 of Criminal Code which is incorporated in the Act except in so far as it is incompatible therewith.—*R. v. WOOLLAND*, [1935] 3 W. W. R. 220; 64 Can. C. C. 313.—**CAN.**

**1 i. — From decision of county court judge on appeal.**—Under sect. 279 (2) of the Customs Act there is no appeal from a decision of a county ct. judge on appeal.—*R. v. ALBERT* (1935), 8 M. P. R. 549; 63 Can. C. C. 363.—**CAN.**

**1 ii. — To Court of Appeal.**—There is no right of appeal under Customs Act, R. S. C., 1927, by way of stated case from a police magistrate to the Ct. of Appeal.—*R. (WEEKS) v. SIMON*, [1937] 3 D. L. R. 142; 4 O. R. 493; 68 Can. C. C. 315.—**CAN.**

**sb. Evidence—Retrospective operation of amending Act.**—Statutes of Canada, 1928 (c. 16), s. 5, which amended R. S. C., 1927 (c. 42), s. 262, & changed the law of evidence in prosecutions under c. 42, is retroactive in effect & applicable to the hearing of an appeal to the county ct. from a conviction made prior to its passing.—*R. v. BINGLEY*, [1929] 1 D. L. R. 777; 51 Can. Crim. Cas. 268; 60 N. S. R. 311.—**CAN.**

**sg. Powers of Supreme Court.**—On appeal to Supreme Ct. from quashing of conviction for harbouring spirits, the ct. by Customs Act, may affirm & amend conviction.—*R. v. McKENZIE*, [1932] 4 D. L. R. 586; 5 M. P. R. 32; 58 C. C. C. 239.—**CAN.**

## **PART XIII. SECT. 2.**

**q i. — Foreign vessel.**—The *A.*, a ship owned by the claimant, C. of St. John's, Newfoundland, the port of registry, cleared from Halifax, N.S., unladen, took on a cargo at St. Pierre & unloaded that cargo on to another vessel at a point some fourteen or fifteen miles off the coast of Nova Scotia. The ship then put into Halifax on account of engine trouble; the claimant, L., master of the ship, in reporting to the Collector of Customs at Halifax, as required by sect. 11 of Customs Act, 1927, made an untrue report. Later the ship was seized by the Royal Canadian Mounted Police for an alleged violation of sect. 185

of the Customs Act. On appeal from the decision of the Minister of National Revenue, confirming the seizure, claimants contended *inter alia* that sect. 11 of the Customs Act was *ultra vires*:—*Held*: (1) or customs purposes, a vessel which is not registered in a Canadian port, even though a British vessel, must be considered a foreign vessel; (2) putting into port under constraint does not carry any legal right to exemption from local law or local jurisdiction; (3) the report required by sect. 11 of the Customs Act is required to be made only after the vessel has entered a Canadian port, & the fact that disclosure is required of acts which may have occurred during the course of the voyage, outside of the territorial waters of Canada, does not render the enactment extra-territorial in its operation; (4) the offence charged herein under sect. 185 of the Customs Act is that of having made an untrue report; (5) the Parliament of Canada, for the protection of the revenue, has the right to require a master coming into a Canadian port, to make a full & complete statement, in his report, of the dealings in cargo which he had during the voyage which immediately preceded his arrival at the port.—*CASHIN & LEWIS v. R.*, [1935] Ex. C. R. 103.—4 D. L. R. 547; 64 Can. C. C. 258.—**CAN.**

**so. Ship within three mile limit—Entry due to "unavoidable cause."**—Def't ship was seized by the Customs Authorities under sect. 183 (c. 42) of R. S. C., 1927 (c. 42), s. 183, as being in Canadian waters contrary to its provision. The defence alleged that the entry into Canadian waters was due to the fact that the sole man in command, during the illness of the master believed himself without the three mile limit. The anchorage was made in the dark, & this man had been battling with the elements for two days alone, had only had three hours' sleep in 72, & was exhausted:—*Held*: in the circumstances, he could not be regarded as a mariner in ordinary conditions, & could not be called upon to take such precautions as would in other circumstances be required by this ct., & the entry was due to "unavoidable causes."—*R. v. "MARY C. FISCHER"* (B. C. Adm.), [1929] 4 D. L. R. 679; Ex. C. R. 207; 52 Can. Crim. Cas. 273.—**CAN.**

**sd. — Waters deemed international.**—A foreign vessel belonging to a foreigner was seized in the territorial waters of British Columbia, having cleared from Seattle, bound for Alaska:—*Held*: as passage over these waters is necessary & convenient they should be deemed international in that sense; want of jurisdiction had been established, & accused was entitled to his discharge.—*R. v. HARDY* (1932),

46 B. C. R. 152; 59 C. C. C. 394.—**CAN.**

**se. Seizure of unregistered motor boat—Departure without clearance.**—A certain unregistered motor boat of less than 10 tons tonnage was seized under sect. 244 of Customs Act for departing from a port in Canada without a clearance. She had been moored at one pier in the Customs port of Sydney & left this pier to go to another point in the same port:—*Held*: (1) inasmuch as the motor boat in question was not required to be registered, & was not eligible for clearance by Customs on a coasting voyage, she was not required to obtain a clearance under the provisions of the Customs Act before leaving her port or place of mooring & in consequence, she was not liable for penalty imposed by sect. 244 of the Act; (2) the boat in question did not depart from the port of Sydney within the meaning of said section & the provisions of the statute do not apply to a small boat which is unregistered & which is proceeding from one point in any port to another point in the same port without goods on board, & that she was not required to clear.—*HEARN v. R.*, [1931] Ex. C. R. 201.—**CAN.**

**sg. Seizure of vessel—Who may recover.**—The owner alone may recover possession of a vessel seized for transporting liquor contrary to *Alcoholic Liquor Possession & Transportation Act* (Que.).—*ROBERTSON v. QUEBEC LIQUOR COMMISSION*, [1933] 1 D. L. R. 78; S. C. R. 246; 59 C. C. C. 191.—**CAN.**

**sk. Locality of seizure.**—On seizure of a schooner with liquor:—*Held*: the locus of the seizure, approximately one & three-quarter miles from the shore, was part of the Province of New Brunswick & therefore, both as to property & jurisdiction, the Province of New Brunswick included the territory within which the offence was alleged to have been committed, & the offence as set forth in the conviction was committed within the Province of New Brunswick & within the body of a county.—*R. v. BURT* (1932), 5 M. P. R. 112.—**CAN.**

**sm. Unlawful seizure—Liability of Crown.**—Certain goods were seized by Canadian Customs officers, & by consent of counsel, an order was made by the Exchequer Ct. dissolving such seizure & directing that the property be restored to the suppliant. Some months later when he went for delivery of the goods, it was discovered there was a shortage, for the value of which this action was brought:—*Held*: the Crown is liable for the value of goods unlawfully seized or detained if restoration cannot be made.—*MASSEIN v. R.*, [1934] Ex. C. R. 223; [1935] 1 D. L. R. 701.—**CAN.**

## Part XIV.—Expenditure of the Revenue.

**837. Add. Annotations:—***Apprvd. Nixon v. A.-G.* (1930), 100 L. J. Ch. 70. *Refd. Re Transferred Civil Servants (Ireland) Compensation*, [1929] A. C. 243.

**839. Add. Annotations:—***Apprvd. Nixon v. A.-G.* (1930), 100 L. J. Ch. 70. *Refd. Re Transferred Civil Servants (Ireland) Compensation*, [1929] A. C. 243.

**841a. Right to pension—Not enforceable at law.]—**An established civil servant of the Crown has, on the true construction of Superannuation Acts, 1834 to 1909, no legal right to a superannuation allowance or, when such an allowance has been awarded to him by the Lords Comrs. of the Treasury, to an allowance of an amount fixed by reference to the scale contained in Superannuation Act, 1859 (c. 26), s. 2, as amended by Superannuation Act, 1909 (c. 10), ss. 1, 3 (1).

Applts., four retired civil servants who had qualified for the award of a superannuation allowance, claimed to be entitled as of right to have superannuation allowances calculated on the full amount of their annual salaries & emoluments, including a bonus granted by the Treasury to civil servants, in accordance with the scale provided by Superannuation Act, 1859 (c. 26), s. 2, as amended by Superannuation Act, 1909 (c. 10), ss. 1, 3 (1). Two of applts. entered the Civil Service on the faith of a statement contained in a Treasury minute of June 14, 1859, to the effect that all persons appointed subsequent to the passing of the Act of 1859 were to be held entitled to the retiring allowances prescribed by the second sect. of that Act, & they contended that the minute was a continuing offer by the Treasury on behalf of the Crown to such persons that they should receive superannuation allowances on the terms therein contained, & that that offer had been accepted by both applts. A third applt. entered the service of the National Telephone Co. in 1895, & on the transfer of the telephones to the Post Office under Telephone Act, 1911 (c. 26), assigned his share in a contributory pension fund to the Postmaster-General, & was appointed

to a pensionable office in the Post Office which qualified him for a superannuation allowance under sect. 6 of that Act, which, by sect. 10, was to be read as one with the Superannuation Acts, 1834 to 1909. The Lords Comrs. of the Treasury, acting in accordance with a Treasury minute dated Mar. 20, 1922, awarded to each of applts. a superannuation allowance calculated on a basis differing from & less favourable to him than that provided by sect. 2 of 1859 Act, as amended by sect. 1 & sect. 3 (1) of 1909 Act, & computed his allowance (a) on his fixed annual salary & emoluments, exclusive of his bonus emoluments; & (b) on a sum less than the full amount of his annual bonus emolument:—*Held*: (1) applts. had no legal right enforceable in a ct. of law to superannuation allowances calculated according to the scale fixed by sect. 2 of 1859 Act as amended by sect. 1 & sect. 3 (1) of 1909 Act; (2) as to the claim founded on contract, the only power of the Lords Comrs. of the Treasury was conferred by statute, & they had no authority to contract themselves out of it; (3) applt. employed in the Post Office received his superannuation allowance on the same footing as the other applts.—*NIXON v. A.-G.*, [1931] A. C. 184; 100 L. J. Ch. 70; 144 L. T. 249; 47 T. L. R. 95, H. L.

**841b. Amount of pension—Whether war bonus included in calculation.]—**Upon its incorporation resp. authority took over a pension scheme, whereby it was provided that deductions be made from the wages payable to certain employees (including applt.), & that, for the purpose of computing the superannuation allowance or pension payable to each employee, the wages were to be deemed to be at the rate of the actual wages paid to him at the time of his superannuation or retirement “exclusive of any gratuities, allowance for house, or other additions.” From 1915 onwards, a weekly sum called “war bonus” was paid to each employee in addition to wages. The bonus rose from time to time, & in May 1918 a part of the bonus was consolidated with the wages.

### PART XIV. SECT. 1.

**841a i. Right to pension—Not enforceable at law.]—***Held*: a civil servant, retired or removed from office, has no right of action to recover any allowance under the Superannuation Act, such allowance being entirely in the discretion of the executive authority. That no contractual relationship arises between the Crown & its servants with respect to such allowances. To create such contractual relationship would require express statutory enactment.—*MILLER v. R.*, [1931] Ex. C. R. 22.—*CAN.*

**i. i. —**—*G.* entered the service of the Govt. Railways in 1887. On Nov. 11, 1911, he was dismissed for misconduct. On Mar. 6, 1913, he was again engaged & continued in the service until Feb. 1, 1928, when he retired. The Superannuation Board decided that he was entitled to a retiring allowance calculated only in respect of his service from Mar. 6, 1913, to the date of his retirement:—

*Held*: he was entitled to the payment of superannuation allowance calculated upon the whole period of his service, viz. 39 years.—*Ex p. GIBBONS* (1928), 29 S. L. N. S. W. 182; 46 N. S. W. W. N. 36.—*AUS.*

**q i. —** *Except when “in service of the State”—Who is.]—*Superannuation (Amendment) Act, 1918, s. 3, provides as follows: “A person to whom a superannuation allowance under any Acts relating to the Public Service shall not be at any time payable . . . to be entitled to be paid such allowance . . . in respect of any period . . . during which he . . . is employed in the service of the State . . .”—*Held*: a tipstaff to a justice of the Industrial Arb. Ct. was “in the service of the State” within the sect., & therefore, while so employed was not entitled to be paid any superannuation allowance which had accrued due to him.—*Re THE SUPERANNUATION BOARD*, *Ex p. DOCKRELL* (1929), 47

N. S. W. W. N. 91.—*AUS.*

**q ii. —** *Meaning of salary.]—*Sums of money paid by the Govt. Savings Bank Comrs. to its officers in respect of their children, & known as “family allowances,” are not salary within Superannuation Act, 1916, s. 3.—*Re SUPERANNUATION ACT*, *Ex p. NEW SOUTH WALES, COMRS. OF THE GOVERNMENT SAVINGS BANK* (1929), 47 N. S. W. W. N. 165.—*AUS.*

**st. Right of Crown to fix amount.]—***KIDDE v. R.*, [1924] Exch. C. R. 29.—*CAN.*  
**sk. Manual labourer.]—***Pltf.* who had been employed by deft. city as a manual labourer on the hour basis:—*Held*: (1) to have been a “permanent employee” within the city’s pension bye-law; (2) to have been in the city’s service for 15 years; & (3) to be “unfit for further service in the employ of the city,” within the bye-law.—*TAWNY v. WINNIPEG CITY*, [1936] 2 W. W. R. 123; *affd.*, [1936] 2 W. W. R. 625; 4 D. L. R. 498; 44 Man. L. R. 243.—*CAN.*



In 1919 a document, containing the words "war bonus 15s. per week added to wage, counting for pension, plus 11s. 6d. per week floating war bonus," was left with each employee. In the same year applt. (as one of the employees), when asking for a reconsideration of his rate of wages, added "Present conditions of annual leave, sick pay, & pensions." No deduction in respect of superannuation or pension was made from that part of the wages which formed the bonus. In Mar. 1925, when a further revision took place, the wages of applt. were described in a circular issued by resp. authority as "68s. 6d. per week as a maximum, non-pensionable floating bonus 12s." Resp. authority, in rejecting a demand by applt. for deductions from the bonus payments, informed him that "the authority are prepared to continue the payment of a non-pensionable bonus in addition to your wages in accordance with the terms of the circular, & by accepting that bonus you must be deemed to have agreed to the conditions upon which it is granted." Without accepting the view of the authority, applt. continued to work as usual, & to receive the bonus payments. Upon his retirement, applt. claimed that the payments of war bonus made to him were part of his wages, & ought to be included in the computation of the amount of his superannuation allowance or pension:—*Held*: by the terms of the agreement between the employers & the workmen, the bonus payments were at all times to be regarded as non-pensionable, & therefore could not be taken into consideration for the purpose of calculating the amount of pension.—*TIBBALS v. PORT OF LONDON AUTHORITY*, [1937] 2 All E. R. 413; 81 Sol. Jo. 496, H. L.

**Officers of local authorities.**—Following this cross-ref. add:—

**841c. — Contracting out—What amounts to.**—

The claimant was employed in the service of the H. Urban District Council. That council was, in 1921, amalgamated with the city of S. By an agreement entered into between the claimant & the S. Corp. in 1920, before but in contemplation of the amalgamation, it was agreed that the corp. should pay to the claimant an annuity of £300 as compensation "in full discharge for all claims to which he shall or may become entitled in any respect whatsoever by reason of his said office or otherwise in relation to the said urban district of H." This annuity was to be suspended while the claimant should hold any office under the S. Corp. He in fact entered their service as from the date of the amalgamation & continued to hold a post in the engineer's & surveyor's department until he attained the age of sixty-five years on Jan. 15, 1935. In 1930 the S. Corp. adopted the Local Govt. & Other Officers' Superannuation Act, 1922 (c. 59), & among the posts which they designated as established posts for the purpose of that Act was the post of "divisional surveyor." The claimant maintained that the post which he held was that of "divisional surveyor" & that he was therefore entitled to claim a superannuation allowance under the Act of 1922, in addition

to the annuity payable under the agreement of 1920. The corp. did not admit that the claimant held the post of district surveyor, & threatened to dismiss him from their service if he did not withdraw his claim. In Oct. 1932, the claimant & the corp. entered into an agreement under seal (expressed to be supplemental to the agreement of 1920) whereby it was declared that the claimant held his employment at the pleasure of the corp., & that the post which he occupied was not & should not be deemed to have been designated as an established post for the purpose of the Act of 1922. It was also agreed that the claimant withdrew his claim & should not at any time be entitled to receive superannuation allowance from the corp. On reaching the age of sixty-five years the claimant retired & claimed that he was entitled to superannuation allowance, & that in calculating the amount his service with the H. Urban District Council must be taken into account. He contended that the agreement of 1932 was void as being an attempt to "contract out" of the Act of 1922. The corp. contended that the agreement was valid. They did not contend that the rights of the holder of an established post could be diminished by "contracting out," but that this was a *bonâ fide* compromise of a dispute whether the claimant did hold an established post. Anyhow, they said, the service with the H. Council was excluded by the terms of Art. 52 of the Provisional Order effecting the amalgamation: "... no officer shall be entitled to claim or receive both compensation for any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary & a superannuation or retiring allowance in respect of the same period of service & the same pecuniary loss." The matter having been referred to arbn. under sect. 22 of the Act of 1922, the arbitrator found as a fact that the claimant did occupy an established post as district surveyor, & decided in his favour on both points, but stated his award in the form of a special case:—*Held*: (1) the agreement of 1932 was void. The rights conferred by the Act of 1922 could not be got rid of by "contracting out" either directly or by the indirect method of agreeing that a post which was (as the arbitrator had found) an established post should "not be deemed to be" an established post; (2) the claimant's service with the H. Council must be excluded in arriving at the amount of the superannuation allowance.—*POWELL v. SHEFFIELD CORPN.*, [1936] 1 K. B. 680; 105 L. J. K. B. 330; 154 L. T. 150; 100 J. P. 139; 52 T. L. R. 248; 80 Sol. Jo. 246; 34 L. G. R. 156.

**841d. — Amount of allowance—Effect of receipt of compensation for loss of office.**—*POWELL v. SHEFFIELD CORPN.*, No. 841c, *ante*.

**843a. Savings Certificates — Nomination to — Validity.**—

War Savings Certificates Regulations, 1919, although they do not expressly mention Savings Banks Act, 1887 (c. 40), are not *ultra vires*, because they modify, & incorporate & apply as modified, the rules as to nominations contained in that Act. Thus, they make it possible for any holder of War Savings Certificates to nominate recipients of the certificates held, & any such nomina-

tion may include certificates held in excess of the authorised maximum, notwithstanding that certificates so held are liable to be forfeited.—*Re* KIMBER, VALE *v.* ROCKMAN, [1928] Ch. 749 ; 97 L. J. Ch. 430 ; 139 L. T. 550 ; 72 Sol. Jo. 545.

849. *Add. Annotation* :—*Generally*, *Refd.* Brown *v.* Brown, [1936] 2 All E. R. 1616.  
 853. *Add. Annotation* :—*Apld.* Green *v.* Weatherill, [1929] 2 Ch. 213.  
 880a. ——— ——— ———.]—*Ex p.* ROSKNOW, [1885] W. N. 3.

## ROYAL FORCES.

## Part I.—The Royal Navy.

1. *Add. Annotation* :—**Refd.** Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.
9. *Add. Annotation* :—**Consd.** Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.
11. *Add. Annotation* :—**Refd.** Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.
27. *Add. Annotations* :—**Consd.** China Navigation Co. v. A.-G. (1932), 48 T. L. R. 375; Admiralty Comrs. v. Valverde Owners, [1937] 1 K. B. 745.
31. *Add. Annotations* :—**Consd.** China Navigation Co. v. A.-G. (1932), 48 T. L. R. 375; Admiralty Comrs. v. Valverde Owners, [1937] 1 K. B. 745.
32. *Add. Annotation* :—**Consd.** Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.
- 33a. **Right to indemnity—For expenses in case of damage to ship or stores.**—A Govt. steamer assisted a merchantman, on a stipulation to reimburse all expenses arising from damage to the steamer or the stores:—**Held**: such stipulation was no bar to salvage compensation.—**THE LUSTRE** (1834), 3 Hag. Adm. 154; 168 E. R. 363.  
*Annotations* :— **Consd.** The Ewell Grove (1835), 3 Hag. Adm. 209; China Navigation Co. v. A.-G. (1932), 48 T. L. R. 375. **Consd.** Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173. **Refd.** The Lord Dufferin (1819), 7 Notes of Cases, Supp. xxxii.
38. *Add. Annotation* :—**Consd.** Admiralty Comrs. v. Valverde Owners, [1937] 1 K. B. 745.
44. *Add. Annotation* :—**Consd.** Admiralty Comrs. v. Valverde Owners, [1937] 1 K. B. 745.
51. *Add. Annotation* :—**Consd.** China Navigation Co. v. A.-G. (1932), 48 T. L. R. 375.
- 56a. — **Ship “specially equipped with salvage plant.”** A cable ship belonging to the Admty. & in the employ of the Post Office rendered salvage services to a vessel, which had lost her propeller & required towage assistance. The cable ship was fitted with grappling ropes & other salvage gear, & was specially constructed for laying & repairing submarine telegraph cables:—**Held**: even assuming the equipment constituted salvage plant, the vessel was not “specially equipped with salvage plant,” which meant plant of a kind that a vessel would not be equipped with except for the purpose of rendering salvage services, & the Admty. were not entitled to claim salvage remuneration in respect of the services of the vessel under Merchant Shipping (Salvage) Act, 1916 (c. 41).—**THE MORGANA**, [1920] P. 442; 89 L. J. P. 232; 124 L. T. 254; 36 T. L. R. 747; 15 Asp. M. L. C. 160.  
*Annotation* :—**Refd.** Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.
- 56b. **Agreement for remuneration—Waiver of Act.]** The owners of the motor vessel V., being informed that she was on fire, made a contract in writing with the Admty. that warships belonging to His Majesty should render salvage services. Such services, including towage, were in fact rendered. On a claim by the Admty. in respect of those services:—**Held**: (1) the agreement as a salvage agreement could not override Merchant Shipping Act, 1894 (c. 60), s. 557, which was in its terms imperative & prohibitory & could not be the subject of contracting out or of waiver; (2) the agreement on its true construction did not exclude or waive the provisions of sect. 557; (3) the agreement, notwithstanding the stipulation it contained for remuneration in the event of non-success, was a salvage agreement, & not an agreement for work & labour outside sect. 557; (4) sect. 557 was intended to exclude, & on its true construction did exclude, all claims whatsoever by the Admty., including claims for the use of the King's ship as a salvaging instrument.  
*Per LORD WRIGHT*: While the House of Lords has power to overrule even a long-established course of decisions, provided it has not itself determined the question, it will in general adopt this course only in plain cases where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law.—**ADMIRALTY COMRS. v. VALVERDA (OWNERS)**, [1938] A. C. 173; [1938] 1 All E. R. 162; 107 L. J. K. B. 99; 158 L. T. 281; 54 T. L. R. 305; 82 Sol. Jo. 153; 43 Com. Cas. 139, H. L.
65. *Add. Annotation* :—**Refd.** Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.
87. *Add. Annotation* :—**Consd.** Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.

## Part II.—The Reserve Naval Forces.

SECT. 2.—COLONIAL NAVAL FORCES (p. 323).

*See, now, Colonial Naval Defence Act, 1931 (c. 9).*

## Part V.—The Regular Army.

111. *Add. Annotations* :—**Consd.** China Navigation Co. v. A.-G. (1932), 48 T. L. R. 375; Kynaston v. A.-G. (1933), 49 T. L. R. 300. **Refd.** Nixon v. A.-G., [1930] 1 Ch. 566.
- 120a. **Disposition of forces—Prerogative right of Crown.**—When Parliament has by the Army (Annual) Act sanctioned the raising & keeping of the army for one year, the right of the Crown in time of peace as to the disposition & use of the forces so raised is a prerogative right the exercise of which cannot be controlled by the cts.—**CHINA NAVIGATION CO., LTD. v. A.-G.**, [1932] 2 K. B. 197; 101 L. J. K. B. 478; 147 L. T. 22; 48 T. L. R. 375; 18 Asp. M. L. C. 288, C. A.
130. *Add. Annotation* :—**Refd.** China Navigation Co. v. A.-G. (1932), 48 T. L. R. 375.
- 137a. **Whether action lies against Crown.**—No engagement between the Crown & any of its military or naval officers in respect of services present or past can be enforced in a ct. of law.—**KYNASTON v. A.-G.** (1933), 49 T. L. R. 300, C. A.
139. *Add. Annotation* :—**Consd.** Nixon v. A.-G. (1930), 100 L. J. Ch. 70.

## Part VIII.—The Air Force.

**Acquisition of land.**—See **COMPULSORY PURCHASE**, No. 263a, *ante*.

**Injury to aircraftsmen by negligence—Action by Crown—Measure of damages.**—See **MASTER & SERVANT**, No. 1456a, *ante*.

## Part IX.—Matters Common to Navy, Army and Air Force.

- 261a. **Going to or coming from place appointed for exercise.**—A rifle volunteer corps got up a rifle-shooting match at their duly certified practice-ground, each man to find his own ammunition, open to all comers; entrance fee, 10s. 6d. Applt. a member of a corps belonging to an adjoining county, was on his way to the match in uniform : —**Held** : this was not such a going to or returning from a place appointed for exercise as to exempt him from toll under 21 & 25 Vict. c. 126, s. 1.—**TEATHER v. TURNER** (1863), 1 New Rep. 435; 7 L. T. 785; 27 J. P. 136; 11 W. R. 425.
265. *Add. Annotation* :—**Consd.** Mackenzie-Kennedy v. Air Council (1927), 138 L. T. 8.

### SECT. 6.—WAR PENSIONS.

- 266a. **Final award—Notice of right of appeal—Construction of Regulation.**—War Pensions Act, 1921 (c. 49), s. 4, provided for final awards & for appeals within one year from those awards. Sub-sect. 3 provided : “The

Minister shall, in such manner as may be prescribed by regulations made by him under this section, bring the provisions of this subsection to the notice of persons having a right of appeal thereunder.”

Sub-sect. 4 brought into the scope of the section officers in whose cases final awards had been made before the Act, but substituted for one year from the award one year from a date to be fixed by the Minister by regulations. By War Pensions (Final Awards) Amendment Regs., 1923, the date fixed was Feb. 7, 1923, & Reg. 3 provided :

“Notice of the right of appeal shall be published in three successive issues of the *British Legion* & in six successive issues of the principal daily or weekly newspapers circulating in London & the provinces, & suitable notices shall be displayed in the local offices of the Ministry :—**Held** : so far as the regulation required publication in London newspapers it did not require publication in more than one principal daily newspaper.—**R. v. WHYTTE, Ex p. MINISTER OF PENSIONS** (1931), 48 T. L. R. 189; 76 Sol. Jo. 68.

## Part X.—Disciplinary Tribunals.

279. *Add. Annotation* :—**As to** (1) **Refd.** O'Connor v. Waldron, [1935] A. C. 76.
281. *Add. Annotations* :—**Consd.** Hearts of Oak Assurance Co. v. A.-G. (1931), 47 T. L. R. 579. **Refd.** O'Connor v. Waldron, [1935] A. C. 76.

### PART V. SECT. 1.

**sa. Effect of enlistment.**—Enlistment by a subject under the Militia Act, is in the nature of a formal transmutation of a citizen into a soldier for the time being, & as required by the Defence of the Realm, & does not constitute a contract between the subject & the Crown creating mutual rights & obligations.—**COOKE v. R.**, [1929] Ex. C. R. 20.—**CAN.**

### PART V. SECT. 3, SUB-SECT. 2.

**d l. —.**—Military officers & soldiers, while in the service of the Crown hold their positions at & during the pleasure of the Crown, & no action at law lies for their pay.—**COOKE v. R.**,

[1929] Ex. C. R. 20.—**CAN.**

**sb. Pension act of grace only.**—Pensions are an act of grace & bounty of the Crown which must be left to the discretion of the Govt.; & there can be no review of the discretion of the Pensions Board by the ct.—**THOMAS v. R.**, [1928] 2 D. L. R. 535; [1928] Exch. C. R. 26.—**CAN.**

**sc. Jurisdiction of Federal Appeal Board.**—In Jan. 1923, the Board of Pension Comrs. refused pension in the matter of one S. on the ground that his death was not attributable to military service. An appeal was taken to the Federal Appeal Board under 13 & 14 Geo. 5, c. 62, s. 10, & the latter found the death was due to military service.

By 14 & 15 Geo. 5, c. 60, s. 10, the Appeal Board was required to give certain information in its judgment. The Comrs., claiming the Appeal Board had not complied with the statute, refused to pay the pension. The Minister, under 18 & 19 Geo. 5, c. 38, s. 30 (8), referred the matter to this ct. for determination :—**Held** : the appeal having been heard & decided in 1926, the question of its jurisdiction must be determined under the law in force at that time, & under 13 & 14 Geo. 5, c. 62, s. 10, the Appeal Board had jurisdiction to hear & determine appeals from the refusal of pension by the Board of Pension Comrs.—**SKITCH v. MINISTER OF PENSIONS & NATIONAL HEALTH**, [1931] Ex. C. R. 97.—**CAN.**

# SALE OF GOODS.

## Part I.—The Contract of Sale Generally.

9. *Add. Annotations* :—**Consd.** Robinson v. Graves, [1935] 1 K. B. 579. **Refd.** Dominion Press v. Customs & Excise Minister, [1928] A. C. 340; Myers (G. H.) & Co. v. Brent Cross Service Co., [1934] 1 K. B. 46.

10. *Add. Annotation* :—**Distd.** Robinson v. Graves, [1935] 1 K. B. 579.

10a. ———.]—Deft. orally commissioned pltf., an artist, to paint the portrait of a lady & promised to pay 250 guineas therefor. Deft. subsequently repudiated the contract before the portrait was completed. In an action by pltf. for the agreed price of the portrait :—*Held* : it was a contract for work & labour & not for the sale of goods, as the substance of the contract was that skill & labour should be exercised upon the production of the portrait, & that it was only ancillary to that contract that there would pass from the artist to his customer some materials—namely, the paint & the canvas, the addition to the skill & labour involved in the production of the portrait, & therefore pltf. could recover notwithstanding that there was no note or memorandum in writing of the contract.—ROBINSON v. GRAVES, [1935] 1 K. B. 579; 104 L. J. K. B. 441; 153 L. T. 26; 51 T. L. R. 334; 79 Sol. Jo. 180; 40 Com. Cas. 217, C. A.

11a. ———.]—BOWMAKER, LTD. v. WILLIAMS (1930), 74 Sol. Jo. 836.

28a. **Option clause—Terms of future contract not set out**—“Prices to be agreed upon.”—MAY & BUTCHER v. R., [1931] 2 K. B. 17, n.; 103 L. J. K. B. 556, n.; 151 L. T. 246 n.

*Annotations* :—**Distd.** Hillas v. Arcos, Ltd. (1932), 147 L. T. 503; Foley v. Classique Coaches, Ltd., [1931] 2 K. B. 1. **Refd.** British Homophone, Ltd. v. Kunz & Crystallite Gramophone Record Manufacturing Co. (1935), 152 L. T. 589.

28b. ———.]—An agreement entered into on May 21, 1930, for the sale & purchase of Russian softwood timber for delivery in 1930 provided that the buyers should have the

option of entering into a contract with the sellers for the purchase of further timber for delivery during 1931. The option clause did not specify what kinds or sizes or what qualities were to be supplied, nor did it define the dates & ports of shipment & discharge :—*Held* : (1) the option having been exercised, the parties intended to enter into, & did in fact, enter into, a complete & binding agreement not dependent on any future agreement for its validity. Both as regards the quality & description of the goods & the times of delivery & shipment the contract was neither uncertain nor incomplete; (2) as regards damages, as resps. did not give the learned judge such help as was in their power, with the full knowledge they possessed, they could not complain of his award of damages on the material then before him.—HILLAS & CO., LTD. v. ARCOS, LTD. (1932), 147 L. T. 503; 38 Com. Cas. 23, H. L.

*Annotations* :—As to (1) **Consd.** Foley v. Classique Coaches, Ltd., [1931] 2 K. B. 1; Saxton v. Nicholson & Co. (1935), 151 L. T. 149. As to (2) **Refd.** Jewson & Sons, Ltd. v. Arcos, Ltd. (1933), 39 Com. Cas. 59; British Homophone Ltd. v. Kunz & Crystallite Gramophone Record Manufacturing Co. (1935), 152 L. T. 589. *Generally, Refd.* Way v. Latilla, [1937] 3 All E. R. 759.

28c. **Agreement giving use subject to payment of interest & depreciation.**—By a contract contained in letters the purchasing co. agreed with the vendors' agents to buy a crane “for a deferred purchase price of £1,000.” The contract provided for annual payments by the purchasing co. for “interest” & “depreciation” respectively, to be deducted from the £1,000. In the meantime the purchasing co. were to have “entire charge & responsibility” for the crane. Three years later, & before payment of the whole of the purchase price, the purchasing co. went into voluntary liquidation & the liquidator entered into a contract, which was shortly afterwards confirmed by the ct., for the sale of the assets to a new co. In the liquidation the vendors

### PART I. SECT. 1.

o 1. ———.]—*Contract between fishermen & cannery.*—SALO v. ANGLO BRITISH COLUMBIA PACKING CO., LTD., [1929] 1 D. L. R. 874; 1 W. W. R. 385; 40 B. C. R. 481.—CAN.

sm. *Distinguished from contract in respect of trade-mark or copyright.*—BERTRAND v. WARRÉ, [1932] S. C. R. 364; 2 D. L. R. 47.—CAN.

sp. *Distinguished from exchange.*—Pltf., a storekeeper, agreed to sell goods to deft. at regular prices, & deft. agreed to sell & pltf. to buy pulpwood to the amount of the price of the goods, the accounts to be set off :—*Held* : a sale & not an exchange in barter.—MESSINGER v. GREENE, [1937] 2 D. L. R. 26; 11 M. P. R. 326.—CAN.

### PART I. SECT. 2.

ss. *Real nature of transaction regarded—Provision for payment by commission.*—By agreement between pltf. co. & deft., deft. was granted the sole selling-rights for New Zealand for certain of pltf. co.'s manufactures.

The agreement provided that deft. should be entitled by way of remuneration to a “commission” of 10 per cent. on the invoiced value of the manufactures, to be deducted by deft. therefrom. Payments for the manufactures were to be made against receipt of shipping documents by deft.'s London or other English agent. In an action by pltf. co. against deft. for an account of the proceeds of sales of pltf. co.'s products by deft. :—*Held* : notwithstanding that the agreement provided for the remuneration of deft. by way of a “commission,” the provisions therein relative to payment for the goods by deft. pointed to the relationship between the parties being that of vendor & purchaser & the account should be taken on that basis.—GANNOW ENGINEERING CO., LTD. v. RICHARDSON, [1930] N. Z. L. R. 301.—N.Z.

sl. *Contract to deliver potatoes—As payment for fertiliser.*—WADE v. WALKER (1930), 2 M. P. R. 405.—CAN.  
sm. *Purchase of grain by elevator company.*—Pltf. stored grain with deft.

elevator co. & was given a graded storage receipt therefor in pursuance of sect. 148 of the Canada Grain Act, 1925. Afterwards pltf. & deft. agreed that pltf. would sell the grain to deft. at a price three cents per bushel above the Port William price, less freight & charges, at any time that pltf. elected so to sell, & deft. agreed to purchase the grain on such election. The grain was put in a particular bin by itself & most of it remained there until it was destroyed by fire before pltf. had made such election :—*Held* : the ownership of the grain had not passed to deft. under the contract.—BUSSE v. EDMONTON GRAIN & HAY CO., LTD., [1932] 1 W. W. R. 296; 1 D. L. R. 745; 26 Alta. L. R. 83.—CAN.

### PART I. SECT. 6.

sp. *Shares in company.*—“Goods,” as defined in the Indian Contract Act, 1872, comprise every kind of movable property, including shares in a co.—DOMINGO v. DE SOUZA (1928), 1 L. R. 50 All. 695.—IND.

contended that the property in the crane had not passed to the purchasing co. & therefore that it was not included in the assets sold to the new co. & claimed that the liquidator must either accept the obligations arising & continue the instalments payable under the contract or return the crane to the vendors. The liquidator rejected these claims. *EVE, J.*, held that the property in the crane passed to the purchasing co. on the making of the contract, in accordance with rule 1 of Sale of Goods Act, 1893 (c. 71), s. 18 :—*Held* : sect. 18 of the Act applied only “ unless a different intention ” appeared, & reading the contract as a whole, a different intention did appear—namely, that the property in the crane should not pass until the purchase was completed by payment of the purchase price; therefore, in the circumstances of the case, the liquidator must be taken to have determined to carry out the contract & to make use of it for the purposes of the liquidation. He was accordingly

bound to pay the balance of the purchase-money due to the vendors under the contract.—*Re ANCHOR LINE (HENDERSON BROS.), LTD.*, [1937] Ch. 1; [1936] 2 All E. R. 911; 105 L. J. Ch. 330; 155 L. T. 100; 80 Sol. Jo. 572, C. A.

34. *Add. Annotation* :—*Refd. Spyer v. Phillipson*, [1931] 2 Ch. 183.
44. *Add. Annotations* :—*Apld. Robinson v. Graves*, [1935] 1 K. B. 579. *Refd. Dominion Press v. Customs & Excise Minister*, [1928] A. C. 340.
48. *Add. Annotation* :—*Distd. Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, [1933] 2 K. B. 141.
49. *Add. Annotation* :—*Consd. Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, [1933] 2 K. B. 141.
50. *Add. Annotation* :—*Consd. Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, [1933] 2 K. B. 141.

## Part II.—Formation of Contract.

73. *Add. Annotation* :—*Generally, Refd. A.-G. v. Cohen*, [1936] 2 K. B. 246.

90a. — **Acceptance within Sale of Goods Act, 1893 (c. 71), s. 35.**—On Mar. 3, 1938, the brother & authorised agent of applt. orally ordered from resps. five kitchen fittings. Shortly after, applt. made entries in his purchases day book & in his bought ledger recording the order & the price of the goods. On Mar. 18, the goods were delivered at applt.'s premises & received by an employee of applt., & remained there until after Apr. 12, 1938. On Apr. 12, 1938, resps. presented a petn. in bkpey. against applt. upon which the receiving order here appealed against was made. Apart from the debt in respect of the above goods, the amount due to the petning. creditors was under £50. It was contended that there was no enforceable contract in respect of these goods, because there had been no sufficient acceptance of the goods within Sale of Goods Act, 1893 (c. 71), s. 4 :—*Held* : once there has been an acceptance within the meaning of Sale of Goods Act, 1893 (c. 71), s. 35, & the facts herein amounted to such an acceptance, the requirements of sect. 4 have been complied with. The object of sect. 4 (3) is to provide that a contract may be enforceable if the require-

ments therein stated are complied with, even though there may be no acceptance within the meaning of sect. 35.—*Re DEBTOR (No. 38 of 1938), DEBTOR v. PETITIONING CREDITORS & OFFICIAL RECEIVER*, [1938] 4 All E. R. 308; 55 T. L. R. 107; 82 Sol. Jo. 970, D. C.

138. *Add. Annotation* :—*As to (1) Refd. Elmes v. Trembath* (1934), 19 Tax Cas. 72.

180a. — **Pending alterations.**—*GOLFING AMUSEMENTS, LTD. v. EVERARD & ELLIS* (1931), 75 Sol. Jo. 330.

200. *Add. Citations* :—138 L. T. 154; 72 Sol. Jo. 14; 33 Com. Cas. 101.

231. *Add. Annotation* :—*Refd. Besseler, Waechter Glover & Co. v. South Derwent Coal Co.*, [1938] 1 K. B. 408.

248. *Add. Annotation* :—*Refd. Turton v. Turnbull*, [1934] 2 K. B. 197.

269. *Add. Annotation* :—*Refd. L'Estrange v. Graucob, Ltd.*, [1931] 2 K. B. 391.

341. *Add. Annotations* : *Apld. Besseler, Waechter Glover & Co. v. South Derwent Coal Co.*, [1938] 1 K. B. 408. *Refd. Royal Exchange Assee. v. Hope*, [1938] Ch. 179; *British Russian Gazette & Trade Outlook, Ltd. v. Associated Newspapers, Ltd., Talbot v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616.

*PTY., LTD.*, [1928] V. L. R. 387; [1928] Argus L. R. 242.—**AUS.**

**PART II. SECT. 4, SUB-SECT. 8.—**  
C. (d).

*ss. Oral contract by agent—Revocation of agency before signature.*—*MOYER & Co. v. SMITH & GOLDBERG, LTD.*, [1929] 4 D. L. R. 416; S. C. R. 625; *aff.*, [1929] 2 D. L. R. 542; 63 O. L. R. 388.—**CAN.**

**PART II. SECT. 4, SUB-SECT. 9.**

339 x. — — — — —.]—*PAGE v. PROCTOR* (1884), 5 O. R. 238.—**CAN.**

346 i. — *By execution of contract.*—*COOLIN v. COOLIN (Sask.)*, [1920] 3 W. W. R. 812.—**CAN.**

**PART II. SECT. 4, SUB-SECT. 7.—**  
B. (a).

*ss. Marginal note—Giving power to vary or confirm option.*—*Held* : the contract form containing the marginal note constituted a memorandum sufficient to satisfy Stat. Frauds.—*J. B. ROGERS, LTD. v. HARRY LESNIE, LTD.* (1927), 27 S. W. N. 427; 44 N. S. W. W. N. 149.—**AUS.**

**PART II. SECT. 4, SUB-SECT. 7.—**  
C. (b) i.

*sd. Place of delivery.*—A verbal agreement, made at the business premises of the purchaser of goods, included a term that the vendor should deliver the goods at the purchaser's premises. Immediately afterwards a

written order was signed on behalf of the purchaser, & handed to the vendor's representative, which contained the names of the parties, particulars of the goods, & the price, & also the words “ Please supply us with the following goods,” but which did not contain any further reference to the place at which the goods were to be delivered :—*Held* : giving the ordinary business meaning to the words quoted, & having regard to the fact that the parties were business men, & to the circumstances in which the document was written, the document indicated with sufficient clearness where the place of delivery of the goods was to be, & constituted a sufficient note or memorandum of the agreement within Goods Act, 1915, s. 9 (1).—*WISEIN v. TERDICH BROS.*

**370a. Whale oil.**—Applts. in these two cases were engaged in whale fishery in the Antarctic, & resps. in the course of their business used large quantities of whale oil for the manufacture of margarine & soap. By contracts now in question resps. bought from each of applt. cos. the entire production of whale oil per a named steamer for the season 1930-1931. In the events which happened both cos. tendered to resps. not only oil which was brought to Europe by the named steamers themselves but also oil which had been loaded by the named steamers into other vessels. Resps. refused to accept any of the oil whatever, & contended that upon a true construction of the contract in each case they were only bound to take such oil as could be brought by the named steamer herself. They contended that both by the words of the contracts & by an implied term from the previous course of business between the parties the transfer of oil from the named steamers to other vessels put an end to the contracts. Applts. brought actions against resps. claiming damages for non-acceptance:

—*Held*: upon a true construction of the contracts resps. had bought the whole of the oil produced by the named steamers & applts. were entitled to deliver not only the oil brought by the named steamers themselves but also oil produced by them & transferred from them to other vessels.—*HVALFANGERSELSKABET POLARIS AKTIESELSKAP v. UNILEVER, LTD., HVALFANGERSELSKABET GLOBUS AKTIESELSKAP v. UNILEVER, LTD.* (1933), 77 Sol. Jo. 388; 39 Com. Cas. 1, H. L.

**370b. Slag**—Payments to cease if no suitable slag "available."—*WRIGHT v. BASSETTS, LTD.* (1936), 80 Sol. Jo. 935.

**380. Add. Annotations:**—*Consd. Gaze W. H. & Sons v. Port Talbot Corpn.* (1929), 93 J. P. 89. *Refd. Re Windsor Steam Coal Co.* (1901) (1928), 140 L. T. 80; *Bentall, Horsley & Baldry v. Vicary* (1930), 47 T. L. R. 99; *Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546; *Akties Steam v. Arcos, Ltd.*, *Akties Bruusgaard v. Arcos, Ltd.* (1933), 39 Com. Cas. 158; *Owen & Smith (trading as Nuagin Car Service) v. Reo Motors (Britain), Ltd.* (1934), 151 L. T. 274; *Trollope (Geo.) & Sons v. Martyn Bros.*, [1934] 2 K. B. 436; *Lensen Shipping Co. v. Anglo-Soviet Shipping Co.* (1935), 40 Com. Cas. 320.

**401. Add. Annotations:**—*Robert A. Munro & Co. v. Meyer*, [1930] 2 K. B. 312; *Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258.

**403a. — Perishing of only part of goods.**—Sale of Goods Act, 1893 (c. 71), s. 6, applies where there is a contract for the sale of specific goods & a part, but not the whole, of the goods has, without the knowledge of the parties to the contract, already ceased to exist.—*BARROW, LANE & BALLARD, LTD. v. PHILLIP PHILLIPS & Co., LTD.*, [1929] 1 K. B. 574; 98 L. J. K. B. 193; 140 L. T. 670; 45 T. L. R. 133; 72 Sol. Jo. 874; 34 Com. Cas. 119.

**417a. Deduction of railway carriage from price—Seller entitled to benefit of rebate.**—*WALLEY v. UNITED DAIRIES (WHOLESALE), LTD.* (1933), 77 Sol. Jo. 251.

**424. Add. Annotations:**—*Refd. Shell-Mex v. Elton Cop Dyeing Co.* (1928), 34 Com. Cas. 39; *Eldon (Lord) v. Hedley Bros.*, [1935] 2 K. B. 1.

**430. Add. Annotations:**—*Refd. Hillas & Co. v. Arcos, Ltd.* (1932), 147 L. T. 503; *Hvalfangerselskapet Polaris Aktieselskap v. Unilever, Ltd.*, *Hvalfangerselskapet Globus Aktieselskap v. Unilever, Ltd.* (1933), 39 Com. Cas. 1.

**430a. "Current prices."**—By an agreement dated July 12, 1927, pltf's. & defts. agreed that pltf's. were to deal with defts.' entire output of Jarrow pig iron available for delivery in Scotland, pltf's. undertaking to push the sale of the same in Scotland in preference to any other brand. They were to base their prices on the current prices for Middlesbrough pig iron, free on truck makers' works or f.o.b. makers' wharf, excluding Tees dues, & to pay cash on Mondays for the previous weeks' shipments. Disputes having arisen between the parties about the prices which pltf's. ought to charge for the pig iron which they sold, defts. notified pltf's. that they terminated the agreement as from Apr. 22, 1928. Pltf's. brought an action for breach of contract, because, as they alleged, defts. refused to supply them at "the current prices for the Middlesbrough pig iron." Defts. contended that the phrase "current prices" were the list prices which were published every week in a trade newspaper by a group or combine of iron foundries in Middlesbrough, but pltf's. contended that "current prices" meant the price at which pig iron was actually being sold in Scotland by the sole agent of the combine.—*Held*: the expression "current prices" in the agreement meant the list prices which were published every week by the combine in Middlesbrough, & did not mean the price at which pig iron was actually being sold in Scotland by the sole agent of

## PART II. SECT. 5, SUB-SECT. 1.

**sb. Sale of oil petroleum as required—Whether petrol included.**—By a written tender, which was accepted, applt. agreed that for a specific period he would supply a military dept. with various oils at named prices, as required; one of the items was "oil petroleum." On certain occasions the dept. called on him to supply "petrol" which he did, charging & being paid at the agreed price for "oil petroleum." Upon the dept. buying petrol elsewhere he sued for damages for breach of contract.—*Held*: the suit failed, because "oil petroleum" did not mean or include "petrol."—*MADHO RAM v. SECRETARY OF STATE* (1933), 1 L. R. 15 Lah. 143.—IND.

## PART II. SECT. 7, SUB-SECT. 1.

**sf. Meaning of "cost landed price."**—*KEVILLON WHOLESALE, LTD. v. GAULTS, LTD.*, [1929] 3 D. L. R. 700; S. C. R. 528; *affo.*, [1929] 2 D. L. R. 217; 1 W. W. R. 825; 24 Alta. L. R. 129.—CAN.

**sg. "Current market price."**—Deft. oil co. agreed to furnish pltf., a dealer, with gasoline "at the same current market price" as furnished to the trade generally; & because pltf. agreed to buy his gasoline from deft. for three years deft. agreed to give him an extra discount of one cent. The usual & current trade discount at the time was four cents off the retail or "tank wagon price." Subsequent deft. made special contracts with other dealers, representing about 90 per cent.

of the trade. Under these contracts deft. was given the exclusive sale to said dealers for a period of years & the dealers were allowed an extra discount of two cents over the usual four cents.—*Held*: said subsequent special contracts did not displace the original "current market price" as the foundation of pltf.'s rights under his contract, & therefore, he was not, as he contended, entitled to a discount of seven cents below the retail price.—*JACKSON v. SHELL OIL Co.*, [1931] 1 W. W. R. 477; 43 B. C. R. 449.—CAN.

**sl. Price conditional on returns.**—Where price is conditional on returns, a post-dated cheque for a larger amount will not make purchaser liable for the higher figure.—*SEGAL v. JEANNOTTE*, [1938] 2 D. L. R. 266.—CAN.



the combine.—**JACKS & CO. v. PALMER'S SHIPBUILDING & IRON CO.** (1928), 98 L. J. K. B. 366; 140 L. T. 473; 34 Com. Cas. 107, C. A.

**433a. Minimum price—Construction of standard contract.**—The ct. held, on the construction of a standard contract for the sale of sugar-beet by the growers thereof to manufacturers of beet-sugar at a price depending on variable factors, there being a provision for a sliding scale minimum price & for a tonnage bonus, that the manufacturers were entitled to include the tonnage bonus in the minimum price, & the bonus applied only if it would bring the contract price above the minimum.—**BROWN & SONS v. LINCOLNSHIRE BEET SUGAR CO., LTD.** (1929), 45 T. L. R. 199, D. C.

**434. Add. Annotation :—***Refd. Ellesmere (Earl) v. Wallace*, [1929] 2 Ch. 1.

**446. Add. Annotation :—***As to (2) Refd. Hillas & Co. v. Arcos, Ltd.* (1932), 147 L. T. 503.

**446a. ———.**—By an agreement in writing pltf. agreed to sell & defts. to purchase a piece of land adjoining other land belonging to pltf., which defts. intended to use for their business as motor coach proprietors. The sale was made subject to defts. entering into another agreement to purchase from pltf. all the petrol required for their said business. On the same date that second agreement, described as supplemental to the first, was executed, which, after reciting that pltf. was the proprietor of a petrol-filling station on the land retained by him, provided that defts. would purchase from him all the petrol required by them for the running of their said business, "at a price to be agreed by the parties in writing & from time to time"; & further, that defts. would purchase no petrol from any other person so long as pltf. was able to supply them with quantities sufficient to satisfy their daily requirements. Clause 8 was in these terms: "If any dispute or difference shall arise on the subject-matter or construction of this agreement the same shall be submitted to arbn. in the usual way in accordance with the provisions of the Arbn. Act, 1889."

The land, the subject of the first agreement, was duly conveyed to defts., & for three years defts. obtained their petrol from pltf. Thereafter disputes arose between them, & thereupon defts. purported to repudiate the second agreement, alleging that it had no binding force because (1) no agreement in writing as to price had ever been made, & (2) the clause requiring defts. to take all their petrol supplies from the pltf. was an unreasonable & unnecessary restraint of their trade. In an action by pltf. claiming a declaration that the petrol agreement was valid & binding, & an injunction to restrain defts. from purchasing petrol required for their said business from any person other than pltf.:—*Held*: (1) a term must be implied in the agreement that the petrol supplied by pltf. should be of reasonable quality & sold at a reasonable price, & that if any dispute arose as to what was a reasonable price it was to be determined by arbn. pursuant to clause 8; (2) inasmuch as defts. were only required to purchase petrol from pltf. for the purpose of the business carried on by them on the land purchased from pltf., & so long only as it was supplied of a reasonable quality & at a reasonable price, the obligation was not an unreasonable & unnecessary restraint of their trade; & (3) the agreement therefore was valid & binding on defts.—**FOLEY v. CLASSIQUE COACHES, LTD.**, [1934] 2 K. B. 1; 103 L. J. K. B. 550; 151 L. T. 242, C. A.

*Annotation :—As to (1) Refd. British Homophone, Ltd. v. Kuuz & Crystallate Gramophone Record Manufacturing Co.* (1935), 152 L. T. 589.

**453a. ——— "Free house London."**—*Held*: an "agreement to the contrary" within Finance Act, 1901 (c. 7), s. 10, & the foreign seller was liable for duty imposed by Abnormal Importations (Customs Duties) Act, 1931.—**LANIFICIO DI MANERBIO S. A. v. GOLD (I. & R.)** (1932), 76 Sol. Jo. 289.

**462. Add. Annotations :—***Refd. Shell-Mex v. Elton Cop Dyeing Co.* (1928), 34 Com. Cas. 39; *Adair & Co. v. Birnbaum*, [1938] 1 All E. R. 532.

**472. Add. Annotation :—***Consd. Charles v. Cardiff Collieries* (1928), 44 T. L. R. 448.

## Part III.—Conditions and Warranties.

**495. Add. Annotation :—***Consd. Foley v. Classique Coaches, Ltd.*, [1931] 2 K. B. 1.

**512. Add. Annotations :—***Refd. Morelli v. Fitch & Gibbons*, [1928] 2 K. B. 636; *Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, [1934] A. C. 402; *Grenfell v. E. B. Meyrowitz, Ltd.*, [1936] 2 All E. R. 1313.

**521. Add. Annotation :—***Consd. Vsesojwzoje Obje-dinenije "Exportles" v. Allen & Sons, Ltd.*, [1938] 3 All E. R. 375.

**526. Add. Annotations :—***Consd. Sullivan v. Constable* (1932), 48 T. L. R. 267. *Refd. Cruse v. Mount* (1932), 102 L. J. Ch. 74.

**527a. ———.**—A quantity of Finnish timber was sold to buyers in London by a contract providing that the goods were to be properly seasoned for shipment, & that in the event of a dispute the buyers should not reject the goods but should accept or pay for them against shipping documents. Owing to bad weather the sellers were unable to season part of the goods properly:—*Held*: the provision as to seasoning was not a condition but only a warranty, & therefore the buyers were not entitled to reject the goods, but could only claim an allowance off the price.—**MONTAGUE L. MEYER, LTD. v.**

### PART II. SECT. 7, SUB-SECT. 4.

**447 v. ———.**—*LEFAIVRE v. LANDRY PULPWOOD CO., LTD.*, [1933] 1 D. L. R. 539.—CAN.

### PART II. SECT. 7, SUB-SECT. 6.—A.

*sh. Sale of logs—Time for measurement—When delivered into water.*—**MCKENZIE v. McDONNELL**, [1931] 3 D. L. R. 229; 3 M. P. R. 48.—CAN.

### PART III. SECT. 2, SUB-SECT. 3.

*sl. Buyer to supply ship—Failure to supply within reasonable time—Liability in damages.*—**SNOW v. HARRIS**, [1930] 1 D. L. R. 802; 1 M. P. R. 51.—CAN.

KIVISTO (1929), 142 L. T. 480; 46 T. L. R. 162; 74 Sol. Jo. 58, C. A.

*Annotations*.—**Consd.** Montague L. Meyer, Ltd. v. Osakeyhtio Carelia Timber Co. (1930), 36 Com. Cas. 17; **White Sea Timber Trust, Ltd. v. W. W. North, Ltd.** (1932), 148 L. T. 263. **Refd.** Vsesojuznoje Obiedineniye "Exportles" v. Allen & Sons, Ltd., [1938] 3 All E. R. 375; Wilensko Slaski Towarzystwo DREWNO v. Fenwick & Co. (West Hartlepool), Ltd., [1938] 3 All E. R. 429.

539a. **Omission of usual trade description in invoice.**—**Stopp v. Hill & Sons** (1928), 72 Sol. Jo. 122.

553. **Add. Citations**.—**affd.** (1928), 138 L. T. 663; 44 T. L. R. 297; 17 Asp. M. L. C. 428; 33 Com. Cas. 213, C. A.

557. **Add. Annotation**.—**Refd.** Gurney v. Grimmer (1932), 38 Com. Cas. 7.

558. **Add. Annotations**.—**Consd.** Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd., [1934] 1 K. B. 148; **Chandler Bros., Ltd. v. Boswell**, [1936] 3 All E. R. 179. **Refd.** Robert A. Munro & Co. v. Meyer, [1930] 2 K. B. 312.

563. **Add. Annotation**.—**Refd.** Wilson v. Wright, [1937] 4 All E. R. 371.

564. **Add. Annotations**.—**As to (1)** **Consd.** Montague L. Meyer, Ltd. v. Osakeyhtio Carelia Timber Co. (1930), 36 Com. Cas. 17. **Refd.** Finlay v. N. V. Kwik Hoo Tong, [1929] 1 K. B. 400; Wilson v. Wright, [1937] 4 All E. R. 371.

581a. ———.—The seller offered for sale potatoes "for Saturday's steamer." The buyer accepted the potatoes by telegram, adding the words "next steamer," which was in fact "Saturday's steamer." The seller sent the consignment of potatoes to the docks in time for loading in the ordinary way on the Saturday steamer, but that steamer was too heavily laden to take them, & they were delayed for two days at the docks. Prices having fallen in the meantime, deft. refused to accept delivery. —**Held**: deft. was entitled to reject the potatoes, as it was a condition of the contract that they should be sent by the Saturday steamer.—**WILSON v. WRIGHT**, [1937] 4 All E. R. 371; 82 Sol. Jo. 14, C. A.

619a. **Sale of wine of particular brand.**—**Pltf.** asked for a bottle of S.'s ginger wine at the licensed premises of defts. While **pltf.** was endeavouring to draw the cork with a corkscrew, the bottle broke at the neck & injured him. —**Held**: the sale was one by description, & the bottle was not of merchantable quality, & the condition that it was of such quality implied under Sale of Goods Act, 1893 (c. 71), s. 14 (2), had been broken, & **pltf.** was entitled to damages.—**MORELLI v. FITCH & GIBBONS**, [1928] 2 K. B. 636; 97 L. J. K. B. 812; 140 L. T. 21; 44 T. L. R. 737; 72 Sol. Jo. 503, D. C.

#### PART III. SECT. 4, SUB-SECT. 1.

**t i.** ———. —**Pltf.** sued for damages for breach of a contract whereby deft. agreed to sell him two car loads of potatoes at 75 cents per bushel, f.o.b., Humboldt, Sask., the potatoes to "be free of small ones & scabs & should not grade lower than Canada Number Two." **Pltf.** alleged that the potatoes delivered did not correspond with said description. The trial judge found that the potatoes were not up to said grade but that **pltf.** after inspection accepted them f.o.b. Humboldt, paid for them at Humboldt & shipped them to his customers at Saskatoon & that the inspection by a Govt. inspector was

made at Saskatoon after a customer had objected to their quality. He therefore held that the doctrine of *caveat emptor* applied to **pltf.** not only on account of his having had a full opportunity of inspection but also because he had assumed the full burden thereof. **Pltf.** appealed. —**Held**: the sale was one by description, the evidence supported the finding that the potatoes did not correspond to the description, because of **pltf.**'s acceptance of the potatoes his right to relief for breach of the condition was restricted to a claim for damages, but the fact that he had inspected the potatoes before accepting them did

621. **Add. Annotation**.—**Refd.** Barker v. Agius (1927), 33 Com. Cas. 120.

622a. **Goods "ready for shipment."**—**Sellers** in Finland sold to buyers in England a quantity of timber. The contract described the sale as a sale of "wood goods hereinafter specified," to be loaded at one of two named ports & "to be ready for shipment on June 15, 1928." A specification followed, giving particulars of the timber sold, & at the foot of the contract was the stipulation "loading place & ready date to be definitely declared to buyers by Apr. 1, 1928." Several clauses were printed on the back of the contract, one of them being "the buyers shall not reject the goods herein specified. . . ." In the events which happened delay occurred in delivery of the timber, & a large proportion of the goods which were finally tendered consisted of goods of the 1929 season & not of goods which had been ready for shipment on June 15, 1928. The buyers refused to accept some of the goods so tendered & as required by the contract, the dispute was referred to arb'n. An award was made in the form of a special case, deciding, subject to the opinion of the ct., that the buyers were entitled to reject. —**Held**: the date of readiness for shipment was of the essence of the contract, & the words "ready for shipment on June 15, 1928," were part of the description of the goods sold & were not a mere warranty; & the clause providing that the buyers should not reject, though not required in cases where there had only been a breach of warranty & intended to protect the sellers where there had been a breach of a condition, did not apply where the goods tendered by the sellers were not of the contract description.—**MONTAGUE L. MEYER, LTD. v. OSAKEYHTIO CARELIA TIMBER CO., LTD.** (1930), 36 Com. Cas. 17, C. A.

*Annotation*.—**Refd.** Wilensko Slaski Towarzystwo DREWNO v. Fenwick & Co. (West Hartlepool), Ltd., [1938] 3 All E. R. 429.

622b. **Sale by trade name—Composition as at time of order.**—A buyer ordering an article by its trade name must be taken to have ordered it as it was manufactured at the date of giving the order, whatever its composition may have been at some previous time.—**HARRIS & SONS v. PLYMOUTH VARNISH & COLOUR CO., LTD.** (1933), 49 T. L. R. 521; 38 Com. Cas. 316.

628. **Add. Annotation**.—**Refd.** Bell v. Lever Bros., Ltd. (1931), 146 L. T. 258.

629. **Add. Annotations**.—**Refd.** Canada Atlantic Grain Export Co. (Inc.) v. Eilers (1929), 35 Com. Cas. 90; Grenfell v. E. B. Meyrowitz, Ltd., [1936] 2 All E. R. 1313.

not bar his claim to such relief; at the time he inspected them he was not in a position to determine finally whether they corresponded with the description.—**PURKIN v. MILLER**, [1938] 1 W. W. R. 640; 21 L. R. 323; 7 F. L. J. (Can.) 293.—CAN.

#### PART III. SECT. 4, SUB-SECT. 2.—A.

623 vi. ———. —**FOXTON v. HAMILTON STEEL & IRON CO., LTD.** (1901), 21 O. L. T. 286; 1 O. L. R. 393.—CAN.

623 vii. ———. —**MADER v. JONES** (1875), 10 N. S. R. (1 R. & C.) 82.—CAN.

**632. Add. Annotations:—***Refd.* Canada Atlantic Grain Export Co. (Inc.) v. Eilers (1929), 35 Com. Cas. 90; *Cammell Laird & Co. v. Mangnese Bronze & Brass Co.*, [1931] A. C. 402.

**643a. —.**—*MELLISH v. MOTTEUX* (1792), Peake, 156; 170 E. R. 113, N. P.

*Annotations:—**N.F. Baglehole v. Walters* (1811), 3 Camp. 154. *Refd.* *Pickering v. Dowson* (1813), 4 Taunt. 779.

**643b. —.**—*—*—If a ship is sold "with all faults," the seller is not liable to an action in respect of latent defects which he knew of without disclosing at the time of the sale, unless he used some artifice to conceal them from the purchaser.—*BAGLEHOLE v. WALTERS* (1811), 3 Camp. 154; 170 E. R. 1338, N. P.

*Annotations:—**Apld.* *Pickering v. Dowson* (1813), 4 Taunt. 779; *Bywater v. Richardson* (1834), 1 Ad. & El. 508. *Apprvd.* *Ward v. Hobbs* (1879), 48 L. J. Q. B. 281. *Refd.* *Gorton v. Macintosh* (1882), 31 W. R. 232.

**643c. —.**—*—*—Although a ship be sold "to be taken with all faults," the vendor cannot avail himself of that stipulation, if he knew of secret defects in her, & used means to prevent the purchaser from discovering them, or made a fraudulent representation of her condition at the time of the sale.—*SCHNEIDER v. HEATH* (1813), 3 Camp. 506; 170 E. R. 1462, N. P.

*Annotations:—**Consd.* *Ward v. Hobbs* (1877), 3 Q. B. D. 150. *Refd.* *Cornfoot v. Fowke* (1840), 6 M. & W. 358.

**645a. —.**—*—*—A contract for the sale of about 1,500 tons of meat & bone meal provided that the meal was to be of a certain specified quality, & that it was to be shipped 125 tons monthly during 1928 in equal weekly quantities. The contract also provided that "each delivery or shipment shall be treated as a separate contract, & the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments." "The goods to be taken with all faults & defects; damaged or inferior, if any, at valuation to be arranged mutually or by arbitration." The sellers made several deliveries under the contract amounting to nearly half the contract amount which the buyer accepted, but eventually the buyer requested the sellers to cancel the delivery of 782 tons then due for delivery under the contract, which the sellers consented to do on the buyer agreeing to pay £782 by four instalments on specified dates. The buyer paid two instalments under the agreement, & then discovered that all the meal that had been delivered to him under the contract had been adulterated & was not of the contract description, so that the deliveries might have been rejected by him. He thereupon refused to pay any further instalments under the agreement. The sellers, who were blameless with regard to the adulteration & had delivered the meal in good faith, thereupon brought this action to recover the balance of the £782 due under the agreement. The

buyer by his defence alleged that the agreement was made under a mutual mistake of fact in that both the sellers & the buyer contracted in the belief that the goods supplied by the sellers were in accordance with the contract, whereas the meal was not in accordance with the contract, & he counter-claimed for rescission of the agreement & for the return of the money paid under it & also for damages for the breach of contract:—*Held*: the various deliveries of meal which had been made by the sellers before the date of the agreement did not, by reason of the adulteration, answer the contract description & therefore might have been rejected by the buyer if the defects had been discovered in time, notwithstanding the clause in the contract: "the goods to be taken with all faults & defects, damaged or inferior, if any, at valuation to be arranged . . ." because that clause applied only to goods which answered the trade description. & did not shut out the overriding warranty in Sale of Goods Act, 1893 (c. 71), s. 13, that in a sale of goods by description there is an implied condition that the goods shall correspond with the description. Further, that the clause in the contract that "Each delivery or shipment shall be treated as a separate contract, & the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments" could not be construed so as to defeat the rights of the buyer under Sale of Goods Act, 1893 (c. 71), s. 31 (2), to treat the breach of contract by the sellers as a repudiation of the whole contract; notwithstanding that the sellers had no knowledge of the defects & had no intention to deliver defective articles, inasmuch as the intention of a seller must be judged from his acts. But although the buyer, if he had at the date of the agreement for cancellation ascertained all the facts relating to the past deliveries, might have been entitled to treat the contract as having been repudiated by the sellers, yet as it was in the circumstances doubtful whether he would have so elected, the defence that the agreement had been entered into under such a mutual mistake as would justify a rescission of the agreement failed, even apart from any question of *restitutio in integrum*. The buyer, however, was entitled to damages in respect of the defective quality of the meal that had been delivered, & to a declaration that, in view of the defective quality of the meal, he was not bound to take delivery of the meal that was undelivered.—*ROBERT A. MUNRO & CO., LTD. v. MEYER*, [1930] 2 K. B. 312; 99 L. J. K. B. 703; 143 L. T. 565; 35 Com. Cas. 232.

*Annotation:—**Consd.* *Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K. B. 148.

#### PART III. SECT. 4, SUB-SECT. 2.— C. (a).

sb. "*Furber*"—*Sale of violin.*—*Pltf.*, who was learning to play the violin, bought a violin from *deft.*, who is a dealer in violins & a violin & bow maker. *Pltf.* had informed *deft.* that he wished to exchange the violin he then had for a better one, paying the difference in cash. *Deft.* showed *pltf.* a violin which had been recently received from England & told *pltf.*

that it was one made by *Furber*, "one of the old English makers":—*Held*: an essential term of the sale was the description of the article as a *Furber*.—*BAILEY v. CROFT*, [1932] 1 W. W. R. 106; 1 D. L. R. 777; 40 Man. L. R. 146.—*CAN.*

sd. "*New*" car.—In a contract for sale of a new engine the primary meaning of the word "new" is not old or of recent origin. In the absence of context "new" does not mean only

"unused." If mere lapse of time results in deterioration in quality or depreciation in value an article is no longer "new" according to ordinary English usage.—*ANDERSON v. SCRUTTON*, [1934] S. A. S. R. 10.—*AUS.*

#### PART III. SECT. 5, SUB-SECT. 1.

681 viii. — — — — *—*—*MURRAY v. REEVES SUPPLY Co.*, [1928] 2 D. L. R. 873.—*CAN.*

661. *Add. Annotation*:—*Refd. Hillas & Co. v. Arcos, Ltd.* (1932), 147 L. T. 503.

663a. "Safety glass."—An aviator in 1932 purchased from certain opticians flying goggles described in a catalogue as fitted with "safety-glass lenses." The goggles were made of laminated glass consisting of two sheets of glass & an interposed sheet of plastic, & evidence showed that the term "safety-glass" in 1932 referred only to such laminated glass. In the opticians' catalogue notice was given that the purchaser of any goggles of the type here in question was given free insurance to cover £1,000 in the case of loss of sight or expenses incurred in the event of a lesser injury to an eye caused by splintering. In 1935 the aviator was involved in a flying accident in which (*inter alia*), he suffered injury due to a splinter from the goggles entering his eye. The aviator brought an action for breach of contract against the opticians, alleging that the goggles did not correspond with the description "safety-glass," & alternatively that if they did so correspond that they were not of merchantable quality:—*Held*: there was no warranty of absolute safety in the word "safety-glass"; *pltf.* did obtain what he purported to buy, namely, "safety-glass" goggles as generally understood by persons making or using them, *i.e.*, goggles made from laminated glass; there was no evidence that the goggles were not of merchantable quality.—*GRENFELL v. E. B. MEYROWITZ, LTD.*, [1936] 2 All E. R. 1313, C. A.

674a. Timber sold as "under deck"—Carried on deck & damaged.]—Buyers bought a quantity of timber to be shipped from Sweden to London, the contract describing the goods as "under deck" & providing that "the buyers shall not reject the goods herein specified, but shall accept or pay for them in terms of the contract against shipping documents." When the timber arrived the buyers found that almost the whole of it had been carried on deck & had been damaged by sea water, & they refused to accept it, on the ground that it was not the timber specified in the contract:—*Held*: the words "under deck" were a condition of the contract, & were

part of the contract description of the goods, & on both grounds the buyers were entitled to reject.—*MONTAGUE L. MEYER, LTD. v. TRAVARU A/B H. CORNELIUS, OF GAMLEBY* (1930), 46 T. L. R. 553; 74 Sol. Jo. 466.

*Annotation*:—*Consd. White Sea Timber Trust, Ltd. v. W. W. North, Ltd.* (1932), 148 L. T. 263.

675a. Effect of adulteration.]—*ROBERT A. MUNRO & Co., LTD. v. MEYER, No. 645a, ante.*

675b. Timber to be loaded on deck one-third.]—*MESSERS, LTD. v. MORRISON'S EXPORT CO., LTD.* (1938), 55 T. L. R. 245.

682. *Add. Annotations*:—*Refd. London Holeproof Hosiery Co. v. Padmore* (1928), 44 T. L. R. 499; *Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258; *Sullivan v. Constable* (1932), 48 T. L. R. 369.

694. *Add. Annotation*:—*Consd. Myers (G. H.) & Co. v. Brent Cross Service Co.*, [1934] 1 K. B. 46.

700. *Add. Annotation*:—*Consd. Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, [1933] 2 K. B. 141.

705. *Add. Annotations*:—*Consd. McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. *Refd. Parker v. Oloxo, Ltd., & Senior*, [1937] 3 All E. R. 521.

709. *Add. Annotation*:—*Refd. Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, [1934] A. C. 402.

709a. ———— Woollen underwear.]—*Applt.* who contracted dermatitis of an external origin as the result of wearing a woollen garment which, when purchased from the retailers, was in a defective condition owing to the presence of excess sulphites which, it was found, had been negligently left in it in the process of manufacture, claimed damages against both retailers & manufacturers:—*Held*: the retailers were liable in contract for breach of implied warranty or condition under exceptions (i) & (ii) of sect. 14 of the South Australia Sale of Goods Act, 1895, which is identical with the English Sale of Goods Act, 1893 (c. 71), s. 14.—*GRANT v. AUSTRALIAN KNITTING MILLS, LTD.*, [1936] A. C. 85; 105 L. J. P. C. 6; 154 L. T. 18; 52 T. L. R. 38; 79 Sol. Jo. 815, P. C.

*Annotation*:—*Refd. Dransfield v. British Insulated Cables, Ltd.*, [1937] 4 All E. R. 382.

### PART III. SECT. 5. SUB-SECT. 2.—A.

i. ———— Hair-drying machine.]—In an action brought against a firm of hairdressers a customer averred that she had been injured through the fault & negligence of the hairdressers in using a defective hair-drying machine. A jury having awarded the customer damages, which together with the expenses of the action amounted to a sum of over £600, the hairdresser brought an action against the manufacturers of the machine concluding for payment of that sum as damages resulting from breach of implied warranty with regard to the condition of the hair-drying machine, in terms of sect. 14 (1) of Sale of Goods Act, 1893:—*Held*: whether or not the action was competently laid as one of relief, the hairdressers had relevantly averred a breach of implied warranty on the part of the manufacturers of the machine in terms of sect. 14 (1) of Sale of Goods Act, 1893; & if such breach of warranty was established, they would be entitled to an award of damages.—*BUCHANAN & CARSWELL v. EUGENE, LTD.*, [1936] S. O. 160.—*SCOT.*

ii. ———— Shoes.]—*Pltf.* claimed

from *deft.* damages for an alleged breach of a warranty of fitness implied under sect. 19 (1) of Sale of Goods Act, 1923 (N.S.W.), in relation to the purchase of a pair of shoes from *deft.* who was a retail distributor of footwear not manufactured by it. *Pltf.* stated in evidence that she told *deft.*'s saleswoman who attended her that she wanted walking shoes, that she had a bunion on her foot & wanted a comfortable pair of shoes; that she was shown three pairs, & finally purchased a particular pair which she had tried on, on the recommendation of the saleswoman. On the third occasion of wearing them the heel of one of the shoes came off, & as a result *pltf.* sustained a fractured leg. Evidence was given that the shoes were "a very bad job" & that the heels were not properly fastened on:—*Held*: (1) there was evidence fit to be submitted to a jury in respect of a cause of action under sect. 19 (2) of the Sale of Goods Act, 1923 (N.S.W.) as there was evidence upon which the jury was entitled to find (a) that the shoes were bought by description, & (b) that the implied condition that they were of merchantable quality had been broken;

(2) in respect of any cause of action founded upon sect. 19 (1) of the Sale of Goods Act, 1923, it was for the jury, upon the evidence, to determine what was the particular purpose made known to the seller for which the buyer required the shoes, & whether the buyer relied upon the seller's judgment in that respect, & whether the shoes were reasonably fit for such purpose.—*DAVID JONES, LTD. v. WILLIS* (1935), 52 C. L. R. 110.—*AUS.*

st. Exceptions to rule—Goods intended for one purpose—Use for another.]—*MCKEILL v. MOTOR SERVICE CO. (Alta.)*, [1929] 1 D. L. R. 594.—*CAN.*

sk. Express provision as to fitness—Inconsistent condition not implied.]—There cannot be implied in a contract under which one person supplies a chattel to another to be used for an agreed or stated purpose, or for a purpose indicated by the nature of the chattel, a condition as to fitness of the chattel for that purpose, which is inconsistent with the express provisions of the contract.—*GEMMELL POWER FARMING CO., LTD. v. NIES* (1935), 35 S. R. N. S. W. 469; 52 N. S. W. W. N. 162.—*AUS.*

**715a.** ——— **Mineral water.]—McALISTER (OR DONOGHUE) v. STEVENSON**, No. 856a, *post*.

**715b.** ——— ———.]—A husband & wife sued the manufacturers & the retailer of a bottle of lemonade for damages for injuries received by reason of the fact that the bottle contained thirty-eight grains of carbolic acid in addition to the lemonade. Both plffs., in suing the manufacturers, relied upon the doctrine enunciated in *M'Alister (or Donoghue) v. Stevenson*, [1932] A. C. 562; Digest Supp. The husband, who in fact purchased the bottle of lemonade, in suing the retailer alleged that the implied conditions as to quality & fitness in the Sale of Goods Act, 1893, s. 14, had not been fulfilled. It was found as a fact that the manufacturers, by adopting a fool-proof process & by carrying out that process under proper supervision, had taken reasonable care to see that there was in the lemonade no defect which would injure plffs. It was also found as a fact that the husband asked for & received a bottle of the manufacturers' lemonade, mentioning the manufacturers by name:—*Held*: (1) the duty owed by the manufacturers to the consumer was not to ensure that their goods were perfect, but merely to take reasonable care to see that no injury was done to the consumer or ultimate purchaser, & this duty they had completely fulfilled; (2) the husband did not, in the circumstances, rely upon the skill or judgment of the retailer, & could not recover under the Sale of Goods Act, 1893 (c. 71), s. 14 (1), but there was a sale by description, & therefore, a breach of the implied condition that the goods should be of merchantable quality, & he could recover under the Sale of Goods Act, 1893 (c. 71), s. 14 (2).—**DANIELS & DANIELS v. WHITE & SONS, LTD. & TARBARD**, [1938] 4 All E. R. 258; 82 Sol. Jo. 912.

**715c.** ——— ——— **Fish.]—Plffs.**, husband & wife, in the course of a motor journey stopped at a hotel for lunch. Owing to the nature of the food supplied, the wife was taken ill with food-poisoning. Upon the question of ordering the meal, the evidence was completely neutral, being that a man & a woman sat at a table & ordered their food. It was agreed that the husband paid for the meal:—*Held*: there being no evidence that either the husband or the wife was in charge of the proceedings, each of them was, as between them & the proprietor, liable to pay for the food ordered, whatever might be the arrangement between them. On the facts, there was an implied contract between the wife & the proprietor, & she was entitled to recover damages for breach of the implied warranty that the food supplied was fit for human consumption.—**LOCKETT v. CHARLES (A. & M.), LTD.**, [1938] 4 All E. R. 170; 159 L. T. 547; 55 T. L. R. 22; 82 Sol. Jo. 951.

**719.** *Add. Annotation*:—**Refd. Cammell Laird & Co. v. Manganese Bronze & Brass Co.**, [1934] A. C. 402.

**726.** *Add. Annotations*:—**Consd. Cammell Laird & Co. v. Manganese Bronze & Brass Co.**, [1933]

2 K. B. 141. **Refd. Canada Atlantic Grain Export Co. (Inc.) v. Eilers** (1929), 35 Com. Cas. 90.

**726a.** ———.]—A firm of shipbuilders agreed to build for & sell to the U. M. Co. two sister ships with main propelling Diesel engines designed for carrying petroleum or molasses, each ship to be classed A1 at Lloyd's. The ships with their engines were distinguished in the shipbuilders' yard by the numbers 972 & 973. The shipbuilders entered into a contract with the M. B. & B. Co., who were makers of ships' propellers out of manganese bronze prepared by a special process, for the manufacture of two propellers for these ships, to be of special Parsons manganese bronze, of a specified diameter, & pitch, each with four blades of a specified total developed area & of a maximum brake horse-power at a specified number of revolutions per minute. Each propeller was to be finished, clipped, & polished in style of the highest class, with boss bored, faced, & keyway cut to the shipbuilders' template, with edges brought up to fine lines, to be true to pitch; all in accordance with the shipbuilders' blue print, to be ready for fitting to the shaft on delivery; & to be to the entire satisfaction of the U. M. Co.'s representative & that of the shipbuilders themselves. They were to be delivered on July 14 & Aug. 1, 1930, respectively. The working drawings gave the information necessary to enable the work to be carried out, including the thickness required along the medial lines of the blades; but beyond this & apart from the direction that the "edges" were "to be brought up to fine lines," further details as to the thickness of the blades were left to the skill & judgment of the M. B. & B. Co. Two propellers constructed in accordance with the design & working drawing were passed by Lloyd's surveyor as satisfactory in tensile strength & similar respects, & were fitted to the two vessels. On trial the propeller fitted to No. 972 caused so much noise that the vessel could not be classed as A1 at Lloyd's & the U. M. Co. would not accept it. The propeller which had been fitted to No. 973 was tried on No. 972 & proved satisfactory. The M. B. & B. Co. then made a second propeller for No. 972, without prejudice to the rights of the parties. Although this propeller conformed with the design & working drawing, & was free from fault in other respects, it nevertheless showed the same defect as the former one, & the U. M. Co. were again dissatisfied. The M. B. & B. Co. then made yet another propeller upon the same terms as to the rights of the parties, & this last attempt proved satisfactory. The shipbuilders brought an action against the M. B. & B. Co. claiming £6,277 5s. 1d. damages for delay in executing the work & expenses incurred in consequence:—*Held*: plffs. were entitled to recover on the grounds that defts. had failed to comply with the condition that the propeller should be to the entire satisfaction of the U. M. Co.'s representative; the agreement was a contract for

the sale of future goods & the case fell within the first exception to Sale of Goods Act, 1893 (c. 71), s. 14, inasmuch as plffs. had made known to defts. the purpose for which the propeller was required, & relied upon their skill & judgment; it is not necessary for the purposes of that sub-sect. that the buyer should rely totally & exclusively on the skill & judgment of the seller for every detail in the production of the goods; it is sufficient if reliance is placed on the skill & judgment of the seller to some substantial extent; & in the present case with regard to that part of the work which was left to the skill & judgment of the sellers there was a breach of the implied condition that the propeller should be reasonably fit for the purpose for which it was required.—**CAMMELL LAIRD & CO., LTD. v. MANGANESE BRONZE & BRASS CO., LTD.**, [1934] A. C. 402; 103 L. J. K. B. 289; 151 L. T. 142; 50 T. L. R. 350; 39 Com. Cas. 194, H. L.

*Annotations* :—**Consd.** Millar's Machinery Co. v. Way & Son (1935), 40 Com. Cas. 204. **Refd.** Myers (G. H.) & Co. v. Brent Cross Service Co., [1934] 1 K. B. 46; Grant v. Australian Knitting Mills, Ltd., [1936] A. C. 85.

**727. Add. Annotation** :—*As to* (2) **Refd.** Cammell Laird & Co. v. Manganese Bronze & Brass Co., [1934] A. C. 402.

**733. Add. Annotations** :—**Refd.** Cammell Laird & Co. v. Manganese Bronze & Brass Co., [1933] 2 K. B. 141; Square v. Model Farm Dairies (Bournemouth), Ltd., [1938] 2 All E. R. 740.

**744. Add. Annotation** :—**Appld.** Cammell Laird & Co. v. Manganese Bronze & Brass Co., [1934] A. C. 402.

**744a. Effect of Sale of Goods Act, 1893 (c. 71), s. 14 (1).**—**MEDWAY OIL & STORAGE CO., LTD. v. SILICA GEL CORPN.** (1928), 33 Com. Cas. 195, H. L.

*Annotation* :—**Refd.** Cammell Laird & Co. v. Manganese Bronze & Brass Co., [1934] A. C. 402; Grant v. Australian Knitting Mills, Ltd., [1936] A. C. 85.

**744b. —.**—**CAMMELL LAIRD & CO., LTD. v. MANGANESE BRONZE & BRASS CO., LTD.**, No. 726a, *ante*.

**753. Add. Annotation** :—*As to* (1) **Refd.** Cammell Laird & Co. v. Manganese Bronze & Brass Co., [1934] A. C. 402.

### PART III. SECT. 5, SUB-SECT. 2.— B. (b).

**734 viii.** — *Sale of horse.*—Where the buyer of a horse made known to the seller that the purpose for which it was required was racing, so as to show that the buyer relied on the skill or judgment of deft., who carried on the business of breeding & selling race-horses, the inspection by the buyer of the horse under conditions that would not have revealed to him the unsoundness of the horse did not affect the implied condition under sect. 16 (a) of Sale of Goods Act, 1908, that the horse was reasonably fit for the purpose of horse-racing.—**SMART v. PRESTON**, [1937] N. Z. L. R. 467; 13 N. Z. L. J. 168. —N.Z.

### PART III. SECT. 5, SUB-SECT. 2.— B. (d) i.

**sl. Sale of seed grain oats.**—*Both parties farmers.*—Plff. a buyer of seed grain oats sued the seller for damages on the ground, *inter alia*, that the oats proved unfit for seed. Both parties

were farmers :—*Held* : there was no implied warranty of fitness in this case. If the sale was a sale by description, the only description was that given to plff.'s hired man who took delivery of the oats that they were 1934 oats, which in fact they were.—**MADSEN v. ANDERSON**, [1937] 3 W. W. R. 41. —CAN.

**so. "Guaranteed used cars."**—One who advertises for sale "guaranteed used cars" thereby warrants that the car is reasonably fit for the purpose for which it was acquired.—**McLACHLAN v. HORNER**, [1937] 4 D. L. R. 188. —CAN.

### PART III. SECT. 5, SUB-SECT. 3.— A.

**765 v. —.**—**WINSLEY BROS. v. WOODFIELD IMPORTING CO.**, [1929] N. Z. L. R. 480. —N.Z.

**775 i. Application of rule—Sale of commodity for resale—Food or drink—Apples.**—There is an implied warranty that apples sold by a grower to a merchant are fit for human food &

**762. Add. Annotation** :—**Refd.** Cammell Laird & Co. v. Manganese Bronze & Brass Co., [1934] A. C. 402.

**766. Add. Annotations** :—**Refd.** Canada Atlantic Grain Export Co. (Inc.) v. Eilers (1929), 35 Com. Cas. 90; Cammell Laird & Co. v. Manganese Bronze & Brass Co., [1934] A. C. 402.

**780a. —. —. Bottle—For wine.**—**MORELLI v. FITCH & GIBBONS**, No. 619a, *ante*.

**782. Add. Annotation** :—**Refd.** Morelli v. Fitch & Gibbons, [1928] 2 K. B. 636.

**787. Add. Annotation** :—**Refd.** Hillas & Co. v. Arcos, Ltd. (1932), 147 L. T. 503.

**788. Add. Annotation** :—**Refd.** Foster v. Driscoll, Lindsay v. Attfield, Lindsay v. Driscoll, [1929] 1 K. B. 470.

**788a. Purchase of propeller—Unsuitable for particular engine.**—**CAMMELL LAIRD & CO., LTD. v. MANGANESE BRONZE & BRASS CO., LTD.**, No. 726a, *ante*.

**790. Add. Annotations** :—**Refd.** Canada Atlantic Grain Export Co. (Inc.) v. Eilers (1929), 35 Com. Cas. 90; Cammell Laird & Co. v. Manganese Bronze & Brass Co., [1934] A. C. 402.

**813. Add. Annotations** :—**Appld.** Cammell, Laird & Co. v. Manganese Bronze & Brass Co., [1934] A. C. 402. **Refd.** Canada Atlantic Grain Export Co. (Inc.) v. Eilers (1929), 35 Com. Cas. 90.

**849. Add. Annotations** :—*As to* (2) **Consd.** McAlister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119. **Refd.** Bottomley v. Bannister (1931), 101 L. J. K. B. 46. *Generally, Refd.* Parker v. Oloxo, Ltd., & Senior, [1937] 3 All E. R. 524.

**852. Add. Annotations** :—**Consd.** McAlister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119. **Refd.** Barnes v. Irwell Valley Water Board, [1938] 2 All E. R. 650.

**854. Add. Annotations** :—**Consd.** McAlister (or Donoghue) v. Stevenson (1932), 101 L. J. P. C. 119; Bottomley v. Bannister, [1932] 1 K. B. 458.

merchantable in the ordinary course of business.—**IEBB v. STODDARD**, [1935] 4 D. L. R. 394. —CAN.

### PART III. SECT. 9.

**854 ii. —. —. —.**—Plff. purchased underwear manufactured by deft. manufacturer from deft. retailer, whose business it was to supply goods of that description. He became acutely affected by dermatitis, which he alleged was caused by the presence of a sulphite or other chemical in the garments. He brought an action of damages against the manufacturer for negligence, & against the retailer for breach of implied warranties, that the garments were of merchantable quality & were reasonably fit for the purpose of his wear :—*Held* : on the evidence plff. had no cause of action against either of defts.—**AUSTRALIAN KNITTING MILLS v. GRANT**, [1933] Argus L. R. 453; 7 A. L. J. 206; 50 C. L. R. 387; *reversd. sub nom. GRANT v. AUSTRALIAN KNITTING MILLS, LTD.* (1935), 79 Sol. Jo. 815, P. C. —AUS.

**856a.** ———.—]—Under English & Scots law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, & with the knowledge that the absence of reasonable care in the preparation & putting up of the products will result in injury to consumer's life or property owes a duty to consumer to take that reasonable care, & an action by the ultimate consumer will lie against the manufacturer.

Appl. drank a bottle of ginger beer, manufactured by resp., which a friend had bought from a retailer & given to her. The bottle contained the decomposed remains of a snail which were not & could not be detected (the glass of the bottle being of a dark colour).—*Held*: she was entitled to succeed in a claim for damages for injury to health against the manufacturer of the ginger beer put by him in the bottle.—*M'ALISTER (OR DONOGHUE) v. STEVENSON*, [1932] A. C. 562; 101 L. J. P. C. 119; 147 L. T. 281; 48 T. L. R. 494; 76 Sol. Jo. 396; 37 Com. Cas. 350, H. L.

*Annotations*:—*Distd. Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606. *Consd. Pattendon v. Beney* (1933), 59 T. L. R. 10. *Appl. Brown v. Cotterill* (1934), 51 T. L. R. 21; *Malfroot v. Nozal, Ltd.* (1935), 51 T. L. R. 551. *Distd. Evans v. Triplex Safety Glass Co.*, [1936] 1 All E. R. 283. *Appl. Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C. 85. *Consd. Kubach v. Hollands*, [1937] 3 All E. R. 907. *Refd. Cunard v. Antifvrc, Ltd.*, [1933] 1 K. B. 551; *Bishop v. Consolidated London Properties, Ltd.* (1933), 102 L. J. K. B. 257; *Haynes v. Harwood*, [1935] 1 K. B. 146; *Barnes v. Irwell Valley Water Board*, [1938] 2 All E. R. 650; *Dransfield v. British Insulated Cables, Ltd.*, [1937] 4 All E. R. 382; *Square v. Model Farm Dairies (Bournemouth), Ltd.*, [1938] 2 All E. R. 740.

**856b.** ———.— **Defect ascertained by third party.]** Crane manufacturers sold a crane in parts to a firm of builders, the arrangement being that the parts were to be assembled by the builders' men. The builders had in their employment an experienced crane erector, who in assembling the parts found that certain cog-wheels worked stiffly, did not fit accurately, & required to be remedied; he accordingly marked in chalk the places where there was inaccurate fitting, saying at the same time that he would have to report the matter to his employers. Before the defects so discovered had been remedied the erector began working the crane, & while he was so engaged a part of it fell & killed him, the fall being due to the defects above mentioned. In an action by his widow under the Fatal Accidents Act, 1846 (c. 93), against the manufacturers of the crane:—*Held*: the defects being discoverable on reasonable inspection, & having in fact been discovered by the deceased man, the manufacturers owed him no duty & were not liable for the accident.—*FARR v. BUTTERS BROS. & Co.*, [1932] 2 K. B. 606; 101 L. J. K. B. 768; 147 L. T. 427, C. A.

*Annotation*:—*Refd. Dransfield v. British Insulated Cables, Ltd.*, [1937] 4 All E. R. 382.

**856c.** ———.—]—Pltf. had been in the habit of having her hair dyed with henna at the second deft.'s shop. The second deft. suggested that pltf.'s hair should be dyed with Oloxo, a dye she described as harmless, & prepared by & bought by the second deft. from the first deft. Pltf. raised objections to the use of such a dye, but was assured it was

safe to use. The pltf. as the result of the use of the dye had an acute attack of dermatitis & nervous trouble. The first deft. by its agent had warranted the dye as safe, but for trade reasons it had supplied the second deft. through a wholesale hairdressers' sundriesman. A booklet was issued with the dye which stated it was dangerous if used without a skin test; but no warning was given to the second deft. as to the danger. A certain quantity of the dye being purchased by the second deft., she was entitled to & did attend certain lectures & demonstrations given on behalf of the first deft., & the lecturer upon behalf of the co. stated that the co. would indemnify hairdressers using this dye against claims arising out of its use:—*Held*: (1) pltf. was entitled to recover against the second deft. in contract; (2) pltf. was entitled to recover against the first deft. in tort; (3) the second deft. was entitled to recover from the first deft. damages for breach of contract, & those damages were the damages the second deft. had to pay to pltf. in this action & her costs of the action; (1) the indemnity given at the lectures was not made at such a time that it could be considered a part of the contract with the second deft. — *PARKER v. OLOXO, LTD., & SENIOR*, [1937] 3 All E. R. 521.

**857. Add. Annotations:**—*Consd. Bottomley v. Banister*, [1932] 1 K. B. 458; *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. *Appl. Pattendon v. Beney* (1933), 50 T. L. R. 10.

**871a.** **Disclosure of wrong name—Whether curable by subsequent defective declaration.]**—The parties had entered into a standard form of contract which provided that certain particulars of goods shipped, "namely, quantity port of shipment & ship's name, must be duly declared." A declaration was given naming a wrong ship & also containing certain exceptions, so that it was therefore invalid. A second declaration, in which the correct ship was named, was therefore made. This declaration also contained exceptions, & so did not come within the requirements of the contract. A third declaration was made, but that was defective in that the port of shipment was not named. Appls. contended that the second & third declarations between them constituted a valid declaration:—*Held*: the third declaration, being itself invalid, could not be cured by importing into it the second one, which was also invalid as it contained terms not provided for by the contract.—*AURE v. VAN CAUVENBERGHE & FILS*, [1938] 2 All E. R. 300, C. A.

**877. Add. Annotation:**—*Refd. Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.*, [1931] 1 Ch. 274.

**877a.** ———.— **Nomination of vessel by buyer—No warranty of seaworthiness.]**—A contract for the sale of oil by a series of deliveries provided for delivery at B. into tank steamers of the buyers, & 15 days' notice of arrival of steamer was to be given to the sellers. The contract further provided that in the event of accidents on board steamers the operation of the contract was to be suspended & at the buyers' option the contract quantity was to be reduced *pro rata*. For one of the deliveries the buyers nominated a steamer which they



had on time charter, but at the time the steamer, without the knowledge of the buyers, was unseaworthy, & the buyers, on learning that the steamer had had an accident & must be dry docked, intimated their exercise of their option to reduce the quantity of oil to be taken. The sellers contended that it was the duty of the buyers to charter some other vessel:—*Held*: on a case stated by an arbitrator, the buyers did not warrant the seaworthiness of vessels which they nominated for the performance of such a contract, & they were entitled to exercise their option.—*MEDWAY OIL & STORAGE CO., LTD. v. RUSSIAN OIL PRODUCTS, LTD.* (1931), 47 T. L. R. 402; 75 Sol. Jo. 403.

**885a. Date of shipment—In bill of lading—C.i.f. contract.**—*JAMES FINLAY & CO. v. N. V. KWIK HOO TONG HANDEL MAATSCHAPPIJ* No. 1814a, *post*.

**893. Add. Annotations:—As to (2) Refd.** *Livock v. Pearson* (1928), 33 Com. Cas. 188; *Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546.

**903a. Exclusion of implied conditions & warranties—Contract for new car—Car not new.**—An agreement between defts. & plffs., whereby defts. appointed plffs. their sole dealers within a named area for the sale of new Singer cars, contained a clause, clause 5, providing that all cars sold by defts. were subject to the terms of an express warranty set out in a schedule to the agreement, & that "all conditions, warranties, & liabilities implied by statute, common law, or otherwise are excluded." Under that agreement plffs. ordered from defts. a new Singer car. Defts. delivered to plffs. a car which the ct. found on the evidence was not a new Singer car:—*Held*: it was an express term of the contract that the car should be a new car, & as the car which defts. delivered to plffs. was not a new car, defts. were not protected from liability for breach of contract by clause 5, which excluded implied conditions, warranties, & liabilities.—*ANDREWS BROS. (BOURNEMOUTH), LTD. v. SINGER & Co.,*

*LTD.*, [1934] 1 K. B. 17; 103 L. J. K. B. 90; 150 L. T. 172; 50 T. L. R. 33, C. A.

*Annotation:—Refd. L'Estrange v. Graucob, Ltd.*, [1934] 2 K. B. 394.

**905. Add. Annotation:—Consd.** *Simon v. Pawson & Leafs, Ltd.* (1932), 148 L. T. 154.

**916a. — Warranty excluded as to defect not apparent on reasonable examination.**—Claimants, grain exporters in Canada, sold a quantity of barley to resps., merchants in Germany. The sale was on c.i.f. terms, & the contract contained a clause providing that the grain was not warranted free from defect rendering it unmerchantable if such defect would not be apparent on reasonable examination. The barley was of a type which was generally used for feeding pigs, & shortly before the consignment which was the subject of this contract arrived in Germany other barley from the same crop had been delivered to German buyers & had been given by them to pigs, with the result that the pigs refused to eat it or, if they ate it, became ill. The German Govt. thereupon ordered that no further barley of the crop should be admitted into the country until they had made an analysis & discovered the cause of the trouble, & accordingly when the barley covered by this contract arrived resps. refused to take up the documents, & eventually the barley was resold at a lower price. The claimants, in an arbn., claimed as damages for non-acceptance the difference between the contract price & the price realised on resale, & the arbitrators decided in their favour, subject to the opinion of the ct. on a special case. It appeared that the barley was infected by a fungus which produced the ill-effects complained of, but that the presence of the fungus could not have been ascertained by any ordinary commercial examination:—*Held*: (1) as the defect was not one which could have been discovered on any reasonable examination by claimants before shipment, claimants were protected by the contract & were entitled to recover; (2) the finding of the arbitrators that the

### PART III. SECT. 17, SUB-SECT. 1.

**sh. Goods "to be reshipped" by vendor**—*Whether reshipment by carrying vessel necessary.*—*SCARLETT & Co. v. H. A. STEPHENSON & SON, LTD.*, [1929] W. A. L. R. 1.—*AUS.*

**sk. Insurance by vendor—Parol evidence.**—*WATERLOO MOTORS, LTD. v. FLOOD*, [1931] 1 D. L. R. 762; 3 M. P. R. 318.—*CAN.*

### PART III. SECT. 17, SUB-SECT. 2.

**sl. Sale of seed flax.**—The representation by a farmer selling seed flax that it was good seed flax held to be a warranty.—*UHLE v. KROEGER*, [1928] 1 D. L. R. 97; 37 Man. L. R. 154; [1927] 3 W. W. R. 636.—*CAN.*

### PART III. SECT. 18, SUB-SECT. 1.

**c. Revsd on the facts**, 59 S. C. R. 118.  
**o. i. — — — — —**—Defts. purchased from plff. a second-hand motor truck under a buyer's order signed by defts. containing a clause providing that "the whole agreement between the parties is contained herein & no representations, warranties or conditions expressed or implied other than those herein contained shall be binding upon the vendor." Defts. required a truck for immediate use on a contract for the construction of a new highway,

necessitating a truck in first-class mechanical condition for immediate & continuous use for hauling purposes. All this was known to one H., plff.'s representative, who stated to defts. that the truck was in first-class mechanical condition. Defts. had trouble from the start in keeping the truck running, but they continued to use it, both parties trying to remedy its condition. In an action to recover the purchase price defts. counterclaimed for damages for breach of warranty:—*Held*: both parties understood the order to call for a certain second-hand truck in first-class mechanical condition, & such being the subject-matter of the sale the above recited clause in the order did not give plff. the right to supply something different. Plff. failed to provide a truck of the standard contemplated by the parties, & was liable in damages to defts. for breach of warranty.—*HAYES MANUFACTURING CO. v. PERDUE & COPE*, [1931] 2 D. L. R. 610; 43 B. C. R. 545.—*CAN.*

**d. i. — — — — —**—In an action on lien notes given for the price of a tractor deft. pleaded failure of consideration & counterclaimed for damages for breach of conditions & also for the price of extra fuel & oil & for loss of time. Deft., although he constantly complained to plff. that

the tractor was not working satisfactorily, had used it during the whole of two seasons in the cultivation of many hundreds of acres. The trial judge, finding that the alleged conditions had not been fulfilled & that deft. had not accepted the tractor & was justified in returning it, as he had done, dismissed the action on the ground of total failure of consideration; he also dismissed the counterclaim. On appeal:—*Held*: while it could not be said that deft. had not accepted the tractor & was entitled to return it, he was entitled to damages for breach of conditions & was not barred therefrom by a clause in the contract by which he agreed "not to bring any suit for breach of warranty or plead any alleged breach of warranty as a defence or by way of set-off after one year from the date of delivery of the machine to him." The trial judge having found a total failure of consideration, i.e. that the tractor was valueless to deft. & there being evidence to support that finding, the amount of damages was the full purchase-price.—*MASSEY-HARRIS CO., LTD. v. SKELDING*, [1933] 2 W. W. R. 567; *affd.*, [1934] 13 D. L. R. 193; 59 S. C. R. 431.—*CAN.*

### PART III. SECT. 18, SUB-SECT. 2.

**k. Revsd.**, 43 S. C. R. 614.

barley was not in fact unmerchantable could not be upset on the evidence. The award was therefore confirmed.—**CANADA ATLANTIC GRAIN EXPORT CO. (INC.) v. EILERS** (1929), 35 Com. Cas. 90.

919. *Add. Annotations*:—**Refd.** *Green v. Arcos, Ltd.* (1931), 47 T. L. R. 336; *Wilensko Slaski Towarzystwo DREWNO v. Fenwick & Co. (West Hartlepool), Ltd.*, [1938] 3 All E. R. 429.

926. *Add. Citation*:—33 Com. Cas. 120.

927. *Add. Annotations*:—**Refd.** *Guy-Pell v. Foster*, [1930] 2 Ch. 169; *Huntoon Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528.

928a. *Right to treat breach as breach of warranty.*—If a representation amounting to a condition is broken & the injured party does not avail himself of his right to be discharged from the contract, or if the contract has been executed, the injured party can recover damages as on a breach of warranty.—**SULLIVAN v. CONSTABLE** (1932), 48 T. L. R. 369, C. A.

937. *Add. Annotation*:—**Refd.** *Lynn v. Bamber*, [1930] 2 K. B. 72.

940. *Add. Annotation*:—**Refd.** *Aslan v. Imperial Airways, Ltd.* (1933), 149 L. T. 276.

948. *Add. Annotation*:—**Refd.** *Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258.

961. *Add. Annotation*:—As to (1) **Refd.** *Sagar v. Ridehalgh (II.) & Son, Ltd.*, [1931] 1 Ch. 310.

980. *Add. Annotation*:—**Refd.** *Sagar v. Ridehalgh (II.) & Son, Ltd.*, [1931] 1 Ch. 310.

992. *Add. Annotation*:—**Refd.** *Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, [1933] 2 K. B. 141.

995. *Add. Annotations*:—**Consd.** *Re Hall & Pim's Arbitration* (1928), 139 L. T. 50. **Apld.** *Dobell (C. G.) & Co. v. Barber & Garratt*

(1930), 47 T. L. R. 66. **Refd.** *Finlay v. N. V. Kwik Hoo Tong Handel Maatschappij*, [1928] 2 K. B. 604; *Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, [1933] 2 K. B. 141.

996. *Add. Annotations*:—**Apld.** *Barker v. Agius* (1927), 33 Com. Cas. 120. **Consd.** *Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, [1934] A. C. 402; *Andrews Bros. (Bournemouth), Ltd. v. Singer & Co.*, [1934] 1 K. B. 17. **Refd.** *Dobell (C. G.) & Co. v. Barber & Garratt* (1930), 47 T. L. R. 66; *Huntoon Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528; *L'Estrange v. Graucob, Ltd.*, [1934] 2 K. B. 391.

1001. *Add. Annotations*:—**Apld.** *Dobell (C. G.) & Co. v. Barber & Garratt* (1930), 46 T. L. R. 120. **Consd.** *Kubach v. Hollands*, [1937] 3 All E. R. 907.

1012. *Add. Annotation*:—**Refd.** *Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, [1933] 2 K. B. 141.

1016. *Add. Annotation*:—**Refd.** *Finlay v. N. V. Kwik Hoo Tong*, [1929] 1 K. B. 400.

1024. *Add. Annotations*:—**Apld.** *Silver v. Ocean Steamship Co.* (1929), 46 T. L. R. 78. **Refd.** *Evans v. Webster* (1928), 45 T. L. R. 136; *United Molasses Co. v. National Petroleum, Ltd.* (1934), 50 T. L. R. 266.

1025. *Add. Annotations*:—**Refd.** *Finlay v. N. V. Kwik Hoo Tong Handel Maatschappij*, [1928] 2 K. B. 604; *Banco de Portugal v. Waterlow & Sons, Ltd.* (1931), 47 T. L. R. 359.

1026. *Add. Annotations*:—**Apld.** *Finlay (James) & Co. v. N. V. Kwik Hoo Tong*, [1929] 1 K. B. 400. **Refd.** *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48; *The Arpad*, [1931] P. 189.

1029. *Add. Annotation*:—**Consd.** *Dobell (C. G.) & Co. v. Barber & Garratt* (1930), 47 T. L. R. 66.

## Part IV.—Effects of the Contract.

1033. *Add. Annotation*:—**Refd.** *Modern Light Cars, Ltd. v. Seals*, [1934] 1 K. B. 32.

1089. *Add. Citations*:—*affd.* (1928), 138 L. T. 663; 44 T. L. R. 297; 17 Asp. M. L. C. 428; 33 Com. Cas. 213, C. A.

1089a. —.—.]—**SHELL-MEX, LTD. v. ELTON COP DYEING CO., LTD.** (1928), 34 Com. Cas. 39.

1091a. *Notice of appropriation—When required.*—*Applts. sold to resps. by a c.i.f. contract a quantity of Australian wheat to be shipped*

### PART III. SECT. 19, SUB-SECT. 1.—A.

927 vi. —.—.]—The fact that a contract for the sale of goods negatives warranties does not prevent a buyer whose acceptance of the goods disentitles him to rescind the contract for breach of a condition from treating such breach as a breach of warranty & recovering damages therefor.—**MCKINCHOL v. DOMINION MOTORS, LTD.**, [1930] 1 W. W. R. 631; 3 D. L. R. 270; 24 Alta. L. R. 441.—**CAN.**

### PART III. SECT. 19, SUB-SECT. 1.—B.

d. *Revsd.* on the facts, 59 S. C. R. 118.

### PART III. SECT. 19, SUB-SECT. 2.—B.

sk. *Right to rescind—Lost by acceptance.*—A right of rescission for latent defects is lost by the acceptance by the purchaser of the goods sold.—**RENFREW MACHINERY CO. v. ILLSEY**, [1933] 2 D. L. R. 674; 6 M. P. R. 512.—**CAN.**

### PART III. SECT. 19, SUB-SECT. 2.—D. (a).

sl. *Nominal damages.*—**SMITH v. WARD**, [1928] 4 D. L. R. 850; [1928] 3 W. W. R. 341; 37 Man. L. R. 528.—**CAN.**

sm. *F.o.b. contract—Damages at date of delivery.*—**BRONSTONE v. BURDETT**, [1928] 1 D. L. R. 877.—**CAN.**

so. *Breach of warranty of age of car—Necessity for proof of damage.*—Before more than nominal damages can be recovered for the breach of a warranty of the age of a motor car the buyer must adduce evidence on which the ct. can find that he is worse off with the car in question than he would have been had it been a car of the age it was represented to be.—**HUNSON v. WATSON MOTOR CO.**, [1931] 3 W. W. R. 621; [1932] 1 D. L. R. 280; 40 Man. L. R. 84.—**CAN.**

### PART III. SECT. 19, SUB-SECT. 2.—D. (b).

gl. —.—.]—*Circumstances in which:*

—*Held*: pltf. was not entitled to damages for the loss alleged to have been sustained by him by his inability to carry out contracts into which he alleged he had entered.—**MCKENNY v. DRUMMOND & DVORETSKY** (1927), 29 W. A. L. R. 6.—**AUS.**

so. *Return of purchase money.*—**MCKENNY v. DRUMMOND & DVORETSKY** (1927), 29 W. A. L. R. 6.—**AUS.**

### PART IV. SECT. 1, SUB-SECT. 1.

1032 xii. —.—.]—**MARCUS CLARK (AUSTRALIA), LTD. v. BROWN** (1928), 40 C. L. R. 540; [1928] V. L. R. 293; [1928] Argus L. R. 189.—**AUS.**

1032 xiii. —.—.]—In Mar. 1928, pltf. sold to deft. certain movables in terms of a written agreement which provided that delivery should be given immediately, that the purchase price should be paid in two instalments in June, 1929, & Dec. 1929, respectively, & that ownership should not pass until the whole price had been paid. In

to London or Hull by one of two named steamers, the contract providing that "Notice of appropriation with ship's name date of bill or bills of lading & approximate quantity loaded shall within 21 days from date of bill of lading be cabled by the shipper . . . direct to his buyer . . . or to his . . . representative in Europe. . . . If vessel is named in contract no appropriation shall be deemed to be necessary. Provisional invoice based on bill of lading weight with ship's name & date of bill of lading shall be sent by shipper's house . . . to his buyer within seven days after arrival of documents in Europe. . . ." The bills of lading were dated Sept. 13, 1929, & the only appropriation (if any) gave their date as Sept. 4, 1929, & stated the name of the steamer, which was one of the two mentioned in the contract. The invoice sent later gave the true date of the bills of lading, & the buyers refused to accept the documents on the ground that the invoice did not agree with the appropriation:—*Held*: as no vessel was named in the contract in such a way that the contract could attach to her, notice of appropriation was required, & as correct notice of appropriation had not been given, the buyers were entitled to reject.—*DALGETY & Co., LTD. v. BRADFORD (T. G.) & Co., LTD.* (1930), 46 T. L. R. 274; 35 Com. Cas. 213.

**1092a. Conclusiveness of appropriation—Wrong ship stated in notice of appropriation.**—A contract for the sale of goods to be shipped from a foreign port provided that notice of appropriation, setting out *inter alia* the name of the vessel in which the goods were shipped, should be given by the seller to the buyer within a specified time, & that such appropriation, when once made, should be irrevocable. The goods were in fact shipped per steamship *T.*, but owing to a clerical error a notice of appropriation was given by the seller's agent to the buyer in which it was stated that the goods had been shipped per steamship *I.* The buyers refused to accept delivery:—*Held*: the appropriation of the *I.* was valid & irrevocable, & the buyers were entitled to refuse delivery of goods in any other ship.—

June, 1929, *pltf.* sued *deft.* for cancellation of the agreement, redelivery, & damages on the ground of *deft.*'s failure to pay the first instalment. *Deft.* excepted to the declaration on the ground that the claims for cancellation & redelivery were bad in law, in the absence of any provision in the agreement for its cancellation on non-payment of the first instalment:—*Held*: allowing the exception, the provision in the agreement postponing the passing of ownership did not take the case out of the ordinary rule.—*STRACHAN v. NEL* (1929), 50 N. L. R. 273.—S. AF.

*sp.* *Property passing under consent judgment—Failure of purchaser to fulfil terms of judgment.*—*DONALDSON v. ALBERTA FOUNDRY & MACHINE CO., LTD.*, [1930] 1 W. W. R. 426; 1 D. L. R. 918.—CAN.

**PART IV. SECT. 1, SUB-SECT. 3.—B. (a).**

**1062 i.** — *Counting & inspection.*—Under the contract in question for the sale of cedar poles to be manufactured by the seller, the "individuality" or identity of the goods could not be finally determined until after the final count & inspection provided for by the

agreement, & that, therefore, it was not until then that the property in the poles would pass.—*NAUGLE POLE & TIE CO. OF CANADA, LTD. v. WILSON (B. C.)*, [1929] 3 W. W. R. 730.—CAN.

**PART IV. SECT. 1, SUB-SECT. 3.—B. (b) ii.**

**1081 xii.** — *—*—*COFFEY v. QUEBEC BANK* (1869), 20 C. P. 110.—CAN.

**1091 i. Validity of appropriation—Appropriation by sellers—Sellers without title to goods.**—The provision of Sale of Goods Act that under a contract for the sale of unascertained goods by description the property in the goods passes to the seller when goods of that description & in a deliverable state are unconditionally appropriated to the contract, cannot apply to the case where when the appropriation is made the seller has no title to the goods.—*HUNTER v. TRANS-CANADA FINANCE CORPN.*, [1930] 1 W. W. R. 801; 3 D. L. R. 275; 38 Man. L. R. 571; *revers.*, [1930] 1 D. L. R. 346; [1929] 3 W. W. R. 503, C. A.—CAN.

**PART IV. SECT. 1, SUB-SECT. 5.—C.**

**1209 iv.** — *—*—*—*—Where on a sale of stacks of hay the buyer agreed

*GRAIN UNION CO., S/A ANTWERP v. A/S HANS LARSEN, AALBORG* (1933), 150 L. T. 78; 49 T. L. R. 540; 38 Com. Cas. 260; 18 Asp. M. L. C. 449.

**1146. Add. Annotation:—Refd.** *Robinson v. Graves*, [1935] 1 K. B. 579.

**1166. Add. Annotation:—Refd.** *Cammell Laird & Co. v. Manganese Bronze & Brass Co.*, [1934] A. C. 402.

**1189a. Goods to be "collected."**—*Pltf.* had entered into a contract with the War Office whereby he agreed "to collect during the currency of this contract the remains of exploded projectiles, practice shell, case shot & fuses lying on or about the artillery ranges . . . & in consideration of our being allowed to retain as our property all such remains, including metals, collected therefrom to pay annually" an agreed sum. This contract expired on June 21, 1936, & *deft.* had a similar contract, which started on June 22, 1936. On June 22, 1936, there was on the ranges a dump of metal collected by *pltf.*, & *deft.* removed & sold this metal. *Pltf.* brought an action for conversion, & claimed that the property in the metal was his:—*Held*: (1) the purpose of the contract was to clear the ranges of metal & this was not accomplished until the metal had been removed from the ranges altogether, & not merely collected in a dump; (2) the property in the metal did not pass to *pltf.* until he had so removed it from the ranges.—*GALE v. NEW*, [1937] 4 All E. R. 645; 54 T. L. R. 213; 82 Sol. Jo. 14, C. A.

**1211. Add. Annotation:—Refd.** *Elmes v. Trembath* (1934), 19 Tax Cas. 72.

**1252. Add. Annotations:—Fold.** *London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd.*, [1934] 2 K. B. 206. *Refd.* *Buller & Co., Ltd. v. Brooks (T. J.), Ltd.* (1930), 142 L. T. 576.

**1252a. Goods obtained on approval—By trick.**—Where a person who has received goods "on appro" pledges them he thereby does an act adopting the transaction within the meaning of the Sale of Goods Act, 1893,

to have it pressed & the seller undertook to load it when bailed into the cars:—*Held*: the latter undertaking was a supplementary obligation distinct from the essentials of the contract of sale, & that the property in the hay had passed although the hay had not yet been so loaded by the seller.—*MARCO v. BERTHOLET*, [1928] 2 D. L. R. 691; [1928] 1 W. W. R. 843; 37 Man. L. R. 307.—CAN.

**PART IV. SECT. 1, SUB-SECT. 5.—D.**

**so. Goods lost by act of God before measurement.**—*TOWLE v. RUSSELL TIMBER CO.*, [1932] 1 D. L. R. 793.—CAN.

**sq. Condition as to weight—Buyer taking possession knowing goods not weighed.**—In an action for the price of scrap steel sold & delivered, the contract providing "railway weight to govern material loaded in Halifax—in Dartmouth according to ship's draft," *deft.* was held bound by the weight proved by *pltf.*, as he took possession of the shipment knowing it was not weighed.—*WHITZMAN v. DEITCHER*, [1936] 1 D. L. R. 780; 10 M. P. R. 301; *affd.*, [1936] S. C. R. 539; 3 D. L. R. 282.—CAN.

- s. 18, r. 4 (a), so that the property in the goods passes to him, & the original owner cannot recover them from the *bond fide* pledgee.—*LONDON JEWELLERS, LTD. v. ATTENBOROUGH, LONDON JEWELLERS, LTD. v. ROBERTSONS (LONDON), LTD.*, [1934] 2 K. B. 206; 103 L. J. K. B. 429; 151 L. T. 124; 50 T. L. R. 436; 78 Sol. Jo. 413; 39 Com. Cas. 290, C. A.; *reversing* S. C. *sub nom.* *LONDON JEWELLERS, LTD. v. SUTTON, LONDON JEWELLERS, LTD. v. ROBERTSONS (LONDON), LTD.*, 50 T. L. R. 193; 78 Sol. Jo. 82.
1258. *Add. Annotation*:—*Consd. Leitch (William) & Co. v. Leydon, Barr (A. G.) & Co. v. Macgeoghegan*, (1930) 47 T. L. R. 81.
1261. *Add. Annotation*:—*Refd. Simeons v. Durand's Trustee*, [1928] 2 K. B. 66.
1268. *Add. Annotation*:—*Refd. Simeons v. Durand's Trustee*, [1928] 2 K. B. 66.
1272. *Add. Annotation*:—*Refd. Simeons v. Durand's Trustee*, [1928] 2 K. B. 66.
1296. *Add. Annotations*:—*Refd. Ellis v. Stenning & Son, Ltd.* (1932), 76 Sol. Jo. 232; *Freshwater v. Bulmer Rayon Co.*, [1933] Ch. 162.
1355. *Add. Annotation*:—*As to (3) Refd. Flatau, Dick & Co. v. Keeping* (1931), 36 Com. Cas. 243.
1361. *Add. Annotations*:—*Refd. Flatau, Dick & Co. v. Keeping* (1931), 36 Com. Cas. 243; *Churchill & Sim v. Goddard*, [1936] 1 All E. R. 675.
1362. *Add. Annotations*:—*Dbtd. Flatau, Dick & Co. v. Keeping* (1931), 36 Com. Cas. 243. *Refd. Churchill & Sim v. Goddard*, [1936] 1 All E. R. 675.
- 1376a. — **Delivery order not in accordance with contract—Agreement for delivery order “from bond”—Delivery order of goods in bond.**—*F.*, a financier, *L.*, a distiller, *D. & M.*, a firm of shipbrokers, & one *A.* were minded to load a ship with a cargo of whisky to be carried across the Atlantic & sold in the U.S. or at some point from which it could easily be smuggled into the U.S., in violation of the laws of that country. *D. & M.* entered into a contract to buy a steamer for £2,565; *F.* advanced £256 as a deposit on the purchase. On Oct. 26, 1927, an agreement was entered into between *F.*, *L.* & *D. & M.*, whereby *L.* agreed to sell to *D. & M.* 7,500 cases of whisky at 27s. 6d. a case free on board at Leith or Glasgow to be delivered ex warehouse not later than Nov. 26. *D. & M.* were to take delivery on board a vessel of a regular line of steamers. Payment was to be made by a bill for £5,500 drawn by *F.*, accepted by *A.* & indorsed to *L.*, & a second bill for £4,812 accepted by *A. & D. & M.*, both bills to be payable ninety days from Nov. 26, & to be drawn & accepted on Oct. 26 & handed to *L.* to hold as security until he should hand the shipping documents or delivery order from bond on or before Nov. 26. *L.* agreed to lend *D. & M.* £2,500 for the purchase of the steamer, the loan to be secured by a first mtge. on the steamer. *F.* agreed to lend *D. & M.* £1,000 at 40 per cent. *per annum* interest to be secured by a second mtge. on the steamer. *D. & M.* agreed to insure the steamer for £1,000 against all risks, including seizure or confiscation, & £2,500 against marine risks & deliver to *L.* cover notes for £1,500 & £1,000, & to *F.* a cover note for £1,000. *F. & L.* agreed jointly to underwrite the insurance for £1,000 against confiscation at a figure to be agreed in the event of the ordinary market rate exceeding thirty guineas per cent. *D. & M.* agreed to provide £1,600, the estimated balance required for the equipment of the steamer for the voyage. Delay having occurred in naming a liner to take delivery of the whisky & in equipping the steamer for the adventure, *L.* gave to *D. & M.* a delivery order addressed to the keepers of the bonded warehouse where the whisky was in store. *D. & M.* immediately pledged the whisky for £500. *F.* hearing of this paid off the loan & took a transfer of the delivery order:—*Held*: *L.* by giving the delivery order to *D. & M.* had not committed a breach of the agreement, & if he had, *F.* could not complain of the breach after having himself taken a transfer of the delivery order.—*FOSTER v. DRISCOLL, LINDSAY v. ATTFIELD, LINDSAY v. DRISCOLL*, [1929] 1 K. B. 470; 98 L. J. K. B. 282; 140 L. T. 479; 45 T. L. R. 185, C. A.
- 1377a. — **Containing letters “O.K.”—Meaning of.**—*DAWSONS BANK, LTD. v. JAPAN COTTON TRADING CO., LTD.* (1935), 79 Sol. Jo. 213, P. C.
1378. *Add. Annotation*:—*Refd. Madras Official Assignee v. Mercantile Bank of India, Ltd.*, [1935] A. C. 53.
1399. *Add. Annotation*:—*Refd. English Hop Growers v. Dering*, [1928] 2 K. B. 174; *Imperial Tobacco Co. (of Great Britain & Ireland), Ltd. v. Parslay*, [1936] 2 All E. R. 515.
- 1399a. — **Appointment as “sole selling agents.”**—By an agreement in writing certain manufacturers of bricks & other building materials appointed a firm of builders’ merchants “sole selling agents of all bricks & other materials manufactured at their works.” The agreement was expressed to be for three years & afterwards continuous subject to twelve months’ notice by either party. While the agreement was in force the manufacturers informed the merchants that they intended in the future to sell their goods themselves without the intervention of any agent, & thereafter they effected sales to customers directly. In an action by the merchants against the manufacturers for breach of the agreement:—*Held*: (1) the effect of the agreement was to confer on *pltf.* the sole right of selling the goods manufactured by *defts.* at their works, so that neither *defts.* themselves nor any agent appointed by them, other than *pltf.*, should have the right of selling such goods; (2) the agreement was one of vendor & purchaser & not one of principal & agent.
- (3) If there had been an ambiguity & the intention of the parties had been in question at the trial, I think it might have been held that the parties had placed their own construction upon the contract & having acted

PART IV. SECT. 1, SUB-SECT. 9.—B.  
sq. *Assumption of chattel mortgage as part of purchase-price—Liability to indemnify seller.*—Where on a sale of

personal property the buyer assumes a chattel mtge. thereon as part of the purchase-price, he is under an implied obligation to indemnify the seller

against the latter’s personal liability to the mtgee.—*WALKER v. WOODYATT*, [1931] 2 W. W. R. 306; 3 D. L. R. 516; 44 B. C. R. 110.—CAN.

upon a certain view, had thereby agreed to accept it as the true view of its meaning (GREER, L.J.).—**LAMB (W. T.) & SONS v. GORING BRICK CO., LTD.**, [1932] 1 K. B. 710; 101 L. J. K. B. 214; 146 L. T. 318; 48 T. L. R. 160; 37 Com. Cas. 73, C. A.

**1403. Add. Annotation:—Apld. Palmolive Co. (of England) v. Freedman**, [1928] Ch. 264.

**1404. Add. Citations:—**[1928] Ch. 264; 138 L. T. 274.

**Add. Annotation:—Consd. Imperial Tobacco Co. (of Great Britain & Ireland), Ltd. v. Parslay** (1935), 52 T. L. R. 61.

**1409. Add. Annotation:—Consd. Palmolive Co. (of England) v. Freedman**, [1928] Ch. 264.

**1417. Add. Annotations:—Refd. Shell-Mex v. Elton Cop Dyeing Co.** (1928), 34 Com. Cas. 39; **Eldon (Lord) v. Hedley Bros.**, [1935] 2 K. B. 1.

**1421. Add. Annotation:—Refd. Shell-Mex v. Elton Cop Dyeing Co.** (1928), 34 Com. Cas. 39.

**1433. Add. Annotation:—Refd. Wilson v. Wright**, [1937] 4 All E. R. 371.

**1435. Add. Annotation:—Refd. Barker v. Agius** (1927), 33 Com. Cas. 120.

**1441. Add. Annotation:—Generally, Refd. Buller & Co. v. Brooks (T. J.), Ltd.** (1930), 142 L. T. 576.

**1451. Add. Annotation:—Refd. London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd.**, [1934] 2 K. B. 206.

**1454. Add. Annotation:—Refd. London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd.**, [1934] 2 K. B. 206.

**1458. Add. Annotations:—Consd. London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd.**, [1934] 2 K. B. 206. **Refd. Ellis v. Stenning & Son, Ltd.**, [1932] 2 Ch. 81.

**1461a. Seller remaining in possession as bailee.]—**H., a dealer in motor vehicles, & defts., a finance co., entered into a transaction for the sale of a motor lorry by H. to defts. & the letting of the lorry by defts. to H. on an

agreement in the form of a hire-purchase agreement. The transaction was carried out by means of the printed forms used by defts. in their business, which were more appropriate to a case in which they bought a vehicle & let it on hire-purchase to a third party, than to the present case. H. being in possession of the lorry then fraudulently sold it to plffs., who were not aware of the previous transaction between H. & defts. The payments due from H. to defts. under the hire-purchase agreement between them having fallen into arrear, defts. resumed possession of the lorry & refused to deliver it to plffs. at their request. Plffs. thereupon brought an action against defts. claiming delivery up of the lorry or damages for its detention:—**Held: H.**, after the transaction between him & defts. had been completed by the agreement for hire-purchase, was not in possession of the lorry as a person who "having sold goods, continues or is in possession of the goods" within Sale of Goods Act, 1893 (c. 71), s. 25, but as a bailee, & therefore the delivery or transfer by him of the lorry under the sale by him to plffs. had not, by virtue of that section, the same effect as if it had been authorised by defts., & was not thereby rendered valid as against defts.—**STAFFS MOTOR GUARANTEE, LTD. v. BRITISH WAGON CO., LTD.**, [1934] 2 K. B. 305; 103 L. J. K. B. 613; 151 L. T. 396.

**Annotation. Distd. Union Transport Finance, Ltd. v. Ballardie**, [1937] 1 K. B. 310.

**1461b. Possession not referable to contract of sale.]**

—Co. A. entered into an agreement with co. B. that B. should make for A. a number of matrices from which B., as requested from time to time by A., would press sound records, B. thus remaining in possession of the matrices. Later B. mortgaged its assets & property to a bank, & subsequently went into compulsory liquidation. Its assets were then purchased by C. On a claim by A. against C. for the return of the matrices:—**Held: on the contract & the evidence although the matrices remained in B.'s possession, the property in them was always in A.; & the**

#### PART IV. SECT. 2, SUB-SECT. 1.

**1440 i. Goods obtained by larceny—Title of bona fide purchaser.]—**Where the owner of a motor car was induced to part with possession of it by the representations of the recipient that he was acting as agent for another person whom he named as the buyer of it & the owner when delivering the car thought he had sold it to the alleged principal, a cheque in the latter's name having been given for the purchase-price, but the alleged buyer was a fictitious person, held that the car had been stolen by a trick, & therefore, deft. who innocently bought it from the thief obtained no title to it.—**CUFF-WALDRON MANUFACTURING CO., LTD. v. HEALD**, [1930] 2 W. W. R. 135; 3 D. L. R. 901; 24 S. L. R. 441.—**CAN.**

**h i. —.]—**The mere fact that the owner of a chattel has given the possession or use of it to another, not a mercantile agent, who, purporting to be the actual owner, fraudulently sells it to an innocent purchaser, does not estop the owner from asserting his title against the purchaser.—**NACHTIGAL v. PREMIER MOTORS, LTD.**, [1929] 2 D. L. R. 190; 1 W. W. R. 641; 24

Alta. L. R. 80.—**CAN.**

**i i. —.]—**Appeal from a judgment for the plff. in an action for the replevin of a motor truck. Plff. contended that the sale through which deft. claimed had been made by a stranger without his authority of consent. Deft. was a bona fide purchaser for value without notice who got possession of a truck at once on his purchase & was in possession at the time the writ was issued. S., the original owner of the truck, had agreed to sell it to P. on condition, *inter alia*, that he was to continue to have the use of it until put in possession of a new truck which he was to get in exchange. It was while the truck was in S.'s possession that P. sold it to plff., the latter agreeing that it should remain with S. until said condition was fulfilled. P. then sold it to F., from whom deft. bought it.—**Held: the case fell within the principle that Bills of Sale Act does not apply where the chattel is at the time of the sale in possession of a third party claiming possession on his own behalf & not as agent or trustee of the seller.**—**BRADSHAW v. BPP**, [1937] 3 W. W. R. 577; 4 D. L. R. 746; 45 Man. L. R. 486; 7 F. L. J. (Can.) 179.—**CAN.**

#### PART IV. SECT. 2, SUB-SECT. 7.

**so. Sale by dealer—Subsequent fraudulent sale to third person.]—**E., a dealer in automobiles, sold or went through the form of selling an automobile to C., under a conditional sale agreement, taking a promissory risk for a part of the price. This note he took to defts., an automobile financing co., & discounted it, at the same time transferring the agreement to defts., who duly filed it in accordance with Conditional Sales Act. The automobile was left in the possession of E., who dishonestly sold it to plff.:—**Held: the real owner of the car being E. or C. or both. E. had authority to dispose of his security, the conditional sale agreement to defts., & defts. were thereafter the owners in law of the automobile; the effect of the transaction between E. & C. along with that between defts. & E. was a "sale," & whether defts. or C. should be considered the purchaser, E., the person having sold the goods continued in possession & was in possession when he sold the automobile to plff., & this was effective to transfer the property to plff. under Sale of Goods Act, R. S. O., 1927, s. 25.—BENDER v. NATIONAL ACCEPTANCE CORPN.**, [1929] 1 D. L. R. 222; 63 O. L. R. 215.—**CAN.**

mtge., not applying to property which did not belong to the mtgor., did not attach to the matrices, & accordingly Sale of Goods Act, 1893 (c. 71), s. 25 (1), had no application, & A. was entitled to succeed.—**AHRENS, LTD. v. COHEN (GEORGE), SONS & Co., LTD.** (1934), 50 T. L. R. 411.

**1461c. Goods in possession of agent.]—**L. & Co. held certain furs in its warehouse which were the property of H. subject to the payment of £178 0s. 6d., its charges in respect of them. H. sold these furs to pltf.s., who gave him a bill of exchange for the price on the representation that he would pay off L. & Co. & obtain delivery orders for pltf.s. Instead of doing this, he arranged to pledge them with defts. for the sum of £178 0s. 6d. Defts., on Aug. 21, 1936, drew a cheque for that amount in favour of L. & Co., & that cheque was cleared on Aug. 22. L. & Co. then received an order from H. to deliver the furs to defts., which was done. Defts., who had no notice of pltf.s.' title, contended that by virtue of Sale of Goods Act, 1893 (c. 71), s. 25 (1), they were entitled to hold these furs as if delivery to them had been expressly authorised by pltf.s.:—*Held*: the furs after L. & Co. had been paid the £178 0s. 6d. by defts. were in the possession of H. as vendor in possession, & there was a disposition or pledge of them by H. to defts. They were entitled to hold the furs under this pledge & the claim of pltf.s. for delivery to them failed. The word "possession" in Sale of Goods Act, 1893 (c. 71), s. 25 (1), must be construed with reference to Factors Act, 1889 (c. 45), s. 1 (2), & includes possession by another person on behalf of the person whose possession is material, & it was immaterial that the agreement of pledge was made before the transfer of the furs could be carried out.—CITY FUR MANUFACTURING CO., LTD. v.

FUREENBOND (BROKERS) LONDON, LTD.,  
[1937] 1 All E. R. 799 ; 81 Sol. Jo. 218.

**1461d. Sale under hire-purchase agreement.]**—On May 17, 1935, T., a branch manager of pltf. co., bought for & on behalf of the co. from C. a motor-car which was forthwith let on hire under a hire-purchase agreement to F., an employee of C., who was not in a financial position to buy a car on any terms. C., T. & F. all knew that the hire-purchase transaction was not genuine in the sense that it was never intended that F.'s part in it should be a real one or that the car should be delivered to F., either by its physical transfer to his custody or by C. submitting to hold it as his bailee. C. made such payments to pltf. co. as were made under the agreement between co. & F., & although F. had agreed not to change the permanent garage of the vehicle, which was expressed to be at his mother's residence, nor to part with its possession or control, & had signed a document acknowledging that he had received delivery of the car, the car remained in C.'s garage, in his possession, & under his control. On Aug. 9, 1935, C. let the car on hire under a further hire-purchase agreement to deft., who took it in good faith & without notice of the transaction between C. & T. In an action by pltf. co. to recover the car from deft.:—*Held*: C., having sold the car to pltf. co., had continued in possession of it within sect. 8 of Factors Act, 1889 (c. 45), with the result that the delivery or transfer by C. of the car to deft. had the same effect as if C. had been expressly authorised by pltf. co. to make the same, & pltf. co. could not, therefore, succeed in the action.—**UNION TRANSPORT FINANCE, LTD. v. BALLARDIE**, [1937] 1 K. B. 510; [1937] 1 All E. R. 420; 106 L. J. K. B. 268; 156 L. T. 112; 53 T. L. R. 210; 81 Sol. Jo. 159.

## Part VI.—Performance of the Contract.

**1476. Add. Annotation :—**Consd. Hvalfangerselskapet Polaris Aktieselskap v. Unilever, Ltd., Hvalfangerselskapet Globus Aktieselskap v. Unilever, Ltd. (1933), 39 Com. Cas. 1.

1516. *Add. Annotation*:—As to (1) **Refd.** Royal Exchange Assce. v. Hope, [1928] Ch. 179.

1569. *Add. Annotation*:—**Reid. Shell-Mex v. Elton**  
Cop Dyeing Co. (1928), 34 Com. Cas. 39.

1577. *Add. Annotation* :—**Consd.** *Ellis v. Noakes*,  
[1932] 2 Ch. 98, n.

1581. *Add. Annotation* :—**Consd.** Besseler, Waechter Glover & Co. v. South Derwent Coal Co., [1938] 1 K. B. 108.

1585. *Add. Annotation* : -**Refd.** The Arpad, [1931]  
P. 189.

**1613.** *Add. Annotation:—Consd. Fisher, Ltd. v. Eastwoods, Ltd., [1936] 1 All E. R. 421.*

**1619.** *Add. Annotation:—*Refd. Monroe Bros.,  
Ltd. v. Ryan, [1935] 2 K. B. 28.

**1677.** *Add. Annotations* :—As to (1) **Refd.** Portofino Tank Steamer Owners v. Berlin Derunaphra (1934), 39 Com. Cas. 330 ; Strathlorne S.S. Co. v. Andrew Weir & Co. (1934), 40 Com. Cas. 168.

**1678a. Right to compensation -Option not to ship goods—Short delivery.]—**By a printed form of contract for the sale of timber it was provided that " In the event of under-shipment of any item buyers are to accept . . . the quantity shipped, but have the right to claim compensation for such short shipment." This form of contract was used for a contract for sale of timber for shipment from a port in the Arctic Circle which is open for shipping only for about 21 days in the year. The

**PART VI. SECT. 1, SUB-SECT. 2.**

1476 v. —.] —WEBB & HENDERSON  
v. CUPPLES, [1928] S. R. Q. 316.—AUS.

**PART VI. SECT. 1, SUB-SECT. 3.**

1498 iii. — (*C.i.f. contract*.)— Under a c.i.f. contract providing for payment against documents the purchaser is under no obligation to take

up documents that do not in fact relate to goods of the description contracted for, & a refusal to take up a draft does not necessarily prove that the buyer was not ready & willing to perform the contract.—HENRY DEAN & SONS (SIDNEY), LTD. v. P. O'DAY PROPRIETARY, LTD. (1927), 39 C. L. R. 330 : [1927] Argus L. R. 233.—AUS.

**sg. Repudiation**.—Any ground may be relied upon.—In a suit for damages for breach, by repudiation, of a contract for the sale of goods, deft. can rely upon any ground for repudiation which existed when he repudiated; he is not confined to the ground which he then stated. —SIVAYYA v. RANGANAYAKULU (1935), I. L. R. 58 Mad. 670, P. C. —IND.

details of the particular contract were added to the printed form in typewriting & a clause was also added which provided that the goods were "sold subject to shipment: any goods not shipped to be cancelled." In a claim for damages for short delivery:—*Held*: the contract gave to the sellers an option whether or not they would ship any timber, but once shipped the sellers were obliged to supply the timber in fulfilment of the contract. If, however, the full quantity of timber was not shipped, the buyers could not recover damages for short delivery.—*HOLLIS BROS. & CO., LTD. v. WHITE SEA TIMBER TRUST, LTD.*, [1936] 3 All E. R. 895; 80 Sol. Jo. 934.

1682a. ———.]—*GABRIEL, WADE & ENGLISH, LTD. v. ARCOS, LTD.* (1929), 73 Sol. Jo. 483.

1686a. ———.]—*TANVACO v. LUCAS* (1859), 1 E. & E. 581, 592; 120 E. R. 1027, 1032; *sub nom. TANVACO v. LUCAS*, 28 L. J. Q. B. 150, 301; 1 L. T. 161; 5 Jur. N. S. 731, 1258; 7 W. R. 568.

*Annotations*.—*Consd.* *Shipton, Anderson & Co. v. Well Bros. & Co.*, [1912] 1 K. B. 374. *Refd.* *Ireland v. Livingston* (1866), L. R. 2 Q. B. 99.

1703. *Add. Annotation*.—*Consd.* *Wilensko Slaski Towarzystwo DREWNO v. Fenwick & Co. (West Hartlepool), Ltd.*, [1938] 3 All E. R. 429.

1715a. ———.—"Total requirements."—A contract for the sale of steel was entered into by the exchange of bought & sold notes in identical terms. The sold note was: "We have this day sold to you the undermentioned material." The quantity was thus expressed: "Buyer's total requirements up to 8,000 tons":—*Held*: (1) this was not a mere option to the purchaser to take any quantity up to 8,000 tons, including the right to take none at all; (2) it was a contract to supply steel up to a total quantity of 8,000 tons, but the buyer could only demand steel actually required in his business, & he could not buy to sell again; (3) in order to recover damages for a breach of the contract it was essential for the buyer to prove that there was a need upon his part for the steel of which delivery was required.—*KIER & CO., LTD. v. WHITEHEAD IRON & STEEL CO., LTD.*, [1938] 1 All E. R. 591; 158 L. T. 228; 54 T. L. R. 452; 82 Sol. Jo. 235.

1728a. ———. *Provision in contract that each item should be considered separately.*—A contract for the sale of timber contained a clause dealing with allowances for overshipment & undershipment, concluding with the words "each item of this contract to be considered a separate interest." The buyer rejected the whole of the goods on the ground that part of them did not comply with the contract specification:—*Held*: the stipulation that each item was to be treated as a separate unit was only applicable to disputes with respect to quantity, & as part of the goods were defective in quality, the buyer was entitled to reject the whole, in accordance with Sale of Goods Act, 1893 (c. 71), s. 30 (3).—*RAAHE O/Y OSAKEYTIO v. GODDARD* (1935), 154 L. T. 124; 80 Sol. Jo. 93.

1745a. *Agreement to cancel future instalments—In consideration of payments by buyer—Buyer ignorant that goods not corresponding with description—Rights of parties.*—*ROBERT A. MUNRO & CO., LTD. v. MEYER*, No. 645a, *ante*.

1746. *Add. Annotation*.—*Consd.* *Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K. B. 148.

1747. *Add. Annotations*.—*Consd.* *Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K. B. 148. *Refd.* *Robert A. Munro & Co. v. Meyer*, [1930] 2 K. B. 312.

1762. *Add. Annotation*.—*Consd.* *Besseler, Waechter Glover & Co. v. South Derwent Coal Co.*, [1938] 1 K. B. 408.

1762a. *Goods not complying with statutory requirements.*—The main tests to be considered in applying sect. 31 (2) are, first, the quantitative ratio which the breach bears to the contract as a whole, & secondly, the degree of probability that such a breach will be repeated.

A contract in writing was entered into between plffs. & defts. for the sale by the former to the latter of 100 tons of rag flock to be delivered in three loads of 1½ tons each per week as required, & the weekly deliveries to be separately paid for, it being stipulated that there should be a written guarantee that all flock supplied should conform to Govt. standard. By statute the Govt. standard was that of not more than 30 parts of chlorine in 100,000 parts of flock, & it was made a penal offence to use flock not conforming thereto. The sixteenth load delivered was duly accepted & used, & after two further loads had been delivered, defts. notified plffs. that a sample drawn from the sixteenth load had been analysed & showed a contamination of 250 parts of chlorine, & defts. claimed to rescind the contract. During ensuing negotiations two more deliveries were taken, but defts. adhered to their claim to rescind & refused to accept any further deliveries. Plffs. thereupon brought an action against defts. for damages for breach of contract by the latter in so refusing. Defts. alleged, in defence, that plffs. by making the defective delivery had repudiated the whole contract, whereby defts. were not obliged to accept further deliveries. It was found at the trial that plffs.' business was well conducted, & that the contamination complained of by defts. was extraordinary:—*Held*: in these circumstances plffs.' breach of the contract was not, within Sale of Goods Act, 1893 (c. 71), s. 31 (2), a repudiation of the whole contract, that defts.' refusal of further deliveries was a breach by them of the contract, & plffs. were entitled to judgment on their claim in the action.—*MAPLE FLOCK CO., LTD. v. UNIVERSAL FURNITURE PRODUCTS (WEMBLEY), LTD.*, [1934] 1 K. B. 148; 103 L. J. K. B. 513; 150 L. T. 69; 50 T. L. R. 58; 39 Com. Cas. 89, C. A.

1765. *Add. Annotation*.—*Refd.* *Banco de Portugal v. Waterlow & Sons, Ltd.* (1931), 100 L. J. K. B. 465.

PART VI. SECT. 2, SUB-SECT. 9.—B.

i. l. ———.]—*THOMPSON & ALIX, LTD. v. SMITH*, [1933] S. C. R. 172; 2 D. L. R. 214.—*CAN.*



- 1766. Add. Annotation:—***Refd.* *Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K. B. 148.
- 1769. Add. Annotations:—***Consd.* *Robert (A.) Munro & Co. v. Meyer*, [1930] 2 K. B. 312; *Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K. B. 148; *Refd.* *Wilensko Slaski Towarzystwo DREWNO v. Fenwick & Co. (West Hartlepool), Ltd.*, [1938] 3 All E. R. 429.
- 1769a. —** *Notwithstanding agreement that each instalment separate contract—Goods not corresponding with description.*—*ROBERT A. MUNRO & CO., LTD. v. MEYER*, No. 645a, *ante*.
- 1801. Add. Annotations:—***Refd.* *Canada Atlantic Grain Export Co. (Inc.) v. Eilers* (1929), 35 Com. Cas. 90; *Churchill & Sim v. Goddard*, [1936] 1 All E. R. 675.
- 1808. Add. Annotation:—***Refd.* *Wilensko Slaski Towarzystwo DREWNO v. Fenwick & Co. (West Hartlepool), Ltd.*, [1938] 3 All E. R. 429.
- 1811. Add. Annotation:—***Refd.* *Foreman & Ellams v. Blackburn*, [1928] 2 K. B. 60.
- 1812. Add. Annotation:—***As to (2) Consd.* *Foreman & Ellams v. Blackburn*, [1928] 2 K. B. 60.
- 1812a. —** *Shipment of goods before contract—Ship visiting other ports before issue of bill of lading.*—A contract, dated July 2, provided for the sale of frozen rabbits & their shipment from Sydney c.i.f. Liverpool by a named steamer to sail during Aug. The bill of lading, which was dated Aug. 17, stated that the goods had been shipped by the steamer, then lying in Sydney. The steamer shipped the goods, or the bulk of them, at Sydney on June 25, when she proceeded to Queensland ports, thereafter returning to Sydney, & finally sailing from that port for Liverpool on Aug. 17. The buyers declined to take delivery of the goods, & the sellers claimed damages from them for breach of contract:—*Held*: the sellers were not entitled to recover, inasmuch as they had themselves committed breaches of the contract, by supplying goods the shipment of which had already taken place before the date of the contract of sale, & by tendering a bill of lading the issue of which had been delayed for so long as seven weeks after the shipment, the steamer having in the meantime visited other ports several hundred miles from the port of shipment.—*FOREMAN & ELLAMS, LTD. v. BLACKBURN*, [1928] 2 K. B. 60; 97 L. J. K. B. 355; 139 L. T. 68; 33 Com. Cas. 359; 17 Asp. M. L. C. 461.
- 1813. Add. Annotation:—***Refd.* *Finlay (James) & Co. v. N. V. Kwik Hoo Tong* (1928), 98 L. J. K. B. 251.
- 1814a. —** *Date of shipment incorrectly stated.*—The seller under a c.i.f. contract tendered to the buyer a bill of lading which stated, not fraudulently, but contrary to the fact, that the shipment had taken place in the contract month. Being unaware of this fact at the time of the tender, the buyer accepted the shipment, & entered into sub-contracts for the sale of a portion of the goods, those sub-contracts containing a clause that "the bill or bills of lading shall be conclusive evidence of the date of shipment." The sub-purchasers refused to take delivery, alleging that the shipment had not been made during the contract month. The buyer under the original contract having then ascertained that the goods had not been shipped during the contract month:—*Held*: (1) he was entitled to damages for the breach by the seller of his obligation to deliver a bill of lading stating the date of shipment correctly, the measure of damages being the difference between the market price & the contract price of the goods; (2) the buyer was not bound to enforce, for the purpose of minimising the damages, the contracts with the sub-purchasers, as to do so, after he knew that the shipment date was incorrect, might seriously injure his commercial reputation.—*FINLAY (JAMES) & CO. v. N. V. KWIK HOO TONG* H. M., [1929] 1 K. B. 400; 98 L. J. K. B. 251; 140 L. T. 389; 45 T. L. R. 149; 34 Com. Cas. 143; 17 Asp. M. L. C. 566, C. A.
- Annotations:—As to (1) Refd.* *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48. *As to (2) Refd.* *Banco de Portugal v. Waterlow & Sons, Ltd.* *Waterlow & Sons, Ltd. v. Banco de Portugal*, [1932] A. C. 452; *The Edison* (1932), 147 L. T. 141.
- 1815. Add. Annotation:—***As to (2) Refd.* *The Njegos*, [1936] P. 90.
- 1816. Add. Annotations:—***Refd.* *De Monchy v. Phoenix Insee. of Hartford* (1928), 138 L. T. 703; *Tredegar v. Harwood*, [1928] Ch. 59.
- 1850. Add. Annotation:—***Refd.* *De Monchy v. Phoenix Insee. of Hartford* (1928), 138 L. T. 703.
- 1858. Add. Annotation:—***Distd.* *Aronson v. Mologa Holzindustrie A/G Leningrad* (1927), 138 L. T. 470.

## PART VI. SECT. 2, SUB-SECT. 9.—D.

*sm. Refusal to take one instalment—Whether repudiation or separable breach.*—*THOMPSON & ALIX, LTD. v. SMITH* (1929), 1 M. P. R. 510.—CAN.

*sp. Refusal to call for delivery—Vendor's right to rescind.*—When a contract for the sale of goods relates to the purchase of buyer's total requirements in instalments at stated times, but in uncertain quantities, the buyer's refusal to call for delivery amounts to renunciation & seller may treat the contract as at an end.—*LANDREVILLE v. GRAHAM NAIL CO.*, [1934] 4 D. L. R. 681; O. R. 752.—CAN.

## PART VI. SECT. 2, SUB-SECT. 11.—B.

**1828 i. Irregularity in documents—Invoice—C.i.f. contract.**—*Scrimble*: the office of the invoice in a c.i.f. contract is to show how the amount of the draft for the contract goods is arrived

at, & provided it makes that clear, the fact that there is on the face of the invoice matter not in accordance with the contract does not justify the buyer in refusing to accept the usual shipping documents, nor in itself does it amount to a breach by the seller of his obligation to tender such valid & effectual shipping documents as are contemplated by the contract or as are usual.—*SAMUEL McCABLAND, LTD. v. RAILTON*, [1931] V. L. R. 247.—AUS.

## PART VI. SECT. 3, SUB-SECT. 1.

*sp. Retention of goods—With knowledge of mistake by vendor—Acceptance implied.*—*ACKERMAN v. MORRISON* (1911), 45 N. S. R. 185; 9 E. L. R. 307.—CAN.

*sr. Resale.*—On a sale by description, resale of the goods by the buyer after a reasonable opportunity for inspection amounts to an acceptance of the goods.—*GALLANT v. NEILSON*,

[1938] 1 D. L. R. 50; 12 M. P. R. 284; 7 F. L. J. (Can.) 197.—CAN.

## PART VI. SECT. 3, SUB-SECT. 2.

**1866 i. Whether implied.**—*SCOTIA FLOUR & FEED CO. v. STRONG*, [1928] 4 D. L. R. 678; [1928] S. C. R. 319.—CAN.

*sq. Special contract—"Inspection acceptance Winnipeg."*—*SCOTT v. ROGERS FRUIT CO.*, [1928] 1 D. L. R. 201; 37 Man. L. R. 145; [1927] 3 W. W. R. 628.—CAN.

*sr. Nature of right.*—Where a buyer of a motor car took delivery thereof under a contract which expressly acknowledged acceptance & used the car in the usual course of his business for 10 days it was held that, in the absence of any agreement giving him the right to test the car for that time, it was not possible to hold that he had not accepted it. The reasonable

1870. *Add. Annotation*:—*As to* (1) **Refd.** *Cam-mell Laird & Co. v. Manganese Bronze & Brass Co.*, [1933] 2 K. B. 141.

1884a. **Sale of marked goods—Rejection of un-marked goods.**—A contract for the sale of timber stated in clause 11 thereof that no claim for quality &/or condition would be recognised by the seller upon any goods shipped under the contract unless reasonable particulars were given to the agents within fourteen days, & goods in respect of which a claim was made were produced ready for inspection within twenty-one days, both periods to be calculated from the ship's final discharge. Reasonable particulars were defined to mean a statement as to whether the claim was for condition &/or quality &/or other defects to be named. A further clause stated that buyers should not reject the goods therein specified, but should accept or pay for them in terms of the contract against shipping documents. The buyers sent in a detailed claim on three grounds: (i) that some of the goods were not seasoned; (ii) that some were of bad manufacture; (iii) that part of the goods did not bear the shippers' usual mark. The sellers declined to inspect the goods on the ground that the claim was out of time:—*Held*: (1) the claim based on the ground that the goods were not properly seasoned came within clause 11 of the contract, & was therefore out of time; (2) as quality & condition did not apply to faulty manufacture, clause 11 did not apply to goods found to be faulty from the point of view of manufacture, & the sellers were therefore liable on the buyers' claim in respect of such goods; (3) the stipulation for a mark was a stipulation which went to the whole subject-matter of the contract, & the buyers were therefore entitled to reject goods not marked with the shippers' mark as not being goods of the contract description. Such goods were not subject to the clause restricting the right of rejection.—*Vsesojwzoje Objedinenije "Exportles" v. Allen & Sons, Ltd.*, [1938] 3 All E. R. 375; 82 Sol. Jo. 682.

1886. *Add. Annotation*:—**Refd.** *Adair & Co. v. Birnbaum*, [1938] 1 All E. R. 532.

1887a. ——. **—**—*MONTAGUE L. MEYER, LTD. v. OSAKEYHTIO CARELIA TIMBER CO., LTD.*, No. 622a, *ante*.

1887b. ——. **—**—Applts. were an English co. which sold Russian Govt. goods in this country. Under contracts made in 1929 they agreed to sell to resps. certain Russian redwood & whitewood staves of specified dimensions. Resps. alleged that the goods delivered did not satisfy the description as to measurement & the matter was referred to arbn. pursuant to the terms of the contract. The arbitrator found, in effect, that the staves which under the contract description were to be of the thickness of half an inch, when

received, exceeded half an inch in thickness & were, at shipment, also in excess of that measure, though not to the same extent; but he held that the staves, when shipped, were commercially within & merchantable under the contract specification & that resps. were not entitled to reject the goods. The award being in the form of a special case came before **WRIGHT, J.**, who held that the difference in the sizes was not of such a trivial character as to justify it being disregarded by the ct., & the finding as to measurement showed that the goods were not those contracted to be sold, & it was those goods, & not their commercial equivalent, that resps. were entitled to demand. The Ct. of Appeal confirmed that view. *Sale of Goods Act, 1893* (c. 71), s. 13, provides that where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description:—*Held*: the fact that the goods were merchantable under the contracts was no test proper to be applied in determining whether the goods satisfied the contract description: the use of the word "commercially" itself showed that, while the goods did not in fact answer the description, they could, as a matter of commerce, be so dealt with, but the rights of resps. under the contracts were not so limited.—*ARCOS, LTD. v. RONAASEN (E. A.) & SON*, [1933] A. C. 470; 102 L. J. K. B. 346; 149 L. T. 98; 49 T. L. R. 231; 77 Sol. Jo. 99; 38 Com. Cas. 166, H. L.; *affg.* S. C. *sub nom.* *RONAASEN (E. A.) & SON v. ARCOS, LTD.* (1932), 48 T. L. R. 356, C. A.

1887c. ——. **Goods to be carried "under deck"—Carriage as deck cargo.**—A contract for the sale of wood strips of sizes & quantities as specified, to be shipped from Archangel, contained a condition that the whole was to be shipped under deck & a clause providing that "buyers shall not reject the goods herein specified but shall accept or pay for them in terms of contract against shipping documents." About a quarter of the whole was shipped as deck cargo & suffered injury by being so carried, & the rest was carried under deck. The buyers rejected the whole shipment:—*Held*: the words "herein specified" did not refer merely to the part of the contract headed "Specification" but meant "herein described," & part of the description of the goods was that they were to be carried under deck, & as about a quarter of the goods was carried on deck the buyers had the right to reject the whole.—*WHITE SEA TIMBER TRUST, LTD. v. W. W. NORTH, LTD.* (1932), 148 L. T. 263; 49 T. L. R. 142; 77 Sol. Jo. 30; 18 Asp. M. L. C. 367.

*Annotations*:—**Consd.** *Vsesojwzoje Objedinenije "Exportles" v. Allen & Sons, Ltd.*, [1938] 3 All E. R. 375. **Refd.** *Raabe O/Y Osukeytio v. Goddard* (1935), 151 L. T. 121.

1889. *Add. Annotations*:—**Apld.** *Montague L.*

opportunity, given by *Sale of Goods Act, R. S. B. C.*, 1924, s. 40, of examining the goods for the purpose of ascertaining whether they are in conformity with the contract is, in at least an action for rescission, a right of inspection, & not a right to make use of a piece of machinery for an indefinite or any time to test its capacity of performance & perfection of con-

struction.—*REEVIE v. WHITE CO., LTD.* (B. C.), [1929] 4 D. L. R. 296; 3 W. W. R. 33.—**CAN.**

**PART VI. SECT. 3, SUB-SECT. 3.—B. (a).**

1887 vii. ——. **—**—*WENTWORTH OR CHARD CO., LTD. v. MERCHANTS CONSOLIDATED, LTD.* (Man.), [1922] 1 W. W. R. 291; 68 D. L. R. 227.—**CAN.**

1887 viii. ——. **—**—*CANADIAN INTERNATIONAL PAPER CO. v. SOPER*, [1931] 3 D. L. R. 801; S. C. R. 718.—**CAN.**

**r 1.** ——. *Sale of "stack branded" or "stack graded" goods—Brand marks matter of identification not description.*—*NEW ZEALAND LOAN & MERCANTILE AGENCY CO., LTD. v. WRIGHT STEPHENSON & CO., LTD.*, [1930] N. Z. L. R. 630.—**N.Z.**

Meyer, Ltd. v. Kivisto (1929), 142 L. T. 480.  
 Consd. Montague L. Meyer, Ltd. v. Osa-  
 keyhtio Carelia Timber Co. (1930), 36 Com.  
 Cas. 17; Green v. Arcos, Ltd. (1931), 47  
 T. L. R. 336. **Distd.** Arcos, Ltd. v. Ronaasen  
 & Son (1933), 49 T. L. R. 231. **Refd.**  
 Wilensko Slaski Towarzystwo Drewno v. Fen-  
 wick & Co. (West Hartlepool), Ltd., [1938]  
 3 All E. R. 429.

1895. *Add. Annotation*:—**Reid**. Hillas & Co. v. Arcos, Ltd. (1932), 147 L. T. 503.

**1897. Add. Annotation:—***Apld.* Barrow, Lane & Ballard *v.* Phillip, Phillips & Co., [1929] 1 K. B. 574.

1905a. — No right to reject goods specified.—**Wrong quantity tendered.**—A buyer bought a quantity of timber to be shipped from Russia, the contract providing that at sellers' option the quantity was subject to a variation of 10 per cent. not exceeding twenty standards on any item, & that "buyers shall not reject the goods therein specified, but shall accept or pay for them in terms of contract against shipping documents." When the cargo arrived the buyer found that, after allowing for the permitted variation, in some classes of the timber there had been over-shipment, in some classes there had been short shipment, & in some classes there had been no shipment at all. The buyer thereupon rejected the whole of the timber on the ground that the sellers had failed to perform the contract:—*Held*: on a special case stated by an arbitrator, the clause as to rejection could not prevent rejection where the goods tendered were not the goods "specified," & as the goods tendered were not, in respect of quantity, the goods specified, the clause did not apply, & the buyer was entitled to reject.—**GREEN v. ARCOS, LTD.** (1931), 47 T. L. R. 336. C. A.

*Annotations*:—**Refid. Arcos, Ltd. v. Ronaasen & Son** (1933), 19 T. L. R. 231; **Wilensko Slaski Towarzystwo Drewno v. Fenwick & Co. (West Hartlepool), Ltd.**, [1938] 3 All E. R. 429.

1906a. -- J.—In a c.i.f. contract for the sale of 1,500 standards of pit-props of stated lengths & top sizes, with liberty to ship up to 10 per cent. more or less than the quantity specified, with "about 1,000 standards 4/10 ft. lengths, fair proportion of lengths, of which the 4/6 feet to be 4/5½ ins. tops with maximum 10 per cent. 2½/3½ ins. tops, the 6½/10 ft. to be 2½/5½ ins. tops of which about 50 per cent. 2½/3½ ins. tops, 5 per cent. 2 ins. tops to be allowed. Fair proportion of tops within each stipulated range and over

remainders. Inches in tops not to exceed feet in length." The contract provided that, upon any dispute, the buyer should "not reject the goods herein named nor any part of them," but such dispute, if not otherwise arranged, should be referred to arb'n. The timber was shipped in two ships, & separate shipping documents (bills of lading, invoice & policy) were tendered in respect of each consignment. In the case of the first consignment, the documents were first rejected because the specification did not comply with the contract. The specification was thereupon amended & the documents re-tendered, but, upon unloading both consignments, the outturn specifications showed that there were substantially more than 10 per cent. of  $2\frac{1}{3}$  ins. tops in the  $\frac{4}{6}$  ft. lengths. The umpire found as a fact that, after amendment as above stated, the shipping documents were in order, but that both consignments were in fact substantially different from the goods described in the contract, whether the consignments were considered separately or together. It was contended that, as the quantity of the goods not in compliance with the contract was under 1 per cent. of the whole, the maxim *de minimis non curat lex* should be applied, & that the clause restricting the right of rejection had purposely been altered from its usual form, & operated to bar rejection in this case:—*Held*: (1) although the number of goods not in compliance with the contract description was relatively small, it was sufficient to entitle the buyers to refuse to take up the documents, especially in view of the fact that the umpire had found that both consignments were substantially different from the goods described in the contract, whether the consignments were considered separately or together; (2) the change in the wording of the rejection clause from "not reject the goods herein specified" to "not reject the goods herein named nor any part of them" had not the effect of preventing the buyer from rejecting the goods, since the goods delivered were not the goods specified. —*WILENSKO SLASKI TOWARZYSTWO DREWNO v. FENWICK & Co. (West Hartlepool)*, LTD., [1938] 3 All E. R. 429; 54 T. L. R. 1019.

**1923.** *Add. Annotations*:—As to (1) **Consd.** Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd., [1934] 1 K. B. 118. As to (2) **Reid**. Robert A. Munro & Co. v. Meyer, [1930] 2 K. B. 312.

PART VI. SECT. 3, SUB-SECT. 3.—  
D. (b) i.

*st. Execution of chattel mortgage on goods.*—METALS, LTD. v. DIAMOND, [1930] 3 D. L. R. 886.—CAN.

PART VI. SECT. 4, SUB-SECT. 4.—  
C. (a).

**r i. —**—,]—E. who had been for some time selling & delivering carcasses of beef for cash to a meat co., delivered four carcasses at the co.'s

shop, whereupon the manager who was then busy asked him to call back for his cheque. The seller thereupon left the shop & came back 15 hours later or the cheque, but in the meantime a garulshoe order had been served on the manager by a creditor of the seller:—*Held*: by his conduct the seller had agreed to give credit to the buyer.—*COPLAND v. ELMORE*, [1928] 2 D. L. R. 308; [1928] 1 W. W. R. 380.—*CAN.*

**PART VI. SECT. 4, SUB-SECT. 6.—G.**

**5v. Right of holder to follow proceeds of goods.**—LEIGH v. ADAMS, WOOD & WEILLER, LTD., & O'NEIL. [1931] 1 W. W. R. 686; [1931] 2 D. L. R. 595; 25 Alta. L. R. 341.—**CAN.**

**PART VI. SECT. 4, SUB-SECT. 11.—A.**

2014 ii. ——— ——— ——— .]—CLARKE  
BROS. & CO. v. LAWRENCE, [1931] 1  
W. W. R. 252; 2 D. L. R. 503.—CAN.

## Part VII.—Rights of Unpaid Seller Against Goods.

2059. *Add. Annotation*:—**Refd.** The Rehearsal (1933), 49 T. L. R. 559.
2164. *Add. Annotation*:—**Refd.** Bottomley v. West Derby Assessment Committee, etc., etc. (1931), 47 T. L. R. 468.
2169. *Add. Annotation*:—**Refd.** Bottomley v. West Derby Assessment Committee, etc., etc. (1931), 47 T. L. R. 468.
2171. *Add. Annotation*:—**Refd.** Bottomley v. West Derby Assessment Committee, etc., etc. (1931), 47 T. L. R. 468.
- 2218a. ——— **Goods sold “free house, London.”**—Napier Bros. having ordered goods from plts. these were dispatched from Hamburg to London by steamer. According to the confirmation of the order the terms of the contract were “Free house, London.” The goods arrived in London & defts., the carriers, were instructed by Napier Bros. on Jan. 14 to warehouse them at the dock. On Jan. 18 Napier Bros. executed a deed of arrangement with their

creditors. It was contended that by the terms of the contract the transit did not end until the goods reached the warehouse of Napier Bros., & that therefore a stoppage *in transitu* on Jan. 18, was in order:—**Held**: the transit terminated as soon as the carriers warehoused the goods on behalf of Napier Bros., & the words “Free house, London,” did not necessarily mean that the goods were in transit until they reached the premises of Napier Bros. in London.—**PLISCHKE & SOHNE G.m.b.H. v. ALLISON BROS., LTD.**, [1936] 2 All E. R. 1009.

2384. *Add. Annotation*:—**Appld.** A.-G. v. Pritchard (1928), 97 L. J. K. B. 561.  
After this case add:—“As regards hire-purchase agreements generally, *see* BAILMENT, Vol. III., p. 96, Nos. 257, 258.”
2388. *Add. Annotations*:—**Distd.** A.-G. v. Pritchard (1928), 97 L. J. K. B. 561. **Refd.** South Bedfordshire Electrical Finance, Ltd. v. Bryant, [1938] 3 All E. R. 580.

## Part VIII.—Breach of the Contract.

2390. *Add. Annotation*:—**As to (1) Consd.** Calico Printers' Association, Ltd. v. Barclays Bank (1930), 145 L. T. 51.
- 2421a. ——— ————Pltfs. sold two second-hand motor lorries to defts. for £475, as to £250 of which they were to be paid in cash, & as to £225 of which they were to receive in part-exchange two other lorries, provided that the latter were delivered within a month. The cash was paid, but the purchaser failed to deliver the lorries:—**Held**: this was an entire contract of sale, in which defts. had a right to discharge £225 of the purchase price by the delivery of the lorries within a month; but upon their failure to do so, pltfs. were entitled to sue for the remainder of the purchase price as a debt due. Pltfs.' remedy in such a case is not an action of detinue for the detention of the lorries, but an action for the balance of the purchase price.—**DAWSON (CLAPHAM), LTD. v. DUTFIELD**, [1936] 2 All E. R. 232.
2424. *Add. Annotation*:—**Refd.** Millar's Machinery Co. v. Way & Son (1935), 40 Com. Cas. 204.

2427. *Add. Annotation*:—**Refd.** Shell-Mex v. Elton Cop Dyeing Co. (1928), 34 Com. Cas. 39.
2466. *Add. Annotation*:—**Refd.** Besseler, Waechter Glover & Co. v. South Derwent Coal Co., [1938] 1 K. B. 408.
2473. *Add. Citation*:—**reusq.** S. C. *sub nom.* STEWARDS & Co., LTD. v. R. (1900), 17 T. L. R. 111, C. A.
2486. *Add. Annotation*:—**Refd.** The Njegos, [1936] P. 90.
2487. *Add. Annotation*:—**Refd.** Shell-Mex v. Elton Cop Dyeing Co. (1928), 34 Com. Cas. 39.
2488. *Add. Annotation*:—**Refd.** Siveyer v. Allison, [1935] 2 K. B. 403.
- 2493a. ——— ————**STURGE v. PHILPOTTS** (1839), 8 L. T. 30.
2496. *Add. Annotation*:—**As to (3) Consd.** Foley v. Classique Coaches, Ltd., [1934] 2 K. B. 1.
2501. *Add. Annotation*:—**Refd.** Banco de Portugal v. Waterlow & Sons, Ltd. (1931), 100 L. J. K. B. 465.

### PART VIII. SECT. 1.

**sd. Repudiation—Grounds for.**—What may be relied upon.]—In a suit for damages, for breach, by repudiation of a contract for the sale of goods, deft. can only rely upon any ground for repudiation which existed when he repudiated; he is not confined to the ground which he then stated.—**NUNE SVAYYA v. MADHU RANGANAYAKULU** (1935), L. R. 62 Ind. App. 89.—**IND.**

### PART VIII. SECT. 2, SUB-SECT. 1.—A.

**sg. Payment of price dependent on performance of term.**—Performance prevented by buyer.]—Where the buyer prevents the seller from performing a term of a contract of sale upon which depends the payment of the price, then the seller is excused from performing the term, or, in other words, the seller is deemed to have performed

the term.—**EAST ASIATIC CO., LTD. v. HANSEN**, [1933] N. L. R. 297.—**S. AF.**

**sj. No right of repossession.**]—The vendor in an unconditional contract has no right of repossession, but an action for goods sold & delivered only.—**CONWAY v. CAMPBELL**, [1935] 3 D. L. R. 696; 10 M. P. R. 223.—**CAN.**

### PART VIII. SECT. 2, SUB-SECT. 1.—E. (a).

2445 i. *Effect of joinder of claims.*]—**WETTLAUFER BROS., LTD. v. ROBERT ELDER CARRIAGE WORKS, LTD.**, **ROBERT ELDER CARRIAGE WORKS, LTD. v. SNOW MOTORS INCORPORATED**, [1928] S. C. R. 580.—**CAN.**

### PART VIII. SECT. 2, SUB-SECT. 2.—A.

**h i.** ——— *Shipment f.o.b.*]—**VIPOND v. SISCO** (1913), 29 O. L. R. 200; 4 O. W. N. 1498.—**CAN.**

### PART VIII. SECT. 2, SUB-SECT. 2.—C. (a).

2490 xiv. ———.]—In an action for damages for breach of a contract to purchase a new motor car:—**Held**: the damages recoverable were those provided for under sect. 49 of Sale of Goods Act, R. S. M., 1913, *i.e.*, those which had directly & naturally resulted from the breach of the contract, which in this instance were held to be the difference between the wholesale & the retail price.—**BROWN v. BUCK**, [1934] 2 W. W. R. 561; 4 D. L. R. 446; 42 Man. L. R. 336.—**CAN.**

2501 i. ——— *No available market.*]—Where a purchaser of a motor-truck chassis from a dealer refused to accept delivery of the motor-truck, which was then re-sold at a profit, there being evidence that similar motor-trucks were available for immediate delivery, & the property not having

**2512. Add. Annotation:—***Refd.* Bessler, Waechter Glover & Co. v. South Derwent Coal Co., [1938] 1 K. B. 408.

**2515. Add. Annotation:—***Refd.* Kroch v. Russell et Compagnie Société des Personnes à Responsabilité, Ltd., [1937] 1 All E. R. 725.

**2516a. Right to repurchase or resell on default—Agreement to give notice—Effect of repurchase without notice.]—**By certain contracts for the sale of wheat it was provided by clause 5: "In default of fulfilment of contract by either party, the other, at his discretion, shall, after giving notice by letter or telegram, have the right of re-sale or repurchase, as the case may be, & the defaulter shall make good the loss, if any, on such repurchase or re-sale on demand. In case either party shall suspend payment, he shall be deemed to be in default, & the other party shall after giving notice by letter or telegram to the defaulting party, & notwithstanding any bkpcy. or liquidation, be entitled immediately to re-sell or re-purchase, as the case may be, & shall also be entitled to be paid, or to prove in any bkpcy., liquidation or otherwise, for the loss, if any, or shall account for the profit, if any, occasioned by such re-sale or repurchase." Before the arrival of the first of the ships which were carrying the parcels appropriated to the various contracts, the sellers suspended payment. The buyers becoming aware of this, proceeded to buy wheat of the description which they were expecting to get under their contracts with the sellers, in order to have wheat to deliver in fulfilment of the contracts which they had made. No notice of any kind was given to the sellers of such purchases. The liquidator of the sellers claimed against the buyers the difference between the price payable under the contracts between the sellers & the buyers & the price at which the buyers purchased the wheat of similar quality & quantity:—*Held*: in the event of suspension of payment by one party, the party not in default had an option either to wait until the time for fulfilment of the contract & exercise his common law rights in respect of the default of fulfilment or to proceed under clause 5, & re-sell or re-purchase as the case might be. In order to proceed under this clause, he must give the notice required by the clause & he would be under a liability to account: the buyers, having given no notice, had not proceeded under clause 5, & were not liable to account to the sellers.—*SHIPTON, ANDERSON & Co. (1927), LTD. v. MICKS, LAMBERT & Co., [1936] 2 All E. R. 1032.*

**2519a. — — — — —.]—***Applts.,* plffs. in the action, contracted to supply defts. with a machine which would do certain specified work to the satisfaction of defts. Plffs. delivered a machine in pursuance of the con-

tract, but it was not satisfactory; & after plffs. had made several unsuccessful efforts to remedy its defects defts. rejected it. Plffs. contended that the failure of the machine to give satisfaction was owing to improper user by defts., & defts. contended that it was due to negligence or lack of skill on the part of plffs. Defts. had paid £350 on account of the price of the machine, & plffs. brought this action to recover the balance of the price; defts. counterclaimed for the return of their £350 & for certain expenses incurred by them in obtaining other machinery & in respect of other matters. The contract contained a guarantee by plffs. to replace defective parts or make good defective workmanship, & added: "We do not give any other guarantee & we do not accept responsibility for consequential damages"; & plffs. contended that by the latter clause they were relieved from liability for any damages caused to defts. by the fact that they had supplied a machine which was not in accordance with the contract:—*Held*: on the facts, the machine supplied by plffs. was not in accordance with the contract & defts. were justified in rejecting it; & upon a true construction of the guarantee clause plffs. were not relieved from the obligation to pay damages arising directly & naturally from their breach of contract. Plffs. appealed, & the ct. dismissed the appeal, holding that the damages claimed by defts. were the direct result of plffs.' breach of contract.—*MILLAR'S MACHINERY Co., LTD. v. WAY & SON (1935), 40 Com. Cas. 204, C. A.*

**2519b. Failure of seller to deliver correct bill of lading—Measure of damages.]—***JAMES FINLAY & Co. v. N. V. KWIK HOO TONG HANDEL MAATSCHAPPIJ, No. 1814a, ante.*

**2520. Add. Annotation:—***Refd.* Adair & Co. v. Birnbaum, [1938] 1 All E. R. 532.

**2522a. Action for recovery of purchase price—Attempt to obtain goods by false pretences.]—**Plff., who was formerly a member of a tobacco assocn. but had been placed on its stop-list for breach of its rules & was therefore unable to obtain supplies of cigarettes from any of its members, arranged with R., who was a member of the assocn., that R. should order in his own name from defts., who were wholesale members of the assocn., a supply of cigarettes which plff. required. Accordingly, R. having ordered the cigarettes, S., one of plff.'s assistants, accompanied by one of R.'s representatives, attended at defts.' premises to receive the cigarettes & to pay the money for them. S. paid the money, but defts., having doubts as to the *bona fides* of the transaction, refused either to deliver the cigarettes or return the purchase money. Plff. thereupon brought the present action for the recovery of the money. *MACNAGHTEN, J.,*

passed:—*Held*: the seller was entitled to retain the profit on re-sale, & also to damages for loss of profit on the original sale. It cannot be said that an available market for a particular make of motor chassis within Sale of Goods Act, 1895, s. 49 (3), exists in South Australia.—*CAMERON v. CAMPBELL & WORTHINGTON, LTD., [1930] S. A. S. R. 402.—AUS.*

**PART VIII. SECT. 3, SUB-SECT. 1.**  
*st. Contract in breach of duty to employer.]—*The mere fact that an

employee who has contracted to give all his working time to his employer's business & not to deal personally in any kind of goods dealt in by the employer is guilty of a breach of duty in entering into a personal contract with a third party for the purchase of goods of such a kind does not disentitle him to recover damages for breach of the contract.—*MADISON v. DONALD H. BAIN, LTD., [1929] 1 D. L. R. 843; 1 W. W. R. 437; 40 B. C. R. 499; affd., [1930] S. C. R. 299; 1 D. L. R. 63.—CAN.*

*sv. Failure of buyer to complete—No right to deposit.]—*In the absence of fraud, the purchaser of a car, who fails to carry out his contract, cannot recover from the vendor the value of an old car taken as deposit.—*GIBSON v. FOWNES, LTD., [1936] 1 D. L. R. 363.—CAN.*

**PART VIII. SECT. 3, SUB-SECT. 2.—A.**

*t. i. — — —.]—**ROBINSON (E. S. & A.) LTD. v. WAYAGAMACK PULP & PAPER Co., [1930] 1 D. L. R. 369.—CAN.*

by whom the action was tried, dismissed it on the ground that pltf. had been guilty of an attempt to obtain goods by false pretences & that the ct. would not assist him to recover the money. On appeal:—*Held*: to succeed in his action for money had & received pltf. must prove the exact circumstances in which the money was paid & the circumstances which he said entitled him on ground of justice to have an order for repayment; if he proceeded to that proof he could only establish his claim by proving facts which showed that he was engaged in a criminal attempt to obtain goods by false pretences; & the ct. on well-established principles would refuse to give its aid to any claim which could only be established by proving facts of that nature.—*BERG v. SADLER & MOORE*, [1937] 2 K. B. 158; [1937] 1 All E. R. 637; 106 L. J. K. B. 593; 156 L. T. 331; 53 T. L. R. 430; 81 Sol. Jo. 158; 42 Com. Cas. 228, C. A.

*Annotation*:—*Refd.* *Briggs v. Parsloe*, [1937] 3 All E. R. 831.

**2522b. Claim relating to quality & condition—Faulty manufacture.**—*VSESOLWZOJE OB-JEDINENJE "EXPORTLES" v. ALLEN & SONS, LTD.*, No. 1884a, *ante*.

**2542. Add. Annotation**:—*Refd.* *British Russian Gazette & Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, *Talbot v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616.

**2545. Add. Annotation**:—*Consd.* *Besseler, Wacchter Glover & Co. v. South Derwent Coal Co.*, [1938] 1 K. B. 408.

**2547. Add. Annotation**: *As to (1) Consd.* *Fisher, Ltd. v. Eastwoods, Ltd.*, [1936] 1 All E. R. 421.

**2552a. Sample not of specified dimensions**—A contract for the sale of timber provided that the sale was "subject to a sample quantity" of about fifty logs to be cut in specified thicknesses. The samples delivered were of the contract quality, but not of the specified dimensions. The buyer complained, & the seller thereupon refused to deliver the bulk:—*Held*: the object of the sample was to show quality, & if that were satisfactory, the seller could not refuse to deliver the bulk, notwithstanding that the buyer was claiming damages in respect of the incorrect dimensions of the sample.—*SAXTON v. NICHOLSON & Co., LTD.* (1935), 151 L. T. 119; 80 Sol. Jo. 93.

**2557. Add. Annotation**:—*As to (2) Refd.* *R. v. Minister of Health, Ex p. Yaffe*, [1930] 2 K. B. 98.

**2560. Add. Annotation**:—*Consd.* *Adair & Co. v. Birnbaum*, [1938] 1 All E. R. 532.

**2567. Add. Annotation**:—*Consd.* *The Arpad* (1934), 50 T. L. R. 505.

**2569. Add. Annotations**:—*Distd. Re Hall & Pim's Arbitration* (1928), 139 L. T. 50. *Consd.* *Simon v. Pawson & Leafs, Ltd.* (1932), 148 L. T. 154; *The Arpad* (1934), 50 T. L. R. 505.

**2570. Add. Annotations**:—*As to (1) Refd.* *The*

*Njegos*, [1936] P. 90. *As to (2) Consd.* *Finlay (James) & Co. v. N. V. Kwik Hoo Tong*, [1929] 1 K. B. 400; *The Arpad* (1934), 50 T. L. R. 505. *Refd.* *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48.

**2571. Add. Annotations**:—*Consd.* *Finlay (James) & Co., Ltd. v. N. V. Kwik Hoo Tong*, [1929] 1 K. B. 400, C. A.; *The Arpad* (1934), 50 T. L. R. 505. *Refd.* *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48.

**2574. Add. Annotation**:—*Consd.* *The Arpad* (1934), 50 T. L. R. 505.

**2575. Add. Citations**:—97 L. J. K. B. 60; 33 Com. Cas. 60.

*Add. Annotation*:—*Refd.* *The Arpad* (1934), 50 T. L. R. 505.

**2583. Add. Annotation**:—*Generally, Refd.* *Widnes Foundry* (1925), *Ltd. v. Cellulose Acetate Silk Co.* (1931), 47 T. L. R. 481.

**2585. Add. Annotations**:—*As to (1) Refd.* *Shell-Mex v. Elton Cop Dyeing Co.* (1928), 34 Com. Cas. 39. *Generally, Refd.* *Adair & Co. v. Birnbaum*, [1938] 1 All E. R. 532.

**2585a. —**—*Resp.* purchased from the claimants a large quantity of pepper, the contract being in the form used by the General Produce Brokers' Asscn. It provided that, upon the seller failing to fulfil the contract, the buyer should close by invoicing back the contract to the seller at once, at a price & weight fixed by arbn., not being less than 2 per cent. nor more than 10 per cent. over the market value on the day of default. The difference between the contract price & the invoicing back price, which was to be paid in cash within seven days, was to be a final settlement between the parties. Another clause provided for insolvency before the maturity of the contract, but this clause was subject to the insolvent receiving forty-eight hours' notice that the other party elected to act upon it. The sellers, before the time of shipment arrived, suspended payment. The general committee of the General Produce Brokers' Asscn. purported to close the contract, but resp. did not accept this position, & refused to pay any sum to the claimants:—*Held*: (1) as no notice was given under the insolvency clause, the case had to be treated as one where the seller was in default; (2) a default due to the insolvency of the seller is not a voluntary default; (3) the first clause referred to above made express provision for the seller's default, & it could not be objected that the seller could not avail himself of this clause when he himself was in default.—*ADAIR & Co., LTD. v. BIRNBAUM*, [1938] 1 All E. R. 532; 43 Com. Cas. 165; *affd.*, [1938] 4 All E. R. 775, C. A.

**2588. Add. Annotation**:—*Refd.* *The Arpad* (1934), 50 T. L. R. 505.

**2590. Add. Annotations**:—*Consd.* *The Arpad* (1934), 50 T. L. R. 505. *Refd.* *Kasler & Cohen v. Slavouski*, [1928] 1 K. B. 78; *The Edison*, [1932] P. 52.

**PART VIII. SECT. 3, SUB-SECT. 2.—B. (a).**

*sv. Sale of fishing tackle—No licence to fish—Failure of seller to procure licence.*—To a claim for damages for delay in the delivery of fishing-net equipments sold by pltf. to deft. the seller set up the defence that the buyer had no licence to fish on the days for

which he claimed damages:—*Held*: since the seller had undertaken to obtain the licence for the buyer & had neglected to do so for several months, he could not rely on its absence as a defence, unless the buyer was guilty of wrongdoing of a character which the ct. could not overlook.—*JONARSON v. DUBINAK*, [1928] 3 D. L. R. 501; [1928]

2 W. W. R. 3; 37 Man. L. R. 430.—**CAN.**

**PART VIII. SECT. 3, SUB-SECT. 2.—C. (a).**

*sw. Self-elected measure.*—*BURKARD & Co., LTD. v. WAHLEN* (1928), 28 S. R. N. S. W. 607; 45 N. S. W. W. N. 201.—**AUS.**

**2612.** For existing para. substitute :—

On Nov. 3, 1925, defts., Messrs. P., sold to plffs., Messrs. H., an unascertained cargo of Australian wheat of the quality & description & at the price stated in the contract for Dec. or Jan. shipment. Messrs. H., without waiting to receive the cargo, resold it to buyers on the same terms except as to price. There were further subsales in a chain of string contracts. By subsequent nomination, Messrs. P., in Jan. 1926, nominated the steamship *I.* as the ship which was containing the cargo, the subject of the contract of Nov. 3, 1925. Messrs. P. (the sellers) had in their hands the documents of the cargo of the steamship *I.*, & could have delivered them to their purchasers &, although they knew that their purchasers had resold the cargo, they broke their contract & refused to deliver the documents to their purchasers. The breach of contract was admitted, the only question being with regard to the measure of damages. The matter went to arbn., & the arbitrators stated that they were "unable to find that it was in the contemplation of the parties or ought to have been in the contemplation of Messrs. P. at that time (i.e. the date of the contract), that the cargo would be resold, or was likely to be resold before delivery; in fact, the chances of its being resold as a cargo & of its being taken delivery of by Messrs. H. were about equal." There was evidence before the arbitrators that Messrs. H., the purchasers, carried on a trade in which they used themselves about half of the cargoes which they bought & resold the remainder:—*Held*: (1) that the contract which was not merely for the sale of corn in bulk, but for the sale of the cargo of an individual ship was effectively made on Nov. 3, 1925. That contract & the conditions which it incorporated showed that it was contemplated that the cargo might be passed on by way of subsale if the buyer did not choose to keep it for himself, & that the seller, in such a case, contracted to put the buyer in a position to fulfil his sub-contracts if he entered into them. Whether the latter was likely to enter into such sub-contracts & pass the cargo down a chain of resales was not material. It was enough that the contract contemplated by its terms that he should have the right to do so if he chose; (2) a breach having been admitted, the measure of damages was not merely the amount of damage measured by loss in the market which arose in the ordinary course of business from the breach. It extended, whenever the special circumstances required this, to such possible damages as might reasonably be supposed to have been in the contemplation of both parties at the time they made

the contract, as the probable result of the breach of it.—*Re HALL (R. & H.), LTD. & PIM (W. H.) JUNIOR & CO.'S ARBITRATION* (1928), 139 L. T. 50; 33 Com. Cas. 324; 30 Ll. L. Rep. 159, Ll. L.

*Annotations*:—*As to* (1) *Consd.* *Finlay & Co., Ltd. v. N. V. Kwik Hoo Tong Handel Maatschappij*, [1929] 1 K. B. 400; *The Arpad* (1934), 50 T. L. R. 505. *Refd.* *The York*, [1929] P. 178; *Foscolo Mango & Co., Ltd. v. Stag Line, Ltd.*, [1931] 2 K. B. 48, C. A. *As to* (2) *Consd.* *Patrick v. Russo British Grain Export Co., Ltd.*, [1927] 2 K. B. 535.

**2618.** *Add. Annotation*:—*Refd.* *Finlay v. N. V. Kwik Hoo Tong Handel Maatschappij*, [1928] 2 K. B. 604.

**2624.** *Add. Annotation*:—*Refd.* *Besseler, Wacchter Glover & Co. v. South Derwent Coal Co.*, [1938] 1 K. B. 408.

**2644.** *Add. Citation*:—[1927] B. & C. R. 140.  
*Add. Annotation*:—*As to* (2) *Appld.* *Shell-Mex v. Elton Cop Dyeing Co.* (1928), 31 Com. Cas. 39.

**2657.** *Add. Annotations*:—*As to* (1) *Refd.* *Ellis v. Noakes*, [1932] 2 Ch. 98, n. *Generally, Refd.* *Golden Horseshoes (New), Ltd. v. Thurgood* (1934), 150 L. T. 427.

**2672.** *Add. Annotation*:—*Refd.* *The Arpad* (1934), 50 T. L. R. 505.

**2673.** *Add. Annotations*:—*Consd.* *The Arpad* (1934), 50 T. L. R. 505. *Refd.* *Re Simms, Ex p. Trustee*, [1934] Ch. 1.

**2676.** *Add. Annotation*:—*Refd.* *Churchill & Sim v. Goddard*, [1937] 1 K. B. 92.

**2684.** *Add. Annotation*:—*Refd.* *Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258.

**2687.** *Add. Citation*:—138 L. T. 470.

**2699a.** ——— *Loss of freight—C.I.F. contract—Policy not in accordance with contract—Refusal of insurer to pay.*—A quantity of copra was sold for shipment from Australasia to London on the terms of cost, freight, & insurance, & the contract provided: "Insurance including war risk on free from particular average terms to be effected by sellers at the contract price plus 5 per cent. on the net shipping weight. . . . Such insurance to cover the copra until delivered in the ordinary course of transit into warehouse at the port of destination." In policies taken out by the sellers the goods & the freight were valued separately, & there was a "freight contingency clause," as follows: "On freight payable at destination . . . being increased value of copra through payment of freight or from such time as freight becomes due at destination, this insurance being deemed to be part of the total amount insured on the copra valued at such total amount." By the bill of lading the freight was payable only if the vessel arrived at the place of destination. The vessel took fire on the voyage & with her cargo became a total loss. The insurance co.

**PART VIII. SECT. 3, SUB-SECT. 2.**  
—C. (c).

d (p. 677) 1. ——— *Not necessarily market value at place of delivery.*—The place stipulated for the delivery of goods sold does not fix the locality of the relevant market for the purpose of estimating the damages for failure to deliver, although it may involve an adjustment of the market price.—*MACKAY v. KAMESHWAR SINGH* (1932), L. R. 59 Ind. App. 399, P. C.—IND.

**PART VIII. SECT. 3, SUB-SECT. 3.**  
**2643** 1. ——— *Property in goods not*

*passed—Growing timber.*—*Re WESTERN CANADA PULPWOOD & LUMBER CO., LTD., NEWTON v. MANITOBA PULP & PAPER CO., LTD.*, [1929] 4 D. L. R. 337; 3 W. W. R. 81; 38 Man. L. R. 351; 11 C. B. R. 28; *affd.*, [1929] 3 W. W. R. 544; [1930] 1 D. L. R. 652; 38 Man. L. R. 378; 11 C. B. R. 125.—CAN.

**PART VIII. SECT. 3, SUB-SECT. 4.**

**2656** 1. *Whether granted*—*Where specific performance would not be decreed.*—

The ct. will not grant an injunction to restrain the breach of a contract or the sale & delivery of future chattels, expressed in an affirmative form, even though the contract so expressed involves a negative in substance, in a case where damages would be a complete remedy, where the contract is of such a nature that it cannot be specifically enforced, & where payment for the goods in question has not been made.—*WOOD v. CORRIGAN* (1928), 28 S. R. N. S. W. 492; 45 N. S. W. W. N. 134.—AUS.



paid to the buyers the insurance on the goods, but refused to pay the insurance on the freight on the ground that it had never become covered. The buyers then claimed damages from the sellers on the ground that the

policies did not comply with the contract :—*LODERS & NUOLINE, LTD. v. BANK OF NEW ZEALAND* (1929), 45 T. L. R. 203.

2701. *Add. Annotation* :—*Refd. Dobell (C. G.) & Co. v. Barber & Garratt* (1930), 47 T. L. R. 66.

## Part IX.—Misrepresentation and Fraud.

2719. *Add. Annotations* :—*Refd. Lever Bros., Ltd. v. Bell* (1930), 47 T. L. R. 47; *Cruse v. Mount* (1932), 102 L. J. Ch. 74.

2720. *Add. Annotation* :—*Refd. Re City Equitable Fire Insurance Co. (2)*, [1930] 2 Ch. 293.

2723a. —.]—In June, 1930, resps., plffs. in the action, made large purchases of Russian timber from applts. The purchases were made in reliance on terms contained in a price list issued by applts., one of the terms being that resps. should not resell the timber at less than certain specified prices. Subsequently resps. discovered that before the date of their purchases applts. had entered into a contract with another party to supply him with timber on terms which were much more favourable than those under which resps. were purchasing, the result being that

owing to the competition of that other party in the market resps. were unable to resell their timber. They therefore brought this action claiming damages, firstly, on the ground that applts. had induced them to purchase the timber by falsely representing that they were not granting better terms to any other buyer; & secondly, on the ground that there was an implied term in applts.' contract with resps. that applts. had not previously to entering into that contract done anything which would render that contract ineffective, & that applts. had broken that implied term & had committed a breach of duty in not disclosing the fact to resps. :—*Held* : applts. had induced resps. to purchase the timber by fraudulent misrepresentations, & the appeal must therefore fail.—*JEWSON & SONS, LTD. v. ARCOS, LTD.* (1933), 39 Com. Cas. 59, C. A.

### PART IX. SECT. 2, SUB-SECT. 2.

t (p. 687) i. ———.]—A contract for the sale of goods cannot be rescinded on the ground of an innocent misrepresentation inducing the contract, unless the misrepresentation was such that there is a complete difference in subject-matter between the thing bargained for & that obtained, so as to constitute a failure of consideration.—*WATT v. WESTHOVEN*, [1933] V. L. R. 458; *Argus L. R.* 448.—*AUS.*

### PART X.

n (p. 688) i. ———.]—To come within the provisions of Bulk Sales Act, R. S. N. S., 1923, a sale must be a sale of an interest in a business or trade in which there is "a stock of goods, wares, & merchandise."—*NORRIS v. MCKENZIE*, [1933] 3 D. L. R. 713; 6 M. P. R. 556.—*CAN.*

e (p. 688) i. ———.]—*Sale in ordinary course of business of substantially whole stock-in-trade*.—A sale of 80 per cent. of the stock of one co. to another held to be a bulk sale.—*COMMERCIAL MOTOR BODIES & CARRIAGES, LTD. v. PERTH, LTD.*, [1930] 4 D. L. R. 1010; 66 O. L. R. 209; *affg.*, [1930] 3 D. L. R. 617; 65 O. L. R. 383.—*CAN.*

e (p. 688) ii. ———.]—*Seizure under lien note*.—*OGILVIE FLOUR MILLS CO., LTD. v. EMPIRE BAKERY, LTD.*, [1931] 2 W. W. R. 766.—*CAN.*

dd (p. 688) i. ———.]—*PAIDON v. MCFARLAND & MCFARLAND & GOLDBERG*, [1930] 3 W. W. R. 632.—*CAN.*

g (p. 689) i. ———.]—On an interpleader issue resulting from the seizure under execution of a motor truck, the claimant being the seller of the truck under a conditional sale agreement :—*Held* : the description of the chattel in the agreement was sufficient to satisfy the requirements of Conditional Sales Act, R. S. A., 1922, s. 2, although it did not state that the chattel was a motor truck.—*O'HANLON v. COCKX &*

*HUGHES*, [1935] 3 W. W. R. 481; *affd.* [1936] 2 W. W. R. 373; 4 D. L. R. 58; 6 P. L. J. (Can.) 115.—*CAN.*

m (p. 689) i. ———.]—*Creditor—Who is*.—Plff. was held not to be in a position to attach the bulk sale, as he was not a creditor as the result of any contractual relationship between them. The term cannot be extended to include persons who have contingent claims arising out of torts or transactions of a tortious character until the relationship has become really that of debtor & creditor by virtue of a judgment.—*COMMERCIAL MOTOR BODIES & CARRIAGES, LTD. v. PERTH, LTD.*, [1930] 4 D. L. R. 1010; 66 O. L. R. 209; *affg.*, [1930] 3 D. L. R. 617; 65 O. L. R. 383.—*CAN.*

q (p. 689) i. ———.]—*Landlord*.—A lease of shop premises contained a proviso that if the term should be taken in execution or attachment, or if the lease should make any assignment for the benefit of creditors or, becoming bkpt. or insolvent, should take the benefit of any Act in force for bkpt. or insolvent debtors, the then current month's rent & the rent for the three months following should immediately become due & payable & the term forfeited & void. During the term, the lessee made a bulk sale of the goods in the shop, & deft. co. was appointed trustee under Bulk Sales Act :—*Held* : the making of a bulk sale did not bring the proviso into operation. Bulk Sales Act, s. 4, makes the Assignments & Preferences Act applicable to the distribution of the bulk sale purchase-money; but the latter Act does not give a landlord a preferential lien for unearned rent.—*MORTON v. CANADIAN CREDIT MEN'S ASSOCN.*, [1929] 1 D. L. R. 911; 63 O. L. R. 334; 10 C. B. R. 442.—*CAN.*

q (p. 689) ii. ———.]—*On failure to comply with Act*.—The creation in the Bulk Sales Act of a presumption of fraud on the part of both purchaser & vendor as against the vendor's creditors, indicates a legislative intention to put a sale in bulk made without compliance with that Act in the same

category as sales made with an intention to defraud the vendor's creditors. This presumption of fraud has the effect of bringing into play all other statutes passed for the protection of creditors against a fraudulent sale of his goods by a debtor to the prejudice of his creditors, & the right to recover from a fraudulent transferee the proceeds of goods coming into his possession by an invalid transfer, & resold by him, is given by Assignments Act, R. S. N. S., 1928, s. 21 (1).—*GARSON v. CANADIAN CREDIT MEN'S TRUST ASSOCN.*, [1929] 3 D. L. R. 300; S. C. R. 282; 10 C. B. R. 504; *affg.*, *sub nom. Re CROUSE*, [1928] 2 D. L. R. 985; 60 N. S. R. 214; 10 C. B. R. 123; *affg.*, 8 C. B. R. 576.—*CAN.*

t (p. 689) i. ———.]—*Fees*.—A trustee under Bulk Sales Act, R. S. N. S., 1923, is entitled to a fee of 3 per cent. of the total proceeds of sale, which is to be deducted from the claims of general creditors.—*Re CRYSTAL SPRINGS MANUFACTURING CO.*, [1935] 4 D. L. R. 331.—*CAN.*

ii (p. 689) i. ———.]—*NATIONAL DISCOUNT CORPN. v. FRECH & JACKSON*, [1928] 2 D. L. R. 256; 61 O. L. R. 659.—*CAN.*

g (p. 690) i. ———.]—*Sufficiency of*.—The fact that the name of the vendor of a motor car sold under a lien agreement appears on the covering over the spare tire carried at the rear of the car is not a sufficient compliance with sect. 9 of Conditional Sales Act, R. S. S., 1920 (c. 201), as amended by 1928 (c. 81), s. 3.—*GLOEDEN v. HICKS MOTOR CO., LTD. (Sask.)*, [1929] 4 D. L. R. 245; 3 W. W. R. 126.—*CAN.*

g (p. 690) ii. ———.]—*Non-renewal of—Effect on creditor with notice*.—*CANADIAN CREDIT MEN'S TRUST ASSOCN., LTD. v. DEALERS FINANCE CORPN., LTD.*, [1932] 1 W. W. R. 681.—*CAN.*

k (p. 690) i. ———.]—*Deft. & H. purchased from pltf. a team of horses, to be paid for in weekly instalments. The terms of the bargain were embodied in a document signed*

by debt. & H. in which they promised to pay at the times stated in a schedule endorsed on the document, & it was provided that "possession of the said property shall not pass until this note is paid in full," & pltf. "has full power to declare the note due & take possession of said property at any time he deems himself unsecured, even before the maturity of this note." Possession was in fact given to the purchasers:—*Held*: the parties did not really intend that the possession should be retained by pltf.—*HARRIS v. TONG*, [1930] 3 D. L. R. 32; 65 O. L. R. 133.—**CAN.**

m (p. 690) i. ———.—A contract for the erection of a building is not one for the sale of goods but for work & labour, & the owner is not a "purchaser," within Conditional Sales Act, of materials, e.g. a refrigeration system, placed in accordance with the contract in the building; &, in any event, if the materials are not bought by the contractor until after he has entered into the contract with the owner, the latter is not a "subsequent purchaser."—*WELCH v. GENERAL REFRIGERATION, LTD.*, [1930] 2 D. L. R. 672; 42 B. C. R. 107; [1929] 3 W. W. R. 660.—**CAN.**

n (p. 690) i. ———.—*Document giving power to seize goods.*—A document purporting to be a lien note, but made payable to one who did not own the goods on which it was given & had not sold them to the maker of the note, is not a lien note within Conditional Sales Act, but merely an authority to seize & sell the goods in default of payment; &, for the same reasons that a chattel mtgee. cannot buy at the mtge. sale, the holder of the note is not entitled to buy at his sale under the note.—*McCORMICK v. HAWORTH (or HARWORTH)*, [1929] 2 D. L. R. 835; 1 W. W. R. 129; 23 S. L. R. 312.—**CAN.**

n (p. 690) ii. ———.—An agreement for the sale of goods for valuable consideration which gives the seller the right to seize & sell the goods on default by the buyer in making his payments thereunder is not invalid between the immediate parties because of the fact that it is not a conditional sale agreement within Conditional Sales Act. Creditors of the buyer who have had notice of such an agreement are in equity bound by it & their rights are subject to the right of the seller to seize & sell the goods.—*HUDSON'S BAY Co. v. CAMPBELL*, [1933] 3 W. W. R. 289.—**CAN.**

n (p. 690) iii. ———.—*Exchange between retail dealers.*—Two retail dealers in motor cars agreed upon an exchange of a certain car from the stock of one for a certain car from the stock of the other, the difference in value between the two cars to be paid for in cash. The cars were delivered & each gave the other a cheque for the full value of the respective cars:—*Held*: whether or not the transaction was a sale or a barter, it was not a sale "in the ordinary course of his business" within Conditional Sales Act, s. 4.—*ALBUTT (W. J.) & Co., LTD. v. RIDDELL*, [1930] 1 W. W. R. 555; 2 D. L. R. 166; 42 B. C. R. 344; *reversed*, [1930] 2 W. W. R. 623; 4 D. L. R. 111; 43 B. C. R. 74.—**CAN.**

p (p. 690) i. ———.—*Notice of seizure—Whether necessary.*—There can be no seizure by a person of goods which are in his own possession & control. The word "seizure" in Extra-Judicial Seizures Act, R. S. A. 1922, has the ordinary meaning of the word, i.e. a forcible taking of possession. Since said Act applies only to cases where seizure is required, it does not apply to the case where goods sold under a conditional sale agreement have been voluntarily returned by a buyer in default to the seller & are in the latter's possession.—*PACIFIC*

*FINANCE Co. v. IRELAND*, [1931] 2 W. W. R. 593; 4 D. L. R. 186; 25 Alta. L. R. 339.—**CAN.**

kk (p. 690) i. ———.—The mere retaking of possession will not, without more, bring the contract to an end, if it is made clear that the seller's purpose in retaining possession is to hold the goods as security for the purchase-money, the contract will not be rescinded nor will the purchaser be released from his obligation to pay the purchase-price.—*MAXWELL RADIO Co. v. DE WILDE, MAXWELL RADIO Co. v. BLONTRUCK*, [1931] 2 D. L. R. 123; 66 O. L. R. 519.—**CAN.**

mm (p. 690) i. ———.—*Authority to resell.*—E., a dealer in automobiles, sold, or went through the form of selling, an automobile to C under a conditional sale agreement, taking a promissory note for a part of the price. This note he took to defts., an automobile financing co., & discounted it, at the same time transferring the agreement to defts. who duly filed it in accordance with Conditional Sales Act. The automobile was left in the possession of E. who dishonestly sold it to pltf.:—*Held*: the real owner of the car being E. or C. or both, E. had authority to dispose of his security, the conditional sale agreement, to defts., & defts. were thereafter the owners in law of the automobile.—*BENDER v. NATIONAL ACCEPTANCE CORPN., LTD.*, [1929] 1 D. L. R. 222; 63 O. L. R. 215.—**CAN.**

mm (p. 690) ii. ———.—*Delivery of goods for purpose of resale—What amounts to.*—Def't. co. having a lien upon two houses being erected by F. obtained a judgment for its claim & afterwards, in satisfaction of the judgment, took from F. a quit-claim deed of the houses. Thereafter, the co. agreed to sell the houses to pltf. A furnace had been purchased by F. upon a conditional sale agreement with the vendor & placed in one of the houses:—*Held*: the furnace was not delivered to a purchaser "for the purpose of resale by him" within Conditional Sales Act, R. S. O. 1927, s. 2 (3); it was to be placed by him in the house he was building, of which it would become an integral part; a sale of the house would not be the sale of a chattel.—*COLLIS v. CAREW LUMBER Co., LTD.*, [1930] 4 D. L. R. 996; 65 O. L. R. 520.—**CAN.**

mm (p. 690) iii. ———.—*Notwithstanding buyer's claim for breach of warranty.*—The fact that a buyer of goods under a conditional sale contract has asserted a claim for damages for breach of warranty does not prevent the seller from repossessing the car on the buyer defaulting in his payments.—*LOVE v. MOTOR FINANCE Co., LTD.*, [1931] 3 W. W. R. 510; [1932] 1 D. L. R. 268; 40 Man. L. R. 106.—**CAN.**

mm (p. 690) iv. ———.—*Effect of acceleration clause.*—In an action by the seller under a conditional sale contract the seller, who had retaken possession of the goods, set up an acceleration provision in the contract & claimed the whole of the unpaid balance of the purchase-price:—*Held*: although under the terms of the contract the seller had a right of action for said balance & the further right to take possession of the goods, yet the result of the bringing of the action for the balance was that the goods became the property of the buyer & the right which the seller had over them by virtue of its possession was equivalent to the unpaid seller's lien provided for by sect. 38 of Sale of Goods Act, R. S. S. 1930.—*INDUSTRIAL ACCEPTANCE CORPN., LTD. v. DOUGHAN*, [1932] 1 W. W. R. 619.—**CAN.**

mm (p. 690) v. ———.—*Notwithstanding existence of registered mortgage.*—Where a furnace is installed under a conditional sales agreement

during the currency of a registered mtge. the vendors have a right to remove & repossess the furnace on default by the purchaser.—*WARNER v. POSTER*, [1934] 3 D. L. R. 605; O. R. 519.—**CAN.**

nn (p. 690) i. ———.—In order to hold a buyer under a conditional sale agreement who has defaulted thereunder liable for the deficiency on a resale of the goods by the seller the notice to the buyer of said resale must be in strict accordance with the requirements of Conditional Sales Act, R. S. B. C. 1924, c. 44, s. 10 (3), notwithstanding that the agreement provides that the seller can exercise the power of resale "by public or private sale with or without notice."—*MARSH v. SIMPSON*, [1928] 1 W. W. R. 956.—**CAN.**

nn (p. 690) ii. ———.—So long as the buyer under a conditional sale agreement has five days' notice of the intended resale, whether he gets it as the result of personal service or because it is left at his place or sent to him by registered mail, the Conditional Sales Act, R. S. A. 1922, c. 150, s. 11, is complied with.—*MINNEAPOLIS STEEL & MACHINERY Co. v. PAULEIROU (No. 2)*, [1928] 1 W. W. R. 976.—**CAN.**

nn (p. 690) iii. ———.—*Sufficiency—Onus of proof.*—Where, in an action by a vendor, under a conditional sale agreement for the balance of the purchase-price after he has repossessed & resold the goods, the defence is raised that the Act has not been complied with, the burden of proving compliance rests on the vendor.—*THOMPSON v. SHOLINDER*, [1928] 1 W. W. R. 386.—**CAN.**

nn (p. 690) iv. ———.—Notice is not required to be given the buyer in a case where the seller merely exercises his right under the contract of repossessing the goods on the buyer's default & continues to hold them without a resale or without making any use of them for his own purposes.—*WATKINS GARAGE, LTD. v. MCKORYE*, [1928] 3 W. W. R. 429.—**CAN.**

nn (p. 690) v. ———.—*MOTOR CAR LOAN Co. v. BONSER*, [1928] 3 D. L. R. 875; [1928] 1 W. W. R. 801.—**CAN.**

nn (p. 690) vi. ———.—A notice that, failing to receive payment of the amount due to the holder of the security before a certain hour of a certain day, the holder would sell the goods, was held not to comply with Conditional Sales Act, s. 7 (2), as not being notice of a definite proposed sale.—*INDUSTRIAL ACCEPTANCE CORPN., LTD. v. CODE*, [1931] 1 D. L. R. 980; 66 O. L. R. 376.—**CAN.**

b (p. 691) i. ———.—*HEALMAN v. PRYCE*, [1930] 2 D. L. R. 608; 42 B. C. R. 101.—**CAN.**

b (p. 691) ii. ———.—In an action to recover the deficiency due on a resale of chattels repossessed under a conditional sale agreement, strict compliance with the statutory conditions as to notice of resale is necessary.—*GOODISON (JOHN) THRESHING MACHINE Co. v. LINDSAY*, [1935] 2 D. L. R. 344; O. R. 219.—**CAN.**

d (p. 691) i. ———.—Where goods sold under a conditional sale agreement are repossessed by the seller but the required statutory notice of the resale thereof is not given, the seller cannot after reselling recover for a deficiency as to the purchase-price unless the agreement expressly so provides.—*THOMAS GARAGE, LTD. v. PROZANOWSKI*, [1931] 1 W. W. R. 248; 2 D. L. R. 179; 25 Alta. L. R. 457.—**CAN.**

f (p. 691) i. ———.—It is open to a buyer of goods

under a contract of conditional sale to waive by the terms of the contract his right under Conditional Sales Act, R. S. S., 1930, s. 8, to notice of the seller's intention after seizure to resell.—*COMMERCIAL CORPN. SECURITIES, LTD. v. NICHOLS (OTHERWISE BUTTERFIELD)*, [1933] 1 W. W. R. 484; 3 D. L. R. 56.—**CAN.**

g (p. 691) i. ———— *Request to retake.*—Under a conditional sale agreement which provided that on default in payment of any instalment the seller would have the right to re-enter & take possession of the goods & "to forthwith cancel this agreement," held that the retaking of possession of the goods did not in itself cancel the agreement, but that something more was required to be done in order to exercise the right of cancellation. A request by the buyer that the seller retake possession of the goods is not a waiver of the requirements of the Conditional Sales Act. In the absence of a provision in the agreement to the contrary, where a conditional sale agreement provides for the retaking possession & resale of the goods the resale contemplated must be taken to be one in accordance with the above mentioned provisions, & a resale made without complying therewith rescinds the contract.—*ADELKIND v. AMIES*, [1930] 2 W. W. R. 702; [1931] 1 D. L. R. 181; 25 S. L. R. 87.—**CAN.**

bb (p. 691) i. ———— *Conditional Sales Act, R. S. N. B.* 1927, s. 10, is only applicable where the contract provides that the buyer shall be liable for a deficiency on resale. Otherwise, a vendor cannot retake & sue for the purchase-price.—*HUMPHREY'S MOTORS, LTD. v. ELIS*, [1934] 3 D. L. R. 140; 8 M. P. R. 37; *affd.*, [1935] S. C. R. 249; 2 D. L. R. 705.—5 F. L. J. (Can.) 19.—**CAN.**

bb (p. 691) ii. ———— *Goods exchanged.*—Where a conditional vendor of a radio repossessed the cabinet & left another in exchange:—*Held*: this did amount to rescission so as to preclude the vendor from suing for the balance due.—*FLEMINGS MUSIC HOUSE v. WILKINSON*, [1937] 1 D. L. R. 247.—**CAN.**

mm (p. 691) i. ———— *Necessity for retention for 20 days.*—Where goods sold under a conditional sale agreement & repossessed by the seller are not retained by him for at least 20 days, as provided by sect. 10 of Conditional Sales Act, R. S. A., 1922, before being resold, he cannot recover the balance remaining unpaid under said agreement if the buyer has not waived his right to the protection of said sect. The goods in question herein had been seized by pltf., the seller's assignee, under an execution issued on a judgment for the balance of the purchase-price, & were in the hands of the sheriff's bailee under said seizure when pltf. claimed & obtained possession from the sheriff in order that it might realise under its lien under the agreement:—*Held*: the 20 days prescribed by said sect. 10 ran from the date when possession was retaken under the agreement.—*MUTUAL ACCEPTANCE CORPN. v. McDERMID*, [1930] 3 W. W. R. 349; [1931] 1 D. L. R. 497.—**CAN.**

mm (p. 691) ii. ———— *No duty to resell.*—Where a chattel sold under a conditional sale agreement is repossessed by the seller because of default by the buyer, the seller is not, in the absence of a provision therefor in the contract, under a duty to the buyer to resell the chattel at all, & if he does exercise his right under the contract to resell, he will not be held liable to the buyer because the chattel brought less, owing to a falling market, than it would have brought had it been resold sooner.—*STERLING SECURITIES CORPN., LTD. v. WAFFLE*, [1931] 2 W. W. R. 273; 4 D. L. R. 765.—**CAN.**

o (p. 692) i. ———— *Pleading.*—*GREAT WEST SADDLERY CO. v. PRIME*, [1928] 3 W. W. R. 705.—**CAN.**

d (p. 692) i. ———— *Effect of Debt Adjustment Act, 1932, s. 16.*—*Debt Adjustment Act, 1932, s. 16*, does not prevent a vendor under a conditional sale agreement from suing on the personal covenant to recover the unpaid purchase-money, & to restrict him to his rights under the lien.—*CHILD & GOWER PIANO CO., LTD. v. GAMBREL*, [1933] 2 W. W. R. 273.—**CAN.**

d (p. 692) ii. ———— *Effect on transaction.*—Pltf. obtained judgment for the balance owing on a washing machine sold under a conditional sale contract. Pltf. had not registered the contract but relied on sect. 6a of Conditional Sales Act, R. S. A., 1922, having glued on the machine a piece of paper on which pltf.'s name was printed. Prior to pltf.'s recovery of judgment the buyer had resold the machine to deft., on the interpleader issue herein, who bought in good faith & for value. Before buying it said deft. asked at pltf.'s office where the original sale had been made & whether anything was owing on it. After searching its records pltf. informed deft. that nothing was owing. Pltf.'s office had through carelessness entered the account under a wrong name. The original contract provided that on default by the buyer pltf. might take the machine & treat the payments made as payments for hire or, at its option, & without demand or notice, the whole balance unpaid should become due & payable:—*Held*: in suing for & recovering judgment pltf. had elected said second alternative & thereby made the conditional sale an absolute one, so that it could not now insist that the property in the machine had not passed.—*BEATTY BROS., LTD. v. JOHNSON & ARDLEY*, [1937] 1 W. W. R. 158.—**CAN.**

f (p. 692) i. ———— *The taking by the seller under a conditional sale agreement of a chattel mortgage from the buyer upon the very goods covered by the conditional sale agreement, held to be consistent only with an agreement between the parties that the property in the goods should pass to the buyer, the conditional sale agreement cease to be effective & the chattel mortgage take its place.*—*ASHMORE v. TRANS-CANADA FINANCE CORPN., LTD.*, [1930] 2 W. W. R. 558; 4 D. L. R. 982; 39 Man. L. R. 52; *affd.*, [1930] 3 D. L. R. 188; 1 W. W. R. 537.—**CAN.**

k (p. 692) i. ———— *To declaration of ownership.*—*EDWARD RENNEBURG & SONS CO. v. ALBION FISHERIES, LTD.*, [1931] 1 W. W. R. 231.—**CAN.**

p (p. 692) i. ———— *Against landlord selling goods under distress warrant.*—Goods purchased under a conditional sale agreement & not yet paid for in full were sold under a distress warrant issued by deft. co. for rent owing by assignees of the purchasers. Pltf., who had been employed by the tenants & had also become an assignee of the vendor's interest in said agreement, notified deft. co. before the distress sale of his interest in the goods. On the day of the sale he sued the tenants for wages, & in that action garnished deft. co. for the amount thereof. Out of the proceeds of the distress it paid amounts into ct. or directly to pltf. which nearly equalled his claim for wages. He then brought the present action for the balance remaining due under the conditional sale agreement:—*Held*: while pltf. had, it seemed, debarrd himself from bringing an action for conversion, his present action was not in form one for conversion but one for money had & received for that part of the proceeds of the distress sale which he was entitled to as assignee of the original

vendors: & it was, therefore, consistent with the garnishee proceedings which were directed to that part, if any, of the proceeds which the tenants were entitled to as purchasers of the goods.—*CLEARWATER v. CHILDS CO. OF MANTOBA, LTD.*, [1929] 3 D. L. R. 305; 2 W. W. R. 228; 38 Man. L. R. 205.—**CAN.**

t (p. 692) i. ———— *Furnace.*—The furnace, having become a fixture, was not "building material" within sect. 8 of Conditional Sales Act, R. S. O., 1927.—*COLLIS v. CAREW LUMBER CO., LTD.*, [1930] 4 D. L. R. 996; 65 O. L. R. 520.—**CAN.**

t (p. 692) ii. ———— *Sec. 8 of Conditional Sales Act does not say that the goods, having been affixed to the realty, are, nevertheless, to be & remain chattels. If a vendor of chattels wishes to protect himself against subsequent purchasers he must register his conditional sale agreement in the registry or Land Titles office.*—*HOPPE v. MANNERS*, [1931] 2 D. L. R. 253; 66 O. L. R. 587.—**CAN.**

t (p. 692) iii. ———— *Automatic coal burner.*—The owner of a building in which an automatic coal burner is fixed is liable under Conditional Sales Act, 1927, s. 8, to the conditional vendor if he elects to retain the fixture.—*ALLEN GENERAL SUPPLIES, LTD. v. RITCHIE*, [1934] 3 D. L. R. 296; O. R. 365.—**CAN.**

t (p. 692) iv. ———— *Wall beds installed in a house are still goods within Conditional Sales Act, s. 9.*—*MURPHY WALL BED CO. OF DETROIT v. LEVIN* (1925), 57 O. L. R. 105.—**CAN.**

t (p. 692) v. ———— *Goods already in possession of vendor.*—A conditional sale agreement for a piano provided that on default in payment the seller might retake possession of the piano without process of law & at any time thereafter, without notice to the buyer, sell it at public auction or private sale. Pltf., the buyer, having defaulted in his payments delivered the piano to deft., the seller, for the purpose, so he alleged, of having it stored in deft.'s warehouse. Several years later, pltf. being still in default, deft. instructed the sheriff to seize the piano. Pltf. was notified of the seizure, but no notice of objection by him to the removal & sale of the piano was received by the sheriff until several days after the expiration of the fourteen days provided for by Extra-Judicial Seizures Act Amendment Act, 1931, & before it was received the sheriff advised deft. that he could proceed in accordance with the said Act, & after the notice was received the sheriff advised deft. of its receipt. Eight months later deft. sold the piano at private sale, without having given pltf. any notice of his intention to do so:—*Held*: the piano being already in deft.'s possession no seizure was necessary & said Act did not apply, & the private sale was within deft.'s rights under the contract. Deft. was entitled as against pltf. to the cost of polishing & tuning the piano to render it more salable & to the cost of advertising it for sale. *FOGARTY v. HENITZMAN & CO.*, [1938] 2 W. W. R. 89.—**CAN.**

aa (p. 692) *affd.*, [1928] 3 D. L. R. 175; [1928] S. C. R. 200.—**CAN.**

aa (p. 692) i. ———— *Ptf. co. sold a motor car, under a conditional sale agreement, to Pacific Motors, Ltd., retail dealers in cars, who sold it, also under a conditional sale agreement, to a buyer who defaulted in her payments. With pltf.'s consent, the car was taken back by Pacific Motors, Ltd., & then, with pltf.'s consent, resold to one F. under a conditional sale agreement which was assigned to pltf. F. defaulted & the car, without pltf.'s knowledge or*

consent, was taken back again & sold by Pacific Motors, Ltd., to deft. S. under a conditional sale agreement which the Pacific Motors, Ltd., discounted with deft. Guaranty Corp., which took the assignment in good faith. All the agreements were duly registered. Pltf. sued for damages for conversion & also sought a declaration that it was the owner of the car & entitled to possession of it. Guaranty Corp. disclaimed any interest in the car. The judge applying Conditional Sales Act, s. 4, & Sale of Goods Act, s. 60, held that S. had obtained title to the car & dismissed the action. Pltf. appealed:—*Held*: the appeal should be allowed, except as to the claim for damages for conversion, & pltf. should be declared the owner & entitled to possession of the car.—*ALBURY (W. J.) & Co., LTD. v. CONTINENTAL GUARANTY CORP. OF CANADA, LTD. (B. C.), [1930] 1 D. L. R. 26; [1929] 3 W. W. R. 292; 11 B. C. R. 537.—CAN.*

*aa (p. 692) ii.* ————  
—*KERR v. MOTORCAR LOAN CO., LTD., [1930] 2 W. W. R. 367.—CAN.*

*cc (p. 692) i.* ————  
Where an agreement for the conditional sale of a motor car contained the following clause: "We shall not at any time, that is the buyer, suffer or permit any charge or lien whether possessory or otherwise to exist against said automobile":—*Held*: this clause negatived the idea that the buyer could authorise the doing of repairs in such a way as to give the repairer a lien.—*ALLIANCE FINANCE CO. & STANDARD MOTORS, LTD. v. SIMONS, [1928] 3 W. W. R. 621.—CAN.*

*ff (p. 692) i.* ————  
Where a motor-car sold under a conditional sale agreement was repossessed by the seller under the terms of the contract which gave the seller wider powers than those given him by Conditional Sales Act, R. S. B. C., 1924, s. 10:—*Held*: the purchaser's right of redemption was not lost by the fact that twenty days had expired without the car being sold.—*MOTORCAR LOAN CO., LTD. v. ADAMS, [1933] 1 W. W. R. 60.—CAN.*

*hh (p. 692) i.* ————  
*Rights of joint purchaser.*—Pltfs. were the joint purchasers of a motor-car sold to them by one A. under a conditional sale agreement. Deft. became the assignee of A. The car was delivered to pltfs., but during the male pltf.'s absence from home, A. obtained possession of the car from the female pltf. & induced her to sign a bill of sale of the car from her to himself, her understanding being that he would sell the car for her for more than enough to pay the balance to be paid the deft. That balance was not then yet due. A. then entered into another conditional sale agreement with one L. as purchaser; & leading deft.'s manager to believe that pltfs. had given up their interest in the car, induced deft. to "finance" the L. agreement. The L. agreement fell into default, & deft. took possession thereunder of the car & resold it:—*Held*: male pltf. was entitled to recover from deft. the net value of his interest in the car. The trial judge held that female pltf. was not entitled to any relief, & this holding was not appealed from.—*SMITH v. STERLING SECURITIES CORP. N., LTD., [1933] 3 W. W. R. 347.—CAN.*

*hh (p. 692) ii.* ————  
*To claim goods.—After judgment for balance owing*]  
—*RUSSELL v. REID, [1928] 1 D. L. R. 628.—CAN.*

*hh (p. 692) iii.* ————  
*To return of purchase-money on rescission by vendor.*]  
—Where the seller of goods under a conditional sale agreement rescinds the agreement against the will of the buyer it is not in all cases an inevitable result of the application of the principle

of *restitutio in integrum* that the buyer is entitled to the return of moneys paid by him under the contract. If he has made use of the goods & is only able to return them to the seller in a depreciated condition an amount may be allowed to the seller with respect to said use of the goods by the buyer.—*STEARNS v. NEYS (Alta.), [1929] 3 D. L. R. 951; 3 W. W. R. 177.—CAN.*

*kk (p. 692) i.* ————  
The seller's assignee of a conditional-sale agreement is not a "purchaser" or "intgee." within sect. 2 of Conditional Sales Act, R. S. S., 1930, & therefore, is not a person entitled to the protection thereof. *GLOBE FINANCIAL CORPN., LTD. v. STERLING SECURITIES CORPN., LTD., [1932] 1 W. W. R. 347.—CAN.*

*kk (p. 692) ii.* ————  
*Receipt of proceeds of refinancing agreement by vendor.—Effect on right of assignee to seize.*—*HAIDEN v. STERLING SECURITIES CORPN., LTD., [1932] 2 W. W. R. 28.—CAN.*

*mm (p. 692) i.* ————  
*Lien agreement not registered.*—The good title which, because of non-compliance with Conditional Sales Act, is acquired by one who without knowledge of the lien buys from the bailee is one which he can pass on to a subsequent purchaser. Even if the fact that such subsequent purchaser was the original vendor restores the lien for the benefit of an assignee of the lien agreement, nevertheless one who afterwards purchases from the original vendor is protected by the Act.—*MUTUAL ACCEPTANCE CORPN. v. SCHILLER, [1931] 2 W. W. R. 458; 3 D. L. R. 417; 2 Alta. L. R. 467.—CAN.*

*b (p. 693) i.* ————  
*Presumed in absence of evidence of compliance with Act.*—Deft. had bought three horses & other animals under a conditional sale agreement. The present action was brought by the administrator of the seller for the balance due under the agreement. Deft. pleaded that the exor. *de son tort* of the seller had taken the horses in satisfaction of the indebtedness out of the possession of a man to whom deft. had sold them. There was no evidence herein as to what the exor. *de son tort* did with the chattels:—*Held*: the burden of proving that the exor. *de son tort* had complied with the terms of the agreement & of Conditional Sales Act as to retention of the chattels & notice of their sale was on pltf. herein, the administrator, & in the absence of said proof, the exor. must be presumed to have taken the chattels in satisfaction of deft.'s debt & so to have rescinded the contract.—*NATIONAL TRUST CO., LTD. v. LARSON, [1929] 2 D. L. R. 863; 23 S. J. R. 457; [1928] 3 W. W. R. 721.—CAN.*

*r (p. 693) i.* ————  
*Action to determine amount due to seller.*—*BOTTOMS v. PACIFIC NORTHWESTERN LUMBER CO. (B. C.), [1929] 2 W. W. R. 495.—CAN.*

*aa (p. 693) i.* ————  
*Transaction amounting to chattel mortgage.—Necessity for compliance with Bills of Sale Act.*—Applts. claimed, under certain conditional sales agreements, to be secured creditors of the estate in bkpy. of certain motor-car dealers. Registrations were made under Conditional Sales Act, R. S. N. B., 1927, but not under Bills of Sale Act, R. S. N. B., 1927. The dealers would order the cars from the manufacturers, who would send the invoice to the dealers, & would send the bill of lading, with sight draft on the dealers attached, to a bank. The dealers would then go to one of applts. with the invoice, a conditional sale agreement covering the cars would be made, & appellant would give the dealers a cheque payable to the dealers for 85 per cent. or 90

per cent. (& in one case payable to the bank for the whole) of the amount of the draft. The dealers took the cheque to the bank & it was applied towards payment of the draft, the dealers supplying the balance. The dealers then obtained the bills of lading & took possession of the cars:—*Held*: the conditional sales agreements were valid & effective.—*Re Estate of SMITH & HOGAN, LTD., INDUSTRIAL ACCEPTANCE CORPN., LTD. & CANADIAN ACCEPTANCE CORPN., LTD. v. CANADIAN PERMANENT TRUST CO., [1932] S. C. R. 661.—CAN.*

*bb (p. 693) i.* ————  
Deft. had bought three horses & other animals under a conditional sale agreement. The present action was brought by the administrator of the seller for the balance due under the agreement. Deft. pleaded that the exor. *de son tort* of the seller had taken the horses in satisfaction of the indebtedness out of the possession of a man to whom the deft. had sold them. The authority of the exor. *de son tort* to take the chattels & so bind the administrator was established by a prior decision in an action by deft. herein against the buyer from him. There was no evidence herein as to what the exor. *de son tort* did with the chattels:—*Held*: the burden of proving that the exor. *de son tort* had complied with the terms of the agreement & of the Conditional Sales Act as to retention of the chattels & notice of their sale was on pltf. herein, the administrator.—*NATIONAL TRUST CO., LTD. v. LARSON, [1928] 3 W. W. R. 723.—CAN.*

*cc (p. 693) i.* ————  
The C. co. contracted with defts. to construct sewers. To enable the co. to perform its contract, it agreed to buy the necessary sewer pipes from pltfs. & to secure to pltfs. payment of the contract price, assigned to them the money payable by defts. under the contract. Notice of the assignment was not given at the time nor until after the failure of the C. co. & after the completion of the work by new contractors employed by defts. After all the pipes had been placed in position, pltfs. asserted a right to remove the pipes, the price not having been fully paid to them & there being a provision in their contract with the C. co. that the property in the pipes was not to pass to the latter unless & until the whole price was paid:—*Held*: by Conditional Sales Act, R. S. O., 1914, s. 3 (1) the property in the pipes passed to defts., notwithstanding pltfs. had complied with the Act. The C. co. was an "other person," & the pipes were entrusted to it with the intention that the title should pass to defts.—*DOMINION LOCK JOINT PIPE CO. v. YORK, [1929] 4 D. L. R. 806; 61 O. L. R. 365.—CAN.*

*ee (p. 693) i.* ————  
Where a conditional sale agreement does not provide that the goods shall be at the risk of the buyer during the continuance of the lien the loss falls on the seller in case the goods are damaged or destroyed before the property passes.—*BURKE v. WEIR, [1928] 4 D. L. R. 837; [1928] 3 W. W. R. 257.—CAN.*

*ff (p. 693) i.* ————  
*What amounts to delivery.*—*REAR v. McCULLOUGH, [1928] 2 D. L. R. 434; [1928] 1 W. W. R. 716; 22 Sask. L. R. 146.—CAN.*

*hh (p. 693) i.* ————  
Under Farm Implement Act, R. S. S., 1920, c. 128, the contract in Form C. for the sale of a second-hand implement on credit constitutes the entire contract between the parties; & therefore, where no warranties have been stated thereon, evidence of alleged oral warranties is not admissible, nor can it be added to or varied by introducing the provisions of the Sale of Goods Act as to implied warranties.—*HAUG*

& SONS v. STACK, [1928] 4 D. L. R. 987; [1928] 3 W. W. R. 443.—CAN.

d (p. 694) i. ————.]—Where a contract for the sale of a large implement within Farm Implement Act, R. S. S. 1920, c. 128, omits from par. 4 thereof, as prescribed by Form A., which provides for the length of time repairs are to be kept available by the vendor, the words "for a period of ten years from the date of this order," the contract is invalid; since said Act provides that no contract for the sale of such an implement shall be valid unless it is worded in accordance with said form, & said omission cannot be said to constitute a "slight deviation."—WATERLOO MFG. CO., LTD. v. WOPPELLE, [1928] 2 D. L. R. 491; [1928] 1 W. W. R. 765.—CAN.

d (p. 694) ii. ————.]—In a contract in Form "A" of the Act the blanks left for the insertion of the dates of shipment were filled in by the words "at once," & it was held that, whatever the exact meaning of "at once" may be in any particular case, the deviation from the form affected the substance of the contract & therefore, was not curable by the application of Interpretation Act, s. 23, & consequently under sect. 12 of Farm Implement Act invalidated the contract, although, under the circumstances of the case, the insertion of said words could not possibly have prejudiced deft. in any way.—ADVANCE RUMELY THRESHER CO. v. SELBRE (Sask.), [1929] 4 D. L. R. 103; 2 W. W. R. 533; *aff.*, [1929] 3 D. L. R. 153; 1 W. W. R. 275; 23 S. L. R. 302.—CAN.

d (p. 694) iii. ————.]—The form of contract prescribed by Farm Implement Act, R. S. S. 1920, is of the essence of the contract; but an immaterial deviation from the phraseology thereof is not a ground on which either party can avoid his proper obligation. With respect to the words "work" & "purpose" in the clause relating to the work which the machine is intended to perform, in so far as work implies purpose, it rests with the purchaser to state the purpose & he is equally responsible with the vendor for the words inserted to express it.—MINNEAPOLIS STEEL & MACHINERY CO. v. EBERLE, [1930] 3 W. W. R. 231; *aff.*, [1931] 1 W. W. R. 236; 1 D. L. R. 999; 25 S. L. R. 218.—CAN.

d (p. 694) iv. ————.]—RUMELY THRESHER CO., INCORPORATED v. STAHL, [1930] 3 W. W. R. 623.—CAN.

k (p. 694) i. ————.]—*Proof.*—An affidavit which meets the requirements of Farm Implement Act, R. S. S. 1920, c. 128, s. 18 (2), is conclusive proof that sub-sect. (1) of said sect., which requires a contract for the sale of a "large implement" to be read over & explained to the purchaser in a language which he understands, if he does not understand English, was complied with.—PELETIER v. MINNEAPOLIS THRESHING MACHINE CO., [1928] 3 W. W. R. 463.—CAN.

k (p. 694) ii. ————.]—*Effect of affidavit.*—The affidavit provided for by sect. 18 (2) of the Act need not state what particular language was used in reading & explaining the contract to the purchaser nor give details of the explanation. An affidavit to the effect required by said sub-sect. is conclusive proof of the facts stated therein, upon proof being given of the signature of the officer before whom the affidavit purports to have been sworn & that he was an officer authorised to take such affidavit.—ADVANCE RUMELY THRESHER CO. v. ZOMAR (Sask.), [1929] 4 D. L. R. 65; 2 W. W. R. 544.—CAN.

t (p. 694) i. ————.]—*Every sale on credit of small implement.*—The intention of sect. 13 of Farm Implement Act, R. S. S., 1930, is that in every case of a sale on credit of a "small implement" form B. is, in so far as the warranty is concerned, to be the contract whether the contract was in said form or not, & that to this contract the parties must look for their respective rights. Therefore, representations made by the seller's agents to the buyer to induce the latter to buy cannot form part of the contract or relieve the buyer from liability.—DE LAVAL CO., LTD. v. DAVIES, [1931] 2 W. W. R. 408.—CAN.

bb (p. 694) i. ————.]—*Evidence of fulfilment—Provision in contract as to.*—While a contract for the sale of farm machinery cannot validly exclude the warranties under Farm Machinery Act, R. S. A., 1922, a provision therein that the failure of the buyer to give the vendor written notice within a specified time that the machine is not working well shall be deemed conclusive evidence of the fulfilment of those warranties as well as of the warranties expressed in the contract, will be upheld as valid if clearly stated & if the periods limited thereby for the trial of the machine & for the giving of the notice are not unreasonable under all the facts & circumstances of the case.—MASSEY-HARRIS CO., LTD. v. BOND, [1930] 1 W. W. R. 72; 2 D. L. R. 57.—CAN.

bb (p. 694) ii. ————.]—*Contracting out—Whether permissible.*—The parties to an agreement cannot contract themselves out of the statutory warranty created by the Farm Machinery Act, R. S. A., 1922.—J. I. CASE THRESHING MACHINE CO. v. DALTON, [1935] 3 D. L. R. 721.—CAN.

cc (p. 694) i. ————.]—SAWYER-MASSEY CO., LTD. v. STURGILL, [1928] 1 D. L. R. 213; [1928] 1 W. W. R. 23; 22 Sask. L. R. 321.—CAN.

ee (p. 694) i. ————.]—*Limitation of action.*—Notwithstanding sect. 5 of Limitation of Civil Rights Act, 1933, the vendor of an article which comes within the provisions of said sect. remains a creditor of the purchaser until the purchase price has been paid in full, although his remedies for enforcing his rights are restricted by the sect.—*Re* MILLER, MASSEY-HARRIS CO., LTD. v. BOARD OF REVIEW, [1937] 2 W. W. R. 438.—CAN.

ee (p. 694) ii. ————.]—*Right of vendor to take debt as security.*—There is nothing in Farm Implement Act, R. S. S., 1930, to prevent a vendor to whom money is owing under a farm implement contract from taking, by way of security for the satisfaction of his claim, a debt due to the purchaser, e.g., one due for the earnings in threshing of the implement in question.—ADVANCE RUMELY THRESHER CO. v. BRAUNSTEIN, [1932] 1 W. W. R. 321.—CAN.

d (p. 695) i. ————.]—*Novation.*—PLOWMAN TRACTOR CO. v. ANDREWS, [1928] 1 D. L. R. 544; [1928] 1 W. W. R. 329.—CAN.

d (p. 695) ii. ————.]—*Notice of defects—Right of seller to reasonable notice.*—The fact that the particular time limited under an agreement for the sale of farm machinery for the giving of notice by the buyer that the machine does not work well is held by the ct. to be unreasonable within sect. 3 of Farm Machinery Act, is not a ground for holding that the seller has lost the right to be notified as soon as is reasonably possible.—MINNEAPOLIS THRESHING MACHINE CO. v. JOHNSON & JOHNSON, [1931] 2 W. W. R. 827.—CAN.

d (p. 695) iii. ————.]—*Form of lien note.*—Since no provision is made in Farm Implement Act, R. S. S., 1930, for including in the lien note provided for by sect. 24 a term that the vendor may repossess the goods if he deems himself insecure, & the Act states exclusively the rights & liabilities of vendors & purchasers under contracts & lien notes to which it applies, a vendor cannot rely upon such a term in such a lien note.—PETRENY v. PORTEOUS, [1933] 3 W. W. R. 602.—CAN.

d (p. 695) iv. ————.]—*Whether Farm Implement Act, R.S.S., 1920, applicable—Question of fact dependent on date of posting.*—MINNEAPOLIS STEEL & MACHINERY CO. OF CANADA, LTD. v. BAXTER, [1928] S. C. R. 62.—CAN.

o (p. 695) i. ————.]—Where sale of machinery is void under Farm Implement Act vendor is entitled to damages for injury to machinery on return.—KALMAROFF v. STRELAEFF, [1938] 2 D. L. R. 138.—CAN.

p (p. 695) i. ————.]—*Right of vendor to recover value of use.*—Where a contract in Form A. of Farm Implement Act, R. S. S., 1920, was executed by deft. as purchaser but was not accepted by pltf. as vendor as required by sect. 19 thereof, the fact that pltf.'s agent left the implement with deft. to give him an opportunity to pay for it & deft. was willing to obtain money for that purpose by making use of the implement, did not alter the fact that because of said Act there was no enforceable contract; & therefore, the property in the implement remained in pltf. Pltf. was held, however, to be entitled to what had been earned by deft. by using the implement.—OLIVER, LTD. v. TAVENDER, [1932] 2 W. W. R. 94.—CAN.

# SALE OF LAND.

## Part I.—The Contract of Sale.

**26a. Verbal acceptance—Proof of.**—In a conflict of recollection as to statements made at an interview, considerable weight ought to be attached to contemporaneous writings throwing some light on what in fact occurred. The *onus* of proving an unconditional verbal acceptance of an offer in writing to sell real estate ought to be regarded as a heavy one, to be discharged only by clear evidence of the fact. In a case of reasonable doubt the ct. must take the view that the verbal acceptance has not been established (MAUGHAM, J.).—WATSON v. DAVIES, [1931] 1 Ch. 455, 468; 100 L. J. Ch. 87; 144 L. T. 545.

**27. Add. Annotation:**—As to (1) *Distd.* Neale v. Merrett (1930), 70 L. Jo. 95.

**28. Add. Annotations:**—*Consd.* Curtis Moffat v. Wheeler, [1929] 2 Ch. 224. *Refd.* Cane v. Leith, [1937] 2 All E. R. 532.

**28a. ———**—CURTIS MOFFAT v. WHEELER, No. 2475a, *post*.

**32a. ———**—**Acceptance “subject to surveyor’s report.”**—MARKS v. BOARD (1930), 46 T. L. R. 424; 74 Sol. Jo. 354.

**32b. ———**—**Method of payment of purchase-price.**—NEALE v. MERRETT (1930), 70 L. Jo. 95; 170 L. T. Jo. 99; [1930] W. N. 189.

**39a. Onus of proof of incapacity.**—S. was in 1935 the owner in fee simple of a country inn, let to a brewery co. on a long lease expiring at the end of 1936, & sublet to a quarterly tenant. Pltf., who was in occupation of licensed premises in Sheffield, was desirous of taking a smaller place in the country. He got into touch with S., & a verbal contract was made for the sale by S. to the pltf. of his inn for £2,000, the sale to be completed on Jan. 1, 1937. Pltf. wanted to pay a deposit, but S. was not prepared to accept it. In Sept. 1936, the tenant of the inn, finding another inn suitable for himself, made arrangements with pltf. to come into occupation, which he did with the knowledge & consent of S. Pltf. carried out substantial alterations & decorations on the premises, of which S. expressed approval. In Dec. 1936,

S. was a man nearly eighty years old, though quite capable of transacting business, but in that month he became seriously ill, & from then until his death in Mar. 1937, he was quite incapable of transacting business. In an action by the exors. of S. for specific performance of the contract, it was contended that S. was incapable, by reason of his health, of entering into the alleged contract, & on the other side, that the expenditure on the alterations & decorations amounted to acts of part performance:—*Held*: (1) to substantiate a defence of incapacity to contract, it would have been necessary to show that the incapacity was known, or ought to have been known, to the other party; (2) in an action for specific performance, pltf. is not bound to prove that S. was in such a state of physical & mental health as to be able to contract. If a question of capacity to contract is to be raised, the deft. must show a *prima facie* case of incapacity; (3) the expenditure on alterations & decorations was an act which was, in all the circumstances of the case, referable only to the contract, & therefore sufficient to defeat the plea of the statute.—BROUGHTON v. SNOOK, [1938] Ch. 505; [1938] 1 All E. R. 411; 107 L. J. Ch. 201; 158 L. T. 130; 51 T. L. R. 301; 82 Sol. Jo. 112.

**73a. Agreement to construct road.**—An estate co., by their agent, orally promised an intending purchaser of a building plot that a road, marked on a plan shown to him & giving access to the plot, would be constructed by them & be ready for use within a reasonable time. Relying on this promise, the purchaser entered into a written agreement to purchase, & the plot was duly conveyed to him. The co. did not construct the road within a reasonable time, or at all, & the purchaser brought an action claiming damages for breach of contract:—*Held*: a promise to construct a road, apart from any conveyance of the land over which it was intended to run, was not a “contract for the sale or other disposition of land or any

**PART I. SECT. 2, SUB-SECT. 2.—B.**  
c i. ——— **Acceptance subject to approval of title.**—SHENSTONE v. HUTTON (No. 2) (1928), 29 S. R. N. S. W. 39.—AUS.

### PART I. SECT. 3.

sg. **Agreement as to nature of transaction.**—JACKSON v. WHITE, [1937] 1 W. W. R. 99.—CAN.

### PART I. SECT. 4.

sa. **Agreement as to interest.**—Pltf. inquired by telegram whether deft. would sell his farm for \$400–\$600 cash & balance 3 years, 7 per cent. Deft. answered: “Will sell farm for \$1,500, six hundred cash. Balance \$200 year, paid in full 3 years.” Pltf. replied that “your offer” was accepted. Deft. executed the transfer prepared by pltf. & sent it to a bank for delivery to pltf. on payment of \$600 & delivery of a mtge. for the \$900 payable on deft.’s terms with interest at

7 per cent. Pltf. refused to agree to pay interest, & in a suit for specific performance contended that the whole contract as to interest was evidenced by the above telegram from deft. & pltf.’s reply to it. Deft. contended that pltf.’s first telegram offering to pay interest was a material part of the correspondence forming the basis of the contract:—*Held*: there was an enforceable contract between the parties for the sale & purchase of the land & that deft.’s contention as to the interest was correct.—MORAW v. MAGINNIS (Alta.), [1929] 1 D. L. R. 458; 1 W. W. R. 68.—CAN.

sc. **Assumption of liabilities by purchaser.**—“Amount at which they may be settled”—*Meaning of.*—The agreement for the sale of the apartment house to C. fixed the price at a certain sum & provided that, should the amount of liabilities assumed by C. “turn out to be” less than the sum which they were stated in the agree-

nient to amount to, C. would pay the difference between that amount & the amount at which “they may be settled”; & that should they turn out to be larger than that stated amount D. would pay C. the difference:—*Held*: the word “settled” did not mean “paid” or “discharged,” but meant “determined” or “ascertained”; & therefore, the fact that at the time of trial some of the liabilities had not been paid by either party, & were probably then barred by the Stat. Limitations, did not render C. liable to pay D. the amount thereof as part of the purchase-money.—DEVENISH v. CONNACHER (No. 2), CONNACHER v. DEVENISH, [1932] 3 W. W. R. 645.—CAN.

### PART I. SECT. 7, SUB-SECT. 1.

sb. **Agreement permitting party to receive rents.**—JONES v. RYDER, [1931] 1 D. L. R. 441; *affg.*, [1930] 3 D. L. R. 449.—CAN.



**SC. Effect of disclaimer of option by trustee in bankruptcy.**—One C. had an option under a certain agreement to purchase land by a certain date. The land, until purchased, was subject to certain trusts. Prior to that date he was adjudicated insolvent, & his trustee in insolvency disclaimed the option:—*Held*: by virtue of the disclaimer, C.'s option had come to an end, & the trustees under the agreement held the land free from the option.—*ER. P. CANDY*, [1929] S. A. S. R. 10.—**AUS.**



## Part III.—Sale by the Court.

**334a.** ——— **Reversionary Interest.**]—*NUNN v. HANCOCK* (1871), 6 Ch. App. 850; 40 L. J. Ch. 700; 25 L. T. 469; 19 W. R. 1041, L. J.J.  
*Annotations*:—*Reid*, *Debenham v. Sawbridge* (1901), 49 W. R. 502; *Re Wells*, *Boyer v. Maclean*, [1903] 1 Ch. 848.

**420a.** ———.]—*YOUNG v. TREGEAR* (1872), 21 W. R. 215.

## Part IV.—Conditions of Sale, Particulars and Special Stipulations.

**567a.** ——— **Waiver.**]—The real estate of a testator was by his will subjected to a yearly perpetual rentcharge of £300. Upon the sale of part of the land, thirty years before the present proceedings, part of the purchase money had been paid into ct., & this money with certain securities formed a fund in ct. sufficient to provide for the annuity. Upon the former sale, the land then sold had been declared by the ct. to be free from the annuity, but no application & no declaration had been made in respect of testator's other real estate. The land now contracted to be sold remained, therefore, subject to the rentcharge, but could at any time be freed from it by an application to the ct. These lands were identified as the blue & the green land. The blue land was made the subject of a special condition, stating that it was "at one time subject to" the rentcharge, but that the purchaser should accept the fund in ct. as a full & sufficient indemnity. The green land was not stated to be subject to the rentcharge. In the course of the investigation of title, it was discovered that the green land was also subject to the rentcharge. The purchaser then objected that the blue & green lands were still subject to the rentcharge, & contended that the fund did not provide an indemnity. No objection was at this time taken to the fact that the green land had not been mentioned in the special condition. The vendor replied on May 19, 1936, that the position had been fully explained at the time the agreement for sale was entered into, & that the purchaser was bound by the special condition, which was the same as that under which the vendor had purchased. No reply to this answer of the vendor was made until July 14, when the purchaser stated that he had been advised by counsel that the special condition was a misleading one, & intended to take out the present summons. The present summons sought a declaration that the purchaser was entitled to compensation in respect of the fact that the blue land & the green land were still subject to the rentcharge, & that there was no such indemnity as the special condition represented. The vendor relied upon the incorporation of the Law Society's General Conditions, which required an answer to an objection within 7 days, & further contended that, although the rentcharge was still in fact in existence, the fund in ct. provided in effect a full indemnity, &

by a proper application to the ct., the land could at any time be freed from the rentcharge:—*Held*: as to the green land there was a misstatement within clause 31 of the Law Society's General Conditions; but, a complete abstract having been then delivered, the time for a further observation on the vendor's reply of May 19 was, under clause 9 (4) of the Conditions, 7 days after the delivery thereof, & the purchaser's reply on July 14 was out of time. The reply of May 19 must therefore be considered as satisfactory & barred a claim to compensation.—*Re OSSEMSLEY ESTATES, LTD.*, [1937] 3 All E. R. 774; 81 Sol. Jo. 683, C. A.

**576a.** ———.]—Leasehold shops described in the particulars of sale as "Valuable business premises" were put up for sale by auction, subject to special conditions of sale & also to the National Conditions of Sale, by one of which, namely, the sixth, it was stipulated that the leases or copies thereof might be examined at the office of the vendors' solrs. before the sale & that the purchaser, whether or not he inspected the same, should be deemed to have bought with notice of the contents thereof. Deft. only became aware of the sale on the day when it was held &, having on that day been supplied by the auctioneers with the particulars & special conditions, but not with the National Conditions, & relying upon the truth of the description in the particulars, he bid at the sale & was declared to be the highest bidder thereat. He then signed the usual form of memorandum to the effect above stated & paid a deposit to the auctioneers. In the course of investigating the title it came to deft.'s knowledge for the first time that the leases under which the properties were held were subject to covenants which prohibited any other trade or business than that of a ladies' outfitter, fancy draper & manufacturer of ladies' clothing from being carried on upon the properties. In consequence of the existence of those restrictive covenants & the failure of the plffs. to procure their removal or the licence of the lessors to use the properties for the purposes of any business, the deft. refused to complete the purchase. In an action by the vendors for specific performance in which deft. counter-claimed rescission of the contract & to recover his deposit:—*Held*: (1) a shop

which could be used for one purpose only was not fairly described as "valuable business premises"; (2) such a misleading representation by pltf. in their particulars of sale disentitled them, notwithstanding the sixth condition, to the assistance of the ct. to compel deft., who purchased in reliance upon the truth of such representation, to specifically perform his part of a contract for a consideration different from that which he was led to expect.—**CHARLES HUNT, LTD. v. PALMER**, [1931] 2 Ch. 287; 100 L. J. Ch. 356; 145 L. T. 630; 75 Sol. Jo. 525.

*Annotations*:—As to (2) **Refd. Re Russ & Brown's Contract**, [1934] Ch. 34; **Bellotti v. Chequers Developments, Ltd.** [1936] 1 All E. R. 89.

**585. Add. Annotation**:—**Refd. Charles v. Cardiff Collieries** (1928), 44 T. L. R. 448.

**634. Add. Citations**:—97 L. J. Ch. 4; 138 L. T. 26.

**636. Add. Annotation**:—**Consd. Bernard v. Williams** (1928), 139 L. T. 22.

**683. Add. Annotation**:—**Consd. Parker v. Judkin**, [1931] 1 Ch. 475.

**771a.** ———.—]—At a sale by auction of property belonging to deft. pltf. became the purchaser of a freehold cottage, subject to the National Conditions of Sale, clause 10 of which provided that no error, misstatement or omission in the particulars should annul the sale, nor should any compensation be allowed by either party in respect thereof. The particulars stated that the cottage was let to a tenant whose notice to quit had determined, but who had been allowed to remain in occupation on sufferance, & that the premises would be sold with vacant possession on completion. The statement was misleading, as the premises were in fact in the occupation of a sub-tenant, who claimed to be entitled to remain on as a statutory tenant under Increase of Rent & Mortgage Interest (Restriction) Acts, & refused to vacate them. The purchaser refused to complete without vacant possession, with which he could have resold the property at a profit, & sued the vendor for damages for breach of contract:—**Held**: the action failed. There was no breach of contract, the statement in the particulars being an error or misstatement within clause 10 of the conditions in respect of which the purchaser could claim no compensation.—**CURTIS v. FRENCH**, [1929] 1 Ch. 253; 98 L. J. Ch. 29; 140 L. T. 133; 45 T. L. R. 15; 72 Sol. Jo. 702.

#### PART IV. SECT. 2, SUB-SECT. 7.— A. (b) i.

**r 1.** ———.—]—*When time begins to run—From delivery of proper abstract.*—**SHENSTONE v. HEWSON** (1927), 28 S. R. N. S. W. 53.—**AUS.**

#### PART IV. SECT. 2, SUB-SECT. 7.— B. (b) i.

**ci.** ———.—]—An undisclosed right of way is a defect of title & a ground for rescission.—**TOMOCU v. NORTH BRITISH CANADIAN INVESTMENT CO., LTD.**, [1936] 1 W. W. R. 721; 2 D. L. R. 409; 44 Man. L. R. 1.—**CAN.**

#### PART IV. SECT. 2, SUB-SECT. 7.— B. (b) ii.

**se.** *Objections known to vendor.*—]—Upon a stipulation providing that "if there is any valid objection to the vendor's title which the vendor shall

be unable or unwilling to remove, & which the purchaser will not waive, the offer shall be null & void:—**Held**: vendor may not invoke this stipulation if the purchaser presents objections to title which vendor knew of, & where he was reckless as to the manner in which he formulated the contract.—**LAVINE v. INDEPENDENT BUILDERS, LTD.**, [1932] O. R. 669; 4 D. L. R. 569.—**CAN.**

#### PART IV. SECT. 2, SUB-SECT. 7.— B. (i).

**n 1.** ———.—]—**LOUCH v. PAPE AVENUE LAND CO.**, [1928] 3 D. L. R. 620; [1928] S. C. R. 518.—**CAN.**

#### PART IV. SECT. 2, SUB-SECT. 9.— B. (d) i.

**814 iii.** ———.—]—L. sold to N. a piece of land which was described in

**776. Add. Annotation**:—*Generally*, **Refd. White v. Bijou Mansions, Ltd.**, [1938] Ch. 351.

**814. Add. Annotation**:—**Consd. Re Belcham & Gawley's Contract**, [1930] 1 Ch. 56.

**821a.** ———.—]—**Misrepresentation as to dimensions of garden—Before contract entered into.**—]—Pltf. entered into negotiations with defts. for the purchase of a house to be built upon a building estate. He made particular inquiries as to the size of the back garden, stating he wished to erect a garage thereon. Defts. wrote to him that the length of the garden was 40 feet "approximately," but in fact, it was only 36 feet, & upon this footing the usual contract was entered into incorporating the National Conditions of Sale:—**Held**: this was an innocent material misrepresentation which had induced pltf. to enter into the contract; this was not an error, misstatement or omission within the National Conditions of Sale, clause 10; pltf. was entitled to rescind the contract & the return of the deposit; pltf. having alleged fraud which had not been proved, the judgment for him would be with the general costs of the action except so far as those costs had been increased by the allegation of fraud.—**BELLOTTI v. CHEQUERS DEVELOPMENTS, LTD.**, [1936] 1 All E. R. 89.

**829. Add. Annotations**:—**Consd. Lawrence v. Cassel**, [1930] 2 K. B. 83. **Refd. Knight Sugar Co. v. Alberta Railway & Irrigation Co.**, [1938] 1 All E. R. 266.

**838. Add. Annotation**:—**Refd. Re Belcham & Gawley's Contract**, [1930] 1 Ch. 56.

**838a.** ———.—]—At an auction sale the purchaser bought freehold property sold subject to certain special conditions & to the General Conditions of Sale, 1925. The particulars & conditions of sale did not disclose the fact that two sewers, vested in the local authority & known by the vendors to exist, ran along the east side of the premises & along the yard at the back. Objection was taken on behalf of the purchaser. The vendors refused to release him from the contract, contending that the existence of the sewers did not prevent the use of the premises as a dwelling-house, for which the purchaser had bought them; but abatement of the purchase price was offered by way of compensation. The purchaser declined the offer, & by this summons asked for a declaration that the property was substantially different

the contract as "containing by measurement 137 acres or thereabouts being farm property on C. Road at present occupied by W. & being the land comprised in "certain certificates of title. The contract also contained the following clause: "No error of misdescription of the property shall annul the sale but compensation shall be made in respect thereof. . . ." The farm occupied by W., & comprised within the said certificates, was conveyed to N., but it only contained 134 acres, & of this latter fact N. was aware before completion:—**Held**: the transactions amounted to a sale of specific property & that the deficiency of three acres was not such a qualification as to area of the description of the land as would entitle N. to recover compensation under the contract.—**NIXON v. LOFTS** (1928), 29 S. R. N. S. W. 9; 46 N. S. W. W. N. 7.—**AUS.**

from that agreed to be sold, & for rescission, or, alternatively, a declaration that he was entitled to compensation:—*Held*: the failure to disclose the existence of the sewers, although materially affecting the description, did not force upon the purchaser property substantially different from that agreed to be sold; & the contract could be performed subject to compensation under Condition 35 of the General Conditions of Sale, 1925.—*Re BELCHAM & GAWLEY'S CONTRACT*, [1930] 1 Ch. 56; 99 L. J. Ch. 37; 142 L. T. 182.

842. *Add. Annotation*:—*Distd. Re Belcham & Gawley's Contract*, [1930] 1 Ch. 56.

860. *Add. Annotation*:—*Refd. Re Russ & Brown's Contract*, [1934] Ch. 34.

880a. *Contract for completion "on or about" given date.*—By a contract dated Oct. 19, 1928, *pltf.* agreed to sell to *deft.* all her right, title & interest in a licensed house known as The Thorns, of which she was the licensee. The contract provided that the purchase money should be paid "on or about" Nov. 10, 1928, & that *deft.* should forfeit the deposit of £120 which he had paid if he should fail to fulfil his part of the contract; also that either party refusing to comply with or neglecting to perform any part of the agreement should pay to the other, on demand, the sum of £200. On Oct. 3, 1928, *deft.* had given to the brewers, who were the freeholders of The Thorns, references which they had accepted by Oct. 10. He went to the magistrates' clerk & signed the ordinary notices on reference to a request for a temporary transfer on Nov. 10, & for full transfer on Dec. 8. At least a week before Nov. 10 *deft.* knew that he would be unable to complete the purchase of The Thorns unless he could raise a loan. His brokers acting in the matter sent him a notice to attend on Nov. 10. He did so, & first saw the brewers, telling them that he could not complete, & that the notice of application for transfer would have to be withdrawn & another one given. He then arranged with *pltf.* that completion should take place on Dec. 8. *Deft.*, however, did not attend to complete. On Dec. 22 *deft.* stated that he

would complete on Jan. 30. In an action by *pltf.* for a declaration that the contract had been rescinded & the deposit of £120 forfeited, & for damages:—*Held*: in the circumstances, & particularly having regard to the subject-matter, time was of the essence of the contract.—*LOCK v. BELL*, [1931] 1 Ch. 35; 100 L. J. Ch. 22; 144 L. T. 108.

895. *Add. Annotations*:—*Expld. Bernard v. Williams* (1928), 139 L. T. 22. *Consd. Lock v. Bell*, [1931] 1 Ch. 35.

901. *Add. Annotation*:—*Consd. Lock v. Bell*, [1931] 1 Ch. 35.

903a. ———.—*LOCK v. BELL*, No. 880a, *ante*.

912. *Add. Annotations*:—*Consd. Re Sandwell Park Colliery Co., Field v. The Co.*, [1929] 1 Ch. 277; *Lock v. Bell*, [1931] 1 Ch. 35; *Harold Wood Brick Co. v. Ferris*, [1935] 2 K. B. 198. *Refd. Bernard v. Williams* (1928), 93 L. T. 22; *Pincott v. Moorstons, Ltd.* (1936), 80 Sol. Jo. 207.

913. *Add. Annotation*:—*Refd. Bernard v. Williams* (1928), 139 L. T. 22.

916. *Add. Annotation*:—*Refd. Bernard v. Williams* (1928), 139 L. T. 22.

925. *Add. Annotation*:—*Refd. Bernard v. Williams* (1928), 139 L. T. 22.

1010. *Add. Annotation*:—*Refd. Oxford Corpn. v. Oxford Electric Co.* (1930), 143 L. T. 577.

1016a. *Condition to indemnify purchaser—"Local land charge of which vendor has had notice"*—*Apportionment under Private Street Works Act, 1892 (c. 57)—Effect of Law of Property Act, 1925 (c. 20), s. 198.*—*Re MIDDLETON & YOUNG'S CONTRACT* (1929), 167 L. T. Jo. 244; 67 L. Jo. 274; [1929] W. N. 70.

1017. *Add. Annotation*:—*Refd. Dennerley v. Prestwich U. D. C.* (1929), 141 L. T. 602.

1030. *Add. Annotation*:—*Distd. Re Belcham & Gawley's Contract*, [1930] 1 Ch. 56.

1050. *Add. Annotation*:—*Expld. & Distd. Mussen v. Van Dieman's Land Co.*, [1938] Ch. 253.

1054. *Add. Annotation*:—*Consd. Low v. Fry* (1935), 152 L. T. 585.

## Part V.—Vendor's Title.

1064. *Add. Annotation*:—*As to* (1) *Folld. Flexman v. Corbett*, [1930] 1 Ch. 672.

1075. *Add. Annotation*:—*Consd. Flexman v. Corbett*, [1930] 1 Ch. 672.

1078. *Add. Annotation*:—*Distd. Turner v. Watts* (1928), 138 L. T. 680.

1100a. ———.—*Declaration in assumpsit stated, that pltf. bargained to buy of deft., & deft.*

### PART IV. SECT. 2, SUB-SECT. 9.—C. (b) iii.

*sk. Restrictive covenants as to user.*—Restrictive conditions as to user of vendor's property, *e.g.*, not to build on open land at the back of the house, or not to close certain windows in a neighbour's house, are material defects entitled purchaser to refuse completion.—*LALLUBHAI RUPCHAND v. CHIMANLAL MANILAL* (1934), 1 L. L. R. 59 Bom. 83.—*IND.*

### PART IV. SECT. 2, SUB-SECT. 10.—B.

*r* (D. 118) 1. ———.—*SHERRIN v.*

WIGGINS, [1917] 2 W. W. R. 895; 27 Man. L. R. 572.—*CAN.*

*sc. Payment into bank—Payment must be made during banking "day."*—*BOERCKE v. SINCLAIR*, [1929] 1 D. L. R. 561; 93 O. L. R. 237.—*CAN.*

### PART IV. SECT. 2, SUB-SECT. 10.—C. (a).

*sd. Interest on unpaid purchase-money to be added to principal.*—Where, by a contract for sale of land, it was stipulated that, in the event of interest

on the unpaid purchase-money being unpaid at the end of each year, the same should be added to the principal, the ct. refused to decree specific performance by the vendor on payment of the principal & simple interest only, or except upon payment of the interest according to the agreement.—*HENDERSON v. DICKSON* (1862), 9 Gr. 379.—*CAN.*

### PART V. SECT. 2, SUB-SECT. 2.

*n* 1. ———.—*Re THOMPSON & JENKINS*, [1928] 4 D. L. R. 564; 63 O. I. R. 33.—*CAN.*

agreed to sell to him, a dwelling-house & the fixtures therein, for the residue of a term of years then and still unexpired therein, to commence from a certain day, to wit, Jan. 1, 1840, for the sum of £60; & that thereupon deft. promised to execute a proper conveyance, to make out an abstract of title, & deliver possession from Jan. 1, 1840, etc. At the trial, the following paper, signed by deft., was read in evidence: "I agree to sell the house & fixtures, No. 163, Piccadilly, to commence from Jan. 1 next, for £60"—*Held*: this document imported the sale of an interest in fee simple, & did not sustain the contract as alleged in the declaration.—*HUGHES v. PARKER* (1841), 8 M. & W. 244; 5 Jur. 730.

**1104a. Sale by vendor in specified capacity.**—Where, in a vendor & purchaser contract, it is stated that the vendor will make title in a specified capacity, the contract does not amount to a warranty that he will make title in a particular manner. The warranty is no more than a warranty that a good title shall be made; & the purchaser can be forced to accept such good title, even though made by the vendor in a capacity other than that specified.

By special conditions of sale, subject to which two houses were sold by auction, it was stated that the vendors were selling as "trustees for sale" under the will of A. On examination of the title by the purchasers, it appeared that no trust for sale was contained in the will:—*Held*: the above statement did not affect the powers of the vendors to make a good title as the legal personal representatives of A.—*Re SPENCER & HAUSER'S CONTRACT*, [1928] Ch. 598; 97 L. J. Ch. 335; 139 L. T. 287; 72 Sol. Jo. 336.

**1111. Add. Annotation:—***Refd. Re Russ & Brown's Contract*, [1934] Ch. 34.

**1115. Add. Annotation:—***Generally, Refd. Re Sandwell Park Colliery Co., Field v. The Co.*, [1929] 1 Ch. 277.

**1125. Add. Annotation:—***Apld. Cunningham v. Shackleton* (1935), 79 Sol. Jo. 381.

**1130. Add. Annotation:—***As to (2) Apld. Cunningham v. Shackleton* (1935), 79 Sol. Jo. 381.

**1134. Add. Annotation:—***Consd. Re Russ & Brown's Contract*, [1934] Ch. 34.

**1136. Add. Annotation:—***Consd. Re Russ & Brown's Contract*, [1934] Ch. 34.

**1138a.** —.]—A contract for sale of property held by underlease will not be enforced against a purchaser unless it distinctly specifies that that which is offered for sale is an underlease: it is not enough for the vendor to show that, after a careful study of the whole contract, it might be held that, upon its true construction, what the vendor is offering for sale is an underlease. The property in Lot 1, described in the particulars of sale as eight leasehold dwelling-houses, was sold subject to special conditions of sale & the National Conditions of Sale. Some of the houses were stated in the particulars to be held for a term of 90 years & others for a term of 99 years (less 7 days). One of the special conditions was: "The title to Lot 1 shall commence with the leases under which the respective properties are held," & the sixth of the National Conditions was: (1) "Leaseholds: The abstract of title to leasehold

property shall (unless otherwise provided) commence with the lease or underlease creating the term sold." (2) "Inspection of lease: The lease or underlease or a copy thereof may be examined at the office of the vendors' solrs. . . & the purchaser shall be deemed to have bought with full notice of the contents thereof." (3) "Property held by underlease: When property sold is held by underlease no objection or requisition shall be made on that account. . . ." The purchaser having objected to the title on the ground that the houses which the vendors contracted to sell as leaseholds were in fact held by underlease, a summons was taken out by the vendors for a declaration that the purchaser's objection had been sufficiently answered & that a good title had been shown in accordance with the contract:—*Held*: the objection had not been sufficiently answered & no such title to the houses had been shown as the purchaser was bound to accept.—*Re RUSSELL & BROWN'S CONTRACT*, [1934] Ch. 34; 103 L. J. Ch. 12; 150 L. T. 125; 50 T. L. R. 19; 77 Sol. Jo. 749, C. A.

*Annotation:—**Refd. Cunningham v. Shackleton* (1935), 79 Sol. Jo. 381.

**1138b.** —.]—*CUNNINGHAM SHACKLETON* (1935), 79 Sol. Jo. 381.

**1151. Add. Annotation:—***Folld. Re Spencer & Hauser's Contract*, [1928] Ch. 598.

**1152. Citation:—**For "[1928] W. N. 135" read "No. 1104a, *ante*."

**1162. Add. Annotation:—***Consd. Re Wells, Swinburne-Hanham v. Howard*, [1933] Ch. 29.

**1162a. Covenant by vendor to indemnify mortgagee—Registered charge.**—On July 11, 1929, the purchaser bought Lot 2 at a sale by auction & paid a deposit. The particulars of sale described Lot 2 as an unrestricted freehold, practically an island block, with four frontages to Little Orford Street & three other streets in Chelsea, the block forming an excellent building site, when the existing buildings came into hand. On examining the vendors' registered absolute title the purchaser found Entry 7 in the Charges Register stating in effect that on the transfer of Lot 2 & other property to the vendors on May 23, 1929, by mtgees. selling under their power of sale in a mtge. of Feb. 17, 1903, from Co. A., the former owners, the vendors by way of indemnity to the mtgees., but not further or otherwise covenanted to perform the obligations of Co. A. under a deed of Dec. 23, 1905, made between Co. A. & the Chelsea Borough Council & under a London County Council Order of Dec. 12, 1905. The deed of Dec. 23, 1905, made in pursuance of a large building scheme by Co. A. provided for the stopping up (*inter alia*) of Little Orford Street & for making certain new streets, including a new transverse street bisecting Lot 2. The Borough Council were to obtain the necessary Closing Orders, & Co. A. were to lay out the new streets at their own expense. By their order of Dec. 12, 1905, the London County Council on the application of Co. A. sanctioned the new streets subject to certain conditions including a condition that Co. A. should covenant to lay them out, & on Dec. 21, 1905, Co. A. covenanted accordingly. On July 10, 1906, on the Borough Council's

application, the justices made a Closing Order for Little Orford Street. For financial & other reasons this part of Co. A.'s scheme had not yet been proceeded with. Little Orford Street was still open; it was in fact repaired by the Borough Council; & at the date of the contract neither the vendors nor the purchaser knew of the Closing Order's existence. On discovering Entry 7 the purchaser required the vendors to delete it from the Register & to obtain a release of the obligations, &, on their refusal, he issued a vendor & purchaser summons for a declaration that a good title was not shown. On subsequently discovering the Closing Order he discontinued the summons & brought this action claiming a declaration that he was entitled to repudiate the contract, damages for breach, & return of the deposit. The vendors denied any breach & counter-claimed for specific performance:—*Held*: (1) as the title of the vendors & their mtgee. predecessors was paramount to the 1905 documents, so that they were not bound by Co. A.'s obligations thereunder, & the vendors' covenant of indemnity was a mere personal covenant to indemnify the mtgees. against a non-existent liability, the purchaser was not entitled to require the removal of Entry 7 from the vendors' registered title, but must be satisfied with a clean transfer not referring to the indemnity, & it would be the Registrar's duty to omit any reference thereto in the purchaser's registered title; (2) the twenty-four years' old Closing Order did not affect the title, but, if & so far as it was inconsistent with the particulars, merely raised a case of innocent misrepresentation, on which the purchaser could neither repudiate the contract nor recover damages, his only remedy being to resist specific performance. Therefore, the purchaser's action failed on both points; (3) on the vendors' counterclaim for specific performance that there was in fact no misrepresentation in the particulars, as the word "street" even in London did not necessarily mean a public highway. There was therefore no ground for refusing specific performance.—*BARNES v. CADOGAN DEVELOPMENTS, LTD.*, [1930] 1 Ch. 479; 99 L. J. Ch. 274; 142 L. T. 626.

1177. *Add. Annotation*:—*Consd. Re Belcham & Gawley's Contract*, [1930] 1 Ch. 56.

1178a. *Property subject to closing order—Unknown to vendor.*—*BARNES v. CADOGAN DEVELOPMENTS, LTD.*, No. 1162a, *ante*.

### PART V. SECT. 3.

*sa. Sale by company—After removal from register.*—A co. incorporated in N. S. W. was registered in Tasmania as a foreign co. It acquired certain land in Tasmania. On Aug. 14, 1924, the co. filed a notice that it had ceased to carry on business in Tasmania, & the registrar thereupon removed its name from the register. On May 16, 1925, the co. contracted to sell the said land to B.:—*Held*: the land in question was still vested in the co., & there would be a declaration that it could show a good marketable title.—*Re LABOR PAPERS, LTD. & BUTTON'S CONTRACT* (1925), 21 Tas. L. R. 35.—*AUS.*

*sd. Property subject to apparent ease-*

*ments.*—Title held good, since purchaser must have had notice from the lay out of the property, of the existence of the easements.—*LUBIENSKI v. SILVERMAN*, [1932] O. R. 396; 3 D. L. R. 320; *affd.*, [1932] 1 D. L. R. 656.—*CAN.*

*sk. Property subject to*  
The fact that the vendor of property encumbered by an undischarged mtgee. has not legal power to compel the mtgee. to discharge the mtge. at any time fixed for closing the sale, does not affect his ability to convey the fee, if it can be shown that he had obtained a promise from the mtgee. to discharge the mtge. at the time of closing, & that promise had not in the meantime been revoked.—*GRAY*

1219. *Add. Annotation*:—*Refd. Re Spencer & Hauser's Contract*, [1928] Ch. 598.

1219a. — *Sale of registered freeholds.*—When a vendor purports to sell registered freehold property without disclosing that his title is only possessory, which fact appears only on delivery of the abstract, the contract is misleading, & the purchaser can refuse to accept the title, notwithstanding a condition that, if objection be not taken within fourteen days of delivery of the abstract, he will be taken to have accepted the title.—*Re BRINE & DAVIES' CONTRACT*, [1935] Ch. 388; 104 L. J. Ch. 139; 152 L. T. 552.

1220. *Add. Annotation*:—*Folld. Charles Hunt, Ltd. v. Palmer*, [1931] 2 Ch. 287.

1220a. *Property described as "valuable business premises"—Covenants restricting carrying on of business.*—*CHARLES HUNT, LTD. v. PALMER*, No. 576a, *ante*.

1236. *Add. Annotation*:—*Refd. White v. Bijou Mansions, Ltd.*, [1937] 3 All E. R. 269.

1242. *Add. Annotation*:—*Folld. Flexman v. Corbett*, [1930] 1 Ch. 672.

1259. *Add. Annotation*:—*Generally. Refd. Manchester & County Bank v. Monk* (1929), 73 Sol. Jo. 465.

1275. *Add. Annotation*:—*Refd. Re Sandwell Park Colliery Co., Field v. The Co.*, [1929] 1 Ch. 277.

1277. *Add. Annotation*:—1s to (2) *Refd. A.-G. v. Cohen*, [1936] 2 K. B. 216.

1280. *Add. Annotation*:—*Consd. Re Spollon & Long's Contract*, [1936] 2 All E. R. 711.

1321. At end of paragraph for "gave notice of a trust," read "gave no notice of a trust."

1347a. *Document insufficiently stamped—Whether purchaser compelled to accept statutory declaration—Open contract.*—Where a vendor is selling land under an open contract, he cannot compel the purchaser to accept a statutory declaration as sufficient evidence to contradict statements appearing in the documents of title, such as the consideration stated in a deed which shows *prima facie* that the deed is insufficiently stamped.—*Re SPOLLON & LONG'S CONTRACT*, [1936] Ch. 713; [1936] 2 All E. R. 711; 105 L. J. Ch. 317; 155 L. T. 554; 80 Sol. Jo. 510.

1394a. — *Assent of representative—Administration of Estates Act, 1925 (c. 23), s. 36 (7)—Meaning of "sufficient evidence."*—The words "sufficient evidence" in Administration of Estates Act, 1925 (c. 23), s. 36 (7),

*v. CHADWICK* (1922), 49 N. B. R. 144.—*CAN.*

*sl. Part of property claimed by Dominion.*—Pltf. sued for specific performance of an agreement of sale of land & land covered with water from him to deft. Shortly after the agreement, the Crown in the right of the Dominion of Canada had asserted a claim to a part of the land as having passed to it at Confederation, under sect. 108 of the B. N. A. Act, as part of a public harbour, & on pltf.'s refusal to remove this objection to title, deft. had purported to terminate the agreement.—*Held*: pltf. had agreed to convey a good & sufficient title to the lands, & action dismissed.—*RODD v. CRONIN*, [1936] S. C. R. 142; 2 D. L. R. 337.—*CAN.*

have not the meaning of "conclusive evidence," &, accordingly, the effect of the sub-sect. is that a purchaser may safely accept a vesting assent as evidence that the person in whose favour it was made was the person entitled to have the legal estate conveyed to him only unless & until, on a proper investigation of the vendor's title, facts come to his knowledge which indicate the contrary; in which event the vesting assent cannot be accepted as sufficient evidence of something which he has reason to believe is not in accordance with the facts.—*Re DUCE & BOOTS CASH CHEMISTS (SOUTHERN), LTD.'S CONTRACT*, [1937] Ch. 642; [1937] 3 All E. R. 788; 106 L. J. Ch. 387; 157 L. T. 477; 53 T. L. R. 1000; 81 Sol. Jo. 651.

**1401a. Proof of ownership in fee simple—Statutory declaration of rent collector.**—The exors. of a testator, who died in 1931, entered into a contract for the sale of property described in the particulars as freehold. The sale was to be subject to the General Conditions of 1925. The vendors furnished the purchaser with an abstract of testator's will appointing them his exors., but not containing any reference to the property. The purchaser objected that this was no evidence of title, & the vendors offered to provide a statutory declaration by a person that he had collected the rents of the property & done repairs to it for the testator over a period to twenty years. The purchaser refused to accept the proposed statutory declaration:—*Held*: the proposed statutory declaration was insufficient to prove that testator had been seised in fee simple in possession free from

incumbrances, & therefore the purchaser's objection prevailed.—*Re GILBERT & FOSTER'S CONTRACT* (1935), 52 T. L. R. 4.

**1401b. Deed over thirty years old—Executed under power of attorney—Proof of execution.**—Upon a sale of land in 1936, the abstract of title commenced with a deed, dated Dec. 12, 1900, & the abstract of that deed ended with the words "executed & attested." It subsequently appeared that this deed had been executed under a power of attorney. The vendor had made a special condition, which was intended to exclude any requisition referring to this power of attorney, but, by inadvertence, the condition failed to do so. It was contended that, as the deed was over thirty years old, no proof of execution was necessary:—*Held*: the purchaser was entitled to require an abstract or a copy of the power of attorney, &, as this could not be done, the deposit must be returned.—*Re COPELIN'S CONTRACT*, [1937] 4 All E. R. 447; 54 T. L. R. 130.

**1416a. — Subsequent purchase by solicitor from client.**—A solr., who has been employed to advise on a title, cannot, on purchasing the land himself of his client, set up an objection, which he did not think of any importance when advising his principal.—*BEEVOR v. SIMPSON* (1829), Tam. 69; 48 E. R. 28.

**1458a. S. P. FLOOD v. PRITCHARD** (1879), 40 L. T. 873.

**1466. After this case add:—**  
— — — — —.]—*See, now*, Law of Property Act, 1925 (c. 20), s. 45 (4).

## Part VI.—Position of Parties Pending Completion.

**1481. Add. Annotation:—Refd.** Halifax Building Society v. Keighley, [1931] 2 K. B. 248.

**1488a. — — — — —.]**—It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if & so far as a ct. of equity would under all the circumstances of the case grant specific performance of the contract (*per* CUR.).—*HOWARD v. MILLER*, [1915]

A. C. 318; 84 L. J. P. C. 49; 112 L. T. 403, P. C.

*Annotation:—Refd.* Central Trust & Safe Deposit Co. v. Snider, [1916] 1 A. C. 266.

**1500. Add. Annotation:—Refd.** *Re* Gillott's Settlement, Chattock v. Reid, [1934] Ch. 97.

**1509a. — — — — —.]**—*PUDDICOMBE v. BYTHIESEA* (1823), 1 L. J. O. S. Ch. 186.

**1517. Add. Annotation:—Refd.** Trollope (Geo.) & Sons v. Martyn Bros., [1934] 2 K. B. 436.

**1538. Add. Annotation:—Distd.** *Watson v. Davies*, [1931] 1 Ch. 455.

**PART V. SECT. 5, SUB-SECT. 8.—B.**  
*sm. Proof of charge.—Note of execution on abstract of title.*—*HIND v. WESBROOK* (1900), 7 Terr. L. R. 10.—*CAN.*

**PART V. SECT. 5, SUB-SECT. 10.—C.**  
*e i. — Certificate that no arrears of income tax outstanding.*—The production of a certificate under Finance Act, 1928, s. 6, from the Revenue Comrs. that no arrears of income tax were outstanding, if required by the purchaser, is an expense which, by Conveyancing Act, 1881, s. 3 (6), must be borne by him, as the contract of sale contained no provision to the contrary.—*HOPKINS v. GEOGHEGAN*, [1931] 1 R. 135.—*IR.*

**PART VI. SECT. 1, SUB-SECT. 2.—A.**  
1515 *ii. — — — — —.]*—The right to possession in the purchaser is not a

necessary incident to an executory contract for the sale of land. This right remains in the vendor until full payment of the purchase price, unless express provision to the contrary is made in the contract.—*MANSSELL v. SMITH*, [1931] 1 W. W. R. 563.—*CAN.*

*sg. What amounts to possession—Actual occupation of part.*—*McKINNON v. McDONALD* (1867), 13 Gr. 152.—*CAN.*

*sh. Right to possession as against transferee of land.*—*Pitt.*, a purchaser under an agreement for the sale of land which provided that he should have the right to immediate possession, entered into possession & filed a caveat, claiming an interest as owner under the agreement. The vendor assigned the agreement to the M. H. Co. & subsequently transferred the land to deft. co. which obtained a certificate of title subject to the caveat, but

acquired no rights under the agreement for sale. *Pitt.* having left the property, deft. co. put deft. into possession without the knowledge or consent of *pitt.*:—*Held*: *pitt.* was entitled to a judgment declaring him entitled to immediate possession of the property, & was entitled also to damages for the wrongful user of his land, such damages to be calculated & allowed up to & inclusive of the day of the entry of the judgment.—*WADDELL v. GRAY-CAMPBELL, LTD. & SCARROW*, [1929] 3 D. L. R. 488; 2 W. W. R. 113; 23 S. L. R. 527; *revg.*, [1929] 2 D. L. R. 362; 1 W. W. R. 241.—*CAN.*

**PART VI. SECT. 1, SUB-SECT. 3.—B.**

*sl. Covenant to leave improvements—Liability for removal of house.*—Under an agreement for the sale of land, the registered owner being the vendor, the

1588. *Add. Annotation*:—*Refd.* Halifax Building Society v. Keighley, [1931] 2 K. B. 248.
1594. *Add. Annotations*:—*Refd.* Page v. Scottish Insce. Corpn. (1929), 98 L. J. K. B. 308; Sutherland v. German Property Administrator (1933), 149 L. T. 47.
- 1597a. ———.]—PINCKE v. CURTEIS (1793), 4 Bro. C. C. 333, n.; 29 E. R. 920.
1631. *Add. Annotation*:—*Refd.* Oxford Corpn. v. Oxford Electric Co. (1930), 143 L. T. 577.
1640. *Add. Citation*:—[1928] Ch. 340.
1656. *Add. Annotation*:—*Refd.* Oxford Corpn. v. Oxford Electric Co. (1930), 143 L. T. 577.
1682. *Add. Annotation*:—*Refd.* Oxford Corpn. v. Oxford Electric Co. (1930), 143 L. T. 577.
1716. *Add. Annotation*:—*Refd.* *Re* Fenton, *Ex p.* Fenton Textile Assocn. (1930), 99 L. J. Ch. 358.
1786. *Add. Citation*:—[1927] B. & C. R. 137.

## Part VII.—Vendor and Purchaser Summons.

1802. *Add. Annotation*:—*Consd.* Clayton v. Clayton, [1930] 2 Ch. 12.
1822. *Add. Annotation*:—*Refd.* Flexman v. Corbett, [1930] 1 Ch. 672.
1823. *Add. Annotation*:—*Refd.* Johnson v. Clarke, [1928] Ch. 847.
1832. *Add. Annotation*:—*As to* (2) Folld. Charles Hunt, Ltd. v. Palmer, [1931] 2 Ch. 287.
1873. In cross-references before this case, for "Ord. 63" read "Ord. 58."

## Part VIII.—Remedies under an Uncompleted Contract.

1930. *Add. Annotation*:—*Distd.* Harold Wood Brick Co. v. Ferris (1935), 79 L. Jo. 448.
1931. *Add. Annotation*:—*Distd.* Harold Wood Brick Co. v. Ferris (1935), 79 L. Jo. 448.

purchaser agreed for himself, his assigns, etc., that all improvements placed on the land should remain thereon & not be removed or destroyed until final payment for the land had been made. Deft. P., the assignee of the purchaser, built a house on the land. P. sold the house to deft. S., who was ignorant of the terms of said agreement. The house, although built on skids, was found to have become in fact & within the intention of the agreement part of the soil at the time of the sale to S. The vendor obtained a final order for "foreclosure," but before it was granted S. had removed the house from the land & refused to return it:—*Held*: both defts. were liable in damages to the vendor for the value of the house at the time of its removal, although it was not shown that the land was worth less than the amount owing to the vendor under the agreement for sale.—CANADIAN PACIFIC RY. CO. v. PRICKETT & SHOWALTER, [1930] 2 W. W. R. 65; 3 D. L. R. 800.—CAN.

### PART VI. SECT. 1, SUB-SECT. 5.

g i. — *Taxes—Composition with revenue authorities—Effect of.*—KEILL v. HUNTER (1928), 39 B. C. R. 396.—CAN.

n i. — *To knowledge of vendor—Effect of sale on action for purchase-money.*—*Resp.*, representing the vendor, sued applt., representing the purchaser, for the balance of the price of sale of a certain parcel of land. The latter denied his liability on the ground that the property could not be transferred to him by the vendor as it had been sold for unpaid taxes; but the vendor contended that the purchaser was still bound because the sale of the property for taxes was due to the failure by the purchaser to pay them as covenanted:—*Held*: resp.'s action should be dismissed. The vendor was aware that the taxes had not been paid & was looking to the purchaser for the money wherewith to pay them; he had already collected some rent for the property which he was holding as a credit against the

taxes, & it can be inferred that the vendor anticipated that payments on account of taxes, when made, would pass through his hands. When, therefore, the property was sold for taxes, it was not because the vendor was misled into a belief that the purchaser had paid or intended to pay the taxes; the vendor had been notified, previously to the sale for taxes, that the purchaser repudiated the contract & was looking for a refund of his payments, & in withholding payment of the municipal claim the vendor acted deliberately, with a full knowledge of the facts.—ROYAL TRUST CO. v. KENNEDY, [1930] S. C. R. 602; 4 D. L. R. 868.—CAN.

o i. —.]—Every vendor & purchaser of land situate in Alberta must be held to have contracted with reference to Unearned Increment Tax Act, & in the absence of an agreement to the contrary, there is implied in an agreement for the sale & purchase of such land an obligation on the vendor to pay or cause to be paid the portion of the tax payable in respect of any increase in value prior to the making of said agreement, or, at least, there is implied an agreement by the vendor that, if the purchaser pays the vendor's portion of the tax, the purchaser will be entitled to recover it from him.—CANADIAN AMERICAN TRUST CO., LTD. v. CENTRAL PROPERTIES, LTD. v. McMULLEN, [1929] 3 D. L. R. 867; 2 W. W. R. 295; 24 Alta. L. R. 153; *revers.*, [1929] 2 D. L. R. 555.—CAN.

### PART VI. SECT. 2, SUB-SECT. 1—A.

sm. *Lease by purchaser.*—A lease given by a person with only a limited right, e.g. a purchaser under an agreement for sale, must be subject to the infirmities or limitations of his own title. An assignment, by the purchaser, of his rights under the agreement to purchase cannot convey the interest which he had vested in his lessee by the lease, & the fact that the assignee is to his vendor makes no difference in this respect.—LINDSAY v. GIBBONEY, [1931] 1 W. W. R. 728; *revers.*, [1931] 1 W. W. R. 618.—CAN.

### PART VIII. SECT. 1, SUB-SECT. 1.—A.

k (p. 221) i. — *Requisites of valid cancellation notice.*—BROWN v. ROBERTS (1912), 17 B. C. R. 16.—CAN.

i i. — *Effect of notice.*—The cancellation clause in an agreement for the sale of land provided that on default by the purchaser "the vendor shall be at liberty to determine & put an end to this agreement . . . by mailing . . . a notice . . . intimating an intention to determine this agreement":—*Held*: under said clause the mailing of such a notice was not sufficient in itself to put an end to the agreement. The clause did not authorise the vendor to terminate the agreement; it merely authorised him to mail a notice of his intention to terminate it.—MANITOBA FARM LOANS ASSOCN. v. WALACH, [1937] 3 W. W. R. 690; 4 D. L. R. 665; 45 Man. L. R. 114; 7 F. L. J. (Can.) 212.—CAN.

m (p. 223) i. — *Implied repudiation by purchaser.*—SKWARCHUK v. SKWARCHUK, [1937] 3 W. W. R. 492; 7 F. L. J. (Can.) 198.—CAN.

m (p. 223) ii. — *Fraud.*—THOMSON v. DELANEY, [1937] 2 D. L. R. 335.—CAN.

o (p. 223) i. — ———.]—HAMILTON v. TAYLOR (1919), 47 N. B. R. 145.—CAN.

as i. — *On liability of defendant for costs.*—Where a vendor suing for specific performance, personal judgment, & in default of payment the usual relief by way of cancellation elects immediately on becoming entitled to judgment to take a judgment for cancellation, a provision for payment of costs by the deft. personally on his failure to redeem should not ordinarily be included in the judgment, at least where deft. has not defended the action.—BRATON v. HAMBICK (Man.), [1929] 1 D. L. R. 982; 1 W. W. R. 375.—CAN.

ee i. —.]—In an action to have an agreement for the sale of land declared determined & the payments made thereunder forfeited:—*Held*:



- 1944a. *S. P. WESTERMAN v. PANTLIN* (1900), 3 Seton on Judgments & Orders, 7th ed. 2218.  
*Annotation*:—*Fold. Olde v. Olde*, [1904] 1 Ch. 35.
1957. *Add. Annotation*:—*Consd. Low v. Fry* (1935), 152 L. T. 585.
2006. *Add. Annotations*:—*Refd. Wilson v. Balfour* (1929), 45 T. L. R. 625; *May & Butcher, Ltd. v. R.*, [1934] 2 K. B. 17, n.; *Trollope (Geo.) & Sons v. Martyn Bros.*, [1934] 2 K. B. 436; *Kahn v. Aircraft Industries Corp., Ltd.*, [1937] 3 All E. R. 476.
2009. *Add. Annotation*:—*Distd. Low v. Fry* (1935), 152 L. T. 585.
- 2009a. ————]—*BERNARD v. WILLIAMS*, No. 2182. *post*.
2013. *Add. Annotations*:—*Dbtd. Bernard v. Williams* (1928), 139 L. T. 22. *Consd. Low v. Fry* (1935), 152 L. T. 585.
2014. *Add. Annotations*:—*Refd. Bernard v. Williams* (1928), 139 L. T. 22; *Low v. Fry* (1935), 152 L. T. 585.
2049. *Add. Annotation*:—*Refd. Re Sandwell Park Colliery Co., Field v. The Co.*, [1929] 1 Ch. 277.
2061. *Add. Annotations*:—*Consd. Re Sandwell Park Colliery Co., Field v. The Co.*, [1929] 1 Ch. 277; *Lock v. Bell* (1930), 69 L. Jo. 219. *Refd. Bernard v. Williams* (1928), 139 L. T. 22; *Harold Wood Brick Co. v. Ferris*, [1935] 2 K. B. 198; *Pincott v. Moorstons, Ltd.* (1936), 80 Sol. Jo. 207.
2070. *Add. Annotation*:—*Is to* (1) *Refd. White v. Bijou Mansions, Ltd.*, [1938] Ch. 351.
2080. *Add. Annotation*:—*Distd. Re Belcham & Gawley's Contract*, [1930] 1 Ch. 56.
2087. *Add. Annotation*:—*Refd. Curtis Moffat v. Wheeler*, [1929] 2 Ch. 224.
- 2087a. — - *Provision for alternative—Repudiation by purchaser.*]—*Pltf. made an agreement*

to purchase the lease of certain premises & paid a deposit. It was a term of the agreement that the vendors should use their best endeavours to obtain the landlord's consent to the assignment of the lease & if they failed to obtain such consent, that they would, at the option of the purchaser, procure a declaration of trust in her favour or otherwise deal with the same as she should direct. They failed to obtain the consent of the landlord. *Pltf.* did not ask for the declaration of trust, but commenced an action for the return of her deposit. At the trial it was held that the purchaser had failed to fulfill her part of the contract & was not entitled to the return of her deposit. Upon appeal it was contended for *pltf.* that the exercise of the option to take a declaration of trust would have caused a forfeiture of the lease, & her failure to exercise such option did not therefore amount to a breach of contract:—*Held*: the inability to obtain the landlord's consent was specially provided for in the contract, & those provisions were binding on both parties. There had therefore been a breach of contract by *pltf.* & the deposit must be forfeited.—*PINCOTT v. MOORSTONS, LTD.*, [1937] 1 All E. R. 513; 156 L. T. 139; 81 Sol. Jo. 136, C. A.

- 2091a. *Default by purchaser—Liquidated damages less than deposit Balance of deposit recoverable.*]—Where on a contract for the sale of land a sum to be paid by way of liquidated damages is agreed, & is less than the deposit, the purchaser is, on a breach of the contract by him, entitled to the return of the balance of the deposit.—*SENNETT v. RENDELL* (1934), 79 L. Jo. 98.
2123. *Add. Annotation*:—*Consd. Low v. Fry* (1935), 152 L. T. 585.

a defaulting purchaser who is persisting in his default & refusing to perform his contract cannot have any relief under the equitable jurisdiction of the ct.; therefore *defts.* were not entitled to have the moneys paid under the agreement returned to them.—*OSHEROBY v. OSHEROBY*, [1931] 1 W. W. R. 604; 2 D. L. R. 996.—CAN.

*sm. Vendor unable to give title—Through purchaser's acts—Liability of purchaser under contract.*]—*WILKIN v. BROWN* (Alta.), [1927] 2 D. L. R. 87.—CAN.

*sd. Time allowed purchaser to make good default—Dependent on circumstances.*]—*SINGER v. GARRETT*, [1929] 4 D. L. R. 132; 2 W. W. R. 201; 41 B. C. R. 160.—CAN.

*sp. Failure to pay instalments—Property passing to vendor—Fixtures.*]—The buildings in question herein which were erected by the purchaser under an agreement for sale which was foreclosed *held* to be the property of the vendor.—*FIFF v. HRAFKO & LETZAK*, [1936] 1 W. W. R. 627; 2 D. L. R. 383; 6 F. L. J. (Can.) 35.—CAN.

*st. Agreement for reversion on default—Effect.*]—Where an agreement for sale entitles the vendor to be reversioned in the property on default by the purchaser he need not resort to foreclosure or sale by public auction.—*BLAKLEY v. MOREASH*, [1937] 4 D. L. R. 411; 7 F. L. J. (Can.) 166.—CAN.

#### PART VIII. SECT. 2, SUB-SECT. 2.—A.

1971 x. ————]—In an action by a purchaser to have an agreement for the sale of land declared rescinded

& for the return of a sum of money paid thereunder & another sum, which was an amount realised by the vendor, out of grain sold from the land, in excess of the interest payable under the agreement:—*Held*: the two items should be considered as a deposit & as part of the cash payment respectively, that the purchaser had in fact abandoned the land, & that through the failure of the purchaser to complete the vendor had suffered loss in an amount in excess of the aggregate of said sums. Therefore, although the declaration of rescission, which was also asked for by *deft.*, was granted, the claim for the return of the money was dismissed.—*KWARA v. PIPER* (Man.), [1930] 1 D. L. R. 83; [1929] 3 W. W. R. 392.—CAN.

a i. ————]—*Default by vendor—Prior to default by purchaser.*]—*ROGERS & BROWN v. HAZELHURST*, [1930] 2 D. L. R. 609; 65 O. L. R. 81.—CAN.

#### PART VIII. SECT. 2, SUB-SECT. 3.—C. (b).

o. *Revsd.*, 33 O. L. R. 78.

#### PART VIII. SECT. 2, SUB-SECT. 3.—C. (e).

2062 i. *Misrepresentation—Of agent of vendor.*]—Where the ground of rescission of a contract for the purchase of land is the fraudulent misrepresentation of the agent of the vendor, & therefore, in law of the vendor himself, the purchaser is entitled to *restitutio in integrum* from the vendor & therefore even though a deposit under the contract has been paid to the agent as "stakeholder" the purchaser is entitled to an order for the repayment of

the deposit by the vendor.—*SWINDLE v. KNIBB* (1929), 29 S. R. N. S. W. 325; 46 N. S. W. W. N. 102.—AUS.

#### PART VIII. SECT. 2, SUB-SECT. 3.—C. (h).

so. *Deposit paid—Provision for payment of further sum on fixed date—Failure of purchaser to pay.*]—*Held*: although the vendor had neither executed nor offered to execute a conveyance he was entitled to sue before completion, inasmuch as the contract fixed a definite date for the payment & did not postpone it until completion or until after completion.—*PERPETUAL TRUSTEE CO. v. UNION TRUSTEE CO.* (1927), 28 S. R. N. S. W. 222; 45 N. S. W. W. N. 30.—AUS.

#### PART VIII. SECT. 2, SUB-SECT. 3.—E.

i i. ————]—Where the ct. gives a purely equitable relief as in the case of rescission of a contract & repayment of the moneys paid by the purchaser, the moneys will carry interest from the date of the payment until the date of repayment, whenever repayment takes place, but will not carry interest as a judgment.—*SKINNER v. JAMES SYMPHONIC VISIBLE MEASURES, LTD.* (1927), 28 S. R. N. S. W. 20.—AUS.

#### PART VIII. SECT. 2, SUB-SECT. 3.—G.

sp. *Form of action.*]—*CLARKE v. ANDERSON* (1839), 4 Ont. Dig. 7210.—CAN.

#### PART VIII. SECT. 3.

m (n. 242) i. ————]—When a contract of sale & purchase is put an end to by the vendor on the purchaser's

**2151. Add. Annotation:—***Refd. Re Sandwell Park Colliery Co., Field v. The Co., [1929] 1 Ch. 277.*

**2153. Add. Annotation:—***As to (1) Consd. Re Sandwell Park Colliery Co., Field v. The Co., [1929] 1 Ch. 277.*

**2182. To the existing paragraph add as follows:—**  
*Semble: if time had not been of the essence, pltf. would not, in an action for recovery of deposit, have been entitled to rely on the*

*absence of any memorandum in writing of the contract.*

*Add. Citation:—*139 L. T. 22.

**2199. Add. Annotation:—***Distd. Re Belcham & Gawley's Contract, [1930] 1 Ch. 56.*

**2215. Add. Annotation:—***Folld. Flexman v. Corbett, [1930] 1 Ch. 672.*

**2220. Add. Annotation:—***Consd. Re Belcham & Gawley's Contract, [1930] 1 Ch. 56.*

default, & it is silent as to the right in that event to retain or recover back instalments of the purchase-money already paid, the purchaser can recover them from the vendor subject to the deduction of the amount of such loss as the vendor has suffered through the purchaser's failure to complete.—*STEPHENSON v. BROMLEY, [1928] 4 D. L. R. 737; [1928] 3 W. W. R. 370; 37 Man. L. R. 487.—CAN.*

*o (p. 242) i. ———.*—*HAGEN v. FERRIS (1915), 31 W. L. R. 661; 3 W. W. R. 1039.—CAN.*

*m (p. 243) i. ———.*—*Instalments of purchase money, other than the deposit payable, upon a sale of land cannot be retained or recovered by the vendor after the contract has been determined by his election to treat the purchaser's default as a discharge. In such a case the contract is determined only in so far as it is executory, & the party in default remains liable for damages for his breach; nevertheless, the contract being at an end, instalments which are prepayments on account of the price of the land become repayable at law, in the absence of a stipulation to the contrary, & equity relieves against such a stipulation. The liability of a surety for an instalment is also discharged when the contract of sale is so determined, because the principal debt to which his obligation is accessory is extinguished.—**McDONALD v. DENNIS LASCELLES, LTD., [1933] Argus L. R. 381; 7 A. L. J. 94; 48 C. L. R. 475.—AUS.*

*m (p. 243) ii. ———.*—*Repudiation by purchaser.*—Where an agreement for the sale of land is silent as to what is to become of instalments of purchase-money already paid on the cancellation of the contract, the purchaser is not entitled to recover them from the vendor where the purchaser has repudiated or voluntarily abandoned the contract.—*GREAT WEST LIFE ASS'CE CO. v. PRAIRIE DEVELOPMENTS, LTD., [1928] 3 W. W. R. 601.—CAN.*

*sr. On cancellation.—Necessity for express agreement.*—*CRONHOLM v. COLF, [1928] 3 D. L. R. 321.—CAN.*

#### PART VIII. SECT. 4, SUB-SECT. 1.

*a i. ———.*—*Failure of vendor to perform condition.—Condition to leave bond on property.*—*FREEMAN v. MAXWELL, [1928] S. C. (Ct. of Sess.) 682.—SCOT.*

#### PART VIII. SECT. 4, SUB-SECT. 3.— A. (a).

**2151 vi. ———.**—*The agreement for sale held to show an intention to sell the minerals as well as the surface; & since the vendor was unable to make title to the minerals, the purchaser was held entitled to have the vendor's action for specific performance dismissed & to succeed on his counterclaim for rescission.*—*KNIGHT SUGAR CO., LTD. v. WEBSTER, [1929] 4 D. L. R. 591; 2 W. W. R. 505; 24 Alta. L. R. 174; revid., [1930] S. C. R. 518; 4 D. L. R. 343.—CAN.*

*st. Vendor unable to give title.—Public Works Act, 1908, s. 116.*—*UJHAM v. BARDEBS, [1927] N. Z. L. R. 722.—N.Z.*

*sw. Prior sale to another purchaser.*—

J.S.

Where a vendor of land under an agreement for sale maintained in force a judgment recovered against the purchaser for the purchase-money he was held to have thereby continued the purchaser's right to pay the money, cure his default & reinstato the agreement; & where such right in the purchaser had been so continued & was existing at the time the vendor brought suit to enforce a subsequent agreement with another purchaser, deft., for the sale of the same land & deft. had repudiated his agreement promptly on discovery of said outstanding right in the first purchaser.—*Held: the vendor could not succeed, even though he was able to make title at the time of the hearing. Pltf.'s position was held not to have been improved by a clause in the agreement providing for acceptance of title by deft.*—*HARVEY v. MALANCHUK, [1931] 3 W. W. R. 596; [1932] 1 D. L. R. 407; 40 Man. L. R. 78.—CAN.*

*sx. Sale of compartments in mausoleum.—Vendor unable to give possession.*—*Action to recover the purchase-money alleged to be due under an agreement by which deft. agreed to purchase from pltf. co. two compartments in a mausoleum to be erected by said co. in the E. Cemetery. Under a prior agreement between pltf. co. & the cemetery co. the former had been given the right to erect the mausoleum on the land of the latter, & had proceeded with its construction. The agreement between pltf. & deft. purported to entitle the latter to "possession" of definitely specified portions of the building on payment of the purchase-money:—**Held: whether what pltf. agreed to sell & deft. to purchase was an interest in land, or a right in the nature of an easement, or a licence to use the compartments agreed to be sold, deft. was entitled to repudiate the contract, since pltf. under its agreement with the cemetery co., had not, & had no right to call for, such a title or right in the compartments as would permit it to grant to deft. that unrestricted "possession" which the agreement with him called for. Moreover, the cemetery co., which held the land under an agreement for sale, had not, at the time of the repudiation, any such title to the land, the use of part of which it purported to agree to give in perpetuity to pltf., & through it to the purchasers of compartments, as could be forced upon an unwilling purchaser.*—*CANADIAN MAUSOLEUMS, LTD. v. IRWIN, [1933] 1 W. W. R. 405; affd., [1933] 3 W. W. R. 224.—CAN.*

*sz. Failure of vendor to register title.*—*The neglect or refusal of a vendor under an agreement for sale to comply within a reasonable time with the purchaser's request that he register his title pursuant to sect. 27 of Land Registry Act, R. S. B. C. 1924, entitles the purchaser to repudiate the agreement & to a decree of rescission. A purchaser under an agreement for sale cannot obtain both rescission thereof & damages.*—*COX v. WHILDON, [1934] 3 W. W. R. 145; [1935] 1 D. L. R. 8; 48 B. C. R. 522.—CAN.*

#### PART VIII. SECT. 4, SUB-SECT. 3.—C.

*h i. ———.*—*Waiver.*—*WILCOX v.*

*JEWELL, [1931] 2 W. W. R. 460; 2 D. L. R. 873; 25 Alta. L. R. 464.—CAN.*

#### PART VIII. SECT. 4, SUB-SECT. 3.— D. (a).

*p. Revid., 15 Sask. L. R. 410.*

*r i. ———.*—*WALKER v. ELLIOTT, [1931] 1 D. L. R. 420; 66 O. L. R. 195.—CAN.*

#### PART VIII. SECT. 4, SUB-SECT. 3.— D. (b).

*t i. ———.*—*In certificates.—Agreement to sell land "as described in certificates."*—*MCLEAN v. STANDARD TRUSTS CO., [1931] 1 W. W. R. 442; 2 D. L. R. 463; 25 Alta. L. R. 550.—CAN.*

*t i. ———.*—*Value of crop.*—In ascertaining whether an unfounded representation by a buyer or seller is open to redress in any form, the means of knowledge of the parties must be considered. If the misrepresentation is on a subject peculiarly within the knowledge of the party making it & he relied on by the other party it may be legally cognisable, but where the facts are not only available to the other party but also he applies or is able to apply unrestricted means of inquiry, & is not induced to withhold inquiry, the alleged misrepresentation is probably no more than "dealers' talk" in which each party from his own standpoint of buyer or seller usually indulges.

A purchaser of a farm sued for rescission of the contract of sale on the ground that he had been induced to buy by the vendor's statement that the crop, which was then cut & included in the sale but not yet threshed, was worth a certain amount which, after threshing, proved to be excessive, to the extent of about two & a half times its real value. The judge, who dealt with the representation as an innocent one, decreed rescission, & deft. appealed.—*Held: because of the application of the above principle, & also because of the difficulty in finding that a representation of that kind was one which was really relied on by pltf. & went to the root of the contract, the appeal should be allowed.*—*RASCH v. HORNE, [1930] 1 W. W. R. 816; 3 D. L. R. 647; 38 Man. L. R. 600; revid., [1929] 4 D. L. R. 809; 2 W. W. R. 673.—CAN.*

#### PART VIII. SECT. 4, SUB-SECT. 3.—E.

*st. Restrictive covenant.—Disclosure of "building covenant."*—*Certain land was sold subject to a special condition that the sale was made "subject to the existing building covenant which provides (inter alia) that no building may be erected other than of brick or stone or at cost of less than £500." The building covenant later disclosed on the title further provided, "& no such building so erected shall be used or occupied for any other purpose than a private dwelling-house."—**Held: the phrase "building covenant" did not primarily denote a covenant dealing only with the construction of the building, but included a covenant dealing with its user, & therefore, there was a sufficient disclosure by the vendors.*—*SHRIMSTONE v. HEWSON (No. 3) (1929), 29 S. R. N. S. W. 377; 46 N. S. W. W. N. 93.—AUS.*

2223. *Add. Annotation*:—**Folld.** *Re Belcham & Gawley's Contract*, [1930] 1 Ch. 56.
2224. *Add. Annotation*:—**Consd.** *Re Belcham & Gawley's Contract*, [1930] 1 Ch. 56.
2227. *Add. Annotation*:—**Refd.** *Sennett v. Rendell* (1934), 79 L. Jo. 98.
2231. *Add. Annotation*:—**Refd.** *A.-G. v. Cohen*, [1936] 2 K. B. 246.
2233. *Add. Annotation*:—**Refd.** *A.-G. v. Cohen*, [1937] 1 K. B. 478.
- 2242a. ——— **Part of purchase-money & money spent on improvements.**—**CORNWALL v. WILLIAMS** (1701), Colles, 117; 1 E. R. 209, H. L.
- 2243a. ——— **Vendor—Notwithstanding right of resale.**—**Deft.** entered into an agreement to purchase certain freehold land & buildings together with the machinery, plant & utensils thereon. Clause 15 provided for completion on Aug. 31, 1933, with an option to deft. to complete earlier at a less price & "if for any reason the actual completion of the purchase is delayed beyond Aug. 31, 1933, then nevertheless on that date the purchase money . . . shall be placed on deposit . . . but the purchase shall in any event actually be completed not later than Sept. 15, 1933. . . ." Clause 16 provided:

"Should the purchaser fail to complete the said purchase in accordance with this agreement any deposit paid by the purchaser shall be forfeited to the vendors who may rescind the sale & resell the property either by public auction or private contract subject to such stipulations as they may think fit." **Deft.** failed to complete the purchase in accordance with the agreement:—**Held**: the date, Sept. 15, 1933, fixed for completion was of the essence of the contract, & as deft. had failed to complete the purchase & had made it plain that he was unable to do so **pltf.** was entitled to treat the contract as broken & to claim the damages suffered by the breach of contract.—**HAROLD WOOD BRICK CO., LTD. v. FERRIS**, [1935] 2 K. B. 198; 104 L. J. K. B. 533; 153 L. T. 241; 79 Sol. Jo. 502, C. A.

2265. *Add. Annotation*:—**Folld.** *Harold Wood Brick Co. v. Ferris* (1935), 79 L. Jo. 448.
2277. *Add. Annotation*:—**Refd.** *British Russian Gazette & Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, *Talbot v. Associated Newspapers, Ltd.*, [1935] 2 K. B. 616.
2287. *Add. Annotation*:—**Refd.** *Curtis Moffat v. Wheeler* (1929), 98 L. J. Ch. 374.
2306. *Add. Annotations*:—**Refd.** *Curtis Moffat v. Wheeler*, [1929] 2 Ch. 224; *Barnes v. Cadogan Developments, Ltd.*, [1930] 1 Ch. 479.

## Part IX.—The Conveyance.

2366. *Add. Annotation*:—**Refd.** *Bernard v. Williams* (1928), 139 L. T. 22.
2367. *Add. Annotation*:—**Refd.** *Curtis Moffat v. Wheeler*, [1929] 2 Ch. 224.

- 2379a. ——— **—.**—**Re** *DURRANT & STONER* (1881), 18 Ch. D. 106; 45 L. T. 363; 30 W. R. 37, C. A.  
*Annotations*:—**Refd.** *Re Newton's Trusts* (1882), 23 Ch. D. 181; *Miller v. Collins*, [1896] 1 Ch. 573.

### PART VIII. SECT. 7, SUB-SECT. 1.

**r i.** ——— **—.**—**A** vendor suing a purchaser in default under an agreement for the sale of land is entitled to apply for personal judgment with leave to issue execution thereon & with liberty to apply further in the event of it being found impossible to realise the amount of the judgment. This further relief may take the form of a sale of the land or rescission of the agreement, depending on what has been done under the execution issued on the judgment.—**BUCKLEY & SCHILL v. HECKERT**, [1932] 1 W. W. R. 831.—**CAN.**

### PART VIII. SECT. 7, SUB-SECT. 3.

**c i.** ——— **Sale of hotel & licence.**—**Held**: the measure of damages was the difference between the price agreed & the value of the land considered as a security for realising the deficiency in the sum contracted to be paid, less the amount of the deposit paid by the purchaser, & the net amount of the compensation received by the owner under the Licensing Act.—**SUMMERS v. COCKS**, [1928] W. A. L. R. 115.—**AUS.**

### PART VIII. SECT. 7, SUB-SECT. 4.—**A. (c).**

2335 i. *Revd.*, 10 Alta. L. R. 478.

**sv.** *Auction fees.*—**Pltf.**, at an auction of certain property, was declared the purchaser, & he thereupon paid the deposit & the auctioneer's fees, as provided by the conditions of sale. These conditions contained one in the usual form enabling the vendor to rescind the contract if the purchaser

made any objection or requisition which the vendor was unable or unwilling to remove or comply with. The sale broke down following the vendor's reply to a requisition of the purchaser, the vendor having added that if the purchaser insisted on the requisition he would rescind the contract, pursuant to the conditions of sale. This reply was, in the opinion of the Ct., neither capricious nor unreasonable. The purchaser replied stating that he insisted on his objection, & that he required the vendor to return the deposit & the auctioneer's fees. The vendor returned the deposit, but not the auctioneer's fees, & the purchaser subsequently sued the vendor for the amount of them:—**Held**: as the only way in which the purchaser could recover these fees was as damages for breach of contract, & as there had been no breach of contract on the vendor's part, the claim failed.—**M'MAHON v. GAFFNEY**, [1930] 1 R. 576.—**IR.**

**sz.** *Effect on successful financing of building project.*—There had been referred to the Exchequer Ct. of Canada a claim by claimants for damages from the Crown for its refusal to carry out an alleged contract for sale by the Crown of certain land, on which, combined with certain adjoining land, there was to be erected an office building, certain floors of which were to be leased to the Crown:—**Held**: having regard to the terms of the claim as made & the form of the reference thereof to the Exchequer Ct., & to the evidence, insufficient weight had been given, in fixing the damages, to certain factors (including the absence of a lease to a certain Govt. department, on

which proposed lease, as well as on the lease first above mentioned, the claimants had depended, as indicated in their claim) tending to affect adversely the claimants' successful financing of the project. In fixing damages, the claimants were entitled to a valuation of possibilities or probabilities which, if becoming actualities, might have led to success of their project.—**R. v. DOMINION BUILDING CORPN., LTD. & FORGIE**, [1935] S. C. R. 338; 4 D. L. R. 18.—**CAN.**

### PART IX. SECT. 1.

**sw.** *What passes by conveyance.*—Buildings erected by the owner of land or use in the making of bricks held to form part of the realty, although some of them were attached to the land by nothing but their own weight. They therefore became the property of deft. who became registered owner of the land in pursuance of the purchase thereof at a tax sale under the Assessment Act. Certain machinery in said buildings was also held part of the realty.—**MCUTCHEON v. LIGHTFOOT**, [1928] 2 W. W. R. 240.—**CAN.**

**sx.** ——— **Wire fencing & fence posts erected or completed by the deft. while he occupied land, previously rented to him, as purchaser under an instalment agreement made with the Crown held to have become part of the soil, & therefore, to have passed to the Crown when the deft. gave up the agreement & surrendered all his interest in the land to the Crown, & to have become subsequently the property of the pltf. when he purchased the land from the Crown.**—**LAROCHELLE v. MARCHAND**, [1928] 3 W. W. R. 731.—**CAN.**

2382. *Add. Annotation*:—**Refd.** General Medical Council v. I. R. Comrs., English Branch Council of General Medical Council v. Same (1928), 139 L. T. 225.

2407. *Add. Annotation*:—**Refd.** *Re* Sharman & Meade's Contract, [1936] 2 All E. R. 1547.

2409. *Add. Annotation*:—**Refd.** Hodges v. Jones, [1935] Ch. 657.

2413a. —.—.]—The draft conveyance of certain property delivered by a purchaser to a vendor identified the property by reference to a plan to be annexed to the conveyance. The vendor contended that the purchaser was not entitled to such a plan unless the purchaser paid the costs of the vendor's surveyor, which the purchaser refused to do, & he suggested that the property could be satisfactorily identified by saying that it was known by a certain number in a certain street & was bounded by other properties similarly described. The purchaser took out a summons to have the question determined:—*Held*: the duty of a vendor is to convey under a description which is a sufficient & satisfactory identification of the land sold, & in the present case identification by reference to a certain number in a certain street was a sufficient & satisfactory identification.—*Re* SHARMAN & MEADE'S CONTRACT, [1936] Ch. 755; [1936] 2 All E. R. 1547; 105 L. J. Ch. 286; 155 L. T. 277; 80 Sol. Jo. 689.

2415. *Add. Annotation*:—**Expld.** *Re* Sharman & Meade's Contract, [1936] 2 All E. R. 1547.

2419. *Add. Annotation*:—**Generally, Refd.** Golden Horseshoes (New), Ltd. v. Thurgood (1934), 150 L. T. 427.

2458. *Add* the following para.:—

The words "otherwise than by purchase for value" in the implied covenant for title were not an exception from the covenant but were part of the covenant itself, & the onus was on pltf. to prove that the dedication was made by some person through whom the vendor claimed otherwise than by purchase for value.—*STONEV. v. EASTBOURNE RURAL DISTRICT COUNCIL*, [1927] 1 Ch. 367.

2459. *Add. Annotation*:—**As to** (3) **Refd.** Blay v. Pollard & Morris, [1930] 1 K. B. 628.

2475. *Add. Annotation*:—**Refd.** Curtis Moffat v. Wheeler, [1929] 2 Ch. 224.

2475a. —.— **Consent in favour of specified nominee.**—On a sale of leaseholds by an original lessee, completion in favour of a solvent nominee of the purchaser can be enforced, unless it is shown that the sale was granted upon considerations purely personal to the purchaser, but the purchaser must join in the assignment for the purpose of guaranteeing the performance of the covenants.

Pltf. co. agreed to purchase from deft. property of which deft. was under-lessee. Her underlease contained a covenant not to assign without the under-lessor's consent, not to be withheld in the case of a responsible assignee. The under-lessor refused a licence to assign to pltf. co., but deft.'s solrs. were informed that a licence would be granted to complete in favour of a specified nominee. The licence was in fact available, but deft. never formally applied for it; & ultimately her solrs. returned the deposit paid by pltf. co., who thereupon brought this action for specific performance:—*Held*: deft. could be compelled to complete in favour of the specified nominee.

LORD CAIRNS indeed seems to have considered that, if the phrase [subject to the title being approved by our solrs.] meant what the Ct. of Appeal thought it meant, it would follow that the purchaser was at liberty through the medium of his solr. to decline the title from mere caprice; but none of the judges accepted this extreme view. It is reasonable, they thought, to imply good faith as a necessary ingredient. On the other hand, it seems to be putting an undue strain on the words to construe them, when used by a layman, as connoting not the approval of his own solr., which is their plain, ordinary meaning, but the decision of a Ct. of justice after an unknown delay & at an unascertainable cost (MAUGHAM, J.).—*CURTIS MOFFAT, LTD. v. WHEELER*, [1929] 2 Ch. 224; 98 L. J. Ch. 374; 141 L. T. 538.

*Annotation*:—**Refd.** *Canev. v. Leith*, [1937] 2 All E. R. 532.

2483. *Add. Annotation*:—**Refd.** A-G. v. Cohen, [1936] 2 K. B. 216.

2487. *Add. Annotation*:—**Refd.** *Re* Gower's Settlement, [1934] Ch. 365.

2506. *Add. Annotation*:—**Refd.** Trollope (Geo.) & Sons v. Martyn Bros., [1934] 2 K. B. 436.

#### PART IX. SECT. 5, SUB-SECT. 1.— E. (a).

**sy. Description by reference to monuments.**—[Apart from special statutory provisions, the description in a conveyance of land is to be construed by reference to the monuments on the ground.—*McDONALD v. KNUDSEN*, [1928] 3 D. L. R. 242; [1928] 2 W. W. R. 577.—**CAN.**

#### PART IX. SECT. 5, SUB-SECT. 1.— E. (c).

**sl. Fixtures—What are.**—[On the question whether a certain thing is a fixture the position of an unpaid vendor with respect to a purchaser of the land, like that of a mtgee. with respect to a mtgor., is much stronger than that of a landlord where the thing is claimed by a tenant. Since the intention with which the thing was placed upon the land is one of the main factors in determining said question the inference that the real intention was that the thing should be a per-

manent improvement of the freehold is more readily to be drawn in the case of a purchaser who placed the thing on land which he has agreed to buy or found it already there than it is in the case where the thing is placed upon the land by a tenant. The thing in question in the present case was a two-storey building with an attached lean-to, the whole resting on stones laid on the ground, there being a dirt cellar under the main building.—*PEIKOFF v. BRIGHTWELL* (No. 2), [1932] 1 W. W. R. 59; 1 D. L. R. 732; 40 Man. L. R. 124.—**CAN.**

**sm. ——— Fanning mill.**—*BANFORD v. BUCKERFIELDS, LTD.*, [1932] 2 D. L. R. 804.—**CAN.**

**sn. ——— Oil burner.**—[An oil burner although only annexed to the freehold by slight attachment to the furnace & by pipes & wires attached to the walls of the house is a fixture.—*FESS OIL BURNERS, LTD. v. MUTUAL INVESTMENTS, LTD.*, [1932] 2 D. L. R. 16; O. R. 203.—**CAN.**

#### PART IX. SECT. 7, SUB-SECT. 1.

**sp. Provision for payment by vendor.**—[A purchaser is ordinarily expected to prepare his own conveyance, but where an agreement for sale provides that it is to be prepared at the expense of the vendor, the ordinary rule does not apply.—*CONSOLIDATED PRESS, LTD. v. J. E. GIBSON*, [1933] 3 D. L. R. 61; O. R. 458.—**CAN.**

#### PART IX. SECT. 8, SUB-SECT. 3.—A.

**sz. Crop-payment plan—Conversion of crop—Liability of purchaser.**—*GROVES v. HULL* (Alta.), [1926] 2 D. L. R. 640; [1926] 1 W. W. R. 910.—**CAN.**

**sa. Agreement by purchaser to pay a certain sum & to take over a loan of specified amount—Loan of smaller amount—Subsequent agreement by purchaser to pay difference—Action for balance of purchase price.**—*LONGOBARDI v. LARKIN* (1928), 28 S. R.

**2530a. Right to give directions as to application of purchase-money — Application of Law of Property Act, 1925 (c. 20), s. 27.]—***Re WIGHT & BEST'S BREWERY CO., LTD.'S*

CONTRACT (1928), 73 Sol. Jo. 76.

**2564. Add. Annotation :—***Consd. Tsang Chuen v. Li Po Kwai*, [1932] A. C. 715.

## Part X. —Title Deeds.

**2571. Add. Annotation :—***Consd. Clayton v. Clayton*, [1930] 2 Ch. 12.

**2576. Add. Annotation :—***Refd. Clayton v. Clayton*, [1930] 2 Ch. 12.

**2588. Add. Annotation :—***Consd. Clayton v. Clayton*, [1930] 2 Ch. 12.

**2596a. Statutory acknowledgment—Purchase from administrator.]—**In view of Administration of Estates Act, 1925 (c. 23), s. 36, which provides for the indorsement, after Jan. 1,

1926, on the probate or letters of administration of notices of assents or conveyances of a legal estate by a personal representative, a purchaser of real estate can now require a vendor to include a probate or letters of administration in such statutory acknowledgment for production & delivery of copies of muniments of title as the vendor may be bound to give.—*Re MILLER & PICKERSGILL'S CONTRACT*, [1931] 1 Ch. 511; 100 L. J. Ch. 257; 144 L. T. 635.

## Part XI.—Position of Parties after Completion.

**2602. Add. Annotation :—***Consd. Re Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter*, [1933] Ch. 611.

**2605. Add. Annotation :—***Apvrd. Re Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter*, [1933] Ch. 611.

**2605a. ————.]—**Where on a sale otherwise than under a building scheme a restrictive covenant is taken, the benefit of which is not on the sale annexed to the land retained by the covenantee so as to run with it, an assign of the covenantee's retained land cannot enforce the covenant against an assign (taking with notice) of the covenantor unless he can show (i.) that the covenant was taken for the benefit of ascertainable land of the

covenantee capable of being benefited by the covenant, & (ii.) that he (the covenantee's assign) is an express assign of the benefit of the covenant. But when the covenantee has once parted with the whole of his retained land he cannot thereafter effectually assign the benefit of the covenant.—*Re UNION OF LONDON & SMITH'S BANK, LTD.'S CONVEYANCE, MILES v. EASTER*, [1933] Ch. 611; 102 L. J. Ch. 241; 149 L. T. 82, C. A.

*Annotations :—Consd. Drake v. Gray*, [1936] 1 All E. R. 363; *Refd. Re Rutherford's Conveyance, Goadby v. Bartlett*, [1938] Ch. 396.

**2608a. Covenant by vendor to cleanse cesspool—**Work carried out by local authority—Rate levied on purchaser—Liability of vendor for

N. S. W. 248; 45 N. S. W. W. N. 64.—**AUS.**

**sc. Payment by instalments—***New agreement by executors—Reduction of Settlement of Debts Act, 1936.]—SIMARD'S EXORS. v. VICTOR'S EXORS.*, [1937] 1 W. W. R. 121; 6 F. L. J. (Can.) 291. **CAN.**

**sd. ——— Default—***Exemption of action.]—*Resp. was the vendor of the land which applt. had agreed to purchase in Aug. 1927 for £200, payable by a deposit of £5 & monthly instalments of £1. The last payment was made in Oct. 1927, & the action was commenced in June 1935. The conditions of sale provided (*inter alia*) that if at the end of five years from the date of the contract any portion of the purchase-money remained unpaid it should at once become due & payable; that if default should be made in payment of any instalment the vendor might rescind the contract, sell the land, & recover any deficiency against the purchaser; or at the option of the vendor the whole of the purchase-money should immediately become due, payable & recoverable; that the vendor might, without waiving or rescinding the contract or any condition, recover any instalment of purchase-money as it became due as if such instalment were a separate debt. Time was of the essence of the contract. The vendor did nothing to indicate any intention to exercise the "option":—*Held*: on the first default

in paying an instalment, the resp. had the right to sue for the balance of the debt, & the statute then commenced to run. *FALZON v. ADELARDE DEVELOPMENT CO., LTD.*, [1936] S. A. S. R. 93. **AUS.**

**PART IX. SECT. 8, SUB-SECT. 3.—****B. (a).**

**sd. Judgment for payment by instalments—***Application for extension of time—No jurisdiction to order.]—COMMUNITY DEVELOPMENT CO., LTD. v. MYERS*, [1933] 3 W. W. R. 283.—**CAN.**

**PART IX. SECT. 8, SUB-SECT. 3.—****B. (c) i.**

**b i. ——— Effect of death of agent.]—**(1) In view of the course of dealing adopted by the parties to an agreement for the sale & purchase of land:—*Held*: a private banker, to whom the purchaser made the cash payment & the payment agreed to be deposited pending the clearing of the title, was a trustee owing duties to both parties. (2) A clear title was obtained by the banker & delivered to the purchaser, but before the vendor obtained payment from the banker of the full amount of the purchase-price deposited with him the banker died & his office closed its doors. The vendor, having failed to obtain the balance of the purchase-money, sued the purchaser therefor:—*Held*: the loss which had occurred must be borne by the vendor.—*STUFFCO v. FAHN*, [1931] 1 W. W. R.

268; 2 D. L. R. 237; 25 S. L. R. 235.—**CAN.**

**PART IX. SECT. 8, SUB-SECT. 3.—****B. (c) ii.**

**2532 i. Authority to receive purchase-money.]—**Where the vendor's solicitor appropriated the purchase-money to his own use:—*Held*: the solr. was agent for the vendor, who must bear the loss.—*CHEFFESEMAN v. COREY* (1913), 13 E. L. R. 469; 15 D. L. R. 445.—**CAN.**

**sg. Payment to solicitor by cheque—***Conversion by solicitor—Effect on right of action.]—LEWIS v. JEV*, [1934] 3 D. L. R. 228; O. R. 307.—**CAN.**

**PART IX. SECT. 8, SUB-SECT. 3.—****D. (a).**

**sb. Conveyance to trustee—***Agreement for sale by holders of equitable estate—Party entitled to purchase-money.]—*DRAPER v. RADENHURST (1892), 21 S. C. R. 714.—**CAN.**

**PART XI. SECT. 2, SUB-SECT. 1.**

**q. affd.** [1928] 3 D. L. R. 491; [1928] 2 W. W. R. 307; 23 Alta. L. R. 474.—**CAN.**

**sc. Covenant against assignment—***Waiver.]—PEIKOFF v. PAISNER, BRIGHTWELL v. PEIKOFF*, [1929] 4 D. L. R. 1077; 1 W. W. R. 931; 38 Man. L. R. 151.—**CAN.**

reimbursement.]—MUSSETT v. STANDEN (1935), 79 Sol. Jo. 816.

2614. *Add. Annotation*:—**Refd.** Grant v. Edmondson (1930), 143 L. T. 749.

2615. *Add. Annotation*:—**Consd.** Grant v. Edmondson, [1931] 1 Ch. 1.

2617. *Add. Annotation*:—**Generally**, **Refd.** *Re* Rutherford's Conveyance, Goadby v. Bartlett, [1938] Ch. 396.

2618. *Add. Annotation*:—**Consd.** Grant v. Edmondson, [1931] 1 Ch. 1.

2623a. **Covenant for joint user of cistern—Construction.**]—HEY v. APPELYARD (1855), 24 L. T. O. S. 310.

2625. *Add. Annotation*:—**Consd.** *Re* Belcham & Gawley's Contract, [1930] 1 Ch. 56.

2626. *Add. Annotations*:—**Consd.** *Re* Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter, [1933] Ch. 611. **Refd.** *Clare v. Theatrical Properties, Ltd., & Westby & Co.*, [1936] 3 All E. R. 483; *Re* Rutherford's Conveyance, Goadby v. Bartlett, [1938] Ch. 396.

2633. *Add. Annotation*:—**Refd.** Hodges v. Jones, [1935] Ch. 657.

2633a. ——— **Covenant by purchaser with himself & others—Effect of Law of Property Act, 1925 (c. 20), s. 82.**]—In 1904, three persons, B., H. & S., were the tenants in common in fee simple of certain land intended to be laid out in plots as a building estate. After several sales had taken place, the remainder of the land was in 1906 offered for sale by auction subject to certain stipulations, one of which was that every purchaser should covenant with the vendors, & so that every person for the time being entitled to any estate in the lands should have a right to the observance of such stipulations so far as they related to the covenantors' property or plot or plots as follows, namely (*inter alia*), that not more than two dwelling-houses should be erected on any one plot. None of the property was sold at this auction, but in Feb. 1907, B., H. & S. (the vendors) sold to one of themselves, namely, B., Lots 23, 24 & 25, & 45 to 51 inclusive. These lots were conveyed by two separate conveyances each dated Feb. 20, 1907. The *habendum* in each conveyance to B. was in each case to be, "subject nevertheless to the . . . covenants by the purchaser (*i.e.*, B.) hereinafter contained." These were in each case as follows: "The purchaser . . . doth hereby for himself . . . covenant with the vendors . . . (owners for the time being of any of the lands now or formerly part of the vendors' estate of which the said hereditaments form part & so that every person for the time being entitled to any estate in any such lands shall have a right to the observance & fulfilment of the stipulations in Part II. of the second schedule so far as they relate to the said hereditaments . . . hereby granted) that the stipulations last aforesaid shall be observed so far as they relate to the hereditaments last aforesaid." This Part II. contained

(*inter alia*) the covenant referred to as one of the stipulations in the above-mentioned conditions of sale. In July, 1907, B., H. & S. sold to pltf. part of the property offered for sale by auction in 1906, namely, Lot 26 & part of Lot 27. Pltf. covenanted with the vendors to perform & observe certain stipulations therein set out which were (*inter alia*) similar to those in the particulars & conditions above referred to in the abortive sale by auction in 1906. Further lots were subsequently sold by B., H. & S. to various purchasers. In 1933, B. agreed to sell part of Lot 25 (the remainder having been previously disposed of) to deft., & the land was duly conveyed without any reference to the stipulations sought to be imposed by the conveyance to B. in Feb. 1907. Deft. having commenced to erect four houses on his plot of land, pltf. began an action for an injunction to prevent him from erecting more than two houses, & for damages:—**Held**: (1) on the question whether a building scheme existed when pltf. purchased his land in July, 1907, & if so, to what land it related; as regards the covenants contained in the conveyance by B., H. & S. to B. alone in Feb. 1907, although they were in form with B., H. & S. jointly, & although each of the covenantors had at that time a separate interest in the land retained, it was not possible to treat them as joint & several, & they were therefore void & unenforceable at the time they were entered into. It followed therefore that no restrictive covenants were in existence relating to any part of the land offered at the 1906 auction at the date when pltf. purchased his plots in July, 1907; & as no subsequent covenants were entered into, no building scheme ever therefore came into existence; (2) there was nothing in Law of Property Act, 1925 (c. 20), s. 82, which would enable the ct. to hold that what was insufficient to create a scheme in 1907 must by virtue of the sect. be deemed from Jan. 1, 1926, to have constituted a building scheme as from the earlier date or any intermediate date. The action therefore failed.—**RIDLEY v. LEE**, [1935] Ch. 591; 104 L. J. Ch. 304; 153 L. T. 437; 51 T. L. R. 364; 79 Sol. Jo. 382.

2641. *Add. Annotation*:—**Refd.** Ridley v. Lee, [1935] Ch. 591.

2645. *Add. Annotation*:—**Refd.** Hodges v. Jones, [1935] Ch. 657.

2646. *Add. Annotations*:—**Refd.** *Chatsworth Estates Co. v. Fewell*, [1931] 1 Ch. 224; *Ridley v. Lee*, [1935] Ch. 591; *White v. Bijou Mansions, Ltd.*, [1938] Ch. 351.

2658a. **Separate covenant with assignees of vendor—Owners of adjacent land—Enforcement by successors.**]—By a conveyance dated Apr. 21, 1887, & made between the Ecclesiastical Comrs. for England of the one part & one H. G. G. of the other part, a freehold house & land known as "W. 11. House" were conveyed to H. G. G. By the conveyance H. G. G. for himself & his assigns & to the intent & so as to bind not only himself

restrictions, it has no jurisdiction to set aside or vary a judgment of the ct. giving effect to such a restriction.—**RUMBLE v. ROWLIN**, [1935] 1 W. W. R. 237; 2 D. L. R. 402; 43 Man. L. R. 116—CAN.

#### PART XI. SECT. 2, SUB-SECT. 3.—B.

n 1. — *Covenant for supply of water.*]—**ROSAMUND v. FORGIE** (1871), 18 Gr. 370.—CAN.

#### PART XI. SECT. 2, SUB-SECT. 4.—A.

n 1. *Jurisdiction of Municipal & Public Utility Board.*]—Although the Municipal & Public Utility Board is empowered to vary or vacate building

... but also all future owners & tenants of the said land thereby conveyed or any part thereof & so that the obligations, provisions & restrictions thereafter expressed & contained might run with & bind the said land every part thereof into whosoever hands the same might come covenanted with the Ecclesiastical Comrs. & their successors & also as a separate covenant with their assigns owners for the time being of the lands adjoining or adjacent to the said land thereby conveyed to observe & perform a number of restrictive covenants. There was no building scheme affecting W. H. House or the surrounding land. There were several other plots of freehold land & houses adjoining or near to W. H. House which had been conveyed by the original vendors, the Ecclesiastical Comrs., to various purchasers before the date of the conveyance of Apr. 21, 1887, & had subsequently been assigned by those purchasers. The estate owners of W. H. House & land took out an originating summons for a declaration that the said house & land were no longer subject to any of the restrictive covenants contained in the 1887 conveyance, or in the alternative that it might be determined whether the said restrictive covenants or any & which of them were enforceable, & if so by whom. Resps. included the successors in title to some of the houses & land which had been sold by the Ecclesiastical Comrs. before the date of the deed of Apr. 21, 1887. Some of these adjoined W. H. House & land & others were near but not actually adjoining thereto:—*Held*: on the true construction of the covenant, the land referred to as “adjacent” included certain plots of land near to but not adjoining W. H. House, & the original covenantees who were purchasers of the land so held to be adjoining or adjacent to W. H. House & the present owners of such land were entitled to enforce the covenants, although the original covenantees were not parties to the conveyance of Apr. 21, 1887.—*Re ECCLESIASTICAL COMRS. FOR ENGLAND’S CONVEYANCE*, [1936] Ch. 430; 105 L. J. Ch. 168; 155 L. T. 281.

*Annotation*:—*Refd.* *White v. Bijou Mansions, Ltd.*, [1937] 3 All E. R. 269.

**2658b. Reference to restrictions in parcels—No covenant.**—By a contract of sale made in Apr. 1920, R., the owner of an estate then partly freehold but mainly copyhold, contracted to sell it to D. for £9,000, of which £3,000 was to be paid by June 25, 1920, & the balance on June 30, 1925. In July, 1925, before this purchase had been completed, D. agreed to sell part of the land to G., subject to certain restrictions set out in the sched. to the contract. On Nov. 27, 1925, in pursuance of this contract R. at the request of D. conveyed the land, which was enfranchised copyhold, to G. in fee subject to these restrictions. The conveyance contained no covenant by any party to observe the restrictions, & was not executed by G. By a subsequent deed of the same date R. conveyed the remainder of the land to D. without mention of any restrictive covenants. In 1927 D. conveyed the bulk of the land vested in him, which included a house & grounds known as Boxdale, to G. A. B. in fee, & by a deed of 1935 G. A. B. conveyed the same to deft. in fee, & each of those convey-

ances contained the words in the parcels “together with the benefit of the covenants, restrictions and stipulations contained in or imposed by the deeds specified in Part I. of the Sched. hereto,” which included the above-mentioned deed of 1925. The vendor R. having died in Dec. 1927, by a deed of Nov. 1937, his legal personal representative purported to assign to deft. the full benefit & the fee simple of all the covenants, restrictions & stipulations contained in or to be implied from the conveyance of Nov. 27, 1925:—*Held*: (1) the equitable obligation which rested upon G. in respect of the land conveyed to him was not a covenant the benefit of which D. could assign to a successor in title; (2) there was no certainty as to the parties to any covenant or agreement implied by the restrictions, or as to the land intended to be thereby benefited; (3) R. having parted with the whole of the land subject to the burden, or entitled to the benefit of such a covenant, in 1925, his legal personal representative had nothing which he could effectively assign in 1937. Therefore G. was entitled to a declaration under Law of Property Act, 1925 (c. 20), s. 84 (2), that the land conveyed to him in 1925 was not subject to any of the restrictions contained in the sched. of the conveyance to him.—*Re RUTHERFORD’S CONVEYANCE, GOADBY v. BARTLETT*, [1938] Ch. 396; [1938] 1 All E. R. 495; 158 L. T. 405; 54 T. L. R. 429; 82 Sol. Jo. 195.

**2661. Add. Annotation**:—*Refd.* *Hodges v. Jones*, [1935] Ch. 657.

**2664. Add. Annotations**:—*As to* (1) *Folld. Re Sunnyfield*, [1932] 1 Ch. 79. *Consd. Re Union of London & Smith’s Bank, Ltd. Conveyance, Miles v. Easter*, [1933] Ch. 611. *Distd. Re Ballard’s Conveyance*, [1937] Ch. 473. *As to* (2) *Refd.* *Drake v. Gray* (1936), 155 L. T. 115; *Zetland (Marquess) & Zetland Estates Co. v. Driver*, [1937] 3 All E. R. 795.

**2665. Add. Annotation**:—*As to* (2) *Folld. Re Sunnyfield*, [1932] 1 Ch. 79.

**2665a. — Of part of land retained.**—In a deed by which certain lands held by trustee on trust for sale were partitioned among the beneficiaries the trustees “for themselves & their assigns to the intent & so that the covenants hereinafter contained shall be binding on the lands & premises hereby assured into whosoever hands the same may come . . . covenant with the respective parties . . . & other the owners or owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid & not hereby assured that the trustees their heirs & assigns will at all times hereafter perform & observe the restrictions & stipulations set out in the said sched. hereto so far as they concern the lands hereby assured.” One of the restrictions as set out in the sched. prohibited the erection on any plot of a house of less than a defined cubical content. Pltf. purchased a strip of one portion of the partitioned land, & deft. purchased a strip of another portion. Deft. having erected a house on the land purchased by her of less than the defined cubical content, pltf. claimed a declaration that he was entitled to enforce the restrictive covenant against her:—*Held*: the words “the owners or



owner for the time being of the remaining hereditaments so agreed to be partitioned as aforesaid" showed a clear intention to annex the covenant to each & every portion of the partitioned land; the benefit of the covenant ran with each & every part of the land; & therefore pltf. was entitled to the declaration claimed & to an injunction restraining any further breach.—*DRAKE v. GRAY*, [1936] Ch. 451; [1936] 1 All E. R. 363; 105 L. J. Ch. 233; 155 L. T. 145, C. A.

**2665b.** ———.]—A conveyance of shop premises, being a small portion of a large area of settled land, contained the following covenant: "The purchaser to the intent & so as to bind so far as practicable the property hereby conveyed into whosoever hands the same may come & to benefit & protect such part or parts of the lands now subject to the settlement (a) as shall for the time being remain unsold or (b) as shall be sold by the vendor or his successors in title with the express benefit of this covenant covenants with the vendor that the purchaser will at all times observe . . ." in particular that "no act or thing shall be done or permitted on the said land which in the opinion of the vendor may be a public or private nuisance or prejudicial or detrimental to the vendor & the owners or occupiers of any adjoining property or to the neighbourhood." The vendor having died, the first pltf. succeeded as tenant in tail in possession under the settlement. The first pltf. then conveyed the premises in fee to deft., who, having notice of the covenant entered into by his predecessor in title, used the premises for the purpose of a fried-fish shop. Pltfs. now sought to enforce the covenant, alleging it to have been broken by such user:—*Held*: (1) in forming his opinion as to whether the act complained of was a nuisance or prejudicial to himself or the owners or occupiers of adjoining property or the neighbourhood, the first pltf. was in no sense performing a judicial or quasi-judicial act, & was under no obligation to give the defts. an opportunity of being heard; (2) the act complained of must be detrimental to the unsold land of the vendor, & it is not sufficient that it should be detrimental to an adjoining owner or the neighbourhood; (3) the rule against perpetuities in no way applied to this covenant; (4) distinguishing *Re Ballard's Conveyance*, [1937] Ch. 473; Digest Supp., the covenant here was enforceable, since it

was expressed to be for the benefit of the whole or any part or parts of the unsold settled property, & not for that of the whole estate.—*ZETLAND & ZETLAND ESTATES CO. v. DRIVER*, [1938] 2 All E. R. 158; 107 L. J. Ch. 316; 158 L. T. 456; 54 T. L. R. 594; 82 Sol. Jo. 293, C. A.

*Annotation*:—*Generally*. *Re Heywood's Conveyance*, Cheshire Lines Committee v. Liverpool Corp., [1938] 2 All E. R. 230.

**2667.** *Add. Annotations*:—*Consd. Re Union of London & Smith's Bank, Ltd. Conveyance*, Miles v. Easter, [1933] Ch. 611; Clore v. Theatrical Properties, Ltd., & Westby & Co., [1936] 3 All E. R. 483. *Refd.* Grant v. Edmondson (1930), 143 L. T. 749; Leney (Alfred) & Co. v. Whelan (1936), 20 Tax Cas. 321.

**2674.** *Add. Annotation*:—*Consd.* White v. Bijou Mansions, Ltd., [1938] Ch. 351.

**2675a.** ——— *Must concern whole land.*]—Where a restrictive covenant purports to have been annexed to land so as to run with it, & does not in fact "concern or touch" the whole of the land, the annexation is ineffective, & the covenant does not run with the land & cannot be enforced by any owner of the land other than the covenantee. Even if there is some part of the land which the covenant does "concern or touch," the ct. will not sever it & treat it as annexed to that part.—*Re BALLARD'S CONVEYANCE*, [1937] Ch. 473; [1937] 2 All E. R. 691; 106 L. J. Ch. 273; 157 L. T. 281; 53 T. L. R. 793; 81 Sol. Jo. 458.

*Annotation*:—*Distd.* Zetland (Marquess) & Zetland Estates Co. v. Driver, [1938] 2 All E. R. 158.

**2683a.** ———.]—*STEVENS v. WILLING & CO., LTD.* (1929), 167 L. T. Jo. 178; 67 L. Jo. 223; [1929] W. N. 53.

**2683b.** ——— *Coal-shed.*]—Certain property was sold subject to a restrictive covenant which provided that the owner for the time being would not at any time erect any building on a certain part of the property. There was a coal-shed, a wooden structure on a concrete foundation, on part of the premises not subject to the covenant. The owner of the land had this shed carried to the part of the premises subject to the covenant, where it stood directly on the ground without any foundations:—*Held*: the owner had not erected a building within the covenant.—*GARDINER v. WALSH*, [1936] 3 All E. R. 870; 81 Sol. Jo. 35.

#### PART XI. SECT. 2, SUB-SECT. 4.—B.

**2666 viii.** ———.]—*WANEK v. THOLS*, [1928] 2 D. L. R. 793; [1928] 1 W. W. R. 903.—*CAN.*

**2666 ix.** ———.]—A provision in an agreement for the sale of land that no assignment thereof by the purchaser shall be valid unless the purchaser's entire interest & unless approved by the vendor in writing, is binding on any one who claims against the vendor through the purchaser; & a person who, without the vendor's knowledge, has entered into an agreement with the purchaser which does not satisfy said requirements cannot acquire thereunder any right against the vendor which will affect prejudicially the vendor's rights under his contract, or in the land covered by that contract; & therefore, he cannot maintain a *caveat* against the vendor.—*MCAVOY v. ROYAL BANK OF CANADA & INTERIOR TRUST CO.*, [1933] 3 W. W. R. 433.—*CAN.*

#### PART XI. SECT. 2, SUB-SECT. 4.—C. (a) i.

**d i.** ——— *"Sunroom"*.—*Whether verandah or porch.*]—*Re CAMPBELL & COWDY*, [1928] 1 D. L. R. 1034; 61 O. L. R. 545.—*CAN.*

**d ii.** ——— *"Duplex house"*.—*Whether detached residence.*]—*Re TORONTO GENERAL TRUSTS CORPN. & CROWLEY*, [1928] 4 D. L. R. 609; 62 O. L. R. 593.—*CAN.*

#### PART XI. SECT. 2, SUB-SECT. 4.—C. (a) ii.

**sz.** *Covenant to erect "house"*.—*Garage.*]—Pltf. & another sold certain property to deft. subject to the condition that deft. erect a house of certain value thereon which would not be within less than six feet from the west side of the lot so sold:—*Held*: the word "house" as so used included the ordinary outbuildings, & therefore, pltf. was entitled to an injunction

restraining deft. from proceeding with the building of a garage.—*MILLIKEN v. YOUNG*, [1928] 3 W. W. R. 547; on appeal, [1929] 3 D. L. R. 64; 1 W. W. R. 213; 23 S. L. R. 370.—*CAN.*

**sd.** *Covenant to build only double-fronted house—Double-fronted villa containing two dwellings.*]—A restrictive covenant attached to certain land prevented the erection on the land of any buildings "except a double-fronted house with out-buildings for residential purposes." It was proposed to erect on the land a double-fronted villa, consisting of two dwellings under the same roof, separated vertically by a dividing wall which afforded no means of communication between the two dwellings, each dwelling being self-contained & having a separate means of entrance:—*Held*: the erection of the building would not constitute a breach of covenant.—*MUNNA v. WATSON*, [1937] V. L. R. 178; 43 Argus L. R. 235.—*AUS.*

- 2686.** *Add. Annotations:—Folld. Re Sunnyfield*, [1932] 1 Ch. 79. *Consd. Re Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter*, [1933] Ch. 611; *Drake v. Gray*, [1936] 1 All E. R. 363. *Refd. Leney (Alfred) & Co. v. Whelan* (1936), 20 Tax Cas. 321.
- 2697.** *Add. Annotation:—Refd. A.-G. v. Poole Corpn.*, [1938] Ch. 23.
- 2698.** *Add. Annotation:—Consd. Sunderland & South Shields Water Co. v. Hilton* (1928), 97 L. J. K. B. 516.
- 2700.** *Add. Annotations:—Distsd. Sunderland & South Shields Water Co. v. Hilton* (1928), 97 L. J. K. B. 516. *Refd. Towle v. Improved Industrial Dwellings Co.*, [1931] 1 K. B. 263.
- 2701a.** *Covenant against building bungalow—Meaning of "bungalow."*—A conveyance contained a covenant by the purchaser "not to erect more than one bungalow" on the piece of land conveyed:—*Held*: a bungalow was a building of which the walls, with the exception of any gables, were no higher than the ground floor, & of which the roof started at a point substantially not higher than the top of the wall of the ground floor, & that it was immaterial in what way the space in the roof of the building so constructed was used.—*WARD v. PATERSON*, [1929] 2 Ch. 396; 45 T. L. R. 519; 98 L. J. Ch. 446; 111 L. T. 683.
- 2703.** *Add. Annotation:—Refd. Hodges v. Jones*, [1935] Ch. 657.
- 2705a.** —.—|—Pltf. & deft. both derived title to their respective properties from a common predecessor who on his own purchase of both properties in 1876 had covenanted with his vendors not to erect any dwelling-house at a less cost price than £1,200. In 1927 deft. built houses at prices exceeding these amounts, but these houses, owing to the great increase of building prices since 1876, were not of the type indicated by the prices of that date. Pltf. sued for an injunction:—*Held*: even if pltf. had been entitled to enforce the 1876 covenants against deft., failing allegation & proof of a building scheme at that date, he could not do so, deft. had not in fact broken those covenants, which, on construction, related to the building prices ruling at the time the houses were actually erected.—*GRANT v. DERWENT*, [1928] Ch. 902; 97 L. J. Ch. 434; 73 Sol. Jo. 59; 27 L. G. R. 139; *affd. on other grounds*, [1929] 1 Ch. 390, C. A.
- 2711.** *Add. Annotation:—Refd. White v. Bijou Mansions, Ltd.*, [1937] 3 All E. R. 269.
- 2722.** *Add. Annotation:—Distsd. Re Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter*, [1933] Ch. 611.
- 2724a.** —.— *Jobbing builder.*—Pltf. & deft. occupied adjoining houses included within a building scheme, & the restrictions were enforceable by either of them against the other. The material restriction was that on no lot should any building be erected as a shop, warehouse or factory, or any trade or manufacture be carried on or any operative machinery be fixed or placed. Deft. was a jobbing builder, & placed ladders, planks, sand & such like against the side wall of pltf.'s house. At the rear of the house, deft. had erected a shed touching, or nearly touching, pltf.'s garden wall. In front of the shed was a lean-to sloping away from pltf.'s wall. It was closed on one side by the fact that it joined the shed, but was otherwise open. This was used as a store for builders' fittings. Pltf. brought this action alleging a technical trespass, damage by damp through the pointing being injured by these articles, & breach of the restrictive covenant by the erection of a warehouse & the carrying on of a trade. Deft. alleged that the covenant was no longer binding, owing to change of the neighbourhood:—*Held*: (1) the placing of the ladders & other articles against the wall was a technical trespass which had damaged the pointing, & pltf. was entitled to the cost of repointing the wall; (2) the shed & lean-to did not constitute a warehouse; (3) deft. was carrying on a trade within the meaning of the covenant, as the business of a jobbing builder involved the buying & selling of materials, & pltf. was entitled to an injunction; (4) the neighbourhood, being still mainly residential, had not suffered such a change as would release the covenant.—*WESTRIPP v. BALDOCK*, [1938] 2 All E. R. 779; 159 L. T. 65; 82 Sol. Jo. 617.
- 2728.** *Add. Annotation:—As to (3) Distsd. Re Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter*, [1933] Ch. 611.
- 2751.** *Add. Annotation:—Consd. Grant v. Edmondson*, [1931] 1 Ch. 1.
- 2757.** *Add. Annotations:—Consd. Southwark Revenue Officer v. Hoe (R.) & Co.* (1930), 143 L. T. 544. *Refd. Shaw v. Public Trustee* (1929), 141 L. T. 465; *New Plymouth Borough Council v. Taranaki Electric Power Board*, [1933] A. C. 680.

PART XI. SECT. 2, SUB-SECT. 4.—  
C. (a) iii.

**2698 i.** *What constitutes breach—Restriction to single dwelling—Block of flats.*—A building two storeys in height & structurally divided into eight self-contained flats, with a carriage-way or passage in the middle of the building, & a roof as one constructional unit over all, & having the entrances to all the flats contained in a common portico, constitutes more than "one house" within the meaning of a covenant not to erect more than one house.—*Ex p. HIGH STANDARD CONSTRUCTIONS, LTD.* (1928), 29 S. R. N. S. W. 274; 46 N. S. W. N. 75.—AUS.

**2698 ii.** —.—|—The owners of a suburban property laid out the lands for sale in lots according to a plan of subdivision. Lots were sold at different times. Each pur-

chaser covenanted with the vendors that he would not build on any one lot more than one house or dwelling. The owner of one of the lots, who was the successor in title of the original purchaser & had taken with notice of the covenant, proposed to erect a building comprising four residential flats intended for occupation by separate households. Pltfs., who owned two other lots & were successors in title to the original purchaser, sought an injunction:—*Held*: the erection of the building would constitute a breach of the covenant, & the pltfs. were entitled to enforce the restriction.—*COBBOLD v. ABRAHAM*, [1933] V. L. R. 385; A. L. J. 531.—AUS.

**2698 iii.** —.—|—Where the lots in a certain township had all been sold subject to the condition (*inter alia*) that "the said lot is sold for residential purposes only & the

purchaser shall have no right to subdivide or transfer any portion of the lot aforesaid, but on the contrary shall only have the right to erect one residence with the necessary out-buildings & accessories on the said lot":—*Held*: the erection of a block of flats upon a lot was prohibited by the condition.—*TRANSVAAL CONSOLIDATED LAND & EXPLORATION CO., LTD. v. BLACK*, [1929] A. D. 454.—S. AF.

PART XI. SECT. 2, SUB-SECT. 4.—  
C. (a) iv.

**n i.** —.—|—*Re EGLINTON & BEDFORD PARK PRESBYTERIAN CHURCH*, [1928] 1 D. L. R. 354; 61 O. L. R. 430.—CAN.

PART XI. SECT. 2, SUB-SECT. 4.—  
C. (a) v.

**p.** *Revd.*, [1930] 3 W. W. R. 185.

**2764. Add. Annotation :—***Refd.* *Foley v. Classique Coaches, Ltd.*, [1934] 2 K. B. 1.

**2764a. Agreement for exclusive right to supply petrol—Whether in restraint of trade.**—By an agreement in writing *pltf.* agreed to sell & *defts.* to purchase a piece of land, adjoining other land belonging to *pltf.*, which *defts.* intended to use for their business as motor coach proprietors. The sale was made subject to *defts.* entering into another agreement to purchase from *pltf.* all the petrol required for their said business. On the same date that second agreement, described as supplemental to the first, was executed, which, after reciting that *pltf.* was the proprietor of a petrol-filling station on the land retained by him, provided that *defts.* would purchase from him all the petrol required by them for the running of their said business, "at a price to be agreed by the parties in writing & from time to time"; & further, that *defts.* would purchase no petrol from any other person so long as *pltf.* was able to supply them with quantities sufficient to satisfy their daily requirements. Clause 8 was in these terms: "If any dispute or difference shall arise on the subject-matter or construction of this agreement the same shall be submitted to arbitration in the usual way in accordance with the provisions of *Arbn. Act*, 1889." The land, the subject of the first agreement, was duly conveyed to *defts.*, & for three years *defts.* obtained their petrol from *pltf.* Thereafter disputes arose between them, & thereupon *defts.* purported to repudiate the second agreement, alleging that it had no binding force because (a) no agreement in writing as to price had ever been made, & (b) the clause requiring *defts.* to take all their petrol supplies from *pltf.* was an unreasonable & unnecessary restraint of their trade. In an action by *pltf.* claiming a declaration that the petrol agreement was valid & binding, & an injunction to restrain *defts.* from purchasing petrol required for their said business from any person other than *pltf.*:—*Held*: (1) a term must be implied in the agreement that the petrol supplied by *pltf.* should be of reasonable quality & sold at a reasonable price, & that if any dispute arose as to what was a reasonable price it was to be determined by *arbn.* pursuant to clause 8; (2) inasmuch as *defts.* were only required to purchase petrol from *pltf.* for the purpose of the business carried on by them on the land purchased from *pltf.*, & so long only as it was supplied of a reasonable quality & at a reasonable price, the obligation was not an unreasonable & unnecessary restraint of their trade; & (3) the agreement therefore was valid & binding on *defts.*—*FOLEY v. CLASSIQUE COACHES, LTD.*, [1934] 2 K. B. 1; 103 L. J. K. B. 550; 151 L. T. 242, C. A.

*Annotation :—As to (1) Refd.* *British Homophone, Ltd. v. Kunz & Crystallite Gramophone Record Manufacturing Co.* (1935), 152 L. T. 589.

**2776. Add. Annotation :—***Apld.* *Coplovitch v. Williams* (1929), 73 Sol. Jo. 484.

**2779. Add. Annotation :—***Refd.* *Grant v. Derwent*, [1928] Ch. 902.

**2780. Add. Annotations :—***As to (1) Refd.* *Zetland (Marquess) & Zetland Estates Co. v. Driver*, [1938] 2 All E. R. 158. *Generally, Refd.* *Re Ballard's Conveyance*, [1937] Ch. 473.

**2785a. —.**—In an action to enforce restrictive covenants against a purchaser with notice, bound only in equity, the *deft.* relied on two equitable defences, namely: (a) A general change in the character of the neighbourhood; (b) An allegation that this change was brought about by the acts or omissions of the *pltf.* or their predecessors:—*Held*: (1) in order to succeed on the first ground *deft.* must show so complete a change in the character of the neighbourhood as to render the covenants valueless to *pltf.*, so that an action to enforce them would be unmeritorious, not *bona fide*, & merely brought for some ulterior purpose; (2) in order to succeed on the second ground *deft.* must make out a sort of estoppel by showing that *pltf.*' acts & omissions were such as to justify a reasonable person in believing that the covenants were no longer enforceable. (3) In order to keep their estate purely residential *pltf.*' predecessors had imposed covenants preventing any house being used "otherwise than as a private dwelling-house." They or *pltf.* had, however, licensed a number of schools, some blocks of flats, a hotel, & in certain exceptional circumstances, three boarding houses, & without *pltf.*' knowledge about half a dozen other boarding houses were being carried on in the area, which, however, still remained mainly residential:—*Held*: these acts & omissions did not prevent the *pltf.* from restraining *deft.* from using his house as a guest house.—*CHATSWORTH ESTATES CO. v. FEWELL*, [1931] 1 Ch. 224; 100 L. J. Ch. 52; 144 L. T. 302.

*Annotation :—As to (1) & (2) Consd.* *Westripp v. Baldock*, [1938] 2 All E. R. 779.

**2807a. Action to enforce restrictive covenant—What included—Exercise of power of re-entry of leasehold premises.**—An action by a reversioner to recover possession of leasehold land, under a power of re-entry, for breach of a restrictive covenant contained in the lease is not a "proceeding by action . . . to enforce a restrictive covenant" within *Law of Property Act*, 1925 (c. 20), s. 84 (9). The *ct.* therefore will not stay such an action to enable the *deft.* to apply to the authority referred to in the section for an order modifying or discharging the restriction which is the subject of the action.—*IVEAGH v. HARRIS*, [1929] 2 Ch. 112; 98 L. J. Ch. 280; 141 L. T. 508; 45 T. L. R. 319.

**2807b. Application to Court—When discretion exercised.**—Where a conveyance of land never the subject of a building scheme contains restrictive covenants not expressed to be for the benefit of adjacent property or of a defined area & never passing by an

**PART XI. SECT. 2, SUB-SECT. 4.—C. (e).**

*sw.* *Property purchased for use in connection with store—No obligation to build store.*—A covenant "that said property is being purchased for use in

connection with a departmental store site" creates no obligation to build such store. The covenant relates only to user.—*CHRISTALL & RONA BUILDING, LTD. v. T. EATON CO.*, [1937] 3 D. L. R. 700; 7 F. L. J. (Can.) 84.—CAN.

**PART XI. SECT. 2, SUB-SECT. 4.—D. (a).**

*sa.* *Notice under Property Law Act*, 1908, s. 94.—*MCCONNELL v. MCCORMICK*, [1929] N. Z. L. R. 560.—N.Z.

assignment under which they can be enforced, the ct. in the exercise of its discretion under Law of Property Act, 1925 (c. 20), s. 84, & Land Registration Act, 1925 (c. 21), s. 82, may declare them no longer effective.

Appct. was the freeholder of premises which a predecessor in title, on buying them from the Ecclesiastical Comrs. had covenanted for himself, his heirs & assigns, to use not otherwise than as a private residence & not for any purpose which, in the opinion of the surveyor for the time being of the Comrs. might be or become injurious to the adjacent property of the Comrs. their successors or assigns. These restrictions were entered in the Charges Register at the Land Registry. Appct., unable to sell the premises as a private residence, negotiated with persons willing to buy them if the restrictions could be proved no longer effective. So far as could be ascertained, the premises had never been the subject of a building scheme: the Comrs. no longer owned any property in the immediate neighbourhood; & neither they nor their successors in title to properties adjacent to the premises claimed the right to enforce the restrictions. On a summons for a declaration, under sect. 84 (2) of Law of Property Act, 1925 (c. 20), that no part of the premises was any longer affected by any of the restrictions, & for the cancellation of the entry of the restrictions in the Charges Register:—*Held*: as there had never been a building scheme, & as the restrictions had never been expressly assigned or expressed to be for the benefit of adjacent property of the Comrs. or of any defined area near the premises, there was no one who could enforce the restrictions, which therefore no longer affected the premises.—*Re SUNNYFIELD*, [1932] 1 Ch. 79; 101 L. J. Ch. 55; 146 L. T. 206.

*Annotation*.—*Refd.* *Re Ecclesiastical Comrs. for England's Conveyance*, *Re* Law of Property Act, 1925, [1936] Ch. 430.

**2807c. Application to arbitrator—Dismissal—Appeal.**—Where an application under Law of Property Act, 1925 (c. 20), s. 84, for the discharge or modification of a restriction affecting the user of a house has been dismissed by the Official Arbitrator the appct. has no right of appeal to the Ch. Div. under sect. 84 (5).—*Re LANCASTER GATE* (No. 108) & LAW OF PROPERTY ACT, 1925, APPLICATION FOR DISCHARGE OF RESTRICTION, [1933] Ch. 419; 102 L. J. Ch. 206; 149 L. T. 14.

**2807d. — What arbitrator may consider—Where no application to court.**—A co. acquired a house which was one of several subject to covenants against use (*inter alia*) for manufacturing, business or professional purposes, or otherwise than as a private residence, demolished it, & replaced it by a building containing flats. The owner of

another of the houses, wishing to do likewise, applied for discharge of the covenants, & was granted modification of them on condition of paying compensation to the adjoining owners. Thereupon the owners of the houses adjoining the co.'s building threatened to bring an action on the covenants, & the co., more than a year after the beginning of its building operations, applied to an arbitrator under Law of Property Act, 1925 (c. 20), s. 84. The arbitrator awarded modification of the covenants on condition that the co. paid £200 to each adjoining owner. On appeal by the co. against the condition:—*Held*: (1) delay by the adjoining owners in taking action did not wipe out the loss inflicted on them by the modification of the covenants, & the condition was proper; (2) the evidence disclosed no defence to an action on the covenants, & the ct. could not hold either that the adjoining owners had lost their rights on the covenants, or that the arbitrator was wrong in holding that they had not lost them.

*Semble*: where, on proceedings under sect. 81, a question of law arises whether persons objecting to the discharge or modification of covenants have lost their right to enforce the covenants, the arbitrator ought either to require that the question be adjourned to the ct., or to adopt the alternative course of making his award conditional upon the objectors establishing their right to sue, the compensation to be paid, pending that event, into ct., under rule 18 (3) of Law of Property (Restrictive Covenants Discharge & Modification) Rules, 1933.—*Re SPENCER FLATS, LTD.*, [1937] Ch. 86; [1936] 2 All E. R. 1392; 106 L. J. Ch. 55; 156 L. T. 186; 80 Sol. Jo. 720.

**2807e. “Term of more than seventy years, after expiration of fifty years”—How calculated.**—By Law of Property Act, 1925 (c. 20), s. 84 (12), the power given to the authority named in that sect., on the application of any person interested, by order to discharge or modify any restriction affecting land is extended to leaseholds in cases where the term created was one of more than 70 years, but only after the expiration of 50 years of the term, in like manner as if the land had been freehold:—*Held*: to bring the case within the sub-sect. the period of 50 years must be reckoned from the date of the lease, & not from any earlier date mentioned in the lease as from which the term is expressed to run.—*CADOGAN (EARL) v. GUINNESS*, [1936] Ch. 515; [1936] 2 All E. R. 29; 105 L. J. Ch. 255; 155 L. T. 404; 52 T. L. R. 447; 80 Sol. Jo. 365.

**2809. Add. Annotation**:—*Refd.* *Grant v. Edmondson*, [1931] 1 Ch. 1.

**PART XI. SECT. 2, SUB-SECT. 5.—A.**

*sc.* What amounts to—Security bond undertaking to compensate purchaser if land taken—Covenant of indemnity—Not covenant for title.—*NATESA VAN-NIVAN v. GOPALASWAMI MUDALIAR* (1927), 1 L. R. 51 Mad. 688.—*IND.*

**PART XI. SECT. 2, SUB-SECT. 5.—B. (d).**

1. —.—.—*VANDEBURGH v. VANALSTINE* (1837), 5 O. S. 454.—*CAN.*

**PART XI. SECT. 2, SUB-SECT. 5.—C. (a).**

*sd.* Implied covenant for quiet enjoyment.—*Def.*, being registered under Land Titles Act as owner in fee of a parcel of land, sold & conveyed it to B. who, with *def.*'s knowledge, sold & conveyed it to *pltf.* The two conveyances were not registered; & *def.*, knowing that he had no longer any interest in the land, & that *pltf.* was the true owner, executed a conveyance or transfer to B., & thereby (B. having

registered his transfer) wrongfully deprived *pltf.* of his title:—*Held*: assuming that B. purchased in good faith & without notice, so that *pltf.* could not recover the land, *pltf.* was entitled to recover damages from *def.*.—*GUEST v. COCHLIN*, [1929] 3 D. L. R. 790; 64 O. L. R. 165.—*CAN.*

**PART XI. SECT. 4, SUB-SECT. 1.**

*sc.* Execution — Whether “liquid assets” within Land Titles Act, s. 94.—*NORTH v. LAUWERYSSEN (Alta.)*,

**2922. Add. Annotation:—**Consd. *Lawrence v. Cassel*, [1930] 2 K. B. 83.

**2922a. ———.]**—By an agreement in writing deft. agreed to sell to pltf. a plot of land, part of a building estate, with a dwelling-house thereon in course of erection, & to complete the dwelling-house in accordance with plans of other houses, with fittings similar in all material particulars to those in other houses, erected on the estate. A deed of conveyance of the premises to pltf. was subsequently executed by the parties. The deed contained no reference to the building of the house or to any work done or to be done by deft. in the way of completing it or otherwise. Pltf. brought an action for breach of the agreement, alleging that deft. had thereby contracted that the builders' work should be carried out in a proper, efficient, & workmanlike manner, & that the materials used should be fit & proper for the purpose, & averring that none of these terms or conditions had been fulfilled:—*Held*: the agreement to complete the house being collateral to the deed of conveyance was not merged therein & breaches of that agreement having been proved, pltf. was entitled to recover.—*LAWRENCE v. CASSEL*, [1930] 2 K. B. 83; 99 L. J. K. B. 525; 143 L. T. 291; 74 Sol. Jo. 421, C. A.

*Annotations:—*Fold. *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K. B. 113. *Refd.* *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46.

**2922b. ———.]**—In a contract with builders or with the owners of a building estate for the purchase of a house to be erected or in course of erection, there is an implied warranty by the vendors that the house shall be built in an efficient & workmanlike manner & of proper materials, & that it shall be fit for habitation.—*MILLER v. CANNON HILL ESTATES, LTD.*, [1931] 2 K. B. 113; 100 L. J. K. B. 740; 144 L. T. 587; 75 Sol. Jo. 155.

*Annotations:—*Consd. *Hoskins v. Woodham*, [1938] 1 All E. R. 692; *Perry v. Sharon Development Co.*, [1937] 4 All E. R. 390.

**2922c. ———.]**—At common law in the absence of express contract a landlord of an unfurnished house is not liable to his tenant, nor is a vendor of real estate liable to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if the defects are due to his construction or are within his knowledge.

A firm of builders, having built several houses had one which was nearly completed. They agreed to complete the house by the end of Oct. 1929, & to make it fit for habitation, & like in decoration & design to the other houses on the estate. The agreement contained a clause enabling C. B. to go into possession

before completion as tenant at will. The house, like the others on the estate, was fitted with a particular make of boiler, which was placed in the kitchen & was heated by a Bunsen gas burner. Above the kitchen was a bathroom. From a cupboard in the bathroom a linen chute ran down to a cupboard in the kitchen connected with the boiler by a pipe. There was no flue to carry gas or fumes from the burner to the outward air. C. B. with his wife & child went into occupation on Sept. 28. The C. Gas. Co.'s inspector examined the gas fittings & set the regulator fitted to the burner so that 45 cubic feet of gas & no more passed into burner per hour. On Oct. 26, C. B. & his wife were found dead in bathroom, poisoned by carbon monoxide gas. A few days afterwards the regulator was found so set that much more than 45 cubic feet could pass into the burner in an hour. The boiler with its burner & the linen chute were parts of the realty. The boiler with the burner properly regulated was not dangerous. It was the business of the Gas Co. & not that of the builders to regulate the flow of gas to the burner. In an action under the Fatal Accidents Act, 1846 (c. 93), by the administrators of C. B. & his wife against the builders:—*Held*: there was no evidence of a breach of any duty which the law cast upon defts. as vendors or lessors of the house towards C. B. or his wife, & pltf. could not recover.—*BOTTOMLEY v. BANNISTER*, [1932] 1 K. B. 458; 101 L. J. K. B. 46; 146 L. T. 68, C. A.

*Annotations:—*Consd. *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119; *Perry v. Sharon Development Co.*, [1937] 4 All E. R. 390. *Refd.* *Otto v. Bolton & Norris*, [1936] 1 All E. R. 960.

**2922d. ———.]**—The first pltf. contracted with defts. for the purchase of a newly-constructed house informing them that on account of the health & nervousness of the second deft. she desired to be assured that the house was well built. Defts. thereupon assured that the house was well built & the sale was completed. About a year later a large part of the ceiling in one of the bedrooms fell on the second pltf. & seriously injured her. Later there were further falls. Both pltf. claimed damages:—*Held*: (1) the first pltf. was entitled to damages for breach of warranty; (2) the claim of the second pltf. being in tort failed, as the builder of a house, even though he is building for the purpose of sale, is under no obligation towards persons who may come to live in it to take reasonable care in the building.

*Semble*: a builder selling a house after completion is not, in his capacity as builder, under any obligation to the purchaser.—*OTTO v. BOLTON & NORRIS*, [1936] 2 K. B. 46; [1936] 1 All E. R. 960; 105 L. J. K. B.

[1927] 2 D. L. R. 758; [1927] 1 W. W. R. 687.—*CAN.*

*¶* **Breach of warranty—Recovery of damages.**—Damages are recoverable by a purchaser for breach of an oral collateral warranty made on a sale of land, even though he made payments on account of the purchase-price & accepted a transfer of title after having become aware that the warranty had not been fulfilled.—*GREENWELL v. JOHNSTON*, [1930] 3 W. W. R. 181; 4 D. L. R. 1026.—*CAN.*

*¶* **g. ———.]**—During the negotia-

tions culminating in the sale under a written agreement of a moving picture theatre together with its fixtures & equipment & the goodwill of the business, the vendor stated, as alleged in the purchaser's pleadings, that the projection equipment "was worth at least \$3,500 & was as good as new in every way & in perfect condition for continued use in the theatre." The vendor sued on a promissory note, & the purchaser, alleging that said statement was an independent collateral warranty on which he had relied on completing said agreement, counter-

claimed for damages for breach thereof, alleging that the lamps were not as represented & that he had been put to the expense of exchanging them for other lamps. The judge found that the vendor had stated that "the equipment was in first-class shape & worth at least \$3,500," & that the purchaser had relied thereon, & awarded him damages. On appeal:—*Held*: the appeal should be allowed & the judgment on the counterclaim set aside.—*DIGNEY v. ROBERTS*, [1937] 2 W. W. R. 513; 3 D. L. R. 780.—*CAN.*

602; 154 L. T. 717; 52 T. L. R. 438; 80 Sol. Jo. 306.

*Annotations*:—**Refd.** *Howard v. Furness Houlder Argentine Lines, Ltd. & Brown, Ltd.*, [1916] 2 All E. R. 781; *Dransfield v. British Insulated Cables, Ltd.*, [1937] 1 All E. R. 382.

**2922e. Action for breach of warranty—Innocent misrepresentation.**—In the particulars of an estate supplied to an intending purchaser it was stated that the estate included (*inter alia*) an inn & farm let at a rent of £193. The vendor intimated that he had had an offer of £250 a year, but had been unwilling to disturb the tenant. It was further stated that the estimated income from electric light supplied to the houses on the estate was £193. The electric light was generated from turbines, one of which had no meter. The vendor's agent had estimated the number of units generated, & calculating at a flat rate, had arrived at the estimated income. In fact, the electric light was supplied at varying rates. It was further stated that there was a small revenue from water supplied to houses on the estate. No mention was made of the fact that the local authority supplied this water, & that it had to be paid for. In an action for damages for breach of warranty after completion of the sale of the estate, the purchaser relied on the facts (i) that the offer of £250 a year had been made some years previously, & not recently as the purchaser had supposed, (ii) that the electric plant did not generate as much electricity as estimated, & (iii) that no mention had been made of the

outgoings in respect of water. There was no suggestion of fraudulent representation:—**Held**: apart from some special arrangement or some special evidence of intention, of which there was none here, a vendor does not guarantee or warrant the correctness of information given. The ct. would not allow damages for breach of an innocent misrepresentation under the guise of a breach of warranty.—**TERRENE, LTD. v. NELSON**, [1937] 3 All E. R. 739; 157 L. T. 254; 53 T. L. R. 963; 81 Sol. Jo. 649.

**2963. Add. Annotation**:—**Refd.** *Lynn v. Bamber*, [1930] 2 K. B. 72.

**2972. After this case add**:—

— **Purchase by undischarged bankrupt.**—*See* BANKRUPTCY, No. 8590a, *ante*.

**2976. Add. Annotations**:—**Refd.** *Robert A. Munro & Co. v. Meyer*, [1930] 2 K. B. 312; *Lever Bros., Ltd. v. Bell*, [1931] 1 K. B. 557.

**2981. Add. Annotation**:—**Consd.** *Re Russ & Brown's Contract*, [1934] Ch. 34.

**2985. Add. Annotation**:—**Refd.** *Lever Bros., Ltd. v. Bell*, [1931] 1 K. B. 557.

**2987. Add. Annotations**:—**Refd.** *Robert A. Munro & Co. v. Meyer*, [1930] 2 K. B. 312; *Lever Bros., Ltd. v. Bell*, [1931] 1 K. B. 557.

**3035. Add. Annotation**:—**Generally Refd.** *Bellotti v. Chequers Development Ltd.*, [1936] 1 All E. R. 89.

**3040. Add. Annotation**:—**Refd.** *Lever Bros., Ltd. v. Bell*, [1931] 1 K. B. 557.

**PART XI. SECT. 4, SUB-SECT. 4.—**  
**A. (a) ii.**

**a i.** — *Representation that house warm.*—Pltf. agreed to purchase a dwelling-house relying on the owner's oral representation that he would "guarantee that it was a good, warm house." Pltf. went into possession, & being unable to keep the house warm, sued for rescission. The judge found that it was a very cold house:—**Held**: pltf. was entitled to rescission.—**SIEGERIST v. PAINE**, [1930] 1 W. W. R. 951; 2 D. L. R. 980.—**CAN.**

**PART XI. SECT. 4, SUB-SECT. 4.—**  
**A. (b) i.**

**2978 iv.** — — — — —.]—**HARILAL DALSUKHRAM v. MULCHAND** (1928), 1 L. R. 52 Bom. 883.—**IND.**

**PART XI. SECT. 4, SUB-SECT. 4.—E.**

**3029 i.** *What purchaser may be allowed Costs of repairs & improvements.*—Pltf., who knew that the municipality's claim against the land arose out of non-payment of taxes, went into possession & made improve-

ments while the land was subject to redemption & before the municipality was entitled to put him into possession. He contended that he relied on an assurance by the municipal officer that title would issue to him, but it was found that no such assurance had been given:—**Held**: pltf. was not entitled to a declaration of lien for improvements made under mistake of title.—**HILLER v. RURAL MUNICIPALITY OF SHAMROCK (Sask.)**, [1929] 3 W. W. R. 458; *affd.*, [1930] 2 W. W. R. 680; 4 D. L. R. 276.—**CAN.**

## SET-OFF AND COUNTERCLAIM.

## Part I. —Set-Off.

48. *Add. Annotation* :—**Refd.** *Ellesmere (Earl) v. Wallace*, [1929] 2 Ch. 1.
75. *Add. Annotation* :—**Consd.** *China Navigation Co. v. A.-G.* (1932), 48 T. L. R. 375.
117. *Add. Annotation* :—**Refd.** *Re Pinto Leite & Nephews, Ex p. Visconde des Oliveira*, [1929] 1 Ch. 221.
180. *Add. Annotation* :—**Refd.** *Sagar v. Ridehalgh & Son, Ltd.*, [1931] 1 Ch. 310.
192. *Add. Annotations* :—**Refd.** *Cottage Club Estates v. Woodside Estate Co., Amersham* (1927), 97 L. J. K. B. 72; *Earle v. Hemsworth R. D. C.*, [1928] 140 L. T. 69; *Williams v. Atlantic Assurance Co.* (1932), 37 Com. Cas. 304.
193. *Add. Annotation* :—**Refd.** *Re Pinto Leite & Nephews, Ex p. Visconde des Oliveira*, [1929] 1 Ch. 221.
225. *Add. Annotation* :—**Refd.** *London & North Eastern Ry. Co. v. Blundy, Clark & Co.* (1931), 20 Ry. & Can. Tr. Cas. 92.
278. *Add. Annotation* :—**Consd.** *Parker v. Jackson*, [1936] 2 All E. R. 281.
295. *Add. Annotation* :—**Refd.** *Re Fenton, Ex p. Fenton Textile Assocn.* (1930), 99 L. J. Ch. 358.

## Part II.—Counterclaim.

307. *Add. Annotations* :—**As to** (1) **Refd.** *Lowe v. Bentley* (1928), 44 T. L. R. 388. **As to** (2) **Refd.** *Re Richardson, Richardson v. Nicholson*, [1933] W. N. 90.
314. *Add. Annotation* :—**Refd.** *Lowe v. Bentley* (1928), 44 T. L. R. 388.
319. *Add. Annotation* :—**Refd.** *Aktieselskabet Ocean v. Harding*, [1928] 2 K. B. 371.
326. *Add. Annotation* :—**As to** (1) **Refd.** *Telsen Electric Co. v. Eastick & Sons*, [1936] 3 All E. R. 266.
327. *Add. Citation* :—72 Sol. Jo. 254.
330. *Add. Annotation* :—**Consd.** *Re Richardson, Richardson v. Nicholson*, [1933] W. N. 90.
331. *Add. Annotation* :—**Consd.** *Re Richardson, Richardson v. Nicholson*, [1933] W. N. 90.
- 331a. —.—.]—*Re RICHARDSON, RICHARDSON v. NICHOLSON*, [1933] W. N. 90; 175 L. T. Jo. 269, C. A.
379. *Add. Annotations* :—**Consd.** *Eshelby v. Federated European Bank, Ltd.*, [1932] 1 K. B. 254. **Refd.** *Lowe v. Bentley* (1928), 44 T. L. R. 388.

## Part III.—Pleading and Practice.

535. *Add. Annotation* :—**Refd.** *Medway Oil & Storage Co. v. Continental Contractors* [1929] A. C. 88.
550. *Add. Annotation* :—**Consd.** *Medway Oil & Storage Co. v. Continental Contractors*, [1929] A. C. 88.

**PART I. SECT. 3, SUB-SECT. 1.**  
38 xvi. —.—.]—**CLARKSON v. ALLISTON CORPN.**, [1928] 2 D. L. R. 715; 62 O. L. R. 149.—**CAN.**

**PART I. SECT. 4, SUB-SECT. 1.**  
p. *Revsd.*, [1913] A. C. 160.  
k (p. 377). For “(1867), 3 Agra, 43” read “(1868), 4 Agra, 43.”

**PART I. SECT. 10, SUB-SECT. 8.—A.**  
222 ii. —.— & *debt due in representative capacity.*—The rule that where an action is brought by an exor. only in his capacity of exor. deft. cannot set up by counterclaim claims against him personally & also as an exor.:—*Held*: not to apply to the case where deft. seeks, in aid of the judgment which he may obtain against the exor. personally, relief from the estate.—**MACKAY v. LONDON & WESTERN TRUSTS CO., LTD.**, [1931] 1 D. L. R. 978; [1930] 3 W. W. R. 620.—**CAN.**

**PART II. SECT. 2, SUB-SECT. 1.**  
317 vi. —.—.]—**THOMAS v. WORDEN.** [1928] 1 D. L. R. 217.—**CAN.**

317 vii. —.—.]—Neither at law nor in equity can a claim unenforceable by action because of the Statute of Frauds be enforced by counterclaim or defence.—**PERPETUAL EXORS. & TRUSTEES ASSOCN. OF AUSTRALIA, LTD. v. RUSSELL**, [1931] V. L. R. 125; *Argus L. R.* 89; 5 A. L. J. 40.—**AUS.**

317 viii. —.—.]—A counterclaim even though it raises an issue entirely

extraneous to the claim can only be struck out if it is embarrassing to pltf.—**EXPORT BREWING & MALTING CO. v. DOMINION BANK**, [1932] O. R. 446; 3 D. L. R. 128.—**CAN.**

321 x. —.—.]—To allow a counterclaim or set-off the ct. must as a condition precedent be vested with the jurisdiction of hearing both the action & the counterclaim or set-off.—**R. v. COSGRAVE EXPORT BREWING CO., LTD.**, *R. v. JOHN LABATT, LTD.*, [1928] Ex. C. R. 103.—**CAN.**

sx. *Must not be embarrassing.*—The right to counterclaim should not be used in such a way as to embarrass & inconvenience the fair trial of the action as originally constituted.—**OAKS v. BRITISH NORTH WESTERN FIRE INSC. CO.**, [1929] 2 D. L. R. 959; 63 O. L. R. 593.—**CAN.**

sz. *Deduction based on contract.*—Where pltf.'s claim to money is established & deft. claims a deduction based on a contract, he should counterclaim.—**SCHIESS v. CHATENAY**, [1934] 4 D. L. R. 671.—**CAN.**

**PART II. SECT. 2, SUB-SECT. 2.—A.**  
sy. *Contributory negligence.*—**CAMERON v. MURRAY**, [1931] 2 D. L. R. 654; O. R. 83.—**CAN.**

**PART II. SECT. 2, SUB-SECT. 5.**  
r (p. 414) i. —.— *Counterclaim for fraudulent misrepresentation.*—*Held*: the counterclaim being based not upon the contract but upon delict,

could not be dealt with in the action on the contract.—**SMART v. WILKINSON**, [1928] S. C. 383.—**SCOT.**

sb. *Action for alimony—Counterclaim for divorce.*—A claim for divorce may be set up by a counterclaim to an action for alimony.—**SCHERER v. SCHERER**, [1928] 1 W. W. R. 305; 22 Sask. L. R. 302.—**CAN.**

**PART II. SECT. 4.**

378 iii. —.—.]—**THOMPSON v. SCOLLARD (B. C.)**, [1929] 3 D. L. R. 857; 2 W. W. R. 466.—**CAN.**

**PART III. SECT. 1, SUB-SECT. 2.**  
p. For “Q. R. 29 S. C. 516,” read “*revsd.*, 29 S. C. R. 516.”

**PART III. SECT. 2, SUB-SECT. 4.—C. (a).**

so. *Statute of Limitations.*—With respect to the application of Stat. Limitations to a counterclaim it is sufficient for pltf. to prove that the counterclaim was barred when it was pleaded.—**REED v. THEL.**, [1928] 4 D. L. R. 72; [1928] 2 W. W. R. 115; 22 Sask. L. R. 495.—**CAN.**

ss. *Res judicata.*—**DAVIS v. DAVIS**, [1928] 3 D. L. R. 69; [1928] 2 W. W. R. 130; 23 Alta. L. R. 355.—**CAN.**

**PART III. SECT. 2, SUB-SECT. 9.—B. (a).**

552 xvii. —.—.]—**STARK v. BATCHELOR**, [1928] 4 D. L. R. 815; 63 O. L. R. 135.—**CAN.**



555. *Add. Annotation* :—**Consd.** Medway Oil & Storage Co. v. Continental Contractors, [1929] A. C. 88.

562. For existing paragraph substitute :—

Where a claim & counterclaim are both dismissed with costs, upon the taxation of the costs, the true rule is that the claim should be treated as if it stood alone, & the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim. In the absence of special directions by the ct. there should be no apportionment. The same principle applies where both the claim & the counterclaim have succeeded.—MEDWAY OIL & STORAGE CO. v. CONTINENTAL CONTRACTORS, [1929] A. C. 88 ; 98 L. J. K. B. 148 ; 140 L. T. 98 ; 45 T. L. R. 20, II. L. ; *reversing* S. C. *sub nom.* CONTINENTAL CONTRACTORS v. MEDWAY OIL & STORAGE CO., [1928] 1 K. B. 238, C. A.

*Annotation* :—**Apld.** The Stentor, [1934] P. 133.

568. *Add. Annotations* :—**Distd.** Medway Oil & Storage Co. v. Continental Contractors, [1929] A. C. 88. **Consd.** The Stentor, [1934] P. 133.

569. *Add. Annotations* :—**Folld.** Medway Oil & Storage Co. v. Continental Contractors, [1929] A. C. 88. **Consd.** The Stentor, [1934] P. 133.

570. *Add. Annotation* :—**Refd.** Medway Oil &

Storage Co. v. Continental Contractors, [1929] A. C. 88.

571. *Add. Annotations* :—**Apprvd. & Folld.** Medway Oil & Storage Co. v. Continental Contractors, [1929] A. C. 88. **Consd.** The Stentor, [1934] P. 133.

574. *Add. Annotation* :—*As to* (3) **Consd.** Medway Oil & Storage Co. v. Continental Contractors, [1929] A. C. 88.

574a. —.—.]—In an action for infringement of a patent, & counterclaim for revocation, an order was made dismissing the action with costs & the counterclaim with costs, with a set-off. Upon taxation the taxing master awarded plffs. only the amount by which the costs of the proceedings had been increased by the counterclaim, amounting to a very small sum. Plffs. moved to vary the order, & contended at the hearing of the motion that the order did not carry out the intention of the ct., which was that plffs. should have certain costs of the issue of validity. Plffs. relied principally on the inherent jurisdiction of the ct. to vary its orders so as to carry out its meaning :—*Held* : there had been no mistake in expressing the intention of the ct. as to what order should be made, though the consequences of the order might not have been what the ct. contemplated. The motion was dismissed with costs.—BRITISH UNITED SHOE MACHINERY CO., LTD. v. ISAACSON & RALPHS (NORWICH), LTD. (1935), 52 R. P. C. 289.

PART III. SECT. 2, SUB-SECT. 9.—B. (b).

g. *Discretion of judge.*—AUSTIN v. O'KEEFE, [1928] V. L. R. 485 ; [1928] Argus L. R. 374.—AUS.

## SETTLEMENTS.

## Part II.—Creation and Construction of Settlements.

- 17a. — To be settled at attainment of majority.] —*LAING v. LAING* (1839), 10 Sim. 315; 9 L. J. Ch. 48; 3 Jur. 1119; 59 E. R. 636.
- 74a. Express estate given not enlarged by implication.]—*THEEBRIDGE v. KILBURNE* (1751), 2 Ves. Sen. 233; 28 E. R. 150, L. C.
- Annotations*:—*Consd. Campbell v. Harding* (1831), 2 Russ. & M. 390; *Verulam Earl v. Bathurst* (1843), 13 Sim. 374. *Refd. Lyon v. Mitchell* (1816), 1 Madd. 467.
- 83a. Gift followed by proviso against absolute vesting—Subsequent trusts not exhausting absolute interest.]—Where there was an absolute gift, followed by a proviso against absolute vesting & for retention of the funds by the trustees, & the subsequent trusts did not exhaust the absolute interest, but there was a failure of those trusts:—*Held*: the proviso only had the effect of cutting down the absolute interests to the extent to which it was necessary to give effect to the trusts & no further, & the absolute gift accordingly remained.—*Re COHEN, COHEN v. COHEN* (1915), 60 Sol. Jo. 239.
- 83b. Condition for forfeiture on becoming Roman Catholic—Condition operating during minority —Invalid.]—A settlement made in 1910 provided that "If any grandchild of the said Sir R. H. B. shall at any time before attaining a vested interest under the trusts hereinbefore declared be or become a Roman Catholic or not be openly or avowedly Protestant such grandchild shall thereupon forfeit & lose one moiety of all the share right or interest in the capital or income of the said trust premises & of all other benefits (if any) conferred upon him or her by these presents":—*Held*: the condition was bad because it operated to restrain the parents of the grandchildren from doing their duty in the matter of religious instruction, & it was also bad on the ground of uncertainty.—*Re BORWICK, BORWICK v. BORWICK*, [1933] Ch. 657; 102 L. J. Ch. 199; 149 L. T. 116; 49 T. L. R. 288; 77 Sol. Jo. 197.
- Innotations*:—*Consd. Re Talbot-Ponsonby's Estate, Talbot-Ponsonby v. Talbot-Ponsonby*, [1937] 4 All E. R. 309. *Refd. Re Tegg, Public Trustee v. Bryant*, [1936] 2 All E. R. 87.
- 86a. — Ambiguity.]—*GARNER v. GARNER* (1860), 29 Beav. 114; 3 L. T. 396; 7 L. T. 182; 54 E. R. 570.
- 134a. "For default of such issue."]—*DOE d. LEES v. FORD* (1853), 2 E. & B. 970; 2 O. L. R. 654; 23 L. J. Q. B. 53; 22 L. T. O. S. 184; 18 Jur. 420; 118 E. R. 1029.
136. *Add. Annotation*:—*Distd. Re Hall, Hall v. Hall*, [1932] 1 Ch. 262.
- 140a. "My own heirs whatsoever."]—*GORDON v. GORDON* (1882), 7 App. Cas. 713, H. L.
- 146a. "Any husband who might survive her"—Whether applicable to divorced husband.]—A woman beneficiary under a settlement was given a power of appointment "for the benefit of any husband who might survive her." The beneficiary married, & she exercised the power of appointment in favour of her husband in the event of his surviving her. Afterwards she divorced her husband, & she died without having been remarried, leaving her divorced husband surviving her:—*Held*: the power could be exercised only in favour of a person who was the beneficiary's husband at the time of her death, & therefore the divorced husband did not take under the exercise of the power.—*BOSWORTHICK v. CLEGG* (1929), 45 T. L. R. 438.
- Annotation*:—*Apprvd. Re Williams' Settlement, Greenwell v. Humphries*, [1929] 2 Ch. 361.
- 146b. — — —.]—Under a marriage settlement made in 1902 of property belonging to the wife, power was reserved to her in the event, which happened, of there being but one child of the then intended marriage, to revoke the trusts of the settlement as to three-quarters of the settled funds & to resettle the same for the benefit of any husband who might survive her, but so that he should not take more than a life interest therein, & any child or other issue of a future marriage. The wife, having been divorced, remarried in 1908, & exercised the power in favour of her second husband. In 1923 the second marriage was dissolved upon the husband's petition, & the wife again remarried. She died in 1928, leaving her first, second & third husbands surviving her:—*Held*: the second husband, although he survived his former wife, was not entitled to any interest under the appointment of 1908, as he had ceased to be her husband on the dissolution of the marriage.—*Re WILLIAMS' SETTLEMENT, GREENWELL v. HUMPHRIES*, [1929] 2 Ch. 361; 98 L. J. Ch. 358; 141 L. T. 579; 45 T. L. R. 541; 73 Sol. Jo. 384, C. A.
- Annotation*:—*Apld. Bosworthick v. Clegg* (1929), 45 T. L. R. 438.

## Part III.—Contracts for Settlements.

165. *Add. Annotation*:—*Refd. Chaney v. Maclow* (1928), 97 L. J. Ch. 349.
203. *Add. Annotation*:—*As to (2) Apld. Re Marshall, Graham v. Marshall*, [1928] Ch. 661.
- 204a. — — —.]—*JOHNSTONE v. MAPPIN* (1891), 60 L. J. Ch. 241; 64 L. T. 48.
225. *Add. Annotation*:—*Refd. London & North-Eastern Ry. Co. v. Blundy, Clark & Co.* (1931), 145 L. T. 269.

## PART II. SECT. 3, SUB-SECT. 1.

eg. *Provision for devolution of property—Valid*.—There is nothing in Intestate Succession Act, R. S. S., 1930, or other statutes of Saskatchewan, to prevent the parties to a marriage from providing by a marriage settle-

ment for the devolution of property covered thereby.—*Re JUTRAS ESTATE*, [1932] 2 W. W. R. 533.—CAN.

## PART II. SECT. 3, SUB-SECT. 3.—E.

sa. *The right heir*.—A settlement provided that in certain events the

settled lands should revert to "the right heir of (the settlor) & his or her heirs & assigns for ever":—*Held*: the words "the right heir" designated the next of kin of settlor.—*Re MACDONALD'S SETTLEMENT, O'CALLAGHAN v. O'CALLAGHAN*, [1928] V. L. R. 421, [1928] Argus L. R. 148.—AUS.

360. *Add. Annotation*:—**Refd.** *Re Bennett, Bennett v. Bennett* (1934), 78 Sol. Jo. 876.
361. *Add. Annotation*:—**Refd.** *Re Bennett, Bennett v. Bennett* (1934), 78 Sol. Jo. 876.
- 368a. ———.—]—A covenant to leave a beneficiary a share in the covenantor's property at death cannot be defeated by a disposition during the covenantor's lifetime which is testamentary in its nature.—*Re BENNETT, BENNETT v. BENNETT*, [1934] W. N. 177; 78 L. Jo. 231; 178 L. T. Jo. 172; *reversd.* 78 Sol. Jo. 876, C. A.
- 386a. ———.—]—*OTWAY v. BRAITHWAITE* (1879), *Cas. temp. Finch*, 405; 23 E. R. 221.
392. *Add. Annotation*:—**Refd.** *Cotton v. Heyl*, [1930] 1 Ch. 510.
533. *Add. Annotation*:—**Refd.** *Re Smith, Franklin v. Smith*, [1928] Ch. 10.
535. *Add. Annotation*:—**Apld.** *Re Smith, Franklin v. Smith*, [1928] Ch. 10.
564. *Add. Annotation*:—**Refd.** *Re Ashton, Sier v. Ashton* (1934), 78 Sol. Jo. 803.
583. *Add. Annotations*:—**Refd.** *Re Brooks, Public Trustee v. White*, [1928] Ch. 214; *Re Turner, Hudson v. Turner*, [1932] 1 Ch. 31.
659. *Add. Annotation*:—**Refd.** *Re Sassoon* (1933), 49 T. L. R. 407.
687. *Add. Annotation*:—**Refd.** *Ditcham v. Miller* (1931), 100 L. J. P. C. 177.

## Part V.—Consideration for Settlements.

710. *Add. Annotation*:—**Refd.** *Elliot v. Joicey*, [1935] A. C. 209.
736. *Add. Annotation*:—**Refd.** *Papadopoulos v. Papadopoulos* (1929), 46 T. L. R. 44.
740. *Add. Annotation*:—**Refd.** *Fowke v. Fowke*, [1938] 2 All E. R. 638.
- 740a. ———.—]—*E. v. E.* (1893), 37 Sol. Jo. 250.
- 740b. *Cohabitation without marriage for several years.*]—By a settlement executed in 1877, in consideration of a then intended marriage, it was declared that a sum of stock, the property of the intended wife, which had been transferred by her to two trustees, should be held by them on trust for the benefit of the intended wife, the intended husband, & the issue of the intended marriage. The marriage was not solemnised, but the parties cohabited without marriage, & three children were born. In 1883 an action was brought by the father & mother against the trustees of the settlement, to obtain a transfer of the fund to the mother:—*Held*: the contract to marry had been absolutely put an end to, & the ct. could order the stock to be transferred to the lady.—*ESSERY v. COWLAND* (1884), 26 Ch. D. 191; 53 L. J. Ch. 661; 51 L. T. 60; 32 W. R. 518.
- Annotation*:—**Apld.** *E. v. E.* (1893), 37 Sol. Jo. 250.
770. *Add. Annotation*:—**Refd.** *Timpson's Executors v. Yerbury*, [1936] 1 All E. R. 186.
774. *Add. Annotation*:—**Refd.** *Westminster Bank, Ltd. v. Wilson*, [1938] 3 All E. R. 652.
798. *Add. Annotation*:—**Refd.** *Westminster Bank, Ltd. v. Wilson*, [1938] 3 All E. R. 652.
800. *Add. Annotation*:—**Distd.** *Re Bowden, Hulbert v. Bowden*, [1936] Ch. 71.
- 803a. ———.—]—*BURROWS v. GREENWOOD* (1840), 4 Y. & C. Ex. 251; 5 Jur. 384; 160 E. R. 999.
- 803b. ———.—]—The trustees & *cestui que trust* under a voluntary settlement cannot compel the settlor to perform any further act than he has already done to render such a settlement operative.—*DENING v. WARE* (1856), 22 Beav. 184; 4 W. R. 523; 52 E. R. 1078.

## Part VI.—Rectification and Variation of Settlements and Articles.

840. *Add. Annotation*:—*As to* (1) **Apld.** *Re Lloyds Bank, Ltd., Bomze & Lederman v. Bomze*, [1931] 1 Ch. 289.
- 849a. *Omission of power to appoint by deed.*]—The pltf., by summons, asked for a compromise of an action. The action claimed rectification of the pltf.'s marriage settlement dated Sept. 29, 1910, by which, her husband having died & there being no children, the trust fund of £25,000 was held upon trust for her, & thereafter as she should by will appoint, & in default for her next-of-kin. There was no power to appoint by deed, nor any trust for the wife absolutely; but the pltf. offered to release her power over one-fifth of the trust fund of £25,000 for the benefit of her next-of-kin, upon terms that a general power, exercisable by deed or will, should be

### PART III. SECT. 4, SUB-SECT. 3.—L.

587 ii. ———.—]—The covenant in question herein in a marriage settlement whereby the wife covenanted for settlement of after-acquired property:—*Held*: not to catch the income received by her under the will of her father without power of anticipation.—*NATIONAL TRUST CO., LTD. v. ASHTON*, [1936] 2 W. W. R. 457.—**CAN.**

### PART V. SECT. 5, SUB-SECT. 3.

768 I. ———.— *Settlor must do everything*

*necessary to transfer property.*]—In order to constitute a valid & effective voluntary settlement binding upon the settlor, he must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done to transfer the property either to the persons for whom he intends to provide, or to a trustee for the purposes of the settlement, or have declared that he himself holds it in trust for such purposes: & the expression of a mere executory

intention to create a trust, or voluntary agreement to do so is insufficient for such purpose.—*HAMILTON v. IZARD*, [1929] N. Z. L. R. 498.—**N.Z.**

### PART VI. SECT. 1, SUB-SECT. 4.

m 1. ———.— *Mistake—Sufficiency of evidence.*]—*GOODWIN v. ROYAL TRUST CO.*, [1928] 1 D. L. R. 309; 39 B. C. R. 113.—**CAN.**

inserted:—*Held*: that the facts as to the making of the settlement precluded rectification, there being no evidence that the instructions given by the settlor had not been carried out. The action would have to be tried on oral evidence, but the evidence available did not justify the ct. in sanctioning

the compromise.—*CONSTANTINIDI v. RALLI*, [1935] Ch. 427; 104 L. J. Ch. 249; 152 L. T. 489; 79 Sol. Jo. 195.

875. After this case add:—

**Effect on construction of referential trusts.]—***See TRUSTS*, No. 493a, *post*.

## Part VII.—Revocation and Avoidance of Settlements.

897a. ———.]—By a voluntary settlement made in 1868 a settlor settled any property to which she might become entitled upon the death of her father & gave to the trustees of the settlement full power to receive & give receipts for the same or any part thereof in her name. Her father died in 1869 & during the years 1871–1874 his exors. transferred the share of the settlor under her father's will to the trustees of the voluntary settlement. In 1935 the settlor requested the trustees to transfer the funds representing the above-mentioned property to her as her absolute property:—*Held*: the original trustees had received the settlor's share under a valid authority unrevoked, & it became impressed with the trusts contained in the settlement.—*Re BOWDEN, HULBERT v. BOWDEN*, [1936] Ch. 71; 105 L. J. Ch. 23; 151 L. T. 157; 79 Sol. Jo. 625.

897b. ——— By subsequent sale of settled property.]—*Held*: the selling out of the settled stock did not amount to a virtual revocation of

the settlement.—*BLACKWELL v. WOOD* (1831), 1 L. J. Ch. 35.

899. *Add. Annotation*:—*Refd. Re Lloyds Bank Ltd., Bomze & Lederman v. Bomze*, [1931] 1 Ch. 289.

913a. ———.]—*GUY v. DORMER* (1677), T. Raym. 295; 83 E. R. 152.

*Annotations*:—*Consd. Doe d. Nowell v. Roako* (1825), 2 Bng. 497. *Refd. Bath & Mountague's Case* (1693), 3 Cas. in Ch. 55.

934. *Add. Annotation*:—*Consd. Re Duncombe's Will Trusts, Wrixon-Becher v. Faversham (Earl)* (1932), 146 L. T. 412.

938a. ———.]—*LAMPERT v. LAMPERT* (1789), 1 Ves. 20; 30 E. R. 210.

975. *Add. Annotation*:—*Refd. Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380.

976. *Add. Annotations*:—*Consd. Re Lloyds Bank, Ltd., Bomze & Lederman v. Bomze*, [1931] 1 Ch. 289. *Refd. Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380.

## Part VIII.—Beneficial Interests in Personalty.

994. *Add. Annotation*:—*Refd. Re Gillott's Settlement, Chattock v. Reid*, [1934] Ch. 97.

1003a. ——— **Equitable assignment—Covenant to pay portion of income to third party—Within three days of receipt.**]—A marriage settlement provided that the wife, if she survived the husband, might appoint all or part of the income of the settled property to be paid to any subsequent husband who might survive her, until he should (*inter alia*) assign it. A second settlement comprised property subject to like trusts, & a third gave the wife power to appoint to any subsequent husband with or without restriction. An agreement between the wife's second husband, the wife, & a lender, for a loan to be applied by the second husband & the wife in paying certain debts, provided that, while money was owing under the agreement, the second husband & the wife should, within three days after receiving any income of the settled property, pay half of it into a specified account, that the money so paid should be used in paying the debts & repaying the loan, & that what remained should be handed to the second husband & the wife or the survivor as they should direct. A later agreement provided that the second husband & the wife, so long as any money then owing by them remained owing, would pay income into a specified account within three days after receiving it, & that when so paid it should be held in trust

for payments to other parties to the agreement as well as to the second husband & the wife. The wife died, having by her will appointed, within the terms of the first settlement, an interest to the second husband in the income of the property comprised in the three settlements, until he should (*inter alia*) assign it:—*Held*: (1) the covenants in the agreements for payment into specified accounts effected an equitable assignment of the income; (2) after the wife's death the second husband became a trustee of the income, as soon as he received it, for those intended to benefit under the agreements, although he was not obliged to pay it over immediately; (3) although no assignment was intended, the second husband, on the true construction of the agreements, had forfeited his interest.—*Re GILLOTT'S SETTLEMENT, CHATTOCK v. REID*, [1934] Ch. 97; 102 L. J. Ch. 332 149 L. T. 419; 77 Sol. Jo. 447.

1003b. ——— **Rentcharge in respect of improvements—Some improvements not authorised by statute.**]—A tenant for life with a life interest defeasible on alienation carried out improvements in the principal mansion house. The Settled Land Act trustees agreed to discharge the cost out of capital moneys, & required him to execute, under Settled Land Act, 1925 (c. 18), s. 85, a deed creating a rentcharge to secure repayment of the cost to

capital, which he did. On a summons to determine whether, if some of the improvements were not within the Act, so that more had been spent on improvements & a larger rentcharge created than the Act authorised, the defeasible interest of the tenant for life ceased on the execution of the deed:—*Held*: the trust giving to the tenant for life a life interest defeasible on alienation did not cease upon the execution of the deed.—*Re LIBERTY'S WILL TRUSTS*, BLACKMORE v. LIBERTY (STEWART), [1937] Ch. 176; [1937] 1 All E. R. 399; 106 L. J. Ch. 118; 156 L. T. 270; 53 T. L. R. 323; 81 Sol. Jo. 99.

**1008a.** — *Order to raise capital money for benefit of tenant for life—Policy on tenant's life assigned to trustees—Premiums paid by tenant.*—The tenant for life of a settled legacy whose life interest was protected against any assignment or charge “whereby the income or some part thereof would if belonging absolutely to him become payable to some other person or a corpn.,” with a gift over upon failure of such trust, applied to the ct. under the powers of Trustee Act, 1925 (c. 19), s. 57, for an order to authorise the trustees to raise £15,000 out of the capital of the settled legacy, which amounted to £150,000, & to apply the same in payment of his debts & generally for his benefit.

An order was made authorising the trustees to raise the money & to apply it accordingly, upon the terms that the tenant for life should effect a policy for £15,000 upon his own life & assign the same to the trustees to secure repayment of the capital raised, & that the trustees should pay the premiums on the policy out of the income unless pltf. should within seven days of each renewal date produce to the trustees a receipt for the amount of the premium paid to the insurance co. On a summons taken out to determine the question whether the tenant for life by applying for & obtaining this order had forfeited his life interest:—*Held*: so long as the tenant for life paid the premiums on the policy & produced the receipt for them to the trustees, so that the trustees were not called upon to apply any part of the income of the legacy in payment of the premiums, the order would not effect a forfeiture of the life interest.—*Re SALTING, BAILLIE-HAMILTON v. MORGAN*, [1932] 2 Ch. 57; 101 L. J. Ch. 305; 147 L. T. 432; 76 Sol. Jo. 344.

*Annotation*:—*Refd. Re Mair, Richards v. Doxat*, [1935] Ch. 562.

**1008b.** — ——.]—An order of the ct. under Trustee Act, 1925 (c. 19), s. 57, giving power to trustees to raise capital moneys for benefit of life tenants will not cause a forfeiture of protected life interests, because the sect. is an overriding sect., the provisions of which are to be deemed to be read into every settlement.—*Re MAIR, RICHARDS v. DOXAT*, [1935] Ch. 562; 104 L. J. Ch. 258; 153 L. T. 145.

**1011a.** — ——.]—By the second clause of marriage articles, it was agreed, that a sum should be settled on the wife, not stating how, & the husband renounced his marital right over it during the coverture. The fourth clause provided that, in case of her death leaving issue, it should belong to the husband & children successively; the fifth gave her a power of appointment, if she died without issue; & the sixth provided that the income

should, “in all cases,” belong to the husband during his life. There was no express life estate given to the wife:—*Held*: the wife, by implication, took an immediate life estate to her separate use.—*BYAM v. BYAM* (1854), 19 Beav. 58; 24 L. J. Ch. 209; 1 Jur. N. S. 79; 3 W. R. 95; 52 E. R. 270.

**1054.** *Add. Annotation*:—*Apld. Re Gooch, Gooch v. Gooch*, [1929] 1 Ch. 740.

**1056a.** — *Omitted words supplied.*]—A settlement recited that it was the desire of the settlor to benefit certain grandchildren described as “all the children present & future of the marriage of” A. & B. The ultimate trust for the grandchildren was worded thus: “in trust for such of the grandchildren as being male shall have attained the age of 21 years or being female shall have married under that age”:—*Held*: the ct. should give effect to the settlement considered as a whole & the provision for female grandchildren should be given effect to as if it read: “or being female shall have attained the age of 21 years or shall have married under that age.”—*Re HARGRAVES' TRUSTS, LEACH v. LEACH*, [1937] 2 All E. R. 545.

**1059a.** — *Application of accumulations during minority.*]—Certain property was vested in the Public Trustee under a settlement, whereby the settlor directed him after her decease to pay the income to the tenants for life therein mentioned, & directed that after the death of any tenant for life the share of that tenant for life should be held in trust for the grandchildren of the settlor in manner therein mentioned. One of the tenants for life died in the lifetime of the settlor. A summons was taken out by the Public Trustee for the direction of the ct. as to the application of the accumulations of income of the share of the tenant for life who died in the lifetime of the settlor, having regard to the facts that (a) no grandchild of the settlor had attained the age of twenty-one years, or being female had married, at the death of the settlor; (b) one of the grandchildren of the settlor was born after the dates, when two of such grandchildren had attained the age of twenty-one years, & (c) a grandchild of the settlor, who survived the settlor, died under the age of twenty-one years:—*Held*: (1) the property from which the accumulated income arose must be regarded as the share to which the infant would become ultimately entitled, even though that share might be reduced by reason of other members of the class coming into existence; (2) the share of the grandchild, who had died under the age of twenty-one years, which had been provisionally assigned to that grandchild, ought to be treated as not having been properly assigned, & that portion of the money which had accrued while the infant was a member of the class, & which had not been applied in the maintenance & education of the infant, ought to be reassigned amongst the other persons who were at that time members of the class; (3) observations on the method of dealing with accumulations of income provisionally assigned to infant members of a class, having regard to Conveyancing Act, 1881 (c. 41), s. 43, & Trustee Act, 1925 (c. 19), s. 31.—

*Re KING, PUBLIC TRUSTEE v. ALDRIDGE*, [1928] Ch. 330; 97 L. J. Ch. 172; 138 L. T. 641.

1071a. ———.—]—*PECK v. PARROT* (1749), 1 Ves. Sen. 236; 27 E. R. 1004, L. C.

1081a. ———.—]—Money was settled upon trust, after the death of the survivor of the parents, to pay, etc., unto all the sons & daughters, & the children of such as should be dead leaving issue (the children to take the share of their parents), with a gift over if there should be no child of the marriage, or being such, all sons, should die under twenty-one, & the daughters under twenty-one or marriage:—*Held*: the shares vested in the children on their births, & the representatives of those who died unmarried, in their infancy, & in the life of the parents, took a share.—*Re MINOR'S TRUSTS* (1860), 28 Beav. 50; 54 E. R. 284.

1088. *Add. Annotation*:—*Consd. Re Sutcliffe, Alison v. Alison*, [1934] Ch. 219.

1094a. *Absolute gift—Restrictions on enjoyment—Failure of trust.*—By a settlement it was provided that the trustees should stand possessed of the trust fund "in trust to divide it into seven equal shares & to appropriate one of such shares to each of the settlor's children," & it was further provided that: "The shares so directed to be appropriated to the settlor's said respective children shall not vest absolutely in them but shall

be retained by the trustees & held upon the trusts" thereafter declared. The income of each share was to be paid to the children during their respective lives, subject to determination on bkpcy., or assignment, & on the death of a life tenant the share was to be held in trust for the children of the life tenant as therein provided. In the event of a life tenant having no children a power of appointment by will was given to such life tenant of the share "given to such life tenant." The trustees were given power on the marriage of a life tenant to settle upon certain trusts all or any part of the trust fund given to such life tenant. One of the children died a bachelor & without having exercised his power of appointment by will. A summons was taken out to determine whether his share formed part of his estate, or whether being undisposed of, there was a resulting trust in favour of the settlor:—*Held*: upon a consideration of the settlor's intention as indicated in the settlement, there was an absolute gift in the first instance, & applying the rule in *Lassence v. Tierney & Hancock v. Watson* the share passed to the child's estate.—*Re GATTI'S VOLUNTARY SETTLEMENT TRUSTS, DE VILLE v. GATTI*, [1936] 2 All E. R. 1489; 52 T. L. R. 674; 80 Sol. Jo. 704.

1095. *Add. Annotation*:—*Refd. Selsdon v. Selsdon* (1934), 50 T. L. R. 469.

## Part IX.—Beneficial Interests in Realty.

260. *Add. Annotations*:—As to (2) *Distd. Re Williams' Settlement, Greenwell v. Humphries*, [1929] 2 Ch. 361. *Consd. Colclough v. Colclough & Fisher*, [1933] P. 143.

1391a. *Portionist disposing of settled property—Loss of portion.*—Whenever a son, entitled to an estate in remainder under a settlement of real property which, if it were an estate in possession, would exclude him from sharing in any portions charged on the property, has exercised, by virtue of his estate in remainder, dominion over & disposed of the settled property, he at once becomes & remains excluded from the portions provision. In observing this principle the ct. will not measure the benefit to himself or the detriment to others which the son so disentailing the settled property creates.—*Re LEEKE'S SETTLEMENT TRUSTS, BOROUGH v. LEEKE*, [1937] Ch. 600; [1937] 2 All E. R. 563; 106 L. J. Ch. 228; 157 L. T. 481; 53 T. L. R. 735; 81 Sol. Jo. 419.

*Annotation*:—*Refd. Re Vaux, Nicholson v. Vaux*, [1938] Ch. 581.

1394. *Add. Annotation*:—*Refd. Re Leeke's Settlement Trusts, Borough v. Leeke*, [1937] 2 All E. R. 563.

1397. *Add. Annotation*:—*Refd. Re Leeke's Settlement Trusts, Borough v. Leeke*, [1937] 2 All E. R. 563.

1427. *Add. Annotation*:—*Consd. Re Leeke's Settlement Trusts, Borough v. Leeke*, [1937] 2 All E. R. 563.

1429. *Add. Annotation*:—*Consd. Re Leeke's Settlement Trusts, Borough v. Leeke*, [1937] 2 All E. R. 563.

1526a. ———.—*Sale of lands charged to pay debts—Charge on other lands of settlor.*—*LEGH v. LEGH* (1846), 15 Sim. 135; 60 E. R. 508.

*Annotation*:—*Refd. Re Saunders-Davies, Saunders-Davies v. Saunders-Davies* (1887), 56 L. J. Ch. 492.

1604a. ———.—]—*STAWELL v. AUSTIN* (1677), 2 Rep. Ch. 125; 21 E. R. 635.

1746. *Add. Annotation*:—*Consd. Re Arden, Short v. Camm*, [1935] Ch. 326.

1779a. ———.—]—*WARMAN v. SEAMAN* (1675), 2 Cas. in Ch. 209; Freem. Ch. 306; Poll. 112; Cas. temp. Finch, 279; 22 E. R. 914; *sub nom. SEAMAN v. WARMAN*, Freem. K. B. 306; 3 Keb. 544.

*Annotations*:—*Refd. Lyon v. Mitchell* (1816), 1 Madd. 467; *Re Wynch Trusts, Ex p. Wynch* (1834), 5 De G. M. & G. 188; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823.

1786a. ———.—*Conditional gift.*—By marriage settlement, C., the husband, in consideration of the intended marriage & of the fortune of S., the wife, to which C. was to become entitled on the marriage, released land to the use of himself in fee until the marriage; & after the marriage, to the use of himself for life; remainder to trustees to preserve contingent remainders; & after the decease of C., in case S. should survive him, to the use of S. for life; remainder to trustees to preserve contingent remainders; & after the decease

of the survivor of C. & S., in case there should be only one child of the marriage, then living, & no other child then dead leaving issue, to the use of such child in fee; but, in case there should happen to be more than one such child living at the decease of the survivor of C. & S., or any child or children then dead leaving issue, then to the use of all such children of C. & S. & such children's children, respectively, for such estates as C. & S. should jointly appoint, &, in default of such appointment, as the survivor should appoint: &, in default of such appointment, to the use of all the children of the marriage as tenants in common & of the heirs of their respective bodies, with cross remainders; & "for default of all such issue," to the use of four

brothers & sisters of S. as tenants in common in fee. S. survived C.: there were two children of the marriage, of whom both died, without leaving issue, in the lifetime of S. No appointment was made:—*Held*: the remainder to S.'s brothers & sisters took effect, as it was not a limitation in remainder after the determination of the estates given to the children as tenants in common in tail by the limitation immediately preceding, but was an independent limitation to take effect in case there were, at the time of the death of the survivor of C. & S., no issue in whom any of the previous limitations could vest.—*DOE d. LEES v. FORD* (1853), 2 E. & B. 970; 23 L. J. Q. B. 53; 22 L. T. O. S. 184; 18 Jur. 420; 2 C. L. R. 654; 118 E. R. 1029.

## Part X.—Tenant for Life and Remainderman.

1808. *Add. Annotation*:—*Appld. Re* Brandon, *Samuels v. Brandon* (1932), 49 T. L. R. 48.

1809. *Add. Annotation*:—*Appld. Re* Brandon, *Samuels v. Brandon* (1932), 49 T. L. R. 48.

1869. *Add. Annotations*:—*As to* (2) *Appld. Re* Robins, *Holland v. Gillam*, [1928] Ch. 721. *Refd. Re* Conquest, *Royal Exchange Assurance v. Conquest*, [1929] 2 Ch. 353; *Re* Whitaker, *Rooke v. Whitaker*, [1929] 1 Ch. 662; *Re* Smith, *Vincent v. Smith*, [1930] 1 Ch. 88.

1872. *Add. Annotations*:—*As to* (1) *Refd. Re* Whitaker, *Rooke v. Whitaker*, [1929] 1 Ch. 662. *As to* (2) *Distd. Re* Robins, *Holland v. Gillam*, [1928] Ch. 721. *Expld. Re* Conquest, *Royal Exchange Assurance v. Conquest*, [1929] 2 Ch. 353. *Consd. Re* Smith, *Vincent v. Smith*, [1930] 1 Ch. 88.

1873. For the existing paragraph substitute the following paragraph:—

— — — — —.]—Testator, who died in 1871, devised his real estate to his trustees upon trust to divide the income during a long period, namely during the joint lives & the life of the survivor of a large class of persons, amongst another class of persons, their respective exors., administrators & assigns; & declared that, on cesser of the period, the land should be sold, & the net proceeds of sale divided amongst a third class of persons only then ascertainable, & he gave his trustees a power of sale until the trust for sale arose. Immediately before the commencement of Law of Property Act, 1925 (c. 20), all the *cestuis que vie* were dead except one, & all the original participants in income were also dead except one, & the income for many years had been distributed amongst their respective estates or assigns:—*Held*: (1) the land was held in undivided shares within Law of Property Act, 1925, Sched. I., Part IV., par. 1.

The trustees having received, through their surveyor, a notice from the local authority

that certain premises, forming part of the trust estate, were in a defective condition, carried out the necessary repairs, & temporarily paid the cost thereof out of the rents of the trust estate:—*Held*: (2) the trustees having asked the ct. for directions, the ct. was free to determine how the expenses ought to be borne; (3) the expenses should be borne by capital.—*Re* ROBINS, *HOLLAND v. GILLAM*, [1928] Ch. 721; 97 L. J. Ch. 417; 139 L. T. 393.

*Annotations*:—*As to* (1) *Appld. Re* House, *Westminster Bank v. Everett*, [1929] 2 Ch. 166. *As to* (3) *Follid. Re* Smith, *Vincent v. Smith*, [1930] 1 Ch. 88. *Refd. Re* Conquest, *Royal Exchange Assce. v. Conquest*, [1929] 2 Ch. 353; *Re* Whitaker, *Rooke v. Whitaker*, [1929] 1 Ch. 662.

1873a. — — — — —.]—Law of Property Act, 1925 (c. 20), s. 28 (2), has not deprived the ct. of its inherent jurisdiction to decide, in a proper case, that the cost of certain repairs to settled land ought to be borne by capital.

The intestate died possessed of an estate which included freehold cottages in a bad state of repair. After the death the local authority served notices to carry out repairs, including re-roofing & pointing of chimney stacks. Some of these repairs, in view of the state of the property at the intestate's death, would have amounted to "permanent improvements"; & this summons, issued upon the application of the administrator of the estate, raised questions as to the incidence of their cost:—*Held*: (1) the cost of repairs which are "improvements" within Settled Land Act, 1925 (c. 18), Sched. III., Pts. I, II., may properly & *prima facie* ought to be borne by capital; (2) works not being "improvements" within these parts of that Sched. may properly be so borne if they are shown to be works in the nature of permanent improvements; (3) ordinary current repairs & "casual repairs," i.e., those carried out in the ordinary course, generally at the cost of the tenant for life, cannot be treated as being "permanent improvements"; (4) Law of Property Act, 1925 (c. 20), s. 28 (2), does not compel Settled Land Act trustees

PART X. SECT. 3, SUB-SECT. 4.—A.

§ 1. — — — — — Ordinary repairs payable out of income by tenant for life.—

*Re* DWYER, [1930] 2 D. L. R. 897.—CAN.

sm. Extent of rule—Corpus liable

only for repairs necessary to keep estate in saleable condition.—*WILSON v. WHELPLEY* (1929), 1 M. P. R. 196.—CAN.



to pay the costs of all repairs out of income, & does not deprive them of their discretion under Settled Land Act, 1925 (c. 18), s. 102.—*Re SMITH, VINCENT v. SMITH*, [1930] 1 Ch. 88; 99 L. J. Ch. 27; 142 L. T. 178.

**1873b.** ——— **Effect of Law of Property Act, 1925 (c. 20), s. 28 (1).**—The effect of above sub-sect. is (a) to give to trustees for sale powers of management of land, including the repair & rebuilding of houses, the cost of which, by virtue of sub-section 3 of Settled Land Act, 1925 (c. 18), s. 102, is payable out of income, & (b) to give power to trustees to make improvements which, under Settled Land Act, 1925 (c. 18), s. 84, coupled with the provisions of Sched. III. thereto, can be paid for out of capital. Therefore where trustees have a choice of powers under above sub-sect., they should be guided in their choice by the equitable principles laid down & applied in *Re Hotchkys, Freke v. Calmady*, No. 1869, & the language of the judgment in *Re Gray, Public Trustee v. Woodhouse*, No. 1872, is not to be construed as an authority for the contrary proposition.—*Re CONQUEST, ROYAL EXCHANGE ASSCE. v. CONQUEST*, [1929] 2 Ch. 353; 98 L. J. Ch. 441; 141 L. T. 685.

*Annotation* :—*Refd. Re Smith, Vincent v. Smith*, [1930] 1 Ch. 88.

**1878a.** ——— **Permanent structural repairs.**—Dangerous structure notices were served by a local authority on trustees in respect of houses forming part of a trust estate. The necessary work involved pulling down, rebuilding, & reinstatement of the houses :—*Held* : the work involved structural reconstruction of a permanent nature, & that therefore the cost was to be provided for out of capital.—*Re WHITAKER, ROOKE v. WHITAKER*, [1929] 1 Ch. 602; 98 L. J. Ch. 312; 141 L. T. 28.

*Annotations* :—*Apld. Re Conquest, Royal Exchange Assce. v. Conquest*, [1929] 2 Ch. 353. *Consd. Re Smith, Vincent v. Smith*, [1930] 1 Ch. 88.

**1878b.** ———.—*Re SMITH, VINCENT v. SMITH*, No. 1873a, *ante*.

**1878c.** ——— **Ancient buildings.**—*Re BATTLE ABBEY SETTLED ESTATE, WEBSTER v. TROUBRIDGE*, [1933] W. N. 215; *sub nom. Re WEBSTER, WEBSTER v. TROUBRIDGE*, 176 L. T. Jo. 143.

**1884a.** ———.—*Devise to A. & others on trust to apply the rents in payment of certain debts, then to apply them for the benefit of A. for life with remainders over, with a direction that A. should be allowed to occupy the premises, keeping them in repair, & paying £100 per annum, or such other rent as the trustees should think reasonable. A. was the only acting trustee. He continued to occupy the premises after testator's death. They were afterwards burnt down :—Held* : A. was bound to reinstate the premises, & to pay £100 a year during the occupation after the fire.—*GREGG v. COATES, HODGSON v. COATES* (1856), 23 Beav. 33; 2 Jur. N. S. 904; 4 W. R. 735; 53 E. R. 13.

*Annotations* :—*Apld. Re Willames, Andrew v. Willames* (1885), 54 L. T. 103; *Re Bradbrook, Lock v. Wills* (1887), 56 L. T. 106. *Refd. Woodhouse v. Walker* (1880), 5 Q. B. D. 404; *Baththany v. Walford* (1886), 33 Ch. D. 624.

**1891.** *Add. Annotation* :—*Refd. Re Weld-Blundell Estate, Mowbray (Lord) v. Weld-Blundell* (1929), 73 Sol. Jo. 585.

**1892.** *Add. Annotation* :—*Refd. Re Warwick's Settlement Trusts, Greville Trust Co. v. Grey*, [1938] Ch. 530.

**1917.** *Add. Annotation* :—*Apld. Spyer v. Phillipson*, [1931] 2 Ch. 183.

**1955.** *Add. Annotations* :—*Consd. Re Macnamara, Macnamara v. Macnamara*, [1936] 1 All E. R. 602. *Refd. Re Fulford, Fulford v. Hyslop*, [1930] 1 Ch. 71.

**1956a.** ——— **Damage to settled property in Ireland.**—A tenant for life unimpeachable for waste of an estate in Ireland & subject to Irish law was awarded £1,400 compensation for damage to the settled property. The compensation, which was awarded by a commission of inquiry set up by agreement between the govt. of the Irish Free State & the British Govt., was in the nature of a gratuity & was not by law recoverable by the owners of the property injured. The tenant for life in fact only received £2,600, the balance being retained by the Irish Free State Govt. in respect of an unascertained liability of the tenant for life for Irish income tax :—*Held* : by Irish law the sum awarded by way of compensation was capital money & was held by the tenant for life as a trustee for the trustees of the settled estate; in the circumstances the liability was the tenant for life was limited to £2,600, the only sum received in respect of the award.—*Re MACNAMARA, MACNAMARA v. MACNAMARA* [1936] 1 All E. R. 602.

**1958.** *Add. Annotations* :—*As to (1) Consd. Re Fenwick, Fenwick v. Stewart*, [1936] 2 All E. R. 1096; *Corbett v. I. R. Comrs.*, [1938] 1 K. B. 567. *Refd. Re Shee, Taylor v. Stoger*, [1934] 1 Ch. 345; *Corbett v. I. R. Comrs.*, [1937] 3 All E. R. 808.

**1958a.** ———.—When part of the residuary estate of a testatrix who died on Mar. 24, 1932, consisted of two houses held on lease for terms expiring in 1914 & 1915 respectively & subject to the payment of heavy ground rents & other liabilities; & before the expiration of the first year after testatrix's death, the exors. in pursuance of their obligations under the leases, expended £353 in payment of rent & other outgoings; & for the purpose of relieving the estate from future liabilities thereunder, acting under proper advice assigned the leases & paid out of the capital of the estate the sums of £500 & £100 to the respective assignees thereof in consideration of their undertaking those liabilities :—*Held* : as between tenant for life & remainderman under the trusts of the residuary estate, the remainderman was not entitled to have the whole of the sums of £500 & £100 recouped to capital out of the income accruing to the tenant for life, although the effect of that payment out of capital was to relieve the tenant for life from the obligations he would have been under to meet out of income the liabilities under the leases, but for the assignment thereof; the obligation to pay the sum of £353 ought not to be wholly borne by the tenant for life, as he was not put in possession of any of the income of the residuary estate until the estate had, within the due period of one year from testatrix's death, been freed from the leasehold liabilities; but, thirdly, those three sums amounting together to

£953 ought to be apportioned as between capital & income upon the principle recognised in *Althusen v. Whittell*.—*Re SHEE, TAYLOR v. STOKER*, [1934] Ch. 345; 103 L. J. Ch. 183; 150 L. T. 451.

**1960a.** — Vested legacy fund—Payment postponed.]—(1) The income of a fund set apart to answer a legacy vested but not payable until a future date falls into the residue as capital, & must, as between the tenant for life & the remainderman of the residue, be invested, & the income only arising from such investment paid to the tenant for life.

(2) The unapplied income of a fund set apart to answer an annuity payable at the discretion of trustees belongs to the tenant for life of the residue as income.—*Re WHITEHEAD, PEACOCK v. LUCAS*, [1894] 1 Ch. 678; 63 L. J. Ch. 229; 70 L. T. 122; 42 W. R. 491; 38 Sol. Jo. 183; 8 R. 142.

*Annotation*.—*Generally, Reffid. Re Hawkins, White v. White*, [1916] 2 Ch. 570.

**1975a.** —.]—In 1838 property was demised for a term determinable on the dropping of three lives, reserving a yearly rent & a heriot payable on the dropping of each life, with a covenant for perpetual renewal at a specified fine on the dropping of each life. In 1869 the persons who had then become absolute owners subject to the lease settled the property in strict settlement, giving to a trustee ample powers of management, with powers to grant leases with or without covenants for renewal, & to perform any covenant for renewal previously entered into by any previous owner, or by the trustee for the time being, so that in every such appointment, lease or demise the best rent be reserved without taking any fine or premium. During the continuance of a tenancy for life under this settlement two lives dropped, & on each occasion a heriot was paid & the lease renewed by the trustee at a fine in pursuance of the covenant.—*Held*: the powers given to the trustee did not affect the question, & the fines & heriots were casual profits payable to the tenant for life.—*BRIGSTOCKE v. BRIGSTOCKE* (1878), 8 Ch. D. 357; 47 L. J. Ch. 817; 38 L. T. 760; 26 W. R. 761, C. A.

*Annotation*.—*Reffid. Re Rodes, Sanders v. Hobson*, [1909] 1 Ch. 815.

**1979a.** Annuity charged on leaseholds—Compulsory sale.]—A settlement was made in 1892 of (*inter alia*) an annuity of £300 charged on & payable out of certain leasehold properties. The settlement provided that the trustees should pay the annuity of £300 to one H. during her life & after her death to her husband, & after the death of the survivor of those two to their three daughters during their lives with remainder to the daughters' children. H. & her husband having died, their three daughters were entitled to the

income, & the children of the daughters were entitled to the capital. The settlement also provided that if & when H. & her husband or the survivor of them should so require, & after the death of the survivor of them if & when the trustees or trustee should in their or his uncontrolled discretion think it expedient, the trustees or trustee should sell the annuity of £300 & invest the proceeds in a manner specified in the settlement. The annuities in question were in fact redeemed by the owner of the leasehold properties under the provisions of sect. 191 of the Law of Property Act, 1925 (c. 20), s. 191:—*Held*: sect. 191 enabled a compulsory sale to be made, & the trustees could not be said to have exercised any discretion in the matter one way or the other. The capital money resulting from the compulsory sale must be treated as though the annuity were still subsisting so far as the relative rights of the tenants for life & the remaindermen were concerned. The trustees should sell in each year sufficient of the capital to produce with the income £300 a year, less income tax, which was to be paid to the tenants for life.—*Re CARR'S SETTLEMENT, RIDDELL v. CARR*, [1933] Ch. 928; 102 L. J. Ch. 327; 149 L. T. 601; 49 T. L. R. 581.

**1996.** *Add. Annotation*.—*Consd. Re MacIver's Settlement, MacIver v. Rae*, [1930] Ch. 198.

**1998a.** Distribution of capital assets.] — A limited co. not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other distribution of money, whether called dividend or bonus or any other name, can only be made by way of dividing profits. Moneys so paid to a shareholder who is a trustee consequently will belong *prima facie* to the person beneficially entitled to the income of the trust estate. If the moneys or any part of them are to be treated as *corpus*, there must be some provision of the trust deed which brings about that result; no statement by the co. or its officers can affect the rights of the beneficiaries in the matter.

In 1925 a pastoral co. in New South Wales sold substantially the whole of its lands, live stock & other assets, & ceased to carry on its business. In 1926 a dividend was declared & paid as "a distribution of capital assets in advance of the winding up." No question arose in the appeal as to that dividend. In Nov. 1927, the co. declared & paid a dividend, stating that it was paid out of the sale of the breeding stock. Upon an originating summons issued by trustees, who held over two-thirds of the shares issued, the Supreme Ct. held that the dividend should be treated as capital of the trust estate. Upon appeal to the Privy Council

**PART X. SECT. 4, SUB-SECT. 3.—**  
**M. (a).**

*sa.* Cash bonus—War Loan conversion.]—M. was entitled to the income of a certain holding in British 5 per cent. War Loan stock for her life. The stock was redeemable at any time between 1929 & 1947, & by the British Finance (No. 2) Act, 1931 (c. 49), the British Treasury was empowered to convert the stock into stock bearing interest at 3½ per cent. *per annum*.

Shareholders were entitled to have their holdings redeemed at par or to have them continued in the new stock, & if their applications for continuance were received before a specified date, cash bonuses were payable to them in respect of their holdings. Sect. 15 (2) of the Act provided that "as between persons having any beneficial interest in a holding, any cash bonus payable in respect of the holding shall belong to the person entitled to the income of the holding on the day when the

bonus is payable":—*Held*: the ct. would apply the provisions of the Act, & therefore, M. would be entitled to the cash bonus payable in respect of the holding.—*Re SCHOPPERLE'S TRUSTS*, [1932] 1 R. 457.—*IR*.

**PART X. SECT. 4, SUB-SECT. 3.—**  
**M. (b).**

*sa.* Dividend out of profit on sale of assets.]—*Re HILL, PERMANENT TRUSTEE CO. v. HILL* (1929), 29 S. R. N. S. W. 53; 46 N. S. W. W. N. 10.—*AUS*.

resps., while supporting that decision, contended alternatively that the dividend could not have been paid but for a breach of duty by the trustees in not opposing resolutions passed in 1926 altering one of the co.'s articles of assocn.:—*Held*: the dividend should be treated as income of the trust estate, but the moneys should be retained by the trustees for a limited period, in order that the beneficiaries might, if they wished, assert in hostile litigation a claim based upon the alternative contention above stated, the materials necessary to dispose of that point not being fully before the board.—*HILL (R. A.) v. PERMANENT TRUSTEE CO. OF NEW SOUTH WALES, LTD.*, [1930] A. C. 720; 144 L. T. 65; *sub nom. Re HILL (RICHARD)*, *HILL v. PERMANENT TRUSTEE CO. OF NEW SOUTH WALES*, 99 L. J. P. C. 191, P. C.

*Annotations*:—*Consd. Re Ward, Ringland v. Ward*, [1936] 2 All E. R. 773. *Refd. Briggs v. I. R. Comrs.* (1932), 17 Tax Cas. 11.

**1998b.** —.]—A testator, who died in 1928 & whose estate largely consisted of shares in a steamship co., by his will directed that they should not be sold during the continuance of the trusts upon which he settled them, & gave the dividends, interest, & annual income thereof to his widow during her life or until she should remarry, & subject thereto to his children during their lives & then to their issue. The co. adopted an article enabling it to distribute surplus moneys representing proceeds of sales of ships & investments among the shareholders on the footing that the same should be received as capital. In 1934 it distributed £819,000 among the shareholders in exercise of this power, of which the trustees of the will received £16,000:—*Held*: on the true construction of the will & in the events which had happened the £16,000 must be treated as an accretion to the capital of the trust fund.—*Re WARD'S WILL TRUSTS, RINGLAND v. WARD*, [1936] Ch. 704; [1936] 2 All E. R. 773; 105 L. J. Ch. 315; 155 L. T. 346; 52 T. L. R. 605; 80 Sol. Jo. 486.

**1998c. Dividends in arrear—Issue of certificates redeemable out of future profits.**—Where dividends on cumulative preference shares are in arrear & the co. issues funded dividend certificates, saleable & redeemable, the future profits of the co. to be used in redeeming them, in lieu of payment of the arrears, the certificates, as between income & capital, are to be treated as income & belong to the tenant for life.—*Re SANDBACH, ROYDS v. DOUGLAS*, [1933] Ch. 505; 102 L. J. Ch. 173; 149 L. T. 44.

**1998d. Waiver of arrears of dividend on preference shares.—In consideration of ordinary shares.**—Dividends on preference shares in a co. being several years in arrear, a scheme was approved by the shareholders & sanctioned by the ct., whereby the ordinary shareholders surrendered part of their holding to the preference shareholders, the latter consenting to waive their right to the arrears of dividends. Under the scheme trustees of a settlement received ordinary shares in lieu of the arrears of dividend due on a block of preference shares forming part of the trust estate:—*Held*: the ordinary shares received by the trustees were to be treated as income

& belonged to the tenant for life.—*Re MACIVER'S SETTLEMENT, MACIVER v. RAE*, [1936] Ch. 198; 105 L. J. Ch. 21; 154 L. T. 339; 52 T. L. R. 25.

*Annotation*:—*Consd. Re Smith's Will Trusts, Smith v. Melville*, [1936] 2 All E. R. 1210.

**1998e. Distribution of ordinary shares to preference shareholders.—In satisfaction of unpaid dividends.**—Two shares of the residue of testator's estate were directed to be settled & the trustees appropriated to such shares certain cumulative preference & ordinary shares in a co. For some years the co. was unable to pay the dividend on the preference shares, & ultimately an arrangement was made by the co. with the sanction of the ct. that the preference shareholders should receive two-thirds of the ordinary shares in satisfaction of all outstanding dividends. The trustees of the will were not entitled by their holdings of shares to control the action of the co. in this respect. The trustees having received these ordinary shares it was contended by those interested in the capital of the shares of the residue that some part of such ordinary shares should be treated as capital:—*Held*: the ordinary shares were income & must be transferred to those entitled to the income.—*Re SMITH'S WILL TRUSTS, SMITH v. MELVILLE*, [1936] 2 All E. R. 1210; 155 L. T. 248; 80 Sol. Jo. 612.

**2000. Add. Annotation**:—*Refd. Briggs v. I. R. Comrs.* (1932), 17 Tax Cas. 11.

**2007. Add. Annotation**:—*Apld. Re Bates, Mountain v. Bates*, [1928] Ch. 682.

**2009a.** —.]—The directors of a co. owning & operating steam trawlers, having sold some of their vessels for sums largely exceeding the values at which they stood in the co.'s balance sheet, carried the proceeds to a suspense account & afterwards distributed them as cash bonuses to the shareholders, with a covering letter stating that such bonuses were capital payments not liable to income tax or super tax:—*Held*: not having been capitalised by the issue of bonus shares increasing the total capital, the payments were income receivable by the tenant for life during his life.—*Re BATES, MOUNTAIN v. BATES*, [1928] Ch. 682; 97 L. J. Ch. 240; 139 L. T. 162; 72 Sol. Jo. 468.

*Annotation*:—*Apprvd. Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A. C. 720.

**2011. Add. Annotation**:—*Consd. Re Sandbach, Royds v. Douglas*, [1933] Ch. 505.

**2020a.** —.]—*CALTHORPE'S LORD WILL CASE (circa 1795)*, cited in 14 Ves. at p. 77; 33 E. R. 450.

*Annotations*:—*Distd. Barclay v. Wainwright* (1807), 11 Ves. 66. *Refd. Re Bouch, Sproule v. Bouch* (1885), 29 Ch. D. 635.

**2026a.** —.]—Subject to certain bequests & dispositions, a testator who died in May, 1931, by his will gave the residue of his estate to his trustees for conversion & investment & directed that the investments representing such residue should be held upon trust as to certain parts for his children therein named, such parts to be settled upon certain trusts. Testator's residuary estate consisted (*inter alia*) of £100 preference shares & £100 ordinary shares in B. B., Ltd. By the articles of B. B., Ltd., it was provided that "the profits of the co. which it shall from

time to time be determined to divide in respect of any year or other period shall be applied first in paying the fixed cumulative preference dividend on the capital paid up on the preference shares to the close of such year or other period & subject thereto in paying a dividend for such year or other period on the capital paid up on the ordinary shares." At the date of testator's death £1 per share had been paid up on the ordinary shares, but nothing on the preference shares. No dividend had been declared before Mar. 1931. By legislation in the Union of South Africa, B. B., Ltd., would become liable, in the event of its not distributing in each year dividends amounting to 75 per cent. of its profits in the Union, to a special super-tax. By an arrangement with the inland revenue, B. B., Ltd., which owed a large sum in respect of income tax, super tax & sur tax, was not to make any distribution by way of dividend until such sum should be discharged. In 1932 an interim dividend was declared on the ordinary shares "out of the profits of the co. for the year 1931." In 1933 an interim dividend was declared which was to be paid "first out of the accumulated profits of the year to Dec. 31, 1924, & if these should not suffice then recourse to be had to the profits of the year to Dec. 31, 1925." Interim dividends were declared in 1934, & 1935, payable similarly out of undistributed profits for the years 1925, 1926 & 1927. When these dividends were declared calls were made upon the ordinary shares which were satisfied out of the dividends declared. A summons was taken out to determine whether the dividends were income or capital of testator's residuary estate or fell to be apportioned between income & capital, & if so on what basis:—*Held*: the interim dividends were for the years in which they were respectively declared; upon the evidence the intention of the co. was a distribution of

profits & not the capitalisation of the amount of the dividends & the dividends declared after testator's death must be treated as income.—*Re JOEL, JOHNSON v. JOEL*, [1936] 2 All E. R. 962.

2035. *Add. Annotations*:—*Distd. Re Bates, Mountain v. Bates*, [1928] Ch. 682; *Parker v. Chapman* (1928), 138 L. T. 729; *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A. C. 720. *Refd. Income Tax Comr., Bengal v. Mercantile Bank of India, Ltd.*, [1936] 2 All E. R. 857; *Re Joel, Johnson v. Joel*, [1936] 2 All E. R. 962; *Re Ward, Ringland v. Ward*, [1936] 2 All E. R. 773.

2059. *Add. Annotation*:—*Distd. Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A. C. 720.

2090. *Add. Annotations*:—*Consd. Re McKee, Public Trustee v. McKee*, [1931] 2 Ch. 145. *Refd. Re Sullivan, Dunkley v. Sullivan* (1929), 45 T. L. R. 590.

2127. Add the following paragraph:—

If that sum had been six months' interest paid by the mtgor. instead of six months' notice before repayment of the mtge. moneys, then it would have been payable to the tenant for life (NORTH, J.).

2131a. *Repayment of Income tax.*—Testator directed that his residuary estate should be held in trust for such of his sons as should attain the age of twenty-one years & such of his daughters as should attain that age or marry. He further directed his trustees to hold the share of a daughter in trust to pay her the income thereof during her life, & after her death in trust for such persons as she should by will appoint, & in default of appointment in trust for all her children in equal shares, & in default of any issue of a daughter in trust for his other sons or daughters as part of their shares. Testator died in 1906, leaving one son & one daughter.

PART X. SECT. 4, SUB-SECT. 3.—  
M. (f).

2058 i. *Surplus assets—Distribution on dissolution—Repayment ordered to be by way of return of capital.*—Money paid to an exor. of a deceased shareholder in a winding up under an order directing the repayment to be by way of return of capital becomes part of the corpus of the estate.—*Re KEATING*, [1934] S. C. R. 698; 3 D. L. R. 745.—CAN.

sb. *Right of life tenant.* Life tenants are not entitled to moneys which represent proceeds of sale of securities over & above their value at the time of testator's death. *Re NICHOL'S ESTATE* (1936), 51 B. C. R. 214. CAN.

PART X. SECT. 4, SUB-SECT. 3.—  
M. (g).

sd. *Proceeds from sale of assets & rents & profits from leasehold & freehold properties.*—*Held*: the moneys so received by the trustees must be treated as part of the capital of the estate.—*UNION TRUSTEE CO. OF AUSTRALIA v. WATSON* (1931), 48 N. S. W. N. 102.—AUS.

PART X. SECT. 4, SUB-SECT. 3.—  
P. (b).

2101 i. *Whether interest equal to interest on authorised investments.*—A tenant for life is entitled to be paid, pending conversion, the amount allowed by the rule in *Howe v. Earl of Dartmouth*, notwithstanding that the income

actually received falls short of the amount allowed under that rule, & is entitled to a charge on capital accordingly. The tenant for life has the same rights pending conversion in a case where the ct. authorises postponement of the sale of assets which without such authorisation the trustees would be bound to realise under the rule in *Howe v. Earl of Dartmouth*. *Qu.*: whether the tenant for life is entitled pending conversion to require the amount of any deficiency in the actual income to be raised by enforcement of the charge.—*UNION TRUSTEE CO. OF AUSTRALIA, LTD. v. GRAHAM* (1931), 31 S. R. N. S. W. 523; 48 N. S. W. N. 194.—AUS.

2101 ii. — *Right of tenant for life.*—The rule in *Howe v. Earl of Dartmouth* was intended to operate in favour of a life tenant as well as of remaindermen. In a case, therefore, in which that rule applies, a tenant for life is entitled to be paid, pending conversion, the amount allowed by that rule, notwithstanding that the income actually received falls short of such amount, & further, is so entitled even where the effect of the application of the rule will be to reduce the amount of capital ultimately available to the remaindermen & may *pro tanto* defeat the intention of testator.—*Re TINDAL, PERPETUAL TRUSTEE CO., LTD. v. TINDAL* (1934), 34 S. R. N. S. W. 8.—AUS.

PART X. SECT. 4, SUB-SECT. 3.—Q.  
sb. *Company dealing in lands of*

*specific estate—Profits on sale.*—*Re VICKERS* (1923), 54 O. L. R. 352.—CAN.

sd. *Profits from carrying on station.*—In carrying on a station property it is the duty of the trustees to hold the scales as evenly as possible between the life tenant & remaindermen consistently with prudent management, starting with the basic principle that the capital of the business is the capital which was embarked therein at the date of the testator's death, that any profit which that capital earns as the result of a strict method of accountancy belongs to the life tenant as soon as that profit is realised in cash, that that profit should be realised in cash so soon as it prudently can be realised, & that the life tenant is only entitled to such profits as is from time to time during the life tenancy realised in cash.—*Re PORTER, PORTER v. PORTER* (1931), 31 S. R. N. S. W. 115; 48 N. S. W. N. 17.—AUS.

sf. —.—For the purpose of ascertaining the amount due to life tenants for income derived from the carrying on of a station for the purpose of the realisation of an estate, the whole period during which the station is carried on must be treated as one period. A book profit shown in an administrator's accounts for a part of such period is not income necessarily to be appropriated to a life tenant.—*UNION TRUSTEE CO. OF AUSTRALIA, LTD. v. BECKFORD* (1931), 31 S. R. N. S. W. 92; 48 N. S. W. N. 40.—AUS.

The daughter attained the age of twenty-one years in 1926, & married in 1927. There was issue of that marriage one son. In 1927 the daughter claimed, under Income Tax Act, 1918 (c. 40), s. 25), repayment of moneys paid or deducted on account of tax in respect of the income of her share accumulated under the will during her minority. In 1928 the Board of Inland Revenue admitted her claim in this respect to the amount of £7,770 19s. 4d., & that amount had been paid to her. A question was then raised whether that sum should be treated as an accretion to the capital of the daughter's share, or whether she was entitled to it absolutely:—*Held*: the daughter was entitled absolutely to the sum of £7,770 19s. 4d.—*Re FULFORD, FULFORD v. HYSLOP*, [1930] 1 Ch. 71; 99 L. J. Ch. 80; 142 L. T. 185.

**2140a.** — — — Dividends on bonus shares created after death of tenant for life.]—*Re HYDE (WILLIAM) WILL TRUSTS, HYDE v. BRYCE* (1930), 74 Sol. Jo. 467.

**2143.** *Add. Annotations*:—As to (2) *Apld. Re Walker, Walker v. Patterson* (1934), 177 L. T. Jo. 325. *Generally, Refd. Re Firth, Sykes v. Hall*, [1938] Ch. 517.

**2145.** *Add. Annotations*:—*Consd. Re Firth, Sykes v. Hall*, [1938] Ch. 517; *Re Winterstoke's Will Trusts, Gunn v. Richardson*, [1938] Ch. 158. *Refd. Re Walker, Walker v. Patterson* (1934), 177 L. T. Jo. 325.

**2146a.** — — —.]—*Re WALKER, WALKER v. PATTERSON*, [1934] W. N. 104; 177 L. T. Jo. 325.

**2149a.** — — — Sale to pay death duties.]—Where, on the death of a tenant for life, the trustees of the settlement sell securities "cum dividend," & part of the dividend accrued while the tenant for life was alive, the trustees should, if requested so to do, account to the exors. of the tenant for life for the proportion of the dividend which has so accrued, so as to preserve the rights which the deceased tenant for life would have had if the securities had been sold "ex dividend."—*Re WINTERSTOKE'S WILL TRUSTS, GUNN v. RICHARDSON*, [1938] Ch. 158; [1937] 4 All E. R. 63; 107 L. J. Ch. 122; 158 L. T. 404; 54 T. L. R. 20; 81 Sol. Jo. 882.

*Annotation*:—*Consd. Re Firth, Sykes v. Hall*, [1938] Ch. 517.

**2149b.** — — —.]—Where the trustees of a settlement, on the death of a tenant for life, sell investments cum dividend, part of which accrued during the life of the tenant for life. Apportionment Act, 1870, does not apply, & the estate of the tenant for life is not entitled to share in the proceeds of sale, except in very exceptional circumstances.—*Re FIRTH, SYKES v. HALL*, [1938] Ch. 517; *sub nom. Re FIRTH, SYKES v. HALL*, [1938]

2 All E. R. 217; 107 L. J. Ch. 251; 158 L. T. 489; 54 T. L. R. 633; 82 Sol. Jo. 332.

**2157a.** Benefits gained by compromise of claim against estate of testator.]—A claim made against the estate of testator was compromised by the payment of a large sum several years after testator's death:—*Held*: the amount due for principal & interest at testator's death must be treated as a debt due from his estate, & the corpus thereof reduced by that amount; & any benefit gained to the estate by the compromise must, as between the persons entitled to the corpus & income thereof, be apportioned in the ratio of the amount due from testator at the day of his death, to the further amount calculated to have been due from his estate at the time when the compromise was effected.—*MACLAREN v. STANTON* (1867), L. R. 4 Eq. 448; 15 W. R. 974.

**2157b.** Insufficiency of assets—Sums received on realisation.]—Testator bequeathed a legacy of £10,000 with interest from his death at 4 per cent. *per annum*, to trustees upon trust to pay the income to certain persons during the life of one of them, & after her death upon trust for other persons. Testator's estate was insufficient for payment in full of his legacies, & the realisation of his assets occupied several years:—*Held*: moneys from time to time received by the trustees & applicable to the legacy were divisible rateably between capital & income, so as to attribute to income 4 per cent. from testator's death on the amount attributed to capital.—*Re TINKLER'S ESTATE* (1875), L. R. 20 Eq. 456; 45 L. J. Ch. 135.

*Annotation*:—*Refd. Re Foster, Lloyd v. Carr* (1890), 45 Ch. D. 629.

**2197a.** Cost of rendering accounts for succession duty.]—*Held*: (1) the expense of fencing waste lands granted to a trustee for the benefit of the estate must be paid out of capital; (2) the costs of rendering accounts for the succession duty, payable for the first equitable tenant for life, must be paid out of income.—*COWLEY (EARL) v. WELLESLEY* (1866), L. R. 1 Eq. 656; 35 Beav. 635; 14 L. T. 245; 14 W. R. 528; 55 E. R. 1043.

**2197b.** Calls on shares.]—Testator bequeathed residuary personality to trustees upon trust, either to continue existing investments or sell any part of the estate, & invest in certain stocks, shares & bonds. He directed calls, if any, which, at or after his death, might be or become due in respect of shares for the time being constituting part of his residuary personal estate, to be paid out of income:—*Held*: the direction applied to calls on railway shares held by testator at his death, but not to such shares acquired by the trustees.—*BEVAN v. WATERHOUSE* (1876), 3 Ch. D. 752; 46 L. J. Ch. 331.

#### PART X. SECT. 6, SUB-SECT. 1.

*sp. Power of trustee to effect hail insurance.*—Where it is a prudent & proper precaution to adopt, a trustee has power to effect hail insurance, although there is no statutory provision authorising him to do so.—*Re SEBEL ESTATE*, [1931] 2 W. W. R. 581.—*CAN.*

#### PART X. SECT. 7, SUB-SECT. 1.—A.

**2190 i.** *Management expenses.*—On the questions arising what should be

given to life tenants under a will, what expenses should be charged against income & what against capital:—*Held*: any expenses incurred in connection with the management & safeguarding of the estate, as an estate, should be charged against the corpus; but expenses incurred in the management, safeguarding & collection of income should be charged to income.—*Re MITCHELL'S ESTATE, NATIONAL TRUST CO., LTD. v. CARSON*, [1936] 3 W. W. R. 249; [1937] 1 W. W. R. 165.—*CAN.*

*di. - .*—By the will of a testatrix an equitable tenant for life was in occupation of the estate of the testatrix, which consisted solely of a cottage property. For a period of three years the tenant for life had neglected to pay the rates on the property:—*Held*: the tenant for life must pay the rates, & in the event of her not paying them the trustee of the will should pay the rates & enter into possession of the property to recoup himself for the amount paid.—*FOLEY v. CANNON* (1936), 53 N. S. W. W. N. 323.—*AUS.*

2202. *Add. Annotation*:—*As to* (1) *Refd. Re Whitaker, Rooke v. Whitaker*, [1929] 1 Ch. 602.

2203. *Add. Annotation*:—*Refd. Re Whitaker, Rooke v. Whitaker*, [1929] 1 Ch. 602.

2204. *Add. Annotations*:—*Apld. Re Smith, Vincent v. Smith*, [1930] 1 Ch. 88. *Refd. Re Whitaker, Rooke v. Whitaker*, [1929] 1 Ch. 602.

2205a. *Enlargement of canal, docks & harbour.*—*Held*: the expenditure was a charge on the *corpus* of the estates comprised in the term.—*Re BUTE (MARQUESS), BUTE (MARQUESS) v. RYDER* (1884), 27 Ch. D. 196; 53 L. J. Ch. 1090; 32 W. R. 990.

2205b. *Cost of fencing waste lands.*—*COWLEY (EARL) v. WELLESLEY*, No. 2197a, *ante*.

2207a. *Liability for performance of covenants in lease.*—Testator, who had assigned during his life certain leasehold property, bequeathed by his will other leaseholds & the residue of his property to tenants for life, with remainders over. The assignees of the leaseholds became bkpt., & the exors. of testator took a reassignment of those leaseholds. Liabilities having arisen under the covenants in the original lease, it was held that those liabilities must fall upon the *corpus*, & not upon the income, of testator's estate.—*ALLEN v. EMBLETON* (1858), 4 Drew. 226; 27 L. J. Ch. 297; 4 Jur. N. S. 79; 6 W. R. 272; 62 E. R. 87.

*Annotation*:—*Apld. Re Owen, Slater v. Owen*, [1912] 1 Ch. 319.

2209a. —.—.—.—.—*Re LORIMER* (1850), 12 Beav. 521; 19 L. J. Ch. 524; 16 L. T. O. S. 406; 14 Jur. 1126; 50 E. R. 1160.

2209b. —.—.—.—.—*A sum of money having been paid into court under Trustee Relief Act, a petition was presented by the tenant for life for payment of the dividends:—Held*: the *corpus* of the fund was not liable to bear the costs of the appln.—*Re BANGLEY'S TRUST* (1852), 21 L. J. Ch. 875; 19 L. T. O. S. 269; 16 Jur. 682.

2209c. —.—.—.—.—*Re BUTLER'S TRUST* (1852), 16 Jur. 324.

2222. For "*Re WOOD'S ESTATE*, No. 2311, *post*," substitute the following: "*Re WOOD'S TRUSTS* (1870), L. R. 11 Eq. 155; 40 L. J. Ch. 179; 23 L. T. 586; 19 W. R. 227."

*Annotation*:—*Consd. Re Evans' Trusts* (1872), 26 L. T. 682.

2243. *Add. Annotation*:—*As to* (2) *Refd. Garland v. Archer-Shee* (1930), 142 L. T. 443.

2243a. —.—.—.—.—*POWYS v. BLAGRAVE* (1854), 4 De G. M. & G. 448; 2 Eq. Rep. 1204; 24 L. J. Ch. 142; 24 L. T. O. S. 17; 2 W. R. 700; 43 E. R. 582, L. C.

*Annotations*:—*Consd. Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408. *Refd. Barnes v. Dowling* (1881), 44 L. T. 809; *Re Williams, Andrew v. Williams* (1884), 52 L. T. 41; *Re Cartwright, Avis v. Newman* (1889), 41 Ch. D. 532; *Re Freman, Dimond v. Newburn*, [1898] 1 Ch. 28.

2243b. —.—.—.—.—*Opposition to Bill in Parliament.*—An estate was settled by the will of a testator, his widow being the first, & his nephew the second tenant for life. During the lifetime of the widow she expended out of her own moneys various sums in making improvements upon the estate. Some of these sums were expended before, & some after the commencement of Settled Land Act, 1882 (c. 38). With regard to those which were expended after the commencement of

the Act, no scheme was, prior to the execution of the works, submitted for approval, either to the trustees of the settlement or to the ct., in accordance with sect. 26 of the Act. The widow also, prior to the commencement of the Act, paid out of her own moneys the costs of the successful opposition of the trustees to some bills in Parliament, which contained provisions injuriously affecting the estate. The repayment to the widow of all the sums thus expended by her was secured by four bonds given to her by the nephew. After the death of the widow the nephew, being then tenant for life in possession of the estate, applied to the ct. of a direction to the trustees to apply capital money in their hands in payment of the amounts due upon the bonds:—*Held*: independently of Settled Land Act, 1882 (c. 38), s. 36, the ct., under its general jurisdiction, had power to direct the payment of the costs of the Parliamentary opposition out of the capital money, & payment was directed accordingly.—*Re ORMROD'S SETTLED ESTATE*, [1892] 2 Ch. 318; 61 L. J. Ch. 651; 66 L. T. 845; 40 W. R. 490; 36 Sol. Jo. 427.

*Annotations*:—*Refd. Re Bristol's (Marquis) Settled Estates*, [1893] 3 Ch. 161; *Re L. C. C., Ex p. Pennington* (1901), 84 L. T. 808.

2254a. —.—.—.—.—*HAWKINS v. HAWKINS* (1836), 6 L. J. Ch. 69.

*Annotation*:—*Distd. Makings v. Makings* (1860), 1 De G. F. & J. 355.

2268. *Add. Annotation*:—*Consd. Re Warwick's Settlement Trusts, Greville Trust Co. v. Grey*, [1938] Ch. 530.

2269. *Add. Annotation*:—*Generally, Refd. Re Shee, Taylor v. Stoger*, [1934] Ch. 345.

2270a. *Interest charged on capital & income.*—Where a jointure & interest on portions are charged on capital as well as income & a tenant for life pays out of his own pocket the amount by which the income of the estate in any year is insufficient to meet the jointure & the interest on the portions, & upon the facts there is no indication of an intention to keep the charges alive for his own benefit, he is not entitled to a charge on the estate for the amount so paid. Where, however, a sufficient indication of intention is given to entitle the tenant to such a charge, he will be entitled to an immediate right to enforce it against capital.—*Re WARWICK'S SETTLEMENT TRUSTS, GREVILLE TRUST CO. v. GREY*, [1938] Ch. 530; [1938] 1 All E. R. 639; 107 L. J. Ch. 233; 158 L. T. 319; 54 T. L. R. 483; 82 Sol. Jo. 231, C. A.

2295. *Add. Annotation*:—*Consd. Re Fenwick, Fenwick v. Stewart*, [1936] 2 All E. R. 1096.

2297. *Add. Annotations*:—*Consd. Re Shee, Taylor v. Stoger*, [1934] Ch. 345; *Re Fenwick, Fenwick v. Stewart*, [1936] 2 All E. R. 1096. *Refd. Re Leicester's Settled Estates, Coke v. Leicester*, [1938] 3 All E. R. 553.

2297a. *Annuity fund—Unapplied income.*—*Re WHITEHEAD, PEACOCK v. LUCAS*, No. 1960a, *ante*.

2297b. *Tithe redemption annuity—No apportionment.*—Under Tithe Act, 1936, all tithe rentcharge will be compulsorily redeemed, the tithe-owner in effect being paid by the Govt. & the Govt. being repaid by the land-owner in annual instalments called redemption annuities. These annuities are payable

for a period of sixty years. It was contended that, in the case of settled land, these annuities are apportionable between capital & income:—*Held*: redemption annuities are not apportionable, & are wholly payable out of income.—*Re LEICESTER'S SETTLED ESTATES, COKE v. LEICESTER*, [1938] 3 All E. R. 553; 54 T. L. R. 1076; 82 Sol. Jo. 682.

**2319a. Temporary Investment—Apportionment of loss.**—A sum of money appointed to be laid out in a purchase to the use of A. for his life, remainder to his eldest son, subject to a charge for the provision of younger children; the money to be let out in any public fund, till a convenient purchase found: if a loss happens before the purchase, it must be born in an average.—*CHAMBERS v. CHAMBERS* (1730), Fitz-G. 127; 1 Eq. Cas. Abr. 115; Mos. 333; 94 E. R. 684, L. C.

*Annotations*:—*Expld.* Oke v. Heath (1748), 1 Ves. Sen. 135. *Consd.* Booth v. Allington (1856), 6 De G. M. & G. 613.

**2324. Add. Annotation**:—*Apld.* *Re Walker's Settlement Trusts, Watson v. Walker*, [1936] Ch. 280.

**2329a.** — — —.—A light railway co. was promoted to serve the interests of an estate that formed part of a settled estate. It was

incorporated under an order made by the Light Railway Comrs. & confirmed by the Minister of Transport. Clause 50 of the order provided: "The co. may create & issue debenture stock. . . . The interest of all debenture stock & of all mtges. at any time created & issued or granted by the co. under this Order or any subsequent Order or Act of Parliament shall, subject to the provisions of any subsequent Order or Act, rank *pari passu* . . . & shall have priority over all principal moneys secured by such mtges." Debenture stock to the amount of £8,000 was issued by the co. & was registered in the names of the trustees of the settlement. On the winding up of the co., the assets that came into the hands of the trustees were not sufficient to pay off the debenture stock & the arrears of interest thereon:—*Held*: the assets should be apportioned between capital & income in accordance with the principle laid down in *Re Atkinson, Barbers' Co. v. Grose-Smith*, No. 2324.—*Re WALKER'S SETTLEMENT TRUSTS, WATSON v. WALKER*, [1936] Ch. 280; 105 L. J. Ch. 49; 154 L. T. 564; 52 T. L. R. 118; [1934-5] B. & C. R. 279.

**2335. Add. Annotation**:—*As to* (2) *Distd.* *Re Shee, Taylor v. Stoger*, [1931] Ch. 345.

## Part XI.—Custody of Title Deeds.

**2357. Add. Annotation**:—*Refd.* *Clayton v. Clayton*, [1930] 2 Ch. 12.

**2358. Add. Annotation**:—*Consd.* *Clayton v. Clayton*, [1930] 2 Ch. 12.

**2358a.** — — —.—*GARROD v. MOOR* (1846), 8 L. T. O. S. 270.

**2359. Add. Annotation**:—*Refd.* *Clayton v. Clayton*, [1930] 2 Ch. 12.

**2377a. Trustees with duties to perform.**—A testator died, having by his will bequeathed settled legacies & having thereby also by legal limitations settled freeholds which in the events which happened became vested free from incumbrances & charges in pltf. From time to time there had been appointments of new trustees of testator's will for the purposes of the Settled Land Acts & other purposes, including three by deeds of

1902, 1904, & 1915. In 1924 pltf. had been appointed Settled Land Act trustee of testator's will, jointly with the then trustees thereof, the appointment being limited to the freeholds. At the date when the freeholds became vested absolutely in the pltf., the trusts of some of the settled legacies were still on foot. In an action by pltf. claiming the custody of the appointments of 1902, 1904, & 1915, as forming part of his title to the freeholds:—*Held*: trustees who have duties to perform in relation to their trusts may retain title deeds lawfully in their possession as trustees.—*CLAYTON v. CLAYTON*, [1930] 2 Ch. 12; 99 L. J. Ch. 498; 143 L. T. 696.

*Annotation*:—*Consd.* *Lewis v. Plunket*, [1937] Ch. 306.

**2379. Add. Annotation**:—*Refd.* *Clayton v. Clayton*, [1930] 2 Ch. 12.

## Part XII.—Express Powers in Instruments.

**2396. Add. Annotation**:—*Refd.* *Johnson v. Clarke*, [1928] Ch. 847.

**2398a.** — — —.—**Sale to tenant for life.**—Where the trustees of lands in strict settlement have a power to sell, with the consent of the tenant for life, a sale by the trustees to the tenant

for life will be held good.—*HOWARD v. DUCANE* (1823), Turn. & R. 81; 1 L. J. O. S. Ch. 85; 37 E. R. 1025, L. C.

*Annotations*:—*Expld.* Eland v. Baker (1867), 29 Beav. 137. *Apld.* *Dicoconson v. Talbot* (1870), 6 Ch. App. 32. *Refd.* *Grover v. Hugell* (1827), 3 Russ. 428; *Greenlaw v. King* (1841), 10 L. J. Ch. 129; *Beaden v. King* (1852), 9 Hare, 499; *Bevan v. Habgood* (1860), 1 John. & H. 222.

### PART X. SECT. 8, SUB-SECT. 1.—B.

**2320 H.** — — —.—Where a loss occurs under a mtge. of trust funds, the income of which is payable to a life tenant, the loss should be apportioned between the tenant for

life & the remainderman by adding the amount actually realised from the security to the amount of interest theretofore received by the tenant for life & dividing the whole sum between the latter & the remainderman in the

proportion in which they would have been entitled to share if the security had been paid in full, the tenant for life giving credit for the amounts already received.—*Re PLUMB* (1896), 27 O. R. 601.—*CAN.*



2399a. ————]—EISDELL v. HAMMERSLEY (1862), 31 Beav. 255; 6 L. T. 706; 54 E. R. 1136.

*Annotations*:—*Apprvd.* Alexander v. Mills (1870), 6 Ch. App. 124. *Consd.* Re Cooper, Cooper v. Slight (1884), 27 Ch. D. 565; Hardaker v. Moorhouse (1884), 26 Ch. D. 417. *Apld.* Re Bedingfield & Herrings' Contract, [1893] 2 Ch. 332. *Refd.* Parr v. A.-G., [1926] A. C. 239.

2399b. Power to sell under subsequent settlement—Reference to former settlement—"Uterior

to limitations therein."—*Held*: the expression "ulterior to the limitations therein" meant ulterior in point of position in the deed, & not ulterior in point of time.—MORGAN v. RUTSON (1848), 16 Sim. 234; 17 L. J. Ch. 419; 11 L. T. O. S. 238; 12 Jur. 813; 60 E. R. 863.

2570. *Add. Annotations*:—*Refd.* A.-G. v. Tasker (1928), 92 J. P. 157; A.-G. v. Manchester Corpn., [1931] 1 Ch. 254.

## Part XIII.—Statutory Powers in Relation to Settled Property.

2579. *Add. Annotation*:—*Generally.* *Refd.* Re Austen, Collins v. Margetts, [1929] 2 Ch. 155.

2594a. Land subject to trust for sale which may never arise.]—A trust for sale that may never arise is not a "trust or direction for sale" within Settled Land Act, 1882 (c. 38), s. 63.—*Re GOODALL'S SETTLEMENT*, FANE v. GOODALL, [1909] 1 Ch. 440; 78 L. J. Ch. 241.

*Annotations*:—*Consd.* Re Wagstaff's Settled Estates, [1909] 2 Ch. 201; Re Johnson, Cowley v. Public Trustee, [1915] 1 Ch. 435; Re Smith & Lonsdale's Contract (1934), 78 Sol. Jo. 173. *Refd.* Re Parker's Settled Estate, Parker v. Parker, [1928] 1 Ch. 247.

2596. *Add. Annotation*:—*Refd.* Re Draycott Settled Estate, [1928] Ch. 371.

2597. For the existing paragraph substitute the following paragraph:—

—Settled Land Act, 1925 (c. 18), ss. 1, 2.]—Land was, on Dec. 31, 1925, held by two persons under a devise contained in a will, made in 1888, as joint tenants in fee simple absolutely, subject to a charge for £1,000 created in 1869 in consideration of marriage:—*Held*: (1) the land was settled land within Settled Land Act, 1925, ss. 1 (1) (v) & 2, & it was excepted from the application of Law of Property Act, 1925 (c. 20), s. 36 (1); (2) there was nothing in the context to give to the words "settled land" in Law of Property Act, 1925, s. 36 (1), any other meaning than that given by sect. 205 (1) (xxvi).—*Re GAUL & HOULSTON'S CONTRACT*, [1928] Ch. 689; 97 L. J. Ch. 362; 139 L. T. 473, C. A.

2598. *Add. Citations*:—97 L. J. Ch. 193; 139 L. T. 59.

2600a. Land subject to payment of perpetual annuity—Settled Land Act, 1925 (c. 18), s. 1 (1) (v).]—A perpetual annuity, created voluntarily, is a payment of a periodical sum for the "benefit" of the person receiving it within Settled Land Act, 1925 (c. 18), s. 1 (1) (v). Therefore land subject to such a charge became, on Jan. 1, 1926, settled land.—*Re AUSTEN, COLLINS v. MARGETTS*, [1929] 2 Ch. 155; 98 L. J. Ch. 384; 141 L. T. 325.

2602. *Add. Annotation*:—*N.F.* *Re Parker's Settled Estates*, Parker v. Parker, [1928] Ch. 247.

2602a. Settlement of undivided moiety—Settlement of remaining moiety—Merger before operation

of Law of Property Act, 1925 (c. 20).]—By a voluntary settlement made in 1909 an undivided moiety of a freehold estate was settled upon the usual limitations of a strict settlement, & the settlor having acquired the other moiety afterwards settled it by his will upon the same uses & trusts & with the same trustees as the settlement. The settlor died in 1910 & the tenant for life under the two settlements died in 1930:—*Held*: the entirety of the land was settled land, the two moieties having completely merged before 1926, & on the death of the tenant for life it vested in his special exors.—*Re EGTON SETTLED ESTATE, FOSTER v. FOSTER*, [1931] 2 Ch. 180; 100 L. J. Ch. 273; 145 L. T. 70.

2602b. Land subject to trust or direction for sale—Trust for sale of land in building plots, but not otherwise.]—*Re SMITH & LONSDALE'S CONTRACT* (1934), 78 Sol. Jo. 173.

2619. *Add. Annotations*:—*Refd.* *Re Patten*, Westminster Bank v. Carlyon, [1929] 2 Ch. 276; *Re Davies' Will Trusts*, Bevan v. Williams, [1932] 1 Ch. 530.

2620a. ——— Person named in last deed of compound settlement as tenant for life.]—Under a settlement of 1899 a jointure in favour of a widow was outstanding. In 1925 there was a resettlement by a disentailing deed under which a jointure rentcharge was created & certain charges by way of legal mtge. were made for raising jointures & portions. In 1932 *appet.*, who was beyond dispute the tenant for life of the 1925 resettlement, by a voluntary settlement appointed & granted the settled estates to trustees in fee simple subject to the mtges. & all equitable incumbrances affecting the same upon trust that the trustees should, as soon as they lawfully could, for the purpose of giving effect to the trust for sale thereby given them in respect thereof, obtain a grant of the legal estate in the estates. By a further clause it was declared that the powers of a tenant for life under Settled Land Act were conferred upon the *appet.* during his life & after his death upon the trustees of the 1932 settlement:—*Held*: as Settled Land Act, 1925 (c. 18), s. 23 (1), vests the powers of a tenant for life in the person of full age on whom such powers are conferred by the settlement, *appet.*

PART XII. SECT. 2, SUB-SECT. 3.—B. (a).

q. i. — Lease obtained by misrepresentation—No relief.]—*Held*: a new lease having been obtained by misrepresentation it was not made *bond fide*

within Leases Act, 1849 (c. 26), s. 2, & there having been no surrender of existing interests, it had the incurable defect of being made in reversion, for both of which reasons Leases Act did not apply.—*MOFFETT v. GOUGH* (1878),

1 L. R. Ir. 331.—*IR.*

PART XII. SECT. 3.

n. i. — Power to retain non-trustee securities.]—*FOGO v. FOGO'S TRUSTEES*, [1929] S. C. (Ct. of Sess.) 546.—*SCOT.*

was, by virtue of the clause in the settlement of 1932, the tenant for life of the compound settlement.—*Re BEAUMONT SETTLED ESTATES*, [1937] 2 All E. R. 353.

**2632. Add. Annotations:—As to (2) *Apld. Re Alston-Roberts-West's Settled Estates*, [1928] W. N. 41. *Refd. Re Sharpe's Deed of Release*, *Sharpe v. Fox*, [1938] 3 All E. R. 449.**

**2633a. Not tenant under lease at rent.]—A person who is a tenant of settled land under a lease at a rent is, as a matter of necessary implication from the language of sect. 20 (1) (iv), of Settled Land Act, 1925 (c. 18), excluded from the class of persons upon whom the section confers the powers of a tenant for life. The amount of the rent is immaterial.—*Re CATLING, PUBLIC TRUSTEE v. CATLING*, [1931] 2 Ch. 359; 100 L. J. Ch. 390; 145 L. T. 613.**

**2648. Add. Annotation:—*Consd. Re Patten, Westminster Bank v. Carlyon*, [1929] 2 Ch. 276.**

**2652. Add. Annotation:—*Refd. Re Acklom, Oakeshott v. Hawkins*, [1929] 1 Ch. 195.**

**2664a. — Discretion as to persons to receive income.]—The testatrix by her will gave freehold property unto trustees upon trust during the lifetime of her son, G. H. G., to enter into possession & to receive the rents & profits thereof with the powers of management of trustees in possession during the minority of an infant tenant in tail, & after payment of certain annuities, in so far as the same were not paid out of the residuary estate, & during the lifetime of her son, or such shorter period or periods, either continuous or discontinuous, as the trustees should think fit, to pay all or any part of the net rents & profits unto, or apply the same for the maintenance or benefit of, all or any one of a number of persons, of whom her son was one. In all these matters the trustees had an absolute discretion. There followed a power to allow all or any of the class of persons already referred to to occupy all or any of the freehold properties, & subject to such discretionary trusts, the surplus of the rents & profits was to go as if the son were then dead without having exercised the power of appointment hereinafter referred to. There were then remainders in strict settlement, with a further remainder as the son should appoint, & in default of appointment, to the right heirs of the son. G. H. G. was alive at the time of the summons, having a wife living, but no children, & R. G. was the right heir of G. H. G.:—*Held*: the interests of G. H. G. & R. G. were too unsubstantial for either of them to be the tenant for life of the settlement, & the powers of the tenant for life were therefore exercisable by the trustees thereof.—*Re GALLENGA WILL TRUSTS, WOOD v. GALLENGA*, [1938] 1 All E. R. 106.**

**2672. Add. Annotation:—*Apld. Re Gallenga Will Trusts, Wood v. Gallenga*, [1938] 1 All E. R. 106.**

**2674. Add. Annotation:—*Apld. Re Gallenga Will Trusts, Wood v. Gallenga*, [1938] 1 All E. R. 106.**

**2676. Add. Annotation:—*Consd. Re Robins, Holland v. Gillam*, [1928] Ch. 721.**

**2678. Add. Annotation:—As to (1) *Refd. Re Sharpe's Deed of Release, Sharpe v. Fox*, [1938] 3 All E. R. 449.**

**2679. Add. Annotation:—As to (2) *Distd. Re Stevens & Dunsby's Contract*, [1928] W. N. 187.**

**2679a. — Trust for accumulation of income for payment of mortgages.]—*Re STEVENS & DUNSBY'S CONTRACT*, [1928] W. N. 187.**

**2686. Add. Annotation:—*Apld. Re Gallenga Will Trusts, Wood v. Gallenga*, [1938] 1 All E. R. 106.**

**2727a. — With "intent" to extinguish—Settled Land Act, 1925 (c. 18), s. 105—To what assignors applicable—Any person in whom life estate vested.]—*Held*: the operation of Settled Land Act, 1925 (c. 18), s. 105 (1), is not confined to the case of an assurance by the tenant for life himself of his estate, but extends to an assurance by any person in whom the life estate is vested, including a trustee in bkpcy. of the tenant for life. The "intent" referred to in the sect. was the intent of the assignor.**

Where therefore a tenant for life was bkpt., & his trustee in bkpcy. sold & assured the estate for life to the tenant in tail in remainder, but the tenant for life refused to execute a vesting deed in his favour:—*Held*: the tenant in tail was entitled to a vesting order under Settled Land Act, 1925 (c. 18), s. 12 (1) (a).—*Re SHAWDON ESTATES SETTLEMENT*, [1930] 2 Ch. 1; 99 L. J. Ch. 189; 142 L. T. 566; 74 Sol. Jo. 215; [1929] B. & C. R. 152, C. A.

**2727b. — — — — Trustee in bankruptcy of tenant for life.]—*Re SHAWDON ESTATES SETTLEMENT*, No. 2727a, *ante*.**

**2727c. — — — — Whose intent referred to—Assignor.]—*Re SHAWDON ESTATES SETTLEMENT*, No. 2727a, *ante*.**

**2732. Add. Annotations:—*Consd. Re Patten, Westminster Bank v. Carlyon*, [1929] 2 Ch. 276. *Refd. Re Acklom, Oakeshott v. Hawkins*, [1929] 1 Ch. 195.**

**2738a. Restriction on power of letting.]—Testator by his will, dated Nov. 22, 1927, directed his trustees to retain £3,000 & to apply the interest yearly in payment of the taxes, rates & repairs of his freehold house, & he desired that his aunt should "have the use of it & my furniture free of cost for her occupation during her life or so long as she may require them, but without the power to sub-let the same or any part thereof. On the termination of her occupation the house is to be sold," & from the proceeds, added to the above £3,000, certain specific legacies were**

#### PART XIII. SECT. 1, SUB-SECT. 1.— D. (h) iii.

**2643 ii. — Mere licensee.]—The persons qualified to exercise the powers of leasing under Conveyancing & Law of Property Act, 1898, s. 68, are those having an estate in land, either an estate for life or a chattel interest. A person having a mere right of personal residence in a house for his life has not an estate of any kind therein, but a**

mere licence, & therefore, is not qualified to exercise the powers of leasing referred to.—*STEVENSON v. MYERS* (1929), 47 N. S. W. W. N. 94.—**AUS.**

#### PART XIII. SECT. 1, SUB-SECT. 4.— D. (c).

**sp. Purchase of sporting rights.]—Capital money may in a proper case be invested in the purchase of sporting**

rights, such rights being a privilege convenient to be held with the settled land within sect. 21 (viii) of the Settled Land Act, 1882.

*Qu.*: whether sporting rights are incorporeal hereditaments which can be purchased with capital money as being a purchase of "land in fee simple" within sect. 21 (vii) of the Act.—*Re PORTARLINGTON'S ESTATES*, [1918] 1 T. R. 362.—**IR.**

given. He also directed that when the house had been sold, his nephew, G. P., should have the furniture:—*Held*: (1) the provision forbidding the tenant for life to sub-let was void under Settled Land Act, 1925 (c. 18), s. 106 (1), & the provision requiring the house to be sold & the gift over of the proceeds of sale upon the termination of her occupation was also avoided by that sub-sect., so far as that provision would operate in the event of her exercising any of her powers as tenant for life; (2) the gift over of the £3,000 was a provision which tended to induce her to abstain from exercising her powers of leasing as a tenant for life, & was void, therefore, in so far as it had that tendency; & that it should be read to take effect only upon her ceasing to reside for any reason other than the exercise of her powers of leasing as a tenant for life; (3) in the event of her selling the house she would not be entitled to be paid any part of the income of the £3,000; (4) she was entitled to the furniture during her life or until she ceased to occupy the house for any reason other than the exercise of her powers as tenant for life.—*Re PATTEN, WESTMINSTER BANK v. CARLYON*, [1929] 2 Ch. 276; 98 L. J. Ch. 419; 141 L. T. 295; 45 T. L. R. 504.

2739. *Add. Annotation*:—As to (2) *Refd. Re Acklom, Oakeshott v. Hawkins*, [1929] 1 Ch. 195.

2739a. — — — — —.]—By this will dated Jan. 4, 1918, the testator bequeathed his leasehold house, garden & grounds, W. Ct., together with the fixtures & fittings & all his furniture, pictures (except some), china, plate, linen, grand piano, & all chattels & other effects therein, to his trustees upon trust to permit his sister, E., to reside there after his death, if she should wish to do so, & to have the use & enjoyment thereof during her life free of rent or other payment, & he gave to his sister the use & enjoyment of his said house, garden, & grounds, & everything contained therein, for her life accordingly, & he directed his trustees after her death or during her life if she should not wish to reside or continue to reside there to sell the same (except certain articles therein), with power to postpone such sale as they might think proper, & divide the proceeds between certain charities. He died on June 26, 1918, & the lady entered into possession thereof immediately. In 1925 she went abroad temporarily for the benefit of her health, the place being left in charge of servants, & she paid the Sched. A. tax. In 1926, owing to severe illness, she was prevented from returning to England, & the house was let by her from time to time, & she still paid Sched. A. tax thereon. In 1927 she sold the house as tenant for life or a person having the powers of a tenant for life, & shortly after the contents, other than the excepted articles, were sold by the trustees. On a summons taken out by the trustees asking whether she had any, & if any, what interest in the proceeds of sale of the leasehold property & the income thereof:—*Held*: on the evidence, it must be deemed that those powers were properly exercised by her. The power of sale in the trustees never arose, nor did they purport to exercise it. She had not therefore forfeited her interest in the proceeds of sale of

the leasehold property or the income thereof.—*Re ACKLOM, OAKESHOTT v. HAWKINS*, [1929] 1 Ch. 195; 98 L. J. Ch. 44; 140 L. T. 192; *sub nom. Re ADELOM, OAKSHOTT v. HAWKINS*, 72 Sol. Jo. 810.

2739b. — — — — —.]—Under the will of a testator who died in 1879, the C. Estate stood limited to the use of his grandson O. for an estate in tail, with remainder to the use of testator's daughter V. W., her heirs & assigns. V. W., who died in 1919, by her will devised the estate to which she was so entitled in remainder, to the use of certain persons successively in strict settlement subject to a condition that if the person who should so become entitled to that estate as tenant for life or tenant in tail should fail to reside at C. House for a certain part of every year, the estate of such person therein should cease & determine. Testatrix then bequeathed her residuary estate upon trust for her nephew O. for life & directed that, after his death, in case the C. Estate or the greater part in value thereof should not then devolve upon the limitations of her will, a sum of £10,000 should be raised out of her residuary estate & held upon trust for certain charitable purposes, & that the remainder should be upon trust for the persons therein named. The main question was whether, in the event of O. (who was tenant in tail in possession & also the heir at law & sole next of kin of testatrix & had no intention of disentailing the estate) exercising his power of sale over the estate under Settled Land Act, 1925 (c. 18), the residuary estate of testatrix would fall to be administered under the trusts declared by her will concerning the same:—*Held*: (1) in the event aforesaid, upon the proper construction of testatrix's will, the C. Estate would not on the death of O. devolve upon the limitations of the will, with the result that the condition upon which the disposition of her residuary estate depended would be fulfilled; (2) as the effect of that disposition would be to prevent the residuary estate from passing, as upon an intestacy, to O. as sole next of kin of the testatrix, it would necessarily tend to induce him to abstain from exercising his power of sale under Settled Land Act, 1925 (c. 18), within sect. 106 of that Act; &, accordingly, the residuary estate would, subject to O.'s life interest therein, pass to him as upon an intestacy, by reason of the invalidity of the disposition thereof contained in testatrix's will.—*Re ORLEBAR, ORLEBAR v. ORLEBAR*, [1936] Ch. 147; 105 L. J. Ch. 92; 154 L. T. 293.

2747a. — — — — — Of proceeds of settled land.]—*Re PATTEN, WESTMINSTER BANK v. CARLYON*, No. 2738a, *ante*.

2763a. Settled Land Act, 1925 (c. 18), s. 64.—When applicable.]—A tenant for life of settled land being desirous of paying off debts incurred by him in the upkeep of the estate, prepared a scheme & applied under Settled Land Act, 1925 (c. 18), s. 64, asking the ct. to sanction the raising of the necessary amount by sale or mtge. of part of the settled land. The judge in Chambers refused the application, holding that he had no jurisdiction, as the scheme was not for the benefit of the settled land:—*Held*: on appeal, the ct. had jurisdiction, inasmuch as the sect. was wide in its terms & applied not only to the settled land

but also to persons interested under the settlement. The scheme being for the benefit of persons interested under the settlement, the appeal must be allowed & effect given to the scheme.—*Re WHITE-POPHAM SETTLED ESTATES*, [1936] Ch. 725; [1936] 2 All E. R. 1486; 105 L. J. Ch. 368; 155 L. T. 553; 80 Sol. Jo. 816, C. A.

— — —.]—*See, also*, SETTLEMENTS, Vol. XL., p. 773, No. 3045.

**2766.** *Add. Annotation*:—*As to* (2) **Refd.** *Re Newhill Compulsory Purchase Order*, 1937, *Payne's Application*, [1938] 2 All E. R. 163.

**2768.** *Add. Annotation*:—*As to* (1) **Consd.** *Re Feversham Settled Estate*, [1938] 2 All E. R. 210.

**2769.** *Add. Annotation*:—**Consd.** *Re Feversham Settled Estate*, [1938] 2 All E. R. 210.

**2785.** *Add. Annotation*:—*As to* (2) **Refd.** *Re Insole's Settlement*, [1938] 3 All E. R. 406.

**2798.** *Add. Annotation*:—**Refd.** *Re Price*, [1928] Ch. 579.

**2789.** *Add. Annotation*:—*As to* (2) **Folld.** *Re Patten, Westminster Bank v. Carlyon*, [1929] 2 Ch. 276.

**2829.** *Add. Annotation*:—**Folld.** *Bernhardt v. Galsworthy*, [1929] 1 Ch. 549.

**2889a.** **Power to vary leases—Settled Land Act, 1925 (c. 18), s. 59—Construction of section.**—It is apparent, in my opinion, that Settled Land Act, 1925 (c. 18), s. 59 (1), is dealing only with a question of form, because it is clear from the final words of sect. 59 (1) that no more is being authorised than what might have been done under Settled Land Act, 1925 (c. 18), s. 52 (1). The provision in question is that "every such lease or grant shall, after such variation, release, waiver or modification as aforesaid, be such a lease or grant as might then have been" granted after a surrender, etc. In my opinion sect. 59 (1) is not limited to cases where the result of the variation, release, waiver or modification will at common law effect a surrender & regrant. This section is conferring a power on the tenant for life to execute documents in a particular form which he could have executed in another form as the result of the surrender or the surrender & regrant of the land previously dealt with. It relates to the widest possible release, variation, waiver or modification, including cases in which only part of the land comprised in the old lease or grant is the subject of those alterations (*MAUGHAM, J.*).—*Re SAVILE SETTLED ESTATES, SAVILE v. SAVILE*, [1931] 2 Ch. 210, 216; 100 L. J. Ch. 274; 145 L. T. 17.

*Annotation*:—**Consd.** *Re Bruce, Brudenell v. Brudenell*, [1932] 1 Ch. 316.

**2900a.** — — — **Effect of existence of underlease.**—A lease may be authorised under the Leases & Sales of Settled Estates Acts upon the surrender of an existing lease, although an underlease granted by the surrendering lessee is unexpired.—*Re FORD'S SETTLED ESTATE* (1869), L. R. 8 Eq. 309.

*Annotation*:—**Folld.** *Re Grosvenor Settled Estates, Westminster (Duke) v. McKenna*, [1932] 1 Ch. 232.

**2900b.** — — —.]—Part of the freehold property comprised in a settlement was subject to a lease & also to an underlease. The tenant for life under the settlement wished

to take a surrender of the lease &, without having a surrender of the underlease, to grant a new lease. On the evidence the proposed new lease reserved the best rent that could reasonably be obtained, & contained a proviso for re-entry on non-payment of the rent for twenty-one days:—*Held*: the tenant for life had power under Settled Land Act, 1925 (c. 18), s. 42 (1), & Law of Property Act, 1925 (c. 20), s. 150, to grant the new lease although the underlease remained outstanding. The new lease would take effect in immediate possession notwithstanding the existence of the underlease, & would therefore comply with Settled Land Act, 1925 (c. 18), s. 42 (1).—*Re GROSVENOR SETTLED ESTATES, WESTMINSTER (DUKE) v. MCKENNA*, [1932] 1 Ch. 232; 101 L. J. Ch. 145; 146 L. T. 402.

**2903.** *Add. Annotation*:—*As to* (2) **Refd.** *Watson & Everitt v. Blunden* (1934), 18 Tax Cas. 402.

**2916a.** **Covenant to rebuild when necessary—Validity.**—A tenant for life has power under Settled Land Act, 1925 (c. 18), s. 41, to grant a building lease for a term of 999 years containing a covenant by the lessee to rebuild existing premises when it shall become necessary, & in particular when required by the lessor's estate surveyor so to do, but without prescribing any definite time within which such rebuilding shall be carried out or begun.—*Re GROSVENOR SETTLED ESTATES, WESTMINSTER (DUKE) v. MCKENNA*, [1933] Ch. 97; 102 L. J. Ch. 50; 148 L. T. 131; 49 T. L. R. 7; 76 Sol. Jo. 779.

**2950.** *Add. Annotation*:—**Folld.** *Re Weld-Blundell Estate, Mowbray (Lord) v. Weld-Blundell* (1929), 73 Sol. Jo. 585.

**2950a.** — — — **Express provision for proper preservation.**—*Re WELD-BLUNDELL ESTATE, MOWBRAY (LORD) v. WELD-BLUNDELL* (1929), 73 Sol. Jo. 585.

**2989a.** — — — **Sale.**—The testator gave the residue of his estate in trust to pay out of the income thereof to M. an annuity, subject to certain conditions. He gave to his trustees a power to sell his residuary estate, or any part thereof, during the lifetime of the annuitant, but only with the annuitant's consent. After any such sale, the trustees were to hold the proceeds of sale & the balance of the income accumulated during the annuitant's lifetime, & the interest thereon, in trust to divide the same between certain named hospitals. Upon application to the ct., it was held that, upon the proper construction of the will, the proceeds of any sale were immediately distributable among the named hospitals. The testator having died on June 15, 1912, the power to accumulate the surplus income ceased, & the question arose as to the destination of the unapplied income accruing after that date, which could not be accumulated:—*Held*: (1) as there was no tenant for life of the settlement created by the will, the trustees were statutory owners, & as such, had a power to sell any land included in the residuary estate. This power of sale was inconsistent with the power to sell with the consent of the annuitant given to the trustees by the will. As from Jan. 1, 1926, the only effective power of sale was that under Settled Land Act, 1925, & the proceeds of any sale after that date were

capital moneys, subject to the trusts of the settlement. As the accumulation of surplus income became impossible after June 15, 1933, such income was undisposed of by the will, & passed as capital moneys on an intestacy; (2) the words "or otherwise" in Settled Land Act, 1925, s. 108 (1), mean something which the tenant for life is to do or abstain from doing, & do not refer to the consent or request of some person other than the tenant for life.—*Re JEFFERYS, FINCH v. MARTIN*, [1938] 4 All E. R. 120; 159 L. T. 542; 55 T. L. R. 44; 82 Sol. Jo. 869.

**3032.** *Add. Annotation:—Refd. Re Insole's Settled Estate*, [1938] Ch. 408.

**3032a.** ————*—Re WATSON, BRAND v. CULME-SEYMOUR*, [1928] W. N. 309; 166 L. T. Jo. 439.

**3032b.** *Architect's fees—Short occupation lease.*—*Re WATSON, BRAND v. CULME-SEYMOUR*, [1928] W. N. 309; 166 L. T. Jo. 439.

**3032c.** *Solicitors' fees—Obtaining short occupation lease.*—*Re WATSON, BRAND v. CULME-SEYMOUR*, [1928] W. N. 309; 166 L. T. Jo. 439.

**3043.** *Add. Annotations:—Consd. Re Curwen, Curwen v. Graham*, [1931] 2 Ch. 341. *Refd. Re Cayley & Evans' Contract*, [1930] 2 Ch. 143.

**3046.** *Add. Annotations:—As to (1) Apd. Re Catchpool, Harris v. Catchpool*, [1928] Ch. 429. *Consd. Re Gaul & Houlston's Contract*, [1928] Ch. 689. *Refd. Re Parker's Settled Estates, Parker v. Parker*, [1928] Ch. 247.

**3047.** *Add. Citation:—97 L. J. Ch. 161.*

*Add. Annotations:—As to (1) Refd. Re Gaul & Houlston's Contract*, [1928] Ch. 689; *Re Norton, Pinney v. Beauchamp*, [1929] 1 Ch. 84. *Generally, Refd. Re Sharpe's Deed of Release, Sharpe v. Fox*, [1938] 3 All E. R. 449.

**3047a.** ————*—On Dec. 31, 1925, certain land stood limited to the use of A. for life, & after his death, subject to certain jointure rentcharges for life, & subject to certain portions which had been charged upon the estate, & which had been further secured by the limitation of a legal term, to the use of trustees upon trust for sale. The settlement under which the land so stood limited was a compound settlement, consisting of various documents, including two deeds of 1911 & 1913. In due course a vesting deed was executed in favour of A. A. died on Dec. 4, 1926, & probate, limited to the settled land, was granted to the trustees of the compound settlement as his special representatives, on the footing that that settlement did not come to an end on his death. There were separate trustees of the two deeds of 1911 & 1913. Clause 11 of the 1911 deed gave to the trustees thereof all the powers conferred on a tenant for life by Settled Land Acts, 1882 to 1890:—Held: (1) the whole legal estate, the subject-matter of the settlement, was not held upon trust for sale; (2) in view of clause 11 of the 1911 deed the trustees of the two deeds of 1911 & 1913 were persons on whom Settled Land Act, 1925 (c. 18), s. 23 (1), conferred the powers of a tenant for life, & they were statutory owners under the compound settlement; & when they sold the land they would sell it as statutory owners & not as trustees for sale, & they must pay over the proceeds of sale to the trustees of the compound settlement.—Re NORTON,*

*PINNEY v. BEAUCHAMP*, [1929] 1 Ch. 84; 98 L. J. Ch. 219; 140 L. T. 348.

*Annotation:—As to (1) Consd. Re Sharpe's Deed of Release, Sharpe v. Fox*, [1938] 3 All E. R. 449.

**3047b.** ————*—By a settlement of 1818, the legal estate in fee simple of the H. estate was vested in a trustee upon trust (so far as any of the trusts remained subsisting) for the payment of £1,000 per annum for 1,000 years "by & out of the residue which shall from time to time remain of the moneys to be received by way of fines or premiums on the demising granting or letting or to arise from the rents & profits of the said hereditaments & premises." By a marriage settlement of 1830, the trustee was to stand seised of the H. estate for a term of 500 years from the date thereof in trust "by & out of the moneys to be received for fines or premiums on the demising granting or letting or to arise from the rents & profits of the said hereditaments & premises or by other means that may be deemed expedient" to pay £400 per annum to trustees. Under the will of W. H. S. S. senr., who died on Apr. 2, 1868, the H. estate, subject to the above annuities of £1,000 & £400 per annum, passed to J. W. S., subject (so far as the trusts were still subsisting) to a further annuity of £100 per annum given to a daughter of the testator. J. W. S. died on Aug. 10, 1917, & by his will gave all his estate to trustees upon trust for sale, certain annuities being payable out of the proceeds of sale, which, subject to those payments, were to be held for W. H. S. S. junr., absolutely. At the time of the hearing, the trustees of the will of W. H. S. S. senr., were the same persons as the trustees of the will of J. W. S.:—Held: (1) the terms of the marriage settlement of 1830 did not create a legal rentcharge, but a purely equitable interest; (2) the trustees as the trustees of W. H. S. S. senr., held the legal estate in the land, subject to the annual payments of £1,000 & £400. As trustees of J. W. S., they held only the beneficial interest of J. W. S. given to him by the will of W. H. S. S. senr., upon trust for sale. The land, therefore, was not subject to a trust for sale within Settled Land Act, 1925 (c. 18), s. 1 (7), & was settled land; (3) the land was now settled land held under a compound settlement consisting of (a) the settlement of 1818, (b) the marriage settlement of 1830, (c) the will of W. H. S. S. senr., & (d) the will of J. W. S.; (4) there was under the compound settlement no tenant for life, nor a person having the powers of a tenant for life, & therefore the trustees, as statutory owners, had the powers of a tenant for life; (5) there were no trustees, for the purposes of the Settled Land Act, of the compound settlement, & upon an application being made & properly supported by an affidavit of fitness, the trustees would be appointed as such.—*Re SHARPE'S DEED OF RELEASE, SHARPE v. FOX*, [1938] 3 All E. R. 449; 54 T. L. R. 1039; *sub nom. Re SHARPE'S DEED OF RELEASE, SHARPE & FOX v. GULLICK*, 82 Sol. Jo. 696.*

**3048.** *Add. Annotation:—Fold. Re Shelton's Settled Estates*, [1928] W. N. 27.

**3049a.** ————*Private Act & three conveyances.*—*On the death intestate of the tenant in tail in possession of an estate settled by a private*

Act & three conveyances, it was held that the Act & conveyances together constituted one settlement & the ct. appointed two trustees for the purposes of the Settled Land Act, 1925 (c. 18), & gave them liberty to apply for a grant of administration limited to the settled lands.—*Re HEREFORD'S SETTLED ESTATES, HEREFORD v. DEVEREUX*, [1932] W. N. 34; 173 L. T. Jo. 115; 73 L. Jo. 153.

**3074a. Refusal to execute—Order of Court under Settled Land Act, 1925 (c. 18), s. 12 (1) (a).]**—*Re SHAWDON ESTATES SETTLEMENT*, No. 2727a, *post*.

**3074b. Contents—Vesting deed on resettlement—Compound settlement.]**—X. & Y., the trustees of an indenture of resettlement dated Aug. 26, 1915, by which certain property was settled subject to a jointure, executed on May 1, 1926, a vesting deed reciting the resettlement & purporting to vest the property in the tenant for life. On Dec. 31, 1925, X. was the sole surviving trustee for the purposes of the Settled Land Acts of an indenture of settlement dated July 12, 1882, which together with the resettlement & two other documents formed the compound settlement of the property. On July 5, 1926, the tenant for life entered into four contracts for the sale of a portion of the property to a purchaser. The purchaser raised objections to the title on the ground that the vesting deed was not framed in accordance with the provisions of the Settled Land Act, 1925 (c. 18): (a) as it only dealt with the resettlement & not with the compound settlement; (b) as it was not executed by the trustees

of the compound settlement; & (c) as it did not contain the names of the persons who were the trustees of the compound settlement. The tenant for life took out a summons for a declaration that a good title to the property had been shown:—*Held*: the vesting deed did not comply with the requirements of the 1925 Act with reference to the compound settlement & the tenant for life was not able to exercise his statutory powers as tenant for life in respect of the disposal of his property; & the summons must be dismissed.—*Re CAYLEY & EVANS' CONTRACT*, [1930] 2 Ch. 143; 99 L. J. Ch. 411; 143 L. T. 405.

*Annotation*:—*Distd. Re Curwen, Curwen v. Graham*, [1931] 2 Ch. 341.

**3074c. Description of trustees as trustees of principal settlement—Sufficiency.]**—A vesting deed, executed with the intended object of giving effect to the provisions of Settled Land Act, 1925 (c. 18), with regard to the vesting of settled land in a tenant for life, contained a statement that the trustees, who were executing the deed, were trustees of the principal settlement, but it contained no reference to the fact that they were trustees of a compound settlement, consisting of the principal settlement & other documents:—*Held*: the trustees were sufficiently described, & the vesting deed was a valid & effectual principal vesting deed, made pursuant to Settled Land Act, 1925 (c. 18), in respect of the land comprised in the compound settlement, constituted by the various documents.—*Re CURWEN, CURWEN v. GRAHAM*, [1931] 2 Ch. 341; 100 L. J. Ch. 387; 146 L. T. 7.

## Part XIV.—Trustees of Settlements.

**3098. After this case add:—**  
**Jurisdiction of court—To appoint trustees of**

**settled land in Ireland.]**—*See COURTS*, Vol. XVI., p. 104, No. 42.

## Part XV.—Land Held in Undivided Shares.

**3138. For the existing paragraph substitute the following paragraph:—**

— **Settled land.]**—By the will of testator, who died in 1884, his real estate was devised to trustees upon trust to permit his widow to receive the rents thereof during her life, & after her decease upon trust to pay same to or for the benefit of such of his two daughters, E. & M., as should be then living & should for the time being be single & unmarried in equal shares if more than one, & when both should be married upon trust as to both capital as well as income for all testator's children in equal shares. Testator's widow died in 1889, & on the death of E., in 1927, questions arose as to the respective interests of E. & M. & testator's children in the income & capital of the real estate. The ct. having decided that E. & M. were entitled to the income of the real estate during their joint lives in equal shares, & upon the death of E. her sister M. became entitled to the whole of the income during her spinsterhood,

& upon her marriage or death the whole estate would become divisible in equal shares between the children of testator, the further question arose whether, on Law of Property Act, 1925 (c. 20), coming into force, the devised real estate vested in the then surviving trustee of the will upon the statutory trusts under Sched. I., Part IV., par. 1 (1), or in her or the Public Trustee under par. 1 (3):—*Held*: (1) as the purposes of the trusts of testator's will were such as might continue beyond the life of his widow, the real estate devised by the will was, at the date of Law of Property Act, 1925, coming into force, by the effect of Wills Act, 1837 (c. 26), s. 31, vested in the then surviving trustee of the will in fee simple in trust for E. & M., who were then beneficially interested in equity until one of them should marry or die in undivided shares vested in possession; (2) although their interests were not absolute interests, the case fell within Sched. I., Part IV., par. 1 (1), & the real estate thereupon

vested in the trustee of the will upon the statutory trusts; (3) when a case fell within par. 1 (1) it did not become necessary to consider whether it fell within any of the subsequent sub-paragraphs.—*Re DAWSON'S SETTLED ESTATES*, [1928] Ch. 421; 97 L. J. Ch. 343; 139 L. T. 94.

*Annotations* :—As to (2) *Fold. Re Barrat, Body v. Barrat*, [1929] 1 Ch. 336. *Refd. Re Robins, Holland v. Gillam*, [1928] Ch. 721.

3138a. —.]—Testator, who died on June 16, 1881, leaving a widow & eight children, by his will gave all his estate to his wife & four children, whom he appointed exors. & trustees, upon trust to pay his debts, etc., & bequeathed the remainder of his personal effects to his wife & the income of his freeholds & leaseholds, subject to certain payments, & after her decease to pay such income to his four sons & daughters in certain shares, which were to cease at death, with a proviso as to four quarterly payments to widows of sons, & subject thereto, gave his estate to the longest liver of his children absolutely. The widow died in 1900, & on the coming into force of the Law of Property Act, 1925, the deft. & daughter, who had since died, were the surviving trustees. All parties interested in the estate now desired a sale, & the question raised by this summons was first, whether *pltf.* & deft. R., the surviving trustee, were together tenant for life for the purposes of the Settled Land Act. Secondly, if it be not settled land, whether the entirety was now vested in the surviving trustee, or in the Public Trustee on the statutory trusts:—*Held*: Law of Property Act, 1925 (c. 20), Sch. I., Pt. IV., para. 4, added by the amending Act of 1926, was not applicable to the case; & secondly, having regard to Wills Act, 1837 (c. 26), s. 31, & following *Re Dawson's Settled Estates*, No. 3138, the entirety was now vested in the surviving trustee under para. 1 (1), upon the statutory trusts.—*Re BARRAT, BODY v. BARRAT*, [1929] 1 Ch. 336; 98 L. J. Ch. 74; 140 L. T. 328.

3138b. —.]—*Re COLLINS, TOWERS v. COLLINS*, [1929] 1 Ch. 201; 140 L. T. 223; 72 Sol. Jo. 779; *sub nom. Re COLLINS, JOWERS v. COLLINS*, 98 L. J. Ch. 47.

3139. *Add. Citation* :—72 Sol. Jo. 86.

*Add. Annotations* :—*Consd. Re Robins, Holland v. Gillam*, [1928] Ch. 721. *Refd. Re Dawson's S. E.*, [1928] Ch. 421.

3139a. — Land held under one & same settlement—Vesting in trustees—Who are trustees.]

Where immediately before the coming into operation of Law of Property Act, 1925 (c. 20), the entirety of the land is settled land held under one & the same settlement, it vests in the trustees, if any, of the settlement under the old law as joint tenants upon the statutory trusts. If there are no such trustees then, pending their appointment, the land vests in the Public Trustee upon the statutory trusts.—*Re CATCHPOOL, HARRIS v. CATCHPOOL*, [1928] Ch. 429; 97 L. J. Ch. 181; 139 L. T. 17; 72 Sol. Jo. 226.

3140. *Add. Annotations* :—As to (1) *Refd. Re Robins, Holland v. Gillam*, [1928] Ch. 721. As to (2) *Refd. Bernhardt v. Galsworthy*, [1929] 1 Ch. 549; *Re House, Westminster Bank v. Everett*, [1929] 2 Ch. 166. *Generally*,

*Refd. Re Thomas, Thomas v. Thompson*, [1930] 1 Ch. 194.

3143. *Citation* :—For the existing citation read "No. 1873, *ante*."

3143a. — Only one trustee—Vesting of land in Public Trustee.]—Under & by virtue of the will of a testator who died in 1921, & of subsequent dispositions, acts in the law & events, the legal estate in certain freehold land was, immediately before the commencement of the Law of Property Act, 1925, vested in two persons for their lives share & share alike, the legal estate in remainder expectant upon the lives of those persons & the life of the survivor of them being vested in a single trustee upon trust after the death of the surviving tenant for life to sell the land & divide the proceeds between the testator's nephews & nieces. Upon a summons by the tenants for life, who were desirous of selling the land, to have it determined in whom, upon the coming into force of the Law of Property Act, 1925, the land was vested:—*Held*: (1) as immediately before the commencement of that Act the land was held at law & in equity in undivided shares, vested in possession, & the entirety thereof was settled land, Law of Property Act, 1925 (c. 20), Sched. I., Part IV., para. 1, sub-para. 3, would apply, if there were more than one trustee of the settlement constituted by the will, in whom the land could vest as joint tenants; but that, as there was only one trustee, the land vested, under clause (i) of the proviso to that sub-para., in the Public Trustee upon the statutory trusts; (2) if, before the Public Trustee accepted the trust, the present trustee (who before the commencement of the Law of Property Act, 1925, was the trustee of the settlement constituted by the will for the purposes of the Settled Land Acts then in force) appointed an additional trustee or trustees of that settlement, the land would vest in the trustees of the settlement as joint tenants upon the statutory trusts.—*Re PRICE, PRICE v. PRICE*, [1929] 2 Ch. 400; 98 L. J. Ch. 417; 141 L. T. 511.

3143b. — Appointment of additional trustee—Before acceptance by Public Trustee.]—*Re PRICE, PRICE v. PRICE*, No. 3143a, *ante*.

3143c. —.]—Immediately before the commencement of the Law of Property Act, 1925 (c. 20), the legal estate in land was outstanding in the personal representatives of the settlor & held upon the trusts of a marriage settlement which, in the events which had then happened, were for two daughters of the settlor in undivided shares absolutely:—*Held*: as the personal representatives then held the land in trust for the daughters in undivided shares vested in possession, they held it, after the Act came into force, upon the statutory trusts, by virtue of Sched. I., Part IV., sub-para. 1 (b) of the Act, with the result that the settlement trustees were not entitled, as, but for Part IV., they would be to call for a conveyance of the legal estate; but the personal representatives held the land on trust for sale & were entitled to sell the same, unless the daughters elected to call for a conveyance.—*Re FORSTER, SOMERVILLE v. OLDHAM*, [1929] 1 Ch. 146; 98 L. J. Ch. 27; 140 L. T. 277; 72 Sol. Jo. 761.



**3143d.** — What is "settled land" within paragraph 2.]—Under a settlement contained in a will the settled property was directed to be held, after the death of the first tenant for life, in trust, as to both *corpus* & income, for the children & issue of the first tenant for life in equal shares as therein mentioned. The first tenant for life died in 1929, having by her will appointed to be her exors. & trustees two persons who, at the date of her death, were trustees of the settlement & of the will containing it. On a summons by the exors. & trustees as plffs. for the determination (*inter alia*) of the question whether, for the purpose of vesting in themselves the land the subject of the settlement contained in the will, they should, as executors of the first tenant for life, execute in favour of themselves, as trustees of the will containing the settlement, a vesting assent upon the statutory trusts for sale of the land—the subject of the settlement, or should apply for a grant to themselves of probate of the will of the first tenant for life limited to that land:—*Held*: Settled Land Act, 1925 (c. 18), s. 36, applied, & plffs., as exors. of the first tenant for life, ought, pursuant to that sect., to execute a vesting assent in favour of themselves as trustees of the will containing the settlement.—*Re CUGNY'S WILL TRUSTS, SMITH v. FREEMAN*, [1931] 1 Ch. 305; 100 L. J. Ch. 145; 144 L. T. 525.

— Conversion.]—See *EQUIT*, Nos. 817a–817c, *ante*.

**3143e.** — Effect on interest of tenant for life under condition to reside on premises.]—Testator died in 1922, having by his will made in 1915 directed (*inter alia*) that plff. should pay the net income of his freehold farm & lands & of his share of minerals thereunder equally between herself & his nephew until testator's youngest or only daughter should attain the age of twenty-one & thereafter between herself for life or until marriage, the nephew for life "or so long as he shall reside upon & assist in the management of my said farm," & testator's two daughters for their lives & the survivor of them for her life. Subject thereto testator devised the farm & lands to the children of his daughters as in the will mentioned. Testator's nephew lived with him at the farm, & assisted in its management until the testator's death, after which he continued to live there & to manage it. Accordingly, upon the coming into force of the Law of Property Act, 1925 (c. 20), the property vested in plff. upon the statutory trusts. On a summons taken out by plff. in 1931 & asking (*inter alia*) whether, upon a sale of the farm & lands under the statutory trusts, or upon the exercise by her of any power of leasing conferred on her by statute or by the will, & in particular upon the exercise of any such power in favour of testator's nephew, his interest in the income would determine:—*Held*: upon the true construction of Law of Property Act, 1925 (c. 20), s. 35, the nephew's life interest would not be forfeited upon any exercise in his lifetime of the statutory trusts.—*Re DAVIES' WILL TRUSTS, BEVAN v. WILLIAMS*, [1932] 1 Ch. 530; 101 L. J. Ch. 301; 147 L. T. 334.

**3143f.** — Real property held by partners.]—A partnership firm in 1932 contracted to sell certain plots of freehold land to a county

council. There was no special stipulation as to the commencement of title, but on examination by the purchasers it appeared that the land had been sold in 1892 to six named persons then carrying on the partnership firm, the habendum of the conveyance being to hold the hereditaments "unto & to the use of the purchasers . . . as joint tenants in trust for them the purchasers . . . as part of their co-partnership estate." On Jan. 1, 1926, the land in question was vested in three of the original purchasers in fee simple as joint tenants in trust as mentioned in the conveyance of 1892. The vendors to the county council were the four present partners, & included two of the three original purchasers living on Jan. 1, 1926, one of those purchasers having died since that date. Questions having arisen whether the land, being on Jan. 1, 1926, partnership property, was held on the statutory trusts, & therefore whether the present vendors or any of them could make a good title as trustees for sale by reason of the Law of Property Act, 1925 (c. 20), Sched. I, Part IV.:—*Held*: the words of that Sched. applied, & on Jan. 1, 1926, the property was held by the three original purchasers then living on the statutory trusts & the two survivors could make a good title as trustees for sale upon the statutory trusts.—*Re FULLER'S CONTRACT*, [1933] Ch. 652; 102 L. J. Ch. 255; 149 L. T. 237.

**3143g.** Application of Settled Land Act, 1925 (c. 18), s. 36—"Trust instrument"—Undivided shares created by deed or event later than instrument.]—A name & arms clause in a will dated Feb. 14, 1863, provided that if any tenant for life or in tail of testator's N. estates for the time being in possession refused to continue the use of the name & arms of H., the interest of that tenant for life or in tail & the limitations dependent thereon should cease. The tenant in tail in remainder (hereinafter called "the remainderman"), whose father was tenant for life in possession, mortgaged to plff. the N. estates discharged as far as possible from his estate tail & from all estates to take effect after its determination or in defeasance of it: & the mtge. irrevocably appointed plff. the remainderman's attorney in his name & on his behalf to convey the property to plff. accordingly, but subject to the right of redemption under the mtge. As this was done without the tenant for life's consent, only a base fee was created. By a conveyance dated Apr. 3, 1914, the remainderman granted & released unto plff. one undivided moiety of the N. estates, to hold unto & to the use of plff., his heirs, exors., administrators & assigns, with provisions as to barring the entail similar to those in the mtge., but free from all right of redemption thereunder; & the remainderman covenanted also to perfect the disentail of the property within seven days of the tenant for life's death during his life. The tenant for life died on Feb. 18, 1929. The remainderman did not perfect the disentail within seven days, so that what was comprised in the mtge. immediately after the death was the base fee, half of it being vested in plff. subject to the mtge. & the conveyance of 1914. On Mar. 3, 1929, the re-

remainderman wrote informing the trustees of the will that he had decided to cease using the name of H. & to take another. On Apr. 8, 1929, he wrote to them a letter confirming that decision; & on the same date, after the confirmatory letter had been written, there was executed by pltf. as his attorney a deed of confirmation supplemental to the mtge. & to the conveyance of 1914, whereby the remainderman conveyed to pltf. the hereditaments, moneys & investments secured by the mtge. upon limitations similar to those in the mtge., to the intent that the base fee or other estate created & subsisting by virtue of the mtge. should be enlarged into an equitable fee simple, & that the mtge. should take effect out of the enlarged interest & the base fee be enlarged for all purposes; & the remainderman conveyed to pltf. one undivided moiety of the hereditaments or proceeds of sale thereof in equitable fee simple or absolutely, to the intent that, subject to the mtge., one undivided moiety should belong to pltf. & the other to the remainderman in equitable fee simple or absolutely. By deed dated Sept. 8, 1930, the remainderman recorded his change of name:—*Held*: (1) on the true construction of Settled Land Act, 1925 (c. 18), s. 36 (1), the conveyance of 1914 came within the expression “trust instrument” in that subject; (2) settled land may be held “on trust for persons entitled in possession under a trust instrument” in undivided shares created by a deed or event later than the instrument, which is nevertheless “the . . . instrument creating the trust”; (3) the words “entailed interest” in the Law of Property (Entailed Interests) Act, 1932 (c. 27), do not apply to a base fee; (4) the ct. could not construe Settled Land Act, 1925 (c. 18), s. 36 (6), so as to give effect to the name & arms clause, which was therefore inoperative.—*Re HIND, BERNSTONE v. MONTGOMERY*, [1933] Ch. 208; 102 L. J. Ch. 91; 148 L. T. 281.

*Annotation*:—*Generally*, *Refd. Re Jones, Public Trustee v. Jones*, [1931] Ch. 315.

**3143h.** — “Trusts . . . requisite for giving effect to the rights of the persons interested” —*Name & arms clause.*—*Re HIND, BERNSTONE v. MONTGOMERY*, No. 3143g, *ante*.

**3143j.** — *Law of Property (Entailed Interests) Act, 1932 (c. 27), s. 1—Whether “entailed interest” includes base fee.*—*Re HIND, BERNSTONE v. MONTGOMERY*, No. 3143g, *ante*.

**3146.** *Add. Annotations*:—*Folld. Re Robins, Holland v. Gillam*, [1928] Ch. 721. *Apld. Re House, Westminster Bank v. Everett*, [1929] 2 Ch. 166. *Refd. Re Barrat, Body v. Barrat*, [1929] 1 Ch. 336.

**3148.** *Add. Citations*:—97 L. J. Ch. 197; 138 L. T. 735.

**3151a.** *Application of Law of Property Act, 1925 (c. 20), s. 34—Land settled upon trust for sale—After specified period.*—The trustees of a will, which came into operation after the commencement of the Law of Property Act, 1925 (c. 20), were directed to stand possessed of testator’s residuary real & personal estate upon trust to pay out of the income thereof four life annuities, & while any annuity remained payable to divide the surplus income amongst such of testator’s grandchildren as

should be living for the period during which any annuity remained payable; & on cesser of all the annuities, to stand possessed of the residuary estate in trust for his grandchildren & the issue then living of any then dead, as tenants in common according to the stocks. By a codicil power was conferred upon the trustees after the expiration of five years from the testator’s death to sell his residuary estate or any part thereof by public auction but not by private contract. Upon a summons raising questions, whether the trustees or the persons entitled to the surplus income until cesser of the annuities were the proper persons in whom the land ought to be vested by the exor.; & if the trustees were the proper persons, whether the annuitants were persons whose wishes ought to be given effect to by the trustees for sale:—*Held*: (1) the land was held in equity in undivided shares; (2) the land was devised in undivided shares within Law of Property Act, 1925 (c. 20), s. 34 (3), with the result that it was devised to the trustees, who were trustees for the purposes of the Settled Land Act, 1925, upon the statutory trusts; (3) those trustees were the persons in whom the land ought to be vested.—*Re HOUSE, WESTMINSTER BANK v. EVERETT*, [1929] 2 Ch. 166; 98 L. J. Ch. 381; 141 L. T. 582.

**3151b.** *Open space held in undivided shares—Meaning of open space—Any land unbuilt upon—Back yard.*—The expression “an open space of land” in Law of Property Act, 1925 (c. 20), Sched. I., Pt. V., para. 2, means any land that is unbuilt upon.

A small yard & ashes place at the rear of two houses in a town was, immediately before the commencement of the Act, held in undivided shares by the owners of the houses with rights of access & user over same:—*Held*: the yard & ashes place were an open space within the par. & had vested in the Public Trustee. Leave given to the Public Trustee to sell same.—*Re BRADFORD CITY PREMISES*, [1928] Ch. 138; 138 L. T. 517; *sub nom. Re BRADFORD CITY PREMISES, SCAIFE v. PUBLIC TRUSTEE*, 97 L. J. Ch. 84.

*Annotation*:—*Consd. Re Townsend. Townsend v. Townsend*, [1930] 2 Ch. 338.

**3151c.** *Private railway siding.*—A private railway siding consisted partly of freehold land, vested in the trustees of a will, & partly of leasehold land held for a long term by trustees of a lease containing a declaration of trust subsequently varied by deed. Neither set of trustees held upon trust for sale or had any power of sale. All rights of access to & user of the siding were vested, at the commencement of Law of Property Act, 1925 (c. 18), in lessees of adjoining property, licensees, & other persons entitled under the declaration of trust, & rents were paid by all parties interested for such user:—*Held*: that the siding was not an open space vested in undivided shares in right whereof each owner had rights of access & user thereof & did not therefore vest in the Public Trustee under Law of Property Act, 1925 (c. 20), Sched. I., Pt. V., para. 2, but was vested in the respective sets of trustees upon the statutory trusts.—*Re TOWNSEND, TOWNSEND v. TOWNSEND*, [1930] 2 Ch. 338; 99 L. J. Ch. 508; 143 L. T. 608.

## Part XVI.—Resettlements.

3171. *Add. Annotation* :—Generally, *Refd. Re Parker's Settled Estates*, *Parker v. Parker*, [1928] Ch. 247.

## Part XVII.—Miscellaneous Clauses in Settlements.

3236. *Add. Annotations* :—*Refd. Re Duncombe's Will Trusts*, *Wrixon-Becher v. Faversham (Earl)* (1932), 146 L. T. 412; *Re Hind*, *Bernstone v. Montgomery*, [1933] Ch. 208.

3238. *Add. Annotation* :—*Refd. Re Duncombe's Will Trusts*, *Wrixon-Becher v. Faversham (Earl)* (1932), 146 L. T. 412.

3260a. — **Payment by trustees—Right to reimbursement.**—The husband in a marriage settlement covenanted (*inter alia*) to pay the premiums on a policy of life insurance. In default of his doing so, the trustees paid the premium & sought to recover the amount so paid from the covenantor. The settlement expressly empowered the trustees to apply the income in making any payments for keeping on foot the policy, & provided that it should not be obligatory on them to enforce the husband's covenants. There was no covenant by the husband to reimburse the

trustees in respect of any payment so made by them :—*Held* : (1) it was an implied term that the husband should reimburse the trustees; (2) the claim of the trustees was not in debt but for damages for breach of covenant, & therefore they could not specially indorse their writ; (3) the damages were substantial & not merely nominal, & the trustees were entitled to recover the full amount paid by them.—*SCHLESINGER & JOSEPH v. MOSTYN*, [1932] 1 K. B. 349; 101 L. J. K. B. 62; 146 L. T. 326; 48 T. L. R. 111.

3260b. — — — **Whether claim in debt or damages.**—*SCHLESINGER & JOSEPH v. MOSTYN*, No. 3260a, *ante*.

3260c. — — — **Measure of damages.**—*SCHLESINGER & JOSEPH v. MOSTYN*, No. 3260a, *ante*.



## SEWERS AND DRAINS.

## Part I.—Sewers and Drains for Sanitary Purposes.

9. *Add. Annotation* :—**Apld.** *Hill v. Aldershot Borough Council*, [1933] 1 K. B. 259.
11. *Add. Annotation* :—**Consd.** *Hill v. Aldershot Borough Council*, [1933] 1 K. B. 259.
- 14a. ———.—]—Three houses owned by applts. formed part of a row of fifteen houses, the remaining twelve belonging to different owners. Each house of the fifteen was drained by a separate pipe into a common pipe which ran the whole length of the row & took the drainage of all the fifteen houses into a sewer in the street. Resp. local authority contended that the common pipe was a "single private drain" within Public Health Acts Amendment Act, 1890 (c. 50), s. 19 :—**Held** : in the absence of evidence that the pipe in question had been constructed on the requisition of the local authority under Public Health Act, 1875 (c. 55), s. 23 or s. 25 had failed to establish that the pipe was a "single private drain" within sect. 19 of the Act of 1890.—**HILL v. ALDERSHOT CORPN.**, [1933] 1 K. B. 259; 102 L. J. K. B. 179; 148 L. T. 173; 96 J. P. 493; 31 L. G. R. 1, C. A.
15. *Add. Annotation* :—**Refd.** *Hill v. Aldershot Borough Council*, [1933] 1 K. B. 259.
16. *Add. Annotation* :—**Refd.** *Southstrand Estate Development Co. v. East Preston Rural District Council*, [1931] Ch. 251.
19. *Add. Annotation* :—**Distd.** *Clark v. Epsom R. D. C.*, [1929] 1 Ch. 287.
- 19a. ———.—]—Pltf. was the owner of a house & grounds on the X. estate, a leaseholder in 1900 & freeholder since 1920. Down to 1912 there was no drainage system for the estate, but in that year a system was established, which so far as affected this property was called "the northern system," by the then owners of the estate with an effective outfall, but without any reference to the local authority, which was maintained since 1920 by means of contributions from property owners to the owner of the part where the disposal works were situated. From these works the effluent passed into the river M., but owing to the filter bed ceasing to function, pollution of the river occurred, & this outfall being stopped by the action of the Thames Conservancy, the effluent was now carried over the adjoining land. In an action by pltf. for a declaration that the system vested in defts. & that they were liable to maintain it :—**Held** : the line of pipes which communicated with the disposal works was a sewer which vested in the local authority, but the remedy of pltf. was to appeal on behalf of the whole of the persons in the district to the Ministry of Health under P. H. Act, 1875 (c. 55), s. 299.—**CLARK v. EPSOM RURAL COUNCIL**, [1929] 1 Ch. 287; 98 L. J. Ch. 88; 140 L. T. 246; 93 J. P. 67; 45 T. L. R. 106; 27 L. G. R. 328.
23. *Add. Annotation* :—**Refd.** *Hill v. Aldershot Borough Council*, [1933] 1 K. B. 259.
47. *Add. Annotation* :—**Consd.** *Legge & Son, Ltd. v. Wenlock Corpn.*, [1938] A. C. 201.
48. *Add. Annotation* :—**Refd.** *Legge (George) & Son, Ltd. v. Wenlock Corpn.*, [1938] A. C. 201.
50. *Add. Annotation* :—**Consd.** *Legge & Son, Ltd. v. Wenlock Corpn.*, [1938] A. C. 201.
51. *Add. Annotation* :—**Consd.** *Legge & Son, Ltd. v. Wenlock Corpn.*, [1936] 3 All E. R. 599.
52. *Add. Annotation* :—**Apld.** *Legge (George) & Son, Ltd. v. Wenlock Corpn.*, [1938] A. C. 201.
- 52a. ———.—]—It is not in law possible for the status of a natural stream to be changed to that of a sewer by the discharge of sewage into it after the coming into operation of Rivers Pollution Prevention Act, 1876 (c. 75).  
*Per* LORD MAUGHAM : While there are statutes imposing duties or prohibitions which can be waived, there is no case in which repeated violation of the express terms of a modern statute passed in the public interest has been held to confer rights on the wrongdoer.—**LEGGE (GEORGE) & SON, LTD. v. WENLOCK CORPN.**, [1938] A. C. 204; [1938] 1 All E. R. 37; 107 L. J. Ch. 72; 158 L. T. 265; 102 J. P. 93; 51 T. L. R. 315; 82 Sol. Jo. 133; 36 L. G. R. 117, H. L.
54. *Add. Annotation* :—**Refd.** *Re Belcham & Gawley's Contract*, [1930] 1 Ch. 56.
55. *Add. Annotation* :—**Consd.** *Legge & Son, Ltd. v. Wenlock Corpn.*, [1936] 3 All E. R. 599.
56. *Add. Annotation* :—**Consd.** *Legge & Son, Ltd. v. Wenlock Corpn.*, [1938] A. C. 201.
57. *Add. Annotation* :—**Consd.** *Legge & Son, Ltd. v. Wenlock Corpn.*, [1938] A. C. 201.
58. *Add. Annotation* :—**Consd.** *Legge & Son, Ltd. v. Wenlock Corpn.*, [1936] 3 All E. R. 599.
76. *Add. Annotation* :—**Consd.** *Southstrand Estate Development Co. v. East Preston Rural District Council*, [1931] Ch. 251.
95. *Add. Annotation* :—**Refd.** *Blundy, Clark & Co. v. London & North Eastern Ry. Co.*, [1931] 2 K. B. 334.
98. *Add. Annotation* :—**Consd.** *Legge & Son, Ltd. v. Wenlock Corpn.*, [1936] 2 All E. R. 1367.
100. *Add. Annotation* :—**Refd.** *Legge (George) & Son, Ltd. v. Wenlock Corpn.*, [1938] A. C. 201.
107. *Add. Annotations* :—**Consd.** *Legge & Son, Ltd. v. Wenlock Corpn.*, [1936] 2 All E. R. 1367. **Refd.** *Clark v. Epsom R. D. C.*, [1929] 1 Ch. 287; *Hill v. Aldershot Borough Council*, [1933] 1 K. B. 259.
116. *Add. Annotation* :—**Refd.** *Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63.

## PART I. SECT. 1, SUB-SECT. 1.—A.

22. *Whether drain or sewer.*—**SWEENEY v. LISNASKA R. D. C.**, [1929] N. I. 119.—**IR.**

121. *Add. Annotations*:—**Refd.** *Re Belchem & Gawley's Contract*, [1930] 1 Ch. 56.
- 121a. **Whether title acquired by adverse possession against local authority.**—**SOUTHSTRAND ESTATE DEVELOPMENT CO., LTD. v. EAST PRESTON RURAL DISTRICT COUNCIL**, No. 125b, *post*.
124. *Add. Annotations*:—**Distd.** *Solihull Rural District Council v. Ford* (1931), 30 L. G. R. 483. **Consd.** *Southstrand Estate Development Co. v. East Preston Rural District Council*, [1934] Ch. 254.
125. *Add. Annotation*:—**Folld.** *Solihull Rural District Council v. Ford* (1931), 30 L. G. R. 483.
- 125a. ———.]—**Deft.** laid pipes & constructed sewage disposal works in accordance with plans approved by pltf's., & a number of houses on a building estate were connected therewith subject to payment by the owners to deft. for this service. Subsequently pltf's. gave deft. notice of their intention to connect a sewer of their own to his pipes. Deft. disputed their right to do so & pltf's. issued a writ claiming a declaration (a) that they had a right to join their pipes to deft.'s because deft.'s pipes were "sewers" vested in them; (b) that deft.'s disposal works were also so vested. Deft. contended that the pipes were not vested in pltf's. because they were "made for profit," & that the disposal works were not so vested because they were not "buildings works materials & things belonging" to the pipes:—**Held**: both the pipes & disposal works were vested in pltf's.—**SOLIHULL RURAL DISTRICT COUNCIL v. FORD** (1931), 30 L. G. R. 483.
- 125b. ———. **Construction by purchaser from building owner.**]—It is a question of fact in each case whether a particular sewer has been made for profit or not. It is not a sufficient ground for holding that the sewer was made for profit if the only evidence is that the sewer was made by a person who was developing a building estate in the course of the development of that estate to provide sanitary facilities for houses to be erected on it. Where, however, the right to construct the necessary sewers was sold to an independent co. who paid for the construction of the sewers & charged a person wishing to use the sewers the amount of the cost of connecting his house with the sewers & also an annual rate:—**Held**: that the sewers were made by the co. for profit.
- Qu.*: whether, in any case, undisturbed possession of the sewers for twelve years & upwards by the co. to the knowledge of the local authority, but without claim by them to any right or interest in the sewers, would confer on the co. a statutory title to the sewers under Real Property Limitation Act, 1874 (c. 57).—**SOUTHSTRAND ESTATE DEVELOPMENT CO., LTD. v. EAST PRESTON RURAL DISTRICT COUNCIL**, [1934] Ch. 254; 102 L. J. Ch. 292; 149 L. T. 328; 49 T. L. R. 451; 31 L. G. R. 225; *sub nom.* *SOUTHSTRAND ESTATE DEVELOPMENT CO., LTD. v. WORTHING RURAL DISTRICT COUNCIL*, 97 J. P. 161.
126. *Add. Annotations*:—**Folld.** *Solihull Rural District Council v. Ford* (1931), 30 L. G. R. 483. **Consd.** *Southstrand Estate Development Co. v. East Preston Rural District Council*, [1934] Ch. 254.
- 137a. **Whether sewer made for profit—Question of fact.**]—**SOUTHSTRAND ESTATE DEVELOPMENT CO., LTD. v. EAST PRESTON RURAL DISTRICT COUNCIL**, No. 125b, *ante*.
148. *Add. Annotations*:—**Refd.** *Clark v. Epsom R. D. C.*, [1929] 1 Ch. 287; *Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485.
158. *Add. Annotation*:—**Refd.** *Clark v. Epsom R. D. C.*, [1929] 1 Ch. 287.
174. *Add. Citation*:—41 J. P. 516.
- Add. Annotation*:—**Refd.** *West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt*, [1932] 2 K. B. 1.
175. In the tenth line of the para. for "sect. 10," read "sect. 16."
- 181a. ———.]—**CLARK v. EPSOM RURAL COUNCIL**, No. 19a, *ante*.
182. *Add. Annotations*:—*As to* (1) **Refd.** *North-western Utilities, Ltd. v. London Guarantee & Accident Co., Ltd.*, [1936] A. C. 108. *As to* (2) **Refd.** *Blundy, Clark & Co. v. London & North Eastern Ry. Co.*, [1931] 2 K. B. 334.
184. *Add. Annotation*:—**Refd.** *Blundy, Clark & Co. v. London & North Eastern Railway* [1931] 2 K. B. 334.
- 197a. ———. **Sewer laid above ground—By private owner—Maintenance by local authority.**]—**Defts.**, who were the urban sanitary authority, served notices, under Public Health Act, 1875 (c. 55), ss. 23, 36, upon the owners of a row of houses within the district requiring them within a certain time to provide water-closets in the houses & to connect the same with the main sewer. By arrangement among the owners the work was carried out by the owner of two of the houses, one of which was occupied by pltf. A six-inch earthenware pipe was laid through the gardens at the backs of the houses to receive the drainage of each house & to discharge into the main sewer. This pipe was laid underground until it came to the garden of the house in which pltf. lived, where, owing to a fall in the land half the pipe appeared above the ground. About three years after the pipe was laid pltf. in going down her garden slipped on the pipe & was injured. In an action against the urban district council to recover damages for the personal injuries so sustained, the pipe being a "sewer" which was vested in them, the jury found that the sewer was constructed so as to be dangerous to the occupants of the house, that defts. had notice of its dangerous condition, & were negligent in not obviating the danger:—**Held**: as deft. council would have been entitled, if they had themselves constructed the sewer, to lay it above ground, they were not guilty of any breach of duty in maintaining the sewer in the same condition as it was when laid, &

**PART I. SECT. 1, SUB-SECT. 4.**

sb. *Non-navigable river.*]—Where a non-navigable river lies wholly within

the boundaries of a county, such river is a public drain, & the county council has power to restrain the removal of gravel from the river bed.—PAHIATUA

COUNTY COUNCIL v. AKITIO COUNTY COUNCIL, [1930] N. Z. L. R. 344.—N.Z.

were therefore not liable to pltf.—*MORRIS v. MYNYDDISLWYN URBAN COUNCIL*, [1917] 2 K. B. 309; 86 L. J. K. B. 1094; 117 L. T. 108; 81 J. P. 261; 15 L. G. R. 453, C. A.

- 217. Add. Annotations :—***Refd.* Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401; Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., [1936] A. C. 108.
- 226. Add. Annotation :—***Refd.* Legge (George) & Son, Ltd. v. Wenlock Corpn., [1938] A. C. 204.
- 250. Add. Citation :—**26 L. G. R. 174.

**250. Add. Citation :—**26 L. G. R. 174.

**262a. Liability for maintenance.]**—The Lewisham Board of Works was constituted under Metropolis Management Act, 1855 (c. 120), with an area extending over Penge, & all sewers in their district, except the main sewer, were vested in the Board, who were bound to repair them. Metropolis Management Act, 1862 (c. 102), empowered the Board to execute sewerage works beyond their own district where necessary, & in 1865 the Board, for the purpose of the drainage of Penge, constructed a sewer in Penge, which passed through the Beckenham district, not under the control of the Board, to the Lewisham district, where it joined the main sewer. The Act of 1862 did not vest this sewer in the Board, & did not in terms oblige the Board to repair it, but this obligation was expressly imposed on the Board by the Beckenham Sewerage Act of 1873, which empowered the Beckenham authority to connect up with the sewer in their area in return for certain money payments. This sewer having become inadequate, a second was constructed nearly alongside, & it assisted to carry off the sewage of Penge, By London Government Act, 1899 (c. 16). District Boards of Works were abolished, & the Lewisham Corporation was created, but by the Penge Order of 1900, made in pursuance of this Act, the district of Penge was taken out of the control of the corpn. &

**PART I. SECT. 3, SUB-SECT. 3.**

1 (p. 29) i. ———. ———.]—Pltfs. claimed damages from defts. municipalities for flooding of lands caused, as alleged, by the municipalities failing to keep drainage ditches in repair.—*Held*,—Pltfs. could not recover from the municipalities because, while the municipalities would be liable for loss suffered by their failure to keep the ditches in repair, yet it was not shown that any of the damage suffered arose from such failure; rather, it appeared that the damage was due to the unprecedented character of the rain storms, the inadequacy of the drainage system, for which the municipalities could not be held liable, to drain lands lying as low as those of pltfs., & the damming of the main ditch by the other defts.—MAYTAG v. HANOVER RURAL MUNICIPALITY, [1932] S. C. R. 298; 2 D. L. R. 208.—CAN.

80. *Petition for establishment of drainage district—Effect of repeal of statute.*—*R. v. SPRUCE GROVE MUNICIPAL DISTRICT*, [1930] 3 W. W. R. 277; 4 D. L. R. 843; *affn.*, [1930] 3 W. W. R. 135.—**CAN.**

*sd. Liability of municipality to repair*  
*--Who may enforce.]—Held:* in view  
of all other relevant provisions of the  
Act, sect. 740 of Municipal Act,  
R. S. M., 1913, was intended merely  
to make it clear that, as between the  
government of the province & the

municipality, the duty was on the latter to keep such drains in repair, & it was not intended to make the municipality liable to an action at the suit of an individual who might suffer damage from the municipality's failure to perform duty.—PIERCE v. WINCHESTER RURAL MUNICIPALITY, [1930] 2 W. W. R. 752; [1931] 1 D. L. R. 237; 39 Man. L. R. 132; *aff'd*, [1931] S. C. R. 628; 4 D. L. R. 724.—CAN.

**PART I. SECT. 5, SUB-SECT. 2.**

**sf. Right to discharge sewage along drain—Continuous easement.]—**An easement consisting of a right to flow sewage water from latrines in pltf.'s house along drains in deft.'s house or land is a continuous easement—**BRIJMOHAN LAL v. HAZARI LAL (1935), 1 L. R. 58 AL. 662. IND.**

**PART I. SECT. 9, SUB-SECT. 3.**

**sd. Construction by municipality on private land—Sufficiency of bye-law.]—MONTGOMERY v. ASSINIBOIA, RURAL MUNICIPALITY OF, [1930] S. C. R. 494; 4 D. L. R. 67; *varg.*, [1930] 2 D. L. R. 947; 1 W. W. R. 500; 38 Man. L. R. 527.—CAN.**

*sf. Failure to repair—Inability of municipality—Limitation of action.*—**STEEVES v. DUFFERIN RURAL MUNICIPALITY, RIORDAN v. DUFFERIN RURAL MUNICIPALITY**, [1934] 3 W. W. R. 549; [1935] 1 D. L. R. 203; 42 Man. L. R. 489.—**CAN.**

became part of the county of Kent, & a scheme of adjustments was made, whereby all property of the Lewisham Board used, & all liabilities of the Board incurred, solely or mainly for the benefit of Penge, where transferred to the Penge District Council, & the question whether any property had been used or any liability had been incurred solely or mainly for the benefit of Penge was to be finally determined by the commissioners appointed under the Act; but the scheme made no provision dealing with the question whether the obligation to maintain the Penge sewers, so far as they were laid in Beckenham, was cast upon the Lewisham Corpn. or not. In an action by the Urban District Council of Penge against the Lewisham Corpn. for a declaration that this obligation was cast upon the corpn. :—*Held*: (1) the jurisdiction of the ct. to determine this question was not ousted by the Penge Order; (2) both the original & the relief sewers were constructed wholly or mainly for the benefit of Penge, & that the action failed.—*PENGE URBAN DISTRICT COUNCIL v. LEWISHAM CORPN.* (1930), 95 J. P. 77.

- 264. Add. Annotation:—***Refd.* West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt (1932), 96 J. P. 159.

- 298.** *Add. Annotation :—*Consd. Hill v. Aldershot Borough Council, [1933] 1 K. B. 259.

**304a. Reconstruction of drain — What amounts to.]**—The L. C. C. made a bye-law that a person who should entirely or partially reconstruct any pipe or drain communicating with a sewer should deposit plans of the proposed work, with the proviso that plans should not be required in the case of any repair which did not involve the entire reconstruction of the pipe or drain ; & another bye-law as to ventilation, which was to apply to every person who should reconstruct in an existing building any pipe or drain communicating with a sewer. Premises situate in the metropolis were drained at the rear

**sk. Drain inadequate** — **Adjacent lands flooded** *Liability of municipality.* — **Deft.**, municipality when constructing an extension to a U drain to relieve adjacent low lands, cut an opening from the terminus of the drain to a near-by creek so as to give the drain the additional purpose of diverting from the creek water which had caused flooding. This cutting became so enlarged by erosion that the water flowing from the creek into the extension overwhelmed it, & consequently, so pftts. alleged, flooded & damaged their lands & crops. **ADAMSON, J.**, found that the work was not carried out in accordance with the engineer's plans & specifications; that **deft.**'s recve had been forewarned that the diversion of the waters of the creek into the drain would ultimately cause erosion & render the drain inadequate; & that there had been want of care in the tapping of the creek which caused an overflow upon pftts.' lands. **Deft.** contended, *inter alia*, that pftts. had themselves brought the injury upon their lands by burning off the peat moss or turf on their lands near the edge of the drain. From a judgment for pftts., **deft.** appealed: — **Held:** the appeal must be dismissed. — **KMETIUK & CHICHOWSKI v. LAO DU BONNET RURAL MUNICIPALITY, [1933] 1 W. W. R. 847; 2 D. L. R. 510; 16 Mau. L. R. 50. —CAN.**



by a line of pipes which took the surface water drainage of the premises through two gullies in the yard & which communicated with a sewer. This line of pipes was not laid upon concrete & was not ventilated, & the drain having become a nuisance, notice was served on the owner to abate the same. The owner opened up the ground, took up the pipes, most of which were defective or broken, & relaid the drain in the same line upon a foundation of concrete. He put in four new lengths of pipes & a new gully & connection, replacing in the drain one old pipe & gully only, & leaving in the ground an old pipe which was not defective:—*Held*: the work done to the drain was a "reconstruction" of the drain, & not merely a "repair" of it, & that the bye-laws applied.—*AGAR v. NOKES* (1905), 93 L. T. 605; 69 J. P. 374; 3 L. G. R. 1168, D. C.

319. *Add. Annotation*:—*Distd. Grant v. Derwent*, [1928] Ch. 902.

319a. ——— *Liability of owner requesting local authority to lay connecting pipe.*—Subject to

the rights of a corpn. as highway & sewer authority, pltf. owned the soil of a public road with a sewer therein. Deft.'s property abutted on this road, as well as on another sewer road, & he was entitled under Public Health Act, 1875 (c. 55), s. 21, to cause his drains to empty into the corpn.'s sewers, on giving proper notice & complying with regulations. At deft.'s request & acting under their local Act, the corpn. connected deft.'s combined drain with the sewer in pltf.'s road, carrying the connecting pipe through a small portion of pltf.'s subsoil:—*Held*: the corpn.'s acts were fully justified by the local Act, even if not by Public Health Acts, & whatever right for compensation pltf. might have against the corpn. for damage sustained by reason of the exercise of their statutory powers, he had no cause of action against deft. for requesting the corpn. to exercise those powers.—*GRANT v. DERWENT*, [1929] 1 Ch. 390; 98 L. J. Ch. 70; 140 L. T. 330; 93 J. P. 113; 73 Sol. Jo. 59; 27 L. G. R. 179, C. A.

## Part III.—Sewers under Commissioners of Sewers.

341. After this case add "*See, now, Land Drainage Act, 1930 (c. 44).*"

388. *Add. Annotation*:—*Refd. Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63.

399a. ——— *GILFLETT v. KENT RIVERS CATCHMENT BOARD*, [1938] 1 All E. R. 810.

399b. *Liability to repair banks—Land Drainage Act, 1930.*—On the south side of the tidal river W., & at varying distances, there ran an artificial bank known as the B. bank, separated by a considerable area of land from another artificial bank on the river side called the C. bank, which itself ran at a short distance from the natural bank of the river W. The land between the B. & C. banks was liable to flooding. The B. bank had been in existence for many centuries, & up to the year 1857 all powers, duties & obligations regarding the B. bank were vested in the Bedford Level Corpn. By the North Level Act, 1857, s. 38, & an Order of the Minister of Agriculture, all these powers & duties, including those relating to the maintenance of the portion of the B. bank the subject of the action, became vested in pltf., the North Level Comrs.

It was admitted that down to the date of the passing of the Land Drainage Act, 1930 (c. 44), the liability to maintain & repair the relevant portion of the B. bank was vested in pltf. The Act of 1930 constituted drainage districts consisting of catchment areas & provided for the constitution of drainage boards called "Catchment Boards." The Act conferred various powers on these catchment boards. In pursuance of the powers & provisions of this Act defts. were constituted the River W. Catchment Board, & they, pursuant to sect. 4 (1) (a) of the Act of 1930, submitted a scheme to the Minister which was duly confirmed. Under the scheme there was transferred to the deft. board "generally all [such] rights, powers, duties, obligations & liabilities over or in connection with the main river (the river W.) as were immediately before the commencement of the said Act vested in or to be discharged by any drainage authority. . . ."

Pltf. claimed that under this scheme & sect. 4 (1) (a), & the definitions of "Main River" & "Banks" in sect. 81 of the Act of 1930, their liability to repair & maintain the river W., including the B. bank, had been transferred to defts. It was admitted,

### PART I. SECT. 12, SUB-SECT. 3.

*sk. Retaining wall—Liability for cost.*—The cost of a retaining wall built by a township along a drain to prevent erosion cannot be charged against upper townships which would not be benefited.—*Re DAWN TOWNSHIP & CHATHAM TOWNSHIP*, [1936] 2 D. L. R. 172; O. R. 176.—*CAN.*

### PART III. SECT. 1, SUB-SECT. 2.

*b i.* ——— *McKILLOP TOWNSHIP CORPN. v. LOGAN TOWNSHIP CORPN.* (Ont.) (1899), 29 S. C. R. 702.—*CAN.*

*c i.* ——— *Time for making ditch.*—*MURRAY v. DAWSON* (1867), 17 C. P. 588.—*CAN.*

### PART III. SECT. 1, SUB-SECT. 3.

*d i.* ——— *ANDERTON TOWNSHIP v. MALDEN & COLCHESTER SOUTH TOWNSHIPS* (1912), 23 O. W. R. 320; 4 O. W. N. 327; 8 D. L. R. 812.—*CAN.*

*d ii.* ——— *Re BRIGHT & SARNIA, Re WILSON & SARNIA* (1913), 24 O. W. R. 817; 4 O. W. N. 1535; 12 D. L. R. 848.—*CAN.*

*se. Appeal from fence viewer.*—*Re McDONALD & CATTANACH* (1870), 30 S. C. R. 432.—*CAN.*

*sd.* ——— *Re BOWKER & RICHARDS* (1905), 1 W. L. R. 194.—*CAN.*

*se. Award under Ditches & Watercourses Act—Who may enforce.*—The purchaser of land from an owner who was a party to proceedings under the Act in respect of that land is entitled to enforce the award.—*DALTON v.*

*TOWNSHIP OF ASHFIELD* (1898), 26 A. R. 363.—*CAN.*

### PART III. SECT. 2.

*st. Construction of ditch under Private Ditches Act, 1920, s. 6—Notice.*—The service of the notice which Private Ditches Act, R. S. S., 1920 (c. 162), s. 6, requires to be made on the owners or occupants of other lands to be affected by a proposed ditch is a condition which must be complied with before the ditch can legally be proceeded with, & where such an owner has not been served an award of an engineer & an assessment & tax levy made under said Act on said owner is null & void.—*VILLENEUVE v. RURAL MUNICIPAL OF KELVINGTON*, [1929] 2 D. L. R. 919; 1 W. W. R. 186; 23 S. L. R. 406.—*CAN.*

however, that this liability did not extend to more than one-half of that portion of the B. bank which was included in the catchment area of deft. board:—*Held*: the B. bank was not included in the expressions "Main River" & "Banks" as defined in sect. 81, since it was not a "bank" adjoining the channel of the river W., & it did not "confine" the waters of that river; further, the maxim *generalia specialibus non derogant* as explained in *Blackpool Corp'n. v. Starr Estate Co.*, [1922] 1 A. C. 27; 42 Digest 770, 1974, applied, & the relevant provisions of the North Level Act, 1857, which imposed the obligations & liabilities to maintain & repair the portion of the B. bank the subject-matter of the action on plffs. & their predecessors in title, still remained in force. Plffs. were an internal drainage board of the river W. catchment area under Land Drainage Act,

1930 (c. 44), & as such were liable for the maintenance & repair of the portion of the B. bank comprised in that area. Defts. were under no liability for its maintenance or repair or to pay any of the moneys claimed by plffs.—*NORTH LEVEL COMRS. v. RIVER WELLAND CATCHMENT BOARD*, [1938] Ch. 379; [1937] 4 All E. R. 681; 107 L. J. Ch. 178; 158 L. T. 107; 102 J. P. 82; 54 T. L. R. 263; 82 Sol. Jo. 76; 36 L. G. R. 77.

403. *Add. Annotation*:—*Refd.* Graigola Merthyr Co. v. Swansea Corp'n., [1928] Ch. 235.

407. *Add. Annotation*:—*As to* (1) *Refd.* Port of London Authority v. Canvey Island Comrs. (1931), 101 L. J. Ch. 63.

412. *Add. Annotation*:—*Refd.* Blundy, Clark & Co. v. London & North Eastern Railway (1931), 100 L. J. K. B. 401.

## Part IV.—Sewers Rate.

423. After this case add "See, now, Land Drainage Act, 1930 (c. 44), ss. 24–28."

432a. *Exemption in local Act—Effect of Land Drainage Act, 1930 (c. 44), s. 66.*—Land Drainage Act, 1930 (c. 44), s. 66, has no reference to provisions dealing with rating, & therefore it does not apply to preserve a provision in a local Act of 1816, giving exemption from a rate levied to meet the expenses of land drainage.

*Qu.*: whether a "comr." or "surveyor" in the local Act is within the term "local authority" in the above sect.—*BELTON v. CROWLE DISTRICT DRAINAGE BOARD*, [1935] 2 K. B. 221; 104 L. J. K. B. 624; 153 L. T. 466; 33 L. G. R. 413.

432b. *Tidal lands—Whether exempt—Land Drainage Act, 1930 (c. 44), s. 77.*—Appl't. was rated under Land Drainage Act, 1930 (c. 44), in respect of certain lands which were admittedly tidal lands within sect. 77 (2) of that Act. Appl't. contended that the lands, being tidal lands, were exempt from rating by sect. 77 (1) (c):—*Held*: the exemption in Land Drainage Act, 1930 (c. 44), s. 77 (1) (c), did not apply to appl't's lands.—*COLLARD v. RIVER STOUR (KENT) CATCHMENT BOARD*, [1937] 1 All E. R. 436; 81 Sol. Jo. 16, D. C.

457. *Add. Citations*:—97 L. J. K. B. 13; 138 L. T. 72 (1926–31), 1 B. R. A. 191.

466a. — *Commutation—New rate based on annual value—Validity.*—By Land Drainage Act, 1918 (c. 17), s. 4 (1), power is given to drainage boards to levy drainage rates either on the basis of acreage or on the basis of annual value. Pursuant to that power resp. drainage board elected to levy a rate on the basis of acreage. By an order made by the Minister of Health in 1927 in pursuance of powers conferred on him by a

local Act, power was given to resps. to require occupiers of land less than one acre in extent to commute the said acreage charge, & in exercise of those powers, they called on appl't. to commute the rate imposed on his land, & he did so. By Land Drainage Act, 1930 (c. 44), s. 24 (4), every rate made by a drainage board shall, after the coming into operation of the Act, be an annual value rate. Resps. thereupon made a drainage rate on an annual value basis, & demanded payment from resp. of his proportion thereof, on the ground that the rate so imposed was a new rate to which the commutation agreement did not apply:—*Held*: the effect of the Act of 1930 was not to impose a new rate, but to fix one of the two alternative methods of assessing the existing rate, & appl't. had commuted that existing rate, & was therefore not liable to be further assessed in respect of it.—*LODGE v. LANCASHIRE COUNTY COUNCIL* (1934), 152 L. T. 167; 98 J. P. 419; 32 L. G. R. 353, D. C.

### SUB-SECT. 5.—COLLECTION AND RECOVERY OF RATE.

469a. *Power of court to state case.*—A special case under Summary Jurisdiction Act, 1879 (c. 49), s. 33, may, by the operation of Summary Jurisdiction Act, 1884 (c. 43), s. 7, & notwithstanding the sect. 10 of that Act be stated by a justice sitting to hear a proceeding for the recovery of a sewers rate under City of London Sewers Act, 1848, 11 & 12 Vict. c. clxiii., s. 194.—*R. v. LONDON (CORPN.) & BROWN* (1887), 57 L. T. 491, D. C.

*Annotations*:—*Consd.* R. v. Glamorganshire JJ., R. v. Pontypool JJ. (1892), 61 L. J. Q. B. 738; 61 L. J. M. C. 169, C. A. *Refd.* Fourth City Mutual Building Society v. East Ham Churchwardens, [1892] 1 Q. B. 661; R. v. Kent JJ. (1896), 74 L. T. 618; R. v. Lincolnshire JJ., [1912] 2 K. B. 413.

PART IV. SECT. 2, SUB-SECT. 3.  
*sg.* "Owner for the time being"—*Who is.*—The term "the owner for the time being" in Nova Scotia Acts, 1920, c. 131, s. 4, an Act relating to

sewers & sidewalks in the town of Springhill does not necessarily mean the registered owner.—*SPRINGHILL v. McLEOD*, [1929] 1 D. L. R. 882; 60 N. S. R. 272.—*CAN.*

PART IV. SECT. 2, SUB-SECT. 4.  
*sh.* *Consideration of prior assessments.*—*Crow v. RALEIGH TOWNSHIP*, [1931] 4 D. L. R. 330.—*CAN.*

**469b. Annual value as assessed to income tax—Reduction of assessment—Effect on drainage rate.**—*SEWERS COMRS. v. CHEFFINGS* (1935), 80 L. Jo. 9.

**469c. Amount of precept—How calculated.**—A catchment board issued a precept to a county council whose area was comprised in the catchment area, demanding a sum calculated on the basis of 2*d.* in the pound on the total of the rateable value of the area concerned. The county council objected (i) that the amount demanded was not an “estimated amount” within Land Drainage Act, 1930 (c. 44), s. 22 (2), but that the drainage board had merely proceeded on a mathematical calculation, & (ii) that the expression “estimated amount which would be pro-

duced by a rate of 2*d.* in the pound” in the same sub-sect. meant the amount which would be produced after making due allowance for costs for collection & bad debts :—*Held* : (1) as the calculation was based on the product expected from a rate in a future year, it was an estimate ; (2) upon a proper construction of Land Drainage Act, 1930 (c. 44), s. 22 (2), the catchment board had made a proper calculation & no allowance for costs of collection or bad debts ought to be made.—*R. v. CAMBRIDGE COUNTY COUNCIL, Ex p. RIVER GREAT OUSE CATCHMENT BOARD*, [1937] 1 K. B. 201 ; [1936] 3 All E. R. 352 ; 106 L. J. K. B. 103 ; 155 L. T. 559 ; 101 J. P. 1 ; 53 T. L. R. 84 ; 80 Sol. Jo. 934 ; 34 L. G. R. 597.

## SHERIFFS AND BAILIFFS.

## Part V.—Powers, Duties, and Liabilities.

274. *Add. Annotation* :—**N.F. R. v. Jones, Ex p. McVittie**, [1931] 1 K. B. 664.

274a. —. —.]—Pltf. obtained judgment in a county ct. against deft. for a sum of money & costs, & an appeal to the Divisional Ct. by deft. was dismissed with costs. Pltf.'s solr. made various but futile efforts to obtain the fruits of the judgment. Deft. disobeyed a bkpcy. notice & an order for payment of the judgment debt & costs by instalments. Several judgment summonses were obtained against the deft., but deft. evaded service of them. Eventually pltf.'s solr. served deft. with a judgment summons within the precincts of a ct. of justice where deft. was waiting for a case, in which he was pltf., to be called on. Deft. applied for a writ of attachment against pltf.'s solr. for contempt of ct. in so doing :—

*Held* : in the circumstances, no contempt had been committed & the rule must be discharged.—**R. v. Jones, Ex p. McVittie**, [1931] 1 K. B. 664 ; 100 L. J. K. B. 193 ; 144 L. T. 597, D. C.

539. *Add. Annotation* :—**Refd. Morris v. Winter**, [1930] 1 K. B. 243.

639a. —. —.]—An attorney, who is arrested on a writ of *capias*, cannot maintain an action of trespass against pltf. & the officer for such arrest : his only remedy is an action on the case.—**NOEL v. ISAAC** (1835), 1 Cr. M. & R. 753 ; 5 Tyr. 376 ; 4 L. J. Ex. 56 ; 149 E. R. 1284.

*Annotation* :—**Refd. Newton v. Constable** (1841), 6 Jur. 317.

726. *Add. Annotation* :—**Refd. Re Simms, Ex p. Trustee** (1933), 103 L. J. Ch. 67.

## Part VI.—Fees, Poundage, and Other Charges.

860. *Add. Annotation* :—*As to* (1) **Consd. China Navigation Co. v. A.-G.** (1932), 48 T. L. R. 375.

## PART II. SECT. 3.

sa. *Right of sheriff to appoint*.]—There is nothing in the statutes of Saskatchewan which provides or implies that a sheriff cannot appoint bailiffs or officers to assist him in the discharge of his duties.—**R. v. REZNEK**, [1931] 1 W. W. R. 607 ; 3 D. L. R. 430 ; 55 Can. C. C. 153.—**CAN.**

sb. *Special bailiffs—Jurisdiction confined to county where residing*.]—**DEVINE v. CARSON & Co.**, [1929] N. 1. 26.—**IR.**

## PART V. SECT. 6, SUB-SECT. 7.—J. (a).

o l. —. —.]—**HIGGINS v. MACDONALD**, [1928] 4 D. L. R. 241 ; [1928] 3 W. W. R. 115 ; 50 Can. Crim. Cas. 353.—**CAN.**

## PART V. SECT. 6, SUB-SECT. 10.—B. (a).

652 vii. —. —.]—In an action against a sheriff for damages for a wrongful seizure & sale under an execution :—*Held* : since the sheriff had properly chosen to leave the conduct of the seizure & sale in the hands

of his clerk & his bailiffs, he was not liable by reason of his personal conduct of his office, & since all of the employees (except the auctioneer) connected with the seizure & sale were not appointed by or subject to dismissal by the sheriff but were members of the civil service of the province, he was not liable for their misconduct or negligence. A sheriff in Alberta is not under the duty of taking personal cognisance of the details of essentially routine proceedings in his office important though they may be in their effect.—**GUNN'S PURE FOODS, LTD. v. RAE & CANADIAN SURETY CO.**, [1934] 2 W. W. R. 108.—**CAN.**

## PART V. SECT. 6, SUB-SECT. 10.—H.

1(p. 116) l. — *Unlicensed bailiff*.]—Collection Agents' Licensing Act, 1930, applies to the work of a bailiff in taking repossession of goods sold under a lien agreement ; & therefore, where a bailiff is not licensed under the Act he has no legal right to enter upon the premises of the buyer for said purpose & in doing so, is a trespasser *ab initio*, & the vendor who employed him for

said purpose is also liable for his trespass & for an assault committed by him in pursuance thereof.—**SHADIN v. DAVID SPENCER, LTD. & McMICHAEL**, [1935] 1 W. W. R. 693 ; 2 D. L. R. 813 ; 50 B. C. R. 55.—**CAN.**

## PART VI. SECT. 1.

sp. *Liability for*.]—A solr. acting for a disclosed principal is not liable for sheriff's fees in executing a *capias*.—**BRADLEY v. McNAUGHT**, [1936] 1 D. L. R. 671. **CAN.**

## PART VI. SECT. 2, SUB-SECT. 1.

c l. — *Execution of writ of capias ad satisfaciendum*.]—Poundage fees in respect of the execution of a writ of *ca. sa.* become due upon execution of the writ, that is, upon taking the body of the judgment debtor in execution, & such poundage may be recovered at the rate prescribed by the scale of fees under Sheriff's Act, 1900, upon the amount for which the writ was issued.—**Re WILLIAM ARNOTT, Ex p. THE SHERIFF** (1929), 29 S. R. N. S. W. 339 ; 46 N. S. W. W. N. 127.—**AUS.**

## SHIPPING AND NAVIGATION.

## Part I.—In General.

## SECT. 1.—THE MERCHANT SHIPPING ACTS

## SUB-SECT. 1.—IN GENERAL (p. 159).

**Powers of colonial legislatures—Exclusion of Dominions.]—**See Statute of Westminster, 1931, s. 5.

- 11a. ——— **Alien stowaway secreting himself at foreign port—Continuing offence.]—**An alien, while a British ship was lying at a quay in a foreign port, secreted himself in the ship & proceeded to sea. He disclosed himself the next day & was then treated as a member of the crew. When the ship reached London he was arrested & prosecuted before a Metropolitan magistrate under Merchant Shipping Act, 1894 (c. 60), s. 237 (1), for having unlawfully secreted himself & gone to sea in the ship without the consent of any person entitled to give such consent:—*Held*: the

words of sect. 237 (1), "secretes himself" & "goes to sea," formed a compound term, the offence, which was a continuing one, consisting of secreting & going to sea without the necessary consent; under sect. 686 (1), the alien, not being a British subject, could be tried for committing "any offence on board any British ship"; & the magistrate had jurisdiction in the matter.—*ROBEY v. VLADINIER* (1935), 151 L. T. 87; 99 J. P. 428; 52 T. L. R. 22; 80 Sol. Jo. 76; 18 Asp. M. L. C. 560; 33 L. G. R. 471, D. C.

25. *Add. Annotation*:—**Consd.** The Champion, [1934] P. 1.  
26. *Add. Annotation*:—**Refd.** The Champion, [1934] P. 1.  
28. *Add. Annotation*:—**Refd.** The Humorous, The Mabel Vera, [1933] P. 109.

## Part II.—Ownership and Control of Ships.

72. *Add. Annotation*:—**Consd.** Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.  
108. *Add. Annotation*:—**Refd.** Cammell Laird & Co. v. Manganese Bronze & Brass Co., [1933] 2 K. B. 141.  
109. *Add. Annotation*:—**Refd.** Cammell Laird & Co. v. Manganese Bronze & Brass Co., [1933] 2 K. B. 141.  
177. *Add. Annotation*:—**Refd.** Aron v. Mial (1928), 139 L. T. 562.  
195. *Add. Annotation*:—**Refd.** *Re* King's Settlement, King v. King, [1931] 2 Ch. 294.  
203. *Add. Annotation*:—**Refd.** The Humorous, The Mabel Vera, [1933] P. 109.  
203a. ——— ——— ———.]—By statutory mtgs. which covered sixty-four sixty-fourth shares

in each ship & her appurtenances two drifters were mortgaged to ptlfs., who, when the mtgors. went into liquidation, took possession of the drifters & the nets & other gear on board them. The mtgors. also claimed under the mtgs. a number of nets & a quantity of other fishing gear which was lying in the store of the mtgors. & was marked with the port number of one or other of the two drifters. The evidence showed that at the date of the mtge. on the drifter *H.* the mtgors. owned no nets or other drift fishing gear; but by the date of the mtge. on the drifter *M. V.* they had acquired nets & other gear & the *M. V.* herself had gear on board. At the hearing it was agreed by counsel that the effect of the authorities cited was that nets & gear which could be said to have been

## PART I. SECT. 1, SUB-SECT. 1.

**sl. Powers of New Zealand Legislature.]—**Sect. 243 of Shipping & Seamen Act, 1908, must be interpreted *ut res magis valeat quam pereat*, & should be interpreted on this doctrine as applying to ships registered in New Zealand. The New Zealand Legislature may by implication repeal sect. 478 (6) of Merchant Shipping Act, 1894 (Imp.), as that sect. is included in the provisions of the statute which the Legislature of a British possession is empowered by sect. 735 to repeal wholly or in part. The assent of His Majesty to the Shipping & Seamen Acts, 1903 & 1908, was intended, & must be regarded, as a confirmation of these statutes for the purposes of sect. 735 of Merchant Shipping Act, 1894 (Imp.), & as subsequent amendments have been assented to & confirmed, the principal Act which was assented to cannot be held invalid for want of confirmation. Even if there be a repugnancy between sect. 243 of Shipping & Seamen Act, 1908, & sect. 478 (6) of Merchant Shipping Act, 1894 (Imp.), that repugnancy is

authorised by sect. 735 of the latter statute; & having regard to sect. 735, it is immaterial whether the jurisdiction of the Board of Trade under sect. 478 (6) is ousted or whether the Board of Trade & the Minister of Marine in New Zealand have concurrent jurisdiction. Consequently, sect. 243 of Shipping & Seamen Act, 1908, must be regarded as a valid exercise of the power conferred upon the New Zealand Legislature by sect. 735 of Merchant Shipping Act, 1894 (Imp.), *quoad* ships registered in New Zealand.—*See "LANGATHA," T. E. V.,* [1936] N. Z. L. R. 357; G. L. R. 250; 12 N. Z. L. J. 133.—**N.Z.**

## PART I. SECT. 2.

**sl. Boat.]—**A motor vessel is a "boat" for the purpose of a prosecution for possessing a boat equipped with apparatus for making a smoke screen. *R. v. CONRAD*, [1938] 2 D. L. R. 541; 12 M. P. R. 588.—**CAN.**

**so. Ship.]—**A tug propelled by steam & not exclusively by oars, which is used in British India only for towing ships within a dockyard whenever any

ship enters the port from the sea, is a "ship" within Indian Merchant Shipping Act, s. 2 (8). *CALCUTTA PORT COMRS. v. BHU BANESHWAR PRASAD*, 1 L. R., [1938] 1 Cal. 133. **IND.**

## PART II. SECT. 1, SUB-SECT. 3.

**r i. ———.]—***GRADY v. WAITE*, [1930] 1 D. L. R. 838; 1 M. P. R. 116.—**CAN.**

PART II. SECT. 2, SUB-SECT. 4.—**B.**

**g i. ——— Arrival in Calcutta—Jurisdiction of magistrate.]—**When some sailors committed an offence on board a British ship on high seas, which subsequently arrived in Calcutta, the Chief Presidency Magistrate had jurisdiction under Merchant Shipping Act, 1894 (c. 60), ss. 684, 686, to entertain a complaint against them, in the absence of evidence to show that they were not in Calcutta at the time. In any case, when the accused surrendered before the ct. it had jurisdiction to proceed with the trial.—*BENGAL SUPERINTENDENT & REMEMBRANCE OF LEGAL AFFAIRS v. RAISALEE* (1932), 1 L. R. 60 Cal. 44.—**IND.**

appropriated to a vessel at the time of her mtge., or substituted for the purpose of maintaining her original gear, would pass as "appurtenances" under the mtge., & it was contended for the mtgees. that the marking of gear with the port number of a particular vessel was sufficient evidence that such gear had been appropriated to her:—*Held*: on the evidence, the mtgors. when renewing gear marked it indiscriminately with the port number of one of their several vessels, & there was no appropriation by them of the gear in store to either of the drifters in question; inasmuch as the mtgors. owned no fishing gear at the date when the *H.* was mortgaged it was impossible for them to appropriate any gear to her & none passed under the mtge.; but in the case of the *M. V.* gear was on board, & appropriated to her, at the time of the mtge., & the gear which was on board when the mtgees. took possession was there in substitution for the original gear & therefore passed to the mtgees. under the mtge.—*THE HUMOROUS, THE MABEL VERA*, [1933] P. 109; 102

L. J. P. 45; 148 L. T. 501; 49 T. L. R. 259; 18 Asp. M. L. C. 373.

204. *Add. Annotation*:—*Refd.* *The Humorous, The Mabel Vera*, [1933] P. 109.

251. *Add. Annotation*:—*Refd.* *The Humorous, The Mabel Vera*, [1933] P. 109.

266. *Add. Annotation*:—*Refd.* *The Inna*, [1938] P. 148.

274. *Add. Annotation*:—*Refd.* *The Zigurds* (No. 1) (1932), 48 T. L. R. 556.

342. *Add. Annotation*:—*Refd.* *The Zigurds* (No. 1) (1932), 48 T. L. R. 556.

347. *Add. Annotation*:—*Distd.* *The Zigurds* (No. 1) (1932), 48 T. L. R. 556.

383. *Add. Annotation*:—*Consd.* *Cory & Son, Ltd. v. Dorman, Long & Co., Ltd.*, [1936] 2 All E. R. 386.

384. *Add. Annotations*:—*As to* (2) *Refd.* *News-holme Bros. v. Road Transport & General Insee. Co.*, [1929] 2 K. B. 356; *The Njeges*, [1936] P. 90.

493. *Add. Annotation*:—*Refd.* *Kerr v. Marine Products* (1928), 44 T. L. R. 292.

## Part III.—Master, Officers and Crew.

551. *Add. Annotation*:—*Consd.* *Savage v. British India Steam Navigation Co., Power v. Same* (1930), 46 T. L. R. 294.

551a. ———.]—In actions by the captain & by the chief officer of an ocean passenger steamer for alleged wrongful dismissal there was no written contract of employment, & the only documents relating to employment were various circulars dealing with the age at which officers must retire, their rights to pension, & their right to leave on full pay after certain periods of service. The circulars made it clear that pensions were only to be paid at the discretion of the employers:—*Held*: the contract of employment was determinable by either party at any time on reasonable notice, & that in the case of the chief officer reasonable length of notice would have been 12 months, & he was entitled to judgment for 12 months' salary. In the case of the captain the action was dismissed.—*SAVAGE v. BRITISH INDIA STEAM NAVI-*

*GATION CO., LTD., POWER v. BRITISH INDIA STEAM NAVIGATION CO., LTD.* (1930), 46 T. L. R. 294.

*Annotation*:—*Consd.* *Edmonson v. Hopner & Co.* (1935), 79 Sol. Jo. 777.

560a. *Termination of contract—Right to reasonable notice—What amounts to.*—*SAVAGE v. BRITISH INDIA STEAM NAVIGATION CO., LTD., POWER v. BRITISH INDIA STEAM NAVIGATION CO., LTD.*, No. 551a, *ante*.

582. *Add. Annotation*:—*Refd.* *Ellerman Lines, Ltd. v. Murray, White Star Line of Royal & United States Mail Steamers Oceanic Steam Navigation Co. v. Comerford*, [1931] A. C. 126.

589. *Add. Annotation*:—*Refd.* *The Croxteth Hall, The Celtic*, [1930] P. 197.

600. *Add. Annotation*:—*Refd.* *The Croxteth Hall, The Celtic*, [1930] P. 197.

602. *Add. Annotation*:—*Refd.* *The Terneuzen*, [1938] P. 109.

### PART II. SECT. 7.

*or. False declaration of ownership—Who may be liable.*—*Held*: (1) the mtgeo. & transferee are, as regards this forfeiture, in as favourable a position under Merchant Shipping Act, 1894, s. 67 (2), which states that the "ship or share shall be subject to forfeiture under this Act to the extent of the interest therein of the declarant," as though they were in possession of the ship & therefore that interest should be protested in the order that should be made under sect. 76, & the balance of the proceeds of the sale of the ship should be paid to the intervenor to be applied in reduction of the mtge.; (2) the owner procuring registration of himself as a British owner by fraudulent means under sect. 67 (2) is not sufficient to establish a use & assumption of flag & character for the prohibited purpose since sub-sect. (2) is obviously directed to matters occurring "on board a ship" & of such a kind as to "make the ship appear to be a British ship" as the result of something

done "on board" of her in the course of her use as a ship & not something done in a registry in relation to the "Procedure for Registration" of her & the claim for forfeiture under sect. 69 must be dismissed.—*R. v. THE "EMMA K."* [1936] Ex. C. R. 92; [1935] 3 D. L. R. 673; 50 B. C. R. 97; *affd.* [1936] 3 D. L. R. 385; S.C.R. 256.—*CAN.*

### PART III. SECT. 3.

*f i. — During illness.*—A seaman serving under articles on a ship was incapacitated by illness from performing his duties & was landed at a port other than his home port, & there put into a hospital where the shipowner paid his expenses. The seaman was later discharged from such hospital as "relieved," although not cured, & he being fit to travel, the shipowner offered him a free passage to his home port, which offer was refused. The seaman remained at his port of landing & later sued the shipowner under sect. 127 (1) of Navigation Act, 1912–1926, for maintenance

from the time of his discharge from the hospital to the date of his writ, on the ground that he was not cured:—*Held*: the shipowner had fulfilled his duty by making the offer to bring the seaman back to his home port, & that offer having been refused, no further liability attached to the shipowner.—*MYRIE v. BURNS PHILP & CO., LTD.* (1935), 29 Q. J. P. R. 93; [1935] Q. S. R. 145.—*AUS.*

*f ii. —*—The articles of agreement under which a seaman was employed by a shipowner contained a clause which provided that if the seaman were landed & left at a port by reason of illness or accident in the service of the ship incapacitating him from duty, he was entitled to certain wages & benefits. The clause further provided that the illness, hurt, or injury, "shall so far as can be ascertained, be an illness contracted on board of the ship, or a hurt or injury sustained in the service of the ship or her owner." The seaman signed the articles on Jan. 10, 1933, & on Apr. 20,

614a. Protection of open hatchways—Breach of statutory duty—Effect of contributory negligence.]—Pltf. was a coal trimmer, & in proceeding to his work on defts.' ship along a passage-way which he was entitled to go along, he stumbled & fell down an open hatchway into one of the holds of the ship, & was injured. He sued defts. for damages, basing his action on a breach of a statutory regulation made under 1894 Act, which provided for the fencing & protection of open hatchways on ships:—*Held*: pltf.'s own contributory negligence was an answer to his claim against defts. based on a breach of statutory duty.—*Dew v. UNITED BRITISH S.S. CO., LTD.* (1928), 98 L. J. K. B. 88; 139 L. T. 628; 17 Asp. M. L. C. 513, C. A.

*Annotations*:—*Consd.* *Service v. Sundell* (1929), 99 L. J. K. B. 55. *Apld.* *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1931] 2 K. B. 132. *Follid.* *Craze v. Meyer-Dumore Bottlers' Equipment Co.*, [1936] 2 All E. R. 1150.

616. *Add. Annotation*:—*Refd.* *Monk v. Warbey* (1934), 151 L. T. 100.

633. *Add. Annotation*:—*Refd.* *Ellerman Lines, Ltd. v. Murray, White Star Line of Royal & United States Mail Steamers Oceanic Steam Navigation Co. v. Comerford*, [1931] A. C. 126.

669. *Add. Annotation*:—*Refd.* *The Terneuzen*, [1938] P. 109.

680. *Add. Annotations*:—*Consd.* *Maver v. "Solon" Ship Owners* (1929), 22 B. W. C. C. 424; *Barras v. Aberdeen Steam Trawling & Fishing Co.*, [1933] A. C. 402; *The Terneuzen*, [1938] P. 109.

685. *Add. Annotations*:—*As to* (1) *Consd.* *Barras v. Aberdeen Steam Trawling & Fishing Co.*, [1933] A. C. 402. *As to* (3) *Refd.* *First Russian Insee. v. London & Lancashire Insee.* [1928] Ch. 922. *As to* (4) *Refd.* *First Russian Insee. v. London & Lancashire Insee.*, [1928] Ch. 922. *Generally, Refd.* *The Penelope*, [1928] P. 180; *Ottoman Bank v. Chakaria*, [1930] A. C. 277; *Walton Harvey, Ltd. v. Walker & Homfrays, Ltd.*, [1931] 1 Ch. 145.

685a. *Indemnity under Merchant Shipping (International Labour Convention) Act, 1925 (c. 42)*

of the same year was landed at a port, having become incapacitated two or three days before, by an illness, pernicious anaemia. He sued the owner of the ship for wages. The medical evidence showed that the disease had been contracted some time prior to the signing of the articles, although it did not manifest itself until a few days before Apr. 20, 1933. The seaman had prior to Jan. 10, 1933, been in the service of the owner under previous articles, separate articles being signed in respect of each voyage.—*Held*: (1) an illness may be contracted within the meaning of the clause before the incapacitating results occur or are experienced; (2) in order to succeed in his claim for wages the seaman must show that the illness was contracted during the currency of the articles, it being insufficient that the illness was contracted in the service of the ship or her owner under previous articles.—*BURNS PHILIP & CO., LTD. v. MARIKIP* (1935), 51 C. L. R. 463; [1935] Q. S. R. 126.—*AUS.*

PART III. SECT. 4, SUB-SECT. 3.—A.

685 b 1. *Indemnity under Merchant Shipping (International Labour Convention) Act, 1925—Unemployment due to wreck—What amounts to.*—A seaman was engaged under an agreement

—For what period seaman entitled.]—*Held*: upon the true construction of sect. 1 of above Act a seaman whose service had been prematurely terminated by the wreck or loss of the ship was entitled to receive wages at the rate payable under his agreement of service for each day on which he was in fact unemployed during a period of two months from the date of the termination of the service, whether his service under the agreement would in the normal course have terminated before the expiration of that period or not, unless the owner discharged the *onus* cast upon him by sect. 1 (2).—*ELLERMAN LINES, LTD. v. MURRAY, WHITE STAR LINE OF ROYAL & UNITED STATES MAIL STEAMERS OCEANIC STEAM NAVIGATION CO., LTD. v. COMERFORD*, [1931] A. C. 126; 36 Com. Cas. 159, H. L.; *sub nom.* *THE CROXTETH HALL, THE CELTIC*, 100 L. J. P. 25; 144 L. T. 441; 47 T. L. R. 147; 18 Asp. M. L. C. 184, H. L.

*Annotations*:—*Consd.* *Barras v. Aberdeen Steam Trawling & Fishing Co.*, [1933] A. C. 402. *Refd.* *The Terneuzen*, [1938] P. 109.

685b. — *Unemployment due to wreck—Onus of proof.*—*ELLERMAN LINES, LTD. v. MURRAY, WHITE STAR LINE OF ROYAL & UNITED STATES MAIL STEAMERS OCEANIC STEAM NAVIGATION CO., LTD. v. COMERFORD*, No. 685a, *ante*.

685c. — *What amounts to.*—A seaman was engaged to serve for six months as chief engineer on a steam trawler. On returning to port during the term of six months to discharge a cargo of fish the trawler collided with another vessel & after making the port under her own steam, went into dry dock for repairs, the crew, including the chief engineer, being paid off. The trawler was laid up for fourteen days, at the end of which time the seaman was re-engaged as chief engineer. He claimed from the owners of the trawler a sum as wages for the time during which the vessel was under repair, alleging that his service had terminated by reason of the "wreck" of the trawler within Merchant Shipping (International Labour Conventions) Act, 1925 (c. 42), s. 1 (1):—*Held*: there was no wreck of the trawler.

to serve as an engineer of a trawler for the period from July to Dec. 1930. On Sept. 25, 1930, the trawler sustained damage in consequence of a collision at sea, but she was able to make port under her own steam. On reaching port the crew were paid off, & the ship was laid up for repairs for a period of fourteen days; thereafter the seaman was re-engaged. He claimed wages, in terms of Merchant Shipping (International Labour Conventions) Act, 1925, s. 1 (1), for the fourteen days during which the ship was under repair, on the ground that his service had been terminated by reason of the "wreck" of the ship.—*Held*: the damage did not constitute a "wreck" within sect. 1 (1), in respect that the period required for repairs was not so prolonged as to render the ship unable to continue within a reasonable time the adventure contemplated in the agreement with the seaman.—*BARRAS v. ABERDEEN STEAM TRAWLING & FISHING CO.*, [1932] S. C. 432.—*SCOT.*

*sp. Agreement to pay wages during unemployment—Anticipation.*—Pltfs. were members of the crew of the S.S. C. P., which was wrecked on May 3, 1936, thereby terminating pltfs.' employment. Deft. paid their wages up

to May 7, 1936, & was ready to pay to each pltf. from day to day while unemployed, an amount equal to the daily wages he would have earned during the two months succeeding May 3, 1936. Pltfs. applied to deft. to be allowed to anticipate in a lump sum the payments which would have been made to them from day to day to July 3, 1936. Deft. disputed this right of anticipation & the matter was referred to the Shipping Master of the Port of Montreal, it being agreed between the parties that the articles of agreement signed by pltfs. should constitute an agreement in writing to submit the dispute to the decision of the Shipping Master. Following the decision of the Shipping Master deft. paid to each pltf. a sum equal to one month's wages from May 8, 1936, to June 8, 1936. Pltfs. brought action claiming the balance of two months' wages from May 3, 1936, to July 3, 1936.—*Held*: sect. 176 of Canada Shipping Act, R. S. C., 1927, c. 186, is not applicable to this case; (2) since the settlement arranged between the parties was equitable & advantageous to pltfs., the action should be dismissed.—*H. BROWN v. CANADIAN NATIONAL STEAMSHIPS CO., LTD.*, [1937] Ex. C. R. 84; 3 D. L. R. 750.—*CAN.*



By Viscount BUCKMASTER, Lord WARRINGTON OF CLYFFE, Lord RUSSELL OF KILLOWEN, & Lord MACMILLAN, on the ground that the word "wreck" having been used in the Act of 1894 & having received a judicial interpretation must, when used in the same context in the Act of 1925, bear that interpretation unless a contrary meaning is indicated; & the trawler was not by the collision rendered incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into, but was merely interrupted in so doing.

By Lord BLANESBURGH on the ground that the decision in *The Olympic*, [1913] P. 92, was, in view of the dissenting judgment of KENNEDY, L.J., not of sufficient authority to warrant the assumption that the word "wreck" in the Act of 1925 was used in the sense attributed to it by the majority of the Ct. of Appeal; the decision of the majority was wrong, & there was no wreck in *The Olympic* & *a fortiori* none in the present case. Consequently the seaman could not recover.—*BARRAS v. ABERDEEN STEAM TRAWLING & FISHING CO., LTD.*, [1933] A. C. 402; 102 L. J. P. C. 33; 149 L. T. 169; 49 T. L. R. 391; 77 Sol. Jo. 215; 38 Com. Cas. 279; 18 Asp. M. L. C. 381, H. L.

685d. ————,]—On Jan. 27, 1937, defts.' steamship was driven ashore in a storm & remained fast. Ineffectual salvage operations were undertaken, & between Feb. 16 & 21 most of the crew were discharged. On Apr. 14 the salvors abandoned their efforts, & on May 5 the remainder of the crew, including pltf., who was the chief officer, were paid off & the ship was abandoned as a total loss. Notice of abandonment as a constructive total loss had already been given to the underwriters on Feb. 3. Pltf., who had been unable to obtain other employment, claimed two months' wages under Merchant Shipping (International Labour Conventions) Act, 1925 (c. 42), s. 1, which provides that "when by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall . . . be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date."

Defts. alleged that pltf.'s services under his agreement were terminated on Jan. 27 by reason of the wreck of the vessel, & that, having been paid at the same rate as under the agreement up to May 5, he was not entitled to anything more :—*Held* : following

the definition of "wreck" laid down by the Ct. of Appeal in *The Olympic*, [1913] P. 92; 41 Digest 230, 689, the injury to the ship which is alleged to have terminated the services must be such as to make the continuance of the voyage useless as a commercial venture, that the loss of the venture was not to be determined *ex post facto* only by the condition & position of the ship at the moment the casualty occurred; there was no wreck until the venture was in fact abandoned by force of circumstances on May 5; & therefore, pltf. was entitled to the sum claimed.—*THE FRANKEN, [1933] P. 109; [1933] 2 All E. R. 318; 107 L. J. P. 60; 51 T. L. R. 661.*

693. *Add. Annotation* :—*Refd.* *The Bathori*, [1933] P. 22.

763. *Add. Annotation* :—*Refd.* *Ellerman Lines, Ltd. v. Murray, White Star Line of Royal & United States Mail Steamers Oceanic Steam Navigation Co. v. Comerford*, [1931] A. C. 126.

796. *Add. Annotations* :—*Refd.* *Huntoon Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528; *Pockney v. Atkinson* (1929), 142 L. T. 135; *Eshelby v. Federated European Bank, Ltd.*, [1932] 1 K. B. 423.

809a. *Effect of settlement at end of voyage—On right to payment in lieu of leave.*]—The signing of a settlement at the end of a voyage, in full discharge & without reservation, puts an end to claims in respect of the particular voyage, but does not necessarily affect the right of a seaman to payment in lieu of leave accruing.—*MCLEA v. ESSEX LINES, LTD.*, (1933), 45 Ll. L. R. 251.

847. *Add. Annotation* :—*Refd.* *Bottomley v. West Derby Assessment Committee, etc., etc.* (1931), 47 T. L. R. 468.

892a. *Combination to impede navigation—Refusal to sail into war zone.*]—On Nov. 16, 1936 (*i.e.* after the outbreak of the civil war in Spain), a number of seamen signed articles as members of the crew of a registered British steamship for a foreign-going commercial voyage of not more than two years' duration, with certain geographical limits, which included all ports in Spain. On Feb. 19, 1937, the vessel reached Portland, where the master received orders to proceed to Hopewell & there load a cargo of nitrate for Seville. The crew refused to go to Hopewell for the purpose of loading nitrate for Spain, but agreed to sail the vessel to Boston, where the British consul was interviewed & was informed by the crew's spokesman that the crew refused to load the cargo for Spain, as Spain was a war zone, that the waters around Spain & the Spanish ports were at all material

#### PART III. SECT. 4, SUB-SECT. 9.

797 l. *Advance note—Liability on.*]—Deft. gave a seaman's advance note to B, a seaman for a one-half month's wages at V., payable five days after the sailing of the M. from B.C. Pltf. cashed the note for B., who then joined his ship before sailing to Victoria, where the ship (being a run runner) was held by the authorities for breach of customs regulations, & not allowed to leave B.C. Deft. was duly notified that pltf. held the note :—*Held* : deft.'s conduct was the sole cause of the impossibility of performance, & having by his own conduct made it impossible for the ship to leave B.C.

he was liable on the note.—*IMPERIAL VETERANS IN CANADA v. EASTERN FREIGHTERS, LTD.* (1927), 39 B. C. R. 17.—CAN.

#### PART III. SECT. 4, SUB-SECT. 12.—A.

sa. *Action for unearned wages.*]—The captain, mate, & certain seamen of the A. had the ship arrested in a joint action *in rem* for wages. The claim made was for one month & some days, being not only the amount actually earned, but also for substantial sums not earned, which were more in the nature of damages :—*Held* : wages cannot be sued for until earned, & where a hiring at so much a month is made, no wages are or can

be earned until the whole month's service is performed.—*BUTKE v. THE AMLA*, [1929] 1 D. L. R. 873; Ex. C. R. 194.—CAN.

#### PART III. SECT. 4, SUB-SECT. 12.—C.

sd. *Set-off.*]—In an action by a seaman for wages deft. may plead set-off for value of goods sold, or necessities furnished, to the seaman's family.—*GRANDY v. ZWICKER & Co.*, [1936] 3 D. L. R. 512. CAN.

#### PART III. SECT. 4, SUB-SECT. 12.—D.

847 i. *Appal.*]—*From sheriff substitute—Does not lie.*—*BAIN v. ORMISTON*, [1928] S. C. (Ct. of Sess.) 764.—SCOT.

times dangerous to shipping, owing to the civil war, that Seville was an important base of the insurgent forces, & that a ship taking a cargo of nitrate to a Spanish port ran a grave risk of destruction or capture, while her crew were in danger of death or captivity. In consequence of their refusal to load the nitrate for Spain, the crew were discharged at Boston on Mar. 4. Thirteen members of the crew were thereupon charged, as seamen lawfully engaged to serve in a ship, with having combined to impede the navigation of the ship contrary to Merchant Shipping Act, 1894 (c. 60), s. 225 (1) (e):—*Held*: the seamen were entitled to decline the voyage in the conditions which then subsisted, which exposed them to the risk of capture, & it was utterly impossible to find them guilty of a criminal offence.—*ROBSON v. SYKES*, [1938] 2 All E. R. 612; 54 T. L. R. 727; 82 Sol. Jo. 193, D. C.

932a. ———.—*R. v. WALL* (1890), 112 C. C. Ct. Cases, 800.

932b. ———.—*R. v. PHILLIPS, ETC.* (1891), 113 C. C. Ct. Cases, 622.

935a. ———. *Whether condition precedent to hearing of complaint.*—A complaint was made before justices by the master of a British ship against six seamen for continuing to neglect

duty, contrary to 1894 Act, s. 225 (1) (e). No entry of the offence had been made in the official log-book, & the justices dismissed the complaint on this ground for want of jurisdiction:—*Held*: the making of the entry in the official log-book was not a condition precedent to the hearing of the complaint. Even where no entry of an offence had been made, & there had consequently been default under the section, the Court was not without jurisdiction to proceed. The effect of 1894 Act, s. 228 (d), was to confer on the ct. in such a case a discretion either to receive other evidence or to refuse to do so & dismiss the complaint.—*PATTERSON v. ROBINSON*, [1929] 2 K. B. 91; 98 L. J. K. B. 457; 141 L. T. 165; 93 J. P. 165; 27 L. G. R. 422; 28 Cox C. C. 626; 18 Asp. M. L. C. 35, D. C.

939. *Add. Annotations*:—*Consd. Barras v. Aberdeen Steam Trawling & Fishing Co.*, [1933] A. C. 402. *Refd.* *The Terneuzen*, [1938] P. 109.

956. *Add. Annotations*:—*Apld.* *Robson v. Sykes*, [1938] 2 All E. R. 612. *Refd.* *Ellerman Lines, Ltd. v. Murray*, *White Star Line of Royal & United States Mail Steamers Oceanic Steam Navigation Co. v. Comerford*, [1931] A. C. 126.

## Part IV.—Authority and Liability of Master as Custodian.

966. *Add. Annotation*:—*Refd.* *Kleinwort, Sons & Co. v. Associated Automatic Machine Corp'n., Ltd.* (1931), 151 L. T. 1.

988a. ———.—*Motion by defts., owners of the steamship G., to stay proceedings in an action which had been commenced against them by the owners of part of the cargo laden on the steamship V. for damage sustained by the cargo in consequence of a collision between the G. & the V. After the collision an action was commenced abroad by the master of the V. on behalf of himself & owners of the cargo on the V. & bail was obtained. Subsequently judgment was given in favour of owners of the V. After judgment had been given in the*

*proceedings abroad, owners of part of the cargo of the V. began the present action:—Held*: the master had no authority to commence the action abroad on behalf of the cargo owners, & that they were not bound by that action, nor were they estopped by it from bringing the present proceedings. *Motion dismissed.*—*THE "GLENLUCE"* (1930), 170 L. T. Jo. 399.

1001. *Add. Annotations*:—*Refd.* *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48; *Haynes v. Harwood*, [1935] 1 K. B. 146.

1107. *Add. Annotation*:—*Refd.* *Trollope (Geo.) & Sons v. Martyn Bros.*, [1934] 2 K. B. 436.

## Part V.—General Statutory Provisions for Safety of Ship and Cargo.

*See, now, Merchant Shipping (Safety & Load Line Conventions) Act, 1932 (c. 9).*

1596. *Add. Citation*:—17 Asp. M. L. C. 303.

1597. *Add. Annotation*:—*Refd.* *Great Western Ry. Co. v. Kassos Steam Navigation Co.* (1930), 144 L. T. 121.

PART IV. SECT. 2, SUB-SECT. 2.—B sb. *Purchaser suffering judgment—Whether liable to interest.*—The vendee of a ship without notice of a claim for necessaries against her, who offers to suffer judgment for the amount of such claim is not liable for interest upon the same.—*HODDER (W. W.) CO., INCORPORATED v. "STRANDHILL"* (N. S. Adm.), [1929] Ex. C. R. 253.—CAN.

### PART V. SECT. 1.

f i. ———.—Sect. 44 (2) of Naviga-

tion Act, 1912–1926 provides that "If a ship proceeds to sea being short in her crew of not more than one-fifth of her engine-room staff, or one-fifth of her deck complement, the master or owner shall not be liable under this sect. if it is proved that the breach was not occasioned through any fault of his own":—*Held*: (1) the excuse contained in sub-sect. (2) is established when it is proved that deft. honestly endeavoured to obtain a full crew & that his failure to do so did not arise from his omission to do something

which he reasonably ought to have done; (2) firemen & trimmers form part of a ship's engine-room staff within the sub-section.—*DAY v. YATES* (1931), 45 C. L. R. 32; 4 A. L. J. 410; [1931] Argus L. R. 128.—AUS.

sk. *Equipment in good condition when installed—Inst.*—In an action for personal injuries, brought by the mate of a steam trawler against the registered owners & the master, it appeared that, while the trawl was being taken on board by means of a steam winch, the

**1599a.** — **Method of measurement—Necessity for compliance with statute.**—Measurement of the space occupied by deck cargo on a ship must, in accordance with the provisions of Merchant Shipping Act, 1894 (c. 60), s. 85 (3), be made in the manner directed by Sched. II., r. 1, of the Act. A memorandum by an

officer of Customs that the proper measurement has been made, if, in fact, that measurement has been made by some other method, is of no effect.—*GREAT WESTERN RY. CO. v. KASSOS STEAM NAVIGATION CO.* (1930), 144 L. T. 121; 18 Asp. M. L. C. 174.

## Part VII.—Carriage of Goods.

**1651. Add. Annotation:—Refd.** *The Erik Boye* (1929), 142 L. T. 335.

**1663a.** — — — — —. — *COMPANIA NAVIERA VASCONGADA v. BRITISH & FOREIGN MARINE INSURANCE CO., LTD.* (1936), 80 Sol. Jo. 110.

**1665. Add. Annotations:—Refd.** *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A. C. 524; *Tatem, Ltd. v. Gamboa*, [1938] 3 All E. R. 135.

**1682. Add. Annotations:—Refd.** *A.-G. v. Blackpool Corpn.* (1928), 92 J. P. 50; *Re Jenkins, Jenkins v. Davies*, [1931] 2 Ch. 218; *Lazard Bros. & Co. v. Brooks* (1932), 38 Com. Cas. 46.

**1690. Add. Annotation:—Refd.** *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48.

**1701. Add. Annotation:—Refd.** *De Beêche v. South American Stores, Ltd. & Chilean Stores, Ltd.*, [1935] A. C. 148.

**1712. Add. Annotation:—As to (1) Refd.** *Hain S.S. Co. v. Sociedad Anonima Comercial de Exportacion y Importacion (Louis Dreyfus & Cia), Ltd. of Buenos Aires* (1934), 50 T. L. R. 387.

**1715. Add. Annotations:—Distd.** *Frenkel v. McAndrews & Co.*, [1929] A. C. 515. **Consd.** *Foscolo Mango & Co. v. Stag Line, Ltd.* (1931), 18 T. L. R. 127; *Reardon Smith Lines, Ltd. v. Black Sea & Baltic General Insurance Co.*, [1938] 2 All E. R. 706. **Refd.** *Kaufmann v. British Surety Insee. Co.* (1929), 45 T. L. R. 399; *Connolly Shaw, Ltd. v. Nordentfjeldske S.S. Co.* (1934), 50 T. L. R. 418; *Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 249; *Dreyfus (Louis) & Co. v. National S.S. Co.*, [1935] 2 K. B. 313; *Mann, Taylor & Co. v. Royal Bank of Canada* (1935), 40 Com. Cas. 267; *North & South Insurance Corpn., Ltd. v. National Provincial Bank, Ltd.*, [1936] 1 K. B. 328.

which broke down, &c. in order to save the gear, the master decided to use the hand windlass. As the windlass, although mechanically perfect, was encrusted with rust, the master ordered the engineers to put it into working order by removing the rust, & they succeeded in doing so. They, however, omitted to notice that the iron pawl, which acted as a brake to prevent the windlass from suddenly reversing while in use, had become immovable through rust, & was not operating. As a result, while the trawl was being hoisted, a roll of the vessel threw an extra strain on the windlass, which suddenly reversed, & pursuer, who was working the windlass, was struck down & seriously injured. In a question whether the accident was due to the fault of defenders, *et separatim* to the failure of the owners to observe Merchant Shipping Act, 1894, s. 458:—

*Held*: (1) the owners, as employers, had discharged their common law & statutory obligations to the pursuer, at common law, in respect that they had provided a windlass which, when installed, was free from mechanical defect, &c. under statute, in respect that, even if the windlass was still a necessary part of the ship's equipment, its rusted condition did not render the ship unseaworthy within sect. 458 (1), the test of seaworthiness being whether the vessel was fit to encounter the ordinary perils of the sea; (2) the true cause of the accident was the negligence of the engineers, who were pursuer's fellow-servants; (3) as the master was entitled to delegate the work of de-rusting to the engineers as competent workmen, he had no ordinary duty to inspect the result of their work, & in the absence of an averment of any special duty of that

**1723a.** “Approved commercial bills on London”—**Trade usage—Ninety day bills.**—*GRIPAIOS v. WALLIS (KAHL) & CO., LTD.* (1928), 15 T. L. R. 161.

**1731a. Payment of stevedores at “current rates.”**—*BRITAIN S.S. CO., LTD. v. BUNGE & CO., LTD.* (1929), 46 T. L. R. 40; 73 Sol. Jo. 818; 35 Com. Cas. 163.

**1750. Add. Annotation:—As to (1) Refd.** *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119.

**1763. Add. Annotation:—Refd.** *Dreyfus (Louis) & Co. v. National S.S. Co.*, [1935] 2 K. B. 313.

**1764.** After this case add:

**Frustration of adventure.**—*See* CONTRACT, Vol. XII., pp. 386–392, Nos. 3175–3200, & Supp.

**1764a. Rescission—Innocent misrepresentation.**—*Defts.*, who had bought a ship without knowing that the British Govt. had given directions (which in substance were as compulsory as requisition) that she should make a particular voyage, chartered her to *plffs.* by a charter-party containing the statement that she was “now at Liverpool, ready to-morrow,” and the following clause: “Charterers, however, take the risk of the steamer being directed to perform any special voyage or voyages by the British or French Govts.” *Defts.* entered into the contract on the basis of a representation that the vessel was free, but in fact she had been directed by the British Govt. to go to Malta with coal. In an action for rescission of the charter on the ground of a misrepresentation which though innocent was material:—*Held*: the clause as to Govt. directions applied only to future directions, & on the facts the contract had not been sufficiently performed to preclude rescission, & *plffs.* were entitled to succeed.—*COMPAGNIE CHEMIN DE FER PARIS—ORLEANS v.*

nature, he was not liable for personal negligence. *Defenders* absolved.—*MILMOD v. HASTED & SONS*, [1936] S. C. 501. **SCOT.**

### PART VI. SECT. 1.

**sa. Departure without clearance—Liability to detention—Motor boat.**—A motor boat of 8 tons burthen may be a “vessel” within Customs Act, s. 244, & so liable to detention if she departs without a clearance.—*NOLAN v. MCKINNON* (1932), 59 C. C. 189; 7 M. P. R. 169.—**CAN.**

### PART VII. SECT. 1, SUB-SECT. 1.

**sp. Legality.**—A contract for carriage of goods which violates the shipping laws is illegal & unenforceable.—*VITA FOOD PRODUCTS INC. v. L. S. SHIPPING CO.*, [1938] 2 D. L. R. 312, 12 M. P. R. 513.—**CAN.**

LEESTON SHIPPING CO., LTD. (1919), 36 T. L. R. 68.

**1780a. Breach of duty—Broker assuming to charter vessel to himself—Ratification of wrongful act.**—Pltfs., owners of the *D.*, instructed H., a broker, to procure a charterparty for their ship. H. being minded, in breach of his duty as a broker, to make use of the ship for his own ends, purported to effect a charterparty dated Aug. 9, 1926, between pltfs. & an export co. of Danzig " & others " as charterers. This document was signed by H. " as agent only " for the owners & by H. " on behalf of the charterers as per separate chartering notes." By one of the clauses of the document the shipowners were to have a lien for all dead freight & demurrage at the port of loading. H. had no authority to act on behalf of the export co., who knew nothing about the transaction. Defts., timber merchants in London, bought from S. & Co., shippers in Danzig, red wood at a price including cost, freight & insurance from Danzig to London. S. & Co. engaged cargo space for the wood on board the *D.*, by means of chartering notes signed by H. purporting to act " by order of the owners," but without their authority, & the wood was shipped on board the *D.* at Danzig under bills of lading signed by H. purporting to act for & on behalf of & with the authority of the master. Each bill of lading incorporated the terms, conditions & clauses of the so-called charterparty of Aug. 9, among which was the above lien clause. The bills of lading were indorsed by S. & Co. & tendered under the contract of sale to defts., who accepted them & paid S. & Co. for the goods. The *D.* left Danzig without a full cargo several days after the lay days had expired. When she arrived in London the master deposited the wood with wharfingers subject to a lien in favour of pltfs. for dead freight & demurrage, & pltfs. brought an action against defts. for a declaration that they were entitled to the lien:—*Held*: the lien clause in the document of Aug. 9 was incorporated in the bills of lading, on the grounds that (1) pltfs., by taking the cargo on board their ship & issuing bills of lading in respect of it after they knew of H.'s breach of duty in assuming to charter their vessel to himself, had ratified his act & so validated the charterparty, & (2) the incorporation of the lien clause was not in any way dependent or contingent upon the charterparty being a valid or effective document, for in the absence of a condition to the contrary, one document, or part thereof, might be incorporated in another, although the first document had, of itself, no legal effect whatever; (3) defts. could not support a plea in avoidance of circuitry of action, because it was essential to that plea that the amount recoverable by deft. pleading it from pltf. in the action in which it was pleaded should be the exact amount recoverable by pltf. from him; & as S. & Co. were not parties to the action, it could not be averred that the damages, if any, recoverable by defts. from S. & Co. for breach of the

contract of sale would be the same in amount as the sum recoverable by pltfs. from defts. under the terms of the bills of lading, & it did not appear that S. & Co. had any cause of action against pltfs., whose liabilities depended upon the bills of lading.—*AKT. OCEAN v. HARDING (B.) & SONS, LTD.*, [1928] 2 K. B. 371; 97 L. J. K. B. 684; 139 L. T. 217; 33 Com. Cas. 277; 17 Asp. M. L. C. 465, C. A.

**1792. Add. Annotation:—***Consd. Cory & Son, Ltd. v. Dorman, Long & Co.*, [1936] 2 All E. R. 386.

**1796. Add. Annotations:—***As to (1) Refd. The Penelope*, [1928] P. 180; *Tatem, Ltd. v. Gamboa*, [1938] 3 All E. R. 135.

**1800. Add. Annotation:—***Refd. Liesbosch S.S. Owners v. Edison S.S. Owners*, [1933] A. C. 449.

**1828a. Representations as to capacity of ship to carry specific cargo—Whether conditions precedent.**—After protracted negotiations pltfs.' brokers on June 12, 1934, signed on their behalf a time charter chartering defts.' tanker for twelve months with the option of cancelling it if the vessel was not ready by July 15. Pltfs. had asked defts. for details of pipe lines & heating coils, & received a reply as follows: "Pipe lines 350 mm. intake; 300 mm. outlet; heating coils fitted right at bottom of tanks." These statements were embodied as "guaranteed" in the charterparty which also contained an arbn. clause. Upon inspection it was found that these statements were not correct, & pltfs. cabled their agents not to sign the charter, but it had, in fact, already been signed, though it was retained in the possession of such agents. The ship was required for the carriage of molasses, for which without certain alterations she was not suitable. These alterations were not made, & ultimately pltfs. refused to take the ship:—*Held*: (1) the charterparty had become a contract binding upon the parties; (2) the representations made before the contract was entered into had become merged in the contract by being embodied therein, & the question was therefore not one of rescission, but whether these representations had become conditions precedent for the breach of which pltfs. became entitled to & did repudiate it; (3) the representations, being "guaranteed," had become conditions precedent, & pltfs. had properly repudiated the contract. (4) It was further contended that once the conclusion was reached that the charterparty became binding upon the parties the action should be dismissed with costs, as the arbn. clause had become operative. The pleadings, it was contended, appeared to be framed to deal only with the question whether the arbitrator had or had not jurisdiction, & defts. were not entitled to ask for a stay of the action:—*Held*: it being no longer necessary to plead conclusions of law, the pleading was sufficient in law to raise the question whether pltfs. were entitled to & did repudiate the contract &, if defts. intended to rely upon this contention, they should have applied for a

PART VII. SECT. 2, SUB-SECT. 3.

**1781 i. Necessity for authority by deed.**—*HICKMAN & CO., LTD. v. ERNST SHIPBUILDING CO., LTD.*, [1928] 2 D. L. R. 229 60 N. S. R. 100.—CAN.

stay of the action under the Arbn. Acts, 1889–1934, in the ordinary way.—PENN-SYLVANIA SHIPPING CO. v. COMPAGNIE NATIONALE DE NAVIGATION, [1936] 2 All E. R. 1167; 155 L. T. 294; 80 Sol. Jo. 722; 42 Com. Cas. 45.

1838. *Add. Annotation* :—**Consd.** The Kate, [1935] P. 100.

1840. *Add. Annotations* :—**As to** (1) **Consd.** Sullivan v. Constable (1932), 48 T. L. R. 267. **Refd.** Hall v. Brooklands Auto-Racing Club (1932), 48 T. L. R. 546.

1845. *Add. Annotation* :—**Consd.** Monroe Bros., Ltd. v. Ryan, [1935] 2 K. B. 28.

1859. *Add. Annotations* :—**Consd.** Petros M. Nomikos, Ltd. v. Robertson, [1938] 3 All E. R. 249. **Refd.** Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd. (1935), 104 L. J. P. C. 88; Carras v. London & Scottish Assurance Corp., Ltd., [1936] 1 K. B. 291; Kulukundis v. Norwich Union Fire Insurance Society, [1936] 2 All E. R. 242; Tatem, Ltd. v. Gamboa, [1938] 3 All E. R. 135.

1867. *Add. Annotation* :—**Consd.** Pennsylvania Shipping Co. v. Compagnie Nationale De Navigation, [1936] 2 All E. R. 1167.

1872. *Add. Annotation* :—**Consd.** Monroe Bros., Ltd. v. Ryan, [1935] 2 K. B. 28.

1873. *Add. Annotation* :—**Consd.** Monroe Bros., Ltd. v. Ryan, [1935] 2 K. B. 28.

1874. *Add. Annotation* :—**Refd.** Monroe Bros., Ltd. v. Ryan, [1935] 2 K. B. 28.

1875. *Add. Annotation* :—**Generally, Refd.** Axel Brostrom & Son v. Louis Dreyfus & Co. (1932), 38 Com. Cas. 79.

1878a. **To load on or about a certain date—Exception of unavoidable hindrances beyond owners' control—Delay due to performance of subsequent charter with other charterers.**—By a charterparty, dated Aug. 2, 1933, shipowners chartered the S.S. *W.*, stated to be "expected ready to load about Sept. 11, 1933," to charterers to proceed "with all convenient speed" to Hamburg & there load from the charterers a full & complete cargo of sugar & salt, & being so loaded proceed with all convenient speed to Merchants Quay, Kilrush, or so near thereto as she might safely get. The charterparty contained exceptions of (*inter alia*) "any other unavoidable accident or hindrances beyond charterers' or owners' control." On Aug. 31, 1933, the shipowners chartered the S.S. *W.*, "expected ready to load on or about Sept. 6/7," to other charterers, to load a cargo of stone at Porthoustock (near Pالمouth) for Felixstowe. The *W.* arrived at Porthoustock on Sept. 7, but owing to bad weather was unable to load until Sept. 11, with the result that, after discharging at Felixstowe, she did not arrive at Hamburg until Sunday, Sept. 17, & did not commence to load until Sept. 18. The shipowners' agent at Hamburg on Sept. 5 gave the shippers of the sugar & salt notice of readiness to load for Sept. 14. The cargo was accordingly brought down to Hamburg in barges ready for loading on Sept. 14. Owing to the delay in the *W.* reaching Hamburg three days' demurrage was incurred in respect of the barges, & the vessel arrived off Kilrush too late for the spring tides. As

the charterers urgently required the sugar, 80 tons were lightered whilst the vessel was waiting for the next spring tides. The shipowners sued the charterers to recover the balance of the freight. This claim was admitted, but the charterers counterclaimed for (*inter alia*) demurrage on the barges at Hamburg & lighterage at Kilrush. The shipowners relied on the exception in the charterparty of Aug. 2 of "unavoidable . . . hindrances beyond . . . owners' control" as excusing the delay of the *W.* in arriving at Hamburg :—**Held** : the exceptions in the charterparty did not apply to matters which happened before the ship entered upon the charterparty voyage, & as the unavoidable hindrance beyond the owners' control, which was relied upon by the shipowners, happened upon the voyage on the intermediate charterparty of Aug. 31, & not upon the voyage on the charter party of Aug. 2, the shipowners could not rely upon the exception as a defence to the charterers' counterclaim.—MONROE BROS., LTD. v. RYAN, [1935] 2 K. B. 28; 104 L. J. K. B. 450; 153 L. T. 31; 51 T. L. R. 361; 79 Sol. Jo. 320; 40 Com. Cas. 193, C. A.

1878b. **Special liabilities in case of vessel loading in October—Vessel loading in November owing to repairs.**—MAISOL S.S. (OWNERS) v. EXPORTELES, LTD. (1938), 54 T. L. R. 783; 82 Sol. Jo. 416.

1879a. **Provision of ice-breakers—Must enable vessel to reach loading place.**—**Resps.**, as owners, chartered a steamer to applts. to proceed to Mariupol & load a cargo of coal, the charterparty providing, "In the event of the loading port being inaccessible by reason of ice on vessel's arrival at the edge of the ice or in case frost sets in after vessel's arrival at port of loading, the charterers undertake to provide ice-breaker assistance to enable steamer to reach, load at, & leave loading port, steamer being free of expense for ice-breaker assistance" :—**Held** : by this clause the charterers undertook to provide ice-breaker assistance to enable the steamer to reach its loading place, & they could not justify their failure to do so on the pretext that the ice-breakers were not under their control.—UGLEEXPORT CHARKOW v. ANASTASIA S.S. OWNERS (1931), 151 L. T. 261; 50 T. L. R. 361; 78 Sol. Jo. 297; 39 Com. Cas. 238; 18 Asp. M. L. C. 482, H. L.; *affg.* S. C. *sub nom.* ANASTASIA S.S. OWNERS v. UGLEEXPORT CHARKOW (1933), 149 L. T. 342, C. A.

*Annotations* :—**Consd.** Danneberg v. White Sea Timber Trust, Ltd. (1935), 52 T. L. R. 5. **Refd.** Sanguineti Fu Davide v. Ugleexport of Moscow (1933), 150 L. T. 110; Akties Steam v. Arcos, Ltd., Akties Buusgaard v. Arcos, Ltd. (1933), 39 Com. Cas. 158; Ugleexport of Moscow v. Sanguineti (Andrea) Davide of Genoa (1933), 10 Com. Cas. 309; A/S Rendal v. Arcos, Ltd., [1937] 3 All E. R. 577.

1879b. —]—**Applt.**, as owner, chartered the steamship *E.* to resps. to convey a cargo of coal from Russia to Italy, the charterparty providing :—

"In the event of the port of loading being inaccessible by reason of ice on vessel's arrival at Kertch if loading at Mariupol or Berdjanska or at the edge of ice if loading at Nicolaieff or Theodosia, or in case frost sets in after vessel's arrival at loading port, the charterers undertake to provide ice-breaker to enable steamer to reach load at & leave the said port, steamer being free of

expense for ice-breaker. Captains must follow official instructions issued by authorities for vessel convoyed by ice-breakers through the ice."

The charterers nominated Mariupol as the port of loading, & the *E.* proceeded to Kertch, & the authorities decided that the ice-breaker should escort her with three other ships in a convoy. The *E.* was delayed several weeks in arriving at Mariupol by the conditions of weather & ice which supervened unexpectedly after the convoy started. The shipowner claimed damages for delay & contended,

"(a) that the ice clause imposed on the charterers an obligation to provide an ice-breaker for the exclusive service of the *E.*, & that if the obligation had been complied with *E.* would have reached Mariupol without delay; (b) that the charterers were responsible for the delay of the *E.* on transit from Kertch to Mariupol while the ice-breaker was engaged in ice-breaking for other vessels of the convoy & not for the *E.*" On a case stated by an umpire:—*Held*: the ice clause imposed an obligation on the charterers to make arrangements for the services of an efficient ice-breaker to be given to the *E.* in such manner as in the circumstances of weather & ice existing & to be reasonably anticipated would enable that vessel, apart from accidents, to reach her loading port without undue delay; & that, as the umpire had found as a fact that the provision of the ice-breaker to assist the *E.* together with three other vessels in a convoy was in accordance with this obligation, the shipowner's claim failed; but, on appeal:—*Held*: the case must be remitted to the umpire for reconsideration & restatement in view of recent decisions of the cts.—*SANGUINETI (ANDREA), FU DAVIDE OF GENOA v. UGLEEXPORT OF MOSCOW* (1934), 50 T. L. R. 407; 78 Sol. Jo. 367; 39 Com. Cas. 248, C. A.; *affd.*, *sub nom.* *UGLEEXPORT OF MOSCOW v. SANGUINETI (ANDREA) DAVIDE OF GENOA* (1935), 40 Com. Cas. 309, H. L.

*Annotation*:—*Refd.* *Akties Steam v. Arcos, Ltd., Akties Bruusgaard v. Arcos, Ltd.* (1933), 39 Com. Cas. 158.

**1879c. Assistance outside port limits.]**—*Resps.*, as owners, chartered a steamer to appls. to take a cargo of timber in winter from Leningrad to Hull, the charterparty providing: "Charterers to supply the steamer with ice-breaker assistance if required by the captain to enable her to enter or leave port of loading free of all expenses to the owners. . . . Ice-breaker assistance to be rendered within forty-eight hours after steamer's arrival at the ice edge or readiness to leave the port of loading. Any time lost in waiting ice-breaker beyond forty-eight hours after readiness to proceed to be for charterers' account":—*Held*: the obligation extended not merely to the boundary of the port but to the point where the ship would be clear of the ice & able to proceed on her voyage, & the convoy system could be justified only so far as it could be reconciled with the paramount obligation to have regard both to the safety & to the despatch of the ship.—*RUSSIAN WOOD AGENCY, LTD. v. DAMPSKIBSELSKABET "HEIMDAL"* (1934), 151 L. T. 261; 50 T. L. R. 361; 78 Sol. Jo. 297; 39 Com. Cas. 238; 18 Asp. M. L. C. 482, H. L.; *affg.* *S. C. sub nom.* *DAMPSKIBS-*

*SELSKABET HEIMDAL v. RUSSIAN WOOD AGENCY, LTD.* (1933), 149 L. T. 342, C. A.

*Annotations*:—*As to* (1) *Refd.* *Akties Steam v. Arcos, Ltd.* (1933), 149 L. T. 428. *Generally, Refd.* *Sanguinetti Fu Davide v. Ugleexport of Moscow* (1933), 150 L. T. 140.

**1879d. Damages for injury.]**—A charterparty provided that the charterers should supply the ship with ice-breaker assistance, if required by the captain, to enable her to enter or leave the loading port, & that the captain should notify the port authorities in due time of readiness to enter or leave the port, ice-breaker assistance to be rendered within forty-eight hours after arrival at the ice edge or readiness to leave, as the case might be, any time lost in waiting for assistance beyond forty-eight hours after readiness to proceed to be for charterers' account:—*Held*: (1) a notice given by the ship on Dec. 23, that she expected to arrive at the ice edge on Dec. 27, was a sufficient notification to impose on the charterers the duty to have an ice-breaker ready to assist her within forty-eight hours of her arrival; (2) thereafter it was the duty of the charterers to have an ice-breaker in attendance until the ship was clear of the ice; (3) the owners were entitled to damages for injury sustained by the ship during a period when she was left in the ice without ice-breaker assistance.

(4) A portion of the timber loaded into the ship was coated with ice & snow, whereby its bulk was increased & the quantity which the ship could carry was reduced:—*Held*: the ship was entitled to dead freight in respect of the reduction in her carrying capacity so caused.—*AKTIES. STEAM v. ARCOS, LTD.* (1933), 149 L. T. 428; *affd.*, 39 Com. Cas. 158; 18 Asp. M. L. C. 409, C. A.

*Annotations*:—*As to* (2) *Refd.* *Sanguinetti Fu Davide v. Ugleexport of Moscow* (1933), 150 L. T. 140. *Generally, Refd.* *A/S Rendal v. Arcos, Ltd.*, [1936] 1 All E. R. 623.

**1879e. Sufficiency of notice.]**—*AKTIES. STEAM v. ARCOS, LTD.*, No. 1879d, *ante*.

**1879f. Undertaking to "arrange for provision of ice-breaking assistance.]**—*Resps.*, as owners, chartered a steamer to appls. to proceed to Leningrad & load a cargo of timber for carriage to Antwerp. Having regard to earlier decisions on the question of the provision of ice-breaker assistance, the present charterparty provided: "(1) In the event of the port of loading being inaccessible by reason of ice or in case ice sets in after vessel's arrival at port of loading the charterers undertake to arrange for the provision by the port authorities of ice-breaker assistance if required by the captain free of expense to the steamer, the steamer complying with official instructions & rules issued by the authorities concerning ice-breaker assistance. . . . (4) Charterers shall not be responsible for any loss of time during passage through ice &/or any loss or damage caused to the steamer by ice, or for any detention on passage through ice":—*Held*: under clause 1 the charterers must provide ice-breaker assistance which was reasonably continuous from the moment when the ship entered the ice, & under clause 4 the charterers were only protected from liability for loss of time & for damage while ice-breaker assistance was being rendered under the terms of the charterparty.—*DANNEBURG v. WHITE SEA TIMBER TRUST, LTD.* (1935), 154 L. T. 25; 52 T. L. R. 5;

79 Sol. Jo. 796; 41 Com. Cas. 60; 18 Asp. M. L. C. 542, C. A.

**1879g. — Notice of claim for damage—Effect of reservation of right to claim.**—A steamship was chartered by Arcos, Ltd., of London, "for Exportles, Moscow," in terms of a Chamber of Shipping "Baltwood" charterparty, which contained a clause binding the charterers to supply the steamer with continuous ice-breaker assistance, & a provision that notice of claims must be given within twelve months of the date of the vessel's arrival at final port of discharge. As a result of breach of the ice clause by the charterers, the steamer was damaged. The owners intimated a claim for demurrage arising out of the delay caused by the ice, & the claim was dealt with by the Russian Trade Delegation at Oslo, as agents for Exportles, Moscow. The owners also intimated that they reserved their right to claim for compensation in respect of ice damage, but no further notice of claim was given within the twelve months:—*Held*: (1) the reservation by the owners of their right to claim in respect of the ice damage was a sufficient notice of claim within the charterparty; (2) adequate notice was given to the charterers through the agency of the Russian Trade Delegation at Oslo; (3) such a notice was in effect a notice to Exportles.—*A/S RENDAL v. ARCOS, LTD.*, [1937] 3 All E. R. 577; 106 L. J. K. B. 756; 157 L. T. 485; 53 T. L. R. 953; 81 Sol. Jo. 733; 43 Com. Cas. 1, H. L.

**1879h. — Service on agent—Proof of agency.**—*A/S RENDAL v. ARCOS, LTD.*, No. 1879g, *ante*.

**1879j. "Safely aground."**—This was an action for damages instituted by the owners of the tanker *P.* against the owners & managers of an oil wharf at Boston (Lines.) & of the berth adjacent thereto, & against the charterers of the *P.* under a charterparty which provided *inter alia* that the *P.* was "to proceed to Boston (Lines.) or so near thereto as she can safely get (safely aground)" in respect of damage alleged to have been sustained by the *P.* at the said berth, & of the loss of freight resulting from the vessel's inability to complete her loading thereat. Against the first defts., pl'tfs. alleged negligence & breach of contract & (or) warranty, contending (a) that the first defts. had improperly invited the *P.* to occupy the said berth when they knew or ought to have known that it was not safe for the *P.* to lie in, & (b) that by so inviting the *P.* for reward, they had impliedly warranted that the said berth was safe & fit for the *P.* to occupy. As to the second defts., pl'tfs. said it was agreed by the charterparty that the ship should proceed to Boston or as near thereto as she could safely get (safely aground) & there load her cargo, & that by ordering the *P.* to the said berth the second defts. had expressly &/or impliedly warranted that the *P.* could lie safely aground in the said berth; that in fact the said berth was unsafe for the *P.* to lie in, & that therefore the second defts. had committed a breach of the said warranty. Both defts. denied liability, & the first defts. counter-claimed for damages in respect of damage done to their berth & to their mooring lines, alleging that the said damage was due to the

negligence of those on board the *P.*, in that they had moored the vessel improperly & in an improper position. The ct. found that *P.* was moored to the wharf, which had a jetty & piling, under the general directions of the first defts.; that she lay with a slight angle out forward from the jetty & that this was not corrected; that after the ship took the ground she had a slight list to starboard; her forward part gradually slipped away, & her forward moorings, & later one of her wires aft, parted so that she pivoted on her stern & lay aground at a substantial angle to the jetty, whereby she sustained serious bottom damage; that as regards the berth, work had been done upon it during July to clear it for the *P.*; that the previous history of the berth had not given the first defts. any warning that such an accident would be likely, & that the first defts. had warned those in charge of the ship that she was lying in an improper position:—*Held*: on the above findings: (1) although a ship lying at an angle when moored would be more likely to slip than if tight up, & a careful master ought to manage his mooring ropes so as to keep the ship parallel & close up to the jetty, the mere fact that the vessel took the ground with a slight angle outward did not indicate negligence on the part of those in charge of her; (2) the accident was caused by the inability of the berth to hold up the ship as she lay slightly angled out, & that, as the first defts. did not warrant the safety of the berth & took all reasonable steps to make it safe, they were not liable; (3) the second defts., as charterers, had no more knowledge about the fitness of the berth than pl'tfs., & they had given no express warranty, & no warranty could be implied from the terms of the charterparty, that the berth was safe. Pl'tfs.' claim against both defts. & the first defts.' counterclaim were dismissed, no order being made as to the costs.—*THE "PASS OF LENY"* (1936), 155 L. T. 421; 19 Asp. M. L. C. 23.

**1898a. "Heavy grain"—Option to ship other cargo—Expense of discharge.**—A steamer was chartered for a cargo of "heavy grain"—i.e. wheat, maize, & rye, the charterers to have the option of shipping other lawful merchandise, & the extra expense of discharging "such merchandise" over that of discharging heavy grain was to be paid by the charterers. Part of the cargo shipped consisted of lawful merchandise other than heavy grain, & part of the optional cargo cost more, & part less, to discharge than heavy grain, the total cost of discharging the optional cargo being more than in the case of heavy grain:—*Held*: the only extra expense which the shipowners were entitled to recover was the extra expense of discharging the optional cargo as a whole, & anything saved in discharging part must be set off against the extra expense for the rest.—*WOODFIELD STEAM SHIPPING CO., LTD. v. BUNGE Y BORN INDUSTRIAL OF BUENOS AYRES* (1933), 49 T. L. R. 188; 77 Sol. Jo. 64.

**1899. Add. Annotation:—Refd.** *The Erik Boye* (1929), 142 L. T. 335.

**1906a. Expenses of discharge.**—Appl't., as owner, chartered to resps. a steamer to bring a cargo of wheat, maize, or rye from Argentina, the charterparty providing, "Charterers have



the option of shipping other lawful merchandise. . . . All extra expenses in . . . discharging such merchandise over heavy grain to be paid by charterers." The steamer loaded a cargo of wheat, oats, bran, & cottonseed & peanut cake, & was ordered to St. Nazaire, where the cost of discharging wheat & maize was less than the cost of discharging rye. Wheat, maize, & rye were all heavy grain, but substantially the port of St. Nazaire did not deal with cargoes of rye from oversea. The shipowner claimed from the charterers the extra expense in discharging the cargo, other than wheat, over the expense of discharging an equivalent weight tonnage of wheat or maize, but the charterers contended that as they had the right to ship rye the equivalent weight tonnage to be used in the calculation was that of rye & not of wheat or maize:—*Held*: the charterers were liable only for the extra expense beyond what they could have caused the shipowner to incur if they had shipped a cargo of rye.—*LYKJARDHOLM v. BUNGE & BORN, LTD.*, [1931] 1 K. B. 680; 103 L. J. K. B. 277; 149 L. T. 46; 49 T. L. R. 294; 18 Asp. M. L. C. 399.

1933. *Add. Annotation*:—*Consd.* Dreyfus (Louis) & Co. v. National S.S. Co., [1935] 2 K. B. 313.

1933a. —.]-Where a ship has been chartered to carry goods, in the absence of any prohibition, express or implied, in the charterparty, the shipowners are entitled to carry passengers if they can do so consistently with their obligations to the charterers.

*Hlfs.* chartered a ship belonging to defts. to carry grain from the River Plate to European ports. A clause in the charterparty provided: "The charterers are to have the full reach & burthen of the steamer including 'tween & shelter decks, bridges, poop, etc. (provided same are not occupied by bunker coals &/or stores)." :—*Held*: the clause applied to cargo space only. It did not preclude the shipowners from carrying passengers.—*SOCIEDAD ANONIMA COMERCIAL DE ESPORTACION E IMPORTACION (DREYFUS (LOUIS) & Co.) v. NATIONAL S.S. Co.*, [1935] 2 K. B. 313; 104 L. J. K. B. 529; 153 L. T. 180; 51 T. L. R. 451; 79 Sol. Jo. 454; 40 Com. Cas. 302.

1958. *Add. Annotation*:—*As to* (4) *Refd.* Akt. Ocean v. Harding, [1928] 2 K. B. 371.

1968. *Add. Annotation*:—*Refd.* Widnes Foundry (1925), Ltd. v. Cellulose Acetate Silk Co. (1931), 47 T. L. R. 373.

1971. *Add. Annotation*:—*Refd.* Widnes Foundry (1925), Ltd. v. Cellulose Acetate Silk Co., [1931] 2 K. B. 393.

1985. *Add. Annotation*:—*As to* (1) *Refd.* Vandepitte v. Preferred Accident Insurance Co. of New York, [1933] A. C. 70.

2001. *Add. Annotations*:—*As to* (2) *Refd.* Bentall, Horsley & Baldry v. Vicary, [1931] 1 K. B. 253. *Generally*, *Refd.* Trollope (Geo.) & Sons v. Martyn Bros., [1931] 2 K. B. 436.

2006. *Add. Annotations*:—*Refd.* Gaze W. H. & Sons v. Port Talbot Corpn. (1929), 93 J. P. 89; Bentall, Horsley & Baldry v. Vicary [1931] 1 K. B. 253.

2023. *Add. Annotation*:—*Refd.* Vandepitte v. Preferred Accident Insurance Co. of New York, [1933] A. C. 70.

2030. *Add. Annotation*:—*As to* (1) *Refd.* Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.

2042. *Add. Annotation*:—*Consd.* Cory & Son, Ltd. v. Dorman, Long & Co., [1936] 2 All E. R. 386.

2050. *Add. Annotation*:—*Consd.* Cory & Son, Ltd. v. Dorman, Long & Co., [1936] 2 All E. R. 386.

2056a. — *Second voyage in addendum.*]-A time charter was entered into for a voyage in ballast from an East Coast port to Archangel to load, & thence to the River Plate. By an addendum the vessel was first to carry cargo from Leningrad to the East Coast port:—*Held*: the voyage contemplated by the addendum was separate & distinct from the charter voyage.—*ANGLO-CELTIC SHIPPING CO., LTD. v. ANGLO-SOVIET SHIPPING CO., LTD.* (1932), 43 Ll. L. R. 295.

2059. *Add. Annotation*:—*Refd.* Istros S.S. Owners v. Dahlstroem (F. W.) & Co., [1931] 1 K. B. 247.

2059a. — *Express exception in charterparty.*]-By a charterparty in the form known as the Baltic & White Sea Conference Uniform Time Charter it was agreed between the owner of a steamship & charterers that the steamship should be taken on time charter by the charterers on terms & conditions which included: "Clause 8: Captain to prosecute all voyages with utmost dispatch. . . ." "Clause 10: . . . Should steamer be driven into port, or to anchorage, by stress of weather . . . causing detention to steamer, time so lost & expenses incurred shall be for charterers' account, even if caused through fault or want of due diligence by owners' servants." "Clause 12: Owners only to be responsible . . . for delay during the currency of this charter . . . if such delay . . . has been caused by want of due diligence on the part of owners or their manager, in making steamer seaworthy & fitted for the voyage, or any other personal act, or omission, or default of owners or their manager. Owners not to be responsible in any other case, nor for damage or delay whatsoever & howsoever caused, even if caused by neglect or default by owners' servants." During a voyage under the charterparty the captain, owing to bad weather, put into three harbours or sheltering places. The charterers having alleged that the captain had failed to prosecute his voyage "with utmost dispatch" within clause 8 of the charterparty & having claimed an allowance of hire in respect of the delay, recourse was had to arb'n. The umpire found that there was nothing to

PART VII. SECT. 2, SUB-SECT. 21.—  
A.

2028 i. *What amounts to—Dependent on construction of charterparty.*]-By the charterparty in suit it was provided *inter alia*: "the owner will let & the charterer will take, for the purpose of

towing flats & barges, the steam launch *Srikrishna* . . . for a period of six months certain . . . provided that the charterer shall not ply the vessel . . . in salt water, nor use the same for any other purpose than towing flats & barges without the consent in writing of the owner:—*Held*: in the absence

of any other provision contradictory to it, the agreement amounted to a demise of the vessel & the charterers were liable for negligence on the part of the master & crew.—*VARAJA LAL & Co. v. HANADAPRASAD SAHA* (1935), 1 L. R. 63 Calo. 53.—*IND.*

justify the captain in putting into the harbours or sheltering places which he entered, that he had not prosecuted the voyage "with utmost dispatch" & that delay had been caused thereby, but that the delay had not been caused by any "personal act, or omission, or default" of the owner or his manager within clause 12. The award having been stated in the form of a special case:—*Held*: the owner was protected from liability for the delay by the provisions of clause 12 of the charterparty which, while not qualifying the duty to prosecute all voyages with utmost dispatch, placed on the captain by clause 8, afforded the owner a defence in such an action as the present.—*ISTROS, S.S. OWNER v. DAHLSTROEM (F. W.) & Co.*, [1931] 1 K. B. 247; 100 L. J. K. B. 141; 144 L. T. 124; 36 Com. Cas. 65; 18 Asp. M. L. C. 177.

**2073a. Re-delivery before expiration of period of hire—Calculation of amount repayable.**—*CHELLEW NAVIGATION CO., LTD. v. A. R. APPELQUIST KOLIMPORT A. G.*, No. 3092a. *post*.

**2073b. Hire dependent on deadweight capacity—Necessity for notice of capacity.**—A charterparty provided that the charterers should pay for the use & hire of the chartered ship 3s. 9d. per ton on deadweight as ascertained on delivery from builders' yard, that the payments for hire should be made in London in cash monthly in advance, & that failing the punctual & regular payment of hire the owners should be at liberty to withdraw the ship from the service of the charterers. The chartered ship arrived at her loading port on Apr. 13, 1937. The charterers' agent accepted the ship & requested the master to begin loading at once, which he did. No statement of the ship's deadweight had been delivered by the shipowners to the charterers, & the latter did not pay the first month's hire until 7 p.m. on the evening of Apr. 15, when they sent a cheque to the shipowners in payment of the first month's hire & other matters. But the shipowners returned the cheque on the ground that it was out of time, & they gave notice withdrawing the ship from hire. *Arbn.* proceedings followed, & the question for the ct. was whether the shipowners were entitled to withdraw the ship from the service of the charterers.

*BRANSON, J.*, held that there must be implied into the charterparty an obligation on the shipowners to inform the charterers of that which was within their knowledge & not within the knowledge of the charterers—namely, the correct amount of the deadweight capacity of the ship—to enable the charterers to put themselves in a position to discharge their obligation to pay the hire due under the charterparty, & that, as no such information was given by the shipowners to the charterers until after the date relied on by the shipowners as the date on which they claimed to be entitled to withdraw the ship from hire, they were not justified in withdrawing the ship from the service of the charterers:—*Held*: by the Ct. of Appeal, the principle that there must be implied into a contract an obligation on the one party to inform the other party of that which was within his knowledge & not within the knowledge of the other party, in order to enable the other party to discharge his obligation

under the contract, was a general principle & applied to all contracts, & was not confined to contracts as between landlords & tenants with regard to repairs.—*KAWASAKI KISEN KABUSHIKI KAISHA v. BANTHAM S.S. CO., LTD.*, [1938] 2 K. B. 790; [1938] 3 All E. R. 690; 107 L. J. K. B. 601; 159 L. T. 432; 54 T. L. R. 1095; 82 Sol. Jo. 623; 43 Com. Cas. 355, C. A.

**2079a. Ship damaged—Improper loading by charterer.**—A steamer belonging to *resps.* was chartered by *applt.* under a time charterparty which provided (*inter alia*); (a) that the steamer should be employed in lawful trades between good & safe ports where she could lie always afloat or safe aground where steamers of similar size & draft were accustomed to lie aground in safety; (b) that the charterers should indemnify the owners against all consequences or liabilities arising from the captain's complying with the orders of the charterers; & (c) that the charterers should be responsible for loss or damage caused to the steamer or the owners by improper loading. In the events which happened the steamer was damaged in consequence of having been loaded at an unsafe berth & was off hire for some weeks under repair. *Resps.* claimed hire for the period during which the steamer was under repair; *applt.* contended that no hire was due & counterclaimed in respect of hire overpaid & other matters. The dispute was referred to *arbn.*, & the umpire awarded, subject to the opinion of the ct. on a special case, in favour of the shipowners, the present *resps.* On argument of the special case before *MACKINNON, J.*, the award was confirmed, & the charterers now appealed to the Ct. of Appeal:—*Held*: dismissing the appeal, *per GREER, L.J.*, (i) if it were necessary a term must be implied in the charterparty extending the provision that the steamer must only be employed between safe ports to include a provision that she must only be loaded at safe berths in those safe ports; (ii) as the steamer had in fact been loaded at an unsafe berth she had been loaded at a berth which was outside the limits within which the owners had agreed that she should be employed & the charterers were therefore not entitled to rely on clauses inserted in the charterparty for their benefit; (iii) as the master had obeyed the orders of the charterers in loading at an unsafe berth the charterers were bound by the charterparty to indemnify the owners against the consequences thereof; (iv) the charterers were responsible for the damage to the steamer & the loss to the owners because the steamer had been improperly loaded within the meaning of the charterparty; *per SLESSER, L.J.*, a term must be implied in the charterparty that the steamer must only be loaded at safe berths, & as this term had been broken by the charterers they were responsible for the consequences; *per MAUGHAM, L.J.*, (i) the expression "safe port" does not include a safe berth within that port, & the suggested implied term in the charterparty could not therefore be implied; (ii) there was no finding by the umpire that the berth at which the steamer was loaded was in fact unsafe, or that it was selected by the charterers. The case ought, therefore, to go back to the

- umpire for further consideration & restatement.—*JENSEN SHIPPING CO., LTD. v. ANGLO-SOVIET SHIPPING CO., LTD.* (1935), 40 Com. Cas. 320, C. A.
2086. *Add. Annotation* :—**Consd.** *Tatem, Ltd. v. Gamboa*, [1938] 3 All E. R. 135.
2091. *Add. Annotation* :—**As to (1) Expld. & Apld.** *Tynedale Steam Shipping Co. v. Anglo-Soviet Shipping Co.*, [1936] 1 All E. R. 389.
2094. *Add. Annotation* :—**Consd.** *Tynedale S.S. Co. v. Anglo-Soviet Shipping Co.* (1935), 51 T. L. R. 539.
- 2099a. — **Ship partially prevented from unloading—Loss of foremast.**—The “Baltic” Charter of 1920 includes the following clauses: “. . . the owners to maintain the steamer in a thoroughly efficient state in hull & machinery during service; . . . the steamer to be fitted & maintained with winches & derricks; . . . in the event of loss of time . . . caused by . . . accident preventing the working of the steamer & lasting more than 24 consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service.” The steamer was damaged & lost her foremast to which the forward winches were attached. Discharge was delayed some six days & shore cranes & floating craft were hired by the charterers to give assistance :—**Held** : in the absence of an express or implied request by the owners for assistance they were not liable to repay to the charterers the sums paid for the hire of the shore cranes & floating craft; on a proper construction of the charterparty the cesser of hire clause had been put into operation by the delay, & the shipowners’ right to be paid hire ceased in respect of the time occupied in discharge; in construing a standard charterparty of this nature it must be assumed that it was drawn & its terms settled with full knowledge of the cases reported prior to the time the document was settled, & was intended to be construed & ought to be construed in the light of these cases.—*TYNEDALE STEAM SHIPPING CO., LTD. v. ANGLO-SOVIET SHIPPING CO., LTD.*, [1936] 1 All E. R. 389; 154 L. T. 414; 52 T. L. R. 304; 80 Sol. Jo. 224; 41 Com. Cas. 206; 19 Asp. M. L. C. 6, C. A.
2101. *Add. Annotation* :—**Consd.** *Tynedale Steam Shipping Co. v. Anglo-Soviet Shipping Co.*, [1936] 1 All E. R. 389.
- 2104a. — **Damage sustained before making of charterparty.**—A time charterparty contained the following cesser clause: “In the event of loss of time from deficiency of men or stores, breakdown of machinery, whether partial or otherwise, collision, stranding, fire in ship & (or) cargo, damage or interference by authorities preventing the working of the vessel for more than twelve running hours, the payment of hire shall cease until she be again in an efficient state to resume her service at the place where the accident occurred. . . .” After the steamer came on hire she went into dry dock for four days to repair damage which she had sustained in collision before coming on hire. The owners allowed the charterers four days’ hire, & claimed to recover the amount so allowed from the defts. in the collision action :—**Held** : the above cesser clause applied to damage arising before as well as after the making of the charterparty; the charterers were entitled to deduct four days’ hire; & the owners were entitled to recover the amount so deducted from the defts. as damages for loss of use of their steamer.—*THE ESSEX ENVOY* (1929), 141 L. T. 432; 35 Com. Cas. 61; 18 Asp. M. L. C. 54.
2111. *Add. Annotation* :—**Refd.** *Kawasaki Kisen Kabushiki Kaisha v. Bantham S.S. Co.*, [1938] 1 All E. R. 571.
2112. *Add. Annotation* :—**Refd.** *Kawasaki Kisen Kabushiki Kaisha v. Bantham S.S. Co.*, [1938] 3 All E. R. 690.
- 2128a. — **In good order—“Fair wear & tear excepted.”**—*CHELLEW NAVIGATION CO., LTD. v. A. R. APPELQUIST KOLIMPORT A. G.*, No. 3092a, *post*.
2129. *Add. Annotations* :—**Consd.** *First Russian Insee. v. London & Lancashire Insee.*, [1928] Ch. 922; *Hyman v. Hyman*, *Hughes v. Hughes*, [1929] 1 K. B. 1; *Tatem, Ltd. v. Gamboa*, [1938] 3 All E. R. 135. **Refd.** *The Penelope*, [1928] P. 180; *May v. May*, [1929] 2 K. B. 386.
2136. *Add. Annotations* :—**As to (1) Consd.** *Tatem, Ltd. v. Gamboa*, [1938] 3 All E. R. 135. **Refd.** *The Penelope*, [1928] P. 180; *May v. May*, [1929] 2 K. B. 386; *Bell v. Lever Bros., Ltd.* (1931), 146 L. T. 258; *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A. C. 524; *Kulukundis v. Norwich Union Fire Insurance Society*, [1936] 2 All E. R. 212. **As to (2) Consd.** *First Russian Insee. v. London & Lancashire Insee.*, [1928] Ch. 922. **Generally, Refd.** *Hyman v. Hyman*, [1929] P. 1.
2139. *Add. Annotation* :—**Refd.** *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A. C. 524.
2207. *Add. Annotation* :—**Apld.** *Nippon Yusen Kaisha v. Ramjiban Serowgee*, [1938] A. C. 429.
- 2211a. **Issue of bills of lading without production of mate’s receipts—Conversion.**—*Resps.*, having entered into contracts with certain mills for the purchase of a quantity of bales of gunnies, sold the like quantity on the same day to a co. who, in due course, booked freight space with *appls.*, shipowners, for carriage of the goods to Japan on two of their vessels. The shipping order stipulated that the mate’s receipts must be exchanged for bills of lading. All the contracts—of purchase & re-sale—provided for delivery free alongside export vessel at Calcutta, & contained conditions that payments were to be made in cash in exchange for mate’s receipts, & that, so long as the mate’s

PART VII. SECT. 2, SUB-SECT. 22.—C.

2115 I. *Duration.*—The *pltf.* chartered his boat to the *deft.* for fishing in the north for 60 days or longer if required. At the end of the 60 days *deft.* informed *pltf.* personally at V. that *deft.* would not require the

boat any longer, & undertook to notify his cannery manager to that effect, but the notification did not reach the latter before the boat had left for another of *deft.’s* canneries, & on arrival there the manager told the captain, & also the engineer who was representing *pltf.*, that he would not

release the boat & that they should fish at a certain place. Fishing was carried on for another 30 days :—**Held** : the charterparty had been put an end to at the expiration of the 60 days.—*PETERSON v. MILLERD PACKING CO.*, [1928] 4 D. L. R. 833; [1928] 3 W. W. R. 279.—**CAN.**

receipts were in possession of the sellers, the lien of the sellers, as unpaid vendors, subsisted both on the mate's receipts & the goods they represented until payment in full. The co. gave shipping instructions to resps., who passed them on in the same terms to the mills, & in due course the goods were shipped, & the mate's receipts therefor, in the name of the co. as shippers, were delivered to the mills' representatives. On the same & the following day, however, appls., having taken a letter of indemnity from the co., issued to the co. the respective bills of lading without the mate's receipts being given in exchange. A few days later resps., having paid the mills for the goods, obtained possession of the mate's receipts, which they then tendered to the co., but the latter defaulted in payment. Resps. thereupon notified appls. in writing that they had an unsatisfied lien or claim for the price of the goods & were entitled to retain the relative mate's receipts, & that bills of lading must not be issued until the mate's receipts were surrendered to them (appls.). By that time, however, the co., having the bills of lading in their possession, had re-sold the goods to purchasers in Japan, to whom they were subsequently delivered by appls. on presentation of the bills of lading. On a claim by resps. against appls. for (*inter alia*) damages:—*Held*: the sale being of unascertained goods the property in them passed under the contract when the goods were appropriated by delivery alongside the vessel. Resps. had then parted with both property & possession, & the lien they held was therefore an equitable & not a common law or possessory lien, & was only enforceable by equitable remedies against the co. All that resps. had was possession of, or a lien on, the mate's receipts, which was not a document of title to the goods shipped. Although *prima facie* the possessor of the mate's receipts is entitled to have the bills of lading issued to him, where in fact the mate's receipts acknowledged receipt from the co., who had contracted for the freight, & the property in the goods was in the co., appls. were *prima facie* bound to deliver the bills of lading to the co. There had been no timeous express notice to appls., or any ground for imputing implied notice, not to issue bills of lading, & the case was one in which appls., who for their own protection had stipulated with the shippers that bills of lading were to be given in exchange for mate's receipts, had waived that provision, & without notice had issued bills of lading to the named shippers & owners of the cargo, & in such circumstances they could not be held responsible. Further, on the footing that the bills of lading were delivered to the co., that the holding of the mate's receipts by resps. only gave them an equitable lien which did not affect the transferee of the bills of lading so as to found a claim for conversion.—*NIPPON YUSEN KAISHA v. RAMJIBAN SEROW-*

GEE, [1938] A. C. 429; [1938] 2 All E. R. 285; 107 L. J. P. C. 89; 159 L. T. 266; 54 T. L. R. 546; 82 Sol. Jo. 292; 43 Com. Cas. 223, P. C.

**2212.** *Add. Annotation*:—*As to* (2) **Consd.** *Foreman & Ellams v. Blackburn*, [1928] 2 K. B. 60.

**2219.** *Add. Annotation*:—**Consd.** *Svenssons (C. Wilh) Travaruaktiebolag v. Cliffe S.S. Co., Ltd.*, [1932] 1 K. B. 490.

**2230a.** —.]—Defts. bought timber to be shipped to Liverpool, & it was shipped in pltf.'s steamer along with the cargo of other shippers. The bill of lading was a clean bill, stating that a specified quantity had been shipped in good condition, & incorporating the terms of the charterparty, which provided that the statements in the bill of lading as to the goods having been shipped in good condition, & as to the aggregate number of pieces delivered to the steamer, should be conclusive evidence against the shipowner. At the time of signing the bill of lading the master signed a protest stating that part of defts.' goods was in bad condition. Defts. were indorsees of the bill of lading, & after the arrival of the steamer pltf. informed them that part of the cargo had been damaged before shipment. There being nothing to indicate to defts. that the damaged part belonged to them, defts. accepted the bill of lading, when presented, & they paid for the timber. On delivery they found that the timber was defective, & that the quantity was less than the specified quantity. The shipowner sued defts. for balance of freight, & defts. counterclaimed for damages for delivering part of the goods in a damaged condition, & for failing to deliver part of the goods shipped:—*Held*: as the information of defts. was not of such a nature as to justify them in rejecting the bill of lading, pltf. was estopped from disputing the statements in it, & defts. were entitled to succeed on their counterclaim. *EVANS v. JAMES WEBSTER & BROTHERS, LTD.* (1928), 45 T. L. R. 136; 73 Sol. Jo. 60; 34 Com. Cas. 172.

*Annotation*:—*Refd.* *The Skarp*, [1935] P. 131.

**2249.** *Add. Citation*:—17 Asp. M. L. C. 307.

**2254.** *Add. Annotations*:—*As to* (1) **Consd.** *The Skarp*, [1935] P. 131. *As to* (2) **Appld.** *Silver v. Ocean Steamship Co.* (1929), 46 T. L. R. 78. *Refd.* *Evans v. Webster* (1928), 45 T. L. R. 136. *As to* (4) **Refd.** *United Molasses Co. v. National Petroleum, Ltd.* (1931), 50 T. L. R. 266.

**2256.** *Add. Annotations*:—*Refd.* *The Torni* (1932), 101 L. J. P. 44; *United Molasses Co. v. National Petroleum, Ltd.* (1931), 50 T. L. R. 266.

**2257.** *Add. Annotations*:—*As to* (1) **Consd.** *Paul (R. & W.), Ltd. v. National S.S. Co.* (1937), 43 Com. Cas. 68. *Refd.* *The St. Joseph*, [1933] P. 119. *As to* (2) **Appld.** *Silver v. Ocean Steamship Co.* (1929), 46 T. L. R.

#### PART VII. SECT. 3, SUB-SECT. 3.

**2189 1.** *Value of contents*—*Failure to insert*—*Limitation of shipowners' liability*—*To specific sum*.—In an action by the indorsee of a bill of lading to recover damages in respect of a machine carried by the deft. ship & delivered in a damaged condition, the evidence established that its market value had been considerably

depreciated & that the extent of the depreciation, based upon the market value of the machine delivered in good condition in Sydney, exceeded £100. The value of the machine had not been declared by the skipper before shipment & inserted in the bill of lading. Deft. failed to establish a case of statutory immunity from liability:—*Held*: pltf. should be awarded £100, the maximum amount of damages

recoverable in those circumstances under Carriage of Goods by Sea Act, 1924, Sched., Art. IV., r. 5.—*PARKE, LACEY, HARDIE, LTD. v. CLAN MACFADYEN, THE SHIP* (1930), 30 S. R. N. S. W. 438; 47 N. S. W. W. N. 160.—**AUS.**

**PART VII. SECT. 3, SUB-SECT. 4**—*A*  
*o. Revasd.*, 30 S. C. R. 473.

78. **Refd.** *Evans v. Webster* (1928), 45 T. L. R. 136. **Generally, Refd.** *Thomson (H. M.) v. Micks Lambert & Co.* (1933), 39 Com. Cas. 10.

2257a. — — —.]—Where a shipowner issues a bill of lading acknowledging the receipt of goods "in apparent good order & condition," he cannot afterwards prove, as against a holder or indorsee of the bill of lading, that the goods were damaged before shipment, if such damage would have been apparent on reasonable inspection; nor can he rely on the exception of insufficiency of packing within Carriage of Goods by Sea Act, 1924, Art. IV., r. 2 (a), if the insufficient packing was apparent on reasonable inspection.—**SILVER v. OCEAN STEAMSHIP CO., LTD.**, [1930] 1 K. B. 416; 99 L. J. K. B. 104; 142 L. T. 244; 46 T. L. R. 78; 73 Sol. Jo. 849; 35 Com. Cas. 140; 18 Asp. M. L. C. 74, C. A.

**Annotations:—Consd.** *The Skarp*, [1935] P. 134. **Refd.** *United Molasses Co. v. National Petroleum, Ltd.* (1934), 50 T. L. R. 266.

2257b. Collateral protest as to damage signed by master.]—**EVANS v. WEBSTER JAMES & BROS., LTD.**, No. 2230a, *ante*.

2259. **Add. Annotation:—Distd.** *Evans v. Webster* (1928), 45 T. L. R. 136.

2262a. — — —.]—**THE SKARP**, No. 2288a, *post*.

2262b. Damage before shipment.]—**EVANS v. JAMES WEBSTER & BROTHERS, LTD.**, No. 2230a, *ante*.

**Annotation:—Refd.** *United Molasses Co. v. National Petroleum, Ltd.* (1934), 50 T. L. R. 266.

2265. **Add. Annotation:—Refd.** *The Njegos*, [1936] P. 90.

2278. **Add. Annotations:—Refd.** *Re Motor-Tanker Athelviscount Owners & National Petroleum Co.* (1934), 39 Com. Cas. 227. *The Skarp*, [1935] P. 134.

2286. **Add. Annotation:—Refd.** *Silver v. Ocean Steamship Co.* (1929), 46 T. L. R. 78.

2287. **Add. Annotations:—Refd.** *Evans v. Webster* (1928), 45 T. L. R. 136; *Silver v. Ocean S.S. Co.*, [1930] 1 K. B. 416.

2288. **Add. Annotations:—As to** (1) **Appld.** *Silver v. Ocean Steamship Co.* (1929), 46 T. L. R. 78. **Consd.** *The Skarp*, [1935] P. 134.

2288a. — — —.]—A quantity of timber was shipped on board defts.' ship under bills of lading which described it as shipped in "good order & condition" to be delivered "in like good order & condition." The timber was, to the knowledge of defts.' master, in a bad condition, & he added the word "condition" to a clause on the back of the bills of lading, "quality, description & measurement unknown," so that the clause read "condition, quality (etc.), unknown." Pltfs. bought the timber from the shippers on formal contracts & received the bills of lading before the timber arrived. In an action against the shipowners pltfs. based their claim on breach of contract & estoppel:—**Held: (1)** "shipped in good order & condition" are not words of contract, & the words "to be delivered in like good order & condition" cannot stand alone to make a contract to deliver in good order & condition; & accordingly the claim in contract failed; & (2) "condition . . . unknown" was not such a qualification of the statement "shipped in good order & condition" as to convey to

pltfs. that the timber was in a damaged state, & had pltfs. acted on the statement to their detriment, defts. would have been estopped from denying that the timber was shipped in good condition; but, as there was a clause in the contracts of sale that the buyers should not reject the goods but refer any dispute to arbitration, the claim based on estoppel also failed.

(3) Two other parcels of 1798 & 494 pieces of timber were short delivered. The bills of lading were expressed to be subject to the terms of the charterparty, which provided that the bills of lading should afford conclusive evidence of the number of pieces delivered to the ship. Both parcels had been lost from a scow alongside the ship during a storm before shipment. The bill of lading in respect of the 1398 pieces made this clear, but as regards the 494 pieces the bill of lading was claused "494 pieces of these lots not on board, being included in specification No. 5 lost from the ship":—**Held: as regards the 494 pieces the bill of lading was not so claused as to bring it to the notice of pltfs. that these pieces were not delivered to the ship; defts. were bound by the "conclusive evidence" clause; & to this extent pltfs. claim succeeded.**—**THE SKARP**, [1935] P. 134; 154 L. J. P. 63; 151 L. T. 309; 51 T. L. R. 541; 41 Com. Cas. 1; 18 Asp. M. L. C. 576.

2289a. — Statement that cargo "shipped in good order & condition"—"Quality unknown to me."—**Resps.**, as owners, chartered a motor tank vessel to applt. to load a cargo of fuel oil & kerosene at Constanza & discharge it at Bombay. The tanks were steamed & cleaned at Constanza to the satisfaction of Lloyd's surveyor, & the master signed bills of lading which described the kerosene as Rumanian Export Type Kerosene "shipped in good order & condition," but he qualified his signature by the words "quality unknown to me." The charterers bought from the shippers part of the kerosene shipped, & opened a credit on which the shippers were entitled to draw on presenting clean bills of lading. Having found that the kerosene from certain tanks was discoloured, the charterers claimed damages from the shipowners, & in an arbn. the umpire found that there was no evidence of the vessel being unfit to receive the cargo, that the fuel oil did not leak into the kerosene, that the discoloration did not take place after the loading, that it was not possible for the master to determine the quality of the kerosene as it was being pumped into the vessel, & that in signing the bills of lading the master relied on the description given by the shippers. On these findings the umpire held that the shipowners were not estopped by the statements in the bills of lading from denying that the kerosene was as therein stated & he dismissed the charterers' claim:—**Held: on a case stated by the umpire, the shipowners were not estopped from alleging that there were at the time of shipment defects which were not apparent on reasonable inspection, & the umpire's award must stand.**—**UNITED MOLASSES CO., LTD. v. NATIONAL PETROLEUM CO.** (1934), 50 T. L. R. 266; *sub nom. Re Athelviscount (Motor-Tanker) Owners & National Petroleum Co.*, 39 Com. Cas. 227.

**2318. Add. Annotation:—**Refd. Dobell (C. G.) & Co. v. Barber & Garratt (1930), 47 T. L. R. 66.

**2329a. Conversion of cargo—Recovery of advance from owner by pledgee—Liability of charterer to indemnify owner.**—By a charterparty dated Sept. 18, 1923, & renewed Feb. 22, 1924, a steamship, the *S.*, belonging to the Strathlorne Steamship Co., resps. in the present appeal, was let on hire to Andrew Weir & Co., applts., by time charter not amounting to a demise. By a voyage charter dated June 24, 1924, Andrew Weir & Co. sub-let the *S.*, as they were entitled to do, to Chinese merchants to carry a cargo of rice from Rangoon to Swatow. On the vessel's arrival at Swatow the agents of Andrew Weir & Co. instructed the master to give delivery of the rice cargo to Chinese claimants who could not produce the bill of lading, & the master obeyed those instructions although the bill of lading provided that the cargo should not be handed over unless the bill of lading was given up to be cancelled. The cargo was in fact stolen, & the shipowners were obliged to compensate the holders of the bill of lading for its loss. The shipowners then claimed to be indemnified by Andrew Weir & Co. on whose instructions they had given delivery. The claim was referred to arbns. & the arbitrator awarded, subject to the opinion of the ct. on a special case, in favour of the shipowners:—*Held*: as the delivery of the rice cargo by resps. under the directions of applts.' agents had resulted in injury to third parties, & such delivery was not an act which was apparently illegal in itself & had been done by resps. honestly in compliance with applts.' directions, applts. were liable to indemnify resps. against the consequences.—*STRATHLORNE S.S. Co., LTD. v. ANDREW WEIR & Co.* (1934), 40 Com. Cas. 168, C. A.

**2414a. — — —.**—In Sept. 1936, a cargo of maize was shipped at Buenos Aires on a steamer, the *H.*, belonging to defts. The maize became the subject of a number of sales, & was ultimately sold to pltf. under a contract containing what were known as Rye Terms, one of the terms being that any deficiency on bill of lading weight would be paid by the seller. Pltf. as indorsees of the bills of lading obtained delivery of the cargo, & on examination part of the maize was found to be in bad condition. Pltf. claimed damages from defts., but defts. refused to pay on the grounds (i) that the damage, if any, was due to inherent vice of the maize & not to any fault of theirs; (ii) owing to the Rye Terms the property in the maize had not passed & pltf. therefore had no right to sue; & (iii) on the facts pltf. had not suffered any damage. Pltf. brought this action to enforce their claim, & GODDARD, J., by whom the action was tried, gave judgment

in their favour:—*Held*: (1) on the evidence, the damage to the maize was not due to inherent vice but was due to unseaworthiness of the steamer, for which defts. were responsible; (2) pltf. were entitled to sue as owners of the maize to whom the property had passed by indorsement of the bills of lading, & they had also a right to sue under an implied contract with defts.; (3) the measure of damages was the difference between the market value which the maize would have had if it had arrived undamaged & its value in its damaged condition.—*PAUL (R. & W.), LTD. v. NATIONAL STEAMSHIP CO., LTD.* (1937), 43 Com. Cas. 68.

**2450. Add. Annotation:—**Refd. Akt. Ocean v. Harding, [1928] 2 K. B. 371.

**2465. Add. Annotation:—**Consd. Nippon Yusen Kaisha v. Ramjiban Serowgee, [1938] A. C. 429.

**2479. Add. Annotations:—**As to (2) Refd. News-holme Bros. v. Road Transport & General Insee. Co., [1929] 2 K. B. 356; The Njegos, [1936] P. 90.

**2496. Add. Annotation:—**As to (1) Refd. Strathlorne S.S. Co. v. Andrew Weir & Co. (1934), 40 Com. Cas. 168.

**2502a. — — Understatement of weight of cargo—Duty of charterer to indemnify shipowner.**—Where by a charterparty the master is required to sign the bill of lading as presented by the charterers, & the bill of lading so presented understates the weight, the charterers are bound to indemnify the shipowner for any loss thereby resulting.

By a charterparty the charterers were entitled to pay freight "on bill of lading weight less 2 per cent. in lieu of weighing." The shipowners, believing that more cargo had been shipped than that stated in the bill of lading presented by the charterers, had the cargo weighed at the port of discharge, where it was found that the weight had been understated:—*Held*: the charterers were not entitled to deduct 2 per cent. from the out-turn weight.—*DAWSON LINE, LTD. v. AKTIENGESellschaft ADLER FÜR CHEMISCHE INDUSTRIE OF BERLIN*, [1932] 1 K. B. 433; 101 L. J. K. B. 57; 146 L. T. 187; 37 Com. Cas. 28; 18 Asp. M. L. C. 273, C. A.

**2503. Add. Annotations:—**As to (1) *Apld.* Dawson Line, Ltd. v. Aktiengesellschaft Adler für Chemische Industrie of Berlin, [1932] 1 K. B. 433. *Consd.* Thomson v. Louis Dreyfus & Co., [1936] 3 All E. R. 687. *Refd.* Strathlorne S.S. Co. v. Andrew Weir & Co. (1934), 40 Com. Cas. 168.

**2508. Add. Annotation:—**Expld. & Apprvd. Louis Dreyfus & Co. v. Tempus Shipping Co. (1931), 47 T. L. R. 542.

**2510a. — — Shipowner required to sign bills of lading involving liability to third persons—Indemnity of shipowner.**—Defts. chartered

#### PART VII. SECT. 3, SUB-SECT. 9.— B. (a).

*o.l.* — *Refusal to pay demand draft.* —Pltf. co., made a written contract of sale & purchase with P. for the supply of certain oils. The contract contained (*inter alia*) the following "terms": "Net cash by demand draft on arrival of vessel or vessels carrying the goods. . . . Seller's liability shall cease upon presentation of bill of lading, or, at their option, by presentation of an

order for delivery alone . . . shipment of the goods to constitute delivery." P. on giving the order, gave to pltf. co. a cheque for £50, such sum to be deducted from the purchase-price when draft was presented for payment. The bill of lading, which was made to order & not to P., was tendered, with a demand draft, attached, to P. & refused. The oils, upon arrival, were seized by defts. under several distress warrants on unsatisfied judgments

obtained against P. On an originating summons to determine in whom was the property in the oil:—*Held*: upon a consideration of the contract & all the surrounding circumstances, the intention of the parties was that the property in the goods should not pass until payment of the demand draft, & the property in the goods never passed from pltf. co.—*SOCIETY PROPRIETARY, LTD. v. BEGO*, [1931] N. Z. L. R. 567.—N.Z.

pltf.'s ship to carry a full & complete cargo of wheat in bulk from Sydney to Birkenhead. Defts. undertook to supply up to 15 per cent. of the cargo in bags for purposes of safe stowage. The captain of the ship demanded additional cargo in bags, & a dispute arose as to who was to pay for the cost of the bags & bagging of this additional cargo. This dispute was submitted to arbn., & an award was made in favour of defts. The captain was bound under the charterparty to sign bills of lading in the form indorsed, & the bills of lading signed in consequence forced the ship to deliver the cargo & the bags to defts. or their assignees. Defts. assigned the cargo to a third party, & the cargo & the bags were delivered to the assignees. Pltf. claimed the costs of the bags which had been delivered to the assignees in accordance with the bills of lading:—*Held*: the bags belonged to pltf. & as he was required by the charterparty to sign bills of lading which necessitated their delivery to the consignee he was entitled to recover the cost of them.—*THOMSON v. LOUIS DREYFUS & Co.*, [1936] 3 All E. R. 687, C. A.

2515. *Add. Annotation*:—*Refd.* Akt. Ocean v. Harding, [1928] 2 K. B. 371.

2526. *Add. Annotation*:—*Refd.* Akt. Ocean v. Harding, [1928] 2 K. B. 371.

2548. *Add. Annotation*:—*Refd.* Kulukundis v. Norwich Union Fire Insurance Society, [1936] 2 All E. R. 242.

2549. *Add. Annotation*:—*As to* (2) *Consd.* Widnes Foundry (1925), Ltd. v. Cellulose Acetate Silk Co. (1931), 47 T. L. R. 373.

2552. *Add. Annotation*:—*As to* (2) *Refd.* Jensen v. Hollis Bros. & Co., [1936] 1 All E. R. 140.

2558. *Add. Annotation*:—*Refd.* Kulukundis v. Norwich Union Fire Insurance Society, [1936] 2 All E. R. 242.

2573. *Add. Annotations*:—*As to* (2) *Consd.* The Stranna, [1937] P. 130. *Generally, Refd.* Paterson S.S. Ltd. v. Canadian Co-operative Wheat Producers, Ltd., [1934] A. C. 538.

2574. *Add. Annotation*:—*As to* (1) *Consd.* The Stranna, [1937] P. 130.

2580. *Add. Annotations*:—*Consd.* The Stranna, [1937] P. 130. *Refd.* Goodwin, Ferreira & Co. v. Lamport & Holt (1929), 141 L. T. 494.

2606a. *Unexplained heeling of ship.*—While loading a deck cargo of timber, the property of applts., resps.' ship took a sudden & unexplained list whereby a portion of the cargo fell overboard & was carried away by the tide & lost. In the ct. below resps.' theory that the listing was caused by a strong flood tide & under-current was rejected, the ct. being of opinion that the probabilities were that the ship heeled over owing to negligent stowage

or mismanagement of the ballast tanks. Resps. relied on the exception in the bills of lading "perils of the sea . . . & all & every other dangers & accidents of the seas, rivers & navigation wheresoever, including ports of loading . . . of whatsoever nature & kind soever . . . excepted, even when occasioned by negligence." Applts. contended that the loss was due to negligence in so loading &/or stowing the cargo that the ship became unstable & unfit to carry the cargo, that a loss so caused was not a loss by "perils of the sea," & was not within the excepted risks:—*Held*: the loss was of a character to which a marine adventure was subject & came within the exception "perils of the sea." *THE STRANNA*, [1938] 1 P. 69; [1938] 1 All E. R. 458; 107 L. J. P. 33; 51 T. L. R. 393; 82 Sol. Jo. 112; 43 Com. Cas. 175, C. A.

2607. *Add. Annotation*:—*As to* (2) *Consd.* Tempus Shipping Co. v. Louis Dreyfus & Co. (1930), 144 L. T. 13.

2609. *Add. Annotations*:—*Appld.* Firemen's Fund Insee. v. Western Australian Insee. & Atlantic Insee. (1927), 138 L. T. 108. *Apprvd.* Louis Dreyfus & Co. v. Tempus Shipping Co. (1931), 47 T. L. R. 542.

2611. *Add. Annotation*:—*Consd.* Tempus Shipping Co. v. Louis Dreyfus & Co. (1930), 144 L. T. 13.

2613. *Add. Annotation*:—*Apprvd.* Louis Dreyfus & Co. v. Tempus Shipping Co. (1931), 47 T. L. R. 542.

2616. *Add. Annotations*:—*Consd.* Tempus Shipping Co. v. Louis Dreyfus & Co. (1930), 144 L. T. 13. *Refd.* Rudd v. Elder Dempster & Co., [1933] 1 K. B. 566; Knott v. London County Council, [1934] 1 K. B. 126; Wheeler v. New Merton Board Mills, Ltd., [1933] 2 K. B. 669; Paterson S.S. Ltd. v. Canadian Co-operative Wheat Producers, Ltd., [1934] A. C. 538.

2620. *Add. Annotations*:—*As to* (2) *Refd.* Compania Mexicana De Petroleo "El Aguila" v. Essex Transport & Trading Co. (1929), 141 L. T. 106; Liesbosch S.S. Owners v. Edison S.S. Owners, [1933] A. C. 449; *Re* Simms, *Ex p.* Trustee, [1934] Ch. 1; Haynes v. Harwood & Son, [1934] 2 K. B. 240.

2635a. *Refusal of crew to discharge vessel.*—A Spanish ship, the property of a co. domiciled at Bilbao, was carrying maize from South America to Sharpness at the time when Bilbao was captured by General Franco. The Spanish Republican Govt. purported to requisition all Spanish ships, either in port or on the high seas. Upon the ship's arrival at Sharpness, notice of the requisitioning was given to the captain. The crew threatened to stop the discharging of the vessel unless all their wages were paid over to them in sterling, & owing to their attitude, work on the discharging ceased. Defts., who were the

#### PART VII. SECT. 4, SUB-SECT. 6.—A.

2575 i. *Fortuitous accidents.*—*Held*: perils of navigation are something fortuitous or unexpected, & damages which flow from the ordinary expected incidents of the voyage are not covered by the exception "perils of navigation."—*BUNGE NORTH AMERICAN GRAIN CORPN. & FIRE ASSOCN. OF PHILADELPHIA v. SKARP, S.S.*, [1932] Ex. C. R. 212; *on appeal*, [1933] Ex. C. R. 75.—*CAN.*

sb. *Effect of unseaworthiness.*—A

consignment of goods placed aboard ship was damaged by the admission of sea-water to the hold of the ship through corrosion of the ship's plates from the inside, arising without negligence on the part of the shipowner, but rendering the vessel unseaworthy:—*Held*: the proximate cause of the damage being the unseaworthiness of the ship, it could not be regarded as a loss arising from "danger of the sea" within Sea Carriage of Goods Act, 1924, s. 3.—*WANGANUI HERALD NEWSPAPER CO.*

v. COASTAL SHIPPING CO., [1929] N. Z. L. R. 305.—*N.Z.*

#### PART VII. SECT. 4, SUB-SECT. 6.—B. (d).

2600 i. *Damage due to stowage.*—Where breaking of barrels of molasses during heavy seas was found to be due to improper stowage, this was not a "peril of the sea" & the onus of showing due diligence in stowing was on the carrier.—*CANADIAN NATIONAL STEAMSHIPS v. BAYLISS*, [1937] S. C. R. 231; 1 D. L. R. 545.—*CAN.*



receivers under the bill of lading, obtained an injunction against the captain, to prevent him from not discharging the cargo. Pltfs., the owners of the ship, brought an action for the balance of the freight, & debts, claimed as a set-off the amount they had had to pay as additional cost of discharging, & the costs of obtaining the injunction. It was found as a fact that the custom in the case of Spanish ships was to pay the wages in Spain at the end of a round trip. The charterparty contained a clause exempting the ship from liability for any loss due to barratry:—*Held*: (1) although there was no crime committed, & no intention of injuring the owners, the loss in this case was due to the barratry of the crew, as there was an act done which in fact prejudiced the owners; (2) the loss was not due to a strike or stoppage of labour, as there had been no withholding of labour by the workmen engaged in discharging the cargo; (3) the owners had acted reasonably (*a*) in their method of paying the crew & (*b*) in not having taken steps to arrest the crew or to obtain an injunction against them; (4) the expense of debts, in obtaining an injunction against the captain were incurred reasonably, & were a loss due to the barratry.—*COMPANIA NAVIERA BACHY v. HOSGOOD (HENRY) & Co., LTD.*, [1938] 2 All E. R. 189; 158 L. T. 356; 82 Sol. Jo. 316.

2642. *Add. Annotation*:—*Refd.* Gosse Millard v. Canadian Government Merchant Marine, [1928] 1 K. B. 717.

2654. *Add. Annotation*:—*Refd.* Tempus Shipping Co. v. Louis Dreyfus & Co. (1930), 144 L. T. 13.

2655. *Add. Annotations*:—*As to* (3) *Consd.* The Kafiristan, [1937] 3 All E. R. 717. *Refd.* Akt. Ocean v. Harding, [1928] 2 K. B. 371; Fiumana Società Di Navigazione v. Bunge & Co., [1930] 2 K. B. 47; Tempus Shipping Co. v. Louis Dreyfus & Co., [1931] 1 K. B. 195.

2677. *Add. Annotations*:—*Consd.* Calico Printers' Assocn., Ltd. v. Barclays Bank (1931), 145 L. T. 51. *Refd.* Svenssons (C. With) Tra-varuaktiebolag v. Cliffe S.S. Co. (1931), 37 Com. Cas. 83.

2679. *Add. Annotation*:—*Consd.* Calico Printers' Assocn., Ltd. v. Barclays Bank (1931), 145 L. T. 51.

2680. *Add. Annotations*:—*As to* (1) *Expld. & Apprvd.* Louis Dreyfus & Co. v. Tempus Shipping Co. (1931), 47 T. L. R. 542, H. L. *Refd.* Gosse Millard v. Canadian Government Merchant Marine, [1928] 1 K. B. 717.

2683. *Add. Annotations*:—*Consd.* Foreman & Ellams v. Federal Steam Navigation Co.,

[1928] 2 K. B. 424. *Apld.* Gosse Millard v. Canadian Government Merchant Marine, The Canadian Highlander, [1929] A. C. 223.

2691. *Add. Annotations*:—*As to* (1) *Consd.* Tempus Shipping Co. v. Louis Dreyfus & Co., [1931] 1 K. B. 195. *Refd.* Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool) (1929), 143 L. T. 206.

2693. *Add. Annotations*:—*Consd.* Aslan v. Imperial Airways, Ltd. (1933), 149 L. T. 276; Elof Hansson Agency, Ltd. v. Victoria Motor Haulage Co. (1938), 51 T. L. R. 666; The Stranna, [1938] P. 69. *Refd.* Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool) (1929), 133 L. T. 296; Fiumana Società Di Navigazione v. Bunge & Co., [1930] 2 K. B. 47; Louis Dreyfus & Co. v. Tempus Shipping Co. (1931), 47 T. L. R. 512.

2697. *Add. Annotation*:—*Consd.* The Tornii (1932), 48 T. L. R. 471.

2699. *Add. Annotation*:—*Refd.* The Minerva (1933), 49 T. L. R. 563.

2700. *Add. Annotation*:—*Refd.* Gosse Millard v. Canadian Government Merchant Marine, [1928] 1 K. B. 717.

2703. *Add. Annotation*:—*Expld.* Foscolo Mango & Co. v. Stag Line, Ltd., [1931] 2 K. B. 48.

2704. *Add. Annotation*:—*Consd.* Foscolo Mango & Co. v. Stag Line, Ltd., [1931] 2 K. B. 48.

2705a. *Errors in navigation or management—Abandonment of ship.*—*BULGARIS v. BUNGE & Co., LTD.*, No. 4313d, *post*.

2707. *Add. Annotation*: *Consd.* The Stranna, [1937] P. 130.

2711. *Add. Annotations*:—*Consd.* Foreman & Ellams v. Federal Steam Navigation Co., [1928] 2 K. B. 424. *Apld.* Gosse Millard v. Canadian Government Merchant Marine, [1928] 1 K. B. 717. *Refd.* Gosse Millard v. Canadian Government Merchant Marine, The Canadian Highlander, [1929] A. C. 223; The Touraine, [1928] P. 58.

2712. *Add. Annotations*:—*Consd.* Foreman & Ellams v. Federal Steam Navigation Co., [1928] 2 K. B. 424; Gosse Millard v. Canadian Government Merchant Marine, The Canadian Highlander, [1929] A. C. 223.

2713. *Add. Annotation*:—*As to* (3) *Apld.* Dawson Line, Ltd. v. Aktiengesellschaft Adler für Chemische Industrie of Berlin, [1932] 1 K. B. 433.

2714. *Add. Annotation*:—*Consd.* Gosse Millard v. Canadian Government Merchant Marine, The Canadian Highlander, [1929] A. C. 223.

PART VII. SECT. 4, SUB-SECT. 12.

2684 *lv.* ———.—*SCOTTISH METROPOLITAN ASSURANCE CO., LTD. v. CANADA STEAMSHIP LINES, LTD.*, [1930] S. C. R. 262; 1 D. L. R. 201; *revers.*, 46 Que. K. B. 305.—*CAN.*

*m i.* ———.—*BURNS JOHN & Co. v. S.S. CANADIAN EXPLORER*, [1928] N. Z. L. R. 767.—*N.Z.*

PART VII. SECT. 4, SUB-SECT. 14.—*A.*

*sd. Burden of proof.* Upon an action against a carrier for damages to goods shipped under bills of lading which specifically stated that the vessel should not be liable for damage caused by perils of the sea, the grounds of

defence were, first that, the carrier having established at the trial a *prima facie* case of loss by a peril of the sea, the burden of proving negligence consequently rested on resp., & secondly, that the carrier had discharged the burden of proof resting on him under clause *g*, r. 2, art. 3 of the Sched. of the Barbados Carriage of Goods by Sea Act, 1926, which was made applicable to the contract:—*Held*: the issue raised by the first ground being an issue of fact, it was incumbent upon the carrier to acquit himself of the onus of showing that the weather encountered during the voyage was the cause of the damage & it was of such a nature that the danger of

damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage. Also, under clause *g*, r. 2, art. 3 the burden rests upon the carrier to show that neither the actual fault nor the privity of the carrier, nor the fault or neglect of the agents or servants of the carrier, contributed to the loss or the damage; & the carrier does not acquit himself of this onus by showing that he has employed competent stevedores to stow the damaged cargo, or that proper directions as to the stowage of the cargo have been given.—*CANADIAN NATIONAL S.S. v. BAYLIS*, [1937] S. C. R. 231; 1 D. L. R. 545.—*CAN.*

2720. *Add. Citation*:—17 Asp. M. L. C. 294.

*Add. Annotations*:—As to (1) **Consd.** Foreman & Ellams v. Federal Steam Navigation Co., [1928] 2 K. B. 424; Gosse Millerd v. Canadian Government Merchant Marine, The Canadian Highlander, [1929] A. C. 223.

2721. *Add. Citations*:—*reversd. sub nom.* GOSSE MILLERD, LTD. v. CANADIAN GOVERNMENT MERCHANT MARINE, LTD., THE CANADIAN HIGHLANDER, [1929] A. C. 223; 98 L. J. K. B. 181; 140 L. T. 202; 45 T. L. R. 63; 34 Com. Cas. 94; 17 Asp. M. L. C. 549, H. L.

*Add. Annotations*:—**Consd.** Foreman & Ellams v. Federal Steam Navigation Co., [1928] 2 K. B. 424; Silver v. Ocean Steamship Co. (1929), 46 T. L. R. 78. **Refd.** Paterson S.S., Ltd. v. Canadian Co-operative Wheat Producers, Ltd., [1931] A. C. 538.

2722. *Add. Citations*:—44 T. L. R. 204; 17 Asp. M. L. C. 413.

2724. *Add. Citation*: 33 Com. Cas. 70.

2725. *Add. Citations*:—[1928] 2 K. B. 424; 72 Sol. Jo. 103; 17 Asp. M. L. C. 447; 33 Com. Cas. 168.

*Add. Annotations*:—As to (1) **Refd.** Stag Line, Ltd. v. Foscolo Mango & Co. (1931), 48 T. L. R. 127.

2726. *Add. Annotation*:—**Refd.** Studebakers Distributors, Ltd. v. Charlton Steam Shipping Co., [1938] 1 K. B. 459.

2727a. — “At charterer’s risk.”—SVENSSONS (C. WILH) TRAVARUAKTIEBOLAG v. CLIFFE S.S. Co., LTD., No. 2974b, *post*.

2730. *Add. Annotations*:—As to (1) **Apld.** Svenssons (C. Wilh.) Travaruaktiebolag v. Cliffe S. S. Co. (1931), 37 Com. Cas. 83. **Consd.** The Stranna, [1937] P. 130.

2736a. **Loading stopped by ice — Whether “weather” preventing loading.**—It was provided in a charterparty that a steamship should proceed to a port in Finland in mid-November & load pit-props at a specified rate “per weather working day”:—**Held**: that days on which, owing to ice, loading could not proceed were not weather working days.—DAMPSKIBSELSKABET BOTNIA A/S v. BELL (C. P.) & Co., [1932] 2 K. B. 569; 101 L. J. K. B. 574; 147 L. T. 499; 48 T. L. R. 93; 76 Sol. Jo. 10; 18 Asp. M. L. C. 307.

2755a. **Strike against loading ship of particular nationality.**—A clause in a charterparty provided that if the cargo therein referred to could not be loaded by reason of a strike or lock-out of any class of workmen essential to the loading the time for loading should not count during the continuance of the strike. The shippers or consignees were not to be exonerated, by reason of a strike or lock-out of their men only, from any liability for demurrage if by reasonable diligence they could have obtained other suitable labour. Owing to some labour dispute in Latvia in 1933 there was at that time in the port of Leningrad a sympathetic strike of stevedores & other dock workers as the result of which there was

no loading of Latvian ships, though the ships of other nationalities were loaded there. Pltfs., Latvian shipowners, chartered to Exportles (a Russian corpn.) a steamer to load at Leningrad a cargo of wood. The steamer arrived at the port in July, 1933, while the strike was in progress, & no loading took place until the strike ended in Sept. 1933. On a claim by the shipowners for demurrage:—**Held**: though Exportles were a separate entity, they did not supply their own labour, there was a strike of workmen essential to the loading by which the charterers were prevented from loading, the charterers could not put an end to the strike, the strike clause applied, & the shipowners’ claim failed.—SKEBERG BROS. v. RUSSIAN WOOD AGENCY, LTD. (1934), 51 T. L. R. 149; 78 Sol. Jo. 915.

2765a. **Outbreak of war.**—By a charterparty dated June 2, 1936, the owners of the *N. M.* chartered their ship to pltfs. on a time charter. The contract contained a clause to the following effect: “Charterers & owners to have the liberty of cancelling this charterparty if war breaks out involving Japan.” In reliance on this provision, on Sept. 18, 1937, the owners withdrew the ship from service & cancelled the contract, on the ground that war had broken out involving Japan. The charterers contended that the owners were not entitled to do so. They denied that the strained relations between China & Japan amounted to “war” within the meaning of the above clause of the charterparty, & claimed damages for breach of the contract. The position at the date of the cancellation was that very serious fighting was in progress between the regular armed forces of China & Japan, & had been for some time before Sept. 18, involving heavy casualties & very extensive movements of troops. On the other hand, there had been no formal declaration of war, & diplomatic relations between the two countries had not been formally broken off. An inquiry addressed to the British Foreign Office elicited the reply that the position was anomalous & indeterminate, & that the govt. were not prepared to say that a state of war existed:—**Held**: the interpretation of the charterparty was not controlled by the niceties or refinements of writers on international law, nor by the expression of opinion of the Foreign Office. The document ought to be interpreted in a broad way by ascertaining what commercial men intended by the use of such a term in a commercial document. On the facts, a war had broken out in which Japan was involved, & the owners were entitled to withdraw the vessel.—KAWASAKI KISEN KABUSHIKI KAISHA OF KOBE v. BANTHAM S.S. Co., LTD. (No. 2), [1938] 3 All E. R. 80; 159 L. T. 87; 54 T. L. R. 901; 82 Sol. Jo. 568.

2776. *Add. Annotation*:—**Refd.** Rederiaktiebolaget Macedonia v. Slaughter (1935), 40 Com. Cas. 227.

PART VII. SECT. 4, SUB-SECT. 14.—D.

2720 i. *Negligence or error in navigation or management—Carriage of Goods by Sea Act, 1924 (c. 22), Sched., Art. IV., r. 2 (a), (n)—Insufficient packing.*—Where goods carried under a bill of lading under Carriage of Goods by Sea Act, 1924, are described in the bill of

lading as being shipped in apparent good order & condition, but noted as “deemed insufficiently packed,” & the owner proves that the goods were delivered in a damaged condition, if the carrier claims the benefit of the immunity specified in r. 2 (n) of Art. IV. of the Sched., the onus lies

on him of affirmatively establishing (a) the goods were insufficiently packed, & (b) that the insufficient packing was the cause of the damage to the goods.—PARKE, LACEY, HARDIE, LTD. v. CLAN MACFADYEN, THE SHIP (1930), 30 S. R. N. S. W. 438; 47 N. S. W. W. N. 160.—**AUS.**

777. *Add. Citation* :—17 Asp. M. L. C. 265.

*Add. Annotation* :—*Generally*, *Refd.* *Silver v. Ocean Steamship Co.* (1929), 46 T. L. R. 78 ; *Peterson S.S., Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] A. C. 538 ; *Petrofina S. A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali Genoa* (1936), 53 T. L. R. 222.

2777a. “Insufficiency of packing”—Not confined to packing of goods damaged.]—*GOODWIN, FERREIRA & CO., LTD. v. LAMPORT & HOLT, LTD.*, No. 3649a, *post*.

2777b. — Insufficiency apparent to reasonable inspection.]—*SILVER v. OCEAN STEAMSHIP CO., LTD.*, No. 2257a, *ante*.

2796. *Add. Annotations* :—*Consd.* *The Erik Boye* (1929), 142 L. T. 335 ; *Fiumana Società Di Navigazione v. Bunge & Co.*, [1930] 2 K. B. 47. *Refd.* *Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool)* (1929), 143 L. T. 296 ; *Silver v. Ocean Steamship Co.* (1929), 46 T. L. R. 78 ; *Paterson S.S., Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] A. C. 538.

2797. *Add. Annotation* :—*Consd.* *Aslan v. Imperial Airways, Ltd.* (1933), 149 L. T. 276.

2800. *Add. Annotations* :—*Consd.* *Calico Printers' Assocn., Ltd. v. Barclays Bank* (1931), 145 L. T. 51. *Refd.* *The Hayle*, [1929] P. 275 ; *Svenssons (C. Wilh.) Travaruaktiebolag v. Cliffe S.S. Co.* (1931), 37 Com. Cas. 83 ; *Petrofina S. A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa* (1936), 53 T. L. R. 222.

2800a. Delay for repairs—Whether amounting to frustration.]—Where a ship was damaged after arrival at loading port & while waiting for a berth, & had to be taken away for repairs :—*Held* : the delay was not of sufficient duration to amount to frustration of the contract.—*REEDERIE KIRCHNER & CO. v. HUGO STINNES G.m.b.H.* (1924), 17 Ll. L. R. 417.

2817a. — Impossible date.]—By a charterparty, dated Aug. 30, 1934, pliffs. agreed to load certain timber at the “end of Aug. 1934.” There was an option to cancel the charterparty if a vessel was not ready to load on or before Sept. 20, 1934. The vessel, was, in fact, ready for loading on Sept. 27, 1934 :—*Held* : as the date of the charterparty was practically the same as the date when the vessel was “expected ready to load,” the parties could not have intended the vessel to load at that time, & the whole document must be looked at to arrive at the proper construction of the charterparty. Having regard to the cancellation clause the proper construction was : “Expected ready to load on or before Sept. 27, 1934.”—*JENSEN v. HOLLIS BROS. & CO., LTD.*, [1936] 1 All E. R. 140.

2826. *Add. Annotation* :—*Refd.* *The Arpad* (1934), 50 T. L. R. 505.

2826a. Delay due to both parties—Apportionment of extra insurance.]—Pliffs. were the owners of a Swedish steamer, the *R.*, which, by a charterparty dated Oct. 9, 1931, was chartered by defts. to go to Soroka, on the

White Sea, & there load a cargo of timber for carriage to Hull. As the season was coming to an end & there was the danger of ice forming it was important that the loading should be completed as quickly as possible, & by clause 36 of the charterparty the charterers undertook to complete loading in time for the steamer to leave Soroka by Oct. 31, or in default of doing so to pay any extra insurance required owing to the delay, unless the delay was attributable to pliffs. or to the ship. At the date of the charterparty the *R.* was at Gothenburg, where she had been laid up for some months. She started for Soroka in due course, but on the way was delayed by unseaworthiness, by collision, for which she was solely to blame, & by bad weather. In the result she did not reach Soroka until Oct. 30, & was unable to leave until Nov. 6. Extra insurance became payable in consequence of the delay, the amount payable being, in English money, £336 8s. 7d. Pliffs. brought this action to recover that sum from defts., & defts. refused to pay on the ground that the delay in loading had been caused by the delay in reaching the loading port, & that that delay was attributable to the ship. Pliffs. contended that so far as the delay in reaching Soroka was due to unseaworthiness & collision they were protected by an exceptions clause in the charterparty which relieved them from liability :—*Held* : the exceptions clause did not apply & the delay due to unseaworthiness & collision was attributable to the ship within the meaning of clause 36 of the charterparty, but the delay due to other causes was for the account of defts. ; & the cost of the extra insurance must, therefore, be apportioned between the parties.—*REDERIE AKTIEBOLAG BYIGIA v. ANGLO-SOVIET SHIPPING CO.* (1932), 38 Com. Cas. 142.

2839a. — Exception of “obstructions”—Berths requisitioned.]—A ship was chartered to proceed to one of two ports as ordered by the charterers & there load a cargo. She proceeded to one of the ports, but upon arrival there found that, by reason of certain govt. requisitions of berths for the landing of troops & stores, there was no berth available where she could load her cargo. The charterparty provided that in the event of “obstructions in the docks or other loading places,” the time for loading should not count during the continuance of such causes. In another clause the words “the charterers undertaking to provide an available berth as soon as required” were inserted :—*Held* : (1) the delay in loading so caused was due to obstructions within the meaning of the clause of the charterparty above referred to & the time thus lost ought to be excluded from the time for loading ; (2) the inserted words “the charterers undertaking to provide an available berth as soon as required” did not amount to an absolute obligation to provide a berth in all events.—*REARDON SMITH LINE, LTD. v. EAST ASIATIC CO., LTD.*, [1938] 4 All E. R. 107 ; 159 L. T. 485 ; 55 T. L. R. 8 ; 82 Sol. Jo. 855.

PART VII. SECT. 5. SUB-SECT. 1.—F. (a).

<sup>90</sup>. *Right to damages for late arrival—Although charter maintained.*]—*WESTRALIAN FARMERS, LTD. v. TYNESIDE LINE (1920), LTD.*, [1929] W. A. L. R. 14.—*AUS.*

- 2856.** *Add. Citations* :—[1928] P. 180 ; 97 L. J. P. 127 ; 139 L. T. 355 ; 72 Sol. Jo. 557 ; 17 Asp. M. L. C. 486.

- 2923.** *Add. Annotation:—Refd. Walton Harvey, Ltd. v. Walker & Homfrays, Ltd., [1931] 1 Ch. 274.*

- 2931a. Option as to port of discharge—Damages reduced by cost of unloading at port most favourable to charterer.]—KAYE STEAM NAVIGATION CO., LTD. v. BARNETT (W. & R.), LTD. (1932), 48 T. L. R. 440; 76 Sol. Jo. 415.**

*Annotation* :—**Refd.** Withers v. General Theatro Corp., Ltd., [1933] 2 K. B. 536.

2955. *Add. Annotation* :—**Refd.** Walton Harvey, Ltd. v. Walker & Homfrays, Ltd., [1931] 1 Ch. 145.

- 2962.** *Add. Annotation:—***Reif.** Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 458.

- 2974.** *Add. Annotation* :—As to (1) **Apld.** Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 725.

- 2974a. Whether included in loading.]**—Construction of the following clause in a charter-party: "Cargo to be loaded & discharged free of expense to the steamer":—*Held*: "load" included the operation of stowing.—*A.-G. v. LEOPOLD WALFORD (LONDON), LTD.* (1924), 18 Ll. L. R. 314.

**Annotation** :— **Consd.** National S.S. Co., Ltd. v. Sociedad Anónima Comercial de Exportacion y Importacion (Louis Dreyfus y Cia), Ltd. (1932), 48 T. L. R. 325 (*see* 49 T. L. R. 50).

- 2974b. —. ]—(1) The operation of loading a ship involves all that is required, *i.e.*, stowing & *semble*, where necessary, lashing, to put the cargo in a condition in which it can be carried.
- By a charterparty a ship was to proceed to specified ports as ordered by the charterers, there load a cargo of pit props, & deliver it to an English port. By the charterparty the vessel was to be “provided with a deck load, at full freight, at charterers’ risk, not exceeding what she can reasonably stow & carry.” By an exception clause accidents of navigation, or latent defects in, or accidents to, hull &/or machinery were (*inter alia*) excepted “even when occasioned by the negligence, default, or error in judgment of the . . . master, mariners, or other persons employed by the shipowner, or for whose acts he is responsible. . . .” The ship loaded part of her cargo at one port & then proceeded to B. to ship the remainder. When the last sling load of deck cargo had been placed on deck, but before it had been stowed, the ship took a list, first to starboard & then to port, the bulwarks carried away, & a large quantity of cargo shot overboard & was lost. The judge held on the evidence that at the time of the loss the ship was unseaworthy owing to the deck load being excessive & that the captain was negligent in loading the ship as he did. In an action by the charterers against the shipowners for the value of the cargo

lost:—*Hela*: (2) as, at the beginning of the loading, the ship was seaworthy to receive & hold the cargo, & as, at the time of the loss, the operation of loading had not been completed, all the cargo not having been stowed, there was no breach of the warranty of seaworthiness & plffs. were not entitled to recover; (3) although the words in the charterparty, “at charterers’ risk,” standing alone, did not excuse defts. in the case of a loss due to negligence on their part or on the part of their servants, those words must be read with the exception clause, & the effect of reading the two together was to enable defts. to rely on the exception clause, which protected them against the consequences of such negligence.—SVENSSONS (C. WILH.) TRAVARUKTIEBOLAG v. CLIFFE S.S. CO., [1932] 1 K. B. 490; 101 L. J. K. B. 521; 147 L. T. 12; 37 Com. Cas. 83; 18 Asp. M. L. C. 281.

*Annotation :* Generally, Refd. The Stranna, [1937] P. 130.

- 2979a. Expenses of shore winchmen.]—

Where by a clause in a charterparty it was provided that "the charterers shall provide stevedors to load the cargo at a cost to the vessel of 25 cents. gold per English ton," & owing to trade union regulations in the port of loading shore winchmen had to be employed at the cost of the charterers to work the vessel's winches:—*Held*: the cost of those winchmen was an expense of the owners of the vessel with which the charterers were entitled to debit them.—*SOCIEDAD ANÓNIMA COMERCIAL DE EXPORTACION Y IMPORTACION* (LOUIS DREYFUS Y CIA), LIMITADA v. NATIONAL STEAMSHIP CO., LTD. (1932), 49 T. L. R. 50; 38 Com. Cas. 88, H. L.; *revers.*, S. C. *sub nom.* NATIONAL STEAMSHIP CO., LTD. v. SOCIEDAD ANÓNIMA COMERCIAL DE EXPORTACION Y IMPORTACION (LOUIS DREYFUS Y CIA), LTD., 48 T. L. R. 325; 37 Com. Cas. 283, C. A.

- 3005a. —[—]—Where a charterparty uses the words “provide & pay” or “employ & pay” [a stevedore] I think the effect of such a clause is to transfer the duty & obligation, which would otherwise rest on the ship-owner, to the charterer, of stowing the cargo in the way it ought to be stowed (GREER, J.). —BRY & GYLSSEN, LTD. v. DRYSDALE & CO. (1920), 4 Ll. L. R. 24.

*Annotation:—* **Consol. National S.S. Co., Ltd. v. Sociedad Anónima Comercial de Exportación y Importación (Louis Dreyfus y Cia), Ltd., (1932), 48 T. L. R. 325 (see 19 T. L. R. 50).**

- 3030.** *Add. Annotation* : -**Consd.** Studebakers Distributors, Ltd. v. Charlton Steam Shipping Co., [1938] 1 K. B. 459.

- 3030a.** — — — —.]—In an action for damages for breach of contract &/or duty in & about the carriage of a number of unboxed automobiles in defts.' steamship from Norfolk, Virginia, to

**PART VII. SECT. 5, SUB-SECT. 3.—**  
**B. (a).**

2843 iii. —.—.]—A ship was under charter to load a full & complete cargo of wheat in bulk or bags. The charterers supplied bulk wheat to the ship. As the ship had between decks, & could carry bulk wheat in the lower holds only, the total capacity of the ship was several hundred tons in excess of its capacity for bulk wheat. The master required the charterers to supply an additional quantity of

wheat in bags to be carried between decks in order to load the ship down to its plimsoll mark. The question was whether the charterers were obliged under the charterparty to supply this additional quantity of wheat in bags:—*Held*: the charterers having provided all the bulk wheat the ship could carry were not obliged to supply any additional wheat in bags.—**WESTRALIAN WHEAT FARMERS, LTD. v. WESTFAL-LARSEN & CO., [1936] W. A. L. R. 54.—AUS.**

PART VII. SECT. 5, SUB-SECT. 3.—  
C. (c).

b. *Revsd.*, 27 L. C. J. 39 n., P. C.

**PART VII, SECT. 5, SUB-SECT. 5.—A.**

2979 I. ——— Construction of charterparty.]—ROBIN LINE STEAMSHIP CO. v. CANADIAN STEVEDORING CO., SEAS SHIPPING CO. v. CANADIAN STEVEDORING CO., [1928] 3 D. L. R. 856; [1928] S. O. R. 423.—CAN.

London, defts. relied on the clauses of the bill of lading, which provided (1) that a certificate of a surveyor of the Board of Underwriters of New York should be accepted as conclusive evidence that the vessel had been properly prepared for cargo & that the cargo had been properly dunnaged & stowed, & (2) that the liability of the shipowner for damage to cargo should not exceed the agreed value per packet of 250 dollars, unless a value in excess of such sum had been declared & extra freight agreed on & paid. The bill of lading was expressed to be subject to the terms & provisions of the Act of Congress of the United States, 1893, known as the Harter Act, by sect. 1 of which "any clause relieving the shipowner from liability for loss arising from negligence, fault or failure in proper loading or stowage" is rendered null & void. The certificate of the surveyor stated that the steamship had been under his inspection "from time to time during the course of her loading," & that the stowage, "so far as it came under the observation of the undersigned, was in accordance with the rule of the Board of Underwriters." On points of law, ordered to be tried as a preliminary issue:—*Held*: the certificate of the surveyor was in such guarded terms that it did not satisfy the requirements of the clause of the bill of lading & was not conclusive evidence of proper stowage, so as to preclude the cargo owners from calling evidence in support of their allegations of negligent stowage & unseaworthiness; & moreover, that the clause itself was inconsistent with the provisions of the Harter Act, because it enabled the shipowner, if he could produce a certificate stating that a surveyor had done that which in fact he had not done, to escape a liability from which the Act intended he should not escape; further, the shipowner, by accepting liability up to an agreed value, was not limiting his liability, because it was open to the shipper to declare a higher value & pay a higher freight, & therefore the clause in question was not invalidated by the Harter Act; but it would be doing violence to the English language to hold that an automobile shipped without a box, crate or any form of covering was a "package," & the clause was inapplicable to such cargo.—*STUDEBAKER DISTRIBUTORS, LTD. v. CHARLTON STEAM SHIPPING CO., LTD.*, [1938] 1 K. B. 459; [1937] 4 All E. R. 301; 107 L. J. K. B. 203; 157 L. T. 583; 54 T. L. R. 77; 81 Sol. Jo. 982; 43 Com. Cas. 59.

# PART VII. SECT. 6, SUB-SECT. 1.—B.

3039 v. ———.—*J.—BURJOR F. R. JOSHI v. ELLERMAN CITY LINES, LTD.*, (1927), 1 L. R. 52 Bom. 327.—*IND.*

*e. i.* ———.—*Whether contract within Carriage of Goods by Sea Act, 1924.*—A firm of shipowners contracted to carry a cargo of machinery belonging to a firm of shipbuilders from the latter's premises in Glasgow to their shipyards at Belfast. The contract was arranged by correspondence, in the course of which the shipowners stipulated that the cargo was to be conveyed at owner's risk & subject to the conditions in their sailing-bills. Those included a condition that, in contracts where there was no bill of lading, the shipowners would not be liable for loss resulting from unsea-

worthiness of the ship. The vessel carrying the machinery was lost on the voyage, along with the cargo. No bill of lading had been issued, but, after the loss of the cargo, the shipowners gave the shipbuilders a letter acknowledging receipt of the cargo & specifying it in detail. In an action at the instance of the shipbuilders against the shipowners for recovery of the value of the cargo based on the alleged unseaworthiness of the vessel, the pursuers contended that the contract between the parties was regulated by the Act of 1924, & that the defenders had failed to comply with the provisions of the Act for contracting out of their statutory liability.—*Held*: that the contract between the parties was not a "contract of carriage" within the meaning of the Carriage of Goods by

Sea Act, 1924, in respect (a) that the only receipt granted for the cargo, viz. the letter of acknowledgment given by the defenders to the pursuers, did not constitute either a "bill of lading" or "similar documents of title" within Art. 1 (b) of the Schedule to the Act, & (f) that, the issue of a bill of lading not being within the contemplation of the parties to the contract, the contract could not reasonably be described as "covered" by a bill of lading within the meaning of Art. 1 (b); & accordingly, that defenders were entitled to contract out of liability for loss resulting from their vessel's unseaworthiness without reference to the Act; & action dismissed.—*HARLAND & WOLFF, LTD. v. BURNS & LAIRD LINES, LTD.*, [1931] S. C. 722.—*SCOT.*

3036. *Add. Annotation*:—*Consd.* Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool) (1929), 143 L. T. 296.

3043. *Add. Annotations*:—*Consd.* Timm & Son, Ltd. v. Northumbrian Shipping Co., [1937] 2 All E. R. 817. *Apld.* Timm & Son, Ltd. v. Northumbrian Shipping Co., [1938] 1 All E. R. 771.

3045. *Add. Annotations*:—*Apld.* Firemen's Fund Insce. v. Western Australian Insce. & Atlantic Insce. (1927), 138 L. T. 108. *Refd.* Elof Hansson Agency, Ltd. v. Victoria Motor Haulage Co. (1938), 54 T. L. R. 666.

3054. *Add. Citation*:—17 Asp. M. L. C. 311.

*Add. Annotation*:—*Refd.* Paterson S.S., Ltd. v. Canadian Co-operative Wheat Producers, Ltd., [1934] A. C. 538.

3056. *Add. Annotations*:—*Consd.* The Hayle, [1929] P. 275. *Refd.* Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool) (1929), 143 L. T. 296; Calico Printers' Assocn., Ltd. v. Barclays Bank (1931), 145 L. T. 51; Tempus Shipping Co. v. Louis Dreyfus & Co. (1930), 144 L. T. 13.

3059a. ———.—*J.—Resp.* defts., in Oct. 1919, shipped 412 tons of West African produce on the applt. pltf's schooner, the *R.*, for carriage from C. on the west coast of Africa to Liverpool. A clause in the bill of lading provided that freight was due on shipment & should be payable on demand, ship or goods lost or not lost. Defts. paid half the freight on shipment. The vessel & cargo were lost during the voyage, & as the goods never reached Liverpool, defts. refused to pay pltf's. the balance of freight, & pltf's. now claimed the balance of freight. Defts. pleaded that the vessel was in fact unseaworthy, & that therefore the bill of lading contract could not be enforced against them. By clause 2 of the bill of lading: "The co. shall not be liable for, or for any loss or damage arising from or due to, collision, . . . or any other peril of the sea . . . of whatsoever nature or kind, whether any perils, causes, or things in this clause mentioned are due to or arise . . . from the wrongful act, omission, or error in judgment or negligence of . . . any person whomsoever in the service of the co. . . . & whether due to or arising . . . from unseaworthiness of the ship . . . provided in case of any loss, injury, or damage arising from or due to unseaworthiness of the ship at the beginning of the voyage all reasonable means shall have been taken to provide against such unseaworthiness. The co. may entrust to experienced or qualified officers,

servants, or agents the duty of providing against unseaworthiness, & shall then be deemed to have fulfilled its obligations hereunder . . .":—*Held*: defts. had failed to discharge the *onus* which lay on them of proving that the vessel was unseaworthy at the beginning of the voyage. Moreover, even if the vessel had in fact been unseaworthy *pltf.*s. were protected by clause 2 of the bill of lading, as (a) they had taken all reasonable means to provide against unseaworthiness, & (b) they had entrusted to experienced & qualified officers, servants, or agents, the duty of providing against unseaworthiness, & must therefore be deemed to have fulfilled their obligations under the bill of lading.—*COSMOPOLITAN SHIPPING CO. (INC.) v. HATTON & COOKSON, LTD. (LIVERPOOL)* (1929), 143 L. T. 296; 35 Com. Cas. 113; 18 Asp. M. L. C. 130, C. A.

*Annotation*:—*Refd. Tempus Shipping Co. v. Louis Dreyfus & Co. (1930)*, 144 L. T. 13.

**3059b.** — *Effect of Incorporation of Harter Act.*—Where a cargo of flour, shipped under bills of lading which incorporated the United States Harter Act, was damaged owing to insufficient ventilation & failure to draw off hot air from the holds, such failure being due to the character & construction of the ship:—*Held*: (1) the damage to the flour was caused by breach of the implied warranty of seaworthiness for the cargo in question; & (2) the United States Harter Act did not exclude the implied warranty of seaworthiness for cargo, or cut down such implied warranty to an undertaking on the part of the shipowner to use due diligence to make the ship seaworthy.—*THE ERIC BOYE* (1929), 142 L. T. 335; 18 Asp. M. L. C. 86.

**3070a.** — *After additional cargo taken on board.*—*Pltf.*s. engaged defts., who were barge owners, to lighter certain machinery from a steamer in Millwall Docks to Fulham, the contract containing an owner's risk clause. Defts.' barge, having taken the machinery on board, proceeded to another steamer & took in additional cargo. While alongside this other steamer the barge was holed by an unknown vessel, & owing to the entrance of water *pltf.*s.' machinery was injured by rust. In an action for breach of the warranty of seaworthiness defts. denied liability on the grounds that the barge was seaworthy when *pltf.*s.' machinery was loaded, & that since, so far as *pltf.*s. were concerned, the loading of additional cargo was part of the voyage, defts. were protected by the owner's risk clause:—*Held*: the loading was not completed until the additional cargo had been taken on board, & therefore, as the barge was unseaworthy at the time when she started on her voyage, *pltf.*s. were entitled to recover.—*THOMPSON & NORRIS MANUFACTURING CO., LTD. v. ARDLEY, P. H., & CO.* (1929), 46 T. L. R. 120; 74 Sol. Jo. 27.

**3070b.** — *Completion of loading.*—*SVENSSONS (C. WILH.) TRAVARAKTIEBOLAG v. CLIFFE S.S. CO., No. 2974b, ante.*

**3071.** *Add. Annotation*:—*Refd. Petrofina S. A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali di Genoa* (1936), 53 T. L. R. 222.

**3072.** *Add. Annotation*:—*Consd. Timm & Son, Ltd. v. Northumbrian Shipping Co., [1938] 1 All E. R. 774.*

**3073a.**

—*Under the Water Carriage of Goods Act, 1910 (Canada), s. 6*, if the owner of any ship transporting merchandise from any port in Canada exercises due diligence to make the ship in all respects seaworthy, neither the ship nor the owner shall be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect. Under sect. 7 neither the ship nor the owner is liable for loss arising from dangers of the sea or other navigable waters. A shipowner had contracted to carry a cargo from Vancouver to Hull, & had arranged that his ship should call on the way at St. Thomas for the purpose of bunkering. The quantity of coal normally required by the ship for the voyage to St. Thomas was 650 tons, & the ship left Vancouver with 675 tons on board. A few days after passing through the Panama Canal the captain realised that he had not sufficient coal to reach St. Thomas & accordingly altered course for Jamaica. While proceeding there he struck a reef, & his vessel & cargo became a total loss. The cargo owners claimed damages, & the shipowner contended that (a) the ship on leaving Vancouver had sufficient coal & a proper margin to take her to St. Thomas; (b) there was a potential coaling port at Colon, & this fact must be regarded in fixing the margin:—*Held*: (1) on the facts the ship when she left Vancouver for St. Thomas was not carrying a proper margin of coal; (2) if Colon was to be regarded as a coaling port, then the stage to be considered was Colon to St. Thomas, & it was clear on the facts that the ship when it passed Colon had not sufficient coal to take her to St. Thomas.—*TIMM & SON, LTD. v. NORTHUMBRIAN SHIPPING CO., LTD., [1938] 1 All E. R. 774; 158 L. T. 474; 54 T. L. R. 501; 82 Sol. Jo. 193; 43 Com. Cas. 201, C. A.*

**3089a.** — *Sailing without mate.*—*BURNARD & ALGERS, LTD. v. PLAYER, RICHARD & CO.* (1928), 72 Sol. Jo. 503.

**3091.** *Add. Annotation*:—*Distd. Chellew Navigation Co. v. A. R. Appelquist Kolimport A. G.* (1933), 49 T. L. R. 295.

**3092a.** — *Necessary for admission to port.*—A steamer was chartered to perform a Baltic round voyage, the charterparty providing as follows: The steamer was to be "in every way fitted for ordinary cargo service." The charterers were to pay all "port charges . . . & all other charges & expenses whatsoever," except certain specified outgoings, which were to be paid by the shipowners. The hire was payable by the charterers by the month "& *pro rata* for any fractional part of a month (the days to be taken as fractions of a month of 30 days)." On the expiration of the charterparty the steamer was to be redelivered "in same good order as when delivered to the charterers (fair wear & tear excepted)." The steamer was ordered to Stockholm, but when she arrived she had no measurement certificate, as required by Swedish law, & the charterers had to procure one & pay the cost of it. The hire began in Aug. & lasted twenty-nine days, the charterers having paid a month's hire in advance. After discharging at Stockholm the steamer went to Lulea & loaded iron ore, which was dropped into the hold from a con-

siderable height, & which was discharged at Emden by means of grabs, & the bottom of the hold was damaged in consequence. In an arbn. the umpire found that the cost of the certificate must be borne by the charterers, that the charterers could get only one day's hire back from the shipowners, & that the damage to the hold was not fair wear & tear:—*Held*: the certificate was not a document which the shipowners were bound to supply, the charterers were entitled to repayment of hire for one day only, & the umpire was entitled in law to hold that the damage was not fair wear & tear, & therefore the award must be upheld on all three points.—*CHELLEW NAVIGATION CO., LTD. v. A. R. APPELQUIST KOLIMPORT A. G.* (1933), 49 T. L. R. 295; 38 Com. Cas. 218.

**3099a.** ———.]—A steamship was chartered to proceed to various ports in the River Plate & there load a cargo of grain for carriage to Hamburg. The shipowners had provided bunker coal more than enough to take the ship to the loading ports. Some of this coal was stowed in a reserve bunker on the port side separated from one of the ship's holds only by an unprotected steel bulkhead. The coal was unfit for the voyage. In this respect the vessel was unseaworthy. Shortly after she started on the return voyage a serious fire broke out in the port reserve bunker. The captain put into a port of refuge & incurred expense for the benefit of ship & cargo. In an action by the shipowners against cargo owners for contribution towards a general average expenditure defts. counterclaimed for damages for injury to their cargo owing to the fire. The fire having happened without the actual fault or privity of pltf's.:—*Held*: (1) by virtue of Merchant Shipping Act, 1894 (c. 60), s. 502, which relieved pltf's. from liability for loss of or damage to the cargo, they were entitled to general average contribution; (2) notwithstanding the unseaworthiness of the ship, pltf's. were not liable for loss of or injury to the cargo.—*LOUIS DREYFUS & CO. v. TEMPUS SHIPPING CO.*, [1931] A. C. 726; 100 L. J. K. B. 673; 145 L. T. 490; 47 T. L. R. 542; 75 Sol. Jo. 554; 36 Com. Cas. 318; 18 Asp. M. L. C. 243, H. L.; *affg.*, S. C. *sub nom.* *TEMPUS SHIPPING CO., LTD. v. LOUIS DREYFUS & CO., LTD.*, [1931] 1 K. B. 195, C. A.

*Annotation*:—As to (1) *Refd.* *Hain S. S. Co. v. Tate & Lyle, Ltd.*, [1936] 9 All E. R. 597.

**3099b.** ———.]—*FIUMANA SOCIETÀ DI NAVIGAZIONE v. BUNGE & CO., LTD.*, No. 4313a, *post*.

**3099c.** ———.]—*TIMM & SON, LTD. v. NORTHUMBRIAN SHIPPING CO., LTD.*, No. 3073a, *ante*.

**3099d.** ———.]—By a clause in a charterparty the shipowners were not to be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on their part to make the ship seaworthy; nor were they to be responsible for loss or damage arising or resulting from the act, neglect or default of the master in the navigation or management of the ship. By the terms of the charterparty pltf's. steamer loaded a cargo of timber, including a deck load, & started on the chartered voyage. Running short of coal she put in to bunker, at which time she had a list to star-

board. After she had taken in a number of tons of coal she heeled over to port. The next day, to save her from sinking, she was beached & some of the cargo was lost & some damaged. On a claim by the shipowners for general average:—*Held*: (1) the ship was unseaworthy when she set out on the chartered voyage from the port of loading; the onus of proving due diligence lay on the shipowners; neither they nor the master had in fact exercised due diligence; but the ship could have been bunkered in such a manner as to have brought her back to the upright & to have allowed her to proceed safely & deliver the cargo, & there was, therefore, no nexus between the unseaworthiness & the accident; & pltf's. were entitled to recover general average by reason of the words in clause 12 that the shipowners were not to be responsible for loss or damage arising or resulting from the act, neglect or default of the master in the navigation or management of the ship.—*SMITH HOGG & CO., LTD. v. BLACK SEA & BALTIC GENERAL INSURANCE CO., LTD.*, [1938] 4 All E. R. 383.

**3099e. Negligent engineer provided.**—Where cargo owners recovered against charterers for damage to cargo due to the negligence of the engineer in leaving open cock controlling bilge suction:—*Held*: the charterers were entitled to indemnity from the shipowners, who had taken on the engineer without real knowledge of his capabilities, & had thereby failed in their duty to exercise due diligence in making the vessel seaworthy.—*THE ROBERTA* (1937), 58 Ll. L. R. 231.

**3100. Add. Annotations:—Refd.** *Foreman & Ellams v. Federal Steam Navigation Co.*, [1928] 2 K. B. 424; *Gosse Millerd v. Canadian Government Merchant Marine, The Canadian Highlander*, [1929] A. C. 223.

**3107. Add. Annotations:—Consd.** *Calico Printers' Asscn., Ltd. v. Barclays Bank* (1931), 145 L. T. 51. *Refd.* *The Hayle*, [1929] P. 275; *Svenssons (O. Wilh.) Travaruaktiebolag v. Cliffe S.S. Co.* (1931), 37 Com. Cas. 83; *Petrofina S. A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa* (1936), 53 T. L. R. 222.

**3108. Add. Annotation:—Consd.** *Aslan v. Imperial Airways, Ltd.* (1933), 149 L. T. 276.

**3110a.** ——— **Flour—Insufficient ventilation of holds.**—*THE ERIC BOYE*, No. 3059b, *ante*.

**3110b.** ——— **Oil—Cleanliness of tanks.**—*Resps.* chartered a steamer from applt. shipowners for the carriage of a cargo of oil. The charterparty contained the following clauses: "1. The steamer being tight staunch & strong & every way fitted for the voyage, & to be maintained in such condition during the voyage, perils of the sea excepted. . . . 16. The captain is bound to keep the tanks, pipes & pumps of the steamer always clean. . . . 27. Steamer to clean for the cargo in question to the satisfaction of charterers' inspector." The tanks were inspected on behalf of the charterers, & the cleaning suggested by the inspector having been carried out by the master, the ship was accepted by the charterers as fit to load. Some portion of the cargo became damaged by discoloration, for which the charterers sought to make the shipowners responsible. There



was no negligence by the shipowners or their servants in making the vessel fit to carry the cargo & the master took all reasonable steps to make the tanks clean & fit for that purpose. The cause of the damage was not established:—*Held*: clauses 1 & 16 contained an express warranty of seaworthiness that the ship was fit for the particular cargo; the shipowners were not relieved from liability by clause 27, which was superadded to the charterparty for the purpose of the charterers; & that the shipowners were accordingly liable to the charterers.—*PETROPINA S. A. OF BRUSSELS v. COMPAGNIA ITALIANA TRASPORTO OLI MINERALI OF GENOA* (1937), 53 T. L. R. 650; 42 Com. Cas. 286, C. A.

**3114.** *Add. Annotations*:—*Consd. Svenssons (C. Wilh.) Travaruaktiebolag v. Cliffe S.S. Co.* (1931), 37 Com. Cas. 83; *Elof Hansson Agency, Ltd. v. Victoria Motor Haulage Co.* (1938), 54 T. L. R. 666.

**3114a.** ———.—*SVENSSONS (C. WILH.) TRAVARUAKTIEBOLAG v. CLIFFE S.S. CO., LTD.*, No. 2974b, *ante*.

**3118.** *Add. Annotations*:—*Appld. Firemen's Fund Insce. v. Western Australian Insce. & Atlantic Insce.* (1927), 138 L. T. 108. *Consd. Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool)* (1929), 143 L. T. 296; *The Kite* (1933), 49 T. L. R. 525. *Refd. Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546; *The Arpad* (1934), 50 T. L. R. 505; *Paterson S.S., Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] A. C. 538.

**3124.** *Add. Annotation*:—*Refd. The Touraine*, [1928] P. 58.

**3125a.** *Absence of shifting boards.*—*Applts.*, Swedish shipowners, chartered a steamer to resps. The charterparty provided (*inter alia*) that the steamer was "every way fitted to carry bulk & general cargoes," that the owners would maintain her in a thoroughly efficient state in hull, machinery & equipment for & during the service, "with dunnage, mats, shifting boards (as far as on board)," & that the charterers should provide & pay for coals . . . & "all other charges & expenses whatsoever appertaining to the cargo." When the steamer was delivered to the charterers she was not fitted with shifting boards. During the currency of the charterparty she was employed to carry grain in bulk, & it was necessary that shifting boards should be provided for the grain to be carried in safety. The carriage of cargo of that description was contemplated by the charterparty. A dispute arose between applts. &

resps. as to which of them should bear the cost of providing the necessary shifting boards; the dispute was referred to arbn. & the arbitrator awarded, subject to the opinion of the ct. on a special case, in favour of resps. The special case was argued before LEWIS, J.; he confirmed the award, & applts. now appealed to the Ct. of Appeal. Their Lordships dismissed the appeal:—*Held*: (1) as the voyage was one of the class contemplated by the charterparty & could not be safely made without shifting boards the obligation to provide shifting boards was laid upon the shipowners by the provision in the charterparty that the steamer was "every way fitted to carry bulk . . . cargoes"; (2) the provision in the charterparty that the owners would maintain the steamer with shifting boards "as far as on board" could not diminish the primary obligation of the shipowners to have the steamer every way fitted to carry bulk cargoes; (3) the provision of shifting boards was part of the duty of the shipowners & was not an expense "appertaining to the cargo" for which by the charterparty the charterers were liable; & (4) shifting boards were part of the equipment of the steamer & if the owners had not provided them they would have broken the overriding warranty of seaworthiness.—*REDERI AKTIEBOLAGET UNDA v. BURDON & CO., LTD.* (1937), 42 Com. Cas. 239.

**3126.** *Add. Annotations*:—*Refd. Barrett v. London General Insurance Co.*, [1935] 1 K. B. 238; *Elof Hansson Agency, Ltd. v. Victoria Motor Haulage Co.* (1938), 54 T. L. R. 666.

**3128a.** ———.—*COSMOPOLITAN SHIPPING CO. (INC.) v. HATTON & COOKSON, LTD. (LIVERPOOL)*, No. 3059a, *ante*.

**3129.** *Add. Annotation*:—*Consd. Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool)* (1929), 143 L. T. 296. *Refd. Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 219.

**3140.** *Add. Annotation*:—*Refd. Kulukundis v. Norwich Union Fire Insurance Society*, [1936] 2 All E. R. 242.

**3161.** *Add. Annotation*:—*As to* (2) *Refd. Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48.

**3162a.** ———.—*Within Carriage of Goods by Sea Act, 1924 (c. 22), Sched., Art. IV., r. 4.*—A cargo of coal was loaded on defts.' steamship, the *L.*, at Swansea, for carriage to Constantinople under bills of lading, which gave the shipowners "liberty . . . to call at any ports in any order, for bunkering or other purposes,

PART VII. SECT. 6, SUB-SECT. 1.—  
D. (b) iii.

**3111 iv.** ———.—*The negligent & improper stowage of a cargo of corn by failure to provide proper shifting boards renders a ship unseaworthy.*—*Re UNUS SHIPPING CO.*, [1937] 2 D. L. R. 239.—*CAN.*

**3111 v.** ———.—*Improper stowage amounts to unseaworthiness & exemption from liability for "perils of the sea or accidents of navigation" does not apply.*—*RICHARDSON (JAMES) & SONS, LTD. v. UNUS SHIPPING CO., LTD.* (1937), 12 M. P. R. 39.—*CAN.*

*eg. What amounts to improper stowage—Wheat in bulk—Lack of shifting*

*boards.*—Wheat was shipped under a bill of lading which incorporated the Water-Carriage of Goods Act, R. S., 1927, c. 207. In the course of the voyage the ship stranded during a gale, & the wheat was lost in consequence. In an action for damages by the owners of the wheat against the shipowners, the trial judge & the appellate ct., concurrently found (a) that the ship was unseaworthy in that the wheat was loaded in bulk without shifting boards or other precaution to keep it from shifting, & that the shipowners had not exercised due diligence to make her seaworthy; & (2) that this unseaworthiness was the cause of the loss, in the sense that the

master had been apprehensive that the wheat, so stowed, would shift if he were to put the ship upon her proper course, as that would involve putting her in the trough of the sea, & that for that reason he did not do so, whereas if she had taken the proper course she would have avoided the shoal upon which she stranded:—*Held*: the findings were findings of fact &, being concurrent, should not be disturbed; & upon them the shipowners were liable under sects. 4 & 7 of the above Act.—*PATERSON STEAMSHIPS, LTD. v. CANADIAN CO-OPERATIVE WHEAT PRODUCERS, LTD.*, [1934] A. C. 538; 103 L. J. P. C. 166; 151 L. T. 549; 51 T. L. R. 5, P. C.—*CAN.*

... all as part of the contract voyage." The shipowners were exempted by the bills of lading from liability for loss due to perils of the seas. The *I.* was fitted, in the interests of the shipowners, with a superheater, & when she started from Swansea she had on board two engineers, who were there to observe whether the superheater was working efficiently. It was intended that these two engineers should be landed with the pilot at Lundy, but when the vessel reached that island no satisfactory trial of the superheater having been obtained, the two engineers remained on board, & were, later, landed in St. Ives Bay. In proceeding there, & for some time after leaving there, the *I.* was off the usual route. Shortly after resuming her voyage from St. Ives Bay & before she had returned to the usual route the *I.* stranded on the Cornish coast, & both ship & cargo were lost. In an action in respect of the loss of the cargo:—*Held*: (1) the departure of the *I.* from the contract route did not come within the liberty given by the bills of lading "to call at any ports in any order, for bunkering or other purposes," as the words "or other purposes" must be construed *ejusdem generis* with the word "bunkering," & as meaning the calling at a port for some purpose having relation to the contract voyage; (2) the deviation was not a "reasonable deviation" within Art. IV., r. 4, of Sched. to Carriage of Goods by Sea Act, 1924 (c. 22).

In considering whether a deviation is "reasonable" within Art. IV., r. 4, the interests to be considered are those of the parties to the contract adventure, & this may include consideration of the position of the underwriters (*per* SCRUTTON, L.J.).

The words "reasonable deviation" mean a deviation whether in the interests of the shipowner, or the cargo owner or both, to which no reasonably minded cargo owner would raise any objection (*per* GREER, L.J.).

The reasonableness of a deviation must depend upon what would be contemplated reasonably by both parties to the contract adventure, having regard to the exigencies of the route, known or assumed to be known to both parties (*per* SLESSER, L.J.).

(3) As the Act of 1924 has not altered the former rule whereby any unauthorised deviation from the contract route has the effect of displacing the exemptions in favour of the shipowners contained in the contract of carriage, the exemption from liability in respect of loss due to perils of the seas did not protect the shipowners; (4) the shipowners were liable in damages, the measure of which was the value of the coal at Constantinople if it had been delivered there in due course.—*FOSCOLO, MANGO & CO., LTD. v. STAG LINE, LTD.*, [1931] 2 K. B. 48; 100 L. J. K. B. 421; 145 L. T. 146; 47 T. L. R. 278; 36 Com. Cas. 213; 18 Asp. M. L. C. 210, C. A.; *affd.*, *sub nom.* *STAG LINE, LTD. v. FOSCOLO MANGO & CO., LTD.*, [1932] A. C. 328; 146 L. T. 305; 101 L. J. K. B. 165; 48 T. L. R. 127; 75 Sol. Jo. 884; 37 Com. Cas. 54; 18 Asp. M. L. C. 266, H. L.

*Annotations*:—As to (1) *Consd.* *Lazard Bros. & Co. v. Brooks* (1932), 57 Com. Cas. 224. *Refd.* *Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 249.

**3162b. Order to proceed to further port of loading not received by master—Return on receipt of**

**wireless order.**—*HAIN S.S. CO., LTD. v. TATE & LYLE, LTD.*, No. 3191a, *post*.

**3163. Add. Annotations**:—*Refd.* *Foscolo, Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48; *Haynes v. Harwood*, [1935] 1 K. B. 146; *Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 249.

**3165. Add. Annotation**:—*Generally, Refd.* *Stag Line, Ltd. v. Foscolo Mango & Co.* (1931), 48 T. L. R. 127.

**3169. Add. Annotation**:—*Refd.* *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48.

**3170. Add. Annotations**:—As to (1) *Refd.* *Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd.* (Liverpool) (1929), 143 L. T. 296; *Paterson S.S., Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1931] A. C. 538; *Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 249. As to (2) *Refd.* *Akt. Ocean v. Harding*, [1928] 2 K. B. 371; *Tempus Shipping Co. v. Louis Dreyfus & Co.*, [1931] 1 K. B. 195.

**3172. Add. Annotations**:—*Consd.* *Hain S.S. Co. v. Tate & Lyle, Ltd.*, [1936] 2 All E. R. 597; *Reardon Smith Lines, Ltd. v. Black Sea & Baltic General Insurance Co.*, [1938] 2 All E. R. 706. *Refd.* *Frenkel v. McAndrews & Co.*, [1929] A. C. 545; *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48; *The Torni* (1932), 101 L. J. P. 44; *Connolly Shaw, Ltd. v. Nordenfjeldske S.S. Co.* (1934), 50 T. L. R. 418; *The Njegos*, [1936] P. 90.

**3174. Add. Annotation**:—*Refd.* *Connolly Shaw, Ltd. v. Nordenfjeldske S.S. Co.* (1934), 50 T. L. R. 418.

**3175. Add. Annotations**:—*Folld.* *Frenkel v. McAndrews & Co.*, [1929] A. C. 545; *Reardon Smith Lines, Ltd. v. Black Sea & Baltic General Insurance Co.*, [1938] 2 All E. R. 706.

**3176. Add. Annotations**:—*Consd.* *Frenkel v. McAndrews & Co.*, [1929] A. C. 545; *Hain S.S. Co. v. Tate & Lyle, Ltd.*, [1936] 2 All E. R. 597. *Refd.* *Akties Steam v. Arcos, Ltd.*, *Akties Bruusgaard v. Arcos, Ltd.* (1933), 39 Com. Cas. 158; *A/S Rendal v. Arcos, Ltd.*, [1937] 3 All E. R. 577.

**3177. Add. Citations**:—*affd.* [1929] A. C. 545; 98 L. J. K. B. 389; 141 L. T. 33; 45 T. L. R. 311; 34 Com. Cas. 241; 17 Asp. M. L. C. 582, H. L.

*Add. Annotations*:—*Consd.* *Reardon Smith Lines, Ltd. v. Black Sea & Baltic General Insurance Co.*, [1938] 2 All E. R. 706. *Refd.* *The Torni* (1932), 101 L. J. P. 44.

**3179. Add. Annotations**:—*Consd.* *Hain S.S. Co. v. Tate & Lyle, Ltd.*, [1936] 2 All E. R. 597. *Refd.* *Reardon Smith Line, Ltd. v. Black Sea & Baltic General Insurance Co.* (1937), 12 Com. Cas. 332.

**3179a. ——— For bunkering "or other purposes"—Construction ejusdem generis.**—*FOSCOLO, MANGO & CO. v. STAG LINE, LTD.*, No. 3162a, *ante*.

**3179b. ——— Purpose relating to contract voyage.**—*FOSCOLO, MANGO & CO., LTD. v. STAG LINE, LTD.*, No. 3162a, *ante*.

**3179c. ——— No frustration.**—A clause in a bill of lading covering lemons shipped at Palermo for London provided: "Nothing in this bill of lading (whether written or printed) is to be read as an engagement that the said carriage shall be performed directly

or without delays, the ship is to be at liberty, either before or after proceeding towards the port of delivery of the said goods, to proceed to or return to & stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route of the said port of delivery) once or oftener in any order backwards or forwards for loading or discharging cargo passengers coals or stores or for any purpose whatsoever whether in relation to her homeward voyage or to her outward voyage or to an intermediate voyage, & all such ports places & sailings shall be deemed included within the intended voyage of the said goods." The vessel deviated to Hull before going to London, but the deviation did not affect the condition of the lemons. In an action by indorsees of the bill of lading against the shipowners for delay in delivery, plffs. alleged that they had suffered damage by a change in the market conditions during the interval:—*Held*: as the purpose of the voyage—namely, the carriage of a perishable cargo to London—was not frustrated, the action failed.—*CONNOLLY SHAW, LTD. v. NORDENFJELDSKE S.S. Co.* (1934), 50 T. L. R. 418; 78 Sol. Jo. 430.

*Annotation*:—*Refd.* *Reardon Smith Line, Ltd. v. Black Sea & Baltic General Insurance Co.* (1937), 42 Com. Cas. 332.

3185. *Add. Annotation*:—*As to* (1) *Consd.* *Hain S.S. Co. v. Tate & Lyle, Ltd.*, [1936] 2 All E. R. 597.

3188. *Add. Annotations*:—*As to* (1) *Apld.* *Canadian Pacific Ry. v. Kelvin Shipping Co.* (1927), 138 L. T. 369. *Generally, Refd.* *Akties Steam v. Arcos, Ltd.*, *Akties Bruunsgaard v. Arcos, Ltd.* (1933), 39 Com. Cas. 158; *A/S Rendal v. Arcos, Ltd.*, [1937] 3 All E. R. 577.

3193a. ——— *By peril of the sea.*—*FOSCOLO MANGO & Co., LTD. v. STAG LINE, LTD.*, No. 3162a, *ante*.

3193b. ——— *Measure of damages.*—*FOSCOLO MANGO & Co., LTD. v. STAG LINE, LTD.*, No. 3162a, *ante*.

3194a. *Liability of indorsees of bills of lading.—General average contribution.*—By a charterparty a firm, having sold sugar to resps., chartered applt.'s steamer *T.* to load the sugar at two ports in Cuba & at one port in San Domingo "as ordered." The charterers, by notice to applts.' agents in New York, specified two loading ports in Cuba & one in San Domingo. The *T.* loaded sugar at the first Cuban port & was sent on by the local agents of the charterers to the second Cuban port. A cablegram directing the steamer to call at a loading port in San Domingo was not delivered to the master, who therefore left Cuba for home with a considerable cargo space unoccupied. Shortly afterwards the steamer was recalled by wireless & ordered to go to the loading port in San Domingo where she completed loading. On leaving

San Domingo on the homeward voyage the *T.* stranded & was badly damaged. The sugar had to be discharged & part of it was lost. The cargo was brought home in another steamer, & to obtain possession of it resps. signed a Lloyd's average bond under which they were required to deposit £9,500 to cover an adequate proportion of general average charges. The present resps., indorsees of the bills of lading, brought an action against the present applts. claiming the return of their deposit under the bond, & a declaration that they were not liable to contribute in general average in respect of the Cuban sugar, on the ground that there had been an unjustified deviation from the charterparty voyage. Applts. counterclaimed for proper contribution in general average & for the balance of freight:—*Held*: although there was an unjustified deviation it was waived by the charterers, & the charterparty thus remained in force; resps., as indorsees of the bills of lading, were not personally liable to contribute to the general average loss as they had not waived the deviation; but as the general average contributions were chargeable on the goods, & applts. gave up their lien in consideration of resps.' undertaking in the bond to make the proper contribution in general average resps. were bound by the bond to make such contribution; there was no implied obligation to pay the balance of freight.—*HAIN S.S. Co., LTD. v. TATE & LYLE, LTD.*, [1936] 2 All E. R. 597; 155 L. T. 177; 52 T. L. R. 617; 80 Sol. Jo. 687; 41 Com. Cas. 350; 19 Asp. M. L. C. 62, H. L.

*Annotations*:—*Refd.* *A/S Rendal v. Arcos, Ltd.*, [1937] 3 All E. R. 577; *Ben Line Steamers, Ltd. v. Compagnie Optorg of Saigon* (1937), 42 Com. Cas. 295.

3199. *Add. Annotation*:—*As to* (1) *Refd.* *The Adriatic* (1931), 47 T. L. R. 638.

3201. *Add. Annotation*:—*Refd.* *The Adriatic* (1931), 47 T. L. R. 638.

3207. *Add. Annotation*:—*Refd.* *The Arpad* (1934), 50 T. L. R. 505.

3208. *Add. Annotation*:—*Refd.* *The Arpad* (1934), 50 T. L. R. 505.

3219. *Add. Annotations*:—*Refd.* *Carras v. London & Scottish Assurance Corp'n., Ltd.*, [1936] 1 K. B. 291; *Kulukundis v. Norwich Union Fire Insurance Society*, [1936] 2 All E. R. 242.

3220. *Add. Annotations*:—*Refd.* *Carras v. London & Scottish Assurance Corp'n., Ltd.* (1935), 40 Com. Cas. 288; *Kulukundis v. Norwich Union Fire Insurance Society*, [1936] 2 All E. R. 242.

3224. *Add. Annotation*:—*Refd.* *Vlassopoulos v. British & Foreign Marine Insee. Co.*, [1929] 1 K. B. 187.

3237. *Add. Annotation*:—*Refd.* *Paterson S.S., Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*, [1934] A. C. 538.

PART VII. SECT. 6, SUB-SECT. 3.—  
B. (b).

*sq. Exemption from liability in lighterman's contract.—Inclusion in contract between shipowner & cargo owner.*—An action of damages was brought by the owners of a cargo against a shipping co., who had contracted to carry a consignment of grit & shot at a through rate from Aberdeen via Newcastle to Boston, U.S.A. It was understood that the cargo would be taken by coasting steamer as far as

Newcastle, where it would be transhipped to a vessel of defenders for carriage to Boston. The contract between the parties was based upon Shipping Instructions, containing this clause:—"All goods awaiting shipment are received & carried subject . . . to the conditions . . . of any . . . persons by whom the goods may be conveyed." During transhipment at Newcastle the goods were placed on board a lighter, where they were damaged through being left uncovered in heavy rain. The lighterman had

accepted the goods from defenders under a contract, the terms of which exempted him from liability for his servants' negligence:—*Held*: the clause quoted from the Shipping Instructions applied during the transhipment of the goods by means of the lighter, & its effect was to import into the contract between pursuers & defenders the exemption from liability contained in the lighterman's conditions of carriage.—*ABERDEEN GRIT CO. v. ELLERMAN'S WILSON LINE*, [1933] S. C. 8.—SCOT.

- 3245. Add. Annotation:—**Refd. *Tempus Shipping Co. v. Dreyfus & Co.*, [1931] 1 K. B. 195.
- 3269. Add. Annotation:—**Refd. *Monk v. Warbey* (1934), 151 L. T. 100.
- 3286. Add. Annotation:—**As to (1) Refd. *Frenkel v. MacAndrews & Co.* (1929), 17 Asp. M. L. C. 582.
- 3293. Add. Annotation:—**Refd. *The Vectis*, [1929] P. 204.
- 3301. Add. Annotation:—**As to (1) Refd. *Carras v. London & Scottish Assurance Corp., Ltd.*, [1936] 1 K. B. 291.
- 3346. Add. Annotations:—**Refd. *Broken Hill Proprietary Co. v. Latham* (1932), 49 T. L. R. 137; *Nihalchand Navalchand v. McMullan*, [1934] 1 K. B. 171; *The Njegos*, [1936] P. 90.
- 3395. Add. Annotation:—**Refd. *Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.*, [1934] A. C. 455.
- 3449. Add. Annotations:—**As to (2) Refd. *Ellis v. Stenning (John) & Son, Ltd.* (1932), 101 L. J. Ch. 401; *Freshwater v. Bulmer Rayon Co.*, [1933] Ch. 162.
- 3471. Add. Annotation:—**As to (3) Refd. *The Varing*, [1931] P. 79.
- 3503. Add. Annotation:—**Consd. *Axel Brostrom & Son v. Louis Dreyfus & Co.* (1932), 38 Com. Cas. 79.
- 3504. Add. Annotations:—**As to (1) Refd. *Foscolo Mango & Co. v. Stag Line, Ltd.*, [1931] 2 K. B. 48; *Spanish Govt. v. North of England S.S. Co.* (1938), 54 T. L. R. 852.
- 3511. Add. Annotation:—**Consd. *Axel Brostrom & Son v. Louis Dreyfus & Co.* (1932), 38 Com. Cas. 79.
- 3514. Add. Annotation:—**As to (1) Consd. *Axel Brostrom & Son v. Louis Dreyfus & Co.* (1932), 38 Com. Cas. 79.
- 3516. Add. Annotation:—**Consd. *Axel Brostrom & Son v. Louis Dreyfus & Co.* (1932), 38 Com. Cas. 79.
- 3517a. Port requiring tug assistance—No tug assistance available.]—**A charterparty provided that the charterers might order the chartered vessel to discharge at two or three safe ports in the United Kingdom or elsewhere within certain defined limits. The charterers ordered the vessel to Liverpool for part discharge & there ordered her to proceed to Londonderry for further discharge. Owing to her size she could not pass safely up the narrow & winding channel to Londonderry without tug assistance. No tugs were kept at Londonderry & the shipowners had to procure a tug from Glasgow to enable the vessel to reach her discharging berth, & after her discharge was completed had to procure another tug from Glasgow to enable her to leave. The shipowners claimed to

recover from the charterers the cost of tug assistance so procured, on the ground that as the chartered vessel could not reach Londonderry without tug assistance & no such assistance was procurable locally Londonderry was not a safe port within the charterparty. The claim was referred to arbn., & the arbitrator awarded, subject to the opinion of the ct. on a special case, in favour of the shipowners:—*Held*: confirming the award, if tug assistance was required to enable the chartered vessel to reach her discharging port & no such assistance was obtainable at the port itself, that port, as regards that particular vessel, was not a safe port within the charterparty.—*AXEL BROSTROM & SON v. LOUIS DREYFUS & CO.* (1932), 38 Com. Cas. 79.

- 3555. Add. Annotation:—**As to (3) Refd. *Hain S.S. Co. v. Sociedad Anonima Comercial de Exportacion e Importacion* (1934), 151 L. T. 305.

**3601a. Two ports of discharge—Vessel to be left "in seaworthy trim"—Construction.]—**A clause in a charterparty provided: "If the vessel is destined for two ports of discharge & the master is not so informed at the time of loading so as to enable him to arrange the stowage it is agreed that the vessel is to be left in seaworthy trim to proceed between ports of discharge":—*Held*: the information given to the master at the port of loading was not sufficient to enable him to stow a cargo of grain so that the expense of bagging part of the cargo left on board after unloading at the first port of discharge could be avoided, the bagging being rendered necessary by the terms of Sched. 18 of Merchant Shipping Act, 1894 (c. 60), & Board of Trade regulations; the words "in seaworthy trim" meant that after discharge at the first port the steamer must be left in a condition in which she could safely meet the perils of the sea on her passage to the second port of discharge & not simply in the condition of riding level in still water; & the shipowners were entitled to recover from the charterers the cost of bagging so as to leave the vessel in "seaworthy trim," but not the cost of emptying the bags at the second port.—*BRITAIN S.S. CO., LTD. v. LOUIS DREYFUS & CO. OF NEW YORK* (1935), 51 T. L. R. 307; 79 Sol. Jo. 196.

- 3604. Add. Annotations:—**Distd. *Dampelskab Svendborg v. L. M. & S. Ry. Co.* (1929), 141 L. T. 521. Consd. *The Varing*, [1931] P. 79. Refd. *Smith, Hogg v. Bamberger* (1928), 97 L. J. K. B. 725; *Dalglish S.S. Co. v. Williamson & Son, Ltd.* (1935), 40 Com. Cas. 312.

#### PART VII. SECT. 7, SUB-SECT. 2.—B.

sd. "*Customary berth*" — *Berth designated by consignee not customary berth—Refusal to discharge.]—NOVA SCOTIA FERTILIZER CO., LTD. v. S.S. "NIDAR" (Can.)*, [1929] 3 D. L. R. 184.—CAN.

#### PART VII. SECT. 7, SUB-SECT. 4.—B.

**3589 v. ———.]—**A cargo was shipped during the war from Archangel to Dundee. The consignee named in the bill of lading was the War Office. On the arrival of the ship at Dundee no bill of lading was presented to the ship's agents, who, accordingly, ware-

housed the goods to await the arrival of the bill. Thereafter, as the result of negotiations between the agents & a third party, the agents, after obtaining from him a letter of guarantee & indemnity which was in favour of themselves only, delivered the cargo to him without insisting on the production of the bill of lading. On Sept. 18, 1918, the third party sold the goods to the War Office & retained the price, & afterwards became bkpt. In an action at the instance of the owners against the agents for delivery of the cargo or, alternatively, for payment of the price of the goods:—*Held*: the agents were liable to the owners for the loss that had been sustained, in

respect that they could have justified their action only by showing that they had acted on the authority of the owners or of the War Office.—*KOLBIN (A. S.) & SONS v. KINNEAR (W.) & CO., KOLBIN (A. S.) & SONS v. UNITED SHIPPING CO., LTD.*, [1931] S. C. 128, H. L.—SCOT.

#### PART VII. SECT. 7, SUB-SECT. 5.—A.

**3596 ii. ———.]—**Under a contract for transfer of grain, delivery must be according to the bills of lading & the customs of the port of delivery.—*PATERSON S.S. CO. v. CONTINENTAL GRAIN CO.*, [1935] 3 D. L. R. 371.—CAN.

**3609.** *Add. Annotation* :—**Apld.** Leeds Shipping Co. v. Duncan Fox & Co. (1932), 37 Com. Cas. 213.

**3611a.** — **Bagging bulk cargo.**—Applts., plffs. in the action, were the owners of a cargo of Egyptian cotton seed shipped in bulk from Alexandria to Southampton in a steamer belonging to resps. At Southampton the docks were owned by the Southern Ry. Co., who did the whole of the work of discharge. The co. refused to allow the cargo to be discharged unless it was put into bags in the hold so that the bags could be raised by the ship's tackle & placed on a weighing machine on deck before being swung ashore. As it was impossible to deliver the cargo in any other way the captain of the steamer instructed the railway co. to have it bagged, & the cargo was accordingly delivered in bags. A dispute arose between applts. & resps. as to whether the ship or the receivers must pay the cost of bagging. Applts., as receivers, brought this action to recover the cost from resps., & **MACKINNON, J.**, by whom the action was tried, gave judgment for resps. Applts. now appealed to the Ct. of Appeal: **Held**: allowing the appeal, although as between a shipowner & a receiver the shipowner is entitled to deliver a bulk cargo over the ship's rail by any reasonable means, in this particular case it was impossible owing to the requirements of the port authority to deliver otherwise than in bags, & the captain, finding that he could not perform the ship's duty to deliver the cargo over the ship's rail in any other way, gave instructions to the port authority to put the cargo into bags. Those instructions were given on behalf of the ship, & resps. must therefore pay the cost of bagging.—**BRITISH OIL & CAKE MILLS, LTD. v. MOOR LINE, LTD.** (1935), 41 Com. Cas. 53, C. A.

**3620.** *Add. Annotation* :—**Consd.** Foster v. Driscoll, Lindsay v. Attfield, Lindsay v. Driscoll, [1929] 1 K. B. 470.

**3623a.** **Provision of lighters with men willing to perform work.**—Plffs. were the owners of timber shipped on defts.' steamer for delivery at the port of London. The bills of lading incorporated the terms of a charterparty in Baltwood form, clause 15 of which provided:—"The cargo shall . . . be discharged by the vessel in the customary manner as fast as the vessel can deliver during the ordinary working hours of the port on to the quay &/or into lighters &/or craft &/or rafts &/or wagons &/or on to bogies & thereon stowed &/or stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary & available at the time of discharge." Plffs. selected customary delivery into lighters, but, owing to a strike of lightermen, could not supply the men required, & thereupon defts., without notifying plffs., discharged on to the quay on their own responsibility, & plffs. incurred expenses for landing charges & quay rent. In an action to recover these expenses :—**Held**: (1) plffs.' right to insist on discharge into lighters ceased when that method ceased to be available; (2) it was not sufficient to supply lighters without men; (3) there was

no obligation on the defts. to notify plffs. before adopting the only method of discharge available at the time, & therefore the action failed.—**FITZGERALD v. LONA S.S. OWNERS** (1932), 148 L. T. 166; 49 T. L. R. 77; 18 Asp. M. L. C. 364.

**3624.** *Add. Citation* :—17 Asp. M. L. C. 305.

*Add. Annotation* :—**Refd.** Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 458.

**3624a.** **Failure of method selected by consignee—Duty to save delay by alternative method.**—A steamer belonging to applts., plffs. in the action, was chartered to bring a cargo of timber from a Baltic port to the Surrey Commercial Dock, London. Resp. was the indorsee of the bill of lading of part of the cargo, & the bill of lading incorporated the terms of the charterparty. By a clause in the charterparty resp. had the right to select any one or more of a number of possible methods of discharge, if available at the port of discharge, & at the Surrey Commercial Dock there were in fact two methods of discharge which were available—into lighters alongside & on to the quay. The steamer arrived in the Surrey Commercial Dock in due course, & resp. selected the method of discharge into lighters. Discharge was thereupon begun, but before more than a small part of the cargo had been unloaded a strike occurred among the lightermen & discharge into lighters became impossible for some weeks. Applts. requested the resp. to make arrangements to take his cargo by the alternative method of discharge on to quay, which was still possible, but the resp., for whom the method of discharge into lighters was much more convenient, refused to take any steps to have his cargo landed. Applts. brought this action to recover demurrage or damages for detention of the steamer. **MACKINNON, J.**, by whom the action was tried, decided in favour of resp., & applts. now appealed to the Ct. of Appeal. The ct. allowed the appeal, on the ground that when the method of discharge selected by resp. became impossible it was his duty under the charterparty to save delay to the steamer by making arrangements within a reasonable time to have the discharge completed by the other method.—**REDERIAKTIEBOLAGET MACEDONIA v. SLAUGHTER** (1935), 40 Com. Cas. 227, C. A.

**3634a.** **Charges for work done beyond "delivering cargo"**—**Meaning of delivery.**—By a charterparty for the carriage of a cargo of timber from the B. to G. it was provided (*inter alia*) as follows: clause 15: "For any work done by the vessel at the port of discharge beyond delivering cargo at the ship's rail if delivered by hand, or within reach of the ship's tackle or of the shore crane tackle if thereby discharged, the consignees shall pay to the shipowner the cost thereof plus 15 per cent." :—**Held**: upon the true construction of clause 15 of the charterparty the vessel had not delivered the cargo until it had lowered it into wagons & released the attachment to the crane which lowered it.—**DAMPSKIP SELSKAB SVENDBORG v. LONDON MIDLAND & SCOTTISH RY. CO.**, [1930] 1 K. B. 83; 99 L. J. K. B. 66; 18 Asp. M. L. R. 27; *sub nom.* **DAMPSKIP SVENDBORG v.**

LONDON MIDLAND & SCOTTISH RY. CO.,  
141 L. T. 521; 45 T. L. R. 591; *sub nom.*  
SVENDBORG v. LONDON MIDLAND & SCOTTISH  
RY. CO., 34 Com. Cas. 359; 20 Ry. & Can.  
Cas. 67, C. A.

*Annotation* :—*Consd.* The Varing, [1931] P. 79.

**3634b. Consignee to select method—Right to alter method.**—*FITZGERALD v. LONA S.S. OWNERS*, No. 3623a, *ante*.

**3634c. "Delivery from ship's tackles"—"Liberty to tranship"—Right to unload into lighters.**—A cargo of rice belonging to *ptfs.* was shipped on a steamship of *defts.*' line for carriage to & delivery at a specified port, the bill of lading containing a clause providing that the shipment was made "with liberty to tranship," a clause providing that the cargo was to be delivered "from the ship's tackles," a clause excepting the act of God & perils of the seas, & a clause incorporating the Hague Rules. By arrangement between *defts.* & a co. a practice existed at the port of delivery according to which *defts.* were entitled to use for discharging the cargoes of steamers of their line a wharf belonging to the co., unless the co. required it for one of its own vessels, when *defts.*' steamer lay in the harbour, the co. sending lighters to take discharge of its cargo & ultimately discharging that cargo at the wharf. On the arrival of the steamship at the port of delivery that wharf was not available, & in accordance with the practice *ptfs.*' cargo was discharged into lighters. While the cargo was still in the lighters they were sunk in a hurricane & the cargo was totally lost. *Ptfs.* alleging that *defts.* by discharging the cargo into lighters in accordance with the practice had committed a breach of the contract between them to which the loss of the cargo was due, brought an action against *defts.* to recover the value of the cargo :—*Held* : the action failed on the following grounds : the practice being to the knowledge of *ptfs.*, a general practice, applicable at the port of delivery to all steamers of *defts.*' line, must be taken to be incorporated in the contract, unless it was unreasonable or was excluded by some provision of the bill of lading; the practice was not unreasonable; the clause in the bill of lading allowing liberty to "tranship," assuming it to be valid, not only did not by implication exclude the practice, but expressly authorised the discharge of the cargo into lighters; that clause was not prevented from being valid by Art. III., r. 8 of the Hague Rules or otherwise; the clause in the bill of lading providing for delivery from the ship's tackles did not exclude the practice; there being no other clause in the bill of lading which excluded the practice, *defts.*, by discharging the cargo into the lighters in accordance with the practice, had not broken & determined the contract, & were therefore protected by the exception clause from liability for the loss of the cargo. —*MARCELINO GONZALEZ Y COMPANIA S. EN C. v. JAMES NOURSE, LTD.*, [1936] 1 K. B. 565; 105 L. J. K. B. 158; 154 L. T. 497; 80 Sol. Jo. 93; 41 Com. Cas. 94; 18 Asp. M. L. C. 590.

**3634d. Nomination of stevedores.**—A steamer of *appls.*, the Ben Line Steamers, Ltd., was chartered to carry a cargo to certain French

ports as ordered. Under the charterparty the charterers had the right to nominate stevedores at the ports of loading & discharging "providing rates are not higher than captain can get the work done by other good stevedores." The charterers' agents at the ports of discharge nominated stevedores who were willing to discharge the steamer at a rate which was the usual rate prevailing at those ports for the discharge of individual vessels, but the shipowners had a standing contract with other stevedores at those ports by which, in consideration of the shipowners' employing those other stevedores for the discharge of all the vessels of their fleet, discharge was effected at a special low rate. The shipowners refused to pay the rate charged by the stevedores nominated by the charterers on the ground that in the circumstances prevailing at those ports they could get the work done at a lower rate within the meaning of the proviso in the charterparty. The dispute was referred to *arbn.*, & the arbitrator awarded, subject to the opinion of the *ct.* on a special case, in favour of the charterers. The special case was argued before *PORTER, J.*, who decided in favour of the shipowners, & the charterers now appealed to the *Ct.* of Appeal. Their Lordships dismissed the appeal, holding that there was sufficient evidence to justify the conclusion that the shipowners could get the work done by other good stevedores at a cheaper rate & that the charterers were therefore not entitled to nominate stevedores to discharge.—*BEN LINE STEAMERS, LTD. v. COMPAGNIE OPTORIG OF SAIGON* (1937), 42 Com. Cas. 295, C. A.

**3635. Add. Annotation** :—*Consd.* Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 725.

**3642. Add. Annotation** :—*Refd.* Lambert v. I. R. Comrs. (1927), 12 Tax Cas. 1053.

**3649a. ——— No other goods to be discharged.**—Certain cotton goods were carried from L. to B., where they were discharged into a lighter. Certain other iron goods, packed in a wooden case, were being lowered into the same lighter when the case broke & the iron goods fell out into the lighter & holed it. Sea-water entered & damaged the cotton goods. Under the contract of carriage lighterage was to be at the risk of the owners, & the provisions of the Carriage of Goods by Sea Act, 1924 (c. 22), were also incorporated. The owners of the cotton goods claimed damages from the owners of the ship :—*Held* : (1) if the sea transit had ended when the goods were placed in the lighter, *defts.* were protected by the terms of the bill of lading. The sea transit, however, had not ended : the discharge into the lighter was part of the operation of discharge from the ship & was not complete as long as there were other goods to be discharged into the lighter; (2) the exception relating to loss due to insufficiency of packing in Carriage of Goods by Sea Act, 1924 (c. 22), Art. IV. (2) (n), was wide enough to cover the case of the packing of other goods, though primarily it would apply to the goods themselves that were lost or damaged; (3) on the evidence *defts.* had shown no negligence on the part of themselves or their servants & were therefore exempt from liability under Art. IV. (2) (g).—*GOODWIN, FERREIRA & CO., LTD. v. LAMPORT & HOLT*,

merchants of Hull, in Aug. 1930, bought from LTD. (1929), 141 L. T. 494; 45 T. L. R. 521; 73 Sol. Jo. 402; 18 Asp. M. L. C. 38.

*Annotation:—As to (1) Distd. Lindsay Blee Depots, Ltd. v. Motor Union Insce. Co. (1930), 46 T. L. R. 572.*

**3665a. "Reversible" working days—How interpreted.]—Pltf., the owner of a motor-schooner, chartered her to defts. to make a number of voyages with cargoes of bricks from R., in Belgium, to London. The charterparty provided: "The cargo to be loaded & discharged together within five reversible working days, time to commence from first high water at or off loading or discharging berth. Charterer is entitled to keep the vessel on demurrage not exceeding ten days at the rate of 1s. per net register ton per day payable day by day." On a claim by the owner against the charterers, for demurrage:—*Held*: the word "reversible" did not entitle the charterers to set off days saved on one voyage against days lost on another voyage under the same charter.—*VERREN v. ANGLO-DUTCH BRICK CO. (1927), LTD. (1929), 45 T. L. R. 556; 73 Sol. Jo. 451, C. A.***

**3668. Add. Annotation:—As to (1) Apld. Leeds Shipping Co. v. Duncan Fox & Co. (1932), 37 Com. Cas. 213.**

**3710. Add. Annotations:—Consd. Anastasia S.S. Owners v. Uglexport Charkow (1933), 149 L. T. 342; Dampskibsselskabet Heimdal v. Russian Wood Agency, Ltd. (1933), 149 L. T. 342. Refd. Stag Line, Ltd. v. Foscolo Mango & Co. (1931), 48 T. L. R. 127; Akties Steam v. Arcos, Ltd., Akties Bruusgaard v. Arcos, Ltd. (1933), 39 Com. Cas. 158.**

**3790. Add. Annotation:—Refd. Marcelino Gonzalez y Compania S. en C. v. Jaunes Nourse, Ltd., [1936] 1 K. B. 565.**

**3801. Add. Annotation:—Refd. Akt. Ocean v. Harding, [1928] 2 K. B. 371.**

**3816. Add. Annotations:—As to (2) Apld. Finlay, James & Co. v. N. V. Kwik Hoo Tong, [1929] 1 K. B. 400. Consd. The Arpad (1934), 50 T. L. R. 505. Refd. Foscolo, Mango & Co. v. Stag Line, Ltd., [1931] 2 K. B. 48; The Njegos, [1936] P. 90.**

**3820. Add. Annotations:—As to (2) Consd. The Edison, [1932] P. 52; Simon v. Pawson & Leafs, Ltd. (1932), 148 L. T. 154. Refd. The Arpad (1934), 50 T. L. R. 505.**

**3821a. Value of goods at date of non-delivery—Contracts of resale disregarded.]—Pltfs., grain a German firm 1,000 tons of Roumanian**

wheat at 36s. a quarter, "as per sealed sample No. 727," Sept./Oct. shipment, from a Black Sea port, & immediately resold it under advance contracts at 36s. 6d. a quarter. The wheat was shipped on defts.' steamship, but a portion of it was not put on board until Nov., & in consequence the German seller had to take 24s. a quarter for that parcel. Deft. shipowners had no knowledge of the purchase or resale prices or that the wheat had been resold. When the ship arrived at Hull in Jan. 1931, it was found that there was a considerable quantity of barley mixed with the wheat; & in an action by pltfs. against defts. for non-delivery & conversion LANGTON, J., found that there was a short delivery of 47 tons & referred the assessment of the damages to the registrar. The registrar found that there was no market for Roumanian wheat "as per sample No. 727," & that the measure of damages was the price pltfs. had paid for the wheat, which in fact (as an allowance of 6d. a quarter for defective quality had to be made) was the same price, except for the parcel bought at 24s., as that at which the pltfs. had resold it. The price of wheat generally, however, had fallen considerably between Aug. & Jan., & defts., who contended that good Roumanian wheat equal to the sample could be bought at about 20s. 3d. a quarter, moved in objection to the registrar's report. BATESON, J., held that although, if they had received the wheat, pltfs. could have sold it, they could not buy any wheat answering to the sample, & that to make a market there must be power to buy as well as to sell; there being no market, & therefore no market price, the price pltfs. had paid for the wheat & the price at which they had resold it afforded some evidence as to what its value was to them; no other measure would give pltfs. *restitutio in integrum*, & the motion in objection to the report failed. Defts. appealed:—*Held*: the appeal must be allowed, on the grounds (a) that the true measure of damages was the value of the goods at the date of the non-delivery, disregarding circumstances peculiar to pltfs.; & although in a proper case, if there be no market, sub-contracts might be put in evidence to show what was the value of the goods, in the present case the prices fixed by the Aug. contracts could not be relied on as any evidence of the value in Jan., when the price of all wheat had fallen; (b) that in an action against a shipowner for non-delivery

PART VII. SECT. 7, SUB-SECT. 6.  
3852 i. *Revd.*, 30 S. C. R. 473.

PART VII. SECT. 7, SUB-SECT. 7.—  
B. (b) i.

3666 III. —.—A charter-party which provided for loading at a daily rate contained a clause that the steamer should employ stevedores appointed by the charterers, but the cargo was to be stowed under the captain's supervision. Time for loading was to be reckoned from twenty-four hours after the master had given written notice that the steamer was ready to load. The master, on arriving at the port of loading, gave notice of readiness. There was only one firm of stevedores at the port, which had been nominated by the charterers, but owing to shortage of labour caused by congestion of shipping the ship could not commence to load until some days after notice had been

given. There was available during this time sufficient casual labour to put the cargo, which was ready in trucks, into the ship's slings. Loading at the port was a joint operation:—*Held*: the charterers were liable for demurrage.—*RE LOUIS DREYFUS & CO. & SIR WILLIAM REARDON SMITH & SONS, LTD., [1928] S. A. S. R. 117.—AUS.*

PART VII. SECT. 7, SUB-SECT. 9.—A.

se. *Defences—Practice as to delivery at port of destination.]—Pltf. consigned a package of goods by deft.'s ship from Melbourne to Sydney under the terms of a bill of lading which provided that all liability of deft. should cease "as soon as the goods are free from the ship's tackles." & by another clause, indorsed thereon, that "should the owner fail to take delivery of the goods in accordance with the terms of this contract, such*

goods may be without notice transhipped into lighters or other craft, landed, warehoused, stored, or in any other way provided for, at the owner's sole risk & expense." Evidence was given that the invariable practice on the part of deft. in discharging cargo of the kind in question was that instead of the consignee taking delivery at the ship's slings the goods were taken by deft.'s servants & tallied into a store, & were subsequently tallied out by deft.'s servants to the consignees; that a small charge was made by deft. for stacking the goods; that the package in question was tallied into the store but could not subsequently be found. In an action by pltf. for damages for loss of the goods:—*Held*: pltf. was not entitled to succeed.—*KEANE v. AUSTRALIAN STEAMSHIPS PTY., LTD. (1929), 41 C. L. R. 494; [1929] V. L. R. 116; 2 A. L. J. 307; [1929] Argus L. R. 81.—AUS.*



of goods, whether there is, or is not, a market for those goods at the port of discharge, in the absence of notice to defts., the law does not take into account, in order to fix the actual value to pltfs., intermediate contracts entered into with a third party for the purchase or sale of the goods; & therefore, although pltfs. had in fact suffered a loss of 30s. a quarter, they were not entitled to *restitutio in integrum*; (c) that on the alternative claim in tort for damages for conversion (as to which MAUGHAM, L.J., was not satisfied that any right of action existed) the measure of damages was the same; (d) that on the evidence the value of the wheat at the date of non-delivery should be taken to be 23s. 6d. a quarter.—*THE ARPAD*, [1934] P. 189; 103 L. J. P. 129; 152 L. T. 521; 50 T. L. R. 505; 78 Sol. Jo. 534; 40 Com. Cas. 16; 18 Asp. M. L. C. 510, C. A.

*Annotation*.—*Reid*. Paul (R. & W.), Ltd. v. National S.S. Co. (1937), 43 Com. Cas. 68.

**3829a. Excessive delivery.**—*NORDBORG S.S. (OWNERS) v. SHERWOOD & Co.* (1938), 55 T. L. R. 252, C. A.

**3830a. — Lighter unseaworthy.**—Pltfs., who were the owners of certain cargo on board a ship, engaged defts., haulage, wharfage & lighterage contractors, to collect the cargo from the ship & deliver it as instructed. Defts. sub-contracted with a lighterage co. to collect the cargo from the ship. Part of the cargo was loaded into a barge, which sank, & some of the cargo was lost & some damaged. On the heading of defts.' accounts were printed the words "Not responsible for strikes, lock-outs or labour disturbances of any kind." They said that pltfs. knew that they had no barges of their own, & that the contract, so far as it related to the collection & conveyance of the cargo by barge from the ship, was subject to the implied term that it should contain the provisions of the London Lighterage Clause. That clause had been changed from time to time, the last alteration having been made in 1937 to exclude liability for unseaworthiness. On a claim by pltfs.:—*Held*: the contract between pltfs. & defts. was a contract of affreightment & the warranty of seaworthiness applied; the barge supplied was unseaworthy; defts. took no steps to bring to pltfs.' notice any terms or conditions other than those on the heading of their accounts; pltfs. were aware neither of the sub-contract nor of its terms or conditions; for all they knew defts. provided their own barges; but pltfs. must be taken to have known that there were some conditions; & it would be assumed that the old London Lighterage Clause—which was judicially recognised—applied. The latest form, which had been amended to exclude liability for damage caused by unseaworthiness of craft, had not been generally accepted nor judicially recognised; the amendment had not been brought to pltfs.' notice & could not be read into the contract between pltfs. & defts.; & defts. were liable to pltfs. for the amount of the damage.—*ELOF HANSSON AGENCY, LTD. v. VICTORIA MOTOR HAULAGE Co., LTD.* (1938), 54 T. L. R. 666; 82 Sol. Jo. 396; 43 Com. Cas. 260.

**3836. Add. Citation**:—17 Asp. M. L. C. 245.

**3850a. — Notwithstanding statutory exemption from liability of shipper.**—*LEEDS SHIPPING*

*Co., LTD. v. DUNCAN FOX & Co., LTD.*, No. 3887a, *post*.

**3873a. Rain—No cargo available.**—Under the terms of a berth contract a steamer was to proceed to one, two or three places on the Danube & there load a full & complete cargo of wheat &/or grain. The berth contract provided that the cargo was to be loaded at a certain rate & that "should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain . . . the amount of actual time so lost during which it is impossible to work owing to rain . . . to be added to the loading time. . . . In calculating the extra time to be added to the lay days on account of interruptions by rain . . . periods of less than three hours shall be reckoned as quarter days." The charterers occupied in loading the steamer 3 days 20 hours beyond the lay days allowed for loading. Whilst the vessel was lying in loading berth in two ports ready to receive cargo rain occurred on certain occasions during working hours to an extent which would have made it impossible to load cargo into the ship had cargo been alongside. The total of the rainy periods amounted to two days. At the particular time when rain occurred the charterers had not booked cargo with shippers, although cargo was available in the port, & no cargo was alongside the ship at those times. In an arbn. the arbitrator held that the rainy periods, amounting to two days in all, were to be added to the lay days, notwithstanding that cargo was not alongside at such time, & that the shipowners were entitled to 1 day 20 hours demurrage. Upon the hearing of a special case *MACKINNON, J.*, held that the work of loading had not been interrupted by rain, as the work of loading had not at that time commenced. The shipowners were therefore entitled to 3 days 20 hours demurrage. On appeal:—*Held*: the charterers, in order to bring themselves within the clause of the berth contract, must prove both that the work of loading cargo became impossible through rain & also that in consequence they lost time in loading. In the present case the charterers had not proved that the impossibility of loading owing to rain had caused them to lose time unloading.—*BURNETT S.S. Co., LTD. v. DANUBE & BLACK SEA SHIPPING AGENCIES*, [1933] 2 K. B. 138; 103 L. J. K. B. 44; 119 L. T. 598; 49 T. L. R. 553; 38 Com. Cas. 326; 18 Asp. M. L. C. 113, C. A.

**3886. Add. Annotation**:—*Generally, Reid*. National S.S. Co. v. Sociedad Anónima Comercial de Exportacion y Importacion (Louis Dreyfus y Cia.), Ltd. (1932), 48 T. L. R. 325.

**3887a. —**—(1) A steamer belonging to pltfs. was chartered by defts. to take a grain cargo from Australia to Callao. The charterparty provided (*inter alia*) that discharge at Callao should be made at an average rate of 450 tons per weather working day, & that if the steamer should be longer detained demurrage should be payable at a rate calculated on her tonnage, which worked out to £65 per day. The steamer arrived at Callao in due course. At that port discharge could only be effected by the employment of stevedors who were members of a trade union which would not allow each man to do more than a limited amount

of work per day & would not allow more than 80 tons per day to be discharged from any one hold. As the steamer had only four holds this rule of the union made it impossible to discharge more than 320 tons per day, although the charterparty required a rate of 450 tons. After discharge had proceeded very slowly for some days the captain made an arrangement with the stevedores that in consideration of an increased wage they would do more work, & by spending £123 in this way he saved the steamer two days' demurrage, which would have amounted to £130. In this action *pliffs.* claimed demurrage which had been actually incurred & also the £123 by which two days' demurrage had been avoided:—*Held*: the charterparty being one for discharge in a fixed time amounted to a guarantee by *defts.* that discharge would be completed within that time unless it was delayed by some fault of the shipowner, & as the idleness of the stevedores was not due to any fault of *pliffs.* demurrage was payable for the time occupied in discharge beyond the time allowed by the charterparty. *Pliffs.* must also recover the £123, the expenditure of which by the captain had saved demurrage amounting to £130, for which the *defts.* would have been liable.

(2) The charterparty incorporated the Australian Sea Carriage of Goods Act, 1924, which contains a provision identical with that of r. 3, Art. IV. of the English Carriage of Goods by Sea Act, 1924 (c. 22), as follows: "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents or his servants." *Defts.* contended that as the idleness of the stevedores was not due to any act, fault, or neglect on their part they were protected by this rule:—*Held*: the rule did not abolish the old-established principle of law rendering the charterer liable for demurrage. — *LEEDS SHIPPING CO., LTD. v. DUNCAN FOX & CO., LTD.* (1932), 37 Com. Cas. 213.

3899. *Add. Annotation*:—As to (1) *Refd.* Burnett S.S. Co. v. Danube & Black Sea Shipping Agencies, [1933] 2 K. B. 438.

3909a. *Agreement to surrender claim—Validity of contract.*—An Italian steamer, the *P.*, was chartered by a German firm, Berlin Derunaptha, to bring seven cargoes of Russian oil from Batoum to Hamburg. A clause in the charterparty provided that any dispute arising under it should be settled by arbitration in London. Three voyages were made under the charter, & the *P.* arrived in due course at Batoum to load the fourth cargo on Oct. 7, 1932, & on the same day the master gave notice of readiness to load. On Oct. 8 the charterers told the master that they intended to load kerosene, which was not one of the kinds of oil specified in the charterparty. The master refused to allow kerosene to be loaded, & the owners supported him in his refusal. The charterers then raised an objection that the *P.* was unseaworthy & not fit to load any oil cargo whatever. Delay occurred in consequence, & finally on Oct. 28 the charterers offered to load if the ship would abandon all claims for demurrage. The master reported this to the owners, & in reply, they cabled, without making any

reference to demurrage, instructing him to give a fresh notice of readiness to load & to protest when loading was completed. On Nov. 3 the charterers induced the master to sign a document making him responsible for certain damages & expenses & agreeing to give up the ship's claim for demurrage. The shipowners, however, claimed demurrage; the dispute was referred to *arbn.* as required by the charterparty, & the umpire in the *arbn.* stated a special case for the opinion of the *ct.* on the question whether an alleged agreement between the parties expressed in certain letters passing between the master & the charterers was a valid contract enforceable at law against the owners. On argument of the special case it was held that whether the letters did or did not constitute a contract there was no consideration, & therefore, if there was a contract it could not be enforced. The charterers appealed to the *Ct. of Appeal*:—*Held*: dismissing the appeal, *per SCRUTTON, L.J. & GREER, L.J.*, the letters relied on by the charterers did not in terms show a concluded agreement, & if they had shown such an agreement it could not have been enforced against the shipowners because the master had no authority to make it on their behalf, & there was also no consideration for it; *per SLESSER, L.J.*: the letters relied on did not show that the parties were ever *ad idem*, but if they had shown an agreement the master had sufficient authority to make such an agreement & there was good consideration for it.—*PORTOFINO TANK STEAMER OWNERS v. BERLIN DERUNAPHTA* (1934), 39 Com. Cas. 330, C. A.

3909b. *Frustration—Ship destroyed before loading.*—*Defts.* chartered from *pliffs.* a ship to proceed to San Juan, a port close to Seville in Spain, & there to load a cargo of ore. On account of the war in Spain, the following marginal clause was inserted in the charterparty: "If the steamer is detained at San Juan by any cause arising from the civil war in Spain, riots, strikes, etc., charterers agree to pay demurrage &/or dead freight." On arrival at San Juan, the ship was immediately struck by a bomb from an aeroplane, belonging presumably to the Spanish Govt., & damaged beyond repair. There was not time before the bomb struck the ship to give notice of her readiness to load:—*Held*: the language of the marginal clause was wholly inapt to cover the case of a ship destroyed so that she was no longer a cargo-carrying ship. The claim for demurrage or dead freight therefore failed.—*D/S. A/S. GULNES v. IMPERIAL CHEMICAL INDUSTRIES, LTD., THE GULNES*, [1938] 1 All E. R. 24; 158 L. T. 134; 54 T. L. R. 194; 81 Sol. Jo. 984; 43 Com. Cas. 96.

3914a. *Sum expended by master to avoid demurrage.*—*LEEDS SHIPPING CO., LTD. v. DUNCAN FOX & CO., LTD.*, No. 3887a, ante.

3920a. — "Per working hatch."—A charterparty on a modified Form A of the Chamber of Shipping Welsh Coal Charter, 1896, provided that a coal cargo was to be taken from alongside by consignees at the port of discharge at "the average rate of 125 tons per working hatch per day." A marginal note or memorandum stated that consignees were not obliged to take cargo at a higher rate than 500 tons per day. Despatch money

was to be payable at the rate of £15 per day. The cargo, which consisted of about 4,000 tons of coal, was loaded in unequal portions in four holds. In a dispute between the shipowners & charterers as to the method of calculating the lay days & the consequential payment or non-payment of despatch money:—*Held*: the term in the charterparty "working hatch" denoted a hatch which could be worked because there was cargo in the hold underneath it waiting to be discharged; the charterparty provided for discharge at the average rate of 125 tons per each working hatch per available day & not 500 tons per day for the whole ship; when in the ordinary course one hold became empty the rate of discharge from the remaining holds remained at 125 tons & was not proportionately increased; & the lay days were in the circumstances easily ascertainable by simply dividing by 125 the number of tons of coal in the hatch which contained the largest quantity of cargo.—*THE SANDGATE*, [1930] P. 30; 99 L. J. P. 49; 142 L. T. 356; 35 Com. Cas. 221; 46 T. L. R. 116; 18 Asp. M. L. C. 83, C. A.

**3957a. Specified date—Provision for loading in regular turn—Construction.**—A charterparty provided that the ship should proceed to her loading port & there load in customary manner in regular turn with other steamers loading ore for the charterers. The time for loading was to count from 6 a.m. after the ship was reported & ready, & in free pratique (whether in berth or not) in accordance with the above provision. Lay days were not to commence before June 10, 1934, unless loading commenced sooner. The steamer arrived at her loading port on June 8, 1934, & was cleared & in free pratique, & notice given of readiness to load on the same day. There was no customary loading berth available until June 18, when in fact the loading began. The question was whether, having regard to the above provisions, the ship's loading lay time began at 6 a.m. after she arrived at the port or not until she came on turn:—*Held*: the ship's loading laytime commenced at 6 a.m. after she arrived at her loading port.—*MOOR LINE, LTD. v. MANGANEXPORT G.m.b.H.*, [1936] 2 All E. R. 404; 155 L. T. 135; 80 Sol. Jo. 489; 19 Asp. M. L. C. 56.

**3975. Add. Annotation.**—*Apld. Verren v. Anglo-Dutch Brick Co.* (1927) (1929), 45 T. L. R. 404.

**3976. Add. Annotation.**—*As to* (1) *Apld. Dampskibsselskabet Botnia A/S v. Bell* (C. P.) & Co., [1932] 2 K. B. 569.

**3978a. — Ice preventing loading.**—*DAMP-SKIBSSELSKABET BOTNIA A/S v. BELL* (C. P.) & Co. No. 2736a, *ante*.

**3988a. — Former religious holidays in Russia—Effect of establishment of five-day week.**—*WESTFAL-LARSEN & CO. AKTIESELSKABET v. RUSSO NORWEGIAN TRANSPORT CO., LTD.* (1931), 75 Sol. Jo. 571.

**3989. Add. Annotation.**—*Refd. Verren v. Anglo-Dutch Brick Co.* (1927) (1929), 45 T. L. R. 404.

**3996a. — No time lost on balance.**—A steamer was chartered to bring a cargo from the

Danube & was to go to Sulina for orders. The charterers were to pay demurrage for detention for more than six hours in waiting for orders, and for time saved in loading they were to have £15 a day despatch money. Clause 9 of the charterparty provided that "if the steamer be longer detained than the time stipulated above demurrage shall be paid . . . at the rate of £30 per running day." The charterers were nearly five days late in giving orders as to the port of loading, but they saved 7½ days in loading:—*Held*: clause 9 covered all references to time in the preceding clauses, & as the steamer had spent a shorter time on her visit to the Danube than she might have taken under the charterparty, nothing was payable by the charterers to the shipowners either as demurrage or as damages for detention.—*SOCIETA LIGURE DI ARMAMENTI v. JOINT DANUBE & BLACK SEA SHIPPING AGENCIES OF BRAILA* (1931), 47 T. L. R. 296; 75 Sol. Jo. 191.

**4001a. — Whether lien clause incorporated in bill of lading.**—*AKT. OCEAN V. HARRINGTON (B.) & SONS, LTD.*, No. 1780a, *ante*.

**4026a. — Insistence on special mode of discharge by consignee.**—Under several bills of lading, which incorporated all the terms of two charterparties in identical terms, pliffs. contracted to carry on board their vessel certain timber consigned to the respective defts. from a Norwegian port to the port of Garston. Under the charterparties the vessel was to "proceed to Garston or so near thereto as she may safely get"; & by clause 13, the cargo was to be discharged in the customary manner "on to the quay &/or into lighters &/or craft &/or wagons &/or on to bogies & thereon stowed &/or stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary & available at the time of discharge." Owing to congestion at Garston dock the L. M. & S. Ry. Co., the owners of the dock, informed pliffs.' agents that the co. were unable to accept any vessels for which storage accommodation was required for any material portion of their cargo, but that they could accept vessels where the whole cargo could be discharged into main line railway wagons & sent direct from ship to destination. When the ship arrived off Garston dock defts. refused to agree to this method of discharge & alleged that the customary method of discharge for cargo destined for Garston itself was into "domestic" wagons which took the timber to the storage ground for sorting &/or storing. Ultimately, to put an end to the deadlock, the railway co. arranged to take the timber to another storage ground at Widnes, ten miles away. Pliffs. claimed demurrage or alternatively damages for the detention of their vessel. The judge of the Liverpool Ct. of Passage found for defts. on the ground that defts.' insistence that the timber should be sorted & stored was not a breach of their contract. Pliffs. appealed:—*Held*: defts. had no right to claim that they were entitled to store the timber on the railway co.'s

ground at Garston; it appeared that the respective consignments of timber could be, & in fact were, delivered without sorting; & as main line wagons were available, defts. were liable in damages for their breach of contract in preventing the ship arriving in her discharging berth on the date when but for their insistence on having their timber stored the railway co. would have admitted the ship into dock.—*THE VARING*, [1931] P. 79; 100 L. J. P. 105; 145 L. T. 433; 18 Asp. M. L. C. 231; *sub nom.* *FORNYADE REDERIAKTIEBOLAGET COMMERCIAL v. BLAKE*, 36 Com. Cas. 278, C. A.

*Annotation*:—*Refd.* *Rederiaktiebolaget Macedonia v. Slaughter* (1935), 40 Com. Cas. 227.

**4046a.** —.]—A charterparty provided that the ship should be loaded at a certain rate, Sundays & holidays excepted, & that despatch money was to be paid by the owners to the charterers for all time saved in loading (including Sundays & holidays saved). Under a local law the work of loading was prohibited after 1 p.m. on Saturdays:—*Held*: notwithstanding the prohibition Saturdays were to be computed as full days in calculating the time for loading under the charterparty.—*HAIN S.S. CO., LTD. v. SOCIEDAD ANONIMA COMERCIAL DE EXPORTACION Y IMPORTACION (LOUIS DREYFUS & CIA), LDA., OF BUENOS AIRES* (1934), 151 L. T. 305; 50 T. L. R. 387; 78 Sol. Jo. 384.

**4046b.** —.]—*Z. STEAMSHIP CO., LTD. v. AMTORG NEW YORK* (1938), 54 T. L. R. 849; 82 Sol. Jo. 605.

**4048a.** Days saved including working holidays—Meaning of “working holiday.”—A steamer was chartered by her owners to the Joint Danube & Black Sea Shipping Agencies of Braila to go to the Danube to load a grain cargo. The charterparty provided (*inter alia*): “4. The cargo shall be loaded at the average rate of 400 units per running day (Sundays & non-working holidays excepted). . . . 26. For all time saved in loading the steamer to pay £15 per day despatch money or *pro rata* for any part of a day saved, including Sundays & holidays saved.”—*Held*: if the labourers working on the ship & the men who passed the grain from the warehouses to the ship worked on a holiday without any substantial addition to their ordinary wages, that day was a working holiday.—*PANAGOS LYRAS, S.S. OWNERS v. JOINT DANUBE & BLACK SEA SHIPPING AGENCIES OF BRAILA* (1931), 47 T. L. R. 403; 75 Sol. Jo. 373.

**4075.** *Add. Annotations*:—*As to* (2) *Refd.* *Tempus Shipping Co. v. Louis Dreyfus & Co.*, [1931] 1 K. B. 195; *The Inna*, [1938] P. 148.

**4113.** *Add. Annotation*:—*As to* (2) *Consd.* *Flatau, Dick & Co. v. Keeping* (1931), 36 Com. Cas. 243.

**4126a.** Validity of charterparty—Breach of duty by broker procuring charterparty—*Ratification of wrongful act.*—*AKT. OCEAN v. HARDING (B.) & SONS, LTD.*, No. 1780a, *ante*.

**4165.** *Add. Annotations*:—*As to* (5) & (6) *Consd.* *Louis Dreyfus & Co. v. Tempus Shipping Co.* (1931), 47 T. L. R. 542. *As to* (6) *Refd.* *Hain S.S. Co. v. Tate & Lyle, Ltd.*, [1936] 2 All E. R. 597.

**4173.** *Add. Annotation*:—*Refd.* *Tempus Shipping Co. v. Louis Dreyfus & Co.*, [1931] 1 K. B. 195.

**4177.** *Add. Annotation*:—*Refd.* *Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 249.

**4202a.** — *Claim based on Merchant Shipping Act, 1894 (c. 60), s. 502.*—*TEMPUS SHIPPING CO., LTD. v. DREYFUS (LOUIS) & CO., LTD.*, No. 3099a, *ante*.

**4208a.** Loss caused by pier—In order to save ship & cargo.—By Rule A. of the York-Antwerp Rules, 1924, “There is a general average act when, & only when, any extraordinary sacrifice or expenditure is intentionally & reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.” Rule 5 is in these terms: “*Voluntary Stranding*. When a ship is intentionally run on shore, & the circumstances are such that if that course were not adopted she would inevitably drive on shore or on rocks, no loss or damage caused to the ship, cargo & freight, or any of them, by such intentional running on shore shall be made good as general average.”

A steam vessel, laden with a cargo of coal, anchored three or four lengths from a pier. During a gale she began to drag, her port cable parted, & she dragged closer to the pier & was unable to get head to sea & steam away. The master feared that if he let the vessel drag ashore she would lose her propeller & possibly break her back; & she was so close to the pier that if she attempted to turn head to sea there was danger of striking the pier with her stern & damaging the propeller. The master accordingly decided to put the ship broadside against the pier, using it as a lever to get the ship's head into such a position that he could steam out to sea. While carrying out this manoeuvre the vessel was grinding against the pier & also bumping upon the ground, & damage to the extent of over £14,000 was occasioned to the pier & the ship. The shipowners claimed that this sacrifice was incurred in the course of a general average act & that they were entitled to a contribution from the insurers of the cargo:—*Held*: although the vessel bumped on the ground there was not a voluntary stranding within the meaning of rule 5; there was an extraordinary sacrifice intentionally made; the action was reasonably taken; & there was a general average act in respect of which *pltf's.* were entitled to contribution.—*THE SEAPOOL*, [1934] P. 53; 103 L. J. P. 49; 151 L. T. 38; 50 T. L. R. 142; 18 Asp. M. L. C. 477.

**4218.** *Add. Annotations*:—*As to* (1) *Refd.* *Svenssons (C. Wilh.) Travaruaktiebolag v. Cliffe S.S. Co.* (1931), 37 Com. Cas. 83. *As to* (3) *Refd.* *Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 249. *Generally, Refd.* *Louis Dreyfus & Co. v. Tempus Shipping Co.*, [1931] A. C. 726.

**4221.** *Add. Annotations*:—*Refd.* *Symington v. Union Insee. Soc. of Canton* (1928), 97 L. J. K. B. 646; *Louis Dreyfus & Co. v. Tempus Shipping Co.* (1931), 47 T. L. R. 542.

**4225.** *Add. Annotations*:—*As to* (1) *Consd.* *Fiumana Società Di Navigazione v. Bunge & Co.*, [1930] 2 K. B. 47. *As to* (2) *Consd.* *Louis Dreyfus & Co. v. Tempus Shipping Co.* (1931), 47 T. L. R. 542.

**4240.** *Add. Annotation*:—*Refd.* *Holloway v. Donaldson Line, Ltd.* (1935), 41 Com. Cas. 47.

4247. *Add. Annotation*:—**Folld.** Wetherall & Co. v. London Assurance (1931), 144 L. T. 645.
- 4247a. —.]—Detention of a vessel after the completion of the voyage while repairs necessitated by a general average act are being effected is not in itself admissible in general average; & consequently, under a policy of marine insurance indemnifying a shipowner against general average, the insurer is not liable to the insured in respect of such detention.—**WETHERALL (J. H.) & Co., LTD. v. LONDON ASSURANCE**, [1931] 2 K. B. 448; 100 L. J. K. B. 609; 144 L. T. 645; 36 Com. Cas. 181; 18 Asp. M. L. C. 205.
- 4248a. —.]—Resps. insured claimant's steamer by a policy providing that general average was to be adjusted according to the York-Antwerp Rules of 1924. The ship was chartered to go to Bordeaux to load for Cardiff, the charterparty also providing that average, if any, should be settled according to those rules. During loading at Bordeaux the foremast broke, & damage was done to the ship. For the purpose of repair she was moved to another dock within the port, & the shipowners incurred expenses as follows: wages & provisions of crew, cost of handling & discharging cargo for the purpose of repairs, cost of coal consumed in going in & out & keeping steam up, expense of towing in & out & mooring & port expenses, & cost of coal consumed in shifting the vessel. While staying at Bordeaux the ship was in no danger. On completion of repairs & loading she left for Cardiff, & while she was at sea she fouled some wreckage without any negligence of those on board her, & though there was no immediate danger she was made unfit to encounter the ordinary perils of the sea, & the master put into Cherbourg, as a port of refuge, & had repairs effected. The expenses at Cherbourg were similar to those at Bordeaux:—**Held**: (1) the cost of repairs in each case was recoverable as particular average; (2) the other expenses at Bordeaux could not be claimed as general average, since no danger was in operation there; (3) the other expenses at Cherbourg could be claimed as general average since, though there was no immediate danger, the vessel was not fit, without repair, to encounter the perils of the sea.—**VLASSOPOULOS v. BRITISH & FOREIGN MARINE INSURANCE CO., LTD.**, [1929] 1 K. B. 187; 98 L. J. K. B. 53; 140 L. T. 44; 44 T. L. R. 725; 72 Sol. Jo. 612; 34 Com. Cas. 65; 17 Asp. M. L. C. 544.
- 4253a. —.]—**VLASSOPOULOS v. BRITISH & FOREIGN MARINE INSURANCE CO., LTD.**, No. 4248a, *ante*.
4260. *Add. Annotation*:—**Generally**, **Refd.** Vlassopoulos v. British & Foreign Marine Insce. Co., [1929] 1 K. B. 187.
- 4260a. —.]—**VLASSOPOULOS v. BRITISH & FOREIGN MARINE INSURANCE CO., LTD.**, No. 4248a, *ante*.
4280. *Add. Annotation*:—**Consd.** Louis Dreyfus & Co. v. Tempus Shipping Co. (1931), 47 T. L. R. 542.
4281. *Add. Annotation*:—**As to (2)** **Refd.** Tate & Lyle, Ltd. v. Hain S.S. Co. (1934), 151 L. T. 249.
- 4283a. **Cost of shifting ship.**—**VLASSOPOULOS v. BRITISH & FOREIGN MARINE INSURANCE CO., LTD.**, No. 4248a, *ante*.
4294. *Add. Annotation*:—**Refd.** Louis Dreyfus & Co. v. Tempus Shipping Co. (1931), 47 T. L. R. 542.
- 4295a. **Effect of deviation.**—A charterparty provided that plths.' steamship should load at Poti on the eastern shore of the Black Sea a cargo of manganese ore & being so loaded should with all convenient speed proceed to a port in the United States & there deliver the same; that the steamship had liberty to call at any port or ports in any order or places to bunker, or to deviate for the purpose of saving life or property; that the owners were not to be called upon to take bunkers from the charterers; & that general average should be adjusted in accordance with English law & custom. The bill of lading incorporated the provisions of the charterparty. The steamship, having loaded the cargo at Poti, instead of proceeding direct to the outlet from the Black Sea by the Bosphorus, proceeded first for Constantza on the western shore of the Black Sea for oil bunkers, oil being cheaper there than at any port on the direct route of the steamship. When off Constantza the steamship grounded on a sandbank, & plths. incurred expenses in refloating & repairing her which they alleged constituted a general average expenditure. By an average guarantee defts., in consideration of the delivery of the cargo to the consignees, guaranteed to plths. the payment of any contributions to general average in respect of the cargo. The consignees of the cargo having declined to pay general average contributions towards the said expenses on the ground that the steamship in calling at Constantza had deviated from the contract voyage, plths. brought an action against defts. as guarantors for the amount of these contributions. It appeared by evidence that during the period of three and a quarter years preceding the date of the charterparty 25 per cent. of all oil-burning steamships sailing from eastern ports within to ports without the Black Sea had called at Constantza for oil bunkers:—**Held**: by the express terms of the charterparty, which were clear & unambiguous, the voyage was a direct voyage by one route only from Poti through the Bosphorus; the evidence did not suffice to prove a general commercial custom permitting a steamship sailing under such a charter to proceed on an alternative route via Constantza, & it was inadmissible merely for the purpose of varying the written contract; the steamship in proceeding to Constantza had made an unjustifiable deviation from the contract voyage; the consignees of the cargo & defts. as their guarantors were not, therefore, under any liability to make general average contributions towards the said expenses; & plths. could not recover in the action.—**REARDON SMITH LINE, LTD. v. BLACK SEA & BALTIC GENERAL INSURANCE CO., LTD., THE INDIAN CITY**, [1938] 2 K. B. 730; [1938] 2 All E. R. 706; 54 T. L. R. 760; 82 Sol. Jo. 393; 43 Com. Cas. 296, C. A.
4303. *Add. Annotations*:—**Refd.** Green Star Shipping Co. v. London Assurance, [1933] 1 K. B.

378; *Tate & Lyle, Ltd. v. Hain S.S. Co.* (1931), 151 L. T. 249.

4304. *Add. Annotation:—Reid. Tate & Lyle, Ltd. v. Hain S.S. Co.* (1934), 151 L. T. 249.

4304a. ——— **Signing average bond—Application of York-Antwerp Rules as to amount payable.**—In June, 1931, *pltf.* as owner chartered a steamship, the *S.*, to an Australian co. to bring a cargo of wheat to one of certain specified ports in Europe. The *S.*, in the course of the voyage, met with bad weather & suffered damage which necessitated her putting into Durban as a port of refuge, & there she incurred general average expenditure & other charges. After repairs had been executed the voyage was resumed, & the *S.* finally reached Hull, which was one of the optional ports of discharge, on Oct. 21, 1931. Defts. had purchased part of the cargo on July 22, 1931; the purchase was made by an ordinary c.i.f. contract in which nothing was said about general average; defts. did not see either the charterparty or the bill of lading & had no notice of any terms relating to average contained in them. When defts. claimed delivery of their wheat the ship would not part with it until defts. signed an average bond by which they agreed to pay their proper proportion of general average & other charges "to be ascertained & adjusted in the usual manner." In fact, by the charterparty & the bill of lading the shippers had agreed that general average if any should be settled according to the York-Antwerp Rules, 1924, & *pltf.* contended that defts. were bound by that agreement. Defts., while admitting that they were bound to pay something for general average, contended that by the bond which they had signed they were only liable for the sum which would be payable at common law & not for the larger sum which would be payable under the York-Antwerp Rules, 1924. *Pltf.* brought this action to recover the latter sum:—*Held*: as the delivery order under which defts. obtained their wheat was expressed to be subject to the conditions & exceptions in the bill of lading, & defts. in the average bond had undertaken to pay general average or other charges which might be chargeable on their consignment or to which the shippers or owners of their consignment might be liable to contribute, upon a true construction of the average bond defts. had undertaken to pay general average settled according to the York-Antwerp Rules, 1924.—*THOMSON v. MICKS LAMBERT & Co.* (1933), 39 Com. Cas. 40.

4310. *Add. Annotation:—As to (2) Consd. The Scapool*, [1934] P. 53.

4313. *Add. Annotations:—As to (2) Follid. Fiumana Società Di Navigazione v. Bunge & Co.*, [1930] 2 K. B. 47. *Consd. Louis Dreyfus & Co. v. Tempus Shipping Co.* (1931), 47 T. L. R. 542.

4313a. ——— **—.]—A steamship belonging to *ptf.* was chartered to carry a cargo of grain from various ports in the River Plate & to deliver the same at Antwerp or Rotterdam. The charterparty provided that average, if any, was to be payable according to York-Antwerp Rules, 1924. It also contained an exceptions clause which provided that the steamer should not be**

**liable for loss or damage occasioned "by fire from any cause or wheresoever occurring . . . or any latent defects in hull, machinery or appurtenances . . . arising in the navigation of the steamer, even when occasioned by the negligence, default or error of judgment of the . . . master, mariners or other servants of the shipowners . . . (not resulting, however, in any case from want of due diligence by the owners of the steamer, or by the ship's husband or manager)." The steamer bunkered at Rotterdam, where she took on board enough bunker coal to take her to the Plate & bring her back to Europe. She carried a cargo of coal from Cardiff to a port in the Plate & was kept waiting a fortnight before she could get into her berth to discharge that cargo. Shortly after she had arrived at her first loading port in the Plate & had commenced to load a cargo of maize a fire broke out by spontaneous combustion in her bunker coal, which had been on the ship for two & a half months since June 30, & had been carried through the tropics, & a portion of the bunker coal was shifted on to the deck. The ship then proceeded to another port in the Plate to complete loading her cargo of maize. On the way another fire was discovered in the bunker coal, which was extinguished after a fortnight & after discharging all the bunker coal on to the deck & subsequently replacing it in the bunkers. The owners of the steamer claimed to recover from defts., who were the indorsees of the bills of lading in respect of the cargo of maize, a contribution in general average for the expense so incurred:—*Held*: (1) the unexplained occurrence of the fires afforded a reasonable presumption that they were due to a defect or unfitness of the bunker coal at the time of the loading of the cargo which amounted to a breach of warranty, & as the ship was unseaworthy *ptf.*s. could not recover a general average contribution from the cargo owners for sacrifice due to their own fault & breach of contract; (2) neither the exception in the charterparty of latent defects nor Rule D of the York-Antwerp Rules, 1924, which provided that a claim in general average was not to be barred because it arose by the default of the carrier, enabled *ptf.*s. to maintain their claim for a contribution in general average.—*FIUMANA SOCIETÀ DI NAVIGAZIONE v. BUNGE & Co., LTD.*, [1930] 2 K. B. 47; 99 L. J. K. B. 626; 143 L. T. 287; 35 Com. Cas. 193; 18 Asp. M. L. C. 147.**

4313c. ——— **Effect of exception of latent defects.]—FIUMANA SOCIETÀ DI NAVIGAZIONE v. BUNGE & Co., LTD.**, No. 4313a, *ante*.

4313d. **Improper abandonment.]—*Pltf.*s. were the owners of a steamer which was chartered to bring a grain cargo from the Black Sea to Falmouth. Defts. became indorsees of the bills of lading & owners of the cargo. The steamer met with very severe weather in the Bay of Biscay & suffered damage which rendered her unmanageable. In reply to an S.O.S. call another steamer came up & took off the crew, but owing to the state of the weather it was impossible to *salvo* *ptf.*s.' steamer & she was left derelict in the Bay. Subsequently, the weather having moderated, she was picked up &**

salved. In a salvage action an award was made under which defts. were obliged to pay £8,303 to the salvors, their contribution as owners of the cargo. Pltfs. had incurred general average expenses & claimed from defts. £1,288 odd as cargo owners' contribution to such expenses. Defts. did not dispute that they must make some contribution to general average expenses, but they counterclaimed a sum sufficient to extinguish pltfs.' claim for £1,288, on the ground that the steamer had been unnecessarily & improperly abandoned, & that if the crew had stayed on board & done their duty the eventual salvage award would have been very much smaller:—*Held*: (1) on the facts, the state of the weather & the damaged condition of the steamer justified the abandonment, so that the contention that the steamer had been improperly abandoned failed; (2) *obiter*, even if the abandonment had been improper pltfs. would have been protected, against any claim arising out of it, by an exceptions clause in the charterparty which excluded liability of the shipowners for loss resulting from the act, neglect, or default of their servants in the navigation or management of the ship.—*BULGARIS v. BUNGE & Co., LTD.* (1933), 49 T. L. R. 237; 38 Com. Cas. 103.

4320. *Add. Annotation*:—*Refd.* Tate & Lyle, Ltd. v. Hain S.S. Co. (1934), 151 L. T. 249.

4326. *Add. Annotation*:—*As to* (2) *Refd.* Tate & Lyle, Ltd. v. Hain S.S. Co. (1934), 151 L. T. 249.

4347. *Add. Annotation*:—*Refd.* Sagar v. Ridehalgh & Son, Ltd., [1931] 1 Ch. 310.

4363. *Add. Annotations*:—*Refd.* Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 458; Dampelskab Svendborg v. L. M. & S. Ry. Co. (1929), 141 L. T. 521.

4372. *Add. Annotation*:—*Distd.* Akt. Ocean v. Harding, [1928] 2 K. B. 371.

4388. *Add. Annotations*:—*Refd.* De Beêche v. South American Stores, Ltd. & Chilean Stores Ltd., [1935] A. C. 148; Reardon Smith Line, Ltd. v. Black Sea & Baltic General Insurance Co., [1938] 2 All E. R. 706.

4392. *Add. Annotation*:—*Refd.* Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 458.

4394. *Add. Annotations*:—*Distd.* Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 725. *Consd.* Dampelskab Svendborg v. L. M. & S. Ry. Co. (1929), 141 L. T. 521. *Refd.* Finlay, James & Co., Ltd. v. N. V. Kwik Hoo Tong, [1929] 1 K. B. 400; Dalglish S.S. Co. v. Williamson & Son, Ltd. (1935), 40 Com. Cas. 312.

4395a. ————.]—*Resps.*, pltfs. in the action, as owners, chartered a steamer, the *R.*, to charterers to bring a cargo from Oporto to Heysham. The charterparty provided (*inter alia*) that the cargo should be taken from alongside at the merchant's risk & expense, & that it should be delivered at Heysham in the manner customary at Heysham. The cargo was shipped under a bill of lading which incorporated the terms of the charterparty, & applts. became indorsees

of the bill of lading. The port of Heysham belongs to the L.M.S. Ry. Co., & all the operations of discharging cargoes at the port are performed by the ry. co. The only practicable method of discharge is from the ship direct into wagons on railway lines at some distance from the edge of the quay. Except on one occasion the whole cost of discharging cargoes at Heysham had hitherto been borne by shipowners without objection, but in this case *resps.* contended that the railway wagons into which the cargo was placed were not "alongside" within the meaning of the charterparty, & that therefore applts. as receivers should repay to them a proportionate part of the sum which they paid to the railway co. to cover the whole cost. of discharge. Applts. refused to pay anything towards the cost of discharge, contending that by the custom of the port of Heysham the whole of the cost was payable by the shipowners. *Resps.* brought an action in the county ct. at Preston to recover the sum claimed, & obtained judgment; & applts. now appealed. The ct. dismissed the appeal:—*Held*: as the charterparty had expressly provided that the cargo should be taken from alongside at the merchant's expense, & the wagons on the railway lines into which the cargo was placed were too far away from the ship to come within the term "alongside," applts. must pay a proportionate part of the cost of discharge.—*DALGLEISH STEAM SHIPPING CO., LTD. v. WILLIAMSON & SON, LTD.* (1935), 79 Sol. Jo. 453; 40 Com. Cas. 312, C. A.

4423. *Add. Annotation*:—*Refd.* Moor Line, Ltd. v. Manganexport G.m.b.H., [1936] 2 All E. R. 101.

4440. *Add. Annotation*:—*Refd.* Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 458.

4449. *Add. Annotation*:—*Consd.* Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 725.

4452. *Add. Annotation*:—*Refd.* Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 458.

4461a. *Discharge of bulk & bag cargoes—Construction of Schedule of Stevedores' Association.*]—*Defts.*' consignment of wheat was carried in bags in pltfs.' steamship from Australia to Avonmouth, & on arriving at its destination was by arrangement between the parties bulked in the ship's hold & thence discharged by means of defts.' bucket elevator. By the current Sched. of the Stevedores' Assocn. of Bristol, Avonmouth, & Portishead different rates were fixed for the discharging of bulk cargoes & bag cargoes:—*Held*: there was no provision in the sched. for a bag cargo which became a bulk cargo by bag starting, & on the proper interpretation of the sched. the cargo in question was a bag cargo & defts. were entitled to charge the shipowners on the basis of the stevedoring rate applicable thereto.—*THE ALDINGTON COURT*, [1932] P. 21; 101 L. J. P. 9; 146 L. T. 256; 48 T. L. R. 35; 18 Asp. M. L. C. 261.

4470. *Add. Citations*:—[1929] 1 K. B. 150; 97 L. J. K. B. 725; 139 L. T. 575; 72 Sol. Jo. 435; 34 Com. Cas. 47; 17 Asp. M. L. C. 505.

## PART VII. SECT. 15, SUB-SECT. 1.

4389 I. *Revsd.*, 33 S. G. R. 1.4357 I. *Revsd.*, 33 S. G. R. 1.



- Add. Annotation* : — **Refd.** Dampelskab Svendborg v. L. M. & S. Ry. Co (1929), 141 L. T. 521.
4472. *Add. Annotations* :—**Consd.** Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 725. **Refd.** Dampelskab Svendborg v. L. M. & S. Ry. Co. (1929), 141 L. T. 521.
4475. *Add. Annotations* :—*As to* (1) **Consd.** Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 458; Dalglish Steam Shipping Co. v. Williamson & Son, Ltd. (1935), 40 Com. Cas. 312.
4485. *Add. Annotations* :—**Distd.** Smith, Hogg v. Bamberger (1928), 97 L. J. K. B. 725. **Consd.** Dalglish Steam Shipping Co. v. Williamson & Son, Ltd. (1935), 40 Com. Cas. 312. **Refd.** Dampelskab Svendborg v. L. M. & S. Ry. Co. (1929), 141 L. T. 521.
4499. *Add. Annotation* :—**Consd.** Elof Hansson Agency, Ltd. v. Victoria Motor Haulage Co. (1938), 54 T. L. R. 666.
- 4499a. ————.] — **BREWSTER & Co.** (WOKING), LTD. v. BECKETT (1929), 34 Lloyd L. R. 337.
- 4499b. ———— **Exemption clause in contract between lighterer & tug.**]—THE KITE, No. 5124a, *post*.
- 4502a. ————.]—It is put for plffs. that defts. are liable for a breach of duty on defts.' part through the lighterman having given a receipt for goods as marked, when, in fact, they were not marked. . . . The evidence before me is that the course of business is for the stevedore to tally the marks, & for the lighterman, unless he is specially instructed, to accept the tallying of the stevedore.—VAVASSEUR & Co., LTD. v. PORT OF LONDON AUTHORITY (1920), 4 Ll. L. Rep. 289; *no appeal*, 6 Ll. L. Rep. 192, C. A.

## Part VIII.—Freight.

4521. *Add. Annotation* :—**Apprvd.** Glen Line, Ltd. v. A.-G. (1930), 46 T. L. R. 451.
4524. *Add. Annotation* :—**Refd.** Kleinwort, Sons & Co. v. Associated Automatic Machine Corp., Ltd. (1934), 151 L. T. 1.
- 4539a. ————.]—Plffs., shipowners & brokers of West Hartlepool, acted as ship's agents for the steamship Z., of Riga, & before making any necessary disbursements on behalf of or incurring any liabilities in respect of the vessel obtained from the master the following document: "Please pay the freight for my vessel, the Z., & all demurrage which may be payable under the charter, to my agents, Messrs. E. A. Caspar, Edgar & Co., Ltd., & oblige." The persons described in the document as the master's agents were the plffs. In an action by plffs. for necessities the evidence showed that this document came into being with the approval of the managing owner of the Z. & after he had agreed to assign to plffs. all freight & demurrage:—**Held**: the document operated as an assignment of the freight & demurrage & plffs. were entitled to judgment.—THE ZIGURDS (1931), 47 T. L. R. 525.
- 4569a. — - **Excess freight required by shipowner—Not recoverable from seller.**]—MODIANO (ISAAC) BROS. & SON v. BAILEY (F. D.) & SONS, LTD. (1933), 50 T. L. R. 43; 77 Sol. Jo. 799.
4604. *Add. Annotation* :—**Refd.** Glen Line, Ltd. v. A.-G. (1930), 36 Com. Cas. 1.
4632. *Add. Annotation* :—**Refd.** Strathlorne S.S. Co. v. Andrew Weir & Co. (1934), 39 Com. Cas. 318.
4650. *Add. Annotation* :—*As to* (1) **Apld.** A.-G. v. Glen Line & Liverpool & London War Risks Insce. Asscn. (1929), 34 Com. Cas. 309.
4700. *Add. Annotation* :—**Refd.** Smith v. Zigurds S.S. Owners & E. A. Casper, Edgar & Co., [1934] A. C. 209.
4700. After this case add :—  
———.]—*See, also*, CHOSSES, Nos. 204a-204c.
- 4714a. **Stevedore—As against equitable mortgagee of freight.**]—A stevedore who unloads cargo & so by completing the adventure contributes to the bringing of the freight fund into existence is not entitled upon his claim for stevedoring charges to priority over a mtgee. who has an equitable assignment of the freight.—THE ZIGURDS (No. 4), [1932] P. 113; 148 L. T. 72; 48 T. L. R. 563; 18 Asp. M. L. C. 324.
4761. *Add. Annotation* :—**Refd.** A.-G. v. Glen Line & Liverpool & London War Risks Insce. Asscn. (1929), 34 Com. Cas. 309.
- 4764a. **Right to dead freight—Cargo coated with ice—Reduction in carrying capacity.**]—AKTIES STEAM v. ARCOS, LTD., No. 1879d, *ante*.
4837. *Add. Annotations* :—*Generally*, **Refd.** Shell-Mex v. Elton Cop Dyeing Co. (1928), 34 Com. Cas. 39; Maine & New Brunswick Electrical Power Co. v. Hart, [1929] A. C. 631.
4846. *Add. Annotations* :—**Refd.** The Adriatic (1931), 47 T. L. R. 638; The Njegos, [1936] P. 90.
4862. *Add. Annotations* :—**Refd.** Canada Atlantic Grain Export Co. (Inc.) v. Eilers (1929), 35 Com. Cas. 90; Cammell, Laird & Co. v. Manganese Bronze & Brass Co., [1934] A. C. 402.
4882. *Add. Annotation* :—**Refd.** Akt. Ocean v. Harding, [1928] 2 K. B. 371.
- 4886a. **Deadweight cargo capacity—Allowance for bunker coal.**]—A charterparty contained the following clause: "Charterers have the option of loading full & complete cargo . . . on deadweight basis, in which case charterers shall pay freight at the rate of as above per ton of 2,240 lb., calculated on steamer's deadweight cargo capacity, as per builder's plan & displacement scale . . . after allow-

ance has been made for loading in fresh water, for bunker coals for the present voyage & also for any weight on board the steamer not reckoned in builder's plan." There was liberty to call at intermediate ports for any purpose:—*Held*: the umpire was right in finding that the allowance for bunker coals should be no more than for the longest stage on the voyage.—*BALKANS & NEAR EAST SHIPPING AGENCY v. UNITED SHIPPING AGENCIES, LTD.* (1935), 53 Ll. L. R. 180.

**4896.** *Add. Annotation*:—*Consd.* Dawson Line, Ltd. v. Aktiengesellschaft Adler für Chemische Industrie of Berlin, [1932] 1 K. B. 433.

**4931.** *Add. Annotation*:—*Reffd.* Perry v. Equitable Life Assce. Society of U.S.A. (1929), 45 T. L. R. 468.

**4938a.** *Civil war—Cargo taken to alternative safe port—Advance freight demanded.*—*Pltfs.* chartered a ship belonging to *defts.* for the carriage of certain goods to one of six ports in Spain named in the charterparty which provided that freight should be prepaid on presentation of bills of lading for signature on completion of loading. The Chamber of Shipping War Clauses attached to the charterparty provided by clause 1 that the master of the ship should not be bound to sign bills of lading for any blockaded port, or for any port which he or the shipowners considered dangerous. By clause 2 (B) if, owing to any war, civil war, etc., entry into any port named in the charterparty should be considered dangerous by the master or owners, the cargo might be discharged at a safe port in the vicinity as ordered by the charterers. Failing such an alternative order, the owners were at liberty to discharge the goods at a safe port. A state of civil war had existed for some time & was still existing in Spain at the date of the charterparty, six days after which date radio stations controlled by the insurgents announced an intended blockade by their forces of that part of the coast of Spain in which the named ports were. The owners' insurance assocn. thereupon passed a resolution, the effect of which was that the owners would, if the ship proceeded to any of the named ports, have to pay a large additional sum by way of cover against war risks. The owners then called on the charterers to name a danger-free port for the discharge of the cargo. The

blockade in fact never materialised, & was not recognised by the British Govt. The charterers having refused to name an alternative port, the owners, before the ship was fully loaded or bills of lading were presented for signature, threatened, if an alternative port were not named, to take the ship on the next tide to Gibraltar. The charterers accordingly named another port at which the goods were in due course discharged, the charterers then having them taken to the desired port at their own expense. In accordance with the charterparty the charterers paid the owners freight in advance, although under protest, at the high rate applicable to carriage to one of the named ports. The charterers having claimed from the owners the difference between the freight at that rate and the cost of freight at the reasonable or market rate, or, alternatively, damages for breach of contract:—*Held*: (1) the charterers having, under protest, named an alternative port & paid the freight in advance, there was duress of goods by the shipowners & it was immaterial that the charterers had loaded the goods voluntarily. It was sufficient that the shipowners had exercised dominion over goods which the charterers had loaded voluntarily, a wrongful seizure of the goods not being necessary to constitute such duress; (2) the term "blockaded" in the war risks clauses attached to the charterparty meant blockaded in the strict legal sense, & Barcelona, one of the six named ports, was never, at the material time, a blockaded port; (3) clause 1 of the war risks clauses was only applicable at the time when bills of lading were presented for signature, the shipowners having no right to exercise their discretion whether or not to proceed to a charterparty port before that time; (4) that the terms of clause 2 (B) were only apt to cover the case where a ship had been fully loaded & the bills of lading signed; (5) the shipowners were guilty of a breach of contract & the charterers were accordingly entitled to recover.—*SPANISH GOVT. v. NORTH OF ENGLAND S.S. CO., LTD.* (1938), 54 T. L. R. 852.

**4945.** *Add. Annotation*:—*Reffd.* A.-G. v. Glen Line & Liverpool & London War Risks Insce. Asscn. (1929), 34 Com. Cas. 309.

## Part IX.—Carriage of Passengers.

**4987.** *Add. Annotation*:—*Consd.* Oliver v. Birmingham & Midland Motor Omnibus Co. (1932), 48 T. L. R. 540.

### PART IX. SECT. 2, SUB-SECT. 1.

*o i.* ———.—At the trial of the owner of a motor boat for a contravention of 1894 Act, s. 271 (1), the evidence adduced was that on a certain occasion the boat carried a party of more than twelve persons, gratuitously,

on a pleasure excursion on the Clyde, without a Board of Trade certificate:—*Held*: that the expression "passenger steamer" did not necessarily include every ship which on any occasion carried persons other than the owner & his family, & the master & crew; &

accordingly, that it was not established that the motor boat was a passenger steamer, & that the sheriff substitute who heard the case was entitled to find the accused not guilty of the charge.—*YOUNG v. DOCHERTY, YOUNG v. KYLE*, [1929] S. C. (J.) 57.—*SCOT.*

## Part XI.—Contract of Towage.

5055. *Add. Annotation*:—**Refd.** *Aslan v. Imperial Airways, Ltd.* (1933), 149 L. T. 276.

5056. *Add. Annotation*:—**Generally, Refd.** *The Kafiristan*, [1937] 3 All E. R. 747.

5057. *Add. Annotation*:—**Consd.** *The Kafiristan*, [1937] 3 All E. R. 747.

5124a. — **Onus of proof.**—Pltf., cargo owners, contracted with a firm of wharfingers for the collection & transport of pltf.'s goods from one wharf on the River Thames to another. The wharfingers, who to pltf.'s knowledge owned neither tugs nor lighters, contracted with a firm of lighterers for the transport, & they in turn contracted with the defts. for a tug. Pltf.'s contract with the wharfingers was on the terms that the latter co. should not be liable for any neglect of its servants or others for whom it might be responsible, & that "persons supplying tugs or barges to the co. to enable it to fulfil its contracts shall incur no greater liability to the co.'s customers than that of the co. hereunder." The wharfingers' contract with the lighterers was on the terms of the London Lighterage Clause. It contained an exception in respect of damage arising from negligence, & further stated that the lighterage rates were quoted on the condition that the person with whom the contract was made was either the owner or the authorised agent of the owner of the goods intended to be carried. The lighterers' contract with the tug owners was on the usual towage terms containing a similar exemption from liability for negligence & also an indemnity clause. Pltf.'s goods, while on board one of the lighterers' barges, which with others was in tow of the tug, were damaged through the barge colliding with one of the abutments of Cannon Street Railway Bridge. Pltf. brought an action against the tug owners, framing it entirely in tort. There being a *prima facie* case of negligence against the tug, pltf. called no evidence on this point, & defts. called one witness only, the master in charge of the tug, who did not see the actual contact but heard the blow & saw the barge "flared out," owing, in his opinion, to the breast rope not having been properly made fast by the lighterers' servants:—**Held**: (1) there was no greater probability that the accident happened through negligence on the part of the tug owners' servants than on the part of the lighterers' servants, & following Lord DUNEDIN'S dictum in *Ballard v. North British Ry. Co.* (1923), S. C. (H. L.) 43, 54, that "if the defenders can show a way in which the accident may have occurred without negligence . . . the pursuer is left as he began, namely, that he has to show negligence,"

pltf. failed on the issue of fact; (2) assuming that a case of negligence was made out, there was a limited authorisation in each step of the negotiations that the contractor could reserve that the people with whom he in turn contracted should have the like exemptions from liability for negligence as the first contractor obtained, & pltf. could not rid themselves of the exempting provisions by framing their action in tort.—**THE KITE**, [1933] P. 154; 102 L. J. P. 101; 149 L. T. 498; 49 T. L. R. 525; 18 Asp. M. L. C. 413.

*Annotations*:—**Consd.** *The Mulbera*, [1937] P. 82; *The Stranna*, [1937] P. 130. **Refd.** *Elof Hansson Agency, Ltd. v. Victoria Motor Haulage Co.* (1938), 54 T. L. R. 666.

5126. *Add. Annotations*:—**Consd.** *Danneberg v. White Sea Timber Trust, Ltd.* (1935), 154 L. T. 25. **Refd.** *Calico Printers' Assn., Ltd. v. Barclays Bank* (1930), 145 L. T. 51; *A/S Rendal v. Arcos, Ltd.*, [1937] 3 All E. R. 577.

5130. *Add. Citations*:—44 T. L. R. 140; 17 Asp. M. L. C. 344.

5133a. "**Whilst towing.**"—Under a contract of towage a tug was engaged to assist a ship from a wharf to buoys further down the river. The precise time at which the towage was to begin was not defined, but it was intimated that the tug should be in attendance about 11 a.m. About 10.55 a.m. the tug arrived; but she was travelling too fast, failed to reverse her engines in time, & struck the ship. At the time of the collision the ship had not finished discharging; those on board her were not ready to give orders to pick up towing ropes; & those on the tug were not expecting such orders & were only concerned in trying to avoid the collision. The tug owners contended that the collision happened "whilst towing," within the meaning of that phrase in the conditions of the contract of towage (the U.K. Standard Towage Conditions) under which it was admitted that the tug would be exempt from liability. In clause I. of the conditions the meaning of the phrase "whilst towing" is stated as follows: "For the purpose of these conditions the phrase 'whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow rope has been passed to or by the tug, whichever is the sooner. . . ."—**Held**: the Towage Conditions had not begun to apply; it would be putting an unreasonable construction on the words to hold that the collision occurred "whilst towing" merely because the tug was within hailing distance & therefore physically "in a position to receive orders direct from the hirer's vessel to pick up ropes"; even if regarded

### PART XI. SECT. 3, SUB-SECT. 1.— A (a).

q. i. — — — — —. —A tug towing a steamer from her winter mooring stern first is liable for damage to the ship's stern & steering gear caused by her striking a submerged pile.—**CANADA STEAMSHIP LINES, LTD. v.**

**TUG "CHAMPLAIN,"** [1938] 1 D. L. R. 197.—**CAN.**

ab. *Tow sinking in heavy sea.*—A tug is not liable, in the absence of negligence, in respect of a dredger sinking in a heavy sea while being towed.—**CANADA DREDGING CO. v. RUSSELL**, [1936] 3 D. L. R. 44.—**CAN.**

sd. *Tug assisting freighter to leave*

*dock—Acting under directions of freighter.*—A tug hired to assist a freighter in moving from her dock stern first, & operating under the direction of the freighter, is not responsible for the latter's grounding.—**CANADA STEAMSHIP LINES, LTD. v. MONTREAL TRUST CO.**, [1938] 1 D. L. R. 325.—**CAN.**

solely from the tug owners' point of view, the tug must at least be in a position to receive & comply with the orders; but the conditions ought to be read with reference to both parties, & until the reasonable moment had come at which orders might be expected to be given from the ship the tug could not be said to be "in a position" to receive them.—*THE URANIENBORG*, [1936] P. 21; 105 L. J. P. 10; 154 L. T. 664; 52 T. L. R. 114; 18 Asp. M. L. C. 591.

**5140a. — When towage commences—More than one tug.**—The *B.*, a tug belonging to plffs., the Port of London Authority, came into collision with defts.' steamship *C. C.* in Tilbury Dock. The *B.* & another tug, the *S.*, which also belonged to plffs., were under contract to tow the *C. C.* from lock to berth. The *S.* was made fast ahead of the *C. C.* & was towing her, & the *B.* was proceeding to the *C. C.*, which had passed through the lock into the dock when the *B.* was struck by the revolving propeller of the *C. C.* The collision was entirely due to the improper way in which the *B.* was handled through those on board not realising that the *C. C.* had twin screws. The dockmaster had given the appropriate signal for the *C. C.* to come ahead on her main engines, & it was not disputed by plffs. that it was the universal practice of all ships navigating through the dock to use their main engines & that no complaint about such use had ever been made by plffs. They contended, however, that defts. had committed a breach of by-law 19 of the Port of London Dock By-laws which provides that "no person shall work, or cause to be worked, the propelling engines of any ship in the dock for any purpose except with the previous consent of the dock-

master, & at such time & place & in such manner as he shall approve. Penalty £5." "Such consent is only to be given (if at all) on the terms that the person on whose behalf the application for the same is made will be responsible for all damage caused by working such engines & will indemnify & save harmless the Authority & its officers against all claims in respect of such damage." Plffs. further contended that by clause 4 of the towage contract defts. agreed to pay for any damage to any of plffs.' property, including the tug or tugs engaged in the towage, which might arise from collision even if caused or contributed to by the negligence of any servants of plffs. Defts. contended that clause 4 did not apply inasmuch as under clause 1 the towage was "deemed to commence when the tow rope had been passed to or by the tug." Plffs.' reply was that the towage was to be done by two tugs & that it commenced when one of the tugs, namely the *S.*, had started towing:—*Held*: by-law 19 did not apply at the time in question, but, even if it did, defts. did not commit a breach of it because the consent of the dock master to use the engines had been given; the towage contract could be fairly interpreted as meaning that the towage should be deemed to have commenced when the tow rope had been passed to each of the two tugs, & that until that had been done the ordinary provisions of the common law applied to the rights & duties of each party; & accordingly defts. were entitled to succeed on the claim & counterclaim. *THE CLAN COLQUHOUN*, [1936] P. 153; 105 L. J. P. 65; 155 L. T. 237; 52 T. L. R. 319; 19 Asp. M. L. C. 11; *sub nom.* *PORT OF LONDON AUTHORITY v. CLAN COLQUHOUN S.S. OWNERS*, [1936] 1 All E. R. 429.

## Part XII. —Collisions.

**5150. Add. Annotation:—As to (2) Consd.** The *Champion*, [1934] P. 1.

**5175. Add. Annotations:—Consd.** *Winnipeg Electric Co. v. Geel* (1932), 48 T. L. R. 657; *The Saint Angus* (1938), 51 T. L. R. 947. *Reid*. The *Mulbera*, [1937] P. 82.

**5186. Add. Annotation:—As to (1) Consd.** The *Otranto*, [1930] P. 110.

**5194. Add. Annotations:—As to (3) Refd.** *Canadian Pacific Ry. v. Kelvin Shipping Co.* (1927),

138 L. T. 369; *Grainston S.S. Owners v. Genua S.S. Owners*, *The Genua*, [1936] 2 All E. R. 798.

**5233a. —** .—*THE AUSONIA* (1933), 45 Ll. L. R. 71.

**5239a. — Near entrance to dock.**—*THE PORTIA* (1932), 44 Ll. L. R. 295.

**5287. Add. Annotation:—Refd.** *The Eurymedon*, [1938] P. 11.

### PART XI. SECT. 3, SUB-SECT. 2.

**5146 1. Liability for negligence.**—The owners of the *P.* contracted with a towing co. to have the *P.* towed from her berth to a grain elevator to unload her cargo. The *P.* had no motive power. Owing to the breaking of the tow line at one stage of the movement the *P.* continued her forward movement past the elevator & reached the south end of the harbour where the *S.* was laid up, puncturing the latter under the water line, by an anchor left hanging down on the port bow of the *P.* partly under water. This anchor was left so hanging down by those on the tow notwithstanding a warning by the tug master.—*Held*: (1) when commencing the towing of a ship her anchor is left, by the joint negligence of the tug master & those in charge of the ship, in such a position as to con-

stitute a danger to other vessels, & does in fact cause such damage, the tow & tug are each responsible & liable for the damages so caused; (2) when a vessel at anchor or moored at a dock is run into by another, the *onus* is upon the moving vessel to justify or excuse her action; (3) towage is a joint undertaking, & although the motive power may be wholly that of the tug, yet both tug & tow are bound to take reasonable care & to use reasonable skill in performing the operation. This duty is not affected by the term of the towage contract, which cannot regulate the relations between the tug & tow & third parties; (4) persons on board the tow such as a shipkeeper & his helpers, though not a regular navigating crew, in regard to reasonable care & skill, may be treated as agents of the owners of the ship in performing or neglecting to perform

such duties as the towage contract or the exigencies of the operation casts upon them; (5) provision in a towage contract that the operation is at "owner's risk" will not absolve the tug in case of negligence in navigation so far as third parties are concerned.—*CANADA S.S. LINES, LTD. v. S.S. PAISLEY, JAMES RICHARDSON & SONS, LTD. v. S.S. PAISLEY*, [1930] Ex. C. R. 105; *reversq.*, *JAMES RICHARDSON & SONS, LTD. v. S.S. PAISLEY*, [1930] 2 D. L. R. 257; [1929] 2 D. L. R. 42; S. C. R. 359.—CAN.

### PART XII. SECT. 2, SUB-SECT. 2.

**5169 1. Want of due caution—Canal.**—*THE KINGDOO v. CANADA STEAMSHIP LINES, LTD., PATTERSON STEAMSHIPS, LTD. v. THE OXFORD*, [1931] S. C. R. 288; 1 D. L. R. 146; *reversq.*, [1930] Ex. C. R. 1.—CAN.

5354. *Add. Annotation* :—*Refd.* The Vectis, [1929] P. 204.

5359. *Add. Annotation* :—*Consd.* The Vectis, [1929] P. 204.

5373. *Add. Annotation* :—*Refd.* McGowan v. Stott (1923), 99 L. J. K. B. 357, n.

5379a. ——— *Harwich Harbour.*—The *E.* was leaving & the *P.* was arriving at Harwich Harbour, both vessels being in charge of a pilot, when a collision occurred. It was necessary for the *P.* at the entrance to the harbour to round Beach End buoy :—*Held* : Harwich Harbour Conservancy Board (1929), Bye-laws No. 8 applied to the entrance to the harbour, & the *E.* which was navigating against the tide, should have eased her speed & allowed the *P.* to pass clear of her.—*THE PRINSES JULIANA, ESBJERB OWNERS v. PRINSES JULIANA OWNERS*, [1936] P. 139; [1936] 1 All E. R. 685; 105 L. J. P. 58; 155 L. T. 261; 52 T. L. R. 269; 18 Asp. M. L. C. 614.

5395. *Add. Annotation* :—*Refd.* The Minerva (1933), 49 T. L. R. 563.

5400. *Add. Annotation* :—*Folld.* The Harkaway, [1928] P. 199.

5400a. ————]—*Defts.* sailing barge came to anchor in a river. She was lying on the mud anchored with fifteen fathoms of chain leading from her bows on to the mud & thence to the anchor lying in the channel, which at low water was a mere gut-way thirty feet wide. *Pltfs.* motor boat, drawing 5 feet 3 inches aft & with about one foot of water under her, coming up the river in the deepest water there was at the time, went over one of the flukes of the anchor projecting up out of the mud at the bottom of the river, & was holed & sank :—*Held* : having regard to the shallowness of the water the anchor ought to have been buoyed or some other warning given of its position, & *defts.* were liable to *pltfs.* for the damage sustained.—*THE HARKAWAY*, [1928] P. 199; 97 L. J. P. 113; 139 L. T. 615 44 T. L. R. 649; 17 Asp. M. L. C. 503.

*Annotation* :—*Refd.* Burley C. v. Lloyd Edw. (1929), 45 T. L. R. 626.

5401a. ——— *Portland Harbour*—Vessel “about to enter”—Collision in one of the “channels between the breakwaters.”—Rule 5 of a schedule to an Order in Council relating to the Port of Portland (1931, No. 176) provides that “When any vessel or vessels are about

to enter from seaward any of the channels between the breakwaters, no vessel proceeding outward by the same channel shall enter this said channel until the before mentioned vessel, or vessels, shall have passed in.”

A collision between the *R.*, an outward bound submarine in command of *deft.*, & *pltfs.* vessel *P.* inward bound, took place in the North Ship Channel entrance to Portland Harbour, slightly to the southward of mid-channel & about 200 to 300 feet outside of a line drawn between the breakwaters. It was argued for *deft.* that *r. 5* did not apply, inasmuch as a vessel “about to enter from seaward” one of the channels meant a vessel going to enter the water which might reasonably be taken to be included in the word “channels”; & that the *P.* was never in a position of being “about to enter,” which implied that she must so approach as to indicate clearly her intention to enter, whereas, instead of “shaping up” at a proper distance to enter the channel, she was cutting the corner & then had to make a turn of five or six points :—*Held* : (1) the collision took place in what might fairly be called one of “the channels between the breakwaters”; taking *r. 5* as a whole, its purport was not to lay down how vessels should or should not approach the harbour, but to lay down in clear language that the outgoing vessel should be the give-way vessel; & accordingly the *R.* was to blame; (2) the vessel with the right of way was not in the position of a “keep course & speed” vessel under the crossing rule; the *P.* having a bad look-out, & considering the fine angle at which she was approaching the breakwater, too high a rate of speed, was also to blame. Both vessels accordingly held to blame in the proportions of two-thirds to the *R.* & one-third to the *P.*—*H.M. SUBMARINE RAINBOW*, [1933] P. 68; 102 L. J. P. 61; 149 L. T. 357; 18 Asp. M. L. C. 368.

5403. *Add. Annotation* :—*Generally*, *Refd.* The Rockabill, [1937] P. 93.

5439. *Add. Annotation* :—*Consd.* The Otranto, [1930] P. 110.

5446. *Add. Annotation* :—*Refd.* Kitano Maru S.S. v. Otranto, S.S., [1931] A. C. 194.

5488. *Add. Annotation* :—*As to* (1) *Refd.* The Kafiristan, [1937] P. 63.

5489. *Add. Annotation* :—*As to* (1) *Consd.* The Champion, [1934] P. 1.

PART XII. SECT. 2, SUB-SECT. 13.—A. (d).

*e. i.* ———]—*Pltf.*’s barge, the *R.*, with her tug attached, was on Sept. 1, 1931, forced to anchor about 1,400 feet below G. Point on the St. Lawrence, on account of heavy fog. Another ship, the *S.*, was also anchored near her. The *P.* knew these vessels were ahead but notwithstanding the fog came on without slowing, until her captain came on the bridge at G. Point when he decided to anchor his vessel, & in manoeuvring to do so the collision in question occurred. The *S.* & the tug regularly sounded their bells, & the *R.* also carried her two mooring lights, but not quite disposed according to the rules, being on the same level. The *R.* did not sound her bell :—*Held* : (1) in the circumstances, & in view of the heavy fog, the *P.* should have stopped sooner, & that

the collision was solely the result of her negligence; (2) the *R.* being attached to her tug, which was her servant, was not required by the rules of the road to ring her bell; & the ringing of the bell by the tug was sufficient compliance with the rules; moreover, the fact that the lights on the *R.* were not placed in accordance with the rules, having had no bearing on the accident; the *R.* in no way contributed to the collision.—*RED BARGE LINE, LTD. v. POPLARBAY, S.S. & POPLARBAY STEAMSHIP CO., LTD.*, [1932] Ex. C. R. 209.—*CAN.*

PART XII. SECT. 2, SUB-SECT. 15.—F.

5403 *iv.* ———]—The descending vessel coming with the current is entitled to consideration, & an up-coming vessel, in a narrow channel, where navigation is intricate, seeing

another vessel coming down stream, must stop, & if necessary come to a position of safety below the point of danger & there remain until the channel is clear.—*STANDARD OIL CO. OF NEW JERSEY v. S.S. “IKAIL,” INDUSTRY S.S. CO., LTD. v. S.S. JAMES MCGEE*, [1929] Ex. C. R. 230.—*CAN.*

PART XII. SECT. 3, SUB-SECT. 3.—B. (b).

5447 *iv.* ———]—*Held* : when a danger of collision occurs, a vessel is not justified in arbitrarily & obstinately insisting on her right of way conferred under rule 25. If in obstinately following out the letter of the rules regulating the course, a collision thereby occurs, she becomes at fault under rule 37.—*“ELFSTONE” v. CHICAGO TRIBUNE TRANSPORTATION CO., LTD., CRETE SHIPPING CO., LTD. v. “CHICAGO TRIBUNE,”* [1931] Ex. C. R. 132.—*CAN.*

- 5490a. — —.]—THE EFFRA (1936), 182 L. T. Jo. 82.
5505. *Add. Annotation* :—*Refd.* The Aeneas, [1935] P. 128.
5516. *Add. Annotation* :—*Refd.* The Champion, [1934] P. 1.
- 5517a. — — —.]—THE DAGMAR, No. 5008a, *post*.
5521. *Add. Annotation* :—*Apld.* The Palembang, [1929] P. 246.
5528. *Add. Annotation* :—*As to* (1) *Consd.* The Palembang, [1929] P. 246.
- 5568a. — — *Steering definite course to definite destination.*—A pilot vessel when not engaged on her station on pilotage duty but steering a definite course to a definite destination, for example, returning to port to land a pilot, must not exhibit the pilot boat lights prescribed by Art. 8 of the Regulations for Preventing Collisions at Sea, 1910, but must exhibit the ordinary navigation lights for vessels of her tonnage prescribed by the regulations.—THE KINGSTOWN (1929), 99 L. J. P. 19.
5573. *Add. Annotation* :—*Refd.* The Tovarisch, [1929] P. 293.
5576. *Add. Annotation* :—*As to* (2) *Apld.* Doncaster v. Sudlow (R.) & Sons (1929), 22 B. W. C. C. 564. *Refd.* Morgan v. Amalgamated Anthracite Collieries, Ltd., Hutchings v. Amalgamated Anthracite Collieries, Ltd. (No. 2) (1934), 27 B. W. C. C. 313.
5592. *Add. Annotation* :—*As to* (1) *Refd.* The Tovarisch, [1929] P. 293.
- 5608a. — — — *Other vessel moored.*—A dumb hopper made fast by forward moorings to a moored vessel, & swinging with the tide, is herself a moored vessel, & not a vessel under way within the Port of London River bye-laws. The *M.*, a dumb hopper loaded with spoil, had been moored alongside a dredger in Blackwall Reach, River Thames. Her after moorings were cast off, & she commenced to swing with the tide, being still made fast forward by her forward moorings. She was exhibiting one white riding light forward & one white riding light aft. In these circumstances the *D.*, a steamship bound up-river, came into collision with the *M.* :—*Held* : (1) the *M.* was not a vessel under way; (2) in any case the *M.* was probably a "lighter" within the meaning of the Port of London River bye-laws 1914–26, & was not required to carry side lights when under way, & no lights were laid down by the bye-laws for her to carry; (3) the *M.*, being moored to the dredger, which was moored to buoys, was herself moored & bound to exhibit two white riding lights in accordance with bye-law 14; (4) the *D.* was alone to blame for the collision.—THE DAGMAR (1929), 141 L. T. 271; 45 T. L. R. 303; 18 Asp. M. L. C. 41.
- 5608b. — — *Dumb barge.*—*Ptiffs.* steamship *S.* was lying moored at a tier on the south side of the River Thames. *Defts.* dumb barge *P.* was lying inside of the *S.* & attached to her by ropes fore & aft. When the work of

receiving cargo from the *S.* ceased for the day the *P.* was left alongside the *S.* unlighted & unattended. The *S.* was exhibiting the usual anchor light. During the night some unknown craft came into collision with the *P.* & she filled & sank, &, as the tide ebbed, the *S.* rested on the submerged hull of the *P.* & both vessels were damaged. Under bye-law 14 of the Port of London River Bye-laws, a vessel under 150 feet in length "when at anchor or moored" by night must exhibit a riding light; but by proviso (a) to the bye-law: "Where masted vessels are lying made fast at the moorings in the tiers, only the outermost off shore of such vessels in each tier shall be required to exhibit the riding light"; & by proviso (c), "... Lighters made fast at wharves, piers or jetties or alongside vessels thereat, shall not be required to exhibit the riding light"—*Held* : (1) it was not negligent to leave the *P.* unattended; but (2) not being a masted vessel nor made fast to a vessel at a wharf, pier or jetty, the *P.* could not bring herself within either proviso (a) or (c); accordingly there was nothing to take her out of the obligation imposed upon her under the main part of the bye-law to exhibit a riding light; (3) as *defts.* could not prove that the absence of the light was not a cause of the collision with the unknown craft, they failed to discharge the *onus* upon them, & there must be judgment for *ptiffs.*—THE PRINCESS, [1929] P. 287; 98 L. J. P. 158; 142 L. T. 94; 45 T. L. R. 627; 18 Asp. M. L. C. 56.

*Annotation* :—*As to* (3) *Refd.* The Mulbera, [1937] P. 82.

5617. *Add. Annotation* :—*Consd.* The Palembang, [1929] P. 246.

5627. *Add. Annotation* :—*Refd.* The Manchester Regiment. [1938] P. 117.

5630a. *Coloured flare.*—A large four-masted barque, after seeing both lights of an approaching steamship about one & a half to two points on the starboard bow, saw only the green light at an estimated distance of about half a mile. Thereupon a green pyrotechnic flare was exhibited on the starboard side of the barque. Immediately afterwards the steamship ported her helm, &, in attempting to cross the bows of the barque, was struck on the port side by the bowsprit & stem of the barque & sank with all hands except one :—*Held* : the exhibition of the green flare by the barque was not a breach of Article 12; the green flare was intended simply to attract attention, & did not call upon the steamship to do anything except that which it was her duty to do when she saw a sailing vessel approaching with lights green to green; & the steamship, by improperly porting, was alone to blame for the collision.—ALCANTARA, S.S. OWNERS v. TOVARISCH, S.S. OWNERS, [1931] A. C. 121; *sub nom.* THE TOVARISCH, ALCANTARA S.S. OWNERS v. TOVARISCH S.S. OWNERS, 100 L. J. P. 46; 144 L. T. 230; 47 T. L. R. 89; 18 Asp. M. L. C. 182, H. L.

*Annotation* :—*Consd.* Leopold L. D. S.S. v. Hochelaga S.S. Co., Louis Dreyfus & Co. v. Hochelaga S.S., Hochelaga S.S. v. Louis Dreyfus & Co., Hochelaga S.S. Co. v. Leopold L. D. S.S. (1931), 101 L. J. P. C. 63.

#### PART XII. SECT. 3, SUB SECT. 5.—B. (1). ii.

5611 iii. — —.]—Collision caused by *pltf.* scow, which failed to show a riding light when anchored for the night—FORBES v. BLAKENY & SON, [1935] 3 D. L. R. 428; 9 M. P. R. 280; 5 F. L. J. (Can.) 68.—CAN.

**5648a. — Vessel under way—Meaning of “under way.”**—Under bye-law 28 (e) of the Port of London River Bye-laws, 1914–1926, in fog, “a steam vessel under way about to turn & whilst turning round shall sound at intervals of not more than two minutes four short blasts in rapid succession, followed, if turning with her head to . . . port, by two short blasts.” Bye-law 5 provides that “in these bye-laws . . . unless there be something in the subject or context repugnant to such construction . . . the expression ‘under way’ when used in relation to a vessel means when she is not at anchor . . . & includes a vessel dropping up or down the river with her anchor on the ground.” In order to come to anchor on account of fog plths.’ vessel *Pakeha*, bound up-river on the flood tide, sounded the appropriate signal under bye-law 28 (e), hard-a-starboarded her helm, & put her engines full speed astern. When she had swung two or three points the anchor was let go with thirty fathoms of chain & was reported to be holding. Her navigation lights were then switched off, the anchor lights switched on & the bell commenced to be rung for fog. The engines had then to be worked half ahead & full speed ahead for about a minute & a half to avoid a small vessel at anchor, & were then put full speed astern for about a minute & then stopped. About ten minutes after the anchor had been let go, & when the *Pakeha* had nearly swung head to tide, she was run into by defts.’ steamship. Defts. alleged (*inter alia*) that the *Pakeha* was a vessel under way & turning in the river, & required, therefore, to continue sounding the signal of four short blasts followed by two:—*Held*: following the criterion laid down in *The Esk*, *The Gitana*, No. 5521, as the *Pakeha* was helden by & under the control” of her anchor during all the time in question, she was not “under way,” & was right in ringing her bell, the appropriate signal for a vessel at anchor in a fog.—*THE PALEMBANG*, [1929] P. 246; 98 L. J. P. 129; 141 L. T. 399; 45 T. L. R. 495; 18 Asp. M. L. C. 45.

**5657. Add. Annotation:—Distd.** *The Palembang*, [1929] P. 246.

**5659. Add. Annotation:—As to (1) Refd.** *The Bremen* (1931), 47 T. L. R. 505.

**5660. Add. Annotation:—Generally, Refd.** *Canton Owners v. Ithesus Owners*, [1928] W. N. 214.

**5666a. Duty of ship hearing signals—Whether alteration of course justifiable.**—Two steam vessels, the *H.* & the *G.*, came into collision in a fog. Both had headway at the time of the collision & were to blame for excessive speed in fog & for not stopping when they first heard the fog signals of the other vessel forward of their beam. The *G.* had been sounding a succession of two prolonged blasts (the signal prescribed by Art. 15 (b) of the

Regulations for Preventing Collisions at Sea to indicate that she was stopped in the water), when in fact she had substantial headway, & the case for the *H.*, which had meanwhile stopped her engines, was that this signal justified her in altering course &, although she still had headway, in putting her engines slow ahead again:—*Held*: before altering course in fog every precaution ought to be taken to ascertain that the vessel blowing the two blast signal, a signal which is frequently unreliable, is really stopped & not altering the bearing or getting nearer; from the sound of the blasts blown by the *G.* it should have been apparent that she was getting nearer & not really stopped; accordingly the *H.* was to blame for going on again & altering her course; & both vessels were to blame in equal degrees.—*THE GASTELU*, [1934] P. 86; 103 L. J. P. 97; 151 L. T. 260; 18 Asp. M. L. C. 480.

**5681. Add. Annotation:—Generally, Refd.** *The Kafiristan*, [1937] P. 63.

**5686. Add. Annotation:—Consd.** *H.M.S. Malaya*, [1937] P. 179.

**5686a. — Meaning of “existing circumstances & conditions”**—Aircraft carrier with aircraft in the air.—The words in Art. 16 of the Collision Regulations, “existing circumstances & conditions” & “circumstances of the case,” refer to circumstances affecting the navigation of the ship & not to outside influences on the minds of persons on board the ship. The fact of the aircraft being in the air with only a limited supply of petrol was not a circumstance which justified the aircraft carrier for failure to comply with the regulations.—*H.M.S. “GLORIOUS,”* [1932] W. N. 213; 74 L. Jo. 109; *affd.*, [1933] W. N. 10; 75 L. Jo. 9, C. A.

**5720. Add. Annotation:—As to (1) Refd.** *The Bremen*, [1931] P. 166.

**5732. Add. Annotation:—As to (1) Refd.** *The Bremen*, [1931] P. 166.

**5748a. Meaning of “ascertained.”**  
In order that the position of a vessel whose fog-signal is heard by another vessel may be “ascertained” within Art. 16 of the Regulations for the Prevention of Collisions at Sea, the vessel must be known by the other vessel to be in such a position that both vessels can safely proceed without risk of collision. An inference as to the vessel’s position, based upon the direction from which the fog-signal was heard, the probable course which she is taking, & the improbability of her crossing the fairway in a fog, is not an ascertainment justifying a disregard of the precautions enjoined by the above article. Implicit obedience to the Regulations, upon which navigators are entitled to rely, is of great importance.—*NIPPON YUSEN KAISHA v. CHINA NAVIGATION CO., LTD.*, [1935] A. C.

**PART XII. SECT. 3, SUB-SECT. 5.—**  
C. (f) i.

*sf. Bare steerage way.*—*EASTERN S.S. CO., LTD. v. CANADA ATLANTIC TRANSIT CO.*, [1928] Exch. C. R. 129. **CAN.**

**PART XII. SECT. 3, SUB-SECT. 5.—**  
C. (f) iv.

*sg. Ten knots.*—*OLSEN & CO. v. S.S. PRINCESS ADELAIDE, S.S. HAMP-*

*HOLM v. C. P. R. Co.*, [1930] Ex. C. R. 10; 4 D. L. R. 778; *affd.*, [1930] 3 D. L. R. 423; *varg.*, [1929] 3 D. L. R. 383; Ex. C. R. 199; 2 W. W. R. 629; 41 B. C. R. 274.—**CAN.**

**PART XII. SECT. 3, SUB-SECT. 5.—C.**  
(g) ii.

5739 ii. ———.—A collision took place in a dense fog in the St. Lawrence

river between the ships *B.* & *L.* The ct. found that the *B.* was chiefly to blame but that the *L.*’s speed was not moderate under the circumstances:—*Held*: under such a set of facts as existed the *L.* should have stopped her engines until the position of the *B.* had been ascertained with certainty.—*PORT COLBORNE & ST. LAWRENCE NAVIGATION CO., LTD. v. THE LAFAYETTE*, [1938] Ex. C. R. 10.—**CAN.**



177; 104 L. J. P. C. 34; 152 L. T. 313; 51 T. L. R. 203; 78 Sol. Jo. 897; 18 Asp. M. L. C. 533, P. C.

*Annotation*.—*Consd.* H.M.S. Malaya, [1937] P. 179.

**5748b.** —[.]—*Held*: to comply with the direction to "stop" & then "navigate with caution" a vessel should run her way off & bring herself as nearly as possible to a standstill; & a vessel which alleged that, on hearing the fog whistle of the other vessel, she went dead slow by stopping her engines & then putting them slow ahead, & so continued alternately stopping & going slow ahead, was not complying with art. 16.—*THE UNION*, [1928] P. 175; 97 L. J. P. 126; 139 L. T. 448; 17 Asp. M. L. C. 483.

**5748c.** — *Unless clear that safe to continue course.*—Under Article 16, a steam vessel hearing the fog signals of a vessel, apparently forward of the beam, is required to stop her engines & then navigate with caution.

The *B.*, a large liner going down Channel in a dense fog at a speed of about 4 knots, heard, on the starboard side about abeam or a little abaft it, the fog whistle of the steamship *B. G.* After the whistle had been heard four or five times more, getting louder & nearer & apparently still on the same bearing, the master of the *B.* decided that he must act. He accordingly starboarded & increased his engine power to assist the helm. The *B. G.* then came into sight 100 to 150 yards away on the starboard side, crossing the bows of the *B.* from starboard to port, & the two vessels came into collision:—*Held*: (1) the main cause of the collision was the bad navigation of the *B. G.* (*inter alia*) in altering her course in fog, proceeding at excessive speed, & failing to stop on hearing the whistle of the *B.* forward of her beam.

The conclusion on the authorities is that in fog, unless the vessel hearing a whistle is quite clear that to continue course & speed will not involve risk of collision, she should always stop her engines (*per Cur.*).

(2) The *B.* was also partly to blame, inasmuch as the fact that the fog signals of the *B. G.* were getting louder & nearer on the same bearing was a clear indication of danger, & that accordingly good seamanship required the *B.* to stop after hearing the second or third blast, when those on board would know for certain that the other ship was approaching & causing risk of collision. Both vessels accordingly held to blame, the *B. G.* to the extent of 80 per cent. & the *B.* 20 per cent.—*THE BREMEN*, [1931] P. 166; 100 L. J. P. 122; 145 L. T. 565; 47 T. L. R. 505; 18 Asp. M. L. C. 252, C. A.

**PART XII. SECT. 3, SUB-SECT. 5.**—*C. (h).*

**5757 i. When duty arises—Vessel approaching.**—The question whether vessels approaching one another in a fog should not merely stop their engines but also their way, or reverse their engines, must be decided under the circumstances of each case. In the present case it was held that the *H.*, which did not reverse her engines immediately after hearing the second whistle of the *A.*, did not "navigate with caution," within the meaning of art. 16 of the Collision Regulations, after, at least, she heard that whistle & thereupon should have realised that

**5748d.** — "So far as the circumstances of the case admit"—Aircraft carrier with aircraft in the air.—*H.M.S. GLORIOUS*, No. 5686a, *ante*.

**5754. Add. Annotation**:—*Consd.* The Bremen, [1931] P. 166.

**5757. Add. Annotations**:—As to (1) *Refd.* The Bremen, [1931] P. 166. *Generally, Refd.* The Young Sid, [1929] P. 190.

**5775. Add. Annotations**:—*Consd.* H.M.S. Malaya, [1937] P. 179. *Refd.* The Bremen (1931), 47 T. L. R. 505; Nippon Yusen Kaisha v. China Navigation Co., [1938] A. C. 177.

**5776. Add. Annotation**:—*Consd.* H.M.S. Malaya, [1937] P. 179.

**5779a.** —[.]—The battleship *M.* came into collision with the steamship *K.* in foggy weather. The whistle of the *K.* was heard by those on the *M.* & was judged to be 10 deg. to 15 deg. on the port bow & a long way off. The engines of the *M.* were stopped for about four minutes, during which time two or three more fog signals were heard. The ship's head fell off to starboard & the engines were then put ahead again. A few minutes later, the whistle having been heard several times on an estimated bearing of 15 deg. to 20 deg. or possibly 25 deg., the captain of the *M.*, having come to the conclusion that the *K.* was on an opposite course & would pass port to port, made further substantial alterations to starboard, as the sound of the *K.*'s whistle was getting rather close & he wanted to give her more room. In fact, however, the *K.* was on the starboard bow of the *M.*, & the starboard wheel action on the *M.*, instead of terminating the risk of collision, brought it about. When the vessels came in sight of each other at a distance of about 500 yards the *M.* was on the starboard bow of the *K.* & the *K.* was on the port bow of the *M.* At that time the *K.*, which had not heard the *M.*'s fog syren until just as the *M.* came into view, was proceeding at about 11 knots & the *M.* at about 7 to 8 knots:—*Held*: (1) the look-out on the *K.* was inefficient, since the marked deterioration in visibility shortly before the collision was not noticed, & both vessels were to blame in respect of their speeds; (2) the *M.* was also to blame for altering course, because, although there is no rule that when two vessels are approaching one another in fog the course should not be altered, a vessel is not justified in altering without reasonable grounds for concluding that the position of the other vessel is ascertained; that the only data known to those on the *M.* were that the bearing of the whistle signals of the *K.* appeared to be one or two points on the port

as it showed no indication of broadening the danger was imminently increasing.—*OLSEN & Co. (OWNERS OF THE "HAMPHOLM") v. "PRINCESS ADELAIDE," CANADIAN PACIFIC RY. CO. (OWNERS OF "PRINCESS ADELAIDE")*, [1929] 3 D. L. R. 383; Ex. C. R. 199; 2 W. W. R. 629; *varied*, [1930] 3 D. L. R. 423; *affd.*, [1930] 4 D. L. R. 778; Ex. C. R. 10.—*CAN.*

**PART XII. SECT. 3, SUB-SECT. 5.**—*C. (i).*

**sh. What amounts to.**—A vessel in fog should run at such a speed that upon sighting an approaching vessel,

she can pull up in the distance she can see. Art. 16 does not require a vessel running in fog to reverse her engine upon hearing of a fog signal apparently forward of her beam, but only to stop her engines & then navigate with caution, & as the *H.* could come to a stop in thirty feet & could see a vessel at three hundred feet, she was navigating with caution within Art. 16, & was not called upon to reverse before she did.—*OLSEN & Co. v. S.S. "PRINCESS ADELAIDE" & S.S. "HAMPHOLM," CANADIAN PACIFIC RY. CO.*, [1930] Ex. C. R. 10; 4 D. L. R. 778; *affd.*, [1930] 3 D. L. R. 423; *varg.*, [1929] 3 D. L. R. 383; Ex. C. R. 199; 2 W. W. R. 629; 41 B. C. R. 274.—*CAN.*

bow & broadening slightly, but that it was only a guess as to the direction of approaching whistle signals two to four miles away with a strong head wind blowing; & the guess was in fact erroneous.—MALAYA, H.M.S., [1937] P. 179; 106 L. J. P. 115; 53 T. L. R. 911.

5891a. ———.]—Two steam vessels, the *S.* & the *K.*, while on courses crossing one another at the fine angle of 8 degrees, sighted each other's lights at a distance of several miles. The *S.* first sighted the masthead light of the *K.* fine on the starboard bow, & afterwards, as the *K.* was yawing considerably, saw both her sidelights. The *K.* had the masthead & green lights of the *S.* open to her a little on the port bow, & the Elder Brethren were of opinion that there must have been times also when, although those on board the *K.* denied seeing it, the red light of the *S.* must also have been open. The *S.* crossed on to the starboard bow of the *K.*, & having got into a position of green light to green light altered her course to starboard, rendering a collision imminent. The *K.*, which up to that time had kept her course & speed, then went full speed astern & hard-a-ported her helm (old command). LANGTON, J., held that art. 18 applied, & that while the *S.* was to blame for porting & hard-a-porting when the vessels were green to green & for not sounding any whistle signals, the *K.* was also to blame for not at an earlier stage altering her course to starboard so as to pass port to port, & he accordingly held the *S.* three-fourths to blame & the *K.* one-fourth. Both parties appealed. On appeal the assessors advised the ct. that while, owing to the yawing of the *K.*, the *S.* would "constantly" see both sidelights of the *K.*, the *K.*, although she might possibly (but not necessarily) see both sidelights of the *S.* "occasionally," would generally be seeing the green light only:—*Held*: as the substantially prevailing position was not that each vessel was generally seeing both sidelights of the other, the requirement of art. 18 were not complied with; accordingly the vessels came under art. 19, & the *S.* was alone to blame.—THE KAITUNA, [1933] P. 234; 103 L. J. P. 1; 150 L. T. 112; 18 Asp. M. L. C. 429, C. A.

5925. *Add. Annotations*:—*Refd.* The *Tovarisch*, [1930] P. 1; *Kitano Maru S.S. v. Otranto S.S.*, [1931] A. C. 194; The *Kaituna*, [1933] P. 234.

5925a. Each vessel must see both sidelights of other.]—THE KAITUNA, No. 5891a, *ante*.

5933. *Add. Annotation*:—*As to* (1) *Consd.* The *Otranto*, [1930] P. 110.

5934. *Add. Annotations*:—*Apld.* The *Treherbert*, [1934] P. 31. *Refd.* The *Otranto*, [1930] P. 110; The *Aeneas*, [1935] P. 128.

5935. *Add. Annotations*:—*Consd.* The *Treherbert*, [1934] P. 31. *Refd.* *Kitano Maru S.S. v. Otranto S.S.*, [1931] A. C. 194; The *Manchester Regiment*, [1938] P. 117.

5935a. ———.]—The first duty of a vessel keeping her course & speed under Art. 21 of the Sea Regulations, 1897, is to keep her course & speed as long as that will enable the other vessel to keep out of the way; after that point, her second duty is to take such action as will best aid to avert collision, but this second duty is not to be very severely pressed, & if the master of the vessel is found to have been watching the other vessel & doing his best to make up his mind when to act, he ought not to be held to blame for waiting a moment too long before acting.—THE RANZA (1898), 79 L. J. P. 21, n.

*Annotations*:—*Apprvd.* The *Oran* (1900), 79 L. J. P. 23. *Consd.* The *Otranto*, [1930] P. 110; The *Lady Belle* (1933), 49 T. L. R. 595. *Refd.* The *Gulf of Suez*, [1921] P. 318.

5935b. ———.]—Two steamships were meeting almost end on, showing red light to red light, & defts.' vessel ported slightly. When still a long way off pl'tfs.' vessel wrongly starboarded & showed her green. Defts.' vessel then kept her course & speed, & the vessels approached close together, green to red. Not more than one minute before the collision, defts.' vessel sounded a short blast & hard a-ported, & afterwards before the collision stopped & reversed; pl'tfs.' vessel blew a short blast in reply, but by some mistake starboarded instead of porting, though, if she had ported, there would have been no collision:—*Held*: defts.' vessel was bound under Art. 21 of the Sea Regulations, 1897, to keep her course & speed until the other vessel could not by her own action alone avoid the collision.—THE ORNEN (1900), 79 L. J. P. 23, n.; 16 T. L. R. 149; 44 Sol. Jo. 195, C. A.; *reversd.* on other grounds (1901), 17 T. L. R. 359, H. L.

5935c. ———.]—Two steam vessels, the *K. M.* & the *O.*, were approaching each other on crossing courses of nearly a right angle at a joint speed of nearly 30 knots. The *O.*, the stand-on vessel, had the *K. M.* broad on the port bow at a distance of several miles. As the bearing of the *K. M.* did not alter, the *O.*, when the vessels were under three-quarters of a mile apart, hard-a-starboarded to pass under the stern of the *K. M.* & sounded two short blasts. Twenty or thirty seconds afterwards the *K. M.* hard-a-ported & sounded one short blast, & the two vessels came into collision less than three minutes after the alteration of course by the *O.* It being admitted that the *K. M.* was partly to blame for the collision, the question was whether the *O.* was also to blame:—*Held*: the master of the *O.* was justified in acting when he did, but not in starboarding & maintaining his speed. He ought, first of all, to

PART XII. SECT. 3, SUB-SECT. 5.—  
D. (e) iii.

5933 i. *Duty to give appropriate signal*.—The collision herein occurred in Halifax harbour, the bow of the *C.* striking the *K.* on her starboard quarter. The *C.* was heading for the Inner Automatic Buoy & the *K.* was northward & westward of the buoy, each showing her red light to the other, until the *K.*, almost immediately after

passing the buoy, altered her course suddenly, showing her green light on the port bow of the *C.* which would be about half to three-quarters of a mile S.S.E. of the buoy, & in attempting to cross the bow of the *C.* was struck as aforesaid. The *K.* gave no signal of her intention to change her course:—*Held*: as the vessels were travelling red to red, the *K.* by altering her course without justification, & especially

without signalling the *C.* her intention to do so, & in attempting to cross the *C.*'s bow, thus creating a danger of collision, violated Arts. 19, 22, 23, 27 & 29 of the International Rules of the Road, & was guilty of mismanagement & bad seamanship, & was solely to blame for the collision which occurred.—THE CAVELIER v. LIVERPOOL SHIPPING CO., [1931] Ex. C. R. 203.—CAN.

have stopped & reversed his engines &, in addition, whatever action he took should have been under a port helm:—*Held*: both vessels were to blame.—KITANO MARU S.S. OWNERS v. OTRANTO S.S. OWNERS, *THE OTRANTO*, [1931] A. C. 194; 100 L. J. P. 11; 144 L. T. 251; 47 T. L. R. 103; 18 Asp. M. L. C. 193, H. L.

*Annotations*:—*Consd.* *The Manchester Regiment*, [1938] P. 117. *Refd.* *The Bremen* (1931), 47 T. L. R. 505.

5937. *Add. Annotation*:—*Dlst.* *The Manchester Regiment*, [1938] P. 117.

5938. *Add. Annotation*:—*As to* (3) *Consd.* *The Otranto*, [1930] P. 110.

5941. *Add. Annotation*:—*Consd.* *The Manchester Regiment*, [1938] P. 117.

5946a. *Duty to avoid collision.*—*THE TREHERBERT*, No. 5958a, *post*.

5946b. —.—Under the note to art. 21 of Regulations for Preventing Collisions at Sea, 1910, when collision cannot be avoided by the action of the giving-way vessel alone, the vessel which has to keep her course & speed under the rules "shall take such action as will best aid to avert collision."

Two small steam vessels, the *M.* & the *L. B.*, on courses crossing so as to involve risk of collision, took no measures at all to keep clear of each other & came into collision. The *M.*, which had the *L. B.* on her own starboard side & consequently under art. 19 had to keep out of the way, admitted that she was partly to blame, but contended that the *L. B.*, on her own pleadings, was also to blame, as it was admitted that she merely kept her course & speed from first to last. The *L. B.* attempted to justify taking no measures under the note to art. 21 on the ground that up to the last moment the *M.* could have avoided the collision, & that in keeping her course & speed the *L. B.* was in fact taking the action which would best aid to avert collision:—*Held*: although the exact moment when the stand-on vessel must act under the note must not be unduly pressed against her, it would render the note nugatory to say that she can be excused from taking any action at all; that at a very late stage the action of taking the way off the *L. B.* would have averted the collision, & that she also was to blame in the proportion of three-fourths to the *M.* & one-fourth to the *L. B.*

While it may be desirable in particular cases to sound a warning blast or blasts to attract the attention of a vessel which apparently is taking no steps to keep out of the way (& it would have been a wise precaution if the *L. B.* had done so), it is not the ordinary practice of seamen to sound whistle signals for which no provision is laid down in the Regns., & accordingly it is not negligent to omit to sound the whistle in such circumstances.—*THE LADY BELLE*, [1933] P. 275; 102 L. J. P. 134; 150 L. T. 117; 49 T. L. R. 595; 18 Asp. M. L. C. 451.

5958a. —. *Channel between line of buoys & open sea.*—By the practice of pilots navigating in

& out of the Thames estuary, steam vessels rounding the N.E. Spit buoy from the southward to proceed up river pass outside the buoy at a sufficient distance to the northward to enable an outward bound vessel to pass between them & the buoy port to port. Two steam vessels, the *A.*, inward bound, & the *T.*, outward bound, got into collision about 400 yards to the northward of the buoy. The *T.*, which had the *A.* on her own starboard side, & therefore, under the crossing rule (Art. 19) had the duty to keep out of the way, alleged that the narrow channel rule (Art. 25) & not Art. 19 applied, & that the *A.* was to blame for being too close to the buoy & for not keeping to her own starboard side of the channel, the southern limit of which was the buoy. LANGTON, J., held that it was impossible to apply Art. 25 to waters which were defined only by one or more buoys & which had on the other side the whole of the North Sea; Art. 19 applied, & the *T.* was to blame for not keeping out of the way. He found, however, the *A.* also to blame, not for having been set down by wind & tide closer to the buoy than she had intended, but under the Note to Art. 21, which provides that when the vessel which has the duty of keeping course & speed under the crossing rules "finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision"; & in the result the *T.* was held three-fourths to blame & the *A.* one-fourth. On appeal:—*Held*: (1) the crossing rule & not the narrow channel rule applied; (2) the practice did not exclude the crossing rule, but was in fact the direct consequence of the group of rules of which Art. 19 was one; for, by Art. 22 the vessel which is to keep out of the way "shall . . . avoid crossing ahead of the other," & if she does not cross ahead, she will ultimately pass port to port; (3) on the facts it appeared that with close navigation there was room for the *T.* to pass between the *A.* & the buoy, but (4) if there was not room, although a vessel ought not as a general rule to pass inside a channel buoy, the *T.*, whose draught enabled her to do so, should, to avoid immediate danger, have gone inside the buoy; (5) up to the time the *A.* acted the *T.* could easily have avoided the collision by her own unaided action, & the *T.* was alone to blame.—*THE TREHERBERT*, [1934] P. 31; 103 L. J. P. 65; 151 L. T. 69; 50 T. L. R. 120; 18 Asp. M. L. C. 458, C. A.

*Annotation*:—*Generally*, *Refd.* *The Manchester Regiment*, [1938] P. 117.

5960. *Add. Annotations*:—*Consd.* *The Manchester Regiment*, [1938] P. 117. *Refd.* *Kitano Maru S.S. v. Otranto S.S.*, [1931] A. C. 194.

5962. *Add. Annotation*:—*Refd.* *The Rockabill*, [1937] P. 93.

5964. *Add. Annotation*:—*Refd.* *The Rockabill*, [1937] P. 93.

## PART XII. SECT. 3, SUB-SECT. 5.— D. (e) v.

5961 i. *Vessel entering or leaving dock.*—*RINFRET v. CANADIAN S.S. LINES, LTD.*, [1928] Exch. C. R. 165.—*CAN.*

5961 ii. —.—Although a vessel emerging from a dock must be navigated with utmost care, yet other vessels should be manoeuvred with consideration to the difficulties of the vessel that is emerging. The manoeuvres & caution to be taken in

such cases all depend on the distance at which the ships sight each other.—*OCEANIC STEAMSHIP NAVIGATION CO., LTD. v. S.S. "LINGAN"* *LINGAN S.S. CO., LTD. v. S.S. "DORIC"* (Que. Adm.), [1929] Ex. C. R. 71.—*CAN.*

5965. *Add. Annotations*:—*Refd.* The Otranto, [1930] P. 110; The Manchester Regiment, [1938] P. 117.

5967. *Add. Annotation*:—*Consd.* The Bremen, [1931] P. 166.

5977. *Add. Annotation*:—*Refd.* The Vectis, [1929] P. 204.

6038. *Add. Annotation*:—*Refd.* The Otranto, [1930] P. 110.

6039. *Add. Annotation*:—*Consd.* The Otranto, [1930] P. 110.

6044a. ——— *Ship adjusting compasses.*—*Pltfs.* steamship *C. M.* & *defts.* steamship *M. R.* came into collision in Liverpool Bay. The *C. M.* sighted the *M. R.* two to three miles away bearing about two points on the port bow & heading in approximately the same direction as the *C. M.* The *M. R.* was engaged in adjusting compasses & was flying the appropriate two-flag signal "J.I." About ten to twelve minutes before the collision, & when the vessels were nearly two miles apart, the *M. R.*, in the process of adjusting her compasses, had swung eight points on to a heading which brought her at right angles to the course of the *C. M.*, so that the *M. R.* had the *C. M.* about six points on her starboard bow. The two vessels continued to approach each other at right angles, the *C. M.* at her full speed of about ten knots & the *M. R.* for a short time at half speed & thereafter at "slow," until they were less than a quarter of a mile apart. The *M. R.* then went full speed astern & a few seconds afterwards the *C. M.* hard-a-starboarded. Barely a minute later the vessels came into collision. *Pltfs.* case was that the crossing rule (Art. 19) applied, & that the *M. R.*, having the *C. M.* on her own starboard bow, should have kept out of the way. *Defts.* case was that, the vessels having sighted each other while the *C. M.* was coming up with the *M. R.* from a direction more than two points abaft her beam, the overtaking rule (Art. 24) applied; on this assumption the *M. R.*, as the overtaken vessel, in continuing to carry out the manœuvre on which she was known to be engaged, was keeping her course & speed within the meaning of Art. 21. Her pilot & master also said that it was customary for all ships to keep clear of a ship adjusting compasses:—*Held*: (a) following *The Ban-shee* (1887), 6 Asp. M. L. C. 221; 41 Digest 761, 6134, that Art. 24, like the other Collision Regulations, was not applicable until the time arrived when, if either ship did something contrary to the Regulations, danger of collision would be caused; at two to three miles distance, when the *C. M.* first sighted the *M. R.*, the vessels had no concern with one another, & it was not until some time after the *M. R.* got on to a heading at right angles to the *C. M.* that they would need to take any notice of each other; as at that time the *M. R.* had the *C. M.* on her

starboard bow the crossing rule applied, & that the *M. R.* was to blame for not keeping out of the way; (b) even if (which was doubtful) at the moment the *C. M.* acted, it could be proved mathematically that the collision could have been avoided if the *M. R.* had put her wheel hard-a-starboard as well as going full speed astern, no seaman would have been justified in attempting that action & no seaman would have been justified in relying on such action being taken, & the *C. M.*, as the stand-on vessel, therefore was also in fault under the note to Art. 21 for not taking action soon enough. Both vessels therefore were to blame in the proportions of four-fifths to the *M. R.* & one-fifth to the *C. M.*

Further, (i) although other ships were usually willing to extend a certain amount of courtesy to a ship flying the "J.I." signal, it imposed no obligation on a stand-on ship to do more than keep an extra good look-out to see that the courtesy was not being abused; (ii) assuming the overtaking rule had applied & the *M. R.* had been the stand-on ship, in altering speed & turning eight points to starboard in the course of adjusting compasses, she was not "keeping course & speed" within the meaning of Art. 21.—*THE MANCHESTER REGIMENT*, [1938] P. 117; 107 L. J. P. 63; 159 L. T. 227; 54 T. L. R. 710.

6050a. *Navigable channel divided into two fairways.*—*THE ZILLAH*, No. 6064a, *post*.

6063. *Add. Annotation*:—*Consd.* The Treherbert (1934), 151 L. T. 69.

6064a. ———.]—A collision occurred between *pltfs.* & *defts.* steamships in a part of Queenstown Harbour known as the inner man-of-war anchorage, where the navigable fairway is bisected by a line of Admiralty battleships' mooring buoys, thus forming a northern & a southern channel. The two vessels were navigating, *pltfs.* steamship up & *defts.* steamship down, the northern channel, & the collision was found by the ct. to have taken place on the south side of the said channel. By virtue of their powers under Dockyard Ports Regulation Act, 1865 (c. 125), the Lords Comrs. of the Admiralty exercise authority over Queenstown Harbour as a dockyard port, but by Order in Council of Aug. 10, 1903, it was provided that a fairway would be kept through the inner man-of-war anchorage, & in 1909 the Cork Harbour Comrs., "in pursuance of the powers vested in them by the Cork Harbour Acts, 1820–1903," issued with the approval of the Board of Trade & the consent of the Admiralty, required by sect. 60 of the Cork Harbour Act, 1903, bye-laws for the regulation of navigation in Queenstown Harbour. By bye-law 41: "Any regulations for preventing collisions at sea for the time being in force, under the provisions of the Merchant Shipping Acts,

PART XII. SECT. 3, SUB-SECT. 5.—  
E. (a).

sj. *Negligent navigation*—*What amounts to.*]—"*WENOCHITA*" v. *BEECH-BAY*, *BEECHRAY S.S. Co. v. "WENOCHITA"*, [1928] Exch. O. R. 178.—*CAN.*

sk. *Duties of masters.*—*Held*: when two vessels are meeting in a narrow channel, careful watch must be kept by the masters of each vessel over the

movement of the other vessel, & they must be prompt to signal in case of emergency resulting from their manœuvres. Carelessness or neglect to so act, if damage results therefrom, is negligence for which each vessel offending is liable.—*EASTERN STEAMSHIP CO. v. "ALICE"*, J. P. PORTER & SONS, LTD. v. "WARREN," [1927] Exch. C. R. 228.—*CAN.*

sp. *Collision between steam vessel & tug with tow—Right of way.*]—A steam vessel coming down a narrow channel has the right of way, & if she has given a short blast, signalling her intention to pass, she is not liable for collision with a moored tug & tow which swing into her path.—*CANADA STEAMSHIP LINES, LTD. v. PORTER & SONS, LTD.*, [1938] 1 D. L. R. 264.—*CAN.*

shall be deemed to apply to the port, & shall be construed as if the following bye-laws, Nos. 42 to 52 (inclusive), were added thereto, & the entire fairway shall be deemed to be a narrow channel." By bye-law 53: "The foregoing bye-laws, where they refer to any part of the man-of-war anchorages or any other part of the dockyard port, shall apply to any merchant ships that may be temporarily using such parts of the port." The interpretation clause prefixed to the said bye-laws defined "fairway" as "the space within the port for the time being reserved as a highway for vessels in motion." In 1916 the Harbour Comrs. issued a "Description of Fairway," para. 6 of which was as follows: "From the eastern limit of the inner man-of-war anchorage to the White Point Buoy there are two fairways—the northern fairway & the southern fairway. The northern fairway is bounded on the north by an imaginary line from 20 fathoms south of Copper Point Buoy to the western end of Queenstown Deep-water Quay, & thence towards White Point House until Rushbrooke Church bears N.W. by W.  $\frac{1}{2}$  W., & thence to White Point Buoy showing a fixed white light, & on the south by the line of Admty. battleships' mooring buoys. The southern fairway is bounded on the north by the line of Admty. battleships' mooring buoys, & on the south by the line of Admty. torpedo-boat & other mooring buoys along the north of Spit Bank & Haul-bowline":—*Held*: subject to the general overriding jurisdiction of the Lords Comrs. of the Admiralty, the Harbour Comrs. have power to reserve space within the port as a highway for vessels in motion, & that the effect of the bye-laws, as explained by the reservation contained in the "Description of Fairway," was to constitute in the inner man-of-war anchorage two separate fairways, divided by the line of mooring buoys, in either of which vessels, whether proceeding up or down the harbour, were entitled to navigate, & pl'tfs.' vessel was alone in fault for the collision for failing to keep on her own starboard side of the northern fairway, in compliance with art. 25.—*THE ZILLAH*, [1929] P. 266; 98 L. J. P. 124; 141 L. T. 174; 45 T. L. R. 440; 17 Asp. M. L. C. 604.

6065. *Add. Annotations*:—*Consd.* H.M. Submarine Rainbow, [1933] P. 68. *Refd.* *The Treherbert*, [1931] P. 31.

6069a. *River Plate*.]—*THE BUCCARI* (1929), 35 Ll. L. Rep. 26.

*Annotation*:—*Consd.* *Leopold L. D. S.S. v. Hochelaga S.S. Co., Louis Dreyfus & Co. v. Hochelaga S.S. Co. v. Louis Dreyfus & Co., Hochelaga S.S. Co. v. Leopold L.D. S.S. (1931), 101 L. J. P. C. 65.*

## PART XII. SECT. 3, SUB-SECT. 5.— E. (d).

m 1. —.]—A collision occurred between the *I.*, & the *McG.*, soon after midnight, in a narrow channel of the St. Lawrence River between buoys 23 & 24, south of the fairway, & close to buoy 23. The weather was fine & clear, somewhat overcast, but without haze, & visibility was good. Both ships were going at full speed. The *McG.* outbound, going with the stream & a tide of 3 knots an hour & the *I.* inbound. When the *McG.* was abreast of the buoy 24 she gave a one-blast signal which was answered by the *I.* when abreast of buoy 23, indicating

that they would pass port to port. The *I.* always going at full speed, then directed her course to port instead of keeping to starboard, contrary to the signal given, & to Art. 25, showing the *McG.* to the south: & the collision occurred, the *I.* striking the *McG.* on the port side just amidships, with her port bow:—*Held*: as the two vessels were travelling port to port after exchanging signals indicating they would keep their course, the speed of the *McG.* in no way contributed to the collision, but that the collision was entirely due to the fault of the *I.* in not keeping to starboard of the channel & neglecting to slow up or stop as good seamanship required.—

6070a. —.]—The *L.* was going down the river St. Lawrence outward bound, stemming the tide, following a course in mid-channel, a narrow channel within the meaning of Art. 25, & when about two miles apart sighted the *H.*, which was well over the southern side of the channel, her port side. The available fairway, which was limited by shoals on each side, was well lighted & about twelve hundred feet wide. The *H.* blew two port helm signals which were not heard, but when within 1,500 feet blew one short blast, put her helm hard-a-port & kept it there until collision. The *L.* only heard the last short blast. The Regulations of 1910 provided for no signal to warn an oncoming ship of an intended breach of rule by the approaching vessel:—*Held*: the two ships were jointly liable & equally to blame, & it ought to be inferred from the Regulations of 1910 that signals other than those specified & prescribed were given at the risk of the vessel which gave them; the *L.* ought to have sounded two short blasts as a signal to the *H.* of her intention to continue on her course so as to pass green to green.—*LEOPOLD L. D. S.S. v. HOCHELAGA S.S. Co.; LOUIS DREYFUS & Co. v. HOCHELAGA S.S.; HOCHELAGA S.S. v. LOUIS DREYFUS & Co.; HOCHELAGA S.S. Co. v. LEOPOLD L. D. S.S. (1932), 101 L. J. P. C. 65.*

6104. *Add. Annotations*:—*Consd.* *Leopold L. D. S.S. v. Hochelaga S.S. Co., Louis Dreyfus & Co. v. Hochelaga S.S., Hochelaga S.S. v. Louis Dreyfus & Co., Hochelaga S.S. Co. v. Leopold L. D. S.S. (1931), 101 L. J. P. C. 65.* *Refd.* *The Otranto*, [1930] P. 110; *The Manchester Regiment*, [1938] P. 117.

6104a. *Liability for*.]—*LEOPOLD L. D. S.S. v. HOCHELAGA S.S. Co.; LOUIS DREYFUS & Co. v. HOCHELAGA S.S.; HOCHELAGA S.S. v. LOUIS DREYFUS & Co.; HOCHELAGA S.S. Co. v. LEOPOLD L. D. S.S., No. 6070a, ante.*

6104b. *Right to give signal*—*Vessel without steerage way*.]—*CLAN LINE STEAMERS, LTD. (OWNERS OF THE "CLAN STUART") v. USKIDE STEAMSHIP CO., LTD. (OWNERS OF THE "USKHAVEN")*, [1929] S. C. (H. L.) 69, H. L.

6104c. *Vessels crossing*.]—*THE BUCCINUM* (1936), 181 L. T. Jo. 503, C. A.

6112a. *Crossing vessels*—*Risk of collision*—*Whether sound signal the "ordinary practice of seamen"*.]—*THE LADY BELLE*, No. 5916b, *ante*.

6115. *Add. Annotation*:—*Refd.* *The Vectis*, [1929] P. 204.

*STANDARD OIL CO. OF NEW JERSEY v. S.S. "IKALA," INDUSTRY S.S. Co., LTD. v. S.S. JAMES MCGEE (Que. Adm.)*, [1929] Ex. C. R. 230.—*CAN.*

n 1. —.]—*UNITED STATES SHIPPING BOARD v. THE SHIP ST. ALBANS* (1928), 28 S. R. N. S. W. 429; 45 N. S. W. W. N. 104.—*AUS.*

## PART XII. SECT. 3, SUB-SECT. 5.— F. (a) 1.

a 1. — *Failure to answer due to agony of collision*.]—*C. P. R. v. S.S. ROSECASTLE, DOMINION SHIPPING Co. v. S.S. MONTROSE*, [1931] 4 D. L. R. 141.—*CAN.*

6134. *Add. Annotation*.—**Folld.** The Manchester Regiment, [1938] P. 117.  
6135. *Add. Annotation*.—**Refd.** The Manchester Regiment, [1938] P. 117.

SUB-SECT. 3A.—HARWICH HARBOUR.

- 6144a. *Waiting at bend.*—**THE PRINSES JULIANA, ESBJERG OWNERS v. THE PRINSES JULIANA OWNERS**, No. 5379a, *ante*.

SUB-SECT. 9A.—SCHELDT.

- 6163a. *Vessel turning—Duties of other vessels—Both to blame.*—By Article 40, r. 3, of the Scheldt Bye-laws a vessel turning in the river must give the appropriate signal, & every vessel in the vicinity ("*proche*") proceeding against the tide must stop her way over the ground, & every vessel proceeding with the tide must slacken her speed, until the vessel turning no longer presents any obstacle "*au passage*."

Applts.' steamship *C.*, a collier, bound up the Scheldt with the tide, had ahead of her the steamship *A.*, which sounded the appropriate signal, that she was going to swing to get head on tide. Resps.' vessel *B.*, one of the Harwich & Antwerp mail boats, was coming down the river at her full speed of 14 knots. She saw the lights of the *C.* coming up astern of the *A.*, & when she got down towards the *A.*, which was blocking about half of the navigable waterway of some 1,000 feet, she saw the lights of the *C.* coming under the stern of the *A.* on the *B.*'s side of the waterway. The *B.* kept her speed until about one minute before the collision when she slowed, & about half a minute afterwards, stopped & went full astern. The President absolved the *B.* from blame for the ensuing collision on the ground that Article 40, r. 3, did not apply to her under the circumstances, as there was ample waterway for her on her own proper side of the river under the stern of the *A.* He held that the *B.* was justified in keeping her speed "until her master saw that there was an element of risk in the turning movement of the *A.* combined with the oncoming of the *C.* but before that risk had developed." He held the *C.* alone to blame for over-starboarding into the water of the *B.* & for not sounding a signal that she was starboarding. The owners of the *C.* appealed:—**Held**: Article 40, r. 3, is directed, not to the moment when the approaching ships get up to the turning ship, but to the time when they are coming towards her & do not know where she may be when they get up to her; the ship coming against the tide cannot excuse herself by saying that when she arrived in the vicinity of the turning ship there was in fact room for her to pass; (*per GREER, L.J.*) r. 3 is a regulation for the purpose of ensuring the safety of vessels navigating the river at the time the turning movement is taking

place quite as much as it is directed to the safety of the turning vessel herself, & that the rule has to be applied until the turning vessel no longer presents any obstacle "*au passage*"; & (*per CUR.*) while the *C.* was to blame, the *B.* was also to blame for keeping her speed & not stopping & reversing her engines until the risk of collision was apparent. Decision of the President varied by holding both vessels to blame in equal degrees.—**THE "CHATWOOD,"** [1930] P. 272; 100 L. J. P. 1; 143 L. T. 735; 18 Asp. M. L. C. 165, C. A.

- 6165a. *Vessel tying-up.*—Defts.' vessel *A.*, while tying-up to the bank in the Suez Canal to allow plfts.' vessel *B.* to pass, was exhibiting three clusters of lights which, under the Canal regulations, should only be exhibited when the operation of tying-up is completed. The *A.*, however, was still exhibiting an arc lamp which should not be extinguished until the tying-up is completed, & she was also exhibiting her masthead lights &, until a moment before the collision, her starboard side-light. Her lights, therefore, were more consistent with her not being finally tied up than with that operation being completed so as to enable the *B.* to pass in safety. In answer to plfts.' allegation that they were misled by the lights, defts. contended that if the *B.* had kept a better lookout she would not have been misled:—**Held**: the mere fact that if the *B.* had been keeping a better lookout, she might have appreciated the situation sooner, was not sufficient to exonerate defts.; the burden was on defts., who had broken, not indeed one of the International Regulations, but a rule of an accepted code laid down for Canal pilots, to prove not only that the breach ought not to have misled the *B.*, but that it did not in fact mislead her; & the ct., being of opinion that the *B.* was to some extent misled, found the *A.* one-fifth to blame, & the *B.*, which was coming too fast & took drastic helm & engine action causing her to sheer into the *A.*, four-fifths to blame.—**THE AENEAS**, [1935] P. 128; 104 L. J. P. 74; 154 L. T. 246; 18 Asp. M. L. C. 571.

6166. *Add. Annotation*.—**Generally, Refd.** The Otranto, [1930] P. 110.

6174. *Add. Citation*.—17 Asp. M. L. C. 289.

- 6180a. ———.]—**THE KAMENETZ PODOLSK** (1937), 183 L. T. Jo. 151.

- 6186a. ———.]—The *C.* was proceeding up-river to the south of mid-channel & against the tide, which was a quarter ebb & of about 1 knot's force. The *U.* was proceeding down-river, from the north, in her own water. Each vessel was in charge of a duly licensed Trinity House pilot, & up to within half a mile of the collision, which occurred to the north of mid-channel, & about two cables below the bend at Stone Ness Point, was doing about 10 knots over the ground. At about half a mile apart, the *U.* sounded

PART XII. SECT. 3, SUB-SECT. 5.—G. (a).

6121 iii. ———.] *In narrow channel—Check signal.*—Where a vessel is overtaking another in a narrow channel such as the Wolland Canal & signifies her desire to pass by blowing one blast,

but receives no reply, she is bound to wait, & not attempt to go forward so as to affect the overtaken vessel until permission is obtained. Rule 29 of the Rules of the Road for the Great Lakes is imperative, & overrides the General Rules which deal with conditions not covered expressly by said

Rule. The "check" signal is not recognised by the Great Lakes Rules, & its meaning & effect can only be determined by the circumstances under which it is given & received.—**SINOBENNE-McNAUGHTON LINES v. "STEEL CHEMIST,"** [1928] Exch. C. R. 182.—**CAN.**

two short blasts, ported her wheel, & put her engines to half speed ahead, the *C.* being then fine on the *U.*'s port bow. The *C.* replied with one short blast & repeated that signal ten seconds later, indicating that she was directing her course to starboard; but the *U.*, whose pilot had meanwhile ordered the wheel amidships, very shortly afterwards again altered course to port. Almost immediately afterwards, the *C.* put her wheel hard-a-starboard & again sounded one short blast. When the vessels were about 1,000 feet apart, the *U.* put her engines full speed astern, but at collision her speed was still 5 knots. The *C.*, on the other hand, although approaching a bend in the river, did not reduce her speed from the time the *U.* was first rounding the point up to the time of impact:—*Held*: by failing to keep to her proper side as she came round the outer curve of the bend, the *U.* had committed a flagrant breach of rule 33; that but for this initial error, which was the real *causa malorum*, the two vessels would have passed clear port to port; the *C.*, being only slightly on the wrong side of mid-channel up to the time when the vessels were about half a mile apart, & in a position to cross the middle line on to her proper side by a mere touch of starboard wheel, had up to that time committed no breach of duty to the *U.*; in the absence of evidence to the contrary, it must be presumed that before the time when the *C.* heard the *U.*'s first signal, it was the *C.*'s intention to get into her proper water without delay; the *C.* was entitled to expect the *U.* to correct her initial error, especially after the *C.* had blown her a second one-blast signal & the *U.* was seen to be steadying; that had the *C.* stopped her engines she would have reduced her way very little, & that as the *U.* had altered course to starboard, she would have run into the *U.* (a vessel full of passengers) if she had reversed them; but for the *U.*'s sudden porting, the necessity for the *C.* to ease her speed or stop as described in rule 4 (3) would never have arisen, & accordingly the *U.* must be held alone to blame; *U.*'s appeal dismissed, & the *C.*'s appeal allowed.—*THE UMTALI* (1938), 159 L. T. 350, C. A.

6187a. — *Duty of waiting vessel.*—*THE ROTORUA*, No. 6455b., *post*.

6195. *Add. Annotation*:—*Expld. The Vectis*, [1929] P. 204.

6200a. *Duty to give sound signal.*—By Art. 34 of Port of London River Bye-laws, 1914, steam vessels crossing the river "shall do so at a proper time having regard to vessels navigating up & down the river, & shall be navigated so as not to cause obstruction, injury, or damage to any other vessel."

*Pltfs.*' steamship *D.*, which had been at anchor head down on the north side of the river waiting to cross over to the south side to enter the Surrey Commercial Docks, was proceeding to work slowly across the river under port helm. In this position only her stern light was visible to *defts.*' steamship *B.*, which was coming down the river to the south of mid channel. The *B.* sounded a short blast to a tug coming up the river & the *D.* sounded two short blasts & starboarded her helm a little. As the *D.* got more athwart the river she opened her green light to the *B.*, which

thereupon reversed her engines & dropped both anchors, but her stern came in contact with the starboard quarter of the *D.*:—*Held*: although a crossing vessel had not the duty, as she had under the old Thames Bye-laws of 1898, of keeping out of the way of vessels navigating up & down the river, Art. 34 did not give her the right of way, but specially put upon her the obligation of care both as to the time when she crossed & the way in which she crossed: the *D.* ought to have given ample warning either by means of a long warning blast or preferably a short blast to indicate that she was crossing the bows of the *B.*, or have taken timely action to allow the *B.* to pass if there was not room to cross ahead of her; & the *D.* was alone to blame.—*THE BORS*, [1926] P. 5; 95 L. J. P. 166; 131 L. T. 148; 17 Asp. M. L. C. 22.

*Annotation*:—*Consd. The Homfere* (1937), 183 L. T. Jo. 172.

6200b. — —] *THE HOMFERE* (1937), 183 L. T. Jo. 172.

6212. After this case add:—

#### *I. Vessel leaving Dock.*

6212a. *St. Katherine's Docks - Sufficiency of signal.*]

—Bye-law 26 of the Port of London River Bye-Laws, 1914–21, provides that "A steam vessel coming out of dock or leaving a wharf or tier shall signify the same by a prolonged blast of the steam whistle, except in the case of a vessel coming out of the St. Katharine Docks requiring the bascules of the Tower Bridge to be raised in order to get into position in the river which shall signify the same by a prolonged blast of the steam whistle followed by three short blasts in rapid succession."

*Defts.*' steamship having, on the flood tide, come stern first out of the lock of the St. Katharine Docks into the Upper Pool of the Thames, was in collision with the *pltfs.*' steamship. When entering the lock *defts.*' steamship sounded a signal of one long blast followed by three short blasts, & this signal she twice repeated as she passed through the lock & into the river. It was contended for *pltfs.* that she ought in addition to have sounded the prolonged blast mentioned in the first part of bye-law 26:—*Held*: the framers of the bye-laws must have had in mind that almost the only occasion when a vessel leaving St. Katharine Docks would require the bascules of the Tower Bridge to be raised was when she was coming out of the docks stern first on the flood tide & so would need all the room she could obtain in which to turn head down river; the combination of one long blast & three short blasts conveyed a warning to those whom it might concern that a vessel was leaving the dock & in doing so coming astern; if the bye-law required a vessel in those circumstances also to sound the general warning signal of a prolonged blast prescribed in the earlier part thereof, it followed that she must also, while going astern, sound three short blasts if & when any other vessel in the crowded reach came in sight; & such a series of blasts would be wholly unnecessary & lead to confusion, & *defts.*' steamship was right in sounding only a signal of one long & three short blasts.—*THE FALCON* (1931), 47 T. L. R. 621.



*J. Vessel at Anchor.*

**6212b. Barge dropping down river on anchor—Under-way lights shown.]**—While defts.' sailing barge was dropping down the River Thames on the tide the anchor of the barge fouled the chain of a dredger lying just above Battersea Bridge. The barge continued to exhibit the regulation side lights & stern light for a sailing vessel under way. About half an hour afterwards, the master of pltf.' tug, which was coming down the river with six barges in tow, saw the red light of the sailing barge & thought that she was under way & about to pass through the bridge. In attempting to avoid the sailing barge, when it was realised that she was foul of the dredger, the tug & one of her craft in tow struck the bridge & received damage. Bye-law 5 of the Port of London River Bye-laws, 1911-31, provides that "the expression 'under way,' when used in relation to a vessel, means when she is not at anchor, or moored, or made fast to the shore, or aground, & includes a vessel dropping up or down the river with her anchor on the ground." Bye-law 14 provides that "a vessel under one hundred & fifty feet in length when at anchor or moored shall, by night exhibit forward . . . a white light. . . ."—*Held*: the sailing barge was "at anchor or moored" within the meaning of bye-law 14, & ought to have taken in her side lights & put up an anchor light, & she was alone to blame.—*THE CURLEW*, [1937] P. 30; 106 L. J. P. 17; 156 L. T. 50; 19 Asp. M. L. C. 74; *sub nom.* UNION LIGHTERAGE CO., LTD. v. CURLEW SAILING BARGE OWNERS, *THE CURLEW*, [1936] 3 All E. R. 676.

**6212c. Lights not sufficiently visible.]**—This was a claim by the owners of the Greek steamship *N.* against E. W.'s Line Limited, of Hull, owners of the steamship *T.*, for damages in respect of a collision which occurred about abreast of Shellhaven Point, Sea Reach, River Thames, on a clear but dark night, at about 2.30 a.m. on Dec. 12, 1936. The *N.*, with no pilot on board, was at anchor; the *T.*, in charge of a fully-licensed Trinity House pilot, was proceeding down-river on a voyage from London to Hull. Pltf.' case was that the *N.*, having failed to find a pilot off the Tongue Light Vessel, had proceeded up the river in the wake of another vessel, whose pilot had undertaken, by wireless, to lead the *N.* to a safe place of anchorage; that when the *N.* was about abreast of Holehaven Creek the pilot on board the other vessel had sent a wireless message to the *N.* telling her to drop anchor there & promising to return in a couple of hours to pilot the *N.* to London Docks; that the *N.* thereupon immediately dropped her starboard anchor, she being then about 300 yds. off Holehaven Creek & stemming the ebb tide, put out her navigation lights & posted her anchor lights, which thereafter burned brightly. About ten minutes before the collision those on board the *N.* observed the red light of a vessel which proved to be the *T.*, about a mile distant & bearing on the *N.*'s port bow. The *T.* came on, but instead of passing the *N.* portside to portside as she could & ought to have done, the *T.*, with her stem & port bow, struck the *N.*'s port bow, doing damage.

Defts.' case was that the *T.* was proceeding down the river at full speed & doing about twelve knots over the ground. After passing West Blyth buoy on her starboard side at a distance of about 150 ft., the *T.* set a course of E.  $\frac{1}{4}$  S., which was maintained until just before the collision, & on that course she proceeded down Sea Reach well on the southern side of mid-channel. When about half a cable away, those on board the *T.* descried the loom of the *N.* about ahead, & very shortly afterwards a faint light was seen. Although the wheel of the *T.* was hard-a-starboarded & her engines were put full speed astern, the *T.*'s port bow struck the port bow of the *N.*, whereby the *T.* sustained considerable damage. As the *T.* then scraped along the port side of the *N.*, it was observed that some of the *N.*'s portholes appeared to be very dimly lit. Defts. denied liability & blamed pltf. for the collision, alleging that the *N.* was improperly anchored in the fairway & was not exhibiting the anchor lights required by the Port of London River Bye-laws, 1914-1934. The learned judge having found as a fact that the *N.* was not lying where she said she was, but was anchored well in mid-channel about abreast of Shellhaven Point:—*Held*: even if the *N.*'s lights were visible at a cable's distance, as the evidence called on behalf of defts. appeared to establish, this was in flagrant breach of bye-law 11 of the Port of London River Bye-laws, 1914-1934, which required that anchor lights should be clear & visible all round the horizon at a distance of at least one mile; the failure of those on board the *T.* to descri such lights as the *N.* had before they did, did not amount to a bad look-out, & in the circumstances there was no negligence on the defts. for not having avoided the collision. Pltf. were accordingly alone to blame.—*THE TRENTINO* (1937), 157 L. T. 70.

*K. Vessel Grounded.*

**6212d. Failure to give signal—Damage not following "naturally & necessarily" from negligence.]**—*THE PEMBROKESHIRE* (1936), 181 L. T. Jo. 470.

*L. Drifting Barge.*

**6212e. Exhibition of light** Light waved by lighterman.]—*THE SUB* (1937), 183 L. T. Jo. 173.

**6218. Add. Annotations.**—*Consd.* H.M. Submarine Rainbow, [1933] P. 68. *Refd.* The Treherbert, [1934] P. 31.

**6230. Add. Annotation** :—*Consd.* The Minerva, [1933] P. 224.

**6240a.** ———.] "BARON VERNON" S.S. v. S.S. "METAGAMA," [1928] S. C. (H. L.) 21, H. L.

**6241. Add. Annotations** :—*Consd.* Canadian Pacific Ry. v. Kelvin Shipping Co. (1927), 138 L. T. 369. *Refd.* Grafton S.S. Owners v. Genua S.S. Owners, The Genua, [1936] 4 All E. R. 798.

**6248. Add. Annotations** :—*Apld.* Canadian Pacific Ry. v. Kelvin Shipping Co. (1927), 138 L. T. 369. *Refd.* Grafton S.S. Owners v. Genua S.S. Owners, The Genua, [1936] 2 All E. R. 798.

**6253. Add. Annotation** :—*Consd.* The Rehearo, [1933] P. 286.

**6253a. Fire—Excessive wash causing stove to upset.]—**WENDY II. MOTOR BOAT OWNER v. SOLACE MOTOR BOAT OWNER (1936), 181 L. T. Jo. 193.

**6253b. Excessive speed on leaving lock—Abnormal wash causing damage.]—**OLIVEGROVE S.S. OWNERS v. SCHUYLKILL OWNERS (1936), 182 L. T. Jo. 127.

**6255. Add. Annotations:—***As to* (1) **Apld.** Canadian Pacific Ry. v. Kelvin Shipping Co. (1927), 138 L. T. 369. **Refd.** Grainton S.S. Owners v. Genua S.S. Owners, *The Genua*, [1936] 2 All E. R. 798.

**6256. Add. Annotations:—****Refd.** Canadian Pacific Ry. v. Kelvin Shipping Co. (1927), 138 L. T. 369; *The Kite* (1933), 49 T. L. R. 525; *The Stranna*, [1937] P. 130.

**6257a. —.**—[The *G.* having been damaged in collision was taken in tow to Dover & there beached. She was beached at a spot where the damaged parts were unsupported & the extent of the damage was thereby greatly aggravated. It was found that there was no failure of ordinary nautical skill in the beaching:—*Held*: in order to succeed on the question of consequential damage defts. must show that plffs., were guilty of negligence in the beaching of the ship; the finding of the judge & the elder brethren that there had been no failure of ordinary nautical skill was a finding of no negligence; though there was no actual danger of the ship sinking immediately, the master had not unlimited time in which to decide upon the proper course to pursue, & it was necessary for defts. to show that he had been unduly ignorant or unduly careless.—GRAINTON S.S. OWNERS v. GENUA S.S. OWNERS, *THE GENUA*, [1936] 2 All E. R. 798; 155 L. T. 456; 19 Asp. M. L. C. 50.

**6267. Add. Annotations:—****Refd.** Canadian Pacific Ry. v. Kelvin Shipping Co. (1927), 138 L. T. 369; *The Eurymedon*, [1938] P. 41.

**6285a. —.**—**Navigating officer alone on bridge.]—**On a fine clear morning defts.' motor-ship, bound down Long Reach, River Thames, collided with plffs.' vessel, which was lying moored outside a pontoon alongside the river bank. The motor-ship had a crew of seven hands. The master & mate took four hours on & four hours off in navigating the ship, & two A.B.'s took similar turns at the wheel. The three other members of the crew consisted of two engineers & a spare hand, who was an ordinary seaman. Shortly before the collision, the A.B., who was steering, handed

over the wheel to the master & left the bridge to go to the lavatory & stoke the galley fire. There were no other vessels under way in the reach at the time. Almost immediately after the A.B. had left the bridge, the master, who was feeling quite well, fainted, owing to the after-effects of food poisoning. As he fell to the deck he pulled the wheel over to starboard, with the result that the ship swung round until she was heading more or less up river & struck plffs.' ship. Defts. alleged that the collision occurred without negligence on their part:—*Held*: while too high a standard must not be laid down for a vessel of her class with a small crew, & while it might not be necessary at all times to maintain the position of the navigating officer on the bridge & the helmsman at the wheel, yet, in the circumstances, the position should have been maintained to the extent that there should have been, in addition to the navigating officer, a man on the deck who might have been able to get to the bridge in time to do something to avert the collision; &, therefore, defts. had not established that they could not have avoided the accident by the exercise of ordinary caution & maritime skill.—*THE SAINT ANGUS*, [1938] P. 225; 107 L. J. P. 135; 159 L. T. 464; 54 T. L. R. 947.

**6325. Add. Annotations:—****Refd.** Winnipeg Electric Co. v. Geel (1932), 48 T. L. R. 657; *The Saint Angus* (1938), 51 T. L. R. 947.

**6369. Add. Annotation:—****Refd.** Winnipeg Electric Co. v. Geel (1932), 48 T. L. R. 657.

**6377a. —.**—[*THE PRINCESS*, No. 5608b, *ante*.

**6414. Add. Annotations:—****Consd.** Service v. Sundell (1929), 45 T. L. R. 569. **Refd.** Dew v. United British S.S. Co. (1928), 139 L. T. 628; *The Eurymedon*, [1938] P. 41.

**6415. Add. Annotations:—****Consd.** *The Eurymedon*, [1938] P. 41. **Refd.** Tidy v. Battman, [1934] 1 K. B. 319.

**6417. Add. Annotations:—****Consd.** Dew v. United British S.S. Co. (1928), 139 L. T. 628; *The Vectis*, [1929] P. 204; *The Eurymedon*, [1938] P. 41. **Refd.** *The Chatwood*, [1930] P. 272; *The Otranto*, [1930] P. 110; Service v. Sundell (1929), 99 L. J. K. B. 55; Swadling v. Cooper (1930), 46 T. L. R. 597.

**6423a. Vessels failing to stop in fog.]—***THE BREMEN*, No. 5748c, *ante*.

**6429. Add. Annotation:—****Expld.** *The Vectis*, [1929] P. 204.

#### PART XII. SECT. 5, SUB-SECT. 3.—A.

**6289 iii. —.**—[BURRARD INLET TUNNEL & BRIDGE CO. v. S.S. EURANA (B. C. Adm.), [1929] 3 D. L. R. 161; 2 W. W. R. 275; *on appeal*, [1931] A.C. 300.—CAN.

#### PART XII. SECT. 5, SUB-SECT. 4.—B. (b) i.

**6353 ix. —.**—[WAKE-WALKER v. STEAMER COLIN W. LTD. & ST. LAWRENCE TANKERS, LTD., [1936] S. C. R. 624; 4 D. L. R. 209; 6 F. L. J. (Can.) 131; *affd.*, [1937] 2 D. L. R. 753; 7 F. L. J. (Can.) 19.—CAN.

#### PART XII. SECT. 5, SUB-SECT. 5.—A.

**6413 xviii. —.**—[SINGENNES-MCNAUGHTON LINE, LTD. v. "BRULIN" S.S., [1928] Exch. C. R. 45; *reversed*, [1929] 3 D. L. R. 536.—CAN.

#### PART XII. SECT. 5, SUB-SECT. 5.—B.

**q i. —.**—[*Held*: where vessels are meeting in narrow channels or areas & improper signals by whistle are exchanged, rules 22 & 23 being violated by both vessels, liability for negligence which causes a collision must be determined by the weight of evidence after consideration of the action of each vessel, having regard to rule 37.—"MANLEY" S.S. (OWNERS OF) v. "HECTOR" S.S. (OWNERS OF) & THE NORTHERN CONSTRUCTION CO., [1928] Exch. C. R. 42.—CAN.

**q ii. —.**—[The collision herein occurred in the First Narrows, at the entrance to Vancouver Harbour. Both vessels were found to have been proceeding at excessive speed through a dense fog:—*Held*: since the collision was primarily caused by the joint

negligence of both ships in failing to comply with the first part of Art. 16 of the International Rules of the Road, & in proceeding through a dense fog at a speed which was immoderate having regard to the existing conditions, they were equally at fault & the total damage occasioned by that joint fault should be borne equally by the parties.—*THE PRINCESS ALICE* S.S. v. WEST VANCOUVER CORPN., [1936] Ex. C. R. 115.—CAN.

#### PART XII. SECT. 5, SUB-SECT. 5.—C.

**6426 v. —.**—[In a collision between vessels passing through a canal at night, responsibility lies upon the ship neglecting to observe the rules governing her course & speed.—*SOVARDS* v. *THE "ELMBAY"*, [1936] 3 D. L. R. 246.—CAN.

**6430.** *Add. Annotations:—*Consd. & Expld. The Vectis, [1929] P. 204. Refd. The Eury-medon, [1938] P. 41.

**6433a.** ———.—]—Pltfs., as owners of the barge *H.*, brought an action in the Mayor's & City of London Ct. against the owners of the barge *V.* in respect of damage sustained by the *H.* in Milton Creek, River Swale, through coming in contact with the *V.*'s anchor, which was admittedly being carried in an improper position, with the stock projecting over the bows, in breach of one of the Milton Creek bye-laws. But for the position of the anchor, the use of fenders would have avoided damage to either vessel. The judge held that the master of the *H.* knew of the position of the anchor & took the risk of coming in contact with the *V.* when the rush of the flood tide swung the *H.*, which was aground, athwart the creek & into contact with the *V.* lying moored on the opposite bank. He found that the master of the *H.* was negligent in not taking measures to avoid coming in contact with the *V.*, & on the authority of *The Monte Rosa*, No. 6430, which he thought was in conflict with *The Dunstanborough*, No. 6129, gave judgment for defts. Pltfs. appealed:—*Held*: defts. had not established either knowledge of the position of the anchor or negligence on the part of the master of the *H.*, & the appeal succeeded.—*THE VECTIS*, [1929] P. 204; 98 L. J. P. 135; 140 L. T. 563; 45 T. L. R. 384; 17 Asp. M. L. C. 574.

**6433b.** ———.—]—H.M. SUBMARINE RAINBOW, No. 5401a, *ante*.

**6437a.** ———.—]—A steamer having stopped but not having, as she should have done, reversed immediately before a collision, though the ct. found as a fact that her not having done so did not affect the collision, & having thus infringed rule 14 of the Thames Rules:—*Held*: she was nevertheless not to blame, for the Thames Rules do not fall within the operation of Merchant Shipping Act, 1873 (c. 85), s. 17.—*THE HARTON* (1884), 9 P. D. 44; 53 L. J. P. 25; 50 L. T. 370; 5 Asp. M. L. C. 213; 32 W. R. 597.

**6441.** *Add. Annotations:—*As to (2) Consd. The Vectis, [1929] P. 204. As to (3) Consd. The Vectis, [1929] P. 204.

**6448.** *Add. Annotation:—*Consd. The Otranto, [1930] P. 110.

**6451.** *Add. Annotation:—*Consd. The Vectis, [1929] P. 204.

**6453a.** *Collision with vessel at anchor.*—]—Pltfs.' vessel *C.* at anchor in Long Reach, River Thames, was run into by defts.' vessel *E.* proceeding up the river. The *C.* had her anchor lights exhibited, but she was lying nearly athwart the river with her whole length to the north of mid-channel in such a position that she was obstructing a large part of the fairway. The practice in Long Reach,

according to the evidence, was for vessels to anchor to the south of mid-channel, & for large vessels proceeding up & down to pass to the northward. Defts.' case was that the *C.*'s lights were defective, & that those on the *E.* only saw the dim forward anchor light, & immediately afterwards the hull, of the *C.* about 650 feet away. The ct. found, however, that the lights were effective & that they were, or should have been, seen at a considerably greater distance than 650 feet; but that the failure of those in charge of the *E.* to identify the lights as anchor lights in time to avoid the collision was partly due to the *C.*'s improper & unexpected position in the river in a locality where bright lights on the north shore would probably make it more difficult to pick up her lights, & partly to the fact that those on the *E.*, which had a speed of at least 10 knots, were not sufficiently alert as to the possibility of danger ahead. On these findings BUCKNILL, J., held both vessels equally to blame. On appeal:—*Held*: the case did not come within the *Davies v. Mann* (1842), 10 M. & W. 546; 36 Digest 113, 751, rule; the *E.* was to blame, inasmuch as those in charge of her on seeing the lights should have realised the possibility that they were those of a ship or ships ahead, the precise position of which was obscure, & should have reduced the speed of the *E.* immediately; but that the *C.* was also negligent for remaining in an improper position athwart the fairway, & this negligence, which continued up to the time of the collision, contributed to the failure on the part of the *E.* to take proper action; the negligence of both vessels therefore contributed to the collision & both were to blame in equal degrees.—*THE EURYMEDON*, [1938] P. 41; 107 L. J. P. 81; 158 L. T. 415; 54 T. L. R. 272; 82 Sol. Jo. 52; *sub nom.* CORSTAR OWNERS v. EURYMEDON OWNERS, *THE EURYMEDON*, [1938] 1 All E. R. 122, C. A.

**6455a.** ———.—]—*THE BREMEN*, No. 5748c, *ante*.

**6455b.** ———.—]—This was a claim by the owners of the motor barge *C.*, which was towing their dumb barge *P.* up-river in the Thames, against the owners of the steamship *R.* for damage suffered by the *P.* in a collision with the *R.* which occurred on the night of Apr. 4, 1935, opposite the Royal Albert Dock, which the *R.* was waiting to enter. Pltfs. contended that as the *C.* was proceeding up-river with three barges in tow laden with cement, the *R.* which was waiting to enter the Royal Albert Dock but which was moving slowly down river & was angled across it, struck the *P.*, the port hand barge in tow of the *C.*, doing her so much damage that she had to be beached to avoid sinking in deep water. Defts. denied liability & said that the *R.* was not moving; she was stemming the tide & not altering her

**6436 i.** *Breach by both vessels—Rules for navigating Great Lakes.*—]—“GLEN-ROSS” v. CANADA S.S. LINES, LTD., SWAN, HUNTER & WIGHAM RICHARDSON, LTD. v. “GLENLEIGH,” [1929] 3 D. L. R. 282; S. C. R. 549.—CAN.

**PART XII. SECT. 5, SUB-SECT. 6.—**C. (a).

**6447 i.** *Rules of Common Law & Admiralty distinguished.*—]—Where the

negligence of deft. is not the sole cause of the damage different principles for assessing liability are applicable at common law from those to be applied in Admiralty, for at common law the suit will fail, whereas in Admiralty where the damage is caused by the combined default of two or more vessels, the liability is to be apportioned.—“RABENFELS,” *THE* (1929), 1 L. R. 56 Calc. 763.—IND.

**PART XII. SECT. 6, SUB-SECT. 1.—D.**

**q i.** ———.—]—The master of the *T.*, which was at all relevant times compulso-ri-ly in charge of a pilot, was in as favourable a position as the pilot to determine whether any risk of navigation was being incurred, & was aware of all the circumstances immediately preceding & leading up to the collision, but stood by & gave no warning to the

leading; they contended that the *C.* was alone to blame for the collision in that, instead of passing the *R.* on the starboard side, the *C.* tried to pass ahead of the *R.* from starboard to port, & although the starboard engine of the *R.* was immediately put full speed astern, the *C.* having got her craft across the tide was unable to regain control of the barges, with the result that the *P.* fell across the stem of the *R.* At a later stage in the hearing & after the conclusion of the evidence, defts. applied for leave to amend the defence by alleging that the *C.* failed to give any sound signal of her intention to alter course so as to pass the *R.* port to port. The amendment was allowed:—*Held*: in a reserved judgment, the governing fact of the collision was that the *R.* was moving down river & trailing across to the northward while her head was falling off to port; she was swinging from time to time & straddling across the water. The *R.* was to blame for bad look-out, for going across into the northern water when she ought to have been held steady in the channel if she were going to remain there at all, & for not taking timely steps to assist the *C.*, which, owing to the action of the *R.*, had to go closer to the north shore than she originally intended; further, the *C.* was also to blame for not letting the *R.* know by sound signal what she was doing & for substantially contributing to the collision thereby. The blame was apportioned as to two-thirds on the *R.*, & as to one-third on the *C.*, the judge directing that the costs of the action should follow the event in the same proportion.—*THE ROTORUA* (1936), 155 L. T. 357; 19 Asp. M. L. C. 6.

6465. *Add. Annotation* :—**Refd.** *The Young Sid*, [1929] P. 109.
6480. *Add. Annotation* :—**Consd.** *Oliver v. Birmingham & Midland Motor Omnibus Co.* (1932), 48 T. L. R. 540.
6484. *Add. Annotations* : **Consd.** *The Aizkarai Mendi*, [1938] 3 All E. R. 483. **Refd.** *The Edison*, [1932] P. 52 ; *A.-G. v. Valle-Jones*, [1935] 2 K. B. 209 ; *Flint v. Lovell*, [1935] 1 K. B. 354.
6499. *Add. Annotation* :—**Consd.** *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.
6501. *Add. Annotation* :—**Refd.** *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.
6504. *Add. Annotation* :—**Consd.** *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.

pilot as to the possibility of danger or as to the breach of regulations as to speed:—*Held*: in the circumstances the master was *particeps* in the negligence of the pilot & the defence of compulsory pilotage was not available to the owners of the *T.—FERRIES* (SYDNEY), LTD. v. TAHITI, THE SHIP (1929), 30 S. R. N. S. W. 360; 47 N. S. W. W. N. 130.—**AUS.**

**PART XII. SECT. 6. SUB-SECT. 2.—A.**

o l. —.]—Sect. 117 of Navigation Act, 1901, is a valid exercise of the power conferred on Colonial Legislatures by sect. 735 of Merchant Shipping Act, 1894, of repealing or altering the provisions of the latter Act relating to ships locally registered. Consequently, sect. 117 of Navigation Act, 1901, is not to be read as subject to sect. 419 (4) of Merchant Shipping Act.

1894. Therefore, the provisions of sect. 419 (4) of Merchant Shipping Act, 1894, are not applicable to ships registered in New South Wales, & the presumption of fault does not arise against any such vessel on proof merely that she has infringed any of the collision regulations, but only where it appears to the ct. that the collision was occasioned by such breach of regulation.—*BUTLER v. MILLMUMUL SHIP* (1929), 30 S. R. N. S. W. 182; 47 N. S. W. W. N. 66.—AUS.

**PART XII. SECT. 6. SUB-SECT. 4.**

8605 1. *Discretion to extend time.*—*Held*: as no sufficient excuse had been given for failure to bring suit for damages for collision within the proper time, extension under Maritime Conventions Act, 1911, s. 8, should not be

- 6546.** *Add. Annotation* :—**Refd.** The Carlton, [1931] P. 186.
- 6562.** *Add. Annotations* :—**Refd.** Dew v. United British S.S. Co. (1928), 139 L. T. 628 ; Service v. Sundell (1929), 45 T. L. R. 569 ; The Eurymedon, [1938] P. 41.
- 6568.** *Add. Annotation* :—**Consd.** The Eurymedon, [1938] P. 41.
- 6591.** *Add. Annotation* :—**Apld.** Brooke v. Bool [1928] 2 K. B. 578.
- 6594.** *Add. Annotation* :—**Consd.** Banco de Portugal v. Waterlow & Sons, Ltd., Waterlow & Sons, Ltd. v. Banco de Portugal, [1932] A. C. 452.
- 6594a.** ——— — — —.]—" HARVEST HOME," THE, No. 5217, *ante*.
- 6601.** *Add. Annotation* :—**Refd.** Jacobs v. London County Council, Shaw v. London County Council, [1935] 1 K. B. 67.
- 6613.** *Add. Annotation* :—**Refd.** The Theems, [1938] P. 197.
- 6618.** *Add. Annotation* :—**Refd.** The Edison (1931), 47 T. L. R. 635.
- 6622.** *Add. Annotation* :—**Refd.** The Baarn, [1933] P. 251.
- 6624.** *Add. Annotations* :—**Consd.** Strathfillan S.S. Owners v. Ikala S.S. Owners, The Ikala, [1929] A. C. 196. **Refd.** The Edison (1932), 48 T. L. R. 224 ; The West Wales, [1932] P. 165 ; The Kafiristan, [1937] 3 All E. R. 747.
- 6627.** *Add. Annotations* :—**Apld.** A.-G. v. Glen Line & Liverpool & London War Risks Insee. Assocn. (1929), 34 Com. Cas. 309. **Consd.** The Edison (1932), 48 T. L. R. 224.
- 6628a.** ——— **Detention due to collision—Owner unable to use ship owing to contract during period of detention.]—**On Mar. 12, 1927, resp's. steamship suffered damage by a collision with appl'ts. steamship, for which the appl'ts. admitted liability. The damage did not render resp's. vessel unseaworthy, & she continued trading without effecting repairs. While she was so trading her owners by a memorandum of agreement dated Dec. 21, 1927, contracted to sell her. The agreement set forth that the vessel was "due London on Dec. 21, thence H. & A., expected ready for delivery between, say, Jan. 10 & Jan. 31, & to be delivered to buyer at Antwerp or a U.K. port at seller's option, but not later than Feb. 25, 1928, subject to buyer's approval afloat & to bottom examination in dry dock, as specified in Clauses 4 & 5 of this contract . . . 4. The buyer shall

granted.—NIPPON YUSEN KAISHA v.  
THE MARIENFELS (1933), I. L. R. 61  
Cal. 22.—IND.

**s1. Effect of Maritime Conventions** (1st, 1914, s. 9.)—The present action is one in *rem* against the tug *S.* for damages to pltf.'s canal boat, when in tow of the *S.*, as a result of a collision between the said canal boat, a dumb tow, & the wall of the inner basin of the harbour of Quebec, which collision was alleged to be due to the negligent navigating of the *S.*: *Held:*—sect. 9 was not limited in its application solely to actions for damages due to collision between vessels, & the present action not having been commenced within two years from the date when the damages or loss or injury was caused should be dismissed — “*SPRAY*” v. *ST. CLAIR*, [1928] Exch. C. R. 56.—**CAN.**

commence the inspection of the steamer afloat within twenty-four hours of receiving notice of steamer's readiness for inspection, & if on superficial inspection the buyer is satisfied with the general condition of the steamer, seller shall at his own risk & expense open up the engines, boilers & tanks for the inspection of the steamer afloat by the buyer. . . . The buyer shall declare acceptance or refusal of the steamer in writing within twenty-four hours after completion of such inspection afloat . . . 5. For examination of bottom &/or other water parts &/or tailend shaft, seller agrees to put the vessel into dry dock. . . ." The steamship arrived at Antwerp on Jan. 10, 1928, & her owners gave notice to the buyer of her readiness. On Jan. 18 they proceeded to open up the vessel's engines, boilers & tanks for inspection, & while the vessel was in that condition & therefore unable to trade, they took the opportunity to effect the repair of the collision damage, which was of such a nature that it could be repaired while the ship was afloat. The repairs admittedly occupied four days, & were completed on Jan. 24. Subsequently the vessel was put into dry dock for bottom examination. On the reference to assess the damage caused by the collision resps. claimed (*inter alia*) loss & expenses in respect of four days' detention while their ship was undergoing repairs:—*Held*: inasmuch as resp. shipowners had entered into contractual obligations which prevented them from trading with the vessel & earning profits during the time when the repair of the collision damage was being executed, they had not suffered any loss by the detention of their vessel in consequence of the collision, & were therefore not entitled to recover from the wrongdoer.—THE YORK, [1929] P. 178; 98 L. J. P. 147; 141 L. T. 215; 17 Asp. M. L. C. 600, C. A.

*Annotation*:—*Refd.* The London Corporation, [1935] P. 70.

6635. *Add. Annotation*:—*Refd.* The Edison (1932), 147 L. T. 141.

6640. *Add. Annotation*:—*Consd.* The Edison, [1932] P. 52.

6642. *Add. Annotation*:—*Overd.* Liesbosch S.S. Owners v. Edison S.S. Owners, [1933] A. C. 449.

6653a. ————.]—A British battleship damaged by collision was put into a naval dry dock for her repairs. The ship's effective life was estimated at twenty years & she was under four years old at the time of the collision. In assessing the damages the registrar allowed nothing in respect of the use of dock & cranes, on the ground that the Admiralty had suffered no pecuniary expenses or loss, & in respect of the loss of use of the ship for fifteen days, the time estimated for the collision repairs, he allowed interest at 2½ per cent., on half the initial costs of the ship for the fifteen days. The Admiralty appealed:—*Held*: that the case must go back to the registrar for re-assessment, for (i) the ship occupied the dock & used the cranes, etc., to the exclusion of other vessels & some allowance, therefore, must be made to the Admiralty in respect of these items, & (ii) having regard to the estimated life of the ship, her annual depreciation & cost of maintenance, the amount awarded for detention appeared to have been computed on

a wrong basis.—THE WEST WALES, [1932] P. 165; 101 L. J. P. 92; 148 L. T. 80; 18 Asp. M. L. C. 349.

6656. *Add. Annotations*:—*Consd.* The York, [1929] P. 178; 101 L. J. P. 92. *Refd.* The London Corporation, [1935] P. 70.

6659. *Add. Annotations*:—*Refd.* Canadian Pacific Ry. v. Kelvin Shipping Co. (1927), 138 L. T. 369; The Edison (1932), 147 L. T. 141.

6663. *Add. Annotations*:—*Consd.* The West Wales, [1932] P. 165. *Refd.* The Ikala, [1928] P. 86; Liesbosch S.S. Owners v. Edison S.S. Owners, [1933] A. C. 449; Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.

6671. *Add. Annotations*:—*Apld.* The York, [1929] P. 178. *Refd.* The London Corporation, [1935] P. 70.

6671a. ———— Although ship sold.]—Pltfs.' & defts.' vessels, while laid up, ranged against each other & each sustained slight damage. Before any action was brought both vessels were surveyed, but no estimate of the cost of repairs was made. Pltfs.' vessel was then sold to be broken up. Defts. afterwards agreed with pltfs. that the repairs, if executed, would cost £250, but no repairs were in fact done. Defts. contended that pltfs. had suffered no loss & were not entitled to any damages:—*Held*: (1) the mere facts that the vessel had been sold to shipbreakers, & that the repairs would never be carried out, did not discharge the onus, which was on defts., of proving that pltfs. had suffered no damage; (2) *prima facie* the value of a vessel damaged in collision is less, by the cost of the repairs, than her value if undamaged, & the fact that a vessel has been sold to be broken up is an accidental circumstance not to be taken into account in the way of diminution of damages.—THE LONDON CORPORATION, [1935] P. 70; 104 L. J. P. 20; 152 L. T. 487; 51 T. L. R. 224; 79 Sol. Jo. 86; 18 Asp. M. L. C. 535, C. A.

6672. *Add. Annotation*:—*Refd.* The London Corporation, [1935] P. 70.

6674. *Add. Annotations*:—*Apld.* The York, [1929] P. 178. *Refd.* The London Corporation, [1935] P. 70.

6677. *Add. Citations*:—*affd. sub nom.* STRATHFILLAN S.S. OWNERS v. IKALA S.S. OWNERS, THE IKALA, [1929] A. C. 196; 98 L. J. P. 49; 140 L. T. 177; 17 Asp. M. L. C. 555, H. L. *Add. Annotation*:—*Consd.* The York, [1929] P. 178.

6678. *Add. Annotation*:—*Refd.* The Young Sid, [1929] P. 190.

6689. *Add. Annotations*:—*Consd.* The West Wales, [1932] P. 165. *Refd.* Liesbosch S.S. Owners v. Edison S.S. Owners, [1933] A. C. 449.

6690. *Add. Annotations*:—*Consd.* The Edison, [1932] P. 52; The West Wales, [1932] P. 165. *Refd.* The London Corporation, [1935] P. 70.

6694a. ———— On special contract.]—While the dredger *L.* was lying moored alongside the breakwater at Patras Harbour in the Hellenic Republic the steamship *E.* fouled the dredger's moorings & carried her out to sea, where she sank & was lost. The owners of the *E.* admitted sole liability for the loss. In proceedings before the Admiralty Registrar & a Merchant between the owners of

the *L.* & the owners of the *E.* to assess the damages it appeared that the *L.* had been bought in 1927 for £4,000 by her owners, who had spent a further £2,000 in bringing her to Patras. They were a syndicate of civil engineers. Under a contract with the Patras Harbour Comrs. they were engaged in constructive work in the harbour, for which a dredger was necessary & for which they were using the *L.* The contract provided for completion of the work within a specified time. Delay in completion involved payment of heavy penalties &, if prolonged, cancellation of the contract. The owners of the *L.* had staked their capital & credit on the successful result of the contract. The loss of the *L.* stopped the work &, being unable from want of funds to purchase any suitable dredger which was for sale, on May 4, 1929, they hired a dredger, the *A.*, which was lying in harbour at Carlo Forte, Sardinia, to take the place of the *L.* The *A.* was more expensive in working than the *L.*, & required the attendance of a tug & two hopper barges. The *L.* was sunk on Nov. 26, 1928. The *A.* got to work on the harbour on June 17, 1929. On June 30, 1930, Harbour Comrs. bought the *A.* from her Italian owners for £9,177, & on Sept. 5, 1930, they resold her to the owners of the *L.* for the same sum payable in instalments:—*Held*: the measure of damages was the value of the *L.* to her owners as a profit-earning dredger at the time & place of her loss; & that it should include:—

(1) A capital sum made up of (a) the market price on Nov. 26, 1928, of a dredger comparable to the *L.*; (b) the cost of adapting the new dredger & of transporting & insuring her from her moorings to Patras; & (c) compensation for disturbance & loss suffered by the owners of the *L.* in carrying out their contract during the period between Nov. 26, 1928, & the date on which the substituted dredger could reasonably have been available for use at Patras, including in that loss such items as overhead charges & expenses of staff & equipment & the like thrown away, but neglecting any special loss or extra expense due to the financial position of one or other of the parties.

(2) Interest upon that capital sum from Nov. 26, 1928.

The rule in *The Columbus* disapproved where a vessel was in profitable employment at the time of her loss.—*LIESBOSCH, DREDGER v. EDISON S.S.*, [1933] A. C. 449; 102 L. J. P. 73; 77 Sol. Jo. 176; 38 Com. Cas. 267; 18 Asp. M. L. C. 380; *sub nom.* *THE EDISON*, 149 L. T. 49; 49 T. L. R. 289, H. L.

*Annotations*:—*Refd.* *Bruckland v. R.*, [1933] 1 K. B. 329; *The Castor*, [1932] P. 142; *Simon v. Pawson & Leafs, Ltd.*, (1932), 148 L. T. 154; *The Arpad* (1934), 50 T. L. R. 505.

#### PART XII. SECT. 6, SUB-SECT. 5.—J.

6711 *l.* — *No market for such type of ship.*—On Aug. 14, 1926, a hopper digger barge belonging to the trustees of the Clyde Navigation was sunk in collision with the s.s. *Ronda*, admitted that those in charge of her were solely to blame for the accident. In an action at the instance of the trustees, brought on Jan. 24, 1928, to assess & recover damages for (*inter alia*), the loss of the barge, it was

proved that there was no market for such a vessel, so that the test of market value was not available. The Lord Ordinary awarded the pursuers the cost of a reasonably efficient second-hand hopper barge, & the cost of adapting it for their special purpose:—*Held*: the Lord Ordinary's method of assessing the value of the barge was not erroneous.—*CLYDE NAVIGATION TRUSTEES v. BOWRING S.S. CO., LTD.*, [1929] S. C. 715.—*SCOT.*

6694b — *Expenses of hiring substitute—Whether expenses reasonably incurred.*—*THE EDISON*, No. 6694a, *ante*.

6696. *Add. Annotation*:—*Refd.* *The Arpad* (1934), 50 T. L. R. 505.

6699. *Add. Annotation*:—*Refd.* *The Arpad* (1934), 50 T. L. R. 505.

6705. *Add. Annotation*:—*Refd.* *The Edison*, [1932] P. 52.

6706. *Add. Annotations*:—*Appld.* *A.-G. v. Glen Line & Liverpool & London War Risks Insee. Assoc.* (1929), 34 Com. Cas. 308. *Consd.* *The Castor* (1932), 48 T. L. R. 604; *Liesbosch S.S. Owners v. Edison S.S. Owners*, [1933] A. C. 449.

6707. *Add. Annotation*:—*Consd.* *Liesbosch S.S. Owners v. Edison S.S. Owners*, [1933] A. C. 449.

6708. *Add. Annotations*:—*Appld.* *A.-G. v. Glen Line & Liverpool & London War Risks Insee. Assocn.* (1929), 34 Com. Cas. 309. *Consd.* *Liesbosch S.S. Owners v. Edison S.S. Owners*, [1933] A. C. 449.

6710. *Add. Annotations*:—*Consd.* *The Castor* (1932), 48 T. L. R. 604; *Liesbosch S.S. Owners v. Edison S.S. Owners*, [1933] A. C. 449. *Refd.* *The Arpad* (1934), 50 T. L. R. 505.

6733. *Add. Annotations*:—*Consd.* *The Edison*, [1932] P. 52. *Refd.* *The West Wales*, [1932] P. 165. *Refd.* *The London Corporation*, [1935] P. 70.

6736a. *Allowance to charterer under cesser clause.*—*THE ESSEX ENVOY*, No. 2104a, *ante*.

6736b. *Use of naval dock & cranes—Repairs to warship.*—*THE WEST WALES*, No. 6653a, *ante*.

6739. *Add. Annotations*:—*Refd.* *The Napier Star*, [1933] P. 136; *The Theems*, [1938] P. 197.

6740. *Add. Annotations*:—As to (2) *Consd.* *The Napier Star*, [1933] P. 136. *Refd.* *Liesbosch S.S. Owners v. Edison S.S. Owners*, [1933] A. C. 449.

6742. *Add. Annotations*:—As to (1) *Consd.* *The Napier Star*, [1933] P. 136. *Refd.* *The Point Breeze*, [1928] P. 135. *Generally, Refd.* *The Theems*, [1938] P. 197.

6751. *Add. Annotation*:—*Refd.* *The London Corporation*, [1935] P. 70.

6753. *Add. Annotation*:—*Consd.* *Compania Naviera Vascongada v. Cristina S.S.*, [1938] A. C. 485.

6754. *Add. Annotation*:—*Refd.* *Compania Naviera Vascongada v. Cristina S.S.*, [1938] A. C. 485.

6758. *Add. Annotations*:—*Consd.* *Compania Naviera Vascongada v. Cristina S.S.*, [1938] A. C. 485. *Refd.* *Engelke v. Musmann*, [1928] A. C. 433.

6761. *Add. Annotation*:—*Refd.* *Compania Naviera Vascongada v. Cristina S.S.*, [1938] A. C. 485.

#### PART XII. SECT. 6, SUB-SECT. 5.—L.

6732 *l.* *Damages through deprivation of use of vessel.*—Though *pltf.'s* vessel is a non-profit earning ship *pltf.* is entitled to recover from *deft.* damages based on maintenance, overhead & depreciation costs, for the time the ship was actually absent from her duties as a result of the collision, in addition to the actual cost of repairs.—*It. v. JERRY PETITE*, [1933] Ex. C. R. 186.—*CAN.*

- 6762.** *Add. Annotation :—***Refd.** *Compania Naviera Vascongada v. Cristina S.S.*, [1938] A. C. 485. **6763.** *Add. Annotation :—***Refd.** *The Zigurds* (No. 1) (1932), 48 T. L. R. 556.

## Part XIV.—Wreck.

- 6794.** *Add. Annotations:—As to (2) Consd. Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.
- 6796.** *Add. Annotations:—Consd. Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159. *Refd.* *Oceanic Steam Navigation Co. v. Evans* (1934), 51 T. L. R. 67.
- 6797.** *Add. Annotations:—Apld.* *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159. *Refd.* *The Chr. Knudsen* (1932), 48 T. L. R. 619.
- 6805.** After this case add:—  
**Negligent repair—Limitation of action.]—***See PUBLIC AUTHORITIES*, No. 949a, *ante*.
- 6807.** *Add. Annotations:—As to (1) Consd. Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159; *G. W. Ry. v. S.S. Mostyn*, [1928] A. C. 57. *Refd.* *Allgemeine Versicherungs-Gesellschaft Helvetia v. German Property Administrator*, [1931] 1 K. B. 672; *Ruislip-Northwood Urban District Council v. Lee* (1931), 145 L. T. 208.
- 6809a.** ————.]—A ketch belonging to defts. sank, owing to their negligence, in a river, of which first plffs. were the conservators, & thereby obstructed the navigation of the river & second plffs.' wharf & the approaches thereto. Immediately after the sinking of the ketch, & before any expenses were incurred in removing her, defts. abandoned her. Plffs. jointly incurred expenses in removing the obstruction, & sued to recover the amount from defts. :—*Held* :
- (1) the ketch having sunk through the negligence of defts., they became liable at common law for the damage caused by the obstruction to the navigation of the river & the blocking of the approach to the wharf, & they could not escape liability for that damage by abandoning the wreck; (2) the damages recoverable were the reasonable cost of removing the obstruction.—*DEE CONSERVANCY BOARD v. MCCONNELL*, [1928] 2 K. B. 159; 97 L. J. K. B. 487; 138 L. T. 656; 92 J. P. 54; 26 L. G. R. 204; 17 Asp. M. L. C. 433, C. A.
- 6811a.** ————.]—Defts.' steamship, a Norwegian vessel, while docking in Stalbridge Dock, Garston, came into collision with & sank a barge. Plffs., as owners of the dock, took steps to raise & remove the wreck, & by a writ *in rem* in the present action claimed to recover from defts. the expenses which they had incurred "in & about the lighting, buoying, removal, & destruction of the barge." The owners of the barge had given notice that they abandoned their vessel. On a motion by defts. to set aside the service of the writ :—*Held* : the claim was for "damage done by a ship," namely, damage done by defts.' ship to plffs.' dock by putting an obstruction in it, with Supreme Ct. of Judicature (Consolidation) Act, 1925 (c. 49), s. 22 (1), (a), (iv.), & was properly commenced by a writ *in rem*.—*THE CHR. KNUDSEN*, [1932] P. 153; 101 L. J. P. 72; 148 L. T. 60; 48 T. L. R. 619; 18 Asp. M. L. C. 317.
- Annotation:—Consd.* *The Minerva* (1933), 49 T. L. R. 563.

## Part XV.—Salvage.

- 6817.** *Add. Annotation:—Generally, Refd.* Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.
- 6821.** *Add. Annotations:—As to (1) Consd.* The Castor (1932), 48 T. L. R. 604. *Refd.* Admiralty Comrs. v. Valverde Owners, [1938] A. C. 173.
- 6849a.** —.]—THE TRES (1936), 181 L. T. Jo. 376.
- 6849b.** *Information as to course to clear ice-field.* —Defts.' steamship *T. B.*, while bound for St. John, New Brunswick, got into an extensive ice-field in which she sustained so much damage that she sent out an S.O.S. message, as it was thought that she was in danger of sinking. The S.O.S. message was heard & answered by plffs.' steamship *N.*, which was some thirty miles away, & by other vessels, but none of these were within 200 miles of the *T. B.* The *N.* was also bound to St. John & had herself encountered the ice-field, but had got out of it & was in clear water. She at once turned back into the ice-field & pushed her way through the ice as fast as she could, doing damage to her hull & propeller to an amount which, with other expenses, was estimated at £1,000. While she was approaching the *T. B.* wireless messages were exchanged, & it was ascertained that the condition of the *T. B.* was not so serious as had been thought, & the only request made by her was that the *N.* should stand by & see her into St. John.

PART XIII. SECT. 2.

hi. — *Bridge*.]—A.-G. FOR BRITISH COLUMBIA v. "PACIFIC FOAM," [1928] 2 D. L. R. 877; [1928] 1 W. W. R. 965. —CAN.

#### h ii. — — —.]—Action by pl'ts. to recover damages suffered by them by reason of deft. ship coming into collision

with a bridge being erected by plths. over the York River at Gaspe, P.Q. :—  
*Held* : the speed of the *D.* in passing through the bridge opening was, in the circumstances, excessive, & since the speed of the *D.* was excessive it could not be maintained that the ship was navigated with reasonable care & the

accident was inevitable.—**PHILIP T. DODGE S.S. v. DOMINION BRIDGE CO., LTD., DUFRESNE CONSTRUCTION CO., LTD., & LA COMPAGNIE DU PONT DE GASPE LIMITEE, [1934] Ex. C. R. 181; *reversé*, [1936] 1 W. W. R. 94; [1935] 4 D. L. R. 65; 5 F. L. J. (Can.) 131, P. C.—CAN.**



The master of the *N.*, which was then about six or seven miles from the *T. B.*, did not think that the situation was such as to require him to stand by, & he sent the following message to the *T. B.*, which had been steering first S.W. & then more or less in a S.E. direction: "Recommend you steer due W. to clear water about twelve miles which I am doing." At that time the *T. B.* had been in the ice-field for some twenty-four hours, but on receipt of this information she altered course & followed the directions given to her by the *N.*, & so got clear of the ice. Pltfs. claimed salvage. Defts. denied that any salvage services were rendered, as the *N.* was under a statutory duty to go to the assistance of the *T. B.*; they alleged that the damage sustained was while she was performing that duty; that the only assistance requested—namely, to stand by, was not rendered; & that they already knew the course to steer to get out of the ice-field, but this last point was found against them. The value of the *N.*, her cargo & freight, was alleged to be over £225,000; the value of the *T. B.* was agreed at £10,000:—*Held*: each separate item of the proceedings could not be isolated & regarded by itself & the whole of the circumstances must be taken into account; without quantifying the moral support given to defts. by the knowledge that the *N.* was coming to their assistance, pltfs. rendered a very definite salvage service, in the course of which the *N.* sustained considerable damage, in giving information that the *T. B.* would find clear water within twelve miles by steering E.; & the proper award was the sum of £2,000, of which, having regard to the damage, £1,500 would go to the owners of the *N.*, £200 to the master & £300 to the crew.—*THE TOWER BRIDGE*, [1936] P. 30; 105 L. J. P. 33; 154 L. T. 565; 52 T. L. R. 153; 18 Asp. M. L. C. 591.

6851a. — *Statutory duty.* — *THE TOWER BRIDGE*, No. 6849b, *ante*.

6927. *Add. Annotation*:—*Refd.* *The Tower Bridge*, [1936] P. 30.

6974. *Add. Annotation*:—*Generally, Refd.* *The Kafiristan*, [1937] 3 All E. R. 747.

6990. *Add. Annotation*:—*Consd.* *The Kafiristan*, [1937] 3 All E. R. 747.

7035. *Add. Annotation*:—*Refd.* *Admiralty Comrs. v. Valverde Owners*, [1938] A. C. 173.

7056. *Add. Annotations*:—*As to* (2) *Consd.* *The Kafiristan*, [1937] 3 All E. R. 747. *Refd.* *Akt. Ocean v. Harding*, [1928] 2 K. B. 371; *Fiumana Società Di Navigazione v. Bunge & Co.*, [1930] 2 K. B. 47; *Tempus Shipping Co. v. Louis Dreyfus & Co.*, [1931] 1 K. B. 195.

7059. *Add. Annotation*:—*As to* (1) *Apprvd.* *Beaverford Owners v. Kafiristan Owners*, [1938] A. C. 136.

7060. *Add. Annotation*:—*Refd.* *Admiralty Comrs. v. Valverde Owners*, [1938] A. C. 173.

7078. *Add. Annotation*:—*Consd.* *Admiralty Comrs. v. Valverde Owners*, [1937] 1 K. B. 745.

7085. *Add. Annotation*:—*Refd.* *Admiralty Comrs. v. Valverde Owners*, [1937] 1 K. B. 745.

7099. *Add. Annotation*:—*Generally, Refd.* *The Terneuzen*, [1938] P. 109.

7108. *Add. Annotation*:—*Refd.* *The Kafiristan*, [1937] 3 All E. R. 747.

7120. *Add. Annotation*:—*Consd.* *Admiralty Comrs. v. Valverde Owners*, [1938] A. C. 173.

7129. *Add. Annotation*:—*Refd.* *The Kafiristan*, [1937] P. 63.

7131. *Add. Annotation*:—*Refd.* *The Kafiristan*, [1937] P. 63.

7132. *Add. Annotation*:—*Generally, Refd.* *The Kafiristan*, [1937] 3 All E. R. 747.

7133. *Add. Annotation*:—*Refd.* *Beaverford Owners v. Kafiristan Owners*, [1938] A. C. 136.

7176. *Add. Annotation*:—*Refd.* *Compania Naviera Vascongada v. Cristina S.S.*, [1938] A. C. 485.

7222. *Add. Annotation*:—*As to* (3) *Refd.* *Carras v. London & Scottish Assurance Corp., Ltd.* (1935), 40 Com. Cas. 288.

7249a. — *Salved value less than agreed remuneration.* — *THE INNA*, No. 8395a, *post*.

7275. *Add. Annotation*:—*Refd.* *The Inna*, [1938] P. 148.

7276. *Add. Annotation*:—*Refd.* *Carras v. London & Scottish Assurance Corp., Ltd.* (1935), 40 Com. Cas. 288.

7355. *Add. Annotation*:—*Refd.* *Admiralty Comrs. v. Valverde Owners*, [1937] 1 K. B. 745.

7376. *Add. Annotation*:—*Refd.* *Admiralty Comrs. v. Valverde Owners*, [1938] A. C. 173.

7392. *Add. Annotation*:—*Generally, Refd.* *Admiralty Comrs. v. Valverde Owners*, [1938] A. C. 173.

7473. *Add. Annotation*:—*Consd.* *The Castor* (1932), 48 T. L. R. 604.

7474. *Add. Annotation*:—*Appld.* *The Castor* (1932), 48 T. L. R. 604.

7475. *Add. Annotation*:—*As to* (1) *Expld.* *The Castor* (1932), 48 T. L. R. 604.

7475a. — *What should be considered—Earning power of ship—Existence of time charter.* — In a salvage action pltfs. obtained an order for the appraisal of defts.' ship. The valuer appraised the ship on the footing that she was employed & likely to be employed, but the fact that she was under a profitable time charter which had nearly seven years unexpired was not disclosed to the valuer:—*Held*: an appraisal should be based on the value of a ship to her owners as a going concern; the earning power under the charterparty should be taken into account as one of the elements of value; accordingly the appraisal was not conclusive; & on further evidence adduced in ct., the value should be raised from £72,820 to £85,000.—*THE CASTOR*, [1932] P. 142; 101 L. J. P. 88; 147 L. T. 359; 48 T. L. R. 604; 18 Asp. M. L. C. 312.

PART XV. SECT. 3, SUB-SECT. 2.—A. 6862 vi. —.]—The bringing of a vessel filled with fish, & submerged to the pilot house, from a situation of peril in the open sea to a place of safety:—*Held*: a substantial salvage

service.—*SMITH v. THE "RACE ROCK"* (1932), 45 B. C. R. 522.—CAN.

PART XV. SECT. 9, SUB-SECT. 1.—G. (a).

o i. — — —.]—PACIFIC

SALVAGE CO., LTD., & VANCOUVER DRYDOCK & SALVAGE CO., LTD. v. THE M.S. "TEX," HOME INSURANCE CO. OF NEW YORK v. THE M.S. "TEX," [1931] 1 W. W. R. 153; 2 D. L. R. 657; 43 B. C. R. 434.—CAN.

7476. This case should be No. 7477a.

7477b. —.]—THE CASTOR, No. 7475a, *ante*.

7495. *Add. Annotation* :—**Consd.** Admiralty Comrs. *v.* Valverde Owners, [1937] 1 K. B. 745.

7519. *Add. Annotation* :—**Generally, Refd.** Admiralty Comrs. *v.* Valverde Owners, [1937] 1 K. B. 745.

7564. *Add. Annotation* :—**Generally, Refd.** The *Beaverford v. The Kafiristan*, [1938] A. C. 136.

7621a. —. —. **No open market for ships—Restrictions on exchange.**]—The *E.*, a German ship, was salvaged & towed into Dover Harbour, & the salvors alleged that her sound value at the time the services ended was £45,000. This figure was arrived at by taking the sum of 550,000 marks which was the price at which the ship was subsequently sold, & converting it into sterling at the rate of 12·2 marks to the £. There was no reliable standard upon which such conversion into sterling could be made, & the usual method of assessing the value of a salvaged ship based upon sales of similar vessels, was not available, as the shortage in Germany of foreign exchange prevented such sales. Evidence having been given that the cost of building a similar ship in Germany would be approximately three times the sum of 550,000 marks for which the salvaged ship had been sold :—*Held* : the salvaged value of the ship was one-third of the cost in sterling of building a new & similar ship in England less the cost of repairs.—*LADY DUNCANNON OWNERS v. EISENACH OWNERS, SIMSON & GOLIATH OWNERS v. EISENACH OWNERS*, [1936] 1 All E. R. 855; *sub nom.* THE EISENACH, 155 L. T. 442; 19 Asp. M. L. C. 28.

(c) *Other Cases.*

7678a. **Collision—Owners of salvor also owning vessel partly to blame—Circuity of action.**]—There is no principle of law which prevents a ship which has rendered salvage services from obtaining a salvage award merely because she belongs to the person who also owns the vessel which caused or was partly responsible for the damage giving rise to the necessity for the salvage services.—THE *BEAVERFORD v. THE KAFIRISTAN*, [1938] A. C. 136; 53 T. L. R. 1010; 43 Com. Cas. 21; *sub nom.* THE *KAFIRISTAN*, [1937] 3 All E. R. 747; 106 L. J. P. 91; 157 L. T. 439; 81 Sol. Jo. 844, H. L.

7727. *Add. Annotation* :—**As to (1) Refd.** Admiralty Comrs. *v.* Valverde Owners, [1937] 1 K. B. 745.

7728. *Add. Annotation* :—**Refd.** *Nestor S.S. Owners v. Mungana S.S. Owners, The Mungana*, [1936] 3 All E. R. 670.

7732. *Add. Annotation* :—**Refd.** Admiralty Comrs. *v.* Valverde Owners, [1938] A. C. 173.

7739a. **Dependent on circumstances.**]—There is no general rule as to the proper apportionment of a salvage award as between owners, master & crew, but the apportionment must in each case depend upon the particular circumstances.—*NESTOR S.S. OWNERS v. MUNGANA S.S. OWNERS, THE MUNGANA*, [1936] 3 All E. R. 670.

7868. *Add. Annotation* :—**Consd.** Admiralty Comrs. *v.* Valverde Owners, [1938] A. C. 173.

7881. *Add. Annotation* :—**Consd.** *Louis Dreyfus & Co. v. Tempus Shipping Co.* (1931), 47 T. L. R. 542.

7910. *Add. Annotation* :—**Refd.** *Tempus Shipping Co. v. Louis Dreyfus & Co.*, [1931] 1 K. B. 195.

## Part XVI.—Pilotage.

8002. *Add. Citation* :—17 Asp. M. L. C. 338.

8030. *Add. Annotation* :—**Distd.** Humber Conservancy Board *v.* Federated Coal & Shipping Co., [1928] 1 K. B. 492.

8044a. —. —. —.]—A collision occurred off Flushing at the mouth of the river Scheldt, between a British & a Dutch steamship. In an action by the owners of the former, the owners of the latter pleaded (*inter alia*), that their vessel was at the time in charge of a Dutch pilot by compulsion of law, & that the negligence, if any, was solely that of the

pilot. The Ct. found that the collision was due to the negligent navigation of the Dutch vessel, &, after evidence had been given as to the Dutch law on the question of compulsory pilotage :—*Held* : though the employment of the pilot was compulsory, the pilot acted as the adviser of the master who remained in charge, &, therefore, the owners of the Dutch vessel were liable for the damages sustained by the owners of the British vessel.—THE *PRINS HENDRIK*, [1899] P. 177; 68 L. J. P. 86; 80 L. T. 838; 8 Asp. M. L. C. 548.

## Part XVII.—Shipping Casualties.

8057. *Add. Annotation* :—**Refd.** *The Royal Star* (1927), 97 L. J. P. 49.

### PART XVII. SECT. 2, SUB-SECT. 3.—B.

g1. —. —. —.]—It was the master of a launch, plying in Port Jackson, which collided with a racing eight. An inquiry into the collision was held under sect. 27 of Navigation Act, 1901. The Ct. of Marine Inquiry held that there had been misconduct on R.'s part

& called upon him to show cause why his certificate should not be suspended. R. thereupon obtained a rule nisi for a writ of prohibition to restrain any further proceedings. The rule nisi was discharged by STEPHEN, J., sitting in chambers, upon the ground that such certificate could be dealt with upon a finding of misconduct as distinguished

from a finding of gross misconduct. Upon appeal :—*Held* : the application for a writ of prohibition, if such writ would lie, was premature & the appeal must be dismissed. *Semble* : a certificate may only be suspended or cancelled under sect. 27 of Navigation Act, 1901, upon a finding of gross misconduct.—*Re WILLIAMS, Ex p. ROSMAN*

## Part XVIII.—Limitation of Liability of Owners and Others.

**8059.** *Add. Annotations* :—*As to* (1) *Refd.* The Napier Star, [1933] P. 136; The Theems, [1938] P. 197.

**8060.** *Add. Annotation* :—*Consd.* The Theems, [1938] P. 197.

**8065.** *Add. Annotation* :—*Consd.* The Theems, [1938] P. 197.

**8065a.** ——— *Rate.*—Although the usual rate of interest in the Admiralty Registry on the amount awarded as damages is now 5 per cent., the proper rate of interest on the sum representing the limit of liability, where there has been a limitation action, is, as it always has been, 4 per cent.—*THE THEEMS*, [1938] P. 197; 107 L. J. P. 139; 159 L. T. 392; 54 T. L. R. 891.

**8070.** *Add. Annotation* :—*Refd.* The Champion, [1934] P. 1.

**8071.** *Add. Annotation* :—*As to* (1) *Consd.* The Champion, [1934] P. 1.

**8080.** *Add. Annotation* :—*Consd.* Cory & Son, Ltd. v. Dorman, Long & Co., [1936] 2 All E. R. 386.

**8083.** *Add. Citation* :—17 Asp. M. L. C. 270.

*Add. Annotations* :—*Consd.* The Ruapehu (No. 2), [1929] P. 305. *Refd.* Gosse Millard v. Canadian Government Merchant Marine, American Can Co. v. Same, [1927] 2 K. B. 432.

**8083a.** ——— *Company managing barge under verbal agreement with lightermen.*—For the purposes of certain constructional work pltfs. supplied defts. with barges for the removal of soil. By the negligence of a bargee damage was done to a coffer dam, part of defts.' works, & in previous proceedings, pltfs. were held to be liable. The present action was brought under Merchant Shipping Act, 1894 (c. 60), s. 503, to limit their liability to £8 for each ton of the ship's tonnage. Pltfs. had in 1916 formed a subsidiary co., Cory Lighterage, Ltd. & all lighters were transferred to the new co. & the men employed on them became employees of the subsidiary co. From 1917 the management of the subsidiary co. was carried on by the principal co. & in 1927 a notice was sent out that trading in the name of the subsidiary co. was to cease. The co. itself, however, continued to exist, & although all agreements with third parties were made with the principal co., all profits were credited to the subsidiary co. & all expenses, wages & the like were debited against it. There was not at any time any document in writing transferring the property or any rights therein from the subsidiary co. to the principal co. In these circumstances the question arose whether pltfs. were the "owners" or the charterers by demise of the barge within Merchant Shipping Act, 1894 (c. 60), s. 503, as amended by Merchant Shipping (Liability of Shipowners & Others) Act, 1900 (c. 32), s. 1, Merchant Shipping Act, 1906 (c. 48), s. 71, & Merchant Shipping Act, 1921 (c. 28), s. 1 (2):—*Held*: pltfs. were neither the owners nor the charterers by demise of the barge & were not entitled to limit their liability under Merchant Shipping Act, 1894 (c. 60), s. 503.—*CORY (WILLIAM) & SON LTD., v. DORMAN, LONG & CO., LTD.*, [1936] 2 All E. R. 386; 155 L. T. 53; 80 Sol. Jo. 509; 41 Com. Cas. 224, C. A.

(1935), 35 S. R. N. S. W. 541; 52 N. S. W. W. N. 210.—*AUS.*

**1.1.** ——— *Reconstruction of collision*—*One party absent.*—*E.*, the master of a steam ferry which had been involved in a collision with a coastal steamer, was summoned to appear before a Ct. of Marine Inquiry appointed to investigate the circumstances of the collision. After evidence had been entered upon, the ct. attended a reconstruction of manoeuvres of vessels concerned in the collision. The reconstruction took place in *E.*'s absence, & without his knowledge. *E.* became aware of what had taken place before termination of proceedings before the Ct. of Marine Inquiry, but there was no evidence that he had communicated with his legal advisers in regard thereto. The ct. found that the collision was due to the negligent navigation of *E.*, & indicated that he would be called upon to show cause why his certificate should not be dealt with. *E.* thereupon obtained a rule nisi for a prohibition to restrain further proceedings.—*Held*: the rule nisi must be made absolute on the grounds: (1) the reconstruction & the order of the ct. subsequent thereto involved a denial of natural justice to *E.*; (2) the reconstruction, not being a mere view, amounted to evidence adduced otherwise than in open ct.; it was not open to appt. to waive his rights as the inquiry was one in which the public was interested.—*RE COURT OF MARINE INQUIRY, Ex p. EVANS* (1935), 52 N. S. W. W. N. 1.—*AUS.*

## PART XVIII. SECT. 1.

*sm. Whether limitation binding on*

*Crown.*—The Crown is not bound by Merchant Shipping Act, 1894 (c. 60), s. 503. Where therefore the South African Railways & Harbours sued resp. co. for damages arising out of the sinking of a ship owned by resp. in the approach to a harbour & the latter pleaded sect. 503:—*Held*: an exception to this portion of the plea should have been allowed.—*SOUTH AFRICAN RAILWAYS & HARBOURS v. SMITH'S COASTERS (PTY.) LTD.*, [1931] App. D. 113.—*S. AF.*

*a. —.*—*As the Crown was not expressly mentioned in Merchant Shipping Act, nor was the Act expressly made applicable to it, the responsibility to the Crown could not be limited by the ct.*—*CANADA STEAMSHIP LINES, LTD. v. EMILE CHARLAND, LTD.*, [1933] Ex. C. R. 147.—*CAN.*

## PART XVIII. SECT. 2.

*sa. Dumb barge.*—A lighter was not registered, & although originally fitted with a rudder, at the time of the collision it had neither a rudder nor side-lights nor any means of propulsion. It was used by the owner to carry cargo from a deepwater port to a shallow water port:—*Held*: such a lighter was a "ship" within sect. 503 of Merchant Shipping Act, 1894.—*HOLYMAN (WILLIAM) & SONS PTY., LTD. v. MARINE BOARD OF LAUNCESTON* (1931), 24 Tas. L. R. 64.—*AUS.*

## PART XVIII. SECT. 4.

**8087.1.** *Manner of loss*—*Loss due to "improper navigation."*—*Pltf.'s vessel collided with the lock gates of the L.*

Canal permitting the water to rush through & damage property. Four actions were instituted against pltf. & it feared other actions. *Pltf. sued for limitation of liability under Merchant Shipping Act, 1894*—*Held*: the accident which occurred was due to the engineer misunderstanding a signal given from the bridge; & the error of the engineer was a case of improper navigation, the owners could not provide for such an event & as the collision occurred without actual fault or privity of the owners they were entitled to judgment limiting their liability.—*CANADA STEAMSHIP LINES, LTD. v. EMILE CHARLAND, LTD.*, [1933] Ex. C. R. 147.—*CAN.*

**8092.1.** *Loss must be without fault or privity of owner—Onus of proof.*—*Held*: where the owner of a ship, after having been condemned in a previous action to pay damages for loss & damage to a cargo, brings another action in which he claims a limitation of his liability, either under the provisions of sect. 503 of Merchant Shipping Act or of sect. 903 of the Canada Shipping Act, he must show affirmatively that the damage or loss happened without his actual fault or privity; he must exculpate himself (as distinguished from his servants or employees) from the responsibility for the loss or damage in respect of which he claims the limitation & the onus is upon him to show that there was no default or privity of his own.—*PATERSON S.S. LTD. v. CANADIAN CO-OPERATIVE WHEAT PRODUCERS, LTD.*, [1935] S. C. R. 617; 4 D. L. R. 637.—*CAN.*

- 8083b. "Charterers by demise."—CORY (WILLIAM) & SON, LTD. v. DORMAN, LONG & CO., LTD., No. 8083a, *ante*.
8088. *Add. Annotation*:—**Consd.** The Minerva (1933), 49 T. L. R. 563.
- 8090a. ———.—]—ROBIN HOOD MILLS, LTD. v. PATERSON S.S., LTD. (1937), 81 Sol. Jo. 569, P. C.
8097. *Add. Annotation*:—**Consd.** The Mint, [1938] W. N. 17.
- 8098a. ———.—]—THE MINT, [1938] W. N. 17.
8099. *Add. Annotation*:—*As to* (2) **Consd.** Tempus Shipping Co. v. Louis Dreyfus & Co. (1930), 144 L. T. 13.
8103. *Add. Annotations*:—*As to* (1) **Consd.** Tempus Shipping Co. v. Louis Dreyfus & Co., [1931] 1 K. B. 195. **Refd.** Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson, Ltd. (Liverpool) (1929), 143 L. T. 296.
- 8103a. ———.—]—**Loss direct consequence of fire.**—TEMPUS SHIPPING CO., LTD. v. DREYFUS (LOUIS) & CO., LTD., No. 3099a, *ante*.
- 8104a. **Dock owner with controlling interest in second dock—Whether second dock included in "the area" for purpose of calculating liability.**—Pltfs., a limited co., owned docks at B., in one of which defts.' vessel *R.* received damage. The *R.* was the largest vessel which had been in those docks within the statutory period, but pltfs. also had a controlling interest in docks at F. owned by another limited co. in which a larger vessel than the *R.* had been docked:—**Held**: even assuming pltfs. exercised any power over the F. docks within 1900 Act, s. 2 (1), those docks were not within "the area" contemplated by the sect., namely, the area containing within it the particular dock in which the damage was caused; & pltfs. were entitled to a limitation decree based on the tonnage of the *R.*—THE RUAPEHU, No. 2, [1929] P. 305; 98 L. J. P. 167; 142 L. T. 96; 45 T. L. R. 657; 18 Asp. M. L. C. 64; *sub nom.* GREEN (R. & H.) & SILLEY WEIR, LTD. v. RUAPEHU S.S. OWNERS, 35 Com. Cas. 86.
8108. *Add. Annotation*:—*As to* (1) **Refd.** Great Western Ry. Co. v. Kassos Steam Navigation Co. (1930), 144 L. T. 121.
- 8121a. **Whether Merchant Shipping Act, 1906 (c. 48), s. 69, retrospective.**—Above sect., with reference to the calculation of the tonnage of a steamship for the purposes of limitation of liability, is not retrospective so as to apply to a collision occurring before the Act came into operation, though the limitation of liability action was commenced after the Act came into operation.—THE LANGDALE (1907), 76 L. J. P. 154; 23 T. L. R. 683.
8132. *Add. Annotation*:—**Refd.** Young v. Merchants Marine Insurance Co. (1932), 37 Com. Cas. 250.
8134. *Add. Annotation*:—**Refd.** Young v. Merchants Marine Insurance Co. (1932), 37 Com. Cas. 250.
8135. *Add. Annotation*:—**Refd.** Young v. Merchants Marine Insurance Co. (1932), 48 T. L. R. 579.

## Part XIX.—Liens on Ship, Freight and Cargo.

8168. *Add. Annotations*:—*As to* (1) **Refd.** The Beldis, [1936] P. 51.
8178. *Add. Annotation*:—**Refd.** The Inna, [1938] P. 148.
8182. *Add. Annotation*:—*As to* (1) **Refd.** The Minerva (1933), 49 T. L. R. 563.
8188. *Add. Annotation*:—*As to* (1) **Refd.** The Inna, [1938] P. 148.
8189. *Add. Annotation*:—**Refd.** The Zigurds (No. 1) (1932), 48 T. L. R. 556.
8193. *Add. Annotation*:—**Refd.** The Humorous, The Mabel Vera, [1933] P. 109.
8215. *Add. Annotation*:—**Consd.** Dee Conservancy Board v. McConnell, [1928] 2 K. B. 159.
8216. *Add. Annotation*:—**Refd.** G.W. Ry. v. S.S. Mostyn, [1928] A. C. 57.
8232. *Add. Annotation*:—**Refd.** The Zigurds (No. 4) (1932), 48 T. L. R. 563.
8279. *Add. Annotation*:—**Refd.** The Minerva (1933), 49 T. L. R. 563.

### PART XVIII. SECT. 5, SUB-SECT. 4.

**so. Onus of proof.**—**Held**: the onus was on petitioners of showing that the damage did not arise on distinct occasions; they must therefore establish that the second collision was caused by the same mistake as caused the first.—THE "LUCULITE" v. THE "R. MACKAY," [1929] S. C. (Ct. of Sess.) 401.—SCOT.

### PART XVIII. SECT. 5, SUB-SECT. 5.

**g l.** ———.—]—**Held**: the words "engine-room space deducted," as found in Canada Shipping Act, R. S. C., 1927, s. 904, & in the corresponding provision of the Merchant Shipping Act, 1894, refers to the deduction allowed for propelling power as appearing in the certificate of registry. In calculating the tonnage of a ship in limitation of liability proceedings, the tonnage allowed for the power propelling space must be added to the register tonnage.—EASTERN S.S. CO., LTD. v. CANADA ATLANTIC

TRANSIT CO., [1929] Ex. C. R. 103.—CAN.

**g ii.** ———.—]—**Held**: for the purposes of limitation of liability under Merchant Shipping Act, 1894, s. 503, as amended by Merchant Shipping Act, 1906, s. 69, the words "engine room space," in sects. 78, 503 of the Act of 1894, & in r. 3 in Sched. II. thereto, mean the whole of the space occupied by the propelling power of a steamship, including the engine room space, & accordingly, the proper method of calculating the tonnage of a vessel for the above purpose is to add to the net register tonnage, as shown by the ship's certificate of registry, the tonnage therein deducted "on account of space required for propelling power."—THE MILLIMUL (1929), 30 S. R. N. S. W. 461; 47 N. S. W. W. N. 170, 191.—AUS.

### PART XIX. SECT. 1, SUB-SECT. 1.

**so. Whether assignable.**—**Held**: in

an action for damages by collision, the sale of one of the ships by the owner does not disentitle him from enforcing a maritime lien on the other ship. Such a lien is in general, & in such a case as this is unassignable.—DUFF v. THE "PROGRESS," [1928] Exch. C. R. 157.—CAN.

### PART XIX. SECT. 1, SUB-SECT. 4.—B. (a).

**b i.** ———.—]—Services performed by a man engaged to superintend the installation of machinery in a ship, to have charge of all the operations of fitting out, purchasing supplies, & finding occupation for the ship, etc., do not create in his favour a maritime lien. His subsequent assumption of the duties of master involving the navigation of the vessel would, if properly proven, create a maritime lien for his services during the period when he was engaged in carrying out his duties as master.—NICHOLSON & SHAW v. THE JOYLAND, [1931] Ex. C. R. 70.—CAN.

8298. *Add. Annotation*:—*Generally, Refd.* The *Zigurds* (No. 1) (1932), 48 T. L. R. 556.
8310. *Add. Annotation*:—*Refd.* The *Minerva* (1933), 49 T. L. R. 563.
8333. *Add. Annotations*:—*Refd.* The *Minerva* (1933), 49 T. L. R. 563; The *Beldis*, [1936] P. 51.
8367. *Add. Annotation*:—*Refd.* The *Rehearo* (1933), 49 T. L. R. 559.
8381. *Add. Annotation*:—*Refd.* The *Inna*, [1938] P. 148.
8388. *Add. Annotation*:—*Consd.* The *Inna*, [1938] P. 148.
- 8395a. —.]—(1) The lien of subsequent salvors has priority over a damage lien of earlier date.
- (2) Where the parties to a salvage agreement have contracted on equal terms, the *et.*, assuming it has power to do so, will not review the agreement at the instance of interveners who have a lien of earlier date in respect of damage done by the salvaged ship, merely on the ground that her salvaged value has turned out to be less than the agreed salvage remuneration which absorbs the whole fund created by the sale of the ship.—*THE INNA*, [1938] P. 148; 107 L. J. P. 110; 159 L. T. 439; 54 T. L. R. 744.
- 8406a. *Lien for wages & disbursements on same footing*.]—In June, 1931, the steamship *M.* was supplied by a firm of necessities men with bunker coal, for which the then master bound himself & the ship, & in

Jan. 1932, another firm supplied the ship with coal, for which the succeeding master bound himself & the ship. In actions *in rem* in the names of the respective masters for disbursements:—*Held*: (1) the claims ranked *pari passu* & not in the inverse order of their attachment; (2) the lien of the master for disbursements is the same as his lien for wages, & accordingly ranks on the same footing; (3) the master's lien for wages is postponed to that of the crew.—*THE MONS*, [1932] P. 109; 101 L. J. P. 67; 147 L. T. 260; 48 T. L. R. 555; 18 Asp. M. L. C. 311.

- 8406b. *Disbursements by successive masters*.]—*The Mons*, No. 8406a, *ante*.
8409. *Add. Annotation*:—*As to* (2) *Folld.* The *Mons*, [1932] P. 109.
- 8437a. —.]—*The Mons*, No. 8406a, *ante*.
8443. *Add. Annotation*:—*Generally, Refd.* The *Zigurds* (No. 1) (1932), 48 T. L. R. 556.
8448. *Add. Annotation*:—*Refd.* The *Zigurds* (No. 4) (1932), 48 T. L. R. 563.
8457. *Add. Annotation*:—*Distd.* The *Zigurds* (No. 1) (1932), 48 T. L. R. 556.
8463. *Add. Annotation*:—*Refd.* The *Roberta*, [1938] P. 1.
8483. *Add. Annotation*:—*Refd.* The *Roberta*, [1938] P. 1.
8498. *Add. Annotations*:—*Refd.* The *London*, [1931] P. 11; The *Baarn* (1932), 49 T. L. R. 132.

## Part XX.—Lighthouses.

8508. *Add. Annotation*:—*Refd.* *A.-G. v. Cornwall County Council* (1933), 97 J. P. 281.
- 8511a. *Liability as foreign-going ship—Effect of loading & unloading cargo at home ports on outward voyage*.]—Under Merchant Shipping (Mercantile Marine Fund) Act, 1898 (c. 44), a vessel which has, at a home port, loaded cargo for abroad & has paid light dues for a voyage as a foreign-going ship & then calls

at other home ports & loads cargo at those home ports with a foreign destination, is not liable in addition to pay light dues as a home-trade ship merely because she also loads cargo at one of those home ports & discharges it at her last home port of loading.—*TRINITY HOUSE CORPN. v. CEDAR BRANCH S.S. OWNERS* (1930), 46 T. L. R. 541; 143 L. T. 352; 74 Sol. Jo. 438; 18 Asp. M. L. C. 151.

## Part XXI.—Harbours, Docks and Piers.

8520. *Add. Annotation*:—*Refd.* *West (Samuel), Ltd. v. Wright's (Colchester), Ltd.* (1935), 40 Com. Cas. 186.
8534. *Add. Citation*:—28 L. G. R. 1.
8540. *Add. Annotation*:—*Consd.* *British Trawlers'*

*Federation, Ltd. v. London & North-Eastern Ry. Co.* (1932), 147 L. T. 313.

8543. *Add. Annotation*:—*As to* (3) *Refd.* *British Trawlers' Federation, Ltd. v. London & North-Eastern Ry. Co.*, [1933] 2 K. B. 14.

### PART XIX. SECT. 4, SUB-SECT. 1.

8370 1. *Determined by lex fori*.]—The *A.* was an American vessel on which H. & E. Holding Company Inc., of New York held a mtg. Messrs. B., C. & M., Inc., of Connecticut had furnished certain necessities to the vessel, for which the laws of the United States gave a maritime lien. The vessel was subsequently libelled & sold in New Brunswick, Canada, & the proceeds of the sale were deposited in *ct.* for subsequent distribution. The mtgee. appeared & claimed that his mtgo. should be preferred to the claim of materialmen:—*Held*: though by

English law a maritime lien created by a foreign law, under circumstances which do not give rise to a maritime lien according to English law, is recognised; the priority which it will be given in the distribution of proceeds is treated as relating only to the remedy determined by the law of the *forum* at which the vessel is libelled & sold, the mtgo. should be preferred to the claims of the materialman.—*MARQUIS v. THE ASTORIA*, [1931] Ex. C. R. 195.

CAN.

### PART XXI. SECT. 1.

*sp. Lease of wharf—Ejectment*.]—

Where a wharf-side site in the B. Harbour E. London, had been leased to applt. by the Union of S. Africa, who was the owner of the site, & an action for ejectment had been brought by the S. African Ry. & Harbours:—*Held*: as pltf. was the Governor-General in Council, who in railway & harbour matters sued in the name of the S. African Ry. & Harbours as directed by sect. 65 of Act 22 of 1916, & who owned the wharf-side site, a contention that pltf. was not the owner of the site could not be sustained.—*WINTER v. S. AFRICAN RY. & HARBOURS*, [1929] App. D. 100.—S. AF.

8546. *Add. Annotation*:—*Refd.* Busby v. Avgherino, [1928] A. C. 290.

8564a. *Exemption—Abolition of.*—*Held*: the exemption claimed having been shown to be in existence for over one hundred years, the ct. would endeavour to find a legal origin for it, but, assuming the exemption to have been proved, it was abolished by Shipping Dues Exemption Act, 1867 (c. 15).—*NEWPORT CORPN. v. ISLE OF WIGHT FARMERS' TRADING SOCIETY, LTD.* (1928), 92 J. P. 109.

8569. *Add. Annotation*:—*Refd.* A.-G. v. Cornwall County Council (1933), 97 J. P. 281.

8594a. — *Construction of special Act against company.*—By the Liverpool Dock Acts of 8 Anne & 2 Geo. 3, certain tonnage duties are payable to the dock co. on all vessels sailing with cargoes outwards or inwards, so as no ship shall be liable to pay more than once for the same voyage out & home. This is one entire duty imposed upon one entire voyage out & home, if there be either an outward or an inward cargo in such voyage, but without making any advance if there should be both.

Must we not suppose that the legislature intended to use these words in the sense in which they are commonly understood; that is, as descriptive of a voyage commencing from & terminating in the country to which the ship belongs, or, as here, in some particular port of such country? If the words would fairly admit of different meanings, it would be right to adopt that which would be most favourable to the interest of the public, & most against that of the co.; because the co. in bargaining with the public ought to take care to express distinctly what payments they were to receive; & because the public ought not to be charged, unless it be clear that it was so intended (*LORD ELLENBOROUGH, C.J.*).—*GILDART v. GLADSTONE* (1809), 11 East, 675; 103 E. R. 1167.

*Annotations*:—*Consd.* Portsmouth Floating Bridge Co. v. Nance (1843), 6 Scott N. R. 823; Stockton & Darlington Ry. Co. v. Barrett (1844), 7 Man. & G. 870; Pryce v. Monmouth Canal & Ry. Co. (1879), 4 App. Cas. 197.

8618a. *Lighter sinking after being moved—Onus of proof.*—While pl'tfs.' lighter *W.* was loading cargo from defts.' steamship in the Royal Albert Docks defts.' servants moved the *W.* to another position, & she was left for the night moored alongside the quay & a little inside the stern & port bow of the steamship. On the following morning the *W.* was found sunk through water having entered her hull from an unknown cause. Pl'tfs. failed to establish any positive evidence of negligence, but they alleged that the fact that defts. had moved & remoored the *W.*, & that she sank, raised a *prima facie* case of negligence which defts. could only discharge by proof that the *W.* sank from a cause which they could not have avoided by the exercise of reasonable care:—*Held*: defts. were not insurers of the *W.*'s

safety; they had no greater duty than to exercise reasonable care & skill in the handling & management of her; & having shown such care & skill they had discharged the burden upon them; further, assuming that the sinking of the *W.* afforded *prima facie* evidence of negligence, defts.' suggestion that the leakage which caused her to sink was due to her condition as an old wooden barge was a reasonable suggestion; having shown a reasonable way consistent with the accident having happened without their negligence, they had shifted the burden of proof back to pl'tfs. to establish that it was the negligence of defts. which caused the *W.* to sink; & that accordingly the claim failed.—*THE MULBERA*, [1937] P. 82; 106 L. J. P. 57; 156 L. T. 348; 53 T. L. R. 314.

8620. *Add. Annotation*:—*Refd.* The Rockabill, [1937] P. 93.

8624. *Add. Annotation*:—*Refd.* The Rockabill, [1937] P. 93.

8629a. — *No duty to disclose condition of berth.*—Pl'tfs.' steamship was damaged by lying in an uneven berth at a wharf owned by defts., a railway co. Defts.' harbour master at the wharf acted as ship's agent for pl'tfs. for the limited purposes of reporting the ship at the Custom House, paying the pilot, & providing the master with funds to pay the labourers discharging the cargo. Before pl'tfs. arranged to send the vessel to the wharf the harbour master had in writing informed them that the berths were "perfectly safe for steamers to lie aground." Defts. alleged that the vessel came to the wharf subject to printed conditions, known to the harbour master, whereby the railway co. did not represent, warrant or guarantee that the berths alongside the wharf were safe or suitable for the accommodation of vessels, & all vessels brought alongside remained at the sole risk of their owners & on the terms that the co. should "in no event whatever be liable for any damage . . . however caused to or suffered by any such vessel." The harbour master did not in fact know that the berth was defective:—*Held*: (1) even if the harbour master ought to have known of the defective condition of the berth, which was doubtful, it was not his duty to impart to pl'tfs. information, acquired as harbour master, which would be against the interests of defts. & of the harbour master to disclose; (2) the notice did not form part of the contract between pl'tfs. & defts., & afforded defts. no defence; & accordingly pl'tfs. were entitled to judgment.—*THE HAYLE*, [1929] P. 275; 99 L. J. P. 145; 141 L. T. 429; 45 T. L. R. 560; 18 Asp. M. L. C. 50.

8632. *Add. Annotation*:—*Refd.* The Rockabill, [1937] P. 93.

8632a. *Whether loss recoverable from Harbour Board under Maritime Conventions Act, 1911 (c. 57), s. 1.*—Pl'tfs., the owners of the *K. O.*, sued defts. the owners

#### PART XXI. SECT. 4.

b 1. — *Shp sunk in harbour*  
—*Liability of owner for expenses of lighting, buoying & destruction.*—Reg. 63 of the regs. under Railways & Harbours Regulation, Control & Management Act is *ultra vires* in so far

as it purports to provide that the expenses reasonably incurred by the administration in the lighting, buoying, & destruction of a ship sunk in the harbour may be recovered from the owner or his agent.—*SMITH'S COASTERS (PROPRIETARY), LTD. v. SOUTH AFRICAN*

RAILWAYS & HARBOURS, [1930] N. L. R. 103.—S. AF.

#### PART XXI. SECT. 7.

sr. *Liability of caretaker of buoys—Damage to individual.*—*HARKINS v. BENSON* (1895), 33 N. B. R. 93.—CAN.

of the *R.*, for damages arising out of a collision between the *K. O.* & the *R.* near the entrance to the Princes Half Tide Dock in the River Mersey. The owners of the *R.* pleaded that the *R.* had been ordered to leave the dock as & when she did by the officials of the Mersey Docks & Harbour Board. Pltfs. thereupon added the Dock Board as defts. The *K. O.* was lying at Princes landing stage, River Mersey; the *R.* was in the Princes Half Tide Dock, which is a little lower down the river than the landing stage. BUCKNILL, J., found on the facts that the *K. O.* left the stage before the *R.* was directed by the harbour-master to come ahead into the entrance, & absolved the *K. O.* from blame, but held both the *R.* & the Dock Board to blame on the ground that the employees of the Dock Board were co-operating with the master of the *R.* in bringing the *R.* out of dock into the river & did so at a time when, if either of defts. had had a better look-out, they would have seen that the *K. O.* had started away from the stage. He accordingly gave judgment for the *K. O.* against both defts. & dismissed the counterclaim of the *R.* against the Dock Board on the ground that the common law rule as to contributory negligence, & not the maritime rule of division of loss, applied. On appeal:—*Held*: (1) the *K. O.* was to blame for a bad look-out & for leaving the stage as & when she did, which (*per* SCOTT, L.J.) was at or about the same time as the *R.* began to come ahead through the entrance; the *R.* was also to blame because, after the direction to come ahead had been given, if she had been keeping a good look-out she would have seen the approaching *K. O.* & ought to have stopped her way & remained in the entrance; & the proportion should be two-thirds to the *K. O.* & one-third to the *R.*; (2) (*per* SLESSER & SCOTT, L.J.J.) that the directions of the dock-master were orders within the meaning of sect. 49; but (3) (*per* GREER & SCOTT, L.J.J., SLESSER, L.J., *dubitante*) the employees of the Dock Board at the time the direction was given were not negligent; (4) if, however, there was any negligence on the part of the Dock Board (*per* CUR.) the rule as to division of loss provided for in the Maritime Conventions Act, while applicable as between the *K. O.* & the *R.*, did not apply to the Dock Board, & that, both the *K. O.* & the *R.* being negligent, on the application of the common law rule, the Dock Board would be entitled to judgment.

*Per* SCOTT, L.J.: the ordinary rule unless there is reason to depart from it, should be that costs should be divided in the same proportion as the liability.—*THE ROCKABILL*, [1937] P. 93; 106 L. J. P. 107; 156 L. T. 296; 19 Asp. M. L. C. 76; *sub nom.* *THE ROCKABILL, KING ORRY OWNERS v. ROCKABILL OWNERS & MERSEY DOCKS & HARBOUR BOARD, ROCKABILL OWNERS v. MERSEY DOCKS & HARBOUR BOARD*, [1937] 1 All E. R. 191, C. A.

8643. *Add. Annotation*:—*Generally*, *Refd.* *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.

8645. *Add. Citations*:—92 J. P. 18; 44 T. L. R. 179; 72 Sol. Jo. 16; 26 L. G. R. 91; 17 Asp. M. L. C. 367.

*Add. Annotation*:—*Consd.* *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.

8661. *Add. Citations*:—*affd.* (1927), 138 L. T. 382; 26 L. G. R. 1; *sub nom.* *BOSTON CORPN. v. WITHAM OUTFALL BOARD*, 92 J. P. 1, H. L.

8665. *Add. Annotations*:—*Consd.* *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159; *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 336. *Refd.* *Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401; *Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546; *The Neptun*, [1938] P. 21.

8670. *Add. Annotation*:—*Refd.* *The Rockabill*, [1937] P. 93.

8680. *Citations*:—For “7 T. L. R. 5” read “8 T. L. R. 546.” *Add* 65 L. T. 674.

8683a. — *Responsibility of owners—Custom of port—Grimsby.*—Pltfs.’ steam trawler, having sustained injury which necessitated repairs, was placed in a graving dock at Grimsby belonging to the London & North Eastern Ry. Co. for the purpose of being repaired by defts. (a local firm of ship-repairers) under a contract, by the terms of which the first dock dues were payable by pltfs. & subsequent dues by defts. In carrying out the repairs defts. removed certain of the trawler’s bow plates, exposing the vessel to the necessity, when in the normal course of business the dock was refilled with water, of floating on her forward watertight bulkhead. Unknown to all the parties the said bulkhead had in its face three small rivet holes, & through these holes the dock water entered the trawler & caused her to sink & suffer damage. There was on board her at the time only a watchman employed by her owners, pltfs. Pltfs. claimed damages on the ground that it was an implied term of the contract that the repairers should safely keep the trawler during the execution of the repairs:—*Held*: defts. were entitled to judgment, for in the circumstances of the case there was no surrender of the trawler to the repairers for the purpose of the repairs, such as would have put upon them a special duty to take care, & moreover, as regards trawlers in the public dock in question there existed a local custom that some one acting on the owners’ behalf should inspect an exposed bulkhead & if necessary keep watch over the ship during the repairs.—*THE REHEARO*, [1933] P. 286; 102 L. J. P. 108; 149 L. T. 570; 49 T. L. R. 559; 18 Asp. M. L. C. 422.

8684a. *Failure to light wreck—Limitation of action.*—Defts.’ sailing barge sank & became an obstruction to navigation in the channel of the River Orwell within the limits of the Port of Ipswich, of which pltfs. were the port & harbour authority. Defts. wrote to pltfs. saying that they presumed pltfs. would take steps to raise the barge & that they (defts.) would pay the reasonable expenses. Pltfs. replied that they hoped to raise the wreck of the barge on the next spring tides, & they did so & moved the barge nearer to the shore. They negligently omitted, however, to put a light on the barge, & she was run into by a passing vessel, dragged further into the channel again, & damaged. Defts. refused to pay the expenses of raising the barge a second time &.



more than six months afterwards, counter-claimed in respect of the damage the barge had received. Pltfs. alleged that in raising the barge they were acting in the exercise of their statutory duty under sect. 56 of Harbours, Docks & Piers Clauses Act, 1847 (c. 27), &/or other public duties as the authority responsible for the conservation of the navigation of the river, & that the counterclaim, not having been brought within six months of the act complained of, was barred under sect. 1 of Public Authorities Protection Act, 1893 (c. 61):—*Held*: pltfs. were under no obligation to raise the barge, which they could have blown up or got some one else to raise; they raised her in pursuance of a contract made between the parties; the negligent act complained of was not done in the direct execution of any statutory or public duty; & the provisions of sect. 1 of Public Authorities Protection Act did not apply. *THE RONALD WEST*, [1937] P. 212; 106 L. J. P. 133; 158 L. T. 70; 53 T. L. R. 988.

**8688a.** —.—.]—*THE HAYLE*, No. 8629a, *ante*.

**8692a.** — — — Onus of proof.]—*THE SOUND FISHER* (1937), 82 Sol. Jo. 33, C. A.

**8692b.** Reasonable precautions taken—No warranty of safety.]—*THE "PASS OF LENY,"* No. 1879j, *ante*.

**8693a.** Breach of covenant to maintain berth—Measure of damages.]—A corpn. which owned the bed of a river & the quays & berths alongside, leased one of the quays to a co. & undertook to keep (*inter alia*) the quay & river berths in good order & condition. While lying aground at the quay to which she had come to discharge a cargo for the co. pltfs.' vessel received damage owing to the defective state of the berth; &, in an action against the corpn. as first defts. & the co. as second defts., recovered judgment against both on the following grounds: (a) that the corpn.'s harbour-master knew that the ground alongside the quay was not safe & had taken no steps to put it right, & (b) that the co. were liable, because, although they did not know of the actual hard ridge which caused the damage, they knew that the berth was in a generally defective state, & took no steps to assure themselves that some repairs, which the corpn. had carried out, were satisfactory or to warn pltfs.' master that they had not done so. In a third party claim by the co. against the corpn. for an indemnity in respect of the damages & costs for which they had been rendered liable:—*Held*: the fact that the co. had not fulfilled their duty to pltfs. involved no breach of duty to the corpn.; the co. were entitled to rely on the covenant by the corpn. to keep the berth in good order; the resulting damage to the vessel for which the co. were liable flowed

naturally from the breach of covenant; accordingly the damages were not too remote; & the indemnity claimed would include the solr. & client costs incurred by the co. in defending the action.—*THE KATE*, [1935] P. 100; 104 L. J. P. 36; 154 L. T. 432; 51 T. L. R. 410; 18 Asp. M. L. C. 562.

**8697a.** Damage "in connection with" towage—What amounts to.]—Pltfs.' steamship with two tugs in the employ of defts., the Port of London Authority, fast to her, was proceeding from the Albert Dock to the Victoria Dock. Defts.' lock foreman had signalled to her to enter the narrow Cutting, some 300 feet long, between the two docks, but at about the same time he had signalled to another tug that she could enter the Cutting from the opposite end. In order to avoid collision with that tug the steamship put her engines astern, with the result that she got out of position & struck the walls of the Cutting, doing herself damage. Defts. relied on the terms of the towage contract, which contained a clause that the owners of the ship being towed or transported would "indemnify & hold harmless the Port Authority" against claims in respect of damage of any kind "arising in the course of & in connection with the towage or transport," & whether caused or contributed to by any negligence on the part of the Port Authority's servants:—*Held*: (1) the clause was not an indemnity against party & party claims, but only against third party claims; (2) the damage did not arise "in connection with" the towage or transport; & accordingly the shipowners were entitled to recover the amount of the damage caused by the negligence of defts.' servant.—*THE CARLTON*, [1931] P. 186; 100 L. J. P. 100; 145 L. T. 423; 47 T. L. R. 517; 18 Asp. M. L. C. 240.

**8698a.** ——— Whether applicable to party & party claims.]—*THE CARLTON*, No. 8697a, *ante*.

**8700.** *Add. Annotations*:—*Consd. McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. *Refd. Oliver v. Sadler & Co.*, [1929] A. C. 584; *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46; *Cunard v. Antifire, Ltd.*, [1933] 1 K. B. 551; *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606.

**8711a.** ———.]—*THE HAYLE*, No. 8629a, *ante*.

**8715.** *Add. Citations*:—138 L. T. 286; 17 Asp. M. L. C. 347; 33 Com. Cas. 79.

*Add. Annotations*:—*As to* (1) *Folld. Wickett v. Port of London Authority* (1928), 138 L. T. 668. *Refd. The Hayle*, [1929] P. 275.

**8715a.** —.—.]—Pltf., a lighterman, was in charge of a barge, which was being taken from a dock through a lock. The dock & lock were both the property of defts. While pltf. was navigating the barge under the orders

PART XXI. SECT. 12, SUB-SECT. 2.—  
B. (b).

**8685** *iii.* —.—.]—In an action of damages brought by a shipowner against harbour trustees for injuries sustained by his ship through being given a foul berth in their harbour, it was established that the berth in question was in a tidal river; that *débris* discharged into the berth from a sewer formed a mound on the bottom of the berth which was a

danger to ships taking the ground at the ebb of the tide; that when dredging the berth defenders, in view of this tendency, made it their practice to dredge at the *lorus* of the mound to a greater depth than at other parts of the berth, but that no regular system of examination existed; that the berth had in fact been dredged some three weeks before the ship arrived, but that no special precaution had been taken to ascertain its condition before assigning her to it:—

*Held*: defenders had failed to establish that they had taken reasonable care to make sure that the berth should be in a safe condition for vessels using it; & accordingly, as the ship had been injured owing to the condition of the berth, defenders were liable for the damage occasioned by their negligence. *COINACK (OWNER OF THE S.S. "COLINTON") v. DUNDEE HARBOUR TRUSTEES*, [1930] S. C. 112.—*SCOT*.

& directions of defts., a rope attached to the barge broke & struck pltf., causing him personal injuries. Pltf. had no option to refuse to take the rope on board. Defts. relied on the terms of a notice, exhibited on the pierhead of the lock, to the effect that lightermen availing themselves of the facilities & assistance of defts.' servants must do so at their own risk, & upon the understanding that no liability whatsoever should attach to defts. or their servants for any injury from whatever cause arising to or by the craft or to or by any person on board

thereof:—*Held*: the words of the above notice were *prima facie* adequate to exempt defts. from liability for the negligence of their servants, & the fact that pltf. was compelled to regulate the barge according to the directions of the dockmaster was in no way inconsistent with the fact that he was in the circumstances "availing himself of the facilities & assistance" of defts., & did not deprive defts. of the exemption afforded by the notice.—*WICKETT v. PORT OF LONDON AUTHORITY*, [1929] 1 K. B. 216; 98 L. J. K. B. 222; 138 L. T. 668.

## Part XXIII.—Pleasure Yachts.

8732a. Survey by Lloyd's Register—Liability of individual surveyor—Negligence.]—Pltf., who was the owner of a yacht, requested the society known as Lloyd's Register to make a special survey of the yacht for classification. The society stipulated for freedom from liability, & the survey was conducted by two of the society's surveyors. Deft., who was one of these two surveyors, was responsible for the mainmast. The society certified that the yacht had been reported to be in a good & efficient state & that she had been classed as A1. In fitting out the yacht for sea pltf.

found that the mainmast was rotten in places & wholly unfit for use, & he claimed damages from deft. for negligence & breach of duty:—*Held*: there was no privity of contract between pltf. & deft., & that independently of contract deft. owed to pltf. no duty of care or skill with regard to the survey, & therefore the action failed.—*HUMPHREY v. BOWERS* (1929), 45 T. L. R. 297; 73 Sol. Jo. 191; 34 Com. Cas. 189.

**Yacht broker—Business carried on by executor—Duty not to enter into competition.]—**See *EXECUTORS*, No. 5977a, *ante*.

## Part XXV.—Requisition of Ship by Government.

8733. *Add. Annotation*:—As to (2) **Dlstd.** *Ensign Shipping Co. v. I. R. Comrs.* (1928), 139 L. T. 111.

8749. *Add. Annotation*:—**Consd.** *Clan Line Steamers v. Board of Trade*, [1928] 2 K. B. 557.

8750. *Add. Annotations*:—**Consd.** *Clan Line Steamers v. Board of Trade* (1928), 140 L. T. 33; *The Clan Matheson*, [1929] C. A. 514. **Refd.** *Hain S.S. Co. v. Board of Trade*, [1928] 2 K. B. 534.

8751. *Add. Annotations*:—**Consd.** *Hain S.S. Co. v. Board of Trade*, [1928] 2 K. B. 534. **Refd.** *Clan Line Steamers v. Board of Trade*, *The Clan Matheson*, [1929] A. C. 514.

8753. *Add. Annotations*:—**Consd.** *Clan Line Steamers v. Board of Trade*, *The Clan Matheson*, [1929] A. C. 511; *Hain S.S. Co. v. Board of Trade*, [1928] 2 K. B. 534.

8754. *Add. Annotation*:—**Refd.** *Clan Line Steamers v. Board of Trade* (1928), 97 L. J. K. B. 735.

8755. *Add. Annotations*:—As to (1) **Consd.** *Clan Line Steamers v. Board of Trade*, [1928] 2 K. B. 557. **Refd.** *Hain S.S. Co. v. Board of Trade*, [1928] 2 K. B. 534. As to (2) **Apld.** *Board of Trade v. Hain S.S. Co.*, [1929] A. C. 534. **Consd.** *Clan Line Steamers v. Board of Trade*, *The Clan Matheson*, [1929] A. C. 514.

### PART XXII. SECT. 3.

8731 i. *Superintendent of mercantile marine office—Jurisdiction—Claim under Merchant Shipping (International Labour Conventions) Act, 1925.]—Held*: a claim under Merchant Shipping (International Labour Conventions) Act, 1925, s. 1 (1), is to be regarded as a claim for wages & not as a claim for indemnity, & is, accordingly, within the jurisdiction conferred upon a superintendent of the Board of Trade by Merchant Shipping Act, 1894, s. 387 (1); further, it is not excluded from his jurisdiction by the fact that it involves the determination of the question whether a ship has become a wreck.—*BRUCE v. NEISH*, [1935] S. C. 500.—**SCOT.**

### PART XXV. SECT. 2.

8746 i. *Amount of compensation—*

*Interest.*—The Crown, in Apr. 1918, pursuant to Order in Council passed under War Measures Act, 1914, requisitioned resps.' ship. The Exchequer Ct. of Canada fixed the compensation at \$11,000 with interest thereon from date of requisition to date of judgment. The Crown appealed against the allowance of interest:—*Held*: the allowance for interest should be set aside. The right to interest does not depend on the income earning capacity of the property requisitioned. Where interest is allowed, it is on the ground of express or implied contract or by virtue of a statute; & no such ground existed here. Interest was really asked for here as damages for detention of the compensation money pending the ascertainment of what was due; & as such it could not be recovered.—

*R. v. MACKAY*, [1930] S. C. R. 130; 1 D. L. R. 100; *resg. in part*, [1928] Ex. C. R. 149.—**CAN.**

*h. i.*—*Value at time of requisition.*—The *S.* was requisitioned by the Canadian Government in 1918. In 1921 the claimant was notified of the release of the vessel. At that time she was lying partly submerged, at Kingston, a derelict hulk of no value, & claimant refused to take delivery thereof:—*Held*: on the facts, the question of hire disappeared, & that the controversy resumed itself into a question of compensation for the value of the vessel so appropriated, as at the date of the requisition thereof, & not for the profits that could have been made out of the vessel during the period of requisition.—*MACKAY v. R.*, [1928] Exch. C. R. 149; *on appeal*, [1930] S. C. R. 130.—**CAN.**

8755a. —.]—The *C. M.* was requisitioned on behalf of the Crown in 1917 by a charterparty, which provided that the Crown should not be liable for marine risks, but should be liable for "all consequences of hostilities or warlike operations." Whilst so requisitioned, the *C. M.* sailed from New York in convoy, destined for Nantes, then a war base, but also an ordinary commercial port, with a cargo, 84 per cent. of which in weight was for the civil commissariat, & 16 per cent. in weight was for war purposes. She was the third ship in the second column from the port hand in the convoy, another vessel, the *W. F.*, which admittedly was at all material times engaged upon & carrying out a warlike operation, being in the corresponding position on the port column. While the convoy was proceeding at night without lights the steering-gear of the *C. M.* suddenly broke down, she sheered seven points off her course & came across the bows of the *W. F.*, by which she was struck & sunk. There was no negligence on the part of those on board the *C. M.*:—*Held*: (1) the arbitrator was entitled to find that the *C. M.* was at no material time engaged, upon or carrying out a warlike operation, notwithstanding a portion of her cargo consisted of war material; (2) the loss of the *C. M.* was not the consequence of a warlike operation, inasmuch as the dominant & direct cause of the loss was the break-down of her steering-gear & her sheering off her course.—*CLAN LINE STEAMERS, LTD. v. BOARD OF TRADE, THE CLAN MATHESON*, [1929] A. C. 514; 98 L. J. K. B. 408; 141 L. T. 275; 45 T. L. R. 408; 35 Com. Cas. 15; 18 Asp. M. L. C. 1, H. L.

*Add. Annotations*:—*As to* (2) *Distd.* Board of Trade *v. Hain S.S. Co.*, [1929] A. C. 534. *Generally, Reifd.* Lazard Bros. & Co. *v. Brooks* (1932), 37 Com. Cas. 224.

8760. *Add. Citations*:—[1928] 2 K. B. 534; 139 L. T. 566; 34 Com. Cas. 1; 17 Asp. M. L. C. 520, C. A.; *affd. sub nom.* BOARD OF TRADE *v. HAIN S.S. Co.*, [1929] A. C. 534; 98 L. J. K. B. 625; 141 L. T. 435; 45 T. L. R. 550; 35 Com. Cas. 29; 18 Asp. M. L. C. 15, H. L.

*Add. Annotation*:—*As to* (2) *Appld.* Clan Line Steamers *v. Board of Trade, The Clan Matheson*, [1929] A. C. 514.

8763a. — Spontaneous combustion—Use as submarine tender.]—The Admiralty requisitioned resp.'s steamer on the terms of charterparty T.99, by which the Admiralty undertook the risk of damage from "all consequences of hostilities or warlike operations," & which provided that if the working of the steamer was suspended owing to deficiency of men & stores, breakdown of machinery, or any other cause, the hire should cease until the steamer was again ready for service. The vessel was loaded with steam coal at Cardiff & dispatched with it to Malta. The coal was not discharged at Malta, but petrol & other stores were put on board & the naval authorities sent the vessel to Tenedos & used her there as a submarine tender. After about four months at Tenedos the cargo took fire by spontaneous combustion, & the vessel was damaged & had to be sent back to Malta:—*Held*: the risk was a consequence of hostilities or warlike operations as the vessel had become part of a combatant fleet, & the cesser clause had no application to a case where the suspension of working was due to injury which was the result of compulsory orders.—*HINDUSTAN S.S. Co. v. ADMIRALTY COMRS.* (1921), 37 T. L. R. 856.

8764. *Add. Annotation*:—*Reifd.* Dreyfus (Louis) & Co. *v. National S.S. Co.*, [1935] 2 K. B. 313.

## Part XXVI.—The Trinity Masters.

8788. *Add. Annotations*:—*As to* (1) *Reifd.* The Otranto, [1930] P. 110; *Hall v. British Oil*

& Cake Mills (1930), 23 B. W. C. C. 529. *As to* (2) *Appld.* The Tovarisch, [1930] P. 1.

# SMALL HOLDINGS, SMALL DWELLINGS AND ALLOTMENTS.

## Part III.—Allotments.

23. After this case add :—**Exemption from rates.**—*See* Local Government Act, 1929 (c. 17), s. 67.

### PART I. SECT. 5.

*5a. Agreement to quit before expiry of lease—Subsequent demand for renewal—Small Landholders (Scotland) Act, 1911, s. 32.*—A statutory small tenant, under a lease terminating at Whit Sunday, 1929, entered into an agreement with his landlord to quit the holding at

Martinmas 1926, the landlord undertaking to buy the straw produced at the threshing of that year's crop, & to pay certain compensations. On the faith of the agreement the landlord advertised the farm for sale with entry at Martinmas 1926, & the farm was sold. The tenant, who knew of these

proceedings, refused to remove when the term arrived, & some days later took up the position that he was entitled to a renewal of his lease under above sect. (4).—*Held*: above sect. did not apply to the circumstances of the case.—*CHEYNE v. PATERSON*, [1929] S. C. (Ct. of Sess.) 119.—SCOT.

## SOLICITORS.

Note:—See, now, Solicitors Act, 1932 (c. 37); Solicitors Act, 1933 (c. 24).

## Part II.—Admission and Registration.

6. *Add. Annotation*:—*Refd. Edwards v. A.-G. for Canada* (1929), 46 T. L. R. 4.
- 9a. *Company as solicitor—Whether permissible.*—*LAW SOCIETY v. UNITED SERVICE BUREAU, LTD.*, No. 4725a, *post*.

## Part III.—Rights and Privileges of Solicitors.

- 321a. *County court—Exercising bankruptcy jurisdiction—Without signing court roll.*—A properly qualified solr. of the Supreme Ct. has a statutory right to practise in a county ct. in the exercise of its bkpy. jurisdiction, & to recover his costs for so doing, although he has not signed the roll of solrs. in that county ct.—*Re DEBTOR* (No. 29 of 1931), [1934] Ch. 280; 103 L. J. Ch. 130; 150 L. T. 126; 50 T. L. R. 38; [1933] B. & C. R. 138, C. A.
331. *Add. Annotation*:—*Consd. Re Debtor* (No. 29 of 1931), [1934] Ch. 280.
334. *Add. Annotation*:—*Refd. Re Debtor* (No. 29 of 1931), [1934] Ch. 280.
335. *Add. Annotation*:—*Refd. Re Debtor, Petitioning Creditor v. Debtor* (No. 29 of 1931) (1933), 102 L. J. Ch. 348.

## Part IV.—Solicitor and Client.

414. *Add. Annotation*:—*Consd. Warmingtons v. McMurray*, [1937] 1 All E. R. 562.
415. *Add. Annotation*:—*Consd. Warmingtons v. McMurray*, [1936] 2 All E. R. 745.

## PART I.

*sa. Jurisdiction of Benchers.*—*Held*: plff. was entitled to have his name restored to the rolls. The benchers' order striking it off was null & void. Under the Legal Profession Act, R. S. A., 1922, such an order could be made only after investigation & recommendation by the discipline committee, which never took place. The fact that the official discipline committee comprised all the benchers who eventually received & adopted the recommendation of the special committee, could not, even apart from the fact that those benchers adopting it had made no investigation of their own, overcome the statutory requirement of the acting by the discipline committee as a distinctive body.—*HARRIS v. LAW SOCIETY OF ALBERTA*, [1936] S. C. R. 88; 1 D. L. R. 401; 5 F. L. J. (Can.) 227.—CAN.

## PART II. SECT. 2, SUB-SECT. 1.

*sa. Effect of alteration of law—On right to admission.*—Appet. on July 30, 1930, entered into written articles with an attorney who had not been in practice for seven years. On Aug. 1, 1930, R. S. C., Ord. 32, r. 53, was repealed & a new rule was substituted which provided that no attorney who had not practised in Natal for at least seven years should be entitled to take under articles any candidate attorney. Appet. applied for admission as a candidate attorney & the application was opposed by the Law Society.—*Held*: granting the application, by entering into the articles prior to the repeal of r. 53 appet. had acquired a right which was preserved to him by sect. 13 of Act 5, 1910.—*Ex p. DE SOUZA* (1930), 51 N. L. R. 221.—S. AF.

## PART II. SECT. 2, SUB-SECT. 5.

*sa. Absence during illness—Additional service.*—The Rules of the Council of Legal Education provided that an articulated clerk may serve under special provisions in the articles for

such term as is necessary to complete the full term of service required by the rules, where he has been absent from the service for a period not exceeding thirty days in each year with the consent of the person to whom he is bound. An articulated clerk, whose articles contained such special provisions & whose required term of service was four years, was absent from service during the fourth year for 114 days owing to illness. Under the special provisions in the articles he served for an additional period of thirty days, which ended on Apr. 16. He continued to serve the master, & on June 27 entered into supplementary articles for a further period of eighty-four days.—*Held*: the clerk's service did not comply with the requirements as to service under articles, & a special order that his service had been sufficient should be refused.—*Ex p. AHERN*, [1931] V. L. R. 292; *Argus* L. R. 216.—AUS.

## PART II. SECT. 5.

179 I. *When application granted—Solicitor called to the Bar—Appointed to judicial office—Office abolished.*—A solr., admitted in 1894, was struck off the roll at his own request in 1900 in order to be called to the Irish Bar. He was called to the Bar in the latter year. In 1918 he became a judge of the Chancery Div. of the then High Ct. in Ireland, & later in the same year a Lord Justice of the then Ct. of Appeal in Ireland. He held the latter office until 1921, when, following the change of government in Ireland, the office was abolished. Subsequently he was called to the English Bar, but, owing to illness, was compelled to abandon his practice. He was then disbarred both in Ireland & in England at his own request, with a view to his being readmitted a solr. in the Irish Free State. He now applied to be so readmitted. The Incorporated Law Society did not oppose the application:—*Held*: the application be granted having regard to the special circumstances of the case, *viz.*, that appet.

did not retire from his judicial office voluntarily, but owing to its abolition; that as a solr. he would not be an officer of, or practise in, any ct. in which he sat as a judge; that upwards of five years had elapsed since he had ceased to hold judicial office, & during the greater part of that time he had lived out of Ireland; & that the reason for the application was the state of his health, which required active occupation, this motive displacing the idea of any improper or corrupt consideration behind the application. Appet. was, however, required to give an undertaking that he would not seek personal audience in any of the cts.—*RE SOLICITORS ACT & SIR JAMES O'CONNOR*, [1930] 1 R. 623.—IR.

## PART IV. SECT. 1, SUB-SECT. 1.

380 ii. —.—[It is the duty of a solr. to obtain a written authority from his client before he commences a suit.—*SALE & SALE v. McMILLAN*, [1931] 4 D. L. R. 203; O. R. 418 *reversd. on other grounds*, [1932] 2 D. L. R. 345; S. C. R. 543.—CAN.]

380 iii. —.—[Although a retainer should be in writing, it is sufficiently established when a firm is engaged by a co. under a resolution of the board of directors.—*ANDREWS, ANDREWS & McBRIDE v. TWO-IN-ONE GOLD MINES, LTD.*, [1937] 2 D. L. R. 709; O. R. 482.—CAN.]

## PART IV. SECT. 1, SUB-SECT. 3.

p i. —.—*Denial by client.*—Where on the taxation of a solr.'s bill of costs the retainer of the solr. is denied by the client the onus is on the solr. to prove the retainer.—*BARKER v. SKIRING* (No. 2), [1936] 1 W. W. R. 431; 1 D. L. R. 544; 50 B. C. R. 298.—CAN.]

t i. —.—[Where a solr. has undertaken legal business without a written retainer, & afterwards has a dispute with the client as to the authority conferred thereby, & there is nothing but assertion against assertion, the ct. must accept the

**449a.** ———.]—Deft. had embarked upon a variety of investments & transactions which were likely to result in serious losses. She retained plffs. generally to prosecute all such actions & proceedings as might be necessary to get her out of her difficulties. Having successfully prosecuted several matters plffs. delivered a bill of costs. Deft., while offering to meet all disbursements in arbn. proceedings which were then being prosecuted on her behalf, intimated that she could not pay anything further. Plffs. then discharged themselves from their retainer & delivered a second bill & brought this action upon both bills:—*Held*: this was not a case of a solr. retained to prosecute an action & no question of entire contract arose. The retainer here was one to prosecute a variety of matters & in such a case it was not reasonable that a solr. should engage himself for an indefinite time without payment. In this case the solr. could upon reasonable notice cease to act & sue for his costs.—*WARMINGTONS v. McMURRAY*, [1937] 1 All E. R. 562; 53 T. L. R. 395; 81 Sol. Jo. 178, C. A.

**483a. Change by Official Solicitor—Substitution of Official Solicitor for solicitor on record.**—The Official Solr., on appointment to defend an action in place of a deceased deft., gave notice of change of solrs. & substituted his name for that of the solrs. on the record as acting for the deceased deft., who were also the solrs. of deceased's insurance co. On summons for directions issued by plff., counsel for the solrs. moved the learned judge to order that the Official Solr. should leave the control of the defence in the hands of the said solrs., & that they should remain on the record, & that the notice of change of solrs. should be removed from the file. The learned judge accordingly varied in this sense his original order appointing the Official Solr. to represent deceased deft. The Official Solr. appealed:—*Held*: as the Official Solr. had the same right as any other litigant to choose who should be his solr., & was entitled

to act for himself, he was entitled to control the defence of himself as representative of deceased deft. & the change of solr. on the record was properly made, & the learned judge had no jurisdiction to make the variation complained of.—*WATTS v. OFFICIAL SOLICITOR*, [1936] 1 All E. R. 249; 80 Sol. Jo. 204, C. A.

*Annotation*:—*Expld. Pratt v. London Passenger Transport Board, Green v. Vandekar*, [1937] 1 All E. R. 473.

**626a. Solicitor acting under court.**—The owner of land involved in litigation in Chancery, held not liable for the acts of a person acting as her attorney in the ct., & of his own motion, under, as he supposed, its authority, but not being her general attorney, & without her privity or actual authority in the particular matter.—*OXENHAM v. COLLINS* (1860), 2 F. & F. 172, N. P.

*Annotation*:—*Refd. Oxenham v. Smythe* (1860), 2 F. & F. 220.

**699. Add. Annotation**:—*Refd. Re Lloyds Bank, Ltd., Bomze & Lederman v. Bomze*, [1931] 1 Ch. 289.

**700. Add. Annotation**:—*Refd. Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380.

**701. Add. Annotation**:—*Refd. Lancashire Loans, Ltd. v. Black*, [1934] 1 K. B. 380.

**711. Add the following paragraph**:—

The ct. will allow a client to institute proceedings against a solr. within a reasonable number of years after the connection of solr. & client has ceased. A solr. took an assignment of some leasehold property from his client in 1810; their connection determined a few months afterwards. In 1828, the client filed a bill against the solr., insisting that the assignment was intended to be a mtge., & not a sale. The bill was dismissed by the Master of the Rolls in 1830; a petition of appeal was presented in 1840. The client has raised the question by some letters in 1811:—*Held*: after so long a time had elapsed, the ct. would not assist him in such a claim.

client's denial as against the affirmation of the solr.—*ECLES v. RUSSELL*, [1928] 3 W. W. R. 765; *affd.*, [1929] 3 D. L. R. 32; 2 W. W. R. 143.—*CAN.*

**t ii.** ———.]—A solr. may prove the fact of his retainer by a client without the production of a written retainer, but if the only evidence as to retainer is on affidavit, & consists merely of assertion & counter-assertion, the solr. fails to prove the retainer.—*MURPHY v. LIESFIELD* (1930), V. L. R. 142; *Argus* L. R. 94.—*AUS.*

**PART IV. SECT. 1, SUB-SECT. 4.—E.**

**sg. All plaintiffs must concur.**—K. B. rule 296 does not entitle one of two or more plffs. to take out a *precipe* order changing his solr., leaving the original solrs. on the record to represent the remaining plff. or plffs. Said rule can be made use of only where all plffs. concur, & if there are any circumstances where one plff. requires to have separate representation, be it temporary or permanent, then a special application should be made. If there develops any conflict of interest or division of opinion between co-plffs., then one of them can apply to be given the sole conduct of the cause. The rules contemplate only one place or address where the papers shall be served on the solrs. who institute an action for two or more plffs.—*MCLEOD v. WINNIPEG*

*SUPPLY & FUEL CO., LTD.*, [1934] 2 W. W. R. 385; 42 Man. L. R. 133.—*CAN.*

**PART IV. SECT. 1, SUB-SECT. 7.—F.**

**sy. Joint retainer—Denial of liability**—"Reasonably necessary services."—*NORTHERN LIFE ASS'CE CO. OF CANADA v. McMASTER*, [1928] 3 D. L. R. 497; [1928] S. C. R. 512; *affg. S. C. sub nom. Re SOLICITORS*, 33 O. W. N. 175.—*CAN.*

**sz. Whether permissible—Separate defences—No conflict of interest.**—Where there is no conflict of interest between co-defts. so far as the action is concerned, there is no reason why a solr. who had acted as solr. for one of them prior to the action & with respect to it should not act as the other's solr. & counsel in the action, even though they put in separate defences.—*WADDELL v. GRAY-CAMPBELL, LTD. & SCARROW*, [1929] 3 D. L. R. 488; 2 W. W. R. 113; 23 S. L. R. 527; *retrsg.*, [1929] 2 D. L. R. 362; 1 W. W. R. 241.—*CAN.*

**PART IV. SECT. 2, SUB-SECT. 2.—A. (c).**

**t i.** ———.] *Liability of solicitor.*—*MORAN v. SCHERMERNORN* (1858), 2 P. R. 261.—*CAN.*

**PART IV. SECT. 2, SUB-SECT. 2.—B. (d).**

**sa. Submission to judgment.**—*DUBUC*

*v. MARSTON CORPN.*, [1928] 1 D. L. R. 225; [1927] S. C. R. 526.—*CAN.*

**PART IV. SECT. 3, SUB-SECT. 1.**

**675 iii.** ———.]—A transaction between solr. & client, in which the solr. takes a benefit, cannot be supported unless the solr. has taken care that his client is fully acquainted with the facts & properly advised upon them, & the onus of proving this is upon the solr.

Where the solr. for a loan co. had benefited from a loan made by the co. to B., by receiving out of the proceeds of the loan payment of certain mtges. from B. to the solr. & certain commissions & fees in connection with said mtges.:—*Held*: under the circumstances of the case, the solr. must be held to have been guilty of a breach of duty to the co. & he was liable to it for loss suffered through the transaction.—*BIGGS v. LONDON LOAN & SAVINGS CO. OF CANADA, LONDON LOAN & SAVINGS CO. OF CANADA v. BRICKENDEN*, [1933] S. C. R. 257; 3 D. L. R. 161.—*CAN.*

**PART IV. SECT. 3, SUB-SECT. 3.—B.**

**ri.** ———.]—The same considerations which apply to a purchase by a solr. from his client apply also to a sale by a solr. to his client; & the obligations of a clerk in the service of a solr., to whom the solr. has delegated a matter, or to whom the solr.'s client goes direct,

784. *Add. Annotation*:—*Refd. Davis v. Symons*, [1934] Ch. 442.

813. *Add. Citation*:—*affd.* (1929), 45 T. L. R. 264, C. A.

904a. ———.]—*LUCK v. MEYLER* (1928), 72 Sol. Jo. 337.

962. *Add. Annotation*:—*Refd. Groom v. Crocker*, [1938] 2 All E. R. 394.

962a. *Exchange of lands*.—*BARTTER v. GAMBRILL* (1932), 76 Sol. Jo. 868.

962b. *Failure to register club*.—Pltfs. were officers of the New Atlantic Club, which desired to move into premises formerly occupied by the Danesbury Club, which had been dissolved. Pltfs. retained deft. as their solr. (*inter alia*) to arrange for the transfer of the registration of the New Atlantic Club. Deft. sent the necessary documents to the justices' clerk who refused the registration on the ground that the Danesbury Club was on the register as of that address, but the papers were left at the clerk's office. It was found as a fact that deft. never notified pltfs. of this refusal, & the New Atlantic Club moved into their new premises. The police raided the club & pltfs. were prosecuted & fined for supplying drink at an unregistered club. In an action for damages for negligence, deft. denied negligence & contended that even if he was negligent the damage to pltfs. resulted not from his negligence, but from a decision of the magistrates which was wrong in law:—*Held*: deft. was negligent in not notifying pltfs. of the clerk's refusal to accept registration of the New Atlantic Club at their new premises; notwithstanding that the clerk's duty was purely ministerial & that he could not decide whether the club should or should not be registered, the leaving of the registration papers was not sufficient to register the club, & the convictions were right; in considering the damages recoverable no reduction should be made because the fines have been paid out of club funds.—*ASHTON v. WAINWRIGHT*, [1936] 1 All E. R. 805; 154 L. T. 399; 100 J. P. 195; 52 T. L. R. 372; 80 Sol. Jo. 346; 34 L. G. R. 193.

1027. *Add. Annotation*:—*Refd. Groom v. Crocker*, [1938] 2 All E. R. 394.

1035a. *Liability of solicitor of insurance company to insured*.—Pltf. took out with an insurance co. a motor insurance policy containing a clause that pltf. would not incur any expense whether in respect of litigation or otherwise or make any payment, settlement, arrangement, or admission of liability for which the co. might be liable under the policy without the written authority of the co., & that the co. should have absolute conduct &

control of all or any proceedings against pltf. Pltf.'s car was run into by a motor lorry, the collision being caused solely by the negligence of the lorry driver. A passenger in pltf.'s car was seriously injured, & issued a writ against the owners of the lorry & also, at their request, against pltf. The latter informed the insurance co., & left the matter in its hands, as he was bound to do under the policy. The co. sent the papers to the solrs., who entered an appearance to the writ & acted in the conduct of the defence. Neither the co. nor the solrs. ever at any time communicated with pltf. in any way, & eventually the solrs. delivered a defence on behalf of pltf. admitting that the accident was caused solely by his negligence & wrote a letter to this effect to the solrs. opposing them. Having accidentally found out what was happening, pltf. protested to the local agent of the insurance co., to which agent the latter wrote: "If we had repudiated liability we ran a very serious risk of the ct. holding a different view." At the trial of that action, judgment was entered against the present pltf. for £1,124 12s. 10d., damages & costs, which sums were at once discharged by the insurance co. Pltf. then claimed damages against solrs. & insurance co. for breach of duty, negligence & libel:—*Held*: (1) the terms of the policy clearly entitled the insurers to nominate a solr. to act in the conduct of the proceedings; (2) such solr. was bound to act *bond fide* in the common interest of the insurers & the insured, & upon the facts, he had not done so; (3) the damages for breach of duty were only nominal, since the sums recovered in the action were at once paid by the insurance co. Pltf. could only sue the solrs. in contract & had no cause of action against them in tort; (4) assuming that the occasion upon which the letter admitting negligence was written was a privileged one, there was evidence of malice.—*GROOM v. CROCKER*, [1938] 2 All E. R. 394; 158 L. T. 477; 54 T. L. R. 861; 82 Sol. Jo. 374, C. A.

1062a. *Fine & costs*—*Failure to register club*.—*ASHTON v. WAINWRIGHT*, No. 962b, *ante*.

1067a. *Failure to issue writ*—*Action barred by Fatal Accidents Act*—*Defendant man of straw*.—*CLAYTON v. KEARSEY* (1935), 79 Sol. Jo. 180.

1096. *Add. Annotation*:—*Refd. Re Lloyds Bank, Ltd., Bomze & Lederman v. Bomze*, [1931] 1 Ch. 289.

1103. *Add. Annotations*:—*Refd. Slingsby v. District Bank, Ltd.* (1931), 48 T. L. R. 114; *Algemeene Bankvereeniging v. Langton* (1935), 40 Com. Cas. 247.

are no less in the matter upon which the clerk proceeds than are the obligations of the solr. himself. In such circumstances the solr.'s clerk will stand in a fiduciary relation to the client, although there be no privity of contract between himself & such client: & before selling his own property to the client he will be bound to make full disclosure to such client of his interest in such property.—*BLAIR v. MARTIN*, [1929] N. Z. L. R. 225.—N.Z.

#### PART IV. SECT. 4, SUB-SECT. 2.—C. (b).

*sd. General rule*.—It is not part of the ordinary duty of a solr. to act as valuer or adviser upon investments;

but, if consulted as to the wisdom of an investment, it is his duty to disclose any relevant facts within his knowledge, & to explain what inquiries should properly be made.—*POLKINGHORNE v. HOLLAND*, [1934] S. A. S. R. 475; 51 C. L. R. 143; 40 Argus L. R. 353; 8 A. L. J. 140.—AUS.

*o i.* ———.]—Where a solr. acting for both parties in the matter of a loan on mtgee. did not disclose in either the application for the loan or the certificate of title the existence of two mtgs. in which he was personally interested:—*Held*: he had been guilty of a breach of duty as solr. for the mtgee., & it would equally have been a breach of duty if he had been

employed only in making the certificate of title. The damages to which the mtgee. was held to be entitled was the balance owing on the mtge. allowing credit for payments made by the mtgor. & for a bonus received by the mtgee., the solr. on payment of such balance to be given an assignment of the mtgee., or, if the properties should be sold at the discretion of the mtgee., the latter to have judgment against the solr. for the deficiency. The claim of the mtgee. against the solr. was held not to be assignable.—*LONDON LOAN & SAVINGS CO. OF CANADA v. BRICKENDEN*, [1934] 2 W. W. R. 545; 3 D. L. R. 465.—CAN.



## Part V.—Solicitor as Trustee, Receiver, or Executor.

1144. *Add. Annotation* :—**Consd.** *Re Gertzenstein, Ltd.*, [1936] 3 All E. R. 341.

1146. *Add. Annotation* :—**Refd.** *Re Gates, Arnold v. Gates*, [1933] Ch. 913.

1148a. ———.]—In the absence of an express power in the instrument creating the trust for a solr.-trustee to charge, a solr.-trustee who employs the firm of solrs. of which he is himself a partner to act for him in the conduct of an action to administer the trust estate, is in no better position than a solr.-trustee who acts as his own solr., & on taxation of his costs, will not be allowed profit costs, even though there be an agreement that the solr.-trustee shall have no share in profit costs.—*Re GATES, ARNOLD v. GATES*, [1933] Ch. 913; 102 L. J. Ch. 369; 149 L. T. 521.

*Annotation* :—**Apprvd.** *Re Hill, Claremont v. Hill*, [1934] Ch. 623.

1148b. ———.]—A solr. who was a trustee under an instrument which gave no power to a solr.-trustee to charge profit costs for work done in connection with the trust, took out an originating summons for the determination of certain questions in connection with the trust. The solr.-trustee was a partner

in a firm of solrs., & had before this transaction arranged with his partners that he should do only a limited amount of work in connection with the partnership & should receive a salary of £600 a year out of the profits of the firm, that amount being only a small portion of their profits. The solr.-trustee employed his firm to do the legal work in connection with the trust, the work being done by a partner who was not a trustee. In taxing the solr.-trustee's bill of costs the taxing master disallowed all his profit costs & allowed only out-of-pocket disbursements, on the ground that he had employed his firm to do the work :—**Held** : inasmuch as the solr.-trustee derived some benefit from the profits of the partnership, although limited in amount, he was not entitled to employ the firm in which he was a partner to do work in connection with the trust for which profit costs could be charged.—*Re HILL, CLAREMONT v. HILL*, [1934] Ch. 623; 103 L. J. Ch. 289; 151 L. T. 416; 50 T. L. R. 487; 78 Sol. Jo. 446, C. A.

1151. *Add. Annotations* :—**Consd.** *Re Gates, Arnold v. Gates*, [1933] Ch. 913 : *Re Hill's Trusts, Claremont v. Hill*, [1934] Ch. 623.

## Part VI.—Remuneration of Solicitors—Costs.

1203. After this case add :—

**Tender of debt without costs—Before action brought.**—*See BANKERS*, Vol. III., p. 200, No. 453; *CONTRACT*, Vol. XII., p. 327, Nos. 2720, 2721.

1207. *Add. Annotation* :—**As to** (1) **Consd.** *Re Debtor*, [1929] 2 Ch. 146.

1228a. ——— **Agreement to give security.**—**By** *Attorneys' & Solrs.' Act*, 1870 (c. 28), s. 4, amended by *Solrs. Remuneration Act*, 1881

(c. 44), ss. 2, 8, a solr. may make an agreement in writing with his client respecting the amount & manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of contentious business done or to be done by the solr. either by a gross sum or by commission or percentage, or by salary or otherwise, & either at the same or at a greater or at a less rate as or than the rate at which

### PART V. SECT. 1, SUB-SECT. 2.—A.

*sp. Under Trustee Act, R. S. S.*, 1930.]—In sect. 76 of *Trustee Act*, R.S.S., 1930, which provides that the allowance to a solicitor-trustee is to be increased by such amount as may be deemed fair & reasonable in respect to professional services rendered by him to the estate, the allowance referred to is the allowance to a trustee for his care, etc., & time, which is provided for by sects. 72-74 of the Act.—*Re MACDONALD ESTATE*, [1933] 1 W. W. R. 421; 41 Man. L. R. 417.—CAN.

### PART VI. SECT. 1.

*e i.* ———.]—Where there is no tariff of costs which can be applied to charges for business done by a solr., & there is no specific contract between the solr. & his client, the general custom & practice of solrs. is to be the guide, if such custom or practice exists; if there is no custom, the value of the services rendered is to be estimated on a *quantum meruit*.—*Re ROYAL BANK OF CANADA v. MARS* (No. 3), *Re MCLEAN & COOK*, [1931] 1 W. W. R. 138; 25 S. L. R. 225.—CAN.

*e ii.* ———.]—*MCLEAN v. COOK*, [1931] 4 D. L. R. 904.—CAN.

*h i. Right to charge commission—*

*Validity of Order.*—*Ord.* 65, r. 29, of the Supreme Court Rules, which provides that, "In the absence of special agreement a solr. shall be entitled to charge his client a commission in lieu of costs on the collection of accounts or claims according to the following scale . . .":—**Held** : valid & given effect to in the present action.—*CORNWALL & ARCHIBALD v. DOYLE CONTRACTING CO., LTD.*, [1932] 1 W. W. R. 8; 45 B. C. R. 81.—CAN.

*r i.* ———.]—Where a collusive settlement between the parties to an action has the effect of depriving the solr. of one of them of his lien for costs, the opposite party will be made to pay them. The intent to defraud the solr. may be inferred from the actions of the parties.—*OBIREK v. BIFROST RURAL MUNICIPALITY & COLEMAN* (No. 2), [1931] 1 W. W. R. 359; 2 D. L. R. 476; 39 Man. L. R. 357.—CAN.

*r ii.* ———.]—The rule that a collusive settlement between the parties to an action will not be permitted to deprive a solr. of his lien for costs, is applicable to the case where the action was one for damages which had not ripened into judgment.—*PONSER v. A. R. McDIARMID CO., LTD., & FOSTER & McQUARRIE*, [1931] 1 W. W. R. 362; 2 D. L. R. 598; 39 Man. L. R. 360.—CAN.

*n i.* ——— *No contract to do work at sum named.*—The solrs. rendered to a client a bill of costs amounting to \$750 for services in drawing a will for the client. Upon taxation the taxing officer allowed the amount charged :—**Held** : there was no agreement as to the amount & no obligations upon the solrs. to state to the client during the course of preparation that their original rough estimate of the probable amount of their bill, before they had entered upon the work, which proved to take ninety hours of the time of one of the solrs. in consultations, drafting, revising, redrafting, etc., was inadequate; & the amount of the bill was not excessive.—*Re SOLICITORS*, [1931] 1 D. L. R. 819; 66 O. L. R. 143.—CAN.

*e i. Right of assignee to issue execution.*—A firm of solrs. with a certificate of taxation of a bill of costs against applt. herein made, for valuable consideration, an absolute assignment of the costs to resp. herein. Resp. then obtained an order from a judge, giving him liberty to issue execution against applt. upon the certificate. On appeal :—**Held** : the appeal should be dismissed.—*Re TAJA SINGH & NUTTA SINGH*, [1932] 2 W. W. R. 671; 4 D. L. R. 303; 45 B. C. R. 547.—CAN.

he would otherwise be entitled to be remunerated: Provided that the amount payable under the agreement shall not be received by the solr. until the agreement has been examined & allowed by a Taxing Master:—*Held*: this section does not apply to an agreement by a client to give his solr. security, whether by way of a charge upon or an assignment of part of a fund to be received by the solr. for the amount of costs to which upon taxation the solr. may be found to be entitled; but an agreement to that effect may be made orally & without any writing between solr. & client.—*JONESCO v. EVENING STANDARD CO., LTD., Re UNDERTAKING BY WINGFIELDS, HALSE & TRUSTRAM*, [1932] 2 K. B. 340; 101 L. J. K. B. 447; 147 L. T. 49, C. A.

1275. *Add. Annotation*:—*Refd.* Ward v. British Oak Insurance Co., [1931] 2 K. B. 637.

1374. *Add. Annotation*:—*Refd.* Alexander v. Rayson, [1936] 1 K. B. 169.

1391a. To what court appeal lies—Divisional Court.—Not “matter of practice & procedure” within Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 31 (3).—*Resps.*, a firm of solrs., acted for applt. in defending him in criminal proceedings before magistrates & at the assizes. Applt. was found guilty & sentenced to imprisonment. In respect of those proceedings *resps.* delivered their bill of costs in summary form to applt.’s attorney, who paid it. A few years later applt. took out an originating summons under Solicitors Act, 1843 (c. 73), asking for delivery of a detailed bill of costs. The master made an order for its delivery. The judge at chambers set aside the master’s order, but gave leave to appeal:—*Held*: the appeal did not relate to a matter of practice & procedure within above sub-sect., & therefore that the appeal lay not to the Ct. of Appeal but to the Div. Ct.—*Re WITHERS & Co.*, [1930] 2 K. B. 192; 99

L. J. K. B. 505; 143 L. T. 347; 46 T. L. R. 540; 74 Sol. Jo. 464, C. A.

1483. *Add. Annotation*:—*As to* (1) *Consd.* Pelster v. Pelster & Samuel, [1936] 3 All E. R. 783.

1524. *Add. Annotation*:—*Refd.* Jonesco v. Evening Standard Co., *Re Undertaking by Solicitors*, [1932] 2 K. B. 340.

1530. *Add. Annotation*:—*Folld.* Bury (H. E. & W.) v. Greenwood, [1934] W. N. 119.

1531. *Add. Annotation*:—*Refd.* Re C. B. & M. (Tailors), Ltd., [1932] 1 Ch. 17.

1531a. ———.—*BURY v. GREENWOOD*, [1934] W. N. 119; 177 L. T. Jo. 399.

1545. *Add. Annotation*:—*Refd.* Re Louch, [1930] 2 Ch. 63.

1558. *Add. Annotations*:—*Consd.* Light & Fulton v. McVittie (1935), 79 Sol. Jo. 341. *Folld.* *Re Taxation of Costs, Re Solicitor*, [1936] 1 K. B. 523.

1559. *Add. Annotation*:—*Consd.* Light & Fulton v. McVittie (1935), 79 Sol. Jo. 341.

1563a. Effect of inherent jurisdiction of court.—*LIGHT & FULTON v. McVITTIE* (1935), 79 Sol. Jo. 341.

1563b. Taxation under Solicitors Act, 1932 (c. 37), ss. 65 (1), 81 (1)—*Counsel’s fees*—Effect of R. S. C., Ord. 65, r. 27, reg. 29 (a).—(1) For the purpose of taxation of a solr.’s bill under Solicitors Act, 1932 (c. 37), the phrase “costs due to a solr.” in sect. 65 (1), must be deemed, having regard to the definition of “costs” in sect. 81, to include “disbursements” due from the client to the solr., which means actual payments before delivery of the bill, & any sums claimed in the bill as disbursements, e.g., fees to counsel, which have not been paid before its delivery, must be disallowed. Solrs. Act, 1932 (c. 37), has not made any alteration in the law in this respect & R. S. C., Ord. 65, r. 27, reg. 29 (a), is still in force.

(2) Where items in a solr.’s bill are struck

#### PART VI. SECT. 3, SUB-SECT. 3.—A.

sb. Absence of agreement as to scale of commission.—Effect.—Where a solr. & client agree that the former’s remuneration for collecting a claim shall be a commission, but they decide to leave the matter of the scale of the commission in abeyance, the solr., if he intends to exact payment according to the scale provided by Ord. 65, r. 27, reg. 29, should draw the client’s attention to said rule & give the client to understand that, in the event of the scale of commission, not being otherwise agreed on, he will apply the rule in demanding payment. The failure to so inform the client was held to be good cause in the present case for depriving the solrs. of their costs.—*CAMERON & CAMERON v. BOULTON*, [1930] 3 W. W. R. 61; 1 D. L. R. 1021; 43 B. C. R. 39.—*CAN.*

sc. “Fair & reasonable”—*What is.*—In deciding whether a contract between a solr. & client is “fair & reasonable to the client,” within sect. 73, Law Society Act, R. S. M., 1913, the word “fair” is to be taken as relating to the means by which the contract was brought about, & “reasonable” as relating to the quantum of remuneration therefrom resulting to the solr. In deciding whether the amount is reasonable the actual work which the solr. was called on to do is a factor but not the sole factor to be considered; & where the contract is one on the contingency & percentage basis, the mere fact that under the

percentage agreed on the amount payable to the solr. in the event of success has turned out to be in excess of the costs taxable on the ordinary solr. & client basis is not ground for holding the contract unreasonable. The reasonableness of such excess must depend on the reality & extent of the risk the solr. undertook & the amount of work anticipated at the time he assumed his obligation.—*GALBRAITH v. MURRAY, ROBERTSON & THOMAS*, [1930] 3 W. W. R. 120; 4 D. L. R. 1005.—*CAN.*

#### PART VI. SECT. 3, SUB-SECT. 3.—B. (b).

sf. Agreement as to counsel’s fees.—*Incomplete statement by solicitor.*—An agreement was made between a solr. & his client regarding the amount of fees to be paid to senior & junior counsel for the conduct of the hearing of an action. The client was adequately warned that the senior’s fees were special & such as would not be recoverable from the other party on a party & party taxation. The client was informed that the junior counsel’s fees were ordinarily two-thirds of senior counsel fees, & agreed in writing to pay fees amounting to about half those of senior counsel. These fees, as agreed, were reduced by the taxing master:—*Held*: although the statement as to the proportion of junior counsel’s fees to senior counsel’s fees was not inaccurate, it was in the circumstances of the case incomplete, & might be misleading &, accordingly,

that the client was not bound thereby.—*SYMON v. HAY*, [1934] S. A. S. R. 66.—*AUS.*

PART VI. SECT. 3, SUB-SECT. 5.  
sk. Special agreement to look to third party for payment.—Where a retainer or employment of a solr. or counsel is proved, coupled with services rendered, the burden of proof that some person other than the client was to pay for the services rests upon the party asserting that such mode of payment was agreed to.—*McGEER, McGEER & WILSON v. FLETCHER, McLellan v. FLETCHER* (H. C.), [1929] 4 D. L. R. 348; 2 W. W. R. 500.—*CAN.*

PART VI. SECT. 4, SUB-SECT. 1.  
so. Application of English law in India.—The law & practice in England relating to solrs. & to taxation of bills of costs applies in the Bombay Presidency, except where that law & practice is inconsistent with the rules & practice of the ct. The English Solrs. Act does not apply to attorneys practising in Bombay. There is no rule which makes it obligatory on an attorney to deliver a bill to the client, though in practice the Taxing Master will see that a client has a proper opportunity of considering the bill before taxation. The English rule that a solr. must be bound by a bill once delivered to a client does not apply to Bombay. He is at liberty to substitute another & a revised bill for taxation.—*REGIE v. VASANTRAS GANPATRAS* (1935), 1 L. R. 59 Bom. 443.—*IND.*

out of it on taxation at the instance of the client, because the business to which the items relate was never included in any retainer given to the solr. by the client, those items cannot be taken into consideration for the purpose of estimating whether one-sixth of the amount of the bill has been taxed off under sect. 66 (5) of 1932 Act.—*Re TAXATION OF COSTS. Re SOLICITOR*, [1936] 1 K. B. 523; [1936] 1 All E. R. 491; 105 L. J. K. B. 376; 154 L. T. 621; 52 T. L. R. 306; 80 Sol. Jo. 224, C. A.

1572. *Add. Annotation:—Generally. Refd. Light & Fulton v. McVittie* (1935), 79 Sol. Jo. 341.

1582a. ——— *Omission of permitted increase from bill.*—A solr. who has omitted the 33 per cent. increase allowed by R. S. C., Ord. 55, r. 10b, from his bill of costs can claim to have it allowed after his bill of costs has been taxed.—*Re LOUCH*, [1930] 2 Ch. 63; 99 L. J. Ch. 421; 143 L. T. 469; 74 Sol. Jo. 387.

1594. *Add. Annotation:—As to (1) Refd. Re Louch*, [1930] 2 Ch. 63.

1596. *Add. Annotation:—Refd. Light & Fulton v. McVittie* (1935), 79 Sol. Jo. 341.

1609. *Add. Annotation:—Refd. Light & Fulton v. McVittie* (1935), 79 Sol. Jo. 341.

1655. *Add. Annotation:—As to (2) Refd. Light & Fulton v. McVittie* (1935), 79 Sol. Jo. 341.

1710. *Add. Annotation:—As to (1) Refd. Light & Fulton v. McVittie* (1935), 79 Sol. Jo. 341.

1715a. *Patent agent—Whether exclusive right to taxation in patent action.*—*Re SOLICITORS. Re TAXATION OF COSTS* (1935), 79 Sol. Jo. 49, D. C.

1823a. ——— *—.*—*Re FENTON*, [1894] W. N. 128.

1849a. *Recovery of damages by infant or person of unsound mind.*—The R. S. C. require that in all actions for damages brought on behalf of an infant or person of unsound mind, the costs of pltf., both as between party & party & as between solr. & client, shall be taxed & certified by the Taxing Master, & no costs other than those so certified are payable to the solr. for pltf. These provisions apply equally whether damages are recovered by a verdict & judgment after trial or by an order staying proceedings upon the terms of a settlement out of ct. In either case there is a direction by the ct. that the costs of pltf., both as between party & party & as between solr. & client, are to be taxed, & it is the duty of the solrs. on both sides to see that the direction is complied with. The Rules & the direction are made for the protection of infants & persons of unsound mind, & are imperative. It is important that it should be known that if they are deliberately disobeyed, the solrs. responsible are liable to be dealt with for contempt of ct.—*PRACTICE NOTE*, [1933] W. N. 190.

1863. *Add. Annotation:—Refd. Warmingtons v. McMurray*, [1937] 1 All E. R. 562.

1908. *Add. Annotation:—Refd. Pratt v. London Passenger Transport Board, Green v. Vandekar*, [1937] 1 All E. R. 473.

1909. *Add. Annotation:—Refd. Pratt v. London Passenger Transport Board, Green v. Vandekar*, [1937] 1 All E. R. 473.

1955. *Add. Annotation:—Refd. Re Potts, Ex p. Etablissements Callot & De Schrijver v. Leonard Tubbs & Co. & Official Receiver*, [1934] Ch. 356.

2016. *Add. Annotation:—Refd. Re Solicitors* (1931), 50 T. L. R. 327.

#### PART VI. SECT. 4, SUB-SECT. 6.

1582 i. *Whether solicitor bound by bill as delivered—Bona fide amendments—Before order for taxation obtained or taxation threatened by client.*—In an action by a solr. to recover fees & disbursements:—*Held:* he was not bound by a bill previously rendered for a lesser amount than that sued for, there having been no express or implied acceptance of said account by deflt. & no taxation or steps taken towards taxation.—*MAULSON v. SHKLOV*, [1935] 1 W. W. R. 568; 2 D. L. R. 476; 13 Man. L. R. 67.—CAN.

#### PART VI. SECT. 5, SUB-SECT. 1.—B.

*se. Arbitrators—Public Works Act, R. S. B. C. 1924, s. 24.*—Under Public Works Act, R. S. B. C. 1924, c. 211, s. 24, the arbitrators only are vested with authority to grant or withhold witness fees in the case of any particular witness, at any rate to the extent of deciding whether such fees should be included in the bill of costs for taxation or not, & what amount of preparation was reasonably necessary.—*Re GALT BROS. & BURNHAM ARBITRATION*, [1928] 1 W. W. R. 798; 39 B. C. R. 470.—CAN.

#### PART VI. SECT. 5, SUB-SECT. 1.—D. (b).

*st. Whether solicitor entitled—On withdrawal of general retainer.*—A solr. was retained by C. to conduct proceedings in an action against S. The retainer was not disputed. The solr. conducted the action until the judgment of the trial judge was given. C. decided to appeal & commenced

proceedings for an appeal. From that time he took over from the solr. the conduct of & control of the proceedings & of the appeal, & thereafter the solr. merely performed such services as C. from time to time required of him. The solr. then delivered his bill of costs, & in due time obtained on *præcipe* an order for its taxation pursuant to Solicitors Act, s. 33 (c):—*Held:* C., by taking over the conduct & control of the proceedings put an end to the general retainer, as he had a right to do, & the solr. was thereupon entitled to claim payment of his costs, & in the absence of "special circumstances," to have a *præcipe* order for taxation of his bill.—*Re SAVIGNAC*, [1928] 4 D. L. R. 433; 62 O. L. R. 589.—CAN.

#### PART VI. SECT. 5, SUB-SECT. 3.—B. (a).

*sg. Change of solicitor.*—Where a solr.'s retainer to defend an action was terminated by the client by a change of solrs. before the trial & there had not been prior to the change such a break in the proceedings as to entitle the solr. to demand payment of his bill without terminating the retainer, held that the month within which, under sect. 56 of Legal Profession Act, bills of costs may be referred to taxation did not begin to run until the change of solrs.—*Re LEGAL PROFESSION ACT, CANADIAN BANK OF COMMERCE v. ANNABLE*, [1929] 2 D. L. R. 372; 1 W. W. R. 700; 23 S. L. R. 613.—CAN.

#### PART VI. SECT. 5, SUB-SECT. 3.—B. (c).

1853 i. *Right to order.*—Although

sect. 80 of Legal Professions Act, R.S.B.C., 1924, does not say that the person chargeable with a solr.'s bill may apply, after the expiration of one month, for a reference, yet from a reading thereof with sect. 81 it would appear that he has that right. An order under sect. 80 is not, however, an order of course.—*Re MILETT*, [1935] 3 W. W. R. 58; 49 B. C. R. 403.—CAN.

#### PART VI. SECT. 5, SUB-SECT. 3.—C. (e) i.

1996 ii. ——— *—.*—A solr.'s bill of costs was adjusted & settled & paid in the life-time of the client, on Nov. 20, 1928. On Aug. 21, 1930, the widow & executrix of the client launched an application for taxation of the bill:—*Held:* the application, not being made within a year from the date of payment, as required by Solrs. Act, could not succeed.—*Re SOLICITOR*, [1931] 1 D. L. R. 315; 66 O. L. R. 201.—CAN.

#### PART VI. SECT. 5, SUB-SECT. 3.—D. (f).

2125 i. *Whether special circumstance.*—The relationship of client & solr. is not of itself a "special circumstance," within Legal Profession Act, s. 58, for allowing the taxation of a bill of costs after the expiration of said month; but it is a circumstance that should always be considered on an application to allow such taxation.—*Re LEGAL PROFESSION ACT, CANADIAN BANK OF COMMERCE v. ANNABLE*, [1929] 2 D. L. R. 372; 1 W. W. R. 700; 23 S. L. R. 613.—CAN.

2145. *Add. Annotation*:—**Consd. Re Solicitors** (1934), 50 T. L. R. 327.
2149. *Add. Annotation*:—**Consd. Re Solicitors** (1934), 50 T. L. R. 327.
- 2151a. ———.]—A solrs.' bill of costs having been paid with an express reservation of the right to ask for taxation:—*Held*: in the circumstances of the case, such a reservation amounted to a "special circumstance" within proviso to Solrs. Act, 1932 (c. 37), s. 66 (2), so as to justify the ct., in the exercise of its discretion, in making an order for taxation.—*Re SOLICITORS* (1934), 50 T. L. R. 327.
2301. *Add. Annotation*:—**Refd. The Edison** (No. 2), [1931] P. 115.
2313. The case is the same as that following, No. 2314.
2390. *Add. Annotations*:—**Refd. White v. Altrincham Urban District Council**, [1936] 2 K. B. 138; *British United Shoe Manufacturing Co. v. Holdfast Boots, Ltd.*, [1936] 3 All E. R. 717.
2423. *Add. Annotations*:—**Consd. Pelster v. Pelster & Samuel**, [1936] 3 All E. R. 783. **Refd. White v. Altrincham Urban District Council**, [1936] 2 K. B. 138.
2430. *Add. Annotations*:—**Refd. White v. Altrincham Urban District Council**, [1936] 2 K. B. 138; *British United Shoe Manufacturing Co. v. Holdfast Boots, Ltd.*, [1936] 3 All E. R. 717; *Pelster v. Pelster & Samuel*, [1936] 3 All E. R. 783.
2466. *Add. Annotation*:—**Consd. Re Taxation of Costs, Re Solicitor**, [1936] 1 K. B. 523.
- 2467a. ———.]—*Re TAXATION OF COSTS, Re SOLICITOR*, No. 1563b, *ante*.
2468. *Add. Annotation*:—**Consd. Re Taxation of Costs, Re Solicitor**, [1936] 1 K. B. 523.
2498. *Add. Annotation*:—**Consd. Re Taxation of Costs, Re Solicitor**, [1936] 1 K. B. 523.
2647. *Add. Annotation*:—**Refd. Davis v. Symons**, [1931] Ch. 442.

## Part VII.—Amount of Costs Recoverable.

2803. *Add. Annotation*:—**Generally, Refd. Pelster v. Pelster & Samuel**, [1936] 3 All E. R. 783.
- 2807a. **Junior counsel.**—Pltf.'s solr. employed a Queen's Counsel & a junior to oppose a motion for further time to answer. The ct. held that he was justified in so doing; & ordered the taxing master, who had disallowed the fees of the junior counsel, to review his taxation.—*COOKE v. TURNER* (1844), 12 Sim. 649; 59 E. R. 1282.
- 2813a. **Counsel attending judge's chambers.**—The Supreme Ct. Rules, Special Allowances,

r. 14, that "as to counsel attending at judge's chambers no costs thereof shall in any case be allowed unless the judge certifies it to be a proper case for counsel to attend" applies to taxation of costs between solr. & client as well as between party & party.—*Re CHAPMAN* (1882), 10 Q. B. D. 54; 52 L. J. Q. B. 75; 47 L. T. 426; 31 W. R. 266, C. A.

2902. *Add. Annotation*:—**Consd. Jackson v. Jackson & Barwell**, [1936] 2 All E. R. 1588.
2905. *Add. Annotation*:—**Refd. Jackson v. Jackson & Barwell**, [1936] 2 All E. R. 1588.

### PART VI. SECT. 5, SUB-SECT. 9.—B. (c).

sk. *Denial of retainer not disclosed.*—The fact that the client disputes the retainer *in toto* need not be disclosed when a solr. obtains an *ex parte* order for the taxation of his costs.—*Re BANKER & SKIRING*, [1935] 1 W. W. R. 751; 49 B. C. R. 179.—CAN.

### PART VI. SECT. 5, SUB-SECT. 10.—E. (a).

sl. *To ascertain "costs in the cause."*—*McLEAN v. RATEKIN*, [1928] 1 W. W. R. 592.—CAN.

### PART VI. SECT. 5, SUB-SECT. 11.—A.

sj. *Effect of reference by court to costs as "taxed."*—In the reasons for judgment herein, by which doft. was declared entitled to a solr.'s lien for costs, the ct., due to a misconception, referred to the bill of costs in question as "taxed." The bill of costs was not, however, finally allowed & certified by the taxing officer until two months after the delivery of said reasons, Pltf. within 15 days after the giving of the certificate gave notice under rule 693 of an application to have the taxation reviewed by a judge in chambers:—*Held*: said judgment of the ct. having not yet been entered, use of the term "taxed" did not prevent pltf. from having the review of taxation proceeded with.—*ROYAL BANK OF CANADA v. MARS* (No. 2), [1930] 2 W. W. R. 215; 3 D. L. R. 530; 1 W. W. R. 262; 24 S. L. R. 340, 433.—CAN.

### PART VI. SECT. 5, SUB-SECT. 11.—B

c i. ———.]—*Jurisdiction of court to extend.*—*Re GENT ONE, Ex p. PRATT* (1927), 27 S. R. N. S. W. 48.—AUS.

### PART VI. SECT. 5, SUB-SECT. 11.—D. (a).

2371 v. ———.]—A taxing officer's ruling as to whether any particular item should be allowed or excluded ought rarely to be interfered with on appeal, if it appears he understood the governing principle.—*CANADIAN EDUCATIONAL FILMS, LTD. & GOODART PICTURES INCORPORATED v. HORAN & NICHOLS THEATRES, LTD.* (1928), 39 B. C. R. 424.—CAN.

2371 vi. ———.]—*NOBLE v. BROMLEY*, [1928] 2 D. L. R. 605; [1928] 1 W. W. R. 809; 39 B. C. R. 518.—CAN.

### PART VI. SECT. 5, SUB-SECT. 11.—D. (b) ii.

2415 ii. *Whether order made.*—Though the ct. will be desirous of giving the greatest weight to the opinion of the taxing master, on a question of the quantum of counsel's fees, upon an appeal it is the duty of the ct. to review that opinion, & if it think that the master has clearly made a mistake to rectify the mistake, & to give such decision as to it seems just.—*Re MELBOURNE PARKING STATION, LTD. (IN LIQUIDATION)* (1929), V. L. R. 5.—AUS.

### PART VI. SECT. 5, SUB-SECT. 12.

2433 ii. ———.]—*To King's Bench judge—From Surrogate Court judge.*—*Re MCKACHEN ESTATE* (No. 2), [1933] 3 W. W. R. 626.—CAN.

### PART VII. SECT. 1, SUB-SECT. 1.

sl. *Solicitor to executor—"General counsel fee."*—The practice which has been followed in Saskatchewan of allowing the solr. for an exor. a "general counsel fee" in addition to the amount of his specific charges is without legal justification.—*Re ROEMER*

*ESTATE, Re MOTT & ROEMER*, [1928] 3 D. L. R. 860; [1928] 2 W. W. R. 566.—CAN.

### PART VII. SECT. 1, SUB-SECT. 4.—B. (c).

sm. *Investigation of title—Of assignee of equity of redemption—On extension of mortgage—Whether covered by scale fee.*—It is a question whether acts are so sufficiently connected with the extension of the mtge. as to be comprised within the scale fee for effecting such extension. The investigation of the title of the assignee of an equity of redemption is not so connected, & the costs of such investigation are not covered by the scale fee.—*Re RUSS* (1927), 28 S. R. N. S. W. 7.—AUS.

### PART VII. SECT. 2, SUB-SECT. 1.—B. (b).

so. *Attendances before registrar to settle judgment.*—*MAIR v. DUNCAN LUMBER CO., LTD.* (No. 2), [1928] 1 W. W. R. 431; 39 B. C. R. 399.—CAN.

### PART VII. SECT. 2, SUB-SECT. 1.—B. (c).

sa. *Personal attendance abroad at taking evidence on commission.*—In a suit for dissolution of marriage in which W. acted as solr. for the petitioner, an order was made for the issue of a commission to take evidence in Java. W. warned petitioner that the costs of his personal attendance at Java might be disallowed on taxation, but he also wrongly advised her that it was necessary that he should attend personally:—*Held*: the costs of his attendance at Java were rightly disallowed on taxation between him & his client.—*Re WINDEYER, FAWL & CO., Ex p. FOLEY* (1931), 31 S. R. N. S. W. 145; 48 N. S. W. W. N. 71.—AUS.

## Part VIII.—Solicitor's Lien.

3028. *Add. Annotation* :—*Re*fd. Clayton v. Clayton, [1930] 2 Ch. 12.

3087. *Add. Annotation* :—*Re*fd. Mason v. Mason & Cottrell, [1933] P. 199.

3195. *Add. Annotation* :—*As to* (1) *Re*fd. Mason v. Mason & Cottrell, [1933] P. 199.

3213. *Add. Annotation* :—*Re*fd. Mason v. Mason & Cottrell, [1933] P. 199.

3302a. **Successful appeal against receiving order.**—A receiving order was made in a county ct., & upon appeal the Div. Ct. in Bkpcy. rescinded the receiving order, dismissed the petition & ordered the petitioning creditors to pay the taxed costs of the appeal to the debtor or to his solr. The solr., having taxed the costs at £41 5s. 7d., & not being paid by the petitioning creditors, issued a writ of *fi. fa.* & the Sheriff of Middlesex levied execution. The execution was paid out, but the petitioning creditors obtained a garnishee order *nisi* on a judgment of the K. B. D. in respect of moneys due to them from the debtor. The solr. for the debtor thereupon applied to the ct. for a charging

order for his costs :—*Held* : the question was one of discretion, & the ct. would exercise its discretion by directing that the solr. should have a charging order on the moneys in the hands of the sheriff & the costs of this application.—*Re* DEBTOR (No. 29 of 1931), WILD v. PETITIONING CREDITORS & DEBTOR (1934), 103 L. J. Ch. 303 ; 78 Sol. Jo. 430 ; [1934] B. & C. R. 54.

3307a. **Administration action—Interest of next-of-kin on intestacy.**—A party to a probate action propounded several wills of the deceased, being also interested as next-of-kin in the event of the intestacy of the deceased. The ct. pronounced for an intestacy & against the wills. On the application of solrs. who had conducted the litigation for the party propounding the wills, & had since been discharged, the ct. made an order declaring them entitled to a charge for their costs upon the interest of their client in the intestacy as upon "property recovered or preserved through their instrumentality."—*HYDE v. WHITE, WHITE v. HYDE*, [1933] P. 105 ; 149 L. T. 96 ; 77 Sol. Jo. 251 ; *sub nom. Re WHITE*, 102 L. J. P. 71 ; 49 T. L. R. 325.

## PART VIII. SECT. 2, SUB-SECT. 3.

—A.

*sb. Whether extending to costs incurred by English agent.*—The law agent of a co. who also acted as its secretary, was instructed to expose for sale a property in England belonging to the co. For this purpose he employed English solrs., who in turn employed auctioneers. The co. went into liquidation, & a petition was presented by the liquidator craving that the law agent should be ordained to deliver to him the titles of certain heritable properties belonging to the co. The law agent maintained that he had a lien over the titles for his own account as law agent (which was admitted), & also for the accounts of the English solrs. & auctioneers, for which the English solrs. had intimated that they held him personally liable :—*Held* : the lien of a law agent did not extend to accounts incurred on behalf of his client which he had not in fact paid & for which he was not personally liable ; accordingly, the law agent's claim to a lien in respect of the accounts of the English solrs. & auctioneers fell to be dismissed, in respect that there was no averment either that he had paid the accounts or that he was liable to pay them.

*Opinion* that the fact that the law agent, who was acting for a disclosed client, gave the instructions to the English solrs. did not necessarily involve him in any personal liability for their account or for the account of the auctioneers employed by them.—*ROBERTS v. SNODGRASS*, [1932] S. C. (H. L.) 73.—SCOT.

## PART VIII. SECT. 2, SUB-SECT. 3.—B.

*sc. For work done by English solicitors & auctioneers employed by solicitor.*—The law agent of a co., who also acted as its secretary, was instructed to expose for sale a property in England belonging to the co. For this purpose he employed English solrs., who in turn employed auctioneers. The co. went into liquidation, & a petition was brought by the liquidator against the law agent for delivery of the titles of certain heritable properties belonging to the co. The law agent maintained

that he had a lien over the titles for his own account as law agent, which was admitted, & also for the accounts of the English solrs. & auctioneers, for which the English solr. had intimated that they held him personally liable :—*Held* : the accounts of the English solrs. & auctioneers, having been properly incurred by the resp. in the ordinary course of law agency, were covered by his lien.—*ROBERTS (H. STAVELBY) v. SNODGRASS*, [1931] S. C. 580.—SCOT.

## PART VIII. SECT. 2, SUB-SECT. 5.—E.

*st. Action settled.*—Deft. settling an action with pltf. after notification by solr. for pltf. of a claim of lien for services, is liable to the solr. for his costs on a solr. & client basis.—*QUEEN'S ROYAL HOTEL, LTD. v. WATTS*, [1937] 1 D. L. R. 74.—CAN.

## PART VIII. SECT. 3, SUB-SECT. 1.

3070 *iii.* —.—A solr. has, apart from any order of the ct., or any statute, a lien over any property recovered or preserved, or the proceeds of any judgment, obtained for his client by the solr.'s exertions. The right of the solr. is, in essence, a claim to the equitable interference of the ct. for the protection of the solr. The question of the solr.'s lien is unaffected by the Civil Procedure Code, & is still governed by the relevant principles of English law.—*PREMSUKHDAS SINGHANIA v. N. C. BURAL & PYNE* (1934), 1 L. R. 61 Cal. 1005.—IND.

*sa. Rule in India.*—The rights of attorneys in India in regard to lien are the same as the rights of solrs. in England under the common law, except in so far as the latter have been modified by statute.—*DAMODAR DAS v. MORGAN & CO.* (1933), 1 L. R. 60 Cal. 1442.—IND.

## PART VIII. SECT. 3, SUB-SECT. 2.—A.

*sd. Sum paid into court by defendant—Defendant successful in first action—Unsuccessful in second action—Solicitor entitled to retainer for costs of first action on sum paid in.*—*RAY v. HOU* (1928), 40 B. C. R. 438.—CAN.

## PART VIII. SECT. 3, SUB-SECT. 4.—B. (a).

3142 *vii.* —.—The ct. will exercise its equitable interference on behalf of a solr. to protect him from being deprived of his costs where he has given the opposite party or the latter's solr. notice of his claim or where it is clearly made out that there has been collusion between the parties to cheat the solr. of his costs.—*TEIRY v. MACDONALD*, [1935] 1 W. W. R. 501 ; 2 D. L. R. 812.—CAN.

## PART VIII. SECT. 3, SUB-SECT. 5.—B.

3192 *iii.* —.—Deft. was given costs against the three pltf's. One of pltf's. had recovered a judgment against deft. for a much larger sum in a previous action to which the other two pltf's. were not parties, & claimed the right to set-off deft.'s costs against that judgment. Deft. argued that the set-off would defeat the lien of his solr. The ct. allowed the set-off, & an appeal from the order was dismissed.—*INLAY HARDWOOD FLOOR CO., LTD. v. DIERSSEN*, [1928] 2 D. L. R. 560 ; [1928] 1 W. W. R. 897 ; 39 B. C. R. 514.—CAN.

## PART VIII. SECT. 4, SUB-SECT. 2.—B. (a).

*p i. — Basis of right—Salvage.*—The principle of salvage is the key to the construction of Legal Professions Act, R. S. B. C., 1924, s. 104, which gives a solr. a charge on & a right of payment out of property "recovered or preserved" through his services. Claims for costs due solr. for defending actions brought for personal services, goods sold, & on a promissory note were held, therefore, not to come within said section ; but a claim with respect to a mechanic's lien action in which the lien was reduced was held to be within it.—*MILLER v. WOLLASTON*, [1929] 3 D. L. R. 348 ; 2 W. W. R. 136 ; 41 B. C. R. 145.—CAN.

*p ii.* —.—*Re* McCORMACK & BROCKST METAL WARES, LTD., *Re* McMILLAN, [1936] 2 W. W. R. 509, 4 D. L. R. 463.—CAN.

**3315.** *Add. Annotation* :—*As to* (2) **Refd.** *Morriss v. Baines & Co.*, [1933] 1 K. B. 540.

**3350a.** *Matrimonial suit—Wife's costs unpaid—Bankruptcy of wife.*—A declaration that a solr. is entitled to a charging order for his costs under Solrs. Act, 1932 (c. 37), s. 69, is discretionary on the part of the ct. & should not be made if the solr. has stood by while the fund sought to be charged has been dealt with under circumstances which render it unjust that the interest of other parties should be postponed to the lien of the solr. Solrs. for a petitioning wife in a matrimonial suit obtained an order for the costs payable by resp. husband without obtaining payment from him. Petitioner became a bkpt. & the solrs. proved in the bkpcy. as unsecured creditors of petitioner for the amount of the costs; the solrs. subsequently applied for a charging order on the amount of a legacy bequeathed to the husband in respect of which the Official Receiver in the bkpcy. had already obtained a garnishee order :—**Held** : the discretion of the ct. to make the charging

order should not be exercised (a) because the admission of the proof of the solrs., as unsecured creditors was inconsistent with the security which the charging order would afford; (b) because the property involved in the legacy had not been recovered by the solrs., being still in the hands of the trustees of the will by which it was bequeathed; & (c) because a charging order would create a new right of creditors in the bkpcy., which did not exist at the date of the bkpcy., contrary to Bkpcy. Act, 1914 (c. 59), s. 7.—*Higgs v. Higgs*, [1934] P. 95; 103 L. J. P. 44; 150 L. T. 516; 50 T. L. R. 313; 78 Sol. Jo. 279.

**3361.** *Add. Annotation* :—**Refd.** *Newport v. Pougher*, [1937] Ch. 214.

**3366.** *Add. Annotation* :—**Consd.** *Higgs v. Higgs* [1934] P. 95.

**3375.** *Add. Annotation* :—*As to* (2) **Refd.** *Millensted v. Grosvenor House (Park Lane), Ltd.*, [1937] 1 K. B. 717.

## Part IX.—Solicitor's Remedies for Costs.

**3440a.** *Refusal of client to pay counsel—Payment by solicitor—Recovery from client.*—Where a solr. on his client's instructions briefs counsel in an action & the counsel duly appears but after the trial the client refuses to pay counsel's fee, the solr. is entitled, on paying the fee himself, to recover it from the

client.—*MEDLICOTT v. EMERY* (1933), 149 L. T. 303; 49 T. L. R. 427; 77 Sol. Jo. 389.

**3451a.** —.—.]—*HORNER v. CREW* (1928), 72 Sol. Jo. 103.

**3544a.** —.—.]—*HAMILTON v. CARTER & BELL* (1932), 173 L. T. Jo. 452, H. L.

## Part X.—Solicitors as Officers of the High Court.

**3563a.** —.—.] A judge of the High Ct., before whom an action has been tried, has inherent jurisdiction to entertain an application that a solr. who has acted for a party should, on the alleged ground of his professional misconduct, pay personally the costs ordered to be paid by that party, notwithstanding that the solr. has ceased to be on the record of the action before the verdict was returned or even before the trial began. In such a case the application should be made summarily to the trial judge, & need not be made to the Div. Ct. or affidavit, or in any other form; & it is for the judge in his discretion to give such directions in regard

to the making of the application as seem to him to be necessary.—*BRENDON v. SPIRO*, [1938] 1 K. B. 176; [1937] 2 All E. R. 496; 107 L. J. K. B. 181; 157 L. T. 265; 53 T. L. R. 667; 81 Sol. Jo. 396, C. A.

**3655a.** *What must be shown.*—The ct. will not summarily order a solr. to deliver up a deed to his client unless it be clearly shown not only that his solr. has no lien upon it, but that he is holding it for appct. alone, & as his solr.—*Ex p. COBELDICK* (1883), 12 Q. B. D. 149; 49 L. T. 741; 32 W. R. 239, C. A.

**3670.** *Add. Annotation* :—**Consd.** *Brendon v. Spiro*, [1937] 2 All E. R. 496.

### PART VIII. SECT. 4, SUB-SECT. 3.

*sf. Retainer.*—The solr. was held not to be entitled to a lien with respect to a claim for a certain sum which his client had agreed to pay him, as a retainer, over & above his taxed costs.—*Re CRUX, ENFANTE v. ENFANTE*, [1932] 1 W. W. R. 93.—**CAN.**

*sk. Costs of administration of estate of deceased—As solicitor for executor—Executor debtor to estate.*—*Re FRASER ESTATE*, [1934] 3 W. W. R. 222.—**CAN.**

### PART VIII. SECT. 4, SUB-SECT. 4.—D.

*k i.* —.—.]—*Seemle* : It is not incumbent upon a solr. to show that he cannot recover his costs from his client in order to entitle him to a charging order upon the judgment which is for

those particular costs.—*DELTA FINANCE CO., LTD. v. BYEIS*, [1932] 1 W. W. R. 827; 3 D. L. R. 139; 26 Alta. L. R. 300.—**CAN.**

### PART VIII. SECT. 4, SUB-SECT. 6.

*sq. Protection of lien by declaratory judgment—Jurisdiction of court.*—*CASIDY v. STUART*, [1928] 3 D. L. R. 879; 62 O. L. R. 374.—**CAN.**

### PART IX. SECT. 1, SUB-SECT. 1.

*l i.* —.—.]—*Collision by defendants to deprive solicitor of costs.*—*ENFANTE v. ENFANTE*, [1932] 1 D. L. R. 788; 44 B. C. R. 472.—**CAN.**

### PART IX. SECT. 1, SUB-SECT. 4.—A.

*st.* *After one month from delivery of bill—Not applicable where amount agreed on.*—**Sec. 66 of Legal Profes-**

sion Act, R. S. S., 1930 (which provides that a barrister or solr. shall not commence an action for the recovery of fees until one month after a bill has been delivered to the party to be charged) does not apply to the case where the amount of the bill has been agreed upon.—*MACMILLEN v. TAYLOR*, [1932] 3 W. W. R. 264.—**CAN.**

### PART X. SECT. 2, SUB-SECT. 4.—B. (a).

**3656 l.** *Delivery up ordered.*—Notwithstanding the provisions of Legal Profession Practice Act, 1915, s. 8, the ct. still has power, in a proper case, to order a solr. to deliver up to his client or former client the latter's documents & papers which the solr. has in his possession.—*Re LONG*, [1929] V. L. R. 318; [1929] *Argus* L. R. 271.—**AUS.**

**3677a. Solicitors nominated by insurer—Conducting action for insured person.]**—Where an action for damages for negligence arising out of an accident is conducted on deft.'s behalf by his insurance co., & solrs. are nominated by the co. under a clause in the policy to that effect, the co. only act as deft.'s agents, & the solrs. are throughout solrs. for deft. The solrs. are therefore bound, if requested so to do, to produce to their client all documents relating to the action in their possession, custody or control, either during the course of the action or after its conclusion, & the insurance co. has no right to object to the production of the documents.

The ct. will, if necessary, make an order for production of the documents. —*Re CROCKER, Re TAXATION OF COSTS*, [1936] Ch. 696; [1936] 2 All E. R. 899; 105 L. J. Ch. 276; 155 L. T. 344; 52 T. L. R. 565; 80 Sol. Jo. 486.

*Annotation: Refd. Groom v. Crocker*, [1937] 3 All E. R. 814.

**3684. Add. Annotation:—Refd. Clayton v. Clayton**, [1930] 2 Ch. 12.

**3686. Add. Annotation:—Consd. Brendon v. Spiro**, [1937] 2 All E. R. 496.

**3874. Add. Annotations:—Apld. Russian & English Bank v. Baring Bros. & Co.**, [1935] Ch. 120. **Consd. Brendon v. Spiro**, [1937] 2 All E. R. 496. **Refd. Watts v. Official Solicitor**, [1936] 1 All E. R. 249; **Myers v. Rothfield**, [1938] 3 All E. R. 498.

**3879a. Misconduct of clerk.]**—The present applt. had been the solr. on the record to one of defts. At the close of the case, pltf. made an application that applt. should be ordered to

pay the costs of the action, on the ground that he had been guilty of unprofessional conduct. It was proved that applt. had left the conduct of the case in the hands of his managing clerk, who was not a solr. It was alleged that applt. had been guilty of unprofessional conduct in that (i) he had filed a defence putting pltf. to the proof of her allegations, knowing that the defence was unlikely to succeed, & (ii) had prepared affidavits of documents which no solr. could help knowing were inadequate:—*Held*: (1) it is not unprofessional conduct on the part of a solr. to file a defence putting a pltf. to proof; (2) a solr. cannot be punished for misconduct committed by his clerk, but only if he himself has been guilty of improper conduct. —*MYERS v. ROTHFIELD*, [1938] 3 All E. R. 498; 159 L. T. 418; 54 T. L. R. 1015; 82 Sol. Jo. 663, C. A.

**3886. Add. Annotation:—Consd. Myers v. Rothfield**, [1938] 3 All E. R. 498.

**3900. Add. Annotation:—Refd. Myers v. Rothfield**, [1938] 3 All E. R. 498.

**3970. Add. Annotation:—Fold. Cooper v. Dummett** (1930), 70 L. Jo. 394.

**3970a. —.]—COOPER v. DUMMETT** (1930), 70 L. Jo. 394; 170 L. T. Jo. 468; [1930] W. N. 248.

**4017. Add. Annotation:—Consd. Myers v. Rothfield**, [1938] 3 All E. R. 498.

**4056a. Solicitor not holding certificate.]—Re REES**, [1933] W. N. 194; 176 L. T. Jo. 88.

**4082. Add. Annotation:—Consd. Brendon v. Spiro**, [1937] 2 All E. R. 496.

## Part XI.—Solicitors and Third Persons.

**4177a. —.]**—In trespass by A. against B. for false imprisonment, B. pleaded that J. recovered a judgment against A. in the sheriffs' ct., London, that A. was summoned, & appeared before the judge of that ct., who ordered the sum recovered to be paid by instalments, that the first instalment was demanded & not paid; that the judge duly, by warrant under his hand & seal according to 8 & 9 Vict. c. 127, ordered the officer of the ct. to take A., & convey him to prison for forty days; & that B. as the attorney of J. delivered the warrant to the officer, who

took A. Replication, that, by this order, it was not directed that A. should be committed, *modo et forma*:—*Held*: deft., having acknowledged actual participation in the act of trespass, by pleading in confession & avoidance, could not protect himself, upon this issue, by showing that he had acted merely as the attorney of J.—*KINNING v. BUCHANAN* (1849), 8 C. B. 271; 7 Dow. & L. 169; 18 L. J. C. P. 332; 13 L. T. O. S. 546; 13 Jur. 812; 137 E. R. 513; *subsequent proceedings* (1850), 15 L. T. O. S. 305.

*Annotation:—Apld. Abley v. Dael* (1850), 10 C. B. 62.

## Part XII.—Partnership between Solicitors.

**4204. Add. Annotation:—Refd. Parker v. Judkin**, [1931] 1 Ch. 475.

**4278. Add. Annotation:—Apld. Stoke Newington Borough Council v. Richards** (1929), 45 T. L. R. 650.

### PART X. SECT. 4, SUB-SECT. 3.—B.

**3873 li. —.]**—A solr. purporting to act for a non-existing party is personally liable to pay the costs of the other party to the suit.—*DHANRAJGIRI v. PAYNE & Co.* (1933), 1 L. R. 53 Bom. 1.—*IND.*

### PART XI. SECT. 2, SUB-SECT. 3.—C.

**4174 li. —.]**—Commitment after a conviction subsequently quashed for

error is illegal, but a solr. who drafts the warrant is not liable for false arrest.—*ROCHE v. GRANT*, [1935] 2 D. L. R. 553; 8 M. P. R. 461; 63 Can. C. C. 315.—*CAN.*

### PART XII. SECT. 1.

**ex. Sale of partnership—Custody of documents.]**—Tenders were called for the sale of partnership assets including goodwill. No offer was received for the

goodwill other than an offer of £15 by S., which was not accepted; but a solr. of standing intimated his willingness to make an offer therefor if the purchaser were entitled to the custody of deeds & documents (subject to the right of the clients) & to the possession of the books of account & record, papers, accounts, drafts, copies of opinions, etc. The circumstances indicated that the goodwill was of little value. S. & S. moved for an order dissolving the injunction



## Part XIII.—London and other Legal Agents.

4354. *Add. Annotation*.—**Refd.** Calico Printers' Assocn., Ltd. v. Barclays Bank (1931), 145 L. T. 51.
- 4408a. **Payment of account by solicitor—Sum including counsel's fees—Fees unpaid by agent—Death of agent insolvent—Rights of solicitor.**—County solrs. paid their London agent a sum of £671 19s. 1d., the balance of an account due to him. The account included a sum of £399 19s. in respect of counsels' fees. The London agent, who died insolvent, did not in fact pay the fees. The country solrs. issued a summons in the administration action relating to the estate of deceased, by which

they claimed a declaration that they were entitled to recover the sum of £399 19s. from the estate, or in the alternative a declaration that they were entitled to claim against the estate as creditors:—*Held*: the country solrs. could not treat that sum as received by them on a trust to pay counsel, & therefore were not entitled to recover it in full from the estate of the deceased, but they were entitled to prove as creditors for it, less an admitted set-off, as money had & received.—*Re SANDIFORD, ITALO-CANADIAN CORPN., LTD. v. SANDIFORD*, [1934] Ch. 707; 103 L. J. Ch. 301; 151 L. T. 559.

## Part XIV.—Discipline and Removal from Roll.

4420. *Add. Annotation*.—**As to (1) Consd.** Brendon v. Spiro, [1937] 2 All E. R. 496.
- 4437a. **Misconduct while practising abroad—Investigation by coroner & attorney of the court.**—*Re SOLICITOR* (1928), 72 Sol. Jo. 570, D. C.
4480. *Add. Annotation*.—**Refd.** Myers v. Rothfield, [1938] 3 All E. R. 498.
4515. *Add. Annotation*.—**Refd.** Grahame v. A.-G. of Fiji, [1936] 2 All E. R. 992.
4430. *Add. Annotation*.—**Consd.** Brendon v. Spiro, [1937] 2 All E. R. 496.
4519. *Add. Annotation*.—**Consd.** Brendon v. Spiro, [1937] 2 All E. R. 496.
4526. *Add. Annotation*.—**Refd.** Myers v. Rothfield, [1938] 3 All E. R. 498.
- 4567a. — **Borrowing trust funds.**—Applt. was suspended from practice as a barrister & solr. of the Supreme Ct. of Fiji for professional misconduct. The case against applt. was twofold:—

(1) On Aug. 25, 1923, the trustees of the estate of one C., deceased, leased a portion of the trust estate to one H. for a period of ten years from May 1, 1923, with an option to purchase the freehold for £4,000. Applt. was H.'s solr. at the date of the lease & for some time prior to it. On Jan. 1, 1926, applt. became a partner with another solr., E., who acted for the C. trustees, applt. continuing to act for H., but when either was absent from Fiji the partner remaining attended to the affairs of all the firm's clients. The property leased to H. improved considerably in value, & in 1932 H. consulted applt. about the exercise of the option. On Nov. 2, 1932, H. exercised the option by a

written notice to E. On Nov. 4, 1932, E. left Fiji & did not return till Dec. 23, 1932. The terms of the purchase were that of the purchase price £4,000, £1,350 were to be paid in cash, & the balance was to be secured by a mtge. at 6½ per cent. H., being unable to provide the necessary funds, agreed to sell the property to applt. on Nov. 8, 1932, in the terms of the sale to him by the C. trustees, & applt. agreed to employ H. as his commission agent for the sub-division & sale thereof. Applt., who had advanced moneys to H. on previous occasions, disclosed to E. that he was going to finance H. to the extent of £1,350, but he did not disclose to E., the extent to which he was interested in the transaction. On Mar. 15, 1933, the estate was conveyed to H. by the C. trustees & H. executed the mtge. for the balance. The sum of £1,350 was paid by a cheque of applt. on his own account:—*Held*: the intention to exercise the option originated with H. & he solicited the assistance of applt. to enable him to carry out his intention. In those circumstances, though it is most desirable that a solr. acting for a client in any transaction should not have a personal interest in that transaction without making full disclosure, there was no duty to the C. trustees on the part of applt., since he had not instigated H. to exercise the option, to abstain from assisting his client H. to complete the purchase.

(2) The Public Trustee, as custodian trustee of the estate of one, V., appointed applt. managing trustee of that estate on Dec. 22, 1931. On Sept. 6, 1933, applt., as solr. for H., had sent a written notice to E. that the amount outstanding on the mtge. by H. to the C. trustees would be paid off on Dec. 15, 1933, & on that day applt. advanced to H.

on the ground that no sale of the goodwill had taken place:—*Held*: (1) it is illegal to sell the right to the custody of documents of clients held by a firm of solrs.; (2) under the circumstances set out in the judgment, S. & S. were not entitled to use G.'s name.—*GRAY v. SLADDEN & STEWART*, [1935] N. Z. L. R. 35.—N.Z.

### PART XIV. SECT. 1, SUB-SECT. 5.

sl. *Dispute as to terms of contract*—*Powers of Law Society.*—It is not the

proper function of the Benchers of the Law Society to assume the jurisdiction of the cts. in determining questions of contract where a solr. is interested as a party. When on the hearing of a complaint against a solr. for not paying over moneys alleged to belong to a client, the discipline committee becomes aware that a question of the terms of a contract is involved, as to which there is a dispute of fact, its proper course is to direct a complainant to take such action

in the cts. as he may be advised.—*Re A SOLICITOR*, [1932] 2 W. W. R. 122.—CAN.

### PART XIV. SECT. 2, SUB-SECT. 2. —A.

sm. *Gross negligence.*—Negligence, even though gross, on the part of a solr. in conducting an action does not of itself amount to "professional misconduct or conduct unbecoming a barrister or solr." within sect. 46 of Legal Profession Act, R. S. S., 1930.—

the amount necessary to obtain the transfer of the mtge., using the funds of the V. estate to repay himself the amount advanced. It was established that when applt. gave notice on Sept. 6, 1933, he intended so to use the V. trust funds, & it was admitted that applt. did not at any time disclose to the Public Trustee his interest in the transaction. On Dec. 18, 1933, the mtge. was transferred to applt. as managing trustee for the V. estate, the interest being 6½ per cent. *per annum*, the mtgor. to give 3 months prior notice in writing to repay the principal or any part of it. On Jan. 8, 1934, as managing trustee of the V. estate, applt. made an agreement with H. altering the terms of the mtge., agreeing that the beneficiaries for whom he was trustee should be paid only 5½ per cent. interest, & that the mtgor. could pay off at any time without prior notice to the mtgee. — *Held*: in using the V. funds applt. was in fact lending trust money to himself & thereby committed a serious breach of trust. This in itself was not necessarily sufficient to constitute professional misconduct, but in agreeing to the alteration of the terms of the mtge., applt. was considering his own interests in preference to, & to the detriment of, the interests of the beneficiaries & was guilty of professional misconduct. — *GRAHAM v. A.-G. OF FIJI*, [1936] 2 All E. R. 992, P. C.

**44582.** *Add. Annotation*: — *Re*ld. *Myers v. Rothfield*, [1938] 3 All E. R. 498.

**44608.** *Add. Annotation*: — *Re*ld. *Myers v. Rothfield*, [1938] 3 All E. R. 498.

**44636a.** *Application to court—Necessity for appearance by counsel.* — An application for a rule requiring an attorney to answer the matters of an affidavit must be made by a gentleman at the bar. — *Ex p. PITT* (1834), 5 B. & Ad. 1077; 2 Dowl. 439; 110 E. R. 1091; *sub nom. Re —*, 3 Nev. & M. K. B. 566.

*Annotations*: — *Folld. Re Solicitor, A. Ex p. Incorporated Law Society*, [1903] 1 K. B. 857. *Distd. Re Solicitors, Two*, [1938] 1 K. B. 616.

*Re SOLICITOR*, [1935] 3 W. W. R. 428; 5 P. L. J. (Can.) 229; [1936] 1 D. L. R. 368.—CAN.

#### PART XIV. SECT. 2, SUB-SECT. 2.—B.

*sk. Compelling client to sign agreement giving solicitor proportion of property recovered.* — A solr. compelling his client to sign an agreement giving him a proportion of a sum obtained for her by compounding a prosecution is guilty of professional misconduct. — *Re BURR*, [1938] 1 D. L. R. 703; 69 Can. C. C. 384.—CAN.

#### PART XIV. SECT. 2, SUB-SECT. 3.

**4564 ii.** — *Solicitor acquiring client's property—After tax sale.* — A solr. who allows property, on which the client holds a mtge., to be sold for taxes so that the solr. may later acquire it himself, is guilty of fraudulent breach of trust. — *McLELLAN v. MILNE*, [1937] 3 D. L. R. 659; O. R. 742.—CAN.

#### PART XIV. SECT. 2, SUB-SECT. 5.

*sn. Providing sham bail.* — B., who was in custody upon a criminal charge, retained H. as his solr. Bail was fixed in one surety at fifty pounds. H. obtained fifty pounds from B., attended at the Central Police Ct. with one P., & paid in that amount in P.'s name. P. then went surety for B. — *Held*: H. had been a party to providing sham

bail, & he should be suspended from practice for a period of six months. — *Re SOLICITOR, Ex p. INCORPORATED LAW INSTITUTE OF NEW SOUTH WALES* (1935), 52 N. S. W. W. N. 182.—AUS.

#### PART XIV. SECT. 2, SUB-SECT. 8.

*so. Assisting director to obtain undue preference.* — A practitioner, while acting as a solr., was knowingly party to a scheme whereby I., a director, who was an unsecured creditor of a co., obtained an undue preference over the assets of the co. The scheme was carried through by B., a party to the scheme, purporting to lend money to the co. & securing a debenture to himself for the loan. The "loan" was arranged by I., the director, obtaining from the co.'s bank, a bank cheque drawn on the co.'s account, which cheque was paid to the credit of B.'s account at another Bank. The amount of the cheque thus paid in, except a negligible sum, was immediately withdrawn by B. by cheque, & this cheque was paid to the credit of the co.'s account. A document purporting to be a transfer of the debenture from B. to I. was prepared in anticipation of the debenture being given, which furnished evidence that the practitioner knew that the money lent to the co. was not B.'s but I.'s money. The co. went into liquidation within six months of the giving of this debenture. The practitioner did not disclose to the liquidators the circum-

**44636b.** — — — — — *Solrs. Act, 1888 (c. 65), s. 13*, by which an application to strike the name of a solr. off the rolls, or to require him to answer allegations contained in an affidavit, is to be heard by a committee of the Incorporated Law Society, who are to embody their findings in the form of a report to the High Ct. of Justice, provides that any person, who but for the Act would have been entitled to apply to the ct. to strike a solr. off the rolls, or to require him to answer allegations contained in an affidavit, shall still be entitled so to apply, & "shall be entitled to be heard, if the society brings the report of the committee before the ct." — *Held*: such an appct. could not be heard in person, but must appear by counsel. — *Re A SOLICITOR*, [1903] 2 K. B. 205; 72 L. J. K. B. 643; 89 L. T. 118; 51 W. R. 561; 19 T. L. R. 553; 47 Sol. Jo. 603, C. A.

*Annotation*: — *Distd. Re Solicitors, Two*, [1938] 1 K. B. 616.

#### 44651a. Right of applicant to appear in person.]—

An application was made to the Disciplinary Committee of the Law Society asking that two named solrs. might be required to answer certain allegations contained in appct.'s application. The Committee, purporting to act under the above-mentioned rule, before fixing any day for the hearing of the application, & in the absence of the appct., considered the application, & being of opinion that no *prima facie* case had been shown against the two solrs., ordered that the application be dismissed without requiring the two solrs. to answer the allegations. Appct. appealed from that order to the Div. Ct. by notice of motion. The sole resp. was the Registrar of Solrs., the two solrs. not being made resps. Appct. desired to conduct her appeal in person; but the Div. Ct. refused to hear her on the ground that in any proceedings in the High Ct. under Solrs. Act, 1932 (c. 37), s. 5, appct. must be represented by counsel. Appct. appealed to the Ct. of Appeal. The sole resp. to the notice of appeal was again the Registrar of Solrs., the two

stances under which the debenture had been given: — *Held*: guilty of unprofessional conduct. — *Re PRACTITIONER OF THE SUPREME COURT*, [1930] S. A. S. R. 142.—AUS.

#### PART XIV. SECT. 2, SUB-SECT. 9.

*sr. Issuing valueless cheques.* — Where a practitioner had drawn & passed to persons not clients of his several valueless cheques without any reasonable expectation that they would be met on presentation, & had not paid the amounts for which they were drawn: — *Held*: he had been guilty of unprofessional conduct, & should be struck off the rolls. — *Re R.* (No. 2), [1927] S. A. S. R. 448.—AUS.

*st. Failing to have trust account audited.* — M., a solr., was convicted & fined for failing to have his trust account audited as required by the regulations under Law Practitioners Amendment Act, 1913. A subsequent audit proved that the account was in order & correct: — *Held*: notwithstanding the conviction & fine & the fact that the solr.'s trust account was subsequently found to be correct, his neglect to have same audited amounted to professional misconduct quite irrespective of the offence against the regulations & of the punishment for that offence, & he should be ordered to pay the Law Society's costs of proceedings. — *Re M.*, [1930] N. Z. L. R. 285.—N.Z.

solsr. not having been served with the notice of appeal:—*Held*: (1) the appeal must be dismissed, because, the two solsrs. not having been served with the notice of appeal, the appeal was defective for want of parties; (2) inasmuch as a right of appeal from an order made by the Disciplinary Committee was given by Solsrs. Act, 1932 (c. 37), s. 8, to both appct. & the solr., appct. was entitled to appear in person in support of her appeal, & the decision of the Div. Ct. to the contrary effect was wrong; (3) rule 2 of Solsrs. Act (Disciplinary) Rules, 1932, under which the Disciplinary Committee purported to act in so far as it authorised the Committee to dismiss the application without hearing appct., was *ultra vires*, as Solsrs. Act, 1932 (c. 37), required that the order of the Committee should be made on a hearing.—*Re SOLICITORS, TWO*, [1938] 1 K. B. 616; [1937] 4 All E. R. 451; 107 L. J. K. B. 214; 158 L. T. 115; 54 T. L. R. 161; 81 Sol. Jo. 1000, C. A.

**4657a.** — From “findings”—No order made.]—A complaint was made on behalf of the Law Society to the disciplinary committee appointed under Solsrs. Act, 1932 (c. 37), s. 4, asking that a solr. might be required to answer allegations contained in an affidavit. After hearing evidence the committee promulgated their “findings & order,” setting

out their findings of fact & ending with the words “while not finding any professional misconduct the committee make no order as to costs.” The complainant, on behalf of the Law Society, appealed:—*Held*: on a preliminary objection by resp., no appeal lay except from an “order” of the committee. There was no appeal from the “findings” with which the order was required to be prefaced, & the committee had made no order. But even if the finding that there was no professional misconduct did amount (as the ct. held that it did not) to an order dismissing the complaint, the words of Solsrs. Act, 1932 (c. 37), s. 8, giving a right of appeal to appct. were not so definite as to override the long-established principle that there could be no appeal against an acquittal. The right contemplated by the sect. must be limited to cases where an order, which appct. deemed inadequate, had been made against the solr.—*Re A SOLICITOR*, [1934] 2 K. B. 463; 152 L. T. 22; 50 T. L. R. 561; 78 Sol. Jo. 587; *sub nom. Re A SOLICITOR, Ex p. LAW SOCIETY*, 103 L. J. K. B. 719, D. C.

*Annotation*:—*Dtd. Re Solicitors, Two*, [1938] 1 K. B. 616.

**4657b.** — From order amounting to acquittal.]—*Re A SOLICITOR*, No. 4657a, *ante*.

**4660a.** Extension of time to appeal—Application under R. S. C., Ord. 59, r. 16—When granted.]—*Re A SOLICITOR* (1929), 73 Sol. Jo. 191, D. C.

## Part XV.—Unqualified Persons.

**4725a.** — Corporation.]—A corporate body is not a “person” within Solicitors Act, 1932 (c. 37), s. 46.—*LAW SOCIETY v. UNITED SERVICE BUREAU, LTD.*, [1934] 1 K. B. 343; 103 L. J. K. B. 81; 150 L. T. 159; 98 J. P. 33; 50 T. L. R. 77; 77 Sol. Jo. 815; 31 L. G. R. 436; 50 Cox, C. C. 37, D. C.  
— — —.]—*See, now*, Solicitors Act, 1934 (c. 45).

**4737a.** Acting under power of attorney.]—An unqualified clerk purporting to act under a power of attorney in the management of the practice of a solr. who was abroad was held to be guilty of a misdemeanour & contempt of ct., & was committed to prison for two months.—*Re THORPE (J. W.)* (1932), 76 Sol. Jo. 919.

**4737b.** Use of description “solicitor”—Name on roll—No certificate.]—Resp. was suspended from practice as a solr. for a period of two

years, but his name remained upon the roll of solsrs. During the period of suspension, one E., who had known resp. for about three years but was unaware of his suspension from practice, called at his private house on several occasions on a matter of business, when the resp. described himself as a solr. Resp. also witnessed two documents in connection with E.’s matter of business, & added the word “solr.” to his signature on both occasions. Resp. was charged with having wilfully used, while not having in force a practising certificate, a title or description implying that he was qualified to act as a solr., contrary to Solsrs. Act, 1932 (c. 37), s. 46. Resp. contended that, as his name was still on the roll of solsrs., he was entitled to describe himself as a solr., & that the documents he had witnessed could have been witnessed by any other person. The magistrate upheld resp.’s contentions & dismissed the charge,

### PART XIV. SECT. 3, SUB-SECT. 4.—B.

**a i.** —.]—The ct. cannot review a finding by the Benchers that a solr. is unworthy to practise.—*Re LAW SOCIETY OF UPPER CANADA & WOODS*, [1935] 2 D. L. R. 557; O. R. 234.—CAN.

### PART XIV. SECT. 4.

**4682 ii.** — — —.]—Where a solr. has been proved guilty of theft & his name has been removed from the rolls, the ct. will not, except in exceptional circumstances, permit him to have his name restored.—*Ex p. MACAULAY* (1929), 30 S. R. N. S. W. 193; 47 N. S. W. W. N. 82.—AUS.

*sv. Mandamus—When granted.*]—*MARION v. CAMPBELL*, [1932] S. C. R. 433; 3 D. L. R. 433.—CAN.

### PART XV. SECT. 1.

*sw. Quebec Bar Act, 1925—Offence by commercial association.*]—A commercial assoc., the manager of which procures appointment as inspector in bankruptcies, questions debtor & lodges criminal informations, is guilty of an offence against Quebec Bar Act, 1925.—*MONTREAL BAR v. BETTER BUSINESS BUREAU OF MONTREAL* (1933), 60 C. C. C. 306.—CAN.

**PART XV. SECT. 2, SUB-SECT. 1.**  
*sy. Legal Profession Act, R. S. A.,*

1922 s. 46—*Right of assignee of debt to sue.*]—*Held*: that a person not enrolled who is the assignee of a debt under an assignment which complies with the requirements of sect. 37 of Judicature Act, R. S. A., 1922, does not violate sect. 46 of above Act by bringing an action on the debt in his own name, without the intervention of a solr., even though he gave no consideration for the assignment & has no beneficial interest in the recovery of the debt & the sole motive for the assignment was to save the expense of solr.’s fees.—*R. v. COOK*, [1931] 3 W. W. R. 707; [1932] 1 D. L. R. 89; 26 Alta. L. R. 156; 57 C. C. C. 256.—CAN.

holding that there was no cause for resp. to answer:—*Held*: as resp., when approached on a matter of business, described himself as a solr., he was, in the circumstances, using that description to imply that he was qualified to act as a solr., & there was, therefore, a case for resp. to answer.—TAYLOR v. RICHARDSON,

[1938] 2 All E. R. 681; 159 L. T. 224; 102 J. P. 341; 54 T. L. R. 846; 82 Sol. Jo. 523; 36 L. G. R. 415, D. C.

4775. After this case add:—

**Jurisdiction of county court.**—*See* COUNTY COURTS, Vol. XIII., p. 555, No. 1122.

PART XV. SECT. 3, SUB-SECT. 2.  
—C.

4767 iv. —.—.]—*Held*: as resps. had done a thing which is usually done by a solr., & had done it in such

a way as to lead to the reasonable inference that they were solrs., they had acted in contravention of s. 87 of the Imperial Acts Application Act, 1922, s. 87, & were therefore guilty of a

contempt of the Supreme Ct. & punishable accordingly.—*Re BERRY & GULLIVER, Ex p. LAW INSTITUTE OF VICTORIA*, [1929] V. L. R. 224; [1929] Argus L. R. 192.—AUS.

## Part II.—Limits of Jurisdiction.

- property should be left to be inspected by the solr. to the charity, & that his own solr. would forward a form of contract; & the secretary thereupon sent out a notice to members of the board of a special meeting to be held two days later "to receive the report & recommendation of the deputation." On the day of that meeting deft. telegraphed to the secretary cancelling all negotiations. The meeting, however, passed resolutions to ratify the deputation's acceptance of deft.'s offer to sell for £6,500, & to instruct the solr. to the charity to require deft. to complete. In an action by pltf. on behalf of himself & of all other members of the board for specific performance of an agreement to sell the property to the charity for £6,500:—*Held*: (1) on the facts the members of the deputation did not warrant their authority to bind the board, & that their acceptance of the deft.'s offer was subject to ratification by the board; (2) where an offer is accepted by an agent subject to ratification by the principal there is no contract or contractual relation until ratification, & at any time before ratification the offer may be withdrawn.—*WATSON v. DAVIES*, [1931] 1 Ch. 455; 100 L. J. Ch. 87; 144 L. T. 545.
160. *Add. Annotation*:—*Reid, Hillas & Co. v. Arcos, Ltd.* (1932), 147 L. T. 503.

**198. Add. Annotation :—***Refd. De Tchihatchef v. Salerni Coupling, Ltd.*, [1932] 1 Ch. 330. **257. Add. Annotations :—***Refd. Cotton v. Heyl*, [1930] 1 Ch. 510; *Re Williams, Richards v.*

1 viii. —. —|—The remedy of specific performance is amongst those principles which are administered by cts. in India by way of justice, equity & good conscience.—GULAB RAY GHUTGHUTIA v. MAHENDRA NATH SREEMANY (1935), L. R. 14 Pat. 249.—IND.

**24 i. General rule—Partial relief not given.]**—A contract which includes a provision for personal services to be rendered by one of the parties thereto which is not separable from the other terms of the contract is not a contract for which specific performance can be decreed.—*DEADY v. BRUNER & ADAMS*, [1933] 1 W. W. R. 398.—**CAN.**

65 ii. ————1—The contract of lease, the hire of personal service, owing to the personal character of the obligations which it entails, is not susceptible of a condemnation for its specific performance: applt. could not physically be forced to keep resp. in its employ, nor could resp. be physically constrained to remain in applt.'s service.—*DUPRE QUARRIES, LTD. v. DUPRE*, [1934] S. C. R. 528; 4 D. L. R. 618.—*GAN.*

77 i. *Employment as manager—Theatre.*].—In an action for damages for wrongful ouster from a theatre property:—*Held*: the agreement

under which *pltf.* claimed the right of possession was merely one of hiring & service, the remuneration being measured by reference to the profits of the theatre business; & therefore *pltf.* was not entitled to specific performance of the agreement, & *pltf.*'s possession being only ancillary to the contract of service, any interest which he had in the property ended with the termination of the contract.—*DOWSLEY C. BRITISH CANADIAN TRUST CO.* [1932] 2 W. W. R. 601; 4 D. L. R. 97; 26 Alta. L. R. 393; 48 Can. [1933] S. C. R. 115; 1 D. L. R. 481.—*CAN.*

127 iv. — — —.]—RAMJI v. RAO  
KISHORESINGH (1929), L. R. 56 Ind.  
App. 280.—**IND.**

1911 lv. —.]—Defts. were in business as land agents, & were the agents of G. for the sale of certain lots. Pltf. made an offer to defts. for the lots & paid them \$100 as a deposit. There was nothing in writing, & the oral offer & deposit were accepted by defts. subject to confirmation by G. The offer was submitted to G., who notified defts. of his acceptance. Defts. then, without informing pltf., obtained from G. an agreement to sell to themselves, & paid him a portion of the purchase-money. They then refused to make the sale to pltf., & returned his \$100 :—*Held*: there being no contractual, fiduciary, or other relationship between

pltf. & defts., pltf. was not entitled to any relief against them.—**ARMSTRONG v. BASTEDO** (Sask.) (1913), 24 W. L. R. 87; 4 W. W. R. 481; 11 D. L. R. 241.—**CAN.**

191 v. ———.]—CREAGHAN (J. D.)  
CO., LTD. v. DAVIDSON, [1929] 3  
D. L. R. 146; *reversg.*, [1928] 3 D. L. R.  
632.—CAN.

191 vi. ———.]—FAWCETT v.  
FAWCETT (1935), 5 F. L. J. (Can.) 99.—  
CAN.

*eg. Lease executed by one party.*—A lease signed by the lessor & a guarantor, but not executed by the lessee, is incomplete, & incapable of specific performance.—*FAWCETT v. TINGLEY*, [1935] 4 D. L. R. 373; 10 M. P. R. 170.—*CAN.*

235 viii. —.]— An option given the lessee of a hotel to purchase it within a year for \$45,000, \$15,000 cash & "the balance to be arranged":—*Held*: unenforceable because incomplete.—**MCsorLEY v. MURPHY** (B. C.), [1928] 4 D. L. R. 790; [1928] 3 W. W. R. 589; *affd. sub nom. MURPHY v. MCSRLEY & PRINCE EDWARD HOTELS, LTD.*—**CAN.**

235 ix. ———.—GEARY v.  
CLIFTON CO., [1928] 3 D. L. R. 64; 62  
O. L. R. 257.—CAN.

235 x. ———.]—CUMMINS v.  
CUMMINS, [1934] 1 W. W. R. 305; 2  
D. L. R. 228; 41 Man. L. R. 607.—  
CAN.

Williams, [1930] 2 Ch. 378; *Blakey v. Pendlebury Property Trustees*, [1931] 2 Ch. 255; *Re Gillott's Settlement*, *Chattock v. Reid*, [1934] 1 Ch. 97.

**282a. Agreement subject to "model form of conveyance specially prepared"—Absence of model form.**—Where one or more of the material terms of an alleged contract cannot be determined, either by interpretation or as being of a kind which the law will supply, there is no contract, even though there has been an act of part performance, & the ct. can grant neither specific performance nor damages.

Pltf. signed an agreement, in the form of a letter prepared on behalf of deft., to purchase certain premises subject to the conditions indorsed thereon, & to take the conveyance "in the model form of conveyance specially prepared" for use in relation to the same. The conditions stated (*inter alia*) that the property sold was subject to restrictions appearing in the model form, & that if the purchaser should not after notice withdraw any objection which the vendor could not or would not remove, the vendor might by notice in writing annul the agreement. The premises were part of property conveyed to deft. by three conveyances, among others, dated respectively 1908, 1910 & 1911. They were comprised in the 1908 conveyance, & were part of what was known in deft.'s agent's office as block 4, other parts of the property being there known as blocks with other numbers. Most of the property had come to deft. subject to restrictions against user for trade purposes. At the date of the agreement the restrictions were obsolete in regard to blocks 4, 7 & 9; but in all dealings with property comprised in those blocks deft. had imposed like restrictions. No model form had been prepared for use in dealings with block 4, & through a mistake of deft.'s agent, pltf. received one appropriate to block 8. Pltf. took possession before completion, & soon raised the question of turning the premises into a shop. After long negotiations, during which the question of restrictions was thoroughly discussed, deft. refused permission, maintaining that, despite his agent's mistake in sending the wrong model form, the restrictions against trade ought to stand; & a new draft conveyance, incorporating such restrictions, was prepared on his behalf. Pltf. refused to execute it, & sought by this action to enforce the original agreement subject only to restrictions in one of the schedules to the conveyance of 1908, & thus

free from restrictions on trading:—*Held*: there was no enforceable contract, as by reason of the non-existence of the appropriate model form of conveyance there were missing from the original agreement material terms which the ct. could not supply, & also that damages could therefore not be assessed.—*STIMSON v. GRAY*, [1929] 1 Ch. 629; 98 L. J. Ch. 315; 141 L. T. 456.

**285. Add. Annotation:—***Refd. Stimson v. Gray*, [1929] 1 Ch. 629.

**285a. —.**—*STIMSON v. GRAY*, No. 282a, *ante*.

**314a. —.**—*LANSDOWN'S LORD CASE* (circa 1786), cited in 16 Ves. at p. 310; 33 E. R. 1002.

*Annotation:—**Consd. Moody v. Walters* (1809), 16 Ves. 283.

**398. Add. Annotation:—***Refd. Dixon (J. J.) v. Taylor & Cowells* (trading as Pine-xxx Liquid & Disinfectant Soap Co.) (1933), 50 R. P. C. 405.

**399. Add. Annotation:—***Refd. British Homophone, Ltd. v. Kunz & Crystallate Gramophone Record Manufacturing Co.* (1935), 152 L. T. 589.

**548. Add. Annotation:—***Consd. Re Belcham & Gawley's Contract*, [1930] 1 Ch. 56.

**556. Add. Annotation:—***Consd. Cunningham v. Shackleton* (1935), 79 Sol. Jo. 381.

**624. Add. Annotation:—***Refd. Re Spillon & Long's Contract*, [1936] 2 All E. R. 711.

**639. Add. Annotation:—***Consd. Re Belcham & Gawley's Contract*, [1930] 1 Ch. 56.

**645. Add. Annotation:—***Refd. Sifton v. Sifton*, [1938] 3 All E. R. 435.

**703. Add. Annotation:—***Refd. Curtis Moffat v. Wheeler*, [1929] 2 Ch. 224.

**707a. Property subject to old closing order.**—On July 11, 1929, the purchaser bought Lot 2 at a sale by auction & paid a deposit. The particulars of sale described Lot 2 as an unrestricted freehold, practically an island block, with four frontages to Little Orford Street & three other streets in Chelsea, the block forming an excellent building site, when the existing buildings came into hand. On examining the vendors' registered absolute title the purchaser found Entry 7 in the Charges Register stating in effect that on the transfer of Lot 2 & other property to the vendors on May 23, 1929, by mtgees. selling under their power of sale in a mtge. of Feb. 17, 1903, from Co. A., the former owners, the vendors by way of indemnity to the mtgees., but not further or otherwise

### PART III. SECT. 2, SUB-SECT. 3.—B.

**b 1. —.**—Specific performance will be decreed against a vendor, notwithstanding a dispute as to the quantity of land, especially where there has been part performance.—*DAUPHINEE v. DAUPHINEE*, [1936] 1 D. L. R. 647; 10 M. P. R. 94; 5 F. L. J. (Can.) 228.—CAN.

### PART III. SECT. 2, SUB-SECT. 7.

**277 1. Term omitted from written agreement.—Terms contained in parol agreement.**—In an action by a vendor for specific performance of an agreement for the sale of farm lands deft. contended that the whole agreement was based upon the understanding that the farming equipment would be included in the sale although no express

mention of it was made in the written agreement. Deft. or his tenant remained in possession of the equipment during the winter following the making of the agreement, without any suggestion being made by pltf. that deft. was not entitled to the equipment. In Mar. pltf. retook possession of the equipment & testified that he did so because deft. had defaulted in paying certain instalments:—*Held*: if the omission of express reference in the written agreement to the equipment deprived deft. of any remedy at law, the case was a proper one in which to apply sect. 13 (4) of King's Bench Act, which authorises "the administration of justice in all cases in which there exists no adequate remedy at law," & justice could be done only by replacing the parties as nearly as possible in the

same position in which they were before the agreement was reduced to writing.—*MCLEOD v. KRYSKO*, [1930] 3 W. W. R. 601; *reversd.*, [1931] 3 D. L. R. 282; 2 W. W. R. 27; 39 Man. L. R. 465.—CAN.

**m 1. —.**—Specific performance refused of an agreement in writing for sale of a store where all the terms agreed upon were not included in the agreement.—*MYERS v. COOK*, [1932] 4 M. P. R. 198.—CAN.

### PART III. SECT. 3, SUB-SECT. 1.

**287 viii. —.**—Action for specific performance of an oral agreement to sell land dismissed, no act of part performance being established.—*WARD v. O'LEARY* (1935), 10 M. P. R. 63.—CAN.

covenanted to perform the obligations of Co. A. under a deed of Dec. 23, 1905, made between Co. A. & the Chelsea Borough Council & under a London County Council Order of Dec. 12, 1905. The deed of Dec. 23, 1905, made in pursuance of a large building scheme by Co. A. provided for the stopping up (*inter alia*) of Little Orford Street & for making certain new streets, including a new transverse street bisecting Lot. 2. The Borough Council were to obtain the necessary Closing Orders, & Co. A. were to lay out the new streets at their own expense. By their order of Dec. 12, 1905, the London County Council on the application of Co. A. sanctioned the new streets subject to certain conditions including a condition that Co. A. should covenant to lay them out, & on Dec. 21, 1905, Co. A. covenanted accordingly. On July 10, 1906, on the Borough Council's application the justices made a Closing Order for Little Orford Street. For financial & other reasons this part of Co. A.'s scheme had not yet been proceeded with. Little Orford Street was still open; it was in fact repaired by the Borough Council; & at the date of the contract neither the vendors nor the purchaser knew of the Closing Order's existence. On discovering Entry 7 the purchaser required the vendors to delete it from the Register & to obtain a release of the obligations, & on their refusal, he issued a vendor & purchaser summons for a declaration that a good title was not shown. On subsequently discovering the Closing Order he discontinued the summons & brought this action claiming a declaration that he was entitled to repudiate the contract, damages for breach, & return of the deposit. The vendors denied any breach & counterclaimed for specific performance:—*Held*: (1) the twenty-four years' old Closing Order did not affect the title, but, if & so far as it was

inconsistent with the particulars, merely raised a case of innocent misrepresentation, on which the purchaser could neither repudiate the contract nor recover damages, his only remedy being to resist specific performance. Therefore, the purchaser's action failed; (2) on the vendors' counterclaim for specific performance that there was in fact no misrepresentation in the particulars, as the word "street" even in London did not necessarily mean a public highway. There was therefore no ground for refusing specific performance.—*BARNES v. CADOGAN DEVELOPMENTS, LTD.*, [1930] 1 Ch. 479; 99 L. J. Ch. 274; 142 L. T. 626.

**707b.** Property represented as bounded by "street"—Whether confined to public highway.]—*BARNES v. CADOGAN DEVELOPMENTS, LTD.*, No. 707a, *ante*.

**709.** *Add. Annotation*:—*Consd. Flexman v. Corbett*, [1930] 1 Ch. 672.

**727.** *Add. Annotation*:—*Refd. Sennett v. Rendell* (1934), 79 L. Jo. 98.

**730.** *Add. Annotation*:—*Refd. Re Fenton, Ex p. Fenton Textile Asscn.* (1930), 99 L. J. Ch. 358.

**768.** *Add. Annotations*:—*Consd. Re Sandwell Park Colliery Co., Field v. The Co.*, [1929] 1 Ch. 277; *Lock v. Bell*, [1931] 1 Ch. 35.

**773.** *Add. Annotation*:—*Consd. Lock v. Bell*, [1931] 1 Ch. 35.

**778.** *Add. Annotation*:—*Consd. Mussen v. Van Dieman's Land Co.*, [1938] Ch. 253.

**801.** *Add. Annotation*:—*Refd. Hyman v. Hyman*, [1929] A. C. 601.

**812.** *Add. Annotation*:—*Generally, Refd. Bremer Oeltransport G.m.b.H. v. Drewry*, [1933] 1 K. B. 753.

**829.** *Add. Annotation*:—*Consd. Grant v. Derwent* (1928), 140 L. T. 330.

## Part IV.—Particular Contracts.

**951.** *Add. Annotation*:—*Consd. Re Franklin & Swathling's Arbn.*, [1929] 1 Ch. 238.

### PART III. SECT. 13, SUB-SECT. 2.

**p. 1.** —.—*Resale by plaintiff under conditions inconsistent with completion of original contract.*—*New South Wales Public Trustee v. GAVEL* (1927), 40 C. L. R. 169.—*AUS.*

### PART III. SECT. 15, SUB-SECT. 1.

**q. 1.** —.—*Land of deceased intestate—Administratrix without power of sale.*—*B.* died in 1920, leaving a widow & four children; letters of administration were granted to the widow. *Pltf.* made an offer for land which *B.* had owned. At this time the two younger children were infants. In 1927 the widow signed a document by which she agreed to sell certain marsh land "owned by & belonging to the estate of my late husband":—*Held*: in 1927 no marsh land belonged to the estate of *B.* for what had been his under Devolution of Estates Act vested in *defts.*, & as administratrix the widow had no power of sale.—*BROWN v. BARBER*, [1929] 2 D. L. R. 391; 63 O. L. R. 512.—*CAN.*

### PART III. SECT. 15, SUB-SECT. 3.

**sd.** *Agreement for sale of licensed premises—Subsequent loss of licence.*—

*SUMMERS v. COCKS*, [1928] A. L. R. 107; 40 C. L. R. 321.—*AUS.*

### PART IV. SECT. 26.

**sf.** *Agreement for possession & devise or conveyance in return for services.*—Under an oral agreement between *pltf.* & *defts.* the latter were to have exclusive possession of a parcel of *pltf.*'s land in return for personal services to be rendered by them to her during her lifetime or until she sold or disposed of her adjoining property, & she also agreed to leave them said parcel by her will or, in the event of the sale of the adjoining property & the removal of her residence therefrom, to convey it to them. *Defts.* took up their residence on the land & built a house & other improvements thereon referable only to said agreement. *Pltf.* brought an action to recover possession, & *defts.* counterclaimed for specific performance. The *ct.* dismissed the action & declared that *defts.* were entitled to specific performance on the death of *pltf.* or upon her removing from the neighbourhood:—*Held*: on appeal, the dismissal of the action ought to be sustained, but the decree of specific performance was premature.

—*LYELL v. CORMACK*, [1928] 4 D. L. R. 902; [1928] 3 W. W. R. 284.—*CAN.*

**sg.** *Contract to take supply of gas.*—Under a contract between *deft.* city & a co. to whose rights thereunder *pltf.* co. was held to have succeeded, the city agreed to permit the co. to connect gas wells, which the co. agreed to drill by a certain date, with the city's main & then to withdraw from the main for its own use a certain percentage of the gas thus added to the city's supply. The co. not having proceeded to drill, the city notified it that the city would not perform its part of the contract after a date specified, which was prior to that to which the contract was found on the trial to have been extended by agreement of the parties. The co. then sued for a declaration that the contract was a good & subsisting contract extending to said later date, which should be specifically performed by *deft.*, & for an extension of time in which to complete the well or wells, & for damages. Said later date had passed at the time of the trial:—*Held*: although the contract had been broken by the city, it was one with respect to which it was impossible to decree specific performance; moreover, it was beyond



## Part V.—Proceedings for Specific Performance.

990. *Add. Annotation*:—**Refd.** *Mayhead v. Hydraulic Hoist Co.* (1931), 100 L. J. K. B. 369.
1029. *Add. Annotation*:—**Refd.** *Harmer v. Armstrong*, [1934] Ch. 65.
1030. *Add. Annotation*:—**Refd.** *Harmer v. Armstrong*, [1934] Ch. 65.
- 1109a. *Purchaser in possession—Delay in completion—Form of judgment.*—**MUTUAL INVESTMENT SOCIETY, LTD. v. JOHNS**, [1934] W. N. 59; 177 L. T. Jo. 240.
1138. *Add. Annotation*:—**Refd.** *Lever Bros., Ltd. v. Bell*, [1931] 1 K. B. 557.
1140. *Add. Annotation*:—**Generally, Refd.** *Oxford Corpn. v. Oxford Electric Co.* (1930), 94 J. P. 86.
1287. *Add. Annotation*:—**Refd.** *Blay v. Pollard & Morris*, [1930] 1 K. B. 628.
1365. *Add. Annotation*:—**Consd.** *Re Belcham & Gawley's Contract*, [1930] 1 Ch. 56.
1373. *Add. Annotation*:—**Consd.** *Re Russ & Brown's Contract*, [1934] Ch. 34.
1394. *Add. Annotation*:—**Consd.** *Cunningham v. Shackleton* (1935), 79 Sol. Jo. 381.
1474. *Add. Annotation*:—**Refd.** *Re Russ & Brown's Contract*, [1934] Ch. 34.
- 1519a. ——— **On adjournment into court—Liability for costs of adjournment.**—**RAMPTON v. MORLEY** [1928] W. N. 268; 66 L. Jo. 427.

the power of the ct. to extend the time, & since the question whether the co. had really sustained any damage depended upon a question which could not be answered, *viz.*, whether by said date the co. could or would have sunk the well or wells & have found sufficient gas to justify it in carrying it to the city's main, *pltf.* could recover nominal damages only.—**MEDALTA POTTERIES, LTD. v. MEDICINE HAT CITY**, [1931] 1 W. W. R. 217.—**CAN.**

### PART V. SECT. 2.

a i. ———.]—**BURRELL v. WATT & HARDINGE**, [1928] 3 D. L. R. 505; [1928] 2 W. W. R. 482.—**CAN.**

### PART V. SECT. 4, SUB-SECT. 2.—A.

q i. ——— *Under Real Property Act, 1900.*—The principle of *Tasker v. Small*, No. 1043, that in proceedings to enforce specific performance of a contract the parties to the contract are the necessary & sufficient parties to the action, & that where a third party sets up some equity against dealing with the land which is the subject-matter of a contract the purchaser cannot in a suit for specific

performance join that third party, applies to land under the Real Property Act, 1900, as well as to land held under a common law title.—**THOMSON v. RICHARDSON** (1928), 29 S. R. N. S. W. 221; 46 N. S. W. W. N. 77.—**AUS.**

### PART V. SECT. 6, SUB-SECT. 3.—B

o i. ——— *Whether varied on appeal.*—**SMITH v. OBORN**, [1931] 2 W. W. R. 817; 25 Alta. L. R. 519.—**CAN.**

sc. *Declaration of vendor's lien.*—**GLENEAGLES, LTD. v. THOMSON**, [1933] 3 W. W. R. 159.—**CAN.**

### PART V. SECT. 6, SUB-SECT. 4.—D. (b) iii.

1185 ii. ———.]—Where in a suit by the purchaser for specific performance of a sale of land, a decree was passed, directing an inquiry as to whether the vendor "can make out a good title" & if so, directing him to convey:—**Held**: it is desirable to follow the English practice of including in the order directing the principal inquiry (*i.e.*, as to whether a good title can be made) a secondary inquiry (*i.e.*, as to the time at which a good title was

shown).—**HARISHANKAR PAL v. SARADAPRASAD DAS** (1931), 1 L. R. 59 Cal. 536.—**IND.**

### PART V. SECT. 6, SUB-SECT. 4.—E.

sf. *Extrinsic evidence of parcels.*—**DAUPHINEE v. DAUPHINEE**, [1936] 1 D. L. R. 617; 10 M. P. R. 94; 5 F. L. J. (Can.) 224.—**CAN.**

### PART V. SECT. 6, SUB-SECT. 6.

sh. *Whether court will consider—Where claim to specific performance abandoned.*—**LEVY v. NORMAN-CULHANE** (1928), 28 S. R. N. S. W. 302; 45 N. S. W. W. N. 51.—**AUS.**

### PART V. SECT. 6, SUB-SECT. 11.—A

sn. *Amendment of claim—When allowed.*—**MAMA v. SABSOON** (1928), L. R. 55 Ind. App. 360.—**IND.**

### PART V. SECT. 8, SUB-SECT. 1.

sp. *By whom enforceable.*—A decree for specific performance operates in favour of both parties & a deft. is as much entitled to enforce it as *pltf.*—**HERAMBACHANDRA MAITRA v. JYOTISHCHANDRA SINGHA** (1931), 1 L. R. 59 Cal. 501.—**IND.**

## STATUTES.

## Part I.—In General.

**3a. Meaning of Act of Parliament—Act of Imperial Parliament.]**—In 1800, by the Act of Union, 39 & 40 Geo. 3, c. 67, the two Parliaments were united, & thereafter the words “some Act of Parliament” mean an Act of Parliament of the United Kingdom. Now looking at the Lotteries Act, 1923 (c. 60), it is clear to me that the words “some Act of Parliament” mean some Act of the Imperial Parliament. Although it is true that in 1922 an Act of the United Kingdom set up a Legislature for Ireland, that has not altered the meaning of the expression, “Act of Parliament” in the Act of 1823, & it is impossible to say that an Act passed by the Irish Legislature is an “Act of Parliament” within Lotteries Act, 1823

(c. 60), s. 41 (SLESSER, L.J.).—*R. v. REGISTRAR OF JOINT STOCK COMPANIES*, *Ex p. MORE*, [1931] 2 K. B. 197, 203; 100 L. J. K. B. 638; 145 L. T. 522; 95 J. P. 137; 47 T. L. R. 383; 29 L. G. R. 452, C. A.

**15a. May contravene international law.]**—Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon & must be enforced by the cts. of this country, for in these cts. the legislation of the Imperial Parliament cannot be challenged as *ultra vires* (*per CUR.*).—*CROFT v. DUNPHY*, [1933] A. C. 156; 102 L. J. P. C. 6; 148 L. T. 62; 48 T. L. R. 852; 18 Asp. M. L. C. 370, P. C.

## Part II.—Classification and Framework.

**52. Add. Annotations :—***Refd. Farnworth v. Manchester Corpn.*, [1929] 1 K. B. 533; *Moon v. London County Council*, *Potteries Electric Traction Co. v. Bailey*, [1931] A. C. 151.

**58. Add. Annotation :—***Refd. R. v. Minister of Health*, *Ex p. Yaffe*, [1930] 2 K. B. 98.

**64a. —.]**—*R. v. HARE*, No. 634a, *post*.

**70. Add. Annotation :—***Consd. Nixon v. A.-G.*, [1930] 1 Ch. 566.

**78a. —. —.]**—One further point was taken upon the Superannuation Act, 1859 (c. 26), with which it is necessary to deal. The marginal notes of sect. 3 refer to “existing rights” & of sect. 12 to “right.” It was contended that these catchwords could be used to explain the meaning of sects. against which they appear. For my part I cannot

allow this. As explained by BAGGALLAY, L.J., in *A.-G. v. Great Eastern Ry. Co.*, No. 70, marginal notes are not a part of an Act of Parliament. The Houses of Parliament have nothing to do with them, & I agree with the learned Lords Justices in that case, BRAMWELL, JAMES, & BAGGALLAY, that the cts. cannot look at them. Their imperfections, spoken of by BRAMWELL, L.J., are illustrated by the note of sect. 9 of this Act (LORD HANWORTH, M.R.).—*NIXON v. A.-G.*, [1930] 1 Ch. 566, 593; 99 L. J. Ch. 259; 143 L. T. 176; 46 T. L. R. 246, C. A.; *affd. on other grounds*, [1931] A. C. 184, H. L.

**91. Add. Annotation :—***Refd. International Ry. Co. v. Niagara Parks Commission*, [1937] 3 All E. R. 181.

## Part III.—Interpretation.

**134. Add. Annotation :—***Consd. Edwards v. A.-G. for Canada* (1929), 46 T. L. R. 4.

**135. Add. Annotations :—***Consd. Assam Railways & Trading Co. v. I. R. Comrs.*, [1935] A. C. 445. *Refd. Edwards v. A.-G. for Canada* (1929), 46 T. L. R. 4.

**137. Add. Annotation :—***As to* (1) *Refd. Huntton Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528.

**139. Add. Annotation :—***As to* (1) *Expld. & Distd. Minister of Health v. R.*, *Ex p. Yaffe*, [1931] A. C. 494.

## PART I.

**3a i. Meaning of Act of Parliament.]**—An Act of Parliament does not mean any proclamation or treaty.—*JITENDRANATH GHOSH v. CHIEF SECRETARY TO BENGAL GOVERNMENT* (1932), 1 L. R. 60 Calc. 364.—**IND.**

**a i. —.]**—The general rule that before a law or any regulation or bye-law having the force of a law can become operative, it must be duly promulgated, must be read subject to the qualifications that the word “law” in the rule must not be given too wide a connotation, & that the enabling enactment must be looked to in order to see whether the necessity

for promulgation is or is not excluded.—*BYERS v. CHINN*, [1928] App. D. 322.—**S. AF.**

## PART II. SECT. 2, SUB-SECT. 6.

**79 iii. —.]**—In the matter of interpretation of status, punctuation is not to be deemed a part of the statute.—*NIJAZ AHMAD KHAN v. PARSHOTAM CHANDRA* (1931), 1 L. R. 53 All. 374.—**IND.**

## PART III. SECT. 1, SUB-SECT. 1.

**m i. —.]**—Inasmuch as Parliament is now, since the passing of the Statute of Westminster, the supreme & sovereign law-making body in the Union, the Supreme Ct. has no power

to pronounce upon the validity of an Act of Parliament duly promulgated & printed & published by proper authority. Such an Act is proved by the mere production of the printed form published by proper authority.—*NDLWANA v. HOE MEYER N.O.*, [1937] A. D. 229.—**S. AF.**

## PART III. SECT. 1, SUB-SECT. 2.—B.

**126 ix. —.]**—*Held*: in interpreting a statute, reference cannot be made to the debates in the Legislative Council, or the report of the Select Committee.—*GURDIAL SINGH v. SRI DARBAR SAHIB AMRITSAR (CENTRAL BOARD LOCAL COMMITTEE)* (1928), 1 L. R. 9 Lah. 689.—**IND.**

141. *Add. Annotations* :—**Refd.** *R. v. Minister of Transport, Ex p. Upminster Services, Ltd.*, [1934] 1 K. B. 277; *Errington v. Minister of Health*, [1935] 1 K. B. 249; *Manchester City (Ringway Airport) Compulsory Purchase Order, 1934* (1935), 153 L. T. 219; *Offer v. Minister of Health*, [1936] 1 K. B. 40; *Denby & Sons, Ltd. v. Minister of Health*, [1936] 1 K. B. 337; *Marriott v. Minister of Health* (1935), L. J. K. B. 125; *Barratt & Co. v. London, Midland & Scottish, London & North Eastern & Great Western Ry. Co.'s* (1936), 24 Ry. & Can. Tr. Cas. 127; *Leslie v. London & North Eastern & London, Midland & Scottish Ry. Co.'s* (1936), 24 Ry. & Can. Tr. Cas. 182.

142a. ———. ]—Housing Act, 1925 (c. 14), s. 40, which empowers the Minister of Health to make an order confirming, with or without modification, an improvement scheme made under the Act, & provides that “the order of the Minister when made shall have effect as if enacted in this Act,” does not preclude the ct. from calling in question the order of the Minister where the scheme presented to him for confirmation is inconsistent with the provisions of the Act.—**MINISTER OF HEALTH v. R., Ex p. YAFFE**, [1931] A. C. 494; 100 L. J. K. B. 306; 47 T. L. R. 337; 75 Sol. Jo. 232, H. L.

*Annotations* :—**Consd.** *Re Bowman* (1932), 48 T. L. R. 351. **Refd.** *R. v. Minister of Health, Ex p. Purfleet Urban District Council* (1934), 104 L. J. K. B. 18; *R. v. West Midland Traffic Area Licensing Authority, Ex p. Great Western Ry. Co.*, [1935] 1 K. B. 449.

143. *Add. Annotations* :—**Appld.** *Stumbles v. Whitley* (1929), 46 T. L. R. 37. **Consd.** *Assam Railways & Trading Co. v. I. R. Comrs.*, [1935] A. C. 445.

151. *Add. Annotation* :—*As to* (1) **Consd.** *Edwards v. A.-G. for Canada* (1929), 46 T. L. R. 4.

205. *Add. Annotation* :—**Consd.** *Re Midland (Amalgamated) District (Coal Mines) Scheme, 1930*, *Holliday & Sons, Ltd. v. Executive Board* (1934), 152 L. T. 212.

222. *Add. Annotation* :—**Refd.** *Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons*, [1930] A. C. 549.

239. *Add. Annotation* :—**Refd.** *Adamson v. A.-G.* (1932), 102 L. J. K. B. 129.

240a. ———. ]—It is a fundamental principle in construing Acts of Parliament to give words their ordinary sense, if by that there arises no

repugnancy or inconsistency (**LORD HANWORTH, M.R.**).—*Re JENKINS, JENKINS v. DAVIES*, [1931] 2 Ch. 218; 100 L. J. Ch. 265; 145 L. T. 184; 47 T. L. R. 379, C. A.

253. *Add. Annotations* :—**Refd.** *Doncaster v. Sudlow (R.) & Sons* (1929), 22 B. W. C. C. 564; *Morgan v. Amalgamated Anthracite Collieries, Ltd.*, *Hutchings v. Amalgamated Anthracite Collieries, Ltd.* (No. 2) (1934), 27 B. W. C. C. 313.

255. *Add. Annotation* :—**Appld.** *Swan v. Pure Ice Co.*, [1935] 2 K. B. 265.

277. *Add. Annotations* :—**Appld.** *Re Jenkins, Jenkins v. Davies* (1931), 100 L. J. Ch. 265. **Consd.** *Barras v. Aberdeen Steam Trawling & Fishing Co.*, [1933] A. C. 402; *Re Sassoon* (1933), 49 T. L. R. 407. **Refd.** *Shaw v. Public Trustee* (1929), 141 L. T. 465.

289. *Add. Annotations* :—**Consd.** *Re Sassoon, I. R. Comrs. v. Raphael, Re Sassoon, I. R. Comrs. v. Ezra*, [1933] Ch. 858. **Refd.** *Leitch v. Emmott*, [1929] 2 K. B. 236.

322. *Add. Annotation* :—**Refd.** *Stokes v. Little*, [1935] 1 K. B. 182.

337. *Add. Annotation* :—**Refd.** *Doncaster v. Sudlow (R.) & Sons* (1929), 22 B. W. C. C. 564.

340. *Add. Annotation* :—*As to* (2) **Refd.** *Barras v. Aberdeen Steam Trawling & Fishing Co.*, [1933] A. C. 402.

342a. ———. ]—The words “charitable institution” in any legislative Act should be given their technical legal sense, unless a contrary intention appears from the context.—**ADAMSON v. MELBOURNE & METROPOLITAN BOARD OF WORKS**, [1929] A. C. 142; 98 L. J. P. C. 20; 140 L. T. 107; 45 T. L. R. 3, P. C.

345. *Add. Annotation* :—**Refd.** *Clark's Appeal* (1937), 26 Ry. & Can. Tr. Cas. 61.

350. *Add. Annotation* :—**Consd.** *West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt* (1932), 96 J. P. 159.

351. *Add. Annotations* :—**Consd.** *West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt* (1932), 96 J. P. 159. **Refd.** *Clark's Appeal* (1937), 26 Ry. & Can. Tr. Cas. 61.

359. *Add. Annotation* :—**Appld.** *Re Blücher (Prince)* (1930), 47 T. L. R. 19.

375. *Add. Annotation* :—**Refd.** *Edwards v. A.-G. for Canada* (1929), 46 T. L. R. 4.

PART III. SECT. 2, SUB-SECT. 2.—A.

153 xxii. ———. ]—In construing an Indian Act words should be given their widest possible meaning consistent with the context unless there is something in the Act itself to indicate that they are intended to be used in the artificial & technical sense which they have acquired in English law or in any other restricted sense.—**HAJI RAHIMBUX ASHAN KARIM v. CENTRAL BANK OF INDIA** (1928), I. L. R. 56 Cal. 367.—**IND.**

153 xxiii. ———. ]—The primary & exact meaning of the word “adjoining” is contiguity, & where the word is used in a statute it should be given that meaning unless the context shows that it is used in a looser sense as meaning near or neighbouring.

In *Municipal Corporations Act, 1920*, s. 282, of New Zealand, which authorises a municipal council to contract with the local authority of any “adjoining district” for the supply thereto of electricity, the context does not show that the word “adjoining” is

not used in its exact & literal sense. The sect. therefore does not authorise the council of a borough so to contract with the council of a neighbouring borough unless the boroughs are contiguous.—**NEW PLYMOUTH CORPN. v. TARANAKI ELECTRIC-POWER BOARD**, [1933] A. C. 680; 102 L. J. P. C. 212; 149 L. T. 594, P. C.—**N.Z.**

PART III. SECT. 2, SUB-SECT. 2.—C.  
257 xii. ———. ]—**R. v. COFFEY (Ont.)**, [1929] 1 D. L. R. 693; 51 Can. Crim. Cas. 100.—**CAN.**

PART III. SECT. 2, SUB-SECT. 2.—D.

297 vii. ———. ]—The ct. will not give to a statute an interpretation which results in a palpable injustice unless the legislature has manifested by express words an intention to produce that result. Such an intention will not be inferred from the use of merely general words.—**RE THE EXCISE ACT (Man.)**, [1929] 4 D. L. R. 154; 2 W. W. R. 353.—**CAN.**

PART III. SECT. 2, SUB-SECT. 3.

356 i. *Words of statute clear—Consequences not regarded.*—Since the cardinal principle of both the British & Canadian constitutions is the supremacy of Parliament or of a Legislature acting within the ambit of its powers, therefore where a statute admits of but one interpretation effect must be given to it whatever its consequences.—**MURRAY v. WEST VANCOUVER**, [1937] 3 W. W. R. 269.—**CAN.**

369 iv. ———. ]—Where the actual words of a statute afford no guidance as to the intention of the legislature the ct. will conclude the legislature intended an equitable & not an inequitable result.—**BORCHERDS v. RHODESIA CHROME & ASBESTOS CO., LTD.**, [1930] App. D. 112.—**S. AF.**

PART III. SECT. 2, SUB-SECT. 4.—A.

376 xxii. ———. ]—A lien is not to be considered to be imposed without a plain declaration of the intention of

- 540 iii. —.]—If there is an ambiguity or uncertainty in the language of an Act, the title may be looked in order to ascertain the scope of the Act, in order to remove the ambiguity; but where the language of the Act is plain it must be given effect to notwithstanding the fact that it goes beyond the matters mentioned in the title. The application of c. 61, 1925-26 (Sask.), entitled An Act respecting Improvements under Mistake of Title, is not confined to mistakes of title, but extends to all cases, including those of mistake of the identity of the land or of its boundaries, where a person has made "lasting improvements under the belief that the land is his own." It is, however, a question for the ct. to determine in each case whether the person claiming for the improvements was under a *bond fide* belief that the land was his own.—SCHIELL & HUNT v. MORRISON & MORRISON, (1930) 2 W. W. R. 737; 4 D. L. R. 664.—CAN.

598a. —.]—*ELLERMAN LINES, LTD. v. MURRAY, WHITE STAR LINE OF ROYAL & UNITED STATES MAIL STEAMERS OCEANIC STEAM NAVIGATION Co., LTD. v. COMERFORD*, No. 448a, *ante*.

604. *Add. Annotation*:—*Refd. Farnworth v. Manchester Corpn.*, [1929] 1 K. B. 533.

634a. —.]—The heading of a group of sections, as is well known, forms no part of the enactment; it is neither voted on nor passed in Parliament. Headings & marginal notes are inserted only after a bill has become law. A heading cannot control the plain meaning of the enacting part of the sect. It may, in some instances, be looked at as a preamble if there is some ambiguity in the meaning of the sect. on which it can throw light (*AVORY, J.*). —*R. v. HARE*, [1934] 1 K. B. 354; 103 L. J. K. B. 96; 150 L. T. 279; 98 J. P. 49; 50 T. L. R. 103; 24 Cr. App. Rep. 108; 32 L. G. R. 14, 15; 30 Cox, C. C. 64, C. C. A.

649a. *May not be referred to.*—*NIXON v. A.-G.*, No. 78a, *ante*.

662. *Add. Annotation*:—*Refd. Assam Railways & Trading Co. v. I. R. Courts.*, [1935] A. C. 445.

674. *Add. Annotation*:—*Refd. Fordree v. Barrell* (1931), 95 J. P. 141.

685. *Add. Annotation*:—*Refd. Stokes v. Little*, [1935] 1 K. B. 182.

689. *Add. Annotations*:—*Refd. Fordree v. Barrell* (1931), 95 J. P. 141; *Stokes v. Little*, [1935] 1 K. B. 182.

731. *Add. Annotation*:—*As to* (1) *Consd. Egan v. A.-G.*, [1930] 1 Ch. 238.

745. *Add. Annotations*:—*Apld. West Midlands*

*Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt* (1932), 96 J. P. 159; *Phillips v. Parnaby*, [1934] 2 K. B. 299.

761. *Add. Annotation*:—*Consd. Egan v. A.-G.*, [1930] 1 Ch. 238.

764a. —.]—It was suggested by the A.-G. in the course of his argument for the Revenue Officers, that the ct. was entitled to consider some of the provisions of the later Derating Act as affecting the construction of the 1928 Act. It was contended that as the later Act obliged railways to pass on the benefit of the derating by reduction of railway rates to the users of railways the definition clauses of the 1928 Act should, if possible, be read as applying only to that part of their property which earned rates that could be reduced in proportion to the derating benefits received by the railway, & therefore the Act should if possible be read as excluding from the privileged classes warehouses for the use of which a customer pays rent & not railway rates & therefore could not be given the advantage of having the derating benefit passed on to him. It was further argued that if railway warehouses are outside the definition for these reasons, dock warehouses should also be deemed outside the definition. In my judgment this argument ought not to have any weight attached to it. The Act of 1928 cannot be interpreted by what Parliament chose to do by an Act of 1929. We are not entitled to assume that the need of so wording the Act as to confine the prospective advantages of differential rating to those hereditaments whose rateable

PART III. SECT. 2, SUB-SECT. 8.—  
B. (d).

599 iv. —.]—In order to restrict the scope of an Act by the terms of its preamble the ct. must be satisfied that there was an intention on the part of the Legislature that its scope should be so restricted.—*KANNAMMAL v. KANAKASABAI* (1930), 1 L. R. 54 Mad. 845.—IND.

PART III. SECT. 2, SUB-SECT. 8.—C.

645 vii. —.]—Headings in a statute may be read, not only as explaining sects. which immediately follow them, as the preamble to the statute may be looked at to explain its enactments, but as affording a better key to the construction of the sects. which follow than might be afforded by a mere preamble.—*Re MID-WEST GLASS Co., LTD.*, [1931] 3 W. W. R. 165; 40 Man. L. R. 289.—CAN.

PART III. SECT. 2, SUB-SECT. 8.—D.

m i. —.]—Marginal notes to sections of an Act can be referred to for the purpose of interpretation if they can be regarded as inserted by, or under the authority of, or assented to by the legislature.—*RAM SARAN DAS v. BHAGWAT PRASAD* (1928), 1 L. R. 51 All. 411.—IND.

PART III. SECT. 2, SUB-SECT. 8.—E.

650 ii. —.]—*Semble*: the illustrations to Indian Acts of legislature are to be used as guides only & not as authoritative & binding declarations of law.—*MYINGYAN MUNICIPALITY v. MAUNG PO NYUN* (1930), 1 L. R. 8 Ran. 320.—IND.

PART III. SECT. 2, SUB-SECT. 8.—  
G. (o).

658 ii. —.]—If there are two sections in an Act which seem to clash

but which can be interpreted so as to give full force & effect to both, then such an interpretation is to be adopted rather than one which will partly destroy the effect of one of them.—*PRINCIPAL IMMIGRATION OFFICER v. BHULLA*, [1931] App. D. 323.—S. AF.

PART III. SECT. 2, SUB-SECT. 12.

—A.

sb. *Comparison with Imperial Act.*—Although in the interpretation of a colonial statute a comparison thereof with a similar Imperial statute on the same subject-matter, & reference to the decisions on the latter statute, may often be helpful, it is quite a different thing & a perilous course to adopt to institute an elaborate textual comparison between the two statutes & to rely on conjectures as to the intention of the draftsman of the colonial statute in selecting some & rejecting other provisions of his presumed model.

The fact that the general words of a statute are subject to certain admitted qualifications does not of itself afford any presumption that they are subject to a further restriction which is not admitted.

Statutes must be read as a whole, & the language used in so-called machinery sections may be called in aid for the interpretation of the charging sections.—*OEI TJONG SWAN v. STAMPS COMR.*, [1933] A. C. 378; 102 L. J. P. C. 90; 149 L. T. 145; 49 T. L. R. 428, P. C.—STRAITS SETTLEMENTS.

sd. *Provincial Act similar to English Act.*—Where a provincial Act, although not identical in language with an English Act on the same subject, is "sufficiently similar in substance" to it, the provincial cts. are bound in interpreting the provincial Act to follow the interpretation given the English Act by the House of Lords,

—*DAVIDNER v. SCHUSTER & MRAZEK, RIJSENBERG v. SCHUSTER & MRAZEK*, [1936] 1 W. W. R. 45; 1 D. L. R. 560.—CAN.

PART III. SECT. 2, SUB-SECT. 12.—  
B. (a).

sd. *English statute—Attitude of South African courts.*—It may be stated as a general proposition that our cts. would, as a general rule, follow the authoritative interpretation of a section in an English statute as laid down by the higher English cts. if that section occurs in a Union statute which in all its essentials is the same as the English statute in which the section occurs. If the decision is one of the Privy Council, & there is no difference between the Union statute & the English statute & if there is nothing in our common law which would require a different interpretation, then we would follow the decision of the Privy Council, & if an interpretation has been put upon a section of an English statute by one of the higher English cts., we would attach great weight to such an interpretation. But if our Legislature takes over a section of an English statute, that section will have to be interpreted in the light of our common law in exactly the same way as if it had not occurred in an English statute (*per CUR.*).—*WEGE'S ESTATE v. STRAUSS*, [1932] App. D. 76.—S. AF.

PART III. SECT. 2, SUB-SECT. 12.—  
B. (c).

747 ii. —.]—As both the Customs Tariff Act & the Tax Act are revenue Acts, a clear definition in one of these enactments of a term common to both may reasonably be referred to for the purpose of dispelling any ambiguity of meaning in the other.—*L. v. MILL, BINGHAM PRINTING Co., LTD.*, [1929] Ex. C. R. 133.—CAN.

occupiers could pass on the benefit to their trade customers was present to the mind of the Legislature when they passed the Act of 1928. We can, however, treat as relevant the purposes for which the Act was passed as stated in the title (GREER, L.J.).—*BOTTOMLEY v. WEST DERBY ASSESSMENT COMMITTEE, MERSEY DOCKS & HARBOUR BOARD v. WEST DERBY ASSESSMENT COMMITTEE, BOTTOMLEY v. MERSEY DOCKS & HARBOUR BOARD, BOTTOMLEY v. LIVERPOOL GRAIN STORAGE & TRANSIT CO., LTD.*, [1932] 1 K. B. 40; 101 L. J. K. B. 8, 95 J. P. 186; 46 T. L. R. 468 (1926–31), 2 B. R. A. 846, C. A.

765. *Add. Annotation*:—*Refd.* Port of London Authority v. Canvey Island Comrs., [1932] 1 Ch. 416.

766a. ———.]—I do not think that, in the circumstances of this case, the subsequent statute can properly be referred to for the purpose of interpreting the earlier. It is, of course, certain that Parliament can by statute declare the meaning of previous Acts. It would be competent for them to do so, even though their declaration offended the plain language of the earlier Act. It would be an unnecessary step to take, unless it were intended, contrary to the general principles of legislation, to make the explanatory Act retrospective, seeing that the subsequent statute could by independent enactment do what was desired. It is also possible that where Acts are to be read together, as they are in this case, a provision in an earlier Act that was so ambiguous that it was open to two perfectly clear & plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute effectual, which is what the cts. would desire to do, & it is also possible that, where a statute has created a crime or imposed a penalty, a subsequent Act showing that that crime was intended to have a limited interpretation or the circumstances regarded as narrow in which the penalty attached, would be used for the purpose of giving effect to the well-known principle of construction to which I referred at an earlier stage (LORD BUCKMASTER).—*ORMOND INVESTMENT CO. v. BETTS*, [1928] A. C. 143; 97 L. J. K. B. 342; 138 L. T. 600; 13 Tax Cas. 400, H. L.

*Annotations*:—*Consd.* Port of London Authority v. Canvey Island Comrs., [1932] 1 Ch. 446. *Refd.* Dewar v. I. R. Comrs., [1935] 2 K. B. 351.

766b. ——— *Erroneous recital of effect in preamble to later statute.*—*Deft.* comrs. relied, first,

upon the statement contained in the preamble of the 1883 Act that by the 1792 Act the comrs. thereby appointed were invested with powers (*inter alia*) of acquiring lands in the Island for the purposes of the Act. . . . In my opinion the erroneous recital of the effect of the 1792 Act does not affect the construction of that Act (LAWRENCE, L.J.).—*PORT OF LONDON AUTHORITY v. CANVEY ISLAND COMRS.*, [1932] 1 Ch. 492; 101 L. J. Ch. 63; 146 L. T. 195; 96 J. P. 28; 30 L. G. R. 42, C. A.

772a. ——— *Addition to provisions incorporated—Not necessarily incorporated in later Act.*—Where provisions of an Act have been incorporated by reference into a later Act, the repeal of the earlier Act does not affect the latter Act; so, too, an addition to the provisions incorporated, unless it is expressly made applicable to the later Act, is not deemed to be incorporated into it, at all events if it is possible for the later Act to function effectually without the addition.—*SECRETARY OF STATE FOR INDIA v. HINDUSTHAN CO-OPERATIVE INSCOE. SOCIETY* (1931), 58 L. R. Ind. App. 259, P. C.

795. *Add. Annotations*:—*Apld.* R. v. Southampton County Confirming Committee, *Ex p.* Sladef, [1929] 1 K. B. 263. *Consd.* Barras v. Aberdeen Steam Trawling & Fishing Co., [1933] A. C. 402.

796. *Add. Annotation*:—*Consd.* Barras v. Aberdeen Steam Trawling & Fishing Co., [1933] A. C. 402.

815. *Add. Citation*:—7 Tax Cas. 236.

832. *Add. Annotation*:—*Consd.* Coleridge-Taylor v. Novello & Co., [1938] Ch. 608.

856. *Add. Annotation*:—*Refd.* Taxes Comr. v. Union Trustee Co. of Australia, Ltd., [1931] A. C. 258.

863. *Add. Annotation*:—*Consd.* Glamorgan County Council v. Birmingham Corpn. (1932), 48 T. L. R. 664.

905a. ——— *Application to articles of association.*—*Interpretation Act, 1889* (c. 63), s. 1 (1), which deals with the inclusion of the plural in words in the singular & *vice versa*, & which governs Table A in Companies Act, 1862 (c. 89), Sched. I., applies also to special articles of a co. which have replaced certain articles of Table A, but which are used together with the remaining articles of Table A.—*FELL v. DERBY LEATHER CO., LTD.*, [1931] 2 Ch. 252; 100 L. J. Ch. 311; 145 L. T. 356.

### PART III. SECT. 2, SUB-SECT. 13.—A.

774 iii. ———.]—Where there is a doubt as to the meaning of a statute, or an award made thereunder, a construction placed thereon & long acquiesced in by all parties will not be departed from.—*GAUSSEN v. LOWER BANN NAVIGATION TRUSTEES*, [1929] N. I. 11—IR.

### PART III. SECT. 2, SUB-SECT. 13.—B.

789 vii. ———.]—It is a well-settled principle of construction that the Legislature must be presumed to know, not only the general principles of law, but, also, the constructions which the cts. have put upon particular statutes, & when a section of an Act,

which had received a judicial construction, is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of the construction.—*BIPULBIHARI CHAKRAVARTI v. NIKHILCHANDRA CHAKRAVARTI* (1929), 1 L. R. 57 Calc. 381.—IND.

### PART III. SECT. 2, SUB-SECT. 17.—A.

o i. ———.]—*HEATHERTON CO-OPERATIVE CO. v. GRANT*, [1930] 1 D. L. R. 975; 1 M. P. R. 145.—CAN.

### PART III. SECT. 3, SUB-SECT. 2.

907 ii. ———.]—In the construction of a statute a definition given in an interpretation clause of the statute

will not be adhered to when the context & subject-matter show that the words defined were intended to have a meaning different from that set forth in the interpretation clause.—*TOWN COUNCIL OF SPRINGS v. MOOSA*, [1929] A. D. 401.—S. AF.

907 iii. ———.]—*Prima facie*, where there is a definition of a particular word used in a statute, that definition must be applied wherever that word occurs, but the ct. is justified in departing from the definition where an adherence to it would work an injustice which both the context & subject-matter show that the legislature never intended.—*SUTHERLAND v. R.*, [1930] N. L. R. 24.—S. AF.

927. *Add. Annotation*:—*Refd.* Farnworth Manchester Corpn., [1929] 1 K. B. 533.

992. *Add. Annotation*:—*Refd.* Egan v. A.-G., [1930] 1 Ch. 238.

## Part IV.—Operation.

995. *Add. Annotation*:—*Fold.* Coleridge-Taylor v. Novello & Co., [1938] Ch. 608.

995a. ———.]—The word “passing” in the phrase “after the passing of this Act” in the proviso to Copyright Act, 1911 (c. 46), s. 5 (2), means, not the date at which the Act came into operation (which is the meaning of “commencement”) but the date of the Royal Assent to the Act in the form of a bill, after it had passed the Legislature.—*COLERIDGE-TAYLOR v. NOVELLO & CO., LTD.*, [1938] Ch. 608; [1938] 2 All E. R. 318; 51 T. L. R. 683; 82 Sol. Jo. 352; *on appeal*, [1938] Ch. 850, C. A.

999. *Add. Annotation*:—*Consd.* Coleridge-Taylor v. Novello & Co., [1938] Ch. 608.

1057. *Add. Annotation*:—*Consd.* A.-G. v. Jackson (1932), 48 T. L. R. 261.

1083. *Add. Annotation*:—*Consd.* Ward v. British Oak Insurance Co., [1932] 1 K. B. 392.

1111. *Add. Annotation*:—*Refd.* *Re Debtor, Ex p. Debtor* (No. 490 of 1935), [1936] Ch. 237.

1116. *Add. Annotations*:—*As to* (1) *Consd.* Ward v. British Oak Insurance Co., [1932] 1 K. B. 392; *Re Dickens, Dickens v. Hawksley* (1934), 50 T. L. R. 536; *Re Nautilus Steam Shipping Co., Ex p. Gibbs & Co.*, [1936] Ch. 17. *Refd.* *Gardner & Co. v. Cone* (1928), 140 L. T. 72.

1172a. *Add. Annotation*:—*Refd.* *Re National Benefit Assurance Co.*, [1931] 1 Ch. 46.

### PART III. SECT. 6, SUB-SECT. 1.

948 i. *Whether equitable construction adopted.*]—Where a statute is clear the ct. must give effect to the intention of the Legislature however harsh its operation may be to individuals affected thereby, but where two meanings may be given to a section & the one meaning leads to harshness & injustice while the other does not, the ct. will hold that the Legislature rather intended the milder than the harsher meaning.—*PRINCIPAL IMMIGRATION OFFICER v. BHULA*, [1931] App. D. 323.—*S. AF.*

### PART III. SECT. 6, SUB-SECT. 2.

aa. *Workmen's Compensation Acts.*]—*CLARKE v. WENTWORTH STORES, LTD.*, [1928] 2 D. L. R. 796.—*CAN.*

### PART III. SECT. 9.

981 i. *Doctrine of contemporanea expositio.*]—When the construction of a statute is doubtful, it is accepted as a canon of interpretation that a useful exposition of the statute may be that which it has received from contemporary authority.—*DINKEL v. UNION GOVT.*, [1929] App. D. 150.—*S. AF.*

### PART IV. SECT. 2.

b i. ———.]—Sect. 1 of c. 30, 1923, provided for the appointment of one or two examiners for the city of Halifax. The Act was to come into force on a day to be fixed by proclamation. C. 54 of 1924, passed May 9, 1924, repealed s. 1 of c. 30, 1923, & substituted another sect. providing for the appointment of one or two examiners for the city of Halifax. On May 23, 1924, it was proclaimed that c. 30, 1923, as amended, should come into force on June 1, 1924. On the same day, May 23, 1924, M. was appointed as an examiner for the city of Halifax. Applt. contended that his appointment was void because made under the authority of a statute that was not in force at the time of his appointment:—*Held*: the proclamation that c. 30, 1923, as amended, should come into force on June 1, 1924, had the same effect as if that date had been fixed by the statute itself as the date when it should become effective as law; & it was common ground that in the latter case appointments could be made in anticipation of the statute

coming into force; the proclamation made that certain which had been contingent; it must be presumed that everything was done regularly unless the contrary was shown; the proclamation & order of appointment bore the same date & were gazetted the same day; & it must be presumed that the proclamation preceded the appointment: the appointment was, therefore, valid.—*MCKENZIE v. HUBBES*, [1929] 4 D. L. R. 1059; *S. C. R.* 38; *affd.*, 60 N. S. R. 203.—*CAN.*

### PART IV. SECT. 4, SUB-SECT. 1.

1040 ix. ———.]—It is a general rule established by English decisions that the Crown is not bound by an Act of Parliament unless named therein expressly or by necessary implication. That rule does not apply where the Act is made for the public good, the advancement of religion & justice, the prevention of fraud, or the suppression of injury & wrong.—*HIRANAND KHUSHIRAM v. SECRETARY OF STATE FOR INDIA* (1934), 1 L. L. R. 58 Bom. 635.—*IND.*

### PART IV. SECT. 5, SUB-SECT. 1.

o i. ———.]—Review of principles applicable to question of whether a statute has retrospective operation.—*MAHAMMAD HOSAIN v. JAMINI NATH BHATTACHARJYA*, 1 L. R., [1938] 1 Cal. 607.—*IND.*

p i. ———.]—A statute is not to be construed so as to have a greater retrospective effect than its language renders necessary.—*KIRPA SINGH v. AJAIPAL SINGH* (1928), 1 L. L. R. 10 Lah. 165.—*IND.*

### PART IV. SECT. 5, SUB-SECT. 2.—A.

1087 vi. ———.]—Statutes regulate future conduct & are construed as operating only on cases or facts which came into existence after they were passed.—*PRINCIPAL IMMIGRATION OFFICER v. BHULA*, [1931] App. D. 323.—*S. AF.*

### PART IV. SECT. 5, SUB-SECT. 2.—B. (b).

1099 x. ———. *Res judicata.*]—Hong Kong Ordinance 20 of 1908 by its retrospective effect gave a right of action for criminal conversation committed prior to its enactment:—*Held*: without explicit words to that effect it did not avail the respondent, whose cause of action was barred as *res judicata*

by a final judgment prior to the Ordinance & founded on the then existing law.—*LEUNG v. MITCHELL*, [1912] A. C. 400.—*HONG KONG.*

### PART IV. SECT. 5, SUB-SECT. 6.

1146 xxvi. ———.]—*METROPOLITAN ARABTTOURS BOARD v. SCHOLE*, [1927] S. A. S. R. 444.—*AUS.*

1146 xxvii. ———.]—Alterations in procedure are always retrospective unless there be some good reason against it.—*Re WICKS & ARMSIRONG*, [1928] 2 D. L. R. 210; 49 Can. Crim. Can. 281; 61 O. L. R. 667.—*CAN.*

1146 xxviii. ———.]—Where a statute deals with practice & procedure only, it applies, unless the contrary is expressed, to actions begun before it came into force.—*HAFFNER v. WESTON & DETCHON*, [1928] 1 D. L. R. 711; 22 Sask. L. R. 203; [1927] 3 W. W. R. 839.—*CAN.*

1146 xxix. ———.]—An action begun after the time limited by the statute that was in force when the writ was issued cannot, because of an amending Act, be held to have begun in time. It is erroneous to assume that a statute imposing a time limit for the commencement of actions for damages, or extending a time already limited, is necessarily to be treated as a statute effecting procedure only & so to be given a retrospective effect.—*KEARLEY v. WILEY*, [1931] 2 D. L. R. 433; 66 O. L. R. 490; *affd.*, [1931] 3 D. L. R. 68; O. R. 167.—*CAN.*

1146 xxx. ———.]—*SHACKLETON v. OLDS TOWN*, [1934] 3 W. W. R. 461, 766; *affd.*, [1934] 3 W. W. R. 657.—*CAN.*

1168 i. *Right of appeal not matter of procedure.*]—Legislation conferring a new jurisdiction on an appellate ct. to entertain an appeal cannot be construed retrospectively, so as to cover cases arising prior to such legislation, unless there is something making unmistakable the legislative intention that it should be so construed. The matter is one of substance & of right.—*SINGER v. R.*, [1932] S. C. R. 70; 1 D. L. R. 279.—*CAN.*

### PART IV. SECT. 6, SUB-SECT. 1.

1169 xiii. ———.]—*ST. CATHERINES CORPN. v. HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO*, [1928] 3 D. L. R. 200; 62 O. L. R. 301; *affd.*, [1930] 1 D. L. R. 409, P. C.—*CAN.*



1180. *Add. Annotations*:—**Consd. Re Debtor, Ex p. Debtor** (No. 490 of 1935), [1936] Ch. 237.
1207. *Add. Annotations*:—**Consd. Glassbrook Bros. v. Leyson**, [1933] 2 K. B. 91. **Refd. A.-G. v. Manchester Corpn.**, [1931] 1 Ch. 254; **Skinner v. Geary** (1931), 47 T. L. R. 597.
1212. *Add. Annotations*:—**Consd. West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt** (1932), 147 L. T. 122; **London County Council v. Montague Burton, Ltd.**, [1934] 1 K. B. 360.
1217. *Add. Annotations*:—**Apld. Farnworth v. Manchester Corpn.**, [1929] 1 K. B. 533; **West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt** (1932), 96 J. P. 159; **Marshall v. Blackpool Corpn.** (1932), 102 L. J. K. B. 91. **Refd. Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons**, [1930] A. C. 549.
1221. *Add. Annotation*:—**Refd. Consett Iron Co. v. Clavering** (1935), 153 L. T. 199.
1236. *Add. Annotations*:—**Consd. Re Debtor, Ex p. Debtor** (No. 490 of 1935), [1936] Ch. 237. **Refd. Re Nautilus Steam Shipping Co., Ex p. Gibbs & Co.**, [1936] Ch. 17.
1244. *Add. Annotations*:—**Apld. Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons**, [1929] 1 Ch. 686. **Refd. Farnworth v. Manchester Corpn.**, [1929] 1 K. B. 533.
1248. *Add. Annotation*:—**Refd. R. v. Minister of Health, Ex p. Yaffe**, [1930] 2 K. B. 98.
- 1248a. — Unless contrary construction clearly intended.]—There is a well-known canon of construction applicable to private Acts of Parliament that if the words used by the statute are ambiguous, the meaning that is most favourable to the public should be adopted; but I do not think that this has the effect of preventing the ct. from saying that if, when the whole of the statute in question is considered, it appears by necessary intendment that the privilege claimed was intended to be granted, the ct. should refuse to draw this inference because the Act does not contain express words creating the privilege claimed (GREER, L.J., in a dissenting judgment).—**BOURNEMOUTH-SWANAGE MOTOR ROAD & FERRY CO. v. HARVEY & SONS**, [1929] 1 Ch. 686; 98 L. J. Ch. 118; 140 L. T. 415; 93 J. P. 129; 27 L. G. R. 264, C. A.; *affd.*, [1930] A. C. 549, H. L.
1262. *Add. Annotations*:—**Refd. Place v. Searle** [1932] 2 K. B. 497; **Eldon (Lord) v. Hedley Bros.**, [1935] 2 K. B. 1.
1334. *Add. Annotation*:—**Refd. Farnworth v. Manchester Corpn.**, [1929] 1 K. B. 533.
- 1344a. — Effect of Interpretation Act, 1889 (c. 63), s. 38.]—The Interpretation Act, 1889 (c. 63), s. 38 (2), does not apply to temporary or expiring statutes, but only to repealed statutes (ROCHE, J.).—**SPENCER v. HOOTON** (1920), 37 T. L. R. 280.
- 1344b. — — — — —.]—No doubt there is some ground for saying that in cases of this kind, where one is dealing with a temporary Act, one must look at the particular statute which is said to be a temporary statute & see what is the meaning of it. It may be drawn in such a way that some parts of it will survive & be operative & that other parts of it are dead & gone, & this can only be ascertained by looking at the words of the particular statute which is before the ct. . . . We cannot say that the Interpretation Act, 1889, shall apply so that legal proceedings can be completed, although they would be heard & determined at a time when no offence under the statute could be committed (DARLING, J.).—**R. v. ELLIS, Ex p. AMALGAMATED ENGINEERING UNION** (1921), 125 L. T. 397.
1351. *Add. Annotations*:—**As to (1) Refd. Kilbane v. Whitehaven Colliery Co.** (1933), 26 B. W. C. C. 76. **As to (2) Refd. De Keyser v. British Railway Traffic & Electric Co.**, [1936] 1 K. B. 224. **Generally, Refd. Sheffield Corpn. v. Luxford, Same v. Morrell**, [1929] 2 K. B. 180.
- 1364a. — — — — —.]—"May" always means may. "May" is a permissive or enabling expression; but there are cases in which, for various reasons, as soon as the person who is within the statute is entrusted with the power it becomes his duty to exercise it. One of those cases is where he is applied to to use the power which the Act gives him in order to enforce the legal right of appt. (TALBOT, J.).—**SHEFFIELD CORPN. v. LUXFORD, SAME v. MORRELL**, [1929] 2 K. B. 180; 98 L. J. K. B. 512; 141 L. T. 265; 93 J. P. 235; 45 T. L. R. 491, D. C.
1381. *Add. Annotations*:—**Refd. Blundy, Clark & Co. v. London & North Eastern Railway** (1931), 100 L. J. K. B. 401; **Northwestern Utilities, Ltd. v. London Guarantee & Accident Co.**, [1936] A. C. 108.
1386. *Add. Annotation*:—**Consd. A.-G. v. London & Home Counties Joint Electricity Authority**. [1929] 1 Ch. 513.
1403. *Add. Annotations*:—**Refd. Mayhead v. Hydraulic Hoist Co.** (1931), 100 L. J. K. B. 369; **Evans v. Bartlam**, [1937] A. C. 473.
1408. *Add. Annotation*:—**Apld. A.-G. v. Sunderland Corpn.** (1929), 46 T. L. R. 10.
1412. *Add. Annotation*:—**Refd. A.-G. v. Racecourse Betting Control Board**, [1935] Ch. 34.
1422. *Add. Annotation*:—**Refd. Re Brighton (Everton Place Area) Housing Order, 1937, Robins & Son, Ltd.'s Application**, [1938] 2 All E. R. 146.
- 1452a. — — — — —.]—Pltf., who was a farmer, was the occupier of property in the neighbourhood of an electricity power station which had been erected by deft. corpn. under Parliamentary powers & which emitted fumes heavily charged with sulphur & sulphur

**PART IV. SECT. 6, SUB-SECT. 2.—A**

1184 iii. —.]—*Held*: the amendments made to the Insurance Act subsequent to the year 1926 were not retroactive & did not take away contractual rights acquired under legislation in force when the contracts were entered into.—*BULLAS v. EMPIRE LIFE INSC. CO.*, [1931] 4

D. L. R. 443 ; O. R. 769.—CAN.

**PART IV. SECT. 7, SUB-SECT. 9.**

**k 1. —.]—**Where a statute directs a specific proceeding in any ct. the proceeding must be according to the practice of that ct. but where there is no practice specially applicable it is competent for the tribunal to deal with the matter as justice & common sense

alike call for.—*Re BUTLER, Ex p. TOOHNEY'S, LTD.* (1934), 34 S. R. N. S. W. 277; 51 N. S. W. W. N. 101.—**AUS.**

11. —.]—When a statute confers upon the ct. a specific power, the ct. cannot, by relying upon its inherent jurisdiction, extend the scope of that power.—R. v. SUKH DEV (1929), 1. L. R. 11 Lah. 220.—IND.

compounds so as to damage the property occupied by pltf. In an action for a nuisance:—*Held*: Electric Lighting (Clauses) Act, 1899, did not expressly make defts. liable for a nuisance, but as defts. had not proved the nuisance to be the inevitable result of the exercise of their statutory powers plaintiff was entitled to an injunction &

damages.—*MANCHESTER CORPN. v. FARNWORTH*, [1930] A. C. 171; 99 L. J. K. B. 83; 94 J. P. 62; 46 T. L. R. 85; 73 Sol. Jo. 818; 27 L. G. R. 709; *sub nom.* FARNWORTH v. MANCHESTER CORPN., 142 L. T. 145, H. L.

*Annotations*:—*Refd.* Markland v. Manchester Corp., [1931] 1 K. B. 566. Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., [1936] A. C. 108.

## Part V.—Criminal and Penal Statutes.

1531. *Add. Annotation*:—*As to* (1) *Consd.* The Torni, [1932] P. 78.

1539. *Add. Annotations*:—*Refd.* Sheffield Corpn. v. Kilson, [1929] 2 K. B. 322; Moore v. Tweedale, [1935] 2 K. B. 163.

1546. *Add. Annotation*:—*Refd.* R. v. Milk Marketing Board, *Ex p.* North (1934), 50 T. L. R. 559.

1554. *Add. Annotation*:—*Refd.* R. v. Milk Marketing Board, *Ex p.* North (1934), 50 T. L. R. 559.

1560. *Add. Annotation*:—*Consd.* Stoke-on-Trent Revenue Officer v. Stoke-on-Trent Assessment Committee & Potteries Electric Traction Co., etc., etc. (1930), 143 L. T. 650.

## Part VI.—Fiscal and Revenue Statutes.

1566. *Add. Annotation*:—*Refd.* British Trawlers' Federation, Ltd. v. London & North-Eastern Ry. Co. (1932), 147 L. T. 313.

1577. *Add. Annotation*:—*Consd.* I. R. Comrs. v. Dalgety & Co. (1929), 98 L. J. K. B. 542.

1578. *Add. Annotation*:—*Consd.* I. R. Comrs. v. Dalgety & Co. (1929), 98 L. J. K. B. 542.

1587. *After this case add*:—  
— *Safeguarding Acts.*—*See* REVENUE, Nos. 93c, 93d.

1591. *Add. Citations*:—[1929] A. C. 354; 98 L. J. Ch. 198; 140 L. T. 624; 93 J. P. 146; 27 L. G. R. 261.

1603. *Add. Annotation*:—*Refd.* I. R. Comrs. v. Westminster, [1936] A. C. 1.

1607. *Add. Annotation*:—*Refd.* Foscolo Mango & Co. v. Stag Line, Ltd., [1931] 2 K. B. 48.

1611a. ———. ]—Where a taxing Act can be construed in one of two alternative ways, the one most favourable to the taxpayer should be adopted.—*HENNELL v. INLAND REVENUE COMRS.*, [1933] 1 K. B. 415; 102 L. J. K. B. 69; 148 L. T. 150; 49 T. L. R. 31; 76 Sol. Jo. 849, C. A.

*Annotation*:—*Refd.* Commercial Union Assurance Co. v. I. R. Comrs., [1937] 1 All E. R. 109.

1612. *Add. Annotations*:—*Generally*, *Refd.* Diggins v. Forestal Land, Timber & Railways Co. (1930), 142 L. T. 509; I. R. Comrs. v. Dalgety & Co., [1930] A. C. 527.

### PART V. SECT. 2, SUB-SECT. 2.

1513 v. ———. ]—A statute ought not to be construed as extending a penal category, if the language is equally capable of a construction that would, & one that would not, inflict the penalty, or if its denotation is uncertain, & no sure conclusion can be reached.—*R. v. ADAMS* (1935), 41 Argus L. R. 421; 53 C. L. R. 563; 9 A. L. J. 242; 8 A. B. C. 97.—*AUS.*

### PART V. SECT. 2, SUB-SECT. 3.

1525 iv. ———. ]—Even a penal statute must not be construed so as to narrow its words to the exclusion of cases which those words in their ordinary acceptance would comprehend.—*R. v. KRAKOWEC, DAHLBERG & EKLUND & CONTINENTAL GUARANTY CORPN. OF CANADA, LTD.*, [1932] S. C. R. 134; 1 D. L. R. 316; 57 C. C. C. 96.—*CAN.*

### PART V. SECT. 3, SUB-SECT. 1.

1532 vi. ———. ]—A statute which casts upon an accused the *onus* of disproving a charge is retrospective &, therefore, applies to a case where it has come into force between the time of the alleged offence & the laying of the information therefor.—*R. v. KUMPS* [1931] 1 W. W. R. 812; 3 D. L. R.

767; 55 Can. C. C. 320; 39 Man. L. R. 445.—*CAN.*

*sa. Extra-territorial operation*.—*Intention must be shown.*—General words in a penal statute will not be given an extra-territorial operation unless an intention to give such an operation to the statute appears expressly or by necessary implication.—*R. v. FRANKIE*, [1929] V. L. R. 285; Argus L. R. 230.—*AUS.*

### PART V. SECT. 3, SUB-SECT. 2.

1543 ii. ———. ]—In so far as it deals with the disqualification of a candidate for a corrupt practice the Ontario Election Act is a penal statute, & the charge against the candidate must be proved beyond a reasonable doubt before such disqualification is ordered.—*Re* SOUTH BRUCE PROVINCIAL ELECTION, *JOHNSTON v. McCALLUM*, [1928] 1 D. L. R. 104; 61 O. L. R. 392.—*CAN.*

### PART VI. SECT. 2.

1588 ii. ———. ]—Special canons of interpretation are no more applicable to a taxing Act than to any other Act.—*FOWLER & ANDREWS v. SPALLUMCHEN TOWNSHIP*, [1930] 3 W. W. R. 12; 53 B. C. R. 47.—*CAN.*

a i. ———. *Matters of procedure.*—The principle that a statute which imposes a duty must be strictly construed applies only in so far as the imposition of the liability is concerned. It does not extend to mere matters of procedure devised as the best means in all ordinary circumstances to collect the impost.—*GOPALASAMI v. SECRETARY OF STATE FOR INDIA* (1933), 1 L. R. 57 Mad. 237.—*IND.*

a i. *Construction with reference to English law.*—In continuing a statute which, like a taxing statute, is meant to apply to all persons irrespective of their personal law, it is quite unnecessary to investigate the meaning of the words in the particular system of jurisprudence that may be followed by the assessee, & it is proper to construe the words in question with reference to the English Law on the point.—*UMAR BAKSHI v. PUNJAB COMR. OF INCOME TAX* (1931), 1 L. R. 12 Lah. 725.—*IND.*

so. ———. ]—The Indian Income Tax Act differs materially from the English Income Tax statutes, & decisions under the English Act are of little assistance in applying the Indian Act.—*COMR. OF INCOME TAX, BENGAL v. SHAW, WALLACE & CO.* (1932), 1 L. R. 59 Cal. 1343.—*IND.*

## Part VII.—Local, Personal and Private Statutes.

1617. *Add. Annotations*:—**Refd.** Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1929] 1 Ch. 686; Farnworth v. Manchester Corpn., [1929] 1 K. B. 533.
1621. *Add. Annotation*:—**Refd.** Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1929] 1 Ch. 686.
1633. *Add. Annotation*:—**Consd.** Altrincham Electric Supply Ltd. v. Sale Urban District Council (1936), 154 L. T. 379.
1636. *Add. Annotation*:—*As to* (2) **Consd.** Altrincham Electric Supply, Ltd. v. Sale Urban District Council (1936), 154 L. T. 379.
1638. *Add. Annotation*:—**Refd.** Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1930] A. C. 549.
1659. *Add. Annotations*:—**Consd.** Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1929] 1 Ch. 686; Farnworth v. Manchester Corpn., [1929] 1 K. B. 533.
1674. *Add. Citations*:—[1929] 1 Ch. 686; 98 L. J. Ch. 118; 140 L. T. 415; 93 J. P. 129; 27 L. G. R. 264; *subsequent proceedings* (No. 2), 144 L. T. 132.
1678. *Add. Annotation*:—**Consd.** West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt (1932), 96 J. P. 159.
1679. *Add. Annotations*:—**Consd.** Marshall v. Blackpool Corpn. (1932), 102 L. J. K. B. 91; London County Council v. Montague Burton, Ltd., [1934] 1 K. B. 360. **Refd.** West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt (1932), 96 J. P. 159.
- 1681a. ———. ]—By the will of a testator who died in 1878 land in New Zealand was devised upon trusts under which testator's natural

daughter became tenant for life with remainders over in tail male to her sons. Her son, the first tenant in tail, attained the age of twenty-one years, but was killed in action in 1915 during his mother's lifetime. He was survived by an infant son who, upon the death in 1930 of testator's natural daughter, became tenant in tail in possession. The will contained no power to sell the settled land, but a private Act (the Rhodes Trust Act, 1901) was obtained & gave the trustees power to lease or sell any part of it. By sect. 5 of the Act moneys received on any sale were to be invested by the trustees & all income produced by the investments was to be paid to the person "who but for such sale or lease would have been for the time being beneficially entitled to the occupation of the land in respect of which such moneys shall have been received." Upon an originating summons issued in 1932:—**Held**: the fund representing the proceeds of sales, whether made before or after the death of the infant's father, belonged absolutely to the infant. Under sect. 5 of the private Act the income derived from the proceeds of sales, like the rents, was payable to the person entitled under the will as tenant in tail; but the vesting of the corpus was postponed until there should be a tenant in tail who was entitled to actual possession or receipt of the rents & profits of the settled land.

The private Act, having been passed for the strictly limited purpose of authorising the trustees to sell or lease the settled land, should not, in the absence of unambiguous language, be given an effect which would unnecessarily alter the rights of the parties.—**BARTON v. MOORHOUSE**, [1935] A. C. 300; 104 L. J. P. C. 69; 152 L. T. 582, P. C.

## Part VIII.—Enforcement.

1723. *Add. Annotations*:—**Consd.** Coles (J. H.) Proprietary, Ltd. v. Need, [1934] A. C. 82. **Refd.** A.-G. v. Sharp (1930), 99 L. J. Ch. 441; Musical Performers' Protection Assn., Ltd. v. British International Pictures, Ltd. (1930), 46 T. L. R. 485.
1726. *Add. Annotations*:—**Apld.** Musical Performers' Protection Assn., Ltd. v. British International Pictures, Ltd. (1930), 46 T. L. R.
485. **Distd.** Ruislip-Northwood Urban District Council v. Lee (1931), 145 L. T. 208. **Refd.** Clark v. Epsom R. D. C., [1929] 1 Ch. 287; Allen v. Waters & Co., [1935] 1 K. B. 200; Stockwell v. Southgate Corpn., [1936] 2 All E. R. 1343.
1728. *Add. Annotation*:—**Refd.** Gilbert v. Ching, [1936] A. C. 145.

## PART VII. SECT. 4.

1682 III. ———. ]—**VANCOUVER CITY v. RICHMOND**, [1928] 4 D. L. R. 506; [1928] 3 W. W. R. 166.—**CAN.**

## PART VIII. SECT. 1.

sa. *Right to enforce statutory duty*—*No right of waiver.*—A person entitled to sue to enforce the performance of a statutory duty cannot waive that right by acquiescence or conduct or even by an express contract.—**OUTEN v. STEWART & GRANT & WINNIPEG CITY**, [1932] 3 W. W. R. 193; 40 Man. L. R. 557.—**CAN.**

## PART VIII. SECT. 2.

o i. ———. ]—Where a statute creates a duty, an action will lie at the suit

of a person injured by reason of a breach thereof if, on a consideration of the Act, it appears that it was the intention of the legislature to create that duty to persons likely to be injured by such breach. It is not essential, in order to give the right of action, that the legislature should have had in mind the protection of a particular class of persons. If, however, it appears that the Act is intended only to create a duty to the State, no such action will lie.—**WHITTAKER v. ROZELLE WOOD PRODUCTS LTD.** (1936), 36 S. R. N. S. W. 204; 53 N. S. W. W. N. 71.—**AUS.**

## PART VIII. SECT. 3, SUB-SECT. 1.

1734 xxv. ———. ]—Where a liability

not existing at common law is created by a statute which at the same time gives a special & particular remedy for enforcing it, the remedy provided by the statute must be followed.—**FRANCES PULP CO. v. SPANISH RIVER PULP CO.**, [1928] 1 D. L. R. 753; 61 O. L. R. 512; *affd.*, [1929] 4 D. L. R. 192; 64 O. L. R. 148.—**CAN.**

1734 xxvi. ———. ]—Where a liability not existing at common law is created by a statute which also gives a particular & special remedy for enforcing it that remedy must be followed.—**DISTRICT MUNICIPALITY, COLDSTREAM OF v. BELLEVUE (B. C.)**, [1929] 4 D. L. R. 52; 2 W. W. R. 597.—**CAN.**

1734 xxvii. ———. ]—**FORT FRANCES PULP & PAPER CO. v. SPANISH RIVER**

1737. *Add. Annotations*:—**Consd.** A.-G. of Trinidad & Tobago v. Gordon Grant & Co., [1935] A. C. 532. **Refd.** Stepney Borough Council v. Walker (John) & Sons, Ltd., [1934] A. C. 365.
- 1739a. *Add. Annotation*:—**Refd.** Monk v. Warbey (1934), 151 L. T. 100.
1755. *Add. Annotations*:—**As to** (1) **Consd.** Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd. (1930), 46 T. L. R. 485. **Refd.** A.-G. v. Sharp (1930), 99 L. J. Ch. 441; A.-G. v. Premier Line, Ltd. (1931), 48 T. L. R. 104. **Generally**, **Refd.** R. v. Minister of Health, *Ex p.* Yaffe, [1931] A. C. 494.
1757. *Add. Annotation*:—**Refd.** Clark v. Epsom R. D. C., [1929] 1 Ch. 287.
1758. *Add. Annotations*:—**Consd.** Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd. (1930), 46 T. L. R. 485. **Refd.** Stepney Borough Council v. Walker (John) & Sons, Ltd., [1934] A. C. 365.
1768. *Add. Annotations*:—**Consd.** Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd. (1930), 46 T. L. R. 485; A.-G. of Trinidad & Tobago v. Gordon Grant & Co., [1935] A. C. 532.
1776. *Add. Annotation*:—**Apld.** Stevens v. Aldershot Gas, Water & District Lighting Co. (Now Mid-Southern District Utility Co.) (1932), 102 L. J. K. B. 12.
- 1777a. ———.]—Had this provision been contained in the English statute I entertain no doubt that in the absence of express penalty where some one was in terms by statute in a

public matter required to do a certain act, or if the act were to be done, to do it in a certain way, that if that person failed to obey that statute, the act done would be in contempt of the statute, & therefore, though there were no express penalty provided, the ordinary common law rules would apply. In such case, the matter being one of public obligation & the act done in contempt of the statute, in an appropriate case the remedy would lie for misdemeanour (SLESSER, L.J.).—**THE TORNI**, [1932] P. 78, 90; 101 L. J. P. 44; 147 L. T. 208; 48 T. L. R. 471; 18 Asp. M. L. C. 315, C. A.

1779. *Add. Annotation*:—**Refd.** A.-G. v. Sharp (1930), 99 L. J. Ch. 441.
1812. *Add. Annotation*:—**Refd.** Minter v. Priest, [1929] 1 K. B. 655.
1850. *Add. Annotations*:—**Refd.** Lochgelly Iron & Coal Co. v. M'Mullan, [1934] A. C. 1; Monk v. Warbey, [1935] 1 K. B. 75; Square v. Model Farm Danies (Bournemouth), Ltd., [1938] 2 All E. R. 740.
1853. *Add. Annotation*:—**Refd.** Monk v. Warbey, [1935] 1 K. B. 75.
1858. *Add. Annotations*:—**Refd.** Monk v. Warbey, [1935] 1 K. B. 75; Flower v. Ebbw Vale Steel, Iron & Coal Co., [1936] A. C. 206; Square v. Model Farm Danies (Bournemouth), Ltd., [1938] 2 All E. R. 740.
1873. *Add. Annotations*:—**Refd.** London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd., [1936] Ch. 78; Legge (George) & Son, Ltd. v. Wenlock Corpn., [1938] A. C. 201.

## Part IX.—Repeal.

1896. *Add. Annotation*:—**Refd.** West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt, [1932] 2 K. B. 1.
1918. *Add. Annotation*:—**Refd.** *Re* Dickens, Dickens v. Hawksley, [1935] Ch. 267, C. A.
1919. *Add. Annotation*:—**Refd.** West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt, [1932] 2 K. B. 1.
- 1928a. ———.]—**SECRETARY OF STATE FOR INDIA v. HINDUSTHAN CO-OPERATIVE INSURANCE SOCIETY**, No. 772a, *ante*.

1935. *Add. Annotation*:—**Consd.** Smith v. Benabo, [1937] 1 K. B. 518.
- 1939a. ———.]—If a later statute again describes an offence created by a previous one, & imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute (GODDARD, J.).—**SMITH v. BENABO**, [1937] 1 K. B. 518; [1937] 1 All E. R. 523; 106 L. J. K. B. 367; 156 L. T. 194; 101 J. P. 141; 53 T. L. R. 353; 81 Sol. Jo. 200; 35 L. G. R. 130; 30 Cox, C. C. 540.

**PULP & PAPER MILLS, LTD.**, [1931] 2 D. L. R. 97.—**CAN.**

1734 xxviii. ———.]—A party injured by the diversion of a water-course is confined to the compensation & remedy given by Municipal Act, R.S.O., 1927.—**MCCURDY v. BAYHAM TOWNSHIP**, [1935] 2 D. L. R. 580; O. R. 271.—**CAN.**

1734 xxix. ———.]—Where a statute creates an offence & defines remedies an injured party has no remedies other than those specified. There is no private right of action, therefore, for offences within the Combines Investigation Act, 1927.—**TRANSPORT OIL CO. v. IMPERIAL OIL CO.**, [1935] 1 D. L. R. 751; O. R. 111; *affd.*, [1935] 2 D. L. R. 500; O. R. 215; 63 Can. C. C. 108.—**CAN.**

### PART VIII. SECT. 5, SUB-SECT. 2.—A.

1842 i. *Who may bring action*—

*Members of statutory class.*—Where it appears either from a reading of an enactment itself or from that & a regard to surrounding circumstances that the Legislature has prohibited the doing of an act in the interest of any person or class of persons, such person, or any one of such class of persons, can obtain the intervention of the ct. to enforce the prohibition without proof of special damage.—**ROODEPOORT - MARAISBURG TOWN COUNCIL v. EASTERN PROPERTIES (PROP.), LTD.**, [1933] App. D. 87.—**S. AF.**

### PART IX. SECT. 1, SUB-SECT. 2.—D.

1924 ii. ———.]—Sections of a public Act which are incorporated by reference in a private Act are not repealed by the repeal of the public Act.—**GRANBY CONSOLIDATED MINING, SMELTING & POWER CO., LTD. v. WEST KOOTENAY POWER & LIGHT CO., LTD.**, [1929] 2

D. L. R. 651; 2 W. W. R. 470; 41 B. C. R. 89; *affg.*, [1928] 4 D. L. R. 724; 3 W. W. R. 301; 40 B. C. R. 269.—**CAN.**

1924 iii. ———.]—Where a statute is incorporated by reference into a second statute the repeal of the first statute by a third does not affect the second. This rule would apply *a fortiori* to legislation by one legislative body which incorporates the enactments of another legislative body by reference.—**R. v. ZASLAVSKY**, [1935] 2 W. W. R. 31; 3 D. L. R. 788; 64 Can. C. C. 106.—**CAN.**

### PART IX. SECT. 1, SUB-SECT. 2.—F. (b) i.

1941 xiv. ———.]—As a rule, a general statute will not override the provisions of a special Act, & general powers do not override special powers.—**ENGEL v. GALLANT** (1934), 7 M. P. R. 219; 62 C. C. C. 302.—**CAN.**

1952. *Add. Annotations* :—**Consd.** Montreal (City) Corp'n. v. Montreal Industrial Land Co., [1932] A. C. 700. **Refd.** Jacobs v. London County Council, Shaw v. London County Council, [1935] 1 K. B. 67.
1955. *Add. Annotation* :—**Refd.** Jacobs v. London County Council, Shaw v. London County Council, [1935] 1 K. B. 67.
1963. *Add. Annotation* :—**Consd.** R. v. Minister of Health, *Ex p.* Villiers, [1936] 1 All E. R. 817.
1968. *Add. Annotations* :—**As to** (1) **Consd.** R. v. Minister of Health, *Ex p.* Yaffe, [1930] 2 K. B. 98. **As to** (2) **Consd.** R. v. Minister of Health, *Ex p.* Villiers, [1936] 1 All E. R. 817.
1974. *Add. Annotations* :—**Consd.** A.-G. v. Liverpool Corp'n. & London, Midland & Scottish Ry. Co., [1937] Ch. 450; Drapers Co. v. London Passenger Transport Board, [1937] Ch. 344. **Refd.** West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt, [1932] 2 K. B. 1; Jacobs v. London County Council, Shaw v. London County Council, [1935] 1 K. B. 67; R. v. Minister of Health, *Ex p.* Villiers, [1936] 1 All E. R. 817.
1989. *Add. Annotation* :—**Refd.** Farnworth v. Manchester Corp'n., [1929] 1 K. B. 533.
1990. *Add. Annotation* :—**Refd.** Farnworth v. Manchester Corp'n. (1929), 98 L. J. K. B. 224.
2007. *Add. Annotation* :—**Refd.** R. v. London County Council, *Ex p.* Entertainments Protection Assoc'n., Ltd., [1931] 2 K. B. 215.
2048. *Add. Annotations* :—**Consd.** *Re Debtor*, *Ex p.* Debtor (No. 490 of 1935), [1936] Ch. 237. **Refd.** Smith v. Metropolitan Properties Co., [1932] 1 K. B. 314.
2053. *Add. Annotation* :—**Refd.** R. v. Minister of Health, *Ex p.* Villiers, [1936] 1 All E. R. 817.

## Part XI.—Codifying and Consolidating Statutes.

2094. *Add. Annotations* :—**Consd.** Shotts Iron Co. v. Curran, [1929] A. C. 409. **Apld.** Stag Line, Ltd. v. Foscolo Mango & Co. (1931), 48 T. L. R.
127. **Consd.** Derbyshire Territorial Army Assoc'n. v. South-East Derbyshire Assessment Committee, [1935] 2 K. B. 373.

## Part XII.—Statutory Rules and Orders.

2114. *Add. Annotation* :—**Refd.** R. v. Minister of Health, *Ex p.* Yaffe, [1930] 2 K. B. 98.
2132. *Add. Annotation* :—**Consd.** R. v. Minister of Health, *Ex p.* Yaffe, [1930] 2 K. B. 98.
2134. *Add. Annotation* :—**Consd.** R. v. Minister of Health, *Ex p.* Yaffe, [1930] 2 K. B. 98.

### PART IX. SECT. 1, SUB-SECT. 2.— F. (b) iv.

1975 vii. —.—.]—In the case of conflict between a general statute & one passed for a particular purpose the latter must, so far as that purpose extends, prevail, whether the special Act was passed before or after the general Act.—LYNE v. CHECKER STAGE SERVICE, LTD., [1932] 1 W. W. R. 335.—CAN.

### PART IX. SECT. 1, SUB-SECT. 2.— G. (b).

1983 vii. —.—.]—R. v. RUDDICK, [1928] 3 D. L. R. 208; 49 Can. Crim. Cas. 323; 62 O. J. R. 248.—CAN.

### PART XI.

2107 xiii. —.—.]—*English & New Zealand distinguished.*—The difference between an identical section in an English consolidation Act only & a New Zealand consolidating & amending Act discussed.—MANAGH v. MANAGH & GOODGETT, [1937] N. Z. L. R. 498; 13 N. Z. L. J. 180.—N.Z.

2107 xiv. —.—.]—The duty of a tribunal interpreting a consolidating Act is to give effect to the language as it stands. Where, however, there is an ambiguity, it may use the history of the legislation to solve that ambiguity.—THOMAS v. DAVIES, [1937] V. L. R. 217; 43 Argus L. R. 366.—AUS.

### PART XII. SECT. 1.

**sg. Power of disallowance—Time limit for exercise.**—Sect. 10 of the Acts Interpretation Act, 1904–1930, requires all Regulations made under statutory power to be laid before both Houses of Parliament, & further provides that: "If either House of the Parliament passes a resolution of which notice has been given at any time within fifteen sitting days after such Regulations have been laid before such House disallowing any regulation, such regulation shall thereupon cease to have effect"—*Held*: the words above quoted indicated that it was the intention of the legislature to fix a time beyond which the disallowance of any Regulation should not be effected, & not to impose a condition on the power to disallow.—DIGNAN v. AUSTRALIAN STEAMSHIPS PRY., LTD., [1931] Argus L. R. 213; 5 A. L. J. 74.—AUS.

**sk. Repeal of Act authorising Orders—Effect of.**—The repeal of an Act, or clause of an Act, authorising the passing or adoption of Orders in Council, regulations or bye-laws, has the effect of repealing or voiding the Orders in Council, regulations or bye-laws passed or adopted under the authority of such Act or clause, unless there be in the repealing Act a stipulation preserving their validity notwithstanding the repeal. Orders in Council, regulations & bye-laws are subordinate

to the Act & when the Act is repealed the Orders in Council, regulations & bye-laws made thereunder, unless otherwise expressly provided, lapse.—BLAKEY & CO., LTD. v. R., [1935] Ex. C. R. 223; 4 D. L. R. 670.—CAN.

### PART XII. SECT. 2.

2126 iii. —.—.]—BYERS v. CHINN, [1928] App. D. 322.—S. AF.

2126 iv. —.—.]—*Not when in conflict with statute.*—R. v. WRIGHT, [1928] 1 D. L. R. 701; 59 N. S. R. 443.—CAN.

### PART XII. SECT. 3.

2132 ii. —.—.]—*Conflict between regulations & statute.*—If regulations are in conflict with an Act, the statutory provisions should be treated as dominant & the regulations as subordinate thereto in order to carry out the intention of Parliament.—ENGLAND v. PENFOLD, *Ex p.* PENFOLD, [1934] S. R. (Q.) 125; 28 Q. J. P. R. 90.—AUS.

### PART XIII. SECT. 4.

**sc. Object & construction.**—All rules of ct. are nothing but provisions intended to secure the proper administration of justice, & it is essential that they should be made to serve & be subordinate to that purpose.—SALDANHA v. SALDANHA (1929), 1 L. R. 54 Bom. 288.—IND.

## STOCK EXCHANGE.

## Part II.—Constitution.

14. *Add. Annotation*:—*Refd.* Cookson v. Harewood (1931), 101 L. J. K. B. 394, n.

## Part III.—Relation between Parties to Stock Exchange Transactions.

21. *Add. Annotation*:—*As to (7)* *Refd.* Solloway v. Johnson, [1934] A. C. 193.
26. *Add. Annotation*:—*Consd.* Solloway v. Johnson, [1934] A. C. 193.
- 30a. *Whether broker exercises public calling.*—*Per* SLESSER, L.J.: A stockbroker does not exercise a "public calling" in the sense in which that term is used as applied to carriers & certain others.—*JARVIS v. MOY, DAVIES, SMITH, VANDERVEIL & Co.*, [1936] 1 K. B. 399; 105 L. J. K. B. 309; 154 L. T. 365, C. A.
67. *Add. Annotation*:—*Generally*, *Refd.* Solloway v. Johnson, [1934] A. C. 193.
69. *Add. Annotation*:—*Refd.* Solloway v. Johnson, [1934] A. C. 193.

## PART III. SECT. 1.

*sc. Town broker & country broker—Agency.*—A broker acting as correspondent for an out-of-town brokerage firm is not necessarily the agent of that firm, nor the agent of his customers.—*ST. PIERRE v. O'HEARN*, [1936] 1 D. L. R. 441.—CAN.

## PART III. SECT. 2, SUB-SECT. 1.

24 i. *Fiduciary relation—Agency—Client's right to follow money.*—Where share certificates are delivered by the owner thereof to a broker with instructions to sell them the broker's relation to the owner is a fiduciary one, the certificates are impressed with a trust, & the broker should not be heard to give any explanation of his dealing with the certificates inconsistent with his authority.—*PLUMMER v. MACK & TIMMS*, [1930] 2 W. W. R. 107; 3 D. L. R. 999; *affd.*, [1930] 3 W. W. R. 188; 4 D. L. R. 768.—CAN.

24 ii. —.—.—*J.*—The legal relationship of a stockbroker & his client is a fiduciary one, that of agent & principal; &, therefore, the broker is not entitled, without the fullest knowledge & assent of the client, to put himself in a position where his interest conflicts with that of his client. He must deal for a client in the capacity of agent, &, therefore, has not the right to trade on the stock markets for himself & at the same time transact his clients' business thereon as their broker.—*R. v. SOLLOWAY & MILLS*, [1930] 2 W. W. R. 516; 54 Can. C. C. 129.—CAN.

h i. —.—.—*J.*—*HUNNINGS (H. E.) & Co., Ltd. v. HALL*, [1932] 2 W. W. R. 541; 4 D. L. R. 270; 46 B. C. R. 12.—CAN.

## PART III. SECT. 2, SUB-SECT. 2.—A.

*ss. Onus of proof.*—In an action by a customer against a stockbroker for wrongfully selling certain stocks & bonds, which he had deposited with the broker as collateral security for his account, & retaining the proceeds:—*Held*: pltf. was not under the onus of proving that the conditions which under the contract between the parties would give deft. the right to sell the securities had not come into existence, but that the onus was on deft. to prove that said conditions had arisen; & even if this view as to the onus was

incorrect, pltf. had at any rate made out a *prima facie* case.—*LOCKETT v. SOLLOWAY MILLS & Co., Ltd.*, [1931] 3 W. W. R. 302; *affd.*, [1932] 1 W. W. R. 886; 46 B. C. R. 211.—CAN.

*sy. —.—.*—*J.*—Sale of securities delivered to stock-brokers as collateral amounts to conversion, & the onus is on them to prove their right to dispose of them.—*BLUMBERGER v. SOLLOWAY, MILLS & Co., Ltd.*, [1932], 46 B. C. R. 241; *affg.* (1931), 45 B. C. R. 66.—CAN.

## PART III. SECT. 2, SUB-SECT. 2.—B.

*sa. Pledging securities of client—For advances to broker.*—*Held*: when collateral security is deposited with a broker & is by him pledged to a bank for any sum, & the loan from the bank is entirely paid off, & at the same time the debt to the broker for which the collateral has been deposited, the rights of both the broker & the bank are at an end, & the owner of the collateral is entitled to its return.—*Re WIGGINS, LTD.*, [1931] 3 D. L. R. 383; O. R. 337.—CAN.

## PART III. SECT. 2, SUB-SECT. 3.

—A.

43 i. *Purchase for client—Readiness to deliver.*—When stockbrokers are instructed to buy on margin they must be at all times ready & able to deliver to their customer.—*ROCHESTER v. SOLLOWAY MILLS*, [1933] 2 D. L. R. 90; O. R. 230; *on appeal*, [1934] O. R. 483.—CAN.

*sd. Duty to use due care & skill.*—*GLENNIE v. McD. & C. HOLDINGS, LTD.*, [1935] S. C. R. 257; 2 D. L. R. 561.—CAN.

*sf. Duty owed to principal only.*—A broker is under no duty to exercise care in regard to market prices towards a person with whom no relationship of principal & agent exists.—*OLMSTAD v. E. A. PIERCE & Co.*, [1937] 1 D. L. R. 625; O. R. 20.—CAN.

## PART III. SECT. 2, SUB-SECT. 3.—B.

50 iii. —.—.—*J.*—*ENGLISH v. KERN AGENCIES, LTD.*, [1931] 2 W. W. R. 22; 2 D. L. R. 948.—CAN.

q i. —.—.—*J.*—Pltf., a customer of a broker, delivered to the latter a share certificate registered in his name

with instructions to sell the shares at a certain price or better. The broker sold the shares for its own purposes at a lower price, & when pltf. demanded his certificate the broker tendered him another certificate of the same co. for the same number of shares. This pltf. refused; & sued for conversion:—*Held*: pltf. was entitled to judgment &, in the absence of other evidence of the value of the shares at the date of the sale, the amount to which pltf. was entitled was that for which the shares were sold.—*MACINNES v. CARTWRIGHT & CRICKMORE, LTD.*, [1931] 1 W. W. R. 81; 1 D. L. R. 572; *affd.*, [1931] S. C. R. 425; 3 D. L. R. 693.—CAN.

q ii. —.—.—*J.*—*SOLLOWAY v. BLUMBERGER*, [1933] S. C. R. 163; 3 D. L. R. 86.—CAN.

t i. —.—.—*Defence—Rules of stock exchange.*—Damages were claimed for breach of an alleged agreement to carry certain stocks & maintain pltf. in a short position with respect thereto:—*Held*: even if there was such a definite agreement, the claim failed because under the rules of the stock exchange deft. was obliged to return the stock borrowed with respect to the short transactions before the shares had dropped to the covering point which was alleged by pltf., & deft.'s evidence had not been refuted that other stock could not be secured to take their place &, therefore, deft. had to buy "to cover."—*CLAY & CLAY v. POWELL & Co., Ltd.*, [1931] 2 W. W. R. 325; 3 D. L. R. 538; 44 B. C. R. 124; *reversd. on other grounds*, [1932] S. C. R. 210; 1 D. L. R. 366.—CAN.

*sg. Instructions to buy "futures."*—The term "futures" refers to a speculative transaction & a broker is therefore under no obligation to buy the commodity indicated in his instructions to buy for future delivery.—*BETCHERMAN v. PIERCE & Co.*, [1933] 3 D. L. R. 99; O. R. 505; *reversd.*, [1934] 2 D. L. R. 449.—CAN.

## PART III. SECT. 2, SUB-SECT. 4.—A. (a).

sl. *Cover deposited by married woman—Whether broker may inquire as to title.*—A broker is not entitled to question the title of a married woman to securities placed in his hands to guarantee speculation.—*JOHNSTON v. CHANNELL*, [1935] 4 D. L. R. 401.—CAN.

101. *Add. Citations*:—[1929] 1 K. B. 321; 98 L. J. K. B. 243; 73 Sol. Jo. 13.

*Add. Annotation*:—*Refd.* Woodward v. Wolfe, [1936] 3 All E. R. 529.

- 147a. — *Part of account.*—*MORTEN v. HILTON* (GIBBES & SMITH, [1937] 2 K. B. 176, n.

*Annotation*:—*Apld.* Samson v. Frazier Jelke & Co., [1937] 2 K. B. 170.

- 147b. — — — — —.]—Pltf. was a speculator on the New York & London stock exchanges. Defts., who were members of the New York exchange but not of the London exchange, acted for him on margin terms, the London transactions being carried out through brokers who were members of the London stock exchange. Defts. became personally liable to these brokers for the fulfilment of pltf.'s contracts. Pltf.'s speculations were unsuccessful & defts. required him to provide further cover. He failed to do so, & defts. sold part of his shares to provide cover for the remainder:—*Held*: defts. were entitled, pltf. being in default, to close part of the account & carry over the remainder, their only duty being to act in good faith & do what was reasonable in the interests of themselves & their client.—*SAMSON v. FRAZIER JELKE & Co.*, [1937] 2 K. B. 170; [1937] 2 All E. R. 588; 106 L. J. K. B. 854; 157 L. T. 530; 81 Sol. Jo. 398.

160. *Add. Annotations*:—As to (1) *Refd.* Morten v. Hilton Gibbs & Smith, [1937] 2 K. B. 176, n.; Samson v. Frazier, Jelke & Co., [1937] 2 K. B. 170.

161. *Add. Annotation*:—*Refd.* Samson v. Frazier, Jelke & Co., [1937] 2 All E. R. 588.

162. *Add. Annotations*:—*Refd.* Morten v. Hilton Gibbs & Smith, [1937] 2 K. B. 176, n.; Samson v. Frazier, Jelke & Co., [1937] 2 K. B. 170.

178. *Add. Annotation*:—*Refd.* *Re* Wheeler & Co.'s Trustee v. Kirby & Grainger (1933), 76 L. Jo. 86.

189. *Add. Annotation*:—*Consd.* Solloway v. Johnson, [1931] A. C. 193.

195. *Add. Annotations*:—*Refd.* Legh v. Legh (1930), 143 L. T. 151; Lynn v. Bamber, [1930] 2 K. B. 72.

- 211a. *Right of jobber to sue third party.*—C. an outside broker, who conducted his brokerage business through defts., who had a seat on the Toronto Standard Stock & Mining Exchange, gave instructions for the purchase & sale of shares without disclosing the name of his clients. Most of the transactions were on margin. C. found himself unable to find the cash for large purchases of a certain class of stock then open, & could not find the client for whom the purchases had been made. Defts., purporting to act under powers given by the contract between them & C., proceeded to sell shares bought & held as security on the general account, which mainly consisted of shares bought on behalf of C.'s clients, & in that way indemnified themselves against the loss on the particular stock in question. C. went into bkpcy., making an assignment for the benefit of his creditors. On a claim for damages by C. & his trustee in bkpcy. against defts., the trial judge made a declaration (*inter alia*) that defts. held the securities

which they sold in trust for C. or his trustee in bkpcy. as trustee for C.'s customers & clients, & that defts. had no right to charge those securities with the purchase price of the stock, & the judgment made provision for the determination & payment of damages. On appeal by defts. the Ct. of Appeal of Ontario set aside this judgment. Pltfs. appealed:—*Held*: that judgment of the trial judge could not stand. So far as the rights of the parties depended upon contract, C. had no claim against defts. in the capacity of trustee. Although there had been numerous actions in which an agent for undisclosed principals had sued in his own name, there appeared to be no precedent for such an agent suing as trustee for his principals; further, if the case were regarded as a wrongful dealing with property apart from privity of contract the result was the same. If there was nothing due from the undisclosed principal in respect of the shares which had been bought, either he or the agent must sue: no question of trusteeship arose. With regard to shares deposited as margin, the agent was in the position of mtgee. with a right to submtge. A mtgee. was not a trustee, & if the shares were improperly dealt with by the submtgee., the mtgee. could sue in his own right, or the mtgor. might, under proper conditions, sue to protect his property. The mtgee. could not sue as trustee for the mtgor., for he was not a trustee. In the present case either C.'s rights passed to his trustee in bkpcy., or C.'s customers alone could sue, & neither C. nor his trustee could sue as trustee for the customers.—*ALLEN v. O'HEARN & Co.*, [1937] A. C. 213; [1936] 3 All E. R. 828; 106 L. J. P. C. 14; 156 L. T. 119; 53 T. L. R. 176, P. C.

215. *Add. Annotation*:—*Consd.* Stanley & Co. v. Solomon, Ltd., [1932] 2 K. B. 287.

- 217a. — — — — — *What amounts to "loss sustained" by principal.*—By an agreement in writing between pltfs., who were stockbrokers & members of the Stock Exchange, & defts., who were also stockbrokers but not members of the Stock Exchange, the latter agreed that in consideration of receiving 50 per cent. of any commission on business introduced by them to pltfs. they would be liable for 50 per cent. of any "loss sustained" by pltfs. in connection with such business. Defts. introduced to pltfs. one W., & as a result of his transactions he incurred a debt to pltfs. no part of which had been paid. W. executed a deed of assignment of his property for the benefit of his creditors, & both pltfs. & defts. were assenting creditors to the deed. Pltfs. claimed that on the execution of that deed of assignment a loss had been sustained by them within the meaning of the above-mentioned agreement, & they brought an action to recover 50 per cent. of W.'s debt:—*Held*: the mere signing of the deed of assignment by W. did not establish a loss sustained by pltfs., & that in the absence of evidence of actual loss sustained by them the action failed.—*STANLEY (MONTAGU) & Co. v. SOLOMON (J. C.), LTD.*, [1932] 2 K. B. 287; 101 L. J. K. B. 532; 147 L. T. 196, C. A.

- 223a. *Necessity for consent of principal.*—Under



the Rules & Regulations of the Stock Exchange & under the general law half-commission is not payable to an agent without

the principal's consent.—*WAITHMAN, DONEGAN & Co. v. RAMIREZ* (1932), 48 T. L. R. 360; 76 Sol. Jo. 290.

## Part V.—Breach of Contract.

373. *Add. Annotation* :—*Refd. Solloway v. Johnson*, [1934] A. C. 193.

## Part VI.—Default and Bankruptcy.

384a. — *Trustee not entitled to recover against jobber.*—*Applt.* was a director of S. M. & Co., a Canadian stock brokerage co. with several branches. T. F. & Co. were a stock brokerage co. carrying on business at a town in British Columbia where there was no stock exchange. In Apr. 1928, S. M. & Co. agreed to accept orders from T. F. & Co. for the sale & purchase of shares, both for cash & on open account, & to divide the commissions with them; T. F. & Co. were to provide 33½ per cent. as margin. T. F. & Co. made numerous contracts with S. M. & Co. in pursuance of orders from their clients, also some on their own behalf. The contract notes were all in the name of T. F. & Co., who did not send them to their clients, but a separate contract was made for each order. Money paid to T. F. & Co. by their clients went into their general account. S. M. & Co. knew that the transactions were entered into by T. F. & Co. mainly, at least, on behalf of their clients. In Sept. 1929, T. F. & Co. became bkpt.; resp. was trustee in the bkpty. In an action brought by him as trustee he obtained judg-

ment for the return of all sums paid by T. F. & Co. to S. M. & Co. on transactions upon open account, & against *applt.* for the amount of those sums as damages. The grounds were that S. M. & Co. adopted a fraudulent system of not making independent contracts in respect of shares dealt in, & that *applt.* was a party thereto. There was no appeal by S. M. & Co.:—*Held*: the judgment against *applt.* should be set aside, because T. F. & Co.'s clients were undisclosed principals to the contracts made upon their orders, & resp. therefore could not maintain the action as to those contracts, & because the action failed as to all the contracts in the absence of evidence that the fraudulent system had been used in connection with any particular contract; further, that even if the judgment could be sustained against the co., *applt.* was not liable in the absence of proof of loss.—*SOLLOWAY v. JOHNSON*, [1934] A. C. 193; 103 L. J. P. C. 49; 150 L. T. 421; 50 T. L. R. 268.

387. *Add. Annotation* :—*Refd. Solloway v. Johnson*, [1934] A. C. 193.

### PART IV. SECT. 7, SUB-SECT. 1.

sb. *Delay in delivery of certificates*—*What is reasonable time.*—*Defts.*, stockbrokers in C., on Sept. 14, 1929, wired *pltf.*, stockbrokers in T., to buy certain shares at a named price. *Pltf.* wore, to the knowledge of *defts.*, members of the T. Stock Exchange. *Pltf.* bought the shares upon the Exchange on the same day & at the named price. *Defts.* knew that the shares would be bought on the Exchange & according to its rules & customs. *Pltf.* were not able to procure delivery of the certificates for the shares until Sept. 27. On Oct. 1 they drew on *defts.* for the price, attaching the certificates to the draft. *Defts.* on Oct. 4 refused to take delivery on account of the delay:—*Held*: in the absence of an express stipulation as to the immediate forwarding of the certificates or of a demand to forward them at once, the delay in procuring & forwarding them was not unreasonable & *defts.* were not justified in repudiating the contract.—*CRANG & Co. v. PLOTKE & Co.*, [1931] 1 D. L. R. 668; 66 O. L. R. 332.—*CAN.*

### PART V. SECT. 1.

373 ii. — *—*.—If broker fails to deliver, purchaser is entitled to value of the shares at time of tender of balance due & demand, less any balance owing on them, & less commission & interest.—*CROFT v. MITCHELL* (1913), 14 D. L. R. 914.—*CAN.*

373 iii. — *Failure to deliver within reasonable time*—*Waiver.*—*CLARK & Co. v. ROBINSON*, [1930] 4 D. L. R. 158; 42 B. C. R. 409.—*CAN.*

373 iii. — *—*.—In an action in which stockbrokers were held liable in

damages to a customer for selling without his authority shares of his which they were holding for him:—*Held*: in assessing damages, the date when *pltf.* would have sold the shares had he not been prevented from doing so by their prior sale by the brokers should be determined on the assumption that he would have done what prudent people would have done & have sold when the hour came to sell. In the present case it was held that this point of time was fixed as at that date when *pltf.*, after objecting to a statement of his account which showed said shares as sold, requested that they be placed to his credit because he wanted to sell them. He was, therefore, awarded the difference between the low market price on that day & the price at which *defts.* had previously sold.—*SUNDERLAND v. SOLLOWAY MILLS & Co., LTD.*, [1930] 3 W. W. R. 641; 43 B. C. R. 297; *affd.*, [1931] 2 W. W. R. 393; 44 B. C. R. 21; *affd.*, [1931] S. C. R. 714; [1932] 4 D. L. R. 795.—*CAN.*

### PART VI. SECT. 2.

400 i. *Property available for distribution among creditors*—*Shares purchased by broker for client.*—In determining on the bkpty. of a stockbroker whether certain shares, certificates for which were in his possession at the time of the bkpty., are the property of a claimant thereto who had been dealing, as a buyer of such shares, with the broker, or are assets in the hands of the trustee, the distinction must be observed between the case where the relationship of the broker & the claimant was that of vendor & purchaser & the case where the relationship was that of agent & principal.

In the former case the shares will not be held to be the property of the claimant unless certificates therefor have been specifically appropriated to the claimant's contract. In the latter case, i.e. where the relationship was that of principal & agent, it must be held that the certificates on hand include those for the shares bought for the claimant if the certificates on hand of the kind in question are sufficient to meet the demands of all purchasers of such shares; & the claimant will be entitled to delivery of the certificates provided he has either paid, or pays therefor in full, or if he has to his credit on the books of the broker an amount sufficient to meet the balance, if any, due from him on said shares.—*Re STORME-FORLONG-MATTHEWS, LTD., Re KERN AGENCIES, LTD.*, [1931] 1 W. W. R. 817; 3 D. L. R. 170; 39 Man. L. R. 476; 12 C. B. R. 313; *revers.*, [1931] 1 W. W. R. 304.—*CAN.*

400 ii. — *Card of membership of Exchange.*—A registered broker in the Sir Dinshaw Petit Native Share Brokers' Hall, Bombay, was declared a defaulter & his card of membership was forfeited by the directors. Shortly afterwards he was adjudicated an insolvent under Presidency Towns Insolvent Act, 1909, & by virtue of the material sections thereof all his property wherever situated which might belong to or be vested in him vested in the Official Assignee of Bombay & became divisible among the insolvent's creditors. In an action by the Official Assignee claiming against the Native Share & Stock Brokers' Assoc. a declaration that the card of the insolvent & all rights & benefits annexed thereto were vested in the Official

**403a. Cash in hands of broker—Right to follow.]**

—Where a client has paid money to a stock & share broker for the purchase of shares which have not been delivered to him, & the broker becomes bkpt., if the transaction was one between principal & agent, & not between principal & principal, a fiduciary

relationship is created & the client is entitled to the return of his money, if it can be followed.—*Re WHEELER (ARTHUR) & Co. (No. 389 of 1931), TRUSTEE v. KIRBY & GRAINGER (1933), 102 L. J. Ch. 341; [1933] B. & C. R. 124.*

Assignee, & that he was entitled to the net proceeds of their sale:—*Held*: by virtue of the nature & character of the assoc. as regulated by the deed of assoc. & the rules made thereunder, in the case of a defaulting member who was expelled from the assoc., no interest in his card remained in himself & none that could pass to his assignee.—*BOMBAY OFFICIAL ASSIGNEE v. SHROFF (1932), 48 T. L. R. 443, P. C.—IND.*

**ii.** — *Payment to obtain shares—Lien for salvage.*—Where in pursuance of the authority of an order of the ct. the stockbroker's trustee in bkpty. has obtained share certificates from another broker who acted as the bkpt.'s correspondent on another exchange & in order to do so has had to pay said correspondent the amount due on said shares, these shares are, except with respect to the money so expended, in the same position as shares which, in the ordinary course, come into the hands of the trustee in taking possession of the assets of the bkpt.: the amount expended to salvage such shares, & interest thereon, constitutes, however, a lien upon them which should be paid *pro rata* by the customers who benefited by the course pursued by the trustee.—*Re CLARK (R. P.) & Co. (VANCOUVER, LTD., [1931] 3 W. W. R. 79; 44 B. C. R. 301.—CAN.*

**ix.** *Rights of clients.*—On the bkpty. of a stockbroker, if there are sufficient shares of any particular description on hand to satisfy orders given therefor by customers to the broker they should be delivered to such customers if the latter have paid for them in full. If the shares have not been fully paid for by the customers they should, before receiving the shares, be required to make payment of the balance due thereon with interest & to make payment of any other indebtedness owing the broker. If there are not available sufficient share certificates of a particular description to satisfy the purchases by the different customers, the latter should be given their *pro rata* number of the shares which are available.—*Re CLARK (R. P.) & Co. (VANCOUVER), LTD., [1931] 3 W. W. R. 79; 44 B. C. R. 301.—CAN.*

**xy.** — *On the bkpty. of a stock-brokerage co.:—Held*: the procedure by which it recorded its transactions on behalf of its customers was such as enabled the latter to identify & claim certain specific securities or the proceeds thereof as their property.—*Re KERN AGENCIES, LTD. (No. 3), [1932] 1 W. W. R. 585.—CAN.*

**sa.** *Pledge of own & client's stock—Right of client to payment out of proceeds.*—*Re WIGGINS, LTD., TRAVELERS & SPRATT'S CLAIMS. [1931] 4 D. L. R. 338; O. R. 573.—CAN.*

**sb.** *Recovery of amount paid for shares on behalf of customer.*—The trustee in bkpty. of a stock-brokerage co. sued to recover money paid by the brokers for the purchase of shares on behalf of deft. Pltf. was at all times ready to deliver, & during the trial did deliver, enough shares of the particular stocks purchased, free from the demands of others, to satisfy deft.'s demand.—*Held*: it was not necessary that the identical shares purchased for deft. should have been earmarked & kept available for him, the brokers being only required to have available for delivery, on demand & payment,

enough of the kind of shares ordered by him; but deft. was obliged to tender the amount due the brokers before he could insist on delivery of the shares, & since he had not done so, & enough shares were available for him, the trustee was entitled to judgment.—*STOBIE-FORLONG ASSETS, LTD. v. BARKER, [1932] 2 W. W. R. 274; 3 D. L. R. 182; 45 B. C. R. 394.—CAN.*

**sd.** *Pledge of shares to bank—Return of shares by bank to trustee—Customer not entitled to return of specific shares.*—*Re CARROLL & WRIGHT, Ex p. BAIN, [1932] 3 D. L. R. 410; O. R. 474.—CAN.*

**st.** — *Return of some shares—Distribution.*—If on the bkpty. of a stockbroker it is found that he has wrongfully pledged the securities of customers including both securities purchased outright & those purchased on margin & that, after the pledgee had sold enough of the pledged securities to satisfy his claim, there was a surplus in cash or securities remaining, but not enough to satisfy the claims of the broker's customers, the owners of securities purchased outright but remaining unsold are not entitled, in the distribution of the surplus cash & securities, to claim their securities without making a *pro rata* contribution to the "burden of the loan," nor are the customers who purchased outright entitled to a preference over margin customers; but, in accordance with the principle that "equality is equity" all classes of customers must share equally in the said burden.—*Re CLARK MARTIN & Co., LTD., [1933] 3 W. W. R. 261; [1934] 1 D. L. R. 521.—CAN.*

**sg.** — *Where a stock-broker has, in breach of his duty, repledged customers' securities pledged with him, & subsequently is made bkpt., & the pledgee realises on some of the securities & returns others, a sole unsatisfied customer is entitled to payment from the trustee in priority to the general creditors.*—*Re HERON & Co., Ex p. ROBERTSON, [1933] 4 D. L. R. 43; O. R. 693.—CAN.*

**sk.** — *On an application under Trustee Act for advice & directions, made by the trustee under a deed of arrangement between a stock-brokerage co. & all except two of its creditors:—Held*: where a stockbroker has wrongfully pledged securities belonging to his customers to a bank which has sold part of them to liquidate the debt owed it & those remaining unsold are not sufficient to satisfy the claims of his customers, the ct. cannot, in view of *Sinclair v. Brougham, [1914] A. C. 398*, at pp. 418-21, apply the doctrine of the American Cts. termed "sharing the burden of the loan," but must hold in the case of a creditor customer that where securities remaining unsold are earmarked & can be identified as those pledged by the customer or in which he specifically directed his money to be invested he is entitled to delivery of them & where they cannot be so identified he should be credited with their market value as of the date when he became a creditor. In the case of customers indebted to the broker & who left securities with him as collateral the customer on paying the amount which he owes the broker is entitled to their return if they can be identified.—*Re JACKSON & MUIR & Co., LTD., [1935] 1 W. W. R. 72; 2 D. L. R. 808.—CAN.*

**PART VI. SECT. 3.**

**sd.** *Differences payable from one stockbroker to another—Whether divisible among stock exchange creditors only on insolvency.*—*KAIKUSHROO TALYARKHAN v. BAI GULAB (1928), 1 L. R. 53 Bom. 508.—IND.*

**PART VII. SECT. 1, SUB-SECT. 1.**

**sl.** *Security Frauds Prevention Acts—Security—Agreements relating to real property—"Lunch & lecture" method.*—*Held*: the purpose & intent of the Act are to prevent & put an end to such dealings & therefore an order enjoining resp. for so trading in securities was granted.—*A.-G. of ONTARIO v. HUTCHINSON, [1931] 1 D. L. R. 56; 66 O. L. R. 387.—CAN.*

**sh.** — *Officer of Dominion company trading—No defence.*—*R. v. HAZZARD (1931), 57 Can. C. C. 254.—CAN.*

**sk.** — *Shares in company.*—Shares in a co. are "securities" within Security Frauds Prevention Act, 1930.—*R. v. McDONNELL, [1935] 1 W. W. R. 175; 1 D. L. R. 532; 63 Can. C. C. 150.—CAN.*

**sl.** — *What amounts to trading.*—The conduct of applt. in systematically soliciting & obtaining from the public subscriptions to the capital stock of a proposed co. which was in process of incorporation, held to constitute a "trading" in "securities" within Security Frauds Prevention Act, 1929 (c. 10).—*R. ex rel. SYMONS v. SPRINGER, [1930] 2 W. W. R. 396.—CAN.*

**sm.** — *Security—Club membership.*—A membership in the club in question herein, which was duly incorporated as a co. is not a "security" within Securities Act, 1929, formerly entitled The Security Frauds Prevention Act, 1929, & therefore, the sale of memberships by the members of the club does not render the club a trader in securities within said Act.—*Re SECURITIES ACT, Re AMALGAMATED BUSINESS MEN'S CLUB, LTD., [1933] 1 W. W. R. 172.—CAN.*

**sp.** — *Investigation—Delegation of authority by Attorney-General.*—The authority to investigate which under sect. 10 of Securities Act, 1930, may be delegated by the A.-G. to his representative & the terms of the authority so delegated in the present case to deft.:—*Held*: broad enough to cover the investigation being carried on by him including an investigation of pltf.'s transactions in the shares of the co. in question.—*BARTLEY & Co. v. RUSSELL, [1935] 1 W. W. R. 26; affd., [1935] 2 W. W. R. 64; 3 D. L. R. 135; 64 Can. C. C. 57; 49 B. C. R. 502.—CAN.*

**sq.** — *Conduct of inquiry.*—The investigation provisions of the statute dealing generally with the prevention of fraud by stock brokers were part & parcel of the administrative machinery for the attainment of the general purposes of the statute. The investigator was not a ct. of law nor was he a ct. in law. While the investigator was bound to act judicially in the sense of being fair & impartial, that is something quite different from the right asserted by appls. of freedom of cross-examination of all the witnesses.—*ST. JOHN v. FRASER, [1935] S. C. R. 441; 64 Can. C. C. 90; 49 B. C. R. 302.—CAN.*

**sr.** — *Right of rescission.*—Securities Act, 1930 (Ont.) does not

## Part VII.—Illegality and Fraud.

430. *Add. Annotations* :—As to (1) *Consd. Weddle, Beck & Co. v. Hackett*, [1929] 1 K. B. 321. *Refd. Ironmonger & Co. v. Dyne* (1928), 44 T. L. R. 497; *Townsend v. Grundy* (1933), 18 Tax Cas. 140; *Woodward v. Wolfe*, [1936] 3 All E. R. 529.
432. *Add. Annotations* :—*Consd. Ironmonger & Co. v. Dyne* (1928), 44 T. L. R. 497. *Refd. Ellesmere Earl v. Wallace*, [1929] 2 Ch. 1; *Weddle, Beck & Co. v. Hackett*, [1929] 1 K. B. 321; *Townsend v. Grundy* (1933), 18 Tax Cas. 140.
433. *Add. Annotations* :—*Refd. Ellesmere (Earl) v. Wallace*, [1929] 2 Ch. 1; *Weddle, Beck & Co. v. Hackett*, [1929] 1 K. B. 321.
- 434a. ——— *One party agent.*—*Brown v. St. Phalle, Ltd.* (1930), 74 Sol. Jo. 122.
450. *Add. Annotation* :—*Refd. Ellesmere (Earl) v. Wallace*, [1929] 2 Ch. 1.
459. *Add. Annotation* :—*Refd. Alexander v. Rayson*, [1936] 1 K. B. 169.

give the purchaser of shares a right of rescission where there is no fraud or misrepresentation, even if vendor is liable to the penalties of the Act.—*Lumley v. Broadway Coffee Co. & Unwin*, [1935] 1 D. L. R. 813; O. R. 104; *affd.*, [1935] 2 D. L. R. 417; O. R. 278.—CAN.

*sw. Liability of company.*—A co. is subject to indictment under sect. 231 of the Criminal Code.—*Webster & Kirkness v. Solloway Mills & Co., Ltd.* (No. 2), [1930] 3 W. W. R. 381; *on appeal*, [1931] 1 D. L. R. 831; [1930] 3 W. W. R. 445.—CAN.

*sy. — Certificate of registration—Powers of Superintendent.*—Sect. 5 (2) of Securities Act, 1930, as amended reads: "The Superintendent may attach to any registration such terms, conditions, & restrictions as he thinks advisable, all of which shall be set out in the certificate of registration, & he may from time to time by notice in

writing to the holder of the certificate vary, add, or omit any terms, conditions, or restrictions"—*Held*: it was not intended thereby that persons who had acquired contractual rights as against the co. might without being heard, without compensation & without remedy, be despotically despoiled of such rights.—*Briscoe v. Yorkshire & Canadian Trust, Ltd. of Vancouver & London & Western Trust Co., Ltd.*, [1936] 3 W. W. R. 513; 51 B. C. R. 222.—CAN.

### PART VII. SECT. 1, SUB-SECT. 2.

425 xi. ———.]—*Beyea v. Johnston & Ward*, [1930] 4 D. L. R. 421; *affd.*, [1930] 1 D. L. R. 219.—CAN.

425 xii. ———.]—On a defence of sect. 231 of the Criminal Code to an action by stockbrokers, for balance due, it must be shown that plffs. had no *bona fide* intention of selling or

making delivery.—*O'Brian, Bell-Irving, Stone & Rook, Ltd. v. Benthams* (1932), 45 B. C. R. 532.—CAN.

*sp. Burden of proof.*—In order for transactions between a broker & his customer to be illegal under sect. 231 of the Criminal Code both parties must intend that instead of the delivery of the article dealt in there shall be a mere payment of the difference between the contract price & the market price. The burden of proving that the transaction was illegal as being a mere cover for the settlement of "differences" rests with the party making the assertion; he must plead the other party's participation in the illegal purpose & prove facts such as to lead to the judicial inference that the other party knew of the illegal purpose & knowingly assisted in carrying it out.—*Tull (G. F.) & Ardern, Ltd. v. Shouldice*, [1932] 1 W. W. R. 141.—CAN.

## STREET AND AERIAL TRAFFIC.

## Part I.—Regulation of Traffic.

3. *Add. Annotations* :—**Folld.** *Edwards v. Wanstall* (1929), 46 T. L. R. 101; *Etherington v. Carter*, [1937] 2 All E. R. 528.

3a. ————]—Under sect. 21 of above Act, a local authority is not confined to making orders for special occasions, but may make an order of a general character restricting traffic of certain kinds in certain streets between specified hours daily, & such order is valid without being confirmed as a bye-law under Public Health Act, 1875 (c. 55), s. 184.—**EDWARDS v. WANSTALL** (1929), 142 L. T. 288; 94 J. P. 51; 46 T. L. R. 101; 28 L. G. R. 38; 29 Cox, C. C. 56, D. C.

*Annotation* :—**Consd.** *Etherington v. Carter*, [1937] 2 All E. R. 528.

3b. ———— **Whether confirmation of order necessary—Under Public Health Act, 1875 (c. 55), s. 184.**—**EDWARDS v. WANSTALL**, No. 3a, *ante*.

5a. **Acquisition of land for parking places—Public Health Act, 1925 (c. 71), s. 68—Objection—When appeal lies.**—Where a local authority has given notice under sect. 68 (2) of above Act, of a proposal to acquire land in order to provide parking places for vehicles, & has given a decision against an objection

duly made thereto under sub-sect. 3, the objector, being entitled to make the objection, is a "person . . . aggrieved" by the decision, & may accordingly appeal therefrom under the provisions of sub-sect. 3, although he alleges no grounds of objection personal to himself, but such only as are common to himself & other ratepayers & inhabitants.—**SEVENOAKS URBAN DISTRICT COUNCIL v. TWYNAM**, [1929] 2 K. B. 440; 98 L. J. K. B. 537; 141 L. T. 566; 93 J. P. 189; 45 T. L. R. 508; 73 Sol. Jo. 334; 27 L. G. R. 525, D. C.

5b. ———— **To what land applicable—Land acquired for street widening.**—**Held** : where land may be lawfully applied for the purpose of street widening, a local authority can, pursuant to its powers under sect. 68 (1) of above Act, use it as a parking place for motor cars.—**A.-G. v. SUNDERLAND CORPN.**, [1929] 2 Ch. 436; 93 J. P. Jo. 480; 45 T. L. R. 618; *affirmed*, [1930] 1 Ch. 168; 99 L. J. Ch. 44; 142 L. T. 61; 94 J. P. 57; 46 T. L. R. 10, C. A.

5c. ———— **Corporation shareholders in omnibus company.**—**KEIGHLEY CORPN. v. YORKSHIRE THEATRES, LTD.** (1937), 81 Sol. Jo. 863, D. C.

## PART I. SECT. 1.

sa. "**Parking**" of vehicles.—**Whether regulation of traffic.**—**SCHILLING v. MELBOURNE CITY**, [1928] V. L. R. 302; [1928] Argus L. R. 203.—**AUS.**

sc. **Regulation by constable—Action against constable for negligence—Contributory negligence.**—**DANGERFIELD v. SMITH**, [1934] 1 W. W. R. 577; 2 D. L. R. 505; 48 B. C. R. 125.—**CAN.**

## PART I. SECT. 2, SUB-SECT. 1.

e i. ————]—**WIMBLE F. T. & Co. v. GUILFESSER**, [1928] S. R. Q. 20; 22 Q. J. P. R. 38.—**AUS.**

e ii. ————]—When two vehicles approach one another at an intersection the driver of the vehicle on the left is under a duty to permit the other vehicle to pass over the intersection first, & if a person is injured because of the failure of the driver on the left to observe this rule there is evidence of negligence on the part of said driver, & the burden is cast upon him to show that under all the circumstances he was not negligent.—**MESS v. CALVER**, [1929] 3 D. L. R. 684; 23 W. W. R. 442; 23 S. L. R. 505.—**CAN.**

e iii. ————]—**LLOYD v. HANNAFIN** [1931] 1 W. W. R. 415; 2 D. L. R. 1000; 43 B. C. R. 401.—**CAN.**

e iv. ————]—**Validity of municipal bye-law.**—A regulation as to the right of way of vehicles at street intersections is a rule of the road within the meaning of a statute which empowers a municipality to regulate traffic, but limits this power to regulations other than rules of the road. Therefore a municipal bye-law which lays down a rule as to the right of way which is in conflict with the rule established by a statute applicable to the municipality is *ultra vires*.—**PIPE v. HOLLIDAY**, [1930] 1 W. W. R. 225; 2 D. L. R. 73; 42 B. C. R. 230.—**CAN.**

e v. ————]—**Held** : the fact that the car to the left is within the intersection before the car to the right enters it does not displace the latter's right to have the right of way. On the contrary, in an action resulting from a collision within an intersection the first question to be answered is : Why did not the driver to the left give way & keep out of the danger zone?—**KENNEDY LUMBER CO., LTD. v. PORTER**, [1932] 1 W. W. R. 230.—**CAN.**

e vi. ————]—With respect to motorists approaching an intersection from different directions the fact that the one on the left has been the first to reach or even enter upon the intersection does not render the rule of the road inoperative.—**HALL v. TINCK**, [1932] 3 W. W. R. 104.—**CAN.**

e vii. ————]—**Effect of traffic lights.**—In Winnipeg at street intersections where traffic lights are in operation a motorist approaching an intersection when the green light is facing him has the right of way over a motorist who, after coming from the opposite direction, has made a left-hand turn within the intersection.—**FANN v. WINNIPEG ELECTRIC CO.**, [1933] 2 W. W. R. 577; 3 D. L. R. 801; 41 Man. L. R. 388.—**CAN.**

e viii. ————]—**RAHAL v. BURNETT** (1931), 45 B. C. R. 122.—**CAN.**

e ix. ————]—Motorists who make left turns across opposing traffic, whether they have the right of way or not, must keep in mind sect. 40 (1) of Highway Traffic Act, 1930.—**RYZ v. NASH-SIMINGTON CO., LTD.**, [1934] 1 W. W. R. 629; 2 D. L. R. 804; 42 Man. L. R. 251.—**CAN.**

e x. ————]—In every cross road collision between two motor vehicles where the streets are of equal importance, the burden which plts. undertake of proving that def.'s negligence is the

proximate cause of the accident, is in practice so heavy that it is seldom, if ever, discharged.—**MURRAY v. BRITZ** (1933), N. L. R. 352.—**S. AF.**

e xi. ————]—**REED v. LAWSON & GIVENS**, [1934] 1 W. W. R. 405; 2 D. L. R. 564; 48 B. C. R. 103.—**CAN.**

e xii. ————]—**HENDERSON v. DOSSE** (1932), 46 B. C. R. 401.—**CAN.**

e xiii. ————]—**Held** : the word "intersection" must be construed in its ordinary natural meaning, & is not intended to apply only where two streets cross at right angles.—**RICHARDSON v. COLLINS**, [1932] W. A. L. R. 101.—**AUS.**

e xiv. ————]—**LITTLEWOOD v. WALKER**, [1935] 1 W. W. R. 576.—**CAN.**

e xv. ————]—The act of turning across the line of oncoming traffic is one that involves a duty of care, which is not necessarily discharged by giving the conventional signal of the intention to turn. The public safety is best conserved by imposing upon every vehicle the duty of observing the precautions appropriate to its own situation. If undue stress is laid upon any particular circumstance there must always be some tendency for the other vehicle to consider itself absolved from the full duty of care appropriate to the particular situation. In default of anything that brings or ought to bring to the knowledge of the driver of a vehicle that another person is acting or likely to act without a reasonable regard for his own safety, the driver of every vehicle may be excused for acting upon the assumption that other people will act reasonably. The act of passing at an important intersection involves a degree of care which is at least equal to that required of the driver who turns out of a road.—**KLEEMAN v. WALKER**, [1934] S. A. S. R. 199.—**AUS.**

**5d. Direction by constable to keep to line of traffic—Failure to comply.**—An information charged a deft. that he "did unlawfully fail" to make a motor car keep to a particular line of traffic when directed to do so by a police constable, contrary to Road Traffic Act, 1930 (c. 43), s. 49. That sect. renders it an offence if any person driving or propelling a vehicle "neglects or refuses" to make it keep to a particular line of traffic, when so directed. The justices convicted deft. :—

**xvi.** ———. —[Pltf.'s motor car, travelling at a reasonable speed, was halfway across an intersection when it was struck by a vehicle approaching from its right which was travelling at an excessive speed. The magistrate found that the real cause of the accident was the negligence of deft. in going across the intersection at too great a pace when the other vehicle was already there & crossing :—*Held* : the magistrate's decision was correct.—*HURDLE v. O'CALLAGHAN*, [1936] W. A. L. R. 3.—**AUS.**

**xvii.** ———. —[Where one street meets another & does not continue beyond it, but makes, at the place of meeting a T-shaped formation, there is an intersection within the meaning of reg. 67 of the Regulations made under motor Traffic Act, 1909.—*SUMMERS v. O'NEILL* (1936), 53 N. S. W. N. 226.—**AUS.**

**xviii.** ———. —[Under Nova Scotia Motor Vehicle Act, 1932, the driver first entering an intersection has the right of way, & is under no duty to look up & down the intersecting street for other vehicles.—*CROWELL v. WILLIAMS*, [1937] 2 D. L. R. 619; 11 M. P. R. 454.—**CAN.**

**mi.** ———. —[It is the duty of traffic on a side road to give way to that on the main road, but the traffic on the main road is not entitled to continue its course & speed without regard to traffic from the side roads.—*RENNIE v. FREMANTLE MUNICIPAL TRAMWAYS & ELECTRIC LIGHT BOARD* (1927), 29 W. A. L. R. 130.—**AUS.**

**ii.** ———. —[*BURNS & Co., LTD. v. CORRY*, [1928] 1 W. W. R. 889; *sub nom. BURNS & Co. v. CARLTON HOTEL*, [1928] 2 D. L. R. 845.—**CAN.**

**iii.** ———. —[The fact that the driver of a motor car has the right of way with respect to the driver of a car on an intersecting street does not entitle him to recover for damage resulting from a collision where the real cause of the damage was the excessive speed of his car & his failure to take precautions to avoid the collision.—*RADIO TAXICAB CO., LTD. v. AVERBACK*, [1928] 1 W. W. R. 685.—**CAN.**

**iv.** ———. —[*HORNBY v. PATTERSON* (B. C.), [1930] 1 D. L. R. 86; [1929] 3 W. W. R. 276; 41 B. C. R. 548.—**CAN.**

**v.** ———. —[*PAUL v. DINES*, [1929] 3 D. L. R. 617; 3 W. W. R. 287; 41 B. C. R. 49.—**CAN.**

**vi.** ———. —[Although it is the duty of the driver of a motor vehicle entering a main road from a private road or cross road to proceed with the greatest caution, it does not follow that a driver on the main road is relieved from responsibility; he is not entitled to rely on the driver on the private road stopping & allowing him to pass, but he must watch the vehicle on the private road & take the steps necessary to avoid a collision if the driver on the private road does not give way.—*CURRIE v. MILNE & MILNE*, [1930] 2 W. W. R. 159; 3 D. L. R. 995; 24 S. L. R. 437.—**CAN.**

**vii.** ———. —[*HOLLIS v. KIRKPATRICK* (1930), 2 M. P. R. 418.—**CAN.**

**viii.** ———. —[Observations on the duties of drivers of vehicles

approaching an intersection. — *LYALL v. McALINDEN*, [1930] W. A. L. R. 113.—**AUS.**

**ix.** ———. —[Where two motor cars are approaching an intersection & the one on the left of the other makes a substantial entry thereon before the latter, the right of way which the latter would otherwise have had is displaced.—*CHAMBERS, CLARK & CRIGHTON v. SAMPSON*, [1931] 2 W. W. R. 251; 3 D. L. R. 206; 41 B. C. R. 134.—**CAN.**

**x.** ———. —[In an action resulting from a collision of motor cars at a street intersection the driver at the left does not satisfy the onus of proving that in entering upon the intersection he was acting with reasonable care merely by establishing the fact that his car was within the intersection before the car to his right entered it. He must show that he had reached the intersecting street substantially ahead of the car having the right of way & that the way appeared to be clear; or, in other words, he must show that he had made a reasonable as well as a substantial prior entry upon the intersection, that is, had exercised reasonable care in entering upon, as well as continuing the crossing of, the intersection. A driver of a motor car must exercise reasonable care not only when entering upon an intersection but also while crossing it. Although the driver coming from the right has by statute & by-law the right of way at an intersection, yet where a vehicle at his left has reached the intersecting street substantially ahead of him the driver at the left is not obliged to wait upon the other if the way appears to be clear. A driver who has ceased to go forward at a "stop sign" long enough for him to make, & has made, the necessary observations as to all the then existing relevant circumstances on the "through highway" & elsewhere around him, has come to a "full stop" according to the requirements of a by-law requiring him to do so; but, nevertheless, the question of his right to proceed is left to be determined according to the then existing circumstances.—*HAINES & HAINES v. WILLIAMS, WILLIAMS & WILLIAMS v. HAINES*, [1933] 1 W. W. R. 478.—**CAN.**

**xi.** ———. —[*McLEOD & McLEOD v. CONSTERDINE*, [1934] 1 W. W. R. 19.—**CAN.**

**xii.** ———. —[*WILIS v. SWARTZ BROS., LTD. & HUDSON*, [1935] S. C. R. 628; 3 D. L. R. 277; 5 F. L. J. (Can.) 243.—**CAN.**

**xiii.** ———. —[*MITCHELL v. ADLAM*, [1935] 2 W. W. R. 613.—**CAN.**

**xiv.** ———. —[An action for damages resulting from a motor-car collision at a street intersection. Pltf. was on deft.'s right, but when pltf. reached the intersection deft. was well within it & gave no indication of intending to stop. The intersection was on a wide street divided by street car tracks into thoroughfares for one-way traffic & declared by by-law to be an arterial highway. By usage & necessity the statutory definition of "intersection" was not, in fact, applied to the whole intersection as so defined but

*Held* : the information properly disclosed the offence charged & was not calculated to mislead the deft. Accordingly, both information & conviction were good.—*PONTIN v. PRICE* (1933), 150 L. T. 177; 97 J. P. 315; 31 L. G. R. 375; 30 Cox, C. C. 44, D. C.

**5e. Traffic sign—"Stop, Road Traffic Officer"—Validity.**—[By an information preferred by an inspector of weights & measures of the Buckingham County Council—a person duly authorised to weigh motor vehicles for the

to each of the two squares comprising it. When pltf., who was on the arterial highway, reached the intersection deft.'s car was between the two lines of street-car track & pltf. continued on his way on the assumption that deft. had seen him & would stop :—*Held* : the action failed because of pltf.'s improper insistence on the right of way.—*FRANKLIN v. GEDDES*, [1935] 1 W. W. R. 580; 2 D. L. R. 720; 13 Man. L. R. 92.—**CAN.**

**xv.** ———. —[Where the driver of a motor car approaching an intersection had the right of way over a car which he saw to be about 125 feet to the left of the intersection :—*Held* : he was entitled to assume that the driver of that other car would respect his right of way & permit him to cross, unless he observed or should, by reasonable care, have observed from the speed of that car or manner in which it was being driven or other circumstances that its driver was not likely to be willing or able to bring that car under control so as to make it safe for him to act on that assumption.—*GROH v. RUTTER*, [1935] 2 W. W. R. 172; 4 D. L. R. 213; 50 B. C. R. 129.—**CAN.**

**xvi.** ———. —[It is the duty of the driver of a motor-vehicle, who intends to alter his course & go down an intersecting street, before turning to his right across the line of route of a vehicle within a short distance & approaching along the street from which the turn is being made, to stop until the approaching vehicle has crossed his line of route, unless he is satisfied that the driver of the approaching vehicle has seen & appreciated his signal of intention to make the turn.—*COMMERCE v. STRATFORD CARRYING CO., LTD.*, [1934] N. Z. L. R. 551; G. L. R. 485.—**N.Z.**

**xvii.** ———. —[Although it is the duty of the driver of a vehicle, when approaching an intersection, to give way to traffic on his right, there is a stage when that duty is qualified by the duty of traffic coming from the right to take care in crossing an intersection. As a general rule if the driver of a motor car has already entered an intersection he is entitled to proceed in front of traffic on the right which has not yet reached the boundary of the intersection.—*DEARDEN v. LILLYMAN*, [1935] W. A. L. R. 3.—**AUS.**

**xviii.** ———. —[In an action resulting from a collision of motor cars at an intersection :—*Held* : the accident was due solely to the negligence of deft., who was on the right of pltf., in not keeping a proper lookout & in not giving pltf. the right of way which he had obtained. Pltf., after coming to a full stop at the stop sign, looked both to the right & left, & having concluded that there was no danger of collision, proceeded to cross, deft.'s car being then at least 250 feet away from the intersection & going about 30 miles an hour :—*Held* : therefore, he was justified in proceeding & had displaced deft.'s right of way. It could not be said that deft.'s car was going at an obviously high or dangerous rate of speed, & that pltf. was negligent in crossing ahead of a "speed maniac."—*WELCH & DOWNIE v. GRANT*, [1936]

purposes of sect. 27 of Road Traffic Act, 1930 (c. 43)—a cartage co. was charged with "unlawfully aiding, abetting, counselling & procuring" a driver of one of its motor vehicles "to fail to conform to the indication given by a traffic sign . . . for regulating the movement of traffic" authorised by the Minister of Transport, pursuant to sect. 48 of Road Traffic Act, 1930 (c. 43), as amended by the Road Traffic Act, 1934 (c. 50). By a second information the driver was charged with failing to conform to the indication given by the said sign. The sign consisted of a portable revolving board, bearing on one side the words "Stop, Road Traffic Officer, Bucks C. C.," as found by the justices, conformed in all material respects to the authorisation & directions of the Minister of Transport. On appeals by defts. from the decisions of the justices it was contended that the device in question was not a traffic sign within the meaning of sects. 48 & 49

of the Act of 1930; that the purported authorisation of the said device by the Minister was *ultra vires*; & that the road traffic officer had no authority or right in law to stop a motor vehicle travelling on the road:—*Held*: the said device was a sign for regulating the movement of traffic within the meaning of sects. 48 & 49 of the Act of 1930; the stopping of a vehicle was the regulating of its movements within the meaning of those sects.; & the authorisation by the Minister was therefore *intra vires* his powers, & the appeals must be dismissed.—*LANGLEY CARTAGE CO., LTD. v. JENKS, ADAMS v. JENKS*, [1937] 2 K. B. 382; [1937] 2 All E. R. 525; 106 L. J. K. B. 559; 156 L. T. 529; 101 J. P. 393; 53 T. L. R. 651; 81 Sol. Jo. 399; 35 L. G. R. 246; 30 Cox, C. C. 585.

#### 18. After this case add:—

—.]—*See, now*, Road Traffic Act, 1930 (c. 43), s. 49.

1 W. W. R. 312; 50 B. C. R. 385.—**CAN.**

**m xix.** —.—.—.]—*ROYAL TRUST CO. v. TORONTO TRANSPORTATION COMMISSION*, [1935] S. C. R. 671; 3 D. L. R. 420.—**CAN.**

**m xx.** —.—.—.]—Where a road allowance has not been graded but there is a used trail thereon which at an intersection with a graded road cuts the corner sharply to the left a driver of a motor car on making that turn is not required to risk the hidden dangers involved in driving to the right of the trail, except to turn out to pass traffic, but he is under the duty of approaching the intersection with care, having his car under control & being ready to act in case of emergency.—*WOLOWIDNYK v. SWIDESKIE*, [1936] 1 W. W. R. 141.—**CAN.**

**m xxi.** —.—.—.]—In an action for damages resulting from a collision between an automobile & a street car:—*Held*: the driver of the automobile was negligent in not looking to her right after entering the intersection, regardless of whether it was true, as she stated, that she had stopped at the stop sign & then proceeded slowly or whether the facts were, as stated by passengers on the street car, that she did not stop at the sign & entered the intersection rapidly. The fact that the motor-man did not see the automobile sooner & in time to avoid the accident was not, under the circumstances, negligence on his part. The collision was due wholly to the negligence of the driver of the automobile.—*MUNTON v. EDMONTON & FINDLEY*, [1936] 2 W. W. R. 481.—**CAN.**

**m xxii.** —.—.—.]—*Held*: the right conferred on the motor car to the right & the duty imposed on the car at the left is not one to be lost on a split second.—*ROBERT SIMPSON WESTERN, LTD. v. GOLDMAN & GOLDMAN*, [1936] 3 W. W. R. 429.—**CAN.**

**m xxiii.** —.—.—.]—Although where two cars approach an intersection the driver of the one on the right of the other is given by statute the right of way he is nevertheless under the duty of exercising reasonable care to avoid a collision with the car on his left.—*MANN v. STRUGNELL & JOHNSTON*, [1937] 1 W. W. R. 730.—**CAN.**

**m xxiv.** —.—.—.]—*EVANS v. DANN*, [1937] 3 W. W. R. 610.—**CAN.**

**m xxv.** —.—.—.]—*RUBINSTEIN v. MALKIN*, [1937] 3 W. W. R. 529; 4 D. L. R. 797.—**CAN.**

**m xxvi.** —.—.—.]—The statutory right of way at an intersection cannot be exercised with impunity when the driver of a car knows, or ought to

have known, that someone else is in a position of danger.—*CARTER v. WILSON*, [1937] 3 D. L. R. 92; O. R. 499.—**CAN.**

**m xxvii.** —.—.—.]—Though, where two motor vehicles are approaching an intersection at approximately the same time, the driver on the right is given the right of way by statute, it still remains his duty to exercise reasonable care to avoid a collision with vehicles approaching on his left. He is still bound to look to the left as well as to the right for approaching vehicles. Thus the question of liability for a collision becomes in most cases one as to the negligence of the respective parties, in other words, a question of fact rather than of law.—*HEARD v. JOHN BRIZINGER, LTD.*, [1938] 1 W. W. R. 725; 2 D. L. R. 655.—**CAN.**

**m xxviii.** —.—.—.]—*Held*: if a collision occurs as the result of a failure of the driver on the left to yield the right of way the burden is upon him to show that under the circumstances he was not negligent, or that notwithstanding his negligence the driver on his right could, by the exercise of reasonable care, have avoided the consequences of the failure to observe his statutory duty.—*THOMPSON v. McCaig*, [1938] 2 W. W. R. 15.—**CAN.**

**n i.** —.—.—.]—*Traveller on cross road reaching intersection first.*—The mere fact that the traveller holding the servient position reaches the limit of intersection first, while relevant evidence, does not of itself give him the right of way.—*SANDS v. GREER*, [1930] 3 D. L. R. 67; 65 O. L. R. 169.—**CAN.**

"Gross negligence."—*See NEGLIGENCE*, Part I, Sect. 1, Sub-sect. 2, ante.

#### PART I. SECT. 2, SUB-SECT. 3.

**19 i. No other traffic on road.**—Notwithstanding Highway Traffic Act, 1930, requiring vehicles to travel on the right-hand side of the road, the driver of a vehicle may travel on any part of a road so long as there is no other traffic in the neighbourhood.—*BELL v. HUTCHINGS*, [1931] 2 W. W. R. 488; *revid. on other grounds*, [1932] 1 W. W. R. 49; 1 D. L. R. 468.—**CAN.**

**xx. Vehicles crossing.**—In an action resulting from a collision between plff.'s motor cycle & deft.'s automobile:—*Held*: the cause of the accident was deft.'s negligence in driving his car across the street in face of the oncoming motor cycle, which he admitted he saw; & there was no contributory negligence. The provision in sect. 47 of Vehicles & Highway Traffic Act, 1924, that a driver meeting another vehicle upon the high-

way must keep to the right:—*Held*: not to apply to plff. in the circumstances since deft.'s automobile was not meeting plff.'s motor cycle but was crossing in front of it.—*BATTAGIN v. BIRD*, [1937] 1 W. W. R. 719; *affd.*, [1937] 2 W. W. R. 365; 3 D. L. R. 412; 7 P. L. J. (Can.) 67; *affd.*, [1938] S. C. R. 70.—**CAN.**

#### PART I. SECT. 2, SUB-SECT. 4.

**sb. General rule.**—Drivers of vehicles on highwys cannot be required to regulate their driving as if in constant fear that other drivers who are under observation, & apparently acting reasonably & properly, may possibly act at a critical moment in disregard of their own, as well as others, safety.—*COLDWELL v. MUNICIPAL TRAMWAYS TRUST*, [1929] S. A. S. R. 88.—**AUS.**

**sc.** —.—.—.]—The rules to be observed by a careful motorist are not limited to those laid down by the Motor Vehicle Act.—*BERRY v. RICHARD* (1932), 5 M. P. R. 62.—**CAN.**

**26 iii.** —.—.—.]—The driver of a motor car is usually able, & is expected, to keep a look out for vehicles & pedestrians crossing his path upon their lawful occasions, & to warn them if they appear to be unaware of his approach.—*MATHEWS v. WARD*, [1930] S. A. S. R. 286.—**AUS.**

**k i.** —.—.—.]—*Duty to slow up at intersection.*—A pedestrian crossing at an intersection has a right to assume that anyone who may come up to the crossing she has already entered will exercise care by reducing his speed, or stopping.—*ALTER v. SOLOWAY*, [1931] 2 D. L. R. 328; 66 O. L. R. 610.—**CAN.**

**k ii.** —.—.—.]—*Pedestrian walking in same direction.*—The fact that a motorist sounds his horn once or oftener on seeing a pedestrian on the road ahead of him & walking in the same direction does not justify him in driving on without taking due care according to the circumstances. If he perceives that the pedestrian is not heeding the horn it is his duty to bring his car under such control, even to the extent of coming to a full stop, that he will be able to guard against an accident should the pedestrian suddenly swerve in his course so as to come in front of the car.—*WOOD v. POWELL*, [1932] 3 W. W. R. 100.—**CAN.**

**k iii.** —.—.—.]—When the driver of a motor car perceives that a pedestrian is not heeding the horn & is not aware of the car's approach he should bring his car under control & if necessary stop it. If he first blows his horn when so close to the pedestrian as to

**31a. Duty to halt at major road.**—A motorist was approaching certain cross-roads when he passed a road sign which read: "Halt at major road ahead." The word "Halt"

was in large letters fitted with reflecting lenses, the other words being in small letters without reflecting lenses. It was dark at the material time & the motorist could reasonably

alarm him he should take care to have his car under sufficient control to be prepared for any emergency resulting from the pedestrian's alarm.—*MALAWSKI v. WALTON*, [1932] 3 W. W. R. 330.—CAN.

**k iv. — Pedestrian alighting from street car.**—A pedestrian stepping from a sidewalk at a street intersection with the object of boarding a street car has a right to expect that the driver of an approaching automobile then some distance away will see him & not come too close to the crossing for safety; & that the driver will slacken his speed & have his car under such control that it can be stopped almost instantly.—*JAMES & JAMES v. PIERCE*, [1932] 3 W. W. R. 365.—CAN.

**k v. — Pedestrian alighting from street car.**—The effect of sect. 11 of Motor-Vehicle Act, R. S. B. C., 1924, which provides that an automobile must stop behind a street car when that street car is halted & discharging passengers & must remain stopped until the passengers get to the curb or are otherwise in safety, is that the onus is placed on a motorist to watch passengers getting off street cars & make sure before proceeding that they have reached the curb or else that they are in safety, as, e.g., if they clearly intimate that they intend to remain in the safety zone until the automobile has passed. This provision of said Act cannot be altered by any city bye-law so as to affect civil rights defined by the Act.—*MACDONALD v. BAILEY*, [1934] 1 W. W. R. 342.—CAN.

**k vi. — — — — —**—*ROLLAND v. WARSAHA*, [1937] 2 W. W. R. 706; 45 Man. L. R. 211.—CAN.

**k vii. — Motorist driving on wrong side—Overtaken by another car.**—Even though there be no provision by statute or bye-law forbidding a motorist to travel on the left part of the right-hand side of a street, nevertheless, since the fact that a motorist occupies that position virtually compels another driver overtaking him to do so on his right, he is bound to use a particularly high degree of care as soon as he realises that the other car is coming up to him. Moreover, such an emergency is expressly provided for by sect. 37 (4) of Highway Traffic Act, 1930, which says that if the driver of an overtaken vehicle finds it impracticable to give way to the right, he shall immediately stop.—*HIRABEO v. LUCID*, [1933] 2 W. W. R. 636; 4 D. L. R. 452; 41 Man. L. R. 383.—CAN.

**k viii. — Contributory negligence of pedestrian.**—Pltf. when walking across a street between intersections about 4.30 a.m. on Jan. 1, in order to get to his parked motor car, saw deft.'s car approaching on his left about 225 feet away. He continued to walk until when about three feet from his car he stopped for about two seconds to see what the driver of a car parked to his right, the self-starter of which was working, intended to do. He was struck by deft.'s car. Deft. did not see pltf., but he was seen by a passenger in deft.'s car, when it was 150 to 160 feet away. She said pltf. would not have been struck had he not taken a step back; & pltf. admitted that if he had looked again he could have avoided the accident by taking one step.—*Held*: deft. was negligent in not seeing pltf.; & deft. was contributorily negligent in not looking to his left when he stopped; his degree of the total fault was 25 per cent.—

*DIXON v. SINCLAIR*, [1936] 3 W. W. R. 527.—CAN.

**k ix. — Driving within safety zone.**—Driving within a safety zone, contrary to Highway Traffic Act, is negligence, & the driver will be liable to a pedestrian injured by the car.—*HANSON v. LOWE*, [1937] 3 D. L. R. 590; 45 Man. L. R. 341.—CAN.

**30 iii. — Observance of rule of road not sufficient.**—*ACORN v. MACDONALD* (P. E. I.), [1929] 3 D. L. R. 173.—CAN.

**o i. — — — — —**—*Held*: even if a driver has no intimation that a street-car ahead of him is about to stop until he is within ten feet from it, he is nevertheless bound to stop his car as quickly as possible as soon as he becomes aware that the street-car is about to stop for the purpose of taking on or letting off passengers.—*KATZ v. CONSOLIDATED MOTORS, LTD., & THOMSON*, [1930] 1 W. W. R. 305; 2 D. L. R. 241; 42 B. C. R. 214.—CAN.

**ac. When accident occurs—Duty to stop—Extent of duty.**—Under Motor Vehicles Act, 1921, s. 36, as amended by Acts of 1925 & 1927, there is an obligation on the driver of a motor vehicle to stop when such motor vehicle is concerned in any accident happening on any road or street.—*Held*: the obligation to "stop" must be understood in the light of the circumstances in each case, & a reasonable interpretation of the obligation was that the motor vehicle must be brought to rest within such a distance & period of time as is reasonable in all the circumstances, including those peculiar to the driver, such as his power or loss of self-control.—*MINERVINI v. WALSH*, [1928] S. A. S. R. 286.—AUS.

**sd. — Duty to report to police station.**—In rule 32 of the rules framed by the United Provinces Govt. under Motor Vehicles Act, 1914, the words "if any person is injured" govern the whole of the clause; the duty of reporting an accident at the nearest police station arises, therefore, only if any person is injured.—*R. v. MAYRA SINGH* (1929), 1 L. R. 51 All. 996.—IND.

**ss. Duty to sound horn.**—Under s. 40 of the Vehicles & Highways Traffic Act, 1924, which provides that every motor vehicle shall be equipped with a suitable bell, horn, or other sufficient means of giving warning of its approach, but gives no direction as to under what circumstances the horn should be sounded or the warning given, the necessity for the sounding of the horn or the giving of a warning is a matter of discretion on the part of the driver determinable by the particular circumstances confronting him.—*BLISS v. MALBERG* (Alta.), [1930] 1 D. L. R. 361; [1929] 3 W. W. R. 641; 24 Alta. L. R. 334; *resolv.*, [1931] 4 D. L. R. 264; S. C. R. 710.—CAN.

**sm. — Car approaching intersection—Effect of bright headlights.**—Having regard to the fact that it was late at night & that the reflection of the powerful headlights of his car would sufficiently serve as a warning of his approach to the intersection, the driver of a car was not negligent in failing to blow his horn on approaching the intersection.—*HARRIS v. SMITH* (1932), 5 M. P. R. 378.—CAN.

**so. — — — — —**—The effect of sub-sect. (3) of sect. 37 of the Highway Traffic Act, 1930, is that in closely built-up sections of a city the driver of a motor

vehicle is not obliged to sound his horn every time he passes a vehicle. A bicycle is a vehicle within sect. 2 (g) of the above Act.—*DYRKACH v. McAREAVY*, [1934] 3 W. W. R. 307.—CAN.

**sp. Vehicle approaching bridge.**—A person driving a motor car in a country where the roads are not yet permanently & smoothly surfaced must expect to meet varying surface conditions therein & is under the duty when approaching a bridge to exercise that reasonable care by which the effect of an inequality, if any, between the surface of the road & the floor of the bridge may be avoided.—*BURGESS v. HODGKINSON* (Alta.), [1929] 3 D. L. R. 133; 2 W. W. R. 21.—CAN.

**sq. Vehicle driving into dark area.**—There is a duty on the driver of an automobile in driving from a well-lighted area into a darkened area to take increased precautions, commensurate with the darkness, against possible dangers lurking therein.—*OWENS v. CRANSTON* (Man.), [1929] 4 D. L. R. 1072; 1 W. W. R. 498.—CAN.

**st. Duty to move seasonably to right of road.**—In an action for damages resulting from a collision between a bicycle which pltf. was riding & an automobile driven by deft. II.:—*Held*: the cause of the accident was the fact that deft. did not "seasonably" move his car to the right of the centre line of the highway; under the circumstances pltf. when faced with the oncoming car was not negligent in turning his bicycle to his left when he saw deft. was not moving his car to his right.—*HARRIS v. HOWES & CHEMICAL DISTRIBUTORS, LTD.*, [1929] 4 D. L. R. 1066; 1 W. W. R. 217; 23 S. L. R. 306.—CAN.

**sw. — — — — —**—A driver of a vehicle may lawfully travel upon any portion of the highway provided he moves his vehicle to the right of the centre line of the highway in reasonably sufficient time to allow other vehicles free passage on the other half of the road.—*CALLEBECK v. MAXWELL*, [1938] 1 W. W. R. 731.—CAN.

**sl. Duty in case of vehicle driving upon private drive opening on busy street.**—*COATES v. PARKER* (N. B.), [1929] 3 D. L. R. 148.—CAN.

**sg. Driving in high wind.**—The standard of skill & experience which the law requires of the driver of a motor car on a highway of varying surface resistances & running through open & sheltered stretches is not that of a novice; & a person driving a car when a normally high wind is blowing should be prepared for any normal exigencies to which the wind may give rise.—*HUNT v. MILNE*, [1930] 1 W. W. R. 977; 3 D. L. R. 513.—CAN.

**sh. Duties of driver of car to driver of horse.**—Pltfs. were proceeding upon a highway in a vehicle drawn by a horse when deft. in an automobile came along behind them & wishing to pass them, ran into the horse as it was being turned to the left to go into a lane.—*Held*: pltf. driving the horse had the right to expect that deft. would give a signal, as required by Highway Traffic Act, s. 38. As no signal was given, there was no contributory negligence on the part of pltfs. in not seeing deft.—*DE MOTT v. CLYNDALE*, [1931] 2 D. L. R. 316; O. R. 1.—CAN.

**sk. Effect of automatic signals on standard of care.**—The fact that a motor car is brought to a stop at a street intersection marked by a "stop"



see only the word "Halt." He had, however, passed the sign previously in daylight. The motorist halted at the sign & then slowly approached & turned into the major road. The construction of the sign conformed with the directions for such signs in the regulations & orders issued by the Minister of Transport:—*Held*: the motorist failed to conform to the indication given by the sign & thereby committed an offence against the Road Traffic Act, 1930 (c. 43), s. 49 (b).—*BROOKS v. JEFFERIES*, [1936] 3 All E. R. 232; 53 T. L. R. 34; 80 Sol. Jo. 856, D. C.

**31b.** ———.]—About 25 yds. from a road junction a duly authorised & approved traffic sign was erected, on the front of which were the words "Halt at major road ahead." Applt., who was approaching the junction, reduced speed to walking pace, observed the roads in all directions & proceeded slowly across:—*Held*: applt. should have brought his car momentarily to a standstill, & in failing to do so he had committed an offence under the Road Traffic Act, 1930 (c. 43), s. 49, as amended by Road Traffic Act, 1934 (c. 50), Sched. 3.—*TOLHURST v. WEBSTER*, [1936] 3 All E. R. 1020; 156 L. T. 111; 101 J. P. 121; 53 T. L. R. 174; 80 Sol. Jo. 1015; 35 L. G. R. 102.

**31c. Pedestrian crossing—Duty to stop—Contributory negligence of pedestrian Whether defence.**—A foot passenger who was crossing a road by a pedestrian crossing which was marked by the prescribed traffic signs, but which was not controlled by a police constable or by light signals, was knocked down & injured by a motor-car as he was about to step on to the opposite kerb. In an action by the foot passenger against the driver of the motor-car for personal injuries:—*Held*: the driver of the motor-car was liable, as the cause of the accident was the failure of the driver to observe the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, which had the force of a statute, & that a plea of contributory negligence on the

part of the foot passenger was not open as a defence to the driver of the motor-car.—*BAILEY v. GEDDES*, [1938] 1 K. B. 166; [1937] 3 All E. R. 671; 107 L. J. K. B. 38; 157 L. T. 364; 53 T. L. R. 975; 81 Sol. Jo. 684.

*Annotations*:—*Fold*. *Chisholm v. London Passenger Transport Board*, [1938] 2 All E. R. 579. *Dist*. *Knight v. Sampson*, [1938] 3 All E. R. 309.

**31d.** ———.]—Pltf., crossing the street at a road intersection controlled by traffic lights, was injured by an omnibus, which had at the time of the accident crossed the intersection. It was found as a fact that he had stepped on to the crossing before the omnibus reached the pedestrian crossing used by pltf. The Pedestrian Crossing Places (Traffic) Regulations, 1935, reg. 3, requires a vehicle to approach a crossing at such a speed that it can stop before reaching the crossing unless it can be seen that there is no pedestrian thereon. Reg. 5 requires a driver approaching a light-controlled crossing to allow uninterrupted passage to a pedestrian who has started to cross before he receives the signal to go on:—*Held*: (1) the driver of the omnibus must be held to have been negligent as the pedestrian was upon the crossing before his vehicle reached it; (2) the circumstances of this case were governed by reg. 3 & not by reg. 5.—*CHISHOLM v. LONDON PASSENGER TRANSPORT BOARD*, [1938] 2 All E. R. 579; 159 L. T. 32; 51 T. L. R. 773; 82 Sol. Jo. 396; 36 L. G. R. 398; *reversd.*, [1938] 4 All E. R. 850, C. A.

*Annotation*:—*Consd*. *Knight v. Sampson*, [1938] 3 All E. R. 309.

**31e.** ———.]—Deft.'s car, proceeding at a proper speed, was approaching a pedestrian crossing & was within a foot or two of the crossing, when pltf., who up to then had not shown by his demeanour that he was about to cross the road, suddenly stepped upon the crossing & was struck & injured by deft.'s car:—*Held*: there was no negligence & no breach of the regulations respecting pedestrian crossing, & pltf. could not recover. *Bailey v. Geddes*, [1938] 1 K. B.

sign does not entitle the driver thereof to abandon care upon resuming the journey. Care must be exercised at all stages, & the first requirement of motor-car drivers is to be alert; to keep a sharp look out for possible dangers.—*PIPE v. HOLLIDAY*, [1930] 1 W. W. R. 225; 2 D. L. R. 73; 42 B. C. R. 230.—*CAN.*

**31. Turning across line of traffic.** Where there are two streams of traffic proceeding in opposite directions along a road, the driver of a vehicle who desires to turn across the line of traffic coming towards him is not bound to wait until there are no vehicles travelling towards him which may be interfered with by his vehicle. He is entitled to make his turn, but must give ample warning of his intention both to vehicles behind him & to those approaching him, & must do so at an opportune moment & in a reasonable manner.—*MILTON v. VACUUM OIL CO. OF SOUTH AFRICA, LTD.*, [1932] App. D. 197.—*S. AF.*

**30. Speed in passing vehicle "going in opposite direction."**—Sect. 39 (1) of Vehicles Act, R. S. S., 1930, which provides that "No motor vehicle shall be driven at a greater speed than thirty-five miles per hour when passing any motor or other vehicle going in the opposite direction" does not apply to the case where the vehicle

which is being passed is standing still on the road.—*MCINTOSH v. PETERSON*, [1933] 1 W. W. R. 440; *affd.*, [1934] 1 D. L. R. 289.—*CAN.*

**31. Duty when overtaking.**—A driver of a motor car who attempts to pass another vehicle going in the same direction assumes a grave responsibility; he must observe whether there are any vehicles approaching from the opposite direction; if other vehicles are coming he must make sure of the distance these vehicles are from him & see that he has time to pass & resume his position on the right side of the highway before their arrival; he must also observe the width & condition of the road & any circumstance which would tend to limit the movements of any of the cars; if the conditions are such that he cannot pass in safety it is his duty to drop back to his original position & not attempt to pass.—*RODGERS v. WAINWRIGHT, NELSON v. WAINWRIGHT*, [1933] 3 W. W. R. 620.—*CAN.*

**31.** ———.]—A driver of a motor-vehicle, who commences an overtaking movement more than 30 feet before an intersection but does not complete it outside that limit, offends against reg. 14 (10) (a) of Traffic Regulations, 1936, made under the Motor-Vehicles Act, 1924. The overtaking is not complete until the overtaking vehicle

is back on its correct side of the road & ahead of the overtaken vehicle. The overtaking vehicle should execute that manoeuvre in such a way as not to compel the overtaken vehicle to check speed.—*GOODWILL v. SAULBREY*, [1938] N. Z. L. R. 114; 14 N. Z. L. J. 47.—*N.Z.*

**31. Duty to stop.**—Sect. 69 of Vehicles Act, 1935, provides: "A driver of a vehicle shall, before proceeding across or turning into a numbered highway, outside the limits of a city, bring his vehicle to a dead stop & shall not proceed until satisfied that it is safe to do so." Pltf. made a left turn on to a numbered highway without bringing his car to a stop, &, although he saw the lights of deft.'s car on the highway before he entered thereon he thought he had sufficient time to make the turn & proceeded. In an attempt to avoid a collision deft. turned down the road to the left. Pltf. accelerated his speed & proceeded in the direction deft. had taken. A sideways collision occurred:—*Held*: pltf. was guilty of both original & ultimate negligence. His negligence & breach of the statute had placed deft. in peril &, therefore, he could not complain that the course taken by deft. was not the best one he could have taken.—*HAMMOND v. WILKINSON*, [1938] 1 W. W. R. 461; 7 F. L. J. (Can.) 278.—*CAN.*

156; Digest Supp., distd.—KNIGHT v. SAMPSON, [1938] 3 All E. R. 309; 159 L. T. 257; 54 T. L. R. 974; 82 Sol. Jo. 524; 36 L. G. R. 534.

31f. **Duty on light-controlled crossing.**—A driver of a motor car who enters a cross-roads when the traffic lights are in his favour is not under any obligation to assume that the driver of another vehicle may be entering the cross-roads from left or right with the red light against him. The rules of the Highway Code & Road Traffic Act, 1939 (c. 48), s. 45 (4), must be read in connection with the legislative provisions in force in regard to traffic lights, & they cannot be read as imposing any special duty of care towards a person unlawfully entering the crossing. When therefore a driver entered the cross-roads with the green light in his favour & accelerated to pass traffic on his left going in the same direction which blocked his view to the left until it was too late to avoid a collision with a vehicle which had entered the cross-roads from the left against the red light, he was not guilty of contributory negligence.—JOSEPH EVA, LTD. v. REEVES, [1938] 2 K. B. 393; [1938] 2 All E. R. 115; 107 L. J. K. B. 569; 159 L. T. 1; 102 J. P. 261; 54 T. L. R. 608; 82 Sol. Jo. 255; 36 L. G. R. 425, C. A.

31g. **"Traffic sign"—What amounts to—White line.**—Applt. drove a motor car on the wrong side of a white line which had been painted on the highway round a corner to indicate that traffic should keep to the near side of the road:—*Held*: the line painted on the highway was not a traffic sign within Road Traffic Act, 1930 (c. 48), s. 48 (9), as being a "device for the guidance or direction of persons using roads," & therefore, applt. was not guilty, under sect. 49, of the offence of failing to conform to the indication given by a traffic sign.—EVANS v. CROSS, [1938] 1 K. B. 694; [1938] 1 All E. R. 751; 107 L. J. K. B. 304; 159 L. T. 161; 102 J. P. 127; 54 T. L. R. 354; 82 Sol. Jo. 97; 36 L. G. R. 196.

#### SECT. 4.—RESTRICTIONS AS TO TRAFFIC.

(Vol. XLII., p. 846.)

See, also, Road Traffic Act, 1930 (c. 43), ss. 46, 47.

33a. **Restriction of motor coaches in certain areas**

—**Validity of regulations.**—A motor coach co., which held a number of metropolitan stage-carriage licenses, owned coaches which plied for hire on regular services in the metropolitan area & home counties. These coaches started from Upper Regent Street, London, where the booking office of the co. was. The Minister of Transport gave notice that he proposed to make regulations under London Traffic Act, 1924 (c. 34), s. 10, which in effect provided that motor coaches should not at any time on any week-day be on any street within a prescribed "inner area" of London, & that they should not be on any street within a prescribed "outer area" except at certain permitted hours. Upper Regent Street was within the outer area, & just on the border of the inner area:—*Held*: the Minister had power under the Act to make the proposed regulations.—R. v. MINISTER OF TRANSPORT, *Ex p.* SKYLARK MOTOR COACH CO., LTD. (1931), 144 L. T. 700; 47 T. L. R. 325.

33b. **Prevention of obstruction—Restriction of sales in streets—Validity.**—A borough council being empowered by Town Police Clauses Act, 1817 (c. 89), s. 21, from time to time to "make orders for the route to be observed by all carts, carriages, horses, & persons, & for preventing obstruction of the streets . . ." made an order as follows: "During the months of May, June, July, Aug. & Sept. in each year no hawker, pedlar or other person shall use the streets set out in the sched. hereto, for the purpose of selling therein toys, postcards, souvenirs, fruit, vegetables, flowers, confectionery or ice-cream, & all constables are directed to enforce the provisions of this order." Applt. was charged with having unlawfully & wilfully committed a breach of the said order by using one of the streets referred to in the sched. for the purposes of selling confectionery, & was convicted & fined 5s. Applt. contended (*inter alia*) that the order was not a valid order, in that it was too general, as it did not specify the hours within which the streets might not be used for the sale of the articles mentioned:—*Held*: the order was valid, as the generality thereof was not in excess of the powers conferred on the borough council by sect. 21 of 1817 Act.—ETHERINGTON v. CARTER, [1937] 2 All E. R. 528; 81 Sol. Jo. 460.

## Part II.—Traffic Nuisances and Offences.

34. **Add. Annotation**:—N.F. Sheffield Corpn. v. Kitson, [1929] 2 K. B. 322.

34a. **Proceedings under Town Police Clauses Act, 1847 (c. 89), s. 47—Consent of Attorney-General.**—A corpn. was convicted upon an information preferred on behalf of a limited

co. under above sect. by one of its directors, for permitting a motor omnibus to be used as a hackney carriage within the prescribed area, without having obtained the necessary licence under the Act:—*Held*: Public Health Act, 1875 (c. 55), s. 253, takes the place of Town Police Clauses Act, 1847 (c. 89), s. 73, which

#### PART I. SECT. 3.

33 ii. ————*Held*: the statutory rules for the regulation for motor traffic have not diminished the common law rule with regard to the duty of pedestrians—*viz.*, that a pedestrian who is run down when crossing a road cannot offer as evidence of

negligence the fact that the vehicle was being driven on the wrong side of the road, but is under a duty to look both to his right & to his left before crossing, for, as regards a foot-passenger, a carriage may go on either side of the road.—HARRIS v. MCKINNON, [1933] N. Z. L. R. 153.—N.Z.

#### PART I. SECT. 4.

sl. *Operation of omnibus service—Order of Public Utility Board—Validity.*—WINNIPEG CITY v. WINNIPEG ELECTRIC CO., *Re* MANITOBA AVENUE BUS SERVICE, [1933] 1 W. W. R. 136, 2 D. L. R. 285; 41 Man. L. R. 74.—CAN.

enabled "any person" to recover penalties for offences against that Act, & therefore except in the case of information by a party aggrieved or the local authority for the district, the consent of the A.-G. is now a condition precedent to proceedings for the recovery of penalties under the Town Police Clauses Act, 1847 (c. 89).—*SHEFFIELD CORPN. v. KITSON*, [1929] 2 K. B. 322; 98 L. J. K. B. 561; 142 L. T. 20; 93 J. P. 135; 45 T. L. R. 515; 73 Sol. Jo. 348; 27 L. G. R. 533; 28 Cox, C. C. 674, D. C.

#### SUB-SECT. 21.—OTHER OFFENCES.

See Town Police Clauses Act, 1847 (c. 89), s. 28.

- 50a. Ringing door bells—Offence by tradesman—Delivery of newspapers.**—The mere fact of a man being instructed to deliver papers at the house of a third person is no answer to a complaint against him under Town Police Clauses Act, 1847 (c. 89), s. 28, charging him with having "wilfully & wantonly" disturbed the party & his family by violently knocking & ringing at the door at an unreasonable hour of the night.—*CLARKE v. HOGGINS* (1862), 11 C. B. N. S. 545; 142 E. R. 909.
- 50b. Standing on window-sill.**—Applts., whose business was that of window-cleaning, on a certain date by their servant were cleaning a window of a room as independent contractors under contract with the occupier of the room.

The servant stood upon the sill of the window in order to clean the outside of the window. The sill was of rough stone, about 1 foot wide & about 18 feet immediately above a public street along which passengers frequently passed & re-passed. No particular passenger had been endangered by the servant so standing, & applts. had supplied him with a safety-belt. Applts. were charged with having unlawfully & to the danger of passengers permitted a person in their service to stand on the sill of the window in order to clean the outside thereof, such window not being in the sunk or basement storey, contrary to Town Police Clauses Act, 1847 (c. 34), s. 28. Applts. contended, *inter alia*, that there was no danger to passengers within the meaning of the Act, & that the *ejusdem generis* rule should be applied to interpret the words "or other person" in sect. 28, so as to restrict their application to persons closely akin to occupiers, & thus to exclude applts. The stipendiary magistrate convicted applts. & fined them the sum of 10s. Thereupon this appeal was brought:—*Held*: the danger to passengers was sufficient to constitute danger within the Act, & as applts. had not discharged their duty to take all reasonable steps to ensure that their servants cleaned windows in the course of their service in a lawful manner, the offence charged was proved.—*WEST RIDING CLEANING CO., LTD. v. JOWETT*, [1938] 4 All E. R. 21; 82 Sol. Jo. 870, D. C.

## Part III.—Lights on Vehicles.

- 55a. Effect of Road Transport Lighting Act, 1927 (c. 37), s. 11 (2)—On powers of Minister of Transport under Roads Act, 1920 (c. 72), s. 12 (1).**—*Held*: the words "or other authority" in Road Transport Lighting Act, 1927 (c. 37), s. 11 (2), did not include the Minister of Transport, & his power to make regulations under the powers conferred upon him by Roads Act, 1920 (c. 72), s. 12 (1), had not been revoked by Road Transport

Lighting Act, 1927 (c. 37), s. 11 (2), & therefore a regulation which the Minister of Transport made on June 12, 1928, requiring a lamp to be carried on vehicles on the road at night for the illumination of the identification plate, was not *ultra vires*.—*SWAITS v. ENTWISTLE*, [1929] 2 K. B. 171; 98 L. J. K. B. 648; 142 L. T. 22; 93 J. P. 232; 45 T. L. R. 483; 73 Sol. Jo. 366; 27 L. G. R. 540; 28 Cox, C. C. 680, D. C.

## Part IV.—Hackney and Stage Carriages.

As to Public Service Vehicles, see, now, Road Traffic Act, 1930 (c. 43), Part IV.

- 76. Add. Annotation:—Consd. White v. Cubitt (1929), 46 T. L. R. 99.** **76a. Public service vehicles—Transitional provisions—Right to continue service operating**

#### PART IV. SECT. 1.

**56 iv. —.**—[Railway Passenger Duty Act, 1842, ss. 13 & 15, contain regulations for the prevention of overcrowding in any "stage carriage." The Act contains no definition of the term "stage carriage":—*Held*: a motor omnibus, which had been chartered by the secretary of a football club to convey a party of club supporters to a match at a fixed fare per passenger, was not a stage carriage on the occasion in question, in respect that it was not plying for hire from one stage to another, but was engaged in the performance of a private contract; & conviction of the conductor for overcrowding accordingly quashed.

—*M'KEE v. WEIR*, [1929] S. C. (J.) 14.—SCOT.

**ss. "Carrying passengers for reward at separate & distinct fares for each passenger"—Some passengers so carried.**—A motor-car is "used for carrying passengers for reward at separate & distinct fares for each passenger," within the definition of "motor omnibus" in Motor Omnibus Act, 1928, s. 21, if some of its passengers are so carried.—*BLYTH v. ANDERSON*, [1931] V. L. R. 153; *Argus* L. R. 154.—AUS.

**sd. Public vehicle.**—A car does not become a public vehicle because the owner, being licensed as a chauffeur, contracts with a number of men to

take them to & from work daily at a monthly rate.—*R. v. BILJAN*, [1935] 1 D. L. R. 477; O. R. 52; 63 Can. C. C. 203.—CAN.

**st. Power of Motor Carrier Board.**—The Motor Carrier Board in New Brunswick has power to grant a right to operate omnibuses in a town in which another co. already has an exclusive franchise granted by the town council.—*CAPITAL TRANSIT, LTD. v. HIGHWAY TRANSPORT, LTD.* (1930), 11 M. P. R. 33.—CAN.

**sl. Road motor undertaking—What is.**—Pltf., who was the proprietor of two hotels, owned two motor omnibuses which were reserved entirely for hotel guests, & which he had used

before Road Traffic Act, 1930 (c. 43)—Validity of regulation fixing date when service must have been operating.]—Road Traffic Act, 1930 (c. 43), s. 72 (1) prohibits the use of any vehicle as a stage carriage or express carriage for public service, as defined by sect. 61, except by persons holding a road service licence or licences to be granted by the comrs. of the traffic areas created by the Act, through which the route passes subject to the conditions thereby provided. By sect. 96 the Minister of Transport is authorised to make such orders as he may consider necessary for the transition from the enactments superseded by Part IV. of the Act, regulating the use of public service vehicles, to the provisions of Part IV., & may provide that existing licences in force before the commencement of the Act shall continue in force for a period fixed by the Order. By Public Service Vehicles (Transitory Provisions) No. 2 Order 1931, dated Mar. 13, the Minister ordered that where a person was, on Feb. 9, 1931, operating a service of public vehicles, & had before Mar. 31, 1931, applied for a road service licence under the Act, it should not be deemed to be an offence for him to continue that service pending the grant or refusal of that application. The prohibition contained in sect. 72 (1) of the Act was first brought into force, by Order of the Minister of Transport, on Apr. 1, 1931. Defts. commenced to operate a service of express coaches over a route between London & Aylesbury on Feb. 26, 1931, & applied in the prescribed manner for the grant of a road service licence from the Comrs. of the Eastern Area through which the route passed before Mar. 31, 1931, but their application was refused & an appeal to the Minister from the

refusal dismissed. Defts. were later prosecuted & convicted at petty sessions for running their service without a road service licence, but, notwithstanding the conviction, continued to do so. In an action by the A.-G., at the relation of other motor coach owners holding licences to operate on the same route, for an injunction to restrain defts. from continuing their service:—*Held*: (1) the action was maintainable notwithstanding that the Act created a statutory offence & provided a penalty for its breach; (2) as defts. were not operating a service of coaches on the route in question on Feb. 9, 1931, they did not come within the terms & conditions of Public Service Vehicles (Transitory Provisions) Order, No. 2; (3) in fixing Feb. 9 as the critical date on which coach services must have been in operation to obtain the protection of the last-mentioned Order, the Minister was not acting *ultra vires* the Act or unreasonably; (4) sect. 81 (3), dealing with appeals to the Minister from a refusal to grant a new licence to a person who had held an old licence did not apply to defts. as they had never held any licences for the particular route under the Act, only under earlier superseded Acts; (5) the ct. made a declaration in favour of the relators on defts. undertaking not to renew the service without obtaining a licence.—A.-G. v. PREMIER LINE, LTD., [1932] 1 Ch. 303; 101 L. J. Ch. 132; 146 L. T. 297; 48 T. L. R. 104; 75 Sol. Jo. 852; 30 L. G. R. 126.

*Annotation*: *Consd. Goldsmith v. Deakin* (1933), 150 L. T. 157.

76b. — Road service licence—Omission to obtain—Injunction.]—A.-G. v. PREMIER LINE, LTD., No. 76a. *ante*.

partly for the purpose of conveying hotel guests to & from his hotels, from & to Larne & Belfast, & partly in taking guests who came to his hotels upon inclusive week's tourist tickets, on advertised motor tours:—*Held*: such operation by plff. of the said omnibuses did not constitute a road motor undertaking within Road & Railway Transport Act, 1935.—MURPHY v. NORTHERN IRELAND ROAD TRANSPORT BOARD, [1937] N. I. 22.—IR.

#### PART IV. SECT. 2, SUB-SECT. 1.

*c i.* — Regulation of taxicabs.]—The city bye-law in question which required operators & drivers of cabs for hire to take out licences, proscribed a "zone tariff" for non-taximeter cabs, a tariff by distance for cabs equipped with taximeters & a rate "by the hour" for both classes of cabs, with a proviso in this case of a minimum charge. It also provided that no owner of a licensed cab should require or permit any driver employed by him to be on duty more than sixty hours in any week. A further provision prohibited the granting of a licence to an operator of a motor vehicle who was not insured in the form required by Part VII. of Highway Traffic Act, 1930, subject to a proviso in the case of an owner of ten cabs; & provided for depriving of his licence an operator whose insurance had terminated.—*Held*: said provisions of the bye-law, except that requiring insurance, were valid.—*Re* WINNIPEG BYE-LAW NO. 14272, [1932] 2 W. W. R. 679; 3 D. L. R. 625; 40 Man. L. R. 413.—CAN.

*c ii.* —.]—*Held*: sect. 12 (1) of Highway Traffic Act, 1930 (Man.),

authorised a bye-law which provided: "No person shall keep or operate any cab within the Town or use the streets thereof in connection with such business without first having obtained a licence therefor from the Town;" & which defined "cab" as meaning "any taxicab or other motor vehicle used or intended to be used for the conveyance of persons for hire." The words "keep" & "operate" as used in the bye-law were held to have the meaning of "having" & "conducting" or "carrying on," as used in the statute.—*R. (THOM) v. SIMPKIN* (No. 2), [1933] 3 W. W. R. 580; 41 Man. L. R. 527.—CAN.

*sb.* Licence fee for trucks plying for hire.—Liability of owners outside municipality.]—NORTH VANCOUVER v. STEWART F.R. & Co., [1928] 1 W. W. R. 586; 49 Can. Crim. Cas. 216; 39 B. C. R. 401.—CAN.

*sc.* Omnibus licensed by town council plying for hire in county.—Bye-law requiring additional licence to be taken out.—Whether valid.]—SCOTTISH MOTOR TRACTION CO., LTD. v. LANARKSHIRE COUNTY COUNCIL, [1928] S. C. (Cl. of Sess.) 909; *revid. sub nom.* LANARKSHIRE COUNTY COUNCIL v. SCOTTISH MOTOR TRACTION CO., LTD. (1929), 142 L. T. 170, H. L.—SCOT.

*sd.* Compliance with statutory requirements.—Personal to owner of public vehicle.—Effect on contract to assign "stage-run."—MCLEAN v. BUTORAC MOTORS v. CAMPBELL, [1930] 3 W. W. R. 39.—CAN.

*se.* Transportation of passengers without certificate from Motor Carrier Board.—What constitutes.]—R. v. TAYLOR (1932), 5 M. F. R. 406.—CAN.

*sq.* Bye-law providing minimum wage for taxi-driver.—Meaning of "on duty."]

—Time spent by a taxi-cab driver with his cab at a telephone station after completing a trip & awaiting instructions from his employers' office to make another held to be time spent "on duty" within sect. 35 of bye-law 14487 of the city of Winnipeg which prescribes a minimum wage for cab drivers.—R. v. MOORE'S TAXI CO., LTD., [1935] 1 W. W. R. 316; 2 D. L. R. 338.—CAN.

#### PART IV. SECT. 2, SUB-SECT. 2.

*s.* Licence for taxi-cab.—Requirement that owner insured.—Validity of bye-law.]—A bye-law provided that no person licensed to keep a cab should operate it until he had filed with the inspector of licences an "owner's policy" as defined in sect. 165 of Insurance Act, 1932, issued by an insurance co., & that no person should operate an automobile after such policy had lapsed or been cancelled. Applt., whose insurance policy had been cancelled, was convicted of continuing to operate her car contrary to said bye-law:—*Held*: the bye-law in compelling licensees to obtain insurance went beyond the authority conferred by the statute, there being no authority clearly conferred with respect to insurance, except as to the "placing" of the same; & moreover, the bye-law left a licensee at the will or mercy of insurance cos. & delegated to such cos. the power to determine whether an appt. should be granted a licence. Therefore the provisions of the bye-law on which the conviction was based were held bad & the conviction set aside.—R. v. HELFRICK, [1933] 3 W. W. R. 179; 61 C. C. C. 60; *revid.*, [1933] 3 W. W. R. 561.—CAN.

76c. ——— Information—By whom laid.]—WESTMINSTER COACHING SERVICES, LTD. v. PIDDLESSEN, HACKNEY WICK STADIUM v. PIDDLESSEN, No. 76f, *post*.

76d. ——— Licence continuing in force pending appeal to Minister—Must be licence obtained under Road Traffic Act, 1930 (c. 43).]—A.-G. v. PREMIER LINE, LTD., No. 76a, *ante*.

76e. ——— “Stage carriages”—What amount to.]—A motor coach proprietor, having no road service licence for the conveyance of spectators from a point in T. to the football ground of the T. City Club, arranged that the coaches should be hired by the club, which conveyed the spectators to the ground at separate fares, which were paid to the club:—*Held*: on these facts, the coaches were “stage carriages” not “contract carriages” & the proprietor ought to have been convicted on an information for permitting them to be used without a road service licence.—OSBORNE v. RICHARDS, [1933] 1 K. B. 283; 102 L. J. K. B. 44; 147 L. T. 419; 96 J. P. 377; 48 T. L. R. 622; 30 L. G. R. 385; 29 Cox, C. C. 524, D. C.

*Annotation*:—*Refd.* Newell v. Cross, [1936] 2 K. B. 632.

76f. ——— ———.]—The second appts. were the proprietors of a greyhound racing stadium, & they entered into an agreement by which the first appts., who were proprietors of motor-coaches, should provide a certain number of vehicles at a fixed charge to be paid by the second appts., to convey would-be patrons of the stadium to & from other points in London free of charge. No payment whatever was collected from persons using the vehicles, & on going into the stadium (which they were not compelled to do) they were charged the same price as those who had not availed themselves of the motor-vehicles provided. They could exchange at the turnstiles the ticket issued on the outward journey for another ticket entitling them to a free ride back after the racing. Passengers on either journey could be picked up & set down at intermediate points. Appts. were summoned on an information signed by a superintendent & an Assistant Commissioner of Metropolitan Police (who held a general letter of authorisation from the Commissioner) with using the vehicles & causing them to be used as stage carriages without a road service licence in that behalf. The magistrate convicted:—*Held*: (1) the effect of Road Traffic Act, 1930 (c. 43), s. 61 (2), was to bring into the category of “stage carriages,” in the circumstances there defined, vehicles which but for that sub-sect. would have been “contract carriages” & exempt from the necessity for a road service licence, & the magistrate was entitled to find that the payments made by the passengers for admission to the stadium were made partly in respect of the journey, & therefore the vehicles were used by appts. as stage carriages; (2) the information was duly laid by a person authorised

in that behalf by a chief officer of police.—WESTMINSTER COACHING SERVICES, LTD. v. PIDDLESSEN, HACKNEY WICK STADIUM, LTD. v. PIDDLESSEN (1933), 149 L. T. 449; 97 J. P. 185; 49 T. L. R. 475; 31 L. G. R. 245; 29 Cox, C. C. 660, D. C.

76g. ——— ———.]—A dance was organised, & the advertisement thereof in a newspaper contained the words “Bus to Chesham after dance.” The organisers arranged to hire a 20-seater motor-coach from resp. to take passengers to Chesham after the dance for the price of 15s., which sum was paid on a date after the dance. Resp. was unaware of the terms of the advertisement, & did not know that during the dance one of the organisers announced that any person who desired to travel by the coach to Chesham must buy a ticket at the door of the hall, & that tickets were issued to those persons, who each contributed not less than 6d. Any person attending the dance, although not a member of the club which organised it, could obtain a ticket. An information was preferred in two separate cases by applt. against resp., under Road Traffic Act, 1930 (c. 43), s. 72 (1), (10), for permitting the motor vehicle to be used as a stage carriage otherwise than under a road service licence. The justices dismissed the information, holding that the coach was being used, not as a stage carriage, but for conveyance of a private party on a special occasion. Applt. contended that, as the driver of the vehicle was in possession of a work ticket as required by statute, resp. must have known that separate payments were to be made by each passenger, & he therefore deliberately abstained from making inquiries regarding the fares, & whether there had been any advertisement in the newspapers:—*Held*: the vehicle was being used as a stage carriage, but, as the resp. was unaware of the use to which it was being put, he was not guilty of the offence charged. The only element which prevented the use of this vehicle being innocent was that the possibility of using the vehicle had been advertised to the public.—EVANS v. DELL, [1937] 1 All E. R. 349; 156 L. T. 240; 101 J. P. 149; 53 T. L. R. 310; 81 Sol. Jo. 100; 35 L. G. R. 105; 30 Cox, C. C. 558.

76h. ——— ——— “Contract carriages”—What amount to.]—OSBORNE v. RICHARDS, No. 76e, *ante*.

76j. ——— ——— “Express carriages”—What amount to.]—A co. which owned motor omnibuses entered into an agreement with a railway co. whereby they undertook to provide motor vehicles for the conveyance of passengers arriving by certain specified excursion trains at a named station to a neighbouring works, where conducted tours took place. Persons taking part in these combined rail & road excursions obtained from the railway co. two tickets, one for the rail journey & the other for the journey by road from

#### PART IV. SECT. 2, SUB-SECT. 3.

76j. 1. Public service vehicles—Necessity for licence—“Express carriages”—What amount to.]—Miss W., a tailoress, hired a motor car for a journey at an agreed fare. The owners of the car did not hold either a public

service vehicle licence or a road service licence. On Miss W.’s instructions the driver picked up five other passengers besides Miss W. before starting the journey. Miss W. had on previous occasions hired the car for the same journey, giving, within the knowledge of the owners of the car,

similar instructions regarding passengers. The purpose of the passengers, including Miss W., was to visit their friends in a sanatorium. Before hiring the car Miss W. arranged that each passenger should pay to her an equal share of the cost, which they did. The driver did not see these

the station to the works, & did not pay any fare direct to the motor omnibus owners, who received from the railway co. a certain sum for each passenger carried. Part of the sum paid by the railway co. was contributed by the owners of the works where the conducted tours took place. Neither the railway co. nor the motor omnibus owners held a road service licence to operate public service vehicles in connection with the visits to the works:—*Held*: the motor omnibus owners were guilty of an offence under Road Traffic Act, 1930 (c. 43), s. 72, as their vehicles were being operated as "express carriages" within sect. 61 (1) (b). They were not protected by the proviso to that section as the vehicles were not being used "for the conveyance of a private party" nor "on a special occasion."—*BIRMINGHAM & MIDLAND MOTOR OMNIBUS CO., LTD. v. NELSON*, [1933] 1 K. B. 188; 102 L. J. K. B. 47; 147 L. T. 435; 96 J. P. 385; 48 T. L. R. 620; 30 L. G. R. 390; 29 Cox, C. C. 529, D. C.

*Annotation*.—*Consid. Miller v. Pili* (1933), 97 J. P. 197.

**76k.** ————.]—A motor vehicle which is used for conveying market produce, & its owners as paying passengers, to market is an express carriage within Road Traffic Act, 1930 (c. 43), s. 61 (1) (b), & requires a public service vehicle licence & a road service licence.—*DREW v. DINGLE*, [1934] 1 K. B. 187; 103 L. J. K. B. 97; 150 L. T. 219; 98 J. P. 1; 50 T. L. R. 101; 77 Sol. Jo. 799; 31 L. G. R. 417; 30 Cox, C. C. 53, D. C.

**76l.** ————.]—Two persons, C. & P., severally hired taxicabs (neither of which had a road service licence as an express carriage) to drive themselves & friends to a certain destination & back for 14s. in each case. C. had made an antecedent arrangement with her friends that each of them should pay her share of the fare. P. had made no such arrangement, though some of her friends in fact subsequently offered to pay & did pay their shares. On the journey the taxicabs were stopped by a police officer & a traffic examiner, who questioned the passengers as to the arrangements for payment, but did not caution them. The hirers were charged with causing & the drivers with permitting the taxicabs respectively to be used as express carriages when there were not in force licences authorising them to be so used. The justices dismissed all the summonses, & expressly found that the drivers did not know, & had no reason to know, that the passengers were sharing the fares:—

*Held*: since there was in C.'s case an antecedent contract for payment by the other passengers of their shares they were "carried in a motor-vehicle in consideration of separate payments made by them," & therefore by sect. 61 (2), the vehicle was to be "deemed to be a vehicle carrying passengers for hire or reward at separate fares," & was brought within the definition of "express carriage" in sub-sect. (1), & C. was therefore guilty of the offence charged. In the absence of an antecedent contract by P. the justices were right in dismissing the charge against her. Nor could it be said that they had erred in law in dismissing the charges against the drivers; further, there is no provision of Road Traffic Act which authorises the questioning of passengers in taxicabs as to who is paying the fare, or which requires passengers to furnish such information. If such questions are to be asked it is the duty of the officer to administer the usual caution.—*NEWELL v. CROSS*, *NEWELL v. COOK*, *NEWELL v. PLUMB*, *NEWELL v. CHENERY*, [1936] 2 K. B. 632; [1936] 2 All E. R. 203; 105 L. J. K. B. 742; 155 L. T. 173; 100 J. P. 371; 52 T. L. R. 189; 80 Sol. Jo. 671; 34 L. G. R. 364; 30 Cox, C. C. 437, D. C.

**76m.** ————.]—T., the owner of a motor car, took three friends of his, who were employed with him at an aerodrome, to their work each morning & returned with them in the evening. T. drove the car, & by agreement the expenses of oil & petrol were shared, each of the four paying 5s. per week. It was contended that the payments made were payments for oil & petrol, & not separate fares in respect of the journeys: *Held*: T.'s friends were persons carried in consideration of separate payments, & the vehicle was therefore a public service vehicle & required to be licensed as such.—*EAST MIDLAND TRAFFIC AREA TRAFFIC COMRS. v. TYLER*, [1938] 3 All E. R. 39; 82 Sol. Jo. 416; 36 L. G. R. 530, D. C.

**76n.** ————.]—*Exemption*—"Conveyance of a private party."—*BIRMINGHAM & MIDLAND MOTOR OMNIBUS CO., LTD. v. NELSON*, No. 76j, *ante*.

**76o.** ————.]—*Necessity for driver's work ticket.*—A motor-coach owner, H., by arrangement with a theatre manager, M., caused a party to be taken from Hounslow to Epsom Races & back. H. had no road service licence to run motor coaches from Hounslow to Epsom, & the coach drivers carried no work tickets. Informations were laid against H. for using & against M. for

payments being made, & was not informed of them:—*Held*: (1) the car was used as an express carriage, in respect that it was used for the carriage of passengers at separate fares, although those separate fares were paid to Miss W. & not to the owners or to anyone acting on their behalf; (2) the owners must be held to have permitted it to be used as an express carriage, in respect that they ought to have known from the circumstances that it was being so used, or, in any event, that in the circumstances there arose a duty of inquiry by them as to the manner of its use.—*CLYDEBANK CO-OPERATIVE SOCIETY v. BINNIE*, [1937] S. C. (J.) 17.—*SCOT*.

**76o i.** ————.]—*Conveyance of private party*—"On a special occasion."—

—In a prosecution of the owner & hirer of a motor omnibus for using it as an express carriage without having in force a road service licence, it was established that the hirer, having decided to get up a party to go to Blackpool for the day to see the illuminations, hired the omnibus for the purpose for £14. The party consisted of the hirer & friends or acquaintances of his or of the owner's sister, & of friends of these friends or acquaintances. There was no public advertisement. The owner of the omnibus drove. The hirer collected £13 12s. from the party which, with a contribution of 8s. from himself, made up the £14. The accused held no road service licence for the omnibus:—*Held*: the omnibus was a vehicle

"used on a special occasion for the conveyance of a private party," & accordingly, it was not an "express carriage."—*M'DOUGALL v. PATERSON*, [1933] S. C. (J.) 39.—*SCOT*.

**76o ii.** ————.]—A football club in an Ayrshire village hired for a fixed sum five motor omnibuses to convey club supporters to a football match to be played by the club team at Dunblane. The excursion was advertised by the club on its private notice board in a public place in the village. The advertisement stated that the omnibuses were being run in connection with the match, & indicated that application for seats should be made to the club secretary, but no intimation was given of the persons eligible to apply or of the charge to be

causing to be used motor vehicles as express carriages otherwise than under road service licences, contrary to Road Traffic Act, 1930 (c. 43), s. 72. The justices found that H. had been induced by M. to believe that the party was a private one, & therefore, there being no *mens rea*, that he had committed no offence under sect. 72. The justices consequently found that M. had not caused an offence to be committed, & dismissed both informations. The informant appealed:—*Held*: as the drivers had not carried work tickets, the conditions of Road Traffic Act, 1934 (c. 50), s. 25, had not been complied with & resps. could not be heard to say that the party was a private one within that sect. Therefore in the absence of a road service licence, both H. & M. had committed offences against sect. 72 of the Act of 1930; *mens rea* is not a necessary ingredient of an offence against Road Traffic Act, 1930 (c. 43), s. 72.—*EVANS v. HASSAN*, [1936] 2 All E. R. 107; 80 Sol. Jo. 409, D. C.

76p. ———— “On a special occasion.”]  
—*BIRMINGHAM & MIDLAND MOTOR OMNIBUS Co., LTD. v. NELSON*, No. 76j, *ante*.

“special occasion” in the proviso to Road Traffic Act, 1930 (c. 43), s. 61 (2), have the same meaning as that which they bear in the proviso to sect. 61 (1). They refer, not merely to the views & intentions of the members of the private party, but to a special local occasion. Where, therefore, a vehicle was used to take a party of private individuals on an excursion to the seaside on which a similar party went every year:—*Held*: (1) that was not a “special occasion” within the proviso to sect. 61 (2).

(2) A regular weekly market or a cattle market held on the second, fourth, & (if any) the fifth Tuesday in every month is not a “special occasion” within sect. 61 (1).—*MILLER v. PILL*, *PILL v. FURSE*, *PILL v. MUTTON (J.) & SON*, [1933] 2 K. B. 308; 102 L. J. K. B. 713; 149 L. T. 404; 97 J. P. 197; 49 T. L. R. 437; 77 Sol. Jo. 372; 31 L. G. R. 236; 29 Cox, C. C. 643, D. C.

76r. ————.]—A motor car adapted to carry less than 8 persons was used to convey 4 persons from Leeds to Blackpool in order that those persons might view the illuminations there. These illuminations were continued for 49 days:—*Held*: this was not a “special occasion” within Road Traffic Act, 1930 (c. 43), s. 61 (1). Such occasions must be *ejusdem generis* with those given in the proviso to the sub-sect. & must be a particular & individual occasion.—*NELSON v. BLACKFORD*, [1936] 2 All E. R. 109, D. C.

made. The club was supported by the villagers generally, & the excursion party consisted of villagers, not all of whom were members of the club. The proprietors of the omnibuses & their servants took no part in collecting fares, which was done by club officials. In a prosecution of the proprietors of the omnibuses & the secretary of the club for using the omnibuses as express carriages without having a road service licence:—*Held*: although the particular excursion constituted a “special occasion,” the party conveyed by the omnibuses was not a “private party,” & accordingly, the vehicles were used

as express carriages & required a road service licence; further, it was no defence on the part of the proprietors to maintain that they were ignorant of the use made of the vehicles. *Opinion reserved* as to whether an ordinary football match would amount to a “special occasion.”—*MACMILLAN v. WESTERN S. M. T. Co., LTD.*, [1933] S. C. (J.) 51.—*SCOT*.

ss. Omnibus.—*Agreement to carry passengers on specified journey for lump sum—Whether licence necessary.*—*BLYTH v. HUDSON*, [1928] V. L. R. 587; [1928] Argus L. R. 397.—*AUS*.

76s. ————.]—Resps. were respectively charged with unlawfully using & causing to be used a motor vehicle as an express carriage otherwise than under a road service licence, in contravention of Road Traffic Act, 1930 (c. 48), s. 72 (1), (10). Certain passengers, all of whom had become members of a club merely payment of an entrance fee of 3d., were conveyed by motor coach from a particular place to a particular football ground on each occasion when the football club played “home” matches at the the football ground, the sum of 1s. 6d. for the return journey being paid by each passenger to the second resp., who hired the coaches from the first resp. at the rate of 30s. per thirty-two-seater coach, & 25s. per twenty-six-seater coach. The coaches were driven either by the first resp. or by his servant. The first resp. was at all material times aware that separate fares were being paid by the passengers to the second resp. The justices, having some doubt on the matter, dismissed the charges, & thereupon this appeal was brought:—*Held*: (1) the motor vehicles clearly came within the statutory definition of “express carriage,” in that they were carrying passengers (a) for hire or reward, (b) at separate fares, & (c) none of whom paid less than 1s. per passenger; (2) on the facts of the case, it was impossible to hold that there was a “special occasion for the conveyance of a private party” within the proviso to Road Traffic Act, 1930 (c. 48), s. 61 (2); (3) in any event, the statutory condition of a “special occasion” imposed by the Road Traffic Act, 1934 (c. 50), s. 25 (1) (c)—namely, that the passengers must not include any person who travels frequently on such journeys—had not been complied with.—*SIDERY v. EVANS & PETERS*, [1938] 4 All E. R. 137; 55 T. L. R. 54; 82 Sol. Jo. 892, D. C.

76t. ———— “Permitting” user of motor vehicle—*Meaning of.*]—Resp. owned a motor-coach, which he was licensed to use as a contract carriage, but not as a stage carriage. A club which was organising a dance, open to the public, hired the coach to convey persons between the dance hall & the club’s headquarters. Resp. received a fixed sum for the use of the coach, which was driven by his servant. It was arranged that the driver should collect tickets from passengers, to prevent unauthorised persons from using the coach. Tickets were in fact sold by the officials of the club entitling the holders to travel in the coach, which on the return journey set them down, if desired, at intermediate points. The tickets (which were plain cards bearing numbers but no indication

sf. *Motor omnibus.*]—The definition of “motor omnibus” in Motor Omnibus (Urban & Country) Act, 1927 (Vict.), s. 3, may be satisfied although the reward at separate & distinct fares for each passenger is not paid to a person who is an “owner” of the vehicle.—*BLYTH v. HUDSON* (1929), 41 C. L. R. 465; 2 A. L. J. 370; [1929] V. L. R. 82; Argus L. R. 73.—*AUS*.

sg. *Construction of bye-law—Carrying on business of hiring vehicles “within the town.”*—*THOM v. SIMPKIN*, [1931] 3 W. W. R. 522; [1933] 1 D. L. R. 158; 40 Man. L. R. 610.—*CAN*.



of price) were collected by the driver, but no money was paid by passengers either to him or to the resp. Resp. was charged with permitting the vehicle to be used as a stage carriage, & the justices found that it was in fact so used, & that the dance was not a "special occasion," nor were the persons attending it a "private party," so as to exempt resp. under Road Traffic Act, 1930 (c. 43), s. 61 (2). But they found that resp. was unaware that it was so used & therefore could not be held to have permitted the use:—*Held*: if a person hires out a vehicle in circumstances in which he ought to know that it probably will be or may be used as a stage carriage & puts his servant in charge of the vehicle to use it in any way which the hirer may direct, he is, within the meaning of the statute, permitting it to be used as a stage carriage, even though he does not actually know that it is so used. In the present case, since resp. knew that tickets were to be collected, & that either the price was included in that of the dance ticket or that a separate charge must be made for the coach tickets, he in fact allowed the vehicle to be used & did not care whether it was used in contravention of the statute. In those circumstances actual knowledge was immaterial, & the justices ought to have found the offence proved.—*GOLDSMITH v. DEAKIN* (1933), 150 L. T. 157; 98 J. P. 4; 50 T. L. R. 73; 31 L. G. R. 420; 30 Cox, C. C. 32, D. C.

*Annotations*:—*Consd. Evans v. Dell*, [1937] 1 All E. R. 319; *Newell v. Cross*, [1936] 2 All E. R. 203.

**76u.** ————,]—*WEBB v. MAIDSTONE & DISTRICT MOTOR SERVICES, LTD.* (1934), 78 Sol. Jo. 336.

**76v.** ———— *Discretion of Minister—Right to adopt report of Traffic Commissioner.*]—*R. v. MINISTER OF TRANSPORT, Ex p. GREY COACHES, LTD.* (1933), 77 Sol. Jo. 301.

**76w.** ———— *Power of Minister on appeal against grant—Order for contingent revocation.*]—*Held*: notwithstanding the wide power conferred by Road Traffic Act, 1930 (c. 43), s. 81 (2), the Minister was only entitled to make an order for the revocation of a licence when the making of such an order was appropriate to the subject-matter of the appeal before him.

When therefore opponents to the grant of a road service licence & backing authorising the running of a service of motor-coaches along a particular route appealed to the Minister against the grant on the ground that the service was not needed in the interest of the public, the Minister had no jurisdiction to make orders on the appeals which in effect were orders for the revocation of the licence & backing as soon as adequate provision had been made for road services on the particular route. The only subject-matter of the appeals before him was whether the licence & backing had been properly granted, & there was no jurisdiction to make orders for a future contingent revocation.—*R. v. MINISTER OF TRANSPORT, Ex p. UPMINSTER SERVICES, LTD.*, [1934] 1 K. B. 277; 103 L. J. K. B. 257; 150 L. T. 152; 98 J. P. 81; 50 T. L. R. 60; 32 L. G. R. 61, C. A.

**76x.** ————,]—*Appets.* had since 1926 provided a seasonal service of express carriages between London & the South Coast. In 1933 their licence was made subject to a

provision that they should only issue return tickets for a journey from London & then back to London & a single ticket should only be issued in respect of an outward journey from London. In 1935 they secured the relaxation of these conditions by a proviso which allowed them to issue single tickets in the reverse direction subject to certain conditions, & their licence was so backed in the south eastern area. The Southern Railway Co. & Southdown Motor Services, Ltd., who ran services competing with appets. & who, though they had not opposed the grant of the original licence, had opposed the insertion of the proviso, appealed to the Minister of Transport against the inclusion of the proviso & the Minister ordered its deletion:—*Held*: (1) no objection to the backing could be sustained on the ground that the conditions thereby imposed affected the scope or utility of the licence not in the south eastern area, but also elsewhere, including the area in which it was granted; (2) the Southern Railway Co. & Southdown Motor Services, Ltd., were entitled under the Road Traffic Act, 1930 (c. 43), s. 81, as amended by Road Traffic Act, 1934, s. 10, to appeal to the Minister; (3) the order of the Minister was good, though it nullified an order made by the comrs. in the exercise of their discretion; (4) the Southern Railway Co., who were mainly concerned with rail traffic, had a right of appeal to the Minister, because under Road Traffic Act, 1930 (c. 43), s. 72 (3) (d), the comrs. must have regard to the co-ordination of all forms of passenger transport, including transport by rail.—*R. v. MINISTER OF TRANSPORT, Ex p. VALLIANT DIRECT COACHES, LTD.*, *R. v. TRAFFIC COMRS. FOR SOUTH EASTERN TRAFFIC AREA, Ex p. VALLIANT DIRECT COACHES, LTD.*, [1937] 1 All E. R. 261; *sub nom. R. v. SOUTH-EASTERN TRAFFIC COMRS., Ex p. VALLIANT DIRECT COACHES, LTD.*, *R. v. MINISTER OF TRANSPORT, Ex p. VALLIANT DIRECT COACHES, LTD.*, *R. v. SOUTH-EASTERN TRAFFIC COMRS., Ex p. VALLIANT DIRECT COACHES, LTD.* 53 T. L. R. 227; 81 Sol. Jo. 138.

**76y.** ———— *Who may appeal.*]—*R. v. MINISTER OF TRANSPORT, Ex p. VALLIANT DIRECT COACHES, LTD.*, *R. v. TRAFFIC COMRS. FOR SOUTH EASTERN TRAFFIC AREA, Ex p. VALLIANT DIRECT COACHES, LTD.*, No. 76x, *ante*.

**76z.** ———— *Backing of licence—Conditions.*]—*R. v. MINISTER OF TRANSPORT, Ex p. VALLIANT DIRECT COACHES, LTD.*, *R. v. TRAFFIC COMRS. FOR SOUTH EASTERN TRAFFIC AREA, Ex p. VALLIANT DIRECT COACHES, LTD.*, No. 76x, *ante*.

**76aa.** *Trade licence—"Conveyance of passenger"—Learner.*]—By the Road Vehicles (Registration & Licensing) Regulations, 1924, art. 29d: "(1) A general trade licence shall not be used upon any vehicle other than a vehicle which is in the possession of the holder of such licence in the course of his business as a manufacturer or repairer of or dealer in mechanically-propelled vehicles. (2) A general trade licence shall not at any time be used upon a vehicle which is being used for conveyance of passengers for profit or reward." A motor car, bearing general trade plates under a general trade licence

held by a co. which carried on a business of dealing in motor cars, was used by an employee of that co. for the purpose of giving a lady instruction in driving. It had been arranged that payment should be made to the co. for the course of tuition. At the material time the lady was actually driving the car & the employee of the co. was seated in the car beside her:—*Held*: the transaction amounted to the “conveyance of passengers for profit or reward,” the fact that the learner was driving the vehicle at the material time not being sufficient to prevent her from being a “passenger” within the meaning of art. 29D (2), & the employee of the co. was, therefore, guilty of an offence against that article.—*GREEN v. DYNES* (1938), 159 L. T. 168, D. C.

**Licensing of goods vehicles.]—Sec Road & Rail Traffic Act, 1933 (c. 53).**

86. *Add. Annotation :—Apld. A.-G. v. Sharp*  
(1929), 45 T. L. R. 628.

- 86a. — — —.]—Deft., who was licensed to ply for hire with motor omnibuses in two districts connected by roads through M., but who had no licence to ply for hire in M., had garages in M., & his omnibuses stopped outside them to take up persons who had bought tickets in the garages:—*Held*: defts.' omnibuses were plying for hire in M.—*A.-G. v. SHARP* (1929), 45 T. L. R. 628; 27 L. G. R. 761.

- 92.** *Add. Citations*:—98 L. J. K. B. 209; 140 L. T. 194; 93 J. P. 61; 27 L. G. R. 39; 28 Cox. C. C. 576.

- 94a. — Private ground—Separated from highway by stone setts.]—A motor car stood on a piece of private ground belonging to a public-house at Barnes & separated from the highway only by a line of level stone setts, which offered no obstruction to the passage either of the motor car or of persons desiring to enter it from the highway. There members of the public entered the car, which was licensed as a hackney carriage for revenue

**PART IV. SECT. 2, SUB-SECT. 4.**

g iv. — *Police car.*] — The driver of a motor car was charged with exceeding the speed limit on a road in a built-up area. At the time of the alleged offence the accused was admittedly driving his car at a speed which exceeded the statutory limit applicable to such a road, but it was proved that he had done so in good faith while following a police car for the sole purpose of ascertaining the speed at which the police car was travelling so that he might have evidence to place before the Chief Constable that the driver of the police car was guilty of an offence against the provisions of the Road Traffic Acts. The accused's car was not being used for police purposes in the sense of Road Traffic Act, 1934, s. 3, & he should have been convicted. Observed, that prosecutions of the police for exceeding the speed limit in circumstances in which sect. 3 does not justify them in so doing should be instructed & conducted on exactly the same footing as prosecutions against private individuals.—*STRATHERN v. GLADSTONE*, [1937] S. C. (J.) 11.—SCOT.

n i. — One occasion.]—*Semble*: although the words "car plying for hire between definite points" *prima facie* connote the idea of a course of action, the section might be contra-

vened by a plying for hire on one occasion only.—*NAYANAH v. R.*, [1931] N. L. R. 332.—*S. AF.*

**sg. Vehicle engaged to carry club under contract—Fares collected by driver.}—Held:** deft. was "plying for hire" within Motor Omnibus Act, 1924, s. 13 (1).—**DICKENS v. MULHOLLAND** (1929), 41 C. L. R. 397; 2 A. I. J. 369; [1929] **ARGUS** L. R. 76.—**AUS.**

**PART IV. SECT. 3.**

**sh. Overcrowding—Whether mens rea necessary—Dublin Carriage Act.]—Held:** the prohibitions contained in this regulation were absolute, & accordingly, in the case of a summons charging an offence under the regulation the absence of *mens rea* was no defence. —*M'ADAM v. DUBLIN UNITED TRAMWAYS CO.*, [1929] I. R. 327.—**IR.**

**sj. — Vehicle not on hire.**—Where the permit granted in respect of a motor vehicle prohibits the carrying of more than four passengers, the carrying of more than this number is an infringement of the terms of the permit & is punishable under Motor Vehicles Act, 1914, s. 16, even though, at the time of the infringement, the vehicle was not on hire.—**KING-EMPEROR v. RAM TAHAL SINGH (1929), I. L. R. 9 Pat. 169.—IND.**

sk. *Passengers standing on cars.*—

purposes, but which was not licensed to ply for hire within the Metropolitan Police District, & on payment of 6d. to the driver were driven to the Richmond Park Golf Club:—*Held*: the motor car was plying for hire in a “public street, road, or place” within Metropolitan Public Carriage Act, 1869 (c. 115).—*WHITE v. CUBITT*, [1930] 1 K. B. 443; 99 L. J. K. B. 129; 142 L. T. 427; 94 J. P. 60; 46 T. L. R. 99; 73 Sol. Jo. 863; 28 L. G. R. 44; 29 Cox, C. C. 80, D. C.

- 116. Add. Citation :—**28 Cox, C. C. 515.

- 117a. — **Overcrowding—Liability of employer for aiding & abetting.**—The conductor of an omnibus was convicted of permitting the omnibus to be overloaded contrary to Railway Passenger Duty Act, 1942 (c. 79), s. 13, which, by sect. 15, imposed a penalty for this offence on the “driver, conductor, or guard.” His employer was not present at the time:—*Held*: the employer was liable to be proceeded against for “aiding & abetting, counselling & procuring” the commission of the offence.—*GOUGH v. REES* (1929), 142 L. T. 424; 94 J. P. 53; 46 T. L. R. 103; 28 L. G. R. 32; 29 Cox, C. C. 74, D. C.

- 117b. ——— Commencement of proceedings.— Whether order of Commissioners of Inland Revenue necessary.]—An information was preferred by a police officer against the conductor of a motor omnibus alleging that he had allowed the omnibus to carry at one time a greater number of passengers than it had been constructed to carry, contrary to Railway Passenger Duty Act, 1842 (c. 79), s. 13 :—*Held* : the prosecution was not a proceeding for the recovery of a fine or penalty under an Act relating to inland revenue within Inland Revenue Regulation Act, 1890 (c. 21), s. 21 (1), & it could, therefore, lawfully be commenced without an order of the Inland Revenue Comrs.—*KIRKBY v. MINTY*, [1929] 2 K. B. 165; 98 L. J. K. B. 733; 141 L. T. 515; 93 J. P. 176; 45 T. L. R. 427; 27 L. G. R. 438; 28 Cox. C. C. 640, D. C.

GLASGOW CORPN. v. STRATHERN, [1929]  
S. C. (J.) 5.—SCOT.

**sl. Permitting omnibus to be over-**  
**crowded—Whether offence against Inland**  
**Revenue & Customs Acts.**—[A complaint  
was brought in a burgh police ct  
which set forth that the accused was  
the conductor of a motor omnibus, in  
which a greater number of passengers  
were conveyed than the omnibus was  
constructed to carry, in contravention  
of Railway Passenger Duty Act, 1842,  
s. 13.—**Held:** under Burgh Police  
Act, s. 454, the burgh magistrate had  
no jurisdiction to entertain the com-  
plaint, in respect that the duties then  
imposed by the Act of 1842 had been  
repealed, & other duties substituted  
therefor, a contravention of sect. 13  
was still an offence against an Inland  
Revenue or Customs Act, within Burgh  
Police Act, s. 454.—CAMERON v.  
SWEENEY, [1928] S. C. (J.) 34.—SCOT.

sm. ———.]—HORN v. DUCKETT,  
[1929] S. C. (J.) 63.—SCOT.

50. ——— Summary proceedings—  
Limitation of time.]—*ORR v. STRA-*  
*THERN*, [1929] S. C. (J.) 30.—**SCOT.**

**PART IV. SECT. 4, SUB-SECT. 1.**

**sp. Motor Omnibus Act—Minimum fares prescribed by Order in Council—Liability of owner.]—DICKENS v. MITCHELL, [1928] V. L. R. 506; [1928] A. L. R. 323.—AUS.**

**146a. — Agreement not to compete with tramway company—Construction of agreement.]**—A local authority entered into an agreement with a tramway co. that they (the local authority) would not promote or be financially interested in any vehicles plying for hire "between any points served by the co.'s service." The local authority later established a motor omnibus service running approximately parallel to the route of the co.'s tramways at a distance of some 300 yards away from any point served by those tramways:—*Held*: the expression "between any points served by the co.'s service" meant definite spots or places on the route of the co.'s tramways which were actually passed by the tramway cars & not points within areas the inhabitants of which might reasonably be expected to use the tramway service. Therefore, there had been no breach by the council either of the agreement, or of sect. 57 of the Cleethorpes Urban District Council Act, 1928, which substantially reproduced it.—**GREAT GRIMSBY**!

**STREET TRAMWAYS CO. v. CLEETHORPES URBAN DISTRICT COUNCIL** (1934), 99 J. P. 81; 33 L. G. R. 33, H. L.

**146b. Rudeness of driver of hackney carriage—Validity of bye-law.]**—By a local Act, a local authority was empowered to make such bye-laws as it thought fit for (*inter alia*) the regulating of hackney carriages & carts plying for hire within the borough & for regulating the conduct of the drivers thereof reasonably. A bye-law was accordingly made which provided: "Every driver of a hackney carriage shall when working or plying for hire . . . conduct himself in a proper civil & decorous manner at all times." In a prosecution under the bye-law it was contended that the bye-law was uncertain as to the standard required & unreasonable, & that it was therefore void & unenforceable:—*Held*: the bye-law was neither uncertain nor unreasonable & was therefore valid & enforceable.—**IRELAND v. WILSON**, [1936] 3 All E. R. 358.

## Part V.—Locomotives and Motor Cars.

*See, now, Road Traffic Act, 1930 (c. 43), Part I.*

**154a. Driver's licence Person under twenty-one—Vehicle driven for previous six months—Exemption of agricultural tractor.]**—(1) An agricultural tractor driven in the course of the internal operations of a farm is exempted from the above provisions. (2) The onus of proof lies on a deft. to bring himself within the above excepting clause, if he can. It is not for the prosecution to prove affirmatively that a deft. does not come within the clause.—**ROCHE v. WILLIS** (1934), 151 L. T. 154; 98

J. P. 227; 32 L. G. R. 286; 30 Cox, C. C. 121.

**154b. — — — — — Onus of proof.]**—**ROCHE v. WILLIS**, No. 154a, *ante*.

**163. After this case add:—**

— — — — —.]—*See, now, Finance Act, 1920 (c. 18), s. 13, Sched. II., para. 4, as amended by Finance Act, 1926 (c. 22), s. 13, & Finance Act, 1927 (c. 10), s. 11, Sched. IV.; Roads Act, 1920 (c. 72), ss. 1, 20 (3).*

### PART IV. SECT. 5.

**f i. — — — — —.]**—Deft., a taxi-cab owner, was convicted for unlawfully permitting his taxi-cab to stand at other than a cab-stand contrary to a municipal bye-law which read as follows: "Excepting at places designated by bye-law as cab stands, no cab shall stand in any street or lane unless hailed by a prospective passenger & then only for sufficient time to take in such passenger, or unless waiting for a passenger for whom the cab has been ordered. The fact of any sign being exhibited on a cab indicating that it is vacant or waiting to be hired shall be conclusive evidence that such cab is not waiting to keep an engagement. Nothing herein shall be construed as prohibiting a cab from stopping at the side of any street for a sufficient length of time, & in order to discharge a passenger, nor as relieving any cab-driver from the duty of complying with all bye-laws of the City relating to parking." During the time in question the car was parked at the side of a street & its windshield carried a card marked "Engaged," & deft. & his wife were at a nearby theatre, & when they came out they drove home in the car. On appeal:—*Held*: the cab did not at the time in question "stand" in any street or lane within the meaning of the bye-law & the appeal was allowed.—**R. v. LEWIS**, [1935] 1 W. W. R. 254; 1 D. L. R. 766; 63 Can. C. U. 171.—**CAN.**

**g i. — — — — —.]**—*Classification of vehicles on basis of possession of metres—Validity of bye-law.]*—**R. v. JOHNSON** (1931), 56 Can. C. C. 358.—**CAN.**

### PART IV. SECT. 9.

**sq. Licence granted subject to approval of time-table—Failure to observe time-table—Liability of owner.]**—Art. 14 of the Omnibus Bye-laws for Aberdeen, 1926, is as follows: "the proprietor of any omnibus shall submit, for the approval of the magistrates, a time-table showing the time of arrival at & departure from the stance . . . & every such omnibus shall leave the aforesaid stance . . . punctually at the time stated in the said time-table as approved by the magistrates." A co. owning motor omnibus, with which it was duly licensed to ply for hire in Aberdeen, obtained from the magistrates approval of a time-table showing the starting times of its omnibuses from a particular stance. On a day when it was anticipated that, owing to special traffic congestion, the arrivals at the stance of the co.'s incoming omnibuses would be delayed, a servant of the co. acting with the manager's approval, took out an additional omnibus to augment the usual service. He started from the stance with this omnibus at a time which was not one of those authorised in the co.'s approved time-table. In a prosecution of the manager, as representing the co. for the contravention of art. 14:—*Held*: a contravention of art. 14 by one of the co.'s servants acting within the scope of his employment, was an offence for which the manager, as representing the co. was responsible.—**BEAN v. SINCLAIR**, [1930] S. C. (J.) 31.—**SCOT.**

**sr. Agreement between corporation & street railway—Prevention of competition—What amounts to breach of bye-**

**law—Sight-seeing omnibus.]**—**R. v. RED LINE LTD.**, [1930] 3 D. L. R. 747; 53 Can. C. C. 280; 65 O. L. R. 199.—**CAN.**

**sv. Loitering.]**—A taxi cab driver, who drove slowly along a street looking for passengers was convicted of an offence against reg. 125 (d) made under the Transport Act, 1930, which provides that "the driver of a public vehicle upon any public street shall not permit the public vehicle to loiter." Upon appeal by way of statutory prohibition:—*Held*: slowness of speed did not in itself constitute sufficient evidence of loitering & therefore, the conviction was bad.—**Re MICHAELIS, Ex p. HAVIS** (1933), 50 N. S. W. W. N. 90; 11 L. G. R. 96.—**AUS.**

### PART V. SECT. 2, SUB-SECT. 2.

**r i. — — — — —.]**—*Licensing of vehicles carrying goods.]*—**R. v. STORIE, R. v. VALENS**, [1930] 3 W. W. R. 366; 54 Can. C. C. 403.—**CAN.**

### PART V. SECT. 2, SUB-SECT. 3.

**sv. Construction of Regulation.]**—**Motor Vehicles (Construction & Use) Regs., 1931**, provide by Reg. 59 that the weight transmitted to the road surface "by any two wheels in line transversely" shall not exceed 8 tons in the case of a motor vehicle with 4 wheels:—*Held*: "transversely" does not mean "obliquely," & the two wheels referred to are either the two front wheels, or the two back wheels, & not a front wheel & a back wheel on opposite sides of the vehicle.—**THOMAS v. GALLOWAY**, [1935] S. C. (J.) 27.—**SCOT.**

**180a. Liability for damage to bridges—Locomotive Act, 1861 (c. 70), s. 7—To what bridges applicable—County bridge.]—Held:** above sect. does not apply to a county bridge.—*R. v. KITCHENER* (1873), L. R. 2 C. C. R. 88; 43 L. J. M. C. 9; 29 L. T. 697; 38 J. P. 134; 22 W. R. 134; 12 Cox, C. C. 522, C. C. R.

*Annotations:—***Reid.** *R. v. Dorset Inhabitants* (1881), 45 L. T. 308; *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. Worcester Corpn.*, A.-G. v. *Sharpness New Docks & Gloucester & Birmingham Navigation Co.*, [1913] 1 K. B. 422.

**180b. Efficient braking system—What amounts to.]**

—Applt.'s motor lorry became involved in an accident with another motor lorry driven in the opposite direction. After the accident, the brakes of applt.'s lorry were tested, & it was found that they were not maintained in good & sufficient working order. Applt. was charged with having unlawfully used on a certain road the said motor lorry not equipped with an efficient braking system or efficient braking systems in either case having two means of operation, contrary to the Motor Vehicles (Construction & Use) Regulations, 1937, reg. 34. The justices convicted applt. & fined him the sum of 10s. Thereupon this appeal was brought, & applt. contended that the prosecution must prove that applt.'s lorry was not equipped with an efficient braking system or efficient braking systems; that for this purpose it was not sufficient to prove merely that the brakes were not maintained in good & efficient working order; that in order to establish the offence charged it must be proved that the braking systems, as systems, with which applt.'s lorry was equipped were not efficient braking systems; & that the prosecution should have been brought under reg. 67 or reg. 68 of the regulations:—**Held:** as the regulation in question draws a clear distinction between construction of braking systems on the one hand, & use on the other hand, the justices were wrong in drawing the inference, from the mere behaviour of a motor lorry, at a particular time, that the

braking system of the motor lorry was not efficient.—*COLE v. YOUNG*, [1938] 4 All E. R. 39, D. C.

**185. Add. Annotation:—Appld.** *Dennis v. Leonard* (1929), 141 L. T. 94.

**185a. — Steam tractor.]—CARPENTER v. FOX**, No. 232a, *post*.

**185b. — Petrol-driven tractor.]—An "Austin"** petrol-driven tractor was driven on a public highway. Upon an information under Locomotives on Highways Act, 1896 (c. 36), s. 7, for breach of Motor Cars (Use & Construction) Order, 1904, Article II., clause 3, the justices held that the vehicle in question was not a motor car within the meaning of that order & Act, stating that the tractor type of vehicle was never contemplated when the order of 1904 was made:—**Held:** that the tractor was such a motor car.—*DENNIS v. LEONARD* (1929), 141 L. T. 94; 28 Cox, C. C. 621, D. C.

**186. Add. Citations:—**[1929] A. C. 354; 98 L. J. Ch. 198; 140 L. T. 624; 93 J. P. 146; 27 L. G. R. 261.

**188a. Trade licence—"Some other or further use"**—What amounts to.]—By Art. D of reg. 29 of Part II. of Road Vehicles (Registration & Licensing) Regulations, 1924, S. R. & O., 1924, No. 1462: "(1) A general trade licence shall not be used upon any vehicle other than a vehicle which is in the possession of the holder of such licence in the course of his business as a manufacturer or repairer of or dealer in mechanically propelled vehicles. (2) A general trade licence shall not at any time be used upon a vehicle which is being used for the conveyance of passengers for profit or reward. . . . (4) Subject to the provisions of paras. (1) & (2) of this article a vehicle may be used upon a public road under a general trade licence for any purpose connected with the business as a manufacturer or repairer of or dealer in mechanically propelled vehicles of the holder of such licence, & so long as such vehicle is *bond fide* being used for such purpose the

#### PART V. SECT. 2, SUB-SECT. 4.

**g i. —** *Necessity for averment of Order.*—Under powers conferred by Locomotives on Highways Act, 1896, s. 12, regulations were made by the Heavy Motor Car (Scotland) Order, 1905, & amending orders, with regard to heavy motor cars, the effect of which was to fix a speed of 20 miles an hour for motor cars exceeding 3 tons in weight. A motor driver was charged in the Sheriff Ct. upon a complaint which set forth that over a distance of 7 miles on a public highway he "did drive a motor car, viz., a motor omnibus, at a speed exceeding 20 miles per hour, viz., about 27 miles per hour, contrary to the Motor Car Act, 1903, s. 9." The weight of the omnibus unladen exceeded 3 tons. None of the Statutory Orders were libelled in the complaint. The sheriff having repelled an objection that sect. 9 did not apply to the omnibus, & having convicted the accused:—**Held:** the complaint as laid was irrelevant, in respect that the provisions of sect. 9 of the 1903 Act applied only to motor vehicles under 3 tons in weight; to make it relevant it was necessary to libel the Statutory Orders which made vehicles exceeding 3 tons in weight subject to a speed limit.—*DURNION v. PATERSON*, [1930] S. C. (J.) 12.—SCOT.

**g ii. —** *Whether notice of*

*prosecution necessary.*—Two police officers, who had detected a heavy motor car travelling in excess of the speed limit of twenty miles an hour, overtook & stopped the car, & one of them thereupon informed the driver that he had been travelling at a speed exceeding twenty miles an hour, & that his speed was twenty-six miles an hour. The driver was subsequently prosecuted for an offence against the Order of 1905. In defence he pleaded that he had not received the warning required by sect. 9 of Motor Car Act, 1903:—**Held:** a prosecution for a contravention of the Order of 1905 is not a prosecution for an offence under sect. 9 of Motor Car Act, 1903; & accordingly, the warning or notice required by that sect. is not a condition precedent to conviction for a contravention of the Order.—*TAYLOR v. HORN*, [1929] S. C. (J.) 111.—SCOT.

**g iii. — Evidence of—Speedometer.**—The driver of a motor charabanc was convicted of exceeding the speed limit of twenty miles an hour. The only evidence was that of two police officers, who followed the charabanc along the street, travelling in a motor cycle combination fitted with a recently tested speedometer. They deposed that, for a distance of 300 yards, their motor cycle kept 20 yards behind the charabanc, & that, during this distance, the speedometer

registered a speed of twenty-six miles per hour. An objection to the sufficiency of the evidence, on the ground that the method of registering the speed of the charabanc was unreliable, repelled; & conviction sustained.—*TAYLOR v. HORN*, [1929] S. C. (J.) 111.—SCOT.

#### PART V. SECT. 3, SUB SECT. 1.

**sb. Validity of bye-law.**—The tax imposed by Winnipeg Bye-law No. 14,415 on motor vehicles used in the city is a "fee or charge" within the prohibition in Highway Traffic Act, 1930, s. 107 (r).—*WINNIPEG CITY v. CRESCENT CREAMERY CO.*, [1934] 1 W. W. R. 228; 41 Man. L. R. 564.—CAN.

**sd. —**—Validity of bye-laws regulating scales of fares, & prohibiting owners from allowing drivers to work more than sixty hours a week, & requiring them to take out motor vehicle liability insurance policy.—*Re WINNIPEG BYE-LAW No. 14,272* (1932), 60 C. C. C. 385; 41 Man. L. R. 448.—CAN.

**se. —**—A bye-law made by the Police Comrs. reducing taxi fares held nugatory in view of the power given to the city of Hamilton by Hamilton Street Railway Co. Act, 1927.—*R. (PERRIN) v. ALTOBELLI* (1934), 62 Can. C. C. 266.—CAN.

holder of the licence shall not by reason only that some other or further use is being made of the vehicle be deemed to commit a breach of these regulations":—*Held*: the words "some other or further use" are limited to a use by the holder of the licence, & do not cover the delivery, for reward, by an intending purchaser of a motor vehicle of his own goods to his customers during a demonstration run.—*WESTOVER GARAGE, LTD. v. DEACON* (1931), 145 L. T. 357; 95 J. P. 155; 47 T. L. R. 509; 29 L. G. R. 474; 29 Cox, C. C. 327, D. C.

**188b. Driver's licence—Applicant suffering from specified disability—Refusal of licence—Whether applicant entitled to appeal.**—The Ct. of Appeal, reversing a decision of the Div. Ct., granted a rule *nisi* for a *mandamus* to justices to hear an appeal from a licensing authority under Road Traffic Act, 1930 (c. 43), s. 5, but held, when the rule came on for argument, that as appct. suffered from a specified disability which he admitted in his declaration & which compelled the licensing authority to refuse the licence the rule must be discharged.—*R. v. CUMBERLAND JUSTICES, Ex p. HEPWORTH* (1931), 146 L. T. 5; 95

J. P. 206; 47 T. L. R. 610; 30 L. G. R. 1; 29 Cox, C. C. 374, C. A.

**188c. —Disqualification for indefinite period.**—*R. v. FOWLER*, No. 254c, *ante*.

**192. Add. Citation:**—28 Cox, C. C. 498.

**199a. —Speedometer—Whether corroboration necessary.**—Resp. was charged with driving a motor car on a road in a built-up area at a speed greater than 30 miles per hour. Applt., a police inspector gave evidence that he followed resp.'s car in another car for a distance of about a mile & a half & that the inspector's speedometer showed that the speed of his car varied between 35 & 42 miles an hour. A police officer also gave evidence that he tested the speedometer on applt.'s car & that it was correct. No evidence was tendered by or on behalf of resp., who submitted that there was no corroboration of applt.'s evidence as required by Road Traffic Act, 1934 (c. 50), s. 2. Applt. contended that the evidence was sufficient as it was coupled with the evidence of the accuracy of the speedometer. Without ruling upon the submissions made by the parties, the justices dismissed the charge, "being of opinion that

**PART V. SECT. 3, SUB-SECT. 2.**

**188b i. Driver's licence—Driving car while disqualified—In place to which public have access.**—The driver of a motor vehicle was convicted of an offence under sect. 7 (4) of Road Traffic Act, 1930, on the ground that, while disqualified, for holding a driving licence, he had driven a vehicle on a road forming the access from a public highway to a farm. The road in question was part of the farm & led only to the farmhouse, where it terminated. It had no other houses on it, & it was not maintained by any public authority but by the farm tenant in terms of his lease. There was no gate at the entrance to it, & no intimation that it was not open to the public, & except at times in summer, when the farmer placed a pole across it to prevent the straying of cattle, there was no obstacle to prevent the public having access to it. The road was used by the public as an access to the farm, & members of the public not having business there also frequently walked on it. They had, on several occasions, been turned off by the farmer when there were growing crops in the adjoining fields.—*Held*: the road was a road to which the public had access within Road Traffic Act, 1930, s. 121 (1).—*HARRISON v. HILL*, [1932] S. C. (J.) 13.—*SCOT*.

**a (p. 868) i. —Officer driving car owned by Crown.**—A provision of a provincial Act which prohibits the driving of a motor car by any one, other than the owner of the vehicle holding a certificate of registration, unless he, the driver, is a duly licensed chauffeur or the holder of a permit to operate, cannot be applied to the driving of a motor car by a member of His Majesty's Permanent Forces where the car is owned by His Majesty in the right of the Dominion & is being used by said driver in the discharge of his military duties.—*R. v. ANDERSON*, [1930] 2 W. W. R. 595; 54 Can. O. C. 321; 39 Man. L. R. 84.—*CAN.*

**a (p. 868) ii. —**—Ontario Highway Traffic Act, R. S. O., 1927, s. 66, which requires an operator's licence, does not apply to a member of His Majesty's Permanent Forces in the Dominion while he is driving a motor vehicle the property of His Majesty in the right of the Dominion while on military or public duty & in obedience

to the order of a superior officer. The Crown, not being expressly mentioned in Ontario Highway Traffic Act, is not bound thereby.—*R. v. KROBES*, [1934] O. R. 44; 1 D. L. R. 251; 61 C. C. C. 3.—*CAN.*

**d i. —**—*BULLOCK v. HANSEN*, [1928] 2 W. W. R. 528; 37 Man. L. R. 450.—*CAN.*

**d ii. —**—By Highway Traffic Act, R. S. O., 1927, s. 66, the result of driving without a licence is liability to a fine; the unlicensed driver does not become an outlaw on the road. In a proper case, therefore, he may recover damages in respect of negligent driving by another party.—*DOWNNEY v. HYSLOP*, [1930] 4 D. L. R. 578; 65 O. L. R. 548.—*CAN.*

**f i. —Person "using."**—*COCKBURN v. GORDON*, [1928] S. C. (J.) 87.—*SCOT*.

that a person drives a vehicle on a highway without carrying the number plates required by statute does not preclude him from recovering damages for injuries sustained as the result of the negligence of the driver of another vehicle.—*SEYMOUR v. ARROWSMITH*, [1931] 3 W. W. R. 561.—*CAN.*

**n (p. 869) i. —New car using number plates of old car.**—Although under Vehicles Act, 1924, c. 42, where a registered car has been disposed of & another one obtained the number plates on the former are to be used on the latter car, the new car must first be registered before the owner is entitled to drive it on public highways with the old plates on it.—*BUNK v. BOUFFARD*, [1928] 3 W. W. R. 219.—*CAN.*

**o (p. 869) i. —Meaning of learning.**—A person is "bona fide learning to drive a motor car" if the relation of pupil & teacher in fact exists, even although he is receiving instruction after he has completely learnt the art of driving & guiding a motor car. When a pupil is being *bona fide* taught matters pertaining to the safe control of a motor car on a highway he comes within the Act.—*HUDD v. WILSON*, [1929] V. L. R. 132; [1929] Argus L. R. 138.—*AUS.*

**PART V. SECT. 3, SUB-SECT. 4.—A. (a).**

**d i. Evidence of speed—Speedometer.**—Instruments such as, & in-

cluding, speedo-meters, may be presumed to function accurately, unless the contrary is shown.—*PETERSON v. HOMES*, [1927] S. A. S. R. 419.—*AUS.*

**g i. —Wrongful admission of constable's notes.**—Where, on a prosecution for exceeding the speed limit, the special magistrate, who stated that he believed the police evidence, wrongly admitted as evidence notes taken by the police constables, & said in his judgment that the police evidence was supported by notes taken at the time.—*Held*: as it could not be inferred that the conviction would have been made had the notes been excluded, the conviction must be set aside.—*PELHAM v. HOMES*, [1928] S. A. S. L. 105.—*AUS.*

**k i. —**—*R. v. KNOTT (Alta.)*, [1929] 1 D. L. R. 773; 1 W. W. R. 304; 51 Can. Crim. Cas. 189.—*CAN.*

**sr. Motor fire engine—Whether exempt from regulations.**—The fact that a motor vehicle operated by a fire department is answering a fire alarm does not exempt its driver from the obligations of the Motor Vehicle Act, even though it has the right of way.—*LAWTON v. WINNIPEG & INTERURBAN SERVICES, LTD.*, [1928] 4 D. L. R. 887; [1928] 3 W. W. R. 354; 37 Man. L. R. 468.—*CAN.*

**sv. What constitutes speed limit—Erection of notice board.**—A speed limit of fifteen miles per hour is not constituted by the erection of a single notice board on which the figure "15" appears without any indication of the limits within which the restriction is to apply.—*WALLACE v. DURBAN INSPECTION OF POLICE*, [1931] N. L. R. 282.—*S. AF.*

**sw. Motor Vehicle Act, 1935, s. 53—Whether affecting civil liability.**—Sect. 53 of Motor Vehicle Act, 1935, is a penal sect. & does not affect civil liability.—*McDERMID v. BOWEN* (No. 1), [1937] 2 W. W. R. 347; 51 B. C. R. 325; on appeal, [1938] 2 W. W. R. 510.—*CAN.*

**sz. Form of information.**—An information is good which charges unlawful operation of a motor vehicle at an excessive rate of speed contrary to sect. 84 (2) of Motor Vehicle Act, 1932 (N. S.).—*R. v. EISENHAUER*, [1937] 2 D. L. R. 770; 11 M. P. R. 406; 68 Can. O. C. 221.—*CAN.*

in cases of this kind it is not desirable that the evidence of a police officer checking a person's speed from the speedometer in his own car should be accepted unless corroborated by another witness present at the time":—*Held*: (1) although resp.'s submission was incorrect in point of law, the justices were wrong in laying down what purported to be a new rule of law of universal application, as there was no rule of law requiring corroboration in the circumstances of the case; (2) as, but for the justices' decision, resp. might have desired to call evidence by way of answer, the proper course was to remit the case back to the justices to hear & determine it according to law.—*RUSSELL v. BEESLEY*, [1937] 1 All E. R. 527; 53 T. L. R. 298; 81 Sol. Jo. 99, D. C.

**199b.** ————.]—Applt. was charged with driving a motor vehicle at a speed exceeding 30 m.p.h. The only evidence given in support of the charge was that of two police officers, who, travelling in the same police car, stated that applt. had been driving at speeds of 38, 40, 42 & 44 m.p.h. They based these statements merely upon observation of the speedometer on the police car. No evidence was given of the accuracy of the speedometer:—*Held*: such evidence, based upon observations of one instrument, without proof of its accuracy, & without evidence of the opinion of an experienced person as to the speed at which applt. was travelling, was not, under Road Traffic Act, 1934 (c. 50), s. 2 (3), sufficient to convict applt.—*MELHUSH v. MORRIS*, [1938] 4 All E. R. 98; 82 Sol. Jo. 854, D. C.

**199c.** ———— Evidence of two witnesses—Whether corroboration.].—Applt. was charged with having unlawfully driven a motor lorry at a speed greater than the maximum speed specified for a vehicle of that class or description in Road Traffic Act, 1934 (c. 50), Sched. I, contrary to Road Traffic Act, 1930 (c. 48), s. 10 (1). Evidence was given by one police officer of excessive speed, estimated by him at a place on the particular road, & by a second police officer to the same effect, estimated by him at a different place on the same road. Neither of the police officers had relied on a stop-watch or speedometer, nor was there any reference to any specified & measured distance for the purpose of calculating the speed of vehicles. Applt. contended that, inasmuch as the opinion of each police officer related to a different place on the road, & to a different time in each case, & inasmuch as the evidence of excessive speed at each place therefore consisted solely of the opinion of one police officer, there could

not be a conviction by virtue of Road Traffic Act, 1930 (c. 48), s. 10 (3), as substituted by Road Traffic Act, 1934 (c. 50), s. 2 (3), which provided that "the evidence of one witness to the effect that . . . the person prosecuted was driving the vehicle at a speed exceeding" the speed limit, was by itself not sufficient for a conviction. The justices convicted applt., imposed a fine of 20s., & ordered that his licence be indorsed:—*Held*: as the vehicle had not been observed by the two police officers at the same moment, the justices were wrong in concluding that the evidence was sufficient to comply with the sect. of the Act with regard to corroboration.—*BRIGHTY v. PEARSON*, [1938] 4 All E. R. 127; 159 L. T. 619; 102 J. P. 522; 82 Sol. Jo. 910, D. C.

**203.** *Add. Annotation*:—*Consd. Milner v. Allen* (1933), 97 J. P. 111.

**207a.** *Motor coach—Schedule necessitating excessive speed—Liability of employer for aiding & abetting.*].—Resps. owned a motor coach which was a heavy motor car fitted with pneumatic tyres, & was restricted under Heavy Motor Car Order, 1904, to a maximum speed limit of twelve miles per hour. The vehicle was driven by a servant of the resps. between L. & P. Resps. advertised times of departure & arrival which necessitated an average speed of eighteen miles per hour without allowing for stops. While driving the coach at thirty-five miles per hour on one of the scheduled journeys, resps.' servant was stopped by the police, & the resps. were summoned for counselling, procuring, aiding & abetting the commission of the offence:—*Held*: resps. ought to have been convicted of counselling & procuring.—*NEWMAN v. OVERINGTON, HARRIS & ASH, LTD.* (1928), 93 J. P. 46; 27 L. G. R. 85, D. C.

**210.** *Add. Annotation*:—*Refd. R. v. Surrey Justices, Ex p. Witherick* (1931), 146 L. T. 164.

**216.** *Add. Annotation*:—*Consd. R. v. Surrey Justices, Ex p. Witherick*, [1932] 1 K. B. 450.

**217.** *Add. Annotation*:—*Consd. R. v. Surrey Justices, Ex p. Witherick*, [1932] 1 K. B. 450.

**222a.** *Under Road Traffic Act, 1930 (c. 43)—"Driving without due care & attention or without reasonable consideration"—Separate offences.*].—Applt. was convicted before justices on an information which charged him with driving a motor vehicle on a road "without due care & attention or without reasonable consideration for other persons using the road contrary to sect. 12 of Road Traffic Act, 1930":—*Held*: the section created two separate offences & the conviction was bad

#### PART V. SECT. 3, SUB-SECT. 4.— A. (b).

**210 H.** ———— *Speed of car—Possibility of control.*].—*R. v. DURAND*, [1928] 2 D. L. R. 703; 49 Can. Crim. Cas. 217; 60 N. S. R. 54.—CAN.

**222a i.** *Under Road Traffic Act, 1930 (c. 43)—Joinder of charges against two drivers in one complaint.*].—A complaint charging two motor drivers with having contravened sect. 12 (1) of Road Traffic Act, 1930, set forth that they had each driven a motor vehicle without due care & attention & without reasonable consideration for other persons using the road, & had

respectively caused each of the vehicles to collide with & damage the other:—*Held*: it was competent to charge the two drivers in the one complaint.—*MATHEWSON v. RAMSAY*, [1936] S. C. (J.) 5.—SCOT.

**xx.** *Driving recklessly & failure to stop.*].—Accused was charged on an indictment which set forth that, while on a public road & under the influence of intoxicating liquor so as to be incapable of driving a car, he drove a car in a reckless manner & at an excessive speed into a motor bicycle on which there was a pillion passenger; that although aware of the accident he failed to stop, & that in consequence

of the collision he injured the driver of the bicycle & killed the passenger. Objection was taken that it was incompetent to incorporate in the indictment averments of intoxication & failure to stop, matters which might each have been charged as a separate & independent statutory offence:—*Held*: the averments objected to formed part of the circumstances surrounding the crime charged, & might cast a light upon the culpability of accused with regard to that crime & further, they gave accused notice of the case which he would have to meet.—*H.M. ADVOCATE v. TULLY*, [1935] S. C. (J.) 8.—SCOT.

for duplicity, applt. having been charged with those two offences in the alternative.—*R. v. SURREY JUSTICES, Ex p. WITHERICK*, [1932] 1 K. B. 450; 101 L. J. K. B. 203; 146 L. T. 164; 95 J. P. 219; 48 T. L. R. 67; 75 Sol. Jo. 853; 29 L. G. R. 667; 29 Cox, C. C. 414, D. C.

*Annotation*.—*Consd. R. v. Willmot* (1933), 97 J. P. 149.

**222b.** ——— “Driving without due care & attention”—*Inexperience—Whether defence.*—*Resp.* was charged with driving a private motor vehicle without due care & attention contrary to Road Traffic Act, 1930 (c. 48), s. 12. The justices dismissed the charge, on the ground that *resp.* “was exercising all the skill & attention to be expected from a person with his short experience”.—*Held*: the justices were wrong in assuming that there can be one standard for an ordinary driver & another standard for a person of inexperience or lacking in skill. Whether experienced or inexperienced, a driver must exercise “due care & attention” as provided by sect. 12 of the Act of 1930.—*McCRONE v. RIDING*, [1938] 1 All E. R. 157; 158 L. T. 253; 102 J. P. 109; 54 T. L. R. 328; 82 Sol. Jo. 175; 36 L. G. R. 160, D. C.

*Annotation*.—*Refd. The Manchester Regiment*, [1938] P. 117.

**222c.** ——— “Driving recklessly or in a manner dangerous to the public”—*Separate offences.*—*R. v. MILLS* (1932), 173 L. T. Jo. 57 (Quarter Sessions).

**222d.** ——— ———.—Applt. was convicted on a count of an indictment in the following terms: “Statement of offence. Driving motor vehicle in a manner dangerous to the public, contrary to sect. 11 (1) of the Road Traffic Act, 1930 (c. 43). Particulars of offence. Charles Willmot . . . on a certain road . . . in the county of Lincoln, drove a motor car recklessly, or at a speed or in a manner which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition & use of the road, & the amount of traffic which was actually at the time, or which might reasonably have been expected to be, on the said road.” Applt. was represented by counsel at the trial, but no objection to the validity of the count was taken until after verdict.—*Held*: the point with regard to the validity of the count was one which under the old practice could have been taken on a writ of error &, although it had not been taken at the trial, the ct. were bound to allow it to be raised on appeal. As the count charged several offences in the alternative, it was bad for duplicity, & the conviction must be quashed.—*R. v. WILLMOT* (1933), 149 L. T. 407; 97 J. P. 149; 49 T. L. R. 427; 77 Sol. Jo. 372; 31 L. G. R. 189; 24 Cr. App. Rep. 63; 29 Cox. C. C. 652, C. C. A.

**222e.** ——— “Driving in a manner dangerous to the public”—*Charge reduced to “driving without due care & attention”—Jurisdiction of justices.*—When a person is charged with driving a motor car in a manner dangerous to the public contrary to sect. 11 of Road Traffic Act, 1930 (c. 43), the justices have no jurisdiction, without the consent of the accused, to reduce the charge to one of driving

without due care & attention under sect. 12 of the Act.—*R. v. SOUTHAMPTON JUSTICES, Ex p. TWEEDIE* (1932), 102 L. J. K. B. 11; 147 L. T. 530; 96 J. P. 391; 48 T. L. R. 636; 76 Sol. Jo. 545; 30 L. G. R. 410; 29 Cox, C. C. 556, D. C.

**222f.** ——— ——— *Validity of conviction—Acquittal on charge of manslaughter in same indictment.*—Applt. was charged on an indictment containing two counts: (1) manslaughter of a man who was knocked down & killed by applt.’s motor lorry; (2) driving the lorry in a manner dangerous to the public, contrary to Road Traffic Act, 1930 (c. 43), s. 11. The jury acquitted applt. of manslaughter, but convicted him of dangerous driving. On a submission that this verdict was bad, in that the *mens rea* required for the two offences was identical, & that it was therefore impossible for the jury to negative that *mens rea* on the first count, & to find it proved on the second, *MACKINNON, J.*, overruled the submission, & upheld the conviction. He sentenced applt. to one month’s imprisonment in the second division, but admitted him to bail, & granted a certificate that the case was fit for appeal.—*Held*: the conviction was right. Each count in an indictment is a separate indictment, & since applt. on an indictment for manslaughter could not have been convicted of dangerous driving, he could not have pleaded *autrefois acquit* if the charge of dangerous driving had been tried separately. It is, however, in the opinion of the ct., undesirable that a charge of dangerous driving should be made a count in an indictment for manslaughter. Where the prosecution desire to prefer both charges they ought to do so in two separate indictments.—*R. v. SRRINGER*, [1933] 1 K. B. 701; 102 L. J. K. B. 206; 148 L. T. 503; 97 J. P. 99; 49 T. L. R. 189; 77 Sol. Jo. 65; 31 L. G. R. 84; 21 Cr. App. Rep. 30; 29 Cox, C. C. 605, C. C. A.

*Annotation*.—*Refd. R. v. Carr* (1934), 24 Cr. App. Cas. 199.

**222g.** ——— ——— *Negligence not amounting to manslaughter.*—Where a person is indicted for manslaughter for having, while driving a motor car, unlawfully killed a man, the judge, in directing the jury, should in the first instance tell them that the facts must be such that in their opinion the negligence of the accused went beyond a mere matter of compensation between subjects & showed such a disregard for the life & safety of others as to amount to a crime against the State & conduct deserving punishment; he should then explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving; & further he should indicate the conditions under which they may acquit the accused of manslaughter & convict him of dangerous driving. A direction that all the jury have to consider is whether death was caused by dangerous driving within sect. 11 of Road Traffic Act, 1930 (c. 43), & no more, is a misdirection.—*ANDREWS v. DIRECTOR OF PUBLIC PROSECUTIONS*, [1937] A. C. 576; [1937] 2 All E. R. 552; 106 L. J. K. B. 370; 101 J. P. 386; 53 T. L. R. 663; 81 Sol. Jo. 497; 26 Cr. App. Rep. 34; 35 L. G. R. 429; *sub nom. R. v. ANDREWS*, 156 L. T. 464; 30 Cox, C. C. 576, H. L.



**222h. ——— On charge of manslaughter.]**

—Appl. was indicted at the Central Criminal Ct., charged with manslaughter. By Road Traffic Act, 1934, s. 34, it is enacted that, on an indictment of manslaughter in connection with the driving of a motor vehicle, the jury can bring in a verdict of driving to the public danger under Road Traffic Act, 1930 (c. 43), s. 11. The accused was driving his car along a road on a dark night when he collided from behind with a young woman, causing her injuries from which she died. The accused did not know that he had struck anybody at all. He was driving at a speed of about 20 miles per hour with side lights only. In his summing up to the jury, the judge referred to the opinion that if a person by reckless driving kills another the proper verdict is a verdict of manslaughter. "I apprehend," he continued, "that what Parliament intended [by Road Traffic Act, 1930 (c. 43), s. 11] was this, that there might be cases where a man was driving a motor car in a dangerous manner, & then had the misfortune to kill somebody, where nevertheless a jury might think, either having regard to the age of the accused or for some reason or other, there were circumstances which would justify the jury in returning a less serious verdict":—*Held*: the direction to the jury in the summing up was adequate & correct.—*R. v. LEACH*, [1937] 1 All E. R. 319, C. C. A.

**222j. ——— & driving while disqualified—Charges tried together.]—*R. v. POMEROY* (1935), 80 Sol. Jo. 94; 25 Cr. App. Rep. 147, C. C. A.****222k. ——— What amounts to.]—**The offence of dangerous driving under Road Traffic Act, 1930 (c. 48), s. 11 (1), is complete if potential danger to traffic which might reasonably be expected to be on the road is proved, it being unnecessary to establish actual danger to any member of the public.

*Per HUMPHREYS, J.*: The danger to which the sect. refers is to be found in the speed itself. Where the speed at which a vehicle is driven is in itself a dangerous speed, no other circumstance need be taken into consideration.—*KINGMAN v. SEAGER*, [1938] 1 K. B. 397; 107 L. J. K. B. 97; 157 L. T. 535; 101 J. P. 543; 81 Sol. Jo. 903; 30 Cox, C. C. 639; *sub nom.* *KINGHAM v. SEAGER*, 54 T. L. R. 50; 36 L. G. R. 43, D. C.

**222l. ——— Driving under influence of drink—In "public place"—Field to which public admitted.]—**A field to which the public are admitted is "a public place" within sect. 15 (1) of above Act.—*R. v. COLLINSON* (1931), 75 Sol. Jo. 491; 23 Cr. App. Rep. 49, C. C. A.**222m. ——— Ambiguous verdict.]—*R. v. HAWKES* (1931), 75 Sol. Jo. 247; 22 Cr. App. Rep. 172, C. C. A.****222n. ——— Form of indictment.]—**(1) An indictment for the offence of driving a motor vehicle when under the influence of drink, contrary to Road Traffic Act, 1930 (c. 43), s. 15 (1) (b), should avoid the use of the word "drunk."

(2) A charge of the above offence should

not be tried together with a charge of manslaughter, even though counsel for the defence consent to such a course being taken.—*R. v. CARR* (1934), 24 Cr. App. Rep. 199, C. C. A.

**222o. ——— Joinder of count for manslaughter.]—*R. v. CARR*, No. 222n, *ante*.****222p. Failure to give hand-signal of intention to stop.]—**The Highway Code, issued by the Minister of Transport under the authority conferred by Road Traffic Act, 1930 (c. 48), s. 45, & approved by Parliament, states in para. 37, dealing with directions to drivers of motor vehicles: "Before you stop, or slow down or change direction, give the appropriate signal clearly & in good time." Part II. of the Appendix to the Code, dealing with "Signals to be given by drivers . . . to indicate their own intention," states that "Signals by drivers should be given with the arm extended from the side of the vehicle at least as far as the elbow, where mechanical indicators are not used," & an appropriate arm signal is indicated when the driver intends to slow down or stop.

Under Road Traffic Act, 1930 (c. 48), s. 30, the Minister of Transport was given power to make regulations with respect to "the appliances to be fitted . . . for intimating any intended change of speed or direction of a motor vehicle & the use of any such appliance." The Minister of Transport on Aug. 21, 1935, made the Motor Vehicles (Direction Indicator & Stop Light) Regulations, 1935, by which a "stop light" was defined by reg. 3 as meaning "a device fitted to a motor vehicle for the purpose of intimating the intention of the driver of the vehicle to stop or slow down."

By reg. 9: "Every stop light shall be fitted at the rear of the vehicle and . . . shall show a red or amber light."

In a case where pltf. was injured in an accident caused by the negligence of the drivers of two motor vehicles, the trial judge held that one of defts., Mrs. B., was chiefly to blame, that she was negligent in pulling up violently & faster than a car usually does & also in not giving a hand signal of intention to pull up before she pulled up, & that, if Mrs. B. had given a hand signal, no accident would have occurred. There was no appeal against the finding of negligence. The trial judge awarded that Mrs. B. should pay two-thirds of the damages & costs & another deft. one-third. Mrs. B. appealed against this apportionment:—*Held*: (1) on these findings of fact, Mrs. B. was not justified in relying solely on the stop light as indicating her intention to stop; (2) the trial judge had jurisdiction at the end of the proceedings in which it had been held that pltf. was entitled to recover, to entertain an application to apportion the blame between the two defts. for the purpose of fixing the contribution as between the two joint tortfeasors, & it was not necessary that some separate formal legal proceedings should be instituted for that purpose.—*CROSTON v. VAUGHAN*, [1938] 1 K. B. 540; [1937] 4 All E. R. 249; 107 L. J. K. B. 182; 158 L. T. 221; 102 J. P. 11; 54 T. L. R. 54; 81 Sol. Jo. 882; 36 L. G. R. 1, C. A.

**223. Add. Annotation:—*Apld. Gough v. Rees* (1929), 46 T. L. R. 103.**

**232a. Leaving car so as to obstruct highway—To what vehicles applicable—Steam tractor.]—Held:** (1) Motor Cars (Use & Construction) Order, 1904, Article IV., clause 2, does not apply to a steam tractor weighing 13 tons unladen, which while being driven on the highway caused an obstruction, inasmuch as it is not a motor car; (2) although the above tractor was in motion, being driven along the highway at the time of the commission of the offence, it was "standing" thereon within the meaning of Article IV., clause 2.—*CARPENTER v. FOX*, [1929] 2 K. B. 458; 98 L. J. K. B. 779; 142 L. T. 234; 93 J. P. 239; 45 T. L. R. 571; 27 L. G. R. 601; 29 Cox, C. C. 42, D. C.

**232b. — What amounts to standing.]—***CARPENTER v. FOX*, No. 232a, *ante*.

**232c. Obstruction of "road"—Whether footway included.]—**The word "road" as used in Road Traffic Act, 1930 (c. 43), & in the Motor Vehicles (Construction & Use) Regulations, 1931, includes the footway as well as the carriageway, & therefore:—*Held:* a person who left a motor car standing on the footway ought to have been convicted of allowing it to stand on the "road" so as to cause unnecessary obstruction thereof.—*BRYANT v. MARX* (1932), 147 L. T. 499; 96 J. P. 383; 48 T. L. R. 624; 76 Sol. Jo. 577; 30 L. G. R. 405; 29 Cox, C. C. 515, D. C.

**Duties in case of accident.]—***See* Road Traffic Act, 1930 (c. 43), s. 22.

**232d. — Refusal to give name & address—Accident reported to police—Not compliance with Act.]—**The failure of the driver of a motor vehicle, who has been concerned in an accident, to comply with Road Traffic Act, 1930 (c. 43), s. 22 (1), by giving his name & address to any person having reasonable grounds for requiring him to do so, is not excused by a subsequent compliance with sect. 22 (2), which requires the driver to report the accident to the police if he has not given his name & address to any such person.—*DAWSON v. WINTER* (1932), 149 L. T. 18; 49 T. L. R. 128; 77 Sol. Jo. 29; 31 L. G. R. 298; 29 Cox, C. C. 633, D. C.

**232e. Excessive load—In relation to speed—Heavy motor car.]—**Road Traffic Act, 1930 (c. 43), s. 2 (1) (d), defines a class of vehicles to be known as heavy motor cars, & by para. 2 (d) of Sched. I., a maximum speed of 16 miles an hour is prescribed for heavy motor cars if all the wheels are not fitted with pneumatic tyres but are fitted with soft or elastic tyres. By Reg. 38 of Motor Vehicles (Construction & Use) Regulations, 1931, a heavy motor car is required to have its maximum speed painted on it. By Reg. 59 of those Regulations the sum of the weights transmitted to the road surface by all four wheels of a heavy motor car is not to exceed 12 tons. By Reg. 10 of Motor Vehicles (Construction & Use) (Amendment) Provisional Regulations, 1931, Reg. 59 is altered by the addition of the following proviso: "Provided that in the case of a heavy motor car with four wheels & propelled by steam . . . the sum of the weights transmitted to the road surface by all the wheels of such heavy motor car may equal, but shall not exceed . . . 14 tons, provided that its maximum speed with or without a trailer does not exceed 12 miles per hour":—*Held:* this proviso did not allow a vehicle whose maximum speed, as allowed by the Sched. to the Act, & painted on the vehicle, was 16 miles an hour, to carry a load between 12 & 14 tons if it reduced its actual speed on that journey to 12 miles an hour; & on proof of the facts that 16 miles an hour was painted on the vehicle, & that the load exceeded 12 tons, the justices were entitled to convict of an offence against Reg. 59 without any evidence that the speed in fact exceeded 12 miles an hour.—*PRITCHARD v. DYKE* (1933), 149 L. T. 493; 97 J. P. 179; 49 T. L. R. 473; 31 L. G. R. 301; 30 Cox, C. C. 1, D. C.

**232f. — Effect of gradient between front & rear wheels when weight measured.]—**An information was preferred against the owners of a four-wheeled heavy motor vehicle for permitting it to be used in such a manner that the sum of the weights transmitted to the road surface by the two rear wheels in line transversely exceeded 8 tons, contrary to

**PART V. SECT. 3, SUB-SECT. 4.—**  
A. (c).

**m i. —.]—**The liability imposed by Highway Traffic Act, Ont., 1927 (c. 251), ss. 9 (1), 41 (1), exists even in absence of negligence: the failure to have a tail light burning & visible on a motor vehicle in accordance with s. 9 (1) is a violation of the Act, & if a cause of a collision resulting in damages, may involve civil liability under s. 41 (1), even though the light was burning until shortly before the accident & went out without the knowledge or personal fault or negligence of the driver of the vehicle.—*HALL v. TORONTO QUELPH EXPRESS CO. & HATCH*, [1929] 1 D. L. R. 375; S. C. R. 92; 63 O. L. R. 355; setting aside O. L. R., *loc. cit.*—*CAN.*

**PART V. SECT. 3, SUB-SECT. 4.—**  
A. (e).

**232d i. Duty to report accident—Name & address given to other party.]—Held:** where a motor vehicle has collided with another vehicle & the driver of the motor vehicle has given his name & address to the driver of the other vehicle, he is under no duty thereafter to report the accident to the police.—

*ADAIR v. FLEMING*, [1932] S. C. (J.) 51.—*SCOT.*

**232d ii. Duty to stop.]—**Where a driver of a motor vehicle which had, to the knowledge of the driver, been involved in an accident, did not stop his vehicle until about 300 yards after the impact:—*Held:* on the facts, the driver had not complied with the obligation to stop imposed by sect. 52 of Road Traffic Act, 1934. The driver's object in returning to the place of an accident is not an element in any offence created by sect. 52, but may be relevant to the quantum of penalty.—*JARMAN v. WALSH*, [1936] S. A. S. R. 25.—*AUS.*

**232d iii. —.]—**Sect. 52 of Road Traffic Act, 1934, requires the driver to stop for such a period as may be reasonable to enable the questions to be put if there is anybody in the vicinity who desires to put them.—*NOBLET v. CONDON*, [1935] S. A. S. R. 329.—*AUS.*

**232j i. Commercial vehicles—Permitted hours for drivers—Constructive driving.]—**A co. carrying on business as carriers between L. & G. were charged with contraventions of Road Traffic Act, 1930, s. 19 (1) (ii.), & were convicted. In a stated case, it

appeared that the sheriff-substitute, in computing driving periods, had taken into account (*inter alia*) time during which drivers of the co.'s vehicles were waiting in the G. depot of the co., subject to be called upon at any time to do work. It was maintained against the co. that such periods of waiting, not being periods of rest within Road & Rail Traffic Act, 1933, s. 31 (1), had been properly taken into account as periods of constructive driving:—*Held:* (1) 1933 Act, s. 31 (1), had no application, in respect that it dealt solely with the calculation of minimum periods of rest under 1930 Act, s. 19 (1) (iii.), & did not affect the calculation of maximum periods of driving under sect. 19 (1) (ii.), which was the subhead on which alone the present complaint was based; (2) the drivers of the co.'s vehicles while waiting in the depot were not constructively driving within 1930 Act, s. 19 (2) (b); (3) the sheriff-substitute had misdirected himself in taking such periods of waiting into account in his computation of driving periods.—*JESSNER & SONS v. WAUGH*, [1936] S. C. (J.) 47.—*SCOT.*

**232j ii. —.]—**At the trial of a co., charged with a contravention

the Motor Vehicles (Construction & Use) Regulations, 1931, reg. 59. There was a camber of the road at the place where the weights were measured, & in consequence of the use of the weighing instruments the rear wheels were at the time when the weights were recorded lifted slightly from the ground. The justices dismissed the information on the ground that there should be no unevenness of surface or gradient between the places where the front wheels & the rear wheels stood, & that no evidence had been given of this fact. They also held there was no evidence that the defts. "permitted" the offence:—*Held*: the Motor Vehicles (Construction & Use) Regulations, 1931, reg. 59, in its universal language, makes no exception with regard to the place at which or the gradient on which the weight is to be ascertained; defts., in accepting the load to be carried, permitted the user of the vehicle contrary to the regulation.—*PROSSER v. RICHINGS*, [1936] 2 All E. R. 1627; 155 L. T. 284; 100 J. P. 390; 52 T. L. R. 677; 80 Sol. Jo. 794; 34 L. G. R. 456; 30 Cox C. C. 457, D. C.

**232g. — To what vehicles applicable—Date of registration.**—A certain four-wheeled motor vehicle fitted with pneumatic tyres was stopped & found to weigh, with its contents, 13 tons. The owners were charged with having unlawfully caused or permitted the use of a vehicle which did not comply with the Motor Vehicles (Construction & Use)

of sect. 19 (1) (i) in respect of three van drivers in their employment, it was proved that forms which, in compliance with statutory requirements, were issued by the co. were filled up weekly by the drivers & returned by them to the co.; that these forms, which included entries under appropriate heads stating correctly the hours of commencing work, the mid-day rest interval, & the hour of ceasing work, also contained a column showing the total time worked exclusive of regular rest intervals; that the figures in that column indicated continuous driving on eighty-three occasions for more than the permitted period; & that the co. without comment had tendered these forms for inspection by the Examiner of Records appointed by the Traffic Comrs. It further appeared that the drivers, when examined for the prosecution, deposed that they had not correctly completed the forms, in respect that they had entered only the regular meal intervals; that they had other intervals of rest & periods when they were not driving or doing work in connection with their vehicles or their loads, many of which had exceeded thirty minutes in duration (a period recognised by the statute as a break in working time); & that on no occasion—except in one instance of which the co. had no knowledge—had the period of five and a half hours of continuous driving been exceeded. The charge was found not proven:—*Held*: the fact that the returns made by the drivers were in statutory form & had been tendered by the co. for inspection as correct records was of itself sufficient, in the absence of any definite evidence as to the actual periods of continuous driving, to establish the contravention charged.—*ADAIR v. CRAIGHOUSE CABINET WORKS*, [1937] S. C. 89.—**SCOT.**

**232j iii. —**—In a prosecution for causing or permitting the driver of a goods vehicle to drive for continuous periods exceeding five &

a half hours, it was proved that the driver had been employed continuously for periods in excess of five & a half hours; that his duties while so employed had been to drive round his employers' customers, delivering goods, canvassing for further orders & collecting payments & empty bottles. While so engaged he did not have an interval of half an hour for rest. The distance actually driven during these periods was approximately only twenty-three miles:—*Held*: these facts established a contravention of sect. 19 (1) (i), in respect that, in view of the provisions of sub-sect. (2), the whole periods during which the driver was employed must be reckoned as time spent in driving.—*MCALLUM & SON v. ADAIR*, [1937] S. C. (J.) 114.—**SCOT.**

**232j iv. —**—Def. was the part-owner of a motor truck. He began work unloading the truck in Melbourne. Having loaded it again with merchandise, he returned on it to Nhill where he lived. For a considerable part of the journey he drove the truck himself, but was relieved on two occasions by an employee while he rested. Def.'s working time, excluding the time his employee was driving, was less than eleven hours, but otherwise more than eleven hours' working time elapsed from the commencement of the unloading in Melbourne until the truck arrived back in Nhill. Sect. 39 (2) of Transport Regulation Act, 1933, provides that time spent by a driver in loading & unloading shall be reckoned as time spent in driving. An information charging def. that, contrary to sect. 39 of the Act, he did drive a motor car used for the carriage of goods for continuous periods amounting in the aggregate to more than eleven hours, in respect of a period of twenty-four hours, was dismissed on the ground that, while the employee was driving, def. was on the truck in the capacity of a passenger & had not worked more than eleven hours:—*Held*: def. was

not a passenger at any stage of the journey to Nhill, & the offence charged had been proved.—*BROADHURST v. MERRETT*, [1937] V. L. R. 91; 43 Argus L. R. 215.—**AUS.**

**232h. — Liability of employer.**—The driver of a lorry, acting on the instructions of its owner, his employer, took it to London, where it received a load of timber. The weight of the load was, in accordance with a custom of the timber trade, judged by its size. According to that standard, its weight was within that permitted to the lorry in question under reg. 64 of Motor Vehicles (Construction & Use) Regulations, 1937. In fact, the weight of the load was in excess of that permitted. The loading was completed at a time of the day when no weigh-bridges were open. The driver that evening drove the lorry unweighed to another part of London. The following day he proceeded with it to Dorset. On the way, the lorry was stopped

not a passenger at any stage of the journey to Nhill, & the offence charged had been proved.—*BROADHURST v. MERRETT*, [1937] V. L. R. 91; 43 Argus L. R. 215.—**AUS.**

**232n. — Failure to keep records. — Whether mens rea necessary.**—A haulage contractor, owner of a motor lorry, & the holder of a licence under Road & Rail Traffic Act, 1933, was charged with a contravention of sect. 16 of that Act, & of regs. 6 & 8 of Goods Vehicles (Keeping of Records) Regulations, 1935. It was proved that the contractor had issued to the driver the appropriate form to be filled up & that on a certain date the driver had made an incorrect entry therein relating to the use of the motor lorry, that on the following day the driver, on request, handed the form to the police; & that the contractor had no opportunity of checking the correctness of the entry. The contractor was found guilty of failing to cause to be kept a correct record:—*Held*: (1) a licence holder is guilty of the offence of failing to cause to be kept a current record when a driver employed by him has made an incorrect entry in the current record; (2) it is immaterial that the licence holder has not had an opportunity of checking such entry; (3) *mens rea* is not a necessary ingredient in the commission of the offence.—*MITCHELL v. MORRISON*, [1938] S. C. (J.) 64.—**SCOT.**

**q i. — Charge of having care & control of automobile "while under the influence of liquor"—No offence.**—*R. v. OUELLETTE* (1931), 55 Can. C. C. 389.—**CAN.**

**d i. —**—*MARANO & MARANO v. LETT (Alta.)*, [1929] 4 D. L. R. 982; 3 W. W. R. 345; *aff.*, [1929] 4 D. L. R. 314; 3 W. W. R. 170.—**CAN.**

**sv. Drunkenness — Alternative offences — Validity of conviction.**—*Held*: a finding by a magistrate that def. while intoxicated was in charge of a motor vehicle did not justify a conviction for driving while intoxicated,

by two police officers who caused the driver to take it to a weigh-bridge, where it was weighed in his presence. The official in charge of the weigh-bridge issued a ticket bearing the weight registered by the lorry. The employer was not being paid to carry, & had instructed the driver not to carry, more than the legal load. The driver had instructions from the employer to have the lorry weighed if he were in doubt as to the weight of its load, & in any case, to have it weighed at the first opportunity:—*Held*: (1) the circumstances in which the lorry was weighed constituted sufficient evidence to justify the justices in coming to the conclusion that the permitted weight had been exceeded, & the driver was accordingly guilty of using the lorry when overloaded; (2) the employer was taking the risk of adopting a known practice whereby it was probable that the offence in question would be permitted; he took the risk that the lorry would for some part of its journey be driven on the public highway with an excessive load, & he was accordingly guilty of permitting the lorry to be driven in contravention of the regulation.—(*MURCHILL v. NORRIS, MAIDMENT v. NORRIS* (1938), 158 L. T. 255; 82 Sol. Jo. 114.

**232j. Indivisible load of exceptional length.]**—Applt. used on the road a motor-drawn trailer loaded with five fir trees, securely fixed, which projected over the back of the trailer for 32 ft. He was convicted at petty sessions for using a trailer in such a condition that danger was likely to be caused, in breach of the Motor Vehicles (Construction & Use) Regulations, 1931, regs. 62, 85. He appealed to quarter sessions on the ground that reg. 51 provides that a trailer may exceed 22 ft. in length if constructed & normally used for the conveyance of indivisible loads of exceptional length. This appeal was dismissed:—*Held*: there was evidence on which the justices could find that the distribution of the load was dangerous to persons on the trailer or on the highway, & therefore the proviso in reg. 51 did not protect the user of the vehicle.

as s. 285 (4) of the Criminal Code deals with two alternative offences.—*R. v. HIGGINS*, [1929] 1 D. L. R. 269; 50 Can. Crim. Cas. 381; 63 O. L. R. 101.—*CAN.*

**sx. — Accused at wheel of disabled car being towed.]**—Accused, while intoxicated, was in control of the steering wheel of a motor car, which, having become disabled at night on a main highway owing to the choking of the gasoline pipe, was being towed at the end of a rope by a service motor truck which he had hired. The steering apparatus was in order. He was charged with having "under his care or control a motor vehicle while he was intoxicated," contrary to sect. 285 (4) of Criminal Code. The magistrate, holding himself bound by *R. v. Higgins*, 63 O. L. R. 101, dismissed the charge. On appeal by the Crown by way of a stated case:—*Held*: the magistrate was not right in holding that the accused could not be convicted, on said facts, of said offence. The order of dismissal was set aside & the case remitted to the magistrate.—*R. v. HENRY*, [1934] 1 W. W. R. 234; 2 D. L. R. 51; 61 C. C. C. 207; 41 Man. L. R. 645.—*CAN.*

**sy. — Form of proceedings.]**—The offence of driving a car while intoxi-

cated may be dealt with summarily or by indictment.—*R. v. FANNING*, [1935] 3 D. L. R. 720; 9 M. P. R. 376; 63 Can. C. C. 377; 5 F. L. J. (Can.) 4.—*CAN.*

**sz. Leaving car without brakes set—In drive.]**—The driver of a motor vehicle was convicted of having near a road quitted his vehicle without having set the brakes so as effectually to prevent two at least of the wheels from revolving. The driver had left his vehicle in the drive at the side of his house, & it had run down the drive, through the gate at the end of the drive, which was open, & on to the public road, where it ran into & damaged the wall & railing in front of another house. The public had no right to use the drive, & tradesmen & others seeking access to the house generally used a path leading from another gate:—*Held*: the Sheriff-Substitute was entitled to convict, per the Lord Justice Clerk & Lord Anderson on the ground that the drive was a road in the sense of the Act, & per Lord Murray on the ground that, on the assumption that the drive was not a road, the vehicle had been moving on the public road with its brakes not set. *Opinion*, per the Lord Justice Clerk, that the offence might be committed although the vehicle was not on a road.—

—*CRIPPS v. COOPER*, [1936] 2 All E. R. 48, D. C.

**232k. Commercial vehicles—Permitted hours for drivers—Road Traffic Act, 1930 (c. 43), s. 19.]**—During a period of twenty-four hours, the driver of a motor lorry constructed to carry goods other than the effects of passengers worked for a number of periods which in the aggregate amounted to more than eleven hours, but were each separated by an interval of at least half-an-hour:—*Held*: offences against sect. 19 (1) of the Act had been committed by the driver & by his employers.—*COOK v. ALFRED PLUMPTON, LTD., COOK v. HENDERSON* (1935), 153 L. T. 462; 99 J. P. 308; 51 T. L. R. 513; 79 Sol. Jo. 504; 24 Ry. & Can. Cas. 237; 30 Cox, C. C. 270; 33 L. G. R. 363, D. C.

**232l. — Evidence—Admissibility of record kept by driver.]**—In a prosecution of resps. for permitting the driver of a motor vehicle belonging to them constructed to carry goods, to drive on one day for continuous periods amounting in the aggregate to more than 11 hours contrary to Road Traffic Act, 1930 (c. 43), s. 19, the only evidence tendered in support of the information was the "current record" of hours worked kept by resps.' driver as required by Road & Rail Traffic Act, 1933 (c. 53), s. 16:—*Held*: inasmuch as the "current record" was one which the statute required to be kept & to be kept accurately it was properly admissible in evidence against resps. though they naturally delegate the actual manual keeping of it to their drivers, or other servants.—*BEER v. W. H. CLENCH* (1930), LTD., [1936] 1 All E. R. 449; 151 L. T. 428; 100 J. P. 191; 52 T. L. R. 300; 80 Sol. Jo. 266; 34 L. G. R. 187; 24 Ry. & Can. Tr. Cas. 118; 30 Cox, C. C. 364, D. C.

**232m. — Driver acting in breach of orders—Whether a defence.]**—On the prosecution of an employer for permitting his driver to drive for more than eleven hours in twenty-four it is no defence that the driver acted in contravention of his master's orders.

*DAVIDSON v. ADAIR*, [1934] S. C. (J. 37).—*SCOT.*

**sc. Taking car without consent of owner.]**—J. was charged under sect. 526A of Crimes Act with taking & using a certain motor car without the consent of the owner. The facts disclosed that J. had the consent of the owner to take & use the car up to a certain time. He used the car after the expiration of the said time, & was convicted under this section by the magistrate:—*Held*: inasmuch as deft. had the consent of the owner to take & use the car during a certain period, the subsequent unlawful use was not sufficient to constitute an offence under this sect.—*Re TURNBULL, Ex p. JOHNSTONE* (1935), 52 N. S. W. W. N. 194.—*AUS.*

**sg. Duty to remain at scene of accident—Validity of Act.]**—Subsect. (7) of sect. 60 of Motor Vehicle Act, 1935, which imposes a penalty upon the driver of a motor vehicle who, having caused damage or injury, fails to remain at or return to the scene of the accident, is *ultra vires*, since the same subject in the same aspect is covered by sect. 285 (2) of the Criminal Code.—*R. v. SALT*, [1937] 1 W. W. R. 785; 51 B. C. R. 485.—*CAN.*

—SIDCUP BUILDING ESTATES, LTD. v. SIDERY (1936), 24 Ry. & Can. Tr. Cas. 164.

**232n.** ——— **Driver not resting.**—Where a driver, by his own wish, & not at the orders of his employers, chose to spend part of the hours allowed for rest in returning home by train from the place where his period of driving ended:—*Held*: no offence was committed by the employers, their duty under Road Traffic Act, 1930 (c. 43), s. 19, being to allow 10 hours "for" rest, not to insist on 10 hours "of" rest. If the driver chose to employ part of the time allowed for rest in some other way the employers were not concerned.—*BEER v. FAIRCLOUGH (T. M.) & SONS, LTD.* (1937), 156 L. T. 238; 101 J. P. 157; 53 T. L. R. 345; 81 Sol. Jo. 180; 35 L. G. R. 113; 25 Ry. & Can. Tr. Cas. 129; 30 Cox, C. C. 551, D. C.

**232o.** ——— **Failure to keep records—Whether mens rea necessary.**—A guilty intention is not a necessary ingredient in the offence of failing to comply with the provisions of Road & Rail Traffic Act, 1933 (c. 53), s. 16, & the Regulations made thereunder as to the keeping of records of hours of work, journeys & the greatest weight of goods carried at any one time.—*COX & SONS, LTD. v. SIDERY* (1935), 24 Ry. & Can. Tr. Cas. 69.

*Annotation.*—*Consd. Beer v. W. H. Clench* (1930) Ltd., [1936] 1 All E. R. 419.

**232p.** ——— **Exemption—Business of agriculture.**—The holder of a licence to use an authorised vehicle under Road & Rail Traffic Act, 1933 (c. 53), was charged with having failed to cause to be kept a current record in respect of the period during which a driver in his employ was driving such vehicle, contrary to Goods Vehicles (Keeping of Records) Regulations, 1935. The driver was charged with having failed to keep such a record. The regulations specially exempt the driver & owner of a vehicle used in the business of agriculture from the duty of keeping or causing to be kept such records. The vehicle in question was loaded with agricultural implements & furniture in order that they might be moved from one farm to another:—*Held*: the vehicle was being used in the business of agriculture, & the offences charged had not been committed.—*FLATMAN v. POOLE, FLATMAN v. OATEY*, [1937] 1 All E. R. 495; 25 Ry. & Can. Tr. Cas. 142.

**232q.** ——— **Time for making records.**—Regulation 7 (2) of Goods Vehicles (Keeping of Records) Regulations, 1935, provides that each item of information required by the appropriate form shall be made in the Record as soon as the particular to be recorded is ascertained. A driver entered an item of information before the particular to be recorded was ascertained:—*Held*: his employers ought to be convicted of the offence of failing to cause current records to be kept under the Road & Rail Traffic Act, 1933 (c. 53), s. 16 (1).—*NELSON v. COVENTRY SWAGING CO., LTD.* (1936), 25 Ry. & Can. Tr. Cas. 68.

**232r.** **Goods vehicle—What is—Sound-recording van.**—The driver of a sound-recording van drove it at more than 30 m.p.h. on a road where the speed of private motor cars was not restricted. The apparatus fitted in the

van was an essentially permanent fixture within Road Traffic Act, 1930 (c. 43), s. 2 (4) (b). The driver was convicted of an offence under sect. 10 (1), the ct. holding that the car was a goods vehicle within Sched. I., para. 2. The driver appealed, submitting that the car was a private car, as it was taxed as a private car & the apparatus was not a load within sect. 2 (4) (b):—*Held*: the car was a goods vehicle, for the apparatus was a burden within Sched. I., para. 2.—*BIRMINGHAM v. LINDSELL*, [1936] 2 All E. R. 159; 80 Sol. Jo. 367, D. C.

**232s.** ——— **Utility car.**—Resp. was charged with having unlawfully driven a Ford utility car, fitted with pneumatic tyres & constructed or adapted for the conveyance of goods or burden, on a public highway at a speed greater than 30 miles per hour (being the speed specified in the Road Traffic Act, 1934 (c. 50), Sched. I., as the maximum speed for such a vehicle), contrary to sect. 2 of that Act. The justices dismissed the charge, holding that the vehicle was a car & not a van, that it had not been proved that the vehicle was a goods vehicle within the meaning of the sched., & that the vehicle was constructed solely for the carriage of passengers & their effects. The justices were also of opinion that the act of lifting out the rear seat of the vehicle was not an adaptation of the vehicle for use for the conveyance of goods, & that it had not been proved that the sides of the vehicle had been boarded up for the purpose of facilitating the conveyance of goods:—*Held*: although the vehicle was also designed to carry, not solely but in part, passengers & their effects, it was nevertheless a vehicle constructed or adapted for use for the conveyance of goods or burden within the meaning of the section of the Act of 1934, & the offence charged was therefore proved.—*HUBBARD v. MESSENGER*, [1938] 1 K. B. 300; [1937] 4 All E. R. 48; 107 L. J. K. B. 44; 157 L. T. 512; 101 J. P. 533; 54 T. L. R. 1; 81 Sol. Jo. 846; 35 L. G. R. 564; 26 Ry. & Can. Tr. Cas. 85; 30 Cox, C. C. 624, D. C.

**232t.** **Goods vehicle adapted to carry passengers.**—*FRY v. BEVAN* (1937), 81 Sol. Jo. 60, D. C.

**232v.** ——— **Exemption from Regulations.**—*UNION CARTAGE CO., LTD. v. HEAMON, EGGLETON v. HEAMON*, No. 232w, *post*.

**232w.** **User of trailer—Validity of Regulations.**—Appls. were charged with unlawfully permitting a motor tractor, with trailer attached, to be driven on the road without a person, in addition to the driver of the vehicle, for the purpose of attending the trailer, contrary to Road Traffic Act, 1930 (c. 43), s. 17, & the regulations made thereunder. The Motor Vehicles (Construction & Use) Regulations, 1931, reg. 77, provides that: "The requirements of Road Traffic Act, 1930 (c. 43), s. 17, with regard to the employment of drivers & attendants shall not apply . . . (c) where a motor tractor is drawing—(i) any closed trailer specially constructed & used for the conveyance of meat between docks & railway stations, or between wholesale markets & docks or railway stations." Although it was generally used for the conveyance of meat between docks & railway stations or between

wholesale markets & docks or railway stations, for which purpose it had been specially constructed, on the date of the alleged offence the trailer was loaded with, & was being used for the conveyance of tiles. Applt. contended that, by reason of reg. 77, no offence had been committed, & that, alternatively, in so far as that regulation purported to refer to the user of a trailer, it was *ultra vires* :—*Held* : (1) Motor Vehicles (Construction & Use) Regulations, 1931, reg. 77, was within the powers conferred upon the Minister of Transport by Road Traffic Act, 1930 (c. 43) ; (2) as the trailer was at the material time carrying tiles & not meat, it was not within the exemption in reg. 77 (c) (i), & an offence had been committed against Road Traffic Act, 1930 (c. 43), s. 17.—*UNION CARTAGE CO., LTD. v. HEAMON* ; *EGGLETON v. HEAMON*, [1937] 1 All E. R. 538 ; 25 Ry. & Can. Tr. Cas. 137.

**245a. Service of notice of prosecution—When excused.**—(1) In the proviso to Road Traffic Act, 1930 (c. 43), s. 21, the expression "the ct." refers to the judge & not the jury, & "reasonable diligence" means "reasonable diligence on the part of the officer in charge of the case."

(2) Where the police have ascertained the name & address of the registered owner of the vehicle in time for a notice to be served on or sent to him within fourteen days of the commission of the offence, although they have not been able to ascertain the name of the driver, & they have not served such notice on the owner, the proviso cannot apply, & if none of the alternative conditions precedent to conviction provided in sect. 21 has been complied with, the failure so to comply is a bar to the conviction of the driver.—*R. v. BORKIS* (1932), 148 L. T. 358 ; 97 J. P. 10 ; 49 T. L. R. 128 ; 77 Sol. Jo. 13 ; 24 Cr. App. Rep. 19 ; 31 L. G. R. 32 ; 29 Cox, C. C. 578, C. C. A.

**245b. — Sufficiency of notice.**—Within fourteen days after the commission of an alleged offence under the Road Traffic Act, 1930 (c. 43), a notice was sent to the offender, who had not been warned at the time of the alleged offence, stating that "you have been reported for the question of prosecution to be considered in respect of your having driven a motor car in a manner dangerous to the public." Then followed particulars of the day, hour, locality, & circumstances. The offender was summoned for driving without due care & attention at that time & place, & he contended that the notice was bad in that (a) it was not a notice of intended prosecution, but only a notice that the question of prosecution was being considered, & (b) he was prosecuted for a different offence from that specified :—*Held* : the notice was

good. It sufficiently specified "the nature of the offence," & "driving to the danger of the public" was not a term of art referable only to Road Traffic Act, 1930 (c. 43), s. 11. The accused had no right to complain that he was prosecuted for a less serious offence than was specified. Nor need a prosecution be irrevocably decided on before the notice is sent.—*MILNER v. ALLEN*, [1933] 1 K. B. 698 ; 102 L. J. K. B. 395 ; 149 L. T. 16 ; 97 J. P. 111 ; 49 T. L. R. 240 ; 77 Sol. Jo. 83 ; 31 L. G. R. 161 ; 29 Cox, C. C. 629, D. C.

**245c. —**—*PERCIVAL BALL*, [1937] W. N. 106, D. C.

**249. Add. Annotation :—***Apld.* *Williams v. Russell* (1933), 149 L. T. 190.

**250. Add. Annotation :—***Apld.* *Williams v. Russell* (1933), 149 L. T. 190

**250a. Secondary evidence of policy—Notice to produce not given.**—On a charge of using a motor vehicle without there being in force a policy of insurance complying with Part II. of Road Traffic Act, 1930 (c. 43), a police officer was about to give evidence of the contents of a certificate of insurance produced by deft. at the time when the vehicle was stopped, but objection was taken on behalf of the deft. that, as no notice to produce had been given, secondary evidence of the contents of the document was inadmissible. The justices upheld the objection :—*Held* : the evidence should have been admitted.

*Semle* : (per *TALBOT, J.*) the onus of proving the possession of the policy was on the deft.—*WILLIAMS v. RUSSELL* (1933), 149 L. T. 190 ; 97 J. P. 132 ; 49 T. L. R. 315 ; 77 Sol. Jo. 198 ; 31 L. G. R. 182 ; 29 Cox, C. C. 610, D. C.

**254a. — Failure to inform accused of right to trial by jury.**—*R. v. LEICESTER JJ., Ex p. WALKER, MYERS v. WALKER* (1935), 80 Sol. Jo. 54, D. C.

**254b. — Conviction—Failure to endorse licence as required.**—*R. v. LEICESTER, JJ., Ex p. WALKER, MYERS v. WALKER* (1935), 80 Sol. Jo. 54, D. C.

**254c. Excessive sentence—Previous offences.**—Applt. was convicted of driving a motor vehicle while under the influence of drink & was sentenced to six months' imprisonment in the second division & disqualification from holding a licence for an indefinite period. Applt. had been convicted on two previous occasions for driving without due care & attention. Applt. appealed against the sentence :—*Held* : (1) the offences of careless driving & of driving while under the influence of drink are of a similar character, & the ct. which convicted applt. was entitled to take

**PART V. SECT. 3, SUB-SECT. 4.—B.**

*sw. Motor Vehicles Act—Penal provisions—Liability of owner.*—*It. v. DOYLE* (1928), 50 Can. Crim. Cas. 233.—CAN.

**PART V. SECT. 3, SUB-SECT. 5.**

*sa. Motor Traffic Regulations—Passing stationary tramcar—Whether evidence of negligence.*—*LANE v. NORTON* (1927), 28 S. R. N. S. W. 143 ; 45 N. S. W. W. N. 38.—AUS.

*sl. Meaning of "intersection of high-*

*ways."*—*Semle* : a right-angled bend in a highway is not an "intersection of highways" within sect. 35 (1) of Vehicles Act, 1924 (c. 42), which provides that a person operating a motor or other vehicle shall at the intersection of highways keep to the right of the intersection of such highways when turning to the right, & pass to the left of such intersection when turning to the left.—*CLARK v. HETHERTON*, [1930] 1 W. W. R. 165 ; 1 D. L. R. 964 ; 24 S. L. R. 275. C. A.—CAN.

*sm. —*—*A private road is not a*

"highway" within Vehicles Act, 1924 (c. 42), & the point at which such a road opens on to a highway is, therefore, not an intersection of highways within the meaning of sect. 35 (2) of said Act.—*COPELAND v. ROBERTS*, [1930] 1 W. W. R. 145 ; 3 D. L. R. 460 ; 24 S. L. R. 224.—CAN.

*q* (p. 878) *l. — — —*—*It. v. TORONTO TRANSPORTATION COMMISSION (Ont.)* (1929), 52 Can. Crim. Cas. 413.—CAN.

*q* (p. 878) *ll. — — — Onus of proof.*—*Held* : unde s. 42 of High-

into consideration the two previous offences when it imposed the sentence. There were no grounds for reducing the sentence of imprison-

ment; (2) the ct. had no power to disqualify for an indefinite period.—*R. v. FOWLER*, [1937] 2 All E. R. 380; 157 L. T. 558; 101 J. P.

way Traffic Act the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the driver or owner of the motor vehicle was upon defts.—*ROSS v. GRAY COACH LINES, LTD.*, [1929] 3 D. L. R. 841; 64 O. L. R. 178.—CAN.

q (p. 878) iii. ———.—*Effect of Highway Traffic Amendment Act, 1929, s. 9.*—The effect of above sect. repealing Highway Traffic Act, R. S. O., 1927, s. 41, is to reduce the responsibility of the owner of a motor vehicle to that at common law.—*TUDHOPE v. HENDERSON, HENDERSON v. TUDHOPE*, [1930] 3 D. L. R. 245; 65 O. L. R. 238.—CAN.

q (p. 878) iv. ———.—*Motor Vehicle Act, R. S. B. C., 1924, does not add to the civil liability at common law of an owner of a motor vehicle who has entrusted it to another person through whose negligence in operating it a third person is injured.*—*ROFF v. SUTHERLAND & MOSS*, [1931] 1 D. L. R. 651; [1930] 3 W. W. R. 544; 43 B. C. R. 218.—CAN.

q (p. 878) v. ———.—*While deft. H. was negotiating with the local agent of deft. co. for the purchase of a motor car its wholesale salesman arrived in the course of one of his regular trips, & it was arranged that H. & the local agent would go on with him so that H. could get practice in driving such a car. Before starting, the wholesale salesman met pltf.'s husband & agreed to the latter's request to be taken along with them. They started on the trip with H. at the wheel & had gone less than a mile when the car overturned, & pltf.'s husband was thrown out & killed. The local agent testified that H. was to his knowledge an incompetent driver, at least of a car of the type in question, & that he, the agent, had informed the wholesale representative that H. was an "erratic" driver. H. had been driving a car with two-wheel brakes for about two years, but had not driven one with four-wheel brakes, which the car in question had. The judge found that no negligence had been established against either deft. On appeal, the ct. found that the accident was caused by H.'s incompetence to handle a car of such, to him, a new & different type; & both defts., the co. & H., were liable.*—*KERR v. HAUG MOTORS, LTD.* (No. 2), [1931] 1 D. L. R. 962; [1930] 3 W. W. R. 470; 39 Man. L. R. 238.—CAN.

q (p. 878) vi. ———.—*MARTEL v. CHARTIER*, [1935] 1 W. W. R. 305; 43 Man. L. R. 54.—CAN.

q (p. 878) vii. ———.—*WOOD v. FREEMAN* (1935), 5 F. L. J. (Can.) 21.—CAN.

q (p. 878) viii. ———.—*Under sect. 71a of Vehicles & Highway Traffic Act, 1924, the owner of a motor car which with his consent, express or implied, is being used by his employee, is liable for damage caused by the negligence of the employee in driving it, even though the consent was a limited one & the driver was exceeding it when the damage was sustained. Thus, where the owner's consent was expressly restricted to the use of the car on the owner's farm & the employee was driving outside the farm when the accident occurred the owner was held liable.*—*LYON & LYON v. NOBLE FARMS, LTD.*, [1935] 3 W. W. R. 582; [1936] 1 D. L. R. 153.—CAN.

q (p. 878) ix. ———.—*Defence of contributory negligence.*—*POOLE & THOMPSON v. McNALLY*, [1934] S. C. R. 717; [1935] 1 D. L. R. 161.—CAN.

(p. 878) x. ———.—*Under*

the enactment as to onus dealt with in *Poole & Thompson, Ltd. v. McNALLY*, [1934] S. C. R. 717, s. 65 (1) of the Prince Edward Island Highway Traffic Act, in substance the same, in the pertinent respects, as that now in question, standing by itself, deft. may acquit himself of the onus cast upon him, by establishing that pltf.'s negligence materially contributed to the mishap, & that he could not, in the result, by the exercise of reasonable care, have avoided the consequences of that negligence; or that the mischief was directly caused by the negligence of pltf. as well as that of himself co-operating together. The enactment does not itself appear to aim at altering the substantive rules of common law touching the effect of contributory negligence; its purpose seems to be to change the law as to the burden of proof. It would seem that deft. had shown that, in the situation which confronted him, he had not failed in that standard of care, skill & judgment which can fairly & properly be required of the driver of a motor vehicle. . . . The standards to be applied are not standards of perfection (*per DUFF, C.J.*).—*McMILLAN v. MURRAY*, [1935] S. C. R. 572; 4 D. L. R. 666; 3 W. W. R. 117; 5 F. L. J. (Can.) 211.—CAN.

q (p. 878) xi. ———.—*The onus cast on a motorist by sect. 66 of Vehicles & Highway Traffic Act, 1924, can be discharged "by establishing that pltf.'s negligence materially contributed to the mishap, & that he could not, in the result, by the exercise of reasonable care, have avoided the consequences of that negligence; or that the mischief was directly caused by the negligence of pltf. as well as that of himself co-operating together."*—*ADAMS & ADAMS v. BETTS*, [1935] 3 W. R. 542; [1936] 1 D. L. R. 183; 5 F. L. J. (Can.) 227.—CAN.

q (p. 878) xii. ———.—*In an action resulting from the collision of a motor vehicle with a pedestrian who was crossing an intersection:—Held: neither the driver nor pltf., the pedestrian, saw the other & that both parties were negligent in not keeping a look out, & following *Murray v. McMillan* [1935] S. C. R. 572, notwithstanding the statutory onus on the driver, pltf.'s contributory negligence prevented her from recovering; a city by-law as to the right of way of a pedestrian at an intersection did not relieve her of the duty of taking ordinary care.*—*SHANAHAN v. TOOLE PEET TRUST CO., LTD.* (No. 2), [1936] 2 W. W. R. 540.—CAN.

q (p. 878) xiii. ———.—*KORNBERGER v. PROVAN*, [1938] 2 W. W. R. 446.—CAN.

q (p. 878) xiv. ———.—*The onus of disproving his own negligence under Highway Act, Ont., s. 42, rests as well upon pltf. driving a car as upon deft.*—*WRIGHT v. C. N. R.*, [1938] 1 D. L. R. 496; O. R. 66.—CAN.

q (p. 878) xv. ———.—*Injury to passenger.*—*The liability thereunder of an owner is not restricted to the case of a person injured on a highway but applies also to injuries sustained by a passenger in the offending motor car.*—*SMITH v. DREWRY'S, LTD. & STEPHENSON*, [1937] 1 W. W. R. 107.—CAN.

q (p. 878) xvi. ———.—*Under Nova Scotia Motor Vehicles Act, 1932, the onus is upon the owner to show that a person operating a car was not acting as his servant or agent. This is a question of fact for the jury.*—*PAR-*

*TERSON v. FATOUH*, [1936] 3 D. L. R. 136; 10 M. P. R. 350.—CAN.

q (p. 878) xvii. ———.—*Held: the words "person driving" in sect. 71a of Vehicles & Highway Traffic Act, 1924, do not include any person other than the person physically in charge of the mechanical devices which control the car.*—*DEUGAU v. KRAMER, MORRISON v. KRAMER*, [1938] 2 W. W. R. 297.—CAN.

q (p. 878) xviii. ———.—*A wife permitting her husband to use her car in his business is not responsible for the negligence of a third person driving the car.*—*SLAUNWHITE v. SMITH*, [1938] 2 D. L. R. 463; 12 M. P. R. 560.—CAN.

q (p. 878) xix. ———.—*The owner of cars which he rents out is liable for the customer's negligence under sect. 34 of Motor Vehicle Act, R. S. B. C., 1924.*—*R. v. PATRY*, [1937] 3 D. L. R. 736; 52 B. C. R. 1; 69 Can. C. C. 70.—CAN.

a (p. 878) i. ———.—*NEILSON v. RICHARD (B. C.)*, [1929] 4 D. L. R. 1052; 2 W. W. R. 153; *reversd.*, [1930] 1 W. W. R. 656; 3 D. L. R. 215; 38 Man. L. R. 553.—CAN.

c (p. 879) i. ———.—*CHORBA v. KIMBRIEL*, [1928] 3 D. L. R. 718; [1928] 2 W. W. R. 386; 22 Sask. L. R. 602.—CAN.

c (p. 879) ii. ———.—*The statutory onus does not increase the degree of diligence required of the owner or driver of a motor vehicle.*—*STANLEY v. NATIONAL FRUIT CO. (Sask.)*, [1929] 3 W. W. R. 522; [1930] 2 D. L. R. 108; 24 S. L. R. 137; *reversd.*, [1931] 1 D. L. R. 306; S. C. R. 60.—CAN.

c (p. 879) iii. ———.—*HEITNER v. GILLSTROM (Sask.)*, [1929] 4 D. L. R. 670; 3 W. W. R. 227; *reversd.*, [1930] 2 W. W. R. 113; 3 D. L. R. 860; 24 S. L. R. 462.—CAN.

c (p. 879) iv. ———.—*MARANO & MARANO v. LETT (Alta.)*, [1929] 4 D. L. R. 982; 3 W. W. R. 345; *affg.*, [1929] 4 D. L. R. 314; 3 W. W. R. 170.—CAN.

c (p. 879) v. ———.—*YONKER v. SERVANT*, [1931] 1 W. W. R. 433; 2 D. L. R. 495; 25 Alta. L. R. 247.—CAN.

c (p. 879) vi. ———.—*Under sect. 62 of Manitoba Motor Vehicle Act, which provides that when any injury is caused to a person by a motor vehicle the onus of proof that the injury did not arise through his negligence shall be upon the owner or driver of the motor vehicle, the onus of negating negligence in an action for damages so caused remains on deft. throughout the proceedings. Thus, although deft. has adduced the evidence of credible witnesses that the accident was due to a latent defect in the mechanism of the motor vehicle & pltf. has adduced no evidence to the contrary, the case should not be withdrawn from the jury but should be left to them to decide by their verdict whether deft. has satisfied the statutory onus of proof.*—*WINNIPEG ELECTRIC CO. v. GREL*, [1932] A. C. 690; 101 L. J. P. C. 187; 148 L. T. 24; 48 T. L. R. 657, P. C.—CAN.

c (p. 879) vii. ———.—*CHEERNIAK v. PARSONS*, [1931] 2 W. W. R. 549.—CAN.

c (p. 879) viii. ———.—*Where in an action for damages for injuries caused by a motor car the judge, after hearing & weighing the whole of the evidence, comes to the definite conclusion that the accident was caused solely by pltf.'s own*



244; 53 T. L. R. 649; 81 Sol. Jo. 422; 26 254d.  
Cr. App. Rep. 80; 35 L. G. R. 265. C. C. A.

Disqualification for indefinite period.]—  
R. v. FOWLER, No. 251c, ante.

negligence, the *onus* which sect. 43a of Vehicles Act, 1924, places on the owner or driver of disproving negligence ceases to be a factor in the case.—PURCELL v. WALLACE, [1930] 1 W. W. R. 732; 2 D. L. R. 1004; 24 S. L. R. 1004.—CAN.

c (p. 879) ix. ———— *Application of Act in favour of passenger.*—*Semble*: the *onus* of negating negligence which sect. 62 of Motor Vehicle Act, 1924, places on the driver of a motor car applies, not only in favour of pedestrians, but also in favour of a passenger in the motor car which caused the damage.—HIRD v. MILNE, [1930] 1 W. W. R. 977; 3 D. L. R. 513.—CAN.

c (p. 879) x. ———— *Injury to guest while car driven by owner.*—DREW v. MACK, [1931] 4 D. L. R. 395.—CAN.

c (p. 879) xi. ———— *CHAUTRAND v. D'Aoust Frenette Auto, Ltd.*, [1933] 4 D. L. R. 813.—CAN.

c (p. 879) xii. ———— *CAMPBELL v. BELT*, [1934] 1 D. L. R. 694; 41 Man. L. R. 625.—CAN.

c (p. 879) xiii. ———— *In an action for damages for injuries resulting from the female plff. coming into collision with deft.'s motor car while she was walking across a street at an intersection, the case being one in which she did, in a sense, walk into the side of the car, that is, she involuntarily in the moment of danger thrust forward her arm against the car with the result that the arm was caught in the handle of the car door.*—*Held*: deft. had not satisfied the statutory *onus* on him of showing that the injury was not caused by his negligence, & moreover, the evidence proved that his negligence actually caused the injury.—DUNBAR v. HUNTER, [1934] 1 W. W. R. 440; 42 Man. L. R. 112.—CAN.

c (p. 879) xiv. ———— *KUHMO & LAAKSO v. HELBERG*, [1931] 4 D. L. R. 323.—CAN.

c (p. 879) xv. ———— *Collision between motor vehicles—Onus on passenger to prove negligence.*—Sect. 66 (2) of Vehicles & Highway Traffic Act, 1924, is not limited to its application as between drivers or owners of the motor vehicles; & therefore, in the case of an action brought by a passenger in a motor vehicle for injuries sustained in a collision between it & another motor vehicle he cannot succeed without proving negligence.—HAYHURST v. INNISFAIR MOTORS, LTD., [1935] 1 W. W. R. 385; 2 D. L. R. 272.—CAN.

c (p. 879) xvi. ———— *The onus imposed on the driver of a motor by sect. 58 (1) of Highway Traffic Act, 1924, does not require him to explain the antecedent movements of a person struck by the car if he proves that he was keeping a good lookout & that said person suddenly emerged from some place where he was not visible & ran in front of the car.*—KSIONEK v. WALLACE, [1937] 2 W. W. R. 530; 3 D. L. R. 651; 45 Man. L. R. 345.—CAN.

c (p. 879) xvii. ———— *Liability of owner for damages caused by third party driving his car without permission.*—Plffs. were injured by a motor car while it was being driven by the 17 year old son of the owner. The boy, who was attending school, lived with his father as a member of the household & was found to have used the car at least seven or eight times during the two years prior to the accident. The car was kept in a yard between the father's house & his store,

& one of the two car-keys was either in the house or in the store where it was accessible to the son. The trial judge accepted the testimony of the father that he had never given the son permission to use the car & did not know that he had ever driven it. The father did not say that he had forbidden the son to drive it:—*Held*: the father could not be heard to say that the car had been "wrongfully taken out of his possession" within Motor Vehicle Act, C. A., 1924 (c. 131), s. 63.—BOBBY v. CHODIKER, [1929] 2 D. L. R. 590; 1 W. W. R. 770; 38 Man. L. R. 171; *revg.*, [1928] 3 W. W. R. 392.—CAN.

c (p. 879) xviii. ———— *NELSON v. DENNIS (Man.)*, [1929] 4 D. L. R. 282; 2 W. W. R. 513.—CAN.

c (p. 879) xix. ———— *WALKER v. SCOTT, NICHOL v. SCOTT (Man.)*, [1929] 3 D. L. R. 647; 2 W. W. R. 92.—CAN.

c (p. 879) xx. ———— *BOYD v. SMITH*, [1931] 1 D. L. R. 729.—CAN.

c (p. 879) xxi. ———— *Deft.*, the owner of a car, refused to let M. have or hire it unless deft.'s chauffeur, P., was taken along to drive it. During the journey M. got drunk, & insisted on driving the car. He was resisted by P. who, though not actually ejected by force, was threatened with a fight & gave way. While M. was driving on a highway the car struck plff.'s car & damaged it:—*Held*: the change of operators was due to duress, & brought about a situation contrary to deft.'s express instructions & the bargain made with M., & the car being "in the possession of some person other than the owner or his chauffeur, without the owner's consent," deft. was not liable.—*KUHMO & LAAKSO v. HELBERG*, [1931] 4 D. L. R. 328; O. R. 630.—CAN.

c (p. 879) xxii. ———— *When a car is driven by a third party permitted to drive by the lessee of the car, it is still in the "possession" of the lessee, & the owner is not protected as when a motor vehicle is without the owner's consent in the possession of some person other than the owner.*—THOMPSON v. BOUTCHIER, [1933] 3 D. L. R. 119; O. R. 525.—CAN.

c (p. 879) xxiii. ———— *Where a car is lent to A., who lends it to B., B. cannot be said to have acquired possession of it with the consent express or implied of the true owner.*—MARTEL v. DOMINION MOTORS, LTD., [1935] 2 D. L. R. 187.—CAN.

c (p. 879) xxiv. ———— *Crown bound by Act—Liability of officer of the Crown—Reckless driving in execution of duty.*—R. v. McLEOD, [1930] 4 D. L. R. 226; 53 Can. C. C. 292.—CAN.

c (p. 879) xxv. ———— *Who is "chauffeur"?*—"Chauffeur" in Vehicles Act, R. S. S., 1930, s. 2 (1), does not include a person employed for the main purpose of doing work other than driving a motor car but which incidentally requires him to drive a car part of the time; especially if at the time as to which he is charged with driving a motor car without having a chauffeur's licence he was not driving it on his employer's business but for his own purposes.—R. (ARMSTRONG) v. PRESTON, [1931] 3 W. W. R. 505.—CAN.

c (p. 879) xxvi. ———— *Limitation of action.*—A statute limiting the time for commencing an action is to be construed retroactively, in the absence of words therein showing a contrary intention; especially where the statute itself expressly provides that its operation is to be postponed.—BEATTIE v. DOROSZ & DOROSZ, [1932] 2 W. W. R. 289.—CAN.

c (p. 879) xxvii. ———— *Joint ownership of car.*—GRAY v. NORD & NELSON, OLIVER & COOK v. NORD & NELSON, [1936] 2 W. W. R. 489; 4 D. L. R. 182.—CAN.

sg. *Breach of statutory duty by plaintiff—Whether defence to action for damages.*—The fact that at the time of a collision between an automobile & a motor cycle, the driver of the motor cycle was violating sect. 19A of Motor Vehicle Act, R. S. B. C. 1924, by allowing a passenger to occupy the driver's seat, & was, therefore, liable to a penalty:—*Held*: not to deprive driver or his passenger, plff. herein, of his civil rights against the driver of the automobile, where such violation in no way caused or contributed to the accident.—GAMON v. EASTMAN, [1932] 2 W. W. R. 622; 46 B. C. R. 23.—CAN.

sk. *Absence of tail light.*—The duty imposed by Highway Traffic Act, 1930, s. 13 (1) (a), to carry a lighted lamp on the rear of a vehicle upon a highway between sunset & sunrise is an absolute one, & where in an action for negligence it is found that the breach of said duty was a cause of the accident the fact that the person in charge of the car did not know that the light was out does not relieve said person, or a person whose agent he was, from liability for the consequences of said breach.—CONNELL v. OLSEN, [1933] 1 W. W. R. 654; 3 D. L. R. 419; 41 Man. L. R. 197.—CAN.

of Vehicles Act, 1924, which provides that a judge may, "having regard to all the circumstances of the case," enlarge the time allowed by sect. 73 (1) for bringing an action to recover damages occasioned by a motor vehicle, must have been intended to prevent injustice & when it appears that the delay in bringing the action was due to the mistake of the intended plff.'s solr., that the mistake was *bona fide*, that the delay was trifling, that prompt action was taken as soon as the error was discovered, & that the other party has suffered no injury which cannot be compensated by costs, the relief should be granted.—LINDSAY v. HEAGLE, [1935] 2 W. W. R. 373; 5 F. L. J. (Can.) 86.—CAN.

sm. ———— *The next friend of an infant applied for an extension of the time allowed by sect. 87 of Vehicles Act, 1935, for the bringing of an action for damages alleged to have been caused by a motor vehicle. It was, at least, highly probable that the infant's injuries were still continuing & that the reason why the action had not been brought within the prescribed time was that his physicians made a *bona fide* error as to the extent of his injuries & their prognosis. Moreover, the laches of the next friend were attributable, to some extent at least, to the attitude of one of the proposed defts., who, when all parties thought that there were no permanent injuries, had intimated his intention of paying the hospital & medical expenses.*—*Held*: the granting of the extension is largely in the discretion of the judge applied to &, under the circumstances, the extension should be made.—KWASNICA v. PORTER & MOLLER, [1938] 1 W. W. R. 802; *affd.*, [1938] 2 W. W. R. 14.—CAN.

sp. *Liability of parent for negligence of minor—Minor owner of car.*—FRASER v. HARRIS & KAUFFMAN, [1937] 2 W. W. R. 488; 3 D. L. R. 78; 51 B. C. R. 509.—CAN.

## Part VII.—Aircraft.

**Carriage by air.**—See Carriage by Air Act, 1932 (c. 36).

**260a. — Goods—Implied warranty.**—Pltf. delivered to defts. at Baghdad a quantity of gold for carriage to London. Between Baghdad & Tiberias, the carriage was to be by aeroplane, & from Tiberias to Brindisi by seaplane. The consignment note provided that the goods were accepted for carriage only at the risk of pltf., & that defts. undertook no responsibility for loss, damage, or delay caused directly or indirectly during the conveyance by aeroplane or otherwise in connection therewith. The clause continued: "This refers to all obligations of the defts. either in respect of carriage, storage, or other operations in connection with the goods." The consignment note further stated that the defts. were not, & would not accept the obligations of, common carriers. In an action for damages for loss of the goods pltf. alleged that the seaplane had no compartment suitable for the carriage of bullion & reasonably fit to resist thieves, that the goods were placed in a compartment not fitted with any means of securing them, & that in consequence they were lost. He further alleged defts., as common carriers,

had been guilty of breach of duty, & he relied upon non-delivery as evidence of negligence, & he set up an implied warranty that the goods would be carried only in a thief-resisting compartment. Defts. admitted non-delivery, but they denied that they were common carriers & that they had been guilty of negligence. On an order for the trial of preliminary issues:—*Held*: (1) on the terms of the consignment note defts. were not under the liabilities of common carriers but were only bailees & so could be liable only for negligence; (2) there was no implied undertaking to provide a bullion room; & (3) the only implied warranty was to use reasonable care & skill to make the seaplane safe for the carriage of pltf.'s goods so far as was consistent with the nature of a seaplane, & the consignment note protected defts. from liability for negligence (if any) in this respect, though it did not mention negligence specifically.—*ASLAN v. IMPERIAL AIRWAYS, LTD.* (1933), 149 L. T. 276; 49 T. L. R. 415; 77 Sol. Jo. 337; 38 Com. Cas. 227.

**260b. — Liability for loss—Bullion.**—*ASLAN v. IMPERIAL AIRWAYS, LTD.*, No. 260a, *ante*.

## PART VII.

**sa. Aircraft in distress—Right to land.**—The aeroplane in question was seized by the Customs authorities on the ground that it had landed at a place other than an airport & for not reporting to a Customs Officer:—*Held*: where the evidence establishes that an aeroplane was forced to land on account of engine trouble & to avoid a crash, she is justified in so doing at any place that such landing can be safely made & for the same reasons that a vessel in distress may enter a port for shelter.—*PENTZ v. R.*, [1931] Ex. C. R. 172.—*CAN.*

**sb. Regulation of aviation — Whether exclusive power of Dominion Legislature.**—See DEPENDENCIES, No. 130g, *ante*.

**sd. — Validity of Regulations.**—The convention for the Regulation of Aerial Navigation, 1919, provides that each contracting State is to register the aircraft of its own nationals & accord freedom of innocent passage to the aircraft of other contracting States, whilst denying passage to aircraft not possessing the nationality of a contracting State. It also provides that no aircraft is to be registered in any State unless it belongs wholly to such nationals. The Regs. made pursuant to sect. 4 of Air Navigation Act, 1920, depart from the terms of the Convention. They contain no prohibition of aircraft not possessing the nationality of a contracting State, & do not restrict registration to persons who have been defined as nationals by any Australian law. They purport to empower the Minister to exempt any aircraft or person from the requirements of the Regs., & differ from the terms of the Convention as to ascertaining the fitness of pilots. The Commonwealth of Australia being one of the contracting States, Art. 30 of the Convention defines State aircraft as military aircraft & aircraft exclusively employed in the State service, such as posts, customs & police aircraft, & declares every other aircraft to be

private aircraft. This art. subjects to the terms of the Convention all State aircraft (other than military, customs & police aircraft), as well as private aircraft. The individual Australian States not being parties to the Convention, the Regs. purport to allow the Govt. of any Australian State to use aircraft within its State for its own purposes, & in exercise of its police power, without being subject to the Regs.:—*Held*: by reason of these & other inconsistencies between the terms of the convention & the Regs., the Regs. are rendered invalid.—*R. v. BURGESS, Ex p. HENRY* (1936), 55 C. L. R. 618; 42 Argus L. R. 482; 10 A. L. J. 335.—*AUS.*

**sl. Insurance—Flight contrary to Government regulations.**—*OBALSKI CHIROUGAMAU MINING CO. v. AERO INSURANCE CO.*, [1932] S. C. R. 540; 3 D. L. R. 25.—*CAN.*

**so. Carriage by air—Extent of liability to passengers & owners of goods.**—*Aviation Act, 1918*, "an Act to control aviation in New Zealand," by sect. 3 conferred upon the Governor-General in Council the power to make regulations for a number of purposes (*inter alia*), by sect. 3 (1), para. (f), "for the issue & cancellation of licences authorising the use of aircraft, & prescribing the conditions subject to which such aircraft may be so used, including conditions as to the carriage of passengers & goods," & by sect. 3 (1), para. (i), "prescribing fines for offences against any such regulations, not exceeding one hundred pounds for any such offence."

Regulations (provisional) were made on Feb. 21, 1921, by clause 3, of which "passenger aircraft" & "goods aircraft" are defined as meaning respectively aircraft intended for carrying passengers or goods (including mails), for hire or reward, & including respectively aircraft on which passengers or goods are actually carried. Clause 1 prescribes a number of "General Conditions of Flying," including the licensing of the personnel of the aircraft in the prescribed manner. No. 4

of the Regns., under the title of "Penalties" provides in sub-clause 1 that where any aircraft flies in contravention of or fails to comply with regulations or any provision thereof, the owner of the aircraft & also the pilot or commander shall be deemed to have contravened or, as the case may be, failed to comply with the regulations; & in sub-clause 3 that any person contravening or failing to comply with the regulations or any provision thereof is liable on summary conviction to a fine not exceeding £100.

The Second Sched. provides for the certificates of pilots of flying-machines, which are denominated "A" & "B." "A" is described as "Flying-certificate for private pilots (not valid for flying passenger or goods aircraft)"; & "B," "Pilot's flying-certificate for flying passenger or goods aircraft." The qualifications required to obtain these certificates are set out, & a higher degree of skill & of physical & mental health is required for a pilot desirous of obtaining a "B" certificate than for an "A." Included in the requirements for a "B" certificate is the passing of a medical examination carried out under the control of the Air Board, & among the requirements of mental & physical fitness are: (a) Good family & personal history, with particular reference to nervous stability. Absence of mental, moral, or physical defect which will interfere with flying efficiency. (b) General medical examination. The applicant must not suffer from any disease or disability which renders him liable suddenly to become incompetent in the management of aircraft:—*Held*: *Aviation Act, 1918*, & the regulations made thereunder, so far as they dealt with conditions as to the carriage of passengers & goods by air, were intended for the protection of a particular class, that is to say, passengers & owners of goods carried in aircraft, as distinct from the general public—& imposed a duty for the benefit of that class, which conferred a right of action upon a passenger being injured by such breach.—

260c.

—.]—Defts. received bar gold valued at £9,138 for transport from London to Paris. The gold was removed by motor-van to Croydon, where it was placed in the strong room of the aerodrome. On the following morning the door of the strong room was found open & the gold was missing. The consignment had the following on the back: "Carriage by air: The general conditions of carriage of goods are applicable to both internal & international carriage. These general conditions are based upon the Convention of Warsaw of Oct. 12, 1929, in so far as concerns international carriage within the special meaning of the said Convention." In an action to recover the value of the gold:—*Held*: the carriage by air of the bar gold had commenced; the statement on the back of the consignment note was not a sufficient statement that the carriage was subject to the rules relating to liability established by the convention; upon the facts plffs. had not made a special declaration of value nor paid any supplementary rate within Carriage by Air Act, 1932 (c. 36), Sched. I, Art. 22 (2), & no question of the additional liability of the carrier under that article could arise.—*WESTMINSTER BANK, LTD. v. IMPERIAL AIRWAYS, LTD.*, [1936] 2 All E. R. 890; 155 L. T. 86; 52 T. L. R. 607; 80 Sol. Jo. 794; 42 Com. Cas. 1.

*Annotation*:—*Refd.* *Phillipson v. Imperial Airways, Ltd.*, [1937] 3 All E. R. 318.

260d. — "High contracting parties"—

*Who are.*—A consignment note for the carriage of gold from England to Belgium by air was subject to general conditions of carriage based on the Convention of Warsaw. The conditions applied to both internal & international carriage. The Convention came into force on Feb. 13, 1933. Great Britain ratified on Feb. 14, 1933, but Belgium did not ratify until Oct. 11, 1936. The contract in the present case was made in Mar. 1935,

& by the conditions international carriage included all carriage by air between places within the territories of the high contracting parties to the Convention of Warsaw:—*Held*: (1) international carriage within the terms of this contract was carriage between two countries which had accepted the Warsaw Convention, either by ratification or by accession. The present contract was, therefore, not one for international carriage, as Belgium had not at the date of the contract so ratified; (2) the term "high contracting party" was not confined to those parties certified to be high contracting parties to the convention by order in council made under Carriage by Air Act, 1932 (c. 36), s. 1 (2). Such a certificate, though conclusive evidence of the matters so certified, was not exclusive.—*PHILIPPSON v. IMPERIAL AIRWAYS, LTD.*, [1938] 1 All E. R. 759; 158 L. T. 470; 54 T. L. R. 523; 82 Sol. Jo. 232, C. A.

260e. — "International carriage"—What

amounts to.—G. took a ticket from London to Antwerp & back, with an agreed stopping place at Brussels, by defts.' air service. The ticket, which was available for fifteen days, was issued in three parts, one which G. was to give up at the place of departure, another at the place of destination, & the third he was to keep; & it stated the fare as £4 for the outward journey, & £2 8s. for the journey from Antwerp to London. If G. did not return within the fifteen days he would be entitled to a refund of the £2 8s. Great Britain is, & Belgium is not, a High Contracting Party to the Convention of Warsaw which is scheduled to the Carriage by Air Act, 1932 (c. 36), & which applies to "all international carriage . . . by aircraft for reward," & which defines "international carriage" as "any carriage in which, according to the contract made by the parties, the place of departure & the place of destination, whether or not there be a break in the carriage,

*DOMINION AIR LINES, LTD. v. STRAND.* 1933] N. Z. L. R. 1, 2, 3.—N.Z.

*sp.*—*Accident to club passenger—Liability of company.*—M. met his death while travelling as a passenger carried for hire in an aeroplane operated by the M. Aero Club. His widow sued the club & the N. Z. Airways Co., Ltd., under Deaths by Accidents Compensation Act, 1908, for damages in respect of his death. The machine crashed in consequence of one of the bolts in one of the bell-crank levers on the elevator-control line becoming unshipped owing to a defective cotter pin. There was an inspection door where this particular bell-crank lever was. As the result of a previous accident the machine was repaired by the co. The club's contract with the co. was that the machine was to be repaired to certificate of airworthiness standard, & a certificate of airworthiness was to be obtained from the proper authorities. After a meticulous inspection by the aviation authorities, the certificate of airworthiness was issued. The machine thereafter was restored by the co. to the club. Plff. rested her case against the club on the failure to hold a ground inspection & breach of the statutory regulations in the non-holding of such inspection, but, on the evidence of plff.'s witnesses, the ground inspection did not touch the defect causing the accident:—*Held*: so far as deft. club was concerned, that the necessary *nexus* between the injury to the pas-

senger & the breach of the statutory duty had not been established. On the evidence, so far as deft. co. was concerned, the onus of establishing that the cotter pin was not properly fixed in position when it left the co.'s hands had not been discharged by plff.—*MAINDONALD v. MARLBOROUGH AERO CLUB & NEW ZEALAND AIRWAYS, LTD.*, [1935] N. Z. L. R. 371.—N.Z.

*sr.* *Pilot—Acting without certificate—Misstatement of Act.*—An information was laid against the accused charging him with acting as pilot of an aircraft "without holding a certificate of the Air Board of Canada authorising him to act, contrary to the provisions of the Aeronautics Act, 1919, & the regulations thereunder." The magistrate dismissed the case on the ground that there is no such Act & stated a case under sect. 761 of the Code:—*Held*: while the regulations made by the old Air Board under Air Board Act are still in force & still contain the original clause 33, which provides that no person shall act as pilot without a certificate issued "by the Air Board," & although this clause is still in force to the extent that it still imposes the obligation to procure a certificate before flying, yet by the effect of the change made by National Defence Act, 1922, in the personnel of the administration of the Act, the obligation is now to procure a certificate, not from the Air Board, which no longer exists, but from the Minister, which is not what the information alleges to have been con-

travened. Neither the substance of the charge nor the statement of the Act, both defective, supplied the information which the other lacks. Therefore the magistrate was right.—*A.-G. FOR CANADA v. MACDOUGALL*, [1934] 1 W. W. R. 621; 62 C. C. C. 7; 42 Man. L. R. 117.—CAN.

*sw.*—*Liability of club for—Collision between car & aeroplane.*—Plff. sought damages arising out of a collision between an aeroplane the property of deft. club & driven & piloted by deft. B., & a motor car the property of plff. It was clear that the accident was due to the negligence of B. & the question to be determined was whether or not at the time of the collision the aeroplane concerned was under the control of B. as the servant or agent of deft. club:—*Held*: having regard to all the circumstances of the case as shown by the evidence the relationship between deft. club & B. with regard to the particular aeroplane was that of bailor & bailee & not that of master & servant or principal & agent & therefore plff. could not succeed against deft. club.—*EBBETT MOTORS, LTD. v. WESTERN FEDERATED FLYING CLUB (INCORPORATED)* (1935), 30 M. C. R. 91.—N.Z.

*sz.*—*Negligence of.*—An aeroplane crashed as the result of a stall caused by loss of flying-speed when the machine was approaching a landing, & a passenger received injuries from which he died. Engine-failure was not

... are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty ... of another Power, even though that Power is not a party to this Convention." The Convention further provides that "in the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs." On the journey back from Antwerp to London the aeroplane in which G. was travelling was wrecked in Belgium, & G. was killed. In an action by his widow claiming damages in respect of his death, LEWIS, J., found that the accident was due to the negligent management of the aeroplane; that the tickets issued to G. involved two distinct carriages, one from London to Antwerp & another from Antwerp to London; that the latter carriage, during which G. met his death, being a carriage from a place not within the territory of a High Contracting Party was not "international carriage" within the meaning of the Convention; & therefore that the liability of the defts. was not limited to the English equivalent of 125,000 francs. On appeal:—*Held*: there was one carriage only—namely, from London to Antwerp & back; it was "international carriage"; & therefore the damages recoverable were limited to the English equivalent of 125,000 francs.

*Semble*: the words "act, neglect or default" in the Fatal Accidents Act, 1846 (c. 93), are wide enough to include a negligent breach of contract.—*GREEN v. IMPERIAL AIRWAYS, LTD.*, [1937] 1 K. B. 50; [1936] 2 All E. R. 1258; 106 L. J. K. B. 49; 155 L. T. 380; 52 T. L. R. 681; 80 Sol. Jo. 735; 42 Com. Cas. 10, C. A.

*Annotation*:—*Refd.* *Philippson v. Imperial Airways, Ltd.*, [1938] 1 All E. R. 759.

**260f.** — *Negligence—Limitation of damages—Action under Fatal Accidents Act, 1846 (c. 93).*—*GREEN v. IMPERIAL AIRWAYS, LTD.*, No. 260e, *ante*.

**260g.** — *No liability to hirer's guests.* Negotiations were entered into with the first defts. for the hire of an aeroplane for the carriage of the hirer & a party of guests. The aeroplane hired was in fact the property of the second defts. & the pilot was their servant. The negotiations, however, were conducted throughout by the first defts., & it was found that they held themselves out as principals. No mention was made of any special conditions. Just as the aeroplane was preparing to leave, an envelope containing a "ticket" was handed to the hirer by the pilot. The "ticket" was a document called a special charter which contained (*inter alia*) a number of conditions, one of

which exempted the second defts. from liability for their own or their servants' negligence. The ticket contemplated signature by the "passenger" & its return when signed to one of the second defts.' officials. Before the hirer had an opportunity of seeing the contents of the envelope, the aeroplane started on its journey & almost immediately it crashed, two of the hirer's guests being killed. The disaster was found to be due to the negligence of the pilot. In an action by the widow of one of the guests on behalf of herself & her three infant daughters for damages under the Fatal Accidents Act:—*Held*: (1) as there was no contractual relationship between the first defts. & the hirer's guests, the first defts. were not liable to the widow; (2) a condition binding on the hirer would also be binding on his guests, as the burden was upon the hirer to pass on to his guests the information as to the existence of the conditions; (3) the condition exempting the second defts. from liability was not communicated to the hirer before the journey started, & the second defts. were not protected by it. As the pilot was negligent, the second defts. were liable to *pltf.* for her husband's death.

(4) I hold that the doctrine *res ipsa loquitur* applies. While it is unnecessary to decide whether this doctrine would apply to every accident occurring to an aeroplane in the course of a prolonged flight, here we have a disaster at the very beginning, just as the machine had taken off & well before it had attained the height at which the journey would be performed (*GODDARD, J.*).—*FOSBROKE-HOBBS v. AIRWORK, LTD., & BRITISH-AMERICAN AIR SERVICES, LTD.*, [1937] 1 All E. R. 108; 53 T. L. R. 254; 81 Sol. Jo. 80.

**260h.** — *Exemption on ticket—Necessity for communication.*—*FOSBROKE-HOBBS v. AIRWORK, LTD., & BRITISH-AMERICAN AIR SERVICES, LTD.*, No. 260g, *ante*.

**260j.** *Liability for collision—Taking off—Air Navigation Act, 1920 (c. 80), s. 9 (1).*—*CUBITT & TERRY v. GOWER* (1933), 77 Sol. Jo. 732.

**260k.** *Contract for supply of machine—Alterations required contrary to Air Ministry Regulations—Whether contract enforceable.*—*Pltfs.* purchased an aeroplane from defts., the purchase being in fact made on behalf of the Spanish Govt. who were at the time engaged in a civil war. For this purpose certain modifications were made in the aeroplane, & as there was an immediate prospect of an embargo being placed upon the delivery of aircraft to Spain, these modifications were hurriedly made, & the aeroplane left for Spain without such modifications being approved by the inspectors of the Air

a factor in the accident. It is not a test of diligence that the pilot may have been desirous of using all care; the test is whether he in fact exercised the care & attention which were customary & proper. On this objective test, *deft.* failed at a critical stage to take the customary & proper precaution of maintaining air speed, & was guilty of negligence.—*HAILEY v. TAYLOR*, [1936] N. Z. L. R. 806; G. L. R. 557; 12 N. Z. L. J. 262.—*N.Z.*

*sa.* — — —. In the absence of statute, the ordinary rules of negligence apply to the operation of an aeroplane & the pilot of a plane carrying a guest must exercise that degree of care & skill which a competent, prudent & qualified pilot would use under the circumstances. The fatal injuries incurred, by a gratuitous passenger, in an aeroplane crash:—*Held*: to have been due to the negligence of the pilot, *deft.*, in not maintaining proper flying speed. Moreover, the

doctrine of *res ipsa loquitur* applied & *deft.* had not satisfied the onus placed on him by that rule.—*MCINNERNY v. McDUGALL*, [1937] 3 W. W. R. 625; [1938] 1 D. L. R. 22; 7 F. L. J. (Can.) 227.—*CAN.*

*sd.* *Negligence—Hired aeroplane.*—Consideration of jury's findings in action for damages for negligent use & operation of hired aeroplane.—*SAUNDERS v. GOODWIN*, [1937] 1 D. L. R. 620; 11 M. P. R. 318.—*CAN.*

Ministry as required by the regulations. It was found that plffs. were privy to the breach of the regulations :—*Held* : the contract was unenforceable as being illegal, since both parties intended that it should be flown without the modifications being approved by the proper authority.—COMMERCIAL AIR

HIRE, LTD. v. WRIGHTWAYS, LTD., [1938] 1 All E. R. 89 ; 81 Sol. Jo. 914.

**Construction of life assurance policy.]—***See* INSURANCE, No. 2971a, *ante*.

**Injury to pupil at aerodrome.]—***See* MASTER & SERVANT, No. 200a, *ante*.

## TELEGRAPHS AND TELEPHONES.

## Part I.—Definitions.

- 4a. — **Broadcasting.**—Their Lordships think broadcasting falls within the description of "telegraphs." No doubt in everyday speech telegraph is almost exclusively used to denote the electrical instrument which by means of a wire connecting that instrument with another instrument makes it possible to communicate signals or words of any kind. But the original meaning of the word "telegraph" as given in the Oxford Dictionary is :

"An apparatus for transmitting messages to a distance, usually by signs of some kind" (*per* CUR.).—*Re* RADIO COMMUNICATION IN CANADA, A.-G. OF QUEBEC *v.* A.-G. OF CANADA, A.-G. OF ONTARIO, A.-G. OF NEW BRUNSWICK, A.-G. OF MANITOBA, A.-G. OF SASKATCHEWAN, A.-G. OF ALBERTA & CANADIAN RADIO LEAGUE, [1932] A. C. 304 ; 101 L. J. P. C. 94 ; 146 L. T. 409 ; 48 T. L. R. 235, P. C.

## Part III.—Construction and Maintenance of Telegraphs.

15. *Add. Annotation.*—*Re*ld. Port of London Authority *v.* Canvey Island Comrs. (1931), 101 L. J. Ch. 63.

- 18a. — — — **Amenities of district.**—*POSTMASTER-GENERAL v. SOUTHGATE CORPN.* (1935), 79 Sol. Jo. 181.

- 24a. **Erection of posts on railway—Acquiescence—Implied licence—Revocability.**—Whether any & what restrictions exist on the power of a licensor to determine a revocable licence to occupy land depends upon the circumstances of each case. In 1926 the Crown proceeded against appts. alleging that poles, carrying telegraph wires, which they had erected on the roadway of a Canadian Govt. railway, were a trespass thereon, & claiming damages ; alternatively the Crown claimed a declaration of the appts.' rights, if any. As to the main section of the telegraph line, the poles, as they stood in 1926, had been erected upon the roadway between 1905 & 1910 without leave or licence. As to two branch lines, the poles had been erected in 1893 & 1911 respectively, in each case while an agreement was in negotiation though no agreement was eventually concluded. The whole telegraph line, which was about 500 miles in length, was used by the public as well as by appts. :—*Held* : (1) on the facts, at the date of the proceedings all the poles were on the roadway with the licence of the Crown. Although the appts. had originally been trespassers in respect of the main line poles, many years' acquiescence & a claim to the payment of rent, had long since prevented them from being so regarded ; in the case of the branch lines, it was to be inferred that the poles had been erected by licence. (2) The licence

was revocable in the absence of any facts from which a contract that it should be irrevocable could be implied ; having regard to the circumstances, the licence could be revoked only by a notice determining it upon a specified future date such as would give the appts. sufficient time, not only to remove the poles & wires, but also to arrange for erecting them elsewhere.—*CANADIAN PACIFIC RY. CO. v. R.*, [1931] A. C. 414 ; 100 L. J. P. C. 129 ; 145 L. T. 129, P. C.

- 28a. **Alteration of lines in consequence of town-planning scheme—Liability of Post Office for costs.**—In pursuance of an approved scheme under the Housing & Town Planning Acts, 1909 & 1919, the Birmingham Corpn. widened certain streets & altered the line or level thereof. In so doing they altered the telegraphic lines. Upon a case stated the question was raised whether the Postmaster-General or the Corpn. should pay the expenses of altering the telegraphic lines :—*Held* : the work had been carried out in conformity with a scheme under the Town Planning Acts, but that provision had been "otherwise made . . . with respect to such alteration," by Telegraph Act, 1863 (c. 112), s. 15, & the expenses were payable by the Postmaster-General under that sect. & not by the Corpn. under Telegraph Act, 1878 (c. 70), s. 7.

The word "enactment" in sect. 7 of the Act of 1878 is not confined to the particular enactment which authorises the alteration, but includes general Acts of Parliament.—*POSTMASTER-GENERAL v. BIRMINGHAM CORPN.*, [1936] 1 K. B. 66 ; 105 L. J. K. B. 10 ; 153 L. T. 405 ; 99 J. P. 361 ; 51 T. L. R. 581 ; 79 Sol. Jo. 592 ; 33 L. G. R. 395, C. A.

## PART V.

5a. *Regulations by Governor-General—Validity.*—*Held* : reg. 21A (2) of the Telephone Regulations, 1913, which provides that a person who enters into occupation of any premises having a telephone service shall not be entitled to use the service until he has obtained a transfer of it, & that if he uses it before transfer he shall be deemed to have assumed the service & shall be liable for all amounts owing

in respect of the service, at the time he entered into occupations of the premises, is not *ultra vires*.—*GIBSON v. MITCHELL* (1929), 41 C. L. R. 275 ; 2 A. L. J. 332.—AUS.

## PART VI.

5d. *Regulations by Governor-General—Validity.*—Sect. 10 of Wireless Telegraphy Act, 1905–1919 provides that "the Governor-General may make regulations . . . prescribing all matters

which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act." Two of pltf. cos. were established to erect & maintain broadcasting stations for the purpose of transmitting messages by means of wireless telegraphy, & the fees to which they were entitled were fixed by regulation. Subsequently a regulation was passed on Aug. 7, 1923, purporting to amend

## Part VIII.—Adjustment of Differences.

49. *Add. Annotation* :—As to (2) *Refd.* West Midlands Joint Electricity Authority v.

Pitt, Minister of Transport v. Pitt, [1932] 2 K. B. 1.

## Part IX.—Compensation.

53. *Add. Annotation* :—*Refd.* Kiddie v. Port of London Authority (1929), 93 J. P. 203.

## Part X.—Penal Provisions relating to Telegraphs.

61a. **Wireless licence—Necessity for—Block of flats—Wireless supplied to tenants.**—The landlords of a block of flats installed therein a wireless receiving set for which they paid the 10s. licence. The set was fitted with an amplifier, which was connected by wires to a socket in each flat, including that of resp. In this flat resp. had installed a loud-speaker with a wire & plug, & by inserting the plug into the socket he had from time to time received broadcast programmes. The operation & tuning of the receiving set was under

the landlords' control, & it was switched off by them nightly at 11 o'clock. Resp. had no wireless licence :—*Held* : resp. had "worked" an "apparatus for wireless telegraphy without a licence" within sect. 1 (3) of Wireless Telegraphy Act, 1901 (c. 24).—*KING v. BULL*, [1937] 1 K. B. 810; [1937] 1 All E. R. 585; 106 L. J. K. B. 430; 156 L. T. 276; 101 J. P. 169; 53 T. L. R. 409; 81 Sol. Jo. 219; 35 L. G. R. 147; 30 Cox, C. C. 567.

the earlier regulation by reducing the remuneration payable to the two cos., & by clause (2) thereof purporting to make such reduction operate retrospectively as from Nov. 1, 1927 :—*Held* : clause (2) of the regulation which made the reduction operate as from a date anterior to the passing of the regulation was void.—*BROADCASTING CO. OF AUSTRALIA PTY., LTD. v. COMMONWEALTH* (1935), 52 C. L. R. 52; 41 Argus L. R. 89; 8 A. L. J. 427.—*AUS.*

2 D. L. R. 113; O. R. 195; 61 C. C. C. 371.—*CAN.*

*sg. Damage to telephone pole—Defence—Abatement of nuisance.*—Deft. was convicted for that he wilfully did, without legal justification or excuse, & without colour of right, unlawfully commit damage by cutting down a telephone pole belonging to a telephone co. A telephone line to a summer hotel was erected many years ago across deft.'s property. It was never used for more than a few months in summer, & for years it was not used at all. No easement for the extension of wires over deft.'s lands existed; & it did not appear that the telephone co. acquired any right to use the line. So far as was established in evidence, the pole was a nuisance to deft., & he acted in what he thought was the exercise of a right when he cut it down :—*Held* : he had good grounds for supposing that he had a right to abate what was to him a nuisance on his own land; according to the evidence, the telephone co. was a mere trespasser there.—*R. v. PIMMETT*, [1931] O. R. 705; 56 Can. C. C. 363.—*CAN.*

1 W. W. R. 741; 60 C. C. C. 66; 46 B. C. R. 459.—*CAN.*

*sw. — Broadcast from land adjoining racecourse.*—The owner of land adjoining a racecourse erected an elevated platform on his land from which it was possible to overlook the course & read information as to starters, scratchings & race results appearing on notice-boards erected thereon. The adjoining owner for reward permitted an employee of a broadcasting co. to use the platform when race meetings were being held, & through a microphone to describe races & announce the results thereof. The broadcasting co. broadcast the comments & descriptions given. The proprietor of the racecourse sought an injunction to restrain this use of the adjoining land, on the grounds (1) that such user was unnatural in that it amounted to a nuisance in impairing the advantages possessed by the land used as a racecourse, & lessened the attendances at race meetings; & (2) that the use of information appearing on the notice-boards & the assumed use in connection therewith of a racebook issued by the proprietor amounted to an infringement of copyright :—*Held* : there was no infringement of copyright.—*VICTORIA PARK RACING & RECREATION GROUNDS CO., LTD. v. TAYLOR* (1937), 43 Argus L. R. 597; 11 A. L. J. 197.—*AUS.*

*sz. Appliance for receiving messages—Broadcast receiving set.*—A wireless set kept for the reception of broadcast programmes is an appliance maintained for the purpose of receiving messages by means of wireless telegraphy within sect. 6 of Wireless Telegraphy Act, 1905-1919.—*R. v. BRISLAN, Ex p. WILLIAMS* (1930), 54 C. L. R. 262; 9 A. L. J. 348; 42 Argus L. R. 45.—*AUS.*

## PART X.

*so. Wireless licence—Liability for failing to take out.*—On Sept. 8, 1928, deft. was the owner of an unlicensed wireless receiving set. Later in the same day, after a visit of an inspector which was not shown to have been communicated to him, he took out a licence. On a charge of maintaining an unauthorised wireless set :—*Held* : the fractions of the day were to be taken into account, & deft. was guilty of the offence.—*BEARE v. WARD*, [1928] S. A. S. R. 1.—*AUS.*

*sd. — Radio receiving set—Whether "radiotelegraph" — Within Radiotelegraph Act, 1913.*—*NOLAN v. McCASSEY*, [1930] 2 D. L. R. 323.—*CAN.*

*se. — Within Radiotelegraph Act, 1927.*—*NOLAN v. SHARP*, [1930] 4 D. L. R. 1016.—*CAN.*

*st. Meaning of "establishing" & "working" radio set.*—When a person installs a radio receiving set in his private dwelling-house he establishes a radiotelegraph station within Radiotelegraph Act, R. S. C., 1927, s. 6. But he does not work the set within this sect. if some one in the owner's absence turns on the current & manipulates the dials.—*R. v. GIGNAC*, [1934]

*sv. Transmission of betting information.*—The furnishing of racing news to newspapers as part of a syndicate service without any proof of active participation in betting operations is not enough to sustain a conviction under Criminal Code, sect. 235 (1), which provides that it is an indictable offence for any one to wilfully & knowingly send, transmit, deliver or receive any message by telegraph, telephone, mail or express conveying any information relating to book-making, pool-selling, betting or wagering, or to assist in book-making, pool-selling, betting or wagering.—*R. v. GENERAL NEWS BUREAU INCORPORATED*, [1933]



## Part XI.—Rights and Liabilities of Telegraph Undertakers.

66. *Add. Annotation* :—*Refd.* The Minerva (1933), 49 T. L. R. 563.

## Part XIV.—Rateability of Property occupied for Telegraphic Purposes.

74. *Add. Annotation* :—*Refd.* Kiddie v. Port of London Authority, Durrant v. Same (1929), 45 T. L. R. 430.

## PART XII.

*n l.* ——— *Order limiting liability—Whether binding on sender of telegram.*—The order of the Board of Railway Comrs., contemplated by sub-sect. (2) of sect. 348 of Railway Act, R. S. C., 1927, merely determines the extent to which a railway co. may limit its liability with respect to the carriage of traffic, leaving it to the co. to make such limitation if it sees fit to do so; but does not prevent the co. from carrying traffic without limiting its liability. General Order No. 162 of said Board, approving conditions of liability, set out therein, with respect to the transmission of telegraphic messages:—*Held*: to be an order made under the powers given by the provision then in force corresponding with sub-sect. (2). It, therefore, has not the effect of making a statutory contract between the sender of a telegram & the co., but only authorises such a contract to be made; & consequently, the conditions are not binding on a sender who had in fact no knowledge of them & to whom they cannot be held to have been communicated.—

JANKELSON v. CANADIAN NATIONAL TELEGRAPHS, [1931] 1 W. W. R. 337; [1931] 2 D. L. R. 86; 25 Alta. L. R. 230.—CAN.

*sp. Telephone switchboard—Whether “immovable.”*—A telephone switchboard with associated equipment belonging to appit. co. & connected with its telephone system by wires & cables was so placed in premises of which the co. was lessee as to rest on the floor without being attached thereto:—*Held*: the switchboard & its equipment, not being a structure incorporated with or adherent to the soil, or physically incorporated as part of a structure which was incorporated with or adherent to the soil, was not a structure “immovable by its nature” within the meaning of “building” in art. 376 of the Quebec Civil Code. The test whether a structure is “immovable by its nature” under that article is incorporation with, or adherence to, the soil, or physical incorporation as part of a structure so incorporated with, or adhering to, the soil. The question whether the structure of which it is claimed to be part—

in the present case the poles, wires & cables of appit.'s telephone system—is commercially able to operate without its assistance is irrelevant, & it could not be said that the switchboard was physically incorporated in the structure composed of the poles, wires & cables of appit.'s undertaking.—BELL TELEPHONE CO. OF CANADA v. ST. LAURENT (VILLE), [1936] A. C. 73; 105 L. J. P. C. 1; 153 L. T. 390; 52 T. L. R. 1, P. C.—CAN.

## PART XVI.

*sw. Implied transfer—On sale of business.*—Under a contract for the purchase of all the assets of a co. the purchaser was after Sept. 1, 1931, to cease to use the name of the vendor co. & the co. was “to have full rights to the same.” At the date of the agreement the co. used a certain word as its cable address:—*Held*: it must have been intended that the co. would have the right to use this cable word after Sept. 1, 1931.—MILLER v. WINCH & WINCH (R. V.) & Co., [1933] 3 W. W. R. 215.—CAN.

## THEATRES AND OTHER PLACES OF ENTERTAINMENT.

## Part I.—Theatres.

- 11a. ——— Discretion must be properly exercised.]—*R. v. CARDIFF CORPN., Ex p. WESTLAN PRODUCTIONS, LTD., NEW THEATRE (CARDIFF), LTD. & MOSS EMPIRES, LTD.* (1929), 73 Sol. Jo. 766, D. C.
36. *Add. Annotation* :—*Refd. A.-G. v. Walkergate Press, Ltd., Same v. Bloomfield, Same v. Carlton* (1930), 142 L. T. 408.
49. *Add. Annotations* :—*Consd. Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546; *Myers (G. H.) & Co. v. Brent Cross Service Co.*, [1934] 1 K. B. 46. *Refd. McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119.
52. *Add. Annotation* :—*Consd. Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546.
53. *Add. Annotation* :—*Consd. Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546.
55. *Add. Annotation* :—*Consd. Hall v. Brooklands Auto-Racing Club* (1932), 48 T. L. R. 546.
59. After this case add :—  
**Liability for income tax—Appropriate schedule.]—See INCOME TAX, No. 312a, ante.**
63. *Add. Annotations* :—*Refd. Hillas & Co. v. Arcos, Ltd.* (1932), 147 L. T. 503; *British Homophone, Ltd. v. Kunz & Crystallate Gramophone Record Manufacturing Co.* (1935), 152 L. T. 589.
- 64a. ——— “Formal contract to be signed in due course.”]—*RONALD FRANKAU PRODUCTIONS, LTD. v. BELL* (1927), 65 L. Jo. 33; 164 L. T. Jo. 504.
68. *Add. Annotation* :—*Apprvd. Herbert Clayton & Jack Waller, Ltd. v. Oliver*, [1930] A. C. 209.
- 68a. ———.]—Applts., theatrical producers, agreed to engage resp., an American actor, to play one of the three leading comedy parts in a musical play about to be produced at the London Hippodrome for six weeks certain at a salary of £55 per week, & the contract contained a provision prohibiting resp. during the continuance of his engagement from acting elsewhere without the consent of the applts. Resp. objected that the part assigned to him was not one of the three leading comedy parts, &, on the refusal of applts. to recast him, declined to appear in the play & sued applts. for damages for breach of contract. At the trial of the action before a judge & jury the jury found for resp. for £1,000 damages for loss of publicity & for three weeks’ salary, & judgment was entered accordingly. The Ct. of Appeal affirmed the verdict & judgment except as to the salary :—*Held* : (1) upon the construction of the contract, it bound applts. to give resp. an opportunity of appearing in public in a part answering the stipulated description; (2) it was competent to the jury, having regard to the character of the contract, to give damages to resp. for loss of publicity.—*HERBERT CLAYTON & JACK WALLER, LTD. v. OLIVER*, [1930] A. C. 209; 99 L. J. K. B. 165; 142 L. T. 585; 46 T. L. R. 230; 74 Sol. Jo. 187, H. L.
71. *Add. Annotations* :—*Apprvd. Herbert Clayton & Jack Waller, Ltd. v. Oliver*, [1930] A. C. 209. *Expld. Withers v. General Theatre Corp., Ltd.*, [1933] 2 K. B. 536, C. A.
78. *Add. Annotations* :—*Refd. Guy-Pell v. Foster*, [1930] 2 Ch. 169; *Huntton Co. v. Kolynos (Incorporated)*, [1930] 1 Ch. 528.
89. *Add. Annotation* :—*Overd. Herbert Clayton & Jack Waller, Ltd. v. Oliver*, [1930] A. C. 209.
- 89a. ———.]—*HERBERT CLAYTON & JACK WALLER, LTD. v. OLIVER*, No. 68a, *ante*.
- 89b. ———.]—Our attention has been quite rightly called to the cases which have been decided in the Ct. of Appeal & the House of Lords with regard to the rights of an actress or an actor, or a public performer, who has been deprived of the opportunity of gaining the prestige & reputation that he would have obtained if he had been allowed to perform in the agreed character. It may be, & I think it is, that very special considerations apply to an agreement with an artist who is to perform in public, because it is a matter of common knowledge that in a large majority of the cases the consideration to the artist when he accepts the engagement is just as much, if not more, the opportunity, certainly in the early stage of the artist’s career, to appear before the public & make his reputation, which is of much greater value than the mere money wages fixed for the period of his employment. It seems to me it is for that reason that it is regarded as the essence of the matter that the artist should have the opportunity for which he has bargained, & these

**PART I. SECT. 1, SUB-SECT. 1.**  
*sa. Greenock Corporation Act, 1909, s. 251—Theatre—Whether picture house included.]—Held* : a building, which it was proposed to erect for use as a picture house was not a “theatre” within the meaning of, & subject to the regulations of, above sect., in respect that its general character, as disclosed by the plans before the ct., was that of

a picture house, rather than of a theatre, & that the sect., as it imposed a restriction on a right of property, must be strictly construed; & according to *contemporanea expositio*, the expression “theatre” in the sect. did not include a building devoted to the exhibition of cinematograph films.—*SCOTTISH CINEMA & VARIETY THEATRES, LTD. v. RITCHIE*, [1929]

S. C. (Ct. of Sess.) 350.—SCOT.

**PART I. SECT. 1, SUB-SECT. 2.**  
*sd. Who should take out—Person keeping theatre open—Lessee.]—The lessee of a theatre is the person who “keeps the theatre open” & not its owner.—UPENDRAKUMAR MITRA v. CALCUTTA CORPN. (1931), 1 L. R. 58 Calc. 1293.—IND.*

considerations make exceptional principles applicable to the case of artists who perform in public (GREER, L.J.).—*Re GOLOMB & PORTER & Co.'s, LTD., ARBITRATION* (1931), 144 L. T. 583, C. A.

- 89c. ———.]—Pltf., who was a variety artiste, was engaged by deft. co. to appear & perform a certain sketch at the London Palladium for three consecutive weeks, commencing July 6, 1931, at a gross salary of £300 per week, he provided the supporting actors & properties. The contract contained a clause by which pltf. agreed, should defts. so desire, to transfer the engagement to any hall owned, controlled by or associated with defts. either in London or the provinces. Pltf. had a preliminary trial week at Portsmouth, & after viewing a performance there defts. on July 2, 1931, gave pltf. notice that they would not allow him to perform at the London Palladium under the agreement. Pltf. sued the defts. claiming damages for breach of contract, including loss of publicity & reputation. At the trial counsel for pltf. suggested to the jury that pltf. had thereby suffered damage to his reputation. The judge in summing up the case told the jury that they must put some figure upon the loss of publicity because pltf. was not allowed to perform at the Palladium. He did not refer in his summing-up to the option in the contract. The jury returned a verdict for pltf. for the salary he had lost & £1,000 for loss of publicity. On appeal by defts.:—*Held*: (1) damage to a reputation already

existing by not allowing an actor to appear in accordance with his contract was not a matter which could be taken into consideration by a jury in assessing damages for breach of contract. What had to be taken into consideration was whether if the actor had been allowed to appear that appearance would have given him an enhanced reputation. That distinction had not been explained to the jury by the judge, & therefore there would have to be a new trial on the question of damages; (2) pltf. had under the contract no absolute right to appear at the Palladium; defts. had an option as to the halls at which he should appear; in assessing damages for the breach of a contract which the defts. could at their option perform in alternative ways it must be assumed that defts. would perform it in the way most beneficial to themselves & not in the way that would be most beneficial to pltf.; & as there had been no direction by the judge with regard to this there must be a new trial on this ground also.—*WITHERS v. GENERAL THEATRE CORPN., LTD.*, [1933] 2 K. B. 536; 102 L. J. K. B. 719; 149 L. T. 487, C. A.

92. *Add. Annotation*:—*Distd. Graves v. Cohen* (1929), 46 T. L. R. 121.  
107. *Add. Annotation*:—*Folld. Warner Bros. Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209.  
111. *Add. Annotation*:—*Consd. Warner Brothers Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209.

## Part III.—Music and Dancing and Other Public Entertainments.

142. After this case add:—

**Film actress—Whether workman within Workmen's Compensation Acts.**—*See MASTER & SERVANT*, No. 2057b, *ante*.

- 147a. ——— **Wireless in hotel—Occasional user.**]—*BADGER v. JAMES* (1934), 78 Sol. Jo. 768, D. C.

- 159a. **Premises must be in existence.**]—A county council delegated, under sect. 5 of Cinematograph Act, 1909 (c. 30), to justices sitting in petty sessions the council's powers under sect. 2 of the Act to "grant licences to such persons as they think fit to use the premises specified in the licence for the purposes" of a cinematograph theatre. Owing to the absence of any provision in the

statute for the granting of provisional licences in respect of buildings not yet erected, a practice grew up of applying to justices to approve plans of a proposed building, it being understood that if the plans were approved—all opposition, if any, being heard on that application—a subsequent application for a licence would be granted as a matter of course when the building was completed in accordance with the plans:—*Held*: since no power was given by the Act to the county council or to justices to approve plans, the justices in so doing, or in refusing to do so, were engaging in an extra-judicial proceeding which the ct. could not control by *certiorari* or *mandamus*.—*R. v. BARNSTAPLE JJ., Ex p. CARDER*, [1938]

### PART I. SECT. 7, SUB-SECT. 4.

p. 1. ——— *Rental based on "gross receipts"* — *Amusement tax not included.*]—*LYNN v. NATHANSON*, [1931] 2 D. L. R. 457.—**CAN.**

*sy. Contract to supply all films available—What amounts to.*]—By agreement in writing deft. agreed (*inter alia*) to supply & pltf. agreed to exhibit in the "Plaza" Theatre, Auckland, all motion-picture films with sufficient supporting subjects to make a programme to be released in New Zealand by deft. from the date of the agreement until Sept. 30, 1933, in accordance

with the terms & conditions in the said agreement contained:—*Held*: there was on the true construction of the contract at the least an obligation on the part of applt. to release & supply to resp. all films which applt. actually had from time to time in New Zealand available for lease.—*BRITISH DOMINIONS FILMS, LTD. v. DOMINION PICTURE-THETRES Co., LTD.*, [1935] N. Z. L. R. Supp. 50.—**N.Z.**

### PART I. SECT. 7, SUB-SECT. 5.

*sz. Contract to supply child pianist.*] — A person contracting to furnish a

theatre & pay a booking agency for the services of a 14-year-old pianist cannot plead either the prohibition of the Inspector of the Dept. of Labour or the death of the King as excuses for failing to carry out the contract.—*MANAGEMENT CHAS. L. WAGNER v. BOURDON*, [1937] 2 D. L. R. 473.—**CAN.**

### PART III. SECT. 2, SUB-SECT. 3.—A.

151 i. *Discretion of justices—Bona fides in exercise.*]—*R. v. CHARLEVILLE TOWN COUNCIL, Ex p. CORONES*, [1928] S. R. Q. 155.—**AUS.**

1 K. B. 385; [1937] 4 All E. R. 263; 107 L. J. K. B. 127; 158 L. T. 409; 101 J. P. 547; 54 T. L. R. 36; 81 Sol. Jo. 903; 35 L. G. R. 651, D. C.

164a. — Subsequent order permitting Sunday opening subject to conditions—Invalid.]—It was the practice of a certain County Council, in granting licences to use premises for cinematograph exhibitions, to impose the condition that the premises should not be so used on Sundays, Christmas Day or Good Friday; but also to entertain applications for permission to open the premises for cinematograph entertainments on those days. A co. applied for a licence to open & use premises for cinematograph entertainments, & also for permission to open the premises for such purposes on Sundays, Christmas Day & Good Friday. In compliance with this application the County Council made an order to the effect that, "subject to arrangements at the premises being completed to its satisfaction, the council will take no action for the present in the event of the

above-named premises being opened for cinematograph entertainments on Sundays, Christmas Day & Good Friday as from & including Sunday, July 6, 1930, provided: (i) that a sum of £35 be paid to charity in respect of each Sunday, Christmas Day & Good Friday on which the premises are opened for cinematograph entertainments." The permission was also subject to conditions relating to the auditing of receipts & expenses, the character & hours of the entertainments, & the employment of servants:—*Held*: that a writ of *certiorari* should issue to bring up & quash the order of the County Council as having been made without jurisdiction, the council having no power to dispense with the provisions of the Sunday Observance Act, 1780 (c. 49).—*R. v. LONDON COUNTY COUNCIL, Ex p. ENTERTAINMENTS PROTECTION ASSOCN., LTD.*, [1931] 2 K. B. 215; 100 L. J. K. B. 760; 144 L. T. 464; 95 J. P. 89; 47 T. L. R. 227; 75 Sol. Jo. 138; 29 L. G. R. 252, C. A.

— — —.]—*See* Sunday Entertainments Act, 1932 (c. 51).

## Part VI.—Cinematographs.

**Licences.**—*See* THEATRES, Vol. XLII., pp. 919, 920, Nos. 148–150, 154, 156–175; 159a, *ante*.

**Sunday performances.**—*See* THEATRES, Vol. XLII., p. 921, No. 164; 164a, *ante*; TIME, No. 127a, *post*, & Sunday Entertainments Act, 1932 (c. 51).

**Regulations for securing safety—Exhibition of films by dealer.**—*See* THEATRES, Vol. XLII., p. 923, No. 183.

— **Meaning of "Inflammable" films.**—*See* THEATRES, Vol. XLII., p. 924, No. 187.

**Right of entry by constable.**—*See* THEATRES, Vol. XLII., p. 919, No. 142.

**Copyright—Breach of—Representation of sketch by film.**—*See* COPYRIGHT, Vol. XIII., p. 215, No. 509.

— — — **Exhibiting advertisements of film.**]

— *See* COPYRIGHT, Vol. XIII., p. 215, No. 510.

— — — **News films.**—*See* COPYRIGHT, No. 489d, *ante*.

**Title of film—Liability for passing off.**—*See* COPYRIGHT, Nos. 523a, 523b, 523c, *ante*.

**"Talkie"—Defamation by—Whether libel or slander.**—*See* LIBEL, No. 24b, *ante*.

— **Infringement of patent—Construction of specification.**—*See* PATENTS, No. 2358d, *ante*.

— — — **Novelty.**—*See* PATENTS, No. 459f, *ante*.

— **Whether included in registration of trade mark for "cinematograph films"—Talkies unknown at time of registration.**—*See* TRADE MARKS, No. 511a, *post*.

### PART III. SECT. 3.

*sc. Regulations for securing safety in cinematograph exhibitions—Moving Picture Act—Order of fire marshal.*—Letters from the fire marshal to the agent of a theatre owner insisting that certain alterations be made in the theatre in order to comply with the regulations under Moving Picture Act, R. S. B. C., 1924, held to have been given by him as fire marshal acting in pursuance of Fire Marshal Act, R. S. B. C., 1924, & to have amounted to an "order" within the meaning of sect. 17 (3) of the latter Act. *McMORRIS v. FORD (B. C.)*, [1929] 3 W. W. R. 159; *affd.*, [1930] 2 W. W. R. 203; 3 D. L. R. 398; 42 B. C. R. 486.—CAN.

### PART III. SECT. 5.

*sf. Exhibition of uncensored film—Place for admission to which charge made.*—*Society.*—Def. society was incorporated with the object of encouraging among its members an understanding & appreciation of cinematic art & craft, & of exhibiting before its members films not screened in the ordinary commercial way, & also films that had been screened. The annual subscription for membership was £1 1s., which entitled a member &

a friend to view each film screened by the society. Members of the general public were not admitted. On a charge of exhibiting a film which had not been approved by the censor, the question was whether such film had been exhibited "in any place for admission to which a charge is made in respect of any person or persons" within sect. 7 of Cinematograph Act, 1928:—*Held*: as the main, & substantially the only privilege, to which a member of the society was entitled, was the right to view the films, & as admission to the place where the films were shown could not be gained without payment of the subscription, that place was one "for admission to which a charge is made" & therefore the exhibition of the uncensored picture came within the Act & def. must be convicted.—*POLICE v. WELLINGTON FILM SOCIETY (INC.)* (1934), 29 M. C. R. 87.—N.Z.

### PART IV.

*sk. Necessity for licence—Billiard table on club premises.*—Accused, who was managing secretary & a member of a club & of its executive committee, was convicted for keeping for hire a billiard table without being licensed to do so. The billiard table was in

premises leased & operated by the club. The prosecution admitted that the club was a *bona fide* one. It had not, however, been exempted as a non-proprietary club, under the provisions of sect. 700 (147) of Winnipeg Charter, 1918, as amended:—*Held*: the conviction must be affirmed. No doubt the city's decision could be made the subject of attack in special proceedings by the club, & if the evidence warranted it, a mandatory order could be made directing the city to pass a by-law for the club's relief. But the matter could not be so dealt with in these proceedings, & until such a by-law had been passed there could be no answer to the charge. Also, the club had no existence apart from its members. The matters complained of in the information (treating the club by virtue of the admissions as being a non-proprietary club) were the acts of the members in carrying out the objects for which the club was formed. It followed that responsibility for them attached in criminal law to the members, with the right in the Crown to prosecute any one or all of them, as it might determine.—*R. v. THEIL*, [1936] 3 W. W. R. 505; 4 D. L. R. 811; 67 Can. C. C. 136; *sub nom. MCCORQUODALE v. THEIL*, 44 Man. L. R. 378.—CAN.

**Contract for exclusive performance by music hall performer—Reproduction on cinematograph.]—***See* THEATRES, Vol. XLII., p. 914, No. 101.

**Agreement for exclusive rights of play—Includes film rights.]—***See* COPYRIGHT, Vol. XIII., p. 196, No. 308; No. 16a, 308a, *ante*.

**195a. — Provision that no "talkie" should be made—Film rights already sold.]—**ARCHIE PARNELL & ALFRED ZEITLIN, LTD. v. THEATRE ROYAL (DRURY LANE), LTD. (1936), 80 Sol. Jo. 284, C. A.

**195b. Contract to perform—Negative stipulations—Whether against public policy.]—**GAUMONT-BRITISH PICTURE CORPN., LTD. v. ALEXANDER, No. 195d, *post*.

**195c. — — — Enforcement by injunction.]—**By a contract in the usual form in the industry, a prominent film actress undertook during the term of the employment not to render any services for or in any other photographic stage or motion picture production or business of any other person or engage in any other occupation without the written consent of the producer:—*Held*: where the enforcement of such negative covenants does not amount to a decree of the specific performance of the positive covenants or to obliging the employee to remain idle or perform the positive covenants, they can be enforced by injunction; the granting of such an injunction was discretionary & should be limited to what is reasonable in all the circumstances of the case; in the circumstances of this case an injunction to enforce the negative stipulations should be granted limited in area to the jurisdiction of the ct. & in the time to the duration of the contract or three years whichever period should be the shorter.—*WARNER BROTHERS PICTURES INC. v. NELSON*, [1937] 1 K. B. 209; [1936] 3 All E. R. 160; 106 L. J. K. B. 97; 155 L. T. 538; 53 T. L. R. 11; 80 Sol. Jo. 855.

**195d. — — — Clause relating to suspension of salary—Right of employer to sue for damages.]—**(1) Restrictions placed upon an employee under a contract of service to take effect during the contract are not in general against public policy.

(2) A clause in an artiste's agreement suspending salary upon her failure to appear & perform does not prevent the employers recovering damages for breach of contract as well as suspending her salary. The suspension of salary is not a penalty.—*GAUMONT-BRITISH PICTURE CORPN., LTD. v. ALEXANDER*, [1936] 2 All E. R. 1086; 80 Sol. Jo. 816.

*Annotation:—Generally, Consd.* *Warner Brothers Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209.

— **Whether film actress "workman" with-**

**in Workmen's Compensation Acts.]—***See* MASTER & SERVANT, No. 2057b, *ante*.

**195e. Injury to performer by excessive lighting—Liability of camera man.]—**A crowd artiste in a film production was injured by the intensity of the lighting in a ballroom scene. The lighting was not abnormal for a scene of this kind, but its effect was increased by the high polish of the floor. The film co. pleaded that they themselves were not responsible for the lighting & pltf. joined the second deft. who, pltf. alleged, was in charge of the lighting. Defts. then added a defence of common employment:—*Held*: lighting of the intensity used was not frequently used in the production of films & there was a duty upon the film co. to warn the artistes or to take precautions against injury to them; it was the system of lighting that was at fault & there was no question of common employment; the second deft. took no responsibility for the effect of the lighting upon the performers. He was there to provide the lighting the co. required, & the likelihood of damage to the performers was known to the film co., & was a risk which they took upon themselves. His employment afforded them no protection against their negligence in using such brilliant lights without proper precautions.—*RUSSELL v. CRITERION FILM PRODUCTIONS, LTD.*, [1936] 3 All E. R. 627; 53 T. L. R. 117; 80 Sol. Jo. 1036.

**195f. — — — Duty of film company.]—***RUSSELL v. CRITERION FILM PRODUCTIONS, LTD.*, No. 195e, *ante*.

**195g. Contract to write film—Breach—Measure of damages—Loss of publicity.]—**Pltfs. were engaged by defts. to write a screen play based upon a novel & by a collateral agreement defts. were to give pltfs. screen credit & their names were to be thrown upon the screen with a statement that they were joint authors of the work. Defts. wrongfully refused to accept pltfs.' work & pltfs. sued them for breach of contract:—*Held*: an author, as well as an actor, is entitled to recover damages for loss of publicity. Substantial damages should be awarded, & there must be a separate assessment in respect of each pltf.—*TOLNAY v. CRITERION FILM PRODUCTIONS, LTD.*, [1936] 2 All E. R. 1625; 80 Sol. Jo. 795.

**195h. Use of song in film—Failure to give screen credit—Implied contract.]—**Defts. had purchased a song lyric from pltf., the author of the song. In a film they ascribed the authorship of the song to a third party:—*Held*: there was an implied contract that defts. would not give screen credit to any one other than author of the song & pltf. was entitled to damages.—*MILLER v. CECIL FILM, LTD.*, [1937] 2 All E. R. 464; 53 T. L. T. 544; 81 Sol. Jo. 318.

## PART VI.

**sf. Breach of contract by distributor.]—**Where the operator of a motion picture theatre is entitled to damages from a motion picture distributor for not supplying "feature" pictures

called for by the contract, he can recover, not only for the loss of profits which would have resulted directly from the exhibition of said pictures, but also for the loss of profits which would have resulted indirectly therefrom on the ground that business is

better in a theatre following the production of a "feature"; the latter damages are not too remote.—*ISIS THEATRE, LTD. v. COLUMBIA PICTURES OF CANADA, LTD.*, [1937] 3 W. W. R. 724; [1938] 1 D. L. R. 348.—*CAN.*

# TIME.

## Part I.—The Calendar and Divisions of Time.

- 19. After this case add :—**

—].—*See, now, Law of Property Act, 1925 (c. 20), s. 61.*

## Part II.—Sundays and Holidays.

105. After this case add :—

—.]—See, now, Hairdressers' & Barbers' Shops (Sunday Closing) Act, 1930 (c. 35).

107. *Add. Annotation* :—**Apld.** Lee v. Craven,  
[1935] 2 K. B. 161.

- 107a. — Proprietor of lending library.]—**A person who conducts a lending library is a “tradesman” within Sunday Observance Act, 1877 (c. 7), s. 1, & commits an offence against the Act if he lends out books on Sunday.—**LEE v. CRAVEN, [1935] 2 K. B.**

- 111. Add. Annotation :—***Refd.* Alexander v. Rayson, [1936] 1 K. B. 169.

- 127. After this case add :—**

(c) *Action for Penalties.*

- 127a. Discharge of action by statute—Right of common informer to costs.]—**The ct. held that a common informer in an action against

**PART 1. SECT. 2, SUB-SECT. 2.**

sy. Supply of electric energy for fifteen years—Agreement to operate street railway continuously "throughout the year"—Calendar year.]—MONCTON TRAMWAYS v. MONCTON (1931), 3 M. P. R. 158—CAN.

**PART I. SECT. 4.**

- 68 1. *Sunday to Sunday—Notice of intention to appropriate.*]—ROGERS v. FREDERICTON (1931), 3 M. P. R. 161.—CAN.

22. Publication of notice—"Once a week for four successive weeks."-  
 "For," as used in *Rakes & Rivers Improvement Act*, R. S. O., 1927, s. 52 is not equivalent to "in," but implies duration, & week does not mean a calendar week.—*Held*: therefore, a notice published in a daily newspaper on Sat. Feb. 9, Sat. Feb. 16, Sat. Feb. 23, & Wed. Feb. 27, was not a notice published "once a week for four successive weeks."—*Re KYRO RIVER IMPROVEMENT CO.*, [1929] 4 D. L. R. 610; 64 O. L. R. 225.—*CAN.*

**PART II. SECT. 2, SUB-SECT. 1.**

so. *Sale of food, drink & cigarettes.*—  
R. v. NINOS (1928), 50 Can. Crim. Cas.  
155.—CAN.

**PART II. SECT. 2, SUB-SECT. 2.—A.**

¶ 1. —J— Sect. 4 of Lord's Day Act, 1927, provides that "It shall not be lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell . . . or to carry on or transact any business of his ordinary calling . . .":—*Held*: the word "law" therein means, not the common law, but a positive enactment dealing with Sunday observance.—*R. v. THOMPSON*, [1931] 2 D. L. R. 282; 1 W. W. R. 26; 55 Can. C. C. 33; 39 Man. L. R. 277.—*CAN.*

sd. Meaning of "any person whatsoever"—*Construed ejusdem generis with other classes in Lord's Day Act, 1859, s. 1.*—A. G. OF ONTARIO v. HAMILTON STREET RAILWAY CO. (1902), 54 Can. C. C. 344; *reversd. on other grounds*, [1903] A. C. 524. P. C.—CAN.

sg. Premises open for business—Dance hall.]—Deft. conducted a restaurant & a dancing hall at which during the daytime refreshments were sold

at prices fixed by a menu & some of those partaking of refreshments amused themselves by dancing. During the evenings a charge of 2s. was made for admission which entitled the person admitted to partake of supper & to dance. On Sat. evenings after the dancing halls in the central part of the city had closed, a very considerable number of persons went from those dance halls to the hall & there had supper & danced until two or three o'clock on Sunday morning. On an information charging deft. with keeping premises open in Sunday for the purpose of transacting business, to wit, the business of running a cabaret & with using a building as a dance hall, the same not having been licensed:—**Held:** the evidence disclosed that the dancing was an essential & not a subsidiary part of the contract which deft. made with each of his patrons on their admission, the building was used for the joint purpose of a dance hall & supper room & deft. must, therefore, be convicted on both charges.—**POLICE V. NIXON** (1934), 29 M. C. R. 111.—N.Z.

sk. *Driving live stock.*]—Upon appeal from the conviction by a Stipendiary Magistrate of applt. for working at his calling on a Sunday by carrying race-horses in a horse-float in breach of sect. 18 of Police Offences Act, 1927:—*Held:* conditions of stock driving having changed since the said sect. first appeared on the Statute Book, it would be putting too narrow an interpretation upon sub-sect. (3) thereof, which *inter alia* exempted "the driving of live stock" on a Sunday, to hold that improved facilities for the transfer of stock could not be availed of on a Sunday, although the same to be done in stock was permitted & that therefore the acts of applt. were covered by the exemption & the appeal must be allowed.—BLACKHALL v. NEARY, [1936] G. L. R. 1: 11 N. Z. L. J. 311.—N.Z.

**PART II. SECT. 2, SUB-SECT. 2.—**  
**B. (a) ii.**

50. *Farm manager — Contract of hiring—Sale of goods involved—Invalid.*—Defts. through an agent S., entered into an agreement with pltf. on Sunday, Mar. 23, 1930, to employ pltf. as manager of their dairy farm

for one year. Pltf. took over the management of the farm at once, remaining there until Oct. 16, when he was dismissed. In an action for wrongful dismissal:—*Held*: the hiring of pltf. on a Sunday was a "transaction in connection with the ordinary calling" of defts. & so within the prohibition of the Lord's Day Act, & the action should be dismissed.—*LISTER v. BURNS & Co.*, [1931] 3 D. L. R. 105; 55 Can. C. C. 197; 43 B. C. R. 468.—**CAN.**

**PART II. SECT. 2, SUB-SECT. 2.—**  
C. (b).

**k i. — Conditional sale of car.**—The contract in question herein, one for the conditional sale of a motor car held to have been made on a Sunday when, after def't's wife had approved of the car, it was handed over to him & he delivered to pltf.'s manager the documents evidencing the contract which he, def't., had signed on Saturday but had taken home with him, & the manager took possession of def't.'s old car which pltf. had agreed to accept in part payment for the new one. The contract was, therefore, enforceable. —SUPERIOR MOTORS, LTD. v. CADE [1930] 2 W. W. R. 448; 3 D. L. R. 1003; 24 S. L. R. 558.—CAN.

m i. ———.] —The ct. must take judicial notice of the fact that a contract of sale took place on a Sunday, contrary to Law No. 24 of 1878, s. 1, & is consequently unenforceable, although this point is not pleaded.—  
NADDOO V. KARODIAN SUPPLY STORES (1936). N. L. R. 323.—S. AF.

¶ 1. — *Building contract.*—A contract executed on a Sunday for the doing of work which is within the ordinary calling of a party thereto, e.g., a building contract with a carpenter & contractor, is illegal under the Lord's Day, R. S. C., 1927 (c. 123), s. 4.

Where in the carrying out of an illegal building contract the contractor's work & materials have been incorporated into a building he cannot recover on a *quantum meruit* based on deft.'s retention of the premises, since the latter is unable to exercise an option to return the materials.—**FARRELL v. SAWITSKI** (Sask.). [1929] 4 D. L. R. 289; 3 W. W. R. 23.—CAN.

a co. for penalties for breach of the Sunday Observance Act, 1781 (c. 49), was entitled to costs down to the date when by Sunday Performances (Temporary Regulation) Act, 1931 (c. 52), the action was discharged & made void, the question of costs being made by the Act a question for the ct.—ORPEN v. NEW EMPIRE, LTD. (1931), 48 T. L. R. 8; 75 Sol. Jo. 763.

131a. London County Council (General Powers) Act, 1927—Sale of vegetables on Sunday—

**Invalidity of licence.]**—Under London County Council (General Powers) Act, 1927, there is no power to grant a licence for the sale of vegetables in the streets on Sunday, as such sale is a contravention of Sunday Observance Act, 1877 (c. 7).—CLIFTON v. HOLBORN BOROUGH COUNCIL (1929), 142 L. T. 160; 93 J. P. 196; 45 T. L. R. 633; 73 Sol. Jo. 500; 27 L. G. R. 658; 29 Cox, C. C. 17, D. C.

**Annotation:—**Refd. Baars v. Keep, Brooks v. Kensington Borough Council (1931), 95 J. P. 153.

## Part III.—Computation of Time.

237. **Add. Annotation:—**Consd. Queen Anne's Bounty v. Title Redemption Commission, [1938] 3 All E. R. 664.

246. **Add. Annotation:—**Refd. Stag Line, Ltd. v. Foscolo Mango & Co. (1931), 48 T. L. R. 127.

290. **Add. Annotation:—**Apld. Re Hector Whaling, Ltd., [1936] Ch. 208.

309. **Add. Annotation:—**As to (2) Apld. Re Hector Whaling, Ltd., [1936] Ch. 208.

309a. —. ]—The period of not less than twenty-one days prescribed by sect. 117 (2) of Cos. Act, 1929, relating to notices of meetings in connection with the passing of special resolutions, means a period of not less than twenty-

### PART II. SECT. 2, SUB-SECT. 3.

k i. — *Miniature golf course.*—Def. was convicted for operating a miniature golf course on Sunday, contrary to a municipal bye-law passed under powers authorising township councils to pass bye-laws for regulating & licensing exhibitions held for hire or gain, theatres, music-halls, bowling alleys, moving picture shows, & other places of amusement:—**Held:** there appearing to be no genus to which all of the specified places of amusement belonged & from which the miniature golf course could be excluded, there was no reason for saying that the golf course was not one of the places dealt with by the statute, & therefore the bye-law was one which the statute conferred authority to pass.—R. v. EPSTEIN, [1931] O. R. 726; 56 Can. C. C. 139.—CAN.

k ii. — *Closure of dance halls.*—A bye-law of the city of Winnipeg provides that every dance hall which is also a restaurant or which is situated in a restaurant or a hotel shall be & remain closed for dancing from 2 a.m. until 9 a.m. on every day except Sunday, & all day on Sunday. It also contains provisions to ensure good order in licensed dance halls during the open hours. The city's charter gives it power to pass bye-laws for the peace, order & good govt. of the city, & specifically for "regulating & licensing . . . music & dance halls," & also the power, in pursuance of which a bye-law was passed, for the inflicting of reasonable fines, & for imprisonment in default of payment thereof, for the breach of any of its bye-laws:—**Held:** the provision in said first-mentioned bye-law requiring said dance halls to be closed all day on Sunday is not legislation to enforce Sunday observance &, therefore, is not *ultra vires* as criminal law legislation, but is *intra vires* as a police & licensing regulation authorised by said provision of the charter.—R. v. BACHYNSKI, [1938] 1 W. W. R. 619; 46 Man. L. R. 1.—CAN.

sg. *Construction of Act—"Some game or other."*—*Miniature golf.*—Sect. 7 of Sunday Observance Law 28 of 1896 (Bill.) prohibits the owner of a public billiard room or other public place of recreation from allowing "some game or other" to be played there on Sunday:—**Held:** the word game in the section had its ordinary meaning, namely, an amusement bringing several people together in competition

with each other, & included miniature golf.—R. v. CLARKE, [1931] App. D. 453.—S. AF.

### PART II. SECT. 2, SUB-SECT. 4.—A.

sl. *Ascension Day—Dies non juridicus.*—R. v. MACCHIONE, [1937] 1 W. W. R. 151; 1 D. L. R. 593; 67 C. C. C. 381.—CAN.

### PART II. SECT. 2, SUB-SECT. 4.—C.

p i. —. ]—A search & seizure made, without warrant, by a preventive officer of Alberta Liquor Control Board under the authority conferred on him by sect. 113 (2) of the Government Liquor Control Act of Alberta is not illegal because made on a Sunday. Such exercise of said authority is not within the prohibition of 29 Car. 2, c. 7, & being a ministerial act is lawful at common law.—R. ex rel. BEAUMONT v. POSTERNAK, [1929] 2 W. W. R. 487; 51 Can. Crim. Cas. 426; 24 Alta. L. R. 202.—CAN.

p ii. —. ]—R. v. WRIGHT (Alta.), [1929] 1 W. W. R. 917; 52 Can. Crim. Cas. 285.—CAN.

### PART II. SECT. 2, SUB-SECT. 5.

a i. — *Preparation of meals.*—The preparation & service of meals on Sunday is a "work of necessity" within the Lord's Day Act.—GEORGES v. CHARLOTTETOWN, [1932] 2 D. L. R. 443; 4 M. P. R. 133; 58 C. C. C. 99.—CAN.

a ii. — *Necessity of person for whom work done.*—The necessity contemplated by the exception of "works of necessity or mercy" in sect. 11 of Lord's Day Act, is the necessity of the person for whom, not of the person by whom, the work is done.

Convictions of confectioners & restaurateurs for violations of sect. 4 of Lord's Day Act sustained, on cases stated by the magistrate, the question of law raised being held to be really whether there was evidence on which the magistrate could find as he did. On another case stated by the magistrate, in this instance after dismissal of the charge laid under said Act:—**Held:** he was right in holding that the accused was entitled to keep his shop open for the sale & delivery over the counter of milk for domestic use, it being within the exception (r) under sect. 11, but that there was no evidence on which he could find as he did that a sale of groceries by the accused was a "work

of necessity or mercy" within the meaning of any of the exceptions provided for by said sect.—R. v. BORTNICK, R. v. PETLEY, R. v. WEBB, [1937] 3 W. W. R. 594; 4 D. L. R. 785; 45 Man. L. R. 508; 69 Can. C. C. 309; 7 F. L. J. (Can.) 197.—CAN.

a iii. — *Repair of wharves—Menace of ice.*—Repair of wharves in face of a menace of ice coming down river is a "work of necessity."—R. v. PORTER & SONS, LTD. (1937), 68 Can. C. C. 163.—CAN.

b i. —. ]—**Held:** neither a co., nor its agent, selling land in subdivision, came within the provisions of sect. 1 of Sunday Observance Act.—LAND DEVELOPMENT CO., LTD. v. PROVAN (1929), 43 C. L. R. 583; 4 A. L. J. 165; (1930), Argus. L. R. 301.—AUS.

sg. *Driving of live-stock—Conveyance of race-horses by motor horse-float.*—It is an offence under sect. 18 (1) of Police Offences Act, 1927, to work at a trade or calling on Sunday in view of any public place, but, by sub-sect. (3) nothing in sub-sect. (1) shall apply to "works of necessity or charity, or the driving of live-stock," etc. B., the driver of a motor horse-float owned by his father, loaded race-horses on the horse-float in view of a public place at New Plymouth on a Sunday; & forthwith conveyed them to Trentham racecourse. On appeal from a conviction under the above-named sect.:—**Held:** allowing the appeal, the facts brought the case within the exemption of the "driving of live-stock" in sect. 18 (3) of Police Offences Act, 1927.—BLACKHALL v. NEARY, [1935] N. Z. L. R. 1057.—N.Z.

### PART III. SECT. 2, SUB-SECT. 2.—C.

230 xv. —. ]—An action for the recovery of damages occasioned by a motor vehicle on Sept. 8, 1928, was begun by writ issued on Mar. 8, 1929:—**Held:** it was not barred by Highway Traffic Act, s. 53 (1). Where anything is to be done in a certain time after a given event or date, the day of the occurrence is to be excluded.—SWITZER v. KAHN, [1929] 4 D. L. R. 232; 64 O. L. R. 219.—CAN.

230 xvi. —. ]—An action arising out of a collision of two motor vehicles upon a highway was begun by a writ of summons issued on Tuesday Apr. 22. The collision took place on Oct. 20 of the previous year,



one clear days, exclusive of the day of service of the notice & exclusive of the day on which the meeting is to be held. Provisions in the articles regulating the date on which a notice is to be deemed to be served must be considered; but an article which provides that the day of service of a notice is to be counted in the relevant number of days must be disregarded.—*Re* HECTOR WHALING, LTD., [1936] Ch. 208; 105 L. J. Ch. 117; 154 L. T. 342; 52 T. L. R. 142; 79 Sol. Jo. 966.

319. *Add. Annotations*:—*Re*fd. *Legge v. Legge* (1928), 45 T. L. R. 157; *Shearn v. Shearn* (1930), 143 L. T. 772; *Stephen v. Stephen*, [1931] P. 197.

324a. “*During*.”—If one was describing a thing which occupied the whole of a period, such as tenure, or presence in a given place, “*during*” & “*for*” were admirable words. But if one said that a series of payments to be made on particular dates was “*during*” or “*for*” a period, “*during*” or “*for*” must mean “*in respect of*” that period (ROWLATT, J.).—*INLAND REVENUE COMMISSIONERS v. ST. LUKE, HOSTEL, TRUSTEES, REGISTERED* (1930), 46 T. L. R. 412; 74 Sol. Jo. 465; *reversd. on other grounds*, 144 L. T. 50, C. A.

324b. “*For*.”—*INLAND REVENUE COMMISSIONERS v. ST. LUKE, HOSTEL, TRUSTEES, REGISTERED*, No. 324a, *ante*.

325. *Add. Annotation*:—*Re*fd. *Re Hector Whaling, Ltd.*, [1936] Ch. 208.

330a. —.—]—For the purposes of the statutory notice of appeal Sunday is not a *dies non*.—

at about 11 a.m. Highway Traffic Act provides that no action shall be brought after the expiration of six months from the time when the damages were sustained. Apr. 20 & 21 were holidays:—*Held*: the action was brought in time. The day of the date of the accident was to be excluded & the ct. was not required to take notice of the hour of the day when the accident occurred.—*BROWN v. CROUCHER & DOUSE*, [1931] 4 D. L. R. 219; O. R. 541.—CAN.

230 xvii. —.—]—The phrase “more than fourteen days before a sittings,” in sect. 750 Criminal Code, means at least fifteen clear days.—*R. v. SHENOWSKI*, [1932] 1 W. W. R. 192; 40 Man. L. R. 218.—CAN.

sl. “*Within seven clear days*.”—R. 1 of the rules (Sask.) for cases stated under sect. 761 of the Criminal Code, provides that “an application to a Justice of the peace to state & sign a case shall be . . . delivered . . . within seven clear days from the date of the proceeding questioned”:—*Held*: the word “*within*” was the governing word &, therefore, the

word “*clear*” did not have the effect of rendering an application made on the eighth day in time.—*Re BONNER & WESTFALL*, [1931] 1 W. W. R. 334.—CAN.

#### PART III. SECT. 3, SUB-SECT. 1.

239 i. *Construed to effectuate intention of parties*.—Where, under a building contract work was to be completed by “Nov. 31” under penalty of damages:—*Held*: this must be construed to mean Nov. 30.—*McBEAN v. KINNEAR* (1892), 23 O. R. 313.—CAN.

#### PART III. SECT. 4, SUB-SECT. 2.

sg. *Whether Remembrance Day included*.—Remembrance Day is not a ct. holiday in which the offices of the ct. in the Province of Saskatchewan are closed.—*Re FORD ESTATE*, [1934] 2 W. W. R. 47.—CAN.

#### PART III. SECT. 5.

334 i. *Legal proceedings—Act to be done by party—Service of notice of appeal*.—*R. v. CHRISTIAN COMMUNITY*

*R. v. GREVILLE* (1929), 21 Cr. App. Rep. 108, C. C. A.

342. After this case add:—

*Presentation of election petition*.—*See* ELECTIONS, No. 1598a, *ante*.

367. *Add. Annotation*:—*Re*fd. *R. v. Scoffin*, [1930] 1 K. B. 741.

385. *Add. Annotation*:—*Consd. Re Warren, Wheeler v. Mills*, [1938] 2 All E. R. 331.

386. *Add. Annotation*:—*Re*fd. *Re Warren, Wheeler v. Mills*, [1938] 2 All E. R. 331.

390. *Add. Annotation*:—*Consd. Re Warren, Wheeler v. Mills*, [1938] 2 All E. R. 331.

391. *Add. Annotation*:—*Re*fd. *Re Warren, Wheeler v. Mills*, [1938] 2 All E. R. 331.

392. *Add. Annotation*:—*Consd. Re Warren, Wheeler v. Mills*, [1938] 2 All E. R. 331.

392a. *Priority over non-judicial act*.—When two judicial acts are done on the same day, the earlier act takes priority; but where a judicial act & a non-judicial act are done on the same day, the judicial act is referred back to the earliest moment of the day, & takes priority over the non-judicial act. The receiving order must, therefore, be taken to have been made before the payment above referred to.—*Re WARREN, Ex p. WHEELER v. TRUSTEE IN BANKRUPTCY*, [1938] Ch. 725; *sub nom. Re WARREN, WHEELER v. MILLS*, [1938] 2 All E. R. 331; 107 L. J. Ch. 469; 159 L. T. 17; 54 T. L. R. 680; 82 Sol. Jo. 394, D. C.

UNIVERSAL BROTHERHOOD, LTD., [1931] 1 W. W. R. 255.—CAN.

g i. — *Adjournment to day of legal holiday*.—The fact that a motion is adjourned to a statutory holiday does not render the notice of motion void.—*ROSA v. KELLINGTON*, [1928] 3 D. L. R. 562; [1928] 2 W. W. R. 399; 22 Sask. L. R. 505.—CAN.

sp. *Option to purchase*.—An option to purchase which expires on midnight of Sunday cannot be made effectively on Monday.—*MONROE v. MEWS*, [1937] 2 D. L. R. 539; O. R. 152. CAN.

#### PART III. SECT. 6, SUB-SECT. 1.

343 iv. —.—]—On Sept. 8, 1928, deft. was the owner of an unlicensed wireless receiving set. Later in the same day, after a visit of an inspector which was not shown to have been communicated to him, he took out a licence. On a charge of maintaining an unauthorised wireless set:—*Held*: the fractions of the day were to be taken into account, & deft. was guilty of the offence.—*BEARE v. WARD*, [1928] S. A. S. R. 1.—AUS.

## TORT.

## Part I.—Nature of Torts.

3. *Add. Annotations* :—**Consd.** *McAlister (or Donoghue) v. Stevenson* (1932), 101 L. J. P. C. 119. **Refd.** *Bottomley v. Bannister* (1931), 101 L. J. K. B. 46; *Hillen v. I. C. I. (Alkali), Ltd.*, [1934] 1 K. B. 455; *Wilchick v. Marks & Silverstone*, [1934] 2 K. B. 56; *Parker v. Oloxo, Ltd. & Senior*, [1937] 3 All E. R. 524; *Shirvell v. Hackwood Estates Co.*, [1938] 2 All E. R. 1.
12. *Add. Annotation* :—**Refd.** *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K. B. 399.
15. *Add. Annotation* :—**Refd.** *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K. B. 399.
19. *Add. Annotations* :—**Refd.** *The Arpad* (1934), 50 T. L. R. 505; *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K. B. 399.
23. *Add. Annotation* :—**Refd.** *Paul (R. & W.), Ltd. v. Wheat Commission* (1935), 152 L. T. 352.
24. *Add. Annotation* :—**Refd.** *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K. B. 399.
26. *Add. Annotation* :—**Refd.** *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K. B. 399.
- 28a. **Action against stockbroker for breach of instructions.**—Pltf. sued defts., a firm of stockbrokers, claiming damages for breach of his instructions as to the purchase of certain shares whereby he sustained loss. At the trial judgment was given in his favour for £60 & costs :—**Held** : the action was founded on contract, & not on tort, & therefore, by County Cts. Act, 1919 (c. 73), s. 11, pltf. was only entitled to costs on the county ct. scale.
- Per GREER, L.J.* : Where the breach of duty complained of arises out of the obligations undertaken by a contract, the action is founded on contract; but where that which is complained of arises out of a liability independently of the personal obligation undertaken by a contract, an action brought in respect of this is founded on tort, & this is so even though there may be a contract between the parties.—**JARVIS v. MOY, DAVIES, SMITH, VANDERVELL & CO.**, [1936] 1 K. B. 399; 105 L. J. K. B. 309; 154 L. T. 365, C. A.
- Annotation* : **Refd.** *Groom v. Croker*, [1938] 2 All E. R. 394.
30. *Add. Annotation* :—**As to (1) Consd.** *Re Simms, Ex p. Trustee*, [1934] Ch. 1. **Refd.** *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863. **Generally, Refd.** *De Stempel v. Dunkels*, [1938] 1 All E. R. 238.
34. *Add. Annotations* :—**Consd.** *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 1 All E. R. 825. **Refd.** *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606.
35. *Add. Annotations* :—**As to (1) Consd.** *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 1 All E. R. 825. **As to (2) Refd.** *De Stempel v. Dunkels*, [1938] 1 All E. R. 238. **Generally, Refd.** *Hampton v. West Cannock Colliery Co.*, [1932] 2 K. B. 293; *Place v. Searle*, [1932] 2 K. B. 497.
44. *Add. Annotation* :—**Refd.** *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.

## Part II.—Liability for Torts.

## SECT. 8.—JOINT TORTFEASORS.

(p. 975).

*See, now, Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), ss. 6, 7.*

62. *Add. Annotations* :—**Refd.** *Chapman v. Ellesmere* (1932), 48 T. L. R. 309; *Crozier v. Wishart & Co. & Western Printing Services, Ltd.*, [1936] 1 All E. R. 1.
65. *Add. Annotation* :—**Refd.** *Crozier v. Wishart & Co. & Western Printing Services, Ltd.*, [1936] 1 All E. R. 1.
69. *Add. Annotation* :—**Apprvd.** *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.
72. *Add. Annotations* :—**Refd.** *Rowntree & Sons, Ltd. v. Frederick Allen & Sons (Poplar), Ltd.* (1935), 41 Com. Cas. 90; *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] Ch. 489.
- 72a. **Apportionment of liability—When justified.**—The Highway Code, issued by the Minister of Transport under the authority conferred by Road Traffic Act, 1930 (c. 48), s. 45, & approved by Parliament, states in para. 37, dealing with directions to drivers of motor vehicles : “Before you stop, or slow down or change direction, give the appropriate signal clearly & in good time.” Part II. of the Appendix to the Code, dealing with “Signals to be given by drivers . . . to indicate their own intentions,” states that “Signals by drivers should be given with the arm extended from the side of the vehicle at least as far as

## PART II. SECT. 8, SUB-SECT. 1.

53 xiii. ———.]—In the case of a collision between two vehicles in consequence of independent acts of

negligence committed by the respective drivers, both directly contributing to the accident & to the injury suffered by a third person riding in one of the vehicles, he having no control over the

driver of the vehicle, both drivers are severally liable to him.—**MACDONNELL & JORDAN v. PITCH & LOVETTE**, [1930] 3 W. W. R. 455; 4 D. L. R. 1037; *affg.*, [1930] 4 D. L. R. 396.—CAN.

the elbow, where mechanical indicators are not used," & an appropriate arm signal is indicated when the driver intends to slow down or stop. Under Road Traffic Act, 1930 (c. 48), s. 30, the Minister of Transport was given power to make regulations with respect "to the appliances to be fitted . . . for intimating any intended change of speed or direction of a motor vehicle & the use of any such appliance." The Minister of Transport on Aug. 21, 1935, made the Motor Vehicles (Direction Indicator & Stop Light) Regulations, 1935, by which a "stop light" was defined by reg. 3 as meaning "a device fitted to a motor vehicle for the purpose of intimating the intention of the driver of the vehicle to stop or slow down."

By reg. 9: "Every stop light shall be fitted at the rear of the vehicle & . . . shall show a red or amber light." In a case where *pltf.* was injured in an accident caused by the negligence of the drivers of two motor vehicles, the trial judge held that one of *defts.*, Mrs. B., was chiefly to blame, that she was negligent in pulling up violently & faster than a car usually does & also in not giving a hand signal of intention to pull up before she pulled up, & that, if Mrs. B. had given a hand signal, no accident would have occurred. There was no appeal against the finding of negligence. The trial judge awarded that Mrs. B. should pay two-thirds of the damages & costs & another *deft.* one-third. Mrs. B. appealed against this apportionment:—*Held*: (1) on these findings of fact, Mrs. B. was not justified in relying solely on the stop light as indicating her intention to stop; (2) the trial judge had jurisdiction at the end of the proceedings in which it had been held that *pltf.* was entitled to recover, to entertain an application to apportion the blame between the two *defts.* for the purpose of fixing the contribution as between the two joint tortfeasors, & that it was not necessary that some separate formal legal proceedings should be instituted for that purpose.—CROSTON v. VAUGHAN, [1938] 1 K. B. 540; [1937] 4 All E. R. 249; 107 L. J. K. B. 182; 158 L. T. 221; 102 J. P. 11; 54 T. L. R. 54; 81 Sol. Jo. 882; 36 L. G. R. 1, C. A.

83. *Add. Annotation*:—*Refd.* Chapman v. Ellesmere (1932), 101 L. J. K. B. 376.

#### PART II. SECT. 8, SUB-SECT. 5.

84 ii. — *Acceptance of sum paid into court.*—DOMINION COAL CO. v. LEYLAND & Co., [1930] 2 D. L. R. 558.—CAN.

88 i. — *Causes of action separate—No discharge to others.*—*Pltf.*'s husband who was a passenger in a motor car which belonged to *deft.*, the Manitoba Power Commission, & was being driven by *deft.* S., was killed in a collision between that car & a truck owned by *deft.* T. which was being driven by *deft.* W. *Pltf.* accepted \$3,000 from the Power Commission & S. & filed a notice of discontinuance of the action as against them, & the settlement was approved by an order which apportioned the \$3,000 between *pltf.* & her infant son:—*Held*: *defts.* S. & the Power Commission were not joint tortfeasors with the other two *defts.* & therefore, the settlement with the former did not preclude *pltf.* from proceeding with her action against the latter; & on the evidence, she was entitled to recover against them also.—NEGRICH (NEGRICH) v. WERNER, [1937] 1 W. W. R. 190.—CAN.

#### PART II. SECT. 8, SUB-SECT. 6.

89 iii. —.—WHYTE v. LESLIE, [1930] 2 D. L. R. 409.—CAN.

#### PART II. SECT. 8, SUB-SECT. 7.

95 vi. —.—ESTEN v. ROSEN, [1929] 1 D. L. R. 275; 63 O. L. R. 210.—CAN.

95 vii. —.—REID v. ACORN & McDONALD, [1932] 3 D. L. R. 239; 4 M. P. R. 341.—CAN.

so. *Effect of Negligence Act, 1930 (Ont.).*—Above Act is concerned with contribution between joint tortfeasors & does not throw any liability on any party who would be liable apart from the Act.—TOPPING v. OSHAWA STREET RY. CO., [1931] 2 D. L. R. 263; 66 O. L. R. 618.—CAN.

sr. *Act believed lawful.*—No right of contribution between joint tortfeasors arises from the fact that, through a mistaken view of the law, they believe their act to be lawful.—WINSLOW v. WILSON (No. 2), [1936]

88. *Add. Annotation*:—*Refd.* Fenton Textile Assn. v. Thomas (1929), 45 T. L. R. 264.

92. *Add. Annotation*:—*Consd.* Clark v. Urquhart, Stracey v. Urquhart (1929), 141 L. T. 641.

95. *Add. Annotation*:—*Refd.* Croston v. Vaughan, [1938] 1 K. B. 540.

99. *Add. Annotation*:—*As to* (1) *Refd.* Strathlorne S.S. Co. v. Andrew Weir & Co. (1934), 40 Com. Cas. 168.

103. *Add. Annotation*:—*As to* (1) *Refd.* Hillen v. I. C. I. (Alkali), Ltd., [1934] 1 K. B. 455.

108a. *Statutory liability to contribute—Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30).*—*Pltf.*, who was upon the premises of *deft.* in circumstances which made him in law an invitee, fell down a hole. The hole had been left uncovered by the negligence of a contractor who was carrying out certain work upon the premises, & he was added as a third party, as *deft.* alleged that the contractor was liable to contribute towards the damages. The damages were agreed at £200 & the action proceeded solely in respect of the claim for indemnity or contribution by *deft.* against the third party:—*Held*: by virtue of Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), s. 6, the third party could be ordered to contribute to the damages, & in the circumstances should contribute one-half of the damages; *Seem*: it is not necessary in a claim under Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), s. 6, that the statute be pleaded.—BURNHAM v. BOYER & BROWN, [1936] 2 All E. R. 1165.

108b. —.—A schoolgirl was carrying out a chemical experiment with chemicals supplied by the teacher of the chemistry class, when an explosion occurred whereby she was severely injured. The experiment was one for the making of oxygen by heating a mixture of potassium chlorate & manganese dioxide, a perfectly harmless experiment. The teacher had purchased the chemicals from the second *defts.*, receiving as manganese dioxide a black powder so labelled in a packet. In fact the black powder was a mixture of antimony sulphide & manganese dioxide, indistinguishable from manganese dioxide to the eye, but dangerous

V. L. R. 247; 42 Argus L. R. 214.—AUS.

sw. *Injury to wife—Car driven by husband.*—*Pltf.*, a wife, who was a passenger in a car driven by her husband & who suffered injuries in a collision with a car driven by *deft.*, sued the latter for damages for such injuries alleged to have been caused by his negligence:—*Held*: (1) *sect.* 3 (4) of Law Reform Act, 1936, has not altered the law that a wife living with her husband may not sue him in tort for damages for personal injury resulting from negligence; (2) therefore, *deft.* could not recover contribution from *deft.* as another tortfeasor in respect of the damages for the injuries to the wife under *sect.* 17 (1) (c) of the said Act; (3) there being no possible claim for contribution, the *ct.*, in the exercise of its discretion under rule 95 of Supreme Ct. Code of Civil Procedure, should refuse an application for the issue of a third party notice claiming such contribution.—WALSH v. FAIRWEATHER, [1937] N. Z. L. R. 855; 13 N. Z. L. J. 291.—N.Z.

when heated with potassium chlorate. The second defts. had purchased this powder as manganese dioxide from the third party, whose invoice stated: "The above goods are accurate as described on leaving our works but they must be examined & tested by user before use. The above goods are not invoiced as suitable for any purpose but they are of the nature & quality described." The second defts. had carried out no test on the powder & had not advised the teacher that an examination or test would be advisable. The second defts. knew that the powder would be used for the purpose of school experiments, but they had not told the third party that the powder might be so used. The schoolgirl recovered damages, in an action for negligence, from the second defts., who sought an indemnity or contribution from the third party:—*Held*: (1) as the third party had no notice of the intended user of the powder, which might have been resold for a variety of purposes or in innocuous compounds or mixtures, & as the second defts. had not carried out a test, as the invoice prescribed, & which the second defts. had ample opportunity for doing, the third party was not liable to indemnify the second defts.; (2) as the third party could not have been successfully sued by the schoolgirl, the third party was not liable to contribute as a joint tortfeasor.—*KURACH v. HOLLANDS*, [1937] 3 All E. R. 907; 53 T. L. R. 1024; 81 Sol. Jo. 766.

*Annotation* :—As to (1) *Refd.* *Dransfeld v. British Insulated Cables, Ltd.*, [1937] 4 All E. R. 382.

**108c.** ——— Contribution amounting to indemnity.]—*Pltf.*, a schoolboy of ten years of age attending a non-provided school, was by reason of his lack of discipline boxed on the ear by his schoolmistress. As a result of the blow, which was found not to have been a violent one, the boy became deaf in one ear. The class in which the boy was working at the time of the accident was a large one, consisting of forty-six boys. In an action for damages to which the managers of the school were made defts. with the schoolmistress, it was proved that there was an agreement between the schoolmistress & the managers, which was not proved to have been brought to the notice of parents, whereby she agreed to teach & conduct the school "in accordance with the requirements of the Board of Education & in accordance with the directions given from time to time by the managers." The only regulations dealing with corporal punishment proved in evidence were certain regulations of the borough education committee, made without the consent of the managers & not adopted by them. As between defts., the managers claimed contribution from the mistress in respect of any damages awarded. It was contended that as between employed & employer this was a claim for an indemnity, & therefore, not within Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), s. 6 (1), (2):—*Held*: (1) the blow, though a moderate one, exceeded reasonable & lawful correction; (2) the schoolmistress was the servant of the managers, & the latter were jointly liable to *pltf.* with her; (3) the act of punishing the boy was one within the general scope of the employment of the mistress, &, as against third parties, the

managers, could not plead a limitation of her powers of punishment not known to the parents. On the facts, no such limitation was proved; (4) Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), s. 6 (1), (2), although it speaks of contribution & excludes the case of a person entitled to be indemnified in respect of the liability in respect of which contribution is sought, contemplates a contribution amounting to 100 per cent. of the damages, which is in effect an indemnity; (5) the sect. applies where an employer claims to be indemnified by his employee; (6) the fact that the class was a large one was not material in considering the question of contribution, which should be a contribution of 100 per cent., amounting to a complete indemnity by the mistress of the managers.—*RYAN v. FILDES*, [1938] 3 All E. R. 517.

**108d.** ———.]—The servant of a coal merchant delivering coke at the house of R. on the instructions of R.'s servant opened a cellar flap in the pavement opposite R.'s house & left it open & unguarded for a short time. *Pltf.* fell into the opening & was injured. In third-party proceedings between joint tortfeasors for an indemnity or contribution:—*Held*: on the true interpretation of Law Reform (Married Women & Tortfeasors) Act, 1935 (c. 30), s. 6 (2), the ct., exercising a judicial discretion, had to determine what, on the facts, was a fair division of responsibility between the parties, & on that basis the damages should be apportioned as to nine-tenths against the coal merchants & one-tenth against R.—*DANIEL v. RICKETT, COCKERELL & Co., LTD. & RAYMOND*, [1938] 2 K. B. 322; [1938] 2 All E. R. 631; 107 L. J. K. B. 589; 159 L. T. 311; 54 T. L. R. 756; 82 Sol. Jo. 353.

**112.** *Add. Annotations* :—As to (2) *Appld.* *Haseldine v. Hosken*, [1933] 1 K. B. 822. *Refd.* *Bradstreets British, Ltd. v. Mitchell (Harold) & Carapanayoti & Co.*, [1933] Ch. 190; *Howard v. Odhams Press, Ltd.*, [1937] 2 All E. R. 509.

**113.** *Add. Annotation* :—*Refd.* *Bradstreets British, Ltd. v. Mitchell* (1932), 48 T. L. R. 670.

**115.** *Add. Annotations* :—*Refd.* *Bradstreets British, Ltd. v. Mitchell* (1932), 48 T. L. R. 670; *The Edison* (1932), 147 L. T. 141; *Re Simms, Ex p. Trustee*, [1934] Ch. 1.

**119.** *Add. Annotation* :—*Refd.* *Strathlorne S.S. Co. v. Andrew Weir & Co.* (1934), 40 Com. Cas. 168.

**120.** *Add. Annotations* :—*Appld.* *Strathlorne S.S. Co. v. Andrew Weir & Co.* (1934), 40 Com. Cas. 168. *Refd.* *Secretary of State for India in Council v. Bank of India, Ltd.*, [1938] 2 All E. R. 797.

**124.** *Add. Annotation* :—*Consd.* *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191.

**125.** *Add. Annotation* :—*Refd.* *Secretary of State for India in Council v. Bank of India, Ltd.*, [1938] 2 All E. R. 797.

**127a.** ———.]—*DAILY MIRROR NEWSPAPERS, LTD. v. EXCLUSIVE NEWS AGENCY* (1937), 81 Sol. Jo. 924.

140. *Add. Annotation* :—**Refd.** *R. v. Manley*, [1933] 1 K. B. 529.
141. *Add. Annotation* :—**Refd.** *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
148. *Add. Annotations* :—**Consd.** *Horwood v. Statesman Publishing Co.* (1929), 98 L. J. K. B. 450. **Refd.** *Green v. Berliner*, [1936] 1 All E. R. 199.
156. *Add. Annotations* :—**Generally**, **Refd.** *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606; *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
157. *Add. Annotation* :—**Refd.** *Wyatt v. Kreglinger & Fernau*, [1933] 1 K. B. 793.
167. *Add. Annotations* :—**Refd.** *A.-G. v. Walkergate Press, Ltd.*, *Same v. Bloomfield*, *Same v. Carlton* (1930), 142 L. T. 408; *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
- 167a. ——— **Necessity for breach before issue of writ.**—Pltf. was managing director & defts. were the chairman & other directors of a limited co. which was incurring heavy losses. Pltf. had urged that an investigation should be held to inquire into the reasons for these losses, but no investigation was then held. Pltf. was compelled through ill-health to leave England. Defts. at a board meeting, thinking that the co.'s poor financial position was due to pltf.'s mismanagement, suspended him from his duties & proposed the holding of an investigation. A report hostile to pltf. was duly made by the investigator. Pltf.'s salary had been paid after his suspension, but on one occasion no payment was made as the co. thought it had an account against him amounting to more than the sum due to him. Pltf. was not told why no payment had been made. He thereupon wrote to the co. demanding to know within two days whether he had been dismissed. On receiving no satisfactory reply, pltf. issued a writ against defts. for damages for wrongfully

conspiring to procure a breach of his contract with the co. He also resigned his directorship :—**Held** : on the evidence pltf. had never been dismissed; a conspiracy to cause a breach of contract is not in itself good cause of action. The intended breach is an integral part of the cause of action & must take place before the writ is issued; directors in a board meeting cannot induce or conspire to induce that meeting to break a contract, though some may before such meeting so conspire; the action of those who induce others to break their contracts can only be justified where such action is taken as a duty.—**DE JETLEY MARKS v. GREENWOOD (LORD)**, [1936] 1 All E. R. 863; 80 Sol. Jo. 613.

- 168a. ——— **Proof of bona fides.**—**BRITISH INDUSTRIAL PLASTICS, LTD. v. FERGUSON**, [1938] 4 All E. R. 501, C. A.
169. *Add. Annotations* :—**Consd.** *Re Simms, Ex p. Trustee*, [1934] Ch. 1. **Refd.** *Place v. Searle* (1932), 101 L. J. K. B. 465; *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
174. *Add. Annotation* :—**Refd.** *De Stempel v. Dunkels*, [1938] 1 All E. R. 238.
176. *Add. Annotation* :—**Refd.** *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
177. *Add. Annotation* :—**Refd.** *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
179. *Add. Annotation* :—**Generally**, **Refd.** *Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181.
- 179a. ——— ——— **BRITISH INDUSTRIAL PLASTICS, LTD. v. FERGUSON**, [1938] 1 All E. R. 501, C. A.
180. *Add. Annotations* :—**As to (1) Refd.** *Place v. Searle*, [1932] 2 K. B. 197. **Generally**, **Refd.** *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
- 184a. ——— ——— ——— **BRITISH INDUSTRIAL PLASTICS, LTD. v. FERGUSON**, [1938] 4 All E. R. 504, C. A.

## PART II. SECT. 9.

r i. ———.—In an action for conspiracy based on an alleged violation of the criminal law the onus on pltf. does not extend to proof beyond a reasonable doubt but is the same as is usual in civil actions.—**FLOYD v. EDMONTON CITY DAIRY, LTD.**, [1935] 1 D. L. R. 754; [1934] 3 W. W. R. 326; 62 C. C. C. 251.—**CAN.**

## PART II. SECT. 10, SUB-SECT. 2.

168 ii. ———.—Owing to trouble having arisen from time to time between pltf., the boatswain of a ship, & the crew a number of meetings were called to consider pltf.'s behaviour & his suitability to act as boatswain. Later the question arose as to whether pltf.'s name appeared on the records of the union as a "scab," & at a further meeting it was decided to write to the union making inquiries, it being agreed by pltf. that if the reply was against him he would leave the ship. The union replied stating that pltf. had sailed as a free labourer, & as he refused to leave the crew by ballot decided not to sail with him. This decision was conveyed to the master of the ship who advised pltf. to leave, which he subsequently did & was paid off. A few days later at a stop-work meeting, at which none of the crew were present, it was unanimously resolved that in view of pltf.'s conduct he be not allowed to sign on as a boatswain or leading hand. On a claim for damages :—**Held** : the substantial reason of the

seamen's refusal to sail with pltf. was his behaviour to the crew whose action was neither wanton nor malicious & did not give rise to an action for damages; there was no evidence connecting deft. union or its President with the conduct of the seamen & the claim for damages must fail.—**BROWN v. NEW ZEALAND FEDERATE SEAMAN'S UNION** (1934), 29 M. C. R. 17.—**N.Z.**

168 iii. ———.—An action for damages lies against persons who act in concert with the object & result of inducing another to break a valid contract in restraint of trade entered into by him with pltf., where as a consequence of their acts pltf. has been injured.—**RAHAL v. RAHAL**, [1931] W. W. R. 903; *affd.*, [1932] 2 W. W. R. 99; 3 D. L. R. 259; 45 B. C. R. 310.—**CAN.**

168 iv. ———.—**Contract of marriage.**—A woman sued a man for damages on the ground that defender had induced his son, a minor, to break his promise to marry the pursuer. She did not aver any facts or circumstances from which it could be inferred that defender had been actuated by malicious or improper motives :—**Held** : in order to support an action against a parent for inducing his child to break a promise of marriage, specific averments that defender had acted from malicious or improper motives were necessary; action dismissed as irrelevant.—**FINDLAY v. BLAYLOCK**, [1937] S. C. 21.—**SCOT.**

168 v. ———.—**No knowledge or intention.**—Pltf., a wholesale vendor

of petrol, sold petrol to retail dealers upon the condition that the dealers would sell pltf.'s petrol at the retail selling price fixed by pltf. from time to time. Defts., who were also wholesale vendors of petrol, sold petrol to the same retail dealers upon the conditions that if the dealers observed a margin prescribed between the price at which the petrol was purchased from defts. & the price at which it was sold, & also sold all comparable grades of petrol at the same price, the dealers would be supplied with petrol by defts. at a price less than the retail price. Defts., but not pltf., increased their prices with the result that the retail price of pltf.'s petrol was less than that of defts.' Deft. thereupon put into operation their conditions of sale & refused to supply petrol, except at the full retail price, to dealers who sold pltf.'s petrol at the lower rate. Certain dealers thereupon increased the price of pltf.'s petrol. On an appeal from an order granting an injunction restraining defts. from inducing or procuring dealers to commit breaches of their contracts with pltf. :—**Held** : defts. were exercising their right to sell their petrol upon their own conditions, & although their action had the effect of causing dealers to break their contracts with pltf., defts. had not knowingly & intentionally procured those breaches, & therefore, the order must be discharged. **INDEPENDENT OIL INDUSTRIES, LTD. v. SHELL CO. OF AUSTRALIA, LTD.** (1937), 37 S. R. N. S. W. 391; 51 N. S. W. W. N. 152. **AUS.**

### Part III.—Remedies for Tort.

195. *Add. Annotation* :—**Refd.** *Monk v. Warbey* (1934), 151 L. T. 100.      198. *Add. Annotation* :—**Consd.** *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 1 All E. R. 825.

### Part V.—Waiver and Consent.

228. *Add. Annotations* :—**Refd.** *China Navigation Co. v. A.-G.* (1932), 48 T. L. R. 375 ; *Copper Export Asscn. Inc. v. Mersey Docks & Harbour Board* (1932), 48 T. L. R. 542.      237. *Add. Annotation* :—**Refd.** *Re Simms, Ex p. Trustee*, [1934] Ch. 1.  
239. *Add. Annotation* :—**Refd.** *Sutherland Publishing Co. v. Caxton Publishing Co.*, [1936] 1 All E. R. 177.

## TRADE AND TRADE UNIONS.

## Part I.—Definitions.

10. *Add. Annotation*:—*As to* (2) *Apld.* *Frost v. Caslon, Frost v. Wilkins*, [1929] 2 K. B. 138.
- 10a. —.—.]—I can find nothing in the Act to prevent me giving to the word "business" one of its ordinary meanings—namely, work or occupation (*RUSSELL, L.J.*).—*FROST v. CASLON, FROST v. WILKINS*, [1929] 2 K. B. 138; 98 L. J. K. B. 523; 141 L. T. 281; 93 J. P. 192; 45 T. L. R. 417; 73 Sol. Jo. 333; 27 L. G. R. 480, C. A.
19. *Add. Annotations*:—*Consd.* *Fry v. Burma Corpn.* (1929), 98 L. J. K. B. 693. *Refd.* *Proctor v. Ryall, Ryall v. Proctor* (1928), 14 Tax Cas. 204.
21. *Add. Annotation*: *Consd.* *Westripp v. Baldock*, [1938] 2 All E. R. 779.
23. *Add. Annotations*: *As to* (4) *Consd.* *Westripp v. Baldock*, [1938] 2 All E. R. 779. *Refd.* *Ritz Cleaners, Ltd. v. West Middlesex Assessment Committee*, [1937] 2 All E. R. 368.
24. *Add. Annotation*:—*Refd.* *Williams v. Neath Assessment Committee* (1935), 151 L. T. 261.

## Part III.—Freedom of Trade and Monopoly.

44. *Add. Annotations*:—*As to* (1) *Refd.* *Eastern National Omnibus Co. v. I. R. Comrs.*, [1938] 3 All E. R. 526. *Generally, Refd.* *Gilford Motor Co. v. Horne*, [1933] Ch. 935; *Simpson v. Charrington & Co.*, [1934] 1 K. B. 64.
50. *Add. Annotation*:—*Refd.* *Midland (Amalgamated) District (Coal Mines) Scheme, 1930 v. Shipley Collieries* (1933), 149 L. T. 290.
51. *Add. Annotations*:—*As to* (1) *Refd.* *Thorne v. Motor Trade Assocn.*, [1937] 3 All E. R. 157. *Generally, Refd.* *L. v. L.*, [1931] P. 63; *Wyatt v. Kreglinger & Fernau*, [1933] 1 K. B. 793.
59. *Add. Annotation*:—*As to* (1) *Refd.* *Gilford Motor Co. v. Horne*, [1933] Ch. 935.
73. *Add. Annotations*:—*Refd.* *Vandepitte v. Preferred Accident Insurance Co. of New York*, [1933] A. C. 70; *Harmer v. Armstrong*, [1934] Ch. 65.
- 77a. —.—.]—*Improper use of patent number by one party.*—*U. Ltd.*, brought an action against *B. Ltd.*, to restrain a breach by *defts.* of an agreement not to sell *pltf's* goods at below the prices fixed by *pltf's*. *Defts.* pleaded that *pltf's* had wrongfully marked their goods with a patent number, & that the agreement was illegal & void: *Held*: assuming that *pltf's* had been guilty of offences against sect. 89 of Patents & Designs Acts, 1907–1932, such conduct did not avoid or make illegal the price maintenance agreement, but *defts.* could have repudiated particular contracts of sale made thereunder. In the circumstances of the case, *pltf's* were given nominal damages & certain costs on the High Ct. scale.—*ULTRA ELECTRIC, LTD. v. JOHN BARNES & Co., LTD.* (1937), 54 R. P. C. 281.

## PART III. SECT. 2, SUB-SECT. 2.

m i. —.—.]—The proper test in a prosecution under sect. 498 of the Criminal Code, which deals with "restraint of trade," is the injury to the public by the hindering or suppressing of free competition, notwithstanding any advantage which may accrue to the business interests of the members of the combine.—*STINSON-REEB BUILDERS SUPPLY Co. v. R.*, [1929] 3 D. L. R. 331; 58 C. C. R. 276; 52 Can. Crim. Cas. 66.—CAN.

m ii. —.—.]—In a prosecution for an unlawful combine all that need be proved is that there was a common design to do the things forbidden by statute reduced to a common undertaking to carry that intention into effect.—*R. v. FAMOUS PLAYERS*, [1932] O. R. 307; 3 D. L. R. 791; 58 C. C. R. 50.—CAN.

m iii. —.—.]—There must be an undue lessening of competition, or an unreasonable enhancement of price to constitute a violation of the Criminal

Code, s. 498.—*FLOYD v. EDMONTON CITY DAIRY, LTD.*, [1935] 1 D. L. R. 751; [1934] 3 W. W. R. 326; 62 Can. C. C. 254.—CAN.

n i. —.—.]—*TORONTO GENERAL TRUSTS CORPN. (Ont.)* (1917), 54 S. C. R. 381; 28 Can. Crim. Cas. 387.—CAN.

sm. *What amounts to "combine"*—*Within Combines Investigation Act, 1927.*—An organisation creating a monopoly of the plumbing industry held to be a combine within the Act.—*R. v. SINGER*, [1931] 3 D. L. R. 698; *affd.*, 56 Can. C. C. 381.—CAN.

sp. —.—.]—"To the detriment or against the interest of the public" in *Combines Investigation Act, R. S. C., 1927*, s. 2, includes the words "unreasonably" & "unduly" in Criminal Code, s. 498 (c), (d).—*R. v. ALEXANDER, LTD.*, [1932] 2 D. L. R. 109; 57 C. C. C. 346.—CAN.

sr. —.—.]—Once it is established that a combine or conspiracy exists, it

is unnecessary, to warrant conviction for the formation of a combine, or of the agreement to conspire, to show accused's complicity in subsequent illegal acts done by, or with the connivance of, the body against members of which conspiracy or unlawful combine is charged; provided there is sufficient proof of their complicity in the original formation of the combine, or in the agreement charged as conspiracy.—*BELYEA v. R.*, *WEINRAUB v. R.*, [1932] S. C. R. 279; 2 D. L. R. 88; 57 C. C. C. 318.—CAN.

st. —.—.]—*R. v. CANADIAN IMPORT Co.*, [1935] 3 D. L. R. 330.—CAN.

sw. *Copyright—Whether subject of combine.*—Since copyright is something within the exclusive control of the owner, subject to the provisions of the Copyright Act, it cannot form subject-matter of a combine or conspiracy.—*UNDERWRIGHTS' SURVEY BUREAU, LTD. v. MASSIE & RENWICK, LTD.*, [1937] S. C. R. 15.—CAN.



## Part IV.—Restraint of Trade by Custom, Bye-Law and Statute.

115. To cross-ref. before this case add :—*See, also*, Firearms Act, 1934 (c. 16).

117a. **Dummy capable of adaptation.**—A person, who was not registered as a firearms dealer, sold a dummy revolver, which was similar in appearance to an ordinary revolver, but was fitted with a barrel & cartridge chambers only partially bored. There was a venthole in the barrel for the escape of gasses. It was incapable, as sold, of discharging a missile, but by drilling it could be converted into a weapon capable of killing a man at a distance of 5 feet. Informations were preferred under

Firearms Act, 1920 (c. 43), s. 2 (1) against the seller, charging him with having, when not registered as a firearms dealer under that Act, sold a firearm, & against the wholesaler who had supplied it, for having aided & abetted the sale :—*Held* : the dummy was a firearm within Firearms Act, 1920 (c. 43), s. 12 (1), or alternatively all the parts other than the barrel were parts thereof within the same sub-sect. & the charges were well founded.—*CAFFERATA v. WILSON, REEVE v. WILSON*, [1936] 3 All E. R. 149; 155 L. T. 510; 100 J. P. 489; 53 T. L. R. 34; 80 Sol. Jo. 856; 34 L. G. R. 546; 30 Cox, C. C. 475, D. C.

## Part V.—Restraint of Trade by Agreement.

129. *Add. Annotation* :—**Refd.** Imperial Tobacco Co. (of Great Britain & Ireland), Ltd. v. Parslay (1935), 52 T. L. R. 61.

131. *Add. Annotations* :—*As to* (1) **Consd.** Warner Brothers Pictures, Incorporated v. Nelson, [1937] 1 K. B. 209. *As to* (2) **Apld.** Wyatt v. Kreglinger & Fernau (1933), 49 T. L. R. 264. **Refd.** Wessex Dairies, Ltd. v. Smith, [1935] 2 K. B. 80. *As to* (6) **Consd.** Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181. *Generally, Refd.* Vincents of Reading v. Fogden (1932), 48 T. L. R. 613.

131a. ——— **Grant of pension—Grantee not to enter specified trade.**—Pltf. had formerly been in the employment of defts. as manager of a department. He retired from their employment in 1923. On his retirement defts. wrote that they had decided to grant him a pension of £200 *per annum*. They added that he was to be at liberty to under-

take any other employment, or enter into any business on his own account, "except in the wool trade, & the only other stipulation we attach to the continuance of this pension is that you do nothing at any time to our detriment (fair business competition excepted)." In a further letter defts. stated that pltf. would receive full salary for three months. Pltf. accordingly received his full salary for three months, & thereafter he received from defts. a pension or remuneration at the rate of £200 *per annum* by monthly instalments of £16 13s. 4d. down to 1932, when it was discontinued. In an action for damages for repudiation of the alleged agreement to pay the pension :—*Held* : *per SCRUTTON, L.J.*, the letters did not constitute a contract : *per CURRIAM*, assuming that the correspondence did create a contractual obligation, the contract was contrary to public policy as being in restraint

### PART IV. SECT. 2, SUB-SECT. 1.

e. i. — *Sale of produce by shareholder without leave of company.*—*AYLESFORD FRUIT & PRODUCE SHIPPING CO. v. NICHOLS* (1935), 5 F. L. J. (Can.) 131.—**CAN.**

sp. *Restraint by proclamation.*—*Contents of proclamation.*—By Local Government Act, 1919 (N. S. W.), s. 309 (1), "the Government may . . . (a) declare by proclamation any defined portion of an area to be a residential district . . . ; (c) prohibit the erection in such district of any building for use for the purposes of such trades . . . as may be described in the proclamation; & (d) prohibit the use of any building in the district for any such purposes."—*Held* : the word "described" requires that every trade intended to be included in the prohibition is to be expressly named in the proclamation, or otherwise specified; & therefore, where a proclamation prohibited the use of any building in a residential district for the purposes of "any trade," the prohibition was invalid as the trades intended to be included were not "described."—*DYER v. LUCKETT* (1928), 41 C. L. R. 44.—**AUS.**

sq. *Carrying on business—For purpose of trade licence—Fruit packing.*—

*R. v. LAKESIDE ORCHARDS, LTD.* (B. C.), [1929] 1 W. W. R. 870; 51 Can. Crim. Cas. 182.—**CAN.**

sr. *Produce Marketing Act, B. C.—Onus of proof.*—*R. v. CHUNG CHUCK* (B. C.) (1930), 54 Can. C. C. 174; 43 B. C. R. 125; *reversg.*, 52 Can. Crim. Cas. 292.—**CAN.**

st. *Who is a manufacturer—Printer.*—A printer held not entitled to be licensed as a "manufacturer" under Companies, Trades & Business License Bye-Law of the City of Vancouver—*JONES v. SUTHERLAND*, [1930] 1 W. W. R. 530; 2 D. L. R. 762; 53 Can. C. C. 349; 42 B. C. R. 321; *affd.*, *sub nom.* *R. v. SUTHERLAND*, [1930] 4 D. L. R. 183; 2 W. W. R. 244; 54 Can. C. C. 313; 42 B. C. R. 367.—**CAN.**

sw. *Renewal of licence—Waterside worker.*—An application for renewal of a licence to a waterside worker, under Transport Workers Acts, 1928–1929, was refused by the licensing officer to whom it was made, on the ground that appet. was not a member of the Waterside Workers' Federation of Australia, & was not a returned soldier or sailor. On the return of an order *nisi* for a writ of *mandamus*, directed to the licensing officer to renew the licence, the order was made

absolute.—*R. v. MAHONY, Ex p. JOHNSON*, [1931] Argus L. R. 377; 5 A. L. J. 286.—**AUS.**

sb. *Industrial Standards Acts—Employer.*—A person running his own shop alone is an "employer" within Industrial Standards Act, R. S. O., 1927.—*Re R. v. BURDICK*, [1938] 1 D. L. R. 796.—**CAN.**

sd. — — — *—A person may be both an employer & employee, within the meaning of Industrial Standards Act, 1937, in respect to the same industry & place of business.*—*R. v. TURNER*, [1938] 1 W. W. R. 494; 7 F. L. J. (Can.) 278.—**CAN.**

### PART IV. SECT. 2, SUB-SECT. 4.

sg. *Restaurant—Necessity for licence—Restaurant Act, R. S. A., 1922—Whether Indian "stampede" an "agricultural fair exhibition."*—*R. v. GULLBERG*, [1933] 3 W. W. R. 639; 62 C. C. C. 281.—**CAN.**

sl. *Junk dealer—Licence—Discretion of Board of Police Commissioners.*—The summary refusal of the Board of Police Comrs. to grant a junk dealer's licence cannot be interfered with, as the Board has a discretionary power in the matter.—*Re SILVERBERG*, [1937] 3 D. L. R. 509; O. R. 528.—**CAN.**

of trade.—*WYATT v. KREGLINGER & FERNAU*, [1933] 1 K. B. 793; 102 L. J. K. B. 325; 148 L. T. 521; 49 T. L. R. 264, C. A.

*Annotation*.—*Distd. Itc Prudential Assurance Co.'s Trust Deed*, *Horne v. Prudential Assurance Co.*, [1934] Ch. 338.

**131b.** ——— **Grantee not to enter into competition with grantor.**—The pension scheme of an insurance co. provided that the pension should cease if the pensioner should engage in any business in competition with that of the co.:—*Held*: whether this provision was, or was not, invalid as being in restraint of trade, its introduction into the scheme did not invalidate the scheme as a whole.—*Re PRUDENTIAL ASSURANCE CO.'S TRUST DEED*, *HORNE v. PRUDENTIAL ASSURANCE CO., LTD.*, [1934] Ch. 338; 103 L. J. Ch. 179; 150 L. T. 474; 49 T. L. R. 558; 77 Sol. Jo. 557.

**133a. Restraint operative during contract.**—Restrictions placed upon an employee under a contract of service to take effect during the contract are not in general against public policy.—*GAUMONT-BRITISH PICTURE CORPN., LTD. v. ALEXANDER*, [1936] 2 All E. R. 1686; 80 Sol. Jo. 816.

*Annotation*.—*Consd. Warner Brothers Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209.

**134a. Agreement entered into at termination of employment.**—Deft., being a director & manager of pltf. co., who carried on business as garage proprietors & motor-car dealers, entered into a written agreement with the co. in consideration of a cash payment to resign both positions, covenanting also not to carry on or assist in carrying on a similar business within a certain radius for a period of five years. The agreement further provided that he should transfer his shareholding in the co. to another director for £250, & this sum was paid to him by a cheque drawn on the co.'s account:—*Held*: (1) assuming the agreement to be one between employer & employee, the restrictive covenant was not rendered invalid as being contrary to public policy by reason of the fact that it was entered into on the termination of the employment instead of at the beginning; (2) if the payment for the shares by the co.'s cheque was such as to contravene sect. 45 (1) of Cos. Act, 1929, & to render the co. liable to a fine under sub-sect. (3), which was not proved, the agreement was not thereby rendered invalid.—*SPINK (BOURNEMOUTH), LTD. v. SPINK*, [1936] Ch. 544; [1936] 1 All E. R. 597; 105 L. J. Ch. 165; 155 L. T. 18; 52 T. L. R. 366; 80 Sol. Jo. 225.

**139. Add. Annotations**.—*As to* (5) *Appld. Wyatt v. Kreglinger & Fernau* (1933), 49 T. L. R. 264. *Refd. Gilford Motor Co. v. Horne* (1933), 102 L. J. Ch. 212.

**143. Add. Annotations**.—*As to* (3) *Consd. Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181. *Generally, Refd. Gilford Motor Co. v. Horne* (1933), 102 L. J. Ch. 212; *Pellow v. Ivey* (1933), 49 T. L. R. 422.

**146a.** ——— *The managing director of a co. entered into an agreement by which it was provided that he "shall not at any time while he shall hold the office of a managing*

*director or afterwards solicit, interfere with or endeavour to entice away from the co. any person, firm or co. who at any time during or at the date of the determination of the employment of the managing director were customers of or in the habit of dealing with the co. & also will not at any time within five years from the determination of this agreement, either solely or jointly with or as agent for any other person, firm or co., be engaged, directly or indirectly, in any business similar to that of the co. within a radius of three miles from any premises wherein the business of the co. shall for the time being be carried on":—Held: the covenant, though prima facie in restraint of trade, was definite in date, contained no ambiguity, & was reasonably necessary for the protection of the co.'s trade. It was intended to deal with persons who, during the employment, were on the books of the co., & of whom the covenantor would have full knowledge; nor were the words "customers of or in the habit of dealing with the co." too vague to be capable of being defined. The covenantor was not in a subordinate position, but in one of responsibility, in which he would be likely to obtain full knowledge of the co.'s business. The covenant must therefore be enforced.—*GILFORD MOTOR CO. v. HORNE*, [1933] Ch. 935; 102 L. J. Ch. 212; 149 L. T. 241, C. A.*

**146b.** ——— *Where an employee makes an invention or discovery in the course of his employment & in doing that which he was engaged & instructed to do, during the time of his employment, & during working hours, & using the materials of his employers, there is an implied term in his contract of service that such invention or discovery becomes the property of his employers, & such an implied term is not excluded by the fact that the express terms of the contract relating to inventions & other matters are unreasonable & unenforceable. In such circumstances, where the employee has made an invention or discovery in the course of his work, the employee becomes a trustee of that discovery or invention for his employers, & he remains such a trustee after he has left their employment, & he is bound to give the benefit of any such discovery or invention to his employers.—*TRIPLEX SAFETY GLASS CO. v. SCORAH*, [1938] Ch. 211; [1937] 4 All E. R. 693; 107 L. J. Ch. 91; 157 L. T. 576; 51 T. L. R. 90; 81 Sol. Jo. 982; 55 R. P. C. 21.*

**147. Add. Annotation**.—*Consd. Wyatt v. Kreglinger & Fernau* (1933), 49 T. L. R. 261.

**154. Add. Annotations**.—*As to* (1) *Refd. Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181; *Wyatt v. Kreglinger & Fernau*, [1933] 1 K. B. 793. *As to* (4) *Refd. Pellow v. Ivey* (1933), 49 T. L. R. 422.

**158. Add. Annotation**.—*As to* (1) *Refd. Pellow v. Ivey* (1933), 49 T. L. R. 422.

**164. Add. Annotation**.—*As to* (1) *Consd. Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181.

PART V. SECT. 1.

**132 i. Who may enter into agreement—Vendor & purchaser of goodwill.**—*SPENCER v. MCKENZIE* (1926), 29 W. A. L. R. 95.—**AUS.**

186. *Add. Annotation* :—*As to* (1) *Refd.* Gaumont-British Picture Corp., Ltd. v. Alexander, [1936] 2 All E. R. 1886.
229. *Add. Annotation* :—*Refd.* Foley v. Classique Coaches, Ltd., [1934] 2 K. B. 1.
234. *Add. Annotation* :—*Generally*, *Refd.* Vincents of Reading v. Fogden (1932), 48 T. L. R. 613.
297. *Add. Annotation* :—*As to* (1) *Refd.* Warner Brothers Pictures, Incorporated v. Nelson, [1937] 1 K. B. 209.
305. *Add. Annotation* :—*Refd.* Warner Brothers Pictures, Incorporated v. Nelson, [1937] 1 K. B. 209.
309. *Add. Annotation* :—*Refd.* Vancouver Malt & Sake Brewing Co. v. Vancouver Breweries, Ltd., [1934] A. C. 181.
323. *Add. Annotation* :—*Refd.* *Re* Brownie Wireless Co. of Great Britain (1929), 45 T. L. R. 584.
377. *Add. Annotation* :—*As to* (3) *Consd.* Imperial Tobacco Co. (of Great Britain & Ireland), Ltd. v. Parslay, [1936] 2 All E. R. 515.
394. *Add. Annotation* :—*As to* (1) *Consd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181.
398. *Add. Annotation* :—*Refd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181.
399. *Add. Annotation* :—*As to* (1) *Refd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181.
406. *Add. Annotation* :—*As to* (1) *Refd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181.
435. *Add. Annotation* :—*Refd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181.
438. *Add. Annotations* :—*As to* (3) *Dttd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181. *As to* (4) *Consd.* Gilford Motor Co. v. Horne (1933), 102 L. J. Ch. 212.
- 457a. "Within ten miles from X."—*Construed as within ten miles from the borough boundary of X.*—*CATTLE v. THORPE*, [1900] W. N. 83.
470. *Add. Annotation* :—*Refd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181.
477. *Add. Annotation* :—*Refd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181.
480. *Add. Annotation* :—*Refd.* Vincents of Reading v. Fogden (1932), 48 T. L. R. 613.
488. *Add. Annotation* :—*Refd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181.
489. *Add. Annotation* :—*Consd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181.
491. *Add. Annotation* :—*Refd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181.
496. *Add. Annotation* :—*Refd.* Gilford Motor Co. v. Horne, [1933] Ch. 935.
497. *Add. Annotation* :—*As to* (1) & (2) *Consd.* Express Dairy Co. v. Jackson (1929), 99 L. J. K. B. 181.
- 498a. *Clause against soliciting or canvassing customers*—*Contract with Infant.*—*Deft.*, while still an infant, entered into an agreement of service with C., a dairyman, as a milk roundsman. C. sold his business to plffs., including the benefits of contracts of service with his employees. After a short time *deft.* left the service of plffs. & served another dairyman, in the conduct of whose business he solicited & served the customers of plffs. When *deft.* entered the service of C. he entered into an agreement of service with C. This agreement contained a restrictive clause with regard to serving soliciting or canvassing customers of the employer, & it was admitted that if the agreement with C. was binding on *deft.*, it was also binding on him with plffs. Plffs. claimed an injunction & damages for acts committed by *deft.* which were alleged to be in breach of the agreement :—*Held* : the restrictive words were too wide & indefinite to be enforceable, especially in the case of a contract with an infant. The word "customers" alone was used in so expanded a sense that that by itself was sufficient to render the restrictive clause inoperative.—*EXPRESS DAIRY CO. v. JACKSON* (1929), 99 L. J. K. B. 181; 142 L. T. 231; 46 T. L. R. 147.
511. *Add. Annotation* :—*Refd.* Huntoon Co. v. Kolynos (Incorporated), [1930] 1 Ch. 528.
512. *Add. Annotation* :—*Refd.* United Indigo Chemical Co. v. Robinson (1931), 49 R. P. C. 178.

## PART V. SECT. 3, SUB-SECT. 3.—B.

394 i. *Right to benefit of agreement*—*General rule.*—The benefit of a covenant in restraint of trade passes without specific mention to the transferee of the business of the covenantor. —*FALLS v. BLOCH*, [1931] 2 W. W. R. 93.—*CAN.*

## PART V. SECT. 6, SUB-SECT. 1.

*sp. How far contract severable.*—An agreement for service of eighteen months as a salesman contained the following clause in restraint of trade :

"8. Except in the event of the determination of this agreement of effluxion of time & the employer or Universal Business Directories, Ltd. being unwilling to continue or renew the employment upon the same terms & conditions, *mutatis mutandis*, as are herein contained the employee shall not within a period of ten years from the time of his ceasing to be employed by the employer or Universal Business Directories, Ltd. & at any place in New Zealand or Australia & either alone or conjointly with or as agent for or on behalf of any other co. firm or person & whether directly or indirectly be

employed engaged concerned or interested in any business similar to the 'Universal Business Directory' or to any other business carried on or which may hereafter during the term of this agreement be carried on by the employer or Universal Business Directories, Ltd." :—*Held* : the only legitimate purpose of a restraint clause in such a case was the protection of a trade connection, but the attempted extension of the restriction to all New Zealand was neither necessary nor reasonable, & the clause, as its contents could not be reduced to limits that were reasonably necessary without rewriting it, was not severable but was in its entirety, although it would have been reasonable for the employer to have subjected the employee to some restraint.—*BALDWIN v. McIVER*, [1937] N. Z. L. R. 265; 13 N. Z. L. J. 46.—*N.Z.*

## PART V. SECT. 7.

n i. —.—*J.*—A covenant in a two year employment not to engage in the same business for two years if dismissed, cannot be enforced after the termination of the contract.—*New*

*YORK WINDOW CLEANING CO. v. BELYZ*, [1936] 2 D. L. R. 668.—*CAN.*

n ii. —.—*Whether extinguished by withdrawal from service.*—Under a contract covering a certain period between a travelling salesman & his employer, the plff., the salesman, agreed to give his whole time to his employer's service, & that he would not sell or offer for sale any goods other than those of the employer. The contract placed no restriction on him after the date of the expiry of the contract, nor did it expressly restrict him from selling other goods if before that date he should be discharged for cause under a clause stipulating a cause for his discharge. The salesman, after working under the contract, left the service & entered that of a concern selling competing goods; & his withdrawal was accepted by the plff. as a breach of contract :—*Held* : the restriction was not intended to govern the salesman after termination of the contract by breach, & that, if so intended, it was so wide, & general as to be unreasonable & unenforceable.—*GERLACH-BARKLOW CO. v. MACPHERSON*, [1928] 3 W. W. R. 150.—*CAN.*

549. *Add. Annotation* :—**Consd.** *Gilford Motor Co. v. Horne*, [1933] Ch. 935.
560. *Add. Annotation* :—**Consd.** *Warner Brothers Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209.
564. *Add. Annotation* :—**Refd.** *Warner Brothers Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209.
568. *Add. Annotation* :—**Consd.** *Imperial Tobacco Co., (of Great Britain & Ireland), Ltd. v. Parslay* (1935), 52 T. L. R. 61.
578. *Add. Annotation* :—**Refd.** *Draper v. Hubert H. P. Trist & Tristbestos Brake Linings, Ltd.* (1935), 53 R. P. C. 66.
584. *Add the following para.* :—  
*Held* : the covenant was not too wide, & an interim injunction should be granted.

591a. — **Fifteen miles—Fifteen years.**—[Deft. carried on business as an accountant in Leek, Staffordshire, having some 60 or 70 clients. He was not a qualified accountant & desiring to be associated with a firm of accountants, the partners in which had professional qualifications, he sold his business to plffs., a firm practising in the Potteries. Forty pounds was paid for the goodwill of deft.'s business. Deft. was to act as manager of plffs.' branch in Leek, being deft.'s business which plffs. had purchased. The agreement for sale contained a covenant by deft. that he would not carry on or be concerned in the

business of an accountant within 15 miles from Leek town hall for a period of 15 years from the operation of the agreement. This area included Macclesfield & Buxton. In an action to restrain deft. from setting up in business as an accountant in Leek after he had ceased to be in plffs.' employment :—*Held* : in the circumstances, the covenant was too wide for the adequate protection of plffs. as purchasers of deft.'s business, & the covenant was, therefore, unenforceable.—*BATES & CO. v. DALE*, [1937] 3 All E. R. 650; 81 Sol. Jo. 618.

597. After this case add :—

— **Use of initials "A. A. I."—**  
*See AUCTION*, No. 15a, ante.

611a. — — — — —. [Appls. held a Dominion brewer's licence, renewable each year, in respect of their premises in Vancouver City, but had never brewed any liquor other than sake, a Japanese liquor made from rice. Under a similar licence resps. carried on a brewing business in Vancouver City, but brewed beer only. There were no other brewers operating in the City, but there were a few others elsewhere in the Province. By an agreement made in 1927 appls. purported to sell & assign to resps. for \$15,000 all the goodwill of their brewer's licence or any renewal thereof (except so far as related to the manufacture of sake), & to covenant that for fifteen years they would not engage in the trade or

**PART V. SECT. 8, SUB-SECT. 1.—**  
**A. (b).**

525 iv. —. [Plff. & deft. Z. had been partners in the restaurant business. Z. sold out his interest therein to plff. & covenanted with him that he, Z., would not during the next three years "carry on or engage in, either directly or indirectly, & whether as a principal, agent, director of a co., servant or otherwise, or take part in the business of a restaurant or cafe or store" within the city of Victoria. Deft. P. opened a combined cafe & candy shop & employed Z. to manage the latter. Plff. sued Z. for damages for breach of the covenant & for an injunction to restrain further breaches & also claimed damages from Z.'s wife & P. for inducing Z. to commit such breach & from all the three defts. on the ground that they had wrongfully conspired to injure his business :—*Held* : the appeal should be allowed, the injunction prayed for granted & damages awarded against the three defts.—*LEWIS v. ZAFERIS* (B. C.), [1929] 3 W. W. R. 422; [1930] 1 D. L. R. 634; 41 B. C. R. 528.—**CAN.**

539 ii. —. [An agreement by the vendor of a restaurant business that she would "neither directly or indirectly have any interest or share or part in any other restaurant or similar place" for five years in the town of B. held not to have been broken by the fact that the vendor became a paid cook for P., a restaurant proprietor who at the time of said sale was employed by the vendor as a cook, & also lent said P. money, without obtaining therefor any right or interest in the restaurant, to be applied by P. in payment of the amount owing on P.'s purchase of the building in which she was carrying on said business.—*FONG v. BOEHLER* (Sask.), [1929] 4 D. L. R. 829; 3 W. W. R. 273.—**CAN.**

539 iii. —. [An agreement for sale by deft. & another of their business to plff. co. contained a covenant by deft. that for a period of years, within a specified radius of Wellington, deft.

would not "be engaged or beneficially interested in or in any way connected with . . . any trade or business similar to that hereby agreed to be sold." On proceedings against deft. for an injunction to compel observance of the covenant :—*Held* : the wording of the covenant was wide enough to cover deft.'s employment as a servant in a similar business.—*SRMADONS & OSBORNE, LTD. v. BIGHAM*, [1931] N. Z. L. R. 502.—**N.Z.**

539 iv. —. [On the sale of a garage business the vendor covenanted "not to enter into the garage business" within a radius of one mile from the garage sold. The vendor became an employee of a garage within said area; but there was no evidence that the employment was not a genuine one & concealed an interest in the business :—*Held* : the covenant had not been broken.—*MORRISON v. McFURK*, [1931] 3 W. W. R. 765; 45 B. C. R. 28.—**CAN.**

t (p. 52). *varied* [1928] 1 D. L. R. 1009; 61 O. L. R. 558.—**CAN.**

**PART V. SECT. 8, SUB-SECT. 1.—**  
**A. (c).**

548 i. *Covenant by wife—Trade carried on by husband—Occasional assistance to husband.*—[Where a married woman on selling a business covenants that she will not for a certain period set up a competing business in the same town, either personally or through an agent, the fact that on her husband establishing such a business she renders occasional voluntary unremunerated services in assisting her husband in carrying on the business does not constitute a breach of the covenant, if the business is in reality his own & not hers.—*LODGE v. ANDERSON*, [1930] 3 W. W. R. 359; 4 D. L. R. 1040.—**CAN.**

**PART V. SECT. 8, SUB-SECT. 2.—A.**

sa. *Correction of judgment—Jurisdiction of court.*—[*WARREN TEA CO., LTD. v. REINGLASS*, [1928] S. R. Q. 29.—**AUS.**

**PART V. SECT. 9, SUB-SECT. 3.**

sd. *Validity or reasonableness of restraint—Agreement not to "operate" within district—Five years.*—[A covenant by a vendor of a business not to "operate" as a land agent within the municipality of Thebarton for five years is not unreasonable.—*LAWRENCE v. LLOYD*, [1930] S. A. S. R. 194.—**AUS.**

**PART V. SECT. 9, SUB-SECT. 5.**

h i. — *One year—Five miles.*—[*Held* : the restraint in respect of the period of one year from the termination of W.'s employment was not unreasonable; but the area within a 5 miles radius was wider than was reasonable, & was void.—*MAQUET v. WALSH* (1929), 29 S. R. N. S. W. 298; 46 N. S. W. W. N. 71.—**AUS.**

sx. *Broadcasting producer.*—[P. entered into an agreement with T. whereby T. agreed to employ P. as a broadcasting "Producer" & P., *inter alia*, agreed that he would not, at any time, divulge any of the affairs or secrets of T. & that he would not, during the continuance of his employment, be engaged, concerned or interested in any other Broadcasting Station within the State of New South Wales. T. had instituted an action against P. for damages for breach of contract & had obtained an *ex parte* interim injunction until Jan. 30, 1936. Upon an application to renew or obtain a fresh injunction evidence was produced by T. that P. had entered into an agreement to be employed by a rival co. on the termination of his present employment & in the meantime was soliciting advertising contracts for & on behalf of another Broadcasting Station carrying on business within New South Wales :—*Held* : there was some evidence of a breach of contract & the injunction should be continued until the termination of the contract or until the conclusion of the action, whichever should first happen.—*THEOSOPHICAL BROADCASTING STATION, LTD. v. PARKES* (1936), 53 N. S. W. W. N. 32.—**AUS.**

business of manufacturing or selling beer, also that if they should sell their licence the sale should be made subject to the foregoing conditions:—*Held*: the agreement was an unenforceable agreement in restraint of trade, because in reality it was a bare covenant against competition, also because it was unreasonable between the parties, as the restriction was unlimited in area.—*VANCOUVER MALT & SAKE BREWING CO., LTD. v. VANCOUVER BREWERIES, LTD.*, [1934] A. C. 181; 103 L. J. P. C. 58; 150 L. T. 503; 50 T. L. R. 253; 73 Sol. Jo. 173, P. C.

634. *Add. Annotation*:—*Refd. Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181.

641. *Add. Annotation*:—*As to* (1) *Consd. Gilford Motor Co. v. Horne* (1933), 102 L. J. Ch. 212.

644. *Add. Annotation*:—*Dbtd. Wyatt v. Kreglinger & Fernau*, [1933] 1 K. B. 793.

705. *Add. Annotation*:—*Refd. Papadopoulos v. Papadopoulos* (1929), 46 T. L. R. 44.

#### PART V. SECT. 9, SUB-SECT. 8.

*q* 1. *Covenant for himself or any member of his family—Severability.*—The contract for the sale of a butchery business contained this clause: "The vendor will undertake for himself or any member of his family not to commence the same business or a similar business within a radius of four miles of the present place of business or to be interested directly or indirectly as master or servant or otherwise in any such business within such radius." The vendor (deft.) & his son were employed by a rival butcher within the prohibited radius as servants at a weekly wage, neither having any financial or proprietary interest in the rival business. On application for injunction to restrain deft. from employment by the rival firm:—*Held*: (1) the vendor could not contract on behalf of his family, & as the phrase "or any member of his family" was a separate & distinct covenant from his own undertaking, it could be severed from the rest of the clause; (2) the vendor had committed a breach of the covenant; (3) the restriction as to distance was reasonable.—*JUDGES v. CARSON*, [1934] N. Z. L. R. 158.—N.Z.

#### PART V. SECT. 9, SUB-SECT. 10.

*r* 1. — *Five years—Twenty-five miles.*—Applt., after being in the employment of resp. co. for about eleven months in its retail drug business in Flin Flon, signed a bond under seal in the sum of \$5,000 which, after reciting that resp. co. had agreed to take him into its employment as a druggist, stated the condition of the bond was that if he should leave or be dismissed from resp.'s services he would not set himself up in like business or work for anyone else within 25 miles from Flin Flon within a period of five years after such leaving or dismissal. Applt. understood that his refusal to execute the covenant would lead to an early termination of his employment. About four years later resp. co. terminated the employment by giving applt. one month's notice, & soon after his dismissal applt. entered service with another drug co. which had opened a drug store immediately adjoining resp.'s store.—*Held*: there was in this case legal consideration for the bond; but, under the circumstances of this case, the bond was unreasonable & unenforceable.—*MAGUIRE v. NORTHLAND DRUG CO., LTD.*, [1935] S. C. R. 412; 3 D. L. R. 521.—CAN.

#### PART V. SECT. 9, SUB-SECT. 13.

*m* 1. — *Five years—Twenty miles.*

—When a contract in restraint of trade is severable as to the areas covered thereby it may be recoverable & valid as to one part of the total area & unreasonable & invalid as to the remainder. Pltff., a physician practising in Nanaimo, who contracted to give professional service to certain miners there, engaged deft. to assist him in that work under an agreement which provided that on its termination deft. would not, for five years, practise in the city of Nanaimo or within a radius of 20 miles thereof. The agreement having been terminated, deft. commenced practice at Ladysmith, 16 miles from Nanaimo:—*Held*: that the restriction was valid as to the city of Nanaimo & invalid as to the area outside of it.—*HALL v. MORE*, [1928] 1 D. L. R. 1028; [1928] 1 W. W. R. 400; 39 B. C. R. 346.—CAN.

#### PART V. SECT. 9, SUB-SECT. 17.

697 *i. Validity or reasonableness of covenant—Covenant not to solicit employer's customers—For six months.*—*Held*: the covenant was not unreasonable.—*COORTE v. SPROULE* (1929), 29 S. R. N. S. W. 578; 46 N. S. W. W. N. 180.—AUS.

699 *i. Construction of covenant "carrying on business."*—Deft., who had been carrying on the business of selling & delivering milk to retail customers in the town of W., sold his business & the goodwill thereof to pltt. under an agreement which described the business as "dairy business" & in which deft. covenanted that he would not during five years from that date "either by himself or his agent carry on business of selling or delivering milk within the town of W." Deft. thereafter made daily sales of milk to one X., a retail milk vendor in W. The sales were made on the deft.'s premises in W., delivery of the milk to X. was taken there, & X. used it to augment the supplies distributed by him to his customers in the same town:—*Held*: said sales to X. constituted a breach of the covenant & pltt. was given damages & an injunction.—*SNELL v. MIETTINEN*, [1931] 2 W. W. R. 209.—CAN.

#### PART V. SECT. 9, SUB-SECT. 25.

*b* (p. 72) 1. —.—Deft. had carried on in Melbourne for some years a shoe-manufacturing business under a firm-name of which his own name formed part. By a clause in an agreement for the sale of the business & goodwill deft., as one of the vendors, undertook not to carry on or be engaged or concerned or interested in, or permit his name to

752. *Add. Annotation*:—*As to* (1) *Refd. Express Dairy Co. v. Jackson* (1929), 99 L. J. K. B. 181.

757. *Add. Annotation*:—*Consd. Warner Brothers Pictures, Incorporated v. Nelson*, [1937] 1 K. B. 209.

774a. *Hairdresser & tobacconist—Validity of restraint—Agreement not to carry on business within borough—No restriction as to time.*—The tenancy of certain premises at B. on which the business of a hairdresser & tobacconist was carried on was, in 1913, sold together with the goodwill of the business, & it was provided in the agreement for sale that the vendor should not carry on or conduct or be directly or indirectly concerned, interested, or employed in any capacity in the business of a hairdresser or tobacconist or either of them within the borough of B. An action was begun against the vendor by the purchasers for an injunction restraining

be used in connection with any similar business within one hundred miles:—*Held*: the clause was not wider than was necessary to protect the goodwill, & was enforceable.—*T. W. CROXIN SHOE LTD. v. CROXIN* (1929), V. L. R. 244; [1929] Argus L. R. 213.—AUS.

*n* (p. 74) 1. — *Salesman—Twelve months—Within City of Toronto.*—Covenant by salesman of cake & pastry that he would not during his employment, or within twelve months after its termination, drive a cake wagon or sell or deliver or serve or solicit orders for any cakes, confectionery, pastry, or other bakery products within the City of Toronto, for himself or for any other person, firm or co. than pltt.:—*Held*: reasonable as to time, but too wide as to locality & in other respects.—*G. WESTON, LTD. v. BAIRD* (1916), 37 O. L. R. 514.—CAN.

*a* (p. 75) 1. *Laundry supply business—14 days of restraint. One year—Fifty-five miles.*—*CANADIAN LINEN CO., LTD. v. MOLE*, [1937] 3 W. W. R. 324; on appeal, [1938] 1 W. W. R. 191.—CAN.

*sa. Musician—Validity or reasonableness of covenant—Three years—Fifty miles.*—Defts. entered into contracts of employment as members of pltt.'s orchestra, one of the terms of which was that they should not, within three years from the termination of such employment, enter into any similar engagements within fifty miles of Great Yarmouth, Redcar, Southport, New Brighton, or Belfast, those being towns in which defts. had previously played under pltt.'s direction. While defts. were playing as members of pltt.'s orchestra in a restaurant in Belfast, pltt. terminated their employment & they thereupon entered into an engagement with the proprietor of the same restaurant to play there on their own account. Pending the hearing of the action pltt. moved for an interlocutory injunction to restrain defts. from playing in the said restaurant in breach of the contracts aforesaid:—*Held*: the contracts were in undue restraint of trade & pltt. was not entitled to an interim injunction.—*DOSSOR v. MONAGHAN*, [1932] N. I. 209.—IR.

*st. Sardine cannery—Agreement by minority shareholders.*—Agreement by minority shareholders not to engage in sardine canning business for all time, nor use their name in connection with sardine canning for ten years:—*Held*: a reasonable restraint & not too wide.—*CONNORS v. CONNORS BROS., LTD.* (1937), 12 M. P. R. 102.—CAN.

him from carrying on the business of a hair-dresser & tobacconist within the borough of B., which they alleged that he had begun to carry on in 1932 in breach of the agreement entered into by him in 1913:—*Held*: the agreement afforded to the purchasers more than adequate protection, & the action failed.—*PELLOW v. IVEY* (1933), 49 T. L. R. 422.

- 791a. — **Fifteen miles—Three years.**—*Pltfs.*, who were motor-car dealers, employed deft. as a salesman under an agreement which provided that from its termination deft. should not for three years be engaged

in connection with the business of a motor-car dealer within fifteen miles of *pltfs.*' place of business. Deft. left *pltfs.*' employment & became a salesman to motor-car dealers within the prohibited area. In an action for an injunction to restrain deft. from an alleged breach of the agreement:—*Held*: as deft.'s employment with *pltfs.* was not of a confidential nature the restrictive clause was not reasonable.

— *PELLOW v. IVEY*, No. 774a, *ante*.  
48 T. L. R. 613; 76 Sol. Jo. 577.

808a. — *PELLOW v. IVEY*, No. 774a, *ante*.

## Part VI.—Goodwill.

834. *Add. Annotations*:—As to (1) *Consd. Re John Sinclair, Ltd.'s Trade Mark* (1932), 146 L. T. 417; *Simpson v. Charrington & Co.*, [1934] 1 K. B. 64. As to (2) *Consd. English, Scottish & Australian Bank, Ltd. v. I. R. Comrs.* (1931), 48 T. L. R. 170; *Re John Sinclair, Ltd.'s Trade Mark* (1932), 146 L. T. 417.
880. *Add. Annotations*:—As to (3) *Consd. Simpson v. Charrington & Co.*, [1934] 1 K. B. 64. *Refd. Whiteman, Smith Motor Co. v. Chaplin*, [1934] 2 K. B. 35.
901. *Add. Annotation*:—*Refd. Re Thomson, Thomson v. Allen*, [1930] 1 Ch. 203.
908. *Add. Annotation*:—*Refd. Lock v. Bell*, [1931] 1 Ch. 35.
962. *Add. Annotation*:—*Consd. Miller v. Amalgamated Engineering Union*, [1938] Ch. 669.
987. *Add. Annotation*:—As to (2) *Folld. Miller v. Amalgamated Engineering Union*, [1938] Ch. 669.
994. *Add. Annotations*:—*Consd. Simpson v. Charrington & Co.*, [1934] 1 K. B. 64. *Refd. Whiteman, Smith Motor Co. v. Chaplin*, [1934] 2 K. B. 35; *Charrington & Co. v. Simpson*, [1935] A. C. 325.

## Part VII.—Trade Unions.

954. *Add. Annotations*:—As to (1) *Refd. Wyatt v. Kreglinger & Fernau*, [1933] 1 K. B. 793. As to (2) *Refd. Re Home & Colonial Insurance Co.*, [1930] 1 Ch. 102.
957. *Add. Annotation*:—As to (1) *Apld. Cotter v. National Union of Seamen*, [1929] 2 Ch. 58.
1038. *Add. Annotation*:—As to (2) *Refd. Upton v. Farmer* (1930), 142 L. T. 526.

### PART VI. SECT. 3, SUB-SECT. 1.

849 i. *Whether implied*—On sale of business.]—The question whether on the transfer of a business the goodwill itself passes is not to be decided in the negative merely because the word "goodwill" is not specifically mentioned; but the fact of the passing of the goodwill may be inferred from the circumstances surrounding the transaction.—*FALLS v. BLOCH*, [1931] 2 W. W. R. 93.—CAN.

sd. —.—[Even if *Trego v. Hunt*, [1896] A. C. 7, must be interpreted as going so far as to hold (& *semble* it does not so hold) that the vendor of the goodwill of a business cannot even in the capacity of servant for another party canvass the customers of the old firm, nevertheless, deft., who by the contract sued upon, sold his shares in *pltf. co.* to the individual *pltfs.*, did not by said contract purport to transfer any goodwill. Such a contract in which the vendor does not expressly transfer the goodwill cannot be interpreted as having the same effect as a contract which does expressly transfer the goodwill unless the further provisions thereof make it capable of being so interpreted.—*KNIGHT v. FAIRALL*, [1934] 1 W. W. R. 131; 48 B. C. R. 61.—CAN.

PART VI. SECT. 3, SUB-SECT. 2.—A. so. Sale of "going concern"—Whether claim against third party passes.]

—When, in a deed of sale, an autobus co. "conveys, sells, assigns & transfers to the purchaser the whole of its enterprise & undertaking as a going concern, including its goodwill & clientele," & further specifically mentions as sold certain equipment & parking rights, such a sale includes a contract with a third party, as an accessory of & as forming part of the enterprise; & a claim made in respect of said contract also forms part of the rights & interests assigned & transferred, together with any action already brought to enforce that claim. If, at the time of the sale, the action against the third party by the vendor be pending before the *cts.*, the purchaser has the right to substitute himself to the *pltf. vendor* by way of intervention, & deal with the case as he thinks fit.—*PROVINCIAL TRANSPORT CO. v. MONTREAL SIGHT SEEING TOURS, LTD., GENERAL MOTORS PRODUCTS OF CANADA, LTD. v. MONTREAL SIGHT SEEING TOURS, LTD.*, [1933] S. C. R. 109; 1 D. L. R. 591.—CAN.

### PART VII. SECT. 2, SUB-SECT. 1.

962 i. *Common law legality*.]—A combination not to work is permissible; but a combination to prevent others from working is unlawful.—*JOHNSTON v. MACKAY*, [1937] 1 D. L. R. 413; 68 Can. C. C. 286.—CAN.

PART VII. SECT. 2, SUB-SECT. 2.—A. sb. International labour union.]—In

an action by an unincorporated international labour union against an incorporated society of manufacturers to enforce an agreement in writing in the nature of a collective bargain, made in 1925 by way of settlement of disputes between local manufacturers & local labour unions, it was held the international labour union was an illegal society incapable because of its illegality of maintaining this action or any civil action in an Ontario Ct.—*POLAKOFF v. WINTERS GARMENT CO.*, [1928] 2 D. L. R. 277; 62 O. L. R. 40.—CAN.

### PART VII. SECT. 3, SUB-SECT. 1.

sd. *Agreement between union & employer—Who may enforce.*]—In the case of a "collective bargain" between a group or union of employees & an employer a workman who cannot show privity by representation, either authorised or adopted, or by statute cannot claim it, & has no right to call for the enforcement of the bargain. Where in making such an agreement the union assumes to speak on behalf of its members only, a non-member is not in a position to ratify it, although it states that it is made "for employees," & the employer intended that it should apply to all employees & has in fact so applied it. Nor since the subject-matter of such an agreement, *i.e.*, rates of wages, hours & conditions of labour, is not property the non-member cannot claim that it

1043. *Add. Annotation*:—*As to* (1) *Dlst. Miller v. Amalgamated Engineering Union*, [1938] Ch. 609.

1043a. ——— **Conduct detrimental to interests of union.**—*Pltf.*, a member of the London Central branch of deflt. union, was expelled after inquiry by his union. *Pltf.* was a casual jobbing hand in the employment of an important firm of printers & bookbinders. He complained that he was not given a fair share of the work distributed, &, without notice, absented himself & sought other employment. The branch committee, when they came to consider the case, were of opinion that he should have accepted the work offered. *Pltf.* still refused to accept the work &, after a further hearing at which he was in effect charged with insubordination, the executive committee expelled him from the union. The general rules of the union specially provided the penalty of suspension from out-of-work benefit for the case of a member leaving his employment without notice & refusing to accept work without a satisfactory reason being given. There was also a rule under which a member who knowingly acted to the detriment of the interests of the union might be expelled & all money he had paid into the funds of the union forfeited. The question raised in this action was whether the only penalty to which *pltf.* had subjected himself was that of suspension under the first rule, or whether he could be expelled from the union altogether under the provisions of the second rule, & *pltf.* asked for a declaration that the action of defts. in expelling *pltf.* from the union was *ultra vires* & illegal under the rules:—*Held*: in the circumstances, defts. were entitled to expel *pltf.* on the general ground that he had acted to the detriment of the interests of the union.—*EVANS v. NATIONAL UNION OF PRINTING, BOOKBINDING & PAPER WORKERS*, [1938] 4 All E. R. 51.

1044. *Add. Annotations*:—*Consd. Upton v. Farmer* (1930), 142 L. T. 526. *Refd. Woodrow v. Trawlers (White Sea) & Grimsby* (1929), 141 L. T. 676.

1046. *Add. Citations*:—98 L. J. Ch. 293; 141 L. T. 83; 73 Sol. Jo. 190.

*Add. Annotations*:—*Apld. Lamberton v. Thorpe* (1929), 45 T. L. R. 420. *Refd. Chapman v. Ellesmere* (1932), 48 T. L. R. 309; *Lumiansky v. Myddleton* (1934), 78 Sol. Jo. 223; *Stuart v. Haughley Parochial Church Council*, [1935] Ch. 452; *Wells v. Myddleton* (1935), 78 Sol. Jo. 270; *Stuart v. Haughley Parochial Church Council* (1935), 104 L. J. Ch. 314.

1046a. ——— **Meeting—Right of member to be present.**—*ROSS v. ELECTRICAL TRADES UNION* (1937), 81 Sol. Jo. 650.

1047. *Add the following paragraph & citations*:—

Prior to the passing of the 1927 Act, various committees of a local authority passed resolutions, which were confirmed by the council, to the effect that certain of their employees be required to become members of one of the trade unions in the resolutions referred to. By that Act it was provided that it should not be lawful for any local or other public authority to make it a condition of the employment, or continuance in employment, of any person that he should or should not be a member of a trade union, & that any such condition should be void. Shortly after the passing of the Act instructions were given by a committee that only men belonging to a specified trade union should be employed in respect of certain casual labour; & an employee, who was dismissed accordingly, obtained a declaration in the county court that his dismissal was illegal. A member of the council thereupon brought forward a motion having for its object that instructions should be given that the resolutions of the committees should cease to be operative; but the motion was defeated:—*Held*: in the circumstances the ct. should declare that it was not lawful for the local authority to require any person, as a condition of employment or continuance in employment, to become or to be a member of a trade union.—*A.-G. v. BIRKENHEAD CORPN.* (1928), 93 J. P. 33; 27 L. G. R. 192.

1050. *Add. Annotation*:—*Refd. Doyle v. White City Stadium, Ltd.* (1935), 104 L. J. K. B. 140.

1051. *Add. Annotation*:—*Refd. Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110.

created any benefit for him which he can enforce as a trust.—*YOUNG v. CANADIAN NORTHERN RY. CO.*, [1929] 4 D. L. R. 452; 2 W. W. R. 385; 38 Man. L. R. 283; *affd.*, [1931] 1 W. W. R. 49; 1 D. L. R. 645, P. C.—*CAN.*

#### PART VII. SECT. 4, SUB-SECT. 3.

d. i. ——— **Reinstatement—Claim by widow to benefit.**—A member of a trade union having defaulted in payment of his dues & thereby having forfeited his membership was reinstated as a member & died a few months later:—*Held*: under the constitution & bye-laws of the union his default caused a loss of all the benefits of his membership prior to the date of his reinstatement so far as the right of his widow to claim against the death death fund was concerned; &, since the period between his reinstatement & death was not long enough to entitle her, under the constitution, to set up such a claim, she could recover nothing.—*HENDERSON v. HERR*, [1931] 3 W. W. R. 546; [1932] 1 D. L. R. 276; 40 Man. L. R. 108.—*CAN.*

h. i. ——— **Whether common law action lies.**—By sect. 521 of Part VIIA. of

Industrial Arbitration Act, 1912, as inserted by the Amendment Act, 1918, No. 16, sect. 17, it is provided that certain persons "shall be entitled to be admitted to membership" of industrial unions. *Pltf.* applied for membership of deflt. union but his application was refused. *Pltf.*, thereupon, sued deflt. union in an action at common law for damages resulting from its refusal to admit him to membership & recovered a verdict for £115. Upon appeal:—*Held*: no right of action at common law can be maintained for a breach of the provisions of sect. 521.—*MARTIN v. WESTERN DISTRICT OF AUSTRALIAN COAL & SHALE EMPLOYEES' FEDERATION, WORKERS' INDUSTRIAL UNION OF AUSTRALIA (MINING DEPARTMENT)* (1934), 34 S. R. N. S. W. 593; 51 N. S. W. W. N. 203.—*AUS.*

sd. **Validity of rule.**—It is not unlawful for an industrial union of workers registered under Industrial Conciliation & Arbn. Act, 1925, to limit its membership by its rules. A rule which provides that admission to membership shall be subject to the consent of the executive of the union is valid.—*WELLINGTON WATERSIDE*

*WORKERS' INDUSTRIAL UNION OF WORKERS v. HARGREAVES*, [1934] N. Z. L. R. 795; G. L. R. 679.—*AUS.*

#### PART VII. SECT. 4, SUB-SECT. 7.

1063 i. **Officers—Election—Construction of rules.**—*Pltf.*, a member & a trustee of a trade union, was duly nominated for the presidency, his nomination paper being perfectly regular & in order. The committee of management resolved, without any warrant under the rules of the union, to reject his nomination on the ground of personal unfitness for the office, & subsequently the returning officer declared the other candidates, *II.*, one of defts., duly elected unopposed, no ballot having been held, *II.* himself presided at the meeting in question, which so resolved, without having afforded *pltf.* an opportunity of being heard. The meeting consisted of seven members, of whom only two had paid their subscriptions, although the rules required a quorum of five financial members. The rules provided for an attendance fee of 2s. 6d. for each member of the committee, of whom the president was an *ex officio*



1086. *Add. Citations*:—98 L. J. Ch. 401; 141 L. T. 294.

1087. *Add. Citations*:—[1920] 2 Ch. 58; 98 L. J. Ch. 323; 141 L. T. 178; 73 Sol. Jo. 206.

1087a. Funds collected by branches—Refusal to pay to union.]—ELECTRICAL TRADES UNION v. NIPPRESS (1937), 81 Sol. Jo. 629.

1092. *Add. Annotation*:—*Refd.* Cotter v. National Union of Seamen, [1929] 2 Ch. 58.

1105a. —.]—A trade union registered under Trade Union Acts, 1871 to 1927, must be deemed to be a trade union within their meaning. Therefore, by virtue of Trade Union Act, 1871 (c. 31), s. 4, it cannot be sued on an agreement for the application of its funds to provide benefits for members. An action by a deceased member's personal representative claiming arrears of superannuation benefit is "a legal proceeding instituted with the object of directly enforcing" an agreement of that kind, & will not be entertained by the ct. An assocn. whose rules included rules conferring a power to expel members for disobedience, so that they would lose all benefits which the rules would otherwise have given them, thus enabling the assocn. to compel members to take part against their will in such activities as strikes, was held an unlawful assocn. at common law, so that no action could be brought at common law to enforce payment of any sum payable under its rules.—*MILLER v. AMALGAMATED ENGINEERING UNION*, [1938] Ch. 669; [1938] 2 All E. R. 517; 107 L. J. Ch. 275; 159 L. T. 388; 54 T. L. R. 776; 82 Sol. Jo. 415.

member, in respect of each committee meeting:—*Held*: the decision of the committee of management was invalid on the following grounds: namely, the committee had no power to reject pltf.'s nomination; H. was present, presiding at the meeting; the committee did not afford pltf. an opportunity of being heard on the question of his eligibility for office; & there was no quorum of qualified members.—*CRADDOCK v. DAVIDSON*, [1929] S. R. (Q.) 328.—*AUS.*

sk. *Honorary officer—Removal—Injunction*.]—On an application for an injunction to restrain a trade union from removing pltf. from his office as honorary chairman of one of the union's branches:—*Held*: penal powers of the kind sought to be enforced must be expressly conferred & could not be implied, & as the rules of the union contained no express power to remove honorary officers from their positions, the proceedings of the committee & sub-committee were *ultra vires*, & pltf. was entitled to the relief sought.—*O'NEILL v. TRANSPORT & GENERAL WORKERS' UNION*, [1934] L. R. 634.—*IR.*

sn. *Secretary—Misconduct—Attempt to influence ballot for officers*.]—The rules of a trade union by rule 22 provided that the secretary should not be removed from office save for fraud, misconduct, or inefficiency. On an annual election of officers of the union the secretary had sent out to members with the ballot papers a leaflet bearing his signature & suggesting the candidates for whom they should vote. At a later date the members of the union, at a meeting at which the secretary was present, terminated his services:—*Held*: the secretary, in sending out to

1107. *Add. Annotation*:—*Refd.* *Miller v. Amalgamated Engineering Union*, [1938] Ch. 669.

1122. *Add. Annotation*:—*As to* (1) *Refd.* *Cotter v. National Union of Seamen*, [1929] 2 Ch. 58.

1122a. — Not individual members—Where proceedings *intra vires*.]—*COTTER v. NATIONAL UNION OF SEAMEN*, No. 1087, *ante*.

1127. *Add. Annotations*:—*As to* (1) *Refd.* *Cotter v. National Union of Seamen*, [1929] 2 Ch. 58; *Miller v. Amalgamated Engineering Union*, [1938] Ch. 669.

1147. *Add. Annotation*:—*Apld.* *R. v. Bedwellty Urban District Council*, *Ex p. Price*, [1934] 1 K. B. 333.

1157a. — Continuing offence.]—Two officers of a trade union were jointly charged with wilfully withholding monies of the trade union. It was proved or admitted that the whole of the money had been in the possession of one or other of them, but it was contended that the money was not in their possession at the date of the charge, & that that fact was a necessary ingredient of the offence, & further that the information was out of time:—*Held*: the offence of withholding money referred to in Trade Union Act, 1871 (c. 31), s. 12, was a continuing offence; & it was not necessary to prove that the money was in the possession of the two officers at the date of the charge if there was evidence that money belonging to the trade union had been in their possession & was still being withheld.—*BEST v. BUTLER & FITZGIBBON*, [1932] 2 K. B. 108; 101 L. J. K. B. 759; 147 L. T. 99; 96 J. P. 303; 48 T. L. R. 481; 30 L. G. R. 315; 29 Cox. C. C. 482, D. C.

members the leaflet with the ballot papers for the annual election of officers of the union, was guilty of misconduct of such a nature as to warrant his dismissal.—*ROPER v. COLLINGRIDGE*, [1935] Q. S. R. 1.—*AUS.*

#### PART VII. SECT. 5, SUB-SECT. 2.—A.

o l. — Claim based on arbitration decree.]—The rules of a master plumbers' assocn. provided that members who tendered successfully for contracts should pay a percentage on these contracts to the funds of the assocn. A claim made by the assocn. against a member in terms of the rules was disputed by him, & a minute of reference was entered into by the parties referring the matter to arbitration & agreeing to abide by & implement the arbitrator's decree, & consenting to registration & execution. The arbitrator decreed in favour of the assocn. Thereafter the member was sequestered, & the assocn., founding on the decree-arbitral, lodged a claim in the sequestration, which his trustee in bankruptcy rejected, in respect that, under Trade Union Act, 1871, s. 4, it was unenforceable:—*Held*: while the original claim could not have been entertained in a ct. of law in respect that it was based on an agreement excluded by sect. 4, no such restriction affected the claim here in question, which was a claim based upon a new & independent agreement by the parties to arbitrate & to implement the arbitrator's decision.—*EDINBURGH MASTER PLUMBERS' ASSOCN. v. MUNRO*, [1928] S. C. (Cl. of Sess.) 565.—*SCOT.*

#### PART VII. SECT. 5, SUB-SECT. 2.—B.

1116 i. — Right to benefit—Construction of rule.]—Pltf. was a member

of the Amalgamated Society of Lithographic Printers. Having attained the age of sixty years, he was entitled, under the rules of this Society, to receive superannuation benefit, provided that he had ceased to follow any employment connected with the trade of lithographic printing, or provided that he was "not practically working at the trade or under the rules of the Society." Pltf., having been employed for twenty-five years by a co. of wholesale stationers as foreman of their lithographic department, was promoted to the position of general manager of their entire business. In this capacity he supervised all their departments, including the lithographic department. The Society contended that he was still working at the trade of a lithographic printer:—*Held*: pltf. had ceased to follow any employment connected with the trade, & was not practically working at the trade, within the meaning of the rules of the Society, & he was accordingly entitled to superannuation benefit.—*McCORD v. SPROAT*, [1931] N. 1. 119.—*IR.*

#### PART VII. SECT. 5, SUB-SECT. 3.

1123 iv. —.]—*BRENTALL v. HETRICK*, [1928] N. Z. L. R. 788.—*N.Z.*

#### PART VII. SECT. 6.

st.  *hindering provision of public service—Whether indictable*.]—*Held*: the offence created by sect. 30k of Crimes Act, 1914–1926, is not an indictable offence, & the offence can be tried in a ct. of summary jurisdiction.—*R. v. ARCHDALL & ROSE RUGE*, *Ex p. CARRIGAN & Ex p. BROWN* (1928), 41 C. L. R. 128.—*AUS.*

1164. *Add. Annotations*:—*As to* (1) **Refd.** *Place v. Searle*, [1932] 2 K. B. 497; *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 1 All E. R. 825; *Thorne v. Motor Trade Assocn.*, [1937] 3 All E. R. 157; *De Stempel v. Dunkels*, [1938] 1 All E. R. 238. *Generally, Refd.* *Hampton v. West Cannock Colliery Co.*, [1932] 2 K. B. 293.
1179. *Add. Annotations*:—*As to* (1) **Refd.** *Re Simms, Ex p. Trustee*, [1934] Ch. 1; *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863; *Thorne v. Motor Trade Assocn.*, [1937] 3 All E. R. 157; *De Stempel v. Dunkels*, [1938] 1 All E. R. 238.
1180. *Add. Annotation*:—**Refd.** *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
1183. *Add. Annotation*:—*As to* (1) **Refd.** *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863. *Thorne v. Motor Trade Assocn.*, [1937] 3 All E. R. 157. *As to* (2) **Refd.** *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606.
1185. *Add. Annotation*:—**Refd.** *De Stempel v. Dunkels*, [1938] 1 All E. R. 238.
1186. *Add. Annotations*:—*As to* (1) **Refd.** *Place v. Searle*, [1932] 2 K. B. 497; *British Homophone, Ltd. v. Kunz & Crystallate Gramophone Record Manufacturing Co.* (1935), 152 L. T. 589; *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
1194. *Add. Annotation*:—*As to* (1) **Refd.** *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
1204. *Add. Annotations*:—**Refd.** *British Homophone, Ltd. v. Kunz & Crystallate Gramophone Record Manufacturing Co.* (1935), 152 L. T. 589; *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.
1215. *Add. Annotation*:—**Refd.** *Musical Performers' Protection Assocn., Ltd. v. British International Pictures, Ltd.* (1930), 46 T. L. R. 485.

PART VII. SECT. 7, SUB-SECT. 3.—A.

1184 vi. —.—.] Pltf., a tally clerk, was employed by Westralian Farmers, Ltd., to assist in the loading of the steamer "B." Pltf. alleged that deft. union & the other defts., W. & M., who were respectively the president & the secretary of the union, combined & conspired to induce Westralian Farmers, Ltd., to dismiss pltf. from his employment & to cease to employ him. There had been a dispute between deft. union & the Australian Workers' Union, & the members of deft. union had resolved that they would not work on the wheat stacks at Geraldton. Pltf., after being elected a member of the deft. union in Nov. 1926, accepted work on the wheat stacks:—*Held*: (1) there was a common understanding among the majority of the members of the union on the jettty that morning to carry out the policy of the union not to work with a man who had worked on the wheat stacks; (2) such common understanding was brought about by defts., W. & M.; (3) the members of the union combined to enforce compliance with their demand that their employer should terminate its contract with pltf.; (4) such combination was unlawful in that the real intention was to deprive pltf. of his contract & thereby injure him; & (5) pltf. was entitled to damages & an injunction.—*COFFEY v. GERALDTON LUMBERS' UNION* (1929) W. A. L. R. 33.—**AUS.**

1184 vii. —.—.] It is an actionable wrong for members of a trade union

wilfully to procure an employer to break a contract of employment with an employee, even though the object in procuring the breach is not to cause damage to the employee, but is to forward the trade interests of the members of the trade union.—*KLEIN v. JENOVES & VARLEY*, [1932] O. R. 504; 3 D. L. R. 571.—**CAN.**

1190 vii. —.—.]—Pltf., who was not a member of deft. union, took a sub-contract under one T. to supply all the labour, but not the material, for the brickwork & masonry work upon a building being erected by T. By a rule of the union no member was to be allowed to work on any sub-contract taken from a building contractor where the sub-contract was for labour only. Two members of the union saw T. & told him that if he did not get rid of pltf. the bricklayers working for pltf. would be withdrawn, they being members of the union. Pltf., when T. told him this said he would give up the contract, & did so; subsequently he sued the union for damages. The two members above referred to & a third were added as defts.:—*Held*: what was done was done for the purpose, not of injuring pltf., but of forwarding or defending the trade of the members of the union, & notice that the members of the union would be warned of the situation was not a threat which was unlawful & did not give any right of action to pltf.—*HAY v. ONTARIO BRICKLAYERS LOCAL UNION No. 25*, [1929] 2 D. L. R. 336; 63 O. L. R. 418.—**CAN.**

1233. *Add. Annotation*:—**Consd.** *Thorne v. Motor Trade Assocn.*, [1937] 3 All E. R. 157.

1234. *Add. Annotation*:—**Consd.** *Thorne v. Motor Trade Assocn.*, [1937] 3 All E. R. 157.

1235a. —.—.]—A trade assocn. which by its constitution is entitled to put on a stop list the name of a member or other person who has infringed its rule forbidding the sale of articles at other than the list prices relevant thereto, may, instead of putting the name of that member or other person on the stop list, require him, in furtherance of its trade interests, to pay a sum of money within reasonable limits. To ask for such payment in those circumstances is not in itself a demand of money with menaces & without reasonable or probable cause within Larceny Act, 1916 (c. 50), s. 29 (1) (i):—*Held*: in a criminal charge under sect. 29 (1) the absence of reasonable or probable cause is a question of fact for the jury; but, if the cause is reasonably capable of being associated with the promotion of lawful business interests, the judge should not allow the case to go to the jury if there is no evidence of the accused's intention going beyond such lawful business interests.—*THORNE v. MOTOR TRADE ASSOCN.*, [1937] A. C. 797; [1937] 3 All E. R. 157; 106 L. J. K. B. 495; 157 L. T. 399; 53 T. L. R. 810; 81 Sol. Jo. 176; 26 Cr. App. Rep. 51, H. L.

1237. *Add. Annotations*:—*As to* (3) **Refd.** *Paul (R. & W.), Ltd. v. Wheat Commission* (1935), 152 L. T. 352. *Generally, Refd.* *The Croxteth Hall, The Celtic*, [1930] P. 197.

1264. *Add. Annotations*:—*As to* (1) **Consd.** *Cookson v. Harewood* (1931), 101 L. J. K. B. 394, n.; *Thorne v. Motor Trade Assocn.*, [1937] 3 All E. R. 157. **Refd.** *De Jetley Marks v. Greenwood*, [1936] 1 All E. R. 863.

1295. *Add. Annotation*:—*As to* (1) **Apld.** *Cotter v. National Union of Seamen*, [1929] 2 Ch. 58.

PART VII. SECT. 8, SUB-SECT. 1.

1237 x. —.—.]—Three defts., officials of a union, were charged with doing an act in the nature of a strike, in that they instigated certain employees to do an act in the nature of a strike, namely, to discontinue their employment in pursuance of an agreement made by the said employees to compel their employer, M., to comply with a demand by the employees to dismiss certain non-unionists:—*Held*: as there was no evidence that the agreement between the employees was entered into with intent to compel or induce the employer to comply with a demand made by the employees that non-unionists should be dismissed, the offence was not proved.—*In re MULLER & WILLIAMS*, [1927] S. A. S. R. 353.—**AUS.**

PART VII. SECT. 8, SUB-SECT. 2.

a i. —.—.]—*Held*: having regard to sect. 2 of Trade Disputes Act, 1906, picketing carried on continuously, but peacefully & not so as to amount to an abuse of the highway, was a reasonable & usual mode of using the highway as such, & did not constitute a trespass.—*FERGUSON v. O'GORMAN*, [1937] I. R. 620.—**IR.**

f i. —.—.] *Criminal liability*.—*R. v. HOWLARKAW* (1913), 24 O. W. R. 397; 24 Can. Crim. Cas. 224.—**CAN.**

PART VII. SECT. 10, SUB-SECT. 2.

1290 i. *Trustees of union—Extent of liability*.—The liability imposed by



## TRADE MARKS, TRADE NAMES AND DESIGNS.

## Part I.—Trade Marks.

5. *Add. Citation* :—[1929] 1 Ch. 113.

*Add. Annotation* :—*Re*fd. *Re Notox, Ltd.*, Application by, for a Trade Mark, *Re Inecto Incorporated* (1930), 48 R. P. C. 168.

15a. ———.]—In 1932 an English Drug Co. registered the word *Livron* as a trade mark in respect of tonic medicines for human consumption. They claimed to have invented the word & that it is a combination of the words *liver* & *iron* & used by them since Aug. 1932, to describe a tonic. *Livron* was, though this was not known to the English co. at the time of registration, the name of a small French town, & a French co. carrying on the manufacture of drugs had one of their factories at *Livron*. In 1934 the French co. applied to expunge the mark. The Assistant-Comptroller granted the application & *Crossman, J.*, upheld his decision. On appeal :—*Held* : (1) the word was not an invented word so as to be registrable under sect. 9, para. 3, of Trade Marks Acts, 1905 & 1919; (2) the word was according to its ordinary signification a geographical name & therefore not registrable under para. 4; (3) the word was not distinctive of the registered proprietor's goods & therefore not registrable under sect. 9, para. 5; (4) even if the mark had been registrable under paras. 3 or 4 the Registrar would, in view of the facts now proved, have been wrong not to exercise his discretion by refusing registration.

*Per* SIR WILFRID GREENE, M.R. & MAC-KINNON, L.J. : A word which is the name of a place in a foreign country is not registrable as an invented word under sect. 9, para. 3, nor can the word when it bears no

other meaning be registered under sect. 9, para. 4.

*Per* ROMER, L.J. : A word wholly unknown to the ordinary Englishman may be an invented word, even though on investigation in some gazetteer or atlas it is found to be a place in a foreign country; & that which is the name of a foreign place may be registered under sect. 9, para. 4, if it has no significance to the ordinary Englishman.—*Re* *Boots Pure Drug Co., Ltd.'s*, REGISTERED TRADE MARK No. 530,535, [1938] Ch. 54; *sub nom.* *Re* *Boots Pure Drug Co., Ltd.'s* TRADE MARK "*LIVRON*," *Re* *SOCIÉTÉ DES USINES CHIMIQUES RHONE-POULENC'S* APPLICATION, 106 L. J. Ch. 352; 157 L. T. 225; 54 R. P. C. 327, C. A.

*Annotation* : *As to* (3) *Re*fd. *Baily & Co., Ltd. v. Clark, Son & Morland, Ltd.*, [1938] A.C. 557.

20. *Add. Annotations* :—*As to* (2) *Re*fd. *Re Liverpool Electric Cable Co.'s* Applications (1928), 46 R. P. C. 99; *Re* *Coats, Ltd.'s* Application, [1936] 2 All E. R. 975.

25a. ———.]—Applications were made in the joint names of a Canadian Co. & an English Co. for the registration in respect of common soap, class 47, & in respect of perfumed toilet soap, shaving cream, shaving soap & shampoos, class 48, of a trade mark consisting of the word "*Palmolive*," & for the registration in respect of toilet soap (perfumed) of two marks, the first consisting of the word "*Palmolive*" shown in gilt lettering on a black band across a representation of a green crêpe paper background, but unlimited as

## PART I. SECT. 1.

*sa. To what goods applicable.*—The words "trade mark" have reference to marks applied to goods that are the subject of trade, trade signifying the business of exchanging commodities by barter or by buying & selling for money, & not in the sense of the word as applied to the mechanical arts.—*JOURNAL OF COMMERCE PUBLISHING CO., LTD. v. RECORD PUBLISHING CO., LTD.*, [1929] Ex. C. R. 168.—CAN.

## PART I. SECT. 2, SUB-SECT. 1.

3 v. ———.]—(1) An importer of goods may have a mark of his own for use in the sale of such goods & disregard the exporter's mark, but he cannot register or appropriate to himself the exporter's mark, the mark of the producer of the goods which he imported, though he may use it in connection with such goods imported with such mark.

(2) It is not necessary for the validity of a trade mark that the public should know the name of the proprietor of a trade mark, but in the public mind such mark meant a particular manufacture.—*CONTINENTAL OIL CO. v. CONSUMERS' OIL CO., LTD.*, [1932] Ex. C. R. 136.—CAN.

*r. i.* ———.]—*Held* : the word "*Zipper*" having become descriptive of slide fasteners generally & the public having come to associate this word with that type of fasteners, it

is not a proper word to be registered as a trade mark.—*LIGHTNING FASTENER CO., LTD. v. CANADIAN GOODRICH CO., LTD.*, [1931] Ex. C. R. 90; 2 D. L. R. 625; *affd.*, [1932] S. C. R. 189; 1 D. L. R. 297.—CAN.

*r. ii.* ———.]—*Held* : the trade mark *Semi-Lustro* is descriptive within the meaning of sect. 26 (1) (c) of Unfair Competition Act.—*SHERWIN WILLIAMS CO. OF CANADA, LTD. v. PATENTS COMR.*, [1937] Ex. C. R. 205; [1938] 1 D. L. R. 318.—CAN.

*sb. Official control or guarantee signs or stamps.*—The amendment of the Trade Mark & Designs Act passed in 1928, adding paragraph (g) to sect. 11 of R. S., 1927, c. 201, was intended as a partial adoption of the terms of Article 6 (*ter*) of the Convention for the protection of Industrial Property, signed at The Hague in 1925, & to which Canada was a signatory. The effect of the addition of paragraph (g) was merely to add to the grounds upon which the Minister might refuse to register a mark. The fact that the Minister is now empowered, by said paragraph, to refuse to register trade marks which consist in whole or in part of "official control or guarantee signs or stamps" adopted by another country, is indicative of the fact that prior to 1928 it was not intended by the Trade Mark Act that a trade mark might be refused registration upon the ground that it consisted of "official

control & guarantee signs or stamps."—*BIRMINGHAM JEWELLERS & SILVERSMITHS' ASSOCN. v. STOCK*, [1929] Ex. C. R. 175.—CAN.

*sd. Name of newspaper.*—The name of a newspaper is not a proper subject of a trade mark susceptible of being registered under the provisions of the Trade Mark & Designs Act.—*JOURNAL OF COMMERCE PUBLISHING CO., LTD. v. RECORD PUBLISHING CO., LTD.*, [1929] Ex. C. R. 168.—CAN.

*sg. "Royal."*—*Held* : Unfair Competition Act does not prohibit the use of the word "*Royal*" in a trade mark. The use of the word "*Royal*" in connection with tobacco, cigars, cigarettes & cigarette papers is not misdescriptive of the character or quality of the wares, or of the conditions of their production or place of origin.—*HOUBE (B.) CO., LTD. v. COMR. OF PATENTS*, [1934] Ex. C. R. 149.—CAN.

*sl. Under Unfair Competition Act—Several applicants—Who entitled to registration.*—Priority in date of application is not the sole determining factor in deciding which of two or more applicants, under Unfair Competition Act, is entitled to registration; the words "first uses or makes known in Canada" in sect. 4 (1), must be considered when determining priority rights between rival applicants.—*CONTINENTAL OIL CO. v. PATENTS COMR.*, [1934] Ex. C. R. 244; [1935] 1 D. L. R. 581.—CAN.

to colours, & the second consisting of the word "Palmolive" shown on a black band & also across a seal at the end of the band. The applications, which had been advertised before acceptance, were opposed by Lever Brothers, Ltd., & others, on behalf of themselves & all other members of the perfumery manufacturers' section of the London Chamber of Commerce:—*Held*: the evidence showed that the words "Palm" & "Olive" had been used in the trade to describe soap containing palm oil & soap containing olive oil respectively; the word "Palmolive" was descriptive of appcts.' soap containing palm oil & olive oil, & would be deceptive if used upon soaps not containing those oils; in spite of the evidence showing that to a large number of persons the word "Palmolive" did in fact distinguish appcts.' goods, the word was not adapted to distinguish within sect. 9 (5); the mark consisting of the word "Palmolive" in gilt lettering on a black band across a representation of a green crepe paper background might, if limited as to colours, be regarded as satisfying the provisions of sect. 9, provided that any right to the exclusive use of the word "Palmolive" were disclaimed; & the objection taken to the applications on the ground of the presence upon the register at the date of the applications of three marks, consisting of or comprising the word "Palmolive," & registered in the name of a different proprietor, would have been removed if the registrations of those prior marks had been subsequently cancelled. Observations were made as to what constitutes a "joint adventure." The applications were refused.—*Re PALMOLIVE TRADE MARK* (1931), 49 R. P. C. 269.

27a. *Addition of diminutive suffix.*—The word "Consolette," as applicable to a gramophone model intermediate in size between a table & a pedestal or "console" model is not an invented word capable of being registered as a trade mark under Trade Marks Act, 1905 (c. 15), s. 9 (3), as it is merely a diminutive form of the word "console," which is in common use in the gramophone trade. The mark, therefore, was expunged from the register.—*S. M. T. GRAMOPHONE CO., LTD. v. ITONIA GRAMOPHONES, LTD.* (1931), 47 T. L. R. 324; 48 R. P. C. 309.

32. *Add. Annotations:—Consd. S. M. T. Gramophone Co. v. Itonia Gramophones, Ltd.* (1931), 47 T. L. R. 324; *Re Société des Usines Chimiques Rhône-Poulenc's Application, Re "Livron," of Boots Pure Drug Co., Ltd.'s Trade Mark*, [1937] 4 All E. R. 23.

#### PART I. SECT. 2, SUB-SECT. 5.

49 ii. —.—]—The words "Shredded Wheat" are common descriptive words & the use of the name "Kellogg's Shredded Whole Wheat Biscuit" cannot therefore be restrained.—*CANADIAN SHREDDED WHEAT CO. v. KELLOGG CO.*, [1936] 4 D. L. R. 760; O. R. 613; *affd.*, [1938] 2 D. L. R. 145; 7 F. L. J. (Can.) 275.—*CAN.*

49 iii. —.—]—Pltf. held entitled to the exclusive use of the name "Top Hat" for a magazine, & to have the same registered as a trade mark.—*BOWMAN v. ERSTEIN*, [1937] 2 D. L. R. 804.—*CAN.*

sp. *Word referring to character & quality—Not registrable.*—In an action for infringement of trade mark:—*Held*: the word "Crunch" in relation to confectionery was a word having a direct reference to the character & quality of the goods in respect of which it had been registered, & was not therefore capable of registration under sect. 82 of Industrial & Commercial Property (Protection) Act, 1927.—*FRY-CADBURY (IR.) LTD. v. LYNNOTT*, [1935] 1 R. 700.—*IR.*

#### PART I. SECT. 2, SUB-SECT. 6.—A.

ab. *Ordinary word misspelt & hyphenated—"Bar-b-q"—For barbecue*

36. *Add. Annotations:—Appld. S. M. T. Gramophone Co. v. Itonia Gramophones, Ltd.* (1931), 47 T. L. R. 324. *Consd. Re Société des Usines Chimiques Rhône-Poulenc's Application, Re "Livron," of Boots Pure Drug Co., Ltd.'s Trade Mark*, [1937] 4 All E. R. 23.

53. *Add. Annotation:—Consd. Re Liverpool Electric Cable Co.'s Applications* (1928), 46 R. P. C. 99.

54. *Add. Annotation:—As to (2) Consd. Re Hans Lauritzen's Application* (1931), 48 R. P. C. 392.

57. *Add. Annotation:—Generally, Refd. Re Coats, Ltd.'s Application*, [1936] 2 All E. R. 975.

64a. —.—]—On Mar. 10, 1930, an application was made to register in Part B of the Register of Trade Marks the word "Brick" as a trade mark in respect of a powder manufactured by appct. for use as a boiler-water purifier. The powder was supplied sometimes in the form of bricks & sometimes in powder form. The application was refused by the registrar, on the grounds (a) that the mark was not "capable of distinguishing" the goods of appct.; (b) that it might be calculated to deceive; (c) that it too nearly resembled a mark "Brico" already registered for similar goods. Appct. appealed to the ct.:—*Held*: the registrar had correctly decided that the word "Brick" was not "capable of distinguishing" appct.'s goods within Trade Marks Act, 1919 (c. 79), s. 2 (2), & there was too great a similarity between the word "Brick" & the mark "Brico." The appeal was dismissed with costs.—*Re HANS LAURITZEN'S APPLICATION* (1931), 48 R. P. C. 392.

67. *Add. Annotations:—As to (2) Consd. Re Liverpool Electric Cable Co.'s Applications* (1928), 46 R. P. C. 99. *Generally, Refd. Bale & Church, Ltd. v. Sutton Parsons & Sutton & Astrah Products* (1934), 51 R. P. C. 129; *Re Coats, Ltd.'s Application*, [1936] 2 All E. R. 975.

— — In market sought.]—*William Grant & Sons, Ltd.*, applied for registration in Part B. of the register in respect of "Scotch whisky for export" of a trade mark consisting of the word "Grant's" standing alone & they claimed user since 1903. The application was opposed by persons or cos. whose names included the name "Grant" on the ground that the mark was not distinctive in the export market. The registrar refused to register the mark on the ground that appcts. had failed to prove the mark capable of distinguishing their whisky in the market for

—*Not registrable.*—*BROOKER v. COLLINS*, [1932] 2 D. L. R. 139; O. R. 189.—*CAN.*

sc. *Must distinguish goods of person registering.*—The word "Leather-mac" which had been registered in Part B. of the register of trade marks as the trade mark of appct.'s goods, viz., real leather outer garments, real suede outer garments, & imitation suede outer garments held not to be capable of distinguishing the goods as those of appct., & therefore the registrar was ordered to be rectified by the cancellation of the registration of that trade mark.—*RICHARDSON v. WEINER*, [1936] 1 R. 32.—*IR.*

which registration was sought. Appets. appealed to the ct. At the hearing of the appeals appets. intimated to the ct. that they wished to limit their application to "blended Scotch whisky (in bottle only) for export." Thereupon the opponents offered to withdraw their oppositions & the appeal was ordered to stand over generally with liberty to appets. or the registrar to apply to restore the appeal & appets. were ordered to pay the costs of the opponents. The registrar having intimated to appets. that, in view of the limitation offered, he did not intend further to oppose the application, appets. applied to the ct. for further directions in the matter. The registrar was ordered to proceed with the application & appets. were ordered to pay the costs of the registrar.—*Re GRANT & SONS, LTD.'s, APPLICATION* (1936), 53 R. P. C. 467.

74. *Add. Annotations:—As to* (2) *Consd. Re Société des Usines Chimiques Rhône-Poulenc's Application, Re "Livron," of Boots Pure Drug Co., Ltd.'s Trade Mark, [1937] 4 All E. R. 23.*

- 77a. ———.]—The Liverpool Electric Cable Co., Ltd., applied to register the words "Liverpool Cables" in Parts A. & B. of the register in respect of electric cables. The applications were refused on the grounds that, although evidence went to show that those words indicated to the trade the co.'s electric cables, the word "Liverpool" was not *primâ facie* capable of distinguishing those cables or of becoming distinctive of them; that Liverpool was one of a class of geographical names which were of such importance that the names ought not to be registered to any one trader; that the word "Liverpool" describes the common characteristic of vast quantities of goods, namely that they come from Liverpool, & that phrase "Liverpool cables" therefore meant, not the cables of the applicant co., but cables manufactured or dealt in at Liverpool:—*Held*: the Registrar had proceeded upon the right grounds, & that his decisions were correct; the Registrar is not bound to accept an application in Part B. to register upon proof of user or that the mark is in fact distinctive; it is part of his duty to consider as a judicial officer applications put before him; he may refuse registration if not satisfied that the proposed mark is capable of distinguishing; in considering whether a geographical name is registrable, both the locality & the goods must be taken into consideration; & the name of such an important commercial centre as Liverpool, even though it may in fact be distinctive

of the goods in respect of which it is sought to register it, is not registrable.—*Re LIVERPOOL ELECTRIC CABLE CO. LTD.'s APPLICATIONS* (1928), 46 R. P. C. 99, C. A.

*Annotations:—Consd. Re Hans Lauritzen's Application* (1931), 48 R. P. C. 392; *Re Coats, Ltd.'s Application, [1936] 2 All E. R. 975. Refd. Re Hammerndill Paper Co.'s Opposition, Re Pirie & Sons, Ltd. (1932), 146 L. T. 493; Re Clark, Son & Morland, Ltd.'s Trade Mark, [1938] 2 All E. R. 377.*

- 78a. ——— *Addition of "s."*—Distinctiveness in fact is not conclusive upon the questions whether a mark is "distinctive" as defined in sect. 9 of 1905 Act, & whether it ought to be registered. The mark must, to be registrable, be "adapted to distinguish," which brings within the purview of the Registrar's discretion the wider field of the interests of strangers & the public.

Both applts. & resps. had for many years carried on business in the town of Glastonbury as makers of sheepskin slippers. In 1933 resps., alleging distinctiveness, obtained registration as a trade mark of the word "Glastonburys" in connection with sheepskin slippers. At that date applts. were not aware that resps. had obtained registration of this mark, but on becoming aware of it later they applied by motion to rectify the register by expunging it:—*Held*: although the mark was distinctive in fact, it was not "adapted to distinguish" resps.' goods from those of other manufacturers of similar goods in the town of Glastonbury, who ought not to be hampered or restricted, by the presence of the mark on the register, in selecting the particular form of words by which they might desire to describe their goods as being products of a town which, in fact, enjoyed a reputation in connection with the manufacture of sheepskin slippers.—*BAILY & CO., LTD. v. CLARK, SON & MORLAND, [1938] A. C. 557; 107 L. J. Ch. 193; 159 L. T. 361; 54 T. L. R. 688; 82 Sol. Jo. 492; 55 R. P. C. 253; sub nom. Re CLARK, SON & MORLAND, LTD.'s TRADE MARK, [1938] 2 All E. R. 377, H. L.*

79. *Add. Annotation:—Refd. Re Liverpool, Electric Cable Co.'s Applications* (1928), 46 R. P. C. 99.

99. *Add. Annotations:—Consd. Re Clark, Son & Morland, Ltd.'s Trade Mark, [1938] 2 All E. R. 377. Refd. Re Liverpool Electric Cable Co.'s Applications* (1928), 46 R. P. C. 99.

- 113a. ———.]—F. H. & Co., Ltd., applied for registration in Part B. of the Register of a label bearing the words "Hewthorn's Gaseous Black Drink," together with other matter, in respect of "A veterinary medicine," claiming user since 1897. The application was opposed by D., Son & H., Ltd., on the

#### PART I. SECT. 2, SUB-SECT. 6.—C.

83 v. ———.]—Sect. 26 (1) (b) of Unfair Competition Act is not limited either to names of persons living in Canada, or to living persons.—*VIRGINIA DAIRY, LTD. v. PATENTS COMR., [1938] Ex. C. R. 172; 2 D. L. R. 617.—CAN.*

#### PART I. SECT. 2, SUB-SECT. 6.—E.

80. *Coloured strand in rope.*—The trade mark in question was a specific trade mark to be applied to the sale of wire ropes, & consisted of a yellow-coloured strand running through the length of such ropes:—*Held*: a

coloured strand woven into a wire fabric is a "mark" which may be used by any person carrying on a manufacture of wire rope for the purpose of distinguishing the article manufactured or produced or offered for sale by him from that of any other manufacture: & the same was a "mark" within sect. 5 of Trade Mark & Designs Act.—*WRIGHTS' ROPES, LTD. v. BRODERICK & BASCOM ROPE CO., [1931] Ex. C. R. 143; 4 D. L. R. 368.—CAN.*

81. *Numerals.*—*Held*: the registered trade marks "No. 360," "No. 361," "No. 90" & "No. 99," applied

to the upper & lower blades of an animal clipping machine, & not in its original use intended as a trade mark, & being without distinctiveness, are not properly trade marks within Trade Mark & Designs Act & should be expunged. There can be no distinctiveness, as a rule, in a numeral or numerals alone, although conceivably they might be so arranged, selected or used, that they would lose, partially at least, the characteristic of numerals, & acquire a distinctiveness qualifying them for registration as trade marks.—*DECATUR FLEXIBLE SHAFT CO., LTD., [1930] Ex. C. R. 97; 2 D. L. R. 540.—CAN.*

ground that the mark would conflict with the opponents' registered trade mark "Gaseous Fluid." The Assistant-Comptroller, acting for the Registrar, decided to register the mark, under sect. 21 of 1905 Act, subject to the limitation to the colours red, white & blue, as shown in the representation on the form of application. The opponents appealed. At the hearing of the appeal the opponents contended that the part of the mark consisting of the words "Gaseous Black Drink" had not been used for the purpose of indicating the proprietorship of the goods, within sect. 2 of 1919 Act, but merely as a description of the goods, & therefore the mark as a whole had not been used so as to fulfil the requirements of the sect. :—*Held*: the conclusion of the Assistant-Comptroller that the mark, with the limitation as to colour, was properly registrable under sect. 21 of the principal Act was correct, & the argument of the opponents was ill-founded, the mark as a whole having been used since 1897 for the purpose of indicating proprietorship. The appeal was dismissed with costs.—*Re HEWTHORN & CO., LTD., APPLICATION FOR REGISTRATION OF A TRADE MARK* (1934), 52 R. P. C. 15.

- 113b. —[Appets. applied to register the word "sheen" in class 23 in respect of machine twist being sewing cotton. After hearing appets. but before delivering his grounds for refusal, the registrar requested the Keeper of the Cotton Marks to consult the Trade & Merchandise Marks Committee of the Manchester Chamber of Commerce as to whether it was desirable to register this word. Neither the question nor the answer was communicated to appets. The application was refused on the grounds that "sheen" was one of a class of words which never could become distinctive of the goods of appets. but should be left free for the whole trade to use. On appeal to the judge it was found that the word "sheen" had in fact become distinctive of the goods of appets. & the registrar was directed to proceed with the application. The registrar appealed :—*Held* : (1) there was sufficient evidence of the distinctiveness of the word "sheen" to justify the judge's finding that it was distinctive & therefore registrable ; (2) it is irregular for the registrar to seek the opinion of the Trade & Merchandise Marks Committee of the Manchester Chamber of Commerce after the close of the hearing of an application to register a trade mark.—*Re COATS (J. & P.), LTD.'S APPLICATION*, [1936] 2 All E. R. 975 ; 155 L. T. 127 ; 80 Sol. Jo. 611 ; 53 R. P. C. 355, C. A.

*Annotations* :—As to (1) *Reffid. Re Clark, Son & Morland, Ltd.'s Trade Mark*, [1937] 2 All E. R. 591, C. A. ; *Société des Usines Chimiques Rhône-Poulenc Application, Re*, [1937] 1 All E. R. 145.

- 113c. —[The Shredded Wheat Co., Ltd., were on Mar. 5, 1929, registered as proprietors of the trade mark "Shredded Wheat" in class 42 in respect of biscuits or crackers made from wheat. The mark was registered as a distinctive mark under the Trade Marks Acts, 1905–19, s. 9, para. (5). The Kellogg Co. of Great Britain, Ltd., on Feb. 20, 1936, applied by motion to rectify the register on the grounds (*inter alia*) (i) that the mark was not & had never been a trade mark within

sect. 3 of Trade Marks Acts, 1905–19, (ii) the mark had been & was descriptive of the article for which it was registered &/or was the name of that article &/or was the name of an article manufactured under Letters Patent which had expired, & (iii) that, if used upon a wheat product not shredded, the mark was calculated to deceive :—*Held* : the mark "Shredded Wheat" was not the name of an article made by a patented process, the mark had reference to the character of the article, but had acquired a distinctive meaning which was identified with resp., & there was no evidence that the mark had ever been used upon a product not made of wheat, & accordingly the motion for rectification was dismissed with costs.—*Re SHREDDED WHEAT CO., LTD.'S TRADE MARK NO. 500,671 "SHREDDED WHEAT."* *Re KELLOGG CO. OF GREAT BRITAIN, LTD.'S APPLICATION* (1937), 55 R. P. C. 55.

114. *Add. Annotations* :—*Consd. Re Liverpool Electric Cable Co.'s Applications* (1928), 46 R. P. C. 99 ; *Re Coats, Ltd.'s Application*, [1936] 2 All E. R. 975. *Reffid. Bale & Church, Ltd. v. Sutton Parsons & Sutton & Astrah Products* (1931), 51 R. P. C. 129 ; *Re Clark, Son & Morland, Ltd.'s Trade Mark*, [1937] 2 All E. R. 594 ; *Canadian Shredded Wheat Co. v. Kellogg Co. of Canada, Ltd.*, [1938] 1 All E. R. 618.

138. *Add. Annotations* :—*Consd. Re Liverpool Electric Cable Co.'s Applications* (1928), 46 R. P. C. 99 ; *Re Coats, Ltd.'s Application*, [1936] 2 All E. R. 975 ; *Re Clark, Son & Morland, Ltd.'s Trade Mark*, [1938] 2 All E. R. 377.

- 152a. —[User in foreign country.]—*Notox, Ltd.*, applied to register the word "Notox" as a trade mark for hair dye, etc. The application was opposed by an American co. who alleged user by them of the mark in America & abroad. The opponents had also, four days before the application, sent out a thousand circulars to hairdressers in London advertising their goods under the mark. Appet. co. had been incorporated about nine months before the application & had made some sales under the mark. The Assistant-Comptroller decided to register the mark. The opponents appealed :—*Held* : the appet.'s right to registration was not affected by the opponents' user abroad, & the thousand circulars sent out by the opponents were not sufficient to cause a liability to confusion such as to destroy the right to registration. The appeal was accordingly dismissed.—*Re NOTOX, LTD., APPLICATION BY, FOR A TRADE MARK, Re INECTO INCORPORATED* (1930), 48 R. P. C. 168.

- 152b. —[False trade description—"Norwegian sardines."]*In 1907 Concord Canning Co. registered a trade mark consisting of a label which contained the words "Norwegian Sardines" in respect of "canned sardines preserved in oil." In 1915 it was held that the term "Norwegian Sardines" was a false trade description within Merchandise Marks Act, 1887. In 1932 an application was made to rectify the register by expunging the mark, or, alternatively, by deleting the words "Norwegian Sardines" therefrom. An order was made that the register should be rectified by deleting the words "Norwegian*



Sardines" from the mark.—*Re* CONCORD CANNING CO.'S TRADE MARK (1932), 49 R. P. C. 323.

162. *Add. Annotation*:—*Consd. Re* Coats, Ltd.'s Application, [1936] 2 All E. R. 975.

166a. —.—.]—*Re* HANS LAURITZEN'S APPLICATION, No. 64a, *ante*.

166b. —.—.]—*Discretion of Court of Appeal*.—Magdalena Securities, Ltd., a Canadian Co., applied to register the word "Ucolite" as a trade mark for partially coked coal. The application was opposed by Low Temperature Carbonisation, Ltd., on the ground that the mark would conflict with the opponents' registered trade mark "Coalite." The registrar decided to register the mark. The opponents appealed. Leave was given to them to take the further objection, which by agreement had been treated as a ground of objection before the registrar, that appets. had at the date when registration was applied for no *bonâ fide* intention to use the mark as a trade mark. At the hearing of the appeal, some of the declarants were cross-examined & further evidence was adduced:—*Held*: (1) in a case where the ct. has materials before it which were not before the registrar, the ct. has to exercise its discretion under sect. 8 (2) of Trade Marks Act, 1919, although generally speaking it ought to have considerable regard to the decision of the registrar, taking into account the fact of his special experience; the appets. had failed to show affirmatively that the mark was not calculated to deceive, & therefore the application ought to be disallowed; (2) on the evidence there was within Trade Marks Acts no *bonâ fide* intention on the part of appets. at the date of the application to use the mark applied for upon or in connection with the goods in question for the purpose of indicating that they were the goods manufactured by

appets. The appeal was accordingly allowed. —*Re* MAGDALENA SECURITIES, LTD., APPLICATION FOR REGISTRATION OF A TRADE MARK, *Re* LOW TEMPERATURE CARBONISATION, LTD., OPPOSITION BY (1931), 48 R. P. C. 477.

167. *Add. Annotation*:—*As to* (2) *Consd. Re* Ham mermill Paper Co.'s Opposition, *Re* Pirie & Sons, Ltd. (1933), 149 L. T. 199.

176. *Add. Annotation*:—*Consd. Re* Columbia Graphophone Co. Trade Marks (Nos. 288,624, 324,745 & 407,537) (1932), 49 R. P. C. 621.

180. *Add. Annotations*:—*Generally, Re* Bass, Ratcliff & Grettton, Ltd. v. Nicholson & Sons, Ltd., & Registrar of Trade Marks (1931), 48 T. L. R. 161; *Re* Magdalena Securities, Ltd., Application for Registration of a Trade Mark, *Re* Low Temperature Carbonisation, Ltd., Opposition by (1931), 48 R. P. C. 477.

180a. —.—.]—An application was made for the registration of a trade mark consisting of the word "Sulphos" in class 2 in respect of "Fertilisers containing sulphur & phosphates." The application was opposed on the grounds that the opponents were the proprietors of a trade mark "Sulphos" which had been used continuously by them & their predecessors in business in respect of fertilisers since Apr. 1932, & that the use by the appct. of that word was calculated to deceive the public & to cause confusion as to the origin of the goods. Appct. was the owner of, *inter alia*, certain British patents relating to the manufacture of fertilisers & he had a controlling interest in a co. to which, under an agreement, he had given a licence to manufacture fertilisers under two of his patents, with power to revoke the licence in the event of the co. ceasing to exist or to manufacture the goods. Shortly after the appointment of a receiver of the co.'s property charged under a debenture, appct. terminated

#### PART I. SECT. 2, SUB-SECT. 7.

154. iii. —.—.] Two fantastic characters, "Mickey Mouse" & "Minnie Mouse," invented by D. had acquired a world-wide popularity in cinematograph pictures. The names & figures had been applied by traders under licence from D. & his assigns to many classes of goods other than films as an aid to selling them. Appct., which had no connection with, or licence from, D., applied for registration as trade marks of the words, "Mickey Mouse" & "Minnie Mouse" in respect of radio receiving sets:—*Held*: registration should be refused.—*RADIO CORON, LTD., v. DISNEY* (1937), 57 C. L. R. 418; 11 A. L. J. 143.—AUS.

k i. —.—.]—By its action, petitioner, owner of the trade marks "Big Ben," "Baby Ben," "Pocket Ben," "Globe Ben" & "Ben Hur," seeks to have the trade mark "Bentima," owned & registered by deft., expunged on the ground that the same was liable to confuse & deceive the public:—*Held*: as the trade marks in question consisted of distinctive names & were printed in such a conspicuous place & manner, there could not be any confusion as to which was which, & the public, even the unwary & incautious purchaser, could not be made or led to purchase the goods of deft. for that of pltf., deft.'s trade mark was not liable or calculated to confuse or deceive the public, & was properly registered & should not be expunged.—*WESTERN CLOCK CO. v. ORIS WATCH CO., LTD.*, [1931] Ex. C. R. 64; [1931]

2 D. L. R. 775; *on appeal*, [1931] 2 D. L. R. 877; S. C. R. 397.—CAN.

#### PART I. SECT. 2, SUB-SECT. 8.—A.

173 i. *When registration allowed*.—*Goods of different description*.—Petitioner, owner of the specific trade-mark "Zipper" to be used in connection with the manufacture & sale of footwear, by its petition, asked that the trade mark of resp. consisting of the same word "Zipper" as applied to the sale of corsets or corsets & brassières combined, be expunged:—*Held*: there was no likelihood of confusion in the mind of the public, the registration of resp.'s mark was not calculated to deceive the public into purchasing the goods of resp. believing them to be those of petitioner, & the petition herein was refused. Petitioner, having chosen to limit its mark to footwear, could not now ask that resp.'s mark be expunged, on the ground that petitioner may at some future time make or vend corsets, or corsets combined with brassières, wherein the sliding fasteners are employed.—*CANADIAN GOODRICH CO., LTD. v. HALL*, [1933] Ex. C. R. 30.—CAN.

#### PART I. SECT. 2, SUB-SECT. 8.—B. (a).

178 iv. —.—.]—Pltf.'s trade mark consisted of the words "Peter Pan" with a representation of Peter Pan, used in the sale of "woven piece goods," & deft. registered a trade mark consisting also of a representation of Peter Pan, with the words "Genuine Peter Pan Garments," to be applied to

"Ladies', Misses' & Children's Ready-to-Wear Garments":—*Held*: while the Trade Mark & Designs Act permits registration of a specific trade mark, & without there being any provision for the classification of goods, nevertheless trade marks resembling one another should not be registered for different classes of goods, if the result of the junior registration "be calculated to deceive or mislead the public"; & in consequence, deft.'s trade mark should be expunged, notwithstanding it was applied to garments only whilst pltf.'s was applied to piece goods.—*HENRY GLASS & CO. v. HAMPTON MANUFACTURING CO., LTD.*, [1931] 1 D. L. R. 637; [1930] Ex. C. R. 212.—CAN.

sg. *Similar mark having expired twenty years previously*.—In Dec. 1929, B. & L. O. Co. applied to have the letters "B. & L." registered as a trade mark. This application was refused by the Comr. of Patents for the sole reason that one L. had registered the letters "B. L." as a specific trade mark in the year 1885. This latter mark was never renewed. Hence this appeal:—*Held*: the trade mark "B. L." having expired in the year 1910, was not at the time of the application of B. & L. O. Co. a registered trade mark within sect. 11 (b) of Trade Marks & Designs Act; & the Comr. of Patents was not justified in refusing the application aforesaid solely because of the registration aforesaid made in the year 1885.—*BAUSCH & LOMB OPTICAL CO. v. COMR. OF PATENTS*, [1930] Ex. C. R. 123; 2 D. L. R. 981.

the licence but subsequently allowed the receiver to continue to manufacture & sell thereunder on a royalty basis. Three days after the application for registration was filed the opponent co. was incorporated & after a further eight days the original co. & the receiver purported to assign the business & goodwill to the opponent co. :—*Held*: contrary to submissions made on behalf of appct., the opponent co. was entitled to bring the opposition, notwithstanding that it was not incorporated until after the date of the application for registration; the fact that appct. owned certain patents under which the opponents' predecessors were licensed to trade did not constitute the business a joint adventure between them for the purposes of any joint ownership of a trade mark used in the business; a patentee cannot validly hold a trade mark for the purpose of its being used upon goods made by others in accordance with a patented process & under the patentee's licence, since such a user does not fall within the definition of a trade mark in sect. 3; appct. had transferred to the opponents' predecessors such goodwill in the sale of fertilisers in this country as he might at one time have possessed, & that he had since done no such separate trade as would entitle him to a joint interest with the opponents' predecessors in their goodwill or in any trade mark which they were using; there was in the agreement no implied covenant that the goodwill of the opponents' predecessors should in certain circumstances revert or be transferred to appct. & that there was in fact no such reversion or transfer; at the date of the application for registration the mark was being used by the receiver on goods made & sold under appct.'s patents, & whether or not the trade mark was assignable to the opponent co. (which was not decided), the evidence showed that to many persons the mark meant the manufacture of the opponents or their predecessors & that its use by appct. upon goods unconnected with them would be likely to cause confusion & deception.—*Re BAPTISTIN BODRERO'S APPLICATION* (1938), 55 R. P. C. 185.

185. *Add. Annotation*:—*Generally*, *Refd.* E. P. Mohamed Noardin v. S. E. S. Abdul Kareem & Co. (1931), 48 R. P. C. 491.

191. *Add. Annotation*:—*Expld.* Bass, Ratcliff & Gretton, Ltd. v. Nicholson & Sons, Ltd., & Registrar of Trade Marks (1931), 48 T. L. R. 161.

195a. ——— *Colour disregarded.*—Appls. had for some years traded under, & had more recently registered, the word "Gardener" for preserved fruits, etc. They applied to register a device containing a head & shoulders representation of an oldish man. The application was opposed by the proprietors of a trade mark consisting of a young man somewhat similarly clothed, & they traded thereunder in fresh fruit, etc. The application was refused by the registrar, & the

appts. appealed to the ct. :—*Held*: colour must be disregarded & unless the marks were compared side by side, the difference between them was insufficient to satisfy the onus upon the appts. to show that there was no likelihood of deception. The appeal was dismissed with costs.—*Re MORRIS & JONES, LTD. APPLICATION FOR A TRADE MARK* (1934), 51 R. P. C. 199.

214a. ———.]—W. B. (Birmingham), Ltd., applied to register the word "Erectiko" in Class 49 for toys. A. C. G. Co. opposed the application on the ground that the word would conflict with the word "Erector," a registered trade mark owned by the opponents for constructional toys. The Assistant-Comptroller held that appts. had discharged the onus of proving that no reasonable probability of confusion would result from registration of the word "Erectiko" & he accordingly decided to register it unless an appeal was entered within one month. The opponents appealed to the ct. :—*Held*: the Assistant-Comptroller had proceeded on a wrong basis; when comparing two words to see whether one would be confused with & mistaken for the other, the words should be compared as a whole & not merely compared syllable by syllable, & regard should be paid to the fact that the word sought to be registered was to be used upon goods similar to those upon which the opponents' mark was being used. Confusion would inevitably result if registration were allowed. The appeal was allowed & resps. were ordered to pay the costs including those of the registrar. An order was made directing the registrar not to proceed.—*Re WILLIAM BAILEY (BIRMINGHAM), LTD., APPLICATION TO REGISTER A TRADE MARK, Re GILBERT & Co. OPPOSITION* (1935), 52 R. P. C. 136.

217a. *Position in foreign countries—Goods intended for export.*—*Re EVANS SONS LESCHER & WEBB, LTD., APPLICATION FOR REGISTRATION OF A TRADE MARK* (1934), 51 R. P. C. 423.

232. *Add. Annotation*:—*As to* (1) *Refd.* *Re* Nicholson & Sons, Ltd., Application, *Re* Bass, Ratcliff & Gretton's Trade Mark, [1931] 2 Ch. 1.

248. *Add. Annotations*:—*Refd.* *Re* Liverpool Electric Cable Co.'s Applications (1928), 46 R. P. C. 99; *Re* Magdalena Securities, Ltd., Application for Registration of a Trade Mark, *Re* Low Temperature Carbonisation, Ltd., Opposition by (1931), 48 R. P. C. 477; *Re* Hammernill Paper Co.'s Opposition, *Re* Pirie & Sons, Ltd. (1933), 149 L. T. 199.

249a. *Picture of three pigs—Picture of four pigs—Three of four in group.*—D. applied to register two different device marks consisting of representations of pigs, one being a picture of four pigs, namely a sow & three little pigs, in respect of "pig products (for food)" & the other being a picture of three pigs in respect of "bacon & pig products for food." The applications were opposed by M., on

PART I. SECT. 2, SUB-SECT. 8.—  
B. (c) i.

sk. "Lysol"—"Lysotab."—The ct. found, on the evidence, that the word "Lysol" was properly registered, was a valid trade mark & that "Lysotab" was calculated to deceive & mislead

the public, & ordered that it be expunged.—*LYSOL (CANADA), LTD. v. SOLIDOL CHEMICAL, LTD.*, [1933] Ex C. R. 21.—CAN.

sm. "Vasenol"—"Vaseline."—*Held*: the marks "Vasenol" & "Vaseline" were similar & the registration

of the word Vasenol would be calculated to deceive & would be in conflict with the word mark Vaseline.—*VASENOLWERKE DR. KÖPF AKTIENGESELLSCHAFT v. COMR. OF PATENTS & CHESEBROUGH MANUFACTURING CO.*, [1935] Ex. C. R. 198; [1936] 1 D. L. R. 532.—CAN.

the grounds that the marks would conflict with the opponents' trade marks, one being a picture of three pigs, but quite different from appets.' picture of three pigs, & the other consisting of the words "Three Pigs Brand." The registrar refused to register the marks on the ground as to appets.' picture of four pigs that the three little pigs formed a group by themselves & persons might not unreasonably identify it as a three pigs mark. Appets. appealed, but only as to the picture of four pigs:—*Held*: there was no ground for interfering with the registrar's decision either in law or fact. The appeal was accordingly dismissed with costs.—*Re DANISH BACON CO., LTD.'S APPLICATION TO REGISTER A TRADE MARK* (1933), 51 R. P. C. 148.

**249b. "Park"—"Hyde Park."**—An application was made for the registration in Part B. of the Register of a trade made in Class 45 in respect of "Cigarettes." The mark consisted of a label showing prominently the words "Hyde Park," together with other features. The application was opposed by a co. who were the registered proprietors of certain trade marks consisting of or embodying the words "Park" or "Park Drive." The opponents claimed that the names "Park Drive," "Park" & "Parks" had become distinctive of cigarettes of their manufacture; that appets.' mark so resembled the opponents' registered trade mark as to be calculated to deceive, & that appets.' user of their mark had been very small & had been confined to Turkish cigarettes sold retail by them at their stores in London. The opponents had offered to withdraw their opposition if appets. would agree to limit their registration to Turkish cigarettes sold retail by themselves, but this offer, which was repeated at the hearing, was not accepted:—*Held*: contrary to submissions made on behalf of the opponents, the fact that appets. had used their mark only upon Turkish cigarettes sold retail by them at their stores would not by itself prevent a registration in respect of cigarettes generally, & that the reference in the mark itself to "Turkish blend cigarettes" did not call for an express limitation of the application to Turkish

cigarettes; although there was no likelihood of the full name "Hyde Park" being confused with the full name "Park Drive," there was a possibility that the name "Hyde Park," if used widely in the retail trade, would be contracted to or mistaken for the word "Park" or "Parks," to which the opponents' mark was in fact frequently contracted, & that in these circumstances confusion would probably occur; the proved user in the tobacco trade of certain other names embodying the word "Park" was relatively small & sporadic & did not affect the conclusion as to the possibility of confusion; the appets.' restricted user of their mark in the past was sufficient to justify a registration which would cover a similar user in the future but, having regard to the very extensive user of the opponents' marks, was not sufficient to justify a concurrent registration which would cover an extension of appets.' user to the opponents' market. The application was allowed, subject either to a limitation of the specification of goods to Turkish cigarettes sold retail by appets. or to the giving of an undertaking by appets. that they would use the mark only upon Turkish cigarettes sold retail by themselves.—*Re HARRODS, LTD.'S APPLICATION TO REGISTER A TRADE MARK IN PART B. OF THE REGISTER* (1934), 52 R. P. C. 65.

**257. Add. Annotation:—***Re* William Bailey (Birmingham), Ltd.'s Application to Register a Trade Mark, *Re* Gilbert Co.'s Opposition (1935), 52 R. P. C. 136.

**259. Add. Annotation:—***As to* (4) *Re* Nicholson & Sons, Ltd., Application, *Re* Bass, Ratcliff & Gretton's Trade Mark, [1931] 2 Ch. 1.

**277a. Triangle & word "Triangle"—Triangle & word "Nicholson."**—From 1865 onwards resps., Nicholson & Sons, brewers of Maidenhead, had stencilled an outline triangle with "N" inside on their "best pale ale" casks & had also branded "Nicholson" thereon. In 1927 they applied to register the combination as a trade mark for bitter beer. Their application was opposed by appts., Messrs. Bass, on account of the similarity of the outline triangle to the well-

PART I. SECT. 2, SUB-SECT. 8.—  
B. (c) ii.

**sl. "Sunlight"—"Sunbrite."**—*Held*: the trade mark of deft. did not so resemble pltf.'s trade mark in appearance, sound, or otherwise, as to be calculated to deceive or mislead the public into purchasing the goods of deft. believing them to be those of pltf. Moreover, pltf.'s product & that of deft. were not of the same class, the one being a cake soap & the other a liquid, & the action of pltf. should be dismissed.—*LEVER BROS., LTD. v. WILSON*, [1932] Ex. C. R. 69.—*CAN.*

**sm. "Sunlight"—"Sunrise."**—*Held*: even if deft.'s product could be said to belong to the same class of goods as that of pltf., deft.'s label being so different in appearance, colour, lettering, & subject-matter from that of pltf.'s label, & bearing on its face, in large type, the words "Sunrise Co.," 711 Langlois Ave., Windsor, Ont., it could not be said to be "calculated to deceive," within Trade Mark & Design Act.—*LEVER BROS., LTD. v. UMBERTO PIZZUTI*, [1932] Ex. C. R. 79.—*CAN.*

**so. "Sure to rise"—"Bound to rise."**—Pltf. had a registered trade mark for baking-powder, a prominent part of which consisted of a plate with figures of loaves over which were the words "Sure to rise." Deft. was the registered owner of a trade mark, part of which consisted of the words "Bound to rise" placed round the top of a balloon. There were many dissimilarities in the details of each mark. Deft.'s mark had been registered in 1882, & pltf. had used its mark for about fifty years & had registered it in 1912. Deft. placed part of its trade mark, namely, the words "Bound to rise," above a cake on a prominent part of its labels:—*Held*: deft. had not made an exact or substantial copy of pltf.'s trade mark, nor had deft., by putting part of its registered mark, namely, the words "Bound to rise," above a cake on a prominent part of its label, infringed the trade mark of pltf., as the words "Bound to rise" had not been so used by deft. as to be calculated to cause its goods to be taken by ordinary purchasers for the goods of pltf.—*EDMONDS, LTD. v.*

*SELF-HELP, LTD.*, [1932] N. Z. L. R. 87.—*N. Z.*

**sq. "Doris Kinsman"—"Dorikin."**—Eight girls, while they were still pupils of a certain Doris Kinsman, the proprietress of "Doris Kinsman's Dancing Studio," formed themselves into a troupe known as "The Dorikin Eight." Doris Kinsman sold her dancing studio to the appct., & some time afterwards resp.; a member of "the Dorikin Eight" troupe, commenced a dancing school, which, with the permission of the remaining seven members of the "Dorikin Eight," was known to the public & advertised by resp. (who had no intention of interfering in any way with appct.'s business) as the "Dorikin Studio":—*Held*: the words "Dancing Studio" were merely descriptive of the class of business carried on & could be ignored, & as there had been no confusion in fact the names "Doris Kinsman" & "Dorikin" were not so similar that it was likely they would be so confused. Interdict therefore refused.—*PARLANSKY v. BROWN* (1931), 52 N. L. T. 147.—*S. AF.*

known Bass solid triangle mark registered in 1876, but the Assistant Comptroller allowed the registration, limiting the outline triangle & "N" to the colours white or black. About the same time resps. applied to remove the word "Triangle" registered by Messrs. Bass in 1926 from the register, & the Assistant Comptroller ordered the removal:—*Held*: (1) resps.' mark had been used both as a mark of quality & of origin before Aug. 13, 1875, & was therefore registrable as an old mark. In the case of a distinctive mark non-recognition by the public is immaterial on the question of "user as a trade mark"; (2) resps.' mark was not prohibited from registration by sect. 11 as being calculated to deceive, inasmuch as the general prohibition in that section must be read subject to the specific exception in sect. 19, which impliedly authorised the Registrar to place upon the register an old mark so nearly resembling a mark of another already on the register as to be calculated to deceive; (3) in view of the extensive user of applts.' mark in connection with bottled beer & the absence of any evidence that resps. had used their mark for bottled beer, bottled beer should be excluded from the specification of goods in respect of which resps.' mark was registered; (4) the registration of resps.' mark involved as a consequence the removal from the register of applts.' mark consisting of the word "Triangle."—*BASS, RATCLIFF & GRETTON, LTD. v. NICHOLSON & SONS, LTD.*, [1932] A. C. 130; 101 L. J. Ch. 98; 48 T. L. R. 161; 75 Sol. Jo. 868; 49 R. P. C. 88; *sub nom.* *Re NICHOLSON & SON'S APPLICATION FOR REGISTRATION OF A TRADE MARK, Re BASS, RATCLIFFE & GRETTON'S TRADE MARK*, 146 L. T. 349, H. L.

*Annotation*:—*Reftd.* *Re Hammermill Paper Co.'s Opposition, Re Pirie & Sons, Ltd.* (1932), 146 L. T. 493.

**277b. "Abermill"—"Hammermill."**—An application by applts., A. P. & Sons, was made for registration of a trade mark in respect of paper goods in class 39, & was opposed by the H. Paper Co., whose business was carried on in the United States of America, but which had business in this country. The H. Paper Co. had a trade mark in the United States "Hammermill Bond," which they made use of in this country after 1920, from that time exporting goods to this country, & each year sold about £2,000 in value of the goods in this country. In May, 1923, applts. adopted the mark "Abermill Bond," which they now sought to register, & their trade under that mark had been over £20,000 a year. Applts. chose the mark "Abermill" in reference to the locality where their paper for stationery was produced near Aberdeen, without any thought of the word "Hammermill" quite honestly, though they were aware of the mark "Hammermill Bond." On June 13, 1931, the Assistant-Comptroller decided that if the application had been

under sect. 19 of the combined Trade Marks Act he would have refused the application, on the ground that there was a resemblance calculated to deceive, but though, therefore, he would not have registered it if it had been a new mark & the application had been under sect. 19, he exercised his discretion under sect. 21 of the Acts, & treated the case as within that section, because of there having been an honest concurrent user of the mark by the applts., & made the order for registration of "Abermill Bond":—*Held*: (1) the ct. ought to be very slow to upset the exercise of the discretion of the Comptroller or Registrar, who had to adjust various considerations; (2) accepting the view of the Comptroller & CLAUSON, J., that sect. 19 alone did not avail to secure the admission of the mark to the register, as to sect. 21 there having been an honest choice of the word "Abermill" & an honest user over a period of six years & no confusion having been proved, the ct. ought to permit the registration of the mark under sect. 21, even if it were deemed to be identical or nearly identical with the trade mark of the H. Paper Co., as that section was in no way controlled or limited by sect. 19.—*Re HAMMERMILL PAPER CO.'S OPPOSITION, Re PIRIE (ALEX.) & SONS, LTD.* (1932), 146 L. T. 493; *sub nom.* *Re ALEXANDER PIRIE & SONS, LTD., TRADE MARK*, 49 R. P. C. 195, C. A. *affd.* (1933), 50 R. P. C. 147, H. L.

*Annotation*:—*Reftd.* *Re Societe des Usines Chimiques Rhône-Poulenc*, [1937] 1 All E. R. 145.

**285a. Duty of Registrar—To impose conditions—When possibility of deception or confusion.**—NOTES OF OFFICIAL RULINGS (1929) A (1929), 46 R. P. C. App. i.

**285b. Decision of Registrar—Attitude of court towards.]**—*Re HAMMERMILL PAPER CO.'S OPPOSITION; Re PIRIE (ALEX.) & SONS, LTD.*, No. 277b, *ante*.

**288. Add. Annotation:—***Reftd.* *Re Nicholson & Sons, Ltd.*, Application, *Re Bass, Ratcliff & Gretton's Trade Mark*, [1931] 2 Ch. 1.

**291. Add. Annotation:—***Consd.* *Re Nicholson & Sons, Ltd.*, Application, *Re Bass, Ratcliff & Gretton's Trade Mark*, [1931] 2 Ch. 1.

**300a. Use as quality mark & mark of origin.]**—*BASS, RATCLIFF & GRETTON, LTD. v. NICHOLSON & SONS, LTD.*, No. 277a, *ante*.

**305a. — Distinctive mark—Triangle.]**—*BASS, RATCLIFF & GRETTON, LTD. v. NICHOLSON & SONS, LTD.* No. 277a, *ante*.

**309. Add. Annotation:—***Reftd.* *Bass, Ratcliff & Gretton, Ltd. v. Nicholson & Sons, Ltd.*, & Registrar of Trade Marks (1931), 48 T. L. R. 161.

**314. Add. Annotation:—***Consd.* *Re Nicholson & Sons, Ltd.*, Application, *Re Bass, Ratcliff & Gretton's Trade Mark*, [1931] 2 Ch. 1.

**317. Add. Annotation:—***As to* (1) *Consd.* *Canadian Shredded Wheat Co. v. Kellogg Co. of Canada, Ltd.*, [1938] 1 All E. R. 618.

#### PART I. SECT. 2, SUB-SECT. 11.

**sh. Meaning of.]**—To be a fancy term & not a descriptive term, a mark applied to goods must be obviously intended to be non-descriptive. Where words are *prima facie* descriptive, the fact that the article to which they are applied does not answer the description imported by them, will not make them

fancy words.—*ORANGE CRUSH (AUSTRALIA), LTD. v. GARTRELL* (1928), 28 S. IL N. S. W. 392; 45 N. S. W. N. 98.—*AUS.*

#### PART I. SECT. 3, SUB-SECT. 1.

**sx. Mandamus to register.]**—*Held*: an application for a mandamus requiring the Comr. of Patents, as

registrar under Unfair Competition Act, to determine whether an application to register a trade mark should be allowed, is a substantive proceeding, & not an interlocutory matter. Such a proceeding should be instituted by statement of claim & not by an originating notice of motion.—*CONTINENTAL OIL CO. v. COMR. OF PATENTS*, [1934] Ex. C. IL 118.—*CAN.*

318. *Add. Annotation*:—**Consd.** *Re* Nicholson & Sons, Ltd., Application, *Re* Bass, Ratcliff & Gretton's Trade Mark, [1931] 2 Ch. 1.
320. *Add. Annotation*:—*As to* (1) **Consd.** *Re* Nicholson & Sons, Ltd., Application *Re* Bass, Ratcliff & Gretton's Trade Mark, [1931] 2 Ch. 1.
321. *Add. Annotation*:—**Refd.** *Bass, Ratcliff & Gretton, Ltd. v. Nicholson & Sons, Ltd., & Registrar of Trade Marks* (1931), 48 T. L. R. 161.
323. *Add. Annotation*:—**Refd.** *Re* Nicholson & Sons, Ltd., Application, *Re* Bass, Ratcliff & Gretton's Trade Mark, [1931] 2 Ch. 1.
- 326a. ———.]—*J. & J. Colman, Ltd.*, applied to register in Part A. of the register in class 42 a label in respect of semolina. The registrar refused the application, on the ground that semolina & mustard prepared for use as food were goods of the same description, & appcls. refused to agree to the association of the mark with earlier marks in respect of mustard. Appcls. appealed to the ct.:—**Held**: mustard falls under the description of a condiment & semolina under the description of a cereal & the goods are not of the same description, & the registrar should be directed to reconsider the question as to what association with the cereal group only should be required.—*Re* COLMAN J. J. LTD.'S APPLICATION (1929), 46 R. P. C. 126.
331. *Add. Annotations*:—*As to* (1) **Refd.** *Cham-pagne Heidsieck et Cie Monopole Societe Anonyme v. Buxton* (1929), 46 T. L. R. 36. *As to* (3) **Consd.** *Re* Columbia Graphophone Co. Trade Marks (Nos. 288,624, 324,715 & 407,537) (1932), 49 R. P. C. 483. **Refd.** *Re* Proctor & Gamble Co.'s Petition, Proctor & Gamble Co. v. Pugsley Dingman & Co. (1929), 46 R. P. C. 421; *Harris (C. & T.) (Calne), Ltd. v. Harris* (1933), 50 T. L. R. 123. **Generally, Refd.** *Lundberg & Sons, Ltd. v. Letrik, Ltd., Re* Lundberg & Sons, Ltd., Trade Marks Nos. 223,405 & 223,408 (1931), 49 R. P. C. 15.
337. *Add. Annotations*:—*As to* (1) **Consd.** *Re* Liverpool Electric Cable Co.'s Applications (1928), 46 R. P. C. 99. **Refd.** *Re* Magdalena Securities, Ltd., Application for Registration of a Trade Mark, *Re* Low Temperature Carbonisation, Ltd., Opposition by (1931), 48 R. P. C. 477; *Re* Coats, Ltd.'s Application, [1936] 2 All E. R. 975. **Generally, Refd.** *Re* Hammernill Paper Co.'s Opposition, *Re* Pirie (Alex.) & Sons, Ltd. Application (1933), 149 L. T. 199; *Re* Société des Usines Chimiques Rhône-Poulenc, [1937] 1 All E. R. 145.
338. *Add. Annotation*:—**Refd.** *Re* Société des Usines Chimiques Rhône-Poulenc, [1937] 1 All E. R. 145.
- 339a. ———.]—*Re* LIVERPOOL ELECTRIC CABLE CO. LTD.'S APPLICATIONS, No. 77a, ante.
- 353a. **Withdrawal of application.**]—On May 28, 1929, appls. had applied to register a trade mark. Their application was refused, & the registrar in his decision dated Feb. 28, 1930, referred to certain trade marks already registered & owned by resps. Leave was given by the ct. to appls. to serve notice of appeal to resps. Appls. did not inquire as to the objections proposed to be relied upon by resps. At the hearing resps. disclosed for the first time that they had a certain other registered trade mark. The learned judge intimated that, if resps. wished to put that matter in evidence, they would only be allowed to do so subject to terms as to costs. Resps. did not seek to rely on the matter. Thereupon the learned judge directed that the matter ought to be relied on by the registrar, who was also a party to the proceedings. Counsel for the registrar was given leave to rely upon the said registered trade mark as a ground of further objection. Appls. then sought leave to withdraw their application without payment of any costs at all:—**Held**: on appls. by their counsel withdrawing their application there be no order on the motion.—*Re* COLUMBIA PICTURES CORPN.'S APPLICATION (1932), 49 R. P. C. 491.
361. *Add. Annotation*:—**Refd.** *Re* Nicholson & Sons, Ltd., Application, *Re* Bass, Ratcliff & Gretton's Trade Mark, [1931] 2 Ch. 1.
385. *Add. Annotation*:—**Refd.** *Re* Nicholson & Sons, Ltd., Application, *Re* Bass, Ratcliff & Gretton's Trade Mark, [1931] 2 Ch. 1.
- 386a. ——— **Trade mark for beer—User on barrels.**]—The ct. refused an application by resps. that the use of appls.' triangle trade mark, of which the ct. had by a majority allowed the registration as a trade mark for beer should be restricted to its use on barrels.—*Re* NICHOLSON & SONS, LTD., APPLICATION (1931), 47 T. L. R. 276, C. A.
- 388a. **Consultation with Chamber of Commerce by Registrar.**]—*Re* COATS (J. & P.), LTD.'S APPLICATION, No. 113b, ante.
- 397a. **Order of Court of Appeal permitting registration—Whether stay of execution ordered pending appeal to House of Lords.**]—*Re* HAMMERMILL PAPER Co.'s OPPOSITION, *Re* PIRIE (ALEX.) & SONS, LTD. (1932), 146 L. T. 493; *sub nom.* *Re* ALEXANDER PIRIE & SONS, LTD., TRADE MARK (1932), 49 R. P. C. 195, C. A.

#### PART I. SECT. 3, SUB-SECT. 2.

**sk. Security for costs—Whether ordered.**]—**Held**: a petitioner in a proceeding before this ct. for an order entitling him to register a trade mark is a pltf., & when residing abroad may be compelled to give security for costs.—*ENERGINE REFINING & MANUFACTURING Co. v. IRVING*, [1927] Exch. C. R. 231.—**CAN.**

**so. Joinder of application to expunge.**]—*T.* presented a petition for leave to register a trade mark, & joined with it in his petition a demand to expunge certain trade marks alleged to stand in his way, objection being made that the two issues could not be so joined in such a petition:—**Held**: in-

asmuch as the present case is not clearly covered by the rules of the ct., the rules in England were not applicable to this case, & to force petitioner to take a second action to expunge would only be multiplying actions to no purpose, contrary to the spirit of modern law, the ct. availing itself of the power vested in it by rr. 299 & 300, gave leave to petitioner to present his petition as libelled. The rules not being quite definite upon the subject, the application was dismissed without costs.—*Re* TURNBULL (C.) Co., LTD.'S PETITION, [1932] Ex. C. R. 6.—**CAN.**

**sp. Time for application—Unfair Competition Act.**]—**Held**: since petitioner had not applied for registration

of its trademark within six months from the date on which Unfair Competition Act came into force, as required by sect. 4 of said Act, the action should be dismissed.—*CANADA CRAYON Co., LTD. v. PEACOCK PRODUCTS, LTD.*, Ex. C. R. 178.—**CAN.**

#### PART I. SECT. 3, SUB-SECT. 8.

**sp. From refusal to register—By petition.**]—An appeal from the refusal of the Comr. of Patents to register an industrial design under Trade Mark & Design Act must be by way of petition & not by notice of motion.—*ROSE v. COMR. OF PATENTS & CARSON Co., LTD.*, [1935] Ex. C. R. 188; [1936] 1 D. L. R. 558.—**CAN.**

414. *Add. Citations* :—[1929] 1 Ch. 92 ; 140 L. T. 9.

414a. *Prevention of deception—Not right to control conditions of resale.*—The statutory right now conferred on the registered proprietor of a trade mark by Trade Marks Act, 1905 (c. 15), s. 39, is the same as that which was conferred by Trade Marks Registration Act, 1875 (c. 91), s. 3, namely, the right to use the mark as a trade mark to indicate that the goods upon which it is placed are his goods & to exclude others from selling under the mark goods which are not the goods of the registered proprietor. This right does not carry with it any right to control, by the imposition of conditions or restrictions, the selling or dealing with the goods under his mark by other persons.

*Pltfs. produced champagne in France. They sold "Champagne Dry Monopole" in England & France, the wine sold in France being the sweeter of the two. The labels on the bottles containing the wine sold in France bore the word "Brut" & sufficiently distinguished in England, as the ct. found as a fact, that wine from the wine prepared for & sold in the English market. Pltfs., who were the registered owners of trade marks under which the wine prepared for English use was sold, took certain steps to prevent the Brut wine from being sold in England. Deft., without being a party to any breach of contract, imported pltfs.' Brut wine into England, & sold it there in bottles bearing the same labels which pltfs. themselves used on the bottles containing that type of wine. In an action for an injunction to restrain the infringement of pltfs.' trade marks by the sale of the Brut wine in England & from passing off that type of pltfs.' wine as & for pltfs.' wine prepared for the English market:—Held: (1) deft. by the sale of the Brut wine in England, although prohibited by pltfs., under the very marks which pltfs. themselves adopted to distinguish that type of their wine, were not guilty of passing off the Brut wine as & for pltfs.' type of wine prepared for the English market; (2) deft. was in no wise affected by the restrictions sought to be imposed by pltfs. against selling or dealing with the Brut wine in England. The action was, accordingly, dismissed.—CHAMPAGNE HEIDSIECK ET CIE MONOPOLE SOCIETE ANONYME v. BUXTON, [1930] 1 Ch. 330; 99 L. J. Ch. 149; 142 L. T. 324; 46 T. L. R. 36; 47 R. P. C. 28.*

417a. ———.—The County Chemical Co., Ltd. applied to register the word "Arlette" for perfumery goods in Class 18. Elizabeth Arden, Ltd. opposed that application on the ground that the word would cause confusion with the word "Ardenette," registered by them in Class 14 for metal goods, & with

certain other of their trade marks. The opponents had sold metal compacts marked with the word "Ardenette" & containing a cake of cosmetic & had also sold refills for such compacts, such refills being marked with the word "Ardenette." The registrar allowed registration of the word "Arlette" for goods in Class 48, but not including refills for compact cases & similar containers. The opponents appealed to the ct.:—*Held*: the limitation suggested by the registrar was satisfactory & ought not to be extended. The appeal was dismissed with costs.—*RE COUNTY CHEMICAL CO., LTD.'S APPLICATION TO REGISTER TRADE MARK* (1937), 51 R. P. C. 182.

429. *Add. Annotation* :—*Consd. Somerlite, Ltd. v. Brown & Re Somerlite, Ltd.'s Trade Mark* (No. 520,004) (1934), 51 R. P. C. 205.

429a. ———.—*Of invalid assignment.*—*Re JOHN SINCLAIR, LTD., TRADE MARK, No. 566a, post.*

429b. ———.—A trade mark had been used for wholesale purposes by a tobacco firm, who also owned retail shops & in them sold tobacco under the mark. By an assignment to the firm who had always supplied the particular goods purporting to assign the mark to that firm, together with the goodwill of the business in the goods for which it has been registered, it was in fact intended that only that part of the wholesale business connected with the mark should be transferred. The assignment was registered. Application was made by a subsequent purchaser of the goodwill of the business as it then existed together with all trade marks relating thereto to expunge the entry from the register, on the ground that the whole goodwill had not been transferred:—*Held*: the assignment was one not permissible by law & the entry of the assignment should be expunged, & the distinction sought to be made between wholesale & retail goodwill was not effective.—*Re DOBIE & SONS, LTD., TRADE MARK* (1935), 52 R. P. C. 333.

432a. ———.—*Leave to adduce further evidence—When granted.*—*Re CARL INGENOHL & WERNER DAVIDIS TRADE MARK, Re EL ORIENTE FABRIKA DE TABACOS, INCORPORATED, APPLICATION* (1931), 48 R. P. C. 399.

442a. *Whether application to go into witness or non-witness list—Motion to stand over to allow respondents to answer appellant's evidence.*—*Re CEMENT GUN CO., LTD., TRADE MARKS* (1933), 50 R. P. C. 195.

458. *Add. Annotation* :—*Generally. Refd. Re Nicholson & Sons, Ltd., Application. Re Bass, Ratcliff & Gretton's Trade Mark*, [1931] 2 Ch. 1.

465. *Add. Annotation* :—*Appld. Re Inescourt's Trade Mark* (1928), 46 R. P. C. 13.

**PART I. SECT. 4, SUB-SECT. 2.**

418 i. *Mark registered under specific mark—Use only in respect of one article in class—Whole class not protected.*—*Re PROCTOR & GAMBLE CO.'S PETITION, PROCTOR & GAMBLE CO. v. PUGSLEY DINGMAN & CO., LTD.* (1929), 46 R. P. C. 421.—*CAN.*

**PART I. SECT. 5, SUB-SECT. 1.—A.**

426 i. *Removal—Grounds for—Prior user by applicant.*—*GOLD MEDAL*

*CAMP FURNITURE MFG. CO. v. GOLD MEDAL MFG. CO.*, [1928] 2 D. L. R. 819.—*CAN.*

**PART I. SECT. 5, SUB-SECT. 1.—C. (a).**

b i. ———.—Proceedings were taken to expunge a trade mark consisting of the words "Birdseye Macaroni," registered in respect of macaroni. It appeared that the word "birdseye" had acquired a definite meaning in the

trade as denoting small annular particles of macaroni. *Held*: the trade mark used in respect of small annular particles of macaroni was descriptive of the character of the goods, & if used in respect of other macaroni would be likely to deceive. The trade mark was therefore ordered to be expunged from the register.—*Re HANCOCK'S GOLDEN CRUST PTY., LTD.'S TRADE MARK*, [1929] Argus L. R. 40; [1929] V. L. R. 17.—*AUS.*

493. *Add. Annotation*:—*Re*fd. *Re* Columbia Graphophone Co. Trade Marks (Nos. 288,624, 324,745 & 407,537) (1932), 49 R. P. C. 483.

496. *Add. Citation*:—29 R. P. C. 158.

499. *Add. Annotation*:—*Apprvd.* *Re* Columbia Graphophone Co. Trade Marks (Nos. 288,624, 324,745 & 407,537) (1932), 49 R. P. C. 621.

503. *Add. Annotation*:—*Re*fd. *Re* Nicholson & Sons, Ltd., Application, *Re* Bass, Ratcliff & Gretton's Trade Mark, [1931] 2 Ch. 1.

504. *Add. Annotation*:—*Re*fd. *Re* Columbia Graphophone Co. Trade Marks (Nos. 288,624, 324,745 & 407,537) (1932), 49 R. P. C. 483.

511a. — Use unknown at time of registration—Mark registered for "cinematograph films"—Whether "talkie films" included.]—Appets., Columbia Pictures Corp., an American Corp., manufacturing & dealing in cinematograph films, applied on Apr. 9, 1930, to rectify the Register by excluding "cinematograph films & goods of a like description to cinematograph films," from the specification of goods for which resps.' three trade marks, all of which contained the word "Columbia" prominently, were registered in class 8. An application by the Corp. for a mark which contained the figure of Liberty & the words "Columbia Pictures" had been refused registration under sect. 19. The following ground of objection was (*inter alia*) relied on by appets.: (1) that there had been no *bona fide* user by resps. of any of their said trade marks in respect of cinematograph films or goods of a like description during the five years immediately preceding the application to rectify. Resps. did not make nor had they ever made cinematograph films for commercial purposes. At the end of 1927 cinematograph films with sound accompaniment began to be shown commercially. Later the sound accompani-

ment was provided by a photographic record of the sound made at the side of the film used to project a picture on the screen. Resps. had no objection, if the words "Cinematograph films" were held only to describe films for the production of visual pictures, to the exclusion of this class of goods from their specification of goods in class 8. But, if the words were held to include films used to record & reproduce a sound accompaniment, then resps. objected to the exclusion of such goods. At the trial it was held that "cinematograph films" included films which record & reproduce acoustic matter whether alone or jointly with visual matter; that films for acoustic reproduction, sought to be excluded, were not known at the date of resps.' registration; that in these circumstances non-user during the five years immediately preceding the application to rectify could not be attributed to a definite intention not to use nor to a deliberate intention to abandon such trade marks in respect of such goods; that the question of exclusion was a matter of discretion & that special circumstances must be considered; & that the special circumstances explained the non-user. An Order was made to exclude from the specification of goods for which the resps.' three trade marks were registered in class 8, "cinematograph films for visual exhibition to the public without the addition as an integral part of such films, of any means for the reproduction of sound." Appets. appealed to the Ct. of Appeal:—*Held*: non-user of the trade mark in respect of talking films during the whole of the five years immediately preceding the application for rectification having been proved, resps. in order to escape from the provisions of sect. 37 of Trade Marks Act, 1905, must show that their failure to use their mark at some time during the five years was due to

b ii. —.—.]—Pltf. was the owner of a registered trade mark "Honey Dew" used in connection with the sale of a certain orange-flavoured drink. The shops where it was sold had a characteristic interior arrangement & equipment & the mark had become well known to distinguish the beverage sold by pltf. from that of others. Deft. subsequently registered the words "Flora Dew" as its trade-mark for a similar drink, displaying said trade mark in & about its shops much in the manner employed by pltf., & in a pronounced manner following the interior arrangement & equipment of pltf.'s shops:—*Held*: deft. could not be said to have adopted his mark with a view of giving a distinctive description to his beverage, but rather to take advantage of the business connection & efforts of a rival trader, & such trade mark being liable to mislead, should be expunged from the register. In considering whether one mark is an infringement of another resemblance between the two marks must be considered with reference to the ear as well as to the eye.—*HONEY DEW, LTD. v. RUPP*, [1929] 1 D. L. R. 449; Ex. C. R. 83.—CAN.

b iii. —.—.]—In 1923 resp. registered, & began using in Canada, a trade mark consisting of a triangle bearing the words "Deer Skin Finish" above the words "Dan Dobbs," & a triangle below bearing the words "Character Hats," for use in the sale of felt & straw hats. Some years before, petitioner, who was in similar business, adopted its president's name

"Dobbs" as a trade mark, to be used in the sale of its hats, & has since used the name to the present in Canada, & now by its petition asks that resp.'s trade mark be expunged:—*Held*: that the words "Dan Dobbs" & "Dobbs" are obviously words as applied to a particular kind of goods that can be confused & would tend to deceive the ordinary purchaser, & resp.'s trade mark should be expunged.—*DOBBS & CO. v. ROBERT GREAN & CO., LTD.*, [1929] Ex. C. R. 161; *varied*, [1930] S. C. R. 307; 3 D. L. R. 22.—CAN.

b iv. —.—.]—Petitioner, long prior to the registration of resps.' mark, adopted for use a specific trade mark consisting of the representation of a ram, across the centre of which appears the word "Ceetee," with under the word "Ceetee" the words "Pure Wool" & over the word "Ceetee" the words "Guaranteed Unshrinkable" & under the ram the phrase "Established 1859," as applied to woollen goods of all kinds. Resps. had registered a specific trade mark consisting of the representation of a sheep arranged in front of the representation of radiating rays of light arranged under a rectangular figure, together with the name "Dominion" cutting through the rectangular figure & the words "Woollens & Worsteds, Ltd." flanked on either side, as applied to woollens, worsteds, knitted goods & wearing apparel. The ct. found that petitioner adopted its trade mark some time previous to the adoption by resps. of their mark & the registra-

tion thereof, &:—*Held*: inasmuch as the most conspicuous part of the two trade marks & that which caught the eye was the ram which was similar in general shape & appearance, resps.' trade mark was calculated to deceive & was registered without sufficient cause & should be expunged.—*TURNBULL (C.) CO., LTD. v. DOMINION WOOLLENS & WORSTEDS, LTD.*, [1932] Ex. C. R. 218.—CAN.

b v. —.—.]—Petitioner has carried on business since May, 1917, as a manufacturer of, & dealer in, lubricating & other oils, greases & similar goods, including on a small scale gasoline, under the firm name of "Atlas Oil Co." Resp. co. in Jan., 1932, was granted a specific trade mark consisting of the word "Atlas" to serve in connection with the sale of gasoline. The ct. found not only that there was a likelihood of confusion but that there had been actual confusion in the minds of the public to the prejudice & detriment of petitioner:—*Held*: a trade mark may be acquired by user & that the prior user of an unregistered trade mark, the use of which by another is calculated to deceive, is entitled to protection, whether such use by another be made fraudulently & with deliberate intent to deceive or not. A specific trade mark applies to all goods of the same class or description.—*WARREN v. EXCEL PETROLEUM, LTD.*, [1933] Ex. C. R. 131.—CAN.

b vi. —.—.]—*SIEGEL KAHN CO. OF CANADA, LTD. v. PEGGY SAGE INC.*, [1935] Ex. C. R. 1; 2 D. L. R. 225.—CAN.



special circumstances in the trade; resps. had at all events about fifteen months during which they could have produced talking films, but they refrained for reasons connected with their own business, & their non-user was not due to special circumstances in the trade. The appeal was allowed. An order was made to exclude from the specification of goods for which resps.' three trade marks were registered in class 8 "goods of the following description *videlicet*: cinematograph films being transparencies adapted for the purpose of producing the illusion of moving pictures with or without a sound track incorporated thereon."—*Re COLUMBIA GRAPHOPHONE CO., LTD. TRADE MARKS* (Nos. 288,624, 324,745 & 407,537) (1932), 49 R. P. C. 621, C. A.

*Annotation*:—*Re*fd. Newton Chambers & Co. v. Neptune Waterproof Paper Co. (1935), 52 R. P. C. 399.

**515a.** —[J. Lesquendieu carried on in Paris a business called Parfumerie Lesquendieu for manufacturing perfumery goods, & used all the six trade marks in question. In 1925 he promoted a French co., Parfumerie J. Lesquendieu Société Anonyme, to acquire this business. He purported to reserve for himself the right to exploit the marks in foreign countries. In 1926 an English co. was formed, called J. Lesquendieu, Ltd., which had the exclusive right to sell the products of the French co. in England, Scotland, Ireland & Wales. In 1931 & 1932 J. Lesquendieu registered the same six trade marks in England; in Aug. 1933, the Parfumerie Lesquendieu Société Anonyme moved to expunge the marks from the register. The appcts. contended that the marks were known in this country as being applied to their goods; that resp. had no *bonâ fide* intention to use the marks, & had not in fact used them. Resp. alleged that appcts. had not been aggrieved by the registrations; & that he had in fact manufactured goods bearing the marks:—*Held*: resp. when he registered the marks was under contractual arrangements with appcts., under which he undertook not to take any interest directly or indirectly for his own account, or for account of a third party, in any perfumery business for a period of twenty-five years from Mar. 1, 1929 (with a saving as to the interest in the English co.), & he had at the times when he registered the marks no *bonâ fide* intention to use the marks; the marks had become distinctive of goods manufactured by appcts. & any user of them for goods not so manufactured would be calculated to deceive; appcts. were parties aggrieved & resp. had no *bonâ fide* claim to be the owner of the marks; & the registration must be expunged from the register. Resp. was ordered to pay the costs of the motion, including the requisite fee for obtaining rectification.—*Re LESQUENDIEU TRADE MARKS* (1934), 51 R. P. C. 273.

**516a.** Trade mark of gas company—Application to limit as to area.—[The South Metropolitan Gas Co. were the registered proprietors of a trade mark consisting of the word "Metro," originally registered in 1910, in respect of "appliances or apparatus to be used in connection with the manufacture, testing, regulating, measuring & consumption of gas, & appliances or apparatus to be used in

connection with the treatment of any products obtained from the manufacture of gas, all the said appliances or apparatus being included in Class 8." On Apr. 1, 1933, Metropolitan Gas Meters, Ltd., gave notice of motion for rectification of the register by removal of the mark or limitation of the territory for which the mark was registered, on the grounds that at the date of registration resps. did not use or intend to use the mark except in the area to which by statute they were entitled to supply gas, & alternatively that the application for registration was *ultra vires* the powers of resps. & that it was *ultra vires* the powers of resps. to be proprietors of the mark. At the hearing appcts. contended that on a proper construction of the Acts governing resps. they had no power to supply meters or other apparatus outside a limited area, that there was an irrebuttable presumption that they would not exceed their statutory powers, that the ct. ought accordingly to assume that they had no *bonâ fide* intention to use, & had not in fact used the mark outside that area, & that the registration ought therefore to be limited, either under the provisions of sect. 35 or sect. 37 of the Trade Marks Acts, 1905–1919, to the area to which by statute resps. were entitled to supply gas. Resps. denied that their statutory power to sell meters was limited as to area, & further contended that, even if it were so limited, this afforded no ground for limitation of the registration:—*Held*: (1) resps. had by statute a general power to deal in meters & other appliances, there was no evidence that they had not exercised that power outside the area to which they were entitled to supply gas, & accordingly there was no ground upon which the registration could be limited to a particular area; (2) on the supposition that resps.' power to deal in meters was, upon the true construction of the Acts, limited to a definite area, sect. 37 of the Trade Marks Acts was limited to the use of a trade mark on goods & had nothing to do with area or territory, & the section had no application; it would not have been right for the registrar to have refused registration of the mark merely because the use or intended use of the mark was within a limited area; at the date when the registration was made there was no power to impose a limitation as to area, the original registration was in any case protected by the provisions of sect. 41, & it would not be right now to limit the registration under sect. 35 merely because the ct. now had a power in certain cases to make conditions as to area which it had not got at the time when the mark was registered. The motion was dismissed with costs.—*Re SOUTH METROPOLITAN GAS CO. TRADE MARK* (No. 321,951) (1933), 50 R. P. C. 321.

**539a.** Costs of affidavits—Discretion of taxing master.—[Appcts., Columbia Pictures Corp., applied by motion to rectify the register of trade marks & in support of their application they filed six affidavits. Resps. to that motion, the Columbia Graphophone Co., Ltd., filed in answer one hundred & seventy-four affidavits & alleged that it was essential to their case to have a large body of trade evidence & they challenged appcts. to produce a like volume of evidence. Appcts.

thereupon filed two hundred & eighty-one affidavits in reply. The motion was allowed with costs, but a direction was given to the taxing master to have special regard to the nature of the evidence filed when he taxed appcts.' costs. The taxing master allowed the appcts. their costs in respect of two hundred affidavits. Appcts. alleged that he had acted arbitrarily in that the affidavits were all of a similar nature & directed to similar matters & that there was no principle on which he could decide to allow the costs in respect of two hundred of them & to disallow the costs of the remaining eighty-one:—*Held*: the matter was solely in the taxing master's discretion; in the absence of any mistake in principle the ct. should not interfere. The summons was dismissed with costs.—*Re COLUMBIA PICTURES CORPN., APPLICATION* (1933), 50 R. P. C. 377.

558. *Add. Citation*:—140 L. T. 19.

566. *Add. Annotation*:—*Consd. Re John Sinclair, Ltd.'s Trade Mark 437,870* (1932), 146 L. T. 417.

566a. —.—(1) When a mark has been registered in respect of a class of goods, an assignment of the mark is invalid, unless there is assigned with it the goodwill of the business connected with the whole class, even though the mark has only been used in connection with one kind of goods in the class.

(2) When an assignment of a registered trade mark is held to be invalid in a case where the original proprietor of the mark is not before the ct., it is the entry on the register in respect of the assignment only which should be expunged & not the whole entry of the mark.—*Re JOHN SINCLAIR, LTD.'s TRADE MARK*, [1932] 1 Ch. 598; 101 L. J. Ch. 239; 146 L. T. 417; 49 R. P. C. 123, C. A.

*Annotations*:—*As to* (1) *Folld. Re Dobie & Sons, Ltd. Trade Mark* (1935), 52 R. P. C. 333. *As to* (2) *Folld. Maclean's, Ltd. v. Lightbown & Sons, Ltd., Re Trade Mark "Mac"* No. 158,654 (1937), 54 R. P. C. 230.

#### PART I. SECT. 6, SUB-SECT. 1.—A.

559 iii. —.—The assignment of a trade mark to be valid must be made in conjunction with the assignment of the business with which it is connected.—*MOYSE v. HOLLAND*, [1933] Ex. C. 11, 217.—*CAN.*

*sd. Breach of warranty—What amounts to.*—*HONEY DEW, LTD. v. RYAN*, [1934] 4 D. L. R. 301.—*CAN.*

#### PART I. SECT. 6, SUB-SECT. 1.—C.

*sm. Assignment in gross.*—One H., doing business under the trade name of the Carp Flour Mills, registered the trade mark "Mello-Creme" in 1925, for use in the milling & sale of a breakfast food, & used the same in his business. In 1927, H., by deed, assigned to pltf. the said trade mark with the goodwill of H., relating to the sale of cereal foods under the said mark. Notwithstanding this assignment, H. continued to carry on his business as before, using the trade mark along with his trade name on the cartons of the product milled & sold by him; & the goodwill aforesaid was never, in fact, transferred. Pltf. did not manufacture but merely sold the product of H., marked as aforesaid, with nothing on the product associating it with them. Pltf. later registered the same trade mark to be used in the sale of all food products, including cattle, hog & hen foods, thereby attempting to extend the scope of the first trade mark. The present action is to restrain defts. from using said mark in the sale of bread:—*Held*: an assignment in

gross of the right to a name is invalid, & as the goodwill of H. was never in fact transferred to pltf., & as the trade mark "Mello-Creme" was assigned by itself, notwithstanding what was alleged in the deed of transfer nothing passed to pltf. by the said transfer, & pltf. had no *locus standi* to take the present action.—*MELLO-CREME PRODUCTS v. EWAN'S BREAD, LTD.*, [1930] Ex. C. R. 124; 4 D. L. R. 877.—*CAN.*

#### PART I. SECT. 6, SUB-SECT. 3.

*sp. Allocation of areas—Action for infringement.*—L. carried on, from 1914, in partnership with various persons, the manufacture & distribution in various Australian States of a furniture & stove polish which was put up in tins of a particular size & description, of which the word "Ezywark" was a distinguishing feature. In 1919 by agreement for dissolution of partnership L. obtained the exclusive right to manufacture & sell the polish in New South Wales, other than the Broken Hill District, & in other areas, while his former partners retained similarly exclusive rights in other States. W. who was carrying on business in Sydney in 1930 obtained consignments of the polish from areas outside pltf.'s control. In a suit by L. to restrain W. from passing off the polish so obtained by him as & for the goods of L., the ct. found as a fact that the word "Ezywark" & the get up of the polish had become associated in the New South Wales market, other than the Broken Hill District, solely with goods of L.'s manufacture, & granted the

583. *Add. Annotation*:—*As to* (3) *Consd. Re Société des Usines Chimiques Rhône-Poulenc*, [1937] 4 All E. R. 23.

594a. *User of mark must be as trade mark.*—“The exclusive right to the use of a trade mark” given to its registered proprietor by sect. 39 of Trade Marks Act, 1905, implies use of the mark for the purpose of indicating, in relation to the goods upon or in connection with which the use takes place, the origin of such goods in the user of the mark by virtue of the definition of trade mark contained in sect. 3. Therefore the right to such exclusive use does not prevent the use of the registered word or phrase if not used as a trade mark.

Appls. were the registered proprietors of a trade mark “Yeast-Vite,” & resp. put on his goods—

YEAST TABLETS  
a substitute for  
YEAST-VITE.

Resp.'s preparation differed substantially from appls.:—*Held*: as the user of resp. was not user as a trade mark, appls. were not entitled to an injunction restraining resp. from infringing appls.' trade mark “Yeast-Vite.”—*IRVING'S YEAST-VITE, LTD. v. HORSE-NAIL (Ex p.)* (1934), 103 L. J. Ch. 106; 150 L. T. 402; 50 T. L. R. 205; 78 Sol. Jo. 102; 51 R. P. C. 110, H. L.

601a. —.—Pltfs. were the registered proprietors of “Sun & Moon” trade marks Nos. 265,479 & 382,012, both registered in Class 38 for articles of clothing, & commenced an action *quia timet* for infringement & passing off. Defts. had used advertising matter bearing the word “Pernacola” with a sun next the letter “P” & with an embellished P & intended to continue such use. Defts. having pleaded prior to amendment the use of the trade mark No. 553,414

injunction asked for.—*LEACH v. WYATT* (1931), 48 N. S. W. N. 173.—*AUS.*

#### PART I. SECT. 7, SUB-SECT. 1.

*st. Resale of repaired articles.*—There is no prohibition on the resale of repaired articles to which the trade mark of the original maker is applied, & for which he has been paid.—*A C SPARK PLUG CO. v. CANADIAN SPARK PLUG SERVICE, SUPER REFINED MOTOR OILS & TIMOTHY WILLIAM BRAZIL*, [1935] Ex. C. R. 57; 3 D. L. R. 84.—*CAN.*

#### PART I. SECT. 7, SUB-SECT. 2.—A.

596 iii. —.—*Matters special to one trader.*—When the goods of one manufacturer are so packed or arranged externally as to resemble those of others engaged in the same trade, as in the case of starch & tea, the similarity common to all does not of itself expose the manufacturer to an action for infringement, but makes it incumbent upon him to take care that his distinguishing mark is really distinguishing. The imitation or similarity must be in respect to matters which are not common to the trade, but special to one trader. In this case the manufacturer's name, printed in large letters at the top being really distinguishing, the public could not be deceived & the action was dismissed.—*HENRY K. WAMPOLE & CO., LTD. v. HERVAY CHEMICAL CO. OF CANADA, LTD.*, [1929] Ex. C. R. 78; *affd.*, [1930] S. C. R. 336; 2 D. L. R. 975.—*CAN.*

registered in the name of Haslam, Ltd., plffs. applied to rectify the register by expunging that trade mark. A consent order was made that it should be expunged & the costs of obtaining the consent order should be paid by resps. Haslams, Ltd. & the costs of resps. Cotella, Ltd. reserved to the conclusion of the action:—*Held*: defts.' use of their mark did not infringe the idea symbolised by plffs.' marks nor did their advertisements constitute anything in the nature of passing off & the action was dismissed with costs. No order was made as to those costs of the motion which had been reserved.—*HOLLINS (WILLIAM) & Co., LTD. v. COTELLA, LTD., Re HASLAM, LTD.'S TRADE MARK*, No. 553,414 (1936), 51 R. P. C. 81.

610. *Add. Annotation*:—*Consd. Abbey Sports Co. v. Priest Bros.* (1936), 53 R. P. C. 300.

610a. —.—Plffs. in this action were the registered proprietors of a trade mark "Corinthian," in respect of a bagatelle game. A representative of plffs. ordered & obtained from defts. by means of a "trap" order a board of another make, under circumstances which plffs. alleged amounted to infringement of trade mark & passing off. The only connection of the board supplied with plffs.' mark was that the mark was mentioned in a letter giving a firm order after the board which was supplied had been inspected at an interview. Subsequently, after issue of the writ, plffs. did not proceed with the action, which was only revived after a considerable delay, because defts. inquired as to the position, & issued a summons:—*Held*: the supply of the board under these circumstances was not an infringement; as regards passing off, the trap order was of an objectionable nature, & a single trap order without evidence of system or of dishonesty was insufficient, & the action must be dismissed. As regards costs, defts. were entitled to know how stood the charge against them, & the action must be dismissed with costs.—*ABBEY SPORTS CO., LTD. v. PRIEST BROS.* (1936), 53 R. P. C. 300.

613a. *Selection—What amounts to.*—In 1910 R. commenced selling oil in & around Cambridge as "Somerlite" oil & registered in respect thereof a device mark incorporating the word Somerlite. In 1914 R. started a branch at Fordham & sold oil under the name Somerlite in an area round Fordham. In 1915, deft. took over the business at Fordham & sold oil supplied to her by R. under the name Somerlite, & used in connection therewith tins bearing the device mark & R.'s name. In 1925 deft. entered into a contract for the supply of oil from C. & Co., with R.'s knowledge, & as plffs. alleged, under his direction; & it was alleged that prior to the date of the contract, R. had tested the oil supplied by C. & Co. This oil deft., with R.'s knowledge, continued to sell as Somerlite. In 1931 R. registered Somerlite as a word mark & assigned the two marks to plffs. In 1932 plffs. commenced an action for infringement of the two marks & for passing off, alleging

that deft. had infringed by selling oil not supplied by plffs. as Somerlite. Deft. admitted the sale, but denied that she had infringed or passed off, & moved for rectification of the register by expunging the name mark, on the ground that it was not adapted to distinguish the goods of plffs. & was calculated to deceive by reason of the continuous user of the mark on oil by deft. on her own account over an extensive territory for many years. She further alleged that plffs. & their predecessor had known for many years of her use of the mark & were debarred from relief by laches or acquiescence. Plffs. alleged that the oil supplied by C. & Co. was R.'s oil by virtue of his selection within Trade Marks Acts, 1905–1919, s. 3:—*Held*: there had been no selection of deft.'s oil by R. within sect. 3 of the Trade Marks Acts; when rectification is sought in respect of a mark which is *per se* registrable under sect. 9 (1) to (4), the circumstances under which such mark was used prior to registration must be considered; the word mark was not distinctive of R. at the date of registration & was calculated to deceive & must be expunged. The appeal was dismissed with costs.—*SOMERLITE, LTD. v. BROWN & Re SOMERLITE, LTD.'S TRADE MARK* (No. 520,004) (1934), 51 R. P. C. 205, C. A.

613b. *Sale of reconditioned goods.*—Defts. had reconditioned vacuum cleaners of plff.'s manufacture & had included in the reconditioned article certain parts not of plffs.' manufacture:—*Held*: plffs. were entitled to an interlocutory injunction on the ground that this was an infringement of their trade mark.—*HOOVER, LTD. v. AIR-WAY, LTD.*, [1936] 1 All E. R. 466; 53 R. P. C. 399.

616. *Add. Annotation*:—*Refd. Bale & Church, Ltd. v. Sutton, Parsons & Sutton & Astrah Products* (1934), 51 R. P. C. 129.

624a. *What must be considered—Circumstances of use prior to registration.*—*SOMERLITE, LTD. v. BROWN & Re SOMERLITE, LTD.'S TRADE MARK* (No. 520,001), No. 613a, *ante*.

629a. —.—Plffs., who were proprietors of a trade mark, consisting of the word "Nildé," registered in class 48 in respect of face powders & similar toilet articles, brought an action for infringement of the mark & for passing off against defts., who carried on business as ladies' hair-dressers under the name "Ernaldé, Ltd.," at premises which were nearly opposite to those of plffs. Plffs. alleged (*inter alia*) that defts.' shop front was identical with that of plffs., save in colour & the substitution of the name "Ernaldé" for "Nildé":—*Held*: the name "Ernaldé" was not adopted with the intention of deceiving, & did not in fact deceive, the public, & there had been no infringement of the trade mark.—*SOCIÉTÉ LA PARFUMERIE NILDÉ v. ERNALDÉ, LTD. & FRYER* (1929), 46 R. P. C. 453.

629b. —.—*E. P. MOHAMED NOORDIN v. S. E. S. ABDUL KAREEM & Co.* (1931), 48 R. P. C. 491, P. C.

#### PART I. SECT. 7, SUB-SECT. 2.—B.

614 xlii. —.—*Malumiar & Co. v. Finlay & Co.* (1929), 1 L. R. 7 Ran. 169.—IND.

#### PART I. SECT. 7, SUB-SECT. 2.—D. (a).

so. "*Peggy Sage*"—"Peggy Royal."—*Held*: the trade marks in question were so similar as to be likely to

cause confusion.—*PEGGY SAGE INC. & NORTHAM-WARREN, LTD., No. 15240 v. SIEGEL KAHN Co. OF CANADA, LTD.*, [1936] S. C. R. 539; 4 D. L. R. 151.—CAN.

655. *Add. Annotation*:—*Refd. Re Inescourt's Trade Mark* (1928), 46 R. P. C. 13.

655a. "*Minimax*."—Defts. in this case used pl'tfs.' trade mark "*Minimax*" in connection with the sale of refills of de'ts.' make for pl'tfs.' fire extinguishers, & pl'tfs. commenced an action to restrain infringement of the trade mark & passing-off:—*Held*: de't. had infringed the trade mark & had passed off his goods for those of pl'tfs.—*MINIMAX, LTD. v. MOFFAT (TRADING AS L. & G. FIRE APPLIANCE CO.)* (1935), 52 R. P. C. 340.

676a. "*Marie Elizabeth*"—"Maria Lisette."—Pl'tfs., a Portuguese firm, who had carried on business by themselves & their predecessors since 1892, were importers (*inter alia*) of tinned sardines into the United Kingdom. They were the registered proprietors of trade mark No. 201,985 registered in Class 42, consisting of the words "*Marie Elizabeth*" & a pictorial design, & of Trade Mark No. 421,307 also registered in Class 42 consisting of the words "*Marie Elizabeth*" alone. Defts. sold a consignment of tinned sardines obtained from America & bearing the words "*Maria Lisette*," the whole of which had been sold prior to the action, & had also issued a circular offering "*Marie Lisette*" tins of sardines:—*Held*: the mark "*Marie Elizabeth*" & its abbreviation "*Maries*" indicated pl'tfs.' goods, & the use of the mark "*Maria Lisette*" or "*Marie Lisette*" was an infringement of the trade marks & was calculated to pass off; & although de'ts. no longer had any goods marked in this way in their possession, pl'tfs. were nevertheless entitled to an injunction. The usual other relief was granted.—*FALHO v. SIMOND & CO.* (1937), 51 R. P. C. 193.

684. *Add. Citation*:—on appeal (1929), 46 R. P. C. 406, C. A.

*Add. Annotations*:—*Consd. Irving's Yeast-Vite, Ltd. v. Horsenail* (1933), 50 R. P. C. 139. *Refd. Irving's Yeast-Vite, Ltd. v. Horsenail* (1933), 103 L. J. Ch. 106.

696a. *Striking out statement of claim*—*Res judicata*.—*JAEGER CO., LTD. v. JAEGER* (1929), 46 R. P. C. 336, C. A.

696b. *Stay of proceedings*—*Pending determination of application for registration*.—*JAMES (J. U.) & SONS, LTD. v. WAFER RAZOR CO., LTD.* (1932), 49 R. P. C. 597, C. A.

713. *Add. Annotation*:—*Refd. Canadian Shredded Wheat Co. v. Kellogg Co. of Canada, Ltd.*, [1938] 1 All E. R. 618.

739a. —.—.]—In an action to restrain infringement of registered trade mark pl'tfs. by their statement of claim pleaded their registration but did not plead user of the mark prior to the date of registration. Defts. pleaded user by them of the same mark prior to the date of the registration of pl'tfs.' mark, but did not

plead that they had used the mark prior to the user (if any) of pl'tfs. At the trial, pl'tfs. tendered evidence of user by them of their trade mark prior to the date of the registration pleaded. Defts. contended that such evidence was inadmissible in that user had not been pleaded by pl'tfs. They further contended that in setting up a defence under sect. 41 of the Trade Marks Acts where user prior to registration had been pleaded by pl'tfs. it was sufficient for de'ts. to plead user by them prior to the date of pl'tfs.' registration, & unnecessary & superfluous to plead user prior to the date of pl'tfs.' user when no such user by pl'tfs. was alleged in the statement of claim, & that, if pl'tfs. wished to rely upon such user, it must be pleaded by way of reply:—*Held*: the statement of claim was correct in that it was not necessary for a pl'tf. who relied upon a registered trade mark to plead user either before or after the date of registration, & accordingly the evidence of user prior to registration was admissible; in order to set up a defence under sect. 41 of the Trade Marks Acts, de't. must plead user by him at a date anterior to the user or registration of pl'tfs., & it was not sufficient to plead user prior to registration *simpliciter*. An injunction to restrain de'ts. from infringing the registered trade mark was granted.—*SMITH, BARTLET & CO. v. BRITISH PURE OIL GREASE & CARBIDE CO., LTD.* (1933), 51 R. P. C. 157.

740a. *Mark not calculated to deceive*—*Trade Marks Act, 1919 (c. 79), s. 4*.—Pl'tfs., who were the registered owners of the word "*Kleenoff*" in Part B. of the register, brought an action against de'ts. in respect of their use of the word "*Kleanup*." Both words were used in respect of cleaners for cooking stoves, but the submission that they were too descriptive to be distinctive was rejected. The judge held that de'ts. had failed to establish the special defence (not calculated to deceive) under sect. 4 of the 1919 Act, & that they had infringed. An injunction was granted against infringement but not against passing off, the issues being similar, pl'tfs. were given their whole costs. In the absence of a motion to expunge the trade mark, & in view of the peculiar nature of a Part B. mark, a certificate of validity was refused. Defts. appealed to the Ct. of Appeal:—*Held*: the mere absence of evidence of actual deception did not enable de'ts. to rely on the special defence in sect. 4, for the ct. could consider probabilities, for example, in telephoned or written orders, & that de't. had not established any special defence under the proviso in sect. 4, & that a difference of get-up did not assist de'ts. on the question of infringement, & that de'ts. had infringed.

*Per ROMER, L.J.*: the words "upon or in connection with the goods" should be

#### PART I. SECT. 7, SUB-SECT. 2. — D. (b).

*eg. Arrow.*]—Pl'tf. was the registered proprietor of a trade mark in respect of chewing gum consisting of an arrow. De't. manufactured & sold chewing gum in small cellophane packets, each packet, though bearing de'ts.' trade mark, having an arrow marked on two sides. De't. adduced evidence to show that the arrows had been placed on the cellophane for the purposes of

an automatic wrapping machine which wrapped the chewing gum in the small cellophane packets:—*Held*: de't. had infringed pl'tf.'s trade mark, & an injunction should be granted.—*WRIGLEY'S (AUSTRALASIA), LTD. v. LIFE SAVERS AUSTRALASIA, LTD.* (1937), 37 S. R. N. S. W. 9; 54 N. S. W. W. N. 19.—*AUS.*

#### PART I. SECT. 7, SUB-SECT. 2.—E. *eg. Directions on medicine.*]—Where

two traders are selling the same medicine, & the one prints on his bottle directions for its use; assuming such directions to be correct, it is no infringement of such label to copy or repeat such directions; otherwise his liberty as a manufacturer would be unduly interfered with.—*HENRY K. WAMPOLE & CO., LTD. v. HERVAY CHEMICAL CO. OF CANADA, LTD.*, [1929] Ex. C. R. 78.—*CAN.*

implied in sect. 4. Mis-spelling, when imitated, is relevant in deciding infringement.

*Per* MAUGHAM, L.J.: the words "the user of which pltf. complains" in sect. 4 extend to a consideration of the probable consequences arising from the use of a mark colourably resembling the registered mark. The test of infringement is the same where a trade mark has a descriptive element as where it has not, except so far as that element may be common to the trade. The appeal was dismissed with costs.—*BALE & CHURCH, LTD. v. SUTTON, PARSONS & SUTTON & ASTRAH PRODUCTS* (1934), 51 R. P. C. 129, C. A.

*Annotations*:—*Consd. Re William Bailey (Birmingham), Ltd.'s Application to Register a Trade Mark, Re Gilbert Co.'s Opposition* (1935), 52 R. P. C. 136. *Refd. Hollins (William) & Co. v. Cotella, Ltd.* (1936), 54 R. P. C. 81; *Ravenhead Brick Co. v. Ruabon Brick & Terra Cotta Co.* (1937), 51 R. P. C. 341.

**740b. Use as description.—Use calculated to deceive.**—Pltfs. were the registered owners of a trade mark "Izal" No. 171,812 registered in 1893 in Class 3 in respect of chemical substances prepared for use in medicine & pharmacy, & they also claimed user of the mark Izal on their disinfectant fluids & on their toilet rolls which were medicated with Izal. Defts. sold toilet rolls in wrappers with the words "Medicated with Izal" on them, the words "medicated with" being in small letters compared with those of the word "Izal." Pltfs. commenced an action against defts. to restrain infringement of trade mark & passing off. Defts. claimed the right to use the words "Izal" & "medicated with" in a diamond shape as being a *bonâ fide* description of their goods which they had in fact medicated with Izal disinfectant fluid:—*Held*: defts.' use of the mark Izal on their toilet roll wrappers was an infringement of pltfs.' trade mark "Izal," defts.' wrapper not constituting a fair description of the character or quality of the goods within sect. 41; also, there was evidence sufficient to support an action to restrain passing off of defts.' toilet rolls as & for pltfs. toilet rolls, but an injunction to restrain infringement of the trade mark afforded ample protection to pltfs. Judgment was given for pltfs. with costs & an injunction to restrain infringement was granted; also, an unlimited registration for a particular class of goods conferred a right to that trade mark for all the goods in that class whenever they may be included. *Seem*: costs of & occasioned by amendment do not include costs thrown away by amendment.—*NEWTON CHAMBERS & CO., LTD. v. NEPTUNE WATERPROOF PAPER CO., LTD.* (1935), 52 R. P. C. 399.

**747. Add. Annotation**:—*As to* (2) *Refd. Coles (J. H.) Proprietary, Ltd. v. Need*, [1934] A. C. 82.

**763. Add. Annotation**:—*Distd. British Blue Spot Co., Ltd. v. Keene* (1931), 48 R. P. C. 375.

**778. Add. Annotation**:—*As to* (1) *Refd. Re Nicholson & Sons, Ltd., Application, Re Bass, Ratcliff & Gretton's Trade Mark*, [1931] 2 Ch. 1.

**818a. — Possibility of confusion.**—*EDISON ACCUMULATORS, LTD. v. EDISON STORAGE BATTERIES, LTD.* (1929), 46 R. P. C. 432.

**825. Add. Annotation**:—*Consd. Draper v. Hubert H. P. Trist & Tristbestos Brake Linings, Ltd.* (1935), 53 R. P. C. 66.

**834a. —**—Pltfs., who were the registered proprietors of a trade mark consisting of the word "Rus," registered in class 16 in respect of porcelain & earthenware, brought an action against defts. for infringement of the mark & passing-off by the use in respect of bricks of the word "Sanrus." Pltfs. alleged that they & their predecessors had used the mark "Rus" upon & in connection with goods, including bricks & tiles, since the year 1913, & complained of an offer for sale by defts. of "Sanrus" facing bricks. Prior to the issue of the writ, defts. had applied to register the mark "Sanrus," & had by letter undertaken not further to use the word until the application for registration had been finally adjudicated upon, & defts. alleged that they had never used the word "Sanrus" as a trade mark & had no intention of so using it unless they obtained registration of the word as a trade mark. At the trial, defts. contended that their mark was not an infringement of "Rus" & that there was no evidence of passing-off, & they contended that the undertaking given before action brought, which they repeated, deprived pltfs. in any event of the right to an injunction:—*Held*: a deft. has no right to divert pltf. from the ct. which he has chosen, & is entitled to choose, for the vindication of his rights, & to cause him to contest in proceedings before the Patent Office the right of deft. to have his mark registered; the word "Sanrus" was an infringement of the trade mark "Rus," & pltfs. were entitled to an injunction restraining infringement; the evidence was too slender for the granting of an injunction to restrain passing-off, but defts. had invaded the legal rights of pltfs. by the infringement of their mark, & an inquiry as to damages was ordered. Defts. were ordered to pay pltfs.' costs of the action.—*RAVENHEAD BRICK CO., LTD. v. RUABON BRICK & TERRA COTTA CO., LTD.* (1937), 51 R. P. C. 341.

**836. Add. Annotation**:—*Consd. Johnson & Son (Loughborough), Ltd. v. Puffer (W.) & Co.* (1930), 47 R. P. C. 95.

#### PART I. SECT. 8.

*sk. Second-hand dealer possessing boom-chains with registered mark.*—To

sustain a conviction of a second-hand dealer for possessing boom-chains having a trade mark duly registered or other mark the words or other mark

must be construed *eiusdem generis*.—*R. v. KLEIN*, [1936] 1 D. L. R. 189; 64 Can. C. C. 341; 50 B. C. R. 90.—**CAN.**

## Part III.—False Marks and False Trade Descriptions.

**859. Add. Annotation:—Refd. *Re Concord Canning Co.'s Trade Mark* (1932), 49 R. P. C. 323.**

**860. Power of magistrate to fix standard.]**—Upon a prosecution for selling a soap described as "Lysol Soap" but which contained only a minute quantity of lysol, defts. were discharged, the magistrate being of the opinion that he had no power in a prosecution under Merchandise Marks Acts, 1887, to fix a standard:—*Held*: the magistrate had power to fix a standard upon the evidence & was bound to do so.—*STOTT v. GREEN, STOTT v. HENSTAW*, [1936] 2 All E. R. 354; 80 Sol. Jo. 426, D. C.

**871a. Omission to indicate country of origin.]**—By the Merchandise Marks (Imported Goods) No. 4 Order, 1929, art. 1: "Subject as hereinafter provided, it shall not be lawful . . . to sell or expose for sale in the United Kingdom any imported raw tomatoes unless they bear an indication of origin." Art. 2: "The indication of origin shall be marked indelibly & in a conspicuous manner as follows . . . (b) on exposure for sale by retail, by means of a show-ticket clearly visible to intending purchasers, bearing the indication of origin in letters not less than half an inch in height." Art. 4: "Nothing in this order shall apply to sales of raw tomatoes in

quantities of 14 lb. or less." Art. 4 of the above order applies only to actual sales, & not to exposure for sale. Where, therefore, a quantity under 14 lb. of Jersey tomatoes was exposed for sale by retail without any show-ticket bearing an indication of origin:—*Held*: an offence against arts. 1 & 2 of the Order had been committed.—*DAVENPORT v. JOHNSTON* (1937), 157 L. T. 21; 101 J. P. 259; 53 T. L. R. 671; 81 Sol. Jo. 500; 35 L. G. R. 278; 30 Cox, C. C. 591, D. C.

**871b. Necessity for conspicuous marking.]**—Resps. were charged with unlawfully selling to a purchaser imported meat not bearing the prescribed marks of origin. The purchaser in question had asked for, & paid the price of, English steak, but in fact had received Argentine steak. This was cut off from a large rump of beef, upon which indications of Argentine origin were branded underneath, where they were not visible to the purchaser:—*Held*: Merchandise Marks (Imported Goods) No. 7 Order, 1934, art. 2, requires the indication of origin to be branded durably & conspicuously, & as the indication was not conspicuously given, the offence here charged was proved.—*ROBINSON v. HAMMETT (R. C.), LTD.*, [1938] 1 All E. R. 191; 82 Sol. Jo. 53; 36 L. G. R. 149.

**877. Add. Annotation:—Refd. *Allen v. Whitehead* (1929), 45 T. L. R. 655.**

## Part IV.—Designs.

**880a. Article—Whether building or structure included.]**—*Re COLLIER & CO., LTD.'S APPLICATION FOR REGISTRATION OF DESIGNS* (1937), 54 R. P. C. 253.

**881. Add. Annotation:—Consd. *Kestos, Ltd. v. Kempat, Ltd.* (1935), 53 R. P. C. 139.**

**882a. —.]**—Resps. were the owners of a design registered in Class 1 in respect of its application to a metal frame for spectacles. They also owned a patent for a similar spectacle frame. They had threatened customers of appcts. with proceedings under the patent. Appcts. had taken steps to revoke the patent, whereupon resps. had surrendered it. Appcts. moved to rectify the register by expunging the design. They alleged that the design was not novel by reason of certain prior publications & prior users & that it was not proper subject-matter for registration as a design since it was a method of construction or a mere mechanical device:—*Held*: prior publication & prior user had not been

proved, but the differences between the prior art & the registered design were so slight that the design was not a new or original design within sect. 49 of Patents & Designs Acts, 1907–1932. An order was made that the register be rectified by expunging the design. If a design *quod* design appeals to the eye & is new or original, it is registrable, even if it also involves a method of construction properly entitled to protection as a patent.—*Re WINGATE'S REGISTERED DESIGN No. 768,611* (1934), 52 R. P. C. 126.

**883. Add. Annotation:—Consd. *Kestos, Ltd. v. Kempat, Ltd.* (1935), 53 R. P. C. 139.**

**886. Add. Annotation:—Refd. *Kestos, Ltd. v. Kempat, Ltd.* (1935), 53 R. P. C. 139.**

**892. Add. Annotation:—Refd. *Kestos, Ltd. v. Kempat, Ltd.* (1935), 53 R. P. C. 139.**

**893a. Wolf-cub head for Boy Scouts' pole.]**—As a model of a wolf-cub's head produced from a mould in papier mache & intended to be

### PART III. SECT. 2.

**o i. —** *Production two short-weight loaves from over forty thousand—No intent.*—*R. v. CANADIAN BAKERIES, LTD.* (1930), 54 Can. C. C. 369.—**CAN.**

### PART III. SECT. 3.

**d i. —** *Gasoline stored in tank—Pump bearing trade mark attached to tank.*—*R. v. CADIEUX & SEGUIN* (1930), 54 Can. C. C. 361.—**CAN.**

### PART IV. SECT. 1.

**sd. Industrial design.]**—*Held*: as Trade Mark & Design Act does not define what industrial designs are within the meaning of the Act, the word "design" therein must be taken to be used in its ordinary, & not in an artificial, sense.—*CLATWORTHY & SON, LTD. v. DALE DISPLAY FIXTURES, LTD.*, [1928] Exch. C. R. 159; *affd.*, [1929] 3 D. L. R. 11; S. C. R. 429.—**CAN.**

### PART IV. SECT. 2, SUB-SECT. 1.—B.

**sg. Not article of manufacture.]**—An industrial design, under the Act, was intended only to imply some ornamental design applied to an article of manufacture, that is to say, it is the design, drawing, or engraving, applied to the ornamentation of an article of manufacture which is protected, & not the article of manufacture itself.—*CANADIAN WM. A. ROGERS, LTD. v. INTERNATIONAL SILVER CO. OF CANADA, LTD.*, [1932] Ex. C. R. 63.—**CAN.**

displayed as their totem on the tops of poles by the Boy Scouts Assocn. consisted of "features of shape, configuration, pattern, or ornament applied to any article" of manufacture or artificial substance by an industrial process, it was therefore a design within the definition of Patents & Designs Act, 1907 (c. 29), s. 93, as amended by Patents & Designs Act, 1919 (c. 80), s. 19, & consequently was capable of being registered under the 1907 Act.—*PYTRAM, LTD. v. MODELS (LEICESTER), LTD.*, [1930] 1 Ch. 639; 99 L. J. Ch. 381; 143 L. T. 227; 46 T. L. R. 290.

896. *Add. Annotation*:—Generally, *Refd.* *Kestos, Ltd. v. Kempat, Ltd.* (1935), 53 R. P. C. 139.

908a. —.]—Registration was obtained in class 12 for a design in respect of its application to a slipper-bag. Pltf. commenced an action to restrain defts. from selling or offering for sale an alleged infringement of the design. Defts. denied that they had infringed the design, & alleged that the design was neither new or original. Defts. had not moved to rectify the register, but at the trial, at the request of both parties, validity was treated as put in issue:—*Held*: pltf.'s design possessed novelty & originality & it was valid; the alleged infringement was not identical with the registered design, but that it differed materially therefrom & that it was not an infringement. The action was dismissed with costs.—*WELLS v. ATTACHE CASE MANUFACTURING CO., LTD.* (1931), 49 R. P. C. 113.

908b. —.]—Pltfs. were the registered proprietors of a design registered in Class I. in respect of spring mattresses, & brought an action against defts. for infringement of the said design:—*Held*: there was no infringement, the mattresses being compared by the eye, & the design was invalid for lack of novelty or originality, & also because it was a mere mechanical device. The action was dismissed with costs & the design was ordered to be expunged from the register with costs against pltfs. including the cost of giving notice to the Comptroller & the costs of the Comptroller. The costs of certain citations objected to by pltfs. were left to the taxing master.—*MARSDEN MANUFACTURING CO., LTD. v. VONO CO., Re MARSDEN MANUFACTURING CO., LTD., REGISTERED DESIGN NO. 744,647* (1934), 51 R. P. C. 282.

908c. —.]—Registration in Class II. was obtained for a design in respect of its application to a dress. The alleged infringing article was made exactly in accordance with the registered design. Defts. alleged (*inter alia*) that pltf.'s design was not new or original & that the alleged infringing dress had in fact been made & exposed to the public before the date of application for registration of pltf.'s design. Defts. moved to rectify the register by expunging the design. Pltf. had seen the design in the showrooms of a certain firm in Berlin & had ordered dresses according to the design which were delivered to her in this country, whereupon she applied

to register the design; there was no evidence that the design was new when pltf. first saw it or as to the date of its origin. The evidence for defts. was that samples of the design were shown to certain people in this country before the date of application for the design & that a dress incorporating it was in the premises of defts. open to travellers & others before that date:—*Held*: the design was not new or original; there having been a prior user of it in public & the action was dismissed with costs, & it was ordered that the register be rectified by expunging the design, & pltf. was ordered to pay the costs including costs to be incurred by defts. in obtaining rectification of the register.—*BARKER v. ASSOCIATED MANUFACTURERS (GOWNS & MANTLES), LTD.* (1933), 50 R. P. C. 332.

908d. —.]—Appets., L. M. Co., Ltd., were the registered proprietors of a design registered in Class 13 in respect of its application to piece goods. Resps., C. V. M. Co., Ltd., were the registered proprietors of another design registered in the same class in respect of similar goods. Appets. moved to rectify the register by expunging the registration of resps.' design on the ground that it was not a new or original design not previously published in the United Kingdom by reason of the prior publication of their own design. Resps. thereupon moved to rectify the register by expunging the registration of appets.' design on the ground that it was not a new or original design not previously published in the United Kingdom by reason of a design admittedly published in 1921:—*Held*: appets.' design was not sufficiently different from the 1921 design, & that it was not a new or original design; also resps.' design was neither new nor original. An order was made that the register be rectified by expunging the registrations of both appets.' & resps.' designs therefrom. No order was made as to costs.—*Re CALDER VALE MANUFACTURING CO., LTD., REGISTERED DESIGN, Re LAPPET MANUFACTURING CO., LTD.* (1934), 52 R. P. C. 117.

908e. —.]—An application was made for the registration in Class 5 of a design to be applied to a calendar pad. A statement of novelty in the following terms was indorsed on the papers of the application: "The novelty consists in the combination of the arrangement, pattern, colouring, & shape of the calendar pad as shown in the representations." Objection was raised to the application on two grounds, viz.: (1) that what was submitted for registration was not a design within the meaning of the Acts so far as concerned arrangement & colouring, & (2) did not possess any substantial novelty of shape or pattern. The application was refused by the Assistant Comptroller after a hearing. Appets. appealed to the Patents Appeal Tribunal:—*Held*: that colour must be disregarded; "arrangement" was not proper subject-matter of a design; the letters indicating the names of the months & days,

#### PART IV. SECT. 2, SUB-SECT. 1.—C. (b).

904 III. —.]—Originality involves the exercise of intellectual activity so as to suggest for the first time the

application of a particular pattern, shape, or ornament to some special subject-matter to which it had not been applied before. To constitute an original design there must be some substantial difference between it &

what had theretofore existed as applied to articles of an analogous character.—*CLATWORTHY & SON, LTD. v. DALE DISPLAY FIXTURES, LTD.*, [1929] 3 D. L. R. 11; S. C. R. 429; *affd.*, [1928] Ex. C. R. 159.—CAN.



or the numerals, could not be considered as constituting an integral part of the pattern claimed; the only relevant features of the pattern were its framework, its division into blank spaces, & the sub-division of these spaces into compartments for the reception of the numerals; there was no novelty in shape, configuration, pattern or ornament applied to any of the pages of the pad; & in refusing registration, the Assistant Comptroller had exercised on a proper basis the discretion given by sect. 49 of the Acts. The appeal was dismissed.—*Re ASSOCIATED COLOUR PRINTERS, LTD.'S APPLICATION* (No. 814,271) (1937), 51 R. P. C. 203.

908f. —.—.]—The registered proprietors of two designs commenced an action for infringement of them. The designs were registered in Class 15 in respect of their application to cotton piece goods. The designs consisted of stripes in various colours. Defts. denied the validity of the designs, alleging anticipation & want of novelty & that in the cotton trade & in particular in the export trade to West Africa such arrangements of stripes as in the registered designs had been commonplace for many years prior to the registration of the designs. They contended that a pattern of plain stripes in any arrangement could not be proper subject-matter for registration—the word “plain” referring to the weave. Defts.’ designs complained of were identical with the registered designs:—*Held*: the registered designs were designs for stripes or checks applied to textile goods, either woven or printed, & the question of plain stripes was outside the question in the action; the defences of anticipation & want of novelty failed & plffs. were entitled to judgment. Injunctions against infringement & an inquiry as to damages were ordered. A certificate that the validity of the designs came in question was refused.—*GOTTSCHALCK & Co. v. VELEZ & Co.* (1936), 53 R. P. C. 403.

910. *Add. Annotation*:—*Folld.* *Dean's Rag Book Co. v. Pomerantz & Sons* (1930), 47 R. P. C. 485.

910a. —.—.]—Plffs. were the owners of a registered design for a toy animal of three dimensions known as Mickey Mouse. Defts. had since put on the market another similar toy animal known as Squeaky which plffs. alleged was an infringement. A motion by defts. to rectify the register by the removal of plffs.’ design was ordered to come on with the hearing of the action. Defts. pleaded in the action that there was prior publication & filed particulars of objections in which publication of pictures & representations in two dimensions of the same or a similar toy was alleged & they submitted that the design was not in the circumstances a proper subject for registration:—*Held*: (1) the registration was valid, & (2) there had been no infringement.—*DEAN'S RAG BOOK CO., LTD. v. POMERANTZ & SONS & Re DEAN'S RAG BOOK CO., LTD. & THE PATENTS & DESIGNS ACTS, 1907 TO 1928* (1930), 47 R. P. C. 485.

914. *Add. Annotations*:—*Refd.* *Saunders v. Automotive Spares, Ltd., Re Registered Design No. 747,128 of Albert Saunders* (1932), 49 R. P. C. 450; *Kestos, Ltd. v. Kempat, Ltd.* (1935), 53 R. P. C. 139.

916. *Add. Annotation*:—*Generally, Refd.* *Gottschalck & Co. v. Velez & Co.* (1936), 53 R. P. C. 403.

923. *Add. Annotations*:—*Refd.* *Gottschalck & Co. v. Velez & Co.* (1936), 53 R. P. C. 403; *Kangol (Manufacturing), Ltd. v. Centrokomise (London), Ltd.*, [1937] 3 All E. R. 179.

929. *Add. Annotations*:—*Consd.* *Kestos, Ltd. v. Kempat, Ltd.* (1935), 53 R. P. C. 139. *Refd.* *Saunders v. Automotive Spares, Ltd., Re Registered Design No. 747,128 of Albert Saunders* (1932), 49 R. P. C. 450.

932. *Add. Annotation*:—*Refd.* *Re Wingate's Registered Design No. 768,611* (1934), 52 R. P. C. 126.

933. *Add. Annotations*:—*Consd.* *Dean's Rag Book Co. v. Pomerantz & Sons* (1930), 47 R. P. C. 485; *Saunders v. Automotive Spares, Ltd., Re Registered Design No. 747,128 of Albert Saunders* (1932), 49 R. P. C. 450. *Refd.* *Wells v. Attache Case Manufacturing Co.* (1931), 49 R. P. C. 113; *Marsden Manufacturing Co. v. Vono Co., Re Marsden Manufacturing Co., Registered Design No. 744,647* (1931), 51 R. P. C. 282; *Kestos, Ltd. v. Kempat, Ltd.* (1935), 53 R. P. C. 139.

934a. —.—.]—S. who was the registered proprietor of a design registered in class 1 in respect of its application to a metal cap for a ball-bearing housing, brought an action for infringement of his copyright in the design against A. S., Ltd. Defts. denied infringement, & alleged that the registration of the design was invalid by reason of want of novelty & subject-matter. Upon the action coming on for trial, an adjournment was ordered to enable defts. to give notice of motion to rectify the register by expunging the design:—*Held*: at the resumed hearing of the action & motion, the design was not new or original, in that it was only distinguishable, if at all, from well-known prior constructions, by modifications of a kind which must be regarded as ordinary trade variants. It was ordered that the register be rectified by expunging the design, & plff. was ordered to pay the costs.—*SAUNDERS v. AUTOMOTIVE SPARES, LTD., Re REGISTERED DESIGN NO. 747,128 OF ALBERT SAUNDERS* (1932), 49 R. P. C. 450.

938. *Add. Annotation*:—*Consd.* *Mallards, Ltd. v. Gibbons Bros. "Rotary" Co., Re Registered Design No. 742,187 of Mallards Ltd.* (1931), 48 R. P. C. 315.

939a. —.—.]—Before the registration of a design a stranger to the registered owner had shown it to a business acquaintance for the purpose of securing orders for articles embodying the design. It was not proved that the registered owner was party to the disclosure:—*Held*: such disclosure was not a confidential but a commercial disclosure & was a prior publication of the design. The registration was therefore invalid & ought to be expunged.—*KANGOL (MANUFACTURING), LTD. v. CENTROKOMISE (LONDON), LTD.*, [1937] 3 All E. R. 179; 54 R. P. C. 211.

940a. —.—.]—*Incorporation in private trade library.*—The registered proprietors of a design registered in class 13 in respect of printed or woven designs on textile piece goods, other than checks or stripes, brought an action for infringement of the design against defts., who moved for rectification of the

register by expunging the design. The design was a woven textile design depending upon the weave for its appearance; other very similar, if not identical, designs were cited as anticipations; as to one alleged anticipation, publication in a private trade library of designs was alleged. The design was prepared by the alleged author submitting a sketch & some instructions to a weaver:—*Held*: incorporation in such a library, to which numerous persons had access, constituted sufficient publication; also, that preparation of the design in the manner above mentioned did not constitute authorship; & the design was invalid for want of novelty, & also because plffs. were wrongly registered as proprietors. It was ordered that the register be rectified by expunging the design accordingly.—*PRESSLER (A.) & CO., LTD. v. GARTSIDE & CO. (OF MANCHESTER), LTD., & WIDD & OWEN, LTD., Re PRESSLER & CO., LTD. REGISTERED DESIGN No. 272,672 (1933), 50 R. P. C. 210.*

943a. ——— **Appeal from refusal to register—Order for registration subject to statement of novelty.**—*Re GUTTA PERCHA & RUBBER (LONDON), LTD. (No. 789,574) APPLICATION (1935), 52 R. P. C. 383.*

943b. **Representations must be satisfactory to Comptroller.**—*Re ENGLISH ELECTRIC CO., LTD. (No. 777,313) APPLICATION FOR REGISTRATION OF A DESIGN (1933), 50 R. P. C. 359.*

945. *Add. Annotation*:—*Generally, Refd. Kestos, Ltd. v. Kempat, Ltd. (1935), 53 R. P. C. 139.*

948. *Add. Annotation*:—*Consd. Gottschalek & Co. v. Velez & Co. (1936), 53 R. P. C. 403.*

948a. **Article manufactured in accordance with design.**—Plffs., who were the registered proprietors of a design registered in respect of its application to a bust bodice or bust support for women's wear, brought an action for infringement of their copyright in the design against deft. co. & K. its Managing Director. Defts. denied infringement & moved to rectify the register by expunging the design, alleging that the registration was invalid by reason of want of novelty or originality, on the ground that the design was a mode or principle of construction or a mere mechanical device, & on other grounds. Defts. issued a summons asking that the question of infringement by deft. co., should be tried before the question of the liability of K., & an order was made for the trial of such preliminary issue, together with the motion for rectification:—*Held*: on the trial of the preliminary issue & motion, the design was valid, but had not been infringed by deft. co. The motion was dismissed with costs, no order being made as to the costs of the trial of the preliminary question.

Defts. then moved for judgment under R. S. C., Ord. 40, r. 7, & the action was dismissed with costs, other than the costs of the trial of the preliminary question.—*KESTOS, LTD. v. KEMPAT, LTD. & VIVIAN FITCH KEMP, Re KESTOS, LTD. REGISTERED DESIGN (No. 725,716) (1935), 53 R. P. C. 139.*

949a. ——— **Director of company—Registration by company.**—Plffs., who were the registered proprietors of a design registered in 1928 in class 1 in respect of its application to fruit peelers, brought an action for infringement of their copyright in the design against defts. Defts. denied infringement & alleged that the author of the design was G., a director of the deft. co., & that the application for registration was made in fraud of defts., who first became aware of the existence of copyright on Apr. 12, 1929. Defts. further alleged want of novelty & subject-matter, & that plffs. had not complied with the provisions as to marking contained in sect. 54 (1) (b) of Patents & Designs Act, 1907 to 1928. Defts. moved to rectify the register by expunging the design:—*Held*: the author of the design was H., a director of the pltf. co., & that therefore the application was not made in fraud of defts., & the design had not been published in any of the alleged anticipations, none of the features of the design were solely dictated by the functions which the article was called upon to perform, & the design was valid & subsisting & had been infringed. Plffs. were granted an injunction & an order for delivery up, but inasmuch as they had failed to comply with the provisions as to marking contained in sect. 54 (1) (b) of Patents & Designs Acts, 1907 to 1928, & it was proved that defts. had no notice of the existence of copyright in the design prior to Apr. 12, 1929, an inquiry as to damages was ordered limited to infringements after that date. Defts. were ordered to pay the costs of the action, & the motion to rectify the register was dismissed with costs.—*MALLARDS, LTD. v. GIBBONS BROS. "ROTARY" CO., LTD., Re REGISTERED DESIGN No. 742,187 OF MALLARDS, LTD. (1931), 48 R. P. C. 315.*

953a. **Two persons producing similar designs—Authorship communicated to each other.**—If there are two persons each of whom has produced a similar design & each has communicated the fact of such authorship to the other, neither of them alone is the proprietor of a new or original design, & neither of them can validly register it.

On Dec. 6, 1933, resp. obtained registration of a design No. 788,451 in Class 3 in respect of a frame for a tennis or other racquet. On June 15, 1931, appct. moved to rectify the register of designs by striking out resp.'s name as the proprietor of the design & by substituting therefor the name of appct., or by expunging the design from the register. Appct. alleged either that resp. had obtained the registration in fraud of appct.'s rights or that the design was improperly registered since it was not a new or original design not previously published in the United Kingdom:—*Held*: appct. had failed to establish a charge of fraud, but the design had in fact been published prior to the date of application for registration & that the register must be rectified by expunging the registration. No order was made as to costs

**PART IV. SECT. 2, SUB-SECT. 2.**  
**sv. Discretion to register.**—*Held*: appct. for the registration of an industrial design has no absolute right to have the same registered. To allow

the registration is within the discretion of the departmental officer charged with duty of administering the Act, but no registration should be lightly made. The exercise of the discretion

to register must always contemplate the interests of the public which ought not to be unduly restricted in matters of trade.—*JONES v. TEICHMAN, [1930] Ex. C. R. 103; 3 D. L. R. 437.—CAN.*

except that each party was ordered to pay an equal share of the costs of the Comptroller-General who was a resp. to the motion.—*Re VREDENBURG'S REGISTERED DESIGN NO. 788,451, RE PATENTS & DESIGNS ACTS, 1907-1932 (1934)*, 52 R. P. C. 7.

- 958a.** Effect of failure to mark—On Inquiry as to damages in action for infringement. ]—**MALLARDS, LTD. v. GIBBONS BROS. "ROTARY" CO., LTD.,** *Re* REGISTERED DESIGN NO. 742,187 of MALLARDS, LTD., No. 949a, *ante*.
- 970.** *Add. Annotation:—As to* (2) **Refd. Saunders v. Automotive Spares, Ltd.,** *Re* Registered Design No. 747,128 of Albert Saunders (1932), 49 R. P. C. 450.
- 970a.** —. ]—Registration in class 3 was obtained for a design in respect of its application to a golf ball. The representation of the design on the register consisted of a freehand drawing comprising two views of the design from different aspects. Golf balls made & sold by pltf. co. were not in fact made in strict accordance with the design, although sold in wrappings marked with the registration number thereof. The managing director of deft. co. was in fact the author of pltf.'s registered design, which he had assigned to them while in their employ. The alleged infringing balls were substantially identical with the Maxfli balls made & sold by pltf.s. Defts. alleged (*inter alia*) that pltf.'s design was only new or original in certain features having regard to certain prior users & prior publications :—*Held:* obvious or fraudulent imitation of the design had not been estab-

lished. The action was dismissed with costs. A certificate that the particulars of objections, subject to an exception, were reasonable was granted & a certificate that the validity of the registered design had been put in issue was granted.—DUNLOP RUBBER Co., LTD. v. GOLF BALL DEVELOPMENTS, LTD. (1931), 75 Sol. Jo. 173; 48 R. P. C. 268.

976. *Add. Annotations*:—**Consd.** *Dean's Rag Book Co. v. Pomerantz & Sons* (1930), 47 R. P. C. 485; *Re Margolin's Registered Design*, [1936] 3 All E. R. 347.
978. *Add. Annotation*:—**Consd.** *Dean's Rag Book Co. v. Pomerantz & Sons* (1930), 47 R. P. C. 485.
996. *Add. Annotation*:—**Refd.** *Kestos, Ltd. v. Kempat, Ltd.* (1935), 53 R. P. C. 139.
997. *Add. Annotation*:—*As to* (1) **Refd.** *Gottschalk & Co. v. Velez & Co.* (1936), 53 R. P. C. 403.
- 1002a. *Cancellation*—**What must be proved.**]—In proceedings under sect. 58 (1) of the Acts the only question to be determined under (a) is whether there has been prior publication of the design or not, & the question whether the design is new or original does not arise.—*Re RADNALL'S REGISTERED DESIGN* (No. 778,735) (1934), 51 R. P. C. 164.
1005. *Add. Annotation*:—**Refd.** *Re Margolin's Registered Design*, [1936] 3 All E. R. 347.
- 1013a. —. ]—*Re GLEN (JOHN) & SONS, DESIGNS* Nos. 308,957, 309,240, 308,956, 308,952, 308,955, 308,954, 309,241 & 308,953 (1932), 50 R. P. C. 41.

## Part V.—Trade Names and Passing Off.

- 1018.** *Add. Annotation:—***Refd.** Illustrated Newspapers, Ltd. v. Publicity Services (London), Ltd., [1938] Ch. 414.
- 1019.** *Add. Annotations:—As to (1)* **Apld.** Stone J. B. & Co. v. Steelcase Manufacturing Co. (1929), 46 R. P. C. 192. *Generally, Refd.* Champagne Heidsieck et Cie Monopole Societe Anonyme v. Buxton (1929), 40 T. L. R. 36.

- 1026.** *Add. Citation* :—29 R. P. C. 379.  
*Add. Annotation* :—**Consd.** Jay's, Ltd. v. Jacobi (1933), 49 T. L. R. 239.
- 1031.** *Add. Annotation* :—**Consd.** Jay's, Ltd. v. Jacobi (1933), 49 T. L. R. 239.
- 1033a.** ———.]—Plf's., the corpn. of the Hall of Arts & Sciences, a body incorporated by Royal Charter, owned a hall, the Royal Albert Hall, commonly known as the Albert

**PART V. SECT. 1.**

**sw. Territorial extent of right—Effect of prior use locally—Line of motor omnibuses.**—The action was to restrain defendants from using a certain trade name in connection with motor passenger transportation business in Alberta. Plaintiff claiming, as first user in that territory, an exclusive right to the name in that business in that territory: **Held:** the judgment of the Appellate Division, which dismissed the action, should be affirmed, on the ground that, in view of the existing prior extensive use of the name by a certain co. & its affiliated corporations in the tourist transportation business in other territories, the use by plaintiff of that name in a like business was not proper, being a use that would mislead the tourist public, & therefore plaintiff had not shown a right to the use entitling it to claim the protection of a ct. of equity.—**BREWSTER TRANSPORT CO., LTD. v. ROCKY MOUNTAIN TOURS & TRANSPORT CO., LTD.** [1931] 5 C. R. 336: [1931] D. L. R. 713; *aff'd*, [1930] 1 W. W. R. 849; 3 D. L. R. 114; 24 Alta. L. R. 489. **CAN.**

trade name is not confined to any particular territory or country; & a person who invokes the equitable jurisdiction of the ct. to restrain the use of a trade name similar to that which he has adopted must come into ct. with clean hands. Pltff. opened a retail meat store in E. under the name "Sterling Meat Market" knowing that the name "Sterling Market" had been used for some time by stores in the same kind of business in V. About two months later deft. co., which had purchased said V. stores in good faith, opened meat stores in E., one of which was near pltff.'s, & conducted them under deft.'s corporate name, "Sterling Food Markets, Ltd."—*Held*: although the similarity of the names was such as to cause some confusion, for a time at least, in the public mind, pltff. had not made out a case entitling him to an injunction restraining deft. from carrying on its business under its own name in E.; & pltff. had not been guilty of such fraud in the appropriation of a trade name as would justify an injunction against him at

the suit of debt.—SHUTT v. STERLING  
FOOD MARKETS, LTD., [1933] 3  
W. W. R. 219.—CAN.

**PART V. SECT. 2. SUB-SECT. 1.**

22. *When right arises.*—The right of a person to a distinct name in respect of his business arises immediately on the user of that name.—**HORMUS ARDESHAR KANDAWALA v. ARDESHAR COWASHJI DUSTOOR** (1934), I. L. R. 61 Calc. 571.—**IND.**

**PART V. SECT. 2. SUB-SECT. 2.**

**§g. Effect of Unfair Competition Act.]**  
**Held:** (1) Unfair Competition Act, s. 8, does not restrict an individual or a group of individuals to his use, as a trade name, or their personal names or surnames alone, thereby debarring him or them from adding any word or words thereto indicating a body corporate or a partnership; (2) no man can be deprived of the right of using his name honestly in connection with his business; (3) any individual or group of individuals may use his or their names or surnames in

Hall, which they let for entertainments including orchestral performances. There was no orchestra employed by plffs. Defts., Albert Edward Hall, carried on a business under the name the "Albert Hall Orchestra," which name he had registered under the provisions of the Business Names Act, 1916 (c. 58). Plffs. alleged that the acts of deft. were calculated to induce the public to believe that his orchestra was connected with the Albert Hall & that thereby plffs.' reputation would be injured & they would suffer damage. Deft. denied the various allegations made by plffs. & alleged that he was known by the name Albert Hall & that he was entitled to use that name in connection with his business. Plffs. sought an injunction to restrain deft. from using for the purposes of his business the name of the "Albert Hall Orchestra" or any other similar name in such manner as to be calculated to lead the public to believe that deft.'s orchestra was in any way connected with the Albert Hall :—*Held* : plffs.' & deft.'s businesses were distinct & deft.'s business would not conflict with that of plffs. ; there was no evidence of actual or immediate future risk of damage to plffs.' reputation ; deft. had not acted fraudulently ; & in any event, in order to comply with the provisions of the Business Names Act, 1916 (c. 58), s. 18 (1) (a), deft. was bound to put his real name on literature relating to business carried on under his registered business name & on an undertaking being given by deft. to comply with the said provisions the action be dismissed with costs.—*HALLS OF ARTS AND SCIENCES CORPN. v. HALL* (1934), 50 T. L. R. 518 ; 51 R. P. C. 398.

1033b. —.] Plffs., who were bacon-curers carrying on business solely in English bacon, were proprietors of a registered trade mark consisting of the word "Harris," limited to bacon, hams, lard, & brawn, & each of their sides of bacon was stamped "Harris." Deft. Harris had a number of retail shops dealing (*inter alia*) in bacon, which was solely Danish bacon & was always described as "Harris's pressure-cured Danish bacon," the sides being stamped with the words "Harris" & "Danish." In an action for passing-off & for infringement of the registered trade mark the trial judge held that as there was no evidence of any confusion between plffs.' & deft.'s goods, & as deft. was using his own name *bona fide* & there was no real risk of confusion, & as deft. was therefore protected by Trade Marks Act, 1905 (c. 15), s. 44, both claims of plffs. failed. An appeal by plffs. was dismissed on the agreed terms of deft.'s giving an undertaking not to use the name "Harris" in connection with bacon sold by him.—*HARRIS (C. & T.) (CALNE), LTD. v. HARRIS* (1934), 50 T. L. R. 338 ; 51 R. P. C. 264, C. A.

1033c. **Name acquired by reputation.**—A person who has *bona fide*, & without any intention to deceive, adopted a name for business purposes & acquired it by reputation over a considerable period is entitled to trade under that name, & cannot be restrained from so

doing, even though the similarity of the name to that of another firm engaged in business in the same trade may occasionally lead to confusion.

Deft. J., who had adopted & been known for some years while managing a ladies' costumiers business in Brighton as "Miss Jay," commenced a partnership business in the same trade under the name "Jays" in Hove. Plffs., Jay's, Ltd., an old-established firm of costumiers in Regent Street, London, sought to restrain defts. from using the name "Jays," or any other name calculated to suggest that the business was that of plffs. or a branch thereof, or that the goods sold by defts. were supplied by plffs. :—*Held* : on the evidence there was no passing-off proved, as the first deft. had acquired the name "Jay" by reputation & was entitled to trade under it, the names were not the same, plffs. being a limited co. with an apostrophe before the letter "s" in their name, & the businesses being of a different class there was no risk of any confusion between them. The action, therefore, failed.—*JAY'S, LTD. v. JACOBI*, [1933] Ch. 411 ; 102 L. J. Ch. 130 ; 149 L. T. 90 ; 49 T. L. R. 239 ; 77 Sol. Jo. 176 ; 50 R. P. C. 132.

1034. *Add. Annotation* :—*Consd. Jay's, Ltd. v. Jacobi* (1933), 49 T. L. R. 239.

1041. *Add. Citation* :—*subsequent proceedings, sub nom. JAEGER CO., LTD. v. JAEGER* (1929), 46 R. P. C. 336, C. A.

1041a. —.]—An English co., the Sturtevant Engineering Co., Ltd. (herein referred to as plff. co.), had for a number of years carried on business in England as manufacturers of & dealers in general engineering machinery. An American co., the Sturtevant Mill Co., carried on a similar business in America & was the sole owner of certain patents which were protected in both America & England. The American co. desired to introduce their patented machinery into England, & for that purpose entered into an agreement with plff. co. whereby the latter was granted full licences to have the sole use of the American co.'s inventions in Europe. Under this agreement plff. co. for 22 years manufactured & dealt with machinery which would otherwise have been protected in favour of the American co. When the agreement was determined in 1933, the patents had expired & plff. co. continued to manufacture the machinery. Plff. co. had acquired a considerable goodwill in England, & in England the name of Sturtevant as used in the trade was always applied to plff. co. In 1935 a co. was incorporated in England with the name Sturtevant Mill Co. of U.S.A., Ltd., which had wide powers to deal in machinery of all kinds. The American co. held virtually all the shares in this new co. Plff. co. brought an action against this new co. asking for an injunction restraining the new co. from using its registered name or any other name in which the word Sturtevant formed part. It was found as a fact that the use of the word Sturtevant by deft. co. would lead to confusion which would result in damage to plff. co. Deft. co. contended (*inter alia*)

connection with his or their business, provided such business be commenced & carried on for his or their own direct

benefit, in good faith & without any intention to deceive. Given these three conditions, confusion is im-

material.—*J. V. BOUDRIAS FILS, LTD. v. BOUDRIAS FRERES, LTD.*, [1934] Ex. C. R. 88 ; 4 D. L. R. 328.—CAN.

(i) that in the circumstances of the case there was an equity which disentitled the English co. to the relief it was seeking, (ii) that as deft. co. was controlled by the American co. which had acquired a goodwill in America in the name of Sturtevant, pltf. co. was not entitled to protection, & (iii) that on the principle that any person is entitled to trade under his own name, deft. co., being controlled by the American co., was entitled to use the name Sturtevant:—*Held*: (1) as any benefit which pltf. co. had obtained from its connection with the American co. was the result of a voluntary agreement between the two cos., there was no equity which disentitled pltf. co. to relief; (2) the goodwill of the American co. was for the purposes of this action restricted to America & could not be treated as part of the goodwill of deft. co. & pltf. co. was entitled to protection for its goodwill; (3) the principle that any person may trade in his own real name did not, in the circumstances of this case, entitle deft. co. to use the name Sturtevant.—*STURTEVANT ENGINEERING CO., LTD. v. STURTEVANT MILL CO. OF U.S.A., LTD.* [1936] 3 All E. R. 137; 80 Sol. Jo. 953; 53 R. P. C. 430.

**1054a.** — — — — —.]—In a small case of default due to ignorance the judge granted relief without requiring service of notice on debtors, or advertisement in any newspaper.—*Re OXLEY* (1932), 77 Sol. Jo. 11.

**1055a.** — — — — — Registration as military officer—No claim to title.]—*Qu.*: whether registration as a military officer by a person who has no claim to that title is an offence under the Registration of Business Names Act, 1916 (c. 58).—*R. v. WRIGHT* (1931), 23 Cr. App. Rep. 128, C. C. A.

**1078.** *Add. Annotation*:—*Refd. Re Nicholson & Sons, Ltd.*, Application, *Re Bass, Ratcliff & Gretton's Trade Mark*, [1931] 2 Ch. 1.

**1090.** *Add. Annotations*:—*Consd. Edison Storage Battery Co. v. Britannia Batteries, Ltd.* (1931), 48 R. P. C. 350. *Refd. Mathieson v. Pitman (Sir Isaac) & Sons, Ltd.* (1930), 47 R. P. C. 541; *Clock, Ltd. v. Clock House Hotel, Ltd.* (1935), 52 R. P. C. 386; *Canadian Shredded Wheat Co. v. Kellogg Co. of Canada, Ltd.*, [1938] 1 All E. R. 618.

#### PART V. SECT. 2, SUB-SECT. 3.

**1046 I.** *What constitutes default—Inaccurate description of business.*—An Arakanese carried on a money-lending business in his own name until his death. His widow continued the business as sole proprietress, in the name of her husband, adding to that name the words " & Co." She lent moneys to resps. on a mtge., which was taken in her business name. She then registered the business under Burma Registration of Business Names Act, but erroneously entered herself as well as her children as partners. She then sued resps. in the name of the business, for the mtge. debt:—*Held*: sect. 3 (6) of the Act applied without qualification in this case, & that her particulars being inaccurate, there was no proper registration under the Act, & her suit failed under sect. 5 (1) of the Act.—*MAUNG THA NYO v. MA UN MA PRU* (1929), 1 L. K. 7 Ran. 296.—*IND.*

**1052 II.** — — — — —.]—*M'LACHLAN (J. J. & P.) Petitioners*, (1929) S. C. (Ct. of Sess.) 357.—*SCOT.*

**1052 III.** — — — — —.]—*SMITH v. FINCH*,

(1906), 12 B. C. R. 186; 3 W. L. R. 476.—*CAN.*

*sz. Separate business commenced after registration—No notification that registered business no longer sole business—Effect on right of action.*—A person who has registered himself under Registration of Business Names Ordinance, 1918, of Ceylon, as carrying on in a business name a specified business, & as having no other business, is not precluded by sect. 9 of the Ordinance from suing upon a contract made by him in respect of a different & entirely separate business which he has commenced in his own name after the registration, although he has not notified, as required by sect. 7, that there has been a change in the registered particulars in that the registered business is no longer his sole business.—*DAVID v. DE SILVA*, (1934) A. C. 106; 103 L. J. P. C. 44; 150 L. T. 223; 50 T. L. R. 185, P. C.—*CEYLON.*

**PART V. SECT. 4, SUB-SECT. 1.—A.**  
*sd. Use of family name—Secondary meaning acquired.*—A family name

**1091.** *Add. Annotation*:—*Refd. General Electric Co. v. Pryce's Stores, British Thomson-Houston Co. v. Pryce's Stores* (1933), 50 R. P. C. 232.

**1094a.** — — — — —.]—Applt. co. for over thirty years have manufactured & sold a product known as shredded wheat, &, until 1914, when the patent expired, were the sole vendors of the article in Canada. The apparatus for the manufacture of the product was also protected by patent, which expired in 1919, when applt.'s monopoly ceased. Applt. co. had registered in 1928 the words "shredded wheat" as their trade mark to be applied to the sale of biscuits & crackers, & in 1929 the same words were registered as their trade mark to be applied to the sale of cereal foods. Resp. co. in 1934 commenced to sell in Canada biscuits of shredded wheat made by substantially the same process. The biscuit was of the same shape as, but smaller than, that made by applt. co., & the carton in which the biscuits were contained was quite different from that used by applt. Applt. claimed an injunction to restrain resps. from infringing their registered trade mark "shredded wheat," &, alternatively, an injunction to restrain resps. from, by a use of the same words or any words only colourably differing therefrom, passing off their biscuits as applt. co.'s biscuits:—*Held*: (1) applt. were in no way using the words "shredded wheat" as indicative of the origin of the goods contained in their carton, but only as descriptive of those goods. The words, which were both the name of, & descriptive of, the invented product, had not acquired the secondary meaning of being distinctive of goods manufactured exclusively by applt. co., & this was clear from the use made of them by the co. in their cartons & advertisements. The requisite secondary meaning of exclusive distinctiveness had not been established. The registration of applt. co.'s trade mark "shredded wheat" was invalid, & the action for infringement failed; (2) once it was established, as here, that the words "shredded wheat" were both the name of a product & descriptive of it, an action for passing off through the use of those words must fail.—*CANADIAN SHREDDED*

attached to goods becomes so distinctive of the goods & of the manufacturer so as to acquire a secondary meaning when the goods come to be known in the market by the intimate attachment to the goods of the family name as the goods of a particular manufacturer.—*POLICANSKY BROS., LTD. v. POLICANSKY*, [1935] App. D. 89.—*S. AF.*

#### PART V. SECT. 4, SUB-SECT. 1.—C.

**1087 VIII.** — — — — —.]—*Held*: the evidence having established that "pyrex" had become by use the only common & convenient name for the substance to which it was applied, the word was descriptive of the character of articles made of that substance & was no longer distinctive of pltf.'s goods. Therefore the action failed, the first mark must be expunged from the register &, unless pltf. filed a disclaimer of any protection for the word "pyrex" the second mark also should be removed.—*JAMES A. JOBLING & Co., LTD. v. JAMES MCEWAN & Co. PRY., LTD.*, [1933] V. L. R. 168; *Argus* L. R. 183.—*AUS.*

WHEAT CO., LTD. v. KELLOGG CO. OF CANADA, LTD., [1938] 1 All E. R. 618; 55 R. P. C. 125, P. C.

1098. *Add. Annotations*:—**Consd.** Reddaway & Co. v. Hartley (1931), 47 T. L. R. 226. **Refd.** Mathieson v. Pitmas (Sir Isaac) & Sons, Ltd. (1930), 47 R. P. C. 541; Lyons & Co. v. Lyons (1931), 49 R. P. C. 188; *Re Hammermill Paper Co.'s Opposition*, *Re Pirie & Sons, Ltd.* (1932), 146 L. T. 493; Canadian Shredded Wheat Co. v. Kellogg Co. of Canada, Ltd., [1938] 1 All E. R. 618; Illustrated Newspapers, Ltd. v. Publicity Services (London), Ltd., [1938] Ch. 414.

1099a. —.]—Pltfs. had manufactured sold since 1926 fencing under the name "Chequerboard," & in 1930 they commenced an action against defts. alleging that they had passed off fencing not of their manufacture as their "Chequerboard" fencing. At the trial of the action two managers of magazines, the manager of an exhibition & an architect's assistant were called as witnesses to prove that the mark was distinctive of pltfs.' goods. Defts. had displayed on their premises, as a background of the display in their shop, panels of fencing which were not of pltfs.' manufacture, & pltfs. alleged that defts. had attempted to sell & in fact sold these panels in response to orders for "Chequerboard" fencing:—**Held**: the mark was *prima facie* descriptive, & the evidence adduced was not of members of the public but of people in a special position to know of the origin of the goods, & was not sufficient to prove that the mark was distinctive of pltfs.' goods; & in any event there was not sufficient evidence to establish any passing off by defts. The action was dismissed with costs.—**T. & C. ASSOCIATED INDUSTRIES, LTD. v. VICTORIA WAGON WORKS, LTD.** (1930), 48 R. P. C. 148.

1100a. "Lechat Camel Hair Belting"—For "Camel Hair Belting."—**F. R. & Co., Ltd.**, the proprietors of a trade mark, consisting of the words "Camel Hair" registered in July, 1908, in class 35 in respect of Belting, commenced an action to restrain deft. from passing off goods not pltfs.' manufacture as being pltfs.' goods. Pltfs. alleged that deft. had fraudulently passed off & was threatening & intending to pass off belts & belting not of pltfs.' manufacture or merchandise as & for pltfs.' belts or belting by using upon, or in connection therewith, the words "Camel" or "Camel Hair"; they claimed a further injunction to restrain deft. from advertising or offering for sale beltings under the description "Lechat's Camel Hair Belting" or under any other name in infringement of their trade name or trade mark in breach of an undertaking given by deft. in 1926. Dft. admitted that the designation "Camel Hair" used alone & without other distinguishing matter denoted both to the trade & to users of belting that such belts or belting were the product of pltfs. Dft. alleged that he had not used upon or in connection with belts or belting not being of pltfs.' manufacture or merchandise the words "Camel" or "Camel Hair" alone, but only with additional matter sufficient clearly to distinguish such belting from the belting of pltfs. Dft. admitted giving the

undertaking on which the claim to the second injunction was founded, but denied that he was bound thereby, alleging that he was induced to give the same by certain untrue representations of pltfs. Dft. sold their goods as Lechat's Camel Hair Belting, the goods being manufactured by a Belgian firm of manufacturers of beltings known as "Etablissements J. Laroche Lechat Société Anonyme":—**Held**: pltfs. had failed to prove their allegation that deft. had passed off or attempted to pass off belts or belting not made by the pltfs. as & for pltfs.' goods; deft. had so used prefix "Lechat" & "J. Lechat's" as sufficiently to distinguish their belting from that of pltfs.; & pltfs. had not made out their alleged breach of the undertaking of Dec. 3, 1926. The action was dismissed with costs.—**REDDAWAY (F.) & CO., LTD. v. HARTLEY** (1930), 48 R. P. C. 10, C. A.

1100b. —.]—Pltfs., who were held in *Reddaway v. Banham*, No. 1098, to be entitled to an injunction restraining the use of the words "camel hair" in connection with belting, not manufactured by pltfs., without clearly distinguishing such belting from pltfs.' belting, brought a passing-off action against deft. for selling camel hair belting, made by a Belgian co., under the description "Lechat's camel hair belting":—**Held**: on the evidence, the prefix "Lechat" was insufficient to distinguish the belting sold by the deft. from pltfs.' belting, & pltfs. were entitled to an injunction to prevent passing-off.—**REDDAWAY (F.) & CO., LTD. v. HARTLEY** (1931), 47 T. L. R. 226; 48 R. P. C. 283, C. A.

1101. *Add. Annotation*:—**Is to (3) Refd.** Coles (J. H.) Proprietary, Ltd. v. Need, [1934] A. C. 82, P. C.

1103. *Add. Annotation*:—**Refd.** Stone J. B. & Co. v. Steelace Manufacturing Co. (1929), 46 R. P. C. 406.

1105. *Add. Annotations*:—**Refd.** *Re* Liverpool Electric Cable Co.'s Applications (1928), 46 R. P. C. 99; *Re* Coats, Ltd.'s Application, [1936] 2 All E. R. 975.

1106. *Add. Annotation*:—**Refd.** Stone J. B. & Co. v. Steelace Manufacturing Co. (1929), 46 R. P. C. 406.

1109a. —.]—In 1926, letters patent No. 273,392 were granted to pltfs. in respect of "improvements in & relating to adjustable electric condensers & other adjustable electric apparatus." Dft. sold condenser dials, not manufactured or licensed by pltfs., bearing upon them the words "manufactured under Ormond Patent No. 273,392." Pltfs. commenced an action to restrain deft. from using these words upon any goods not manufactured or licensed by pltfs. & from passing off as goods manufactured or licensed by pltfs. any goods not so manufactured or licensed by pltfs. A claim to restrain deft. from infringing the patent was abandoned before the trial:—**Held**: assuming that the words complained of meant that deft. had been licensed by pltfs. & were untrue, there was no evidence that pltfs. were either making or selling goods of the kind in question, & pltfs. had not proved any damage & had not established any cause of action.

The action was dismissed with costs.—*ORMOND ENGINEERING CO., LTD. v. KNOFF* (1932), 49 R. P. C. 634.

**1120a.** — **Misleading trade circular by successor to business.**—Pltfs. & defts. carried on business of a similar description. On the expiration of the term in a lease of certain works to pltfs., where they had carried on their business, defts., fifteen months afterwards, had procured a lease of the same works, with the exception of certain mines of clay. Defts. issued a circular & card tending to lead the public to suppose that defts. had succeeded to the business of pltfs., & were working the same material as pltfs. had formerly used:—*Held*: although the words of the circular & card might be literally true, yet, if they tended to mislead the public, the ct. would restrain them from further circulating or issuing such or any similar circular or card.—*HARPER v. PEARSON* (1860), 3 L. T. 547.

**1120b.** — **Representation as to edition prescribed for examination.**—Pltfs. were the publishers of, & owners of the copyright in, a book entitled "Hazlitt's Selected Essays," edited by George Sampson, which included thirteen essays & notes on the essays. In 1927 & 1928 the book was prescribed by the London University as one on which candidates for matriculation would be examined. One of defts. published & sold & the other defts. sold a book entitled "Hazlitt's Selected Essays, Edition Hollingworth," containing twenty of such essays, including the thirteen selected by Sampson. Pltfs. commenced an action against defts., alleging that defts. had passed off the Hollingworth edition as & for the Sampson edition of pltfs. by representing that the Hollingworth edition was that prescribed for the London Matriculation Examination, & also alleging infringement of copyright in their selection of essays:—*Held*: if the fact were that a purchaser had been misled into thinking that defts.' book had been prescribed for a certain examination, that was simply a representation as to quality & would give pltfs. no right of action, there had been no passing off of defts.' book as pltfs.' & there was no infringement of copyright.—*CAMBRIDGE UNIVERSITY PRESS v. UNIVERSITY TUTORIAL PRESS* (1928), 45 R. P. C. 335.

**1120c.** — **Goods sent in reply to order by plaintiff.**—Pltfs., who had for some time used the device of a swan with the word "white" on labels on porcelain enamelled baths of their manufacture, applied on two occasions to register the device, first in class 1

in relation to enamel, secondly in class 13 in relation to baths & the like. Both applications were refused. On Jan. 25, 1926, the B. W. Assocn. registered under sect. 62, in respect of a standardised brass tap approved by the Ministry of Health, the device of a swan with the letter B. W. A. The attention of pltfs. was drawn to the sale by defts. of one of these standardised taps in Feb.; & later, upon ordering "½-in. brass globe cocks Ministry of Health pattern swan," pltfs. received a like tap from defts. Pltfs. thereupon brought this action to restrain defts. from passing off, & at the same time moved to rectify the register by removing therefrom the B. W. Assocn.'s standardisation mark:—*Held*: pltf.'s device of a swan was known to the trade as indicating, not taps, but porcelain baths of pltfs.' manufacture or merchandise enamelled with a particular characteristic enamel; the presence on the register of resps.' standardisation make, & the use of it upon brass taps made to the Ministry of Health specification was not calculated to deceive the trade into believing that such taps were merchandise or manufacture of pltfs.; the sending of one of such taps by defts. in response to pltfs.' order was a reasonable response to that order: pltfs. had proved neither that the device of a swan indicated their taps to the trade, nor passing off by defts.; & both the action & the motion failed.—*WILSON'S & MATHIESON'S, LTD. v. MEYNELL & SONS, LTD., Re WILSON'S & MATHIESON'S LTD.'S APPLICATION* (1929), 46 R. P. C. 80.

**1135.** *Add. Annotation*:—*Refd.* Illustrated Newspapers, Ltd. v. Publicity Services (London), Ltd., [1938] Ch. 414.

**1137.** *Add. Annotation*:—*Refd.* Crystalate Gramophone Record Manufacturing Co. v. British Crystalite Co. (1934), 51 R. P. C. 315.

**1137a.** — — — — —. —Pltf. co. was incorporated in Great Britain in 1909, for the purpose of carrying on a business, by means of manifold shops, for the sale of a large variety of articles at a price not over 6d. each. Deft. co. was incorporated on June 17, 1929, & was the buying agency of another co. which was incorporated in Australia under the name of Woolworths, Ltd., for the sale of a large variety of articles of a similar class to pltf. co.'s goods, but mainly at a higher price. There was no one with the name of Woolworth connected with deft. co. or its parent co. in Australia. The memorandum of deft. co. was framed so as to include the power to carry on retail business. Pltf. co. brought an action against deft. co. claiming

**PART V. SECT. 4, SUB-SECT. 1.—E.**

**1110 i.** *Whether use by other person restrained—Expiration of patent.*—Where a person has invented & patented a new substance & given to it a new name, & during the continuance of the patent has alone made & sold the substance by that name, there being in question no registered trade mark of the same name during the life of the patent, he would not be entitled to the exclusive use of that name after the expiration of the patent, the name being descriptive of the substance itself. In such cases it is a question of fact whether or not the name is descriptive of the article itself.—*LYSOL (CANADA), LTD. v. SOLI-*

*DOL CHEMICAL, LTD.,* [1933] Ex. C. R. 21.—*CAN.*

**PART V. SECT. 5, SUB-SECT. 1.**

*sp. Law in India.*—In India there is no statute which gives to owners of trade marks a statutory title like that obtained in England. In such cases the rules of English common law as to "passing off" actions are generally followed, & the rights & liabilities of the parties are decided according to the principles of the English common law.—*ANGLO-INDIAN DRUG & CHEMICAL CO. v. SWASTIK OIL MILLS, LTD.* (1934), 1 L. R. 59 Bom. 373.—*IND.*

*sr. —.*—There being no statutory

law in India on the subject of trade marks, cases have to be decided according to rules of justice, equity, & good conscience. English law on the subject may be applied, not because it is applicable as such in India, but in so far as it embodies rules of justice, equity, & good conscience. Conditions peculiar to India may, however, necessitate acceptance of the English law with certain modifications.—*THOMAS BEAR & SONS, LTD. v. PRAYAG NARAIN* (1934), 1 L. R. 57 All. 510.—*IND.*

**PART V. SECT. 5, SUB-SECT. 2.—A.**

**1123 i.** — *Use of trade name of plaintiff.*—*GREENAWAY v. MCINTOSH* [1930] 2 D. L. R. 656.—*CAN.*



an injunction restraining deft. co. from trading under its present title & from using the term "Woolworth" as part of its title or from using any other title calculated to deceive the public or to lead the public to believe that deft. co. was in any way connected with the pltf. co.:—*Held*: the evidence had not shown that there had been up to the time of the action any real confusion; but by the name "Woolworths" pltf. co. was understood to be meant, not only among the general public, but also among traders & manufacturers; the name Woolworths (Australasia), Ltd., must suggest some connection with pltf. co.; deft. co.'s name so nearly resembled the name of pltf. co. as to be calculated to deceive; the area of the trading operations of the two cos. was so much the same in many ways that there was serious risk of confusion.—*WOOLWORTH (F. W.) & Co., Ltd. v. WOOLWORTHS (AUSTRALIA), Ltd.* (1930), 47 R. P. C. 337.

1137b. — — —.]—Pltf. had for nine years had a circus at Olympia in London during the winter, lasting each year for a period of about five weeks, which had each year been largely advertised & attended by a very large number of people. Deft. had a shop in London for animals & birds & in the past winter had had a sideshow of animals during the circus which pltf. was holding at Olympia. In 1928 he started a travelling Zoo, & shortly before the action he added a circus & advertised it as "Chapman's London Olympia Zoo & Circus." Pltf. commenced an action against deft. for an injunction to restrain him from using the words "London Olympia" as descriptive of or in connection with Zoo-Circus or other circus or entertainment & gave notice of motion for an interlocutory injunction:—*Held*: the words "London Olympia Circus" had come to mean pltf.'s circus. An interlocutory injunction was granted restraining deft. from using the words "London Olympia" in conjunction with one another as descriptive of or in connection with a Circus or Zoo-Circus.—*MILLS v. CHAPMAN* (1930), 47 R. P. C. 115.

1145a. — — — After revocation of licence.]—In 1910 pltf. co., which was carrying on in New York the business of manufacturers of numbering machines, entered into an agreement with deft. that deft. should act as agent for pltf. in this country for the sale of such machines, but the relationship was not of agency in the strict sense, for deft. purchased the machines from pltf. co., & paid for them on terms arranged. From the commencement of the agreement deft. carried on business in such machines under the same name as pltf. & the machines bore the name of pltf. co. In 1933 pltf. co. terminated the agreement, but deft. continued to carry on business under that name & claimed the right to do so. Pltf. co. brought an action to restrain deft. from using that name & for breach of contract, alleging that it was a term of the agreement that deft. should not deal in such printing apparatus or be interested in the business of any competitor of pltf. co. Deft. contended that the name meant his business & that pltf. co. carried on no business in this country & he relied on the fact that from 1917 onwards he had been

& still was registered under Registration of Business Names Act, 1916 (c. 58), under the said name:—*Held*: pltf. co. had acquired a sufficient reputation in this country for its machines to entitle it to protect the use of its name here; deft. merely held a revocable licence to use the name which was revoked on the termination of the agency agreement; also it was a term of the agreement that deft. would not during its existence deal with the numbering machines of any rival manufacturers, & that he had so done.

An injunction was granted restraining deft. from using the name of The Roberts Numbering Machine Co. or any name so similar to it as to be calculated to cause the belief that deft.'s business was a branch of or in any way connected with the business of pltf. co., & an inquiry was ordered as to damages in respect of the breach of agreement.—*ROBERTS NUMBERING MACHINE CO. v. DAVIS* (1935), 53 R. P. C. 79.

1155. *Add. Annotation*:—*Consd. Lyons & Co. Lyons* (1931), 49 R. P. C. 188.

1163a. — — —.]—Pltf. brought an action to restrain deft. from passing off goods not of pltf.'s manufacture as & for pltf.'s goods. Deft. was originally registered under the name of Sidney Lyons, but his name was later changed to Joseph Lyons. Pltf. co. was well known & had two hundred & fifty shops in Great Britain, four of which were situated in the neighbourhood of Brighton. Pltf. also had two hundred thousand retail agents, & spent one hundred thousand pounds per annum on the advertisement of their tea. Deft. who was the keeper of a boarding establishment at Brighton had notepaper headed "J. Lyons food specialists." He advertised for canvassers & his advertisement read "J. Lyons require. . . ." He provided his canvassers with sets of packets: (i) a cardboard box labelled "J. Lyons, pure domestic cocoa," (ii) a packet of J. Lyons' cake flour, & (iii) a silver foil packet containing tea & bearing a label worded "J. Lyons' superior tea Brighton depot 8d. net wt.  $\frac{1}{4}$  lb." Pltf. sold tea in quarter-pound packets with a label also printed in blue on a white ground, & worded "Lyons tea, J. Lyons & Co., Ltd., Cadby Hall, Kensington." Pltf. alleged that by reason of the similarity between deft.'s goods sold by the canvassers on behalf of deft., deft. had intended to deceive & had deceived the public into buying his goods as & for those of pltf. Deft. denied that the acts complained of were calculated to deceive or that they had led to deception. He further claimed to be entitled to trade under his own name provided that his trade was lawful & not calculated to deceive.—*Held*: the phrases "Lyons Tea" & "Lyons Cocoa" had come to mean the goods of pltf., the quarter-pound packets of tea, sold by pltf. & deft. respectively, were exceedingly alike, the phrase "Brighton depot" was misleading, deft. had intended to deceive & had deceived the public into buying his goods as & for pltf.'s goods. An injunction was granted, together with five pounds damages & costs.—*LYONS (J.) & Co., Ltd. v. LYONS (J.)* (1931), 49 R. P. C. 188.

1168a. — — — Custom of mining company.]—*Held*: (1) the valley containing the bed of

minerals a part of which was owned by the Spanish Co. had become known as the Tigon Basin, & therefore the word "Tigon" had acquired a geographical significance; (2) having regard to such geographical significance & the custom of mining companies operating in the same area to adopt a name by reference to the geographical name of that area, coupled with the name of a point of the compass, the use by deft. co. of the word "Tigon" was not calculated to deceive or cause confusion in the minds of the public; (3) as pltf. co. themselves had marketed neither sulphur nor any other product under the name "Tigon," there was nothing which, by the use of the word "Tigon," deft. co. could sell or pass off as or for the product or goods of pltf. co. The action was dismissed with costs, & pltf. co. having been granted an interlocutory injunction on motion with the usual undertaking, an inquiry as to damages was ordered on the application of deft. co., the costs of that inquiry being reserved.—**TIGON MINING & FINANCE CORPN., LTD. v. SOUTH TIGON MINING CO., LTD.** (1931), 48 R. P. C. 526.

**1168b.** ———.]—Pltfs. had a very large paper manufacturing & printing works carried on principally at Apsley Mills, at Apsley. They were incorporated in 1886, & in 1887 became the owners of a registered mark consisting of the head of the Duke of Wellington, with the words "The Apsley." It appeared that the word "Apsley" had become associated in the trade with pltf. co. Deft. co. were incorporated in 1936 under the name of the "Apsley Press, Ltd." with the object of carrying on the business of printers & publishers. Pltf. co. brought this action for an injunction to restrain deft. co. from carrying on any business similar to the business carried on by pltfs. under their present name or any name incorporating the name "Apsley":—*Held*: the use by deft. co. of the word "Apsley" was calculated to cause confusion between the business of pltfs. & defts. Such confusion was likely to lead to loss of reputation to pltfs. with loss of customers. Injunction granted.—**JOHN DICKINSON & CO. v. APSLEY PRESS, LTD.** (1937), 157 L. T. 135; 54 R. P. C. 219.

**1171a.** ———.]—Pltf. co., The Clock, Ltd., was incorporated on May 15, 1929, & in Oct. 1929, opened an establishment known as a road-house on land adjoining the Welwyn By-Pass Road near Welwyn, in the county of Hertford. A prominent feature of that establishment was a clock on the top of a gabled building. That establishment was not licensed to sell intoxicating liquor nor did it provide patrons with lodging, but it provided them with meals & offered them

facilities for bathing, tennis & golf. The establishment acquired a reputation & was known to many people as The Clock, & the name The Clock had always appeared in conspicuous letters on pltfs.' premises. Deft. co., The Clock House Hotel, Ltd., was incorporated on Oct. 6, 1934, & in Nov. 1934, opened an hotel on land adjoining the Barnet By-Pass Road at a point five miles south of the point occupied by pltfs.' road-house, at New Hatfield, in the county of Hertford. A prominent feature of that hotel was a tower carrying a clock above which was written the word "Hotel," & below which were written in large letters the words "Clock House." That hotel was licensed to sell intoxicating liquors & did provide patrons with lodging. It did not offer facilities for bathing, tennis or golf, but provided meals. Pltfs. commenced an action to restrain defts. from carrying on business under the name Hotel Clock House, or any other name calculated to cause confusion with & damage to their business:—*Held*: pltfs. had acquired a reputation in the name Clock in connection with their road-house, & in the locality the words "The Clock" had come to mean pltfs.' premises; the use of the words "Hotel Clock House" by defts. constituted a real possibility of confusion which might result in actual damage to pltfs. An injunction was granted but was limited to restraining defts. from using the words complained of on their present premises. The operation of the injunction was stayed for one month to enable defts. to alter their name as it appeared on their clock, newspaper & elsewhere. Defts. were ordered to pay the costs of the action. Defts. appealed to the Ct. of Appeal. The appeal was dismissed with costs.—**CLOCK, LTD. v. CLOCK HOUSE HOTEL, LTD.** (1936), 53 R. P. C. 269.

**1171b.** ———.]—Pltfs. & their predecessors in title were the owners of properties in Droitwich called the "St. Andrews Baths" & the "Royal Baths," & have carried on business in connection with these properties under the name of "The Brine Baths." The ct. was satisfied on the evidence that to the public the term "The Brine Baths" meant pltfs.' baths & on a motion granted an interlocutory injunction restraining defts. from carrying on business under the name of "Droitwich Brine Baths, Ltd." or under any other name calculated to deceive the public into the belief that the business of defts. is that of pltfs. or connected therewith. The operation of the injunction was suspended for one month to enable deft. co. to alter their registered name.—**HESKETH ESTATES, SOUTHPORT, LTD. v. DROITWICH BRINE BATHS, LTD.** (1934), 52 R. P. C. 39.

PART V. SECT. 5, SUB-SECT. 2.—J.

**1196 II.** ———.]—Pltf. co., incorporated in the United States of America in 1852, & one of the largest manufacturers of wrought-steel hardware & tools in the world, has registered trade-marks of "Stanley" & "S. W.," & its goods are & have been long known both in the wholesale & retail trade in New Zealand as "Stanley" goods. Deft. co. incorporated in 1931 with a capital of £600 under the name of "Stanley Ironworks, Ltd." took over the business of engineers, etc.,

carried on at Stanley Street, Auckland, by S., & known as the Stanley Ironworks. The business originally established by W. about forty-one years ago as that of a shoeing & general smith & carried on later by his nephew from whom S. acquired it in 1929, when it was a general jobbing engineering business, specialising in the production of bolts & hinges & all classes of builders' ironwork, was moved about thirty-six years ago to Stanley Street, Parnell, & the premises called "Stanley Ironworks," but up to about 1930 the goodwill of the business was attached to the

name W. in respect of a jobbing & engineering business & not of a manufacturing & trading business which made articles for stock & sent out travellers to sell quantities of that stock. Deft. co., when incorporated, became definitely a manufacturing & trading co. making for stock, & employed a New Zealand representative & distributor of its products, & is manufacturing & selling articles of hardware which are also made by pltf. co. & sold in New Zealand. On a motion for a perpetual injunction restraining deft. co. from carrying on

1199. *Add. Annotation*:—**Refd. C. & A. Modes, Ltd. v. Central Purchasing Assocn., Ltd.** (1930), 48 R. P. C. 163.

1207a. ———.]—**C. & A. MODES, LTD. v. CENTRAL PURCHASING ASSOCN., LTD.** (1930), 48 R. P. C. 163.

1210a. ———.] **Use of initials of name of book.**]  
—Pltfs., the General Council of Medical Education & Registration of the United Kingdom were a body incorporated by Medical Council Act of 1862 (c. 91), s. 1. It was the duty of pltfs. imposed upon them by Medical Act, 1858 (c. 90), s. 54, re-enacted by Medical Council Act, 1862 (c. 91), s. 2, to publish a book containing a list of medicines & compounds & the manner of preparing them. This book was to be known as the British Pharmacopœia. The book was a valuable property & had a great reputation. When any one in the medical or the pharmaceutical professions saw the letters B.P. placed after a drug he understood such drug to conform to the specification for such drug to be found in the British Pharmacopœia. Before action brought pltfs. had published three editions of their book & since the issue of the writ they had published a further edition. Defts., Barrett Proprietaries, Ltd., were a limited co. which made & sold medical & pharmaceutical preparations contained in cartons, packages & bottles. Defts. made prominent use of the letters B.P. upon or in connection with their goods, advertisements therefor & price lists thereof. With the exception of one drug, namely acetylsalicylic acid, commonly known as aspirin, none of the preparations made & sold by defts. was to be found in the British Pharmacopœia. Pltfs. alleged that the acts of defts. were calculated to hinder & defeat the successful performance by pltfs. of their statutory duty & that the use of the letters B.P. by defts. was calculated to lead to confusion & that such confusion would result in the failure of the British Pharmacopœia to be maintained as a standard & that this failure would involve pltfs. in financial loss. Pltfs. further alleged that the use by defts. of the letters B.P. was improper & fraudulent & was done with the intention of deceiving the medical, dental & pharmaceutical professions, the trade & the public & inducing them to believe that defts.' preparations were in some manner connected with, or prepared & guaranteed to be in accordance with, the information contained in the British Pharmacopœia. Defts. denied

the various allegations made by pltfs. The A.-G. was joined as a pltf. at the relation of the Council, it being contended that the public had rights in respect of the British Pharmacopœia. Pltfs. sought an injunction to restrain defts. from (*inter alia*) selling or offering for sale preparations represented to be guaranteed by pltfs. or made in accordance with the information contained in the British Pharmacopœia:—**Held**: it had not been proved that the conduct of defts. was calculated to hinder the successful performance by pltf. Council of their statutory duty to publish & keep up to date the British Pharmacopœia; there was no evidence what the public would understand by the letters B.P., & in the absence of such evidence it was not possible to hold that the use by defts. of the letters B.P. in the manner complained of was calculated to lead to confusion; the allegation that confusion due to the use by defts. of the letters B.P. would result in the failure of the British Pharmacopœia to maintain a standard & would result in financial loss to pltf. Council due to the diminution in sales of the book resulting from loss of reputation had not been proved; since there was no evidence that any member of the public had bought defts.' goods in the belief that such goods had been made in accordance with the prescriptions to be found in the British Pharmacopœia, the claim put forward on behalf of the A.-G. must fail; & the ct. could not infer from the evidence that defts. had acted fraudulently. The action was dismissed with costs.—**A.-G. & GENERAL COUNCIL OF MEDICAL EDUCATION OF UNITED KINGDOM REGISTRATION v. BARRETT PROPRIETARIES, LTD.** (1932), 50 R. P. C. 45.

1212a. ———.]—Pltf. co. was a public co. with a large capital incorporated in Feb. 1924, for the purpose of carrying on the business of English & foreign chemists & druggists, wholesale & retail, & had a number of retail shops in the West End of London, their most outlying shop being in Knightsbridge. Deft. co. was incorporated in Nov. 1928, with a nominal capital of £1,000 for the purpose of carrying on the business of a high-class dispensing chemist in the neighbourhood of Barons Court, London, & had one shop in that district. Deft., I. J. Eppel, took medical degrees & was a qualified chemist in Dublin in 1912, & carried on there the business of a chemist's shop until 1923. Deft., I. J. Eppel, having formed deft. co.,

business under the name of "Stanley Ironworks, Ltd.":—**Held**: (1) deft. co. had taken the whole name of pltf. & inserted the word "iron," a common ingredient, because both cos. manufactured with it & dealt in the products; (2) the use of deft.'s name was calculated to deceive, & so either to divert business from pltf. to deft. or to lead to the belief that deft. was a branch of or otherwise connected with pltf. to the latter's prejudice; (3) deft. had not succeeded to the goodwill of an existing business carried on in Auckland in the name of "Stanley Ironworks, Ltd." in a manufacture & trade of the kind which it is now doing, so as to entitle it to the use of that name.—**STANLEY WORKS v. STANLEY IRONWORKS, LTD.**, [1935] N. Z. L. R. 865.—N.Z.

**PART V. SECT. 5, SUB-SECT. 3.**  
**J. I. — Use by purchaser for long period by agreement.**—**Resp.**, a trader who had carried on a fancy-goods business under a trade name for several years, made an agreement with applt. under which applt. was to obtain a new shop, on lease, & to open a new business there conducted under resp.'s trade name, buy all his stock from resp., & acquire that stock at a concession price. No term was fixed for the duration of the agreement. The trade name was actually painted upon the new shop by resp. or under his direction, & after the parties had acted on the agreement, with certain variations, for nearly three years resp., who was carrying on business in various other shops, purported to terminate the agreement, & sought an injunction

to restrain applt. from continuing to use the name:—**Held**: resp. was not entitled to an injunction either at common law or on the footing of rights arising out of Business Names Act, 1928, the name having been so used under the licence that it did not identify the business as being that of resp., & resp.'s conduct having debared him from relief.—**NEED v. COLES (J. H.) PTY., LTD.** (1932), 46 C. L. R. 470; [1932] Argus L. R. 139; 5 A. L. J. 355.—AUS.

**sm. "Canada Bud"**—**For "Budweiser."**—**Held**: although Budweiser beer was called Bud by customers there was no such resemblance or similarity as would support an action for infringement.—**ANKHUSER-BUSCH INC. v. CANADA BUD BREWERIES, LTD.**, [1933] 1 D. L. R. 463; O. R. 75.—CAN.

- pltf. co. sought an injunction to restrain deft. co. from trading under the name of Eppels, Ltd.:—*Held*: on the evidence there was no ground on which deft. co. could effectively resist the injunction.—*HEPELS, LTD. v. EPELS, LTD. & EPEL I. J.* (1928), 46 R. P. C. 96.
- 1212b. ———.]—*MADEIRA HOUSE CO., LTD. v. MADEIRA HOUSE (LONDON), LTD.* (1930), 47 R. P. C. 481.
- 1212c. ———.]—English subsidiary of foreign company.]—*STURTEVANT ENGINEERING CO., LTD. v. STURTEVANT MILL CO. OF U.S.A., LTD.*, No. 1041a, *ante*.
- 1215a. ———.]—*SOCIÉTÉ LA PARFUMERIE NILDÉ v. ERNALDÉ, LTD. & FRYER*, No. 629a, *ante*.
- 1226a. ———.]—Any person who has, without the use of unfair means, become acquainted with the mode of compounding a secret unpatented preparation may, after the death of the original discoverer, make & sell the compound, describing it by the name of the discoverer, provided he does not lead the public to suppose that his preparation is the manufacture of the successors in business of the original discoverer; but he must not assert that his is the only genuine article, or suggest that the article manufactured by the successors of the original discoverer is spurious.—*JAMES v. JAMES* (1872), L. R. 13 Eq. 421; 41 L. J. Ch. 353; 26 L. T. 568; 20 W. R. 434.
- 1233a. ———.]—In 1909 pltf.s. commenced the sale in England of storage batteries made by them in America in accordance with certain letters patent granted between the years 1900 & 1908. The storage batteries were imported & sold as Edison storage batteries by deft. Monnot & later by defts. Edison Accumulators, Ltd., who did so in accordance with the terms of various agreements made between them & pltf.s. In 1929, Edison Accumulators, Ltd., changed its name to Britannia Batteries, Ltd., a new co. was formed by Monnot under the name Edison Accumulators, Ltd., & the two cos. commenced to manufacture & sell in England storage batteries made by them under the name Edison. Pltf.s. commenced an action to restrain defts. from passing off their batteries as those of pltf.s. & from using the expression "Edison Accumulators" as part of their name. Defts. admitted that they had sold storage batteries not of pltf.s.' manufacture as Edison batteries, but alleged that the name Edison was not distinctive of pltf.s.' goods, but was descriptive of all types of nickel alkaline batteries, & particularly those made in accordance with certain letters patent, & that they were entitled to continue to describe the goods sold by them as Edison storage batteries:—*Held*: the words "Edison accumulators" & "Edison storage batteries" were at the date of the writ distinctive of pltf.s.' goods, & that defts. intended to pass off goods made by them as those of pltf.s. Injunctions were granted restraining defts. from passing off & from using the expression "Edison Accumulators" as part of their name, with costs. An inquiry as to damages was refused.—*EDISON STORAGE BATTERY CO. v. BRITANNIA BATTERIES, LTD.* (1931), 48 R. P. C. 350.
- 1233b. ———.]—Pltf. sold greyhound race programmes outside dog racing tracks known as outside cards. His cards were a light green in colour with the names of the dogs running printed & a selection of dogs to win made under the pseudonym "Stirling." These cards became well known to the public as Stirling green cards. Deft. Freeman also sold outside racing cards which were first a buff colour but subsequently were coloured light green. He then registered under Business Names Act, 1916 (c. 58), the business name of Stirling as being the proprietor & publisher of Stirling race cards. Shortly afterwards he incorporated deft. co. which he called Stirling Press, Ltd., & his race cards had printed on them "published by Stirling Press, Ltd." On the evidence the ct. was satisfied that some of the sellers of deft.s. cards sold them as Stirling cards:—*Held*: there had been a deliberate attempt to sell defts.' cards as pltf.s. cards. An injunction was granted to restrain defts. & each of them from printing, publishing, selling or distributing greyhound racing programmes not being the programmes of pltf. as Stirling cards.—*SHALLIS v. FREEMAN & STIRLING PRESS, LTD.* (1931), 48 R. P. C. 370.
- 1238a. ———.]—Goods sold as exclusive original models of dressmaker—Goods previously sold & copied.]—In May, 1933, defts. issued a circular to their customers in which appeared the following passages: "Our buyers have just returned from Paris with a collection of more than usual loveliness which we are able to offer at a mere fraction of the original cost. . . . Coats for restaurant, race & travel as well as one or two sumptuous evening wraps come from the salons of Paquin. . . ." The next day defts. sold a coat which had been made by pltf.s. & sold by them in Feb. 1933, to an American firm who had copied it & re-shipped it to England, the coat being subsequently purchased by defts. Pltf.s. commenced an action to restrain defts. from offering for sale or selling as Paquin models any garments not being new garments sold by pltf.s. Defts. denied that they had represented that they had purchased the garments direct from pltf.s. & claimed the right to sell as "Paquin models" garments which had been sold by pltf.s. to dealers for the purpose of copying. Defts. also alleged that the term "Paquin" did not indicate pltf.s. exclusively:—*Held*: the circular did not represent that the garments had been purchased direct or that they had not been copied or had only been produced a short time before the issue of the circular; & the action must be dismissed. In view of the fact that defts. had put in issue the distinctiveness of the word "Paquin" but had not relied upon it, an order was made that pltf.s. should pay two-thirds of defts.' costs.—*PAQUIN, LTD. v. JOHN BARKER & CO., LTD.* (1934), 51 R. P. C. 431.
1242. *Add. Annotation*:—*Refd. Re Hammermill Paper Co.'s Opposition, Re Pirie & Sons, Ltd.* (1932), 146 L. T. 493.
- 1243a. ———.]—In 1899 a trade mark, consisting of the word "Lektrik," was registered in a number of classes, including a registration in class 50 in respect of articles not included in other classes made of vulcanised fibre,

& various other goods. In 1931 pltfs., who were the registered proprietors of the mark, brought an action against Letrik, Ltd., for infringement of the mark & passing off by the use upon or in connection with electrical hair combs of the word "Letrik." Pltfs. manufactured & sold electrical goods & accessories, & they alleged that they had manufactured & sold under their trade mark "Lektrik" large quantities of electrical apparatus & accessories for use in connection with electrical hair wavers, hair dryers, & other hairdressing appliances. Defts. denied that the goods in respect of which pltfs.' mark was registered included electrical hair combs, & they further denied that pltfs. had manufactured & sold electrical apparatus for use in connection with hairdressing appliances as alleged, save in so far as pltfs. might have sold the usual switches, plugs, & sockets necessary in any electrical installation, & defts. denied that the mark "Lektrik" was distinctive of pltfs. in connection with hairdressing appliances. Defts. moved to rectify the register by excluding from the specifications of goods, in respect of which the marks in class 50 & another class were registered, electrical hair combs & goods of a like description, on the ground of non-user of the marks in connection with such goods:—*Held*: pltfs. had never manufactured combs, & the user of their mark had been on & in connection with goods of a wholly different character; the trade in electric light & heat accessories was distinct from the trade in combs & toilet articles, & the use of defts.' mark could not legitimately be said to constitute an infringement of pltfs.' registered mark, or to be calculated to induce the belief that defts.' combs were of pltfs.' manufacture or merchandise. The action was dismissed with costs & an order to rectify the register was made, as to the trade mark registered in class 50, in the terms of the notice of motion.—LUNDBERG (A. P.) & SONS, LTD. v. LETRIK, LTD., *Re* LUNDBERG (A. P.) & SONS, LTD., TRADE MARKS NOS. 223,405 & 223,408 (1931), 49 R. P. C. 15.

*Annotation*:—*Re*ld. *Re* Columbia Graphophone Co. Trade Marks (Nos. 288,624, 324,745 & 407,537) (1932), 49 R. P. C. 483.

**1243b. Name must be attached to goods.]—**TIGON MINING & FINANCE CORPN., LTD. v. SOUTH TIGON MINING CO., LTD., No. 1168a, *ante*.

**1245a. Name descriptive of formula.]—**Maclean's, Ltd. (the predecessors of the same name as pltfs.) in 1931 marketed a preparation known as "Maclean brand stomach powder"; it was made in accordance with a formula of a Doctor Maclean, & as a prescription had been known moderately well in medical circles & to some extent by the public as "Maclean's Powder." Pltfs.' preparation, by advertisement & sales, became very well known to the public at large. In 1935 pltfs. marketed medicated sweets, or throat lozenges, under the name "Macs." After this defts. brought out a medicated sweet containing a small quantity of powder made up to Dr. Maclean's

prescription. The name used for these sweets by defts. was "Vitamacs" & later "Merrimacs." The labels & advertisements referred to "Dr. Maclean's stomach powder" & in some cases to "the famous Maclean Sweets." The labels, etc., also referred, but in small type, to defts.' name or trade mark. Actual confusion between pltfs.' & defts.' goods was proved. There was also evidence that the name "Mac" had been used by other firms in the sweetstuff trade, though not in the pharmaceutical trade:—*Held*: (1) although the words "Maclean's Powder" were originally descriptive of a formula, they had become so identified with pltfs. that pltfs. were entitled to have it made clear that the powder . . . made up from a prescription of Professor Maclean was not pltfs.' powder; that, although the name or Trade Mark "Mac" had been used for ordinary sweets, it had not been applied to medicated sweets, properly sold by chemists; & this was an attempt by defts. to "filch" pltfs.' reputation. On the other hand defts. were entitled to state that their sweets contained Dr. Maclean's powder. An injunction was therefore granted in the following form ". . . from selling, supplying, offering or advertising for sale medicated sweets not being the pltfs.' goods under or in connection with the name 'Merrimacs' (or any name of which 'Macs' forms part) or the description 'The famous Maclean sweets' or 'Maclean Sweets' or any other name or description which by reason of its consisting of or comprising the name 'Maclean' or 'Maclean's' is calculated to deceive, without clearly distinguishing the said goods from the goods of pltfs."; (2) that allegations as to collusion or fraud (of pltfs.' witness) were most improper unless strict inquiry had been made; (3) in their writ pltfs. had also sought relief in respect of infringement of a Trade Mark "Mac," No. 158,654, registered in Class III. but had not included this cause of action in their Statement of Claim. Defts., however, sought (by motion) to expunge this Trade Mark, on the ground that it had been assigned to pltfs. without any goodwill:—*Held*: that, even if there had been no goodwill to assign, but the mark was not yet expungeable under sect. 37 (22) was unqualified & a trade mark could not be assigned in gross. In the absence of the previous proprietors the Trade Mark should not be altogether expunged, but the assignment to pltfs. & previous assignments should be so dealt with.—MACLEANS, LTD. v. LIGHTBOWN & SONS, LTD., *Re* TRADE MARK "MAC," No. 158,654 (1937), 54 R. P. C. 230.

**1246. Add. Annotation:—***Re*ld. United Kingdom Tobacco Co. (1929), Ltd. v. Malayan Tobacco Distributors, Ltd. (1933), 51 R. P. C. 11.

**1266a. "Navy-Spot"—For "Blue-Spot."]**—Pltf. co., who were manufacturers of wireless apparatus, & had sold large quantities of loudspeaker units under the mark "Blue-Spot" & in cartons with a distinctive get-up, claimed an injunction to restrain defts. from passing off loudspeaker units by the use

PART V. SECT. 5, SUB-SECT. 4.—  
A. (a) ii.

sl. "Mulsol"—"Monsol."—*Held*: the words were not so similar as to be

likely to cause any ordinary purchaser to confuse goods marked or described as "Mulsol" with goods marked or described as "Monsol."—MOND STAF-

FORDSHIRE REFINING CO., LTD. v. ELLIS HARLEM (1929), 41 C. L. R. 475; 2 A. L. J. 368; [1929] Argus L. R. 93.—AUS.

upon or in connection therewith of the word "Navy-Spot" or by using a similar get-up. The form & appearance of the two loud-speaker units were almost identical. Defts. admitted that the word "Blue-Spot" was distinctive of pltf.s., but they alleged that their units were always sold in their cartons, which were different from pltf.s.' The trial of the action was not defended:—*Held*: defts.' loudspeaker units as sold were calculated to deceive & to be passed off as pltf.s.' An injunction was granted & an inquiry as to damages was ordered, & an order as to delivery up of defts.' cartons & all parts of the units bearing the word "Navy-Spot" was made.—*IDEAL WERKE A. G. v. WILLESSEN & DISTRICT LIGHT SUPPLY CO., LTD.* (1930), 48 R. P. C. 123.

**1266b. "Pine-exx"—For "Pine-ette."**—Pltf. carried on the business of a soap merchant & manufacturer in Manchester, & in the course of his business sold soap of various kinds including liquid soap. In June, 1924, pltf. began to sell his liquid soap under the name of "Pine-ette," & in May, 1932, registered the word "Pine-ette" as a trade mark in Class 47, claiming user from June 16, 1924. Defts.' business, which was carried on at works in the City of Salford, was commenced in 1929 by one J. T. Jones who had formerly been an agent of pltf.: he began to sell liquid soap under the name of "Pine-exx." In Jan. 1932, this business was sold to defts., the sum of £85 being fixed as the price of the goodwill, which included, so far as Mr. Jones & his son (who was associated with him in the business) were able to assign the same but no further or otherwise, the right to use the word "Pine-exx." Pltf. commenced this action against defts. claiming an injunction & other relief:—*Held*: though pltf. had failed to prove actual deception, the similarity between the two words "Pine-ette" & "Pine-exx" was so close, especially when spoken, that the use of the word "Pine-exx" created a great probability of deception; & defts. had not discharged the onus which was upon them of proving acquiescence (which they alleged) on the part of pltf. in the user of the word "Pine-exx" by J. T. Jones. An injunction was granted & delivery up of infringing labels ordered, an inquiry as to damages not being asked for.—*DIXON (J. J.) v. TAYLOR & COWELLS (TRADING AS PINE-*

*EXX LIQUID & DISINFECTANT SOAP CO.)* (1933), 50 R. P. C. 405.

**1280. Add. Annotations:—***Consd. Mathieson v. Pitman (Sir Isaac) & Sons, Ltd.* (1930), 47 R. P. C. 541. *Consd. Canadian Shredded Wheat Co. v. Kellogg Co. of Canada, Ltd.*, [1938] 1 All E. R. 618. *Refd. T. & C. Associated Industries, Ltd. v. Victoria Wagon Works, Ltd.* (1930), 48 R. P. C. 148.

**1289. Add. Annotation:—***Refd. Houghton v. Film Booking Offices, Ltd.* (1931), 48 R. P. C. 329.

**1317. Add. Annotation:—***Generally, Refd. Champagne Heidsieck et Cie Monopole Société Anonyme v. Buxton*, [1930] 1 Ch. 330.

**1322. Add. Annotation:—***Consd. Reddaway & Co., Ltd. v. Hartley* (1931), 47 T. L. R. 226.

**1329. Add. Annotation:—***Refd. Dixon (H. C.) & Son, Ltd. v. Richardson & Co.* (1933), 50 R. P. C. 365.

**1345. Add. Annotation:—***Refd. Canadian Shredded Wheat Co. v. Kellogg Co. of Canada, Ltd.*, [1938] 1 All E. R. 618.

**1350a. —.**—*WILSON'S & MATHIESON'S, LTD. v. MEYNELL & SONS, LTD., Re WILSON'S & MATHIESON'S LTD.'S APPLICATION*, No. 1120c, *ante*.

**1350b. —.**—Pltf. co. claimed an injunction to restrain deft. co. passing off emollient tablets as & for pltf. co.'s goods. In 1916 the trade mark "Snowfire" was registered in class 48 of which pltf. co. was the registered owner. The trade mark had been exclusively advertised & used in connection with an emollient preparation to be used for chapped hands & cracked lips. On one side of the carton containing the preparation was the word "Snowfire" in black on a red sky with snow mountains against a black background representing a dark sky & a brazier with a bright red flame & the words "Chapped Hands." On the other side were snow mountains against a black sky, the words "Snowfire," "Cracked Lips," & "Chapped Hands." Deft. co.'s carton showed on one side snow mountains with "Sunshine Snow" written below in red & a red sun with yellow rays, & on the other side the words "Sunshine Snow" were put into the sky instead of being placed down below & the sun was setting in a lower position. Deft. co. alleged that the features of which pltf. co. claimed a

**PART V. SECT. 5, SUB-SECT. 4.—**  
**B. (b).**

**1271 ii. —.**—*Where goods are ordinarily sold by retail, a mere general resemblance with pltf.'s goods at a distance is not enough to entitle him to succeed in a passing-off suit. The test which the ct. will apply is the probability of confusion at that distance which would ordinarily intervene between the purchaser & the seller, or between the purchaser & the goods if they were placed upon the counter.*—*ESDAILE v. MATTHEWS THOMPSON, LTD.* (1927), 28 S. R. N. S. W. 15.—*AUS.*

**PART V. SECT. 5, SUB-SECT. 5.—A.**

**1289 I. Get-up must be recognised description of plaintiff's goods.**—*Where the name, or the shape, design & appearance, under which an article has long been sold by the sole maker or owner vendor thereof, has become distinctive of the goods of that trader,*

*although that trader acquires thereby no monopoly, a rival trader may not sell the same article under that name or that shape, design & appearance, without sufficiently distinguishing his goods from those of the original trader as to prevent the likelihood of his goods being purchased as & for those of the original trader.*—*KETTLES & GAS APPLIANCES, LTD. v. ANTHONY HORDERN & SONS, LTD.* (1934), 51 N. S. W. P. W. N. 190.—*AUS.*

**PART V. SECT. 5, SUB-SECT 5.—**  
**C. (b) i.**

**1313 iv. —.**—*WHITWORTH HERBERT, LTD. v. JAMNADAS LEMCHAND MERTA* (1927), 1 L. R. 52 Bom. 228.—*IND.*

**1313 v. —.**—*HARRY HORNE CO. v. SCHWARTZ & SONS, LTD.*, [1929] 2 D. L. R. 791; 60 N. S. R. 610.—*CAN.*

**1313 vi. —.**—*Where the name, or the shape, design & appearance, under*

*which an article has long been sold by the sole maker or owner-vendor thereof, has become distinctive of the goods of that trader, although that trader acquires thereby no monopoly, a rival trader may not sell the same article under that name, or that shape, design & appearance, without sufficiently distinguishing his goods from those of the original trader as to prevent the likelihood of his goods being purchased as & for those of the original trader. In cases of innocent passing off, where pltf.'s only remedy is equitable, although pltf. has made out a *prima facie* case for relief, that right may be lost by misrepresentation on pltf.'s part amounting to a misstatement of any material fact calculated to deceive the public. The maxim that he who comes into equity must come with clean hands applies in such cases.*—*KETTLES & GAS APPLIANCES, LTD. v. ANTHONY HORDERN & SONS, LTD.* (1935), 35 S. R. N. S. W. 108.—*AUS.*

monopoly & the manner of the packing were common to the trade, & that the get-up was not calculated to deceive:—*Held*: the manner in which the product was packed & the shape & colour of the cartons was common to the trade, & pltf. co. had established no monopoly in regard to them; the distinctive feature of pltf. co.'s carton was the combination of snow mountains with the bright flame from the brazier forming a representation of the trade mark "Snowfire," but deft. co.'s get-up showed snow & the sun having reference to the name "Sunshine Snow" & there was nothing in the package or the get-up of deft. co.'s goods which so nearly represented pltf. co.'s goods in any distinctive feature as to be calculated to deceive; & three had been no infringement of pltf.'s trade mark. The action was dismissed with costs.—HAMPSHIRE (P. W.) & Co. (1927). LTD. v. GENERAL KAPUTINE SYNDICATE, LTD. (1930), 47 R. P. C. 437.

**1350c.** —.—Pltfs., who were the proprietors of a trade mark consisting of a label registered in class 47 in respect of matches & fuses, brought an action against defts. for infringement of the mark & passing off by the use on defts.' match boxes of a label which pltfs. alleged to be a deceptive imitation of their trade mark. Pltfs. claimed to have used their mark, substantially in the form in which it was registered, as a label for match boxes for upwards of sixty years, & they alleged that defts.' label had been designed & adopted with the object of enabling it to be mistaken for pltfs.' label. Defts.' matches were sold under the brand name "Alpha" & this name appeared prominently on their label. Defts. denied the allegations of infringement & passing off & that their label was an imitation, deceptive or otherwise, of pltfs.' label, & they further denied that it had been designed or adopted with the object of enabling it to be mistaken for pltfs.' label. It was admitted that labels printed in black upon a yellow ground, as were both pltfs.' & defts.' labels, were common to the trade:—*Held*: confusion between the two labels was probable & while no lack of *bona fides* was to be attributed to two directors of defts.' co. personally, the design & adoption of defts.' label was deliberate, with the object of occasioning confusion with pltfs.' label. An injunction was granted both against infringement of trade mark & passing off & defts. were ordered to pay the costs of the action.—BRYANT & MAY, LTD. v. UNITED MATCH INDUSTRIES, LTD. (1932), 50 R. P. C. 12.

**1350d.** —.—Pltfs., shippers & merchants & exporters of knitting wool yarns to the China market, were the registered proprietors of certain trade marks registered in Class 33 in respect of yarns of wool or worsted, all of which were registered on Jan. 30, 1931.

They had in the year 1928 devised a new combination marking or lay-out of marks which were printed on the wrappers of the bundles of knitting wool yarn exported by them to China surrounding a coloured ticket comprising in the top part the representation of a Mosque or Three Candlesticks or other objects, & in the bottom part of the ticket Chinese characters. Early in 1928 they began to ship such goods to China under such new lay-out, & had since continued to ship considerable quantities of knitting wool yarns so marked. In the year 1931 pltfs. discovered that defts., who were also shippers of knitting wool yarns to the China markets, were using a combination marking which pltfs. alleged to be a colourable imitation of their combination marking or lay-out of marks. As the result of correspondence between the parties defts. agreed to alter the general lay-out of their bundle paper "in such a way as to prevent the possibility of any confusion arising in the minds of the Chinese buyers." In Apr. 1932, pltfs. having discovered that defts. were using a combination marking or lay-out, which they alleged to be a close imitation of pltfs.' said lay-out, & an infringement of pltfs.' registered trade marks, commenced an action against defts. claiming injunctions, damages & other usual relief.—DIXON (H. C.) & SON, LTD. v. RICHARDSON (GEORGE) & Co., LTD. (1933), 50 R. P. C. 365.

**1354.** *Add. Annotation*:—*Refd.* E. P. Mohamed Noardin v. S. E. S. Abdul Kareem & Co. (1931), 48 R. P. C. 491.

**1363a.** *Advertising supplement inserted in newspaper*.—Pltfs. were the owners of certain illustrated periodicals from which they derived revenue by sale & advertisements. Defts. were an advertising agency who supplied hotels with a holder of pltfs.' periodicals. This holder had a special device which prevented the periodical being removed. Defts. utilised this device to insert a four page advertisement sheet at or near the middle of the particular periodical. The inset was printed & published in the same style as the periodical & was called a supplement. Pltfs. brought this action to restrain defts. from advertising in this fashion, namely, passing off the inset as part of their periodical:—*Held*: the act of defts. amounted to passing off, as the public would be led to believe that the "supplement" was part of the original publication & further damage was likely to be done to the property of pltfs., namely, their goodwill in the advertising media in their periodicals. Pltfs., therefore, were entitled to relief by way of injunction.—ILLUSTRATED NEWSPAPER, LTD. v. PUBLICITY SERVICES (LONDON), LTD., [1938] Ch. 414; [1938] 1 All E. R. 321; 107 L. J. Ch. 154; 158 L. T. 195; 54 T. L. R. 364; 82 Sol. Jo. 76; 55 R. P. C. 172.

#### PART V. SECT. 6, SUB-SECT. 1.

*sv. Action under Unfair Competition Act—Immaterial whether trade mark registered.*—KITCHEN OVERALL & SHIRT CO., LTD. v. ELMIRA SHIRT & OVERALL CO., LTD., [1937] Ex. C. R. 230; [1938] 1 D. L. R. 7.—CAN.

#### PART V. SECT. 6, SUB-SECT. 2.—A.

1391 i. *Party having no interest.*—

Applt. co. was the manufacturer of "Orange Crush" concentrate, which is sold to bottlers. The concentrate was used by the bottlers, in accordance with a formula supplied by applt., in the preparation of a beverage called "Orange Crush." The concentrate forming less than 1 per cent. of the finished article. The beverage was sold by the bottlers within their respective areas to their customers.

Applt. sued resp. for passing off under the name of "Orange Crush" a beverage not manufactured or sold by the applt. as a beverage manufactured or sold by it.—*Held*: applt. had no local interest in the business sold to be injured by resp.'s representations; there was no connection between the commodity sold to the public as "Orange Crush" & applt.'s business except that applt. supplied one of the



1399a. ———.]—ROBERTS NUMBERING MACHINE CO. v. DAVIS, No. 1145a, *ante*.

1415a. Particulars — When ordered.]—Where a paragraph of the defence admitted the selling by defts. of certain articles, an order for further particulars of goods of which pltf. complained was refused on the ground that defts. must be presumed to have had knowledge of what they were selling. Where pltf. alleged that the carrying on of a trade over a long period of years by defts. was calculated to deceive, & that defts. had in fact deceived, particulars of the acts of actual passing off which pltf. intended to rely on at the trial were ordered to be given.—JEYES SANITARY COMPOUNDS CO., LTD. v. PHILADELPHUS JEYES & CO., LTD. (1929), 46 R. P. C. 236.

1419a. Discovery—In inquiry as to damages.]—Pltf. in this action had acquired the goodwill of the first deft. in a business carried on under the name "Trist." Pltf. complained that defts. continued to solicit old customers & to trade under & use the name "Tristbestos" (which had been used by pltf. & the first deft. while in partnership) in a manner calculated to pass off their goods for pltf.'s goods. At the trial defts. ultimately consented to judgment, including an inquiry as to damages. Pltf. now sought discovery from defts. of customers solicited & of all sales made under the name "Tristbestos." The application was dismissed in the ct. of first instance on the ground that an inquiry as to damages & an account of profits should be distinguished in reference to discovery, & that, in a passing off action every act complained of did not necessarily result in deception & damage, & pltf. must under both inquiries prove damage before discovery. Pltf. appealed:—*Held*: when once some damage had been proved (& the judgment by consent was equivalent to admission of wrongful acts & of damage suffered by pltf. by reason of them) every act of the kind specified done by defts. was material & the documents relating to it were documents relating to the matter in question within R. S. C., Ord. 31, r. 12. An order for discovery was made with a provision that the master should decide to whom books, etc., should be shown.—DRAPER (B. E.) v. HUBERT H. P. TRIST & TRISTBESTOS BRAKE LININGS, LTD. (1935), 53 R. P. C. 66, C. A.

1423. After this case add:—  
Commission—Evidence immaterial to issue pleaded.]—See EVIDENCE, No. 6269a.

1427a. ———.]—Pltf. were manufacturers of a sweetmeat in the form of a transparent peppermint cube. They were the owners of a trade mark consisting of the word Glacier registered in class 42. Their sweetmeat had the word Fox stamped upon its base. Pltf. had a substantial trade & their goods were very well known to the public. Deft. owned a number of retail shops in Leicester. He sold various kinds of sweetmeats, including one in the form of a transparent peppermint cube. Pltf. alleged that sweetmeats of this last kind had been sold by deft.'s

shop assistants in response to requests by customers for Glacier mints. Five instances of passing off were alleged. In each case the sale complained of was alleged to have been in response to an oral trap order given by a person on behalf of pltf. Pltf. commenced an action to restrain passing off sweetmeats not of pltf.'s manufacture as & for pltf.'s Glacier Mints. Deft. denied the alleged passing off. The action subsequently came on for trial:—*Held*: in each of the alleged cases of passing off it was conceivable that deft.'s shop assistant did not hear, or did not properly hear, the word Glacier; the word might have been mistaken for a request for "glassy" sweets—for in Leicester sweetmeats of this character were often spoken of as "glassy" mints; & pltf.'s evidence was not sufficient to discharge the heavy onus placed upon them in an allegation of passing off. The action was dismissed with costs.—FOX'S GLACIER MINTS, LTD. v. JOBLINGS (1932), 49 R. P. C. 352.

1431a. ——— Strict proof required.]—Pltf. were the registered proprietors of the trade mark "Castrol" in class 47. Deft., who owned a garage, sold there petrol & lubricating oil, but, if asked for Wakefield Castrol XL oil, said he did not stock it. His house was a mile & a half away & he got his wife to sell the very small amount of petrol & oil which might be asked for there. He took to the house two empty tins marked Wakefield Castrol XL oil, from one of which he had blacked out the words "Wakefield Castrol." Pltf., to protect their trade, sent out employees to discover any dishonesty by the selling as their Wakefield Castrol XL oil of other XL oil. Two of their employees called at deft.'s house, & after asking for & buying some petrol alleged that they asked for two pints of Castrol XL oil. Defts.' daughter, 14 years old, attended to customers & poured out of the tin on which the words "Wakefield Castrol" were blacked out a pint. The supply then gave out & she asked in the house whether there was any more XL oil & was told there was not. The oil the daughter poured out was not Castrol XL oil, but XL oil of another name. The employees asked her to give a receipt & she made out one for one pint of oil 9d. The price 9d. was substantially less than the price at which Wakefield Castrol XL oil was sold. She was then told she had not given a receipt for Castrol & was asked to put the word Castrol on the receipt. She added the words "Castrol XL." Pltf. claimed an injunction against deft., his servants, & agents:—*Held*: it was necessary in trap order cases for a pltf. to prove beyond peradventure his case, but that had not here been done, as there was no suggestion that deft. had ever traded dishonestly at his garage & no proof that the daughter acted dishonestly: further, there was no evidence that a train was laid by deft. so as to enable an innocent agent to commit something which would amount to dishonest trading. Therefore no injunction could be granted

Ingredients contained in the finished article, & this of itself was not sufficient to identify the beverage sold to the public with the business of applt. so

as to justify the assertion that the commodity sold to the public was the goods of applt.—ORANGE CRUSH (AUSTRALIA), LTD. v. GARTRELL (1928),

41 C. L. R. 282; 29 S. R. N. S. W. 19; 46 N. S. W. W. N. 1; 2 A. L. J. 326; [1929] Argus L. R. 96.—AUS.

against deft., & the action was dismissed with costs.—**WAKEFIELD (C. C.) & Co., LTD. v. RUSSELL** (1930), 47 R. P. C. 473.

**1431b.** ———.]—Pltfs., who were manufacturers of lubricating oil known as "Castrol" & were the proprietors of a trade mark consisting of that word registered in Class 47 in respect of lubricating oil, placed two separate trap orders with deft. Pltfs. then issued a writ for infringement & passing off. Pltfs. by their statement of claim alleged that on each occasion the oil supplied by deft.'s employees in response to orders for Castrol XL was not Castrol XL, & that on the second occasion the oil supplied was drawn from a cabinet labelled Castrol XL, the said cabinet being exposed to the public view. Deft. denied the allegations:—*Held*: in an action for passing off the offence must be proved in the fullest possible way, & notice as soon as practicable of the incident relied upon should be given to deft.; although an offence had been committed no relief by way of injunction or damages could be granted, as a course of dealing could not be inferred from an isolated instance until it had been proved beyond doubt that the offence had been committed wittingly & knowingly. Inasmuch as an offence had been committed, although deft. himself was innocent, pltfs. were justified in bringing an action. No order was made in the action for any relief asked & no order as to costs.—**WAKEFIELD (C. C.) & Co., LTD. v. PURSER** (1934), 51 R. P. C. 167.

**1431c.** ——— **All circumstances considered.**]—Pltfs. S.-M. & B. P., Ltd., & A. I., Ltd., marketed paraffin oil under the trade mark "Aladdin," in pursuance of an agreement between them, whereby the oil was selected by A. I., Ltd., & supplied & distributed by S.-M. & B. P., Ltd. The oil was for the purpose of identification coloured pink by a dye supplied by A. I., Ltd., & advertisements relating to it were issued by A. I., Ltd. Pltfs. commenced an action against defts., who were vendors of paraffin oil, to restrain them from passing-off by selling oil not being pltfs.' oil under the name "Aladdin." Pltfs. alleged that the name "Aladdin" was distinctive of the oil marketed by them under the joint venture, & that defts. had sold other oil coloured pink in response to orders, most of which were trap orders, for "Aladdin." On a summons by defts. for particulars of the statement of claim, including particulars as to which of pltfs. had advertised & used the trade mark "Aladdin" & sold oil thereunder, which of pltfs. it was alleged that the trade mark indicated, & whether it was alleged that the trade mark indicated the manufacture or merchandise of pltfs. & of which of them, it was held by LUXMOORE, J., that defts. were entitled to particulars as to which of pltfs. had advertised & used the mark & sold oil thereunder, but were not entitled to the other particulars asked for. During the course of the trial of the action, defts. admitted that the trade mark "Aladdin" was distinctive of the oil marketed by pltfs. under the joint venture, which oil was in fact coloured pink, but they claimed to be entitled to sell paraffin oil coloured pink:—*Held*: in deciding whether or not there has been passing-off as the result of trap orders the ct.

always considers the circumstances & the opportunities given to defts., including the time at which defts.' attention is called to the facts, but that the whole of the evidence has to be considered in the light of the circumstances of the case; in all the circumstances of the case, & on the evidence, pltfs. had discharged the onus of proving that defts. had in answer to orders for "Aladdin" paraffin sold paraffin, pink in colour, which was not the paraffin of pltfs., & that pltfs. were entitled to the relief sought. An injunction was granted & an inquiry as to damages ordered, & defts. were ordered to pay pltfs.' costs of the action.—**SHELL-MEX & B. P., LTD. & ALADDIN INDUSTRIES, LTD. v. HOLMES (R. & W.)** (1937), 54 R. P. C. 287.

**1431d. Single trap order insufficient.**]—**ABBEY SPORTS CO., LTD. v. PRIEST BROS., No. 610a, ante.**

**1436a. Sale of second-hand goods by trade name—No deception.**]—Pltfs. were manufacturers of electric lamps under the marks "Osram" & "Mazda" respectively, & such marks were well known to the public. Deft., who kept a small shop in a poor quarter of London in which he sold various goods, offered for sale second-hand lamps of pltfs.' make at reduced prices in cartons bearing the respective marks:—*Held*: the question whether a customer in such a case expects to receive new or second-hand goods depends upon the circumstances, including the nature of the locality, of the shop, & of the goods: in the present cases there was no fraud or intent to deceive, & the inference might be drawn that deft.'s customers expected to receive second-hand lamps, & passing-off was not established. Both actions were dismissed with costs.—**GENERAL ELECTRIC CO., LTD. v. PRYCE'S STORES, BRITISH THOMSON-HOUSTON CO., LTD. v. PRYCE'S STORES** (1933), 50 R. P. C. 232.

**1442. Add. Annotations:—***Refd.* Stone, J. B. & Co. v. Steelace Manufacturing Co. (1929), 46 R. P. C. 192; Irving's Yeast-Vite, Ltd. v. Horsenail (1933), 103 L. J. Ch. 106.

**1442. Add. Annotation:—***Refd.* Stone J. B. & Co. v. Steelace Manufacturing Co. (1929), 46 R. P. C. 192.

**1442a.** ———.]—Pltfs., a German co., had for many years manufactured & sold magnetos under the name "Bosch" & certain other marks such as "Z.R.4." Before the war pltfs. formed a co. in America to make & sell magnetos, which co. was sequestered in 1917 & formed into the American Bosch Corpn. Since 1917 magnetos had been imported into this country, manufactured by the American Corpn. & bearing the word "Bosch" as a part of the identifying marks. Pltfs. commenced an action against defts. to restrain them from passing off magnetos by using in connection with them the name "Bosch" & such marks as "Z.R.4.":—*Held*: there was no sufficient evidence that an American Bosch magneto could not properly be described as a Bosch magneto without other distinguishing words, & accordingly the word "Bosch" when applied to magnetos was not distinctive of pltfs.; & deft. was not intending to pass off magnetos not manufactured by pltfs. as manufactured by them.—**ROBERT BOSCH AKTIENGESSELL-**

SCHAFT *v.* COOK (R. H.) & Co. (1930), 47 R. P. C. 402.

1448a. —. —. —.]—HAMPSHIRE (F. W.) & Co. (1927), LTD. *v.* GENERAL KAPUTINE SYNDICATE, LTD., No. 1350b, *ante*.

1458. *Add. Annotation* :—Folld. Johnson & Son (Loughborough), Ltd. *v.* Puffer (W.) & Co. (1930), 47 R. P. C. 95.

1462a. —. —. —.]—Pltfs. commenced an action asking for an injunction to restrain the defts. from passing off as & for their goods hosiery not being their hosiery by using upon or in connection therewith the word "Trinity" or any other word only colourably differing therefrom. Pltfs. were the registered proprietors of a Trade Mark No. 321,009 registered in 1910 consisting of the words Trinity Street, Street being in small letters, above a triangle within which was a monogram, & the word "Brand" below the triangle. On their hosiery, however, they had used a mark consisting of the words "Trinity Street Brand," above "All Pure Wool made in England," the word "Trinity" being in large letters & the word "Street" in small letters, & against those words was "Registered 321,009." Defts.' hosiery was dyed by a firm, whose works were in Trinity Lane, Hinckley, & they put on a mark consisting of the words "Trinity Dye & Finish," above a shield containing a representation of the arms of the Borough of Hinckley :—*Held* : pltfs., having made a misrepresentation in the mark which they had used that it was a registered trade mark, had disintitiled themselves to relief & that the motion must be refused. The costs were ordered to be defts.' costs in the action.—JOHNSON & SON (LOUGHBOROUGH), LTD. *v.* PUFFER (W.) & Co., LTD. (1930), 47 R. P. C. 95.

1478. *Add. Annotation* :—*Generally*, *Reffd.* Abbey Sports Co. *v.* Priest Bros. (1936), 53 R. P. C. 300.

1495a. —. —. —.]—Due to mistake—As to rights of defendant.]—In 1930, Radio Rentals commenced business in the hiring of wireless receiving sets. In the early part of 1933, Radio Rentals entered into negotiations for an increase of capital with C. & W. In July, 1933, during the continuance of these negotiations, C. & W. incorporated deft. co. In Aug. 1933, pltf. co. was incorporated & had transferred to it the business carried on by Radio Rentals. In Jan. 1934, the negotiations were abandoned & defts. commenced trading in a business similar to that of pltfs. In May, 1934, pltfs. commenced an action to restrain defts. from trading in the hire of wireless receiving sets under the name "Rentals, Ltd." or any name so closely resembling pltfs.' name as to be calculated to deceive. Defts. alleged that their name was descriptive & not calculated to deceive, & that by reason of delay pltfs. were estopped from bringing an action :—*Held* : the delay was due to the mistaken belief by pltfs. that deft. co. had acquired some rights by reason of their prior registration, & the name of defts. so closely resembled that of pltfs. as to be calculated to deceive or cause confusion

between the two businesses. An injunction was granted but was suspended for four weeks & an order was made for the payment by defts. of thirty guineas damages. Relief other than in respect of the trade names having been claimed in the pleadings but not at the trial, defts. were ordered to pay two-thirds of pltfs.' costs.—RADIO RENTALS, LTD. *v.* RENTALS, LTD. (1934), 51 R. P. C. 407.

1504a. —. —. —.]—CLARK (C. & J.), LTD. *v.* CLARK'S SHOE SERVICE (1935), 52 R. P. C. 251.

1516a. —. —. —.]—Pltfs. had for some years sold motor car windscreen wipers marked with the words "Vokes-Folberth," "C. G. Vokes & Co." & with pltfs.' address. Such wipers were manufactured for pltfs. by the C. Co. under an agreement which prohibited the C. Co. from manufacturing such wipers otherwise than to pltfs.' order & from selling such wipers to persons other than pltfs. The C. Co. wrongfully sold a number of such wipers marked as above to deft. E., who resold a number of such wipers to defts. The Marble Arch Motor Supplies, Ltd., who resold to the public. Pltfs. instituted an action against defts., claiming an injunction to restrain passing off, an inquiry as to damages, & an order for delivery up :—*Held* : the wipers complained of had been manufactured & sold to deft. E. by the C. Co. wrongfully & in breach of duty to pltfs. : such wipers, not having been selected or marketed by pltfs., were spurious, & the sale thereof by defts. constituted actionable passing off : both defts. had purchased innocently, & there being no evidence of sales by defts. of spurious wipers subsequently to complaint being made by pltfs., an inquiry as to damages must be refused : both defts. had, subsequently to complaint being made by pltfs., maintained their right to sell the spurious wipers, & the action was maintainable. An injunction to restrain passing off was granted against both defts., & an order for delivery up was made against defts. Marble Arch Motor Supplies, Ltd. Defts. appealed, but the appeal was, by consent, dismissed.—C. G. VOKES, LTD. *v.* EVANS (F. J.) & MARBLE ARCH MOTOR SUPPLIES, LTD. (1931), 49 R. P. C. 140, C. A.

1516b. —. —. —.]—Inquiry as to damages.]—C. G. VOKES, LTD. *v.* EVANS (F. J.) & MARBLE ARCH MOTOR SUPPLIES, LTD., No. 1516a, *ante*.

1516c. —. —. —.]—Order for delivery up.]—C. G. VOKES, LTD. *v.* EVANS (F. J.) & MARBLE ARCH MOTOR SUPPLIES, LTD., No. 1516a, *ante*.

1527a. *Action for passing off settled*—Breach of terms—Injunction.]—Pltfs. commenced an action against defts. to restrain passing off. That action was settled on terms agreed by the parties & an order was made staying all further proceedings except for the purpose of enforcing the terms scheduled to the order. On ascertaining that breaches had been committed pltfs. moved for an injunction & an inquiry as to damages resulting from such breaches :—*Held* : the procedure was proper for obtaining relief in such cases. Defts. gave an undertaking in the terms of the notice

of motion & an inquiry as to damages was granted.—HYATT ROLLER BEARING CO. & DELCO REMY & HYATT, LTD. v. FREDERICK POLLARD & CO. (BEARINGS), LTD. (1931), 52 R. P. C. 115.

**1527b. Motion for injunction in default of defence.]**

—Pltfs., who manufactured rectifiers for wireless purposes under the name "Westinghouse Rectifiers," commenced an action against defts. to restrain passing off their goods as those of pltfs. & moved for an interlocutory injunction. Defts. had obtained genuine goods of pltfs. & had taken them to pieces & reassembled them in an altered or mutilated form. Defts. did not appear & an interlocutory injunction was granted, of which the form was settled. After delivery of a statement of claim, pltfs. moved for judgment in default of defence, & an order was made for an injunction in terms substantially the same & for costs to be paid by defts.—WESTINGHOUSE BRAKE & SANBY SIGNAL CO., LTD. v. VARSITY ELIMINATOR CO., LTD. (1935), 52 R. P. C. 295.

**1534a. — Misrepresentation—No damage.]**

ILLUSTRATED NEWSPAPERS, LTD. v. PUBLICITY SERVICES (LONDON), LTD., No. 1363a. ante.

**1557a. —**—[Resps. had used for many years in India a ticket containing a picture of a lotus flower & also a combination of three marks, one of which also contained a picture of a lotus flower. Appls. had adopted a ticket with a different picture, but also including a lotus flower, & a combination of three marks similar in general appearance to resps.' three marks, but with a rose instead of a lotus flower. The ct. at Allahabad found that applts. had adopted these marks fraudulently, & that they were cal-

culated to lead to passing off, & granted an injunction & damages. No case of actual deception was proved. The estimate of damages in particulars to the plaintiff which was verified by affidavit was Rs.25,000. The ct. awarded damages on the following basis: applts. were proved to have sold cloth bearing the marks complained of to the value of Rs.3,200,000; the ct. assumed that, if offered without these marks, only 40 per cent. of this quantity would have been sold, & gave as damages 9 per cent. as profit on the remaining 60 per cent., i.e. Rs.172,800. Appls. appealed:—*Held*: the injunction was rightly granted, but the damages must be calculated by estimating the trade lost to resps. by reason of the use of applts.' marks, & the damages should be reduced to Rs.67,000.—JUGGI LAL-KAMLA, PAT & JUGGILAL-KAMLAPAT MILLS OF CAWNPORE v. SWADESHI CO., LTD. (1928), 46 R. P. C. 74, P. C.

**1570. Add. Annotations:—Apld.** The Young Sid. [1929] P. 190; Co-operative Wholesale Society, Ltd. v. Lally (1930), 23 B. W. C. C. 513. *Refd.* Brown v. Dagenham U. D. C. (1929), 98 L. J. K. B. 565; Clark v. Urquhart, Stracey v. Urquhart, [1930] A. C. 28; Lloyd del Pacifico v. Board of Trade (1930), 46 T. L. R. 476; London Welsh Estates, Ltd. v. Philip (1931), 144 L. T. 613; Midland Employers' Mutual Assurance, Ltd. v. Lewis (1930), 23 B. W. C. C. 192; Hamilton v. Branch, [1933] W. N. 11; British Russian Gazette & Trade Outlook, Ltd. v. Associated Newspapers, Ltd., Talbot v. Associated Newspapers, Ltd., [1933] 2 K. B. 616; Lancashire Loans, Ltd. v. Black, [1934] 1 K. B. 380; *Re* Margolin's Registered Design, [1936] 3 All E. R. 347.

## Part VI.—Royal Arms.

**1586a. Application for transfer to King's Bench Division—For trial by jury at Assizes.]**—ROYAL WARRANT HOLDERS ASSOCN. v. SLOAN, LTD. (1931), 48 R. P. C. 387.

**1589a. Improper use of device or title.]**—ROYAL WARRANT HOLDERS' ASSOCN. v. LIPMAN (1933), 78 Sol. Jo. 64; 51 R. P. C. 155.

**PART V. SECT. 6, SUB-SECT. 7.—**  
F. (b) i.

*eg. Licence to use trade name—Revocation—Continued use by licensee—Injunction.*—[Appls. carried on business at shops in & near Melbourne under trade names which had become associated with their business, & they had the exclusive right to use the names by Business Names Act, 1928, s. 25 (1), as they were registered under Partnership Act, 1915, as using the names. Appls. verbally agreed with resp. that he should, at his own expense, open a shop fitted up like applts.' shops & there sell goods to be bought from them; resp., with applts., assent, painted up over the shop their trade names, his own name not appearing. In the following year applts. complained that resp. was buying part of his stock elsewhere & required him to discontinue the use of the names, but an agreement was made that, as a temporary measure, he should purchase elsewhere goods which they could not supply. After some months resp.

was buying from applts. only 10 percent. of his stock & was finally required to discontinue the use of the names. Upon resp. refusing applts. claimed an injunction against him:—*Held*: resp. had only a revocable licence to use the names, & as it had been revoked by applts. they were entitled to an injunction; the evidence did not show that the names had ceased to be distinctive of applts.' business by reason of their user under the agreement, & if there had been any deception of the public by applts., it was not fraudulent so as to disentitle them to the relief claimed.—COLES (J. H.) PROPRIETARY, LTD. v. NEED, [1934] A. C. 82; 103 L. J. P. C. 13; 150 L. T. 166; 50 R. P. C. 379, P. C.—AUS.

*sk. Whether granted—No intention to pass off—Sale of reconditioned goods.*—[Deft. sold reconditioned spark plugs manufactured by pltf. No trade mark was added to that already on the plugs, & they were sold as "renewed spark plugs." An action against deft. for an injunction was dismissed because

(a) it was not contrary to Unfair Competition Act, 1932, there being no competition between a new spark plug & an old one, & (b) it was not contrary to Criminal Code, sects. 486 to 490, since deft. did not attempt to sell a different article under pltf.'s trade name.—A.C. SPARK PLUG CO., LTD. v. LOGAN, [1934] 2 D. L. R. 390; O. R. 301; *reversd.*, [1934] 2 D. L. R. 390.—CAN.

**PART V. SECT. 6, SUB-SECT. 7.—**  
F. (b) ii.

**1538 i. Whether granted—***Probability of damage to be shown.*—BREWSTER TRANSPORT CO. v. ROCKY MT. TOURS & TRANSPORT CO. (Alta.), [1929] 4 D. L. R. 413.—CAN.

**PART V. SECT. 6, SUB-SECT. 7.—**  
F. (c).

**1559 iii. —**—[JUGGI LAL-KAMLA-PAT v. SWADESHI MILLS CO., LTD. (1928), L. R. 56 Ind. App. 1.—IND.

## TRAMWAYS AND LIGHT RAILWAYS.

## Part I.—Tramways.

25. *Add. Annotation*:—**Consd.** *West Midlands Joint Electricity Authority v. Pitt, Minister of Transport v. Pitt*, [1932] 2 K. B. 1.

85. *Add. Annotation*:—**Appld.** *London Midland & Scottish Ry. Co. v. Greaver*, [1937] 1 K. B. 367.

89a. ——— **Or on leaving carriage.**—By bye-law 12 of the London County Council's Tramways Bye-laws & Regulations: "Each passenger shall, immediately upon demand or in case no demand shall have been made, before leaving the carriage, pay to the conductor the fare legally demandable for his journey, & accept a ticket therefor":—*Held*: the bye-law was invalid (a) as being repugnant to the general law of England, in that it made failure to pay a fare legally

demandable an offence, irrespective of whether there was or was not an intention to avoid payment, & (b) as being unreasonable.—**LONDON PASSENGER TRANSPORT BOARD v. SUMNER** (1935), 154 L. T. 108; 99 J. P. 387; 52 T. L. R. 13; 79 Sol. Jo. 840; 33 L. G. R. 459.

*Annotation*:—**Refd.** *Haynes v. Davey* (1937), 25 Ry. & Can. Tr. Cas. 294.

91. *Add. Annotation*:—**Consd.** *London Passenger Transport Board v. Sumner* (1935), 154 L. T. 108.

103. *Add. Annotation*:—**Consd.** *Sewai Jaipur (I.L.H. Maharaja Man Singh) v. Arjun Lal*, [1937] 4 All E. R. 5.

115. *Add. Annotation*:—**Generally, Refd.** *Oxford Corp'n. v. Oxford Electric Co.* (1930), 143 L. T. 577.

## PART I. SECT. 3, SUB-SECT. 4.—A.

341. *Extent of obligation to repair.*—The Hobart Tramway Company's Act, 1884, by sect. 15 (2), requires the Hobart Corp'n. as the successor of the Tramway Co., "to cause the place where the road is opened or broken up, to be fenced & watched, & to be properly lighted at night where this is necessary for the public safety":—*Held*: the qualification expressed by the words "where this is necessary," etc., extends to the whole sub-sect.—**SEYMOUR v. HOBART CORPN.**, 22 Tas. L. R. 46.—**AUS.**

## PART I. SECT. 4, SUB-SECT. 3.

m i. ——— *What amounts to breach.*—**GLASGOW CORPN. v. STRATHERN**, [1929] S. C. (J.) 5.—**SCOT.**

## PART IV.

i (p. 365) i. ——— *To indemnify under agreement—Damages payable through negligence of municipality.*—A municipal corp'n. cannot claim under an agreement for indemnity against a street ry. co. when the damages paid by the municipality were rendered payable by the municipality's own negligence.—**OTTAWA v. OTTAWA ELECTRICITY CO.**, [1936] 3 D. L. R. 301.—**CAN.**

h (p. 365) i. ——— *A street railway company operating within a province, originally incorporated by a provincial legislature, but whose undertaking was subsequently declared by a Dominion Act to be a work for the general advantage of Canada, is not subject to the jurisdiction of a public service commission created by the province, but the execution of its powers is, by the provisions of the Railway Act, within the jurisdiction of the Board of Railway Comrs. for Canada.*—**QUEBEC RY. LIGHT & POWER CO. v. MONTREAL LAND CO.**, [1928] 1 D. L. R. 143; 34 Can. Ry. Cas. 275; [1927] S. C. R. 545.—**CAN.**

aa (p. 365) i. ——— *To consider apportionment of cost of tramway.*—An agreement between a city & a tramway co. apportioning the cost of a subway is a matter which the Railway Board may refuse to consider.—**QUEBEC RAILWAY, LIGHT & POWER CO. v. QUEBEC**, [1934] 4 D. L. R. 523.—**CAN.**

ee (p. 365) i. ——— *By an agreement made in 1891, & confirmed by a*

statute of the Ontario legislature, applt. co. was given the exclusive right to construct & operate an electric railway for a period of 40 years, with a right of renewal for a further period of 20 years, on the lands of resp. commission. The agreement provided that, on its determination, the co., if unwilling to renew, was to be duly compensated by the grantors "for their railways, equipment, machinery & other works . . . but not in respect of any franchises for holding or operating the same," the compensation to be fixed by mutual agreement, or, in case of difference, by arb'n., the property of the co. passing to the grantors of the franchise. The railway was operated by the co. for 40 years in accordance with the terms of the agreement, but it was not a commercial success. The franchise having terminated, an arb'n. was proceeded with to determine the amount of compensation payable to applt. co., & the majority of the arbitrators were of the opinion that the railway, at the time it was handed over to resp. commission, "was of no value for operation as a railway to the railway co. or the parks commission or to anyone else," & that the compensation payable was the "scrap value," an amount which they fixed at \$179,104. In case this should be held to be the wrong basis of assessment, they fixed the value of the undertaking calculated on the basis of cost of reconstructions, less depreciation, as at Sept. 1, 1932, at \$967,592:—*Held*: there was no justification under the agreement or the confirming statute for assessing the compensation at scrap value. It was fundamental that it was a railway complete with equipment, machinery, & works, which applt. co. was bound to hand over to resp. comrs. & for which it was to be duly compensated, & the proper basis of the compensation was the cost of reconstruction, less depreciation. It is well established that the reconstruction cost, less depreciation, is a correct method of valuing a public utility where the value of the franchise is excluded from consideration.—**INTERNATIONAL RY. CO. v. NIAGARA PARKS COMMISSION**, [1937] 3 All E. R. 181; 81 Sol. Jo. 524, P. C.—**CAN.**

ff (p. 365) i. ——— *Exemption—Contract of agreement.*—In an action to recover from deft. co. certain fees alleged to be payable under a bye-law of pl't. corp'n. passed under Public

Vehicles Act, R. S. O., 1927, s. 4:—*Held*: an agreement for exemption from taxation applied to the operation of vehicles partly within & partly without the city.—**OTTAWA v. OTTAWA ELECTRIC CO.**, [1930] 1 D. L. R. 551; 36 C. R. C. 192; 64 O. L. R. 537.—**CAN.**

pp (p. 365) i. *Duty to replace track.*—The obligation of a street ry. co. by its Act to replace its track in the event of a certain street being paved by the city does not extend to relocating its track when directed to do so by the city engineer.—**HALIFAX v. NOVA SCOTIA LIGHT & POWER CO., LTD.**, [1934] 4 D. L. R. 728; on appeal, [1935] 2 D. L. R. 214.—**CAN.**

e (p. 366) i. *Liability for construction of bridges.*—Appl't. co. operated in the cities of Winnipeg & St. Boniface a street railway system which had crossed the two bridges in question, but service across them had been discontinued as one of them was considered unequal to the strain of increasing general traffic over it, & appl't. had provided (with consent of the municipalities) a substituted service. The municipalities replaced the bridges by new & stronger ones, the change involving construction on alignments different from those of the old bridges & the substitution of two lines of track for the former single track. On application by the municipalities, the Manitoba Municipal & Public Utility Board made an order requiring appl't. to pay the cost of placing rails, ties & foundations therefor on the bridges & one-half the cost of such work in connection with the approaches:—*Held*: the order was unauthorised.—**WINNIPEG ELECTRIC CO. v. WINNIPEG & ST. BONIFACE CITY**, [1934] S. C. R. 173; 4 D. L. R. 181; *affd.*, [1935] 4 D. L. R. 657, P. C.—**CAN.**

e (p. 366) ii. ——— *OTTAWA ELECTRIC RY. CO. v. OTTAWA*, [1934] 1 D. L. R. 787.—**CAN.**

aa (p. 366) i. ——— *Whether mandamus lies to continue.*—A mandamus cannot be granted to compel a street railway co. to continue the operation of its line.—**R. v. OTTAWA ELECTRIC RY. CO.**, [1933] 1 D. L. R. 695.—**CAN.**

ff (p. 366) i. ——— *SYMONS v. WINNIPEG ELEC. CO.*, [1928] 1 D. L. R. 159; 37 Man. L. R. 170; [1927] 3 W. W. R. 650; *affg.* S. C. *sub nom.* **WINNIPEG ELEC. CO. v. SYMONS**, [1929]

2 D. L. R. 197; [1928] S. C. R. 627.—CAN.

ff (p. 366) ii. ———.—]—MORGAN v. BRITISH COLUMBIA ELECTRIC RY. CO., [1930] 2 W. W. R. 776; 4 D. L. R. 30; 42 B. C. R. 382.—CAN.

ff (p. 366) iii. ———.—]—ALLEN v. EDMONTON (CITY), [1930] 2 W. W. R. 25; 3 D. L. R. 539; 37 C. R. C. 23; 24 Alta. L. R. 458.—CAN.

ff (p. 366) iv. ———.—]—Held: it was the duty of defts. motorman to take all precautions to avoid a danger which was reasonably to be anticipated; but he could not have anticipated that the driver of the automobile which he saw in front of him was going to run her vehicle out from the kerb so as to be in his way, & when he saw that an accident was imminent he did everything possible to prevent a collision.—MALONEY v. HAMILTON ST. R. CO., [1930] 1 D. L. R. 268; 36 C. R. C. 211; 94 O. L. R. 444.—CAN.

ff (p. 366) v. ———.—]—Where a truck which had become stalled on a tram track was run into by a tram & damaged.—Held: there was common negligence & the judge properly made them equally liable.—PETROLEUM HEAT & POWER, LTD. v. BRITISH COLUMBIA ELECTRIC RY. CO. (1932), 46 B. C. R. 462.—CAN.

ff (p. 366) i. ———.—]—MERCER v. BRITISH COLUMBIA ELECTRIC RY. CO., [1931] 1 W. W. R. 550.—CAN.

rr. (p. 366) ii. ———.—]—When a street car is travelling on its own right of way, not on a highway, the high speed of the car is not a ground of negligence unless there was some reason for the motorman anticipating an emergency.—NIXON v. OTTAWA ELECTRIC RY. CO., [1932] O. R. 389; 3 D. L. R. 263; *reversd.*, [1933] S. C. R. 154; 1 D. L. R. 609.—CAN.

aaa (p. 366) i. ———.—]—Where a railway co. runs its cars along part of a highway, its statutory right not being exclusive of the right of the public though preferential in the sense that upon the approach of a car other users of the highway have to give it right of way, the co. is under a legal duty by its servants to be on the watch for the safety of persons on the railway track, & to equip its car with lights adequate at night to enable the driver to stop in time to avoid them. It is not sufficient to equip the car with a light of a recognised & proper pattern, reasonable care must be taken that a car does not proceed when the light is out of order. There is a reciprocal duty upon persons using the highway to take reasonable care to avoid the car.

The language used by a jury in explaining their reasons for their verdict should not be construed too narrowly.—PRONEK v. WINNIPEG, SELKIRK & LAKE WINNIPEG RY. CO., [1933] A. C. 61; 102 L. J. P. C. 12; 148 L. T. 193, P. C.—CAN.

aaa (p. 366) ii. ———.—]—The duty of a railway co. towards its passengers for hire is to take reasonable care, including in that the use of skill & foresight, to see that its carriages are reasonably safe for persons using

them in the ordinary & customary manner & with reasonable care; but this does not mean that the co. should be held to have absolutely warranted their safety. With respect to the constructional type of the steps of street railway cars, the duty of the co. under the above rule is fulfilled when it purchases from the best manufacturers equipment of the type customarily used for that traffic or itself manufactures such equipment in accordance with the design customarily employed by street railway companies; provided, of course, there is no special defect in the individual car in question.—GERDIE v. SASKATOON, CITY OF, [1930] 2 W. W. R. 625; 4 D. L. R. 543.—CAN.

b (p. 367) i. ———.—]—After alighting beyond stopping place.—Tramway co. held not liable for injury to a passenger who was struck by an automobile after alighting from a street car at a point beyond its regular stopping place.—KUCZERKY v. TORONTO TRANSPORTATION COMMISSION & SARACINI, [1937] 1 D. L. R. 756; O. R. 256; *reversd.*, [1937] S. C. R. 431; 3 D. L. R. 471.—CAN.

dd (p. 367) i. ———.—]—A violent jerk in starting & an abrupt stop to avoid a car, whereby a passenger is injured, constitute negligence.—MONTREAL TRAMWAYS CO. v. YERVANT [1936] 3 D. L. R. 241.—CAN.

dd (p. 367) ii. ———.—]—Sudden stop.—Injury to passenger about to alight.—The mere happening of a jerk when a street car is about to stop does not of itself prove negligence on the part of the motorman or the co.; & a passenger who is thrown down within the car while about to alight must in order to succeed in an action for damages prove such negligence by affirmative evidence.—HYDE v. BRITISH COLUMBIA ELECTRIC RY. CO., LTD., [1933] 1 W. W. R. 174; 46 B. C. R. 443.—CAN.

hh (p. 367) i. ———.—]—Slippery step.—CHIPPENDALE v. WINNIPEG ELEC. CO., [1928] 1 D. L. R. 920; [1928] 1 W. W. R. 238; 37 Man. L. R. 207.—CAN.

hh (p. 367) ii. ———.—]—Displacement of platform on street.—ZEIDEL v. WINNIPEG ELECTRIC CO., [1928] 3 D. L. R. 570; [1928] 2 W. W. R. 601; 34 Can. Ry. Cas. 267; 37 Man. L. R. 412; *reversd.*, *sub nom.* WINNIPEG ELECTRIC CO. v. ZEIDEL, [1929] 3 D. L. R. 610; S. C. R. 534.—CAN.

ii (p. 367). *Affid. sub nom.* WINNIPEG ELECTRIC CO. v. SCOTT, [1928] 2 D. L. R. 420; [1928] S. C. R. 52; 34 Can. Ry. Cas. 260.—CAN.

oo (p. 367). *Reversd. sub nom.* WINNIPEG ELECTRIC CO. v. ODEGAARD, [1928] 2 D. L. R. 297; [1928] S. C. R. 192.—CAN.

oo (p. 367) i. ———.—]—Starting car before passenger seated.—The evidence showed that a female passenger entered a street car in the winter season, & that there was water, snow & slush on the floor of the car at the time. While ptff. was in the front vestibule of the car, trying carefully to reach a seat, the operator of the car suddenly, & before ptff. had reached a seat or a position of safety, started the car.

Ptff. was thrown down & her leg broken.—Held: the operator, knowing the condition of the floor of the car, was negligent.—GLICK v. NOVA SCOTIA TRAMWAYS & POWER CO. (1928), 60 N. S. R. 198.—CAN.

oo (p. 367) ii. ———.—]—Collision with automobile.—Injury to plaintiff by automobile.—ATHONAS v. OTTAWA ELECTRIC RY. CO., [1931] S. C. R. 139; 2 D. L. R. 473.—CAN.

oo (p. 367) iii. ———.—]—Misleading notice in car.—Ptff., a passenger in a street-car operated by deft. Commission, was injured by a fall from the car & sued the Commission & a taxicab co. for damages. Ptff. was standing on the treadle of the car, when the emergency brake was suddenly applied & she was thrown against the exit door which opened & she fell into the road.—Held: the notice "Do not stand on the treadle unless you wish to leave the car" was an invitation to stand on it if one wished to leave the car, & implied that it was a proper & safe place to stand whilst the car was in motion. The Commission was therefore liable for negligence.—MORTON v. NATIONAL TAXI, LTD., & TORONTO TRANSPORTATION COMMISSION, [1930] 4 D. L. R. 785; 66 O. L. R. 3.—CAN.

oo (p. 367) iv. ———.—]—Limitation of action.—An action for injury to a passenger while travelling on a street car is not barred by the time limit imposed by Ontario Railway Act, 1927, s. 267 (2), on action upon breach of contract relating to traffic.—BRYAN v. LONDON STREET RAILWAY CO., [1934] 4 D. L. R. 704; O. R. 769.—CAN.

tt (p. 367) i. ———.—]—SOUTH AUSTRALIAN RAILWAYS COMRS. v. BARNES (1927), 40 C. L. R. 179.—AUS.

aa. Agreement between street railway & municipality.—Not enforceable by private individual.—*Ex p.* NEW BRUNSWICK POWER CO. (N. B.), [1928] 1 D. L. R. 332.—CAN.

sb. Ontario Railway Act, 1913, s. 246.—Not applicable to railway declared to be for general advantage of Canada.—Held: the railway being one of Dominion status, s. 246 has no application in so far as it is sought thereby to impose an obligation on the municipality to assume the ownership of the railway or in default submit to the continued exercise of the co.'s privileges, notwithstanding the expiration of the term of the franchise.—MERRITTON v. NIAGARA, ST. CATHERINES & TORONTO RY. CO., [1931] 1 D. L. R. 371; 65 O. L. R. 563; *affd.*, [1931] 2 D. L. R. 161; 66 O. L. R. 500.—CAN.

sd. Limitation of action.—The benefit of sect. 60 of Consolidated Railway & Light Co. Act, 1896, which provides that actions for any damage or injury sustained by reason of the tramway or railway or the works or operations of the co. shall be commenced within six months after the time when such damage was sustained, extends to employees of the co. as well as to the co. itself.—BENTLEY v. ALLEN & YOUNG, [1932] 1 W. W. R. 399; 45 B. C. R. 55.—CAN.

## TRESPASS.

## Part I.—In General.

24. *Add. Annotations*:—**Refd.** *Rose v. Ford*, [1937] 3 All E. R. 359; *Workington Harbour & Dock Board v. Trade Indemnity Co.* (No. 2), [1937] 3 All E. R. 139.
50. *Add. Citations*:—*sub nom.* *BIGGS v. GREENFIELD & BENDER*, 8 Mod. Rep. 217; *sub nom.* *BRIGGS v. GREENFIELD & BENDER*, 1 Stra. 610.

## Part II.—Trespass to Land.

55. *Add. Annotation*:—**Refd.** *Elias v. Pasmore*, [1934] 2 K. B. 164.
- 61a. **Ladders & planks against wall.**—Pltf. & deft. occupied adjoining houses included within a building scheme, & the restrictions were enforceable by either of them against the other. The material restriction was that on no lot should any building be erected as a shop, warehouse or factory, or any trade or manufacture be carried on or any operative machinery be fixed or placed. Deft. was a jobbing builder, & placed ladders, planks, sand & such like against the side wall of pltf.'s house. At the rear of the house, deft. had erected a shed touching, or nearly touching, pltf.'s garden wall. In front of the shed was a lean-to sloping away from pltf.'s wall. It was closed on one side by the fact that it joined the shed, but was otherwise open. This was used as a store for builders' fittings. Pltf. brought this action alleging a technical trespass, damage by damp through the pointing being injured by these articles, & breach of the restrictive covenant by the erection of a warehouse & the carrying on of a trade. Deft. alleged that the covenant was no longer binding, owing to change of the neighbourhood:—**Held**: (1) the placing of the ladders & other articles against the wall was a technical trespass which had damaged the pointing, & pltf. was entitled to the cost of repointing the wall; (2) the shed & lean-to did not constitute a warehouse; (3) deft. was carrying on a trade within the meaning of the covenant, as the business of a jobbing builder involved the buying & selling of materials, & pltf. was entitled to an injunction; (4) the neighbourhood, being still mainly residential, had not suffered such a change as would release the covenant.—**WESTRIPP v. BALDOCK**, [1938] 2 All E. R. 779; 159 L. T. 65; 82 Sol. Jo. 617.
99. *Add. Annotation*:—**Consd.** Port of London Authority v. Canvey Island Comrs. (1931), 101 L. J. Ch. 63.
116. *Add. Annotations*:—**Refd.** Port of London Authority v. Canvey Island Comrs. (1931), 101 L. J. Ch. 63; *Stillwell v. Windsor Corpn.* (1932), 76 Sol. Jo. 433.
133. *Add. Annotation*:—**As to** (1) **Refd.** Port of London Authority v. Canvey Island Comrs. (1931), 101 L. J. Ch. 63.
138. *Add. Annotation*:—**Refd.** Griffiths v. St. Clement's School, Liverpool, [1938] 3 All E. R. 537.

## PART I. SECT. 1.

22 i. — *Interference with super-incumbent air*—*Bodies traversing air without touching ground*—*Bullets*.—Deft., who at the time was upon his own property, fired a bullet from a rifle at & killed pltf.'s cat which was then on a shed on the adjoining property occupied by pltf. The judge directed the jury that deft. had committed a trespass for which he was liable in damages to pltf.:—**Held**: the direction was right.—**DAVIES v. BENNISON**, 22 Tas. L. R. 52.—**AUS.**

sb. "Trespass" distinguished from "case".—Where an act is done by deft. negligently & which is in itself an immediate injury to another's person or property, the action is "trespass" & not "case". Where no act is done, but the negligence consists only of an omission, or where the act done is not immediately injurious, the action is "case" & not "trespass." Although the act of negligence is of such a nature that if it had been done by deft. personally "trespass" would lie, trespass will not lie if the act of negligence had been committed by deft.'s servant; in such a case the action is "trespass on the case" & not "trespass." The "act" referred to above in the first paragraph is an act causing "immediate injury," although that act merely sets in motion an unbroken series of continuing consequences, the last of which ultimately

causes injury to pltf.—**HILLIER v. LEITCH**, [1936] S. A. S. R. 490.—**AUS.**

## PART I. SECT. 3.

31 iv. —.—Several persons may be properly sued jointly for trespass to the person in falsely arresting pltf. & subjecting her to a physical examination.—**PACHKOWSKY v. ANDREWS**, [1934] 4 D. L. R. 652; 62 C. C. C. 141; 42 Man. L. R. 355.—**CAN.**

PART II. SECT. 3, SUB-SECT. 1.—A.

62 xx. —. —.—**HOLLINGSWORTH & WHITNEY, LTD. v. WRIGHT**, [1930] 3 D. L. R. 996.—**CAN.**

62 xxi. —. —.—In an action for damages for trespass to land, pltf. must prove possession.—**BREEN v. LEE**, [1934] 4 D. L. R. 662; 9 M. P. R. 68.—**CAN.**

b i. — *Lease by committee*—*Trespass by owner*.—**PEARSON v. DUKE**, [1931] 2 W. W. R. 442.—**CAN.**

PART II. SECT. 3, SUB-SECT. 1.—B.

72 xxix. —. —.—In an action of trespass:—**Held**: pltf. had failed to prove the identity of the lands which he occupied with those described in the documents under which he claimed, & his claim therefore failed.—**FRENETTE v. TAYLOR** (1935), 9 M. P. R. 212.—**CAN.**

sg. *At time of writ.*—In an action of trespass pltf. must have a title to

the land at the time of the issue of the writ.—**STEWART v. GOSS** (1933), 6 M. P. R. 72.—**CAN.**

PART II. SECT. 3, SUB-SECT. 1.—C. (a).

g (p. 384) i. —. —.—**CLARKE v. CORBURN LUMBER CO.** (1929), 1 M. P. R. 579.—**CAN.**

PART II. SECT. 3, SUB-SECT. 4.—A.

sa. *Locatee of Crown lands.*—**HAMM v. KROKBACK & CO., BALL v. KROKBACK & CO.** (1928), 34 O. W. N. 81; *affg.*, [1928] 2 D. L. R. 389.—**CAN.**

PART II. SECT. 3, SUB-SECT. 4.—H. (a).

q i. —. —.—A painter employed under a contract with a firm of manufacturers, painted on the wall of a shop occupied by a tenant an advertising sign. He did the work with the permission of the tenant, being under the impression that the tenant was the owner, & here presented to his employers that he had the owner's permission. In an action by the owner of the property claiming damages against the painter & his employers:—**Held**: the owner was entitled to damages against both defts., the matter complained of being of such a permanent nature as to cause injury to the reversion.—**BIRCHNELL v. WALKER (FRED.) & CO. PTY., LTD.** (1930), Argus L. R. 176.—**AUS.**



162. *Add. Annotation*:—**Refd.** *Re Southern Ry. Co.* (1935), 153 L. T. 105.

165. *Add. Annotations*:—**As to** (1) **Consd.** *Elias v. Pasmore*, [1934] 2 K. B. 164; *Owen & Smith* (trading as Nuagin Car Service) *v.* *Reo Motors* (Britain), Ltd. (1934), 151 L. T. 274.

173. *Add. Annotation*:—**Refd.** *Lavell & Co. v. O'Leary*, [1933] 2 K. B. 200.

176. *Add. Annotations*:—**Consd.** *Elias v. Pasmore*, [1934] 2 K. B. 164; *Owen & Smith* (trading as Nuagin Car Service) *v.* *Reo Motors* (Britain), Ltd. (1934), 151 L. T. 274.

229a. — **Value of land removed.**—In trespass for cutting into the pltf.'s close, & carrying away the soil, the proper measure of damages is the value to pltf. of the land removed, not the expense of restoring it to its original condition.—*JONES v. GOODAY* (1841), 8 M. & W. 146; 11 Dowl. N. S. 50; 10 L. J. Ex. 275; 151 E. R. 985.

*Annotations*:—**Refd.** *Whitwham v. Westminster Brymbo Coal & Coke Co.*, [1896] 1 Ch. 891; *Wednesbury Corpn. v. Lodge Holes Colliery Co., Ltd.*, [1907] 1 K. B. 78, C. A.

233a. — **Injury to wife.**—A pltf. in an action of trespass may give in evidence a consequential injury to his wife, not as a substantive ground of action, but to show how violent defts.' conduct was.—*HUXLEY v. BERG* (1815), 1 Stark. 98.

236. *Add. Annotation*:—**Refd.** *Callard v. Beeney*, [1930] 1 K. B. 353.

247a. — **Holding public meeting on private land.**—Pltf. co. was formed to acquire & did in fact acquire land at H. to be laid out as a garden city under & by virtue of powers conferred by a private Act of Parliament. The roads in the garden city were vested in the pltfs. & were to remain so vested until made up & taken over by the highway authority. Deft. gave notice that he intended to hold an open air meeting in the neighbourhood of a church on pltfs.' property at the junction of two roads. These roads were not barred, but notices had been posted upon them announcing that they were private roads. They were not dedicated to the public, nor had they been taken over by the highway authority. Pltfs. having sought an injunction:—**Held**: it being clear that there was no public right of way along the roads in question, it was unnecessary to discuss the question about any right of holding a meeting at the junction of the roads, & pltfs. were entitled to an injunction.—**HAMPSTEAD**

**GARDEN SUBURB TRUST, LTD. v. DENBOW** (1913), 77 J. P. 318.

258. *Add. Annotation*:—**Refd.** *Grant v. Derwent*, [1929] 1 Ch. 390.

261. *Add. Annotation*:—**Refd.** *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.

273. *Add. Annotation*:—**Refd.** *Williams-Ellis v. Cobb*, [1935] 1 K. B. 310.

274. *Add. Annotation*:—**Refd.** *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.

308a. **No right to set up *jus tertii*.**—In an action of trespass a deft. cannot set up a *jus tertii* against a possessory title.—*NICHOLLS v. FLY BEET SUGAR FACTORY*, [1931] 2 Ch. 84; 100 L. J. Ch. 259; 145 L. T. 113.

327a. — — — (1) Pltf. & deft. owned adjoining properties. Dft., wishing to rebuild his property, obtained leave from pltf. to underpin pltf.'s wall which abutted upon deft.'s building. Dft.'s new building was to have girders upon a steel cage, & to support this steel framework it was necessary to place stanchions at intervals along the boundary. Where these stanchions were placed deft. extended the concrete foundations some 20 ins. beyond pltf.'s wall into pltf.'s land:—**Held**: (1) the permission to underpin pltf.'s wall did not authorise the extension of the concrete foundations into pltf.'s land, & this extension amounted to a trespass. (2) Before trial, deft. paid £100 into ct. with a denial of liability. At the trial pltf. recovered £31 10s. damages:—**Held**: pltf. ought to have his costs of the action up to the time of payment in, & the subsequent costs of the issue of trespass. Dft. should have the costs since payment in of the issue as to damages.—*WILLCOX v. KETTEL*, [1937] 1 All E. R. 222.

348a. — — — (1) If a person who keeps hounds & a hunting establishment receive notice not to trespass on the lands of A., & after this his hounds go out, followed by a number of gentlemen who go upon the lands of A., the owner of the hounds is answerable for all the damage they do, though he himself forbear to go on the lands, unless he distinctly desires the gentlemen so out with his hounds not to go on those lands.

(2) If a stag, hunted by the hounds of B. run into the barn of A., B. & his servants have no right to enter the barn to take his stag; & if they do so they are trespassers.—**BAKER**

#### PART II. SECT. 5, SUB-SECT. 6.—B.

1 (p. 400) i. — — — — — On an appeal from a judgment whereby pltf. in an action for trespass was awarded vindictive damages in addition to special damages, held that, in view of deft.'s persistence in trespassing in defiance of pltf.'s requests to desist, his violent & abusive conduct towards pltf. & the particularly injurious & malicious manner in which certain of the trespasses were committed, the allowance of vindictive damages was justified & the amount thereof should not be reduced.—*SPENCER v. GRANT*, [1928] 1 D. L. R. 820; [1928] 1 W. W. R. 190; 22 Sask. L. R. 365.—**CAN.**

o (p. 400) i. — — — — — However wilful & long continued a trespass may have been, no damages can be given therefor beyond the loss sustained by pltf.—*STEWART v. TRADERS*

*TRUST Co.*, [1936] 2 W. W. R. 536; 4 D. L. R. 139.—**CAN.**

b (p. 401) i. — **Depreciation in value of property—Unlawful removal of remains of building.**—*SIMON v. GASTONGUAY*, [1931] 2 D. L. R. 75; 2 M. P. R. 470.—**CAN.**

b (p. 401) ii. — **Malicious damage to building.**—The measure of compensation for the malicious destruction of, or injury to, a building, in the possession of a claimant as owner in fee is not necessarily the cost of the restoration or reinstatement of the building. The ct. should award full compensation in money, measured by the injury or loss sustained by the owner, due regard being had to all the circumstances of the case, including the potential value, as well as the existing value, to the owner of the property destroyed or injured.—**MUR-**

*PHY v. WEXFORD COUNTY COUNCIL*, [1921] 2 I. R. 230.—**IR.**

#### PART II. SECT. 6, SUB-SECT. 2.—B.

so. **Possession of mother.**—The possession of a mother will not be considered tortious as against the heir, being her own child, but will rather be treated as the possession of a guardian.—*DOE d. HOAK v. EMPEY* (1834), 3 O. S. 488.—**CAN.**

#### PART II. SECT. 6, SUB-SECT. 3.—A.

sb. **Trespass on Indian reserve—Necessity for consent of band.**—*PAP-WEE-IN v. BEAUDRY*, [1933] 1 W. W. R. 138.—**CAN.**

#### PART II. SECT. 6, SUB-SECT. 3.—B.

sd. **Long possession of easement.**—*BROWN v. STREET* (1844), 1 U. C. R. 124.—**CAN.**

v. BERKELEY (1827), 3 C. & P. 32; 172 E. R. 310.

362a. ——— **Repair.**—To an action on the case for prostrating part, & building on part, of a wall, & laying materials on a close, in which wall & close plff. was interested as reversioner, deft. pleaded that his own dwelling-house, which he was repairing, accidentally & without his default fell upon the wall & threw it down, & that afterwards, & before action brought, & within a reasonable time, deft. carefully, & at his own expense, erected & built the said wall upon the said close, & in & about such erecting &

building, necessarily & unavoidably committed the grievances, etc., doing no unnecessary damage, etc., & thereupon & then, to wit at the times when, etc., at his own expense, repaired all damages sustained by plff. by reason of the grievances, etc.:—*Held*: on demurrer, no answer to the action.—TAYLOR v. STENDALL (1845), 3 Dow. & L. 161; 7 Q. B. 634; 14 L. J. Q. B. 301; 5 L. T. O. S. 214; 9 Jur. 1096; 115 E. R. 629.

379. *Add. Annotation*:—**Refd.** London Corpn. v. Lyons, Son & Co. (Fruit Brokers), Ltd., [1936] Ch. 78.

## Part III.—Trespass to Goods.

443. *Add. Annotation*:—As to (1) **Refd.** Solloway v. McLaughlin, [1938] A. C. 247.

448a. **Bottles marked with name of plaintiff—Refilled by defendant.**—Applts., who were manufacturers of aerated water, marked their name on the bottles & claimed an exclusive right of property in them. Resp. was a grocer who had no contractual relationship with applts., & he had in his shop a soda fountain by means of which he supplied customers with aerated beverages for consumption off the premises. The customers had to bring a bottle or other receptacle, & in practice resp. filled it without examination & without inquiring into the customer's right to use it. Occasionally applts.' bottles were used in this way. In an action by applts. against resp. to restrain him from receiving from customers bottles marked with applts.' name for the purpose of filling them with beverages:—*Held*: there was no duty on resp. to ascertain which bottles were applts.' property, & the action failed.

As in the particular case the requests to fill the bottles were in the nature of a trap order & were made with the authority of applts., no case of trespass was proved & for this reason the action failed (*per CUR.*).—LEITCH (WILLIAM) & CO., LTD. v. LEYDON, BARR (A. G.) & CO., LTD. v. MACGEOGHEGAN, [1931] A. C. 90; 100 L. J. P. C. 10; 144

L. T. 218; 47 T. L. R. 81; 74 Sol. Jo. 836, H. L.

448b. **Retaking goods held under "display agreement"**—No notice of removal.]—By a written "display agreement" made between X. co. & dealers, X. co. delivered a motor chassis to the dealers on the terms that it should remain the property of X. co., & should not be taken out on the road. The dealers made a deposit of £10 & were entitled by prepayment to purchase the chassis. X. co. were to be at liberty to remove the chassis at any time, but "if the dealer shall have constructed a body on the vehicle he shall be at liberty to dismantle the said body before removal of the vehicle under the provisions of this clause." X. co., without notice to the dealers, entered their garage & seizing a chassis in the possession of the dealers, took it into the street, where they dismantled a body that had been fixed thereto by the dealers. The dismantling was observed by a creditor of the dealers & others:—*Held*: a term must be imported into the agreement that X. co. must give such notice of the removal to the dealers that they could remove their body from the chassis in the garage. Accordingly the co. had committed a trespass to goods for which substantial damages could be awarded.

*Per SCRUTTON & MAUGHAM, L.JJ.*: Ex-

### PART II. SECT. 6, SUB-SECT. 6.

• i. ———.]—The moneys payable under an agreement for the sale of land were assigned to deft. bank, & the purchaser, who was in possession & had defaulted in his payments, agreed with the bank to pay over to it the proceeds of the crop on the part of the land which had been broken but had not been summer-fallowed for several years, & also agreed to summer-fallow it without delay. He, however, having neglected to summer-fallow it, although the bank told him that if he did not do so it would, & having failed to carry out a promise given by him to the weed inspector to plough under the weeds, one C., acting under instructions from the bank, entered on the land & had ploughed under the weeds on a part of it when he was ordered off by the purchaser:—*Held*: the bank & C. were liable to the purchaser for damages for trespass. The bank was not in the position of a person who has a right to abate a nuisance with or without notice even if a nuisance existed; nor, in the absence of a contract giving it a right

of entry, had it a right to enter on the principle that it was entitled to preserve its security or prevent its impairment; & the evidence did not support a finding that the entry was by leave & licence.—ROYAL BANK OF CANADA v. BENDIKSEN & IRELAND, [1928] 2 W. W. R. 27.—CAN.

### PART II. SECT. 6, SUB-SECT. 9.

• i. *Mistake as to land entered upon.*—MUNRO v. PINDER LUMBER & MILLING CO. (1925), 52 N. B. R. 487.—CAN.

• k. *Entry by private detectives.*—D. & another were employed as inquiry agents to obtain evidence in connection with certain divorce proceedings. Believing that they would be able to obtain the evidence required they entered the premises of M. without his consent. On a charge under sect. 4 of Inclosed Lands Protection Act, the magistrate found that a trespass had been committed, but dismissed the charge on the ground that defts. had a lawful excuse for entering upon the land in question:—*Held*: the entry of defts. on the land in question was

without lawful excuse, as an entry by a private detective, or any other person, against the consent of the owner or occupier of land in order to obtain evidence in connection with civil proceedings, is an entry "without lawful excuse" within sect. 4 of Inclosed Lands Protection Act, 1901.—MORRIS v. DABRY (1936), 53 N. S. W. W. N. 136.—AUS.

### PART III. SECT. 1, SUB-SECT. 1.—B. (a).

433 i. *Accidental act—Arising from negligence*—*Shtp.*—WOLVERINE S.S. Co. v. CANADIAN DREDGING Co., [1930] 4 D. L. R. 684; 65 O. L. L. 41.—CAN.

### PART III. SECT. 1, SUB-SECT. 1.—B. (b).

• sm. *Removal of books of insurance agent during illness by second agent.*—An insurance agent removing books & effects from the office of another agent during his illness is liable for damages in trespass.—FOXALL v. SHORROCK, [1936] 2 D. L. R. 165; 50 B. C. R. 430; *affd.*, [1936] 4 D. L. R. 464.—CAN.

emplary damages may be awarded for trespass to goods, due to the manner of the trespass.—OWEN & SMITH (TRADING AS NUAGIN CAR SERVICE) v. REO MOTORS (BRITAIN), LTD. (1934), 151 L. T. 274, C. A.

*Annotation*.—*Consd.* *Intervenor Stove Co. v. Hibbard & Painter & Shepherd*, [1936] 1 All E. R. 263.

**448c. Seizure of documents at time of arrest—No search warrant.**—In order to effect the arrest of H., defts., police officers entered pltf.'s premises. While there they seized & carried away documents found on the premises, being (a) documents which were afterwards used on the trial of E., (b) a document found on H. & used on his trial, & (c) documents which did not constitute evidence on these trials. At the conclusion of the trials the documents under (a) & (b) were not returned; those under (c) were returned soon after seizure.—*Held*: (1) although the original seizure of the documents was unlawful, it was excused as regards documents under (a) & (b), it being to the interest of the State that material evidence should be preserved; (2) the police had a right to search H. on his arrest, & also to seize any documents in his possession which would form material evidence against him or anybody else on a criminal charge. Any property so taken might be retained by the police until

the conclusion of proceedings under any such charge.

The police, having lawfully entered the premises to arrest H., did not by reason of the subsequent unlawful seizure of the documents under (c) become trespassers *ab initio* as to the land, but only as to the documents.—*ELIAS v. PASMORE*, [1934] 2 K. B. 164; 103 L. J. K. B. 223; 150 L. T. 438; 98 J. P. 92; 50 T. L. R. 196; 78 Sol. Jo. 104; 32 L. G. R. 23.

**478. Add. Annotation**.—*Consd. Re Simms, Ex p. Trustee*, [1934] Ch. 1.

**489. Add. Annotation**.—*Consd. Freshwater v. Bulmer Rayon Co.*, [1933] Ch. 162.

**496a. Exemplary damages—Manner of trespass.**—OWEN & SMITH (TRADING AS NUAGIN CAR SERVICE) v. REO MOTORS (BRITAIN), LTD., No. 448b, *ante*.

**508. Add. Annotation**.—*Refd. Swaffer v. Mulcahy, Hooker & Mulcahy, Smith v. Mulcahy*, [1934] 1 K. B. 608.

**551. Add. Citations**.—*sub nom. BIGGS v. BENDER*, 2 Ld. Raym. 1372; *sub nom. BRIGGS v. GREINFELD & BENDER*, 1 Stra. 610.

**555a. Trap order.**—LEITCH (WILLIAM) & CO., LTD. v. LEYDON, BARR (A. G.) & CO., LTD. v. MACGEOGHEGAN, No. 448a, *ante*.

## Part IV.—Trespass to the Person.

**597. Add. Annotation**.—*Refd. Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.

**630. Add. Annotation**.—*Refd. Liddle v. North*

*Riding of Yorkshire County Council*, [1934] 2 K. B. 101.

**647. Add. Annotation**.—*Consd. Horsfield v. Brown*, [1932] 1 K. B. 355.

### PART III. SECT. 5, SUB-SECT. 3.—B.

**q i.** —.—In an action for negligence causing damage to goods the measure of damages is the depreciation in the value of the goods as the result of the accident.—*COPLEY v. FINKELSTEIN*, [1928] 3 D. L. R. 671; [1928] 3 W. W. R. 89.—CAN.

**t i.** —.—Where a gasoline engine used in a fishing boat was wrongfully seized under a conditional sale agreement damages were awarded for loss as a result of being unable to fish during the season.—*ROBERTSON v. VIVIAN*, [1934] 2 D. L. R. 775; 48 B. C. R. 295.—CAN.

### PART III. SECT. 6, SUB-SECT. 8.

**548 iv.** —.—In an action for replevin of logs evidence by deft. of *ius tertii* is not admissible if pltf. is in possession of the land in dispute; unless deft. can prove he entered by authority of the owner of the *ius tertii*.—*PENTLAND v. GODIN* (1932), 4 M. P. R. 385.—CAN.

### PART IV. SECT. 1, SUB-SECT. 5.—D.

**637 i. How far assault justified.**—*Held*: on the facts disclosed the blow struck was justified on the ground of self-defence.—*WESTON v. LOTT & CHRISTOPHERSON*, [1935] 2 W. W. R. 456.—CAN.

**644 vii.** —.—*MCNEILL v. HILL* (Sask.), [1929] 2 D. L. R. 296.—CAN.

### PART IV. SECT. 1, SUB-SECT. 5.—F.

**sp. Assault by bailiff—Independent contractor.**—Deft. co. authorised deft.

R., who carried on business as a licensed bailiff, to seize a motor car under a conditional sale agreement. In the course of the seizure B. broke open pltf.'s garage, & assaulted pltf. Damages were awarded pltf. against both defts. The co. appealed.—*Held*: the bailiff was an independent contractor & the co. was not liable.—*ROMAN v. MOTORCAR LOAN CO., LTD., & BURNS*, [1930] 1 W. W. R. 775; 3 D. L. R. 296; 42 B. C. R. 457.—CAN.

**sr. Death by shooting.**—In an action against a police officer for the death of a person who had been killed by the ricochetting of a bullet from a revolver which the officer had fired, without aiming at any one when pursuing the deceased in order to arrest him.—*Held*: the officer believed on reasonable & probable grounds that the deceased had been abetting one whom he also believed on such grounds had broken into a shop, & the officer in shooting as he did was acting properly within his rights & doing no more than his duty required him to do.—*MERIN v. ROSS*, [1933] 1 W. W. R. 109; 60 C. C. C. 18; 46 B. C. R. 471.—CAN.

### PART IV. SECT. 1, SUB-SECT. 5.—J.

**676 i. Disturbances at public meeting.**—In an action for damages for assault alleged to have been committed by deft. when chairman of a meeting of a branch of a brotherhood, it was shown that because of pltf.'s attempt to address the meeting a breach of the peace arose & there was reasonable

ground for apprehension that if he persisted it would continue & perhaps extend in area & intensity.—*Held*: under the circumstances, it became deft.'s duty as chairman to try to restore order, & the judge was right in concluding that in attempting to do so deft. was justified in using force & that he had used no more force than was necessary for that purpose.—*SIKORSKI v. KOBRINSKI*, [1935] 3 W. W. R. 433; 5 F. L. J. (Can.) 229.—CAN.

### PART IV. SECT. 1, SUB-SECT. 7.

**k i.** —.—*Provocation to assault.*—On appeal from a judgment for pltf. in an action for assault the damages were reduced to \$10, the assault having been merely a technical one, which apparently had been courted by pltf. with a view to an action for damages.—*HODGKINSON v. MARTIN*, [1928] 3 W. W. R. 763.—CAN.

### PART IV. SECT. 2, SUB-SECT. 2.

**714 iii.** —.—A direct act of trespass is essential to an action for false imprisonment.—*GUNTER v. PRINCE WILLIAM SCHOOL DISTRICT, No. 3, TRUSTEES* (1934), 8 M. P. R. 15.—CAN.

**731 i.** —.—*Charge made to police officer—No further action by defendant.*—*MANN v. RASMUSSEN*, [1928] 3 D. L. R. 319; [1928] 2 W. W. R. 278; 23 Alta. L. R. 515.—CAN.

**731 ii.** —.—*Incorrect repetition of statement made by defendant causing arrest.*—*SPARKS v. JOSEPH* (1858), 7 C. P. 69.—CAN.

**o i.** —.—*Detention without formal arrest.*—A felony having been com-

733a. ————.]—If A., having no right to apprehend B., direct a police officer to take B., & he do so, B. may maintain an action for false imprisonment against A.; but if A. merely make a statement to the officer, leaving it to him to act or not as he thinks proper, & the officer then take A., B.'s remedy against A. is, if any, by action on the case.—*HOPKINS v. CROWE* (1836), 7 C. & P. 373; 173 E. R. 166, N. P.; *subsequent proceedings*, 4 Ad. & El. 774.

*Annotations*:—*Distd. Hudson v. Howard* (1837), 1 Jur. 658. *Refd. Kine v. Evershed* (1847), 10 Q. B. 143; *Read v. Coker* (1853), 13 C. B. 850; *Derecourt v. Corbishley* (1855), 1 Jur. N. S. 870.

757a. ————.]—S., an agent of defts., thinking pltf. guilty of larceny, gave him into custody & signed the charge-sheet. S. stated in evidence: "I did give him in charge":—*Held*: this amounted in law to false imprisonment, but no case of malicious prosecution was

shown.—*CLUBB v. WIMPEY & Co., LTD.*, [1936] 1 All E. R. 69; *reversd.*, [1936] 3 All E. R. 148, C. A.

769. *Add. Annotation*:—*As to* (1) *Refd. Lazard Bros. & Co. v. Banque Industrielle de Moscou, Lazard Bros. & Co. v. Midland Bank, Ltd.* (1931), 101 L. J. K. B. 65.

776. *Add. Annotation*:—*Refd. McArdle v. Egan* (1933), 150 L. T. 412.

783. *Add. Annotation*:—*Refd. Clubb v. Wimpey & Co.*, [1936] 1 All E. R. 69.

829. *Add. Annotations*:—*Refd. McArdle v. Egan* (1933), 150 L. T. 412; *Herniman v. Smith*, [1938] A. C. 305.

852. *Add. Annotations*:—*Refd. Chapman v. Ellesmere* (1932), 48 T. L. R. 309; *Crozier v. Wishart & Co. & Western Printing Services, Ltd.*, [1936] 1 All E. R. 1.

mitted, a civic guard requested the two pltf.s, whom he suspected of complicity in the crime, to go to the civic guards' barracks, which pltf.s voluntarily did. When they reached the barracks they were questioned by deft., the chief superintendent of the civic guards for the county, & were then detained in the barracks while the guards were endeavouring to procure evidence. They were not charged with any crime, nor were they formally arrested. They were detained in the barracks from an early hour of the morning of one day until the evening of the following day, when, in consequence of a letter of complaint from their solr., they were formally arrested & charged with the crime & brought before a peace comr., who remanded them on bail to the next district ct. At that ct. the charge was dismissed. It was admitted that pltf.s. could have been brought before a peace comr. on either of the two days during which they were detained. Each of pltf.s. then brought a civil bill against deft. for damages for false imprisonment:—*Held*: the detention of pltf.s. amounted in law to imprisonment, as it was a total restraint of their liberty imposed on them by the action of the Guards. It was the duty of deft., as the officer responsible for such detention, to have brought pltf.s. before a peace comr. as soon as he reasonably could. Accordingly, as he did not do so, he was liable

to pltf.s. in damages in respect of the period that elapsed between the time when deft. could reasonably have brought pltf.s. before a peace comr. & the time when he in fact did so.—*DUNNE v. CLINTON*, [1930] 1 R. 366.—IR.

o ii. ———— *Submitting to be searched.*—Pltf. when shopping in deft.'s store was wrongly accused by a house detective of theft, & in order to prevent the necessity of actual force being used or the creating of a scene, went at the detective's request with her & the latter's assistant to a room where he was searched:—*Held*: deft. was liable in damages for false imprisonment.—*CONN v. DAVID SPENCER, LTD.*, [1930] 1 W. W. R. 26; 1 D. L. R. 805; 42 B. C. R. 128.—CAN.

#### PART IV. SECT. 2, SUB-SECT. 3.

sa. *Warrant issued in course of duty*—*By clerk of court—No liability.*—*NALTY v. HOWELL* (1929), S. A. S. R. 23.—AUS.

#### PART IV. SECT. 2, SUB-SECT. 4.—A. (a).

765 i. *Arrest on civil process—Defective affidavit to hold to bail—Failure to allege notice in writing to debtor as required by Judicature Act, R. S. N. B.*, 1927, s. 32.—*ELSTON v. PURDY* (1929), 1 M. P. R. 421.—CAN.

#### PART IV. SECT. 2, SUB-SECT. 5.

r (p. 456) i. ————.]—Pltf. while trying to get a cash refund from deft. co. for a dress was ordered by a peace officer employed by deft. to accompany him to the office of the deft.'s superintendent. She did so, but while waiting in an outer office to speak to the superintendent, & after the officer had pointed out to her that the information she had given did not correspond with entries in the city directory, she left hurriedly & attempted to reach an elevator. The officer pursued & caught her by the arm, & after some resistance, she accompanied him to the superintendent's office, when on her refusing to give any explanation of the dress, she was permitted to leave. In an action for damages, it was found, on such of the evidence as the ct. accepted as true, that there was no assault & that there was no actual detention except for the period between the time when the officer seized her arm when she was near the elevator & the time when she was told she might go:—*Held*: the officer had reasonable ground for his suspicion that pltf. was committing an offence, & his conduct towards her was reasonable & justifiable under the circumstances.—*COCHRANE v. T. EATON Co., LTD.*, [1936] 1 W. W. R. 639; 2 D. L. R. 513; 65 Can. C. C. 329; 44 Man. L. R. 17; 5 F. L. J. (Can.) 308.—CAN.

## TROVER AND DETINUE.

## Part I.—Nature and Subject-Matter.

58. *Add. Annotation* :—**Refd.** *Banco de Portugal v. Waterlow & Sons, Ltd.* (1931), 100 L. J. K. B. 465.
68. *Add. Annotation* :—**Refd.** *Ellis Noakes*, [1932] 2 Ch. 98, n.

## Part II.—Liability for Conversion and Detinue.

99. *Add. Annotations* :—**Apprvd.** *Oakley v. Lyster*, [1931] 1 K. B. 148. **Refd.** *Ashby v. Tolhurst*, [1937] 2 K. B. 242.
100. *Add. Annotation* :—**Apprvd.** *Oakley v. Lyster*, [1931] 1 K. B. 148.
102. *Add. Annotations* :—**Consd.** *Fenton Textile Assocn. v. Thomas* (1929), 45 T. L. R. 264. **Refd.** *Leitch (William) & Co. v. Leydon, Barr (A. G.) & Co. v. Macgeoghegan* (1930), 47 T. L. R. 81, H. L.; *United Fruit Co. v. Frederick Leyland & Co.* (1930), 47 T. L. R. 33; *Savory & Co. v. Lloyds Bank, Ltd.*, [1932] 2 K. B. 122; *The Arpad* (1934), 50 T. L. R. 505.
- 105a. ———]—There may be a conversion of goods even though deft. has never been in physical possession of them, if his act amounts to an absolute denial & repudiation of pltf.'s right.—**OAKLEY v. LYSTER**, [1931] 1 K. B. 148; 100 L. J. K. B. 177; 144 L. T. 363, C. A.
106. *Add. Annotation* :—**As to** (3) **Refd.** *Sutherland Publishing Co. v. Caxton Publishing Co.*, [1936] 1 All E. R. 177.
113. *Add. Annotation* :—**Refd.** *De Tchihatchef v. Salerni Coupling, Ltd.*, [1932] 1 Ch. 330.
116. *Add. Annotation* :—**Refd.** *Solloway v. McLaughlin*, [1938] A. C. 247.
125. *Add. Annotation* :—**Refd.** *Golden Horseshoes (New), Ltd. v. Thurgood* (1934), 150 L. T. 427.
139. *Add. Annotation* :—**Refd.** *Spyer v. Phillipson*, [1931] 2 Ch. 183.
142. *Add. Annotation* :—**Refd.** *Leitch (William) & Co. v. Leydon, Barr (A. G.) & Co. v. Macgeoghegan* (1930), 47 T. L. R. 81.
- 147a. **Illegal seizure of documents at time of arrest**—**Documents retained after trial.**—In order to effect the arrest of H., defts., police officers, entered pltf.'s premises. While there they seized & carried away documents found on the premises, being (a) documents which were afterwards used on the trial of E., (b) a document found on H. & used on his trial, & (c) documents which did not constitute evidence on these trials. At the conclusion of the trials the documents under (a) & (b) were not returned; those under (c) were returned soon after seizure :—**Held** : although the original seizure of the documents was unlawful, it was excused as regards documents under (a) & (b), it being to the interest of the State that material evidence should be preserved; (2) the police had a right to search H. on his arrest, & also to seize any documents in his possession which would form material evidence against him or anybody else on a criminal charge. Any property so taken might be retained by the police until the conclusion of proceedings under any such charge. The police, having lawfully entered the premises to arrest H., did not by reason of the subsequent unlawful seizure of the documents under (c) become trespassers *ab initio* as to the land, but only as to the documents.—**ELIAS v. PASMORE**, [1934] 2 K. B. 161; 103 L. J. K. B. 223; 150 L. T. 438; 98 J. P. 92; 50 T. L. R. 196; 78 Sol. Jo. 104; 32 L. G. R. 23.
156. *Add. Annotations* :—**Consd.** *London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd.*, [1934] 2 K. B. 206; *Staffs Motor Guarantee, Ltd. v. British Wagon Co.*, [1934] 2 K. B. 305. **Refd.** *Buller & Co. v. Brooks (T. J.), Ltd.* (1930), 142 L. T. 576.
- 185a. ——— **Delivery to bailee.**—In the end of 1924 the Metropolitan Police found at the house of pltf. & took into their possession a quantity of goods including certain cloth. Pltf. was brought before the police ct. on charges of receiving, & some of the evidence there given tended to show, but did not prove, the identity of the cloth which had

## PART II. SECT. 1, SUB-SECT. 1.

93 i. — *Mere deprivation of possession not sufficient.*—In order to support an action for conversion there must be an element of wrong; the mere fact of possession of the goods by the deft. is not sufficient.—**BALL v. SAWYER-MASSEY CO., LTD.** (Sask.), [1929] 4 D. L. R. 323; 2 W. W. R. 582.—**CAN.**

103 iii. ———]—Pltf. co., importer of the K. motor car, gave P. the right to sell its cars. P. found a purchaser for a K. car, who wished to trade in his old S. car as part payment. P. obtained a car from the pltf. co. & was debited with the price less his commission £346 5s. 0d. He paid pltf. co. £46 5s. 0d. & the S. car valued at £300 was accepted by pltf. co. P.

who had retained possession of the S. car, sold it on behalf of pltf. co. to C. on hire purchase. C. made default under his hire purchase agreement, & P., without authority from pltf. co., seized the car, & sold it to deft. co. who in turn sold it to W. Dft. co. never had actual possession of the car. Before the sale to W. was completed pltf. co. demanded the car, but the deft. co. refused to deliver it up & completed its purchase from P. & its sale to W. P. delivered the car to W. Pltf. co. then sued for conversion of the car & the jury found a verdict in its favour :—**Held** : there was sufficient evidence of ownership in pltf. co. & of possession of the car by deft. co. to justify the finding of the jury; but even if deft. co. had not been

in physical possession of the car, its denial of pltf. co.'s right amounted to a conversion in the circumstances.—**MOTOR DEALERS CREDIT CORPN., LTD. v. OVERLAND (SYDNEY), LTD.** (1931), 31 S. R. N. S. W. 516; 48 N. S. W. W. N. 205.—**AUS.**

## PART II. SECT. 1, SUB-SECT. 2.—A. (b).

131 i. *Intermeddling with goods distrained.*—**MORT v. BARNES**, [1928] V. L. R. 56.—**AUS.**

## PART II. SECT. 1, SUB-SECT. 2.—B.

sa. *Unjustifiable detention by police officer.*—**BARRITT v. GALLAGHER** (1928), 28 S. R. N. S. W. 549; 45 N. S. W. W. N. 154.—**AUS.**

been stolen from a firm of carriers. Pltf. was committed for trial at the London sessions on indictments charging him with having received certain of the goods other than the cloth knowing them to have been stolen, & on an indictment charging him with a similar offence in respect of the cloth, & in Feb. 1925, he was convicted on the first-mentioned indictments & sentenced to five years' penal servitude. He was never tried on the indictment relating to the cloth, but it was allowed to remain upon the record. On Apr. 2, 1925, pltf. not having as yet made any credible claim to the cloth, the Receiver for the Metropolitan Police District handed it over to the firm of carriers, who claimed it, taking from them a written indemnity. On Jan. 16, 1931, pltf., having less than six months before made an unsuccessful demand for the cloth as his property, brought an action against the Receiver & the firm of carriers claiming damages for detainue & conversion of the cloth. The first-named deft. relied, among other defences, upon the Public Authorities Protection Act, 1893 (c. 61). The jury, having heard the evidence, found that it did not establish the identity of the cloth with that stolen from the carriers, & they returned a verdict for pltf. against both defts.:—*Held*: the first deft. in handing over the cloth to the second defts. in Apr. 1925, had acted in "intended execution" of a "public duty" within Public Authorities Protection Act, 1893 (c. 61), s. 1, & as the action in respect of the act of conversion so effected had not been commenced within

six months after that act, it was not maintainable in respect thereof. Pltf. could not elect to rely only on his claim in detainue, so as to make the time run from his demand & to bring the date of the action within six months after the cause of action. Therefore, judgment should be entered for the first deft. against pltf., & for pltf. against the second defts.—*BETTS v. METROPOLITAN POLICE DISTRICT RECEIVER & CARTER PATERSON & Co., LTD.*, [1932] 2 K. B. 595; 101 L. J. K. B. 588; 147 L. T. 336; 96 J. P. 327; 48 T. L. R. 517; 76 Sol. Jo. 474; 30 L. G. R. 349.

188. *Add. Annotation*:—*Refd.* Simpson v. Maurice's Exors. (1929), 14 Tax Cas. 580.

200a. *Bill indorsed to agent for account of plaintiff—Deposit by agent to secure advances.*—*TREUTTEL v. BARANDON* (1817), 8 Taunt. 100; 1 Moore, C. P. 543; 129 E. R. 320.

*Annotations*:—*Apld.* Evans v. Kymor (1830), 1 B. & Ad. 528. *Refd.* Wooley v. Pole (1820), 4 B. & Ald. 1; Sigourney v. Lloyd (1828), 8 B. & C. 622; Bank of Bengal v. Macleod (1849), 5 Moo. Ind. App. 1.

202. *Add. Annotation*:—*Consd.* Banco de Portugal v. Waterlow & Sons, Ltd. (1931), 100 L. J. K. B. 465.

208. *Add. Annotation*:—*Refd.* Savory & Co. v. Lloyds Bank, Ltd. (1932), 48 T. L. R. 344.

245. *Add. Annotation*:—*Refd.* *Re* Mason, [1929] 1 Ch. 1.

314. *Add. Annotation*:—*As to* (1) *Refd.* London Jewellers, Ltd. v. Attenborough, London Jewellers, Ltd. v. Robertsons (London), Ltd., [1934] 2 K. B. 206.

## Part III.—Enforcement of Liability.

359. *Add. Annotation*:—*Consd.* Rekstin v. Severo Sibirsko Gosudarstvvernoe Akcionernoe Olschestro Komseverputj & Bank for Russian Trade, Ltd., [1933] 1 K. B. 47.

403. *Add. Annotation*:—*Refd.* Alexander v. Rayson, [1936] 1 K. B. 169.

455. *Add. Annotation*:—*Refd.* Bushell v. Timson, [1934] 2 K. B. 79.

### PART II. SECT. 1, SUB-SECT. 2.—F.

*sd. Using plant.*—M. left, on premises which he quitted, certain articles, consisting of fittings & plant, used by him in the manufacture of a disinfectant. C. having entered into a contract, in writing, with the owner, to lease the premises, went into occupation thereof. Endorsed upon the contract was a provision that the above-mentioned articles were M.'s property & were not leased with the premises, & that they were "to remain where at present situated upon the lessee vacating the premises." C. manufactured a disinfectant on the premises & in the course thereof, used those articles:—*Held*: C. had been guilty of conversion.—*CRAIG v. MARSH* (1935), 35 S. R. N. S. W. 323; 52 N. S. W. N. 123.—*AUS.*

### PART II. SECT. 1, SUB-SECT. 2.—J.

*sd. Confusion of goods.*—Where deft. wrongfully intermingled a certain quantity of leaves belonging to pltf. with his own, & the fact of what proportion of the same was the property of pltf. was not sought to be proved by deft.:—*Held*: deft. being a wrongdoer, the burden of proving that proportion lay upon deft. & he having made no effort to discharge that burden, the presumption was that the entire leaves

belonged to pltf. & the same must be taken as the measure of pltf.'s loss.—*SITARAM SYAM NARAIN v. INWARI CHARAN SARANGI* (1934), 1 L. R. 13 Pat. 762.—*IND.*

### PART II. SECT. 2, SUB-SECT. 3.—A. (a).

*g i.* —.—In an action for conversion:—*Held*: deft.'s use of the property after the action was begun, & more especially its denial, in the action, of pltf.'s ownership & right to possession, must be regarded as evidence of conversion before action.—*CANADIAN ORCHESTRAPHONE, LTD. v. BRITISH CANADIAN TRUST CO.*, [1923] 2 W. W. R. 618; 4 D. L. R. 86; 26 Alta. L. R. 305.—*CAN.*

### PART II. SECT. 2, SUB-SECT. 3.—A. (d).

*s. Goods in custodia legis.*—No conversion by refusal to deliver up on demand if chattel is in *custodia legis*.—*FLOOD v. MOORE*, [1933] 4 D. L. R. 392; 6 M. P. R. 492.—*CAN.*

### PART II. SECT. 3.

342 vi. —.—*Qu.*: whether an equitable mtgee. of chattels who has never had possession of the mtgd. chattels has any such title as is required to support an action for conversion.—

*WHITE v. ELDER, SMITH & Co., LTD.*, [1934] S. A. S. R. 56.—*AUS.*

### PART III. SECT. 2, SUB-SECT. 1.—B.

371 ii. —.—In an action for damages for the conversion of goods it is incumbent on pltf. to prove beyond a doubt title in himself & the right of possession.—*MCUTCHEON v. LIGHTFOOT*, [1930] S. C. R. 108; 1 D. L. R. 995; *affg.*, [1929] 1 D. L. R. 971; 1 W. W. R. 694; 38 Man. L. R. 160; *reussg.*, [1928] 2 W. W. R. 240.—*CAN.*

### PART III. SECT. 2, SUB-SECT. 4.—A. (a).

*h i.* —.—*Election of remedy.*—Where a bailee or agent wrongfully sells property the owner may claim in tort for conversion or waive the tort & claim the proceeds, but cannot do both.—*TRUSTS & GUARANTEE CO. v. BRENNER*, [1932] O. R. 245; 2 D. L. R. 688; *on appeal*, [1933] S. C. R. 656.—*CAN.*

*h ii.* —.—*G.* supplied *X.* with certain goods under a hire-purchase agreement provided (*inter alia*) that *X.* should not part with the possession thereof without *G.*'s consent. The agreement also provided that *G.* might retake possession of the goods on default of payment by *X.* of weekly instalments on account of the hire, or for breach of other provisions thereof.

484. *Add. Annotation*:—**Consd.** *Ash v. Dickie*, [1936] 2 All E. R. 71.
488. *Add. Annotation*:—**Refd.** *Smart Bros. v. Holt*, [1929] 2 K. B. 303.
494. *Add. Annotation*:—**Refd.** *Slingsby v. District Bank, Ltd.* (1931), 48 T. L. R. 114.
503. After this case add:—  
**Contract for whole crop—Sale of part of crop to third party.**—*See* INJUNCTION, No. 853a, ante.
562. *Add. Annotation*:—**Refd.** *British Russian Gazette & Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, *Talbot v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616.
- 578a. — **Cost of replacement—Where no market.**—*Resp. co.* did work for applt. in erecting & testing a pair of experimental davits. The davits & testing apparatus were then dismantled & kept by resp. co. for several years. A dispute arose over the non-payment of part of applt.'s account for work done, & a writ was issued. Applt. counterclaimed for damages for detinue or conversion of his davits & testing apparatus, which it transpired that resp. co. had sold as scrap. The judge awarded applt. the scrap value of these articles as damages. On appeal:—*Held*: applt. was entitled to the value of the articles converted, which was ordinarily the price of similar articles in the market. As there was no market in the articles concerned, the measure of damages was the cost of replacement.—*HALL (J. & E.), LTD. v. BARCLAY*, [1937] 3 All E. R. 620, C. A.
579. *Add. Annotation*:—**Refd.** *Banco de Portugal v. Waterlow & Sons, Ltd.* (1931), 47 T. L. R. 359.
582. *Add. Annotation*:—**Consd.** *Ash v. Dickie*, [1936] 2 All E. R. 71.
583. *Add. Annotations*:—**Consd.** *Re Simms, Ex p. Trustee*, [1934] Ch. 1; *The Arpad* (1934), 50 T. L. R. 505.
584. *Add. Annotation*:—**Consd.** *Ash v. Dickie*, [1936] 2 All E. R. 71.
586. *Add. Annotation*:—**Consd.** *Solloway v. McLaughlin*, [1938] A. C. 247.
590. *Add. Annotation*:—**Refd.** *Re Simms, Ex p. Trustee v. William Simms, Ltd. & Gillett*, [1934] Ch. 1.
594. *Add. Annotation*:—**Refd.** *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.*, [1938] A. C. 287.
595. *Add. Annotation*:—**Refd.** *Banco de Portugal v. Waterlow & Sons, Ltd.* (1931), 100 L. J. K. B. 465.
601. *Add. Annotation*:—**Refd.** *Re Simms, Ex p. Trustee v. William Simms, Ltd. & Gillett*, [1934] Ch. 1.
615. *Add. Annotation*:—**Refd.** *Buckland v. R.* (1933), 102 L. J. K. B. 404.
623. *Add. Annotation*:—**Refd.** *Buckland v. R.* (1933), 102 L. J. K. B. 404.
- 624a. **Title deeds.**—After a pltf. had recovered damages on a writ of inquiry in trover, for the conversion of his title deeds, the ct. permitted satisfaction of the damages to be entered on the roll, upon the terms of the deft. delivering up the deeds & paying all the costs, as between attorney & client, incurred by pltf. in the cause, & submitting to other terms, placing pltf. in as good a situation as he was in before cause of action.—*COOMBE v. SANSOM* (1822), 1 Dow. & Ry. (K. B.) 201.
- 628a. **Shares—Sale by broker.**—A client instructed his stockbrokers to buy for him a number of shares of a certain co. on margin at the then market price, & at the same time he deposited with the brokers shares of the same co. as margin. He received a contract note purporting to show that the transaction had been carried out in accordance with the rules of the appropriate stock exchange. The shares having declined in value, the client received requests for further margin, & he thereupon deposited with the brokers more of the same class of shares & also paid a sum in cash. He had received monthly statements showing the shares as being carried for him. The stockbrokers, however, while purporting to buy, & in fact making valid

X. without G.'s knowledge, gave a bill of sale over the goods to H. At a time when X. was in default in payments under the hire-purchase agreement, H., acting under his bill of sale & without objection on the part of X., caused the goods to be removed from X.'s premises & placed in store in X.'s name. The goods were subsequently sold at X.'s direction. G. then sued H. for conversion:—*Held*: H. had converted the goods.—*GLASS v. HOLLANDER* (1935), 35 S. R. N. S. W. 304; 52 N. S. W. N. 76.—**AUS.**

**PART III. SECT. 3, SUB-SECT. 1.—B. (e).**

532 v. —.—Where goods are left upon premises on termination of the lease to secure payment of rent in arrear, & sold by the landlord's agent, the agent cannot set up lien as a defence to an action of conversion for selling the goods if no claim of lien has previously been made.—*KINSELLA v. GILLIS*, [1934] 2 D. L. R. 555; 7 M. P. R. 31.—**CAN.**

**PART III. SECT. 3, SUB-SECT. 1.—B. (k).**

b. i. —.—*BAXTER v. ADAMS*, [1930] 1 D. L. R. 278.—**CAN.**

**PART III. SECT. 3, SUB-SECT. 1.—C. (b) i.**

574 iv. —.—(1) In estimating the damages for the conversion of pltf.'s goods, the value of the goods at the place where the principal market for them exists is the right basis of calculation: but there must be deducted from the price at which they could there have been sold the cost of conveying them thereto.

(2) In an action to recover damages from defts. for obstructing pltf.'s right of ingress & egress to a forest, & his right of obtaining & removing timber therefrom:—*Held*: on the evidence, the obstruction was not caused by the persons who were agents of defts. for the purpose of working in the forest, or of doing any class of acts analogous to those complained of, & that defts. were not shown to have knowingly adopted or ratified those acts, & the acts were not shown to have been committed for their benefit.

(3) A principal is answerable for the act of his agent in the course of his master's business & for his master's benefit, & for every such wrong of the servant or agent as is committed in the course of the service, & for the master's benefit. Though the master

may not have authorised the act, if he has put the agent in his place to do a particular class of acts, he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in.—*BURMAH TRADING CORPN. v. MIRZA MAHOMED ALLY SHERAZEE & BURMAH CO., LTD.* (1878), L. R. 5 Ind. App. 130.—**IND.**

574 v. —.—Where pltf. has the immediate right to the possession of goods, the proper measure of damages in an action against the sheriff for wrongfully taking them is the value of the goods at the time of the conversion, though they were taken under an execution against a person who had performed labour upon them, & for which pltf. would be bound to account to such person.—*RANKIN v. MITCHELL* (1869), 12 N. B. R. (1 Han.) 495.—**CAN.**

**PART III. SECT. 3, SUB-SECT. 1.—C. (h) vii.**

so. **Shares.**—In an action by an owner of co. shares against his trustee for damages for their wrongful detention:—*Held*: the measure of damages, the shares being of fluctuating value,



contracts of purchase for their clients, contemporaneously sold shares of the same co. & used their client's shares to complete those sales. They also sold at once the shares which the client had deposited as margin. When, at a later date, the client closed his account, the stockbrokers went into the market & brought the necessary number of shares at the then market price, which was substantially lower than that ruling at the date when the client gave his original order to buy & deposited shares as margin, & delivered them to the client:—*Held*: the transactions were part of a fraudulent system of business, & were themselves fraudulent in their inception, continuance & completion. A broker, although not under an obligation to retain for his client the specific shares which might be delivered to him under the contract made for his client, had, however, to get into his possession & retain an equivalent number of shares. With regard to the shares originally ordered by the client the brokers were employed as agents but, having engaged in a scheme to defraud their principal they were not, as they would otherwise have been had they honestly fulfilled their mandate, entitled to an indemnity against the price which they had paid to the sellers for those shares. The principal, therefore, on discovery of the fraud, was entitled to recover back the money paid on the footing of an honest transaction, giving credit for the value of the shares at the time he received them. As to the deposited shares, the brokers never had any right to deal with them, & on the facts of this case, involving fraudulent misuse, their disposal of them amounted to conversion, & the client, who at the time he received & retained the shares or their equivalent from the brokers did not know of the conversion, was entitled to damages measured by the value of the shares at the date of the conversion less the value of the shares received at the time he received them.—*SOLLOWAY v. McLAUGHLIN*, [1938] A. C. 247; [1937] 4 All E. R. 328; 107 L. J. P. C. 1; 51 T. L. R. 69, P. C.

**652. Add. Annotations:—***Refd. Re City Equitable Fire Insurance Co. (2)*, [1930] 2 Ch. 293; *Re Fenton, Ex p. Fenton Textile Assocn.* (1930), 99 L. J. Ch. 358.

**653a. What must be proved.]—***MILLS v. GRAHAM* (1804), 1 Bos. & P. N. R. 140; 127 E. R. 413.

*Annotations:—**Refd. Gledstane v. Hewitt* (1831), 1 Tyr. 445; *Whitehead v. Harrison* (1844), 6 Q. B. 423.

**653b. Proof of taking—What amounts to.]—**Trover for bricks. Evidence that men fetched them away, saying they were ordered by deft., & evidence that the cart they took them in had on it the same name as deft.'s, is not evidence to go to the jury that deft. took them away.—*EVEREST v. WOOD* (1824), 1 C. & P. 75; 171 E. R. 1108, N. P.

**664. Add. Annotations:—***Consd. Ellis v. Stenning & Son, Ltd.* (1932), 76 Sol. Jo. 232. *Refd.*

*Freshwater v. Bulmer Rayon Co.*, [1933] Ch. 162; *South Bedfordshire Electrical Finance, Ltd. v. Bryant*, [1938] 3 All E. R. 580.

**664a. ———.]—**In 1925, a certain piece of land, known as B. Lodge, was sold to J. & M. In the conveyance a quantity of timber trees, saplings, etc., was excepted out of the sale by the vendors, who reserved to themselves the right to cut & remove them before Oct. 11, 1927. In 1926, pltf. purchased the timber trees, etc., & proceeded to cut & remove them. A large amount of the cut timber was, however, left on the land after Oct. 11, 1927, & in these circumstances J. & M. stated that pltf. had lost his title thereto & forfeited his right to remove it, & they claimed it as their property. As the result of an action in 1930 against J. & M. it was held that the property in the timber remained in pltf. after Oct. 11, 1927, & a certain sum by way of damages for conversion against J. & M. was at the instance of the judge agreed between all parties to the proceedings & awarded pltf. In the meanwhile J. & M. purported to sell the cut timber to the present defts. Pltf., who had taken no steps to enforce the order which he had obtained against J. & M., gave notice on June 10, 1930, to defts. that the sale by J. & M. to them was ineffective, as J. & M. had no title to the timber, & requesting the return of the timber to him. Defts. having refused & repudiated liability, pltf. commenced an action, & by his statement of claim asked for a sum by way of damages for conversion; the conversion relied on being the refusal by deft. co. to return the timber in compliance with the notice of June 10, 1930:—*Held*: whether a judgment in trover was in the alternative form or was merely one for the value of the goods or for damages for their conversion, it did not by itself & apart from special circumstances divest the owner of the property of his title thereto unless & until the judgment was fully satisfied.—*ELLIS v. STENNING (JOHN) & SON*, [1932] 2 Ch. 81; 101 L. J. Ch. 401; 147 L. T. 449; 76 Sol. Jo. 232.

**667. Add. Annotations:—***Refd. Ellis v. Stenning & Son, Ltd.*, [1932] 2 Ch. 81; *Re Simms, Ex p. Trustee*, [1934] Ch. 1.

**668. Add. Annotations:—***Consd. Ellis v. Stenning & Son, Ltd.* (1932), 76 Sol. Jo. 232. *Apld. Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] Ch. 489. *Refd. Freshwater v. Bulmer Rayon Co.*, [1933] Ch. 162; *South Bedfordshire Electrical Finance v. Bryant*, [1938] 3 All E. R. 580.

**704. Add. Annotation:—***Refd. Sutherland Publishing Co. v. Caxton Publishing Co.*, [1936] 1 All E. R. 177.

**708. Add. Annotations:—***Consd. Ellis v. Stenning & Son, Ltd.* (1932), 76 Sol. Jo. 232. *Refd. Freshwater v. Bulmer Rayon Co.*, [1933] Ch. 162.

**711. Add. Annotation:—***Consd. Re Simms, Ex p. Trustee*, [1934] Ch. 1.

should be based on the average of the market prices for such shares during the months following the refusal to deliver them up; a period when, it appeared, the shares might have been sold in reasonable quantities at such prices.—*DEVENISH v. CONNACHER*

(No. 2), *CONNACHER v. DEVENISH*, [1932] 3 W. W. R. 645.—*CAN.*

**PART III. SECT. 3, SUB-SECT. 4.**  
**688 i. Jurisdiction of court to order specific delivery—County court.]—**The jurisdiction conferred on the King's

Bench by K. B. r. 695 with respect to enforcing the delivery up of specific goods demanded in an action of detinue is not given to the county ct.—*MCINTYRE v. BRODIE*, [1933] 1 W. W. R. 577; 3 D. L. R. 297.—*CAN.*



to testator's wife in trust for two children "on the understanding" that testator's father provided for the wife so long as she retained her present name, the ct. held on motion that the condition had no testamentary value, & made the grant of letters of administration with the will annexed to the widow as beneficially entitled.—*Re DULSON* (1929), 140 L. T. 470; 45 T. L. R. 228.

409a. —.]—Testator, being entitled to two leasehold houses situate at P. & at R. respectively, directed his trustees to allow his wife to occupy his house at P. or at R. as she should elect, for her life, without the payment of any rent.—*Held*: the widow must elect between the two houses, & could not enjoy both.—*HARBY v. MOORE* (1860), 3 L. T. 209; 6 Jur. N. S. 883.

413. *Add. Annotation*:—*Refd.* *Sifton v. Sifton*, [1938] 3 All E. R. 435.

415. *Add. Annotations*:—*Refd.* *Blackwell v. Blackwell*, [1929] A. C. 318; *Re Keen, Evershed v. Griffiths*, [1937] Ch. 236.

421. *Add. Annotation*:—*Refd.* *Garland v. Archer-Shee* (1930), 142 L. T. 443.

427. *Add. Annotation*:—*Refd.* *Garland v. Archer-Shee* (1930), 142 L. T. 443.

428. *Add. Citation*:—140 L. T. 369.

*Add. Annotation*:—*Refd.* *Re W. D. J.*, [1934] Ch. 174.

438. *Add. Annotation*:—*Apld.* *Re Villar, Public Trustee v. Villar*, [1929] 1 Ch. 243.

451. *Add. Annotation*:—*Refd.* *Blackwell v. Blackwell*, [1929] A. C. 318.

451a. —.]—A wife by her will gave all her property to her husband absolutely, "knowing that he is fully aware of my intention that at his death all my possessions are to be sold & given to" a certain church. The will further stated that testatrix was aware of her husband's intention to bestow his possessions at his death on the same church. The will also charged her husband to pay £20 to a dear friend. The will was in testatrix's handwriting, but was executed in the presence of two solrs. at an interview at which the husband was present, & at which the terms of the will were discussed in his presence without any objection by him. The wife predeceased her husband. He made no will after her death & died intestate. The Parochial Church Council of the named church claimed the wife's property; the husband's next-of-kin claimed that the husband had taken the property free from any trust or obligation:—*Held*:

on the evidence the husband knew the contents of his wife's will & by his silence agreed to carry out her wishes; it was against the conscience of the husband to take the property for himself, & a ct. of equity would enforce the obligation; & the Parochial Church Council took the wife's property.—*Re WILLIAMS, WILLIAMS v. ALL SOULS, HASTINGS (PAROCHIAL CHURCH COUNCIL)*, [1933] Ch. 244; 102 L. J. Ch. 58; 148 L. T. 310.

453. *Add. Annotation*:—*Consd.* *Blackwell v. Blackwell*, [1929] A. C. 318.

460. *Add. Citations*:—*affd.* [1929] A. C. 318; 98 L. J. Ch. 251; 140 L. T. 444; 45 T. L. R. 208; 73 Sol. Jo. 92, H. L.

461. *Add. Annotation*:—*Consd.* *Blackwell v. Blackwell*, [1929] A. C. 318.

462. *Add. Annotation*:—*Consd.* *Blackwell v. Blackwell*, [1929] A. C. 318.

463. *Add. Annotations*:—*Folld.* *Blackwell v. Blackwell*, [1929] A. C. 318; *Re Keen, Evershed v. Griffiths*, [1937] Ch. 236.

463a. —.]—Testator by a codicil to his will gave to five persons £12,000 upon trust to invest the same as they should think fit, & apply the yearly income "for the purposes indicated by me to them," with power to pay over the capital sum of £8,000 "to such persons indicated by me to them" as they thought fit, & to pay the balance of £4,000 to the trustees of his will to be held as part of his residuary estate. Detailed parol instructions for the codicil were given by testator to C., one of the five trustees, & the object of the trust was known in outline to & accepted by all the rest before the execution of the codicil. On the same day, soon after the execution of the codicil, C. wrote out & signed a memorandum of the instructions given to him to the effect (*inter alia*) that the interest of the £12,000 was to be paid to a lady, whose name & full address were given, for the benefit of her & her son, whose full name followed. In an action by the widow of the testator & her son against the trustees & beneficiaries to test the validity of the trust legacy of £12,000:—*Held*: parol evidence was admissible to establish the trust; a complete valid & consistent trust had been established by the codicil & the memorandum of even date.—*BLACKWELL v. BLACKWELL*, [1929] A. C. 318; 98 L. J. Ch. 251; 140 L. T. 444; 45 T. L. R. 208; 73 Sol. Jo. 92, H. L.

*Annotations*:—*Consd.* *Re Keen, Evershed v. Griffiths*, [1937] Ch. 236. *Refd.* *Re Gardner's Will Trusts, Boucher v. Horn*, [1936] 3 All E. R. 938.

t iii. — "Wish & request."—Testator's "wish & request" construed as constituting a precatory trust.—*Re WELLS, BRILLY v. LEWIN* (1935), 9 M. P. R. 580; F. L. J. (Can.) 163.—CAN.

#### PART I. SECT. 3, SUB-SECT. 5.—B. (b).

429 1. *Discretion to select among class.*—Testator bequeathed property to a certain relative, or among certain relatives, who should within five years after his death settle in Australia. If after five years no one was qualified to receive the property, his trustees were empowered to "extend the time limit for a further three years, & after the lapse of this time were directed to hand over the property to one or more than named beneficiaries, stipulating if they

think fit the terms on which" the property was to be handed over. The trustees were directed to consult two persons "about the disposal of the property." The trustees extended the time for the three additional years, but no one of the beneficiaries fulfilled the necessary qualification. During the period from the death of the testator to the disposal of his property the trustees were directed "to hand over the income to any approved object or person" in Adelaide, Australia, or to an Imperial object.—*Held*: the trustees had power to select any one or more of the named beneficiaries, & to apportion the subject-matter between them & to propose to any or all of these beneficiaries a reasonable scheme for the application

of the property to some special purpose ancillary to the general objects of the recipient in question, & to be guided in the exercise of their discretionary power by the answer or answers received, & to prefer the beneficiary who was able & willing to devote the property to any approved object.—*Re JOHNSON*, [1928] S. A. S. R. 490.—AUS.  
g. For "[1918] N. Z. L. R. 364" read "[1928] N. Z. L. R. 364."

#### PART I. SECT. 4, SUB-SECT. 1.—B.

447 iv. —.]—A secret trust is valid even though not referred to in a will which leaves property to the trustee or exor. apparently beneficially.—*McDONALD v. MORAN* (1938), 12 M. P. R. 424.—CAN.

464. *Add. Annotations*:—*Distd. Blackwell v. Blackwell*, [1929] A. C. 318. *Consd. Re Keen, Evershed v. Griffiths*, [1937] Ch. 236.

465. *Add. Annotations*:—*Apld. Re Williams, Williams v. All Souls, Hastings, Parochial Church Council*, [1933] Ch. 244. *Refd. Blackwell v. Blackwell*, [1929] A. C. 318; *Re Keen, Evershed v. Griffiths*, [1937] Ch. 236.

470. *Add. Annotation*:—*Distd. Re Williams, Williams v. All Souls, Hastings, Parochial Church Council*, [1933] Ch. 244.

470a. — Will referring to future notification to trustees.]—A testator by his will gave to his trustees £10,000 to be held upon trust & disposed of among such person, persons or charities as he might notify to them during his lifetime, & in default of such notification to fall into the residue. Testator had on the execution of an earlier will containing a similar clause which was revoked by the later one told one of his trustees that he desired to provide for a person whose name was to be kept secret, & that he had written the name & address of the proposed beneficiary on a sheet of paper enclosed in a sealed envelope which he then handed to the trustee to be kept with his will & not to be opened until after his death. The envelope remained in the trustee's possession & no further communication relating to it was ever made by the testator. After his death it was opened & found to contain a paper bearing the words "£10,000 to G.," giving a person's name & address. The other trustee until then was ignorant of the existence of the secret trust. A summons having been taken out to determine whether a valid secret trust was created in favour of G., FARWELL, J., decided that there had been no notification of any person within the meaning of the will to the trustees by the testator during his lifetime:—*Held*: on the true construction of the will it reserved power to testator to dispose of property by a future unattested disposition, contrary to Wills Act, 1837 (c. 26). The trust sought to be established by parol evidence was one inconsistent with the terms of the will, the notification of it to the trustee being anterior to the will. The trust therefore failed & the legacy fell into residue.—*Re KEEN, EVERSHED v. GRIFFITHS*, [1937] Ch. 236; [1937] 1 All E. R. 452; 106 L. J. Ch. 177; 156 L. T. 207; 53 T. L. R. 320; 81 Sol. Jo. 97, C. A.

478. *Add. Annotation*:—*Refd. Blackwell v. Blackwell*, [1929] A. C. 318.

479. *Add. Annotation*:—*Consd. Blackwell v. Blackwell*, [1929] A. C. 318.

480. *Add. Annotations*:—*Consd. Blackwell v. Blackwell*, [1929] A. C. 318; *Re Williams, Williams v. All Souls, Hastings, Parochial Church Council*, [1933] Ch. 244; *Re Keen, Evershed v. Griffiths*, [1937] Ch. 236.

481. *Add. Annotation*:—*Refd. Re Penrose, Penrose v. Penrose* (1933), 49 T. L. R. 285.

484. *Add. Annotation*:—*Refd. Blackwell v. Blackwell*, [1929] A. C. 318.

487. *Add. Annotations*:—*Fold. Re Hawksley's Settlements, Black v. Tidy*, [1934] Ch. 384.

*Refd. Blackwell v. Blackwell*, [1929] A. C. 318; *Re Keen, Evershed v. Griffiths*, [1937] Ch. 236.

487a. —.]—A testatrix having made a will in 1922 by which she purported to exercise certain general & special powers of appointment vested in her under certain settlements, subsequently in 1927 made a second will by which she appointed three named persons to be her executors & residuary legatees "to carry out instruction that I may leave in writing or verbally which I have not yet fully completed." This will contained a reference to a "cancelled will" which it was admitted referred to the 1922 will: testatrix having written on a copy of it the word "cancelled." The 1927 will was described as "Last will & testament," etc.:—*Held*: on the words used in the 1927 will—namely, "to carry out instructions that I may leave in writing or verbally which I have not yet completed," the residuary legatees took what was given them by the will as trustees, & it being impossible for the ct. to ascertain what the trusts intended by testatrix were, whatever passed to the residuary legatees had to be held by them on trust for testatrix's next of kin.—*Re HAWKSLEY'S SETTLEMENTS, BLACK v. TIDY*, [1934] Ch. 384; 103 L. J. Ch. 259; 151 L. T. 299; 50 T. L. R. 231.

493a. — After variation of original settlement.]—

Testator bequeathed his residuary estate upon trust for his children in equal shares & declared that as to the share of his son E. a moiety thereof should be held upon trust to pay & make over the same to the trustees of a settlement dated Sept. 23, 1916, to be held by them upon the trusts of such settlement, so far as the same should be then applicable & capable of taking effect. By the settlement so referred to, which was made after the marriage of E. with his wife G., a certain fund was vested in the trustees thereof under which E. took the first life interest & upon his death G. took an interest during her widowhood with remainders over upon trusts for E.'s children by his wife G. or any future wife. Testator died in 1917, & in 1928 the marriage was upon G.'s petition dissolved, & an order was made under which the trusts of the settlement were varied; the effect of this variation being to deprive E. of any interest under the original trusts thereof, to give G. an immediate life interest, & to vest the settlement fund after her death in P., the only child of her marriage with E.:—*Held*: upon the proper construction of testator's will, the share of E. in his father's residuary estate ought to be held upon the trusts of the settlement as originally framed without regard to the order varying those trusts.—*Re GOOCH, GOOCH v. GOOCH*, [1929] 1 Ch. 740; 98 L. J. Ch. 285; 141 L. T. 150.

495. *Add. Annotation*:—*Refd. Re Gooch, Gooch v. Gooch*, [1929] 1 Ch. 740.

544a. —.]—Testator directed by his will that his residuary real & personal estate should, after the death of his widow, be "equally divided amongst & settled for their own & sole use upon my dear children, & should

PART I. SECT. 12, SUB-SECT. 1.

aa. *Effect of non-acceptance by beneficiaries.*—*Re B., CANADA TRUST CO. v. GARDINER*, [1928] 1 D. L. R. 501.—CAN.

they marry the husband to have no control over their property." Testator left him surviving three daughters only:—*Held*: the expression in the will of testator was not sufficiently precise to raise an executory trust.—*Re BANNISTER, HEYS-JONES v. BANNISTER* (1921), 90 L. J. Ch. 415; 125 L. T. 54.

549. *Add. Annotations*:—*Refd.* *Re Duncombe's Will Trusts, Wrixon-Becher v. Faversham* (Earl) (1932), 146 L. T. 412; *Re Hind, Bernstone v. Montgomery*, [1933] Ch. 208.

557. *Add. Annotation*:—*Consd.* *Re Curryer's Will Trusts, Wyly v. Curryer*, [1938] 3 All E. R. 574.

561a. ——— Trust for promotion of fox-hunting.]—Where a legacy was bequeathed to G. to be applied in such manner as he should in his absolute discretion think fit towards the promotion & furthering of fox-hunting, the ct. ordered that, upon G. undertaking to apply the legacy towards that object, the exors. should pay him the legacy, with liberty to the residuary legatees to apply in case the legacy was not so applied.—*Re THOMPSON, PUBLIC TRUSTEE v. LLOYD*, [1934] Ch. 342; 103 L. J. Ch. 162; 150 L. T. 451.

666. *Add. Annotations*:—*Refd.* *Garland v. Archer-Shee* (1930), 142 L. T. 443; *Westminster Bank, Ltd. v. Wilson*, [1938] 3 All E. R. 652.

761. *Add. Annotation*:—*Consd.* *A.-G. v. Goddard* (1920), 98 L. J. K. B. 743.

769a. Agreement to convey to creditor.]—W. being indebted to C., agreed by deed to convey his estate to C., upon trust to sell the same, & to pay off certain debts of W. due to other persons, & then the debt due from W. to C., & to pay over the surplus, if any, to W. No conveyance was executed. C. being afterwards in possession of the estate under a *fi. fa.* issued on a judgment upon a warrant of attorney given by W., agreed with W.'s agent to purchase the estate. W. ratified the contract, but subsequently impeached it as one made by a trustee for his own benefit & against the interest of the *cestui que trust*:—*Held*: C. was not a trustee for W., but was a creditor holding a security for his debt; & the contract of sale was valid.—*WATERS v. GROOM* (1844), 11 Cl. & Fin. 684; 8 E. R. 1262, H. L.; *affg.* *S. C. sub nom. CHAMBERS v. WATERS* (1833), *Coop. temp. Brough*, 91, L. C.

*Annotation*:—*Refd.* *Helling v. Lumley* (1858), 28 L. J. Ch. 249.

PART I. SECT. 14, SUB-SECT. 2.—  
A. (c) i.

844 viii. ———.]—*MARSHALL v. HETT & SIBBALD, LTD.*, [1932] 1 W. W. R. 520.—*CAN.*

PART I. SECT. 14, SUB-SECT. 2.—  
A. (c) iii.

866 v. *Add. Citation*:—*revsd.* (1923), 54 O. L. R. 205.

PART I. SECT. 14, SUB-SECT. 2.—  
A. (d) i.

n i. ———.]—*ANDERSON, GREENE & CO., LTD. v. KICKLEY*, [1934] S. C. R. 388; 3 D. L. R. 787.—*CAN.*

sa. *Loss of trust deed.*]—A settlement deed being lost:—*Held*: there were no circumstances either in the conduct of the parties or otherwise that would enable the ct. to make any inference as to the contents of the settlement, &

782. *Add. Annotations*:—*Refd.* *I. R. Comrs. v. City of Buenos Ayres Tramways Co.* (1904), Ltd. (1926), 12 Tax Cas. 1125; *Madras & Southern Mahratta Ry. Co. v. I. R. Comrs.* (1920), 12 Tax Cas. 1111.

790. *Add. Annotations*:—*Apld.* *Re Gatti's Voluntary Settlement Trusts, De Ville v. Gatti*, [1936] 2 All E. R. 1489. *Refd.* *A.-G. v. Lloyd's Bank, Ltd.*, [1935] A. C. 382; *Re Cohen's Will Trusts, Cullen v. Westminster Bank, Ltd.*, [1936] 1 All E. R. 103; *Re Hodson's Settlement, Brookes v. A.-G.*, [1938] 3 All E. R. 341.

791. *Add. Annotation*:—*Refd.* *Re Beresford's Will Trusts, Sturges v. Beresford*, [1938] 3 All E. R. 566.

792. *Add. Annotations*:—*Apld.* *Re Gatti's Voluntary Settlement Trusts, De Ville v. Gatti*, [1936] 2 All E. R. 1489. *Refd.* *A.-G. v. Lloyd's Bank, Ltd.*, [1935] A. C. 382; *Re Curryer's Will Trusts, Wyly v. Curryer*, [1938] 3 All E. R. 574; *Re Hodson's Settlement, Brookes v. A.-G.*, [1938] 3 All E. R. 341.

798. *Add. Annotation*:—*Consd.* *Re Gatti's Voluntary Settlement Trusts, De Ville v. Gatti*, [1936] 2 All E. R. 1489.

862. *Add. Annotation*:—*As to* (1) *Refd.* *Brown v. Brown*, [1936] 2 All E. R. 1616.

863a. ——— Effect of Law of Property Act, 1925 (c. 20), s. 20.]—*Re VINOGRADOFF, ALLEN v. JACKSON*, [1935] W. N. 68; 179 L. T. Jo. 274.

903. *Add. Annotations*:—*Refd.* *Perrin v. Dickson* (1929), 98 L. J. K. B. 683; *Re Collier*, [1930] 2 Ch. 37; *Re Pitts, Cox v. Kilsby*, [1931] 1 Ch. 546; *Cousins v. Sun Life Assurance Society*, [1933] Ch. 126; *Re Sigsworth, Bedford v. Bedford*, [1935] Ch. 89; *Re Clay's Policy of Assurance, Clay v. Earnshaw*, [1937] 2 All E. R. 548; *Beresford v. Royal Insurance Co.*, [1938] A. C. 586; *Re Foster, Hudson v. Foster*, [1938] 3 All E. R. 357; *Re Sinclair's Life Policy*, [1938] 3 All E. R. 124.

929. *Add. Annotation*:—*Refd.* *Re Blake, Re Minahan's Petition of Right*, [1932] 1 Ch. 54.

955. *Add. Annotation*:—*Refd.* *Blakey v. Pendlebury's Trustees* (1931), 47 T. L. R. 503.

966. *Add. Annotation*:—*Refd.* *Naamlouze Vennootschap Handels-en-Transport Maatschappij Vulcaan v. Ludwig Mowinckels Rederi A/S* (1937), 42 Com. Cas. 200.

977. *Add. Annotation*:—*Refd.* *Verner-Jeffreys v. Pinto*, [1929] 1 Ch. 401.

accordingly the funds resulted to the representatives of the parties by, & on whose behalf, they were brought into settlement.—*CUMMINS v. HALL & CUMMINS*, [1933] I. R. 419.—*IR.*

PART I. SECT. 14, SUB-SECT. 3.—B.  
sb. *Company*—*Application for shares.*—*Re FADA (AUSTRALIA), LTD., Ex p. A. L. BROWN*, [1927] S. A. S. R. 590.—*AUS.*

## Part II.—Trustees.

986. *Add. Annotation*:—**Consd. *Re* Turkington, Owen v. Benson, [1937] 4 All E. R. 501.**

1110. After this case add:—

—.]—*See, now, Trustee Act, 1925 (c. 19), s. 36 (1).*

1178. After this case add:—

—.]—*See, now, Trustee Act, 1925 (c. 19), 41 (1).*

1179. Before this case add "*See, now, Trustee Act, 1925 (c. 19), s. 41 (1).*"

1185a. **Bank—One beneficiary customer.**—There is no principle whatsoever that would prevent a bank from being appointed a trustee of a settlement merely because one or more of the beneficiaries are customers of the bank &, in fact, have overdrawn accounts with the bank. The judge of first instance having in his discretion refused to make the appointment where the settlement contained a power to make advancements to such beneficiaries at the discretion of the trustees & having made the appointment where the beneficiaries took a protected life interest & where the income was to be divided between the beneficiaries at the discretion of the trustees, the Ct. of Appeal refused in the circumstances to interfere with such exercise of the judge's discretion, the position of the beneficiaries being such that the possibility of there being a forfeiture of the protected life interest was so remote as not to affect the exercise of the discretion in the matter. The fact that the bank are the bankers of the exors. of the settlor is also not an absolute bar to its appointment as trustee.—*Re Northcliffe's Settlements, [1937] 3 All E. R. 804; 81 Sol. Jo. 716, C. A.*

1226a. —.]—The ct. declined making an order allowing a *feme sole* to propose herself to be trustee, on the ground that on her marriage her husband might interfere with the trust.—*Brook v. Brook (1839), 1 Beav. 531; 48 E. R. 1046.*

*Annotation*:—**N.F. *Re* Dickenson's Trusts, [1902] W. N. 101.**

1226b. —.]—Upon the hearing of a petition under the Settled Estate Act, 1877 (c. 18),

asking that two ladies, respectively a widow & a spinster, the then trustees of a will, might be authorised to sell the whole or any part or parts of the estates devised, the ct. in the first instance refused to confer the authority upon two ladies, & the petition was ordered to stand over generally. Upon further evidence showing that petitioners had been unable to procure any other suitable persons to act as trustees, though they had endeavoured to do so, the ct. made an order conferring the authority asked for on the two ladies during their joint lives, subject to the approval of the ct. in the case of each sale.—*Re Peake's Settled Estates, [1894] 3 Ch. 520; 71 L. T. 371; 42 W. R. 687; 38 Sol. Jo. 648; 8 R. 539.*

1422a. — **Sole managing trustee—Corporation.**]

—Being desirous of retiring, the sole surviving trustee under a will, which gave trustees no power to charge for their services, by deed dated May 31, 1932, appointed a bank to be (a) managing trustee, & (b) custodian trustee, with a view to enabling the bank to charge fees as custodian trustee under Public Trustee Act, 1906 (c. 55), s. 4 (3):—*Held*: the bank was not entitled so to charge. Either the deed of appointment operated to appoint the bank an ordinary trustee or it was inoperative as an attempt to do the impossible by appointing the same single body to hold the divided positions of managing trustee & custodian trustee.—*Forster v. Williams Deacon's Bank, Ltd., [1935] Ch. 359; 104 L. J. Ch. 132; 152 L. T. 433; 51 T. L. R. 254; 79 Sol. Jo. 145, C. A.*

*Annotation*:—**Apld. *Arning v. James, [1936] Ch. 158.***

1422b. — — —.]—One of two trustees under a settlement, which gave no power to trustees to charge for their services, was desirous of retiring from the trust. By a deed of appointment dated July 6, 1926, a bank was appointed to be managing trustee, together with the continuing trustee & separately, custodian trustee, with the object of enabling it to charge fees under sect. 4 (3) of the Public Trustee Act, 1906 (c. 55),

## PART II. SECT. 1.

so. — **Discretionary acts—How performed.**—In performing the duty of a personal trust a co. must carry out discretionary acts by the Board of Directors, & not by a servant or agent.—*Re Wilson, Capital Trust Corp'n. v. Wilson, [1937] 3 D. L. R. 178; O. R. 769.—CAN.*

sd. **Trust corporation—Winding up—Rights of beneficiaries & creditors.**—The trust co. in question herein which was the administrator of many estates had followed the practice of advancing money from its general trust account to protect certain of the estates which it was administering. The directors, on learning of the situation, purported to earmark certain assets as security for said funds. The co. was ordered to be wound up. The liquidator applied to the ct. for advice. On the appeal from the order of the judge appealed from, counsel for the *cestuis que trustent* stated that all of them were willing to be treated as a class & to rank *pari passu* among themselves

in respect to any lien created in their favour on securities held by the co. It was admitted that all moneys taken from the general trust account could be traced, but it was not possible to ascertain from what estates the advances had been made:—*Held*: the creditors who should have funds in the trust account according to the trust & agency ledger were entitled to a first lien & charge on the fund described as "advances to estates, trusts & agencies," & that until such trust accounts were paid in full said moneys should be distributed rateably among said trust creditors in proportion to their claims together with interest.—*Re Saskatchewan General Trusts Corp'n., [1938] 2 W. W. R. 375. CAN.*

## PART II. SECT. 2, SUB-SECT. 1.—A.

sg. **Persons resident in Great Britain—Tenant for life resident in England.**—*Re Baillie, Whiting v. Cavendish, [1928] V. L. R. 171; [1928] Argus L. R. 12.—AUS.*

## PART II. SECT. 2, SUB-SECT. 2.—

B. (c).

sk. **Jurisdiction of court to vary power of appointment.**—Trustee Act, 1925, s. 81, enables the ct. to do any administrative act in the administration of a trust, & empowers the ct. in a proper case to vary a power of appointment of new trustees.—*Re Mayne (1928), 28 S. R. N. S. W. 157; 45 N. S. W. W. N. 46.—AUS.*

## PART II. SECT. 2, SUB-SECT. 2.—

C. (d).

sl. **"Desire" for not less than three trustees—Whether mandatory or directory.**—Testator by his will declared that the statutory power of appointing new trustees should be exercisable if any of his trustees should go to reside out of the Australian States, but expressed a "desire" that the number of trustees of the will should always be not less than three. One of the three trustees was dead:—*Held*: it was mandatory on such retirement to appoint not less than three trustees.—*Re Mayne (1928), 28 S. R. N. S. W. 157; 45 N. S. W. W. N. 46.—AUS.*

s. 4 (3):—*Held*: the whole appointment was ineffective, & the retiring trustee was never in his lifetime discharged from the trusts.—*ARNING v. JAMES*, [1936] Ch. 158; 105 L. J. Ch. 27; 154 L. T. 252.

**1434a. Equitable estate of beneficiary becoming legal estate.]**—On July 5, 1802, B. & another trustee who predeceased him were admitted to certain copyhold plots upon trust out of the rents & profits to raise & pay an annual rent of £7 10s. to H. & his heirs & subject thereto in trust for W. & his heirs. Many years after B.'s death his customary heir C., since deceased, was admitted to two plots, but no one was admitted to the third; so that on Dec. 31, 1925, the best right to admittance was in the customary heirs of C. & B. On the same date the equitable title to the land stood vested in T. & X. as joint tenants in fee, subject to the equitable rentcharge then vested in Y., subject to proof of his title. On Jan. 1, 1926, the Law of Property Acts came into operation & the copyhold plots were enfranchised. The ct. being asked to determine in whom the legal estates in the land & the rentcharge vested:—*Held*: on the rentcharge becoming a legal rentcharge the trustees became bare trustees with no longer any active duties to perform.—*RE KING'S THEATRE SUNDERLAND, DENMAN PICTURE HOUSES v. THOMPSON & COLLINS ENTERPRISES*, [1929] 1 Ch. 483; 98 L. J. Ch. 109; 140 L. T. 463.

**1465. Add. Annotation:—***Re*fd. *Westminster Bank, Ltd. v. Wilson*, [1938] 3 All E. R. 652.

**1470. Add. Annotation:—***Re*fd. *Re Gardner's Will Trusts*, *Boucher v. Horn*, [1936] 3 All E. R. 938.

**1492. Add. Annotations:—***Re*fd. *Re Blake, Re Minahan's Petition of Right* (1931), 100 L. J. Ch. 251; C. Kasivisvanathan Chettiar v. S. V. S. Chokalingam Chettiar, [1935] A. C. 163.

**1495. Add. Annotation:—***Re*fd. *Re Blake, Re Minahan's Petition of Right* (1931), 100 L. J. Ch. 251.

**1497. Add. Annotation:—***Re*fd. *Lynn v. Bamber*, [1930] 2 K. B. 72.

**1499a. Acquisition from married woman trustee—In order to defeat judgment.]**—Where the ct. in giving judgment against a married woman, who is a defaulting trustee, orders that the judgment be satisfied out of her separate estate, & execution proves useless, it is not open to pltf., in a new action, to obtain

against her judgment in a different form for payment of the moneys into court. As against her the matter is *res judicata*. But if it appear that she has transferred the moneys to a person with knowledge of the proceedings against her, action will lie against the transferee as constructive trustee. Pltf. obtained against the first deft., a married woman, judgment for payment out of her separate estate of the sum in dispute & costs. Evidence disclosed that the first deft. had parted with the whole of the sum, having transferred most of it to her sister, the second deft., who was not a party to the proceedings but knew of them at the time. Execution in respect of the judgment thus proving useless, pltf. now brought this action, alleging that the first deft. had paid the money to the second deft. in order to defeat any judgment for the pltf., & that the second deft. received the money as constructive trustee:—*Held*: judgment could be given against the second deft., who had received the moneys as constructive trustee.—*GREEN v. WEATHERILL*, [1929] 2 Ch. 213; 98 L. J. Ch. 369; 142 L. T. 216; 45 T. L. R. 494.

**1538. Add. Annotation:—***Generally*, *Re*fd. *Solloy v. Johnson*, [1934] A. C. 193.

**1653. Add. Annotation:—***Re*fd. *I. R. Comrs. v. Raphael, I. R. Comrs. v. Ezra*, [1935] A. C. 96.

**1811a. ———.]**—*EPSTEIN v. LLOYD* (1933), 77 Sol. Jo. 319.

**1906. Add. Annotation:—***As to* (1) *Consd. Re Gower's Settlement*, [1934] Ch. 365.

**1910. Add. Annotation:—***Consd. Re Gower's Settlement*, [1934] Ch. 365.

**1911a. ——— Trustee Act, 1925 (c. 19), s. 53.]**—In a case where an infant is tenant in tail in remainder of settled land with divers remainders over, the ct. has power, by virtue of Trustee Act, 1925 (c. 19), s. 53, with a view to the application of the capital or income of the settled property for his maintenance, education or benefit, to authorise a mtge. of the settled land subject to interests having priority over the infant's tenancy in tail, so framed as to vest in the mtgee. a security which would be as effective a bar against the infant's issue & subsequent remaindermen as if the infant were of full age & had executed the conveyance in accordance with the Fines & Recoveries Act, 1833 (c. 74).—*Re GOWER'S SETTLEMENT*, [1934] Ch. 365; 103 L. J. Ch. 164; 150 L. T. 449.

## PART II. SECT. 6, SUB-SECT. 1.

**1423 1. Trustee having no duties to perform.]**—P., by his will, devised his real estate to his trustee in fee simple upon trust for the absolute & exclusive use, enjoyment, benefit, & advancement of certain named beneficiaries, including K., & having invested his trustee with powers of selling & mortgaging such estate for payment of debts, & of leasing & managing same, declared that "if any one of the beneficiaries under this my will shall die without issue, then all his rights, titles, & interests which he has acquired by virtue of this my last will shall vest in the children of M. P. as tenants in common in equal shares:—*Held*: the trustee named in the will was not a bare trustee.—*RE PANAPA WARHOPI*, [1929] N. Z. L. R. 815.—N.Z.

## PART II. SECT. 6, SUB-SECT. 2.

**1439 1. Duty to convey legal estate—To beneficiaries.]**—*Re KEITH, KEITH v. EASTERN TRUST CO. (N. S.)*, [1929] 1 D. L. R. 599.—CAN.

## PART II. SECT. 7, SUB-SECT. 1.—C. (b) 1.

**sh. Property subject to existing contract—Trusts Ordinance, 1917, s. 93, of Ceylon—When registration necessary.]**—*HALL v. PELMADULLA VALLEY TEA & RUBBER CO., LTD.*, [1929] A. C. 602.—CEYLON.

## PART II. SECT. 8, SUB-SECT. 1.—A.

**1557 v. ——— Objects of trust not named.]**—Where a will distinctly shows an intention to create a trust but does not proceed with sufficient clearness, or at all, to denote the objects of the trust,

although it distinctly names a devisee or legatee in trust, the effect is the trustee holds the property for the benefit of those on whom the law, in the absence of disposition, casts it.—*FRASER v. FRASER*, [1937] 1 W. W. R. 91; 6 F. L. J. (Can.) 276.—CAN.

## PART II. SECT. 8, SUB-SECT. 3.

**sj. Death of trustee.]**—*Re CATLIN & REID* (1923), 54 O. L. R. 1.—CAN.

## PART II. SECT. 8, SUB-SECT. 5.

**sk. Grant of administration for purpose of conveying—Invalid appointment of trustees.]**—Three new trustees of a will had been appointed in 1875, & the trust estate vested in them. Two of these trustees died prior to 1907, & the third, E., being desirous of retiring from the trust, C. & W. were in that



**2015a. — Right of beneficiaries.**—In the events which had happened, a testator's residuary estate was held as to one-half in trust for plffs. absolutely & as to the other half in trust for testator's daughter for life & subject thereto for her children absolutely. The trust fund comprised (*inter alia*) certain shares in a private limited co., which shares carried a voting power in the co. sufficient to enable the holder of them to control an ordinary resolution. By his will testator had directed the trustees not to sell these shares "unless they in their discretion shall consider it absolutely necessary," & he authorised them "to retain the same so long

as they in their absolute & uncontrolled discretion shall think fit." Plffs. required the trustees to divide the estate & to transfer to them the half to which they were entitled. The trustees contended that they were entitled to refuse to divide the shares if in their discretion they were of opinion that it was to the interest of the trust fund as a whole that they should be retained:—*Held*: plffs. were entitled to have their half of the estate, including half of the shares in question, transferred to them.—*Re SANDEMAN'S WILL TRUSTS, SANDEMAN v. HAYNE*, [1937] 1 All E. R. 368; 81 Sol. Jo. 137.

## Part III.—Administration of Trusts.

**2033a. — Misapplication of trust funds—Payment to wrong person.**—The indemnity conferred on trustees by Trustee Act, 1925 (c. 19), s. 30 (1), does not apply where a trustee, even though as the result of an honest mistake, has misapplied trust funds by paying them to the wrong person.

The selling agents of a colliery co., which had sold its undertaking & was being voluntarily wound up, claimed £19,088 damages for alleged breach by the co. of the agency agreements. There had in fact, as the ct. held, been no breach of the agreements. The liquidator consulted the solrs. of a large shareholder, who was opposed to the claim, & they said they had advised their client that there was a valid claim but that the amount of damages was uncertain. Without taking further advice or obtaining the opinion of the ct., a course the liquidator had recognised to be open to him, the liquidator settled the claim for £15,000. A summons was taken out by a contributory to obtain repayment of this sum to the co., on the ground that the liquidator had been guilty of misfeasance, & the liquidator, whose *bona fides* was not in question, claimed the

benefit of the indemnity given to trustees by Trustee Act, 1925 (c. 19), s. 30:—*Held*: without deciding whether the liquidator was a trustee within the meaning of the Act, even if he were: (1) he was not entitled to indemnity under sect. 30 (1), because that sub-sect. does not extend to a case where a trustee had misapplied trust funds coming to his hands; (2) he was not, on the facts, entitled to relief under sect. 61.

Even if a liquidator is a trustee within Trustee Act, 1925, he is, as a paid trustee, disentitled to relief under sect. 61 (*per* CUR.).—*Re WINDSOR STEAM COAL CO. (1901), LTD.*, [1929] 1 Ch. 151; 98 L. J. Ch. 147; 140 L. T. 80, C. A.

*Annotation*:—*Generally, Refd. Re Home & Colonial Insce. Co.*, [1930] 1 Ch. 102.

**2076. Add. Annotation:—Refd. Re Murphy's Estate, Morton v. Marchanton (1930), 74 Sol. Jo. 321.**

**2092. Add. Annotation:—Refd. Flower v. Prechtel (1934), 150 L. T. 491.**

**2136. Add. Annotation:—Consd. Re Gates, Arnold v. Gates, [1933] Ch. 913.**

year appointed new trustees. This appointment was subsequently discovered to be invalid. The legal estate was never divested from E., who died intestate in the U.S. in 1915, & no representation had been raised to his estate. The ct. gave liberty to a person, who represented some of the beneficiaries, to apply for a grant limited to conveying the legal estate & without

moved from his position as trustee:—*Held*: the making of the order for his removal was a proper exercise of the Ct.'s discretion. *MILLER v. CAMERON* (1936), 54 C. L. R. 572; 42 Argus L. R. 301; 10 A. L. J. 33.—AUS.

### PART III. SECT. 3, SUB-SECT. 1.—A.

*SB. Claim for indemnity against trustee in bankruptcy.*—Pltf. took & held in his own name title to certain land as trustee for a co.; & then to assist the co., & with the approval of its directors, gave a mtge. in his own name. There was no doubt but that the amount owing on the mtge. was a debt of the co. The co. made an authorised assignment in bkpcy.; said land was included in the assets specifically mentioned, the assignment was registered against the title, & the trustee requested a transfer of the title from pltf. & otherwise so acted as to indicate an intention to take over the property as part of the estate assets. The principal of the mtge. being overdue, the mtgees. demanded payment thereof from pltf., & he sought an order compelling the trustee in bkpcy. in its individual as well as in its representative capacity to pay said moneys, or to indemnify him against all liability under the mtge. & to have

title to the land transmitted to it from his name:—*Held*: the claim for indemnity or payment should be dismissed.—*ELLIOTT v. CANADIAN CREDIT MEN'S TRUST ASSCO., LTD.*, [1933] 2 W. W. R. 11; 41 Man. L. R. 398; *affd.*, [1934] 1 W. W. R. 801; [1934] 2 W. W. R. 208; 3 D. L. R. 129; *affd.*, [1935] S. C. R. 1; 1 D. L. R. 353.—CAN.

### PART III. SECT. 3, SUB-SECT. 1.—D. (a).

**2055 H. —**—*Brighouse v. Morton*, [1929] 3 D. L. R. 91; S. C. R. 512; *revg.*, 40 B. C. R. 278.—CAN.

### PART III. SECT. 3, SUB-SECT. 4.—A.

**2136 xxvi. —**—C. had mortgaged certain of his property to a bank. He became mentally defective, & allowed the payments to fall into arrear. The applicants mortgaged their own property, & paid off the bank. At their request, the bank offered C.'s property for sale, & there being no bid, transferred it to the applicants, who sold the property to advantage. They claimed commission as trustees:—*Held*: commission or remuneration could only be allowed for services rendered in the course of the administration of a trust, & that as the services had all been

### PART II. SECT. 9, SUB-SECT. 2.—B. (a.)

**1981 iii. —**—*In determining whether or not it is proper to remove a trustee, the ct. will regard the welfare of the beneficiaries as the dominant consideration. A trustee of a settlement assigned his estate for the benefit of his creditors, & subsequently, on the death of his co-trustee, became sole trustee of the settlement. His functions as trustee involved the exercise of important discretionary powers in respect of the settled property, which was of considerable value. He was requested both by the settlor & the*

*trustee, but he refused to do so. In a action in the Supreme Ct. of Tasmania it was ordered that he be re-*

2144. *Add. Annotations*:—**Consd.** *Re Hill's Trusts, Claremont v. Hill*, [1934] Ch. 623. **Refd.** *Re Gates, Arnold v. Gates*, [1933] Ch. 913.

2147a. **Income fee on sums collected or distributed—Whether payable out of residue.**—A testator by his will directed that out of the yearly income of his residuary estate his trustees should pay to his wife during her life "such an amount as will give her a clear yearly sum of £12,000 after paying or deducting income tax & super tax" & that "subject thereto" his trustees should stand possessed of his trust estate upon certain trusts for his son & daughter, & directed that all devises bequests legacies & annuities given by his will should be free of all death duties payable on his death which should be paid out of his residuary estate. He directed that a trust co. whom he appointed one of his exors. & trustees should be entitled to remuneration free of duties in accordance with the scale of fees in force at the date of his will. The fee to the co. under the scale in respect of the income dealt with by the co. was fifteen shillings per cent., & the whole of such income fee had been paid out of the income of the residuary estate. Questions arose whether any part of the income fee ought to be borne by the annuity, & this summons was issued to decide the point:—**Held**: whether the income fee was to be treated as an administration expense or as a legacy it ought to be borne out of the income of the residuary estate after providing for the annuity.—*Re HULTON, MIDLAND BANK EXECUTOR & TRUSTEE CO., LTD. v. THOMPSON*, [1936] Ch. 536; [1936] 2 All E. R. 207; 105 L. J. Ch. 273; 155 L. T. 226; 52 T. L. R. 507; 80 Sol. Jo. 386.

*Annotations*:—**Distd.** *Re Roberts's Will Trusts, Younger v. Lewins*, [1937] Ch. 271. **Consd.** *Re Godwin, Coutts & Co. v. Godwin*, [1938] Ch. 341.

2147b. — — — — —.]—A testatrix appointed a bank as one of her exors. & trustees & declared that the bank should be entitled to remuneration "in accordance with the bank's scale of fees now in force." The will created certain trust funds to be held on separate trusts. It was admitted that the acceptance fee charged by the bank was payable out of residue. Questions arose whether the income fees & withdrawal fees were payable out of the income & capital of the separate funds or out of residue:—**Held**: the income & capital fees were payable out of the income & capital of the separate funds.—*Re ROBERTS'S WILL TRUSTS, YOUNGER v. LEWINS*, [1937] Ch. 274; [1937] 1 All E. R. 518; 106 L. J. Ch.

232; 156 L. T. 213; 53 T. L. R. 358; 81 Sol. Jo. 199.

*Annotation*:—**Consd.** *Re Godwin, Coutts & Co. v. Godwin*, [1938] Ch. 341.

2175. *Add. Annotation*:—**Consd.** *Re Nicholson's Will Trusts, Ortmans v. Burke*, [1936] 3 All E. R. 832.

2250. *Add. Annotation*:—**Refd.** *Re Lloyds Bank, Bomze & Lederman v. Bomze*, [1931] 1 Ch. 289.

2269. *Add. Annotation*:—**Consd.** *Re Raine, Tyerman v. Stansfield*, [1929] 1 Ch. 716.

2273a. **Voluntary settlement in accordance with unexecuted will—Failure to include trust for maintenance—Remedy of beneficiary.**—*LANGDON v. BLAKE* (1865), 12 L. T. 202; 11 Jur. N. S. 762.

2273b. **Power to pay sum out of capital—Interest of infant contingent—Meaning of "occurrence of any other event."**—Under the trusts of the will of a testator who died in 1930, an infant was entitled, subject to the life interests of testator's widow & the infant's mother who was restrained from anticipation, to a share in testator's residuary estate contingently upon surviving her mother & attaining the age of twenty-one years. Upon a summons by the mother (a married woman) of the infant asking that the trustees might be authorised under Trustee Act, 1925 (c. 19), s. 32, with the consent of pltf. & of testator's widow to raise & pay out of the capital of the contingent share of the infant in the residuary estate of testator certain sums for school fees & other incidental expenses:—**Held**: (1) upon the proper construction of the will & Trustee Act, 1925 (c. 19), s. 32, the alternative contingency therein mentioned of "the occurrence of some other event" is not restricted to the occurrence of an event having no reference to a specified age, but, while excluding the single event of attaining a specified age, includes the compound or double event of attaining a specified age & survivorship; & accordingly, the power of advancement conferred upon trustees by that sect. was (sub) ject to the provisos in that sect. contained-available in respect of the interest of the infant in the residuary estate of testator; (2) notwithstanding the restraint on anticipation imposed by the will on the interest of the mother of the infant, she was capable of giving a valid consent to the exercise of such power, within proviso (c) to Trustee Act, 1925 (c. 19), s. 32 (1).—*Re GARRETT, CROFT v. RUCK*, [1934] Ch. 477; 103 L. J. Ch. 244; 151 L. T. 194.

rendered before appcts. became trustees, no allowance could be made.—*Re COMMANE*, [1927] S. A. S. R. 238.—**AUS.**

t i. — — — — —.]—Apart from legislation, the general rule is that, in the absence of an expressed prior stipulation with his *cestui que trust*, a trustee will not be allowed remuneration for personal trouble & loss of time.

The right of a trustee to remuneration under Trustee Act, R. S. S., 1920, s. 65, may be disallowed where he has acted fraudulently or dishonestly in managing the trust.—*PROCTOR v. BENTLEY* (Sask.), [1929] 3 W. W. R. 711; [1930] 2 D. L. R. 6; 24 S. L. R. 206.—**CAN.**

s l *Application for—Practice.*—One co-trustee may petition alone for trustees' commission, & *quære* whether on such an application the ct. has jurisdiction to consider, & if necessary, to award, a distribution of any commission it may allow. It is not necessary in all circumstances that the personal representatives of a deceased trustee should have notice of such an application.—*Re BOWMAN'S SETTLEMENT*, [1929] S. A. S. R. 1.—**AUS.**

#### PART III. SECT. 3, SUB-SECT. 5.—A.

2171 i. — *Question of construction.*—Upon a summary application under Trustee Act, R. S. O., 1927, s. 59, "for

the opinion, advice or direction of the ct.," the ct. will not determine legal rights.—*Re TECUMSEH PUBLIC UTILITIES COMMISSION & MCPHEE*, [1931] 1 D. L. R. 538; 66 O. L. R. 231.—**CAN.**

#### PART III. SECT. 4, SUB-SECT. 3.—B.

2206 iv. — — — — —.]—The rule that a trustee for sale is incapable of purchasing the trust property applies to a person to whom under the terms of the trust agreement the trustee was required to, & did, give the sole charge & general management of the trust property.—*MCLENNAN v. NEWTON*, [1928] 1 D. L. R. 189; 37 Man. L. R. 201; [1927] 3 W. W. R. 684.—**CAN.**

**2273c.** ——— **Effect of restraint on anticipation—On power to consent to exercise.]—***Re GARRETT, CROFT v. RUCK*, No. 2273b, *ante*.

**2280.** *Add. Annotation:—Refd. Re Halsted's Will Trusts, Halsted v. Halsted*, [1937] 2 All E. R. 570. v.

**2280a.** **Meaning of "benefit."—**A testator directed that part of his residuary estate should be held upon trust to pay the income thereof to one of his sons & that after the son's death it should fall back into & form part of testator's residuary estate. The trustees were, however, empowered to advance to the son a sum not exceeding one-half of this settled fund for the purpose of establishing him in business "or otherwise for his benefit or advancement in life." The son, who was married, was not in a position to make provision for his wife & child in the future, & he sought to have a sum raised out of the settled fund to be settled upon himself for life & after his death for his wife for life & after her death for his children:—*Held*: the trustees had power under the terms of the settlement to raise a sum not exceeding one-half of the settled fund for the purposes of a settlement upon the son & his family, but such a settlement ought to include the wife & children only, with an ultimate trust in favour of testator's residuary trust.—*Re HALSTED'S WILL TRUSTS, HALSTED v. HALSTED*, [1937] 2 All E. R. 570.

**2283a.** ——— **Life interest protected against assignment—Forfeiture.]—**Trustees of a will held land upon trust for sale & the proceeds of sale were not subject to any trust for reconversion under the will:—*Held*: (1) they were entitled to exercise the power of advancement out of capital conferred upon them by Trustee Act, 1925 (c. 19), s. 32, in favour of a remainderman, subject to the consent of the tenant for life, whose life interest was protected against assignment; (2) the tenant for life by consenting to the exercise of the power of advancement forfeited his life interest under the will.—*Re STIMPSON'S TRUSTS, STIMPSON v. STIMPSON*, [1931] 2 Ch. 77; 100 L. J. Ch. 312; 145 L. T. 249.

**2285a.** **Property held on trust for sale.]—***Re STIMPSON'S TRUSTS, STIMPSON v. STIMPSON*, No. 2283a, *ante*.

**2287.** *Add. Annotation:—Refd. Re Duncombe's Will Trusts, Wrixon-Becher v. Faversham (Earl)* (1932), 146 L. T. 412.

**2289a.** **Accumulations of income applicable to overdraft—Overdraft secured by equitable mortgage—Legal mortgage of same property to pay off overdraft—Whether accumulations applicable to legal mortgage.]—**A testator, when he died, owed a bank £915 by way of overdraft, as security for which he had deposited the deeds of thirty-five cottages owned by him. By his will he directed that the bank should be paid out of accumulations of income "till the mtge. I owe be paid." Less than two years from the death, the bank required the trustees of the will to discharge the overdraft & to meet this the trustees borrowed the sum of £1,000 from other parties on a legal mtge. of the cottages & paid off the overdraft out of these monies. There was no transfer of the bank's security. The present trustee of the

will raised the question whether the legal mtge. ought to be paid off out of accumulations of income:—*Held*: the answer was in the negative. To hold the contrary the ct. would have to make a new will for the testator to meet an event for which he had not provided.—*Re BRANDON, SAMUELS v. BRANDON* (1932), 49 T. L. R. 48.

**2289b.** **Trust for maintenance education or benefit of children—No power to accumulate.]—**On the marriage of O. and V., H. the father of the husband executed a deed whereby he covenanted with trustees that if the husband should die in his lifetime he would pay them an annuity of £1,000 in trust for V., so long as she should remain the widow of O., & thereafter upon trust to pay or apply the same for or towards the maintenance, education or benefit of any of the infant children of the marriage as the trustees might think fit. The marriage was dissolved & the wife remarried. O. afterwards died in the lifetime of H. & the annuity became payable. There was one child of the marriage, who was an infant living with & being maintained by his mother:—*Held*: the deed created a trust to apply the whole annuity for the maintenance, education or benefit of the infant, the trustees having no power to accumulate all or any part of the income for the benefit of the infant until he should attain 21 years of age. The word "benefit" is intended to cover expenditure incurred which does not strictly come under the heads either of "maintenance" or "education."—*Re PEEL, TATTERSALL v. PEEL*, [1936] Ch. 161; 105 L. J. Ch. 65; 154 L. T. 373; 80 Sol. Jo. 51.

**2290.** *Add. Annotation:—Refd. Vandepitte v. Preferred Accident Insurance Co. of New York*, [1933] A. C. 70.

**2357.** *Add. Annotations:—Consd. Hyman v. Hyman*, [1929] A. C. 601. *Refd. Harmer v. Armstrong*, [1934] Ch. 65.

**2361.** *Add. Annotation:—As to (1) Refd. Harmer v. Armstrong*, [1931] Ch. 65.

**2500.** After this case add:—

**Infant domiciled abroad.]—***See CONFLICT OF LAWS*, No. 548a, *ante*.

**2503a.** ——— **Fund not carried to account of particular person.]—***Re BIRKIN, BIRKIN v. BIRKIN*, [1901] W. N. 33.

**2546a.** **Administrator ad litem.]—**Moneys are never paid out of ct. to an administrator *ad litem*.—*WILLIAMS v. ALLEN* (No. 2) (1863), 32 Beav. 650; 55 E. R. 255.

**2609a.** ———.]—Testator bequeathed a fund to A. for life, with remainders over. The fund was paid into ct. under Trustee Relief Act, 1847 (c. 96). On a petition by A. for payment of the dividends, which was not served on any persons claiming in remainder:—*Held*: the ct. could not allow the costs out of the capital of the fund.—*Ex p. FLETCHER* (1848), 17 L. J. Ch. 169; 11 L. T. O. S. 218; *sub nom. Re FLETCHER, Ex p. FLETCHER*, 12 Jur. 619.

**2635a.** ———.]—Property was mtged. to two trustees of a settlement. The mtgor. had no notice of the trust. One trustee died, & the survivor became a lunatic. New trustees of the settlement were appointed under a power, but the mtge. debt was not transferred to them. The mtgor. gave notice to

pay off the money. A petition was presented, asking that the new trustees might be appointed to reconvey the mtged. property to the mtgor. on payment of the mtge. money:—*Held*: the costs of the petition must be paid out of the trust funds.—*Re JONES* (1876), 2 Ch. D. 70; 45 L. J. Ch. 688; 34 L. T. 470, C. A.

**2654a.** *Proceedings against trustee by action instead of summons.*—An action was brought against the surviving trustee of a will, claiming a declaration that he was not entitled to charge in account with plff., who was a *cestui que trust* under the will, the costs of an action brought by the superior landlord in consequence of the failure by the trustee to repair some houses which formed part of the trust property, or to charge com-

mission paid to a collector who had collected the rents of the same property, & also claiming, if necessary, administration of testator's estate. There was no practical dispute as to the facts:—*Held*: the points in dispute between the parties might have been decided upon an originating summons, under R. S. C., Ord. 55, r. 3, & although plff. succeeded in his claim, no costs of the action would be given.—*Re JOHNSON, WAGG v. SHAND* (1885), 53 L. T. 136.

**2714.** *Add. Annotation*:—As to (2) *Refd.* *Garland v. Archer-Shee* (1930), 142 L. T. 443.

**2777a.** —.—.]—*SNOW v. TEED* (1870), L. R. 9 Eq. 622; 18 W. R. 623; *sub nom.* *SUM v. TEED*, 23 L. T. 303.

**2835.** *Add. Annotation*:—*Refd.* *Parker v. Judkin*, [1931] 1 Ch. 475.

## Part IV.—Duties of Trustees.

**2953.** *Add. Annotation*:—*Refd.* *Clayton v. Clayton*, [1930] 2 Ch. 12.

**3038.** *Add. Annotation*:—*Refd.* *Re Vickery, Vickery v. Stephens*, [1931] 1 Ch. 572.

**3118a.** —.—.]—*REYNOLDS v. BROWN* (1852), 1 W. R. 50.

**3128.** *Add. Annotation*:—*Refd.* *Re Sandeman's Will Trusts, Sandeman v. Hayne*, [1937] 1 All E. R. 368.

**3142.** *Add. Annotations*:—*Dlstd.* *Re Sullivan, Dunkley v. Sullivan* (1929), 45 T. L. R. 590. *Consd.* *Re McKee, Public Trustee v. McKee*, [1931] 2 Ch. 145.

## Part V.—Powers and Discretions of Trustees.

**3149a.** *Jurisdiction of court to confer power.*—Sect. 57 (1) of Trustee Act, 1925 (c. 19), provided: "Where in the management or administration of any property vested in trustees, any sale, lease, mtge., surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the ct. expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the ct. may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, & subject to such provisions & conditions, if any, as the ct. may think fit. . . ."

—*Held*: for the ct. to exercise its powers under the sub-sect. the proposed transaction must be, in the opinion of the ct., expedient, not for the benefit of one beneficiary only, but for the benefit of the whole trust.—*Re CRAVEN'S ESTATE, LLOYDS BANK, LTD. v. COCKBURN* (No. 2), [1937] Ch. 431; 106 L. J. Ch. 311; *sub nom.* *Re CRAVEN'S ESTATE, LLOYDS BANK, LTD. v. CRAVEN* (No. 2), 81 Sol. Jo. 436.

**3162a.** *Exercise of statutory powers—Duty to consult beneficiaries.*—A summons in an administration action was taken out by the trustees for the purposes of the Settled Land Act, 1925 (c. 18), of a settlement of real estate made by the will of a testator for the determination of the question whether the provisions of Law of Property Act, 1925

### PART III. SECT. 10, SUB-SECT. 2.—B.

**2655 viii.** —.—.]—*BRYDEN v. BRYDEN (GRIERSON)* (1833), 6 Wils. & S. 354; *affg.*, 9 S. 457.—*SCOT.*

**2655 ix.** —.—.]—The costs of the trustee of a *donatio mortis causa* in successfully defending an action brought against him by the administrator of the donor's estate, were ordered to be paid out of the whole fund which was the subject-matter of the *donatio mortis causa*.—*WALKER v. ROMAN CATHOLIC BISHOP OF ST. JOHN*, [1929] 4 D. L. R. 15; 54 N. B. R. 371.—*CAN.*

### PART III. SECT. 11, SUB-SECT. 7.—C.

**2866 iii.** —.—.]—Testator being dead, the ct. is empowered, when the benefit of the estate requires it, to do what it believes a prudent testator

would do if alive, & to revoke a direction which had nothing to do with the destination of the estate, but merely with its administration.—*Re ROGERS*, [1929] 1 D. L. R. 116; 63 O. L. R. 180.—*CAN.*

### PART IV. SECT. 7.

*sm. Trustee following wishes of majority of beneficiaries—Against wishes of minority—No liability for breach of trust.*—*GREEN v. FRASER*, [1931] S. C. R. 160; [1930] 4 D. L. R. 42; *affg.*, [1930] 2 D. L. R. 702; 65 O. L. R. 90.—*CAN.*

### PART IV. SECT. 9.

**3067 xi.** —.—.]—*HAMILTON v. YORK & BALDREY* (1913), 24 W. L. R. 679; 4 W. W. R. 859.—*CAN.*

*sq. Form of accounts.*—The proper

method of keeping the trust accounts of a farming business, where there are life tenants or annuitants & remaindermen, is by taking a standard value at the commencement of that period & maintaining that standard value throughout, the duty of the trustees being to see that so far as number & quality are concerned the stock is kept up to the standard value. It is not proper, therefore, for trustees in trust of any such farming business to value the live-stock at the end of each year for the purpose of their accounts.—*Re BASSETT, BASSETT v. BASSETT*, [1934] N. Z. L. R. 690; G. L. R. 637.—*N.Z.*

### PART V. SECT. 5, SUB-SECT. 2.—A.

*g l.* —.—.]—*MACLEOD v. ROYAL TRUST CO. (Alta.)*, [1929] 1 D. L. R. 589.—*CAN.*

(c. 26), s. 26 (3), as amended by the Law of Property (Amendment) Act, 1926 (c. 11) (by which they were directed to consult the wishes of beneficiaries), applied only in respect of sales or applied also to the exercise by them of their other statutory trusts & powers:—*Held*: it was the duty of the trustees to consult the wishes of the beneficiaries not only with regard to the exercise of the trust for sale, but also with regard to the exercise of all other trusts & powers arising under Settled Land Act, 1925 (c. 18), & Law of Property Acts, 1925 (c. 26), & 1926 (c. 11), & the additional or larger powers conferred by the settlement on the trustees thereof or otherwise.—*Re JONES, JONES v. CUSACK-SMITH*, [1931] 1 Ch. 375; 100 L. J. Ch. 129; 144 L. T. 642.

**3191a. — Public Trustee.**—By his will a testator, who died in 1887, appointed four named persons as the exors. & trustees of his will & gave his real & personal estate to them upon trust that they & the survivors & survivor of them & the heirs, exors. or administrators of such survivor their or his assigns, each & all of whom were intended to be included in the term "my trustees" thereafter used, should distribute the net residue of his estate to & among such of the descendants of his brothers & sisters in such shares, proportions or amounts & at such proper times as the trustees, in whom he "placed full confidence," in their absolute & uncontrolled discretion should determine. Two of the trustees died in 1902, one retired in 1907, when another was appointed who retired in 1923 in favour of yet another. In 1934 the two remaining trustees retired & the Public Trustee was appointed in their place. In a summons to determine the effect of the will, it was argued by testator's next of kin that: (i) the gift of the residuary estate was void, because there was no longer anybody who, in accordance with the terms of the will, was entitled to exercise the power of selecting the descendants of testator's brothers & sisters who were to take, & (ii) the gift was void as infringing the rule against perpetuities, because the descendants of the testator's brothers & sisters might be selected by persons ascertained outside the limit fixed by the rule against perpetuities, & might themselves be persons who took outside that time:—*Held*: (1) the Public Trustee, as an assign, came within the definition of "my trustees" in the will & was entitled to exercise the power of selection; (2) the gift was void as infringing the rule against perpetuities.—*Re SYMM'S WILL TRUSTS, PUBLIC TRUSTEE v. SHAW*, [1936] 3 All E. R. 236; 80 Sol. Jo. 994.

**3322. Add. Annotation:—Consd. *Re Vickery, Vickery v. Stephens*, [1931] 1 Ch. 572.**

**3450. Add. Annotation:—Distd. *Re Stevens & Dunsby's Contract*, [1928] W. N. 187.**

**3486a. — Consent refused by tenant for life.**—Where in the case of a trust for sale "any requisite consent cannot be obtained," because the person from whom it must be

obtained refuses it, the ct., under Law of Property Act, 1925 (c. 20), s. 30, & Trustee Act, 1925 (c. 19), s. 57, can direct the trustees for sale to sell.—*Re BEALE'S SETTLEMENT TRUSTS, HUGGINS v. BEALE*, [1932] 2 Ch. 15; 101 L. J. Ch. 320.

**3469a. — Consent refused—Power of court to order sale under Law of Property Act, 1925 (c. 20), s. 30.**—*Re BEALE'S SETTLEMENT TRUSTS, HUGGINS v. BEALE*, No. 3469a, *ante*.

**3475a. — — — — —.**—In an administration action in which a decree had been made, & which was still pending, a receiver had been appointed, who was receiving the rents & profits & distributing them amongst various persons. On the coming into force of Law of Property Act, 1925 (c. 20), the statutory trusts under Sched. I, Part IV., of the Act came into operation, & the trustee, in whom the legal estate was vested, became invested with the statutory trusts for sale:—*Held*: the trustee could exercise the statutory trusts without the sanction of the ct. in the still pending suit.—*BERNHARDT v. GALS-WORTHY*, [1929] 1 Ch. 549; 98 L. J. Ch. 284; 140 L. T. 685.

*Annotation:—Held. Re Thomas, Thomas v. Thompson*, [1930] 1 Ch. 194.

**3475b. Persons beneficially interested in possession—Annuitants.**—The trustees of a will, which came into operation after the commencement of Law of Property Act, 1925 (c. 20), were directed to stand possessed of the testator's residuary real & personal estate upon trust to pay out of the income thereof four life annuities, & while any annuity remained payable to divide the surplus income amongst such of testator's grandchildren as should be living for the period during which any annuity remained payable; &, on cesser of all the annuities to stand possessed of the residuary estate in trust for his grandchildren & the issue then living of any then dead, as tenants in common according to the stocks. By a codicil power was conferred upon the trustees after the expiration of five years from testator's death to sell his residuary estate or any part thereof by public auction but not by private contract. Upon a summons raising questions, whether the trustees or the persons entitled to the surplus income until cesser of the annuities were the proper persons in whom the land ought to be vested by the exor.; &, if the trustees were the proper persons, whether the annuitants were persons whose wishes ought to be given effect to by the trustees for sale:—*Held*: the annuitants were persons beneficially interested in possession within Law of Property Act, 1925 (c. 20), s. 26 (3), whose wishes should be consulted by the trustees for sale.—*Re HOUSE, WESTMINSTER BANK v. EVERETT*, [1929] 2 Ch. 166; 98 L. J. Ch. 381; 141 L. T. 582.

**3488a. — — — — —.**—Testator, who died in the year 1901, gave the residue of his estate real & personal, consisting of certain stocks & shares, freehold hereditaments, & leasehold houses held on leases expiring in the

**PART V. SECT. 7, SUB-SECT. 2.—B.**

*sr. Whether power of sale given—WESSLES v. CARSCALLEN* (1860), 10 C. P. 218.—CAN.

**PART V. SECT. 7, SUB-SECT. 2.—F. (a).**

*m l. — — — — —.*—A contract between a trustee for sale & the wife of the trustee is in law a valid contract,

but the ct. of equity would presume that the contract was for the benefit of the trustee & would require evidence to displace that presumption.—*Re DOUGLAS* (1928), 29 S. R. 48.—AUS.

year 1924, to trustees upon trust neither to allow the same to remain in its state of investment at his decease or, as & when his trustees should, in their absolute discretion, see fit so to do, from time to time to realise & sell & convert the same or any part thereof. Testator directed his trustees to reinvest the money when realised in trustees' securities & to hold the investments, whether original or substituted, upon trust to pay unto or permit his wife, F., who was one of the trustees, to receive the income of his residuary estate during widowhood, to be reduced to a moiety of the income on her re-marriage, & subject to her life interest the testator gave his residuary estate to his son C. to be paid to him as to a moiety at twenty-one & the residue on his attaining thirty, but should his son die under twenty-five the whole residue was given to F.:—*Held*: the words of the will created a trust for sale.—*Re CRIPS*, *CRIPS v. TODD* (1906), 95 L. T. 865.

*Annotations*:—*Consd. Re Johnson*, *Cowley v. Public Trustee*, [1915] 1 Ch. 435; *Re White's Settlement*, *Pitman v. White*, [1930] 1 Ch. 179.

**3489. Add. Annotation:—***Dlstd. Re White*, *Pitman v. White* (1929), 46 T. L. R. 30.

**3489a. — With consent of tenant for life.**—By a marriage settlement made in 1882 an undivided share of real estate passing under a will was settled, together with other property belonging to the wife, upon trust either to retain the same in its present condition, or with the consent of the tenant for life during her life, to sell, & after her death to sell at the discretion of the trustees. The settlement contained various powers to the trustees appropriate to the management of real estate, but no power to postpone conversion. In 1906 a partition of the entirety of the estate was effected, & certain hereditaments appropriated & conveyed to the trustees in satisfaction of the undivided share settled. On a summons to determine the question whether the land remaining unsold was settled land or held upon trust for sale:—*Held*: the settlement having been made before the coming into operation of Law of Property Act, 1925 (c. 20), under sect. 25 (4), of which it would have created a trust for sale, the question was one of construction, & having regard to the trusts & powers in the settlement for the management of the property as real estate, the land remaining subject thereto was not held upon trust for sale but was settled land.—*Re WHITE'S SETTLEMENT*, *PITMAN v. WHITE*, [1930] 1 Ch. 179; 99 L. J. Ch. 49; 142 L. T. 279; 46 T. L. R. 30.

**3490. Add. Annotations:—***Consd. Re Whitaker*, *Rooke v. Whitaker*, [1929] 1 Ch. 662. *Refd. Re Conquest*, *Royal Exchange Assurance v. Conquest*, [1929] 2 Ch. 353. *Mentd. Re Smith*, *Vincent v. Smith*, [1930] 1 Ch. 88.

**3491a. Estate divisible among beneficiaries—Trustee must sell—***Notwithstanding power to postpone under Law of Property Act, 1925 (c. 20), s. 25.*—*Re BALL*, *JONES v. JONES* (1930), 74 Sol. Jo. 298.

**3571. Add. Annotation:—***Refd. Barlow v. I. R. Comrs.* (1937), 21 Tax Cas. 354.

**3590. Add. Annotation:—***As to (1) Consd. Re Mansel*, *Smith v. Mansel*, [1930] 1 Ch. 352.

**3592a. — — — — —**—A testator by his will gave the residue of his property upon trust for his wife for life or so long as she should continue his widow. In the event of her remarriage, testator directed that his trustees should set apart from the trust funds a sum sufficient to secure to the wife an annual income of £300. The principal of that sum was to be paid after the wife's death to testator's step-daughter absolutely. Testator died in 1892, & was survived by his wife. Upon a summons to determine questions arising upon the will, it was held (*inter alia*) that in the event of the widow's death without marrying again a fund sufficient when invested to produce on the date of the widow's death £300 a year would devolve upon the step-daughter absolutely. Testator's widow died in 1934 without having remarried, & the step-daughter claimed that the sum due to her, subject to adjustment in respect of advances made during the widow's lifetime, should be provided by the trustees raising & paying to her such capital sum as, if invested in 2½ per cent. consols at the date of the widow's death, would have produced an income of £300:—*Held*: the trustees had a discretion under the will to appropriate for the purpose of the widow's annual income of £300 such of the investments authorised by the will as they should think fit, & as that discretion had not been surrendered, they should be at liberty, subject to adjustment in respect of advances, to appropriate, for the purpose of constituting the fund payable to the step-daughter, investments forming part of the funds subject to the trusts of the will.—*Re NICHOLSON'S WILL TRUSTS*, *ORTMANS v. BURKE*, [1936] 3 All E. R. 832.

**3617. Add. Annotation:—***Refd. Re Fenton* (No. 2), *Ex p. Fenton Textile Asscn., Ltd.*, [1932, 1 Ch. 178.

**3626. Add. Annotation:—***Apld. Re Lennard*, *Lennard's Trustee v. Lennard*, [1934] Ch. 235.

**3639a. Power to partition—Under Law of Property Act, 1925 (c. 20), s. 28 (3)—When exercisable.**—(1) Law of Property Act, 1925 (c. 20), s. 28 (3), which enables trustees for sale to partition unsold land in cases where the net proceeds of sale have become "absolutely vested" in adult persons in undivided shares, does not apply where those proceeds are only vested in life tenants. A power of partition in a will-settlement is *pro tanto* inconsistent with the statutory trusts for sale, & cannot therefore be treated as an "additional or larger" power preserved by sect. 28 (1) as amended by Law of Property (Amendment) Act, 1926 (c. 11), Sched. It is therefore overridden by the statutory trusts.

(2) Where partition, though expedient, cannot be effected under any power vested in the trustees by the trust instrument or by law, the ct. can confer the necessary power for that purpose under Trustee Act,

PART V. SECT. 7, SUB-SECT. 2.—F. (d).

c. i. — *Objection by beneficiaries—Duty to sell or apply to court for direction.*—*DUTHIE v. GALLAGHER & DUTHIE*, [1930] 2 D. L. R. 582.—CAN.

1925 (c. 19), s. 57.—*Re THOMAS, THOMAS v. THOMPSON*, [1930] 1 Ch. 194; 99 L. J. Ch. 140; 142 L. T. 310.

*Annotations*:—*As to* (1) *Distd. Gorringe & Braybans, Ltd. Contract*, [1934] Ch. 614, n. *As to* (2) *Consd. Re Brooker, Public Trustee v. Young*, [1934] Ch. 610.

**3639b.** ———.—*Re GORRINGE & BRAYBONS, LTD.'S CONTRACT*, [1934] Ch. 614, n.; 151 L. T. 347, n.

*Annotation*:—*Consd. Re Brooker, Public Trustee v. Young*, [1934] Ch. 610.

**3639c.** ———.—*Proceeds absolutely vested in trustees or personal representatives.*—The power of partitioning land given to trustees for sale by Law of Property Act, 1925 (c. 20), s. 28 (3), in cases where the proceeds of sale

have “become absolutely vested in persons of full age in undivided shares,” with the consent of the persons, if any, interested in possession of the net rents & profits of the land until sale, is exercisable when the persons in whom the proceeds of sale are vested are trustees or personal representatives, & is not confined to the case where such persons are beneficially interested in the property.—*Re BROOKER, PUBLIC TRUSTEE v. YOUNG*, [1934] Ch. 610; 151 L. T. 345; *sub nom. Re BROOKER, YOUNG v. PUBLIC TRUSTEE*, 103 L. J. Ch. 217; 78 Sol. Jo. 447.

**3639d.** ———.—*Whether court may confer.*—*THOMAS, Re, THOMAS v. THOMPSON*, No. 3639a, *ante*.

## Part VI.—Investment of Trust Funds.

**3677.** *Add. Annotation*:—*Refd. Nicholson's Will Trusts, Ortmans v. Burke*, [1936] 3 All E. R. 832.

**3703a.** ———.—*What amounts to amalgamation.*—A scheme of arrangement was promoted by the directors of six electric lighting cos. serving different London areas, under which their capital, or at least 90 per cent. thereof, was to be acquired by a holding co. which would issue shares at par value to the stockholders in exchange for their holdings. The objects of the holding co. were to control the policy of the constituent cos. to effect economies in administration, & to carry on other business which might advantageously be combined with that of the cos., but was beyond their powers. No transfer of the undertakings of the constituent cos. to the

holding co. was either effected or intended, but the pooling of profits was suggested as a future possibility:—*Held*: the scheme was not an “amalgamation of the co. with another co.” within Trustee Act, 1925 (c. 19), s. 10 (3) (c), in which the trustees of a settlement comprising a sum of stock of one of the constituent cos. were authorised to concur.—*Re WALKER'S SETTLEMENT, ROYAL EXCHANGE ASSURANCE CORPN. v. WALKER*, [1935] Ch. 567; 101 L. J. Ch. 274; 153 L. T. 66; 51 T. L. R. 389; 79 Sol. Jo. 362, C. A.

**3738.** *See* [1897] W. N. 5, from which it appears that this case was reversed on appeal.

**3922.** *Add. Annotation*:—*Refd. Re Vickery, Vickery v. Stephens*, [1931] 1 Ch. 572.

## Part VII.—Breaches of Trust.

**3996a.** ———.—*Re WINDSOR STEAM COAL CO. (1901), LTD., No. 2033a, ante.*

**4002.** *Add. Annotation*:—*Refd. Re Blake, Re Minahan's Petition of Right* (1931), 100 L. J. Ch. 251.

**PART VI. SECT. 1, SUB-SECT. 2.**  
*sg. Trustee Act, R. S. A., 1922, s. 54.*—*FRASER v. FRASER*, [1933] S. C. R. 171; 2 D. L. R. 513.—CAN.

**PART VI. SECT. 4, SUB-SECT. 2.**  
*sk. What investments included in power to invest—On “public stocks or funds in Government securities of the United Kingdom”—“£3½ per cent. War Loan.”—Determination of question whether the new £3½ per cent. War Loan was an investment authorised by a settlement, the words being, “the public stocks or funds in Government securities of the United Kingdom.”—Held: within the additional modes of investment of trust funds authorised for trustees by sect. 18 of Adaptation of Enactments Act, 1922.*—*Re WESTBY*, [1932] 1 L. R. 444.—IR.

**PART VI. SECT. 7, SUB-SECT. 1.**  
*sn. Action to set aside trust pending.*—The trustee under a *donatio mortis causa* is not guilty of laches if he does not invest trust funds in securities but deposits them in a bank, when suit has been brought against him to have the gift set aside, & 3 per cent.

interest is all he should pay.—*WALKER v. ROMAN CATHOLIC BISHOP OF ST. JOHN*, [1929] 4 D. L. R. 15; 54 N. B. R. 371.—CAN.

**PART VI. SECT. 7, SUB-SECT. 2.—E.**  
*sp. Executor-trustee—Not liable for failure to invest within one year of death.*—*CAMPBELL v. HOGG*, [1930] 3 D. L. R. 673.—CAN.

*sg. ———.—Under the decision of the Privy Council in Campbell v. Hogg, where a trustee is passing his accounts before a Surrogate Ct. judge under Trustee Act, R. S. O., 1927, s. 23, the ct. or judge cannot charge the trustee who was also exor. with losses arising from failure to sell non-trustee investments of testator within one year of the date of testator's death.*—*Re JOHNSON*, [1932] O. R. 385; 3 D. L. R. 164.—CAN.

**PART VI. SECT. 7, SUB-SECT. 2.—F. (a).**

*p i. —Failure to invest—Reliance on counsel's opinion.*—Trustees were asked by a beneficiary to invest certain moneys, most of which were ad-

mittedly due to the beneficiary pending settlement of the account. At the same time the trustees were told that a claim for interest would be made against them if the moneys continued to lie idle. The trustees, acting on the erroneous opinion of counsel that they were not entitled to invest, omitted to do so:—*Held*: the proper course was for the trustees to invest as requested, but having referred what was a matter of law to competent counsel for his opinion & having acted on it, they were not guilty of wilful neglect & default so as to make them accountable for the loss.—*PERPETUAL TRUSTEE CO. v. WATSON* (No. 2) (1927), 28 S. R. N. S. W. 43; 45 N. S. W. N. 3.—AUS.

**PART VII. SECT. 1, SUB-SECT. 1.**  
*3923 ii. ———.—JOHNSTON v. SMITH & NELSON*, [1928] 4 D. L. R. 771; [1928] 3 W. W. R. 495.—CAN.

**PART VII. SECT. 1, SUB-SECT. 2.**  
*3935 iii. —Loss of securities.*—*BROWN v. BROWN*, [1932] 2 D. L. R. 819; *reverso*, [1931] 4 D. L. R. 420.—CAN.



4050. *Add. Annotation*:—*Refd. Re Houlder*, [1929] 1 Ch. 205.
4136. *Add. Annotation*:—*Refd. Re Blake, Re Minahan's Petition of Right* (1931), 100 L. J. Ch. 251.
4162. *Add. Annotation*:—*Refd. A.-G. v. Goddard* (1929), 98 L. J. K. B. 743.
4322. *Add. Annotation*:—*Refd. Re Fenton* (No. 2), *Ex p. Fenton Textile Assocn., Ltd.*, [1932] 1 Ch. 178.
4356. *Add. Annotations*:—*Consd. Re Windsor Steam Coal Co.* (1901), [1929] 1 Ch. 151. *Apld. Re Vickery, Vickery v. Stephens*, [1931] 1 Ch. 572.
4360. *Add. Annotations*:—*As to* (1) *Apld. Re Windsor Steam Coal Co.* (1901), [1929] 1 Ch. 151. *As to* (3) *Refd. Re Vickery, Vickery v. Stephens*, [1931] 1 Ch. 572.
4612. *Add. Annotation*:—*As to* (1) *Refd. Madras Official Assignee v. Krishnaji Bhat* (1933), 49 T. L. R. 432.
4614. *Add. Annotation*:—*As to* (1) *Refd. Madras*

*Official Assignee v. Krishnaji Bhat* (1933), 49 T. L. R. 432.

4617. *Add. Annotation*:—*Consd. Re Wheeler & Co., Trustee v. Kirby & Grainger* (1933), 76 L. Jo. 86.

4619. *Add. Annotation*:—*Refd. Madras Official Assignee v. Krishnaji Bhat* (1933), 49 T. L. R. 432.

4626a. —.]—G. & two others, trustees of funds without power to lay out in land, purchased copyholds to be held on trusts as nearly as possible to correspond with the trusts of the settlement. The husband laid out money on the copyholds & was bkpt., & the trustees neglected to prove in respect of a portion of the fund covenanted to be paid by the husband, & the surviving trustee proceeded to sell under a power contained in the deed executed on the purchase of the copyholds. On motion for injunction to restrain his interference with the property, & for payment of the sum due on the covenant of the husband into ct. motion granted in both respects.—*WILES v. GRESHAM* (1853), 1 W. R. 514.

## Part VIII.—Judicial Trustees.

4728a. Appointment in pending action for administration—Title of summons.]—*Re JONES*,

*JONES v. PICKETT*, [1934] W. N. 77; 177 L. T. Jo. 274.

### PART VII. SECT. 3, SUB-SECT. 2.—B. (a).

4100 i. —. *Trustee paying money to wrong person.*—*CHIEANG THYE PIIN v. LAM KIN SANG*, [1929] A. C. 670.—**STRAITS SETTLEMENTS.**

### PART VII. SECT. 3, SUB-SECT. 2.—B. (b).

sg. *No fixed rate—Dependent on extent of breach.*—*TORONTO GENERAL TRUSTS Co. v. HOGG*, [1932] 4 1. L. R. 465; O. R. 641; *affd.*, [1933] 3 D. L. R. 721; [1934] S. C. R. 1.—**CAN.**

### PART VII. SECT. 4, SUB-SECT. 3.—B.

4367 i. —. *Without negligence.*—*M. & B., a solr., who were the trustees & exors. under a will, decided that certain shares, part of the trust estate, should be sold in order to provide for the payment of legacies. M. allowed B. to put himself in a position where he was able to misappropriate the proceeds of the sale of the shares, & also, two bearer cheques drawn on the estate trust account to pay certain legatees. M. throughout acted honestly, but, although he did not suspect that B. was dishonest, M. had at least a certain amount of suspicion that there was an element of risk attaching to his conduct, & at the material dates he knew that he was omitting to perform his duty to protect the trust estate & to safeguard the interests of the beneficiaries & he took the risk of such omission:—Held: (1) M. had been guilty of wilful neglect & default within Trustee Act, 1925, s. 59 (2), & he was not safeguarded from responsibility for his breach of trust by the provisions of that sub-sect.; (2) M., although he had acted honestly throughout, had not acted reasonably, & accordingly,*

he was not entitled to the protection of Trustee Act, 1925, s. 85 (2).—*DALRYMPLE v. MELVILLE* (1932), 32 S. R. N. S. W. 596; 49 N. S. W. N. 206.—**AUS.**

sm. *Loans without security—Similar loans made by testator.*—The will of a testator domiciled in the Straits Settlements created a trust fund & provided that the trustees might invest trust moneys in such investments as they in their absolute discretion thought fit. The sole surviving trustee, a son of testator, lent trust moneys at interest upon the security of deposited jewellery without independent valuations, & made other loans without taking security. By Ordinance No. 14 of 1929, s. 60, the ct. may relieve a trustee, wholly or partly, from personal liability for a breach of trust, if it appears to the ct. that he has acted honestly & reasonably, & ought fairly to be excused:—*Held: (1) the loans upon the security of jewellery were not breaches of trust in the absence of proof that the security was insufficient when the loans were made, but the unsecured loans were not investments, & therefore were made in breach of trust; (2) the trustee was not entitled to relief under the Ordinance, because, although he had acted honestly, he had not considered whether the unsecured loans were dispositions which it was prudent & right for him to make as a trustee, but had treated it as sufficient that the testator himself made similar loans in his lifetime.*

*Semle: an appeal lies from the exercise by a trial judge of the discretion conferred by sect. 60 of the Ordinance.*—*KHOO TEK KEONG v. CH'NG JOO TUAN NEOH*, [1934] A. C. 529; 103 L. J. P. C. 161; 152 L. T. 53, P. C.—**STRAITS SETTLEMENTS.**

### PART VII. SECT. 5, SUB-SECT. 3.—C. (a).

4608 ii. —.]—Where a trustee wrongfully mingles trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.—*OFFICIAL ASSIGNEE, MADRAS v. MINAKSHI VIDYASALAI SANGAM* (1929), 1. L. R. 52 Mad. 919.—**IND.**

p i. —.]—*DAVIES v. CHRISTAKOS* [1931] 1 D. L. R. 1009; [1930] 3 W. W. R. 481; *varg.*, [1930] 2 D. L. R. 870.—**CAN.**

### PART VII. SECT. 6, SUB-SECT. 2.—A.

4651 i. *Form of proceeding.*—The ct. may entertain upon an originating summons a claim for relief framed on a breach of trust.—*PERPETUAL TRUSTEE Co. v. WATSON* (No. 1) (1927), 23 S. R. N. S. W. 39; 45 N. S. W. W. N. 1.—**AUS.**

so. *Whether right to jury exists.*—*Defts., as exors. of a will, were directed by the will to sell lands of testatrix, & distribute the proceeds among her children & a grandchild. In this action, plffs., two of the children, alleged that defts., exors., had committed a breach of trust by selling the lands at a gross undervalue. Plffs. gave a notice for trial by jury, & the action was tried with a jury, & judgment entered upon its findings in favour of plffs. for the recovery of damages:—Held: the action being one which, before Administration of Justice Act, could have been brought only in the Ct. of Ch., plffs. had no right to give a jury notice, & the notice should have been struck out by the trial judge.*—*DAVIES v. NELSON*, [1928] 1 D. L. R. 254; 61 O. L. R. 457.—**CAN.**

## Part IX.—The Public Trustee.

4757. After this case add :—

**Power to sell open space held in undivided shares—Law of Property Act, 1925 (c. 20), Sched. I., Pt. IV., para. 2.]—See SETTLEMENTS, Nos. 3151b, 3151c, *ante*.**

**Appearance as plaintiff & defendant.]—See EXECUTORS, Nos. 7812a, 8757a, *ante*.**

4761. *Add. Annotations :—*Consd. *Re Hulton, Midland Bank Executor & Trustee Co. v. Thompson*, [1936] 2 All E. R. 207. **N.F.** *Re Riddell, Public Trustee v. Riddell*, [1936] Ch. 747.

4761a. ——— **Not payable from annuities.]—**Testator appointed the Public Trustee to be one of the exors. & trustees of his will. He bequeathed several annuities & disposed of

his residuary estate :—*Held* : the income fee, to which the Public Trustee is entitled under Public Trustee Act, 1906 (c. 53), s. 9, is an administration expense & no part of it is payable out of the annuities.—*Re RIDDELL, PUBLIC TRUSTEE v. RIDDELL*, [1936] Ch. 747 ; [1936] 2 All E. R. 1600 ; 105 L. J. Ch. 378 ; 155 L. T. 247 ; 52 T. L. R. 675 ; 80 Sol. Jo. 595.

*Annotations :—***Distd.** *Re Roberts's Will Trusts, Younger v. Lewins*, [1937] Ch. 274. **Consd.** *Re Godwin, Coutts & Co. v. Godwin*, [1938] Ch. 311.

4763. After this case add :—

——— **Construction of will—Appearance as plaintiff & defendant.]—See EXECUTORS, No. 8757a, *ante*.**

## VALUERS AND APPRAISERS.

### Part II.—Duties, Rights, and Liabilities.

31. *Add. Annotation :—Refd.* *McAlister* (or *Donoghue*) *v.* *Stevenson* (1932), 101 L. J. P. C. 119.
35. *Add. Annotation :—As to* (1) *Refd.* *Shipley Urban District Council v. Bradford Corpn.* (1935), 179 L. T. Jo. 475.

#### PART II. SECT. 1

*sa. Liability for loss—Valuation bond fide.*—Deft., a paid valuator, estimated the value of a certain property at \$4,980, stating in the certificate of value that he held himself "responsible to you," *plfcs.*, "for the correctness of this report & valuation," which was enclosed in a letter stating "the houses are unfinished, & my valuation of \$4,980 is on the supposition that they

will be finished in a manner similar to those adjoining. A final inspection should, I think, be made." The houses never were finished similarly to those adjoining, nor was the deft. ever called upon to make any final or other inspection, & at a subsequent sale the property, which had been taken possession of by the mortgagees & allowed to become greatly out of repair, realised only \$1,800 :—*Held* : under these circumstances, there being no *mala fides*

imputable to the appraiser, that he was not answerable for the loss sustained by the lender.—*SCOTTISH AMERICAN INVESTMENT Co. v. HOPE* (1879), 26 Gr. 430.—CAN.

#### PART II. SECT. 2.

*sb. Incomplete valuation—Effect of.*—*DANROTH v. RAILWAY PASSENGERS ASSURANCE Co.*, [1930] 2 W. W. R. 555; [1931] 1 D. L. R. 156; 43 B. C. R. 21.—CAN.

# WATER SUPPLY.

## Part I.—Supply by Local Authorities.

**13a. Interference with existing supply.]—**Pltfs. were the owners in fee simple & the tenant of a farm which had been sold to their predecessors in title in 1923. The 1923 conveyance contained the words "... together with the right as now enjoyed in common with others having the same right to the water supply to the hereditaments hereinbefore described through pipes from a spring. . . ." In 1933 whatever rights had been conveyed to the then purchasers in 1923 passed to pltfs. In 1934 defts., a local authority, acquired the pipes & water rights which constituted the water supply to the farm. As a result of the construction of additional service pipes by defts., the supply of water to the farm was decreased. Pltfs. sought an injunction to restrain defts. from making these alterations :—*Held* : upon the construction of the deed of 1923 the right conveyed was one to have the residue of the water after the then existing branches had been supplied through service pipes of the diameter then used.—**BEAUCHAMP v. FROME RURAL DISTRICT COUNCIL**, [1938] 1 All E. R. 595; 54 T. L. R. 476; 82 Sol. Jo. 213; 36 L. G. R. 377, C. A.

**33a. — By agreement—Whether easement appurtenant.]—**Deft. board became in 1920 the successors of the Weardale & Shildon District Waterworks Co., which had been incorporated by statute in 1866, its powers being extended by Acts of 1875 & 1879. Under the 1879 Act the Weardale Co. acquired the right to lay a line of pipes along a line shown on a deposited plan, with a permitted deviation. In 1880 it became necessary to lay pipes through land belonging to the predecessor in title of the present pltfs., & as this could not be effected by exercising its rights under the 1879 Act, the land being outside the permitted deviation, it entered

into an agreement whereby, in consideration of the payment of a yearly rentcharge of £3, the co. was granted the right to lay pipes through this land. This land subsequently passed through several hands, during which the yearly payment of £3 was regularly made, until finally it became vested in fee simple in pltfs. They contended that the grant was not binding upon them, as the acquisition of the rights thereunder was *ultra vires* the co., & that it had never been enforceable. Alternatively, they contended that it was merely a personal licence, not binding on the grantor's successors, & that, as there was no dominant tenement contiguous to the land in which the pipes were laid, it was an attempt to create an easement in gross :—*Held* : (1) as the consent of the owner of the land to the laying of the pipes was obtained by agreement, & not by compulsion, the co. was not acting *ultra vires* in acquiring the rights under the grant; (2) the undertaking of the co. consisted of corporeal hereditaments, namely, land for the erection of reservoir & othersimilar purposes, & incorporeal hereditaments, namely, the rights required in the land of others to lay pipes & for other purposes, & so was capable of being a dominant tenement in respect of the grant although the co. had no contiguous land; (3) the easement was one which was intended to be, & was capable of being, used & exercised in connection with the undertaking of the co., & was one which the then owner of the land could validly grant, & was binding upon his successors in title. *Re SALVIN'S INDENTURE, PITT v. DURHAM COUNTY WATER BOARD*, [1938] 2 All E. R. 498; 82 Sol. Jo. 395; 36 L. G. R. 388.

**41. Add. Annotation :—***Apld. A.-G. v. London & Home Counties Joint Electricity Authority*, [1929] 1 Ch. 513.

### PART I. SECT. 2, SUB-SECT. 1.—A.

**sg. Right of expropriation.]—**A town in Saskatchewan can expropriate land outside its own limits in order to obtain a water supply, even though the water is to be obtained not for the town's own purposes but with the object of selling it to a person or corpn. outside the town, e.g. in this instance, the C.N.R.—**HORWOOD v. CANORA TOWN**, [1934] 2 W. W. R. 348.—**CAN.**

**sl. Entry on land outside district.]—**A local urban authority desired to enter lands outside its district & to make borings, for the purpose of measuring, surveying, making plans, & taking levels, to ascertain whether the lands were suitable to be acquired by them as the site of a new reservoir in connection with the water supply of their district. The justices had made an order that defts. were to admit pltf. authority to enter upon the lands for such purposes. Defts., however, appealed to the County Ct. Judge, who held that sect. 271 of Public Health (Ireland) Act, 1878, under which the

application was brought, did not apply to lands outside the district of the authority. He allowed the appeals, but stated a special case for the opinion of the King's Bench Division as to whether he was right in holding as he did :—*Held* : the County Ct. Judge was right in holding that sect. 271 of Public Health (Ireland) Act, 1878, did not enable pltfs. to enter upon lands outside their district.—**PORTRUSH URBAN DISTRICT COUNCIL v. MATRIS, PORTRUSH URBAN DISTRICT COUNCIL v. SLOAN**, [1937] N. I. 14.—**IR.**

### PART I. SECT. 2, SUB-SECT. 3.—A.

**sa. Purity—Failure to maintain—Liability in damages.]—****CAMPBELL v. KINGVILLE (Ont.)**, [1929] 4 D. L. R. 772.—**CAN.**

### PART I. SECT. 2, SUB-SECT. 5.

**sx. Losses—How calculated.]—**A county council & a water board, in pursuance of their powers under local Acts & Orders, levied public water rates within limited areas in two

counties. Prior to the operation of Local Govt. (Scotland) Act, 1929, these rates had been levied on gross annual value, whereas rates leviable under public general Acts had been levied on a value arrived at after giving effect to deductions specified in Sched. I. to Rating (Scotland) Act, 1926. Under sect. 59 (1) of 1929 Act the loss on account of the public water rate levied by the county council fell to be calculated in accordance with the rules already mentioned. Under sect. 70 (2) & relative Regulations the water board's loss also fell to be calculated in accordance with these Rules. The county council & the water board contended that, for the purpose of ascertaining their losses on account of the public water rates referred to, "unreduced rateable value" meant gross annual value :—*Held* : "unreduced rateable value" was the value arrived at after giving effect to the deductions specified in Sched. I. to 1926 Act.—**LANARKSHIRE COUNTY COUNCIL v. LORD ADVOCATE**, [1937] S. C. 155.—**SCOT.**

# Part -Powers, Duties and Liabilities of Undertakers.

**76a. Agreement to acquire before Board constituted—Whether binding.]—**A water board constituted by a private Act consisted of representatives of a county council & four rural district councils, & it was provided by that Act that all agreements & conveyances, etc., made by these separate local authorities should on & after the appointed day be binding & of as full force & effect in every respect in favour of or against the board as if the board had been a party thereto. The county council before the appointed day proceeded with the provision of a new pumping station, & entered into an agreement, acting on behalf of the board, for the purchase of a site. It was contended that the agreement, having been entered into before the board was in existence, could not be binding upon it:—*Held*: the provision in the private Act made the agreement enforceable against the board.—*BEDFORD (DUKE) v. BUCKS WATER BOARD*, [1938] 1 All E. R. 199.

**99. Add. Annotations:—***Refd.* Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons, [1929] 1 Ch. 686; *Farnworth v. Manchester City Corpn.*, [1929] 1 K. B. 533.

**108. Add. Annotation:—***Refd.* *Re Simeon*, [1937] 3 All E. R. 149.

**116. Add. Annotations:—***Refd.* *Manchester Corpn. v. Farnworth*, [1930] A. C. 171; *Blundy, Clark & Co. v. London & North Eastern Ry. Co.*, [1931] 2 K. B. 334.

**124. Add. Annotations:—***Refd.* *Farr v. Butters Bros. & Co.*, [1932] 2 K. B. 606; *Re Simeon*, [1937] 3 All E. R. 149.

**136. Add. Annotations:—***Consd.* *Barnes v. Irwell Valley Water Board*, [1938] 2 All E. R. 650. *Refd.* *Stevens v. Aldershot Gas, Water & District Lighting Co. (now Mid-Southern District Utility Co.)* (1932), 102 L. J. K. B. 12.

**136a. ————.]—**Pltfs. were supplied with water for domestic purposes by deft. water board. It was provided that the water was pure so long as it was in iron pipes, but in its passage through lead pipes it dissolved lead & became poisonous. The only lead piping through which the supply was passed was a length of 6 feet below the stop-cock when reached, & the pipes upon pltfs.' premises, which had been inspected by the board. Pltfs., by drinking the water supplied, had contracted lead poisoning:—*Held*: (1) the board had not been guilty of any breach of statutory duty, as the supply of water up to the turncock was pure & wholesome; (2) the board had been negligent, in that it should either have taken steps to reduce the plumb-

solveny of the water, or have warned consumers that the water, if passed through lead pipes, was liable to be dangerous to health. Pltfs. were therefore entitled to recover.—*BARNES v. IRWELL VALLEY WATER BOARD*, [1938] 2 All E. R. 650; 107 L. J. K. B. 629; 159 L. T. 125; 102 J. P. 373; 54 T. L. R. 815; 82 Sol. Jo. 394; 36 L. G. R. 493, C. A.

**138a. ———— Liability for negligence—Who may sue.]—***READ v. CROYDON CORPN.*, [1938] 4 All E. R. 631.

**138b. ———— Nature of remedy.]—***READ v. CROYDON CORPN.*, [1938] 4 All E. R. 631.

**150. Add. Annotation:—***Apld.* *Manchester Corpn. v. Buttle*, [1929] 2 Ch. 390.

**161. Add. Annotation:—***Consd.* *Manchester Corpn. v. Buttle*, [1929] 2 Ch. 390.

**165. Add the following paragraph & citations:—**Under a local Act no person was entitled to require, nor was the corpn. bound to supply, any dwelling-house in the borough with water, otherwise than by meter or special agreement, where any part of such dwelling-house is used for any trade or business purposes:—*Held*: the residence of a dentist where he practised the profession of dentistry was a dwelling-house used in part for business purposes, & therefore the corpn. was entitled to demand & be paid an annual sum in addition to the ordinary domestic & public water rates charged in respect of dwelling-houses not so used, although the water supplied was used for domestic purposes within the meaning of another local Act.—*MANCHESTER CORPN. v. BUTTLE*, [1929] 2 Ch. 390; 98 L. J. Ch. 394; 142 L. T. 14; 94 J. P. 33; 45 T. L. R. 568; 27 L. G. R. 748.

**176a. Right to use fire-plugs for purposes other than extinction of fires.]—**Hydrants, fire-plugs, & other apparatus, provided by a metropolitan waterworks co., pursuant to the Metropolitan Fire Brigade Act, 1865 (c. 90), s. 92, & Metropolis Water Act, 1871 (c. 113), s. 34, for supply of water in case of fire, may be used by the waterworks co. for purposes other than the supply of water for extinguishing fires, cleansing sewers & drains, cleansing & watering streets, or supplying public pumps, baths, & washhouses, without the consent of the London County Council, & may, by permission of the co., be used by persons other than the co.—*LONDON COUNTY COUNCIL v. EAST LONDON WATERWORKS CO.*, [1900] 1 Q. B. 330; 69 L. J. Q. B. 304; 82 L. T. 268; 48 W. R. 252; 16 T. L. R. 141; 44 Sol. Jo. 395, D. C.

## PART III. SECT. 1, SUB-SECT. 2.—C.

**115 iv. ———.]—**Resp., under statutory authority, laid & maintained water mains in the streets in Adelaide. At 11.15 p.m. on the night in question one of the water mains burst. At 12.30 a.m. it became dangerous to applts.' property, & it was reported to resp.' department a few minutes afterwards. Resp.' officer, without negligence as the trial judge found, did not commence to turn off the water until 1 a.m., & the water was not turned off until 1.10 a.m. Resp.' department relied upon the police & members of the public to report leaks & maintained no inspection for the purpose of discovering them. The water

which escaped damaged applts.' premises between 12.30 & 1.10 a.m. In an action by applts. against resp. claiming damages for the injury caused by the escape of water:—*Held*: resp. was not liable for the damage done without proof of negligence.—*COX BROS. (AUSTRALIA), LTD. v. WATERWORKS COMR.* (1934), 50 C. L. R. 108; 12 L. G. R. 21.—*AUS.*

## PART III. SECT. 2, SUB-SECT. 7.

**s. Supply for irrigation.]—**A land co., which had bought land to which a water record was appurtenant, sold part of the land to the deft. & agreed to supply him with water for irrigation purposes at a rate not to exceed a

certain amount per acre. The land co., & a water co. which it had caused to be formed & which had constructed an irrigation system for the purpose of supplying water to the land co.'s covenantees, sold all their rights in the water to the pltf. municipality which assumed the obligations of the land co. The municipality then obtained from the Water Board an order under the Water Act increasing the rates chargeable for water for irrigation purposes beyond those fixed by said agreement between deft. & the land co.:—*Held*: the municipality was entitled to recover the increased rates from deft.—*PENTICTON CORPN. v. SUTHERLAND*, [1928] 2 W. W. R. 145.—*CAN.*

**199a. Railway purposes—Wrongful user—Acquiescence.]**—A covenant to repair or renew a pipe is broken if in consequence of the pipe becoming furred by encrustation the flow of water is substantially diminished, although it is still sufficient for ordinary purposes. Where a railway co. has obtained a supply of water by meter to a railway station this does not authorise the use of part of the supply for another railway station. Knowledge of such wrongful user over a long period cannot be imputed to the principals supplying the water by reason of their agent having from time to time read a meter which happened to be side by side with the meter which measured the wrongful user of the supply.—*GREAT NORTHERN RAILWAY v. BRADFORD CORPN.* (1918), 88 L. J. Ch. 101; 120 L. T. 267; 83 J. P. 33; 63 Sol. Jo. 229; 17 L. G. R. 1.

**243. Add. Annotation :—Apld.** *Runcorn Guardians v. Worrall* (1930), 94 J. P. Jo. 205.

**269. Add. Annotation :—As to (1) Refd.** *Copper Export Asscn. Inc. v. Mersey Docks & Harbour Board* (1932), 48 T. L. R. 542.

**269a. — Personal injury.]**—A road had been dedicated to & accepted by the public but not yet adopted by the local authority, so that the road was repairable by no one. The local authority was also the water authority & in this capacity in Sept. 1934, it laid in the pavement of the road certain stopcocks & levelled them with the pavement by ramming in earth. Owing to the action of rain & weather upon the earth one of the stopcocks protruded. In Sept. 1916, pltf. fell over the protruding stopcock & injured herself. In an action for damages the local authority relied upon Waterworks (Clauses Act, 1847 (c. 17), s. 32 :—*Held* : it was not sufficient for the local authority, when it reinstated the road in accordance with its obligations under Waterworks Clauses Act, 1847 (c. 17), s. 32, to level up the pavement with earth or otherwise, in such a manner that the action of the weather would revive the inequality; but the road ought to have been so reinstated that no inequalities would be produced except by the natural consequence of wear & tear. The local authority having failed in its statutory duty was therefore liable.—*Withington v. Bolton Borough Council*, [1937] 3 All E. R. 108.

**270. Add. Annotation :—Refd.** *Grant v. Derwent*, [1929] 1 Ch. 390.

**PART III. SECT. 2, SUB-SECT. 9.—A. (a).**

*p. revsd. sub nom.* *HALIFAX CITY v. READ*, [1928] 4 D. L. R. 461.—*CAN.*

**PART III. SECT. 2, SUB-SECT. 9.—A. (c).**

**227 i. Power to charge different rates.]**—*Held* : an assessment discriminating between those dwelling in the City & those dwelling outside was unfair & should be quashed.—*R. v. WHITE*, (1931), 4 M. P. R.

**PART III. SECT. 2, SUB-SECT. 9.—C. (a) i.**

**243 i. Time for bringing action.]**—Stat. Limitations, R. S. N. S., 1923, applies to an action for meter rates,

but not for water pipe rates for fire protection.—*HALIFAX CITY v. KING*, [1934] 2 D. L. R. 363.—*CAN.*

**PART III. SECT. 2, SUB-SECT. 9.—C. (b).**

**249 i. When permissible—Arrears due from previous occupier.]**—Where certain of pltf.'s mtgors. had made default & pltf., pursuant to the powers contained in its mtgs., had leased or let the mortgaged premises & defts., in reliance on Municipal Corpns. Act, 1920, s. 86, had cut off the water supply from the said premises, & deft. had refused to supply water thereto unless arrears of rates, due in respect of water supplied to previous occupiers or mtgors. prior to the date of pltf.'s leasing or letting, had been paid :—*Held* : (1) the said sect. 86 gave defts.

**275. Add. Annotation :—Consd.** *Markland v. Manchester Corpn.*, [1934] 1 K. B. 566.

**276. Add. Annotation :—Consd.** *Markland v. Manchester Corpn.*, [1934] 1 K. B. 566.

**279. Add. Annotation :—Refd.** *Withington v. Bolton Borough Council*, [1937] 3 All E. R. 108.

**283. Add. Citation :—affg., S. C. sub nom.** *STRUTE v. SOUTHWARK & VAUXHALL WATER CO.* (1889), 53 J. P. 424; 5 T. L. R. 451.

**285. Add. Annotation :—Generally, Consd.** *Withington v. Bolton Borough Council*, [1937] 3 All E. R. 108.

**289. Add. Annotation :—Distd.** *Wells v. Metropolitan Water Board*, [1937] 4 All E. R. 639.

**289a. — Escape of water—Frost—Car skidding.]**—When pltf.'s husband was stepping off a tramcar he was knocked down by a motor car & killed. At the place of the accident a pool of water had formed owing to a leakage from a service pipe through which deft. corpn., who were the statutory water authority, supplied water. Three days later frost supervened & the water froze, & the motor car skidded on the ice thus formed. Pltf. brought an action against the owner of the motor car & against the corpn. The trial judge freed the owner of the motor car from liability, but found that there was negligence on the part of the corpn. in that, though they did not know, they should have known that the pipe was leaking & took no steps to render the roadway safe, & he gave judgment for pltf. against the corpn. The corpn., in districts outside the city, had certain periodical examinations & tests made at the various stopcocks & hydrants involving a visit to any given spot about once in nine days, & they also relied on the probability of information from other local authorities or persons concerned with a district :—*Held* : on the material before him the trial judge was fully entitled to reach the conclusion which he did & his decision must be upheld.—*MANCHESTER CORPN. v. MARKLAND*, [1936] A. C. 360; 104 L. J. K. B. 480; 153 L. T. 302; 51 T. L. R. 527; 33 L. G. R. 341; *sub nom.* *MARKLAND v. MANCHESTER CORPN.*, 99 J. P. 343, H. L.

**290a. — Injury due to act of child - Allurement.]**

—Pltf. was injured through tripping up over the cover-plate of a valve-box belonging to deft. water board. When the cover of this valve-box was closed, it was in no way objectionable or dangerous, but on this occasion someone, presumably a child, had

no power to refuse to supply water to the said premises until the said arrears had been paid; (2) pltf. must pay a fair & reasonable charge for the water supplied, & the charge made to other persons was a test of what was fair & reasonable.—*SUPERINTENDENT OF STATE ADVANCES DEPARTMENT v. AUCKLAND CORPN.*, [1932] N. Z. L. R. 1709; G. L. R. 706.—*N.Z.*

*sk. Validity of rate—Trustees de facto but not de jure.]*—A bye-law levying a rate under Water Act, R. S. B. C., 1924, is not rendered invalid by the fact that some of the trustees who concurred in making it were trustees *de facto* but not *de jure*.—*LOWE v. CAWSTON IRRIGATION DISTRICT*, [1933] 3 W. W. R. 151; *affd.*, [1934] 1 W. W. R. 508; 2 D. L. R. 464; 48 B. C. R. 83.—*CAN.*

opened the cover, & when open, it projected some 3 inches or 4 inches above the surface of the road. The cover could be opened quite easily, & was not fitted with any locking device, & there was evidence that the fitting of a locking device was both possible &

reasonable :—*Held* : pltf.'s injuries were caused by the negligence of defts., & she was entitled to recover.—*WELLS v. METROPOLITAN WATER BOARD*, [1937] 4 All E. R. 639 ; 102 J. P. 61 ; 54 T. L. R. 104 ; 81 Sol. Jo. 944 ; 36 L. G. R. 46.

## Part V.—Metropolitan Water Supply.

309. *Add. Annotation* : —**Folld.** *Mountford v. London County Council*, [1935] 2 K. B. 243.



## WATERS AND WATERCOURSES.

## Part I.—Rights and Obligations in Respect of Water.

12. *Add. Annotation*:—*As to* (2) *Consd.* Keewatin Power Co. v. Lake of the Woods Milling Co., [1930] A. C. 640.
40. *Add. Annotation*:—*Generally*, *Refd.* Bleachers Assocn., Ltd. & Bennett & Jackson, Ltd. v. Chapel-en-le-Frith Rural District Council, [1933] Ch. 356.
- 46a. ————.]—The right of a riparian owner on the banks of a tidal navigable river exists *jure naturæ*, but it is essential to its existence that his land should be in contact with the flow of the stream at least at the times of ordinary high tides.—*DAWOOD HASHIM ESOF v. TUCK SEIN* (1931), 58 Ind. App. 80, P. C.
71. *Add. Annotation*:—*Generally*, *Refd.* Bartlett v. Tottenham, [1932] 1 Ch. 114.
- 84a. *Action for deprivation between tenants in common*.—*JONES v. BENNETT* (1935), 79 Sol. Jo. 777.
99. *Add. Annotation*:—*Refd.* Farnworth v. Manchester Corp., [1929] 1 K. B. 533.
122. *Add. Annotation*:—*As to* (1) *Refd.* Port of London Authority v. Canvey Island Comrs. (1931), 101 L. J. Ch. 63.
174. *Add. Annotation*:—*As to* (2) *Refd.* Keewatin Power Co. v. Lake of the Woods Milling Co., [1930] A. C. 640.
193. *Add. Annotation*:—*Consd.* Nicholls v. Fly Beet Sugar Factory, Ltd., [1936] Ch. 343.
252. *Add. Annotation*:—*Refd.* Bleachers Assocn., Ltd. & Bennett & Jackson, Ltd. v. Chapel-en-le-Frith Rural District Council, [1933] Ch. 356.
257. *Add. Annotation*:—*Refd.* Farr v. Butters Bros. & Co., [1932] 2 K. B. 606.
262. *Add. Annotation*:—*Expld.* (The headnote . . . is too wide, & does not accurately represent the effect of the judgment, *per LUX-MOORE, J.*) Bleachers Assocn., Ltd. & Bennett & Jackson, Ltd. v. Chapel-en-le-Frith Rural District Council, [1933] Ch. 356.
- 262a. ————.]—Pltfs., who were proprietors of bleaching works situated on a stream, sought an injunction to restrain defts., the local authority for the rural district through which the stream flowed, from interfering with the R. Spring so as seriously to diminish the supply of water in the stream. At the first hearing pltfs. suggested that certain excavations should be carried out close to the R. Spring's point of issue. These excavations were made. Pltfs. contended that the R. Spring flowed in a defined underground channel, & that the excavations which had been carried out established this fact which was known with reasonable certainty before the excavations were made. Defts. denied that the R. Spring flowed in a defined underground channel, & contended that even if any such defined underground channel existed, it was not possible to know of its existence unless & until the excavations had in fact been made:—*Held*: (1) pltfs. had failed to establish before any excavations were made that any such underground channel existed either before or as the result of the excavations, & also the excavations had not proved that any defined channel existed in the ground which had remained unexcavated; (2) the excavations established that the water which emerged as the R. Spring was not flowing in any defined underground channel, but was water per-

## PART I. SECT. 2, SUB-SECT. 1.

k (p. 7) i. ———— *To change point of diversion*.—*BUONAPARTE RANCH v. SCHNEIDER*, [1928] 2 D. L. R. 993; [1928] 2 W. W. R. 106.—*CAN.*

## PART I. SECT. 4, SUB-SECT. 1.

sb. *What is reasonable user*.—Riparian owners must make a reasonable user of water flowing through their land. Restoring water to its natural channel in such a way that it freezes solid is not a natural use.—*ELLIS v. CLEMENS* (1893), 22 O. R. 216.—*CAN.*

sd. *Effect of Water Act, R. S. B. C.*, 1924.]—Unless records or licences have been granted for all the water flowing by or through his land a riparian proprietor still has the right to use the water for domestic purposes, subject to any rights granted. The present Water Act, R. S. B. C., 1924, as amended does not abrogate such right to such an extent that he has no remedy against a wholly wrongful & unauthorised diversion which deprives him of the opportunity he would otherwise have to use the water for domestic purposes without committing any offence.—*JOHNSON v. ANDERSON & ANDERSON*, [1937] 1 W. W. R. 245; 1 D. L. R. 762; 51 B. C. R. 413.—*CAN.*

## PART I. SECT. 4, SUB-SECT. 3.—B. (b).

4 i. *Irrigation—General rule*.—The

property in land bounded by a river, whether tidal & navigable or not, has inherent in it the riparian right to take water from the river for irrigating the land, & on a permanent settlement of the land that right is included, without special mention, in the property in respect of which the Zamindar enters into an engagement with the Government to pay the jama; the right being a natural right, not an easement, is not lost by non-user.—*SECRETARY OF STATE FOR INDIA v. SUBBARAYUDU*, 59 L. R. Ind. App. 56.—*IND.*

d i. ————.]—Pltfs. & defts. occupy lands very near each other, the land of a third party intervening between. Defts. had been taking water, flowing through an artificial channel, into their land, for the purpose of irrigation, for nearly 32 or 35 years without interruption, every monsoon, through the land of the third person, by cutting the ridge (all) of a plot of land, belonging to pltfs., in one place. Pltfs. sued for permanent injunction to restrain defts. from cutting the all.—*Held*: defts. had acquired a prescriptive right to take water by cutting the all.—*BIPIN BEHARI GHATAK v. RAMNATH GHATAK* (1929), 1 L. R. 56 Calc. 151.—*IND.*

## PART I. SECT. 4, SUB-SECT. 5.—A.

sg. *Authority of Governor in Council*.]

—A construction on granted land between high & low water mark held illegal, since the authority of the Governor in Council had not been obtained, as required by Navigable Waters Protection Act, R. S. C., 1927.

—*ST. JOHN HARBOUR COMRS. v. EASTERN COAL DOCKS, LTD.* (1935), 8 M. P. R. 499.—*CAN.*

## PART I. SECT. 4, SUB-SECT. 5.—B.

sx. *Erection of piers—To support building*.—Deft., who was the owner of premises bounded by a natural river, erected on his own half of the bed & soil of the river, concrete piers & steel stanchions for the purpose of supporting a building. The erection of these piers caused an appreciable quantity of water which formerly flowed over deft.'s half of the bed of the river to be discharged & flow over pltf.'s half & along pltf.'s banks on the opposite side, but no actual damage was thus occasioned.—*Held*: the piers & stanchions constituted an unlawful obstruction & diversion of the waters of the river, & an injunction was accordingly granted compelling deft. to remove them.—*MASSEREENE & FERRARD v. MURPHY* (1931), N. I. 192.—*IR.*

sz. *Wharf*.—Wharf in navigable water held an illegal structure & actionable nuisance.—*LONDON v. VANDOVER CITY* (1934), 49 B. C. R. 328.—*CAN.*

colating through the soil & rock of the district, & pl'tfs. had therefore failed to establish any right to prevent the interference by defts. with the flow of underground water into the R. Spring.—**BLEACHERS' ASSOCN., LTD., & BENNETT & JACKSON, LTD. v. CHAPEL-EN-LE-FRITH RURAL DISTRICT COUNCIL**, [1933] Ch. 356; 102 L. J. Ch. 17; 148 L. T. 91; 96 J. P. 515; 49 T. L. R. 51; 76 Sol. Jo. 902; 31 L. G. R. 88.

**268. Add. Annotation:—Generally, Refd. Bartlett v. Tottenham**, [1932] 1 Ch. 114.

**281. Add. Annotations:—Expld. Vanderpant v. Mayfair Hotel Co.**, [1930] 1 Ch. 138. **Refd. Liddiard v. Waldron**, [1933] 2 K. B. 319.

**298. Add. Annotation:—Consd. Legge & Son, Ltd. v. Wenlock Corpn.**, [1936] 2 All E. R. 1367.

**299. Add. Annotation:—Apld. Legge (George) & Son, Ltd. v. Wenlock Corpn.**, [1938] A. C. 204.

**302. Add. Annotations:—Folld. Green v. Matthews & Co. (1930)**, 46 T. L. R. 206. **Refd. Legge & Son, Ltd. v. Wenlock Corpn.**, [1936] 2 All E. R. 1367.

**302a. ———.**—]A person cannot set up a right either by prescription or under the doctrine of lost grant to cause sewage or trade refuse to fall or flow into a stream or watercourse & thereby to pollute it, where the right claimed would be in contravention of a statutory prohibition such as is contained in the Rivers Pollution Prevention Act, 1876 (c. 75).—**GREEN v. MATTHEWS & Co. (1930)**, 46 T. L. R. 206.

**Annotation:—Refd. Legge & Son, Ltd., v. Wenlock Corpn.**, [1936] 2 All E. R. 1367.

**328. Add. Annotation:—Consd. Legge & Son, Ltd. v. Wenlock Corpn.**, [1938] A. C. 204.

**237a. ———.**—]The pollution of a stream by sewage, if so serious as to cause a nuisance, will be restrained by injunction.—**CHESHAM (LORD) v. CHESHAM URBAN DISTRICT COUNCIL (1935)**, 79 Sol. Jo. 453.

#### PART I. SECT. 5, SUB-SECT. 2.

**266 v. ———.**—]Where by digging a ditch a proprietor of land causes surface water to flow therefrom on to lower-lying land he is liable for the damages caused thereby through the flooding of the lower land.—**QUALLEY v. DAY**, [1928] 3 D. L. R. 56; [1928] 1 W. W. R. 961; 22 Sask. L. R. 442; *on appeal*, [1929] 2 D. L. R. 928; 1 W. W. R. 20; 23 S. L. R. 425.—**CAN.**

**p. Add para. —**

An upper proprietor has the right to appropriate all surface water coming from rains & melting snow & not merely diffused generally over the surface of the land, but flowing in a definite channel provided by natural gullies or ravines or depressions (but in which, when the water is not flowing, there is no distinct bed, nor at any time any cutting of the soil so as to mark the banks or edges of the channel), & also the right to require the next lower proprietor to receive it in its usual channel. Even if this statement of the law is not the law of England, it is the law in Alberta.—**MAKOWECKI v. YACHIMYO**, [1917] 1 W. W. R. 1279.—**CAN.**

**t. revsd. [1928]** 3 D. L. R. 725; [1928] S. C. R. 522.—**CAN.**

**d l. ———.**—]With respect to the right of a proprietor of land to prevent water

flowing from higher land of his neighbour from coming on to his land, the weight of authority in the provinces of Canada where the English common law prevails is that the principles which apply to water flowing in a watercourse, *i.e.* in a defined channel, do not apply to water of a temporary & casual character which does not flow in any regular channel & has no certain course but which merely squanders itself over the surface of the ground. A right to have mere surface water drain from higher land on to lower land does not exist *jure nature*, & the proprietor of the lower land is entitled to erect an obstruction on his own land to prevent such water from overrunning his land, even if such obstruction has the effect of forcing the water back over the land of the upper proprietor. If on July 15, 1870, it was the common law of England that such was the right of the lower proprietor, that law, in the absence of legislation to the contrary, is the law of Saskatchewan. It does not appear to be sufficient to say that another law would be better or is to be preferred in view of the natural conditions existing here. If the civil law on the subject is preferable, the adoption of it is a matter for the Legislature.—**EDWARDS v. SCOTT RURAL MUNICIPALITY**, [1934] 1 W. W. R. 33; *affd.*, [1934] S. C. R. 332; 3 D. L. R. 793.—**CAN.**

**339. Add. Annotation:—As to (1) Refd. Farnworth v. Manchester Corpn.**, [1929] 1 K. B. 533.

**363a. ———.**—]Damage common to all King's subjects.]—Under the Bristol Dock Act, 43 Geo. 3, c. 140, s. 107, which gives compensation where, by means of the dockworks, or in the progress or execution thereof, damage may be done to any hereditaments, houses, lands, & tenements, or the same may be rendered less valuable thereby, no compensation is due to the owners of a brewery for a loss arising to them in their business from the deterioration of the water of the public river Avon, from which the brewery had been before supplied by means of pipes laid under low water mark; the use of the water having been common to all the king's subjects, & not claimed as an easement to the particular tenement. The only remedy for such an injury is by indictment, which was taken away in this case by the act of parliament.—**R. v. BRISTOL DOCK CO. (1810)**, 12 East, 429; 104 E. R. 167.

**Annotations:—Consd. East & West India Docks & Birmingham Junction Ry. Co. v. Gattke (1851)**, 3 Mac. & G. 155. **Apld. Caledonian Ry. Co. v. Ogilvy (1855)**, 25 L. T. O. S. 106. **Consd. Chamberlain v. West End of London & Crystal Palace Ry. Co. (1862)**, 2 B. & S. 605; **R. v. Metropolitan Board of Works (1869)**, L. R. 4 Q. B. 358. **Apld. McCarthy v. Metropolitan Board of Works (1872)**, L. R. 8 C. P. 191. **Refd. R. v. Thames & Isis Navigation Comrs. (1836)**, 5 Ad. & El. 804; **R. v. London & North Western Ry. Co. (1854)**, 3 E. & B. 443; **Kicket v. Metropolitan Ry. Co. (1865)**, 5 B. & S. 156; **Rhodes v. Alredale Drainage Comr. (1876)**, 1 C. P. D. 380.

**365. Add. Annotations:—Refd. Blundy, Clark & Co. v. London & North Eastern Railway (1931)**, 100 L. J. K. B. 401; **Greenwood Tileries, Ltd. v. Clapson**, [1937] 1 All E. R. 765.

**367. Add. Annotation:—As to (1) Refd. Legge & Son, Ltd. v. Wenlock Corpn.**, [1936] 3 All E. R. 599.

**387. Add. Annotation:—Refd. Legge (George) & Son, Ltd. v. Wenlock Corpn.**, [1938] A. C. 204.

**388. Add. Annotation:—Refd. Farnworth v. Manchester Corpn.**, [1929] 1 K. B. 533.

#### PART I. SECT. 6, SUB-SECT. 3.— A. (a).

**ss. Bye-law — Discharge through sewer.**—]A bye-law forbade the discharge into a river of liquid liable to putrefaction. Deft. permitted liquid of that nature to pass from his premises through a pipe into a street channel, down which it flowed for half a mile to the river:—**Held: deft. had not violated the bye-law.**—**KING v. PRINELL**, [1932] V. L. R. 418; **Argus L. R. 366.**—**AUS.**

#### PART I. SECT. 7, SUB-SECT. 1.

**434 il. ———.**—]A riparian owner may make defences against floods anywhere on his own land provided he does not interfere with the *alveus* or with a recognised flood channel, but if flood water comes on to his land he must not take active steps to turn it on to his neighbour's property, since such an act would amount to active transference of the mischief & not to a protective measure in anticipation of apprehended danger.—**MADRAS & SOUTHERN MAHARATTA RY. CO., LTD. v. MAHARAJA OF PITHAPURAM, I. L. R.**, [1937] Mad. 919.—**IND.**

**§ 1. ———.**—]License to overflow.—No right to overflow on subsequent occasions.—**POTTER v. SILVERWOOD**, [1930] 1 D. L. R. 989.—**CAN.**

**m i. ———.**—]Water from higher land

430. *Add. Annotations* :—*Refd.* Manchester Corpn. v. Farnworth, [1930] A. C. 171; Blundy, Clark & Co. v. London & North Eastern Ry. Co., [1931] 2 K. B. 334.

438. *Add. Annotation* :—*Consd.* Bartlett v. Tottenham, [1932] 1 Ch. 114.

## Part II.—The Sea and the Seashore.

457. *Add. Annotations* :—*Refd.* Secretary of State for India in Council v. Fourcar & Co., Ltd. (1934), 50 T. L. R. 241; Symes & Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board, [1937] 1 K. B. 548.

471. *Add. Annotation* :—*As to* (1) *Refd.* Symes & Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board, [1937] 1 K. B. 548.

475a. *Part of beach "opposite to" land.*—A municipal corpn. passed a resolution in Jan. 1860, agreeing to let to pltf. the flat part of the beach opposite to pltf.'s field, for 300 years, at a nominal rent. Pltf. claimed all the beach comprised between lines drawn in prolongation of the sides of his field, & he built a wall & terrace along the part so claimed. In 1864 the corpn. gave pltf. notice to quit, & after much negotiation, in 1869, brought an action of ejectment against pltf., who thereupon filed the bill in this suit for specific performance :—*Held* : the boundaries of the piece of land agreed to be demised were lines drawn from the extremities of pltf.'s field perpendicular to the coast-line.—*CROOK v. SEAFORD CORPN.* (1871), 6 Ch. App. 551; 25 L. T. 1; 35 J. P. 804; 19 W. R. 938, L. C.

477. *Add. Annotation* :—*Refd.* Secretary of State for India in Council v. Fourcar & Co. (1934), 50 T. L. R. 241.

479. *Add the following paragraph & citation* :—

The doctrine of accretion has no appln. to a non-tidal sheet of more or less stagnant water such as one of the Norfolk Broads. It is limited to the seashore & land abutting on rivers of running water & does not extend to canals, lakes or ponds.—*TRAFFORD v. THROWER* (1929), 45 T. L. R. 502.

*brought into ditch—Ditch unable to take plaintiff's flood water.*—Pltf. (resp.) alleged that water from an area of higher land (A.'s land) was improperly brought by deft. (applt.) through a ditch constructed & extended by it in order to drain a public road adjoining his lands, causing the ditch to overflow & damage his property. The trial judge found that the water from the higher land would not reach pltf.'s land in the course of nature; & he gave damages against deft. for the alleged wrong. Deft. appealed; & the appeal was allowed.—*GEALL v. RICHMOND TOWNSHIP*, [1932] 3 W. R. 318; 4 D. L. R. 796; 46 B. C. R. 249.—*CAN.*

*aa* (p. 60) *l.* ——.—In an action against a municipality for faulty construction of ditches, whereby water was brought on to pltf.'s land, causing damage :—*Held* : pltf. must show that deft. brought water on to his land. Here the natural flow was in the same direction as the ditches, & the damage appeared to be due to abnormal rainfall.—*ANGUS v. BURNABY CORPN.* (1932), 46 B. C. R.

335.—*CAN.*

### PART II. SECT. 3, SUB-SECT. 1.

*ad. "Coastline"* — *Construction of statute.*—*Held* : in a grant to applt. co. by the Dominion Govt. of certain lands, together with the minerals thereunder, for the purpose of constructing a railway made under a British Columbia Act of 1883 the expression "coastline" used to describe the eastern boundary of the land in view of the context & circumstances of the case was meant to describe the eastern boundary of the land at high water mark & did not, as the applt. contended, include the foreshore & foreshore rights.—*ESQUIMAULT & NANAIMO RY. CO. v. TREAT* (1919), 121 L. T. 657.—*CAN.*

### PART II. SECT. 3, SUB-SECT. 3.—A.

476 *II.* ——.—It is an essential condition of the operation of the doctrine which adds to riparian lands the increment which is caused by accretion that the accretion should be natural, i.e. occasioned in the ordinary

course of the operations of nature, & so gradual as to be in a practical sense imperceptible in its course & progress as it occurs.—*CLARKE v. EDMONTON CITY*, [1928] 2 D. L. R. 154; [1928] 1 W. W. R. 553; 23 Alta. L. R. 233; *on appeal*, [1929] 4 D. L. R. 1010.—*CAN.*

*b. Grant of licence of occupation—Identification of subject-matter of grant.*—*BARTLET v. DELANEY* (1913), 29 O. L. R. 426; 5 O. W. N. 200.—*CAN.*

### PART II. SECT. 3, SUB-SECT. 3.—B. (a) *l.*

*sp. Proportion of accretion to which adjoining owners entitled.*—In an action between proprietors of adjoining properties on the shore of a bay of the sea to determine the proportion of accretions to which they were entitled :—*Held* : it should be divided by taking a line representing the line of the shore drawn at such distance seawards as to clear the line of the shore & by letting fall a perpendicular from the end of the land boundary dividing the properties in dispute.—*PAUL v. BATES* (1934), 48 B. C. R. 473.—*CAN.*

1792 & 1883. The ownership acquired by the Comrs. under those Acts is similar to that acquired by a local authority laying sewers in a street, namely, an ownership in the works themselves & just so much of the soil upon which the works are constructed as will enable them to be erected & maintained.—**PORT OF LONDON AUTHORITY v. CANVEY ISLAND COMRS. & CANVEY ISLAND URBAN COUNCIL**, [1932] 1 Ch. 446; 101 L. J. Ch. 63; 146 L. T. 195; 96 J. P. 28; 30 L. G. R. 42, C. A.

580. *Add. Annotations*:—**As to (1) Consd. Williams-Ellis v. Cobb**, [1935] 1 K. B. 310. **Refd.** Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons (No. 2) (1929), 94 J. P. 10.

584. *Add. Annotations*:—**Consd. Williams-Ellis v. Cobb**, [1935] 1 K. B. 310. **Refd.** Greenwood Tileries, Ltd. v. Clapson, [1937] 1 All E. R. 765.

591. *Add. Annotations*:—**Consd. Williams-Ellis v. Cobb**, [1935] 1 K. B. 310. **Refd.** Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons (No. 2) (1929), 94 J. P. 10.

606. *Add. Annotations*:—**Consd. China Navigation Co. v. A.-G.** (1932), 48 T. L. R. 375. Symes & Jaywick Association Properties, Ltd. v. Essex Rivers Catchment Board, [1937] 1 K. B. 518. **Refd.** Port of London Authority v. Canvey Island Comrs. (1931), 101 L. J. Ch. 63.

626a. No right to drain through sea wall on to land.] -No one can acquire a right to interfere with a sea wall so as to prevent it operating as intended by the Crown when it was built, & no grant from the Crown can be inferred from the existence of a drain letting sea water through the sea wall on to land behind the sea wall. If therefore a person makes a gap in or a hole under the sea wall for this purpose he commits an illegal act. The mere fact that by the action

of the sea the land on the seaward side of a sea wall has become higher than the land on its landward side gives the owner of property on the seaward side no right to drain through the sea wall.

*Per* SCOTT, L.J.: In passing Land Drainage Act, 1930 (c. 44), Parliament must be presumed to have intended to deal with any residual prerogative rights & duties, to entrust them to the various authorities mentioned in the Act, & to maintain the general constitutional position originally built up at common law & then taken over & developed by various statutes. It is an express or implied principle of the Act of 1930 that it is the duty of the relevant Board constituted under the Act to look to the attainment of its two main objects: (a) to control the flow of inland waters, & (b) to keep out sea water from farm lands. Where these lands lie below the level of high water, the sea defences can ensure no effective legal protection unless the Act contains this implication.—**SYMES & JAYWICK ASSOCIATED PROPERTIES, LTD. v. ESSEX RIVERS CATCHMENT BOARD**, [1937] 1 K. B. 518; [1936] 3 All E. R. 908; 106 L. J. K. B. 279; 156 L. T. 116; 101 J. P. 179; 53 T. L. R. 180; 81 Sol. Jo. 33; 35 L. G. R. 163, C. A.

634. *Add. Annotation*:—**Refd. China Navigation Co. v. A.-G.** (1932), 48 T. L. R. 375.

638. *Add. Annotation*:—**Refd. Greenwood Tileries, Ltd. v. Clapson**, [1937] 1 All E. R. 765.

640. *Add. Annotation*:—**As to (1) Apd. A.-G. & Public Trustee v. Metropolitan Borough of Woolwich Council** (1929), 93 J. P. 173. **Generally, Refd.** Greenwood Tileries, Ltd. v. Clapson, [1937] 1 All E. R. 765; Symes & Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board, [1936] 3 All E. R. 908.

642. *Add. Annotation*:—**Refd. Blundy, Clark & Co. v. London & North Eastern Railway** (1931), 100 L. J. K. B. 401.

## Part III.—Rivers, Lakes and Pools.

652. **Bank erected & maintained under statute—Wall substituted by private owner—Liability for maintenance.**—A river bank made by comrs. appointed under a private statute was given into the care of elected surveyors whose duty it was to keep & repair the bank. A private landowner built a wall through the bank in such a way as to make the wall replace part of the bank as a protection against floods. On the occasion of a particularly high tide, though not the highest on record, the waters broke through the wall, but not the bank

alongside, & flooded neighbouring land:—**Held**: (1) as the surveyors had no right to prevent the private landowner cutting through the bank, they were under no duty to maintain the substituted defence, & the action failed against them; (2) the owner of the wall owed a duty to the neighbouring landowners to keep the wall in good repair; (3) as the bank had withstood the tide which broke through the wall, & in any event the tide was not the highest on record, the owner of the wall could not rely upon the defence

### PART V. SECT. 3, SUB-SECT. 4.— B. (c) ii.

c i. — *Taking sea-ware.*—In an action brought to interdict a restaurateur from selling refreshments on the foreshore, pursuer, whose titles were habile to include the foreshore upon proof of prescriptive possession, relied for such proof mainly upon the taking of sea-ware:—**Held**: the taking of sea-ware was relevant to support a claim of property in the foreshore; &

interdict granted.—**AILSA (MARQUESS) v. MONTEFORTE**, [1937] S. C. 805.—**SCOT.**

### PART II. SECT. 3, SUB-SECT. 5.—G.

608 i. *When injunction granted—Destruction of natural barrier.*—The owner of land abutting on the foreshore is entitled to all the natural advantages belonging to that land, & therefore to all things, such as deposits of shell & sand, which in the course of nature

may be swept thereon. But such owner is not entitled to destroy a natural barrier against the sea, e.g., by the removal of shingle, so as to cause an injury to a neighbouring landowner, even though the removal of shingle is a natural & ordinary use of the land; nor is he entitled to interfere with an adjoining landowner's right of support by causing a subsidence of such neighbour's land.—**SMALE v. TAKAPUNA BOROUGH COUNCIL**, [1932] N. Z. L. R. 35.—**N.Z.**

of act of God.—*GREENWOOD TILLERIES, LTD. v. CLAPSON*, [1937] 1 All E. R. 765; 156 L. T. 386; 101 J. P. 215; 81 Sol. Jo. 278; 35 L. G. R. 200.

#### 676a. Duties of Humber Conservancy Board.]

—On June 27, 1936, plffs.' steamship, outward bound from Goole, became a total loss through stranding a little below the Middle Whitton lightship in the Upper Humber, for which defts., the Humber Conservancy Board, were the buoyage & beaconage authority. Plffs. alleged that defts. levied dues as a buoyage & beaconage authority & that as such it was their duty &/or their contract with the owners of vessels to exercise reasonable care in the performance of their functions to keep the channels safe for vessels to navigate in, & to place lightships in such positions as would indicate to vessels where the deep water channels were; that the information supplied by defts. (& in particular a chart published on May 27, 1936) indicated a minimum depth of 3 ft. at low water ordinary spring tides throughout the Whitton channel; that from time to time defts. issued notices indicating a less depth, & that, no such notice having been issued, the information given raised a representation or warranty that a depth of 3 ft. could be relied on. Plffs. calculated that on this information there would be a minimum depth of 16 ft. 6 ins. while navigating the channel, & that, on the

draught of the vessel, they would have a margin of between 1 ft. 2 ins. & 1 ft. 6 ins. It was in evidence that the channels in the Upper Humber changed their course frequently & rapidly, that the lightships had constantly to be moved, & that the Upper Whitton lightship had been shifted on June 27 before the accident happened:—*Held*: the liability of defts. depended upon the special relationship which arose through their taking dues; this relationship, though not exactly that of invitor & invitee, imposed duties analogous to the common law duties existing between invitor & invitee to take reasonable care; the issue of the information & charts did not give rise to a representation or warranty that a minimum depth of 3 ft. would be found on any given date in a bed of a river which was constantly changing; defts. had not been negligent as regards the frequency or extent of their soundings or in the placing of the lightships; & the action failed.—*THE NEPTUN*, [1938] P. 21; 107 L. J. P. 49; 54 T. L. R. 195.

696a. — *Removal of shingle.*—*MALDON CORPN. v. LAURIE* (1933), 97 J. P. Jo. 132; 175 L. T. Jo. 320.

745. *Add. Annotation*:—As to (1) *Refd. Secretary of State for India in Council v. Fourcar & Co.* (1934), 50 T. L. R. 241.

747. *For citation substitute "No. 479, ante."*

#### PART III. SECT. 2, SUB-SECT. 2.

678 vi. —.—.—.]—It has been recognised by a series of decisions that in India the beds or channels of navigable waters are the property of the Government in the right of the Crown. The public right of waterway can only be co-extensive with the property of the Government & accordingly does not extend beyond the limits of ordinary high tides, that is to say, the mean between spring & neap tides.—*DAWOOD HASHIM ESOF v. TUCK SEIN* (1931), 58 L. R. Ind. App. 80.—*IND.*

d i. —.— *International waters.*—The common law doctrine of *ad medium flum* has never been applied to international waters.—*Re FORT ERIE VILLAGE & BUFFALO & FORT ERIE PUBLIC BRIDGE CO.*, [1928] 1 D. L. R. 723; 61 O. L. R. 502.—*CAN.*

#### PART III. SECT. 2, SUB-SECT. 4.

702 ii. —.—.—.]—The right of a riparian owner on the banks of a tidal navigable river exists *jure naturæ*, but it is essential to its existence that his land should be in contact with the flow of the stream at least at the times of ordinary high tides.—*DAWOOD HASHIM ESOF v. C. TUCK SEIN* (1931), 1 L. R. 9 Ran. 122.—*IND.*

#### PART III. SECT. 3, SUB-SECT. 1.

so. *Right to sever banks.*—The owner of the banks & bed of a river (not a navigable one) may sever them & deal with them as with any other real estate.—*ELLIOTT v. BAIRD, BAIRD v. ELLIOTT & SHEARD* (1879), 26 Gr. 549.—*CAN.*

#### PART III. SECT. 3, SUB-SECT. 2.—B.

b i. —.— *Special administrative area.*—A portion of a parish was constituted a special drainage district for administrative purposes.—*Held*: the presumption that the description "bounded by" a non-navigable river included the alveus of the river up to

the *medium flum* applied in the case of a special administrative area forming part of a larger area; & the fact that the boundary was described by reference to points on the river bank was insufficient to reargue that presumption.—*HAMILTON MACISTRATES v. BENT COLLIERY CO., LTD.*, [1929] S. C. 686.—*SCOT.*

#### PART III. SECT. 3, SUB-SECT. 2.—C.

p i. —.—.]—The principle that gradual accretions to land by tidal action enure to the landowner applies in Burma under sect. 13 (3) of Burma Laws Act, 1898, as it is according to justice, equity, & good conscience. The principle applies even if the boundary on the water front of the land when granted is known or capable of being ascertained.—*SECRETARY OF STATE FOR INDIA v. FOURCAR & Co.* (1933), 61 L. R. Ind. App. 18; 50 T. L. R. 241.—*IND.*

#### PART III. SECT. 4.

756 vi. —.—.—.]—*Held*: a grant from the Crown of land bounded on one side by the waters of an inland non-tidal & non-navigable lake carries with it the ownership of the land covered by water to the centre of the lake.—*FARES v. R.*, [1929] Ex. C. R. 144; *revid.*, on other grounds, [1932] S. C. R. 78; 1 D. L. R. 421.—*CAN.*

g i. —.—.]—Where a water lot is described by metes & bounds, with measurements & bearings from a fixed point, the boundaries of the lot are so ascertained notwithstanding that one boundary is said to be the water's edge & by a subsequent lowering of the water level part of the lot has become dry land.—*Re MAILLE & TORONTO*, [1932] O. R. 375; 3 D. L. R. 10.—*CAN.*

so. *Shore as boundary of municipality—Extent.*—Where the letters patent incorporating a British Columbia municipality describe one of its bound-

aries as the "shore" of a certain navigable lake, the limits of the municipality extend to low-water mark, although the lake in question is non-tidal water.—*R. v. LAKESIDE ORCHARDS, LTD.* (B. C.), [1929] 1 W. W. R. 870; 51 Can. Crim. Cas. 182.—*CAN.*

st. *Irrigation waters run through lake—Level of waters raised—Destruction of muskrat—Damage to licensee of right to trap muskrat.*—Plff. held a licence from the province entitling her to trap muskrats on lands covered by Diggs Lake in deft. irrigation district. She had taken over the interests of a former licensee who, under an agreement with the district, had given it the privilege of running the irrigation waters through the lake & "any other privilege that may be required for the successful operation of the said irrigation district so long as the natural level of the lake is not interfered with." The agreement was continued with plff. & was acted on by both plff. & deft. In Dec. 1936, the district, with the object of providing water for the domestic use of farmers in the district, raised by means of a headgate the level of the water in the lake at least 18 inches. The result was the flooding out of the houses built on the lake by the muskrats for their winter quarters. Many muskrats were destroyed & many left the lake. It was then too late in the year to make alterations to suit the changed conditions:—*Held*: the "natural level" contemplated by the contract was the natural level that may exist from time to time according to natural conditions, having regard to the use of the lake as a canal for the irrigation waters. Therefore, the contract had been broken & plff. was entitled to general damages as well as to damages for her estimated loss with respect to the muskrats she would have caught.—*WILLIAMS v. MOUNTAIN VIEW IRRIGATION DISTRICT*, [1938] 2 W. W. R. 408.—*CAN.*

## Part IV.—Ports, Harbours, Docks, Piers and Wharves.

786. *Add. Annotation* :—**Refd.** British Trawlers' Federation, Ltd. v. London & North Eastern Ry. Co. (1932), 147 L. T. 313.

793. *Add. Annotation* :—**As to** (1) **Refd.** Bourne-mouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons (No. 2) (1929), 94 J. P. 10.

819a. ————**]**—**FRESH WHARF, LTD. v. NICHOLSON'S WHARVES, LTD.** (1935), 79 Sol Jo. 479.

820. *Add. Annotation* :—**Consd.** British Trawlers' Federation, Ltd. v. London & North-Eastern Ry. Co. (1932), 48 T. L. R. 491.

821a. ————**Removal of goods purchased—Licence.]**  
—Pltf. railway co. were the owners of two docks & the quays thereof at Kingston-upon-Hull. These docks were used extensively by fishing vessels. The catches were landed on the quays & there sold by "Dutch auction." The purchasers carted away their purchases to various points on the quay where they had offices rented from the railway co. Here the fish was sorted & packed for transport. The railway co. provided facilities for the transport of fish by rail, but the practice had grown up for the merchants to provide mechanical road transport. While the railway co. had no objection to road transport for reasonably short distances, they had serious objection to that form of transport for long distances; not only on account of the loss of revenue, but also on account of the serious congestion of the vehicles at the docks, which interfered also with the control of the railway-wagons on the quay sidings. They therefore sought to exclude the long-distance road transport by a system of licensing. Some merchants accepted the conditions; defts., among others, did not. Pltf. railway co. brought the present action against defts. to establish their position, & asked for a declaration that they were entitled to refuse admission of road transport to the docks except under licence & subject to conditions, & also asked for an injunction against the merchants, giving effect to the declaration. Defts. contested this right & claimed that they were entitled to bring their own vehicles & remove their fish irrespective of the destination; they based their contention mainly on their rights at common law & the provisions of the Hull Docks Act, 1861 :—**Held** : (1) the common law right of access to the docks & quays had gone except so far as preserved by the North-Eastern Railway (Hull Docks) Act, 1883, or subsequent statutes. The rights of the parties were, therefore, governed by the Act of 1883. Under the Act the railway co. were not bound to allow fish sales to take place on the quays in question, & had

power to exclude defts. in the first instance. The railway co., however, had given a licence to defts. to attend the fish sales & become owners of goods on the quay, & defts. thus acquired a statutory right to remove them, & by inevitable implication they also had the right to use such vehicle or vehicles as might be reasonably necessary for such removal. Defts. having a statutory right to remove goods of which they were owners, the railway co. had no power of directing the manner in which such goods should be removed; (2) the licence granted by the railway co. gave defts. a right *ex contractu* to carry on their business as fish merchants on the quay, & as long as this contract continued, defts. had the right of access to the quay & to do all acts necessary for the conduct of their business, provided, under the terms of the licence, the business, traffic & convenience of the railway co. were not interfered with.—**LONDON & NORTH-EASTERN RY. CO. v. CHESTER (J. W.) & SON** (1932), 147 L. T. 308; 48 T. L. R. 484.

*Annotation* :—**Consd.** British Trawlers' Federation, Ltd. v. London & North-Eastern Ry. Co. (1932), 48 T. L. R. 491.

821b. ————**]**—Under & by virtue of various statutes, one of which incorporated the Harbours, Docks, & Piers (Clauses Act, 1847 (c. 27), a railway co. became the owners of a harbour, docks, & quays, a statutory market for fish & a railway in connection therewith.

By Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), s. 33 : "Upon payment of the rates made payable by this & the special Act . . . the harbour, dock, & pier shall be open to all persons for the shipping & unshipping of goods." . . . By sect. 83 of the Act "The undertakers may from time to time make such bye-laws as they shall think fit . . . for regulating the shipping & unshipping . . . & removing of all goods within the limits of the . . . premises of the undertakers."

Formerly the co.'s railways answered all the requirements of fish merchants & owners of trawlers, but laterly the merchants brought to the market motor vehicles which carried fish to far distant places, formerly served by the railway, to the serious loss of the co.'s undertaking; to repair which the co. refused to admit to their dock premises any vehicle for the conveyance of fish without a licence which provided (among other things) : (a) the vehicle should not be used for the transport of fish beyond the boundaries of the co.'s fish docks except for fish consigned for transit by railway or for sale & consumption within a radius of twelve miles from the docks; (b) no fish transported by the

## PART IV. SECT. 1, SUB-SECT. 1.

b i. ————**]**—The Comrs. appointed under Hamilton Harbour Comrs. Act to manage the business of the harbour are entitled, under Trustee Act, R. S. O., 1927, s. 60, to reasonable compensation for their services.—**Re HAMILTON HARBOUR COMRS.**, [1930] 2 D. L. R. 509; 65 O. L. R. 149.—**CAN.**

## PART IV. SECT. 1, SUB-SECT. 2.

sd. *Harbour Commissioners—Power to*

*resume possession of land vested in them—Whether of land subject to lease.]*  
—**FLETCHER W. & R., LTD. v. GEELONG COMRS.**, [1928]

## PART IV. SECT. 2, SUB-SECT. 1.

sd. *Expropriation of water lots for improvement of wharf—Basis of valuation.]*—The basis or starting point for the valuation of water lots, expro-

priated by the Crown for the . . . of wharf improvements, may be had from a municipal assessment of the property, taking into consideration the higher assessable value of the land owing to its location, & the advantage afforded to the owners as a result of the improvements.—**R. v. ADVENTURERS OF ENGLAND, GOVERNOR & CO.** (1916), 17 Exch. C. R. 441; 42 D. L. R. 181.—**CAN.**

vehicle should be transferred directly or indirectly to or from any other road vehicle for conveyance to any other place beyond a radius of twelve miles from the fish docks:—*Held*: the co. were not entitled to impose those conditions upon the removal of fish from their premises without a valid bye-law enabling them in that behalf, supposing such a bye-law could be validly made; for that the marketing of fish when landed must be regarded as part of the process of shipping & unshipping within sect. 33 of the above-named Act, & access to the docks must include access with such a vehicle as the party seeking access deems necessary, subject to the power of the co. under sect. 83 to regulate such access by means of a valid & operative bye-law.—*LONDON & NORTH-EASTERN RY. CO. v. BRITISH TRAWLERS' FEDERATION, LTD.*, [1934] A. C. 279; 103 L. J. K. B. 311; 50 T. L. R. 275; *sub nom. BRITISH TRAWLERS' FEDERATION v. LONDON & NORTH-EASTERN RY. CO.*, 150 L. T. 461, H. L.

*Annotation*:—*Refd. London & North-Eastern Ry. Co. v. Chester & Son* (1932), 147 L. T. 308.

**821c.** — *To hold fish market.*—*LONDON & NORTH-EASTERN RY. CO. v. CHESTER (J. W.) & SON*, No. 821a, *ante*.

**821d.** — *—*—*LONDON & NORTH-EASTERN RY. CO. v. BRITISH TRAWLERS' FEDERATION, LTD.*, No. 821b, *ante*.

**825.** *Add. Annotation*:—*Refd. A.-G. v. Cornwall County Council* (1933), 97 J. P. 281.

**828.** *Add. Annotations*:—*Consd. Great Western Railway v. Monmouthshire County Council* (1929), 94 J. P. 6. *Refd. The Kate*, [1935] P. 100; *Lensen Shipping Co. v. Anglo-Soviet Shipping Co.* (1935), 40 Com. Cas. 320.

**831a.** — *—*—*This was a claim by the owners of the steamship A. against the Ford Motor Co., Ltd. & the Port of London Authority for damage sustained by the A. whilst lying moored at Ford's Jetty, Dagenham, on May 3, 1935. At low water she took the ground & sustained damage by sitting on an anchor which was out from a P. L. A. dredger dredging in the river abreast of the jetty & about 250 feet away from it. The A. was part laden when she arrived at the jetty at about 2 a.m. The berth was assigned to her by the first defts., & she moored head down river under the directions of their servants. Pltfs. claimed that the first defts. should have known & warned them that the berth was unsafe. They alleged that the second defts. placed the anchor upon which the A. sat without buoying it, without giving warning, & without removing it after the A. arrived & before the water ebbed. The first defts. did not admit that the ship was properly moored or moored in accordance with the orders of their servants, nor did they admit the damage. They denied that they ought to have known that the berth was unfit & said that, if it was, the second defts. were to blame for placing the anchor upon the berth. The second defts. denied that they had been negligent, contending that the moorings of the A. were not properly secured, & they further denied that the A. was damaged by*

*an anchor of theirs. They further alleged that both pltfs. & the first defts. had had circular notification that the dredger would be working opposite Ford's Jetty & that the first defts. had also been notified to that effect by a letter sent to them after the circular:—Held: the presence of the dredger did not put the first defts. on inquiry as to where the dredger's anchors were; pltfs. had failed to establish that the first defts. ought to have ascertained that the berth was safe, & that accordingly the first defts. were not liable; the second defts. were negligent in putting the anchor where they did without giving proper notice to the first defts. or pltfs., as to where the anchor actually was; those in charge of the dredging operations had not taken reasonable care to see the exact position where the anchor was dropped; if they had taken such reasonable care they would have realised that it was unsafe for the A. to berth where she did, & they ought to have warned pltfs. & the first defts. before the A. took the ground of the danger of her doing so. Judgment entered for the pltfs. with costs & for the first defts. with costs, pltfs. to recover from the second defts. the costs which they (pltfs.) would have to pay to the first defts.*—*ALBATROSS S.S. OWNERS v. FORD MOTOR CO., LTD. & PORT OF LONDON AUTHORITY* (1936), 155 L. T. 326; 19 Asp. M. L. C. 1.

**831b.** — *—*—*DOREY (ONESIMUS) & SONS, LTD. v. HEADLEY'S WHARF, LTD. & ASHBY, LTD.*, [1938] 4 All E. R. 680.

**831c.** *Liability of consignee.*—*A motor-barge belonging to pltfs. was chartered to take a cargo to C. as ordered or so near thereunto as she might safely get, & there deliver the cargo alongside any wharf as ordered where she could safely deliver. A bill of lading was issued by the master to defts. as consignees of the cargo; it incorporated the terms of the charterparty, & by it the cargo was to be delivered at C. to defts.' order. The barge arrived at C. & went to a wharf called P.'s wharf, & there delivered a small part of the cargo to defts. & she was then moved to a more suitable wharf, where discharge was continued. It was then found that the bottom of the barge had sustained serious damage, owing, apparently, to her having laid in a foul berth. Pltfs. brought this action to recover damages from defts. on the ground that the injury must have been sustained at P.'s wharf; defts. denied liability & brought in the corp'n. of C. as third parties, contending that if they should be held liable to pltfs. they ought to be indemnified by the corp'n. as the harbour authority:—Held: (1) even if the injury to the barge had occurred at P.'s wharf, which had not been proved, there was no evidence that defts. were either lessees or occupiers of that wharf, & they could not therefore be held liable under the principles laid down in *The Moorcock*, 14 P. D. 64; (2) even if defts. had ordered the barge to a particular berth which was in fact an unsafe berth for that particular vessel, which had*

#### PART IV. SECT. 2, SUB-SECT. 3.

**826** iv. — *—*—*One who invites another to moor a ship at a certain*

*place undertakes with that other that there are no concealed dangers.*—*COAST CEMENT CO., LTD. v. NAVIGAZIONE LIBERA TRIESTINA S. A.*,

*MCKENZIE BARGE & DERRICK CO. v. NAVIGAZIONE LIBERA TRIESTINA S. A.*, [1930] 3 W. W. R. 69; 4 D. L. R. 897.—CAN.



not been proved, they would still not have been liable, for it was the duty of the master to make sure that the berth to which he was ordered was a safe berth for his vessel, & if he found that he could not safely deliver at the berth to which he was ordered he need not obey the order to go to it. Judgment.

was therefore given for debts. & the question of their right to be indemnified by the third parties did not arise.—WEST (SAMUEL), LTD. v. WRIGHT'S (COLCHESTER), LTD. (1935), 40 Com. Cas. 186.

*Annotation:—Reid. Lensen Shipping Co. v. Anglo-Soviet Shipping Co. (1935), 40 Com. Cas. 320.*

## Part V.—Navigation of Tidal and Natural Inland Watercourses.

833. *Add. Annotation* :—**Refd.** *Vanderpant v. Mayfair Hotel Co.*, [1930] 1 Ch. 138.
851. *Add. Annotation* :—**As to** (1) **Refd.** *Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63.
856. *Add. Annotations* :—**As to** (1) **Consd.** *Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63. *Generally*, **Refd.** *Fresh Wharf, Ltd. v. Nicholson's Wharves, Ltd.* (1935), 79 Sol. Jo. 479.
867. *Add. Annotation* :—**Refd.** *Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons* (No. 2) (1929), 94 J. P. 10.
892. *Add. Annotation* :—**Consd.** *Port of London Authority v. Canvey Island Comrs.* (1931), 101 L. J. Ch. 63.
903. *Add. Annotation* :—**Refd.** *Re Salvin's Indenture*, *Pitt v. Durham County Water Board*, [1938] 2 All E. R. 498.
- 906a. **Superannuation—Effect of Land Drainage Act, 1930 (c. 44), s. 79 (8).**—The rights to superannuation allowances conferred by Land Drainage Act, 1930 (c. 41), s. 79 (8), on officers & servants of the River Thames Conservators are confined to officers & servants in the employment of the Conservators at the date of the passing of the Act, namely, Aug. 1, 1930, & cannot be extended to cover officers & servants entering the service of the Conservators after that date.
- Similarly, the rights to superannuation allowances conferred by sect. 80 (7) of the Act of 1930 on officers & servants of the Lee Conservancy Board & of the Lee Conservancy Catchment Board are confined to the officers & servants of the Lee Conservancy Board who were in the employment of the Board at the date of the passing of the Act & remained in its service, or were at that date transferred to the Lee Conservancy Catchment Board (*per CUR.*).—**ANDREWS v. RIVER THAMES CONSERVATORS** (1938), 102 J. P. 209; 82 Sol. Jo. 154; 36 L. G. R. 369, C. A.
912. *Add. Annotation* :—**Generally**, **Refd.** *Fresh Wharf, Ltd. v. Nicholson's Wharves, Ltd.* (1935), 79 Sol. Jo. 479.
914. *Add. Annotation* :—**Refd.** *A.-G. v. Wilcox*, [1938] 3 All E. R. 367.
921. *Add. Annotation* :—**Refd.** *The Neptun*, [1938] P. 21.
- 927a. **Provision of buoys—Fitness for purpose—Extent of duty.**—Defts., as port authority for London, provided moorings in the Thames for the use of barges & other craft free of charge. Pltfs. were the owners of three barges which on the evening of Mar. 8, 1932, were moored for the night to a buoy provided by defts. in the Thames at Battersea. During the night the chain by which the buoy was secured to the bed of the river broke & pltfs.' barges went adrift & caused injury to other craft. Pltfs. became liable for damages & incurred expense in having their barges salvaged; & they brought this action to recover their loss from defts. :—**Held** : even assuming that pltfs. were invitees & not merely licensees the duty of defts. was not an absolute duty to keep the buoy fit for the purpose for which it was used, but was only a duty to take all reasonable steps to see that it was so fit; & as the evidence showed that they had taken all such reasonable steps the action failed.—**WILLIAMS (SAMUEL) & SONS, LTD. v. PORT OF LONDON AUTHORITY** (1933), 39 Com. Cas. 77.
932. After cross-reference following this case add :—
- 932a. **Failure to repair swing-bridge—Injury to public—Whether liable.**—Pltf. was injured by tripping over a nail projecting from the footway of a swing-bridge which defts., the Port of London Authority, were under a statutory duty to maintain in repair, &

**PART V. SECT. 1, SUB-SECT. 1.**

o i. — — —.]—Re WATERS &  
WATER POWERS REFERENCE, [1929]  
2 D. L. R. 481; S. C. R. 200.—CAN.

853 ff. — *Causing backwash—Nuisance.*—A steamer co. taking up passengers, in course of plying their steamers, from boats & from places other than recognised jetties & thereby causing backwash involving danger to the public does not by these acts commit a public nuisance. — *CALCUTTA STEAM NAVIGATION CO., LTD. v. EMPEROR* (1930), 1. L. lt. 58 Calc. 854.—**IND.**

se. *Rights in St. Francis River.*—R.  
r. SHERBROOKE, [1932] 4 D. L. R. 73.—  
CAN.

**PART V. SECT. 1, SUB-SECT. 3.—A.**

eg. Works of navigation—Liability to maintain.]—GAUSSEN v. LOWER BANN NAVIGATION TRUSTEES, [1929] N. I. 11.—IR.

**PART V. SECT. 1, SUB-SECT. 3.—D.**

**sk. No right to moor—On private ground—Loch Lomond.]—**A boat-hirer on Loch Lomond claimed the right, as a member of the public, to beach & moor boats on private ground on the shore of the loch. He averred that such a right was incidental to the public right of navigation in the loch, which admittedly existed. He further averred that the public had, by

Immemorial usage, a right of port & harbour at the place where he claimed the right to beach his boats, & that they had access thereto by a public road. It was admitted, for the purposes of the case, that Loch Lomond was to be assumed to be an extension of the navigable non-tidal River Leven which flowed out of it:—*Held*: a right of navigation on the part of the public did not include a right to beach or moor boats on private ground for the purpose of carrying on the business of a boat-hirer; & a right on the part of the public to embark & disembark on private ground could not be acquired by prescription.—*LEITH-BUCHANAN v. HOGG*, [1931] S. C. 204.—*SCOT.*

which the public had a right to use only when it was not required to be swung open for dock traffic. The cause of the accident was the failure of the defts. to maintain the footway in good condition. In an action for damages:—*Held*: the swing-bridge was not a highway & defts. were not in the position of a surveyor of highways, & therefore defts. could not avoid liability on the ground of nonfeasance or on the ground that a surveyor of highways is not liable to pay damages to persons injured by his neglect of duty, & pltf. was entitled to recover.—*GUILFOYLE v. PORT OF LONDON AUTHORITY*, [1932] 1 K. B. 336; 101 L. J. K. B. 91; 146 L. T. 91; 48 T. L. R. 55; 75 Sol. Jo. 763; 29 L. G. R. 659.

*Annotation*:—*Refd.* *Swain v. Southern Ry. Co.*, [1938] 3 All E. R. 705.

943. *Add. Annotation*:—*Refd.* *R. v. Minister of Health, Ex p. Yaffe*, [1930] 2 K. B. 98.

961a. — *Construction of local Act.*—By Milton Creek Conservancy Act, 1899, s. 7, "No person shall . . . make or form any recess dock . . . or other work or drive any piles . . . in or upon the bed or shores of Milton Creek below high-water mark so as to impede or interfere with the navigation of the creek . . . without in every case the licence of the

Conservators." Defts., under a licence from the Conservators, erected in the creek, which was a navigable channel, a pumping plant which was concealed at high tide, & pltf.'s barge, without any negligence on the part of the master, collided with the plant & was damaged. In an action for a nuisance the ct. found that defts. had failed to give adequate warning of the existence of the obstruction:—*Held*: the sect. did not confer upon a licensee a right to create an obstruction causing damage to members of the public & the action succeeded.—*BURLEY C., LTD. v. LLOYD EDW., LTD.* (1929), 45 T. L. R. 626.

965. *Add. Annotations*:—*Refd.* *Blundy, Clark & Co. v. London & North Eastern Railway* (1931), 100 L. J. K. B. 401; *Harper v. Haden & Sons*, [1933] Ch. 298.

979. *Add. Annotation*:—*Refd.* *Seaton v. Slama* (1932), 77 Sol. Jo. 11.

1000. *Add. Annotation*:—*As to* (1) *Refd.* *Oceanic Steam Navigation Co. v. Evans* (1931), 51 T. L. R. 67.

1016. *Add. Annotations*:—*Consd.* *The Edison*, [1932] P. 52. *Refd.* *The West Wales*, [1932] P. 165; *Liesbosch S.S. Owners v. Edison S.S. Owners*, [1933] C. A. 419.

#### PART V. SECT. 3, SUB-SECT. 1.

*sm. Line of navigation—May vary.*—In a case where the channel dries up in particular seasons of the year, it is quite possible that what is within the line of navigation in one particular season is not so in another season.—*GOBINDACHANDRA PODDAR v. CHANDPUR SUBDIVISIONAL OFFICER* (1931), I. L. R. 58 Calc. 1288.—*IND.*

#### PART V. SECT. 3, SUB-SECT. 3.—B.

*sp. Erection over non-navigable stream.*—Where a person is the owner of land in the province of British Columbia through which a non-navigable stream flows, he may legally build a bridge across the stream from one part of his property to the other without the necessity of obtaining the permission or authority of the Provincial Government. Such a bridge, though built with a pier in the centre of

the stream, leaving a passage of 50 feet & over on each side thereof, is not an "obstruction" within Water Act of British Columbia. Anyone floating logs or poles down such a stream must take the necessary precautions to avoid causing damage to such a bridge by the flotation operations; & the ct. in this case finding deft. negligent, condemned it to pay damages.—*R. v. BELL LUMBER CO.*, [1932] Ex. C. R. 31.—*CAN.*

## WEIGHTS AND MEASURES.

### Part II.—Standards of Weights and Measures.

26. *Add. Annotation* :—*Apld. Phillips v. Parnaby*, [1934] 2 K. B. 299.  
*Add. Citation* :—28 Cox, C. C. 550.

### Part V.—Special Provisions.

110a. **Application of Sale of Food (Weights & Measures) Act, 1926 (c. 63), s. 12 (6)—Conditions precedent to prosecution.**—*Appld.* was convicted by justices of delivering a quantity of coal which was less than that expressed in the weight ticket, contrary to Weights & Measures Act, 1889 (c. 21), s. 21 (2). No notice in writing of the date & nature of the alleged offence had been served on or sent by registered post to *applt.* in accordance with Sale of Food (Weights & Measures) Act, 1926 (c. 63), s. 12 (6). The coal was delivered under an antecedent contract covering a number of deliveries & was purchased for consumption in or by a steam roller belonging to the purchasers :—*Held* : (1) as sect. 15 (1) of 1926 Act provided that that Act was to be construed as one with the Weights & Measures Acts, 1878–1926 (which included the Weights & Measures Act, 1889 (c. 21)), & as there was no manifest discrepancy between the provisions of sect. 12 (6) of 1926 Act, & sect. 21 (2) of 1889 Act, the conviction was bad for failure to fulfil one of the conditions precedent to a prosecution laid down by sect. 12 (6); (2) as the coal was sold for consumption by the purchaser, *applt.* was a “retailer” within sect. 12 (6) of 1926 Act, his position in that respect not being affected by the fact that the coal was delivered under an antecedent contract.—*PHILLIPS v. PARNABY*, [1934] 2 K. B. 299; 103 L. J. K. B. 575; 151 L. T. 400; 98 J. P. 383; 50 T. L. R. 446; 32 L. G. R. 270; 30 Cox, C. C. 146, D. C.

110b. — **Meaning of “retailer.”**—*PHILLIPS v. PARNABY*, No. 110a, *ante*.

119a. **Food—Sale of Food (Weights & Measures) Act, 1926 (c. 63)—Validity of Regulations.**—

By Sale of Food (Weights & Measures) Act 1926 (c. 63), s. 3, a person in offering for sale an article of food is forbidden to make any misrepresentation as to its weight. Sect. 4 (1) provides that in the case of certain specified articles [which includes lentils] the weight of the wrapper may be included in the weight purported to be sold if its weight is not proportionally heavier than specified. By sect. 4 (2) (b), the wrapper, where the article is prepacked & the weight of the wrapper is permitted to be included in the weight sold, must bear a true statement of the “minimum weight” of the article with its wrapper. By Reg. 2, cl. 8, of the Sale of Food (Weights & Measures: Prepacked Articles) Regs., 1927, in this latter case the wrapper must bear the words “gross” or “gross weight” in addition to the indication of weight. Resps. offered for sale three packets of lentils bearing on the wrappers the words “1 lb. net,” the packets in fact containing less than one pound of lentils alone :—*Held* : (1) “minimum weight” in sect. 4 (2) (b) meant minimum gross weight, & consequently resps. had made a misrepresentation as to the weights of the packets under sect. 3 of the Act, & had also infringed the provisions of Reg. 2, cl. 8, of the regulations in omitting to add the words “gross” or “gross weight”; (2) Reg. 2, cl. 8, was not *ultra vires*.—*HUGGETT v. HELP YOURSELF STORES, LTD.*, [1934] 2 K. B. 230; 103 L. J. K. B. 394; 150 L. T. 416; 98 J. P. 76; 32 L. G. R. 33; 30 Cox, C. C. 74, D. C.

119b. — **Prepacked articles—Meaning of “minimum weight.”**—*HUGGETT v. HELP YOURSELF STORES, LTD.*, No. 119a, *ante*.

### Part VIII.—Miscellaneous Terms of Measurement.

156a. — *Re ECCLESIASTICAL COMRS. FOR ENGLAND'S CONVEYANCE*, No. 158a, *post*.

158. *Add. Annotations* :—*Consd. New Plymouth Borough Council v. Taranaki Electric Power*

#### PART VI.

*sd. Condition precedent—Consent of Minister.*—Sect. 63 (2) of Weights & Measures Act, R. S. C. 1927, provides : “No proceedings shall be taken under the provisions of this section [penalising short weights & measures] except with

the consent of the Minister” :—*Held* : the required consent is not merely a condition precedent to the magistrate entertaining or trying the charge, but the sub-sect. positively prohibits the prosecution in the absence of the consent. Therefore, where the consent is not valid, the very laying & taking of

the information is illegal, & when that becomes evident on an appeal from a conviction in proceedings so instituted the ct. cannot do otherwise than declare them bad *ab initio* & set aside the conviction.—*It. v. SAFEWAY STORES, LTD.* (No. 3), [1938] 2 W. W. R. 488.—*CAN.*

Board, [1933] A. C. 680 ; *Re Ecclesiastical Comrs. for England's Conveyance*, [1936] Ch. 430.

158a. ——.].—When used in conjunction with the word “land,” the word “adjoining” in its primary sense means that which lies near so as to touch in some part the land which it is said to adjoin. Of necessity it connotes

contiguity. . . . The word “adjacent” when used in contradistinction to the word “adjoining” means, I think, that which lies near but is not in actual contact with land. The degree of proximity must depend on the circumstances of each case (LUXMOORE, J.).—*Re Ecclesiastical Comrs. for England's Conveyance*, [1936] Ch. 430 ; 105 L. J. Ch. 168 ; 155 L. T. 281.

## WILLS.

## Part I.—Nature of a Will.

19. *Add. Annotation:—Refd. Re Bund, Cruikshank v. Willis*, [1929] 2 Ch. 455.

80. *Add. Annotation:—Refd. Ariff v. Rai Jadunath Majumdar Bahadur* (1931), 47 T. L. R. 238.

83a. ———— Covenant invalid.]—A husband &

wife entered into a separation deed on May 30, 1902, wherein the husband covenanted that he would not revoke nor alter a will which he had already made. That will gave one-half of his estate to trustees upon trust for the wife & the issue of the marriage. The husband subsequently remarried &

## PART I. SECT. 1, SUB-SECT. 1.

1 i. "Release."] — *Re DONNELL*, [1930] 4 D. L. R. 1037.—CAN.

## PART I. SECT. 2, SUB-SECT. 1.

32 i. *Will distinguished from settlement.*—If a document is "consummate" to create a trust in *presenti* although one to be performed after the death of the donor, it is not dependent upon his death for its vigour & effect, & therefore, is not testamentary.—*CORLET v. ISLE OF MAN BANK, LTD.*, [1937] 2 W. W. R. 209; 3 D. L. R. 163.—CAN.

d i. *Document in form of will passing no property.*—A woman procured a printed form of will & partly filled it in, so that it purported to "give devise & bequeath" to her husband, but did not contain any statement of the property to be disposed of or any appointment of an executor. The document was duly executed as required by law in the case of a will.—*Held*: as the document contained no disposition of property, it could not be regarded as a will & should not be admitted to probate.—*Re FAIRCHILD*, [1931] V. L. R. 289.—AUS.

sb. *Decd.—Operative on death.*—An instrument, even though in the form of a deed, which is not to become operative until the maker's death is testamentary in its character & its operation depends upon its execution complying with *Manitoba Wills Act*, R. S. M. 1913.—*Re PRIMMER ESTATE*, [1936] 1 W. W. R. 609; 44 Man. L. R. 96.—CAN.

## PART I. SECT. 2, SUB-SECT. 2.—A. (a).

36 i. *Tests for ascertainment.*—Where a will is made subject to a clearly expressed condition that it is to be subject to the happening of a specified contingency, e.g., the testator's death before a certain time or during a certain surgical operation, the will does not take effect unless the condition is fulfilled; but, if the will is so expressed as to show that the contingency is only the motive for making the will, the will is not conditional but takes effect whether the event happens or not.—*Re SWORDS ESTATE* (Alta.), [1929] 3 D. L. R. 564; 2 W. W. R. 245.—CAN.

## PART I. SECT. 3, SUB-SECT. 1.

79 vi. ————]—*FOLSETTER v. YORKSHIRE & CANADIAN TRUST CO.*, [1932] 2 W. W. R. 382; 3 D. L. R. 190; 45 B. C. R. 315.—CAN.

79 vii. ————]—Specific performance granted of an oral agreement to leave property by will in consideration of an executed agreement to take care of the promisor during illness.—*BARNES v. CUNNINGHAM*, [1933] 3 D. L. R. 653; 6 M. P. R. 521.—CAN.

79 viii. ————]—*Re SMITH ESTATE*,

[1934] 3 W. W. R. 351; 49 B. C. R. 79.—CAN.

79 ix. ————]—S. offered to leave plff. his horse property, furniture & one half of his money left after paying his debts, if plff. should keep house for him & look after him until his death, in a manner satisfactory to him. The letters containing the offer could not be produced. Plff. accepted the offer & kept house for & attended to S. for 14 months. Then, on Sept. 26, 1934, S. made a will making said provision for her. The will also provided that the devise & bequests to her should be null & void if she "shall leave me & cease to care for me." On Feb. 5, 1935, plff. & S. had a quarrel & she left his house. On that day he made a new will which made no mention of her. On the second day after she had left him S. asked plff. to return. She did so & continued her duties as housekeeper & nurse until S.'s death. No wages were ever paid plff. The second will was admitted to probate. Deft. was the exor. named therein. Plff. knew nothing of that will until S.'s death. Plff. sued for specific performance of the contract. *ADAMSON, J.*, dismissed the action, & plff. appealed.—*Held*: the appeal should be allowed.—*BRIESE v. DUGARD* (No. 2), [1936] 1 W. W. R. 193; 1 D. L. R. 723; 43 Man. L. R. 489.—CAN.

79 x. ————]—A verbal promise to devise property which included real estate, in consideration of services rendered, is within Stat. Frauds & where not partly performed is unenforceable against the promisor.—*STRATCHUK v. MONTREAL TRUST CO.*, [1936] 3 D. L. R. 310.—CAN.

sg. *Application of Statute of Frauds.*—Plff. sued defts., the personal representatives of C., for damages for breach of contract whereby C. had promised to make a will in plff.'s favour leaving her his fortune consisting of 4/7th interest under his deceased father's will & his insurance policy. At the death of C., his deceased father's estate consisted of certain mtges. of land, accrued interest, & two blocks of vacant land. C. had become entitled to four 1/7th shares in this estate as next-of-kin of certain of his children. The alleged contract was oral, & at the trial of the action plff. was non-suited on the ground that the contract related to land & there was no note or memorandum in writing of the contract as required by Statute of Frauds. Upon appeal.—*Held*: since the property included land, the interest of C. under his father's will derived through his children, was an interest in land, & plff. was properly non-suited. *Semble*: a mtge. of land is an interest in land for the purposes both of sect. 4 of the Statute of Frauds & of sect. 54 (A) of Conveyancing Act, 1919–1930.—*HORTON v. JONES* (1934), 34 S. R. N. S. W. 359; 51 N. S. W. W. N. 126; *aff'd*, 53 C. L. R. 475; 8 A. L. J. 470; 41 Argus L. R. 177; 35 S. R. N. S. W. 397; 52 N. S. W. W. N. 138.—AUS.

sk. *Death of intended donee in lifetime of testator.*—E. transferred to her brother, W., her interest in a property in consideration of a written promise by W. to re-transfer the same to E. by leaving such interest to her in his will. E. died, & subsequently W. made a will, but omitted therein to perform his promise. In a suit praying in effect for specific performance of the contract as against the exors. of the will of W., an amended statement of claim alleged that from the date of making of the contract up to the date of his death W. was under a moral obligation to make a will in performance of his contract, & save as next hereinafter mentioned, W. recognised that he was under such moral obligation; that shortly prior to the date of his will W. believed he was not under any such moral obligation as aforesaid & while holding such belief & on account of the same made his will; but that subsequently thereto, W. again recognised his said moral obligation, & formed an intention to discharge the same, & continued to have such intention up to his death, which, however, occurred before he could carry out such intention & discharge such obligation. On demurrer to the statement of claim.—*Held*: the ct. was not justified in extending to the case of a notional gift or will the doctrine stated in *Stevens v. King*, [1904] 2 Ch. 30, at p. 33, as to the exception to the general rule that a gift by will lapses on the death of the donee in the lifetime of testator. Further, the principles stated in *Syngue v. Syngue*, [1894] 1 Q. B. 466, at pp. 470, 471, could not be extended or applied so as to entitle plff. to a decree. As it was not contended that W. was bound by his contract, or was under any moral obligation, to provide against lapse in his will, the case was governed by the decision in *In re Brookman's Trust*, L. R. 5 Ch. 182; & in the events which had happened the breach of contract was merely an *injuria sine damno*.—*MCDONALD v. MCDONALD* (No. 2), (1935), 35 S. R. N. S. W. 463; 52 N. S. W. W. N. 145.—AUS.

sm. *Subject-matter must be certain.*—Testator, an American citizen, was married in America in 1893, & in 1896, while his wife was still living, he went through a form of marriage in Bermuda with another woman, C. M. H., whom he brought to New Zealand, where he lived with her until 1920, she bearing him eight children. He then obtained a decree of divorce against her. When he died, in 1920 his lawful wife was alive in America & C. M. H. was alive in New Zealand. In his will, testator used these words: "To C. M. H. divorced I wish my trustees to make such provision for her maintenance as the exigencies of the funds will permit & requiring the beneficiaries to contribute to her support." On originating summons asking what rights, if any, were conferred on C. M. H., & what duties, if any, were cast upon the administrator & the beneficiaries, & what powers, if any, conferred, upon the administrator by

made a new will not giving the one-half of his estate to trustees upon the then subsisting trusts of the first will. The question upon this summons was whether or not the covenant not to revoke the former will was void:—*Held*: the covenant was not enforceable. A covenant not to revoke a will which is broken either by marriage or by remarriage is, to that extent, not enforceable, as being in restraint of marriage & against public policy.—*Re MARSLAND, LLOYDS BANK, LTD. v. MARSLAND*, [1938] 4 All E. R. 279.

93. *Add. Annotation*:—*Dbtd. & Dlst. Re* *Duddell, Roundway v. Roundway*, [1932] 1 Ch. 585.

98. *Add. Annotation*:—*Folld. Re* *Hack (A.)* (1930), 169 L. T. Jo. 284.

98a. ————.—*Re* *HACK (A.)* (1930), 169 L. T. Jo. 285.

105. *Add. Annotation*:—*Refd. Re* *Hagger, Freeman v. Arscott*, [1930] 2 Ch. 190.

106. *Add. Annotation*:—*Apld. Re* *Hagger, Freeman v. Arscott*, [1930] 2 Ch. 190.

108a. ————.—*]*—A husband & wife made a joint will, whereby they left certain property, which each possessed at the time of the death of the spouse first dying, to the survivor for life with certain absolute remainders over, & they agreed that the will should not be revoked without their mutual consent. The wife died first, & as from her death the husband received the income from the whole estate until his death:—*Held*: from the death of the wife the property of which the husband was then possessed was subject to a trust under which the legatees in absolute remainder took vested interests subject to the life interest of the husband; & the death of such a legatee after the death of the wife but before the death of the husband did not occasion a lapse.—*Re Hagger, Freeman v. Arscott*, [1930] 2 Ch. 190; 99 L. J. Ch. 492; 143 L. T. 610.

112. After this case add:—

**Exercise of power of appointment by joint will.**—*See* *POWERS*, No. 269a.

## Part II.—Power of Disposition by Will.

131. *Add. Annotation*:—*Consd. Re* *Franklin & Swathling's Arbn.*, [1929] 1 Ch. 238.

132. *Add. Annotation*:—*Refd. Parker v. Judkin*, [1931] 1 Ch. 475.

229a. — *Delusions affecting one clause Deletion of clause from declaration.*—The testator made his will on Nov. 26, 1926, & subsequently executed four codicils, the last in 1932. The bequests were quite ordinary ones to relatives, servants & charities. The codicil of 1932 declared in clause 2 that the gift to charities should be read as if the word "England" had been deleted therefrom & the words "United States of America" substituted therefor. The evidence showed that the testator did not enjoy the best of health & often treated his relatives in a harsh manner. He had, however, at all times been a man of exceptional acumen in managing his private affairs, which chiefly concerned the investment of his capital in stocks & shares. In the last years of his life he was clearly suffering from a delusion that the London County Council were acting improperly in order to dispossess him of his house, which the council desired to acquire for hospital purposes. It was found as a fact that the testator was suffering from a delusion—that he was a paranoid psychopath—at the time the codicil was made in 1932, but that the only testamentary disposition affected thereby was the substitution of the words "United States of America"

for "England" referred to above:—*Held*: the will & codicils were valid testamentary dispositions except clause 2 of the codicil of 1932, which should be deleted therefrom.—*In the Estate of BOHRMANN, CAESAR & WATMOUGH v. BOHRMANN*, [1938] 1 All E. R. 271; 158 L. T. 180; 82 Sol. Jo. 176.

239. *Add. Annotation*:—*Refd. Re* *Carrington Ralphs v. Swithenbank*, [1932] 1 Ch. 1.

239a. **Creation of estate tail—Death after commencement of Law of Property Act, 1925 (c. 20)—Necessity for.**—Under Law of Property Act, 1925 (c. 20), s. 130, the power to create an entailed interest in personal estate can be exercised by will only in the case of a testator who dies after the commencement of the Act. Therefore, where testator, who died in 1912, by his will settled certain chattels including three family portraits to be held upon trusts which should as nearly as the rules of law & equity permitted correspond with the limitations of real estate in tail, & set out such limitations at length, but settled no real estate upon the same limitations:—*Held*: testator had attempted to create an entailed interest in the chattels but had not succeeded, & therefore the trustees of his will had no power to sell them under sect. 130 (5). But the ct., deeming it in the circumstances expedient, would make an order authorising the sale of the portraits by the trustees under Trustee Act, 1925 (c. 19), s. 57.—*Re HOPE'S*

the will:—*Held*: the bequest under the clause of the will as above quoted was void for uncertainty & conferred no rights on C. M. H., & no liability on the administrator or the beneficiaries. *Aliter*: if the clause had merely provided for the maintenance of C. M. H.—*Re* *S. B. H., PUBLIC TRUSTEE v. B. F. H.*, [1936] N. Z. L. R. 756; G. L. R. 552; 12 N. Z. L. J. 250.—N.Z.

**PART I. SECT. 4, SUB-SECT. 1.**  
104 i. For "S. AF." read "CEYLON."

**PART I. SECT. 4, SUB-SECT. 2.**  
106 viii. ————.—*]*—The fact that a husband & wife have simultaneously made mutual wills, giving each to the other a life interest with similar provisions in remainder, is not in itself evidence of an agreement not to

revoke the wills: in the absence of a definite agreement to that effect there is no implied trust precluding the wife from making a fresh will inconsistent with her former will, even though her husband has died & she has taken the benefits conferred by his will.—*GRAY v. PERPETUAL TRUSTEE CO., LTD.*, [1928] A. C. 391; 40 C. L. R. 358; [1928] Argus L. R. 235.—AUS.

WILL TRUST, *HOPE v. THORP*, [1929] 2 Ch. 136; 98 L. J. Ch. 249; 141 L. T. 509.

239b. — **Necessity for use of statutory form.**—A testator, whose will was executed before 1926, devised his residuary estate after the death of his wife upon trust to pay the income to the beneficiary in possession of the P. Estate under the will of his uncle. The wife died in 1933. The residuary estate was entirely personalty. By the will of the uncle the P. Estate was devised to the use of his son R. for life with remainder to his sons successively in tail with remainder to his son H. for life with remainder to his sons in tail with remainder over to testator's right heirs. R. had no issue & was in possession of the P. Estate as tenant for life. H. had one son, B., who was living & had an infant son. The question arose whether the law in force before 1926 applied, under which B. as the first tenant in tail would take the personalty absolutely subject to the prior life interests, or whether under Law of Property Act, 1925 (c. 20), s. 130 (3), an estate tail had been created in the personalty, so that the infant son of B. was entitled in tail until his father executed a disentailing assurance:—*Held*: the sub-sect. does not operate unless there is in the will to be construed a direction that the personalty shall be held upon trusts described in the exact words of the sub-sect.; such words not being used in this will, the sub-sect. did not apply: & after the death of the wife the property was to be held under the law in force before 1926.—*Re JONES, PUBLIC TRUSTEE v. JONES*, [1934] Ch. 315; 103 L. J. Ch. 102; 150 L. T. 400; 78 Sol. Jo. 82.

265. *Add. Annotations*:—**Distd.** *Re Sullivan, Dunkley v. Sullivan* (1929), 45 T. L. R. 590. **Consd.** *Re McKee, Public Trustee v. McKee*, [1931] 2 Ch. 145.

299a. **Disclaimer by donee—Intestacy—Application of Administration of Estates Act, 1925 (c. 23), ss. 33 (5), 46, 49.**—Testator who owned certain musical copyrights, & who died in 1928, by his will gave the residue of his estate, including the copyright royalties, on trust for his wife for life & afterwards for his children, & directed that the royalties should be treated as capital. Testator left a widow but no children:—*Held*: as there was a partial intestacy, namely, as to the capital of the residue, the direction would not apply if the widow disclaimed her life interest under the will, & the result of the disclaimer would be that the widow would take a life interest in the residue, including the royalties.—*Re SULLIVAN, DUNKLEY v. SULLIVAN*, [1930] 1 Ch. 84; 99 L. J. Ch. 42; 142 L. T. 187; 45 T. L. R. 590.

*Annotation*:—**Consd.** *Re Thornber, Crabtree v. Thornber*, [1936] 2 All E. R. 1594.

299b. **Death of remaindermen in lifetime of widow.**—By his will testator who died in 1928, after making certain bequests, devised & bequeathed all his real & personal estate not otherwise disposed of to his trustee upon trust for sale & conversion, & after paying his funeral & testamentary expenses, debts

& legacies, to invest the net residue, & to stand possessed of the net residue & the investments thereof upon trust to pay the income to his wife for life, & after her death to divide the same between his surviving brothers & sisters. The last of the brothers & sisters died in 1930. The widow was still living. On the construction of the will surviving brothers & sisters was held to mean brothers & sisters surviving the widow, & there was therefore an intestacy as to the reversionary interest in the testator's residuary estate expectant on the widow's death:—*Held*: the reversionary interest ought not to be forthwith sold.—*Re MCKEE, PUBLIC TRUSTEE v. MCKEE*, [1931] 2 Ch. 145; 100 L. J. Ch. 325; 145 L. T. 605; 47 T. L. R. 424; 75 Sol. Jo. 442, C. A.

*Annotation*:—**Consd.** *Re Thornber, Crabtree v. Thornber*, [1936] 2 All E. R. 1594.

299c. **Provision for accumulation for children—Death without issue.**—A testator, after bequeathing an annuity to his mother, directed his trustees out of the annual income of his residuary estate to pay an annuity to his wife, & he further directed that the surplus income of his residuary trust fund should be accumulated during the life of his wife or for twenty-one years from his death (whichever period was the shorter); & he directed that at the expiration of the period of accumulation his residuary trust fund should be held upon trust, as to both capital & income & the accumulations of such income, for his children. Testator died without issue, & his widow claimed that she was entitled to call on the trustees to stop the accumulation of any surplus income of the residuary estate & deal with any such surplus income as upon an intestacy. Testator's mother claimed that the accumulations ought to be continued:—*Held*: testator having died without issue there was no effective disposal by his will within sect. 49 of Administration Estates Act, 1925 (c. 23), of the residuary estate, & the direction to accumulate the income was not a direction to which the property not effectively disposed of by the will was subject. Therefore, subject to making provision in due course of administration for the annuity given to testator's mother, the trustees ought not to accumulate the surplus income, but that it ought to be dealt with as income from the residuary estate undisposed of by testator.—*Re THORNBUR, CRABTREE v. THORNBUR*, [1937] Ch. 29; [1936] 2 All E. R. 1594; 106 L. J. Ch. 7; 155 L. T. 223; 80 Sol. Jo. 689, C. A.

299d. **Leaseholds held on statutory trust for sale.**—A testator gave the income of the whole of his real & personal estate to two persons in equal shares. The will contained no express trust for sale, but, having regard to the provisions of the Law of Property Act, 1925, relating to property held in undivided shares, the land included in the gift would become subject to a statutory trust for sale, including a power to postpone the sale. The gift included certain long leaseholds, & it was contended that the rule in *Howe v. Dartmouth (Earl)* (1802), 7 Ves. 137; 44 Digest 197, 265, did not apply to such a gift, since

PART II. SECT. 3, SUB-SECT. 2.—C. (a).

265 I. **Necessity for conversion into permanent securities.**—*Re BINGHAM*, [1931] 1 D. L. R. 248; 66 O. L. R. 121.—**CAN.**



it had been previously decided that, in the case of such a gift, where there was an express trust for sale with power of postponement in the will, that rule did not apply:—*Held*: the rule in *Howe v. Dartmouth (Earl)*, *supra*, does not apply to a gift of leaseholds subject to the statutory trust for sale with power of postponement arising under Law of Property Act, 1925 (c. 20), ss. 34, 35.—*Re BERTON, VANDYK v. BERTON*, [1938] 4 All E. R. 286; 159 L. T. 506; 55 T. L. R. 40; 82 Sol. Jo. 890.

- 373a. —.—.]—A testator gave all his property to his trustee upon trust for sale with power to postpone the sale thereof “& to retain any investments subsisting at my death whether of the kind hereinafter authorised or not so long as he shall think proper & this notwithstanding that the property affected may be of a leasehold tenure or otherwise of a perishable or wasting or wearing out nature & in particular my trustee shall not sell my securities in concerns in North or South American within three years of my death unless of opinion that any further recovery of price of any such security during such period is unlikely.” Then followed the following clause negating apportionment: “the net profits & income received after my death from time to time of any unconverted property whatever its nature shall be applied without apportionment as if the same were income accruing after my death from the proceeds of the conversion thereof.” The question was whether the latter clause merely

excluded the application of the rule in *Howe v. Dartmouth (Earl)* (1802), 7 Ves. 137; 44 Digest 197, 265, or whether it also excluded the application of the Apportionment Act, 1870 (c. 35):—*Held*: the clause was appropriate to exclude the rule in *Howe v. Dartmouth (Earl)*, *supra*, only, & the provisions of the Apportionment Act, 1870 (c. 35), must be applied.—*Re BATE, PUBLIC TRUSTEE v. BATE*, [1938] 4 All E. R. 218.

411. *Add. Annotation*:—*Folld. Re Wavertree, Rutherford v. Walker*, [1933] Ch. 837.  
 412. *Add. Annotation*:—*Folld. Re Wavertree, Rutherford v. Walker*, [1933] Ch. 837.  
 412a. —.—.]—Testator bequeathed to his adopted daughter R. “such of the furniture & household effects which at the date of my death shall be in or about either of my residences H. or S. as she may select for the purpose of furnishing a residence for my said adopted daughter”:—*Held*: (1) the legatee was entitled to select from both of the houses; (2) “household effects” included motor cars, consumable stores, garden implements & tools & movable plants; (3) there was no quantitative limit to the power of selection, but the legatee was entitled to the whole of the furniture & household effects in the two houses.—*Re WAVERTREE OF DELAMERE (BARON), RUTHERFORD v. HALL-WALKER*, [1933] Ch. 837; 102 L. J. Ch. 367; 149 L. T. 418; 49 T. L. R. 515; 77 Sol. Jo. 468.

## Part IV.—Capacity to Benefit under Will.

454. *Add. Annotation*:—*Consd. Re Belliss, Polson v. Parrott* (1929), 141 L. T. 245.

- 479a. —.—.]—Testator directed that the income of his residuary estate should be paid to his son for life, & after his death be held in trust for the son’s “children or reputed children,” as the son should by will or codicil appoint. The son had two legitimate children, one predeceasing him & the other being expressly excluded by testator’s will from benefiting under the power of appointment, & three illegitimate children, to the second & third of whom, under the power, he appointed the income of testator’s residuary estate in equal shares by his will, in which he described them by name & as his “children or reputed children.” For many years payments of the income were made for the benefit of the children. On a summons to determine (*inter alia*) whether the trusts in favour of “children or reputed children” were void

as contrary to public policy as regards reputed children of the son (a) living at or (b) born after the date of the will:—*Held*: the power of appointment was valid, & the son’s appointment of the income to his “children or reputed children” named in his will was a proper exercise of the power.—*Re HYDE, SMITH v. JACK*, [1932] 1 Ch. 95; 101 L. J. Ch. 95; 146 L. T. 255; 75 Sol. Jo. 781.

487. *Add. Annotation*:—*Consd. Re Hyde, Smith v. Jack*, [1932] 1 Ch. 95.  
 489. *Add. Annotation*:—*Refd. Re Hyde, Smith v. Jack*, [1932] 1 Ch. 95.  
 491. *Add. Annotation*:—*Refd. Re Hyde, Smith v. Jack*, [1932] 1 Ch. 95.  
 504. *Add. Annotations*:—*Consd. Re Pitts, Cox v. Kilsby*, [1931] 1 Ch. 516. *Apld. Re Sigs-worth, Bedford v. Bedford*, [1935] Ch. 89. *Consd. Beresford v. Royal Insurance Co.*, [1938] A. C. 586. *Refd. Re Collier*, [1930]

### PART II. SECT. 3, SUB-SECT. 2.—C. (b) iii.

358 i. *Discretion given to trustees*.]—A testator devised & bequeathed his residuary estate upon trust for his widow for her life, with remainder over. He empowered his trustees, “at their discretion to sell & dispose of or to postpone the sale & disposal of any part” of his estate. Part of his residuary estate consisted of shares in gold mining cos. & other unauthorised investments, & part consisted of a reversionary interest:—*Held*: the application of the rule in *Howe v. Earl of Dartmouth* (1802), 7 Ves. 137a, was

excluded by the discretionary power to sell or to postpone the sale, given by the will to the trustees, accordingly, the life tenant was entitled pending conversion to the whole of the income from the residuary estate, but she was not entitled to share in the capital of that part of the estate which consisted of the reversionary interest.—*Re LEVIEN, TRUSTEES EXORS. & AGENCY CO., LTD. v. LEVIEN*, [1937] V. L. R. 80; 43 Angus L. R. 39.—*AUS.*

### PART III. SECT. 1.

p. *Add. Citation*:—*varied* (1925), 57 O. L. R. 673.

55. *Loss of power of speech & writing*.]—A codicil is valid although the testator had lost the power of speech & ability to write after an epileptic fit, as she was able to understand the nature & effect of her act.—*Re SOUCH*, [1938] 1 D. L. R. 563; O. R. 48.—*CAN.*

### PART IV. SECT. 2, SUB-SECT. 2.—B.

452 iii. —.—.]—Where a legatee who prepares a will obtains only a small share, suspicion extends only to that share.—*Re MACKAY’S ESTATE* (1935), 8 M. P. R. 526.—*CAN.*

2 Ch. 37; *Cousins v. Sun Life Assurance Society*, [1933] Ch. 126; *Re Clay's Policy of Assurance, Clay v. Earnshaw*, [1937] 2 All E. R. 548. **Refd.** *Re Foster, Hudson v. Foster*, [1938] 3 All E. R. 357; *Re Sinclair's Life Policy*, [1938] 3 All E. R. 124.

505. **Add. Annotation** :—**Consd.** *Beresford v. Royal Insurance Co.*, [1938] A. C. 586.

506. **Add. Annotations** :—**Consd.** *Re Pitts, Cox v. Kilsby*, [1931] 1 Ch. 546; *Re Sigsworth, Bedford v. Bedford*, [1935] Ch. 89.

506a. ———. ]—A coroner's jury found a verdict against X. of wilful murder of his

mother & of *felo de se*. X. was named as the sole beneficiary under his mother's will. On a summons taken out to determine the devolution of the mother's estate :—**Held** : the rule of public policy which prevented X. (or his estate) from benefitting under the mother's will also debarred his personal representative from participating as such in the intestacy from the death of the mother caused by the son's act.—*Re SIGSWORTH, BEDFORD v. BEDFORD*, [1935] Ch. 89; 104 L. J. Ch. 46; 152 L. T. 329; 51 T. L. R. 9; 78 Sol. Jo. 735.

**Annotation** :—**Refd.** *Beresford v. Royal Insurance Co.*, [1937] 2 K. B. 197.

## Part V.—Formalities of Will or Codicil.

597. **Add. Annotations** :—**Refd.** *Smith v. Thompson* (1931), 146 L. T. 14; *In the Estate of Musgrave, Tidy v. Musgrave*, [1934] Ch. 402, n.; *Re Hawksley's Settlement, Black v. Tidy* (1934), 151 L. T. 299.

597a. ———. **Execution prevented by death.** ]—Instructions for a will containing the fixed, & final, intentions of the deceased are valid, if the formal execution is prevented by death; & if there is no evidence of insanity, at the time of giving the instructions, the commission of suicide, three days afterwards will not invalidate the paper by raising an inference of previous derangement.—*BURROWS v. BURROWS* (1827), 1 Hagg. Ecc. 109; 162 E. R. 524.

**Annotation** :—**Refd.** *Godman v. Godman*, [1920] P. 261.

633. **Add. Annotations** :—**Refd.** *In the Estate of Musgrave, Tidy v. Musgrave*, [1934] Ch. 402, n.; *Re Hawksley's Settlement, Black v. Tidy* (1934), 151 L. T. 299.

635. **Add. Annotations** :—**Refd.** *In the Estate of Musgrave, Tidy v. Musgrave*, [1934] Ch. 402, n.; *Re Hawksley's Settlement, Black v. Tidy* (1934), 151 L. T. 299.

651. **Add. Annotation** :—**Consd.** *Palin v. Ponting*, [1930] P. 185.

653. **Add. Annotations** :—**Refd.** *In the Estate of Musgrave, Tidy v. Musgrave*, [1934] Ch. 402, n.; *Re Hawksley's Settlement, Black v. Tidy* (1934), 151 L. T. 299.

673. **Add. Annotation** :—**Consd.** *Palin v. Ponting*, [1930] P. 185.

712a. **Reference to deed—Deed inoperative.** ]—On Apr. 15, 1935, a testator executed a document in the form of a deed expressed to be made between testator, his brother, his sister & 7 named persons as trustees, which

stated that each of the first three parties thereto covenanted with the others that he or she would execute a will whereby all his or her residuary estate should be given to the trustees upon the trusts therein mentioned, being charitable trusts for the establishment & endowment of a hospital. The instrument was also executed by testator's brother, but not by his sister or the trustees. On Apr. 25, 1935, testator by a codicil to his will revoked the gift of his residuary estate contained in his will & directed his exors. "to stand possessed thereof upon trust to pay & transfer the same to the persons (naming them) named in a deed dated Apr. 15, 1935, to be the trustees of such deed or the survivors of them or other the persons who are for the time being the trustees of such deed (hereinafter referred to as the 'charity trustees') to be held by the charity trustees upon the trusts in the said deed declared." The testator died & the question arose whether his exors. ought to hand over his residuary estate to the persons named as trustees in the instrument of Apr. 15, 1935, to be held by them upon the trusts therein expressed :—**Held** : testator by his codicil intended to give his residuary estate to the trustees of an operative deed to be held by them upon the trusts of that deed, & as the instrument referred to never became an operative deed, the exors. ought not to hand over the testator's residuary estate to the persons named as trustees in that instrument.—*Re HURDLE, BLAKENEY v. HURDLE*, [1936] 3 All E. R. 810.

717a. ———. **Codicil commencing "this is the last will & testament."** ]—A testamentary paper headed "Codicil to be attached to my will," & proceeding "This is the last will & testa-

### PART IV. SECT. 2, SUB-SECT. 9.

505 ii. ———. **Suicide pact.** ]—Husband & wife entered into a "suicide pact," & in pursuance thereof the wife drank arsenical poison & four hours later the husband drank the poison. The wife died but the husband survived :—**Held** : the husband was not entitled to any share in his deceased wife's estate either under her will or as on an intestacy.—*WHITELAW v. WILSON*, [1934] O. R. 415; 3 D. L. R. 554; 62 C. C. C. 172.—**CAN.**

### PART V. SECT. 1, SUB-SECT. 1.

a. **Holograph codicil.** ]—To establish

a holograph codicil it must satisfactorily appear that the testator intended to exercise the right given by the statute to make a holograph codicil to an already executed will. To be a codicil it must appear to have been intended to be a part of the will, making the two one instrument, a document to be read as part of & with the will itself.—*Re FOULDS ESTATE*, [1938] 1 W. W. R. 186.—**CAN.**

### PART V. SECT. 1, SUB-SECT. 4.—A.

m i. ———. ]—The holograph document in question herein which was put forward as a codicil to a will held not

to be of testamentary character. *McMURTRY v. SCARROW & SCARROW*, [1938] 2 W. W. R. 39; 46 Man. L. R. 86.—**CAN.**

### PART V. SECT. 1, SUB-SECT. 4.—D.

597 ii. ———. ]—*Re DUNLOP* (Ont.), [1929] 1 D. L. R. 542.—**CAN.**

### PART V. SECT. 1, SUB-SECT. 5.—B. (a).

629 i. **Whether document incorporated in will—Necessity for reference.** ]—*Re POOLE, STEWART v. POOLE* (P. E. I.), [1929] 1 D. L. R. 418.—**CAN.**

ment of A. B." did not expressly or by implication revoke an earlier will, although it effected a substantial difference in the destination of a large portion of the property passing. The same paper bore, in addition to the signature of the testator, the signatures of four persons, two of whom were beneficiaries under it; all four signatures had been placed on the paper at the time of attestation, & there was evidence that the two beneficiaries signed otherwise than as attesting.—*Held*: (1) the words "last will & testament" did not preclude the admission to probate of both papers; (2) probate of the codicil might go without including the names of the two beneficiaries as attesting witnesses.—*KITCAT v. KING*, [1930] P. 266; 99 L. J. P. 126; 143 L. T. 408; 46 T. L. R. 617; 74 Sol. Jo. 488.

**727. Add. Annotations:—***Consd. Jones v. Treasury Solicitor* (1932), 48 T. L. R. 615. *Refd. In the Estate of Musgrave, Tidy v. Musgrave*, [1934] Ch. 402, n.; *Re Hawksley's Settlement, Black v. Tidy* (1934), 151 L. T. 299.

**729. Add. Annotation:—***Apld. Kitcat v. King*, [1930] P. 266.

**769a. Thumb-mark.**—Being unable to sign his will an illiterate testator pressed his thumb, which had been smeared with ink, at the foot of his will, & this form of signature was duly attested by two witnesses.—*Held*: the will was duly executed, though the method of making testator's mark did not commend itself to the ct.—*In the Estate of FINN* (1935), 105 L. J. P. 36; 154 L. T. 242; 52 T. L. R. 153; 80 Sol. Jo. 56.

**801. Add. Annotation:—***Consd. In the Estate of Roberts (W. E.)*, [1934] P. 102.

**801a. —.**—[Testator filled the whole of a sheet of paper with the dispositions of a holograph

will leaving no space at the foot of the sheet for his own signature or those of attesting witnesses. These were placed on the left-hand margin of the paper at right angles to the dispositions of the will, the names, descriptions & addresses of the witnesses occupying the lower & the signature of testator the upper margin.—*Held*: the will was duly executed.—*In the Estate of ROBERTS*, [1934] P. 102; 103 L. J. P. 61; 151 L. T. 79; 50 T. L. R. 321; 78 Sol. Jo. 319.

**802a. Signature at top of sheet.**—A lady got some one to write on a single sheet of paper her wishes for the disposal of her property after her death. There was no room at the end of the writing for her signature, so she signed at the top of the sheet, & her signature there was duly witnessed.—*Held*: the document was not a valid will as it was directly within the prohibition in Wills Amendment Act, 1852 (c. 24), that no signature should be operative to give effect to any disposition or direction which was underneath or which followed it.—*Re STALMAN, STALMAN v. JONES* (1931), 145 L. T. 339, C. A.

*Annotations:—Consd. In the Goods of Smith (M. M.)*, [1931] P. 225; *In the Estate of Roberts (W. E.)*, [1934] P. 102.

**820. Add. Annotation:—***Fold. In the Estate of Roberts (W. E.)*, [1931] P. 102.

**830. Add. Annotations:—***Distd. Re Stalman, Stalman v. Jones* (1931), 145 L. T. 339. *Apld. In the Goods of Smith (M. M.)*, [1931] P. 225. *Consd. In the Estate of Long*, [1936] 1 All E. R. 435.

**831. Add. Annotations:—***Consd. In the Goods of Smith* (1931), 47 T. L. R. 618; *In the Estate of Long*, [1936] 1 All E. R. 435.

**831a. —. —. —.**—[Holograph testamentary dispositions so written as to stand after the executive clause, which was in a printed

## PART V. SECT. 2.

**50. Will typed by testator & signed.**—A typewritten testamentary document was found in the repositories of a deceased bank agent, to which was appended his signature in writing. An addition, also typewritten, had been made to the original document, altering one of its provisions, & his written signature was also appended to it. The original document & the addition each contained a statement, also typewritten that they were "accepted as holograph." In a special case brought to determine the validity of the document as a testamentary writing, the parties were agreed in stating that both of the signatures were those of deceased, & further that, owing to a physical disability, he had for some time prior to his death invariably used a typewriter for his communications in writing, & that the whole of the document in question had been typewritten by him.—*Held*: as the document was a document admittedly typewritten in its entirety by testator, who had appended his written signature to it, it could competently be treated as holograph of testator, & accordingly, it fell to receive effect as a valid testamentary writing.—*M'BEATH'S TRUSTEES v. M'BEATH*, [1935] S. C. 471.—*SCOT*.

## PART V. SECT. 3, SUB-SECT. 1.

**1. —.**—[Testator in his trust-disposition & settlement directed his trustees "to pay, implement & fulfil any legacies or bequests which I may leave or bequeath by any writing under my hand, however informally the same

may be expressed or executed." Some time prior to his death he delivered to his law agents, who had custody of his trust-disposition & settlement, a sealed envelope bearing the following holograph endorsement: "To be placed with my Last Will & Testament—T. R." After his death the envelope was found to contain three documents of a testamentary character, all holograph of the testator. Only one was signed. One of the unsigned documents began in these terms: "I T. R. desire to make the following alterations & additions to my last Will & Testament namely." Certain directions followed, & the document concluded with these words: "Written by my own hand at L. A. the 17th day of October 1921"—*Held*: the trustees were bound to give effect to the directions contained in the unsigned document, on the ground that the facts connected with the document, taken in conjunction with the directions in the trust-disposition & settlement, showed that testator intended it to be read along with his formal settlement, of which he had effectually made it a part.—*RONALDS' TRUSTEES v. LYLE*, [1929] S. C. (Cl. of Sess.) 104.—*SCOT*.

**2. Will typewritten & signed by testator.**—A will wholly typewritten by testator & signed by him is a good holograph will under sect. 10 of Manitoba Wills Act, R. S. M., 1913.—*Re NESBITT ESTATE*, [1933] 3 W. W. R. 171.—*CAN*.

## PART V. SECT. 3, SUB-SECT. 4.

**780 i. Signature in name of person**

*requested to sign—Notary.*—A testamentary document in Scotland specifically dealt with real estate in Ontario. The document was executed before C., a notary public, & was signed, in the presence of two witnesses, by C. & not in the name of testator, C. signing his own name & the witnesses signing a statement that they had heard authority given to C. & heard the document read over to B., who declared he could not write.—*Held*: a good compliance with Wills Act, R. S. O., 1927, s. 11.—*Re DEELEY & GREEN*, [1930] 1 D. L. R. 603; 64 O. L. R. 535.—*CAN*.

## PART V. SECT. 3, SUB-SECT. 5.—B.

**1. —.**—[*In the Will of MORONEY* (1928), 28 S. R. N. S. W. 553; 45 N. S. W. W. N. 147.—*AUS*.

## PART V. SECT. 3, SUB-SECT. 5.—C.

**1. Execution invalid.**—The whole of a will, except testator's signature, was written on one side of a single sheet of paper. The signature appeared in the middle of the back of the sheet.—*Held*: the will was invalid as it was not signed at the foot or end thereof, nor was the signature so placed that it was apparent on the face of the will that testator intended to give effect by such his signature to the writing signed as his will.—*Re MORGAN*, [1931] V. L. R. 191; *Argus L. R.* 150.—*AUS*.

## PART V. SECT. 3, SUB-SECT. 5.—D.

**2a. Signature appearing as endorsement.**—*Re DYTRYCH*, [1928] V. L. R. 144; [1928] *Argus L. R.* 88.—*AUS*.

form:—*Held*: to be part of the will & entitled to probate, being written before execution, & the page executed not containing any disposition.—*In the Goods of SMITH*, [1931] P. 225; 100 L. J. P. 115; 146 L. T. 46; 47 T. L. R. 618; 75 Sol. Jo. 725.

*Annotation*:—*Consd. In the Estate of Long*, [1936] 1 All E. R. 435.

836. *Add. Annotations*:—*Consd. In the Goods of Smith* (1931), 47 T. L. R. 618; *Re Stalman, Stalman v. Jones* (1931), 145 L. T. 339; *In the Estate of Long*, [1936] 1 All E. R. 435.

838. *Add. Annotation*:—*Consd. Palin v. Ponting*, [1930] P. 185.

839. *Add. Annotation*:—*Consd. Palin v. Ponting*, [1930] P. 185.

839a. — “See other side for completion.”—On the margin of the first page of a will on a printed form, duly executed & attested at the foot of the page, occurred the words, “See other side for completion.” On the second page under the words, “Continuation from the other side,” there were dispositions of property & a residuary gift without any further execution or attestation:—*Held*: the words, “See other side for completion,” had the effect of joining in or interlining the writing on the second page, & that the executed writing should be included in the probate.—*PALIN v. PONTING*, [1930] P. 185; 99 L. J. P. 121; 46 T. L. R. 310; 74 Sol. Jo. 234; *sub nom. PALING v. PONTING*, 143 L. T. 23.

839b. — Evidence that signature written last — Holograph will.]—A holograph will contained on one page a list of bequests; on another page appeared the heading of a will together with the appointment of an exor. Below this was an attestation clause with the signatures of testatrix & attesting witnesses. There was evidence that the whole will was written before the execution, but there was nothing on the face of the page containing bequests to show that the words of the final bequest were the concluding words of the will. On the question whether the whole of the will or only the page containing the appointment of the exor. received the protection of Wills Act Amendment Act, 1852 (c. 24), s. 1, & whether the bequests were disentitled to probate by reason of their being “underneath or following” the signature, within the meaning of the exception in the closing words of the sect.:—*Held*: distinguishing cases previously decided

on those words, which were cases of the use of will forms, if the ct. is satisfied that the whole will was written before execution & that the dispositive part of it may fairly be read as leading up to the execution & in no sense as a mere annexe or schedule to the will, it would be transgressing the spirit of the statute to insist as a criterion of valid execution upon proof that the several parts of the will were actually written in any particular sequence.—*In the Estate of LONG*, [1936] P. 166; [1936] 1 All E. R. 435; 105 L. J. P. 44; 154 L. T. 469; 52 T. L. R. 323; 80 Sol. Jo. 248.

850. *Add. Annotation*:—*Refd. In the Estate of Benjamin* (1934), 150 L. T. 417.

854. *Add. Annotation*:—*Consd. Neal v. Denston* (1932), 48 T. L. R. 637.

888. *Add. Annotation*:—*Consd. Neal v. Denston* (1932), 48 T. L. R. 637.

913. *Add. Annotation*:—*Expld. & Dlst. Neal v. Denston* (1932), 48 T. L. R. 637.

928. *Add. Annotation*:—*Refd. In the Estate of Benjamin* (1934), 150 L. T. 417.

958. *Add. Annotation*:—*Refd. In the Estate of Benjamin* (1934), 150 L. T. 417.

961. *Add. Annotation*:—*Refd. In the Estate of Benjamin* (1934), 150 L. T. 417.

961a. — Knowledge of nature of document immaterial.]—The signature of a testator to his will may be duly attested although an attesting witness does not know that the document in question is the testator's will. The intention of the witness is immaterial so long as he signs the paper in compliance with the requirements of the Wills Act.—*In the Estate of BENJAMIN* (1934), 150 L. T. 417.

967. *Add. Annotation*:—*Refd. In the Estate of Benjamin* (1934), 150 L. T. 417.

1074. *Add. Annotation*:—*Generally, Refd. Blackwell v. Blackwell*, [1929] A. C. 318.

1075a. — Gift to abbess of convent—Attestation by member of community.]—A testatrix, who was a nun in a convent, by her will gave all her property to the person who at the time of her death should be or should act as abbess of the convent. The will was attested by two nuns belonging to the convent, one of whom was subsequently elected abbess & held that office at the time of testatrix's death:—*Held*: the will did not create a beneficial legacy or gift to the abbess

#### PART V. SECT. 3, SUB-SECT. 6.—C.

871 iii. —.]—In an action to establish a testamentary document as the last will of H. deceased, the only question for decision was, whether the will had been properly executed. The evidence was conflicting, but the trial judge found that one of the persons attesting the document signed before testator signed, that the other attesting witness signed after testator, & the first witness did not resubscribe the will:—*Held*: the document was not executed in the manner prescribed by Wills Act, s. 12 (1), & could not be admitted to probate. The signature of testator must be written or acknowledged by him in the actual presence of both witnesses together before either of them attests & subscribes the will.—*CHESLINE v. HERMISTON*, [1928] 4 D. L. R. 786; 62 O. L. R. 575.—CAN.

PART V. SECT. 4, SUB-SECT. 1.  
sp. Law in India.]—The law in

India regarding the requirements of a valid attestation of a will or other document is not different from that in England.—*AMIR HUSAIN v. ABDUL SAMAD*, I. L. R., [1937] All E. R. 723.—IND.

#### PART V. SECT. 4, SUB-SECT. 4.—B. (o).

1006 i. *Testator unable to turn in bed—Attestation visible by turning.*]—Where although the witnesses to a will were in the same room with testator at the time they attested it & so near him that he could have seen them sign if he had been looking at them, yet, if he had his face turned away from them & was unable to move without assistance so that it was out of his power to see them even if he so wished, the attestation is invalid.—*Re WOZCIECHOWICZ ESTATE*, [1931] 3 W. W. R. 283; 4 D. L. R. 585; 26 Alta. L. R. 1.—CAN.

#### PART V. SECT. 4, SUB-SECT. 8.—A.

f i. —.]—A testator devised & bequeathed all his real & personal estate to his wife for life, & after her death to all his children at her wisdom & discretion. By her will his wife appointed the estate to all the children in equal shares, subject only that the share of a son F. should be retained by her trustees upon trust for him for life with remainder to his issue born before the lapse of twenty-one years from his death as he should appoint, & in default, etc. The husband of M., one of testator's children to whom the appointment was made, attested the execution of the testator's will:—*Held*: M. was not given any share or interest in testator's estate by his will, & therefore Wills Act, 1928, s. 13 did not apply.—*Re KOCH, KOCH v. KOCH*, [1931] V. L. R. 263; *Argus* L. R. 274.—AUS.

personally, but the gift was one in trust for, & as an addition to the funds of the community, & was not invalidated, under Wills Act, 1837 (c. 26), s. 15, by the attestation of the will by the witness who afterwards became abess.—*Re RAY'S WILL TRUSTS, Re RAY'S ESTATE, PUBLIC TRUSTEE v. BARRY*, [1936] Ch. 520; [1936] 2 All E. R. 93; 105 L. J. Ch. 257; 155 L. T. 405; 52 T. L. R. 446; 80 Sol. Jo. 406.

1097. *Add. Annotation*:—*Apld. Kitcat v. King*, [1930] P. 266.

1097a. —.]—*KILCAT v. KING*, No. 717a, *ante*.

1117. *Add. Annotation*:—*Consd. Palin v. Ponting*, [1930] P. 185.

1126. *Add. Annotation*:—*Consd. Neal v. Denston* (1932), 48 T. L. R. 637.

1141. *Add. Annotations*:—*Consd. In the Estate of*

Benjamin (1934), 150 L. T. 417. *Refd. Neal v. Denston* (1932), 48 T. L. R. 637.

1155. *Add. Annotation*:—*Refd. Neal v. Denston* (1932), 48 T. L. R. 637.

1158a. —.]—The ct. applied the presumption of law, *omnia presumuntur rite esse acta*, in favour of the validity of a will where the evidence of the attesting witnesses as to the circumstances of the execution was found to be wholly unsatisfactory & not to be relied upon & the main fact alleged against undue execution, apart from declarations made by the attesting witnesses, was that it would have been a physical impossibility for testator & the attesting witnesses to have been present together in the confined space in which the execution of the will took place.—*NEAL v. DENSTON* (1932), 147 L. T. 460; 48 T. L. R. 637; 76 Sol. Jo. 691.

*Annotation*:—*Refd. In the Estate of Benjamin* (1934), 150 L. T. 417.

## Part VI.—Executors and Administrators.

1278a. — — — —.]—By his will dated Mar. 3, 1932, testator bequeathed to his niece the sum of £1,150 Five per Cent. War Loan 1929–1947 stock & gave his residuary estate to G. C. At the date of his will testator held £1,150 War Loan of that denomination & in pursuance of a notice given to him by H.M.'s Govt. in accordance with a Prospectus dated Jan. 11, 1917, of their intention to redeem the Five per Cent. War Loan 1929–1917, & of the Finance (No. 2) Act, 1931 (c. 49), Part III, s. 11 (1) (b), elected to make a “repayment application,” & in Dec. 1932, was repaid in cash in respect of his said holding. On Apr. 23, 1933, testator died, not then being the holder of any War Loan of the description of the War Loan so bequeathed:—*Held*: (1) upon the

construction of the will the bequest was a general bequest of £1,150 Five per Cent. War Loan 1929–1947; (2) the Three & a Half per Cent. War Loan in which testator's holding would have been “continued” if he had not elected to claim repayment of his holding of the Five per Cent. War Loan was, for the purpose of giving effect to the general legacy, the same War Loan as the Five per Cent. War Loan 1929–1947; (3) the legatee was entitled either to call upon the trustees of the will to purchase for her £1,150 Three & a Half per Cent. War Loan or to be paid such a sum as would purchase the same.—*Re GAGE, CROZIER v. GUTHERIDGE*, [1934] Ch. 536; 103 L. J. Ch. 241; 151 L. T. 210.

## Part IX.—Alterations and Erasures.

1364. *Add. Annotation*:—*Consd. Palin v. Ponting*, [1930] P. 185.

1387. *Add. Annotation*:—*Consd. Palin v. Ponting* [1930] P. 185.

### PART V. SECT. 4, SUB-SECT. 8.—C.

*sa. Holograph will.*]—Sect. 10 of Manitoba Wills Act, R.S.M., 1913, provides as follows: “A holograph will, wholly written & signed by testator himself, shall be subject to no particular form, nor shall it require an attesting witness or witnesses:—*Held*: the fact that a will wholly written & signed by testator himself is also witnessed does not prevent it being a valid will under said sect.—*Re KAMES ESTATE*, [1934] 3 W. W. R. 364; 42 Man. L. R. 474.—CAN.

### PART V. SECT. 5, SUB-SECT. 3.

*so. Necessity for compliance with statutory requirements at time of execution.*]—The validity of a testamentary document, in so far as its execution is concerned, depends entirely on the question whether it complied with the statutory requirements in that behalf in force at the time of its execution.—

*Re MCGIBBON, ROYAL TRUST CO. v. BAXTER*, [1931] 2 W. W. R. 86; 2 D. L. R. 586; 25 Alta. L. R. 321.—CAN.

### PART VII.

*r i.* — — —.]—Sect. 14a of Wills Act Amendment Act, 1924, fixes a time as to when the validity of a will of the class referred to therein is determined, viz., when it was made. Therefore, if a British subject, when outside the province, makes a will which meets the requirements of said sect., its validity is not destroyed by the fact that testator afterwards ceases to be a British subject. Where a person while domiciled in British Columbia & owning realty therein makes a will valid as to realty in that province, & he acquires a foreign domicile & makes a holograph will, invalid as to realty in British Columbia, revoking all previous wills & disposing of both

realty & personalty, & dies domiciled in said foreign country, the British Columbia will remains effective as to the British Columbia realty.—*Re COLVILLE ESTATE*, [1931] 3 W. W. R. 26; [1932] 1 D. L. R. 47; 44 B. C. R. 331.—CAN.

### PART IX. SECT. 1, SUB-SECT. 2.—A.

1371 *i. Alterations made after execution of will.*]—After a testator had signed his will, & before the witnesses had signed it he instructed his solr. to increase a legacy in the will. The solr. immediately directed his clerk to make the alteration, but in the meantime both witnesses had signed the will. The alteration was then made & initialled in the margin of the will by testator & the witnesses:—*Held*: the alteration was not made after, but at the execution of the will.—*RAYMOND v. MASTER OF THE SUPREME COURT, Re KHAN'S ESTATE*, [1933] N. L. R. 711.—S. AF.

## Part X.—Revocation, Revival and Republication.

- 1513a. ———.]—*In the Estate of BIRKBY* (1929), 73 Sol. Jo. 556.
- B. Will Made in Contemplation of Marriage.*  
(Vol. XLIV., p. 319.)
- 1522a. Disappearance of wife—Bequest to woman with whom testator cohabiting—Subsequent marriage to legatee.]—Testator, being married to a woman who had left him some years before & had not been heard of, bequeathed the whole of his estate to a woman with whom he was living & whom he described as his wife. Shortly afterwards he married the woman in question, relying on the legal presumption of the death of his wife:—*Held*: the marriage was *prima facie* valid & the will was expressed to be made in contemplation of it, & was accordingly within the protection of Law of Property Act, 1925 (c. 20), s. 177, & not revoked by the marriage.—*PILOT v. GAINFORT*, [1931] P. 103; 100 L. J. P. 60; 145 L. T. 22; 47 T. L. R. 376; 75 Sol. Jo. 490.
- 1522b. Reference to particular marriage—Necessity for.]—In order that a will may not be revoked by marriage, it must contain an express reference to that particular marriage.—*SALLIS v. JONES*, [1936] P. 43; 105 L. J. P. 17; 154 L. T. 112; 52 T. L. R. 113; 79 Sol. Jo. 880.
1544. *Add. Annotation*:—*Consd. Jones v. Treasury Solicitor* (1932), 48 T. L. R. 615.
1546. *Add. Annotation*:—*Consd. Jones v. Treasury Solicitor* (1932), 48 T. L. R. 615.
- 1549a. ———.]—Where a testatrix commenced a will made two days before her death with the words, "This is my last will, the former one being *ungutlig*," & then substituted for the German word "*ungutlig*" the English word "cancelled," & this will made dispositions quite different from those in an earlier will, without, however, disposing of the residue, & where the residue had been disposed of by the earlier will, & the later will contained no operative appointment of exors., the ct. held that the later will revoked the earlier, & testatrix being illegitimate & having died without issue, granted letters of administration to the Treasury Solr. with the later will annexed.—*JONES v. TREASURY SOLICITOR* (1932), 147 L. T. 340; 48 T. L. R. 615; 76 Sol. Jo. 690; *affd.*, 49 T. L. R. 75, C.A.
1555. *Add. Annotation*:—*Refd. Smith v. Thompson* (1931), 146 L. T. 14.
1556. *Add. Annotation*:—*Refd. Smith v. Thompson* (1931), 146 L. T. 14.
1558. *Add. Annotation*:—*Consd. Lowthorpe-Lutwidge v. Lowthorpe-Lutwidge*, [1935] P. 151.
1570. *Add. Annotation*:—*Consd. Bickersteth v. Shanu*, [1936] 1 All E. R. 227.
1610. *Add. Annotation*:—*Refd. Smith v. Thompson* (1931), 146 L. T. 14.
1611. *Add. Annotation*:—*Consd. Jones v. Treasury Solicitor* (1932), 48 T. L. R. 615.
1613. *Add. Annotation*:—*Apld. Jones v. Treasury Solicitor* (1932), 48 T. L. R. 615.
- 1613a. ———.]—*Re HAWKSLEY'S SETTLEMENTS*, *BLACK v. TIDY*, No. 3490a, *post*.
1622. *Add. Annotations*:—*Refd. In the Estate of Musgrave, Tidy v. Musgrave*, [1934] Ch. 402, n.; *Re Hawksley's Settlement, Black v. Tidy* (1934), 151 L. T. 299.
1624. *Add. Annotation*:—*Apld. Kitcat v. King*, [1930] P. 266.
- 1642a. ———.]—*Re HAWKSLEY'S SETTLEMENTS*, *BLACK v. TIDY*, No. 3490a, *post*.
1647. *Add. Annotation*:—*Consd. Jones v. Treasury Solicitor* (1932), 48 T. L. R. 615.
1650. *Add. Annotation*:—*Refd. Smith v. Thompson* (1931), 146 L. T. 14.
- 1651a. ———.]—A will & codicil made by testatrix in 1893 were revoked by a will made in 1907. In 1911 testatrix made a codicil to the will of 1907 declaring that a share in her estate thereby given to a son should be held upon protective trusts. In 1921 testatrix executed a third codicil, which referred only to the will & codicil of 1893, altered some of the provisions of the will & otherwise confirmed it:—*Held*: the effect of the codicil of 1921 was to revoke both the will of 1907 & the codicil of 1911, & to revive the will & codicil of 1893.—*Re BAKER, BAKER v. BAKER*, [1929] 1 Ch. 668; 98 L. J. Ch. 174; 141 L. T. 29.
1655. *Add. Annotation*:—*N.F. Re Robinson, Lamb v. Robinson*, [1930] 2 Ch. 332.

### PART X. SECT. 1, SUB-SECT. 2.

1496 v. ———.]—A will is the aggregate of a man's testamentary intentions, so far as they are manifested in a writing or writings duly executed according to the governing statute. A testamentary paper does not necessarily revoke one prior in date, even though the second instrument contains a general revocatory clause; the intention of testator is the sole guide & the intention to be discovered is that relating to the disposition of testator's property & not to the form of the will.—*Re SNOW ESTATE*, [1932] 1 W. W. R. 473.—CAN.

### PART X. SECT. 1, SUB-SECT. 3.

1507 v. ———.]—Where it was proved that a testator made a will which could not be found after his death & there was no evidence touching its whereabouts after it was made:—*Held*: it must be presumed, there being no evidence to rebut the presumption, that

the will was destroyed by the testator with the intention of revoking it.—*Re ROBINSON ESTATE*, [1930] 2 W. W. R. 673.—CAN.

1507 vi. ———.]—The presumption that a will which was shown to have been in the custody of testator prior to his death, but which could not be found after he died, had been destroyed *animo revocandi* held not to have been rebutted.—*Re SIGURDSON ESTATE, SIGURDSON v. SIGURDSON*, [1935] 1 W. W. R. 265; 2 D. L. R. 445; *affd.*, [1935] 4 D. L. R. 529; 43 Man. L. R. 1.—CAN.

### PART X. SECT. 1, SUB-SECT. 4.—B.

so. *Necessity for express declaration of contemplation of marriage.*—*Re SEDGWICK ESTATE*, [1931] 1 W. W. R. 837.—CAN.

### PART X. SECT. 1, SUB-SECT. 5.—A.

1532 iv. ———.]—A codicil revokes a

will only if the intention to revoke is clearly & unambiguously expressed.—*SMITH v. SMITH* (1915), 19 D. L. R. 192, P. C.—CAN.

g i. ———.]—An invalid subsequent will does not revoke an earlier will.—*Re GARDNER*, [1935] 1 D. L. R. 308; O. R. 71.—CAN.

### PART X. SECT. 1, SUB-SECT. 5.—B. (a).

a i. ———.]—*Some property undisposed of by subsequent will.*—A will made in Canada disposed of testator's entire estate. A later will, made in England, expressly revoked all prior wills & disposed of all the estate "with the exception of Canadian property in Calgary":—*Held*: the second will revoked the first will entirely, & therefore, there was an intestacy as to the Calgary property.—*Re ALLEN ESTATE*, [1935] 1 W. W. R. 584; 5 F. L. J. (Can.) 51.—CAN.

1656. *Add. Annotation*:—*Consd. Re Robinson, Lamb v. Robinson*, [1930] 2 Ch. 332.

1657a. ———.]—The question whether a will has been revoked by a subsequent instrument depends entirely upon the intention of the testator as expressed in that instrument. The rule laid down in *Baker v. Story*, No. 1655, & earlier cases that a second will will revoke an earlier one though it is ineffective to confer any gift, if such failure is due to the incapacity of the devisee or legatee & not to any infirmity in the will itself, is no longer acceptable since the decision in *Ward v. Van der Loeff*, No. 1662.

Testatrix by a will made in 1914 gave her residuary estate upon trust to pay an annuity to her son H., & subject thereto for her grandchildren who should attain twenty-one. In 1921 she executed a document which she described as her last will, by which she gave the whole of her estate to H. absolutely, but it contained no clause revoking former wills. The later will was ineffective, though admitted to probate, owing to the wife of H. having attested it:—*Held*: the earlier will was restored, there being no intention shown by testatrix in the later one to revoke it.—*Re ROBINSON, LAMB v. ROBINSON*, [1930] 2 Ch. 332; 99 L. J. Ch. 431; 143 L. T. 593; 46 T. L. R. 542.

1662. *Add. Annotations*:—*Apld. Re Robinson, Lamb v. Robinson*, [1930] 2 Ch. 332. *Refd. Re Hawksley's Settlement, Black v. Tidy*, [1934] Ch. 384.

1664. *Add. Annotations*:—*Consd. Jones v. Treasury Solicitor* (1932), 48 T. L. R. 615. *Refd. In the Estate of Musgrave, Tidy v. Musgrave*, [1931] Ch. 402, n.; *Re Hawksley's Settlement, Black v. Tidy* (1934), 151 L. T. 299.

1671. *Add. Annotation*:—*Consd. Re Bund, Cruikshank v. Willis*, [1929] 2 Ch. 455.

1707a. ———.]—B., by his will, after appointing his sister W. & one S. exors. & trustees thereof, & after giving certain legacies & exercising certain powers of appointment therein more particularly referred to, appointed & devised his mansion house, lands, cottages & hereditaments known as Wick Episcopi unto & to the use of his trustees upon trust after payment thereof as therein mentioned to pay the residue of the rents & income thereof to his sister the said W. for her life, & after her death upon the trusts therein mentioned. After a further bequest of jewellery, plate & portraits so as to devolve as heirlooms with the said mansion house so far as the rules of law would permit by (*sic*) the person or persons for the time being entitled to the possession or receipt of the rents of the same mansion house, testator thereby further gave, appointed, devised & bequeathed all the rest & residue of his real & personal estate unto & to the use of his trustees to such uses, upon such trusts, & for such ends intents & purposes as the Wick estate might under the trusts of his will for the time being be held so far as the rules of law would permit. By a codicil dated

August 4, 1927, after reciting that he was desirous of giving to his stepdaughter C. (pltf.) a residence in England, testator appointed, devised & bequeathed to her for her life his said house Wick Episcopi & all the furniture, books, linen, plate & effects therein or belonging thereto & also the land he occupied therewith. After testator's death in 1928 pltf. C. took out an originating summons to determine (*inter alia*) the question whether pltf. was entitled for her life to the whole or any & if so what part of the rents, profits & income arising out of the residuary real & personal estate of the testator or of the income of the proceeds of sale thereof, or whether deft. W. was entitled during her life to the said rents, profits & income or to some & what part thereof, or to whom the same were payable:—*Held*: testator intended by the codicil only to give certain defined property to pltf. for her life for the definite purpose, namely, the provision of a house in England, mentioned in the codicil & that the codicil could only be read as interpolating into the will an interest in favour of pltf. in respect of the property specifically mentioned in the codicil; & therefore deft. W. was entitled during her life to the rents profits & income of testator's residuary real & personal estate, & the proceeds of sale thereof. Further, the jewellery, plate, etc., included in the gift of heirlooms contained in testator's mansion house at the date of his death, were in the events that had happened, to be enjoyed by deft. W. during her life; & the excepted articles of plate were to be enjoyed by pltf. during her life.—*Re BUND, CRUIKSHANK v. WILLIS*, [1929] 2 Ch. 455; 99 L. J. Ch. 4; 142 L. T. 39.

1715. *Add. Annotations*:—*Refd. Jones v. Treasury Solicitor* (1932), 48 T. L. R. 615; *Smith v. Thompson* (1931), 146 L. T. 14.

1776. *Add. Annotation*:—*Apld. Re Spracklan's Estate*, [1938] 2 All E. R. 315.

1776a. ———.]—A testatrix, who had made a will about a month before her death & at a time when she was seriously ill, dictated a document which was duly attested in the manner in which a will should be, containing the following words: "Will you please destroy the will already made out." The document was addressed to the manager of a bank, in whose custody the will had been placed:—*Held*: the wording of the document showed a sufficient intention to revoke the will within Wills Act, 1837 (c. 26), s. 20.—*Re SPRACKLAN'S ESTATE*, [1938] 2 All E. R. 315; 82 Sol. Jo. 373, C. A.

1801a. ———.]—*Remainder stitched together.*—Testatrix in 1921 had a will prepared by her solrs. in the usual way. In 1935, some two months before her death, she asked for the will & sent it to the solrs. She was then about 98 years old. It was noticed that the will had been cut & stitched, but as she was then ill, nothing was said about it. In fact two or three lines had been cut out of the will & the remainder stitched together again. There

PART X. SECT. 1, SUB-SECT. 7.—  
A. (a).

sa. *Will cut into two pieces.*—Testator was a bachelor, & on his death

there was found a duplicate original of his will with one paragraph cut out, the cutting severing the will into two pieces. There were no initials of testator on either portion, & there was

no evidence that the will had been resigned, republished, or reattested.—*Held*: an entire revocation.—*Re ANDERSON*, [1933] O. R. 131; 1 D. L. R. 581.—CAN.



was no evidence when this had been done but there was evidence that the lines taken out were not of a dispositive character:—*Held*: the part cut out had been revoked & the remainder should be admitted to probate.—*In the Estate of NUNN*, [1936] 1 All E. R. 555; 105 L. J. P. 57; 154 L. T. 498; 52 T. L. R. 322; 80 Sol. Jo. 267.

1915. *Add. Annotation*:—*Consd. In the Estate of Birkby* (1929), 73 Sol. Jo. 556.
1967. *Add. Annotation*:—*Generally, Refd. Blackwell v. Blackwell*, [1929] A. C. 318.
- 1967a. —. —. —.]—*Re HAWKSLEY'S SETTLEMENTS, BLACK v. TIDY*, No. 3490a, *post*.
- 1978a. —. —. —.]—*Mistake as to legal rights of widower.* —*In the Estate of GREENSTREET* (1930), 74 Sol. Jo. 188.
1995. *Add. Annotation*:—*Consd. Goldie v. Adam*, [1938] P. 85.
- 2008a. —. —. —.]—*Re BAKER, BAKER v. BAKER*, No. 1651a, *ante*.
- 2016a. —. —. —.]—A testator made a will dated June 9, 1929, & three codicils thereto. He made a will on Sept. 11, 1932, revoking the earlier will & codicils. On Aug. 12, 1933, he executed a testamentary document expressed to be a fourth codicil to the revoked will of 1929 & ending with the words: "In all other respects I confirm my said will":—*Held*: there was no evidence that the draftsman applied his mind to the provisions of

the will of 1929 or to the three codicils thereto, & the mind of the draftsman must be treated as the mind of the testator; there was a complete absence of any words of revival; there were indications of ignorance on the part of the draftsman of the codicil of 1933 concerning the revocation of the will of 1929 & the codicils thereto; & the will of 1932 & the codicil of 1933 must be pronounced for, omitting from the latter the reference to the revoked will.—*GOLDIE v. ADAM*, [1938] P. 85; 107 L. J. P. 106; 158 L. T. 359; 54 T. L. R. 422; *sub nom. Re TAYLOR'S ESTATE, GOLDIE v. ADAM*, [1938] 1 All E. R. 586; 82 Sol. Jo. 236.

2028. *Add. Annotation*:—*Consd. Goldie v. Adam*, [1938] P. 85.
2032. *Add. Annotation*:—*Consd. Goldie v. Adam*, [1938] P. 85.
2034. *Add. Annotation*:—*Consd. Goldie v. Adam*, [1938] P. 85.
2068. *Add. Annotation*:—*Refd. Goonewardene v. Goonewardene*, [1931] A. C. 647.
2102. *Add. Annotation*:—*Refd. Re Tilden, Clough v. Royal Society of London* (1938), 82 Sol. Jo. 334.
2133. *Add. Annotations*:—*Consd. Re Warren, Warren v. Warren*, [1932] 1 Ch. 42. *Refd. Re Vaux, Nicholson v. Vaux*, [1938] Ch. 581.
2167. *Add. Annotation*:—*Consd. Re Carrington, Ralphs v. Swithenbank*, [1932] 1 Ch. 1.

## Part XI.—Codicils.

2194. *Add. Annotation*:—*Refd. Re Bund, Cruikshank v. Willis*, [1929] 2 Ch. 455.
- 2196a. —. —. —.]—*Re BUND, CRUIKSHANK v. WILLIS*, No. 1707a, *ante*.
2246. *Add. Annotation*:—*Refd. Re Forrest, Carr v. Forrest*, [1931] 1 Ch. 162.
2248. *Add. Annotation*:—*Appld. Re Forrest, Carr v. Forrest*, [1931] 1 Ch. 162.
2249. *Add. Annotation*:—*Consd. Re Forrest, Carr v. Forrest*, [1931] 1 Ch. 162.
- 2249a. —. —. —.]—By her will in 1920 testatrix, who died in the same year, gave the residue

of her real & personal estate to her exors. upon trust to permit her husband to receive the rents & income thereof for his life, & directed that after his decease the trustees should sell & convert her residuary estate & should stand possessed of the net residue upon trust to pay & provide for thereout certain legacies. Then there was a direction that the surplus moneys remaining after payment of the legacies should be divided between seven named persons, the children of A., the children of W., & the two children of J., in certain proportions. By a codicil testatrix gave £1,000 upon trust to pay the

### PART X. SECT. 1, SUB-SECT. 7.—B. (c) i.

1859 viii. —. —. —.]—*LEFEBVRE v. MAJOR*, [1930] S. C. R. 252; 2 D. L. R. 532; *reversd.*, [1929] 3 D. L. R. 248; 64 O. L. R. 43.—CAN.

1859 ix. —. —. —.]—Upon a question whether the presumption of destruction *animo revocandi* had been overcome:—*Held*: the presumption was so attenuated by declarations made by testator, & by evidence of opportunity for removal of the will after testator's death, & by the circumstance that after his death money was stolen from his house, as to be negligible.—*BODDY v. CARPENTER*, [1931] 4 D. L. R. 927; O. R. 694.—CAN.

### PART X. SECT. 3, SUB-SECT. 2.—C. (a).

2047 i. *General rule.*—If a codicil framed to amount to a republication of a will is to have that effect, it is necessary that it should refer in its body to the will to which it is a codicil,

& the fact that it appears in the same paper as the will itself to which it is sought to make it a codicil is not sufficient.—*In the Will of ETON* (1927), 28 S. R. N. S. W. 119; 45 N. S. W. N. 6.—AUS.

### PART X. SECT. 3, SUB-SECT. 3.—A.

2093 ii. —. —. —.]—By sect. 5 of Ordinance No. 21 of 1844, of Ceylon, as by Wills Act, 1837 (c. 26), s. 34, the effect of confirming a will by a codicil of later date is to make a disposition in the will operate in the same way as it would have operated if the words of the will had been contained in the codicil.—*GOONEWARDENE (M.) v. GOONEWARDENE (E. M.)*, [1931] A. C. 647; 100 L. J. P. C. 145; 145 L. T. 7, P. C.—CEYLON.

### PART X. SECT. 3, SUB-SECT. 3.—D.

2146 ii. —. —. —.]—The codicil in question herein to the will of an insured held not to affect a prior declaration (made subsequently to the will) by

which under sect. 102 of Insurance Act, 1925, a trust of the proceeds of the insurance policy was created in favour of the insured's wife. The republication of the will by the codicil did not necessarily make it operate for all purposes as if it had originally been made at the date of the republishing instrument; a contrary intention could be shown; & in order to destroy the benefits which the insured's declaration had intended that the wife should acquire, a document clearly indicating his subsequent contrary intention must have been executed by him, & this the codicil did not do.—*ROYAL TRUST CO. v. SHIMMIN*, [1932] 3 W. W. R. 447; 46 B. C. R. 273; *affd.*, [1933] 3 D. L. R. 718; 47 B. C. R. 138.—CAN.

### PART XI. SECT. 3, SUB-SECT. 1.

2189 iii. —. —. —.]—A will & a codicil are invariably read together.—*Re PARSONS, PARSONS v. PARSONS* (1933), 7 M. F. R. 129.—CAN.

income to E. for her life, & after her decease directed that the same should fall into her residuary estate & be divisible accordingly; she then revoked the gift by her will of the portion of her residuary estate to the two children of J., & directed that they should take no part of her residuary estate, & in all other respects, she confirmed her will:—*Held*: in the absence of sufficient indication of intention to give the shares, the gift of

which was so revoked, to the other residuary legatees, the effect of the revocation was that those shares were undisposed of.—*Re* FORREST, *CARR v. FORREST*, [1931] 1 Ch. 162; 100 L. J. Ch. 122; 144 L. T. 297.

2251. *Add. Annotation*:—*Re* *Forrest, Carr v. Forrest*, [1931] 1 Ch. 162.

2255. *Add. Annotation*:—*Consd. Re Forrest, Carr v. Forrest*, [1931] 1 Ch. 162.

## Part XII.—Legal Incidents of a Gift by Will.

2230a. ———.—]—The legatee of a house, held by testator on a lease at a reserved rent higher than it could be let for after his death, cannot reject the gift of the lease & retain an annuity under the will, but must take the benefit *cum onere*.—*TALBOT v. RADNOR (EARL)* (1834), 3 My. & K. 252; 40 E. R. 96.

2239. *Add. Annotation*:—*Re* *Buxton, Buxton v. Buxton*, [1930] 1 Ch. 648.

2258. *Add. Annotation*:—*Re* *Stillwell, Stillwell v. Stillwell*, [1936] Ch. 637.

2278. *Add. Annotation*:—*Re* *Warren, Warren v. Warren*, [1932] 1 Ch. 42.

2295. *Add. Annotation*:—*Re* *Newman, Slater v. Newman*, [1930] 2 Ch. 409.

2438. *Add. Annotation*:—*Consd. Re Warren, Warren v. Warren*, [1932] 1 Ch. 42.

2511a. ———.—]—*Re BACKHOUSE, WESTMINSTER BANK, LTD. v. SHAFTESBURY SOCIETY & RAGGED SCHOOL UNION*, [1931] W. N. 168; 172 L. T. Jo. 10; 72 L. Jo. 79.

2541. *Add. Annotation*:—*As to (2) Re* *Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

2573. *Add. Annotation*:—*Consd. Re Tilden, Coubrough v. Royal Society of London* (1938), 82 Sol. Jo. 334.

2574a. ———.—]—*Re TILDEN, COUBROUGH v. ROYAL SOCIETY OF LONDON* (1938), 82 Sol. Jo. 331.

2575. *Add. Annotations*:—*Generally, Re* *Newman, Slater v. Newman*, [1930] 2 Ch. 409; *Re Warren, Warren v. Warren*, [1932] 1 Ch. 42.

## Part XIII.—Conditions.

2636. *Add. Annotation*:—*Re* *Elliot v. Joicey*, [1935] A. C. 209.

2663. *Add. Annotation*:—*Appl. Re Thomas's Will Trusts, Powell v. Thomas*, [1930] 2 Ch. 67.

2665a. ———.—]—Where testator makes a gift subject to a condition precedent, the fulfilment of which is rendered impossible by operation of law before the date of the will, the condition is void & the gift remains.—*Re THOMAS'S WILL TRUSTS, POWELL v. THOMAS*, [1930] 2 Ch. 67; 99 L. J. Ch. 286; 144 L. T. 64; 74 Sol. Jo. 201.

2666a. ———.—Condition forbidding named person to come upon property.]—A testator by his will devised the L. estate to his son upon condition that he made the same his home, & upon the further condition that he did not allow a

named person to set foot upon the property:—*Held*: the conditions were not void for uncertainty or impossibility. There would be no difficulty in saying whether or not the named person had come upon the property; & the effect of his having come there in fulfilment of a duty would be a matter to be determined if & when it arose.—*Re TALBOT-PONSONBY'S ESTATE, TALBOT-PONSONBY v. TALBOT-PONSONBY*, [1937] 4 All E. R. 309; 54 T. L. R. 33; 81 Sol. Jo. 883.

2667. *Add. Annotations*:—*Consd. Re Hanlon, Heads v. Hanlon*, [1933] Ch. 254; *Re Borwick, Borwick v. Borwick*, [1933] Ch. 657; *Re Tegg, Public Trustee v. Bryant*, [1936] 2 All E. R. 878; *Sifton v. Sifton*, [1938] 3 All E. R. 435. *Re* *Talbot-Ponsonby's Estate, Talbot-Ponsonby v. Talbot-Ponsonby*, [1937] 4 All E. R. 309.

### PART XII. SECT. 5, SUB-SECT. 2.—A.

2356 vl. ———.—]—A specific legacy of the proceeds of an agreement for sale of land is adeemed by the acceptance by the testator of a quit-claim deed from the purchaser.—*Re CALVERT*, [1928] 3 W. W. R. 42.—CAN.

### PART XII. SECT. 5, SUB-SECT. 2.—B. (a).

2373 ll. ———.—]—By the devise of an estate, which testator has previously mortgaged in fee, nothing passes at law.—*DE VERER v. ANDREWS* (1845), 4 N. B. R. (2 Kerr) 604.—CAN.

### PART XII. SECT. 5, SUB-SECT. 2.—B. (d).

so. *Direction to realise mortgage—Subsequent discharge of mortgage—Ademption.*—*Re TODD*, [1932] 4 M. P. R. 6.—CAN.

### PART XII. SECT. 6, SUB-SECT. 3.

sb. *Application to real & personal estate.*—It is now settled that the doctrine of acceleration applies both to real & personal estate.—*HARMAN v. ANDERSON*, [1930] N. Z. L. R. 67.—N.Z.

### PART XIII. SECT. 1, SUB-SECT. 2.

2611 v. ———.—]—Within a few days of his death deceased made a holograph will by which after using words which

indicated, in the opinion of the ct., that he knew he was on the verge of death, he left "everything" to one H., & added: "She is to have everything as I have no living relations." He then had, in fact, a wife & daughter living. There was no evidence on the application herein that he had communicated with or had information of them for many years.—*Held*: the truth of the assumption that he had no living relatives was the condition of the gift to H., & that assumption being false, the estate should go to the wife & daughter, as though the will had never been made.—*Re WRIGHT ESTATE, BURROWS v. HONEYSETTE*, [1937] 3 W. W. R. 452.—CAN.

**2667a.** ———.—]—A testator by his will devised & bequeathed his real & personal property to his exors. upon trust to manage the corpus of the estate & to pay "to or for my said daughter [the applt.] a sum sufficient in their judgment to maintain her suitably until she is forty years of age, after which the whole income of the estate shall be paid to her annually. The payments to my said daughter shall be made only so long as she shall continue to reside in Canada":—*Held*: the provision that the payments were to be made "only so long as she shall continue to reside in Canada" was a condition subsequent which was void for uncertainty.—*SIFTON v. SIFTON*, [1938] A. C. 656; [1938] 3 All E. R. 435; 107 L. J. P. C. 97; 159 L. T. 289; 54 T. L. R. 969; 82 Sol. Jo. 680, P. C.

**2668.** *Add. Annotation*:—*Consd.* *Sifton v. Sifton*, [1938] 3 All E. R. 435.

**2675.** *Add. Annotations*:—*Consd.* *Re Talbot-Ponsonby's Estate*, *Talbot-Ponsonby v. Talbot-Ponsonby*, [1937] 4 All E. R. 309. *Refd.* *Sifton v. Sifton*, [1938] 3 All E. R. 435.

**2678.** *Add. Annotation*:—*Consd.* *Re Talbot-Ponsonby's Estate*, *Talbot-Ponsonby v. Talbot-Ponsonby*, [1937] 4 All E. R. 309.

**2686.** *Add. Annotations*:—*As to* (2) *Consd.* *Re May, Eggar v. May* (1931), 47 T. L. R. 515; *Re Borwick, Borwick v. Borwick*, [1933] Ch. 657; *Sifton v. Sifton*, [1938] 3 All E. R. 435.

**2689.** *Add. Annotation*:—*Refd.* *Re Knapp, Spreckley v. A. G.*, [1929] 1 Ch. 341.

**2691.** *Add. Annotation*:—*Distd.* *Berry v. Geen*, [1938] A. C. 575.

**2698.** *Add. Annotation*:—*Refd.* *Garland v. Archer-Shee* (1930), 142 L. T. 443.

**2713.** *Add. Annotation*:—*Appld.* *Re Cockerill, Mackaness v. Percival*, [1929] 2 Ch. 131.

**2727.** *Add. Annotation*:—*Distd.* *Re Cockerill, Mackaness v. Percival*, [1929] 2 Ch. 131.

**2730.** *Add. Annotation*:—*Distd.* *Re Cockerill, Mackaness v. Percival*, [1929] 2 Ch. 131.

**2731.** *Add. Annotation*:—*Appld.* *Re Cockerill, Mackaness v. Percival*, [1929] 2 Ch. 131.

**2732a.** ———.—]—Testator, by his will, devised land to P. subject to the payment of certain annuities, of road-making charges for which testator was liable, & of estate & other death duties, & subject also to the proviso that if within twenty years of testator's death P. should desire to sell the land, he was to give the Governors of the N. Grammar School the option of purchasing the land at the price of £300 an acre, such offer to be subject to the payment by the Governors of the said annuities & road charges, & acceptance to be notified within three months. The land, of about 22 acres in area, was in fact worth £670 an acre at the date of testator's death. In accordance with the condition P. offered it to the School Governors at £300 an acre, & the offer was duly accepted & the land sold & conveyed to the Governors for £6,688. The value of the land for the purposes of death duties was assessed at £14,720. On a summons being taken out to determine whether the Governors were liable to pay a rateable proportion of the estate & succession duties levied upon the value of the property:—*Held*: the condition being one in restraint of alienation except to a particular purchaser was void for repugnancy, & not binding upon the devisee. The death duties payable must therefore be borne entirely by P., the devisee.—*Re COCKERILL, MACKANESS v. PERCIVAL*, [1929] 2 Ch. 131; 98 L. J. Ch. 281; 141 L. T. 198.

**2751.** *Add. Annotation*:—*Generally, Refd.* *German Property Administrator v. Knoop* (1932), 49 T. L. R. 109.

**PART XIII. SECT. 3, SUB-SECT. 3.—B.**

**2708** ii. ———.—]—A devise to sons subject to a reservation that "no one of said sons shall have power to sell, etc., except to one or more of his brothers" is void for repugnancy.—*Re DOHERTY*, [1935] 3 D. L. R. 782; *affd. sub nom. DOHERTY v. DOHERTY*, [1936] 2 D. L. R. 150; 10 M. P. R. 286; 5 P. L. J. (Can.) 27.—*CAN.*

**PART XIII. SECT. 3, SUB-SECT. 6.—A.**

**p i.** ———.—]—*Condition as to amicable relations with wife.*—Testate having provided for one of his sons, subsequently left a codicil revoking the provision, & substituting a sum of \$70 a month until he was 35, when the original bequest was to be reinstated provided the son was then living amicably with his wife:—*Held*: not contrary to public policy.—*Re JONES, ROYAL TRUST CO. v. JONES* (No. 2) (1934), 49 B. C. R. 204.—*CAN.*

**p ii.** ———.—]—*Gift to mother of largest number of children.*—A testator by his will made certain bequests & then directed his trustees to give the residue of his estate at the expiration of 10 years from his death "to the mother who has since my death given birth in Toronto to the greatest number of children as shown by the registrations under the Vital Statistics Act":—*Held*: not contrary to public policy & valid because (a) the word children in a will means legitimate children, & (b) there is no ground of public policy which recognises the undesirability of bearing children at too frequent

intervals. *Re MILLAR*, [1937] 1 D. L. R. 127; [1936] O. R. 554; *affd.*, [1937] O. R. 382; *affd.*, [1938] S. C. R. 1.—*CAN.*

**p iii.** ———.—]—A clause leaving a bequest to the "mother who has since my death given birth . . . to the greatest number of children as shown by registrations under Vital Statistics Act" means that the mother must have produced living as well as legitimate children.—*Re MILLAR*, [1938] 2 D. L. R. 161; O. R. 188.—*CAN.*

**PART XIII. SECT. 3, SUB-SECT. 6.—B.**

**2754** i. *Whether valid—Condition for divorce.*—By her will testatrix directed her trustees to invest one-fourth share of her estate & to pay the net annual income to pltf., her daughter, E., during her life, without power of anticipation, & after her death to hold such fourth share for the three other children of testatrix, & testatrix declared that if E. "shall survive her present husband or shall obtain a divorce "from her present husband" the trustees should hold such fourth share for E. absolutely. E. was committed to a mental hospital in 1921, & had continued to be a mentally defective person ever since. Her marriage with "the present husband" was dissolved in 1932 on the husband's petition.—*Held*: (1) on a general review of the dispositions of testatrix concerning E., the words "shall obtain a divorce" were not limited to proceedings in which pltf. should be the petitioner; (2) provision

made by a mother for her daughter upon the contingency of the latter either divorcing her husband or being divorced by him was not against public policy as being *contra bonos mores*, not being in itself likely to induce the mischief aimed at in *Lambert v. Dillon*, [1933] N. Z. L. R. 1059, & the cases therein cited.

*Semble*: there is a clear distinction between the encouragement of separation between the spouses, which is the voluntary act of one or both, & provision for the contingency of divorce, which in the final resort is the decree of the ct. made only upon proof of its legal justification.—*WACKER v. BULLOCK*, [1935] N. Z. L. R. 828.—*N.Z.*

**PART XIII. SECT. 3, SUB-SECT. 6.—C. (a).**

**r i.** ———.—]—*Condition subsequent—Annexed to gift of personality.*—A testamentary condition subsequent in general restraint of marriage, whether it forfeits or only reduces the gift, is, in the case of personality, only *prima facie* void; & if on the true construction of the will the intention is to benefit the object in whose favour the gift over is made & not to compel the celloacy of the first object of the gift, the condition takes effect.—*Re HAYTHORNTWATE ESTATE*, [1930] 1 W. W. L. 58; 3 D. L. R. 235.—*CAN.*

**r ii.** ———.—]—Under his will, C. devised all his immovable property to his son to be held & enjoyed by him for the term of his natural life . . . & after his death to my son's sons, namely

2774. *Add. Annotation*:—*Refd. Re Hanlon, Heads v. Hanlon*, [1933] Ch. 254.

2782. *Add. Annotation*:—*Consd. Sifton v. Sifton*, [1938] 3 All E. R. 435.

2792. *Add. Annotation*:—*Refd. Re Hanlon, Heads v. Hanlon*, [1933] Ch. 254.

2806. *Add. Annotations*:—*As to (1) Consd. Re Hanlon, Heads v. Hanlon*, [1933] Ch. 254; *Re Borwick, Borwick v. Borwick*, [1933] Ch. 657.

2810. *Add. Annotation*:—*Refd. Re Hanlon, Heads v. Hanlon*, [1933] Ch. 254.

2825a. **Condition against joining religious society requiring surrender of property—Effect of joining society requiring surrender of income only.**—Testator, who died in 1929, left his residue to his uncle's children as tenants in common, with the following proviso: "In case any child of my uncle shall at any time before becoming entitled to receive any share in my residuary estate have joined a religious body to which he or she shall have been or be under a religious obligation to give his or her own property, then I hereby direct & declare that unless such child shall quit & renounce such religious body within six calendar months after my death such child shall be deemed to have died in my lifetime." One of the children in 1927 joined a religious society which had a rule providing that the society should receive the income of the property of members, though every member retained a right to dispose of the capital. The child in question had not quitted or renounced the society within six months

from the testator's death:—*Held*: the child's share of the residue was not forfeited.—*Re BELL, BELL v. AGNEW* (1931), 47 T. L. R. 401.

2825b. **Condition for conformity to Established Church.**—A testator left his property in England to his trustee upon trust for conversion & to pay out of the income an annuity of £2 per week to his daughter, or if she predeceased him the capital to be divided between her children in equal shares. The following condition was added: "I desire that my daughter & any children she may bear should at all times conform to & be members of the Established Church of England & at no time may any child of hers go to or be sent to any Roman Catholic school for education & if either my daughter or her children violate this my wish in any way then all the benefits accruing to her or them under this my will shall be considered as null & void," & there followed a gift over:—*Held*: (1) the first part of the condition requiring persons to conform to & be members of the Church of England was void for uncertainty, since it was open to grave doubt whether any particular act or omission in the future would bring about a forfeiture; (2) the second part of the condition requiring that "at no time may any child of hers go to or be sent to any Roman Catholic school for education" was void as a fetter upon the mother to do what she might think best for the welfare & education of her children. The condition was directed against sending the child to a Roman Catholic school & did not require that the child should not be

... & my son's daughter, F., in equal shares absolutely, provided that, if the said F. should be married before the death of my son ..., then & in such case she will not take any interest under my will":—*Held*: the condition attached to the bequest to the son's daughter was not contrary to law or morality & therefore was valid.—*COHEN v. COHEN* (1931), 1 L. R. 59 Cal. 102.—*IND.*

#### PART XIII. SECT. 3, SUB-SECT. 6.—C. (b).

2786 ix. —.—.]—A settlement made by a Jewish mother contained trusts of real property in favour of her sons, who were of the Jewish faith, & of their widows, & of the children of her sons. It also contained a forfeiture clause in the following terms: "Provided nevertheless & notwithstanding anything herein contained if any person or persons entitled hereunder should marry out of their persuasion then any share or interest of him her or them shall go be applied, & be divided & distributed as if there had never been any such person":—*Held*: the forfeiture clause was void for uncertainty.—*EQUITY, TRUSTS, EXECUTORS & AGENCY CO., LTD. v. MOSS*, [1931] Argus L. R. 281.—*AUS.*

2786 x. —.—.]—Testator directed his trustees after payment of his debts, funeral & testamentary expenses to divide the whole of the assets of his estate into three equal parts, to pay two of them to his son for his own use absolutely & to pay the other part to his daughter for her own use absolutely. This direction was followed by a defeasance clause & gift over in the event of marriage with a member of the Roman Catholic Church:—*Held*: the interests taken by the children indefeasibly vested in them on the death of testator, &, therefore, the defeasance clause was

restricted in its operation to the period anterior to the vesting, that is to marriage in the lifetime of testator.—*SAYWELL v. SAYWELL* (1932), 32 S. R. N. S. W. 155; 49 N. S. W. W. N. 33.—*AUS.*

#### PART XIII. SECT. 3, SUB-SECT. 6.—D.

2803 i. *Whether valid—Condition not to live with or be under control of father.*—A condition in a will having the effect of deterring a father from the performance of his parental duties, or constituting an attempt to interfere with the discretion of the ct. as to the custody & maintenance of its ward, is void as being opposed to public policy.—*Re ELLIS, PERPETUAL TRUSTEE CO., LTD. v. ELLIS* (1929), 29 S. R. N. S. W. 470; 46 N. S. W. W. N. 146.—*AUS.*

#### PART XIII. SECT. 3, SUB-SECT. 8.—D.

k i. —.—.]—Where an annuity is conditional on the annuitant being of a certain religion, he must give proof before each instalment.—*Re PATTON*, [1933] 1 D. L. R. 796.—*CAN.*

p i. —.—.]—*Or marrying Roman Catholic.*—*Re JONES, JONES v. BAXTER* (1929), 30 S. R. N. S. W. 26.—*AUS.*

so. *Condition as to confirmation.*—A will provided for the payment of certain legacies on the legatees becoming twenty-five years old, & also provided that the legacies should not be paid until the legatees had been confirmed as members of the Church of England, & that, should any of them attain the age of twenty-five years without having been so confirmed, then his legacy should be divided between the others who had been so confirmed & another legatee:—*Held*: the condition as to being confirmed was a condition precedent; & that, if it was a condition subsequent, it was one which should not be dis-

regarded as being against public policy, or, under the facts of the case, on the ground that its performance was impossible. Moreover, the fact that the legatee in question was so confirmed when thirty-one years old was not a substantial compliance with the condition.—*Re FORBES, HARRISON v. COMMIS.*, [1928] 3 D. L. R. 22; [1928] 1 W. W. R. 880; 22 Sask. L. R. 473.—*CAN.*

sd. *Condition against entering Roman Catholic convent.*—On the construction of a forfeiture clause in a will:—*Held*: "in the event of her entering any Roman Catholic Convent or similar institution" meant a permanent assoc. with a convent as a member of the community, which assoc. could only be brought about by the taking of the final vows after periods spent first as a postulant & then as a novice. No forfeiture was incurred by children attending a Roman Catholic convent, school or institution as boarders.—*Re MADORE ESTATE* (1936), N. L. R. 215.—*S. AF.*

so. *Condition interfering with parental duties.*—A testator, after devising property to his trustees for his son, John, for life, & thereafter for his son's children on their attaining the age of twenty-one years, or being females attaining that age or marrying, expressed the desire "that the children of my said son John shall be brought up in the Protestant faith & in the event of my wish not being complied with in this respect I hereby exclude all & every or any the children or child of my said son John from taking any benefit under the devise...":—*Held*: the condition was void, as it would operate to interfere with a parent in the exercise of his parental duty in the religious education of his children.—*PERPETUAL TRUSTEE CO. v. HOGG* (1936), 36 S. R. N. S. W. 61; 53 N. S. W. W. N. 67.—*AUS.*

brought up in or adopt the Roman Catholic faith; & the mother having survived testator, the result would be to the detriment of the mother rather than the child.—*Re TEGG, PUBLIC TRUSTEE v. BRYANT*, [1936] 2 All E. R. 878; 80 Sol. Jo. 552.

**2825c. Condition against sending child to Roman Catholic school.**—*Re TEGG, PUBLIC TRUSTEE v. BRYANT*, No. 2825b, *ante*.

**2825d. Condition not to become or marry Roman Catholic.**—By her will dated Oct. 23, 1934, a testatrix having bequeathed several pecuniary legacies declared as follows: "Should any of the foregoing beneficiaries under this my will have become or become a Roman Catholic or marry or shall have married (*sic*) a Roman Catholic, such beneficiary shall forfeit all benefit under this my will. . . ." By another clause in her will she declared: ". . . As to the rest I direct one moiety to be paid to the Trinitarian Bible Society & the other moiety to the London Association in aid of Moravian Missions. . . ." Testatrix died on Dec. 24, 1936. The Public Trustee as trustee of the will issued a summons by which he asked, *inter alia*, whether the provisions for forfeiture applied: (a) only as at the date of the testatrix's death, or (b) as at that date & up to the expiration of one year from it, or (c) as at that date & throughout the legatees' lives:—*Held*: the testatrix meant the ban to apply to those who became or married Roman Catholics between the date of her will & the date of her death, & therefore, the ban applied only to them.—*Re WRIGHT, PUBLIC TRUSTEE v. WRIGHT* (1937), 158 L. T. 368; 54 T. L. R. 153; 81 Sol. Jo. 1022.

**2837a. Condition against association or marriage with named person.**—Testator devised & bequeathed one moiety of his residuary estate upon trust for conversion & investment & to pay the income to his wife during her life or widowhood, & subject thereto in trust for his two children named, a son & a daughter, in equal shares, but subject to a proviso in the case of the daughter that if she should intermarry with A. B. or live with him as his wife, or leave home with the intention of living with him or misconduct herself with him, or be delivered of a child or children of whom the said A. B. should be the father, then in any of those events any devise or bequest either residuary or otherwise under testator's will should be absolutely void & forfeited, & the daughter should be deemed to have died in his lifetime as a single woman. There was no gift over of the daughter's share upon any forfeiture for breach of the conditions:—*Held*: the conditions were not void for uncertainty,

or as being *in terrorem*, for if a testator desires & expressly intends a gift to be revoked the absence of a gift over will not prevent the revocation from taking effect, & moreover the doctrine of *in terrorem* is only applicable to conditions in restraint of marriage & against disputing a will. Therefore, there was an intestacy as to the daughter's share, & the next-of-kin, being all *sui juris*, could agree so as to defeat the proviso.—*Re HANLON, HEADS v. HANLON*, [1933] Ch. 254; 102 L. J. Ch. 62; 148 L. T. 448; 76 Sol. Jo. 868.

**2873. Add. Annotation.**—*Refd. R. v. Lamb* (1934), 150 L. T. 519.

**2898a. — Effect of disentailing estates.**—*Re WATSON, CULME-SEYMOUR v. BRAND*, No. 7034a, *post*.

**2961. Add. Annotations.**—*Apld. Patton v. Toronto General Trusts Corp.*, [1930] A. C. 629. *Consd. Re May, Eggar v. May*, [1932] 1 Ch. 99.

**2961a. — — —.**—Testator, who died in 1919, bequeathed to his grandson, applt., an annuity, provided that he was & proved himself to be of the Lutheran religion; until he was twenty-five years of age the annuity was to be paid to his mother for his benefit. In 1917, when the will was made, applt. was only twelve years of age, & testator knew that applt.'s mother was a Roman Catholic, & that he was being brought up in that religion. According to the law of Germany, where applt. & his parents were domiciled, applt. could not effectively change his religion without their consent until he was twenty-one years of age. On reaching that age he proved that he had become of the Lutheran religion, & he had since remained so:—*Held*: the intention of testator was that applt. should have an opportunity of choosing his religion, & as he was entitled in law to postpone his choice until he was twenty-one, but not beyond, he was entitled to receive the annuity, also arrears from the date of testator's death, as until he reached twenty-one his enjoyment of the annuity was free from condition.—*PATTON (W. R.) v. TORONTO GENERAL TRUSTS CORPN.*, [1930] A. C. 629; 143 L. T. 572; *sub nom. Re PATTON, PATTON v. TORONTO GENERAL TRUSTS CORPN.*, 99 L. J. P. C. 213, P. C.

*Annotation*:—*Refd. Re May Eggar v. May*, [1932] 1 Ch. 99.

**2961b. — — —.**—Testatrix, who died in 1915, bequeathed a sum of money to trustees to accumulate the income until her nephew should attain the age of 24 years & afterwards to pay him the income, provided that he should not be a Roman Catholic at her death, or, if he was, that he should cease to be one within 12 months thereafter, the

### PART XIII. SECT. 3, SUB-SECT. 8.

—G.

**sk. Condition as to keeping testator out of lunatic asylum.**—Testator's will contained the following residuary clause:—"I bequeath the remainder of my property to my brother —, on condition that my friends keep me out of a lunatic asylum, but if they allow me to be put into a lunatic asylum, I do then bequeath to the British Home & Foreign Bible Society the sum of seven hundred pounds & to my brother —, I bequeath the remainder of my property." About

eighteen months after the execution of the will, & five years prior to his death, testator had been committed to a lunatic asylum on the information of a neighbour & had been detained for a period of one month:—*Held*: the condition imposed by testator was valid, & in the events which had happened the gift over to the British & Foreign Bible Society took effect.—*Re ARCHBOLD, MCKEE v. ARCHBOLD*, [1933] N. I. 47.—*IR.*

### PART XIII. SECT. 4, SUB-SECT. 3.

**2924 i. Where period prescribed—Whether court will extend time.**—Where

testator's object in imposing conditions as to time was to provide for the distribution of his estate within a reasonable time & to relieve his trustee from responsibility in the event of a claim being made after distribution, a failure in strict performance of the condition due to circumstances beyond the control of the claimant will not disentitle such claimant to participate in the distribution of the estate if the parties can be put in substantially the same position as they would have been in had the conditions been performed within the proper time.—*ELCOCK v. CAMPBELL*, [1931] N. Z. L. R. 1060.—*N. Z.*

payments to continue until he should become a Roman Catholic, with a gift over if the gift failed. At the death of testatrix the nephew was a child of about nine years of age. He was the son of a Roman Catholic & was being brought up in that faith. In 1917 NEVILLE, J., decided (No. 2961) that within the meaning of the will the child was not a Roman Catholic at the death of testatrix & that he was to have an opportunity of making a choice in the matter when he attained 21 years of age. In 1931, when the legatee was 24 years of age & had never wavered in his adherence to the Roman Catholic Church, the trustees applied for a decision

of the question whether the gift over had taken effect:—*Held*: although the proviso as to the child's ceasing to be a Roman Catholic within 12 months was void, yet, as the will provided that even after the age of 24 years the legatee was to benefit only until he became a Roman Catholic, & as this provision included his being a Roman Catholic at that age, the gift over took effect.—*Re MAY, EGGAR v. MAY*, [1932] 1 Ch. 99; 101 L. J. Ch. 12; 146 L. T. 56; 48 T. L. R. 3; 75 Sol. Jo. 741, C. A.

**3095.** *Add. Annotation:—***Refd.** *Re* **Monro's Settlement, Monro v. Mill, [1933] Ch. 82.**

## Part XIV.—Lapse.

3117. *Add. Annotation:—Apld. Re Graham, Graham v. Graham, [1929] 2 Ch. 127.*

**3120. Add. Annotation:—Apld.** *Re* Graham, Graham v. Graham, [1929] 2 Ch. 127.

3131a. —. —.]—By her will, after giving life interests to her parents, a testatrix devised & bequeathed her real & personal estate to her husband, but if he should have predeceased both her parents, then to her husband's children, whether by herself or his first wife. The husband survived both the parents, but predeceased testatrix. Testatrix left no issue of her own, but at her death there were six children of her husband's first marriage living :—*Held* : there was no implication of a gift over to those children on failure of the gift to the husband by lapse in any event, & therefore the residuary estate of testatrix was undisposed of & passed to her next of kin.—*Re GRAHAM, GRAHAM v. GRAHAM*, [1929] 2 Ch. 127 ; 98 L. J. Ch. 291 ; 141 L. T. 197.

**3131b.** ——— **Trust in settlement for payment for legacies.]**—A settlement, without reciting any will, declared trusts for (*inter alia*) payment of the legacies bequeathed by the settlor's "said will," dated Sept. 24, 1904. A will so dated was then in existence. The ct., in certain proceedings, pronounced the trusts which were declared by the settlement to take effect after the settlor's death to be irrevocable whether the will should be revoked or not. The will was afterwards revoked. Two legatees predeceased the settlor:—*Held*: as the legatees had predeceased the settlor, the sums representing the legacies were not payable out of the funds then subject to the settlement to the legatees' personal representatives.—*Re HALL'S SETTLEMENT TRUSTS, SAMUEL v. LAMONT*, [1937]

Ch. 227; [1937] 1 All E. R. 571; 106 L. J.  
Ch. 111; 156 L. T. 269; 53 T. L. R. 382;  
81 Sol. Jo. 179.

3143a. ——. —.]—*Re* BAKER, STEADMAN  
DICKSEE (1934), 78 Sol. Jo. 336, C. A.

**3215.** *Add. Annotation* : - **Refd.** *Re Cousen's Will Trusts, Wright v. Killick, [1937] Ch. 381.*

**3217a.** —.—A testator by his will gave a half share of his residuary trust fund to the children of S. M. C. who should be living at his death, provided always that if any child of S. M. C. should die in the lifetime of testator, whether before or after the date of his will, leaving issue living at his death, the share which such child would have taken if he or she had survived testator should be held in trust for his or her personal representatives as part of his or her personal estate. No child of S. M. C. survived testator. One child, a daughter, C. S. C., married W. A. She died intestate in the lifetime of testator, leaving her husband, W. A., who became her personal representative & beneficially entitled to the whole of her estate, & a daughter, J. W. W. A., having made certain dispositions by his will in favour of J. W., also died in the lifetime of testator. J. W. survived testator :—*Held* : as W. A. died in the lifetime of testator there was a lapse & the half share of the residuary trust fund went back into testator's estate.—*Re COUSEN'S WILL TRUSTS*, *WRIGHT v. KILLICK*, [1937] Ch. 381 ; [1937] 2 All E. R. 276 ; 106 L. J. Ch. 261 ; 157 L. T. 32 ; 53 T. L. R. 490 ; 81 Sol. Jo. 317.

3226. In para. before "*Held*," add:—

"On a summons to determine the effect of the above-mentioned disposition with regard to testator's own marriage settlement

**PART XIV. SECT. 1.**

3112 xiv. ——.]—Where one of several legatees is dead, unknown to the testator, when the will is made, his share passes as on an intestacy.—*DIS ROCHES v. ROBINSON*, [1938] 1 D. L. R. 376; *sub nom. Re HENDERSON'S ESTATE*, 12 M. P. R. 402.—**CAN.**

**PART XIV. SECT. 6.**

sb. *Wills Act*, 1936, s. 30.]—A will devised & bequeathed all of the testator's estate to a trustee "to pay the income thereof to my children

share & share alike until my youngest child attains the age of twenty-one years upon the happening of which event the corpus shall be divided equally amongst my children share & share alike." The testator had had nine children, four of whom predeceased him. One deceased daughter, M., was survived by her husband & their daughter; the husband had, after M.'s death, married another daughter of the testator who also predeceased the testator & was survived by the husband & their son. The husband &

said grandchildren of the testator were living at the time of the death of the testator: *—**Id.* sect. 30 of Wills Act, 1936, applied, the result being that the testator's said son-in-law shared, in accordance with the provisions of Devolution of Estates Act, R. S. M., 1913, c. 54, in the shares of the testator's estate to which said daughters would have been entitled had they survived him: *—**Re RAKI'S ESTATE*, [1938] 1 W. W. R. 492; 1 D. L. J. 191; 45 Man. J. R. 616. **CAN.**

fund & his residuary real & personal estate " :—

*Add. Annotation* :—**Refd.** *Elliot v. Joicey*, [1935] A. C. 209.

**3244.** *Add. Annotation* :—**Consd.** *Re Ashton*, *Sier v. Ashton* (1934), 78 Sol. Jo. 803.

**3250.** *Add. Annotations* :—**N.F.** *Re Taylor*, *Taylor v. Taylor* (1931), 75 Sol. Jo. 393. **Apld.** *Re Harward*, *Newton v. Bankes*, [1938] Ch. 632.

**3251.** *Add. Annotation* :—**Apld.** *Re Harward*, *Newton v. Bankes*, [1938] Ch. 632.

**3253a.** — — —.—*Testatrix by her will gave, devised & bequeathed all her residuary real & personal estate to a trustee upon trust for conversion, & to divide the net proceeds of such conversion equally between her four step-children named. The will contained a proviso directing that the share to which A., one of her step-daughters, "shall become entitled," should be retained by the trustee upon trust to invest the same, & to apply the income thereof or so much as he should in his discretion think fit towards the maintenance or benefit of A. during her life, & to accumulate the residue of the income (if any), & after the death of A. the said share settled upon her & the investments & income thereof, & any unapplied accumulations were to be equally divided between the other three step-children. A. & another step-child named in the will predeceased testatrix :—Held : as A. did not live to become entitled to any share in the residue, the gift lapsed, the settlement failed, & there was an intestacy as to one-half of the residue.—Re TAYLOR, TAYLOR v. TAYLOR, [1931] 2 Ch. 237; 100 L. J. Ch. 309; 145 L. T. 443; 75 Sol. Jo. 393.*

*Annotation* :—**Refd.** *Re Harward*, *Newton v. Bankes*, [1938] Ch. 632.

**3253b.** — — —.—*A testatrix by her will gave a pecuniary legacy of £5,000 to her married daughter G. By a codicil executed some months later the testatrix directed her trustees to retain & invest the legacy, & to pay the income to G. during her life without power of anticipation, & after her death to hold the capital & income upon trust for the persons who on the death of G. would be the next of kin of the testatrix under Administration of Estates Act, 1925 (c. 23), as if she (the testatrix) had died intestate & without*

*having been married. G. predeceased the testatrix :—Held : the legacy did not lapse & fall into residue, but was held by the trustees for the persons entitled under the settlement created by the codicil.—Re HARWARD, NEWTON v. BANKES, [1938] Ch. 632; [1938] 2 All E. R. 804; 107 L. J. Ch. 307; 159 L. T. 354; 54 T. L. R. 784.*

**3256.** *Add. Annotation* :—**Refd.** *Re Harward*, *Newton v. Bankes*, [1938] Ch. 632.

**3261.** *Add. Annotation* :—**Folld.** *Re Buxton*, *Buxton v. Buxton*, [1930] 1 Ch. 648.

**3329.** *Add. Annotation* :—**Consd.** *Re Dale*, *Mayer v. Wood*, [1931] 1 Ch. 357.

**3330.** *Add. Annotation* :—**Refd.** *Re Forrest*, *Carr v. Forrest*, [1931] 1 Ch. 162.

**3332.** *Add. Annotation* :—**Apld.** *Re Forrest*, *Carr v. Forrest*, [1931] 1 Ch. 162.

**3334.** *Add. Annotation* :—**Consd.** *Re Forrest*, *Carr v. Forrest*, [1931] 1 Ch. 162.

**3336a.** — — —.—*Testatrix, who died in 1873, by her will made in 1866 gave her residuary estate in trust for her four daughters A., B., C. & D., or such of them as should be living at her death in equal shares. By a codicil the testatrix revoked her will so far as regarded the bequest to B., & substituted therefor a legacy of £100, & in other respects confirmed her will. Each of the four daughters, including B., survived testatrix :—Held : whether or not the bequest in trust for testatrix's four daughters was, in the technical sense of the phrase, a class gift, the share bequeathed in favour of B. did not lapse, but the whole of the residue went to the other three daughters.—Re WOODS, WOODS v. CREAGH, [1931] 2 Ch. 138; 100 L. J. Ch. 385; 145 L. T. 206.*

**3349.** *Add. Annotation* :—**Expld. & Apld.** *Re Woods*, *Woods v. Creagh*, [1931] 2 Ch. 138.

**3352.** *Add. Annotations* :—**Folld.** *Re Maynard*, *Pearce v. Pearce* (1930), 69 L. Jo. 440. **Refd.** *Re Woods*, *Woods v. Creagh*, [1931] 2 Ch. 138.

**3354a.** — — —.—*Re MAYNARD, PEARCE v. PEARCE* (1930), 69 L. Jo. 440; 169 L. T. Jo. 519; [1930] W. N. 127.

**3357.** *Add. Annotation* :—**Apld.** *Re Taylor*, *Taylor v. Taylor* (1931), 75 Sol. Jo. 393.

## Part XV.—Powers.

**3390.** *Add. Annotation* :—**Generally**, **Refd.** *Re Mills*, *Mills v. Lawrence*, [1930] 1 Ch. 440.

**3448.** *Add. Annotation* :—**Refd.** *Re Hawksley's Settlement*, *Black v. Tidy*, [1934] Ch. 384.

**3452.** *Add. Annotation* :—**As to (2)** **Refd.** *Smith v. Thompson* (1931), 146 L. T. 14.

**3453a.** — — —.—*Cheques written in 1833 by deceased upon his bankers, but not intended*

*to have effect until after his death, pronounced for as part of the testamentary disposition of the deceased; he having in 1834 formally executed a will, disposing of the whole of his property, & containing a full clause of revocation.—GLADSTONE v. TEMPEST (1840), 2 Curt. 650.*

*Annotations* :—**Consd.** *Smith v. Thompson* (1931), 146 L. T. 14. *Lowthorpe-Lutwidge v. Lowthorpe-Lutwidge*, [1935] P. 151.

### PART XIV. SECT. 9. SUB-SECT. 2. —B.

**3294 v.** — — —.—*Re TAIT ESTATE*, [1929] 4 D. L. R. 1074; 1 W. W. R. 380; 23 S. L. R. 454.—**CAN.**

**3294 vi.** — — —.—*Testator bequeathed of the remainder of her estate "equal shares" to the children of her two sisters (or their children), to a brother one "such share," to a sister (or heirs) two "such shares" & to a*

*niece two "such shares." The brother predeceased testatrix :—Held : the intention was to create seven equal shares, & the brother having predeceased her his share lapsed.—Re KERR (1937), 12 M. P. R. 31.—**CAN.***



3456. *Add. Annotation*:—*Refd. Smith v. son* (1931), 146 L. T. 14.

3457. *Add. Annotation*:—*Refd. Smith v. Thompson* (1931), 146 L. T. 14.

3457a. ———.]—Although a general revocatory clause in a will does not necessarily revoke an earlier testamentary exercise of a power of appointment it requires cogent evidence to show that that effect is entirely unreasonable; otherwise a revocation of the appointment will result. Apart from cases in which strong evidence is forthcoming rebutting revocation, any doubt which may have previously existed of this effect of a general revocatory clause upon the previous exercise of a power by an earlier paper must be regarded as now set at rest by the decision in *Re Kingdom, Wilkins v. Pryer*, No. 3457.—*LOWTHORPE-LUTWIDGE v. LOWTHORPE-LUTWIDGE*, [1935] P. 151; 104 L. J. K. B. 71; 153 L. T. 103.

3459a.

—.]—Where there were two testamentary papers, of which the first, a duly executed will (*inter alia*), exercised a special power of appointment under an ante-nuptial settlement, & the second, also a duly executed will, purported to revoke all former wills without expressly dealing with the power of appointment:—*Held*: the ct. could take into account the surrounding circumstances & treat the exercise of the power of appointment as unrevoked.

The ct. made a grant of letters of administration, with the two papers annexed as the last will of testatrix, & declared that the revocatory clause did not in fact revoke the earlier appointment.—*SMITH v. THOMPSON* (1931), 146 L. T. 14; 47 T. L. R. 603; 75 Sol. Jo. 555.

*Annotation*:—*Distd. Lowthorpe-Lutwidge v. Lowthorpe-Lutwidge*, [1935] P. 151.

3469. *Add. Annotation*:—*Consd. Re Phillips, Lawrence v. Huxtable*, [1931] 1 Ch. 347.

## Part XVI.—Construction.

3483. *Add. Annotation*:—*Generally, Refd. Re Walker, Walker v. Walker*, [1930] 1 Ch. 469.

3490a. ———.]—(1) The ct. of Probate, in considering whether certain wills should be admitted to probate, expressed an opinion as to how the wills should be construed. In arriving at that opinion the ct. referred to matters which would have been inadmissible in a ct. of construction on a question of construction & the order for probate did not contain any finding on the question of construction. In view of the form of the order, there was no opportunity of appealing from it in the case of some of the parties who would be affected by the opinion expressed on construction if that opinion was binding on them:—*Held*: the opinion expressed by the ct. of Probate did not bind the Chancery Ct. before which the question of construction ultimately came.

(2) The testatrix, in a will executed by her in 1927, described the document as her "last will & testament" & referred in it to a will of 1922 as a "cancelled will." She also wrote "cancelled" on the will of 1922:—*Held*: these words by themselves were not sufficient to effect a complete revocation of the 1922 will & a codicil to it of 1925, but the question whether there had been revocation must depend on the construction of the 1927 will as a whole.

(3) It being found, as a matter of construction, that the provisions of the 1927 will were either entirely inconsistent with the provisions of the 1922 will & the codicil or merely repeated the provisions therein contained:—*Held*: the 1927 will rendered ineffectual the whole of the provisions of the 1922 will & the codicil.

(4) If an absolute gift or appointment is made by a testator in one testamentary document to one person & the subject of the gift or appointment is then given or appointed by a subsequent document to a second person & the second gift or appointment fails to take effect, the doctrine of dependent relative revocation does not apply in the absence of evidence that the testator intended that the person first benefited should take if the second person could not, & the first gift or appointment does not become operative.—*Re HAWKESLEY'S SETTLEMENTS, BLACK v. TIDY*, [1934] Ch. 384; 103 L. J. Ch. 259; 151 L. T. 299; 50 T. L. R. 231.

3502. *Add. Annotations*:—*As to* (4) *Apld. Re Jenkins, Jenkins v. Davies* (1931), 100 L. J. Ch. 265. *As to* (4) *Consd. Barras v. Aberdeen Steam Trawling & Fishing Co.*, [1933] A. C. 402; *Re Sassoon, I. R. Comrs. v. Raphael, Re Sassoon, I. R. Comrs. v. Ezra*, [1933] Ch. 858. *Refd. Shaw v. Public Trustee* (1929), 111 L. T. 465.

3515. *Add. Annotation*:—*Refd. Re Monro's Settlement, Monro v. Hill*, [1933] Ch. 82.

3516. *Add. Annotations*:—*Refd. Re Lynch-White, Smith v. Lynch-White*, [1937] 3 All E. R. 551; *Macleay v. Treadwell*, [1937] A. C. 626.

3554. *Add. Annotation*:—*Refd. Re Grove-Grady, Plowden v. Lawrence*, [1929] 1 Ch. 557.

3571. *Add. Annotation*:—*Generally, Refd. Re Villar, Public Trustee v. Villar*, [1929] 1 Ch. 243.

3590. *Add. Annotation*:—*Refd. Re Walker, Walker v. Walker*, [1930] 1 Ch. 469.

3592. *Add. Annotation*:—*As to* (3) *Consd. Shaw v. Public Trustee* (1929), 141 L. T. 465.

### PART XV. SECT. 8.

3461 i. *Whether gift by implication arises.*—*Re LLOYD*, [1938] 1 D. L. R. 450; O. R. 32.—*CAN.*

PART XVI. SECT. 3, SUB-SECT. 1.  
— *Condition relating to re-*

*ligion of donee.*—*Re PATTON*, [1929] 3 D. L. R. 459; 63 O. L. R. 655.—*CAN.*

so. *Whether date of codicil.*—A codicil does not in all cases operate to make the will read as if made at the date of the codicil. The intention of testator is an important element.—

ROYAL TRUST Co. v. SHIMMIN, [1933] 3 D. L. R. 718; 47 B. C. R. 138.—*CAN.*

PART XVI. SECT. 4, SUB-SECT. 4.—*A. (a).*

3594 xiv. ———.]—*Re RUMNEY'S ESTATE* (1925), 21 Tas. L. R. 3.—*AUS.*

- 3609. Add. Annotations:—**As to (1) *Apld. Re Gowenlock, Public Trustee v. Gowenlock* (1931), 177 L. T. Jo. 95. As to (2) *Apld. Re Smalley, Smalley v. Scotton*, [1929] 2 Ch. 112. As to (3) *Apld. Re Smalley, Smalley v. Scotton*, [1929] 2 Ch. 112. As to (4) *Apld. Re Smalley, Smalley v. Scotton*, [1929] 2 Ch. 112.
- 3624. Add. Annotation:—***Refd. Re Cockerill, Mackaness v. Percival*, [1929] 2 Ch. 131.
- 3625. Add. Annotation:—***Refd. Re Hood, Public Trustee v. Hood*, [1931] 1 Ch. 240.
- 3650. Add. Annotation:—**Generally, *Refd. Re Sassoon, I. R. Comrs. v. Raphael, Re Sassoon, I. R. Comrs. v. Ezra*, [1933] Ch. 858.
- 3672. Add. Annotation:—**As to (3) *Refd. British S.S. Owners' Association v. Chapman (R.) & Sons* (1933), 50 T. L. R. 159.
- 3674. Add. Annotation:—***Refd. Re Ridge, Hancock v. Dutton* (1933), 149 L. T. 266.
- 3684. Add. Annotation:—**As to (3) *Refd. Re Messenger's Estate, Chaplin v. Ruane*, [1937] 1 All E. R. 355.
- 3697. Add. Annotation:—***Refd. Re Curryer's Will Trusts, Wyly v. Curryer*, [1938] 3 All E. R. 574.
- 3707. Add. Annotation:—***Refd. Jagmohan Singh v. Pandit Sri Nath* (1930), 46 T. L. R. 586.
- 3715. Add. Annotation:—***Apld. A.-G. v. Lloyd's Bank, Ltd.*, [1935] A. C. 382. *Consd. Re Cohen's Will Trusts, Cullen v. Westminster Bank, Ltd.*, [1936] 1 All E. R. 103. *Apld. Re Gatti's Voluntary Settlement Trusts, De Ville v. Gatti*, [1936] 2 All E. R. 1489. *Refd. Re Coleman, Public Trustee v. Coleman*, [1936] Ch. 528; *Re Hodson's Settlement, Brookes v. A.-G.*, [1938] 3 All E. R. 341.
- 3741. Add. Annotation:—**As to (1) *Refd. Re Bund, Cruikshank v. Willis*, [1929] 2 Ch. 455.
- 3743. Add. Annotation:—**As to (1) *Consd. Re Sutcliffe, Alison v. Alison*, [1934] Ch. 219.
- 3781. Add. Annotation:—***Refd. Shaw v. Public Trustee* (1929), 141 L. T. 465.
- 3822a. —.**—Testator devised & bequeathed the residue of his estate to the Public Trustee upon trust for sale & conversion & to pay one-half of the net income arising from the fund so created to R. & the other half to T., & "from & after their decease" to pay the principal as well as the income to a specified charity. R. predeceased testator. The question arose whether there was an intestacy as regards R.'s share, & if not, whether it was payable, both capital & income, to the charity or whether R.'s share of income was payable to T. for her life:—
- Held: there was no intestacy. The clear intention of testator was to benefit both R. & T. &, on the true construction of the will, the gift over to the charity did not take effect till the death of both the annuitants. The surviving annuitant was entitled therefore to the whole of the income from the fund.—Re RAGDALE, PUBLIC TRUSTEE v. TUFFILL, [1934] Ch. 352; 103 L. J. Ch. 181; 150 L. T. 459; 50 T. L. R. 159; 78 Sol. Jo. 48.*
- 3876. Add. Annotation:—***Consd. Lowthorpe-Lutwidge v. Lowthorpe-Lutwidge*, [1935] P. 151.
- 3890. Add the following para. :—**  
Family reputation admissible to show that a legatee was the godson of testator.
- 3910. Add. Annotations:—***Consd. Re Prosser, Prosser v. Griffith* (1929), 167 L. T. Jo. 307; *Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357. *Refd. Re Cossentine, Philp v. Wesleyan Methodist Local Preacher's Mutual Aid Assocn.* (1932), 76 Sol. Jo. 512.
- 3976. Add. Annotation:—***Consd. Shaw v. Public Trustee* (1929), 141 L. T. 465.
- 4043. Add. Annotation:—***Refd. Jagmohan Singh v. Pandit Sri Nath* (1930), 46 T. L. R. 586.
- 4049. Add. Annotations:—***Consd. Re Gates, Gates v. Cabell*, [1929] 2 Ch. 420. *Refd. Re Emerson, Morrill v. Nutty*, [1929] 1 Ch. 128; *Re Mellor, Porter v. Hindsley*, [1929] 1 Ch. 446.
- 4054. Add. Annotations:—***Consd. Shaw v. Public Trustee* (1929), 141 L. T. 465. *Refd. Re Sassoon, I. R. Comrs. v. Raphael, Re Sassoon, I. R. Comrs. v. Ezra*, [1933] Ch. 858.
- 4074. Add. Annotation:—***Consd. Re Thompson, Public Trustee v. Husband*, [1936] 2 All E. R. 141.
- 4106. Add. Annotation:—***Consd. Rooke, Re, Jeans v. Gatehouse*, [1933] Ch. 970.
- 4110. Add. Annotation:—***Consd. Price v. Gould* (1930), 143 L. T. 333.
- 4141a. Word used inaccurately.]—***Re RIDGE, HANCOCK v. DUTTON*, No. 6754a, *post*.
- 4179. Add. Annotation:—***Refd. Re Recknell, White v. Carter*, [1936] 2 All E. R. 36.
- 4181. Add. Annotation:—***Refd. Re Recknell, White v. Carter*, [1936] 2 All E. R. 36.
- 4183. Add. Annotation:—***Refd. Re Recknell, White v. Carter*, [1936] 2 All E. R. 36.
- 4184. Add. Annotation:—***Refd. Blackwell v. Blackwell*, [1929] A. C. 318.
- 4185. Add. Annotation:—***Refd. Re Recknell, White v. Carter*, [1936] 2 All E. R. 36.

## PART XVI. SECT. 9, SUB-SECT. 1.—A.

3823 i. *Will construed to avoid intestacy—*Property not acquired at date of will.]—*Re GRAZEBROOK, CHASE v. LAYTON*, [1928] V. L. R. 75.—AUS.

## PART XVI. SECT. 9, SUB-SECT. 3.—B.

30. *Gift to Hindu female.*—In the case of a gift to a Hindu female, there is no presumption other than that testator did not mean what he said, or that words are not to be given their ordinary meaning unless further words are added which, by tautology or emphasis, make it certain that they mean what they express.—*PRAMATHANATH SARKAR v. SUPRIKASH GHOSH* (1930), 1 L. R. 58 Cal. 77.—IND.

## PART XVI. SECT. 10, SUB-SECT. 2.—B. (a).

3946 vii. —.]—Words of a will must be interpreted in their strict & primary sense when there is nothing in the context of the will to suggest that they were used in any other sense.—*Re HOOPER, HOOPER v. TORONTO GENERAL TRUSTS CORPN.*, [1936] 3 D. L. R. 545; O. R. 533; *affd. sub nom. Re HOOPER, HAMM v. HOOPER*, [1937] 1 D. L. R. 803; S. C. R. 352.—CAN.

## PART XVI. SECT. 10, SUB-SECT. 2.—B. (b) i.

30. *Will of Indian testator.*—Too rigid a construction of the English

language should not be applied to the will of an Indian testator.—*INDIRANI GHOSH v. AKHOY KUMAR GHOSH* (1932), 1 L. R. 59 Ind. App. 419, P. C.—IND.

## PART XVI. SECT. 10, SUB-SECT. 2.—C.

4046 i. —. *Testator inops concili.*]—*Re SPIAN (Alta.)*, [1929] 4 D. L. R. 405.—CAN.

## PART XVI. SECT. 10, SUB-SECT. 2.—E. (d).

4085 ii. —. *Effect of Maori customary marriage.*]—Where the will of a Maori created (*inter alia*) a trust to pay income to his wife "for her life-

**4186a.** —.]—A testatrix by her will made in 1902, when she was living in Isleworth, after giving certain specific & monetary legacies directed that “all other money invested or in the London & County Bank” should be divided among the persons therein named. Testatrix, who had not had an account with the London & County Bank for many years, died in 1934, at Bexhill, where she had been living for some years:—*Held*: upon a proper construction of the will & in the circumstances of the case the words “all other money” constituted a residuary gift & the words “invested or in the London & County Bank” were mere words of enumeration & not qualifying words.—*Re* RECKNELL, WHITE v. CARTER, [1936] 2 All E. R. 36; 80 Sol. Jo. 406.

**4229.** *Add. Annotation*:—*Re* *Re Sassoon, I. R. Comrs. v. Raphael, Re Sassoon, I. R. Comrs. v. Ezra*, [1933] Ch. 858.

**4241a.** —.]—A testator directed his trustees to convert his property & invest the proceeds, & then went on: “& I declare that the said trustees or trustee may vary the said stocks, funds, shares & securities at their or his discretion, & shall pay the moneys & the investment for the time being representing the same to my said wife during her life upon trust for all my children or any child who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry & if more than one in equal shares.” He then empowered the trustees, after the death of his wife or previously by her direction, to raise any sums not exceeding half the expectant share of any child for his or her advancement, & to apply the income of each child's expectant share for maintenance after the death of his wife; & if no child, being a son, should attain twenty-one, or, being a daughter, attain that age or marry, the fund was given over after the death of the widow:—*Held*: the widow took a beneficial interest for life in the fund.—*GREENWOOD v. GREENWOOD* (1877), 5 Ch. D. 954; 47 L. J. Ch. 298; 37 L. T. 305; 26 W. R. 5; 21 Sol. Jo. 630, C. A.

*Annotation*:—*Re* *Smith v. Crabtree* (1877), 6 Ch. D. 591.

**4346a.** —.]—The testator by his will gave a number of legacies to institutions, the amount of all except one being stated in both words & figures to be £500. The amount of the remaining legacy was first stated in words to be “one hundred pounds” & then in figures “£500”:—*Held*: applying the maxim that in a will the second of two inconsistent provisions is to prevail, the

legacy was one of £500, & not of £100.—*Re* HAMMOND, HAMMOND v. TREHARNE, [1938] 3 All E. R. 308; 54 T. L. R. 903; 82 Sol. Jo. 523.

**4374.** *Add. Annotation*:—*Re* *Berry v. Geen*, [1938] A. C. 575.

**4375a.** *Uncertain time of distribution.*—]—Testator by his will, devised his residuary real estate to his exors. upon trust to pay the income subject to a life interest in part for testator's widow: “To such of my children from time to time as to my exors. shall appear to be most in need the payments to be at the absolute discretion of my exors. If at any time it appears to my trustees that none of my children are in need of assistance but are all unembarrassed financially then after the death of my wife my trustees may divide the estate among my children then living in such proportions as to them shall seem fit.” The wife & eleven children survived testator, & the wife & four children died subsequently. One of the children applied to have various questions of construction arising under the will determined by the ct., & in particular the question whether the trustees were not bound to make an immediate division & distribution of the corpus of the estate:—*Held*: the trustees were at liberty to distribute the estate among the children living at the time of such distribution, but only if & when it should appear to them that none of the children were in need of assistance, & all were unembarrassed financially; until the time for such distribution should have arrived the trustees should pay the income from the estate from time to time to such of the children of testator as to them appeared most in need.—*MAGEE v. MAGEE*, [1936] 3 All E. R. 15, P. C.

**4385a.** *No subject of disposition mentioned.*—]—By his will, which was on a printed form, a testator appointed E. A. C. to be his exor. After providing for the payment of testator's debts, funeral & testamentary expenses, the will proceeded: “I give & bequeath to E. A. C.”:—*Held*: upon a consideration of testator's intention expressed in the will, E. A. C. was beneficially entitled to the whole of testator's estate.—*Re* MESSENGER'S ESTATE, CHAPLIN v. RUANE, [1937] 1 All E. R. 355; 81 Sol. Jo. 138.

**4392a.** *Gift to named person for distribution among political bodies to be selected.*—]—Testator by his will bequeathed 4 per cent. of his residuary estate to H. S. “to be by him distributed amongst such political federations or bodies in the United Kingdom having as their

time or so long as she shall remain unmarried” there is no ceaser of the wife's interest upon her contracting a sexual relationship known as “Maori customary marriage.” In any event, upon the facts the evidence did not disclose that testator had used the word “unmarried” other than in its ordinary sense.—*Re* TAMAHAU MAHUPUKU, THOMPSON v. MAHUPUKU, [1932] N. Z. L. R. 1397.—N. Z.

#### PART XVI. SECT. 10. SUB-SECT. 5.

*sp. When later words prevail.*—]—Application of rule that where a testamentary gift has been modified by a subsequent clause in a will or in conflict therewith, the latter clause

controls.—*DINSMORE v. DINSMORE* (1936), 11 M. P. R. 196, 6 F. L. J. (Can.) 196.—CAN.

#### PART XVI. SECT. 10. SUB-SECT. 6.

*I. I. — Clerical error.*—]—In construing a will the ct. goes far to discover the intention of the testator, & if it can be discovered from the will itself & the surrounding circumstances a clerical error will be treated as such & the apparent intention given effect to.—*Re* ZUROWSKI, [1928] 1 D. L. R. 357; 22 Sask. L. R. 249; [1928] 3 W. W. R. 745.—CAN.

*I. II. — Omission of beneficiary.*—]—In the residuary clause of a will which bore every evidence of having been

prepared with great care & professional skill testator expressed his intention to dispose of all the residue of his estate by gifts which were expressed to be of “one-eighth”; but the words “one-eighth” appeared only seven times:—*Held*: there was an intestacy as to the one-eighth share of the residue; the omission of the name of the beneficiary of this share was clearly due to accident or mistake, & the ct. should not hazard a speculation as to the name.—*Re* MCKITTRICK ESTATE, [1933] 3 W. W. R. 536; 41 Man. L. R. 454 [1934] 1 D. L. R. 422.—CAN.

#### PART XVI. SECT. 12. SUB-SECT. 1.

**4335 xiii.** —.]—*Re* GIVIN ESTATE (1932), 40 Man. L. R. 481.—CAN.

objects or one of their objects the promotion of Liberal principles in politics as he shall in his absolute discretion select & in such shares & proportions as he shall in the like discretion think fit." H. S. stated that he was able to ascertain all the bodies in the United Kingdom that fell within the description of the bequest:—*Held*: no question of a charitable bequest arose; there was a class of beneficiaries capable of ascertainment in a specified area; the bequest was not void for uncertainty; there was no trust for the promotion of Liberal principles; & the bequest was valid.—*Re OGDEN, BRYDON v. SAMUEL*, [1933] Ch. 678; 102 L. J. Ch. 226; 149 L. T. 162; 49 T. L. R. 341; 77 Sol. Jo. 216.

*Compare* CHARITIES, Vol. VIII., pp. 293, 294.

- 4419.** *Add. Annotation :—Refd. Re Maynard, Pearce v. Pearce* (1930), 69 L. Jo. 440.  
**4432.** *Add. Annotation :—As to (3) Consd. Re Smalley, Smalley v. Scotton,* [1929] 2 Ch. 112.  
**4437.** *Add. Annotation :—Refd. Re Cruse, Gass v. Ingham,* [1930] W. N. 206.  
**4443.** *Add. Annotation :—Refd. Re Gates, Gates v. Cabell,* [1929] 2 Ch. 420.  
**4564.** *Add. Annotations :—Refd. Smith v. Thompson* (1931), 146 L. T. 14; *In the Estate of Musgrave, Tidy v. Musgrave,* [1934] Ch. 402, n.; *Re Hawksley's Settlement, Black v. Tidy* (1934), 151 L. T. 299.  
**4607.** *Add. Annotation :—Distd. Re Jackson, Beattie v. Murphy,* [1933] Ch. 237.  
**4619.** *Add. Annotation :—Refd. Shaw v. Public Trustee* (1929), 141 L. T. 465.  
**4653a.** ———.]—*Re JACKSON, BEATTIE v. MURPHY,* No. 6708A, *post*.  
**4684a.** ——— “War Loan.”]—*Re CRUSE, GASS v. INGHAM,* [1930] W. N. 206.  
**4691.** *Add. Annotation :—As to (1) Refd. Re Gowenlock, Public Trustee v. Gowenlock* (1934), 177 L. T. Jo. 95.  
**4708.** *Add. Annotation :—Consd. Re Smalley, Smalley v. Scotton,* [1929] 2 Ch. 112.  
**4715a.** ———.]—*Re GOWENLOCK, PUBLIC TRUSTEE v. GOWENLOCK* (1934), 177 L. T. Jo. 95.  
**4834a.** ———.]—*Re GOWENLOCK, PUBLIC TRUSTEE v. GOWENLOCK* (1934), 177 L. T. Jo. 95.

**PART XVI. SECT. 14, SUB-SECT. 4.**

o l. ———.]—On determining whether the devise & bequests in the will in question herein were to be paid free of probate & succession duties:—**Held:** the evidence of two legatees of their opinion of testatrix' intention was inadmissible, since it did not fall within the "equivocation rule."—*Re DIXON ESTATE*. [1935] 3 W. W. R. 118; *on appeal*, [1936] 1 W. W. R. 383; 1 D. L. R. 593; 50 B. C. R. 285.—**CAN.**

**4534 i.** — *Words used in peculiar sense—Evidence of customary usage by testator.*—Where the words of a devise or bequest in the primary sense, when applied to the circumstances of the family & the property, make the devise or bequest insensib[ly], collateral facts may be resorted to in order to show that in some secondary sense of the words & one in which testator meant to use them, the devise or bequest may have a full effect.—*RE CREAMER ESTATE*, [1932] 3 W. W. R. 621.—**CAN.**

4537. i. — To translate words of

**4862.** *Add. Annotation:—***Refd.** British S.S. Owners' Association v. Chapman (R.) & Sons (1933), 50 T. L. R. 159.

**4865.** *Add. Annotation:—Refd. Re Warren, Warren v. Warren, [1932] 1 Ch. 42.*

**4895.** *Add. Annotation* :—As to (1) *Refd. Re Carrington, Ralphs v. Swithenbank*, [1932] 1 Ch. 1.

**4911.** *Add. Annotation*:—**Consd.** Shaw v. Public Trustee (1929), 141 L. T. 465.

4921a. Money Invested in Swansea Harbour Trust—Statutory substitution of Great Western Railway Stock.]—The undertaking of the Swansea Harbour Trustees was vested in the Great Western Railway Co. by the Great Western Railway (Swansea Harbour Vesting) Act, 1923, which provided that stock of the Great Western Railway should be issued to holders of stock of the trustees in substitution therefor. Sect. 12 of the Act provides: “Stock of the co. substituted by virtue of this Act for any stock of the Trustees . . . shall be held upon & subject to the same trusts liens charges powers & other legal or equitable rights privileges & restrictions as affected the stock . . . for which by virtue of this Act the stock of the co. is substituted . . . & any reference in any Act of Parliament deed will codicil book document instrument or writing to any such stock . . . shall be deemed to be a reference to the stock of the co. . . . by virtue of this Act substituted therefor”:—*Held*: the latter part of the sect. was not restricted in meaning by regard to the first part, & it applied to any reference to stock of the trustees in any “document instrument or writing” in existence when the Act of 1923 came into force, even though the “document instrument or writing” was not then effective to create trusts liens charges powers or other legal or equitable rights privileges or restrictions.

By his will made in 1913 testator bequeathed "the sums of £3,500 & all other moneys that I may at my death possess invested in the Swansea Harbour Trust" upon certain trusts. In 1923 testator received, pursuant to the Act of 1923, £2,800 5 per cent. consolidated preference stock of the Great Western Railway Company in sub-

*will.*].—In determining the meaning of expressions in a will written in a language other than English, preponderating weight should be given to the evidence of persons who are not merely skilled in the use of that language, but have presumably a sounder judgment of the verbal nuances of that tongue under the conditions of life of the testator, with which they are familiar, than can be imputed to conclusions from the study of dictionaries.

"*Arrière neveux*," as used in the will in question herein, held to mean both grand-nephews & grand-nieces, & not posterity or descendants generally.—*Re BRULE*, [1928] 1 W. W. R. 308.—CAN.

4537 H. *Incorrect translation filed.*—Where a will is in a foreign language the probate copy of which is an incorrect translation, the Ct. of Equity will not look at the correct translation in order to construe the will, the proper course being to apply to the Probate Ct. to have the translation corrected. — *Re KLEINBANG*

(1928), 28 S. R. N. S. W. 455; 45  
N. S. W. W. N. 123.—AUS.

**PART XVI. SECT. 14. SUB-SECT. 8.—**  
**C. (a) I.**

4629 iv. —.].—Testator, who was ninety-one years of age & seriously ill, in his last will & thereby made certain bequests to the children of his late sister Sarah Ann Baker. Testator had a sister Sarah Baker & a niece Sarah Ann Bacon (*nee* Baker). In order to clear up the difficulty caused by the misdescription it was proposed to tender evidence of testator's verbal instructions for his will & of the correspondence between testator & his niece & her children, & of a former will in which he had given a legacy "to the children of my late niece Sarah Ann Bacon (daughter of my "sister Sarah Baker)." *Held*: the evidence was admissible, so that the children of Sarah Ann Bacon were entitled to the share given under the will to the children of Sarah Ann Baker. *Re* TAYLOR, TAYLOR v. BAKER, [1931] N. Z. L. R. 352.—N. Z.

stitution for his holding of £3,500 4 per cent. Swansea Harbour Stock, & continued to hold the Great Western Railway stock till his death:—*Held*: the reference in the will to the property bequeathed was a reference to stock of the Swansea Harbour trustees within the meaning of the Act; by virtue of the latter part of sect. 12 of the Act the bequest operated to pass the substituted Great Western Railway stock.—*Re JENKINS, JENKINS v. DAVIES*, [1931] 2 Ch. 218; 100 L. J. Ch. 265; 145 L. T. 184; 47 T. L. R. 379, C. A.

4944. *Add. Annotation*:—*Refd. Re Union of London & Smith's Bank, Ltd. Conveyance, Miles v. Easter*, [1933] Ch. 611.

5194. *Add. Annotation*:—*Refd. English, Scottish & Australian Bank, Ltd. v. I. R. Comrs.* (1931), 48 T. L. R. 170.

5198. *Add. Annotation*:—*As to (1) Distsd. Joseph v. Phillips*, [1934] A. C. 348.

5227. *Add. Annotation*:—*Generally, Refd. Shaw v. Public Trustee* (1929), 141 L. T. 465.

5239a. — *Occupation prevented by insanity.*—Testator bequeathed to his wife any house of which he might at the time of his death be the owner & occupier. At the date of his death his wife was in occupation of a house which he had bought & in which his furniture had been placed, but in which he had never resided, as, shortly after the purchase of the house, he became of unsound mind & was removed to a mental home:—*Held*: testator was the occupier of the house at the time of his death & his widow was entitled to the proceeds of sale of the house.—*Re GARLAND, EVE v. GARLAND*, [1931] Ch. 620; 103 L. J. Ch. 287; 151 L. T. 326; 78 Sol. Jo. 519.

5286. *Add. Annotation*:—*Consd. Re Jenkins, Jenkins v. Davies* (1931), 100 L. J. Ch. 265.

5286a. *Securities "or investments representing the same" at date of testator.*—Testator appointed plff. his sole executrix & trustee. He bequeathed certain securities "(or the investments representing the same at my death if they shall have been converted into other holdings)" to plff. upon trust for the benefit of a cousin for life. One of the named securities was redeemed during testator's lifetime, & he placed the sum so received together with other money on deposit account with his bank & with the A. & N. Stores, Ltd.:—*Held*: on the true construction of the clause, there had been no redemption of the bequest. Money on deposit may be an investment.—*Re LEWIS'S WILL TRUSTS, O'SULLIVAN v. ROBBINS*, [1937] Ch. 118; [1937] 1 All E. R. 227; 106 L. J. Ch. 90; 156 L. T. 235; 53 T. L. R. 132; 80 Sol. Jo. 1035.

5330. *Add. Annotation*:—*As to (2) Consd. Re Tomline's Will Trusts, Pretymen v. Pretymen*, [1931] 1 Ch. 521.

5331. *Add. Annotation*:—*Consd. Re Tomline's Will Trusts, Pretymen v. Pretymen*, [1931] 1 Ch. 521.

5332. *Add. Annotation*:—*Consd. Re Tomline's Will Trusts, Pretymen v. Pretymen*, [1931] 1 Ch. 521.

After this case add:—

*See, also*, Nos. 5900, 5901, *post*.

5332a. *Manuscript letters.*—(1) Testator by his will made a settlement of his two mansion houses & then bequeathed "all the pictures prints statues sculptures articles of vertu

PART XVI. SECT. 15, SUB-SECT. 3.—  
A. (i).

*sg. All my worldly goods*—*Passes really.*—Testatrix by her will gave unto her husband "all her worldly goods for life under these conditions he is not to sell 'Southcote' or any of my household furniture that goes to my nephew D. for his life afterwards to his sons in perpetuity my husband has only a life interest in it after his death my nephew D. is to inherit 'Southcote.' My husband can sell any & all my Northern Territory possessions at his will & live at 'Southcote' or let it as he chooses. . . ." The husband survived testatrix & was living; the nephew died before testatrix, leaving three sons, all of whom were born before the date of the will & were living:—*Held*: the words "all my worldly goods" included realty.—*Re LAY*, [1934] S. A. S. R. 196.—*AUS.*

PART XVI. SECT. 15, SUB-SECT. 4.—  
A. (b).

5086 ix. — — — — —.]—Subject to his wife's right to carry on his farming business & take the net profits thereof, testator gave, devised, & bequeathed his residuary estate to trustees to sell & convert the same & stand possessed of the proceeds, to pay the income thereof to his wife during her life & after her death to pay such income equally "between such of my children as shall survive me & be alive at the death of my said wife":—*Held*: the gift after the widow's death to the children being of the income of the residuary estate without limit as to time, & there being no other disposition of capital, it amounted to a gift of the capital.—*LYNDON v. LYNDON*, [1930] N. Z. L. R. 76.—*N.Z.*

5066 x. — — — — —.]—*Re MACDONALD*, [1931] 4 D. L. R. 920; O. R. 659.—*CAN.*

PART XVI. SECT. 15, SUB-SECT. 6.

*sg. Own occupation—Imperfect description.*—A devise of "all my real estate consisting of the farm on which I now reside" was held to include a wood lot situated about fifty miles from the farm, the words "consisting of the farm on which I now reside" being an imperfect enumeration of the property included in the general gift.—*LEWIS & SONS, LTD. v. DAWSON*, [1934] 2 D. L. R. 396; 7 M. P. R. 255; *affd.*, [1931] S. C. R. 676; 4 D. L. R. 753.—*CAN.*

PART XVI. SECT. 15, SUB-SECT. 9.

*sa. Dominion War Bonds—Inscribed stock subsequently acquired.*—Testatrix by her will gave "all Dominion war bonds which may form 'part of my estate (other than a sum of £400 available for payment of death duties)' to a certain church. At the date of the will, apart from the sum of £100 which was held in New Zealand inscribed stock, she had £700 in war bonds issued under the War Purposes Loan Act, 1917, & £900 in New Zealand Government "Victory" war bonds issued under the Finance Act, 1918. Subsequent to the date of the will she invested in inscribed stock the sum of £1,500, received from discharged mtgs. — *Held*: the expression "Dominion war bonds" must be taken as meaning New Zealand Government war bonds: & having regard to the will itself & the surrounding circumstances, testatrix had not beyond all (or beyond reasonable) doubt excluded the ordinary & well-known meaning of "war bonds," which did not include the inscribed stock

subsequently purchased.—*Re BANKS, LOUGHNAN v. HAMILTON; HAMILTON v. LOUGHNAN* [1931] N. Z. L. R. 798.—*N.Z.*

*sd. Misdescription of company.*—A testator bequeathed to his brother 87 shares of common stock "of the British Columbia Telephone Co., Ltd." There was no co. so named. A provincial co. had been incorporated in 1891 which changed its name to British Columbia Telephone Co., Ltd. & which in 1922 was amalgamated with a Dominion co., the name of the resulting co. being changed to British Columbia Telephone Co. All the shares in the provincial co. were surrendered for shares in the amalgamated co. & for all practical purposes the provincial co. ceased to exist & since then there had not existed anywhere any co. of the name of the British Columbia Telephone Co., Ltd., although that name was often applied by the public to the British Columbia Telephone Co. All but 10 shares of the existing co. were held by another telephone co. & the shares so held were not for sale. Neither at the date of his death nor at that of his will or could did deceased own any common shares in the British Columbia Telephone Co. or in the provincial co. but some years prior to any of said dates he had owned a greater number of common shares in the British Columbia Telephone Co. than 87 shares & at the time of the date of his death he owned, & for some years prior thereto had owned preference shares in the British Columbia Telephone Co.:—*Held*: the legatee was entitled under said bequest to 87 shares of common stock of the British Columbia Telephone Co.—*Re BARNARD ESTATE*, [1937] 1 W. W. R. 340; 51 B. C. R. 230.—*CAN.*

books furniture & plate in my mansion houses . . . unto my trustees upon trust to allow the same, hereinafter called 'the said heirlooms,' to be used & enjoyed" as in the will mentioned. Included in testator's estate were 155 original manuscripts of the series of letters & papers known as the Paston letters. All the originals of the series had belonged to Sir John Fenn, who, towards the end of the eighteenth century, had had these 155 letters inlaid into sheets of paper, which he had then had bound in three volumes. Testator had acquired them so bound, & they were still so bound at the date of his death. On a summons on behalf of the tenant for life under the settlement asking whether the 155 letters were included in the chattels settled by the will to devolve as heirlooms or formed part of testator's residuary estate, &, if the answer to the first part of the question was in the affirmative, that the tenant for life might be authorised to sell them:—*Held*: the three volumes containing the MSS. of the Paston letters passed under the will as heirlooms under the word "books."

(2) There must be many objects of antiquity or curiosity which are not, ordinarily speaking, articles of vertu. I have suggested two, a prehistoric axe-head & an Egyptian mummy. I do not think that anybody in ordinary parlance would describe either of those things as an article of vertu. For my part I think that an article of vertu must be in some sense a product of the fine arts; & the phrase connotes, if not artistic merit, a certain effort on the part of the person who originally produced it, in the direction of what he conceived to be the fine arts (MAUGHAM, J.).—*Re TOMLINE'S WILL TRUSTS*, PRETYMAN v. PRETYMAN, [1931] 1 Ch. 521, 526; 100 L. J. Ch. 156; 144 L. T. 592; 47 T. L. R. 274.

5335. *Add. Annotation*:—*Consd. Re Rhagg, Easten v. Boyd*, [1938] 3 All E. R. 314.

5337. *Add. Annotation*:—*Consd. Re Rhagg, Easten v. Boyd*, [1938] 3 All E. R. 314.

5338. *Add. Annotation*:—*Consd. Re Rhagg, Easten v. Boyd*, [1938] 3 All E. R. 314.

5339. *Add. Annotation*:—*Consd. Re Rhagg, Easten v. Boyd*, [1938] 3 All E. R. 314.

5341. *Add. Annotation*:—*Consd. Re Rhagg, Easten v. Boyd*, [1938] 3 All E. R. 314.

5346. *Add. Annotation*:—*Consd. Re Rhagg, Easten v. Boyd*, [1938] 3 All E. R. 314.

5350a. *Bequest of practice—All assets included.*—A testator by his will bequeathed his business of a solr. & the office furniture, law books, & other articles in the office to his managing clerk, & bequeathed the residue of his estate to charities. Some time after the date of

the will the testator made the legatee his partner, giving him one-half of the profits. On a summons taken out to determine the question what passed under the bequest:—*Held*: (1) the bequest was not adeemed by the partnership agreement; (2) all the assets & moneys employed in the business, including the office premises, undrawn profits, the testator's capital therein, & loans made to clients or prospective clients, & not merely the goodwill of the business, passed to the legatee.—*Re RHAGG, EASTEN v. BOYD*, [1938] Ch. 828; [1938] 3 All E. R. 314; 159 L. T. 434; 54 T. L. R. 990; 82 Sol. Jo. 546.

5356a. ————.—*Re FITZPATRICK, DEANE v. DE VALERA* (1934), 78 Sol. Jo. 735.

5362a. ———— *Desk & contents—Pass-book & promissory notes in drawer.*—Testator bequeathed to his niece "my personal effects in my room, including pictures roll-top desk & chiffonier complete with their contents." The desk had a drawer in which were three pass-books referring to deposit accounts for a total sum of over \$30,500, & nine promissory notes payable to testator's order & not endorsed. Another part of the will provided for pecuniary legacies, including one to testator's niece:—*Held*: the bequest was only of such things as could properly be treated as personal effects, & did not extend to the choses in action represented by the pass-books & promissory notes.

These gifts depend for their validity on the physical delivery to the donee of something, the possession of which may confer a title to claim the real subject of the gift (LORD WARRINGTON).—*JOSEPH v. PHILLIPS*, [1934] A. C. 348; 103 L. J. P. C. 79; 151 L. T. 51; 50 T. L. R. 385; 78 Sol. Jo. 317, P. C.

5450. *Add. Annotation*:—*Refd. Shaw v. Public Trustee* (1929), 141 L. T. 465.

5453. *Add. Annotation*:—*Consd. Re Warren v. Warren*, [1932] 1 Ch. 42.

5458. *Add. Annotation*:—*Refd. Re Cruse, Gass v. Ingham*, [1930] W. N. 206.

5466a. "Bristol Gas Company shares"—*Stock passes.*—*Re CRUSE, GASS v. INGHAM*, [1930] W. N. 206.

5470. *Add. Annotation*:—*Refd. Re Recknell, White v. Carter*, [1936] 2 All E. R. 36.

5520. *Add. Citation*:—*affd. sub nom. SHAW v. PUBLIC TRUSTEE* (1929), 141 L. T. 465, H. L.

5532a. "War Loan"—*Conversion Stock & Treasury Bonds.*—Testatrix by her will gave a legacy of "my £400 5 per cent. War Loan, 1929/1947." She had never had any War Loan, but some time before the date of her will acquired £400 National War Bonds. These were converted by her, £200 into £284 3½ per cent. Conversion Stock, & £200

PART XVI. SECT. 15, SUB-SECT. 14.—G. (b.)

sa. "Shares"—*Investment certificates*—One of the bequests was of "All my shares in the British Mge. Trust Corp. of Ontario." Testatrix owned shares in said co. & also guaranteed investment certificates issued by the same co., & acquired after the making of the will:—*Held*: the bequest did not include the investment certificates.—*Re KENNEDY ESTATE*,

KENNEDY ESTATE EXORS. v. JICKLING, [1936] 1 W. W. R. 204.—CAN.

PART XVI. SECT. 15, SUB-SECT. 14.—G. (g.)

sd. "Promissory notes"—*Debenture bonds.*—By a codicil to his will testator gave to his four daughters & his son, in equal shares, "all mtges., promissory notes, money in bank . . . & cash in hand." The will contained a residuary gift to the son. At the

time of his death testator had two "debenture bonds" of a loan co. made payable to him "his exors., administrators or registered assigns":—*Held*: these bonds did not pass by the codicil as "promissory notes," they did not come within the strict & primary meaning of those words, & there was nothing in the will or the circumstances to indicate that a secondary meaning should be given to them.—*Re GEE*, [1928] 3 D. L. R. 54; 62 O. L. R. 184.—CAN.

into 5 per cent. Treasury Bonds, in each case before the date of the will. Testatrix possessed no other investments at the date of her death:—*Held*: the converted stocks passed under the description of "War Loan."—*Re* PRICE, TRUMPER v. PRICE, [1932] 2 Ch. 54; 101 L. J. Ch. 278; 147 L. T. 351; 48 T. L. R. 318; 76 Sol. Jo. 217.

5532b. "War Saving Certificates"—National Savings Certificates.]—*Re* LAMB, MARSTON v. CHAUVET (1933), 49 T. L. R. 541; 77 Sol. Jo. 503.

5560. *Add. Annotation*:—As to (1) *Folld. Re* Collings, Jones v. Collings, [1933] Ch. 920.

5568. *Add. Annotation*:—*Consd. Re* Tomline's Will Trusts, Pretymman v. Pretymman, [1931] 1 Ch. 521.

5598a. Garden implements & tools.]—*Re* WAVERTREE OF DELAMERE (BARON), RUTHERFORD v. HALL-WALKER, No. 412a, *ante*.

5598b. Movable plants.]—*Re* WAVERTREE OF DELAMERE (BARON), RUTHERFORD v. HALL-WALKER, No. 412a, *ante*.

5601a. —.]—*Re* WAVERTREE OF DELAMERE (BARON), RUTHERFORD v. HALL-WALKER, No. 412a, *ante*.

5602. *Add. Annotation*:—As to (2) *Consd. Re* Tomline's Will Trusts, Pretymman v. Pretymman, [1931] 1 Ch. 521.

5602a. Consumable stores.]—*Re* WAVERTREE OF DELAMERE (BARON), RUTHERFORD v. HALL-WALKER, No. 412a, *ante*.

5625a. "Furniture"—Wireless cabinet.]—The ct. held that a wireless set contained in an oak cabinet would pass under a bequest of "furniture."—*Re* WILEY, GOULDING v. SHIRTCLIFFE (1929), 45 T. L. R. 327.

5696. *Add. Annotation*:—*Expld. Re* Gates, Gates v. Cabell, [1929] 2 Ch. 420.

5696a. —.]—In a will the word "money" has its strict legal meaning of cash, unless there is some context to enlarge the meaning so as to include things such as investments or other personal estate.—*Re* PUTNER, PUTNER v. BROOKE (1929), 45 T. L. R. 325.

5699. *Add. Annotation*:—*Apld. Re* Putner, Putner v. Brooke (1929), 45 T. L. R. 325.

5708a. —. Direction to pay debts.]—By a home made will of 1928 testator, after expressly directing payment of his debts & giving (*inter alia*) a limited interest in his (freehold) residence to his housekeeper, gave "the remainder of any monies" to nine legatees including the housekeeper. There was no other residuary gift:—*Held*: having regard to the express direction to pay debts the gift of "the remainder of any monies" could not be construed in the strict sense of the word "monies," but must include all property liable to the payment of debts. Therefore, the residuary property both real & personal passed by the gift either (a) on the ground that under Administration of Estates Act, 1925 (c. 23), real & personal estate were now *pari passu* liable to the payment of debts, or (b) because when once it was clear that the word "monies," was not used in its strict sense the ct. could give effect to testator's manifest intention to include the whole of his property in the gift.—*Re* MELLOR, PORTER v. HINDSLEY, [1929] 1 Ch. 446; 98 L. J. Ch. 209; 110 L. T. 469.

*Annotations*:—*Consd. Re* Shaw, Mountain v. Mountain (1929), 168 L. T. Jo. 371; Jones v. Treasury Solicitor (1932), 48 T. L. R. 615.

5714. *Add. Annotations*:—*Consd. Jones v. Treasury Solicitor* (1932), 48 T. L. R. 615. *Refd. Re* Gates, Gates v. Cabell, [1929] 2 Ch. 420.

5720a. —.] Testator made his will in the following terms: "I leave all my money to A. B." His estate included cash in the house, in his solrs.' hands & on current account at his bankers, furniture, stocks & shares, & an equity of redemption in freehold property:—*Held*: in the absence of any context the word "money" must be construed in its strict sense, & that the will therefore only passed the cash in the house, in his solrs.' hands & on current account at his bank.—*Re* GATES, GATES v. CABELL, [1929] 2 Ch. 420; 98 L. J. Ch. 360; 141

#### PART XVI. SECT. 15, SUB-SECT. 14.—J. (a).

ss. "Household goods & effects" "Motor car."—*Re* JOHNSON, [1931] 2 D. L. R. 987.—CAN.

sf. "Home".]—Testator, R., by his will directed payment of his debts, & proceeded to dispose of his estate as follows: "I give devise & bequeath £100 to my brother A., £100 to my daughter M., the remainder of my money to my adopted J.: she can keep the home or sell it as she thinks best after paying all expenses." Testator's estate consisted of 5½ acres of orchard land, on which was erected a cottage, wherein he & his adopted daughter, J., dwelt at the date of his death. He owned, besides some household furniture, a small museum, a certain amount of money invested on mortgages, & other small personal belongings:—*Held*: the expression "the home" meant the house of testator, & the whole of the 5½ acres of orchard land occupied therewith, together with the furniture, household goods, implements, & curios, as the same were enjoyed in the home of testator; & J. took an estate in fee simple in the said orchard.—*In the Will of* RAYNER (1929), 23 Tas. L. R. 41.—AUS.

sk. Furniture & effects in house in which I now reside—Motor car.]—A

testator bequeathed to his wife "the whole of the furniture & effects in the house at C. in which I now reside":—*Held*: the bequest did not include a motor car used by testator & his wife & kept in a garage built in the yard of the house but separated from it by a distance of about thirty yards.—*Re* TORMEY, TORMEY v. TORMEY, [1935] V. L. R. 300; 41 Argus L. R. 420.—AUS.

#### PART XVI. SECT. 15, SUB-SECT. 14.—L. (a).

5692 iii. —.]—"Money" must be construed strictly when there are several terms of description showing it was not alone meant to pass the personal estate & also if there is an express gift of the residue.—*Re* SAINT-HILL, [1933] 3 D. L. R. 231; 7 M. P. R. 19.—CAN.

5697 iv. —.]—Testatrix made the following will: "This being my last will & testament, I bequeath the interest of all my money on trust to my second husband G. until my child becomes twenty-one years of age. When the child reaches the age of twenty-one the whole of my money is to be his. If G. dies before the child is twenty-one years old G.'s children are to have ten pounds each out of the estate & also all his funeral expenses

are to be paid out of the estate":—*Held*: the word "money" as used in the will comprised "the whole of the assets in the estate of testatrix, both real & personal."—*PUBLIC TRUSTEE v. HORTON*, [1929] N. Z. L. R. 83.—N.Z.

5697 v. —.]—Testatrix made her will as follows: "I wish my granddaughter, B., to have the use of all my money for her lifetime. I now revoke all former wills." At the date of her death testatrix was possessed of cash on current account in her bank & cash on deposit account, money due to her for pension as the widow of an army officer, a sum of India 5 per cent. Stock, with dividends accrued thereon, a sum of War Stock, with dividends accrued thereon, an undivided interest in leasehold property, an appurtened part of rents of leasehold property in which she had a life interest, an appurtened part of dividends on stocks in which she also had a life interest, & an undivided interest in freehold property:—*Held*: the word "all" was introduced into the will to insure a wide interpretation being given to the expression "my money," & accordingly, B. was entitled to a life interest in all the said property except the interest in the freehold.—*Re* JENNINGS, CALDBECK v. STAFFORD & LINDEMERE, [1930] 1 R. R. 196.—IR.



L. T. 392 ; 45 T. L. R. 522 ; 73 Sol. Jo. 429, C. A.

*Annotation* :—*Consd.* Jones v. Treasury Solicitor (1932), 48 T. L. R. 615.

5724a. *Real estate*—Bequest of “balance of money.”—*Re* SHAW, MOUNTAIN v. MOUNTAIN (1929), 168 L. T. Jo. 371 ; 68 L. Jo. 334 ; [1929] W. N. 246.

5731. *Add. Annotation* :—*Consd.* *Re* Collings, Jones v. Collings, [1933] Ch. 920.

5731a. ———.]—A will contained the provision “All my money left to brother & sisters unused at their death is to go to a good lifeboat society,” & the brother predeceased the testatrix :—*Held* : the word “money” meant money in the strict legal sense, but following *Manning v. Purcell*, the term included money on deposit account with the bank.—*Re* COLLINGS, JONES v. COLLINGS, [1933] Ch. 920 ; 102 L. J. Ch. 337 ; 150 L. T. 19.

5734a. ———.]—*Re* GATES, GATES v. CABELL, No. 5720a, *ante*.

5734b. ———.]—*Money not in testator's bank.*—A testator, who died on Mar. 19, 1925, gave “all money in the bank, War stock, club money along with any money in hand” equally between pltf., who was his exor., & the first deft. At the date of his death, the only estate known to the exor. was valued at £46 9s. Some years later pltf. was informed by the solr. acting for the trustees of the testator's wife, who died on June 6, 1918, & in whose residuary estate the testator had a life interest, that they had been advised that in 1917 she had deposited in the Westminster Bank the sum of £4,495 2s. 2d. The interest on this sum from June 6, 1918, to Mar. 19, 1925, amounted to £791 18s. 3d., which represented the income accrued due during the life of the testator, & was part of his estate. The trustees were prepared to pay this sum to pltf. as exor. of the testator, & the question arose as to whether this sum should be divided between pltf. & the first deft. under the terms of the testator's will :—*Held* : this sum, as it was not covered by any descriptive words in the testator's will, & as it was agreed that there was no residuary gift, was undisposed of by his will, & passed as on his intestacy.—*Re* LOWE'S ESTATE, SWANN v. ROCKLEY, [1938] 2 All E. R. 774 ; 82 Sol. Jo. 451.

5737. *Add. Annotations* :—*Consd.* *Re* Emerson, Morrill v. Nutty, [1929] 1 Ch. 128. *Apld.* *Re* Gates, Gates v. Cabell, [1929] 2 Ch. 420 ; *Re* Mellor, Porter v. Hindsley, [1929] 1 Ch. 440. *Consd.* Jones v. Treasury Solicitor (1932), 48 T. L. R. 615 ; *Re* Collings, Jones v. Collings, [1933] Ch. 920.

5764a. ———.]—*National Savings Certificates.*—A testatrix, by her will, bequeathed “my money” to two named persons “equally divided.” At the date of her will & at the date of her death her estate amounted to about £1,438 3s. 11d., & included National Savings Certificates of the value of £621 13s. 1d. & £31 11s. 6d. 3½ per cent. War Stock. The remainder of her estate consisted of cash :—*Held* : in the absence of any context to the contrary in the will the word “money” must be given its primary meaning, & it did not carry the National Savings Certificates or the War Stock.—*Re* HODGSON, NOWELL v. FLANNERY, [1936] Ch. 203 ; 105 L. J. Ch. 51 ; 154 L. T. 338 ; 52 T. L. R. 88 ; 79 Sol. Jo. 880.

5773. *Add. Annotation* :—*Consd.* *Re* Mellor, Porter v. Hindsley, [1929] 1 Ch. 446.

5783. *Add. Annotation* :—*Distd.* *Re* Gates, Gates v. Cabell, [1929] 2 Ch. 420.

5793. *Add. Annotation* :—*Consd.* *Re* Gates, Gates v. Cabell, [1929] 2 Ch. 420.

5778. *Add. Annotation* :—*Consd.* Jones v. Treasury Solicitor (1932), 48 T. L. R. 615.

5806. *Add. Annotation* :—*Consd.* Jones v. Treasury Solicitor (1932), 48 T. L. R. 615.

5808. *Add. Annotation* :—*Consd.* *Re* Gates, Gates v. Cabell, [1929] 2 Ch. 420.

5811a. ———.]—*Re* MELLOR, PORTER v. HINDSLEY, No. 5708a, *ante*.

5811b. ———.]—*Re* ALLAN, ROBERTS v. ROBINSON (1933), 77 Sol. Jo. 448.

5831. *Add. Annotations* :—*Consd.* *Re* Collings, Jones v. Collings, [1933] Ch. 920. *Distd.* *Re* Lewis's Will Trusts, O'Sullivan v. Robbins, [1937] Ch. 118.

5881a. “Property (not personal)” — *Personal estate except personal belongings*—Will made without legal advice.—*Re* BANHAM, WESTMINSTER BANK, LTD. v. A.-G. (1931), 47 T. L. R. 376 ; 75 Sol. Jo. 311.

PART XVI. SECT. 15, SUB-SECT. 14.—  
L. (b) ii.

5728 v. ———.]—*PUBLIC TRUSTEE* v. LEITCH (1928), 28 S. R. N. S. W. 313 ; 45 N. S. W. W. N. 85.—AUS.

PART XVI. SECT. 15, SUB-SECT. 14.—  
L. (c).

*sg. Money due under mortgage.*—*Receipt of cheque prior to death.*—Testator gave upon trust for certain nephews “all moneys due & payable to me under” a mtge. executed in his favour over certain property sold by him. That mtge. provided for the payment of a stated sum per annum in reduction of the principal sum, & the first of the annual payments fell due on Aug. 1, 1929. Testator died on Aug. 2, 1929. On the latter day, but prior to testator's death, a cheque in part payment of the first annual sum reached his solrs. On the same day, but after death, the cheque was presented for payment & cashed :—*Held* : until the cheque was presented for

payment & met, the debt remained in existence, although the remedy was suspended ; & accordingly, that the portion of the mtge. debt represented by the amount of the cheque was, at the moment of testator's death, comprised within the words in the will “all moneys due & payable under.”—*ASHBY v. HAYDEN* (1931), 31 S. R. N. S. W. 324 ; 48 N. S. W. W. N. 61.—AUS.

PART XVI. SECT. 15, SUB-SECT. 14.—  
—M.

5858 i. *All my personal property—Real estate.*—The will was in the following words : “I—M. E. C. wish to leave all my personal property to my husband.” Testatrix at the time of her death owned no personal property :—*Held* : evidence of extrinsic circumstances was properly admissible to show ambiguity as to what testatrix understood & meant by “all my personal property,” & it was sufficient to show that the term “personal prop-

erty” was not understood by her in its technical sense but as meaning “all property owned by me personally.”—*Re* CREAMER ESTATE, [1932] 3 W. W. R. 621.—CAN.

PART XVI. SECT. 15, SUB-SECT. 14.—  
—P.

5871 v. ———.]—*Re* SPLAN (Alta.), [1929] 4 D. L. R. 405.—CAN.

*sm. Life interest in stock.*—*Re* GAGE (1935), 6 F. L. J. (Can.) 69.—CAN.

PART XVI. SECT. 15, SUB-SECT. 14.—  
—Q.

*sp. Rents.*—By her will, which was home drawn, dated Aug. 17, 1934, W. provided, *inter alia* : “I leave all my real estate (money & property) to be equally divided after all my just debts are paid between my two (2) sisters” V. & O. “I bequeath all my personal property to my sister” O. “named above, should either of my said sisters predecease me then the surviving sister takes everything.” At the date

**5897a. Articles of vertu—Rare books & manuscripts.**—*Re ZOUCHE (BARONESS), DUGDALE v. ZOUCHE (BARONESS)*, No. 5568, *ante*.

**5897b.** —. —.]—*Re TOMLINE'S WILL TRUSTS, PRETYMAN v. PRETYMAN*, No. 5332a, *ante*.

**5899. Add. Annotation:—Consd. *Re Mills' Will Trusts, Marriott v. Mills*, [1937] 1 All E. R. 142.**

**5899a.** —. —.]—The will of a testatrix contained the following clause: "I give & bequeath unto my daughter . . . all my home & personal belongings except the piano . . . & all insurance to go to my daughter. . . ."—*Held*: as the word "belongings" meant "property," the residuary estate, which included cash in the house & money at the bank, passed to the daughter under the bequest as well as the personal chattels & the benefit of the insurance policies.—*Re MILLS' WILL TRUSTS, MARRIOTT v. MILLS*, [1937] 1 All E. R. 142; 106 L. J. Ch. 159; 156 L. T. 190; 53 T. L. R. 139; 80 Sol. Jo. 975.

**5901. After this case add:—**

—.]—*See, also*, Nos. 5330–5332, *ante*.

**5913. Add. Annotation:—Consd. *Midland Bank Executor & Trustee Co. v. Yarner's Coffee, Ltd.*, [1937] 2 All E. R. 51.**

**5913a. "All sums owing to me."**—By his will a testator declared "I forgive & release to any person indebted to me all sums owing to me by them except such sums as shall be secured to me by mtges. or legal charges." In answer to a circular sent to the shareholders of a co. in which testator was a shareholder, he had lent to the co. £300 which had not been repaid at the time of his death:—*Held*: the words "forgive & release" did not restrict the operation of the clause to debts of a personal nature & the co. was released from payment of the £300 & all interest owing thereon. A sum of money on deposit at a bank & book-debts of testator's business were not released.—*MIDLAND BANK EXECUTOR & TRUSTEE CO., LTD. v. YARNERS*

of her will W., who was living with her sister O., possessed real estate amounting to £1,500, consisting of vacant land & cottages, & personal estate amounting to £1,090, consisting of money in the Savings Bank & on fixed deposit. There was also an amount of £138 owing to her in respect of overdue rents. W. died in Mar. 1935. There were no debts owing either at the date of her will or at her death:—*Held*: the overdue rents passed under the gift of "all my real estate (money & property)," but that the £1,090 passed to O. under the gift of "all my personal property."—*WALKER v. PETRIE* (1936), 53 N. S. W. N. 155.—*AUS.*

#### PART XVI. SECT. 15, SUB-SECT. 14. —S.

*sq. "Desk & contents"*—*Choses in action evidenced by documents.*—Bequest of a desk & its contents:—*Held*: not to include choses in action evidenced by documents & bank books usually kept in the desk.—*PHILLIPS v. JOSEPH*, [1934] 2 D. L. R. 577; 2 W. W. R. 113, P. C.—*CAN.*

*sv. "Proceeds"*—*Income.*—*Re PROTER ESTATE (Alta.)*, [1929] 1 D. L. R. 358; 3 W. W. R. 78.—*CAN.*

**PART XVI. SECT. 16, SUB-SECT. 1. 5977 II.** —. —.]—Testator died survived by his wife, & by a son &

daughter. By his trust-disposition & settlement, in which he stated that he had already by *inter vivos* deed made sufficient provision for his daughter, he directed his trustees, after payment of his debts, testamentary & funeral expenses, & certain legacies, to make over the "free residue" of his estate in equal shares to his wife & son. The son & daughter claimed & were paid their *legitim*, the son forfeiting, in terms of the will, its provisions in his favour. A question having arisen as to whether "free residue" fell to be ascertained before or after deduction of the *legitim* fund:—*Held*: "free residue" primarily meant residue after deduction (*inter alia*) of the *legitim* fund, & that there was nothing in the fund, & that there was nothing in the language of the trust-disposition & settlement to indicate that the testator had intended to give these words any other than their ordinary meaning.—*SAMSON v. RATNOR*, [1928] S. C. (Cl. of Sess.) 899.—*SCOT.*

#### PART XVI. SECT. 16, SUB-SECT. 2.

*o i.* —. —.]—*Held*: the word "balance" was equivalent to "residue."—*Re ANDREW, ANDREW v. ANDREW*, [1934] N. Z. L. R. 526; G. L. R. 529.—*N.Z.*

*sq. All other articles.*—A will by which specific devises & bequests were made to others than the testator's

COFFEE, LTD., [1937] 2 All E. R. 54; 156 L. T. 271; 53 T. L. R. 403; 81 Sol. Jo. 237.

**5935a. —. Autograph letters.**—*Re NEILSON, CUMMING v. CLYDE* (1929), 73 Sol. Jo. 765.

**5951a. "Private papers"**—Unpublished manuscript.—C. D., who died in 1870, by his will bequeathed "all my private papers whatsoever" to G. H., who died in 1917, & the residue of his property to his children. Included in the property of testator was the manuscript of an unpublished work of testator which was sold & first published in 1934. On a summons taken out by pltf., who was by devolution the executrix both of the will of C. D. & the will of G. H.:—*Held*: the manuscript was a "private paper" & passed under the gift of "all my private papers" to G. H.—*Re DICKENS, DICKENS v. HAWKSLEY*, [1935] Ch. 267; 104 L. J. Ch. 174; 152 L. T. 375; 51 T. L. R. 181; 78 Sol. Jo. 898, C. A.

**6006. Add. Annotation:—Refd. *Re Emerson, Morrill v. Nutty*, [1929] 1 Ch. 128.**

**6036a. "Everything I die possessed of."**—A testator by his will gave "everything I die possessed of" to E. T. Testator's father by his will bequeathed half his residuary estate to the testator. Testator died in 1933, & his father died in 1934, leaving him surviving testator's two children, with the result that, by virtue of the Wills Act, s. 33, testator was to be presumed to have survived his father, so as to prevent the operation of the doctrine of lapse in respect of the half share of residue bequeathed to him by his father's will. Upon a summons to determine whether the words in the testator's will were sufficient to entitle E. T. to testator's share in expectancy in his father's residuary estate, or whether testator died intestate as far as that share was concerned:—*Held*: the words of the gift to E. T. were a general residuary devise & included the property which he would receive under his father's will.—*Re HAYTER, HAYTER v. TRANTER*, [1937] 2 All E. R. 110.

wife concluded by "devising in bequest" to his wife a certain house " & all other articles [or things] which have not yet been above specified." The will was written in Ukrainian & it was proved that either the word "articles" or the word "things" was the proper translation of the word used by testator:—*Held*: the phrase quoted passed the residue of the estate to the wife.—*Re MELNYK ESTATE, LAZARUK v. ZELENSKO*, [1936] 1 W. W. R. 666.—*CAN.*

#### PART XVI. SECT. 16, SUB-SECT. 3. —A.

*sl. Intention to dispose of residue—Aggregate of gifts not exhausting residue.*—Where the whole residue of an estate was bequeathed in fractions, which did not dispose of the whole, the remaining fraction was divided among all the beneficiaries, since testator intended to dispose of all.—*Re WILSON'S WILL, WOOD v. WILSON* (1935), 9 M. P. R. 572; 5 F. L. J. (Can.) 100.—*CAN.*

#### PART XVI. SECT. 17, SUB-SECT. 3. —A.

*sm. Intention to benefit class—Shares dependent on exercise of power of appointment—Effect of non-exercise of power.*—*UNDERWOOD v. DAWSON* (N. S.), [1929] 2 D. L. R. 278.—*CAN.*

6212. *Add. Annotations*:—**Folld.** *Re Maynard, Pearce v. Pearce* (1930), 69 L. Jo. 440. **Consd.** *Re Woods, Woods v. Creagh*, [1931] 2 Ch. 138.

6231. *Add. Annotation*:—**Expld. & Apld.** *Re Woods, Woods v. Creagh*, [1931] 2 Ch. 138.

6239. *Add. Annotation*:—**Apld.** *Re Sutcliffe, Alison v. Alison*, [1934] Ch. 219.

6239a. ———.]—Testator, who died in 1878, by his will directed his trustees to divide the income of his residuary estate until the death of his last-surviving child into five equal parts & to pay one of such parts unto each of his five children therein named during their lives & after the death of any of them to divide the income among such of them as should from time to time be living & the issue of such of them as should have previously died leaving issue *per stirpes*. & after the death of the last survivor of his said five children the trustees were to convert his estate & to hold the proceeds upon trust to pay one-fifth part thereof & to divide the same amongst the issue of such of his said children as should have died leaving lawful issue who might be then living, such issue to receive the share his or her respective parents would have been entitled to in case such fifth part had been divisible equally among such parents. Each of testator's children except the last survivor left lawful issue, some of whom were living at the date of distribution:—*Held*: (1) the word "issue" must be construed as extending to all descendants, & the division among them was to be a stirpital one; (2) the contingency that there should be issue living at the date of distribution was not to be imported by implication into the constitution of the class of issue entitled, & therefore the personal representatives of four of testator's grandchildren all of whom predeceased the last survivor of testator's children without leaving issue living at her death were entitled to a

share in the capital directed to be divided among the issue of testator's children.—*Re SUTCLIFFE, ALISON v. ALISON*, [1934] Ch. 219; 103 L. J. Ch. 154; 150 L. T. 391.

6240. *Add. Annotation*:—**Consd.** *Re Sutcliffe, Alison v. Alison*, [1934] Ch. 219.

6266. *Add. Annotation*:—**Distd.** *Re Watt's Will Trusts, Watt v. Watt*, [1936] 2 All E. R. 1555.

6293. *Add. Annotation*:—**Refd.** *Re Walker, Walker v. Walker*, [1930] 1 Ch. 469.

6307. *Add. Annotation*:—**Consd.** *Elliot v. Joicey*, [1935] A. C. 209.

6309. *Add. Annotation*:—**Folld.** *Re Watt's Will Trusts, Watt v. Watt*, [1936] 2 All E. R. 1555.

6359. *Add. Annotation*:—**Refd.** *Re Froy, Froy v. Froy*, [1938] Ch. 566.

6362. *Add. Annotation*:—**Consd.** *Re Sutcliffe, Alison v. Alison*, [1934] Ch. 219.

6364. *Add. Annotation*:—**Consd.** *Re Sutcliffe, Alison v. Alison*, [1934] Ch. 219.

6525. *Add. Annotation*:—**Consd.** *Re Walker, Walker v. Walker*, [1930] 1 Ch. 469.

6526. *Add. Annotation*:—**Folld.** *Re Walker, Walker v. Walker*, [1930] 1 Ch. 469.

6527a. ———.]—The primary meaning of "shall die" in a will is "shall hereafter die." In the absence of some context to indicate a contrary intention it cannot be construed as equivalent to "shall have died" or "shall be dead," so as, in an original or substitutional gift to the issue of a child or other person who "shall die," to let in the issue of one who was already dead at the date of the will.

Testator by his will directed that after the death of his wife his trustees were to stand possessed of his residuary estate for all his children in equal shares "provided nevertheless in case any child of mine shall die in my lifetime leaving issue living at my death such

PART XVI. SECT. 17, SUB-SECT. 3.—**B.**

6196 i. *General rule.*]—In order for a gift by will to be a gift to a class there must be a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, & who are all to take in certain proportions, the share of each being dependent upon the ultimate number of persons composing the class. *Re SLOAN'S ESTATE, BUTT v. SLOAN*, [1937] 3 W. W. R. 455.—**CAN.**

PART XVI. SECT. 17, SUB-SECT. 3.—**C. (a).**

6216 xv. ———.]—The term "children" in the will in question herein held not to include the children of a daughter who predeceased the testator. This conclusion held not affected by sect. 31 of Manitoba Wills Act, R.S.M., 1913, since it assumes that a devise has been made, & in this case there was no devise to the children of said daughter.—*Re WOODMAN ESTATE*, [1935] 2 W. W. R. 111; 43 Man. L. R. 342.—**CAN.**

PART XVI. SECT. 17, SUB-SECT. 3.—**C. (c).**

6255 v. For "[1918] N. Z. L. R. 364" read "[1928] N. Z. L. R. 364."

PART XVI. SECT. 17, SUB-SECT. 3.—**C. (d) ii.**

6304 i. *Provision for conversion &*

*distribution when all attain age.*]—Testator devised & bequeathed his residuary estate upon trust to convert & to divide the same equally between such of his grandchildren as should attain the age of twenty-one years, excepting certain named grandchildren, & empowered the trustees to postpone conversion & distribution for such time as they in their absolute discretion might deem expedient & in the meantime to carry on testator's business. He then gave directions for the distribution of the income of the business during the period of its continuance. At the date of testator's death there were a number of grandchildren, of whom one had attained the age of twenty-one years. The trustees had postponed conversion for several years, & during that period other grandchildren were born:—*Held*: the "rule of convenience" laid down in *Andrews v. Partington*, No. 6266, had no application until conversion, inasmuch as (a) upon the true construction of the will there was no occasion for the operation of the rule until conversion had taken place, & (b) the will contained an expression of a contrary intention. Therefore, the class of grandchildren entitled to share in the residuary estate was not closed until the date of conversion.—**PERMANENT TRUSTEE CO. OF NEW SOUTH WALES, LTD. v. R.** (1929), 30 S. R. N. S. W. 318; 47 N. S. W. W. N. 116.—**AUS.**

*sk. Provision for distribution when youngest child attains twenty-one.*]—Life estate to widow, on her death income to be divided between sisters & brother "until the youngest child of any of said sisters & brother shall have attained the age of 21 years":—*Held*: class closed when youngest attained twenty-one.—*Re LONG*, [1938] 1 D. L. R. 344; O. R. 28.—**CAN.**

PART XVI. SECT. 17, SUB-SECT. 5.—**C. (a).**

q i. ———.]—Testatrix devised real estate to a nephew & his wife for life, & then to the children of the nephew or such of them as should then be living, in equal proportions, & in case either of such children should be deceased leaving lawful issue then to such issue the same share which the parent would have had if living:—*Held*: the devise to the issue of the children was original & not substitutional.—*Re BENTLEY'S TRUSTS* (1935), 9 M. P. R. 271.—**CAN.**

PART XVI. SECT. 17, SUB-SECT. 5.—**C. (a) i.**

6502 xi. ———.]—The words "shall die" in a will must be given their primary meaning, "shall die hereafter," unless there be some context indicating that these words were not used in a strictly future sense.—*Re KING, KING v. KING* (1932), 32 S. R. N. S. W. 669; 49 N. S. W. W. N. 228.—**AUS.**

issue shall stand in place of such deceased child, & shall take equally between them if more than one the share of my residuary estate which such deceased child of mine would have taken if he or she had survived me." One of testator's sons died three weeks before the date of the will, leaving one child, a daughter, surviving him, & these facts were known to testator when he made his will:—*Held*: there being no context in the will, such as a gift to children who "shall attain the age of twenty-one years," the word "shall" must be strictly construed as referring to the future only, & therefore the daughter of the deceased son was not entitled to any share in the residuary estate.—*Re WALKER, WALKER v. WALKER*, [1930] 1 Ch. 469; 99 L. J. Ch. 225; 142 L. T. 472; 74 Sol. Jo. 106, C. A.

6528. *Add. Annotation*:—*Consd. Re Walker, Walker v. Walker*, [1930] 1 Ch. 469.
6537. *Add. Annotation*:—*Consd. Re Walker, Walker v. Walker*, [1930] 1 Ch. 469.
6538. *Add. Annotation*:—*Consd. Re Walker, Walker v. Walker*, [1930] 1 Ch. 469.
6540. *Add. Annotation*:—*Consd. Re Walker, Walker v. Walker*, [1930] 1 Ch. 469.
6545. *Add. Annotation*:—*As to (1) Distd. Re Froy, Froy v. Froy*, [1938] Ch. 566.
6590. *Add. Annotation*:—*Refd. Re Froy, Froy v. Froy*, [1938] Ch. 566.
6669. *Add. Annotation*:—*Refd. Re Smalley, Smalley v. Scotton*, [1929] 2 Ch. 112.
6683. *Add. Annotation*:—*Refd. Re Hyde, Smith v. Jack*, [1932] 1 Ch. 95.
6708. *Add. Annotation*:—*As to (1) Distd. Re Jackson, Beattie v. Murphy*, [1933] Ch. 237.
- 6708a. *Bequest to nephew—Legitimate preferred to illegitimate of same name—Unless extrinsic evidence admissible to prove the contrary.*—Testatrix devised & bequeathed all her real & personal estate to her trustees upon trust for sale & conversion, & to hold the net proceeds upon trust for her two brothers, two sisters & "my nephew Arthur Murphy" in equal shares. Testatrix had three nephews named Arthur Murphy, two of whom were legitimate sons of two of her brothers & the other was an illegitimate son of a sister. One of the legitimate nephews was resident in Australia, but had visited testatrix on occasions. The other legitimate nephew was resident in England & known to testatrix, but he was the son of a brother who was given another share of the residuary estate. The illegitimate nephew had married a legitimate niece of testatrix & was well known to testatrix, whose affairs he had managed before her death for some time. Questions arose as to which person testatrix had intended by the words "my nephew Arthur Murphy":—*Held*: (1) if there had been only the two legitimate nephews it would have been impossible to tell which of

them was intended, & the ambiguity would have caused an intestacy; (2) although as against one legitimate claimant evidence could not be admitted in favour of an illegitimate claimant, the ct. was entitled in the circumstances to look at evidence as to the family; (3) if from such evidence it appeared that testatrix did not intend to describe either of the legitimate nephews, but did intend to describe the illegitimate nephew, the ct. could not disregard such evidence; (4) in order to avoid ambiguity the ct. was entitled to consider the claim of the illegitimate nephew; (5) on the evidence the person who had married a niece of testatrix, & so was in a sense a nephew, was clearly intended by the words used in the will; & the illegitimate nephew took a share of the residuary estate.—*Re JACKSON, BEATTIE v. MURPHY*, [1933] Ch. 237; 102 L. J. Ch. 1; 148 L. T. 238; 49 T. L. R. 5; 76 Sol. Jo. 779.

6720. *Add. Annotation*:—*Consd. Re Ridge, Hancock v. Dutton* (1933), 149 L. T. 266.

6725. *Add. Annotation*:—*As to (1) Follid. Re Hall, Hall v. Hall*, [1932] 1 Ch. 262.

6726. *Add. Annotation*:—*Distd. Re Hall, Hall v. Hall*, [1932] 1 Ch. 262.

6728a. "Grandchildren of any degree"—All lawful descendants except children.]—By his will testator disposed of two equal fourth parts of his residue, in the will called "the residuary trust fund," as therein mentioned, & directed his trustees, after the death of one of his daughters, whom he named, & her husband, & subject to or in default of any exercise of a general power of appointment by her, to hold another equal fourth part "in trust as to the capital & income for all my grandchildren who may be living at the time in equal shares." By the second of two codicils he directed that his trustees, at the death of the survivor of his son J. & J.'s wife, should divide the amount of the remaining fourth part "into as many parts as there may be grandchildren of any degree of mine then living, & give to each one a part, part & part alike." Testator had five children. One predeceased him without leaving issue her surviving. All of the remaining four married, three having issue of their marriages. J. predeceased his wife, there having been no issue of the marriage. At the date of the death of J.'s wife, there were living lawful grandchildren, great-grandchildren & great-great-grandchildren of testator. By this summons the trustee of the will & codicils asked (*inter alia*) whether, on the true construction thereof, the words "grandchildren of any degree of mine then living" included lawful grandchildren & remoter descendants of the testator living at the death of J.'s widow. There was evidence that a great-grandchild of testator was shown to him at a date before the execution of the codicils:—*Held*: the words "grandchildren of any degree" included all testator's lawful

PART XVI. SECT. 17, SUB-SECT. 6. —  
A. (d).

6702 i. *Reference in will to illegitimate child—As "niece."*—By his will testator, out of his residuary estate, gave a sum of money to "my niece J. M., daughter of my late sister Martha," & gave other sums to children

of his other brothers & sisters including "my niece J. R., daughter of my late sister Margaret." He finally directed that the ultimate residue of his estate be held in trust for "the children of my brothers & sisters share & share alike." J. M. was the illegitimate & only daughter of the testator's sister Martha. J. R. was legitimate:

*Held*: J. M. was included in the trust for the children of the testator's brothers & sisters.—*Re MITCHELL, BALLARAT TRUSTEES, EXORS. & AGENCY CO., LTD. v. NATIONAL TRUSTEES, EXORS. & AGENCY CO. OF AUSTRALASIA, LTD.*, [1929] V. L. R. 95; Argus L. R. 108.—AUS.

descendants, save his children, living at the date mentioned in the second codicil.—*Re HALL, HALL v. HALL*, [1932] 1 Ch. 262; 101 L. J. Ch. 129; 147 L. T. 33.

6729. *Add. Annotation*:—*Consd. Re Ridge, Hancock v. Dutton* (1933), 149 L. T. 266.
6736. *Add. Annotation*:—*Consd. Re Ridge, Hancock v. Dutton* (1933), 149 L. T. 266.
6737. *Add. Annotation*:—*Refd. Re Ridge, Hancock v. Dutton* (1933), 149 L. T. 266.
6739. *Add. Annotation*:—*As to (1) Consd. Re Ridge, Hancock v. Dutton* (1933), 149 L. T. 266.
6740. *Add. Annotation*:—*As to (1) Apld. Re Ridge, Hancock v. Dutton* (1933), 149 L. T. 266.
6741. *Add. Annotation*:—*Refd. Re Ridge, Hancock v. Dutton* (1933), 149 L. T. 266.
6746. *Add. Annotation*:—*Refd. Re Ridge, Hancock v. Dutton* (1933), 149 L. T. 266.
6747. *Add. Annotation*:—*Distd. Re Ridge, Hancock v. Dutton* (1933), 149 L. T. 266.
- 6754a. —.]—Testatrix made her will on Oct. 28, 1925, & died on May 22, 1932. Her niece A. G. R. had a child born on Oct. 9, 1925. A. G. R. died in childbirth. The name at that time mentioned as one to be given to the child was Clifford, but he was baptized Kenneth Higham R. By clause 3 of the will testatrix gave free of duty "to my nephew Clifford Rich, the infant child of my late niece Annie Gertrude Rich, the sum of one thousand pounds." She bequeathed the residue of her estate equally between all or any my nephews & nieces living at my death who being male attain the age of twenty-one years or being female attain that age or marry. The greatnephews & greatnieces of testatrix claimed that having regard to clause 3 of the will testatrix intended her residuary estate to be divided equally between nephews, nieces & greatnephews & greatnieces. If the nephews & nieces only were entitled they would take one-eighth share each in the residue, but if greatnephews & greatnieces were entitled also each of the class would be entitled to one-twentieth of the residue:—*Held*: the present case was not governed by *James v. Smith*, No. 6747, as there were sufficient variations in the will there & the will in the present case to prevent its being authority to govern the words in the will in this case. There was no interpretation of the words "nephews & nieces" to be found in clause 3, but the use of the word "nephew" in that clause was rather a term of affection. The single use of a word inaccurately in one part of a will did not necessarily mean that that word was used equally inaccurately when it occurred again later on.—*Re RIDGE, HANCOCK v. DUTTON* (1933), 149 L. T. 266, C. A.

6822. *Add. Annotation*:—*Refd. Re Smalley, Smalley v. Scotton*, [1929] 2 Ch. 112.
- 6827a. — "My uncle G. D. C."—*Cousin G. D. C.*—Where in a will legatees were described as the grandchildren of "my uncle George Dennis Curnock" though in fact he was a cousin of testatrix, & the will had been admitted to probate, but no copies of probate had been issued, the ct. granted an application for the exclusion of the words "my uncle" from probate.—*Re CLARK* (1932), 101 L. J. P. 27; 147 L. T. 240; 48 T. L. R. 544; 76 Sol. Jo. 461.
6840. *Add. Annotation*:—*Refd. Re Smalley, Smalley v. Scotton*, [1929] 2 Ch. 112.
6867. *Add. Annotation*:—*Refd. Elliot v. Joicey*, [1935] A. C. 209.
6868. *Add. Annotation*:—*Refd. Elliot v. Joicey*, [1935] A. C. 209.
6872. *Add. Annotation*:—*Refd. Elliot v. Joicey*, [1935] A. C. 209.
6877. *Add. Annotation*:—*Consd. Elliot v. Joicey*, [1935] A. C. 209.
6884. *Add. Annotation*:—*Overd. Elliot v. Joicey*, [1935] A. C. 209.
6886. *Add. Annotation*:—*Folld. Elliot v. Joicey*, [1935] A. C. 209.
6887. *Add. Annotation*:—*Refd. Elliot v. Joicey*, [1935] A. C. 209.
- 6887a. —.]—Testatrix executed a power of appointing trust funds under her father's will by appointing the funds in favour of all her children surviving her in equal shares, & directed that each child's share should be retained by the trustees of her father's will upon trust during twenty-one years from her death to pay the income of such share to such child if he or she should so long live. If such child should die within the said period of twenty-one years then the trustees were to hold such share & the income thereof in trust, in default of appointment by the child, upon the trusts following: "In the event of such child of mine leaving any issue him or her surviving in trust for such child of mine absolutely but in the event of such child of mine not leaving any issue him or her surviving then such share & the income thereof shall go & accrue by way of addition to the share or shares in the appointed funds of my other child or children who shall survive me," etc. Testatrix died on Jan. 12, 1912, leaving her surviving three sons, of whom one married on Apr. 14, 1931, & died on May 11, 1932, intestate without having exercised the power of appointment under the will of testatrix. On June 12, 1932, a posthumous child was born to him:—*Held*: the said son did not "leave issue him surviving" within the meaning of the will, but in the events which happened, his share accrued by way of addition to one of the other sons of the testatrix.

PART XVI. SECT. 17, SUB-SECT. 6.—  
B. (c) i.

6729 iv. —.]—Testatrix, after a gift to her husband of an estate for life in all her real & personal estate, directed that her estate should be equally divided among "all the nieces then living after his death":—*Held*: the expression "all the nieces" was equivalent to "all my nieces," & there was no context in the will sufficient

to displace its strict legal meaning, namely, nieces by blood, & to expand the word "nieces" so as to include nieces by affinity.—*Re DAVIS, DOUGLASS v. McPHEE* (1933), 33 S. R. N. S. W. 330; 50 N. S. W. W. N. 122.—AUS.

PART XVI. SECT. 17, SUB-SECT. 7.—  
A. (a).

6782 iii. —.]—*Re TREMBLAY*, [1931] O. R. 781.—CAN.

PART XVI. SECT. 17, SUB-SECT. 9.

6857 vii. —.]—A child *en ventre sa mere* is considered as a child in being. To include such unborn child in a class of "living" children, it must be shown that such inclusion, as here is for that child's benefit.—*Re BROWN, BROWN v. BROWN*, [1933] N. Z. L. R. 115.—N.Z.

The effect of *Villar v. Gilbey*, No. 6886, may be thus summarised:—

Subject to any special context in the document to be construed: (a) Words referring to children or issue “born” before or “living” at, or “surviving,” a particular point of time or event will not in their ordinary or natural meaning include a child *en ventre sa mère* at the relevant date.

(b) The ordinary or natural meaning of the words may be departed from, & a fictional construction applied to them so as to include therein a child *en ventre sa mère* at the relevant date & subsequently born alive if, but only if, that fictional construction will secure to the child a benefit to which it would have been entitled if it had been actually born at the relevant date.

(c) The only reason & the only justification for applying such a fictional construction is that where a person makes a gift to a class of children or issue described as “born” before or “living” at or “surviving” a particular point of time or event, a child *en ventre sa mère* must necessarily be within the reason & motive of the gift.

(d) That being the only reason & the only justification for applying the fictional construction, it follows that, if the person who uses the words under consideration confers no gift on the children or issue described as above mentioned, but confers the gift on some one else, it is impossible (except in the light of subsequent events) to affirm either that the fictional construction will secure to the child *en ventre sa mère* a benefit to which if born it would be entitled, or that the child *en ventre sa mère* must necessarily be within the reason & motive of the gift made. In these circumstances the words used must bear their ordinary or natural meaning.—*ELLIOT v. JOICEY*, [1935] A. C. 209; 101 L. J. Ch. 111; 51 T. L. R. 261; 79 Sol. Jo. 144; *sub nom. Re JOICEY, JOICEY v. ELLIOT*, 152 L. T. 398, II. L.

6892. *Add. Annotation*:—**Consd.** *Elliot v. Joicey*, [1935] A. C. 209.

6912. *Add. Annotation*:—**Refd.** *Re Messenger's Estate, Chaplin v. Ruane*, [1937] 1 All E. R. 355.

6957a. —.]—After testator's birth, his mother, M. J., married E. J., a widower with one daughter. There were three children of the marriage of M. J. & E. J. By his will, testator gave to his trustees £10,000 “upon trust to invest the same & to pay the income thereof to E. J. & my mother M. J. . . . during their joint lives, & on the death of either of the said E. J. & M. J. upon trust . . . to divide the same in equal shares between the children of the said E. J. & M. J. on their respectively attaining the age of 21 years”:—**Held**: upon the true construction of the will, the legacy became, on the death of the survivor

of E. J. & M. J., divisible in equal thirds between the three children of the marriage of E. J. & M. J. & the child of E. J. by his former marriage was not entitled to share in the legacy.—*Re LEWIS'S WILL TRUSTS, PHILLIPS v. BOWKETT*, [1937] 1 All E. R. 556; 81 Sol. Jo. 179.

6984. *Add. Annotations*:—**Consd.** *Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357. **Refd.** *Re Prosser, Prosser v. Griffith* (1929), 167 L. T. Jo. 307; *Re Cossentine, Philp v. Wesleyan Methodist Local Preachers' Mutual Aid Assocn.* (1932), 76 Sol. Jo. 512.

6985. *Add. Annotations*:—**As to (2) Consd.** *Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357. **Apld.** *Re Cossentine, Philp v. Wesleyan Methodist Local Preachers' Mutual Aid Assocn.* (1932), 76 Sol. Jo. 512.

6986. *Add. Annotation*:—**Consd.** *Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357.

6989. *Add. Annotation*:—**Consd.** *Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357.

6994. *Add. Annotation*:—**Refd.** *Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357.

7032. *Add. Annotation*:—**Refd.** *Re Sassoon, I. R. Comrs. v. Raphael, Re Sassoon, I. R. Comrs. v. Ezra*, [1933] Ch. 858.

7034a. Son born “within due time after my death.”—By a will devising estates in strict settlement the testator declared that if any son of W. or M. should be thereafter born “whether during my lifetime or within due time after my death” the estate in tail male therein devised to such son should not take effect, & in lieu thereof he devised the estates to the use of such son for his life, with remainder to the use of his first & other sons in tail male. The will also contained a name & arms clause requiring every person who became entitled to the possession of the estates as tenant for life or in tail to take & use the name & arms of X. upon pain of forfeiture to the next person entitled in remainder. Testator died in 1899. Pltf., the eldest son of M., was born in 1909, & on the death of W. without issue in 1925 became tenant in tail in possession subject to the effect, if any, of the above proviso cutting down estates tail to estates for life. Immediately after attaining the age of twenty-one years, in 1930, pltf. executed a deed disentailing the estates:—**Held**: the expression “within due time after my death” referred to the period of gestation. Pltf. not having been born in testator's lifetime or within nine months of his death did not come within the clause cutting down his estate tail to a life estate, & having duly disentailed the estates, was not bound to comply with the name & arms clause.—*Re WATSON, CULME-SEYMOUR v. BRAND*, [1930] 2 Ch. 344, 99 L. J. Ch. 452; 143 L. T. 764.

7086a. —.]—*Re SUTCLIFFE, ALISON v. ALISON*, No. 6239a, *ante*.

PART XVI. SECT. 17, SUB-SECT. 11.  
—B. (b) i.

b i. — *Gift to “lawful children.”*—Testator had adopted a child under the laws of a foreign State where he was domiciled. By the laws of that State the child upon adoption became the child & legal heir of the son & entitled to all the rights & privileges & subject to all the obligations of a child begotten in lawful wedlock:—

*Held*: the child was not, under the laws of Ontario applicable to the interpretation of the will, the son's “lawful child.”—*Re SKINNER*, [1929] 4 D. L. R. 427; 64 O. L. R. 245.—CAN.

PART XVI. SECT. 17, SUB-SECT. 11.  
—B. (b) iv.

6982 i. *Whether stepchildren included.*—A bequest to “my children”

does not include stepchildren.—*Re CONNOLLY*, [1935] 2 D. L. R. 465; 8 M. P. R. 418.—CAN.

PART XVI. SECT. 17, SUB-SECT. 11.—  
F. (c) i.

7089 v. —.]—While it is possible that a will may be so worded as to indicate that testator meant to include remoter descendants in the word “children,” held, however, that there

7170. *Add. Annotation*:—*Apld. Re Smith, Bull v. Smith*, [1933] Ch. 847.

7171a. "Right heirs"—Devise of copyholds—Common law & not customary heir entitled.]—Testatrix by her will dated Mar. 31, 1873, in exercise of a general testamentary power of appointment, devised her copyhold lands upon trusts in favour of certain relatives & their respective issue in tail, all which trusts determined by their deaths without issue, with an ultimate trust for "my own right heirs (other than & except my nephew Robert John Smith & his issue)." On Oct. 2, 1875, by an award of the Copyhold Comrs., the copyhold lands so devised were enfranchised. Robert John Smith, who would have been testatrix's heir at common law had he survived her, died on May 12, 1879. Testatrix died on Sept. 11, 1883, leaving John Robert Smith, the eldest son of the said Robert John Smith, her heir at common law, a nephew Alfred William Smith, her heir at common law if Robert John Smith & his issue were excluded, & a brother George Smith, her heir according to the custom of the manor, which was borough-English:—*Held*: the words "my own right heirs" must be construed to mean her heirs at common law & not her customary heirs: & the limitation, not materially differing from the limitation in *Goodtitle d. Bailey v. Pugh* (1787), 3 Bro. P. C. 454, a decision of the House of Lords, was ineffectual, & accordingly the lands so devised were unappointed.—*Re SMITH, BULL v. SMITH*, [1933] Ch. 847; 102 L. J. Ch. 359; 149 L. T. 382.

7176a. —.—]—Testator by his will which he made in 1901 directed that his estate should be held, subject to a prior life interest therein for the benefit of his mother, upon trust for his wife & after her death "upon trust for such person or persons as at the decease of my said wife shall be my heir or heirs at law absolutely." Testator died in 1934, his mother having died in 1910 & his wife in 1924:—*Held*: applying the rule which inclines against intestacy, the word "heir" must be construed in its popular meaning of

heir apparent or heir presumptive, & the estate passed to the person or persons who would have been testator's heir or heirs-at-law if he had died at the same time as his wife.—*Re HOOPER, HOOPER v. CARPENTER*, [1936] Ch. 442; [1936] 1 All E. R. 277; 105 L. J. Ch. 298; 154 L. T. 677; 80 Sol. Jo. 205, C. A.

7179a. —.—]—*Re HOOPER, HOOPER v. CARPENTER*, No. 7176a, *ante*.

7179b. *Construed as gift to ancestor*.]—Testator by his will bequeathed pecuniary legacies & continued: "The rest of my property of whatsoever kind I give to my wife & after her decease to be divided between the Local Preachers' Mutual Aid Society & the heirs of my brother & sisters." At the date of the will testator had two sisters living, each of whom had one child, also then living. He had had no sister who had predeceased him. He had no brother then living, but had had one brother who had predeceased him leaving a wife & one child, both alive at the date of the will. Testator's wife predeceased him:—*Held*: (1) the gift "to the heirs of my brother & sisters" was a gift to the sisters & the daughter of the deceased brother; (2) the gift for division between the charity & the three other donees was a gift in equal fourth shares.—*Re COSSENTINE, PHILP v. WESLEYAN METHODIST LOCAL PREACHERS' MUTUAL AID ASSOCN. TRUSTEES*, [1933] Ch. 119; 102 L. J. Ch. 78; 148 L. T. 261; 76 Sol. Jo. 512.

7189. *Add. Annotation*:—*As to* (1) *Refd. Re Smith, Bull v. Smith*, [1933] Ch. 847.

7201. *Add. Annotation*:—*Refd. Macleay v. Treadwell*, [1937] A. C. 626.

7231. *Add. Annotation*:—*Consd. Re Boyer, Neathercoat v. Lawrence*, [1935] Ch. 382.

7234. *Add. Annotation*:—*Refd. Re Boyer, Neathercoat v. Lawrence*, [1935] Ch. 382.

7249. *Add. Annotations*:—*Consd. Re Hayden, Pask v. Perry* (1931), 172 L. T. Jo. 97. *Distd. Re Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

7250. *Add. Annotation*:—*Refd. Re Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

was nothing in the will in question herein to justify a departure from the ordinary meaning of the word. The will in question herein was held to indicate sufficiently that in using the word "issue" in the phrase, "without leaving issue," testator intended to confine its application to issue of the first degree, i.e. "children," notwithstanding the fact that the will contained both expressions.—*FISHERIEH v. LONDON & WESTERN TRUSTS CO., LTD., FIELD v. LONDON & WESTERN TRUSTS CO., LTD.*, [1930] 3 W. W. R. 150; 4 D. L. R. 609; *varg.*, S. C. *sub nom. Re HOBBS*, [1929] 4 D. L. R. 433; 64 O. L. R. 370.—*CAN.*

PART XVI. SECT. 17, SUB-SECT. 11.—H. (a).

e i. —.—]—*Effect of assimilation of descent of realty & personality*—*New Zealand*.]—Testator, who at the date of his death, childless, in 1895, was resident & domiciled in New Zealand, by his will, made in 1891, devised all his real estate "whatsoever & wheresoever" to trustees for the benefit of a brother & the eldest son of that brother during their joint lives & the life of the survivor, & then directed it at the expiration of twenty-one years after the death of the survivor to be conveyed & transferred

absolutely to "the heir-at-law of such survivor his heirs & assigns." The whole of testator's real estate consisted of a farm of 500 acres in New Zealand:—*Held*: (1) the heir-at-law named in the will was the heir-at-law constituted by the law of New Zealand, where the basic law of succession to real estate was the old common law of England as modified in 1833 by the Inheritance Act; (2) notwithstanding anything contained in the provisions of the three New Zealand statutes, the Real Estate Descent Act, 1874, the Administration Act, 1879, which repealed the Act of 1874, & the Administration Act, 1908, a consolidation statute, which introduced in New Zealand a new rule of succession to real estate by which in cases of intestacy realty was to be administered & was to devolve precisely like personality, the common law heir-at-law had not been extinguished in New Zealand, but still survived there with definite rights & privileges appertaining to his status, & remained an heir capable of being ascertained & identified as easily as before the passing of the above legislation. *Appltd.*, the eldest son of testator's nephew who, in the events which happened, became the survivor named in the will, was therefore the "heir-at-law of such

survivor" & as such entitled to the whole of the testator's real estate.—*MACLEAY v. TREADWELL*, [1937] A. C. 626; [1937] 2 All E. R. 38; 106 L. J. P. C. 91; 157 L. T. 1; 53 T. L. R. 434; 81 Sol. Jo. 356, P. C.—*N.Z.*

PART XVI. SECT. 17, SUB-SECT. 11.—H. (c) i.

o i. —.—]—*Re BENJAMIN* (1931), 3 M. P. R. 5.—*CAN.*

PART XVI. SECT. 17, SUB-SECT. 11.—H. (d).

7247 i. *Whether words substitutional—Bequest of personality & realty*.]—By her will testatrix gave the whole of her estate to her husband W. for life, & after his decease to be equally divided amongst "my children or their heirs." W., who was still alive, & six of her children survived the testatrix. E., a son, died leaving him surviving a widow & child, & made a will by which he appointed W. his sole exor. & beneficiary. Testatrix's estate comprised both personality & realty:—*Held*: the words "or their heirs" in testatrix's will were words of substitution & not of limitation.—*Re ROBERTS* (C. J.) *WILL* (1929), 29 S. R. N. S. W. 562; 46 N. S. W. W. N. 188.—*AUS.*



**7252. Add. Annotation :—***Refd. Re Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

**7255a. Gift to married woman or heirs—Whether husband included.**—With regard to *Re Walton's Trust*, I find the facts in that case to have been these: real estate & personal estate were given by will to trustees, upon trust for testator's wife, & after her decease to be sold, & the proceeds divided equally between testator's children (nomination), "or their heirs or assigns." The Vice-Chancellor decided in favour of the children of a daughter who had died in the interval between the death of testator, & that of the tenant for life, & against her husband, who claimed his wife's share as her administration (*PAGE WOOD, V.-C.*).—*Re WALTON'S TRUST* (1856), cited 2 K. & J. 738; *revid. on other grounds, sub nom. Re WALTON'S ESTATE* (1856), 8 De G. M. & G. 173, L. JJ.

*Annotation :—Folld. Re Boyer, Neathercoat v. Lawrence*, [1935] Ch. 382.

**7255b. ———.**—A testatrix by her will gave £600 upon trust for the benefit of E. & F. during their lives, & after the death of both of them she directed that the amount should be equally divided "among such & so many of my brothers & sisters or their heirs as shall be living at the time of my decease." N., a sister of testatrix, survived testatrix, but died in the lifetime of her husband:—*Held*: the husband of N. did not take as her heir.—*Re BOYER, NEATHERCOAT v. LAWRENCE*, [1935] Ch. 382; 104 L. J. Ch. 171; 152 L. T. 553; 51 T. L. R. 259.

**7297. Add. Annotations :—***Apld. Re Williams' Settlement, Greenwell v. Humphries*, [1929] 2 Ch. 361. *Refd. Bosworthick v. Clegg* (1929), 45 T. L. R. 438.

**7304. Add. Annotation :—***Apld. Re Smalley. Smalley v. Scotton*, [1929] 2 Ch. 112.

**7307a. ———.**—Testator by his will gave all his property to "my wife E. A. S." Testator left a lawful wife M. A. S. & children by her & contributed to their support, but about five years before his death had contracted a bigamous marriage with a widow E. A. M., who lived with him & was known as E. A. S., & believed she was, & was reputed to be, his wife. The will was produced by E. A. M.:—*Held*: the will, taken in connection with the surrounding circumstances, indicated that the testator intended to benefit E. A. M., she being in a secondary sense & by repute his "wife," & therefore she was entitled, although not his wife nor bearing his surname.—*Re SMALLEY, SMALLEY v. SCOTTON*, [1929] 2 Ch. 112; 98 L. J. Ch. 300; 141 L. T. 158; 45 T. L. R. 396; 73 Sol. Jo. 234, C. A.

**7309. Add. Annotation :—***Consd. Re Smalley, Smalley v. Scotton*, [1929] 2 Ch. 112.

**7314. Add. Annotations :—***Distd. Re Williams' Settlement, Greenwell v. Humphries*, [1929] 2 Ch. 361. *Refd. Bosworthick v. Clegg* (1929), 45 T. L. R. 438.

**7347. Add the following paragraph & citations :—**

Testator, by his will, bequeathed a share of his residuary estate upon trust for G. for life, & after his death for his children in equal shares, & in case he died without children upon trust for the person or persons who under the statutes for the distribution of intestate estates would on his decease have been entitled as his next of kin, in case he had then died possessed thereof intestate. Testator died in 1875, & G. died without leaving children in Mar. 1927:—*Held*: the share was divisible among the persons entitled under the Statutes of Distribution in force at the date of testator's death, there being no contrary intention expressed in the will to exclude the operation of those statutes, so as to introduce the rules of distribution contained in Administration of Estates Act, 1925 (c. 23).—*Re SUTCLIFFE, SUTCLIFFE v. ROBERTSHAW*, [1929] 1 Ch. 123; 98 L. J. Ch. 33; 140 L. T. 135; 72 Sol. Jo. 384.

*Annotation :—Consd. Re Sutton, Evans v. Oliver*, [1931] Ch. 209.

**7347a. ———.**—Residuary bequest upon trust "for such person or persons who at the decease of my wife shall be of my blood & of kin to me & who under the statutes for the distribution of the personal estates of intestates would be entitled to my personal estate if I were to die immediately after the death of my wife intestate." Testator died on Oct. 9, 1923, & his widow died on June 6, 1933. Between these dates Administration of Estates Act, 1925 (c. 23), had come into operation, & by sect. 46 new rules of intestate succession had been prescribed. By sect. 50 (2), trusts declared by a will coming into operation before the commencement of the Act by reference to the Statutes of Distribution "shall, unless the contrary thereby appears, be construed as referring to the enactments relating to the distribution of effects of intestates which were in force immediately before the commencement of this Act":—*Held*: the persons to take the residue were to be ascertained according to the law of distribution in force before the commencement of Administration of Estates Act, 1925 (c. 23).—*Re SUTTON, EVANS v. OLIVER*, [1934] Ch. 209; 103 L. J. Ch. 127; 150 L. T. 453; 50 T. L. R. 189.

**7347b. ———.**—By a settlement dated Mar. 19, 1924, W. gave certain property to the Public Trustee upon trust to divide a

#### PART XVI. SECT. 17, SUB-SECT. 11. - I. (a).

**7298 i. Divorced wife (Gift during widowhood).**—A testator by his will directed his trustees to "pay to my wife so long as she shall remain unmarried" an annuity of £200, & the trustees were empowered to apply for maintenance, "subject to my wife's income during widowhood." A recital in the codicil referred to the direction in the will to pay "my wife so long as she shall remain my widow"; substituted for the annuity of £200 one of £150; & in other respects referred to & confirmed his "said will." After the

date of the codicil the testator divorced his wife.

Before the execution of the codicil, an order that testator should pay his wife for life £3 a week for maintenance was made under Destitute Persons Act, 1910. This amount was later increased to £1 5s. per week; & later, in the divorce proceedings, the Supreme Ct. ordered testator to pay his wife £1 a week. Testator purchased for her an annuity of £208. On originating summons, asking whether, on the assumption that the annuity of £156 in the codicil was substitutory & in lieu of the annuity of £200 in the will, the

annuity was payable: *Held*: the context was sufficient to displace the position which would have obtained had the gift been merely to "my wife"; the annuity was given during widowhood, & as the testator's divorced wife was never his widow, she could not take the annuity.—*Re NEWCOMBE, CRESSWELL v. NEWCOMBE*, [1938] N. Z. L. R. 98; 14 N. Z. L. J. 47. N.Z.

#### PART XVI. SECT. 17, SUB-SECT. 11.—J. (a).

**p 1. ———.**—*Re YOUNG*, [1928] 2 D. L. R. 966; 62 O. L. R. 275.—CAN.

a part thereof among "such persons being next of kin of the settlor at the date of her death according to & in such manner & proportions as are prescribed by the Statutes of Distribution as if the settlor died unmarried & intestate & as if the whole of the trust fund was personal estate." By her will made on the same day W. gave all her estate not disposed of by the settlement to the Public Trustee "upon the like trusts & to & for the like ends intents & purposes & with the like powers & provisions applicable thereto as are declared by & contained in the said indenture of settlement with regard to the trust premises settled thereby after my death shall have occurred." W. died in 1929:—*Held*: the trust funds under both the settlement & the will must be administered according to the law of intestacy in force at the date of the settlement.—*Re WALSH, PUBLIC TRUSTEE v. WALSH*, [1936] 1 All E. R. 327; 80 Sol. Jo. 264, C. A.

7380. *Add. Annotation*:—*Reid. Re Hooper, Hooper v. Carpenter*, [1936] 1 All E. R. 277.

7435. *Add. Annotation*:—*As to* (1) *Consd. Price v. Gould* (1930), 143 L. T. 333.

7455. *Add. Annotation*:—*Consd. Price v. Gould* (1930), 143 L. T. 333.

7482. *Add. Annotation*:—*Reid. Re Bridgen, Chaytor v. Edwin*, [1938] Ch. 205.

7496a. *Persons within Administration of Estates Act, 1925 (c. 23), s. 43.*—By her will, made in 1930, a testatrix, a spinster, directed "all my possessions to be held in trust after my death & divided equally amongst all my relations":—*Held*: (1) the terms of the will created no intestacy, but constituted an effective disposition of the whole of the property of the testatrix; (2) as in wills made before the Administration of Estates Act, 1925 (c. 23), the ct. adopted a rule of convenience whereby the term "relations" was construed as meaning the persons other than a husband or wife who on an intestacy would have taken under the Statute of Distributions, so in wills made since that Act the terms should be construed as meaning those persons who on an intestacy would actually have taken under Part IV. of the Act in the circumstances of each case & not as including the whole class defined by Part IV. as potential beneficiaries on intestacy; (3) accordingly, the estate should be divided in equal shares *per capita* among the

persons who would have been entitled under Part IV. of the Act if the testatrix had died intestate.—*Re BRIDGEN, CHAYTOR v. EDWIN*, [1938] Ch. 205; [1937] 4 All E. R. 342; 107 L. J. Ch. 124; 158 L. T. 238; 54 T. L. R. 100; 81 Sol. Jo. 922.

7581. *Add. Annotations*:—*Consd. Re Bain, Public Trustee v. Ross*, [1930] 1 Ch. 224. *Reid. Re Stratton, Stratton v. A.-G.*, [1930] 2 Ch. 151; *Re Ashton, Westminster Bank v. Farley*, [1938] Ch. 482.

7596. *Add. Annotation*:—*Folld. Re Forbes, Public Trustee v. Hadlow* (1934), 78 Sol. Jo. 336.

7599a. ————]—*Re FORBES, PUBLIC TRUSTEE v. HADLOW* (1934), 78 Sol. Jo. 336.

7601a. *Lady's maid.*]—*Re FORBES, PUBLIC TRUSTEE v. HADLOW* (1934), 78 Sol. Jo. 336.

7620a. *Change of ownership of business unknown to legatee.*]—By his will, made in Oct. 1933, a testator gave "to every person who shall at the date of my death be in my service & shall have been in my service for not less than three years continuously immediately prior to that date" one year's wages. Testator had carried on the business of a sports ground proprietor. In May, 1931, testator had signed a declaration of trust whereby he admitted & acknowledged that he held the business of a sports ground proprietor carried on in his name in trust for the persons mentioned in the declaration in certain proportions. Testator continued until his death to manage the business exclusively. The question arose whether certain persons who had been employed in testator's business since before May, 1931, & without any knowledge of any change in the ownership of the business, had remained in the employ of the business continuously until testator's death, were entitled to legacies under testator's will:—*Held*: the employees were in testator's service for a continuous period of three years immediately prior to his death within the terms of the will, & they were entitled to legacies.—*Re HOWELL'S TRUSTS, BARCLAYS BANK, LTD. v. SIMMONS*, [1937] 3 All E. R. 647.

7637a. ———— *Confined to wages in cash.*]—The ct. held that a bequest to a servant of "one year's wages" was confined to wages in cash, & did not include various other benefits to which the servant was entitled.—*Re PEACOCK, PUBLIC TRUSTEE v. BIRCHENOUGH* (1929), 45 T. L. R. 301; 73 Sol. Jo. 220.

PART XVI. SECT. 17, SUB-SECT. 11.—  
J. (d.) 1

7365 v. *revid. sub nom. McQUARRIE v. EASTERN TRUST CO.*, [1928] 1 D. L. R. 239; [1928] S. C. R. 13.—CAN.

7365 ix. ————]—*Re CAMPBELL*, [1928] 4 D. L. R. 797; 63 O. L. R. 36.—CAN.

PART XVI. SECT. 17, SUB-SECT. 11.—  
J. (d) iii.

7389 i. *Ascertainment at death of testator*]—By his will testator, after a certain bequest to his wife, gave her a life estate in the whole of his residuary real & personal estate, & then provided that, after the death of his wife, all his real & personal estate should be converted into money, & such money should be handed over "to my then living nearest of kin":—*Held*: the persons who were entitled in remainder

on the death of the life tenant were such of testator's nearest blood relations ascertained at his death as were living at the date of the expiration of the life estate.—*Re McRAE, McDONALD v. CREER* (1928), 28 S. R. N. S. W. 447; 45 N. S. W. N. 93.—AUS.

PART XVI. SECT. 17, SUB-SECT. 11.—  
K. (b).

7442 xi. ————]—*Held*: "family" meant the children of testator.—*Re ALLEN*, [1933] S. A. S. R. 122.—AUS.

o i. ————]—Testator directed his trustees to pay the income of his estate to his daughter for life, & if she left no issue then to give to his half brother W., one-fourth of his estate "to be expended by him at his discretion & without account for the benefit of more needy members of his branch of

my father's family." Testator's daughter died without issue in 1927. Testator's father was married twice & had children by both marriages. W. was a child by the second marriage, & he & three other children of the second marriage who were living at testator's death predeceased the daughter:—*Held*: the words "his branch of my father's family" were not intended by testator to apply to W.'s issue, but to benefit children of the second marriage who were living at his death, the word "family" being used in its primary meaning of children, & as no contrary intention appeared, the members composing it were to be ascertained as at testator's death.—*Re HATHEWAY, WARDROP v. WOOD* (1929), 51 N. B. R. 347.—CAN.

o ii. ————]—*Re HORBS*, [1929] 4 D. L. R. 433; 64 O. L. R. 370.—CAN.

**7673. Add. Annotation:—***Re*fd. Shaw v. Public Trustee (1929), 141 L. T. 465.

**7742a. —.**—In this case an absolute term of ninety-nine years limited to J. C. amongst other limitations of a real estate under a will, was, with reference "to the true construction of the several parts of the will," considered not as an absolute term, but as determinable on the death of J. C.—*CORYTON v. HEELYAR* (1745), 2 Cox, Eq. Cas. 340; 30 E. R. 156.

*Annotations:—*Consd. Clarke v. Hackwell (1788), 2 Bro. C. C. 304; Lytton v. Lytton (1793), 4 Bro. C. C. 441; Wykham v. Wykham (1811), 18 Ves. 395; Sherratt v. Bentley (1834), 2 My. & K. 149. *Re*fd. Mansell (Lady) v. Mansell (Sir) (1757), Wilms. 36; Northumberland (Earl) v. Egremont (Earl) (1759), 1 Eden, 435; Strong v. Teatt (1760), 1 Wm. Bl. 200; Evans d. Brooke v. Astley (1762), 1 Wm. Bl. 521; Frogmorton d. Bramstone v. Holyday (1765), 3 Burr. 1618; Venables v. Morris (1797), 7 Term Rep. 342; Wilkinson v. Adam (1812), 1 Ves. & B. 422; Hart v. Tulk (1852), 2 De G. M. & G. 300; Key v. Key (1853), 4 De G. M. & G. 73; Windus v. Windus (1856), 6 De G. M. & G. 549.

**7781a. Absolute gift "subject to provisions & directions hereinafter contained."**—Testator by his will devised & bequeathed the residue of his real & personal estate equally among several named children "subject to the provisions & directions hereinafter contained." The provisions & directions settled the shares of daughters, but failed to dispose

of the whole interest of a married daughter who died without children:—*Held*: a gift in these terms is not an absolute gift & the personal representatives of the daughter were not entitled to the interest undisposed of.—*Re COHEN'S WILL TRUSTS, CULLEN v. WESTMINSTER BANK, LTD.*, [1936] 1 All E. R. 103.

**7798. Add. Annotation:—***Re*fd. *Re Orlebar, Orlebar v. Orlebar*, [1936] Ch. 147.

**7911. Add. Annotation:—***Extd. Re Sleeman, Cragoe v. Goodman* (1929), 167 L. T. Jo. 116.

**7911a. —.**—*Re SLEEMAN, CRAGOE v. GOODMAN*, [1929] W. N. 16; 167 L. T. Jo. 116; 67 L. Jo. 163.

**7958a. —**—Life interest to remain property of descendants.]—The testatrix made her will in the French language & included a gift of which the following is the English translation: "I bequeath to B. for her life & after her death to her son L. should he survive her the life interest in my holding of War Loan. . . . This life interest will remain the property of the descendants of the B. branch of the family until extinct." At the date of the will, L. in fact had descendants. Upon a summons, the question was raised as to what interest L. took under this clause:—*Held*:

#### PART XVI. SECT. 17, SUB-SECT. 11. —Q.

*sm.* "Niece"—*Grandniece.*]—*Re LASEURE ESTATE; RANDOM v. LASEURE*, [1931] 3 W. W. R. 775.—CAN.

#### PART XVI. SECT. 18, SUB-SECT. 1.

*sa. Bequest to one child—Bequest of residue to "all" children—Enumeration of children omitting first donee—Rejection of "all."*—*Re SHORT (Out.)*, [1929] 1 D. L. R. 451.—CAN.

*sb. "Farm"—Lands owned not farm lands in local sense.*—*Re MCCABE ESTATE, LEISEMERE v. RESIDUARY LEGATEES & BURNETT*, [1931] 2 W. W. R. 573.—CAN.

*sd. "Legatee"—In residuary clause—Whether donees of previous charitable bequest included.*]—While the words "legatees" & "bequests" are indiscriminately used in testamentary dispositions to mean gifts of personality, yet a testator may use them to distinguish donations to different classes, & his intention to do so, if clear, will be given effect.—*Re TYHURST, SMITH v. CHATHAM TRUSTEES, HOME OF THE FRIENDLESSE*, [1932] S. C. R. 713; 4 D. L. R. 173.—CAN.

#### PART XVI. SECT. 19, SUB-SECT. 1.

*d i. —.*—*Roche v. Roche*, [1930] 4 D. L. R. 310.—CAN.

#### PART XVI. SECT. 19, SUB-SECT. 3. —A.

**7704 xxvi. —.**—Testator by his will directed his trustee to divide the residue of his estate among his children, the share of each child to be vested in & paid to that child at twenty-one years of age. By a codicil testator directed his daughters' shares of residue to be sold & invested, & restricted the gift to his daughters to a life estate, with remainder to their respective children.—*Held*: the gift to the daughter contained in the will was an absolute gift, from which interests were carved out by the codicil in favour of the daughter's children, & as the daughter never had children, the absolute gift remained unaffected.—*Re BISHOP, PUBLIC*

*TRUSTEE v. BISHOP* [1928] S. A. S. R. 302.—AUS.

**7704 xxvii. —.**—By the first clause of the will in question herein the testatrix gave her "entire estate," with certain exceptions, to her brother. The will then went on to provide that on the death of her brother "the residue of my estate then remaining" should go to another named person, the testatrix' niece.—*Held*: the brother took an absolute estate, not merely a life interest, & the gift over to the niece was void.—*Re ROBINSON ESTATE*, [1930] 2 W. W. R. 609; [1931] 1 D. L. R. 289; 39 Man. L. R. 93; *reversd.*, [1930] 3 D. L. R. 820; 1 W. W. R. 935.—CAN.

#### PART XVI. SECT. 19, SUB-SECT. 3. —B.

**7763 iii. —.**—A testator by his will bequeathed all his possessions to his wife for her absolute use or disposal. There were further provisions in the will that at her death, if she had made no will to the contrary & if testator survived her, the property after payment of debts should be divided among certain named beneficiaries.—*Held*: the wife took an absolute & not a life interest in all property real & personal of testator.—*Re HERVEY, STEPHENS v. MARKS & HERVEY*, [1936] Q. S. R. 217.—AUS.

*sf. Absolute gift followed by executory devise.*—Where testator has made an absolute gift to a beneficiary, & in the succeeding sentence an executory devise beginning with the words " & at his death if he has no lawful issue " followed by a sentence beginning, " & if he leaves a widow," the clear inference of testator's intention is that the beneficiary takes a fee simple.—*Re STARK & TRIM*, [1932] O. R. 263; 2 D. L. R. 603.—CAN.

*sk. Absolute gift to wife—Provision for disposition of "any remaining at her death."*—A wife takes an absolute interest by a gift of residue to her without restriction, subject to a proviso that any remaining at her death should be divided among the children.—*NOVA SCOTIA TRUST CO. v. SMITH* [1933] 2 D. L. R. 272.—CAN.

*sm. Gift of real & personal estate to wife—Subsequent "restrictions."*—*Re*

*SCOTT ESTATE*, [1937] 3 W. W. R. 272.—CAN.

#### PART XVI. SECT. 19, SUB-SECT. 3. —C.

*d i. —.*—A gift to "my wife & on her death to the Home Mission Fund of the Presbyterian Church" creates a life estate only with remainder to the fund.—*CHATHAM TRUST CO. OF CANADA v. MACPHERSON* (1936), 11 M. P. R. 118.—CAN.

#### PART XVI. SECT. 19, SUB-SECT. 6.— A. (a).

*a. affd.* [1928] 3 D. L. R. 773; [1928] S. C. R. 329.—CAN.

#### PART XVI. SECT. 19, SUB-SECT. 6.— A. (i).

*q i. —.*—*Re BECKSTEAD*, [1928] 4 D. L. R. 666; 62 O. L. R. 690.—CAN.

#### PART XVI. SECT. 19, SUB-SECT. 6.— A. (i).

*sg. At his decease to his heir male absolutely.*]—A testator, who resided in England & died there in 1869, devised certain land in Victoria upon trust for his son for life, " & at his decease to his heir male absolutely or failing any lawful son to his eldest daughter absolutely ".—*Held*: the rule in *Shelley's Case* did not apply, & the words "heir male" designated the eldest son of the life tenant.—*Re RUDDUCK, EQUITY TRUSTEES EXECUTORS & AGENCY CO., LTD. v. RUDDUCK*, [1935] V. L. R. 251; 41 Argus L. R. 351.—AUS.

#### PART XVI. SECT. 19, SUB-SECT. 6.— B. (a).

*a i. —*—Remainder to "representatives."—*Re MORAN, CLAY v. EASTERN TRUST CO. (N. S.)*, [1929] 1 D. L. R. 592.—CAN.

*a ii. —*—Insurance policy payable to donee.]—Testator devised all his property, including all life insurance in trust for his sister-in-law for life & then to her grandson absolutely. Three of his policies were payable to his sister-in-law.—*Held*: her interest in those was cut down to a life interest.—*Re ROGERS WILL* (1935), 9 M. P. R. 575.—CAN.

(1) this was not an indefinite gift to L. of the rents & profits so as to be equivalent to an absolute gift; "the descendants" were not exclusively the descendants of L., & therefore the gift could not be construed as creating an entailed interest under the Law of Property Act, 1925 (c. 20), s. 130 (2); (3) L. took a life interest only, & subject to that, the holding of War Loan fell into residue.—*Re BROWNIE BROWNIE v. MUAUX*, [1938] 4 All E. R. 54.

8001. *Add. Annotation*:—*Refd. Re Duncombe, Wrixon-Becher v. Faversham*, [1932] 1 Ch. 622.

8003. *Add. Annotations*:—*Refd. Re Duncombe's Will Trusts, Wrixon-Becher v. Faversham* (Earl) (1932), 146 L. T. 412; *Re Hind, Bernstone v. Montgomery*, [1933] Ch. 208.

8009. *Add. Annotations*:—*Refd. Re Duncombe's Will Trusts, Wrixon-Becher v. Faversham* (Earl) (1932), 146 L. T. 412; *Re Jones, Public Trustee v. Jones*, [1934] Ch. 315.

8010. *Add. Annotation*:—*Refd. Re Duncombe's Will Trusts, Wrixon-Becher v. Faversham* (Earl) (1932), 146 L. T. 412.

8017. *Add. Annotation*:—*Refd. Re Duncombe's Will Trusts, Wrixon-Becher v. Faversham* (Earl) (1932), 146 L. T. 412.

8022. *Add. Annotation*:—*As to (1) & (2) Overd. Re Duncombe's Will Trusts, Wrixon-Becher v. Faversham* (Earl), [1932] 1 Ch. 622.

8026. *Add. Annotation*:—*Refd. Barton v. Moorhouse*, [1935] A. C. 300.

8028. *Add. Annotation*:—*Consd. Re Duncombe's Will Trusts, Wrixon-Becher v. Faversham* (Earl) (1932), 146 L. T. 412.

8032. *Add. Annotation*:—*Refd. Re Hind, Bernstone v. Montgomery*, [1933] Ch. 208.

032 a. ———.]—By his will dated May 22, 1879, testator bequeathed certain chattels to his exors. upon trust to "permit the same to go along with & be used & enjoyed so far as the rules of law & equity will permit by person or persons who under or by virtue of this my will shall for the time being be in the actual possession or entitled to the receipt

of the rents & profits of the mansion & demesne of W. included in & settled by" a resettlement dated Oct. 31, 1874, but so as not to vest absolutely in any tenant in tail by purchase until he attained twenty-one years of age. The will also contained a bequest of residuary personal estate. The W. estate was not settled by testator's will but by the resettlement, & the words "this my will" in the bequest of chattels were therefore construed as "the resettlement." In the events which had happened testator's daughter, E., was on July 6, 1917, tenant for life in possession under the resettlement, & his nephew A. tenant in tail in remainder expectant on the event which happened of testator's three daughters dying without sons. By a disentailing deed of that date A. disentailed the property comprised in the resettlement with the consent of E. as protector of the settlement, & A. & another daughter of testator joined in conveying the property to E. in fee simple. E. survived testator's other daughters & died in 1930. In the events which had then happened testator's great nephew B. would, but for the disentailing deed, have then become tenant in tail in possession. He died soon afterwards. On a summons raising the question who on the death of E. became entitled to the chattels, LUXMOORE, J., who would apart from authority have held that the chattels fell into residue, decided on the authority of *Hogg v. Jones*, No. 8022, that B. became entitled to the chattels absolutely on E.'s death. On appeal:—*Held*: reversing the decision of LUXMOORE, J., but without deciding whether the chattels belonged to E. absolutely or fell into residue, as B. had never been in the physical possession of the mansion house & demesne of W., he did not become entitled to the chattels on E.'s death.—*Re DUNCOMBE, WRIXON-BECHER v. FAVERSHAM*, [1932] 1 Ch. 622; 101 L. J. Ch. 280; 146 L. T. 412, C. A.

8039. *Add. Annotation*:—*Consd. Sifton v. Sifton*, [1938] 3 All E. R. 435.

PART XVI. SECT. 19, SUB-SECT. 6.—  
B. (b) iii.

7968 ii. ———.]—Testator made bequests of money to his three daughters, "these respective sums for my daughters & their heirs, the interest during their lives to be absolutely theirs & not subject to the control of their husbands; & after their decease, the principal shall be equally divided among their lawful issue as they shall severally attain the age of twenty-one years, & in case any of my daughters shall not marry or have any lawful issue, then at their decease such daughter's share shall be equally divided between her surviving sisters or their heirs."—*Held*: each daughter took not a life interest merely but an absolute interest.—*Re LLOYD, POWELL v. RICHARDSON* (1929), 54 N. B. R. 336.—CAN.

PART XVI. SECT. 19, SUB-SECT. 7.—  
B.

h i. ———.]—*Re BRADSHAW ESTATE*, [1931] 3 W. W. R. 577; [1935] 1 D. L. R. 167; 12 Man. L. R. 525.—CAN.

PART XVI. SECT. 19, SUB-SECT. 8.—  
D.

q i. ———.]—Testator gave to his wife the whole of his estate "for her

sole use as long as she may live," & at her death, to nieces & nephews "what shall then remain over of my estate":—*Held*: no more than a life estate was given, but the description "what shall then remain over of my estate" adequately implied a power on the part of the widow to encroach on capital; & what remained after her encroachments passed at her death under the will to his nephews & nieces.—*STADDER v. CAN. BANK COMMERCE*, [1929] 3 D. L. R. 651; 64 O. L. R. 69.—CAN.

PART XVI. SECT. 19, SUB-SECT. 8.—  
E. (c).

8141 vii. ———.]—A testator gave all his real & personal estate to his wife "provided she remains my widow, she nevertheless throughout maintaining supporting & educating my infant children, but should she marry again": he gave his estate to his trustee for conversion & distribution equally among all his children:—*Held*: the widow took a determinable life interest in the estate only, & not an absolute interest subject to divesting on remarriage.—*Re HAMDORF*, [1935] S. A. S. R. 396.—AUS.

PART XVI. SECT. 19, SUB-SECT. 8.—  
F. (a).

sk. After life interest—"Whatever

remains."—[Gift to wife of all real & personal estate "the same to be used during her lifetime as she may require it," provision being made at her death for division of "whatever remains":—*Held*: to constitute a life estate.—*LISTER v. GILBERT* (1938), 12 M. P. R. 566.—CAN.

PART XVI. SECT. 19, SUB-SECT. 8.—  
F. (b).

8164 i. *Whether first donee takes absolutely*—"Residue of my estate that may be remaining over at her death."—*A morris causa settlement*, by which testator conveyed his whole estate to his stepdaughter E., whom he also appointed his sole executrix, contained this provision:—"In the event of T. surviving his sister, the said E., the revenue of the residue of my estate that may be remaining over at her death shall fall to the said T., but in lieu for his life rent use alienary, & at his death, to my own heirs whomsoever in fee." E. survived testator, & died leaving a general settlement by which she bequeathed her whole estate to her brother T., who survived her. At the date of her death she still retained in her possession, in their original forms, certain securities which had belonged to the testator, & a deposit receipt representing heritage belonging to him which she had sold.

8217. *Add. Citation*:—140 L. T. 369.

*Add. Annotation*:—*Refd. Re W. D. J.*, [1934] Ch. 174.

8329a. — *Application to substitutional gift.*—The rule stated in Jarman on Wills, 7th ed., at p. 1772, that, where there is a gift to a compound class consisting of children & the issue of any deceased child who should have died leaving issue, there must be double words of severance, if a tenancy in common is to be imported not only only the children, but also among the grandchildren, does not apply where the gift is in such a condensed form that words of division can readily be construed as applying not only to the original class of children, but to any substituted issue. —*Re FROY*, *FROY v. FROY*, [1938] Ch. 566; [1938] 2 All E. R. 316; 107 L. J. Ch. 342; 158 L. T. 518; 54 T. L. R. 613; 82 Sol. Jo. 273.

8344. *Add. Annotation*:—*Refd. Re Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

8368. *Add. Annotation*:—*Apld. Re Froy, Froy v. Froy*, [1938] Ch. 566.

8375. *Add. Annotation*:—*Refd. Re Coleman, Public Trustee v. Coleman*, [1936] Ch. 528.

8385. *Add. Annotation*:—*Consd. Re Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

8495. *Add. Annotations*:—*Consd. Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357. *Apld. Re Cosentine, Philp v. Wesleyan Methodist Local Preachers' Mutual Aid Assocn.* (1932), 76 Sol. Jo. 512.

8511. *Add. Annotation*:—*Consd. Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357.

8534a. —.]—By his will testator gave all his residuary real & personal estate to his trustees upon trust to pay the rents, profits & income to his wife for life & after her death upon trusts for sale & to divide the proceeds into two equal portions, one to be paid to his son A. & the other on certain trusts for his daughter B. & her children as therein mentioned. By a codicil testator, after reciting that since the date of his will he had purchased a freehold house, devised the same on trust for his wife for life & on her death for E. for life. He then directed his trustees on these events happening to sell the house & "divide the proceeds thereof equally between the children of 'my son A. & my

In a question between T., as his sister's universal legatee, & testator's heirs whomsoever regarding the right of these funds:—*Held*: the effect of the provision above quoted was to restrict the absolute gift originally made by testator to E. to a right of consumption of testator's estate during her lifetime; & accordingly, as the funds in question were at her death still capable of identification as part of testator's estate, they passed in terms of his settlement, as residue of his estate, in fee to his heirs whomsoever, subject to a right of life interest in favour of T.—*HEAVYSIDE v. SMITH*, [1929] S. C. (Ct. of Sess.) 68.—SCOT.

8164 ii. —.]—*Re WELLS, REILLY v. LEWIN* (1935), 9 M. J. R. 580; 5 F. L. J. (Can.) 163.—CAN.

sb. *Whether first donee takes absolutely—Gift over of "what is left."*—Testator gave to his wife certain properties, & at her death "what was left was to go over to" a granddaughter, & the will further directed that the wife was to have "the power to do what she likes with" the property, but what remained at the death of the wife was to go to the granddaughter:—*Held*: the wife did not take an absolute interest in the property, but took an interest for life with power to dispose of the whole or part of the corpus of the property, & that on the death of the wife the granddaughter took any part of the property undisposed of.—*Re MCINTOSH*, [1929] S. A. S. R. 21.—AUS.

sd. — *"If there is any left."*—A will read as follows: "I give, devise & bequeath all my real & personal estate of which I may die possessed in the following manner, that is to say: unto my wife N. K. & I nominate & appoint N. K. to be executrix of this my last Will & Testament. After the death of my wife, my estate is to go to my grandchildren equally, if there is any left":—*Held*: the will vested the testator's estate in the widow absolutely.—*Re KANE ESTATE*, [1934] 2 W. W. R. 202; 3 D. L. R. 637; 42 Man. L. R. 265.—CAN.

sf. — *Gift of "whatever remains."*—Testator devised his residue in these terms: "All the residue . . . I devise & bequeath to my wife provided, however, that whatever remains of said residue at her death shall be divided as follows . . .":—*Held*: the wife took an absolute estate in fee simple

in the residue.—*Re SMITH'S ESTATE, NOVA SCOTIA TRUST CO. v. SMITH* (1933), 6 M. P. R. 205.—CAN.

sk. — *"Balance, if any."*—A gift of residue of realty & personalty to a wife for her use & benefit with a direction that she should leave the balance if any to a mission fund is an absolute gift to the wife.—*Re MOORE* (1925), 57 O. L. R. 530.—CAN.

PART XVI. SECT. 19, SUB-SECT. 9.—A. (a).

8179 viii. —.]—Testator by his will vested residuary property in his wife "to be used by her at discretion in educating & providing for my two sons":—*Held*: the wife took the beneficial interest in the residue, subject to a trust or charge to educate & provide for the sons as in her discretion seemed proper.—*HOVRIGAN v. TRUSTEES EXECUTORS & AGENCY CO.*, [1934] V. L. R. 279; 40 Argus L. R. 283; 8 A. L. J. 146.—AUS.

PART XVI. SECT. 19, SUB-SECT. 9.—A. (b).

8200 ii. —.]—*Re PEARCE, PEARCE v. PEARCE*, [1927] S. A. S. R. 397.—AUS.

8202 ii. —.]—*PUBLICO TRUSTEE v. WEIR*, [1928] N. Z. L. R. 800.—N.Z.

sd. *Trustee to have "control" of estate—Whether amounting to beneficial interest.*—Testator by his will appointed his wife sole executrix, & after a direction in usual form to pay debts, provided as follows: "I give devise & bequeath all my property to my wife Elizabeth Emma to be held in trust by her for the benefit of our children. The said Elizabeth Emma to have control of the estate during her lifetime." Upon an originating summons for the interpretation of the will:—*Held*: the widow took no beneficial interest under the will & that she held the property only as trustee for the children.—*Re WALLACE, WALLACE v. WALLACE*, [1932] N. Z. L. R. 479.—N.Z.

PART XVI. SECT. 19, SUB-SECT. 9.—B. (a).

8206 i. —.]—*Application in discretion of donee.*—*BAKER v. DUMARESQ*, [1934] S. C. R. 665.—CAN.

PART XVI. SECT. 19, SUB-SECT. 10.—A. (a).

8256 x. —.]—C. gave his real & personal estate to his wife, J. "for

the use & benefit of herself & our dear daughter, E." & upon the death of his wife the whole of his estate was "to revert to my dear daughter, E. as to her sole use & benefit," & he appointed his wife sole executrix. Testator died in 1904 & E. died in 1911:—*Held*: the gift created a joint tenancy, & J. took the whole gift by survivorship.—*Re CHAMBERS* (1925), 21 Tas. L. R. 26.—AUS.

8256 xi. —.]—A bequest to a number of persons without any accompanying explanatory words creates a joint tenancy.—*Re BANCROFT, BANCROFT TRUST CO. v. CALDER*, [1936] 1 D. L. R. 571.—CAN.

PART XVI. SECT. 19, SUB-SECT. 10.—B. (a).

sl. *Trust for education & provision.*—Testator left the residue of his property to his widow as trustee, to be used by her at her discretion in educating & providing for his two sons R. & P.:—*Held*: the sons took as tenants in common, & not as joint tenants.—*HOVRIGAN v. TRUSTEES EXECUTORS & AGENCY CO., LTD.*, [1933] V. L. R. 470; Argus L. R. 501.—AUS.

PART XVI. SECT. 19, SUB-SECT. 10.—C. (a) ii.

8515 iv. —.]—Testator, by his will, gave one-fourth of a section of land upon trust for his son G. to use, occupy, & enjoy for life, & as to the remaining three-fourths, upon similar trust for three other children. On the death of the children respectively, the will directed the trustees to sell that portion of the section in which each had a life interest, & to stand possessed of the proceeds from any such sale on trust "for all my grandchildren being issue" of the four children "who shall live to attain the age of twenty-one years share & share alike." There was also a direction to use the whole or part of the income for the benefit, etc., of all or any of the children of the four children respectively, whether of full age or not. The residue of the estate was given to the four children or such as should be alive at the testator's death share & share alike. Certain grandchildren died in the lifetime of the life tenants:—*Held*: there was a gift of the proceeds of each of the four parts to the children of each life tenant.—*Re BAUDERSTONE*, [1928] S. A. S. R. 262.—AUS.

daughter B.' " A. was married, with one child, a son. B. was also married, & had six children. A.'s son having died, his legal personal representative was one of the depts. to the summons. One of B.'s children, a son, also died, & his legal personal representative was also a dept.:—*Held*: although on the authorities a gift to be equally divided between the children of A. & B. ought, in the absence of surrounding circumstances, to be construed as a gift in equal shares to the individual B. & the children of A., the construction must in each case depend on the particular context & all the surrounding circumstances; the gift in the codicil included all testator's grandchildren, both A.'s & his daughter B.'s children, & accordingly the proceeds of sale were divisible in sevenths.—*Re DALE, MAYER v. WOOD*, [1931] 1 Ch. 357; 100 L. J. Ch. 237; 145 L. T. 632.

*Annotation*.—*Consd. Re Cossentine, Philip v. Wesleyan Methodist Local Preachers' Mutual Aid Assocn.* (1932), 76 Sol. Jo. 512.

**8538a.** "Divided between".—*Re COSENTINE, PHILP v. WESLEYAN METHODIST LOCAL PREACHERS' MUTUAL AID ASSOCN.*, No. 7179b, *ante*.

**8552.** *Add. Annotations*:—*As to* (2) *Folld. Re Prosser, Prosser v. Griffith* (1929), 167 L. T. Jo. 307. *Consd. Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357; *Re Cossentine, Philip v. Wesleyan Methodist Local Preachers' Mutual Aid Assocn.* (1932), 76 Sol. Jo. 512.

**8553a.** —.—*Re PROSSER, PROSSER v. GRIFFITH* (1929), 167 L. T. Jo. 307; 67 L. Jo. 346; [1929] W. N. 85.

*Annotation*.—*Consd. Re Dale, Mayer v. Wood*, [1931] 1 Ch. 357.

**8583.** *Add. Annotation*:—*Distd. Re Froy, Froy v. Froy*, [1938] Ch. 566.

**8625.** *Add. Annotation*:—*Refd. Re Forbes, Public Trustee v. Hadlow* (1934), 78 Sol. Jo. 336.

**8698a.** —.—*Testator executed a codicil to his will whereby he revoked the appointment of an executor & appointed another in his place, revoked a specific devise & bequest & declared certain other trusts of the property comprised therein, gave certain directions to his trustees, bequeathed pecuniary legacies additional to those in his will & declared that the power of appointing new trustees should be exercised by the surviving & continuing trustees, & in other respects confirmed his will. On the same day he executed another codicil in almost identical terms, the only material difference being that a blank left in the amount of a legacy in one codicil was filled in in the other. The two codicils were attested by the same witnesses & placed in one envelope, which was sent to a bank for custody. The testator at a later date executed another, which he described as a "third" codicil to his will, & referred therein to his will & codicils:—*Held*: the two codicils of even date were duplicates of one & the same instrument, & that the legacies thereby given were substitutional & not cumulative.—*Re MICHELL, THOMAS v. HOSKINS*, [1929] 1 Ch. 552; 98 L. J. Ch. 197; 140 L. T. 686; 45 T. L. R. 243.*

**8703.** *Add. Annotation*:—*Refd. Re Gardner's Will Trusts, Boucher v. Horn*, [1936] 3 All E. R. 938.

**8712a.** —.—*Where a second codicil appears to be only a repetition of a former, with the addition of a simple legacy, the legacies are not doubled. Parol evidence read, to show they were intended as accumulative.—COOTE v. BOYD, COOTE v. COOTE* (1789), 2 Bro. C. C. 521; 29 E. R. 286.

**8836.** *Add. Annotation*:—*Apld. Re Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

**8840.** *Add. Annotation*:—*Consd. Re Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

**8897a.** —.—*A testator by his will, drawn up in clauses in English form, appointed appts. to be his exors. & trustees, & by clause 6 devised to his son certain real property consisting of a number of plots of land & the buildings thereon situated at Lagos. A separate clause at the end of clause 6 stated that: "These devises shall take effect upon my said son attaining the age of twenty-five years." Testator died in 1918, & the son, on attaining the age of twenty-five years in 1930, brought an action against appts. claiming an account as from the date of testator's death of the rents of the properties devised to him by clause 6 of the will:—*Held*: (1) the established rule for construing devises of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness; (2) on a consideration of the whole of the will & of the circumstances in which it was made, & applying the above-stated rule or principle, the words "shall take effect" related to the devise taking effect in possession, & were not intended to impose a condition precedent on the devise, which, therefore, was to be construed as vesting at the death of the testator, subject to divestment if the son should fail to attain the age of twenty-five years, & was not contingent on his attaining that age. The son was accordingly entitled to the rents claimed.—*BICKERSTETH v. SHANU*, [1936] A. C. 290; [1936] 1 All E. R. 227; 105 L. J. P. C. 53; 154 L. T. 360; 52 T. L. R. 290; 80 Sol. Jo. 164, P. C.*

**8902.** *Add. Annotation*:—*Refd. Bickersteth v. Shanu*, [1936] 1 All E. R. 227.

**8910.** *Add. Annotation*:—*Refd. Bickersteth v. Shanu*, [1936] A. C. 290.

**8913a.** —.—*"Shall take effect" on attaining specified age.*—*BICKERSTETH v. SHANU*, No. 8897a, *ante*.

**8919a.** —.—*A testator who died in 1914 domiciled in Scotland & was survived by his widow, two sons & three daughters, directed his trustees by his will (1) to settle certain capital sums on each of his five children; (2) to give the life-rent of the remainder of his estate to his widow; & (3) on her death, after increasing the amount of the children's provisions, (a) to convey the heritable or real estate in Scotland to his elder son, whom failing to his younger son, & (b) to divide the whole residue of the estate equally between the elder & the younger son; & in*

the event of the elder son dying before attaining the age of 26 & leaving lawful issue, such issue were to take his half, but failing such issue his half was to go to the younger son or his issue. There was a vesting clause in the will which declared that the bequests & provisions "shall vest at the dates when the same are due & payable & fall to be made over." The elder son, who died at the age of 41, predeceased the widow & left no issue. The questions raised in the appeal were (a) whether one half of the residue primarily destined to the elder son vested in him *a morte testatoris*, & (b) if it did not so vest whether it passed to the younger son & his issue, or was the subject of an intestacy & was thus available as a fund out of which testator's widow & children could benefit:—*Held*: the vesting clause could reasonably be construed to mean that the one half of the residue destined to the elder son vested in him *a morte testatoris*, at which date he had already attained the age of 26, regardless of whether the widow was then alive or not.

*Per* LORD MAUGHAM: In both Scotland & England, where a testator's intention could be gathered with reasonable certainty from the entire will, supplemented by extrinsic evidence if admissible, that intention was effective even against the literal meaning of the particular non-technical words used by testator in the will. —PARKES (OR KESWICK) v. PARKES (OR KESWICK), [1936] 3 All E. R. 653, 11. L.

8950. *Add. Annotation*:—*Consd. Re Heath, Public Trustee v. Heath*, [1936] Ch. 259.

8954. *Add. Annotation*:—*Consd. Bickersteth v. Shanu*, [1936] 1 All E. R. 227.

8969. *Add. Annotation*:—*Refd. Re Heath, Public Trustee v. Heath*, [1936] Ch. 259.

8993. *Add. Annotation*:—*Apld. Re Heath, Public Trustee v. Heath*, [1936] Ch. 259.

8998. *Add. Annotation*:—*Refd. Re Heath, Public Trustee v. Heath*, [1936] Ch. 259.

9015. *Add. Annotation*:—*Refd. Re Alston-Roberts-Wests' Settled Estates*, [1928] W. N. 41.

#### PART XVI. SECT. 20, SUB-SECT. 2.—B. (d).

9018 i. *Whether gift vests before age attained.*—*Re BREWER'S WILL, BREWER v. BREWER* (1932), 4 M. P. R. 361.—CAN.

#### PART XVI. SECT. 20, SUB-SECT. 3.—A.

9060 v. —.—.]—In case of a vested legacy payable at a future time, there is a complete severance of the legacy from the residue.—*MANEKJI RUSTOMJI v. NANABHAI CURSETJI* (1928), 1. L. R. 53 Bom. 724.—IND.

#### PART XVI. SECT. 20, SUB-SECT. 3.—B. (b).

9101 v. —.—.]—Bequests of a certain amount of stock in a co. to each of the nephews & nieces of testator "who shall be alive at the time of my death & who shall attain the age of 21 years"—*Held*: in view of other provisions of the will, to be vested subject only to being divested on death before attaining 21 years of age without leaving issue. Therefore, the nephews & nieces who were at the death of testator & still were under 21 years of age were entitled to the dividends on

their shares paid between the date of the death of testator & the date of their attaining respectively the age of 21 years.—*Re TEGLER ESTATE (Alta.)*, [1929] 1 D. L. R. 445; 1 W. W. R. 181.—CAN.

9101 vi. —.—.]—*SINGER v. SINGER*, [1932] S. C. R. 44; 1 D. L. R. 284.—CAN.

#### PART XVI. SECT. 20, SUB-SECT. 3.—D.

9173 ii. —.—.]—Where testator gives funds upon certain events, namely, the death of a legatee, vesting is postponed until that event occurs.—*HASZARD v. WINCHESTER*, [1935] 4 D. L. R. 44; *affd. sub. nom. Re ROBERSON*, [1936] 4 D. L. R. 443; 6 F. L. J. (Can.) 133; *reversd. sub. nom. Re ROBERSON, CAMERON v. HASZARD*, [1937] S. C. R. 354; 2 D. L. R. 571.—CAN.

#### PART XVI. SECT. 20, SUB-SECT. 3.—E. (a).

9178 i. —.—.]—*UNITED CHURCH v. MURPHY*, [1931] 1 D. L. R. 452.—CAN.

9178 ii. —.—.]—Testator's will, after providing for collection & pay-

9016. *Add. Annotation*:—*Consd. Bickersteth v. Shanu*, [1936] 1 All E. R. 227.

9037. *Add. Annotation*:—*Apld. Re Heath, Public Trustee v. Heath*, [1936] Ch. 259.

9071a. —.—.]—Testator bequeathed a sum of stock to trustees, upon trust, during sixty years from his death, if the law should allow, or, if not, then during the lives of his two sons, & of the survivor, & twenty-one years after his death, to lay out the dividends in repairing & insuring the houses, etc., on his farms, called H. & S., it being his desire, that, upon no account, should the timber of such farms be cut down during the said term of sixty years, on pain that the person so cutting such timber should lose all interest in the said estates, as if he were dead, & upon trust to pay the surplus, if any, of the said dividends, equally among the persons for the time being in possession of the estates under his will, during the continuance of the said trust; & immediately after the expiration thereof, to transfer one moiety of the said stock to the person then in possession of the H. farm, such person being one of his sons, or a descendant of a son; but if not, then to the descendants of testator's brothers & sisters, & to pay the other moiety in like manner to the person in possession of the S. farm. Testator devised the H. farm to the same trustees, in fee, upon trust for his son J., for ninety-nine years, if he should so long live, remainder to the use of his first & other sons in tail, with divers remainders over. Testator devised the S. farm in like manner for the benefit of his son H. & his issue. J. & H., & their eldest sons, barred the entail in remainder in the said farms & resettled the same, & the stock having been transferred into ct. under Trustee Relief Act, petitioned for the payment out of the fund to them:—*Held*: the fund being intended for the benefit of the sons & their issue, the period for the enjoyment of the capital had been accelerated by barring the entail, which had determined the restriction against cutting down timber.—*Re COLSON'S TRUSTS* (1853), Kay, 133; 2 Eq. Rep. 257; 23 L. J. Ch. 155; 22 L. T. O. S. 183; 2 W. R. 111; 69 E. R. 57.

ment of debts & for certain specific legacies, provided for sale of certain property, comprising the residue of his estate, & investment of the proceeds & payment of the interest for the maintenance of his wife & daughter A. until A., who, however, predeceased testator, attained 21 years of age, & on A. attaining 21 years of age or dying, for payment of \$400 of interest to his wife annually during her life, & then provided that "any money remaining after the payment of said \$400 shall be equally divided among my children, the issue of any deceased child to take parent's share. On the death of my wife the whole of my property shall be divided between my children (the issue of any deceased child shall be entitled to parent's share) said division to be in equal shares"—*Held*: the estate of any deceased child of testator who died in the lifetime of testator's widow & left no issue him surviving was not entitled to share in the income from the said residue or in the corpus when divided on the widow's death.—*BUCH v. EASTERN TRUST CO.*, [1928] 3 D. L. R. 834; [1928] S. C. R. 479.—CAN.

9178 iii. —.—.]—Testator "devised



9205. *Add. Annotation*:—*Generally*, *Consd. Browne v. Moody*, [1936] 2 All E. R. 1695.

9207. *Add. Annotation*:—*Refd. Re Froy, Froy v. Froy*, [1938] Ch. 566.

9210a. —. —.]—Testatrix, by clause 5 of her will, set aside a fund of \$100,000, & gave the income therefrom to her son for his life, & on his death she directed the fund to be divided as follows: one half to her grand-daughter E. & the other half equally between her daughters F., C. & H. By clause 6 she gave, devised & bequeathed the residue of the estate equally between the said grand-daughter & her three daughters share & share alike. By clause 7 she directed that, if the grand-daughter or any of the daughters predeceased her or her son leaving issue, the child or children of the person so dying should take the share to which their mother would have been entitled had she survived. All the beneficiaries mentioned survived testatrix. A special case was stated for the opinion of the Supreme Ct. of Canada, asking two questions: (a) whether the legacies given by clause 5 on the death of the son vested in the beneficiaries on the death of the testatrix; (b) if they became so vested whether they were liable to be divested under clause 7. The Supreme Ct. answered the first question in the negative, & the second question did not arise. On appeal to the Privy Council:—*Held*: the legacies

given by clause 5 on the death of the son vested in the beneficiaries on the death of testatrix since the postponement of the division was solely for the purpose of interposing a life interest in favour of the son; in the case of a beneficiary dying in the lifetime of the son without issue the legacies would not be divested; in the case of a beneficiary dying in the lifetime of the son leaving issue, the legacies would be divested in favour of the child or children of the beneficiary so dying.—*Browne v. Moody*, [1936] A. C. 635; [1936] 2 All E. R. 1695; 105 L. J. P. C. 140; 155 L. T. 469; 53 T. L. R. 5; 80 Sol. Jo. 814, P. C.

9241. *Add. Annotation*:—*Apld. Re Sutcliffe, Alison v. Alison*, [1934] Ch. 219.

9267. *Add. Annotation*:—*Consd. Re Sutcliffe, Alison v. Alison*, [1934] Ch. 219.

9294. *Add. Annotation*:—*Refd. Browne v. Moody*, [1936] 2 All E. R. 1695.

9328. *Add. Annotation*:—*Consd. Re Sutcliffe, Alison v. Alison*, [1934] Ch. 219.

9340. *Add. Annotation*:—*Distd. Ganapathy Pillay v. Alamaloo*, [1929] A. C. 462.

9406. *Add. Annotations*:—*Consd. Re Jefferies, Finch v. Martin*, [1936] 2 All E. R. 626; *Berry v. Geen*, [1938] A. C. 575.

9408. *Add. Annotation*:—*Refd. Berry v. Geen* [1938] A. C. 557.

& bequeathed "his seat on the Winnipeg Grain Exchange to one of his sons, G., & an amount equal in value to that seat to his other son, S., & then gave & bequeathed "all the balance of my property of every kind both real & personal unto my trustees [also exors.] in trust to convert the same into money & invest the proceeds in any investments which they deem advisable with power to vary such investments at their discretion & pay the income of the proceeds to my wife during her life, & after her death to pay to my daughter, A. P., the sum of ten thousand dollars & to divide the balance of the corpus equally between my sons, S. A. H. & G. B. H." Power was given to the trustees to postpone the conversion of any part of the property for so long as they should think fit, & it was directed that the income of any unconverted property should be paid & applied in the same manner as if converted. The wife & the three children survived testator, but the two sons died in the mother's lifetime. A. P. is living. S. left a daughter him surviving, & G. left him surviving a widow, who is said to have remarried. Testator's widow died while the appeal in these proceedings, which were brought by the exors. on a motion for the construction of the will, was pending. The question for construction was whether by reason of the death of the sons in the lifetime of their mother there was an intestacy with respect to the residuary bequests to them upon the view that the bequests were not vested in their lifetime, but were conditional on their surviving her:—*Held*: the bequests to the children vested on testator's death.—*Re HARGRAFT ESTATE*, [1934] 1 W. R. 753; 2 D. L. R. 593; 42 Man. L. R. 47.—*CAN.*

9178 liii. —. —.]—The Ct. of Appeal must yield implicit obedience to the decision of the Supreme Ct. of Canada in *Busch v. Eastern Trust Co.*, [1928] S. C. R. 479, which decided that if there is no gift in a will save in a direction to pay after the determination of a prior life estate, there is not a

vested legacy & the right of the legatee is defeated if he predeceases the period of payment.—*Re McFAIRLANE*, [1934] O. R. 383; 3 D. L. R. 457.—*CAN.*

9178 liv. —. —.]—Devise to children on death or remarriage of wife confers a vested estate.—*Re UNIAKKE*, [1934] 2 D. L. R. 413.—*CAN.*

9178 lv. —. —.]—*Re HAMMOND*, [1934] 2 D. L. R. 580; S. C. R. 403.—*CAN.*

PART XVI. SECT. 20, SUB-SECT. 3.—E. (c).

9269 xix. —. —.]—*Held*: the postponement of the gift until after the life interest was merely for the convenience of the estate, & the estates of the children were therefore vested at testator's death.—*Re MOORE*, [1931] 4 D. L. R. 668; O. R. 454.—*CAN.*

9269 xx. —. —.]—Testator's will directed that his trustee should stand possessed of \$10,000 in trust, as to one moiety thereof for the sole & separate use of a daughter A. & as to the other moiety for a daughter L., & after the decease of said daughters or either of them the trustee to stand possessed of the share of the daughter so dying in trust to be divided between all the children of said daughter in equal shares on their respectively attaining the age of twenty-one years. The moiety held in trust for L. was fully & finally distributed. A. died in Jan. 1931. She had four children, Isabella, Annie, John, & Flora. Of these Isabella only survived her mother. Flora died in infancy & by will John left all his estate to his sister Isabella. Annie was survived by two children, C. & P.:—*Held*: there were no words of present gift in favour of Annie's children to be found in the will, & no language to interpret which could, consistently with the will, be made effective to vest any portion of the trust fund in them. The granddaughter Isabella therefore was entitled to all the trust fund still awaiting distribution.—*Re YALE* (1931), 44 B. C. R. 196.—*CAN.*

9269 xxi. —. —.]—Testator gave his

property in trust for his wife, & "at her death to give the sum of \$1,000 to each one of my children:—*Held*: the children took vested legacies on the death of testator.—*Re MERSEREAU'S WILL* (1936), 10 M. P. R. 177; *sub nom. MERSEREAU v. SCOTT*, 5 F. L. J. (Can.) 276.—*CAN.*

PART XVI. SECT. 20, SUB-SECT. 3.—F. (a).

9335 v. —. —.]—Testator, after devising a life estate to his wife in a certain property, directed that upon her death same should be sold, & the proceeds, along with those from the sale of another property, invested, & the principal & interest divided equally between named grandchildren "or the survivors of them in equal shares as soon as the youngest surviving one shall have attained the age of twenty-one years":—*Held*: a grandchild dying before the youngest surviving grandchild attained the age of twenty-one years was not entitled to a share.—*PUBLIC TRUSTEE v. BOWYEN*, [1929] N. Z. L. R. 438.—*N.Z.*

PART XVI. SECT. 20, SUB-SECT. 3.—H. (c).

9473 iv. —. —.]—*ROACH v. ROACH*, [1931] S. C. R. 512; 3 D. L. R. 374.—*CAN.*

PART XVI. SECT. 20, SUB-SECT. 3.—J. (b).

9508 vi. —. —.]—A will provided for a legacy to each of four children, "to be paid to some of the beneficiaries as they shall become of age," with a gift over to the surviving children in the event of one or more of the children dying before becoming of age, & with a direction that the legacies should be paid out of the proceeds of the crop grown on a certain quarter section of land, which was devised to one L., with the direction to the exors. that the conveyance to her should be made upon completion of the payment of said legacies:—*Held*: said legacies must be looked upon as a provision made for the benefit of each child

**9530. Add. Annotation:—***Consd. Re Heath, Public Trustee v. Heath*, [1936] Ch. 259.

**9535a. —**].—By his will testator gave £5,000 to E. L. H. if she should be living at the date of the death of the survivor of himself & his wife & should attain the age of 21 years or marry under that age, & proceeded: "In case the said E. L. H. predecease me or shall survive me but shall not attain the age of 21 years or marry under that age, then . . . I give the said legacy of £5,000 to L. K. B." E. L. H. survived testator & his wife, but was under the age of 21 years & unmarried:—*Held*: E. L. H. took a vested interest, subject to be divested in the event mentioned. The rule in *Phipps v. Ackers*, No. 8993, applied to a gift of pure personality.—*Re HEATH, PUBLIC TRUSTEE v. HEATH*, [1936] Ch. 259; 105 L. J. Ch. 29; 154 L. T. 536; 52 T. L. R. 54.

**9571a. — — —**].—A will provided that at the expiration of twenty-one years from the death of testator a trust fund should be divided into five shares, that one of such shares should be paid to each of testator's four sons, & that, in the event of any of the sons dying before the period expired leaving a child or children, such child or children should take the share to which such son would have been entitled if he had survived, & in default of issue of any son, the share of such son should be payable to the surviving sons equally:—*Held*: the child of a son who died before the expiration of the period was entitled only to the one-fifth share which his father would have taken, & was not entitled to participate in the share of a son who died before the expiration of the period without issue.—*GANAPATHY PILLAY v. ALAMALOO*

upon such child attaining his or her majority, & there could be no vesting of the legacies until the children, or the survivor of the children, should have reached the age of 21. In the meantime the legacies were merely contingent, & if the four children should die in their minority, the legacies, or such portion of them as should have accumulated, would revert to the devisee of the land.—*Re BAIRD ESTATE*, [1931] 1 W. W. R. 263; 2 D. L. R. 1002.—*CAN.*

**PART XVI. SECT. 20, SUB-SECT. 3.—**  
J. (c.)

**9561 ii. — — —**].—A bequest of income to A. for life & should she die without leaving children then to testator's next of kin means that the life interest should be distributed among the next of kin of testator as at time of distribution.—*Re PENNOCK*, [1936] 2 D. L. R. 192.—*CAN.*

**PART XVI. SECT. 20, SUB-SECT. 3.—**  
J. (d).

*sp. Whether bequest vested or contingent—Gift over on death before receiving share.*—Where a will contained a legacy, with a gift over if the legatee should die before receiving his share, & the legatee survived testator but died before receiving his share:—*Held*: the gift vested *a morte testatoris*.—*WALSH v. EASTERN TRUST CO.* (1936), 11 M. P. R. 126; 6 F. L. J. (Can.) 197.—*CAN.*

**PART XVI. SECT. 20, SUB-SECT. 3.—**  
L.

**1. —** Discretion in trustees to withhold distribution while children in need of assistance.—A will after devising

certain lands & all testator's personal property to his wife, devised all the rest of his estate to trustees, who were empowered to retain, manage, lease, sell or otherwise dispose of the whole or any part thereof in their discretion & to invest the proceeds & to pay the income, after discharging all liabilities in respect of the estate, as follows: "One half thereof to my wife during her life in manner hereinafter described & the rest as follows: To such of my children including M. [one of the trustees] from time to time as to my exors, shall appear to be most in need, the payments to be at the absolute discretion of my exors. If at any time it appears to my trustees that none of my children are in need of assistance but are all unembarrassed financially then after the death of my wife my trustees may divide the estate among my children then living in such proportions as to them shall seem fit my desire being that as far as possible the division shall be made so as to give the larger share to those of my children who are not so well off as the others nevertheless this desire is not to affect the absolute discretion hereby vested in my trustees. . . . The trustees acted on the view that all the income (less the share given the widow during her life) should be available for distribution among needy children without disposal of the corpus until the time arrived, if at all, when in their view, none of the children required assistance:—*Held*: the estate did not vest in the beneficiaries upon the death of the wife but would vest only when the time for distribution arrived; that time would never arrive if it should appear to the trustees that the last surviving child was in need.—*Re*

[1929] A. C. 462; 98 L. J. P. C. 109; 141 L. T. 43, P. C. .

**9615. Add. Annotation:—***Refd. Parker v. Judkin*, [1931] 1 Ch. 475.

**9687. Add. Annotation:—***Refd. Re Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

**9748a. Leaving "issue surviving"—Child en ventre sa mère.**—*ELLIOT v. JOICEY*, No. 6887a, ante.

**9751. In line 9 of headnote, for "without leaving" read "without having" or "without having had."** (See [1915] 1 Ch. 847, n.)

**9810. Add. Annotation:—***Refd. Re Curryer's Will Trusts, Wyly v. Curryer*, [1938] 3 All E. R. 574.

**9839. Add. Annotation:—***Generally, Refd. Browne v. Moody*, [1936] 2 All E. R. 1695.

**9849. Add. Annotation:—***Fold. Re Graham, Graham v. Graham*, [1929] 2 Ch. 127.

**9978. Add. Annotation:—***Refd. Re Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

**9985. Add. Annotation:—***As to (2) Refd. Re Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

**10,013. Add. Annotation:—***Generally, Refd. Re Hayden, Pask v. Perry*, [1931] 2 Ch. 333.

**10,020a. —**].—In construing a devise of real estate to a class of persons "or their issue," the words "or their issue" must be read as words of limitation & not of substitution, the word "or" being construed to mean "&." Therefore a devise of real estate to be equally divided between the sisters of C. "or their issue" was held to confer upon each of the sisters of C., of whom there were three, an estate tail in one undivided third part.—*Re HAYDEN, PASK v. PERRY*, [1931] 2 Ch. 333; 100 L. J. Ch. 381; 146 L. T. 303.

*MAGEE ESTATE*, [1935] 1 W. W. R. 487; 2 D. L. R. 377; 49 B. C. R. 481; *affd.*, [1936] 3 W. W. R. 355, P. C. *CAN.*  
**1. —** *Bequest to such daughters "as shall be spinsters."*—*Re GOODGER* (1925), 21 Tas. L. R. 17.—*AUS.*

**PART XVI. SECT. 23, SUB-SECT. 3.—**  
B.

**9752 xxv. —**].—*Re MAYBELLE, FOX v. EQUITY TRUSTEES, EXECUTORS & AGENCY CO., LTD.*, [1928] V. L. R. 86; [1928] Argus L. R. 65.—*AUS.*

**PART XVI. SECT. 25, SUB-SECT. 2.—**  
A. (c).

**10,073 1. Death in lifetime of tenant for life.**—Testator dying in 1898 gave to his daughter-in-law the use of a property for life, with the right to the exors. to sell the property & to pay her during her life the interest on the proceeds of sale, & after her decease to divide the principal among the children born to her & his son, & in any event after the death to sell . . . such property . . . & to divide the proceeds among such children, the child or children of any such child or children of theirs deceased to receive in equal parts the portion of such deceased parents' share." The daughter-in-law, D., died in 1926, her husband having predeceased her. Five children were born of the marriage, three of whom survived D. Two sons predeceased her, each leaving a widow but no issue, & each dying intestate:—*Held*: at the death of testator in 1898 a vested estate was created in any child then born to his son & D. subject to be divested in part as other children were born; & the widows, or personal representatives of the sons who died before D.

10,157a. ———.]—Testator gave all his "substance" to his exors. upon trust as to one quarter for his daughter F. S. for her separate use, as to one other quarter for his daughter A. C. for her sole use for life, & thereafter for her children if she leave any equally, as to another quarter for the children of his deceased son G. J. equally, & as to the last quarter for W. S. & T. S. The testator declared that the benefits under his will should become vested on the coming of age of the legatee, & that any legacy which by the death of any person should lapse should go to F. S. A. C. survived the testator but died without having ever had any children, & her share lapsed for that reason. The question raised was whether the gift over to F. S. upon lapse by reason of the death of any person took effect in these circumstances:—*Held*: (1) the one quarter given to A. C. did not lapse by the death of any person, but for the reason that A. C. had never had any children; (2) the gift over took effect under the rule in *Jones v. Westcomb* (1711), *Precedent* Ch. 316; 44 Digest 1175, 10,165, that, by necessary implication, the testator must be taken to have made provision for the event which had happened as well as for the lapse by reason of the death of any person; (3) "lapse" in this will did not refer only to the failure of a gift by reason of the death of a legatee in the testator's lifetime.—*Re Fox's Estate*, *DAWES v. DRUITT*, *PHOENIX ASSURANCE CO., LTD. v. FOX*, [1937] 4 All E. R. 664; 82 Sol. Jo. 74, C. A.

10,165. *Add. Annotations*:—*As to* (1) *Distd. Re Graham, Graham v. Graham*, [1929] 2 Ch. 127. *Apld. Re Fox's Estate, Dawes v. Drutt, Phoenix Assurance Co. v. Fox*, [1937] 4 All E. R. 664.

10,168. *Add. Annotation*:—*Refd. Elliot v. Joicey*, [1935] A. C. 209.

10,172. *Add. Annotation*:—*Consd. Re Coleman, Public Trustee v. Coleman*, [1936] Ch. 528.

10,175. *Add. Annotation*:—*Folld. Re Graham, Graham v. Graham*, [1929] 2 Ch. 127.

would take the husband's share unless there was issue, in which case the issue could be substituted for the father; the gift to the children of D. was determinable only in one event, their death leaving issue, an event which did not happen.—*Re Smith*, [1928] 1 D. L. R. 179; 61 O. L. R. 412.—*CAN.*

10,073 II. ———.] *Re McDowell Estate*, [1931] 2 W. W. R. 574.—*CAN.*

PART XVI. SECT. 25, SUB-SECT. 3.—*E.*

*sm. Failure to farm estate.*]—If real estate is devised, with a gift over if the devisee failed to farm the devised land, a long period of farming creates a presumption that the whole estate of testator has passed to the devisee.—*Conroy v. Rogers* (1933), 5 M. P. R. 579.—*CAN.*

PART XVI. SECT. 27, SUB-SECT. 2.—*A.*

10,267 I. ———.]—*Re Gordon, Stophart v. Weston* (1931), 3 M. P. R. 156.—*CAN.*

10,267 II. ———.]—If a gift is to take effect immediately the question of survivorship has reference to the death of testator; if the gift is not immediate & there is an intervening life estate, the question of survivorship is construed as intended to carry the

gift to the objects who are living at the period of distribution.—*COMMERCIAL TRUST CO. v. WHITE*, [1937] 2 D. L. R. 115; 11 M. P. R. 349; 6 F. L. J. (Can.) 261.—*CAN.*

PART XVI. SECT. 27, SUB-SECT. 2.—*C. (b).*

10,355 I. *Contrary intention of testator.*—*Re Walker, Croker v. Penny*, [1928] S. R. Q. 163.—*AUS.*

PART XVI. SECT. 27, SUB-SECT. 2.—*E. (b) i.*

10,401 x. ———.]—Testator by his will directed his trustees to distribute the income of his residuary estate amongst his children in equal shares for the term of their respective lives provided that if any of his children should die without leaving lawful issue or widow or widower living at the date of death of such child the share of the income of the child so dying "shall be equally divided amongst the survivors upon the same trusts & conditions."—*Held*: the word "survivors" must be interpreted in its ordinary meaning & the share of a child so dying must be distributed only amongst the actual brothers & sisters then surviving such child.—*MacPhillamy v. Fox* (1928), 29 S. R. N. S. W. 249; 46 N. S. W. W. N. 85.—*AUS.*

10,177. *Add. Annotation*:—*Folld. Re Graham, Graham v. Graham*, [1929] 2 Ch. 127.

10,202. *Add. Annotation*:—*Refd. Re Canning's Will Trusts, Skues v. Lyon*, [1936] Ch. 309.

10,205. *Add. Annotation*:—*Folld. Re Graham, Graham v. Graham*, [1929] 2 Ch. 127.

10,263. *Add. Annotation*:—*Apld. Re Crosse, Crosse v. Crosse* (1933), 77 Sol. Jo. 116.

10,263a. ———.]—*Re Crosse, Crosse v. Crosse* (1933), 77 Sol. Jo. 116.

10,405. *Add. Annotation*:—*Generally. Refd. Browne v. Moody*, [1936] 2 All E. R. 1695.

10,427. *Add. Annotation*:—*Folld. Gilmour v. MacPhillamy*, [1930] A. C. 712.

10,427a. ———.]—The word "survivors" in a will should be given its natural & ordinary meaning unless the context necessitates or justifies a departure therefrom; it is not enough for that purpose that the natural & ordinary meaning produces what might appear to be a capricious result, or one not in accordance with a logical scheme of disposition. Testator directed that the income of the residue of his estate should be paid to his nine children in equal shares for their respective lives, provided that if any of his children should die without leaving issue, or widow or widower, the share of the child so dying should be equally divided among the survivors upon the same trusts & conditions; & that after the death of any child his or her share in the residue should be held (subject to a provision for widows & widowers) for his or her children equally:—*Held*: upon the death of a child of testator unmarried the issue of a child who had died earlier were not entitled to participate.—*GILMOUR v. MACPHILLAMY*, [1930] A. C. 712; 143 L. T. 606; *sub nom. Re MacPhillamy (Charles)*, *GILMOUR v. MACPHILLAMY*, 99 L. J. P. C. 199, P. C.

10,634. *Add. Annotation*:—*Refd. Browne v. Moody*, [1936] 2 All E. R. 1695.

10,674. *Add. Annotation*:—*Refd. Re Pilkington's*

## PART XVI. SECT. 28, SUB-SECT. 1.

*sp. Trust for "my other child"*—*Meaning of "other."*—Testator, by his will, settled certain property upon his children, & further directed as follows: " & if any child of mine shall die without leaving a child, who being a son, shall attain the age of twenty-one years, or being a daughter, shall attain that age or marry, then the share in the settled fund, whether original or accruing, of any such child of mine shall be held in trust for my other child in such shares as shall correspond with their respective original shares." One of testator's sons died childless; afterwards, another died, leaving one child; who attained twenty-one years of age; after, a third son died childless:—*Held*: the use of the word "other" in the accrual clause did not import that the child, or children, referred to therein should survive the point at which the accrual clause came into operation. Upon the death of the third son, the effect of the accrual clause upon his share was to require its division among all such children, or their representatives, of testator, as has not already died without leaving any child who attained twenty-one years of age, or who being a daughter, married.—*MURPHY v. PATRON* (1930), *ARGUE L. R.* 389; 4 A. L. J. 236.—*AUS.*

Will Trusts, *Pilkington v. Harrison*, [1937] 3 All E. R. 213.

10,702. *Add. Annotation*:—*As to* (1) *Refd. Re Vaux, Nicholson v. Vaux*, [1938] Ch. 581.

10,752. *Add. Annotation*:—*Consd. Re Mansel, Smith v. Mansel*, [1930] 1 Ch. 352.

10,764. *Add. Annotation*:—*Consd. Re Mansel, Smith v. Mansel*, [1930] 1 Ch. 352.

10,766. *Add. Annotation*:—*Consd. Re Mansel, Smith v. Mansel*, [1930] 1 Ch. 352.

10,767. *Add. Annotation*:—*Folld. Re Mansel, Smith v. Mansel*, [1930] 1 Ch. 352.

10,767a. ———.]—Testatrix by her will directed that her residuary estate should be held by her trustees upon trust in four equal shares for her four children for life with remainder over. By the third & fourth codicils to her will testatrix declared that two sums, amounting in all to £16,120, which she had advanced to her son, T. M., should be deducted from his share, & that his share should be less in amount than the shares of her other children by that sum. The value of the estate of the testatrix was easily ascertainable as at the date of her death:—*Held*: for the purpose of the division of the actual income of the residuary trust estate of testatrix, pending the appropriation

thereof, the £16,120, ought to be added for computation to the capital of the estate, valued as at the death of the testatrix, & deducted from T. M.'s share in the aggregate amount of capital so arrived at, & that the annual income ought to be divided between her four children & their respective issue in the proportions of their respective shares *per stirpes* of capital so arrived at.—*Re MANSEL, SMITH v. MANSEL*, [1930] 1 Ch. 352; 99 L. J. Ch. 128; 142 L. T. 281.

10,768. *Add. Annotation*:—*Expld. Re Mansel, Smith v. Mansel*, [1930] 1 Ch. 352.

10,769. *Add. Annotation*:—*Consd. Re Mansel, Smith v. Mansel*, [1930] 1 Ch. 352.

10,770. *Add. Annotation*:—*Consd. Re Mansel, Smith v. Mansel*, [1930] 1 Ch. 352.

10,771. *Add. Annotation*:—*Expld. Re Mansel, Smith v. Mansel*, [1930] 1 Ch. 352.

10,772. *Add. Annotation*:—*Consd. Re Mansel, Smith v. Mansel*, [1930] 1 Ch. 352.

10,943. *Add. Annotation*:—*Refd. Ganapathy Pillay v. Alamaloo*, [1929] A. C. 462.

10,983. *Add. Annotation*:—*Refd. Re Graham, Graham v. Graham*, [1929] 2 Ch. 127.

11,094. *Add. Annotation*:—*Refd. Re Curryer's Will Trusts, Wyly v. Curryer*, [1938] 3 All E. R. 574.

## Part XVII.—Testator's Family Maintenance and Protection.

*See* Inheritance (Family Provision) Act, 1938 (c. 45).

### PART XVI. SECT. 31, SUB-SECT. 4.

10,720 *L. Whether release of personal liability*.—Testator devised all his real & bequeathed all his residuary personal estate to his trustees in trust to sell the same & divide the proceeds into eleven parts, & pay one of such parts to his widow & each of his ten children. The will proceeded: "I declare that the share of any child of mine in my residuary estate shall be subject to deduction, therefrom of any sum or sums owing by her or him to me at my death or any sum or sums payable by me upon any guarantee made or to be made by me or my exors. on her or his behalf." Testator had guaranteed the overdrawn bank account of R. one of his children, & at the time of testator's death this account was overdrawn to the extent of £1,396 0s. 10d. The exors. of testator paid off this sum to the bank in accordance with the said guarantee:—*Held*: the declaration operated as a gift to R. of the whole of his indebtedness to the estate.—*In the Will of ANTHONY HEADLAM* (1925), 21 Tas. L. R. 27.—AUS.

### PART XVI. SECT. 31, SUB-SECT. 5.

n i. — *Payment by way of income*.]—*Held*: the quarterly payments having been made not as permanent provision for the daughter, but in lieu of the income which would have arisen from the settlement upon her of portion of the testator's capital estate, they did not fall within the hotchpot provisions of the will.—*Re CLARKE; CLARKE v. STURT*, [1929] V. L. R. 249; [1929] Argus L. R. 219.—AUS.

n ii. ———.]—A will case devised & bequeathed "all my real & personal estate of which I may die possessed," & after giving certain specific legacies,

contained the following clause: "The balance of my property to be divided between my ten children (naming them), & so that the said Joseph P. Hauck shall receive one thousand dollars less than the shares coming to the other children named, in consideration of advances previously made to him by me, & with this exception no account shall be taken or had of advances heretofore made by me to any of my children." Four of the sons were indebted to the estate on promissory notes given by them individually to testator. Joseph P. had received \$1,000 from his father in connection with some partnership transaction in land which they had entered into together. Other than the above-mentioned transactions with the five sons, the only advances were wedding presents of not over \$100 each to the four daughters:—*Held*: the debts represented by the notes were discharged by reason of the words in the will " & with this exception no account shall be taken or had of advances heretofore made by me to any of my children." According to the intention of testator, ascertained by a fair construction of the will & under the circumstances of the case, the words being given their usual & ordinary meaning, the moneys covered by the notes ought to be treated as no longer owing.—*Re HAUCK ESTATE*, [1934] 3 W. W. R. 335; 4 D. L. R. 581; *revid. sub nom. HAUCK v. SCHMALTZ*, [1935] S. C. R. 478.—CAN.

### PART XVI. SECT. 32, SUB-SECT. 4.

—B. (c).  
11055 ii. ———.]—Gift of a farm to testator's son, with a gift over to the rest of the family living if the son die without leaving an heir creates an estate tail in the son with an executory

devise in favour of his brothers & sisters living at his decease.—*Re THOMPSON*, [1936] 1 D. L. R. 39; O. T. 8.—CAN.

### PART XVII.

b (p. 1289) i. ———. *Real property situated outside State*.]—Testatrix died leaving real estate in New South Wales & also property in Queensland:—*Held*: the authority of the ct. to make an order did not, & could not, directly or indirectly be made to extend to the real property of the testatrix situated in New South Wales.—*Re OSBORNE*, [1928] S. R. Q. 129.—AUS.

b (p. 1289) ii. ———. *Real property in New Zealand—Testator domiciled abroad*.]—Testator died domiciled in Scotland, leaving a wife & a daughter resident in New Zealand, & by his will gave all his estate, including land in New Zealand, to a niece. By the law of Scotland the wife became entitled to a sum of over £1,000 out of his estate & the daughter to a sum of £200. On an application by the wife & the daughter under Family Protection Act, 1908, s. 33, for further provision out of the land situated in New Zealand:—*Held*: (1) the validity of a will affecting an immovable, such as land, & the rights of succession thereto, including testator's capacity to deal with his whole estate so far as consisting of such land, is governed by the *lex situs* & not by the law of domicile; consequently Family Protection Act, 1908, applies to a will so far as it affects land situated in New Zealand, whether testator be domiciled in New Zealand or elsewhere, & an order in respect of such land may be made under that Act in favour of those who are entitled to further provision out of testator's estate; (2) testator, in failing to make any provision in his will additional to

that which the widow (who died after testator but before the hearing of the application) became entitled to by Scottish law, had not failed to make adequate provision for his wife's maintenance & support; & as to the daughter, who was in delicate health & able to do light work only, & who was possessed of resources received subsequent to the death of testator, such improved means should be taken into account in disposing of the application, & an order should be made providing a sum of £1,000 for her out of the immovable estate in New Zealand, additional to what she took by Scottish law.—*Re BUTCHART, BUTCHART v. BUTCHART*, [1932] N. Z. L. R. 125.—N.Z.

b (p. 1289) iii. ——— *Real Property in British Columbia—Testator domiciled abroad.*—Testator's Family Maintenance Act, R. S. B. C., 1924, applies to land in British Columbia belonging to a testator who was domiciled outside of the province but not to his movables.—*Re RATTENBURY'S ESTATE*, [1936] 2 W. W. R. 551; 51 B. C. R. 321.—CAN.

i i. ——— *To redraw will.*—On an application for relief under Testator's Family Maintenance Act, R. S. B. C., 1924, c. 256, the ct. has no power to redraw the will & dispose of the estate as it may think right & just.—*Re ELWORTHY ESTATE, ELWORTHY & HALB*, [1928] 2 D. L. R. 421; [1928] 1 W. W. R. 737; 39 B. C. R. 474.—CAN.

g i. ———.—Testator's Family Maintenance Act, R. S. B. C., 1924, was not intended to authorise the ct. to make a new will for testator, but only to alter the will in so far as might be necessary for the proper maintenance of testator's wife, husband or children. It is always a question of fact in each case whether or not an order under the Act should be made; & with respect to children the Act refers only to children for whose maintenance at the time of the testator's death no adequate means of support are available. If the children are at least as well established in life as testator was in his or her lifetime, the Act should not be applied where the surviving parent is the beneficiary under the will. The discretion which is given the ct. to apply the Act where it thinks it just & equitable in the circumstances to do so is not judicially exercised unless the object, intent & spirit of the Act are observed. If a higher ct. is convinced that the judge of first instance did not take a proper view as to the scope of, & the application of the powers conferred by, the Act, it may & should interfere. If, too, a higher ct. is satisfied that the facts of the particular case are such that it was not intended that the powers conferred by the Act should be exercised, it may intervene. In such cases the order made would be based on a wrong principle. If, too, a higher ct. is convinced that on all the facts the judgment under appeal is clearly wrong, it should be set aside.—*WALKER v. McDERMOTT*, [1930] 1 W. W. R. 332; *sub nom. McDERMOTT v. WALKER*, [1930] 1 D. L. R. 945; 42 B. C. R. 184.—CAN.

g ii. ——— *To consider change in conditions since will made.*—G. left an estate of a net value of £26,000. After making certain provisions for members of his family, he bequeathed a farm property of a conservative value of £8,000 for charitable purposes, & a sum of £5,000 for the erection of an orphanage thereon. The farm was leased at the statutorily reduced annual rental of £512, & was charged with an allowance of £250 per annum for the lifetime support & maintenance of an imbecile son. G.'s widow, aged eighty years, had a life interest in the residue, & was thus provided with a house,

furniture (her own), & an income of £812 per annum, subject to payment of outgoings amounting to £31 1s. 5d. each year. Her imbecile son & an unmarried daughter lived with her, the latter having £100 a year from the estate during the widow's lifetime, & on the widow's death receiving one-third (approximately £4,000) of the residue. A similar amount each would come to the married daughter & married son, who meanwhile received no benefit. A great part of the residue consisted of mtges. On an application by each of the widow & children for an increase of the amounts bequeathed to them:—*Held*: after consideration of the possible fluctuation of income & the doubtful position of mtges., however sound, the ct. is entitled to take into consideration the different conditions prevailing at the date of a testator's death from those when the will was made, whenever it appears that an estate consists largely of mtge. securities & both corpus & income of provisions made for a widow & children are likely thereby to be affected.—*Re GIBSON, GIBSON v. PUBLIC TRUSTEES*, [1933] N. Z. L. R. (S.) 13.—N.Z.

g iii. ——— *Difficulty of realising estate.*—It is not the proper course to postpone dealing with an application for maintenance under Testator's Family Maintenance Act because difficulty in realising the assets of the deceased exists. The ct. should exercise the power under the Act & leave it to the exor. to resort to another jurisdiction for directions if the order cannot immediately be carried out owing to difficulties in realising the assets. When the spouses have been living apart, the ct. may make an order for a further amount to the widow than that allowed by the husband to her as his wife during his life.—*Re GERLOFF*, [1933] S. A. S. R. 351.—AUS.

g iv. ———.—The discretion reposed in the ct. by sect. 139 of Administration & Probate Act, 1928, to order provision out of testators' estates for the maintenance of widows & children left without sufficient means of support, is not limited to cases in which there has been a capricious or unreasonable testamentary disposition of property. A covenant by a wife with her husband that she will not, after his death make an application for such provision does not deprive the ct. of jurisdiction to entertain such an application, though the existence & terms of the covenant, & the circumstances under which it was entered into, may be extremely important & sometimes conclusive facts in relation to the exercise of the ct.'s discretion in a particular case.—*Re PEARSON*, [1936] V. L. R. 355; 42 Argus L. R. 480.—AUS.

h i. ———.—Under Testator's Family Maintenance Act, R. S. B. C., 1924, the provision, which the ct. is authorised to make in the circumstances stated in sect. 3, is "such provision as the ct. thinks adequate, just & equitable." The conditions upon which this authority rests are that the person whose estate is in question has died leaving a will, & has not made, by that will, in the opinion of the judge, adequate provision for the proper "maintenance & support" of the wife, husband or children, as the case may be, on whose behalf the application is made. What constitutes "proper maintenance & support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the ct. on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital & his parental duty; & would of course con-

sider the situation of the child, wife or husband, & the standard of living to which, having regard to this & the other circumstances, reference ought to be had. If the ct. comes to the decision that adequate provision has not been made, then the ct. must consider what provision would be not only adequate, but just & equitable also; & in exercising its judgment upon this, the pecuniary magnitude of the estate & the situation of others having claims upon testator, must be taken into account. Applying these principles to the circumstances of this case, where the only daughter of the deceased brought an application under the Act for an order directed against his second wife, sole beneficiary under the will:—*Held*: the judge was right in deciding that the widow should be called upon to forego part of her annual income in order to make some provision for the appet.—*WALKER v. McDERMOTT*, [1931] S. C. R. 94; [1931] 1 D. L. R. 662.—CAN.

h ii. ———.—*Re HOFFMAN*, [1931] 1 W. W. R. 293; 43 B. C. R. 463.—CAN.

h iii. ———.—*Re CLEGG ESTATE*, [1933] 3 W. W. R. 407; 47 B. C. R. 447.—CAN.

h iv. ———.—In applications under Testator's Family Maintenance Act, R. S. B. C., 1924, the ct., in exercising its discretion as to what is adequate provision for the widow of testator, should inquire into: (1) the station in life of the parties; (2) the age, health & general circumstances of the widow; (3) the means possessed by testator at the time of his death; (4) the property or means which the widow possesses in her own right. Further the claims of others upon testator must be taken into account.—*Re MORTON ESTATE*, [1934] 3 W. W. R. 719; 49 B. C. R. 172.—CAN.

h v. ———.—In determining on an application under Testator's Family Maintenance Act, R. S. B. C., 1924, whether testator has made adequate, just & equitable provision for a child, the ct. will consider among other things the obligations & necessities of the child arising from the fact that said child has, & may have more, children of his or her own.—*Re JONES ESTATE*, [1934] 3 W. W. R. 726; 49 B. C. R. 216.—CAN.

h vi. ———.—The ct. has no right to interfere under the Family Protection Act except in so far as it is satisfied that the testamentary dispositions of a testator fall short of making for the wife or for the children such provision as a wise & just testator would regard it his moral duty to make. Where, owing to a change in economic conditions, the provision made for wife & children became inadequate, & testator gave instructions for a further testamentary document making further provision for them, the execution of which was prevented by the state of his health, the ct., although it could not make for him the codicil that he contemplated, would be encouraged by testator's views to increase the provision.

Where a testator is able to leave the financial provision necessary for all his dependants to continue the style of living in which he had encouraged them & to which his generosity had accustomed them, it is his duty, so far as his widow, his dependent daughters, & young children are concerned, under the Statute, to leave that provision unless he considers on good grounds that a humbler style is desirable.—*Re HAWKE, HAWKE v. PUBLIC TRUSTEE*, [1935] N. Z. L. R. 157.—N.Z.

h vii. ———.—The ct., in determining in the exercise of its discretion under sect. 3 (1) of Testator's Family Maintenance & Guardianship of Infants





R.S.B.C., 1924.—*Re RAMSEY ESTATE*, [1933] 2 W. W. R. 506; 50 B. C. R. 83.—CAN.

t ii. ———— *Children domiciled outside jurisdiction.*—Benefits under Testator's Family Maintenance Act, 1916, are available to children domiciled outside the jurisdiction of the ct.—*Re DONNELLY* (1927), 28 S. R. N. S. W. 34; 45 N. S. W. W. N. 5.—AUS.

t iii. ———— *Re PRIDMORE ESTATE*, [1936] 1 W. W. R. 390; 50 B. C. R. 300.—CAN.

e (p. 1290) i. ———— *Adult son—Incapacitated from following his trade by disease contracted in testator's employ.*—*In the Will of JOLLIFFE*, [1929] S. R. (Q.) 189.—AUS.

c (p. 1290) ii. ———— *Promise to bequeath land—Improvements made on faith of promise.*—*In the Will of HUGHES* (1930), S. R. (Q.) 329.—AUS.

c (p. 1290) iii. ———— *Child in want.*—Where a wealthy man died, making no provision for a daughter, to whom advances had been made during his lifetime but who at his death was in actual want, & the assets of the estate were ample to provide for her maintenance & an order could be made in her favour without undue hardship to any necessitous recipient of testator's bounty, an order should be made for the maintenance of such daughter.—*Re HOLMES, McMASTER v. CUNINGHAM*, [1936] N. Z. L. R. s. 26; G. L. R. 263, 264; 12 N. Z. L. J. 133.—N.Z.

e (p. 1290) i. ———— *—FRENEY v. PERPETUAL TRUSTEES, EXECUTORS & AGENCY CO. OF TASMANIA, LTD.* (1925), 21 Tas. L. R. 6.—AUS.

e (p. 1290) ii. ———— *—In the expression "the situation of others having claims upon testator must be taken into account," the word "others" is not to be understood as limited to only such others as would have had legal claims upon the estate either under Administration Act, R. S. B. C., 1924, or Testator's Family Maintenance Act. Under the circumstances of the present case:—Held: the sister of testator, & two children who had lived with testator & his wife as their daughters until they returned to their father, for which sister & children testator had made provision by his will, came within the word "others" in said expression. Having regard to all the circumstances, & the claims of said "others," the whole estate should not be given to the widow. However, she should be given a larger share than that given her by the will, & as against her claim, there should be a reduction by one-half of the amounts which said sister & children claimed under the will.—*Re PEELAR ESTATE*, [1933] 1 W. W. R. 267; 46 B. C. R. 481.—CAN.*

e (p. 1290) iii. ———— *—Testator died possessed of a mtge. debt of £10,000 & income-bearing property producing about £80 a year. Shortly before his death he released the mtgors. from payment of all interest & agreed to accept repayment of the principal by instalments, the whole debt to be repaid in 1936. The widow had property of her own producing about £40 per annum; also a house & land, on which she resided, & kept a cow, poultry, etc. By his will testator left the widow the whole income from his estate, subject to her suitably maintaining the four children of the marriage, of whom the eldest was eighteen, & the youngest, seven. Up to very shortly before his death the deceased had had an income of between £600 & £700, & had lived just within his income.—Held: (1) the standard of living of deceased prior to his death could not be taken as the measure of the allowance to be now made to his wife for the support of herself & the*

children; (2) among the circumstances to be considered in granting the allowance were the depressed state at the time of & since testator's death, of business & of the property market & the financial stringency & also the doubt whether this position would improve; (3) having regard to the widow's income of £40 & the ownership of house & land an allowance of £310 per annum was sufficient; (4) the proper course was not to make a separate allowance for each child, but to fix a sum to be paid to the widow, she thereout maintaining the children.—*Re LOCK*, [1931] S. A. S. R. 418.—AUS.

e (p. 1290) iv. ———— *—In order to raise jurisdiction under sect. 3 of Testator's Family Maintenance Act, it must be found that a person has so disposed of his or her property by will that upon his or her death his widow or her widower or his or her children or any of them are left without "sufficient means for their maintenance & support." The jurisdiction conferred is to order such provision to be made out of the deceased person's estate in or towards the "maintenance & support" of the widow, widower, or children, or any of them "as to the ct. or judge seems proper having regard to all the circumstances of the case." The sect. must be read as a whole & the jurisdiction conferred by sect. 3 is co-extensive with the insufficiency predicated by the first part of the sect., & means that to the extent that the means are insufficient the ct. can make good the insufficiency. The language of the second part of sect. 3 leaves no doubt that the insufficiency which is predicated is not merely an insufficiency of the means of bare subsistence. The measure of the provision to be made, is what is sufficient in the circumstances of the particular case to provide for the needs of the appet. as regards fit maintenance & support, & in no case can the ct. exceed that measure.—*Re GREENE'S ESTATE* (1932), 25 Tas. L. R. 15.—AUS.*

e (p. 1290) v. ———— *—When it was found that on the evidence presented the probabilities were that a wife left her husband & that he had accepted the fact of her living apart before his decease & agreed through the State Children's Department to pay her a small allowance:—Held: the widow was not disentitled to family maintenance; the measure of such allowance should be the amount agreed to be paid to the widow by her husband; the wife being an inmate of a State hospital for the insane, the fact that the maintenance would go in relief of the cost of her support in a State hospital could not be taken into account.—*Re WILLIAMS*, [1933] S. A. S. R. 107.—AUS.*

e (p. 1290) vi. ———— *—Application for increase—"Undue hardship."*—An increase of an annual allowance made in pursuance of an order under Family Protection Act, 1908, will not be made where the hardship alleged is not "undue" in the sense of being excessive & confined to the appet.'s particular class or peculiar to the appet.'s case caused by the order itself, or is a common hardship due to the widespread fall in rents & interest—i.e. assuming the ct. has power in its discretion to make such an increase. A reduction of an annuity provided by an order of the ct. under the said Act for the benefit of testator's only surviving child, a daughter, will not be made for the exclusive benefit of a person who had no claim on testator's bounty unless the exercise of the ct.'s discretionary power is clearly called for by the altered circumstances of the case. No modification under sect. 42 of the National Expenditure Adjustment Act, 1932, will be made in an order under Part II. of Family Pro-

tection Act, 1908, where appet. has failed to prove that she has suffered undue hardship through the operation of the order, in that its terms cannot be complied with or could not be complied with without causing undue hardship to another annuitant under that order. *Qu.*: whether sect. 42 of the National Expenditure Adjustment Act, 1932, should enure for the benefit & sole advantage of an Englishwoman who chooses to live in a foreign country.—*Re ROPER, PRESTON v. PUBLIC TRUSTEE*, [1933] N. Z. L. R. 1237.—N.Z.

e (p. 1290) vii. ———— *—Upon what property allowance charged.*—An order was made increasing a weekly sum bequeathed by testator to his widow. Testator's property consisted almost wholly of real estate. Testator, by his will, in addition to the weekly allowance to his widow, had bequeathed a weekly sum to a daughter & also to a stranger in blood. The balance of the income was given to a grandson of testator for life, & the real estate was directed to be held in trust after his death for his child or children then living, with gifts over if there were no such child:—*Held*: In fixing the burden of the provision made by the order the whole of testator's real estate was to be regarded as one property settled successively within sect. 5 (2) of the Act.—*Re SMITH*, [1928] S. A. S. R. 524.—AUS.

e (p. 1290) viii. ———— *—Evidence admissible against applicant.*—Statements by testator having reference to particular terms of his will & testifying directly, & not merely by inference, to the state of his mind which prompted the making of his will in the form in which it is, are admissible against an applicant for maintenance under Testator's Family Maintenance & Guardianship of Infants Act, 1916.—*Re HALL* (1929), 30 S. R. N. S. W. 165; 47 N. S. W. W. N. 65.—AUS.

e (p. 1290) ix. ———— *—Time for making application—Extension of time.*—Where there has been long & inexcusable delay an application under Family Protection Act, 1908, for extension in time will be refused unless it clearly appears that to refuse it would in the circumstances result in manifest injustice.—*SHEKHAN v. PUBLIC TRUSTEE*, [1930] N. Z. L. R. 1.—N.Z.

e (p. 1290) x. ———— *—Before distribution—Transfer of part of estate to beneficiary trustee.*—*Held*: to amount to partial distribution within Family Protection Act, 1908, s. 33, & application for extension therefore refused.—*PUBLIC TRUSTEE v. KIDD*, [1931] N. Z. L. R. 1.—N.Z.

e (p. 1290) xi. ———— *—Effect of delay.*—An application for an order that the time limited for making an application be extended was made some fifteen years after the death of testator. At the time of the death the estate was insolvent, but at the time of the application was worth some £4,000. By the will the widow took a life estate, & thereafter her two children took also life estates. At the date of the application the widow had assets of her own worth £3,700, her daughter was earning £103 per annum as a postmistress, & the son had saved £200:—*Held*: the delay had been great & had not been satisfactorily explained. Furthermore, the case was not one where, if an extension of time were granted, an order for further provision out of the estate could properly be made in favour of any of plffs.—*STEPHENS v. BARLTROP*, [1931] N. Z. L. R. 7.—N.Z.

e (p. 1290) xii. ———— *—An application under sect. 3 of Testator's Family Maintenance Act, 1916, is not out of time if, within the time prescribed by sect. 5 of the Act, an appropriate notice of motion is in fact filed*



& the exor. of the will is informed by or on behalf of appct. of that fact: & accordingly it is not necessary that the application should be brought on for hearing before the expiration of twelve months from the grant of probate of testator's will, nor that the return date mentioned in the notice of motion be within that twelve month period.—*Re BUCKERT (J.)* (1931), 48 N. S. W. W. N. 83.—AUS.

• (p. 1290) xiii. —.]—Testator's Family Maintenance Act, R. S. B. C., 1924, s. 11, provides that an application by a party claiming the benefit of the Act shall be made within six months from "the date of the grant or resealing in the Province of probate of the will".—*Held*: the words quoted mean with respect to the grant the date when the grant or granting of the probate of the will is actually completed by the grant being sealed.—*Re PEDIAR ESTATE*, [1933] 1 W. W. R. 267.—CAN.

(p. 1290) xiv. — Costs—*Whether payable out of estate.*—*WALKER McDERMOTT* (No. 2), [1930] 1 W. W. R. 845; *sub nom. McDERMOTT v. WALKER*, [1930] 2 D. L. R. 413; 42 B. C. R. 354.—CAN.

• (p. 1290) xv. —.]—It is the duty of counsel appearing for trustees, particularly in the cases of applications under Testator's Family Maintenance Act, 1916, to assist the ct. In cases where counsel for trustees appears merely to submit, & there is no other resp. party represented in the matter before the ct., no costs in regard to the attendance of counsel for the trustees will be allowed, & the trustees will not necessarily be allowed their costs as between solr. & client.—*Re NEWELL* (1932), 49 N. S. W. W. N. 181.—AUS.

• (p. 1290) xvi. — *Practice.*—Although Testator's Family Maintenance Act, contemplates separate applications being made by each person

seeking relief, the ct. will adhere to the practice, which had been adopted, of allowing two or more applications to be made on one motion. Any abuse of this practice, as by a person severing unreasonably or by a person, who has no real chance of success, joining with one who has, will be met by a suitable order as to costs. As soon as an appct. has filed his motion & before he has filed his evidence, he should inquire from the exor. whether any other applications are pending or threatened. If he does not so inquire it is the duty of the exor. to inform him of any other applications pending. Where there are more applications than one, either the appcts. or the exor. should at the earliest possible moment apply to the ct. for the consolidation of the proceedings.—*Re WHITE* (1932), 49 N. S. W. W. N. 178.—AUS.

• (p. 1290) xvii. — *Agreement by wife not to apply.*—An agreement between husband & wife whereby the former settles property on the latter which she declares she regards as sufficient maintenance for her after his death & agrees that she will not make any application under Testator's Family Maintenance Act, R.S.B.C., 1924, does not bar the jurisdiction of the ct. to make an order in her favour under said Act.—*Re LEWIS ESTATE*, [1935] 1 W. W. R. 747; 2 D. L. R. 45; 49 B. C. R. 386.—CAN.

• (p. 1290) xviii. — *Death of applicant—Liability for maintenance before death.*—The ct. has jurisdiction under sect. 3 of Testator's Family Maintenance Act, 1916, to make an order, after the death of an appct., for payment out of the estate of testator of liabilities incurred by appct. in respect to maintenance & remaining unpaid at the death of appct.—*Re SHANNON* (1935), 35 S. R. N. S. W. 516; 52 N. S. W. W. N. 171.—AUS.

• (p. 1290) xix. — *Release of claim—What amounts to.*—On an applica-

tion under Testator's Family Maintenance & Guardianship of Infants Act, 1916, by a widow for an allowance out of the estate of her deceased husband, it appeared that in 1911 she had obtained a decree of judicial separation against her husband & had then instituted proceedings for permanent alimony. In the course of the latter proceedings by agreement between the parties the wife in consideration, *inter alia*, of the sum of £1,500 paid to her by her husband executed a deed of release from all claims (which were set out in detail in the deed) against him:—*Held*: upon its true construction the deed did not constitute a release of appct.'s claim under the Act.—*Re PATRICK* (1936), 36 S. R. N. S. W. 156; 53 N. S. W. W. N. 34.—AUS.

• (p. 1290) xx. — *Out of what property allowed.*—An insured's will appropriated & apportioned his life insurance among preferred beneficiaries, viz. his wife, sons & daughter. The testator was insolvent at his death & nothing passed by his will except said insurance. The widow petitioned for relief under Testator's Family Maintenance Act, R. S. B. C., 1936:—*Held*: the insurance money did not form part of "the estate of the testator" & therefore, was not subject to disposition under sect. 4 of said Act.—*Re DALTON & MACDONALD'S ESTATE*, [1938] 1 W. W. R. 758.—CAN.

• (p. 1290) xxi. — *Review of order.*—The Supreme Ct. has jurisdiction to hear an application pursuant to leave reserved for the review of an order under the Family Protection Act, 1908, made by the Supreme Ct. by consent of all parties (all being *sui juris*) for provision to be made for the widow out of the estate until the parties otherwise agree or the ct. further orders; & the ct. may make final provision by its reviewing order.—*Re SHELLEY, SHELLEY v. PUBLIC TRUSTEE*, [1937] N. Z. L. R. 342; 13 N. Z. L. J. 108.—N.Z.

## WORK AND LABOUR.

## Part I.—Contracts for Work and Labour.

1. *Add. Annotation*:—*Refd.* Robinson v. Graves, [1935] 1 K. B. 579.
2. *Add. Annotation*:—*Refd.* Robinson v. Graves, [1935] 1 K. B. 579.
7. *Add. Annotations*:—*Apld.* Robinson v. Graves, [1935] 1 K. B. 579. *Refd.* Craven-Ellis v. Canons, Ltd., [1936] 2 All E. R. 1066.
29. *Add. Annotation*:—*Consd.* Sagar v. Ridehalgh & Son, Ltd., [1931] 1 Ch. 310.
30. *Add. Annotation*:—*Consd.* Sagar v. Ridehalgh & Son, Ltd., [1931] 1 Ch. 310.
39. *Add. Annotation*:—*Consd.* Sagar v. Ridehalgh & Son, Ltd., (1930) 144 L. T. 480.
58. *Add. Annotation*:—*Consd.* Sagar v. Ridehalgh, H., & Son, Ltd., [1931] 1 Ch. 310.

## Part II.—Statutory Determination of Minimum Rates of Wages.

63. *Add. Annotation*:—*Folld.* Pockney v. Atkinson (1929), 45 T. L. R. 639.

63a. —.—.]—An employer engaged a worker in agriculture for a period from Dec. 4, 1927, to Nov. 23, 1928, & agreed to pay him on the completion of that term a lump sum which, with his board & lodging, was equivalent to the minimum rate of wages prescribed under the Agricultural Wages (Regulation) Act, 1924 (c. 37). Before the completion of the term, the worker refused to obey a

lawful order of the employer & left the employment without notice:—*Held*: the Agricultural Wages (Regulation) Act, 1924 (c. 37), did not prevent the making of an agreement for employment for a fixed term with payment of a lump sum equivalent to the prescribed rate at the end of the term, & the Act did not entitle a worker who had broken his contract to demand any wages for the period during which he was in fact employed.—*POCKNEY v. ATKINSON*, [1930] 1 K. B. 197; 99 L. J. K. B. 42; 142 L. T.

## PART I. SECT. 4, SUB-SECT. 1.

n i. —.— *Work done at request of defendant*.—An essential averment in a claim for work & labour is that the work was done at the request of deft.—*McDONALD v. WOLVERTON*, [1932] 2 W. W. R. 354; 3 D. L. R. 317; 45 B. C. R. 385.—*CAN.*

sa. *Lease of land for term of years*—*Agreement for payment for summer-fallowing on cancellation of lease*.—*MANTIE v. HIMOUR*, [1928] 3 W. W. R. 390.—*CAN.*

## PART I. SECT. 4, SUB-SECT. 2.—A.

17 iv. —.— *Contract completed unperfectly*.—Where there was a contract to do certain work, *c.s.* the summer-fallowing of a certain number of acres, & the work has been done, the contract price cannot be reduced or abated on the ground that the work was done improperly unless there is evidence of specific damage.—*WAGNER v. HEIDT*, [1931] 1 W. W. R. 625; 2 D. L. R. 680.—*CAN.*

d i. —.— *Evidence of value of services*.—In an action brought on a *quantum meruit* for work done & services rendered evidence was given of an agreement, not in writing, whereby deft. agreed to pay a certain weekly salary & also a sum of £200 at the end of two years. It was also proved that deft. had paid the weekly salary but had refused to pay the sum of £200:—*Held*: although the parol agreement was one to which the provisions of Stat. Frauds were applicable, it was nevertheless admissible as evidence of the value of pltf.'s services.—*WARD v. GRIFFITHS BROS., LTD.* (1928), 28 S. R. N. S. W. 425; 45 N. S. W. W. N. 130.—*AUS.*

d ii. —.—.]—Where there is a contract to do specified work for a fixed sum, with a proviso for payment of

proportionate amounts, equal to eighty per cent. of the fixed sum, as the work is done, & the balance of twenty per cent. in thirty days after completion & acceptance, completion is a condition precedent to the right to payment, & where the work is not completed there is no right to recover for the portion done as upon a *quantum meruit*.—*SHERLOCK v. POWELL* (1899), 26 A. T. 407.—*CAN.*

d iii. —.—.]—Where there is an entire contract for work & labour containing a provision for monthly payments not exceeding 75 per cent. of the work done, which is abandoned by the party performing the work & labour, he is nevertheless entitled to sue for 75 per cent. of the value of the work performed before abandonment.—*McLACHLAN v. NOURSE* (1923), S. A. S. R. 230.—*AUS.*

d iv. —.—.]—When a person has done work under an express contract he cannot sue on an implied contract for what has been done if the express contract is still subsisting.—*TAYLOR v. GIFFORD*, [1934] 3 D. L. R. 70; 7 M. P. R. 387.—*CAN.*

sa. *Contract for logging & cutting timber*.—*MIKKELSEN v. DUFF*, [1930] 1 D. L. R. 760.—*CAN.*

sa. *Agreement to pay bonus on estimated saving in cost of production*.—*Depreciation of plant*.—A lumber co. agreed with the superintendent of its logging operations to pay him as a bonus to his salary such amount as he could save the co. in cutting & hauling poles on the net cost of production, taking as a basis the figures set out in the schedule of the agreement:—*Held*: depreciation of the plant & equipment used in the operations was a proper item to include in the cost of production.—*ATKIN v. BAXTER & CO.*, [1928] 3 W. W. R. 142.—*CAN.*

sd. *Necessary repairs to automobile in excess of order*.—An automobile, deft. co.'s property, was sent to pltf. to have certain repairs made. Pltf. at the same time made certain other repairs which he thought necessary & for which he claimed payment. Evidence was given to show that on previous occasions repairs of a similar character were ordered & other work done, & that the accounts rendered were paid without question:—*Held*: pltf. entitled to recover.—*CALKIN v. WOLFVILLE FRUIT CO.* (1927), 59 N. S. R. 499.—*CAN.*

sg. *Treatment by male nurse*.—While K., the grandfather of pltf., was residing with pltf. & her husband, paying \$15 per month for his board, he suffered from a skin disease which pltf. treated daily for 1,080 days, the treatment taking from half an hour to an hour per day. Pltf. was not a professional nurse, but the treatments were given under the advice of a physician. Pltf. & her husband were during the time in question on relief. No rate of remuneration for said services was fixed, but K. informed her that she would be paid therefor. On his death pltf. claimed \$1,080, being at the rate of \$1 per day. The physician testified that that would be a reasonable compensation. No other evidence, other than that of pltf., as to what a reasonable rate would be was given. The trial judge, TAYLOR, J., thought the amount excessive, & awarded pltf. \$360. Pltf. appealed. The ct. divided equally.—*MCARTHUR v. MCBURNEY*, [1938] 1 W. W. R. 35; 1 D. L. R. 773.—*CAN.*

## PART I. SECT. 4, SUB-SECT. 3.

56 iii. —.—.]—*SIMPLEX MACHINE CO. v. McLELLAN, McFEELEY & Co.*, [1928] 3 W. W. R. 255.—*CAN.*

58 iv. —.—.]—*COOPER v. PENNINGTON*, [1928] 2 D. L. R. 878.—*CAN.*

135; 94 J. P. 15; 45 T. L. R. 639; 27 L. G. R. 645, D. C.

**64. Add the following paragraph:—**

By an order of the Agricultural Wages Board, embodying orders of a wages committee: "Where a whole-time male worker is employed by the week or any longer period & the hours of work agreed between the worker & the employer in any week (excluding hours of overtime employment) are less than 50 in summer & 48 in winter, the rate of wages applicable to that worker shall be such as to secure to the worker the wages which would have been payable if the agreed hours had been 50 in summer or 48 in winter as the case may be." *Applts. employed one T. as an agricultural labourer by the week of 50 hours at 30s. per week. On Good Friday, T., according to custom, was not required by the appellants to work, & in consequence they refused at the end of the week to pay him his full weekly wages, deducting the portion appropriate to that day, but gave him, according to their custom, a small bonus instead:—Held: the above order was intra vires, & that T. was entitled to be paid 30s. for the Good Friday week.—SEABROOK & SONS, LTD. v. JONES, [1929] 1 K. B. 335; 98 L. J. K. B. 169; 140 L. T. 497; 93 J. P. 47; 45 T. L. R. 139; 72 Sol. Jo. 874; 27 L. G. R. 47; 28 Cox, C. C. 586, D. C.*

**64a. Breach of contract by worker—Whether entitled to wages for period employed.]—POCKNEY v. ATKINSON, No. 63a, ante.**

**64b. "Agriculture"—Whether poultry farming included.]—**By the Agricultural Wages (Regulation) Act, 1924 (c. 37), s. 16, it is provided that "the expression 'agriculture' includes dairy farming, & the use of land as grazing, meadow or pasture land or orchard or osier land or woodland or for market gardens or nursery grounds." *Resps. occupied a poultry farm when the grass land was kept solely for the purpose of poultry breeding & poultry rearing. They employed on the poultry farm a general worker, whose wages were below the minimum rate fixed by Agricultural Wages (Regulation) Act, 1924 (c. 37). Resps. were charged with so employing the worker at those wages, contrary to the provisions of the Act of 1924. Resps. contended that, as poultry farming was not agriculture within the meaning of the Act, the worker was not employed in agriculture for the purposes of the Act. The justices upheld this contention & dismissed the charge. Thereupon this appeal was brought:—Held: as grass land must necessarily contribute to a material degree either to the nourishment or to the health of the poultry, the poultry farm was a use of land for the purpose of husbandry, & the worker was therefore employed in agriculture.—WALTERS v. WRIGHT, [1938] 4 All E. R. 116; 55 T. L. R. 31; 82 Sol. Jo. 872, D. C.*

**67. Add. Annotation:—Generally, Refd. Pockney v. Atkinson, [1930] 1 K. B. 197.**

**68. Add. Citation:—28 Cox, C. C. 518. Add. Annotation:—Consd. Hughes v. Davies (1929), 94 J. P. 48.**

**68a. — Deduction in respect of washing & mending.]—Resps. employed a worker in**

agriculture upon a yearly hiring under which the employers did his washing & mending for two shillings a week, which was reckoned as part of his wages. By the orders made for that county under Agricultural Wages (Regulation) Act, 1924 (c. 37), washing & mending were not benefits or advantages which might be reckoned as part payment of wages in lieu of payment in cash. The justices held that no offence had been committed, & alternatively that it was trivial. They did not convict, & made no order under sect. 7 (3) of the Act for payment of the arrears:—*Held: (1) there was no material on which the justices could find that no offence was committed, that which was done being the very thing prohibited; (2) they were not entitled to find that the offence was trivial; the question was not the quantum of money involved, but the nature of what was done, which was something entirely subversive of the Act; (3) in any event sect. 7 (3) was imperative in its terms, & the justices were bound to make an order for payment of the arrears due.—HUGHES v. DAVIES (1929), 94 J. P. 48; 28 L. G. R. 11, D. C.*

**68b. — Charge for board & lodging in excess of value fixed by order.]—**A worker in agriculture under his contract of service received his proper statutory wages in full. Under a separate agreement with his employer he paid back to his employer £1 each week for board & lodging with him, 15s. being the maximum amount fixed by statutory order under Agricultural Wages (Regulation) Act, 1924 (c. 37), s. 8 (1) (a), as the value of that benefit or advantage which could be reckoned as payment of wages instead of payment thereof in cash. The worker was free to lodge elsewhere, & the employer would have preferred him to do so:—*Held: as the employer had allowed the worker to board & lodge with him he might not receive from him more than 15s. per week in respect thereof, although in form the contract to pay more was distinct from the contract of service.—WILLIAMS v. SMITH, [1934] 2 K. B. 158; 103 L. J. K. B. 421; 151 L. T. 112; 98 J. P. 231; 50 T. L. R. 336; 78 Sol. Jo. 318; 32 L. G. R. 171; 30 Cox, C. C. 110, D. C.*

**68c. Value of lodgings supplied.]—**A farmer, in calculating the wages of one of his workers, deducted the value of certain lodgings which were available to the latter. The worker had not agreed to accept such accommodation & did not in fact avail himself of it, preferring to sleep at his own home, which was about half a mile distant:—*Held: the value of the lodgings was not a benefit or advantage received by the worker within Agricultural Wages (Regulation) Act, 1924 (c. 37), s. 7 (11), & the deduction ought not to be made.—WILLIAMS v. HUGHES, [1936] 1 All E. R. 674; 80 Sol. Jo. 633.*

**70a. — Duty of justices—To make order for payment of arrears—Although amount trivial.]—HUGHES v. DAVIES, No. 68a, ante.**

**Wages paid below statutory rate—Claim for balance—Limitation of action.]—See LIMITATION OF ACTION, No. 111b, ante.**

**71. Add. Annotation:—Consd. R. v. Minister of Labour, Ex p. National Trade Defence Assn. (1931), 95 J. P. 105.**

72. *Add. Annotation*:—*Consd. R. v. Minister of Labour, Ex p. National Trade Defence Asscn.* (1931), 95 J. P. 105.

73. *Add. Citations*:—*affd.* [1929] A. C. 496; 98 L. J. K. B. 373; 140 L. T. 673; 45 T. L. R. 306; 27 L. G. R. 249, H. L.

73a. *Piece-worker—Fur trade.*—A worker employed as nailer in the fur trade, who was paid on a piece-work basis, was, during a period between Nov. 1927, & Dec. 1930, not supplied by his employers with a sufficient quantity of work to enable him to earn the minimum piece-work basis rate of 1s. 8d. an hour to which he was entitled under Statutory Orders made in accordance with the provisions of the Trade Boards Acts of 1909 & 1918:—*Held*: he was entitled to an account on the footing that in respect of each hour of his employment during the period in question he was to be paid a minimum wage of 1s. 8d.—*NATHAN v. GULKOFF & LEVY, LTD.*, [1933] Ch. 809; 102 L. J. Ch. 286; 149 L. T. 424; 49 T. L. R. 426; 77 Sol. Jo. 355; 31 L. G. R. 211.

74a. *Power of Minister to define "trade"—Validity of Order.*—By Trade Boards Act, 1918 (c. 32), s. 1, Parliament has given the

power of defining or specifying a definite trade for which he may make a special order to the Minister of Labour, with this qualification, that there must be some subject-matter which can be reasonably described as a trade before its exact limits are defined. The Minister may define a trade by exclusion as well as by description. A special order does not exceed the scope of the very extensive powers given to the Minister & is not bad, on the grounds (1) that it defines a trade by reference to the place where it is carried on; or (2) that it includes a number of occupations or vocations whose collocation is fortuitous except for the fact that all the work is done in or in connection with a trading establishment; or (3) that an employee by its terms might be within or outside the scope of the Acts according to the particular part of the premises on which at a particular moment he might be.—*R. v. MINISTER OF LABOUR, Ex p. NATIONAL TRADE DEFENCE ASSOCIATION, Ex p. INCORPORATED ASSOCIATION OF PURVEYORS OF LIGHT REFRESHMENTS, Ex p. STRAND HOTEL, LTD.*, [1932] 1 K. B. 1; 100 L. J. K. B. 540; 145 L. T. 341; 95 J. P. 105; 47 T. L. R. 364; 29 L. G. R. 363, C. A.

#### PART II. SECT. 3.

b i. — *To occupations—Exclusion of professions—Pharmacy.*—*DAVENPORT v. MCNIVEN*, [1930] 2 W. W. R. 263; 4 D. L. R. 386; 42 B. C. R. 468; *revers.*, S. C. *sub nom. Re MALE MINIMUM WAGE ACT* (B. C.), [1929] 4 D. L. R. 1034.—*CAN.*

b ii. — *Appeal from Board.*—The Male Minimum Wage Board made an order for a minimum wage to be paid to licentiates of pharmacy. (On an appeal for rescission or review the Judge dismissed the application to rescind, but ordered that the appeal should be heard as a rehearing *de novo*.—*Held*: the whole appeal brought by petition to the Ct. below must be disposed of before an appeal can be taken to the Ct. of Appeal.—*MERRYFIELD & DACK v. MALE MINIMUM WAGE BOARD*, [1931] 44 B. C. R. 380.—*CAN.*

b iii. — *To trades—Restaurant.*—*R. v. BREARLEY*, [1935] 3 W. W. R. 63.—*CAN.*

i. — *Who is "employee."*—Resp. was convicted under Minimum Wage Act for women, R. S. B. C., 1924, for unlawfully employing complainant, a hair dresser, for less than the minimum wage fixed by a valid order of the Board at \$14.25 per week. Resp. contended that because of the special conditions under which the complainant worked she was not an "employee" & therefore not subject to the Act. He conducted a hair-dressing parlour in Vancouver in which employees are engaged admittedly subject to the Act. In 1932 he divided the premises & constructed an annex with a separate entrance from the street. A superintendent was placed in charge of this annex & she, on resp.'s direction, gave employment to the complainant & others on a commission basis. They received 30 per cent. of the receipts for all work done by them, the resp. taking 70 per cent. He paid the rent & supplied materials including machines. Complainant, however, had her own machine &

received an allowance for it:—*Held*: the arrangement between complainant & resp. brought the former within the definition of "employee" in sect. 2 of Minimum Wage Act & the latter within that of "employer" in the same sect., & therefore, he was rightly convicted, under sect. 13 of that statute, for employing complainant at less than the minimum wage.—*R. v. GAURSCH*, [1934] 2 W. W. R. 196; 3 D. L. R. 583; 48 B. C. R. 287.—*CAN.*

ii. — *Who is employee in mercantile industry.*—*STEVENSON v. BRITISH COLUMBIA LEATHER CO., LTD.*, [1935] 3 W. W. R. 254; 4 D. L. R. 143; 50 B. C. R. 166.—*CAN.*

iii. — *"Construction industry."*—An order of the Board of Industrial Relations under the Male Minimum Wage Act relating to payments in "construction industry" does not apply to carpentry work & painting.—*FENTON v. HASKAMP* (1935), 50 B. C. R. 241.—*CAN.*

iv. — *Sales broker.*—Contract between employer & sales broker held without the scope of Male Minimum Wage Act.—*MCGREGOR v. HOOVER CO., LTD.* (1934), 49 B. C. R. 312.—*CAN.*

v. — *Employee in beauty parlour.*—The provisions of the order made by Minimum Wage Board under Minimum Wage Act, R. S. S., 1930, fixing the minimum wages payable to females employed in "beauty parlours" apply exclusively to employees who comply with the terms of the order & cannot be added to or varied. Therefore where a female employee after taking a probationary course of three months had worked by & for herself for 12 months before she was employed by the accused:—*Held*: said period of independent operation could not be taken into consideration in determining the minimum wage she was entitled to.—*R. v. MEYERS*, [1936] 2 W. W. R. 454.—*CAN.*

vi. — *Taxi-driver.*—For the

purpose of determining his hourly minimum wage, a taxi-driver is on duty from the time he takes charge of his car until he turns back, less meal times.—*MACKENZIE v. MOORE'S TAXI CO., LTD.*, [1938] 2 D. L. R. 195.—*CAN.*

sb. *Industrial Arbitration Act—Meaning of "industry."*—*PARKER & SON v. AMALGAMATED SOCIETY OF ENGINEERS* (1926), 29 W. A. L. R. 90.—*AUS.*

sd. *Offences—Liability of employer—Necessity for knowledge.*—The mere fact that an employee works for longer hours than those prescribed by the Minimum Wage Board does not constitute an offence by the employer in the absence of proof that he knowingly required or permitted the employee so to work.—*R. v. BREARLEY* (1930), 62 Can. C. C. 202; 48 B. C. R. 458.—*CAN.*

st. *Constitution of Board.*—*R. v. HATSKIN*, [1936] 2 W. W. R. 321; 3 D. L. R. 437; 66 Can. C. C. 142; 6 F. L. J. (Can.) 20.—*CAN.*

sk. *No agreement as to wage—Whether minimum wage implied.*—In a case wherein there was no express agreement between an employer & employee as to what the latter's wages would be, it does not follow that the Ct. must infer in a prosecution under Minimum Wage Act, C. A., 1924, that there was an implied contract for the standard wage & therefore no breach of the Act by the employer. In the absence of the proof required from the employer by sect. 17 (2), which places the onus on him of showing that he has complied with the Act & the regulations, it must be taken that the payments made by him & with the making of which he stopped paying were his idea of what was due. Reg. 17 of Minimum Wage Board prescribing a standard minimum wage is quite within the Board's authority.—*SHIMOSKI v. CRONIN*, [1937] 3 W. W. R. 570; 4 D. L. R. 580; 45 Man. J. R. 478; 7 F. L. J. (Can.) 165.—*CAN.*

## Part III.—Organisation of Labour.

**78a. — London County Council (General Powers) Act, 1921—Whether contract made at licensed address.]**—The London County Council (General Powers) Act, 1921, provides for the licensing of employment agencies & requires that the business of the agency shall be carried on at the licensed address. The office of Collins Orchestras, Ltd., a theatrical employment agency, was in Dean Street. A contract between that firm & deft. was drawn at the licensed premises on stationery headed with an address in Shaftesbury Avenue (an old office of the co.) was discussed & developed at various places, & finally signed in an office of a director of the co. in Lisle Street. By the

contract deft. agreed to pay "commission during the whole period of my present engagement & on every subsequent prolongation of the agreement." Deft.'s present engagement with a music hall was determined & another band engaged for a week. After that deft. was engaged again :—*Held*: (1) the real transaction took place at the licensed premises & the contract was not void as having been entered into at premises other than the licensed address; (2) the re-engagement of deft. was a prolongation of the present engagement.—*ARRAM v. WALTERS*, [1936] 2 All E. R. 959; 80 Sol. Jo. 793.

## Part IV.—Unemployment Insurance.

**82a. "Employment in agriculture"—Employee on fur farm.]**—The employees were engaged in the tending, cleaning & generally in giving the necessary attention to foxes upon a fox-breeding farm. The foxes were bred for the purpose of selling the pelts, which were sold in their wet, uncured state. The question raised upon the issue was whether these men were engaged in agriculture within Unemployment Insurance Acts, 1935 (c. 8) & 1936 (c. 32):—*Held*: the employment was an employment in agriculture within the above Acts.—*Re STEPHENS' APPLICATION*, [1938] 2 K. B. 675; *sub nom. Re STEPHENS & BRANTHWAITE & OTWAY, Re HUME & CROFT*, [1938] 3 All E. R. 311; 54 T. L. R. 998; 82 Sol. Jo. 711; *sub nom. MINISTER OF LABOUR v. STEPHENS*, 107 L. J. K. B. 614; 159 L. T. 120.

**94. Add. Annotation :—Consd. Re Blackpool Corpn. & Barritt, etc. (1931), 95 J. P. 103.**

**96. Add. Annotation :—Consd. Re National Health Insurance Act, 1924, Re Professional Players of Association Football, [1934] 2 K. B. 265.**

**108. Add. Annotation :—Refd. Re Blackpool Corpn. & Barritt, etc. (1931), 95 J. P. 103.**

**111. Add. Annotation :—Refd. Re Blackpool Corpn. & Barritt, etc. (1931), 95 J. P. 103.**

**112. Add. Annotation :—Refd. Re Blackpool Corpn. & Barritt, etc. (1931), 95 J. P. 103.**

**117. Add. Annotation :—Consd. Re Blackpool Corpn. & Barritt, etc. (1931), 95 J. P. 103.**

**118a. — Employees of Eton College Stores.]—Re ETON COLLEGE STORES (1931), 47 T. L. R. 306; sub nom. Re MINISTER OF LABOUR, Re ETON SCHOOL STORES & PARKER, Re ETON SCHOOL STORES & BRAMPTON, Re ETON SCHOOL STORES & MITCHELL, Re ETON SCHOOL STORES & ADDAWAY, Re LONDON**

### PART IV. SECT. 1, SUB-SECT. 1.

**sd. Who is employed person.]—G., a teacher of dancing, owned a number of tenement houses, & he also dealt in the materials of old buildings which he used to buy on the sites for removal & disposal by sale or for use in other buildings of his own. For many years he had work constantly in hand in connection with tenements & other enterprises. He engaged M. in connection with the work on the tenements, for repairs & reconstruction, & also for the demolition & removal of old buildings. M. employed other men for the carrying out of this work, but G. provided the money to pay them, & their insurance cards were stamped with money supplied by G. G. did not stamp any insurance cards for M. M. ordered the materials required for the work. M. was himself paid weekly by G. from £3 6s. to £4 a week, such payment being at a rate per working hour. When M. was not employed on work for G. he worked independently, describing himself as a "builder & contractor," & he had billheads so printed. M. also undertook to do all kinds of electric lighting work & shop & house repairs. On one occasion M. gave a certificate that a certain sum had been spent upon one of G.'s houses for the purpose of sustaining an increase of rent of the house by G., M. purporting to give the certificate as an independent contractor. G. considering that M. was not exer-**

cising proper supervision over certain work which G. had engaged him to carry out, & in annoyance at his repeated absence, put an end to his engagement. Two years after M. had ceased to work for G., M. claimed that he was, while in the employment of G., an "employed person" under "a contract of service" with G. within Unemployment Insurance Act, 1920 (c. 30). G. contended that M. was an independent contractor working upon a time & material basis :—*Held*: M. was not an "employed person" within the Act.—*GRAHAM v. MINISTER FOR INDUSTRY & COMMERCE & MOLLOY*, [1933] I. R. 156.—*IR*.

**sg. "Money payments"—What are.]**—M. became an apprentice to G., the proprietor of a motor garage, under a verbal contract of apprenticeship with a view to learning the trade of motor mechanic. No premium was paid to G., by or on behalf of the apprentice & the contract did not provide for any payment to the apprentice during the four years' period of apprenticeship. After the first year of the apprenticeship G. paid the apprentice a sum of three shillings & sixpence per week, the payments generally being made every fortnight in respect of each two weeks. The payments were made gratuitously to enable the apprentice to pay for his daily lunch & to purchase cigarettes, etc., but were entered in G.'s petty cash book, & were charged as one of the expenses of his business in

his income tax returns :—*Held*: the payments were "money payments" within Sched. I., Part 1, to Unemployment Insurance Act, 1920 (c. 30); the apprentice was an employed person & the employer was liable to pay unemployment insurance contributions in respect of the apprentice.—*Re GIVEN*, [1936] I. R. 20.—*IR*.

### PART IV. SECT. 1, SUB-SECT. 2.—A.

**sd. Laundresses in army laundry.]—**An army laundry was established for the purpose of washing the clothing of the members of the forces in the Dublin area. The cleansing of army blankets, sheets & the like was also carried on. A number of laundresses, including M., who was a "hand washer," & A., a "drier," were employed for this purpose. The laundry was within the precincts of the army barracks, but was situated in a separate building & quite distinct from the building where the soldiers resided. Although the laundry was not conducted with a view to profit, the facts did not exclude the possibility of a profit being made :—*Held*: M. & A. were not employed in domestic service, as they had all the characteristics of ordinary industrial workers: their service was entirely impersonal; & their work in the circumstances in which it was carried on, was of a purely industrial character.—*MINISTER FOR INDUSTRY & COMMERCE v. STEWART & LOWRY*, [1930] I. R. 112.—*IR*.

COUNTY COUNCIL & EDWARDS, *Re* LONDON COUNTY COUNCIL & SATCHELL, 75 Sol. Jo. 247.

118b. — Employees of Poor Law Institution—Baker.]—*Re* ETON COLLEGE STORES, No. 118a, *ante*.

118c. — — — Ironer.] — *Re* ETON COLLEGE STORES, No. 118a, *ante*.

119. *Add. Annotation* :—*Consd.* *Re* Blackpool Corp'n. & Barritt, etc. (1931), 95 J. P. 103.

123a. — Eton College Stores.]—*Re* ETON COLLEGE STORES, No. 118a, *ante*.

123b. — Tramway undertaking—Depot cleaner & lavatory attendant.]—In the first case B. was employed by the Blackpool Corp'n. as a lavatory attendant & a depot cleaner at the corp'n.'s tramway depot. In the second case J. was employed by the Liverpool Corp'n. as a lavatory attendant. In both these cases the tramway undertakings were owned & worked by the corp'n. & were carried on for purposes of gain. In the third case W. was employed as a waitress by the Manchester Corp'n. in refreshment rooms at H. Park, Manchester, which was over three miles from the centre of the city. Refreshments were there served to the public at a price which would just cover the cost. In the fourth & fifth cases M. was a waitress & D. a waiter, the former being employed at a pier restaurant & the latter at the "Lucullus" room at the Pavilion, Bournemouth, both being carried on by the Bournemouth Corp'n. as part of their pier undertaking. It was admitted in all these cases that the employed persons were in domestic service :—*Held* : the test for making these persons insurable persons within the Act being (1) whether a trade or business was being carried on for the purposes of gain, & (2) whether they were employed in that trade or business. B. & J. were both insurable persons, as the tramway undertakings constituted a trade or business which was being carried on for the purposes of gain. The same reasoning applied to the two Bournemouth cases, but in the case of W. the Manchester Corp'n. did not carry on the refreshment catering for the purposes of gain. W. was therefore not an insurable person under the Act.—*Re* MINISTER OF LABOUR, *Re* BLACKPOOL CORPN. & BARRITT, *Re* LIVERPOOL CORPN. & JACKSON, *Re* MANCHESTER CORPN. & WELSBY, *Re* BOURNEMOUTH CORPN., MILLARD & DEREZ (1931), 95 J. P. 103 ; 75 Sol. Jo. 206 ; *sub nom.* *Re* BLACKPOOL CORPN., 47 T. L. R. 300.

123c. — Corporation refreshment room—Waitress.]—*Re* MINISTER OF LABOUR, *Re*

BLACKPOOL CORPN. & BARRITT, No. 123b, *ante*.

123d. — Pier undertaking—Waiter & waitress.]—*Re* MINISTER OF LABOUR, *Re* BLACKPOOL CORPN. & BARRITT, No. 123b *ante*.

126. *Add. Annotation* :—*Consd.* *Re* Wroot (1935), 153 L. T. 73.

128a. — Workman employed by Drainage Board to clear drains.]—Drainage comrs., charged under a local Act of Parliament with the duty of providing & maintaining drains in a wholly agricultural area, employed a workman to clean & repair the drains & to keep them clear of weeds :—*Held* : the workman was employed in agriculture & was therefore not a person insurable under Unemployment Insurance Acts, 1920-1934.—*Re* WROOT (1935), 153 L. T. 73 ; 51 T. L. R. 397 ; 79 Sol. Jo. 343.

135. *Add. Annotations* :—*Consd.* Hearts of Oak Assurance Co. v. A.-G. (1931), 47 T. L. R. 579 ; *Mason v. Brewis Bros., Ltd.*, [1932] 2 All E. R. 420.

139a. Master of barge—Whether independent contractor.]—The ct., in dealing with appeals by employers relating to the liability for insurance under Unemployment Insurance Acts, 1920-1932, held that the master of a barge owned by appts. was engaged under a contract of service with them, but that the mate of the barge, a son of the master, was engaged under a contract of service with his father.—*Re* BAILEY (1933), 49 T. L. R. 195 ; *sub nom.* *Re* W. H. COWBURN & COWPAR, LTD. APPEALS, *Re* BAILEY, 77 Sol. Jo. 64.

139b. Mate of barge—Whether employed by master.]—*Re* BAILEY, No. 139a, *ante*.

139c. Employment otherwise than by way of manual labour—Modeller.]—The work of the employees, who were modellers, was to mould clay into ornaments & other things, according to the employer's instructions, & for this purpose they were supplied with photographs & detailed working drawings, so that the finished model was a reproduction of something conveyed to them by the drawings & photographs, & not an artistic creation of their own. It was contended that these employees were engaged in "employment otherwise than by way of manual labour" :—*Held* : the substantial nature of the employment, which was the criterion to be applied, was manual labour, & the employment was not "employment otherwise than by way of manual labour" within Unemployment Insurance Act, 1935 (c. 8), Sched. I., Part II., para. 9.—*Re* GARDNER, *Re* MASCHKE, *Re* TYRRELL, [1938] 1 All E. R. 20 ; 158 L. T. 174 ; 82 Sol. Jo. 155.

WARNER v. MINISTER FOR INDUSTRY & COMMERCE, [1929] 1 R. 582.—IR.

#### PART IV. SECT. 2.

*sg. Appeal—From Minister for Industry & Commerce to High Court—Right of appeal to Supreme Court.*—*WARNER v. MINISTER FOR INDUSTRY & COMMERCE*, [1929] 1 R. 582.—IR.

#### PART IV. SECT. 1, SUB-SECT. 2.—C.

124 H. — — — — —.]—H. was employed by a dairy farmer, who had a farm of about 200 acres in the County of Dublin, & who tilled about 50 acres & kept 100 cows, & sold the milk in the city & suburbs of Dublin. H. used to come to the farm about 5 o'clock in the morning, milk the cows, get ready a

horse & cart, & then go into the city & distribute the milk. On his return he washed the cans, tended his horse, drove in the cows, again milked them & delivered the milk. When he returned the second time, after tending his horse & cleansing the cans, his duties were ended :—*Held* : H. was employed in agriculture & excepted from the provisions of the Act.—

## Part V.—National Health Insurance.

**142a. — Canvasser.**—Appet. was employed as a canvasser by a firm of millers & corn factors. By the terms of his employment, he was paid a fixed sum of 5s. per week as expenses, & also the price of the first order obtained from a new customer in the streets allocated to him to canvass. He worked for the firm for five days in each week, & did not work for any other person. He was not obliged to canvass at specified times, nor had he to obtain permission if he wished not to work on any particular day, but, if he did not do so, the sum of 1s. was deducted from his expenses:—*Held*: appet. was not employed within National Health Insurance Act,

(c. 32).—*BELCHER'S APPEAL, Re ESSEX FLOUR & GRAIN CO., LTD., [1938] 3 All E. R. 244.*

**146a. — Acrobat.**—A music-hall artist, employed as an acrobatic entertainer, & having no speaking part, is not employed by way of manual labour within National Health Insurance Act, 1924 (c. 38).—*Re DODDS APPEAL, Re McMANUS (1933), 148 L. T. 406; 49 T. L. R. 187; 77 Sol. Jo. 49.*

*Annotations:—Consd. Re National Health Insurance Act, 1924, Re Professional Players of Association Football, [1934] 2 K. B. 265; Re Graham, Re National Health Insurance Act, 1924, Re Professional Players of Association Football (1934), 103 L. J. K. B. 595.*

## PART V. SECT. 1.

**1 i. — Ganger employed by local authority—Working in corporation quarry.**—A ganger who was taken off the road & employed in a stone quarry owned by the local authority is still an employed person within the National Health Acts.—*LIMERICK COUNTY COUNCIL v. IRISH INSURANCE COMRS. & CONDON, [1934] 1 L. R. 364.—IR.*

**1 ii. — Credit bookmaker's clerk.**—A bookmaker, who engaged in both credit & ready-money betting business, the latter in contravention of Betting Act, 1853, s. 1, employed his son to act as his clerk. Most of the son's duties related to the credit betting transactions, but it was the intention of both parties that he should also assist, & he did in fact assist, in the ready-money betting business. Contributions under the National Health Insurance Acts were paid in respect of the son. On the son's death, a claim by his widow to receive a widow's pension was rejected by the Department of Health for Scotland, on the ground that deceased was not employed under a lawful "contract of service," & accordingly, was not an insured person within the 1925 Act:—*Held*: deceased was employed under a "contract of service," in respect that employment as a credit bookmaker's clerk was an ordinary legitimate contract of service, & that neither was the basis of the contract in question the carrying out of an illegal purpose, nor did the contract contain any express term which made it necessary that the clerk should act unlawfully; accordingly, he was an "insured" person within the Act.—*FEGAN v. DEPARTMENT OF HEALTH, [1935] S. C. 823.—SCOT.*

**1 i. — — — — —.**—R., a salmon factor, was the owner of several boats used for salmon fishing. At the beginning of a fishing season he let a boat to one B., who proceeded to select a crew of two others, one of whom was H., & proceeded to fish in the ordinary way. R. was not aware that H. was a member of the crew of the boat. All fish caught had to be handed over to R., who sold them, retaining one-fourth of the proceeds of the sale of the salmon, & handing over the remaining three-fourths & the proceeds of the sale of any other fish caught to B. B. then divided all he received with the crew in proportions arranged between themselves. R. had no part in the arrangement between B. & the crew as to payment, & was not concerned as to how the money was disposed of. In the event of no fish being caught, R. received nothing & made no payment to B. or to the crew, & if B. failed to take the boat out to fish, R. could take it away from him. All repairs to the boat, nets, & tackle were done by

R. at his own expense, but B. had full control over its management, the part of the river to be fished, etc., & could dismiss any of the crew, who had to obey his orders:—*Held*: there was no contract of service between R. & H., & consequently R. was not liable for insurance contributions in respect of H.—*GALVIN v. MINISTER FOR INDUSTRY & COMMERCE & HIGGINBOTHAM, [1932] 1 L. R. 216.—IR.*

**a (p. 1310) i. — Employment under local authority in pensionable office.**—By an order made under National Insurance Act, 1913 (c. 37), s. 6, "employment under any local or other public authority in any pensionable office in a permanent capacity" shall be deemed not to be employment within the meaning of Part I. of National Insurance Act, 1911, the Order providing that "the expression 'office' includes any office, situation, or employment, & the expression 'pensionable office' means an office coming within the provisions of any Act authorising the grant of a superannuation allowance." A rural district council employed H. in Sept. 1899, temporarily to take charge of the waterworks system which supplied water to the town of C. shortly after the waterworks had been constructed. In Nov. 1899, H. was permanently appointed as "a person to drive the engine & the pumps, & perform any other duties he might be called upon to perform." The town of C. became on Apr. 1, 1900, an urban sanitary district by virtue of two orders of the Local Govt. Board, & the urban district council, which was created thereby, took over the waterworks. This council was under no obligation to take over the employees or officials of the rural district council who were employed on the waterworks, but H. continued to carry on his duties as before. H.'s wages were increased from time to time, & such increases were passed by the auditor of the Local Govt. Board. He furnished reports from time to time to the urban district council & frequently attended their meetings. At a meeting of the council soon after they had taken over the waterworks the opinion of the Local Govt. Board was sought as to the payment of H.'s wages, & the Board was requested to make an immediate adjustment of the council's property & liabilities. The Board replied that H.'s wages were to be paid by the council pending an adjustment of the accounts. There was no evidence as to the making of any such adjustment. The Board was fully aware of everything done at the meetings of the council, as copies of the minutes had to be transmitted to the Board:—*Held*: having regard to the provisions as to the granting of superannuation allowances contained in

Part IV. of Local Govt. Act, 1925, H. was engaged in employment under a local authority in "a pensionable office in a permanent capacity," & therefore not engaged in employment within Part I. of National Insurance Act, 1911.—*HANRATTY v. MINISTER FOR INDUSTRY & COMMERCE & IRISH INSURANCE COMRS., [1931] 1 L. R. 189.—IR.*

**a (p. 1310) ii. — Temporary work for unemployed.**—Employments within National Health Insurance Act, 1924, include employment under any contract of service whether for a money payment or not, & except in so far as excluded by special order, employment under any local authority.

In consequence of the prevalence of unemployment in a city a large number of men were in receipt of able-bodied relief, & the municipal corp., who were also public assistance authority, made arrangements whereby men in receipt of able-bodied relief were allowed to work as voluntary workers in the corp.'s departments when work of a casual nature was available. In addition to the opportunity which the work afforded the men of keeping physically fit, the corp. held out as an inducement to those who undertook the work the prospect of preferential selection for vacancies in regular corp. employment. Men who were prepared to do this work received no payment for it, but continued to receive relief from the public assistance committee. The departments to which the men were assigned exercised control over them when working, but the men could not be required to work as a condition of receiving relief. The widow of a man who had worked under these arrangements in the corp.'s electricity department having applied for determination of the question whether her husband was employed by the corp. within the 1924 Act:—*Held*: he was not employed under a contract of service, & was not an employed person within National Health Insurance Acts.—*McGRATH v. DEPARTMENT OF HEALTH FOR SCOTLAND, [1938] S. C. 282. SCOT.*

**sa. Employment partly in Free State & partly in Scotland—Whether "continuously insured."**—The husband of appet. for a widow's pension had been employed in Scotland from 1912 till Aug. 1928; he had been employed in the Irish Free State from Oct. 1928 till Aug. 1930; he was employed in Scotland from Dec. 1930 till Aug. 1931, after which he was in ill-health until his death in June, 1932. He was insured under National Health Insurance Act, 1924, while in Scotland, & under the corresponding Irish Free State Insurance Act while in the Free State:—*Held*: in view of Irish Free State Reciprocal Arrangements Order, 1924, appet.'s husband must be



**146b.** — Professional footballer.]—Professional players of games who receive remuneration exceeding in value £250 a year are not insurable under the National Health Insurance Act, 1924. A professional player of Association football was employed to play for a club for a year at a salary of £6 a week during the "close" season & one of £7 a week during the playing season, with extra pay when playing in the first team & bonuses for playing in won & drawn matches:—*Held*: his employment was not "by way of manual labour" &, therefore, as his rate of remuneration exceeded in value £250 a year, he fell within the exception to liability to be insured contained in Part II. (k) of Sched. I. to the Act.—*Re* NATIONAL HEALTH INSURANCE ACT, 1924; *Re* PROFESSIONAL PLAYERS OF ASSOCIATION FOOTBALL, [1934] 2 K. B. 265; 103 L. J. K. B. 595; 151 L. T. 176; 50 T. L. R. 370; 78 Sol. Jo. 337, D. C.

**149.** *Add. Citation*:—93 J. P. 35.

**149a.** — Military service—Territorial officer.]—An ex-sergeant-major of the Regular Army received a commission as lieutenant & quartermaster in a Territorial unit. He received an annual salary, which was paid monthly by cheque from the county assocn., to whom it was later refunded by the War Office:—*Held*: he was employed "in the military service of the Crown" & therefore

came within the exception set out in Sched. I., Part II., para. (a), of National Health Insurance Act, 1924 (c. 38), & was not an employed person within that Act.—*Re* COUSENS, [1938] 1 K. B. 499; [1938] 1 All E. R. 17; 54 T. L. R. 237; 82 Sol. Jo. 97; *sub nom.* COUSENS v. MINISTER OF HEALTH, 107 L. J. K. B. 286; 158 L. T. 32.

**169a.** Dental benefit—Who is "dentist."—A registered medical practitioner, although entitled to practice dentistry under Dentists Act, 1921 (c. 21), s. 1 (3), is not entitled to give dental treatment to a patient insured under National Health Insurance Acts, 1924 to 1928, for which fees can be charged to & payment demanded from the patient's approved society under National Health Insurance (Dental Benefit) Regulations, 1930, unless he is a dentist registered in the dentists' register kept under Dentists Act, 1878 (c. 33). These regulations, having been approved after being laid before Parliament, have the same effect as if they had been enacted in an Act of Parliament.—*BYNOE v. GENERAL FEDERATION OF TRADE UNIONS APPROVED SOCIETY* (110), [1938] Ch. 164; [1937] 4 All E. R. 184; 107 L. J. Ch. 26; 157 L. T. 508; 51 T. L. R. 61; 81 Sol. Jo. 901, C. A.

**169b.** — Validity of Regulations.]—*BYNOE v. GENERAL FEDERATION OF TRADES UNIONS APPROVED SOCIETY* (110), No. 169a, *ante*.

## Part VI.—Old Age Pensions.

**179a.** Widows', Orphans' & Old Age Contributory Pensions Act, 1929 (c. 10)—Employment of husband in Irish Free State before 1922.]—Employment before 1922 in what is now called the Irish Free State under Irish Free State Constitution Act, 1922 (Session 2), is

not employment entitling the employee's widow to a pension under Widows', Orphans' & Old Age Contributory Pensions Act, 1929 (c. 10), s. 1 (1).—*Re* ECHLIN (1932), 147 L. T. 530; 48 T. L. R. 675.

treated as though he had been continuously insured under 1924 Act, & appct. was entitled to the pension claimed.—*MELVILLE v. DEPARTMENT OF HEALTH FOR SCOTLAND*, [1934] S. C. 53.—SCOT.

### PART V. SECT. 8.

*sh. Dispute between approved society & member—Refusal of referees to state a case—Application to court.*—*M'NAMARA v. SCOTTISH CATHOLIC INSURANCE SOCIETY*, [1929] S. C. (Cl. of Sess.) 55.—SCOT.

### PART VI.

**179 i.** *Widows', Orphans' & Old Age Contributory Pensions Acts—Meaning of "entry into insurance."*—A workman engaged in employment which, after July 5, 1912, rendered him compulsorily insurable under National Insurance Act, 1911, became insured as at that date, & paid his weekly contributions in full until Dec. 1922, when he passed out of insurable employment. For the purposes of the Insurance Acts he ceased, in Dec. 1924, to be an insured person. On Jan. 4, 1926, he again became insured as a voluntary contributor, & thereafter, until his death in July, 1927, he paid his weekly contributions, numbering 81, in full. His widow applied for a pension, but her claim was rejected on the grounds that sect. 5 (a) of 1925 Act had not been complied with, since it had not been established that 104 weeks had elapsed & 104

contributions had been paid since the date of her husband's last entry into insurance. The Dept. contended that "entry into insurance" in sect. 5 (a) must be construed consistently with National Health Insurance Act, 1924, & particularly sect. 3 (4) thereof, which in effect gave to that expression the meaning "last entry":—*Held*: sect. 5 (a) had been complied with, in respect that the "date of his entry into insurance" was the date when appct.'s husband first became an insured person, not the date when he again became insured as a voluntary contributor; & the meaning was not controlled by sect. 3 (4) of 1924 Act, which was not applicable in the case of voluntary contributors.—*KERR v. DEPARTMENT OF HEALTH FOR SCOTLAND*, [1930] S. C. 813.—SCOT.

**179 ii.** — — — — —.]—An appct. for an old age contributory pension had been insured as an employed contributor from Mar. 6, 1922, till Dec. 31, 1925. On Jan. 4, 1926, he became insured as a voluntary contributor, & continued so insured until the expiry of five years, on Jan. 4, 1931. He had attained the age of sixty-five in Mar. 1930. The Dept. rejected his claim, on the ground that the date of his entry into insurance must be taken to be Mar. 6, 1922, & he had not been in continuous insurance since that date:—*Held*: on a construction of Widows', Orphans' & Old Age Contributory Pensions Act, 1925, s. 8 (a) & proviso (1), the phrase "entry into insurance" meant entry into the qualifying period; &, accord-

ingly, the date of appct.'s entry must be taken to be Jan. 4, 1926, & he was entitled to a pension on the expiry of five years from that date.—*WYLIE v. DEPARTMENT OF HEALTH FOR SCOTLAND*, [1932] S. C. 51.—SCOT.

**179 iii.** — — — — —.]—An appct. for an old age contributory pension had been insured as an employed contributor from July 15, 1912, till Jan. 4, 1920. On Jan. 4, 1926, he became insured as a voluntary contributor, & continued so insured for five years. In accordance with the statutory provisions, no contributions were payable by him after the appointed day, Jan. 2, 1928. He attained the age of sixty-five in Oct. 1927. The Department having withdrawn a pension awarded to him, on the ground that the date of his "entry into insurance" for the purpose of sect. 8 of 1925 Act was Jan. 4, 1926, & that the number of contributions for the three contribution years immediately preceding the expiry of five years from that date, viz. July, 1927 to July, 1930, did not represent an average of thirty-nine for each year:—*Held*: the date of appct.'s entry into insurance in the sense of proviso (1.) of sect. 8 was not, as he contended, the date when he first entered into insurance as an employed contributor, viz. July 15, 1912, but was the date of his entry into the qualifying period, Jan. 4, 1916, & accordingly, he had not satisfied the condition required by sect. 8 (c) as modified by proviso (1.).—*GILBERTSON*

v. DEPARTMENT OF HEALTH FOR SCOTLAND, [1933] S. C. 707.—SCOT.

179 iv. — [—]—A woman who had reached the age of sixty-five claimed an old age pension at the full rate of 10s. per week. She had complied with the ordinary statutory conditions attached to the grant of such a pension. She had, however, obtained a certificate of exemption in 1924, which she had surrendered in Apr. 1926. At the latter date she was between fifty-nine & sixty. Contributions in respect of her insurance were paid by her employer during the period while she was exempt:—*Held*: the case was governed by *Widows' Orphans' & Old Age Contributory Pensions Act, 1925, s. 14 (4)*, & the regulations made thereunder; "entry into insurance" in these regulations meant re-entry at the date when the certificate of exemption was surrendered, & accordingly claimant was entitled only to a pension at the rate applicable to the age at which she had surrendered her certificate of exemption.—*MERSON v. DEPARTMENT OF HEALTH FOR SCOTLAND, [1934] S. C. 47.—SCOT.*

179 v. — *Husband's employment within three years of death—Husband bedridden.*—A widow, aged sixty, applied for a pension. Her husband, who died on Nov. 1, 1928, had been employed from boyhood until 1914, & periodically from 1914 until 1921, as a share-fisherman. He became paralysed in 1922, & from that date until his death he was wholly incapacitated for work. For the last three & a half years of his life he was bedridden:—*Held*: appct. was not entitled to the pension claimed, in respect that it could not be held that her husband's normal occupation, at any time within three years before his death, was employment of the specified character.—*MACDONALD v. DEPARTMENT OF HEALTH FOR SCOTLAND, [1931] S. C. 354.—SCOT.*

179 vi. — *Nature of employment—Question for referee.*—A widow having applied for a pension under sect. 1 (1) (a) (ii.) of *Widows', Orphans', & Old Age Contributory Pensions Act, 1929*, the Department refused the application, on the ground that her husband's normal occupation was not employment in respect of which contributions would have been payable under the 1925 Act. This question turned on whether the husband's occupation had been employment by way of manual labour. The widow having applied for a reference to a referee, the latter found that the husband's occupation had been employment by way of manual labour. The Dept. refused to accept the referee's finding, & after inquiry, held that the husband's occupation had not been by way of manual labour, & refused the application for a pension:—*Held*: the question of the nature of the husband's employment was determinable by the referee & not by the Dept., any question which might thereafter arise as to whether such employment was employment in respect of which contributions would have been payable

being reserved for the determination of the Dept.—*GAMMIE v. DEPARTMENT OF HEALTH FOR SCOTLAND, [1932] S. C. 644.—SCOT.*

179 vii. — *Decision of Department—Estoppel.*—An appct. for an old age contributory pension was informed that he was not eligible. Subsequently, in view of a decision of the Ct. of Session in the case of another appct., the Department decided that the appct. was eligible, & awarded him a pension. As a result of a later decision the Department revised its decision & withdrew the pension. The appct. maintained that the Department had no power to withdraw the pension, on the ground that it had been awarded for the purpose of giving effect to a decision by a referee:—*Held*: the Department was not debarred from revising its original award, in respect that proviso (c) of sect. 18 (1) of 1929 Act applied only to an award giving effect to a decision pronounced with reference to the case in question, & not to an award made owing to a decision in another case.—*GILBERTSON v. DEPARTMENT OF HEALTH FOR SCOTLAND, [1933] S. C. 707.—SCOT.*

179 viii. — *Disqualification—Widow cohabiting with man as his wife.*—A widow was charged with having, in a form of claim for a widow's pension, fraudulently represented that she was not disqualified from receiving such pension by reason of any of the disqualifications stated in the form, & thus induced the Dept. of Health for Scotland to award her a pension. One of the disqualifications in the form was that a widow was disqualified if she was "cohabiting with a man as his wife." Accused was cohabiting with a man & had three children by him, but she did not hold herself out as his wife, & it was well known in the neighbourhood that the man was married & living apart from his wife:—*Held*: accused had been cohabiting with the man as his wife in the sense of the statute so as to be disqualified from receiving a widow's pension; but in the circumstances the Sheriff-Substitute was not bound to find that she had acted with fraudulent intent.—*PATERSON v. RITCHIE, [1934] S. C. (J.) 42.—SCOT.*

179 ix. — *Who entitled.*—An insured man, who had been divorced by his wife, did not remarry, & died survived by the wife & one child of the marriage. In a claim by the wife for a child's allowance under *Widows', Orphans' & Old Age Contributory Pensions Act, 1925, s. 1 (1) (a)*, or alternatively for an orphan's pension under sect. 1 (1) (b) in respect of the child:—*Held*: (1) the term widow fell to be read in its ordinary signification, & accordingly appct., not being the wife of the insured at the date of his death & therefore not entitled to a widow's pension, was not entitled to an allowance in respect of the child under sect. 1 (1) (a); (2) the child, not being an orphan within sect. 44 (1) was not entitled to an orphan's pension under sects. 1 (1) (b), 4.—*COLGAN v. DEPT. OF*

HEALTH FOR SCOTLAND, [1937] S. C. 16.—SCOT.

n i. — *Residence—Material date—Date of application.*—A claim for an old age pension under the Acts of 1925 & 1929, made on Mar. 4, 1930, was refused by the Department of Health for Scotland, on the ground that appct. had not satisfied the condition as to residence imposed by sect. 23 (1) (b) of the Act of 1925. Appct. had left Scotland in July, 1929, for the Falkland Islands, where he was still residing on Oct. 26, 1929, the date on which he attained the age of sixty-five:—*Held*: appct.'s right to a pension fell to be determined as at the date of his application; at that date the condition as to residence imposed by sect. 23 (1) (b) of the 1925 Act had been effectively repealed by sects. 13 (3) & 27 (5) of the 1929 Act; & accordingly, appct., who otherwise was duly qualified, was entitled to an old age pension.—*ROSS v. DEPARTMENT OF HEALTH FOR SCOTLAND, [1931] S. C. 346.—SCOT.*

sk. *Recovery of pension payments by Crown—Priorities.*—Pension payments recoverable against the estate of a deceased pensioner by virtue of *Old Age Pensions Act, s. 9 (3)* are Crown debts & take priority over all debts owing by the estate, except burial expenses, costs of administration, remuneration of representatives, & probate & succession duties.—*DIXON v. WORKMEN'S COMPENSATION BOARD (1935), 49 B. C. R. 407.—CAN.*

so. — *Validity of claim.*—Prior to the end of Aug. 1937, a husband & wife had been pensioners of plrf. board. By will of their daughter who died Aug. 27, 1937, they were made joint beneficiaries of all her estate. Forthwith after grant of probate in Sept. 1937, said pensioners notified the board that they would not require any further pension. Neither when they qualified for a pension nor at any time while they were in receipt of pensions had they any other income or any assets. The board claimed from the exor. & executrix of the daughter's estate all moneys of the estate & a lien on the estate properties. The board functioned under *Old Age Pensions Act, 1928 (Man.) & Old Age Pensions Act, R. S. C., 1927*, & the regulations authorised by & passed under both statutes:—*Held*: the board's claim failed on each of the following grounds: (1) it had not been shown that either Parliament or the Legislature intended the payment of a pension to a person without property to be a loan of the money advanced, rather than a bounty or such like to the pensioner; (2) the relationship between the exor. & executrix as such on the one part & the pensioners on the other part at the time these proceedings were taken was not that of creditor & debtor respectively. The board was ordered to pay the costs.—*OLD AGE PENSIONS BRANCH OF WORKMEN'S COMPENSATION BOARD OF MANITOBA v. JACOBS, [1937] 3 W. W. R. 657; [1938] 1 D. L. R. 46; 45 Man. L. R. 437; 7 F. L. J. (Can.) 212.—CAN.*



## PLEADING.

### Part III.—Setting out Party's Own Case.

**212a.** ——— **Claim for return of insurance moneys—Allegation of arson.**—In an action against an administrator to recover insurance moneys paid to deceased, it being alleged that the fire in respect of which the moneys were paid was caused by the deliberate act of deceased

with intent to defraud :—*Held* : particulars of the act alleged must be given fourteen days before any application to fix the trial.—*LONDON ASSURANCE v. KIDSON* (1935), 79 Sol. Jo. 641, C. A.

### Part IV.—Answering an Opponent's Case.

**409a.** ——— **Precise point must be stated in order.**—An order for the trial of a preliminary point of law should specify clearly & precisely what is the preliminary

point of law which is going to be tried.—*MASTER LIGHTERMEN & BARGE OWNERS ASSOCN. v. SOUTHERN RY. Co.* (No. 1) (1933), 21 Ry. & Can. Tr. Cas. 108.

### Part VI.—Objections to Pleadings.

**662a.** ——— **Whether dependent proper party.**—Pltf. sued for libel the author, printers & publishers of a novel, & also the printers of the advertising wrapper, which contained a striking picture & a reference to the contents of the book, though no directly defamatory matter. Against these defts. he pleaded that they had "assisted to publish" the libels in the book. The judge in chambers ordered this part of the statement of claim to be struck out & pltf. appealed :—*Held* : an allegation of assisting in publication is identical with an allegation of publication; the question of whether these defts. were a party to the publication was one of fact to be decided on the evidence at the hearing & the claim in respect thereof should not have been struck out.—*MARCHANT v. FORD*,

[1936] 2 All E. R. 1510; 80 Sol. Jo. 791, C. A.

**687a.** **Nuisance —One decision contrary to claim.**—Pltf.'s statement of claim contained a claim for infringement of pltf.'s right to light from ancient windows & a further claim for nuisance alleging that the carrying up of deft.'s building to a greater height had interfered with the proper escape of smoke & fumes from pltf.'s chimneys & such interference had caused a nuisance to pltf. :—*Held* : having regard to the case of *Bryant v. Lefever*, 19 Digest 61, 319, the claim for nuisance disclosed no cause of action & should be struck out. The ct. is entitled to deal with the law as it think it stands.—*WILLOUGHBY v. ECKSTEIN*, [1936] 1 All E. R. 650, C. A.

### Part VII.—Amendment of Pleadings.

**886.** **Add. Citations** :—101 L. J. K. B. 245; 146 L. T. 336, C. A.

**891a.** ——— **Breach of statutory duty.**—A builder's labourer was engaged in digging a trench 6 ft. deep in connection with the erection of a block of flats. The sides of the trench were not secured by boards. Owing to the unsuspected existence of an old drain near one side of the trench, that side fell in, & the labourer was fatally injured. His widow commenced an action under the Employers' Liability Act, & Lord Campbell's Act. Shortly before the trial, it was discovered that deft. co. had, at the time of the accident, had certain hoisting apparatus & cement-mixers upon the site. At the beginning of the trial, pltf.

sought leave to amend her statement of claim by alleging the presence of this machinery, & a breach, on the part of deft. co., of a statutory duty, imposed by the Building Regulations, 1926. Pltf., at the time of making this application, offered to give deft. co. an adjournment, & to pay any costs occasioned thereby. The judge refused to allow any amendment, & gave judgment in favour of deft. co. It was stated that pltf. had had an opportunity of asking for such an amendment when interrogatories relevant to the amended case were disallowed :—*Held* : (1) the amendment sought was one which was essential in order for the real issues in the case to be before the ct.,

& should have been allowed; it was, moreover, one which would not have caused deft. co. any injustice for which it could not have been compensated by way of costs; (2) (*per* SCOTT, L.J.): when a pltf. proposes to allege a breach of statutory duty, that is a strong additional reason for allowing an amendment.—HUNT v. RICE & SON, LTD. (No. 2), [1937] 3 All E. R. 715; 53 T. L. R. 931; 81 Sol. Jo. 648, C. A.

1087a. ———.—*Held*: any amendment of their pleadings to enable pltf. to raise a case of mutual mistake implying good faith on the part of defts. could not without injustice to them be allowed after an action based exclusively on fraud had failed, & that accordingly the issue was not open to pltf. in this House.—BELL v. LEVER BROS., LTD., [1932] A. C. 161; 101 L. J. K. B. 129; 146 L. T. 258; 48 T. L. R. 133; 76 Sol. Jo. 50; 37 Com. Cas. 98; H. L.; *revsg. sub nom.* LEVER BROS., LTD. v. BELL, [1931] 1 K. B. 557, C. A.

1095a. Amendment causing injustice.]—BELL v. LEVER BROS., LTD., No. 1067a, *ante*.

#### A. In General (p. 125).

R. S. C., Ord. XXVIII., r. 2. In Rule 2 of Order XXVIII. the words "or where defence is delivered but no order for reply is made within ten days from delivery of the defence or the last of the defences" shall be omitted. (*Amended by R. S. C. (No. 1), 1934.*)

1158a. Leave to serve writ out of jurisdiction—Claim in tort—Claim in contract added.]—Where leave has been granted under R. S. C., Ord. XI., r. 1 (*cc*), to serve a writ out of the jurisdiction claiming damages for a tort committed within the jurisdiction upon a deft. who is domiciled in Scotland, it is not competent for pltf. subsequently to deliver a statement of claim containing also a claim based upon a contract made within the jurisdiction which was not upon the writ when leave was granted, & in respect of which leave to serve the writ out of the jurisdiction could not have been granted.—WATERHOUSE v. REID, [1938] 1 K. B. 743; [1938] 1 All E. R. 235; 107 L. J. K. B. 178; 158 L. T. 122; 54 T. L. R. 332; 82 Sol. Jo. 93, C. A.

## Part VIII.—Statement of Claim.

### SECT. 1.—IN GENERAL.

(p. 130.)

R. S. C., Ord. XX., r. 1. Rule 1 of Order XX. shall be revoked and the following Rule shall be substituted therefor:—

"1. The delivery of statements of claim shall be regulated as follows:—

- (a) Where the writ is specially indorsed with or accompanied by a statement of claim under Order III., Rule 6, no further statement of claim shall be delivered, unless the Court or a Judge shall otherwise order.
- (b) Subject to the provisions of Order XIII., Rule 12 as to filing a statement of claim when there is no appearance, the plaintiff shall (unless he has delivered a statement of claim under Order III., Rule 6, or the Court or a Judge otherwise orders) deliver a statement of claim either with the writ of summons or notice in lieu of writ of summons, or within ten days or in the Chancery Division twenty-one days after appearance, provided that the times prescribed by this paragraph may be enlarged by consent in writing or by the Court or Judge." (*Substituted by R. S. C. (No. 1), 1933; & R. S. C. (No. 2), 1936.*)

### SUB-SECT. 4.—CLAIMS FOR MONEY LENT (p. 135).

R. S. C., Ord. III., r. 10. Rule 10 of Order III. shall be revoked and the following Rule shall be substituted therefor:—

"10. Where an action for the recovery of money lent by a moneylender or for the enforcement of any agreement or security relating to any such money is brought by the lender or an assignee, the indorsement on the writ shall state, in addition to any other particulars, the fact that at the time of making the loan or contract the plaintiff or (in an action by an assignee) the original assignor was a licensed moneylender, and if the writ be specially indorsed under Rule 6 of this Order, shall also state—

- (a) the date on which the loan was made;
- (b) the amount actually lent to the borrower;
- (c) the rate per cent per annum of interest charged;
- (d) the date when the contract for repayment was made;
- (e) the fact that a note or memorandum of the contract was made, and was signed by the borrower;
- (f) the date when a copy of the note or memorandum was delivered or sent to the borrower;
- (g) the amount repaid;
- (h) the amount due but unpaid;
- (i) the date upon which such unpaid sum or sums became due;
- (j) the amount of interest accrued due and unpaid on every such sum." (*Substituted by R. S. C. (No. 2), 1936.*)

1229a. Action by Indian moneylender.]—Pltf. brought proceedings by specially endorsed writ to recover the amount which became due on a promissory note dated June 24, 1932, on default in payment of an instalment, with interest at 3 per cent. per month from the date of default. Pltf. were moneylenders who were stated on the writ to reside at Bombay, & the figures of the promissory note were in rupees, but it did not appear where pltf. carried on business. Deft. did not appear to the writ, but when pltf. sought to sign judgment in default of appearance, judgment was not entered because the writ did not comply with R. S. C., Ord. III., r. 10:—*Held*: in the absence of evidence to exclude the application of the Moneylenders Acts, the claim to enter judgment in default of appearance was rightly refused.—NIHALCHAND NAVALCHAND v. McMULLAN, [1934] 1 K. B. 171; 103 L. J. K. B. 234; 150 L. T. 170, C. A.

### SECT. 4.—SPECIALLY INDORSED WRITS.

(p. 138.)

R. S. C., Ord. XX., r. 1. See new Rule 1, section 1, *ante*. R. S. C., Ord. III., r. 6. The following provisions shall be inserted in Rule 6 of Order III.:—

(a) After the words "damages for its detention;" the words:—"(4) in all other actions in the King's Bench Division (except actions for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, and actions in which fraud is alleged by the plaintiff)".

(b) After the words "specially endorsed with," the words:—"or accompanied by."

(c) After the words "Appendix C., sec. IV." the words:—"to VII. inclusive." (*Added by R. S. C. (No. 1), 1933.*)

In Rule 6 of Order III. after "detention" and before "and" in paragraph (3) there shall be inserted:—

(3A) Where the plaintiff claims possession of any property forming a security for the payment of money." (*Added by R. S. C. (No. 1), 1937.*)

**SUB-SECT. 2.—ACTIONS FOR RECOVERY OF LAND.**

(p. 143.)

**R. S. C., Ord. XVIII., r. 2.** In Rule 2 of Order XVIII. after the words "injury to the premises claimed," there shall be inserted the words "and except also claims for payment of principal money or interest secured by or for any other relief in respect of a mortgage or charge of such land." (*Added by R. S. C. (No. 1), 1937.*)

**SUB-SECT. 3.—TIME FOR DELIVERY (p. 150).**

**R. S. C., Ord. XXI., r. 6.** In Rule 6 of Order XXI. after the word "extended" the following words shall be inserted:—"by consent in writing or." (*by R. S. C. (No. 2), 1936.*)

**B. Claims for Debt or Liquidated Demand (p. 152).**

**R. S. C., Ord. XXVII., r. 2.** The following amendments shall be made in Order XXVII.:—

In Rule 2, after the words "deliver a defence, the plaintiff" there shall be inserted the words "subject as provided by Rule 17 of this Order." (*Added by R. S. C. (No. 3), 1936.*)

**R. S. C., Ord. XXVII., r. 3.** In Rule 3, after the words "the proviso to Rule 2" there shall be inserted the words "and subject as provided by Rule 17 of this Order." (*Added by R. S. C. (No. 3), 1936.*)

**K. Actions for Money Lent (p. 155).**

**R. S. C., Ord. XXVII., r. 17.** After Rule 16 the following Rule shall be added and shall stand as Rule 17:—

"17. In any action in which the plaintiff is claiming any relief of the nature or kind specified in Order LV., Rule 5A—

(a) no judgment shall be entered in default of pleading without leave of the court or a judge who may require the application for leave to be supported by such evidence as might be required if relief were being sought on originating summons under Order LV., Rule 5A and may require notice of such evidence to be given to the defendant;

(b) on any motion for judgment under Rule 11 of this Order the judge may require the motion to be supported by such evidence as might be required if relief were being

sought on originating summons under Order LV., Rule 5A and may require notice of such evidence to be given to the defendant." (*Added by R. S. C. (No. 3) 1936.*)

**L. Motion for Judgment in Default.**

**1372a. — Motion to rectify register of patents—**

**Delivery of points of claim & defence by consent.]—**An application was made by originating motion to rectify entries in the register of patents relating to the patent above mentioned, & on the matter coming on for hearing LUXMOORE, J., by consent of the parties (*inter alia*), ordered points of claim & points of defence to be filed. Both resps. filed points of defence, but the first resp., R., failed to obey an order of the ct. & an order to strike out his points of defence was made; the second resp., P., applied for leave to withdraw its points of defence, leave was granted & the points of defence were withdrawn. The Comptroller-General had informed appct. that he did not wish to be represented at the hearing of the matter nor did he wish to have any documents served upon him. Appcts. then applied, by motion, for judgment in default of defence:—**Held:** the provisions of R. S. C., Ord. XXVII., r. 11, did not apply to a case in which points of claim & points of defence were delivered as a matter of convenience between the parties; also the motion to rectify should be set down in the witness list to be proved by oral evidence.—*Re REPLOGLE'S LETTERS PATENT NO. 139,892 (1934), 51 R. P. C. 267.*

## Part IX.—Defence.

**1424a. — After grant of time in which to pay.]—**

Where a discretionary jurisdiction is given to the ct. or a judge, the judge in Chambers is in no way fettered by the previous exercise of discretion by the Master, although no doubt he will give the weight it deserves to that decision. A judgment debtor who asks for & obtains a stay of execution does not thereby approbate the judgment or elect to treat it as binding so as to preclude him from thereafter seeking to set it aside whether on appeal or otherwise. While the Ct. of Appeal will not normally interfere except on grounds of law with the exercise of the judge's discretion, if it is seen that on other grounds his decision would result in injustice being done, the Ct. of Appeal has both the power & the duty to remedy it.—*EVANS v. BARTLAM*, [1937] A. C. 473; [1937] 2 All E. R. 646; 106 L. J. K. B. 568; 53 T. L. R. 689; 81 Sol. Jo. 549; *sub nom.* *BARTLAM v. EVANS*, 157 L. T. 311, H. L.

**1431a. — Security for costs.]—**On the construction of R. S. C., Ord. 27, r. 15, the discretion therein given is wide enough to allow the ct. or a judge to make an order for

security for costs.—*BURCHMORE v. HILLS* (1934), 79 L. Jo. 30.

**N. Proceedings for Foreclosure or Redemption.**

**R. S. C., Ord. XIII., r. 17.** After Rule 16 the following Rule shall be added and shall stand as Rule 17:—

"17. In any action in which pltf. is claiming any relief of the nature or kind specified in Order LV., Rule 5A no judgment shall be entered in default of appearance without leave of the court or a judge who may require the application for leave to be supported by such evidence as might be required if relief were being sought on originating summons under Order LV., Rule 5A and may require notice of such evidence to be given to deft." (*Added by R. S. C. (No. 3), 1936.*)

**1496a. Auction—Sales by Auction Act, 1867 (c. 48)**

**—Effect of pleading wrong section.]—**Deft. here relies on sect. 6 of Sale of Land by Auction Act, 1867 (c. 48). That sect. having failed him, he wishes to rely on sect. 5. I have already held that sect. 5 does not apply to this case, but if I am wrong in that, it would be improper to allow any amendment so that that sect. could be relied upon (*LUXMOORE, J.*).—*HILLS & GRANT, LTD. v. HODSON*, [1934] Ch. 53; 103 L. J. Ch. 17; 150 L. T. 16.

## Part XII.—Plea of Possession.

R. S. C., Ord. XXI, r. 21. In Rule 21 of Order XXI. after the word "unless" the following words shall be inserted:—"he is in possession by virtue of a lease or tenancy granted by the plaintiff or his predecessor in title or". (*Added by R. S. O. (No. 2), 1936.*)

## Part XIV.—Particulars.

SUB-SECT. 3.—ACCOUNT STATED OR SETTLED  
(p. 194).

1643a. **Right to particulars.**—KLEINBERGER v. NORRIS (1937), 183 L. T. Jo. 107, C. A.

1733a. ——— Up to or at trial.]—Pltf. complained that she was libelled by a newspaper article concerning certain aeroplane smuggling exploits of "an Englishwoman." Pltf. was not referred to by name or description, but alleged that the words "an Englishwoman" referred to her. Defts. applied for

particulars of the facts from which it was to be inferred that pltf. was the person referred to:—*Held*: defts. were entitled to the particulars asked, & pltf. should have leave to supplement the particulars at any time up to 20 days before the trial or at such later time as may be ordered by the ct. or a judge or at the trial on such terms as may be deemed just.—BRUCE v. ODHAMS PRESS, LTD., [1936] 1 K. B. 697; [1936] 1 All E. R. 287; 105 L. J. K. B. 318; 154 L. T. 423; 52 T. L. R. 224; 80 Sol. Jo. 144, C. A.

## Part XV.—Reply and Subsequent Proceedings.

SUB-SECT. 1.—DELIVERY OF REPLY (p. 208).

R. S. C., Ord. XXIII. Order XXIII. shall be revoked and the following Order shall be substituted therefor:—

1. Where the Plaintiff desires to deliver a reply, he shall deliver it within seven days from the delivery of the defence.

2. Where a counterclaim is pleaded, a reply thereto shall be subject to the Rules applicable to defences. (*Substituted by R. S. C. (No. 1), 1933.*)

SUB-SECT. 7.—DEFAULT IN DELIVERY (p. 211).

R. S. C., Ord. XXVII, r. 13. Rule 13 of Order XXVII. shall be revoked, and the following Rule shall be substituted therefor:—

"13. Where a pleading subsequent to a reply is not ordered, then, at the expiration of seven days from the

delivery of the defence or reply (if any), or, where a pleading subsequent to the reply is ordered, and the party who has been ordered or given leave to deliver the same fails to do so within the period limited for that purpose, then at the expiration of the period so limited, the pleadings shall be deemed to be closed and material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue; provided that this Rule shall not apply to a reply to a counterclaim, and that, unless the plaintiff delivers a reply to a counterclaim, the statements of fact contained in such counterclaim shall, at the expiration of fourteen days from the delivery thereof, or of such time (if any) as may by order be allowed for delivery of a reply thereto, be deemed to be admitted, but the Court or a Judge may at any subsequent time give leave to the plaintiff to deliver a reply." (*Substituted by R. S. C. (No. 1), 1933.*)



## PRACTICE.

## Part IV.—Indorsements of Claim.

## SECT. 6.—SPECIAL INDORSEMENTS.

## SUB-SECT. 1.—CLAIMS FOR DEBT OR LIQUIDATED DEMAND (p. 270).

**R. S. C., Ord. III., r. 6.** The following provisions shall be inserted in Rule 6 of Order III. :—

(a) After the words "damages for its detention;" the words:—"and (4) in all other actions in the King's Bench Division (except actions for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, and actions in which fraud is alleged by the plaintiff)".

(b) After the words "specially indorsed with," the words:—"or accompanied by."

(c) After the words "Appendix C., sec. IV.," the words:—"to VII. inclusive." (*Added by R. S. C. (No. 1), 1933.*)

In Rule 6 of Order III. after "detention" and before "and" in paragraph (3) there shall be inserted:—

"or (3A) Where the plaintiff claims possession of any property forming a security for the payment of money." (*Added by R. S. C. (No. 1), 1937.*)

*A. In General (p. 277).*

**R. S. C., Ord. XIV., r. 1.** Paragraph (a) in Rule 1 of Order XIV. shall be revoked and the following paragraph shall be substituted therefor:—

"(a) Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under Order III., Rule 6, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed, if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed." (*Substituted by R. S. C. (No. 1), 1933.*)

**197a.** ——. [Plff., a legal mtgee., brought an action to recover possession of the mtged. land, & applied for judgment under R. S. C., Ord. XIV. Deft. alleged that the terms of the mtge. deed had been varied by a parol agreement to the effect that the mtgee. should not exercise his right of re-entry before the end of 1936. To this the plff. objected that the mtge. being required to be in writing under the Statute of Frauds the alleged variation must be in writing. Deft. then alleged that he had entered upon the land & spent money upon the property, in effect, setting up a plea of part performance:—*Held*: it could not be said that the defence was unarguable & deft. ought to be given leave to defend, & the action should be transferred to the Chancery Div.—**KNAPP-FISHER v. CRISP**, [1936] 3 All E. R. 560, C. A.]

**218a.** ——. **Judgment not signed.**—A firm of costumiers claimed against a husband & wife the price of various articles supplied to the wife. An order was made that plffs., the costumiers, be at liberty to sign final judgment in the action against the wife, the summons under R. S. C., Order XIV., against the husband being adjourned. Judgment was never signed against the wife. The matter went on to trial against the husband who alleged that in the circumstances of the case he was not liable in respect of orders given by his wife, even for necessities. The

county ct. judge found that the husband had given authority to the wife to pledge his credit in respect of the goods supplied & that he had not revoked his authority in any way, & judgment was given for plffs. against the husband. The husband appealed on the grounds that, as the liability of the husband & wife was alternative & plffs. had obtained leave to sign judgment against the wife, plffs. were barred from proceeding against the husband in respect of the same debt, & further that the obtaining of an order against the wife constituted an election which barred proceedings against the husband:—*Held*: liberty to sign judgment against the wife was not sufficient to bar the plffs. from proceeding against the husband; & the obtaining of liberty to sign judgment against the wife did not amount to an election, & as in all the circumstances of the case there had been no election plffs. were entitled to proceed against the husband.—**CHRISTOPHER (HOVE), LTD. v. WILLIAMS**, [1936] 3 All E. R. 68; 80 Sol. Jo. 853, C. A.]

**277a.** ——. [Plffs., in a claim for goods sold & delivered, said, in their affidavit, under R. S. C., Ord. XIV., that deft. had complained that the goods were not up to sample, but also said that they believed that he had no defence. Deft. paid into ct. part of the sum claimed, in satisfaction of the whole claim, with admission of liability. Plffs. took out a summons, under R. S. C., Ord. XIV., asking leave to sign final judgment for the whole amount. On the day of the hearing of the summons deft. filed a defence & counterclaim. The master dismissed the summons with costs & the judge in chambers upheld his order. On appeal:—*Held*: the master & judge should have allowed plffs. to sign judgment under R. S. C., Ord. XIV., r. 4, for such part of their claim as was admitted, but plffs. were not entitled to the costs of the application to the master, as they had applied for leave to sign judgment for the whole amount & knew that there was a defence as to the bulk of it.—**SHAERF (RECENIA R.), LTD. v. SMYTH**, [1936] 2 All E. R. 1622, C. A.]

*JA. Writ of Inquiry (p. 297).*

**R. S. C., Ord. XIV., r. 7A.** The following Rule shall be inserted after Rule 7 of Order XIV. and shall stand as Rule 7A:—

"7A. Where in the case of any claim for unliquidated damages the Court or a Judge has given leave to enter interlocutory judgment, a writ of inquiry shall issue to assess the value of the goods and the damages (or the damages only) to be awarded, provided that the Court or a Judge may order that instead of a writ of inquiry the value and amount of damages or either of them shall be ascertained in any way which the Court or Judge may direct." (*Added by R. S. C. (No. 1), 1933.*)

*K. Directions as to Trial—Short Cause List. (p. 297).*

**R. S. C., Ord. XIV., r. 8.** Paragraph (c) is revoked (R. S. C. (No. 3), 1937).

**R. S. C., Ord. XIV., r. 8.** The following paragraph shall be added at the end of Rule 8 of Order XIV., and shall stand as paragraph (d):—

"(d) Where the plaintiff has obtained leave to enter final judgment subject to a suspension of execution pending the trial of a counterclaim, the provisions of this Rule shall apply to the counterclaim as if it were an action." (*Added by R. S. C. (No. 1), 1933.*)

#### SECT. 10.—ACTIONS FOR MONEY LENT. (p. 300).

R. S. C., Ord. III., r. 10. Rule 10 of Order III. shall be revoked and the following Rule shall be substituted therefor:—

"10. Where an action for the recovery of money lent by a moneylender or for the enforcement of any agreement or security relating to any such money is brought by the lender or an assignee, the indorsement on the writ shall state, in addition to any other particulars, the fact that at the time of

making the loan or contract the plaintiff or (in an action by an assignee) the original assignor was a licensed moneylender, and if the writ be specially indorsed under Rule 6 of this Order, shall also state—

- (a) the date on which the loan was made;
- (b) the amount actually lent to the borrower;
- (c) the rate per cent. per annum of interest charged;
- (d) the date when the contract for repayment was made;
- (e) the fact that a note or memorandum of the contract was made, and was signed by the borrower;
- (f) the date when a copy of the note or memorandum was delivered or sent to the borrower;
- (g) the amount repaid;
- (h) the amount due but unpaid;
- (i) the date upon which such unpaid sum or sums became due;
- (j) the amount of interest accrued due and unpaid on every such sum." (*Substituted by R. S. C. (No. 2), 1936.*)

## Part VI.—Issue of Writs of Summons.

#### SUB-SECT. 2A.—CLAIM ARISING OUT OF MORTGAGE OR CHARGE (p. 303).

R. S. C., Ord. V., r. 5A. In Order V. the following Rule shall be inserted after Rule 5 to stand as Rule 5A:—

"5A. Every action in which there is a claim for payment of principal money or interest secured by any mortgage or charge or a claim for possession of any property forming a security for payment to the plaintiff of any principal money or interest shall be assigned to the Chancery Division:

Provided that this Rule shall not apply to an action assigned to the Probate Divorce and Admiralty Division by section 56 (3) of the Act." (*Added by R. S. C. (No. 3), 1936.*)

In Rule 5A of Order V. there shall be inserted:—

- (a) after "mortgage or charge," the words "upon real or leasehold property"; and
- (b) after "possession of any," the word "such." (*Added by R. S. C. (No. 1), 1937.*)

#### B. Admirally Actions in rem—Warrant of Arrest (p. 305).

R. S. C., Ord. V., r. 16. The following paragraph shall be inserted after paragraph (d) of Rule 16 of Order V., and shall stand as paragraph (e) of that Rule:—

"(e) The lodging of an undertaking in writing by the solicitor who applies for the issue of the warrant to pay the fees and expenses of the Marshal." (*Added by R. S. C. (No. 1), 1934.*)

## Part IX.—Defence.

#### SUB-SECT. 3.—TIME FOR DELIVERY (p. 150).

R. S. C., Ord. XXI., r. 6. Rule 6 of Order XXI. shall be revoked and the following paragraph shall be substituted therefor:—

"6. Where a defendant has entered an appearance, he shall deliver his defence within fourteen days from the time limited for appearance or from the delivery of the

statement of claim, whichever shall be the later, unless such time is extended by the Court or a Judge, or, in actions in which the writ of summons has been specially indorsed with or accompanied by a statement of claim under Order III., Rule 6, the plaintiff in the meantime serves a summons for judgment under Order XIV." (*Substituted by R. S. C. (No. 1), 1933.*)

R. S. C., Ord. XXI., r. 8. Rule 8 of Order XXI. shall be revoked. (*Revoked by R. S. C. (No. 1), 1933.*)

## Part XI.—Service of Writ of Summons.

443a. ———.]—Pltfs., the owners of a vessel damaged in collision with a vessel owned by defts., a foreign corpn., served a writ upon a member of an English firm, E. M. & Co., who acted as defts.' agents. The writ was served at E. M. & Co.'s London offices. The defts. moved to set aside the writ & service on the ground that they were not resident within the jurisdiction. It appeared that E. M. & Co. were one of defts.' agents in this country for the booking of freight, issue of passenger tickets, & the ordinary purposes for which ship's brokers are employed. The only remuneration received by them was the customary agents' commission, & they had no concern with the management of deft. corpn. The only name appearing on the door of E. M. & Co.'s offices was their own name, but upon the window of the ground floor their name was exhibited as agents for deft. corpn. together with the names of other foreign shipping cos. for whom E. M. & Co. acted:—*Held*: E. M. & Co. were a firm who

"sold" & did not "make" contracts on behalf of defts., & that defts. did their business in this country "through" E. M. & Co. & not "by" them; defts., accordingly, were not resident within the jurisdiction & that the writ & service must be set aside.—*THE LALANDIA*, [1933] P. 56; 102 L. J. P. 11; 148 L. T. 97; 49 T. L. R. 69; 18 Asp. M. L. C. 351.

443b. ———.]—In a collision case where the procedure *in rem* was not available it was sought in an action brought *in personam* against a foreign shipping co. to effect service of the writ through London agents. The agents were general agents for shipping cos. & the foreign co. in question had no financial interest in the firm nor was any of their staff assigned exclusively to the business of the foreign co. The remuneration was wholly by commission:—*Held*: service on such general agents was bad.—*THE HOLSTEIN*, [1936] 2 All E. R. 1660; 155 L. T. 466; 19 Asp. M. L. C. 71.

**448a.** — **Share register in England.**—A Greek vessel & an Argentine vessel came into collision in the River Parana; the Argentine vessel sank, & it was alleged, became a total loss. On Sept. 30, 1930, proceedings were instituted in the Argentine by the owners of the sunken ship, an Argentine corp'n.; the owner of the Greek ship put in a counter-claim, but on Oct. 27 withdrew it. Meanwhile, on Sept. 30, he had issued the writ in the present proceedings in this country, & served it by leaving a copy at the London office of the Argentine Corp'n. which had been established for the purpose of the transfer & registration of shares. The Argentine Corp'n. moved to set aside the writ, or alternatively to stay the proceedings, on the grounds, amongst others, (a) that the corp'n. only carried on business within the jurisdiction so far as claims connected with the share register were concerned; (b) that the proceedings were vexatious & oppressive as there was an action pending in Argentina, where all the corp'n.'s witnesses as well as the chief witnesses for the Greek ship resided; & further that pltf. had no effective remedy,

inasmuch as Argentine law must be applied in this country, under which, if a vessel was a total loss, liability being limited to the property available, her owners were under no liability at all. By s. 352 of Cos. Act, 1929 (c. 23), the expression "place of business" includes a share transfer office:—*Held*: (1) as the corp'n. had a place of business within the jurisdiction it was amenable to the jurisdiction for all purposes & not merely to the limited jurisdiction suggested; (2) pltf.'s action could not be stayed merely because he was deft. elsewhere; it could not be said, as in *Dawkins v. Prince Edward of Saxe Weimar* (1876), 1 Q. B. D. 499, that on the facts of the declaration no cause of action was shown; & the question whether pltf.'s claim was groundless depended on facts which he was entitled to have tried, & that accordingly the motion failed.—*THE MADRID*, [1937] P. 40; [1937] 1 All E. R. 216; 106 L. J. P. 39; 53 T. L. R. 237.

**459.** *Add. Citations*:—[1932] 1 K. B. 617; 101 L. J. K. B. 65; 146 L. T. 240; 49 T. L. R. 94, C. A.; *affd.*, [1933] A. C. 289, H. L.

## Part XIII.—Service Out of the Jurisdiction.

### SUB-SECT. 1.—IN GENERAL (p. 338).

R. S. C., Ord. XI., r. 1. The following paragraph shall be inserted at the end of Rule 1 of Order XI. and shall stand as paragraph (1.) in that Rule:—

"or (1.) The action is one brought under the Carriage by Air Act, 1932." (*Added by R. S. C. (No. 2), 1933.*)

**606a.** **Charterparty made in England—Action on foreign award.**—On Nov. 10, 1929, a charterparty was made in London which provided that any dispute arising during the execution of the charterparty should be settled by arbn. in Hamburg. In 1931, disputes arose between the parties which were submitted to arbn. in Hamburg, & an award made against deft. for £20,913 13s. 7d., payment to be made in English currency. On Nov. 29, 1932, pltf's., who were a German firm, obtained *ex parte* an order that they should be at liberty to issue a writ against deft., who was residing in France, claiming the amount due & payable under the award, & to serve notice of the writ on deft. in France. On Jan. 5, 1933, deft. applied to have that order set aside, but *GODDARD, J.* dismissed the application. On appeal:—*Held*: (1) the order for service out of the jurisdiction was properly made under R. S. C., Ord. XI., r. 1 (e), as the action based on the award was for the enforcement of a contract made within the jurisdiction, namely, the submission to arbn. contained in the charterparty; but (2) the order could not be supported on the ground that the breach of contract was committed within the jurisdiction, as the award had not required payment in England, & the ordinary rule therefore applied that the debtor must seek out his creditors, the German firm, at their place of business & pay them there.—*BREMER OELTRANSPORT G.M.B.H. v. DREWRY*, [1933] 1 K. B. 753; 102 L. J. K. B. 360; 148 L. T. 540, C. A.

**613a.** —.]—A pltf. obtained leave to serve notice of a writ for breach of contract on deft. out of the jurisdiction. Deft. appealed, submitting that the statement of claim, affidavit, & letters attached did not show a contract between pltf. & deft., but only between pltf. & a co-director of deft. acting as agent for a co. of which deft. was chairman:—*Held*: as there was no reasonable evidence that a contract had been made with deft., leave for service out of the jurisdiction should not have been given.—*CROMIE v. MOORE*, [1936] 2 All E. R. 177, C. A.

**622a.** **Action on foreign award—Award not requiring payment in England.**—*BREMER OELTRANSPORT G.M.B.H. v. DREWRY*, No. 606a, *ante*.

**624a.** —.]—Pltf. & deft., both British subjects, being in Germany, became engaged to marry. Pltf. came to England, & there received a letter written & posted by deft. in Germany, in which she declined to carry out her engagement. Pltf. sued out a writ of summons under C. L. P. Act, 1852 (c. 76), s. 18:—*Held*: the words "cause of action," in the above sect., mean the whole cause of action, & do not apply where a contract has been made out of the jurisdiction & the breach has occurred in England; also, the breach of the contract to marry occurred in Germany, the receipt of the letter only furnishing evidence of the breach & not constituting the breach itself.—*CHERRY v. THOMPSON* (1872), L. R. 7 Q. B. 573; 41 L. J. Q. B. 243; 26 L. T. 791; 20 W. R. 1029.

**626a.** —.]—Deft. made a promise of marriage to pltf. whilst both parties were residing abroad. Both afterwards came to England, where deft. wrote a letter to pltf. renouncing the contract. He afterwards left the country. Pltf., under 15 & 16 Vict. c. 76,

s. 18, issued a writ indorsed for service abroad. Deft., having been served with the writ abroad, moved to set it aside:—*Held*: the writ was rightly issued; cause of action in sect. 18 means the act or omission constituting the violation of duty complained of, & not the whole cause of action.—*DURHAM v. SPENCE* (1870), L. R. 6 Exch. 46; 40 L. J. Ex. 3; 23 L. T. 500.

626b. ———. [Pltf., a German national of Jewish faith, was manager of the London branch of a German co. The co., not knowing pltf.'s London address, sent from Germany to their agents in London a blank piece of notepaper containing their address & signature, & instructed their agents to write thereon a letter dismissing pltf. from their employment & to post it in London to his address. Pltf. commenced an action for wrongful dismissal, & obtained leave to serve the writ out of the jurisdiction of the ct. The co. applied to have the service of the writ set aside on the grounds that the alleged breach of contract took place in Germany, & as both parties were of German nationality, & as the contract of employment was to be construed according to German law, Germany was the *forum conveniens*. Pltf. contended that, being of the Jewish faith, he might not be entitled to the services of an advocate in the German ct., & moreover, should he return to Germany to prosecute a lawsuit, he would be in grave peril of being deprived of his liberty. The application to set the writ aside was granted. Pltf. appealed to the Ct. of Appeal:—*Held*: (1) the alleged breach of contract was committed in London; (2) England was the *forum conveniens*.—*OPPENHEIMER v. LOUIS ROSENTHAL & Co.*, A. G., [1937] 1 All E. R. 23, C. A.

632a. Leave to serve writ claiming in tort granted.—No right to add claim in contract. [Where leave has been granted under R. S. C., Ord. XI, r. 1 (*ee*), to serve a writ out of the jurisdiction claiming damages for a tort committed within the jurisdiction upon a deft. who is domiciled in Scotland, it is not competent for pltf. subsequently to deliver a statement of claim containing also a claim based upon a contract made within the jurisdiction which was not upon the writ, when leave was granted & in respect of which leave to serve the writ out of the jurisdiction could not have been granted.—*WATERHOUSE v. REID*, [1938] 1 K. B. 743; [1938] 1 All E. R. 235; 107 L. J. K. B. 178; 158 L. T. 122; 54 T. L. R. 332; 82 Sol. Jo. 93, C. A.]

667a. ——— No substantial wrong within jurisdiction. [Pltf. brought an action for libel in England against the respective publishers of a Belgian newspaper & a French newspaper. The evidence showed that the newspapers were published in Belgium & in France, respectively, & that they circulated almost entirely within those countries, only a very small number of each being brought to England & distributed there. Pltf., who was a foreigner, stated that he was a gentleman of no occupation, & there was no evidence that he had any reputation in or associations with England. Pltf. applied for an order under R. S. C., Ord. 11, r. 1 (*ee*), for service out of the jurisdiction upon defts. in each case:—*Held*: assuming that there was a tort committed within the jurisdiction &

technically within the terms of R. S. C., Ord. 11, r. 1 (*ee*), there was no question of substance in England, & as pltf.'s substantial complaint, if any, was one which ought to be investigated in the one case in Belgium & in the other case in France, an order for service out of the jurisdiction ought not to be made.—*KROCH v. ROSELLI ET COMPAGNIE SOCIÉTÉ DES PERSONNES A RESPONSABILITÉ, LTD.*, *KROCH v. SOCIÉTÉ EN COMMANDITE PAR ACTIONS LE PETIT PARISIEN*, [1937] 1 All E. R. 725; 156 L. T. 379; 81 Sol. Jo. 294, C. A.]

668a. Threat of action for infringement.—No evidence of threats within jurisdiction. [Pltfs., an Australian co., instituted an action to restrain threats against two American cos. registered in New York, & obtained an order giving leave to serve notice of the writ upon defts. out of the jurisdiction. Upon application by defts. to discharge the order:—*Held*: there was no evidence that any threats had been made within the jurisdiction & the order must be discharged & all subsequent proceedings stayed. Defts. were given the costs of the motion together with the costs of a motion of pltfs. for interlocutory relief.—*EGG FILLERS & CONTAINERS (AUST) PROPRIETARY, LTD. v. HOLED-TITE PACKING CORPN. & PACKING PRODUCTS CORPN.* (1933), 51 R. P. C. 9.]

#### SUB-SECT. 3.—ACTIONS UNDER CARRIAGE BY AIR ACT, 1932 (c. 36) (p. 375).

R. S. C., Ord. XI, r. 8A. The following Rule shall be inserted after Rule 8A of Order XI, and shall stand as Rule 8B of that Order:—

"8B.—(1) Where, for the purpose of an action under the Carriage by Air Act, 1932, and the Convention therein set out, leave is given to serve a notice of a writ of summons upon a High Contracting Party to the Convention other than His Majesty, the provisions of this Rule shall apply.

(2) The notice shall specify the time for entering an appearance as limited in pursuance of Rule 5 of this Order.

(3) The notice shall be sealed with the seal of the Supreme Court for service out of the jurisdiction, and shall be transmitted to His Majesty's Principal Secretary of State for Foreign Affairs, together with a copy thereof translated into the language of the country of the defendant, and with a request for the further transmission of the same to the Government of that country.

(4) The request shall be in Form 10AA in Appendix A, Part I, with such variations as circumstances may require.

(5) The party bespeaking a copy of a document for service under this Rule shall, at the time of bespeaking the same, file a praecipe in Form 10B in Appendix A, Part I.

(6) An official certificate transmitted by one of His Majesty's Principal Secretaries of State to the English Court certifying that the notice was delivered on a specified date to the Government of the country of the defendant shall be deemed to be sufficient proof of service and shall be filed of record as, and be equivalent to, an affidavit of service within the requirements of these Rules in that behalf.

(7) After entry of appearance by the defendant or, if no appearance is entered, after the expiry of the time limited for appearance, the action may proceed to judgment in all respects as if the defendant had for the purposes of the action waived all privilege and submitted to the jurisdiction of the Court.

(8) Where it is desired to serve or deliver a summons order or notice in the proceedings on the defendant out of the jurisdiction, the provisions of this Rule shall apply with such variations as circumstances may require." (*Added by R. S. C. (No. 2), 1933.*)

#### SECT. 13.—SERVICE OF FOREIGN PROCESS OR CITATION.

(p. 375).

R. S. C., Ord. XI, r. 9. In paragraph (4) of Rule 9 of Order XI, the words "verified by notarial certificate" shall be omitted. (*Amended by R. S. C. (No. 1), 1934.*)

## Part XIV.—Appearance.

*D. Instruction to Transfer to New Procedure List.*

The New Procedure List is now abolished, & R. S. C., Ord. XII., r. 17A, is accordingly revoked (R. S. C. (No. 3), 1937).

**870a. Hearing of motion before appearance—  
Duty of solicitor to enter appearance im-**

**mediately.]**—It is the duty of a solr. who in exceptional circumstances instructs counsel to appear for a deft. on a motion before entry of appearance, to correct the irregularity without any delay.—PRACTICE NOTE, [1934] W. N. 228; 78 L. Jo. 381; 151 L. T. Jo. 443.

## Part XV.—Default of Appearance.

*A. In General* (p. 385).

**R. S. C., Ord. XIII., r. 3.** The following amendments shall be made in Order XIII. :

In Rule 3, after the words "the plaintiff may" there shall be inserted the words "subject as provided by Rule 17 of this Order." (*Amended by R. S. C. (No. 3), 1936.*)

**SECT. 7A.—ACTIONS UNDER CARRIAGE BY AIR  
ACT, 1932 (c. 36).**

(p. 390.)

R. S. C., Ord. XIII., r. 9A. The following Rule shall be inserted in Order XIII. after Rule 9 and shall stand as Rule 9A of that Order :—

"9A. In any case to which Rules 3 to 8 of this Order do not apply, in which the defendant fails, or all the defendants, if more than one, fail, to appear, but in which by reason of payment, satisfaction, abatement of nuisance, or for any other reason it is unnecessary for the plaintiff to proceed with the action, he may by leave of the Court or a Judge to be obtained on summons in Chambers enter judgment for costs.

Provided that such summons shall be filed and shall be served in the manner in which service of the writ has been effected or in such other manner as the Court or a Judge shall direct." (Added by R. S. C. (No. 2), 1933.)

**SECT. 10.—ACTIONS BY MONEYLENDERS OR ASSIGNEES OF MONEYLENDERS.**

(p. 390.)

**947a. Action by Indian moneylender.]—Pltfs.**

brought proceedings by specially endorsed writ to recover the amount which became due on a promissory note dated June 24, 1932, on default in payment of an instalment, with interest at 3 per cent. per month from the date of default. Pltfs. were moneylenders who were stated on the writ to reside at Bombay, & the figures of the promissory note were in rupees, but it did not appear where pltfs. carried on business. Defd. did not appear to the writ, but when pltfs. sought to sign judgment in default of appearance, judgment was not entered because the writ did not comply with R. S. C., Ord. III., r. 10 :—*Held*: in the absence of evidence to exclude the application of the Moneylenders Acts, the claim to enter judgment in default of appearance was rightly refused.—**NIHALCHAND NAVALCHAND v. McMULLAN**, [1934] 1 K. B. 171; 103 L. J. K. B. 234; 150 L. T. 170, C. A.

950a. ————.]—Pltf. in a running-down  
action notified deft.'s insurers that he had  
issued a writ against deft. Deft. entered no

appearance, & judgment was obtained against him by default, & a summons taken out for the assessment of damages before a master, on which occasion deft. again made no appearance. No notice was given to the insurers that the writ had been served, or that the case had been set down for trial. The insurers applied to have the judgment set aside :—*Held* : they were persons who had been injuriously affected by the judgment, as they were under a statutory liability to pay plff. the amount of the judgment. They were therefore entitled to be heard, & the judgment ought to be set aside.—*WINDSOR v. CHALCRAFT*, [1938] 2 All E. R. 751; 107 L. J. K. B. 609; 159 L. T. 104; 54 T. L. R. 834; 82 Sol. Jo. 432, C. A.

**964a. Request to abstain from execution--Effect**

of.]—Where a discretionary jurisdiction is given to the ct. or a judge, the judge in Chambers is in no way fettered by the previous exercise of discretion by the Master, although no doubt he will give the weight it deserves to that decision.

A judgment debtor who asks for & obtains a stay of execution does not thereby approve the judgment or elect to treat it as binding so as to preclude him from thereafter seeking to set it aside whether on appeal or otherwise.

While the Ct. of Appeal will not normally interfere except on grounds of law with the exercise of the judge's discretion, if it is seen that on other grounds his decision would result in injustice being done, the Ct. of Appeal has both the power & the duty to remedy it.—EVANS v. BARTLAM, [1937] A. C. 473; [1937] 2 All E. R. 646; 106 L. J. K. B. 568; 53 T. L. R. 689; 81 Sol. Jo. 519; *sub nom.* BARTLAM v. EVANS, 157 L. T. 311, H. L.

**SECT. 16.—PROCEEDINGS FOR FORECLOSURE  
OR REDEMPTION.**

**R. S. C., Ord. XIII., r. 17.** After Rule 16 the following Rule shall be added and shall stand as Rule 17 :—

"17. In any action in which the plaintiff is claiming any relief of the nature or kind specified in Order I.V., Rule 5A no judgment shall be entered in default of appearance without leave of the court or a judge who may require the application for leave to be supported by such evidence as might be required if relief were being sought on originating summons under Order LV., Rules 4 and 5 and require the plaintiff to produce evidence to be given to the defendant." (*Added by R. S. C. (No. 3), 1936.*)

## Part XVII.—Summary Judgment for Specific Performance.

**991a. Proceedings for interest on purchase-money**  
**—Allegation of wilful default against plaintiff.]**  
 —Pltf., as the vendor of freehold property, sought to charge deft., the purchaser, with interest on the purchase-money. This deft. refused to pay, alleging that pltf. had been guilty of wilful default. In an action for

specific performance of the contract, pltf. sought to avail himself of the summary procedure under R. S. C., Ord. XIVa. :—**Held** : this was not a proper case for the summary jurisdiction, as there was an issue to be tried & the parties must proceed to trial.—*UPJOHN v. SIMMONS*, [1936] 1 All E. R. 615.

## Part XIX.—Parties.

**1003a. Party believed to be non-existent—Duty of court.]**—Where there is ground for thinking that a party alleged to be before the ct. is non-existent, & this issue is not raised by the other party or parties, the ct. has not only inherent power but a duty, in order that there may be no abuse of its process, to make such order as it deems necessary to ascertain the truth on this issue. Accordingly, where there was ground for thinking that defts. named in this action, the Banque des Marchands de Moscou, had ceased to exist many years before the date of the issue of writ, neither party placing before the ct. any evidence as to defts.' existence or non-existence, the ct. directed the Official Solr. to investigate the matter & to adduce evidence on this issue & as to the authority of one C., at one time a director of that bank, to act on its behalf in the year 1930. Information as to the evidence proposed to be adduced by the Official Solr. was to be supplied to the parties. On the evidence being adduced, the parties were to be at liberty to cross-examine & themselves to call evidence on these issues.

Where a pltf. has recovered judgment for a sum of money against a deft. named in the action who appeals &, on the appeal, the Ct. of Appeal find that the deft. at the date of the issue of writ was not in existence, although there is no applt. in existence, the ct. has power to deal with the existing judgment & to strike out the action.—*DEUTSCHE BANK UND DISCONTO GESELLSCHAFT v. BANQUE DES MARCHANDS DE MOSCOU* (1931–32), 107 L. J. K. B. 386; 158 L. T. 364, C. A.

**1010a. Absence of right to sue—Power of court to strike out action.]**—As a rule objection to the right to bring an action should be taken not at the trial but by interlocutory motion or summons, & if that course is not followed the ct. should not entertain an application at the trial to dismiss the action, but where want of capacity or authority to sue plainly appears at any stage the ct. may order the action to be struck out (*ROCHE, L.J.*).—*SHAW (JOHN) & SONS (SALFORD), LTD. v. SHAW*, [1935] 2 K. B. 113; 104 L. J. K. B. 549; 153 L. T. 245, C. A.

**1019a. — Of solicitors.]**—Actions were commenced by E. & S. by separate writs issued by the same solrs. on the same date claiming damages against the same defts. in respect of personal injuries sustained in the same

accident. After separate statements of claim & defences admitting liability had been delivered, the actions were consolidated. Defts. paid into ct. £225 in respect of E.'s claim, & £125 in respect of S.'s claim. S. recovered £185, £60 more than the payment into ct. & E. recovered £200, £25 less than the payment into ct. :—**Held** : (1) the question of suing on one writ or on separate writs was one for the discretion of pltf.' solrs.; (2) the proper order as to costs was as follows: judgment for pltf., S. for £185 & costs, including the costs of the consolidated action, except in so far as directly attributable to the claim of E. after the date of payment into ct. Order payment out to pltf. S. of the £125 in ct. in part satisfaction. Judgment for pltf. E. for £200 & costs up to the date of payment into ct. Pltf. E. to pay to defts. any costs of the consolidated action arising after the date of payment into ct. which are directly attributable to his being a party to the consolidated action. Order payment out to defts. of £25, part of the sum of £225 paid into ct. Order payment out to pltf. E. of £180, the remainder of the sum in ct. to be dealt with according to the taxing-master's certificate.—*ENGLISH v. BLOOM & LONDON PASSENGER TRANSPORT BOARD, SIEGENBERG v. BLOOM & LONDON PASSENGER TRANSPORT BOARD*, [1936] 2 K. B. 550; [1936] 2 All E. R. 1592; 105 L. J. K. B. 659; 155 L. T. 286; 52 T. L. R. 679; 80 Sol. Jo. 795.

**1025a. — Interference with light.]**—Two pltf's. were interested in No. 4, B. Street, & two pltf's. in No. 6, B. Street. These buildings were not adjacent, there being an intermediate structure. Deft. was erecting new premises on the other side of B. Street & both pltf's. alleged an interference with ancient lights. Both sets of pltf's. joined in one action against deft. as pltf's. having a right to relief in respect of or arising out of the same transaction or series of transactions within the meaning of R. S. C., Order 16, r. 1 :—**Held** : in the exercise of the discretion of the ct. pltf's. should elect within 14 days which of the two sets of pltf's. should be allowed to proceed in the action, & upon election being made, there should be struck out of the writ & statement of claim all parts thereof referring to the other set without prejudice to their issuing a new writ claiming relief pertinent to their premises, both actions to come into the list before the same judge on the same day to be dealt with as he thinks

fit, the party issuing the new writ to stand in the same position as if that writ was issued on the date of the original writ.

*Semle*: without expressing any final opinion as to whether the joinder of these causes of action is permitted by R. S. C., Ord. XVI., r. 1, or on the meaning of the word "transaction" therein, that word would seem to mean an act the effect of which extends beyond the agent to other persons, & the building of the new premises is such an act in that its effect extends to other premises as an interference with an easement. The authorities support this view, & they have clearly extended its meaning from that of a mere contractual relationship.—*BENDIR v. ANSON*, [1936] 3 All E. R. 326; 80 Sol. Jo. 873, C. A.

**1120a. — Personal injuries—Joinder of insurance company.**—Pltfs. had been injured by a motor car driven by deft. B. It was in dispute whether deft. E. had sold the car to B., or whether B. was driving it as his agent. Pltfs. obtained leave to add E.'s insurance co. as a deft. In the statement of claim, pltfs. claimed, *inter alia*, a declaration that the insurance co. was liable to satisfy any judgment obtained against E. or B. An application was made to strike out such portions of the statement of claim as referred to the insurance co. as being frivolous & vexatious:—*Held*: (1) (*per* GREER, L.J.) the claim against the insurance co. was frivolous & vexatious, as there could not be any claim for a declaration in view of the fact that there was not at that time any dispute between pltfs. & the insurance co.; (2) (*per* SLESSER, L.J.) the addition of the insurance co. as a deft. would tend to embarrass the fair trial of the action. The old practice, whereby a jury should not be informed that a deft. motorist is insured, has not been altered by the passing of the Road Traffic Act, 1934 (c. 50); (3) (*per* MACKINNON, L.J.) the question of the liability of the insurance co. depended primarily upon fact. A declaration of future liability is not, in such circumstances, a suitable remedy.—*CARPENTER v. EBBLEWHITE*, [1938] 4 All E. R. 41; 159 L. T. 564; 55 T. L. R. 17; 82 Sol. Jo. 889, C. A.

**1166a. — All members not liable.**—In 1921, 89 out of 1093 members of a Lodge, which was a branch of the Durham Miners' Asscn., a registered trade union, received goods from pltf., such goods being supplied upon a form of voucher signed by the then secretaries of the Lodge & bearing the Lodge stamp. Between 1922 & 1930 pltf. received from the treasurer of the Lodge various payments on account. In Aug. 1936, he commenced an action against the chairman, treasurer, general secretary & financial secretary of the Lodge as representing the general body of members of the Lodge claiming a declaration that the balance of the price of the goods was due & owing to pltf. from the members of the Lodge & was payable to him out of the funds of the Lodge. Pltf. then applied for & obtained an order under R. S. C., Ord. XVI., r. 9, that defts. should defend the action on behalf of the Lodge. It appeared that the majority of the members of the Lodge in 1921 had now ceased to be members, & that

the majority of the members of the Lodge at present time were not members in 1921, that members who were infants had no voting powers, & only 19 out of the 89 members to whom the goods were supplied were now members of the Lodge. The rules of the Asscn. did not provide for the supply of goods to members. The judge in Chambers set aside the writ & the representation order. On appeal:—*Held*: the representation order ought not to be made, as the various members of the Lodge had different interests & different defences in the cause or matter.—*BARKER v. ALLANSON*, [1937] 1 K. B. 463; [1937] 1 All E. R. 75; 106 L. J. K. B. 108; 156 L. T. 135; 53 T. L. R. 243; 81 Sol. Jo. 77, C. A.

**1229a. — Against trustee—Right of beneficiaries to proceed without joining trustee as plaintiff.**—Defts., the V. Press, Ltd., were the owners of five periodicals which dealt with philately, & deft. A. was helping in their production. In Nov. 1932, A. learnt that the co. desired to sell the papers, & not being able to purchase of his own resources, he negotiated with pltf. H., who authorised him to make an offer of £1,500, of which H. & his co-pltf. K. would find four-fifths & A. was to supply the remainder. The offer was accepted, & an agreement under seal dated Dec. 15, 1932, was made between the V. Press, Ltd. & A., under the terms of which A. agreed to purchase from the co. the copyright & interest & all the goodwill of the co. in the five periodicals. When that had been done, A. asserted that he alone was interested in the purchase, & purported shortly afterwards, with the consent of the co., to put an end to the agreement. Pltfs. in their action asked for a declaration that deft. A. entered into & took the benefit of the agreement of Dec. 15, 1932, as agent & trustee for pltfs. & himself in the share of two-fifths for each of pltfs. & one-fifth for himself, & also for an order for specific performance of the agreement:—*Held*: (1) the cross-appeal must be dismissed, as the evidence was clear & sufficient to hold that A. was acting as agent & trustee for pltfs.; (2) the appeal by pltfs. should be allowed so far as they were refused an order for specific performance of the agreement. A. having acted as trustee for pltfs. & being before the ct., & further having been found to have committed a breach of trust, & pltfs. being *cestuis que trust* as beneficiaries upon the contract, pltfs., having regard to R. S. C., Ord. XVI., r. 11, which provided that no action should be defeated by reason of the misjoinder or non-joinder of parties, could obtain leave to sue the co. for specific performance in the name of A. That, however, involved circuity of action & expense, & using R. S. C., Ord. XVI., r. 11, the ct. were prepared in the special circumstances—all the parties being before the ct.—to give the remedy to which ultimately pltfs. would have become entitled, namely, to order specific performance of the contract in this action by pltfs. The order for inquiry as to damages would be discharged. The principle of equity was to enforce the contract in the name of & for the benefit of the trust.—*HARMER v. ARMSTRONG*, [1934] Ch. 65; 103 L. J. Ch. 1; 149 L. T. 579, C. A.



SECT. 13A.—ACTIONS UNDER CARRIAGE BY AIR ACT, 1932 (c. 36).

(p. 433.)

R. S. C., Ord. XVI., r. 14. The following Rule shall be inserted after Rule 13A of Order XVI., and shall stand as Rule 14 of that Order:—

"14.—In any action under the Carriage by Air Act, 1932, and the Convention therein set out, a High Contracting Party to the Convention who, for the purposes of that action, and by virtue of that Act, is deemed to have submitted to the jurisdiction of the Court, may, subject to and in accordance with these Rules, be made a defendant." (*Added by R. S. C. (No. 2), 1933.*)

SECT. 15.—INFANTS.

(p. 433.)

R. S. C., Ord. XVI., r. 16. In Rule 16 of Order XVI. the following words shall be omitted:—"Married women may sue and be sued as provided by the Married Women's Property Act, 1882." (*Deleted by R. S. C. (No. 2), 1936.*)

SECT. 16.—MARRIED WOMEN.

(p. 434.)

R. S. C., Ord. XVI., r. 16. In Rule 16 of Order XVI. the following words shall be omitted:—"Married women may sue & be sued as provided by the Married Women's Property Act, 1882." (*Deleted by R. S. C. (No. 2), 1936.*)

SECT. 18.—POOR PERSONS.

(p. 435.)

R. S. C., Ord. XVI. The following amendments shall be made in Order XVI.:—

(a) In paragraph (4) of Rule 23, the words "or Court of Appeal" shall be omitted.

(b) At the end of Rule 23 there shall be inserted the following words:

"The certificate shall bear the date on which the application is granted by the Committee."

(c) In Rule 25, the words "The certificate shall be filed by the conducting solicitor" shall be omitted, and the following words shall be substituted therefor:—

"Before taking any other steps in the proceedings, the conducting solicitor shall file the certificate . . ."

(d) In paragraph (5) of Rule 28, after the words "shall direct" there shall be inserted the words "a sum of money," and after the words "conducting solicitor" the words "any sum of money not exceeding in the first instance the sum of £5" shall be omitted.

(e) Paragraph (1) of Rule 30 shall be omitted, and the following paragraph shall be substituted therefor:—

"(1) After the date on which the certificate is granted, no poor person nor any solicitor nominated to conduct the proceedings for him shall enter into any settlement or compromise, whether before or after the commencement of the proceedings, nor discontinue the proceedings, without the leave of the Court or a Judge, or, where no Court order is required, of the Committee."

(f) Rule 31A shall be revoked, and the following Rule shall be substituted therefor:

"31A.—(1) In matrimonial causes every pleading shall be settled by counsel.

(2) Proofs of the witnesses shall be furnished to counsel with the instructions to settle the pleadings.

(3) This Rule shall not apply to petitions for alimony or maintenance or to answers to such petitions."

(g) The following Rules shall be substituted for Rule 31B, which is hereby revoked:—

"31B.—(1) The Court or a Judge may order the out-of-pocket expenses of a poor person to be paid by any other party. Where such an order is made it shall be deemed to include all out-of-pocket expenses properly incurred in the course of the proceedings, but not office expenses, or fees to counsel, or Court fees.

(2) Where it appears to the Court or a Judge that any other party has acted unreasonably in bringing or defending the proceedings or in his conduct of them, or that the special circumstances of the case require it, the Court or Judge may order the other party to pay the costs of the Poor Person, including profit costs, or a proportion of profit costs, or a sum of money in respect thereof, in addition to out-of-pocket expenses properly incurred in the course of the proceedings, but not fees to counsel or Court fees.

(3) Where it appears to the Court or a Judge that the proceedings are of such length or difficulty as to throw an unusual burden on the solicitor acting for the Poor Person, the Court or Judge may order the other party to pay, in addition to out-of-pocket expenses properly incurred in the course of the proceedings, such sum as the Court or Judge thinks fit in respect of such unusual burden.

(4) All out-of-pocket expenses and other costs ordered to be paid under this Rule shall be taxed.

(5) Where an order is made to pay costs under paragraphs (2) or (3) of this Rule, the order shall not be enforced without the leave of the Court or a Judge, and the Court or Judge may refuse leave if satisfied by the party ordered to pay the costs that he has not the means to pay them.

In this paragraph 'means' shall include insurance or other indemnity.

31BB.—Where it appears to the Court or a Judge that the certificate was obtained by fraud or misrepresentation the Court or Judge may order the Poor Person to pay the costs of the other party, and where such an order is made, the costs shall be taxed as if the party ordered to pay them were not a Poor Person."

(h) At the end of Rule 31C the following paragraph shall be added:—

"(2) In this Rule, money or property recovered includes money or property recovered by virtue of a settlement or compromise." (*Amended by R. S. C. (No. 5), 1934.*)

(i) In paragraph (2) of Rule 31DD the words "High Court without the leave of the Judge of the County Court or of a Divisional Court of the High Court" shall be omitted, and the following words shall be substituted therefor:—

"Court of Appeal without the leave of the Judge of the County Court or of the Court of Appeal."

(j) In paragraph (3) of Rule 31DD the words "High Court" shall be omitted and the words "Court of Appeal" shall be substituted therefor.

(k) The following paragraph shall be inserted after paragraph (3) of Rule 31DD, and shall stand as paragraph (4) of that Rule:—

"(4) This Rule shall apply *mutatis mutandis* to any proceedings in which an appeal lies from a County Court to the High Court." (*Amended by R. S. C. (No. 2), 1935.*)

(l) The following paragraph shall be added to Rule 31E:—

"(2) Where any such Poor Person is a party to an appeal to the Court of Appeal either as respondent, or, subject to the provisions of the preceding paragraph of this Rule, as appellant, the provisions of Rules 22 to 31D of this Order shall apply, so far as applicable." (*Amended by R. S. C. (No. 5), 1934.*)

1298a. Appeal as poor person—Application for leave—Prima facie case to be shown.]—

PRACTICE NOTE, [1936] W. N. 54; 181 L. T. Jo. 148, C. A.

1303a. — Bankruptcy proceedings—Security for costs.]—On an appeal by a poor person from the dismissal of a motion in bkpcy., the deposit pursuant to r. 131 of Bkpcy. Rules must be paid before the appeal is entered. The exception of bkpcy. proceedings in R. S. C., Ord. 16, r. 22, is imported into r. 31F.—*Re DEBTOR* (1932), 74 L. Jo. 291, C. A.

1314a. — Right to appeal subject to—On discharge of certificate by Court of Appeal.]—A person who has not taken, defended or been a party to any proceedings as a poor person in the High Ct., but who has obtained under R. S. C., Ord. XVI., r. 31 F, a certificate from the Poor Persons' Committee of the Law Society admitting him to appeal to the Ct. of Appeal as a poor person, cannot appeal to the Ct. of Appeal as a poor person unless he has obtained the leave of the judge before whom the matter was heard, or the leave of the Ct. of Appeal, inasmuch as the concluding words of rule 31 F make the provisions of rule 31 E apply to such a case. In the circumstances of the case leave to appeal as a poor person to the Ct. of Appeal was refused & the certificate given to pltf. by the Poor Persons' Committee admitting

him to appeal to the Ct. of Appeal as a poor person was discharged by the Ct. of Appeal of its own motion under rule 29 of R. S. C., Ord. XVI. Order for security of costs against the pltf. & his next friend as a condition of prosecuting the appeal.—*RODRIQUES v. BAKEWELL & SALMON*, [1934] 1 K. B. 668;

103 L. J. K. B. 522; 151 L. T. 81; 78 Sol. Jo. 317, C. A.

**1321a.** Necessity for—Party who has not previously sued or defended as poor person.]—*RODRIQUES v. BAKEWELL & SALMON*, No. 1314a, ante.

## Part XX.—Third-Party Procedure.

**1369a.** ———.]—A passenger in a private motor car belonging to & driven by her husband sustained injuries as a result of a collision with a Glasgow Corpn. tramway car. She sued the corpn. for damages on the ground of negligence on the part of a servant of the corpn. In their pleadings the corpn. averred that the husband was solely to blame for the accident. After the close of the pleadings the corpn., in terms of the Rules of the Ct. of Session, 1934, proposed a counter-issue of negligence on the part of the husband & asked for an order for service of a third party notice upon him. The ct. held that the corpn. had not relevantly pleaded a right of contribution against the husband to bring the case within the rules, whereupon the corpn. asked for leave to amend their pleadings by adding averments of an alternative case alleging that, on the assumption that their servant was negligent,

the collision was materially contributed to by the negligence of the husband, against whom the corpn. claimed a right of contribution, relief, or indemnity. There is a decision of the Second Division of the Ct. of Session against the right of the wife to recover from the husband in such a case & the addition of the husband as third party would probably necessitate the case being taken to the House of Lords:—*Held*: this was not a case in which the discretion of the ct. should be exercised in favour of allowing a third party notice to be served. Leave to amend the pleadings was, therefore, refused & applts.' proposed counter-issue was disallowed.—*GLASGOW CORPN. v. ROBERTSON (OR CAMERON)*, [1936] 2 All E. R. 173, H. L.

**1478.** *Add. Citations*:—[1932] 2 Ch. 122; 101 L. J. Ch. 321; 147 L. T. 185, C. A.; *affd.*, 49 T. L. R. 94, H. L.

## Part XXIV.—Amendment.

**1549a.** *Erroneous award of interest.*]—As it now stands, the motion raises the point whether interest is payable or ought to be ordered to be paid upon items of estimated repairs & estimated demurrage, in circumstances where *ex concessis* no expenditure of any kind has been incurred at the date of the report. . . .

I am inclined to think that I could have acted under this Order [R. S. C., Ord. 28, r. 11] although I have preferred to deal with the matter as a question of principle raised by special leave after the expiry of the time allowed for objection to the registrar's report (LANGTON, J.).—*THE NAPIER STAR*, [1933] P. 137, 142; 102 L. J. P. 57; 149 L. T. 359; 49 T. L. R. 342; 18 Asp. M. L. C. 400.

**1566a.** ——— Judgment in form against married

woman—Woman in fact widow.]—Deft. was sued, & judgment was obtained against her, as Mrs. A., a married woman, the judgment being in the form settled in *Scott v. Morley*. In fact, deft. was not Mrs. A. or a married woman, but was Mrs. W., a widow, she having kept back from, & actively misrepresented to, the ct. her real name & status. On the real facts being ascertained pltf. applied by summons to the master asking that the judgment should be altered to a personal judgment against deft. as Mrs. W., a widow:—*Held*: there was no jurisdiction to amend the judgment either under the slip rule or under the inherent jurisdiction of the ct., inasmuch as the judgment had been intentionally given in the form it was.—*MACCARTHY v. AGARD*, [1933] 2 K. B. 417; 102 L. J. K. B. 753; 149 L. T. 595, C. A.

## Part XXVII.—Payment into and out of Court and Tender.

R. S. C., Ord. XXII. The following Rules of Order XXII. shall be re-numbered in the manner shown:—

Present number of Rule.	Future number of Rule.
10	7
11	8
12	9
12A	10
12B	11
13	12
14	13
15	14
15A	15
18A	19
19	20

Rules 1, 2, 3, 4, 5, 6, 7, 8, 8A, 9, 20 and 22 of Order XXII shall be revoked and the following Rules shall be substituted therefor:—

1.—(1) In any action for a debt or damages or in an admiralty action the defendant may at any time [after appearance] upon notice to the plaintiff pay into court a sum of money in satisfaction of the claim or (where several causes of action are joined in one action) in satisfaction of one or more of the causes of action; provided that with a defence setting up tender before action the sum of money alleged to have been tendered must be brought into court.

(2) Where the money is paid into court in satisfaction of one or more of several causes of action the notice shall specify the cause or causes of action in respect of

which payment is made and the sum paid in respect of each such cause of action, unless the Court or a Judge otherwise order.

(3) The notice shall be as in Form 3 in Appendix B, and shall state whether liability is admitted or denied, and receipt of the notice shall be acknowledged in writing by the plaintiff within three days.

2.—(1) Where money is paid into court or, where more than one payment into court has been made, within seven days of the receipt of the notice of the last payment into court under Rule 1, the plaintiff may, within seven days of the receipt of the notice of payment into court, accept the whole sum or any one or more of the specified sums in satisfaction of the claim or in satisfaction of the cause or causes of action to which the specified sum or sums relate, by giving notice to the defendant in Form 4 in Appendix B; and thereupon he shall be entitled to receive payment of the accepted sum or sums in satisfaction as aforesaid.

(The words in italics added by R. S. C. (No. 2), 1936.)

(2) Payment shall be made to the plaintiff or on his written authority to his solicitor, and thereupon proceedings in the action or in respect of the specified cause or causes of action (as the case may be) shall be stayed.

(3) If the plaintiff accepts money paid into court in satisfaction of his claim, or if he accepts a sum or sums paid in respect of one or more of specified causes of action, and gives notice that he abandons the other cause or causes of action, he may, after four days from payment-out and unless the Court or a Judge otherwise order, tax his costs incurred to the time of payment into court, and forty-eight hours after taxation may sign judgment for his taxed costs.

(4) [A plaintiff in an action for libel or slander who takes money out of court may apply by summons to a Judge in Chambers for leave to make in open court a statement in terms approved by a Judge.]

(5) This rule does not apply to admiralty actions or to an action or cause of action to which a defence of tender before action is pleaded.

3.—If the whole of the money in court is not taken out under Rule 2, the money remaining in court shall not be paid out except in satisfaction of the claim or specified cause or causes of action in respect of which it was paid in and in pursuance of an order of the Court or a Judge, which may be made at any time before, at or after trial.

4.—(1) Money may be paid into court under Rule 1 by one or more of several defendants sued jointly or in the alternative, upon notice to the other defendant or defendants.

(2) If the plaintiff elects within seven days after receipt of notice of payment into court to accept the sum or sums paid into court, he shall give notice as in Form 4 in Appendix B to each defendant.

(3) Thereupon all further proceedings in the action or in respect of the specified cause or causes of action (as the case may be) shall be stayed, and the money shall not be paid out except in pursuance of an order of the Court or a Judge dealing with the whole costs of the action or cause or causes of action (as the case may be).

5.—A plaintiff or other person made defendant to a counterclaim may pay money into court in accordance with the foregoing Rules, with the necessary modifications.

6.—Except in an action to which a defence of tender before action is pleaded or in which a plea under the Libel Acts, 1843 and 1845, has been filed, no statement of the fact that money has been paid into court under the preceding Rules of this Order shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the Judge or Jury until all questions of liability and amount of debt or damages have been decided, but the Judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into Court and the amount of such payment." (Substituted by R. S. C. (No. 1), 1933; the words in square brackets added or substituted by R. S. C. (No. 1), 1934.)

**1594a. Lump sum—Several causes of action—Allocation—When necessary.]**—Where in an action for infringement of copyright pltf. claims damages for infringement, damages for detention & damages for conversion, deft. can, under R. S. C., Ord. 22, r. 1 (1) & (2), pay into ct., with denial of liability, one sum in respect of the whole action, without specifying the cause of action.—TALLEN v. COLDWELL, [1938] Ch. 653; [1938] 2 All E. R. 107; 107 L. J. K. B. 230; 158 L. T. 347; 54 T. L. R. 564; 82 Sol. Jo. 294.

**1615a. Offer by joint tortfeasor to pay proportion of liability.]**—The ct. or a judge has no power under R. S. C., Ord. 30, r. 2, to make

an order giving one deft. in an action for negligence leave to write to another deft. making an offer on a percentage basis to pay such damages as may be awarded, such notice to be treated as a payment into ct. in third-party proceedings between defts.—SIGLEY v. HALE, [1938] 2 K. B. 630; [1938] 3 All E. R. 87; 107 L. J. K. B. 497; 159 L. T. 184; 54 T. L. R. 967; 82 Sol. Jo. 493, C. A.

**1646a. ———.]**—Defts. in an action against them for libel paid £525 into ct. under R. S. C., Ord. 22, r. 1, with an admission of liability. Pltf., acting upon R. S. C., Ord. 22, r. 5, took the money out of ct. & went on with his action. At the hearing the jury awarded pltf. one farthing damages. Pltf. claimed to retain the money taken out, on the ground that as it had been taken out of ct. before trial the ct. had no power to order its return:—*Held*: (1) the money in question was now the property of pltf. & that the ct. had no power to order its return to defts.; (2) pltf. was entitled to his costs of action up to the date of payment in.

(3) *Semble*: when deft. has paid money into ct. with an admission of liability pltf. may take out the money at any time before the conclusion of the trial.

(4) *Semble*: the ct. in such circumstances has no power to allow a deft. to amend his pleadings by denying liability, revoking payment into ct. & pleading justification after pltf. has taken the money out of ct.—MORRIS v. BAINES & Co., LTD., [1933] 1 K. B. 540; 102 L. J. K. B. 629; 148 L. T. 428; 49 T. L. R. 196; 77 Sol. Jo. 84.

**1649a. Sum taken out before verdict—Lower amount awarded by jury—No jurisdiction to order repayment.]**—MORRIS v. BAINES & Co., LTD., No. 1646a, *ante*.

**1649b. ———.]**—No jurisdiction to order amendment of pleadings.]—MORRIS v. BAINES & Co., LTD., No. 1646a, *ante*.

**1649c. Libel—Application for leave to make statement in open court.]**—An application under R. S. C., Ord. XXII., r. 2 (4), must be made by summons served upon deft., & not *ex parte*; the summons, though heard in Chambers, should be addressed to the judge in charge of the list in which the particular action appears; such an application is a proceeding in the Supreme Ct. within R. S. C., Ord. LXV., r. 1, & therefore the judge who hears the application has jurisdiction to deal with the costs incident thereto.—WOLSELEY v. ASSOCIATED NEWSPAPERS, LTD., [1934] 1 K. B. 448; 103 L. J. K. B. 188; 150 L. T. 347; 50 T. L. R. 143, C. A.

**1658a. ———.]**—MORRIS v. BAINES & Co., LTD., No. 1646a, *ante*.

**1662a. ———.]**—Two defendants—Form of order.]—ENGLISH v. BLOOM & LONDON PASSENGER TRANSPORT BOARD, SIEGENBERG v. BLOOM & LONDON PASSENGER TRANSPORT BOARD, No. 1019a, *ante*.

**1671a. Death of plaintiff—Application for payment out by execution—What order made.]**—H., a widow, on Oct. 12, 1934, issued a writ against deft., S., claiming damages for personal injuries. Deft. duly appeared to the writ, & on Nov. 13 the statement of claim was delivered. On Nov. 19 deft. paid into ct. a sum of money with a denial of liability.

Under the Rules of Ct. pltf. was entitled within seven days to take that sum out in satisfaction, but on Nov. 26 she died from a cause not due to the accident. Her exor., having been substituted as pltf., applied by summons for the payment out of the money :—*Held* : no order would be made except that the money should remain in ct.—*DAWSON v. SPAUL* (1935), 152 L. T. 444 ; 51 T. L. R. 247 ; 79 Sol. Jo. 162.

**1674a.** ———.—Pltf. & deft. owned adjoining properties. Deft., wishing to rebuild his property, obtained leave from pltf. to underpin pltf.'s wall which abutted upon deft.'s building. Deft.'s new building was to have girders upon a steel cage, & to support this steel framework it was necessary to place stanchions at intervals along the boundary. Where these stanchions were placed deft. extended the concrete foundations some 20 ins. beyond pltf.'s wall into pltf.'s land :—*Held* : the permission to underpin pltf.'s wall did not authorise the extension of the concrete foundations into pltf.'s land, & this extension amounted to a trespass.

(2) Before trial, deft. paid £100 into ct. with a denial of liability. At the trial pltf. recovered £31 10s. damages :—*Held* : pltf. ought to have his costs of the action up to the time of payment in, & the subsequent costs of the issue of trespass. Deft. should have the costs since payment in of the issue as to damages.—*WILLCOX v. KETTEL*, [1937] 1 All E. R. 222.

**1701a.** ———.—**Consent order for injunction—Payment into court by defendant—Claim to injunction abandoned.**—Pltfs. in an action claimed an injunction to restrain defts. from continuing the erection of a building so as to be a nuisance or illegal obstruction to the ancient lights in pltfs.' premises. They also claimed damages. On Oct. 7, 1936, a motion by pltfs. for an injunction in the terms of the writ came before LEWIS, J., sitting as Vacation judge. The motion stood over till the trial of the action, defts. giving a limited undertaking as to building & pltfs. the usual cross-undertaking in damages ; the costs of the motion were expressly reserved. On Nov. 4 defts. paid into ct. the sum of £300, but denied that pltfs. were entitled to an injunction. On Nov. 12 pltfs. accepted the £300 & abandoned their claim to an injunction. On Nov. 26, 1936, the case came before FARWELL, J., on the question of costs only & pltfs.' cross-undertaking in damages. His Lordship ordered that it should be referred to the Taxing Master to tax : (1) the costs of pltfs. down to Nov. 4, 1936, allowing such costs as would have been incurred if a statement of claim had been delivered ; (2) the costs of defts. of the motion ; these two sets of costs to be set off & the balance paid by the party from whom the balance should be certified to be due. He further ordered

that an inquiry should be made whether the defts. had sustained any & if so what damages by reason of their undertaking in the order of Oct. 7, which pltfs. ought to pay according to their undertaking, & that the costs of the inquiry should be reserved. On appeal :—*Held* : defts. by their payment into ct. of the £300 having admitted their liability, pltfs. were entitled to be paid their costs reserved by the order of Oct. 7, & defts. were not entitled to an inquiry as to the damages sustained by them by reason of their having given the undertaking they did at the hearing of the motion.—*WILTSHIRE BACON CO. v. ASSOCIATED CINEMA PROPERTIES, LTD.*, [1938] Ch. 268 ; [1937] 4 All E. R. 80 ; 107 L. J. Ch. 49 ; 157 L. T. 467 ; 54 T. L. R. 28 ; 81 Sol. Jo. 900, C. A.

#### SECT. 9.—PAYMENT INTO COURT UNDER ORDER OR CERTIFICATE—APPROPRIATION OF PAYMENT.

(p. 495).

**R. S. C., Ord. XXII., r. 11.** In Rule 8 of Order XXII. the words "by notice in writing" shall be substituted for the words "by his pleading"; and the words "by his pleading" shall be inserted after the words "or if he pleads a tender may" (*Amended by R. S. C. (No. 1), 1934*)

**1735a. R. S. C., Ord. XXII., r. 6 —Whether directory or imperative.**—A judge, at the trial of an action in the High Ct. without a jury for personal injuries, by his oral judgment gave judgment for pltf. for £50 damages with costs. He was then informed that there had been a payment of £20 into ct. He then gave pltf. such costs as would be awarded if the action had been brought in the county ct. On the following day an application was made to the judge with regard to the costs. The judge then said that he thought that £50 damages was excessive & ordered that pltf. recover from deft. £35 damages with costs to be taxed on the county ct. scale. At that time the judgment had not been drawn up. On an appeal by pltf. :—*Held* : R. S. C., Ord. XXII., r. 6, was directory & not compulsory, & if the fact that there had been a payment into ct. was disclosed to the judge before he delivered his judgment the rule did not compel the judge to refuse to continue to hear the case, but he had a discretion, if he were of opinion that the statement as to payment in could not reasonably be calculated to cause any miscarriage of justice, to allow the case to proceed, & if he did so that did not afford any ground upon which the Ct. of Appeal could order a new trial ; & further the rule did not interfere with the power of a judge to alter his judgment at any time before the judgment had been drawn up & perfected.—*MILLENSTED v. GROSVENOR HOUSE (PARK LANE), LTD.*, [1937] 1 K. B. 717 ; [1937] 1 All E. R. 736 ; 106 L. J. K. B. 221 ; 156 L. T. 383 ; 53 T. L. R. 106 ; 81 Sol. Jo. 198, C. A.

## Part XXVIII.—Discontinuance of Action or Withdrawal of Part.

**1738a.** ———.—**Notice to deliver affidavit of documents.**—A formal notice to deliver an affidavit of documents given by a pltf.'s solrs., after receipt of defence, is not "any other

proceeding in the action" within Ord. 26, r. 1, & a subsequent notice of discontinuance by pltf. is valid. It follows that special terms (*e.g.* as to prohibiting pltf. from bring-

ing another action) cannot be imposed upon pltf.—*MUNDY v. BUTTERLEY Co., LTD.*, [1932] 2 Ch. 227; 102 L. J. Ch. 23; 148 L. T. 132.

1753a. —.]—Pltf. complained that defts. had infringed the copyright in a book he had written. Correspondence took place between the parties from Oct. 12, 1937, up to Nov. 8, 1937, on which date defts. gave an undertaking to keep accounts, on the understanding that pltf. would not ask for an injunction. On Jan. 22, 1938, a writ was issued claiming damages for infringement of copyright. No statement of claim was ever delivered, & on Apr. 8, 1938, the action was dismissed with costs for want of prosecution, no statement of claim having been delivered within three months of the issue of the writ. In the meantime, defts. had been put to considerable expense in the preparation of their defence,

& before the taxing master they claimed £420 in this respect. The master, who was apparently influenced by the fact that no statement of claim had been delivered, reduced this item to £26 5s. On appeal, the judge remitted the matter to the taxing master, directing him to allow the expenses incurred up to Nov. 8, 1937. Both parties appealed:—*Held*: this accusation of breach of copyright necessitated the making of very close & careful inquiries. These would be no less necessary in fighting the action for damages than in opposing proceedings for an injunction. The costs had, therefore, been properly incurred, & were recoverable; & the appeal must be allowed, as the taxing master must have proceeded on a wrong principle.—*SCHEFF v. COLUMBIA PICTURES CORPN., LTD.*, [1938] 4 All E. R. 318; 82 Sol. Jo. 1029, C. A.

## Part XXXI.—Summons for Directions.

### SECT. 1.—SUMMONS.

(p. 506.)

R. S. C., Ord. XXX., r. 1. Rule 1 of Order XXX. shall be amended as follows:—

(1) Paragraphs (a) and (b) shall be revoked and the following paragraph shall be substituted therefor:—

“(a) Within seven days from the time when the pleadings shall be deemed to be closed, the plaintiff shall take out a summons for directions returnable in not less than seven days.”

(2) Paragraph (c) shall be lettered “(b).”

(3) In paragraph (d) the words “to actions in which the writ is specially indorsed under Order III., Rule 6” shall be omitted, and the following words shall be substituted therefor:—

“to actions in which the plaintiff has applied for judgment under Order XIV. and directions have been given, or to actions in which an application for transfer to the Commercial List is pending, or in which transfer to such List has been ordered, [or to actions for infringement of a patent.]”

(4) Paragraph (d) so amended shall be lettered “(c).” (*Amended by R. S. C. (No. 1), 1933; the words in square brackets added by R. S. C. (No. 1), 1934.*)

### SECT. 2.—INTERLOCUTORY PROCEEDINGS—APPLICATION OF NEW PROCEDURE.

(p. 507.)

R. S. C., Ord. XXX., r. 2. In Rule 2 of Order XXX. after

the words “place and mode of trial” there shall be inserted the words “and the mode by which particular facts may be proved at the trial.” (*Added by R. S. C. (No. 1), 1933.*)

### SECT. 7.—ORDER AS TO EVIDENCE OF PARTICULAR FACT.

(p. 509.)

R. S. C., Ord. XXX., r. 7. In Rule 7 of Order XXX. after the words “on the hearing of the summons” there shall be inserted the words “or at the trial,” and after the words “shall be given” there shall be inserted the words “at the trial.” (*Added by R. S. C. (No. 1), 1933.*)

### SECT. 8.—FAILURE OF PLAINTIFF TO APPLY FOR DIRECTIONS.

(p. 509.)

R. S. C., Ord. XXX., r. 8. In Rule 8 of Order XXX. the words “within 14 days from the entry of the defendant’s appearance” shall be omitted and the words “within seven days from the time when the pleadings shall be deemed to be closed” shall be substituted therefor. (*Substituted by R. S. C. (No. 1), 1933.*)

## Part XXXII.—Discovery, etc.

### SECT. 9.—DISCOVERY OF DOCUMENTS.

(p. 511.)

R. S. C., Ord. XXXI., r. 12A. After Rule 12 of Order XXXI. the following Rule shall be inserted and shall stand as Rule 12A:—

“12A. Where in any action arising upon a Marine Insurance Policy an application for discovery of documents is made by the insurer, the following provisions shall apply:—

(a) On the hearing of the application, the court or judge may, subject as is provided in the next paragraph, make an order in accordance with Rule 12 or Rule 14 of this Order.

(b) Where in any case the court or judge is satisfied, either on the original application or on a subsequent application, that it is necessary or expedient, having regard to the circumstances of the case, to make an order for the production of ship’s papers, the court or judge may make such an order in the Form No. 19 in Appendix K.

(c) In making an order under this Rule the court or judge may impose such terms and conditions as to staying proceedings or otherwise as the court or judge in its or his absolute discretion shall think fit.

(d) Rule 13A of this Order shall not apply to any application made under this Rule.” (*Added by R. S. C. (No. 3), 1936.*)

### SECT. 10.—AFFIDAVIT OF DOCUMENTS.

(p. 511.)

R. S. C., Ord. XXXI., r. 13. In Rule 13 of Order XXXI. for the words “a party against whom such order as is mentioned in the last preceding Rule has been made” there shall be substituted the words “any person against whom an order for discovery of documents has been made under Rule 12 or under paragraph (a) or paragraph (b) of Rule 12A of this Order,” and after the words “and it shall” the words “except in the case of an order made under paragraph (b) of Rule 12A,” shall be inserted. (*Substituted by R. S. C. (No. 3), 1936.*)

## Part XXXV.—Special Case.

### SECT. 5.—LEAVE WHERE PARTY UNDER DISABILITY.

(p. 523.)

R. S. C., Ord. XXXIV., r. 4. The following amendments shall be made in Rule 4 of Order XXXIV. :—

- (a) the words "a married woman (not being a party thereto in respect of her separate property or of any separate right of action by or against her)" shall be omitted and the word "an" shall be substituted therefor,

- (b) after the words "affect the interest of such" the words "married woman" shall be omitted. (*Amended by R. S. C. (No. 2), 1936.*)

### SECT. 6.—FORM OF ENTRY.

(p. 523.)

R. S. C., Ord. XXXIV., r. 5. In Rule 5 of Order XXXIV. the words "married woman" shall be omitted. (*Deleted by R. S. C. (No. 2), 1936.*)

## Part XXXVI.—District Registries.

### SECT. 5.—PARTICULAR PROCEEDINGS IN DISTRICT REGISTRY.

(p. 526.)

R. S. C., Ord. XXXV., r. 5. In paragraph (a) of Rule 5 of Order XXXV. the expression "Order XVI., Rules 6 & 9" shall be substituted for the expression "Order XVI., Rules 50 and 51." (*Substituted by R. S. C. (No. 1), 1937.*)

**1924a.** — **Contents of order.]**—In proceedings in a District Registry, where an order for any account or inquiry is made, a direction is to be inserted in the order either that the proceedings are to be transferred to London or that the account or inquiry is to proceed in the District Registry. It is the duty of the party obtaining the order to ask for this direction.—**PRACTICE NOTE**, [1932] W. N. 252 ; 174 L. T. Jo. 403.

### SECT. 26.—PROCEEDINGS BY POOR PERSONS UNDER MATRIMONIAL CAUSES ACT.

(p. 531.)

R. S. C., Ord. XXXVA., r. 3A. The following Rule shall be inserted after Rule 3 of Order XXXVA. and shall stand as Rule 3A of that Order :—

"3A.—(1) Where an appearance to a petition has been entered by a party named in the petition and a copy of an answer by that party has not been delivered within the time prescribed or allowed, the petitioner's solicitor may apply to the District Registrar for a search to be made in the Court Minutes.

(2) If an answer has not been filed, the District Registrar shall thereupon issue a certificate as in Form No. 6 in Appendix M, and shall file a copy thereof, which shall be in substitution for and of the same force as an affidavit of search for answer." (*Added by R. S. C. (No. 2), 1933.*)

## Part XXXVII.—Trial.

### SECT. 1.—FIXING THE MODE AND PLACE OF TRIAL.

#### SUB-SECT. 1.—IN GENERAL (p. 533).

R. S. C., Ord. XXXVI., r. 1. The following provision shall be inserted at the end of Rule 1 of Order XXXVI. :—

"provided that this Rule and Rules 1A, 2, 3, 4, 5, 6 and 7 of this Order shall have effect subject to the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933, and an application under section 6 of that Act for an order that an action assigned to the King's Bench Division or a question arising in such an action shall be tried with a jury, if not made at the hearing of the summons for directions under Order XXX. or the hearing of the summons for leave to enter judgment under Order XIV., may be made at any other time, so however that in any case the application is not made later than four days after notice of trial has been given." (*Added by R. S. C. (No. 3), 1933.*)

**1975.** After this case add :—

—.]—*See* Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 6.

**1975a.** — **Discretion of judge.]**—In an action brought in the King's Bench Division of the High Ct. by a young girl against a railway co. for damages for severe personal injuries alleged to have been caused by the negligence of defts.' servants, the judge at Chambers made an order, affirming an order of the Master, that the action should be tried by a judge & jury. Defts. appealed to the Ct. of Appeal for an order setting aside the order of the judge & directing that the action should be tried by a judge alone :—*Held* : under the appropriate provisions of R. S. C., Ord.

XXXVI., rr. 1-7, in their present form, that is to say as altered & rendered subject to Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 6, by the addition to rule 1 of the proviso thereto, & under that sect. it was completely within the discretion of the judge to order the action to be tried either with or without a jury, & the ct. would not interfere with the order which he had made in the exercise of that discretion.—*HOPE v. GREAT WESTERN RY. CO.*, [1937] 2 K. B. 130 ; [1937] 1 All E. R. 625 ; 106 L. J. K. B. 563 ; 156 L. T. 331 ; 53 T. L. R. 399 ; 81 Sol. Jo. 198, C. A.

**2016.** *Add. Citations* :—[1932] P. 98 ; 101 L. J. P. 36 ; 147 L. T. 40 ; 48 T. L. R. 469 ; 76 Sol. Jo. 433.

**2017a.** **Application of Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 6—Medical evidence.]**—*KEELING v. COOK* (1934), 78 L. Jo. 306, C. A.

**2035a.** — — —.]—When an action for slander was part heard without a jury, a second deft., who was a partner of the first deft., was added. The judge, who had partly heard the case, made an order that the case should be further heard before him without a jury after the necessary amended pleadings had been delivered. The second deft. applied for a jury. It was contended by plff. that, by R. S. C., Ord. 36, r. 1, a jury must be asked for not later than four days after notice of

trial has been given. It was admitted that no notice of trial had been given to the second deft., but it was suggested that, as he had acted upon the order for directions, he had adopted it, & thereby waived any notice of trial:—*Held*: as the second deft. had never been given any notice of trial, it could not be said that the application for a jury had been made more than four days after notice of trial had been delivered. Deft. was therefore entitled to a jury.—*SALVALENE LUBRICANTS, LTD. v. DABBY*, [1938] 1 All E. R. 221; 82 Sol. Jo. 111, C. A.

**2036a. Allegations of fraud amounting to breach of trust—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 6.]**—In an action for breach of a separation agreement pltf. alleged that she had been induced by false pretences & undue influence amounting to duress to enter into agreements to reduce the amount payable under the separation agreement. The master ordered the case to be tried with a jury. Defts. appealed to a judge in chambers asking that it should be tried by a judge alone or transferred to the Ch. Div. The judge ordered that the case be transferred to the Ch. Div. Pltf. appealed:—*Held*: when properly examined the allegations of fraud appeared really to be allegations of breaches of trust & the judge had exercised his discretion properly.—(*CECIL-WRIGHT v. McCULLOCH*, [1936] 3 All E. R. 518, C. A.

#### SECT. 4.—NOTICE AND ENTRY OF TRIAL.

##### SUB-SECT. 1.—NOTICE OF TRIAL BY PLAINTIFF (p. 516).

R. S. C., Ord. XXXVI., r. 11. Rule 11 of Order XXXVI. shall be revoked and the following Rule shall be substituted therefor:—

"11. Notice of trial may be given in any cause or matter by the plaintiff or other party in the position of plaintiff at the times following:—

- (a) in actions to which Rule 1 of Order XXX. applies and in actions in the New Procedure list, at any time after an order made on the summons for directions or after an order under Order XIV. giving directions as to the place and mode of trial;
- (b) in other proceedings, at any time after a reply has been delivered or after the time for delivery of a reply has expired." (*Substituted by R. S. C. (No. 3), 1933.*)

**2092a. Form of order.]**—A firm of merchants insured goods against loss between Constantinople & London, warehouse to warehouse. The goods did not arrive & they claimed under the policy, alleging non-delivery & total loss, but not specifying a date of loss. The writ was issued in Oct. 1930, but pltf. did not ask for a date for trial until late in 1932. Thereafter they requested further adjournments, & in Apr. 1933, the judge in chambers made an order adjourning the trial generally & ordering that if the action was not fixed for trial within six years from the date of the alleged loss the action stand dismissed. In Apr. 1936, pltf. applied again for a date for trial & another judge gave a date in Oct. 1936. Defts. appealed on the ground that, as the action had not been fixed for trial within six years from the latest date on which the loss could have occurred, May 14, 1930, it stood dismissed:—*Held*: an interlocutory order dismissing an action must be

absolutely precise in its terms; the date with reference to which the dismissal of the action is to be determined, in this case the "date of the alleged loss," must be a definite date & not a period; "the date of the alleged loss" must be a date which is to be found in the pleadings; the ct. would not try an issue of fact or of law to ascertain the date in question; the order fixed no ascertainable date & was inoperative to effect a dismissal of the action.—*ABALIAN v. INNOUS*, [1936] 2 All E. R. 834; 80 Sol. Jo. 594, C. A.

**2171a. Master.]**—Pltf. claimed in 1936 to be indemnified from certain losses, the latest of which accrued to him in 1929, by reason of an agreement made between his predecessor in title & deft. Deft. pleaded that the statement of claim disclosed no cause of action which was not statute-barred & pltf. did not deliver a reply. The master ordered this issue to be tried as a preliminary point of law. With the consent of both parties, the matter was heard by the same master acting as a special referee. He decided that all claims were statute-barred, & dismissed the action. He also refused to allow pltf. to deliver a reply or to have an adjournment. Pltf. appealed to the Div. Ct., who held that the statement of claim was ambiguous, & did not allege when any cause of action arose; & that the master should not have ordered a trial of the preliminary point, but should have allowed pltf. to deliver a reply. The master's order dismissing the action was set aside, & pltf. given leave to deliver a reply or to amend his statement of claim. The master's order for the trial of the preliminary point was also ordered to be set aside. Deft. appealed to the Ct. of Appeal. Pltf. contended that this was an appeal against a final judgment, & that, therefore, under Judicature Act, 1935 (c. 2), s. 1 (f), the leave of the Div. Ct. to appeal was necessary, which leave had been refused:—*Held*: (1) the order made by the Div. Ct. was interlocutory, & not final, so that leave to appeal was unnecessary; (2) the statement of claim made it clear that all alleged causes of action arose more than 6 years before the delivery of the writ; (3) the refusal to allow an adjournment was a matter for the master's discretion, which should not be interfered with; (4) Div. Ct. had no jurisdiction to deal with the master's order for the trial of the preliminary point as the appeal on this order lay to a judge in chambers.—*KRONSTEIN v. KORDA*, [1937] 1 All E. R. 357; 81 Sol. Jo. 176, C. A.

**2228a. Submission of no case.]**—Observations as to the inconvenience of the practice of asking a judge, when sitting without a jury, to rule at the conclusion of the evidence of the party on whom the onus of proof lies, that there is no case to answer.—*ALEXANDER v. RAYSON*, [1936] 1 K. B. 169; 105 L. J. K. B. 148; 154 L. T. 205; 52 T. L. R. 131; 80 Sol. Jo. 15, C. A.

*Annotation*:—*Consd. Muller & Co.'s Algemeene Iron & Coal Co., Ltd., Muller & Co. N. V. etc. v. Ebbw Vale Steel, Iron & Coal Co., Ltd. (Consolidated)* [1936] 2 All E. R. 1363.

**2228b. Whether undertaking not to call further evidence obligatory.]**—Contracts were entered into for the delivery by pltf. to defts. of certain monthly quantities of iron ore. Defts. requested pltf. to suspend



chartering instructions until further instructions were given. In an action for damages for non-acceptance of the iron ore outstanding for delivery, *pltf.*s. alleged that by certain letters *defts.* had repudiated the contracts & had refused to give further orders for delivery or to accept delivery of any of the ore. *Defts.* submitted that there was no evidence of any repudiation by them of their obligations under the contracts, & no evidence, therefore, of breach of contract. *Pltf.*s. contended that the judge should not deal with this submission except upon the terms that *defts.* should undertake not to call any further evidence upon any question of fact. In the event of their submission being wrong, *defts.* would have relied upon a clause in the contracts which, they said, relieved them from any obligation to take the undelivered balance of the ore, & for this ground of defence they would have been desirous of calling further evidence:—*Held*: the judge was not bound to deal with the submission only upon the terms that *defts.* should undertake not to call any further evidence upon any question of fact; it is in the judge's discretion whether he will deal with the submission or wait until he has heard all the evidence on both sides; in the present case the submission should be dealt with.—*MULLER & Co.'s ALGEMEENE, ETC. v. ERBW VALE STEEL, IRON & COAL CO., LTD., MULLER & Co., N. V., ETC. v. ERBW VALE STEEL, IRON & COAL CO., LTD. (CONSOLIDATED)*, [1936] 2 All E. R. 1363; 155 L. T. 351; 52 T. L. R. 655; 80 Sol. Jo. 722.

### SUB-SECT. 3.—REFEREES.

#### A. Distribution of Business (p. 567).

**R. S. C., Ord. XXXVI.** The following amendments shall be made in Order XXXVI:—

(a) In Rule 45—

(i.) after the word "order" where it first occurs there shall be inserted the words "or a submission under the Arbitration Act, 1889"; and

(ii.) after the word "order," wherever else it occurs there shall be inserted the words "or submission."

(b) In Rule 46, after the word "order" wherever it occurs there shall be inserted the words "or submission."

(c) In Rule 47—

(i.) after the word "order" there shall be inserted the words "or submission"; and

(ii.) the words "the clerk" shall be omitted and the following words shall be substituted therefor:—"the order or submission shall be produced to the clerk as in the last preceding Rule provided, and he."

(d) The following Rule shall be inserted after Rule 47 and shall stand as Rule 47A.—

"47A. Where under Rule 46 or Rule 47 of this Order any business shall have been referred to any official referee, it shall forthwith be entered with the clerk of the official referee to whom it is so referred, and application shall be made to that official referee within fourteen days for directions as to fix the date of trial."

(e) The following Rules shall be inserted after Rule 47b and shall stand as Rules 47c and 47d:—

"47c. Any official referee shall have power to order the transfer of any business from himself to any other official referee, provided that no order shall be made under this Rule except with the consent of all parties to the business and of the official referee to whom it is to be transferred.

47d. In the absence of the official referee to whom any business is assigned or, with his consent, at any time, any interlocutory application may be made to any other official referee, who shall have

power to deal with the same and make any order thereon which could have been made by the official referee to whom the business was assigned." (R. S. C. (No. 1), 1937.)

#### B. Powers & Duties (p. 568).

**R. S. C., Ord. XXXVI, r. 48.** In Rule 48 the words from "He shall" to the end of the Rule shall be omitted. (*Deleted by R. S. C. (No. 1), 1937.*)

**2257a. Reference by order When granted.]**—*ULLSTROM v. NAAR* (1938), 82 Sol. Jo. 989, C. A.

#### F. Power to Submit Question to Court or State Facts Specially (p. 569).

**R. S. C., Ord. XXXVI, r. 52.** In Rule 52 the phrases "before the conclusion of any trial before him or" and "re-trial or" shall be omitted, and after the words "reference made to him" there shall be inserted the words "under Section 88 of the Act." (*Amended by R. S. C. (No. 4), 1932.*)

#### G. Power as to Questions or Issues of Fact (p. 570).

**R. S. C., Ord. XXXVI, r. 52A.** In Rule 52 the expression "to 51" shall be substituted for the expression "to 52", and the Rule shall stand as Rule 51A. (*Amended by R. S. C. (No. 4), 1932.*)

#### I. Adoption or Variation of Report (p. 570).

**R. S. C., Ord. XXXVI, rr. 54, 55.** In Rules 54 and 55 the phrase "section 88 of the Act" shall be substituted for the phrase "section 13 of the Arbitration Act, 1889." (*Amended by R. S. C. (No. 4), 1932.*)

**2286a. When inquisition set aside.]**—Suffering judgment by default in an action for use & occupation, amounts to an admission that *deft.* held a house of *pltf.*, who need not show that it was his house, & it lies upon *deft.* to prove that he did not occupy the particular house to which the attention of the jury has been directed. The *ct.* will not set aside an inquisition, on behalf of the *pltf.*, when he has not obtained a verdict for his full demand, though no evidence is given on one part of the demand, nor will *pltf.* be permitted to enter a *noli prosequi* as to that part.—*ANON.* (1815), 1 Chit. 644, n.

—.]—*See, also, DAMAGES*, Vol. XVII., p. 128, No. 363.

**2286b. Time of execution of writ.]**—*BEETKNIFE v. PACKINGTON (SIR H.)* (1729), 1 Barn. K. B. 233.

**2286c. —.]**—On notice to execute a writ of inquiry at a certain hour, the party is not tied down to the exact time fixed by the notice.—*WILLIAMS v. FRITH* (1779), 1 Doug. K. B. 198.

**2286d. Failure of sheriff to return Remedy.]**—Where a sheriff does not return in due time a writ of inquiry, the *ct.* will compel him by rule so to do.—*STOCKDALE v. HANSARD* (1840), 8 Dowl. 297.

**2286e. Appearance by counsel—Notice of—Sufficiency.]**—It is sufficient notice of a *pltf.*'s intention to appear before the sheriff by counsel on the execution of a writ of inquiry that *pltf.*'s attorney inform the attorney for the *deft.* of such intention. Had there been no intimation of such an intention, *deft.* should have applied to the sheriff to put off the execution of the writ of inquiry.—*ELLIOTT v. NICKLIN* (1818), 5 Price, 641.

**Proof of evidence at inquiry—Admissibility of Sheriff's minutes.]**—*See EVIDENCE*, Vol. XXII., p. 306, No. 2961.

**Special jury.]**—*See JURIES*, Vol. XXX., p. 261, No. 645.

## Part XXXVIII.—Trial of Matrimonial Causes or Assizes.

## SECT. 2.—UNDEFENDED CAUSES.

(p. 574).

2292a. Grounds for hearing at assizes.]—SIMPSON v. SIMPSON (1937), 81 Sol. Jo. 318.

## Part XXXIX.—Evidence.

## SUB-SECT. 8.—PROCEEDINGS UNDER NATIONAL HEALTH INSURANCE ACTS (p. 584).

R. S. C., Ord. XXXVII., r. 34B. In Rule 34B of Order XXXVII. the expression "section 163 of the National Health Insurance Act, 1936" shall be substituted for the expression "section 90 of the National Health Insurance Act, 1924." (*Substituted by R. S. C. (No. 1), 1937.*)

## Part XXXIXa.—Court Expert.

(Added by R. S. C. (No. 2), 1934.)

R. S. C., Ord. XXXVILA, r. 1. In any case which is to be tried without a jury involving any question for an expert witness the Court or a Judge may in his discretion at any time on the application of any party appoint an independent expert (to be called "the Court expert") to inquire and report upon any question of fact or of opinion not involving questions of law or construction (hereinafter called "the issue for the expert").

r. 2. The report so far as it is not accepted by all parties shall be treated as information furnished to the Court and shall be given such weight as the Court may think fit. The report shall be made in writing to the Court, together with such carbon or other copies as the Court may require, and copies of the report shall be forwarded by the proper officer to the parties or their solicitors.

r. 3. Any party shall be at liberty within 14 days after receipt of a copy of the report or such other time as the Court or Judge shall direct to apply for leave to cross-examine the Court expert on his report, and the Court or Judge shall on such application either (a) make an order for the cross-examination of the Court expert by all parties at the trial, he being called and sworn at such stage as the Court shall at the hearing direct, or (b) make an order for a like cross-examination before an Examiner at such time and place as the Court shall direct.

r. 4. The Court expert shall if possible be a person agreed between the parties, and failing agreement shall be nominated by the Court or Judge. The question or the instructions submitted or given to the Court expert, failing agreement between the parties, shall be settled by the Court or Judge.

r. 5. If the Court expert is of the opinion that any experiment or test of any kind is necessary to enable him to report in a satisfactory manner (other than any experiment or test of a trifling character), he shall communicate the fact to the parties or their solicitors and shall endeavour to arrange with them as to the expenses involved and as to the persons to attend and other similar matters. Failing agreement between the parties all such matters shall be determined by the Court or Judge.

r. 6. The Court or Judge may at any time direct the Court expert to make a further or supplemental report which shall be treated as annexed to his original report.

r. 7. The remuneration of the Court expert shall be fixed by the Court or Judge and shall include a fee for making the report, a fee for any supplementary report and a proper sum *per diem* for each day during which the presence of the Court expert may be required either in Court or before an examiner. The parties shall be jointly and severally liable to pay the remuneration so fixed without prejudice to the question by whom it shall be ordered to be paid as part of the costs of the action or proceeding. Provided however that in any case in which the appointment of a Court expert is opposed, the Court or Judge may require the party applying for the appointment to give such security for the remuneration of the Court expert as the Court or Judge may think proper as a condition of making the appointment.

r. 8. Any party shall be at liberty on giving reasonable notice before the trial to call, with regard to the issue for the expert, not more than one expert witness, provided that in exceptional cases and by the leave of the Court two or more expert witnesses may be called. Provided however that the costs of and occasioned by the calling of any such expert shall be specially dealt with by the Judge at the trial, and that no such costs shall be allowed to a successful party unless the Judge shall certify that the calling of such expert was reasonable and that his evidence has materially assisted the Court in determining the question or issue.

r. 9. In any case in which more than one issue for the expert shall arise the Court or a Judge may appoint more than one Court expert to inquire and report on the separate issues so arising, and these Rules shall apply to each Court expert so appointed.

r. 10. In taxing the costs incurred in proceedings in which a Court expert shall have been appointed such just and reasonable charges and expenses as appear to have been properly incurred in obtaining the advice of an expert (whether called as a witness or not) as to whether the action should be brought or defended or as to whether the report or reports of the Court expert should be accepted to any and what extent or as to the matters on which he might properly be cross-examined upon his report or reports, including if proper the attendance in Court of the expert so employed, are to be allowed.

r. 11. The word "Expert" in this Order shall include scientific persons, medical men, engineers, accountants, actuaries, architects, surveyors and other specially skilled persons whose opinions on any question relevant to the issues involved would be received by the Court.

## Part XL.—Affidavits and Depositions.

## SUB-SECT. 3.—CONTENTS OF AFFIDAVIT (p. 587).

R. S. C., Ord. XXXVIII., r. 3. In Rule 3 of Order XXXVIII., the words "except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted" shall be omitted, and the words:

"Provided that on interlocutory proceedings or with leave under Order XXX., Rule 7, an affidavit may contain statements of information and belief, with the sources and grounds thereof shall be substituted therefor." (*Amended by R. S. C. (No. 2), 1933.*)

## Part XLa.—Exhibits.

(Added by R. S. C. (No. 1), 1935.)

**R. S. C., Ord. XXXVIII., r. 1.** (1) The Associate shall take charge of every document or object put in as an exhibit during the trial of an action in the King's Bench Division, and shall mark or label every exhibit with a letter or letters indicating the party by whom the exhibit is put in (or where more convenient the witness by whom the exhibit is proved) and with a number, so that all the exhibits put in by a party (or proved by a witness) are numbered in one consecutive series.

(2) The Associate shall cause a list of all the exhibits in the action to be made in accordance with Form 82 in Appendix K.

(3) The list of exhibits when completed shall be attached to the pleadings and shall form part of the record of the action.

(4) For the purpose of this Order a bundle of documents may be treated and counted as one exhibit.

(5) In this Rule a witness by whom an exhibit is proved includes a witness in the course of whose evidence the exhibit is put in.

**r. 2.** It shall be the duty of every party who has put in any exhibit to apply to the Associate immediately after the trial for the return of the exhibit, and, so

far as is practicable regard being had to the nature of the exhibit, to keep it duly marked and labelled as before, so that in the event of an appeal to the Court of Appeal or the House of Lords, he may be able to produce the exhibit so marked and labelled at the hearing of the appeal in case he is required by the Court of Appeal or the House of Lords to do so.

**r. 3.** (1) Any party may apply for and on payment of the prescribed fee obtain an office copy of the list of exhibits for the purpose of an appeal to the Court of Appeal or the House of Lords or otherwise.

(2) Where there is an appeal to the Court of Appeal, the appellant shall include an office copy of the list of exhibits amongst the documents supplied to the proper officer of the Court of Appeal for the purpose of the appeal.

**r. 4.** (1) The provisions of this Order shall apply to actions tried at Assizes as they apply to actions tried in the King's Bench Division.

(2) The Clerk of Assize shall be responsible for seeing that the duties imposed by this Order on the Associate are carried out by one of the Circuit Officers.

## Part XLI.—New Trial.

**2345a.** —.]—Where it was not distinctly sworn that the disqualification of a juror, being a town councillor of the borough in which the cause was tried, was not discovered till after verdict, the ct. refused to grant a rule for a new trial.—*PEERMAIN v. MACKAY* (1845), 9 Jur. 491.

**2384a.** —.]—A judge has no right to nonsuit a pltf. on counsel's opening (LORD HANWORTH, M.R.).—*DESBOROUGH v. PORTSMOUTH* (1934), 27 B. W. C. C. 192, C. A.

**2401a.** —.]—In a suit to revoke probate of a will the jury found by a majority that testator was of unsound mind at the date of its execution:—*Held*: the verdict must be set aside as against the weight of evidence; the medical evidence being insufficient to support it, while the other evidence of incapacity related to irrelevant circumstances, & was contradicted by witnesses who deposed to actual transactions with the testator, & to his conduct & condition at the time of

executing his will.—*AITKEN v. McMECKAN*, [1895] A. C. 310, P. C.

**2405a.** —.]—When it is decided that a case is to be tried by a jury, that tribunal is the only judge of the facts, & no appellate tribunal can substitute its finding for that of the jury. The appellate ct. has a revising function to see, first, whether there is any evidence in support of the issue found by the jury; & secondly, whether the verdict can stand as being one which reasonable men might have come to. If on the latter question it is obvious that no verdict for pltf. on all the available evidence could be supported, the ct. may save the waste of time in ordering a new trial, which could have only one result, by ordering the verdict & judgment to be entered for deft.—*MECHANICAL & GENERAL INVENTIONS CO., LTD. & LEHWESS v. AUSTIN & AUSTIN MOTOR CO., LTD.*, [1935] A. C. 346; 104 L. J. K. B. 403; 153 L. T. 153, H. L.

## Part LII.—Writ of Possession.

### SECT. 1.—ENFORCEMENT OF JUDGMENTS OR ORDERS FOR RECOVERY OF POSSESSION BY WRIT.

(p. 650).

**R. S. C., Ord. XLVII., r. 1.** Rule 1 of Order 47 shall be revoked and the following Rule shall be substituted therefor:—

"1.—(1) A judgment or order that a party do recover possession of any land may by leave obtained *ex parte*

application to the Court or a Judge supported by affidavit, be enforced by writ of possession in manner immediately before November 1, 1875, used in actions of ejectment in the Superior Courts of Common Law.

(2) Such leave shall not be given unless it is shown that all persons in actual possession of the whole or any part of the land have received such notice of the proceedings as may be considered sufficient to enable them to apply to the Court for relief or otherwise." (Substituted by R. S. C. (No. 2), 1936.)

## Part XLIII.—Entry of Judgment.

**2512a.** — Judgment by consent—Death of defendant.—Where by the terms of the judge's order, made by consent, a pltf. is to be at liberty to sign judgment for debt & costs, on a particular day, but before that day deft. dies, the ct. will not permit pltf. to enter judgment *nunc pro tunc*, as of the day when the consent was given.—*WILKINS v. CAUTY* (1842), 1 Dowl. N. S. 855; 11 L. J. Q. B. 191; 6 Jur. 807.

**2539.** *Add. Citations* :—[1932] 2 K. B. 87; 101 L. J. K. B. 701; 147 L. T. 399; 48 T. L. R. 292; 78 Sol. Jo. 249.

**2552.** For “No. 2439, *ante*,” read “No. 2539, *ante*.”

**2561.** For “No. 2439, *ante*,” read “No. 2539, *ante*.”

**2563.** For “No. 2439, *ante*,” read “No. 2539, *ante*.”

## Part XLIV.—Reciprocal Enforcement of Judgments.

### SECT. 17.—FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933 (c. 13).

(Added by R. S. C. (No. 2), 1933.)

#### SUB-SECT. 1.—APPLICATION FOR REGISTRATION.

R. S. C., Ord. XLII., r. 1. An application under section 2 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (in this Order referred to as “the Act”) to have a foreign judgment to which Part I. of the Act applies registered in the High Court of Justice may be made *ex parte* to the Court or a Judge.

#### SUB-SECT. 2.—EVIDENCE IN SUPPORT OF APPLICATION.

R. S. C., Ord. XLII., r. 2. (1) An application for registration shall be supported by an affidavit of the facts—

- (a) exhibiting a certified copy of the judgment issued by the original court and authenticated by its seal and a translation of the judgment [certified by a Notary Public] authenticated by affidavit.
- (b) stating to the best of the information and belief of the deponent—
  - (i) that the applicant is entitled to enforce the judgment;
  - (ii) as the case may require, either that at the date of the application the judgment has not been satisfied, or, if the judgment has been satisfied in part, what the amount is in respect of which it remains unsatisfied;
  - (iii) that at the date of the application the judgment can be enforced by execution in the country of the original court;
  - (iv) that if the judgment were registered, the registration would not be, or be liable to be, set aside under section 4 of the Act.
- (c) specifying the amount of the interest, if any, which under the law of the country of the original court has become due under the judgment up to the time of registration;

and shall be accompanied by such other evidence with respect to the matters referred to in sub-paragraph (iii.) of paragraph (b) or paragraph (c) above as may be required having regard to the provisions of the Order in Council extending the Act to the country of the original court.

(2) Where the sum payable under the judgment is expressed in a currency other than the currency of the United Kingdom, the affidavit shall also state the amount which that sum represents in the currency of the United Kingdom calculated at the rate of exchange prevailing at the date of the judgment.

(3) The affidavit shall also state the full name, title, trade or business and the usual or last-known place of abode or of business of the judgment creditor and the judgment debtor respectively, so far as known to the deponent.

(4) Where a judgment is in respect of different matters, and some, but not all of the provisions of the judgment are such that if those provisions had been contained in separate judgments, those judgments could properly have been registered, the affidavit shall state the provisions in respect of which it is sought to register the judgment.

(The words in square brackets added by R. S. C. (No. 1), 1934.)

#### SUB-SECT. 3.—SECURITY FOR COSTS.

R. S. C., Ord. XLII., r. 3. Save as otherwise provided by any relevant Order in Council the Court may, in respect to an application for registration order the judgment creditor to find security for the costs of the application and of any proceedings which may thereafter be brought to set aside the registration.

#### SUB-SECT. 4.—TITLE OF AFFIDAVIT AND SUMMONS.

R. S. C., Ord. XLII., r. 4. The affidavit, if any, shall be intitled :—

“In the matter of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, and in the matter of a judgment of the (describing the Court) obtained in (describing the cause or matter) and dated the day of 19 ”

#### SUB-SECT. 5.—ORDER ON APPLICATION FOR REGISTRATION.

R. S. C., Ord. XLII., r. 5. (1) An order giving leave to register a judgment shall be drawn up by, or on behalf of, the judgment creditor.

(2) No such order shall require to be served on the judgment debtor.

(3) Every such order shall state the period within which an application may be made to be set aside the registration and shall contain a notification that execution on the judgment will not issue until after the expiration of that period.

(4) The Court or a Judge may, on an application made at any time while it remains competent for any party to apply to have the registration set aside, grant an extension of the period (either as originally fixed or as subsequently extended) during which an application to have the judgment set aside may be made.

#### SUB-SECT. 6.—REGISTER OF JUDGMENTS.

R. S. C., Ord. XLII., r. 6. There shall be kept in the Central Office by, or under the direction of, the senior Master of the King's Bench Division a register of the judgments order to be registered under the Act.

#### SUB-SECT. 7.—NOTICE OF REGISTRATION.

R. S. C., Ord. XLII., r. 7. (1) Notice in writing of the registration of a judgment must be served on the judgment debtor—

(a) if within the jurisdiction, by personal service as in the case of a writ of summons, unless some other mode of service is ordered by the Court or a Judge;

(b) if out of the jurisdiction, in accordance with the rules applicable to the service of a writ of summons out of jurisdiction, save that special leave to serve out of the jurisdiction shall not be required.

(2) The notice of registration shall state—

- (a) full particulars of the judgment registered and the order for registration; and
- (b) the name and address of the judgment creditor or of his solicitor or agent on whom, and at which, any summons issued by the judgment debtor may be served; and
- (c) the right of the judgment debtor to apply on the grounds provided in the Act to have the registration set aside; and
- (d) in accordance with the terms of the order giving leave to register, within what time from the date of service of the notice an application to set aside may be made.

SUB-SECT. 8.—ENDORSEMENT OF SERVICE.

R. S. C., Ord. XLII., r. 8. (1) Within three days from the day of service or within such extended period as may, in special circumstances, be allowed by order of a judge, the notice or a copy or duplicate thereof shall be endorsed by the person serving the same with the day of the month and of the week on which service was effected, and, if the notice is not so endorsed, the judgment creditor shall not be at liberty to issue execution on the judgment without the leave of the Court or a Judge.

(2) Every affidavit of service of any such notice shall state on what day such endorsement was made.

SUB-SECT. 9.—APPLICATION TO SET ASIDE REGISTRATION.

R. S. C., Ord. XLII., r. 9. (1) An application to set aside the registration of a judgment shall be made by summons to the Court or a Judge supported by affidavit.

(2) A summons for the purpose of this Rule shall be an ordinary summons entitled in the same manner as the affidavit referred to in Rule 3 of this Order.

(3) On any such application the Court or a Judge may direct that an issue between the judgment creditor and the judgment debtor shall be stated and tried and may give such directions in relation to the trial of such issue as may be necessary.

SUB-SECT. 10.—ISSUE OF EXECUTION.

R. S. C., Ord. XLII., r. 10. (1) Execution shall not issue on a registered judgment until after the expiration of the period which, in accordance with the provisions of Rule 5 (3) of this Order, is specified in the Order giving leave to register as the period within which an application may be made to set aside the registration, or, if an Order is made extending the period so specified, until after the expiration of the extended period.

(2) If an application is made to set aside the registration of a judgment, execution shall not issue until such application has been disposed of.

(3) The party desirous of issuing an execution upon a registered judgment shall produce to the proper officer an affidavit of the service of the notice of registration and of any Order made by the Court in relation to the judgment registered.

SUB-SECT. 11.—FORM OF WRIT OF EXECUTION.

R. S. C., Ord. XLII., r. 11. In the case of a registered judgment the form of a writ of execution shall be varied as follows:—

For the words "which said sum of money and interest were lately before us in our High Court of Justice," etc., there shall be substituted the words "which said sum of money and interest were lately in....." (describing the court in which judgment was obtained)," etc., "and which judgment has been duly registered in our High Court of Justice in England pursuant to Part I. of 'The Foreign Judgments (Reciprocal Enforcement) Act, 1933.'"

SUB-SECT. 12.—DETERMINATION OF CERTAIN QUESTIONS.

R. S. C., Ord. XLII., r. 12. If, whether under the Act or under this Order, any question arises whether a foreign judgment can be enforced by execution in the country of the original court, or what interest is payable under the foreign judgment under the law of that country, that question shall be determined in accordance with such provisions, if any, in that behalf, as are contained in the Order in Council extending the Act to that country.

SUB-SECT. 13.—CERTIFIED COPY OF UNITED KINGDOM JUDGMENTS.

R. S. C., Ord. XLII., r. 13. (1) An application under section 10 of the Act for a certified copy of a judgment obtained in the High Court shall be made *ex parte* to a Master of the Supreme Court on an affidavit made by the judgment creditor or his solicitor.

(2) An affidavit for the purposes of this Rule shall—

- (a) give particulars of the proceedings in which the judgment was obtained; and
- (b) have annexed to it a copy of the writ of summons or the originating summons by which the proceedings were instituted, the evidence of service thereof upon, or appearance by, the defendant, copies of the pleadings, if any, in the proceedings, and a statement of the grounds on which the judgment was based; and
- (c) state whether the defendant did or did not object to the jurisdiction, and, if so, on what grounds; and
- (d) show that the judgment is not subject to any stay of execution and that no notice of appeal against it has been entered, and whether the time for appealing has expired; and
- (e) state the rate at which the judgment carries interest.

(3) Where an application for a certified copy of a judgment is duly made under this Rule, there shall be issued an office copy of the judgment sealed with the seal of the Supreme Court and certified by one of the Masters of the Supreme Court as follows:—

"I certify that the above copy judgment is a true copy of a judgment obtained in the High Court in England and this copy is issued in accordance with section 10 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933.

Signed.....  
A Master of the Supreme Court of  
Judicature in England."

together with the following further certificates also under the seal of the Supreme Court and certified by one of the Masters of the Supreme Court:—

- (a) a certificate giving particulars of the proceedings in which the judgment was obtained and having annexed to it copies of the writ of summons, or originating summons, by which the proceedings were instituted, showing the manner in which the writ or summons was served on the defendant, or that the defendant appeared thereto, and the objections made to the jurisdiction, if any, the pleadings, if any, in the proceedings, a statement of the grounds on which the judgment was based and such other particulars as it may be necessary to give to the foreign tribunal in which it is sought to obtain execution of the judgment.
- (b) a certificate stating the rate at which the judgment carries interest.

SUB-SECT. 14.—RULES TO HAVE EFFECT SUBJECT TO ORDERS IN COUNCIL.

R. S. C., Ord. XLII., r. 14. The Rules of this Order shall in relation to any judgment, have effect subject to any such provisions contained in the Order in Council extending the Act to the country of the original court as are declared by the Order in Council to be necessary for giving effect to the agreement made between His Majesty and that country in relation to matters for which provision is made by these Rules."

## Part XLV.—Consent Orders and Judgments.

**2578a.** Consent not given in presence of solicitor for defendant.]—A writ of summons having been issued, but not served on deft., he signed a document entitled in the cause, & prepared by pltf.'s attorney, whereby deft. consented to a judge's order for the payment of the debt & costs, with liberty for pltf.'s attorney to enter an appearance for him, & sign judgment & issue execution instant. No attorney attended on behalf of deft. when this consent was given. A judge's order was afterwards obtained on this consent, final judgment signed, & execution issued:—*Held*: on motion to set aside the judge's order & subsequent proceedings, this consent did not, under 1 & 2 Vict. c. 110, s. 9, require the presence of an attorney for deft. at its execution, & that unless fraud were shown the ct. would not interfere.—*THORNE v. NEAL* (1842), 2 Q. B. 726; 2 Gal. & Dav. 48; 114 E. R. 283.

**2598a.** — *Necessity for express order.*]—To a count containing an allegation that pltf. consented & agreed not to take any further proceedings in a certain other action between pltf. & deft., & that by an order made by a judge, it was ordered that all proceedings in the said action should be stayed, & that the same then were & thence hitherto have been & still are stayed, deft. pleaded, that the further proceedings in the said action had not been & were not stayed according to pltf.'s agreement in that behalf, but on the contrary thereof, the said action was still depending & not discontinued or stayed; & that it was by the said order ordered that, upon payment of, etc. (the debt for which that action was brought), together with interest thereon, on, etc., all further proceedings should be stayed; & that unless the said debt & interest were paid as aforesaid, pltf. was to be at liberty to sign judgment & issue execution for the amount, with costs of judgment, etc. Replication, that pltf. did consent & agree not to take any further proceedings in the said action, & did cease, & hath from thence hitherto ceased, to prose-

cute the same, & all further proceedings therein were & have been stayed, according to pltf.'s agreement in that behalf, concluding to the country:—*Held*: upon the issue raised by this replication, pltf. was bound to prove an absolute stay of proceedings; & such absolute stay of proceedings was disproved by the judge's order, which, upon production by pltf., appeared to be in the conditional form stated in the plea.—*FILMER v. BURNBY* (1841), 2 Man. & G. 529; Drinkwater, 100; 2 Scott, N. R. 689; 133 E. R. 858.

**2604a.** Appeal from order of High Court or judge made with consent of parties—*Necessity for leave.*]—*HADIDA v. FORDHAM & SONS* (1893), 10 T. L. R. 139, C. A.

**2604b.** —.]—This was an action brought in 1888, by the surviving exor. of a partner who died in 1877, against Brown, the surviving partner, asking for payment of an amount appearing from an account delivered by Brown in 1879 to be due from the partnership to the estate of testator. *KEKEWICH, J.*, was of opinion that the inference from the facts & evidence was that an arrangement had been made for Brown to carry on the business on behalf of himself & testator's exors., one of whom was the residuary legatee. His Lordship, therefore, refused to give such a judgment as was asked for, but said that pltf., if he liked, might take an inquiry of what the partnership assets consisted at the testator's death, & an account of Brown's dealings with them, on the footing that the business had been carried on by Brown with the assent of the exors. for the joint benefit of himself & the testator's estate. Pltf. elected to take this account & inquiry rather than have the action dismissed. The judgment, after the usual reference to the pleadings, evidence, & argument, proceeded: " & pltf. by his counsel accepting an inquiry & account in the form hereinafter directed, this ct. doth order, etc." Pltf. appealed:—*Held*: an appeal would lie.—*ALDAM v. BROWN*, [1890] W. N. 116.

## Part LV.—Transfers and Consolidation.

### SUB-SECT. 1.—TRANSFER BY LORD CHANCELLOR (p. 653).

**R. S. C., Ord. XLIX., r. 1.** In Rule 1 of Order XLIX. the words " or from one judge to another of the Chancery Division " shall be omitted. (*Deleted by R. S. C. (No. 1), 1935.*)

### SUB-SECT. 1A.—TRANSFER FROM ONE JUDGE TO ANOTHER OF THE CHANCERY DIVISION.

**R. S. C., Ord. XLIX., r. 1.** The following Rule shall be inserted after Rule 1 of Order XLIX. and shall stand as Rule 1A of that Order:—

" 1A.—Causes or matters may be transferred from one judge to another of the Chancery Division by order made by the judge to whom the cause or matter is assigned with the consent of the judge to whom such cause or matter is to be transferred." (*Added by R. S. C. (No. 1), 1935.*)

**2765a.** By Master—Consent of Lord Chancellor—Right to appeal from Master to Judge

at Chambers.]—Where an order for transfer of an action has been made by a Master under R. S. C., Ord. 49, r. 3, there is jurisdiction in a judge to hear an appeal although the consent of the President of the Division to which the case is to be transferred may have been given to the transfer before the appeal.—*SOCIETA ANONIMA MATTEO MORANDI v. HORNER* (1935), 79 Sol. Jo. 434, C. A.

**2788.** Add the following para. & citations:—

A lady, who was a widow, agreed with pltf. that he should act as companion to her son, a young man of full age, & exercise general supervision over him & over his expenditure in consideration of a certain salary, a certain allowance which was not to be unduly exceeded, & payment of pltf.'s travelling &

other, not being merely personal, expenses. The agreement was subject to one month's notice of termination. Pltf. brought two actions, one against the lady for wrongful dismissal & other breaches of the contract, & the other against the young man for indemnity against liabilities incurred & for repayment of disbursements made by pltf.

on his behalf:—*Held*: in view of the change in procedure effected by Ord. 16, rr. 1 & 4, an order might properly be made under Ord. 49, r. 8, consolidating the two actions.—*BAILEY v. CURZON OF KEDLESTON (MARCHIONESS), BAILEY v. DUGGAN*, [1932] 2 K. B. 392; 101 L. J. K. B. 627; 147 L. T. 269; 48 T. L. R. 283, C. A.

## Part LVI.—Interlocutory Orders.

### C. Security (p. 665)

R. S. C., Ord. L., r. 18. In Rule 16 of Order L. the words and taken before a person authorised to administer oaths"

shall be omitted; and the word "guarantee" shall be substituted for the word "recognizance." (*Amended by R. S. C. (No. 1), 1934.*)

## Part LVII.—Sales by the Court.

R. S. C., Ord. LI., r. 14. At the end of Rule 14 of Order LI the following words shall be added:—  
"and a solicitor who takes out a commission for appraisalment

or sale shall file an undertaking to pay the fees and expenses of the Marshal if they are demanded." (*Added by R. S. C. (No. 1), 1934.*)

## Part LIX.—Motions and Other Applications.

2850a. **Standing over generally—Undesirable.**—  
There are grave objections to motions standing over generally, & the practice is not to allow it under any but the most exceptional circumstances.—*Re KRAMER*, 79 Sol. Jo. 215; *sub nom. Re KRAMER, Ex p.*

OFFICIAL RECEIVER *v.* GORDON [1934-5] B. & C. R. 196.

2921. After this case add:—  
**Agreement for reference to Registrar—Effect of subsequent payment.**—*See THE BAARN, ADMIRALTY, No. 1403a, ante.*

## Part LXI.—Patents.

### SECT. 2.—INTERPRETATION.

(p. 682.)

R. S. C., Ord. LIIIA., r. 1. In Rule 1, the words "by the Patents and Designs Act, 1919" shall be omitted. (*Amended by R. S. C. (No. 4), 1932.*)

SUB-SECT. 3.—WHAT MUST BE STATED IN ADVERTISEMENTS—COPY TO SOLICITOR TO BOARD OF TRADE (p. 683).

R. S. C., Ord. LIIIA., r. 3. In Rule 3, the word "Illustrated" shall be omitted from paragraph (c). (*Amended by R. S. C. (No. 4), 1932.*)

SUB-SECT. 14.—COSTS (p. 685).

R. S. C., Ord. LIIIA., r. 3.—Paragraph (w) of Rule 3 and paragraph (l) of Rule 4 are hereby revoked. (*R. S. C. (No. 2), 1933.*)

*See PATENTS, No. 2055a, ante.*

B. Title, Service, etc. (p. 686).

R. S. C., Ord. LIIIA., r. 4. In Rule 4, for the expression "and 1919" in paragraph (a) there shall be substituted the expression "to 1932"; and the word "Illustrated" in paragraph (d) shall be omitted. (*Amended by R. S. C. (No. 4), 1932.*)

D. Public Advertisement of Application.

*See B, supra.*

J. Costs (p. 687).

R. S. C., Ord. LIIIA., r. 4.—Paragraph (w) of Rule 3 and paragraph (l) of Rule 4 are hereby revoked. (*R. S. C. (No. 2), 1933.*)

### SECT. 5.—APPEALS TO COURT FROM COMPTROLLER.

SUB-SECT. 1.—APPEALS BY PETITION, CONTENTS OF PETITION, ETC. (p. 688).

R. S. C., Ord. LIIIA., r. 5. In Rule 5, paragraph (a), three shall be inserted after the number "20," the number "21," and after the number "27," the expression "37 and"; and the expression "49 and 58" shall be omitted. (*Amended by R. S. C. (No. 4), 1932.*)

### SECT. 7.—COSTS.

(p. 688.)

R. S. C., Ord. LIIIA., r. 7. In Rule 7 the words "(except as hereinbefore expressly provided in the case of Patents under section 18 of the Principal Act)" shall be omitted. (*R. S. C. (No. 2), 1933.*)

SUB-SECT. 3.—SERVICE OF NOTICE OF MOTION, ETC., ON COMPTROLLER, ADVERTISEMENT OF PROPOSED AMENDMENT, ETC. (p. 692).

R. S. C., Ord. LIIIA., r. 21. In Rule 21, the word "Illustrated" shall be omitted from paragraphs (c) and (f). (*Amended by R. S. C. (No. 4), 1932.*)

SUB-SECT. 6.—ORDER ALLOWING AMENDMENT—LODGMET OF COPY WITH COMPTROLLER, ADVERTISEMENT OF ORDER, ETC. (p. 693).

*See Sub-sect. 3, supra.*



**SECT. 18.—APPLICATIONS FOR DIRECTIONS IN ACTIONS FOR INFRINGEMENT OR PETITIONS FOR REVOCATION.**

(p. 693.)

**R. S. C., Ord. LIIIA., r. 21A.** Rule 21A of Order LIIIA shall be annulled and the following Rule shall be substituted therefor:—

"21A.—(1) In any action for infringement of a patent or petition for the revocation of a patent, the plaintiff or petitioner shall, as soon as he becomes entitled to give notice of trial, apply as to the mode of trial, and if he fails to apply within fourteen days of becoming so entitled, the defendant or respondent, as the case may be, may make such application.

Any such application may be dealt with in chambers or in court, as the Judge shall think fit.

(2) Upon any such application the court or judge may give such directions:—

- (a) for the delivery of further pleadings or particulars;
- (b) for the delivery of statements signed by counsel setting out all the contentions whether of fact or law (including contentions as to the construction of the specification or other documents) upon which the parties respectively intended to rely;

(c) for the taking by affidavit of evidence relating to matters requiring expert knowledge, and for the filing of such affidavits and the delivery of copies thereof to the other parties;

(d) for the making of experiments, tests, inspections or reports;

(e) for the hearing, as a preliminary question, of any question that may arise (including any question as to the construction of the specification or other documents),

and otherwise as the court or judge may think necessary or expedient for the purpose of defining and limiting the issues to be tried, restricting the number of witnesses to be called at the trial of any particular issue, and otherwise securing that the case shall be disposed of, consistently with adequate hearing, in the most expeditious manner.

Where any affidavits are directed to be taken as aforesaid, the deponents shall, unless the parties otherwise agree, attend at the trial for cross-examination.

(8) No action for infringement of a patent or petition for the revocation of a patent shall be set down for trial unless and until an application under this Rule has been made and disposed of." (*Substituted by R. S. C. (No. 3), 1936.*)

In Rule 21A of Order LIIIA the words " (otherwise than by way of appeal from the Comptroller) " shall be inserted after the word " petition." (*Added by R. S. C. (No. 1), 1937.*)

## Part LXIV.—Landlord and Tenant Act, 1927.

**SECT. 14.—CONSIDERATION OF REPORT, HEARING OF PARTIES, ETC., ON HEARING OF FURTHER CONSIDERATION.**

**2987a. Form of report.**—In a reference to one of a panel of referees, the report of the referee must show the evidence given before the referee, the facts he found to be proved, what

inferences he drew from those facts & the result at which he arrived, having applied his view of the law. Such a referee has not merely to make such an award as an arbitrator would make, or give a verdict such as a jury might give.—**FREEMAN v. DARTFORD BREWERY CO., LTD.**, [1938] 3 All E. R. 120; 159 L. T. 62; 54 T. L. R. 672.

## Part LXV.—Applications and Proceedings at Chambers.

**SUB-SECT. 8.—WHEN APPEARANCE—NOT REQUIRED (p. 701).**

**R. S. C., Ord. LIV., r. 4F.** In Rule 4F—

In Paragraph (I) the expression " Solicitors Act, 1932 " shall be substituted for the expression " Solicitors Act, 1843."

In Paragraph (II) the expression " sections 82 or 97 of the County Courts Act, 1934 " shall be substituted for the expression " sections 17 or 19 of the County Courts Act, 1919." (*Substituted by R. S. C. (No. 1), 1937.*)

**SUB-SECT. 1A.—EXERCISE BY JUDGE IN CHAMBERS OF JURISDICTION CONFERRED UPON COURT BY ARBITRATION ACT, 1934 (p. 703).**

**R. S. C., Ord. LIV., r. 11A.** The following Rule shall be inserted after Rule 11 and shall stand as Rule 11A:—

"11A. The jurisdiction conferred on the Court by sections 3, 5, 6, 8, 9 and 13 of the Arbitration Act, 1934, may be exercised by a Judge in Chambers." (*Added by R. S. C. (No. 5), 1934.*)

**SUB-SECT. 2.—JURISDICTION OF MASTERS AND REGISTRARS (p. 703).**

**R. S. C., Ord. LIV., r. 12.** Paragraph (g) of Rule 12 of Order LIV. shall be omitted. (*Deleted by R. S. C. (No. 2), 1936.*)

**SUB-SECT. 3.—EXERCISE BY MASTERS OF JURISDICTION CONFERRED UPON COURT BY ARBITRATION ACT, 1889, AND COUNTY COURTS ACT, 1919 (p. 703).**

**R. S. C., Ord. LIV., r. 12A.** (1) The following words shall be inserted at the beginning of Rule 12A:—

"Without prejudice to such jurisdiction and powers as he may possess by virtue of Rule 12."

(2) The following words shall be inserted at the end of Rule 12A:—

"or section 12 (2) of the Arbitration Act, 1934." (*Added by R. S. C. (No. 5), 1934.*)

In Rule 12A the expression " County Courts Act, 1934 " shall be substituted for the expression " County Courts Act, 1919." (*Substituted by R. S. C. (No. 1), 1937.*)

**SUB-SECT. 5.—APPLICATION FOR ISSUE OF COMMISSION, ETC., TO EXAMINE WITNESSES UNDER COUNTY COURTS ACT, 1919, s. 17 (p. 704).**

**R. S. C., Ord. LIV., r. 12c.** In Rule 12c the expression " section 82 of the County Courts Act, 1934 " shall be substituted for the expression " section 17 of the County Courts Act, 1919." (*Substituted by R. S. C. (No. 1), 1937.*)

*C. Order made on Application (p. 704).*

**R. S. C., Ord. LIV., r. 12d.** In paragraph (i) of Rule 12d the expression " section 97 of the County Courts Act, 1934 " shall be substituted for the expression " section 19 of the County Courts Act, 1919." (*Substituted by R. S. C. (No. 1), 1937.*)

**2993a. Appeal from order transferring action.—After consent by Lord Chancellor.]—SOCIETA ANONIMA MATTEO MORANDI v. HORNER, No. 2765a, ante.**

**3015a. — Grant of injunction.—Committal order on disobedience.]—In an action for libel an order was made restraining defts. from publishing the libels complained of or any similar libel injuriously affecting plffs. One of the defts. subsequently disobeyed that injunction, & the judge at Chambers made an order committing deft. to prison for his contempt in**

disobeying the injunction:—*Held*: the order of committal was made in a matter of practice & procedure & that therefore under R. S. C., Ord. LIV., r. 23, the appeal from such order was to the Ct. of Appeal & not to the Div. Ct.—*LEVER BROS., LTD. v. KNEALE & BAGNALL*, [1937] 2 K. B. 87; [1937] 2 All E. R. 477; 106 L. J. K. B. 465; 157 L. T. 30; 53 T. L. R. 661; 81 Sol. Jo. 377, C. A.

**3028a.** — **Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 31, 62.**—The effect of above sects. is that when a Judge in Chambers in the K. B. D. has made an order in a matter of practice & procedure, he has no jurisdiction when sitting in ct. to hear an application to set aside or discharge his order made in Chambers, nor has the Div. Ct. such jurisdiction. The appct.'s remedy is by appeal to the Ct. of Appeal.—*DAWSON v. HILL* (No. 1), *DAWSON v. HILL* (2), (1934), 152 L. T. 279; 51 T. L. R. 117; 78 Sol. Jo. 876; 79 Sol. Jo. 86, C. A.

**3028b.** — **Application for leave to bring action.**—*Held*: an appeal from an order of a judge at Chambers giving leave under Mental Treatment Act, 1930 (c. 23), s. 16, to bring an action against the owners of a certified Institution under the Mental Deficiency Acts was an appeal in a matter of practice & procedure & therefore lay to the Ct. of

Appeal.—*Re SHOESMITH*, [1938] 2 K. B. 637; 107 L. J. K. B. 582; *sub nom. SHOESMITH v. LANCASHIRE MENTAL HOSPITAL BOARD*, [1938] 3 All E. R. 186; 159 L. T. 155; 102 J. P. 115; 54 T. L. R. 940; 82 Sol. Jo. 176; 36 L. G. R. 617, C. A.

**3029a.** **Shorthand note taken at chambers—Whether available on appeal.**—During the trial of an action for breach of contract & wrongful dismissal, pltf. had a discussion with the judge in his private room, of which discussion a shorthand note was taken, by the judge's orders. No representative of defts. was present at the discussion. The action was then settled. Subsequently, pltf. entered notice of appeal, upon the grounds (*inter alia*) that, at the time, he was almost unconscious, owing to shock, & was under a misapprehension as to his legal rights. Resps. applied to the Ct. of Appeal for an order that a transcript of the shorthand notes of the discussion should be made:—*Held*: (1) this application was contrary to the established practice with regard to proceedings in chambers, & was not one that could be allowed; (2) (*per SLESER, L.J.*): the application sought to obtain an order against a third party who was not before the ct., & for that reason also, it could not be allowed.—*VERNAZZA v. BARBURRIZA & Co., LTD.*, [1937] 4 All E. R. 364, C. A.

## Part LXVI.—Construction of Written Instruments.

R. S. C., Ord. LIVa., r. 1A. The following Rule shall be inserted after Rule 1 of Order LIVa. and shall stand as Rule 1A.

"1A. In any Division of the High Court any person claiming any legal or equitable right in a case where the

determination of the question whether he is entitled to the right depends upon a question of construction of a statute, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed." (*Added by R. S. C. (No. 1), 1933.*)

## Part LXIX.—Appeals and References under Law of Property Acts.

SUB-SECT. 1.—FROM WHAT DECISIONS, ORDERS OR AWARDS (p. 714).

R. S. C., Ord. LIVd., r. 1. Rule 1 of Order LIVd. shall have effect and be deemed always to have had effect as if the words "or under Section 140 of that Act (determination of compensation by the Minister)" were inserted after the words "Schedule 15 of that Act" at the end of paragraph (b). (*Added by R. S. C. (No. 1), 1936.*)

**3063a.** **Refusal to register—Whether appeal lies.**—The Land Registrar having refused an application by the trustees to be registered as proprietors of the land with an absolute

title, the trustees applied by summons under R. S. C., Ord. LIV. D, r. 6, to *CLAUSEN, J.*, asking that the refusal of the Registrar might be reversed & that he might be directed to register apprts. with an absolute title:—*Held*: in the absence of a decision or direction of the Registrar, no appeal lay from his refusal of the trustees' application.—*DENNIS v. MALCOLM*, [1934] Ch. 214; 103 L. J. Ch. 140; 50 T. L. R. 170; *sub nom. Re CHEAM COMMON SCHOOL*, *DENNIS v. MALCOLM*, 150 L. T. 394.

## Part LXXI.—Chambers in Chancery Division.

### SUB-SECT. 3. - WHAT MATTERS MAY BE DISPOSED OF (p. 716).

**R. S. C., Ord. LV., r. 2.** In paragraph (15) of Rule 2 of Order LV. the expression "22 & 23 Geo. 5, c. 37" shall be substituted for the expression "6 & 7 Vict. c. 3." (*Substituted by R. S. C. (No. 1), 1937.*)

### SUB-SECT. 10.—ORIGINATING SUMMONS FOR FORECLOSURE OR REDEMPTION (p. 732).

**R. S. C., Ord. LV., r. 5A.** In Order LV., Rule 5A., after "that is to say,—," there shall be inserted the words "Payment of monies secured by the mortgage or charge." (*Added by R. S. C. (No. 3), 1936.*)

In Rule 5A of Order LV. after "delivery of possession" there shall be inserted the words "whether before or after foreclosure." (*Added by R. S. C. (No. 1), 1937.*)

### SUB-SECT. 13A.—FORMS.

**R. S. C., Ord. LV., r. 8A.** In Order LV. the following Rule shall be inserted after Rule 8 and shall stand as Rule 8A:—

"8A. Orders for payment and for possession made under Rule 5A of this Order shall be in the Forms set out in Appendix L to these Rules, Nos. 38, 39, and 40, with such variations as the circumstances of the case may require, and the like Forms shall *mutatis mutandis* be used under corresponding circumstances in actions for the like relief commenced by writ." (*Added by R. S. C. (No. 4), 1936.*)

### SUB-SECT. 14A.—ORIGINATING SUMMONS ISSUED OUT OF DISTRICT REGISTRY.

**R. S. C., Ord. LV., r. 9A.** After Rule 9 of Order LV. the following Rule shall be inserted and shall stand as Rule 9A:—

"9A. (1) An originating summons under Rule 5A of this Order in relation to a mortgage or charge of real or leasehold property within the district of any district registry may be issued out of such registry and the following provisions shall be applicable in relation thereto:—

- (a) In all cases where a defendant to such an originating summons neither resides nor carries on business within the district, there shall be a statement on the face of the summons that such defendant may cause an appearance to be entered at his option either at the district registry or at the central office, or a statement to the like effect.

- (b) In all cases where the defendant resides or carries on business within the district, there shall be a statement on the face of the summons that the defendant do cause an appearance to be entered at the district registry, or a statement to the like effect.

- (c) If any defendant resides or carries on business within the district he shall appear in the district registry.

- (d) If any defendant neither resides nor carries on business within the district he may appear either in the district registry or at the central office.

- (e) If any defendant appears or all the defendants appear in the district registry or if all the defendants who appear appear in the district registry and the others make default in appearance, then, subject to the power of removal below provided, the matter shall proceed in the district registry.

- (f) If the defendant appears or any of the defendants appear in London, the matter shall proceed in London, provided that if the court or a judge shall be satisfied that the defendant appearing in London is a merely formal defendant or has no substantial cause to interfere in the conduct of the matter, such court or judge may order that the action may proceed in the district registry notwithstanding such appearance in London.

- (g) Any party to the originating summons may at any time apply to the court or a judge or to the district registrar for an order to remove the matter from the district registry to London, and the court, judge or registrar may make an order accordingly, if satisfied that there is sufficient reason for doing so, upon such terms, if any, as shall be just. The court or a judge may at any time direct (with or without application by any party) that the matter or any proceedings therein should be dealt with in London or, if the matter has been removed to London, in the district registry in which the originating summons was issued.

- (2) This Rule shall not apply to proceedings in the district registry of Liverpool or the district registry of Manchester." (*Added by R. S. C. (No. 1), 1937.*)

### SUB-SECT. 1.—ADJOURNMENT TO JUDGE (p. 735).

**R. S. C., Ord. LV., r. 15.** In Rule 15 of Order IV. the words "for substituted service and" shall be omitted from the first proviso to that Rule. (*R. S. C. (No. 1), 1934.*)

**R. S. C., Ord. LV., r. 15A.** At the end of Rule 15A of Order LV. the following proviso shall be added:—

"Provided that this Rule shall not apply to an order for general administration in a creditor's action for administration where there is *prima facie* evidence that the estate is insolvent." (*Added by R. S. C. (No. 1), 1934.*)

## Part LXXIII.—Appeals and Proceedings under Particular Acts.

**R. S. C., Ord. LVb.** The following amendments shall be made in Order LVb:—

- (a) In the title under Order LVb the expression "National Health Insurance Act, 1936" shall be substituted for the expression "National Health Insurance Act, 1924" and the expression "Unemployment Insurance Act, 1935" shall be substituted for the expression "Unemployment Insurance Act, 1920" and the expression "Housing Act, 1936" shall be substituted for the expression "Housing Act, 1930."

- (b) In the heading to Rule 1 the expression "National Health Insurance Act, 1936" shall be substituted for the expression "National Health Insurance Act, 1924."

- (c) In Rule 1 and also in Rule 4 the expression "section 161" shall be substituted for the expression "section 89" and the expression "National Health Insurance Act, 1936" shall be substituted for the expression "National Health Insurance Act, 1924."

- (d) In the heading to Rule 12 the expression "Unemployment Insurance Act, 1935" shall be substituted for the expression "Unemployment Insurance Act, 1920."

- (e) In Rule 12 the expression "paragraph (a) of subsection (1) of section 84" shall be substituted for the expression "proviso (i.) of subsection (1) of section 10."

- (f) In Rule 27 the expression "paragraph (b) of subsection (1) of section 84" shall be substituted for the expression "proviso (ii.) of subsection (1) of section 10."

- (g) In Rule 38 the expression "The Unemployment Insurance Act, 1935" shall be substituted for the expression "The Unemployment Insurance Act, 1920."

- (h) In the heading to Rule 71 the expression "Housing Act, 1936" shall be substituted for the expression "Housing Act, 1930."

- (i) In Rule 71 the expression "paragraph two of the Second Schedule to the Housing Act, 1936" shall be substituted for the expression "section eleven of the Housing Act, 1930."

- (j) In sub-paragraph (i) of Rule 74 the expression "Housing Act, 1936" shall be substituted for the expression "Housing Act, 1930." (*Amended by R. S. C. (No. 1), 1937.*)

### SECT. 5.—AUDIT (LOCAL AUTHORITIES) ACT, 1927. (p. 753).

**R. S. C., Ord. LVb., rr. 1 and 59.** The expression "Local Government Act, 1933, Part X." shall be substituted for the expression "Audit (Local Authorities) Act, 1927." (*R. S. C. (No. 3), 1934.*)

### SUB-SECT. 1.—INTERPRETATION (p. 753).

**R. S. C., Ord. LVb., r. 70.** In Rule 70, the expression "Local Government Act, 1933," shall be substituted for the expression "Audit (Local Authorities) Act, 1927." (*Substituted by R. S. C. (No. 3), 1934.*)

**SUB-SECT. 2.—INSTITUTION OF APPEAL (p. 753).**

**R. S. C., Ord. LVB., r. 59.** In Rule 59, the expression "section 229" shall be substituted for the expression "section 2"; and the expression "subsection (1) of section 230" shall be substituted for the expression "subsection (2) of that section" (*Substituted by R. S. C. (No. 3), 1934.*)

**SUB-SECT. 7.—APPLICATION UNDER AUDIT (LOCAL AUTHORITIES) ACT, 1927, s. 2 (2) (p. 753).**

**R. S. C., Ord. LVB., r. 64.** In the introductory phrase, the expression "subsection (1) of section 230" shall be substituted for the expression "subsection (2) of section 2."

In Paragraph (a), the words "whose accounts were subject to the audit" shall be substituted for the words "to whose accounts or to the account of whose officer the surcharge relates"

In Paragraphs (b) and (c), the words "local government elector for" shall be substituted for the words "ratepayer or owner of property in."

In Paragraph (d), the words "local government elector" shall be substituted for the words "ratepayer or owner."

In Paragraph (e), the words "local government elector" shall be substituted for the words "ratepayer or owner of property." (*Amended by R. S. C. (No. 3), 1934.*)

**SUB-SECT. 8.—DELIVERY OF COPY OF AFFIDAVIT FILED IN SUPPORT OF MOTION (p. 753).**

**R. S. C., Ord. LVB., r. 65.** In Rule 65, the words "local government elector" shall be substituted for the words "ratepayer or owner of property." (*Amended by R. S. C. (No. 3), 1934.*)

**SUB-SECT. 11.—APPLICATION FOR ORDER DIRECTING MINISTER TO STATE SPECIAL CASE (p. 754).**

**R. S. C., Ord. LVB., r. 68.** In Paragraph (1) of Rule 68, the expression "subsection (3) of section 229" shall be substituted for the expression "subsection (1) of section 2" (*Amended by R. S. C. (No. 3), 1934.*)

**SUB-SECT. 12.—SIGNING OF SPECIAL CASE BY MINISTER (p. 754).**

**R. S. C., Ord. LVB., r. 69.** In Paragraph (1) of Rule 69, the expression "subsection (3) of section 229" shall be substituted for the expression "subsection (1) of section 2" (*Amended by R. S. C. (No. 3), 1934.*)

**SECT. 6.—HOUSING ACT, 1930. TOWN AND COUNTRY PLANNING ACT, 1932**

(*Added by R. S. C. (No. 1), 1933, replacing R. S. C. (No. 2), 1932.*)

**SUB-SECT. 1.—INSTITUTION OF PROCEEDINGS.**

**R. S. C., Ord. LVB., r. 71.** An application under section eleven of the Housing Act, 1930, or under paragraph two of Part II. or paragraph two of Part III. of the First Schedule to the Town and Country Planning Act, 1932, shall be made by an originating notice of motion to a Judge of the High Court selected for the purpose by the Lord Chancellor.

**SUB-SECT. 2.—EVIDENCE UPON HEARING OF APPLICATION.**

**R. S. C., Ord. LVB., r. 72.** The evidence upon the hearing of the application shall be by affidavit except in so far as the Court at the hearing may direct oral evidence to be given.

**SUB-SECT. 3.—CONTENTS OF NOTICE OF MOTION.**

**R. S. C., Ord. LVB., r. 73.** The notice of motion shall state the grounds for the application, and the date mentioned in the notice for the hearing of the application shall be not less than fourteen days after the service of the notice.

**SUB-SECT. 4.—SERVICE OF NOTICE OF MOTION.**

**R. S. C., Ord. LVB., r. 74.** The notice of motion shall, within the time limited by the said respective enactments for making the application, be entered at the Crown Office and be served on the Minister of Health and also :—

(i.) if the application relates to a clearance order or a compulsory purchase order under the Housing Act, 1930, on the authority by whom the order was made, or

(ii.) if the application relates to a scheme, supplementary order, or compulsory purchase order under the Town and Country Planning Act, 1932, on the authority by whom the scheme or supplementary order was prepared or adopted, or is deemed to have been prepared or adopted, or the compulsory purchase order was made.

**SUB-SECT. 5.—APPLICATION OF ORDINARY RULES AND PRACTICE IN KING'S BENCH DIVISION.**

**R. S. C., Ord. LVB., r. 75.** The ordinary practice and Rules of the King's Bench Division shall apply so far as they are applicable, and are not inconsistent with the provisions of the Acts referred to in this Part of this Order, or of the Rules contained therein."

## Part LXXVII.—Appeals to Court of Appeal, Rehearing, etc.

**3270a. Damages—Appeal as to quantum—Money taken out of court.]—**Pltfs. in an action for damages for negligence obtained a judgment in their favour. They took the amount awarded out of money which had been paid into ct., & then appealed on the quantum of damages. It was contended that, having taken money out of ct., & thereby approbated the judgment, they could not now reprobate it by appealing :—*Held* : pltfs. were entitled to appeal. It could not be said that, by appealing as to quantum of damages, they were reprobating the judgment.—*MILLS v. DUCKWORTH*, [1938] 1 All E. R. 318 ; 82 Sol. Jo. 172, C. A.

**3341a. — How application made—Ex parte.]—**Applications to the Ct. of Appeal for leave to appeal from the Div. Ct. should be made *ex parte*.—*DORSET COUNTY COUNCIL v. PETHICK BROS.* (1898), 14 T. L. R. 183, C. A.

**3357a. — — — — —.]—**Principles which should guide the Ct. of Appeal in hearing an appeal from the decision of a judge sitting

without a jury under that order, where the matter in question is a matter of fact.

On such an appeal the Ct. of Appeal has to exercise its jurisdiction as a tribunal of appeal on matters of fact as well as on matters of law. Where the question at issue is the proper inference to be drawn from facts which are not in doubt, the appellate ct. is in as good a position to decide the question as the judge at the trial is. But the appeal, although a rehearing, is a rehearing on documents & not, as a rule, on oral evidence ; & where the judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen & heard, are trustworthy & which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be ; & the appellate tribunal will generally defer to the conclusion which the trial judge has formed.—*POWELL v. STREATHAM MANOR NURSING HOME*, [1935] A. C. 243 ; 104 L. J. K. B. 304 ; 152 L. T. 563 ; 51 T. L. R. 289 ; 79 Sol. Jo. 179, H. L.

**3374a. — Co-defendants in action for negligence—Costs.**—Pltf. in a running-down action had obtained judgment against three defts. One deft. appealed, unsuccessfully. The question arose as to whether the remaining defts., who had been served with notice of the appeal, & had been present thereat, ought to have been so served, & whether they were entitled to their costs:—*Held*: the other defts. had properly been made parties to the appeal, as they might have been interested in the result, had it been different. They were therefore entitled to their costs. *HOPGOOD v. WILLAN*, [1938] 2 All E. R. 196; 82 Sol. Jo. 253, C. A.

**3382a. —**—An appellate ct. should be very chary of permitting amendments where counsel have had ample opportunity of raising alternative pleas at the trial & have not thought fit to do so. Nothing would be more unfortunate than to encourage the idea that counsel may present one point to the jury & keep an alternative for the Ct. of Appeal (LORD ATKIN).—*LEY v. HAMILTON* (1935), 153 L. T. 384; 79 Sol. Jo. 573, H. L.

**3395a. Action for infringement of copyright—Assessment of damages.**—Pltf. had obtained judgment against defts. in an action for damages for conversion by publishing in defts.' newspaper certain literary articles, the copyright in which was vested in pltf. An inquiry was directed to determine the damage suffered by pltf. by reason of such conversion. The master, basing his assessment upon the value as pulp of the paper used for the articles, found that the damages should be £10. Upon a summons to vary the master's certificate, the judge held that the assessment should be an aggregate of the literary value of the articles, the value of the paper on which the articles were printed & the value of the process involved in printing the articles. Pltf. appealed:—*Held*: the assessment should have been based on the sum of money obtained by selling the articles at the time of the conversion; where, as in the case of an article in a newspaper, it is impossible to apportion to the article any particular fraction of the amount received on the sale of the whole newspaper, the ct. must make the best estimate it can upon the evidence; the ct. ought in the present case to proceed under R. S. C., Ord. 84, r. 4, & make such an order as it appeared to the ct. ought to have been made by the judge below; in the circumstances pltf. should be awarded £100 damages for the conversion.—*ASH v. DICKIE*, [1936] Ch. 655; [1936] 2 All E. R. 71; 105 L. J. Ch. 337; 154 L. T. 641; 52 T. L. R. 534; 80 Sol. Jo. 364, C. A.

**3454a. —**—*LEY v. HAMILTON*, No. 3382a, *ante*.

**3485a. Dismissal of petition for divorce—Application for new trial—Power to grant decree nisi.**—On an appeal from an order of the Divorce Ct. dismissing a petition for divorce, the Ct. of Appeal has power under Ord. LVIII., r. 4, & Ord. XXXIX., if it has before it all the necessary materials, & comes to the conclusion that the verdict of the jury finding there has been no misconduct was wrong, itself to grant a decree *nisi* instead of sending the case back for a new trial.—*CROKER v. CROKER*, [1932] P. 173; 101 L. J. P. 69; 147

L. T. 464; 48 T. L. R. 597; 76 Sol. Jo. 527, C. A.

**3488a. Striking out action—Party non-existent.**—*DEUTSCHE BANK UND DISCONTO GESELLSCHAFT v. BANQUE DES MARCHANDS DE MOSCOU*, No. 1003a, *ante*.

**3583a. —**—Where in a pending appeal the parties have agreed to postpone the setting down of the appeal for hearing, & the time for such setting down has expired, it is open to the ct. to grant an extension. The time for setting down an appeal is not determined by any rule of the Supreme Ct., but is fixed, as part of the practice of the ct., for the ct.'s convenience, & it is therefore open for the ct. to vary the practice as it may think fit.—*POLE-CAREW v. WESTERN COUNTIES & GENERAL MANURE CO., LTD.*, [1920] 2 Ch. 97; 89 L. J. Ch. 100; 123 L. T. 12; 36 T. L. R. 322, C. A.

**3583b. —**—*WALTON v. RIKOF* (1937), 81 Sol. Jo. 941, C. A.

**3637a. —**—The rule that the cost of a shorthand transcript of the evidence given at the trial should not be allowed on appeal unless there has been an agreement in the ct. below that it should be taken & used as the judge's note is not a hard & fast rule but only as ground for asking the ct. to exercise its discretion in the matter. Where the shorthand transcript has been used without objection & the appeal could not be properly presented without it, such costs ought to be allowed to a successful party.—*GREAVES v. DRYSDALE*, [1936] 2 All E. R. 470; 80 Sol. Jo. 464, C. A.

**3693a. — Client abroad.**—Applt. was in America at the time when an interlocutory order was made. This order was made shortly before the beginning of the long vacation, & at that time no leave to appeal was sought. By the beginning of the following term, instructions had been received from applt., & this application was made for an extension of time within which to appeal, & for leave to appeal:—*Held*: in the circumstances of this case, it would be a denial of justice to applt. if the time for appeal was not extended, & it ought, therefore, to be extended.—*KEVORKIAN v. BURNEY*, [1937] 4 All E. R. 97; 157 L. T. 492; 54 T. L. R. 19; 81 Sol. Jo. 900, C. A.

**3696a. — Ignorance.**—*STANTON v. LAWS*, [1934] W. N. 130.

**3740a. — Two previous decisions against appellant.**—In the present case E. C. is an impecunious person & will obviously be unable to pay costs if her appeal fails. Yet she appears by a King's Counsel. This seems to me peculiarly a case where the ct., considering that applt. has had two decisions against her, should say that if she desires to obtain another decision it will protect resps. by ordering her to give security for the costs of the appeal (SCRUTTON, L.J.).—*Re CARROLL*, [1931] 1 K. B. 104; 108-9; 100 L. J. K. B. 62; 144 L. T. 154; 47 T. L. R. 20; 74 Sol. Jo. 770, C. A.

**3743a. —**—In an application for security for the costs of an appeal, resps. filed an affidavit alleging that, though application had been made to applt. for payment of the costs in the ct. below, no such payment had been made:—*Held*: this was not sufficient grounds

for making an order for security.—*HILLS v. LONDON PASSENGER TRANSPORT BOARD*, [1937] 4 All E. R. 230 ; 81 Sol. Jo. 882, C. A.

**(a) Old Jurisdiction (p. 814).**

**R. S. C., Ord. LVIII., r. 19A.** At the end of the Rule 19A of Order LVIII the phrase "or from an official referee under the Administration of Justice Act, 1932" shall be inserted. (*Added by R. S. C. (No. 4), 1932.*)

**CC. Agricultural Holdings Act, 1923 (c. 9) (p. 814).**

**R. S. C., Ord. LVIII., r. 20.** Rule 20 of Order LVIII. shall be extended so as to apply to appeals to which section 2 of the Administration of Justice (Appeals) Act, 1934, applies, and accordingly that Rule shall be amended by omitting "on questions of law under the Workmen's Compensation Act, 1925," and appeals under the Agricultural Holdings Act, 1923," and by substituting therefor the words "(other than appeals to which Rule 21 of this Order applies)." (*Amended by R. S. C. (No. 4), 1934.*)

In paragraph (d) of Rule 20 of Order LVIII. the words "to which this Rule applies" shall be substituted for the words "under the said Act to the Court of Appeal." (*Substituted by R. S. C. (No. 5), 1934.*)

**FF. Appeals from County Courts.**

See Administration of Justice (Appeals) Act, 1934 (c. 40), & amended R. S. C., Ord. LVIII., *supra*.

Where an appeal from a decision of a County Court given before the 7th August, 1934, lies to the Court of Appeal instead of the High Court by virtue of section 2 of the Administration of Justice (Appeals) Act, 1934, and the Order of the Lord Chancellor made under that section and dated the 26th day of July, 1934, the appeal may be heard and determined by the Court of Appeal

notwithstanding that any provisions of Order LVIII. have not been complied with in respect of that appeal, if the corresponding provisions of Order LIX. have been complied with. (*R. S. C. (No. 4), 1934.*)

**3777a. Action of review—Whether leave necessary.]** *ISHERWOOD FOSTER & STACEY, LTD. v. MIGLIO* (1938), 82 Sol. Jo. 434.

**3778a. —.]—**The jurisdiction given to the ct. by National Debt Act, 1870 (c. 71), s. 55, to decide upon petition as to the validity of a claim for the re-transfer of stock, which has been transferred to the National Debt Comrs. under the provisions of sect. 51, is to be exercised in the mode in which the ordinary jurisdiction of the ct. is exercised. Therefore, if a petition for the re-transfer of stock is heard on its merits, & is dismissed on the ground that the petitioner has failed to make out his title, he cannot, on the subsequent discovery of fresh evidence in support of his title, present a fresh petition for the same object, at any rate without the leave of the ct. previously obtained.—*Re MAY* (1883), 25 Ch. D. 231 ; 32 W. R. 337.

**3781a. —.]—**The new evidence must be . . . such as might have affected the judgment of the judge at the trial (*GREER, L.J.*).—*NICHOLSON v. INVERFORTH* (1935), 79 Sol. Jo. 816, C. A.

## Part LXXVIII.—Divisional Courts.

**SUB-SECT. 1.—IN GENERAL (p. 819).**

**R. S. C., Ord. LIX., r. 1.** The following amendments shall be made in Order LIX. :—

Paragraph (c) of Rule 1 is hereby revoked. (*Revoked by R. S. C. (No. 5), 1934.*)

**SUB-SECT. 1.—IN GENERAL (p. 822).**

**R. S. C., Ord. LIX., r. 9.** In Rule 9 the words "county courts and other inferior courts of record of civil jurisdiction" shall be omitted and the words "inferior courts of record of civil jurisdiction, except county courts" shall be substituted therefor. (*Substituted by R. S. C. (No. 5), 1934.*)

**SUB-SECT. 5.—APPEAL NOT OPERATING AS STAY, UNLESS BY ORDER, OR WHERE DEPOSIT MADE OR SECURITY GIVEN.**

**3812a. Duty of court to fix deposit or security.]**—By R. S. C., Ord. 59, r. 14, an appeal under the Workmen's Compensation Act, 1925, "shall not operate as a stay of proceedings under the decision appealed from unless the inferior ct. shall so order or unless within ten days after the decision a deposit shall be made of or security given to the satisfaction of such inferior ct. for a sum to be fixed by the said ct., not exceeding the amount of the money or the value of the property affected by the judgment order or finding appealed from." The effect of this rule is to make it obligatory on the county ct. judge to fix a deposit or security if requested to do so & he has no discretion to refuse. Appeal allowed.

Costs of appeal from such a refusal will not be made costs in the original arbn. nor will the Ct. of Appeal order that they may be set off against any costs which the workman may obtain either in that arbn. or in any

subsequent proceedings arising out of an appeal from the original decision.—*SHORT v. PAGE* (1937), 30 B. W. C. C. 125, C. A.

**SUB-SECT. 8.—APPLICATION OF RULES AS TO APPEALS FROM HIGH COURT (p. 823).**

**R. S. C., Ord. LIX., r. 17.** In Rule 17 the words "appeals from county courts and other inferior courts of record of civil jurisdiction to the High Court" shall be omitted and the words "appeals to the High Court from inferior courts of record of civil jurisdiction, except county courts" shall be substituted therefor. (*Substituted by R. S. C. (No. 5), 1934.*)

**SECT. 8.—APPEALS FROM INFERIOR COURTS—WHAT INCLUDED IN.**

(p. 824).

**R. S. C., Ord. LIX., r. 18.** Rule 18 of Order LIX. shall be revoked. (*Revoked by R. S. C. (No. 2), 1935.*)

**SUB-SECT. 1.—IN GENERAL (p. 824).**

**R. S. C., Ord. LIX., r. 19.** In paragraph (1) of Rule 19 of Order LIX. the words "and an appeal under subsections (3) and (4) of section 14 of the Pharmacy and Poisons Act, 1933," shall be inserted after the words "Therapeutic Substances Act, 1925." (*Added by R. S. C. (No. 3), 1934.*)

**SECT. 11.—APPEAL UNDER SUMMARY JURISDICTION ACT, 1857, S. 2, OR SUMMARY JURISDICTION ACT, 1879, s. 33.**

**R. S. C., Ord. LIX., r. 22.** At the end of Order LIX. there shall be inserted the following Rule :—

"22. Where a case has been stated by justices under section two of the Summary Jurisdiction Act, 1857, or under section thirty-three of the Summary Jurisdiction Act, 1879, the appellant shall—

- (a) within ten days after receiving the case transmit it to the High Court; and
- (b) within 14 days after receiving the case serve on the respondent a notice in writing of the appeal and a copy of the case." (*Added by R. S. C. (No. 3), 1934.*)

## Part LXXIX.—Appeals from Official or Special Referees.

*See, now, Administration of Justice Act, 1932 (c. 55), s. 1.*

### SECT. 1.—RIGHT OF APPEAL FROM FINDING, DECISION, ORDER, Etc.

(p. 825.)

R. S. C., Ord. LIXA., r. 1. In Rule 1 the word "a" shall be substituted for the words "an official or". (*Amended by R. S. C. (No. 4), 1932.*)

3816a. Order dismissing action for want of prosecution.]—Administration of Justice Act, 1932 (c. 55), s. 1 (1), applies to any appeal sought to be brought in respect of a decision, either interlocutory or final, which has been given by an Official Referee in any cause or matter which has been referred to him under Supreme Ct. of Judicature (Consolidation)

Act, 1925 (c. 49), s. 89, & therefore it applies to an order made by an Official Referee for the dismissal of an action for want of prosecution, even though the action was brought before the Act was passed.—CONWAY (THEO.), *LTE. v. HENWOOD* (1934), 50 T. L. R. 474; 78 Sol. Jo. 503, C. A.

### SECT. 5.—APPLICATION OF R. S. C., ORDER XL., rr. 6, 6a, AND R. S. C., ORDER XXXVI., r. 52.

(p. 827.)

R. S. C., Ord. LIXA., r. 5. Rule 5 is hereby annulled (*R. S. C. (No. 4), 1932.*)

## Part LXXX.—Officers.

### SECT. 4.—RECOGNISANCES IN THE CHANCERY DIVISION.

(p. 828.)

R. S. C., Ord. LX. r. 4. Rule 4 of Order LX. is hereby revoked. (*Revoked by R. S. C. (No. 1), 1934.*)

## Part LXXXI.—Central Office.

SUB-SECT. 1.—NO ENROLMENT OF JUDGMENTS, ORDERS, ETC. (p. 830).

R. S. C., Ord. LXI., r. 8A. In Rule 8A of Order LXI. the words "bond or guarantee" shall be substituted for the words "recognizance or bond." (*Amended by R. S. C. (No. 1), 1934*)

## Part LXXXIII.—Registrars of the Chancery Division.

3879a. — Necessity for presence of interested party.]—The minutes of an order having been once settled by the registrar cannot be altered in the absence of any of the parties interested. Parties unnecessarily served with notice of motion, & only appearing to ask for costs, will not be allowed the costs of their

appearance.—MAJOR *v.* MAJOR (1848), 11 L. T. O. S. 469; 13 Jur. 1; 13 Jur. 202.

3894a. Whether order set aside.]—An order drawn up in the registrar's office, in the absence of a deft., will not be set aside where no error is shown.—SMITH *v.* ACTON (No. 2) (1859), 26 Beav. 559.

## Part LXXXIV.—Sittings and Vacations.

### SECT. 1.—PERIODS OF SITTINGS.

(p. 841.)

R. S. C., Ord. LXIII., r. 1. In Rule 1 the words "12th of October and" shall be omitted and the following words shall be substituted therefore:—

"day appointed by Order in Council for that purpose and shall." (*Substituted by R. S. C. (No. 2), 1935.*)

### SECT. 4.—VACATIONS IN COURTS AND OFFICES.

SUB-SECT. 1.—PERIODS (p. 841).

R. S. C., Ord. LXIII., r. 4. In paragraph (1) of Rule 4 the words "11th of October" shall be omitted and the following words shall be substituted therefor:—

"day appointed by Order in Council for that purpose." (*Substituted by R. S. C. (No. 2), 1935*)

### SECT. 7.—OFFICE HOURS.

(p. 841.)

R. S. C., Ord. LXIII., r. 9. The summons and order department and the crown office and associates departments shall close on Saturdays at one in the afternoon instead of half-past one and accordingly in Order LXIII., Rule 9, the word "half-past" shall be omitted wherever it occurs. (*Amended by R. S. C. (No. 2), 1936.*)

### SECT. 10.—SITTINGS OF OFFICIAL REFEREES.

(p. 842).

R. S. C., Ord. LXIII., r. 16. Rule 16 of Order LXIII. shall be revoked and the following Rule shall be substituted therefor:—

"16. The sittings of the official referees shall be the same as those in London and Middlesex of the High Court of Justice, but nothing in this Rule shall prevent an official referee from sitting in vacation if he shall deem it expedient so to do." (*Substituted by R. S. C. (No. 1), 1937.*)



## Part LXXXV.—Time.

### SECT. 4.—DELIVERY, ETC., OF PLEADINGS.

#### SUB-SECT. 1.—WHEN ALLOWED IN LONG VACATION (p. 843).

**R. S. C., Ord. LXIV., r. 4.** In Rule 4 and in paragraph (1) of Rule 4A the words "in the Long Vacation on and after the 1st day of October in any year" shall be omitted and the following words shall be substituted therefor:—

"during the last eleven days of the Long Vacation."  
(Substituted by R. S. C. (No. 2), 1935.)

#### SUB-SECT. 1A.—CAUSES FOR NEW PROCEDURE LIST (p. 841).

**R. S. C., Ord. LXIV., r. 4A.** (1) In causes intended to be tried in the New Procedure List under Order XXXVIIIa summonses may be issued and pleadings may be amended, delivered, or filed

in the Long Vacation on and after the 1st day of October in any year, but pleadings, in such causes, shall not be amended, delivered, or filed during any other part of such Vacation, unless by direction of one of the Judges nominated under Order XXXVIIIa, Rule 2 (4).

See amended Rule 4, *ante*.

(2) Any summons issued under this Rule may be heard by one of the Judges so nominated, or in the absence of both of such Judges shall, if necessary, be heard by the Vacation Judge.  
(Added by R. S. C. (No. 2), 1932.)

Notwithstanding anything in Rule 4 and 4A (1) of Order LXIV. all summonses may be issued and pleadings may be amended, delivered, or filed in the Long Vacation on and after the 20th day of September in all causes or matters to which those Rules apply. (Amended by R. S. C. (No. 2), 1933.)

As to New Procedure, *see* Part XCIV.

## Part LXXXVI.—Costs.

**3968a. Application for leave to make statement—Money taken out of court in libel action.]—**  
**WOLSELEY v. ASSOCIATED NEWSPAPERS, LTD.,**  
No. 1649c, *ante*.

**4006a. — Motion for rectification.]—**An action was brought in respect of an alleged infringement of a registered design. Defts. pleaded invalidity as a defence, & to strengthen their position they issued an originating motion to have the register rectified by expunging the registration of pltf.'s design therefrom. Pltf. then applied to have his action dismissed, & it was dismissed & costs awarded in favour of defts. Defts. then applied to withdraw their motion, but asked for an order that pltf. should pay the costs of the motion. The judge made the order asked, giving as his reason that the motion was launched as a precaution & to make sure that the defence of invalidity could be raised at the trial:  
*Held:* the motion was an independent proceeding & it was open to defts. to proceed with it whatever happened to the action. The judge therefore had no jurisdiction to make an order for costs against pltf., who was the successful resp. to the motion, & if he had such jurisdiction, there was no ground upon which he could exercise his discretion in favour of defts.—*Re MARGOLIN'S REGISTERED DESIGN*, [1936] 3 All E. R. 347; 51 R. P. C. 1, C. A.

**4036a. Grant of leave to appeal.]—***Held:* inasmuch as the trial judge had exercised his discretion as to costs, the Ct. of Appeal could not interfere with that exercise of the judge's discretion, notwithstanding that the trial judge had given leave to appeal.—**BRITISH RUSSIAN GAZETTE & TRADE OUTLOOK, LTD. v. ASSOCIATED NEWSPAPERS, LTD., TALBOT v. ASSOCIATED NEWSPAPERS, LTD.**, [1933] 2 K. B. 616; 102 L. J. K. B. 775; 149 L. T. 545, C. A.

**4086a. Trade union—Action by member—Solicitor instructed by Union—Whether plaintiff entitled to costs.]—**Pltf. was a member of a Trade Union which provided, amongst other benefits, legal aid for members in connection with their employment. Pltf. had duly paid all his contributions to the Union & was entitled to the benefits. The Union's funds

were allocated to, amongst other objects, that of providing the legal aid mentioned above. According to the usual practice pltf. laid his claim against his employers, the defts., from wrongful dismissal before the executive council of the Union, & they decided to give him legal aid, & instructed a firm of solrs., who were the general solrs. to the Union, to act for him in the matter. Pltf. gave no written retainer to solrs. There was no agreement with the solrs. that pltf. was not to be liable to them for their costs. They issued a writ on his behalf, & conducted the action to trial, instructing counsel on his behalf during the preliminary stages & at the trial. Pltf. recovered judgment in the action against defts.:—*Held:* pltf. was entitled to judgment with costs.

*Per* BANKES & ATKINS, L.J.J.: On the ground that the Union, acting on pltf.'s behalf, engaged the solrs. to act for him, & they became his solrs., & he was liable to them for payment of their costs, there being no agreement with them that he should not in any circumstances be liable to them for their costs; & that liability was not excluded upon the assumption that the Union also undertook to pay the solrs.' costs.

*Per* YOUNGER, L.J.: On the ground that there was on the facts no distinction between this case & *R. v. Archbishop of Canterbury*, [1903] 1 K. B. 289.—**ADAMS v. LONDON IMPROVED MOTOR COACH BUILDERS, LTD.**, [1921] 1 K. B. 495; 90 L. J. K. B. 685; 121 L. T. 587; 37 T. L. R. 229; 65 Sol. Jo. 154, C. A.

**4086b. Shorthand notes.]—**In an action to recover money subscribed for preference shares & which pltf. alleged had been obtained from him by fraudulent misrepresentation, the trial lasted eight days & resulted in judgment for deft. with costs. On taxation the Master allowed the costs of taking & transcribing a shorthand note of the proceedings & of transcripts for the judge & counsel for deft. Pltf. objected to this item & insisted that there was nothing to make these costs costs in the cause. It appeared that at the commencement of the trial both parties came to an agreement that a note should be taken &

a transcript provided for the judge:—*Held*: there was an implied agreement that the costs of taking the note, transcribing it, & making a copy for the judge should be borne equally by the parties (nothing having been said about making these costs costs in the cause), & that pltf. was liable to pay half of these costs, but in the absence of a direction by the judge at the trial or an agreement by the parties that the costs of the shorthand notes should be costs in the cause, such costs ought not to be allowed on taxation as part of the costs of the cause; & except to the extent above stated no such agreement could be implied in the present case.—*SEAL v. TURNER*, [1915] 3 K. B. 191; 81 L. J. K. B. 1658; 113 L. T. 769; 59 Sol. Jo. 649, C. A.

**4086c.** —.].—At the beginning of the hearing of an action counsel for pltf. informed the judge that a shorthand note of the evidence was being taken by pltf., & it was agreed that the transcript should be used as the evidence in all subsequent proceedings. It was then stated that both parties were taking shorthand notes, & the judge said that they must agree to take one note only. Counsel for both parties agreed that the solrs. would be able to arrange matters during the adjournment of the ct. In fact no arrangement was made, & two shorthand notes were taken, but a copy of pltf.'s transcript was supplied to the judge:—*Held*: no agreement could properly be implied from what had taken place either (a) that the costs of pltf.'s shorthand note should be costs in the cause, or (b) that they should be borne by the parties in equal shares.—*RICHARDS v. BROWN* (1919), 88 L. J. Ch. 411, C. A.

**4105.** In citation, for "Q. B." read "K. B."

**4161a.** —.].—Pltf. was a passenger in a motor coach owned by deft. co., when the coach was involved in a collision in which pltf. was injured. Deft. co. admitted the collision, but denied negligence & liability. Subsequently the co. paid money into ct. admitting negligence, but still denying liability. At the trial pltf. recovered a less amount than had been paid in. The judge refused to give judgment for the deft. co. for its costs from the date of payment in. In the note of his judgment the judge stated that he had taken into account both the fact that money had been paid into ct. & the amount of such payment as directed by R. S. C. Ord. XXII., r. 6:—*Held*: payment into ct. by a deft. of a sum which is greater than the amount recovered by pltf. does not give deft. a conclusive right to costs after the date of such payment in, but such payment is a factor to be taken into account by the ct. in exercising its discretion as to costs. In the present case it was impossible to say that there were no grounds on which the judge had exercised his discretion.—*BROWN v. NEW EMPRESS SALOONS, LTD.*, [1937] 2 All E. R. 133; 106 L. J. K. B. 331; 156 L. T. 427; 53 T. L. R. 457; 81 Sol. Jo. 157, C. A.

**4162a.** Plaintiff recovering sum in excess of that paid in.—*Held*: the sum paid into ct. being inadequate, pltf. was entitled to costs.—*MALDON CORPN. v. LAURIE* (1933), 97 J. P. Jo. 132; 175 L. T. Jo. 320.

**4181a.** —.].—Action against husband & wife for goods supplied to wife, & held not to be necessities. Judgment against wife for amount claimed, with costs, & for husband, with costs, the husband's remedy to be against the wife.—*KNIGHT v. GORDON* (1931), 76 Sol. Jo. 68.

**4194a.** —. Different acts of negligence by each defendant.].—Def. S. performed a minor operation on pltf. in deft. council's hospital. After she had left the hospital pltf. complained of pains, & upon examination by her doctor she was found to be suffering from pyelitis, & a wad of surgical gauze was found in & removed from her body. Pltf. brought an action against S. for breach of duty & neglect to remove the plugging after the operation, & against deft. council for breach of duty & negligence arising out of a failure to nurse her properly. The negligence alleged against the council was that the nurses in their hospital had failed to remove the plugging, had failed to observe or report to the doctor in charge certain symptoms in pltf.'s condition, & had failed to take her temperature on the morning on which she had left the hospital. At the hearing counsel for S. put leading questions to witnesses for deft. council:—*Held*: upon the evidence S. had negligently left the gauze in pltf.'s body & was liable in damages; the negligence alleged against the nurses was negligence in carrying out their skilled duties as nurses, for which deft. council were not liable; upon the evidence the nurses had no reason to know that the gauze had been left in, & inasmuch as pltf. had not complained of pain there was no duty upon the nurses to discover the presence of the gauze; inasmuch as the temperature had pursued a perfectly normal course & gave no indication that there was anything wrong, the nurses were not negligent in not taking pltf.'s temperature on the morning on which she left the hospital; the causes of action against the two defts. were quite distinct & arose to a substantial extent out of different facts, & counsel for the one deft. was entitled to cross-examine a witness for the other; there ought not to be an order that pltf. should recover the costs payable by her to deft. S., as the acts of negligence alleged against two defts. were different.—*DRYDEN v. SURREY COUNTY COUNCIL & STEWART*, [1936] 2 All E. R. 535; 80 Sol. Jo. 656.

**4197a.** Independent proceeding by co-defendant for contribution.].—Where co-defts. are decreed to pay the costs of an action, one co-deft. cannot, by an independent proceeding, obtain contribution in respect of such costs against the other.—*DEARSLY v. MIDDLEWEEK* (1881), 18 Ch. D. 236; 30 W. R. 45; *sub nom.* *MIDDLEWEEK v. DEARSLY* (1881), 50 L. J. Ch. 777; 45 L. T. 404.

## Sect. 19.—SOLICITORS.

### SUB-SECT. 2.—FEES.

#### B. Higher Scale.

(p. 900.)

R. S. C., Ord. LXV., r. 10. Rule 10 of Order LXV. shall be designated and stand as paragraph (1) of Rule 10 of that Order. The following paragraphs shall be substituted for Rules 10a and 10b of Order LXV. (which are hereby revoked) and shall stand as paragraphs (2), (3), (4), and (5) of Rule 10 of that Order:—

- (2) The total in any bill of costs of the fees prescribed by this Order (as distinct from payments) shall in respect of business done in any cause or matter in the Supreme Court after the 31st day of December, 1917, be increased as follows, that is to say,
- (a) if done before the 1st day of September, 1919, by 20 per centum;
  - (b) if done after the 31st day of August, 1919, and before the 12th day of October, 1932, by 33½ per centum;
  - (c) if done after the 11th day of October, 1932, and before the 13th day of April, 1936, by 25 per centum;
  - (d) if done after the 12th day of April, 1936, by 33½ per centum;
- and any such increase shall be allowed upon any taxation of costs in respect of any such business as well between party and party as between solicitor and client, and in taxations under or pursuant to the Solicitors Act, 1932.
- (3) In respect of any bill of costs which was delivered to the client sought to be charged therewith or to the person chargeable therewith or any bill of costs which was taxed and certified or allowed before the 28th day of May, 1918, paragraph (2) of this Rule shall not apply; and in respect of any bill so delivered or taxed and certified or allowed after the 31st day of August, 1919, but before the 1st day of May, 1920, all business included therein shall for the purpose of paragraph (2) of this Rule be deemed to have been done before the 1st day of September, 1919.
- (4) Paragraph (2) of this Rule shall not—
- (a) apply to the remuneration prescribed by or under section 56 of the Solicitors Act, 1932, or
  - (b) affect the question whether a bill of costs when taxed is or is not less by one-sixth part than the bill delivered, sent or left, or
  - (c) affect the power to direct payment of a sum in lieu of costs under Order LXV., Rule 23, or the power to allow a fixed sum for costs under Order LXV., Rule 27 (38), or a gross sum under Order LXV., Rule 27 (38A).
- (5) Paragraphs (2), (3) and (4) of this Rule shall apply to all references to arbitration and to all proceedings on the Crown side and to all proceedings assigned to the Crown Office Department and to all business done after 31st day of August, 1919, in all criminal proceedings in the Supreme Court and, so far as applicable thereto, to all divorce and matrimonial causes in the Supreme Court." (*Added by R. S. C. (No. 2), 1932, as amended by R. S. C. (No. 1), 1936.*)

### SUB-SECT. 3.—ADDITIONAL REMUNERATION.

(p. 901.)

R. S. C., Ord. LXV., r. 10B. See new rule 10, *ante*.

4458a. —.]—The ct. will not superadd to a rule for security for costs, the term of deft. being at liberty to sign judgment as in case of a non-suit, if the security should not be given within a limited time.—*KELLY v. BROWN* (1836), 5 Dowl. 264; 2 Har. & W. 315.

**4516a.** —. —. —. Plff., who resided abroad, had purchased from def., for over £3,000 what was warranted to be an authentic Greek statue of the sixth century B.C. In an action for breach of warranty, wherein it was alleged that the statue was spurious, application was made that plff. should give security for costs. The ct. had already made an order that the statue, which was deposited with a warehousing co. within the jurisdiction of the ct., should not be removed without the consent of defts. or an order of the ct. — *Held*: as, in the event of plff. being unsuccessful in the action, the value of the statue must be more than any order for costs that could be made against him, there ought to be no order for security for costs. — *KEVORKIAN v. BURNES* (No. 2), [1937] 1 All E. R. 468, C. A.

**4526a.** —. ]—Pltfs. B. Co., an American Corpn., brought an action against K. & Co. for infringement of letters patent. Defts. obtained certain security for costs. Subsequently, the letters patent were assigned to P., Ltd.

On defts. applying for further security, plffs. applied for & obtained leave from the master in chambers to join P., Ltd. as co-plffs. The master thereupon refused to order further security & the summons was adjourned into ct. as a procedure summons. After the matter had been argued, counsel for plffs. stated that B. Co. & P., Ltd. were willing to accept liability, jointly & severally, for costs from the date of commencement of the action. Accordingly, no order was made on the summons except that the costs be costs in the action.—*BATES VALVE BAG Co. v. KERSHAW (B.) & Co. (1920), LTD. (1932)*, 50 R. P. C. 43.

4631a. ———.]—An order made in an action directed that debts. were to have the costs of the action except the costs attributable to a particular issue, the costs on that issue to be plff.'s:—*Held*: debts. were entitled to the general costs of the action & pltf. was only entitled to the costs of proving the issue on which he succeeded & was not entitled to have the general costs of the action apportioned. The repeal of R. S. C., Ord. LXV., r. 2, has not revived the practice which prevailed in the Chancery Division before 1902. —ADAMSON v. BIRKENHEAD CORPN., [1937] Ch. 279; [1937] 2 All E. R. 221; 106 L. J. Ch. 202; 157 L. T. 109; 81 Sol. Jo. 256.

4651a. Who may apply—Parties only—Running down action—Application by insurer.]— Lloyd's underwriters by a policy insured the owner of a motor car against third-party risks, but the policy did not cover damage to the assured's own car. The assured had a collision with a motor lorry in which both cars were damaged. The assured brought an action against the owners of the motor lorry to recover the damage done to his motor-car. The owners of the motor lorry counterclaimed for the damage to their motor lorry. Notice of that counterclaim was given to the underwriters' agents. At the trial in the county ct. judgment was given against the assured & in favour of the owners of the motor lorry on their counterclaim. The assured's solr. drew up his bill of costs in respect of pltf.'s claim & in defending defts.' counterclaim, & proposed that the underwriters should pay two-thirds of the total bill of costs & the assured the remaining one-third. The underwriters' agents objected to the proposed division of liability. The registrar was accordingly asked to tax the bill of costs as between the underwriters' agents & pltf.'s solr. The registrar decided that pltf.'s solr.'s division of liability for his costs was correct. The underwriters' agents applied to the county ct. judge to review the taxation, but he upheld the registrar's decision. On appeal by the underwriters' agents:—*Held*: the registrar had only jurisdiction to tax costs as between parties to the litigation on the record or as between one party to the litigation on the record & his solr.; & the registrar had no jurisdiction to tax costs as between some one who was not a party to the litigation & the solr. of a party to the litigation.—*Re* TAXATION OF COSTS, *Re* T. A. M., [1937] 2 K. B. 491; [1937] 3 All E. R. 113; 106 L. J. K. B. 622; 157 L. T. 98; 53 T. L. R. 796; 81 Sol. Jo. 477, C. A.

**4670a. Stay pending new trial.]**—Pltf. brought an action for damages for personal injuries

caused by negligence or breach of statutory duty. At the close of pltf.'s case, the judge ruled that there was not sufficient evidence of negligence to go to the jury, & he directed the jury to find a verdict for defts. On appeal, it was held that there was evidence of negligence sufficient to go to the jury, & that it could not be said that there was conclusive evidence of contributory negligence on pltf.'s part. A new trial was therefore ordered. The costs of the first trial not having been paid by pltf., a bkpcy. notice had been served on him in respect of those costs :—*Held* : there must be a stay of the order for the costs of the appeal until after the new trial. Should defts. be successful again, the costs of the trial would be set off against the costs of the appeal.—*STEVENS v. ECONOMIC HOUSE BUILDERS, LTD.*, [1938] 1 All E. R. 651 ; 82 Sol. Jo. 172, C. A.

**SUB-SECT. 3.—DISTRIBUTION OF BUSINESS IN THE TAXING DEPARTMENT (p. 926).**

**R. S. C., Ord. LXV., r. 18.** In Rule 18 of Order LXV. the proviso at the end of the Rule shall be omitted and the following proviso shall be substituted therefor :—

" Provided that if within the seven years next preceding the date of the judgment or order under which a taxation is to take place there has been a former taxation in the same cause or matter or in a summons under Order LV., Rule 3 or 4, relating to the same estate or trust, the taxation shall go to the Taxing Master before whom the former taxation took place." (*Substituted by R. S. C. (No. 1), 1934.*)

**4764a.** ———.—[There was a dispute between B. Co. & L. Co. with regard to the price of a certain metal. The matter went to arb'n. under the rules of the Metal Exchange, & an award was made. L. Co. was dissatisfied with the award & took proceedings in the High Ct. to set aside the award. The matter came before CLAUSON, J., who held that the award was bad. B. Co. appealed against that decision. When the case came before CLAUSON, J., each party was represented by one counsel. After notice of appeal had been given, L. Co.'s solrs. wrote to B. Co.'s solrs. to say that, unless the latter were instructing a leader, they would leave the matter in the hands of the counsel who represented them in the proceedings before CLAUSON, J. B. Co.'s solrs., in reply to that letter, stated that they were briefing a leader to appear in the Ct. of Appeal. L. Co.'s solrs. then briefed a second junior counsel. The Ct. of Appeal dismissed the appeal & ordered the B. Co. to pay the costs. The subject-matter of the dispute was of great interest to many persons, other than the parties. The taxing master disallowed all the fees of the second counsel briefed on behalf of L. Co. in the Ct. of Appeal :—*Held* : the taxing master ought to have taken into consideration the fact that the matter in question was of importance to a large number of persons &, in the circumstances of the case, have allowed the costs of briefing a second counsel in the Ct. of Appeal.—*BRITISH METAL CORPN., LTD. v. LUDLOW BROS. (1913), LTD.*, [1938] Ch. 787 ; [1938] 3 All E. R. 194 ; 107 L. J. Ch. 347 ; 159 L. T. 247 ; 82 Sol. Jo. 565.

**4843a. Documents in patent action.**—In an action for infringement of a patent pltf's. were an English co. & an American co. Defts. obtained an order for discovery & in their bill of costs pltf's. made a charge of 500 guineas

for instructions for affidavits of documents of the two pltf's. & instructions for brief. This was taxed down to 300 guineas, of which the master stated that 275 guineas was referable to the instructions for affidavits of documents. The bill referred to correspondence which passed between the solrs. & the American co. & to the consideration of a large number of documents sent over from America to be advised upon in England. The master saw none of these documents & had no opportunity of deciding how far they were material to the issues in the action :—*Held* : the master's duty in taxation was not only to see that the work was done, & find the value of the work, but also to see that the work was necessary to be done. The master, therefore, should have seen the documents referred to (which were, of course, privileged documents & not disclosed in the action) in order to satisfy himself that the work done upon them was necessary & not the result of over-caution. A review of the taxation before another master must be ordered.—*BRITISH UNITED SHOE MANUFACTURING CO., LTD. v. HOLLFAST BOOTS, LTD.*, [1936] 3 All E. R. 717.

**4845a. Claim for damages made on wrong basis.**—

Pltf's. dredger L. was sunk by defts.' vessel & defts. admitted liability subject to a reference to assess the damages. Pltf's. had bought the L. at a cost of £4,000 to enable them to carry out some excavation work under a contract with the Patras Harbour Comrs., & spent another £2,000 in bringing her to Patras. Pltf's. had exhausted their financial resources, the loss of the L. stopped the work, & accordingly they hired another & more expensive dredger, the A., to take the place of the L. Their claim for damages, amounting to over £23,500, was made up under five heads : (i.) the actual value to them of the L. ; (ii.) expenses incurred while the work was stopped ; (iii.) hiring expenses of the A. ; (iv.) extra cost of working the A. ; (v.) loss of profit. Subject to certain deductions on some of the heads of damage, the registrar assessed the damages, as framed, at £19,820, together with the costs of proving the claim, & his report was confirmed by the ct. On appeal, the Ct. of Appeal, & subsequently the House of Lords (*see SHIP-PING*, No. 6694a), held that the claim had been assessed on a wrong basis, & that all that pltf's. were entitled to was a capital sum representing the value of the L. as a going concern together with interest ; & the House of Lords sent the case back to the registrar to assess the damages on these principles. There having been no tender, under the order of the Ct. of Appeal pltf's. were given " the costs of the reference." The registrar found that the sum due was £11,333, with interest & the cost of proving the claim. Pltf's. then carried in for taxation the costs of the original reference including therein the whole cost of proving the claim in its original form. The assistant registrar held that pltf's. could only recover the costs of proving a claim on the basis laid down by the House of Lords, & accordingly he taxed off some two-thirds of pltf's. bill & this taxation was upheld on appeal by the ct.

Thereupon defts. delivered to pltf's. a bill of costs for the expenses they had incurred

in opposing the claim presented on a wrong basis. These costs they claimed to be entitled to under R. S. C., Ord. LXV., r. 27 (20).

The assistant registrar held that he had power to entertain a tax defts.' bill of costs inasmuch as pltf's. costs had been disallowed by him, acting under sub-rule 29, as they were not necessary or proper for the attainment of justice, & that sub-rule 20 provided that the party incurring such costs should pay the costs occasioned thereby to the other party. Pltfs. took out a summons to review the taxation of this bill of defts. The ct. allowed the objection, & defts. appealed:—*Held*: sub-rule 20 was aimed at the piling up of costs, the costs of matters which were improper & unreasonable as well as merely unnecessary, & dealt with quite separate matters from those dealt with under the general direction in sub-rule 29; & the assistant registrar, having disallowed pltf's.

costs under sub-rule 29, was not justified in then proceeding to deal with the matter under sub-rule 20 under which he had exercised no discretion.

*Semble*: a taxing officer ought not to order a party to pay the costs occasioned to the other side by reason of matters in respect of which costs have been disallowed under sub-rule 29 unless there is an order of the ct. to that effect.—*THE EDISON* (No. 2), [1934] P. 115; 103 L. J. P. 79; 151 L. T. 279; 18 Asp. M. L. C. 486, C. A.

**4900a. Right of parties to attend before certificate signed.**—*Re RITA, GAMMON v. RITA*, [1934] W. N. 76; 177 L. T. Jo. 289.

*Z. Unpaid Items of Disbursements* (p. 950).

**R. S. C., Ord. LXV., r. 27.** In paragraph 20 (a) of Rule 27 of Order LXV. "the Solicitors Act, 1932" shall be substituted for "the Solicitors Act, 1843." (*Substituted by R. S. C. (No. 1), 1936.*)

## Part LXXXVII.—Notices, Printing, Paper, etc.

SUB-SECT. 1.—IN GENERAL (p. 959).

**R. S. C., Ord. LXVI., rr. 3, 2A.** The following Rule shall be substituted for Rules 3 and 3A of Order LXVI (which are hereby revoked) and shall stand as Rule 3 of that Order:—

"3.—(1) Where by any provision of these Rules any document is required to be printed, that document may be either printed or reproduced by type lithography or stencil duplicating.

(2) The type to be used for such printing or other form of reproduction shall be type producing a clear and legible impression and shall be not smaller than small pica type for printing and not smaller than elite type for type lithography or stencil duplicating.

(3) Any other document required for use in any proceeding in the Supreme Court shall either be printed or reproduced as prescribed in the last two preceding paragraphs or shall be clearly and legibly written or type-written.

(4) The paper to be used for any pleading or petition of right shall be cream-wove tub-sized writing paper of durable quality of a substance not less than 32 lbs. per 1,000 sheets of foolscap 13½ inches by 16½ inches, and the paper to be used for any other such document shall be cream-wove tub-sized or hard-sized writing paper of durable quality of a substance not less than 26 lbs. per 1,000 sheets of such foolscap.

(5) The inner margins of any such document shall be about three-quarters of an inch wide and the outer margins about two inches and a half wide." (*Substituted by R. S. C. (No. 1), 1934.*)

## Part LXXXVIII.—Service of Orders, Etc.

**5021a. Winding-up petition—Dissolved foreign company.**—*Held*: the ct. can wind up a foreign co. which has carried on business within the jurisdiction, even if the co. has ceased to exist, & that if there is no member, officer, or servant of the co. on whom the petition to wind up can be served, the service must be effected, not under R. S. C., Ord. 67,

r. 6, but under Companies (Winding-up) Rules, 1929, r. 28, by leaving a copy of it at the co.'s "last known principal place of business" within the jurisdiction.—*Re TEA TRADING CO., K. & C. POPOFF BROS.*, [1933] Ch. 647; 102 L. J. Ch. 224; 149 L. T. 138; 77 Sol. Jo. 215; [1933] B. & C. R. 120.

## Part LXXXIX.—Application of Rules in Crown, Revenue, and Matrimonial Causes.

**5028a. Crown Suits Act, 1865 (c. 104), s. 37—Whether still applicable.**—*Held*: R. S. C., Ord. XI., is not a prohibitory order but one extending the jurisdiction of the ct., & therefore that, though made applicable to proceedings on the Revenue Side of the King's Bench Division by R. S. C., Ord. LXVIII., r. 3, it did not abrogate the right

conferred by sect. 37 of Crown Suits Act, 1865 (c. 104), to serve a writ of subpoena on a British subject out of the jurisdiction without the leave of the ct.—*A.-G. v. PROSSER*, [1938] 2 K. B. 531; [1938] 3 All E. R. 32; 107 L. J. K. B. 643; 159 L. T. 275; 51 T. L. R. 933; 82 Sol. Jo. 433, C. A.

## Part XCIII.—Stay of Proceedings.

**5142a.** ——— — **Different issues.**—The present action was brought by pltf. claiming damages for the death of her husband, which was alleged to have been caused by the negligence of defts. in supplying contaminated drinking water. Other actions were pending against the same defts., but in some of them breach of statutory duty was alleged in addition to negligence. An application was made to stay the present action pending the hearing

of one of the other actions, which was to be treated as a test action:—*Held*: as the issues raised in the present action were not identical with those raised in the proposed test action—the result of which might depend solely on the issue of breach of statutory duty, the issue of negligence not being there material—no stay ought to be ordered.—*PERRY v. CROYDON BOROUGH COUNCIL*, [1938] 3 All E. R. 670; 82 Sol. Jo. 623, C. A.

## Part XCIV.—New Procedure.

NOTE.—The New Procedure List was abolished by R. S. C. (No. 3), 1937, r. 15; and R. S. C., Ord. XXXVIIIa., is accordingly revoked.

### SECT. 2.—NEW PROCEDURE LIST.

(p. 985.)

**R. S. C., Ord. XXXVIIIa., r. 2.** In paragraph (4) of Rule 2 of Order 38a the words "The Lord Chancellor may, after consultation with the Lord Chief Justice, arrange that" shall be omitted. (*Deleted by R. S. C. (No. 5), 1934.*)

### SUB-SECT. 3.—REPLY.

(p. 985.)

**R. S. C., Ord. XXXVIIIa., r. 6.** The following Rule shall be substituted for Rule 6 which Rule is hereby revoked:—

"6. Where the defendant has set up a counterclaim the plaintiff shall, within seven days of the delivery thereof, deliver a reply." (*Replaced by R. S. C. (No. 2), 1932.*)

### SECT. 5.—SUMMONS FOR DIRECTIONS.

(p. 985.)

#### SUB-SECT. 1.—SUMMONS.

**R. S. C., Ord. XXXVIIIa., r. 7.** In paragraph (1) of Rule 7 the word "four" shall be substituted for the word "seven"; and the words "or of the reply (if any)" shall be omitted.

In Rule 7 the following paragraph shall be added as paragraph (3):—

"(3) If, within twenty-eight days from the date when appearance has been entered no summons for directions has been issued it shall be the duty of the plaintiff's solicitor to inform the Court of the reason why the provisions of this Order are not being complied with." (*Amended by R. S. C. (No. 2), 1932.*)

### SUB-SECT. 2.—POWERS OF JUDGE AT HEARING.

(p. 985.)

**R. S. C., Ord. XXXVIIIa., r. 8.** In paragraph (5) of Rule 8 after the words "leave of the Judge" there shall be inserted the words "or of the Court of Appeal." (*Added by R. S. C. (No. 2), 1932.*)

**5143a. As to trial by jury.**—An application for trial with a jury was made on the ground that money having been paid into ct. with a denial of liability it was desirable that the case should be heard by a tribunal unaware of the payment in. Trial without a jury was directed & on appeal:—*Held*: R. S. C., Ord. 38a, r. 8 (2) (g) is not *ultra vires* & the judge had sufficiently exercised his discretion under that rule as to whether there should be trial by jury.—*HAMILTON v. BRANCH*, [1933] W. N. 11; 175 L. T. Jo. 47, C. A.

### SECT. 8.—INTERLOCUTORY PROCEEDINGS BEFORE MASTER.

(p. 987.)

**R. S. C., Ord. XXXVIIIa., r. 13.** In paragraph (3) of Rule 13 after the words "unless the Judge" there shall be inserted the words "or the Court of Appeal." (*Added by R. S. C. (No. 2), 1932.*)

### SECT. 9.—LIVERPOOL AND MANCHESTER DISTRICT REGISTRIES.

(p. 987.)

**R. S. C., Ord. XXXVIIIa., r. 14.** In Rule 14 after the words "unless the Judge" there shall be inserted the words "or the Court of Appeal." (*Added by R. S. C. (No. 2), 1932.*)

### SECT. 11.—COMMERCIAL LIST.

(p. 987.)

**5147a. Transfer to Commercial List—Application to Commercial judge.**—(1) An action against an underwriter on a policy of insurance was marked by pltf.'s solrs. for the New Procedure List. On the summons for directions coming before the judge in charge of that list deft. applied for an adjournment to enable him to make an application to the judge in charge of the Commercial List for its transfer to that list, but the judge refused an adjournment on the ground that in his opinion pltf's. were entitled to choose their tribunal. Deft. appealed:—*Held*: the judge in charge of the New Procedure List was wrong in refusing an adjournment, as deft. was entitled in such an action to apply to have it transferred to the Commercial List.

(2) A deft. in such an action who desires to have it transferred from the New Procedure List to the Commercial List should apply for this as soon as possible, & his application should be heard by the judge in charge of the Commercial List without waiting until the summons for directions comes before the judge in charge of the New Procedure List.—*BUTCHER, WETHERLY & CO., LTD. v. NORMAN*, [1934] 1 K. B. 475; 103 L. J. K. B. 238; 150 L. T. 341; 50 T. L. R. 185, C. A.

## WORDS AND PHRASES.

- A.A.I.]** AUCTION, No. 15a  
**about to be wound up.]** COYS., No. 7373a  
**about to enter from seaward.]** SHIP., No. 5401a  
**absolutely vested in persons of full age.]** TRUSTS, No. 3639c  
**accident.]** MAST. & S., Nos. 2310a, 2317a, 2317b, 2331a, 2768a  
**accidental slip or omission.]** ARBN., No. 1668a  
**accident insurance business.]** COYS., No. 7490b  
**account of payee.]** B. OF EXCH., No. 2840a  
**account stated.]** LIMIT. OF A., No. 672b  
**acknowledgment.]** COYS., Nos. 3126a, 4904a; LIMIT. OF A., No. 785a  
**action.]** ACTION, Nos. 18a, 18b  
**action in respect of copyright.]** COPRT., No. 575c  
**action or other matter.]** ACTION, No. 35a  
**action or suit.]** ACTION, No. 48a  
**Act of Parliament.]** STATS., No. 3a  
**actual cost.]** INC. T., Nos. 276a, 276b  
**actually paid.]** L. & T., No. 4375a  
**additional capital raised . . . or provided.]** COYS., No. 7843a  
**additional or larger power.]** TRUSTS, No. 3639a  
**adhesive labels.]** COPRT., No. 325a  
**adopter.]** POOR L., No. 504a  
**advertising.]** CRIMINAL LAW, Nos. 8178a, 8178c  
**after marriage in right of wife.]** BKPCY., No. 7096b  
**agency of necessity.]** AGCY., No. 215a  
**agistment.]** AGRIC., No. 164a; ANIMALS, No. 342a  
**agreement . . . respecting the amount & manner of payment.]** COURTS, No. 895a; SOLRS., No. 1228a  
**agreement under hand only.]** REVENUE, No. 767a  
**agricultural holding.]** AGRIC., No. 30f  
**aiding & abetting.]** CRIM., 613a; STR. TRAF., No. 117a  
**air gun or air rifle.]** REVENUE, No. 302a  
**alienation.]** E. D., No. 666a  
**all boroughs.]** RATES, No. 675f  
**all loss.]** ARBN., No. 238a  
**all lost.]** B. OF EXCH., No. 2414a  
**all lots uncleared shall be resold.]** AUCTION, No. 280a  
**all my home & personal belongings.]** WILLS, No. 5899a  
**all my interest.]** BKPCY., No. 7689a  
**all my property real & personal of every description.]** AGCY., No. 296a  
**all my relations.]** WILLS, No. 7196a  
**all other goods upon the premises (unless specially exempt) sufficient to satisfy the amount of this distress.]** DISTR., No. 737a  
**all pleasure grounds.]** L. & T., No. 4760a  
**all risks.]** BAILMT., No. 218a  
**alterations & improvements in the buildings.]** EDUC., No. 32a  
**amount or value of the subject-matter of the suit.]** DEF., No. 482a  
**amount . . . remaining in dispute.]** CTY. CTS., No. 335a  
**and co.]** ALIENS, No. 558d  
**annual payment towards the cost of the maintenance & repair.]** HGHYS., No. 65  
**annual salary.]** ELECTRIC, No. 103b  
**annual value.]** INC. T., Nos. 25a—25d  
**annuity.]** COYS., No. 7611a  
**ante-nuptial or post-nuptial settlements.]** H. & W., No. 5624a  
**any act or thing or any event happened whereby he would be deprived of right to receive income.]** BKPCY., No. 5902a  
**any grass land.]** AGRIC., No. 56a  
**any husband who might survive her.]** STTLMTS., Nos. 146a, 146b  
**any other petition.]** BKPCY., No. 6965a  
**any other loss whatever.]** INSCE., No. 3259a  
**apparatus for wireless telegraphy.]** TELE., No. 61a  
**apparent.]** B. OF EXCH., No. 2513a  
**appeal in an action.]** CTY. CTS., No. 776a  
**appellant.]** CRIM., No. 5607a  
**application for the review.]** MAST. & S., No. 3708a  
**applied to charitable purposes only.]** See Charitable purposes only, *infra*  
**appropriated.]** BLDG. CONTS., No. 319a  
**approved commercial bills on London.]** SHIP., No. 1723a  
**approved insurance policy.]** BANK., No. 756a  
**approved subject to adjustment & conditions of insurances.]** AGCY., No. 2139b  
**appurtenances.]** SHIP., No. 203a  
**arising out of the termination of the tenancy.]** AGRIC., Nos. 29a—29c  
**arranged.]** INSCE., Nos. 729a, 729b  
**arrangement.]** COYS., No. 7373a  
**arrears.]** ECCLES., No. 3491c  
**articles of vertu.]** WILLS, No. 5332a  
**artistic work.]** COPRT., No. 111a  
**as agent for.]** AGCY., No. 2482a  
**as at present enjoyed.]** B-MTS., No. 687b  
**as principal.]** MAGS., No. 1229a  
**assault on any constable when in the execution of his duty.]** CRIM., No. 7685a  
**assessed.]** COYS., No. 6936a  
**assessed up to the fifth day of April.]** COYS, No. 4982b  
**assignment.]** ALIENS, No. 389a  
**assignment of property.]** BKPCY., No. 8782b  
**association with persons of bad character.]** CRIM, No. 5239b  
**assurance of property or of an interest therein.]** EASMT., No. 196b  
**at all times.]** MED., No. 242b  
**at charterer's risk.]** SHIP., No. 2974b  
**at customer's sole risk.]** BAILMT., No. 140a  
**at present.]** H. & W., No. 4836b  
**at stated periods.]** REVENUE, No. 619a  
**attached.]** HGHYS., No. 2405a  
**attempt.]** CRIM., Nos. 751a, 751b, 10,779a  
**at the time of.]** COYS., No. 4709a  
**authorise.]** COPRT., Nos. 394b, 489a, 489b  
**authorised by this or some other Act of Parliament.]** GAMING, No. 451a  
**authorised improvements.]** LAND IMP., Nos. 79a—79c  
**authorised undertakers.]** ELECTRIC, No. 103a  
**autrefois acquit.]** CRIM., No. 3647a  
**autrefois convict.]** CRIM., No. 3608a  
**average.]** FOOD, No. 476m



## WORDS AND PHRASES

- bag cargo.] SHIP., No. 4461a  
 baggage of passengers.] REVENUE, No. 70a  
 balance of money.] WILLS, No. 5724a  
 bankruptcy matters.] BKPCY., No. 1552b  
 beasts which gain the land.] ECCL., No. 3490b  
 become effective.] COMP. PCHE., No. 540a  
 been charged.] INC. T., No. 204m  
 before the charge is gone into.] CRIM., No. 1032a;  
 MAGS., No. 334a  
 benefice.] ECCL., No. 3466a  
 beneficial interest.] INSCE., No. 491a  
 beneficial owners.] EQY., No. 688a  
 benefit of any persons.] STTLMTS., No. 2600a  
 bill of lading.] ADM., No. 541a  
 bill, poster or placard.] ELECT., No. 1038a  
 body of persons . . . established for charitable  
 purposes only.] See Charitable purposes only,  
*infra*  
 bookmaker.] REVENUE, Nos. 93a, 93b  
 books.] WILLS, No. 5332a  
 books containing the names of the members.]  
 IND. SOC., No. 27c  
 bought of ourselves as principals.] AGCY., No.  
 1529a  
 British court having jurisdiction in bankruptcy.]  
 BKPCY., No. 395a  
 brothel.] CRIM., No. 8143b  
 building.] BURIAL, Nos. 300a, 309a  
 bungalow.] S. LAND, No. 2701a  
 bunkering or other purposes.] SHIP., No. 3162a  
 burial ground.] BURIAL, No. 294a  
 business.] ALIENS, No. 221a; BKPCY., Nos.  
 274a, 274b; TRADE, No. 10a  
 business efficacy.] BLDG. CONTS., No. 58a  
 butter toffee.] FOOD, No. 243a  
 buttons.] REVENUE, No. 93d  
 buy.] AGRIC., No. 979b  
 by any deed or document anticipate, charge, assign,  
 or otherwise dispose of.] BKPCY., No. 5922a  
 by order of J. S. & others.] AUCT., No. 301a  
 by return.] CONTR., No. 418a  
 by virtue or in consequence of any disposition.]  
 INC. T., No. 691c
- candidate.] ELECT., No. 1593a  
 cannot exceed six years.] INC. T., No. 576a  
 carrying away.] MINES, No. 325a  
 carrying on business.] ALIENS, No. 198a  
 carry on its business more economically or more  
 efficiently.] COYS., No. 4321b  
 carry-over.] EDUC., No. 288a  
 cash paid.] COYS., No. 4707a  
 castings, iron or steel of light type.] CARR., No.  
 1245d  
 casualty.] INSCE., No. 3289a  
 cease to be in force.] MAST. & S., No. 3288c  
 change of circumstances.] LUNAT., No. 529a  
 channels between the breakwaters.] SHIP., No.  
 5401a  
 charge . . . fixed under any subsisting agreement  
 or special statutory provision . . . for valuable  
 consideration.] CARR., Nos. 1237a—1237f  
 charges.] CARR., No. 1349a  
 charges of said assured upon said cargo.] INSCE.,  
 No. 551a  
 charitable institution.] STATS., No. 342a  
 charitable or public institutions.] CHAR., No.  
 724a  
 charitable purposes only.] INC. T., Nos. 472a—  
 472f, 476a—476h  
 charities & institutions as exors. think fit.] CHAR.,  
 No. 735a  
 charities or such religious bodies as trustees think  
 fit.] CHAR., No. 728a  
 charity subsidiary & ancillary.] CHAR., No. 901a
- charterer.] AGCY., No. 2609a  
 charterers' risk.] SHIP., No. 2606a  
 chattels.] E. D., No. 128a  
 Chelsea Hospital.] CHAR., No. 884a  
 cheque.] BANK., No. 691d; B. OF EXCH., No.  
 242a  
 chequelet.] B. OF EXCH., No. 3146a  
 child.] FR. SOC., No. 175d  
 children.] H. & W., Nos. 5781a—5781d  
 children or reputed children.] WILLS, No. 479a  
 chose in action.] ALIENS, No. 389a  
 Christian principles.] CHAR., No. 68a  
 church.] CHAR., No. 981a  
 church belonging to a monastic order, benefit of.]  
 CHAR., No. 79a  
 Church of England.] CHAR., No. 981b  
 cinematograph films.] TRADE MKS., No. 511a  
 class of creditors.] COYS., No. 7404a  
 class of persons.] DEP., No. 176a  
 clear yearly sum after paying or deducting income  
 tax & super-tax.] RNTCHGS., No. 593a  
 clergymen of the Church of England.] CHAR.,  
 No. 980a  
 clift.] MAST & S., No. 3811b  
 closed stations.] CARR., No. 954a  
 club.] CLUBS, Nos. 111a, 111b  
 coal.] CARR., No. 1245c  
 coal mine.] MINES, No. 327q  
 collision with any object.] INSCE., No. 1708a  
 commencement of proceedings for compensation.]  
 AGRIC., No. 265c  
 committed personally.] MINES, No. 1212a  
 common fund.] BKPCY., No. 2028a  
 common gaming house.] CLUBS, Nos. 136a,  
 140a; GAMING, Nos. 284a, 284b  
 commonly understood.] ELECT., No. 1025a  
 competent to dispose of property.] E. D., Nos. 63a,  
 117a; POWERS, No. 1005a  
 completion.] AGRIC., No. 266m  
 comprised in any hire-purchase agreement.]  
 DISTR., No. 424a  
 compromised.] INSCE., No. 729b  
 compulsory examination or deposition before any  
 court on the hearing of any matter in bank-  
 ruptcy.] BKPCY., No. 4637a; CRIM., No.  
 2204a  
 compulsory process of any court of law.] CRIM.,  
 No. 2204a  
 condonation.] H. & W., No. 3179a  
 conducted by himself.] MED., Nos. 260a, 260b  
 conduct of the parties.] H. & W., Nos. 5364a,  
 5365a  
 confiscation or destruction by the Government of  
 the country.] CONFL., No. 17a  
 consecutive journeys.] ANIMALS, No. 688a  
 consent of owner.] AGCY., Nos. 485a, 495a, 495b  
 consent or permission of the true owner.] BKPCY.,  
 No. 6745a  
 consequences of hostilities or warlike operations.]  
 SHIP., No. 8755a  
 contemplation of marriage.] WILLS, No. 1522a  
 contiguous.] RATES, Nos. 226cc, 226dd  
 contract carriages.] STR. TRAF., No. 76h  
 contract for sea insurance.] INSCE., No. 252a  
 contract for the repayment by a borrower of money  
 lent to him.] MONEY, No. 353b  
 contract for the sale or other disposition of land or  
 any interest in land.] S. LAND, No. 73a  
 contract in writing.] ARBN., No. 1152a  
 contract made within the jurisdiction.] 'ARBN.,  
 No. 1981b  
 contract of employment.] INSCE., No. 3217cc  
 contract to receive a share of the profits.] BKPCY.,  
 No. 4353a  
 contracted.] INSCE., No. 3195a  
 contrary intention.] EASMT., No. 186a

## WORDS AND PHRASES

- contrary or other intention.] EXORS., No. 5620a  
 contrary stipulation.] ALIENS, No. 2151  
 contributory.] COYS., No. 6217a  
 control.] INC. T., No. 674q  
 conveniences.] CORPNS., No. 997a  
 conveyance of a private party.] STR. TRAF., No. 76b  
 conveyance of minerals.] MINES, No. 325c  
 corporation constituted under the law of the United Kingdom or any part thereof.] EXORS., No. 919a  
 corroboration in material particular.] BASTY., No. 325a  
 cost of repairs.] INSCE., No. 3289a  
 costs, charges or expenses, properly incurred incident to the sale.] MTGE., No. 4326a  
 costs of the execution.] COYS., No. 6624a  
 counselling & procuring.] CRIM., No. 9490a  
 counterclaim, set-off or cross demand.] BKPCY., No. 940a  
 county court or other court for the recovery of small debts.] POOR L., No. 225b  
 court.] COURTS, Nos. 11a, 17a, 17b  
 court in which the plaint was entered.] CTY. CTS., No. 750b  
 covenant or provision . . . having reference to the subject-matter.] L. & T., No. 2792a  
 cream.] FOOD, No. 476c  
 creditor.] BKPCY., No. 8869a  
 creditor entitled to benefit of deed.] BKPCY., No. 8645a  
 crime.] CRIM., Nos. 5a, 5309a  
 criminal case.] DEP., 91a  
 criminal cause or matter.] CRIM., Nos. 6293a, 6298a; CR. PRACT., No. 797a  
 criminal habits & tendencies.] CRIM., Nos. 5239b—5239e  
 cruelly ill-treating.] ANIMALS, Nos. 572a, 587a  
 current prices.] S. GOODS, No. 430a  
 current rates.] SHIP., No. 1731a  
 custody of the child.] CRIM., No. 9399a  
 customarily made up.] INC. T., No. 204d  
 customer.] BANK., Nos. 289a, 292b, 692d  
 customers.] TRADE, No. 498a
- damage done by a ship.] ADM., Nos. 484a, 486c; SHIP., No. 6811a  
 damage to hull or machinery.] INSCE., No. 1830a  
 dealer in milk.] INC. T., No. 79a  
 debt.] BKPCY., Nos. 1657a, 8869a  
 debt or other legal thing in action.] BLDG. CONTS., No. 342a; CHOS., No. 77a  
 debts due or growing due to bankrupt.] BKPCY., Nos. 6858a, 6858b, 6858c  
 deckload.] INSCE., No. 1931a  
 decree, order, sentence, or decision.] DEP., No. 621a  
 deduction for or in respect of bad or negligent work.] FACT., Nos. 264a, 264b, 264c  
 deed.] CORPNS., No. 182a  
 defeasance or condition.] B. OF SALE, No. 228a  
 defined.] WATERS., No. 262a  
 definitive publication of any order.] CHAR., No. 2154a  
 del credere agent.] AGCY., No. 127a  
 delivering cargo.] SHIP., No. 3634a  
 demand.] PUB. HLTH., No. 502d  
 demand . . . in, to, or on the property.] L. & T., No. 2792a  
 de minimis non curat lex.] ACTION, No. 303a; COPRT., No. 43b  
 dental surgeon.] MED., No. 218a  
 dentist.] WORK, No. 169a  
 deposit.] GAMING, No. 408a  
 design.] COPRT., Nos. 77a, 111a, 229a; TRADE MKS., No. 893a  
 determination.] RYS., No. 503a
- determined by a legal notice to quit or otherwise.] L. & T., No. 6957a; MTGE., No. 732a  
 devolve in accordance with the general law.] DIST., No. 283f  
 direct & particular interference with business.] BLDG. CONTS., No. 287a  
 direct loss or damage.] CONST. LAW, No. 499a  
 direct or contributing cause of the accident.] GUAR., No. 1826c  
 direct taxation.] DEP., Nos. 135a—135e, 142a  
 directors.] B. OF EXCH., No. 763a  
 disabled from acting by any provisions of this Act.] L. G., No. 27b  
 discovery.] INC. T., Nos. 254a, 592c  
 discovery by the party aggrieved of the matter complained of.] CARR., No. 1224a  
 dishonesty.] INSCE., No. 3260a  
 dismissed.] CRIM., No. 6134a  
 disorderly house.] CRIM., No. 4222a  
 dispute.] BANK., No. 112a  
 dispute concerning wages.] FISH., No. 497a  
 distribution of capital assets.] STTLMTS., No. 1998a  
 disused burial ground.] BURIAL, Nos. 291a, 294a, 309a  
 divided between.] WILLS, Nos. 7179a, 8538a  
 dividends.] BANK., No. 691d; B. OF EXCH., No. 242a  
 divine service.] CRIM., No. 7095a  
 dock charges.] RYS., No. 756a  
 documents used in the ordinary course of business.] B. OF SALE, No. 138a  
 domestic animal.] ANIMALS, No. 602a  
 domestic service.] WORK, No. 118a  
 domestic & private use only.] COPRT., No. 483c  
 donatio mortis causa.] GIFTS, Nos. 291a, 337a, 356a; MTGE., No. 3453a  
 double dipped.] ANIMALS, No. 690a  
 dramatic piece.] COPRT., No. 99a  
 driving in a manner dangerous to the public.] STR. TRAF., Nos. 222d, 222e  
 driving recklessly or in a manner dangerous to the public.] STR. TRAF., No. 222b, 222c  
 driving . . . under the influence of drink.] STR. TRAF., Nos. 222f, 222g  
 driving without due care & attention or without reasonable consideration.] STR. TRAF., No. 222a  
 drunk.] INTOX., No. 764a  
 due & payable within twelve months next before.] RATES, No. 1188a  
 due notice.] H. & W., No. 342a  
 duly authorised.] MAGS., No. 1229a  
 during.] TIME, No. 324a  
 duties of customs & excise.] DEPS., No. 135e  
 duty due upon an account of real property.] E. D., No. 209e  
 dwelling-house.] CRIM., No. 10,815a; L. & T., No. 7351b; PUB. HLTH., No. 502g
- E. & O. E.] SALE OF GOODS, Vol. XXXIX., p. 461, No. 885  
 educational establishment.] INC. T., No. 540a  
 education of candidates for Holy Orders.] CHAR., No. 75a  
 ejusdem generis.] CARR., No. 685c; CHAR., No. 755a; CONFL., No. 639a; HGHYS., No. 1435f; INSCE., No. 855a; NUIS., No. 134b; SHIP., No. 3162a  
 electrically propelled vehicle.] REVENUE, No. 140a  
 emoluments.] METROP., Nos. 29a, 29b  
 employee.] DEP., No. 135h  
 employers of workmen.] FACT., No. 153a  
 employment.] INC. T., Nos. 312a, 495a, 496a—490c  
 enable her to leave the port.] SHIP., No. 3872b

## WORDS AND PHRASES

- enemy.] ALIENS, Nos. 198a, 392a  
 enemy debt.] ALIENS, No. 215b  
 England, unto my country.] CHAR., No. 217c  
 engravings.] COPRT., No. 229a  
 entailed interest.] STTLMTS., No. 3143f  
 entering the employment.] MAST. & S., No. 3837a  
 entertainment.] REVENUE, No. 791a  
 entrusting.] CRIM., Nos. 10,315a—10,315c  
 entry into insurance.] POOR L., No. 1672a  
 equipment.] CHAR., No. 1382a  
 equitable assignment.] BKPCY., No. 2902a  
 error in law on the face of an award.] ARBN., No. 1598b  
 error of law apparent on the record.] CRIM., Nos. 6298a, 6298c  
 estimated to be bad.] INC. T., No. 592b  
 everything I die possessed of.] WILLS, No. 6036a  
 evidence of character & repute.] CRIM., No. 5308a  
 except to the amount of any cash paid to the company.] COS., No. 4707a  
 exceptional.] CARR., No. 1323a  
 exceptional quotations.] FOOD, No. 476in  
 exceptional war measures.] ALIENS, No. 223b  
 excusable.] BKPCY., No. 8557a  
 execution of the works.] COMP. PCHL., No. 284a  
 exercise of prerogative right to His Majesty.] CONST. LAW, No. 534a  
 exert influence.] CONTR., No. 5168a  
 existing circumstances & conditions.] SHIP., No. 5686a  
 expenses & maintenance of patients from the parishes of S. & S.] CHAR., No. 42a  
 expenses . . . incurred . . . by reason . . . of notice to treat.] COMP. PCHL., No. 2211a  
 expenses necessarily incurred in carrying this Act into effect.] L. G., No. 550a  
 exported.] RATES, No. 226kk  
 express carriages.] STR. TRAF., Nos. 76j, 76k, 76l  
 express trust.] EXORS., No. 3818a  
 external & visible injury.] ANIMALS, No. 145a  
  
 factory.] FACT., No. 180b  
 factory or workshop.] See Industrial hereditament, *infra*  
 fair dealing.] COPRT., Nos. 43a, 489a  
 fair wear & tear.] SHIP., No. 3092c  
 false in any material particular.] CRIM., No. 10,352a  
 false pretences.] CRIM., No. 9340a  
 false representation.] FR. SOC., No. 174a  
 false statement . . . in relation to . . . personal character.] ELECT., No. 1038b  
 family.] L. & T., No. 7107b  
 father.] ALIENS, No. 20a  
 father . . . or reputed father.] POOR L., No. 504a  
 faute grave.] MAST. & S., Nos. 470a, 470b  
 features of shape, configuration, pattern, or ornament applied to any article.] COPRT., No. 111a  
 fees & actual expenses.] COYS., No. 6950a  
 final award.] ARBN., Nos. 1058a, 1067a  
 final judgment.] CONFL., No. 1113a  
 final judgment or order.] BKPCY., No. 830a  
 fine.] L. & T., No. 5269a  
 firearm.] REVENUE, No. 302a  
 fire brigade duties.] PUB. HLTH, No. 584a  
 fire insurance business.] COYS., No. 7490a  
 first arose.] INC. T., No. 449a  
 first option.] CONTR., No. 5b  
 first owner.] COPRT., No. 229a  
 first published.] COPRT., No. 16a  
 fit for habitation.] L. & T., No. 3106a  
 fitness or propriety.] INTOX., No. 299a  
 flour.] AGRIC., No. 979c  
 for.] TIME, No. 324b  
 for & on account of.] CRIM., No. 5943b  
 for any term suitable.] L. & T., No. 1978a  
 for a purpose.] REVENUE, No. 140b  
 for default of such issue.] STTLMTS., No. 134a  
 for her use only & to do as she may wish in her lifetime.] CHAR., No. 657a  
 for his own benefit.] BKPCY., No. 6401a  
 for some period less than the life of the child.] INC. T., No. 575b  
 for the benefit of.] INC. T., No. 545b  
 for the benefit of his wife.] BKPCY., No. 6012a; H. & W., No. 1223a  
 for the purposes of this scheme.] ELECTRIC, No. 6b  
 for use . . . in connection with agriculture & horticulture.] MED., No. 272a  
 force majeure.] BLDG. CONTS., No. 65a  
 forged.] CONFL., No. 705a  
 formal contract to be signed in due course.] CONTR., No. 546c; THEATRES, No. 64a  
 forthwith.] ESTPL., No. 597a  
 foundation Mass.].—CHAR., No. 106a  
 found by night having in his possession without lawful excuse implements of housebreaking.] CRIM., No. 5478a  
 found in the United Kingdom.] ALIENS, No. 541a  
 founded on contract.] MONEY, No. 434a  
 fraudulent assignment.] BKPCY., Nos. 454a, 596a  
 fraudulent conveyance.] BKPCY., No. 7339a  
 fraudulent preference.] AGCY., No. 2273a; BKPCY., Nos. 4665a, 7166a, 7172a, 7176a, 7185a, 7339a, 7361a, 7393a, 7414a; COYS., Nos. 3353b, 4699a, 4709a, 6746a  
 fraudulent purpose.] COYS., No. 3353b  
 free & clear of all taxes & incumbrances whatsoever.] RNTCHGS., No. 592b  
 free from incumbrances.] E. D., No. 244a  
 free house London.] S. GOODS, No. 453a  
 free of all death duties.] E. D., No. 209c  
 free of all duties.] E. D., No. 777a  
 free of income tax.] RNTCHGS., No. 592a  
 free from all death duties.] E. D., No. 227b  
 freight-transport hereditament.] RATES, Nos. 226jj—226tl  
 fresh evidence.] BASTY., Nos. 366a, 366b; H. & W., Nos. 6251b, 6255b, 6255c  
 front.] HGHYS., No. 2580a  
 full benefit of all pending contracts & engagements & of all other property.] CONTR., No. 4957a  
 full regular pay.] MAST. & S., No. 628c  
 furniture.] WILLS, No. 5625a  
  
 game or pretended game of chance.] GAMING, No. 322c  
 gardens for the sale of produce.] INC. T., No. 83a  
 general contingencies.] ARBN., No. 372a  
 general provisions.] METROP., No. 42a  
 generalia specialibus non derogant.] COMP. PCHL., No. 650b  
 German Government for the benefit of its soldiers disabled in the late war, gift for.] CHAR., No. 23c  
 German national.] ALIENS, No. 215j  
 given by the borrower.] MONEY, No. 353r  
 gone away.] BKPCY., No. 5475a  
 good cause.] LIBEL, No. 2198a  
 good character.] CRIM., No. 3820c  
 goods.] B. OF SALE, No. 138b  
 goods & chattels.] COHLDs., No. 394a  
 goods, wares, & merchandizes.] COYS., No. 2211a  
 goods works.] CHAR., No. 823a  
 got by Cheshire Cheese, warranted sound.] ANIMALS, No. 416a  
 grandchildren of any degree.] WILLS, No. 6728a  
 grandparent.] FR. SOC., No. 174a  
 grantor.] B. OF SALE, No. 288a

## WORDS AND PHRASES

grave & weighty.] H. & W., No. 2479a  
gross value.] INC. T., No. 25e

haulage & traction.] ELECTRIC, No. 43a  
heir-at-law.] COHDS., No. 1533a  
heirs of my brother & sisters.] WILLS, No. 7179a  
herein specified.] S. GOODS, No. 1887c  
high contracting parties.] STR. TRAF., No. 260c  
highway.] HGHYS., No. 1894a  
His Majesty's ships.] ADM., No. 130a  
hoarding or similar structure.] PUB. HLTH.,  
Nos. 204a, 204b  
holder in due course.] BANK., No. 687a; B. OF  
EXCH., No. 896a  
holding.] AGRIC., No. 266x, 267d  
holiday.] SHIP., No. 4046a  
home of rest.] CHAR., Nos. 47b—47d  
honest.] BKPCY., No. 8557a  
honour & interests of the medical profession.]  
ACTION, No. 249a  
Honours Final. Institute of Chartered Account-  
ants.] INJON., No. 906c  
hospital.] INC. T., No. 58a  
hospital or other charitable or benevolent institu-  
tion.] CHAR., No. 755a  
hostile person.] ALIENS, No. 280a  
house with the furniture & fittings as it stands.]  
CONTR., No. 429a  
household effects.] WILLS, No. 412a  
husband.] H. & W., No. 2039a

if any dispute should arise as to the agreement or  
any matter or thing therein or intention or  
construction thereof.] ARBN., No. 237a  
if he deems it to be conducive to the public good.]  
ALIENS, No. 551a  
if peace is not declared.] CONST. LAW, No. 487b  
if the mare was not all right she was. not his.]  
ANIMALS, No. 476a  
ignorantia legis neminem excusat.] BLDG. CONTR.,  
No. 383b  
illegality.] INSCE., No. 2527a  
immediate consequences.] INSCE., No. 720c  
immediately before.] POOR L., No. 315a  
impossible in law.] MAGS., No. 500a  
improper conduct.] CRIM., No. 10,505a  
improvements.] LAND IMP., No. 79b  
imputations on the character of . . . the witnesses.]  
CRIM., No. 4734a  
inaccurate description.] ELECT., No. 1145a  
in all respects reasonably fit for human habitation.]  
L. & T., No. 3160a  
in any action.] EVID., No. 4428a  
in apparent good order & condition.] SHIP.,  
No. 2257a  
in arrear.] COYS., No. 3734a  
in charge of any vehicle.] INSCE., No. 3157a  
income.] BKPCY., No. 7603b; INC. T., No. 557a  
income arising from any part of my estate.]  
PTRNRS., No. 1102a  
income tax at the current rate.] RNTCHGS., No.  
587a  
in connection with.] SHIP., No. 8697a  
in connection with the work.] GUAR., No. 1826b  
inconsistent with the provisions of this Act.]  
FACT., No. 211a  
incorporated accountant.] INJON., No. 906b  
incorporated company.] B. OF SALE, No. 144a  
increase of capital.] COYS., No. 1126a  
independent contractor.] MAST. & S., Nos. 2213a,  
2216a, 2220a  
in dispute.] ANIMALS, No. 390a; MAST. & S., 3849a  
industrial hereditament.] RATES, Nos. 226a—  
226bb

initial share issue.] COYS., No. 1814a  
in public interest.] L. & T., No. 7298a  
in pursuance of any Compensation Scheme.]  
MAST. & S., No. 3822c  
in relation to the removal of the wreck.] INSCE.,  
No. 1865a  
instead of the insured car.] INSCE., No. 3217e  
institute, society or nursing home . . . as provide  
for persons of moderate means.] CHAR.,  
No. 47a  
in such position or of such construction as to be  
equally safe to every person employed or work-  
ing in the factory as it would be if it were  
securely fenced.] FACT., No. 76a  
insufficiency of packing.] SHIP., Nos. 2257a, 3649a  
insurance on his life.] INC. T., No. 549a  
intended execution of public duty.] PUB. AUTH.,  
No. 777b  
intent.] CRIM., No. 751a  
intent to defraud creditors.] COYS., No. 3353a,  
3353b  
intent to extinguish.] STTLMTS., No. 2727a  
interest.] E. D., No. 63a; INC. T., Nos. 380a, 345e  
interested.] COYS., No. 3419a  
interest in respect of money charged upon or pay-  
able out of land.] ACTION, No. 48a  
interest . . . on any securities issued under the  
War Loan Acts, 1914 to 1917.] INC. T.,  
No. 317b  
interest provided by the deceased.] E. D., No. 67a  
interfered . . . with the management of the mine.]  
MINES, No. 1126a  
interference with the freedom of Inter-State trade.]  
DEP., No. 188a  
international carriage.] STR. TRAF., No. 260c  
in the actual possession or entitled to the receipt.]  
WILLS, No. 8032a  
in the body.] B. OF EXCH., No. 1548a  
in the body of it made payable at a particular place.]  
LIMIT. OF A., No. 154a  
in the course of his trade or business.] BKPCY.,  
Nos. 6659a, 6715a  
in the course of trade.] REVENUE, No. 140b  
in the event of peace not being concluded.] CONST.  
LAW, No. 487a  
in the nature of a fine.] L. & T., No. 5269a  
in the ordinary course of business.] B. OF EXCH.,  
No. 2475b  
in the ordinary way.] H. & W., No. 4909a  
in trust for any creditor.] BKPCY., No. 7414a  
investigation of title.] MTGE., No. 4061a  
involuntarily alienate or encumber.] ALIENS,  
No. 215b  
issue.] COYS., No. 2589a; WILLS, No. 6239a  
issue of shares . . . to holders of shares in the  
existing company.] COYS., Nos. 7155a, 7155b  
issued.] BANK., No. 687a; COYS., No. 439a  
is twenty-one years of age.] CRIM., No. 5240b  
it being my wish.] TRUSTS, No. 379a

Jew.] ECCL., No. 1047a  
Jewish National Fund.] CHAR., No. 215a  
judgment.] CTY. CTS., No. 787a  
judgment in rem.] JDGMTS., No. 54a  
judgment or order.] JDGMTS., No. 30a  
judicial officer.] DEP., No. 393a  
jurisdiction within . . . foreign countries.]  
DEP., No. 20a  
jus tertii.] NUIS., No. 598a  
just & equitable.] COYS., No. 5357c

keeper.] ALIENS, No. 558a; CORPNS., No. 903b;  
CRIM., No. 8177a  
keeping a place . . . for receiving money.] GAM-  
ING, No. 401a

## WORDS AND PHRASES

- keeping open shop.] MED., No. 242b  
 knock-out.] AUCT., No. 76a  
 knowing that he is fully aware of my intention.] WILLS, No. 451a  
 knowingly.] COYS., No. 3916a  
 known.] WATERS., No. 262a  
 known, admitted, & approved of.] MED., No. 253a
- landlord.] AGRIC., Nos. 265b, 265c, 266m, 266z; L. & T., Nos. 7351a, 7351b, 7352a—7352d; RATES, No. 226ee  
 land or any interest in land.] CONTR., Nos. 837a, 837b  
 last will & testament.] EXORS., No. 1351a; WILLS, No. 717a  
 law library.] WILLS, No. 5935a  
 lawfully sublet.] L. & T., No. 7254c  
 lease of mines & minerals.] L. & T., No. 6399a  
 leasehold.] S. LAND, No. 1138a  
 leaving issue . . . surviving.] WILLS, No. 9748a  
 legacies.] E. D., No. 209c  
 legal & other remedies.] BLDG. CONTS., No. 345a  
 legally incapable.] LUNAT., No. 26a  
 legally liable.] PUB. HLTH., No. 335b  
 legal right to compensation.] CONST. LAW, No. 1534a  
 lessee.] CRIM., No. 8143a; L. & T., No. 6361a  
 liberty to apply.] H. & W., Nos. 5459a, 5469a  
 lighter.] SHIP., No. 5608a  
 liquidated damages or penalty.] DAMGS., Nos. 426a, 426b, 487a  
 lis inter partes.] INC. T., No. 689a  
 Lister Institute of Preventive Medicine.] CHAR., No. 47a  
 load.] SHIP., Nos. 2974a, 2974b  
 local land charge.] S. LAND, No. 1016a  
 local rate.] BKPCY., No. 4281a  
 loitering for the purpose of bookmaking.] GAMING, No. 319a  
 London Agency.] ALIENS, No. 221a  
 London Library.] CHAR., No. 251a  
 long continued exposure.] MAST. & S., No. 38111  
 loss, damage or delay.] STR. TRAF., No. 260a  
 loss sustained.] GUAR., No. 1745a; STK. EX., No. 217a  
 lost.] INSCE., No. 3282a
- machine or implement moved by steam, water or other mechanical power.] FACT., No. 44a  
 maintain.] HGHYS., No. 2644a; RYS., No. 978a  
 maintain, keep & leave . . . in good & proper order & condition.] L. & T., No. 4780a  
 maintenance.] RATES, No. 226d  
 majority of creditors.] BKPCY., No. 8772a  
 manner & form.] DEP., No. 192a  
 mansuetæ naturæ.] ANIMALS, Nos. 163a, 258a  
 manual labour.] WORK, Nos. 146a, 146b  
 market garden.] AGRIC., Nos. 267b, 267c, 267d  
 market overt.] MKTS., No. 472a  
 material evidence . . . implicating the accused.] CRIM., Nos. 4826a, 4826b  
 materially altered.] BANK., No. 629a; B. OF EXCH., Nos. 2462b, 2475b  
 matter of practice & procedure.] ARBN., Nos. 523a, 630a; SOLRS., No. 1391a  
 may.] STATS., No. 1364a  
 may order.] CTY. CTS., No. 198a  
 may remove.] LUNAT., No. 1688c  
 may supply.] ELECTRIC, No. 43a  
 mean. FOOD, No. 476m  
 members.] CLUBS, No. 21a; COYS., No. 7669a; INC. T., No. 674r  
 memorandum in writing.] AUCT., Nos. 63a, 76a; L. & T., Nos. 370a, 396a  
 memorandum of agreement.] MONEY, No. 353p; REVENUE, Nos. 548a, 548b  
 mens rea.] CRIM., No. 40a  
 mercantile agent.] AGCY., Nos. 485a, 489a, 489b, 489c, 495b  
 minerals.] MINES, No. 651a  
 mineral substances.] MINES, No. 651a  
 mines, minerals & mineral substances.] MINES, No. 651a  
 minimum weight.] WGHTS., No. 119a  
 misconduct.] CRNRS., Nos. 152a, 308a  
 misdemeanour.] MED., No. 205b  
 misfortune without any misconduct.] BKPCY., No. 1657e  
 missionary purposes.] CHAR., No. 702a  
 mistake.] RATES, No. 1617a  
 mixed charity.] CHAR., No. 2137  
 model form of conveyance specially prepared.] SP. PFCE., No. 282a  
 modification.] MAST. & S., No. 3801d  
 money.] WILLS, Nos. 5696a, 5720a, 5731a  
 money invested on any security.] MTGE., No. 1324a  
 money laid out or expended for the purposes of the trade.] INC. T., No. 222b  
 money secured on mortgage.] EXORS., No. 5594a  
 monies.] WILLS, No. 5708a  
 moored vessel.] SHIP., No. 5608a  
 motor car.] STR. TRAF., Nos. 185b, 232a  
 M. S. A.] INJON., No. 906a  
 my own heirs whatsoever.] STTLMTS., No. 140a
- name other than that by which he was ordinarily known.] ALIENS, Nos. 558c, 558d  
 national interest.] MINES, Nos. 180a, 327a, 327c  
 National League of the Blind.] CHAR., No. 23a  
 nationals of the former Austrian Empire.] ALIENS, No. 215l  
 nationals of the former Kingdom of Hungary.] ALIENS, No. 49h; PRIZE L., No. 1103a  
 nature or conduct of the defence.] CRIM., No. 4751a  
 necessary approaches.] RYS., No. 197a  
 necessary either for disposing fairly of the matter or for saving costs.] ADM., No. 1047a  
 negligence.] BANK., No. 289a  
 negligence of master.] INSCE., No. 1660a  
 negligent in the observance or performance of any of his ordination promises.] ECCL., No. 2717a  
 nephews & nieces.] WILLS, No. 6754a  
 nepos.] DESCCT., No. 134a  
 net profits.] PRTRNS., No. 1841a  
 new building.] HGHYS., No. 2591a  
 new erection.] HGHYS., Nos. 2592a, 2592c  
 new exceptional rate.] CARR., No. 1323c  
 newly-born.] CRIM., No. 8266a  
 new street.] HGHYS., No. 951a  
 next quarter sessions.] RATES, No. 1392a  
 no application for a new trial before a referee shall be made.] ARBN., No. 2580b  
 no liability . . . for any accident or damage.] BAILMT., No. 140b  
 nominee.] FR. SOC., No. 155a  
 no person shall act as such agent or canvasser.] MONEY, No. 381a  
 not being earlier than.] FACT., No. 211a  
 notice of suspension or intended suspension of payment.] BKPCY., No. 957a  
 notice to quit.] L. & T., No. 7281a  
 not negotiable.] AGCY., No. 989a  
 not required.] COMP. PCHE., No. 110b  
 not required for the purposes for which it has been acquired.] COMP. PCHE., No. 116b  
 novus actus interveniens.] ANIMALS, No. 205a  
 now or hereafter in force.] DEP., No. 164a

## WORDS AND PHRASES

now paid.] B. OF SALE, No. 237a  
nudum pactum.] CONTRACT, No. 3869a

obliter dicta.] JDGMTS., No. 517b  
objects connected with the church as he shall think fit.] CHAR., No. 717a  
objects of charity or any other public objects in parish of F.] CHAR., No. 751a  
obstruction.] HGHYS., No. 2592a  
obtained.] CRIM., No. 10,754b  
obtained under circumstances which amount to . . . misdemeanour.] CRIM., No. 10,752a  
occasional.] MAST. & S., No. 3801a  
occupied & used.] RATES, No. 226b  
occupied for the purpose of business.] ELECT., No. 96a  
occupier.] FACT., 44a; WILLS, Nos. 5239a  
occurrence of any other event.] TRUSTS, No. 2273b  
offence.] CRIM., No. 1676a  
offer in writing to withdraw notice to quit.] AGRIC., No. 266e  
office or employment of profit.] INC. T., Nos. 488a, 489b  
official guide.] COPRT., No. 135a  
oldest respectable inhabitants.] CHAR., No. 23b  
omnia præsumentur rite esse acta.] WILLS, No. 1158a  
on account of our principals.] AGCY., No. 2546a  
on a sale being effected.] AGCY., No. 1776c  
on a special occasion.] STR. TRAF., No. 76h, 76m  
on a voyage.] INSCE., No. 720b  
on or about.] S. LAND, No. 880a  
on or before.] INC. T., No. 638a  
on sale by private treaty.] AGCY., No. 1776a  
on signing this charter.] AGCY., No. 1786a  
on the sale of any article.] AGRIC., No. 971a  
on the understanding.] TRUSTS, No. 401a  
one year's wages.] WILLS, No. 7637a  
open space.] STTLMTS., Nos. 3151b, 3151c  
openly produced & read.] ELECT., No. 1109a  
opposite to.] WATERS, No. 475a  
order.] JDGMTS., No. 368a  
order, disposition or reputed ownership.] B. OF SALE, No. 673a  
order or judgment.] BKPCY., No. 8496a  
orders to be acknowledged by return.] CONTR., No. 418a  
order . . . to do an act.] CORPNS., No. 1493a; CNTMPT., No. 528a  
order to pay forthwith or within a fixed time after receipt.] BKPCY., No. 8398a  
ordinarily resident.] ALIENS, No. 13a; INC. T., Nos. 131b, 131c  
ordinary course of business.] AGCY., No. 495b  
ordinary necessities of life.] MAST. & S., No. 2120a  
original literary work.] COPRT., Nos. 43a, 43b  
original or first vendors.] MED., No. 253a  
or in some other responsible insurance office to be approved by the lessor.] L. & T., No. 5069a  
or other authority.] STR. TRAF., No. 55a  
or their issue.] WILLS, No. 10,020  
other funds, charities & institutions as my exors. in their absolute discretion shall think fit.] CHAR., No. 47a  
other services.] HGHYS., No. 1435f  
other source.] ELECTRIC, No. 6a  
others.] WILLS, No. 10263a  
otherwise.] RATES, No. 1146a  
otherwise absenting himself to the intent to delay creditors.] BKPCY., No. 669a  
otherwise than as a private dwelling-house.] S. LAND, No. 2785a  
otherwise than by reason of a contract.] COYS., No. 6352a  
outgoings.] L. & T., No. 4482a; RATES, No. 226ee

out of or in the course of the employment.] MAST. & S., Nos. 2340b—2737b  
outstanding liabilities.] COYS., No. 2344a  
owner.] PUB. HLTH., Nos. 502a  
owner for the time being.] HGHYS., No. 2439a  
owner, occupier, keeper or person as aforesaid.] GAMING, No. 358a  
owner of the goods.] PAWNS, No. 173a  
packing or wrapping paper.] REVENUE, No. 93c  
paid.] COS., No. 4707a; INC. T., No. 557a  
paid office.] L. G., No. 14a  
parent.] EDUC., No. 99a  
parish property.] POOR L., No. 34a  
parochial institutions or purposes as he shall select.] CHAR., No. 717b  
partial consideration.] E. D., No. 107a  
particulars of claim.] AGRIC., Nos. 266v—266x  
part with the possession of the demised premises or any part thereof.] L. & T., No. 5186a  
patentee as such.] PATS., No. 1687f  
patriotic purposes or charitable institutions or objects.] CHAR., No. 740b  
peace, order, & good government.] DEP., Nos. 179a, 234b  
penalty or liquidated damages.] DAMGS., Nos. 426a, 426b, 487a  
pending the settlement of his claim.] MAST. & S., No. 4137a  
performance in public.] COPRT., Nos. 483a—483d  
peril of the sea.] SHIP., No. 2606a  
permanent improvements.] STTLMTS., No. 1873a  
permit.] L. & T., No. 2932a  
permits such premises . . . to be used as a brothel.] CRIM., No. 8143b  
permitting.] STR. TRAF., Nos. 76r, 76s  
persistent cruelty.] H. & W., No. 6165a  
person.] BANK, No. 128a; CORPNS., No. 907a; ELECTRIC, No. 33a; SOLRS., No. 4725a  
person affected by the decision of the court.] ADM., No. 1597a  
person aggrieved.] BKPCY., Nos. 4808a, 4808b; FOOD, No. 476b; HGHYS., No. 1894a; RATES, No. 1158d; STR. TRAF., No. 5a  
person authorised.] MED., No. 242b  
person claiming to be entitled to any money deposited in such savings bank.] BANK., No. 112a  
person entitled to receive the rents & profits.] AGRIC., No. 266m  
person entitled to require a legal estate to be conveyed to or otherwise vested in him.] L. & T., No. 1526a  
person having an interest in the inquiry.] ADM., No. 1597a  
person interested.] ECCL., No. 2443b  
person interested in the estate.] EXORS., No. 2314a  
person interested in the land.] AGRIC., No. 266u  
person in the employment of the company.] COYS., No. 3526a  
person in trust for any creditor.] BKPCY., No. 7414a  
person managing or conducting an entertainment.] CORPNS., No. 903b; CRIM., No. 8177a  
person of full age.] CORPNS., No. 903a  
personal effects.] WILLS, No. 5362a  
personal estate.] CONFL., No. 511  
personal negligence or wilful act of the employer.] MAST. & S., No. 4071c  
personal luggage.] INSCE., No. 32171  
person suffering loss by exercise of powers.] AGRIC., No. 266t  
persons beneficially interested in possession.] TRUSTS, No. 3475b

## WORDS AND PHRASES

- per working hatch.] SHIP., No. 3920a  
 pipes, rain water, & their connections, cast iron or steel.] CARR., No. 1245b  
 placards, posters or advertisements other than plates or other similar announcements.] L. & T., No. 3026a  
 place.] GAMING, No. 358a; INTOX., No. 366a  
 place appropriated to public religious worship.] HGHYS., No. 2405b  
 place of business.] PRACT., No. 118a  
 place of business within the United Kingdom.] CORPNS., No. 1514a  
 place of dramatic entertainment.] COPRT., No. 99a  
 place of residence.] LUNAT., No. 1902a  
 plead guilty or admit the truth of the charge.] ALIENS, No. 558h  
 policy effected on his own life.] INSCE., No. 1228a  
 possession. S. GOODS, No. 1161c  
 possession or apparent possession.] B. OF SALE, No. 673a  
 possession, order or disposition.] BKPCY., Nos. 6507a, 6516a, 6659a, 6708a, 6745a  
 post-nuptial settlement.] H. & W., Nos. 5623a, 5623b, 5624a, 5624b, 5625a, 5625b  
 post office offence.] CRIM., No. 5156a  
 pound.] MONEY, No. 17d  
 power . . . to appoint or dispose of property as he thinks fit.] E. D., No. 117a  
 prejudiced by a voluntary winding-up.] COYS., No. 7203a  
 premises.] ACTION, No. 604a; ALIENS, No. 558a; ELECT., No. 96a; FISH., No. 176a; INC. T., No. 228b; L. & T., No. 2306f  
 premises exclusively appropriated to public religious worship.] HGHYS., No. 2405b  
 premises in such a state as to be a nuisance.] NUIS., No. 364a  
 premises on which machinery . . . is temporarily used for the purpose of the construction of a building.] FACT., No. 180b  
 prepared or published by or under the direction or control of His Majesty.] COPRT., No. 85a  
 presently or presumptively or prospectively payable.] E. D., No. 227b  
 preservation of all animals, birds or other creatures not human.] CHAR., No. 208a  
 pressure.] BKPCY., Nos. 7172a, 7261a  
 previous twelve months.] MAST. & S., Nos. 3231c, 3801h  
 prices to be agreed upon.] S. GOODS, No. 28a  
 primary purpose & use.] See Industrial hereditament, *supra*  
 prime cost.] INSCE., No. 491a  
 Primrose League.] CHAR., No. 217b  
 principles of practice.] AGRIC., No. 266ff  
 printing or knowingly circulating coupons.] GAMING, Nos. 415a—415d  
 private papers.] WILLS, No. 5951a  
 private pleasure.] INSCE., No. 3217g  
 private profit.] COPRT., No. 389a  
 private purposes.] INSCE., No. 3217n  
 private wharf.] CARR., No. 1166a  
 proceeding.] PUB. AUTH., No. 882a  
 proceedings.] LABEL, No. 1668c  
 proceeding by action . . . to enforce a restrictive covenant.] S. LAND, No. 2807a  
 proceeding . . . for recovery of a fine or penalty imposed in relation to an offence against any law of excise.] REVENUE, No. 811a; STR. TRAF., No. 117b  
 proceeding instituted.] ACTION, No. 90a  
 proceedings . . . in respect of an alleged deficiency in weight.] FOOD, Nos. 439a, 439f  
 process . . . including the preparation for glazing.] MAST. & S., No. 3811f  
 process involving exposure to silica dust.] MAST. & S., Nos. 3811g  
 process of racing grindstones.] MAST. & S., No. 3811j  
 procured.] GAMING, No. 399b  
 professing to tell fortunes.] CRIM., Nos. 12,169a, 12,169b  
 profit.] INC. T., No. 224a  
 profits available for dividend.] COYS., No. 4016a  
 profits or gains.] INC. T., Nos. 93a, 96a, 97a, 97b, 99a—99k  
 profits or gains brought into charge to tax.] INC. T., No. 369c  
 promotion of sport.] CHAR., No. 199a  
 proper & necessary powers of working.] MINES, No. 944a  
 proper books of account.] INSCE., No. 3269a  
 properly packed.] CARR., No. 1323f  
 property.] BKPCY., Nos. 5738a, 7681b, 7782b; CONST. LAW, No. 474a; DEP., Nos. 128c, 485a  
 property held by bankrupt on trust.] BKPCY., No. 6150a  
 property in lands, tenements, hereditaments & heritages.] INC. T., No. 36a  
 property . . . in respect of which estate duty is leviable.] E. D., No. 129a  
 property locally situate out of the United Kingdom.] CHOS., No. 26a; COYS., No. 4389a; REVENUE, No. 661a  
 property (not personal).] WILLS, No. 5881a  
 property of which deceased was competent to dispose.] E. D., No. 33a  
 property recovered or preserved.] SOLRS., No. 3307a  
 property, rights & interests within His Majesty's dominions.] ALIENS, Nos. 215f, 215g, 215m, 215n, 215o, 215p; PRIZE L., No. 1103a  
 property undisposed of by will.] EXORS., Nos. 5917a, 5917b, 5919a  
 property with respect to which the personal qualifications of the tenant are of importance.] L. & T., No. 6399a  
 protective trusts.] POWERS, No. 187b  
 Protestant.] DEP., No. 176a  
 public charity.] MAST. & S., Nos. 4230a—4230c  
 public duty.] PUB. AUTH., No. 777a  
 public interest.] PATS., No. 1651a  
 public mischief.] CRIM., No. 6735a  
 public place.] STR. TRAF., No. 222f  
 public religious worship.] ECCL., No. 2a  
 public school.] EDUC., No. 182a; INC. T., Nos. 59a, 62a  
 public street, road, or place.] STR. TRAF., No. 94a  
 public trusts.] CHAR., No. 1870b  
 publish any proposal . . . for the sale of any ticket.] GAMING, Nos. 462a, 464a, 464b  
 punctually.] B. OF EXCH., No. 441a  
 purchase.] E. D., No. 102a  
 purchase for partial consideration.] E. D., No. 107a  
 purchaser for valuable consideration.] BKPCY., Nos. 7719a, 7121a  
 purposes of his trade or business.] MAST. & S., No. 2227a  
 purposes of the employer's trade or business.] MAST. & S., No. 2204a  
 put through.] BKPCY., No. 7393a  
 qualified persons.] COYS., No. 2879a; DEP., No. 52c  
 quia timet.] EQY., Nos. 2702a, 2705a  
 railway.] CARR., No. 1287a  
 railway charges.] RYS., No. 756a  
 railway motor carriage.] CARR., No. 1245b



## WORDS AND PHRASES

- railway vehicle.] CARR., No. 1245b  
 ratione nocumenti.] HGHYS., No. 1002a  
 ratione tenuræ.] HGHYS., No. 951a  
 ready for shipment.] S. GOODS, No. 622a  
 real & personal estate.] EXORS., No. 5917b  
 realisation.] INC. T., Nos. 95b, 309a  
 real securities.] MTGE., No. 383a  
 real securities in England or Wales, but not in Ireland.] MTGE., No. 389a  
 reasonable deviation.] SHIP., No. 3162a  
 reasonable diligence.] STR. TRAF., No. 245a  
 reasonable excuse.] AGRIC., No. 978a; EDUC., Nos. 78a, 79a, 96a  
 reasonable notice.] MTGE., No. 1041a  
 reasonable opportunity of making a valuation.] AGRIC., No. 265c  
 reasonable part of income.] INC. T., No. 674n  
 reasonable steps to obtain employment.] MAST. & S., Nos. 3283b—3283k  
 reasonable time.] INC. T., No. 674g  
 reasonable wear & tear excepted.] L. & T., No. 4739a  
 reasonably required for the purpose of carrying out this Act.] RATES, No. 1158b  
 receivable.] INC. T., No. 691a  
 receiver.] B. OF EXCH., No. 763b  
 receiver, F. Ltd.] COYS., No. 5036a  
 receives payment.] BANK., No. 292b  
 receiving.] INC. T., No. 632a  
 reconstruction.] SEWERS, No. 304a  
 recovery.] MAST. & S., No. 3541a  
 rector of St. Thomas' Roman Catholic Church at N.] CHAR., No. 991b  
 rectory with cure of souls.] ECCL., No. 3466a  
 refusal or failure to agree to arbitration.] AGRIC., No. 266j  
 regular jurymen.] CRNRS., No. 152a  
 regularly employed.] POOR L., No. 100a  
 reimbursing or repaying any money knowingly lent or advanced for betting.] GAMING, No. 188a  
 relating to payments on death of children.] FR. SOC., No. 175a  
 relief.] POOR L., No. 1607a  
 relief, order or direction concerning or relating to a charity, or the estate, funds, property or income thereof.] CHAR., No. 2177a  
 remainder of any monies.] WILLS, No. 5708a  
 renewal debentures.] B. OF EXCH., No. 843a  
 repair.] SEWERS, No. 304a  
 repatriation fund . . . for . . . returned soldiers.] CHAR., No. 199b  
 requisite consent cannot be obtained.] TRUSTS, No. 3466a  
 res gestæ.] EVID., Nos. 311a, 311b  
 resident.] ALIENS, No. 13a; INC. T., Nos. 131b, 131c; LUNATICS, 1419d  
 resident in the United Kingdom.] INC. T., No. 489a  
 resorting.] GAMING, No. 278a  
 restoration or maintenance.] CHAR., No. 1444b  
 restraint of princes, rulers & people.] CONTR., No. 3183a  
 retail shop.] RATES, Nos. 226l, 226q, 226r, 226t, 226y, 226aa, 226cc  
 retailer.] WGHTS., No. 110a  
 return.] CORPNS., No. 1493a; CNTMPT., No. 528a  
 revenue.] RATES, No. 800a  
 reversible.] SHIP., No. 3665a  
 reversion.] L. & T., No. 4841b  
 revert to & be added to my general residuary estate.] EXORS., No. 5654a  
 right heirs.] COHLDS., No. 1533b; WILLS, No. 7171a  
 rights capable of being transferred.] COYS., No. 6457a  
 road.] STR. TRAF., No. 232c  
 rogue & vagabond.] CRIM., No. 1031a  
 rolling stock.] CARR., No. 1245a  
 Roman Catholic Church.] CHAR., No. 981c  
 Royal National Lifeboat Institution.] CHAR., No. 47a  
 royalties.] DEP., Nos. 98, 98a, 130c  
 rule.] JDGMTS., No. 308a  
 salary.] PUB. AUTH., No. 1048a  
 sale for use as food for cattle.] AGRIC., No. 978b  
 sale in exercise of a statutory power to enforce a right or to satisfy a claim or lien.] AGRIC., No. 978b  
 salvage plant.] ROYAL F., No. 56a  
 same authority in the conduct of any reference or trial as a judge of the High Court.] ARBN., No. 2580b  
 satisfied.] PUB. HLTH., No. 481a  
 scheme.] EDUC., No. 24a; ELECTRIC, No. 103c  
 secured creditors.] BKPCY., No. 3375a  
 securities for money.] MTGE., No. 1321a  
 security for an annuity.] REVENUE, No. 619a  
 see other side for completion.] WILLS, No. 839a  
 self-governing Dominion.] COPRT., No. 389a  
 seller of milk.] INC. T., No. 79b  
 selling price.] PUB. HLTH., No. 509c  
 semper præsumentur pro matrimonio.] H. & W., No. 453a  
 sentence.] CRIM., No. 5554a  
 servant or agent.] INTOX., No. 733a  
 service of the council of any county.] POOR L., No. 105a  
 set apart for the purposes of interment.] BURIAL, No. 291a  
 settled land.] STTLMTS., No. 2597  
 set up a counterclaim.] ADM., No. 969a  
 set up & commenced.] INC. T., No. 200b  
 set up new profession.] INC. T., No. 315a  
 seven days.] CRIM., No. 3165a  
 sewers made . . . for his own profit.] SEWERS, Nos. 125a, 125b  
 Shakespeare Memorial National Theatre.] CHAR., No. 73a  
 shall be deemed to be a rogue & vagabond.] GAMING, No. 466a  
 shall die.] WILLS, No. 6527a  
 shall do some act whereby income would be assigned.] BKPCY., No. 5909a  
 shall not pass to any trustee or other person.] BKPCY., No. 6296a  
 shares.] WILLS, No. 5466a  
 ship.] ADM., Nos. 87a, 1721a  
 ship entitled to be registered as a British ship.] ADM., No. 648a  
 ship or vessel.] INSCE., No. 505a  
 shipped in apparent good order & condition.] SHIP., No. 2257a  
 ship's creditors.] CONFL., No. 1309b  
 shop assistant.] FACT., No. 206a  
 sickness.] MAST. & S., No. 640a  
 signed by him.] BKPCY., No. 8653a  
 single private drain.] SEWERS, No. 14a  
 single woman.] BASTY., No. 262a  
 sinking.] INSCE., No. 1608a  
 société en nom collectif.] INC. T., No. 206a  
 society.] ACTION, No. 599a  
 so far as the circumstances of the case admit.] SHIP., No. 5686a  
 so long as he is in the service of the council of any county.] POOR L., No. 105a  
 Soldiers' Crippled Homes.] CHAR., No. 891a  
 sole agency.] AGCY., Nos. 1813a, 1813b, 2083a -- 2083c  
 sole & exclusive right of representing or performing.] CONTR., No. 4922a

## WORDS AND PHRASES

- sole selling agents.] S. GOODS, No. 1399a  
solely occasioned.] MINES, No. 327g  
solvent.] BKPCY., No. 4116a; COYS., No. 3353b  
some other or further use.] STR. TRAF., No. 188a  
special circumstances.] EXORS., No. 1463a; SOLRS., No. 2151a  
special occasion.] INTOX., Nos. 579a, 582a; STR. TRAF., Nos. 76p, 76q  
special requirements of the district.] INTOX. L., No. 582d  
specially equipped with salvage plant.] ROYAL F., No. 56a  
specially valuable articles.] INSCE., No. 3282c  
specifically described.] B. OF SALE, No. 420a  
specific cause.] INC. T., Nos. 212, 214a  
specified.] S. GOODS, No. 1905a  
specified age.] INC. T., No. 545c  
stage carriages.] STR. TRAF., No. 76e, 76f, 76g  
standard.] CARR., No. 1323a  
standing.] STR. TRAF., No. 232a  
stateless person.] ALIENS, No. 49a  
step in the proceedings.] ARBN., Nos. 316a, 402a  
storage.] RATES, Nos. 226g, 226o  
street.] HGHYS., Nos. 91a, 2766a; S. LAND, No. 1162a; SP. PCE., No. 707a  
struck with sterility.] OPEN SP., No. 14a  
subject of the decree.] H. & W., No. 5624b  
subject to any legal objection.] ARBN., No. 816a  
subject to a proper contract to be prepared by the vendor's solicitors.] CONTR., No. 546b  
subject to contract.] AGCY., No. 1705a; CONTR., Nos. 539a, 540a  
subject to purchaser's solicitor approving the lease.] CONTR., No. 3324a  
subject to such terms being fully set out in a formal contract or agreement.] CONTR., No. 511a  
subject to suitable agreements being arranged between your solicitor & mine.] CONTR., No. 546a  
subject to surveyor's report.] CONTR., No. 422b; S. LAND, No. 32a  
subject to the terms of a lease.] CONTR., No. 419a; L. & T., No. 370a  
subject to the title being approved by our solicitors.] CONTR., No. 420a  
submission.] ARBN., No. 36a  
substantial injustice.] BKPCY., No. 1286b  
substantial part.] COPRT., No. 489a  
succession.] INC. T., Nos. 210a—210d  
such charges as were in force.] CARR., No. 1377m  
suffer.] L. & T., No. 2932a  
suffer an injustice.] LUNAT., No. 529a  
sufficient cause.] BKPCY., Nos. 1077a, 1483a, 1491a  
sufficient evidence.] S. LAND, No. 1394a  
suitable.] MAST. & S., No. 3392a  
Summary Jurisdiction Acts.] H. & W., No. 6233b  
sum periodically payable.] REVENUE, No. 619a  
Sunday.] CRIM., No. 5570b  
Superior of the Jesuit Church.] CHAR., No. 79a  
supply of mechanical power.] FACT., No. 98a  
surety or guarantor for the debt due to such creditor.] BKPCY., No. 7361a  
surplus assets.] COYS., No. 6569a  
surrounding circumstances.] B. OF EXCH., No. 763b  
surviving.] WILLS, Nos. 6887a, 9748a  
survivors.] WILLS, No. 10,427a  
tackle & furniture of the barge.] INSCE., No. 519a  
tax appropriate thereto.] INC. T., No. 467a  
team-work.] AGRIC., No. 166a  
temporarily used.] FACT., No. 153a  
temporary building.] JDGMTS., No. 219a; PUB. HLTH., No. 265a  
tenant.] L. & T., Nos. 7352d, 7359b, 7359c  
tenement factory.] FACT., No. 98a  
termination of the tenancy.] AGRIC., No. 266h  
term of not less than two years.] L. & T., No. 7359d  
term of years.] RATES, No. 1057a  
testamentary expenses.] EXORS., Nos. 5448a, 8819a  
the area.] SHIP., No. 8104a  
then current rate.] RATES, No. 1184a  
the same.] HGHYS., No. 2244a  
thing in action.] H. & W., No. 2294a  
third parties.] INSCE., No. 2962a  
threatening to accuse . . . of . . . crime.] CRIM., No. 10,505a  
tickets in any lottery.] GAMING, No. 466b  
till further order.] ECCL., No. 1775a  
title deeds.] REAL PROP., No. 537b  
to be at his own disposal.] CHAR., No. 1424a  
to be drawn by counsel.] CONTR., No. 504a  
to be sent to me as published.] CONTR., No. 1213a  
to be settled by arbitration in London in the usual way.] ARBN., No. 135a  
to get votes.] ELECT., No. 96a  
to his knowledge false.] INSCE., No. 3217h  
trade.] BKPCY., No. 274a; INC. T., Nos. 99j, 112a, 114a, 114b, 116a; WORK, No. 74a  
trade expense.] INC. T., Nos. 224a—224c, 226a, 226b  
trade of the mine.] MINES, No. 327u  
trader.] BKPCY., Nos. 79b, 160a; CARR., No. 1166c  
trader interested.] CARR., No. 1377a  
trading.] INC. T., No. 119a  
trading receipts.] INC. T., No. 119a  
trade or business carried on for purposes of gain.] WORK, Nos. 118a, 123b  
transfer of goods in the ordinary course of business of any trade or calling.] B. OF SALE, No. 138b  
transfer of property.] BKPCY., No. 2902a  
transfer or assignment.] B. OF SALE, No. 830a  
treacle delivered direct to farmers.] RATES, No. 226nn  
treated as a market garden.] AGRIC., No. 267a  
true owners.] BANK., No. 687a; B. OF SALE, No. 710a  
trust instrument.] STTLMTS., No. 3143f  
trustee.] COYS., No. 6857a  
trustees for sale.] S. LAND, No. 1104a  
twelve feet in height.] PUB. HLTH., No. 204b  
twenty-three years of age or under.] CRIM., Nos. 9323c—9323e  
two institutions . . . which I hope to be able to name.] CHAR., No. 703a  
uberrimæ fidei.] INSCE., No. 2907a  
ulterior to the limitations therein.] STTLMTS., No. 2399b  
unconditionally.] H. & W., No. 5410a  
under any circumstances whatsoever.] CARR., No. 851b  
under deck.] S. GOODS, Nos. 674a, 1887c  
under efficient instruction in some other manner.] EDUC., No. 88a  
under influence of drink.] INTOX., No. 761b  
underlet or permit any other person to use or occupy.] AGRIC., No. 164a; ANIMALS, No. 342a  
under proper conditions.] CORPNS., No. 340a  
under such circumstances that he is the reputed owner thereof.] BKPCY., Nos. 6802a, 6882a, 6882b  
undertaking.] CONTR., No. 3379a

## WORDS AND PHRASES

- under the control of not more than five persons.] INC. T., No. 674q
- under this Act.] H. & W., No. 6230a
- under way.] SHIP., Nos. 5608a, 5648a
- unfinished buttons.] REVENUE, No. 93d
- unforeseen contingencies excepted.] CONTR., No. 2505a
- United Methodists.] CHAR., No. 901a
- Universal Negro Redemption Fund.] CHAR., No. 272a
- unlawful gaming.] GAMING, Nos. 255a, 267a, 278a
- unless he attempts to become bankrupt.] BKPCY., No. 5936a
- unreasonably refused to grant.] MINES, No. 321e
- unreasonably withhold.] L. & T., Nos. 2995b, 5287a, 5291a
- unship.] WATERS, No. 821b
- until after the completion of the works.] BLDG. CONTS., No. 388a
- until further order.] H. & W., No. 5405b
- until he shall do some act . . . which shall forfeit the same in the case of bankruptcy.] BKPCY., No. 5936a
- until she shall marry again.] H. & W., No. 755b
- unto my country England.] CHAR., No. 217c
- untrue.] INSCE., No. 2855a
- used.] GAMING, No. 399b
- used as parts of a single . . . factory.] RATES, No. 226cc
- used only for commercial travelling.] INSCE., No. 3279a
- used or intended to be used as a model or pattern to be multiplied.] COPRT., No. 111a
- use of this form constitutes a submission to the rules of the association.] CUSTOM, No. 703a
- usual covenants.] L. & T., No. 2498a
- usually.] INC. T., No. 204a
- usual public-house contract to be entered into.] CONTR., No. 513a
- utters . . . any letter . . . demanding . . . with menaces.] CRIM., No. 10,487a
- valid lease.] L. & T., No. 7359d
- valuable business premises.] AUCT., No. 191a ; S. LAND, No. 576a
- value.] ANIMALS, No. 694a ; EXORS., No. 4101b
- value cheque on London.] MONEY, No. 17b
- vehicle.] INSCE., No. 3157a
- venire de novo.] CRIM., Nos. 2567a, 3287a, 6234a, 6234b, 6237b
- violation or culpable neglect of duty.] EXORS., Nos. 3127a, 3127b
- volenti non fit injuria.] ANIMALS, Nos. 205a, 205b ; CARR., No. 598a ; LIBEL, No. 167c ; MAST. & S., No. 4071d ; NEGL., No. 620b
- voluntary transfer.] BKPCY., No. 7220a
- voyage.] INSCE., No. 912a
- war.] ALIENS, No. 405a
- war bonuses.] L. G., No. 48a
- war loan.] WILLS, No. 5532a
- War Saving Certificates.] WILLS, No. 5532b
- ways. MAST. & S., No. 1881a
- weather.] SHIP., No. 2736a
- weather working days.] SHIP., No. 2736a
- wherein no business of any kind is carried on.] L. & T., No. 2913a
- which I promise never to repay.] B. OF EXCH., No. 295a
- whist drive.] CLUBS, No. 140a
- whole means & estate.] BKPCY., No. 5936b
- wholesale distributive business.] RATES, Nos. 226h, 226o, 226t
- wholly let out in apartments or lodgings.] RATES, Nos. 675a, 675b
- wholly pastoral.] AGRIC., No. 30f
- whosoever.] CRIM., No. 8121a
- widows with young children dependent on them.] CHAR., No. 21a
- wife.] H. & W., Nos. 1223a, 2039a ; WILLS, No. 7307a
- wilful act.] MAST. & S., No. 4071d
- wilful act or omission.] COYS., No. 3059a
- wilful default.] EXORS., No. 6915a
- wilfully assaults . . . child . . . in a manner likely to cause . . . unnecessary suffering.] CRIM., No. 9023a
- wilfully refusing & neglecting to maintain.] CRIM., No. 72b
- wilfully withhold.] TRADE, No. 1157a
- wilful neglect.] CRIM., No. 1985a
- wilful neglect or default.] COYS., Nos. 3059a, 4678a
- wilful or wrongful act or default.] COYS., No. 432c
- winding-up of any partnership.] PRTRNS., No. 1691a
- wine.] INTOX., No. 9a
- with all faults.] S. GOODS, Nos. 643a—643c, 645a
- within due time after my death.] WILLS, No. 7034a
- within six years.] AGRIC., No. 229a
- within ten miles from X.] TRADE, No. 457a
- within the prohibited degrees of affinity.] INFTS., No. 1253b
- without negligence.] B. OF EXCH., No. 2475b
- without prejudice.] EVID., Nos. 535a, 3850a
- without prejudice to any civil liability.] AGRIC., No. 978a
- with respect to the objects of the company.] COYS., No. 4321a
- with utmost dispatch.] SHIP., No. 2059a
- work.] COPRT., No. 325c ; TELE., No. 61a
- work connected with the Roman Catholic Church.] CHAR., No. 717d
- working hatch.] SHIP., No. 3920a
- working holiday.] SHIP., No. 4048a
- work of the Cathedral.] CHAR., No. 717c
- work of the Church in Wales.] CHAR., No. 718b
- workman.] MAST. & S., Nos. 2057a, 2057b, 2189a, 2057d
- works.] MAST. & S., No. 1881a
- wreck.] SHIP., No. 685c
- writing.] CONTR., No. 467b
- written promise to pay.] LIMIT. OF A., No. 356a
- year to year.] MAST. & S., No. 769a
- Zoological Gardens, upkeep & improvement of.] CHAR., No. 70a
- zoology, advancement of.] CHAR., No. 70a



